RACE AND A REVISED DOCTRINE OF DOUBLE EFFECT: A RESERVATION ABOUT PROFESSOR COLB'S REVISION

Sheri Lynn Johnson†

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INTRODUCTION

Even as her life ebbed, Professor Sherry Colb was remarkably committed to scholarship. Among the works she produced in her last year was *A New and Improved Doctrine of Double Effect: Not Just for Trolleys*,[1] posthumously published in the Connecticut Law Review. It was creative, enormously ambitious, wide-ranging, and entertaining—but, I think, at least in one crucial respect, wrong. It might seem unfair to criticize the work of someone who can no longer defend it, but because most scholars hope their work will outlive them, I offer my thoughts on *A New and Improved Doctrine of Double Effect* in the spirit of taking Professor Colb's work seriously.

My criticism is limited. I have no command of the larger philosophical question her article addresses, nor much knowledge about most of the areas of application it addresses; she may be right about them all. However, with respect to Professor

† The James and Mark Flanagan Professor of Law, Cornell Law School.

[1] Sherry F. Colb, *A New and Improved Doctrine of Double Effect: Not Just for Trolleys*, 55 CONN. L. REV. 533 (2023).

Colb's application of her revised doctrine of double effect to race discrimination, I do have relevant expertise, and I think she was wrong. Interestingly, it seems to me that there is a tension between Professor Colb's prior work on racial motivation and the approach she takes in *A New and Improved Doctrine of Double Effect*. For reasons I set out below, I both think that Colb's earlier work is a better explanation of the law related to racial motivation and double effect than is her newer article and have additional objections to the approach she takes therein. I want to emphasize, however, that my observations are limited to the application of her revised doctrine of double effect to racial motivation, and not intended to address the broader merits of her proposed revision of the doctrine of double effect.

I
The Unrevised Doctrine of Double Effect and Its Critics

A. Classic Double Effect

The doctrine of double effect ("DDE") has its roots in philosophy (and religion), not so much law, though it does provide answers to some legal questions. Thomas Aquinas introduced the doctrine of double effect as an answer to the moral conundrum: What should one do when taking an action would do more good than harm, but the harm done is to a person who has done nothing wrong?[2] One famous hypothetical—the one that gives rise to the title of Professor Colb's paper—is "the trolley problem." In the classic trolley problem, constructed by Philippa Foot, a trolley is heading toward five people tied to the tracks and will hit and kill them absent intervention. The trolley is moving too fast to stop before it reaches the five people, but it is possible by pulling a lever to divert the train onto a different track. Such an intervention would save the lives of the five people but would cause the trolley to hit and kill one person who is tied to the second track, a person who has no responsibility for the situation of the five people who would be saved by the intervention.[3]

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2 Thomas Aquinas, Summa Theologica, pt. II-II, q. 64, art. 7. *See* Alison McIntyre, *Doctrine of Double Effect*, Stan. Encyc. Phil. 1225 (July 28, 2004), https://plato.stanford.edu/entries/double-effect/ [https://perma.cc/6TDK-JE5Q] (last visited Dec. 24, 2018) (crediting Thomas Aquinas with introducing the Doctrine of Double Effect).

3 Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 Oxford Review 2 (1967).

If this hypothetical seems fanciful, more pressing examples have been posed in the literature, and in the world outside the literature. If two countries are at war, and to destroy a munitions plant—a permissible military target—the attackers' planes must drop a bomb on it, *but* the munitions plant is located in a neighborhood in which any bombing would kill many civilians, is the bombing permissible?[4] A natural response is to fight the hypothetical, urging the warning of civilians, but doing so often would thwart the mission because the defenders would use their air defenses to shoot down the attacking planes. Or, imagine a terminally ill patient suffering terrible pain, pain which can only be alleviated by the administration of a drug in a sufficiently large dose likely to kill the patient.[5] Here too, one might fight the hypothetical by arguing that a terminally ill person should have the right to end their life, but assuming that state law does not permit physician aid in dying, should it permit the administration of the drugs?

The doctrine of double effect would answer all three questions the same way: DDE permits actions that cause foreseeable harmful collateral consequences to the innocent, so long as: 1) the actor foresees *but does not intend them*; and 2) the anticipated benefit is greater than the corresponding harm. With respect to the munitions and the palliative care questions, the law generally would support this traditional formulation of DDE. The international law of war authorizes the attackers to bomb the munitions plant, notwithstanding that the explosion would kill some civilians, if these anticipated civilian casualties are proportionate to the military advantage provided by the bombing.[6] If, however, the attackers in fact desired the death

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[4] *See, e.g.*, 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); Michael L. Gross, *Killing Civilians Intentionally: Double Effect, Reprisal, and Necessity in the Middle East*, 120 POL. SCI. Q. 555, 558 (2006).

