

# *Anti-abortionist Action Theory and the Asymmetry between Spontaneous and Induced Abortions*

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This essay defends the asymmetry between the badness of spontaneous and induced abortions in order to explain why anti-abortionists prioritize stopping induced abortions over preventing spontaneous abortions. Specifically, it argues (1) the distinction between killing and letting-die is of more limited use in explaining the asymmetry than has sometimes been presumed, and (2) that accounting for intentions in moral agency does not render performances morally inert. Instead, anti-abortionists adopt a pluralist, non-reductive account of moral analysis which is situated against a backdrop that sees the limits of our ability to control the process of fertility as themselves valuable. Though this view is complex, the paper concludes by arguing that it has the advantage of explaining features of the anti-abortion outlook that have sometimes been overlooked. First, it accounts for why the pre-Roe regime of abortion restrictions primarily imposed penalties on doctors who induced abortions rather than the women who seek them. And second, it explains why the advent of ectogestation will not prompt anti-abortionists to compromise on ‘disconnect abortions,’ which putatively let the embryo die by extracting it from the mother’s womb.

Spontaneous abortions, William Simkulet, ectogestation, double-effect, killing and letting die, miscarriage

## *I. Introduction*

The prevalence of spontaneous abortions seems to pose difficulties for those who think the embryo has full moral status. Though there is some uncertainty about the precise number of such abortions, even conservative estimates suggest that some 25% of embryos do not survive to birth.<sup>1</sup> The scale of death from spontaneous abortions is, on any measure, staggering. Such a problem has generated a *reductio* aimed at demonstrating that the anti-abortionist commitment to the full moral status of the early embryo is either inconsistent or incoherent. One form of the *reductio* contends that anti-abortion advocates should give up either their affirmation of full moral status or their resistance to embryo research, as the deaths caused by each are relatively equivalent in number and moral significance. In another form, critics have argued that anti-abortionists’ putative lack of interest in reducing spontaneous abortions is indicative that they are not actually committed to the embryo’s full moral status.<sup>2</sup> Anti-abortionists’ relative unconcern about spontaneous abortions is *prima facie*

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<sup>1</sup> A recent review of the various studies on embryonic wastage suggested “early embryonic wastage is in the order of 50%.” The authors add, though, that one half of “early spontaneous abortion specimens contain no embryonic/fetal parts. If an embryo is present at all, it is often either severely damaged or fragmented” (Benagiano, Farris, and Grudzinskis, 2010, 736-737). Gavin Jarvis argues that the relevant studies are highly unreliable. While he suggests that the overall rate of pregnancy lost might be somewhere between 40-60%, he does not account for the possibility of incompletely formed embryonic material in this number (Jarvis, 2016, 2765).

<sup>2</sup> The most prominent such example is Toby Ord 2008, 12-19. For a related form of the *reductio*, see John Harris 2003, 353-371.

evidence that their focus on induced abortions is either inconsistent or hypocritical.

The *reductio* hangs on equating the badness of spontaneous abortions and induced abortions/embryo research. For anti-abortionists, though, the wrong of intentionally killing an innocent individual cannot be reduced to the badness of embryonic death: the former has features that animates the anti-abortionist political program. As Nicholas Colgrove observes, for anti-abortionists induced abortion constitutes not only the “unjust killing of innocent human beings,” but “significant violation of parental obligations, . . . horrific violations of bodily integrity, invasions of individuals’ right to privacy, the dehumanizing of human beings,” and so on (Colgrove, forthcoming, 13). Sarah Brakman’s judgment is similar (2008, 22-23).<sup>3</sup> On her view, spontaneous abortions are a nonmoral problem, akin to the accidental death of children by cars. For Brakman, the relative lack of attention anti-abortionists give spontaneous abortions is in part because of their relative lack of visibility, but largely because the “intentional and direct taking of human life by other humans” is more clearly a *moral* problem (2008, 22).

While much of the literature about abortion focuses on whether the embryo has full moral status, the moral asymmetry between spontaneous abortions and induced abortions rests upon an action theory, in which what is done in an induced abortion is worse than what happens in a spontaneous abortion.<sup>4</sup> Where anti-abortionists have sought to defend this asymmetry, they have either appealed to something like a doctrine of double effect or to the distinction between killing and letting die.<sup>5</sup> Yet skepticism about these rejoinders persists, for two reasons. First, unlike most ordinary cases where double-effect or killing/letting-die might pertain, in cases of spontaneous abortions the agents that ‘accept’ or ‘permit’ the deaths of embryos are also the ones who had caused their existence. Such an oddity seems to eviscerate the distinction between killing and letting die. William Simkulet, for instance, dismisses attempts to distinguish deaths ‘caused by moral agency’ and spontaneous abortions because the latter often happen “from accidents that occur before women even realise they are pregnant” or result from a woman’s negligence. These ‘spontaneous’ abortions are thus “caused by ‘moral agency’ in some sense” (Simkulet, 2019, 305). Similarly, Ezio Di Nucci argues that because the couple ‘causes’ the spontaneous abortion, there is no real distinction between deaths from spontaneous abortions and embryonic research: “the couple freely and actively engages in an activity that it knows to cause the death of embryos the same way in which the researcher freely and actively engages in an activity that she knows will cause the death of embryos.” Both, he concludes, “are clear cases of action rather than omission” (Di Nucci, 2013, 540). Second, the high death rate in ordinary procreation raises substantive challenges about whether the risks imposed by reproduction are proportionate to its benefits, which leaves appeals to the doctrine of double effect in jeopardy (Di Nucci, 2013, 533-536; Devolder, 2013, 533-536).

In this essay, I want to defend the asymmetry between the badness of spontaneous and induced

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<sup>3</sup> While Colgrove (forthcoming) does not rest his argument on the distinction between killing and letting die, Brakman 2008, 22-23 appeals in her rejoinder to something much like it.

<sup>4</sup> As noted in the above footnote, Colgrove (forthcoming) does not rest his argument on a distinction between killing and letting die. But his description of the wrongness of induced abortions does rest upon some account of *what is done* within them: their putative badness or wrongness is not only constituted by embryo death (Colgrove, forthcoming).

<sup>5</sup> While these distinctions are often treated as equivalent, they would be best kept apart—as this paper will argue. Those who take the killing/letting-die distinction path include Burda, 2008, 23-25; Dodsworth, Toth-Feiel, and Stangebye, 2008, 29-31; Blackshaw and Rodger, 2019, 103-120; Friberg-Fernros, 2018, 743-745. Those who frame their position around intention include Murphy, 2013, 529-532; Brakman, 2008, 22-23.

abortion in order to better explain why anti-abortionists prioritize stopping induced abortions over preventing spontaneous abortions. Specifically, I want to clear away some conceptual confusions about what type of agency parents have (and do not have) in generating human life by defending a pluralist, non-reductive account of moral analysis in which intentions, what an agent does, and what Jeff McMahan (1993) calls the ‘default’—or what would happen in the absence of intervention—all matter. First, then, I argue that the distinction between killing and letting-die is of more limited use in addressing the *reductio* than both its defenders and critics have presumed: in general, the asymmetry between induced and spontaneous abortions dissolves into either the doctrine of double effect or the lack of control we have to prevent miscarriages. The distinction between killing and letting-die applies only in a very narrow range of cases, namely those where an individual’s death is *already* underway and can be prevented. I then invoke this pluralist account to argue (against William Simkulet) that including intentions to kill within the purview of our moral analysis does not mean that the performance of those intentions is morally irrelevant. Rather, a sophisticated theory of moral assessment can supply distinct judgments on both attempts and performances. I then consider whether this pluralist account can adequately respond to the *reductio*, by taking up considerations surrounding the doctrine of double effect. I suggest that judgments about the proportionality of spontaneous embryo deaths happen against a backdrop that sees the limits of our ability to control the process of fertility as themselves valuable, which affects both how anti-abortionists judge the proportionate value of conceiving in the face of high rates of spontaneous abortions and their de-prioritization of reducing spontaneous abortions relative to stopping induced abortions.

