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THE LEGALITY AND MORALITY OF USING DEADLY FORCE TO PROTECT UNBORN CHILDREN FROM ABORTIONISTS

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On March 10, 1993, Michael Griffin shot and killed an abortionist outside a Pensacola, Florida abortuary. Griffin has since been tried and found guilty of murder.¹ On July 29, 1994, outside yet another abortuary in Pensacola, Paul Hill shot and killed an abortionist and his escort, and wounded the escort's wife.² Hill has been convicted in federal court of violating the Freedom of Access to Clinic Entrances Act (FACE), and in state court of murder, a conviction for which he has been sentenced to death.³

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1. See Eloise Saholz, *The Death of Doctor Gunn*, NEWSWEEK, March 22, 1993, at 34, 35.

2. *Abortion Protestor is Guilty Under Clinic Access Law*, N.Y. TIMES, Oct. 6, 1994, at A18. In December 1994, John Salvi III allegedly shot and killed two abortuary workers and wounded five others in two different abortuaries in Brookline, Massachusetts. Salvi was apprehended in Norfolk, Virginia, after firing shots into an abortuary there. See *Clinic Slaying Suspect Caught Shooting at Norfolk Abortion Center Tied to Massachusetts Attacks*, WASH. POST, Jan. 1, 1995, at A1. The Brookline-Norfolk assailant appears to have simply directed fire at anyone inside the abortuaries. For reasons that will be made clear, there is no possible legal or moral justification for the Brookline attacks; consequently this article will not discuss further the alleged actions of John Salvi III. One other person has been wounded in a shooting by an anti-abortionist. In 1993 in Wichita, Kansas, Rachele Shannon shot and wounded an abortionist in both arms. She was sentenced to 11 years imprisonment for the shooting. *Woman Who Shot Doctor Gets Nearly 11 Years*, WASH. POST, Apr. 27, 1994, at A24.

3. FACE, 18 U.S.C. § 248 (West 1994), provides in pertinent part that
(a) Whoever—

(1) *by force or threat of force or by physical obstruction intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from,*

While most leaders of the pro-life movement have condemned these killings, there is a temptation among some to hail Griffin and Hill as heroic defenders of the unborn, or at least to claim that the killings were justified.

The killings, and the temptation to defend those killings, must be viewed in the context of the violence spawned inside abortuaries by *Roe v. Wade*⁴ and *Doe v. Bolton*,⁵ the Supreme Court's 1973 decisions that invalidated the abortion laws of all fifty states and required states to make almost all abortions legal. The Pensacola killings are symptoms of a deep social illness that can be traced in large part to *Roe* and *Doe*.

In *Roe v. Wade*, the Court held that a woman has a fundamental right to privacy, which is broad enough to include the right to choose whether to end her pregnancy by abortion. While stating this right is not absolute, the *Roe* Court held that the state may not prohibit elective abortion up to the point where the unborn child becomes viable (that is, when the unborn child is able to live outside the womb).⁶ The Court did hold that after viability, the state could restrict and even prohibit abortion except "where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."⁷ But in *Doe v. Bolton*, the Court defined maternal health to include "psychological as well as physical well-being" and held that "the medical judgment may be exercised in the light of all the factors — physical, emotional, psychological, familial, and the woman's age — relevant to the well-being of the patient."⁸ Given this

obtaining or providing reproductive health services . . . ;
[or] . . .

(3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . . , is subject to certain civil and criminal penalties provided in § 248 (b) and (c). Criminal penalties may range from a maximum \$10,000 fine and up to six months in prison for a first offense of non-violent physical obstruction to life imprisonment if death results. See § 248 (b) (emphasis added).

Hill was convicted in federal court on October 5, 1994. Hill's only defense at that trial was to say at opening and closing: "This government is unjust because it does not protect innocent life. To the extent we take part in this evil, we must answer to God. May God help us all." See *Abortion Foe Convicted Under Clinic Access Law*, ATLANTA CONSTITUTION, Oct 6, 1994, at A1. In November of 1994, Hill was convicted in state court of murder and subsequently sentenced to death on December 6, 1994. See *Anti-Abortion Killer Sentenced to Die*, VIRGINIAN PILOT, Dec. 7, 1994, at A1.

4. 410 U.S. 113 (1973).

5. 410 U.S. 179 (1973).

6. *Roe*, 410 U.S. at 163-165.

7. *Id.* at 165.

8. *Doe*, 410 U.S. at 191-92.

open-ended definition of "health," it is fair to say that in *Roe* and *Doe* the Court established (or, if you will, invented) a "fundamental right" to abortion throughout all nine months of pregnancy.⁹

The Court expressly recognized that if the unborn child were a "person" the case for recognizing a right to abortion would collapse.¹⁰ The Court in *Roe* was only able to hold as it did because of its conclusion that the unborn child is not a person entitled to protection by the Fourteenth Amendment.¹¹ Note, however, that the Court did not decide that the unborn child is not a human being. Given the scientific data supporting the conclusion that human life begins at conception¹² and the logical deduction that the living offspring of two human parents cannot be anything but human (has a woman ever given birth to a chimpanzee?), the Court could hardly deny the unborn child's humanity outright. Indeed, three years before the Court decided *Roe*, an editorial favoring legal abortion appeared in the California Medical Association's official journal which argued:

It will become necessary *and acceptable* to place relative rather than absolute values on such things as human lives [because of demographic, ecological, and social problems]. This is quite distinctly at variance with the [traditional] Judeo-Christian ethic [which places an absolute value on life] The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion Since the old ethic has not been fully displaced, *it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent.* The result has been a curious avoidance of the *scientific fact, which everyone really knows, that human*

9. See generally Charles E. Rice, *Issues Raised by the Abortion Rescue Movement*, 23 SUFFOLK L. REV. 15 (1989).

10. *Roe*, 410 U.S. at 156-57; see also *id.* at 157 n.54 (suggesting that if the unborn is a person, the state may not allow abortion even to save the mother's life).

11. *Id.* at 158.

12. See, e.g., *The Human Life Bill — Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm.*, 97th Cong., 1st Sess. 9 (1981) (testimony of Dr. Hymie Gordon, professor of Medical Genetics at the Mayo Clinic) ("[T]he question of the beginning of life — when life begins — is no longer a question of the theological or philosophical dispute [I]t is an established fact that all life, including human life, begins at the moment of conception."); *Id.* at 22-23 (testimony of geneticist Dr. Jerome LeJeune) ("To accept the fact that after fertilization has taken place a new human has come into being is no longer a matter of taste or opinion. The human nature of the new human being from conception to old age is not a metaphysical contention, it is plain experimental evidence."). See generally BERNARD N. NATHANSON, M.D., *THE ABORTION PAPERS: INSIDE THE ABORTION MENTALITY* (1983).

life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to *rationalize abortion as anything but taking a human life* would be ludicrous if they were not often put forth under socially impeccable auspices.¹³

Roe is the application of the editorial's reasoning. Forsaking the editorial's forthrightness about the beginning of human life, the Supreme Court in *Roe* engaged in the "semantic gymnastics" the editorial suggested and curiously avoided the "scientific fact" that "life begins when life begins"¹⁴ — at conception. Instead, the Court stated that it "need not resolve the difficult question of when life begins."¹⁵ While the Court was unwilling to say so in so many words, its essential holding in *Roe* was that even if the unborn child is a human being, it is not a "person" worthy of legal protection for purposes of the Fourteenth Amendment. In effect, *Roe* declared that the question of which human beings are worthy of protection is a matter for the lawmaker to decide.¹⁶ This is the foundational proposition common to both the declaration in the *Dred Scott*¹⁷ case that slaves were property rather

13. Editorial, *A New Ethic for Medicine and Society*, 113 CALIFORNIA MEDICINE 67-68 (Sept. 1970) (emphasis added).

14. See NATHANSON, *supra* note 12, at 22.

15. *Roe*, 410 U.S. at 159. In Dr. Nathanson's view, this statement by the Court in *Roe* "sweeps us back with dizzying speed to the state of the biologic arts in the eighteenth century" when the theory of spontaneous generation — that is, the theory that animal life could spontaneously arise from putrefying matter — held sway. In the mid-eighteenth century, Lazzaro Spallanzoni disproved the theory of spontaneous generation, showing that animal life could not occur without the direct contact of sperm and ovum. According to Nathanson, "Spallanzoni's work had thereafter not been seriously challenged until *Roe v. Wade*, when the Magnificent Seven seemed to disavow it." NATHANSON, *supra* note 12, at 158.

16. See 410 U.S. at 158-59. Not all courts have found it necessary to use "semantic gymnastics" to obscure their holding that it is up to the lawmaker's whim to decide which members of the human race qualify as persons worthy of legal protection. *Byrn v. New York City Health and Hosps. Corp.*, 286 N.E.2d 194 (N.Y. 1972) involved a suit seeking to overturn New York's liberal 1970 abortion law and enjoin abortionists from committing any abortions except those necessary to save the mothers' lives. The trial court granted a preliminary injunction, but the New York Court of Appeals ultimately vacated the injunction and ordered the suit dismissed. The court of appeals conceded that the unborn child "is human . . . and is unquestionably alive." *Id.* at 888. But the court held that it is for the legislature (within constitutional limits) to decide what human beings (or other entities) are persons with legal rights and privileges. *Id.* at 889. The question of personhood is thus "a policy determination . . . and not a question of biological or 'natural' correspondence." *Id.* (emphasis added). In other words, human beings are not persons unless the law (whether statutory or constitutional) says they are persons. For further discussion of this point, see *infra* text accompanying notes 220-224.

17. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405-406, (1856).

than persons, and the "legal" Nazi extermination of Jews and other "undesirables" before and during World War II.¹⁸

By arbitrarily stripping millions of human beings of any entitlement to legal protection, *Roe* has helped convey the simple and stark message that life is cheap. That message is bound to have consequences. For example, one of the rationalizations advanced for legal abortion was the need to prevent the birth of "unwanted" children, who purportedly would be subject to lives of misery and abuse (the unstated assumption being that certain death is preferable to possible abuse). Yet, one study in Los Angeles showed that ninety percent of child abuse cases involved children from "wanted" pregnancies.¹⁹ Though ironic, this finding should not be surprising. If a woman has the unquestionable right to destroy her child (with the help of a medical professional) on any day before birth, why should parents, even of wanted children, not conclude they have the right to abuse those children at will after birth?

In the Garden of Gethsemane the night before his crucifixion, Christ told his apostles and the crowd gathered to arrest him that "all who take the sword will perish by the sword."²⁰ As has been wisely pointed out, this statement "is an assessment of the reciprocal nature of violence. Violence begets violence and is contagious."²¹ Thus by violence the social order unravels. *Roe v. Wade*, by sanctioning the violent execution of innocent unborn children, by their own mothers at the scalpel-wielding hands of professionals ostensibly dedicated to preserving human life, has contributed in a unique way to the cycle of violence and the unraveling of our social order.

Prophetic voices have warned of this unraveling. Pope John Paul II stated in a 1979 speech at the Capital Mall in Washington,

18. See *Byrn*, 286 N.E.2d at 892 (Burke, J., dissenting); Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 551-52 (1989); Rice, *Abortion Rescue Movement*, *supra* note 9, at 23. See generally WILLIAM BRENNAN, *THE ABORTION HOLOCAUST* (1983).

19. See Edward Lenoski, M.D., *A Research Study on Child Abuse*, HEARTBEAT, Winter 1980, at 16-17 (cited in BRIAN CLOWES, *THE PRO-LIFE ACTIVIST'S ENCYCLOPEDIA* 41-4). Child abuse in general has risen sharply in this country since 1972, and is now six times higher than it was in 1972. See BRIAN CLOWES, *THE PRO-LIFE ACTIVIST'S ENCYCLOPEDIA* at 41-6-7.

20. *Matthew 26:52* (New American) (All biblical quotations in this article are from the New American Bible); see also Keith A. Fournier, *The Sword Belongs in its Sheath*, CASENOTE (American Center for Law and Justice, Virginia Beach, VA.), Sept. 1994, at 5-6.

21. John W. Whitehead and Franky Schaeffer, *Violence and the Pro-life Movement*, in *ARRESTING ABORTION* 32, 35 (John W. Whitehead ed., 1985).

D.C. that “[i]f a person’s right to life is violated at the moment he is first conceived in his mother’s womb, an indirect blow is struck also at the whole of the moral order which serves to ensure the inviolable goods of man. Among those goods, life occupies the first place.”²² Mother Teresa reiterated this theme even more bluntly in her address to the National Prayer Breakfast in Washington on February 3, 1994: “[T]he greatest destroyer of peace today is abortion, because it is a war against the child, a direct killing of the innocent child, murder by the mother herself. And if we accept that a mother can kill even her own child, how can we tell other people not to kill one another?”²³

Since abortion involves the killing of innocent life, killing in which the victim’s own mother is a participant, it is natural that legalized abortion would elicit a deep emotional response from those who oppose it. Dr. Bernard Nathanson, a former abortionist and co-founder of the National Abortion Rights Action League, neatly summed up the reason for many pro-lifers’ passionate reaction to abortion:

I queried a woman whom I respected for her otherwise calm and intellectual approach to complex questions as to why she became so heated and intense on this particular issue. She looked at me almost uncomprehending for a moment, then replied: “Doctor, if you walked into a room in your hospital from which screams were emanating and found a woman beating her six-week old infant with a blunt instrument — blood everywhere and the infant grotesque and unrecognizable from the marks of the beating — and if you tried to stop it and were told it was legal, good for the infant and even better for the mother, and if you came upon this scene daily for ten years and were powerless to stop it, you’d get pretty heated up too.” When articulated in these simple, visceral terms, the emotion generated by this issue became all too understandable.²⁴

Unfortunately, emotion tends to cloud the intellect, causing people in their zeal often to take matters into their own hands. When the Supreme Court declares it a “fundamental right” for

22. John Paul II, *Stand Up for Life*, in *THE ZERO PEOPLE* 261, 262 (Jeff Lane Hensley ed., 1983).

23. *Mother Teresa Issues Plea for Americans to Stop Abortion*, UPI, Feb. 3, 1994, available in LEXIS, NEXIS library, News file.

24. NATHANSON, *supra* note 12, at 2. Nathanson credits this insight with finally enabling him to “commit my heart to the pro-life cause, and . . . pass[] from disinterested observation, through indignant protest, to angry resistance.” *Id.*

a woman to have her unborn child killed, and when this killing proceeds unabated for over twenty years, it is not surprising that the Michael Griffins and Paul Hills of this world would conclude that "if it is OK to kill the child, it must be OK to kill the abortionist to save the child." Although this is not sound moral reasoning,²⁵ it is understandable, and foreseeable, that some would break with reasonable thought processes in a society where a child is not even safe from its own mother and members of the "healing" profession.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁶ the Supreme Court reaffirmed what it understood to be *Roe v. Wade*'s "central holding." While *Casey* did uphold some abortion restrictions that the Court could have held unconstitutional under *Roe* and its progeny,²⁷ nothing in *Casey* casts any doubt on *Roe*'s holdings that the unborn, whether or not human, is not a person, and that a woman, in effect, has the right to have an abortion at any time throughout all nine months of pregnancy.²⁸

In reaffirming *Roe*'s "central holding," the joint opinion in *Casey* stated that the Court's abortion decisions, particularly *Roe*, had "call[ed] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution," a mandate which the American people will be "tested by following."²⁹ Yet far from resolving the abortion issue, the Court's arrogant fiat has done "more than anything else to nourish it. . . ."³⁰ "[B]y foreclosing all democratic outlet for the deep passions [abortion] arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight . . . the Court merely prolongs and intensifies the anguish."³¹ The political process is like a release valve on a pressure cooker; close the valve, and an explosion is bound to occur. Michael Griffin and Paul Hill are that explosion. Seeing no hope for progress in the

25. See *infra* part II.

26. 112 S. Ct. 2791 (1992).

27. See *id.* at 2881-82 (Scalia, J., dissenting).

28. See *id.* at 2803-33 (joint opinion of Justices O'Connor, Kennedy, and Souter); *id.* at 2838-43 (Stevens, J., concurring and dissenting) ("implicit in the Court's analysis" is the reaffirmation of *Roe*'s rejection of the argument that the "fetus is a 'person'"); *id.* (Blackmun, J., concurring and dissenting); see also *id.* at 2843-55 (joint opinion) (reaffirming *Roe*'s holding that abortion may not be prohibited even after viability if necessary to preserve the mother's life or health).

29. *Id.* at 2815-16 (joint opinion).

30. *Id.* at 2882 (Scalia, J., dissenting).

31. *Id.* at 2885 (Scalia, J., dissenting).

normal arenas of public debate and political change, Griffin and Hill decided it was time to act on their tortured and anguish-driven moral reasoning that justifies killing as a response to killing.

Three people died in Pensacola at the hands of Michael Griffin and Paul Hill, and five people in total have died at the hands of anti-abortionists during the twenty-two years since the Court decided *Roe v. Wade* in 1973. During that same time, almost thirty million innocent unborn babies have been slaughtered.³²

"Today, one out of every three babies conceived in America is aborted Abortion claims the lives of 131,520 children each month, 4,384 each day, 183 each hour, 3 each minute, and 1 every 20 seconds." Through abortion alone, America has killed about four times more people than the combined number of adults, adolescents, and children (in or outside the womb) who lost their lives under the extermination policies of Nazi Germany.³³

Against the backdrop of thirty million deaths by abortion, five deaths hardly represents an "epidemic" of anti-abortion killings. Certainly, abortionists face much less of a threat from abortion opponents than unborn children face from abortionists.

But to say that Griffin's and Hill's actions were understandable and resulted in "only" three deaths is not to say that killing abortionists is either legally or morally justified. This article will explore those questions. Is killing abortionists as they arrive at abortuaries to perform regularly scheduled abortions a legally justifiable use of force in defense of another person's life? Under commonly accepted criminal law principles of justification, a person normally is entitled to use force — even deadly force — when necessary to save a person's life from an aggressor bent on taking that life. But because *Roe* and its progeny have made abortion a constitutionally protected right, courts would predictably hold that using force against an abortionist is not legally justified, despite the fact that the motive for that force is to defend innocent human life.

Even if intentionally killing an abortionist can be legally justified, is it morally justified? Roman Catholics apply Catholic moral teaching to this question. That teaching embodies universal

32. See WILLIAM J. BENNETT, *THE INDEX OF LEADING CULTURAL INDICATORS* 68-69 (1994).

33. KEITH A. FOURNIER, *IN DEFENSE OF LIFE* 11 (1994) (quoting THOMAS A. GLESSNER, *ACHIEVING AN ABORTION-FREE AMERICA BY 2001*, at 23 (1990)).

moral principles that are useful to anybody — Catholic or non-Catholic — who cares to analyze the moral issue. Based on Catholic moral teaching, intentionally killing abortionists as Griffin and Hill did is morally wrong, at least at a time when we are not in a state of justified rebellion. For now, there are alternatives to violence — particularly prayer and the uncompromising proclamation of the truth about abortion — that are more appropriate, prudent, and in the long run, effective than escalating the violence that abortionists, spurred by the Supreme Court, have started.

I. IS KILLING THE ABORTIONIST LEGALLY JUSTIFIED?

A. *The General Principle of Justification by Necessity*

Suppose Baker, walking down the street one day, sees Able in his front yard pointing a shotgun at his son and yelling, "I'm going to kill you!" Baker jumps the fence surrounding Able's yard, runs onto the lawn, tackles Able, and wrenches the gun out of his hands.

Would the fact that Baker was acting in a way he thought reasonably necessary to save Able's son's life provide a defense to criminal charges of trespass (for running onto Able's property), assault and battery (for tackling Able), and robbery (for forcibly taking Able's gun)?³⁴ Most, if not all, would intuitively answer that of course Baker should have a defense to these charges. The law in most states, consistent with this intuition, would exonerate Baker.

