THE BLAME GAME: AN AXIOLOGICAL APPROACH TO THE DOCTRINE OF DOING AND ALLOWING

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by

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INTRODUCTION

The Doctrine of Doing and Allowing (DDA) is a moral principle that holds that harms done are morally worse than harms allowed. The objective of this thesis is to show that the much-disputed DDA is only viable with supplementation. The DDA has been considered a non-consequentialist principle, however, recent attempts to revive the principle have resorted to the use of axiology, the value theory used in consequentialism. The DDA relies on a binary picture of harms. This thesis claims that this binary picture of harms is the primary reason that the DDA is susceptible to objection. Through an axiological approach, the project of this thesis is to develop a sliding-scale theory of harms, which is more robust and less open to criticism.

There have been two major approaches to explaining the DDA: deontology and consequentialism. The first chapter will discuss the denontological approach to the DDA. The deontological approach has been used by philosophers like Philippa Foot and Warren Quinn who hold that the DDA is a non-utilitarian principle. Both Foot and Quinn have used rights to explain the moral asymmetry between harm-doings and harm-allowings. Chapter one analyzes the rights-based defenses of the DDA put forth by Foot and Quinn. Both Foot and Quinn explain the DDA by appealing to the precedence of negative rights over positive rights. The precedence of negative rights over positive rights, though, is not immediately clear. Both Foot and Quinn have failed to provide an account of why negative rights are more stringent than positive rights.
Such incomplete accounts mean either that the DDA should be dropped as a principle or that rights are do not provide the best defense for the DDA. Kai Draper challenges the DDA and provides a rights-based alternative to the DDA. Draper defends his rights-based account of harms with value. His account provides an important development in explaining the DDA: value becomes an essential part of saving the DDA. Though Draper aims to get rid of the DDA, his account opens the door to the possibility of saving it through the use of value.

The second chapter discusses the DDA and its relationship with consequentialism. This chapter examines how Fred Feldman responds to an objection from justice to utilitarianism by developing an axiology that is sensitive to desert. Feldman’s approach to this objection provides a methodology, which is useful to saving the DDA. Though Foot objects to consequentialism in general, and utilitarianism in particular, an axiological approach does not rely on strict consequentialism to defend the DDA. Axiology is distinct from consequentialism and can be used to provide a more robust theory of harms. In fact, Xiaofei Liu has recently defended a value-based approach to the DDA in response to Draper’s objection. Liu further develops Draper’s value defense. Liu’s defense, however, still relies on a binary picture of harms.

The third chapter incorporates a theory desert to develop a sliding-scale theory of harm-doings and harm-allowings. Feldman’s axiological approach is used to analyze the traditional, binary version of the DDA and explain why it does not work. The next part of the chapter explains how moral responsibility for a harm creates desert of blame—blame is one side of the badness of a harmful state of affairs. The other side of the badness of harm is the goods lost by the person harmed. Liu’s discussion of
autonomy and well-being is used to explain how degree of goods lost is reflected in the badness of harm. The badness of a harmful state of affairs is no longer determined solely by whether the state of affairs resulted from a harm-doing or harm-allowing. According to the sliding-scale approach to harms, the badness is measured by the distribution of blame and the loss of goods within the state of affairs.

The fourth chapter applies the sliding-scale approach to harms to three case studies. Each case analysis discusses the badness of a harmful state of affairs according to the traditional, binary picture of harms. The traditional, binary picture of harms is then compared with a full analysis of the sliding-scale approach to harms. The objective of chapter four is to illustrate the explanatory power of the axiological approach to harms. The objective of this thesis is to show that the DDA can be supplemented with axiology to create a more robust theory of harms.
CHAPTER 1

DOING AND ALLOWING HARM

1.1 Introduction:

*Do no harm* is a commonly accepted, ethical principle in medicine. This principle of nonmaleficence "requires that health-care professionals \(^{[HCP]}\) not act in ways that entail harm or injury to patients."\(^1\) Though encouraged to avoid harm, harm is inevitable. When faced with limited resources and exhausted by endless patients, choices often have to be made which will result in the harm or injury of some patient. Furthermore, the changing landscape of healthcare now emphasizes not only cures, but end-of-life caring in the emerging field of palliative care, where dying is treated with dignity. Understanding the nature of harms and how they are morally assessed becomes a key point in addressing the contemporary environment of medicine. The point of this chapter is to explore a moral principle concerning harm and to discuss its merits, and flaws. The larger project of this thesis will be to enrich this traditionally, deontological principle with the axiology that grounds utilitarianism.

The Doctrine of Doing and Allowing—also known as the DDA—is one principle that holds that *harms that are done are worse than harms that are allowed*. An agent is positively relevant to a harmful result when the agent *does* a harm. An agent, on the other hand, is negatively relevant to a harmful result, when he *allows* a harm to

occur. A classic example of doing harm is the conductor of an out-of-control trolley who switches to a track occupied by one person from a track occupied by five people. The conductor allows harm, on the other hand, by staying on the initial track. According to the DDA, the harm that results in part from the agent’s lack of action is less bad than the harm done when the agent acts by switching to another course. This chapter will explore some of the explanations for why allowing harm seems less bad than doing harm.

Many prominent accounts of the DDA base the difference on the general relationship that harms have with the rights they come against. Rights-based accounts explain why harms done are morally worse than harms allowed. According to Xiaofei Liu, right-based analyses of the DDA provide the most promising defense. Such analyses provide an explanation for why harms done are worse than harms allowed. However, rights-based accounts of the DDA are incomplete. According to Liu, these explanations lack an explanation of why certain rights are stronger than other kinds of rights. For example, Philippa Foot fails to explain why negative rights are stronger than positive rights. Warren Quinn also does not explain why negative rights take precedence over positive rights. Kai Draper’s pure rights-account of harm does not explain “why autonomy is more important than well-being.” These accounts lack elements crucial to a complete explanation. A claim that one set of harms is worse than another set of harms needs proof that the rights or values are coextensive with one type

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of harm matter more than those coextensive with another type of harm. Many DDA accounts fail to explain either the conceptual difference or moral difference between harms. Many accounts seem to lack such components and are at best incomplete and, at worst, wrong.

Recently, value-based accounts of the DDA have been proffered as alternatives to rights-based explanations. Value accounts of the DDA explain the difference between harm categories with one harm coming against values that could be construed as more fundamental and other values as being secondary to those fundamental values. In other words, multiple values are involved and different harms are associated with different values. Another view of values may be that one harm is worse than another because a single value, such as autonomy, is violated to greater degree. Such an account would likely be at odds with the DDA because the DDA is held to be a non-consequentialist principle by many deontologists. Consequentialism uses axiology or value theory to identify goods and their hierarchy. Proponents of the DDA, like Philippa Foot, found the DDA attractive because it lined up with ordinary intuitions about harm and presented an alternative to utilitarianism. Perhaps the DDA is fundamentally opposed to utilitarianism and no aspect of consequentialist theory should be invoked to explain the DDA. The DDA is an anti-consequentialist means of measuring harm in which the measurement of harm must be provided by something other than a value-based approach. The current chapter will focus on reviewing particular versions of the DDA, which may later be enhanced by some aspect of consequentialism.
Warren Quinn clarified that the DDA applies “...more directly to moral justification than to other forms of moral evaluation.” Evaluation is defined as the “act of ascertaining or fixing the value or worth of something.” Typically moral evaluation is the act of ascertaining or fixing the moral value or worth of acts, states of affairs, or even the people’s lives. Quinn claims that the DDA is a principle of moral justification that is a form of moral evaluation. Moral justification means “something (such as a fact or circumstance) that shows an action to be morally reasonable or necessary.” So, Quinn holds that the DDA shows that there is a difference in the moral status or value of two different categories of harms, harms that are done and harms that are allowed, by showing that harms that are allowed are more reasonable than harms which are done. This thesis will be not be directly concerned with how harms are justified, but instead which moral theories, rights or values, provide a better explanation of how to differentiate or rank harms.

1.2 The Concept of Harm

The DDA is an explanatory account of harm that holds moral asymmetry between harms that are done and harms that are allowed. For purposes of this thesis, the DDA refers to a class of harm that results in death or severe injury. Beachamp and Childress provide two uses of harm in medical contexts: “the normative and nonnormative use.” The normative use of harm means “wronged” or “treated unjustly.”

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The second use, *nonnormative* use, means “caused an adverse effect on...[one’s] interests.”

The adverse effects in the nonnormative use of harm can result without an agent causing the harm. For example, a person who is harmed by an earthquake is harmed in the nonnormative sense. Harm in the normative sense is caused by an agent.

Beauchamp and Childress, in discussing the principle of nonmaleficence discuss the difference between both types of harms:

A harmful action by one party may not be wrong or unjustified on balance, although acts of harming in general are *prima facie* wrong. The reason for their *prima facie* wrongness is precisely that they do set back the interests of the persons affected. Harmful actions that involve justifiable setbacks to another’s interests are, of course, not wrong...We will concentrate on intending, causing, and permitting death or the risk of death.\(^7\)

Like Beauchamp and Childress, this thesis will focus on harms that are wrong that intend, cause, or permit death or the risk of death.

Beauchamp and Childress divide harms in the medical context into normative and nonnormative. These two uses of harm distinguish harms between those that are morally wrong and those that are not wrong but are justifiable setbacks to one’s interests. In the medical context, patient’s preferences cannot always be honored. For example, a cancer patient may prefer an early discharge to see her child’s holiday ballet performance. However, the patient’s condition leaves her susceptible to infection and her physician strongly recommends that she remain in the hospital until well enough for a proper discharge. The adverse effect on this patient’s interests were justifiable and not caused by anyone in particular. Nonnormative harm differs from harm in the normative sense, which must be caused by an agent. For example, a patient contracts a

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\(^8\) Beauchamp et. al. 2001, 116-17, ibid.
dangerous blood virus from a healthcare employee when the employee injects the patient with a needle that accidentally pierced the employee’s hand. Nonmaleficence holds that medical professionals avoid harms in the normative sense because these harms are clearly wrong.

1.3 Contrast Strategy

The Stanford Encyclopedia of Philosophy states that there have been two major approaches of analyzing the DDA: the contrast strategy and analyzing the conceptual nature of the distinction.9 The contrast strategy employs parallel cases that have identical features except a single factor that is different to see if the single factor makes a moral difference. The contrast strategy uses paradigm cases of harm-doings and harm-allowings to demonstrate the moral difference between doing and allowing harm. Another method for explaining the DDA is conceptual analysis that analyzes the conceptual nature of the distinction between doing and allowing harm.

The contrast strategy is used by philosophers such as Philippa Foot and James Rachels. This strategy is useful in defending the doctrine and critiquing it. Foot’s pair of examples, for example, includes the choice “between framing and killing an innocent man and allowing five innocents to be killed in a riot.”10 Shelly Kagan writes that the contrast strategy commits the additive fallacy. The additive fallacy is a result of what Kagan calls the additive assumption. The additive assumption is the assumption that the moral “status of the act is the net balance or sum which is the result of adding up the

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10 Howard-Snyder, ibid.
separate positive and negative effects of individual factors.” The additive assumption holds that the moral status of a whole act is the total value of its separate parts. So, the moral status of the action in Foot’s example is made up of the separate negative and positive effects of its factors like the framing and murdering of an innocent man. The point of this example is to show that framing and murdering one man is worse than letting five people die in a riot. Based on the cases alone, it seems that doing harm is worse than allowing harm regardless of the death toll, but there are other factors involved. The framing and murder of an innocent man involves the unjust blame and killing of a man. The five men who died in the riot were murdered at the hands of an angry mob. The judge making the decision does not take steps to deceive the crowd into thinking that these men were responsible for some crime. Instead, these men die indirectly due to the confusion and chaos of an angry mob and not by the direct, premeditated action of any agent. This example can show that the contrast strategy appears to be more compelling than it really is. This example is not showing the difference between doing and allowing harm per se, but the difference between direct intentional harm and indirect unintentional harm. The matters are far more complex than what one would expect given cases as the only support for an argument for the DDA.

In contrast strategy, if each factor is individual and independent of one another, then those factors can be added to or subtracted from cases, or substituted without greatly affecting the moral status of the act. The constitutive error occurs in thinking that the moral value of the unaltered parts of the case will remain the same irrespective

of an alteration of some other element of the case. The point is that the moral status of an act is not necessarily a matter of merely adding up the parts of the state of affairs. By misunderstanding moral evaluation, the contrast strategy appears to be an ineffective method of capturing the moral status of a state of affairs because it fails to capture the essential aspects of a moral status. A thesis that seeks to explain the moral values according to the DDA by relying solely on the contrast strategy alone could surely be damaged by Kagan’s argument against contrast strategy. However, this thesis intends to discuss how particular accounts of the DDA explain the conceptual difference between harms. In addition to fleshing out the conceptual account of the DDA, this thesis will import other notions in order to enrich the DDA.

The other method of analysis used by philosophers like Warren Quinn has been conceptual analyses to isolate the conceptual distinction between doing and allowing harms and thereafter identifying particular concepts which account for one category of harms being morally worse than another. A conceptual distinction identifies what is essentially distinct a priori about the definition of a ‘harmful doing’ versus the definition of a ‘harmful allowing.’ Quinn’s conceptual distinction, for example, is between action and inaction. He defines the nonmoral notion of action and then demonstrates the moral difference between harmful doings and allowings with test cases. He does not use the cases as his sole support. This thesis uses conceptual analysis to analyze the nature of the moral distinction between harm-doings and harm-allowings. Further, this thesis

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aims to find a better approach to assessing the badness of harms on a different basis than rights.\textsuperscript{13}

\textbf{1.4 Rights-based Versions of the DDA}

The following versions of the DDA use rights to support the claims of the conceptual differences between the DDA. These accounts clarify what is meant by harm-doings and harm-allowings. Each account also explains how harm-doings and harm-allowings are coextensive with certain kinds of rights. Rights are used to explain the moral asymmetry between harm-doings and harm-allowings—why harms done are worse than harms allowed. This thesis focuses on the rights-based accounts of the DDA because rights have been the primary, deontological basis for arguing for the DDA. Section 1.4 and its subsections discuss the rights-based accounts of Philippa Foot and Warren Quinn. Philosophers like Foot and Quinn have held that there is a fundamental conflict between the DDA and utilitarianism. The final section discusses Kai Draper’s rights-based \textit{alternative} to the DDA. In 2005, Draper argued that the DDA did not properly explain moral intuitions about harms. He held that a pure rights-based account of harms would provide the best explanation of harms. His analysis segues into the next chapter that discusses utilitarianism and a value account of the DDA. Each analysis will include the philosopher’s particular definitions of ‘doing’ and ‘allowing,’ how rights are used to explain why harms done are worse than harms allowed, implications of the analysis, and a brief explanation regarding distinction from utilitarianism.

\textsuperscript{13} Howard-Snyder, ibid.
1.4a Phillippa Foot’s Version of the DDA

The DDA gained attention through the works of philosophers such as Philippa Foot in efforts to support non-utilitarian principles. Her stance against utilitarianism in moral theory came from a fundamental belief about its implications for the treatment of people: utilitarianism seemed to promote its designated value by any means necessary. Foot held that utilitarian ethics leads to the extreme conclusion that even persons may be sacrificed to promote the general welfare. Foot held that consequences or outcomes were not the only morally relevant aspects of a state of affairs. In other words, Foot held that the factors that make a state of affairs better or worse morally than another state of affairs are not determined entirely by consequences. Foot claimed that principles like the Doctrine of Double Effect (DDE) and the DDA held that elements such as intentions and the manner in which harms occur, done or allowed, are morally relevant. In essence, morally relevant factors include how actions are performed, including elements like intentions and an agent’s relationship to harmful results. The Doctrine of Double Effect (DDE), for instance, emphasized an agent’s intentions as morally important in harm. Foot believed, however, that the DDE was compelling because of a closely related principle: “the strength of the doctrine [of Double Effect] seems to lie in the distinction between what we do (equated with direct intention) and what we allow (thought of as obliquely intended).”

Foot’s analysis of the DDA was formed in her 1978 work, "The Problem of Abortion and the Doctrine of Double Effect." The primary goal of the essay was

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15 Foot 1978 ibid.
discussing the importance of the DDA as a fundamental principle of harm. While her analysis is brief and, perhaps, incomplete, it provides an interesting starting point in understanding the DDA and discussing the rights on which it is based.

According to Foot, the DDA is defined as a moral difference between two relationships an agent can have with a harmful chain of events. An agent is wholly responsible for harmful doing if one “starts up a new train of events [or sustains a pre-existing train of events] in someone’s life.” For example, an agent who pulls a cord that opens up the trap door beneath a man with a noose tied around his neck has initiated a harmful sequence of events. An agent, likewise, who greases the wheel of the pulley as it turns slowly to speed up the opening of the trap door, sustains the harmful train of events. Harmful allowings, on the other hand, are “refusing to intervene to stop” a train of events which is not new and already in motion. For example, a licensed nurse who is visiting a sick relative allows a harm when she sees that a breathing tube of a dying patient has become detached from the breathing machine but fails to reattach it. The fault of the harmful doing, according to Foot, seems to fall on the agent more so than the fault of harmful allowings. This conceptual analysis successfully explains what doing and allowing mean and how each harm occurs. Xiaofei Liu provides a revised version of Foot’s distinction between doing and allowing harm:

An act is a doing harm if and only if it initiates a harmful sequence; or when there is already exists a harmful sequence that is not initiated by that act, a) the act removes an obstacle, and b) sustaining or creating the obstacle does not require the actor’s further effort, and c) the part of the obstacle that is to be removed or prevented from being created by the act is not something that the actor has authority to remove or withdraw.

17 Foot 1985, 69 ibid.
By contrast, an act is an *allowing*-harm if and only if it merely allows a harmful sequence to continue; or it removes, or prevents the creation of, an obstacle that will prevent a harmful sequence, but a) sustaining or creating the obstacle requires the actor's further effort, or b) the part of the obstacle that is to be removed or prevented from being created by the act is something that the actor has authority to remove or withdraw.18

This distinction between doing and allowing is assumed by the DDA and provides the categories discussed by Foot and others. Foot's own categories have experienced some criticism. In particular, there has been trouble with Foot's category of harmful allowings and that category's inclusion of what she calls harmful enablings.