[5] *See, e.g.*, 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).

[6] 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. 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 4, 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.").

of civilians, either in revenge for casualties they had suffered or for the purpose of demoralizing the enemy—then dropping the bomb is morally impermissible.[7] Likewise, even in states that forbid physician aid in dying, a doctor may administer sufficient narcotics to relieve pain even if those narcotics cause the death of the patient.[8]

B. Criticism of Classic DDE

But what about the trolley problem itself? If it is analogous to *Regina v. Dudley & Stephens*,[9] then, arguably, DDE does not explain the law, or even our intuitions regarding right actions. Dudley and Stephens, shipwrecked sailors, killed the cabin boy to eat him, thus saving several lives (including their own), lives that otherwise would have been lost from starvation. Yet their convictions of murder were upheld, albeit with a thinly disguised recommendation of clemency to the Crown.[10] One wing of DDE supporters may have a rejoinder, or perhaps an amendment: This is different because Dudley and Stephens *intended* to kill the cabin boy, and then eat him, as opposed to throwing him overboard to avoid capsizing their lifeboat; had they merely thrown him overboard, not desiring his death although anticipating it, they would have been absolved.[11] Under this reading, *Dudley & Stephens* is not surprising; as with the permissibility of dropping a bomb that costs civilian lives, it is *wanting* to cause death that renders the action impermissible.

Even with this amendment to DDE, there are several possible objections. From one perspective, the problem with DDE is that it is *never* permissible to treat a human life as a

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7 Alison Hills, *Intentions, Foreseen Consequences and the Doctrine of Double Effect*, 133 Phil. Stud. 257, 260–61 (2007) ("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.").

8 Washington v. Glucksberg, 521 U.S. 702, 780 & n.15 (1997) (Souter, J., concurring) (observing that the Washington statute "generally permits physicians to administer medication to patients in terminal conditions when the primary intent is to alleviate pain, even when the medication is so powerful as to hasten death and the patient chooses to receive it with that understanding," and citing similar provisions in other states).

9 14 Q.B. 273 (1884).

10 *Id.*

11 I use this example as a substitute for the classic variation of the trolley hypothetical that Professor Colb wished she did not have to repeat because she found it stigmatizing; those readers who care about the provenance of the distinction can consult her article.

means to another end. Interestingly, a version of this objection can come either from the right or the left. From the left: We shouldn't require women to bear the burdens of pregnancy for the sake of the life of the fetus whether or not the fetus is a human being.[12] Or to put this in Justice Stevens's terms, the Due Process Clause embodies "the moral fact that a person belongs to himself and not others nor to society as a whole."[13] But from the right, it might be said that we shouldn't give a drug that causes death in order to relieve pain, because the human life is more important than pain. This doesn't mean that all measures to prolong life are necessary, but only that affirmative measures that shorten life are impermissible. In this view, DDE is not the right limit; rather, we should rely on the distinction between action and omission and refuse to permit the administration of such a drug, regardless of subjective purpose. Moreover, this distinction between action and omission is familiar, one that plays a substantial role in the criminal law, albeit with the limit that some circumstances or relationships create a duty to act.

But another objection to DDE is entirely different. Rather than complaining that DDE allows actions that should be forbidden, some critics insist that DDE is too restrictive: In emphasizing subjective motivation, it draws distinctions that don't matter. To such critics, distinguishing between doing something with the *desire* to cause a particular outcome (something harmful, such as the death of an innocent person) and doing something that you *anticipate* will cause that same outcome but prefer would not, makes no (moral) sense.[14] Giving a dying person a lethal dose of a painkiller is equally right (or wrong) whether you hope to end the person's life or merely hope to end their pain knowing it will also end their life; ditto bombing an area in which civilians reside. Such critics sometimes observe that the criminal law generally treats intent and knowledge as equally culpable. (While this is generally true, as I will return to later, it is not true of specific intent crimes, most notably,

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12 *See* Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47 (1971).

