Abortion: The Persistent Debate
and Its Implications for Stem-Cell Research

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More than thirty-four years after the United States Supreme Court initially recognized a woman’s constitutional right to choose whether or not to terminate a pregnancy (at least within the first two trimesters)1 in its landmark abortion decision Roe v. Wade,2 the issue of whether women ought to have this right continues to affect public debate.3 Presidential candidates are asked about the issue,4 and potential Supreme Court nominees and their prior judicial decisions, academic writings, and speeches are thoroughly scrutinized for any inkling of how they would likely rule in a future case on the issue.5 Perhaps even more important

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1 The trimester system originally was adopted by the Court as a means to determine the boundary between a woman’s right to choose to terminate a pregnancy and the state’s interest in preserving prenatal life. The system operated by dividing the pregnancy into three periods. During the first trimester, a woman’s right to terminate a pregnancy could not be interfered with by the state. During the second trimester, the state could only regulate to insure the life or health of the mother. In the third trimester, after the fetus was expected to be viable (meaning it could survive outside the womb), the state could regulate and even prevent abortions to preserve prenatal life. Regardless of the trimester framework, a state could never ban an abortion if it was necessary to protect the life or health of the woman. For a variety of reasons—including the difficulties associated with determining when viability occurs in the face of changing medical technology—in Planned Parenthood of S.E. Pennsylvania v. Casey, the Court threw out the trimester system while affirming its original holding in Roe v. Wade favoring a woman’s right to choose. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 874 (1992). In its place the Court directed that state regulations must not unduly burden a woman’s fundamental right to choose. Exactly, what this means and how it will play out in subsequent challenges of various state regulations remains to be seen.

2 410 U.S. 113 (1973).


is the way the debate over this issue has impacted federal funding for stem cell research in the United States. Because of moral concerns regarding the personhood status and level of dignity owed to the human embryo as a form of human life, in September of 1999, the National Bioethics Advisory Commission recommended against providing federal funding for the use and derivation of embryonic stem (ES) cells and embryonic germ (EG) cells except when obtained from “cadaveric fetal tissue” or “embryos remaining after infertility treatment.”6 In this article, I will suggest that the abortion debate and its offshoots into embryonic medical research persist because of a failure to properly separate human personhood from human biology. I will argue further that a proper analysis of the problem will not only enlighten the abortion and fetal tissue research debate, but will have implications for end-of-life issues as well.

Part One of this article discusses what is meant by human personhood, as well as how we differentiate our moral obligations towards human persons from our obligations towards other animals and ultimately toward the whole of nature. Part Two argues that our ontological categories of mind and body are often confused because of the close causal connection of our bodies to our minds; and that this connection, in turn, implicates discussions of what it means to be a human being. Part Three suggests that a proper description of the mind/body separation brings us a long way towards showing why a different level of concern is warranted when protecting prenatal life or fetal tissue from the categorically higher concern we show towards other human agents. It isn’t just a matter of a continuum, but an actual difference in kind that separates our treatment of the two. Finally, in Part Four, I will justify the use of fetal tissue in medical research along with limits on that use.

I. WHO ARE MORAL AGENTS

Social conservatives can often be heard arguing that life begins at conception.7 Some liberals, trying to follow a principled approach to the issue, claim to have trouble with abortion, not because they want to claim fetuses have human rights, but because they are uncertain why fetuses would not have these rights.8 Perhaps the problem these liberals have with abortion is that they too-closely associate the word “human” to the biology, rather than the mentality, of

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who has rights. This would be consistent with standard liberal views, which affirm the dignity of all persons, including persons who have serious mental challenges. Notwithstanding there may be good reasons for recognizing the rights of those with lesser mental abilities, it does not follow that mentally challenged individuals will have the same rights as those who are not challenged (as indicated by court appointments of guardians to help those who may be particularly susceptible to fraud or mismanagement of their own affairs); nor does it follow that there is a starting point before or after which we might say a living being (despite certain physical human characteristics) has rights. Trying to answer the question of why abortion is not a grave moral wrong, then, may be less about whose right to life is recognized and more about the stage of human development at which rights-bearing occurs. Stated differently, the abortion issue need not, and in the first instance should not, be seen as simply a solution to the social problem of women’s economic inequality with men in being promoted to higher positions during childbearing years. Rather, it should be seen as a woman’s personal choice because women and fetuses are not similarly situated as rights-bearers.

Taking the issue out of the realm of politics, then, it is about the proper characterization of “fetal tissue” as that term relates to what it means to be a moral person. Here, the phrase “moral person” refers not to one who in fact acts morally, but to one who has the capacity to act morally. A moral agent, then, is one who can be an author of his own actions, a creator of his own life. Moral agency requires that one have knowledge of relevant circumstances and how one’s choices will likely affect the basic interests of others to freedom and well-being. Put another way, a moral agent is one who does not merely respond to a particular stimulus in some predetermined way, but is able to evaluate an appropriate response by treating the interests of others as deserving the same level of respect and consideration as one affords his or her own interests. That said, it must be concluded that an unborn fetus is not a moral agent in this relevant sense, since it

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9 See John Rawls, Political Liberalism, 6 (1993), Rawls provides a conception of justice that identifies three central features:

[F]irst, a specification of certain basic rights, liberties and opportunities (of a kind familiar from constitutional democratic regimes); second, an assignment of special priority to those rights, liberties, and opportunities, especially with respect to claims of the general good and of perfectionist values; and third, measures assuring to all citizens adequate all-purpose means to make effective use of their liberties and opportunities.

Id.


12 I have in mind here that “the view that an action (or event) is caused by exertion of power of some agent endowed with will and understanding” without endeavoring to afford any specific limits (either broad or narrow) for the range of freedom that the agent’s will can undertake, other than to suggest it has some capacity of choice. The Cambridge Dictionary of Philosophy 14–15 (Robert Audi ed., 2d ed. 1999).