The conceptual line between doings and allowings seems to blur in what Foot has identified as *harmful enablings*. Foot defines a 'harmful enabling' as an instance where an agent removes “some obstacle which is, as it were, holding back a train of events.”19 For example, physician A sees that another physician B has injected a lethal dosage of a medicine to end the suffering of an ailing cancer patient; however, the intravenous tubing that carries the medicine is kinked. Physician A straightens the tubing that allows the medicine to flow freely into the patient's veins. In this case, physician A has facilitated or enabled the harm. Stephen Rickless supports what he calls, Foot’s *Equivalence Hypothesis* by dismissing counterexamples by philosophers like Jonathan Bennett as misleading.20,21 A generic account of the DDA does not include, as Bennett's examples do, agents with malicious intent. Such examples are not true cases of harmful

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18 Liu 2012, 79. Liu combines Foot's original definitions of doing and allowing harm with McMahan's discussion of withdrawing aid.
19 Foot 1978, 150, ibid.
20 Rickless, Samuel. “The Moral Status of Enabling Harm. “ *Pacific Philosophical Quarterly* 92 (2011): 68,82. The *equivalence hypothesis* is the claim that enabling harm is just as bad as doing harm.
21 It's worth noting that these are the types of case examples that commit Kagan's additive fallacy. These cases insert malicious intentions on the part of the agent's which make the cases seem to be worse morally than they are. The case, which is supposed to illustrate moral badness of harmful enabling is actually reflecting the badness malicious intentions of the agent.
enabling. Minus harmful intent, harmful enabling seems to fall neatly under harmful allowing. Harmful enabling is important to discuss because it illustrates the difficult task of defining harmful doings and allowing. The problem becomes more apparent when applying the DDA to cases.

The DDA, for Foot, engages a discussion of moral duties and rights. Rights in general can be defined as follows:

Rights are entitlements (not) to perform certain actions, or (not) to be in certain states; or entitlements that others (not) perform certain actions or (not) be in certain states. Rights dominate modern understandings of what actions are permissible and which institutions are just. Rights structure the form of governments, the content of laws, and the shape of morality as it is currently perceived. To accept a set of rights is to approve a distribution of freedom and authority, and so to endorse a certain view of what may, must, and must not be done. 22

This definition is generic for many different types of rights theories. The DDA deals with an agent and a person harmed; the agent can also be the person harmed. The significance of self-harm will emerge in Draper’s ‘No Heroics’ case in section 1.4c.

Rights theories divide DDA associated rights into positive and negative rights:

A distinction between negative and positive rights is popular among some normative theorists, especially those with a bent toward libertarianism. The holder of a negative right is entitled to non-interference, while the holder of a positive right is entitled to provision of some good or service. A right against assault is a classic example of a negative right, while a right to welfare assistance is a prototypical positive right. Since both negative and positive rights are passive rights, some rights are neither negative nor positive. Privileges and powers cannot be negative rights; and privileges, powers, and immunities cannot be positive rights. The (privilege-) right to enter a building, and the (power-) right to enter into a binding agreement, are neither negative nor positive. It is sometimes said that negative rights are easier to satisfy than positive rights. Negative rights can be respected simply by each person refraining from interfering with each other, while it may be difficult or even impossible to fulfill

everyone's positive rights if the sum of people's claims outstrips the resources available. However, when it comes to the enforcement of rights, this difference disappears. Funding a legal system that enforces citizens' negative rights against assault may require more resources than funding a welfare system that realizes citizens' positive rights to assistance. As Holmes and Sunstein put it, in the context of citizens' rights to state enforcement, all rights are positive. Moreover, the point is often made that the moral urgency of securing positive rights may be just as great as the moral urgency of securing negative rights. Whatever is the justificatory basis for ascribing rights—autonomy, need, or something else—there might be just as strong a moral case for fulfilling a person's right to adequate nutrition as there is for protecting that person's right not to be assaulted.\(^\text{23}\)

Foot holds that an agent has certain moral duties that correspond to particular rights. Ethical duties are part of the broader ethical theory of deontology:

Deontology is one of those kinds of normative theories regarding which choices are morally required, forbidden, or permitted. In other words, deontology falls within the domain of moral theories that guide and assess our choices of what we ought to do (deontic theories), in contrast to (aretaic ["virtue"] theories) that—fundamentally, at least—guide and assess what kind of person (in terms of character traits) we are and should be. And within that domain, deontologists—those who subscribe to deontological theories of morality—stand in opposition to consequentialists.\(^\text{24}\)

Foot discusses duties as part of a right and duty pair—a negative duty with a negative right and a positive duty with a positive right. For example, with regard to the right of noninterference, an agent has a moral duty to refrain from harming others. For example, a woman may not trip her brother down the stairs in order to gain his fortune. Likewise, agents have a moral duty to provide aid according to the positive right to aid when persons are in danger. For example, an agent is morally required to respond to


the screams of a woman who is being attacked by a mugger. The key difference between refraining from harm and providing aid is that the latter case requires an agent to step in the way of the harm herself. The duty to provide aid requires more of an agent than merely refraining from doing harm.25

Foot uses rights because rights seem to explain the DDA without resorting to utilitarian considerations. Foot stated “no decision is more important for practical ethics than that by which we come to embrace or reject utilitarianism.”26 Foot wrote that there was little “theoretical justification for utilitarian principles.”27 The DDA was an example of a principle which is, like utilitarian principles, seems to be “deeply embedded in our ordinary morality” but, unlike utilitarian principles, Foot argues that the DDA actually is embedded in our ordinary morality and has “theoretical justification.”28 Foot's objection to utilitarianism stems from a large debate over whether utilitarianism, as a moral theory, does or does not actually explain our moral judgments. Foot holds that utilitarianism fails to discern between the badness of doing harm and allowing harm. The failure of this distinction stems from the utilitarianism's central principle of utility as intrinsic value:

Welfare [understood] in terms of the intrinsically valuable, utilitarianism sets morality the task of maximizing the occurrence of intrinsically valuable state of affairs. In principle it is impersonal about this; who is to enjoy the result, or who produces it, does not essentially matter. Hence the formula that utilitarianism aims to maximize the general welfare.”29

25 Alexander and Moore, ibid.
26 Foot 1985, 67, ibid.
27 Foot 1985, 67, ibid.
28 Foot 1985, 67, ibid.
Utilitarianism holds that a morally right action is one that maximizes or promotes the general welfare. However, this claim is inconsistent with the DDA:

Utilitarians, who place the whole moral significance of an action on its production of good or harm, must treat the difference between initiating and allowing as having no independent influence on morality.\textsuperscript{30} Foot's analysis of the DDA assumes that the DDA is an incompatible principle with central utilitarian considerations. The DDA is a principle that determines the moral status of an action by the “position of the agent in a causal nexus.”\textsuperscript{31} Foot's analysis assumes that categorizing an action in this way is not possible under strictly utilitarian considerations. For example, hedonic act utilitarianism holds that the total amount of pleasure over pain in the outcome of an action is what is morally important. The kind of action whether done or allowed is not morally important according to this particular utilitarian principle.

Liu finds fault, not with Foot's definitions of doing and allowing harm, but with her justificatory support of the DDA which uses positive and negative rights:

There is a legitimate question: why are negative rights necessarily more important than positive rights? Foot does not give a theoretical explanation; she simply appeals to our moral intuition as illustrated by a few cases.\textsuperscript{32} According to Liu, moral intuition and case analysis is not sufficient to support Foot’s use of negative and positive rights.

In “A Defense of the Doctrine of Doing and Allowing,” Liu aims to respond to Kai Draper who dismissed the DDA in favor of a pure rights-based account of harm. Liu claims that the DDA can be saved and argues for a value-based explanation rather than

\textsuperscript{30} Foot 1985, 69, ibid.
\textsuperscript{31} Foot, 1985, 69, ibid.
\textsuperscript{32} Liu 2012, 65-66, ibid.
the traditional rights-based explanation used by Foot. He objects to Foot's account of rights because it lacks explanatory support for the difference between negative and positive rights:

It is not obvious that the negative right here is necessarily more important than its corresponding positive right. Without an explanation of precisely what is so unique about negative rights and why it makes them morally more significant, the alleged moral difference between doing and allowing remains a mystery. Foot's analysis is thus *explanatorily incomplete.*

This is a common complaint against Foot's analysis — she provides an inadequate account of why negative rights of noninterference take precedence over positive rights to aid. This burden-of-proof, Liu holds, is on Foot. If positive and negative rights exist, then it is up to Foot to explain why negative rights take precedence over positive rights. Her account, however, lacks any further justification or explanation of the moral difference between doing and allowing, posing a problem for the DDA or at least the rights-based version.

Foot's distinction between doing and allowing harm depends on the "position of the agent in a causal nexus." Quinn argues that Foot's analysis breaks during theoretical application to cases. For example, Quinn finds Foot's analysis confusing at the point of *allowing a sequence to complete itself and keeping it going:*

One problem with this account arises when we try to explain the difference between allowing a sequence to complete itself and keeping it going when it would otherwise have stopped. We might have thought the former was a matter of doing nothing to stop it and the latter was a matter of doing something to continue it. But that would seem to take us back to the rejected distinction between action and inaction.

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33 Liu 2012, 66, ibid.
34 Foot 1985, 69, ibid.
35 Quinn, 1989, 297-98, ibid.
Quinn claims that Foot's distinction can be reduced to the distinction he makes between doing and allowing harm. He holds that the difference is fundamentally the difference between action and inaction, or omitting an action. Quinn’s account of the DDA will be covered in section 1.4.b and will include an explanation of his distinction between doing and allowing harm.

Quinn rejected Foot's account for several other reasons. He chiefly criticized a part of Foot's definition of ‘allowing’: an agent who fails to stop a pre-existing sequence of events leading to harm. Quinn claims that there is no conceptual necessity for the train of events to be pre-existing for the agent to allow the train of events to continue:

Suppose I have always fired up my aged neighbor's furnace before it runs out of fuel. I haven't promised to do it, but I have always done it and intend to continue. Now suppose that an emergency arises involving five other equally close and needy friends who live farther away, and that I can save them only by going off immediately and letting my neighbor freeze...[This] doesn't seem to be a case in which I merely allow an already existing fatal sequence to finish my neighbor off. For he was not already freezing or even, in danger of freezing before the emergency arose. Or if we think he was in danger, that danger was partly constituted by what I might fail to do.\(^3^6\)

Allowing harm does not \textit{necessarily} require that the events that led to harm preexist an agent's involvement. Quinn goes on to suggest that any attempt to save Foot's definition of ‘allowing’ by changing it would ultimately boil down to Quinn’s definitions of the do/allow distinction of action and inaction. Fiona Woolard agrees that “pre-existing threat formulation is unhelpful. The doing/allowing distinction cannot

\(^3^6\) Quinn 1989, 298, ibid.
Woolard claims that this part of allowing can be removed without losing the force of Foot's definition:

> What we should focus on is not whether the sequence existed before the behavior, but on whether the sequence is appropriately independent of the agent's behavior. Thus understood, Foot's account avoids Quinn's counterexample. It is clear that the sequence leading to the elderly neighbor's death is independent of the agent's behavior.\(^\text{38}\)

Woolard claims that Foot's account of doing and allowing is the most promising account and suggests that further work must be done to flesh out what is meant by “appropriately independent of the agent's behavior:”

This account places a lot of weight on the idea of a sequence being 'appropriately independent' of an agent's behavior. More detail is needed to explain this idea. When an agent does or allows harm, the harmful sequence is always in some way dependent upon his behavior: usually had the agent behaved differently the harm would not have occurred. If the harmful sequence is causally independent of the agent's behavior, so it would have unfolded in exactly the same way however the agent behaved, then it is odd to describe him as doing or allowing harm. So the idea of independence appealed to here cannot be causal independence. Until we are told what it is for a sequence to be appropriately independent of an agent's behavior, Foot's account remains incomplete.\(^\text{39}\)

One could suggest that “appropriately independent” could mean that the agent's behavior did not become a part of the “active circuit of events” which led to harm. For example, an agent who was rushing his fatally wounded daughter to a hospital did not stop the car to distract a hungry bear from catching a woman running away from it. Nor did the agent release the bear from a cage to begin the chase. The agent failed to become a part of the circuit of events.

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\(^{38}\) Woolard 2012, 450, ibid.

\(^{39}\) Woolard 2012, 450, ibid.
Woolard uses Jonathan Bennet and Jeff McMahan's accounts of doing and allowing creating clearer definitions:

Foot's account is thus more promising than Quinn's account as an analysis of the doing /allowing distinction. For Foot recognizes that withdrawal of aid can count as merely allowing harm. I also suggest that, properly interpreted, Foot can recognize that some cases of removing a barrier to harm involve doing harm. I suggest that when an agent removes a barrier that belongs to the victim, the harmful sequence is not appropriately independent of the agent. Had the agent not interfered, the sequence would have come to a halt, held back by barriers that do not require any contribution from the agent. I suggest that Foot should count such cases as sustaining a harmful sequence: keeping it going when it would otherwise have stopped. However, the very fact that it is unclear how Foot's account should be interpreted reinforces the earlier criticism. Foot's account is essentially incomplete. It does not tell us enough about what it is for a sequence to be independent of an agent's behavior. Nonetheless, I believe that Foot's account points us in the right direction. Roughly speaking, I suggest that a harmful sequence is independent of an agent's behavior if and only if and the harm runs through a negative fact about the agent's behavior or resources.

Negative facts tell us something is not the case: you did not move Charlie from the boulder's path; the net was not underneath Imperiled Person; the respirator is not running. Thus when the link between the agent and the harms runs through a negative fact about his behavior or resources, the agent is only relevant to the sequence through the absence of some condition that he could have maintained in order to prevent the sequence. His behavior counts as a condition for the sequence rather than part of the sequence.\textsuperscript{40}

At worst, it seems that Foot's account of doing and allowing, both conceptually and in justification of the moral distinction, is, as Liu claims, explanatorily incomplete. Nonetheless, Foot's analysis remains a relevant development in the discussion of the DDA.

1.4b Warren Quinn's notion of the DDA

Warren Quinn's account of the DDA has often been called the action-omission interpretation of the DDA. Quinn held that harmful inaction was less bad than harmful

\textsuperscript{40} Woolard 2012, 455, ibid.
action. Quinn held that culpability of a harmful act was stronger than a harmful inaction because actions exist in a sense that inactions do not. Quinn, following Foot’s lead, grounded his claims by giving precedence to negative rights over positive rights. The following analysis of Quinn’s account of the DDA will provide a summation of his definitions and his supporting discussion of rights. Quinn defines harmful doing and allowing as follows:

A state of affairs counts as a typical doing if and only if the harm is brought about by the agent’s action. A state of affairs counts as a typical allowing if and only if the harm is brought about by the agent’s inaction or omission.41

For example, Bob’s body acts as life support for Mitchell whose liver and lungs have failed to work. Through a series of complex connections, Bob’s liver filters the toxins from Mitchell’s digestive tract and Bob’s lungs supply Mitchell’s body with oxygen. Knowing that Mitchell would die soon after disconnecting himself, Bob remains in place until one day one of the connections suddenly becomes loose. Bob, who no longer wants to support Mitchell, decides to not reconnect himself. Bob does not act to prevent harm. Bob allows harm to befall Mitchell.

Given the same circumstances, Bob still connected to Mitchell contemplates how he may end the dependent relationship he has with Mitchell. Bob smothers Mitchell and disconnects himself from Mitchell’s body. Mitchell’s death is a direct consequence of Bob’s action. Bob acts to harm Mitchell. Bob does harm to Mitchell.

Actions according to Quinn are adopted from the Anscombe-Davidson conception—“individual actions are concrete particulars that may be variously described.”42 So, for Quinn, actions exist in a sense whereas inactions do not exist:

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41 Quinn 1989, 301-2, ibid.
To say that John hit Bill yesterday is to say that there was a hitting, done by John to Bill, that occurred yesterday. To say that John did not hit Bill, on the other hand, is to say that there was no such hitting. Taking things his way, the distinction between harmful positive agency and harmful negative agency would be the distinction between harm occurring because of what the agent does (because of the existence of on of his actions) and harm occurring because of what the agent did not do but could have done (because of the noninstantiation of some kind of action that he might have performed).43

Quinn, like Foot, holds that the force of the doctrine of doing and allowing is found in the precedence that negative rights have over positive rights, or the precedence thesis:

Negative rights are claim rights against harmful intervention, interference, assault, aggression, etc. and might therefore naturally seem to proscribe harmful positive agency, whether by action of the agent himself or by action of some object to which, by strategic inaction, he lends a hand. Positive rights, on the other hand, are claim rights to aid or support, and would therefore seem to proscribe harmful negative agency. Foot's idea seems to be that general negative rights are, ceteris paribus, harder to override than general positive rights. And while this seems intuitively correct, it is not obvious why it should be so.44

According to Quinn, Foot claims that the precedence thesis holds true because “general negative rights are...harder to override than general positive rights.”45 Quinn also holds that the precedence thesis is true but does not appeal to intuition as an adequate explanation. Quinn argues the following:

The moral sense in which your mind or body is yours seems to be the same as that in which your life is yours. And if your life is yours then there must be decisions concerning it that are yours to make-decisions protected by negative rights.46

Quinn argues that it is morally understood that each person, in a sense, possesses his or her own life. While it is not exactly ownership or property to that person, Quinn argues

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42 Quinn 1989, 294, ibid.
43 Quinn 1989, 294, ibid.
46 Quinn 1989, 309, ibid.
that each person *should* have a say to a certain extent over interference with that life. Quinn argues that it is important to give moral weight to each person’s stake in what happens to each person’s life. By giving precedence to other’s general interests, as is done in consequentialism, Quinn argues that a grave price is paid:

Barring great emergencies, we think people's lives must be theirs to lead. Not because that makes things go best in some independent sense but because the alternative seems to obliterate them as individuals. This obliteration, and not social inefficiency, is one of the things that strikes us as appalling in totalitarian social projects for example, in the Great Cultural Revolution.\textsuperscript{47}

In other words, a sense of individualism or a proper moral image of self is lost when giving priority to the interests of others:

We feel, I believe, most strongly about assaults on our minds. Here most of us are far from minimalists about the precedence of negative rights. The idea that against our will we could justifiably be brainwashed or lobotomized in order to help others cuts deeply against our sense of who and what we are. Here it seems the sense of our own rightful say leads almost to absolutism. We feel less strongly about our persons (at least those parts that do not directly affect our minds) and labor.\textsuperscript{48}

Negative rights like the claim of noninterference protect against “any assaults on our minds.” Quinn supports his claim of the precedence of negative rights with the claim that a proper conception of humanity or personhood are protected by negative rights. Quinn doesn’t explicitly state that the proper conception of personhood is a value of sorts. However, by saying that “we feel...most strongly about assaults on our minds” Quinn seems to imply a general, strongly held value which seems to conflict with any

\textsuperscript{47} Quinn, 1989, 310, ibid.
\textsuperscript{48} Quinn 1989, 310, ibid. It should be noted that the Quinn describes harmful interference as harm done to the mind. Specifically, he discusses lobotomies and brainwashing as grave cases of harmful interference with the mind. This differs slightly from the discussion of this thesis that discusses harmful interference with life. In these cases, he discusses the importance of he human mind in moral philosophy. This does not exclude harmful interference related to life and death. Harmful interference with the mind is simply one aspect of the whole that Quinn argues should be protected.
notion that morality allows that one person may be justifiably harmed, “lobotomized or brainwashed,” for the sake of the general welfare. Kai Draper discusses the values of well-being and autonomy as those protected by the right of self-ownership, a discussion which will be elaborated on in section 1.4c. There is significant overlap between the arguments of Quinn and Draper, though Draper argues for a pure rights account of harm. This overlap suggests that the DDA may be saved after all given the agreement between each account.

