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In its standard formulation, the doctrine of double effect (DDE) permits an action that causes foreseeable and harmful, even dire, collateral consequences, so long as the actor merely foresees but does not intend them and the harms are proportional to the benefit. Yet DDE's critics question the moral distinction between intending a bad outcome, on one hand, and merely knowing that the actions will result in the bad outcome but acting in exactly the same way, on the other. After all, except in a few narrow circumstances, criminal law in the United States treats intent and knowledge as equally culpable mental states that each amount to "intent."

This Article reinterprets and reconstructs DDE to avoid this critique. Properly reimagined, DDE does not depend on an actor's subjective intentions. Instead, it allows an action if one can plausibly identify a permissible intention that could explain that action and any resulting harm is proportionate to the expected benefit from the action. However, if the only plausible way to understand a particular action is as the product of an impermissible intention, then the action is morally impermissible, and there is then no need to inquire into proportionality. Thus reconceived, DDE helps make sense of how the law resolves problems in a wide range of contexts, including jury nullification, disparate impact race discrimination, and the admissibility of evidence that proves too much. With the notable exception of most prohibitions against intentional discrimination—which control the special context of at-will employment and other at-will settings—DDE as reconstructed proves to be a powerful instrument for answering challenging legal questions.

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A New and Improved Doctrine of Double Effect: Not Just for Trolleys

SHERRY F. COLB [*]

INTRODUCTION

I remember first learning about the doctrine of double effect (DDE), originally a religious principle,[1] as a college student. My professor explained that under DDE, some actions would be impermissible if the actor intended a bad result but permissible if the actor merely anticipated but did not intend the bad result. I learned about DDE in the context of distinguishing assisted suicide (where the doctor intends the patient's death), which is sinful, from lethal pain remission (where the doctor anticipates but does not intend the patient's death), which is morally acceptable.[2] Having endured twelve years of religious education, I was familiar with distinctions without a difference, and I viewed DDE in that light. Giving a dying person an overdose of morphine is somehow sinful if you are intending to help her die but virtuous (or at least permissible) if you are intending to relieve her pain? Either way, I figured, you are doing the same thing, but here comes religion to identify the correct "mental state" and condemn you for having the wrong one.

A few years after experiencing my initial, reflexive skepticism of an intent-based rule, I came to conclude as a law student that DDE had at most very limited application to legal problems. We typically define "intentional" crime as either intentional in the literal sense *or* knowing, failing to

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[*] C.S. Wong Professor, Cornell Law School. Professor Colb died in August 2022, after completing the substantive writing of this article and after the article was accepted for publication. Her colleague Michael C. Dorf, to whom she was married for over thirty-one years, completed the author's portion of the editorial work on the article thereafter, adhering as closely as he could to Professor Colb's substantive views and writing style. (The balance of this footnote was written by Professor Colb.) The author expresses immense gratitude to Steven Marzagalli, Cornell Law School class of 2022, for his tireless research assistance and excellent questions and challenges that helped make this article immeasurably stronger and clearer. Thanks are also due to Michael C. Dorf for comments and suggestions on an earlier draft and to Neil Buchanan, Mathilde Cohen, and Lewis Grossman for invaluable feedback. Last but not least, the author thanks the fantastic students on the *Connecticut Law Review* for selecting this article for publication and for the hard and often unsung work of editing and cite-checking.

[1] Alison McIntyre, *Doctrine of Double Effect*, STAN. ENCYC. PHIL. (July 28, 2004), https://plato.stanford.edu/entries/double-effect/ (Dec. 24, 2018) ("According to the principle of double effect, sometimes it is permissible to cause a harm as a side effect (or 'double effect') of bringing about a good result even though it would not be permissible to cause such a harm as a means to bringing about the same good end."); *id.* (crediting Thomas Aquinas (1225–1274) with introducing the Doctrine of Double Effect, citing THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II-II, q. 64, art. 7).

[2] *See* Stephen R. Latham, *Aquinas and Morphine: Notes on Double Effect at the End of Life*, 1 DEPAUL J. HEALTH CARE L. 625, 630–31 (1997).

distinguish between the two.[3] Accordingly, in an important article, Norman Cantor and George C. Thomas III argue that DDE has virtually no legal force and that to develop theories based on DDE might therefore lead people to imagine a legal utility to the doctrine that simply is not there.[4]

So DDE is merely an interesting theory with little practical impact on the law, right? Wrong. Cantor, Thomas, I, and nearly everyone else have misunderstood DDE to make claims about mental states. Properly understood, DDE is about the *availability* of any permissible purpose[5] to justify the action, not an actor's actual subjective intent. (Throughout this article, I use terms such as *intent* and *purpose* more or less interchangeably. Although in some contexts their meanings differ, the key distinction for me is between actual subjective mental states and available intentions or purposes at which an action could plausibly be thought to aim.)

Once we can invoke a possible permissible purpose to defend our actions (and if that permissible purpose aims at a result that is proportionate to the actions' harmful effects), we may act. And as importantly, in the absence of such a possible permissible purpose, action is impermissible. Thus, a narrower set of legally or morally permissible purposes translates into many fewer opportunities to act, and it is that constriction—rather than limits on the correct state of mind—that controls our behavior under the legal and moral rules that bind us.

This Article argues that DDE is not merely a marginal phenomenon but is ubiquitous in the law and morality, and that it does a lot more than offer distinctions without a difference between identical actions driven by distinct mental states. Some scholars argue that DDE explains extant law or normative views in a few settings, most prominently wartime bombings that kill or injure civilians,[6] physician assistance in dying,[7] the trolley problems one encounters in moral philosophy,[8] and abortion.[9] I explain how much more DDE, properly reconceptualized, truly is.

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[3] *E.g.*, MODEL PENAL CODE § 210.2(1) (AM. L. INST. 1962) ("criminal homicide constitutes murder when . . . it is committed purposely or knowingly").

[4] Norman L. Cantor & George C. Thomas III, *The Legal Bounds of Physician Conduct Hastening Death*, 48 BUFF. L. REV. 83, 126–27 (2000).

[5] By "permissible purpose," I mean an objectively acceptable moral or legal goal that, under the circumstances known to the actor, the actor's conduct plausibly furthers, regardless of whether something altogether different might have motivated the actor.

[6] *See* Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFFS. 334, 336 (1989); Bradley Gershel, *Applying Double Effect in Armed Conflicts: A Crisis of Legitimacy*, 27 EMORY INT'L L. REV. 741, 747 (2013) (citing Michael L. Gross, *Killing Civilians Intentionally: Double Effect, Reprisal, and Necessity in the Middle East*, 120 POL. SCI. Q. 555, 558 (2006)).

[7] *See* Latham, *supra* note 2, at 631–42; Judith Jarvis Thomson, *Physician-Assisted Suicide: Two Moral Arguments*, 109 ETHICS 497, 514–16 (1999) [hereinafter Thomson, *Physician-Assisted Suicide*].

[8] Judith Jarvis Thomson, Comment, *The Trolley Problem*, 94 YALE L.J. 1395 *passim* (1985) [hereinafter Thomson, *Trolley Problem*].

[9] James Edwin Mahon, *Innocent Burdens*, 71 WASH. & LEE L. REV. 1429, 1453–69 (2014).

Part I of this Article reviews how the canonical cases have generally characterized DDE. Part II reimagines DDE's real role in these and other settings. The remainder of the Article turns to bodies of law in which scholars have largely neglected DDE's hidden influence and potential further utility. Part III analyzes the law of evidence, where DDE offers a coherent account of what otherwise seems like an arbitrary set of conflicting rules that seldom fully protect against "unfair prejudice." Part IV discusses the disparate impact branch of antidiscrimination law, which forbids some knowing discrimination absent any discriminatory purpose. Once we properly reconceptualize DDE, its role with respect to evidence law and disparate impact claims appears at the surface. In a coda, Part IV-A examines the disparate treatment branch of antidiscrimination law and explains why this branch and other narrowly similar contexts would not lend themselves well to DDE analysis. Yet DDE answers questions that might otherwise seem unanswerable in other settings. Thus, in Parts V, VI, and VII, the Article expounds the role that DDE can play in analyzing, respectively, jury nullification, the Fourth Amendment exclusionary rule, and the regulation of dangerous products.

Through these illustrations, this Article will show how important the DDE insight is not only to a small set of questions of interest to theologians and moral philosophers but also to the law. DDE sharpens our understanding of what we are doing when we make choices in the face of risk or even certain harms. It helps determine the conduct we wish to encourage, independent of anyone's mental state. Far from the marginal phenomenon that some believe it to be,[10] DDE is a common fixture in our law and morality, and it is tremendously useful to clear thinking.

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[10] *See* T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME (2008). Scanlon, a moral philosopher, critiques what he takes to be the doctrine of double effect, an approach that distinguishes identical actions based on a mental state of intent versus knowledge and that he finds intuitively appealing for many but not all moral dilemmas. He substitutes a heterodox approach that looks to justifications to determine when an action is permissible and intentions to determine the "meaning" of an action for an actor, adding that sometimes, but not always, meaning can help inform permissibility. *Id.* at 27–28 ("[T]he distinction I am calling attention to is narrower and, for that reason, easier to overlook. It is the distinction between the permissibility of an action and a special kind of agent assessment, in which what is being assessed is not the agent's overall character but rather the quality of the particular piece of decision making that led to the action in question."). Scanlon somewhat mysteriously proposes that different moral situations may call not only for different responses but for wholly distinct moral analyses. *Id.* at 1–4. Though perhaps not entirely fair, I came away from Scanlon's analysis of his (I believe, erroneous) understanding of DDE wondering: "Why is [his version of] DDE such an intuitively attractive approach to some but not all moral dilemmas?" I might answer: "DDE does a good job of answering some but not all moral dilemmas." If I am correct, then Scanlon mistakes a restatement of the problem for a solution. In my analysis, by contrast, I understand DDE as connected both with the actor's state of mind—because a permissible purpose either is or is not available to him, given what he knows to be true—and with the (also known) costs associated with pursuing the planned course of action. Unlike Scanlon, I do not distinguish between past and future action or between permissibility and meaning. If no permissible purpose is available, the action is prohibited, no matter how beneficial it is.

I. CLASSIC DDE: OF MUNITIONS PLANTS, MORPHINE, AND ABORTION

This Part reviews "classic" cases in which proponents of DDE have applied the approach. I use these familiar examples to set out the conventional view of DDE, take note of equally conventional critiques, and then develop an alternative account.

A. *Collateral Casualties in War*

One of the clearest illustrations of DDE involves a munitions plant on which one side of an armed conflict has set its sights.[11] To destroy the plant, which is a permissible military target, the attackers' air force must drop a bomb on it. The problem? The munitions plant is located in a densely populated neighborhood, and any bombing would therefore kill civilians.

Furthermore, warning civilians of the bombing would undermine the attackers' mission because the defenders' armed forces would then use their air defenses to shoot down the attacking planes or intercept the missiles. And worse, the enemy forces would retaliate despite the attackers' failure to complete their mission. Yet without a warning, no matter what time of day the bombing took place, some number of civilians would die.

In this situation, the international law of war authorizes the attackers to bomb the munitions plant, notwithstanding that the explosion would kill some civilians, if these "collateral" casualties are proportionate to the military advantage the bombing provides.[12] If, however, the attackers' actual subjective *goal* had been to kill civilians—perhaps as a means of demoralizing the enemy—then dropping the bomb, the same act by outward appearances, would constitute a war crime.[13]

If a permissible purpose is available, then the tendency of the action to further the permissible purpose may enter a cost-benefit analysis for proportionality against the harmful. My approach simplifies rather than complicates or restates the problem of why DDE seems (and is) an intuitive and powerful tool for solving moral problems. *See also* Michael C. Dorf, *Even a Dog: A Response to Professor Fallon*, 130 HARV. L. REV. F. 86, 89–90 (2016).

[11] *See, e.g.*, Quinn, *supra* note 6, at 336.

[12] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 28, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 ("The presence of a protected person may not be used to render certain points or areas immune from military operations."); OSCAR M. UHLER ET AL., INT'L COMM. OF RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE TIME OF WAR 208 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) (distinguishing "ruses of war (which are permissible)" from "acts of barbarity (which are unlawful)"); Gershel, *supra* note 6, at 745 ("Thus, positive law seeks an 'equitable balance' between humanity and military necessity—those who do not 'directly participate' in the fight are immune from direct attack, however innocent loss of life when incidentally unavoidable is permissible.").

[13] *See* Alison Hills, *Intention, Foreseen Consequences and the Doctrine of Double Effect*, 133 PHIL. STUD. 257, 260–61 ("Though both the Terror bomber and the Strategic bomber choose to raise the chances that civilians die, and both may even kill the same numbers of civilians, only the Terror bomber is committed to killing: only he intends to kill. If DDE is correct, Terror bombing is morally worse than Strategic bombing."); Quinn, *supra* note 6, at 335–36, 343–44 (purporting to solve the Strategic Bomber problem by distinguishing between the intention to produce direct or indirect harm).

B. *Physician Aid in Dying*

Another well-known illustration of DDE concerns a dying patient who is in terrible pain. In some jurisdictions, such a person has the legal right to a physician's assistance in ending the patient's life.[14] But most of the United States does not recognize such a right, and the Supreme Court in *Washington v. Glucksberg* and *Vacco v. Quill* rejected a putative right to physician assistance in dying under either, respectively, the Due Process or Equal Protection Clause of the Fourteenth Amendment.[15]

The debates over physician assistance in dying typically come down to an exchange between those who believe a person should be able to play a role in determining the circumstances of their death and those who believe it is wrong to take an innocent life, full stop, even if the person whose life is at issue wants to stop living.[16] From a certain religious perspective, suicide is a mortal sin,[17] no matter how much suffering a person is enduring. But even religions that take this view typically also recognize that it is permissible for a doctor to do what is possible to mitigate a patient's pain and suffering at the end of her life.[18] In other words, they allow DDE.

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[14] Currently, eleven U.S. jurisdictions allow physician assistance in dying. Legislation authorizes the practice in California (CAL. HEALTH & SAFETY CODE § 443.14(c) (West 2015)), Hawai'i (HAW. REV. STAT. § 327L-19 (2019)), Maine (ME. STAT. tit. 22, § 2140 (2019)), New Jersey (N.J. STAT. ANN. § 26:16-4 (West 2019)), New Mexico (N.M. STAT. ANN. § 24-7C-7 (West 2021)), Vermont (VT. STAT. ANN. tit. 18, § 5283 (2013)), and the District of Columbia (D.C. CODE § 7-661.01 (2017)). Ballot initiatives established the right in Colorado (COLO. REV. STAT. § 25-48-103 (2016)), Oregon (OR. REV. STAT. § 127.880 (1995)), and Washington (WASH. REV. CODE § 70.245.040 (2009)). The Montana Supreme Court found the right in the state constitution. *See* Baxter v. State, 224 P.3d 1211, 1222 (Mont. 2009). Several foreign jurisdictions also permit physician-assisted suicide, including Canada, the Netherlands, Switzerland, and Belgium. *See* Carter v. Canada (Att'y Gen.), [2015] 1 S.C.R. 331, 365–71 (Can.); Wet van 1 april 2001, Stb. 2001, 194 (Neth.); SCHWEIZERISCHES STRAFGESETZBUCH [StGB], CODE PÉNAL SUISSE [CP], CODICE PENALE SVIZZERO [CP] [CRIMINAL CODE] Dec. 21, 1937, SR 311.0, art. 115 (Switz.); *The Belgian Act on Euthanasia of May, 28th 2002*, 10 EUR. J. HEALTH L. 329, 329 (2003) (unauthorized translation).

[15] Washington v. Glucksberg, 521 U.S. 702, 705–06 (1997) ("The question presented in this case is whether Washington's prohibition against 'caus[ing]' or 'aid[ing]' a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not."); Vacco v. Quill, 521 U.S. 793, 797 (1997) ("The question presented by this case is whether New York's prohibition on assisting suicide therefore violates the Equal Protection Clause of the Fourteenth Amendment. We hold that it does not.").

[16] *See, e.g.*, Cantor & Thomas, *supra* note 4, at 159–62 (discussing rationales of those opposed to physician-assisted suicide); Thomson, *Physician-Assisted Suicide*, *supra* note 7, at 506–07 (discussing rationales of those opposed to suicide in general).

[17] *See* John Potter, *Is Suicide the Unforgivable Sin? Understanding Suicide, Stigma, and Salvation Through Two Christian Perspectives*, RELIGIONS, Nov. 2021, art. 987, at 3 (2021); Elisabetta Povoledo, *Vatican Reiterates Its Opposition to Euthanasia and Assisted Suicide*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/22/world/europe/pope-francis-euthanasia-assisted-suicide.html ("The Vatican on Tuesday reiterated the Roman Catholic Church's opposition to assisted suicide and euthanasia, which it called 'intrinsically evil' acts, 'in every situation or circumstance.'").

[18] Letter from Card. Luis F. Ladaria Ferrer, S.I., Prefect, Congregation for the Doctrine of the Faith, Samaritanus Bonus on the Care of Persons in the Critical and Terminal Phases of Life, (July 14, 2020), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200714_samaritanus-bonus_en.html#Palliative_care ("Palliative care is an authentic expression of the human and

A high dose of an opiate—such as morphine or fentanyl—could eliminate or drastically reduce a patient's pain and suffering, but it could also end the patient's life as a side effect of the medication (by depressing respiration).[19] Because the objective of relieving the patient's intense pain is so important, DDE allows doctors, nurses, or family members (acting under the guidance of a health care professional) to administer very high doses of opiates sufficient to alleviate the patient's pain.[20] Recognizing that such a quantity of medication will be lethal in many cases, DDE says that giving the patient that (lethal) amount of painkilling medication is nonetheless justified and proportionate to the permissible objective of relieving the patient's suffering. Though the patient dies in both cases, intentional killing is, by hypothesis, immoral, whereas incidental killing is justifiable.[21] At least, that is how moral philosophers have conventionally understood DDE to justify death-causing palliative care.