14 Id. at 171.
lacks both the capacity to control its own actions and knowledge of relevant circumstances to aid its control, which even a young child possess.\(^{15}\) The latter, too, is not a fully moral agent, but for a different reason. In easily imaginable circumstances—such as when a brightly colored ball rolls out of the play yard onto a street—a child may run toward the ball, paying no attention to the dangers inherent in crossing the street. As a result, a parent or guardian, who seeks the best interests of the child can restrict the child’s freedom of movement without violating its moral agency, at least until the child is capable of making fully-determined, purposive decisions for itself.\(^{16}\) Here, it should be noted that it is neither the number nor the sophistication of the purposes that determines moral agency, but the capacity and aspiration to act for those purposes with knowledge of relevant circumstances.\(^{17}\)

Accordingly, it follows from this line of argument that our moral stance towards the developing fetus must be different in kind, and not just degree, from what is owed a full-fledged human agent (an adult who has the capacity to control her own behavior with knowledge of relevant circumstances). It must also be different in kind, and not just degree, from what is due a young child or person suffering mental challenges who has the capacity to understand and aspirations to pursue purposes only in a lesser degree relative to an adult agent.\(^{18}\) It should be emphasized that what I am setting forth here is a categorical difference and not just a variation in degree between a fetus and even a young child, since it seems that birth gives rise to intellectual possibilities that are not present in even a developing fetus. This does not mean that our stance towards an unborn fetus should be one of indifference—since the ingredients that make it what it is, from its possession of forty-six chromosomes to its development of physical structures—would, all else being equal, give rise to its becoming a moral agent already afforded some dignity.\(^{19}\) But exactly what degree of respect should be assigned to an unborn fetus, and how it should compare to the dignity assigned a pregnant woman, when the

\(^{15}\) Id. at 142.
\(^{16}\) Id. at 141.
\(^{17}\) Id. at 124.
\(^{18}\) Id. at 141–42.
\(^{19}\) Here I follow an argument made by Ronald Dworkin: “The great majority of people who have strong views about abortion—liberal as well as conservative—believe, at least intuitively, that the life of a human organism has intrinsic value in any form it takes, even in the extremely undeveloped form of a very early, just-implanted embryo.” RONALD DWORFIN, LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 68–69 (1993). How strong a value this set of intuitions provide, however, especially when one life is seen as a possible threat to what another can become, is what Dworkin believes that conservatives and liberals differ over in the abortion debate, rather than a difference over a well-developed view that “a fetus is [or is not] a person with rights and interests of its own.” See id. In effect, what Dworkin seems to be making use of here is a kind of Rawlsian “reflective equilibrium” where I come to judge a particular based on how well or not it fits other views I have properly honed for the new circumstance. See JOHN RAWLS, A THEORY OF JUSTICE 20 (1971). The problem with this approach is not that it fails to identify some value that humans share, but it fails to provide concrete determinants that might help resolve conflicts with other values also thought to be important, like the emotional as well as physical effect of carrying a child to term on the future life prospects of a mother.
interests of the latter conflict with the continuing development of the former, are part and parcel of what the abortion question is about.

Here we take note that our moral stance towards different objects in the universe will depend on a variety of different characteristics. In the case of inanimate objects, it may depend on the harmony they bring to the rest of nature or the relation they may have to the physical or mental well-being of human beings. Quite a different stance is taken toward other sentient beings to whom respect is assigned based on certain emotional and cognitive similarities to those also possessed by humans. These cognitive or mental features are not present in such non-sentient living things as plants and very simple forms of animal life like amoebas, although I do not discount the possibility (perhaps derivative of a broader ecological claim) that that there will be circumstances where they deserve consideration too.

Clearly, at the top rungs of sentient life is human agency as exhibited by voluntary purposive behavior. Its possession may be only indirectly ascertainable from one’s outer behavior, since there may be an ultimate separation between how we perceive ourselves and how others perceive us. Still, its existence is what entitles us to define a moral person as one responsible for her own actions because she has knowledge of relevant circumstances and can act for her own purposes. The moral value assigned to human agency has nothing to do with how much knowledge or how many purposes the agent actually possesses beyond whatever goal she has (although there may be a separate moral obligation to advance, where possible, such purposive possibilities), since this feature of moral agency allows human beings to affect not only their own lives, but also the lives of others. In the latter case, there of course would be a limitation that one not make use of one’s own agency to deny equal rights to others, but this is where the qualification of the

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20 Franz de Waal argues that higher forms of mammals such as chimpanzees display a similar capacity for reciprocity to that of humans and thereby should be counted morally. See Franz deWaal, Chimpanzee Justice, in ETHICS: THE BIG QUESTIONS 375, 375–76 (James P. Sterba ed., 1998). Peter Singer argues that because animals feel pain, they deserve moral consideration. See Peter Singer, All Animals Are Equal, id. at 377, 377–88.

21 Alan Gewirth argues that it is these two features of “voluntariness or freedom and purposiveness or intentionality” that comprise “all the possible objects of moral and other practical precepts.” Alan Gewirth, The Justificatory Argument for Human Rights, in ETHICS: THE BIG QUESTIONS, supra note 20, at 93, 96; GEWIRTH, REASON & MORALITY, supra note 13, at 27.

22 It has been argued, for example, that moral precepts assume that persons operate as bearers of social roles such as husband, father, voter or taxpayer and that their decisions are constrained by criminal and other laws. See GERTHWITH, supra note 13, at 27. This view, however, fails to appreciate that social roles and laws are prescriptive and not just descriptive and thus presuppose that the persons addressed are capable of voluntary purposive action. See id. at 28.

23 Gewirth notes that these “features of the actions prescribed by moral principles and judgments are also found in the behaviors prescribed by technical, artistic, prudential, social, and other principles and judgments.” Id. at 29.

24 See id. at 120 (noting that while there are “degrees of approach to full-fledged agency,” there are “not also degrees of agency itself, so that ‘normal’ adult human agents are unequal to one another as agents.”). By analogy, one approaches the right to vote by virtue of age, thereby increasing access to civic courses, but one does not gain a greater right to vote once he or she passes eighteen years of age. Instead, the right to vote is the same: one person, one vote. See id. at 121–22.
“moral” in “moral agent” plays its decisive role, as favoring no bias among purposive agents.25

To be a moral agent, one does not have to be exceptionally bright or thoughtful. The issue is whether the person has knowledge of relevant circumstances and control of his own behaviors for whatever purposes.26 When such knowledge and control exists, we speak of the person as a full-fledged agent.27 Persons who fail the test of moral agency include very young children who do not have adequate knowledge of relevant circumstance or who have not learned how to control their behaviors to serve their own purposes.28 Another group that fails the test of full-fledged agency is comprised of those with severe mental challenges who cannot process information or do not have full motor control over their own behaviors.29 In all these instances, it is fair to say that the person possesses moral responsibility only to the extent that he or she possesses moral agency.30 Thus, a person who is under the influence of an unexpected heart attack while driving a car and causes harm to others would not be responsible for the harm. But if that same person causes harm while under the influence of drugs or alcohol, then he or she would be responsible—provided such knowledge of the effects of drugs or alcohol was available and the person knew or should have known (because the effects are well-documented) that the potential for causing harm was likely. Here it is important to understand that what defines one as a full-fledged agent is not an *occurrent* willingness to operate with relevant knowledge for one’s own purposes, but the *dispositional* capacity and ability to perform such actions even though at the moment one may be asleep or in a temporary coma.31 Individuals in a coma or even just asleep dispositionally are still moral agents in that they have all the abilities and capacities for agency, except that being temporarily at rest they are not occurrently choosing to act or not act in any particular way.32 This is an important point, which seems presupposed by moral

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25 See JAMES RACHELS, THE ELEMENTS OF MORALITY 12 (2d ed. 1993) (“Almost every important theory of morality includes the idea of impartiality. The basic idea is that each individual’s interest are equally important: from within the moral point of view, there are no ‘privileged’ persons; everyone’s life has the same value”).

