

Personhood Under the Fourteenth Amendment

Vincent J. Samar

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PERSONHOOD UNDER THE FOURTEENTH AMENDMENT

VINCENT J. SAMAR*

This Article examines recent claims that the fetus be afforded the status of a person under the Fourteenth Amendment. It shows that such claims do not carry the necessary objectivity to operate reasonably in a pluralistic society. It then goes on to afford what a better view of personhood that could so operate might actually look like. Along the way, this Article takes seriously the real deep concerns many have for the sanctity of human life. By the end, it attempts to find a balance for those concerns with the view of personhood offered that should engage current debates about abortion and women's rights.

I. INTRODUCTION	288
II. BRIEF HISTORY OF THE ABORTION DEBATE	289
III. DIFFERENT VIEWS ABOUT PERSONHOOD	302
IV. THE NEED FOR AN EMPIRICALLY VERIFIABLE, CROSS-CULTURAL NORMATIVE FRAMEWORK	310
V. PERSONHOOD AS VOLUNTARY PURPOSIVE AGENCY	317
VI. THE PROBLEM OF PAIN	325
VII. CONCLUSION.....	331

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I. INTRODUCTION

Recent efforts by some state legislatures¹ and the federal Congress² to pass laws declaring fetuses to be persons, and 2016 presidential candidate Mike Huckabee's unilateral declaration that a fetus is a person under the Fourteenth Amendment,³ represent a renewal of an old attack on a woman's privacy right to obtain an abortion. In effect, such efforts might be a precursor to a future constitutional challenge to a woman's right to choose abortion by suggesting that the United States Supreme Court's view of who are persons, as set forth in its landmark *Roe v. Wade* decision,⁴ is somehow misguided if not also out-of-step with that of the current society at large. No doubt if the Court were to adopt such an interpretation, it would effectively undermine its earlier decision, which recognized a woman's privacy right to obtain an abortion.⁵ That right would cease to exist if fetuses were recognized as persons, since abortion as a *private action* presupposes that it does not violate the basic interest of any person.⁶

Additionally, these attempts and assertions beg a number of questions, including: What does it mean to be a person for purposes of invoking Fourteenth Amendment protection? Is personhood a classification a legislature can assign? Is the determination of who is a person inherently a religious or moral consideration? Can there be an objective moral basis for defining personhood that would pick out those who the law has already recognized as persons but would not be limited to any one specific religious or moral tradition? This Article presents a normative view of personhood that is both consistent with current law and is neither specifically religious nor moral in context to *only one* tradition; it also provides moral as well as empirical grounds for showing that the *fetus* is not a person in the requisite constitutional sense, especially at an early stage of pregnancy.

1. Olivia Becker, *At Least 46 Anti-Abortion Bills Are Already in Front of State Legislatures*, VICE NEWS (Jan. 12, 2017), <https://news.vice.com/story/at-least-46-anti-abortion-bills-are-already-in-front-of-state-legislatures-in-2017> [<https://perma.cc/N74R-4QTT>].

2. Sanctity of Human Life Act, H.R. 586, 115th Cong. § 2 (2017).

3. Bethania Palma Markus, *Mike Huckabee's Bizarre Fetal Personhood Proposal Would Criminalize Miscarriages*, RAWSTORY (Aug. 7, 2015, 12:26 ET), <http://www.rawstory.com/2015/08/mike-huckabees-bizarre-fetal-personhood-proposal-would-criminalize-miscarriages/> [<https://perma.cc/3DNS-YL52>].

4. *Roe v. Wade*, 410 U.S. 113, 162 (1973), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

5. *See id.* at 154.

6. *See id.* at 162.

Part II recaps the case history of the abortion debate in the United States, focusing primarily on seven principle cases: *Roe v. Wade*,⁷ *City of Akron v. Akron Center for Reproductive Health, Inc.*,⁸ *Thornburgh v. American College of Obstetricians and Gynecologists*,⁹ *Webster v. Reproductive Health Services*,¹⁰ *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹¹ *Gonzales v. Carhart*,¹² and *Whole Woman's Health v. Hellerstedt*.¹³ Additionally, Part II will briefly mention several other cases to illustrate how the issue arose, where the debate in this area has lied pre- and post-*Roe*, and to show that after *Roe* and until recently the legal status of abortion was not primarily focused on the question of personhood. Part III discusses different views of what personhood means and why some views may be thought to be just religious or moral in nature. Part IV poses the following question: What further criterion beyond mere morality might the Constitution require before a personhood argument should be recognized under the Fourteenth Amendment? Part V introduces a view of personhood that is at least partially empirical and objectively assessable such that it can be ascertained independently of any particular moral or religious claim. Part VI considers the question of whether pain might present a challenge to claims that the fetus is not a person in the requisite sense. A brief conclusion then follows for where the law ought to head.

II. BRIEF HISTORY OF THE ABORTION DEBATE

It is worth beginning by pointing out that Section 1 of the Fourteenth Amendment to the U.S. Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

7. 410 U.S. 113.

8. 462 U.S. 416 (1983).

9. 476 U.S. 747 (1986).

10. 492 U.S. 490 (1989).

11. 505 U.S. 833 (1992).

12. 550 U.S. 124 (2007).

13. 136 S. Ct. 2292 (2016).

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁴

Of particular relevance to the abortion debate are the protections afforded by the last two clauses, “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁵ That is because the question of what protection the Fourteenth Amendment might provide rather than who might be a relevant person to receive protection is what has evolved, even if only very slowly, from the provision’s original post-Civil War Reconstruction purpose of protecting the former slaves,¹⁶ to eventually more generally protecting racial minorities,¹⁷ illegitimate people,¹⁸ women,¹⁹ mentally challenged persons,²⁰ and more recently, gay and lesbian persons.²¹ Still, it really wasn’t until the issue of abortion landed on the Court’s docket in 1973 that the question of who might be a relevant person to receive protection, as opposed to what protection they should receive, ever gets addressed.

14. U.S. CONST. amend. XIV, § 1.

15. *Id.*

16. See Richard Wormser, *The Rise and Fall of Jim Crow: The Fourteenth Amendment Ratified (1868)*, PBS, http://www.pbs.org/wnet/jimcrow/stories_events_14th.html [https://perma.cc/L38U-8VTH] (last visited Dec. 28, 2017).

17. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 2, 11–12 (1967) (holding that state miscegenation laws prohibiting interracial marriage violated a fundamental right to marry and were a form of discrimination designed to promote white supremacy); *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (recognizing that state mandated separate but so-called equal educational facilities for black and white children violated the Equal Protection clause).

18. See *Illegitimacy*, JUSTIA, <http://law.justia.com/constitution/us/amendment-14/90-illegitimacy.html> [https://perma.cc/H49Z-M7QS] (last visited Oct. 30, 2017).

19. See, e.g., *United States v. Virginia*, 518 U.S. 515, 558 (1996) (applying, in a landmark 7-1 decision, intermediate scrutiny to strike down Virginia Military Institute’s (VMI’s) longstanding male-only admissions policy); *Roe v. Wade*, 410 U.S. 113, 164 (1973) (finding that a woman had a fundamental constitutional privacy right to terminate a pregnancy subject only to maintaining maternal health before the end of the second trimester when the fetus becomes viable); see also *Craig v. Boren*, 429 U.S. 190, 210 (1976) (holding for the first time that administrative sex classifications required intermediate scrutiny).

20. See, e.g., *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450 (1985) (ordering a more exacting form of scrutiny than traditional rational basis to govern claims of discrimination by mentally challenged individuals and setting aside a city ordinance denying a permit for such a living center).

21. See, e.g., *Pavan v. Smith*, 137 S. Ct. 2075, 2079 (2017) (holding that Arkansas cannot, consistent with *Obergefell*, deny to both partners of a same-sex marriage the right to be listed as parents on a child’s birth certificate in the same manner as is afforded to opposite-sex couples); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (holding that states must license same-sex couples to marry and recognize legitimate out-of-state same-sex marriages).

The U.S. Supreme Court's abortion regulation and its view about personhood really begins with *Roe v. Wade*²² and its companion case *Doe v. Bolton*.²³ These two cases challenged the abortion laws in several states that made it a crime to "procure an abortion," usually with an exception "for the purpose of saving the life of the mother."²⁴ In both of these cases, the Court found "that the [woman's] right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests."²⁵ The Court reached its decision after considering a line of privacy cases beginning with *Union Pacific Railway Co. v. Botsford*,²⁶ and continuing through *Griswold v. Connecticut*,²⁷ *Stanley v. Georgia*,²⁸ and *Eisenstadt v. Baird*,²⁹ among others, all in which "the Court . . . recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."³⁰ This right, the Court held,

whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.³¹

What is especially significant for this discussion from the way the Court reached its decision is what it said concerning the fetus's status under the Fourteenth Amendment. Justice Blackmun's opinion for a seven-member majority took up the appellee's (the State of Texas's) claim "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment."³² Noting that "[t]he Constitution does not define 'person,'" Blackmun opined that its use, including its three references in the Fourteenth Amendment, "has

22. 410 U.S. at 158.

23. 410 U.S. 179 (1973).

24. *Roe*, 410 U.S. at 117–18 (quoting TEX. PENAL CODE ANN. §§ 1191, 1196 (West 1973)); accord *Doe*, 410 U.S. at 183.

25. *Roe*, 410 U.S. at 154; see also *Doe*, 410 U.S. at 189.

26. 141 U.S. 250, 251 (1891).

27. 381 U.S. 479, 483–84 (1965).

28. 394 U.S. 557, 568 (1969).

29. 405 U.S. 438, 453 (1972).

30. *Roe*, 410 U.S. at 152. Elsewhere this Author shows that the line of cases beginning with *Griswold v. Connecticut*, and continuing through *Roe v. Wade*, afforded constitutional recognition of a private act separate from private information and states of affairs. See VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION 33–36, 73–74 (1991).

31. *Roe*, 410 U.S. at 153.

32. *Id.* at 156.

application only postnatally.”³³ Additionally, Justice Blackmun’s opinion found it persuasive that “throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today,” indicating “that the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”³⁴ Justice Blackmun then noted the different views about “when life begins” that have pervaded religious, medical, and legal treatments, with no one theory consistently applying across the law.³⁵ Offering this historical analysis at the beginning of the majority’s opinion was important in order to exclude any claim to personhood for the unborn at the outset of the case. If the abortion right was to be seen as truly a private act involving, in the first instance, only the interest of the woman, without including any other interest the state might believe itself obligated to protect, then the issue of the fetus’s status had to be considered.³⁶ In sum, as Justice Blackmun noted: “[T]he unborn have never been recognized in the law as persons in the whole sense.”³⁷ Thus, “[i]n view of all this, we do not agree that . . . Texas may override the rights of the pregnant woman that are at stake.”³⁸

Next, the Court found “that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . and that it has still *another* important and legitimate interest in protecting the potentiality of human life.”³⁹ The Court noted that “[t]hese interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes ‘compelling.’”⁴⁰ With this in mind, the Court went on to describe the points where the state’s interest operates to regulate abortion.⁴¹ At the end of the first trimester the state may regulate abortion but only “to the extent that the regulation reasonably relates to the preservation and protection of maternal health”; this was held to be a

33. *Id.* at 157.

34. *Id.* at 158.

35. *See id.* at 159–62.

36. SAMAR, *supra* note 30, at 68. This Author notes that “[a]n action is self-regarding (private) . . . if and only if the consequences of the act impinge in the first instance on the basic interests [, freedom and well-being,] of the actor and not on the interests of the specified class of actors.” *Id.* Here, the action’s mere “description without the inclusion of any additional facts or causal theories” must not suggest a conflict with any other person’s interest in the relevant group. *Id.* at 67.

37. *Roe*, 410 U.S. at 162.

38. *Id.*

39. *Id.* at 162.

40. *Id.* at 162–63.

41. *Id.* at 163.

“‘compelling’ point” within current medical knowledge.⁴² The state’s important and legitimate interest in potential life becomes “compelling” only after the point where the fetus becomes viable, probably close to the end of the second trimester, because it is at that point that the fetus “presumably has the capability of meaningful life outside the mother’s womb.”⁴³ So, the state may “proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.”⁴⁴

Justices White and Rehnquist both wrote separate dissenting opinions, with Justice Rehnquist joining in Justice White’s dissent in *Doe v. Bolton*, where Justice White disdained the majority’s opinion, noting:

The upshot [of today’s decision] is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand.⁴⁵

Justice Rehnquist’s disagreement was more to what he saw as the Court’s “sweeping invalidation of any restrictions on abortion during the first trimester.”⁴⁶

Ten years after *Roe* the Court would reaffirm its earlier holding in *City of Akron v. Akron Center for Reproductive Health*, where it struck down local legislative restrictions on access to abortions and proclaimed that

[a]lthough the Constitution does not specifically identify [the right to privacy], the history of this Court’s constitutional adjudication leaves no doubt that “the full scope of the liberty guaranteed by the Due Process Clause [of the Fourteenth Amendment] cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.” Central among these protected liberties is an individual’s “freedom of personal choice in matters of marriage and family life.”⁴⁷

42. *Id.*

43. *Id.*; see also Michelle Ye Hee Lee, *Setting the Record Straight on Measuring Fetal Age and the ‘20-week Abortion,’* WASH. POST (May 26, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/05/26/setting-the-record-straight-on-measuring-fetal-age-and-the-20-week-abortion/?utm_term=.4d269d250877 [<https://perma.cc/WGK5-P7A6>].