C. *Abortion*

DDE also frequently figures in discussions of abortion. The leading example in the philosophical literature is a 1967 essay by Philippa Foot (who, like Judith Jarvis Thomson, also discusses other leading instances of DDE),[22] but I can make the issue more vivid by relating an extended back-and-forth on the subject I had with a pro-life activist about a decade ago.[23] In his view, abortion is never justified because the intention behind an

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Christian activity of providing care, the tangible symbol of the compassionate 'remaining' at the side of the suffering person. Its goal is 'to alleviate suffering in the final stages of illness and at the same time to ensure the patient appropriate human accompaniment' improving quality of life and overall well-being as much as possible and in a dignified manner.").

[19] Philip A. Reed, *Opioids, Double Effect, and the Prospects of Hastening Death*, 46 J. MED. & PHIL. 505, 507–08 (2021). *But see* Susan Anderson Fohr, *The Double Effect of Pain Medication: Separating Myth from Reality*, 1 J. PALLIATIVE MED. 315, 326 (1998) (rejecting DDE because the risk of respiratory depression is extremely low).

[20] Timothy E. Quill et al., *The Rule of Double Effect — A Critique of Its Role in End-of-Life Decision Making*, 337 NEW ENG. J. MED. 1768, 1768 (1997).

[21] *Id.* ("Many medical ethicists cite the rule of double effect to explain why a clinician is permitted to administer high doses of opioid analgesics to relieve severe pain in a terminally ill patient toward the end of life, even in amounts that could cause the patient to die sooner than he or she would otherwise."); *see also* AQUINAS, *supra* note 1, at art. 8.

[22] Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. 5, 9 (1967). In response to Foot's essay, Judith Jarvis Thomson, famous for her 1971 essay, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47 (1971), published a series of papers that further explored the trolley problem: Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 MONIST 204 (1976) [hereinafter Thomson, *Letting Die*]; Thomson, *Trolley Problem*, *supra* note 8; JUDITH JARVIS THOMSON, THE REALM OF RIGHTS (1990); Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFFS. 283 (1991); Judith Jarvis Thomson, *Turning the Trolley*, 36 PHIL. & PUB. AFFS. 359 (2008); Judith Jarvis Thomson, Comment, *Kamm on the Trolley Problems*, *in* F.M. KAMM, THE TROLLEY PROBLEM MYSTERIES (Eric Rakowski ed., 2016).

[23] *See* Sherry F. Colb, *To Whom Do We Refer When We Speak of Obligations to "Future Generations"? Reproductive Rights and the Intergenerational Community*, 77 GEO. WASH. L. REV. 1582, 1606 n.61 (2009).

abortion is always to kill the innocent unborn child/embryo/fetus.[24] In some cases, however, what doctors might call an abortion is not an abortion at all, he explained.

If a pregnant woman had cancer in her uterus that would spread to the rest of her body if her uterus were not removed, the doctor could permissibly remove the woman's uterus to save her life. In the process, the fetus would die if the hysterectomy occurred prior to viability. Yet the purpose of the doctor performing the hysterectomy would be to protect the woman from the immediate threat of cancer, not to end the life of the fetus. The death of the fetus would thus qualify in this example as an undesirable effect rather than the objective of the action.

My pro-life interlocutor and I hit an impasse, however, when I asked what he would think about terminating a pregnancy by inducing labor and doing so because the physical burdens of pregnancy were too much of an emotional burden to bear, not because her life or physical health was at substantial risk. I thought maybe that kind of abortion would be permissible, as the death of the fetus again would be an undesirable effect of the true objective, but my interlocutor did not agree. I believe an element of DDE, described below, accounted for the impasse.[25]

D. *Caveats and Criticisms*

As noted above, an important caveat or addendum accompanies DDE: the incidental and unintended harm must not be disproportionately grave relative to the intended benefit.[26] For example, it would not be acceptable to go drag racing on a residential street,[27] even if the likely, let alone certain, death of neighborhood pedestrians were unintended. Knowing of extremely harmful but unintended outcomes (or even acting "merely" recklessly with respect to the risk of those outcomes) is culpable when the harm is disproportionate to any benefit one pursues with the activity. Entertainment or thrill-seeking activities such as drag racing would appear generally to fit that description.

Driving at those same dangerous speeds to bring a group of gunshot victims to the hospital, however, might be justified, notwithstanding a comparable risk of injuring or killing someone in the process.[28] This part of DDE, proportionality, is easy to understand and accept. We often perform a

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[24] Note that I will use the word "fetus" to denote a zygote, an embryo, or a fetus.

[25] *See infra* Section II.D.

[26] Quinn, *supra* note 6, at 334 n.3 ("[T]he good end must be proportionate to the bad upshot.").

[27] *See e.g.*, N.C. GEN. STAT. § 20-141.3 (1995) ("It shall be unlawful for any person to operate a motor vehicle on a street or highway willfully in prearranged speed competition with another motor vehicle.").

[28] *See e.g.*, N.C. GEN. STAT. § 20-145 (2015) ("The speed limitations set forth in this Article shall not apply to . . . public or private ambulances and rescue squad emergency service vehicles when traveling in emergencies . . . .").

cost-benefit analysis when we undertake dangerous or harmful activities, and some benefits are sufficient to justify a high cost, while others are not.

Critics have taken issue with a feature of DDE that seems less intuitively sensible than proportionality. To some, distinguishing between doing something with the *intent* to cause a particular outcome (such as the death of a civilian) and doing something that you *foresee* will cause that same outcome but wish would not, makes no moral sense.[29] If you are aware that a particular outcome will result, critics ask, then why should anything turn on whether you *desire* that outcome?

If a dying patient is in terrible pain, and you give that patient a lethal dose of morphine, does it really matter whether your intent is to end the patient's life or to relieve the pain, knowing that the patient will die in the process? The act is the same, the surrounding circumstances are the same, and the outcome is the same as well. Accordingly, part of what bothers critics of DDE is that the premise—that intent is morally very different from knowledge—seems mistaken.[30] When a person does something and knows at the time that the act in question will bring about a harmful result, it seems morally irrelevant whether the actor sought this result or simply knew that it was coming.

The critique would seem quite persuasive if we were assessing two instances of conduct identical to each other, taken under the very same circumstances, with the actor in each case knowing the act will have a particular result, so that the only difference between the two actions is that the actor in one case acts with the intention of achieving the result, while the actor in the other case simply knows the result will occur but does not specifically seek the result. First, we might be skeptical of the second person's claim that she knew but did not intend the effect of her behavior. How can we be confident that she is telling the truth, especially if she stood to benefit from the foreseen effect? More importantly, is this distinction truly important? As Cantor and Thomas observe, criminal law typically treats

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[29] Jonathan Bennett, *Morality and Consequences*, Lecture at Brasenose College, Oxford University (May 9, 16, & 23, 1980), *in* 2 THE TANNER LECTURES ON HUMAN VALUES 45, 115–16 (Sterling M. McMurrin ed., 2011), *available at* https://tannerlectures.utah.edu/_resources/documents/a-to-z/b/bennett81.pdf ("[T]here is . . . no intended/foreseen difference which belongs in the load-bearing part of a moral structure."); Thomson, *Physician-Assisted Suicide*, *supra* note 7, at 516 n.18 ("[W]hat an agent intends (as opposed to merely foreseeing) in acting is irrelevant to the moral permissibility or impermissibility of his action."); Richard Hull, *Deconstructing the Doctrine of Double Effect*, 3 ETHICAL THEORY & MORAL PRAC. 195, 197 (2000); Kimberly Kessler Ferzan, *Beyond Intention*, 29 CARDOZO L. REV. 1147, 1156 & n.46 (2008) ("This 'moral equivalence' argument begins by acknowledging the distinction between intended and known killings and then argues that this is a distinction without a difference." (citing H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 122 (1968); ERIC D'ARCY, HUMAN ACTS: AN ESSAY IN THEIR MORAL EVALUATION 170–74 (1963); Hans Oberdiek, *Intention and Foresight in Criminal Law*, 81 MIND 389 (1972); J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 160–68 (1977))).

[30] Quinn, *supra* note 6, at 343 & n.17.

intent and knowledge as equivalents,[31] so it seems misguided to draw a firm line between them when assessing wartime bombing, euthanasia, or abortion.

Accordingly, a leading critic of the doctrine of double effect—T.M. Scanlon—argues that DDE places too much weight on intentions and conflates judgments about moral permissibility with judgments about right actions.[32] Scanlon concludes that "there is no single explanation for all of the cases to which the doctrine of double effect is thought to apply."[33] Although I share the view of Scanlon and other critics of DDE that intentions cannot do the work that DDE, as conventionally understood, requires, I nonetheless contend that DDE, properly reconceptualized, functions effectively and coherently across subject-matter domains.

In my view, the specific actor's actual subjective intent should not drive the analysis or the distinctions we draw in DDE cases. What should drive the analysis instead is the scope of the category of permissible purposes.[34] To say that one may not intentionally bring about a harmful effect is thus another way of saying that one must be able to point to an intent one *could* have that would aim at a beneficial goal that in turn outweighs any expected but regrettable collateral harm.

In other words, the obligation to identify a permissible possible purpose operates mainly by constraining behavior rather than by mandating a correct

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[31] Cantor & Thomas, *supra* note 4, at 126 ("If a physician uses a massive analgesic dosage intending to kill the patient or knowing that the dosage will certainly or almost certainly be fatal, she has the requisite state of mind—intentional or knowing—for criminal responsibility."); *Id.* at 126–27 ("[E]uthanasia is unlawful even where a competent patient has asked to be put out of her misery."); *Id.* at 127 ("[I]t would be criminal homicide for a surgeon to remove a vital organ from a patient even if the patient so requested and even if the object was to save another person's life via a transplant."); *Id.* at 119 ("A risky surgery, such as a heart by-pass operation, is justified if it offers a substantial gain in the patient's longevity or quality of life, but reckless if the prospective gain to the patient is modest compared to the accompanying risk of death."); *Id.* at 125 n.147 ("[A] person can expect death from a course of conduct yet not intend that death occur. . . . [An example is] a Jehovah's Witness declining a critical blood transfusion.").

[32] *See* SCANLON, *supra* note 10, at 27–28 (discussing how intentions can decide permissibility).

[33] *Id.* at 4; *accord* David R. Mapel, *Revising the Doctrine of Double Effect*, 18 J. APPLIED PHIL. 257, 257 (2001) ("[I]t is possible to justify a large range of judgments previously attributed to the DDE on the basis of complicated interactions between several distinct moral considerations.").

[34] William J. FitzPatrick, *Acts, Intentions, and Moral Permissibility: In Defence of the Doctrine of Double Effect*, 63 ANALYSIS 317, 319 (2003) (proposing, in a cursory and incomplete defense of DDE, an interpretation of DDE similar to my own, one which he subsequently abandoned without explanation in favor of the more conventional DDE analysis that showcases intent, in William J. FitzPatrick, *The Intend/Foresee Distinction and the Problem of "Closeness,"* 128 PHIL. STUD. 585, 585 (2006)). Another set of scholars does apply DDE to various areas of law (including disparate impact). *See, e.g.*, Edward C. Lyons, *In Incognito—the Principle of Double Effect in American Constitutional Law*, 57 FLA. L. REV. 469, 540–42 (2005). But this work assumes that "purpose" means subjective intention, an assumption that might work in some contexts but that falls prey to the critique by Norman Cantor and George Thomas. Cantor & Thomas, *supra* note 4, at 126 ("If a physician uses a massive analgesic dosage intending to kill the patient or knowing that the dosage will certainly or almost certainly be fatal, she has the requisite state of mind—intentional or knowing—for criminal responsibility."). That critique does not apply to my reconstructed version of DDE.

state of mind or mens rea.[35] When considering conduct that plainly causes harm, one must either identify a permissible purpose that can explain the action and that is significant enough to justify the harm, or one must refrain from engaging in the conduct. Having to identify a permissible purpose thus limits permissible conduct.

II. THE CLASSICS RECONSIDERED

With my distinctive view thus stated, this Part clarifies and justifies it by revisiting and expanding on the classic examples of DDE. My aim is to flesh out and defend DDE in a way that is both persuasive and consistent across domains.

Recall the paradigmatic examples discussed above: bombing a munitions plant during a war when some civilian casualties will inevitably result; giving a dying patient enough medication to treat the pain and thereby kill the patient; and abortion. This Part returns to these areas, applying the approach to DDE that I have proposed. After applying my approach to the canonical real-world DDE cases, this Part considers the trolley problem and related hypothetical examples that occupy many pages of moral philosophy but examines them using my possible-permissible-purposes-as-constraints-on-conduct approach to DDE.

A. *Bombing Redux*

Let us begin by returning to the bombing example. The permissible and proportionally valid purpose here is to destroy the enemy's munitions plant. The undesirable, inevitable, and known effect of the bombing is killing (let's say) three civilians.

If you are the military official in charge of the attacking side, A, and you are considering whether to initiate this bombing, you might secretly like the idea of killing civilians on B's side of the war because such killings demoralize B's civilians and can turn them against the war, much in the way that terrorists aim to affect public opinion. In this scenario, you have an improper intent (killing civilians). No one is likely to find out about your impermissible intent, however, so one might think that the possible-permissible-purposes requirement of reconceptualized DDE is toothless.

To see why the requirement has teeth, think about the primary impact of requiring a permissible military purpose and proportionality. The point of the limitation is not to ensure that military officials have the correct mens rea when they carry out otherwise identical actions. Such requirements instead amount to a limit on what actions military officials are allowed to take.

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[35] I thus agree with Scanlon that DDE judgments often turn on moral permissibility rather than intentions, even as I disagree with his further critical claims about DDE. *See* SCANLON, *supra* note 10, at 3.

Military officials may not direct a bomb at a group of civilians whenever no permissible purpose could justify the action. If there is no military target within bombing range, then bombing is impermissible.[36] Furthermore, even if there is a permissible target, the munitions plant that Side A hopes to bomb must pose enough of a threat (by supplying Side B with substantial weaponry they can use in combat against Side A) to cost-justify the "incidental" or "collateral" killing of civilians.[37] Here, too, the correct or incorrect state of mind makes no difference.

Finally, if there is some way to successfully destroy the munitions plant without killing the civilians (e.g., by leafletting in advance of the bombing), then Side A may not conduct a surprise attack.[38] Thus, any behavior that objectively manifests a desire to target civilians will be impermissible because the action is unnecessary to the pursuit of a permissible and proportionate military goal Side A might intend to achieve. Attending to the availability of permissible goals one might intend to achieve thus serves to constrain behavior rather than quixotically seeking to demand desirable mental states for otherwise identical behavior.

B. *Euthanasia Redux*

Turn now to a doctor and her dying patient. The doctor will encounter the same type of constraint that purpose erects around the military official's options in the bombing example. Under conventional DDE, the only permissible intention in treating a dying patient is to alleviate pain, with the permissible incidental effect of ending the patient's life if there is no other way to alleviate his pain.[39]

In my reconceptualized version of DDE, the requirement of a possible permissible purpose still limits the doctor's permissible conduct: however much she may secretly wish to end the patient's suffering, she may prescribe only the kinds of medicines that alleviate pain. Even if there is a quicker way to end the patient's life, if the quicker way does not involve the alleviation of pain, then it will be impermissible. In addition, if there is some way to treat the patient's pain sufficiently without causing or seriously risking the patient's death, then the application of reconceptualized DDE (prohibiting euthanasia but permitting a pain-relieving dose that will kill the patient) will bar the doctor from choosing to administer an opiate overdose.

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[36] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52, June 8, 1977, 1125 U.N.T.S. 3 ("Civilian objects shall not be the object of attack or of reprisals. . . . Attacks shall be limited strictly to military objectives.").

[37] *Id.* at art. 51 ("Indiscriminate attacks are prohibited. Indiscriminate attacks [include] . . . [a]n attack which may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated.").

[38] *Id.* at art. 57 ("Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.").

[39] *See supra* notes 20–21 and accompanying text.

The actions must accordingly reflect the objective purpose of alleviating pain, regardless of whatever subjective wishes the doctor might harbor in her heart. The pain must also be such that treating it is important enough to justify the cost of causing or risking death. A patient with a mild headache will not qualify.

Finally, if the patient is in no pain but wishes to die while she can still think clearly and make competent decisions, the exclusivity of the pain-amelioration purpose in most U.S. jurisdictions will preclude the doctor from taking any steps to assist the patient in dying.[40]

To say that we can reconceptualize DDE to make better sense is not to say that every invocation of DDE will now be correct. We might think that DDE explains but does not justify a position that allows palliation with death as a side effect while forbidding direct killing. Some people (including me[41]) advocate for a broader right to physician assistance in dying, independent of the right to palliative care, because a narrow palliative-purpose requirement places substantial (and in my view unnecessary) limits on what a doctor can do, no matter what her state of mind might be. One harmful effect of such limits is the suspicion that might attach to pharmacists or other distributors stocking unusually large quantities of narcotics.[42] When the *only* permissible reason to be prescribing high doses of morphine to a dying patient is to treat the patient's pain, the government might be inclined to look more closely at whether doctors and hospitals are truly limiting themselves to permissible treatment options. A policy of palliation-but-not-direct-killing thus has the potential to discourage even adequate palliative care.

For this Article, however, I bracket my support for a broader right to physician aid in dying. The main point here is that insofar as one thinks that it makes sense to distinguish between direct aid in dying and palliative care that kills the patient as a side effect, a reconceptualized DDE explains and justifies the latter practice's permissibility by focusing on the objective availability of a permissible purpose rather than the actor's actual subjective intent.

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[40] *See supra* notes 14–15; *see also* Peter T. Hetzler III et al., *A Report of Physicians' Beliefs About Physician-Assisted Suicide: A National Study*, 92 YALE J. BIOLOGY & MED. 575, 582–83 (2019) (finding that many doctors believe that "physical pain is not even in the top five reasons why patients seek [physician-assisted suicide]," and discussing the ramifications of legalization).

[41] Sherry F. Colb, *Abortion and Physician Assistance in Dying*, JUSTIA: VERDICT (Mar. 23, 2022), https://verdict.justia.com/2022/03/23/abortion-and-physician-assistance-in-dying.

