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## The Business of Double-Effect: The Ethics of Bankruptcy Protection and the Principle of Double-Effect

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Ethics must begin at the top of an organization. It is a leadership issue and the chief executive must set the example.

- *Edward L. Hennessy, Jr.*<sup>1</sup>

In the wake of the terrorist attacks on September 11, 2001, the airline industry in the United States suffered a severe blow as a sharply increased fear of flying among the general public, followed subsequently by more stringent security regulations and soaring fuel prices, created an exceptionally challenging business environment. Particularly hard hit were the legacy airlines and all of them, with the notable exception of AMR Corporation (American Airlines), filed for Chapter 11 bankruptcy protection in order to drastically cut expenditures and restructure aggressively in response to new market conditions. AMR's then-CEO, Gerard Arpey, opposed the action on the basis that such an action would be unjust to many stakeholders of the airline, specifically the employees and shareholders. His staunch opposition to the filing earned the admiration of D. Michael Lindsay, who concurred with Arpey's insistence that such an action constituted a moral failure.<sup>2</sup>

Even though the events of 9/11 and the accompanying tumult in the airline industry is now a part of economic history, Chapter 11 bankruptcy protection filings remain routine across various industries under a variety of market conditions. The many reasons behind such an action create a multitude of ethical questions. In this particular study, I aim to utilize the travails of the airline industry as an entry into a wider discussion of the ethics of utilizing bankruptcy protection as management strategy. By "management strategy," I refer specifically to the deployment of bankruptcy protection as a means to drastically reduce costs, as opposed to a means of providing for an orderly liquidation of a company. The question I wish to address is whether filing for bankruptcy protection as management strategy can be ethically justifiable and, if so, what criteria might be established to assess its ethicality. My proposal is to undertake this reflection using the Principle of Double-Effect as an analytical method, following which three criteria are proposed for discerning the ethics of deploying such strategy. Thus, even though this study focuses its practical reflections on the example of American Airlines and the airline industry, its ramifications apply across different industries since bankruptcy protection is not a managerial strategy restricted only to airlines.

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<sup>1</sup> See Joel Kurtzman, "Business Forum: Executive Ethics; Doing Business, Doing Good," *The New York Times*, January 3, 1988, <https://nyti.ms/2HbM8zb>. Edward L. Hennessy, Jr. is a philanthropist and former CEO of Allied-Signal Inc.

<sup>2</sup> D. Michael Lindsay, "A C.E.O.'s Moral Stand," *The New York Times*, November 13, 2011, <https://nyti.ms/2kDfA76> (accessed December 9, 2019).

## **HISTORICAL AND LEGAL CONTEXT: THE AIRLINE INDUSTRY AND BANKRUPTCY AS STRATEGY**

In the United States, bankruptcy matters are addressed under Title 11 of the United States Code of Laws. Specifically, Chapter 11 of the Title in question discusses the reorganization of a *viable* company that faces a bleak future for external or internal reasons. Some companies facing impending insolvency utilize the provisions of Chapter 11 bankruptcy protection to wind down in an orderly fashion. Indeed, prior to 1978, bankruptcy laws permit this as the only reason most companies would file for bankruptcy which was why, as business scholars Mahmoud Salem and Opal-Dawn Martin describe, there used to be a public stigma attached to such an action. At the time, the filing for bankruptcy protection involved replacing management with a court-appointed trustee who would be tasked to reorganize the firm and ensure that creditors would be paid. In such a situation, the future careers of managers and business relationships the firm has with others would be at stake, making this course of action, by default, one of last resort.<sup>3</sup>

The specific Chapter, however, was amended by the Bankruptcy Reform Act of 1978, which liberalized bankruptcy legislation and changed how it functioned in the economy. The intent of the new law was to encourage firms under financial stress to address debt problems earlier and so reduce the necessity for liquidations, along with the economic and social trauma that accompanies them. To that effect, several legal conditions and precepts were relaxed, which Salem and Martin helpfully summarize.<sup>4</sup> One important change that pertains specifically to our inquiry was how firms merely needed to demonstrate imminent insolvency instead of actually being insolvent in order to be eligible to file for bankruptcy protection. Additionally, a petition for bankruptcy protection relieves the firm of interest and principal payments on debt, providing leeway for firms to pay for provided goods and services (thus, avoiding any immediate threat to business relations), and allowing the firm to keep its existing management team to oversee reorganizational efforts. These liberalizing amendments not only streamlined bankruptcy protection filing processes but, as Salem and Martin suggest, they may have also unintentionally empowered riskier management behaviors such as taking on extensive (or even excessive) debt, over-expanding operations, and other riskier strategies.<sup>5</sup>

Thus, after the 1978 amendments, bankruptcy evolved from being an indication of insolvency and impending liquidation into a strategic managerial tool.

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<sup>3</sup> Mahmoud Salem and Opal-Dawn Martin, "The Ethics of Using Chapter XI as a Management Strategy," *Journal of Business Ethics* 13 (1994): 96.

<sup>4</sup> *Ibid.*, 96-7.

<sup>5</sup> *Ibid.*, 97.

As part of the reorganization, companies can choose to maintain (“perform”) or cancel (“breach”) existing contracts, with companies usually choosing the latter, often resulting in the laying off or dismissal of thousands of workers in order to cut costs. The hardship this causes to workers could be partially ameliorated if some form of severance payments were included with their employment contracts, but this is not always guaranteed. An important twist to our problem arises with respect to employees who enjoy collective bargaining agreements with the company. Subchapter I, §1113 of Chapter 11 allows for companies to breach existing contracts only after negotiations with unions have failed.<sup>6</sup> Although we will revisit this later, it is important to observe the advantages that the company filing for bankruptcy protection have over its employees, including the reality that the consequences of mismanagement or unhelpful management decisions are borne largely on the shoulders of the employees. Nonetheless, the pitfalls of the Chapter 11 procedure should not obscure its positive contributions to society. Despite its negative effects, it provides an organized legal structure for companies to restructure aggressively, allowing for costs to be cut quickly and for companies to have a greater chance of repositioning themselves successfully in the face of rapid changes to the economic picture. This, in turn, could prevent further job losses or reduce the number of unpaid creditors.

Historically in the airline industry, Chapter 11 bankruptcy protection provisions have been utilized to aggressively cut costs, and not necessarily in ways that benefited all stakeholders of the airline. In 1978, the U.S. federal government deregulated airfares and routes, forcing the established legacy airlines to adjust quickly to the new economic reality of market competition in the industry. To facilitate such an adjustment, then-Continental Airlines CEO, Frank Lorenzo, filed for bankruptcy protection in 1983 and 1990 in order to lower their labor costs drastically, even though the company was not in actual danger of financial insolvency. Lorenzo’s successor would confess that the strategy is better described as an aggressive effort in union-busting, with regular layoffs and remaining employees paid below industry wages.<sup>7</sup> The possibility of voiding contracts rapidly made the action of filing for bankruptcy protection one that most of the legacy airlines took in the wake of September 11, 2001. In time, all were able to exit bankruptcy protection. Their financial strength allowed some of them to merge, creating larger, more stable, and more profitable airlines in the process.

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<sup>6</sup> The subchapter and section was amended by the U.S. Congress in 1984 in the wake of the U.S. Supreme Court decision to *National Labor Relations Board v. Bildisco & Bildisco*. In that landmark case, the Court decided that collective bargaining agreements act like any other contracts in the case of bankruptcy.

