

PAPER

Spontaneous abortion and unexpected death: a critical discussion of Marquis on abortion

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ABSTRACT

In his classic paper, 'Why abortion is immoral', Don Marquis argues that what makes killing an adult seriously immoral is that it deprives the victim of the valuable future he/she would have otherwise had. Moreover, Marquis contends, because abortion deprives a fetus of the very same thing, aborting a fetus is just as seriously wrong as killing an adult. Marquis' argument has received a great deal of critical attention in the two decades since its publication. Nonetheless, there is a potential challenge to it that seems to have gone unnoticed. A significant percentage of fetuses are lost to spontaneous abortion. Once we bring this fact to our attention, it becomes less clear whether Marquis can use his account of the wrongness of killing to show that abortion is the moral equivalent of murder. In this paper, I explore the relevance of the rate of spontaneous abortion to Marquis' classic anti-abortion argument. I introduce a case I call Unexpected Death in which someone is about to commit murder, but, just as the would-be murderer is about to strike, his would-be victim dies unexpectedly. I then ask: what does Marquis' account of killing imply about the moral status of what the would-be murderer was about to do? I consider four responses Marquis could give to this question, and I examine what implications these responses have for Marquis' strategy of using his account of the wrongness of killing an adult to show that abortion is in the same moral category.

INTRODUCTION

In his classic paper, 'Why abortion is immoral', Don Marquis 'sets out an argument that purports to show... that abortion is, except possibly in rare cases, seriously immoral, that it is in the same moral category as killing an innocent adult human being'.¹ What makes killing an adult seriously immoral, Marquis contends, is that doing so deprives the victim of the valuable future he/she would otherwise have had. Moreover, 'since the loss of the future to a standard fetus, if killed, is ...at least as great a loss as the loss of the future to a standard adult human being who is killed, abortion, like ordinary killing, could be justified only by the most compelling reasons'.¹ Marquis' argument has received a great deal of critical attention in the two decades since its publication. Nonetheless, there is a potential challenge to it that seems to have gone unnoticed. A significant percentage of fetuses are lost to spontaneous abortion. Once we bring this fact to our attention, it becomes less clear whether Marquis can use his account of the wrongness of killing to show that

abortion is the moral equivalent of murder. (I will follow philosophical convention and use 'fetus' to stand for all stages of development between fertilisation and birth. I will use 'spontaneous abortion' to stand for all types of unintended pregnancy loss, and I will abbreviate 'spontaneous abortion' to SA.)

In this paper, I explore the relevance of the rate of SA to Marquis' classic anti-abortion argument. I proceed as follows. After I explain Marquis' account of the wrongness of killing in more detail, I introduce a case I call 'Unexpected Death'. In this case, someone is about to commit murder, but, just as the would-be murderer is about to strike, his would-be victim dies unexpectedly. I then ask: what does Marquis' account of the wrongness of killing imply about the moral status of what the would-be murderer was about to do? I consider four responses Marquis could give to this question. My aim is neither to criticise these responses—each has some merit—nor to suggest that Unexpected Death itself poses a problem for Marquis' account of the wrongness of killing (although some readers may think it does). Instead, my aim is to examine what implications these four responses have for Marquis' strategy of using his account of the wrongness of killing an adult to show that abortion is in the same moral category.

Here, in short, are the implications, or so I will argue. If Marquis gives either of the first two responses that I consider, then he cannot consistently maintain that abortion is in the same moral category as killing an innocent, healthy adult. If he gives either the third or fourth response, then he can consistently maintain this, but only if he is also willing to say that euthanasia is always in that category. This will obviously be good news for those who think that abortion and euthanasia are both in the same category as killing an innocent, healthy adult. However, it will not be good news for Marquis himself. He makes clear in 'Why abortion is immoral' that he thinks his account of the wrongness of killing does not imply that euthanasia is always immoral. He also makes clear that he believes this to be a virtue of his account, not a vice.

MARQUIS' ACCOUNT OF THE WRONGNESS OF KILLING

According to Marquis, 'for any killing where the victim did have a valuable future like ours, having that future by itself is sufficient to create the strong presumption that the killing is seriously

wrong'.¹ Someone has a 'valuable future like ours', in the sense Marquis means, just in case, in the future, he will engage in 'activities (and) projects' that he values while engaging in them, and have 'experiences and enjoyments' that he values while having them.¹ (I will abbreviate 'valuable future like ours' to VFLO.) On Marquis' view, if someone would have had a VFLO if he were not killed, this is 'sufficient to create the strong presumption' that killing him would be seriously wrong. This doesn't settle the question of whether killing that person really is wrong—in principle, there could be even stronger reasons in favour of killing him—but it does mean that there is a very strong reason not to kill him. Finally, Marquis does not claim that someone's having a VFLO is the only thing that could possibly make it wrong to kill him. Even if someone doesn't have a VFLO, it might be wrong to kill him for other reasons.