[42] Aneri Pattani, *DEA Takes Aggressive Stance Toward Pharmacies Trying to Dispense Addiction Medicine*, NPR (Nov. 8, 2021, 2:05 PM), https://www.npr.org/sections/health-shots/2021/11/08/1053579556/dea-suboxone-subutex-pharmacies-addiction ("Research in North Carolina and Kentucky has found that many pharmacists worry that ordering more buprenorphine will trigger a DEA investigation."); Toni Clarke, *War on Drugs Moves to Pharmacy from Jungle*, REUTERS (June 16, 2012, 8:16 AM), https://www.reuters.com/article/idUSBRE85F09220120616 ("[T]he DEA suspended the license of drug wholesaler Cardinal Health Inc to sell narcotic painkillers and other controlled substances . . . , saying it had failed to detect suspicious order volume from several pharmacy customers.").

C. *Abortion Redux*

With respect to abortion, there are two very different ways of thinking about DDE's demands within my possible-permissible-purposes-as-constraint-on-behavior framework. I first consider an approach that places nearly insurmountable obstacles in the path of a person seeking to terminate a pregnancy. I next consider a way of thinking about reconceptualized DDE that would permit abortion in more circumstances.

In some views, abortion is entirely or almost entirely impermissible throughout pregnancy. A common (typically religious) definition of abortion consistent with such views is the intentional killing of a fetus (or even a zygote).[43] One therefore may not intentionally bring about the death of a fetus, even if doing so as a means to some beneficial end.

From extended discussions with my pro-life interlocutor, however, I learned that under one version of the otherwise strictly anti-abortion position, a doctor may permissibly give the pregnant person a treatment that the doctor knows will cause the fetus's death, if the doctor has a righteous purpose that does not include the death of the fetus and the beneficial impact of pursuing that righteous goal is proportionate to the harmful outcome.[44] He offered the example of a pregnant woman with leukemia who needs a very toxic chemotherapy infusion to save her life. The doctor may treat her patient with chemotherapy in that case, even though the treatment will certainly cause the fetus to die.

In the chemotherapy example, it seemed very important to my pro-life interlocutor that the doctor not have the death of the fetus as her actual goal. The fetus's death must be a collateral harm that results from the pursuit of a righteous objective like saving the patient's life. However, in practice, requiring that the doctor must pursue a righteous objective does not limit the underlying motivations that might drive the pregnant person's choice to undergo a chemotherapy regimen that would kill the fetus. And under reconceptualized DDE, a patient suffering from leukemia for which chemotherapy is an appropriate treatment modality may permissibly undergo chemo even if the patient's true (presumably secret) wish is to kill the fetus.

Properly reconceptualized DDE does not require that actual intentions be hidden but nonetheless imposes substantial constraints on the circumstances that might justify terminating a pregnancy if one holds the views of my pro-life interlocutor. If the pregnant person does not suffer from a serious or life-threatening disease, then her purpose necessarily cannot be the treatment of a serious or life-threatening disease. So long as

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[43] *E.g.*, CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2270–75 (2d ed. 1997).

[44] *See supra* note 23 and accompanying text; *see also* PEW RSCH. CTR., AMERICA'S ABORTION QUANDARY 9 (2022), https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2022/05/PF_05.06.22_abortion.views_.fullreport.pdf ("[L]arge shares of those who generally oppose abortion say it should be legal in certain situations or say their position depends on the circumstances.").

she requires no lifesaving or health-saving treatment, she may not kill the fetus, even indirectly.

The pregnant person may not, for example, use a hallucinogenic drug that causes intense uterine contractions that expel and thus kill the fetus, even if her only goal in using the drug is to inspire her poetry. The death of the fetus is likely to strike most people who oppose abortion as a disproportionate harm relative to the benefit of inspiring poetry. Accordingly, despite the fact that my pro-life interlocutor drew moral distinctions based on the actual subjective intentions of pregnant persons and doctors, reconceptualized DDE, by focusing on the availability of a permissible intention, makes sense of what seems to be the core of his position.

Just as we saw how a DDE argument can cohere yet fail to persuade in the euthanasia example, so DDE arguments can sometimes be used for either side of a single question. Thus, contrary to the view just sketched, one could examine abortion under a possible-permissible-purposes-as-a-constraint-on-conduct approach to DDE in a way that allows at least some abortion methods. Let us again define abortion as the purposeful killing of a fetus. Now, however, we can identify what most people seek when they have an abortion as the termination of pregnancy rather than the death of a fetus.[45]

The decision to stop being pregnant that people make when they have an abortion is distinct from a decision to kill the fetus, even though the two outcomes go together. We could accordingly characterize a person's decision to terminate her pregnancy as a double effect phenomenon: the purposeful act is terminating the pregnancy, while the unintended but known consequence is killing the fetus, much as it is when the doctor gives her patient chemotherapy to combat her life-threatening leukemia.

The reader might object that when a doctor performs an abortion, she typically kills the fetus directly rather than simply terminating the pregnancy with the known but unintended death of the fetus. The most common surgical abortion methods involve killing the fetus before or during its removal from the womb.[46] Vacuum aspiration abortion, or suction curettage, sucks out the contents of the uterus, including the embryo, which cannot survive the procedure.[47] Dilation and evacuation, a method for later termination, involves dismembering the fetus with forceps and removing each part from the uterus, a process that kills the fetus unless the doctor has already administered a medication prior to the procedure to stop the fetus's heart (which also kills the fetus directly).[48] Dilation and extraction, also

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[45] *See generally* Colb, *supra* note 23 (distinguishing between a person's wish not to become a parent and the wish not to remain pregnant, which vindicates an interest in bodily integrity).

[46] Gonzales v. Carhart, 550 U.S. 124, 135 (2007) ("Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation.").

[47] *Id.* at 134.

[48] *Id.* at 135–36.

called intact dilation and evacuation,[49] involves delivering part of the fetus alive from the birth canal and then collapsing the fetal skull and potentially suctioning out the brain prior to removal, a process that (obviously) kills the fetus.[50]

With any of the above-enumerated methods, it would be impossible to claim that death is merely an unintended effect of the procedure. In each case, the procedure specifically and directly kills the fetus, even if the killing is a means to some ultimate goal of ending the pregnancy.

Not all methods of abortion directly kill the fetus, however. A few just remove the fetus from the pregnant person's body. Prior to viability, the fetus needs the parent's body to survive,[51] so removal leads to its death even if the goal of removal is to protect the parent from the harms of pregnancy. One such method is medical abortion. Medical abortion works by first blocking progesterone, a hormone that reinforces the thick uterine lining in which the fetus implants.[52] Medical abortion next induces uterine contractions, which cause the fetus to exit the pregnant person's uterus.[53] Neither step directly kills the fetus, but the effect of removing the fetus at the stage of pregnancy in which medical abortion is available, is fetal death.[54]

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[49] *Id.* at 137. This type of abortion is prohibited by the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, a federal law that the Supreme Court upheld in *Gonzales v. Carhart*, 550 U.S. at 132–33 ("These cases require us to consider the validity of the Partial-Birth Abortion Ban Act of 2003 (Act) . . . . We conclude the Act should be sustained against the objections lodged by the broad, facial attack brought against it.").

[50] *Gonzales*, 550 U.S. at 137–39 ("Intact D&E, like regular D&E, begins with dilation of the cervix. . . . In an intact D&E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. . . . In the usual intact D&E the fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass. . . . 'At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down). While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger. [T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening. The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.' . . . Another doctor . . . squeezes the skull after it has been pierced 'so that enough brain tissue exudes to allow the head to pass through.' Still other physicians reach into the cervix with their forceps and crush the fetus' skull. Others continue to pull the fetus out of the woman until it disarticulates at the neck, in effect decapitating it. These doctors then grasp the head with forceps, crush it, and remove it." (citations omitted) (first quoting H.R. Rep. No. 108-58, at 3 (2003); then quoting Joint Appendix at 41, *Gonzales*, 550 U.S. 124 (No. 05-380), 2006 WL 1440830)).

[51] Roe v. Wade, 410 U.S. 113, 160 (1973) (defining a "viable" fetus as one that is "potentially able to live outside the mother's womb, albeit with artificial aid").

[52] *Medical Abortion*, MAYO CLINIC (July 29, 2022), https://www.mayoclinic.org/tests-procedures/medical-abortion/about/pac-20394687; Greer Donley, *Medication Abortion Exceptionalism*, 107 CORNELL L. REV. 627, 633–34 (2021).

[53] *Medical Abortion*, *supra* note 52; Donley, *supra* note 52, at 633–34.

[54] *Information About Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, FDA (Jan. 24, 2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-

In addition to medical abortion, a safe alternative during at least the first seven weeks of pregnancy,[55] it is also possible to terminate a pregnancy at any stage by inducing labor.[56] To be sure, this method is extremely unusual in the United States because it requires the pregnant person to endure labor and delivery, including the pain and associated risks, just so that a fetus can emerge and then die because it is unable to live outside the womb.[57] Nonetheless, it occurs.

My friend, whom I will call Ronit, learned that she was in labor before her very-much-wanted child was viable. Rather than submit to a conventional abortion involving the active killing of her pre-viable fetus, Ronit decided, against the advice of her doctors, to go through labor and delivery so she could hold her daughter in her arms and say goodbye while the baby was still alive. Labor and delivery were extremely painful and heartbreaking for Ronit, but she chose not to have an abortion because she would have lost the chance to hold her living child.

Ronit very much regretted that labor came upon her early and could not be stopped. Her tragic example nonetheless illustrates that ending a pregnancy need not entail intentionally killing a fetus. That conclusion in turn has broader implications. I argue that inducing labor, whether in the early part of pregnancy through a medical abortion or in the later parts of pregnancy with Pitocin and other such drugs,[58] meets the criteria of DDE. The possible permissible purpose of the procedure is to end the tremendously stressful, painful, and risky experience of pregnancy, not to kill the fetus. The requirement of a possible permissible purpose here constrains the methods that one may use to end pregnancy by allowing only

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patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation (noting mifepristone is approved for use through seventy days gestation); *Roe*, 410 U.S. at 160 ("Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.").

[55] *The Availability and Use of Medication Abortion*, KAISER FAM. FOUND. (Jan. 4, 2023), https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/; *Medical Abortion*, *supra* note 52 ("You shouldn't attempt a medical abortion if you've been pregnant for more than nine weeks (after the start of your last period). Some types of medical abortion aren't done after seven weeks of pregnancy."). *But see* Amicus Brief for The American Center for Law and Justice et al. in Support of Respondent-Cross-Petitioner at 30–31, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (Nos. 18-1323, 18-1460) (suggesting against the weight of the evidence that "[t]here is now ample reason to believe that abortion is *detrimental* to maternal health and, if anything, *more likely* to lead to death or other adverse consequences for the pregnant woman than is continuing the pregnancy").

[56] *Labor Induction*, MAYO CLINIC (May 17, 2022), https://www.mayoclinic.org/tests-procedures/labor-induction/about/pac-20385141; Daniel Grossman et al., *Self-Induction of Abortion Among Women in the United States*, REPROD. HEALTH MATTERS, Nov. 24, 2010, at 136, 136–37.

[57] Grossman et al., *supra* note 56, at 142–43 (noting that the results of multiple surveys suggest self-managed abortions are "uncommon" in the United States). *But see* Lauren Ralph et al., *Prevalence of Self-Managed Abortion Among Women of Reproductive Age in the United States*, JAMA NETWORK OPEN (Dec. 18, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774320 (projecting, after adjusting for underreporting of abortions, that seven percent of U.S. women will attempt self-managed abortions in their lives).

[58] *Labor Induction*, *supra* note 56.

those methods that do not require the doctor to directly kill the embryo or fetus in the process of the abortion (or beforehand or afterwards). And the benefit—ending one of the most intrusive experiences a person can have—is proportionate to the known effect of ending the life of the fetus. Therefore, at least in principle, people who oppose abortion might accept these methods of terminating a pregnancy.

Nonetheless, I do not expect people who oppose abortion on religious or other moral grounds to sign onto my DDE analysis. They might agree that the alternative methods of abortion do not directly kill the fetus and should therefore qualify as having a distinct purpose. But they would undoubtedly reject the notion that terminating an unwanted pregnancy is a sufficiently important benefit to outweigh the fetus's interest in remaining alive.

Stated differently, abortion opponents typically minimize the hardships of pregnancy, even unwanted pregnancy. At most, some of them allow that abortion is permissible when there is a very good reason for one, such as to save the pregnant person's life;[59] they regard other grounds for abortion as insufficiently weighty compared to the harm an abortion does to a fetus (or to an embryo or zygote). This minimization of what even a "normal" pregnancy takes from a pregnant person best characterizes the pro-life position that wanting to stop being pregnant is not a permissible proportionate purpose, regardless of the abortion method employed.[60] It is thus the answer to the question of proportionality that, for many people who are pro-life, rules out all methods of ending a pregnancy.

D. *Trolleys and Other Classic Hypothetical Examples*

The classic trolley problem brings to the fore the considerations that inform DDE analysis.[61] A trolley heads toward five people tied to the tracks and will hit and kill them if you do not intervene. The trolley is moving too quickly to stop it, but you can intervene and save the five people by pulling a lever to divert the train onto a different track. If you intervene in this way, however, the trolley will hit and kill one person who is tied to the second track.[62]

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[59] *See* Amy Schoenfeld Walker, *Most Abortion Bans Include Exceptions. In Practice, Few Are Granted.*, N.Y. TIMES (Jan. 21, 2023), https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html (reporting that in states that have enacted new bans since the Supreme Court eliminated the constitutional right to abortion, "very few exceptions to these new abortion bans have been granted").

[60] *See* Sherry F. Colb, *The Pro-Life Story of How Babies Are Made*, JUSTIA: VERDICT (Oct. 15, 2021), https://verdict.justia.com/2021/10/15/the-pro-life-story-of-how-babies-are-made (reporting the remarks of a pro-life advocate and noting that "the physiological burdens of pregnancy[] do not seem to trouble" him).

[61] Thomson, *Trolley Problem*, *supra* note 8, at 1395.

[62] In Thomson's "bystander" variation of the Trolley Problem, one could respond to the facts by saying that the right thing to do is to refrain from acting, thereby removing oneself from having to bear responsibility for anyone's death. The doctrine of doing and allowing (DDA) explains this intuition and

Most people react to the facts in this scenario by saying that the right thing to do is to pull the lever and thereby save the five people, even though this action will cause the death of one person.[63] The intervenor's (your) purpose in this case is to save the five rather than to kill the one, it appears. The one death is the regrettable and known consequence of saving the five, a cost that is proportionate relative to the five lives saved. A conventional DDE analysis would regard this action as justified.

Now consider one of the classic variations on the trolley problem, one that introduces the "fat man."[64] In this scenario, the first part is the same: A trolley heads toward five people tied to the tracks and will kill the five, absent intervention. The trolley's speed precludes its stopping in time to avoid running over the five.

This time, however, instead of pulling a lever, the only way you can save the five is by pushing a fat man standing on a bridge overlooking the train track. (For simplicity, I reluctantly follow the literature in the callous and offensive fat shaming the example invokes.)[65] If you push him off the bridge, he will fall onto the tracks in the path of the train. The train will hit him and kill him, but his body will block the train from killing the other five. Is it morally permissible or even laudable to throw the fat man off the bridge?

The answer people typically give is no.[66] It is wrong to throw the fat man off the bridge to save the five people who would otherwise perish under the trolley car.

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has moral force because we frequently distinguish between acts and omissions in judging culpability. For our purposes, however, I want to put the DDA to one side. Therefore, I want to consider Foot's original trolley problem, in which the trolley driver is forced to choose to kill one or five people. Foot, *supra* note 22, at 9. One possibility is to think about driving a car that is on cruise control and autopilot (but one that does not detect obstacles on the ground). The driver is responsible for what the car does. There are five people lying unconscious on the highway and no time to stop the vehicle. The driver must either mow down the five (on autopilot) or grab the steering wheel and turn away, an act that will lead the car to run over one person who is lying unconscious off to the side. *See* Samantha Godwin, *Ethics and Public Health of Driverless Vehicle Collision Programming*, 86 TENN. L. REV. 135, 143 (2018) ("Someone has to decide in advance what a driverless vehicle will do in situations where the vehicle cannot avoid a crash altogether but can select what object or person it will collide with.").

[63] Thomson, *Trolley Problem*, *supra* note 8, at 1395–96.

[64] Thomson, *Letting Die*, supra note 22, at 207–08 (1976) (introducing the "fat man" variation); Thomson, *Trolley Problem*, *supra* note 8, at 1403 (applying the "fat man" variation to the "bystander" and "loop" variations).

[65] This hypothetical scenario suggests that pushing a fat person off a bridge might in theory be a good thing to do. Were I writing on a clean slate, instead of a fat man I would hypothesize that the person to be pushed off the bridge was dressed in an outfit made of rocks, worn to maximize the impact of the bodybuilder's workout. Throwing the "rock man" over the bridge will reliably stop the trolley. (It is already unrealistic to think that a fat man could stop a runaway trolley, so do not interrogate the rock-man scenario too closely for verisimilitude.)

[66] Sarah Bakewell, *Clang Went the Trolley*, N.Y. TIMES (Nov. 22, 2013), https://www.nytimes.com/2013/11/24/books/review/would-you-kill-the-fat-man-and-the-trolley-problem.html ("Surveys suggest that up to 90 percent of us would throw the lever in 'Spur,' while a similar percentage think the Fat Man should not be thrown off the bridge. Yet, if asked, people find it hard to give logical reasons for this

To be sure, not everyone agrees. Cass Sunstein and other utilitarians suggest that the "fat man" scenario is no different, from a moral standpoint, from Thomson's "bystander" trolley scene in which the intervenor can pull a lever.[67] In both cases, Sunstein maintains, the intervenor kills one person to save five. Both are therefore morally justified, and people make a moral error when distinguishing between the two. The error, Sunstein argues, is a function of how the human brain handles violence that is up close and personal versus at a distance. Pushing the man off the bridge (or even imagining doing so) thus engages a different part of the brain, the part that objects to most violence that one might commit against someone who is nearby and correspondingly concrete in his victimhood.[68]

Sunstein is wrong. I do not mean to suggest that the human brain processes faraway and close-by violence in the same way; it plainly does not. The same people who will happily chow down on a chicken sandwich would be horrified to see or participate directly in live chickens meeting their death at the slaughterhouse. However, the distinction people draw between the two trolley variations is rational and therefore does not call for a neurological account.[69]

If the two trolley scenarios were effectively the same, as Sunstein supposes, then state of mind—independent of action—could be driving people's distinct judgments, an argument for the "state of mind" or mens rea understanding of DDE. Under that supposition, in the first scenario, your subjective purpose in pulling the lever and thus redirecting the trolley onto the track to which one person is tied is to save the five, not to kill one. In the "fat man" scenario, by contrast, you have two subjective purposes: to throw the fat man in the path of the train, thus killing one; *and* (thereby) to save

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choice. Assaulting the Fat Man just feels wrong; our instincts cry out against it."). *But see* Edmond Awad et al., *Universals and Variations in Moral Decisions Made in 42 Countries by 70,000 Participants*, 117 PROC. NAT'L ACAD. SCIS. 2332, 2334 (2020) (showing nearly sixty percent of U.K. citizens surveyed would have sacrificed the "fat man").

