Restricting Donative Choice: Fetal Tissue Transplantation and Respect for Human Life

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I. INTRODUCTION

Fetal tissue transplantation offers hope for a cure to hundreds of thousands of people suffering from a number of debilitating diseases. Due to its proximity to the turbulent domain of abortion politics, fetal tissue research provokes intense social conflict, and participates in the controversial moral and political concerns that surround the abortion debate.

At the heart of both debates lies the question of fetal worth. Researchers have managed to avoid the question by distinguishing between the decision to abort and the decision to donate the resultant fetal tissue. For example, current federal regulations require that the decision to donate be made only after a...
woman has decided to terminate an unwanted pregnancy. These researchers believe that by keeping the two decisions temporally separate, the desire to possibly help a person in need of fetal tissue therapy will not affect a woman's decision to abort. The acceptance of such regulations, the researchers believe, assures that "[a] practical separation of induced abortion and the subsequent use of human fetal tissue for the purposes of public policy" has been achieved.

I shall argue that the issue of fetal tissue transplantation cannot be insulated from the issue of abortion; ignoring this connection risks devaluation of both women and the fetuses they carry. While some would argue that a limitation on donative choice will lead to further limitations on a woman's reproductive autonomy, a restriction on donative choice need not be a restriction on abortive

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2 242 U.S.C. § 289 et seq. (1996), in pertinent part:
(b) INFORMED CONSENT OF DONOR.--
(2) ADDITIONAL STATEMENT. -- In research carried out under subsection (a) human fetal tissue may be used only if the attending physician with respect to obtaining the tissue from the woman involved makes a statement, made in writing and signed by the physician, declaring that:
(A) in the case of tissue obtained pursuant to an induced abortion --
(i) the consent of the woman for the abortion was obtained prior to requesting or obtaining consent for a donation of the tissue for use in such research;
(ii) no alteration of the timing, method, or procedures used to terminate the pregnancy was made solely for the purposes of obtaining the tissue; and
(iii) the abortion was performed in accordance with applicable State law;
(B) the tissue has been donated by the woman in accordance with paragraph (1); and
(C) full disclosure has been provided to the woman with regard to --
(i) such physician's interest, if any, in the research to be conducted with the tissue; and
(ii) any known medical risks to the woman or risks to her privacy that might be associated with the donation of the tissue and that are in addition to risks of such type that are associated with the woman's medical care.


5 An additional way in which fetal tissue researchers may devalue human life is to define the fetus as a tool, or an intervention. By constructing the fetus as "a therapeutic technology with the potential to benefit many "living" people, scientists conceive of the fetus as "devoid of human social attributes such as personhood and agency." Monica J. Casper, At the Margins of Humanity: Fetal Positions in Science and Medicine, 19 SCI., TECH., & HUMAN VALUES 307, 317 (1994). Defining the fetus as non-human devalues the fetus, and provides fodder for anti-abortion activists who find justification for their position if doctors would treat the fetus as anything less than human.

FETAL TISSUE TRANSPLANTATION

choice; the circumstances that give rise to each choice are entirely different. The moral exception that permits an abortion in the case of an accidental pregnancy should not extend to the case of intentionally becoming pregnant in order to "make tissue." Conflating the two variant moral situations and thereby treating the limited restriction on donative choice as a blanket restriction on abortive rights would do more to jeopardize a woman's reproductive autonomy than would acknowledging and enforcing the morally necessary distinction.

This study addresses the issue of a woman's right to donate fetal tissue to the designee of her choice, following either an unwanted or an intended pregnancy. A key question is whether the right to abort prior to fetal viability (currently protected as a matter of federal constitutional law) also affords a woman the right to donate the aborted fetal tissue to the recipient of her choice, or, further, to become pregnant with the intent to abort in order to donate the fetal tissue. I use casuistic reasoning to argue for a justification of both abortion and fetal tissue transplantation, and to argue against directed donation, analogizing the key issues to the ethical framework of just-war and self-defense reasoning.8

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L. REV. 375, (1996) (arguing that the restriction on directed donation infringes on a woman's fundamental right to have an abortion, because Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of S. E. Pa. v. Casey, 505 U.S. 833 (1992) allow a woman to have an abortion for any reason). Clearly, however, the issue of becoming pregnant with the intent to abort was not before the court in these cases.

7See Roe v. Wade, 410 U.S. at 113; Casey, 505 U.S. at 833.

8Casuistry is the deliberative process of drawing analogies between the new and the familiar, the accepted and the ambiguous, in order to solve newly presented ethical dilemmas. It should be noted that I argue from a strictly moral standpoint. I do not address the ideology of those who believe, for religious or other reasons, that abortion is "wrong for any reason, even to save the life of the mother." Keith J. Allred, Fetal Tissue Transplants: A Primer With a Look Forward, 28 J. HEALTH & HOSP. L. 193 (1995). Rather, I will attempt to show that a moral justification for abortion does not necessarily derive from a lack of respect for the suffering of others.

The uncertainty of the conflict between fetal tissue transplantation and certain religious convictions is illustrated by Keith J. Allred in his paper Fetal Tissue Transplants: A Primer With a Look Forward. Id. Allred discusses the case of Terri and Guy Walden, a Southern Baptist couple who at one time "did not approve of abortions under any circumstances." Id. The couple had two children afflicted with Hurler's syndrome, a rare and deadly genetic disease. Id. One child had already died and the other's health was failing when Terri learned that she was once again pregnant. Allred, supra note 8, at 193. Tests showed that the fetus was also afflicted with Hurler's syndrome. Id. Shortly thereafter, the Waldens learned of a new technique "involving the transplantation of the liver cells from an aborted fetus into an unborn" fetus with Hurler's syndrome. Id. Although the procedure was in the experimental stage, "researchers hoped the transplanted cells would [migrate] to the recipient's bone marrow and produce" the crucial missing enzyme. Id. The Waldens, torn between their strong religious opposition to abortion and their desire to save their newborn child, finally justified the operation based on the scriptural account of God having "removed one of Adam's ribs to create Eve." Allred, supra note 8, at 193.

The procedure was performed on the fetus in utero, but when the child was born, he showed no sign of developing the crucial enzyme. Id. After six months, however, tests revealed that he was producing "low normal amounts" of the missing enzyme, and
I propose that a woman who becomes pregnant with the intent to abort will be treated as an initial aggressor, and as such she will be denied the "abortion exception" that will be granted to the woman who aborts an accidental, unwanted pregnancy. Moreover, I shall argue that a woman should not be allowed to designate the donee of the fetal tissue from her abortion, even though her pregnancy was accidental. Without this restriction, a woman who intends to become pregnant and abort may simply claim her pregnancy was accidental, and thereby claim the exception.

Central to this study is the question of fetal worth, and the value to be ascribed to beings not like us, that is, not like human beings who have been born. Although I argue for a moral justification of elective abortions, I intend to show that such a justification should be a narrowly drawn exception to the prima facie duties neither to harm nor to instrumentalize others. I shall also argue that prohibiting a woman from becoming pregnant in order to abort is necessary because such a situation does not fall within the narrow exception for elective abortions, and that such a restriction is crucial to preserving our respect for those with no voice. Finally, I shall argue that the prohibition against becoming pregnant with the intent to abort does not vitiate a woman's right to terminate an unwanted pregnancy. Rather, this restriction is a necessary condition of the prima facie duties of nonmaleficence and non-instrumentalization.

A. Use of Fetal Tissue in the Treatment of Various Diseases

Fetal tissue transplantation therapy offers hope for victims of several debilitating diseases including Parkinson's disease,9 Alzheimer's disease,10 aplastic anemia,11 leukemia,12 spinal cord injury,13 thalassemia,14 AIDS,15 that the transplant was a success. Id. The Waldens are now advocates of fetal tissue transplantation, and believe that all those facing similar dilemmas should have the option to use these techniques. Id. For a detailed description of this technique, see Esmail Zanjani, Transplantation of Fetal Liver Hematopoietic Stem Cells in Utero. Paper presented at Institute of Medicine Conference on Fetal Research and Applications, June 20-22, 1986, Irvine, CA.

9Ignacio Madrazo, et al., Fetal Homotransplants (Ventral Mesencephalon and Adrenal Tissue) to Striatum of Parkinsonian Subjects, 47 ARCHIVES OF NEUROLOGY 1281 (1990); H. Winder, et al., Bilateral Fetal Mesencephalic Grafting in Two Patients With Parkinsonism Induced by 1 Methyl-4-phenyl-1,2,3,6-tetrahydropyridine (MPTP), 327 NEW ENG. J. MED. 1541 (1992); Curt R. Freed, et al., Survival of Implanted Fetal Dopamine Cells and Neurologic Improvement 12 to 46 Months After Transplantation for Parkinson's Disease, 327 NEW ENG. J. MED. 1549 (1992).


