Embryos, Fetuses, and Babies: Treated as Persons and Treated with Respect

By Robert L. Stenger*

I. Introduction

The impact of recent advances in medical science and technology upon traditional moral and legal understandings of human existence is perhaps nowhere more dramatic than in developments affecting human reproduction. Late twentieth century developments in assisted reproduction, which offer opportunities for influencing the very origins of individual human life, are comparable to the mid-twentieth century developments in physics, which offered opportunities to manipulate atomic structure. As nuclear physicists and political leaders suddenly had the awesome power of the atom at their disposal, so now scientists raise the possibility of control not only of individual humans but of the human genome itself.

The President’s Council on Bioethics recognized what was at stake in its March, 2004 report, Reproduction and Responsibility. On the one hand, capacities emerging from the confluence of reproductive biology, developmental biology and human genetics offer a growing capacity to control the beginnings of human life, especially \textit{ex vivo} (outside the body). On the other hand:

biologically speaking, human procreation represents life’s answer to mortality, perpetuating the human species despite the perishability of every one of its members... Humanly speaking, because these deep

* Professor of Law, Louis D. Brandeis School of Law, University of Louisville. Professor Stenger is a member of the Human Studies Committee (the Institutional Review Board for University of Louisville Hospital) and of the Hospital Ethics Committee. Professor Stenger also serves on the Matrimonial Tribunal of the Roman Catholic Archdiocese of Louisville.
biological facts are lifted up into human self-consciousness, procreation commonly establishes ties of belonging, rooted in begetting, richly significant for parents, children, and the larger society.¹

From the 28th of July, 1978, when news media broadcast the birth of Louise Joy Brown, a 5 lb. 12 oz. healthy baby in the Oldham and General District Hospital, ethicists, philosophers, physicians, couples suffering from infertility, legislators, and the general public have pondered its implications. This little girl was the first baby born who had been conceived outside of her mother's body by a process called in vitro fertilization ("IVF"). One of the physicians involved attempted to alleviate concerns that scientists were attempting to create life by explaining:

Nobody can create human life artificially, not in a test-tube, a Petri dish, or anywhere else. Such claims are ridiculous, pathetically arrogant. Life is uniquely there, bursting out everywhere, a wonderful part of our universe. The most any of us can do is to help to make life possible, and to make it healthy and good.²

Since 1978, over a million babies have been born via the process of in vitro fertilization to couples who cannot or do not wish to conceive in the usual manner.³ The process has now expanded to include the freezing and storage for later use of a human embryo, implanting it into the uterus of a woman (gestational mother) other than the donor of the eggs (genetic mother), disaggregating an embryonic cell from a four to eight cell embryo, growing an embryo for purposes of research or as a source for embryonic stem cells, and screening embryonic cells to prevent the births of genetically damaged infants.⁴

By the end of the twentieth century, discussions of assisted reproduction had become further complicated by the possibilities of human cloning⁵ and demands for the

³ Reproduction and Responsibility, supra note 1, at 3.
⁴ Id. at 16-17.

As I wrote in my 113-page report on cloning for the National Bioethics Advisory Commission, in which I urged a ban on human cloning, I was struck
use of stem cells derived from human embryos for research into treatments for chronic and currently incurable diseases. It appears increasingly impossible to separate scientific advances from humanistic beliefs about human life or to slow research to permit philosophical and religious reflection. What can be done turns into what will be done before there is time to ask what should be done.

The state of the debates over the status of human embryos is currently reflected in the juxtaposition of three perspectives. First, there is increased scientific and medical understanding of the beginnings of individual human lives, from pre-fertilization through the formation of a genetically new and unique human life to implantation in a uterus and development until birth. Much of this increased knowledge was made possible by experience with ex vivo fertilization and the earliest stages of cell division. Second, there is continuing philosophical reflection on human personhood, both at its origins and in its ending, as medical advances permit the extension of life well beyond what was possible just a few decades ago. Third, there are the responses that the legal system has made to these new developments as issues arise that demand legal resolution. Courts have no way of avoiding conflicts brought in traditional legal actions, e.g., the rights of husband and wife who are dissolving their marriage to their frozen embryos, or parental rights of gestational versus genetic mothers. Legislatures are called upon to frame new civil remedies and criminal sanctions for harms to a fetus. All of the debates and discussions concerning human reproduction occur in the emotionally and politically charged atmosphere of sharply divided and conflicting viewpoints on the morality and legality of abortion.

II. The Beginnings of Human Life: Science and Medicine

Any discussion of the philosophical and legal status of an embryo should begin with the best available scientific evidence. As Jane Maienschein states so clearly:

by the fact that my past was coming back to haunt me. I had helped create the legal precedents that gave couples the right to use reproductive and genetic technologies. Now John Robertson, the lawyer who had replaced me on the American Fertility Society Ethics Committee, was testifying before the National Bioethics Advisory Commission that reproductive freedom included the right to create a child through cloning.

Cf. THE HUMAN EMBRYONIC STEM CELL DEBATE: SCIENCE ETHICS AND PUBLIC POLICY 205 (Suzanne Holland et al. eds., 2001) ("Stem cell technology holds the promise not only of increasing human health and life spans but also of changing power structures and fundamental notions of human personhood, moral status, and mortality."))
Biology shows us what happens through all the complex stages of development that make up a life cycle, from formation of the germ cells through fertilization and on to death. These discoveries change the boundaries of what is and is not possible. They give us a more refined understanding of the organic processes involved in life. Science alone does not, however, define when life begins. Science does not tell us when along the sequence of embryological stages a developing organism becomes something that we want to call a life.\(^7\)

While science does not itself provide an automatic answer to questions about human life, personhood, and human dignity, such questions should not be answered on the basis of inadequate or faulty science. The situation is similar to that of a bioethicist asked to advise concerning the continuation of life-prolonging treatment. The basic evidentiary foundation for a sound bioethical decision is as accurate a clinical diagnosis as one can obtain and, if research is involved, an adequate exploration of the risks and benefits of the experimental treatment and available alternatives.\(^8\)

Maienschein offers a succinct chronology of the development of scientific descriptions of human origins from Aristotle to contemporary embryologists. Aristotle contributed a gradualist understanding (generation involves change over time) which continued to the end of the nineteenth century, when it was known how each individual life began with an egg from the mother, fertilized by a sperm from the father, with the nuclei coming together and cell divisions occurring and eventually resulting in a fully formed organism.\(^9\) The explanation of that gradual process of development was clarified by the mapping of the human genome and by analysis of fertilization and a more detailed exploration of development from a single cell to a complex organism.

Much contemporary debate centers about stages of development. Human development begins when sperm cell and egg meet and the fertilized egg then has its complete set of chromosomes. By the end of the process of fertilization, genetic uniqueness is established. Then the fertilized egg divides, directed by the internal mechanism of mitosis and guided by the structures of the egg's cytoplasm. It is important to note that "most fertilized eggs never develop at all or survive past a few cell divisions."\(^10\) The cell divides into two, then four, then eight cells, each of which is

---

\(^7\) JANE MAIENSCHEIN, WHOSE VIEW OF LIFE? 9-10 (2003) [hereinafter MAIENSCHEIN].

\(^8\) TOM BEAUCHAMP & JAMES CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 81 (2001).

\(^9\) MAIENSCHEIN, supra note 7, at 13, 49.

\(^10\) MAIENSCHEIN, supra note 7, at 256. Ann Kiessling, What is an Embryo?, 36 CONN. L. REV.
equivalent to the others so that were the cells to be separated, the separated cells could develop independently. After approximately three days of cell division, an inner mass of cells and an outer mass (which will become the placenta) form. By the fifth and sixth days the hollow ball of cells (called a blastocyst) contains cells which are totipotent, that is, wholly undifferentiated and capable of becoming any of the specialized cells in the human body.\textsuperscript{11}

By the ninth or tenth day the blastocyst has moved to the mother's uterus, where it begins the process of implantation. Up to this point, a fertilized egg can grow \textit{ex vivo} and \textit{in vitro}. With current technology, it is not possible to grow the blastocyst outside of a mother's uterus; the incubation centers of Aldous Huxley's \textit{ Brave New World} remain, as they were in 1932, a part of science fiction. Following implantation occurs gastrulation and, by the fourteenth day, the appearance of the “primitive streak” and differentiated cells and, perhaps, the capacity to experience sensation.