13 Webster v. Reprod. Health Servs., 492 U.S. 490, 549 (1989) (Blackmun, J., concurring in part and dissenting in part).

14 *See, e.g.*, 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); 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).

inchoate crimes.) Accordingly, as Professor Colb notes, one leading critic of DDE, T. M. Scanlon, argues that DDE, by placing so much weight on intent, conflates judgments about what is morally permissible with judgments about what actions are right.[15] This observation leads him to conclude that no single explanation can account for all of the cases to which DDE is claimed to apply.[16]

II
Professor Colb's DDE Revision

A. Subtracting Subjective Intentions

Professor Colb did not disagree with Scanlon and other DDE critics who have contended that intent cannot do the work that DDE requires, but her agreement, rather than leading her to reject DDE, led her reconceptualize it: "I nonetheless contend that DDE, properly reconceptualized, functions effectively and coherently across subject-matter domains."[17] In her 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."[18] Thus, DDE should demand an objective calculation of harm rather than an inquiry into the subjective state of mind of the actor; rather than saying a person may not intentionally bring about a harmful effect, one should say that a person may bring about a harmful effect only if someone *could* have had an intent aimed at a beneficial goal that outweighs any anticipated collateral harm.

Put differently, "the obligation to identify a permissible possible purpose operates mainly by constraining behavior rather than by mandating a correct state of mind or mens rea."[19] When conduct causes harm, it can only be justified when a permissible purpose significant enough to justify the harm can be imagined. The requirement of identifying a permissible

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15 T. M. Scanlon, Moral Dimensions: Permissibility, Meaning, Blame 27–28 (2008). Scanlon, a moral philosopher, critiques what he takes to be the doctrine of double effect ("[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.").

16 *Id.*

17 Colb, *supra* note 1, at 543.

18 *Id.*

19 *Id.* at 543–44.

purpose sufficiently limits permissible conduct; no additional limit, in particular, no subjective mental state with respect to that purpose, is necessary.

B. The Explanatory Power of Revised DDE

A New and Improved Doctrine of Double Effect claims that DDE minus the traditional subjective limitation has extremely broad explanatory power, indeed broader power than has previously been claimed for DDE. Professor Colb explained that her revision, like conventional DDE, provides permission to the trolley operator to flip the switch, permission to the reluctant attacker faced with a munitions plant surrounded by a civilian population to drop his bombs, and permission to the physician seeking only to relieve pain to administer a lethal dose if that is what is required. However, Professor Colb's DDE also provides permission to the attacker secretly *enthusiastic* about bombing a civilian population—so long as that bombing is objectively justified by the legitimate end of destroyed the munitions plant—and permission to the doctor *seeking* to cause death in the course of administering the drugs necessary to end pain.

Moreover, Professor Colb claims to have a better explanation for the condemnation of actions like those of defendants Dudley and Stephens (though she doesn't discuss their case) and the distinction between such cases and the initial trolley problem. The difference, she says, can be seen by looking not at actual intent, but at possible intentions. In the trolley problem, the switch operator might or might not actually want the death of the one individual on the tracks, so a hypothetical operator without an evil motivation would be justified in flipping the switch. In contrast, trolley problem variations where one person is thrown onto the tracks to stop the trolley are different. In such variations, no benevolent motive can be imagined for throwing the one person on the tracks; it is the very deliberate taking of one life that itself saves the other lives, not the rerouting of the train onto the track where it unfortunately runs over the one person. Under Professor Colb's account, it is never a permissible purpose to deliberately want to cause death; we know this because no one could justify medically killing one person in order to use his body parts to save more people, nor could we create vaccines by deliberately infecting some persons in order to save larger numbers from a deadly virus. What is different about all of these cases, according to Professor Colb, is not the actual subjective motivation of the actor, but that objective facts make it plain that

no permissible subjective motivation could be at work. Thus, had Dudley and Stephens decided to throw the cabin boy off of a lifeboat, whether they did so *intending* to kill him or just intending to keep the lifeboat afloat is irrelevant; they would have been justified in doing so either way. They could not, however, have decided to kill him to eat him, because there is no plausible purpose that could justify that action. As later in the article she puts it, "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."[20]

I'm not so sure about that. I'm not so sure that the distinction would make much difference to the cabin boy, who probably didn't care about motivation at all. I'm not clear why I should care more about possible motivations than about actual motivations, unless it is just a proof problem. I'm not so sure that earlier explanations of the distinction, such as a neurologically based visceral aversion to close-up killing as opposed to long distance killing,[21] are not more likely to explain typical reactions that throwing the man in front of the train is different than throwing the switch, and that eating another man is different than throwing him overboard.

So maybe Professor Colb has a better explanation for distinctions among the trolley scenarios, and maybe she does not; I will readily concede I don't have the training to evaluate the relative philosophical merit of various explanations for distinctions among the trolley hypotheticals, and I have not done the empirical research necessary to determine whether the claims of others that neurology explains differentiated intuitions about these hypotheticals. But I put those questions aside, because Professor Colb's claim that her revised DDE is superior to the classic version does not depend on its explanatory power with respect to these distinctions. Rather, she asserts that her revised DDE is not only right, but that its correctness is corroborated by its previously unrecognized appearance in a variety of other areas of the law.