11Robert P. Gale, Fetal Liver Transplantation in Aplastic Anemia and Leukemia, 10 THYMUS 89 (1987).

12Id.

13Sally Squires, Spinal Cord Repair Research Yields Results, WASH. POST, Sept. 22, 1992,
DiGeorge's Syndrome, diabetes. In the treatment of neurologic diseases, it is hoped that fresh fetal brain cells, when transplanted into the areas of an adult brain having been damaged by various neurological diseases, will regenerate in these areas, restoring normal function. Preliminary studies reveal some success. It is also hoped that transplantation of fetal pancreatic cells will replace defective pancreatic cells in adults with diabetes.

Fetal cells are particularly well suited for transplantation because they are immunologically immature and thus less likely to trigger an immune response from the host. This tissue is also biologically "plastic," adjusting readily to a new physiological environment. Further, fetal tissues and organs are capable of being preserved and then revived using the technique of cryopreservation.

B. Fetal Tissue as a Possible Cure for Diabetes

Scientists have begun working with undeveloped fetal pancreatic tissue in an attempt to find a cure for diabetes. In type I diabetes, the insulin-producing

\[\text{at Health 6.}\]

\[14\text{Jean L. Touraine, et al., Fetal Tissue Transplantation and Prospective Gene Therapy in Severe Immunodeficiencies and Enzyme Deficiencies, 10 THYMUS 75 (1987).}\]

\[15\text{Racheal Benson Gold & Dorothy Lehrman, Fetal Research Under Fire, The Influence of Abortion Politics, 21 FAM. PLAN. PERSP. 6 (1989).}\]

\[16\text{C. S. August, et al., Implantation of a Foetal Thymus Restoring Immunological Competence in a Patient With Thymic Aplasia (DiGeorge's Syndrome), 2 LANCET 1210 (1968).}\]

\[17\text{Bernard E. Tuch, et al., Normalization of Blood Glucose Levels in Nondiabetic Male Mice by Human Fetal Pancreas After Induction of Diabetes, 46 TRANSPLANTATION 608 (1988); Shauna S. Roberts, Potential Cure, Ethical Questions; Using Fetal Tissue Transplantation as Therapy for Insulin-Dependent Diabetes, 48 DIABETES FORECAST 42 (August, 1995).}\]

\[18\text{See, e.g., Fetal Cell Tissue Use Affects Parkinson's Disease, (CNN NEWS, Transcript #221-5, May 21, 1994): Close to twenty human transplants have been performed at the University of Colorado, and "a dozen patients have had the cells at least a year ... [which is] long enough ... to judge any benefits." Dr. Curt Freed reports that two-thirds of the patients "have shown some improvement," and six out of the twelve "have had a change in their Parkinson's disease that has revolutionized their lives." In order to answer challenges from skeptics who claim that the transplant patients improve due to a mere placebo effect, Dr. Freed has agreed to perform a study which involves sham surgery. In this study, one half of the patients will receive fetal cell tissues, while the other half will not. Both sets of patients will have all of the same procedures, except that the surgeons will not penetrate the control group's brains with needles, and no tissue will be injected into the brain. Control subjects will have the chance to return for "a real fetal tissue transplant" after a year has passed. Participants will be fully informed of the risks of the surgery, and of the possibility that they might not receive any cells at all.}\]

\[19\text{See Roberts, supra note 17.}\]

\[20\text{Council on Scientific Affairs, Medical Applications of Fetal Tissue Transplantation, 263 JAMA 565, 566 (1990).}\]

\[21\text{Id. at 566.}\]

\[22\text{See Casper, supra note 5.}\]
beta cells, located in the islets of the pancreas, are either damaged or destroyed. Although no cure exists, people "manage" the disease by self-administering daily injections of insulin. Despite even the most careful regimen, however, diabetes can still rage out of control, leading to serious complications or death. Researchers believe that providing diabetics with new, insulin-producing tissue might ultimately cure their diabetes.

Organs such as the pancreas are formed from "unspecialized, nonfunctional cells" that eventually "proliferate (multiply) and differentiate (become specialize)," resulting in the mature, functioning organ. The hope is that transplanting the undifferentiated fetal pancreatic islet cells will provide the host with potential insulin-producing, young, and healthy cells. Fetal pancreatic cells have the advantage of being genetically primed to grow quickly and abundantly, whereas adult cells are programmed "simply to maintain the status quo." Also, fetal pancreatic cells are susceptible to replication through stimulation by growth hormone, while adult cells tend to resist such manipulation.

Fetal islet transplants in humans have been performed in other countries, and scientists in the United States have been experimenting with these unspecialized cells both in vitro and in animals. One scientist has developed

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23 "Despite the present inadequacy of subcutaneous insulin delivery systems for physiological insulin replacement, over 60% of patients with Type I diabetes do reasonably well over the long term. The remaining develop severe disability leading to blindness, end stage renal failure, and early demise." John H. Karam, Diabetes Mellitus and Hypoglycemia, in, CURRENT MED. DIAGNOSIS & TREATMENT 1029 (L. Tierney, Jr. et al., eds. 1995). The implication of this statement is that a superior insulin delivery system would avert an early demise. Perhaps fetal pancreatic tissue will one day serve as that "superior insulin delivery system." Id. at 1029.

24 Transplants of adult pancreases into diabetic patients have produced disappointing results. The surgery is complicated, and the "transplant recipients must take [immunosuppressant] drugs for the rest of their lives" in order to avoid rejecting the new organ. The side effects from these drugs are so severe that a "pancreas transplant isn't done unless the patient already takes immunosuppressants" required by a previous organ transplant, or is at a high risk for diabetes-induced death. Roberts, supra note 17, at 42.

25 Id.

26 One researcher has transplanted a combination of adult and fetal pig islet cells into diabetic pigs. This type of transplant is thought to yield a "faster-acting, longer-lasting transplant" because it combines the advantages of both therapies: the adult cells begin producing insulin immediately, while the fetal cells require time to differentiate before they can produce insulin. Also, the adult cells wear out quickly whereas the fetal cells have a lifetime of insulin production ahead of them. Finally, the immediate glucose control afforded by the adult cells is thought to "improve[] the environment for the growth and maturation of the fetal islets." Id.

27 Id.

28 Roberts, supra note 17, at 43.

29 Id.
an "immortal" cell line of fetal tissue pancreas cells, producing pancreas cells that can grow outside the body indefinitely, provided they are cultured correctly. While such cell lines may some day obviate the need for fetal tissue, these cell lines cannot be developed without first using actual fetal cells.

Extraction of fetal tissue is a difficult and complex process. Fetal brain cells are living organisms and must be frozen within minutes of leaving the mother's body or they will become useless for transplantation purposes. After either spontaneous or induced abortion, researchers must quickly transport the fetal remnants to neurosurgeons or neuro-anatomists who search through the remains for brain tissue. Once the desired tissue is found, the researchers immediately freeze the cells to preserve them for future use. All of this must occur within minutes of removal of the fetus from the woman's body, and requires the presence of specialists able to identify the appropriate tissue from the fetal remains. Thus, the collection procedure can be accomplished only in a hospital setting and only where there are specialists available to locate and harvest the appropriate tissue immediately.

Researchers maintain that they need at least several thousand fetuses each year in order to conduct transplant research. The fetal tissue available from ectopic pregnancies and spontaneous abortions, however, is usually infected or chromosomally defective, and cannot be used for transplant purposes. Only elective abortions consistently yield healthy tissue, and the 1.6 million abortions performed every year provide an abundant, potential source of fetal tissue. Because elective abortions are the primary source of fetal tissue, the

30Id.
32Roberts, supra note 17, at 43.
33Although the researchers collect the fetal remains in a sterile jar, approximately "30% of the specimens are infected with bacteria," making them useless for transplantation purposes. Id.
34Id.
35Id.
37Id.
38Fetal tissue transplant research ... will use tissue retrieved from the one and a half million abortions performed annually in the United States to end unwanted pregnancies. Nearly 80 percent of induced abortions are performed between the sixth and eleventh weeks of gestation, at which time neural and other tissue is sufficiently developed to be retrieved and transplanted.

social concerns and controversies surrounding abortion have been extended to the issue of fetal tissue transplantsations.39

The recent discovery of a safe and effective alternative to invasive methods of pregnancy termination will likely decrease the amount of fetal tissue available for transplants. The new treatment, which involves the combination of two drugs already approved for other uses in the United States, can be administered in the privacy of a doctor's office, with the completion of the actual abortion occurring in the woman's home, five to seven days after administration of the second drug.40 Since the fetus is expelled in the woman's home, it is impossible to harvest the cells under sterile conditions, and, by the time the expulsion occurs, the tissue is nonviable and therefore no longer useful for transplant purposes.41 The introduction of these medical abortions will decrease the availability of fetal tissue significantly, but until the drugs are widely available, surgical abortions will continue to occur.