Current interdisciplinary discussion and debate is complicated by various labels which are given to different stages in the process. Embryologists and developmental biologists designate stages of development as “morula,” “blastula” and “gastrula” which would be included under the more general label of “embryo.” With the growing popularity of assisted reproduction came the terms “preimplantation embryo” or “pre-embryo.” The developing embryo is a “fetus” after the eighth week.\textsuperscript{12}

The fourteenth day after fertilization has been utilized as a point of distinction in embryonic development both here and abroad. In 1979 the Ethics Advisory Board recommended that federally-funded research could take place up to the fourteenth day.\textsuperscript{13} The United Kingdom, in the Human Fertilisation and Embryology Act, 1990, followed the recommendation of the Warnock Report in limiting activities with respect to an embryo after the fourteenth day from fertilization, when the primitive streak was presumed to have arisen.\textsuperscript{14}

\textsuperscript{11} James A. Thomson, \textit{Human Embryonic Stem Cells}, in \textit{THE HUMAN EMBRYONIC STEM CELL DEBATE} 15-17 (Suzanne Holland et al. eds., 2002).

\textsuperscript{12} MAIENSCHEIN, \textit{supra} note 7, at 260-62. The varying definitions of “embryo” from general dictionaries, medical and law dictionaries, and embryology textbooks, are listed by Kiessling, \textit{supra} note 10, at 1064-66.

\textsuperscript{13} MAIENSCHEIN, \textit{supra} note 7, at 281.

\textsuperscript{14} Human Fertilisation \& Embryology Act, 1990, c. 37, § 3, (3)(a), (4) (Eng.); see also DEREK MORGAN \& ROBERT G. LEE, \textit{BLACKSTONE'S GUIDE TO THE HUMAN FERTILISATION \&
One significant conclusion which can be drawn from an understanding of the continuum of human development from a one-celled fertilized ovum is summarized by Maienschein:

What should be clear is that there are many biologically significant steps along the way toward a life. It is not the case that a life begins at conception in the sense that it is recognizable, or that it has all its parts, or that it is functioning in any significant way other than cells dividing into other cells that are just like them. Implantation, primitive streak, forty days, eight weeks: each has biological significance, as does every other point along the way.15

The continuum of development, as biologists understand it today, does provide guidance in selecting terminology to label what is happening. From the process of fertilization emerges unique human life, whose DNA is derived from that of both biological parents and whose DNA is unlike that of any other living thing. From fertilization there is life and it is human life; it is not potential life or potentially human life. “[F]ertilization is the most critical event in the life of an organism because it effects the cell-to-organism transition that initiates a species-specific developmental trajectory.”16

An understanding of life as inner-directed development of an organism reiterates the explanation that Aristotle (384-322 B.C.E.) elaborated in his philosophy, which was rooted in empirical biological investigations. He called the principle of animate life “the soul” which he defined as “an actuality of the first kind of a natural organized body.”17 By making life the act of the body, he avoided both dualism (the soul is something that drives the body) and monism (the soul is a part of the body).18 Austriaco utilizes contemporary biological understanding to support Aristotele’s

---

15 MAIENSCHEIN, supra note 7, at 262.
hylomorphic theory (form and matter explain substantial change) while rejecting allegedly Aristotelian theories that claimed that humans had a sequence of souls (vegetative, sensitive, intellectual) or that humans acquired a soul only at some time after fertilization when the body was sufficiently developed to have a soul (called “delayed hominisation”).

At the same time that one recognizes the uniqueness of human life, that begins when the process of fertilization is complete, there remains the possibility of twinning. Until about the fourteenth day of development with the beginning of gastrulation, an embryo can “spontaneously” split into identical (monozygotic) twins. Thus, what originally appeared as one unique life may be not one life but two. A similar result could be achieved by splitting an embryo in vitro. Or, if reproductive cloning of a human being were to become possible, a single individual could have a genetic copy with literally the same genes as the donor. And, finally, the uniqueness of human life can be altered by recombinant DNA in which gene therapy could remove what is defective or add what is desired.

As scientists and clinicians come to know more about the processes of human development and as experience and technologies permit further human interventions, fundamental moral and legal questions will continue to stir controversy and debate. It is futile, however, to expect that science and technology can provide definitive solutions to the questions or quiet the controversies. One must look to those who reflect upon human life from a philosophical or religious perspective. Notions of human dignity, rights, personhood and morality arise from reflection upon human living and not from raw scientific data.

III. Human Personhood: Philosophy and Theology

Biological evidence concerning the rich complexity and diversity of life on this planet may inspire awe, appreciation, and even a commitment to work for the preservation and conservation of all forms of life. But such a reaction does not define

---


21 Id. at 127-29.
how human life differs from other life or how humans in relating to one another should act individually and communally.

There are formal and widely accepted statements about the value to be ascribed to human individuals, as, for example, in the Charter of the United Nations: "We, the Peoples of the United Nations, determined... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person..."\(^{22}\)

One statement of the question can be formulated from Justice Blackmun's opinion in *Roe v. Wade*. To the argument put forth for Texas that "life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception," he replied:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer. It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult subject.\(^{23}\)

Ambiguity arises as soon as the question is phrased "when does life begin." There is no doubt when human life begins. Life for the human species began when the first ancestor with genes sufficiently similar to those that currently define *Homo sapiens sapiens* walked on this earth. That original human life passed by sexual reproduction through countless generations of humankind. Each individual human life begins when the process of fertilization is complete and there is a new and unique life that can be genetically identified. And fertilization could not occur were not the sperm and egg alive. Surely human life exists from fertilization through implantation and live birth and continues until death. Justice Blackmun stated the legal issue more precisely when he noted:

\(^{22}\) See Richard Lillich & Hurst Hannum, *International Human Rights: Documentary Supplement* 1, 33-35 (1995). The Charter was signed in June, 1945. The idea was reinforced in the Preamble to the 1966 International Covenant on Civil and Political Rights: "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..." and Article 6: "Every human being has the inherent right to life." *Id.*

The appellee and certain *amicus* argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.\(^2\)

What is controverted is not when human life begins, but when the existing human life should be accorded the dignity and human rights attributed to each human person.

In his study of abortion (which appeared three years before the Supreme Court of the United States undertook its resolution of the constitutionality of criminal statutes prohibiting abortion), Daniel Callahan recognized that there was no scientific answer to the question of the beginning of human life.\(^2\) He elaborated three possible positions concerning when one should be recognized as human. The genetic school would find the defining criterion of humanness in the individualized human life that is the product of conception from human parents and that has the potential for all further development. The weakness of this position is that potentiality of any particular individual is more like a statistical probability and the potentiality can only develop in specialized biological and cultural environments. The developmental school would require some stage of development as essential and this might be the development of differentiated organs or sensation or consciousness. The difficulty of this position is, of course, that there is no agreement about which stage of development is the defining moment. Finally, the social-consequences school would ask first for the purpose of the definition and define as appropriate to the goals of the questioner. But any such definition will appear arbitrary for there is no intrinsic reason for selecting one defining characteristic over others.\(^2\)

A developmental approach to recognizing personhood dissociates personhood from bodily life, so that one might begin to be a person after a period of biological life and development or cease to be a person while biological life continues. Jeff McMahan elaborates such a position in *The Ethics of Killing: Problems at the Margin of Life*, where he includes at the margins of life human embryos and fetuses, newborn infants, anencephalic infants, congenitally severely retarded human beings, human beings who have suffered severe brain damage or dementia, and human beings who have become

\(^2\) *Id.* at 156-57.
\(^2\) *Id.* at 378-83, 384-94.
irreversibly comatose. He defends the position that “person” refers to any entity with a mental life of a certain order of sophistication that includes self-consciousness. Personal identity includes continuity over time and egoistic concern is only rationally justified where there is personal identity, which requires sufficient physical and functional continuity of the areas of the brain in which consciousness is realized.

This theory of personal identity and egoistic concern can be applied to the deaths of embryos (and infants). Their deaths are not great losses to them for “it is not a misfortune to lack a good that one is by nature psychologically incapable of having,” for misfortune means loss of something one cares about deeply and thus assumes that there is a subject psychologically well developed enough to grasp a future.

From an embodied mind account of identity (persons do not begin to exist until their organisms develop the capacity to generate consciousness), one can conclude that death for an embryo is the end of biological life (something dies) but not the death of a person (someone dies). This idea is further explained by the time-relative interest account, which is a function of: (i) the amount of future good that a person may rationally anticipate and (ii) the relations of unity existing between the person now and in the future. Because the lack of consciousness precludes rationally planning for future goods, and because there is very little unity between a fetus and a maturing child or adult, one should not predicate personhood on an embryo.

