

# The Relevance (and Irrelevance) of Questions of Personhood (and Mindedness) to the Abortion Debate

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***Abstract:** Disagreements about abortion are often assumed to reduce to disagreements about fetal personhood (and mindedness). If one believes a fetus is a person (or has a mind), then they are “pro-life.” If one believes a fetus is not a person (or is not minded), they are “pro-choice.” The issue, however, is much more complicated. Not only is it not dichotomous—most everyone believes that abortion is permissible in some circumstances (e.g. to save the mother’s life) and not others (e.g. at nine months of a planned pregnancy)—but scholars on both sides of the issue (e.g. Don Marquis and Judith Thomson) have convincingly argued that fetal personhood (and mindedness) are irrelevant to the debate. To determine the extent to which they are right, this article will define “personhood,” its relationship to mindedness, and explore what science has revealed about the mind before exploring the relevance of both to questions of abortion’s morality and legality. In general, this article does not endorse a particular answer to these questions, but the article should enhance the reader’s ability to develop their own answers in a much more informed way.*

***Keywords:** Abortion, Personhood, Mindedness, Sapience, Sentience, Self-awareness, Pro-life, Pro-choice, Fifth Amendment, Roe v. Wade, Don Marquis, Judith Jarvis Thomson, Morality of Recreational Sex, Fetal Consciousness, Fetal Pain*

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## Introduction

IT IS COMMONLY ASSUMED that the abortion issue is binary; one is either for it or against it. Further, whether one is for it or against it is often assumed to be determined by where one stands on the issue of fetal personhood (i.e. the question of whether a fetus is a person). If you think a fetus is a person, then you think abortion is immoral and should be illegal; and if you think a fetus is not a person, then you think abortion is moral and should be legal. Things, it turns out however, are not so simple.

For example, the abortion issue is not binary such that *abortion is either wrong or it is not*. Why? Because just about everyone thinks that abortion is moral in at least some cases and immoral in other cases. Presumably, just about everyone would agree that if both the baby and the mother will die otherwise,

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terminating a pregnancy is moral; it is obviously better to save one life than none. Likewise, presumably just about everyone would think it is immoral for a woman who initially wanted to be pregnant to have an abortion a week before her due date so she could go on a spontaneous vacation instead. So, rather than being binary, the abortion question is linear. The debate becomes a question of where on the continuum should one “draw the line” that indicates when abortion should and should not be permissible.

Something else that complicates matters is the fact that questions of abortion’s morality and legality are separate because, in principle, questions about morality and legality fall into different categories. Generally, questions about what should be legal are answered by appealing to empirical facts about what effects laws will have on society. John Stewart Mill, for example, argued that the primary issue to consider when determining law was utility: what will produce the greatest amount of happiness for the greatest amount of people?<sup>1</sup> Few moral philosophers, however, are purely utilitarian; they think that morality also involves issues of duty, virtue, and care. As a result, there is not a one-to-one correspondence between what is moral and immoral and what should be legal and illegal. For the protection of society, we have laws against jaywalking and speeding, but few would think that jaywalking and going five miles over the speed limit are immoral. Likewise, it was illegal to harbor Jews from the Nazis in Germany during WWII, but that did not make it immoral. Conversely, most would likely agree that it is immoral to lie to your boyfriend or girlfriend so you could cheat on them with their best friend, but few are going to think such a thing should be regulated by the government.

Consequently, one could answer the “When is abortion moral?” question without having answered the “When should abortion be legal?” question. Indeed, a person could believe that abortion is immoral in most cases, but still think that it should be legally available for those same cases. For example, if one thought that making abortion illegal would not reduce the number of abortions but would increase the number of deaths due to botched abortions (potentially because more women would die seeking back alley coat

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<sup>1</sup> To be more specific, Mill argued that governmental action should be governed by what he called “the Harm Principle.” The only time someone’s liberty could rightly be curtailed by the government was to prevent them from harming others. Nonetheless, Mill specifically rejected appealing to natural rights to support his argument. He saw protecting liberty as the most effective way to produce the most amount of happiness for the most amount of people. See J. S. Mill, *On Liberty* (Boston, MA: James R Osgood and Company, 1871), chap. 1, <https://doi.org/10.1037/12289-000>.

hanger abortions), one could coherently think that abortion is usually immoral but also argue in favor of its legality. Such a person could consistently argue that pregnant mothers should have the legal right to have an abortion and then simultaneously try to convince pregnant mothers not to have one. This might be the position of someone who says that abortion should be “safe, legal, and rare.”