UNEXPECTED DEATH

Almost all of the treadmills at the university gym are being used. A biologist named Justine is running on one of them, and Jackie, a filmmaker, is running next to her. Both women are in their mid-thirties and run regularly. On the second floor of the gym, a man named Jeff is leaning over the balcony, looking down at the backs of Justine and Jackie. No one sees him, so no one realises he has a gun pointed toward the two women. He has decided to kill one of them, and he's trying to settle on which one. For a few moments he hesitates, looking from Jackie's head to Justine's and back again. 'That one,' he finally mutters. He takes careful aim, whispering, 'One, two—,' but before he gets to 'three' and pulls the trigger, Justine lurches backward and lands in a heap behind her treadmill.

When Jeff was deciding whom to shoot, Justine began to feel lightheaded. A few seconds later, as he was about to pull the trigger, she fainted and never regained consciousness. Justine died from a ruptured brain aneurysm before the paramedics arrived. Jackie, by contrast, lived for another 50 years.

Back on the balcony, Jeff was so startled by Justine's fall and the ensuing commotion that he never fired his gun. He simply slipped it into his bag and walked, unnoticed, out of the gym.

Killing Jackie would have deprived her of a VFLO. Therefore, according to Marquis, there is a strong presumption that it would have been seriously wrong for Jeff to kill her. But what about Justine? What does Marquis' view imply about the moral status of killing her, in this situation? To make this question especially pointed, let us assume that Justine died from the aneurysm at exactly the moment she would have died from the gunshot wound if Jeff had shot her. In other words, let us assume that Jeff's shooting her would not have deprived her of even a very short VFLO. (McMahan, Little and DeGrazia discuss what the moral relevance might be of the length of a potential victim's VFLO²⁻⁴.)

FIRST RESPONSE: KILLING JUSTINE WOULD NOT HAVE BEEN SERIOUSLY WRONG

Marquis might say that, because killing Justine would not have deprived her of a VFLO, it would not have been seriously wrong for Jeff to kill her. (As I explained above, Marquis claims that a victim's being deprived of a VFLO is a sufficient, but not a necessary, condition of its being seriously wrong to kill that victim. Therefore, he might say that, although killing Justine would not have deprived her of a VFLO, killing her would, nonetheless, be seriously wrong for other reasons. I take up this idea below.) However—and this is what I want to emphasise here—if Marquis says that it would not have been seriously

wrong to kill Justine because she did not have a VFLO, then he will have to say that, with regard to a significant percentage of fetuses, abortion is also not seriously wrong.

According to Marquis, abortion is seriously wrong only if it is performed after the fetus has become a definite individual, because only then is there a definite individual who would be deprived of a VFLO. Moreover, Marquis suggests that a fetus becomes a definite individual when it implants in the uterine wall.⁵ However, approximately one-third of the fetuses that survive long enough to implant in the uterine wall are eventually lost to SA.^{6, 7} This means that at least one-third of the fetuses that make it to this stage of development will not have a VFLO. (Some fetuses that are not lost to SA will end up not having a VFLO for other reasons—for example, they will be stillborn or will die very early in infancy.) Therefore, if Marquis says that it would not have been seriously wrong for Jeff to kill Justine because she did not have a VFLO, then he would also have to say that, out of every three post-implantation fetuses, there are only two that it would be seriously wrong to abort. He could maintain that, when it is seriously wrong to abort a fetus, it is just as seriously wrong as killing an adult—and wrong for exactly the same reason. However, he would still have to accept a radical asymmetry between the morality of killing adults, on the one hand, and the morality of abortion, on the other. Imagine someone claiming that out of every three adults, there are only two that it would be seriously wrong to kill!

AN OBJECTION IN DEFENCE OF MARQUIS

Around three-quarters of abortions are performed when the woman has been pregnant for more than 6 weeks,⁸ and by that time in pregnancy the rate of SA drops to between one in eight and one in ten.⁹ Therefore, if Marquis says that it would not have been seriously wrong for Jeff to kill Justine because she did not have a VFLO, then, with regard to most of the abortions that are actually performed, Marquis only needs to accept that between one in eight and one in ten of them are not seriously wrong. Granted, that still commits him to an asymmetry between the morality of abortion and the morality of murder—we surely don't think that out of every ten adults there is one whom it would not be seriously wrong to kill—but the asymmetry is much less radical than I claimed above.