40 Richard U. Hausknecht, Methotrexate and Misoprostol to Terminate Early Pregnancy. 333 NEW ENG. J. MED., 537 (1995). The women seeking termination of their pregnancies who were selected for participation in a pilot study of this abortion procedure, were selected "on the basis of their good general health, emotional stability, and a pregnancy of 63 days or less in duration." Id. The participants were given an intramuscular injection of methotrexate, a drug which "has been used safely and successfully to terminate unruptured ectopic pregnancy." Id. at 538. Seven days later, a dose of misoprostol, a drug which causes uterine contractions, was administered intervaginally. Id. "If abortion did not occur after seven days [following the administration of misoprostol] the woman was offered [the option of receiving] a second dose of misoprostol, or vacuum aspiration." Hausknecht, supra note 40, at 538. Out of 178 women who participated, 171 had successful non-surgical abortions. Id. Twenty-five of the women required a second dose of misoprostol, and of these, seven required further treatment in the form of suction curettage. Id. All seven surgical abortions revealed "histological evidence of disruption of the conceptus." Id. There were "no important side effects or complications" noted; indeed, when the women were asked to rate the experience with any previous abortions they might have had, "they overwhelmingly preferred the medical termination of pregnancy to the surgical method." Hausknecht, supra note 40, at 539. Although the author concluded that "the combination of methotrexate and misoprostol represents a safe and effective alternative to invasive methods for the termination of early pregnancy," id., some experts advise women who might be inclined to try the procedure to wait until further studies have been completed, or until the FDA has explicitly approved the drugs. Harassment-Free Abortions, N.Y. TIMES, Sept. 1, 1995, at A24.

Following the publication of Dr. Hausknecht's study, Dr. Eric Schaff published the results of a similar study. The combination therapy resulted in non-surgical abortions in 98 out of 100 abortion-seeking women, (some of whom were up to 8 weeks pregnant), with the remaining two women requiring surgical abortions. Since completing the study, Dr. Schaff has used the treatment on a total of 280 women, with a 97% success rate. Additionally, researchers testing the abortion drug RU 486, will file a new drug application with the FDA this year, following U.S.-based clinical trials of the drug. Approval could occur in 1996. New Study Confirms Medical Abortion Safe, PROPRIETARY TO THE UNITED PRESS INT'L 1995, Sept. 14, 1995, Domestic News Section.

II. Political History of Fetal Tissue Transplantation

In her paper *Regulating Transfer and Use of Fetal Tissue in Transplantation Procedures: The Ethical Dimensions*, Nikki Melina Constantine Bell provides an excellent review of the procedural history of fetal tissue transplantation research.\(^4\) Prior to 1987, federal approval of fetal tissue transplantation research was not necessary.\(^4\) Nonetheless, in 1987, the National Institutes of Health Director, James B. Wyngaarden, sought approval for fetal tissue transplantation research from the Department of Health and Human Services (DHHS).\(^4\) The Assistant Secretary of the DHHS opted to convene a panel of "medical researchers, lawyers, physicians, clergy, and ethicists," to decide whether this type of research should be funded, and, if so, what guidelines were appropriate.\(^4\) Although the majority of the panel determined that the research was acceptable, the minority, opposed to abortion for any reason, argued against allowing federal funding for fetal tissue transplantation.\(^4\)

In November 1989, President Bush's Assistant Secretary of the DHHS, Louis T. Sullivan, adopted the view of the minority of the panel and upheld the ban on federal funding for fetal tissue transplantation.\(^4\) The Bush Administration then decided to create a fetal tissue bank, whose source of tissue would be that obtained solely from ectopic pregnancies and miscarriages.\(^4\) Under pressure from the Bush Administration, the NIH inflated its statistics so that it would appear that as many as 2000 fetuses per year could be obtained from ectopic pregnancies and miscarriages, obviating the need to seek tissue from elective


\(^4\)Prior to 1987, all fetal research was governed by Federal Regulation 45 C.F.R. pt. 46 (1989), Department of Health and Human Services, Protection of Human Subjects, which was adopted in 1975. Chryasso B. Sarkos, *The Fetal Tissue Debate in the United States: Where is King Solomon When You Need Him?*, 7 J. L. & Pol. 379, 398 (1991). According to these regulations, research involving the dead fetus and fetal tissue was to be governed by "the Uniform Anatomical Gift Act, local laws, and 'commonly held conventions about respect for the dead.'" *Id.*, (quoting, The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, *Report and Recommendations: Research on the Fetus*, reprinted in 40 Fed. Reg. 33.530, at 75). Although approval of the Ethical Advisory Board (EAB) was required for certain types of research that the EAB determined were controversial, fetal research on dead fetuses did not fall into this category. See Sarkos, *supra* note 43, at 398. Therefore, no approval was required for research using a dead fetus. *Id.*, (citing, 45 C.F.R. 46.210(1989)).

\(^4\)Bell, *supra* note 42, at 278.

\(^4\)Id.


\(^4\)Id.

abortions. These figures were a significant overestimation, however, given that fetuses from such pregnancies are typically genetically defective or have viral infections and thus cannot and, indeed, should not be used for transplantation purposes. More realistic estimates of the useable fetuses from ectopic pregnancies and miscarriages resulted in a figure of twenty-four fetuses per year in the US. The banks ultimately failed, and lost federal funding in 1993.

As Ms. Bell points out, in June of 1992, President Bush vetoed H.R. 2507, the NIH Reauthorization Bill. President Bush's purported purpose for the veto was "to prevent taxpayer funds from being used for research that many Americans find morally repugnant . . . and because of [fetal tissue research using fetuses from elective abortions] potential for promoting and legitimating abortion." The veto was upheld after a House vote of 271-156. Presumably, some members of the House had been misled by the inflated figures in the NIH report, believing the fetal tissue bank to be a viable option.

After his election in 1992, President Clinton lifted the ban on fetal research. Thus, until President Clinton lifted the ban, fetal tissue research was "frozen" for eight years, during which time many people suffered who might have benefitted from research performed during those eight years. Moreover,

49 See Bell, supra note 42, at 279. See also, N.Y. Times News Service, Fetal Tissue Bank Plan is Faulted: Scientists Say Need is Far Greater Than the Available Supply, BALTIMORE EVENING SUN, July 27, 1992, 1A [hereinafter Plan is Faulted].

50 Garry, supra note 36, at 1593.

51 Plan is Faulted, supra note 49, at 1A.

52 See Roberts, supra note 17.

53 Bell, supra note 42, at 280.

54 Id. (quoting H.R. 2057, 102d Cong., 2d Sess. (1992)).

55 Id. at 279.

56 Id. at 280.

57 Bell, supra note 42, at 280.

58 Joan I. Samuelson, a person afflicted with Parkinson's disease, founded an organization to develop support for lifting the ban on fetal tissue research. The organization worked with Congress and the public to dispel the myths surrounding the proposed research, and to document the safeguards which would prevent fetal tissue research from affecting the decision to abort. Appealing to reporters to "stick to the facts," and to avoid the use of campaigns which twist the truth in order to scare and confuse the public, Ms. Samuelson notes that the NIH Reauthorization Act of 1993 "establishes the first statutory set of ethical requirements for obtaining tissue from elective abortions and writes into federal law a set of guidelines by which any scientific research raising ethical questions can be evaluated." She also mourns the loss of the eight years of research which might have helped her and countless others:

[Eight years of research were lost. I have had Parkinson's disease for exactly that same period, during which I have lost my ability to run, hike and backpack, watching the symptoms of tremor and stiffness threaten the many motor functions essential to my ability to earn a
although only federal funding of fetal tissue research was banned, private companies, who usually follow federal guidelines whether receiving federal funding or not, also ceased performing fetal tissue transplantation research.59 Thus, the ban on federal funding also slowed research in the private sector, leading one top fetal tissue research company in the United States to discontinue fetal tissue research altogether.60 Today, despite President Clinton's reversal of the ban on federal funding of tissue transplantation research, the ethical battle between fetal tissue research and anti-abortion movement continues.