<sup>7</sup> Jacques Boettcher, Gerald Cavanagh, and Min Xu, “Ethical Issues that arise in Bankruptcy,” *Business and Society Review* 119, no. 4 (2014): 487-8.

Today, largely helped by comparatively lower oil prices and leaner cost structures, legacy carriers have enjoyed profitable quarters with unprecedented passenger load figures. But American Airlines held out as being the only airline to decide against filing for bankruptcy protection. Its then-CEO, Gerard Arpey, opposed the action on moral grounds, arguing that such a course of action would jeopardize two key stakeholding groups: the shareholders, who would see the value of their shares in American Airlines plummet; and the employees, whose benefits would certainly be reduced substantially, and some of whom may lose their jobs. However ethically commendable his convictions may have been, Arpey's decision was costly. Although he was able to renegotiate labor contracts, industry experts estimated that American's annual labor costs were \$800 million above industry standards.<sup>8</sup> Eventually in 2011, the company's board of directors directed Arpey to file for bankruptcy protection, leading to his resignation from his position and his membership in the company's board as he was unwilling to be involved with leading the company through its bankruptcy.

Arpey's insistence on not filing for bankruptcy protection generated much discussion regarding its ethics. On the one hand, he avoided the large-scale layoffs and reduction of shareholder value that typically accompanied such an action. Yet on the other hand, his unwillingness to file for bankruptcy protection led to an extended period of losses for the company; it was not until 2014 when American Airlines began reporting net profits. While it is clear that such difficult decision involves acknowledging both its positive and negative effects, the more important inquiry for our present study is its ethics. Simply put, was Arpey occupying the moral high ground by not performing the action on the basis of the harm done to stakeholders? Framed in this way, this question points to a more general ethical problem that is by no means pertinent only to the airline industry. Specifically, can a chief executive or business leader morally file for bankruptcy protection as management strategy, and if so, what criteria or conditions are necessary to ensure that such an action is ethically justifiable? Because the problem being presented in such a scenario concerns the ethics of an action that intends a greater good but must balance that with negative and unintended side-effects, I suggest that the case study of the airline industry and Arpey's actions lend themselves well to an ethical analysis using the Principle of Double-Effect (PDE). This study, thus, demonstrates that possibility. However, because other studies have brought PDE to bear on business-ethical considerations, we shall first provide a philosophical survey of the method and an accounting of its applications.

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<sup>8</sup> Michael J. de la Merced, "For AMR's Now-Former Chief, a Long Career Felled by Chapter 11," *New York Times*. November 29, 2011, <http://dealbook.nytimes.com/2011/11/29/for-amrs-now-former-chief-a-long-career-felled-by-chapter-11/> (accessed December 9, 2019).

## THE PRINCIPLE OF DOUBLE-EFFECT IN PHILOSOPHY

At the foundation of a PDE analysis is the practical recognition that many decisions made in the interests of advancing good often involve negative consequences. This is hardly surprising. The diverse entanglements of human relationships with their environments, coupled with the various infirmities of human nature suggest that few decisions exist where a good intention or action is absolutely free of negative consequences. The then-bankruptcy law specialist Elizabeth Warren wrote that the Chapter 11 legal structure was designed to respond to problems arising from such an imperfect world; in situations where poor business decisions, unfortunate executions of business strategy, or political-economic rogue waves can bring conscientiously-managed businesses to their knees, the bankruptcy process provides public and collective oversight to ensure that justice can be maximized for all stakeholders.<sup>9</sup> But for Chapter 11 as management strategy, the ethical picture of whether justice is indeed maximized for all stakeholders becomes muddy. Jacques Boettcher, Gerald Cavanagh, and Min Xu acknowledge this ambiguity when they write that even though such a strategy can have a deleterious effect on society with job losses, breached contracts, and other ills, it also can preserve troubled firms and, therefore, avoid the trauma of greater job losses and social disorder.<sup>10</sup> What justice looks like concretely, then, depends on the specific situations and contexts of bankruptcy protection cases.

Versions of the PDE variously exist in other cultures and philosophical traditions, and may well have been understood implicitly in more ancient times. An example of this comes from 1 Maccabees 6:43-47. In that narrative Eleazar Avaran, at the risk of his own life, kills a war elephant that he wagered had carried his opponent, the Seleucid king Antiochus V. The positive effect and intentions, in this case, would have been the death of the enemy king and the likelihood of dealing a blow to enemy morale, with the unintended effect being Eleazar's possible death. History surely bears abundant testimony to similar situations of undesirable decisions being made that require tradeoffs between good intentions and unwelcome effects. But in terms of being stated directly, it was arguably the *Doctor Angelicus*, St. Thomas Aquinas, who first conveyed it in terms of the positive and negative effects that would inaugurate a long and complicated history of interpreting, critiquing, and reforming the PDE that this study will have to skip over.<sup>11</sup>

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<sup>9</sup> Elizabeth Warren, "The Untenable Case for Repeal of Chapter 11," *Yale Law Journal* 102, no. 2 (1992): 475.

<sup>10</sup> J. Boettcher, G. Cavanagh, and M. Xu, "Ethical Issues that arise in Bankruptcy," 492-493.

<sup>11</sup> Interested readers will want to consult Thomas Cavanaugh, *Double-effect Reasoning: Doing Good and Avoiding Evil* (Oxford, UK: Oxford University Press, 2006), 1-37.

St. Thomas's articulation of the PDE is located in his *Summa Theologiae* II-II, Q.64, a.7.<sup>12</sup> The article does not narrowly pertain to the PDE but to a wider and more practical question of the lawfulness of killing another person out of self-defense, which is itself embedded in an extensive discussion on the virtue of justice that forms one of the seven virtues being discussed in the *Secunda Secundae*. Regarding the justice of homicide in self-defense, Thomas argues that,

Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental as explained [in *ST* II-II, Q.43, a.3 and *ST* I-II, Q.72, a.1]. Accordingly the act of self-defense may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in *being*, as far as possible. And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end.<sup>13</sup>

The passage from the *Summa Theologiae* already shows some criteria, or at least their outlines, that comprise a PDE analysis. The moral and intended action – the preservation of the agent's life – is assumed to be good and, thus, orients its ethical acceptability.<sup>14</sup> The unintended and negative action is not unlawful so long as it is proportional to the intention.

Given the original moral problem Q.64, a.7 was trying to resolve, it is not surprising that the PDE is often applied to questions of just war. One of the more recent of such applications comes from Michael Walzer, who writes that the Principle justifies an action that would likely result in unintended but foreseen negative consequences provided that it fulfills four criteria:

- (1) The action is good or at least indifferent *per se*.
- (2) The direct effect of the action is morally acceptable.
- (3) The agent does not intend the negative consequences, striving only to accomplish the direct effect.

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<sup>12</sup> The *Summa Theologiae* is abbreviated *ST* in subsequent footnotes. Translations will come from St. Thomas Aquinas, *The Summa Theologica of St. Thomas Aquinas*, trans. Fathers of the English Dominican Province (Notre Dame, IN: Christian Classics/Ave Maria Press, 1981).

<sup>13</sup> *ST* II-II, Q.64, a.7.

<sup>14</sup> We will discuss why this assumption is valid under Roman Catholic social teaching later in this study.

