
Unacknowledged Harms: Justifying the Texas-Mexico Border Wall

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ABSTRACT

Imagine I am the defendant in a murder trial. I realize that in law, murder is an intentional crime. Why not simply claim that I did not intend to kill? Of course I cannot usually do so. The law allows various ways in which subjective first person reports of intent can be defeated by other evidence. The criminal law is one of the best-developed bodies of doctrine formalizing the use of such evidence and in this paper I propose to apply it to the available public justifications for the construction of the Texas component on the US-Mexico border wall. The stated intent of the policy embodied in the construction of the Texas segments of the US-Mexico border wall is to reduce unauthorized border crossings; but I show that this cannot be its actual intent. I then document the extent of the harmful effects of the wall policy, effects that impose a high burden of justification on the policy. However, since the intent of the policy is unknown, no justification for the wall has been given. This is a very disturbing state of affairs. It might still be possible to provide such a justification, even if public officials are reluctant to do so. But, by analyzing some plausible candidate intentions behind the wall policy, I show that such justifications are highly unlikely to succeed. The best justification would have been on the basis of the stated intention. Indeed it is not implausible to suppose that the reason why the actual intent is

not stated openly is exactly because it is obvious to policy makers that it does not justify the policy. Lastly, I shall argue that there is an interpretation of the doctrine of the double effect that has explanatory value in this case. It suggests a refusal to acknowledge the moral relevance of those – usually poor, usually Mexican – unauthorized migrants whose lives are blighted as a result of the policy. In the course of the paper I also offer a novel argument showing by reductio that it cannot be generally impossible (as some suppose) to attribute intent to collective entities.

INTRODUCTION

Imagine I am the defendant in a murder trial. I realize that in law, murder is an intentional crime. That is, I can only be convicted of murder if it can be shown not only that my action caused the victim to die, but also that I *intended* my action to do so; if I did not intend to kill, then (except perhaps in rare circumstances), I cannot be convicted of murder. Why then should I not simply claim that I did not intend to kill? After all, intent is a subjective state and my own reports of it ought to carry weight. This is particularly true in a criminal trial where the prosecution must demonstrate the presence of each element of the crime, including intent in an intentional crime, to a very high standard – beyond a reasonable doubt. Surely I can introduce a reasonable doubt about my intent simply by claiming that I did not have it?

Of course, I cannot usually do so. The law allows various ways in which subjective first person reports of intent can be defeated by other evidence. The criminal law is one of the best-developed bodies of doctrine formalizing the use of such evidence and in what follows I propose to apply it to the available public justifications for

the construction of the Texas component on the US-Mexico border wall.

Section I outlines some of the issues concerning establishing intent in criminal law, paying particular attention to the use of objective data to defeat subjective reports of mental states.

However, to successfully apply this doctrine to the public justifications for the policy of constructing the US-Mexico border wall, I must first, in section II, respond to the important objection that only individual human persons may be said to possess the kind of intentional states that partly comprise moral responsibility. Collective entities like organizations are not ontologically persons, and therefore may not be said to possess any intentional states. If this is so, then my investigation is essentially a category mistake. There is a rich and interesting literature on this subject (Moore, 1999). But I will argue that, because this literature is mostly focused on a particular class of collective entity (corporations), it does not attend to the particular circumstances that *governmental* collective entities are in. In a democracy, I propose, governmental collective entities enjoy a special status that enables a *reductio* argument against the claim that it is a category mistake to regard such entities as susceptible to moral evaluation and hence capable of possessing analogues of mental states like intentions.

The stated intent of the policy embodied in the construction of the Texas segments of the US-Mexico border wall is to reduce unauthorized border crossings. But, having established in section II that it is possible to attribute intent

here, in section III I show (using the tools from section I) that this publically stated intent of the policy cannot be its actual intent.

In section IV, I document the extent of the harmful effects of the wall policy, most seriously, the steep increase it has caused in the number of people killed while crossing the border. These effects are well-known; indeed they can often be gleaned from government reports. Consequently, they impose a high burden of justification on the policy. I outline two traditional ways in which the harmful effects of an action can be morally justified (utilitarianism and the deontological doctrine of the double effect) and show briefly that neither is applicable in this case because the argument of section III has shown that the intent of the policy is unknown. As a result, no justification for the wall has been given. This is a very disturbing state of affairs. It might still be possible to provide such a justification, even if public officials are reluctant to do so. But, by analyzing some plausible candidate intentions behind the wall policy, I show that such justifications are highly unlikely to succeed. The best justification would have been on the basis of the stated intention. Indeed it is not implausible to suppose that the reason why the actual intent (whatever it may be) is not stated openly is exactly because it is obvious to policy makers that it does not justify the policy.

Lastly, in section V, I shall argue that there is an interpretation of the doctrine of the double effect (DDE) that has explanatory value in this case (Duff, 1982). But it is not an interpretation that justifies or excuses the border wall. Rather it suggests a refusal to acknowledge

the moral relevance of those – usually poor, usually Mexican – unauthorized migrants whose lives are blighted as a result of the policy.