The principle allowing Baker to violate the law and save Able's son can be called generally the principle of justification by necessity.³⁵ That principle provides, in general, that otherwise criminal conduct can be justified, and therefore not criminal, in circumstances in which that conduct is necessary to prevent a greater harm or evil.³⁶ Indeed, the necessity principle as embodied

34. See BLACK'S LAW DICTIONARY 1347, 105, 1193 (5th ed. 1979) (assault and battery is "unlawful touching of another;" criminal trespass is "entering [onto] land" that is "fenced or otherwise enclosed"; robbery is "taking of . . . personal property . . . of another, from his person, . . . and against his will, accomplished by means of force.").

35. See *People v. Richards*, 75 Cal. Rptr. 597, 604 (Ct. App. 1969).

36. See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW §§ 5.4, 5.8 (2d ed. 1986); PAUL H. ROBINSON, 2 CRIMINAL LAW DEFENSES §§ 121, 124, 131, 133, (1984); W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 20 (5th ed. 1984) [hereinafter PROSSER ON TORTS]; MODEL PENAL CODE §§ 3.01, 3.04, 3.05, 3.10 & Comments (Proposed Official Draft 1962 with Revised Commentary 1985).

in most states' law would exonerate Baker for shooting and killing Able if that action was necessary, or if Baker reasonably believed that action was necessary, to save Able's son's life.³⁷

One might suggest that like Baker, Michael Griffin and Paul Hill were merely taking action they reasonably believed necessary to save innocent human lives from unjust aggression. After all, Griffin and Hill knew, or at least reasonably believed, that the abortionists they attacked were going to commit abortions on the days they were shot. Abortions kill unborn children; unborn children are human beings; therefore, the abortionists were going to be killing innocent human beings. Griffin and Hill believed (or might claim to have believed) that killing the abortionists was necessary to save the lives of the unborn babies the abortionists were scheduled to kill. If this belief was reasonable, one might argue that the principle of justification by necessity could have exonerated Griffin and Hill, just as it would exonerate Baker.

To test this thesis, we must examine the principle of justification by necessity in more detail. The necessity principle is embodied in several different but related defenses, which have been codified, at least to some extent, in many states.³⁸ Federal courts also have recognized the principle as a defense.³⁹ As a general matter, "[a]ctions taken in self-defense, in defense of property or other persons, or to avert a public disaster or a crime may be held non-criminal under this 'justification' doctrine."⁴⁰

The necessity principle has been formulated in general terms in general necessity or "lesser evil" defenses. These defenses typically involve a general weighing of the harm caused by the defendant's conduct against the harm that would have resulted if the defendant had not acted. The two principal American formulations of the general necessity defense are found in the Model Penal Code and the New York Penal Law. The Model Penal Code's general necessity defense may justify an otherwise criminal act when "the harm or evil sought to be avoided by [the defendant's] conduct is greater than that sought to be prevented

37. Defense of others is discussed specifically in part I (B).

38. See statutes cited in ROBINSON, *supra* note 36, § 124, at 45, 46 n.1 and MODEL PENAL CODE § 3.02, cmt. 5 n. 21.

39. See, e.g., *United States v. Simpson*, 460 F.2d 515, 517 (9th Cir. 1972); *United States v. Seward*, 687 F.2d 1270, 1275 (10th Cir. 1982), *United States v. Gant*, 691 F.2d 1159 (5th Cir. 1982).

40. *Simpson*, 460 F.2d at 517.

by the law defining the offense charged.”⁴¹ The New York Penal Law provision provides that for conduct to be justified, “the desirability and urgency of avoiding such injury [to the defendant or a third person must] clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.”⁴²

Besides the lesser evil defenses, other defenses have developed that embody the necessity principle. These are more specific defenses, geared to more specific situations; they are “a part of the law of necessity which has attained relatively fixed rules.”⁴³ Among these defenses are self-defense and the defense that justifies the use of force against a person to repel an attack by that person on a third person (generally called defense of others). If killing an abortionist can be justified legally, that killing likely would have to meet the requirements of the defense of others justification.⁴⁴ We will proceed to analyze that defense and its application to the killing of an abortionist.

B. Defense of Others.

Almost all American jurisdictions have adopted some form of defense of others justification either by statute or judicial decision.⁴⁵ These formulations vary from jurisdiction to jurisdic-

41. MODEL PENAL CODE § 3.02(a); see Kent Greenawalt, *Natural Law and Political Choice: The General Justification Defense — Criteria for Political Action and the Duty to Obey the Law*, 36 CATH. U. L. REV. 1, 4 (1986).

42. N.Y. PENAL LAW § 35.05 (McKinney 1987); see Greenawalt, *supra* note 41, at 4.

43. LAFAVE & SCOTT, *supra* note 36, § 5.4(b), at 443.

44. For example, § 3.02(1)(b) of the Model Penal Code provides that the general choice of evils defense applies where “neither the Code nor other law defining the offense provides . . . defenses dealing with the specific situation involved.” The introduction to Article 3 of the Code explains that “Section 3.02 . . . yields to more specific provisions when those deal with the particular situation posed in any concrete case.” Similarly, the New York Penal Law provides that the general justification defense applies “[u]nless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force.” In *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073, 1078 (Alaska 1981), a case involving trespass at an abortuary to rescue unborn children from death, the court noted that when an illegal action is taken in response to human force, the proper defenses are “duress, defense of others, or crime prevention.” Of the three, the only defense likely to apply to an abortionist’s killing would be defense of others. *But see United States v. Hill*, No. 94-03118-RV, slip op. at 7 (N.D. Fla. Sept. 28, 1994) (opinion granting government’s motion in limine), in which the court suggested that Paul Hill might be able to raise a general necessity defense to justify his killings. Hill did not raise such a defense and was convicted. See *supra*, note 3. See also a possible argument for applying the general necessity defense, *infra* part I. B. 3. b.

45. See statutory references and cases collected in ROBINSON, *supra* note 36, § 133, at 101 n.1.

tion, but certain general principles underlie all of these formulations. Professor Robinson, in his treatise on criminal defenses, posits that "[a]ll justification defenses, [including self-defense and defense of others] have the same internal structure: (1) *Triggering Conditions* plus the *Response requirements* of (2) *Necessity* and (3) *Proportionality*."⁴⁶ This structure provides a convenient framework for discussing the general principles of the defense of others justification. Using this framework, one could generally state the defense of others justification, in a case where the defendant has used deadly force,⁴⁷ as follows: *When an actor reasonably believes an aggressor is unjustifiably using or going to use deadly force against another person (the triggering condition), the actor may use force against the aggressor "when and to the extent" he reasonably believes necessary to protect the other person (the necessity principle). That force may include deadly force, if necessary (the proportionality requirement).*⁴⁸ With this general formulation in mind, we may proceed to examine the defense of others justification's specific requirements and apply those requirements to determine whether a defendant who kills an abortionist has a possible defense for his action.

1. The Actor's Reasonable Belief

Suppose that in the Able and Baker example, Baker's conclusion that Able was about to kill his son was wrong; although Able was pointing a gun at his son and yelling, "I'm going to kill you!" that was just a strange form of "male bonding" that Able and his son engaged in. Would Baker have a defense for using force to (he believed) save Able's son's life?

46. *Id.* § 121, at 2.

47. MODEL PENAL CODE § 3.11 (2) defines deadly force as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of death or serious bodily injury. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force . . ." See also N.Y. PENAL LAW § 10.00 (11), which defines "deadly physical force" as "physical force which, under the circumstances. . .used, is readily capable of causing death or other serious physical injury." Abortion, which always intends the unborn child's death, and killing an abortionist both fall easily into these rather typical definitions of deadly force.

48. See ROBINSON, *supra* note 36, § 133, at 102; LAFAVE & SCOTT, *supra* note 36, § 5.8, at 463; MODEL PENAL CODE §§ 3.04; 3.05. None of these sources state the defense of others justification exactly as we have stated it, but we believe our statement of the justification represents a fair statement of the general principles embodied in the justification. Specific differences between formulations are explained in the analysis of the general statement.

If justification for Baker's act depends on the situation actually being as Baker believed it to be, Baker would not have a defense. However, Baker acted for a noble purpose — to save Able's son's life — and it seems unjust for the law to punish Baker for his reasonable mistake. Fortunately for Baker, justification for his action generally would not depend on Able actually using or threatening deadly force against his son. Instead, most jurisdictions would hold Baker's use of force against Able justified so long as Baker reasonably believed that Able was using or was about to use unjustified force against his son.⁴⁹

Besides applying to the actor's conclusion that a person is using or is going to use unjustified force, the reasonable belief rule also applies to the actor's conclusion that the action he takes is necessary to protect the third person.⁵⁰ If Baker reasonably believed the force he used was necessary, but it turned out it was not, Baker's action still would be justified.

The issue of reasonable belief may come up in an abortionist killer's defense in a number of ways. Most obvious is the issue of whether the defendant reasonably believed that killing the abortionist was necessary. However, questions may also arise, for example, as to the defendant's belief about whether the abortionist was actually going to perform abortions that day, whether those abortions were legal, and about the unborn child's humanity or personhood. We will examine these questions in subsequent sections as we discuss and apply the other specific requirements for asserting the defense of others justification,

49. See LAFAVE & SCOTT, *supra* note 36, § 5.8, at 463 ("The prevailing rule is that one is justified in using reasonable force in defense of another . . . when he *reasonably believes* that the other is in immediate danger of unlawful bodily harm and that the use of such force is necessary to avoid this danger.") (emphasis added); see, e.g., ALA. CODE § 13A-3-23 (Michie 1994); ARIZ. REV. STAT. ANN. § 13-406 (West 1989); N.Y. PENAL LAW § 35.10 (McKinney 1987); FLA STAT. ANN. § 776.012 (West 1992). The Model Penal Code goes even further. Suppose an actor actually, but unreasonably, believes that force is being used or threatened against another person, that the force being used or threatened is unjustified, or that the responsive action he takes is necessary. If justification depends on *reasonable* belief, then the actor would have no defense, which could subject him to conviction for an intent-based offense, possibly even murder. The Model Penal Code has rejected this result. Instead, the Code bases justification for defense of others on the actor's actual belief. If that belief is negligent or reckless, the actor will not be completely stripped of his defense. Instead, he will be subject only to prosecution for crimes requiring negligence or recklessness, but not for any crime based on intent. See MODEL PENAL CODE §§ 3.04, 3.05, 3.09; § 3.04, cmts. 2(a) & (d); § 3.09, cmt. 2. For a list of jurisdictions that have adopted this position in their criminal codes, see § 3.04, cmt. 2, n.11. For a list of jurisdictions that have not adopted this position in their criminal codes, see *id.* n.12.

50. See LAFAVE & SCOTT, *supra* note 36, § 5.8, at 463.

including particularly the necessity of force and the type of force one may lawfully defend against.

2. Necessity

The key element in the defense of others justification is necessity. An actor may use force against an aggressor *when and to the extent necessary to protect the other person*. Both the time at which the defendant acts and the way in which he acts — including the amount of force he actually uses — are important in determining if that use of force is justified. An actor should not be allowed to use force when he does not need to, or to use more force than he needs. For example, if Baker reasonably could prevent harm to Able's son by tackling rather than shooting Able, it is not necessary for Baker to shoot Able; likewise, if an actor can delay using force until a later time without significantly increasing the risk to the innocent party by waiting, he should wait.⁵¹

Most jurisdictions typically impose some kind of temporal limitation on the use of defensive force beyond the general requirement that force is justified only when necessary. Jurisdictions state the limitation differently. For example, many jurisdictions only allow a person to use force to defend against the "imminent" use of force against another.⁵² This language reflects a presumption that force is not actually necessary until harm is close at hand.⁵³ In a variation on this theme, some states' codes allow the use of force or deadly force against an attacker who is "about to use" force⁵⁴ or when a person is "about to be injured."⁵⁵

On the other hand, the Model Penal Code says nothing explicit about how close at hand the harm must be before a

51. See ROBINSON, *supra* note 36, § 131(c), at 77. As noted, this rule is tempered by a requirement that the actor's assessment of necessity be reasonable, not necessarily correct. Thus, if an actor reasonably believes he must use a certain amount of force, or that he must act now because waiting will appreciably increase the risk to the innocent party, the defense of others justification will be available in most jurisdictions.

52. See, e.g., FLA. STAT. ANN. § 776.02 (may use force to defend against the "imminent" use of force); N.Y. PENAL LAW § 35.15(1) (may use force to defend against the "use or imminent use of force"). See ROBINSON, *supra* note 36, § 131(b), at 76, n.16 (citing statutes).

53. See ROBINSON, *supra* note 36, § 131(c), at 78.

54. ME. REV. STAT. ANN. tit. 17-A, § 108 (West 1988) (person may use deadly force if he reasonably believes aggressor is "about to use" deadly force).

55. TENN. CODE ANN. § 38-2-103 (Michie 1991).

person may use force to resist it. Instead, the Code requires that the defensive force a person uses be "immediately necessary . . . [to resist] force by such other person on the present occasion."⁵⁶ Some states have adopted this language in their own criminal codes.⁵⁷ The Code's language shifts the temporal focus from the imminence of harm to the actual need for the actor to use force at the time he used it. But as a practical matter, the harm's temporal proximity — that is, the harm's "imminence" — would still be an important factor to consider to determine if force is immediately necessary. A temporally removed harm would likely call for less "immediate" action than an imminent harm.

Some temporal limitation on the use of force is necessary. Using force whenever it appears someone may do some harm to another in the future, or even at the first inkling that force is appropriate, may effectively thwart a possible attack; but allowing force too early deprives the potential aggressor of a chance to change his mind and abate the danger himself.⁵⁸ It is for that reason that killing an abortionist on the golf course or at home while mowing his lawn would not and should not be legally justified. But one could argue whether a standard such as "imminence" is necessary or even useful. The term "necessary" itself implies a temporal limitation; if a person can wait before acting without increasing the risk, his action at the earlier time is not necessary.

In fact, too strict a temporal limitation could increase the danger to the aggressor's victim and decrease the chance that intervention will be effective.⁵⁹ Returning to Baker and Able, suppose that Baker hears Able yell at his son, "I'll kill you as soon as I get my gun." The gun is lying fifteen feet from Able, and Baker reasonably concludes: Able will carry out his threat; Able's son cannot escape before Able gets the gun (even with Baker's help); Baker himself cannot get the gun before Able can; and the only way to prevent an attack on Able's son is to use

56. MODEL PENAL CODE § 3.04(1).

57. See, e.g., DEL. CODE ANN. tit. 11, § 464 (Michie 1987); HAW. REV. STAT. § 703-304 (1985); see also MODEL PENAL CODE § 3.04, cmt. 2(c) n.15.

58. See ROBINSON, *supra* note 36, § 124(f), at 58 (noting that the virtue of a less restrictive temporal limitation is that it allows early intervention, but that the virtue of a more restrictive standard is that it "allows time for the apparent threat to abate itself before justifying conduct to prevent it"); see also *id.* § 131(c), at 79; *id.* § 121(a), at 4-5 n.5.

59. See *id.* § 124(f), at 58.

force on Able to prevent it. Should Baker have to wait until Able is pointing the gun at his son, or should he be able to use force against Able to prevent Able from getting his gun in the first place? If Baker must wait, the danger to Able's son as well as to Baker himself will increase dramatically. This hardly seems an appropriate result.

Under the Model Penal Code's formulation, Baker should be able to use force because he reasonably believes that using force is immediately necessary to stop Able from killing his son "on the present occasion."⁶⁰ But even the "imminence" or "about to" standards should have enough elasticity to allow Baker to use force against Able to prevent him from getting his gun. Florida, for instance, has defined "imminent" as "near at hand, mediate rather than immediate, close rather than touching."⁶¹ Certainly, it is reasonable to think that the harm to Able's son is "near at hand" and "close." And it would seem strange in that situation to say that a person could not reasonably believe that Able was "about to" kill his son.

Similarly, a person reasonably could believe that the deaths of unborn children scheduled to be aborted on any given day are "close at hand" when a known abortionist pulls up to an abortuary entrance on a day abortions are scheduled. The district court in Florida that heard Paul Hill's federal prosecution recognized this when, in considering whether Hill could raise a necessity defense, it ruled that "injuring or interfering with the [abortion] provider could be an action taken to avert the imminent peril of the abortion being performed."⁶² This is not to say that it could not be possible that the abortionist was going to his office for any number of other reasons, including to pick up his belongings to leave, never to perform abortions again, a possibility which presents both moral and prudential reasons for not shooting. But the relevant standard in assessing necessity is the defendant's

60. Compare MODEL PENAL CODE § 3.04, cmt. 2(c), at 39-40, which notes as an example that an actor may "use defensive force to prevent an assailant from summoning reinforcements if he believes it is necessary" to prevent an attack by overwhelming numbers, so long as he believes the attack will occur on the present occasion and not at some future time.

61. *Scholl v. State*, 115 So. 43, 44 (Fla. 1928). See also BLACK'S LAW DICTIONARY 676 (5th ed. 1979) (giving the same definition for "imminent").

62. *United States v. Hill*, No. 94-03118-RV (N.D. Fla. Sept. 28, 1994) (order granting the government's motion in limine). The court ruled that Hill could probably raise a necessity defense at trial if he proffered evidence to support the defense's elements. But the court granted the government's motion in limine concerning the defense because Hill had not proffered any such evidence.

belief; if a person has made his living for years doing abortions and has given no indication of any intention to quit, it is reasonable to believe that when he arrives at the abortuary at the start of a normal "business" day, he is arriving to do abortions.

But even if a person could reasonably believe abortions are imminent, that does not necessarily mean that he could reasonably believe that killing the abortionist outside the abortuary is necessary to prevent those imminent abortions. That depends also on whether the amount of force used was necessary, which in turn depends on whether the actor reasonably believed he could not prevent the harm the abortionist was threatening by any less drastic means. For example, if a karate expert can thwart an attack by using non-deadly martial arts techniques rather than pulling out a gun and shooting the attacker, he will not be justified in shooting.⁶³

It follows from this principle that the actor must use the least drastic means necessary, and that the actor is not justified in breaking the law to prevent a harm if there are legal alternatives available to him to prevent the harm; in other words, illegal action is not necessary if the actor has "a chance both to refuse to do the criminal act and also avoid the threatened harm."⁶⁴ This principle has developed in cases where defendants have invoked the general choice of evils defense to justify actions other than homicide,⁶⁵ but it is relevant to the defense of others justification because it really is just a part of the necessity principle underlying that justification. If a person has reasonable legal alternatives to avoid a harm, breaking the law is not

63. See ROBINSON, *supra* note 36, § 133, at 103. A defense of others situation may become complicated by the requirement in some jurisdictions that an actor may only use force to defend a third person to the extent the third person could use force to defend himself. See, e.g., MODEL PENAL CODE § 3.05(1)(b) (actor may use force if "under the circumstances as the actor believes them to be, the person he seeks to protect would be justified in using such protective force"); see also ROBINSON, *supra* note 37, § 133, at 103 & n.3. Under this view, if the karate expert is being attacked, a person who knows that the karate expert could use martial arts to defend himself would be privileged to use karate, but could not use any force greater than that. Given that an unborn child has no special skills with which to protect itself, this complication should not be relevant in the context of force used to prevent an abortion.

64. United States v. Bailey, 444 U.S. 394, 410 (1980) (quoting W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 379 (1972)); see also United States v. Gant, 691 F.2d 1159, 1164 (5th Cir. 1982).