III. ETHICAL ISSUES

Currently, if a woman decides to donate the fetal tissue from her elective abortion, she is not permitted to designate a particular recipient for the tissue transplant.61 If a woman is permitted to terminate her pregnancy prior to fetal viability, what ethical consideration should prevent her from designating a donee for the fetal tissue from the abortion? What moral obligation should constrain her from intentionally becoming pregnant in order to abort and provide fetal tissue for transplantation? If the law allows abortion under certain circumstances, what moral principle should limit the use of tissue from abortions lawfully performed?

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60 Hana Biologic, one of the only U.S. companies to make public its attempts at fetal tissue research, discontinued all such research, citing technical difficulties and political pressure as the reasons for making this decision. The company has since merged with Somatix, which intentionally avoids fetal tissue research altogether. Id.

61 42 U.S.C. 289 (1996), follows the NIH guidelines for fetal tissue research. The law explicitly makes funding of fetal tissue transplantation research legal when the following criteria are met:

(1) The patient's decision to have an abortion and the decision to donate fetal tissue are kept strictly separate.
(2) Researchers do not pay women for donating fetal tissue.
(3) Recipients of transplants are told of the source of the tissue, (not the donor, just the source).
(4) The woman agrees to donate the tissue.
(5) The tissue is not given to a relative of the woman nor to anyone she specifies.
(6) State law is followed in performing both the abortion and the research.

Roberts, supra note 17, at 46.
The purported reason for the prohibition against designating a particular donee is to prevent an increase in abortions. However, further analysis of this regulation is necessary in order to make it clear that this restriction is not a restraint on a woman's right to do with her body as she wishes; rather, it is a natural limitation imposed by the prima facie duties of nonmaleficence towards, and non-instrumentalization of, another. In order to understand this limitation, it is first necessary to examine the moral issues associated with abortion.

A. Abortion as Exception to the Prima Facie Duties

This discussion will begin with a review of the Aristotelian theory of ethical reasoning and the obligation to honor prima facie duties. I will then use Bell, supra note 42, at 282. See, infra § A. Abortion as Exception to the Prima Facie Duties.

Sir William David Ross, a Scottish Aristotelian scholar and moral philosopher, was an intuitionist who took issue with "ideal utilitarianism," which "ignores, or at least does not do full justice to, the highly personal character of duty." A. Stout, William David Ross, 7 THE ENCYCLOPEDIA OF PHIL. 216 (P. Edwards, ed. 1967), (quoting, WILLIAM D. ROSS, THE RIGHT AND THE GOOD (1930), at 22). In describing how Ross distinguishes between actual duties, and prima facie duties, Stout writes:

Conflict of duties is one of the main problems facing an intuitionist, who cannot accept the utilitarian's 'Do what will produce the most good.' Ross says, 'Do whichever act is more of a duty.' To make sense of 'more of a duty,' he draws a distinction between prima-facie and actual duties and holds that conflict can only arise between prima-facie duties. An act is a prima-facie or 'conditional' duty by virtue of being of a certain kind (for instance, the repaying of a debt) and would be an actual duty if it were not also of some other morally important kind or did not conflict with another more important prima-facie duty. Thus, if I have promised to lend money to a friend in need, I have a prima-facie duty to hand over the money. But suppose that before I have done so, I find that I need it for the legal defense of my son, charged with a crime of which I believe him innocent. I recognize a conflicting prima-facie duty to help him. Ross maintains that (a) one, and only one, of these two prima-facie duties is my actual duty; (b) I know each of them to be a prima-facie duty -- this is self-evident; (c) I can have only an opinion about which is 'more of a duty' and therefore my actual duty.

Id. at 217. (Emphasis added). Thus, prima facie duties, by their very nature, are those that admit of conflict. The statement that a prima facie duty is one that is in conflict with "a more important prima facie duty," refers to the fact that people differ in what they consider to be the morally correct thing to do, and this subjective interpretation gives rise to a personal actual duty. But, as Stout notes, Ross asserts that this "actual duty" is merely a prima facie duty which, in the actor's opinion, is the "more important" duty, and so takes precedence over the other.

In the instant study, I present, in two layers, what I believe are the conflicting duties. The first conflict is that between the duty of noninstrumentalization and nonmaleficence towards the fetus, and the woman's right to reproductive autonomy, and the second is that of the conflict between the duty of noninstrumentalization and nonmaleficence towards the (now aborted) fetus, and the patient in need of a fetal tissue transplant.
FETAL TISSUE TRANSPLANTATION

casuistic reasoning to show how prima facie duties may sometimes be overridden in the face of conflicting duties, but that the underlying obligations continue to inform and survive the resolution of the conflict.

Aristotelian ethics holds that it is impossible for moral understandings to be based on general abstract principles (universally, invariably, and certainly known) because particular ethical situations are so variable they defy generalization. Therefore, "ethics is not and cannot be a science." Ethical thinking must begin from a position of the "virtue of prudence," and requires application of a "practical wisdom." For Aristotle, ethics is a practical, not a theoretical science.

In his paper, *On Transplanting Human Fetal Tissue: Presumptive Duties and the Task of Casuistry*, Richard Miller describes the process by which prima facie duties arise, and how they can be overridden by greater, conflicting duties. Miller accepts prima facie duties as those that "give presumptive weight to values" arising from an abiding minimum expectation of human behavior. They are presumptive duties that are compelling unless a unique situation arises, demanding a contrary action. Thus, in the absence of exceptional, extenuating circumstances, we have an obligation to honor these prima facie duties, that is, prima facie duties are not absolute, but may be abandoned upon a showing of sufficient proof that a more compelling duty exists.

Significantly, even when a prima facie duty is overridden, it continues to affect the subsequent action. For example, the underlying duty not to use others as a means to an end informs or instructs the conditions and methods of the subsequent overriding act, resulting in certain criteria which define the moral limits of the overriding act.

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67 *Id.*


69 *Id.* at 619.

70 *Id.* at 620.

71 *Id.*

To override a prima facie duty, however, is not to abandon it. Such duties continue to function in the situation or subsequent course of action, leaving 'residual effects' or 'moral traces.' The overridden duty casts a shadow, affecting our action in pursuit of other duties or values.

Miller, *supra* note 68, at 620.

72 In his paper, Miller lays out, as an example of such criteria, the boundaries inherent in just-war reasoning. *Id.*
Ethicists and scholars have used the theory of *prima facie* duties in dealing with a variety of moral dilemmas, and the problems surrounding abortion and fetal tissue transplantation can be addressed by way of comparison to these earlier analyses. This process of comparison, called casuistry or casuistic reasoning, is useful in providing a way to analyze new and difficult moral issues against the backdrop of more familiar areas of ethical reasoning and accepted moral principles.

**B. Casuistry as an Ethical Method**

The formal enterprise of casuistry lost theoretical respectability 300 years ago, when people began to fear that a system wherein morality was decided on a case-by-case basis would yield a moral relativism, excusing the inexcusable. At that time, casuists, made up of ethicists, physicians, legal scholars, and clergy, used their collective experience and education to ponder the problems of new ethical dilemmas and to discuss them with each other. This debate was considered the moral dialogue of the community, the "knowing together" (*con-scientia*). Under this process

> liberty of conscience" never meant the right to take up a personal moral position that ran in the face of the general agreement of reflective scholars and doctors: rather, it meant that when the outcome of the collective debate left room for differences of opinion in marginal or ambiguous cases, it was for each individual to resolve those residual ambiguities in accordance with the dictates of his or her heart and convictions.

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74 *Jonsen & Toulmin*, supra note 66, at 11.

75 See generally, id. at 16-20.

76 *Id.* at 335.

77 *Id.* The relegation of the issue of abortion to the legal realm produces precisely the opposite result from that which "*con-scientia*" would prescribe. The "*con-scientia*" process would hold that abortion is one of those situations with such widespread difference of opinion that no "general agreement" will ever be reached, and therefore that the individual should be allowed to decide what to do without reference to any dictates of the law. The law should control only those issues where a general agreement may be reached. Otherwise, we risk imposing the opinion of the majority on the individual whose differing opinion is just as valid as the majority's, but in opposition to it. The ambiguity of the abortion issue simply does not lend itself to resolution via the courts, because rather than a general agreement having been reached, there exists only a set of conflicting moral positions, each equally valid. Given such an ambiguous situation, the only option is to allow the decision to be an individual choice, decided completely outside the dictates of the law.