(Here is how I arrive at the claim that about three-quarters of abortions are performed after 6 weeks of pregnancy. In 2008 in the USA, 825 564 abortions were performed. Of these, 190 218 were performed at 6 weeks or earlier. This is 23% of 825 564, so 23% of abortions were performed at 6 weeks or earlier. Thus 77% were performed after 6 weeks.⁸)

A REVISION IN LIGHT OF THE OBJECTION

There has been a trend over time toward a greater percentage of abortions being performed earlier in pregnancy. ('For every year during 1999–2008, the percentage of abortions shifted over time toward earlier gestational ages', and during that same time period, 'the percentage of abortions performed at ≤ 6 weeks increased 53%.')⁸ Moreover, as gynaecology and obstetrics continue to advance, it seems likely that this trend will continue (because it seems likely that more pregnancies will be detected earlier). If this trend does continue, then the fetuses that are aborted in the future will tend to be 'younger' than the fetuses that are aborted now. Furthermore, since 'younger' fetuses are more likely to be lost to SA than 'older' fetuses, we might expect that, in the future, a larger percentage of the fetuses that are aborted would have been lost to SA had

they not been aborted. However, it also seems likely that, as gynaecology and obstetrics advance, the overall percentage of fetuses lost to SA will fall and our success at predicting which fetuses will be lost to SA will rise. If these things happen, then we might expect that a smaller percentage of the fetuses aborted in the future will be such that they would have been lost to SA had they not been aborted.

What should we make of all this? It seems to me that the best we can do is to estimate that somewhere between one in three and one in ten of the fetuses that are aborted—both now and in the near future—would have been lost to SA and thus would not have had a VFLO, even if they had not been aborted. To be as fair as possible to Marquis, from here on I will assume that the figure is one in ten.

SECOND RESPONSE: KILLING JUSTINE WOULD HAVE BEEN LESS SERIOUSLY WRONG THAN KILLING JACKIE

As I mentioned above, Marquis leaves open the possibility that, if someone does not have a VFLO, it might, nonetheless, be seriously wrong to kill him for other reasons. So even though Jeff's killing Justine would not have deprived her of a VFLO, Marquis could say that killing her would have been wrong for other reasons. However, according to Marquis, losing your VFLO 'is almost the greatest misfortune' you can suffer.¹ Thus, whatever other reasons Marquis might cite as making it wrong to kill Justine, he will almost certainly say that killing her would be less seriously wrong than killing Jackie.

Marquis does not take up the issue of what, exactly, might make it wrong to kill someone who would not have had a VFLO even if he were not killed. I will assume that Marquis would think about the moral status of killing such a person the same way that he thinks about the moral status of killing someone who has a VFLO, namely, in terms of whether anyone would suffer a serious loss as a result of the killing.

Justine died from the aneurysm, we are imagining, at the exact moment she would have died if Jeff had shot her. So whether Jeff was going to shoot her or not, her friends and family were going to lose her, and the wider world was going to lose the contributions she would have made to the greater good had she lived. Her friends and family found her unexpected death extremely distressing. However, it is possible that some of them would have found it even more distressing had she been murdered. Nonetheless, it is very unlikely that the additional distress they would have felt had she been murdered would have been severe enough to make the loss that would be caused by killing her equal to the loss that would be caused by killing Jackie (ie, Jackie's loss of a VFLO).

The people around Justine at the gym had the disturbing experience of seeing someone young and seemingly healthy die in their midst. If Jeff had shot her, they would have experienced something arguably much worse: seeing someone murdered. Again, however, the difference between how much they actually suffered and how much they would have suffered if she had been killed does not seem large enough to make killing her anywhere near as seriously wrong as killing Jackie, on Marquis' account. In short, if Marquis says that it would have been wrong for Jeff to kill Justine because of the losses other people would have suffered, then Marquis would almost certainly say that killing Justine would be much less seriously wrong than killing Jackie.

If Marquis were to give this response to my query about the morality of Jeff's killing Justine, what would follow, on his view, about the morality of abortion? More specifically, what would follow about the morality of aborting a fetus that (presumably

unbeknownst to the pregnant woman and the doctor) would otherwise eventually be lost to SA? Suppose Marquis says that aborting such a fetus would be wrong because of the harm the abortion would do to individuals other than the fetus. We can assume that the doctor who performs the abortion is not harmed by performing it. We can also assume that, on balance, the pregnant woman is not harmed by the abortion (since she chose to abort the fetus rather than carry the pregnancy to term). The man who impregnated her might be harmed—for example, he would lose the chance to observe the continuation of her pregnancy (for as long as it would have continued before the eventual SA)—and the people who care about the man and woman might be harmed in a similar way. However, it is extremely unlikely that these people would be hurt severely enough to equal the loss to Jackie of a VFLO.