65. For example, in *Bailey*, prisoners who had escaped from jail argued that their escape was necessary because of dangerous conditions at the jail. 444 U.S. at 398. The Court held that even if the defendants' initial escape was justified, their continued absence was not because they produced no evidence to show they attempted to turn themselves in to authorities as soon as the original necessity abated. *Id.* at 412-13.

necessary.⁶⁶ For example, if Charlie is surrounded by sixteen police officers, and sees one person begin to beat up another person, Charlie likely could call on the officers present to protect the victim rather than rushing in and assaulting the attacker himself. Thus, Charlie's bypassing the officers and rushing to the victim's defense would not be necessary.

It also follows from the principle that an illegal act is justified only if necessary— that is, a "causal relationship" must exist between the actor's use of force and the avoidance of the threatened harm.⁶⁷ Again, the notion is simple: if a person's action cannot prevent the harm, that action certainly cannot be necessary to prevent the harm.

Could a defendant reasonably argue that killing an abortionist was necessary to save unborn babies from death? A number of reported cases have analyzed the general choice of evils defense in cases involving trespasses at abortuaries that were designed to prevent abortions at those abortuaries.⁶⁸ Generally, those cases have rejected the argument that the trespasses were necessary,⁶⁹ but the legal reasoning in those cases on the necessity question is flawed.

66. See *id.* at 411.

67. See *Gant*, 691 F.2d at 1164.

68. See, e.g., *Zal v. Steppe*, 968 F.2d 924, 929 (9th Cir. 1992); *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1350-52 (3d Cir. 1989); *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981); *Bird v. Municipality of Anchorage*, 787 P.2d 119 (Alaska Ct. App. 1990); *State v. O'Brien*, 784 S.W.2d 187 (Mo. Ct. App. 1989); *City of St. Louis v. Klocker*, 637 S.W.2d 174 (Mo. Ct. App. 1982); *Buckley v. City of Falls Church*, 371 S.E.2d 827 (Va. Ct. App. 1988); *Commonwealth v. Wall*, 539 A.2d 1325 (Pa. Super. Ct. 1988); *People v. Smith*, 514 N.E.2d 211, 212-13 (Ill. App. Ct. 1987); *People v. Berquist*, 608 N.E.2d 1212 (Ill. App. Ct. 1993); *People v. Stiso*, 416 N.E.2d 1209 (Ill. App. Ct. 1981); *Erlandson v. State*, 763 S.W.2d 845, 852 (Tex. App. Ct. 1988); *Sigma Reproductive Health Ctr. v. State*, 467 A.2d 483, 484 (Md. 1983).

69. All the cases cited in note 68 rejected the necessity defense. No reported appellate court case has accepted the necessity defense in an abortuary trespass case. However, several trial courts have acquitted abortuary trespassers based on the necessity defense. See, e.g., *City of Wichita v. Tilson*, No. 91 MC 108 (18th Dist. Ct., Sedgwick County, Kansas, July 20, 1992); *City of St. Louis v. Petersen*, No. 808-00002 (Cir. Ct. Mo. March 28, 1980); *County of Fairfax v. Gaetano*, No. 13974 (Fairfax County Va. Oct 17, 1977). See also *United States v. Hill*, No. 94-03118-RV (N.D. Fla. Sept. 28, 1994) (holding necessity could be a defense for Paul Hill in his federal FACE prosecution, but granting the government's motion in limine to exclude the defense because Hill had not proffered any evidence to support the defense); *People v. Archer*, 537 N.Y.S.2d 726 (City Ct. 1988) (allowing necessity defense only if defendants could prove abortions were committed after first trimester). Judges in two trespass cases also have opined that necessity can be a valid defense in some trespass cases. See *Cleveland v. Municipality of Anchorage*, 631 P.2d at 1086 n.1 (Dimond, Senior Judge, concurring) (necessity could justify trespass in a case where a husband is attempting to prevent his wife from having an abortion); *City of St. Louis v. Klocker*, 637 S.W.2d at 178-79 (Pudlowski, J., dissenting).

Several of the cases rejecting the necessity defense for abortuary trespassers have held that the trespassers could not reasonably have believed that their trespassing could prevent abortions.⁷⁰ The Alaska Supreme Court in *Cleveland* likened abortuary trespassers to anti-war and anti-nuclear demonstrators who trespass to dramatize their beliefs.⁷¹ Courts consistently have denied the necessity defense to anti-war and anti-nuclear demonstrators because those demonstrators could not reasonably have thought that their actions would result in cessation of war or the use of nuclear weapons.⁷² For example, a person trespassing onto the property of a plant that produces bombshell casings can hardly think his action will prevent the use of nuclear weapons. Besides, such a trespass is directed at a temporally remote threat of harm.⁷³

But unlike anti-war and anti-nuclear protestors, abortuary trespassers are not acting to prevent some remote harm at some future time. Instead, abortuary trespassers are seeking to prevent abortions on the day of their trespass by actually blocking access to the clinics. As the judge in Hill's federal prosecution sensibly noted, "[I]t is possible to hold a reasonable belief that injuring or interfering with abortion providers will prevent at least one or some abortions from occurring."⁷⁴ Some courts have reasoned that blocking an abortuary could only temporarily halt abortions. The trespassers eventually would be removed; women could reschedule their appointments or go to another abortuary; and eventually "society's normal operations would reassert themselves."⁷⁵ This reasoning begs the question whether it was reasonable to think trespassing at an abortion clinic would actually prevent abortions at that clinic on the day of the trespass. An attacker may come back and finish his work some other time; somebody else may harm the victim the very same day. But that does not mean a person is not legally justified in directly resisting a known aggressor at the time of his aggression. An abortuary

70. *McMonagle*, 868 F.2d at 1352; *Cleveland*, 631 P.2d at 1079-80; *Bird*, 787 P.2d at 121-22; *Wall*, 539 A.2d at 1329.

71. 631 P.2d at 1079.

72. See cases cited in Rice, *supra* note 9, at 18 n.15 and *United States v. Hill*, No. 94-03118-RV, slip op. at 4. But see *People v. Gray*, 571 N.Y.S.2d 851 (Crim. Ct. 1991) (allowing necessity defense for defendants who blocked a bridge to protest opening a lane to automobile traffic that previously had been reserved for pedestrians and bicycles).

73. See *Commonwealth v. Berrigan*, 501 A.2d 226 (Pa. 1985).

74. *United States v. Hill*, No. 94-03118-RV, slip op. at 5.

75. *Cleveland*, 631 P.2d at 1080; see *Wall*, 539 A.2d at 1324; *McMonagle*, 868 F.2d at 1352.

trespasser should at least be allowed to present evidence to show that abortions were to be done at the abortuary that day, that his trespass was designed to prevent those abortions, and that it was reasonable to believe that the trespass would prevent one or more abortions (for example, by presenting evidence of successful rescue efforts in the past, or evidence that the trespass actually prevented one or more women from having scheduled abortions).

Courts also have found that abortuary trespassers had other legal means available to them to protest or to try to stop abortions, such as lobbying to change abortion laws and communicating with women to persuade them not to have abortions; therefore, those courts held, breaking the law was not necessary.⁷⁶ This may be so if the abortuary trespassers were doing nothing but protesting and could not reasonably believe they could actually prevent abortions on the day of the trespass. But, as the court in Hill's federal prosecution noted, "a lurking question may remain as to whether such legal alternatives are viable alternatives to [prevent] the perceived imminent harm."⁷⁷ Certainly one can doubt that lobbying to change abortion laws or the Constitution some time in the future will actually prevent abortions that are scheduled today at a particular abortuary. And while protestors and sidewalk counselors (that is, people who counsel pregnant women outside abortuaries that abortion is wrong, that alternatives to abortion exist, and that the women should not and need not have their unborn children killed) may persuade some women not to have abortions, it could be reasonable to believe that not all women have been or will be persuaded, and that at least some of the abortions planned on any given day are likely to proceed as scheduled.

A defendant raising a necessity defense may demonstrate that he has no reasonable legal alternative to his illegal action by showing "that he actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative."⁷⁸ If an abortuary trespasser who reasonably believed his trespass could prevent abortions at the abortuary can present evidence to show that he exhausted available legal alternatives or that past experience led him to

76. See, e.g., *McMonagle*, 868 F.2d at 1352; *Zal*, 968 F.2d at 929; *Cleveland*, 631 P.2d at 1079-80; *Wall*, 539 A.2d at 1329; *Buckley*, 371 S.E.2d at 828.

77. *Hill*, No. 94-03118-RV, slip op. at 7.

78. *United States v. Gant*, 691 F.2d 1159, 1164 (5th Cir. 1982).

believe such alternatives would be futile, he should not be prevented from arguing to a jury that his trespass was necessary.

Trespassing at or blocking an abortuary is one thing; homicide is another. Could a defendant demonstrate that killing the abortionist was necessary to prevent scheduled abortions? As noted earlier, one could reasonably believe that when a known abortionist pulls up to the abortuary entrance, the deaths of the unborn children are "close at hand" or, in other words, "imminent" or "about to occur." One also could reasonably believe that some action to prevent the abortionist from doing his work would be "immediately necessary."⁷⁹ Theoretically, it is possible that the abortionist's killer could present evidence to show he reasonably believed he could not have gotten any closer to the abortionist in time or place than he did, and that barring some action at that time to prevent the abortionist from entering the abortuary, the abortionist would enter and commit abortions.

The defendant should have no problem showing his reasonable belief that a "direct causal connection" existed between shooting the abortionist and preventing scheduled abortions. Indeed, it is difficult to imagine a more direct connection—a dead abortionist cannot perform abortions. As for alternative legal means of preventing those abortions, the killer could make the same arguments the trespassers could make. There is no reason why it would be impossible for the killer to show that he had tried other legal means or that he knew those means had turned out to be futile in the past.

Assuming the defendant can show that he reasonably believed some action was necessary to prevent the abortionist from committing abortions that day, a more difficult question arises: Can the defendant show that he reasonably believed that he could only stop the abortionist by *killing* him? In asking this question, we assume a case in which the defendant has used force specifically designed to kill the abortionist. Such was the case in the Griffin and Hill cases (both of which involved shootings), and it is reasonable to assume that any future case (if there ever is such a case) will involve direct intentional killing rather than a use of force that was not designed to kill but went awry.

The judge in Hill's federal prosecution found that Hill conceivably could have raised a necessity defense if Hill would have

79. See *supra* text accompanying notes 59-61.

presented evidence to support the defense. But the judge never considered whether Hill could have used less drastic means than killing to prevent the abortions that were scheduled to take place at the abortuary. The judge did consider whether Hill could reasonably believe that he had no available legal alternatives, but that is only part of the necessity analysis. It is also essential to consider whether Hill reasonably believed that no alternatives — legal or illegal — were available. This is so because, as noted, killing the abortionist would not have been necessary if less drastic means (even if illegal) would have sufficed to prevent the abortions, just as Baker's killing Able would not be necessary if Baker could save Able's son by tackling Able.

It is not difficult to think of several alternative means short of killing the abortionist to prevent abortions at an abortuary. Blockading the abortuary and its examining rooms is one example; breaking into the abortuary and destroying the instruments of death is another. One could threaten the abortionist — "Leave, or I will shoot you." One also could break the abortionist's hands or arms, or shoot to wound rather than to kill.⁸⁰

Like shooting to kill, shooting to wound or breaking the abortionist's hands or arms would constitute deadly force. Deadly force generally is force that a person knows will cause, or is likely to cause, death or serious bodily harm.⁸¹ But there are degrees of deadly force. Shooting somebody and hitting him with a baseball bat with enough force to break his leg are both deadly force, but few would suggest that shooting a person is not greater force than hitting a person with a bat. Courts have noted this distinction in analyzing defense of others claims. In *Fersner v. United States*,⁸² the court held that even if the defendant was entitled to use deadly force to defend a friend who was being kicked, stomped, and beaten, he could not, as a matter of law, reasonably have believed that striking the aggressor in the head with the sharp side of a hatchet with enough force to kill him

80. We are not recommending these actions; we are only pointing out that actions less drastic than killing an abortionist may be available to prevent abortions, even if those less drastic actions are themselves illegal. As a matter of moral doctrine, it is objectively wrong to injure another person intentionally, just as it is to kill. *See infra* part II. Moreover, all these actions would potentially expose the actor to federal prosecution and substantial criminal and civil penalties under FACE (*see* 18 U.S.C. § 248(a)-(c) as well as prosecution for various state law offenses).

81. *See* MODEL PENAL CODE § 3.11(2); N. Y. PENAL LAW § 10.00(11); *Fersner v. United States*, 482 A.2d 387, 392 (D.C. App. 1984).

82. 482 A.2d 387 (D.C. App. 1984).

was necessary to defend his friend. The court reasoned that the defendant "obviously" could have thwarted the attack on his friend by using a lesser degree of deadly force designed to injure rather than kill, such as striking the aggressor elsewhere on his body with the hatchet's blunt side.⁸³

Despite the likely availability of less drastic (if still illegal) means, it is conceivable that a defendant could show he reasonably believed killing the abortionist was necessary. One argument the defendant should not be able to make is that killing the abortionist, rather than temporarily disabling him, was the only way to permanently prevent the abortionist from doing abortions. This argument ignores any limitation on the temporal proximity between the defendant's use of force and the threatened harm. Although, as we have seen, the requirements that the harm be "imminent" or that the use of force be "immediately necessary" have some elasticity and do not necessarily require a defender to wait until the last possible moment to use force, the law must draw a line somewhere. To allow force to prevent harms contemplated to occur days, weeks, or months in the future would stretch the concepts of imminence and immediate necessity, and even unadorned necessity, beyond the breaking point. Allowing the defendant to argue that killing rather than some less drastic use of force was necessary because it would permanently disable the abortionist is to allow the defendant to argue that his action was necessary because it would prevent harms that were to occur far in the future. If the law recognized that principle, it should also allow open season to kill abortionists anywhere, at any time, so long as the killers could show that they reasonably believed they had no other opportunity to stop the abortionist from permanently doing abortions. This result is neither legally nor morally justified.⁸⁴

The discussion appears to leave little room to argue that killing an abortionist could be necessary to prevent the abortions he is about to perform. But reasonable belief in necessity, not actual necessity, is the question, and a defendant might be able to prove that he reasonably believed such drastic action was necessary. For example, the defendant could present evidence showing that he previously had participated in or knew about abortuary blockades and that a blockade would not have been effective to prevent all the day's scheduled abortions because of

83. *Id.* at 393.

84. *See infra* part II.

a lack of a sufficient number of participants, or some other reason.⁸⁵ He conceivably could present evidence that circumstances prevented him from getting close enough to the abortionist to threaten the abortionist or physically disable him without shooting. And he could present evidence that the only opportunity he had to shoot at the abortionist was, for example, an opportunity to shoot at his head — to shoot to kill. It is possible the defendant could show that if he did not take that opportunity, he reasonably believed that scheduled abortions would take place inside the abortuary; or, in other words, if he did not shoot to kill, unborn children surely would die that day. If the defendant could produce this type of evidence, a fact finder conceivably could find that the defendant reasonably believed that shooting the abortionist, drastic as it was, was necessary to prevent the abortionist from taking unborn lives by abortion.⁸⁶

3. Other Obstacles to Raising the Defense of Others Justification.

Assuming that a defendant could show that he reasonably believed that killing the abortionist as he arrived at the abortuary was necessary to save the lives of the babies to be aborted that day (and that a court would ever allow a defendant to make such a showing), the defendant would face several other significant hurdles in asserting a defense of others justification. All these hurdles essentially revolve around the Supreme Court's holdings in its abortion cases that the unborn child is not a person entitled

85. Cases such as *Cleveland v. Municipality of Anchorage* and *Commonwealth v. Wall* have held that a blockade participant could not prove that he could reasonably believe that trespassing at the abortuary could effectively prevent abortions. See 631 P.2d at 1080; 539 A.2d at 1329. These cases unwittingly seem to suggest that the next person who wants to prevent abortions should perhaps use a more forceful means of accomplishing his purpose.

86. Paul Hill killed an abortionist. He also killed the abortionist's escort and wounded the escort's wife, neither of whom was an abortionist. Even if Hill could establish that it was necessary to kill the abortionist, it is difficult to believe that he could prove that killing the escort or wounding the escort's wife was justified. The escort was not an abortionist; he could not perform abortions; without the abortionist, the abortuary could not function even with the escort alive. No matter what one may think of the escort's participation in the evil of abortion, killing the escort smacks of cold-blooded execution, not of an act designed to save the lives of unborn children. Only duly appointed agents of the state have the legal or moral right to execute any person for committing a crime. See *infra* part II; 4 WILLIAM BLACKSTONE, COMMENTARIES * 178-79 (execution is justifiable homicide if done by one who has the legal duty to do so; otherwise, "wantonly to kill the greatest of malefactors . . . is murder.").

to Fourteenth Amendment protection and that the state may not prohibit most abortions because of a woman's "right" to have an abortion.

a. *Roe, Casey, and the question of personhood*

Most formulations of the defense of others justification provide that a person may use force to defend another *person*.⁸⁷ As we already have noted, the Supreme Court ruled in *Roe v. Wade* that the unborn child is not a person for purposes of the Fourteenth Amendment. One could argue that this ruling settles the question of whether a defense of others justification is available for a defendant who kills an abortionist. But most defense of others statutes do not necessarily state that one may "use force to defend a person as that term is used in the fourteenth amendment as defined by *Roe v. Wade*." The point is that "person" can mean any number of different things, and the word "person" in a formulation of a defense of others justification need not be limited as it was in *Roe*; it could include the unborn child.⁸⁸

A "person" in general usage is "a human being..."⁸⁹ By this definition, the unborn child definitely qualifies as a person. *Roe v. Wade*, as we have noted, did not decide that the unborn child is not a human being; instead, *Roe* declined to answer this question.⁹⁰ "[T]he 'scientific' fact, which everyone really knows, that human life begins at conception and is continuous whether intra-or-extra uterine until death"⁹¹ has been recognized even by abortion proponents.⁹² Logic and a plethora of data support the

87. See e.g., MODEL PENAL CODE § 3.05(1) (use of force is "justifiable to protect a third person"); ALA. CODE § 13-A-3-23 (Michie 1990); LA. REV. STAT. ANN. § 14:22 (West 1986); ME. REV. STAT. ANN. tit. 17-A § 108 (West 1988); N.Y. PENAL LAW § 35.15 (McKinney 1987). Some state statutes provide for use of force in defense of "another." See, e.g., FLA. STAT. ANN. § 776.012 (West 1993), which provides that "[a] person is justified in the use of force, ... against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another ..." (emphasis added). The object of this sentence — "another" — relates back to the subject — "person" — thus making it reasonable to conclude that "another" means "another person."

88. *But see Boushey v. State*, 804 S.W.2d 148, 150, 151 (Tex. App. 1990) (Texas Penal Code defines person as an "individual, corporation, or association" and an "individual" as "a human being who has been born and is alive;" therefore, an unborn child is not a person for purposes of defense of others justification).