A third complication arises when one realizes (as will be shown) that some scholars who publish on abortion see the issue of fetal personhood as primarily irrelevant to the debate. Even if a fetus is *not* a person, some argue, abortion is still immoral in most cases. Others argue that even if a fetus *is* a person, abortion is still moral in most cases. It is the purpose of this paper, therefore, to explore the relevance (and irrelevance) of the philosophical questions surrounding personhood regarding the abortion debate. To accomplish this, this article will first lay out what seems to be required for personhood and show how it is related to (what is here labeled) “full-mindedness.” It will then explore what philosophical and scientific investigation has revealed about mindedness, before going on to articulate the relevance of what is discussed to both the question of abortion’s morality and its legality. The purpose of the article is not to draw the line that determines when abortion stops or starts being morally permissible and when it should be legal, but it should help readers have a much more informed and logically consistent answer to the question of where such lines should be drawn.

### **What is a Person?**

The word “person” is illusive. Most intuitively grasp the term’s meaning but cannot clearly define it when asked. “Person” is often thought to be synonymous with “human,” for example, but that cannot be right. Thomas Aquinas considered angels to be persons, and modern Christians usually consider each part of the Trinity to be a person.<sup>2</sup> Even if God and angels do not exist, they would still be persons if they did (at least in principle). Thus, there could be non-human persons. The same follows from the fact that we consider science fiction characters—like Spock, Superman, and Yoda—to be persons, even though they are not human. Indeed, this would seem to be true even if they

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<sup>2</sup> Cf. Lawrence B. Porter, “On Keeping ‘Persons’ in the Trinity: A Linguistic Approach to Trinitarian Thought.,” *Theological Studies* 41, no. 3 (1980): 530–48 <https://doi.org/10.1177/004056398004100303> and Johannes Panagopoulos, “Ontologie oder Theologie der Person: Die Relevanz der patristischen Trinitätslehre für das Verständnis der menschlichen Person,” *Kerygma und Dogma* 39, no. 1 (1993): 2–30.

did not look like the bipedal “humanoid” typical of science fiction aliens, and instead were wholly different from us (like the Heptapods in the movie *Arrival*).

### The Relevance of Intelligence

Something that all such beings have in common, however, is intelligence. The conclusion that intelligence is what makes something (or someone) a “person” is therefore tempting, but this too does not seem right. After all, elephants, chimps, and dolphins are intelligent but usually are not considered persons.<sup>3</sup> The same is arguably true of computer programs like AlphaZero, which *taught itself* to play complicated games (like Go) so well that it consistently beats humanity’s best.<sup>4</sup> While such things are clearly intelligent, we would not call such devices a person. So, while intelligence does seem necessary for personhood, it is not sufficient in and of itself.

In his definition of person, John Locke included “thinking intelligent Being, that has reason and reflection, and can consider it self as it self [*sic*].”<sup>5</sup> On face, this seems right—except that, if Locke is right, God would not be a person. Why? Because, at least as God is traditionally conceived, God does not reason. If God is either omnitemporal (exists outside of time), or immutable (unchanging), he cannot reason because he cannot draw inferences. God cannot come to know something through the process of recognizing a ground-consequent relationship between propositions (e.g. by recognizing that one proposition entails another). If he is immutable, he cannot go through the changing process of cognitive reasoning; and if he is omnitemporal, he just knows everything through divine *praescientia*. As Aquinas put it, “In the divine knowledge there is no discursiveness....God sees all things in one thing alone, which is Himself. Therefore, God sees all things together, and not

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<sup>3</sup> Of course, some animal rights activists do consider them persons, but many do not do so simply because they exhibit intelligence. See for example, Elisa Aaltola, “Personhood and Animals,” *Environmental Ethics* 30, no. 2 (2008): 175–93, <https://doi.org/10.5840/enviroethics20083025>.

<sup>4</sup> “AlphaZero AI Teaches Itself to Beat Humans at Their Own Complex Games,” *American Association for the Advancement of Science*, December 6, 2018, [https://www.eurekalert.org/pub\\_releases/2018-12/aaft-aat120318.php](https://www.eurekalert.org/pub_releases/2018-12/aaft-aat120318.php).

<sup>5</sup> John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (1975; repr., New York: Oxford University Press, 1979), 335.

successively.”<sup>6</sup> Or as William Mann and Alvin Plantinga assert, “Of course God neither needs nor uses logic; that is, he never comes to know a proposition A by inferring it from proposition B.”<sup>7</sup> George Mavrodes also writes, “[The doctrine that God’s knowledge is discursive] has not been popular among Christian philosophers and theologians. I can think of no one who has positively defended this doctrine, and several seem to have explicitly denied it.”<sup>8</sup>

Of course, one might try to avoid this problem by suggesting that intelligence is merely the ability to know things (rather than the ability to reason), and just say (contrary to Locke) that only intelligence (rather than intelligence *and* reason) is necessary for personhood. Even so, it seems that unless one is talking about God, the ability to reason is required for intelligence. Unless a being cannot reason because it is immutable and omniscient, the fact that a being cannot reason would, therefore, seem to suggest that it is not intelligent. Generally, the ability to reason is indicative of intelligence. If so, Locke’s criterion is essentially redundant, and things can be simplified by merely suggesting that personhood requires intelligence.