[67] Cass R. Sunstein, *How Do We Know What's Moral?* N.Y. REV. BOOKS (Apr. 24, 2014) (book review), https://www.nybooks.com/articles/2014/04/24/how-do-we-know-whats-moral/ ("Most people have pretty clear intuitions about the two problems. In the Trolley Problem, you should pull the switch, but in the Footbridge Problem, you should not push the fat man. . . . On utilitarian grounds, the Trolley Problem and the Footbridge Problem seem identical and easy to resolve.").

[68] *Id.* (citing Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105, 2106–07 (2001)).

[69] For similar reasons, even though someone might be more emotional in the leadup to a menstrual period, we ought to first consider their statements on the merits before we start dismissing what they say as the product of PMS. *Premenstrual Syndrome (PMS)*, MAYO CLINIC (Feb. 25, 2022), https://www.mayoclinic.org/diseases-conditions/premenstrual-syndrome/symptoms-causes/syc-20376780; Lisa Eggert et al., *Emotional Interference and Attentional Processing in Premenstrual Syndrome*, 54 J. BEHAV. THERAPY & EXPERIMENTAL PSYCHIATRY 77, 83 (2017); *see also* Valerie Siebert, *Nearly Half of Women Have Experienced "Period Shaming,"* N.Y. POST, https://nypost.com/2018/01/03/nearly-half-of-women-have-experienced-period-shaming/ (Jan. 11, 2018, 9:01 AM). To invoke biology to explain why a person says what he says is to treat the statement as a symptom rather than a valid observation about the world.

the five. In other words, if the acts are the same but people nonetheless distinguish them based on the actor's state of mind, then maybe I am wrong to suggest that the inquiry into possible permissible purpose operates *only* by constraining action; perhaps it can dictate the appropriate subjective mental state as well, condemning the "fat man" scenario on that basis.

As I am not the first to suggest, however, the "fat man" scenario is very different from the lever scenario.[70] They are not at all equivalent. In one case, the purpose is to turn the trolley away from a path that would kill five people, much as one might do by swerving on the highway to avoid a group of suddenly appearing pedestrians.

You do not need the one person on the alternate track for your project to work. In fact, you would be delighted if no one were on the alternate track because you could then save the five people on the first track without any collateral casualties. The one person who dies because of your actions truly is regrettable (though known) collateral damage. Because the action taken in pulling the lever is consistent, from the perspective of an outside viewer, with a permissible purpose, we need not examine your actual subjective motivations but instead turn to the proportionality inquiry and find that losing one life as an incidental consequence of saving five is proportionate and therefore just.

In the "fat man" scenario, you are using the fat man as a braking mechanism for the trolley. You do not wish that the man was safely located elsewhere because his presence and instrumental use is essential to saving the five.[71] If you imagine him crossing the bridge and reaching safety, then your objective of saving the five is no longer feasible.

Throwing the fat man off the bridge does more than allow a known harm to the fat man to take place when you are separately trying to save the five. It instead inflicts violence on the fat man purposefully as a *means* of saving the five.

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[70] Tim Stelzig, *Deontology, Governmental Action, and the Distributive Exemption: How the Trolley Problem Shapes the Relationship Between Rights and Policy*, 146 U. PA. L. REV. 901, 938–39 (1998) ("On the facts as imagined, we might console the passerby who pulled the switch by saying that it was not her fault, that she did not kill the one—the trolley did. A similar statement offered to assuage the guilt of one who rolled the rock would not be convincing. This response is sufficient to distinguish the Trolley Problem from Fat Man and Rock.").

[71] S. Matthew Liao, *The Closeness Problem and the Doctrine of Double Effect: A Way Forward*, 10 CRIM. L. & PHIL. 849, 849–53 (2016) (The closeness problem refers to when "an agent's intention can be identified in such a fine-grained way as to eliminate an intention to harm from a putative example of intended harm, and yet, the (resulting) case appears to be a case of impermissible action.") One might argue that you, the agent, merely intend to stop the trolley, not caring if the fat man was actually Superman, impervious to physical assault. However, my version of DDE solves this problem because we no longer consider the actor's intentions but ask instead whether the action taken under the circumstances is consistent with a permissible purpose. Here, the objective is to cause the fat man to be hit by the trolley. This is not an action consistent with a permissible purpose under the circumstances and is therefore impermissible notwithstanding the closeness problem.

To recap my takeaway from the trolley problem and its variations, consider a somewhat more realistic example. If you are driving your car and your brakes fail and you suddenly see five people passed out on the ground in front of you, you may veer off to the right or to the left to avoid the five people, even if one person is passed out on the ground to your right and another is passed out on the ground to your left. In that case, you are veering away from the five with the effect of killing the one. You are justified in veering in that way (regardless of your subjective state of mind) because you have available a permissible purpose, thus satisfying reconceptualized DDE.

E. *Utilitarian Doctors*

Now assume (as philosophers ask of us in another canonical hypothetical example)[72] that a healthy man comes into the hospital for a blood test. While he is there, a doctor notices that he is a perfect match for five patients who will die that night if they do not receive a heart, lungs, a liver, and two kidneys, respectively. If the doctor takes the healthy man into an operating room, chloroforms him, and proceeds to remove his heart, lungs, liver, and kidneys to save the five people in need, the doctor commits murder. The doctor's first purpose is to remove vital organs from a man who will die without them, and that purpose is impermissible. The *ultimate* goal, to save the lives of the five people, cannot redeem the impermissible direct intent and cannot be achieved except through that impermissible direct intent. And importantly, it is obvious on the face of the action that the doctor's intent is to harvest organs from a living man as a means of saving five people.[73] We need not inquire further into the doctor's actual subjective motivations.

The man from whom the doctor extracts vital organs is not simply a collateral cost of helping the five other people; he is the means through which the doctor provides that help. This feature makes it very different from veering away from five people in traffic with the known effect of hitting one. The harm to the one person on the road is not the only plausible purpose behind the action, as it is for the doctor.

Now consider an all-too-realistic scenario as another example. Imagine that we are living during a pandemic, and we have a vaccine or several vaccines that can protect people from landing in the hospital and/or dying of the virus. Assume that the vaccine will kill a tiny proportion of the people who take it. For argument's sake, assume that one in a million will die because they took the vaccine, while a thousand times as many people will live and many more will avoid hospitalization because they took the vaccine.

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[72] Thomson, *Trolley Problem*, *supra* note 8, at 1395–96.

[73] *Id.* at 1404 ("The reason why the surgeon may not proceed in *Transplant* is that if he proceeds, he maximizes utility, for he brings about a net saving of four lives, but in so doing he would infringe a right of the young man's.").

Should the government allow the makers of the vaccines to distribute them? The intention of the companies that make the vaccines, in addition to making money, is to prevent the spread of life-threatening illnesses and thereby save many lives. The companies' leaders know (though they regret) that some number of people will die from the vaccines. This situation fits both traditional and reconceptualized DDE: it is permissible to give people medicine that will save hundreds of thousands of lives, even though the known collateral effect is to kill a handful of people (whose identities are unknown ex ante). The cost is proportionate, given the benefit, and the plausible purpose is permissible. The advantage of reconceptualized DDE is we need not worry about actual subjective intentions. We need not keep a vaccine on the shelf if it turns out (bizarrely) that its inventor's primary subjective intention was the killing of the one in a million. Nor (more realistically) need we concern ourselves with the subjective pecuniary goals of the pharmaceutical executives.

Now imagine a different scenario. We no longer have a vaccine for the pandemic virus, but we know that we can treat the sick effectively by harvesting the brains of a handful of humans and distributing cultured cells from those brains to be injected into the spinal fluid of the larger population of sick people. Once again, it might be that we are killing only a small number of people and saving a much larger number of people.[74]

Virtually no one would suggest that this behavior is morally acceptable. Unlike in the case in which we distribute vaccines to large numbers of people, hoping to save lives but knowing that a small number of people will die from the vaccines, here we are intentionally doing direct violence to innocent people in order to use them as medicine for many other people. Under no version of DDE may we intentionally do violence that is a necessary condition to saving the others; such harm must be an unintended and regrettable cost.

In the pairs of cases that we have been comparing, we see reconceptualized DDE judging permissible actions based on the possible permissible purposes that plausibly explain the actions, and we rule out other actions as impermissible based on the unavoidably impermissible intentions manifest in those actions. Because there is an inescapably impermissible intention in the latter set of examples, we do not reach the next step of balancing proportionality and seeing how the number of lives on one side compares with the number on the other. We may not select the life of one as a means of mining that one to save others or as a trolley-stop to rescue others. Actions that can only be understood as carrying out such a purpose are impermissible, full stop.

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[74] For a fictional depiction of a similar scenario and moral dilemma set within a zombie apocalypse, see M.R. CAREY, THE GIRL WITH ALL THE GIFTS (2014).

III. THE LAW OF EVIDENCE

We now turn to areas of law in which DDE helps to make sense of what we find. In most of this Part, I discuss the law of evidence. So far as I have been able to ascertain, no one has previously subjected evidence to DDE analysis, but DDE appears tailor-made to explaining and justifying how the evidence rules work.

Before coming to the law of evidence, I offer a general observation about the role of DDE. As noted above, Cantor and Thomas have argued that DDE has no real presence in American law.[75] They observe that in the criminal law, the mens rea of "intent" requires *either* intent *or* knowledge.[76] With these two states of mind interchangeable, it follows that merely *knowing* the effect of one's behavior will not excuse conduct that *intentionally* causing that effect would condemn. Giving a patient an overdose of morphine that leads to her death is accordingly an "intentional" homicide, whether the death is actually intended or simply foreseen.[77]

Although Cantor and Thomas are correct about the substantive criminal law in general, and thus about the legal status of euthanasia, absent special legislation or other dispensation, it would grossly overread their important insight to conclude that DDE has no place at all in American law. Indeed, even a narrow focus on criminal law yields subtlety beyond the equation of knowledge with intent.

In some areas of law, we have a level of clarity about the conduct that we stigmatize and prohibit. We know that in most cases, killing an innocent person is wrong and criminal. If one knows what one is doing, then one is criminally responsible. Still, there are exceptions.

For example, one may kill another person in self-defense.[78] When the circumstances that make self-defense an option are in place, then one can justify killing. What matters, as I have discussed above, is not the actor's "true" subjective motivation but instead the availability of a permissible and plausible purpose that objectively justifies the action (and of which the actor is at least aware). Perhaps the actor really wanted to kill the other person even absent a prior attack, but in the face of a threat of death from that person, the actor may kill in self-defense, regardless of his subjective intent.

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[75] Cantor & Thomas, *supra* note 4, at 131 ("[U]nder the Model Penal Code (MPC), which reflects prevalent state law on this point, both purposeful and knowing conduct can prove murder. Using specific intent to determine the actor's culpability therefore fails to reflect modern American criminal law doctrine regarding homicide.").

[76] *Id.*

[77] *Id.* at 126 ("If a physician uses a massive analgesic dosage intending to kill the patient or knowing that the dosage will certainly or almost certainly be fatal, she has the requisite state of mind—intentional or knowing—for criminal responsibility.").

[78] MODEL PENAL CODE § 3.04 (AM. L. INST. 1962); N.Y. PENAL LAW § 35.15 (McKinney).

To be sure, the criminal law mostly does not exemplify DDE. In other areas, however, DDE is not an exception but the core. Nowhere is that more true than with respect to the law of evidence.

A. *The Basic Structure of Evidence Law*

Some students begin their course in Evidence with a basic misapprehension about what this area of law does. They believe that the law of evidence tells us which evidence is admissible and which is not in just the way the criminal law lays out which conduct is prohibited. It is easy to get that impression when judges on television and in real life seem to rule up or down on whether a piece of evidence or testimony will be admitted.

The truth about the law of evidence, however, is that it determines relationships between evidence and conclusions rather than the absolute admissibility of concrete items of evidence.[79] For example, a criminal defendant's prior felony conviction may be admissible to prove that the defendant as a witness lacks credibility,[80] but that same prior conviction is inadmissible to help establish that the defendant is guilty.[81] This relationship between a prior conviction and the permissible versus impermissible objectives it might serve is an important illustration of DDE, as we will see below.

Under the law of evidence, almost nothing is inherently inadmissible, save for the truly irrelevant. Instead of two classes of evidence, admissible and inadmissible, there are permissible and impermissible grounds for introducing whatever evidence a party might offer. Most of the rules present obstacles to the admission of an exhibit or testimony or other evidence, but the obstacle need not be insuperable. We often wind up with evidence that does risk causing unfair prejudice while also serving some permissible objective, much like the lethal morphine dose needed to treat the patient's pain.

Take the case of hearsay as a familiar example of how the rules of evidence work. Hearsay is an out-of-court statement that "a party offers in evidence to prove the truth of the matter asserted in the statement."[82] If you offer my statement "the light is red" to prove that the light was red when I made the statement, you offer hearsay.

For a more involved example of hearsay, imagine that John Doe gets into an accident while driving a rental car and that a pedestrian dies in the accident. Imagine further that the estate of the pedestrian sues both Doe and the car rental agency, claiming that Doe's driving was negligent and that the rental agency was negligent for renting a vehicle to Doe (who, let us

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[79] *See* FED. R. EVID. 402 ("Relevant evidence is admissible . . . . Irrelevant evidence is not admissible.").
[80] FED. R. EVID. 609.
[81] FED. R. EVID. 404(b)(1).
[82] FED. R. EVID. 801(c).

suppose, had previously had his license suspended for driving irresponsibly). Imagine the rental agency putting one of its employees on the witness stand to say that a trusted customer named Jane Roe was with Doe when he rented the car and that Roe at that time told the rental agents (including the testifying employee) that Doe was an excellent driver.

If the rental employee testifies in this way, and the defendant's stated intention in presenting the employee as a witness is to prove that Doe was a good driver and that the accident was therefore not his fault, then the employee's testimony is inadmissible hearsay unless it falls within one of the various hearsay exceptions.[83] If, on the other hand, the defendant's stated intention in introducing the statement is to prove that it was reasonable for the rental company to rent Doe a car, a proposition that does not require the jury to believe Roe's out-of-court statement (that Doe is an excellent driver) to be accurate, then the statement might be admissible on this limited point.[84]

The "might" reflects the fact that the judge must weigh the permissible use of the statement—to prove it was reasonable for the rental company to rent to Doe—against the impermissible but tempting hearsay inference—that Doe really was a good driver and therefore was not at fault in the accident. The jury might draw this inference notwithstanding measures taken to avoid it (such as a limiting instruction).[85] If the assistance the evidence provides the finder of fact through the permissible use is not substantially outweighed by the risk of unfair prejudice via its impermissible use, then the evidence comes in, despite its double effect.[86] If it were relevant only to an impermissible inference, however, then no permissible purpose would be available to justify admitting the evidence, and the evidence would accordingly stay out.

When it is the criminal defendant's prior criminal conduct that comes into evidence (instead of a statement about a civil defendant being a good driver), those concerned about the interests of the accused are especially uncomfortable with the mix of permissible and impermissible uses of the admitted criminal convictions.[87] Take the case of a defendant charged with robbery and having a rap sheet with two prior convictions for burglary. If

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[83] *See* FED. R. EVID. 802; FED. R. EVID. 801(d); FED. R. EVID. 804.

[84] FED. R. EVID. 801(c); GEORGE FISHER, EVIDENCE 380 (3d ed. 2013) (including "[t]o prove the statement's impact on someone who heard it" among common nonhearsay purposes for evidence of out-of-court statements).

[85] *See* FED. R. EVID. 105 ("If the court admits evidence that is admissible . . . for a purpose—but not . . . for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."). *See* Liesa L. Richter, *Seeking Consistency for Prior Consistent Statements: Amending Federal Rule of Evidence 108(d)(1)(B)*, 46 CONN. L. REV 937, 966–67 (2014) (discussing the challenges in crafting clear limiting instructions to jurors when dealing with hearsay evidence).

[86] FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . ."); W. VA. R. EVID. 403; ME. R. EVID. 403.

[87] *See* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1997–98 (2016); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 45–47 (1985).

the defendant decides to take the witness stand and say that he is innocent and did not commit the robbery charged, then the prosecutor might be able to introduce the prior burglaries into evidence. Under Federal Rule of Evidence 609 and similar state rules, the judge may admit the evidence if its permissible probative value to impeach the defendant's credibility outweighs the prejudicial tendency of the prior convictions to suggest that the defendant is by disposition a criminal and therefore likely to be guilty of the robbery for which he is on trial.[88]

The formal point of introducing prior convictions in this situation is to impeach the credibility of the defendant-witness, suggesting that if he was willing to commit as serious a crime as burglary, then the jury has reason to distrust whatever he happens to say on the witness stand.[89] Note that the permissible use here—if the evidence comes in—is to serve the objective of reducing or eliminating the weight of the defendant's testimony that he is innocent, given his history of crime.

The obvious downside risk of allowing such impeachment is that jurors will see the prior burglaries as more than just proof that the defendant's sworn testimony of his innocence is entitled to little weight.[90] Jurors could take the criminal history as increasing the likelihood of the defendant's guilt—if he committed burglary before, he more likely robbed now. If the jury takes the evidence as proof of guilt, with or without instructions not to do so, then the defendant will likely have harmed rather than helped his case by testifying that he is innocent. This calculus could deter the next defendant from testifying in the first place, even though she has a constitutional right to testify.[91]

Note the Double Effect logic (as I have reconstructed it to turn on objective purpose) at work here: neither the defendant nor the judge cares whether the prosecutor's actual subjective motive for introducing the prior convictions is to attack the defendant's credibility with the prior convictions; the priors have that impact and also risk a prejudicial effect either way. For the same reason, a person who wants to stop the doctor from ending a dying patient's life may not care whether the doctor's subjective intention in giving the patient a lethal dose of morphine is to relieve the patient's pain. The

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[88] FED. R. EVID. 403; FED. R. EVID. 609.