89. BLACK'S LAW DICTIONARY 1028 (5th ed. 1979).

90. See *supra* text accompanying notes 10-16.

91. See *supra* note 13 and accompanying text.

92. *Id.*

unborn child's membership in the human species from the time of conception.⁹³ The assertion that the unborn is not human from conception is not a scientifically supportable statement of fact but is merely a value judgment concerning which humans the law should protect, a statement that human beings begin to have "worth" only at some arbitrarily chosen time.⁹⁴

To interpret "person" in the defense of others justification in its normal sense — that is, as including any living human being — would be consistent with the rationale apparent from the face of these formulations of that justification, which is to protect human life. A corporation, for legal purposes, generally is a "person";⁹⁵ yet, it would be strange to think of somebody using physical force to injure or "kill" a corporation. True, somebody could burglarize or attempt arson on a corporation's property, or otherwise damage a corporation's property, actions which in a sense would injure the corporation and could perhaps even "kill" the corporation by forcing it out of existence. But a separate justification exists to allow a person to use force to protect property.⁹⁶ Even in that case, *deadly* force is generally proper only when a serious threat to a *human* life exists — that is, "where the unlawful interference with property is accompanied by a threat of deadly force (in which case it is proper to use deadly force in self-defense), or where the unlawful interference [with property] involves an invasion of an occupied dwelling house under circumstances causing the defender reasonably to believe that the invader intends to commit a felony therein or to do serious bodily harm to its occupants."⁹⁷

Interpreting the word "person" in its normal sense also would be consistent with protection the unborn child receives in other areas of the law. The unborn child "has been accorded legal status for various purposes in equity, criminal law, property law,

93. See *supra* sources cited at note 12; see also *supra* notes 11-13 and accompanying text.

94. See Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORDHAM L. REV.* 807, 840 (1973). For a thoughtful discussion of the arbitrariness and scientific invalidity of assigning standing for the recognition of individual rights at any point other than fertilization (i.e., the point at which the nuclei of the sperm and ovum unite to form a biologically distinct, genetically unique, living organism), see John J. Coleman III, *Roe v. Wade: A Retrospective Look at a Judicial Oxymoron*, 29 *ST. LOUIS U. L. J.* 7, 16-27 (1984).

95. *Santa Clara County v. Southern Pac. R.R.*, 118 U.S. 394 (1886) (corporation is a person for purposes of the Equal Protection Clause).

96. See *MODEL PENAL CODE* § 3.06; *LAFAVE & SCOTT, supra* note 36, § 5.9.

97. *LAFAVE & SCOTT, supra* note 36, § 5.9, at 465.

and tort law."⁹⁸ For example, almost all states allow a child to recover for prenatal injuries he received after viability, and allow recovery for wrongful death if the child is born alive and then dies.⁹⁹ A majority of states have eliminated the requirement that a child be born alive before his parents may recover for wrongful death,¹⁰⁰ and most courts, "when actually faced with the issue for decision," have allowed recovery for injuries a child received before viability.¹⁰¹ This trend is consistent with the common law, which, with "one relatively short-lived aberration" regarded the unborn child as "a human being in esse in all areas of law except for the criminal law where the exigencies of proof give rise to the . . . dichotomy" between an unborn child before and after quickening.¹⁰²

Courts also have ordered women to undergo medical procedures to protect their unborn children's lives. For example, in *Estate of Warner*,¹⁰³ an Illinois court ordered a Jehovah's Witness woman to undergo blood transfusions to save her unborn child's life, despite her religious objections and even though the child was not viable at the time of the court's order.¹⁰⁴ *Warner* was a

98. PROSSER ON TORTS, *supra* note 36, § 55, at 368.

99. *Id.*; see also STUART M. SPEISER, CHARLES F. KRAUSE & JUANITA M. MADOLE, RECOVERY FOR WRONGFUL DEATH AND INJURY § 4:33, at 180-82 (3d ed. 1992) (hereinafter WRONGFUL DEATH AND INJURY).

100. PROSSER ON TORTS, *supra* note 36, § 55, at 369-70; WRONGFUL DEATH AND INJURY, *supra* note 99, § 4:35, at 187-92.

101. PROSSER ON TORTS, *supra* note 36, § 55, at 368-69. The viability rule is a legal anachronism: the authors of PROSSER ON TORTS, in espousing recovery for injuries to an unborn baby inflicted before viability, have noted that "if existence at the time of the tortious act is necessary, medical authority has long recognized that an unborn child is in existence from the moment of conception," and that "[v]iability of course does not affect the question of the legal existence of the unborn . . . and it is a most unsatisfactory criterion, since it is a relative matter . . ." *Id.* § 55, at 367, 369.

102. See Byrn, *supra* note 94, at 843 n.224. As Professor Byrn notes, before the mid-1800s, criminal law commonly made a distinction between abortions done before and after the child quickened (that is when the mother could feel the child move). The common law history is complex, but the best explanation for the distinction is that prosecuting abortions performed before quickening presented serious problems of proof, not that abortion at any time was any kind of common law "right." See generally *id.* at 815-27. As Dr. Nathanson has noted, "It's not surprising . . . that the common law permitted abortion without penalty before quickening . . . it was simply that one could not even be sure a woman was pregnant until that event." NATHANSON, *supra* note 12, at 119. As we shall discuss later, after the mid-1800s, states commonly prohibited abortion at all stages of pregnancy. See *infra* notes 186-195 and accompanying text.

103. No. 71 P 3681 (Cook County, Ill. Cir. Ct., May 5, 1971), cited in Byrn, *supra* note 94, at 846-47.

104. See Byrn, *supra* note 94, at 846. Other pre-*Doe* cases also had ordered women to undergo blood transfusions to save their unborn children. See *id.* at 845-46 (citing Hoerner v. Bertinato, 171 A.2d 140 (Juv. & Dom. Rel. Ct. 1961) and Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964)).

pre-*Roe* case. Even after *Roe*, courts have ordered women to undergo medical treatment to save their unborn children. In *In re A.C.*,¹⁰⁵ the District of Columbia Court of Appeals ordered doctors to perform a Caesarian section on a woman dying of cancer. The mother and child both ultimately died.¹⁰⁶ But despite that fact, and despite the fact that the court of appeals subsequently vacated its decision, *In re A.C.* shows that even after *Roe*, courts consider the unborn child an entity worthy of legal protection. This at least implies a recognition of the unborn's humanity, no matter how courts might try to say otherwise; courts do not order people to undergo invasive surgical procedures to save their property.

Cases like *In re A.C.* and tort cases allowing recovery for prenatal injuries point to gaping anomalies within the law, anomalies that exist thanks to the Supreme Court's abortion jurisprudence. On the one hand, a woman is free (subject only to token restrictions) to have her unborn child killed any time before it is viable, and any time after viability if she can show it is necessary to protect her "health," as the Supreme Court has sweepingly defined that term. On the other hand, if somebody injures that unborn child, the child may recover for those injuries in many states; and, if the child's life is in danger, the state may order the woman to undergo medical treatment to save the child, even though the woman could subsequently decide to abort the child.

Perhaps most anomalous is the way the law treats intentionally killing an unborn child except when done by a doctor at the mother's behest. In St. Petersburg, Florida, an abortuary turned away a nineteen-year-old girl who was six months pregnant because she did not have the \$1,300 to \$1,800 necessary to pay for a late-term abortion.¹⁰⁷ The girl, desperate to abort, fired a pistol into the right side of her womb, shooting her baby in the wrist. The baby was born by emergency Caesarian section,

105. 533 A.2d 611 (D.C. 1987), *vacated*, 539 A.2d 203 (D.C. 1988).

106. 533 A.2d at 611.

107. *Woman Who Shot Fetus to Abort Charged With Murder*, American Political Network Abortion Report, Sept. 12, 1994, available in Lexis, Nexis library, News file. This sad episode exposes the abortion industry for what it is — a cold-hearted, cold-blooded business, concerned more with profits than with the alleged welfare of the women for whom the industry ostensibly exists. Dr. Bernard Nathanson (who, having been director of one of the largest abortuaries in the United States is eminently qualified to speak to the matter) estimated that as far back as 1980, the gross income of the abortion industry was \$500,000,000, with approximately \$250 to \$300,000,000 of that going to the abortionists. See NATHANSON, *supra* note 12, at 162-63.

but died less than one month later from complications of the premature birth.¹⁰⁸ The mother was charged with third-degree murder, and given that she killed an innocent human being, this was an appropriate charge. But in light of *Roe* and its progeny, one may reasonably wonder whether the more proper charge should have been practicing medicine without a license; after all, the mother was only doing what the Supreme Court in *Roe* and its progeny said she had a right to do.¹⁰⁹

In *People v. Davis*,¹¹⁰ the California Supreme Court recently held that killing a seven-week-old unborn child could constitute murder (and potentially subject the killer to the death penalty) under a California murder statute which read: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."¹¹¹ Previous California Court of Appeals cases had held that a person committed murder only when he killed a *viable* fetus.¹¹² These holdings were based on the view that "implicit in [*Roe v. Wade*] is the conclusion that as a matter of constitutional law, destruction of a non-viable fetus is not a taking of human life." Thus, "one cannot destroy independent human life prior to the time it has come into existence."¹¹³

The California Supreme Court overruled these court of appeals cases. Taking the murder statute at face value, the supreme court noted that the statute did not refer to viability. According

108. *Woman Who Shot Fetus Charged With Murder*, *supra* note 107.

109. See William Raspberry, *A Case of Abortion by Gunshot*, WASH. POST, Sept. 14, 1994, at A21.

110. 872 P.2d 591 (Cal. 1994).

111. *Id.* at 593; see *Cal. Penal Code* § 187(a) (West 1988).

112. See *People v. Smith*, 129 Cal. Rptr. 498 (Ct. App. 1976); *People v. Apodaca*, 142 Cal. Rptr. 830 (Ct. App. 1978); *People v. Smith*, 234 Cal. Rptr. 142 (Ct. App. 1987).

113. *People v. Smith*, 129 Cal. Rptr. at 502 (quoted in *Davis*, 872 P.2d at 595). The court of appeals in *Smith* was wrong, of course, in concluding that *Roe* had decided that destroying a nonviable unborn child was not a taking of human life. As we already have noted, *Roe* did not decide the unborn child was not human; it decided only that it was not a "person" for Fourteenth Amendment purposes. The *Smith* court also supported its conclusion that there was no human life to take before viability by equating "human life" with the being's ability to live independently. Thus, until viability, which is the point at which the unborn theoretically can live outside the womb, the unborn is not human and therefore not worthy of protection. This reasoning is specious. A viable unborn child — and a newborn baby, or many elderly people for that matter — is no more capable of "independent" existence than a non-viable unborn child. If the ability to live independently is the criteria for entitlement to legal protection, infants, small children, and many elderly people should be no more worthy of legal protection than the unborn. Sadly, this is the direction in which our culture is moving. See generally FOURNIER, *supra* note 33, at 37-60 (noting the relation of the abortion mentality to increasing incidents of infanticide, euthanasia, and assisted suicide).

to the court, *Roe v. Wade* did not require that any viability requirement be read into the statute. Even the United States Supreme Court's abortion cases recognized that the state has an interest in protecting what those cases referred to as "potential human life," before viability as well as after.¹¹⁴ *Roe* and its progeny were only concerned with when that interest was sufficiently strong to override the woman's liberty or privacy interest in having an abortion. The California Supreme Court reasoned that where the woman's privacy or liberty interest is not at stake, nothing in *Roe* or its progeny prevents a state from protecting the unborn child at any stage of development.¹¹⁵

Fetal homicide cases graphically illustrate the absurdity in our legal regime that declares abortion a fundamental right but nevertheless purports to assign some type of protection to the abortion's object. Suppose Sue, who is pregnant and on her way to have an abortion, is accosted by Baker across the street from the abortuary where she was headed. Baker demands Sue's purse; when she hesitates, Baker shoots her in the abdomen. The shooting causes Sue to give birth prematurely, and the baby dies because of the complications of that premature birth.

The law would call Baker a murderer, and rightly so. In California, Baker could even be put to death for his crime. But if Sue had walked across the street, another person could have done to her unborn child what Baker did (and perhaps even less humanely), free from any meaningful restriction by the state. The law would not call that person a murderer; it would call him a "doctor." And that person would not be subject to death for killing Sue's child and thousands of other unborn children; instead, he would continue to make a substantial living from his killing.

114. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2817 (1992), in which the Court emphasized that *Roe* had "recognized the State's 'important and legitimate interest in protecting the potentiality of human life.'" (quoting *Roe*, 410 U.S. at 162). The Court in *Casey* noted that this interest existed throughout pregnancy, and although it did not become strong enough to override the woman's "liberty" to abort until viability (subject, of course, to the toothless "life or health" exception of *Doe v. Bolton*), it did justify some restrictions on abortion that did not create an "undue burden" on the right to abort. See generally 112 S. Ct. at 2817-21.

115. See *Davis*, 872 P.2d at 597-99. Other states' courts also have employed essentially the same reasoning to hold that *Roe* and its progeny do not prevent a state from prosecuting an unborn child's killer for murder, even if the child was not yet capable of living outside the womb. See *State v. Merril*, 450 N.W.2d 318 (Minn. 1990); *People v. Ford*, 581 N.E.2d 1189 (Ill. 1991).

Putting this absurdity aside, the fetal homicide cases (along with the tort cases and the cases involving court-ordered medical care to save the unborn child's life) do demonstrate that the Supreme Court's abortion cases do not prohibit states from meaningfully protecting the unborn child where that protection does not conflict with the woman's right to have an abortion.¹¹⁶ Certainly, the difference in treatment that Baker and the abortionist would receive cannot be accounted for entirely by the fact that Baker inflicted injury on Sue as well as her child. Neither attempted murders nor deprivations of property or privacy rights are normally punishable by death, and current Eighth Amendment jurisprudence probably would not allow the death penalty for these offenses.¹¹⁷ Instead, the law, despite *Roe*, must implicitly recognize something about the unborn child that makes it worthy of protection in the same way that any other human being is worthy of protection. The Supreme Court's abortion cases simply do not speak to the matter of how states may protect the unborn child when that protection does not conflict with the woman's right to abort, other than to say the state has an interest in protecting the unborn's life. Likewise, the Supreme Court's abortion cases do not speak to the actions a private citizen may take to protect the unborn child, or the defenses that citizen may raise if criminally prosecuted for his acts. Moreover, those cases do not define the word "person" in all contexts. Thus, one could argue that the Supreme Court's abortion cases do not prevent a state from defining "person" in its defense of others statute to include unborn children, thus making that defense potentially available to somebody who kills an abortionist in the belief that the killing was necessary to save unborn children who were about to die at the abortionist's hands.

b. State action

Abortion proponents would object that recognizing the defense of others justification for the abortionist's killer *does* conflict

116. The California murder statute makes a specific exception for legal abortion. See *Davis*, 872 P.2d at 594 (citing CAL. PENAL CODE § 187(b)).

117. See *Coker v. Georgia*, 433 U.S. 584 (1977) in which the Court found that the Eighth Amendment prohibited states from imposing the death penalty for rape even though the plurality opinion acknowledged that rape is "highly reprehensible" and "[s]hort of homicide . . . is 'the ultimate violation of self,'" and the defendant, at the time he committed the rape, was an escaped convict serving a life sentence for murder, rape, and various other serious crimes. See *id.* at 587, 597 (citations omitted). The dissent in *Coker* opined that the decision implied that "the death penalty may be properly imposed only as to crimes resulting in the death of the victim." *Id.* at 621 (Burger, C.J., dissenting).

with the woman's right to have an abortion by giving a private citizen a veto over a woman's decision to abort. Language in *Planned Parenthood of Missouri v. Danforth*,¹¹⁸ may seem to support that position. In *Danforth*, the Supreme Court held unconstitutional a state-imposed requirement that a woman obtain her husband's written consent before having an abortion during the first twelve weeks of pregnancy. The Court also held unconstitutional a state-imposed requirement that a minor obtain one of her parents' consent before having an abortion.¹¹⁹ In holding these requirements unconstitutional, the Court noted that "since the state cannot regulate or proscribe abortion . . . the state cannot delegate authority to any particular person . . . to prevent abortion"¹²⁰

Some courts in abortuary trespass cases have reasoned that to allow a necessity defense in those cases would be to allow the state to delegate a veto power to strangers that it could not delegate to a woman's spouse. By doing so, the argument goes, the state itself would be imposing an impermissible restriction on a woman's decision to have an abortion.¹²¹ This reasoning ignores the well-recognized dichotomy between individual and state action, and the role that dichotomy plays in Fourteenth Amendment jurisprudence. According to the Supreme Court, the decision to have an abortion is a species of liberty protected by the Fourteenth Amendment's guarantee that the *state* may not "deprive any person of . . . liberty . . . without due process of law. . . ."¹²² The Fourteenth Amendment is a limitation on the *state's* power to act.¹²³ Consequently, "constitutional guarantees

118. 428 U.S. 52 (1976).

119. *Id.* at 67-75. In *Planned Parenthood v. Casey*, the Supreme Court also struck down a requirement that a woman provide a signed statement that she has notified her husband before having an abortion. 112 S. Ct. at 2826-31. *Casey* did, however, uphold a parental consent requirement for minors seeking abortions because the requirement contained an adequate procedure by which the minor could seek a court's consent for the abortion in lieu of her parents' consent. *See id.* at 2832-33; *see also* *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 506-19 (1990) (upholding Ohio law requiring notice to one parent; law contained judicial bypass); *Hodgson v. Minnesota*, 497 U.S. 417, 459-61 (O'Connor, J., concurring in part); *id.* at 488-97 (Kennedy, J., concurring in part and dissenting in part) (holding that two-parent notification provision is constitutional if accompanied by judicial bypass provision).

120. 428 U.S. at 69.

121. *See* *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073, 1080-81 n.15 (Alaska 1981); *State v. Sahr*, 470 N.W.2d 185, 192 (N.D. 1991); *Commonwealth v. Wall*, 539 A.2d at 1325, 1330 n.7 (Pa. Super. Ct. 1988).

122. U.S. CONST. amend. XIV, §1; *see Casey*, 112 S. Ct. at 2804-08.

123. *See DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 195-96 (1989).

of liberty . . . do not apply to the actions of private entities."¹²⁴ As the Court recognized long ago, "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."¹²⁵

In *Danforth*, the court struck down a *state-imposed* requirement that a woman obtain another's consent before having an abortion. The actionable violation of the woman's right to an abortion was not the husband's preventing his wife or the parents' preventing their daughter from having an abortion; it was, instead, the fact that the state required the wife or daughter to obtain her husband's or parent's consent. Absent the state-imposed requirement, a husband's preventing his wife from having an abortion would not violate the Fourteenth Amendment because no state action is involved. Likewise, a private citizen's preventing a woman from having an abortion by blockading an abortuary (or killing an abortionist) would not violate the Fourteenth Amendment. And even if the state did not prohibit trespass (or murder) or the police failed to break up an abortuary blockade in time to allow abortions to be done, the state would not be violating the Due Process Clause because that clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure . . . liberty . . . interests of which the government itself may not deprive the individual."¹²⁶

It would seem to follow that to allow a defendant who broke the law to prevent abortions to raise a generally applicable criminal defense would not constitute state infringement of the woman's right to abort. This would be akin to the state's failure to make trespass a crime. The court in *Cleveland v. Municipality of Anchorage*, however, cited *Shelley v. Kraemer*¹²⁷ to support its suggestion that allowing defendants in an abortuary trespass case to raise a necessity defense would constitute state infringement of a woman's right to have an abortion.¹²⁸ But *Shelley* does

124. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991).

125. *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

126. *DeShaney*, 489 U.S. at 196; *Cf. Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (even though a woman has a right to an abortion, she has no right to have the state pay for it; "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . . , it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom.").

127. 334 U.S. 1 (1948).

128. *See* 631 P.2d at 1080 n.15.

not support that conclusion. In *Shelley*, the Supreme Court struck down two courts' decisions to enforce racially discriminatory private covenants against sellers who wished to sell their property to blacks in violation of the covenants.¹²⁹ The Supreme Court held that while private adherence to the covenants would not have violated the Fourteenth Amendment,¹³⁰ state court enforcement of the covenants amounted to state action depriving the buyers of equal protection of the laws. The Court noted that

[t]hese are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of the government to deny petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.¹³¹

Note that *Shelley* involved willing buyers and sellers. Had the state courts not interfered, no discrimination would have occurred. The state court was not merely allowing a private decision to discriminate, it actually was compelling the seller to discriminate. In other words, *Shelley* implicitly recognized a distinction between a state court's decision to affirmatively require conduct, and a state court's decision to deny relief to an allegedly aggrieved party.