Professor Colb claims that the principles underlying her revised DDE can be found in areas of the law as disparate as products liability, the Fourth Amendment exclusionary rule,

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20 *Id.* at 563.

21 *See* 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/[https://perma.cc/7TWM-A8JG] (discussing related research on brain function).

and, pervasively, the law of evidence. Knowing relatively little about the exclusionary rule and nothing about products liability, I will say nothing about them. Given that she taught Evidence, it is not surprising that Professor Colb turned to it for examples, and given that I do not, I am not conversant enough with the secondary literature in the field to evaluate whether she identified a broadly applicable generalization or shoehorned a few rules into her paradigm. But my practice does include courtroom work, and from that, I suspect that with respect to the law of evidence she is right and not just cherry-picking; the balance between probative value and prejudice runs through much of evidence, and it does not entail an inquiry into the actual motives of the party offering evidence but only the relative cost and relative benefit. I pause to note that I really dislike one of the evidence examples that Professor Colb provided, the rules that govern the admission of prior convictions in criminal cases. However, after reading this section of *A New and Improved Doctrine of Double Effect*, I have to admit that I dislike it *not* because she is wrong that motivation is irrelevant, but because I think courts get the balance of harm from the admission of prior convictions wrong. That kind of objection doesn't undermine Professor Colb's point; I think she found it corroborating. In her version of DDE, we don't focus on the motivations of the prosecutor, but on whether the acknowledged harm of an inference of propensity from a prior conviction is outweighed by the probative value of the information about a defendant's truthfulness supplied by that conviction. And at least if we acknowledged that the prosecutor's subjective intention was irrelevant, I would not be so incensed at the pretense that her intention was to provide the jury with information on the defendant's truthfulness.[22]

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[22] An additional admissibility rule, albeit one that derives from constitutional rather than statutory or common law evidentiary constraints, also fits the revised DDE model she adopts, though she does not cite it. The Fifth Amendment constraints imposed by *Miranda v. Arizona*, 384 U.S. 436 (1966), are subject to a "public safety" exception, but satisfying that exception does not turn on whether officers were motivated by the public safety, or even whether they believed that there was a danger to the public safety; custodial statements produced by interrogation may be admitted despite the failure to administer Miranda warnings if, objectively, a danger to the public safety was present and could be ameliorated by interrogation without warnings. New York v. Quarles, 467 U.S. 649 (1984). I don't like that rule either, but again, probably not because of the objectivity of the test. Rather, it is because I think there is no necessary trade-off between public safety and Fifth Amendment rights; as Justice O'Connor explained, the officers

I can't write as clear and concise a summary of Professor Colb's argument as she wrote in her conclusion, so I will quote it in full:

> 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 mind but is instead between permissible and impermissible available intentions, purposes, or goals.
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> 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.[23]

C. An Exception That Proves the Rule?

But what of racial motivation and DDE? One might think that Colb's revised DDE, being indifferent to subjective motivation would predict—or at least prescribe—that the law would limit itself to concern with whether negative disparate racial effects could be justified by a plausible good motive, abjuring inquiry into actual racial motivation. Since the law, in virtually most areas where racial motivation is alleged,[24] *does* concern itself with the actual motivation of the actor, one might think that Colb would either view that deviation as counting against the persuasiveness (and pervasive explanatory power) of her formulation or else argue that to the extent the law does concern itself with actual racial motivation, it is wrong. But no.

Instead, Professor Colb acknowledges several racial discrimination claims as a "category of cases in which our legal

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can elect to not give warnings if the situation is pressing, but the consequence is that the statement is inadmissible. *Id.* at 660 (O'Connor, J., concurring).

23 Colb, *supra* note 1, at 587–88.

24 *See* Washington v. Davis, 426 U.S. 229 (1976) (imposing the requirement that equal protection plaintiffs prove purposeful discrimination).

framework decisively rejects DDE,"[25] (and even argues that one species of racial discrimination claim that does not now inquire into actual motive should do so) but goes on to set forth what distinguishes this category from others and "how that distinction might provide a reason for discarding DDE in this category of cases."[26] Professor Colb considers three contexts in which racial motivation is often argued to be relevant: discrimination in employment decisions, discrimination in the exercise of the peremptory challenge, and discriminatory police stops. Ultimately, she claims that "in analyzing [race-based] disparate treatment cases, we discover the exception that proves the rule that DDE helps us in contexts that require good reasons for acting."[27]