44. *Roe*, 410 U.S. at 163–64.

45. *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

46. *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting).

47. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 426–27 (1983) (citation omitted) (first quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961); then quoting *Roe*, 410 U.S. at 169 (Stewart, J., concurring)).

This was followed three years later by *Thornburgh v. American College of Obstetricians and Gynecologists*, in which the Court struck down as unconstitutional several state statutes it found to “intimidate women into continuing [their] pregnancies.”⁴⁸ There the Court noted that “[c]lose analysis of those provisions, however, shows that they wholly subordinate constitutional privacy interests and concerns with maternal health in an effort to deter a woman from making a decision that, with her physician, is hers to make.”⁴⁹ However, three years later, in *Webster v. Reproductive Health Services*, the Court raised for the first time a doubt about the trimester system holding constitutional a Missouri statute that not only prohibited the use of public facilities, public employees, or public funds in abortions, but also made a presumption that a twenty-week fetus was viable, suggesting that states could then offer protection.⁵⁰ Thus, the question of when viability occurs and how changing medical technology might affect its occurrence becomes part of the discussion.

The next major case to come before the Court was *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992.⁵¹ This was a case brought by abortion clinics and physicians challenging the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982⁵²:

The Act requires that a woman seeking an abortion give her informed consent prior to the abortion procedure and specifies that she be provided with certain information [about abortion alternatives and government financial support] at least 24 hours before the abortion is performed. For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent’s consent. Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion. The Act exempts compliance with these three requirements in the event of a “medical emergency,” which is defined in . . . the Act. In addition of the above provisions regulating the performance of abortions, the Act

48. 476 U.S. 747, 759 (1986).

49. *Id.*

50. 492 U.S. 490, 501, 518–19 (1989) (citing MO. REV. STAT. §§ 188.029, .205, .210, .215 (1986)).

51. 505 U.S. 833 (1992).

52. *Id.* at 844–45.

imposes certain reporting requirements on facilities that provide abortion services.⁵³

The *Casey* Court also considered whether *Roe v. Wade* might now be overruled.⁵⁴ In a split decision, the Court held

the rule of *stare decisis* . . . [requires that] the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.

It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.⁵⁵

Nowhere did the Court question its earlier finding in *Roe* that "the unborn have never been recognized in the law as persons."⁵⁶ To the contrary, its reaffirming of the central holding in *Roe* would not have been possible had the Court intended to change its understanding of the fetus's status. Instead, what the Court did do was reject the trimester framework, because it did not consider it "to be part of the essential holding of *Roe*."⁵⁷ In effect, the Court was to now allow some state involvement in the previability pregnancy period, so long as it wouldn't unduly burden a woman's right to abortion.⁵⁸ The Court found that

[a] logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the

53. *Id.* at 844 (citing Pennsylvania Abortion Control Act of 1982, 18 PA. CONS. STAT. §§ 3203, 3205, 3206, 3207(b), 3209, 3214(a), (f) (1992)).

54. *Id.*

55. *Id.* at 846.

56. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

57. *Casey*, 505 U.S. at 873.

58. *See id.* at 878.

protection of fetal life.⁵⁹

It should be noted that the rejection of the trimester system was not based on the fact that medical technological improvements might move back the point of viability, which the Court acknowledged was “an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter.”⁶⁰ Moreover, the Court only treated the point of viability as the time when the state’s interest in protecting prenatal life might trump a woman’s right to an abortion, without ever saying exactly what that state interest might be.⁶¹

In place of the trimester system, the Court employed an “undue burden analysis.”⁶² Under this test “a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”⁶³ The Court then noted that

[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.⁶⁴

Afterwards, the Court went on to afford “[s]ome guiding principles” to govern how the undue burden test might actually operate in determining which state interests could be tolerated previability.⁶⁵ Specifically,

[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.⁶⁶

59. *Id.* at 873.

60. *Id.* at 870.

61. *Id.*

62. *Id.* at 878.

63. *Id.*

64. *Id.* at 877.

65. *Id.*

66. *Id.*

The Court then applied the undue burden test to the Pennsylvania Abortion Control statute upholding each of its various restrictive provisions, except the requirement that “a married woman seeking an abortion must sign a statement indicating that she has notified her husband.”⁶⁷ Regarding the other provisions at issue, the Court found that “[s]ince there is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, we conclude that it is not an undue burden.”⁶⁸ And similarly, with regard to the twenty-four hour waiting period, the Court noted “[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision.”⁶⁹ Although, the Court did acknowledge that the provision would likely raise the cost of abortion for poor persons who would presumably have to travel a second time to a clinic or obtain a hotel room if residing out-of-town.⁷⁰ The Court also dismissed the challenge to the parental consent requirement for minors that included a judicial override finding such requirements to be “based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart.”⁷¹ As mentioned, the only provision the Court struck was the spousal notification requirement noting that “there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion.”⁷²

Justice Stevens filed a separate opinion partially concurring in affirming *Roe* and partially dissenting from the majority, taking particular aim at the twenty-four-hour waiting period, noting that “[a] burden may be ‘undue’ either because the burden is too severe or because it lacks a legitimate, rational justification,” suggesting that the information it was supposed to give attention to likely would already be known by the woman making the decision.⁷³ Justice Blackmun similarly filed an opinion partially concurring and partially

67. *See id.* at 844, 879, 898.

68. *Id.* at 884–85.

69. *Id.* at 885.

70. *Id.* at 886.

71. *Id.* at 895.

72. *Id.* at 893.

73. *Id.* at 911, 920 (Stevens, J., concurring in part and dissenting in part).

dissenting, in which he stated that “[a] State’s restrictions on a woman’s right to terminate her pregnancy also implicate constitutional guarantees of gender equality.”⁷⁴ Perhaps anticipating a personhood argument in a future case based on what was said by the dissent, Justice Blackmun also noted: “No Member of this Court—nor for that matter, the Solicitor General, has ever questioned our holding in *Roe* that an abortion is not ‘the termination of life entitled to Fourteenth Amendment protection.’”⁷⁵

In contrast, Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, wrote: “We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.”⁷⁶ What is most interesting about Rehnquist’s dissent is his following statement: “One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. Nor do the historical traditions of the American people support the view that the right to terminate one’s pregnancy is ‘fundamental.’”⁷⁷ The statement is interesting because its focus on the destruction of the fetus reveals that some members of the Court were coming to think of the fetus as possibly a person for Fourteenth Amendment protection, which would then nullify a woman’s right to choose, perhaps, even if her life were at risk.

The net effect of the Court’s decision in *Casey* was to allow some state interference with a woman’s exercise of her right to choose an abortion previability, so long as it didn’t constitute an “undue burden on the right” itself.⁷⁸ On its face, the decision appears benign. However, because the Court never said exactly where the borders of the undue burden test lie, and given the regulations the Court allowed to stand,⁷⁹ the test must be seen not only as being pretty vague and uncertain with no clear framework for guidance, but, even worse, as an open invitation to differing interpretations, which could seriously erode a woman’s right to access abortion, depending on how future Courts might view it, even absent any claim about the status of the fetus.

The next case in the Court’s abortion-regulation precedent is *Gonzales v. Carhart*.⁸⁰ This was a case brought by four physicians challenging the federal

74. *Id.* at 922, 928 (Blackmun, J., concurring in part and dissenting in part).

75. *Id.* at 932 (Blackmun, J., concurring in part and dissenting in part) (internal citation omitted) (citing *Roe v. Wade*, 410 U.S. 113, 159 (1973)).

76. *Id.* at 944 (Rehnquist, C.J., concurring in part and dissenting in part).

77. *Id.* at 952 (Rehnquist, C.J., concurring in part and dissenting in part) (citation omitted).

78. *Id.* at 878.

79. *See id.* at 879.

80. 550 U.S. 124 (2007).

Partial-Birth Abortion Ban Act of 2003 that prohibited certain procedures that might be applied to late second-term abortions.⁸¹ “The Act proscribes a particular manner of ending fetal life” known as intact dilation and extraction, in which “the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart.”⁸² It also “proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process.”⁸³ Justice Kennedy, writing for the majority, upheld the Act noting that Congress, in passing the Act, had stated as follows: “Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.”⁸⁴ Kennedy also noted that “Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion.”⁸⁵ Kennedy then went on to say that “[t]here is documented medical disagreement whether the Act’s prohibition would ever impose significant health risks on women.”⁸⁶ That uncertainty, along with available alternatives to this procedure, Kennedy stated, “provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.”⁸⁷ What Justice Kennedy did not say was that the procedure should be disallowed because of any status the Court was now willing to recognize as inherent in the fetus.⁸⁸ Instead, he focused on how allowing this specific medical procedure may desensitize society to the basic human needs of its most vulnerable and innocent members,⁸⁹ suggesting that his concern here was more with affirming the sanctity of human life and protecting the medical community’s reputation, rather than protection of the fetus as a person.

Justice Thomas, joined by Justice Scalia, wrote a separate concurring opinion to reiterate his view that “the Court’s abortion jurisprudence, including [its decisions in] *Casey* and *Roe v. Wade* ha[d] no basis in the Constitution.”⁹⁰

81. *Id.* at 132–33, 135 (citing Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. IV 2004)).

82. *Id.* at 134, 136–37; *see* 18 U.S.C. § 1531.

83. 550 U.S. at 156–57; *see* 18 U.S.C. § 1531.

84. 550 U.S. at 156–57 (citing Partial-Birth Abortion Ban Act of 2003 § 2).

85. *Id.* at 157 (citing Partial-Birth Abortion Ban Act of 2003 § 2).

86. *Id.* at 162.

87. *Id.* at 164.

88. *See* 550 U.S. 124.

89. *See id.* at 157 (citing Partial-Birth Abortion Ban Act of 2003 § 2).

90. *Id.* at 168–69 (Thomas, J., concurring) (citation omitted).

Justice Ginsburg, joined by Justices Stevens, Souter and Breyer, in a strongly worded dissent, argued that the Court's decision

refuses to take *Casey* and *Stenberg* [*v. Carhart*] seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases [to protect the health and well-being of the woman] by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.⁹¹

Finally, in *Whole Woman's Health v. Hellerstedt*, the Court considered, under the *Casey* undue burden standard, whether two provisions of a Texas law placed an undue burden on a woman's right to obtain an abortion because the "'purpose or effect' of the provision 'is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'"⁹² The two provisions at issue required (1) that "physician[s] performing or inducing an abortion . . . have active admitting privileges at a hospital that . . . is located not further than 30 miles from the location at which the abortion is performed or induced"⁹³ and (2) that "an abortion facility must be equivalent to the minimum standards adopted under [the Texas Health and Safety Code section] for ambulatory surgical centers."⁹⁴

Writing for the majority, Justice Breyer stated: "We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access."⁹⁵ What Justice Breyer was referring to was the district court

91. *Id.* at 169–71 (Ginsburg, J., dissenting) (noting that seven years earlier the Court had, in *Stenberg v. Carhart*, "invalidated a Nebraska statute criminalizing the performance of a medical procedure that, in the political arena, has been dubbed 'partial-birth abortion.'" (quoting 530 U.S. 914 (2000))). *Stenberg v. Carhart* was a 5-4 decision holding that a Nebraska law that failed to provide an exception for threatened maternal health, and instead just criminalized partial birth abortions (where the unborn fetus is partially delivered into the vagina before being subject to a procedure that causes its death), violated the U.S. Constitution. 530 U.S. at 945–46.

92. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992)).

93. *Id.* (final alteration in original) (quoting TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a) (West 2015)).

94. *Id.* (alteration in original) (quoting TEX. HEALTH & SAFETY CODE ANN. § 245.010(a)); *see also* TEX. HEALTH & SAFETY CODE ANN. § 243.010 (demonstrating the Texas Health and Safety Code minimum standards for ambulatory surgical centers).