Support for not naming an embryo a person may also be grounded in the common intuition that the death of an embryo or fetus is different from the death of an infant. To call a bundle of dividing cells a person is rather a conclusion drawn from biological evidence of genetic identity between fertilization and birth. The problem with identifying personhood with the arrival of consciousness is that one can date consciousness at cortical EEG activity (21-22 weeks), or visual and auditory response (at 24 weeks), or cerebral functioning (28 weeks) or at birth or well after birth, for an

---

28 Id. at 6.
29 Id. at 41, 79.
30 Id. at 150, 163-65. McMahan's theory also responds to the claim that personhood belongs from the time of conception to the fertilized ovum; if "on a very conservative estimate two of every three products of human conception die of natural causes prior to birth," then the vast majority of human persons were never even born.
31 Id. at 267, 275.
32 McMahan, supra note 27, at 267 (quoting Julius Korein, Ontogenesis of the Brain in the Human Organism: Definitions of Life and Death of the Human Being and Person, in 2 ADVANCES IN BIOETHICS
infant has only rudimentary awareness, and self-consciousness, including grasping one's future, is a product of development and environment. Thus, conclusions one may apply to an embryonic death could also apply quite logically to infants, small children, and persons physiologically and psychologically incapable of formulating a concept of self-identity.33

Just as the developing capacity for consciousness brings a human organism towards personhood, so declining mental capacity would bring the end to the person, even as the biological life of the organism continued. McMahan concludes:

In summary, the life of the human organism begins when the cells of which it is initially composed begin to function together in an organized, integrated manner; and the organism dies when its various parts irreversibly cease to function together in this way. If, as I have argued, we are not organisms, it is not necessary that we begin to exist when our organisms do, or that we die, or cease to exist, when our organisms die. We begin to exist when our brains develop the capacity to generate consciousness and mental activity—that is, when a mind first begins to exist in association with an organism—and we cease to exist when our brains lose that capacity in a way that is in principle irreversible.34

Separating death of the person from death of the organism could clarify the situation of a persistent vegetative state in which modern medical technology can maintain biological life via respirators and artificial nutrition and hydration after there has been a neurological diagnosis of irreversible loss of cortical functioning. The distinction is perhaps easiest to apply to trauma, when a sudden event, such as cardiac arrest or serious accident, plunges the victim into irreversible unconsciousness while bodily life continues. More common, however, are cases of progressive dementia where mental abilities slowly decline as the individual loses awareness of who they have been or who they are. If self-consciousness is constitutive of personhood, then such persons

25-26 (1997)).

33 See Peter Singer, Writings on an Ethical Life 160-63 (2000) ("The intrinsic wrongness of killing the late fetus and the intrinsic wrongness of killing the newborn infant are not markedly different.") (emphasis in original).

34 McMahan, supra note 27, at 424, 438-439 (If the death of the person is separable from the death of the organism, then two definitions of death are necessary: neocortical or cerebral death occurs when the parts of the brain which sustain consciousness are irreversibly destroyed and brainstem death occurs when the integrated functioning of the major organ systems and subsystems takes place.).
would no longer be the same person nor a different person but a conscious individual “post-person.”

The moral and legal implications of determining that demented individuals are no longer persons would lead many to reject the claim, for it would appear to put demented patients outside of moral and legal protections for persons and deny them human and civil rights. Decisions about providing life-prolonging treatment to those who have been in some form of unconsciousness for years sometimes receive public scrutiny. The intensity of the conflicting deeply-held views appeared dramatically in the case of Terri Schaivo, where efforts by her parents and the executive and legislative branches of state and federal government to maintain her artificial nutrition and hydration opposed those of her husband, who succeeded in state and federal courts to make medical decisions for his wife, including termination of nutrition and hydration.

Ronald Dworkin supported his conclusion that a fetus (up to some point in its development) does not have interests or rights by distinguishing two different objections to abortion. A derivative objection to abortion is derived from a belief that a fetus, like all human beings, has rights and interests of its own, including an interest in remaining alive, and that government has a derivative duty to protect that interest. A detached objection to abortion is derived from a belief that human life has an intrinsic and innate value and is sacred even before the one whose life it is has interests or rights of its own and that government has a duty to protect that value. The fetus may be said to have interests or rights of its own when it reaches the stage of cortical development,

---

35 Id. at 493.

(The Psychological Account of Identity has the surprising and implausible implication that the Patient at Onset [of the early stages of progressive dementia] and the Demented Patient [the patient in the later stages of dementia] are not the same individual. For as the day-to-day psychological connections within the victim’s life become progressively fewer, a point is eventually reached at which the Demented Patient is no longer psychologically continuous with the Patient at Onset. According to this view, then, the Demented Patient is a post-person who succeeds the Patient at Onset in the latter’s own body.)


38 See RONALD DWORKIN, LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 11 (1993) [hereinafter DWORKIN, LIFE’S DOMINION].
probably at about thirty weeks of gestation, to enjoy or fail to enjoy, to have emotions, to have, in short, "the neural substrate necessary for interests of any kind."  

Thus, Dworkin argues, there is a period of development during which there is human life but not personhood, for a person is one who has interests and rights. Dworkin differs from McMahan with respect to the severely demented because the detached view includes recognition of the inherent dignity or sanctity of human life and a recognition that the community, in respecting the severely demented, acknowledges the value of the life they had lived and the necessity for the community to continue to acknowledge the value of human life.  

Jurgen Habermas reaches similar conclusions in his profound reflections upon the implications of human interventions into the very processes of human gestation via genetic testing and manipulation. He concludes that decades of debate over abortion and the status of pre-natal life have shown that it is not possible to describe early prenatal life in terms that are neutral with respect to worldviews and “thus acceptable for all citizens of a secular society.” It is reasonable to have a “gradually changing evaluative sentiment and intuitions toward an embryo in the early and middle stages of its development” that corresponds to the phenomenon of development. He suggests a distinction between “something not to be disposed over” [in German, "unverfugbar"] and something “inviolable” in the sense of absolute human rights [in German, "unanantastbar"];  

39 Id. at 17-18.  
40 Id. at 237.  
41 JURGEN HABERMAS, THE FUTURE OF HUMAN NATURE 13 (2003):

Up to now, both the secular thought of European modernity and religious belief could proceed on the assumption that the genetic endowment of the newborn infant, and thus the initial conditions for its future life history, lie beyond any programming and deliberate manipulation on the part of other persons. Our life histories are made from a material that we can “make our own” and “responsibly take possession of,” in Kierkegaard’s sense. What is placed at our disposal today is something else: the previous uncontrolability of the contingent processes of human fertilization that results from what is now an unforeseeable combination of two different sets of chromosomes . . . For as soon as adults treat the desirable genetic traits of their descendants as a product they can shape according to the design of their own liking, they are exercising a kind of control over their genetically manipulated offspring that intervenes in the somatic bases of another person’s spontaneous relation-to-self and ethical freedom. This kind of intervention should only be exercised over things, not persons.”
prenatal life is not something to be disposed over, while personhood in the full sense arises at birth when social individuation occurs, i.e. integration in the public context of interaction of an intersubjectively shared lifeworld.\(^\text{4}^\) 

A sharply contrasting view is argued by John Kavanaugh, S.J., who disagrees with depersonalizing contemporary culture and its “de-personed” philosophy.\(^\text{43}^\) He objects to separating personal existence from biological life as a dualism of Cartesian proportions, and Kavanaugh defends the personhood of all humans, including marginal humans who are members “albeit damaged, undeveloped, or rendered incompetent” of our personal community and who not only require our respect but reveal our own vulnerability.\(^\text{44}^\) He explains that philosophizing springs from a human subject who is multi-dimensional with (i) subjective endowments required to dynamically experience an interior world, (ii) set in a background of personal history and context, and (iii) life under the objective conditions of the cosmos and an inter-subjective world of language and tradition.\(^\text{45}^\)

A human experiences consciousness, self-consciousness, and reflexive consciousness, which enables a person to express their personal uniqueness (and not only their genetic uniqueness) in self-defining choices and actions. Persons have a capacity for freedom and to create a life that is a narrative.\(^\text{46}^\) Kavanaugh maintains fundamental equality for all persons, even as he recognizes that people differ in their abilities and accomplishments:

No one of us is greater than any other in terms of our endowments as persons. Some of us may be further developed in our fulfillments, organic or otherwise. Some of us may be more mature or supple. Some of us may be more greatly gifted by the contingencies of time and place, genetic endowment, physical nutriment, cultural expanse. Each and all of us, however, are radically equal and unique in our capacity to say our own ‘yes.’\(^\text{47}^\)