This pluralist, non-reductive moral analysis of the asymmetry between spontaneous and induced abortions might be complex, but it has the advantage of explaining features of the anti-abortion outlook that have sometimes been overlooked. In the final section of this paper, I employ it to explain why the pre-Roe regime of abortion restrictions primarily imposed penalties on doctors who induced abortions rather than the women who seek them—a stance that I would argue anti-abortionists should still adopt.<sup>6</sup> Additionally, I suggest that this analysis means there is less reason than some hope to expect the advent of ectogestation will lead to a compromise on ‘disconnect abortions,’ which putatively let the embryo die by extracting it from the mother’s womb. The narrow utility of the killing/letting-die distinction explains why anti-abortionists will almost certainly limit their endorsement of ectogestation to rescuing embryos who might be in danger of spontaneous abortions, rather than accepting it as an alternative to disconnect abortions.<sup>7</sup>

## II. Does the killing/letting-die distinction do any work?

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<sup>6</sup> See Paul Linton 2007 and Daniel K Williams, 2016. Some “pro-life” writers have endorsed penalties for women. Kevin Williamson (2018) incited controversy on this point. For his complete views, see [https://www.washingtonpost.com/opinions/kevin-williamson-the-punishment-i-favor-for-abortion/2018/04/25/5001c6cc-48c5-11e8-8b5a-3b1697adcc2a\\_story.html](https://www.washingtonpost.com/opinions/kevin-williamson-the-punishment-i-favor-for-abortion/2018/04/25/5001c6cc-48c5-11e8-8b5a-3b1697adcc2a_story.html). See also the critique of Williamson by conservative Ross Douthat’s in Douthat, 2018.

<sup>7</sup> I take this supposition from the fact that the Roman Catholic church has opposed IVF, which represents a more general opposition to the externalization of reproduction. See *Donum Vitae* (1987), or “Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation,” Congregation of the Doctrine of the Faith, available online at [https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19870222\\_respect-for-human-life\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html). David Reiber (2010, 515-527) also defends only a narrow use of ectogestation.

It is widely acknowledged that the distinction between killing and letting-die has some purchase on our intuitions. It is hard to eradicate our sense that there is some moral difference, for instance, between extubating an individual who is on the cusp of death and not intubating them to begin with (Wilkinson, Butcherine, and Savulescu, 2019, 21-28). Yet the distinction has been challenged through appeals to cases that suggest our intuitions are not as settled as it seems. Here I want to isolate the various components that have sometimes been lumped in with the distinction, in order to argue that it does less work in explaining the asymmetry between the badness of spontaneous and induced abortions than even anti-abortionists have sometimes thought.

Consider the following cases, which William Simkulet develops to argue that the distinction cannot be invoked to explain the putative asymmetrical badness of induced and spontaneous abortions.<sup>8</sup>

Smith Kills: Smith stands to make a significant amount of money from future fertility treatments if something should happen to his patient's fetus during pregnancy. During the birth, he wraps the umbilical cord around the fetus's neck, causing it to suffocate to death and be stillborn. He acts to bring about the fetus's death for financial gain.

Jones Lets Die: Jones stands to make a significant amount of money from future fertility treatments if something should happen to his patient's fetus during pregnancy. During the birth, he notices that the umbilical cord is wrapped around the fetus's neck and does nothing, allowing the fetus to die and be stillborn. He refrains from acting to bring about the fetus's death for financial gain. (Simkulet, 2017, 788)

As Simkulet observes, Smith and Jones both act with the same *reasons*, which seems to make these cases morally equivalent. Simkulet argues that such cases pose problems for anti-abortionists, for two reasons: first, even if there *is* a moral asymmetry between them, the latter case is still "morally significant"—while the anti-abortionist ostensibly thinks such deaths have *no* moral significance (Simkulet 2017, 788).<sup>9</sup> Second, many spontaneous abortions are "doings," in that they arise from accidents or from negligence on the part of either the woman or third parties.<sup>10</sup>

Simkulet's cases demonstrate that an agent's reasons for their action matter to moral evaluation. First, Smith and Jones' reasons for acting indicate that they intend to bring about the baby's death, and that they both choose strangulation as their means. That Smith wraps the umbilical cord around the fetus's neck and Jones does not remove it is immaterial to our intuitions about the respective wrongness of their conduct. Jones' omission of care is, in that respect, an action—a *killing*. As Phillipa Foot and others have argued, failing to do something can be as much an action as directly bringing about the same result (Foot, 1994, 280-290; cf. McMahan, 1994, 383-415). Someone might swim away from a drowning person to distract a shark that would otherwise eat them both—or

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<sup>8</sup> Simkulet draws from James Rachels' famous critique of the distinction.

<sup>9</sup> This claim is surely contestable. Brakman (2008, 23), for instance, adopts a sharp distinction between moral and non-moral evils. But she also defends a responsibility to mitigate the latter, when possible. Nonmoral deaths might still be a concern, even if they arise from a different source than moral objections to people's conduct.

<sup>10</sup> One possible rejoinder is to argue, as Blackshaw and Rodger (2019, 114) do, that the distinction survives in most cases even if it is "blurred when comparing between certain contrived examples." Here I am trying to parse out why it survives in some examples and not others.

swim away because they are next in line to inherit their wealth. Either way, the reasons and intentions individuals have in ‘omitting’ care or ‘letting-die’ are decisive for their moral quality.

At the same time, reasons and intentions are insufficient for moral evaluation: capability or ‘control’ matters as well. One reason for our horror at both Smith and Jones is our recognition that they might have acted otherwise. When we have no ability to execute our intentions, they indicate the content of our character—but are otherwise inert. In fact, there is some reason to think that a person who claims to have such an intention is deluded or self-deceived.<sup>11</sup> As Simkulet himself notes, “a person that freely ignores drowning children *they could otherwise easily save* is a moral monster” (2017, 788).<sup>12</sup> Such a judgment is warranted only on the basis that they might have prevented the death without any inconvenience or difficulty, and failed to do so. It makes no sense to speak of ‘letting’ or ‘allowing’ things to happen over which we have no control: the sun rises every morning, but neither Smith nor Jones can meaningfully be said to ‘allow’ or ‘let’ it happen.

The relevance of both intentions and control to moral analysis narrows the range of cases in which the killing/letting-die distinction applies. In fact, appeals to the distinction in order to explain the asymmetry between spontaneous and induced abortions dissolve into either of these features. For one, the intentions that lead to spontaneous abortions are asymmetrical with the intentions behind induced abortions. While generative acts might be undertaken without intending to conceive, it seems unlikely that induced abortions can be undertaken without intending the death of the embryo.<sup>13</sup> Additionally, undertaking a generative act might create a human life—while disconnecting an embryo will certainly lead to its death. Spontaneous abortions thus seem to fall under the doctrine of double effect: when what is intended is both morally permissible and sufficiently valuable, the risk of spontaneous abortions is proportionate.<sup>14</sup> At the same time, the killing/letting-die distinction is irrelevant since individuals are incapable of suspending the process that leads to such deaths (even if their choice and conduct began that process). While some embryo deaths might be preventable by modifying behavior, educating people, and so on, the question of our responsibility to pursue such pre-emptive measures is distinct from whether we are permitted to allow those individuals to die. The killing-letting die distinction presupposes that we have the ability to suspend a process already at work. Consider a couple who does everything in their power to prevent a spontaneous abortion—as many who are attempting conception do. If their efforts fail, there is nothing they can do to stop the death from occurring. In such a case, the killing/letting-die distinction is irrelevant: the couple neither kills the embryo (though they are a cause of its death), nor allows it to die, since they cannot prevent its death (which they surely would, if they could). The same is also true for those fatal processes that we unwittingly start, provided that we do not intend to bring about the death of a person as our end.<sup>15</sup>

This is not to say that the distinction between killing and letting-die never applies. Intention and

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<sup>11</sup> I will defend this claim further below.