Quinn, like Foot, finds a fundamental disagreement between consequentialism and ordinary, moral intuitions about harm. He argues that there is still danger in a moral system, consequentialism for instance, that gives some authority to persons over personal interference but still allows for personal authority to be overridden when it serves the best interests of others: “A system that gave you some authority over what might be done to you but allowed us to kill or injure you whenever that would even slightly maximize the overall good would seem a form of tokenism.”

Quinn was motivated to explain the DDA as he claimed, “it stands in apparent opposition to that most general of all moral theories, consequentialism.” Foot and Quinn have similar goals in rejecting utilitarianism, or the larger moral theory of consequentialism: “Were morality to withhold it, were it to allow us to kill or injure him whenever that would be collectively best, it would picture him not as being in his own

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49 Quinn, 1989, 311, ibid. In this part of Quinn’s essay, he is making the argument that consequentialism cannot make amendments to prevent sacrificing people for the greater good. An amendment that allowed people some authority would still be overruled by the precedence that good outcomes take over that authority. Quinn is making the point that such an amendment would only be a “form of tokenism” or would give the appearance of a solution without really solving the problem for consequentialism.

50 Quinn 1989, 288, ibid.
right but as a cell in the collective whole.”

In essence, the DDA takes into account that those affected by harms are persons. In other words, when Mary is running away from her captors and the only path to safety is one where she must knock over several people to bridge the way across a river, those people are not reducible to tools or instruments that Mary may use in order to save her life. Even if Mary is the president of the United States and her survival would bring great happiness to the masses, she is not permitted to treat persons as less than they are.

In essence, utilitarianism and other forms of consequentialism can lead to extreme injustice because the priority or precedence is given to the interests of others over the interests of self. As Quinn stated, persons are regarded as a “cell[...s] in the collective whole.” Basically, a moral principle should not justify sacrificing the persons regardless of the size of the evil that could be prevented. Quinn originated a detailed discussion of the value of autonomy as impossible in a consequentialist moral system.

The DDA recognizes that:

...A person is constituted by his body and mind. They are parts or aspects of him. For that very reason, it is fitting that he have primary say over what may be done to him—not because such an overall arrangement best promotes human welfare, but because any arrangement that denied him that say would be a grave indignity. In giving him this authority, morality recognizes his existence as an individual with ends of his own—an independent being.

Quinn is discussing the difference between a moral principle which prioritizes general welfare and a moral principle with a strong respect for autonomy, ”giving him this authority, morality recognizes his existence as an individual with ends of his own—an

\[51\text{ Quinn 1989, 309, ibid.}\]
\[52\text{ Quinn 1989, 309, ibid.}\]
independent being,” that may or may not be balanced with interests of the general welfare.\textsuperscript{53}

Quinn does not discuss an agent as a person. However, this notion seems to a potential extrapolation from the DDA. When Judith is faced with the decision to save an elderly woman on the first floor of a burning building or save the five young couples on the top floor about to crash, the DDA does not expect Judith to maximize the overall happiness of the people in the building. The DDA is a principle that understands Judith to be a person with limitations. Morally the expectation is that she \textit{does what she can within reason}.

**1.4c Kai Draper**

Kai Draper holds that DDA does not provide the best explanation for cases like Foot’s trolley problem and problem of abortion. He claims that the DDA is not \textit{necessary} to explain these cases. He claims that the “DDA only approximates the truth and that the moral difference...must be explained in terms of some moral principle or principles distinct from that doctrine.”\textsuperscript{54} Furthermore, Draper holds instead that \textit{rights alone} can explain the difference between harms in such cases. After discussing Draper’s argument against the DDA and for his right's account, Draper uses the following cases to illustrate the DDA’s flaws:

\textit{No Heroics}: A stray arrow (tipped with a deadly poison) is headed right at Jones. You know that the arrow will strike and kill him unless you sacrifice your own life by moving in front of him. You choose to preserve your own life.

\textsuperscript{53} Quinn 1989, 309, ibid.
\textsuperscript{54} Draper 2005, 254, ibid.
Shield: A stray arrow is headed right at you. You know that the arrow will strike and kill you unless you sacrifice the life of Jones by pulling him in front of you. You choose to preserve your own life.\textsuperscript{55}

Draper’s rights-based account of harms will be discussed as an important objection to the relevance of the DDA as an explanation of harms. Draper’s account provides both a negative objection to the DDA and his own positive explanation of harms.

Draper’s negative objection to the DDA is that the DDA is \textit{extensionally inadequate}. By this, he means that the DDA offends, what he calls, “moral common sense.” Cases like \textit{No Heroics} and \textit{Shield} illustrate a generally accepted difference between harms. Typically, Draper claims, these cases could be seen as the difference between doing and allowing harm. By using these particular cases, Draper takes one particular view of the DDA: an agent chooses the direction of harm toward himself or another. In the first scenario, \textit{No Heroics}, the agent’s life is indirectly in the path of harm if he chooses to save the life of Jones. In this sense, the agent \textit{allows} harm when he chooses not to forfeit his life to save someone else. In the second scenario, \textit{Shield}, the agent’s life is in the direct path of harm. In this sense, the agent \textit{does} harm by using Jones’s body as an instrument to block injury to himself. Draper presents these cases as classic examples of doing and allowing. Draper holds that these cases \textit{do} show a difference between harms, but that these harms cannot be split into the categories of doing and allowing.

Foot’s account, for example, according to Draper, is extensionally inadequate. Foot’s notion of \textit{enabling} is a popular example of how the DDA wrongly classifies the

\textsuperscript{55} Draper 2005, ibid. It should be noted that the DDA is not a principle about stray arrows and how to avoid getting hit. Test cases like these are problematic in either supporting or overturning the DDA because they rely on overly simplistic events.
moral aspects of a state of affairs. Foot classifies *enabling* as a type of allowing but “as more than one writer points out, at least some instances of enabling a harmful sequence to complete itself belong in the doing column of the DDA.”56 The reason that Foot included enabling into her account of the DDA was to identify a type of *allowing* that *seemed* to look like doing harm. Draper uses enabling harm to show that Foot is wrong in her classification—there are times when enabling harm *is* doing harm. Enabling is an example of how the DDA is extensionally inadequate, the distinction does not hold consistently across test cases. For Draper, each account of the DDA that follows Foot’s is guilty of the same offense: each account is out of line with moral common sense. Draper claims, “these difficulties can be avoided, however, if we abandon DDA and explain the moral difference...in terms of the moral rights possessed by the relevant parties.”57

Draper’s negative argument against the DDA is that the DDA is extensionally inadequate based on its failure to apply consistently to cases like *No Heroics* and *Shield*. Draper clearly shows that various accounts of the DDA, like Foot’s and Quinn’s, can mistakenly classify certain *harmful doings as harmful allowings* and vice versa. Draper attributes these errors of classification to the DDA’s mere approximation of truly describing the moral difference in these cases of harms. For Draper’s negative analysis to hold, his test cases must include the essential aspects of typical cases of doing and allowing harm. His cases include elements that are important to the DDA including the harmful agency and responsibility. However, the simplicity of these cases lacks the

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56 Draper 2005, 259, ibid.
57 Draper 2005, 265, ibid.
complexity of real cases where more issues are involved than simply DDA. For example, a cancer patient who only experiences temporary moments of lucidity requests that a doctor removes all treatments. This case involves more than a question of doing or allowing harm. It involves questions of patient autonomy, consent, paternalism, beneficence, etc. Draper uncovers a significant problem for the DDA. Test cases assume a binary picture of harm in the DDA. However, harms fail to be so neatly and tidily classified. The best objection to the DDA that relies on the binary picture of harms will be limited in its potency because the binary of picture of harms itself is extensionally inadequate.

According to his own binary picture of harms, Draper holds that certain harms are worse than other harms depending on whether harms are just or unjust. Unjust harm is harm that “results from an infringement upon rights.” Just harm does not infringe rights though it results from “a foreseeable consequence of the relevant agent’s behavior.” Draper appeals to need rights as a plausible basis for his distinction between just and unjust harms. According to Draper, both the agent and the victim need the entity in some way. The agent needs the car, perhaps to take a loved one to the hospital or even to save his own life. The victim, quite simply, needs the car to stop a train from hitting him:

My analysis requires only “rights to noninterference.” Specifically, it requires only the existence of need rights that entitle the right holder to use an object to meet her needs and to exclude others from acting on that object in ways that would prevent that use. By moving the car off the tracks, you would act on the car in a way that would prevent Jones from using it to survive and so would violate his need right to use the car.

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58 Draper 2005, 268, ibid.
This rights account differs from the DDA because the harm consists not in acting on another person only but instead, acting on some lifesaving entity to which that person has some claim:

The relevant notion of “acting-on” is tied to the power of exclusion that partly constitutes a variety of rights, including the right of self-ownership. For (with few exceptions) when we find that some person B has a right to some entity O, we also find that B has the power to exclude others from acting on O in ways that would result in harm to B (or would otherwise frustrate B’s legitimate aims). Thus, one way to infringe upon B’s right to O is to act on O without B’s (free and informed) consent with the result that B is harmed.  

A lifesaving entity can be something a person requires to prevent harm to self, including the following: property of another agent, the agent himself, or something another agent requires to prevent harm to himself. Draper holds that rights, other need rights, property rights, etc., rights of noninterference, depending on the circumstances, can outweigh other rights. When in harm’s way, a person may need some entity to block the harm, remove him or herself from harm, or decrease the amount of harm. For instance, the entity can be some block to harm like a car that blocks a train from hitting Jones, an example used by Draper. The car is a life-saving entity to which Jones, in a sense, has a temporary claim while his life is in danger.

In the first case, even though you have a property right to the car, Jones has a need right to use it as a shield. This right to noninterference limits your property rights, so that Jones temporarily has the power to exclude acting on the car in a way that interferes with his needed use. Thus, you violate Jones’s need right when you move the car; and so the harm you inflict on Jones is unjust. In the second case, on the other hand, you do not violate a right to noninterference by failing to move the car in front of Jones. If you do violate Jones’s rights, it is because he has a right against you to positive aid. But this right, if it exists, is weaker than Jones’s right to noninterference in the first case.

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Draper 2005, 269, ibid.
For in the second case Jones’s having a right to positive aid would amount to his having a right to *use you* to move your car, and your right of self-ownership constitutes a strong reason not to recognize such a right, and to limit its strength even if, on balance, it ought to be recognized. Thus the harm that Jones suffers as a result of your failure to come to Jones’s aid in the second case is either not unjust at all or else is less unjust in virtue of violating a right to positive aid rather than a right to noninterference.  

Cases become more difficult to analyze when the entity necessary for avoiding harm is the agent himself. For instance, an agent wakes up in a car on train tracks. The car blocks an incoming train from the path of the victim. The agent can save his own life by driving the car off the tracks or save the life of the victim by remaining on the tracks. In this case, there is tension between both the victim's right to noninterference and the agent's right to noninterference—each right to noninterference is analogous to a right to self-preservation.

Draper holds that the *right of self-ownership* is a fundamental need right expressed by the DDA and that it provides sufficient explanation of the moral badness of harms without the DDA. Draper bases his claims about rights on the values of *well-being* and *autonomy* which “generate and shape our rights.” Draper does not include exact definitions of well-being and autonomy. Well-being plays an important role, for Draper, as an important part of the “foundation of need rights.”

Draper discusses well-being as the potential support for the claims of existence of his sort of need rights. Well-being seems to relate to situations where one’s well-being is in jeopardy by some form of harm and the prevention of harm requires certain goods whether the property of another agent or the agent himself. Draper understands

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62 Draper 2005, 275, ibid.
63 Draper 2005, 275, ibid.
well-being to be the value that need rights protect against harms. Well-being is an important concept when discussing harms. A person’s well-being is a state of being that is compromised when harmed. The severity of the harm can be proportionate to how permanent the damage to a person’s well-being.⁶⁴

Draper provides a clearer picture of what he means by autonomy as a *capacity*. Autonomy is view of self-ownership that “it is unfitting for one person to control another, or to treat another as if she were a mere resource to be used for purposes other than her own.”⁶⁵ Whereas well-being is a state, autonomy can be described as a capacity one has for self-mastery. This means that one has the rational ability to consider and choose from various options for various decisions relatively free from internal or external constraints.⁶⁶ The value of autonomy is related to harm in the notion that outside interference, or harm, may limit one’s autonomy. Draper’s analysis provides valuable insight into the relationship between harm and the concepts of well-being and autonomy.

Draper’s pure rights-based alternative to the DDA positively asserts that the greater moral evil of certain unjust harms over just harms is due to the way that rights are violated. Draper’s analysis makes two claims about moral harms. His first claim agrees with the DDA about the existence of a moral difference between harms. He holds that there is a moral difference between the harms in cases like *Shield* and *No Heroics*.⁶⁷ His second claim is about the origin of the difference where the severity of harms as

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⁶⁴ This explanation of well-being is my personal analysis of Draper’s discussion of well-being. I’ve extrapolated from his claims to grasp at his exact meaning.
⁶⁵ Draper 2005, 276, ibid.
⁶⁷ Draper 2005, 273, ibid.
unjust or just based on how *need rights* are violated. Draper’s second claim disagrees with the DDA that holds that harmful states of affairs where harms done are worse than harms allowed. The DDA focuses on *actions* while Draper’s analysis focuses on the *need rights* involved. The primary objection to this analysis rejects both the binary picture of harm in the first claim and the origin of the difference in the second claim. The first part of the objection has been discussed in Draper’s negative analysis. Draper’s straightforward rights-based account seems to provide a robust solution to the problems that the DDA encounters in accounting for the binary picture of harms. However, by rejecting the first claim, that such a binary picture exists, rights may not provide the best analysis for an alternative view. This alternative view of harms is that harms come in degrees. This view will be supported by an axiological basis rather than a basis of rights to account for the measure of harm.

**1.5 Conclusion**

The purpose of chapter one is to set up one of the rights-based defense of the DDA. Rights have been used as a deontological approach to the nonconsequentialist version of the DDA. This chapter has shown that there has been a gradual progression from rights to the use of values. Kai Draper’s own account has used values as a foundation for his rights-based account. The problems with the DDA may stem from the claim that rights, and not value, provides the best explanation. This claim may stem from the binary view of harms. Former versions of the DDA have problems in categorizing a strictly binary system of harms. In the following chapters, axiology will be used to support a spectrum account of harms that come in degrees.
CHAPTER 2

AXIOLOGY AND CONSEQUENTIALISM

2.1 Introduction

Traditional consequentialism, like any moral theory, has been subject to great critical backlash, including the objection from justice. The goal of this chapter is to understand the significance that Fred Feldman's axiological adjustment made to hedonic act utilitarianism in responding to an objection from justice. Feldman's method of response may prove to be a useful template for the DDA in responding to similar challenges. The broad parallel is that both the DDA and simple forms of hedonic act utilitarianism seem to be too simple. The DDA's simple versions, like Quinn's act/omission account, are judged as "extensionally inadequate" so they fail to line up with "moral common sense."\(^{68}\) In other words, the categories in classical forms of the DDA of doing and allowing were too broad and failed to be specific enough to respond to most counterexamples. Likewise, forms of hedonic act utilitarianism have suffered from too simple a formula in the sense that pleasure and pain alone were the sole determinants of value. This led to the objection from justice, which holds that consequentialism is false because it allows for persons to be treated as means; the collective, and not the individual person, is what is morally relevant. Feldman, by

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\(^{68}\) Draper 2005, 254-5, ibid.
adjusting utility with personal desert, seeks to show that it is possible to amend hedonic act utilitarianism so that the objection from justice no longer holds.

This chapter will begin with a section that discusses the recent trends in utilitarian literature, mainly the changes that have been made to deal with various objections to traditional utilitarianism. This part of the chapter will distinguish Feldman's 1995 axiological adjustment from later trends. Claims made in Feldman’s 1995 essay in particular best parallels the DDA as a moral principle. The next section will discuss Feldman’s interpretations of classical utilitarianism and the objection from justice. The next section will go into greater detail in analyzing Feldman's conceptual primitive, as he calls it, of desert. The next section will review Feldman's adjustment method, or how he makes the value of pleasure or pain sensitive to justice with the notion of desert. This method will be discussed as a template of response to the objections that the DDA faces, in particular that the DDA should be abandoned because it is extensionally inadequate; it fails to apply to cases and cannot overcome numerous counterexamples.

2.2 Recent Trends in Utilitarianism

The following section will distinguish between consequentialist accounts that use states of affairs as the fundamental bearers of value and accounts that hold that lifespans are the fundamental bearers of value. The particular meaning of state of affairs will be reviewed. This section will explain the rationale for choosing Feldman’s 1995 axiological account over other accounts which will be reviewed to illustrate the difference.
The DDA focuses on the moral difference between harmful *states of affairs* based upon whether the harm caused by a doing action or an allowing action. Feldman's axiology applies his principle to *states of affairs* as the fundamental bearers of moral assessment instead of a *life as a whole*. Unlike Feldman, contemporary accounts of consequentialism hold that a lifetime is the fundamental bearer of value and answer philosophical questions by examining lifetimes rather than states of affairs. However, states of affairs questions are useful for examining a particular moral principle in particular contexts in certain disciplines like medical ethics. For example, one seeks to know whether it is permissible to provide less information for consent for a patient of lesser intelligence versus a patient with greater intelligence. A state of affairs approach allows a philosopher to focus on a principle across various cases. Feldman's axiological account best parallels the DDA: his account develops a principle that applies to states of affairs.

Utilitarianism has faced objections including the objection from justice. This section will provide survey of recent versions of utilitarianism to show how this moral theory has adapted to modern moral conceptions. A crucial development in the defense of utilitarian theory has been to alter the *bearer of value*. Feldman, in his 1995 essay “Adjusting Utility for Justice” still refers to *state of affairs* as the primary bearer of value value are based on how a particular action in a state of affairs effects the overall resulting value. Mark Textor discusses essential elements that states of affairs must
One conception of states of affairs is that states of affairs involve particulars and properties:

States of affairs directly involve particulars and properties. What does it mean to ‘directly involve’ particulars and properties? ‘Involvement’ is often spelled out further as ‘contains as parts (constituents)’. Pollock is a representative example: “[States of affairs] are ‘about’ objects but not in terms of some mode of representation. States of affairs, in some sense, contain objects as direct constituents.” Hence, the state of affairs of Mont Blanc's being more than 4000 meters high contains (in some sense) Mont Blanc, the mountain with all its snowfields (see for example, Russell 1904, 169).