Section I

Sometimes legal scholars regard *knowledge* of the consequences of one's actions as sufficient to establish intent: according to the famous dictum that 'a man is taken to intend the foreseen consequences of his actions' (Kenny, 1978, p. 50). However, more often this *cognitive* aspect is treated only as one component of intent, alongside a *volitional* one. On this view, to murder someone I must both want my act to be the act of murdering that someone and believe that it is, i.e. that in so placing my hands on my victim's neck I will in fact kill my victim. It might seem that there is relatively little distinction between volitional and cognitive components since it is hard to see how I could reasonably claim that I did not want to kill my victim while I nevertheless knew that my strangling would lead to the victim's death. But, what ought to be done in cases where a defendant *does* make this claim? Shouldn't the defendant be the best judge of the defendant's mental states? If not, what is the appropriate rationale for defeating the defendant's first person mental state reports? Making intent purely cognitive would solve this problem. But, it has its own implausible consequences, since almost every intentional action will have side-effects that are not germane to the desire that accompanies intent but that are nevertheless foreseen by the agent. In strangling I may hurt my hands, leave fingerprints on the victim, get out of breath etc. I may not *want* these things to happen (even as means to my end),

although I may still know that they will. But, it is surely implausible to suggest that I *intend* them all. Yet this follows from the cognitive view.¹

There is an alternative however: to view the cognitive element as *constraining* the volitional component. If I *know* my act of strangulation will lead to the death of my victim, this is *ceteris paribus* enough to defeat my claim that I nevertheless did not *want* to kill my victim. This is one way in which first person reports can be defeated. But it presupposes another and more important way: the so-called ‘reasonable person’ test (see Herring 2008: Chapter 1.7.1; Duff 1996; Kenny 1978: Chapter 3). The reasonable person test provides that an act exhibits the intent required to constitute murder if a reasonable person would have foreseen that death (or grievous bodily harm) would be its (likely) outcome.² A similar standard to this was used to convict so-called ‘AIDS murderers’ in the 1990s, where the State of Maryland argued that the fact that death would be ‘the natural and probable result of the ... conduct’ meant that intent to kill could be inferred merely from knowledge that there was *some* risk of infection (Grishkina, 1997, p. 1618). The formula that agents may be said to intend the natural and probable consequences of their actions is certainly controversial, but has found its way into the U.S. Manual on Jury Instructions in Federal Criminal Cases (Malle & Nelson, 2003, p. 573).

The reasonable person test is somewhat controversial and orthodox legal scholars maintain that someone is innocent of a murder if, contrary to all evidence, they did not *in fact* want to kill or that they were *in fact*, even though quite

irrationally, unaware that their action would be likely to kill. On the face of it, this orthodox account is hard to square with the intuition that I cannot exculpate myself of murder simply by denying that I wanted to kill or denying that I knew that my action would be likely to cause serious harm (or both) *no matter how implausible my claim is*. If I push someone off a cliff, I cannot simply claim that I didn't want them to fall (but was merely interested in getting them out of my way) or that I sincerely had no idea that gravity would make them fall (perhaps on Humean grounds).

However, I think the orthodox qualms can be assuaged while holding onto the possibility of defeating first person reports in some cases. The way to do this is to make a distinction between a kind of legal realism and legal anti-realism about mental states. The worry of the orthodox scholars is that it remains possible that the subjective mental element (of desire or belief) may still be absent in spite of the evidence, and that without this element, the so-called *mens rea* or guilty mind, a crime has not actually been committed. Thus if non-subjective evidence is used to 'impute' intentions where none actually exist, then an innocent person will be convicted. As Kenny puts it, the use of external evidence raises the problem of 'finding an intent where none existed' (Kenny, 1978, p. 62).

This view seems to presuppose a kind of legal anti-realism in which a certain evidential set is tied *by definition* to the existence of what it is evidence *for*: intent, on this view, is *constituted* by mere knowledge or even by what a reasonable person may be presumed to know. But there is no

need to think this: it is perfectly coherent to maintain the distinction between the actual existence of intent as a mental state and our epistemic warrant for asserting the existence of an intent while at the same time allowing that other non-subjective factors may weigh more heavily than 1st person reports. It is true that a reasonable person would have known that gravity will make someone fall off a cliff if pushed. But this fact does not have to be understood as making an appropriate kind of pushing *constitute* intent to make fall; it can be understood instead as a very strong evidential warrant for thinking that someone who *denies* having this knowledge is not telling the truth. This warrant is potentially defeasible and situations can be constructed in which one might even want to allow the first person report. But such situations would have to provide a lot of countervailing evidence, perhaps some kind of well established but odd religious belief.

Here I rely only on the observation, supported by the general framework of legal doctrine, that the assessment of intent ought to depend on a range of factors and that it can, in certain circumstances, overturn first personal reports of volition on the basis of both cognitive factors and objective ‘rational person’ tests. In sections III and IV, I will use both of these ideas in the context of determining the aim behind the policy of building a wall along the Texas-Mexico border.