With respect to employment discrimination claims, Colb explains that while the law does consider actual motivation in some cases, that it does so can be explained without undermining revised DDE's explanatory power. She first notes that Title VII's treatment of disparate impact claims is consistent with her revised DDE: Title VII frames proportionality as "business necessity," but is still assessing how important the permissible objectives are and whether the costly (here, disparate impact) measure is needed to reach those objectives.[28] This is because "[i]f 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."[29] So far, so good. But how can she account for the fact that intentional racial discrimination in employment, if established, is unlawful, and not subject to "business necessity" (i.e., proportionality) analysis? As she admits, ". . . [d]iscriminatory motive trumps the availability of an alternative reasonable justification."[30]

According to Professor Colb, the explanation lies in the background norm in employment discrimination: at-will employment, under which a frivolous reason is sufficient to justify firing an employee. Were DDE applied in this setting, it "would altogether undo the prohibition against intentional

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25 Colb, *supra* note 1, at 565.

26 *Id.*

27 *Id.* at 588.

28 *Id.* at 563–64.

29 *Id.* at 564.

30 *Id.* at 565.

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."[31] Professor Colb then addresses the prohibition against the use of race in the exercise of the peremptory challenge, another area in which she thinks "the law sensibly focuses on actual subjective intent rather than employing DDE logic (reconstructed or otherwise)."[32] Why? Professor Colb's justification for considering actual intent in this context parallels the one she offered for exempting intentional discrimination in employment from DDE: "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."[33]

The limitation of DDE, then, is that it works only when applied to conduct with a finite number of potential justifications. In such settings, "DDE becomes a useful vehicle for ensuring that one of them applies and then for approving of the action taken if it satisfies proportionality . . . [but] [w]ith no standard for good justifications, abandoning an intent standard means abandoning altogether the prohibition against the conduct."[34] Professor Colb then turns to pretextual police stops, an area where the Supreme Court does not require inquiry into actual motivation, but where she thinks such inquiry (contrary to ordinary DDE) *would* be appropriate.[35] Again, this is because the standard for justifying police traffic stops is so low—a plethora of violations that are routinely committed by a very large number of drivers—that it poses no limit at all on discrimination.[36] DDE will only work when the number of reasons that would justify an action is small. Professor Colb distinguishes the instances in which her DDE is appropriate from those in which it is not as follows:

> In [many settings], 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

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31 *Id.* at 566.

32 *Id.* at 567–68.

33 *Id.* at 568.

34 *Id.*

35 *Id.* at 569–70.

36 *Id.* at 570.

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.[37]

III
Tension with Professor Colb's Prior Work?[38]

In one respect, Professor Colb's analysis of racial motivation and DDE is entirely consistent with her prior work; she has addressed police stops and advocated that an officer's racially motivated stop violates constitutional constraints whether or not a race-neutral basis for the stop could have provided a motivation and justification. But with respect to the rationale for examining racial motivation, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*[39] differs significantly from *A New and Improved Doctrine of Double Effect*. *Innocence, Privacy, and Targeting* sets forth Professor Colb's model of Fourth Amendment freedom from unreasonable searches, explaining why both civil libertarian and crime-control-oriented intuitions have it partly right: The Fourth Amendment is a right of the innocent and of the guilty. What Colb calls the Formalist Model of the Fourth Amendment is dominant and it construes the right against unreasonable searches and seizures as designed to protect all persons whom police lack adequate suspicion to detain or search;[40] she calls the alternative model the Innocence Model, under which the purpose of the Fourth Amendment prohibition as designed is to protect only those who are innocent.[41] Under the first model, whether an *ex ante* unreasonable search results in the discovery of evidence of guilt is irrelevant; however, under the second, a search that reveals nothing incriminating is the harm the Fourth Amendment was designed to avoid, while one that reveals incriminating evidence does not create that harm even though it literally violates the Fourth Amendment. Colb proposes a third model, one she calls Innocence plus Targeting, which posits that the Fourth Amendment takes account of

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37 *Id.* at 567.

38 I owe insight into this contrast to my colleague (and Professor Colb's spouse) Michael Dorf, who is familiar with the entire body of Professor Colb's work. Of course, any errors are my own.

39 Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 Colum. L. Rev. 1456 (1996).

40 *Id.* at 1462.