This sense of state of affairs will be used in discussing utilitarianism and the DDA. Such states of affairs will be morally assessed either for actions or outcomes. States of affairs contain properties and particulars. Unlike propositions which are true or not, states of affairs either obtain or do not obtain. Textor outlines certain conditions to which an adequate theory of state of affairs should adhere:

There seem to be good reasons to posit state of affairs as a sui generis category of object. If states of affairs shall be useful (i) they must exist even if they do not obtain and (ii) must involve objects and properties (relations) directly. (i) is the basic feature that distinguished states of affairs from facts; (ii) is the basic feature that distinguished them from thoughts. Therefore a theory of states of affairs must answer the question how a state of affairs can be directly about objects and properties (relations) and combine them, if the objects don't exemplify the properties (stand in the relations). Although there are promising proposals to answer it, this question is still open.

Current trends in consequentialism have been inspired Derek Parfit's chapter “What makes someone's life go best” in his monumental work Reasons and Persons.

Parfit does not ask the question, what is the right action? Instead, he asks, “What would be best for someone, or would be most in this person's interests, or would make this

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69 Fred Feldman does not provide a definition of state of affairs. I am speculating that Textor’s definition would be an adequate sense of state of affairs that is close to Feldman’s meaning.
71 Textor, ibid.
person's life go, for him, as well as possible?" Parfit calls theories that ask these questions self-interest theories. Notice that Parfit is not asking what is the right-making feature of an action or the well-making feature of a state of affairs. Instead, Parfit is broadening the focus to the lifespan of an individual. In addition, the questions do not ask about what can make the world better, at least not directly—indeed a world full of good lives would be a better world. Parfit is also asking about what makes life better for a person, not what can the person do to make everyone else’s life better.

Consequentialism, utilitarianism included, traditionally aimed at ensuring that every action brought about the best state of affairs or resulted in as much possible pleasure overall. Feldman's desert-adjusted axiology focuses on a state of affairs. This is similar to the DDA as it, too, focuses on the relevant state of affairs related to doing or allowing harm. This section will provide a brief summary of a few accounts that focus on lifespans instead of states of affairs. A lifespan perspective considers ethical questions about how to live. For example, it is one thing to ask what is the best life for Janet to live. For example, if Janet is considering whether to dedicate her life to teaching blind children how to function in society or to engage in insider trading at a business firm, the ethical answer will undoubtedly be different from the economic one.

Parfit classifies three kinds of theories which all claim to answer his question, what makes someone's life go best: hedonist theories, desire-fulfillment theories, and objective list theories. James Griffin provides a theory of informed-desire fulfillment: informed desires are desires for objects that have particular desirability features. Griffin’s

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73 Parfit 2012, 329, ibid.
explanation provides an account of desire in terms of value—value is explanatorily prior to desire. Informed desires are contrasted with an older notion of desires, whose fulfillment is of intrinsic value. Fulfillment of desires, in the old notion, without regard for the object of desires, was thought to be sufficient for making a life valuable. Griffin holds that a particular set of desires, informed desires, are the morally relevant types of desires that, when fulfilled, make a life go well. He explains that desires are informed via reason of an object's desirability features—desires are educated, in a sense, by rational understanding: special objects meet desirability criteria worth pursuing. Desire is shaped by the appreciation of the nature of its objects. Rationality is a unique addition to Griffin's account—reason was often regarded as the fundamentally opposed to passion or desire. Griffin argues that a life goes well depending on the proper dual operations of reason and desire as a ground for the worthwhile desires to flourish.74

Richard Kraut defends an account of *worthwhile objects* or objects which are desirable and whose pursuit leads to worthwhile lives. Kraut too is answering the question *what makes a life go well* or, in his words, makes life worthwhile. Desires that are worth fulfilling "are those that organize our lives and lead to projects that absorb considerable time and energy."75 Kraut answers the question of what makes a life go well by defining *goodness* in the following way: there are certain desirable characteristics, features, or traits an object must have in order to warrant the fulfillment of my desire for it. So, "what makes one's life a good one is one's caring about

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something worth caring about.” Kraut's purpose is to show why certain lives are more valuable than others depending on what types of desires are fulfilled. He claims that other theories about desire fulfillment define ‘desire’ too broadly and are open to too many counterexamples. His view, he says, is controversial because it dismisses the claim that pleasure is intrinsically good and pain is intrinsically bad. Pain, Kraut argues, is almost always relationally bad, but it is because it “is an animal's generally reliable mechanism for keeping it out of harm's way, and this applies no less to human animals than others.” In essence, the goodness or badness of pleasure or pain turns on the characteristics of the stimulating object. Kraut concludes that it is reason, not desire, which picks out these characteristics. His account, he claims, explains the plurality of goodness, provides an accurate account of well-being which does not lead to counterexamples, and does not rely on the inadequacies of desire theory.

Fred Feldman used axiology in two essays to respond to different ethical questions. In 1995, Feldman uses axiology to answer the question: how can one maximize utility in a state of affairs without injustice? His 1995 essay differs from his subsequent writings in that he focuses on a state of affairs rather than a lifetime. Such a future writing includes his 2002 essay wherein Feldman provides an axiological account of what makes life go best. Feldman holds that hedonism can be saved by arguing from an axiological standpoint. Feldman holds that the fundamental value is attitudinal hedonism: “A mode of consciousness...a way of being aware of a state of affairs.”

Axiology allows for a nuanced view of consequentialist principles where the values of

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76 Kraut 1995, 319, ibid.
77 Kraut 1995, 320, ibid.
fundamental goods are affected by other values including the worthiness of objects, the truthfulness of a state of affairs, the value of enjoyment of attitudinal pleasure, and the desert of the subject. His 2002 work is an evolved version of his 1995 reply to an objection from injustice. An analysis of his 1995 work has been done due to its parallels to the DDA. The DDA is a principle that focuses on states of affairs and not on lifetimes. In 1995, Feldman introduces a simple axiology that makes utility sensitive to justice by adjusting utility for desert. This thesis holds that the concept of desert can be used to understand the degrees of harm in each different state of affairs.

2.3a Traditional Utilitarianism and Axiology

The following analysis of Feldman’s reply to the objection from justice will include an explanation of the difference between consequentialism and its axiology, Feldman’s understanding of the meaning and implications of the objection from justice, and his reply to the objection which includes an explication of his notion of desert.

Feldman replies to the objection from justice that holds that consequentialism allows for injustices. Feldman chooses to defend a form of hedonic act utilitarianism that is a type of consequentialism. Consequentialism holds that the relevant element in determining the moral normative status of an action or state of affairs is its outcome or consequences. This idea is captured in a central principle of utilitarianism, (C), which holds that “an act is morally right if and only if it maximizes intrinsic value.”

Utilitarianism is a type of consequentialism that holds that utility is the good that should be maximized by an action or state of affairs. Hedonic act utilitarianism holds

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79 Feldman 1995, 569, ibid.
that utility is maximized when the greatest pleasure over pain is achieved. Geoffrey Thomas states “Utilitarianism can be understood as involving six claims:”

1. **Results**: The rightness of an action is judged to be in terms of its results (consequences) for welfare.
2. **Metricity**: Welfare can be, and is to be, measured in terms of realization of intrinsically valuable states of affairs.
3. **Unity**: The relevant values are either all of one kind or at least form a consistent set.
4. **Personal decision-making**: In deciding what actions to do, the individual agent’s intention should be to maximize welfare.
5. **Aggregation**: All agents are to do likewise, as so welfare will be maximized by the whole society, so far as results match intentions.
6. **Definition of welfare**: The single value, or consistent set of values, can be specified.\(^80\)

Consequentialism is typically “based on the idea that on each occasion of moral choice, there are several possible acts available to the agent.”\(^81\) The following test case will be used to illustrate the application of the consequentialist principle:

**Test Case One (TC1):** Donna is a single mother with two sons. One is dying from cancer and the other is healthy but hungry. She has one ration of food and must choose whom to feed. The possible acts she could choose are to feed the boy dying from cancer and not the healthy son; feed the healthy son and not the son with cancer; feed neither and eat the bread herself; etc.

Feldman then explains that for “each alternative, there is a 'total consequence.'” The total consequence of each alternative or each action is “the combination of all the things that would happen as a result if the alternative were performed.” The following versions of TC1 demonstrate the options available to Donna.

**TC1a:** The total consequence of Donna feeding the boy with cancer is that he throws up the ration from his nausea medicine and the healthy boy has an empty stomach. The total consequence of feeding the dying boy is that the healthy boy grows a little weaker.

\(^80\) Thomas 1993, 71, ibid.
\(^81\) Feldman 1995, 568, ibid.
TC1b: Donna feeds the healthy boy. The boy with cancer dies.

TC2c: Donna eats the food herself. The boy with cancer dies and the healthy boy grows weaker.

Hedonic act utilitarianism then isolates how much pleasure and pain is produced as a result of Donna’s action in each scenario. According to the the C principle, the action which produces the best state of affairs or the state of affairs with the most pleasure over pain is the right action. Say, for example, that TC1a produces the best pleasure over pain as the boy with cancer lives one more day comfortable; his healthy brother is happy to see him fed; and the mother is happy to have one more day with her son. TC1a would be the action that produced the best outcome and, therefore, is the right action.

Feldman chose to use hedonic act utilitarianism (hereafter referred to as utilitarianism) as the object of his analysis in responding to the objection from justice “in virtue of its simplicity and familiarity.” This form of utilitarianism differs from hedonic rule utilitarianism and other forms of consequentialism in that the focus is on act tokens and their resulting pleasure or pain. An action maximizes intrinsic value “if and only if no alternative has a total consequence with greater intrinsic value.” According to Feldman, a typical utilitarian theory needs "a ranking of total consequences in terms of intrinsic value...for each possible total consequence, there is a number indicating the total intrinsic value." Feldman uses numbers to represent different amounts of intrinsic value. For example, an action which leads to a state of affairs with a higher intrinsic value would be represented with a larger number than another action which would lead to a state of affairs with a lower intrinsic value. In essence, the higher the

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82 Feldman 1995, 568, ibid.
83 Feldman 1995, 569, ibid.
84 Feldman 1995, 569, ibid.
intrinsic value the larger the number. The lower the intrinsic value the smaller the number.

The experience of pleasure or pain is regarded as what matter morally when judging which course of action to take. The experience of pleasure or pain is not pleasure that is experienced by the agent prior to acting or during action. Instead, the experience of pleasure which counts to utilitarianism is the outcome of a particular action. The pleasure or pain experienced because of certain actions is not limited to the agent alone but to anyone who stands to be benefitted or harmed by a certain act. For example, Jennifer gains great pleasure from thinking about kinds things that she will do for her sister, Marge. However, those thoughts alone do not make an action morally right. Jennifer, for instance, does the right thing, morally, when she takes care of Marge when sick and when she watches Marge's children when Marge is sick. The right-making feature of Jennifer's actions is that they bring great pleasure to Jennifer, Marge, and everyone else involved. Not only is the right action one that brings some pleasure, rather, the right action is right if and only if it leads to the best state of affairs. The best state of affairs will be the one that maximizes intrinsic value or brings the greatest amount of pleasure over pain to all affected. The measure of the amount of pleasure or pain that is experienced in an episode is the hedonic level.

The axiological component of utilitarianism is the part that establishes which thing is good, like pleasure, and how it ranks with other goods, like wisdom. The normative principle, C, comes into play when the act which maximizes intrinsic value is said to equal the right action. Feldman focuses on the axiological component as the
problem area for utilitarianism concerning justice. This means that Feldman can solve a problem for consequentialism by modifying the axiology.

The typical axiology of utilitarianism supervenes over hedonic level (or the amount of pleasure or pain). Experience of pleasure results in an equal increase in intrinsic value because episodes of pleasure are the fundamental value of hedonism and all other values are subordinate. If I experience anything but pleasure, for example I experience an increase in wisdom from certain life events or actions, while that level of wisdom may or may not bring me pleasure, it, by itself, will not raise the hedonic value.

The final formula for hedonic act utilitarianism, according to Feldman, is C+H:

C+H: An act is morally right if and only if it maximizes intrinsic value; pleasure is intrinsically good and pain is intrinsically evil or bad.

C represents the consequentialist principle that the right action maximizes intrinsic value couples with H, hedonism, which specifies that the intrinsic value is pleasure.\(^8\) Pleasure is an intrinsic good and pain is an intrinsic evil or bad. Pain is considered to be the opposite, or deprivation, of pleasure. A state of affairs, in other words, is made worse when pain is present. An agent following the consequentialist principle would be required to minimize pain as part of maximizing overall intrinsic value. The net balance of costs and benefits, pain and pleasure, is the total intrinsic value in a state of affairs.

Feldman focuses on the H aspect of C+H. H is the axiological component which identifies which goods have value and how those goods stand in relationship with other goods. Feldman modifies H in order to save C+H from the objection from justice.

\(^8\) Feldman 1995, 570, ibid.
2.3b Objection from Justice

According to the objection from justice, the utilitarian formula yields an injustice in its moral obligation, some philosophers may “say that consequentialism is false.” Consequentialist considerations can lead to injustice because the theory fails to “take seriously the distinction between people.”

The moral obligation of utilitarianism, according to C+H, is to maximize intrinsic value of pleasure and pain. Beyond those two values, there are no other considerations. Other subordinate or instrumental values may be considered but only if they lead to more pleasure and less pain. In the eyes of the utilitarian, the only morally relevant feature of an action is whether it will lead to more pleasure or pain. Consequently, certain means would seem to be morally wrong, like murder or rape, would could be considered morally permissible if they achieve the hedonic end. A common objection to consequentialism is that the end always seems to justify the means. In other words, as long as there is more pleasure than pain in the end overall other acts and means to the end, the course of action taken does not matter. John Rawls discusses utilitarianism's notorious difficulties with justice. According to the classic forms of utilitarianism, a certain course of action is morally right if it produces the greatest sum of satisfactions. And, as Rawls points out, the perplexing implication is “...that it does not matter, except indirectly, how one man distributes his satisfactions over time.” By how, Feldman takes Rawls's meaning to be that utilitarianism is only concerned with the end of an action, not with means of an action. C+H principle defines that the right action is the one that produces the greatest pleasure over pain. By broad terms of this

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86 Feldman 1995, 572, ibid.
principle, justice, the sense that that justice happens when someone gets what he or she deserves, is not possible. Injustices are possible because C+H does not define who should get what pleasures and pains. Feldman concludes the passage with Rawls’s objection that this is how “utilitarianism does not take seriously the distinction between persons.”

2.3c Feldman’s Notion of Desert

Feldman discusses the view of desert he uses to adjust utility for justice. He arrives at desert from the particular type of justice he is responds to in Rawls’ objection from justice:

My conception of justice is based on the ancient and plausible idea that justice is done when people receive goods and evils according to desert. The closer the fit between desert and receipt, the more just the outcome. Other things being equal, the more just the outcome is the better.

Feldman seems to aim at a principle of justice rooted in the legal usage “justice was served when the murderer was hit by a car” or in the colloquial usage of someone getting their “just deserts.” In other words justice is served if and only if a person receives exactly what he/she deserves. The notion of desert Feldman uses is primitive and broad. While he does not provide a strict sense of the word, he provides enough information about the features of desert for his purpose. Feldman’s goal is to show how consequentialism can be modified, and thus requires only a conceptual primitive.

While Feldman’s notion of desert is broad, the sense he uses should be familiar. People frequently appeal to desert when they say that a vicious criminal “deserves to rot.

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in jail,” that a sick child “does not deserve to suffer,” or how those who have worked hard without recognition “deserve their day in the sun.”

Roughly, to say that a person deserves some good is to say that a person deserves some good is to say that it would be “distributionally appropriate” for him to get it. I assume that the desert is a matter of degree, so that it makes sense to say that a certain person deserves a certain pleasure or pain to a certain extent.\(^89\)

Feldman draws meaning from his notion of distributive justice as opposed to retributive justice. Retributive justice is a notion of revenge where a subject aims to correct a past wrong by returning a future wrong of equal or greater value. According to distributive justice, Feldman will be concerned with how goods and evils, episodes of pleasure and pain, are distributed and to whom.

Desert has three ingredients, according to Owen McLeod's summary of desert concept: the subject, object deserved, and the desert basis.\(^90\) The subject of desert is the human being who deserves something. Feldman identifies pleasure and pain as the objects of desert, however, many different facts relate to the desert basis for receiving pleasure or pain. Feldman holds that there are three facts that influence desert basis: a subject’s deficient or excessive past receipt of desert, moral worthiness, and relevant moral rights and claims:

One of these [facts] is excessive or deficient past receipt. Excessive past receipt lowers your desert level; deficient past receipt increases it. To see how this works, imagine a case in which there are two possible recipients for some good. Suppose the potential recipients are alike in all relevant aspects except that one of them has already received more of that good than the other. Then, since other things are equal, the one who has so far been short-changed has greater desert.

