

How Not to Defend the Unborn

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Abstract: It is sometimes proposed that killing or harming abortion providers is the only logically consistent position available to opponents of abortion. Since lethal violence against morally responsible attackers is normally viewed as justified in order to defend innocent parties, pro-lifers should also think so in the case of the abortion doctor, and so they should act to defend the unborn. In our paper, we defend the mainstream pro-life view against killing abortion doctors. We argue that the pro-life view can, in various ways, reject the assumption that defensive violence to save innocent individuals is always permissible. Now even if that assumption is accepted, we contend that defensive violence against abortion doctors still is not justified. Drawing on Frances Kamm's work, we contend that there are structural similarities between abortion and letting someone die who needs your help to stay alive; and we argue that it is impermissible to kill those who kill in order to avoid giving life-saving aid.

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1. Introduction

THE PRO-LIFE MOVEMENT in the last 50 years has, on very rare occasions, regretfully had to deal with members of its own undertaking violence against abortion providers. The leaders of the movement and the vast majority of its members consistently condemn such violence,¹ but the violence does not disappear. Some philosophers argue that the minority viewpoint does not disappear for good reason.² Indeed, these philosophers contend that killing or harming abortion providers is the only logically consistent position available to opponents of abortion. After all, on the pro-life view, an abortion doctor is a morally responsible attacker who plans to kill two or more innocent individuals. Since lethal violence against such attackers is normally viewed as justified in order to defend innocent parties, pro-lifers should also think so in the case of the abortion doctor.

In our paper, we defend the mainstream pro-life view against killing abortion doctors. Our general strategy is to focus on the claim that if a morally responsible attacker plans to kill two or more innocent individuals, then defensive violence against him is permissible. Our first section considers the possibility that the pro-life view can, in various ways, reject this assumption. The remaining sections try to challenge the idea that this assumption, even if it were accepted, appropriately justifies killing abortion doctors.

¹ H.M. Alvare, H. Arkes, F. Canavan, and J. Garton, "Killing Abortionists: A Symposium," *First Things* 48 (1994): 24–31.

² J. McMahan, "Infanticide," *Utilitas: A Journal of Utilitarian Studies* 19/2 (2007): 131-59; D. Stretton, "Critical Notice – Defending Life: A Moral and Legal Case against Abortion Choice by Francis J. Beckwith," *Journal of Medical Ethics* 34/11 (2008): 793-97; J. Brennan, "Abortion and Killing in Defense of Others" (2015), Bleeding Heart Libertarians [online], available: <http://bleedingheartlibertarians.com/2015/11/abortion-and-killing-in-defense-of-others/> (accessed March 29, 2021); S. Kershner, *Does the Pro-Life Worldview Make Sense? Abortion, Hell, and Violence against Abortion Doctors* (London: Routledge, 2019).

2. *Pacifism and Theoretical Consistency*

Critics of the pro-life position believe that consistency requires that pro-lifers be committed to assassinating abortion doctors. This is false for at least two reasons. First, because of the possibility of pro-life pacifism. A number of pro-lifers maintain that it is wrong to use violence at all, whether in abortion, the death penalty, or war.³ This is sometimes called the “Consistent Life Ethic” or an ethic of “non-resistance”: the view that intentional killing of either the innocent or guilty is always wrong.

Many philosophers believe that pacifism is implausible because it would rule out defensive war, for example, or lethal protection of children who are being slaughtered. Now this hardly amounts to an argument against the plausibility of pacifism. Pacifists are aware that their positions rule out defensive war and other expressions of defensive violence and defend arguments in favor of the plausibility of such theses.⁴ Whether these positions are in fact plausible obviously cannot be settled in this paper, but the very possibility of pacifism shows that consistency is easily attainable for the pro-lifer: she need only oppose all kinds of violence (as many pro-lifers appear to do). We should add here that it is important to remember that critics of the pro-life view often address their argument about consistency to all pro-lifers and not merely pro-life philosophers. There may be a number of philosophical grounds on which pacifism is implausible, but such grounds might be ignored by or irrelevant for the average pro-life person. Whatever theoretical weaknesses pacifism might

³ J. Bernardin, *The Seamless Garment: Writings on the Consistent Ethic of Life*, edited by T.A. Naim (Maryknoll, NY: Orbis, 2008); R.M. McNair and S.J. Zunes, *Consistently Opposing Killing: From Abortion to Assisted Suicide, the Death Penalty, and War* (Westport, CT: Praeger, 2008).

⁴ C.C. Ryan, “Self-Defense, Pacifism, and the Possibility of Killing,” *Ethics: An International Journal of Social, Political, and Legal Philosophy* 93/3 (1983): 508-24; S. Hauerwas, “Pacifism: Some Philosophical Considerations,” *Faith and Philosophy: Journal of the Society of Christian Philosophers* 2/2 (1985): 99-104; D.C. Cochran, “War-Pacifism,” *Social Theory and Practice: An International and Interdisciplinary Journal of Social Philosophy* 22/2 (1996): 161-80; S. Reader, “Making Pacifism Plausible,” *Journal of Applied Philosophy* 17/2 (2000): 169-80; M.A. Fox, *Understanding Peace: A Comprehensive Introduction* (New York: Routledge, 2014).

have, pro-lifers who adopt the doctrine are clearly not committed to killing abortion doctors.