Subsequent Supreme Court cases also recognized this distinction. Take, for instance, *Flagg Brothers, Inc. v. Brooks*.¹³² In *Flagg Brothers*, a woman storing goods in a warehouse sued to enjoin the warehouseman from selling her property pursuant to a New York statute allowing such a sale.¹³³ The woman argued that the sale amounted to state action because the state statute "had authorized and encouraged it." The Court scotched this argument, holding that "a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State."¹³⁴ The Court went on to note that "[a] judicial decision

129. 334 U.S. at 5-6.

130. *Id.* at 13.

131. *Id.* at 19 (emphasis added).

132. 436 U.S. 149 (1978).

133. *Id.* at 151-53.

134. *Id.* at 164 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)); *see*

to deny relief [and permit the sale] would be no less 'authorization' or 'encouragement' of that sale If the mere denial of . . . judicial relief is . . . [all that is required] to make the . . . State responsible for . . . private acts, all private deprivations would be converted into public acts whenever the State, for whatever reason, denies relief"135

Recognizing the necessity defense for defendants who break the law to prevent women from having abortions may "encourage" such lawbreaking, but it in no way compels the lawbreaking. Defendants seeking to assert the necessity defense only "seek judicial acquiescence. . . ."136 Allowing these defendants to raise this defense is no more a state deprivation of the right to an abortion than allowing a murder defendant to raise a particular defense is a state deprivation of the victim's right to life. Allowing a defense merely allows the jury to deny relief to the state by acquitting the defendant. Such an acquittal does not amount to state action denying women the right to an abortion.¹³⁷

c. Using force to defend against unlawful force.

If the defendant can adduce sufficient facts to show that killing the abortionist was necessary and can persuade the court that the unborn child is a "person" for purposes of the defense, he will still run into probably the biggest obstacle to raising defense of others as a justification for killing an abortionist — the limitation in almost all jurisdictions' formulations of the justification that a person may use force only to defend against *unlawful* force. The Model Penal Code, for instance, provides that a person may use force to protect himself or a third person "against the use of unlawful force by [an aggressor]."138 Commentators agree that a person may use force only to defend others against unlawful force. According to LaFave and Scott, "The prevailing rule is that one is justified in using reasonable force

also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177-79 (state administrative rule requiring a private club to comply with racially discriminatory bylaws was state action); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed that of the state. Mere approval of or acquiescence in the initiatives of a private party is not sufficient. . . .").

135. 436 U.S. at 165.

136. Patrick G. Senftle, Comment, *The Necessity Defense in Abortion Trespass Cases*, 32 ST. LOUIS U. L. REV. 523, 543 (1987).

137. See *id.*; see also Debbe A. Levin, Note, *Necessity as a Defense to a Charge of Criminal Trespass at an Abortion Clinic*, 48 U. CIN. L. REV. 501, 514 (1979) which, although arguing against recognizing the necessity defense in abortuary trespass cases, concedes that recognizing the defense would not amount to state action depriving women of the right to an abortion.

138. MODEL PENAL CODE § 3.04(1); see *id.* § 3.05(1)(a)-(b), which deems use of force in

in defense of another person ... when he reasonably believes that the other [person] is in immediate danger of *unlawful bodily harm*¹³⁹ Perkins' conclusion is similar: "The present position [on defense of others] ... is that one may go to the defense of a stranger if that person is the victim of an *unlawful* attack."¹⁴⁰ Most state statutes allow the use of force only against unlawful force. For example, Florida law allows a person to use force "when and to the extent he reasonably believes that such conduct is necessary to defend ... against ... imminent use of unlawful force."¹⁴¹ Connecticut's statute, unlike most, allows a person to use force to defend another person from "what he reasonably believes to be the use or imminent use of physical force ..." without mentioning that that force need be unlawful.¹⁴² But the Appellate Court of Connecticut has ruled in an abortuary trespass case that the defense of others justification was not available because abortion, being legal and constitutionally protected, is not "an injury under the law."¹⁴³

Some state defensive force statutes define "unlawful" conduct simply as conduct that is "criminal or tortious," which adds nothing to the commonly recognized definition of the word.¹⁴⁴ Others, such as Florida, do not define "unlawful."¹⁴⁵ In states where "unlawful" is not defined, it seems reasonable to consider "unlawful" conduct or force in its common sense, as conduct or force that "is contrary to, prohibited, or unauthorized by law."¹⁴⁶ In either event, legal abortion would not be unlawful, so a defendant likely could not raise defense of others to justify killing an abortionist.

The Model Penal Code takes a broader view of what constitutes unlawful force, defining it as:

[F]orce, including confinement, that is employed without the consent of the person against whom it is directed and the employment of which constitutes such offense or actionable

defense of a third person justified where self-defense would be justified. Section 3.04(1) permits a person to use force in self-defense only in response to "unlawful" force.

139. LAFAYETTE & SCOTT, *supra* note 36, § 5.8, at 463 (emphasis added); *see also id.* § 5.8(a), at 463-64.

140. ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 1145 (3d ed. 1982) (emphasis added).

141. FLA. STAT. ANN. § 776.012 (West 1993).

142. CONN. GEN. STAT. ANN. § 53a-19(a) (West 1985).

143. *State v. Clarke*, 590 A.2d 468, 469-70 (Conn. App. Ct. 1991).

144. *See, e.g.*, 720 ICLS § 5/7-1, 1961 comm. cmts. at 292 (West 1993); WIS. STAT. ANN. § 939.49(3).

145. FLA. STAT. ANN. § 776.012 (West 1993).

146. BLACK'S LAW DICTIONARY 1377 (5th ed. 1979).

tort or would constitute an offense or tort except for a defense (such as the absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status) not amounting to a privilege to use the force.¹⁴⁷

This definition of "unlawful force" encompasses more than actual crimes or torts. For example, an attack by a legally insane person, or a person incapable of forming the state of mind necessary to commit a crime or tort, or a person covered by diplomatic immunity would still be considered "unlawful," and therefore justify defensive force. This reflects the policy choice that "it cannot be regarded as a crime to safeguard an innocent person . . . against threatened death or injury that is unprivileged, even though the source of the threat is free from fault."¹⁴⁸

Even this expanded definition of "unlawful force" would not help the defendant who kills an abortionist. The abortionist (typically) is not performing an act that would be unlawful but for a defense he has to the act. The abortionist need not claim insanity, or lack of mens rea, or some type of immunity to avoid legal sanction for committing abortions. Instead, he is performing an act that, thanks to *Roe, Doe*, and their progeny, is not only legal, but affirmatively protected from meaningful restriction in most cases throughout nine months of pregnancy. Despite the butchery that occurs inside abortuaries,¹⁴⁹ legal abortions are not considered unlawful force in the eyes of the human law.

147. MODEL PENAL CODE § 3.11(1).

148. *Id.* cmt. 1, at 159.

149. Two particularly gruesome abortion techniques are saline injection and dilation and extraction (D & X). In an abortion by saline injection, the abortionist injects a concentrated saline solution into the amniotic fluid. The high concentration of salt burns off the baby's outer layer of skin and usually causes a painful death in about an hour. The mother typically goes into labor the next day and delivers a dead, desiccated baby. See FOURNIER, *supra* note 33, at 14. In a D & X abortion, the abortionist pulls all of the baby's body except the head outside the womb, forces scissors into the base of the baby's skull, and opens the scissors to enlarge the hole. Then, the abortionist inserts a catheter into the hole to suck the baby's brains out. After that, the abortionist removes the baby. See *Shock-tactic Ads Target Late-Term Abortion Procedure*, LIFE ADVOCATE, Sept. 1993, at 30, 31. Although both saline and D & X abortions are performed on unborn children older than 16 weeks, even early abortions typically involve techniques that require cutting or ripping the unborn child's body to pieces. See FOURNIER, *supra* note 33, at 13.

Sometimes babies aborted in late-term abortions survive the ordeal. For example, Gianna Jessen, a 16-year old girl from San Clemente, California was aborted by saline injection when her mother was 24 to 29 weeks pregnant.

[But Gianna was] delivered alive, weighing two pounds, her brain starved for oxygen during the hours she spent gulping the saline solution. A nurse of the abortion clinic staff rescued Gianna and kept her alive in an incubator. She was diagnosed with cerebral palsy which has resulted in four operations.

Note, however, that it is legal abortions that cannot be considered unlawful force. This leaves a loophole for raising the defense when the killing is done to prevent illegal abortions. Despite *Roe* and the rest of the Supreme Court's abortion cases, not all abortions are legal. States may prohibit abortions after viability except where necessary to protect the mother's life or health.¹⁵⁰ If a defendant can show that he reasonably believed the abortions he sought to prevent by acting were illegal abortions, the defense of others justification should be available to him (assuming he can establish the justification's other elements).¹⁵¹

As a practical matter, the fact that not all abortions are legal would not be likely to make the defense of others justification available in many — if any — cases. Given the open-ended definition of maternal "health" the Supreme Court adopted in *Doe v. Bolton*,¹⁵² the universe of illegal abortions is small (even with the restrictions now allowed by *Casey*). Even after her unborn baby is viable, a woman who wants to abort that baby need only convince a doctor (or perhaps two doctors) that her "emotional, psychological or familial" well-being would suffer if she could not have an abortion. While "abortion on demand" for all nine months of pregnancy technically may not be the law in this country, "abortion effectively on demand" probably is a fair description of the law.

A defendant might try to argue that his killing of an abortionist was justified by the general necessity, or choice of evils defense rather than by the defense of others justification. The

She still walks with a slight limp and sometimes stumbles but otherwise she is a bright, energetic teenager with amazing talents.

Gianna Jessen to Highlight MCFL Convention and Dinner, MASS. CITIZENS FOR LIFE NEWS, Sept. 1994, at 16. Ana Rosa Rodrigues also was born alive, but with one arm severed, several days after Dr. Abu Hayat botched a third-trimester abortion. Hayat is facing 20 to 60 years in prison for botching Ana's abortion; in a strange twist, it is unlikely that Hayat would have been prosecuted had the abortion succeeded and Ana been killed (even though the abortion was technically illegal). See *Doctor is Convicted in Case of Maimed Baby*, LIFE ADVOCATE, Apr. 1993, at 24-25.

150. See *Casey*, 112 S. Ct. at 2821; *Roe*, 410 U.S. at 164-65. Florida, for example, has prohibited post-viability abortions except where necessary to preserve the mother's life or health. See Fla. Stat. Ann. § 390.001(2) (West 1993).

151. Cf. *United States v. Hill*, No. 94-03118-RV, slip op. at 3-4 (illegally performed abortions would be an "evil" or "harm" for purposes of the general necessity defense, even if that defense does not allow legal activity to qualify as an evil to be avoided); *People v. Crowley*, 538 N.Y.S.2d at 151 n.3 (holding that legal abortions are not a legally cognizable harm for purposes of the general necessity defense, but suggesting that action to prevent illegal abortions might be justified).

152. See *supra* notes 6-8 and accompanying text; see also *Rice*, *supra* note 9, at 21.

common formulations of this defense do not require that the harm to be avoided necessarily be an illegal harm.¹⁵³ For example, the Model Penal Code's lesser evils provision justifies conduct "the actor believes to be necessary to avoid a harm or evil to himself or to another" if "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."¹⁵⁴ The New York Penal Law lesser evils provision justifies "conduct which would otherwise constitute an offense" if "[s]uch conduct is necessary as an emergency measure to avoid an imminent public or private injury . . . which is of such gravity that . . . the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue."¹⁵⁵

A problem exists, however, in applying these defenses in a defensive force situation. For example, the New York Penal Law's general necessity defense applies only "[u]nless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force . . ."¹⁵⁶ In other words, the specific justification defense provision applying to the use of force — including defensive force — trumps the general necessity provision. That provision, like most defense of others provisions, limits the use of defensive physical force to situations in which a person is resisting unlawful force.¹⁵⁷

Likewise, the Model Penal Code's general necessity justification does not apply if "the Code . . . provides . . . defenses dealing with the specific situation involved . . ."¹⁵⁸ Since the Model Penal Code provides a specific justification defense for the use of force to defend another person, it would seem that the Code's general necessity defense would not be available in that situation (which is the situation of the defendant who has killed an abortionist to save the lives of unborn children). Again, that provision, like most defense of others provisions, allows a person to use force only to resist unlawful force.¹⁵⁹

153. See *United States v. Hill*, No. 94-03118-RV, slip op. at 3 (noting that harm to be avoided in general necessity defense need not result from illegal activity); see also Senftle, *supra* note 136, at 527-29 (arguing that general necessity defense does not require that the harm to be avoided be unlawful).

154. MODEL PENAL CODE § 3.02(1)(a).

155. N.Y. PENAL LAW § 35.05(2).

156. *Id.* § 35.05.

157. *Id.* § 35.15(1).

158. MODEL PENAL CODE § 3.02(1)(b).

159. *Id.* § 3.05(1)(a)-(b) (justifying force to defend another only where self-defense would be justified); § 3.04(1) (justifying self-defensive force only to resist unlawful force).

It is arguable, at least in the case of the Model Penal Code, that the general necessity defense would justify defensive force to save lives even from a lawful threat. This is because the Code's drafters made an explicit decision not to exclude homicide from the justification's scope, stating that "[i]t would be particularly unfortunate to exclude homicidal conduct from the scope of the defense."¹⁶⁰ The Code's drafters and some commentators believe the general necessity defense should be available for a person who takes one life to spare two or more lives.¹⁶¹ This principle, as proposed by the Code's drafters, would provide justification for *intentional* killing (that is, intentional not only in the sense that the actor's conduct will inevitably result in death even though the actor does not desire that result, but also in the sense that the actor's specific purpose in performing the act is to kill) done to avoid a greater harm.¹⁶² Thus, the Code proposes the following example:

Suppose ... the citizens of a town receive a credible threat ... that everyone in the town will be killed unless the townspeople themselves kill their mayor, who is hiding. *If the townspeople accede, they would have a substantial argument against criminal liability under this section ...*¹⁶³

This position has some support in case law. In *United States v. Holmes*,¹⁶⁴ thirty-two passengers and nine seamen, including Holmes, boarded a lifeboat after a shipwreck. When a storm threatened to sink the boat, Holmes and some other crew members threw fourteen male and two female passengers overboard

160. *Id.* § 3.02, cmt. 3, at 14-15. *Cf.* WIS. STAT. ANN. § 939.47 (West Supp. 1993) (necessity only reduces first-degree intentional homicide to second-degree intentional homicide); *also cf.* MO. ANN. STAT. § 563.026 (Vernon 1979) (general necessity defense does not apply to murder).

161. *See* MODEL PENAL CODE § 3.02, cmt. 3, at 14-16; LAFAVE & SCOTT, *supra* note 36, § 5.4, at 442-443.

162. As we will discuss in part II, we do not agree that it is morally justified to kill another human being intentionally, even to achieve a good end, except in cases of a just war, a justified rebellion, or capital punishment. Nor do we believe the law should explicitly sanction such intentional killing (although we do recognize the law is perhaps limited in its ability to discern an actor's intent and may therefore at times tolerate killing in limited circumstances that may have been intentional). We are merely suggesting a possible legal argument an abortionist's killer might make in his defense.

163. MODEL PENAL CODE § 3.02, cmt. 3, n.15. *See also* LAFAVE & SCOTT, *supra* note 37, § 5.4, at 442 ("[W]hen A in an emergency intentionally kills B to save C and D, he may be eligible for the defense of necessity" because "it is better that two lives be saved and one lost than that two lives be lost and one saved").

164. 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15383).

to lighten the load so that the boat would not go under.¹⁶⁵ Holmes and the lifeboat's other remaining passengers survived; but after he reached port, Holmes was tried for manslaughter.¹⁶⁶ The trial court instructed the jury that seamen have a special duty to their passengers, and in times of emergency must sacrifice their own lives to save the passengers. Therefore, the seamen *not necessary to manage the boat* "have no right, for their safety, to sacrifice the passengers."¹⁶⁷ The court also told the jury that in the case of equally situated people, killing some could be justified if the victims were selected by lots.¹⁶⁸ The jury convicted Holmes, and the court upheld the conviction.¹⁶⁹

Underlying the court's instructions in *Holmes* is the assumption that necessity can justify the intentional killing of innocent people. The court's statement that excess seamen have no right to sacrifice passengers implies that seamen who are needed to manage the boat may sacrifice passengers if necessary. And the court's suggestion that victims be chosen by lot assumes that it is proper to sacrifice innocent victims in the first place.¹⁷⁰

Another case lending some support to the view that necessity can justify intentionally killing an innocent human being is the English case of *Rex v. Bourne*.¹⁷¹ In *Bourne*, a doctor was on trial for having performed an abortion on a young girl who had been raped. The abortion statute under which the doctor was prosecuted forbade "unlawful" abortions, but did not mention any exception for abortions performed to save the woman's life or

165. *Id.* at 361.

166. *Id.* at 362-63. LaFave and Scott note that the proper charge should have been murder, since the killings were intentional, but that the grand jury "apparently refused to indict for more than manslaughter." LAFAVE & SCOTT, *supra* note 37, § 5.4, at 445 n.31.

167. 26 F. Cas. at 367 (emphasis added).

168. *See id.*

169. *Id.* at 368-69.

170. A later English lifeboat case rejected the *Holmes* approach. In *Regina v. Dudley & Stevens*, 14 Q.B.D. 273 (1884), three sailors and a cabin boy were adrift in a lifeboat more than 1,000 miles from land. On the twentieth day, after going nine days without food and seven days without water, two of the sailors, Dudley and Stevens, killed the cabin boy, fed on his flesh, and drank his blood. Four days later, a passing ship picked up the three survivors. *Id.* at 273-75. Dudley and Stevens were tried and convicted for murder, and on appeal the court held that killing the innocent cabin boy was not justified by necessity. The English court expressly rejected Holmes' suggestion "that the proper mode of determining who was to be sacrificed was to vote upon the subject" as "hardly. . . an authority satisfactory to a court in [England]" *Id.* at 285. We discuss *Dudley & Stevens* further in part II.

171. 3 All E.R. 615 (1938).

health.¹⁷² However, the judge applied the necessity defense and instructed the jury not to convict unless it found that the Crown had proven beyond a reasonable doubt that the doctor had not performed the abortion in good faith to preserve the girl's life.¹⁷³ This was so even though "[t]he law of this land has always held human life to be sacred, and the protection that the law gives to human life it extends also to the unborn child...."¹⁷⁴ But, continued, the court, "[t]he unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother."¹⁷⁵

One could argue from the Model Penal Code's approach to necessity, supported to some extent by *Holmes* and *Bourne*, that some necessity defense (whether called a general lesser evils defense or defense of others) should be available to a defendant who kills an abortionist to save the unborn children the abortionist was about to kill. It makes no sense to allow necessity to justify killing an innocent person to save human lives but to deny the same defense to a person who kills an *aggressor* to save human lives. It should not matter that the law does not prohibit the aggressor's conduct. Certainly, neither the mayor in the Model Penal Code example, the hapless sailor in a lifeboat who drew the wrong lot, nor the unborn child in *Bourne* were engaging in any unlawful conduct at the times their lives were taken.