\(^89\) Feldman 1995, 573, ibid.
His desert level for the good is greater than the desert level of others who have already received more.\footnote{Feldman 1995, 574, ibid.}

A recipient's \textit{moral worthiness} may have an impact on his desert level, too. Suppose two potential recipients of good are alike in all other relevant respects, except that one of them has been good, whereas the other has been bad. Then the one who has been good has greater desert. If no other factors complicate the case, it would be more just for the good to be given to him.\footnote{Feldman 1995, 574, ibid.}

A third factor is based on rights and claims. Other things being equal, someone with a \textit{legitimate} claim on some good has greater desert relative to that good than does someone with less claim on it. Thus, if two recipients are in other respects similar, but one legally owns the means to a certain pleasure and the other does not, then the owner deserves more to have the pleasures arising from ownership of that object.\footnote{Feldman 1995, 574, ibid.}

Feldman concedes that he takes a few liberties with the notion of desert. In order to adjust the traditional hedonic axiology, Feldman allows his conceptual primitive of desert to come in \textit{degrees}, where there can more or less of it, “so that it makes sense to say that a certain person [subject of desert] deserves a certain pleasure or pain to a certain extent.”\footnote{Feldman 1995, 573, ibid.} The bearer of intrinsic value, episodes of pleasure and pain, also comes in degrees. Feldman represents \textit{desert} level with numbers from a small amount of desert, 1, to a large amount of desert, 10-desert, like pleasure is on a scale. Such a flexible notion of desert allows for its extension to a number of cases. For example, a loving mother who has been separated from her child because the child was kidnapped \textit{deserves} to find her child more than a mother who abandoned her child. The deserving mother may gain the same amount of pleasure as the undeserving mother in the reunion, but, since the loving mother's desert level is greater, the intrinsic value of her reunion with her child will be greater when she receives what she deserves.
It is important to note that desert is not defined here in terms of *moral obligation*. The statement that a person deserves some good is not equivalent to the statement that she ought to get it, or to the statement that someone else ought to provide it. In some cases, although someone deserves some good, no one is in position to provide it; in other cases, for various reasons, some other considerations overrides the demands of justice. So the statement that someone deserves something does not entail the statement that she ought morally to get it. Equally the statement that someone ought to get a certain good does not entail that she deserves it. If the results would be good enough, there would be a case in which someone morally ought to give a certain good to a certain recipient, even though the recipient does not deserve it.\(^{95}\)

Moral obligations are normative, things one ought to *do*, e.g duties, rules, like telling the truth and keeping promises. In other words, moral obligations are about what is morally required of an agent. Desert is also normative but focuses on what one should *receive*. Feldman uses desert to make pleasure, a moral good, more valuable when the subject of desert *deserves* to receive that particular pleasure. However, Feldman is not *required* to give anyone a certain amount of pleasure. The axiological focus is the value of pleasure and its relationship with desert.

**2.3d Feldman’s Adjustment Method**

Utilitarianism faces a plethora of old and new problems, one being the objection from justice. Feldman responds to this objection by employing what will be called the *axiological adjustment method* or, simply, *adjustment method*. The general approach is as follows:

*Adjustment Method:* the value of utility is increased or decreased by another factor like desert.

Feldman locates the problem of justice as not a problem with the utilitarianism as a moral theory but in the “axiologies traditionally associated with

\(^{95}\) Feldman 1995, 574-75, ibid.
consequentialism.\textsuperscript{96} In other words, the problem is not with C, but with H in the C+H theory. The axiology is the part of the consequentialist principle which identifies what is of value and how that value is ranked.\textsuperscript{97} For example, the axiology behind utilitarianism identifies pleasure and displeasure as the fundamental bearers of value so each instance of pleasure or pain equals a certain amount of value. The consequentialist goal is to make choices or perform actions that will lead to the greatest overall value. However, the focus of Feldman's project is to focus solely on the value itself and how that value may be affected by other considerations.

Traditional utilitarianism relied on a binary scale of intrinsic value, the level determined by positive hedonic value and the negative value, pleasure and pain:

\textit{Pleasure principle, H:} the total amount of pleasure or pain, the hedonic level, of the individual persons in a state of affairs equals the net intrinsic value of each the state of affairs.\textsuperscript{98}

In other words, amount of pleasure or pain, equals the intrinsic value of a state of affairs. Feldman defined the \textit{hedonic level} as amount pleasure or pain episodes produced in state of affairs. In other words, the only relevant matter in choosing the morally right action is the level of pleasure or pain produced. All other features of a state of affairs at any other time are secondary to the hedonic level.

Hedonism, as the sole determinant of value, was too simple, like Quinn's version of the DDA, to account for the complexities of actual cases. The clear danger is the possibility of injustice that stems, according to Feldman, from an overly simple

\textsuperscript{96} Feldman 1995, 572, ibid.
\textsuperscript{98} Feldman 1995, 569, ibid.
axiology. This danger becomes apparent when offering certain injustice inspired test cases:

TC2: Mary owns a fortified house during the zombie apocalypse and a horde of zombies enters the house. Mary must quickly decide whom to save. She can either save her only child and nephew trapped upstairs. Or she can save a band of nine strangers, all of whom killed her husband during a raid, on the first floor.

Mary, according to the pleasure principle, would produce the greatest value by rescuing the band of nine strangers as they would all be happy to survive the invasion of the zombies. Their happiness would cancel out the pain of the children and Mary's pain of losing her loved ones. According to the pleasure principle the following numbers could apply:

TC2a: Mary saves the nine strangers and herself where each person counts as one positive unit of pleasure or one negative unit of pain: 10-3=7 or a value of 7

TC2b: Mary saves her two loved ones and herself: 3-10=-7 or a value of -7

TC2c: Mary saves no one. Everyone dies: -13

The numbers may not accurately portray the true hedonic levels. Mary may feel more displeasure than is represented. Those saved or left behind may feel more pleasure or displeasure. The point is that the collective pleasure or pain experienced can override the pleasure or pain experienced by the few. Injustices, in other words, are more likely because value is only dependent on one moral consideration: the experience of pleasure or pain. Parental and family bonds are of no moral import. Past behavior of the people receiving pleasure is not considered—recall that the strangers murdered her husband. Even if the entire band of ten strangers were holding Mary and her family hostage, the pleasure principle would hold steady. The best action morally, according to utilitarianism, would remain TC2a in which Mary saves the nine strangers. Feldman's
adjustment to pleasure includes a notion of desert that adds a complexity to the hedonic formula that would prevent scenario TC2a to have the greatest value.

Feldman introduces two variables which will affect the intrinsic value of an episode of pleasure or pain: “(i) the amount of pleasure or pain the recipient receives in that episode, (ii) the amount of pleasure or pain the recipient deserves to receive in that episode.”99 His theory states the following:

Pleasure is generally intrinsically good; but is better if it is fully deserved, and it is less good if it is not deserved. In extreme cases, if it is undeserved, it may be worth much less—indeed, it may be worthless or even bad. Pain, on the other hand, is generally intrinsically bad. However, it is even worse when the person who suffers it does not deserve it. It is less bad—and may be even good—if the person who suffers it fully deserves it.100

The value of pleasure or pain is no longer unaffected by particular circumstances. The value of pleasure can now be increased or decreased depending on whether the person deserves the pleasure he receives and likewise with the value of episodes of pain. In everyday judgments of how moral someone is, one does not solely consider how much pleasure or pain one has brought to the world. Surely, one's contributions to the world, how one has made the world better or worse, matters morally. However, that alone is not the single factor one considers when sizing someone up morally or whether they've done the right thing. For example, Mary's husband, were he still living, would think her choice, saving the strangers instead of her family, morally reprehensible. Feldman's desert-adjusted axiology now better reflects important features of moral decision-making that had before been irrelevant.

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100 Feldman 1995, 575, ibid.
After adding *desert* and *receipt* as variables, Feldman explains that "part of the content of the axiology may be expressed by some principles about desert and receipt:"\(^{101}\)

JH: The intrinsic value of a state of affairs equals the hedonic level of pleasure received as adjusted by pleasure deserved.

Feldman provides six principles (P1-P6) which each "governs a class of cases involving a range of receipt and desert levels."\(^{102}\)

- **P1:** Positive desert enhances the intrinsic goodness of pleasure.
- **P2:** Negative desert mitigates the intrinsic goodness of pleasure.
- **P3:** Neutral desert neither enhances nor mitigates the intrinsic goodness of pleasure.
- **P4:** Positive desert aggravates the intrinsic badness of pain.
- **P5:** Negative desert mitigates the intrinsic badness of pain.
- **P6:** Neutral desert neither enhances not mitigates the intrinsic evil of pain.\(^{103}\)

According to H, intrinsic value formerly directly correlated with hedonic level because there was a single principle that determined the goodness or badness of a state of affairs. With JH, value of pleasures and pain episodes now vary depending on whether pleasure or pain received was deserved. There are now six principles concerning the relationship between desert and pleasure or pain rather than a single principle. Feldman argues that desert represents how a variable specific to important moral notions like justice can be added to the content of an axiology. In the case of desert, certain *axiological phenomena* occur when adding it to the intrinsic value equation.

\(^{101}\) Feldman 1995, 575, ibid.

\(^{102}\) Feldman 1995, 575, ibid.

\(^{103}\) Feldman 1995, 575-80, ibid.
These six principles, Feldman argues, act to exclude counterexamples that Rawls would have in mind.\textsuperscript{104} Now return to TC2 to see which scenario proves to be the best:

\textbf{TC2:} Mary owns a fortified house during the zombie apocalypse and a horde of zombies enters the house. Mary must quickly decide who to save. She can either save herself and her only child and nephew trapped upstairs. Or she can save herself and a band of nine strangers, all of which killed her husband during a raid, on the first floor.

The best scenario is no longer the scenario where Mary chooses the nine strangers over her family. Instead, the best scenario which is the \textit{just} state of affairs, is the scenario where she chooses her family because the nine strangers get the pain they deserve and Mary and her family get what they deserve. One could argue that there are still nine people who end up losing their lives and that is still a very high amount of pain relative to the pleasure experienced by Mary and her family. However, when considering desert, their pain could be \textit{transvalued} because justice is done for the murder of Mary's husband. In a sense, the value of their pain is good to a certain degree. The value of Mary's pleasure is enhanced because she gets what she deserves. So, although Mary's family is outnumbered in terms of people who can experience pleasure or pain, the \textit{justice of the state of affairs actually makes the scenario the best one}.

Feldman concedes that justice-adjusted hedonism cannot possibly mitigate all possible injustice. There will be times when the right action is one that leads to injustice. His aim is not to completely solve the problem but to show how a solution may be initiated.\textsuperscript{105} Similarly, the goal of this thesis will not be to completely solve the

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\textsuperscript{104} Feldman 1995, 578-582, ibid.  \\
\textsuperscript{105} Feldman 1995, 584, ibid.
\end{flushleft}
DDA for counterexamples, but to show how, using a similar method to Feldman, one may introduce notions like desert which could explain why some counterexamples to the DDA are not true counterexamples.

2.4 DDA and Consequentialism

Fundamental arguments against utilitarianism’s explanation of harm have originated with philosophers like Philippa Foot. Foot does more than argue against utilitarianism's inconsistency with principles like the DDA. She argues that utilitarianism is a flawed moral system. For example, Foot begins her essay with the statement, “Morality, Action, and Outcome,” with “no decision is more important for practical ethics than that by which we come to embrace or reject utilitarianism.”\textsuperscript{106} Foot argues that since “utilitarians, who place the whole moral significance on an action in its production of good or harm, must treat the difference between initiating and allowing as having no independent influence on morality.”\textsuperscript{107} In other words, an agent’s responsibility for harmful action is not morally important to utilitarians, though it is a morally important part of the DDA.

In her essay, Foot holds that the DDA and DDE are examples of moral principles which are “apparently deeply embedded in our ordinary morality,” although the intuitions behind them lack theoretical justification and “are in danger of being disregarded on theoretical grounds.”\textsuperscript{108} Foot claims that utilitarianism seems to have theoretical justification but runs contrary to common sense principles like the DDE and the DDA. Foot’s primary objection is that one cannot logically accept the claims of

\textsuperscript{106} Foot 1985, 67, ibid.
\textsuperscript{107} Foot 1985, 69, ibid.
\textsuperscript{108} Foot 1985, 67, ibid.
principles like the DDE and the DDA along with the claims of utilitarianism. The plausibility of such principles, which are logically inconsistent with utilitarianism, provides sufficient reason to doubt utilitarianism’s explanatory power as a moral theory:

For it seems that what matters morally is not only how someone acts [as in the DDA], which is what we have so far been considering, but also how his will is disposed even when this cannot affect the course of events [DDE].

A moral action is not only good or bad because of its outcomes but also because of means and the will of the agent.

Foot holds that utilitarianism is a moral theory that claims:

The moral character of an action, motive, or any other subject of moral judgement is taken wholly to depend on its causal relation to the general welfare: whether it is conceived as pleasure, happiness, or preferential choice; whether maximum welfare is taken as an average or a sum total; and whether it is supposed to be distributed more or less equally...

Foot argues that there are grave implications when consequentialist principles are followed to their logical conclusion:

There is nothing so bad that it cannot be done to prevent others from doing more things of the same kind. Consequentialist systems have this implication because in basing moral judgment solely on the evaluation of states of affairs they allow of no distinction between what an agent does himself and what he allows others to do.

Here, Foot objects to the core utilitarian claim that a right action is right if and only if it produces the best state of affairs. Utilitarianism is open to such morally terrible states of affairs and consequently excludes important moral principles like the DDA because the only criteria for right action is consequences. If the only alternative is a slightly worse state of affairs, like a woman being raped and murdered, then the slightly better...
scenario, a woman being raped and left alive, may be considered the *right* action. Foot concludes that utilitarianism cannot be amended or saved. Foot argues that under traditional utilitarianism, certain extremes like murdering or torturing, which are permissible under a utilitarian system, run contrary to ordinary moral intuitions that such acts are wrong.

Despite these problems with utilitarianism, Foot concedes that utilitarianism seems plausible because it is commonly held that “utilitarian morality is the only *rational* morality.” Foot holds that the underlying reason for the appeal of utility is that it appears to be the only morality that simplifies morality to the point where it can be reasoned by individual agents. Morality is a matter of using one’s reason to determine and produce the best states of affairs. For utilitarianism, Foot claims, “it must always be right for an agent to bring about the *best state of affairs* that is within his reach.” This last idea opens up to Foot’s primary objection against utilitarianism as “discordant with our ordinary moral intuitions.”

For the question raised is why any action should not be done if the doing of it will produce the best state of affairs or total outcome; and it is exactly this which tends to make us think that it must be morally permissible, or even obligatory, to do to individuals anything that ‘needs to be done for the general good’. How can it be right, we ask ourselves, to choose to produce a state of affairs less good or worse than another that is equally within our reach? If this state of affairs is the best state of affairs then we ought to produce it. To be sure we are not always able to do what would bring about what is in *other contexts* referred to as the best state of affairs, but that is because there may be restraints on our actions coming e.g. from law, morality, or etiquette. When it is a question of bringing about the ‘best state of affairs’ there can be no such restrictions because only moral restraints operate against morality, and only an irrational moral rule could stand against the production of the morally best state of affairs.

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112 Foot 1985, 74, ibid.
113 Foot 1985, 74, ibid.
Foot disagrees that morality is, in part, a matter of an agent producing the best of affairs as far the agent is able. In order for one to aim at the best state of affairs, there must be a concept of a good state of affairs. Foot holds that the good state of affairs in the utilitarian sense is absent from morality:

A morally good state of affairs would, it seems, be a state of affairs which morally right or good action must aim at or produce. But since what is morally good or right is what a moral system calls good or right there can be a state of affairs which stands in this position only if a good moral system contains no radically non-utilitarian rules. So if a good moral system does indeed contain rules of the kind we have been discussing then there cannot be a good state of affairs in the sense which consequentialism requires. There is, as we saw, a limited use for the concept within morality; but a virtue such as benevolence does not give an end to which all moral action must aspire.114

Here, Foot provides her negative argument against utilitarianism’s sense of good state of affairs. For it to be the case, she claims, that a sense of good state of affairs exists, it would have to be the case that a good moral system contains no radically non-utilitarian rules. However, as Foot argues, there do exist radically non-utilitarian rules like the DDA and the DDE. She concludes that the sense of good state of affairs assumed by consequentialism does not exist and, thus invalidating the utilitarian claim that right action solely aims at or produces the best state of affairs.

Foot’s argument against utilitarianism is a vital detail in understanding the claim that the DDA is a radically non-utilitarian principle. Philosophers like Foot argue for a partly deontological morality that is a mix of positive aims, like aiming for respect with honesty, and negative rules, like refraining from harm. These rules, she argues, have content that pertains to the actions of the agent and not how an agent should control the actions of others. Foot argues for an ordinary morality, or morality as it is,

114 Foot 1985, 79, ibid.
which differs from a morality which positively prescribes action for the universal aim toward the general good. Due to this position, philosophers like Foot find a fundamental disagreement between the DDA and consequentialism which cannot be bridged without altering the fundamental makeup of either.

2.5 Value Account of the DDA

Liu claims that the DDA is best understood as an “assymetrical constraints”; it requires achievement of a much greater moral good for for a harm-doing to be permissible than for a harm-allowing to be permissible.”¹¹⁵ In essence, doing and allowing harm have different moral constraints—there are greater constraints against doing harm than allowing harm. For Liu, the greater constraint against doing harm is the requirement of some greater moral good. Liu holds that the DDA, when understood as asymmetrical constraints, can be defended by a consequentialist approach rather than a deontological approach.

Liu classifies his version of the DDA as a moderate version of the DDA. Here he considers the DDA and a comparison between harm done versus harm allowed to and agent’s well-being:

Although I intend a robust defense, the version of DDA that I defend here is a moderate one—other things being equal, an act of doing a certain degree of harm to a certain kind of well-being requires a greater moral good to justify it than an act that allows the same degree of harm to the same kind of well-being. For example, the version of DDA that I defend would say that killing one innocent human being requires more to justify it than allowing one innocent human being to die.¹¹⁶

¹¹⁵ Liu 2012, 63, ibid.
¹¹⁶ Liu 2012, 64, ibid. Liu defines moderate but fails to provide a contrasting meaning of a non-moderate version of the DDA. Also note, Liu sets up the relationship between the subject harming, i.e., the agent; harm which is understood as a degree of harm, one degree being doing and the other allowing; and the object harmed as one’s well-being.
Liu explains that his “analysis does not show that an act of doing any harm is greater is always harder to justify than an act of allowing harm.”\textsuperscript{117} In other words, an extreme version of the DDA would claim that doing harm is always worse than allowing harm. Liu’s defense of the DDA, by contrast, holds that doing harm is usually worse than allowing harm. His defense, provides us with a \textit{prima facie} reason why an act of doing a certain degree of harm to a certain well-being requires more to justify it than an act of allowing the same degree of harm to the same kind of well-being.\textsuperscript{118}

Liu holds rights-based explanations of the DDA unsatisfactory because each appeal to rights claims a special distinction without theoretical justification. For example, Liu holds that Foot’s defense of the DDA appeals to an arbitrary difference between positive and negative rights. The difference is arbitrary because Foot provides no explanation of the unique quality negative rights possess that would justify giving them precedence over positive rights. Draper, likewise, appeals to the distinction between positive and negative rights but provides a more robust account of the difference:

The moral difference between negative rights and positive rights, according to Draper, consists in the different constraints that they impose on autonomy: positive rights typically impose a greater constraint on autonomy because they demand a specific use of the property or body of another person, whereas negative rights do not typically impose such a constraint on others’ self-mastery \textsuperscript{”autonomy”}. Since we value autonomy, the greater constraint upon autonomy, the less morally desirable the rights—this explains why negative rights are more important.\textsuperscript{119}

\textsuperscript{117} Liu 2012, 70, ibid.
\textsuperscript{118} Liu 2012, 70, ibid.
\textsuperscript{119} Liu 2012, 67, ibid.
Draper’s explanation, according to Liu, is unsatisfactory as well because ultimately Draper doesn’t explain, “exactly why autonomy is more important than well-being.”\(^{120}\)

Like Foot, Draper’s analysis makes certain assumptions about what is intuitively more important, like negative rights or autonomy, without clarification as to what makes it more important. Liu claims that a value-based analysis may provide a complete explanation of giving precedence to one value over another. Draper argues that harmful doings are worse than harmful allowing because harmful doings involve a greater moral evil. The greater moral evil is determined by the total of moral evils in the consequences.