\(^{42}\) Id. at 31, 34.  
\(^{44}\) Id. at 9.  
\(^{45}\) Id. at 25. In short, humans are “living, engaged-in-the-world persons,” “self-conscious bodies . . . set in coordinates of space and time mediated to us by culture and intersubjective discourse.” Id. at 33.  
\(^{46}\) Id. at 56.  
\(^{47}\) Id. at 62.
Kavanaugh believes that his understanding of human personhood expresses what Boethius meant in defining a person as “an individual substance of a rational nature,” which includes individuality (differing from others in a significant way), substantiality (having an internal organizing principle and integration of activities), of a particular kind or nature (differing from other species), and rationality (learning and responding affectively to that knowledge). 48

As one surveys the range of philosophical understandings of human personhood, it becomes apparent that philosophy, like biology, includes a range of views about human life. As biologists trace the development of human life from a single-celled fertilized ovum to a mature adult without sharp divisions between the stages of development, so also philosophers reflect on human personhood in ways that are only more or less congruent with lived experience and traditions of ethical analysis. Many would agree that the lives of young fetuses, severely demented persons, or persistent vegetative persons are within the care and concerns of the human community and indifference to such lives reflects poorly on the ethical values of anyone who would exclude them. Both McMahan and Kavanaugh wrote books subtitled about the ethics of killing and agree that intentionally terminating the lives of such individuals at least demands ethical explanation and justification.

Ronald Dworkin, while denying that a fetus has rights or interests of its own, yet affirms “that individual human life is sacred. . . [and that] a fetus is a living, growing human creature and that it is intrinsically a bad thing, a kind of cosmic shame, when human life at any stage is deliberately extinguished.” 49

---

48 Kavanaugh, supra note 43, at 64-65. The definition focuses on capacities that make the person what the person is. Capacities may not be activated or fulfilled, so that a handicapped or underdeveloped or “vegetative” human remains a person at a different stage of development. Similarly, at the beginnings of human life, the fetus has undeveloped capacities. Id. at 67-68.

Thomas Aquinas explained the definition of Boethius in terms of the specific power of humans: “The particular and individual is found in a more special and more perfect manner in rational substances which have dominion over their own actions and are not only acted upon, as other individuals, but act by themselves.” Thomas Aquinas, Summa Theologica, I, q. 29, art. 1 (Rome, Marietti, 1952).

49 Dworkin, Life’s Dominion, supra note 38, at 13. By “sacred” he means inviolable, having intrinsic value, something others should respect, honor, and protect as marvelous in itself. Id. at 73. In a later writing, he returned to the same theme: [A]n abortion is morally wrong when it does not show respect for the intrinsic value of every human life, no matter what stage or form . . . An abortion shows the proper respect for human life, in principle, in two circumstances: first, when the life of the child, if carried to term, would be a frustrating one, in
The relationship of human life and the sacred is the domain of religion, which includes both communal and individual dimensions. While the basic texts of centuries-old religious traditions do not include discussions of embryos, there are references to prenatal life and religious institutions in some official and other statements have adopted positions on the morality of abortion. The plurality of viewpoints that exist among philosophers also exists among the world’s religions. While bringing together spokespeople of major religious traditions, Daniel Maguire discovered that, while “[c]onventional wisdom says that religions are invariably anti-choice when it comes to contraception with abortion as a backup when necessary,” there is also “respectable and orthodox” support for choice. Implicit in religious support is the premise that terminating a pregnancy is not infanticide or killing babies. Maguire also notes that it is difficult to identify the specific religious dimension in a fertility or family planning decision because religious influences are intertwined with culture, education, affluence, the status of women, and traditional and contemporary notions of family, marriage, and parenthood and the moral values and rules that might apply.

IV. Treated as a Person: Law

The legal status of an embryo or a fetus reflects assumptions by legislators and jurists about the biological, philosophical, and religious positions outlined above. The issue of the fetus’s legal status continues to divide legal practitioners, as illustrated in the intense debates among Justices of the Supreme Court in deciding the constitutionality of statutes limiting or prohibiting abortion.

In 1992, in Planned Parenthood v. Casey, the Justices revisited the abortion debate and the impact of stare decisis in substantive due process decisions under the Fourteenth
Amendment to the Constitution. Justice O'Connor, who wrote for the plurality, indicated that not only had the debate about abortion continued for nineteen years, but that the Executive Branch took sides by appearing as *amicus curiae* in this and five other cases over the last decade to request the overruling of the 1973 decision *Roe v. Wade*.\(^5\)

Law students study *Casey* in Constitutional Law courses as an example of separation of powers, the role of the Supreme Court in interpreting the Fourteenth Amendment, or the propriety of an unelected plurality of Justices determining issues that provoke widespread public debate and division. This paper will focus on the reasoning employed by Justice O'Connor, the first person to sit on the Supreme Court who could have experienced an “unwanted pregnancy.” In her usual careful selection of words, she re-affirmed what she claimed was *Roe*'s essential holding:

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... Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that a State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus which may become a child.\(^5\)

Justice O'Connor recognized a pregnant woman's stake in the abortion decision, while opponents of abortion often overlook her perspective:

Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law... Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course

\(^5\) *Id.* at 843.
\(^5\) *Id.* at 846.
of our history and culture. The destiny of the woman must be shaped
to a large extent on her own conception of her spiritual imperatives and
her place in society.\textsuperscript{55}

Based on similar concerns, Justice O'Connor struck down the spousal notification
requirement. "[M]illions of women in this country... are the victims of regular physical
and psychological violence at the hands of their husbands... [a]nd many women... are
pregnant as a result of sexual assault by their husbands."\textsuperscript{56}

Here is recognition not only of the pregnant woman's liberty to decide to
terminate her pregnancy, but also a recognition of the state's proper and properly limited
power to protect human life, including fetal life. Claims for state protection of the fetus
are often based upon notions of divine creation, image of God, or the Decalogue's
prohibition of killing; therefore, if a government imposes such beliefs upon a woman, it
would establish a religion, thereby violating the First Amendment, or thwarting her
freedom of religion to choose which religious beliefs to accept as guides for her own
conduct. The current variety of philosophical and religious viewpoints concerning the
status of fetal life and the historical ambiguity of legal precedent concerning prenatal life
leave the Justices with no basis other than their own personal convictions about their
judicial roles for choosing one position rather than another.

The state's interest in protecting fetal life is expressed in prohibiting abortion
after viability (except to save the life of the mother). Courts use viability as a dividing
point because the viable fetus has "a realistic possibility of maintaining and nourishing
life outside the womb," and one could say, "in a broad sense, that a woman who fails to
act before viability has consented to the State's intervention on behalf of the developing
child."\textsuperscript{57} Justice Stevens in his concurrence spoke directly to the argument that abortion
must be prohibited because it is unlawful killing. The Supreme Court has never
recognized that a fetus is a person entitled to the protections of the Constitution:

In short, the unborn have never been recognized in the law as persons
in the whole sense... Accordingly, an abortion is not 'the termination
of life entitled to Fourteenth Amendment' protection.\textsuperscript{58}

From this holding, there was no dissent; indeed, no member of the Court has ever

\textsuperscript{55} \textit{Id.} at 852.
\textsuperscript{56} \textit{Id.} at 893.
\textsuperscript{57} \textit{Id.} at 870.
questioned this fundamental proposition. Thus, as a matter of federal constitutional law, a developing organism that is not yet a “person” does not have what is sometimes described as a ‘right to life.’ This has been and, by the Court’s holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.\(^5\)

In its most recent decision concerning “partial birth” abortion, the Court again revealed the division among its members as the majority opinion of Justice Breyer was accompanied by concurrences from Justices Stevens, O’Connor, and Ginsburg, and four dissenters expressed their views in dissents by Justices Rehnquist, Kennedy, and Thomas.\(^6\) Ambiguity concerning the legal status of the fetus continued, as the statute defined partial birth abortion as when “[the person performing the abortion] partially delivers vaginally a living unborn child before killing the unborn child,” while Justice Breyer spoke of “those procedures seek to terminate a potential human life.”\(^6\) The Court struck down the Nebraska statute because it did not provide an exception for the health of the woman.\(^6\) The partial birth procedure (dilation and extraction) is a procedure used after sixteen weeks gestation, when the fetus would not, under any scenario, be considered viable, and on through the period of viability.\(^6\)

The legal characterization of the status of the fetus can also be discovered in how the law treats the death of the fetus. The issue arises in criminal law (murder, manslaughter, homicide or feticide) and in civil law actions for wrongful death or injury of a fetus. While constitutional issues typically arise in federal courts, these issues occur in state courts and their resolution depends upon history (how legislators and judges in each state understand the common law of England as received and developed in each state’s own law) and statutory construction (how statutes are given meaning when applied by courts).