95. *Whole Woman's Health*, 136 S. Ct. at 2300.

findings “that ‘[t]he great weight of evidence demonstrates that, before the act’s passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure.’”⁹⁶ Justice Breyer then noted that the new rules forced the number of abortion facilities to be reduced from forty to twenty, effecting especially rural areas, establishing, as “the record evidence indicates[,] that the admitting-privileges requirement places a ‘substantial obstacle in the path of a woman’s choice.’”⁹⁷ Regarding the surgical-center requirement, Justice Breyer said this offered “no benefit when complications arise in the context of an abortion produced through medication”;⁹⁸ that Texas law allowed for midwives overseeing child birth that had “a mortality rate 10 times higher than an abortion”;⁹⁹ that many of the “requirements [mandated by this provision] are inappropriate as applied to surgical abortions”;¹⁰⁰ and “that ‘[m]any of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary.’”¹⁰¹ A concurring opinion by Justice Ginsburg noted that, given the realities of the law’s requirements, “it is beyond rational belief that [the statute,] H.B. 2[,] could genuinely protect the health of women, and certain that the law ‘would simply make it more difficult for them to obtain abortions.’”¹⁰² There were two dissents: the first by Justice Thomas, in which, after disagreeing with the Court’s application of the undue burden test, he stated, “I remain fundamentally opposed to the Court’s abortion jurisprudence”;¹⁰³ the second by Justice Alito (joined by Chief Justice Roberts and Justice Thomas), in which he challenged the Court’s failure to recognize that the case was barred for procedural reasons by *res judicata*.¹⁰⁴

Clearly, one conclusion that might be drawn from *Whole Woman’s Health* is the extent to which those opposed to abortion will go to prevent access to legal abortions. If this and the prior case, *Gonzales v. Carhart*, signify that the

96. *Id.* at 2311 (alteration in original) (quoting *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014)).

97. *Id.* at 2302, 2312 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992)).

98. *Id.* at 2315.

99. *Id.*

100. *Id.*

101. *Id.* at 2316 (alteration in original) (quoting *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d at 684).

102. *Id.* at 2321 (Ginsburg, J., concurring) (quoting *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 910 (7th Cir. 2015)).

103. *Id.* at 2324 (Thomas, J., dissenting).

104. *Id.* at 2330 (Alito, J., dissenting).

Court may be teetering between continuing a woman's right to an abortion or taking it away, either by making it difficult to obtain or outright prohibiting it, then, obviously, any claim about the status of the fetus being a person under the Fourteenth Amendment could profoundly impact the future of the abortion right. For this reason alone, one must take very seriously claims about what the proper status of the fetus is and, particularly, what is meant by personhood under the Fourteenth Amendment, not just as the law has stated it up to the present, but more generally how it should be understood in the future.

III. DIFFERENT VIEWS ABOUT PERSONHOOD

Professor Ronald Dworkin provides a valuable leadoff for a discussion of the abortion question that focuses on the personhood status of the fetus.¹⁰⁵ In *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*, Dworkin states:

[R]easonable-sounding proposals that the abortion issue should somehow be resolved by compromise seem unrealistic. For these proposals do not challenge the standard view of the *character* of the abortion argument—the standard view of what the argument is *about*—according to which the issue turns on what answer one gives to a polarizing question. Is a fetus a helpless unborn child with rights and interests of its own from the moment of conception?¹⁰⁶

He then describes two very different ideas that might be meant when persons debating abortion use phrases such as “human life begins at conception,” “a fetus is a person from that moment,” and “abortion is murder or homicide or an assault on the sanctity of human life.”¹⁰⁷

The first idea holds “that fetuses are creatures with interests of their own right from the start, including, preeminently, an interest in remaining alive, and that therefore they have the rights that all human beings have to protect these basic interests, including a right not to be killed.”¹⁰⁸ For those who hold this view, “[a]bortion is wrong in principle” because it “violates someone's right

105. RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993).

106. *Id.* at 9.

107. *Id.* at 11.

108. *Id.*

not to be killed.”¹⁰⁹ This seems to be the view that Justice Thomas ascribes to.¹¹⁰

The second idea claims

that human life has an intrinsic, innate value; that human life is sacred just in itself; and that the sacred nature of a human life begins when its biological life begins, even before the creature whose life it is has movement or sensation or interests or rights of its own.¹¹¹

Those who hold this second idea, probably the late Justice Scalia, believe “abortion is wrong in principle because it disregards and insults the intrinsic value, the sacred character, of any stage or form of human life.”¹¹²

The two ideas are different in that the former derives from rights all humans are thought to possess, whereas the latter represents a detached responsibility that government has to protect, namely, “the intrinsic value of life.”¹¹³ The distinction is helpful in that it focuses arguments about personhood on what kinds of grounds should be thought to be determinative. However, this Author believes the distinction becomes problematic especially when, as with the second idea, it opens the door to basic rights being possibly affected by who has a majority of votes in the legislature. In the first instance, the focus will be on the qualities or abilities possessed by the fetus. In the second instance, it will be on the obligation of government to protect those values *thought by a majority* to be intrinsic. Indeed, as Dworkin notes, Chief Justice Rehnquist, in *Cruzan v. Director, Missouri Department of Health*,¹¹⁴ exposed this second idea when he

amplified the Missouri court’s claim about the sanctity of life: he said that Missouri, as a community, had legitimate reasons

109. *Id.*

110. See Laurence H. Tribe, Opinion, *Clarence Thomas and ‘Natural Law,’* N.Y. TIMES (July 15, 1991), <http://www.nytimes.com/1991/07/15/opinion/clarence-thomas-and-natural-law.html> [https://perma.cc/9Y75-MC3J].

111. DWORKIN, *supra* note 105, at 11.

112. *Id.* In *Cruzan v. Director, Missouri Department of Health*, Justice Scalia, writing in concurrence, stated:

It is not even reasonable, much less required by the Constitution, to maintain that although the State has the right to prevent a person from slashing his wrists, it does not have the power to apply physical force to prevent him from doing so, nor the power, should he succeed, to apply, coercively if necessary, medical measures to stop the flow of blood.

497 U.S. 261, 298 (1990) (Scalia, J., concurring).

113. DWORKIN, *supra* note 105, at 11.

114. 497 U.S. 261.

for keeping Nancy Cruzan alive, even on the assumption that remaining alive was against her own interests, because the state was entitled to say that it is *intrinsically* a bad thing when anyone dies deliberately and prematurely.¹¹⁵

Dworkin then goes on to state that

Justice Scalia, concurring, was even more explicit in stating that the intrinsic value of human life does not depend on any assumption about a patient's rights or interests; states have the power, he said, to prevent the suicide of competent people who rightly think they would be better off dead, a power that plainly is not derived from any concern about their rights and interests.¹¹⁶

This second idea provides an incredible perspective for it suggests that the obviously important status of being a person under the law is one that the states, and presumably the federal Congress, can construct and, if so, deconstruct at will. Surely the states and Congress have authority under the Constitution to protect objects they deem to be of value. However, to assign that authority to include personhood seems potentially very dangerous even from the point of view of those who would seek to guarantee the sanctity of unborn life, since the states' authority even when exercised would not be constitutionally mandated.¹¹⁷ Indeed, even if society in general upholds the sanctity of human life as the antecedent to an assertoric hypothetical imperative governing what it should do, this would still only afford the unborn fetus protection (insofar as it is acknowledged as a person) merely a contingent value, to be altered whenever the current majority's preferences change.¹¹⁸ Nor would Section 5 of the Fourteenth Amendment (which states that "[t]he Congress shall have power to

115. DWORKIN, *supra* note 105, at 12; *see Cruzan*, 497 U.S. at 281.

116. DWORKIN, *supra* note 105, at 12; *see Cruzan*, 497 U.S. at 293 (Scalia, J., concurring).

117. *See* ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 419–20 (3d ed. 2006). For example, the third clause of Article I, Section 8, of the U.S. Constitution allows Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. Art. I, § 8, cl. 3. This means that "[i]f Congress has legislated, the question is whether the federal law preempts the state or local law Even if Congress has not acted or no preemption is found, the state or local law can be challenged on ground that it excessively burdens commerce among the states." CHEREMINSKY, *supra*, at 419. Justice Frankfurter explains that the doctrine "by its own force and without national legislation, puts it into the power of the Court to place limits on state authority." *Id.* at 419–20 (quoting FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY & WAITE 18 (1937)).

118. Here follows Immanuel Kant's description of what would constitute an assertoric hypothetical imperative and why such an imperative ought not to be the basis of a moral principle. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS: AND WHAT IS ENLIGHTENMENT? 31–32 (Lewis White Beck trans., The Bobbs-Merrill Co. Inc. 1959) (1785).

enforce, by appropriate legislation, the provisions of this article”) provide this conclusion any greater legitimacy.¹¹⁹ For as the Court has already stated: Congress cannot change the substantive meaning of the Fourteenth Amendment’s protections merely by acting under the enforcement provision of Section 5.¹²⁰ Neither would Congress’s attempt to do so address the real question: Should a fetus be thought of as a person or not? That question can only be decided on grounds that go to what the fetus is. Thus, the second idea seems even more precarious than the first since it leaves it to the state to decide, by whatever popular position the society or those in the legislature currently hold, what protection the fetus is afforded, and that would afford the fetus no great protection at all, as it would reduce a “constitutional right” (“a woman’s right to an abortion”) to just being another instance of majoritarian rule. Either the fetus is a person based on grounds of its own nature that can be readily assessed within the best understanding of personhood that can be developed, or it is not. Especially since there is no doubt that a pregnant woman is a person, this would seem to be the profoundly more important question to ask, since its answer clearly implicates the rights of women.

Turning to the first idea that the fetus is a person, Dworkin points out that “familiar questions about when life begins and whether a fetus is a person are not simply but multiply ambiguous.”¹²¹ He goes on to note that “[s]cientists disagree about exactly when biological life of any animal begins, but it seems undeniable that a human embryo is an identifiable living organism at least by the time it is implanted in the womb, which is approximately fourteen days after its conception.”¹²² But this view only further begs the question of whether the fetus is a person.

Historically, in religious thought, “[t]he traditional Jewish view on abortion does not fit conveniently into any of the major ‘camps’ [pro-life or pro-choice] in the current American abortion debate—Judaism neither bans abortion

119. U.S. CONST. amend. XIV, § 5.

120. In *City of Boerne v. Flores*, Justice Kennedy wrote:

Congress’ power under [Section] 5, however, extends only to ‘enforc[ing]’ the provisions of the Fourteenth Amendment. The Court has described this power as ‘remedial.’ The design of the Amendment and the text of [Section] 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States.

521 U.S. 507, 519 (1997) (alteration in original) (citation omitted).

121. DWORKIN, *supra* note 105, at 21.

122. *Id.*

completely nor does it allow indiscriminate abortion.”¹²³ “In talmudic times, as in ancient *halakhah*, abortion was not considered a transgression unless the fetus was viable.”¹²⁴ However, this view may not be monolithic. “The Zohar explains that the basis of the prohibition against abortion is that ‘a person who kills the fetus in his wife’s womb desecrates that which was built by the Holy One and His craftsmanship.’”¹²⁵ So, God’s craftsmanship rather than the nature of the fetus itself seems to be the determining factor here. Moreover, other views within the tradition would seem to allow abortion only “if the fetus endangers the mother’s life,” but here too, the issue of what should constitute an endangerment is not so clear and may be constrained depending upon whether the fetus has emerged from the womb into the world or may be a product of an adulterous union or would be a bastardous offspring.¹²⁶ In Islam the fetus is not considered to be a living soul “before the foetus is 120 days old,” roughly four months after gestation, and abortion is only allowed before that time to save the mother’s life; otherwise, abortion is not allowed.¹²⁷ “The Qur’an teaches that on the Day of Judgement parents who killed their children will be under trial for that crime, and their children will be witnesses against them.”¹²⁸

Interestingly, the Catholic church’s position on this issue also seems to have changed or, at least, been seriously nuanced over the centuries:

Many early Church leaders and publications, such as the Didache, Tertullian, Athenagoras, Basil the Great, and others, also indicated that quickening was not used to determine the value of life in the womb. Later Catholic theologians, leaning heavily on Greek philosophers like Aristotle, declared a distinction in the severity of the crime of procured abortion

123. *Issues in Jewish Ethics: Abortion*, JEWISH VIRTUAL LIBRARY: A PROJECT OF AICE, <https://www.jewishvirtuallibrary.org/abortion-in-judaism> [<https://perma.cc/64MB-VM77>] (last visited Oct. 30, 2017).

124. *Id.* (citation omitted).