<sup>12</sup> Emphasis mine.

<sup>13</sup> Procedures aimed at saving the mothers’ life, such as salpingectomies in order to treat ectopic pregnancies, might lead to the termination of the embryo in the same way that a ‘disconnect abortion’ does. But they fall under the doctrine of double effect. The possibility of ectogestation has opened an ongoing debate about whether abortions seek the termination of pregnancies or the termination of the embryo. Christine Overall (2015, 126-140) has prominently switched her position that abortions terminate pregnancies to the claim that they terminate fetal lives. My thanks to an anonymous reviewer for pushing me to clarify this.

<sup>14</sup> See, for instance Murphy, 2013, 529-532. I consider the question of proportionality below.

<sup>15</sup> I consider the details of this concern below as well.

control are not the only morally relevant features of an act: *what is done* also matters, as does what Jeff McMahan (1993) calls the ‘default’—or what would happen without our intervention. Such features help clarify when the distinction between killing and letting-die matters. Consider *Penitent Smith and Jones*: renouncing their greedy ways, they now intend to safely deliver the babies under their care. Both of them also have the ability to bring about their intentions. Smith performs his task admirably, delivering a healthy baby. Jones does the same—but the delivery requires acting swiftly to unravel the umbilical cord from around the infant’s neck. In *Penitent Smith and Jones*, the ‘default’ each doctor faces is different: Jones is put in a position where to bring about his intentions he must rescue the baby. Though their intentions are identical, Jones faces a threatening process or sequence that he must suspend which Smith does not.<sup>16</sup> As McMahan (2013, 16) argues, the ‘default’ “determines the nature of one’s agency...[and] the nature of the agency affects the morality of the action.” It also affects our assessments of their actions. While their reasons are morally equivalent, and the outcome is the same, we regard Jones’s actions as more praiseworthy than Smith’s because they have done something—namely, *rescue* a baby—that Smith has not.

On McMahan’s view, the ‘default’ allows us to distinguish between cases of killing and letting-die: if an agent withdraws life-sustaining aid that is “complete and self-sustaining,” then it counts as a killing—but where the aid requires further contributions, withdrawing it seems tantamount to letting a person die. In other words, cases of letting-die involve antecedent threats “to the victims the existence of which is independent of any action by the agent” (McMahan, 1994, 394).<sup>17</sup> A fireman who sets up a net to catch one person jumping from a burning building but then moves it to instead catch two does not kill the one individual, but lets them die as they rescue others: the default of the person’s without nets beneath them (or dying in the fire) sets a baseline against which we evaluate the fireman’s action. On the account I have defended here, such a default is not sufficient for a full moral analysis: the fireman must not intend the death of the one person because they know they will inherit their money. But we cannot evaluate their intentions without some reference to the default and their action in response to it, either.<sup>18</sup>

The moral significance of preventing embryo deaths, then, depends on a variety of factors: the intentions of the prospective parents, their ability to prevent such deaths from occurring, what they do, and the ‘default’ (what would happen without their intervention). For spontaneous abortions, the distinction between ‘doing’ and ‘allowing’ does not apply: while the couple is active in conceiving the child, they often have no ability to suspend the threatening process or prevent the death. For those spontaneous abortions a couple does have the ability to prevent, their intentions and reasons matter: their failure to prevent a death is blameworthy unless they have some sufficiently weighty countervailing reason or intention. The distinction between ‘killing’ and ‘letting-die’ thus dissolves in most cases into the absence of control—and in other cases seems to reduce to some doctrine of

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<sup>16</sup> The language of ‘threatening sequence’ is taken from Phillipa Foot (1994, 285).

<sup>17</sup> One need not follow McMahan’s construal of what, precisely, constitutes killing versus letting-die to affirm that letting-die presupposes some pre-existing threatening process. This latter claim is the only one the anti-abortionist needs.

<sup>18</sup> If nothing else, the default makes an individual’s intentions more transparent to us, and thus our knowledge of what they intended more secure. In the original *Smith and Jones* cases, the default and what they do establish an asymmetry in how we assess their intentions. The explanatory bar Jones has to overcome in order to explain why their ‘letting die’ is justified is high—but given that Smith wrapped the umbilical cord around the baby’s neck makes their justificatory task even harder.

double-effect.

### III. *Intentional Killings and Intending to Kill*

If the distinction between killing and letting-die does less work in differentiating spontaneous and induced abortions than is sometimes thought, that does not entail that the anti-abortionist is committed to the idea that the wrongness of induced abortions is constituted solely by the intention to kill. While every intention to kill an innocent individual is morally bad, not every such intention is morally equivalent: whether a person can successfully accomplish their intention matters as well.

Such a pluralist account of moral assessment clarifies why Simkulet's recent attempt to defend the *reductio* fails. Simkulet (2019) argues that we hold people accountable even when they fail to successfully perform their intentions. In his reading of what he calls the "two tragedies" position, anti-abortionists object to induced abortions because they have an additional tragedy that spontaneous abortions lack, namely, the intention to kill. On Simkulet's view, the anti-abortionist account needs the intention to kill to be much worse than the badness of death *per se*. However, Simkulet draws from the moral luck debate to argue that success or failure at attaining one's intention is morally irrelevant: successful assassins are no more culpable than unsuccessful assassins, as agents are morally culpable for their intentions. A successful performance merely changes the epistemic conditions of our assessment: it makes no substantive difference, though, to our moral judgement about what they (try to) do.

Suppose that an anti-abortionist is faced with a choice between saving one brother from a disease, or preventing brother 2 from killing brother 3 (Friberg-Fenros, 2018, 744).<sup>19</sup> The upshot of Simkulet's view is that the anti-abortionist is too late: the moral tragedy of brother 2s intending to kill brother 3 has already occurred (Simkulet, 2019, 306). Simkulet offers a variant of the case in order to demonstrate the putative absurdity of the anti-abortionist concern that an 'intention to kill' makes a weighty moral difference. In the modified case, the anti-abortionist has a choice between saving brother 1's life or between preventing brother 2 from killing an automaton that he *thinks* is brother 3. On Simkulet's account, if the "the tragedy to intentionally act to kill a person is far worse than the tragedy of the death itself," as the anti-abortionist ostensibly thinks, then the anti-abortionist would be obligated to take the second choice, rather than save brother 1's life (2019, 307). This is extremely counterintuitive, though, which indicates the weight of the reason to act derives from the badness of death—rather than from the intention to kill.