[89] *See* Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 186 (2017) ("The link between credibility, reputation, and criminality drawn in today's impeachment rules thus continues to reflect the notion that the indicia of being a bad person, however defined, is also the indicia of a liar. One bad act is still sufficient to draw an inference about a person's bad character, and that bad character, in turn, tells us something about a witness's propensity to lie.").

[90] *See generally* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1358 (2009).

[91] Rock v. Arkansas, 483 U.S. 44, 51–53 (1987) (recognizing that "[t]he right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution," namely the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and as "a necessary corollary to the Fifth Amendment's guarantee against compelled testimony").

defendant wants the judge to exclude the harmful testimony, no matter why it is offered. Yet having a permissible and weighty purpose available allows the prosecutor and the doctor each to act in ways that would be impermissible in the absence of such a plausible permissible purpose, despite the fact that the bad outcome in both cases is known and may well be subjectively desired.

In addition, in both cases DDE requires proportionality analysis. One cannot give a lethal dose of morphine to someone with a stubbed toe; the harm there substantially outweighs the benefit, especially because nonlethal substitutes are readily available; one can treat stubbed-toe pain without a lethal dose of (or any) morphine. By analogy, if the criminal defendant-witness has prior convictions for perjury, a crime far more probative of sincerity than burglary, then the judge will likely exclude the prior burglary convictions. The discounted probative value of the burglary convictions is very low, given its highly prejudicial potential impact and the availability of other evidence with the same (or a greater) upside and a far lesser downside.[92]

In the end, if the controversial step is taken (the morphine administration or the admission of the prior burglary convictions), those opposed will find it difficult to take comfort in the fact that the fact that the stated intention was something other than what happened. And as a matter of subjective intention, it is usually reasonable to suppose the prohibited purpose really was what drove the conduct. Maybe the doctor wanted to honor the patient's right to die, and maybe the prosecutor wanted the jury to conclude that a recidivist burglar likely committed robbery as well. What matters, however, is not what the actor truly wanted but whether a person in that actor's shoes could have plausibly acted with only the permissible purpose.

B. *Pretext*

Hold on. Do we really want a legal system that evaluates the permissibility of conduct based on the existence of a possible purpose when some other purpose really motivates the conduct? Does the law of evidence really work to license pretextual reasoning in that way? The answer to both questions is yes.

Consider the case of a criminal defendant who has a prior conviction for a felony. Rule 404 prohibits the introduction of the defendant's prior conviction offered to prove that the defendant in this instance acted in conformity with whatever character trait was manifest in the crime of

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[92] *See* FED. R. EVID. 404 advisory committee's note ("The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."); Old Chief v. United States, 519 U.S. 172, 182–83 (1997); David H. Kaye, *Digging Into the Foundations of Evidence Law*, 115 MICH. L. REV. 915, 929 (2017) (book review).

conviction (the "character" or "propensity" inference).[93] If he was convicted of aggravated assault, then the prosecution may not offer the prior conviction to help show that he is violent and therefore is more likely (than in the absence of the prior) to be guilty of the current assault or murder charge.

Does this prohibition mean that prosecutors never introduce an opposing party's prior convictions with the actual subjective intent of inspiring the jury to draw the character inference? Of course not. Parties routinely seek ways of covertly encouraging the jury to draw the character inference from prior conviction evidence.[94]

If a criminal defendant testifies as a witness, the prosecution may introduce the witness's prior conviction to show a bad character for veracity (and therefore, diminished credibility).[95] Everyone knows that the prosecutor's likely actual intention in introducing—and the likely effect of—prior conviction evidence is to prompt the jury to conclude that the defendant is more likely to be guilty of the crime with which she is charged.[96] So a cynic might say that the objective purpose inquiry essentially whitewashes the use of evidence to contaminate the jury's thinking. Stated differently, the requirement of a possible permissible purpose not only does nothing for a defendant whose jury gets to hear about prior convictions, but it does not even ensure that the prosecutor offering the evidence has the correct mens rea.

Yet such cynicism misses much of the story in which DDE governs evidence law. The law blesses some uses of evidence (such as the impeachment of testifying witnesses with prior felony convictions[97]) and curses all other uses (such as the character inference[98]). That line between uses (rather than the line between "intent" and "knowledge") is where reconstructed DDE has its impact. Because one may not use prior convictions to support the character inference, a few things follow: (a) if the defendant stays off the witness stand, the prosecution will have a very hard time justifying the introduction of the prior convictions;[99] (b) the defendant who does wish to testify may successfully argue that whatever probative value the prior conviction has on the defendant-witness's credibility does not outweigh the tendency of the prior conviction to support the character inference and thus guilt;[100] (c) if the prior conviction does come in to impeach the defendant's credibility as a witness, the defense is entitled to an

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[93] FED. R. EVID. 404.

[94] Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 295, 300–03 (2008).

[95] FED. R. EVID. 609.

[96] Bellin, *supra* note 94, at 295, 300–03.

[97] FED. R. EVID. 609.

[98] FED. R. EVID. 404.

[99] Eisenberg & Hans, *supra* note 90, at 1373 (finding that juries learn about prior criminal records in less than nine percent of cases where defendants do not testify).

[100] *See* FED. R. EVID. 403.

instruction telling the jury not to consider the prior as evidence of guilt;[101] and (d) if the prior conviction does come in for impeachment purposes, the prosecution may not make the propensity-implies-guilt argument to the jury—in other words, she may not tell the jury that because the defendant has committed burglaries in the past, she is likely to have committed the robbery charged in this case.[102]

All the above are real limits on the scope of what the prosecutor may do, and they are limits that flow directly from the (reconstructed) "double effect" nature of admitting evidence associated with foreseeable but impermissible inferences. It therefore matters a great deal whether a prosecutor is allowed to offer prior convictions only for credibility purposes or whether the prosecutor may offer them on the question of guilt, even though the prosecutor's subjective (and covert) intention may in either case be to help establish guilt. The possible-permissible-use limitation is not just an irrelevant technicality if we understand it as a constraint on the scope of what a party may do rather than as a restriction on the states of mind that a party is allowed to have. When we describe undesirable, foreseeable effects of pursuing a permissible purpose, the phrase "collateral damage" tells us something about how far the actor in question may go. If the asserted pretextual righteous purpose is implausible—that is, if it is not available—the de facto authority to pursue a subjectively impermissible aim necessarily disappears.

IV. DISPARATE IMPACT IN ANTIDISCRIMINATION LAW

As construed by the Supreme Court, the Constitution prohibits only intentional discrimination,[103] but federal statutes address practices that have a racially (or otherwise proscribed) disparate impact as well. Under Title VII of the 1964 Civil Rights Act, an employer must not discriminate against people based on race.[104] Disadvantaging people expressly because of their race is prohibited, full stop.[105] In addition, the law has a separate category for actions that do not expressly rely on a proscribed characteristic but that

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[101] FED. R. EVID. 105.

[102] FED. R. EVID. 404(b).

[103] Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact [of a statute] is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." (citation omitted)); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979) ("When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert of overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an 'important starting point,' but purposeful discrimination is 'the condition that offends the Constitution.'" (citations omitted)).

[104] 42 U.S.C. § 2000e-2.

[105] § 2000e-2(a), (k)(2).

have the effect of disadvantaging a class of persons defined by such a characteristic.[106] For instance, an employer might use a qualifying exam that disproportionately disqualifies African American applicants (for a job or promotion), though the employer is simply trying to narrow down the field of candidates and select the best ones.

In such a situation, the employer may continue using the test, despite its disparate impact, if she can demonstrate "business necessity."[107] To survive scrutiny under that standard, alternative screening mechanisms that do not have the same disparate impact must prove ineffective in selecting the best candidates.[108] In these circumstances, the employer succeeds under a standard DDE analysis: the intent—selecting the best candidates—is neutral and thus permissible; the disproportionate exclusion of African American applicants is an undesirable byproduct of the screening test; and the test—by satisfying the "business necessity" requirement—survives proportionality analysis.

Similar to the method used in the law of evidence, assessing proportionality in disparate impact claims involves determining whether there is a different method by which the business could screen in the best applicants without disproportionately excluding African Americans. If so, then the availability of this alternative method will discount the value of the existing screening test, just like the availability of alternative evidence that is less prejudicial than the evidence on offer discounts the probative value (and thus the proportionate permissible benefit) of the latter. If other alternatives do not exist, and the challenged screening test truly distinguishes the best-qualified applicants, then the business can continue to use the test.

Title VII frames proportionality as "business necessity," but it still involves an assessment of how important the permissible objectives are and whether the costly measure is the only way (or one of the only ways) to reach those objectives. If an employer truly needs to use a test with a disparate impact to select the best employees, then we have proportionality as well as the double effect—the permissible purpose to screen in the best employees and the undesirable discriminatory impact. By contrast, when the only possible intention is to discriminate, then the act of firing or failing to hire is unlawful, and we do not reach the question of benefits. An employer may not intentionally discriminate against a person based on race even if doing so will yield great benefits because intentional discrimination

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[106] § 2000e-2(k). Congress amended the 1964 Act to cover disparate impact in 1991. Civil Rights Act of 1991, Pub. L. No. 102-166 §105, 105 Stat. 1074.

[107] § 2000e-2(k)(1)(A)(i).

[108] *Id.* (requiring the respondent "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

is unlawful "disparate treatment" not subject to proportionality (business necessity) analysis.[109]

IV-A. CODA: DISPARATE TREATMENT

Up until this point and resuming again in the next section, I have argued for the broad legal relevance of DDE, a doctrine that many commentators incorrectly consider a parochial approach to moral questions that rarely bears on legal doctrine.[110] In this section, I discuss one category of cases in which our legal framework decisively rejects DDE. I will then examine what distinguishes this category from those I have been discussing so far and how that distinction might provide a reason for discarding DDE in this category of cases.

The area in question is the disparate treatment prong of antidiscrimination law, including provisions of and cases construing such statutes as Title VI, Title VII, and Title IX.[111] Imagine that James brings a lawsuit against his employer Bob for disparate treatment based on race.[112] Assume further that James proves that Bob took some adverse employment action against James because of James's race. Proving Bob's racial motive for his action satisfies Title VII and will result in a recovery if the adverse action yielded damages.

How is the above inconsistent with DDE? Because the employer cannot simply point to some independent justification for the adverse employment action and show that the action and its adverse effect on the employee were proportionate relative to the value of acting on the putative justification. For example, even if James is slow at his job and speed is very important in his line of work, the fact that Bob demoted or fired James because of James's race renders Bob liable for discrimination. Discriminatory motive trumps the availability of an alternative reasonable justification. Why?

One good reason has to do with the background norm in the context of most discrimination cases versus in the other zones we have studied. Most

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[109] 42 U.S.C. § 2000e-2(k)(2) ("A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.").

[110] *See supra* note 4 and accompanying text.

[111] 42 U.S.C. §§ 2000d to 2000d-6 (Title VI, covering federally funded programs); 42 U.S.C. §§ 2000e to 2000e-17 (Title VII, covering employment); 20 U.S.C. §§ 1681–1686 (Title IX, prohibiting sex-based discrimination in education).

[112] Note that suing for disparate treatment means proving that the defendant has intentionally acted on the basis of the plaintiff's race. Suing for disparate impact, by contrast, requires only that the plaintiffs prove that the defendant's actions produced a racially disparate effect. In the latter cause of action, a defendant can justify its conduct by demonstrating "business necessity," a legitimate need for the neutral measure that has a racially disproportionate impact. Recall that having a "business necessity" amounts to having a plausible purpose for the action that is proportionate to the harm of the disparate impact. In other words, as we saw earlier, disparate impact analysis relies on the logic of DDE as I have described it here. *See supra* notes 107–08 and accompanying text.

employment in the United States is at-will.[113] At-will employment means that the employer has the right to fire, demote, or otherwise take adverse employment actions against an employee without having to identify any reason for doing so.[114] For instance, if the employer finds the employee's wardrobe uninteresting, the employer need not give the employee the chance to (a) purchase new clothes, or (b) argue that boring attire is irrelevant to the job in question. Immediate termination is at the complete discretion of the employer.

Laws prohibiting intentional discrimination in employment (and other areas) tell the employer that while she may be able to fire a person for any of an infinite list of stupid reasons, none of which would qualify as "good cause," the one reason that she must not have for firing an employee is the latter's race (or sex, etc.).[115] If a DDE approach were permissible in this context, then the existence of a completely stupid reason for firing an employee (e.g., the employee wears a platinum wedding band instead of a gold one) would excuse the employer for having in fact fired him for racial reasons. Given a backdrop of at-will employment, DDE would altogether undo the prohibition against intentional discrimination because there are effectively infinitely many nonracial-but-stupid reasons for firing a person that an at-will employer accused of discrimination could invoke.[116]

To function, DDE requires a system in which there is only one or a small number of reasons for an action that are sufficiently compelling, relative to the costs of the action, to justify taking an action that has a harmful effect. For instance, bombing a munitions plant where civilians are standing nearby during a war is justifiable only if the bombing will have a substantial impact on the enemy's capacity to produce weapons and even then only if comparable destruction of the enemy's war-making capacity cannot be achieved by attacking some other target or the same target at some other time. Now imagine instead that the military was authorized to bomb any part of the enemy's territory so long as the military's reason for the bombing, however absurd, is something other than to kill civilians. We can see how DDE in this context would no longer narrow down the range of permissible actions. Almost by definition, there is always some ludicrous basis for dropping a bomb or firing an employee, and anyone accused of intentionally killing civilians could accordingly use DDE to get out of jail free *every time* within a free-fire or at-will universe.

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[113] *At-Will Employment — Overview*, NAT'L CONF. ST. LEGISLATURES, https://www.ncsl.org/labor-and-employment/at-will-employment-overview (Apr. 15, 2008).

[114] *Id.*

[115] *See, e.g.*, 42 U.S.C. § 2000e-2(m) (recognizing that Title VII is violated in cases of mixed motives, "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice").

[116] *Cf.* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1996) (exploring the implications of the background at-will employment norm for antidiscrimination law).

In many settings, including those we have examined prior to this Coda, the law regulates an actor by requiring of him good reasons that truly justify the action that he takes. In such cases, we can dispense with the inquiry into actual subjective intent and focus exclusively on whether one could plausibly invoke a justification for the action taken and whether that justification is proportionate to the harm caused. But where the law takes a more libertarian approach, permitting actors to behave unreasonably—perhaps out of a respect for individual autonomy—then coming up with a permissible justification requires no work at all. Yes, an employer might say, I did fire this person from his job as an accountant, but there is a nonracial reason I could have invoked: his daughter is a vegetarian. Though having a daughter who is a vegetarian has no relevance whatsoever to the job of an accountant (or nearly any other job), at-will employment permits such a reason or any other reason (that is not discrimination on the basis of race, sex, etc.) for termination.

Next consider another antidiscrimination context in which the law sensibly focuses on actual subjective intent rather than employing DDE logic (reconstructed or otherwise). Most U.S. jurisdictions allow trial attorneys to eliminate jurors from the venire pretrial not only for cause (i.e., for good reasons) but also for any or no reason at all.[117] The for-cause challenges are, in theory, unlimited, and they require the attorney to provide the presiding judge with a real justification for removing a particular juror (e.g., he is close friends with the plaintiff).[118] By contrast, each party has a limited number of peremptory challenges—challenges to jurors for virtually any reason or no reason at all.[119] Peremptory challenges are like at-will employment in this way. They enable an attorney to eliminate prospective jurors who just rub him the wrong way without having to identify any problem with their serving.

In *Batson v. Kentucky*, the Supreme Court held that a prosecutor exercising peremptory challenges must not eliminate a juror because of her race.[120] Other decisions followed, extending the *Batson* prohibition to peremptory strikes by lawyers for civil litigants and for criminal

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[117] *See, e.g.*, N.Y. CRIM. PROC. LAW § 360.30 (McKinney); IDAHO CODE §§ 19-2015, 19-2016; S.D. CODIFIED LAWS § 23A-20-19; TEX. CODE CRIM. PROC. ANN. art. 35.14 (West).

[118] *See, e.g.*, N.Y. CRIM. PROC. LAW § 360.25 (McKinney); IDAHO CODE §§ 19-2017, 19-2019; S.D. CODIFIED LAWS § 23A-20-13.1; TEX. CODE CRIM. PROC. ANN. art. 35.16 (West).

[119] *See e.g.*, N.Y. CRIM. PROC. LAW § 360.30 (McKinney); IDAHO CODE § 19-2016; S.D. CODIFIED LAWS § 23A-20-20; TEX. CODE CRIM. PROC. ANN. art. 35.15 (West).

[120] 476 U.S. 79, 89 (1986) ("Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (citation omitted)).

defendants.[121] The idea is that if attorneys discriminate based on race in empaneling a jury, then the jurors themselves suffer an Equal Protection violation under the Fourteenth Amendment.[122] If we tried to apply DDE to this framework, we would find that whenever an attorney stood accused of eliminating a juror based on race, the attorney could invoke one of an infinite number of nonsensical, pretextual reasons as a justification. DDE works only when applied to conduct that generally must conform to some sort of reasonableness standard. With a finite number of potential justifications in place, DDE becomes a useful vehicle for ensuring that one of them applies and then for approving of the action taken if it satisfies proportionality. With no standard for good justifications, abandoning an intent standard means abandoning altogether the prohibition against the conduct.