- (4) The direct effect is sufficiently good enough to offset the negative consequences, following the proportionality criterion laid out by Henry Sidgwick.<sup>15</sup>

The first two criteria insist that actions or direct effects which clearly are intrinsically evil or yield morally questionable effects disqualify them from ethical acceptability, as far as a PDE analysis is concerned. But upon what bases can “intrinsic evil” or moral dubiousness be discerned so that a PDE analysis does not become reduced into a form of consequentialist reasoning, with the nature of an act’s goodness or evil determined largely by their results?

To reason a way forward on this matter, we begin with the ethicists Thomas Garrett and Richard Klonoski, who distinguish between major/moral evils and minor/physical evils. As they define, major evils “involve the destruction of goods necessary for an individual or society, as well as the violation of rights,” and minor evils “involve harm to a purely physical good or to some means that is useful, but not necessary, for the individual an society.”<sup>16</sup> But Garrett and Klonoski acknowledge that distinguishing between the two evils is difficult. The challenge is situated in the many decisions that business face, some of which have long-term implications that are challenging to foresee in the present, as well as the temptation to subjectively evaluate evil on the basis of the benefits to the self. Hence, the two ethicists insist that more work needs to be done in order to provide stronger criteria for ethical decision making.

The ethicist Peter Knauer provides a helpful direction in advancing the possibility for a more solid criterion. For Knauer, moral evil “consists in the last analysis in the permission or causing of a physical evil which is not justified by a commensurate reason.”<sup>17</sup> That is to say, absent such reason, the evil effect becomes a critical part of an act – a moral evil – instead of merely being an unintended consequence. But then we must ask, What must the reason be commensurate to? Knauer crisply summarizes that “an act becomes immoral when it is contradictory to the fullest achievement of its own end in relation to the whole of reality. A short-run ‘more’ of the value is paid by a ‘lesser’ achievement of the same value in the long run.”<sup>18</sup> Knauer provides helpful examples to illustrate what he meant, of which I will choose one to describe here: the regulation of speed limits and traffic regulations. Contrary perhaps to the inclinations of some, imposing such

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<sup>15</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York, NY: Basic Books, 2015), 153.

<sup>16</sup> Thomas M. Garrett and Richard J. Klonoski, *Business Ethics* (Englewood, NJ: Prentice Hall, 1986), 7-8.

<sup>17</sup> Peter Knauer, “The Hermeneutical Function of the Principle of Double Effect,” *Natural Law Forum*, Paper 127 (1967): 133, [http://scholarship.law.nd.edu/nd\\_naturallaw\\_forum/127](http://scholarship.law.nd.edu/nd_naturallaw_forum/127).

<sup>18</sup> *Ibid.*, 144.

regulations actually maximizes the preservation of life – that is, the “whole of reality” that ethical reasoning is commensurate to. Of course, mandating very low speed limits and burdening the citizenry with excessive regulation may ensure greater protection of life in the short term but over the long term, it might increase economic inefficiency which, in turn, can militate against the preservation of life as a whole. Something similar could be argued for the opposite, where no speed limits or very little regulation is imposed. The increased occurrence of accidents would result in a greater loss of life which, in turn, contradicts the whole reality and principle of life preservation. Thus, commensurate reason, and the discernment between whether an act is a moral or physical evil, rests on whether it best contributes to towards the act’s fulfillment of the whole principle that serves as the ends of the action.

Certainly, it may be impossible to provide a comprehensive index of actions and intentions that enable us to distinguish conclusively an act’s morality or physicality. Such determinations of commensurate reason have to be contextual. Nonetheless, even a contextual analysis must orbit around a governing ethical principle or “goal” in order to avoid deviating into consequentialist analyses. The question for our study is what the “whole” that bankruptcy protection legislation aims towards is. Garrett and Klonoski, in introducing their business ethics, argue that the goal of ethics...

... is the full human perfection of the human being as person. This means that the person is not a means to the perfection of society, the state, or anything else. In this view, societies are means to the real perfection of the individual even though they may contribute to this only indirectly.<sup>19</sup>

To build off this framework, any action that insists on its moral goodness must ensure that the action in discussion is commensurate to the humanization of peoples, even if it were accompanied with its associated physical evils. Such commensurate reason assists with the distinction of physically evil effects from morally evil effects. Should any action be accompanied by the latter, the action is by nature neither good nor morally neutral, at least in a PDE analysis, because moral evils cannot contribute to the fullness of human perfection. Such a weighing between the good and evil effects persist in the PDE’s third and fourth criteria.

To organize our considerations, let us begin by addressing the fourth criterion – the proportionality criterion – first. The PDE demands that negative consequences have to be proportionate to the positive ends being achieved. However, as Walzer has noted, one argument made against the Principle as a mode

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<sup>19</sup> T. Garrett and R. Klonoski, *Business Ethics*, 3.

of analysis is that, strictly speaking, there is no universally-accepted way to judge proportionality. On its own, any agent can argue that their action with a (minor) good effect is morally justifiable despite extremely negative consequences. Thus, Walzer strengthens the fourth criterion by drawing on the work of the philosopher Henry Sidgwick. Sidgwick's utilitarian rule is twofold and is designed to restrict the excessive harm arising from instances of warfare. The two conditions to determine excessive harm are utility and proportionality. With regards to utility, all actions in war, including the harm done, must contribute concretely and narrowly towards the goal of the war, which is presumably the achievement of victory. With regards to proportionality, the harm done must be proportional to the contribution that an action in war makes towards victory. In particular, "we are to weigh 'the mischief done,' which presumably means not only the immediate harm to individuals but also any injury to the permanent interests of [humankind], against the contribution that mischief makes to the end of victory."<sup>20</sup>

Sidgwick's rule is not perfect. As it may be with many utilitarian and instrumentalist analyses, it originally comes across as being quite brute and does not assume the complex interplay between positive and negative effects that the PDE addresses. Nonetheless, in fairness to Sidgwick, it must be kept in mind that the intentions behind his rule was to ensure that war was brought to a swift conclusion.<sup>21</sup> Actions that do not contribute concretely and specifically to victory (e.g. raping or wanton killing of civilians, etc.) risk purposeless and widespread violence, not to mention the certainty of introducing irreparable trauma upon the innocent and sowing the seeds of future violence. Walzer points out additionally, in a note that suggests St. Thomas's wider moral-theological project, that such wars must assume moral leadership, since moral character is necessary to weigh the circumstantial differences and situations that are important for evaluating proportionality.<sup>22</sup> When constrained by the narrowness of Sidgwick's rule, military leaders would be forced to wage battles quickly and cheaply, aiming for the least number of military and civilian casualties. What this illustrates is the importance of the proportionality criterion; it constrains utility, preventing the acceptability of an action that inflicts an inordinate amount of harm, even if it contributed minutely to victory.

Proportionality, however, is insufficient for our ethical deliberations because on its own, as Thomas Cavanaugh correctly observes, it does not sufficiently exclude actions that may be intrinsically evil, regardless of the effects that may be derived from it.<sup>23</sup> Cavanaugh is not particularly concerned for actions that are *clearly* evil – such actions would void an ethical analysis by way of the

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<sup>20</sup> Ibid., 128-9.

<sup>21</sup> Ibid., 129.

<sup>22</sup> Ibid., 130.

<sup>23</sup> T. Cavanaugh, *Double-effect Reasoning*, 39-40.