While Simkulet is right that anti-abortionists think the intention to kill differentiates induced from spontaneous abortions, he goes awry in assuming that anti-abortionists think intention is *exclusively* determinative for moral evaluation. The anti-abortionist is not committed to treating intentional *attempts* as equivalent to intentional *performances*, in either moral evaluation or in legal or political judgment. One plausible reason to distinguish attempts and performances is the fact that failed attempts require us to recommit ourselves to our plan and redouble our efforts to complete them. Suppose a person developed a highly-detailed plan to shoot Queen Elizabeth as she floated down the Thames for the Diamond Jubilee Pageant. Despite their earnestness, they are frustrated in their attempts to purchase the appropriate gun: the United Kingdom's restrictive gun laws prevent its sale in stores, and their several efforts to procure one from the black market yield nothing. The

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<sup>19</sup> This is a case that Friberg-Fenros (2018, 744) develops, and to which Simkulet (2019, 306) responds.

risk of detection increases with every try, which causes them to have to undertake increasingly more elaborate ruses to keep their intentions secret. After months of trying, they finally succeed—and so are in a position to fulfill their intention. The premeditated quality of the act makes it, in certain respects, worse than if they had simply seized it as a crime of opportunity. At each stage in the process, they had an exit ramp they did not take. Suppose that after their fifth attempt to purchase a gun they renounce their ways, and turn themselves in. While we would condemn that person for their morally bad character, no reasonable person would put such an intention on par with one which was so strong that a person sought to accomplish it regardless of what obstacles came their way. Trying is not performing. In this respect, the anti-abortionist view is commensurate with most legal regimes, which issue less severe punishments for attempted crimes than for successfully accomplished ones.<sup>20</sup>

If this is right, then as long as the anti-abortionist has good reason to think brother 2's intention to kill brother 3 will be frustrated, they ought save the life of brother 1 from disease. Simkulet's two cases work against each other. If the anti-abortionist is already too late to prevent the tragedy of brother 2 having a morally bad intention in the first case, then they have no special reason to prevent him from stabbing the automaton in the second: they have already had the bad intention, which means the only intervention left is preventing them from damaging a very expensive robot. The anti-abortionist would do better to prevent brother 1 from dying. Failing to do so would mean letting brother 1 die unnecessarily, that is, without some proportionately weighty reason. The anti-abortionist focus on intentional abortions is not founded on a comparative judgment between the badness of preventable deaths and the badness of intentions to kill: it is instead founded on the comparative judgment of the badness of (putatively) preventable deaths with the badness of intentional killings. These are distinctions, though, that only a pluralist account of moral assessment can provide.

#### *IV. Double Effect, Proportionality, and the Value of the 'Default'*

If the distinction between killing/letting die does less work in explaining the asymmetry between spontaneous and induced abortions than some people have thought, that does not entail the anti-abortionist has escaped the *reductio*. For one, there are oddities to spontaneous abortions that call into question whether appeals to either the lack of control or the doctrine of double-effect are persuasive ways of exonerating couples from doing more to prevent such deaths. One worry that has been raised is that because couples are causal agents in bringing about spontaneous abortions, preventing death is always a possibility—even if doing so means choosing to not conceive. One might reasonably invoke the doctrine of double effect to explain why it is licit for couples to proceed: spontaneous abortions are not intended, but rather regrettable foreseen side-effects. But other questions arise: for instance, it might seem like spontaneous abortions are a means to having a child (which would render doing so illicit), or that the rate of embryo death is disproportionate to the deaths of embryos. While these worries have been addressed at points in the literature, I want to suggest that the anti-abortionist's rejoinders are plausible only against the background commitment to the valuableness of the limits that surround human agency in procreation. The *lack* of control over creating life leads many anti-abortionists to especially value it, and makes *seizing* of control in

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<sup>20</sup> For a discussion, see Duff, 1996.

intentionally terminating life seem especially wrong. The specialness of procreation is intertwined with the distinct wrongness of abortion. Such intuitions stand beneath the moral asymmetry between induced and spontaneous abortions that anti-abortionists affirm, and beneath the disparate priorities they place on preventing each.

#### *IV.1 Spontaneous abortions as means?*

Are the embryos that die in spontaneous abortions an illegitimate means for the end of giving birth to a baby? An anti-abortionist couple deeply desires to conceive only one child: they experience, through no negligence or fault, four miscarriages before successfully giving birth on their fifth try. Without descending into the details of the non-identity problem, it seems natural to believe that their child, with just their particular traits and qualities, would not have come into existence if their first embryo had lived until birth. As such, it is tempting to see the deaths of the four embryos as the means to giving birth to the fifth.<sup>21</sup>

Yet there is little reason we should accept such an argument. In one response to this worry, Timothy Murphy (2013, 530) argues that because children can be born without any preceding embryo loss, they do not constitute means. Such a thought has intuitive force: if a process can be accomplished without a death, then it seems like such death is not a necessary means of accomplishing that end. Yet that way of putting the rejoinder is too imprecise: as Di Nucci (2013, 538) observes, what is *extensionally necessary* is distinct from the *intensional* means. The doctrine of double-effect rests upon this distinction: while it might be necessary for some innocent people to die in bombing a military convey, they are not the means to attaining the objective of defeating the enemy. Even if the first four miscarriages were extensionally necessary to the birth of the fifth child, that is not enough to indicate that they are an illegitimate means.

Yet the case that the first four embryos are not means can be strengthened, as the fact that they are *not* extensionally necessary to the birth of the fifth child seems to matter for understanding what the parents intend in conceiving. Extensional necessity affects the threshold of justification for our stated intentions and our use of double-effect. Because spontaneous miscarriages are *not* extensionally necessary for giving a birth to a child, we can presume that they are unintended: if they were necessary, then we would need to marshal more evidence that we are not intending such deaths as the means of bringing about life. If a couple tries to have four spontaneous miscarriages on the belief that the fifth child they conceive will live the happiest imaginable life, they can meaningfully be said to have intended the deaths of the first four embryos as means. But it is hard to imagine anyone doing so.

#### *IV.2 Proportionality?*

The more forceful objection to the anti-abortionist view from spontaneous abortions is that the

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<sup>21</sup> John Harris has proposed, for instance, that the “sacrifice of embryos seems to be an inescapable part of the process of procreation.” Despite not being intentional, this is a “conscious, knowing, and therefore deliberate sacrifice.” The “consequent miscarriages are a price it is morally justifiable to exact to achieve that end” (Harris, 2003, 362-363). Interestingly, bioconservative Leon Kass employs similar language: any couple trying to conceive “tacitly accepts the sad fact of such embryonic wastage as the perfectly tolerable price to be paid for the birth of a (usually) healthy child” (Kass, 2002, 92).

number of such abortions a couple might suffer is disproportionate to the birth of a child. As Di Nucci states the objection, if “embryos are indeed persons, then it is not at all clear that the DDE proportionality condition will be met.” Di Nucci uses a high number of embryo deaths as the baseline, suggesting that “in vivo conception kills more persons than it gives birth too” [*sic*]. As such, the “sacrifice of persons involved in in vivo conception is, on this argument, very great: this practice kills more persons than it does not kill, for example” (Di Nucci, 2013, 538). Setting aside the question of whether the practice *kills* early embryos, much less *sacrifices* them, Di Nucci’s description animates criticisms of the anti-abortionists: even on conservative estimates of embryo death, the rates of loss still seem high enough to seriously call into question whether having a child is proportionately valuable.

Whether a number of deaths is proportionate to the end being pursued depends, in part, on the standpoint from which the question is being evaluated. For instance, the proportionality of embryo deaths might be framed retrospectively, such that one imputes blame on parents who give birth to a child *after* they suffer five spontaneous abortions. There are reasons, though, why an anti-abortionist would resist such a judgment. For one, parents make determinations of value from within partial moral bonds. Neither the miscarried embryos nor the living child are abstract, isolated individuals with whom the parents have no prior connection: they are, instead, individuals who were formed out of the parents’ choices, intentions, and bodily lives. Such an account means that in certain respects the deaths of embryos are worse for parents, as they resonate with them more deeply than the deaths of strangers.<sup>22</sup> Yet it also restricts the strictly numerical weighing of lives that criticisms from proportionality depend upon: what parent would wish to consider whether the life of their one child is “worth” the deaths of five other embryos, whom they might have once hoped would also become a child? For anti-abortionists, parents’ reluctance to compare their child’s value with the lost embryos generalizes. Such comparisons seem to imply that individuals are fungible with respect to their lives and existence—that the lives of four people might be an appropriate trade-off for the life of one. While such judgments are commonplace in many contexts pertinent to public policy, many anti-abortionists see such an assessment as disparaging toward the life of the individual. Parental proximity discloses something important about personhood, namely, that individual lives cannot be weighed against each other or replaced by each other.