This leads to the second direct way in which one can consistently oppose pro-life violence: suspend belief about a theory of lethal violence. The pro-lifer, whether pacifist or not, need not have formally inconsistent beliefs because it may be that he merely lacks a theoretical account of when lethal violence to defend himself or innocent individuals is justified. It is difficult to articulate an adequate theory of defensive violence (or associated principles of defensive violence) that explains everything we want it to. Jeff McMahan,⁵ for example, argues that a plausible theory of self-defense likely lacks a single, unified foundation and that instances are justified differently in different cases. Larry Alexander argues,⁶ moreover, that providing an adequate theory of self-defense is enormously complicated and should include such factors as relative numbers of deaths, relative moral fault, fair allocation of risks and incentives, non-appropriation of others, relative ages of the parties, incentive effects on productive and protective conduct, the benefits of easy-to-follow rules, and the relevance of risk, among other. Despite the fact that many people believe that self-defense is justified, there is some question as to whether our intuitions on the matter are confused or incoherent, given the difficulties and controversies involved in articulating an adequate theory of defensive violence. Or at least, given these difficulties, it would hardly be surprising if it turned out that most people do not have such a theory (or associated principles). If they do not, they are not inconsistent in refusing to kill abortion doctors. We might call this position “theoretical openness” as it allows one to adopt the following three beliefs: abortion is wrong, lethal violence against Nazis is permissible, and abortion doctors should not be assassinated, without providing the general theory that determines the morality of every instance of lethal force. While such a position might be philosophically unsatisfying, it is not inconsistent.

⁵ Jeffrey McMahan, “Self-Defense and the Problem of the Innocent Attacker,” *Ethics: An International Journal of Social, Political, and Legal Philosophy* 104/2 (1994): 252-90.

⁶ L. Alexander, “Self-Defense, Justification, and Excuse,” *Philosophy and Public Affairs* 22/1 (1993): 53-66.

That lethal violence against an attacker is often justified is normally taken as a bedrock or commonsense belief. This might lead the critic of the pro-life view to doubt whether pro-lifers really believe that a fetus should not be killed in an abortion. As Jeff McMahan argues, the fact that most opponents of abortions do not engage in the killing of abortionists “suggests that they do not really believe that abortion is murder.”⁷ We think that this is an unlikely contention that pays more homage to the philosophical god of consistency than to first-person reports about what beliefs people actually have. In our view, people are much more likely to have inconsistent beliefs than not to believe what they claim. We are not unaware that experimental psychology sometimes tells us that people do not believe what they claim to believe, but there must be some evidence presented to refute first-person reports of beliefs and an appeal to inconsistency is not sufficient evidence. Only a philosopher would imagine that the person on the street always has a set of consistent beliefs of which he happens to be ignorant.

Let us suppose that it is true that individuals do generally (aim to) ensure consistency of their beliefs in a self-conscious way. Consider the following four claims:

- (1) Abortion is the wrongful killing of an innocent person.
- (2) An abortion doctor is a morally responsible attacker who plans to commit abortion.
- (3) If a morally responsible attacker plans to kill two or more innocent individuals, then defensive violence against him is permissible.
- (4) One ought not to use defensive violence against abortion doctors.

These four claims are formally inconsistent. McMahan thinks that this inconsistency shows that in fact pro-lifers do not really believe (1) that abortion is murder. We think, as we argued above, it is much more likely that pro-lifers do not really believe (3). It is perhaps true that most non-pacifists are likely to assent, if asked, to (3), which would commit them to the beginning of a theory of defensive violence. This assent is likely to be

⁷ R. Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf, 1994), 13; McMahan (2007), 137.

even more forthcoming if examples are provided of Nazis killing Jews or gun-wielding zealots invading elementary schools. However, we think that such assent should be viewed skeptically, since most pro-lifers who do assent to this assumption have not given it the same amount of careful consideration as they have their opposition to abortion. Moreover, it is likely that pro-lifers have never acted on a principle of defensive violence compared to the pro-life belief (perhaps they are likely, e.g., to have voted pro-life). Once it is pointed out that (3) entails that pro-lifers must give up (4), they would likely be quick to withdraw assent from (3). It would be mistaken to suppose that an abstract principle about defensive violence is more doxastically stable than what a pro-lifer would call to mind when he considers the issue of abortion itself.

In fact, the doxastic weakness of any theory or principle of defensive violence is evident when we consider other moral issues besides abortion. Even non-pacifists who oppose an unjust war waged by their own country are unlikely to use defensive violence against their country's political or military leaders.⁸ Even non-pacifist opponents of the death penalty do not typically use defensive violence against executioners. Animal rights activists do not typically use defensive violence against factory farm workers. In general, despite the apparent plausibility of using defensive violence against a morally responsible attacker, many people either do not practice such a principle or, what is more likely, do not actually believe it. This is probably in part because an adequate theory of defensive violence is more complicated than the assumption that we are justified in using lethal violence to defend innocent parties would seem to suggest. The next section considers some of these complications.

3. Defensive Violence

If the pro-life position is true, then some would contend that it is permissible or obligatory for pro-lifers to try to defend the unborn by killing or harming abortion doctors. To make this argument, they would assume, as we have seen, that it is permissible to use defensive violence against

⁸ C. Kaczor, *The Ethics of Abortion* (New York: Routledge, 2011), 203.

morally responsible attackers. However, theories of defensive violence almost always argue for constraints on such violence.

First, according to many theories of defensive violence, private citizens may be permitted to use lethal violence against a morally responsible attacker, but they must not intend to kill.⁹ In the event that the attacker is killed in the process, this is sometimes viewed as an application of the doctrine of double effect: the actions taken might allow an agent to foresee the death of the attacker but not intend his death. According to such theories, lethal force can be justified, provided one does not intend to kill as an end or as a means (among other restrictions). In short, the use of lethal force is not the same thing as intent to kill.