PDE due to the first criterion being violated – but for those that are difficult to discern between actions that bestride the line between what is ethically neutral and unacceptable. After all, the PDE is an ethical analysis of an undesirable action, and the line between undesirability and intrinsic evil can be easily crossed. For the PDE to address this lacuna appropriately, extended consideration must be given to the PDE's third criterion – the intentionality criterion. Walzer appreciates this approach, which was why he argues that the weight of any PDE analysis lies in the actor's intention.<sup>24</sup> How intention forms the critical center of a PDE analysis requires us to interrogate the language of intention. Here, Cavanaugh's emphasis on intentionality as being a volitional commitment towards what is good is helpful.<sup>25</sup> Intention speaks to the ethical "content" of the action while proportion ensures that such "content" is not diminished by the magnitude of the negative effects. David Chan, however, ventures one step further, arguing that it would be more useful to situate the center of a PDE analysis in desire rather than intent because the former is what differentiates the ethical core of an action surrounded by ethical ambiguity.<sup>26</sup> Hence, negative effects can be intended if an agent follows through with the action, although they are not desired. Chan's distinction will be important for our considerations on intention later but in regards to the criticality of intention in a PDE analysis, his contribution does not change how the third criterion remains central to any deployment of the method. The difficulty and place of greatest contention lies in how to test them.

The importance of testing intentions is why Michael Walzer is uncomfortable with leaving the PDE criteria as is, and he is rightly concerned that the moral bar is still set too low since it is easy for intentionality to override proportionality considerations. After all, one can over-magnify one's own intentions so that any negative effect is proportional to it. Consider, for instance, a common PDE scenario: the ethical difference between a strategic bomber and a terrorist bomber. The PDE would argue that what differentiates the two are their intentions or desires, which would be confirmed by their choice of targets and how they plan to fulfill their missions; the strategic bomber would narrowly aim for a military target and take pains to avoid civilian casualties while the latter, intending to sow general fear among the public, would likely intend or even desire to maximize both military and civilian deaths. But if we supposed that, for some reason, a military munitions plant (i.e. a significant military target) lay next to a public market, leading for the results of both bombers to be quite similar, it would be easy for the strategic bomber to argue that because her desire was eliminating the military target, her action should not be considered unacceptable despite the

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<sup>24</sup> M. Walzer, *Just and Unjust Wars*, 153.

<sup>25</sup> T. Cavanaugh, *Double-Effect Reasoning*, 91.

<sup>26</sup> David K. Chan, "Intention and Responsibility in Double Effect Cases," *Ethical Theory and Moral Practice* 3, no. 4 (Dec. 2000): 406.

certainty of her actions causing heavy civilian casualties. Walzer, following Sidgwick's inclinations, wishes to reduce the possibility of such casualties being summarily explained away by desire or intention. Hence, he proposes a "double-intentionality" amendment whereby intentions are checked by a positive commitment to address the negative effects.<sup>27</sup> Thus, his revised intentionality criterion reads, "The intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends, and, aware of the evil involved, he seeks to minimize it, accepting costs to himself."<sup>28</sup> In light of the potential for managerial intentions to diminish the proportionality of the unfortunate effects resulting from difficult decisions, this study will consider Walzer's double-intentionality as it formulates its own intentionality criterion in our deliberations on bankruptcy protection actions.

### **THE PRINCIPLE OF DOUBLE-EFFECT IN BUSINESS ETHICAL SITUATIONS**

Having discussed the PDE in some detail, let us rest its discussion and return to surveying its import into business ethics. Such an import is not without its critics. Deon Rossouw, for instance, argues that business and war are two different ethical considerations, and using a method (PDE) that grew out of a just-war context to assess non-war situations risks analogizing both.<sup>29</sup> His argument, however, fails to understand that the PDE is a general ethical method – thus, a *principle* – and is not merely a just-war ethical method, even though it has been applied abundantly to wartime situations. One can apply the PDE situationally to non-war situations by reformulating the PDE parameters to account for the specific situation in question. The fact that he proposes criteria to amend the PDE for international business considerations actually contradicts his wider argument by demonstrating the Principle's wider relevance for non-war situations.<sup>30</sup>

The first ethicists to suggest connections between the PDE and business ethics were the Jesuit moral theologians Thomas Garrett and Henry Wirtenberger.<sup>31</sup> Garrett, in particular, applied the PDE to the marketing of pharmaceuticals. The question his study posed is whether it is morally justifiable for a pharmaceutical

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<sup>27</sup> M. Walzer, *Just and Unjust Wars*, 155-6.

<sup>28</sup> *Ibid.*

<sup>29</sup> G. J. Rossouw, "Business in not just war: Transferring the principle of double effect from war to business," *South African Journal of Philosophy* 22, no. 3 (2003): 236-46.

<sup>30</sup> *Ibid.*, 245.

<sup>31</sup> See, for instance, Henry Wirtenberger, *Morality and Business* (Chicago, IL: Loyola University Press, 1962) and Thomas Garrett, *Business Ethics* (Englewood Cliffs, NJ: Prentice Hall, 1966).

company to advertise a drug that the firm knows possesses some risk of a dangerous side effect.<sup>32</sup> As Manuel Velasquez and F. Neil Brady summarize the scenario,

A company is considering whether to market a new medical drug in which, though the literacy rate is high, drugs are nevertheless not subject to regulation and so all drugs are freely available for purchase without prescription. The company has decided to place labels on the drug – which is effective against a broad range of serious but not life-threatening conditions – warning that if the drug is taken by pregnant women there is some risk of birth defects to their fetuses and that some of these defects will cut short the lives of their future children. The continued existence of the company, which employs 500 people, is to a large extent dependent on [the] marketing of this new drug. Is it [therefore] ethical for the company to market the drug under these conditions?<sup>33</sup>

Following Garrett's analysis, the action is judged to be ethical because they fulfill all the PDE criteria. Like the goal behind traffic regulation, marketing a useful drug should aim towards the preservation of human life. Hence, the action is not intrinsically evil *per se*, and neither of the major means contributing to the action are moral evils. Indeed, the direct effects – the prospering of the company's employees and the saving of lives for those who consume the drug – are positive while the negative effect – the possibility of pregnant women who, through failing to notice the warnings on the label or deciding to take on the risk, give birth to deformed children – is neither intended nor desired by the company. Proportionality is where the ethical difficulty enters the picture because the question now pivots to how permissible the negative effect could be before the act fails to be ethical. That is to say, as Garrett puts it, the ethics of advertising the drug must ensure that the positive effects are proportional to the risks of the negative effect.<sup>34</sup>

But the moral analysis does not end there. Given Walzer's concern that led to his "double intentionality" construction, ethical deliberations need to include the fact that some people might possibly suffer grievously as a result of the side effect. Of course, one response could be to simply not market the drug at all, but considering the possibility that the drug is critical to the employment of the company's 500 employees and has beneficial effects for consumers that might outweigh the risks of the drug – such as the curing of a very rare cancer, for instance

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<sup>32</sup> Manuel Velasquez and F. Neil Brady, "Natural Law and Business Ethics," *Business Ethics Quarterly* 7, no. 2 (1997): 96-7. Velasquez and Brady cite Garrett's *Business Ethics* for the case study on pharmaceuticals marketing, but the study was not found in the cited source.

<sup>33</sup> *Ibid.*, 96.

<sup>34</sup> *Ibid.*, 96-7.