26 GEWIRTH, REASON & MORALITY, supra note 13, at 124.

27 Id.

28 Id. at 120.

29 Id. at 120, 145.

30 Id. at 122.

31 Contra id. at 60, 219.

32 Contra id.
agency, for it suggests a causal connection between what will be shown to be the ontologically dissimilar concepts of mind and body. More specifically, when all the requisite features of agency are fully-present, but are not at the moment being acted upon, there is at least a rebuttable presumption that the person is a full-fledged agent. 33 The same would not be true of a newborn infant who lacks even minimal capacities of control and is unable to ascertain the relevant knowledge necessary to act for its own purposes.

The importance of moral agency is that it sets a standard for judging to whom we owe the moral duties of respect and equal consideration. Granted, some commentators may think differently, believing that morality falls on a person primarily by virtue of his or her membership in the human society or role in all of creation. But this fails to acknowledge that the purpose of moral precepts is to regulate behavior, which assumes human beings may choose to operate contrary to the norms. 34 Thus, the rules assume alternative behavior is possible in the sense that it is within the human being’s control, even if the control is only dispositional rather than occurrent. 35

Clearly, we owe moral duties to those who are full-fledged agents which would include all normal, mentally functioning adults. To these persons, we owe the highest duties of granting maximal freedom and well-being to control their own lives, for they are like us in all relevant respects. 36 We also owe an equivalently high duty to insure the well-being of all newborn infants. For, even though these infants may not be full-fledged agents in having the capacity to effectively run their own lives, being wholly separate from the mother’s body, they are in no comparable conflict with the mother in such a way as would warrant their destruction. 37

Here, I enter a proviso to my discussion of moral agency. Since newborns are obviously not capable of doing very much for themselves, it follows that any moral duty owed them cannot be directly related to their agency, but only to their potential for agency. Still, because a newborn is physically separate from the mother, it no longer possesses the same potential for conflict with the mother. This suggests that newborn infants and young children should only suffer so much diminution of their right to freedom as is necessary for them to mature into full-fledged agents. 38 In other words, since agency is the determining factor for recognizing moral duties, and agency would cease if young children were not taken care of, it follows that there is a moral duty to protect young children because they will develop into full-fledged agents at no comparable cost to anyone else. However, the fetus is not in the same situation because it is not physically separate from the mother. Hence, its protection requires specific limitations on the freedom, and perhaps the well-being, of the mother just to mature. In the case of

33 See id. at 134.
34 See id. at 27–28.
35 See id. at 28.
36 See id. at 140.
37 See id. at 142–43.
38 Id. at 142.
young children, such limitations fall on either those who are the guardians or on the society at large. The first is usually by choice, as when a mother keeps her child or when a relative or stranger adopts the child. The second represents a moral obligation to protect already existing potential agents, as well as a collective social choice to establish alternatives to abortion by engaging the common resources of the community to provide adoption and foster care centers.

Other beings to whom we owe duties (but to proportionately lesser extents because they possess some mental capacities similar to what humans possess), are animals, who do not have the capacities for full-fledged agency, but do possess some rudimentary purposes and experience the unpleasantness of pain and suffering. As to all other existing things, it is less clear that we owe any direct duties towards them. We may owe an indirect duty for their continued existence because it will benefit future generations, and this duty might also include a respect for natural beauty. Thus, destroying a forest—not for the sake of gathering needed wood products, but just because other uses of the land might produce higher revenues—would violate this moral obligation if it leads to rainforests becoming extinct and there is no real necessity in the furtherance of self-fulfillment to use the land for this purpose. There may also be an obligation to find alternative building materials which do not force the destruction of nature especially if their substitution would cause little or no serious impact for purpose-fulfillment.

In all these instances, it is the view that human agents are bearers of rights—not the view that the human body is deserving of respect—that is decisive. This is contrary to certain ethical guidelines for medical research, and statements by President Bush who did not want American “tax dollars going for medical research involving fetal tissue from voluntary abortions.” Twenty-three years ago, the issue of whether fetal tissue should be buried or incinerated like other extracted body parts brewed a firestorm in Los Angeles County not out of safety concern but out of a dignity concern. Those who believe that fetal tissue is worthy of dignity are not saying that the fetus deserves some respect because of what it might have become, but that it deserves the respect of human personhood because of what it is.

39 See id. at 144.
40 Here I follow Kant’s idea that certain duties, called imperfect, do not require us to always satisfy the duty since a violation of the duty does not imply a formal contradiction, but do require us to at least sometimes satisfy the duty if we are to conceive of ourselves as rational beings. See, e.g., IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS, 47 (Lewis White Beck trans., Robert Paul Wolf ed., Bobbs-Merrill 1969) (1785) (discussing society’s obligation to help the poor).
More generally, the idea that the fetus itself is owed the dignity of personhood is the pivotal point for those who believe abortions are morally wrong.

II. HUMAN PERSONHOOD AND THE MIND/BODY PROBLEM

Perhaps the main problem is that it is easy to fall into a kind of reductionism concerning the status of the unborn. Although one could approach the problem of the status of fetal tissue from a number of perspectives, including religious ones, I prefer to see the problem less parochially. Rather than thinking of the issue as a question of religious dogma or even trying to fit it within various dogmatic traditions, I prefer to see the problem as fundamentally centered on what human personhood is about and whether human personhood can be reduced to physical body. I say this because I believe this may be the difficulty that some on the political left have with abortion. For this reason, I want to question whether the mental life and human experience we associate with having a mind is ontologically different from the chemical electrical process of neurons in the bodies that produce mental experience. I am assuming production here since no one denies (at least for living beings) that the various chemical, electrical, and synaptic parts of the brain produce mental or psychological states. The problem is whether causal production transfers to ontological identity between body and mind. I think not, but the problem is sufficiently obscure as to explain why some may have been led to disagree. Moreover, because philosophers are themselves undecided as to whether the mind and body represent two distinct substances or only one, it is worth a brief digression into the problem to see if it helps enlighten why some assign personhood status to a fetus.

The so called mind/body problem refers to how we account for the fact that physical acts, like a pinch, give rise to the mental experience of pain. Descartes was probably the first to really work out why there was a problem here. His explanation and intuitive proof for the existence of mind was to recognize that any self-doubt we have would, at least, establish for ourselves our existence as thinking

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45 See generally John R. Searle, Freedom and Neurobiology 40, 83 (2007) (stating that “[a]ll of our mental states are caused by neurobiological processes in the brain . . .” and describing the meaning of ontologically subjective and objective experiences).