The question of whether four deaths are proportionate might also be put prospectively, though—which is the situation that prospective parents are actually in. The choice such parents face is not between one child and four dead embryos: rather, they face a series of successive choices between nothing happening, having one child, and a spontaneous abortion.<sup>23</sup> While their estimate of the probability of success might change after they suffer spontaneous abortions, they would still have reason to not approach the decision through an aggregated percentage of the risk of embryo loss. As Julian Savulescu has noted, each and every embryo “gets the best and equal chance of being a baby” (Savulescu, 2004, 73).

This deliberative context means that Di Nucci makes a mistake in rejecting the killing/letting-die distinction because “the couple freely and actively engages in an activity that it knows to cause the death of embryos” (2013, 540).<sup>24</sup> The couple might know that they risk ‘causing’—in some sense—a

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<sup>22</sup> Resonance is a concept drawn from Niko Kolodny (2003, 135-189).

<sup>23</sup> My thanks to an anonymous commenter for pushing me further to consider this.

<sup>24</sup> As I have argued, the distinction should be rejected in cases of spontaneous abortions on the basis of a lack of

spontaneous abortion by engaging in reproductive activity. But even if they have experienced four prior miscarriages, they do not know whether the next attempt will be another one. In general, attempting to conceive involves the risk of spontaneous abortion—yet that lowers the threshold for its licitness, as it is easier to justify accepting the risk of death than accepting *foreseen* or *known* deaths.<sup>25</sup> Indeed, most worthwhile activities seem to be accompanied by risks, for ourselves or others. The scholar risks hypertension from inactivity; the parent risk their children’s lives by driving them to piano lessons. Those who attempt to conceive risk the death of embryos; but they do so for an end which, save only the most ardent pessimistic anti-natalists, most everyone thinks is sufficiently valuable.<sup>26</sup>

### *IV.3 The Risk of Death and the Value of Life*

For anti-abortionists, the doctrine of double-effect and its corresponding account of intention helps explain the moral asymmetries between spontaneous and induced abortions. But having children seems sufficiently valuable to justify the risks of embryo death in part because anti-abortionists tend to think the presence of such risk is *itself* valuable. For many anti-abortionists, the acute awareness of the risk of death in procreating intensifies the value of life. Few anti-abortionists register sympathy with a Darwinian valorizing of the survival of the fittest; instead, awareness of life’s astonishing fragility and vulnerability becomes a reason to specially protect it, especially when that life is otherwise defenseless and unable even to speak on its own. Such a heightened concern to protect is reasonable. If we think a car is valuable, then our interest in protecting it will increase not only in proportion to our risk of losing it, but in proportion to its irreplaceability.<sup>27</sup> The risk of death in the earliest days of our life is a heuristic that helps clarify how incomparable and irreplaceable particular lives are.

Accounting for the valuableness of our lack of control over ordinary procreation—and with it the risk of death—has sometimes been gestured at by anti-abortionists. Alexander Pruss (2013, 412) suggests, for instance, that it is easier to think of life as a “gift” when a process has been established independently of one’s agency. Yet there are reasons internal to the process of reproducing that make the idea that human life is a ‘gift’ seem reasonable as well.

The idea that we must have the relevant skill or capability to bring about an intention—‘practical knowledge’—means that what we can meaningfully intend to do is constrained by vulnerability or luck. As noted above, if we have no capability to bring about an end, then the ‘intention’ is inert. While someone might have the relevant psychological state, their inability to perform their intention nullifies its practical salience. In extreme cases, we might conclude they are delusional or simply

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control.

<sup>25</sup> On the ethics of risk imposition in procreating life, see Weinberg, 2015.

<sup>26</sup> The fact that embryonic death is *not* extensionally necessary to conceiving a child seems like *prima facie* evidence that the morally relevant ‘cause’ of the embryo’s death is not the sexual intercourse that aims at conception. After all, sexual intercourse is a ‘cause’ not only for embryonic death, but the death of 80-year-olds who would not exist without it. There are, to be sure, intractably difficult questions here about the individuation of causes: yet Di Nucci’s claim that those who attempt conception *know* they are undertaking an act that causes embryo death stands in need of defense (Di Nucci, 2013).

<sup>27</sup> If we do not think the car valuable, then the risk of losing it does not animate our protective impulses. If a car is valuable but replaceable, then we might protect it in accordance with its value. But if the car is irreplaceable to us, then we would have special reason to ensure its safety that go above and beyond the value it has on other terms.

wrong about what they intend: if someone claims they intend to fly to the moon without assistance, we have reason to think they don't understand what an intention is. Those who lack the relevant 'practical knowledge' to perform certain tasks might still accomplish them: they might get lucky. In such cases, we would say that they perform such acts *intentionally*. But intentionally undertaking an act is distinct from intending that act: in cases where double effect applies, for instance, one intentionally kills another without intending to kill them.

Tying intentions to our ability to perform them seems reasonable on either probabilistic or modal terms. Probabilistically, it seems like there is some (almost certainly vague) threshold of success below which one cannot claim 'practical knowledge' of the task. A 30% free-throw shooter does not have the relevant skill to intend to make the shot, but a 70% free throw shooter might.<sup>28</sup> Similarly, one cannot intend to win the lottery: the odds of success are too low, even if one has the relevant know-how to put oneself in a position to win. The modal condition is this: one has the relevant practical knowledge if one would have successfully accomplished the project, but was prevented by an intrusion of an unexpected event from outside the process or a mistake within it. A free throw shooter would have made the shot, had his arm not unexpectedly buckled from his opponent hitting it or had his hand not suddenly gone numb. In that sense, having practical knowledge seems compatible with the failure of performances, depending on the reasons for their occurrence. Not every dimension of a performance is equally vulnerable to failure: some vulnerabilities are structural conditions of an act, and others are extrinsic to it. If a process is ordered such that failure is extremely likely, like the lottery, then it is the kind of process that brings about an end that is unavailable to one's intentions.

If such constraints are plausible, then 'conceiving a child' is the sort of end that lies beyond the reach of an intention—even though someone who conceives a child does so intentionally.<sup>29</sup> Consider the various 'success conditions' at which an act of sexual intercourse might aim. Helen Watt argues that in ordinary procreation intercourse is "biologically successful beyond the success of the immediate act" (Watt, 2015, 145-146). While Watt is right that procreation is a "goal directed" biological process, its successful completion lies beyond the competence of those who undertake it. There are sharp limits on what the biological mother can do to make the process "biologically successful" (as many infertile couples will attest). The embryo's formation and development is beyond their grasp, and interventions into the process are inherently mediated by the woman's body. Moreover, the process of conceiving seems to be one in which failure is likely, if not extensionally necessary.<sup>30</sup> In any particular reproductive cycle, the fecundity rate "rarely exceeds 35%," and even under "ideal conditions, the greatest probability of achieving a clinical pregnancy is 30-40%" (Benagiano, Farris, and Grudzinskas, 2010, 733). Those odds obviously improve as couples try to

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<sup>28</sup> These probabilistic constraints may be indexed to the kind of activity one undertakes, and whether other agents are involved. A batter's 30% success rate in professional baseball would plausibly make a player an all-star, despite the pervasiveness of their failure. What constitutes the difference between a skill and luck may be inherently vague. For more on this account of intention, see Mele and Sverdlik, 1996, 265-287; Mele, 1989, 19-30; Mele and Moser, 1994, 39-68.