For our purposes, it is useful to consider a case in which there is an accusation of discrimination and there is also a requirement for an objectively good reason for the action in question. In *Whren v. United States*, police followed a vehicle and ultimately pulled it over upon witnessing a minor traffic violation.[123] After stopping the vehicle, police asked for and received consent to search the vehicle and found drugs during the search. The driver and his passenger, both Black,[124] moved to suppress the evidence found in the vehicle on the ground that the police should not have stopped the vehicle and that the search, though consensual, was therefore the product of an unconstitutional seizure under the Fourth Amendment, yielding fruit of the poisonous tree.[125]

The driver acknowledged that when the police pulled him over, he had been violating the traffic law.[126] He asserted, however, that an objectively reasonable police officer seeing the minor traffic violation that the driver committed would not have stopped him absent a motive to try to search the car for drugs, and the police had no reasonable suspicion or probable cause to believe that the car contained drugs.[127] The claim was effectively that the

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[121] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991) ("Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal. . . . We conclude that courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial."); Georgia v. McCollum, 505 U.S. 42, 59 (1992) ("We hold that the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.").

[122] *Batson*, 476 U.S. at 84 ("[A] 'State's purposeful or deliberate denial to [Black people] on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.'" (quoting Swain v. Alabama, 380 U.S. 202, 203–04 (1965))).

[123] 517 U.S. 806, 808–09 (1996).

[124] *Id.* at 810 ("Petitioners, who are both black . . . .").

[125] *Id.* at 809 ("At a pretrial suppression hearing, they challenged the legality of the stop and the resulting seizure of the drugs. They argued that the stop had not been justified by probable cause to believe, or even reasonable suspicion, that petitioners were engaged in illegal drug-dealing activity; and that Officer Soto's asserted ground for approaching the vehicle—to give the driver a warning concerning traffic violations—was pretextual.").

[126] *Id.* at 810.

[127] *Id.* at 809.

police stopped the driver because of his race and/or because they suspected him of having drugs in the car despite the absence of any basis for that suspicion. It was a pretext.[128]

The pretext claim squarely brings DDE to mind. As I have interpreted and applied it in this Article, reconstructed DDE says that a person is justified in acting when the action is a permissible means of accomplishing a permissible objective (considering the balance between the harmful and beneficial effects), even if the actor had a different and impermissible motive for acting. The work that DDE does is to rule out actions that do not conform to an available justification rather than to identify correct mental states to distinguish between otherwise identical actions. Stated differently, pretext is permissible under DDE, so long as one has fulfilled the elements of some justifying account, however "bad" one's true motives.

I have explained that in the intentional discrimination (or "disparate treatment") context, pretext is generally fatal to a defendant's attempt to justify his actions. If an employer fires an employee because of the latter's race, then a pretextual justification is no justification at all. So how should we think about *Whren*, a context in which both discrimination and the need for objective justification may co-exist?

The Supreme Court answered the question by holding that so long as the police have probable cause to justify the stop of a driver, the Fourth Amendment has nothing to say about their true motives for the stop.[129] The Court added that if officers are conducting law enforcement activities in a manner that discriminates based on race, then the injured parties are free to bring a claim against the police for violating the Equal Protection Clause.[130]

I and others wrote scholarship that was quite critical of the Court's decision at the time.[131] Though I had not yet come to appreciate the power of DDE, my prior argument evaluating the Court's decision fits neatly under the analysis I have been offering in this Article. I observed that the Court was treating the requirement that police have reasonable suspicion or probable cause before stopping a vehicle as a limit on police authority to pull over vehicles.[132] Since police had probable cause to believe the driver had violated the traffic law,[133] it followed that they could stop the driver. Whatever their true motives might have been, the Court viewed the existence

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[128] *Id.*

[129] *Id.* at 819 ("Here the District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct.").

[130] *Id.* at 813.

[131] Sherry F. Colb, *Stopping a Moving Target*, 3 RUTGERS RACE & L. REV. 191, 205 (2001); *see also* Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117, 146–47 (2001).

[132] Colb, *supra* note 131, at 205 ("In reaching this result, the Court emphasized that the Fourth Amendment protects against police having limitless discretion to stop any driver.").

[133] *Whren*, 517 U.S. at 810.

of a valid and known justification as dispositive on the question of whether the stop was reasonable and therefore constitutionally valid under the Fourth and Fourteenth Amendments.[134]

I and others challenged the claim that the probable cause requirement places any real limit on police authority to stop a vehicle.[135] Because the law governing drivers is so extensive, I argued, anyone who drives for more than ten or fifteen minutes will necessarily violate the traffic law, which, among other things, is internally inconsistent.[136] As a result of the expansive rules governing drivers, police effectively have what I would call an "at-will" option of pulling over a driver any time they like, despite the Court's belief that this is not so.[137] The probable cause requirement is therefore, I argued, only an apparent but not a real obstacle to police stopping anyone or everyone.[138]

Because I view the highway as an at-will zone for police, I would not apply DDE to police stops of drivers. I would instead say that, as with at-will employment and peremptory challenges, rather than asking the alleged discriminator to identify permissible justifications (of which there are a virtually infinite number), we must instead, at the very least, penalize police who provably act on the basis of race or sex or some other impermissible basis. Permitting a stop on probable cause effectively permits police to stop people for "driving while Black."[139]

Given the Supreme Court's factual premise, however, its decision made sense. The Court regarded probable cause to believe a driver has violated a traffic law as being a real and valid reason for stopping a vehicle because stopping people for traffic offenses is an effective way of ensuring that people heed the traffic laws.[140] If a driver's violation of the traffic law is an

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[134] *Id.* at 819.

[135] Colb, *supra* note 131, at 200; Maclin, *supra* note 131, at 120–21.

[136] Colb, *supra* note 131, at 200 ("The traffic law is so extensive as to make absolute compliance virtually impossible for any driver, regardless of race.").

[137] Delaware v. Prouse, 440 U.S. 648, 663 (1979) ("[W]e hold that *except in those situations in which there is at least articulable and reasonable suspicion* that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment." (emphasis added)).

[138] Colb, *supra* note 131, at 200 ("As a result, though police *must* have reasonable suspicion or probable cause for every vehicular stop, they in fact always *do* have such suspicion about virtually every driver.").

[139] David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 265 (1999) ("African-Americans call it 'driving while black'—police officers stopping, questioning, and even searching black drivers who have committed no crime, based on the excuse of a traffic offense.").

[140] Whren v. United States, 517 U.S. 806, 817–18 (1996) (approvingly quoting *Prouse*, 440 U.S. at 654–55, for the prospect that "'the foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations,' which afford the 'quantum of individualized suspicion' necessary to ensure that police discretion is sufficiently constrained" (citations omitted)).

important breach that justifies a police officer in stopping the driver, then reconstructed DDE has a place in this area. Reconstructed DDE would say that a stop based on probable cause is valid, regardless of what truly motivated the police officer, even if it was the race of the driver. Pretextual activity is permissible when real requirements of justification apply. The only problem with the Court's analysis is the fact that when it comes to driving, everyone is an outlaw every time they take out the car for a spin.

V. JURY NULLIFICATION

To this point I have discussed areas of law in which DDE logic operates (or does not operate) to structure determinations of permissible conduct. In this Part, I take a somewhat different approach. I take a legal phenomenon—jury nullification—and ask whether it is a permissible goal in itself or a collateral consequence of other policies. My aim in so doing is to show that reconstructed DDE logic can sometimes make sense of otherwise puzzling phenomena in the law. I beg the reader's indulgence as I chase down the true nature of jury nullification. The payoff, I hope, is an appreciation of the utility of thinking in terms of reconstructed DDE across a wide range of contexts.

"Jury nullification" occurs when a jury in a criminal case, after reviewing all the evidence from the trial and concluding beyond a reasonable doubt that the defendant committed the crime charged, nonetheless returns a verdict of "not guilty."[141] The jury makes this choice for any of a number of reasons: (a) it believes the defendant's conduct should not be criminal;[142] (b) it believes the victim had it coming/asked for it/deserved it and therefore is not entitled to the community's outrage and, thus, a conviction;[143] (c) police, prosecutors, or other law enforcement officials misbehaved in ways that call for a kind of exclusionary sanction via acquittal;[144] or (d) some

[141] Paul Butler, *In Defense of Jury Nullification*, LITIGATION, Fall 2004, at 46, 46 (2004) (discussing a common understanding of how jury nullification often occurs when a jury believes a defendant is guilty and decides to acquit).

[142] *Id.*

[143] *E.g.*, JOHN GRISHAM, A TIME TO KILL 113 (1989) ("'I wanna ask you folks a question. How many of you would do or wanna do what Mr. Hailey did if someone raped your daughter[?'] . . . Crowell smiled and continued, 'I admire him for what he did. It took guts. I'd hope I'd have the courage to do what he did, 'cause Lord knows I'd want to. Sometimes a man's just gotta do what he's gotta do. This man deserves a trophy, not an indictment.'").

[144] Alex Abrams, Editorial, *Jury Was Within Its Rights by Sticking It to the Cops*, DAILY NEWS L.A., Oct. 4, 1995, at N17, 1995 WLNR 1414351 ("T[he] racism and corruption that has permeated police departments in this country for so many years will not be tolerated, particularly by the members of a community who are most often its victims."); Clarence Page, Commentary, *Crime and Punishment? Jury Nullification Is a Clear Signal that Blacks Are Losing Confidence in the Criminal Justice System*, CHI. TRIB., Nov. 15, 1995, at 21, 1995 WLNR 4516131 ("Nullification is a sign that the criminal justice system is not trusted. We should find out why."); Peter Blood, Editorial, *The O.J. Simpson Verdict's Impact on Society and Justice*, HARTFORD COURANT, Oct. 14, 1995, at A11, 1995 WLNR 4726114 ("Now it is time to look for the real killers and weed out the LAPD's bad apples and poor investigatory procedures.").

combination of these reasons or some other reason altogether made a not-guilty verdict seem like the most just outcome.[145]

Theorists engage in lively debate over the status of jury nullification within American law.[146] Some argue that it is and should be a protected right that jurors, defendants, or both may permissibly exercise.[147] Others regard jury nullification as an occasionally beneficial but usually harmful byproduct of other rights that a criminal defendant enjoys under the Fifth,[148] Sixth,[149] and Fourteenth Amendments.[150] Could it be that jury nullification is a feature rather than a bug, as some people claim?[151] Could it be that jury nullification is itself a protected constitutional right rather than an undesirable side-effect of other features of the criminal justice system? DDE offers us a surprisingly helpful route to figuring out which of these characterizations best describes jury nullification.

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[145] Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1171–96 (1997).

[146] *See, e.g.*, Butler, *supra* note 141, at 69 (concluding that nullification is an "essential component of the jury trial system" that, as "a limited remedy," is not to be feared); Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 112–14 (1996) (explaining how many African Americans believe criminal law practices impact the way jury nullification is utilized); Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 698 (arguing that jury nullification allows citizen jurors to interpret and embed meaning into the written law) (2012); Pamela Baschab, *Jury Nullification: The Anti-Atticus*, 65 ALA. LAW. 110, 114 (2004) ("Jury nullification, no matter how you slice it, is at bottom a desecration of the basic premise that we are all equal under the law.").

[147] *E.g.*, Butler, *supra* note 141, at 49, 69; Carroll, *supra* note 146, at 698–99, 703–05.

[148] Steven M. Warshawsky, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 208–09, 209 n.123 (1996) ("The jury's nullification power derives primarily from the Fifth Amendment prohibition against double jeopardy, which prevents the government from re-prosecuting a defendant who has been acquitted, even when the acquittal was 'based upon an egregiously erroneous foundation.'" (quoting Sanabria v. United States, 437 U.S. 54, 64 (1978))); U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

[149] James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, LITIGATION, Summer 1996, at 6, 6 ("[Jury nullification] is reflected in the Sixth Amendment, which grants the accused an inviolable right to a jury determination of his guilt or innocence in all criminal prosecutions for serious offenses. Because of this right, a trial judge absolutely cannot direct a verdict in favor of the State or set aside a jury's verdict of not guilty, 'no matter how overwhelming the evidence.'" (quoting Sullivan v. Louisiana, 508 U.S. 275, 277 (1993))); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

[150] Jenny E. Carroll, *Nullification as Law*, 102 GEO. L.J. 579, 602–09 (2014) (acknowledging that the Court has incorporated the Sixth Amendment's right to a jury "without alteration," but presenting the historical opposition of the ratifiers of the Fourteenth Amendment to jury nullification); U.S. CONST. amend. XIV, § 1 (Due Process Clause).

[151] Butler, *supra* note 141, at 47 ("When the U.S. Constitution was written, nullification also was a tenet that satisfied the Framers. The Sixth Amendment right to jury trial was an important component of the institution of democracy in the new country. People from the community, not the government, were to have the last word in whether a person would be punished. Jurors were an important check on government power, part of the complex system of checks and balances that was designed to prevent the state from becoming too overbearing.").

Those who argue for a right to nullification that belongs either to juries or to criminal defendants tend to point to the fact that juries do have the ability to nullify in any criminal case.[152] When people are consistently able to do something, and no one can stop them from doing it, the action looks very much like a right.

To test this characterization, we might ask: How would the system look if jury nullification were impermissible, an abuse of the jury's power of acquittal? One possibility is that if the evidence plainly proved the defendant's guilt beyond a reasonable doubt, then a judge encountering an acquittal could issue a judgment of conviction notwithstanding the verdict.

The finality of acquittals thus stands as one piece of evidence for the proposition that nullification is a constitutional prerogative of the jury. Otherwise, the argument goes, just as in a civil case, so the judge in a criminal case could issue a JNOV (judgment notwithstanding the verdict)[153] of conviction or at least grant a motion for a new trial. And an appellate court could evaluate the evidence and find it incompatible with the jury's decision to acquit. The finality of a plainly nullifying verdict of acquittal may not signify infallibility,[154] but considering the availability of alternatives, it is at least suggestive of an affirmative protection rather than an abuse of power. Stated differently, the finality of acquittals is consistent with and thus provides some support for the view that jury nullification is constitutionally protected for its own sake.

How else might we determine whether jury nullification should be deemed a feature of our criminal justice system rather than a side effect of the Double Jeopardy Clause of the Fifth Amendment and the Sixth Amendment right to jury trial? One fairly straightforward answer is to evaluate its costs and benefits. If the former outweigh the latter, that would suggest that it is a bug, not a feature.

People who support jury nullification sometimes invoke and praise its use to essentially invalidate an unfair law. They cite the juries that refused to enforce the Fugitive Slave Laws that criminalized assisting an enslaved person's escape from captivity.[155] It is unclear, however, whether one jury

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[152] *See* Duane, *supra* note 149, at 6, 9.

[153] In federal court, the JNOV now takes the form of a renewed posttrial motion for judgment as a matter of law. *See* FED. R. CIV. P. 50(b).

[154] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

[155] Morgan Cloud, *Quakers, Slaves and the Founders: Profiling to Save the Union*, 73 MISS. L.J. 369, 394 (2003) ("As unsettling as it is to read these advertisements offering rewards for the capture of runaway human property described primarily by their race, it is just as unnerving to recognize that slave catchers pursuing these runaways were justified not just by the laws of the slave states, but also by a statute passed by the Second Congress and by a specific constitutional provision crafted by the Framers."); Ryan Shymansky, Note, "*The Great Bulwark of . . . Political Liberties": The Decline of Jury Power and the Rise of Slave Interests in the Early American Republic*, 107 GEO. L.J. 1733, 1746–58 (2019) ("If fugitives were afforded 'this inestimable right [of trial by jury] in every northern State,' then

or even several juries acquitting because they disapprove of a law is an effective way to promote justice. Such an approach might instead extend the life of an unfair law. Nullification serves to release the political pressure that would otherwise build for repealing the unjust law for all cases.[156]

Perhaps more unfortunately, juries sometimes reject laws that many of us would consider just. Consider current laws against acquaintance rape. Juries are reluctant to convict men of raping women with whom they had almost any prior social interaction, such as meeting at a party or bar.[157] Because of this reluctance, prosecutors are often hesitant to bring the cases, out of a desire to avoid acquittals.[158] And police have correspondingly little interest in arresting a man who claims consent in the rape of an acquaintance.[159]

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they would be safe; after all, 'where can you find twelve impartial men . . . who will decide on their oaths, that a man has not a better right to himself than another has to him . . . that the right to liberty is not inalienable?'"); Butler, *supra* note 141, at 47; Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 185–86 (2011) ("Not only was the belief that juries were the independent judges of both law and fact prevalent at the Founding, abolitionist Lysander Spooner wrote an entire book defending this proposition in 1852 . . . . Spooner's immediate motivation for the project was to bolster the argument about jury nullification he had made in his 1850 pamphlet *A Defence for Fugitive Slaves*, which responded to the Fugitive Slave Act of 1850." (footnotes omitted)).

[156] Brown, *supra* note 145, at 1178–83.

[157] *See generally* Vivian Wang & Cheryl P. Weinstock, *Yale Student Found Not Guilty in Rape Trial*, N.Y. TIMES (Mar. 7, 2018), https://www.nytimes.com/2018/03/07/nyregion/yale-student-not-guilty-saifullah-khan.html; Molly Redden, *The Story of Nate Parker's Rape Accuser and a University's Cold Shoulder*, GUARDIAN (Aug. 19, 2016, 10:45 AM), https://www.theguardian.com/us-news/2016/aug/19/nate-parker-rape-penn-state-jean-celestin; *Bradley Acquitted in Rape Trial*, L.A. TIMES, Jan. 27, 1993, at 8, 1993 WLNR 3988291; Susan Estrich, *Palm Beach Stories*, 11 LAW & PHIL. 5, 29 (1992). Even when a jury does manage to convict a man of rape, the judiciary seems prepared to make such a decision meaningless as it did in the case of Brock Turner. Despite a conviction, a judge only sentenced Turner to six months in the county jail, later knocked down to merely three. Three months for violating another human's bodily integrity in the most intimate manner seems like a fairly ludicrous signal to send to the public and future juries. CHANEL MILLER, KNOW MY NAME: A MEMOIR 236 (2019).

[158] Tamara Rice Lave, *The Prosecutor's Duty to "Imperfect" Rape Victims*, 49 TEX. TECH L. REV. 219, 229–30 (2016) ("The chief prosecutor is often elected, and even if not, she is under enormous pressure to satisfy the public. Historically, prosecutors have achieved this satisfaction by winning most cases."); Shawn Marie Boyne, *Uncertainty and the Search for Truth at Trial: Defining Prosecutorial "Objectivity" in German Sexual Assault Cases*, 67 WASH. & LEE L. REV. 1287, 1297–98 (2010) ("Prosecutors are often reluctant to file charges in rape cases and even less likely to bring those cases to trial unless there is a high certainty that a jury will return a guilty verdict.").