The fact that the law currently allows an individual women to decide whether or not to abort a nonviable fetus is incidental. If her choice is made within the limits defined by the majority, it is not her choice. If abortion rights depend upon the changing will of the majority as expressed in provisional laws, one of the opposing, equally valid views
Although the process of casuistry was abused in the past, it has since reemerged, and is increasingly relied upon by people in marginal and ambiguous situations where pat solutions, universal standards, and general theories seem vague and somewhat beside the point. Rather, moral problems require a fair balance between opposing issues in ways appropriate to the particular situation. In ethical dilemmas, the might of the majority does not necessarily or inevitably impose the right resolution.

In the context of abortion, people who argue for an unqualified "liberty of conscience" or "right to choose" claim that every pregnancy carries identical ambiguous or marginal difficulties, and that therefore every woman should be allowed in all cases to have the right to decide in individual ways. But becoming pregnant intending to abort in order to donate fetal tissue is quite different than becoming pregnant unexpectedly or inadvertently. The problems involved in a "pregnancy situation" where a woman intentionally becomes pregnant in order to abort are much clearer than the issues in a "pregnancy situation" wherein the pregnancy is unintended and unwanted. In sum, it is easier to arrive at a consensus as to why a woman should not intentionally become pregnant in order to abort, than it is to decide whether a woman should have the right to terminate an accidental, unwanted pregnancy. In the former case, we begin with a situation where competing rights do not yet exist, whereas in the latter case, the situation of conflicting rights is ripe, and so demands a solution in the face of an extremely ambiguous situation. It is this ambiguous situation, that of an unwanted pregnancy, where we squarely face the conflict between a woman's right to reproductive autonomy and a

must be denied. Once the issue of abortion becomes a legal one, the majority is allowed to dictate and control a highly ambiguous situation, and the "con-scientia" model would hold that this is ethically invalid. The law has no place here.

78 JONSEN & TOULMIN, supra note 65, at 304. In The Abuse of Casuistry, Jonsen notes that casuistry gained an unfavorable reputation because it was thought to breed moral laxity. Id. at 231-249. Jonsen writes: 

[the casuists were professed and dedicated Christians ... [who] acknowledged the moral dimensions of Christian faith. ... Still, as the casuists pursued their analysis of the moral life into more and more detailed cases, they seemed to move further and further away from the clear light of those beliefs. Each series of cases began with a strong affirmation of Christian ideals; but as the cases became more complex, the loftiness and rigor of those ideals faded into the background.

Id. at 238. The casuists were thought to be too ready to excuse those who did not deserve to be excused, (particularly the wealthy wrongdoers), and reading an individual casuist opinion out of context might easily lead to this impression. However, Jonsen notes that "effective casuistry depends precisely on 'what precedes and follows.' Casuistical arguments comprise chains of cases arranged in order of increasing complexity. If a particular opinion is broken out of these original chains, it can be exposed to criticism or ridicule; but its full moral relevance is apparent only when it is replaced and viewed within those chains of cases." Id. at 245.

79 JONSEN & TOULMIN, supra note 66, at 335.
fetus's right to life. This is where there is "room for differences of opinion," and this is where it is time "for each individual to resolve those residual ambiguities in accordance with the dictates of his or her heart and convictions." On the other hand, the situation of an intentional pregnancy with the intent to abort allows less room for differences of opinion, given the powers of both the prima facie duty of nonmaleficence and the duty not to use others as a means to an end. But while the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, an example of a current-day institute

80 Id. In addressing the consequences that follow from the various possible moral judgments concerning abortion, Jonsen, et al., note:

No one, surely, can doubt that in the best of all worlds there would be no occasion for abortion to be considered, et alone performed. . . . But as always, this is only one of a dozen distinct consequential questions. In the cure of souls, as well as personal charity, we know that sometimes the decision for an abortion is, at the very worst, deeply regrettable but understandable -- certainly not unforgivable, to say nothing of damnable.

Id. at 337.

These authors also suggest that making abortion a crime raises profound questions of jurisprudence and public policy about the extent to which, and the conditions on which, good purposes are served by bringing the judicial processes of the State to bear on the most painful and personal aspects of the lives of the citizens. In deciding such matters, points of pure principle make great slogans; but the demands of personal discernment and the practice of the confessional place upon us other more serious moral demands...

Id. at 337.

In a recent article from the New England Journal of Medicine, the authors note that:

Because politics as currently practiced seems so unprincipled, there have been sporadic attempts to redefine abortion-related issues as ethical questions and to set up national panels and advisory groups to examine various practices and make recommendations about their ethics. When the subjects studied by the panels have been unrelated to abortion, the panels have often helped to forge a consensus. But when abortion has dominated the agenda, virtually no progress has been made.

George J. Annas, et al., Sounding Board: The Politics of Human-Embryo Research -- Avoiding Ethical Gridlock, 334 NEW ENG. J. MED. 1329 (1996). It is precisely this difficulty in reaching a consensus on the issue of abortion that necessitates that the issue be a personal and not a group decision.

81 In 1974, Congress enacted legislation to create the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. JONSEN & TOULMIN, supra note 66, at 16; see also NAT'L COMMIS. FOR THE PROTECTION OF HUMAN SUBJECTS, infra note 106. From 1975 to 1978, the Commission conducted hearings and published reports and recommendations on a variety of moral issues. JONSEN & TOULMIN, supra note 66, at 16. In discussing the Commission's methods of argument, Jonsen, (a former member of the Commission) notes:

On a completely general level, it is true, the members of the commission were able to share certain agreements -- for example, as to the principles of autonomy, justice, and beneficence. But these shared notions were too comprehensive and general to underwrite specific moral positions. The National Commission did issue a statement of general principle, but it was composed only after the commissioners had worked through
of casuistry, would decide that a woman should not become pregnant in order to abort, it does not diminish her right to terminate an accidental or unwanted pregnancy. The two types of pregnancies are much different, and it is these differences that qualify the "liberty of conscience."

Casuistry is an alternative to deciding cases based on absolute principles, and requires a critical but moderated inquiry into the circumstances of each unique case as it arises. To demonstrate why becoming pregnant with the intent to abort should not be permitted, it is first necessary to consider justifications for abortion. Once this is done, it can be shown that such justification, which is an exception to certain prima facie duties, does not extend to intentional pregnancies.

C. Toward a Moral Justification for Abortion

One approach to justifying the termination of an unwanted pregnancy is to draw analogies from the ethical structure of self-defense reasoning. We have a prima facie duty of nonmaleficence, yet self-defense acknowledges a justification, with concomitant limitations, for using lethal force against another person if necessary. The presumptive duty of nonmaleficence must yield in the face of a conflicting duty where generalities fail to address the unique situation of a physical attack, or, by analogy, an unwanted pregnancy. As with a physical intrusion, an unwanted pregnancy poses an exceptional circumstance in which the duty to avoid harming another conflicts with the duty to protect oneself. The fetus qua fetus is not the attacker; rather, it is the condition of being undesirably pregnant and the resultant unwanted burdens of motherhood that pose the threat. Although a pregnancy may not be life-threatening, carrying an unwanted pregnancy to term is a significant emotional and physiological burden for a woman, a burden that overrides their problematic cases casuistically. See The Belmont Report: Ethical Principles and Guidelines for Protection of Human Subjects of Biomedical and Behavioral Research (Washington, D.C., 1978).

JONSEN & TOULMIN, supra note 66, at 356. Note that following the completion of the work of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research was created by statute in 1978, and completed its work in 1983. BARRY R. FURROW, ET AL., BIOETHICS: HEALTH CARE LAW AND ETHICS 400 (1991). These institutional ethics committees were extremely important because "neither had any actual power to implement their recommendations. Both viewed their roles as primarily educational, and each became a vehicle for developing a national consensus on policies that would inevitably be incorporated into law." Id. Both commissions "remain the most constantly cited sources on every issue they studied." Id.