Perhaps the critic of the pro-life view can get around this point by arguing that any acts of lethal violence can be redescribed to make the attacker's death a side effect. On this redescription view, an agent can shoot an attacker in the head, for example, or bomb an attacker's car but not be intending to kill the attacker; instead, the agent is merely "disabling" the attack. We think it is unlikely that this redescription strategy is plausible. One cannot intend to blow up an individual and claim that that individual's death is a side effect of one's action. As Elizabeth Anscombe writes, "circumstances, and the immediate facts about the means you are choosing to your ends, dictate what descriptions of your intention you must admit."¹⁰ In any case, it is extremely implausible that one can carry out premeditated violence against an abortion doctor and claim that one does not intend the abortion doctor's death or grave harm.

⁹ These theories are typically traced back to St. Thomas Aquinas; see especially *Summa theologiae*, II-II, q. 64, a. 7. For further discussion, see also, for example, G.E.M. Anscombe, *Ethics, Religion, and Politics* (Minneapolis: Univ. of Minnesota Press, 1981); S.J. Jensen, "The Trouble with Secunda Secundae 64, 7: Self-Defense," *Modern Schoolman: A Quarterly Journal of Philosophy* 83/2 (2006): 143-62; G.M. Reichberg, "Aquinas on Defensive Killing: A Case of Double Effect?" in *The Thomist: A Speculative Quarterly Review* 69/3 (2005): 341-70; and W. Kaufman, *Justified Killing: The Paradox of Self-Defense* (Lanham, MD: Lexington Press, 2009).

¹⁰ G.E.M. Anscombe, "Action, Intention, and 'Double Effect'" in *Human Life, Action, and Ethics: Essays*, ed. G.E.M. Anscombe, L. Gormally, and M. Geach (Charlottesville, VA: Imprint Academic, 2005), 207-26 at p. 22.

It should be added here that the same tradition that prohibits intent to kill in the act of self-defense typically makes an important distinction between acts of killing as carried out by a private citizen and that carried out by a state or an agent of the state (such as a police officer or soldier). While it is wrong for a private citizen to intend to kill in self-defense, it is not wrong for those acting with public authority to do so. The reasoning for this has to do with a complex political philosophy, but even short of providing one, it is easy to see for the plain person that individuals and the state are appropriately held to different standards about permissible actions.¹¹ We do not let private citizens arrest others, execute them, declare war, and so on.

It is not only Thomistic or double-effect theories of self-defense that would problematize a justified killing of an unjust aggressor. Justified defensive homicide is something of a modern invention; only relatively recently has it entered the western conscience that killing in the name of self-defense is obviously morally justified. One theorist observes that it is hard to know when we have exhausted options short of killing, putting the justification for defensive homicide on shaky ground.¹² Some contemporary legal theorists have argued that it is better not to see defensive violence as justified but rather excused.¹³ On this view, defensive homicide escapes criminal (and, to some degree, moral) responsibility, but the act is still something deplorable or regrettable. Moreover, it is sometimes thought, according to the excuse view, that defensive violence to protect innocent

¹¹ For more discussion of this distinction, see Anscombe (1981) and Jensen (2006). This point is overlooked even by some who roughly aim to adopt a Thomistic position; see B. Prusak, "Aquinas, Double-Effect Reasoning, and the Pauline Principle," *American Catholic Philosophical Quarterly* 89/3 (2015): 505-20 at p. 516.

¹² Ryan (1983).

¹³ W. Blackstone, *Commentaries on the Laws of England* (Philadelphia: J. B. Lippincott Co., 1893) Book I, Chapter 1, p. 130; C.J. Rosen, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill," *American University Law Review* 36/1 (1986): 11-56; C. Finkelstein, "Self-Defense as a Rational Excuse," *University of Pittsburgh Law Review* 57/621 (1996): 213-62; Kaufman, 2009, 127-33.

third parties is prohibited.¹⁴ Even outside of the idea of excusing defensive homicide, there is a strong awareness about the moral seriousness of taking human life, even when necessary to defend oneself or an innocent third party. There is a presumption against doing so. Even when it is thought to be justified, it must only be used under certain conditions, such as when the threat is imminent and the defensive force is absolutely necessary to repel the attack. The claim that pro-lifers should kill abortion providers blithely overlooks nearly all these factors.

Second, justification for the use of lethal violence to defend innocent individuals often depends on the claim that such violence will or is likely to effectively protect such individuals.¹⁵ Certainly, this can be seriously doubted in the case of killing abortionists. Killing or gravely harming abortion doctors does not do anything to reduce the demand for abortion. This is different from other cases where lethal violence might be justified to defend innocent parties where the threat is effectively removed. Nevertheless, the innocent parties in the abortion case are still threatened by the mother's decision to seek an abortion.

One might think it is obvious that killing abortion doctors and harassing abortion clinics reduces the frequency of abortions. In many states, for example, there are few abortion providers and they are far apart. However, one recent social scientific study examined the effect of pro-life violence on access to abortion and found that demand for abortions tends to move to where the supply is. Researchers Mireille Jacobson and Heather Royer concluded that "the net effect of violence [against abortion providers] on abortions (and thereby births) is small and temporary" while "the displacement of abortions to nearby counties is quite considerable."¹⁶

¹⁴ G. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, and Co., 1978), 859.