[159] DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS 63–64 (2021) ("A study of a different set of police officers found that a majority of the detectives believed 40 to 80 percent of sexual assault complaints are false. . . . Studies using the most reliable research methods, those that look beyond the police classification, find false reporting rates between 2 and 8 percent. A recent meta-analysis puts the rate at about 5 percent."); Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1292–99 (2016) ("[L]aw enforcement tends to view non-stranger rape with greater skepticism." (citing CASSIA SPOHN & KATHARINE TELLIS, NAT'L CRIM. JUST. REFERENCE SERV., POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY 134–39 (2012))); REBECCA CAMPBELL ET AL., NAT'L CRIM. JUST. REFERENCE SERV., THE DETROIT SEXUAL ASSAULT KIT (SAK) ACTION RESEARCH PROJECT (ARP), FINAL REPORT 137 (2015) (detailing findings of study of Detroit's policing of sexual assault).

Women are not the only victims of jury nullification; members of racial minority groups are as well. Just as proponents of jury nullification invoke its use to combat the racialized injustice of slavery, so we find historical examples of nullification supporting such injustice. Consider attempts at prosecuting lynching, post-Reconstruction and well into the twentieth century. Juries would repeatedly acquit anyone charged with murder in connection with a lynching, even when the evidence was incontrovertible and the crime outrageously cruel and horrifying.[160] This failure to convict (or even to charge) in state courts spurred the movement to pass federal antilynching legislation.[161]

One would have thought it unnecessary to prohibit murder at the federal level when every state has and has always had a murder statute that it was otherwise able to enforce. What were juries doing when they consistently acquitted white men on trial for lynching African Americans when all evidence pointed to their guilt? The juries were engaging in jury nullification.

Such white supremacist juries knew that the evidence was more than enough to convict the defendants, but they opposed punishing white men for lynching African Americans.[162] And because the jury's acquittal is final, no judge could reverse the acquittals, issue judgments of conviction notwithstanding the verdicts, or order new trials. The jury had the last word, as ugly and reprehensible as that word was.

Other examples abound. Juries sometimes nullify when they like the defendant and dislike the victim, because of race, physical appearance, personality, or some other arbitrary and legally irrelevant reason.[163] Other times, juries nullify because some members want to be finished with jury duty, and they see that their fellow jurors are voting to acquit.[164]

Juries nullify the law as applied to the particular case. When there is widespread opposition to a law, then there might be widespread nullification, whether that law is progressive (e.g., the law that prohibited lynching and the law that prohibits the rape of an acquaintance) or that law is conservative or reactionary (e.g., a law that prohibits the use of marijuana or that prohibits

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[160] Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1182–83 (2011).

[161] *Id.* at 1181–87 (discussing the fact that state juries would repeatedly nullify in lynching cases and find the lynchers not guilty of murder, notwithstanding plain evidence of guilt beyond a reasonable doubt).

[162] *Id.* at 1182–84.

[163] John Clark, *The Social Psychology of Jury Nullification*, 24 LAW & PSYCH. REV. 39, 47 (2000) (citing physical attractiveness, attitude, social categorization, and judicial bias as extralegal factors affecting juror nullification); Irwin A. Horowitz, *Jury Nullification: An Empirical Perspective*, 28 N. ILL. U. L. REV. 425, 447 (2008) ("the manipulated variations of sex, class, and ethnicity did affect verdicts").

[164] Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 945 (1999) (noting holdout jurors often "find it difficult to maintain their position and eventually conform to the majority position" amid pressure from fellow jurors as well as judges who urge them "to relent and to vote with the others").

abortion or physician assistance in dying). When juries simply enact their own personal preferences, such as acquitting an attractive defendant or a defendant with an unattractive victim, it may be harder to detect what they are doing. But regardless of how the jury exercises it, we have seen that the power to nullify arises from the right to a jury trial in which the judge and appellate courts may not reverse the jury's acquittal. The balance of costs and benefits seems to weigh more heavily on the cost side, undercutting the notion that we should regard nullification as a matter of constitutional right.

Still, the case remains open, so let us turn to another consideration: evidence that jury nullification is a byproduct of protecting other, distinct constitutional rights. Why are acquittals final, if not for the protection of nullification? Why does the jury that acquits have the last word, regardless of how obvious it is, based on the evidence, that the defendant is guilty beyond a reasonable doubt? Why are type II errors in this context uncorrectable? I have already cited the Fifth Amendment's Double Jeopardy Clause and the Sixth Amendment's right to a jury trial as one reason, but there is more to the story.

Remember that the burden of proof in a criminal case already produces many type II errors—defendants who are guilty but whom the jury properly acquits in light of the evidence and the burden of persuasion.[165] If one wanted to minimize the total number of errors of all kinds, we would have a preponderance burden in criminal cases.[166] The jury's power to acquit when the evidence proves guilt beyond a reasonable doubt results in some additional (and also inevitable) type II errors.

One answer to the "why tolerate these additional type II errors" question is that the Supreme Court has understood the Sixth Amendment right to a jury trial as requiring courts to offer every criminal defendant the option of being judged by a jury of her peers.[167] The Court incorporated the Sixth Amendment against the States through the Fourteenth Amendment in 1968.[168] The government, whether state or federal, must accordingly grant the accused a trial by jury to determine whether she is guilty. The Court has said more recently that if a defendant is to receive a punishment for her crime, it must be the jury that finds the facts that trigger a penalty of that severity.[169]

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[165] James A. Shapiro & Karl T. Muth, *Beyond a Reasonable Doubt: Juries Don't Get It*, 52 LOY. U. CHI. L.J. 1029, 1030–31 (2021) (discussing that the reasonable doubt standard "reflects the basic American value that it is better to let the guilty go free than to convict the innocent").

[166] David Kaye, *Naked Statistical Evidence*, 89 YALE L.J. 601, 603–05 (1980) (book review) ("[T]he judge makes the least mistakes if he adopts the following decision rule: resolve [some disputed fact] in plaintiff's favor when [the probability] is greater than one-half; otherwise, find in defendant's favor.").

[167] Duncan v. Louisiana, 391 U.S. 145, 152–53, 156 (1968).

[168] *Id.* at 154.

[169] Apprendi v. New Jersey, 530 U.S. 466, 490, 494 n.19, 496 (2000) (finding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum [(making it 'the functional equivalent of an element of a greater offense')] must be submitted to a jury, and proved beyond a reasonable doubt," but refusing to apply that finding to invalidate "state

For a trial judge to issue a judgment notwithstanding the verdict after a jury has acquitted the defendant would be for that judge to take the case away from the jury. It would mean that the criminal defendant's right to a jury trial is subject to override by a judge who disagrees—or even strongly disagrees—with the jury's decision to acquit.

If a jury issues a not guilty verdict, and a judge takes the case away and finds the defendant guilty, then in what sense has the defendant enjoyed the right to a jury trial? The judge has effectively tried the defendant and convicted him. As a logical matter, the right to have the jury decide one's guilt or innocence may thus entail the proposition that a judge cannot invalidate a jury's "not guilty" verdict, no matter how guilty the judge believes the defendant to be.[170]

Another escape hatch that is unavailable from a jury's acquittal against the evidence is an appeal to a higher court. If the jury returns a verdict of not guilty, the government may not bring an appeal seeking either a conviction or a new trial. As I have already discussed, this block on correcting the jury's "wrongful" acquittal is a product of the Supreme Court ruling that the Double Jeopardy Clause of the Fifth Amendment prohibits the retrial of a criminal defendant who has already been tried and acquitted.[171]

One could respond by asking "so what" if the Court's construction of the Fifth and Sixth Amendments explains the existence of the jury nullification power? Whatever the reason, juries have the power to acquit

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capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death"); Ring v. Arizona, 536 U.S. 584, 609 (2002) ("Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." (citation omitted)).

[170] Fong Foo v. United States, 369 U.S. 141, 143 (1962) ("[T]he verdict of acquittal was final, and could not be reviewed . . . without putting [the petitioners] twice in jeopardy, and thereby violating the Constitution." (quoting United States v. Ball, 163 U.S. 662, 671 (1896))).

[171] U.S. CONST. amend. V ("[no person shall] be subject for the same offence to be twice put in jeopardy of life or limb"); Blockburger v. United States, 284 U.S. 299, 304 (1932) ("The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."); *Ball*, 163 U.S. at 669–70. The reader might object that defendants do sometimes have to endure a second trial. Does that fact not contradict my claim that the Double Jeopardy Clause protects against a second trial? The answer is that a convicted defendant can choose to challenge a verdict of conviction, and he can demand a second trial at which the judge leaves out whatever error the defendant identifies. When the defendant himself is the one requesting a second trial, retrying the case is not a problem. It would not—in the way that retrying an acquitted defendant at the prosecutor's behest would—put the defendant twice in jeopardy for the same offense in violation of the Double Jeopardy Clause. And if an appellate court were to reverse a jury's verdict and issue a verdict of conviction, then it would not only be denying the defendant's right to a jury trial but also evaluating the evidence itself without having watched the witnesses testify or examined all of the exhibits. The only time an appellate court can reverse a jury's judgment is when a jury has convicted the defendant, and the trial judge made a reversible error that the defendant has challenged on appeal or the evidence at trial was insufficient to support the verdict. An appellate court does not have the power to second-guess what the jury has done when the jury has found the defendant not guilty. *See id.* at 670.

anyone they like, no matter how damning and credible the evidence of guilt. If one can do something, and no one can stop one from doing it nor reverse what one did, then does it not follow that doing that thing is effectively the exercise of a right?

If the jury can nullify, then what is the difference between calling that power of nullification an undesirable byproduct of other constitutional provisions or calling it itself a protected right? You say potato, I say potato. Six of one, half dozen of the other, right?

Wrong. As we have seen in the context of euthanasia, abortion, evidence law, and disparate impact antidiscrimination cases, having available a permissible purpose for one's actions enables a whole suite of other conduct that would be impermissible if the consequence of one's conduct were merely an incidental effect that we tolerate as a cost. We will see that if jury nullification were truly a protected right, whether of the defendant or of the jurors themselves, trials would look very different from what they look like now.

Consider an uncontroversially protected right. Criminal defendants are entitled to an acquittal unless the government proves guilt beyond a reasonable doubt.[172] As a result, the judge will instruct the jurors on this burden of persuasion, and the judge will take the case away from the jury if no reasonable juror could find that the evidence in the case proved guilt beyond a reasonable doubt.[173]

The defense attorney also may specifically reference this heavy burden in arguing to the jury that it should bring back a verdict of not guilty because the evidence was insufficient to support a conviction. And if the judge misstates the burden and tells the jury to find guilt by a preponderance, the defendant can challenge the conviction and get a new trial. Here, the Sixth Amendment right to be tried by a standard of reasonable doubt is up front and clear in the case law; no one must sneak around it.[174]

Another actual right is the right against compelled self-incrimination under the Fifth Amendment.[175] Because of this right, the defendant can decide not to take the witness stand at her own criminal trial.[176] The prosecutor may not call her to the stand in that case and may not argue to the

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[172] *In re* Winship, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

[173] United States v. Jackson, 368 F.3d 59, 66–67 (2d Cir. 2004) (asserting that the defense is entitled to a directed acquittal if the prosecution fails to meet the reasonable-doubt standard).

[174] *Winship*, 397 U.S. at 368 (holding that juveniles charged with criminal offenses are subject to the same reasonable-doubt standard as they would be as an adult).

[175] U.S. CONST. amend. V ("[no person] shall be compelled in any criminal case to be a witness against himself"); Hoffman v. United States, 341 U.S. 479, 486 (1951) ("This provision of the [Fifth] Amendment must be accorded liberal construction in favor of the right it was intended to secure.").

[176] Malloy v. Hogan, 378 U.S. 1, 8 (1964) (incorporating the Fifth Amendment right against self-incrimination against the states through the Due Process Clause of the Fourteenth Amendment).

jury that if the defendant is innocent, she ought to say so.[177] Finally, if the defense wants an instruction, the judge must instruct the jury not to draw any inferences about the case from the fact that the defendant has refrained from testifying.[178] The defendant, the judge must tell the jury, has the right not to testify.

How might a trial look if jury nullification were as straightforwardly protected a right as the entitlement to proof of guilt beyond a reasonable doubt or the right against compelled self-incrimination? If nullification were protected for its own sake, then we would expect that defense attorneys could introduce evidence that a victim is an evil person and then argue that the jury should acquit the defendant of murder because the world is well rid of his victim.

In turn, the prosecution could introduce rebuttal evidence that the victim was a wonderful person and offer evidence of his philanthropy and his extensive network of friends, not just as "victim impact" evidence for sentencing but for the guilt phase of the trial as well.[179] After all, if jury nullification is a right, then it follows that juries should have the information necessary to determine whether the guilty defendant deserves an acquittal.

In a right-of-nullification regime, a defendant might be entitled, under *Brady v. Maryland*,[180] to demand evidence in the prosecution's possession that could persuade a jury to acquit against the evidence. As a matter of procedural due process, the defendant might have an affirmative entitlement to introduce unduly prejudicial (for Federal Rule 403 purposes)[181] derogatory evidence about the victim because there would be no such thing as undue prejudice where the evidence is pro-acquittal. The fact that evidence—such as testimony that all the victim's neighbors hated him—might motivate the jury to find the defendant not guilty would, on its own, be reason enough to admit the evidence. It would make little sense to rule out any pro-defendant evidence, even if it was irrelevant to the defendant's guilt, if it might help lead the jury to nullify.

No evidence and no argument in support of acquittal against the evidence would be out of bounds, even though such evidence and arguments

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[177] Griffin v. California, 380 U.S. 609, 614 (1965) (finding that allowing prosecutors to comment on a defendant's refusal to testify "cuts down on the privilege [against self-incrimination] by making its assertion costly").

[178] Carter v. Kentucky, 450 U.S. 288, 305 (1981).

[179] *Contra* FED. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."); FED. R. EVID. 404(a)(2) (limiting admissible character evidence in criminal trials for other purposes to a defendant's "pertinent" traits).

[180] 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

[181] FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

have no bearing on whether the defendant is guilty or innocent of the crime charged. And certainly, the defense could emphasize in its closing argument the jury's right to acquit the defendant for any reason at all and no matter how overwhelming the evidence of guilt.

It is not only the conduct of the prosecutors and defense attorneys that would undergo substantial change in a nullification-as-a-right regime. If jury nullification were a right, then the trial judge too would be miscarrying justice by telling the jury that it must convict if it finds beyond a reasonable doubt that the defendant committed the crime charged.[182] The judge would instead instruct the jury that even if it finds beyond a reasonable doubt that the defendant committed the crime, it may still choose to acquit the defendant for any reason or no reason at all.

However, judges commonly tell juries the very opposite, that they must convict if they find all the elements beyond a reasonable doubt.[183] And neither judges nor defense attorneys must or even may tell jurors that they can acquit against the evidence.[184] Defense attorneys may not announce to the jury that the defendant did nothing worthy of punishment because the victim "needed killing."[185]

Likewise, defense attorneys may not introduce evidence irrelevant to guilt or innocence that is likely to encourage nullification. "Relevance," a threshold requirement for the introduction of any evidence during a trial, under Federal Rules 401 and 402, means bearing on the odds that the criminal defendant did or did not commit the crime in question.[186]

Now the punchline: the foregoing analysis of jury nullification relies on the logic of DDE. Nullification is analogous to the death of civilians in the bombing of a munitions plant.[187] Both are known consequences of pursuing an independent and valid other objective (respectively, honoring the right to a jury trial and Double Jeopardy protections; destroying the enemies' weapons store). But neither is itself a permissible purpose such that absent the other purpose, it would still be permissible to pursue it.

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[182] *But see, e.g.*, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT § 6.5, at 108 (NINTH CIR. JURY INSTRUCTIONS COMM. 2022) ("On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.").

[183] Duane, *supra* note 149, at 8, 13.

[184] United States v. Dougherty, 473 F.2d 1113, 1130–37 (D.C. Cir. 1972) (finding that judges are not required to instruct juries of their power to nullify the law); Duane, *supra* note 149 at 7–8 ("Without exception, the appellate courts will not allow a defense attorney to use her closing argument to tell the jurors about their power to nullify, or to urge them to use it."); Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 988 (2006) ("[A]rguing for nullification is forbidden by professional canons of ethics.").

[185] *See* United States v. James, 169 F.3d 1210, 1215–16 (9th Cir. 1999) (Kleinfeld, J., dissenting) ("[T]he risk of unfair prejudice to the prosecution was considerable. The victim was a bad man. Some people would say, in private and out of court, that 'he deserved it,' or 'he needed killing.' But no one says such things in a courtroom, because the law does not permit murder, even of very bad people.").

[186] FED. R. EVID. 401–402; OHIO EVID. R. 401–402; HAW. REV. STAT. §§ 626-1 rs. 401–402.

[187] *See supra* Section I.A.

VI. FOURTH AMENDMENT EXCLUSIONARY RULE

Just as DDE explains the deep logic of jury nullification, it can help us better understand other areas of law as well. Consider the Fourth Amendment exclusionary rule. First announced by the U.S. Supreme Court in *Weeks v. United States*,[188] it holds (more or less) that if police violate the Fourth Amendment right against unreasonable searches and seizures, then whatever they find because of the illegality stays out of evidence. I shall now show how attention to DDE logic can help us determine whether to regard the exclusionary rule as part and parcel of the Fourth Amendment itself—as some Supreme Court Justices once contended[189]—or as a judge-made remedy that aims simply to deter Fourth Amendment violations—as contemporary doctrine treats it.[190] Spoiler alert: I shall argue in favor of the deterrent-only view.