83"The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." Casey, 505 U.S. at 852.
her duty of nonmaleficence toward other human life and allows her to abort in order to protect herself.\textsuperscript{84}

\textit{D. Constraints on the Right to Abort}

Importantly, by overriding the \textit{prima facie} duty not to harm other human life, we do not forsake the duty completely.\textsuperscript{85} The moral demands of the duty remain firmly in place, strongly affecting subsequent action, even as the primary obligation itself is overridden.\textsuperscript{86} Whether the overriding action is self-defense or abortion, the duty of nonmaleficence continues to exert a subjective pressure on the actor, by requiring that the act invoke "not moral guilt but at least regret about [possible] suffering and the loss of life that results."\textsuperscript{87} This is not to say that the act is morally wrong but to affirm that suffering has on some level occurred. Preserving feelings of regret, and never losing sight of the loss, acts as a limitation on the justification for overriding the presumptive duty of nonmaleficence in cases of both self-defense and abortion.

The residual traces of the presumptive duty of nonmaleficence exert their most significant pressure on the objective questions of: (1) when an overriding action is justifiable; and (2) the type of means appropriate for attaining a justified action.\textsuperscript{88} Thus, the duty not to harm is not abandoned, but continues to exert both subjective and objective pressure on all decisions made.

\textit{E. Applying the Just-War Analogy}

In making his argument in favor of fetal tissue transplantation, Richard Miller draws an analogy from the general ethical framework of just-war reasoning.\textsuperscript{89} I have further extended these criteria to situations of self-defense and abortion:

(1) \textit{Just Cause}. The just cause for using lethal force in a situation of war or self-defense is for the "defense of innocent victims of aggression."\textsuperscript{90} In the case of an unwanted pregnancy, it may not appear that there is an aggressor; but there does exist an extremely deleterious situation from the vantage point of

\textsuperscript{84} Although the pre-viability fetus has not attained legal personhood, prior attempts to elucidate the ethics of fetal research indicate that we attribute some value to the pre-viable fetus, however nebulous the extent of that value may be. See \textsc{Natl. Commis. for the Protection of Human Subjects}, \textit{infra} note 106. Therefore, we afford some protections to fetal life even though the fetus is not considered to be a person, and these protections can only be overcome for just cause.

\textsuperscript{85} Miller, \textit{supra} note 68, at 620.

\textsuperscript{86} \textit{Id.}

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} \textit{Id.}

\textsuperscript{89} Miller, \textit{supra} note 68, at 620.

\textsuperscript{90} \textit{Id.}
the woman that requires resort to lethal force for eradication. Although the woman might not be an "innocent victim of aggression," presumably she is facing the unwanted pregnancy unwillingly, through no fault of her own, and is thus no less vulnerable than a person who is being attacked.

(2) Competent Authority. Miller writes that in the situation of just-war, "the representatives of the community must declare war and marshall a defense." In a situation of self-defense, the legal system has elaborated the conditions wherein self-defense is appropriate; it is not an arbitrary decision left to the whims of the defender. In the abortion situation, a doctor determines fetal viability in order to assure that a viable human life is not aborted.

(3) Right Intention. An appropriate intention must be present in order to override a presumptive duty. In a situation of just-war, the intent is "to reestablish the condition of peace and fairness." In an abortion situation, the

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91 Some might suggest that an unwanted pregnancy is strictly the woman's "fault." This suggestion ignores the fact that contraceptives are not fail-safe. Further, there may be any number of reasons for wanting to terminate even an initially planned pregnancy, none of them trivial to the woman involved. The bottom line is that a woman who is pregnant and does not want to be, is in no less vulnerable a position than a person being attacked. There is no way out of her situation other than by way of lethal force; there are no alternatives to ending the pregnancy except abortion. Suggesting that a woman carry the pregnancy to term and either keep the child or put it up for adoption is no answer because these options do not remove her from the threatening situation, being undesirably pregnant.

While there may be women who are careless in their use of contraception, or do not have adequate education about or access to contraception, the answer to these problems is not to find fault or place blame, but to educate these women, and to use societal persuasion, not governmental coercion, to prevent what still must be considered "accidental" pregnancies.

Further, it makes little sense to try to decrease unwanted pregnancies by restricting access to abortion. The unwanted pregnancy and subsequent abortion can be analogized to a automobile accident. Some accidents occur as a result of careless or reckless driving, some because of poor road conditions or faulty automobiles. Similarly, an unwanted pregnancy may occur due to recklessness, faulty contraception, or for no apparent reason. In an attempt to decrease automobile accidents, we regulate the act of driving with laws prohibiting speeding or driving while intoxicated. Yet we can not attempt to prohibit the actual wreck, as it is impossible to control "accidents." It is similarly absurd to attempt to decrease unwanted pregnancies by prohibiting abortion. Once an unwanted pregnancy has occurred, no amount of regulation can reverse it. Prohibiting abortion is equivalent to denying the accident victim a chance to seek medical treatment. And in the same way that allowing an accident victim to seek medical treatment does not increase the number of automobile accidents, providing pre-viability abortion on demand does not increase the number of unwanted pregnancies, it merely provides a safer remedy for an undeniably tragic event that has occurred.

92 Id.

93 See LAFAYE, supra note 82.

94 Miller, supra note 68, at 620-1.

95 Id.
intent is to reestablish the condition of non-pregnancy, not to harm a living being for no reason.

(4) Last Resort. This element requires that all peaceful means be exhausted prior to an act of war or self-defense.\textsuperscript{96} In the context of abortion, there are no other means by which to terminate the pregnancy except suicide, and this is obviously no solution.

(5) Reasonable Hope for Success. There must exist a reasonable probability of success before resort to force can be justified.\textsuperscript{97} "Rash or irrational resort to force is prohibited."\textsuperscript{98} Abortion satisfies this element in that it is a safe and effective way to terminate a pregnancy. Additionally, the recently introduced medical abortions are even less invasive than surgical abortions.

(6) Comparative Justice. In a situation of just-war or self-defense, it is necessary that neither side have "absolute justice in defense of its cause or claims."\textsuperscript{99} Rather, there must exist conflicting claims before resort to force can be justified.\textsuperscript{100} In an abortion situation, there are obviously conflicting claims, with neither the woman nor the fetus having a clear defense of its claims.

(7) Proportionality. Dangers and risks inherent in an act of war or self-defense "must not outweigh the prospective benefits" of such acts.\textsuperscript{101} Likewise, the risks of abortion, both psychological and physiological, must not outweigh the benefit of restoring the woman to a non-pregnant status. An additional risk to be considered is the possibility that abortion may devalue human life, and cause a loss of respect for certain fetal rights, however uncertain they may be.

A resort to lethal force can be justified only after the above criteria are adequately satisfied.\textsuperscript{102} This "adequacy" must be determined on a case-by-case basis, and in reliance on the judgment of ethical committees appointed for the express purpose of addressing these issues.

Once an action is justified, there remains the question of the type of means permissible to achieve the justified outcome.\textsuperscript{103} Here, the \textit{prima facie} duty of nonmaleficence continues to exert pressure on the decision, by limiting the \textit{way} in which a justifiable override of the duty may be carried out. For example, in an act of self-defense, deadly force may be used only to meet deadly force.\textsuperscript{104} One is not justified to kill another unless one's own life is in imminent danger.

\textsuperscript{96}ld. at 621.

\textsuperscript{97}ld.

\textsuperscript{98}Miller, supra note 68, at 621.

\textsuperscript{99}ld.

\textsuperscript{100}Id.

\textsuperscript{101}Id.

\textsuperscript{102}Miller, supra note 68, at 621.

\textsuperscript{103}ld.

\textsuperscript{104}LAFAVE, supra note 82, at 650-53.
An abortion may appear to be an exertion of lethal force against non-lethal force, but, as discussed above, an unwanted pregnancy is typically considered by any woman to be a potentially life-altering threat. In legal rather than moral terms, the Supreme Court has determined that a woman's right to bodily integrity and privacy overrides the duty not to use the fetus (via an abortion) as a means to an end, i.e., as a means to attaining the condition of non-pregnancy. The line demarcating permissible and nonpermissible override of this duty is currently inscribed by the safety of the abortion procedure, and the presence of fetal viability. However, these lines have already begun to elide, as medical technology improves a fetus' chance for survival outside of the womb prior to the third trimester, and as second and third trimester abortions become increasingly safer, creating ambiguity and uncertainty for the future of abortion rights. Still, at least for the moment, there is no absolute bar. Under some circumstances, the law does not proscribe abortion.

**F. Concern for the Interests of the Fetus**

If the fetus is considered to be nothing more than an aggregate of maternal cells, then fetal tissue research is no more problematic than other research involving bodily parts or organs. However, according to the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (1975) the human fetus is thought to have some worth

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105 See, Roe v. Wade, 410 U.S. at 113 (1973); Casey, 505 U.S. at 833.