Liu, like Draper, holds that the DDA is based on a difference between positive and negative rights and that the violation of those rights are coextensive with the loss of the values of autonomy and well-being. Unlike Draper, Liu claims that the DDA, and not a straightforward rights-based analysis, is the best explanation for the moral difference between harms. Liu claims that autonomy is valuable “because we value the self-mastery of our own person—the freedom to do whatever is within that domain of self-mastery and the protection against any unjust interference with that domain.”\(^{121}\)

Well-being is not a capacity like autonomy, but is valuable because it “consists in the class of things that fall naturally under the domain of self-mastery, such as life, body, and property.”\(^{122}\) Note that the principle of beneficence requires that agents promote the well-being of others. Beneficence is important to medical ethics and frequently comes into conflict with other values like justice and respect for autonomy.

\(^{120}\) Liu 2012, 67, ibid.

\(^{121}\) Liu 2012, 67, ibid.

\(^{122}\) Liu 2012, 67, ibid.
Liu’s discussion of well-being and autonomy touches on some of the specific ways autonomy and well-being interact in morality. The DDA, according to Liu, allows that one’s autonomy and well-being go hand-in-hand. When one loses one’s autonomy, one loses his or her well-being and vice versa.

Autonomy is a capacity whereas well-being consists in the substantive parts that one has autonomy or self-mastery over, including one’s life. Draper claims that a violation of negative rights results in greater harm because it negatively affects both well-being and autonomy. Liu disagrees with this claim and finds that both doing and allowing harm involve acts that negatively affect both autonomy and well-being. Liu holds that doing harm involves a greater number of evils than allowing harm because there are two distinct evils related to diminishing autonomy:

One is the mere loss of authority over part of the domain of self-mastery. A moral evil of this kind can be caused by either a natural event or a deliberate action. Both a strike of lightning and an intentional shooting can deprive me of my authority over my life. The other kind of moral evil relevant to autonomy is the unjust interfering itself. An unjust interfering with one’s authority of self-mastery is a distinct moral evil from the mere loss of that authority. An act that does not actually deprive me of my authority over myself may nevertheless unjustly interfere with my autonomy and thus be morally objectionable.123

Liu’s final approximation of the DDA shows that,

The key difference is that a harm-doing always constitutes an unjust interfering with autonomy, and though a harm-allowing may sometimes also result in an unjust interfering to somebody interfering, the shift of agency, from one’s own interfering to somebody else’s interfering, changes the moral value of the freedom involved.124

Liu makes two important claims concerning the different goods and evils related to the DDA. The first claim is that harmful doings are always unjust interferences with

123 Liu 2012, 69, ibid.
124 Liu 2012, 74, ibid.
another's autonomy. The second claim is that harmful allowings, even those that unjustly interfere with another's autonomy, indirectly involve a moral good. The agent, in keeping with his or her freedom, is able to refuse to provide aid. In other words, the agent is permitted to allow harm. Cases of allowing harm are special circumstances where the potential claim another person has on the agent’s resources, aid, interfere with the agent’s negative rights. Hence, an agent who allows a harm also brings about a positive state of affairs: the state of affairs of his/her right not to be required to act for the sake of other obtains.

Liu’s argument rides on the assumption that a consequentialist approach that uses values provides a better explanation of the DDA. Rights-based explanations have illuminated which values, autonomy and well-being, and the kinds of rights related to the DDA, rights of noninterference and rights of self-ownership. Liu does not dispute that rights play a role in the defense of the DDA. Liu has identified that rights-based approaches have failed to provide an explanation of why the rights violated by doing harm are more important than the rights violated by allowing harm. There is overlap between the values involved in both cases of harming. There is also overlap between the kinds of evils that occur in both doing and allowing harms. In addition to showing the complexities woven throughout the categories of doing and allowing harm, Liu’s defense shows the importance of involving value in explaining the DDA.

Liu’s consequentialist approach interprets the DDA as involving an asymmetry in evils. Liu’s account allows for some flexibility in the categories of harmful allowing and doing following the rule that there is more evil on the side of harmful doings. For example, every case of harm-allowings does not always involve the exact same kinds of
evils as other cases of harm-allowings. Liu’s use of value to explain the DDA picks up on an important theme in objections to the DDA. Some objections to the DDA claimed that the DDA failed to show a true moral difference between harm-allowings and harm-doings. Former versions of the DDA were not sophisticated enough. Liu’s version upholds the traditional, binary picture of harms. Liu explained that some cases of allowing may seem just as bad as cases of doing harm. He explains this by calling the freedom to allow harm a moral good. Liu does not use Feldman’s theory C, the normative aspect concerned mainly with outcomes, to which Foot objects. Liu uses the value part of consequentialism, an axiological component, akin to H, which analyzes every part of an action, means and ends, as having some value. He calls the interfering with autonomy a separate moral evil. By doing this, he shows that he is not only concerned with outcomes, but is interested in the DDA as an important principle. Liu also gives moral weight to harmful intent of deliberate action that is entailed by interfering with autonomy. Deliberate action involves reasoning and the will of the agent. Liu shows that the value piece of consequentialism is compatible with rights, but also provides a richer background from which to argue for the DDA. Rights-based explanations have not provided sufficient explanation for the DDA; value is a necessary part of a complete explanation. However, more can be done beyond Liu’s development, as his project still assumes the binary picture of harms. This paper will claim that there are different degrees of harms and that harmful allowings can be as evil as harmful doings.
2.6 Conclusion

This chapter discussed the development of traditional utilitarianism into more complex accounts of utilitarianism in response to various objections. In particular, Feldman's account of desert-adjusted utility has been useful in informing how to take a notion like pleasure, and perhaps harm, and make it sensitive to a personal quality of desert.

Sometimes when confronted with counterexamples, a theory doesn't have a philosophical leg on which to stand. This is not the case at all for consequentialism; in the face of counterexamples it continues to grow more robust. Feldman's adjustment method has great implications for how certain objections are handled. Feldman provides a unique response to the objection from justice. Interestingly, the problem of justice is comparable to the reason why many supporters of the DDA avoid utilitarianism. They claim that the DDA, and principles like it, provide a different type of moral outlook. Foot bluntly stated that "no decision is more important for practical ethics than that by which we come to embrace or reject utilitarianism."¹²⁵ For her, as a defender of the DDA, there is no room for negotiation concerning the relationship between the DDA and utilitarianism. Feldman's project by no means bears any conclusions that will resolve this issue, but his *method* is important to the survival of the DDA. In fact, more recent versions of the DDA, like one defended by Liu, and proposed alternatives to the DDA, like Kai Draper's rights-based account, seem to employ a similar strategy. Liu and Draper employ values of autonomy and well-being to adjust either their distinction

¹²⁵ Foot 1985, 67, ibid.
between doing and allowing harm, in Liu's case, or to place limitations on the particular need rights in Draper's project.
CHAPTER 3

A REVISED ACCOUNT OF DOING AND ALLOWING HARM

3.1 Introduction

The DDA is on one hand a postulated as a way of justifying certain actions using a non-consequentialist framework, on the other hand, objections to the DDA can be addressed by incorporating consequentialist considerations into the DDA. Such an explanation would include an axiology or value theory that would establish some fundamental good(s) like pleasure and how other subordinate goods are ranked according to that fundamental good. Instead of using values to explain the DDA, deontological explanations have used rights, though those explanations have proved insufficient. For example, when explaining the DDA with rights, Philippa Foot ran into trouble explaining why negative rights should take precedence over positive rights. The DDA overlies complex relations between values of autonomy and well-being. Rights alone are insufficient for teasing out these complexities. Liu developed a robust explanation that involved both rights and values illuminating the necessity for value in explaining the DDA. The fundamental problem for the DDA is that it relies on the claim that harms are easily divided into two neat categories: doings and allowings. Value must not merely be incorporated in explaining the DDA, it must be used to recapture the nature of harms.
The following chapter will distinguish between the binary picture of harms assumed by traditional versions of the DDA and a new, sliding-scale picture of harms. Feldman’s methodology and insight will be used to provide an understanding of a way to recast the DDA. The DDA will be adjusted for desert to provide an alternative explanation that uses axiology, but not collapse into a straightforward consequentialist explanation.

3.2 Two Pictures of Harms

The traditional version of the DDA holds that doing harm always or usually is worse than allowing harm. Consider a few of Foot’s cases:

Suppose that a judge or magistrate is faced with rioters demanding that a culprit be found for a certain crime and threatening otherwise to take their own bloody revenge on a particular section of the community. The real culprit being unknown, the judge sees himself as able to prevent the bloodshed only by framing some innocent person and having him executed...In the case of the riots the mob has five hostages, so that in both exchange is supposed to be one man’s life for five.

It may rather be supposed that he is the driver of a runaway tram which he can only steer from one narrow track on to another; five men are working on one track and one man on the other; anyone on the track he enters is bound to be killed.126

Foot used cases like this to illustrate the non-utilitarian nature of the DDA. The size of evil prevented, potential number of lives lost, could not justify a harm-doing, like taking the life of the innocent man for the sake of saving five. These cases also illustrated the binary picture of harms: the driver either does harm or allows harm. For Foot and Liu, a harmful sequence is either initiated or sustained. For Quinn, there is either a harmful action or inaction. For right-based defenses of the DDA, positive rights or negative

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126 Foot 1979, 146-147, ibid.
rights are violated, and so on. Previous versions of the DDA assumed a static notion of harmful acts where acts could be neatly placed in one of two categories of harms. A static notion is one that assumes that a harmful act that is done is always or usually worse than a harm that is allowed. This static view of harm fails to adequately capture the subtle degrees of badness of harms any case of doing or allowing. Miscalculation of harm comes partly from the prevalence of test case analysis in many explanations of the DDA. The judge either kills an innocent man or allows the mob to make good on their promise. The driver either allows the five to die or kills the one man by switching the tracks.

With sophisticated test cases or actual case studies, the “badness gap” between doing and allowing harm seems to be narrow at times and wider at others. In fact, the DDA has been often criticized because harm-allowings can seem just as bad as harmful-doings. For example, holding an infant under water seems to be morally equivalent to not saving a drowning infant from water. Draper’s argument against the DDA held that there is no reliable, moral difference between doing and allowing harm. This criticism stems from the fact that the DDA does not accurately represent the variety of moral values of harmful acts. Liu has argued, on the other hand, that the DDA does represent a true moral difference between harmful actions.

Liu argues that harm-doing acts are morally worse than harm-allowing acts because each act is constituted of a different number of evils. His argument relies on the moral value of constituent parts of acts of doing and allowing. Though Liu continued to argue from the binary view of harms, and did not explicitly state that there was a sliding-scale of harms, his work did imply that there could be a slight variation of harm
values depending on the constituent of evils within each state of affairs. Liu’s work illuminated that the DDA is coextensive with a consistent difference in the value loss and gain of both harmful doings and allowings. For Liu, each act consisted of a collective of certain evils and goods including a loss of autonomy and a loss of well-being. Harm-doings were distinct because they always consisted in an unjust interference with autonomy. Harm-allowings were distinct because they always consisted in an indirect moral good, the freedom of the agent to refuse aid or to allow harm.

Liu claimed that values accounted for the moral asymmetry between harmful doings and allowings. However, his argument still relies on the assumption that the moral asymmetry between harmful doings and allowings is self-evident. This chapter will deny such an assumption and hold that harms are best understood on a sliding-scale. Feldman’s response to the objection from justice shows how pleasures or pains can fall on a scale of hedonic levels: episodes of pleasure are represented by positive number one or greater and episodes of pain are represented by negative number one or greater. Feldman also introduces the notion of desert which makes value more complex and, consequently, sensitive to justice. This chapter will also assume that harms can fall on a scale of harm levels, one to ten units of harm. The moral normative status will supervene on each instance of harm. Desert, in Feldman’s sense, is a notion that will bring a novel perspective to the DDA and the harms. Harms will no longer be viewed as binary, but as multi-faceted.
3.3 Feldman’s conception of desert and the DDA

Desert according to Feldman is a matter of *justice served*. What is important to his discussion is that desert comes in degrees, there can be more or less of it. For example, a criminal can be more or less deserving of punishment. A master criminal may deserve a more severe punishment than his somewhat hapless accomplice. Finally, his conception of desert is not “defined in terms of moral obligation.”¹²⁷ In other words, to say that someone deserves pleasure—Mary deserves to rest after a hard day's work—does not mean that Mary's husband is morally obligated to rub her feet and make dinner. Though there is a connection between the two terms, one statement about desert does not entail a statement about moral obligation.¹²⁸ Also, Feldman uses desert as an important constituent of justice: justice is done when people get what they deserve. However, there is no universal agreement about the relationship between desert and justice. For example, if an escaped serial killer dies after accidentally tripping and falling into a bed of rocks, one could say that the badness of that harm was less than if an innocent man suffered the same fate because the serial killer *deserved* severe punishment for his wrongdoing.

This chapter will assume desert, as used by Feldman, is a *conceptual primitive*, a rough approximation. Owen McLeod's discussion of desert, in addition to Feldman's own, will be used to flesh out the particular sense of desert that will be used. McLeod begins his discussion of the concept of desert with a brief summary of its major themes:

> The concept of desert is deeply entrenched in everyday morality. We say that effort deserves success, wrongdoing deserves punishment, innocent suffering

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¹²⁷ Feldman 1995, 573, ibid.
deserves sympathy or compensation, virtue deserves happiness, and so on. We think that the getting of what’s deserved is just, and that failure to receive what’s deserved is unjust. We also believe it’s good that a person gets what she deserves, and bad that she doesn’t—even if she deserves something bad, like punishment. We assume, too, that it's wrong to treat people better or worse than they deserve, and right to treat them according to their deserts. In these and other ways, the notion of desert pervades our ethical lives. In spite of its ubiquity, or perhaps because of it, the notion of desert is not especially well understood. This isn’t surprising, since there are many difficult questions surrounding desert. For instance, what are the ingredients (as it were) of desert? What sorts of thing can be deserving? What are the grounds or bases for desert? How do bases for desert manage to make a thing that has them deserving? What connections does desert have to other moral-normative concepts, such as justice and goodness?\textsuperscript{129}

As McLeod points out, desert is a notion with a lot of conceptual baggage and some work must be done to untangle desert and from other concepts that are related to it.

There are three basic parts or ingredients of desert: "a basis, object and subject."\textsuperscript{130} For example, a hardworking, loving mother is said to deserve the appreciation of her husband. The subject of the desert is the mother; the desert basis is the hard work and love given by the mother; the object deserved is the appreciation from her husband, and the source of the object is her husband. There is a disputed fourth ingredient of desert. Some argue that the conception of desert must also include an object-source. The last ingredient is debated in cases that involve "either no object-source, or an object-source so general that specifying it would be otiose."\textsuperscript{131} Another reason to reject the addition of this fourth part of desert is that it “is already contained in one of the undisputed ingredients—namely, the desert object itself.”\textsuperscript{132}

\textsuperscript{129} McLeod, ibid.
\textsuperscript{130} McLeod, ibid.
\textsuperscript{131} McLeod, ibid.
\textsuperscript{132} McLeod, ibid.
What sort of being can be a deserving subject? According to McLeod’s discussion, the “most uncontroversial bearers of desert are human beings. Humans are thought to deserve, or be capable of deserving, many things: punishment, reward, apologies, compensation, admiration, contempt, wages, grades, prizes, and so on.”

The DDA is also a principle regarding the treatment of humans. For the sake of this discussion, *desert* will be limited to human beings, although there is an open discussion regarding whether animals can also be deserving subjects.

Desert bases differ according to the object deserved. For example, Juliette may deserve praise for taking care of her mother who has dementia. Such a morally good action, most would agree, is praiseworthy. Some may even say that meriting praise is the same as *deserving* praise. The desert object of the DDA is not immediately clear. It may make sense to say that some people deserve harm. Some people who have brought about great pain and suffering to others may be considered to deserve harm. In some cases someone deserves help less than others. So the determining factor is not that the person deserves to be harmed *per se*, but that there will always be other people who may deserve saving and this may lead to less deserving people receiving harm. For example, Olivia is talking on her phone while driving and consequently not paying attention. She hits Nancy, a child, who runs into the street to get her ball. Olivia swerves the car after hitting Nancy and runs into another car. Both Olivia and Nancy are rushed to the hospital by an ambulance minutes after the crash. Olivia and Nancy both have an equal chance of survival and the hospital team can only operate on one at a time. In a sense, Nancy *deserves* to receive the treatment more than Olivia because Olivia was responsible.

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133 McLeod, ibid.
for both their injuries when she failed to be a responsible driver. However, the DDA
does not seem to be about deserving help or harm, at least not directly. In terms of
justice and how some good is distributed, the thing distributed is not harm or help in
the DDA. It seems that the thing distributed is responsibility for the harm. Moral
responsibility for harm, or being more or less blameworthy, is deserved to the extent to
which one is morally responsible. The DDA is about blame and responsibility. This is
opposed to someone deserving praise for doing a good. The DDA is about harming,
clearly a moral wrong, which deserves blame. However, there are not simply two
amounts of blame someone deserves, but more or less degrees of blame. Also, blame can
be accorded to more than one thing or person.

According to McLeod's survey, bases for desert can either be a fact about the thing
or one can be deserving in virtue of that for which someone is responsible. For example,
Meredith may deserve recognition for her charity based on the fact that she organized
and planned the charity. Meredith deserves praise based on her moral acts. In a sense,
she owns those acts and ownership entails that any praise or recognition be distributed
her way. McLeod explains responsibility as a desert basis with the following example:

A professor discovers that his student isn't responsible for the high-quality paper
she submitted (because she stole it from the Internet), then she can't deserve a
good grade for it. Or consider the fact that criminal action deserves punishment,
but not if the agent was insane at the time of the action. Presumably, the
justification for this is that an insane agent is not responsible for his or her
actions, and no one deserves punishment for actions for which he or she isn't
responsible. \(^{134}\)

Desert bases can also include certain facts about the persons involved and personal
responsibility for the harm caused and received. Desert bases create desert. If someone

\(^{134}\) McLeod, ibid.
deserves blame because of past wrongdoing or is personally responsible for the state of affairs which led to harm, desert is created. For example, Alex ignores his physician’s warnings and continues to smoke. Eventually Alex develops emphysema. Alex’s behavior, at least in part, contributed to and caused the emphysema outcome. When given reasons to quit, Alex never attempted quitting. Rationally, Alex is partly culpable for his condition and, in this sense, deserves a measure blame for the outcome. This is not to say that any person should suffer, but that personal responsibility plays a role in some preventable outcomes. When one fails to take responsibility for his/her own well-being, it makes some sense to say that such a person deserves blame for the outcomes of his/her actions.