The “born alive” rule and its English antecedents were discussed by the Kentucky Supreme Court in a recent decision abolishing the rule in Kentucky.\(^6\) Justice Keller noted that:

\[1\]he earliest commentator on the common law suggested that killing a ‘quickened’ fetus was homicide stating, if there be anyone who strikes a

---

59 Casey, 505 U.S. at 913-14.
61 Id. at 921 (quoting NEB. REV. STAT. ANN. § 28-328(1) (1999)).
62 Id. at 921.
63 Id. at 927.
64 Commonwealth v. Morris, 142 S.W.3d 654 (Ky. 2004).
pregnant woman or gives her a poison whereby he causes an abortion, if the foetus be already formed or animated, especially if it be animated, he commits homicide.65

The position of Bracton was not followed, however, and the “born alive” rule stated by Coke was almost universally received in the United States:

If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the the childe be born alive, and dieth of the Potion, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.66

The rule was employed as a rule of proof, for it was not possible before modern medicine to prove that the fetus was alive or what caused its life to end until exit from the womb.

The Supreme Court abolished the “born alive” rule in Kentucky because contemporary medical science can determine viability, health, and the causes of the fetus’s death and because “biologically speaking, such a child [a viable unborn child] is, in fact, a presently-existing person, a living human being”.67

The judicial recognition of the graduated applicability of homicide statutes to viable fetuses contrasts sharply with recent legislative expansion of criminal liability for killing or injuring a fetus. The federal Unborn Victims of Violence Act of 2004 (known as “Laci and Conner’s Law”) creates a separate offense for one who causes the death or bodily injury of a child in utero.68 An ‘unborn child’ means “a child in utero, and the

---

66 Id. at 656-57 (citing SIR EDWARD COKE, THIRD INSTITUTE 50-51 (1644)).
68 Laci and Conner’s Law, Pub.L. 108-212, § 2(a), 118 Stat. 568 (2004) (codified at 18 U.S.C. § 1841 (Supp. I. 2005)). The punishment for the separate offense is the same as that for injury to the unborn child’s mother, and does not require proof that the perpetrator knew or should have known of the pregnancy; intending the death of the unborn child triggers the punishment for intentional killing. 18 U.S.C. § 1841(a)(2)(A)-(B). The statute was occasioned by the death of Laci Peterson and her unborn son Conner in December 2002; the Peterson case was one of ten
term 'child in utero' or 'child, who is in utero' means a member of the species *homo sapiens*, at any stage of development, who is carried in the womb.\(^6\) "A member of the species *homo sapiens*" could mean biological identification via DNA analysis or, that the member is an individual or a person.\(^7\) It remains to be determined whether "at any stage of human development" could include determination, in an autopsy of a woman, that there was an egg in the process of fertilization or a fertilized egg that had not yet implanted in her uterus.

In a civil action, in response to whether a fetus could be the basis for a wrongful death action, courts face English precedent that no action survives death. In *Baker v. Bolton*, Lord Ellenborough wrote that "in a civil Court, the death of a human being could not be complained of as an injury."\(^7\) The reason for the rule may have been that, although accidental killing of a human being was compensable even before the Norman Conquest, the development of the felony-merger rule made it futile to sue the tortfeasor-felon who was put to death and whose property escheated to the crown.\(^7\) The response of the English Parliament was the passage of the Fatal Accidents Act, also called Lord Campbell's Act, which allowed recovery for wrongful death to close relatives of the victim.\(^7\)

State legislatures followed the English example and after the first American wrongful death statute was enacted in New York in 1847, all states followed.\(^7\) The

considered by Congress in deciding to abolish the "born alive" rule. The House Report cited fifteen states as recognizing the unborn as victims throughout prenatal development, thirteen as recognizing unborn victims during some stage of development, and six as criminalizing certain specific conduct which terminates a pregnancy. H.R. REP. NO. 108-420, pt. 1, 25 (2004). The statute applies to death or injury under over sixty federal statutes, and similar language is included in death or injury of an unborn child, 10 U.S.C. § 919a (Supp. I. 2005), which applies to the military.

\(^6\) 18 U.S.C. 1841(d) (Supp. I. 2005); 10 U.S.C. 919a(d) (Supp. I. 2005). Similar wording is found in recently enacted state legislation, where "unborn child' means a member of the species *homo sapiens, in utero* from conception onward, without regard to age, health or condition of dependency." KY. REV. STAT. ANN. § 507A.010(1)(c) (2004).

\(^7\) MAIENSCHEN, supra note 7, at 235. Twinning, which can occur spontaneously or by division of the cells following fertilization, can result in two persons with the same previously undivided DNA.


\(^3\) Farley, 466 S.E.2d at 525.

\(^4\) Id. at 526.
statute was not applied to the death of a fetus, however, as states which addressed this issue followed the Massachusetts decision in which Oliver Wendell Holmes, Jr., claimed he did not know of any case where "if the infant survived, it could maintain an action for injuries received by it while in its mother's womb," because the unborn infant "was a part of the mother at the time of the injury" and any harm to the infant would be recovered by the mother.\(^7\)

Holmes's claim was denied by Justice Boggs in his 1900 dissent, which presaged later considerations of the status of a fetus:

A foetus in the womb of its mother may well be regarded as but a part of the bowels of the mother during a portion of the period of gestation; but if, while in the womb, it reaches that pre-natal age of viability when the destruction of the life of the mother does not necessarily end its existence also, and when, if separated prematurely and by artificial means from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically, as other children generally, it is but to deny a palpable fact to argue there is but one life, and that the life of the mother.\(^76\)

The argument of Justice Boggs became the basis for a trend by the middle of the twentieth century for states to recognize wrongful death actions for the death of a viable fetus.\(^77\) Texas, however, while noting in 1995 that an overwhelming majority of thirty six states and the District of Columbia allowed wrongful death actions for the loss of a viable fetus, continued to hold that its legislature had not intended "person" in that

---


\(^76\) Fairley, 466 S.E.2d at 527 (citing Allaire v. St. Luke's Hospital, 56 N.E. 638, 641 (Ill. 1900)).

\(^77\) Mitchell v. Couch, 285 S.W.2d 901, 904-05 (Ky. Ct. App. 1955) (citing case law from numerous jurisdictions in interpreting wrongful death statute to apply to a viable fetus). The Mitchell court underscored the importance of viability for its holding:

The most cogent reason, we believe, for holding that a viable unborn child is an entity within the meaning of the general word 'person' is because, biologically speaking, such a child is, in fact, a presently existing person, a living human being. It should be pointed out that there is a definite medical distinction between the term 'embryo' and the phrase 'viable fetus.' The embryo is the fetus in its earliest states of development, but the expression 'viable fetus' means the child has reached such a stage of development that it can presently live outside the female body as well as within it. Id. at 905.
statute to include a fetus.\textsuperscript{78}

The significance of viability in the decisions of the majority of states to allow wrongful death actions on behalf of a deceased viable fetus usually resulted from recognizing viability as the possibility of independent existence outside the womb.\textsuperscript{79}

The Rhode Island Supreme Court, in allowing recovery for the wrongful death of a nonviable fetus, moved beyond viability.\textsuperscript{80} The logic of tort law had led states beyond Holmes' opinion in \textit{Dietrich},\textsuperscript{81} for a tortfeasor should not escape liability on the happenstance that the fetus was not born alive. That same logic now took the court:

to the inescapable conclusion that viability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy protection of our remedial laws and those who shall become, for most intents and purposes, nonentities.\textsuperscript{82}

Four years later, however, the Supreme Court of New Hampshire retained the viable-nonviable distinction because it was based upon public policy:

The viable-nonviable distinction was made as part of the never-ending effort to widen more and more the circle of liability which surrounds us. As with all such efforts, the pressure never ends... Years ago, few if any would have foreseen that the circle would include a viable fetus. Who can foresee what the next step would be if the circle were to include the nonviable fetus. If life is not to become intolerable, there must be some boundaries to the zone of liability. Neither logic nor science is the determining factor. It is the policy of the law which must establish a reasonable limitation on liability. In our opinion, it is not

\textsuperscript{78} Krishnan v. Sepulveda, 916 S.W.2d 478, 481 (Tex. 1995). The court allowed the mother, but not the father, to recover for mental anguish at the loss of the fetus; neither parent could recover for loss of society, companionship, and affection. \textit{Id}. at 482.

\textsuperscript{79} See \textit{Farley}, 466 S.E.2d at 527.