46 See id. at 39–40.

47 John Searle has noted that “[o]ften when philosophers talk about ‘naturalizing intentionality’ or ‘naturalizing consciousness’ they take ‘naturalizing’ to mean denying the existence of the phenomena in question . . . . That is not the sense of naturalization that I am talking about. I am claiming that it is possible to recognize the real intrinsic character of consciousness, rationality, language, etc., and at the same time see them as part of the natural world.” Id. at 19.

48 Here I adopt a distinction offered by John Searle between ontologically objective versus ontologically subjective. See id. at 83 (the latter’s existence, like pain, “depends on being experienced by a human or animal subject.” The former’s existence, like mountains or planets, is independent of subjective experiences).

49 Here I adopt the distinction between mind and body first raised by René Descartes. See René Descartes, Discourse on Method and Meditations on First Philosophy, 93–105 (Donald A. Cress trans., 3d ed., Hackett Publishing 1993) (1637 & 1641).
Consequently, from the first person perspective, to doubt even my own existence is to prove indubitably that I am a thinking thing. This contrasts with my idea of having a body since I could imagine myself a disembodied spirit. My body then, seems to force itself on my thoughts since I am not aware of trying to conjure up those thoughts, nor am I aware of any outside source trying to deceive me. This suggests that the source of my experience of body is the body itself, assuming that a malevolent God does not deceive me. But here we must be careful. What we experience of these bodies is in our heads. Thus, matters of color, shape and arrangement in space may be as much about our thoughts as of the bodies themselves. This is at least part of the reason why Bishop Berkeley opted for the idealist position that all existence is mental since all that could meaningfully be held to exist were ideas in our heads. Still, although there may be something present when an unexpected object appears before us, our lack of any awareness concerning our part in bringing this about, suggests that what appears is not strictly a mental object. This, in part, may explain Bertrand Russell’s disagreement with Berkeley for not distinguishing the mental act by which we apprehend a thing from the thing apprehended. The former is in some sense subjective; the latter need not be. So, Descartes’ argument that bodies exist as a separate substance from mind is not wholly implausible, though it may not be complete. Again, there is the difficulty of explaining the correlation of pain with the physical act of the pinch. I should note that Hobbes and other so called “materialist philosophers,” held that only the physical exists (as what causes us to act); all the rest is illusory. Who has it right? The issue will not be resolved here

50 See id. at 66.
51 See id.
52 See id. at 68–69.
53 See id. at 97–98.
54 See id. at 98.
55 See id. at 98.
56 See id. at 98.
57 See BERKELEY, supra note 57, at 116. ("Now my first observation here is that there is a great difference between a mind and a body, in that a body, by its very nature, is always something divisible. On the other hand, the mind is utterly indivisible.").
58 See SEARLE, supra note 45, at 83. Otherwise, it would be “epistemically subjective.” See id. Note, epistemically objective and subjective are knowledge categories answering the question how we know. Ontologically objective and subjective are metaphysical categories answering the question: “What is?”
60 See DESCARTES, supra note 49, at 95.
61 See RUSSELL, supra note 59, at 41.
63 See THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, supra note 12, at 387, 685 (explaining that “Hobbes philosophical views have a remarkably contemporary sound. In metaphysics, he holds a strong materialist view, sometimes viewing mental phenomena as epiphenomenal ["the doctrine that physical states cause mental states, but mental states do not cause anything"], but later moving
with any finality. Still, if there are some reasonable standards for distinguishing the
body from the mind, other than saying they are separate existing substances, then
that would, at least, more precisely refine the debate. For it would shore up why
normatively we may not always want to treat the two alike, without feeling we are
venturing into some uncertain metaphysical waters.

I refer here again to the opponents of abortion—who assert the personhood of
the fetus—as against those proponents who claim it starts only after the infant has
a mental life, which usually means after birth.63 The old adage of the doctor’s slap
of the newborn infant to get it to cry captures this idea. The question is whether
there is something more here. If indeed mental states are illusions and human
beings are just as their physical shells present them, then an unborn fetus may
constitute a human person, at least at a latter stage in the pregnancy. On the other
hand, if mental properties define personhood, and those can be shown readily not
to be present early in a pregnancy, at least not the conscious cognitive features,
then abortion to that point would seem less problematic. I say less, because there is
always the question: why not let the fetuses just develop to what eventually and
post-birth will be a person? It should be noted that I connect cognitive features to
consciousness in order to distinguish them from stimuli responses by a developing
fetus, which may involve only a motor reaction.

Here, the reader confronts even more perplexing questions: Why should
personhood have any moral significance when associated only to the deterministic
operations of bodies? If what we really value here are mental states, how do metal
states get introduced when they do not exhibit cognitive presence in material
bodies such as fetuses, especially at an early stage of the pregnancy? If the point is
that the mental supervenes on the physical, at what point in the developmental
process does this take place and what minimal physical features must be present
for it to come about? It seems that the abortion debate, when carefully thought out,
follows the problems that these questions pose for us, with the further caveat that it
is not just any mental state that must supervene on the physical tissue but the
specific state that we call moral agency. The debate seen in this way may also
provide us a means for resolving the issue at least from the liberal point of view. If
the abortion question, at least for liberals, arises because of a murky distinction
between mind and body, saying how these two phenomena really are different may
alleviate some of the resistance to protecting a woman’s right to an abortion.

III. ONTOLOGICAL DIFFERENCE WITHOUT DENYING CAUSE

Here, I would begin by following John Searle in distinguishing two powers of
the person: brute powers and status functions.64 The former are powers that persons
share with all unfree physical particles in the universe (bodies) while the latter are

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63 See DWORKIN, supra note 19, at 30–34, 39–42.
64 See SEARLE, supra note 45, at 33–34.
powers that allow persons to recognize social, political, and moral purposes that are desire-independent.65 It is by way of this latter capacity that human minds grant recognition to various outside authorities to govern the distribution of social goods.66 In other words, the mind has the power to assign to persons—usually identified by body features—roles and responsibilities, as well as rights and privileges that are not directly derived from the brute forces composing the body itself. Rather, these rights and privileges derive from various desire-independent linguistic constructs by which we identify the persons as deserving of human rights or equal citizenship, or having other special social statuses such as being a president or a priest.67 Contrastingly, fetuses may exhibit various brute powers associated with processes of development and maturation that might display its current level of physical development.68 But any such biologically-assigned status would nevertheless be separate from any normative status such as being a person or having a soul absent a moral theory for how such statuses get assigned. That being said, the choice to assign a normative status to the fetus (such as personhood) cannot, in the first instance, be based on biological development, but rather must reflect a moral understanding of the conditions for becoming a rights-holder.69