¹⁵ While success is not usually listed among the standard conditions for self-defense (alongside imminence, necessity, and proportionality), Daniel Statman (2008) shows it is implied by them in his article "On the Success Condition for Legitimate Self-Defense," *Ethics* 118/4 (2008): 659-86. Success does explicitly appear among the conditions for a just war.

¹⁶ M. Jacobson and H. Royer, "Aftershocks: The Impact of Clinic Violence on Abortion Services," *American Economic Journal: Applied Economics* 3/1 (2011): 189-223 at p. 219.

If one can reduce only a small number of abortions by killing abortionists, then one must weigh the benefits of this strategy against nonviolent tactics that also reduce a small number of abortions. Moreover, if fewer abortionists are available to perform surgical abortions, the demand for abortion may be met by the use of non-surgical abortions.

It is natural to think that when something becomes more expensive and less convenient, there will be less of it. So, the more abortion doctors one kills, the fewer abortions will be performed. Interestingly, however, some studies show that making abortions illegal (which is, of course, another way to make something more expensive and less convenient) does not seem to reduce their frequency.¹⁷ This suggests that the demand for abortion is great indeed, and reducing the number of abortions is not so easy without addressing this demand.

The relationship between the law and the number of abortions is obviously complicated, as is the relationship between killing abortionists and the number of abortions. In fact, we do not have very good evidence about either of these relationships, and we believe the empirical work so far should be viewed with some suspicion. We think it is likely that the long-term and even short-term effects of pro-life violence are not very well established. Nor do we want the question about pro-life violence to depend on an empirical matter that might conceivably commit pro-lifers to violence, so it is important not to put too much emphasis on our argument here.¹⁸ Now we are suggesting that it is mistaken simply to assume that pro-

¹⁷ G. Sedgh, S. Henshaw, S. Singh, E. Åhman, and I.H. Shah.2007, "Induced Abortion: Estimated Rates and Trends Worldwide" *The Lancet* 370/9595 (2007): 1338-45; G. Sedgh, S. Singh, I.H. Shah, E. Åhman, S.K. Henshaw, and A. Bankole, "Induced Abortion: Incidence and Trends Worldwide from 1995 to 2008," *The Lancet* 379/9816 (2012): 625-32.

¹⁸ We worry that most of the reasons given by the contributors to the *First Things* symposium against those in their ranks who violently attack abortionists are based on mere contingencies. Relying on such contingent considerations could ultimately embarrass pro-lifers, for it would seem to commit them to violence if these factors turn out not to be the case. This is true of those objections claiming that pro-life violence will: increase support for the pro-choice movement; redirect attention away from the killing of fetuses, failing to reduce the overall number of abortions; engender disrespect for the law; incite anarchy; initiate a cycle of violence; be premature since persuasive or legal remedies were not exhausted;

life violence is likely to protect the innocent individuals it is intended to protect.

4. The Impermissibility of Killing Those Who Kill to Avoid Providing Life-Saving Aid

It is typically held that a third party can lethally intervene to stop an unjustified aggressor who is threatening the life of an innocent. Surely, for example, we can kill a Nazi bringing poison gas to the concentration camp or a maniac intent on harming children in an elementary school. If pro-lifers believe that lethal violence can be used to protect infants or other innocents from unjust deadly aggression, then, the argument goes, they should find abortionists to be legitimate targets as well. Such an argument works as a *reductio* of the pro-life view that killing fetuses is as wrong as, say, killing infants.

How should pro-lifers respond? We believe that a plausible answer to why abortionists may not be killed even though they are unjustly killing innocents involves recognizing the structural similarities between abortion and letting someone die who needs your help to stay alive. This view renders abortion morally akin to letting someone die. Our claim draws heavily upon Frances Kamm's work.¹⁹ She argues that there are certain features that are conceptual truths about letting die that are properties of some killings such as abortion, making such killings less wrong than those that do not share such features.²⁰ The definitional property of letting die that

involve a premeditated, intentional lethal attack outside the clinic rather than a defense of the fetus during an abortion procedure; lack the certainty that harm would have been inflicted by the abortionist if force had not been used, etc.

¹⁹ F. Kamm, *Creation and Abortion: A Study in Moral and Legal Philosophy* (Oxford: Oxford Univ. Press, 1991), 30; *Morality, Mortality, Vol II: Rights, Duties, and Status* (Oxford: Oxford Univ. Press, 1996), 17-120. Although we draw heavily on Kamm's appropriation of the morality of killing in abortion to the morality of letting someone die, she does not consider our topic of the morality of killing abortion doctors.

²⁰ That killing becomes less bad when it has properties that are conceptually tied to letting die indicates that letting die is not as bad as killing someone. We are assuming throughout this paper that killing and letting die are not morally

it is crucial to this thesis that the victim loses out on a life that he only would have had via the agent who lets him die. In doing so, the non-saver exercises control over what is his (body, efforts, property).²¹

It is not essential to a killing that the victim loses out on a future that he could only have with the lethal agent's assistance. When an agent kills, his action is either "(i) the original cause of death, whether the victim is dependent or independent of him or (ii) the removal of a defense against death from someone independent of him."²² When someone is allowed to die, the agent's action is "(i) not the original cause of death, but may be (ii) the removal of the defense the agent provides from one dependent upon him."²³ We follow Kamm in suggesting that the original-cause killings of those people dependent on the killers, unlike original-cause or removal-of-defense killings of people independent relative to the killers, sometimes have practically the same moral weight as cases of letting someone die.