Section II

My aim is to use the basic legal insight that first personal claims to have an intention ought to be subject to evaluation based on other criteria, and apply this legal standard to the case of the publically stated intent behind the Texas border wall. However, before I can do that an important objection needs to be addressed. The objection is that mental states cannot be attributed to collective entities comprising multiple regular human persons, over and above the attribution of intentional states to the individuals comprising the collective entities.

There has been a long and vigorous debate about the moral responsibilities of corporations. In the United States, corporations have been legally regarded as persons since *Santa Clara Country vs. Pacific Railroad* (1886). And a similar doctrine is the foundation of corporate law in many other countries too. As a result, corporations have successfully sued for legal and constitutional rights as persons, and these have changed the face of the corporation beyond all recognition from its earlier instantiation as a entity endowed with limited liability because of its charter to serve a particular public good (Bakan, 2004). Now corporations have the right to own and sell property, have defense against unreasonable search and seizure, and, of course a right to free speech that undergirds the use both of advertising and political donation.³

This legal situation naturally leads to an analogous moral question about corporations: do corporations have *moral* rights and responsibilities? Since moral rights and

responsibilities are usually understood to presuppose the capacity for intentional action, and corporations comprise a subset of collective entities, these debates bear directly on the question I am dealing with: the attribution and evaluation of intentional states to collective entities.

The modern debate was initiated by French (1979) who makes the case that corporations do constitute moral persons. Since then the question has been much discussed, especially in the business literature. French's strategy is to attempt to construct a list of abilities required for moral personhood, and seek to show that each can be plausibly attributed to a corporation. He especially emphasizes what he calls the Corporation's internal decision structure (French, 1979) that draws a substantive analogy between the process of rational deliberation that goes on in a flesh and blood person in forming an intent to act in a certain way, and the process of regulated committee deliberations that culminate in the formation of corporate policy. This would of course establish that at least some collective entities possess intentional states.

French's position has been vigorously rejected in many quarters. For instance (Velasquez, 1985) argues that corporations cannot be morally responsible because they do not have bodies to carry out actions. (Ladd, 1970) argues that rational-technical decision-making structure of what he calls 'formal organizations' is logically incompatible with the introduction of ethical reasons, described by Ladd as "a category mistake" (Ladd, 1970, p. 500). (Bakan, 2004) argues that it may be true that corporations are

persons but that the *kind* of person they constitute is one incapable of acting ethically towards others as a result of the over-riding requirement to seek profit.

I am personally sympathetic to the views of Ladd and Bakan, but the latter's views apply *specifically* to corporations (whose activities are in principle limited by their articles of association) and an exception should be made to Ladd's strictures *in the case of organizations whose goals are or ought to be determined by popular will*.⁴ The reason is this. Assume that such organizations could not form intentions. Then we would not be able to evaluate their actions morally. It might be for instance a

category mistake to do so. But this is absurd. Individual citizens ought to formulate policy on a moral basis, and this entails that they ought to evaluate the implementation of that policy when it is mediated by collective governmental or non-governmental agencies. On the familiar principle that ought implies can, then, if moral evaluation sometimes requires the attribution of mental states, it follows that it must be possible to attribute mental states at least to collective governmental agencies that mediate the enactment of the popular will (or ought to do so). Thus either we can attribute intentional states to such agencies, or it is impossible to formulate and evaluate the implementation of the popular will on a moral basis. I take it that the latter claim is false. Therefore, we must be able to attribute intentional states at least to governmental agencies.

It can seem circular to base a defense of the attribution of intentional states to collective

entities on the basis of ‘ought implies can’ since the latter principle itself presupposes such attribution. But the argument is not circular because it is *citizens* who ought to (and hence can) subject collective entities to moral evaluation (at least when those entities mediate enactment of the popular will). The premise of the argument that uses the ‘ought implies can’ principle does not use it of collective entities, but of individual citizens. It is then because citizens *can* morally evaluate at least some collective entities that it must be possible to attribute intentional states to those entities (since this is a necessary condition for moral evaluation).

Section III

In this section, I return to the main thread of the argument. I will use criteria based on the legal ones briefly described in Section I to cast doubt on the stated intention behind the border wall project. In fact I will argue that on any reasonable reading, the stated intent of the policy cannot be the actually motivating intent, whose achievement comprises the content of the volition of the intent.

The wall is officially intended substantially to reduce unauthorized entry into the US.⁵ Such a reduction is supposed to be good in itself as well as to be an instrument for achieving several other ends: it is supposed to reduce the downward pressure on wages in the US produced by the presence of a pool of workers peculiarly vulnerable to exploitation; it is supposed to reduce the threat of a terrorist attack in the US and to reduce the supply of illegal drugs in the US. But any moral case that could be made

defending the wall rests on the truth of the claim about what the actual purpose of the policy is. It is this claim that I will try to show is highly unlikely to be true.