Put another way, if the fetus did not have to rely on the mother for its very existence, the moral notion of equality along with the logical principle of universalizability, “which says whatever is right for one person must be right for any similar person in similar circumstances,” would support providing the fetus adequate means for survival and maturation, notwithstanding that it was not yet a full-fledged, voluntary, prospective, and purposive agent.70 The problem is complicated, however, if bringing the fetus to term would seriously impair the mother’s mental or physical health. In that instance, even a late term abortion seems justified.71 The situation is quite different for a newborn infant, who—though it is not a voluntary, prospective, purposive agent—is no longer in active

65 See id.
66 See id. By “social goods,” I have in mind everything from art, architecture, property and money to positions of political power or social status.
67 Such statuses are ontologically subjective in the sense that their existence depends on the creation of institutional structures, although they would be epistemically objective in that they would be commonly recognized among human agents.
68 Medical science might determine a descriptive developmental matter as the point in time after which the fetus becomes viable in that it can survive outside the mother’s womb.
69 But saying that medical science can determine a point of development after which the fetus can live outside the womb is very different from saying that after this point the mother or the state owes the fetus a duty of protection against early termination.
70 Here I note, notwithstanding its moral application, that the principle of universalizability is not a substantive moral principle but rather a logical condition that holds merely “if some predicate P belongs to some subject S because S has the property Q (where the ‘because’ is that of a sufficient reason or condition), then P must also belong to all other subjects S1, S2, . . . Sn that have Q.” GEWIRTH, REASON & MORALITY, supra note 13, at 105.
71 Cf. Gonzales v. Carhart, 127 S.Ct. 1610, 1625, 1627 (2006) (Justice Kennedy’s majority opinion upholding statutory language providing a hearing for doctors charged with violating the act as a defense to override restrictions on late-term abortions to protect the mother’s health in specific cases).
conflict with the mother’s physical or mental well-being and thus deserving of as much care as possible to allow maturation. Where I believe a mistake occurs, even by some liberals, is the failure to appreciate the ontological difference of the fetus’s status in the legal and moral language of our collective minds’ desire-independent viewpoint, from its brute powers as body. As a result, many well meaning people commit the naturalistic fallacy of going from an is-statement to an ought-statement by saying that because the fetus has the full chromosome complement of a living adult, it ought to be considered as having the moral status of a person. The problem, of course, is that this “ought” doesn’t follow unless it is supplanted within a linguistic theory that identifies such biological features as defining personhood, and the latter is supplanted in a moral theory that recognizes personhood as a basis for human rights. Though the moral theory may be less controversial, the linguistic theory that would connect biological features to personhood is by no means self-evident, especially if personhood is meant to be more than a materialistic description of a set of deterministic causal mechanisms. A better understanding of the “is” statement of personhood would be to ask which criteria suggest voluntary purposive behavior and are these criteria present. The criteria would then invoke mental phenomena and be described in the ways we usually describe mental events by talking of actions, reasons, and causes, but not formulas or bio-chemical-electrical interactions. The problem with deterministic causal mechanisms is that agents are supposed to operate by their own unforced choice with knowledge of relevant circumstances, which is contrary to the law-like responses we associate with causal mechanisms.

But herein lies the dilemma: if agents are presupposed to make individual choices and that is the ground of their being brought within the moral law, then how are such choices really any different from complex electrical discharges of neurons along various synaptic pathways in the brain? On the surface, the

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72 This is shown by the amount of ink spilled by the Supreme Court early in its Roe v. Wade decision to show that legally the fetus was not a person, and suggested that ontologically, the matter could not be solved. See 410 U.S. 113, 129–37 (1973).

73 See Searle, supra note 45, at 32–33.

74 A possible answer follows an analogous problem raised by Searle between the consciousness of the brain and the solidity of a wheel:

The solidity of the wheel [like when it rolls down a hill] is ontologically reducible to the behavior of the molecules, and not just causally reducible. In the case of consciousness, though we suppose consciousness is causally reducible to the behavior of the microelements, we cannot make a similar ontological reduction for consciousness. That is because the first-person ontology of consciousness is not reducible to third-person ontology.
dilemma seems plausible enough to warrant the conclusion that bodies (in the present case, human fetuses) ought be protected. But the mistake in the aforesaid evaluation is that if it holds, morality itself disappears from the picture and no one’s status ought morally to be protected since all human decision-making becomes an induced process of biochemical electrical design discharges in the brain. Of course, that is not the case and no thoughtful anti-abortion rights person would advocate such a conclusion. But then what must their position advocate if not taken primarily from a religious direction? It must advocate the potential of human choice at least at a later stage of fetal development. Here we need to work out very clearly what is meant by “potential.”

Some suggest that the whole idea of brain states determining choice is itself confused. If so, then that discussion would precede any discussion of the importance of developing brain states as potential human agency. That is to say, if brain function is to be described by biochemical processes, then there should be a law governing any choice one will make based on one’s current brain state. Of course this conclusion, while perhaps appealing because it describes the way computers function, ignores the question of how human brain states come to be. With a computer, it is usually an outside operator who inputs information for the computer program to then solve according to some pre-established process. But in the case of human beings, we often describe the initial input of information as imparted by the person solving the problem. This feedback is explicable within advanced computer-programming designs, except that human agents seem far more capable of unexpected inputs than are typical of even the more sophisticated computer-programming designs. Perhaps this is just an illusion on our part either because we do not fully understand the workings of the human brain or we want to elevate the status of humans over machine. This issue is far from resolved. What I am suggesting is that, at a certain point in the process of inputting or processing information, the brain may become indeterminate. Some have suggested that this may reflect a quantum indeterminacy where in principle, no specific outcome can

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75 The idea here, is that what we take as consciousness or free choice is epiphenomenal; it really plays no causal role in what we decide. It is strictly illusory.


77 Gödel’s incompleteness theorem explains that there are statements that no physical system can prove. Yet, although a proponent of Gödel’s works, Roger Penrose claims that Gödel’s theorem limits what machines can do. Solomon Feferman, Stanford Professor of Mathematics and Philosophy, Address at the Institute for Advanced Study, Princeton, Gödel’s Centenary Program: The Nature and Significance of Gödel’s Incompleteness Theorems 3 (Nov. 17, 2006) (transcript available at http://math.stanford.edu/~feferman/papers/Godel-IAS.pdf).

78 SEARLE, supra note 45, at 45.

[I]t is important for this discussion to remember that as far as our actual theories of the universe are concerned, at the most fundamental level, we have come to think that it is possible to have explanations of natural phenomena that are not deterministic. And that possibility will be important when we later discuss the problem of free will as a neurobiological problem.