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[188] Weeks v. United States, 232 U.S. 383, 393–94, 398 (1914) ("We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States acting under color of his office in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused."). The Court initially held that the exclusionary rule was a constitutionally protected right, but then, in *Wolf v. Colorado*, 338 U.S. 25, 31–33 (1949), the Court interpreted exclusion as purely a deterrent remedy that it chose not to extend to the States (a choice that would have been unavailable upon incorporation of the Fourth Amendment against the States in *Wolf* if the rule represented a constitutionally protected right of the defendant). Then in *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), the Court extended exclusion to the States and used language suggesting that the rule was indeed protected by the Fourth Amendment: "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." But relatively soon, in *Stone v. Powell*, 428 U.S. 465, 486 (1976), the Court reversed course and said that exclusion was a deterrent remedy, adding that the remedy is "extraordinary," *id.* at 501 (Burger, J., concurring), and later that it was only appropriate in cases of the most flagrant violations both subject to deterrence and worth the heavy cost of losing incriminating evidence, Herring v. United States, 555 U.S. 135, 144 (2009) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.").

[189] United States v. Leon, 468 U.S. 897, 931, 935 (1984) (Brennan, J., dissenting) ("At bottom, the Court's decision turns on the proposition that the exclusionary rule is merely a 'judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right.' . . . I submit that such a crabbed reading of the Fourth Amendment casts aside the teaching of those Justices who first formulated the exclusionary rule, and rests ultimately on an impoverished understanding of judicial responsibility in our constitutional scheme. For my part, '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' comprises a personal right to exclude all evidence secured by means of unreasonable searches and seizures. The right to be free from the initial invasion of privacy and the right of exclusion are coordinate components of the central embracing right to be free from unreasonable searches and seizures."); *Mapp*, 367 U.S. at 651 (Justice Clark, writing for the majority, noted that the exclusionary rule is "part and parcel of the Fourth Amendment's limitation upon federal encroachment of individual privacy.").

[190] Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("Suppression of evidence, however, has always been our last resort, not our first impulse. . . . We have rejected '[i]ndiscriminate application' of the rule,

Those who believe the exclusionary rule to be part of the right against unreasonable searches and seizures, as Justice Brennan expressed in his dissent in *United States v. Leon*,[191] have argued that if police had obeyed the Fourth Amendment, they would not have found the piece of evidence that the defendant seeks to exclude from the trial.[192] They contend that because prosecutors would accordingly not be in a position to introduce that evidence if police had obeyed the Constitution, using unlawfully obtained evidence after finding it violates the Fourth Amendment.[193]

As I and others have observed, however,[194] that conclusion does not necessarily follow. In my view, the state of the world after a Fourth Amendment violation does not have to mirror all aspects of what the world would have looked like in the absence of a Fourth Amendment violation.[195] In the ideal world of police work, police would perform all the searches that would turn up evidence against guilty people (assuming the crimes are serious), and police would perform no searches of innocent people.[196] Any search that either happens to an innocent person without evidence (type I error) or fails to happen to a guilty person harboring evidence (type II error)[197] departs from the ideal.

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and have held it to be applicable only . . . where its deterrence benefits outweigh its 'substantial social costs[.]'" (citations omitted)).

[191] *See Leon*, 468 U.S. at 941 ("If nothing else, the Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence inevitably will go undetected if the government obeys these constitutional restraints. It is the loss of that evidence that is the 'price' our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment.").

[192] *Id.* ("Thus, some criminals will go free *not*, in Justice (then Judge) Cardozo's misleading epigram, 'because the constable has blundered,' but rather because official compliance with Fourth Amendment requirements makes it more difficult to catch criminals." (citation omitted)).

[193] *Id.*

[194] Sherry F. Colb, *Excluding Illegally-Obtained Evidence and the Doctrine of Double Effect*, FINDLAW (Nov. 25, 2009), https://supreme.findlaw.com/legal-commentary/excluding-illegally-obtained-evidence-and-the-doctrine-of-double-effect.html.

[195] Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1471 (1996) ("The intuition that *C* (the odoriferous one) deserved more privacy than *B*, even though there was probable cause in both cases, and the intuition that *C* deserved more privacy than *A* (the one who sprayed the effective deodorizer), even though it is *A* and not *C* who was searched without probable cause, are completely unacknowledged under the Formalist model.").

[196] *Id.* at 1472 ("The Fourth Amendment tells us that searches must not be performed unless they are 'reasonable.' To be reasonable, a search must generally be justified by the prior acquisition of some quantum of evidence that makes it likely that the search will uncover further evidence of wrongdoing. It follows that the Fourth Amendment requirement that searches be reasonable is in part an attempt to maximize the number of searches that are performed against people concealing evidence while minimizing the number of searches conducted against persons concealing nothing. The search that discloses evidence is, in other words, the 'ideal' search under the Fourth Amendment, and the search that discloses nothing is the 'worst case' search against which the prohibition of unreasonable searches is designed to [guard].").

[197] Shapiro & Muth, *supra* note 165, at 138–40.

Some people who reject that view say that what makes a search legal and therefore "ideal" is simply the fact that police have probable cause and a warrant, and that what makes a search unlawful and therefore less than ideal is the fact that police lack probable cause and a warrant (or whatever criteria amount to Fourth Amendment "reasonableness").[198] These people maintain that we have no reason to distinguish the illegal search that happens to turn up evidence against a guilty person and the illegal search that happens to invade the privacy of an innocent person.[199] We likewise have no reason to distinguish between a lawful search that turns up evidence of murder or rape and a lawful search that invades the privacy of an innocent person.

Which view is better? Unsurprisingly, I believe mine is, and DDE reasoning explains why. When police respect the rights protected by the Fourth Amendment, we know that some number of criminals will evade detection, as will the evidence that would have emerged to prove their criminality in court. So the question is this: Do we protect people's privacy from unreasonable searches in order to ensure (a) that various criminals go undetected and (b) that the evidence that would have proved their guilt remains undiscovered? To ask the question is to answer it. No, of course not. No sane society creates rules aimed at ensuring that violent or otherwise dangerous criminals remain undetected and therefore safe to continue their predatory behavior.

If the only thing that a proposed Fourth Amendment would have accomplished were to preclude detection of criminals and allow evidence of grave wrongdoing to go undiscovered, then no one would have supported ratifying the Fourth Amendment, and indeed, no one would have drafted it in the first place. Thus, in my view, the purpose of the Fourth Amendment is to minimize searches of innocent people and to prevent what I have called the "targeting harm,"[200] which occurs when police conduct searches for the wrong reasons. But regardless of whether the reader agrees with my analysis, only diehard contrarians would claim that the point of prohibiting unreasonable searches is to enable criminals to escape accountability for their crimes.

Once we rule out "criminals evading capture" as a reason for the right against unreasonable searches, we can treat the loss of incriminating evidence that necessarily results from compliance with the Fourth Amendment as a known incidental effect of the Fourth Amendment rather than as part of its raison d'être. The fact that everyone has the right to be free from police performing unreasonable searches does not mean that, on the

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[198] Colb, *supra* note 195, at 1466–67 (describing the Fourth Amendment Formalism school of thought).

[199] *Id.* at 1470–71.

[200] *Id.* at 1464; *see also* Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 852 (2011); William J. Stuntz, Essay, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2166 (2002).

regrettable occasions on which police violate that right, a court should exclude the probative evidence of crime that police found during their unreasonable searches.

DDE reasoning makes sense of the Fourth Amendment. The point of forbidding warrantless searches and searches based on less than probable cause is to protect law-abiding privacy, not criminal behavior or evidence thereof. When police comply with the Fourth Amendment, some crimes go undetected, but that is a foreseen and incidental effect of protecting law-abiding privacy. If we want to personify DDE reasoning, we could say that permitting some criminals to go undetected was, from the perspective of those who framed and ratified the Fourth Amendment, proportionate collateral damage arising out of the purposeful protection of law-abiding privacy.

Thus, the loss of evidence that we anticipated was never part of the point of the Fourth Amendment, just a known cost, much as failing to find some kidnapping victims in time to save their lives—also a foreseeable eventual consequence of full Fourth Amendment compliance—was never part of why we protected the right against unreasonable searches. And thus if police did find a kidnapping victim during an unlawful search, no one would argue that they should leave him to die in captivity because he would have died in captivity anyway if they had complied with the Fourth Amendment. DDE reasoning condemns that result as grossly disproportionate relative to any benefits of restoring the status quo ante.

Having used DDE reasoning to identify the purpose of the Fourth Amendment, we can further understand the provision's potential remedial implications by distinguishing an ex-ante from an ex-post perspective. Ex ante, if police are about to perform an unreasonable search, the argument that they might find incriminating evidence or a kidnapped child is not enough to authorize that search. If it were enough, then the law would not prohibit the search. The extremely slim odds that they will find evidence or a live victim have already gone into the initial calculus under which the law classified the search as unreasonable to begin with. We understand that we assume some substantial costs when we grant people privacy, and we assume those costs because on balance, we determine that privacy is worth it. Ex ante, to say the police have insufficient grounds to perform a lawful search is to recognize that they cannot reliably distinguish between people using their privacy for law-abiding purposes (intended beneficiaries of the Fourth Amendment) and criminals exploiting the presumptive grant of privacy to all.

Once police illegally breach privacy, however, we need not treat every consequence of the breach as equally objectionable from a Fourth Amendment standpoint. If police found a private diary in which the resident wrote down personal and embarrassing thoughts, fidelity to the Fourth Amendment's objectives would require leaving the diary in place and not disclosing its contents. Keeping private (and noncriminal) diaries private

falls within the core of the Fourth Amendment—the text of which expressly protects personal security in, among other things, "papers."[201]

If police find evidence of a horrific crime, however, we then can mitigate what would have been a cost of compliance with the Fourth Amendment, the loss of criminal evidence. To insist that suppression of the evidence *must* happen—as Justice Brennan insists when he says it is the Fourth Amendment rather than the exclusionary rule that dictates the loss of the evidence,[202] is to confuse a known cost of privacy with its purpose. The loss of evidence, in the terms of DDE, is a known cost associated with the purpose of guaranteeing innocent privacy.

Accordingly, the Court is justified in treating the decision whether to apply the exclusionary rule in various contexts as calling for a balance of costs (loss of evidence against the guilty) and benefits (deterrence of searches that invade law-abiding privacy and are unlikely to be prevented or redressed through other means, such as post hoc damages actions). That is not to say that the Court has always struck the right balance. In my view, the Court too readily fashions exceptions to the exclusionary rule.[203] But DDE logic shows that the framework the Court deploys correctly identifies the purpose behind the Fourth Amendment.

VII. PRODUCTS LIABILITY

At bottom, DDE logic simply distinguishes between intended or unintended effects or, more simply still, between purposes and effects. And because the law sensibly draws that distinction in myriad contexts, DDE logic is nearly ubiquitous. As a final example, consider the law and morality of liability for the manufacture of dangerous products.

We understand the difference between, on one hand, intent or purpose, and on the other, effect, when discussing drugs. People have various reasons for using heroin or fentanyl, but none of them is the constipation caused by opiates or the rapidity with which users develop a tolerance and come to need the drug just to feel normal.[204] Many people became addicted to opioids

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[201] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[202] United States v. Leon, 468 U.S. 897, 934 (1984) (Brennan, J., dissenting) ("The [Fourth] Amendment therefore must be read to condemn not only the initial unconstitutional invasion of privacy—which is done, after all, for the purpose of securing evidence—but also the subsequent use of any evidence so obtained.").

[203] *See* Sherry F. Colb, *No Knock-and-Announce? No Problem: The Supreme Court Holds Evidence from No-Knock Entries Admissible in Court*, FINDLAW (June 28, 2006), https://supreme.findlaw.com/legal-commentary/no-knock-and-announce-no-problem-the-supreme-court-holds-evidence-from-no-knock-entries-admissible-in-court.html (criticizing Hudson v. Michigan, 547 U.S. 586 (2006), in which the Supreme Court held that violations of the knock-and-announce requirement do not trigger the exclusionary rule).

[204] George F. Koob & Michel Le Moal, *Drug Addiction, Dysregulation of Reward, and Allostasis*, 24 NEUROPSYCHOPHARMACOLOGY 97, 120 (2001) ("The hypothesis generated here is that

after having filled a doctor's prescription for them,[205] but even those who began using such drugs recreationally did not do so with the intention of becoming addicted.[206]

The distinction between intended and merely known effect also helps make sense of the way that we think about the impact of consumer products manufactured in large quantities, like cars and drugs. When a company decides to manufacture vehicles, it knows that some number of people will die because those vehicles exist.[207] No matter how stringent the laws, someone will drive recklessly or drunk, or will suffer a seizure while driving and kill another person in the process. In fact, with a large enough number of customers, it may be possible to predict with some precision how many people will die due to the creation of the vehicles.

Yet car manufacturers continue to produce cars, notwithstanding the fact that a nontrivial number of people will certainly die as a result. The manufacturers—and the people whose laws authorize the manufacture—make a judgment that some number of deaths is "worth it" for the population to have the benefits that cars afford.[208] The purpose of the car is not to kill some number of people, but the deaths are a known effect and one that the population considers proportionate to the benefits that accrue from having cars.

We could say the same thing of speed limits: we know approximately how many lives a lower speed limit would save,[209] and yet speed limits remain relatively high.

There are plenty of people who would disagree with the calculus through which manufacturers and lawmakers conclude the level set in any particular jurisdiction in these examples. But even those who would criticize those

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counteradaptive processes such as opponent-processes, that are part of a normal homeostatic limitation of reward function, fail to return within the homeostatic range. Such dysregulations grow with repeated drug intake producing an allostatic state that drives further drug intake, and ultimately compulsive drug intake, and in turn exaggerates the allostatic state."); Lynn R. Webster, *Opioid-Induced Constipation*, 16 PAIN MED. S16, S16–S17 (2015).

[205] John Strang et al., *Opioid Use Disorder*, NATURE REVS. DISEASE PRIMERS, Jan. 9, 2020, at art. 3, 2 (noting parallel increases in the U.S. between prescriptions for opioid analgesics and use of heroin and synthetic opioids like fentanyl).

[206] *See* Koob & Le Moal, *supra* note 204, at 115 ("[A]buse is the consequence of a peculiar, possibly pathological reaction to the drug, and individuals are vulnerable because of an intrinsic functional brain state that interacts with the drug.").

[207] *See, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 368 (Ct. App. 1981) ("[Circumstantial evidence] had a tendency in reason to prove that Ford's failure to correct the Pinto's fuel system design defects, despite knowledge of their existence, was deliberate and *calculated*." (emphasis added)).

[208] W. Kip Viscusi, *Pricing Lives for Corporate Risk Decisions*, 68 VAND. L. REV. 1117, 1123 (2015) ("The safety design task is to strike an appropriate balance between risk and cost, recognizing that at some point the value of the added safety to the consumer will not be worth the additional expense or loss of vehicle performance.").

[209] CHARLES M. FARMER, INS. INST. HIGHWAY SAFETY, THE EFFECTS OF HIGHER SPEED LIMITS ON TRAFFIC FATALITIES IN THE UNITED STATES, 1993–2017, at 8 (2019).

decisions would probably have a number that they would consider acceptable. Drugs that save lives also end lives.[210] Calculating the difference between the lives saved (the point of the drugs) and the lives ended (the undesirable but known side effect of the drugs) allows us to determine whether we ought to have those drugs on the market.

Importantly, the fact that a particular lifesaving drug will result in approximately twenty deaths a year does not mean it is legally or morally permissible to poison twenty people a year. We know this precisely because the deaths are undesirable, known side effects (or collateral damage) rather than intended impacts.

I once wrote an article on this subject in which I opined that people irrationally judge the same conduct more harshly when it is concrete (the killer knows who his victims are at the time he acts) versus when it is abstract and statistical (the killer does not know who his victims are or will be when he acts).[211] On further reflection, I continue to think what I described there is a real phenomenon, but the DDE logic allows me to see an example I previously described in a different light. I observed how differently people regard a murderer versus a car manufacturer, despite the fact that both knowingly kill.[212] I would now highlight that distinguishing Son of Sam from, say, the Ford Motor Company, is not simply an irrational attachment to the concrete versus the abstract. Under DDE, distinguishing them makes considerable sense. Son of Sam's killings were plainly intentional because they could not possibly be justified by reference to any permissible aim, while Ford made an assessment (with which one could agree or disagree) that a particular number of deaths is a reasonable price to pay as an incidental effect of producing the benefits that come with the production of many cars.[213]

CONCLUSION

Contrary to the view that DDE is an exotic moral doctrine that has no place in American law, we have seen that DDE is everywhere. Critics who suggest that the difference between intent and knowledge should never matter do not realize the work that reconstructed DDE does in organizing sets of legal rules in many disparate areas of the law. The important line, as I have argued, is not between intent and knowledge as subjective states of

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[210] *See supra* Sections I.B, II.B.

[211] Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms*, 73 LAW & CONTEMP. PROBS. 69 *passim* (2010).

[212] *Id.* at 98–100.

[213] Automobile manufacturers necessarily make such judgments routinely, but Ford notoriously opted not to make a relatively inexpensive redesign of its Pinto, which was vulnerable to exploding in rear-impact collisions, "based on the cost savings which would inure from omitting or delaying the 'fixes.'" Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 361 (Ct. App. 1981) (sustaining a products liability verdict against Ford).

mind but is instead between permissible and impermissible available intentions, purposes, or goals.

Once we know that a particular purpose falls outside of the permissible list, we know as well that conduct we can understand only by resort to that impermissible purpose is itself prohibited. And conduct that arguably serves a permissible purpose but also brings about outcomes connected to impermissible ones will lead to a balancing test measuring proportionality. If one can pursue the permissible purposes in other ways (that do not have the same collateral effects) or if pursuit of the permissible purposes is not as important as the avoidance of the impermissible effects, then, too, the behavior will be prohibited.

We see exactly this analysis, with little modification, in the context of evidence that almost always serves some permissible purpose while risking unfairly serving an impermissible one. We have a name—"discounted probative value"—for evidence that serves an impermissible purpose in a way that a substitute piece of equally probative evidence would not. We encounter the same analysis in examining disparate impact cases in antidiscrimination law. And in analyzing disparate treatment cases, we discover the exception that proves the rule that DDE helps us in contexts that require good reasons for acting. DDE logic also enables us to better understand the true nature of jury nullification and the Fourth Amendment exclusionary rule. Finally, we see that assessing the utility of dangerous products is permissible only because of a preliminary DDE analysis in which we found a permissible purpose for creating those products in the first place. No doubt more examples of DDE logic abound.