There is one serious difference between the analysis I propose here and the legal concepts outlined in section I. My interest is in evaluating the plausibility of the official claim that the *purpose* of the border wall is to prevent unauthorized migration. But, it is often said in law that (ultimate) purposes are never relevant, and the law concerns itself only with immediate intent (Chantry, 1991; Kenny, 1978, Chapter 3; Fletcher, 1998, Section 7.3). In other words, I cannot claim that I am not committing murder because my ultimate purpose was a good one (finding out where the dirty bomb is, relieving suffering in a case of euthanasia). But, my claim here is not about what is relevant to a legal evaluation of mental states, but merely to apply the evidence-gathering techniques of the law. There is no structural difference between the kind of evidence that can support or refute a claim to have a properly local intent and the evidence needed to support or refute an ultimate purpose.

What kind of evidence will work here? My contention is that it is precisely the *relation* between the stated final end (of reducing unauthorized migration) and the policy instrument proposed (the Texas border wall) that should be analyzed. Briefly put, if the proposed policy instrument fails to bear an appropriate relation to the stated purpose and yet the policy continues to be followed, then there is evidence that the stated purpose is not the actual purpose of the policy: claims about the *volitional* component

of an intent (whether the purpose is really what is desired) can be, in principle, defeated by *cognitive* counterclaims.

For example, say I am getting on a bus in San Antonio and that I claim that I am doing so with the purpose of getting to my wedding in Houston on time. If the bus is in fact going to El Paso, then either I am sorely mistaken about the bus or I do not really want to go to my wedding. Now of course I may claim to be mistaken. But, in accordance with the second way in which 1st person reports can be defeated, this cognitive claim can itself be rejected. One can apply the 'reasonable person' rule here and argue that what any reasonable person ought to know is in fact known in this case. But such 'imputation' of cognitive states is not required and I defend a weaker position (along the lines of the realism mentioned at the end of section I). The weaker position is that an agent must at least give good reason why they are in ignorance of well known facts. In this example, of course a reasonable person ought to know whether the bus to their wedding is going in the right direction or not. But it is possible to imagine situations in which ignorance is genuine (dyslexia perhaps). Equally it is clear that there are situations where the claim to ignorance becomes decreasingly plausible: for instance, if my best man points out to me that the bus is headed in the wrong direction, gets a timetable to show it and makes me ask the driver. In situations where there is reasonable ground for skepticism about the efficacy of a chosen instrument in achieving a given purpose, then the extent to which one is motivated by the actual end itself can also be measured by one's willingness to contemplate alternative instruments. In this

example, there would surely be nothing for it but to assume that I have some unstated purpose in mind in getting on the bus if I persist in taking the wrong one even after being presented with evidence about its direction.

It is possible to make an analogy here with the consent element of the crime of rape. This element is specifically cognitive: it is not possible to be guilty of rape if one *believes* consent has been given. On the conservative legal understanding of mental states, someone is innocent of rape if they believe consent has been given, *no matter how irrational that belief is*. On the more controversial ‘externalist’ understanding presented above, it would be possible to impute belief that there has been no consent in cases where a reasonable person would have such a belief. But there is a more subtle interpretation (Kenny 1978: Chapter 3) according to which an irrational belief that consent has been

given constitutes evidence of a lack of appropriate concern for ascertaining whether consent has been given, evidence that may rise to the level of showing reckless disregard (something that legally constitutes rape). It is this idea of an appropriate epistemic or evidential concern with one’s actions that I think can be usefully applied in the present case. To maintain that one is acting so as to pursue a particular purpose is to place an epistemic obligation on oneself to ascertain whether one’s action really is likely to bring about one’s purpose, and if there is doubt, then to investigate other possible instruments for bringing about the same purpose. Reckless indifference to such epistemic obligations is, in the absence of alternative

explanations, evidence that one's actual purpose – the one actually motivating one's action -- is not the stated one.

Does the official justification for the border wall meet this condition? In other words: to what extent do the public institutions involved show themselves to be interested in collecting or providing evidence that their policy will achieve its purpose of reducing net unauthorized migration?

It is not hard to see intuitively that there can be reasonable skepticism about what effect the wall (and other similar programs) will have on net unauthorized migration given the fact that there is no plan to wall off the entire southern border of the US and uncontroversial assumptions about the relative inelasticity of the supply of potential migrants who are highly and even desperately motivated to perform what was even before the wall an extremely risky venture: if migrants cannot cross (easily) where the wall is, it is likely that they will cross – or be directed by professional intermediaries to cross – at another point.

The Border Patrol of course collects statistical records. That it does shows that it understands the epistemic obligation to provide evidence about the effectiveness of its policies. But standardly the Border Patrol collects evidence about apprehension events and these bear only an indirect and unpredictable relation to the actual number of unauthorized entries. Moreover, the success of individual wall segments is often measured in terms of a reduction in apprehensions in that sector, thus

ignoring the possibility that migrants will, if deterred at all, choose different points of entry.