Id.
be assured with one hundred percent accuracy. At that level of brain state, it has been suggested that the mind may substitute rational or some other form (perhaps emotional) decision-making to resolve the indeterminacy. In other words, the indeterminacy would not necessarily transfer over to the mental function, but would leave a conceptual space for the mind to adopt alternative problem-solving mechanisms (such as rational thought). But then, this would mean that materialists could not have a theory of morality because ought-statements would be no more than a prediction, which is no morality at all. Kant gave homage to the prescriptive view of morality, noting that a theory of morality must necessarily presuppose human freedom, which itself cannot be proved. Still, dividing the mental and physical realms may moot the need for any such proof of freedom since the two realms speak in two distinct languages that are not inter-translatable. But this is all highly speculative; as yer, there does not appear to be an objective test for determining that such a view is even correct.

Despite the foregoing, I do not believe we need to resolve this issue to affirm, for moral and legal purposes, that mind and body are ontologically distinct because the former operates with a degree of independence that the latter is not capable of attaining. Beginning with Kant’s critique of Hume’s position that mental life is phenomenological, and thereby subject to causal laws, philosophers have

79 It has been suggested that if the quantum indeterminacy is only indeterminacy established by nature, at the point where it appears that consciousness and free choice lead to rational decision-making, quantum indeterminacy operates at the brain-state level. See id. at 74.

80 The idea is to avoid the fallacy of composition by thinking of conscious decision-making as a system process involving perception, memory, rational thought, intentionality and volition. See id. at 72–73. Here “randomness at the micro level does not by itself imply randomness at the system level.” Id. at 76.

81 Now, we cannot conceive of a reason which consciously responds to a bidding from outside with respect to its judgments, for then the subject would attribute the determination of its power of judgment not to reason but to an impulse. Reason must regard itself as the author of its principles, independently of foreign influences; consequently, as practical reason or as the will of a rational being, it must regard itself as free. That is to say, the will of a rational being can be the will of its own only under the idea of freedom, and therefore in a practical point of view such a will must be ascribed to all rational beings. KANT, supra note 40, at 66–67.

82 See infra p. 34 and note 86.

83 See HUME, supra note 73, at 3 (“After the most accurate examination of which I am capable, I venture to affirm, that the rule [always corresponding ideas and impressions] here holds without exception, and that every simple idea has a simple impression, which resembles it; and every simple impression a correspondent idea.”).

84 See id. at 408–09.

We feel that our actions are subject to our will on most occasions, and imagine we feel that the will itself is subject to nothing; because when by a denial of it we are provok’d to try, we feel that it moves easily every way, and produces an image of itself even on that side, on which it did not settle. This image or faint motion, we persuade ourselves, cou’d have been completed into the thing itself; because, shou’d that be deny’d, we find, upon a second trial, that it can. But these efforts are all in vain; and whatever capricious and irregular actions we may perform; as the desire of showing our liberty is the sole motive of our actions; we can never free ourselves from the bonds of necessity. We may imagine we feel a
engaged the possibility that, from the first-person perspective of choosing between a set of options, the choice appears free in the sense that the agent envisions himself as capable of having decided otherwise.\textsuperscript{85} This appears true to the agent even though those outside might think the agent’s choice a predetermined outcome that could be causally explained once all the inputs of information were clearly ascertained. The importance of this distinction is that no contradiction occurs between these two points-of-view since they arise differently. The first reflects a first-person perspective of which there is no analogue in the latter, or third person perspective. The opposition of these two perspectives is thus not in kind, which implies that both could be correct from within their own vantage point. The importance of this issue is to present two distinct vantage points that are different in a morally relevant way. Even the empiricist Hume, who believed human actions were determined by causal laws, left some small room for spontaneity in human morality when one is not forcibly constrained or hindered.\textsuperscript{86} More importantly for us, it is not that we operate in each decision \textit{de novo}, but that we perceive it to be our decision. All moral reasoning relies upon this fact because it is prescriptive—namely, that from the first person perspective we perceive ourselves free in making the choices that we do. Here the sense of freedom is that the choice was not the product of outside constraints but arose from the action of the will limited only by what reason provided it. Otherwise, one could never be held responsible for any actions undertaken, since these actions would be thought predetermined prior to any choice made by the agent. The only way one can infer moral (and as part of that, legal) responsibility is to recognize the free choice of agents, at least from within their own point-of-view. This view also provides a moral ground for the insanity defense in the law. Under the \textit{M’Naghten} test, an agent whose cognitive abilities fail to discern that his conduct is illegal or immoral because of a mental disease is not legally responsible for the act which results from that failure.\textsuperscript{87} That being said, it is obvious that mind and body are viewed differently in legal and moral practice, suggesting that the two may not be the same. This difference is also reflected in the work of the philosopher Donald Davidson who argued persuasively that there was an irreducibility of translation of mental language into physicalistic language, even though the brain gives rise to mental existence.\textsuperscript{88}

\textsuperscript{85} See \textit{infra} note 90.
\textsuperscript{86} See \textit{Hume, supra} note 73, at 404–05.
\textsuperscript{87} Daniel M’Naghten’s Case, (1843) 8 Eng. Rep 718, 722 (H.L.).
\textsuperscript{88} “The heteronomic character of general statements linking the mental and the physical traces back to this central role of translation in the description of all propositional attitudes, and to the indeterminacy of translation.” Donald Davidson, \textit{Mental Events}, in \textit{READINGS IN PHILOSOPHY OF PSYCHOLOGY} 116 (Ned Block ed., 1980) (\textit{citing} W. V. QUINE, \textit{WORD AND OBJECT} (1960)).
Davidson’s claim here is that we can know a particular causal connection for a specific mental event without knowing the law or how to describe precisely what is being connected in the event. In this sense, “a mental event is identical with some physical event without knowing which one (in the sense of being able to give it a unique physical description that brings it under a relevant law).” More generally:

Mental events as a class cannot be explained by physical science; particular mental events can when we know particular identities. But the explanations of mental events in which we are typically interested relate them to other mental events and conditions. We explain a man’s free actions, for example, by appeal to his desires, habits, knowledge and perceptions. Such accounts of intentional behavior operate in a conceptual framework removed from the direct reach of physical law by describing both cause and effect, reason and action, as aspects of a portrait of a human agent. The anomalism of the mental is thus a necessary condition for viewing action as autonomous.