125. *Id.* Sometimes religious conservatives misquote scripture “to suggest that fetuses have full human status.” JAMES RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 58 (Cynthia Ward et al. eds., 2d ed. 1993). For example, in “the first chapter of Jeremiah . . . God is quoted as saying: ‘Before I formed you in the womb I knew you, and before you were born I consecrated you.’” *Id.* (quoting *Jeremiah* 1:5). The passage, according to James Rachels is meant to assert Jeremiah’s authority to speak as a prophet, not to sanctify the unborn. *See id.*

126. *See Issues in Jewish Ethics: Abortion*, *supra* note 123.

127. *What Does Islam Say About Abortion?*, ISLAMCAN.COM, <http://www.islamcan.com/common-questions-about-islam/what-does-islam-say-about-abortion.shtml> [<https://perma.cc/8VH4-K2VE>] (last visited Oct. 30, 2017).

128. *Id.* (citing *Qur’an* 81:8-9).

based on a particular point in development. Indeed, St. Augustine and St. Thomas Aquinas both cited a point after conception, generally the point of quickening, as the moment at which the life in the womb becomes human, meaning ensouled with a rational human soul. For Augustine and Aquinas, intentional abortion was always an offense against God but after the point of ensoulment it was much more so. These and other Church theologians often declared that abortion after quickening was a highly immoral action, worthy of immediate excommunication and/or the legal penalty for homicide.¹²⁹

Indeed, it wasn't until the seventeenth century that the Church adopted its current conservative view "that the fetus is a human being from the moment of conception"; prior to that time, the Church accorded with the view of Saint Thomas Aquinas, who, following Aristotle, held that an embryo is not ensouled "until several weeks into the pregnancy" when "the soul is the 'substantial form' of man"; that is, "has a recognizably human shape."¹³⁰ At the Council of Vienne in 1312, for example, the Church "officially accepted" Aquinas's "rational or intellectual soul" as "essentially the form of the human body," and "to this day it has never been officially repudiated."¹³¹

129. Katherine Brind'Amour, *Roman Catholic Church Quickening*, THE EMBRYO PROJECT ENCYCLOPEDIA (Nov. 11, 2007), <http://embryo.asu.edu/pages/roman-catholic-church-quickening> [https://perma.cc/LVT9-ZHB4]; see *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation Replies to Certain Questions of the Day*, VATICAN (Feb. 22, 1987), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html [https://perma.cc/HTY7-57KB] (stating the fetus is "a person" with a "right to life and physical integrity from the moment of conception until death"). Dworkin points out that "most American Catholics do not seem to accept that view, and it has been the clear official view of the church itself for little more than a century, a fraction of Catholicism's long history. . . . [N]ot . . . that the church ever sanctioned early abortions." DWORKIN, *supra* note 105, at 39. Cf. John Garvey, *Orthodox Christians and Abortion*, ORTHODOX CHURCH IN AMERICA (Jan. 18, 2013), <https://oca.org/the-hub/the-church-on-current-issues/orthodox-christians-and-abortion> [https://perma.cc/T4E3-AK2A] (arguing that although some Christian theologians made these distinctions, "they were never understood as offering permission for early abortions").

130. RACHELS, *supra* note 125, at 57, 59–60; see also DWORKIN, *supra* note 105, at 40–41.

131. RACHELS, *supra* note 125, at 59–60; see also *Council of Vienne 1311-1312 A.D.*, PAPAL ENCYCLICALS ONLINE, <http://www.papalencyclicals.net/Councils/ecum15.htm#can1> [https://perma.cc/WV5N-JCM4] (last updated Feb. 20, 2017). More generally, Rachels notes that

[t]he Christian tradition may be ambiguous about a specific issue; within the tradition, there may be elements that support both sides. But because a particular believer feels so strongly about the issue, he or she will emphasize the elements of the tradition that support the favored moral view, while ignoring its other elements. Then, without quite realizing what has happened, he or she will conclude, quite sincerely, that Christianity *mandates* the favored moral position.

Other religions, including other Christian denominations, hold varying views on abortion, based on scripture or church teachings, that straddle Dworkin's distinction between personhood and sacredness of life: more conservative anti-abortion views are held by the Church of Jesus of the Latter Day Saints, the National Association of Evangelicals, Southern Baptists, and Lutheran Church-Missouri Synod, who believe abortion is wrong except to save the life of the mother; more liberal views are followed by the Episcopal Church, the Presbyterian Church, United Church of Christ, and the Unitarian Universalist Association of Congregations, who tend more toward the matter being a woman's choice; in the middle are the Evangelical Lutheran Church in America and the United Methodist Church, who take into account fetal abnormalities that might affect the unborn and the presence of proper medical procedures respectively.¹³² Hinduism is generally against abortion unless a woman's health is at risk; Buddhism has no official position, "although many Buddhists believe life begins at conception and that killing is morally wrong."¹³³

What is clear from these varied accounts from the different religious traditions, as well as the various differences within each tradition, is that the dominant factor at work is the presently existing values held central by the particular religious tradition that determine what factors are relevant and why. This is also why these varying views should be seen as religious and not strictly biological or in any *cross-cultural sense* as moral; for, as Dworkin explains,

it does not follow from those facts that a fetus also has rights or interests of the kind that government might have a derivative responsibility to protect. That is plainly a further question, and it is in large part a moral rather than a biological one. Nor does it follow that a fetus already embodies an intrinsic value that government might claim a detached responsibility to guard. That is also a different question, and also a moral rather than a biological one.¹³⁴

Additionally, there may be situations where even religious institutions like the Catholic church acknowledge that there are times when it is morally

RACHELS, *supra* note 125, at 57; *see also Council of Vienne 1311-1312 A.D., supra.*

132. *See Religious Groups' Official Positions on Abortion*, PEW RESEARCH CENTER (Jan. 16, 2013), <http://www.pewforum.org/2013/01/16/religious-groups-official-positions-on-abortion/> [<https://perma.cc/XB8E-3SRH>]; *see also* DWORKIN, *supra* note 105, at 38 ("Some conservative theologians and religious leaders have also explicitly said that the crucial question about abortion is not whether a fetus is a person but how best to respect the intrinsic value of human life.").

133. *See Religious Groups' Official Positions on Abortion, supra* note 132.

134. DWORKIN, *supra* note 105, at 22.

permissible to allow a fetus to die by extraction, but do not call those extractions “abortion,” provided the intent was not to kill the fetus, even though that would be known to be the likely result.¹³⁵ For example, under the *Doctrine of Double Effect*,

[a] doctor who believed that abortion was wrong, even in order to save the mother’s life, might nevertheless consistently believe that it would be permissible to perform a hysterectomy on a pregnant woman with cancer. In carrying out the hysterectomy, the doctor would aim to save the woman’s life while merely foreseeing the death of the fetus. Performing an abortion, by contrast, would involve intending to kill the fetus as a means to saving the mother.¹³⁶

Here, it is important to note that what is doing the moral work in this decision is not any claim about the status of the fetus, but the intention the doctor has in performing the hysterectomy, which is to save the woman’s life. The mere consequence that follows removing a cancerous womb carrying an embryo plays no significant role in the morality of the choice, provided also that the result is proportional: life for life.¹³⁷ In contrast, that same intention to save the woman’s life would not, under the *Doctrine*, justify an intention to kill the fetus, even if necessary to save the life of the mother.¹³⁸ For then the good effect would be produced by the willed bad effect and not just as an incidental result of the bad effect’s occurrence. What fails to get resolved by this approach, however, is why it should be thought wrong to intentionally kill a previable fetus in the first place. That is something produced not by the *Doctrine*, but by the background moral views already upheld by the religion. In Catholicism, this is set by an Aquinian Natural Law tradition in which innocent existence must be protected since everything that naturally exists is thought to serve some moral purpose.¹³⁹ In other words, if one doesn’t already

135. See *Doctrine of Double Effect*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/double-effect/> [<https://perma.cc/7TRB-GLYA>] (last updated Sept. 23, 2014).

136. *Id.*

137. *See id.*

138. *See id.*

139. See RACHELS, *supra* note 125, at 52. “The theory rests upon a certain view of what the world is like. The natural world is not regarded merely as a realm of facts, devoid of value and purpose. Instead, the world is conceived to be a rational order with values and purposes built into its very nature.” *Id.* at 50. Thus, the view expresses a conception of the world, founded to some extent in Aristotle, in which “[t]he ‘natural laws’ that specify what we should do are laws of reason, which we are able to grasp because God has made us rational beings.” *Id.* at 51, 53. For a discussion of how Natural Law might operate, see Joseph Bolin, *Natural Law and Natural Inclinations*, PATHS OF LOVE

uphold the values of the tradition that killing the fetus would be wrong because it is contrary to purposeful existence, perhaps because one believes existence expresses merely a non-purposeful evolutionary result of survivability in a particular niche, then one would not necessarily accept the Church's conclusion that it is wrong to abort a fetus.¹⁴⁰ So, two questions must be met. First, what is so special about personhood itself that warrants its protection? And second, who are the beings that should be thought to possess personhood? Especially in a pluralist society of laws affording individual rights, where not all people share the same religious or particular moral points of view, these questions are especially pressing, as their answers are likely to affect the rights of other persons, namely, women.

IV. THE NEED FOR AN EMPIRICALLY VERIFIABLE, CROSS-CULTURAL NORMATIVE FRAMEWORK

It is true that the way the world is understood is always in terms of the concepts used to make sense of it. The philosopher Willard Van Orman Quine says:

We cannot strip away the conceptual trappings sentence by sentence and leave a description of the objective world; but we can investigate the world, and man as a part of it, and thus find out what cues he could have of what goes on around him. Subtracting his cues from his world view, we get man's net contribution as the difference. This difference marks the extent of man's conceptual sovereignty—the domain within which he can revise theory while saving data.¹⁴¹

Quine's point is that human understanding will always be associated with some conceptual scheme brought to bear on whatever data it is considering, but that doesn't mean there are no indications of what the understanding might itself be contributing to the data or of how its contribution might be better revised to provide a more satisfactory understanding of what is being considered. This

(Apr. 23, 2010), <http://www.pathsoflove.com/blog/2010/04/natural-law-and-natural-inclinations/> [https://perma.cc/B2YJ-DYVR]. Whether, in fact, the way the world is ("laws of nature") is just the way it is, or the way it must be (nomological necessity), represents a deep philosophical divide between Regularists and Necessitarians respectively. See Norman Swartz, *Laws of Nature*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, www.iep.utm.edu/lawofnat/ [https://perma.cc/674Y-U3HN] (last visited Dec. 28, 2017).

140. See generally *What Does It Mean to Be Human: Introduction to Human Evolution*, SMITHSONIAN NAT'L MUSEUM OF NAT. HIST., <http://humanorigins.si.edu/education/introduction-human-evolution> [https://perma.cc/QXS8-GX7A] (last updated May 24, 2017) (providing a short discussion of human evolution).

141. WILLARD VAN ORMAN QUINE, *WORD AND OBJECT* 5 (Leo L. Beranek et al. eds., 1960).

should be as true of one's understanding of personhood as it is of anything else, especially if one's understanding of personhood is in any way based on empirical criteria.

Following in Quine's wake along a related path, the philosopher Donald Davidson notes that "[w]hat matters, then, is not whether we can describe the data in a neutral, theory-free idiom; what matters is that there should be an ultimate source of evidence the character of which can be wholly specified without reference to what it is evidence for."¹⁴² He goes on to write that "[i]f the ultimate evidence for our schemes and theories, the raw material on which they are based, is subjective . . . , then so is whatever is directly based on it: our beliefs, desires, intentions, and what we mean by our words."¹⁴³ Davidson's point is to let go of the "[m]yth of the [s]ubjective," the belief that all we know is just what is in our mind, in favor "of a common public world" in which "the very possibility of thought demands shared standards of truth and objectivity."¹⁴⁴

The point of raising this line of thought here is to emphasize that one's view of personhood, like one's view of anything else, will, at least in part, be necessarily connected to one's concepts and, in general, to the overall conceptual scheme or worldview one holds. One cannot extract oneself from this, at least not completely. So, it makes sense that one's view of personhood may be related to his or her moral or religious beliefs about the human condition and its importance. If these beliefs play an important part in one's worldview, as would be suggested from the above cited religious traditions,¹⁴⁵ then the religious and moral concepts of the tradition may very much bear on who is thought to be a person. But here is also where personhood becomes problematic.

The problem comes in when one's view of personhood in a pluralistic society is based on a conceptual scheme or worldview adopted by a single, or very few, religious traditions, not shared by all members of the society. For in that instance, the unique view of personhood will be used to assign moral significance and, perhaps with it, legal protections, notwithstanding that these same protections might harm other persons' rights, who may not share the same

142. DONALD DAVIDSON, SUBJECTIVE, INTERSUBJECTIVE, OBJECTIVE 42 (2001).

143. *Id.* at 43.

144. *Id.* at 51–52.