It is also easy to make a *prima facie* case that other factors than US border policy will have an effect on the number of people seeking to enter the US. It is hardly controversial to suggest that many potential migrants from Mexico are motivated by poor economic conditions in their own country (and especially by the devastation of the agricultural sector). As a result, one would expect the numbers of migrants seeking entry to be at least partly responsive to prevailing economic conditions both in Mexico and the US. There are widely known statistical techniques available that allow multiple factors affecting an outcome to be partially disentangled, yet the evidence officials cite does not include a statistical analysis that excludes even such obvious factors as economic ones. Indeed official justifications do not even mention these other factors. Similarly, little consideration has been given to other ways of achieving the stated goal of reducing unauthorized migration: alleviating economic distress in Mexico, increasing the very limited opportunities for legal migration from Mexico, or even permitting temporary worker programs like the Bracero program.

It is hard to argue that collective agents of government policy can remain systematically in ignorance of the evidence that a sectoral wall will displace rather than reduce unauthorized migration. In general, it is much harder to credit collective entities than individuals with this kind of ignorance since collective entities have many more cognitive resources than individuals and are less easily isolated from obvious facts. But, using

the standard of appropriate epistemic obligation, I think it is very hard indeed to believe that government agencies could be ignorant *of the mere possibility* that a sectoral wall might not serve its stated purpose. Once this has been acknowledged, then agencies have an epistemic obligation to collect evidence supporting the use of the chosen instrument. It is almost impossible to believe that agencies were ignorant of their epistemic obligations since e.g. the Border Patrol *does in fact attempt to give evidence*. In these circumstances I think the only reasonable interpretation of the persistence of the policy is that it is motivated by some other purpose than the stated one.

Section IV

These considerations are made much more serious by the weighty negative consequences of persisting in the border wall policy. Construction of wall segments in major urban areas like San Diego/Tijuana led, as one would intuitively expect, to a displacement of preferred points of unauthorized entry to un-walled border sections (Nuñez-Neto & Garcia, 2007, p. 14). It would be wrong to say that crossing the border is easier in these sections however, as they are much more likely to be located in physically and socially hostile environments in which migrant access to life-sustaining necessities like food, water and emergency health care (always fragile) is very tenuous.

To cite just the grossest measure of this human cost, government studies of the effect of similar measures in California suggest that it has been responsible for more than doubling the

number of annual crossing fatalities since the early 1990s from somewhere in the region of 200 to 472 (or more) in 2005.⁶ Overall, more than 4,000 migrants have been killed trying to cross the southern US border in the last 12 years, which is 15 times as many as were killed trying to cross the Berlin Wall in the 28 years of its existence (Federación Internacional de Derechos Humanos 2008).

Government sources unequivocally attribute the increase in mortality to the wall (and other aggressive paramilitary enforcement tactics). The wall in California especially has succeeded in ‘channeling’ would-be migrants away from San Diego and into the Sonoran desert (Nuñez-Neto & Garcia 2007: 35f). There is less evidence available about Texas because the wall has only just been completed. What there is, points to a similar channeling away from El Paso again into the Sonoran desert. This is the best evidence policy makers have about the likely effects of the rest of the Texas wall: it is likely to redirect rather than reduce migration; and, given the position of the wall segments, it will redirect migrants to more dangerous crossing points, increasing the risk of mortality.

Actual mortality is of course a very gross measure of the dimension of human suffering caused by the wall; but one that is easy to demonstrate and quantify. Another obvious effect is to undermine the institution of the family. Many unauthorized migrants cross as individuals, leaving their families behind in order to be able to support them financially through monetary remittances from paid employment in the US. Indeed, such remittances now comprise \$20bn

annually, the second largest source of hard currency in Mexico, after petrodollars (Federación Internacional de Derechos Humanos 2008). Before the various operations of which the border wall is a part were undertaken in 1990, families could be regularly reunited; but now both the human risks and financial costs of crossing are so great that many families remain more or less permanently separated. The movies *Made in LA* (US 2007, Dir. Almudena Carracedo) and *Los Trabajadores* (US 2001) by Austin director Heather Courtney illustrate two moving stories of family separation. With about 12 million unauthorized migrants currently residing in the US, the number of untold stories is hard to estimate.

These known negative effects are serious enough to require a high level of justification the policy that leads to them. If the intent of the policy were, as it has been publically stated, to reduce unauthorized migration, then there would be various ways in ways in which even high levels of harm could in principle be justified. One might take a broadly utilitarian route and attempt to offset harm caused to migrants with the benefits of reduced migration. Or, one might take a broadly deontological route and argue that reducing unauthorized migration is good in itself (or at least permissible) and the resulting harm justified, using the doctrine of double effect (DDE), as an unintended (if foreseeable) consequence of pursuing that aim. Neither route is likely to be convincing. The evidence shows that the wall does not measurably reduce overall unauthorized migration. Therefore, if this were the intent, there is no evidence of benefit, but considerable evidence of harm. This would make