It is doubtful, however, that any court would accept this argument. While there are a few unreported exceptions,¹⁷⁶ reported cases uniformly have rejected the idea that necessity can justify any illegal action taken to prevent abortions.¹⁷⁷ One of the principal reasons given for this rejection has been that abortion is legal, constitutionally protected conduct and therefore does not constitute a legally cognizable harm.¹⁷⁸ Thus, the law comes full circle; first, it has stripped the unborn child of any meaningful protection by the public authorities whose job it is to protect

172. See LAFAYE & SCOTT, *supra* note 36, § 5.4, at 443 n.12.

173. 3 All E.R. 616, 617. The court did not instruct the jury in so many words to acquit if the doctor performed the abortion to preserve the mother's life or health. But the judge did tell the jury to acquit if it thought there was no clear distinction between health and life even though the girl was not facing imminent death. See *id.* at 617-18. Commentators thus have read *Bourne* as standing for the principle that necessity justifies abortion to preserve the mother's life or health. See LAFAYE & SCOTT, *supra* note 36, § 5.4, at 443 n.12; see also Byrn, *supra* note 94, at 854 n.280.

174. 3 All E.R. at 620.

175. *Id.*

176. See cases cited *supra* at note 69.

177. See cases cited *supra* at note 68.

178. See, e.g., *Zal v. Steppe*, 968 F.2d at 929; *Northeast Women's Ctr., Inc. v. Mc-*

innocent human life; then, by bootstrapping on the holding that the unborn may not receive protection from public authorities, the courts hold that unborn children also may not receive protection from private citizens because abortion is "lawful."

d. Is abortion really lawful?

In determining that abortion is a "right" and therefore must be allowed by law, the Supreme Court purported to be interpreting the Fourteenth Amendment of the Constitution. But a fair reading of the Fourteenth Amendment, in light of the historical context of its enactment, supports the conclusion that the amendment was meant to protect all *human* life, including unborn children. The evil of slavery was precisely that the law arbitrarily had stripped a segment of living human beings of legal protection. The Supreme Court's decision in *Dred Scott* that freed slaves could not be citizens was based on the idea that slaves were merely property.¹⁷⁹ In *Bailey v. Poindexter's Executor*,¹⁸⁰ counsel seeking to strike down a provision in a will allowing the testator's slaves to choose between emancipation and sale argued that "in the eye of the law, so far certainly as civil rights and relations are concerned, the slave is not a person, but a thing The attribution of legal personality to a chattel slave, — legal conscience, legal intellect, legal freedom, or liberty and power of free choice and action . . . implies a palpable contradiction in terms."¹⁸¹ The court agreed that the slave "has no civil rights or privileges" and struck down the will provision allowing the slaves to choose freedom or sale because slaves had no legal capacity to choose.¹⁸² The court also suggested in dictum that only free persons enjoyed the right to "protection from injury."¹⁸³

The Thirteenth and Fourteenth Amendments were enacted to reverse decisions such as *Dred Scott* and *Bailey* and thus prevent the state from degrading "human beings. . . to the status of property, without civil rights — without even the right to the

Monagle, 868 F.2d at 1352; *People v. Smith*, 514 N.E.2d 211, 213 (Ill. App. Ct. 1987); *State v. Sahr*, 470 N.W.2d at 190-92; *Cleveland v. Municipality of Anchorage*, 631 P.2d at 1078-79; *City of St. Louis v. Klocker*, 637 S.W.2d at 176-77; *Commonwealth v. Wall*, 539 A.2d at 1328; *People v. Crowley*, 538 N.Y.S.2d 146, 149-50 (1989).

179. See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 405-406 (1856).

180. 55 Va. (14 Gratt.) 132 (1858).

181. *Id.* at 142-43.

182. *Id.* at 191-93.

183. *Id.* at 191.

law's protection of their lives. . . ."¹⁸⁴ In other words, those amendments were meant to prevent the type of legal reasoning employed in *Roe*. Thus:

The precise purpose of Congress in submitting the Thirteenth and Fourteenth Amendments was to establish that the concept of "human being" and "person" were one and the same concept rather than different concepts, as they had in practice been treated by many states, the federal courts, and even at times by the federal legislature and executive, as well as to insure constitutional protection for all human beings, of whatever age and of whatever condition, from the time of their creation and endowment with human nature at conception by God, with respect to their right to life and all other fundamental human rights. It was the view of their framers that the concept of "person" had been misconstrued and misapplied between the time of the adoption of the Constitution and their submission of these amendments for adoption. It was their purpose to establish a new definition of person consonant with biological reality and common sense so as to comprehend all human beings.¹⁸⁵

With regard specifically to abortion, at the time the Fourteenth Amendment was proposed and ratified, the prevalent mood in this country was against abortion, at any stage of the unborn's development. "Almost all the then existing states enacted abortion statutes during the nineteenth century."¹⁸⁶ By 1868, twenty-eight of the thirty-seven states had made abortion before quickening a crime. By 1883, thirty-five of thirty-eight states had done so.¹⁸⁷

As the Supreme Court itself noted in *Roe*, "[t]he anti-abortion mood prevalent in this country in the late nineteenth century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period."¹⁸⁸ The nineteenth century medical profession's attitude toward abor-

184. Byrn, *supra* note 94, at 837; see also Rice, *supra* note 9, at 30 n.81 ("Before the Civil War, the law considered slaves as chattels. 'The slave, therefore, had no political or civil rights If he was killed by a white, the white would probably not be tried for murder.'") (quoting M. MEILZER, *SLAVERY II: FROM THE RENAISSANCE TO TODAY* 202) (1972).

185. Joseph P. Witherspoon, *Impact of the Abortion Decisions Upon the Father's Role*, 35 *THE JURIST* 32, 42 (1975); see generally Byrn, *supra* note 94, at 837-39.

186. Byrn, *supra* note 94, at 827 & n.132.

187. *Id.* at 836 & nn.186 & 187.

188. 410 U.S. 113, 141 (1973).

tion was based primarily on the belief that the unborn child was a human being from the moment of conception. In 1867, the Medical Society of New York "condemned abortion at every stage of gestation as murder."¹⁸⁹ The American Medical Association had expressed a similar view almost a decade earlier. In 1859, the AMA adopted a report that called on state legislatures to pass laws restricting abortion, which the report called "the unwarranted destruction of human life."¹⁹⁰ In support of this call, the AMA cited the "grave defects of our laws . . . as regards the independent and actual existence of the child before birth as a living being . . . with strange inconsistency, the law fully acknowledges the fetus in utero and its inherent rights for civil purposes; while personally and as criminally affected it fails to recognize it and to its life as yet denies all protection."¹⁹¹ In 1871, the AMA Committee on Criminal Abortion amplified these conclusions, reporting, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less."¹⁹²

It is unlikely that the Fourteenth Amendment's framers "acted in defiance of both the 1859 AMA statement and state legislation, and deliberately created an unarticulated right of privacy which included the right to kill unborn children whom the framers intended to exclude from Fourteenth Amendment protection."¹⁹³ In fact, it is likely that "the framers of the Thirteenth and Fourteenth Amendments . . . knew well that the existence of the unborn child was a biological reality."¹⁹⁴ For the medical profession was not alone in calling for stricter abortion laws based on the unborn child's humanity. In 1868, Francis Wharton (not for the first time) urged that the quickening distinction in abortion statutes was unjust and "argued that unborn children should be protected regardless of gestational age."¹⁹⁵

In any event, it should not matter for the unborn child's constitutional protection whether the Thirteenth and Fourteenth

189. Byrn, *supra* note 94, at 836.

190. *See id.* at 835; *see also* NATHANSON, *supra* note 12, at 164.

191. NATHANSON, *supra* note 12, at 164 (quoting AMA report); *see also* Byrn, *supra* note 94, at 835.

192. Byrn, *supra* note 94, at 836; *see also* NATHANSON, *supra* note 12, at 164.

193. Byrn, *supra* note 94, at 838.

194. Rice, *supra* note 9, at 30 (citing Witherspoon, *supra* note 185, at 42).

195. Byrn, *supra* note 94, at 836 (citing 2 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 210-12 (6th ed. 1868)).

Amendment's framers had the unborn child specifically in mind when they drafted those amendments. Medical developments since the mid- and late-1800s, particularly the development of the medical discipline of fetology, have fully confirmed that distinctly human life begins at conception.¹⁹⁶ A court must often apply a constitutional provision to a situation the provision's drafters might not have envisioned, as for example, in *Katz v. United States*,¹⁹⁷ in which the Court held that electronic eavesdropping (a practice unknown in the 1790s) is a search within the meaning of the Fourth Amendment.¹⁹⁸ If the Thirteenth and Fourteenth Amendments were meant to equate humanity with personhood to ensure that government could never again proclaim any class of human beings as unworthy of legal protection, and if developments since the amendments were passed have confirmed that the unborn child is indeed a human being, the Thirteenth and Fourteenth Amendments should protect the class of unborn children as they protect any other class of human beings.¹⁹⁹

Notwithstanding constitutional provisions, abortion is not lawful according to the only law that ultimately matters — God's law. The Supreme Court's fiat that abortion is a constitutionally protected "right" cannot make abortion lawful by this standard. Unborn children are innocent human beings — indeed, as innocent as any human beings can be. Value judgments about when human

196. See generally NATHANSON, *supra* note 12, at 111-175. "Fetology is the study and science of the human unborn [F]etology has become such a comprehensive and well established medical specialty that it has even sprouted sub-specialties." *Id.* at 3-4. Ironically, fetology became recognized as a medical specialty in 1973, the year the Supreme Court decided *Roe*. See *id.* at 4.

197. 389 U.S. 347 (1967).

198. See *id.* at 351-53.

199. One might argue that this approach allows a judge to ignore the limits the amendment's drafters have placed on the rule of law created by the amendment. It goes without saying that in interpreting a legal text, a judge is bound by the limits on that text imposed by the text's drafters; otherwise, judges usurp decision making power not granted to them. See *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 138-39 (7th Cir. 1987) (Easterbrook, J., dissenting). We share this concern, but this concern does not in turn justify a narrow-minded literalism under which only evils identified at the time of the amendment's drafting are forbidden. *Id.* at 138 (en banc) (Bork, J., concurring). To interpret the word "person" in the Fourteenth Amendment Due Process and Equal Protection Clauses to exclude unborn children simply because the amendment's drafters were not aware of the breakthroughs in fetology that confirm the unborn's membership in the human race would be to adopt the "narrow minded literalism" Judges Bork and Easterbrook have warned against. To interpret "person" to include unborn children is faithful to the rule established by the Fourteenth Amendment — that no group of human beings may arbitrarily be denied legal protection, as the slaves were.

life should be protected, masquerading as “objective” theories about when human life begins, cannot obscure this fact.²⁰⁰ Killing innocent human beings is wrong; “Thou shalt not kill” is still (and always has been) a *commandment*, not a suggestion.

This involves the issue of whether there is a higher law than man’s law, and whether that higher law has any proper role in shaping and limiting human law. The natural law tradition, as exemplified most clearly in the writings of St. Thomas Aquinas, holds that human law is subject to a higher standard, God’s law, which includes the natural law. According to this tradition, a human law that “deflects from the law of nature” is no longer a law but a perversion of law, and an unjust law is “no law at all.”²⁰¹ A law can be unjust in two ways:

[F]irst, by being *contrary to human good* . . . either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory—or in respect of the author, as when a man makes a law that goes beyond the power committed to him—or in respect of the form, *as when burdens are imposed unequally on the community*, although with a view to the common good. The like are acts of violence rather than laws; because as Augustine says (De Lib Arb. i.5), a law that is not just, seems to be no law at all. Wherefore *such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause man should even yield his right*

Secondly, laws may be unjust through being *opposed to the Divine good*: such are the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law: and *laws of this kind must nowise be observed*, because, as stated in Acts v. 29, we ought to obey God rather than men.²⁰²

Any law allowing abortion, including the Supreme Court’s holding that women have a “right” to abortion, is unjust, and therefore “no law at all.” By singling out a class of human beings as unworthy of legal protection, who therefore can be legally killed at another person’s discretion, a law allowing abortion imposes burdens unequally on the community. Moreover, al-

200. See *supra* note 94 and accompanying text.

201. 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Part I - II, Q. 95, art. 2 & Q. 96, art. 4 (English Dominican trans., Christian Classics 1981) (1911) (hereinafter cited as “S.T.”).

202. *Id.* Q. 96, art. 4 (emphasis added). An example of a law contrary to Divine good would be a law compelling doctors to commit abortions. Doctors would be morally required to disobey such a law, even on pain of death. See Charles E. Rice, *Natural Law, the Constitution, and the Family*, 1 LIBERTY, LIFE AND FAMILY 77, 89 (1994).

though the government need not (and probably should not) prohibit every vice,²⁰³ human law must prohibit vices "without the prohibition of which human society could not be maintained."²⁰⁴ Aquinas mentions only two such vices: murder and theft. It is almost self-evident that no society could function if the law allowed people to kill each other at will. Abortion, as the intentional killing of an innocent human being, is murder. Thus, the state may never validly tolerate abortion.²⁰⁵ By requiring states to make abortion legal, *Roe* violates the Divine good; it forces states, and state officials, to abandon their duty to protect innocent human life.

The application of higher law principles is not foreign to the law. The most striking example of this application came in Nazi war crimes trials after World War II. For example, in one case, physicians who had participated in "experimental killings" defended themselves by asserting that their participation was legal under the laws of the Third Reich. An appellate court at Frankfurt rejected this argument, declaring:

Law must be defined as an ordinance or precept devised in the service of justice. *Whenever the conflict between an enacted law and true justice reaches unendurable proportions, the enacted law must yield to justice, and be considered a "lawless law [unrichtiges Recht]."* An accused may not justify his conduct by appealing to an existing law if this law offended against certain self-evident precepts of the natural law.²⁰⁶

In another case, a German officer who summarily shot a soldier who was absent without leave defended himself by asserting that his action was legal under Hitler's so-called *Katas-*

203. *See id.* Q. 96, art 2. Because most people are not capable of becoming perfectly virtuous, any attempt to forbid every vice would likely be impossible to enforce. This in turn could cause people to "despise the law" and thus result in "greater evils." *Id.* In most cases, then, deciding what vices to prohibit, and to what degree to prohibit those vices, is a matter for the lawmaker's prudential judgement. *See infra* notes 267-72 for a further discussion of this point.

204. *Id.* Q. 96, art. 2; *see Rice, supra* note 202, at 89, 90.

205. *See* LIBRERIA EDITRICE VATICANA, CATECHISM OF THE CATHOLIC CHURCH nos. 2270, 2273 (U.S. Catholic Conference trans., 1994). Although the law can never validly tolerate murder of an innocent, the analysis becomes a bit more complex when a person kills in a situation in which he would be morally justified in using force to defend himself or another except for the fact that his real purpose for killing is to harm the aggressor rather than to defend the victim (which in moral terms is murder). *See infra* text accompanying notes 267-72.

206. Ernst Von Hippel, Note, *The Role of Natural Law in the Legal Decisions of the German Federal Republic*, 4 NAT. L.F. 106, 111 (1959) (emphasis added) (quoting 2 SUEDDEUTSCHE JURISTEN ZEITSCHRIF 521 (1947)).

tropfen-order which allowed any member of the armed forces to kill instantly any deserter. Again, the German courts rejected the defense:

Even if the *Katastrophen-order* had been promulgated in due form it could not have become law [Recht]. For the positive legislative act is intrinsically limited. It loses all obligatory power if it violates the generally recognized principles of international law or the natural law [Naturrecht], or if the contradiction between positive law and justice reaches such an intolerable degree that the law, as *unrichtiges Recht*, must give way to justice.²⁰⁷

Post-war German courts also appealed to higher law to uphold the claims of Jewish citizens seeking to recover property that had been confiscated after they had fled Germany. The confiscation was legally authorized by the 1935 Nuernberg anti-Semitic legislation which had declared that German Jews living outside the country or who subsequently fled or emigrated would lose their German citizenship and forfeit their property to the state. In recognizing the Jewish citizens' claims, the court held that the Nuernberg law, "though clothed in the formal rules of the legality of a law, cannot be considered as a genuine *Rechtsnorm* as to content . . . [The law is] an extremely grave violation of the suprapositive principle of equality before the law as well as of the suprapositive guarantee of property. . . ."²⁰⁸

Abortion was not unknown to the Nazis; indeed, it was a major component of the Nazis' "systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups . . ."²⁰⁹ One of the indictments in the war crimes trials accused defendants of forcing Polish and other Eastern European women to undergo abortions.²¹⁰ But at trial, the prosecution made clear that crimes against the women themselves were not the only reason for indicting the defendants:

Abortions were prohibited in Germany . . . Abortions were also prohibited under the Polish Penal Code . . . and under

207. Heinrich Rommen, *Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany*, 4 NAT. L.F. 1, 11 (1959) (emphasis added) (citation omitted).

208. *Id.* at 14 (quoting 15 ENTSCHIEDUNGEN DES BUNDRSGERICHTSHOFS IN ZIVILSACHEN 76 (1951)).

209. 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 609-13 (U.S. Govt. Printing Office 1949). See generally WILLIAM BRENNAN, THE ABORTION HOLOCAUST 33-37 (1983).

210. TRIALS, *supra* note 209, at 613.

the Soviet Penal Code. . . . But *protection of the law was denied to unborn children of the Russian and Polish women in Nazi Germany*. Abortions were encouraged and even forced on these women.²¹¹

As one commentator has noted:

The right of the unborn child to the law's protection was a litigated issue Neither prosecution nor defense could ignore the aborted children who stood as mute and invisible accusers at the trial. On behalf of the United States, an American prosecutor condemned the defendants before a court composed of American judges because "protection of the law was denied to the unborn children."²¹²

Despite *Roe*, abortion is not lawful under a proper interpretation of the Fourteenth Amendment or under the higher law of God. But arguments based on a reconsideration of the Court's construction of the Fourteenth Amendment or on higher law principles are likely to fall on deaf ears. With regard to the Fourteenth Amendment, Justice Stevens correctly has noted that "[n]o member of [the Supreme] Court has ever suggested that a fetus is a 'person' within the meaning of the Fourteenth Amendment."²¹³ Even Justice Scalia, who among the Justices has authored some of the more articulate and pointed critiques of the Supreme Court's abortion jurisprudence, believes that the question of when human life begins is a "nonjusticiable question" that must be left to the "political process."²¹⁴ In Scalia's view, "The states may, if they wish, permit abortion-on-demand, but the Constitution does not *require* them to do so."²¹⁵

Higher law arguments are likely to fail as well, because *Roe* itself is "probably the clearest example of triumphant positivism

211. *Id.* at 1077 (emphasis added).

212. Byrn, *supra* note 94, at 834 (citation omitted).

213. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 779 n.8 (1986) (Stevens, J., concurring); see also *Casey*, 112 S. Ct. at 2839 (Stevens, J., concurring and dissenting) ("no member of the Court has ever questioned [the] fundamental proposition" that "an abortion is not 'the termination of life entitled to Fourteenth Amendment protection'") (citation omitted).

214. *Ohio v. Akron Reproductive Health Ctr.*, 497 U.S. 502, 520 (1990) (Scalia, J., dissenting); see also *Casey*, 112 S. Ct. at 2875 (Scalia, J., dissenting) ("There is of course no way to determine [whether the unborn child is a human life] as a legal matter; it is a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so.").