<sup>29</sup> One possible feature of this view is that there is no such thing as an 'unintentional' child, as there can be no such thing as an intended child. Framing children as a side-effect of an intention does not remove it from moral scrutiny, any more than the side-effects of civilian death are irrelevant to the moral analysis of bombing. Everything one brings about 'intentionally,' ends and side-effects, matter for moral reasoning—even if they do not matter equivalently.

<sup>30</sup> Note that the failure to conceive is distinct from embryo death.

conceive. Indeed, the likely reproductive failure of a single reproductive act makes its repetition almost necessary for a couple to seriously aim at procreating. The need for frequent repetition of the act in order to improve the odds of the ‘further success’ of procreating suggests that the most one can do in any particular instance of intercourse is *try* to procreate.<sup>31</sup> Additionally, the correlation of the act’s frequency with trying to procreate means the knowledge that a particular act was successful is inversely related to one’s intentional attempts at procreating. A couple that increases their reproductive odds through frequent attempts in the right conditions makes it harder to know which act was reproductively successful—unlike if they ‘unintentionally’ became pregnant from a single act. In order to improve the probability of procreation, couples must dilute their own agency to the point that they may not be able to name the place or time that a child was conceived. These oddities indicate that the practical knowledge of procreating stands beneath the “social practice of sexual reproduction,” or the repeated attempts to generate life within the conditions necessary for its emergence. But procreation is unavailable to the couple as a discrete end in any particular act itself.

There are reasons, then, to think that the intrinsic vulnerabilities and ‘luck’ within ordinary procreation are structurally necessary for understanding its ‘biological success’ as a ‘gift.’ Those who adopt the ‘gift analogy’ to object to IVF emphasize the unavailability of procreating to the couple who engages in sexual intercourse, even if they do not develop the account of agency as extensively as I have here. Roman Catholic theologian William May, for instance, argues every act of intercourse must be “intended to be open to the gift of life,” which is an odd and cumbersome locution (May, 2013, 133).<sup>32</sup> How can one intend what one cannot bring about, namely receiving (or bestowing) a gift? But if we adopt the above description of the limits of practical knowledge in procreating, May’s formulation becomes intelligible. The only discrete end agents can intend in intercourse is a communicative act of love, affection, delight, and pleasure in one’s spouse within the mutual openness to parenthood. What happens after is not up to them, at least if they are trying to have a baby.<sup>33</sup>

Situating the question of whether embryo deaths are proportionately valuable against this backdrop helps explain why anti-abortionists affirm an asymmetry between spontaneous and induced abortions, and why they do not prioritize preventing spontaneous abortions. If eliminating deaths from spontaneous abortions required taking such control over our fertility that its contingent and involuntary dimensions were eclipsed, many anti-abortionists would balk. Obscuring the conditions that lead many anti-abortionists to construe life as a ‘gift,’ and an exceedingly precious one at that, would be a real cost to their intuitions: because each life emerges from such a precarious environment, it seems especially valuable. That has the twofold effect of making the effort to create life even in the face of high mortality rates seem proportionately valuable, and of making the decision to terminate seem especially bad. Suppose, for instance, that complete ectogenesis were not only possible, but so efficient that it had a considerably higher ‘success’ rate than natural reproduction. While the value of pregnancy and gestation is hotly disputed, few anti-abortionists would discount that value to zero—such that they would see eliminating it as a worthy aim, even if

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<sup>31</sup> This feature paradoxically means it is important to not only have non-procreative ends for acts in which one hopes to conceive, but that one should aim at those ends as well.

<sup>32</sup> Emphasis mine.

<sup>33</sup> There is an asymmetry in the ‘interventions’ that are possible, which is established by the fact that the ‘default’ is the growth of the embryo into a baby. The couple might intervene to prevent that from either beginning or happening—but they cannot yet intervene to improve the process, at least not directly.

doing so lead to significantly fewer spontaneous abortions. While the deaths of early embryos are themselves tragic, the limits on human agency that make them possible underscores for many anti-abortionists the contingency and luck involved in generating human life and heightens its significance.

The account on offer here is related to what David Wendler calls the “natural process” outlook, though it does not give such processes the weight that Wendler thinks it has. As he recounts the view, a natural process is determined independently of human intentionality or choice. The natural process of conception and development establishes the “fundamental structure” of our lives, which we are morally obligated to accept—an obligation that also establishes a further obligation to not interrupt “token instances of fetal development” (Wendler, 1999, 32-56). Yet Wendler suggests that this account—and not the belief that embryos have full moral status—stands behind the anti-abortionist opposition to induced abortion and complacency about spontaneous abortions.<sup>34</sup> The argument I have set forth here is distinct, and more modest: the thought that natural processes are valuable arises from a variety of features, rather than the fact that they determine the “fundamental structure” of our lives. And such a commitment forms only the background condition for judgments about what sort of means would be proportionate for preventing spontaneous abortions, rather than grounding the explanation for why anti-abortionists oppose induced abortions. The anti-abortionist outlook is pluralist: it is not derived only from the idea that embryos have full moral status, but includes an account of intentions, what an agent does, the ‘default’ in any particular situation, and the valuableness of having natural processes for its force.

#### *V. Punishing Mothers and Ectogestation*

While the account of the anti-abortionist position is complicated, it has the advantage of explaining features of the anti-abortionist outlook that have gone unnoticed in the literature. In the first place, the pluralistic approach to moral assessment defended here helps make intelligible the pre-Roe regime’s general focus on imposing penalties on those doctors who performed abortions rather than the women who sought them.<sup>35</sup> In certain cases, it seems reasonable to prioritize the person who is nearest to the action for our attribution of praise or blame, in part because what one does in response to the default is qualified by one’s agency. Consider our evaluation of intentions when people *try* to do something morally worthwhile, even when they lack the capacity: someone who cannot swim dives off a tall pier over a rocky promontory to save a drowning baby, but fails to do so. Their intention is praiseworthy, as is what they do. Yet if they attempted to save the baby when there was a lifeguard ten feet away who might have been alerted, we evaluate their performance differently. Their intention might be the same as the lifeguard’s, but their limited capabilities make their choice of means inapt. Their decision to try to save the baby on their own, rather than opting for the more reliable and efficient means of hailing the lifeguard, seems bad. Yet suppose they do hail the lifeguard, who then saves the baby: we would commend them for their

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<sup>34</sup> See also Berg, 2017, 1223.

<sup>35</sup> My argument here supplies my own reasons for such restraints, which obtained in most—but not all—states prior to Roe. Pre-Roe abortion law seems to have been motivated by concern to protect fetuses. However, as I have argued, affirming the full personhood of the embryo is commensurate with differentiated levels of culpability for terminating its life. See Witherspoon, 1985, 58ff. Thanks to Francis Beckwith for pointing me to this paper.

quick thinking, but would not necessarily treat what they do as equivalent to the action of the person who risked their life by jumping into water surrounded by deadly rocks. (This is no ordinary lifeguarding effort.) Their solicitation is still morally salient. What the lifeguard does accrues to them, as they alerted them. If they failed to solicit help and the lifeguard never noticed what was happening, they would be negligent in a blameworthy way. But we would not put their solicitation on a par with the lifeguard's life-threatening jump into the water. The praiseworthiness that accrues to them is derivative on the lifeguard's success.