a utilitarian justification unlikely to succeed. According to the DDE, the overall aim must be something good in itself and the foreseen but unintended consequences must be ‘proportionate’ to the good achieved by the aim. For instance, I may permissibly shoot you intending to defend myself against your violent attack knowing (but not intending) that you may die as a result. But, I may not plant booby traps in the road, knowing (but not intending) that people may be injured or die as a result, in order to help you across the road safely. The DDE would offer a more plausible justification than utilitarianism in this case. However, it is nevertheless at least questionable whether ‘reducing unauthorized migration’ is an unalloyed good. For example, it directly harms the migrants who are successfully deterred. This seems like a different sort of harm from the unintended but foreseen harm of increased mortality rates in that it is hard to distinguish from the goal of reducing unauthorized migration itself: to reduce unauthorized migration *is* to deprive would-be migrants of economic opportunities they desperately need. If so, then the end is obviously not good in itself, and the DDE cannot be applied. One might argue that we have the right to determine border policy. But, this is a legal right, not a moral one; and the question here is precisely whether (legal) public policy is morally justified.

The important thing—and the primary point I want to make here—is that we know that reducing unauthorized migration is *not* the actual intent of the policy. We know this because the evidence shows that the wall has no measurable effect on migration; and the reason for this is that there is no plan to wall off the whole border, so

that would-be migrants are consequently displaced rather than deterred—displaced to more dangerous crossing points, causing the high level of harm now under discussion. As a result neither of the above justificatory frameworks is available. We know that the policy is *not* intended to reduce unauthorized migration. Therefore, this cannot be the overall goal of a DDE argument. Moreover, we do not know *what* the aim is. Therefore, we cannot determine the *type* of action the policy embodies. Almost all forms of utilitarianism evaluate not individual action tokens but action types. If they did not, then I could justify an individual action token of the type ‘shooting you in the head’ on the ground that in this case I missed and you were so relieved as a result that your life was henceforth transfigured. But, we do not know what type of action is embodied in the wall policy action token. Therefore, we do not know what action type to subject to a utilitarian calculus.

Sub specie aeternitatis, this does not mean that the policy is *not* justified. It does mean that *no justification has been given for it*, and hence, we are acquiescing in an action that is known to cause harm without giving any justification for that harm. This is a situation that I find very morally disturbing.

It is tempting to want to find out what the actual intent of the policy is in order to see whether there is some justification, even though one has indeed not been given. However, I think it is important to take a step back and reflect on what the current situation is before doing so. Here is one way of understanding it: official mendacity about the aim of the policy leaves us in the

situation where we do not actually know what the action being undertaken by the policy is so that moral evaluation on the current data is impossible. The action is clearly not just ‘build a wall for no reason’ (and if it were, it would be obviously unjustified given the harm it causes). We need to know what the wall *aims at* to determine the action type embodied in the policy in a way relevant for the moral evaluation we are obliged as citizens to perform on public policy. This is precisely what we cannot do.

Moreover, the fact the stated intent is not the actual intent makes figuring out the actual intent a matter for speculation, and hence makes *any* moral evaluation of the policy perilous: it is always possible to question this or that speculation. The pragmatic result is that our obligations to morally evaluate policy are themselves channeled into epistemically problematic speculations that are always open to challenge so that actual moral evaluation has a hard time gaining discursive traction. It is therefore very important to remember that speculations about the actual intent do nothing to alter the current situation, which is that a policy with known harmful consequences is being undertaken *without any public justification*.

Nevertheless, I think rehearsing the possible actual intents behind the policy is informative because it turns out that—once reducing unauthorized migration has been eliminated—there is no plausible candidate intent that could be the basis of any remotely convincing moral justification for the known harms caused. Indeed it is surely not too much to suggest that this is

exactly why the actual intent (whatever it is) was not presented as the stated intent.

One possibility is that the policy is intended to displace migrants (rather than lead to an overall drop in the number of crossings) simply to make things easier for the Border Patrol. This is suggested by Border Patrol's own claim to be 'rerouting illegal migration away from urban areas towards geographically isolated areas where their agents have a tactical advantage over border crossers' (Nuñez-Neto & Garcia, 2007). The increase in the death rate is presented in official publications as an 'unintended consequence' (35f) of this policy. But, a DDE could not be used to justify the policy if this were its intent because of the proportionality principle. This principle states that the foreseen but unintended effects of an action must not be disproportionately bad in comparison to the (good) intended effect. However, here the unintended but foreseen effect (exposing would-be migrants to risk of death) is out of proportion to the aim, which would be a mere 'tactical advantage' understood as an end in itself. Of course 'tactical advantage' is almost certainly not meant stand on its own as an end in itself but rather be a means to an end by leading to a reduction in unauthorized migration. Then the new purpose would collapse back into the one that Section III argues is highly implausible. It ought to be uncontroversial to suggest that tactical advantage on its own, not leading to increased effectiveness, is far from suitable for justifying unintended consequences amounting to hundreds of excess deaths.