41 *Id.* at 1463.

two distinct types of harm: the "privacy harm" is the substantive deprivation of privacy that is suffered when an innocent individual's private space is scrutinized by the government and the "targeting harm" is the indignity suffered by an individual singled out by the government for a privacy invasion for reasons unrelated to evidence tending to inculpate her:

> What distinguishes the Innocence plus Targeting model from the Innocence model is that the former identifies an additional, secondary purpose to the prohibition against unreasonable searches: treating the individual fairly and not utilizing available discretion to target her for unfavorable treatment without a legitimate basis. From the perspective of this "targeting" concern, anyone who is singled out and searched without adequate pre-search justification is harmed, regardless of his guilt or innocence. . . . The Innocence model is incomplete because it neglects the harm that stems entirely from government targeting rather than from individual entitlement.[42]

To defend this model, Professor Colb had to explain why targeting is a dignitary harm, and particularly why it was such a harm in situations where there was no explicit acknowledgement by police that targeting was taking place. A proponent of the Innocence Model might respond to Colb's hybrid model by objecting that a guilty person subjected to a search should (and likely will) assume that the reason she has been searched is that she is concealing evidence of her guilt; such a person will not *experience* a targeting harm, and therefore is entitled to no remedy. Professor Colb's response was that often the targeted person will judge the motive of the police officer conducting the search, perhaps by the surrounding circumstances, perhaps by the officer's demeanor, and perhaps by information later revealed at trial.[43] Moreover, "people who are targeted because something about them is unappealing to the police are likely to have the experience happen more than once," a pattern that often will inform the suspect's inferences about the motives behind her selection.[44]

Though one would think that "targeting" by police can hardly be contemplated without thinking about racial profiling, in describing her Innocence plus Targeting Model, Professor Colb says very little explicitly about race, and what she does say she says in the footnotes. The footnote to the passage quoted above tersely observes that "[i]t is common knowledge,

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42 *Id.* at 1464.

43 *Id.* at 1500.

44 *Id.*

for example, that minorities and the poor are disproportionately singled out for invasions of their privacy," then cites a couple of articles on racial profiling.[45] Interestingly, *Innocence, Privacy, and Targeting* at one point foreshadows Colb's views about double effect, first with respect to the general irrelevance of actual motive:

> As a general rule, *it makes sense to regard objectively justifiable searches as legitimately motivated as well.* Pretextual searches should consequently not be actionable under the Fourth Amendment in most cases.[46]

Moreover, the accompanying footnote then notes racial profiling as an exception to this general rule:

> One important exception to such a rule would apply in the case of invidiously motivated harassment. An example of such harassment might be the disproportionate number of highway stops visited upon African-American drivers.[47]

While there is no explanation for this exception, the only reasonable inference from the rest of the paper is that it is the targeting harm that creates the exception.

And if *Innocence, Privacy, and Targeting* leaves any doubt that it is the targeting aspect of racial profiling that troubles Professor Colb (and conversely, racial profiling that prompts her to amend her initial preference for the Innocence Model of the Fourth Amendment to an Innocence plus Targeting Model), her subsequent works, *Stopping a Moving Target*[48] and *Profiling with Apologies*[49] resolve that doubt.

Stopping a Moving Target,[50] published five years after *Innocence, Privacy, and Targeting,* explored targeting harm on the highway and potential approaches to curtailing it, arguing that targeting inflicts a particularly harsh experience on drivers, and that the broad discretion police have to stop violators of even minor traffic ordinance guarantees high levels of targeting. Because of the virtual ubiquity of offenses that are deemed to justify a stop, preference and prejudice will determine when a police officer chooses to stop a particular driver for a low-level offense. The answer Colb proposed was reducing discretion, which she asserted would diminish the expression of bias in

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45 *Id.* at 1500 n.111.

46 *Id.* at 1490–91 (emphasis added).

47 *Id.* at 1490 n.85.

48 Sherry F. Colb, *Stopping a Moving Target*, 3 RUTGERS RACE & L. REV. 191, 191 (2001).

49 Sherry F. Colb, *Profiling with Apologies*, 1 OHIO ST. J. CRIM. L. 611 (2004).

50 Colb, *supra* note 48, at 191.

traffic stops, and concomitantly, diminish the targeting harm suffered by (relatively) innocent Black motorists.

The 9/11 attack altered the remedy Colb proposed, but not her underlying analysis of the harm of targeting. In *Profiling with Apologies*, Professor Colb explicitly states what was implicit in *Innocence, Privacy and Targeting*: "Racial profiling embodies the paradigmatic Fourth Amendment targeting harm."[51] Not surprisingly then, Colb finds a targeting injury created by the profiling interviews conducted with approximately 5,000 Arab and Muslim aliens in the United States immediately following 9/11, and in the subsequent interviews with 11,000 Iraqi nationals living in the United States, even assuming that the "questioning was limited to people willing to cooperate voluntarily and, therefore, not subjected to the sorts of pressure that qualify as legal compulsion."[52] That is, the government's decision to target people on the basis of nationality, ethnicity, religion, and gender created a cognizable targeting harm, even if it did not entail a high degree of intrusion into protected spaces. Ultimately, she concluded that the size of the threat justified imposing that harm but argued that the innocent should be compensated for its infliction upon them.[53]