145. See *Issues in Jewish Ethics: Abortion*, *supra* note 123; *What Does Islam Say About Abortion?*, *supra* note 127; *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation Replies to Certain Questions of the Day*, *supra* note 129.

view. This is why Justice Scalia's view in *Cruzan*¹⁴⁶ is so incredible: it implies that the way rights get legally recognized might be similar to who may receive government benefits, by a simple legislative majority sharing some similar point of view.¹⁴⁷ Surely, if personhood is to be assigned the universality that pretty much all religious traditions claim for it, it can't be limited to a simple majoritarian vote, for then it could not be guaranteed to have any long-lasting significance. But neither can the rights of women who may seek an abortion be so limited either. What is needed then, if personhood is to be afforded true universality, is a *common* understanding of what is at stake when the personhood label is used that crosses the various religious and moral traditions and can be readily ascertained. But finding a common understanding will not be possible unless some part of that understanding also can be objectively verifiable, possessing, at least, some empirical content recognizable by norms of most traditions.

Neither would a satisfactory understanding be discernable by just presupposing that any objective empirical content should suffice to resolve the issue. Certainly, it is empirically verifiable that fetal cells have forty-six chromosomes (just like adult human cells) and that normal fetal matter, at a certain stage in its development, becomes animate—quickens.¹⁴⁸ These identifications are all empirically verifiable and may have significance for particular traditions. Still, the normative significance to be assigned any one of these features, if it is to be treated as a basis for Fourteenth Amendment protection, cannot be founded solely because it satisfies a *particular* religious framework. Otherwise, the result could emerge that one or a few religious views could dominate over all others or no religion at all, in violation of the First Amendment Establishment clause.¹⁴⁹ So, the problem isn't to find just

146. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 292–98 (1990).

147. See *id.* at 292–93.

148. See *Medical Genetics: How Chromosome Abnormalities Happen*, U. OF ROCHESTER MED. CTR., <https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=90&ContentID=P02126> [<https://perma.cc/39NM-NJLH>] (last visited Oct. 30, 2017); *First Fetal Movement: Quickening*, AMERICAN PREGNANCY ASSOCIATION, <http://americanpregnancy.org/while-pregnant/first-fetal-movement/> [<https://perma.cc/9PT5-K4ZE>] (last updated Sept. 2, 2016, 5:56 PM).

149. The First Amendment provides in pertinent part: “Congress shall make no law respecting an establishment of religion” U.S. CONST. amend. I. In *Lemon v. Kurtzman*, the Court ruled unconstitutional the Pennsylvania Nonpublic Elementary and Secondary Education Act that allowed the superintendent of public schools to reimburse salaries of teachers in parochial (mostly Catholic) schools who taught from public textbooks and used only public instructional materials. 403 U.S. 602, 606–07 (1971). The Court noted that

the very restrictions and surveillance necessary to ensure that teachers play a

any conceptual framework that can be empirically verified and isn't internally inconsistent. The problem is to find the normative framework capable of operating in a pluralistic society—which means across many different traditions—for guaranteeing fundamental rights. Indeed, this is what Justice Stevens was pointing to in his dissent in *Bowers v. Hardwick*, a case that challenged whether a state can constitutionally criminalize adult consensual same-sex, noncommercial “sodomy” in private.¹⁵⁰

In that case, Justice Stevens wrote in dissent: “[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”¹⁵¹ Justice Kennedy would later say, in *Lawrence v. Texas*—a very similar case to *Bowers v. Hardwick*—that “Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”¹⁵²

Of course, Justice Stevens in his dissent was looking retrospectively at whether the state could criminally prohibit a certain kind of personal freedom.¹⁵³ Here the question is prospectively whether the Fourteenth Amendment, in its protection of “persons,” might protect the unborn from any of various harms, including the harm of death associated with abortion. Still, the issue is essentially the same. Because protecting fetuses as persons under the Fourteenth Amendment would undo a woman’s constitutional right to an abortion and probably lead to making those who perform abortions criminals, the fact that the concern here is prospective rather than retrospective is of no paramount significance. It is essentially the same concern, as it involves a conflict with a right clearly held by a woman—to control her own body—

strictly nonideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes “any subject matter expressing religious teaching, or the morals or forms of worship of any sect.”

Id. at 620–21. By contrast, in *Van Orden v. Perry*, the Court let stand, as not an establishment violation, a display of the Ten Commandments on Texas State Capitol grounds consistent with the country’s long-standing history dating back to 1789. 545 U.S. 677, 686, 691–92 (2005).

150. 478 U.S. 186, 189–90 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

151. *Id.* at 216 (Stevens, J., dissenting).

152. *Lawrence*, 539 U.S. at 578.

153. *Bowers*, 478 U.S. at 218–19 (Stevens, J., dissenting).

juxtaposed against a *supposed* right of a fetus to continue to term. So, the question that must be met before this conflict can be resolved is what possible interpretation of what it means to be a person could possibly serve to clarify the Fourteenth Amendment's meaning of who to count as persons, while at the same time being sufficiently broad to not just be founded upon the understandings of one or even a few religious or moral traditions within a pluralistic society. What is being looked for here is a specifically normative conception of personhood that could cross different traditions containing incommensurably different moral or religious doctrines, even if it may not provide a fully satisfactory solution within any one tradition. The reason for searching out a cross-cultural conception and not just arbitrarily setting out a definition for 'personhood' is to acknowledge that with it will be accompanied rights and protections that otherwise would not be the case.¹⁵⁴ This is a point the philosopher John Rawls makes when he argues for a cross-cultural, political conception of justice for a pluralistic society, to avoid running into incommensurable, comprehensive doctrines of a moral, religious or metaphysical nature that not all will agree with.¹⁵⁵

154. Here this Author follows an idea from John Rawls and H. L. A. Hart concerning the distinction between a concept and a conception. Rawls writes in *A Theory of Justice*:

Men disagree about which principles should define the basic terms of their association. Yet we may still say, despite this disagreement, that they each have a conception of justice. That is, they understand the need for, and they are prepared to affirm, a characteristic set of principles for assigning basic rights and duties and for determining what they take to be the proper distribution of the benefits and burdens of social cooperation. Thus it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles, these different conceptions, have in common.

JOHN RAWLS, *A THEORY OF JUSTICE* 5 (1971). Rawls's point is to distinguish how one might recognize that what is being talked about is justice, because it involves (borrowing from Plato) "treating like cases alike" or "rendering to each his due," from how one determines what is one's due and when two cases should be thought alike. *See id.*; *see also* PLATO, *THE REPUBLIC OF PLATO* 6 (A. D. Lindsay trans., E. P. Dutton & Co. 1957) (4th Century B.C.)).

155. Rawls argues:

[G]iven the fact of reasonable pluralism, what the work of reconciliation by public reason does, thus enabling us to avoid reliance on general and comprehensive doctrines, is two things: first, it identifies the fundamental role of political values in expressing the terms of fair social cooperation consistent with mutual respect between citizens regarded as free and equal; and second, it uncovers a sufficiently inclusive concordant fit among political and other values seen in a reasonable overlapping consensus.

JOHN RAWLS, *POLITICAL LIBERALISM* 157–58 (1993). Challenging this notion of Rawls, the philosopher Robert George argues that "Rawls's strategy is not to deny the truth of the claims of rationalist believers, but merely to deny that their claims 'can be publicly and fully established by

Thus, in searching for a conception of personhood, one wants a normative criterion that is both able to cross different moral traditions and empirically verifiable. Such a conception should certainly include a view of moral agency as founded within *any* moral tradition by virtue of its simply being prescriptive.¹⁵⁶ Specifically excluded from this requirement are any additional features—beyond this thin view of prescriptiveness—which might be too closely associated with particular religious traditions that the First Amendment Establishment clause cannot give cognizance to because the features themselves are not established independently of the religious framework in which they are a part.¹⁵⁷

Perhaps since Kant, if not Plato, most philosophers have focused their attention on the actions of a “conscientious moral agent,” as “someone who is concerned impartially with the interests of everyone affected by what he or she does; who carefully sifts facts and examines their implications; who accepts principles of conduct only after scrutinizing them to make sure they are sound; who is willing to ‘listen to reason’ even when it means that his or her earlier convictions may have to be revised; and who, finally, is willing to act on the results of this deliberation.”¹⁵⁸ At a minimum, this presupposes a capacity for

reason.” Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2483–84 (1997) (quoting RAWLS, *supra*, at 153). George later goes on to ask, specifically in context to the abortion debate, how one might conclude that a woman has

“a duly qualified right to decide whether or not to end her pregnancy” . . . without appeal to moral or metaphysical views widely in dispute about the status of embryonic and fetal human beings, or the justice or injustice of choices either to bring about their deaths or to perform acts with the foreseeable side effect of bringing about their deaths?

Id. at 2487–88 (quoting RAWLS, *supra*, at 243 n.32). Perhaps the apex of George’s arguments persuadably lies at the point where public reason appears unable to more than sidestep deeply founded moral debates, such as abortion and homosexuality, as simply being too difficult for what reasonable pluralism can resolve. If so, then that same persuasiveness dissolves at the point where the use of public reason is directed, as it is here, towards objectively uncovering, at the core of such debates, a moral understanding for the concept of *person* itself. While such an understanding may not offset a steadfast commitment to particular religious or moral doctrines, it should nevertheless afford the realization that public reason has gone as far as it possibly can to recognize the legitimacy of different points of view within a pluralistic society.

156. See generally *Moral Responsibility*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/moral-responsibility/> [<https://perma.cc/AN35-DN8P>] (last updated Mar. 26, 2014).

157. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

158. RACHELS, *supra* note 125, at 13–14. Immanuel Kant states in his first version of the “categorical imperative” that every rational being ought to “[a]ct only according to that maxim [personal rule of behavior] by which you can at the same time will that it should become a universal

normative deliberation combined with a willingness to search for the truth. What more may be presupposed will likely depend from where a person is coming and the kind of society the decision will affect. Some other utilitarian philosophers, notably Jeremy Bentham, John Stuart Mill, and Peter Singer, have a different understanding. For them, “[a]ll that matters is whether [the individual] is capable of experiencing happiness and unhappiness—pleasure and pain. If an individual *is* capable of suffering, then we have a duty to take that into account when we are deciding what to do, even if the individual in question is nonhuman.”¹⁵⁹ The importance of this latter understanding goes to some of the claims raised by those who believe abortion is immoral if the fetus can feel pain.¹⁶⁰ However, the utilitarian view is certainly not the standard view of philosophers concerned with moral agency, as it focuses on the consequences of pain and pleasure, rather than the status of persons. Moreover, as will be described below, not all pains may be undesirable.¹⁶¹ Consequently, this utilitarian view shall be afforded attention in the final section where the issue of pain is considered as a possible limitation to the argument offered below. In the meantime, the conception of personhood that can operate in a pluralistic society that also takes account of what makes one a moral agent must now be found.

law,” implying that morality presupposes human autonomy, even if such autonomy (such freedom of the will) cannot be shown by way of sensation. KANT, *supra* note 118, at 39, 170–72. Plato, in a famous dialogue in *The Republic*, asks whether one who borrowed weapons should return them if the person from whom the weapons were borrowed has since gone mad, suggesting that the use of reason may involve a greater responsibility in determining how one should act than would simply follow fulfilling a prima facie obligation. PLATO, *supra* note 154, at 6.

159. RACHELS, *supra* note 125, at 97–100; JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 311 (1876); JOHN STUART MILL, UTILITARIANISM 16 (2d ed. 1864); PETER SINGER, ANIMAL LIBERATION 45 (2d ed. 1990).

160. Holly K. Michels, *Bill Says Fetuses Can Feel Pain, Outlaws Abortion After 20 Weeks*, BILLINGS GAZETTE (March 13, 2017), http://billingsgazette.com/news/government-and-politics/bill-says-fetuses-can-feel-pain-outlaws-abortion-after-weeks/article_78ffd2c2-fc19-5644-939c-f3012a0a27a0.html [<https://perma.cc/V3YP-Z39W>].

161. The philosopher Peter Singer describes what he calls “speciesism” as “a prejudice or attitude of bias in favor of the interests of members of one’s own species and against those of members of other species.” SINGER, *supra* note 159, at 6. Singer goes on to say that “[t]he capacity for suffering and enjoyment is a *prerequisite for having interests at all*, a condition that must be satisfied before we can speak of interests in a meaningful way.” *Id.* at 7. Singer notes that “[n]early all the external signs that lead us to infer pain in other humans can be seen in other species, especially the species most closely related to us—the species of mammals and birds.” *Id.* at 11. “[T]wo central illustrations of speciesism in practice” are taxpayer supported “experimentation on animals” for medical and cosmetic purposes, and “rearing animals for food.” *Id.* at 22. He goes on to state: “To stop them we must change the policies of our government, and we must change our own lives, to the extent of changing our diet.” *Id.* at 23.