215. *Casey*, 112 S. Ct. at 2873.

in American law"²¹⁶ This type of positivism is the legal philosophy that holds that the higher law — in other words, objective morality — is irrelevant in formulating and applying civil law because it is impossible for man to know objective morality. To the positivist, therefore, law is essentially the assertion of the lawmaker's will. A law is valid so long as the lawmaker validly enacts it, and a law's content has nothing to do with its validity. In the words of Hans Kelsen, this century's leading positivist jurist:

[L]egal norms . . . are not valid by virtue of their content. Any content whatsoever can be legal; there is no human behavior which could not function as the content of a legal norm. A norm becomes a legal norm only because it has been constituted in a particular fashion, born of a definite procedure and definite rule The individual norms of the legal system . . . must be constituted by an act of will, not deduced by an act of thought.²¹⁷

When Kelsen wrote that "[a]ny content whatsoever can be legal," he meant it. Witness Kelsen's response to Nazi law that authorized concentration camps, forced labor, and murder: "Such measures may morally be violently condemned; but they cannot be considered as taking place outside the legal order"²¹⁸ Thus, to the positivist, "the law . . . under the Nazi government was law"²¹⁹

It follows that in positivist jurisprudence, the human being has no intrinsic value. To quote Oliver Wendell Holmes, for such a positivist there is no final reason for attributing to man a "significance different in kind from that which belongs to a baboon or a grain of sand."²²⁰ Thus, for the positivist, a legal "person" is whatever the court says is a legal person.²²¹ This philosophy undergirds the cases upholding the "right" to abortion. For instance, after finding that the unborn child is "human . . .

216. CHARLES E. RICE, *BEYOND ABORTION: THE THEORY AND PRACTICE OF THE SECULAR STATE* 49 (1979).

217. Hans Kelsen, *The Pure Theory of Law*, 51 L.Q. REV. 517, 517-18 (C.H. Wilson trans., 1935); see also HANS KELSEN, *PURE THEORY OF LAW* 198 (Max Knight trans., 1967).

218. KELSEN, *supra* note 217, at 40.

219. HANS KELSEN, *DAS NATURRECHT IN DER POLITISCHEN THEORIE* 148 (F.M. Schmoetz ed., 1963) (quoted in translation in FRIEDRICH A. HAYEK, *2 LAW, LEGISLATION AND LIBERTY (THE MIRAGE OF SOCIAL JUSTICE)* 56 (1976)).

220. 2 HOLMES-POLLOCK LETTERS 252 (Mark DeWolfe, ed., 1946); See generally Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 252 (1918).

221. See Senftle, *supra* note 136, at 544 (citing HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 93 (1945)).

and it is unquestionably alive," the New York Court of Appeals in *Byrn v. New York City Health and Hospital Corp.*²²² went on to hold that the legislature could define that living human as a nonperson, and also allow it to be aborted.²²³ In classic positivist reasoning, the court, citing Hans Kelsen among others, stated that:

What is . . . a legal person is for the law, including of course the Constitution, to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person (e.g., Kelsen, *General Theory of Law and State*, pp. 93 - 109) The point is that it is a policy determination whether legal personality should attach and not a question of biological or "natural" correspondence.²²⁴

Although *Roe* dodged the question of whether the unborn child is a human being, its holding that he is not a person regardless of his humanity involves the same positivist reasoning that the *Byrn* court made explicit.²²⁵ At least with respect to the unborn, this view is not confined to the Justices who would uphold *Roe*, as evidenced by Justice Scalia's belief that whether or not the unborn is human is a "value judgment" that must be left to the "political process."²²⁶ Thus, because *Roe* and the Court's other abortion cases are themselves statements of the reigning positivist jurisprudence, a defendant seeking to justify illegal action taken to defend unborn children will be unlikely, to say the least, to succeed by arguing that abortion contravenes a higher law.

222. 286 N.E.2d 887 (1972); see *supra* note 16.

223. See *id.* at 889-90.

224. *Id.* at 889.

225. In *Byrn*, the trial court had found that "as a medical fact, the fetus is a live human being." Both the appellate division and the court of appeals accepted this finding. The plaintiff in *Byrn* (who had challenged New York's permissive abortion law on behalf of a class of unborn children whom he represented as guardian ad litem) appealed to the Supreme Court. One of the questions on appeal was "[w]hether the [unborn children], each of whom is a live 'human being,' a 'child [with] a separate life,' a 'human' who is 'alive' and 'has an autonomy of development and character,'" are human persons entitled to the protections afforded such persons by the Constitution of the United States." Rather than face that question (and have to state explicitly that the unborn child is not a human being or that a living human being is not a person for constitutional purposes), the Supreme Court dismissed the *Byrn* appeal for want of a substantial federal question in the wake of *Roe*. See *Byrn*, *supra* note 94, at 841-42.

226. *Casey*, 112 S. Ct. at 2875 (Scalia, J., dissenting); *Ohio v. Akron Reproductive Health Ctr.*, 497 U.S. at 520; see also notes 214 and 215 and accompanying text.

The authors of the joint opinion in *Planned Parenthood v. Casey* began their opinion with the observation that “[l]iberty finds no refuge in a jurisprudence of doubt.”²²⁷ Whatever this “august and sonorous”²²⁸ observation means, it would have been more accurate to say that “liberty — or any other right — finds no refuge in a positivist jurisprudence.” For as slavery and the Nazi horrors graphically remind us, a legal system that does not acknowledge a fixed moral order to guide and limit human law cannot ultimately protect human rights. If law is simply the lawmaker’s exercise of will, and law’s content does not actually matter, what is to prevent the lawmaker from, for instance, requiring a woman to have an abortion? One may say the Constitution prevents this. But the Constitution itself is law and can be amended. In a purely positivist legal system, there is nothing to prevent amending the Constitution to allow forced abortions, or involuntary euthanasia, or property confiscation, or any other encroachment on human rights, so long as those with the legal authority to amend the Constitution can be persuaded to adopt that encroachment.

For all practical purposes, the only reason it is even necessary to discuss whether killing an abortionist could be legally justified is because of the corrupting influence *Roe* and the positivist jurisprudence it reflects have had on the law and on our society. In any civilized society, all human beings have a natural right to be treated as persons entitled to the right to live. The brutality of American slavery and Nazi Germany’s atrocities bear poignant reference to the danger of severing the natural bond between humanity and personhood.

Americans need to answer some hard questions. Would we think that a person who used necessary force to defend a slave was legally justified to use that force? Would we think that a person who physically defended a Jew from Nazi efforts to herd him to a death camp was legally justified? If we answer those questions, “yes,” we have to ask why is it that American law does not legally justify necessary efforts to protect the unborn from death. The apparent reason is that American law has deemed the unborn child unworthy of legal protection — just as earlier American courts deemed slaves and Nazi law deemed Jews unworthy of legal protection.

227. 112 S. Ct. at 2803 (joint opinion).

228. 112 S. Ct. at 2876 (Scalia, J., dissenting).

If American law regarded the unborn child as a person, as it should, that law, pursuant to the privilege to defend others and the general necessity defense, would allow others to defend that child against the abortionist and, possibly, even to kill the abortionist to defend that child. More basically, however, if American law regarded the unborn child as a person, there would be no legalized abortuaries, and legal authority, rather than private individuals acting on their own initiative, would defend the child. The question of whether killing abortionists can be legally and morally justified, would become again what it ought to be — an interesting but abstract academic question.

II. IS KILLING THE ABORTIONIST MORALLY JUSTIFIED?

Suppose a court does allow a defendant to argue that killing an abortionist was a legally justifiable use of force in defense of another. Suppose further the defendant convinces the jury to acquit him. This would provide legal vindication for the defendant. Legal vindication is nice (particularly when a defendant is facing the death penalty), but man's ultimate goal is eternal salvation.²²⁹ When the rich man asked Jesus what he had to do to have eternal life, the first thing Christ told him was to "keep the commandments," including the commandment, "You shall not kill."²³⁰ Likewise, the First Letter of John tells us that "the way we may be sure that we know [Christ] is to keep his commandments."²³¹

Thus, in the Christian scheme of things, a more important question than "Does civil law justify killing an abortionist?" is, "Does God's law justify killing the abortionist?" We turn now to how Roman Catholic moral teaching would answer that question.

According to St. Thomas Aquinas, the natural law is a rule of reason that God has promulgated in man's nature so that man can discern how to act to achieve the purpose God created him for — eternal salvation.²³² Unlike the relativists, St. Thomas

229. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 205, nos. 1, 1700-01.

230. See *Matthew* 19:16-18; see also POPE JOHN PAUL II, VERITATIS SPLENDOR [THE SPLENDOR OF TRUTH] no. 6. (Vatican trans., 1993).

231. *1 John* 2:3; see also *1 John* 2:4 ("Whoever says, 'I know him,' but does not keep his commandments is a liar . . .").

232. See 2 S.T., Part I-II, Q. 91, art 2; cf. *Romans* 2:15 ("the demands of the law are written in their hearts"). The natural law, though closely associated with St. Thomas, is neither a Catholic doctrine nor even a Christian invention. Among others, pre-Christians Aristotle and Cicero, and non-Catholic Christians such as Luther, Calvin, Coke, and

taught that we can know the commands of the natural law by the use of reason.²³³ However, St. Thomas also recognized that because of the weakness and concupiscence that flow from original sin, our reason is flawed. Therefore, God also has given us His divine revelation, which St. Thomas also referred to as divine law, to ensure that despite our flawed reason we know what is necessary to achieve our destiny of eternal salvation.²³⁴ In the Catholic tradition, revelation is found in both Sacred Scripture and Sacred Tradition, which "comes from the apostles and hands on what they received from Jesus' teaching and example and what they learned from the Holy Spirit."²³⁵ Catholics affirm that Christ has entrusted this "deposit of faith" to a teaching Church that has authority to interpret that revelation and to teach authoritatively on faith and morals, including the natural law.²³⁶

As already noted, the human law cannot validly permit the murder of innocent human beings.²³⁷ Despite the Supreme Court's decree, abortuaries, which are murder factories, have no moral right to exist. *Roe v. Wade*, which defined the unborn child as a nonperson subject to execution at the discretion of others, is an unjust law and therefore void.²³⁸ So, too, otherwise neutral and just trespass laws can be unjust when they are applied to prevent nonviolent "rescues" at abortuaries. Whether such a nonviolent

Blackstone have acknowledged the existence of a natural moral law. Because natural law is a rule of reason implanted in man by God, and reason is not the exclusive domain of Catholics, it is natural that others than Catholics have recognized the natural law's existence. See generally sources cited in CHARLES E. RICE, 50 Questions on the Natural Law: What It Is and Why We Need It 30-36 (1993). Catholics, however, recognize the Catholic Church's claim to authoritatively interpret the natural law, and its application.

233. See 2 S.T. Part I-II, Q. 91, art. 2.

234. See *id.* Part I, Q. I, art. I; see also *id.*, Part I-II, Q. 94, art. 6 ("[in] secondary precepts, the natural law can be blotted out from the human heart, either by evil persuasions . . . or by vicious customs and corrupt habits. . .").

235. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 205, no. 83; cf. *John* 21:24-25 ("There are also many other things that Jesus did, but if these were to be described individually, I do not think the whole world would contain the books that would be written"); *2 Thes.* 2:15 ("hold fast to the traditions that you were taught, either by an oral statement or by a letter of ours"); *1 Tim.* 3:15 ("the church of the living God [is] the pillar and foundation of truth"); see generally ALAN SCHRECK, CATHOLIC AND CHRISTIAN 41-53 (1984) for a good discussion of the relationship between apostolic tradition and the Bible.

236. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 205, no. 84. See generally SCHRECK, *supra* note 235, at 41-98 for an overview of the Biblical and historical basis for Catholic belief about the Church, the Papacy, and the Church's authority to interpret and teach God's revelation.

237. See *supra* notes 203-05 and accompanying text.

238. See *id.*

rescue will be morally justified depends upon prudential judgments.²³⁹ But more to the immediate point, it does not follow from the injustice of *Roe v. Wade* that laws forbidding the killing of the abortionist are unjust. The *Catechism of the Catholic Church* states two general criteria that govern this matter: First,

Human life is sacred because from its beginning it involves the creative action of God and it remains forever in a special relationship with the Creator, who is its sole end. God alone is the Lord of life from its beginning until its end: no one can under any circumstance claim himself the right directly to destroy an innocent human being.²⁴⁰

Second,

In the Sermon on the Mount, the Lord recalls the commandment, "You shall not kill," and adds to it the proscription of anger, hatred and vengeance. Going further, Christ asks his disciples to turn the other cheek, to love their enemies. He did not defend himself and told Peter to leave his sword in its sheath.²⁴¹

Despite the evil of what abortionists do, their lives are still sacred, and the command "You shall not kill" still applies generally to abortionists. The Church, however, affirms that people have a right to defend themselves and others:

The legitimate defense of persons and societies is not an exception to the prohibition against the murder of the innocent that constitutes intentional killing. "The act of self-defense can have a *double effect*: the preservation of one's own life; and the killing of the aggressor The one is intended, the other is not."²⁴² Love toward oneself remains a fundamental principle of morality. Therefore it is legitimate to insist on respect for one's own right to life. Someone who defends his life is not guilty of murder even if he is forced to deal his aggressor a lethal blow: "If a man in self-defense uses more than necessary violence, it will be unlawful, whereas if he repels force with moderation, his defense will be lawful Nor is it necessary for salvation that a man omit the act

239. For a more detailed discussion of this issue, see Rice, *supra* note 9; see also *infra* text accompanying notes 281-82.

240. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 205, no. 2258.

241. *Id.* no. 2262.

242. *Id.* no. 2263 (emphasis added) (quoting 3 S.T., Part II-II, Q. 64, art. 7).

of moderate self-defense to avoid killing the other man, since one is bound to take more care of one's own life, than of another's."²⁴³ Legitimate defense can be not only a right but a grave duty for someone responsible for another's life, the common good of family or of the state.²⁴⁴ The prohibition of murder does not abrogate the right to render an unjust aggressor unable to inflict harm. Legitimate defense is a grave duty for whoever is responsible for the lives of others or the common good.²⁴⁵

The issue is whether intentionally killing an abortionist is a legitimate exercise of the right to defend others, and therefore not murder. In answering this question, it is essential to note that the right to defend oneself or another does not authorize the *intentional* killing of the aggressor. As we have indicated above, the principle of the double effect governs this situation.²⁴⁶ Catholic theologian John Hardon, S.J., explained this principle clearly with respect to operations to remove the cancerous womb of a pregnant woman. Such operations can be justified by the principle of the double effect because the death of the child is an unintended effect of an operation independently justified by the necessity of saving the mother's life. They do not involve the intentional killing of the child for the purpose of achieving another good — for example, the preservation of the mother's life.

As Father Hardon notes:

To be licitly applied the principle must observe four limiting norms:

1. The action (removal of the diseased womb) is good; it consists in excising an infected part of the human body.

2. The good effect (saving the mother's life) is not obtained by means of the evil effect (death of the fetus). It would be just the opposite, e.g., if the fetus were killed in order to save the reputation of an unwed mother.

3. There is sufficient reason for permitting the unsought evil effect that unavoidably follows. Here the Church's guidance is essential in judging that there is sufficient reason.

4. The evil effect is not intended in itself, but is merely allowed as a necessary consequence of the good effect.

243. *Id.* no. 2264 (quoting 3 S.T., Part II-II. Q. 64, art. 7).

244. *Id.* no. 2265.

245. *Id.* no. 2321.

246. *See supra* note 243 and accompanying text.

Summarily, then, the womb belongs to the mother just as completely after a pregnancy as before. If she were not pregnant, she would clearly be justified to save her life by removing a diseased organ that was threatening her life. The presence of the fetus does not deprive her of this fundamental right.²⁴⁷

The principle of the double effect could apply to the defense of the unborn in some cases. If a person were in the room with an abortionist as he was about to perform an abortion, he would have the moral right, and perhaps the duty, to use reasonable force to prevent that imminently threatened killing of the unborn child.²⁴⁸ The defender's action would be moral if he used only the force necessary to stop the killing and if his intent was to stop the killing rather than harm the abortionist. It is most unlikely, however, that deadly force would be necessary or justified even in that situation. And the defender surely would have no right to kill the abortionist intentionally.

In Catholic moral teaching, it is never acceptable for a person to do an intrinsically evil act even if his motive is to bring about some good result.²⁴⁹ "One may not do evil so that good may result from it."²⁵⁰ Catholic teaching is clear that intentional killing is wrong:

The fifth commandment forbids *direct and intentional killing* as gravely sinful. The murderer and those who cooperate voluntarily in murder commit a sin that cries out to heaven for vengeance.²⁵¹ The fifth commandment forbids doing anything with the intention of *indirectly* bringing about a person's death. The moral law prohibits exposing someone to mortal danger without grave reason, as well as refusing assistance to a person in danger . . . *Unintentional* killing is not morally imputable. But one is not exonerated from grave offense if, without proportionate reasons, he has acted in a way that brings about someone's death, even without the intention to do so.²⁵²

The only situations in which anyone ever has the right to intentionally kill anyone are during a just war or a justified

247. JOHN A. HARDON, S.J., THE CATHOLIC CATECHISM 337 (1975).

248. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 205, no. 2265; see also *id.* no. 2269.

249. See *id.* nos. 1749-61; see generally VERITATIS SPLENDOR, *supra* note 230, nos. 95-97.

250. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 205, no. 1756.

251. *Id.* at no. 2268.

252. *Id.* at no. 2269.

rebellion (or what the *Catechism of the Catholic Church* calls "armed *resistance* to oppression by political authority")²⁵³ or in carrying out a lawful sentence of capital punishment.²⁵⁴ The common thread running through all these exceptions is that they involve the use of force by the state or, in the case of justified rebellion, by persons who justifiably have assumed the state's authority to protect the common good.²⁵⁵ Moreover, restrictions exist on these exceptions to the general rule. The death penalty may be inflicted only on a person judged guilty of a capital crime, and a just war or justified rebellion is subject to the mandate of noncombatant immunity, which forbids the direct and intentional killing of noncombatants.²⁵⁶ Whether in a just war or any other circumstance, no one ever has the moral right intentionally and directly to kill an *innocent* human being.

As we have seen, however, this moral reasoning has not uniformly been reflected in the law. The Model Penal Code's drafters and LaFave and Scott have concluded that the lesser general evils defense could justify killing an innocent human being.²⁵⁷ Some of the situations in which the defense might justify such killing may arguably involve an application of the double effect principle.²⁵⁸ On the other hand, the Model Penal Code itself recognizes that other such cases will not. Take, for example, the situation we discussed earlier: townspeople must kill their mayor or everybody in town will be killed.²⁵⁹ Catholic moral teaching would condemn the killing of the mayor. True, the townspeople would be acting to bring about a good effect (that is, acting to save their lives). But, as we have seen, any intentional killing of another human being outside of just war, justified rebellion, and capital punishment is morally unjustified. Also, as we have seen, it is never right to intentionally perform an evil act to achieve a good end. Killing the mayor would fall outside the double effect principle because that principle, consistent with these more fundamental principles, does not allow a person intentionally to do an evil act to obtain good results.

253. *Id.* at no. 2243.

254. *See id.* (justified rebellion); *id.* nos. 2312-14 (just war); 3 S.T., Part II-II, Q. 64, art. 2 (capital punishment). For a more detailed examination of Catholic teaching on capital punishment (an examination that is beyond this article's scope), *see* RICE, *supra* note 232 at 57-60, and sources cited therein.

255. *See* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 205, nos. 2263-65, 2321.

256. *Id.* at nos. 2312-14 (just war), 2266 (capital punishment).

257. *See supra* notes 160-63 and accompanying text.

258. *See* MODEL PENAL CODE § 3.02, cmt. 3 n.15.

259. *See supra* note 163 and accompanying text.

The Model Penal Code and LaFave and Scott maintain that necessity could legally justify intentionally killing the mayor, based strictly on the killing's consequences — the townspeople will live if the mayor dies. LaFave and Scott state this reasoning: “[I]t is better that two lives be saved and one lost than that two lives be lost and one saved.”²⁶⁰ The suggestion in *Holmes* that innocent lifeboat occupants may be sacrificed if the victims are impartially chosen depends on this same reasoning. The decision in *Rex v. Bourne* went even further; it allowed a “less valuable” life (the unborn’s) to be taken to save a “more precious” life (the mother’s).