Let us look at some examples. David is a person innocent of any wrongdoing, and he is not an innocent threat to another. He possesses a right to life. David's right to life does not mean that others are obligated to die to save David, even if they are obligated to take on considerable but lesser burdens to save him. However, Stephanie's wrongfully seeking to avoid doing what she should do to save David doesn't justify the threat of lethal force against her to ensure that she fulfills her obligation. This is true even if the only way that Stephanie can extricate herself from the burdens of saving David involves David being killed. Stephanie's letting David die involves him losing out on future life that David could have only with the assistance of Stephanie. If Stephanie kills David to extricate herself from saving or sustaining David, then that killing is structurally analogous and (roughly) morally akin to letting someone die. David cannot kill Stephanie when Stephanie is doing something structurally and morally similar to letting someone die. So the claim that those wrongfully killing another can themselves be killed does not work in cases where the killers are extricating

equivalent. See Kamm (1996), 17-120 for a thorough and nuanced defense of this nonequivalence.

²¹ Kamm (1996), p. 31.

²² Kamm (1996), p. 31.

²³ Kamm (1996), p. 31.

themselves from providing immense life-saving burdens. Abortion is such a case. The pregnant woman who herself aborts a fetus is killing someone whose life she was saving, that is, sustaining.

We contend that this principle about the impermissibility of killing those who kill to avoid providing life-sustaining aid can be extended to the agents of David such as Phil and to the agents of Stephanie such as Marie-Claire. Marie-Claire (an abortion doctor) cannot be killed by Phil (a prolifer) as she extricates pregnant Stephanie from providing burdensome life-saving aid to fetal David. Thus, the killing of abortion doctors is not analogous to cases such as Nazis, since they are not killing those who are saving others from immense physical impositions. Killing abortion doctors is roughly akin to killing the agent of the person with the healthy kidney supporting Judith Thomson's famous violinist when that agent is extricating the healthy person from the violinist at the expense of the violinist's life.²⁴

We think that Judith Thomson is correct that someone's right to life does not mean that everyone else must do everything in their power to keep that individual alive. However, she is wrong about how much others must do to save a life. Her famous violinist scenario does not capture the fact that morality is very demanding and that we must take on considerable burdens to save another's life. Consider the example of an adult blown up onto a hurricane-damaged roof with a premature newborn (a nonperson) landing on top of him.²⁵ The baby is wiggling, which will cause the roof to give way, and the adult and baby will fall to the ground, but the adult's body will cushion the baby, saving its life. However, the impact causes the adult pain that is equivalent to the discomfort of giving birth and also suffers nine months of back pain, abdominal swelling, and nausea equivalent to a pregnancy. If the adult rotates so the baby is beneath him rather than on top of him, then the baby will hit the ground first and the adult will land safely on his feet but the baby will die from the impact of the ground below and

²⁴ J.J. Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1/1 (1971): 47-66.

²⁵ Thomson assumes the fetus is a person from conception. Her reasoning is that if a person can be killed, then surely so could merely potential persons. Our example of a premature newborn shows how morally demanding morality is toward even a nonperson who is but a potential person in the Neo-Lockean sense of personhood requiring self-consciousness and a sense of one's past and future.

the adult above. It seems intuitive that the adult cannot rotate and cause the crushing of the baby but must take on a considerable burden to save the life of the baby. It is even more obvious that a third party should not help the adult disentangle himself.²⁶

However, if the adult would have died without rotating, well, that is a different matter. So the right to life of X (fetus, violinist, roof baby, David) does not obligate Y (mother, person supporting the violinist, roof adult, Stephanie) to save X's life at the expense of Y's life—even though Y should take on considerable but lesser burdens to save X's life. For example, if X is in shark-infested waters, X's right to life does not mean

²⁶ Why the different reactions to Thomson's violinist case and the roof cases? Which one should we trust? We would conjecture that our response to the roof case better illustrates our deepest moral commitments. There are various aspects of Thomson's case that distort our judgments. Peter Unger has speculated that how we group people in need often determines our sense of what aid is owed; P. Unger, *Living High and Letting Die* (New York NY: Oxford Univ. Press, 1996). The child and adult are in the same bad situation on the roof. Thomson's kidnapped person with the healthy kidney is seen as uninvolved in the violinist's predicament. For an extension to abortion of Unger's ideas about grouping those in need, see D.B. Hershenov, "Abortions and Distortions: An Analysis of Morally Irrelevant Factors in Thomson's Violinist Thought Experiment," *Social Theory and Practice: An International and Interdisciplinary Journal of Social Philosophy* 27/1 (2001): 129-48. Patrick Lee, *Abortion and Unborn Human Life* (Washington, DC: The Catholic Univ. Press, 1996) suggests that the wrongdoing of the society of music lovers may taint the violinist and thus remove his innocence. We also suspect that the way Thomson tells the story leads readers to identify with the kidnapped, and perhaps the improbability of ever being in the violinist's predicament prevents readers from recognizing their duty to aid. Thomson does not consider that you could be the ailing violinist or the healthy kidnapped person. Imagine, if she had just said that everyone a year from their present age will need nine months of kidney support that only a unique person can provide. This makes life-saving kidney support more like pregnancy—something we all need once. The universality and the future timing of the need offset our identifying with just the kidnapped and keep us from making self-interested decisions based on the probability that we would be unlikely to ever be the one in need. We suspect that people will be less inclined to think refusal is within their right when the likelihood they will need support is not rare and they are not identifying with just the person giving the support.

that Y must jump in and distract the sharks at the cost of Y's own life. Now X should be saved at a lesser cost to Y.