V. PERSONHOOD AS VOLUNTARY PURPOSEIVE AGENCY

In his book, *Reason and Morality*,¹⁶² Professor Alan Gewirth argues for recognition of the *Principle of Generic Consistency* (PGC)—Gewirth’s supreme principle of morality—as

an egalitarian universalist moral principle . . . [that] says to every [moral] agent that just as, in acting, he necessarily manifests or embodies the generic features of action—voluntariness and purposiveness—and necessarily claims the generic goods [of freedom and well-being] as his rights, so he ought to accept that his recipients, too, should manifest or embody these same generic features and have these same generic goods as their rights.¹⁶³

Although Gewirth’s goal is the establishment of a *universal* moral egalitarian principle rather than a specifically legal one, insofar as the Due Process and Equal Protection clauses of the Fourteenth Amendment would afford many of the rights,¹⁶⁴ it is helpful to show how his system clarifies the personhood concerns involved in the abortion decision.

Of specific merit is Gewirth’s focus on human agency as embodying two important facets of personhood relevant to the abortion debate. First, the generic features of voluntariness and purposiveness of human agency are themselves something every moral theory, by virtue of being prescriptive, necessarily presupposes and thus should certainly be part of any Fourteenth Amendment analysis by virtue of it also being prescriptive.¹⁶⁵ Second, these

162. ALAN GEWIRTH, *REASON AND MORALITY* (1978).

163. *Id.* at 140.

164. “The Supreme Court has held that some liberties are so important that they are deemed to be ‘fundamental rights’ and that generally the government cannot infringe upon them unless strict scrutiny is met.” CHEMERINSKY, *supra* note 117, at 792. The rights include “rights protecting family autonomy, procreation, sexual activity and sexual orientation, medical care decision making, travel, voting, and access to the courts.” *Id.* Professor Chemerinsky says, “[a]lmost all of these rights have been protected by the Court under the [D]ue [P]rocess [C]lauses of the Fifth and Fourteenth Amendment and/or the [E]qual [P]rotection [C]lause of the Fourteenth Amendment.” *Id.* at 792–93. More recently, the Court added same-sex marriage to the list protected by the Due Process Clauses with aid from the Equal Protection Clause. *See United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–2605 (2015). This Author has written an earlier, now somewhat dated in the American context, discussion of how Gewirth’s *Principle of Generic Consistency*, his universal moral egalitarian principle, would provide both a rational grounding for many of the rights found in the *Universal Declaration of Human Rights*, adopted by the United Nations in 1948, as well as a means for interpreting and rationally justifying rights that should be protected by the U.S. Constitution. *See Vincent J. Samar, Gay-Rights as a Particular Instantiation of Human Rights*, 64 ALB. L. REV. 983, 1001–29 (2001).

165. *See GEWIRTH, supra* note 162, at 30. Gewirth writes,

same features also fit neatly into the intuitive, self-referential idea of the “I” as subject that is consistent with a Kantian first-person perspective in which Kant affirms a principle of humanity and a meaningful sense for human responsibility.¹⁶⁶ Gewirth describes voluntariness and purposiveness as follows:

Voluntariness involves a procedural aspect of actions in that it concerns the way actions are controlled as ongoing events. Purposiveness, on the other hand, in addition to having the distinct procedural aspect . . . also involves the substantive aspect of actions, the specific contents of these events. Voluntariness refers to the means, purposiveness to the end; voluntariness comprises the agent’s causation of his action, whereas purposiveness comprises the object or goal of the action in the sense of the good he wants to achieve or have through this causation.¹⁶⁷

By focusing on human agency as opposed to mere biological existence, such as having forty-six chromosomes or the fetus having human form or having quickened, a bridge is created between humans as moral agents and their

But however much the persons addressed by various moral and other practical precepts may differ in other respects, it is true of all of them that they are assumed to be able to control their relevant behaviors by their unforced choice for reasons and purposes they can make their own.

Id. This is a nontrivial point that should not be ignored simply because one adopts a particular moral stance on an issue. For although various particularist moralities, especially those connected with specific religious doctrines, also might deem other criteria to be morally relevant, still they must all at least acknowledge that voluntariness and purposiveness provide a common denominator at the foundation of moral agency, necessary to its very existence.

166. Kant writes:

[W]e cannot conceive of a reason which consciously responds to a bidding from the 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 a 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 118, at 66–67. In his book, *The Big Picture*, physicist Sean Carroll, who adopts the philosophical framework of *poetic naturalism* [belief in only one natural world which might be consistently described using different vocabularies] notes: “The hallmark of consciousness is an inner mental experience. A dictionary definition might be something like ‘an awareness of one’s self, thoughts, and environment.’ The key is awareness: you exist, and the chair you’re sitting on exists, but you *know* you exist, while your chair presumably does not.” SEAN CARROLL, *THE BIG PICTURE: ON THE ORIGINS OF LIFE, MEANING, AND THE UNIVERSE ITSELF* 3–4, 322 (2016).

167. GEWIRTH, *supra* note 162, at 41.

biological selves. In Kantian terms, by recognizing persons as ends in themselves, one acknowledges their inherent dignity as authors of their own actions, creators, at least in part, of their own lives.¹⁶⁸ Here it is important to separate mere desire as the apparent operating factor in human choice, as might appear from within a third-person perspective, from the ability to deliberate on one's desires, and to claim the ends of certain desires as one's own.¹⁶⁹ Humans care about what they do just because they care about themselves.¹⁷⁰ This awareness of their own self-worth is what allows humans to adopt, from their own point of view, evaluative criteria for what they do whether that criteria is just egoistic or prospectively moral.¹⁷¹ It becomes part of their individual identities as they see what actions they undertake as affirming themselves and

168. Kant writes:

[R]ational nature exists as an end in itself. Man necessarily thinks of his own existence in this way; thus far it is a subjective principle of human actions. Also every other rational being thinks of his existence by means of the same rational ground which holds also for myself; thus it is at the same time an objective principle from which, as a supreme practical ground, it must be possible to derive all laws of the will. The practical imperative [or Categorical Imperative in its second version], therefore, is the following: 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 118, at 47 (footnote omitted). The Estonian-Canadian psychologist, Endel Tulving, distinguishes "two different kinds of memory: *semantic memory*, which refers to general knowledge (Gettysburg was the site of an important battle in the American Civil War), and *episodic memory*, which captures our recollection of personal experiences (I visited Gettysburg when I was in high school)." CARROLL, *supra* note 166, at 323 (citing Endel Tulving, *Episodic Memory and Autonoesis: Uniquely Human?* in *THE MISSING LINK IN COGNITION: ORIGINS OF SELF-REFLECTIVE CONSCIOUSNESS* 3, 13–16 (Herbert S. Terrence and Janet Metcalfe eds., 2005)). The relevance is that "[t]here is some evidence that episodic memory doesn't develop in children until they are about four years old, around the time they also seem to develop the capacity for modeling the mental states of other people." *Id.* at 325.

169. Christine M. Korsgaard makes this point in *The Sources of Normativity* when she notes that "[t]he human mind is self-conscious," such that

we human animals turn our attention on to our perceptions and desires themselves, on to our own mental activities, and we are conscious *of* them. That is why we can think *about* them. And this sets us a problem no other animal has. . . . Shall I act? Is this desire really a *reason* to act? The reflective mind cannot settle for perception and desire, not just as such. It needs a *reason*.

CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* 92–93 (Onora O'Neill ed., 1996).

170. Korsgaard states that the communitarian sees that "his particular ties and commitments will remain normative for him only if this more fundamental conception of his identity is one which he can see as normative as well." *Id.* at 119.

171. *See id.* at 119–22.

who they are.¹⁷² Consequently, humans are valuable and warranting respect and dignity because anything they value begins from their prior valuation of themselves.¹⁷³ They are persons because of their capacity to be a subject of value, and not just an object of whatever desire may be strongest at any particular moment.¹⁷⁴

Still, if all that was being asserted here was a “transcendental” claim of human beings having the capacity to value, one might question how such a claim could ever be established, except perhaps anecdotally.¹⁷⁵ What is valuable about the Gewirthian focus on voluntariness and purposiveness is its potential for being discoverable by external psychological evidence at least to the degree of credence that any mental state is objectively determinable by an agent’s words or deeds.¹⁷⁶ In the case of children, as with adults, voluntariness and purposiveness are discovered by fashioning “a coherent plan of life.”¹⁷⁷ In the case of the unborn fetus, voluntariness and purposiveness will not likely be discoverable for it is doubtful that these abilities will surface as their capacities are still in the developmental stage and the fetus is unlikely to display them.¹⁷⁸

The ability to ascertain voluntariness and purposiveness for children and adults is important because, no doubt, one of the attractions for describing personhood in terms of human biological existence is its ability to be readily

172. *See id.*

173. *See id.*

174. *See id.* Korsgaard writes:

Much of our legal system, and much of the way we navigate the waters of our social environment, hinges on the idea that individuals are largely responsible for their actions. . . . [For example, even among those who question how deeply human freedom extends, such as] [p]oetic naturalists and other compatibilists [who find compatibility between underlining deterministic, impersonal scientific claims and the language “of choice and volition”] . . . have no difficulty in attributing responsibility or blame [at least not in the normal run-of-the-mill cases].

CARROLL, *supra* note 166, at 383.

175. “Kant’s central argument for this view is the transcendental deduction, according to which it is a condition of self-consciousness that our understanding constructs experience in this way.” *Immanuel Kant*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <https://plato.stanford.edu/entries/kant/#MorFre> [<https://perma.cc/W45J-2LXP>] (last updated Jan. 25, 2016).

176. Gewirth notes that human beings’ autonomy necessary for rationality in a broad sense is able to set “laws for himself, or decide[] on his own principles of conduct,” even if “it may be based on a faulty use of reason, including false but corrigible beliefs or invalid inferences.” GEWIRTH, *supra* note 162, at 138.

177. *Id.*

178. *See id.* at 120, 140.

ascertained with a high degree of credence. Voluntariness and purposiveness also support affording a level of moral recognition to higher animals since many of these actually display more of the characteristics of human personhood, such as memory and behavioral reciprocity, than might be found even in very young infants or persons with serious mental challenges.¹⁷⁹ Thus, the criteria of voluntariness and purposiveness together present the sought after standard for determining legal personhood, as the criteria afford a basis for determining who should count that is both consistent with longstanding Western moral tradition and is empirically ascertainable.¹⁸⁰

Assuming then that voluntariness and purposiveness are now to be considered a reliable benchmark for determining personhood, what limitations might this benchmark suggest? Certainly, normal human adults who are asleep or in a temporary coma are still in an important way voluntary purposive agents, even though they may not be exercising *actual* agency at the moment or even impliedly claiming by their actions rights to freedom or well-being.¹⁸¹ The point is that such claims are to be understood as dispositional attributions arising from their own internal characteristics and not necessarily occurrent.¹⁸² Such agents are *prospective* and, as such, deserving of the same respect as actual agents, for there is no fundamental distinction between them and actual

179. See SINGER, *supra* note 159, at 19 (“We may legitimately hold that there are some features of certain beings that make their lives more valuable than those of other beings; but there will surely be some non-human animals whose lives, by any standards, are more valuable than the lives of some humans. A chimpanzee, dog, or pig, for instance, will have a higher degree of self-awareness and a greater capacity for meaningful relations with others than a severely retarded infant or someone in a state of advanced senility.”); see also FRANS DE WAAL, CHIMPANZEE POLITICS: POWER AND SEX AMONG APES 205–07 (Johns Hopkins Paperbacks 1989) (1982) (showing that Chimpanzees exhibit reciprocity in their response to being attacked even after several hours have passed along lines not too different from “an eye for an eye, a tooth for a tooth”).

180. This discussion ignores the further question: Can certain nonliving beings, such as corporations, estates, or trusts, be persons in the sense described? Here the range of nonliving actors is narrowed to leave conceptual space for future advances, as might be produced in the field of Artificial Intelligence. Suffice to say, that in their regular operation, the specified nonliving institutions have been assigned the “legal fiction” *person* by various federal and state statutes. See 34 AM. JUR. 1ST *Limitation of Actions* § 372 (1941). The philosopher Peter French has argued that the term “moral person” might also apply to these same institutions, if the existence of their interests and decisions are not simply reducible to the interests or decisions of the individual shareholders, officers, or trustees. Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 207–15 (1979). Of course, it will be a matter of controversy just how much voluntariness and purposiveness the specified nonliving institutions actually exhibit.

181. See GEWIRTH, *supra* note 162, at 62.

182. *Id.*

agents, except that, at the moment, they are not exercising their agency.¹⁸³ Certainly, one who assigns value to herself as agent would not want that value undercut simply because she fell asleep or was in a temporary coma. What is more problematic concerns *potential* agents, such as fetuses, for example, who are not yet capable of being agents. This is where the abortion issue requires careful attention if personhood is to be secured.