Compare the Model Penal Code, *Holmes*, and *Bourne* with the decision in *Regina v. Dudley and Stevens*,²⁶¹ another lifeboat case. In *Dudley and Stevens*, three sailors and a cabin boy were adrift in a lifeboat more than 1,000 miles from land. On the twentieth day, after nine days without food and seven without water, two of the sailors, Dudley and Stevens, killed the cabin boy. They then fed on his flesh and drank his blood for four days until picked up by a passing ship. Dudley and Stevens were tried for murder.²⁶²

Although the jury found that Dudley and Stevens probably would have died had they not killed and eaten the cabin boy, the appellate court found that this did not justify the killing. The contention that the killing could be anything else but murder was, to the court, “both new and strange.”²⁶³ The court ultimately rejected the sailors’ necessity defense:

[T]he deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognized excuse admitted by the law [T]here was in this case no such excuse, unless the killing was justified by what has been called “necessity.” But the temptation to the act which existed here was not what the law called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law [to be] an absolute defense of it. It is

260. LAFAVE & SCOTT, *supra* note 36, § 5.4, at 442; see also MODEL PENAL CODE § 3.02, cmt. 3, at 15.

261. 14 Q.B.D. 273 (1884).

262. *Id.* at 273-75.

263. *Id.* at 281.

not so. To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it [I]t is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow.²⁶⁴

Unlike the Model Penal Code, *Holmes*, and *Bourne*, the result in *Dudley and Stevens* is consistent with sound moral reasoning. To intentionally kill another innocent human being is morally unjustifiable. It should also be legally unjustifiable. An abortionist can hardly be labeled innocent. But even in self-defense or defense of others, against an aggressor, the intent must be to defend rather than to kill. Consider two situations. In the first, Able, an abortionist's assistant in the killing room, suddenly has a change of heart just as the abortion begins. He intends to defend the child, not to kill the abortionist. He has a right to use force to defend the child. In the second situation, Baker, an opponent of abortion, shoots the abortionist in the parking lot as he is approaching the building to do abortions a few minutes later. Why is Able's act, but not Baker's, morally justified?

One difference between the two cases is the harm's imminence or immediacy. St. Thomas speaks of the justified defender who "*repels force with moderation.*"²⁶⁵ Able is acting to repel force. He engages himself in the child's immediate defense; if he has no intent but to defend that child, and he has no separate intent to harm or kill the abortionist, his action is morally justified. Recall that in justified self-defense or defense of others, the intent cannot be to kill the aggressor, but rather to stop the attack. Baker, by contrast, is not in the heat of a physical struggle to save the child. He is not actually repelling force. Indeed, he cannot be acting to repel force because the abortionist is not using force at the time Baker acts. Instead Baker thinks, "I can get no closer than this. If I do not stop him he will go in there and murder babies. So I will shoot him in the head." His purpose or motive is to save children. But his intent in the act he performs that moment is to blow the baby killer's head off to achieve that purpose of saving children. Apart from capital punishment, the just war, or the justified rebellion, which derive from God's authority, no one may ever intentionally kill anyone. Baker is intentionally doing an intrinsically evil thing to achieve a good end. Although his motive is to save babies, in actual intent and

264. *Id.* at 286-87 (emphasis added).

265. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 205, no. 2264 (quoting 3 S.T., Part II-II, Q. 64, art. 7).

effect he is acting as the abortionist's executioner. He assumes God's authority to decide when the abortionist will face God's final judgement. His act is not morally justified. St. Thomas, quoting St. Augustine, said that "A man who, without exercising public authority, kills an evildoer, shall be judged guilty of murder, and all the more, since he has dared to usurp a power which God has not given him."²⁶⁶

We earlier suggested that the temporal limits imposed by the law on the use of defensive force are flexible enough to allow argument that killing the abortionist in the parking lot could be legally justified as in defense of the child because the parking lot is as close as the killer could get. But we have rejected this argument as a matter of Catholic moral teaching, which teaches that killing in defense of oneself or another is justified only if done actually to resist force and only if there is no separate intent to kill. Moreover, even if the defender were resisting imminent force, so that the law would justify his act, his act could still be immoral. Suppose Freddy happens upon Professor Able, who is in the process of choking Baker to death. The only way Freddy can defend Baker is to shoot Professor Able. Freddy, recognizing this situation, thinks to himself, "Now's my chance to get Able for giving me a B in torts. I won't have to go to jail for it because I'm defending Baker. Hasta la vista, baby!" Freddy then shoots the hated Professor Able to death.

It is possible that Freddy's act could be legally justified, despite the bad motive or purpose with which Freddy acted. Freddy has met all the legal requirements of the defense of others justification: he reasonably believed force was immediately necessary to protect Baker and he used only that force which was necessary to defend Baker. The law likely would not inquire into Freddy's real purpose or motive for shooting Professor Able.²⁶⁷ Morally, however, Freddy's act was wrong. Although the immediate object of Freddy's act was to resist the force against Baker, Freddy also had the separate intent to kill Professor Able in revenge for Professor Able's insufficiently generous grading

266. 3 S.T., Part II-II, Q. 64, art. 3; cf. 4 WILLIAM BLACKSTONE, COMMENTARIES *178-79 (execution by anyone other than proper public authority is murder). As we have noted, *supra* note 87, Paul Hill's killing of an abortionist's escort was nothing more than an unauthorized execution. In terms of Catholic moral doctrine, his shooting of the abortionist also amounts to an execution, not a justified defense of others. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 205, nos. 1749-1761.

267. See ROBINSON, *supra* note 36, § 122(b), at 15-16.

policies.²⁶⁸ The double effect principle would not apply here because Freddy intended the evil effect (Professor Able's death).

This raises an interesting question: *Should* the law justify Freddy's act? One could say that ideally, it should not; the law should not tolerate any murder. But that is not to say that the law *must* refuse to justify Freddy's act. Objectively speaking, Freddy's act was necessary to save Baker's life from an attack in progress, which, absent Freddy's bad purpose, would be a moral act. In fact, it is likely that Freddy did act to save Baker's life in the sense that but for the need to save Baker, Freddy would not have killed Professor Able. To inquire into Freddy's "real reason" for acting would raise delicate issues regarding intent, purpose, and motive that could exceed the law's practical competence. One could justify this inquiry; but a law-maker could also reasonably and morally conclude that such an inquiry is not worth the cost of possibly deterring *justified* defensive force.²⁶⁹

St. Thomas was cautious about the law's role in society; he taught that the law should not try to do too much. This is reflected in the principle that the law should not try to forbid every vice, lest the law's unenforcability cause people to despise it.²⁷⁰ Moreover, the requirement that murder of innocents be forbidden is based on the principle that the human law must forbid vices "without the prohibition of which human society could not be maintained."²⁷¹ While it is almost self-evident that no society could function if the law allowed people to kill each other at will, it is not so evident that failing to inquire into the "real purpose" of an actor exercising otherwise morally justified defensive force would be detrimental to society.²⁷² A lawmaker in this situation would be entitled to exercise prudential judgment

268. Cf. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 205, no. 1755 (an objectively good act is immoral if done for an evil end).

269. Suppose, for instance, that Freddy had expressed his hatred for Professor Able to many people but that when he actually confronted Professor Able, his purpose was pure — he only wanted to save Baker. A prosecutor could use Freddy's prior statements as evidence that he was really acting to kill Professor Able and that Able's aggression toward Baker was just a convenient excuse for Freddy to act. In that situation, Freddy could be convicted of murder even though he was morally blameless *and* met all the usual requirements of the defense of others justification. The possibility of such a conviction, in turn, could deter people from coming to the morally justified defense of others.

270. 2 S.T., Part I-II Q. 96, art. 2.

271. *Id.*

272. *See supra* note 269.

in determining whether to make acts like Freddy's criminal; and one could reasonably agree that prudence dictates not prosecuting defendants like Freddy.²⁷³ The most one could demand from the law would be to impose a stringent imminence requirement, confining defense of others to actions necessary to immediately repel force. This requirement would, in effect, act as a proxy for an intent requirement: the law could presume reasonably that action taken that is necessary to actually repel force is intended to repel force, and thus justified. This merely recognizes that human law, and people who must apply human law, are limited in their ability to make subtle judgments about a person's subjective reasoning process.

This situation, however, is far removed from the situation in which a defendant kills an abortionist in the abortuary parking lot as he arrives at work. As we have seen, the object of the killing cannot be to repel force because the abortionist is not using any force at that time. No subtle and difficult determination of purpose or motive is necessary to conform law to morality in this case; no matter what the defendant's purpose for killing the abortionist, his act is still immoral. Also, as we have noted earlier, if killing the abortionist in the parking lot is justifiable simply because that is as close as the killer can get, why not allow killing the abortionist on the golf course or at the video store if that is the only practical way to stop him? Why not allow open season on abortionists? This kind of vigilante justice is not socially desirable and in fact could conceivably destroy society. One could argue as well that the law must not justify killing the abortionist in the parking lot. We believe that in any event, a prudent interest in maintaining civilized society argues strongly that the law should not allow a defense of others justification in this situation.

Intentionally killing an abortionist could be justified morally only if it were incidental to a justified rebellion, in which "armed resistance to oppression by political authority" would be justified.²⁷⁴ Five conditions must be met to justify a rebellion against the government: there must be a "certain, grave, and prolonged violation of fundamental rights;" "all other means of redress must

273. Contrast this to a situation in which Freddy kills Professor Able without knowing of Baker's plight, but discovers later to his happy surprise that he actually saved Baker's life. In such a case, the law likely would not justify Freddy's act and probably should not. See LAFAYE & SCOTT, *supra* note 36, § 5.4, at 446; *but see* ROBINSON, *supra* note 36, § 122(b) (arguing for an objective rule of justification in which it would not matter if the defendant knew of the circumstances justifying his action).

274. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 205, no. 2243.

have been exhausted;" rebellion "will not provoke worse disorders;" the rebellion carries "a well-founded hope of success;" and it must be "impossible reasonably to foresee any better solution."²⁷⁵ A justified rebellion involves the assumption by private persons of the prerogative of the state to wage a just war. In a rebellion the war is waged against the state itself. The rebellion itself would be a just war, in which the abortionist, as someone directly a part of the "grave . . . violation of fundamental rights" justifying the rebellion, would be rightly regarded as a combatant and therefore a legitimate target.²⁷⁶ It is true that in *Roe v. Wade* and later cases, the Supreme Court, with the cooperation of Congress and the Executive branch, has stripped an entire class of human beings of legal protection and has precipitated an unraveling of the American civic fabric. In that sense, there has been a grave violation of fundamental rights. However, it cannot legitimately be concluded that the situation has disintegrated so far beyond other means of correction that armed rebellion is justified in whole or in part. For one thing, hope of success would be speculative at best. Moreover, if the legal means of changing government in a democratic republic are still open, it is likely that if sufficient popular support existed for the rebellion to have a "well-founded hope of success," sufficient support to end the rights violation legally would exist also. Sanctioning rebellion would just invite "worse disorders" by implicitly inviting revolutionary action by the disaffected and unstable.

Rebellion is not something to be lightly sanctioned. The just war waged by a government is limited by the fact that it can be waged only by the duly constituted public authority. A rebellion, by contrast, involves an assumption of all or part of the public authority by private persons who themselves decide that they are justified in taking over the state's power in whole or in part. And if one person can so decide, so can another. In 1967, Pope Paul VI said that "a revolutionary uprising — save where there is manifest long-standing tyranny which would do great damage to fundamental personal rights and dangerous harm to the common good of the country — produces new injustices, throws more elements out of balance and brings on new disasters."²⁷⁷

275. *Id.*

276. *See id.*

277. POPE PAUL VI, POPULORUM PROGRESSIO, [ON THE DEVELOPMENT OF PEOPLES] no. 31 (NCWC News Serv. trans., 1967).

The divine prohibition of intentional and direct killing (apart from capital punishment and the just war, including justified rebellion) is absolute. In his 1993 encyclical, *Veritatis Splendor*, Pope John Paul II stated:

The *negative precepts* of the natural law are universally valid. They oblige each and every individual, always and in every circumstance. It is a matter of prohibitions which forbid a given action *semper et pro semper*, without exception, because the choice of this kind of behavior is in no case compatible with the goodness of the will of the acting person, with his vocation to life with God and to communion with his neighbor. It is prohibited — to everyone and in every case — to violate these precepts. They oblige everyone, regardless of the cost, never to offend in anyone, beginning with oneself, the personal dignity common to all The Church has always taught that one may never choose kinds of behavior prohibited by the moral commandments expressed in negative form in the Old and New Testaments.²⁷⁸

If it is morally illicit to kill the abortionist, can a person at least inflict a non-lethal injury or property damage on abortionists? Instead of killing the abortionist, can a person break his arms to prevent him from killing babies? Or can a person destroy his property to put economic pressure on him to stop killing babies? Recall that we raised these possibilities in considering whether a person could show it was necessary, in legal terms, to kill an abortionist.²⁷⁹ But in moral terms, even the intentional infliction of a non-lethal injury would probably be unjustified. If Baker intentionally wounded the abortionist in the driveway, for example, by shooting him in the arm, that act would still lack the imminence necessary for defense of others because Baker would not actually be resisting force. It would therefore seem to be unjustified in principle. In response to the question "Whether it is lawful for a private individual to kill a man who has sinned?" St. Thomas rejected the infliction of "harm" which is not sanctioned by public authority: "It is lawful for any private individual to do anything for the common good, provided it harm nobody: but if it be harmful to some other, it cannot be done, except by virtue of the judgment of the person to whom it pertains to decide what is to be taken from the parts for the welfare of the

278. VERITATIS SPLENDOR, *supra* note 230, no. 52.

279. See *supra* note 81 and accompanying text.

whole.”²⁸⁰ Thus, to inflict any intentional physical harm on abortionists is morally unjustifiable.

Invasion of property rights by trespass or destruction or damage of property is probably unjustified on prudential grounds. Those who rescue or bomb may save lives, but legal sidewalk counselors also can claim success in saving lives, and they can be at the abortuary day after day rather than wasting time on their civil and legal defenses.²⁸¹ Illegal activity, particularly violence, also can be counterproductive. It distracts attention from the real, spiritual nature of the abortion problem, generates adverse publicity for the pro-life movement, motivates the passage of draconian laws directed at pro-lifers such as FACE, and diverts pro-life efforts from more useful approaches. More importantly, it can accelerate the disintegration of the civil order with predictably harmful impact on the common good.²⁸²

All these prudential concerns apply with even greater force to killing abortionists. And the killing raises another concern: How can one be sure that an abortionist will not someday repent, stop killing, and perhaps even work for the pro-life cause? One may argue this is unlikely. But in the early 1970s, Dr. Bernard Nathanson operated the largest abortuary in New York. If a Paul Hill had decided at that time to kill Nathanson, the pro-life movement would have been deprived of one of its most articulate spokesmen, a man whose work has probably saved more babies' lives than the Pensacola killings.

In any event, what is really wrong in the pro-life movement is that for two decades the movement has approached abortion as a legal and political problem. In a good-faith effort to “save lives,” the leaders of the establishment pro-life movement have proposed one compromise after another, affirming in their actions, despite their rhetoric, that the right to life is alienable — and therefore that the unborn child is a nonperson who, though innocent, may be executed in at least some cases. Moreover, Christians and others who deeply oppose abortion have supported

280. 3 S.T., Part II-II, Q. 64, art. 3.

281. See Rice, *supra* note 9, at 32.

282. These objections probably have less force in the case of non-violent rescues than in the case of damage or destruction to property. One could argue that a non-violent rescue “draws public attention to the abortion problem and thereby promotes a solution through creative tension on the streets and in the courts.” *Id.* at 33. But rescuers still must spend time defending themselves legally that they could have spent engaged in more productive pro-life work.

candidates for public office who believe that abortion should be legal, simply because these candidates favor more restrictions on legal abortion than their opponents. This approach does more harm than good by permeating the public discourse with the message that even pro-life "leaders" think that innocent life is negotiable, thus suggesting that even pro-lifers do not take seriously their own rhetoric about the unborn's humanity and the inalienability of the right to live. This, in turn, leads others not to take such rhetoric seriously and undercuts the pro-life message.

Bombing and shooting exacerbate the problem: The pro-death forces who dominate our government would like nothing more than to see the pro-life movement disintegrate in spasms of bombing and shooting. Such would confirm the pro-death assumption that there is no objective morality and that the issue is reducible to the utilitarian exercise of power. It is therefore more important than ever to reject violence in the pro-life cause. It may be a cliché, but it is still true that two wrongs do not make a right; they simply make two wrongs.

III. CONCLUSION

It is possible to argue that under commonly applied criminal law principles, killing an abortionist as he arrives at the abortuary is a legally justified use of force in defending another. However, it is unlikely that any court would accept that argument, primarily on the grounds that force used to prevent abortion is unjustified because the Supreme Court's decisions in *Roe v. Wade* and its progeny have made abortion a woman's constitutionally protected right. One could argue that *Roe's* holding is a perversion of the Fourteenth Amendment which the Supreme Court purported to interpret, and that, in any event, abortion is unlawful under God's higher law. Courts operating in the present milieu of positivist jurisprudence would likely turn a deaf ear to these arguments; the Supreme Court and the legislatures have spoken; the case is closed. In any event, intentionally harming abortionists is not morally justified, and the law should not (and probably may not legitimately) sanction such clearly immoral conduct.

Forsaking violence does not leave pro-lifers powerless. Instead, it frees the movement to rely completely on its strongest weapons: the truth and prayer.

Pro-lifers should speak the truth in the political realm. No candidate who believes that the law should authorize the exe-

cution of the innocent, born or unborn, is fit to hold public office. Pro-lifers should not support — let alone propose — any law which would authorize execution of the unborn in any case. It is time to go back to the position taken by Roman Catholic Cardinals Krol, Medeiros, Manning, and Cody in their Senate testimony in 1974. Speaking on behalf of the National Conference of Catholic Bishops, they took to the Senate the N.C.C.B. post-*Roe* proclamation that urged “legal and constitutional conformity to the basic truth that the unborn child is a ‘person’ in every sense of the term from conception.”²⁸³ They refused to support the proposed Buckley Amendment to the Constitution because it would have allowed abortion to save the mother’s life. And they insisted that “the prohibition against direct and intentional taking of human life should be universal and without exceptions.”²⁸⁴ Pragmatism does not work because it dilutes this message. Pro-lifers must proclaim — in the media, in the courts, in journals, in crisis pregnancy centers, and in front of the abortuaries — the reality that the only coherent basis for affirming absolute rights in the human person is that he is an immortal creature made in the image and likeness of God, with a dignity which absolutely transcends the state’s interests.

Most importantly, the pro-life movement must put its primary reliance on prayer. All pro-lifers should pray within their own tradition. What is important is that pro-lifers pray for this country, for the women who contemplate, or who have committed, abortion, and especially for the abortionists and all who support them.

Philosophers and politicians have tried for three centuries, and especially in the last few decades in this country, to build a society as if God did not exist. But their effort is a total failure. As John Paul II has stated, the Christian Restoration of faith and culture is well underway. The pro-life movement can play an important part in that restoration, not by violence, but by adhering to objective moral principle, speaking the truth without compromise, and most importantly, by praying.

283. NAT’L CONF. OF CATHOLIC BISHOPS, DOCUMENTATION ON THE RIGHT TO LIFE AND ABORTION 55 (1974) (quoted in CHARLES E. RICE, NO EXCEPTION: A PRO-LIFE IMPERATIVE 88 (1990)).

284. RICE, *supra* note 283 (quoting from Record of Hearings on S.J.Res. 119 and S.J. Res. 130 before the Subcomm. on Constitutional Amendments (93d Cong., 2d Sess. (1974))).