The significance of these arguments for my position is that brain function, as a physical body reality, regardless of the developmental level, can never be substituted for mental agency. The most one could hope is that if the brain is fully functioning normally according to all relevant neurological tests, then the person should be able to operate as a full-fledged cognitive agent. But, of course, the actual test for such functioning would have to engage the mental and not just the physical side of the human condition. Absent that, the most which could be said for example, of a person in a coma, is that if the EEG shows cognitive function, they may still be an agent. But that would be all, and this would be a moral reason perhaps for not denying hydration and food (assuming the person did not instruct otherwise to his doctor or guardian). From the standpoint of morality given what was said above—absent an appropriate EEG—there would be no moral reason why the body would need to be kept alive. Moreover, in the case of a developing

89 Id. at 118.
90 Id. at 118. Davidson concludes this discussion with a familiar passage from Kant:

It is an indispensable problem of speculative philosophy to show that its illusion respecting the contradiction rests on this, that we think of a man in a different sense and relation when we call him free, and when we regard him as subject to the laws of nature . . . . It must therefore show that not only can both of these very well co-exist, but that both must be thought as necessarily united in the same subject . . . .

fetus, there is the further concern of an inherent conflict with the mother that might suggest a choice in favor of the mother, even were such an EEG to suggest higher cognitive functioning, but this raises an issue beyond the scope of this article.92

IV. IMPLICATIONS FOR FUTURE ABORTION CASES AND FETAL TISSUE RESEARCH

Seeing the abortion debate as confusing the categories of biology and human personhood makes plausible that social policies would arise that disaffirm both a woman’s right to choose and a medical researcher’s right to use fetal tissue to develop treatments for disease. Currently, the federal government’s position is to severely restrict funds for research involving new fetal materials.93 The concern is based on a dispute about the dignity due fetal tissue. That position is overstated, however, if I am correct to think that the same confusion between mind and body that explains much of the persistence of the abortion debate in political parlance also fuels this discussion.

While fetal tissue deserves the dignity of any living thing, and while it might also deserve some further consideration as a potential future person, especially if the development is well along in the stages of pregnancy to producing a full-fledged agent. But neither of these reasons is sufficient to disallow the use of fetal tissue to support human well-being. Yet, there is an interesting surface contradiction here that I need to address prior to making my central argument, so I am not misread to be saying that human tissue is not human. The issue has to do with the semantics of filling in the blank of “A____X is not an X.” Obviously, if the subject and predicate are to be understood in the same way, a contradiction arises. However, no contradiction results, if the subject is merely descriptive and the predicate is evaluative. And so “my driver is no driver” is not contradictory, since the former references the person who transports me while the latter evaluates his abilities as a driver. More generally, we can fill in the blank with an alienans as when we say “a glass diamond is no diamond” or even more weakly “a car that doesn’t start is a defective car.”94 In the latter situation, it would be too strong a statement to say, “a car that does not start is not a car,” but certainly not too strong to say it is a defective automobile or a “lemon.” And so, our language permits a wider use of the sense of a word or phrase than might at first be thought when I say that living human fetal tissue does not deserve the same respect as a living human agent.

In the pre-viability case, especially in the first term of the pregnancy, it is not unreasonable that the inconvenience still awaiting the mother may be an overriding evaluative concern of her human dignity if going to term prevents her from having

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a career or in some other way fulfilling important aspects of her life. Later in the pregnancy, but still pre-viability, because the fetus begins to resemble a human person, it is reasonable to expect that she would have a stronger reason to discontinue the pregnancy. Still, because the burdens of pregnancy may vary at different points in the pregnancy and will not always be objective, the law should give deference to her subjective evaluation of the burdens she faces. In this limited sense some open discussion would not be objectionable, provided that it is only offered to insure the issue is being thought about. Obviously, the woman’s health issues would be overriding, but also overriding would be the important psychological or life-fulfilling expectation she will forego if she continues her pregnancy full-term. Because the latter issues here are highly subjective, it would be next to impossible to find a common basis upon which they might be evaluated, and so the decision should be left to the woman in consultation with her doctor as long as the fetus is pre-viability. The viability limitation arises because, once viable, the fetus could presumably survive outside the body. An obvious further limitation on a woman’s choice of how this might effect her livelihood would be if the doctor thought the abortion would seriously harm the woman’s life. But even then this may be more a matter of ensuring that her choice is made with knowledge of all relevant circumstances and that the doctor (who is an agent too) fully supports the procedure. This is to speak positively as opposed to negatively.

In the pre-viability situation—or even in the post-viability situation—where the pregnancy would endanger the woman’s life, the fetus can be removed. The important difference between the two time periods is that in the first it can be removed for purposes of its positive use in medical research to grow stem cells, while in the latter case its removal is a matter of medical necessity and is unlikely to be accomplished to meet the state’s interest to protect prenatal life. It may be thought that in the case where the late-term fetus thus cannot be extracted alive, regulations to limit use of the tissue can still be imposed to avoid unconscious research incentives from effecting medical decisions. But if there were adequate

95 See Dworkin, supra note 19, at 33 (stating a liberal view).
96 See Gewirth, Reason & Morality, supra note 13, at 143-44.
97 This is the interpretation I would afford those aspects of the U.S. Supreme Court’s plurality holding in Casey, in which the Court allowed, as not producing an undue burden on a woman’s right to choose, that: states require a twenty-four hour waiting period, the women must make an informed consent after being told a state may prefer promotion of life, and that states may impose a parental notification requirement subject to judicial override. See Planned Parenthood of Southeastern Pennsylvania v. Casey 505 U.S. 833, 833 (1992).
98 This explains the Supreme Court’s focus on viability in the third trimester as the point where the state’s interest in pre-natal life may outweigh the woman’s interest to have an abortion. Note, the claim is not that the woman would have to carry the child after this point, only that abortion versus induced live birth may, all else being equal, no longer be her choice. See Roe v. Wade, 410 U.S. 113, 150 (1973).
99 The Supreme Court’s decision in Gonzales v. Carhart, may have gone too far in permitting government to broadly restrict the types of procedures used to extract a fetus in late term pregnancies, even taking into account Justice Kennedy’s allowance for judicial relief, in particular cases, where the allowed procedure that will be potentially harmful to the woman’s health. See 127 S.Ct. 1610, 1625–27 (2007).
medical reasons to justify the removal, such a regulation would seem to be a red herring. More likely, removal of a late term fetus is unlikely to have much scientific benefit because of the condition it is in. The difference between the two situations of pre- and post-viability is, therefore, normative. Since under my analysis we value human agency, if a post-viable fetus can develop into a human agent, all else being equal, it should be allowed to do so. This will more than likely mean the pregnancy continues. The pre-viable fetus is in a different position because it cannot so develop on its own; and rather than be discarded it would be more, rather than less, supportive of human well-being to use its material in support of health research. The question that now arises: is it disrespectful to intentionally grow fetal tissue for the purpose of medical research? This question is important because the issue is not whether we discard unwanted fetal tissue or use it positively in support of human life. Rather, the proper question should be: is it morally objectionable to begin fetal development for the purpose of using it for medical research?