\textsuperscript{80} Presley v. Newport Hospital, 365 A.2d 748 (R.I. 1976). It should be noted the 3-2 decision included Chief Justice Bevilacqua concurring in part and dissenting in part. \textit{Id}. at 754-56.

\textsuperscript{81} \textit{Dietrich} v. Inhabitants of Northampton, 138 Mass. 14 (1884).

\textsuperscript{82} \textit{Id}. at 753-54. Chief Justice Bevilacqua concurred that wrongful death actions applied only to a viable fetus; however, the plurality's views were dicta, as the case involved administration of drugs during the process of delivery and the fetus was clearly viable.
reasonable to extend liability to a nonviable fetus.\textsuperscript{83}

The predicted next judicial step was taken by the Supreme Court of Appeals of West Virginia fifteen years later.\textsuperscript{84} After noting that thirty-five states allowed wrongful death actions for the loss of a viable fetus and all states allowed negligence actions for injuries to a fetus, whether viable or not, who was born alive\textsuperscript{85}, the Court held that ‘person’ in the wrongful death statute encompassed a nonviable unborn child because (i) this would hold a tortfeasor liable for the full extent of the injuries caused by wrongful conduct, (ii) this would recognize the parental loss that does not depend upon a fetus being viable, and (iii) this would give effect to the societal interest in preventing wrongful taking of all life, whether young, old or prospective.\textsuperscript{86} The Court recognized that there would be problems in determining causality and damages as one moved closer to conception and it limited its decision to a fetus \textit{en ventre sa mere} while requesting the legislature to define ‘person’ with respect to extra-corporeal conception and pre-conception torts.\textsuperscript{87}

Other states encompassed a nonviable fetus within the wrongful death statute by amendment. The Supreme Court of South Dakota interpreted its amended wrongful death statute to apply to a nonviable fetus, which died \textit{in utero} at 7.3 weeks.\textsuperscript{88} When the legislature amended the wrongful death statute to say “whenever the death or injury of a person, including an unborn child...” after the Court had interpreted “person” in the prior statute to include a viable fetus, it must have intended to extend the coverage of the statute to a nonviable fetus.\textsuperscript{89} The Court also found that it was not inconsistent to

\begin{itemize}
  \item \textsuperscript{83} Wallace v. Wallace, 421 A.2d 134, 135-36 (N.H. 1980)
  \item \textsuperscript{84} \textit{Farley}, 466 S.E.2d 522.
  \item \textsuperscript{85} \textit{See} Nealis v. Baird, 996 P.2d 438 (Okla. 1999). After the Supreme Court of Oklahoma surveyed the history of tort recovery for the loss of a viable fetus, it concluded:
    \begin{quote}
      Whatever argument can be made that a nonviable fetus is not a ‘person’ when \textit{en ventre}, we reject the notion that the distinction between biological existence and personhood can extend beyond live birth. \textit{W}e hence \textit{hold here only that once live birth occurs, the debate over whether the fetus is or is not a person ends and the live born child attains the legal status of ‘one.’} \textit{Id.} at 453 (emphasis in original).
    \end{quote}
  \item \textsuperscript{86} \textit{Farley}, 466 S.E.2d at 533.
  \item \textsuperscript{87} \textit{Id.} at 534-35. The Court appears ingenuous in its decision to use “unborn child” for all stages of human development so as to avoid the distinctions between “embryo” and “fetus” without regard for the rhetorical, emotional and logical effects of its choice of words on the authority of Webster’s Dictionary, which states “the common definition of ‘child’ includes an unborn... person.” \textit{Id.} at 522; \textit{see also WEBSTER’S NEW COLLEGIATE DICTIONARY} (10\textsuperscript{th} ed. 1993).
  \item \textsuperscript{88} Wiersma v. Maple Leaf Farms, 543 N.W. 2d 787 (S.D. 1996).
  \item \textsuperscript{89} \textit{Id.} at 789-90; S.D. CODIFIED LAWS § 21-5-1 (2005). The legislature defines “unborn child” in
\end{itemize}
hold a tortfeasor liable for negligently injuring a nonviable fetus while allowing a pregnant woman to intentionally abort the fetus, for the pregnant woman and tortfeasor are not similarly situated. State tort law and federal constitutional law may be inconsistent. In the context of abortion, the Supreme Court of the United States had determined in *Roe v. Wade* that “the word ‘person’ as used in the Fourteenth Amendment does not include the unborn” and a state cannot by legislation redefine the Fourteenth Amendment or change its coverage.

Establishing the legal status of an embryo again arose, when a dissolution of marriage action also included disposition of frozen embryos that a couple had stored. The Supreme Court of Tennessee provided guidance, which other courts have chosen to follow. The trial court, accepting the position of an expert that human life began at conception and an embryo was “a tiny human being,” gave custody of the eight-cell frozen embryos, children in vitro, to the wife, who was willing for the embryos to be implanted in her or donated to another woman for “it was in the best interest of the children” to be born rather than destroyed. The Court of Appeals explicitly rejected the trial judge’s reasoning because under Tennessee law a fetus was not a person under the wrongful death, abortion, or homicide statutes nor did the fetus have legal

---

90 [Wiersma v. Maple Leaf Farms, 543 N.W.2d 787, 791 (S.D. 1996).](#)

91 [See Alexander v. Whitman, 114 F.3d 1392, 1400-01 (3d Cir. 1997):](#)

The question is not whether a stillborn child is a human being from the moment of conception, but whether that unborn ‘human being’ is included within the meaning of ‘person’ contained in the Fourteenth Amendment. That legal question was resolved over twenty-four years ago when the Supreme Court decided *Roe.*

92 [Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).](#)

93 [Id. at 597.](#)

94 [Id. at 593-94.](#)
protection under the federal Constitution. The Supreme Court of Tennessee based its decision upon what the American Fertility Society called the most widely held view:

The preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential.

The Court then concluded that frozen embryos have a status that is neither "person" nor "property," but they "occupy an interim category that entitles them to special respect because of their potential for human life." The husband and wife, while not having ownership, do have "decision-making authority concerning disposition of the preembryos, within the scope of policy set by law."

The appropriate legal perspective is not ownership of property or custody of children but progenitors’ rights with respect to procreation, which is rooted in constitutional protection for liberty and privacy. The parties could agree concerning disposition of the embryos or, in case of their disagreement, a court would balance their respective interests. The interest of the husband in avoiding genetic parenthood with its accompanying emotional and financial implications would take precedence over the wife’s interest in donating the embryos to another infertile couple. The balance might be different if the wife wanted to have the embryos implanted in herself and using the frozen embryos would be her only reasonably available opportunity for genetic parenthood.

When the disposition of cryogenically preserved embryos arose in New York, the trial court gave custody to the wife (genetic mother) because a woman has exclusive

---

95 Id. at 594-95. The Court of Appeals ordered that the husband and wife share joint control and an equal voice in the disposition of the embryos. Id.
96 Id. at 596 (citing Ethical Considerations of the New Reproductive Technologies, 53 J. AM. FERTILITY SOCY 34-35 (Supp. 1999)).
97 Davis, 842 S.W.2d at 597 (1992).
98 Id. at 597.
99 Id. at 598-604.
decisional authority over a nonviable fetus. The Court of Appeals held that a woman's privacy rights were not involved before implantation and the issue should be decided under contract law because the parties had signed a contract, which provided that if they no longer wished to use the embryos themselves or were unable to make a decision, the embryos could be used for approved research by the IVF Program with which they were working.

The Supreme Judicial Court of Massachusetts was faced with a contract between a clinic and a married couple that provided "should they become separated, [they] both agreed to have the embryo(s) . . . returned to the wife for implant" and the wife attempted to enforce the contract over the objections of her husband. The Court had doubts about the meaning of the contract, for while it appeared to determine the parties’ relationship with the clinic and with one another in case of disagreement between them, there was no temporal duration for applying the contract, and “become separated” was not legally identical to “divorced.” Even if the contract were unambiguous, however, the Court stated that public policy would prevent enforcing a contract that would force procreation upon persons against their wishes, just as it would never force a person into an involuntary marriage or intimate family relationship.

The analysis of the Tennessee Supreme Court in Davis has been followed by the Supreme Courts of New Jersey, Washington, and Iowa. The embryo is not treated as a person nor is there any recognized right to be implanted or to be made available to individuals or couples wishing to bring the embryo's potential to realization in live birth. Nor is the embryo to be treated as property over which the rules of ownership would apply. Rather, the embryo is treated with respect and the genetic parents have the power to decide its disposition. It is recommended that the decision should be expressed in contractual terms between the progenitors, the infertility clinic and frozen storage facility. The courts are unanimous in refusing to impose genetic parenthood upon a gamete donor against that person's wishes, either at the time of the contract or at the time of implantation.