Another suggestion, provided by Peter Andres' analyses (Andreas, 2000) is that the aggressive enforcement policies along the border (including the wall) are intended primarily to be symbolic rather than efficacious. They are part of an elaborate game played between states to send messages to each other. In this case the wall is 'sending a message' to the Mexican government that the US wants the Mexican government to take steps to reduce migration and should respond appropriately. The understandable indignation of many Mexican officials about the wall would, on this reading, be an important marker of its success. Also, the symbolic nature of the action would explain why so little attention is paid to the efficacy of the actions in terms of reducing unauthorized migration. If this is true, then there are two possibilities. Either the human costs of the wall are a part of the intended symbolic presentation of an aggressive stance. In this case they are directly willed as a means to the end, and hence cannot be justified by means of the DDE. Or, they are foreseen but not desired consequences. But again, the consequences are so dire that it is hard to see how they are proportionate with the desire to send a message to a foreign government.

In both these cases the putative aims—tactical advantage for Border Patrol agents and communication with the Mexican government—must be understood as divorced from the aim of reducing unauthorized migration (which has been eliminated from consideration). When so separated, there is an obvious disproportion between the aim and the harm that defeats both DDE and utilitarian considerations. These justifications trade implicitly on the global aim of

reducing unauthorized migration and once this has been eliminated they are very weak indeed.

It is also possible that an increase in death rates is directly intended by policy. The overall strategy of Border enforcement since militarization began in the 1990s has been ‘prevention [of unauthorized entry] through deterrence’ (Nuñez-Neto & Garcia, 2007). Minimally such a strategy precludes other ways of achieving a reduction in unauthorized entry (implying that this *on its own* is not the goal, something that was already clear from the fact that no other means of reducing unauthorized entry are considered). However, in conjunction with the emphasis on displacement, it suggests that the cost of the fatal risks of traversing inhospitable landscapes is one of an array of deterrents that is therefore being intentionally imposed on potential migrants. If this were the operative reasoning, then, again, DDE justification fails (since the end being willed is wrong) and consequentialist reasoning fails because there are in fact few expected benefits (since the evidence suggests that migrants are not deterred in significant numbers, but merely displaced to other crossing points).

Other possible rationales are no morally better: the enormous cost of the technical aspects of the border wall suggests that a possible motivation is to provide a military Keynesian stimulus to a favored sector of the economy. Similarly, the advantages to US-based capital of a vulnerable and docile labor pool – both in terms of reductions in the cost of labor and in terms of breaking working class solidarity – are manifest and would be well served by a policy like the

current one that does little to reduce migration but increases the vulnerability of the migrant labor pool within the US. The ends in these cases would be clearly wrong. Even coarse utilitarian rationales would probably fail for both of these possibilities: military Keynesianism creates notably fewer social benefits than Roosevelt-style social Keynesianism even if its economic effects are similar; and attacking labor might create benefits for capital, but is obviously harmful for labor. A sophisticated utilitarian would also recognize the unfairness and violations of rights entailed by both possibilities.

None of these analyses is particularly complicated. In part, this is my point. It is at least *possible* to give some justification of the wall policy on the basis of its stated intent of reducing unauthorized migration. Personally, I doubt if any such justification would succeed (for the reasons given above), but they would have at least some plausibility. But, the stated intent of reducing unauthorized migration is *not* the actual intent. Therefore, these justifications are excluded. The other possible aims of the policy that I have analyzed open up little or no prospect for justification. This is why the analyses are so simple; and probably why the actual intent (whatever it may be) was not stated publically.

The goal of reducing unauthorized border crossings is justified in official pronouncements not only as intrinsically valuable but also by the claim that it will be instrumental in promoting several other goals. If the official purpose is not the real purpose then these other claims are moot. But, it is at least worth mentioning that they are open to analogous counter-evidence.

One stated goal is to reduce drug consumption in the US. However, attempting to reduce the supply of illegal drugs is well known to be relatively ineffective in combating the problem of drug use (Wilson, 2002); while other effective means (like medical treatment) remain aggressively unpursued. Another stated goal is protection against terrorism. However, there is no known instance in which a would-be terrorist has entered the US illegally from Mexico. It is, on the face of it, implausible that one would assume the extra risk of doing so. Official sources do not even pretend to present data to back this claim up. Equally, there are well known alternative ways of reducing the threat of terrorism that have not been undertaken. The standard argument used here is an interesting one: that a terrorist attack would be so bad that even the slightest probability that it might occur must be addressed, i.e. a probability that cannot be detected by means of actual evidence. If policy were motivated by this principle, it would also have to consider other horrendous events, like an asteroid strike, or, less fancifully, global warming, and adopt a similarly precautionary principle. Such options however, are not considered.

In this section I have tried to show not only that there is no public justification for the border wall policy, given the implausibility of its stated aim being its real aim, but also that, in the face of the known highly negative consequences of the policy, other potential aims (about which we can of course only speculate) would make it very hard to justify either on consequentialist or deontological grounds.