As I explained above, I estimate that around one in ten of the fetuses that are actually aborted—both now and in the near future—would not have had a VFLO, even if they were not aborted. Assuming my estimation is correct, if Marquis gives this second response to Unexpected Death, then he should say that, out of the fetuses that are actually aborted, there is a significant percentage—around one in ten—whose abortion is much less seriously wrong than the killing of an adult. Imagine someone saying that out of every ten adults, there is one whom it would be much less seriously wrong to kill than the others!

THIRD RESPONSE: MARQUIS COULD REVISE HIS ACCOUNT OF THE WRONGNESS OF KILLING

Marquis' account of what makes killing wrong is consequentialist; he locates the wrongness of killing primarily in its consequences (specifically, in the harm it does to the victim). What makes Unexpected Death a hard case for Marquis is that no one, including Jeff, knew that the consequences of his killing Justine would be so radically different from the consequences of his killing Jackie. This makes the case hard for any consequentialist. Marquis could respond to Unexpected Death using a strategy that many consequentialists use to try to deal with the fact that we often don't know what the consequences of our actions will be. He could say that what makes an act of killing wrong is not the harm it would actually cause but the harm we believe it would cause, given what we know. More specifically, he could say that an act of killing is *prima facie* seriously wrong if, for all we know, it would deprive its victim of a VFLO. I will call this the FAWK (*for all we know*) revision of Marquis' account of the wrongness of killing.

Leaving aside my privileged epistemic position as the omniscient narrator of Unexpected Death (and your privileged position as reader of my narration), as far as anyone knew, killing either Justine or Jackie would deprive someone of a VFLO. Therefore, on the FAWK revision of Marquis' view, the moral status of killing Justine would be exactly the same as the moral status of killing Jackie. What does the FAWK revision imply about the morality of abortion? More specifically, can Marquis use it to argue that abortion is the moral equivalent of murder? He can, but only if he is also willing to say that euthanasia is always the moral equivalent of murder. Let me explain.

Take any particular fetus F. Is it the case that, for all we know, F will have a VFLO if it is not aborted? If the answer to this question is yes, then Marquis can use the FAWK revision of his view to argue that abortion and murder are morally equivalent. So is it the case that, for all we know, any particular fetus F will have a VFLO if it is not aborted? In one sense, the answer to this question is yes. Even if F doesn't *seem* to be

healthy enough to have a VFLO, we can't be certain that it won't. Suppose amniocentesis seems to show that F suffers from a genetic defect that almost always results in the loss of the fetus to SA. We can't be certain that the test results are correct—maybe F really doesn't have this defect—and, even if the results are correct, we can't be certain that the defect won't somehow resolve itself in F's case. However, in exactly the same sense, we can't be certain that an adult we (mistakenly) believe has a terminal illness won't have a VFLO. We can't be certain that the diagnosis is correct, and, even if it is, we can't be certain that the illness won't respond to treatment or somehow resolve itself in this case. Therefore, Marquis can use the FAWK revision of his view to argue that abortion is the moral equivalent of murder, but only if he is willing to agree that euthanasia is as well.

This will be welcome news for those who think that euthanasia is the moral equivalent of murder. However, Marquis himself doesn't think this, as we can see from the following passage of 'Why abortion is immoral'. 'The view that what makes killing wrong is the loss to the victim of the value of the victim's future gains additional support when some of its implications are examined'. The third such implication he cites is this:

the claim that the loss of one's future is the wrong-making feature of one's being killed does not entail, as sanctity of human life theories do, that active euthanasia is wrong. Persons who are severely and incurably ill, who face a future of pain and despair, and who wish to die will not have suffered a loss if they are killed. It is, strictly speaking, the value of a human's future which makes killing wrong in this theory. This being so, killing does not necessarily wrong some persons who are sick and dying.¹

In this passage, Marquis claims that killing someone does not necessarily cause her to suffer a loss if the following three conditions apply: (1) she is 'severely and incurably ill'; (2) she faces 'a future of pain and despair'; and (3) she wishes to die. The third condition seems to provide a clear way to argue for a moral asymmetry between abortion and euthanasia. If fetuses do not have the cognitive ability to wish for anything, then a fetus cannot wish to die, and the third condition can never apply in the case of a fetus. However, as I explained above, the way to argue from the FAWK revision of Marquis' view to the conclusion that abortion is the moral equivalent of murder is to point out that we can never be certain that a particular fetus will be lost to SA. The problem (for a defender of Marquis) is that, in just the same way, we can never be certain that a particular adult is 'incurably ill'. Thus, we can never be certain that the first (or, for that matter, the second) of these three conditions applies in the case of an adult.