Gewirth notes that a person is a full-fledged agent with all the rights to freedom and well-being when she can attain through her use of her own practical abilities those purposes she regards as good no matter how simple or complex her own purposes might be.¹⁸⁴ So, a child, for example, may be required to hold a parent's hand when crossing a street without demeaning the child's personhood, since a child would not have relevant knowledge of street traffic to know how to safely navigate on its own; that is to say it is not yet a *full-fledged* agent.¹⁸⁵ Similarly, persons suffering from dementia might have a guardian ad litem appointed by a court to aide them in conducting their own financial and personal affairs in order to avoid being defrauded or harmed. In neither case are the persons being demeaned; rather, there is an empirically assessable recognition at work that allows, indeed requires, assistance for the conduct of their own affairs.¹⁸⁶ The situation is different where no agent with purposes and abilities of his own is yet in existence but only in a state of becoming an agent, if left to continue to develop unimpeded.¹⁸⁷ Here, the question of personhood is far more uncertain because the agency involved is only *potential*, not actual.

Gewirth deals with this question in his moral theory specifically in the context to the abortion issue when he says that a potential agent like a fetus at a late stage of pregnancy may have more claim to being brought to term than at an earlier stage, but that in no event should such a claim trump a woman's right to continue her personhood if her life or health is seriously threatened.¹⁸⁸ Here it is important to understand that Gewirth's argument is addressing the pregnant

183. *See id.* at 140. Gewirth states that “[t]he moral population or community to which the *PGC* applies comprises all prospective purposive agents.” *Id.*

184. *See id.* at 120, 141. Here it should be noted that while “there are degrees of approach to being a prospective purposive agent, there are not degrees of actually being such an agent in the respect that is relevant to the justification of having the generic rights.” *Id.* at 124.

185. *See id.* at 120, 141.

186. *See id.* at 120, 142.

187. *See id.* at 142. At the other end of life, one can imagine such agency as essentially extinguished when one falls into a persistent vegetative state with no hope of ever regaining consciousness. *See id.* at 141–42; *see also* SAMAR, *supra* note 30, at 200.

188. *See* GEWIRTH, *supra* note 162, at 143.

woman's claim to discontinue a pregnancy, not the state's claim to disallow abortion.¹⁸⁹ For, prior to viability, the state's interest could not be well-founded since the fetus's value cannot be described in a nonquestion-begging way distinct from the value of the mother.¹⁹⁰ However, this would not prevent the state from establishing criteria applicable throughout the pregnancy, as was suggested in *Roe* and *Casey*, to protect the health and well-being of pregnant women, since their value is always to be acknowledged.¹⁹¹ This follows from the recognition of the woman as a full-fledged agent with all the rights to freedom and well-being that go along with that full-fledged status.¹⁹²

Gewirth describes this situation with a "*Principle of Proportionality*," according to which, if "the abilities to control one's behavior by one's unforced choice" vary in degree because they either have not yet developed or are deficient to carry out one's purposes, then any claim arising from them against a full-fledged agent, who would have the rights in full, would need to be balanced.¹⁹³ Gewirth analogizes this situation to a person approaching voting age, who does not yet have the right to vote but, nevertheless, with each passing year has a greater claim on her school or society to provide civics courses so she will understand the importance of the right (and how to exercise it) when she reaches voting age.¹⁹⁴

What is of paramount importance in the abortion debate then is locating not where the woman's interests lie (which presumably would continue throughout the whole pregnancy) but locating specifically where the fetus's interest (or more likely the society's derivative interest as its protector) can be found to be sufficiently important to now play an independent and possibly governing role. On this point, Gewirth writes:

it is also important to consider the relation between the mother's generic rights and the prospects for the fetus's development of the generic abilities required for purpose-fulfillment. . . . [I]f there is no conflict of rights, then the fetus, because of its human potentialities, has such right to well-being as is required for developing its potentialities for growth toward purpose-fulfillment. But the prospects for fulfilling this right are often meager when the mother's physical, psychological, or social circumstances render her unable or

189. *See id.*

190. *See id.*; *Roe v. Wade*, 410 U.S. 113, 163 (1973).

191. *See Roe*, 410 U.S. at 164; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992).

192. *See* GEWIRTH, *supra* note 162, at 142–44.

193. *See id.* at 121–22.

194. *See id.*

unwilling to give her baby the nurturing care it needs. In such cases the mother's rights to freedom and well-being are threatened and with them also the aforementioned right of the fetus.¹⁹⁵

Gewirth goes on to state that

[i]t is vitally important that concern for the fetus's right to life be matched by concern for its right to adequate nutrition and other components of basic well-being. Too often the advocates of the former right show marked indifference to the latter. Where the prospects of fulfilling the latter right are poor, this fact, together with the fetus's lack of practical abilities and purposes, may also justify abortion.¹⁹⁶

The point of viability—where the fetus can presumably live outside the womb—operates here to locate where the developing fetus's interest lies (with society as its protector) and must now receive attention.¹⁹⁷ Before that stage, society's interest must be in service to that of the woman's and should include information about her own health and well-being. At the point of viability, however, the fetus's "brain may have developed sufficiently so that [in addition to being able to live outside the womb] a primitive form of fetal sentience is possible."¹⁹⁸ This, in addition to any concern the state may have for promoting prenatal development, is where society's concern for the fetus takes on a partially independent character.¹⁹⁹ However, in no instance, even at this post-viability stage, where society may set some standards for fetal survival, would society's concern for the rights of the fetus ever equate or be comparable to the same rights of the woman, as would be the case if saving the life of the fetus would lead to death or serious physical or mental harm to the mother, for, as yet, the fetus is still not yet a person with purposes of its own. As Gewirth describes the situation:

The conflict involves that the mother's generic rights to the use of the abilities required for purpose-fulfillment are threatened by the fetus's being carried to full term. With regard to well-

195. *Id.* at 143–44.

196. *Id.* at 144.

197. Gewirth notes that

[i]f there were no conflict between the rights of the fetus and the rights of the mother, the Principle of Proportionality together with the PGC would require simply that the fetus, while of course having no right to freedom, have such right to well-being as is required for developing its potentialities for growth toward purpose-fulfillment.

Id. at 142.

198. DWORKIN, *supra* note 105, at 169.

199. *See infra* Part VI.

being, the threat may be the mother's death, or severe diminution of physical or mental health, or lesser but still sizable losses. With regard to freedom, the threat may be a continuation of the kind of severe violence or coercion that occurs when impregnation is due to rape or seduction or other causes beyond the mother's ability to control. In all such cases, abortion is justified regardless of the fetus's stage of development. For the mother, as a purposive agent, already has the generic practical abilities and the purposes to which these are directed, and their being lost, endangered, or attacked for the sake of the fetus would involve that the generic rights of someone who has them in full would be drastically subordinated to a minimal possessor of these rights.²⁰⁰

Now it should be noted that nothing in this analysis could be used to support infanticide. That is because "the case of infants is different, for there is no comparable threat to the mother's generic rights, and the infant already has its own desires and purposes stemming from its separate physical existence," even if only rudimentarily.²⁰¹ Additionally, recall that Dworkin identified as one idea for the persistence of the abortion debate that human life should be viewed as sacred; if this is so, then setting a fairly bright line at the point where the fetus becomes viable should support this view, provided maternal life or health not be seriously endangered. And so, the fact that *Roe* had set, and *Casey* affirmed, viability as this important guidepost for where the fetus's interest in being brought to term is afforded independent state attention is certainly consistent with Gewirth's analysis of the rights involved.²⁰²

VI. THE PROBLEM OF PAIN

Earlier it was suggested that an alternative view of personhood that would be consistent with utilitarian views held by Bentham, Singer, and some others

200. GEWIRTH, *supra* note 162, at 143. *But cf.* Nathan Jun, *Gewirth's Ethical Rationalism and Abortion: A Response*, OHIO UNIVERSITY (June 27, 2009), <https://www.ohio.edu/ethics/1999-conferences/gewirths-ethical-rationalism-and-abortion-a-response/index.html> [<https://perma.cc/64FZ-V4HM>] (asserting three criticisms of Gewirth's argument without offering, at least in this account, any supporting argument, including the criticism that Gewirth's claim of no "comparable conflict" is unintelligible). It appears that the author, Nathan Jun, may have misunderstood the significance Gewirth identifies with being a full-fledged agent as categorically different from being merely a potential agent, which possesses no voluntariness or purposiveness, and is also unlikely to be self-aware.

201. GEWIRTH, *supra* note 162, at 143.

202. *See Roe v. Wade*, 410 U.S. 113, 163 (1973); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992).

might encompass “[t]he capacity for suffering and enjoyment [as] a prerequisite for having interests at all.”²⁰³ If this view is to be seriously considered then an immediate concern arises for determining the stage of fetal development where the fetus might experience physical pain. How should the law react to fetal pain? First, it is important to note that the American College of Obstetricians and Gynecologists, according to its spokesperson, Kate Connors, states: “The science shows that based on gestational age, the fetus is not capable of feeling pain until the third trimester.”²⁰⁴ If so, then the point at which the fetus might feel pain would occur after the point of viability.²⁰⁵ “New research confirmed that 22-week fetuses, measured from the first day of the pregnant woman’s last menstrual cycle [not from the date of conception as some have suggested], can survive [outside of the womb].²⁰⁶ Babies born before that age did not survive.”²⁰⁷ So, it would appear that the issue of sensing

203. SINGER, *supra* note 159, at 7.

204. Sara G. Miller, *Do Fetuses Feel Pain? What the Science Says*, LIVESCIENCE (May 17, 2016 5:22 PM), <http://www.livescience.com/54774-fetal-pain-anesthesia.html> [<https://perma.cc/Y32W-DRFU>]. See generally Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 JAMA 947, 950–952 (2005), <http://jamanetwork.com/journals/jama/fullarticle/201429> [<https://perma.cc/73LA-YS4C>] (explaining how the fetal nervous system develops).

205. See Miller, *supra* note 204; see also Ye Hee Lee, *supra* note 43.

206. Ye Hee Lee, *supra* note 43; see also Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 NEW ENG. J. MED. 1801, 1802 (2015).

207. Ye Hee Lee, *supra* note 43; see also Rysavy, *supra* note 206, at 1804 (explaining how different hospital practices account for different survival rates at 22, 23, and 24 weeks of gestation). Here it is important to also take account of potential future changes in medical technology that theoretically could push viability to a very early stage of pregnancy. See, e.g., Adam Wishart, *Are Doctors Defying Nature by Keeping Premature Babies Alive?*, DAILY MAIL, <http://www.dailymail.co.uk/health/article-1364007/Are-doctors-defying-nature-keeping-premature-babies-alive.html> [<https://perma.cc/HH9F-QNCT>] (last updated Mar. 7, 2011, 8:19 PM). While this was not a determining factor in *Casey*, see 505 U.S. 833, 872 (1992), it could become a factor in the future, if the definition of viability were to be made to encompass all forms of medical procedures that might make a fetus survive outside the womb, regardless of its stage of development. For this reason, it is important to be clear that such an approach could very seriously limit a woman’s right to control her own body, if the result of it were to force, what would otherwise be a previable birth. The situation is not dissimilar from end of life decisions where a person decides, perhaps by a provision in a living will, not to extend life by extraordinary measures, as this is not considered euthanasia. Mary Randolph, *What is a Living Will?*, ALLLAW, http://www.alllaw.com/articles/wills_and_trusts/article7.asp [<https://perma.cc/29KY-7HXT>] (last visited Nov. 5, 2017). Since the law generally recognizes adult persons to have authority over their own bodies both in regard to end of life decisions, *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 281 (1990), and by requiring consent before receiving most medical treatments, *Understanding Informed Consent - A Primer*, FINDLAW, <http://healthcare.findlaw.com/patient-rights/understanding-informed-consent-a-primer.html> [<https://perma.cc/L9MX-FE4M>] (last visited Nov. 6, 2017), these same requirements should be extended to a decision not to undergo a previable birth, when made in consultation with one’s physician. See generally Richard J. Ackermann, *Withholding and Withdrawing Life-Sustaining*

pain, even if it were thought to be part of personhood, would do little to alter the *Roe* finding that the state's interest in prenatal life starts with viability.²⁰⁸

Still, as the theory presented here focuses on voluntariness and purposiveness, which is not likely to occur before the time of birth, how should any prebirth sensation of pain affect what has been presented? Stated another way, what legitimate requirements might the state impose to offset pain associated with a post-viable abortion performed to protect maternal health? Here, the philosopher Christine Korsgaard, in considering how pain might be an objection to focusing on conscious determinations of how to live, notes:

Many pains are worth having; one may even say that they are true. Pain is not the condition that is a reason to change your condition, the condition in which the natural and the normative are one. It is our *perception* that we have a reason to change our condition. Pain itself is not a reason at all.²⁰⁹

That one may have a tooth ache doesn't necessarily signal that one should pull out the tooth. Rather, it operates as a call to investigate, to find a reason, for what should be done. Korsgaard goes on to note that

a *living* thing is a thing with a special kind of form. A living thing is so designed as to maintain and reproduce itself. It has what we might call a self-maintaining form. So it is its own end; its job is just to keep on being what it is. Its business in life is to preserve its own *identity*. And its organs and activities are arranged to that end.²¹⁰

Korsgaard's point here is to deny that when a living thing experiences the sensation of pain, as when it experiences the sensation of hunger, it perceives anything more than a threat to its identity to which it is biologically designed

Treatment, AM. FAM. PHYSICIAN (Oct. 1, 2000), <http://www.aafp.org/afp/2000/1001/p1555.html> [<https://perma.cc/6UYU-NMN5>]. One could analogously say the decision to not engage extraordinary measures to birth an otherwise pre-viable fetus is properly the woman's decision, since following *Roe* and *Casey*, the developing fetus, at this point, is just a part of the woman's body, with no independent personhood status of its own. Additionally, there are serious concerns that arise from birthing pre-viable fetuses, regarding both the survival of the fetus and its impact on the long-term health and well-being of the fetus and the woman. See *Perivable Birth*, 130 OBSTETRIC CARE CONSENSUS 187, 188 (2017). Thus, the pre-viable situation is in a significantly important way quite different from the post-viable situation where the fetus *has a heartbeat and could survive outside the womb*, even if it should need the assistance of medical services to guarantee its survival, provided the mother's health is not in jeopardy. But even in the post-viable situation, as this Article has argued and the case law has maintained, a serious health risk to the mother overrides any state interest in prenatal life.

208. See *Roe v. Wade*, 410 U.S. 113, 163 (1973).

209. Christine M. Korsgaard, *The Sources of Normativity*, in THE TANNER LECTURES ON HUMAN VALUES 21, 104 (Nov. 16–17, 1992).

210. Korsgaard, *supra* note 169, at 149.

to revolt.²¹¹ This tendency to revolt, however, is different from that of a normal adult human who then evaluates the threat to determine a proper response.²¹² As the latter suggests, “[o]bligation is the reflective rejection of a threat to [one’s] identity. Pain is the *unreflective* rejection of a threat to your identity. So pain is the *perception* of a reason, and that is why it seems normative,” but it is not the reason that carries the response,²¹³ for that needs reflection.

Now consider the case even of an animal in pain: “An animal’s cries express pain, and they mean that there is a reason to change its condition. And you can no more hear the cries of an animal as mere noise than you can the words of a person.”²¹⁴ But they are not the reason, which may depend on what is causing the pain. Persons have reasons to come to the aid of a dog or cat, or any animal in pain by determining its cause and what a proper response should be. But how might this analysis now translate to a post-viable unborn fetus suffering the pain of abortion?

Why not first start from the position of the pregnant woman as a full-fledged moral agent and then consider the position of the fetus if it is in pain? From the woman’s point of view, she would rationally want to consider the level of fetal development: if before viability and pain is not yet present, then her pause for concern, like for killing any living thing—the fetus is living tissue after all—would require her to have a reason for why she ought not to continue its development. That reason need not represent any great difficulty she ought to endure, be it physical or mental, economic or situational, but it should at least represent a reason that would affirm why continuing the fetus to term would not be in *her* best interests, especially if she is far along in the pregnancy.

By contrast, if the developmental point for fetal viability and pain reception have both already occurred, then the concern needs to be more than just how discontinuing the fetal development should benefit the woman’s interest including how it might affect her life prospects for a job or future family; at that point, the concern needs to also take into account the fact that fetal pain and the potential for life outside the womb is being discounted. If the woman’s life or health is seriously threatened, then the abortion is certainly justified as she is a full-fledged agent whose right to life is being threatened. But what about the pain issue? Here her moral obligation and that of the states should be to offset any pain to be suffered by the fetus as much as possible without unreasonably endangering maternal health. This might be accomplished by use of anesthesia,

211. See *id.* at 149–50.

212. See *id.* at 150.

213. *Id.*

214. *Id.* at 153.

provided it would not pose a health risk to the woman.²¹⁵ For here the situation would involve a woman, who is a full-fledged voluntary purposive agent, surviving only because of the unfortunate consequence that a potential agent would not. Similarly, were a woman to choose an induced labor, in order to maybe save the unborn's life, the consideration there too should take into account her need to do what is necessary for her well-being, as well as whatever risk she might be willing to freely tolerate to bring the fetus preterm.

Again, if the physical or mental danger to the woman is sufficiently grave, abortion, even post-viability, must be an option. The approach must consider the whole picture of the woman's needs as a full-fledged agent against that of the still developing but, as yet, only potential agency of the fetus. As Singer points out with respect to humans in their relation to other species, "[i]t is not arbitrary to hold that the life of a self-aware being, capable of abstract thought, of planning for the future, of complex acts of communication, and so on, is more valuable than the life of a being without these capacities."²¹⁶ And this utilitarian stance takes on greater significance when one considers, not as a matter of utility but as a matter of rights, that what will be lost is, as yet, only a potential human agent.²¹⁷

215. Jeff Guo, *Should We Give Fetuses Painkillers Before We Abort Them?*, WASH. POST (Mar. 26, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/26/montana-lawmakers-want-fetuses-to-be-anesthetized-before-theyre-aborted/?utm_term=.970297ed70da [<https://perma.cc/UGQ5-CMLE>].

216. SINGER, *supra* note 159, at 20.

217. See Gewirth, *supra* note 162, at 140. See generally Robert A. Montaña, *The Gewirthian Ideal of Self-Fulfillment: Enhancing the Moral Foundations of International Law*, in GEWIRTHIAN PERSPECTIVES ON HUMAN RIGHTS, 125, 127 (Per Bauhn ed., 2016). An interesting question arises: Should a state be able to legally require a brain-dead pregnant woman to be kept alive in order to try to save the fetus? This question received a fair amount of attention in 2014 when Marlise Muñoz, a 33-year-old pregnant woman, was found to be brain-dead after collapsing on the kitchen floor at her home. Manny Fernandez & Erik Eckholm, *Pregnant, and Forced to Stay on Life Support*, N.Y. TIMES (Jan. 7, 2014), <https://www.nytimes.com/2014/01/08/us/pregnant-and-forced-to-stay-on-life-support.html> [<https://perma.cc/TEL5-FCGR>]. When Marlise Muñoz was declared brain dead, she was 14 weeks pregnant. *Id.* Her husband and parents both asked the treating doctors at John Peter Smith Hospital in Fort Worth, Texas, to remove Marlise from life-support, but the doctors told the mother that they would not make that decision until the fetus reached 22 to 24 weeks. *Id.* This was to comply with a Texas statute, which "states that a person may not withdraw or withhold 'life-sustaining treatment' from a pregnant patient." *Id.*; see TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2017). Texas is one of twelve states with the most restrictive laws, out of thirty-one states that "have adopted laws restricting the ability of doctors to end life support for terminally ill pregnant women, regardless of the wishes of the patient or the family." Fernandez & Eckholm, *supra*. Subsequently, in response to a petition by the family accompanied by a motion to compel, a judge ordered the hospital to remove Mrs. Marlise Muñoz from life support. See Manny Fernandez, *Texas Woman Is Taken Off Life Support After Order*, N.Y. TIMES (Jan. 26, 2014), <https://www.nytimes.com/2014/01/27/us/texas->

From a societal point of view, *Casey* has already allowed for the possibility that a woman be told, as if she did not already know, that there is a societal preference for life.²¹⁸ Indeed, this position might be consistent with the view of “sanctity of life” that Dworkin describes as a major concern in the public abortion debate. The danger lies where the social expression becomes a burden on a woman’s exercise of her personal fundamental right to choose. It is extremely important to recognize that previability the woman’s right is conditioned *only* by her own health and nothing more. This should not be a difficulty for most people to fathom provided the fetus is not perceived as a person, nor should the fetus be so perceived for the reasons already described. The position of this Article is that personhood occurs when moral agency is possible. And such agency is not possible where a previable, non-sentient fetus

hospital-to-end-life-support-for-pregnant-brain-dead-woman.html [https://perma.cc/U689-VPXJ]; see also Plaintiff’s Original Petition for Declaratory Judgment and Application for Unopposed Expedited Relief, *Munoz v. John Peter Smith Hospital*, No. 017-270080-14, http://thaddeuspope.com/images/Munoz_v._JPS_Jan_2014_.pdf [https://perma.cc/WHY4-XNQE]; Plaintiff’s Motion to Compel Defendants to Remove Marlise Munoz from “Life Sustaining” Measures and Application for Unopposed Expedited Relief, *Munoz v. John Peter Smith Hospital*, No. 017-270080-14, http://thaddeuspope.com/images/Munoz_v._JPS_Jan_2014_.pdf [https://perma.cc/2X63-PUUU]. Here, one might ask what does it matter if the state’s interest in preserving prenatal life should dominate since the woman is dead, except perhaps that the state would not be complying with her or her family’s wishes? Still, if the reason for allowing people to make decisions concerning the disposal of their body after death include “ingrained notions of human dignity and respect for the dead,” as was a long-standing part of English common law, *Disposal of the Dead: Legal Rights and Responsibilities*, L. EXPLORER (May 19, 2016), <https://lawexplores.com/disposal-of-the-dead-legal-rights-and-responsibilities/> [https://perma.cc/H3EJ-L3GY], then it would matter that the woman’s interest is put aside because an important part of respect for persons should include respecting their decisions for dispositions of their bodies after death, at least to the same extent that it would apply were they still alive. And while such a respect is never absolute, it seems hard to justify a restriction on what a woman might do with her body upon death based on an interest in preserving prenatal life when that same interest could not have prevented her from having a previable abortion were she alive. Interestingly, in a case out of Ireland in December 2014, “Ireland’s high court ruled that doctors can switch off the life support machine of a brain-dead woman who is 18 weeks pregnant,” notwithstanding the doctors’ concern that “[u]nder the 8th Amendment of the Irish constitution the unborn child has the same rights as its mother even in this case.” Henry McDonald, *Brain-Dead Pregnant Woman’s Life Support Can Be Switched Off*, *Irish Court Rules*, THE GUARDIAN (Dec. 26, 2014), <https://www.theguardian.com/world/2014/dec/26/ireland-court-rules-brain-dead-pregnant-womans-life-support-switched-off> [https://perma.cc/8QXY-S9G]. Similar to the Texas case, the doctors had refused to take the woman off life support for fear of prosecution. *Id.* And indeed, one can understand their concern especially given the broad language of the Irish constitution. Still, in the context of a previable fetus, one must take pause to ask whether the court’s interpretation to allow removal quite rightly followed the view by the Irish Health Service “that the constitution was not designed to cope with cases where a brain-dead woman was kept alive because she was pregnant.” *Id.* If so, then viability here too is doing the important work in making the decision, as “[a]ll the medical experts who gave evidence in this case” agreed that “the chances of the unborn child surviving were minimal.” *Id.*

218. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992).

is developing in the womb. To hold any different position would be to elevate a mere potential person to a status greater than that of an actual person. What society can and should do in all such situations concerning prenatal life is to encourage all persons to think seriously about these issues, while not diminishing the rights of voluntary purposive human agents in the process. It is this problem of how to bring a multicultural, pluralistic society to think better on such important questions that should play the central role in the abortion discussion, and not misguided assertions of the fetus as a person for purposes of Fourteenth Amendment legal protection.

VII. CONCLUSION

This Article has shown that recent claims to make the fetus a person for purposes of Fourteenth Amendment protection fail a test of reasonable objectivity as would be required to establish the desired protection in a pluralistic society. It has also offered what a conception of personhood might look like that would fit a pluralistic application and, in effect, support the kinds of protections the Fourteenth Amendment Due Process and Equal Protection Clauses currently acknowledge. In the process of doing this, this Article takes serious the concern for potential life without denigrating the fundamental right of women to choose prior to viability whether or not to terminate a pregnancy, or after viability to terminate, if her life or health is seriously threatened. Abortion is a complex and, for many people, a very painful issue as it makes one confront some of the most basic questions about human existence: Who are persons? Why is personhood of value? Still, if the different positions are to be reconciled, clarity of both the language used and justification for the assumptions made is essential. The abortion debate need not represent a threat to human dignity but rather the possibility of finding an answer to that all-important complex moral question: To whom is morality due, and what is morality about?