Section V

In conclusion, I would like to suggest one way in which the DDE can illuminate the Texas border wall policy. In 'Intention, Responsibility and the Double Effect' (Duff, 1982) argues that the DDE comprises not two but three possible attitudes on the part of an agent to the effects of his / her actions. First, the agent may actively intend the effect: either it is the purpose, aim or end of the action, or a means to that end. Second, the agent may not specifically desire to bring about the effect, but, foreseeing that it will happen, takes it into account as a reason against performing the action, but a reason that is outweighed by other reasons in favor of the action. It is this relation of agent to the effects of his / her actions that is the typical target for the DDE justifications for causing harm: the strategic bomber surely understands the civilian casualties and foresees that they may cause reasons against bombing, but ones outweighed by the moral importance of the intended purpose. Duff however points to a third possibility: the agent may also not directly desire to bring about the effect, but may regard it with such indifference that it does not enter into the space of reasons for or against the action. On Duff's account DDE hesitates between the second and third ways of relating to a foreseen but not desired outcome, and should be disambiguated. He gives moral examples of his third possibility from both consequentialist and deontological traditions. For a consequentialist, my action might involve something e.g. stepping on ants that I can foresee, but which has no bearing on the net aggregate utility of my action, and hence does not enter into the space of my reasons for acting. For a

deontologist, Duff considers a terror case in which I am forced to choose between killing one and someone else's murder of many. I believe that killing is always wrong, and hence I choose not to kill in this case too. Duff argues that I ought correctly to exclude from the space of my reasons the harm that I foresee comes to the many through my act of refusal. The deaths of the many ought not to factor in as reasons against my action at all since they are not attributable to me.

However, I propose another, this time psychological, reading of Duff's understanding of the DDE, one in line with some of Duff's other examples: I may intend to walk across the grass knowing that the grass will be slightly damaged, but be so indifferent to this damage that it does not figure as a reason against my action. It seems to me that this is an accurate description of the psychology of the intent behind the Texas border wall: whatever the ultimate purpose motivating the policy, the suffering caused to those, unauthorized migrants, most directly affected by the policy appears *simply not to count*. It is probably foreseen (the evidence is obvious and available), but does not appear to be taken up into the space of reasons as something that might militate against the action.

Endnotes

1. This is the basis of the influential doctrine of double effect (DDE). In a widely used example, strategic bombing is morally distinct from terror bombing because the terror bomber both knows that civilians will likely be killed and wills this to happen, whereas the strategic bomber foresees that civilians will likely be killed but does not will this to happen (Hull 2000, among many others, uses this example). I will return to the notion of double effect in sections IV and V.
2. *Smith* [1961] AC 290; Kenny (1978: 53). *Smith* was widely regarded as unworkable. British law has subsequently changed its position on this issue (several times) and now maintains a position in which intent to commit murder may only be inferred from a conjunction of high objective probability that death or grievous bodily harm will result and subjective knowledge of this probability (*R v Nedrick* [1986] 3 All ER 1; Harris 2007: 312-5)
3. *Noble v. Union River Logging* [1893] established that corporations legal personhood entitles them to protection under the Bill of Rights; *Hale v. Henkel* [1906] established protection under 4th Amendment against ‘unreasonable search and seizure’; *Grosjean v. American Press Co.* [1936] established 1st amendment protection for corporations to advertize.
4. The view I am defending here—that at least collective entities that mediate the enactment of popular will can be attributed intentions—does not exclude the possibility that corporations too might, under some circumstances, enact popular

will, and hence that we may be capable of attributing intentions to them too. For the purposes of this paper, all I need to show is that it is possible to attribute intent to the entities involved in formulation and implementation of the border wall policy.

5. Federación Internacional de Derechos Humanos (2008: 12). The official slogan for the policies introduced during the 1990s, and of which the wall is the culmination, is 'prevention through deterrence' (Nuñez-Neto & Garcia 2007: summary)
6. 475 deaths in 2005 according to the Congressional Research Service (Nuñez-Neto & Garcia 2007: 35) and 472 according to GAO (2006: 1). These figures almost certainly underestimate the actual number of fatalities since no attempt is made to scan the entire Sonoran desert north of the Arizona-Mexico border and the climate and fauna tend to consume bodies in a short amount of time leaving almost no trace. No one can really be sure of course, but the true mortality rates may be as much as three times as high (Federación Internacional de Derechos Humanos 2008: 12).
7. In addition, the evidence used to defeat the stated intent of reducing unauthorized migration (that the wall does not do this) also suggests that were this the intent, a utilitarian calculation would still come out negative.

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Biographical Sketch

Alistair Welchman teaches at the University of Texas at San Antonio and is interested in questions of naturalism and materialism, especially but not exclusively in relation to French and German philosophy since Kant and he has published on Kant, Schelling, Schopenhauer and Deleuze. In addition he works as a translator, mostly of Schopenhauer's *World as Will and Representation* (Cambridge) but also of Salomon Maimon's *Essay on Transcendental Philosophy* (Continuum) and have a growing interest in political questions stemming from his situation close to the US-Mexico border.