Obviously either of these two conclusions could be disputed, but my point here is that in all three Fourth Amendment articles that involve race discrimination, whether directly or indirectly, Professor Colb focuses on targeting harm as the distinctive factor that limits the application of her general preference for an innocence model of the Fourth Amendment. Thus, one might ask why she doesn't do the same in her DDE paper? Certainly it would be easy to distinguish all three of the race discrimination claims she addresses—intentional employment discrimination, discrimination in the exercise of the peremptory challenge, and discrimination in police stops—on the targeting harm principle. In all of those cases, DDE minus inquiry into actual motivation would erase the targeting harm, which is quite a different reason for creating an exception to her revised DDE based on whether a large number of frivolous justifications might be presented to defend the decision (as also characterizes all three of her race exceptions.)

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51 Colb, *supra* note 49, at 612.

52 *Id.* at 614.

53 *Id.* at 623–24.

IV
My Own Objections

While I prefer Professor Colb's account of the significance of racial motivation in her Fourth Amendment work to her account of its significance in *A New and Improved Doctrine of Double Effect*, I wouldn't endorse either one as the best explanation for our consideration of actual motive when race discrimination is at stake. But let me start with why targeting is a better rationale for the exceptions she addresses than the multiplicity of available pretextual justifications, and then turn to why I think even a targeting exception is not the best way to exempt clearly problematic decisions from revised DDE approval.

Why would a focus on targeting harm be a better distinction? Because there are other settings in which a plethora of nonracial, pretextual justifications do not exist, yet we would not (or should not) want to let purposeful discrimination go uncorrected. One immediate example is selective prosecution of serious offenses. The decision to seek the death penalty differs from at-will employment, traffic stops, or peremptory challenges in a crucially relevant respect: There aren't "an infinite number of nonsensical, pretextual reasons" that could serve to justify the decision. When the State of Georgia sought death against Warren McCleskey, only a limited number of justifications—the statutorily prescribed "aggravating factors"—were available to support that decision, which McCleskey contended was influenced by his race and the race of his victim. What if, contrary to the Supreme Court's determination in *McCleskey v. Kemp*, McCleskey had succeeded in establishing that his prosecutor sought death against McCleskey out of racial animosity? The Supreme Court plainly assumed that *if* racial motivation had been proved to its satisfaction, regardless of the presence of a statutory aggravating factor that supported McCleskey's death sentence, it would have to be struck down.[54] Yet under Professor Colb's revised DDE—even with its exception for cases where a multiplicity of potential alternative justifications render DDE inapplicable—inquiry into the prosecutor's motives would be superfluous, because a prosecutor could have been motivated solely by the statutory aggravating factor.

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[54] True, Justice Scalia's papers reveal that *he* did not have issue with the strength of the proof of racial motivation and would affirm the conviction regardless of the strength of the proof. Memorandum to the Conference from Justice Antonin Scalia in No. 84-6811-McCleskey v. Kemp of Jan. 6, 1987. *McCleskey v. Kemp File*, Thurgood Marshall Papers, The Library of Congress, Washington, D.C. Plainly, the rest of the majority did not agree.

This just can't be right. Whether there are many or few plausible justifications for an action taken on the basis of race can't determine whether demonstrable racial motivation matters. Had Professor Colb borrowed a targeting focus from her Fourth Amendment articles, this counterintuitive (and appalling) result would have been avoided. Targeting itself is a harm, regardless of whether or not other purposes place some limits on discretion. Possibly the Innocence plus Targeting Model would deem the death sentence itself—imposed on someone guilty of the crime and eligible for a death sentence—not a cognizable harm, with the only harm being the targeting harm, but that would still be an improvement over not recognizing any harm at all.

So one problem with the "multiplicity of other justifications" exception as the explanation for intentional employment discrimination, *Batson*, and pretextual police stops is that it affords no scrutiny of racial motivation when only a limited number of alternative justifications are available. Another, quite different problem lies in the multiplicity of justifications formulation of the exception: Why does it not exempt all decision from DDE when a multiplicity of alternative justifications are possible? That is, although Professor Colb's examples are all race discrimination examples, why should that be so? If a police officer stops someone for a trivial traffic offense, why should that person not be able to say, "He stopped me because I look like his estranged sibling?" or, "He stopped me because he was mad that the pastry store was out of his favorite donut and I had a bumper sticker for that store on my car?" Similarly, then, the juror who is excluded because the prosecutor doesn't like red t-shirts would be able to claim an exemption from revised DDE because there are so many legitimate justifications for a strike. But if the exception does permit such inquiries into motive, then whether or not Professor Colb's revised DDE applies depends on the number of justifications that might be offered, and neither the invidiousness of the suspected motivation nor the magnitude of the individual's interest in avoiding the unfavorable treatment matter. This distorts ordinary equal protection doctrine beyond recognition.[55]