In sum, if Marquis were to respond to Unexpected Death by accepting the FAWK revision of his account of the wrongness of killing, he would be able to argue that abortion is the moral equivalent of killing a healthy, innocent adult. However, he would also have to admit that, contrary to his own stated view, euthanasia is always the moral equivalent of killing a healthy, innocent adult.

FOURTH RESPONSE: MARQUIS COULD (FURTHER) MINIMISE THE ROLE OF MORAL LUCK

On all three of the responses to Unexpected Death that I have considered thus far, factors out of the agent's control can play a significant role in determining the morality of his action. This is especially clear with regard to the first two responses, since they make the moral status of killing an adult (or aborting a fetus) depend on something the agent may have no way of knowing and

thus no way of adjusting his actions in light of, namely, whether the potential victim will have a VFLO if not killed.

The role of moral luck is less obvious in the third response, since, on that response, the moral status of killing (or aborting) depends on something the agent can discover and thus can adjust his actions in light of, for example, whether, as far as we know, the potential victim will have a VFLO if not killed. However, the role of moral luck in the third response becomes clearer if we consider another fictional case.

Suppose a sharpshooter named Joseph plans to assassinate a politician. As a precaution, whenever this politician travels by car, she is seated next to a mannequin designed to look like her. (The mannequin is an inexpensive body double.) As the politician's limo moves slowly through snarled traffic, Joseph trains the sites of his rifle on the back window of the vehicle. He knows the politician travels with a mannequin body double, and he can't distinguish between the two heads in the window. He hesitates for a few seconds, looking from one head to the other. 'That one', he mutters, as he takes aim and fires at the head on the left. As it happens, Joseph succeeds in assassinating the politician. The head on the left was hers.

In Unexpected Death, killing either Justine or Jackie would have deprived someone of a VFLO, as far as we know. Thus, on the FAWK revision of Marquis' account, killing either one of them would have been *prima facie* seriously morally wrong. By contrast, we obviously know that no mannequin will have a VFLO, so the FAWK revision of Marquis' view seems to imply that, if Joseph had chosen to shoot the other figure—the mannequin rather than the politician—what he did would not have been nearly as seriously wrong.

Perhaps there really is a large moral difference between killing the politician and shooting the mannequin. (After all, the punishment for attempted murder is much less severe than the punishment for actual murder.) On the other hand, perhaps the morality of what Joseph was about to do was already fixed before he decided which figure to shoot. We can accommodate the latter thought by making a further revision to the FAWK revision of Marquis' account of the wrongness of killing. We can say that it is *prima facie* seriously morally wrong to *try to* kill someone who, for all we know, will have a VFLO if not killed. (When Joseph fires his gun, he is trying to kill the politician—someone who, for all we know, will have a VFLO if she is not killed.) Of course, this further revision of Marquis' view does not avoid the implication about euthanasia that I discussed in the previous section.

CONCLUSION

I have considered four responses that Marquis could give to Unexpected Death, and I have argued that each response poses a challenge to his attempt to argue that 'abortion is, except in possibly rare cases, seriously immoral, that it is in the same moral category as killing an innocent adult human being'.¹ If he gives either of the first two responses, then he has to admit that, with regard to approximately one in ten of the fetuses that are most likely to be aborted given their 'age', abortion would either not be seriously wrong at all or else it would be much less seriously wrong than killing a healthy, innocent adult. By contrast, if he gives either the third or fourth response, then he can argue that abortion is in the same moral category as killing a healthy, innocent adult. However, he will also have to say that euthanasia is always in this category, and it is quite clear that he thinks it is not.

I have not argued that these four responses to Unexpected Death are the only ones available to Marquis. There may be

other responses he could give. What I have argued is that, unless he can find another way to respond, he cannot continue to argue that 'abortion is...in the same moral category as killing an innocent adult human being' while also maintaining that, in an important category of cases, euthanasia is not.¹

Author note This paper is dedicated to the memory of Justine Augusta Salton, 12 March 1972 to 28 October 2005.

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