– withholding the drug may be the more immoral action, especially when it could possibly save the lives of some people. Lawrence Masek, for that reason, argues that the ethical bar must be set higher by ensuring that those risks to the consumer are publicly and clearly displayed, which can be accomplished most efficiently through clearly-printed labels on the drug’s packaging. Thus, the risk of the consumer failing to acknowledge the risks is reduced, thereby transferring more of the responsibility for being affected by the negative effect to the consumer.<sup>35</sup>

Garrett and Masek demonstrate how the PDE can be useful for business ethical considerations even though the method’s precise application would not be universally identical across different industries and circumstances. Following in their footsteps, I suggest that a Chapter 11 bankruptcy protection filing, as illustrated by our case study with United Airlines and American Airlines, can benefit from this method for ethical analysis. Having addressed the PDE and its applications to certain business ethical situations with some detail, we turn to test how the Principle can be specifically applied to this ethical problem.

Let us restate the central ethical question in our study outright: is filing for bankruptcy protection morally justified as management strategy and, if so, what conditions might there be to ensure that the action is ethical? Recall that in Walzer’s articulation of the PDE, an action that would likely have unintended but foreseen negative consequences is ethically permissible provided that it fulfills four criteria:

- (1) The action is good or at least indifferent *per se*.
- (2) The direct or positive effect of the action is morally acceptable.
- (3) The agent does not intend the negative consequences, striving narrowly at the acceptable effect; the evil effect is neither one of his ends nor is it a means to his ends and, aware of the evil involved, he seeks to minimize it, accepting costs to himself.
- (4) The direct effect is sufficiently good enough to offset the negative consequences.

The first criterion of the PDE does not pertain to the action’s effects but assesses the action’s inherent morality; in other words, recalling our considerations with Garrett, Klonoski, and Knauer, the action cannot be or perform a moral evil, the morality of which is discerned through reasons commensurate to its underlying overarching principle or “whole.” The question, then, is what that “whole” constitutes within the purview of filing for bankruptcy protection.

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<sup>35</sup> Lawrence Masek, “The Doctrine of Double Effect, Deadly Drugs, and Business Ethics,” *Business Ethics Quarterly* 10, no. 2 (2000): 493.

Garrett and Klonoski's centering of business ethics on the "full human perfection of the human being as person" proves to be helpful.<sup>36</sup> Of course, as they admit, there is always in business the risk that an action or the means to an intention are dehumanizing, but are not understood or argued as such. Oftentimes, "culture" presents easy justifications for "unintended" effects. The sexual harassment of female employees, for example, may have been *de rigueur* practices in a business environment dominated and led by men several decades ago, but a business ethic that is oriented towards actions which contribute to a humanizing society should find such an action unethical and indefensible regardless of social (in)acceptability or whether the harassment was a means or the intention of an action. Likewise, I suggest that the goodness (or evil) of filing for bankruptcy protection depends on whether it contributes towards the goal of a society in which the humanity of the parties involved were at least affirmed throughout the entire process.

A point should be made at this point on the criticality of affirming human dignity as part of ethical analysis. Many of the authors cited in this present study, such as Garrett, Klonoski, Knauer, Masek, and Velazquez, articulate their ethical approaches from Roman Catholic social teaching, which takes its cue from the biblical narrative of creation in which God created humanity in God's own image. (Gen. 1:26, 27) This datum grounds the ethical obligation of one human being to another, and has been expounded to include the treatment of strangers and foreigners (Deut. 10:17-19), the poor (Jas. 2:1-8), and various ways in which humans are marginalized in society. The pastoral constitution *Gaudium et Spes* summarizes this ethical obligation as one that...

... binds us to make ourselves the neighbor of every person without exception and of actively helping him when he comes across our path, whether he be an old person abandoned by all, a foreign laborer unjustly looked down upon, a refugee, a child born of an unlawful union and wrongly suffering for a sin he did not commit, or a hungry person who disturbs our conscience by recalling the voice of the Lord, "As long as you did it for one of these the least of my brethren, you did it for me" (Matt. 25:40).<sup>37</sup>

But it also identifies the goal or "end" of all things. Reasoning from the doctrine of the *imago Dei*, St. Thomas argues that while every actor acts for an end, God – the "prime agent" (*primo agenti*) does not act to obtain anything, instead, "intends only to communicate His perfection, which is His goodness; while every creature intends to acquire its own perfection, which is the likeness of the divine perfection

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<sup>36</sup> T. Garrett and R. Klonoski, *Business Ethics*, 3.

<sup>37</sup> *Gaudium et Spes*, 27.

and goodness.”<sup>38</sup> Thus, *Gaudium et Spes* and Roman Catholic social teaching hint at St. Thomas’s contribution to moral theology in reminding us how all creation is connected, and that dehumanizing acts not only are infamies, but also harm human society *and* the actors. They additionally constitute “supreme dishonor to the Creator.”<sup>39</sup>

Garrett and Klonoski’s identification of the human goal for business ethics as “the full human perfection of the human being as person,” therefore, is not original to them, but is a statement that draws richly from the Roman Catholic social teaching tradition, one which we will reference later in our study. But to return to our discussion on bankruptcy protection, to inquire about the inherent morality of the act, we must be reminded that filing for Chapter 11 bankruptcy protection is a legal mechanism that ensures the orderly reorganization of an unviable company or one that risks becoming so. Without such provisions, unviable or near-unviable companies risk dissolution, following which many employees would lose their jobs, creditors may not be paid, and in some cases, many outside the industry may be negatively impacted. Consider our example of airlines. If we assumed that the airlines were approaching imminent insolvency, then the absence of such an action would not only reduce the value of the companies’ shares, but would also immediately terminate the employment of tens of thousands of individuals. Not all creditors would be paid, possibly impacting the viability of other companies. But more critically, it would likely mean that many people would not be able to travel by air for business or leisure in the wake of 9/11 which, in turn, can further disrupt society in negative ways. Thus, the action itself provides time for the affected company to undertake strategies that can correct some, if not all, of the problems, thereby minimizing the possibility that the aforementioned negative effects would be experienced.

Geared towards this end, the action on its own is not morally evil. This assessment, of course, might change under different circumstances. The wrinkle in our problem concerns the action *as management strategy*, meaning that the firm in question *risks* insolvency, but is likely not immediately so. Consequently, the circumstances surrounding the action give it the context for discerning the involvement moral or physical evils. I suggest, therefore, that given the new business environment resulting from the terrorist attacks from 9/11, it would at least be plausible that filing for Chapter 11 bankruptcy protection, despite the many accompanying physical evils, has moral validity. We will test the intentions in a later discussion. But for now, in summary, it is difficult to argue that the action is evil under any conditions. Hence, the action is at least morally neutral. The second criterion focuses on the ethical acceptability of the positive effects. This would be fulfilled if, for the sake of argument, we assume that the action was undertaken to

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<sup>38</sup> *ST I*, Q.45, a.4.

<sup>39</sup> *Gaudium et Spes*, 27.

reposition the company for viability in a rapidly changing business environment and to preserve as much employment as possible.