X's right to life does not allow him to save his own life by killing Y when Y refuses to take on burdens that she is supposed to take on to save X. A supporting illustration of this principle is as follows: Y should throw a life ring to X who is drowning but Y does not. X cannot shoot and kill Y, so Y falls into the water, bringing the life-saving flotation device within the reach of X.

X's right to life does not allow him to kill Y when Y's extricating herself from saving X's life necessarily occurs by the taking of X's life—even though Y should save X. For example, consider Y, a great swimmer and one-time lifeguard, is in the water carrying the drowning X to shore and who then decides, without good reason, to stop supporting X. But X clings onto Y for dear life. Assume that the only way for Y to remove X is through lethal violence. If Y punches and fatally pushes X to get X off her body, X cannot kill Y to stay afloat, even though Y was wrong to stop saving X.²⁷

Y's lethal extraction of herself from X is structurally similar and morally akin to letting someone die. Letting someone die involves failing to provide the aid needed to stay alive. Typically, killings do not bring about the cessation of life-saving aid and so are not akin to allowing death. Now when Y kills someone that she was saving, then that makes Y roughly akin to a "death-allower." So Y's wrongfully killing X in order to cease saving X's life does not entitle X to use lethal force upon Y to make Y do what Y is obligated to do.

The assumption that those innocents being targeted for wrongful killing can kill their attacker, or have a third party provide them with lethal protection, is true in most scenarios where innocents are being threatened. However, it does not apply to abortion. This is because the unjust killer is structurally and morally akin to a death allower and cannot be killed, even though she is getting out of a life-saving burden that she is morally obligated to provide. When Nazis kill innocent people in gas chambers or maniacs kill children in an elementary school, they are not killing innocent

²⁷ We ask that the reader just assume that even a dead Y will serve to keep X afloat.

people that they were using their bodies to support. Thus, they are legitimate targets for lethal self-defense, while those aborting are not. So these examples are not analogous to abortion in a morally relevant way.

Readers may worry that our approach makes abortion much less wrong than pro-lifers typically maintain, and thus seeking a ban on abortion will not be justified. However, we are not asserting a precise moral equivalence of killing and letting die in such cases, just that they become morally much more alike. It is important to realize that killing the dependent is still a rejection or violation of the separateness of persons, which is not the case for letting someone die. When one lets someone else die, the dying is not imposed upon, a new threat is not initiated that interferes with their lives, the boundaries that separate them from other persons are not transgressed. Even letting someone die by withdrawing bodily support, which is an action rather than an omission, still is not a transgression that initiates a new threat that ends a separate life. It restores (or creates for the first time) a separateness that is fatal because the separated cannot support themselves. We think it is better to speak of an earlier lack of independence than a lack of separateness.²⁸ Withdrawing aid from the attached renders independent those who were dependent. Now those who die when attached always had separate lives. Their lives were dependent on the support of others; but as a matter of individuation and identity, there were already two separate lives. Even when attached, since one life could end whereas the other could survive, that entails that there were two numerically distinct and separate lives. Therefore, withdrawing aid renders separate lives independent. Intentionally killing someone who is attached would still deliberately violate the separateness of persons, for the victim had a distinct life. Assuming that killing is worse than letting die because it violates the separateness of persons, killing the attached is still worse than letting them die, all other things being equal.²⁹ But since such killings involve a property that is definitional of letting die—the deceased could have only lived with

²⁸ See Kamm (1996), 37, 66-77 for a discussion of the difference between separateness and independence.

²⁹ To see what is involved in “other things being equal,” consult Kamm (1996).

the assistance of what belonged to someone else—the killing becomes morally much more like letting someone die.³⁰

Readers might be thinking that even if we have successfully shown that someone obtaining an abortion cannot be killed to save the fetus, most abortions are done by doctors who are not supporting the fetus whose life they end. So let us now consider a modification of the above claims which creates a transfer principle to an Agent: Neither X nor his agent (The Society of Music Lovers, pro-lifers) can use lethal force to prevent Y or Y's agent (abortion doctors) from ceasing to save X by a means that is necessarily fatal to X—even though Y should save X.³¹ For example, if Y, the person with the healthy kidney supporting Thomson's violinist, wrongly stopped supporting the violinist, then that would be a case of wrongfully letting someone die. If the violinist's archenemy disconnected the healthy person without the permission of Y (or the violinist's), then that would be a case of wrongfully killing, for the archenemy was not providing the aid. If

³⁰ We write “more like,” not identical, for the reasons given above about separateness. Moreover, abortion is standardly worse than typical cases of letting individuals die in a far-off land from, say, malnutrition, because in such cases the non-saver is not responsible for their predicament nor has a special obligation as a relative to aid them, and hopes someone else will save them. These features are all absent in a typical abortion. Abortion standardly involves a woman deciding to kill a child who is in a state of precarious dependence on her because of her earlier decision to engage in consensual sex. It also involves killing one's own child to whom one has special obligations. Moreover, those aborting do not want the child saved. As Patrick Lee observes “In most abortions, if by some miracle the baby did survive and the attendants at the clinic brought the baby into the mother, all of those involved in choosing the abortion would no doubt protest that the abortion clinic had not done their [sic] job” (1996), p. 115 n15

³¹ For an informative discussion of when withdrawing aid is to be classified as killing and when it is to be classified as letting die, see J. McMahan, “Killing, Letting Die, and Withdrawing Aid,” *Ethics: An International Journal of Social, Political, and Legal Philosophy* 103/2 (1993): 250-79. McMahan argues that when the person providing the life-saving aid ceases to do so, the result is letting someone die. The life support can be maintained by different persons assuming the same role, say, that of medical care provider. So one doctor of a medical team providing life support can withdraw the life-saving aid, even if the aid-withdrawing doctor is not one of the earlier aid-providing doctors. However, if the aid is withdrawn by someone who was not part of a team and fulfilling a role in providing the aid, the act is a killing.