106 If abortion is criminalized, it is not likely that the actual number of abortions will decrease. At a national conference held by Planned Parenthood in 1955, the majority of the participants estimated the annual number of abortions to be between 800,000 and 1,000,000 per year. Patricia Miller, The Worst of Times 322 (1993). In the 1955 Kinsey Report on the sexual behavior of the American female, twenty-two percent of all the married women who responded admitted to having had at least one abortion by age forty-five, and the average number of abortions over the course of the woman's reproductive life was two. Id. The average annual number of abortions since legalization has been consistently greater than 1,000,000 per year. Id.

Extrapolations from what is known about 19th Century birth rates, illegitimacy, and 19th Century contraceptive use and its effectiveness, yield estimates equaling approximately 160,000 abortions in the year 1860. Marvin Olasky, Abortion Rites: A Social History of Abortion in America 291 (1992). Adjusted for population growth, this figure is equivalent to the current rate of 1,600,000 abortions per year. Id. at 291-92. Thus, whether abortion is legal or illegal, the actual rates of abortion are roughly equivalent. This suggests that a woman who has decided not to carry her pregnancy to term will not, no matter how difficult it is to terminate her pregnancy. Criminalization affects only the safety of the abortion procedure, not the number of abortions that are ultimately performed.

107 Miller, supra note 68, at 618.

108 The National Commission for the Protection of Human Subjects of Biomedical Research was established in 1974, pursuant to Title II of the National Research Act, Public Law 93-348, to "study the ethical principles underlying biomedical and behavioral research on human subjects and to make recommendations to the Secretary,
and therefore should be afforded some type of protection. In a legal system dominated by adult humans, the only value or worth that a non-adult human\textsuperscript{109} will have is that afforded to it by those in control of the system. To


Whatever a fetus may be, the determination of its value or worth deserves at least a coherent moral argument in order to "define the moral status of the embryo convincingly." Annas, \textit{supra} note 80. In discussing the moral framework as elaborated by the Human Embryo Research Panel of the National Institutes of Health, these authors suggest that the "[i]nability to define the moral status of the embryo convincingly is the crucial failure of both the panel's report and the overall debate on the subject," and that such a failure "guaranteed that [the Human Embryo Research Panel's] report would have no effect" on resolving the ethical dilemmas of human embryonic research. \textit{Id.} at 1330.

A persuasive moral argument for conducting some research on human embryos can be made. Such an argument must explicitly and straightforwardly account for the relationships involved in human procreation and its social context. An embryo has moral standing not so much for what it is (at conception or later), but because it is the result of procreative activity. . . . People have a direct interest in the status and fate of every embryo formed from their gametes, because such embryos carry their genes and can potentially become their children. In this respect, the embryo is not only a symbol; it is real. Similarly, society has a direct interest in that embryo, since society has an interest in how its members procreate and how families are created. \textit{Id.} at 1330-31. A similar argument can be made with respect to a woman "making fetal tissue" purely for transplant purposes. Further, "to create embryos solely for research — or to sell them, or to use them in toxicity testing — seems morally wrong because it seems to cheapen the act of procreation and turn embryos into commodities." Likewise, becoming pregnant with the intent to abort turns the act of procreation into the equivalent of growing hair to be used in a natural hairpiece, or growing fingernails for use as press-on nails.

It is society's moral attitude toward procreation and the interests of those whose gametes are involved in making the embryos that provide the moral force behind the restriction or prohibition of the manufacture of embryos for nonprocreative uses. A moral framework that reduces the matter to an exclusive focus on the intrinsic properties of embryos, ignoring the interests of those whose gametes make the embryos and the circumstances under which procreation occurs, cannot persuade, or even engage, those to whom the creation of embryos solely for research is morally suspect. \textit{Id.} at 1331. The same argument applies to becoming "fetal tissue farms;" it denies fetal worth by devaluing the procreative process.

\textsuperscript{109}The category of non-adult humans consists of all living things that are not adult humans, including children, animals, fetuses, and natural objects such as trees or wilderness areas, etc. The fact that it is impossible for these entities to voice their interests does not mean that they have no independent worth beyond that afforded to them by adult humans, only that this worth is difficult to ascertain in a system that only understands the language of adult humans. To dismiss the interests of those who cannot speak is to ignore the possibility that these interests might exist.
avoid the possible abuse of such control, I presume for the purposes of this study that the fetus has interests, although these interests may not be directly ascertainable.

Some have argued that the fetus has no rights because it has no interests.110 Those who make this argument rely on the fact that because a fetus is not like us, in that it does not think, speak, or feel the way adult humans do, its interests cannot be equivalent to ours in value. This is the same reasoning which was used in the past to deny rights to women and to African Americans.111 Anytime there is an attempt to confer rights on a new "being," it will sound impossible, because "until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of 'us' - those who are holding rights at the time."112

G. Denial of Right to Designate a Donee

Assuming a woman's choice to have an abortion is morally sound, we turn to the question of whether she may designate a donee for the fetal tissue which results from her abortion. Currently, a woman who has made the decision to

While it is possible that these beings have no interests, and that claiming that they do might limit the amount of tissue available for transplants, this is merely one factor to be weighed in the decision of how best to approach the problem of unascertainable interests. Of equally important consideration is the possibility that these beings have inexpressible but existent interests, and ignoring this possibility perpetuates the dysfunctional illusion that we "human adults" are irredeemably separate from other beings and from our environment, instead of inextricably intertwined with these elements. In a situation where we may never be able to speak directly to those upon whom our legal system impacts, the least we can do is to admit that our inability to understand them does not mean that no interests exist, only that we are unable to know what these interests are. The limits of our knowledge may be instructive.

110John A. Robertson, Abortion to Obtain Fetal Tissue for Transplant, 27 SUFFOLK U.L. REV. 1359, 1376 n. 46 (1993)(arguing that "because the fetus is not yet an entity with interests or rights, no wrong is done in aborting previable fetuses to get tissue for transplants"); Bell, supra note 42, at 284 (arguing that the fetus has no interests because "[i]t has never participated in life as we know it. It has not formed relationships or ever had anything we could honestly call an experience. It has never exerted its will or formed expectations."); RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 16 (1993)(arguing that a fetus cannot have interests until it has the necessary neurological capacity to feel pain: "[i]t makes no sense to suppose that something has interests of its own ... unless it has, or has had, some form of consciousness: some mental as well as physical life").

111See, e.g., Scott v. Sandford, 60 U.S. 393, 404-05 (1856)(African Americans were denied citizenship because they were "a subordinate and inferior class of beings, who had been subjugated by the dominant race"). Additionally, in framing the Constitution, the founding fathers, conceived by asexual generation, denied personhood to women: "[t]o the extent that the Framers' intent can fairly be fathomed, their dominant conceptions denied the humanity and equality of a majority of the American people, including women, the Native American population and people of color." Sylvia L. Law, Family, Gender & Sexuality, 26 JUDGES J. 22, 56 (Summer 1987).

abort cannot donate the tissue from her abortion to a specific recipient. This precludes a woman from deciding to help a particular individual at the same time that she ends her unwanted pregnancy and also prevents a woman from becoming pregnant with the explicit intent to donate her fetal tissue to a specific beneficiary. The social concern behind this regulation was the fear that allowing a woman to designate a donee would increase abortions by: (1) encouraging a woman to abort a pregnancy she might otherwise have carried to term; and (2) enabling a woman to "make tissue" for someone she knows who desperately needed it, by intentionally becoming pregnant and then aborting the fetus for transplant purposes. Although opponents of fetal tissue transplantation combine these fears into a single concern, the situations are vastly different.

The reasons for a woman's choice to abort are many and varied but universally, and essentially, personal.

A woman has an abortion because she is unwed, has difficult financial circumstances, already has a large family that she is trying to raise, is barely more than a child herself, or for other deeply personal reasons. One ethicist who contributed to the Stanford University Medical Center Committee on Ethics Special Report remarked that "[i]n light of the deeply personal and powerful physical, emotional, economic and religious concerns of women considering abortions, it seems implausible that the knowledge [that her fetus could provide tissue to a transplant recipient] would have any marked effect [on her


114 By keeping the decision to abort and the decision to donate separate, and by prohibiting the designation of a specific donee, researchers believe the use of the fetal tissue for transplants will not indicate complicity in elective abortions, any more than the use of an organ from a murder victim indicates complicity in homicide. John A. Robertson, The Ethical Acceptability of Fetal Tissue Transplants, 22 TRANSPLANTATION PROCEEDINGS 1025 (1990).