### **INTENTIONALITY AND THE FILING OF BANKRUPTCY PROTECTION**

This takes us to our discussion on intentionality, which will form the bulk of our considerations. To begin, we propose the following provisionally as the intentionality criterion for the action in question before analyzing it further:

*The intention of the actor – in this case, the managing executive(s)  
– must be good, while the foreseen negative effects are not intended.*

Because we are considering the action in terms of management strategy and not orderly liquidation, David Chan's advice to center the PDE analysis on desire rather than intent is particularly salient. For Chan, different desires can nonetheless produce the same intention because desire is intrinsic; one desires a goal for its own sake, as opposed to a means to an ulterior motive.<sup>40</sup> In our ethical situation, the managing executives can desire the company's success in a rapidly changing business environment or, alternatively, they can desire the breaching of contracts in an effort to kneecap labor unions. But if the former desire requires the breaching of labor contracts, then the situations have the same intentions and resultant negative effects. The latter, of course, would hardly qualify as being ethical under the parameters of the PDE and our study would agree with Boettcher, Cavanagh, and Xu that the executives' managerial methods would be better described as an abuse of bankruptcy protection procedures and, thus, is ethically problematic.<sup>41</sup> But for the sake of argument, let us assume that the managing actor files for Chapter 11 bankruptcy protection with the desire to preserve the long-term viability of the company by rapidly reorganizing its operations and structures.

Certainly, the ease at which negative effects could be dismissed on the basis of the company's good intentions presents a never-vanishing ethical problem. But, following Walzer and Masek, intentions can be tested and strengthened. The company in Garrett's pharmaceuticals advertising case study does not desire the negative effects of its drugs, even though they were foreseen. Proportionality, which will be discussed in the next section, obliges the agent to mitigate the extent by which the negative effects could be experienced through means such as clearly communicating those effects to consumers through clear labeling. Intentionality can be tested by investigating what the decision makers do in the leadup to their action in question. As we have discussed earlier, this is how a strategic bomber's

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<sup>40</sup> D. Chan, "Intention and Responsibility in Double Effect Cases," 416-7.

<sup>41</sup> J. Boettcher, G. Cavanagh, and M. Xu, "Ethical Issues that arise in Bankruptcy," 489.

actions are ethically distinct from that of a terror bomber. For our purposes, however, let us apply a similar line of reasoning to Garrett's pharmaceuticals marketing scenario where desire might critically distinguish between the ethical advertising of the drug and pharmaceutical malpractice. If the company desired continued success, as Garrett's framing of the question suggests, then it is in its interests to conduct extensive testing for the drug so that the positive effects are maximized or, in the very least, the chances of the negative effect are small or negligible. To do less would be unethical as it may jeopardize the company's desires for long-term success and viability, not to mention the other positive effects such as ensuring the continued employment of 500 employees. Oppositely, it is difficult to argue for the ethical propriety of advertising a drug in which less than adequate testing was done before it is widely distributed for consumption. Such oversights, in fact, comprise some of the reasons for why firms have been charged with pharmaceutical malpractice.

I contend that the same is true of bankruptcy protection filings. Even if we had assumed that the managing executives of the company had rightly-placed intentions and motivations, recall Walzer's double-intentionality construct that sought to elevate the ethical bar as far as intention is concerned by confirming the company's desires and intentions by obliging the agent to be aware of the magnitude of the negative effects and to commit to minimizing the effects as much as possible, even so much as to accept costs to himself or herself. The problem for this study is to consider what that might look like as far as filing for Chapter 11 bankruptcy protection is concerned. While we have established that ethical justification for the action is first contingent on the company intending the good and not the negative effects, two important facets of our problem need to be appreciated. First, the ethical problem behind the action in question has a critical difference from Garrett's pharmaceuticals marketing situation. In the latter case, the risk of the negative effect is passed onto the consumer but the same could not be said of bankruptcy protection filings where, among other negative effects, at-risk employees could not simply avoid or reduce the risks of the negative effect. Indeed, if contracts were breached as part of the action, the negative effects simply *happen* to the employees. Second, layoffs induce great stress on affected peoples and their families. In some cases, laid-off workers may be too advanced in age to find employment elsewhere.

This is not a recent ethical concern in Catholic social teaching. In 1891, confronted with an industrializing West, the wealth of nations concentrated in a few individuals such as Andrew Carnegie and John D. Rockefeller, and the advent of Fordist modes of production Pope Leo XIII, in his encyclical *Rerum Novarum*, set the course for modern Catholic social teaching in reaffirming the dignity of the poor and working class while not sanctioning popular revolution and social disorder. For Leo, even though workers were theoretically free to accept certain wages for their

labor, the moral challenge comes when such labor is critical for living and self-preservation. Harkening to our discussion earlier on affirming human dignity, Leo writes,

Now, were we to consider labor merely in so far as it is personal, doubtless it would be within the workman's right to accept any rate of wages whatsoever; for in the same way as he is free to work or not, so is he free to accept a small wage or even none at all. But our conclusion must be very different if, together with the personal element in a man's work, we consider the fact that work is also necessary for him to live: these two aspects of his work are separable in thought but not in reality. The preservation of life is the bounden duty of one and all, and to be wanting therein is a crime. It necessarily follows that each one has a natural right to procure what is required in order to live, and the poor can procure that in no other way than by what they can earn through their work.<sup>42</sup>

Thus, he concludes quickly that wages need to be sufficient for supporting, at least, "a frugal and well-behaved wage-earner," adding that, "if through necessity or fear of a worse evil the workman accept harder conditions because an employer or contractor will afford him no better, he is made the victim of force and injustice."<sup>43</sup> Pope St. John Paul II echoes Leo in his encyclical *Laborem Exercens* in which he insisted on understanding humanity not as objects of production or labor but as meaningful subjects of work. The turn from object to subject is a recurring theme in the Roman Catholic teaching tradition that prioritizes the dignity of human life, which includes solidarity with workers as part of Christian witness, especially when the "dignity of human work" is violated through unemployment or mistreatment.<sup>44</sup> Indeed, unemployment constitutes "the opposite of a just and right situation," being an "evil, which, when it reaches a certain level, can become a real social disaster."<sup>45</sup>

The tradition of affirming workers' rights in Catholic social teaching, one that is continued by the current Pope Francis, continually cautions how human dignity is easily undermined when unemployment is suddenly foisted upon those vulnerable to it by virtue of being on the lower rungs of the business ladder. I suggest, however, that some of that dignity can be preserved by drawing from Garrett's and Masek's example of pharmaceuticals marketing. In particular, the negative risks of the action can be partially ameliorated by passing some of those risks to the worker through disclosing up-front the risks behind their employment

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<sup>42</sup> *Rerum Novarum*, 44.

<sup>43</sup> *Rerum Novarum*, 45.

<sup>44</sup> *Laborem Exercens*, II.8.

<sup>45</sup> *Laborem Exercens*, IV.18.

contracts. That means clearly informing the employee prior to their employment of the possibilities for contracts being breached through bankruptcy protection filing. Potential employees, then, can decide if they were willing to bear some of those risks by agreeing to the contract. Hence, in order to figure this into our considerations, we revise our intentionality criterion as such:

*The intention of the actor – in this case, the managing executive(s) – must be good, while the foreseen negative effects are not intended. To demonstrate the unintentionality of the negative effects, employment contracts should specify the possibility of contracts being breached in the event that a filing must occur. In the event of a bankruptcy protection filing, the company will make every effort to provide severance to those affected.*

One may ask whether this criterion is unnecessary or even unrealistic, arguing that in a free market economy, employees should know that layoffs are to be expected even if they were not specified in any employment contract. Boettcher, Cavanagh, and Xu note, however, that in practice today workers and labor unions are often notified prior to employment that contracts could be breached by management in the event of a bankruptcy protection filing.<sup>46</sup> Thus, it is difficult to sustain critiques of this criterion based on the unfeasibility of such pre-employment specification.