Y asked someone to disconnect her, then Y's agent would inherit Y's immunity as a death allower and could not be killed, even though neither Y nor her agent should disconnect the violinist. So Y's agent inherits Y's immunity against being killed when the killing is aimed at making Y continue to save X.

We can accept that the doctor who acts as an agent for the involuntary support system is engaged in a killing that lacks any properties that are definitional properties of letting die.³² An analogy might be helpful. The owners of a hospital or medical practice are morally protected against lethal threat when they cease to allow a patient to use the life-support equipment they own. Likewise, a newly hired ICU technician is protected against lethal threat when he has permission to disconnect life-support machinery belonging to the hospital employer without his having first maintained the equipment and assisted in the life support. The same protection should apply to the newly hired physician or abortion provider who has the mother's consent to terminate her fetus.

Perhaps the lethal agent even inherits some of the mitigating factors of Y's great burdens when it comes to blameworthiness.³³ While the agent is

³² McMahan would disagree. He offers his own version of a transfer principle rendering the actions of the agent who detaches another upon the latter's request as an instance of letting die rather than killing. He writes about a case called Involuntary Donor 3, where the person using his body to keep another alive asks someone else to disconnect him. "To understand why this is a case of letting die rather than killing, we must distinguish between the decision to withdraw aid and the execution of that decision. What is important, in determining whether an act of terminating aid or protection counts as killing or letting die, is who decides to terminate it, not who physically implements the decision. In Involuntary Donor 3, it is the person who has been providing the aid who decides to terminate it"; McMahan (1993), 265. Kamm would disagree and claim the authorized doctor is killing "which is not to say the killing is impermissible"; (1996), p. 29. But if McMahan is right about a doctor in Involuntary Donor 3 just letting someone die, then if the doctor had instead killed at the donor's request, then the doctor's killing would have inherited the moral properties of letting someone die. We think McMahan is conflating the transfer of immunity with the sharing of death-allowing properties in Involuntary Donor 3.

³³ The wrongness of an action and being blameworthy for performing it are different. One can do the right act for the wrong reason, and one can do the wrong

not under the duress of the physically burdened Y, the agent may be motivated by alleviating that duress. So while abortion doctors do not have the excuse of the greatly burdened pregnant woman and thus might face a penalty, the woman does not; nevertheless, their duress-removing motivation could be a mitigating factor.

If we are right that it is wrong to kill those who do not provide life-sustaining aid, this might also be part of the explanation for the common pro-life view that it is mistaken to punish women seeking an abortion. If abortion is murder, is not punishing the woman only logical?³⁴ Aside from (and in addition to) claims about the woman's duress or ignorance, the idea that killing a burdensome dependent is a lesser wrong can justify the view that we do not treat abortion-procuring women as murderers. Likewise, the fact that history has shown a lack of punishments or lesser punishments for abortion than punishments for killing the born may also be explained by the idea that abortion is structurally similar to a letting die. Our thesis, in other words, could have been implicitly understood by legislatures and courts. Diminished punishments either for the abortion doctor or for the woman seeking an abortion need not be due to lesser moral status of fetuses or lesser harms done to the aborted, but just the lesser wrong of killing the burdensome dependent.³⁵

5. Public Reason Limitations on Violence

Let us now assume for the sake of argument that the above claim about abortion sharing the mitigating features of letting someone die is false and the innocent target X of an unjustified killing by Y can kill Y to save his

deed for reasons that leave one blameless. One can also do the wrong deed for reasons that mitigate one's blameworthiness.

³⁴ See, for example, K. Pollitt, "Abortion and Punishment," *The New York Times* 1 April 2016, <https://www.nytimes.com/2016/04/02/-opinion/campaign-stops-abortion-and-punishment.html?mcubz=> (accessed March 29, 2021).

³⁵ So Justice Blackmun may have been misled by the fact that "the penalty for criminal abortion ... is significantly less than the maximum penalty for murder [of those already born]" to infer erroneously from such lesser punishments that fetuses lack the moral status of infants. *Roe v Wade*, 410, US, at 87, note 54 (1973). The same mistake is perhaps made by prominent defenders of abortion rights like Ronald Dworkin (1994), 10, 32, 110-12.

life, even though Y was keeping X alive.³⁶ It does not follow that a third party Z can always kill Y who is the unjustified threat to X. For instance, assume the death penalty is justified for some murders, but not others. Or at least assume that there are very good reasons for the death penalty even if, all things considered, the weight of reasons supports the abolition of capital punishment. If a convicted murderer scheduled to be executed in Attica prison is the type of murderer who deserves life in prison rather than execution, then he is being unjustly executed. Perhaps he can save his life by killing his executioner, but it is not clear that third parties like ourselves can.