101 Id. at 178-79.
103 Id. at 1056-57.
104 Id. at 1058-59.
107 In re Marriage of Witten, 672 N.W.2d 768 (Iowa 2003).
One other area where the legal status of a fetus has become central is the relationship between the pregnant woman and her fetus. While scientists and physicians recognize the independent life and functioning of the fetus, there is currently no technology for extra-corporeal fetal development from about the fourteenth day after fertilization until viability. Fertilization is possible in vitro, but within about fourteen days the developing organism must become implanted in a uterus, where it will be nourished and sustained for the six to nine months until viability, when survival is possible independently of the mother. During those months the pregnant woman and the fetus have a unique relationship. The biological reality and necessity of that relationship provides the foundation for legal recognition of any legal rights of the fetus and any rights or duties of the pregnant woman.

An Illinois court faced the issue of compelling a blood transfusion for a woman who was 34 3/7 weeks pregnant and refused blood because she was a Jehovah’s Witness. The pregnant woman had a cystoscopy for removal of a urethral mass and lost more blood than anticipated; when she refused a blood transfusion, the state brought an action for wardship and the court appointed the hospital administrator as temporary guardian of the fetus with the right to consent to one or more blood transfusions if the attending physicians found them necessary. The appellate court held that appointing a guardian who had permission to consent to blood transfusions was error, for a competent adult has a right to refuse medical treatment and a pregnant woman has no legal duty to consent to an invasive medical procedure for the benefit of her viable fetus.

Florida did require a pregnant woman who was attempting a full-term vaginal delivery at home with the assistance of a midwife to have a caesarean section when five obstetricians testified that, because a caesarean section the previous year using a vertical incision extended beyond the ordinary length, a vaginal home delivery would produce a


\[109\] Id. at 399-400. The treating physician testified that without a blood transfusion the chances of survival for the woman and for the fetus were only 5%.

\[110\] Id. at 405. A similar result had been reached in In re Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994), where the court held that a court may not balance whatever rights a fetus may have against the rights of a competent woman to refuse medical advice that she have a caesarean section because (i) the woman’s right to make medical decisions has constitutional underpinnings, (ii) a pregnant woman has no duty to guarantee the health of her child and cannot be compelled to act merely for the child’s benefit, and (iii) the methods necessary to enforce a court order upon an unwilling adult would not be acceptable “in a civilized society.” In re Baby Boy Doe, 632 N.E.2d at 331-33.
substantial risk to her and the viable fetus. The appellate court found that the state’s interest in preserving the life of a viable fetus took precedence over the woman’s right to make medical decisions because she could find no physician willing to assist her in delivering at home and the evidence was extraordinary and overwhelming for ordering a caesarean section.

Florida recently addressed whether a court could appoint a guardian for the fetus of a 22-year old severely mentally retarded woman who became pregnant as a result of sexual battery. The court determined that the guardianship statute did not provide for the appointment of a guardian for a fetus and the Florida Supreme Court had never determined that a fetus was a person. Judge Orfinger, concurring specially, emphasized the pregnant woman’s right to privacy and personal bodily integrity and suggested that troubling questions would arise were a court to attempt through guardianship proceedings to take control of a woman’s body and to supervise her conduct or lifestyle during pregnancy. A court in Illinois recently denied that it had subject matter jurisdiction regarding the future custody of a child when a husband, who petitioned for dissolution of marriage from his wife who was two months pregnant, asked the court to make certain orders concerning the child.

The legal relationship between the pregnant woman and the fetus has also been addressed in tort suits by a child born alive for injuries sustained in utero because of the mother’s negligence. The Illinois Supreme Court provided a detailed analysis of the tort liability of mothers for unintentional infliction of prenatal injuries upon a fetus later born alive. After noting that even a nonviable fetus could bring an action for prenatal negligence against a third-party tortfeasor, the Court refused to extend such actions against the mother, for to do so “would have serious ramifications for all women and

---

112 Id. at 1254. “In anything other than an extraordinary and overwhelming case, the right to decide would surely rest with the mother, not with the state.” Id. The court noted that in this case the risk from caesarean section was far less than the risk of vaginal delivery and thus distinguished the case from In re A.C., 573 A.2d 1235 (D.C. 1990), where the risk of surgery was substantial both for the woman who was in the terminal stages of cancer and for the fetus.
115 Id. at 541. Without developing the notion further, he added: “If a fetus has rights, then all fetuses have rights. And, if a fetus is a person, then all fetuses are people, not just those residing in the womb of an incompetent mother.” Id. at 541.
their families, and for the way in which society views women and women’s reproductive abilities.” While the law at one time erred in determining that a fetus was part of the mother, the court would not err in the opposite direction by finding that the fetus was entirely separate from the mother.

It would be a legal fiction to treat the fetus as a separate legal person with rights hostile to, and able to be asserted against, its mother. The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant:

[N]o other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world. It is, after all, the whole life of the pregnant woman which impacts on the development of the fetus... the mother's every waking and sleeping moment..., for better or worse, shapes the prenatal environment which forms the world for the developing fetus. That this is so is not a pregnant woman's fault; it is a fact of life.118

In order to create liability for the mother, a court would have to define a legal duty and a standard of care that could apply to every woman who became pregnant of all socio-economic backgrounds, whether well-educated or ignorant, whether rich or poor, whether having or not having adequate and appropriate prenatal medical care, whether the pregnancy was planned or unplanned, and whether the woman knew she

---

118 Id. at 359. Recognition of a legal, and not only a moral, duty of the pregnant woman to the fetus would require her to effectuate the best prenatal environment, to avoid anything which might possibly harm the fetus and to be subject to a duty to provide, under penalty of law, anything which might benefit the fetus. “Since anything which a pregnant woman does or does not do may have an impact, either positive or negative, on her developing fetus, any act or omission on her part could render her liable to her subsequently born child.” Id. Patricia King, after listing eighteen recommendations for pregnant women, writes that enforcing such under penalty of law would “be asking her to be a saint” and we do not require others to be saints. Also, in cases of coerced medical treatment of pregnant women, 81% were minority, 44% were unmarried, and 24% did not speak English as their first language. Patricia A. King, Should Mom be Constrained in the Best Interests of the Fetus?, 13 NOVA L. REV. 393, 396-97, 401 (1989). Bonnie Steinbock likewise concludes: “pregnant women, like society as a whole, are not under a special obligation to be good Samaritans. They have no legal obligation to undergo bodily invasion and risk for the sake of their fetuses, not even if they intend to carry the fetus to term.” Bonnie Steinbock, Maternal-Fetal Conflict and In Utero Fetal Therapy, 57 ALB. L. REV. 781, 793 (1994).

119 Stallman, 531 N.E.2d at 360.
was pregnant or not.\textsuperscript{120}

New Hampshire reached the opposite conclusion on the basis of the logic of tort law: because a child born alive may maintain an action against another for prenatal injuries and such child may sue its mother for negligence (parental immunity having been abolished), it follows that a child born alive may sue its mother for injuries caused by her negligence while in utero.\textsuperscript{121}

After Adeline Mary Huie was born with cocaine and alcohol in her blood, a suit was brought against her mother alleging that her drug and alcohol use had caused the child to be born with disfigurement, physical impairments, past and future pain and suffering, and the need for past and future medical care, special education, physical and occupational therapy and loss of earning capacity.\textsuperscript{122} The court concluded that no cause of action could be brought by the child against the mother, for while the fetus is more than a part of the mother, “the unique symbiotic relationship between a mother and her unborn child...cannot be ignored.”\textsuperscript{123} Women could be held liable for actions, even before they became pregnant, that allegedly affected a child who would later be conceived, and their choices about diet, physical and sexual activity, and work environment would be subject to a standard of care, even a “reasonable pregnant woman’s standard of care,” which has never been applied to intimate, private and personal decisions.\textsuperscript{124}

There are further limitations upon a state’s power to take action against a pregnant woman because of her pregnancy. A county Department of Health and Human Services successfully brought action on September 5, 1995, to take “John or Jane Doe, a 36-week old unborn child” into protective custody under a CHIPS statute (child alleged to be in need of protection or services) after the pregnant woman’s drug

\textsuperscript{120} Id.
\textsuperscript{121} See Bonte v. Bonte, 616 A.2d 464, 467 (N.H. 1992) (holding child born alive may sue mother for injuries caused while in utero). Justice Johnson concurred specially with Justices Thayer and Horton that in this case the mother breached her duty of care while also agreeing with dissenting Chief Justice Brock and Justice Batchelder that the legal relationship between a mother and her fetus is “irrefutably unique.” Id. at 466. The dissenters, following Stallman, emphasized the social effects of judicially mandating acts and supervising conduct which was within each pregnant woman’s sense of personal responsibility and which would include such details of a woman’s life as her diet, sleep, exercise, sexual activity, work and living environment, and, of course, nearly every aspect of her health care. Id. at 467.
\textsuperscript{122} See Chenault v. Huie, 989 S.W.2d 474, 474-75 (Tex. App.1999).
\textsuperscript{123} Id. at 475 (holding no existence of tort action against mothers for fetal injuries caused in utero).
\textsuperscript{124} Id. at 477.
screens in May, June and July showed cocaine use. After the birth of her son, the mother contested her confinement, and the Supreme Court of Wisconsin held that “child” in the child protection statute is defined as “a person who is less than 18 years of age” and that does not include a viable fetus. Arkansas has recently concluded that a judge exceeded her authority in attempting to place custody of a fetus with the Department of Human Services when the pregnant woman was found to be using illegal drugs, for the Juvenile Code defined child as “an individual from birth to the age of eighteen years.”