Desert is tied to a number of other concepts including justice, intrinsic value, moral obligation, etc.¹³⁵ A full analysis of desert's relationship with each concept is not possible, but a brief word should be said about some of the important concepts as they relate to the DDA. Justice is thought by some, like Feldman, to be entirely constituted of getting what one deserves. McLeod discusses Feldman’s particular view about the relationship between justice and desert:

An ancient idea is that justice involves the getting of what’s deserved—even if this results in inequalities, and even if distribution according to desert involves or requires some loss of liberty. On an old-fashioned version of this view, for instance, justice obtains entirely to the extent that the morally virtuous are happy, and the morally wicked suffer. If happiness were somehow to be distributed according to moral goodness in this way, the result would be inequality with respect to happiness, since the more virtuous would be happier than the less virtuous. There would also be a loss of liberty or freedom for the morally wicked, since they would be punished or otherwise made to suffer. But these inequalities and losses of freedom wouldn't detract from the justice of the world; instead, they would be required by justice itself.¹³⁶

¹³⁵ McLeod, ibid.
¹³⁶ McLeod, ibid.
This simple idea, *justice is done when one gets what one deserves*, will be the model that is used in determining when blame received fits blame deserved. There will be different ways to understand this. There will be times when one does not deserve any blame or, in a manner of speaking, deserves absolution or praise. In the moral sense, the world will be made worse when someone underserving receives blame. For example, Alice allows the Mad Hatter to be beheaded for a lie that Alice told. Alice has some ownership of that beheading due to the lie she told. By *allowing* the Mad Hatter to be killed, Alice does deserve some of the blame for the action. Though she didn’t order the execution or hold the axe that cut off his head, her intentional silence played a part losing his head. The world of Wonderland was made worse because the Mad Hatter received blame for an action for which he was not responsible. At other times, one will get the blame one deserves. William, for instance, after setting fire to an apartment building filled with sleeping people, becomes trapped when the only exit is barricaded by falling debris. William then burns alive. William has an important causal role in his death and the deaths of others. Following the fire, a homeless man with charred clothing and singed facial hair is taken into custody on arson and murder charges. Meanwhile, William’s mother becomes aware of his plans after he dies and tells the truth to the police. The homeless man is released and the world is aware of William’s part in the burning building. This rough sense of justice is sufficient for this project in using desert as a tool for further explaining the badness of harms according to the DDA.

This sense of justice and desert has been absent from the foreground discussion of the DDA. Although, recently, there has been a growing connection between the DDA
and a general sense of justice. Draper discusses the difference between \textit{just} harm and \textit{unjust} harm.\footnote{Draper 2005, 268, ibid.} Liu describes the interference with autonomy as \textit{unjust}.\footnote{Liu 2012, 68, ibid.} These senses of just and unjust seem to differ from Feldman’s sense of desert. First, justice has not been discussed as an independent principle related to the DDA. Second, justice’s descriptive use has been a feature attached to harm or interference. For Draper, an unjust \textit{harm} is unjust because it violates certain rights. For Liu, an unjust \textit{interference} is unjust because it results in the loss of two values: autonomy and wellbeing. Neither of these uses of the word \textit{unjust} mean that some harm or interference is undeserved. Both uses of \textit{just} do not relate directly to desert, but connect with rights or values. Distributive justice, independent of rights or values, deals with how goods are distributed. Feldman’s project used desert to determine the distribution of pleasures and pains—\textit{how the consequences were distributed to whom}. The DDA is concerned with distinguishing actions that cause harmful results. Prior versions of the DDA held that the agent was more responsible for doing harms than allowing harms. Fiona Woolard holds that the difference between allowing and doing harm consists of what it means to be \textit{appropriately independent} of the harm:

I have argued that Foot’s account, when understood in terms of whether the threatening sequence is appropriately independent of the agent, is the most promising account of the doing/allowing distinction. However, it requires further work to explain what makes a sequence count as appropriately independent of the agent.\footnote{Woolard 2012, 450, ibid. Woolard holds that the meaning of “appropriately independent” remains unclear.}

Appropriate independence of an act depends on that agent’s distance from the harmful causal chain. In any case of doing or allowing harm, the agent seems to be partially
responsible for the harm. The more or less dependent the harm is from the agent’s interaction will constitute, in part, that agent’s responsibility for the harm. Thus, there is one thing that is distributed in the DDA: blame for the harm caused. The DDA has discussed personal responsibility for harmful results, but the relationship between the moral badness of the harm and blame has not been made explicit. Further, the amount of blame for the harm has not been appropriately reflected in the badness of harm.

Desert can also be tied to the notion of intrinsic value. Feldman lets the intrinsic value of an episode of pleasure or pain vary depending on whether the episode was deserved. The state of affairs is made better or worse when someone gets the pleasure or pain they deserve. Likewise, a state of affairs can be made better or worse, in terms of value, when responsibility is distributed appropriately. The badness of a harmful state of affairs partly depends on who is responsible for a harm. Quinn argued that harmful doings were actions and harmful allowings were inactions or omissions. Liu and other philosophers have argued that both are actions: “By ‘act’, I mean any intentional behavior. I understand ‘act’ in a very loose sense here: an intentional non-performance can be called an act of allowing harm.”

Liu emphasized that the content of actions is important to the total evil in a state of affairs. He argued that the DDA was a relevant principle from a consequentialist approach. He claimed that there were particular evils that occurred in doing harm that in most cases differed from allowing harm. For example, there is greater evil in a situation where Joe loses his autonomy and well-being when he is raped by a gang than when Monica loses her autonomy because she suffers a stroke. According to Liu, unjust

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140 Liu 2012, 64, ibid.
interference with the value of autonomy is a separate evil from the mere loss of autonomy. For interference to occur, there must be an agent to do the interfering. Loss of autonomy, Liu argues, can be caused by intentional action or by some natural disaster or event. Also, there is greater evil in Joe’s situation than when Jessica breaks her neck because Miranda pushed Jessica, Miranda’s stalker, out into an alley to escape Jessica. The amount of evil changes if responsibility for harm is shared by the agent and the person who receives harm. Sometimes the harm that occurs is at the end of a long chain of harms caused by a lot of wrongdoing. Jessica, for instance, had long unjustly interfered with Miranda’s autonomy: Miranda had lost her sense of security, control, and well-being because of Jessica’s threats and verbal attacks. Perhaps the received harm, by someone like Jessica, is organic to past harms. Miranda is plagued by fear, her body is constantly in a fight or flight mode, there is constant nagging stress infused in Miranda’s every waking moment. When Jessica surprises Miranda as she walks out of work, Jessica’s identity as the object of Miranda’s fear, causes Miranda to push Jessica out into a dark alley where she falls on her neck and dies. Such situations will become problematic for the DDA because, based on this state of affairs, Miranda is in the wrong for doing harm. However, Jessica is partly responsible for her own death and deserves a measure of blame for the outcome.

The DDA does not seem to have any underlying claims about intrinsic value. However, there are certain fundamental values that are related to the DDA. Draper and Liu identify two values related to the DDA: autonomy and well-being. Liu held that harms are caused because one or both of these values are lost. Autonomy is one of these values that can be thought of as the freedom of self-mastery and self-determination.
Well-being is another value that seems to be associated with the DDA—the DDA is a principle concerning harm and harm can be seen as interfering or diminishing one's sense of well-being. Both of these values are central to explain the badness of harms and have been discussed at length by philosophers like Liu and Draper. The badness of a state of affairs is affected by the extent to which autonomy or well-being is lost. Liu’s discussion separates a state of affairs into separate evils and goods. Such parsing is important for capturing the complexity of all cases. Desert, like autonomy and well-being, adds an additional dimension to the DDA which, in keeping with Feldman’s project, assigns value to important elements of harm-doing and harm-allowing.

### 3.4 Two Sides of Harm

The following section will consider the desert of blame. The DDA has assigned moral blame to an agent for performing or allowing a harm. The amount of blame has depended on whether the harmful act was done or allowed. These versions involved harm that involved two ends of a harm: a harmer causing the harm and a person to whom the harm is caused. Extensive writing has covered what constitutes harm in another person: the loss of autonomy and well-being. On the other side of harm, the causer of harm gains something: the blame for harm caused. Both sides of harm are matters of degree. The severity of harm may be measured, in part, by how much time and effort must be spent to recover those things lost. For example, Mary who has been mistakenly given a medication she is allergic to suffers an allergic reaction, a rash. She quickly recovers and the only discomfort she suffers is an itch (and some annoyance). If the same measure of autonomy and well-being cannot be recovered, the harm is
perceived as worse. For example, Shirley is taken to surgery to amputate her left leg and the right leg is amputated by mistake. In the end, Shirley has lost two legs and must adjust to her changed form and functionality. Shirley’s autonomy and well-being continue, but they cannot be restored to their former status. At times, no autonomy or well-being can be recovered because someone has died.

The other side of harmful actions is the causal agent in the state of affairs. The agent stands in some causal relation to the harm. As Woolard claims, the difference between doing and allowing harm is whether the agent is appropriately independent of the harm. In other words, the harm *depends* on the agent in harm-doings more so than harm-allowings. Prior to now, the degree of dependence of that harm has not varied beyond the nature of the act as either a harm-doing or harm-allowing. For example, the infant held under the water depended greatly on the agent to continue the holding. However, the same infant, thrown into the water by someone else, unable to swim or save itself, depended equally on both the agent who threw him, and the agent who stood by and withheld help. Focus on the comparison between the drowner in the first case, and the bystander in the second case. Intuitively, it seems that the agent who *allows* the baby to die is slightly less blameworthy for the infant drowning than the agent who *does* the drowning. It does seem like there is a consistent difference between allowing a harm to happen and doing the harm. There is not an exact correlation between the dependence of a harm on an agent and the moral blame that the agent gets for a harm. In certain cases of harm, perhaps the allowing agent gets partial blame, but some blame nonetheless. Blame can be shared. There are also cases of doing where the harm may partially dependent on another agent. In those cases, the blame for the harm is also
shared. The blame deserved for a harm-doing and harm-allowing is not completely
determined by the action itself, but also by how much ownership the agent can take for
the action. For example, recall William who set fire to a house full of people and he dies
subsequently from falling debris. His death, a harm, results totally from his own
actions—he has complete ownership of those actions. The blame for his death is
completely deserved by him.

There are two sides to harmful actions: the harmer and the harmed. The harmer
gains blame for causing the harm and harmed loses a certain amount of well-being and
autonomy. The badness of the state of affairs supervenes partly on these two aspects,
the gains and losses on both sides of the harmful action. The DDA defines a particular
way of assigning blame and measuring the badness of harms. The proportional
assigning of blame depends on whether the harm is done or allowed. The next step in
creating a clearer picture of how large the moral value gap between harm-doings and
harm-allowings is understanding how the two sides of a harmful action fit together in a
sliding-scale.

3.5 A Sliding-Scale of Badness

Sliding scales are commonly used in medicine, i.e. determining the amount of
insulin to give a diabetic based on the blood sugar value, or in business, i.e. determining
a fee based on ability to pay. Sliding scales are akin to a linear function: the higher the
input value, the higher the output value. For instance, the higher a blood sugar value,
the more insulin someone will require or the higher one’s income, the larger the
required fee. Beauchamp and Childress discuss a sliding-scale strategy to quantifying the requirement for competence depending on the risk of a medical procedure:

Some writers offer a sliding-scale strategy to realize this goal. They argue that, as an intervention in medicine increases the risks for patients, we should raise the level of ability required for a judgment of competence to elect or refuse the intervention. As the consequences for well-being becomes less substantial we should lower the level of capacity required for competence. The sliding scale allows standards of competence in decision-making to slide with risk.\textsuperscript{141}

This example of competence and risk follows from a discussion about how to respect autonomy in a practical manner. Likewise, the question at hand is how do we calculate badness of harm-doings and harm-allowings? The answer to this question has been complicated by including the values which constitute the harmer and harmed. As discussed, a sliding-scale approach toward the moral badness of a harmful state of affairs must include both amount of blame assigned to the agent who perpetrates the harm \textit{and} the values lost by the individual who received the harms. The basic scale will be that the moral badness required of a state of affairs scales with the blame gained, on the side of the harmer, \textit{and} values lost, on the side of the harmed.

Blame deserved will correlate with how dependent the harm was on the agent. \textit{Dependence} will mean that the harm would not have occurred exactly the way it did had that agent not acted, even omitted to act. In cases of allowing, where an agent has not directly initiated a harmful sequence, the agent can still be partially responsible for the outcome. The degree of responsibility will create a certain measure of desert. A fuller analysis of the meaning of a harm, including its dependence on an agent would help to clarify a further difference between doing and allowing. However, note that the

\textsuperscript{141} Beauchamp et al. 2001, 75, ibid.
difference between doing and allowing seems less important in the case of blame because there are times when it is unclear.

The severity of harm, for the harmed, depends on the losses to the individual. As Liu discusses, harm involves the loss of autonomy and well-being. For a basic understanding of how to measure this, the severity of harm will be constituted in part by the permanence of the loss and the degree of recovery. Sometimes, the loss will depend on whether an action was done or allowed. As Liu has discussed, harm-doings seems to involve certain losses and evils that are usually worse than harm-allowings.

Finally, the values of both degree of blame gained and values lost will scale with the badness of the state of affairs. In other words, the badness of the state of affairs will increase as the cumulative value of blame and value loss increases. When an agent is more responsible for a great loss, the badness of a state of affairs will be very bad. When an agent is very responsible for a minor loss, the state of affairs will be slightly bad. When an agent is slightly responsible for a great loss, the state of affairs is bad but not as morally bad. It matters morally how much blame the agent deserves and the amount of harm caused.

3.6 A Theory of Harm-Doing and Harm-Allowing

The DDA takes a role in explaining the badness of a harmful state of affairs. It still matters whether harms are done or allowed, but that is not the sole determinant of the badness of a state of affairs. Feldman faced the problem of developing an axiology that accurately reflected moral intuitions about justice. He solved the problem by designing an axiology in which hedonic value is sensitive to desert. This chapter has
done something similar to solve problems with the DDA. Past versions of the DDA failed to accurately portray the badness of a state of affairs is based on the action alone. As discussed in this chapter, the degree of badness also depends on how close an agent is to a harm. In other words, how much does the harmful state of affairs, the extent of value lost, depend on the agent’s intentional behavior or action? Note that there is a subtle difference between the *values lost* and *the degree to which those values are lost*. One can lose a lot or a little of autonomy. Values can also be lost in another way: one can lose autonomy temporarily, indefinitely, or permanently, e.g. death or in a persistent vegetative state. That loss can also be judged in terms of how quickly it can be restored, if at all. The consequences matter to the estimation of the badness of the harmful state of affairs. The number of evils, for Liu, solely constitutes the moral difference in harm-doings and harm-allowings. However, the difference does not always hold. In both types of harmful actions, there can be more or less involvement of an agent. That involvement is marked by the dependence of harm, as well as the degree of value loss. The more that harm depends on the agent, the more blame is assigned to that agent. The greater the value lost, the greater the harm. The amount of blame can be more or less depending on those two factors.

There are two ways to understand the degree of blame. The first way is the relationship between the blame and the extent of the harm. The larger the harm, the greater the blame for the harm. For example, when Thomas breaks into Angie’s house, ties her up, beats her, and steals from her, Angie’s sense of autonomy and well-being has been lost. Suppose that Angie heals quickly physically but takes a long time to psychologically recover. She never fully regains her sense of security or control over her
The size of blame is great, more so than the blame for a momentary loss of autonomy and well-being (such as the patient who suffers an allergic rash when mistakenly given a medication to which she is allergic). In this way, the blame created by the harmful state of affairs correlates with the extent of value loss. Blame is measured in another way: amount of blame attributed to an agent. An agent can be responsible for total harm or part of the total harm. In other words, the agent either deserves total blame or partial blame. In the case of Thomas and Angie, total blame is attributed to Thomas for the entire harm. In other cases, the agent may be partially responsible for the entire harm. Partial responsibility can be true of harmful doings or allowings. Greg pushes his mother who dies after a ladder falls into her path simultaneous with Greg’s push. Greg’s mother trips over it and breaks her neck. Had the ladder stayed in place she would not have broken her neck. Greg’s intent was only to push his mother. In a sense some responsibility is taken away from Greg because of the accidental fall of the ladder. In the allowing version of the infant drowning, the allowing agent is partially responsible for the total harm. Consider that the infant is saved by another person. The infant lives but has extensive brain damage due to lack of oxygen. The allowing agent is partially responsible for that brain damage because he did nothing to stop it.

The DDA plays a role in explaining the badness of harms. Liu held that the DDA was a reliable indicator of the size of evil in a harmful state of affairs. Indeed, doing or allowing harms is a way of understanding how close an agent is to a harm. This sliding-scale approach to the DDA has undermined its full explanatory power but
has recast the DDA in the role of illuminating in a more robust account of harms. The following chapter will use case analysis to illustrate this sliding-scale account of harms.
CHAPTER 4

CASE STUDIES

4.1 Introduction

The DDA has been a subject of much debate. Thus far, the DDA has been shown to be part of a more dynamic explanation of harms. This chapter will focus on using the DDA for a case analysis. Three cases will be reviewed to show how the variable of desert plays a role in understanding subtle differences in the moral badness of each state of affairs. Each analysis will include the subject, desert basis, and object of desert. The central goal is to illustrate the application of the DDA put forth in chapter three.

4.2 Cases

The following cases have been chosen to illustrate the kind of harmful state of affairs illuminated by the DDA. Each case will review harm; the size and extent of harm as determined by the circumstances surrounding the particular state of affairs, including the values of autonomy and well-being; the ingredients of desert including subject, desert basis as moral responsibility, and the object of blame; and finally whether an action is an act of doing or allowing. Each case will include initial intuitions about the case, including if the case adheres to the traditional DDA in which harms done are always or usually worse than harms allowed, and finally how the badness of harms is calculated by the sliding-scale account. Note that there will be times when harm-doings are compared with a harm-allowing version of the same case and vice versa. This means
that the same case would be worse or less bad than a similar case depending on whether
the harm is done or allowed.