Something similar seems to hold true in some cases of wrongdoing.<sup>36</sup> Suppose the would-be assassin of Queen Elizabeth is visually impaired, and so cannot execute the final step of the plan themselves. Instead, they pay a friend one million pounds to look through the scope and pull the trigger. In that case, the friend who pulls the trigger has the same intention to kill, but brings about what the would-be assassin could not. The solicitation is still wrong, and in most places they would (rightly) be tried for murder. Yet their lack of competence to perform the morally bad task puts them in a special position of reliance upon someone else, and makes their otherwise morally bad intention practically inert. Because of their lack of capacity, Queen Elizabeth's successful voyage down the Thames remains the 'default'; only the willingness of the assassin to pull the trigger changes that, which is something no one else can do for them. In a fashion similar to how performances are worse than attempts, though, enabling someone to successfully accomplish their morally bad intention is worse than intending to do a wrong one is otherwise incapable of doing. If the one who solicits such a crime has a bad character, the one who enables it to happen makes something worse happen than would have happened otherwise. It might make sense in certain cases, then, to subject them to more stringent punishment.<sup>37</sup>

This is especially the case if the one who enables the wrong has role-based responsibilities that they violate in order to do so. While mothers who seek induced abortions doubtlessly do something wrong on the anti-abortionist account, their inability to safely perform that wrong without assistance means that they are dependent upon the choices and decisions of others to bring about their end. That means, though, that with respect to their end of terminating their fetus they are nearer to the visually impaired would-be assassin of Queen Elizabeth.<sup>38</sup> Yet they seek abortions from doctors

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<sup>36</sup> Note that I do not think this be true of every case of accomplice liability.

<sup>37</sup> Wading through the complexities of accomplice liability law is beyond the scope of this paper. However, it is worth noting that the view I have defended is out of step with how accomplice liability is generally understood these days. By and large, accomplices are charged with the same crimes as those who in fact commit them. While this gives me pause, I think it not decisive. A number of considerations bear on my judgment. First, as Joshua Dressler observes, even though "all parties are treated alike in the criminal law codes, prosecutors may treat accomplices more leniently in the initial charging process, or during plea bargaining" (Dressler, 1985, 91-140). Second, in its current form, accomplice law does not address causality the way I have attempted to here—which seems more a problem for how accomplice liability is currently formulated than my view. Third, my approach is commensurate with common law understandings of liability and complicity, which took into account proximity in causing. As Dressler notes, "as an accessory was treated quite differently, and potentially more leniently, than the perpetrator or accomplice at the scene" (Dressler, 1985, 95). This framework was abandoned in part because it generated some counterintuitive results; but those cases are distinct in important ways from those of mothers pursuing abortions. Finally, there are statutory exceptions to accomplice liability, like those which protect underage individuals from being charged with statutory rape if they willingly undertake sexual relations with a person above the relevant age. The principle of primarily holding doctors responsible seems as though it could be grounded in a similar type of process of reasoning, albeit one that is made explicit legislatively. See also Dressler, 2018. I am grateful to Kate Greasley, especially, for her critical comments on this part of the paper.

<sup>38</sup> While female agency and autonomy are central considerations to uphold, few people are capable of performing

whose social and moral responsibilities involve preserving health and life. Doctors would be expected to know that abortion is wrong (if it is) by virtue of their position and training, and because they have role-based responsibilities to avoid causing harm. Such doctors are also more proximate to the actual wrongdoing, and would be especially culpable for undertaking it. As such, reasonable anti-abortion legislation could include this asymmetry between women and the doctor. The priority of penalizing doctors, then, rather than mothers is not incoherent, as some have charged: it is, rather, a recognition of the differentiated layers of blame and judgment that fine-grained distinctions about action theory require.<sup>39</sup>

Additionally, parsing the relevant features of action as I have done here has the virtue of explaining why anti-abortionists will be unlikely to accept ectogestation as a compromise for ‘disconnect’ abortions. As argued above, the distinction between killing and letting-die is pertinent in far fewer cases than anti-abortionists have sometimes thought. Yet the distinction still obtains when someone’s life is threatened and we have the means or ability to suspend the process that has endangered it. Such a narrow reading of the distinction has implications for what sorts of moral compromises around ectogestation anti-abortionists might be willing to accept.<sup>40</sup> Simkulet has recently argued that the killing/letting-die distinction could form the basis for a compromise on the ethics of abortion. As he understands the view, anti-abortionists who affirm the distinction between killing and letting-die “do not necessarily oppose women getting abortions, only how they get abortions—abortions by disconnect are acceptable” (Simkulet, 2020, 94). If transferring fetuses into an ectogestational environment were a safe (and non-invasive) possibility, then anti-abortionists who accept the distinction between killing and letting-die ostensibly would have no objection to the procedure.

However, few anti-abortionists—if any—who appeal to the killing/letting-die distinction would employ it to defend “disconnect abortions.” One reason is that there is an important difference between causing threatening processes and responding to them: there is a wide gap between bringing someone into a world where there are known risks (even very high ones) of early death or termination, and withdrawing the aid and support required to minimize those risks. The latter introduces a threatening process into the life of the fetus: it does not respond to a pre-existing process.

Jeff McMahan’s use of the same distinction to defend disconnect abortions is more subtle, but no more persuasive. On his view, the threatening process need only be *latent*, rather than *active*, for the withdrawal of life-sustaining aid and care to count as “letting die.” An individual who is “chronically unable to satisfy his or her essential needs without assistance from others is threatened by his or her own helplessness and dependency” (McMahan, 1993, 270). The best counterexample to the notion that some pre-existing threatening process must be in place for the distinction between

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surgeries of any kind on ourselves. I suspect the principle of holding those who make morally bad actions possible when they would not be otherwise could also be applied to makers of chemical abortifacients. As such, there would be reason to regulate their production and sale—but not punish those women who procured them through an (inevitable) black market.

<sup>39</sup> For a criticism of this view, see Buell, 1991, 1774-1832. Such a carve-out from ordinary notions of solicitation would most reasonably happen at the statutory level, where various exceptions to otherwise general norms of complicity get made (such as, for instance, the exemption given to those under the age of statutory rape so that they are not accused of crimes which they consented to).

<sup>40</sup> As complete ectogenesis would include the formation of embryos outside the womb, I here focus only on the ability to gestate embryos which are transferred from a woman.

killing and letting-die to be operative, he contends, is that given by Philippa Foot (1994): the fetus is dependent on the mother for nourishment in the same way that children are dependent upon their parents for food. On McMahan's account, if parents "fail to feed their baby, they do not create a threat or initiate a threatening causal sequence; hence they do not, by [Foot's] definition, kill the baby" (1993, 270).

Yet there are important differences between embryos currently being gestated and babies outside the womb, which call into question whether the nature of dependency is equivalent. For one, the 'defaults' are not only different, but the precise inverse of the other. For the embryo, what happens without the mother's intervention is its growth and development (unless it naturally miscarries, in which case a 'disconnect abortion' is an irrelevant option). The mother must feed herself, and do so sufficiently to feed two—but if she fails to do that, both she and the embryo will suffer. For the child, though, the default is that they would starve, while the life of the mother would not be impaired at all. McMahan's parallel significantly discounts the distinctiveness of life within the womb, and the moral significance of birth for our obligations to each other.<sup>41</sup> As such, it seems implausible that the presence of a "latent" threatening process is a sufficient basis to think that withdrawing aid is tantamount to "letting die."<sup>42</sup>

However, anti-abortionists might still endorse ectogestation in a narrow set of cases that are oriented toward rescuing embryos from pre-existing threatening processes. In such cases, the killing/letting-die distinction is relevant. Suppose the 'default' is that the embryo will die, but ectogestation would extend its life for six months. The couple thinks that an experimental treatment might make a significant difference to the outcome, and so elects to transfer the embryo into an ectogestational environment. In such a case, ectogestation is a form of rescue. Alternately, the couple might conclude that an experimental treatment is unlikely, and view the process of transferring the embryo as invasive. The couple does not intend to kill the embryo; they regret the position they are in, and would choose if they could to extend the embryo's life beyond six months. But seeing that such an outcome is both exceedingly improbable and burdensome, they discontinue efforts to prevent its death. In that case, they can be said to let the embryo die—rather than to kill it.