But even so, critiques that employees should be aware of the possibilities of contract breaches even if they were not explicitly discussed in their employment contracts do not fairly address questions of power and privilege that *Laborem Exercens* aimed to elucidate. If employees should make provisions for such unspecified risks, then one could ask why “golden umbrellas” or generous severance payments should be included explicitly in the employment contracts of managing executives and leaders. Such stark expressions of the inequality between the risks, rewards, and consequences specified in employment contracts often give bankruptcy laws and systems a negative valence, subjecting them easily to public criticism. As Warren elucidates, the bankruptcy process has often borne the ire of many individuals’ discontents. “Creditors,” she writes, “are angry with debtors who have resisted payment and thwarted their collection efforts. Employees are angry with companies that have laid them off while the big boys remain in their high paying jobs. Tort victims are angry with companies because they are not getting enough money to compensate them for all that they have lost.”<sup>47</sup> A fundamental imbalance of power and privilege that is often aired out publicly in major bankruptcy protection filings must be taken seriously and any discussion of the ethics involved cannot ignore how comparatively rare managing executives

<sup>46</sup> J. Boettcher, G. Cavanagh, and M. Xu, “Ethical Issues that arise in Bankruptcy”: 491.

<sup>47</sup> E. Warren, “The Untenable Case for Repeal of Chapter 11,” 436-7.

were dismissed and held proportionately accountable for their poor decision-making and leadership, compared to “expendable” workers who could lose employment in a moment simply due to “restructuring.”

But insofar as the PDE is concerned, one of the requirements for discerning the permissibility of filing for Chapter 11 is that the agent must recognize the magnitude or seriousness of the action’s negative effects. Of course, it is difficult to argue that the company must guarantee employment to remedy the ethical gravity of the action, a difficulty that is also recognized by *Laborem Exercens*. After all, as our case study with airlines demonstrates, markets do change drastically under unforeseen circumstances and airlines need to adapt to such a radically altered economic environment for survival, lest insolvency threaten everybody’s employment, the value of owning the company’s shares, and other social maladies. For instance, in 2008, the bankruptcy of one of the world’s largest investment banks, Lehmann Brothers, had a global effect, being one of the contributing factors to the Great Recession. Nevertheless, although the PDE is concerned primarily with the moral permissibility and justifiability of a difficult action, it does not absolve the agent from any moral responsibility for the negative consequences. Indeed, as Harry Gould reminds us, the presence of consequences “create responsibility for the agent.”<sup>48</sup> Just as the PDE does not exonerate a tactical bomber of her responsibility for those who die because she mistakenly targets a marketplace instead of a military installation, managing executives of a company are not exonerated from their responsibilities for a bankruptcy protection filing, even if they had not intended the disadvantaging of some of its employees.

Before moving forward to finally discussing proportionality, another significant party affected by the negative effects of a bankruptcy protection filing must be addressed: the company’s shareholders. Certain details, however, distinguish their situation from those of employees facing unemployment as a result of the action. Shareholders of some large firms include not only wealthy individual investors but also other financial institutions, retirement fund managers, nonprofit organizations, governments, and other entities who use the profits from the investment to support programs or other interests. Complicating our scenario is the fact that a company’s shareholders may also include its own employees who were awarded some of its shares as part of an incentive program. But for the most part, participants in the financial markets are warned that their investments may lose value, oftentimes in writing from their financial management firms or banks. For instances, investment prospectuses or bank statements routinely carry clearly-highlighted provisos, warning clients that their investments may lose value. In this case, the scenario would be akin to Masek’s in that those who are potentially

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<sup>48</sup> Harry Gould, “Rethinking Intention and Double Effect,” in *The Future of Just War: New Critical Essays*, ed. Caron E. Gentry and Amy E. Eckert (Atlanta, GA: University of Georgia Press, 2014), 142-3.

affected by a Chapter 11 filing knowingly bear some of the risk of experiencing the action's negative effects.

As it is for many PDE case studies, the agent's intentions factor heavily into determining the ethical propriety of an action. Yet, the PDE also insists that the negative effects be proportional to the benefit the good effects bring. Our final move, therefore, would be to visualize proportionality in filing for Chapter 11 bankruptcy protection by considering our final PDE criterion.

## PROPORTIONALITY AND LAST RESORT

Interrogating our final criterion opens up a new discussion regarding the conditions for discerning what constitutes proportionality. To return to just war considerations, it is one matter to state that the evil effects of waging war should be proportional to its good effects, but it is much more difficult to consider how far the evil effects should extend before proportionality ceases to apply. Or, to put it bluntly, how much suffering can be tolerated before a war becomes unethical? Thomas Hurka rightly cautions that proportionality judgments cannot be made in a contextual vacuum; any ethical evaluation to that end requires some degree of specificity regarding both effects and their hypothetical alternatives.<sup>49</sup>

But this does not mean that some ways of articulating proportionality's boundaries are not possible. It is instructive to begin with Thomas Garrett and Richard Klonoski's summary of the matter. According to them, proportionality is to be judged by

1. The type of goodness or evil involved;
2. The urgency of the situation;
3. The certainty or probability of the effects;
4. The intensity of one's influence on the effects, and;
5. The availability of alternate means.<sup>50</sup>

The first three criteria are easier to explain. Proportionality requires that (1) a *necessary* good outweighs one that is *marginally useful*, and (2) the necessity can be affected by urgency and (3) the probability of the effects happening. For instance, maintaining a company's financial viability will override, say, upgrading factory machinery. Both are good effects, to be sure, but the latter is only marginally so in light of the more urgent concerns the company faces, and is even

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<sup>49</sup> Thomas Hurka, "Proportionality in the Morality of War," *Philosophy and Public Affairs* 33, no. 1 (2005): 66.

<sup>50</sup> T. Garrett and R. Klonoski, *Business Ethics*, 6.

much more the case if the likelihood is high that such upgrades will end up costing the company more than it brings in more income.

Criteria 4-5 are critical for our forthcoming deliberations. The degree to which an individual is responsible for the effects affects proportionality considerations. For example, an employer dismisses an employee because the latter has committed fraud, but this action would foreseeably cause hardship to the employee's family. But the cause of foreseeable, negative effect is not the employer because the employee has caused the problem. Thus, given the magnitude of the problem and the fact that the employee's family have nothing to do with the company, the action would be proportional even though the action would cause hardship to the employee's family. But if the situation had changed so that it was really the employer that committed the fraud and forced the employee to take undue responsibility for it, the proportionality, not to mention the agent's actual ethical intentions, quickly fail. At the same time, if there were alternatives to the action that would yield the same or better benefits while being accompanied by less negative effects, then proportionality suggests that the alternatives would be a more ethical course of action. Hurka makes a similar point regarding discussions of just war, noting that proportionality does not merely factor into the negative effects' relationship with the positive effects, but also its alternatives.<sup>51</sup> After all, for an agent to pursue a course of war when an ethically superior alternative is possible raises questions regarding the agent's intentions.