4.2a Case Study One: When the Doctor Gives a Deadly Dose

At the age of seventy, Mrs. R. had become severely disabled by cardiac failure due
to a damaged mitral valve. With her full and appropriate consent, she underwent a risky
valve replacement, which initially went fairly well. However, within twelve hours after
surgery, her cardiac output was clearly inadequate. Despite intensive care in the ICU, an
adequate blood flow could not be sustained, so an experimental cardiac assist device was
implanted in her chest. Again, initially she seemed to improve as she was finally “waking
up,” though she remained moderately unresponsive. A few hours later, however, even with
the assist device, her cardiac output again began to fail. No treatment arrested this
downward spiral; everyone involved agreed that she would not survive. In addition to
the cardiac assist device, Mrs. R was on a respirator and had seven different tubes going
into her body for fluids, medications, and monitoring.

Her surgeon, Dr. L., has remained in the hospital throughout the twenty-four
hours since surgery. He talked with the family frequently and encouraged them to discuss
their concerns, to visit the patient, and to call in other family members and their pastor.

Since Mrs. R. was vaguely aware and seemed quite uncomfortable, with her
family’s knowledge, she was given morphine. Dr. L. turned off the cardiac assist device
and stopped the medications regulating her blood pressure. Since she still seemed
uncomfortable, jerking at intervals and furrowing her brow, Dr. L., gave her another dose
of morphine. When that had no discernible effect, he asked a nurse to draw up 10 cc of
potassium chloride. Then, within sight of most ICU staff, he injected it into Mrs. R.’s
intravenous line.

Within minutes, she lay still and the cardiac monitor showed no
heartbeat. Dr. L. turned off the respirator and went to tell the family that Mrs. R was dead. The ICU
nurses and house staff were very concerned.

4.2b Analysis of Deadly Dose Case

There are two reactions which one may initially perceive upon reading this case.
The first reaction is that the physician did the right thing, he relieved his patient of her
suffering. The second reaction is the exact opposite: the physician did the wrong thing

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by ending his patient’s life. Both intuitions are understandable. The first reaction follows from the idea that there are worse evils than death. The second reaction follows from certain Kantian ideas that every life is of equal moral value and that every killing is a moral evil. Additionally, in most locations, ending a patient’s life in this way is illegal.

The DDA holds that harms done are morally worse than harms allowed. In this case, Dr. L. has clearly done a harm. Mrs. R.’s immediate death is clearly brought about by Dr. L. It is not clear that the alternative of allowing Mrs. R. to die due to the failing of her own bodily processes would be less bad than Dr. L’s action. This comes from the intuition that the harm of Mrs. R.’s suffering prior to her immanent death seems far worse than the harm of her death. This case exemplifies how the complexity of harms is difficult to analyze with the traditional DDA.

The sliding-scale version of harms begins with examining the subject of desert. In this case, Dr. L. is the subject of desert who has done the harm. Dr. L. is responsible for her death at the time it occurred. Dr. L. deserves total blame for the action of killing her.

Dr. L. was not solely responsible for a loss of Mrs. R.’s autonomy and well-being. Her condition had caused her substantial loss of both autonomy and well-being prior to her death. The degree of that loss seemed to grow the longer she lived. There is, however, some loss of autonomy and well-being, related to her death that for which Dr. L. is responsible. The loss caused by Dr. L. is permanent.

There will be more than one sliding scale for this case. For the complete loss of her autonomy and well-being, Dr. L. is only partially responsible and therefore only deserves partial blame. For the permanent and irreversible loss of autonomy and well-
being related to death, Dr. L. is fully responsible and deserves full blame. The full badness of the state of affairs based solely on the principles of autonomy, well-being, and justice would increase with the ultimate conclusion of her death, but would scale back slightly with the consideration that Dr. L. was not completely responsible for the total loss of autonomy and well-being attributed to Mrs. R.’s condition prior to her death.

The traditional version of the DDA would have counted this as a harmful doing which would have been morally worse than an allowing version. The traditional DDA fails to capture that the badness of allowing Mrs. R. to suffer in pain would be worse than or just as bad as the harm-doing action of giving her the injection. Mrs. R was in great pain that could not be relieved. Every other means of comfort had been attempted. Her prognosis was most certainly that she would die. Dr. L.’s harm-doing was a harmful state of affairs that was either less bad or equally bad to a harm-allowing state of affairs in which he had allowed Mrs. R. to die.

4.3a Case Study Two: Does “Do Everything” Include CPR?

Fred Walker, ninety years old and retired since 1955, was admitted to a community hospital with bronchial pneumonia, advanced pulmonary edema, urinary tract infection, and anemia. Mr. Walker responded to treatment initially but then his condition worsened. Mrs. Walker asked the attending physician to do “everything possible” for her husband and assured him that they were able to pay the costs of treatment not covered by Medicare.

On the morning of the fourteenth day in the hospital, Mr. Walker’s physician visited him and found his condition unchanged. Although he was not improving, Mr. Walker was alert and asked, “Am I all right, doctor?” Fifteen minutes later a nurse entered the room and found that Mr. Walker was not breathing and that all vital signs were absent. She summoned the doctor, who immediately decided not to attempt to resuscitate Mr. Walker. The cause of death was recorded as ventricular fibrillation.

According to hospital officials it is the institution’s policy to make an all-out effort to revive all unresponsive. Like other hospitals, this one has a “code”--usually a series of numbers or color--for summoning staff members with portable defibrillators and other resuscitation equipment to the bedside of a patient in cardiac arrest. “Code Blue”--
as it is called at this hospital -- is known only to insiders and can thus be called without alarming other patients and visitors. But physicians may also issue “no code” orders. That is, in certain circumstances they may direct staff not to resuscitate a patient should cardiac arrest occur. Patients, however, are usually not told about coding. “It would make already anxious patients and relatives even more fearful,” one official explained. “They don’t need to know about it. They will be coded anyway. People should assume whatever care is needed is going to be given.”

Mr. Walker’s physician and the hospital officials maintained that Mr. Walker was coded, but both conceded that “code blue” was not called. Mr. Walker’s physician argued, “Doing ‘everything’ for a patient in my mind does not include cardiopulmonary resuscitation (CPR). In Mr. Walker’s case, it might mean doing nothing.” According to the physician, Mr. Walker was not sent to the intensive care unit (ICU) for two reasons. There was a shortage of beds in the unit and Mr. Walker “didn’t seem like he belonged there” because he was not acutely ill. “When it came to resuscitating, it’s reasonable for a man in his fifties or sixties, but criminal to resuscitate in [Mr. Walker’s] age group to prolong life a week at the most, given his condition. I don’t see any sense in calling code blue with a ninety-year-old man who has no future to look forward to. That’s doing him a disservice and increasing his hospital costs.”

Mrs. Walker disagreed... “Doing everything,” she said, “is the difference between life and death. The doctor was playing God when he decided he should not try to save my husband. You’re not playing God when you’ve tried everything and exhausted all methods. All I wanted was for them to try. My husband knew how to love and be loved. That was his quality of life. That suited him and it suited me.”

4.3b Analysis of “Doing Everything” Case

As with the last case, there are a few conflicting intuitions. Given the patient’s poor prognosis, one could argue that the doctor did the right thing. On the other hand, one could argue that the physician’s decision was wrong because it was overly paternalistic. There is no information about the patient’s wishes, however, it is clear that the wife’s wishes were not honored. These conflicting principles make the overall moral badness of the case unclear.

The DDA holds that harms done are worse than harms that are allowed. Mr. Walker's death was a clear case of allowing death. His condition had deteriorated to the point where his heart had stopped. The DDA in this case would hold that the allowing version is less morally bad than the doing version.

Mr. Walker's death was allowed by his physician. Unlike the first case, in which Dr. L. kills his patient with a potassium injection, it does not make sense to say that the physician is responsible for Mr. Walker's death. This case presents a unique example of allowing a patient to continue towards death.

Standard hospital protocol holds codes are called for all patients with full code status. In addition to this, the patient's wife had asked the physician to “do everything.” The desert basis for the blame deserved by the physician is complex in this case. There are two perspectives to consider regarding autonomy. Firstly, a unique sense of autonomy is lost in this case. Individual autonomy is the standard of autonomy but, in the absence of the patient’s ability to make such a decision, his wife was legally the given that power. Her wishes, and perhaps the wishes of her late husband, to resuscitate were known after the doctor's decision was made. There was a fundamental disagreement between what each meant by “do everything” and “quality of life.” In a sense, the autonomy of the patient was not respected when considering the wishes of the wife. The physician deemed the resuscitation as futile in Mr. Walker’s case. In addition to this, had Mr. Walker been resuscitated, the doctor foresaw that he would have no quality of life based on his age and poor condition prior to arrest. In this sense, the physician was more concerned with the patient’s well-being than any autonomous
wishes. However, Mrs. Walker also disagreed with the doctor on what constituted “well-being.”

There is harm from two perspectives. The harm, according to the physician, was minimized compared with any other alternative. The doctor believed the greater harm would have been to resuscitate Mr. Walker. For the wife, the harm that was done by allowing Mr. Walker to die was a great loss to the patient and his family. For her, the patient’s well-being was in his loving connections with his family which would have continued had he lived. There are conflicting harms with conflicting principles and, in cases like this, it is difficult to parse out which harms are greater.

The doctor cannot be blamed for the patient’s death. Mr. Walker’s death was not dependent on any of his doctor’s actions. However, there is some blame for the harm to the family and maybe even potential harm to the patient given the possibility that the patient could have been happy had he been resuscitated. However, the likelihood of this scenario seems small given the facts about the case. Though the harm to the family and potential harm to the patient in irreversible loss of autonomy and well-being may be deemed as moderate to severe, the doctor seems to have acted in the best interests of the patient. Note that, if the code status for the patient had been a full code per Mr. Walker’s or his wife’s explicit instructions, the intentional behavior of the doctor would have been a direct failure to respect the autonomy of the patient. Early discussions about patient’s code wishes are important to avoid such errors. Such a violation would be deemed a great harm for which the doctor would be fully responsible. Consequently, he would deserve full blame. However, as this fact is unknown about this case, it can
only be surmised that the badness of the scenario was not very bad. Thus, the sliding-
scale picture of these particular harms renders a picture of a lower degree of badness.

4.4a Case Study Three: Two Cardiac Arrests, One Medical Team

George Burnham and Donald Mattison were patients in adjoining rooms in the
rehabilitation division of a state medical center. George was a thirty-three-year-old,
severely retarded man who had lived in state institutions since the age of three. His
family had had no contact with him for over twenty years. George had been trained to
feed himself and to keep himself reasonably clean, but at the age of twenty-five he had
suffered cardiac arrest that left him with some paralysis. After rehabilitation he only
occasionally lacked bowel control. A second recent cardiac arrest had left him semi-
 paralyzed and totally incontinent. The chances of his regaining even his former level of
continence, the staff felt, were hopeless.

Donald Mattison, a forty-eight-year-old businessman, active in the community
and church affairs, married, and the father of four, had suffered a minor stroke, which
left him slightly paralyzed. In his six weeks on the rehabilitation ward he had regained
almost total use of his arm and leg. His prognosis for full recovery seemed excellent.

The hospital has at least one cardiac arrest team on duty twenty-hour hours a
day, and one crash cart in every patient area at all times. The possibility of simultaneous
cardiac arrests seemed remote. If it were to happen, there would not be time to transfer an
additional crash cart from another patient area, since the rehabilitation ward is served
by an extremely slow elevator.

But in this case, the improbable happened. George had a cardiac arrest at 3:00
one morning. Within four minutes the cardiac team had arrived in his room and was
ready to begin work. At that very moment Donald also had a cardiac arrest. Knowing of
the simultaneous cardiac arrests, every team member hesitated. Two also knew both
patients’ histories; the others, including the team leader, did not. After a moment, the
team leader said, “First come, first served. Let’s go to work.” With no further hesitation,
the team began to resuscitate George.

Without the emergency aid, Donald died. George was resuscitated, but suffered
another cardiac arrest at 8:20 in the morning. This time [the team] was unable to revive
him, and he too died. 144

144 “Allocation of Scarce Resources: Two Cardiac Arrests, One Medical Team,” Cases in Bioethics: Selections
1998.
4.4b Analysis of the Two Cardiac Arrests Case

Unlike other cases, one primary intuition come to mind after reading this case. The strongest intuition is that the *wrong decision* was made. This follows from the intuition that the patient with the best chance for survival is the patient who takes precedence. Judging from Donald’s condition and prognosis, his chances of survival seem far superior to George’s. This initial intuition seems consistent with the decision-making process for choosing organ transplant candidates. The “first come, first served” principle is not utilized in some cases of scarce resources like organs. Rather, candidates are chosen based on a variety of factors, including psychological and physical health. Such considerations follow from a goal of successful organ transplantation and retention—the goal is that organs will not be wasted.

The application of the DDA in this case appears to render the wrong answer in this case. According to the DDA, harms allowed are less bad than harms done. Donald’s death was *allowed* in order to save George’s life. This is a case of allowing which seems to be almost as bad as the harm-doing version of the case. The harm-doing version of this case could involve a member of the healthcare team killing Donald due to an overdose of medication. A grave mistake has been made according to the DDA. According to the traditional version of the DDA, harm-allowings are less bad than harm-doings because the harm is less dependent on the agents involved. The agents are appropriately independent of the loss of autonomy and well-being. According to the traditional version of the DDA, the agents are less responsible for the harm than if the harm was done. The DDA cannot appropriately distribute blame because this is not a typical case of allowing. The principle that was used was “first come, first served,” which...
seems more appropriate for a free meal than for a hospital. This is a case in which it is
difficult judge the badness of the state of affairs with the DDA alone. The DDA cannot
explain harms or measure the badness of those harms in cases where a death was
wrongfully allowed. In other words, according to the traditional DDA, this case of
allowing harm looks more like a case of doing harm. This case would qualify as a
counterexample to the DDA. The sliding-scale approach to harm is better equipped to
determine the badness of the state of affairs.

The sliding-scale approach to harm begins by considering the subject of desert.
This particular case has multiple subjects as allowing the death to continue happened as
a result of a team’s actions. Typically, a team leader of a code team is a physician. The
team leader acts as a dictator who makes unilateral decisions concerning the
resuscitation process. The resuscitation process follows standard best practices as
updated by national medical associations that should be reflected in hospital policies. In
other words, the team leader’s decisions on when to commence CPR vary little from
case to case; they do vary except on when to stop. The team leader cannot be the sole
subject of deserving blame for the harm. In this case, there were two team members
who were aware of the histories of both patients. Both those team members refrained
from sharing information. In one sense, when one considers the information needed to
make a rational decision, those two team members were more autonomous than the
team leader. Had they shared the information and the team leader still decided to
resuscitate George, the team leader would have had a greater responsibility in total
harm.
This case includes great loss by both patients, but there is more significant loss to Donald. Values lost in this case must refer to the potential goods Donald would have had following his resuscitation. Given his medical condition and prognosis, Donald would have had a better outcome in both autonomy and well-being. This follows from his autonomy and well-being prior to his stroke and the quickness and quality of his recovery. George, on the other hand, had little personal autonomy related to his incompetence, and his well-being was not as great as Donald’s. His medical condition and prognosis was very poor. Further, George died shortly after his resuscitation. Donald most likely would have lived for years after his potential resuscitation. The values lost by Donald and his family are permanent, a fact which makes the badness of this case even more severe.

Cases such as this one, which involve split-second decision-making and appropriate distribution of resources, depend on several factors. One of these factors is knowledge of a patient’s medical history, condition, and prognosis. This information is not always readily available, but there were two team members who were aware of such information about the arrested patients. This case results in a great harm and likewise demands great blame. The blame is shared by the team leader and the silent team members. However, it seems that a greater degree of total blame should fall on the team members. The silent team members deserve blame created by the moral responsibility they incurred in not speaking out. The team leader deserves some blame for following a principle, “first come, first served,” which does not accurately reflect important principles in both medicine as a whole and medical ethics (principles including
nonmaleficence, justice, and beneficence). According to the sliding scale, the total badness of this harmful state of affairs is very bad.

4.5 Conclusion

This chapter utilized the sliding-scale approach to harms to assess harms in three cases. This approach was compared with both possible intuitions about each case and the traditional version of the DDA. The DDA has been relegated to a subordinate status in assessing the badness of a harmful state of affairs. This is not to claim that the DDA is still not important. The sliding-scale approach to harms is a more robust account of harms which allows for the flexibility to assess degrees of badness in a number of cases. A more developed version of the sliding-scale could include actual numerical values that could better express the values involved. This chapter has shown by case analysis how a consequentialist approach to harms is compatible, in a sense, with the DDA.
CONCLUSION

In medical ethics, there is much controversy over the moral permissibility of harming. Principles such as the DDA and DDE have been examined to provide clarity in navigating the complex and difficult issues surrounding harm. There has been much doubt concerning the DDA’s ability to explain moral responsibility related to harm. This thesis has explored the particular objection that holds that there is not a true moral difference between harm-doings and harm-allowings. Consequentialism has been rejected as a defense of the DDA, because philosophers such as Foot and Quinn object to the consequentialist approach to viewing harms solely in terms of outcomes. The DDA is unique, for Foot and Quinn, because it holds that categories of harms can be distinguished based on actions and not consequences. The classic utilitarian sentiment that the ends justify the means is considered by Foot and Quinn to be dangerous, because this utilitarian principle, if followed to its logical conclusion, leads to sacrificing persons for the sake of the collective good. This thesis has claimed that it not necessary to rely on this utilitarian principle to explain the DDA. Rather, axiology, value theory, is an excellent way to pick up on the complexities of cases to explain the badness of harm. This thesis has developed an account of harms that explains the badness of harms in terms of the loss of goods, autonomy and well-being and the gain of blame for the perpetrators of harm. Actions are still an important part of explaining the badness of harm, but the binary picture of harms has been modified into a sliding-scale. The sliding-scale approach to harms has been adopted to more accurately capture the
badness of harms—harms are best described as a continuum of badness and not as two strict categories.

This thesis had several limitations. One limitation included the rights-based approaches of Foot, Quinn, and Draper. It would be interesting to further explore other deontological approaches and responses to the DDA. This thesis was also limited to the axiological approach of Feldman and only two of his essays. A more thorough study of axiology would help in the development of the sliding-scale approach of harms. It would be interesting to engage in a wider survey of his writings. This thesis was also limited to the information contained within the resources chosen. The DDA is a topic that has been written about by several philosophers including Jonathon Bennett. Future plans for improvements could include a more thorough analysis of those writings.

There are several concepts that could be further developed. This thesis was limited in its analysis of each of these concepts. Future improvements could include a more thorough, conceptual analysis of blame and the different kinds of blame. It would be interesting to also explore the relationship between the DDA and ideas such as moral obligation and effort.
BIBLIOGRAPHY