One upshot of this view is that a pre-existing threatening process changes the justificatory burden for actions that lead to a person's death. On the narrow account of the killing/letting-die distinction I have defended here, there can be no intending or aiming at the death of the individual—even if we are compelled to let them die. But if the default is a person's ongoing existence, then the threshold for justifying our complicity in a process that leads to their death goes up: all things being equal, it should be harder to justify withdrawing care or life-preserving aid for those who are completely healthy than it is for those who would die without our intervention. However, this entails that the anti-abortionist might not be able to accommodate ectogestation as a

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<sup>41</sup> Though they prescind from drawing any moral conclusions Kingma and Finn's discussion of the metaphysics of pregnancy helpfully teases out some of its unique properties (Kingma and Finn, 2020).

<sup>42</sup> Does the withdrawal of aid to the baby constitute as "letting die"—or as a killing? For Foot (1994, 285), the distinction between killing and letting-die is responsive to the rights that people have to our aid. When our obligations give us a reason to save someone, then our failure to fulfill them constitutes a killing. Even though the baby's 'default' is to die without aid, the positive obligation to supply it entails that failing to do so is a "killing"—unless one has reason to not perform that obligation, in which case it would be a "letting-die." Such a rejoinder seems compatible with the narrow application of the distinction I have defended here, which is downstream from considerations of what is intended in starting or responding to a threatening process.

“clean” moral compromise for disconnect abortions as Simkulet hopes (2020, 1).<sup>43</sup> In such cases, the “default” is the growth and eventual delivery of the fetus. The choice between inducing abortion or disconnecting an embryo for placement in an ectogestational environment is a choice between two forms of intervention: in one the embryo dies, and in the other the embryo continues to live. Yet as there is no pre-existing threatening process in place, the choice between them does not fall beneath the “killing/letting-die” distinction. It is not a case of “rescue,” except perhaps in cases where the life of the mother would similarly be in jeopardy due to starvation, abuse, or other means. Yet even in those cases, the anti-abortionist will query whether undertaking the hazards of embryo transfer is reasonable if there are more efficient means of rescue for both the mother and fetus, such as providing her food, safety, and so on. Limiting the use of ectogestation to the rescue of embryos (probably as a means of last resort) is, I think, commensurate with the Roman Catholic church’s general aversion to externalizing the means of reproduction—which ectogestation, in the final analysis, represents.<sup>44</sup>

## VI. Conclusion

The focus on the moral status of embryos and its implications for the relative badness of spontaneous and induced abortions is too narrow to properly capture why anti-abortionists treat the two phenomena asymmetrically. Anti-abortionists invoke a wide range of moral concepts to solve puzzles that arise on an undifferentiated account of the badness of death and the full personhood of the embryo: specifically, they rely on a pluralist approach to moral assessment that not only includes the significance of intentions but pays reference to what is done, the default, proximity, and other moral features. As I have articulated that theory here, the distinction between killing and letting-die ends up doing less work for anti-abortionists than sometimes they have thought: it arises in a very narrow range of cases where there is some pre-existing threat to a person’s life that we are capable of preventing. As such, few cases of spontaneous abortions—if any—can be explained with reference to it. Yet that does not entail the distinction is unnecessary: it might arise, for instance, in cases where ectogestation would preserve or extend the life of an embryo who we have reason to think would have died otherwise.

The more pertinent moral distinction for understanding the asymmetry between spontaneous and induced abortions is the doctrine of double-effect, which rests upon the claim that intentions make a moral difference for our evaluation of the consequences of our actions. Such a doctrine does not entail, though, that intentions *alone* make a difference: what is done, the default, and the background against which we weigh the proportionate benefits of our actions all matter as well. Because of the peculiarities of the procreative process, it is tempting to think of embryonic deaths either as means to the end of having children or as insufficiently proportionate. Yet it is those very peculiarities that stand behind the anti-abortionist’s adherence to the doctrine of double-effect in such situations. For one, the extensional non-necessity of embryonic deaths lowers the threshold for

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<sup>43</sup> Simkulet (2020, 1) describes such compromises as those in which neither party is required to act in a way that is morally bad.

<sup>44</sup> See *Donum Vitae: Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation*,” Congregation for the Doctrine of the Faith (1987), available online at: [https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19870222\\_respect-for-human-life\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html)

determining whether we are justified in acting on behalf of the end of having a child. At the same time, our assessment of whether such deaths are proportionate are invariably affected by our assessment of the valuableness of the reproductive process. Prospectively, parents do not weigh all the embryos that might die from their attempts against the life of a single child: they weigh the possible life of a single child against the risk of a single spontaneous miscarriage. Retrospectively, parents are reluctant to value the lives of their children through comparisons to their other (possible) children. That aversion generalizes, in part because the peculiarities of the reproductive process intensify anti-abortionists' commitment to the idea that each embryo is uniquely valuable and, as such, incommensurate with others. The assessment of proportionality, then, is inflected by background commitments that the limits on human action in generating life are themselves valuable and worth preserving. That does not entail the anti-abortionist position reduces to such a claim: but it makes anti-abortionist arguments intuitively plausible in ways that abstract considerations of the early embryo's moral status do not.

The account I have developed here not only clears away a number of confusions and misunderstandings that have accumulated in the literature, but has the distinct advantage of explaining two features of the anti-abortion outlook that have rarely been given due consideration. It entails, first, that the anti-abortionist's political focus on penalties for doctors, rather than women, is neither incoherent nor duplicitous; it is instead an implication of an action theory which has available to it a variety of moral concepts. Second, it entails that anti-abortionists will be less open to ectogestation as a "clean" moral compromise than some think. (Whether they will be open to it as an imperfect political compromise is a separate matter.) The narrow account of killing and letting-die developed here would not view disconnect abortions as 'letting die,' and as such would not be able to relinquish moral opposition to withdrawing maternal care from embryos—unless the life of the mother, and indirectly the life of the embryo, were threatened. It also helps explain anti-abortion reluctance to embrace the complete elimination of embryo death as a program.

The various distinctions that anti-abortionists employ to escape dilemmas and objections often seem *ad hoc*. At its worst, the doctrine of double-effect is the philosophical version of Lady MacBeth's tortured effort to cleanse her conscience: it offers a way of justifying our moral complacency in the face of considerably weighty bad events, as it rationalizes accepting such bads as merely 'side-effects' of the good one is doing. Such an account seems like special pleading. Yet what the anti-abortionist position lacks in simplicity, it retains in coherence and elegance: by finely dividing the moral landscape, it enables individuals to make morally tragic decisions without being paralyzed by guilt for causing bad things to happen in an opaque effort to bring about some vaunted greater good. If few anti-abortionists can articulate or verbalize these distinctions, that is simply a feature of what is lost in any political movement: it is the task of philosophers to make them, and of activists to focus their efforts in light of them. As I have argued here, the prioritization of induced abortion in the face of known rates of spontaneous abortion is one prominent way in which activists rightly respond to the value of individual human lives and the badness of their deaths.<sup>45</sup>

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