115 In Ohio, a woman who learned of the development of fetal tissue transplantations, and whose husband was afflicted with Parkinson's disease, stated, "if I could become pregnant and have an abortion to help him I would do it." Marlene Cimons, Fetal Tissue Research Stirs Debate, L.A. TIMES, Sept. 6, 1988, Pt.2, at 3 col.1.

116 An analogous situation occurs in the context of embryonic research. In embryonic research, the tissue source is either the "spare" embryos that are created for procreation but are not needed, or embryos that are created specifically for research purposes. Annas, supra note 80. Annas, et al., note that, with respect to embryonic research "many people, like President Clinton, could approve of research using 'spare' embryos created by in vitro fertilization without approving of the creating of embryos for that specific purpose." Id. at 1331. The authors also suggest that had the "Republican dominated House of Representatives" been provided with adequate information to distinguish "research on spare embryos from research on embryos created solely for the purpose of performing experiments, the failed amendment to permit federal funding to be granted for research using spare embryos might have passed. Id.
decision].' Her last concern is likely to be what happens to the fetal tissue, including whether it can help someone.\footnote{Bell, supra note 42, at 289. (Footnotes omitted).}

A woman facing an unwanted pregnancy is unlikely to be swayed in her decision to abort simply by the prospect of helping another.

The second fear, that a women will become pregnant intentionally in order to abort, is a different matter and the two situations should not be conflated. To ensure that the restriction on directed donation is not viewed as a limitation on a woman's right to abort an unwanted pregnancy, it is important to distinguish between these two pregnancy situations. One way to make this distinction is to consider the two pregnancy situations in the context of fetal tissue transplantation and apply the concept of \textit{prima facie} duties not to instrumentalize or harm others.

Such a consideration begins with the assumption that using fetal tissue for transplantation in order to save another’s life is a justifiable reason for overriding the \textit{prima facie} duty not to use another as a means to an end.\footnote{I consider the fetus as an "other" for purposes of this discussion.} This assumption is based on the idea that the duty to the health of others overrides the duty not to use the fetus as a means or not to harm the fetus.\footnote{The "use" of a fetus I am referring to here is the use of a fetus from an elective abortion of an unintended pregnancy, in order to obtain fetal tissue. In weighing the conflict between the duty to alleviate suffering in those with debilitating diseases, and the duties neither to instrumentalize nor harm the aborted fetus, I believe that the duty to alleviate the suffering of the living overrides the duties to the aborted fetus. This belief is conditional, however, in that the fetus in question must come from an elective abortion of an unintended pregnancy, a situation that I have already attempted to justify, and a situation beyond which this belief does not extend. Richard Miller notes that in our society and in many cultures, the dead are treated with respect "because a deep personal sentiment is attached to them." Miller, supra note 68, at 623. We honor a person’s premortem wishes out of duty not to instrumentalize the dead. \textit{Id.} Miller suggests that the \textit{prima facie} duty not to use the dead as a means to an end derives from "the presumption against harm, the \textit{prima facie} duty of nonmaleficence construed as a bias against suffering." \textit{Id.} He believes that this presumption against harm, along with the "concomitant sentiment of regret," enable us to treat the dead with imputed dignity. \textit{Id.}; \textit{See also}, Uniform Anatomical Gift Act (UAGA) 8A U.L.A. 30-60. It is impossible to ascertain the premortem wishes of the fetus, but combining our respect for fetal life with our respect of the non-fetal dead creates a presumption of respect for the fetal dead. Miller, supra note 68, at 623. This presumption can be overcome only by compelling circumstances, such as a need for transplant tissue for a living person.}

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This exception to the \textit{prima facie} duties continues to be constrained, however, by the overridden \textit{prima facie} duties themselves. These duties require that the tissue not be obtained from intentional pregnancies, because the exception allowing the use of aborted fetuses for fetal tissue transplantation arises from the conflicting \textit{prima facie} duties inherent in the situation of an unwanted pregnancy, a conflict that is not present in the situation of an intentional pregnancy. Richard Miller notes that in our society and in many cultures, the dead are treated with respect "because a deep personal sentiment is attached to them." Miller, supra note 68, at 623. We honor a person's premortem wishes out of duty not to instrumentalize the dead. \textit{Id.} Miller suggests that the \textit{prima facie} duty not to use the dead as a means to an end derives from "the presumption against harm, the \textit{prima facie} duty of nonmaleficence construed as a bias against suffering." \textit{Id.} He believes that this presumption against harm, along with the "concomitant sentiment of regret," enable us to treat the dead with imputed dignity. \textit{Id.}; \textit{See also}, Uniform Anatomical Gift Act (UAGA) 8A U.L.A. 30-60. It is impossible to ascertain the premortem wishes of the fetus, but combining our respect for fetal life with our respect of the non-fetal dead creates a presumption of respect for the fetal dead. Miller, supra note 68, at 623. This presumption can be overcome only by compelling circumstances, such as a need for transplant tissue for a living person.
pregnancy. The argument against directed donation thus returns to the justification for abortion itself.

Abortion is an exception to the *prima facie* duties not to use others as a means to an end nor to harm another. This exception is limited, however, in that a woman may not take a further step and intentionally become pregnant in order to abort. As discussed above, a woman who becomes accidentally pregnant is permitted to abort in order to escape a threatening situation, but this "defense" will be denied to her if she becomes pregnant with the intent to abort, because she is not facing the same threats that are inherent in an accidental pregnancy. The *prima facie* duties not to use others as a means to an end and not to harm others preclude an extension of the abortion exception beyond the accidental, unwanted pregnancy.

The woman who intentionally becomes pregnant in order to "make tissue" can be compared to an initial aggressor in a situation of self-defense. The initial aggressor is denied the defense of self-defense, having purposefully placed herself in the threatening situation, and so may not be availed of the exception to the *prima facie* duty not to harm others. Similarly, a women who intentionally becomes pregnant is in a different situation than the woman facing an accidental and unwanted pregnancy. The *prima facie* duties will bend far enough to allow the abortion, because it is still an unwanted pregnancy, but they must operate as a barrier to stop a woman from taking the unjustifiable step of becoming pregnant intentionally in order to "make tissue." This barrier does not affect a woman's right to choose to abort an unwanted pregnancy, which, as discussed above, is a situation that presents an independently compelling reason to override the duty not to use or harm others, unlike the situation of an intentional pregnancy.

IV. CONCLUSION

Because elective abortions are the primary source of fetal tissue, moral and ethical issues surrounding fetal tissue research are inextricably intertwined with those of the abortion debate. Doctors and researchers have argued that a transplant from an aborted fetus is morally no different than a transplant from an accident victim or a homicide victim, and that fetal tissue transplantation should not become a platform upon which to argue the morality of abortion. Some opponents of legal abortion agree that fetal tissue transplantation can be separated from the act of abortion, and that the use of the tissue does not constitute complicity in the abortion itself. Despite the initiation of

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regulations governing fetal tissue transplantation, the process makes us uneasy, and this discomfort is likely a manifestation of the unsettled debate concerning fetal worth, the very question at the heart of the abortion issue. Distinguishing between terminating an unwanted pregnancy and intentionally becoming pregnant in order to abort is crucial, precisely because the latter raises fears of instrumentalization that could ultimately jeopardize the limited right to terminate a pregnancy of any kind. Embracing the distinction will preclude opponents of abortion rights from claiming that fetal worth is being ignored for the sake of scientific progress.

The Supreme Court has yet to address the question of fetal tissue donations, although the status of a woman's right to choose is implicated by the issues surrounding fetal tissue transplantations. Opponents of this therapy have voiced concerns ranging from the need to protect the purported rights of the fetus to fears that women will be coerced into decisions they would otherwise not confront. Women are portrayed alternatively as murderers and victims, unworthy and unable to make an informed decision in the face of complexities involving the decision to donate. However, the regulations prohibiting designation of a donee were not established because a woman cannot make a reasoned decision, or in order to limit her reproductive rights. Rather, these limitations are the legal manifestation of the moral duty not to harm others or use others as a means to an end.

It is important to accept the choice to abort as an exception to the duties not to harm or to instrumentalize others and to understand that this exception does not encompass the choice to become pregnant with an intent to abort. These are very different situations. Unless the difference is recognized, both types of abortion will be conflated, and a woman's right to terminate even an unwanted pregnancy will be lost amidst fears that we are creating "tissue farms." Insisting upon the distinction between these two types of pregnancy situations, and limiting the moral exception to include only one, preserves the right to choose as well as the value of fetuses and of all human life.