What is the difference between the third party Z killing the executioner in an American prison and a third party killing a Nazi worker who brings poison gas to a concentration camp? There are two possibilities of an epistemic nature that distinguish the executioner and the abortion doctors from the Nazi, even if we hypothesize that the Nazi is blameless, given the arguments that have been made available to him in his environment. The first is that with the death penalty (like abortion) there are good reasons for the practices that can be recognized by those in a philosophically idealized setting; and we are assuming that it is far more likely that we are in such a state than is the Nazi. The idealized epistemic possibility that the abortion and capital punishment may be permissible might make those who still lean toward them being wrong hesitate to use lethal force. Second, capital punishment and abortion can be put forth in a way compatible with Rawlsian Public Reason, whereas the illiberal barbarism of the Nazi cannot.³⁷ It may be that we third parties must tolerate and work to

³⁶ If the claim in the previous section is true instead, as we believe, then the arguments should be understood as over-determining that conclusion. For what it is worth, we have more confidence in the arguments of the previous section than in this section because of some lingering doubts that Public Reason overly constrains bioethical discussions.

³⁷ See Rawls's two famous footnotes on abortion in *Political Liberalism* (New York: Columbia Univ. Press, 2005). He earlier wrote, "on any reasonable balance of these three values giv[ing] the woman a duly qualified right to decide whether or not to end her pregnancy during the first trimester...any comprehensive doctrine that leads to a balance of political values excluding that duly qualified right in the first trimester is to that extent unreasonable" (243, n32). Rawls later offered a

politically change wrongful killings that are compatible with political liberalism but should not tolerate illiberal wrongful killings.

Rawls calls our attention to the fact of reasonable pluralism. He writes that the plurality of conflicting comprehensive religious, philosophical, and moral doctrines is the normal result of its culture of free institutions. Citizens realize that they cannot reach agreement on the basis of their irreconcilable comprehensive doctrines. As a result, they recognize that comprehensive philosophical, religious, and moral doctrines must be withheld from public sphere discussions of political justice and constitutional fundamentals; instead, the debate must take place within the parameters of the idea of the politically reasonable. Rawls insists that it would be a form of disrespect of their fellow citizens if the majority legally imposed their comprehensive views on others. So, those opposed to abortion, say because they believe that God ensouls a fetus at fertilization, could recognize that many fellow citizens can reasonably be expected to reject their ensoulment views as incompatible with public reason. They then should not seek to legislate their comprehensive pro-life (religious) doctrine nor condemn in public/political settings their fellow citizens who argue there for abortion rights in terms endorsed by public reason.

Rawls is fond of using the type of reasons that a Supreme Court judge must rely on to demonstrate public reason.³⁸ He calls the Court the

clarification of his earlier abortion comments. He there stated that he earlier was providing his personal opinion, not giving an argument (p. 479, n80). He was trying to explain what he meant by political values (and he admits there are more than the three he mentioned) and how they could apply to the “troubled issue of the right to abortion where it might seem improbable that political values could apply” (479). He suggests that a more detailed development in public reason of those values might provide a reasonable argument for abortion rights. But he adds that he is not claiming “that it would be the most reasonable or decisive argument” (p. 479). He even admits that there can be an argument against abortion which “make[s] its case in public reason.” He suggests that is just what Cardinal Joseph Bernardin did by appealing to commonly accepted standards of moral behavior in a community of law, public peace, essential protection of human rights; J. Bernardin, “The Consistent Ethics: What Sort of Framework?” in *Origins* 16 (1985): 345-50. Rawls adds that he “doesn’t assess his (Bernardin’s) argument here, except to say that it [is] clearly cast in some form of public reason” (480, n83).

³⁸ Rawls (2005), 478-79.

“exemplar of public reason.”³⁹ The judges cannot decide cases, even standoffs, by recourse to their personal philosophy. They must speak the language of the constitution and precedents. The justifications of public reason may be compatible with the comprehensive doctrines, but they must be presented independently from comprehensive doctrines of any kind. The ideas must be seen as worked out from the fundamental ideas seen as implicit in the public political culture of a constitutional regime such as the conceptions of citizens as free and equal persons and of society as a fair system of cooperation.

Rawls points out that pro-lifers who lose out in the political realm to pro-choicers “may, in line with public reason, continue to argue against abortion.”⁴⁰ We would add that they must limit their advocacy to public reason.⁴¹ They cannot violently produce a political change. Abortion does not warrant a violent revolution. As with the unjust death penalty, those who are not the target of violence must respect those who disagree within the limits of liberal public reason. In conclusion, it is worth returning to our argument of the previous section to note that executioners are not like pregnant women or their agents that kill to prevent someone from continuing to take on immense burdens to save those killed.

6. Conclusion

It is not uncommon to suppose that the pro-life view, if taken seriously, commits itself to lethal violence against abortion providers. We have argued that this supposition inadequately accounts for the grounds of lethal violence to protect the innocent and that the comparison between abortion on the one hand and other scenarios where innocent life is at stake

³⁹ Rawls (2005), 235.

⁴⁰ Rawls (2005), 480.

⁴¹ This does not mean that in other settings (books, journals, churches, schools) that they cannot put forth arguments against abortion based on comprehensive doctrines. Rawls even adds a proviso that the comprehensive doctrines relied upon by the Civil Rights activists can be put forward in the political sphere as long as there is an effort later made to reformulate them in the language of public reason (2005), 462–66.

on the other overlooks significant moral disanalogies. Abortion providers, while committing a serious moral wrong, ought not to be killed.⁴²

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⁴² This paper began as a response to an argument developed by Stephen Kershnar, to whom we are very grateful for pushing us to develop the ideas presented here. We also thank the audiences at presentations of an earlier version of this paper at the University at Buffalo in May 2016 and the University Faculty for Life Conference at the University of Saint Thomas School of Law in June 2017. We also thank Alexander Pruss and the Romanell Center for Bioethics and Philosophy of Medicine Reading Group, especially Stephen Kershnar, John Keller, and Jim Delaney, for helpful discussion.