Similar reasoning was employed by a Wisconsin court in disallowing the prosecution of a mother for first-degree intentional homicide or first-degree reckless injury after she delivered an extremely small female infant with a blood-alcohol level of 0.199%. The court reasoned that while her actions were egregious, it would not accept the state’s broad construction that the criminal statutes could be employed against any self-destructive behavior during pregnancy that could result in injuries to the unborn child.

One state, South Carolina, has enforced its criminal statutes against pregnant women for crimes against the fetus they were carrying. The conviction of a woman who pled guilty to criminal child neglect for causing her baby to be born with cocaine metabolites because of her ingestion of crack cocaine during pregnancy was upheld when the court found that “child” in the Children’s Code included a viable fetus. Six

---

127 See Ark. Dep’t of Human Servs. v. Collier, 95 S.W.3d 772, 782 (Ark. 2003) (holding fetus not included in definition “individual from birth to the age of eighteen years”).
128 See State v. Deborah J.Z., 596 N.W.2d 490, 494 (Wis. Ct. App. 1999) (holding state criminal statutes do not apply to mother’s harm of unborn fetus). The mother was picked up at a local tavern, where she had a blood alcohol level of 0.30% and said she would continue drinking because she had fears about the baby’s race, an abusive relationship she was involved in, and the pains of childbirth. Id. at 491.
129 See Whitner v. State, 492 S.E.2d 777, 778 (S.C. 1997) (holding that “child” under state criminal statute includes viable fetus). In the Children’s Code of South Carolina, “child” is defined as a “person under the age of eighteen.” See S.C. CODE ANN. § 20-7-30(1) (1985). The court in South Carolina determined that a viable fetus was a person under the wrongful death and homicide statute. Whitner, 492 S.E.2d at 780. The Court noted that California, Florida, Georgia, Kentucky and Ohio had interpreted their statutes not to apply to prenatal conduct by the pregnant woman. Id. at 782. Massachusetts had laws similar to those of South Carolina yet found that the criminal laws did not apply to the pregnant woman. See Commonwealth v. Pellegrini, No. 87970, slip op. (Mass. Super. Ct. 1990). In the Massachusetts case, wrongful death
years later the South Carolina homicide by child abuse statute was successfully applied against the mother of a stillborn five-pound baby girl after the cause of death was determined to be prenatal cocaine consumption. With respect to the position of the pregnant woman, the Court placed upon her the burden of stopping the use of illegal drugs, for "[o]nce the mother has exercised her constitutional choice to have a child, she must accept the consequences of that choice. One of the consequences of having children is that it creates certain duties and obligations to that child."132

V. Conclusion

After surveying biological, philosophical, religious and legal viewpoints about prenatal human life, what can one conclude? Or, to phrase the question somewhat differently, do recent developments in biology, medicine, and medical technology concerning human reproduction support or require changes in beliefs or conclusions concerning the legal status of prenatal human life?

It is obvious to any observer that a wide variety of viewpoints, sometimes passionately held viewpoints, exist about human life. Widely different and conflicting positions are taken regarding abortion, contraceptives such as the morning-after pill, using human embryos for research or as sources for stem cells, and possibilities suggested by modifying the human genome or cloning human life. The debate is religious, philosophical, ethical, legal as well as scientific.

Amidst the clashing views, some agreement can be forged. The developments of modern medicine and contemporary biology support the developmental view of human life, from the single-cell stage that ends fertilization through implantation in a womb and the stages, which can now be documented visually, of embryonic and fetal development until quickening, viability and birth. There is human life from conception and it is a genetically unique human life. There are different stages of life but not

and homicide statutes were applied to vindicate the interest of the mother or parents in potential life. Id. South Carolina, in contrast, founded its interest not in the parent's interest but in the state's compelling interest in potential life after viability. See Whitmer, 492 S.E.2d at 780, 782-83. 131 See State v. McKnight, 576 S.E.2d 168, 171 (S.C. 2003) (affirming conviction of homicide by child abuse where mother gave birth to still-born infant). "Homicide by child abuse" was defined as causing the death of a child under the age of eleven by committing child abuse or neglect. S.C. CODE ANN. 16-3-85(A) (1985). The Court found no constitutional violation for it is common knowledge that ingestion of crack cocaine during pregnancy is damaging to a fetus and the pregnant woman is under no different obligation than other citizens to avoid the use of cocaine. McKnight, 576 S.E.2d at 172-73. 132 Id. at 175.
different kinds of life.

Scientists, philosophers, and religious believers find human development awesome and deserving of respect. The respect is due both to what the single-celled organism has become and what it has the potential to become if many complex factors work together in just the right way. At the same time, there is recognition of the devaluation of human life in recent times, from the Holocaust during the Second World War, to the mass destruction brought about by nuclear weapons, to genocide and related atrocities, to nonconsensual medical experimentation upon humans, including the most vulnerable. The slippery slope argument rests upon the ease with which scientifically and technologically advanced people have acted with utter disregard for others. Efforts to establish effective recognition of the human rights of each and every human being and to create criminal tribunals to bring to justice those who egregiously violate those rights result from awareness of the fragility of such goals in a world of \textit{realpolitik}.

Legally, in the United States, there has been change from the historical “born alive” rule and the notion that before birth a fetus was part of its mother to legal recognition of prenatal life. It is noteworthy that courts deciding cases in which such issues were raised did so without determining whether a fetus is a person. Such a determination was not necessary for the resolution of the legal issues the court was called upon to decide. Nor must a legislature necessarily decide whether a fetus is a person before enacting a fetal protection statute. The criminal or tortuous loss of prenatal life is a harm to society and to the parents. Such loss may and often is recognized in statutes criminalizing feticide or assault upon a pregnant woman and in wrongful death and other tort actions. Fetal life is respected without the fetus being declared a person.

The recognition of a woman’s liberty and autonomy interests as constitutionally grounded reflects recognition of the unique biological relationship that exists between a woman and the fetus she can carry. Were the law to recognize the fetus as a person with the panoply of rights that follow upon that designation there would be an impossible conflict between maternal and fetal rights. The nurturing that the developing fetus needs from its mother requires daily lifestyle choices that are beyond the power of the law to impose.

Medical advances and technology continue to place even more difficult choices before a pregnant woman, or even a woman of child-bearing potential. Assisted reproductive technologies are employed by couples that have an identified genetic condition, which they may pass to some of their offspring. By utilizing \textit{in vitro}
fertilization it is possible to identify and discard those embryos that carry the genetic defect and allow the parents to begin a pregnancy with full knowledge that their child will not carry the genetic defect. The pregnant woman who is found to have cancer or AIDS or other medical condition may find that the only available life-saving therapy is toxic to a fetus. She must decide what level of risk is acceptable and choose whether or not to receive medication, treatment or enter a clinical trial.

It is not difficult to understand why legislators, pressured by popular demand, would pass a statute or even propose a constitutional amendment providing that a human life is a person from the moment of conception. It seems impossible, however, to enforce such a law without unacceptable intrusion into the intimate, personal decisions of people deciding to have children and of women making decisions about their lives. Rather, the law through constitutional amendments, statutes and court decisions should treat prenatal life in the embryo and fetus with respect while not treating the embryo or fetus as a person (at least up to a point where viability is quite certain). In practice, respect is shown to embryonic and fetal life by the respect that is shown to the pregnant woman, to whose care nature has entrusted it.