Here is where we get to the mind/body question: what is the status of the tissue? From what was said earlier, it would not be plausible to assign this tissue individual thoughts, purposes, or even minimal self-awareness because it is wholly reliant on the mother for nutrition and support. But this is not a necessary claim, for a young child might be wholly reliant on its parents for nutrition and support (shelter and protection) and still be, at least minimally, an agent. The claim I am asserting is categorical. Unless there are independent reasons supporting the existence of minimal aspects of human agency in the fetal tissue, government is not justified to limit an important area of human medical research by denying access to this material. And, of course, here is where the mind/body problem takes center stage. For if the fetal tissue has all the genetic elements, including genetic organizing ingredients for developing into a full-fledged agent, then is this not proof that it is, at least minimally, an agent for proposes of not cultivating its use in medical research?

The issue, as I have exposed it, is really two questions. First, are researchers who engage in the use of fetal tissue deeming the value of human life as an end in itself? And if so, is that not just using a fundamental aspect of the physical body of one human being for service to another or others? While on the surface this is a Kantian question, it is ultimately untenable according to a Kantian analysis. Second, is it true that not allowing the use of fetal tissue in medical research has no affect on the agency of others? This is a reconceptualization of the abortion question where now the parties are not just a particular woman and her fetus, but

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100 I take on the easier limitation that government could not restrict such research, since it is by no means clear that government could not choose to redirect its funding to other research it finds more palatable. See Harris v. McRae, 448 U.S. 297, 297–99 (1980) (holding that federal funding restrictions on abortions did not violate the First or Fifth Amendments to the Constitution and further that states, under Title XIX, do not have to pay for medically necessary abortions, which the federal government will not reimburse); see generally OFFICE TECH. ASSESSMENT, U.S. CONGRESS, BIOLOGY, MEDICINE, AND THE BILL OF RIGHT: A SPECIAL REPORT, 55 (1988).
the well-being of many human agents who might stand to benefit from the scientific or medical use of fetal tissue.

With respect to the first issue, Kant’s second version of the categorical imperative prohibits treating any rational agent not as an end, but only as a means.\[101\] Here the idea of an end is as an author of one’s own actions, a creator of one’s own life, essentially a moral agent.\[102\] The problem with applying Kant’s categorical imperative to fetal tissue is that there is no reason to believe that fetal tissue prior to viability presents anything like the minimal aspects of agency that would allow it to be an end. But there is another aspect of the Kantian analysis that needs to be attended to, although maybe not in the way Kant intended. This is that although we are treating the tissue as a means to achieving improvements in the medical health of others, we are not merely treating it in that way. We are not saying that it is to be used for just any purpose, but only for a specific set of purposes that will likely greatly benefit human well-being. In this sense, we are granting fetal tissue a level of respect for what it is, part of a development that could mature into a human being. Kant’s idea of not merely treating a rational being as a mere means but rather as an end implies that their own interest must be taken into account. Since pre-vital fetal tissue is not developed enough to have an interest (again, it has no independent agency), perhaps the best way to afford some value to it, is to value what it could be and afford dignity to that condition by limiting its use only to supporting important medical research aimed at saving human lives.\[103\] Like a child’s first drawing, you would not seriously call it art, but neither would you treat it as a nullity. For it represents at some level, something of what the child is becoming, whether it be thru the child’s interpretation of the subject matter, the proficiency of its execution, or just the selection of images. By the same token, fetal tissue is not a person in the relevant sense we have been talking about because it fails to exhibit the necessary voluntary purposive behavior. But it does reflect thru its DNA how well it is maturing and what the person that will likely result if carried to term might be. For this reason, like the child’s drawing, it deserves respect. But it does not warrant treatment as a person in its own right anymore than the drawing warrants being treated as art. We might not, for example, want to develop such tissue for making better cosmetics. But that would not sustain avoiding a much loftier purpose of using it to develop cures to save human lives.

101 The second version of Kant’s categorical imperative, which is applicable here, says: “Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.” KANT, supra note 40, at 47.

102 Id. at 46 (“Now, I say, man and, in general, every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will. In all his actions, whether they are directed to himself or to other rational beings, he must always be regarded at the same time as an end.”).

103 Kant notes, for example, “[b]eings whose existence does not depend on our will but on nature, if they are not rational beings, have only a relative worth as means and are called ‘things’; on the other hand, rational beings are designated ‘persons’ because their nature indicates that they are ends in themselves, i.e., things which may not be used merely as means. Such a being is thus an object of respect and, so far, restricts all [arbitrary] choice.” Id.
Regarding the second issue, it is by no means clear that, even putting aside the interest of the pregnant woman, there are not other people who have important interests in the development of fetal tissue for specifically stem cell research. I put aside here the medical researchers themselves, who it might be argued share a self-interested motive of merely seeking to advance their career, although I should say I believe such an argument would, in general, be unfair. The real interested persons are those who might, as a result of this research, avoid disease or stand to be cured of some fatal or serious life-threatening disease. These people, who are what Plato thought would be the objects of the sound practice of the field of medicine,\(^{104}\) have a fundamental interest in this research. Their very lives and well-being depends on it. Therefore, they are at least in the position of the mother who in deciding whether to have an abortion is making her decision based on an evaluation of her own future well-being. Moreover, given my suggested restriction on the use of fetal tissue to purposes of such important human interest, its use is not disrespectful, but quite the contrary; we would be making use of it for noble purposes. A part of our human nature—our bodies—would, in effect, be used for the benefit of all humans by another aspect of our nature, our minds.

Here I would propose that the medical community develop a set of comprehensive guidelines for the proper use of human fetal tissue. The regulations will be in some sense comparable but also contrasting with those proposed regulations of the National Bioethics Advisory Commission. They should emphasize the proper respect for such tissue without outright prohibition of its use, but accordingly limit its use to purposes to support respect for human life.

V. Conclusion

In this article, I have sought to determine why the debate over abortion persists even among those who do not claim a specific religious basis for their thoughts. I have tried to suggest that the reason for the persistence of the debate concerns a deep misunderstanding of the mind’s relation to body that traces back to Descartes but was not adopted in his discussion of the mind/body problem. The misunderstanding holds that a law-like relationship exists between physical brain states and mental events such that the two describe essentially the same thing, even though in relevant and material ways they are quite dissimilar. It seems like one can speculate on how these two seemingly different ontological entities may be related, the physical is cause, for example, of the mental as effect. Still, for morality to operate, the real point is that we must assume a separation of these two entities. Failure to do so would mean that even minimal freedom of choice as essential to the possibility of moral agency would have no place. The significance for the abortion debate is then to disentangle arguments related to body development from what is the cognitive status of human agency. Absent such status, the pre-vital fetus is not a person and, therefore, can have no special claim

\(^{104}\) Plutarch, The Republic 17 (Raymond Larsen ed., & trans., AHM Publishing 1979) (circa 360 B.C.E.)
against the rights of the mother to be brought to term; or even against the rights of medical researchers who will make scientific use of the tissue. I hope this discussion adds clarity to this rather painful debate that seems to be infecting so much of our political lives.