In both proportional evaluations, however, plenty of room exists for ethical ambiguity, which is why specifics can change the moral analysis of the situation. The ethical ambiguities only proliferate in business ethics because of the many different effects and hypothetical alternatives inherent in business-ethical situations. Consider, for instance, our particular case study of airlines filing for bankruptcy protection to reduce costs. In 1983, Continental Airlines initiated the action despite not being in financial distress, arguing that the high labor costs disadvantaged it next to its competitors. But Salem and Martin are concerned that high labor costs served as a convenient argument that can set a troubling precedent for other companies to follow suit.<sup>52</sup> When the airline is argued to be in a terrible competitive position solely due to high labor costs, contract breaching and wage reductions can momentarily sound proportional. However, such a claim easily dismisses legitimate alternative explanations for Continental's lack of competitive edge – perhaps competing airlines had access to better pricing information or were able to manage maintenance or fuel costs more effectively. This sentiment is, perhaps, can disqualify the action from being inherently good or neutral in a PDE framework, but it also motivated Walzer's concern about intention; if the ethical bar is set too low, then too many negative effects can easily be justified in the

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<sup>51</sup> *Ibid.*, 37.

<sup>52</sup> M. Salem and O. Martin, "The Ethics of Using Chapter XI as a Management Strategy," 99.

pursuit of the good. Such *laissez faire* ethical approaches to the use (or abuse) of the bankruptcy protection system can enable a mechanism designed to minimize financial disorganization to be abused into a convenient tool for breaching labor contracts, particularly those of unionized workers. Hence, in order to raise the ethical bar for such an action, it must be restricted so that it can only be deployed when all other strategic alternatives cannot suffice. That is to say, it must be an action of last resort.

Taking into consideration our foregoing insights on proportionality and Walzer's concern about recognizing the magnitude of the negative effects, we can formulate our final PDE criterion for discerning the ethical propriety of filing for Chapter 11 bankruptcy protection as management strategy:

*Filing for bankruptcy protection must be an action of last resort. It should be utilized only after all actions to rectify the company's predicaments have failed and after the agents ultimately responsible for the well-being of the company have clearly sought to minimize the magnitude of unwelcome effects, even at their own cost.*

An important implication of our third criterion is what it would mean for agents responsible to "minimize the magnitude of unwelcome effects, *even at their own cost.*" Navigating this subject requires balancing two concerns that we have addressed previously. First, without specifications to ascertain whether the company's agents have indeed minimized the negative effects of their actions, there is a risk that the third criterion would be evacuated of any significance as just about any action could be argued as being generally contributive to the fulfilment of this criterion. As an example, executives could simply argue that the costs to themselves include public shame for their management shortcomings or making difficult and unpopular decisions like laying off workers. But second, codifying universal specifications for verifying intent by proposing an exhaustive list of proportional actions is impossible because of the contextuality of such ethical analyses. As we have discussed earlier, many situations, difficulties, and specific changes can mean the difference between an ethical and unethical strategic deployment of the action in question.

I suggest, however, that one way this criterion can be applied practically involves responsible agents – ostensibly the company's directors and managing executives – reducing their compensation as a demonstration that the action was one of last resort. At first, this seems to be a controversial proposition and careless interpretations may consider this a social-democratic call for more distributed compensation across the company. However, this may not be so if we bear in mind that proportionality demands that the risks and benefits associated with the successful operation of a business and execution of strategy are borne

proportionally by relevant employees. If responsible agents make strategic or managerial errors that produce job losses and deny just compensation for existing employees, and yet not suffer from any proportional consequences, it is difficult to argue that filing for bankruptcy protection is an action of last resort, and that the action undertaken by company executives and directors are truly proportional relative to its negative effects and all other possible alternatives.

### APPLICATION TO THE AIRLINE INDUSTRY

As a summary of the moral terrain we have traversed thus far, we restate the three criteria that would, when fulfilled, argue from a PDE framework that filing for Chapter 11 bankruptcy protection for reasons of financial strategy would be ethically justifiable. The act in question would be justifiable provided that

- (1) *The action is morally neutral and the positive effect – the repositioning of a company for future success in a newly challenging business environment – is indeed beneficial and no moral evils are necessary as part of achieving this goal.*
- (2) *The intention of the actor – in this case, the managing executive(s) – must be good, while the foreseen negative effects are not intended. To demonstrate the unintentionality of the negative effects, employment contracts should specify the possibility of contracts being breached in the event that a filing must occur. In the event of a bankruptcy protection filing, the company will make every effort to provide severance to those affected.*
- (3) *Filing for bankruptcy protection must be an action of last resort. It should be utilized only after all actions to rectify the company's dire situation have failed and after the agents ultimately responsible for the well-being of the company have clearly sought to minimize the magnitude of unwelcome effects, even at their own cost.*

To close our reflections on a concrete note, let us apply our three criteria to determine if filing for Chapter 11 bankruptcy protection was ethically justified for both United Airlines and American Airlines. For United Airlines, filing for bankruptcy protection in the face of a challenging business environment certainly repositioned it for future success. Unfortunately, this was accomplished at the expense of more than 7,000 employees who were laid off as part of the bankruptcy filing. Of course, no publicly-available information exists to confirm conclusively that the leaders and directors of United Airlines did all that they could to prevent

the corporation from filing for bankruptcy protection, but the fact that the CEO at the time – Glenn F. Tilton – earned a total of \$11.05 million in compensation throughout the duration of United’s bankruptcy renders it difficult to argue that the Chapter 11 bankruptcy protection filing is an action of last resort rather than an action of protecting the interests of corporate leadership.<sup>53</sup> Recall our third criterion, which notes that last resort can be confirmed “after the agent has clearly sought to minimize the magnitude of the unwelcome effects, even at their own cost.” But did American Airlines pursue a more morally justifiable course of action in resisting a bankruptcy protection filing? Over the course of the past few years, the airline sought to cut costs without going through the bankruptcy protection process. While employees volunteered to take wage and benefits cuts to help trim costs, these were not shared proportionately among all employees. The top five executives of American Airlines, for instance, enjoyed a compensation package totaling \$16.5 million in 2007, despite the fact that the airline has suffered more than \$8 billion in losses by that time as a result of the decisions they had made.<sup>54</sup>

On November 29, 2011, American Airlines finally filed for bankruptcy protection following directions to that effect from the company’s directors. Prior to the filing, however, the CEO Gerard Arpey resigned, refusing to lead the company down such a path; he also refused any claims to a lucrative severance package. Arpey’s actions might earn commendations for its rarity in America’s corporate environment and, indeed, few examples exist that mirror Arpey’s experience.<sup>55</sup> But in light of our assessment of the PDE and its applications to business ethics, one must not rush to claim that filing for bankruptcy protection constitute moral failings *per se*. As this study has asserted, under certain conditions it could be ethically justifiable, not to mention economically beneficial for the company’s long-term survival. Those conditions, unfortunately, were not met at either United Airlines or American Airlines.

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<sup>53</sup> “Glenn F. Tilton,” *Forbes*, March 30, 2006, <http://www.forbes.com/lists/2006/12/KSIW.html> (accessed December 9, 2019).

<sup>54</sup> Trebor Banstetter, “Pilots not happy with AMR execs’ \$16.5 million pay for 2007,” *Fort Worth Star-Telegram*, April 18, 2008, <http://www.star-telegram.com/2008/04/18/591504/pilots-not-happy-with-amr-exec.html> (accessed December 9, 2019).

<sup>55</sup> D. Michael Lindsay, “A C.E.O.’s Moral Stand,” *The New York Times*, November 13, 2011, [www.nytimes.com/2011/12/01/opinion/at-american-airlines-a-departing-ceos-moral-stand.html?\\_partner=rssnyt&emc=rss](http://www.nytimes.com/2011/12/01/opinion/at-american-airlines-a-departing-ceos-moral-stand.html?_partner=rssnyt&emc=rss) (accessed December 9, 2019).