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55 It may be that Professor Colb would have responded that there is no need for DDE at all unless a harm is present; racial discrimination is a harm, and that's what triggers DDE. But she didn't say that, and I don't think that she would, since it would have been easy to do so, and she didn't. Interestingly, "targeting," depending on its interpretation, may have a similar flaw. Professor Colb's first article on targeting only discusses racial profiling in the footnotes,

No. What makes intentional racial discrimination in employment wrong, intentional racial discrimination in the exercise of the peremptory challenge wrong, and racial profiling wrong, and what makes inquiry into subjective intent right—in each case is attributable to the shared adjective "racial." There are lots of bad motives, but most of them don't require special attention. Why race gets strict scrutiny depends on a congeries of reasons starting with the terrible history of racial discrimination, public and private, in this country, a history which includes longstanding abysmal treatment of African Americans, Indigenous peoples, Asian Americans, and Latinos. History isn't the only reason of course; there is also the salience of race; the relative immutability of race; enduring pernicious and pervasive stereotypes based on race; enduring and recurring pockets of animosity based on race; the long-term economic disadvantage created by slavery, genocide, and prior racial discrimination; the discrete and insular nature of many racially identifiable communities; and the widespread implicit bias against members of racial minorities—to name a few other factors.

Professor Colb should have acknowledged a racial motivation exception to her revised DDE. And at least a handful of additional exceptions based on other invidious categories, such as citizenship, gender, sexual orientation. Equal protection law, which is far from expansively just, requires investigation into racial motivation, regardless of the existence of a legitimate purpose that would otherwise be sufficient to explain the action; any evaluation of right action (whether by a private or government entity) should require at least as much.

Myself, I would go further. Present day equal protection allows a law motivated by race to be resuscitated if the government can show that the action would have been taken absent the racial motivation.[56] As I have argued elsewhere, the confluence of the difficulty of ascertaining *any* counterfactual purpose with the race-specific likelihood that invidious motivations are so inextricably linked with stereotypes and preferences

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and there as an example, not as the central motivation behind the modification of the Innocence Model to include a targeting concern. Thus, "targeting" is a harm regardless of the reason for the targeting. I would not dispute that, but just think that *racial* targeting, *racial* employment discrimination, and *racially* motivated exercise of the peremptory challenge are different than discrimination on noninvidious bases, however stupid or venal.

[56] Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

that even the actor cannot untangle them, compels the conclusion that the establishment of discriminatory purpose should be the end of the matter.[57]

Conclusion

My knowledge of philosophy in general is limited, and most of what I know about the doctrine of double effect in particular I learned from Professor Colb's article. Consequently, any observation of mine as to the overall merits of her proposal is worth little. I will confess I don't like it (which is not the same thing as saying my dislike has any significance). I keep thinking about the statement attributed to Oliver Wendell Holmes, "[e]ven a dog distinguishes between being stumbled over and being kicked."[58] And, I might add, *cares* whether he has been kicked or stumbled over. Relatedly, I also keep thinking that Uriah "*the Hittite*," a soldier, would have seen King David's decision to send him into frontline battle in order to hide his adultery with Uriah's wife Bathsheba quite differently than the decision to send him along with fellow soldiers to the frontlines absent that motivation.[59] Targeting matters, history matters, and animosity matters.

In any event, I *do* know something about race and racial motivation. And with respect to racial motivation, the reason no version of DDE should exclude inquiry into racial motivation is an extraordinary amount of targeting, an extraordinarily long history of targeting, and, still today, an extraordinary amount of stereotyping and animosity. Even in settings where only a few things might be proffered to justify race discrimination, a revised DDE would be a bad innovation. Race is different because it is race.

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57 Sheri Lynn Johnson, *Flowers for the Arlington Heights Footnote: The Slow Demise of Mixed Motives Analysis*, 57 Ind. L. Rev. 7 (2023).

58 Oliver Wendell Holmes, Jr., The Common Law 3 (Little, Brown, & Co. 1881).

59 2 *Samuel* 11. For an exploration of what Uriah knew, and what David thought he knew, *see* Meir Sternberg, The Poetics of Biblical Narrative: Ideological Literature and the Drama of Reading, 190–222 (1987). Bathsheba might have seen the death of her husband in battle very differently depending on David's motivation, but her opinions on this matter, as on the matter of David originally spying on her and sending for her, are not recorded, or to my knowledge, anywhere discussed.