A bit more precision is still needed, however, because intelligence comes in degrees. Consequently, one must wonder how much intelligence is required for personhood. How complex of reasoning must a being be capable of in order to be considered a person? Fortunately, there is a word for this: sapience, which essentially just means “wisdom” or “intelligence” but (given its name) does seem to refer to the level of intelligence that *Homo sapiens* typically possess. Now, whether or not some animals, like dolphins, whales, primates, and dogs, also have a level of intelligence necessary for personhood is beyond the scope of this paper. Although, it should be noted that regardless of whether they do, having a level of intelligence equivalent to that of humans is not necessary for animals to deserve moral consideration or even to have some of the same basic rights as humans.<sup>9</sup> For the sake of this article, however,

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<sup>6</sup> English translation appears in Thomas Aquinas, *Basic Writings of Saint Thomas Aquinas*, ed. Anton C. Pegis (1945; repr., Indianapolis, IN: Hackett Publishing Company, 1997), 146.

<sup>7</sup> William E. Mann and Alvin Plantinga, “Does God Have a Nature?,” *Philosophy and Phenomenological Research* 42, no. 4 (1982): 625–30, <http://dx.doi.org/10.2307/2107384>.

<sup>8</sup> George I. Mavrodes, “How Does God Know the Things He Knows?” in *Divine and Human Action: Essays in the Metaphysics of Theism*, ed. Thomas V. Morris (Ithaca, NY: Cornell University Press, 1988), 346.

<sup>9</sup> See Rick O’Neil, “Intrinsic Value, Moral Standing, and Species,” *Environmental Ethics* 19, no. 1 (1997): 45–52, <http://dx.doi.org/10.5840/enviroethics199719138>.

the term “sapience” refers to the capacity for exhibiting the same level of intelligence that is customary of *Homo sapiens*.

### From Sapience to Sentience

Interestingly, P. F. Strawson would also disqualify God from being a person because he thinks persons must have “corporeal characteristics” (i.e. a physical body). This definition appears far too narrow, however, as it would disqualify the potential personhood of “beings of pure energy,” such as The Ethereals from *Marvel Comics*. Nonetheless, Strawson also suggests that persons must be conscious—they must have subjective states of experience—and this initially seems right. Although it may not be required for intelligence or reason (as AlphaZero is arguably intelligent and reasons out moves, even though it is not conscious), consciousness does seem to be a necessary condition for personhood. Indeed, this is likely the primary reason why AlphaZero would not be considered a person; it lacks consciousness. Indeed, given the role that memory of conscious states played in Locke’s account of personal identity over time, Locke would seem to agree.

Again, however, more precision is needed. Consciousness itself cannot be necessary for personhood since a person can be unconscious—while they are asleep, for example, or in a coma. What Strawson seems to have in mind is the *ability* to be conscious; the capacity to feel sensations or experience subjective states. Fortunately, there is a term for this (although it is often misused in public discourse): “sentience.”<sup>10</sup> Accordingly, given what has been discussed so far, personhood appears to require both sapience and sentience. Again, however, it seems these two characteristics are not sufficient for defining personhood.

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<sup>10</sup> The actual meaning of “sentience” is the ability to perceive or feel things like pain. However, in common usage, the term often refers to something more grandiose—something akin to the very essence of what it takes to be a person. For example, after the villain Thanos wished “half of all life” out of existence because the universe had become too crowded at the end of the movie *Avengers: Infinity War*, fans debated online whether he eliminated half of every *living* thing—animals, livestock, plants, crops, bugs, bacteria—or just half of all “sentient life” (the assumption being that animals are not sentient, even though they are able to perceive and feel things). Doing the latter was seen as equivalent to eliminating every other *person* in the universe, whether they be human or not. For those who care, the answer seems to be that Thanos eliminated half of all *animal* life (which would include both humans and livestock). At least that is what he did in the graphic novel. See Richard C., “In the Comics Did Thanos ‘Kill Just Sentient Beings or All Creatures with the Snap?,”” Science Fiction & Fantasy Stack Exchange, March 5, 2019, <https://scifi.stackexchange.com/questions/206658/in-the-comics-did-thanos-kill-just-sentient-beings-or-all-creatures-with-the-s>.

### From Sentience to Self-Awareness

Locke also included in his definition of person the ability of a being to “consider it self as it self.”<sup>11</sup> Philosophers might call this “self-awareness”—an awareness of one’s own existence and conscious states—and it does seem to be a necessary element of personhood. Indeed, according to Christine Korsgaard, it is this quality that sets humans apart from animals: our having self-awareness, and their lacking it. She writes,

A lower animal’s attention is fixed on the world. Its perceptions are its beliefs and its desires are its will. It is engaged in conscious activities, but it is not conscious *of* them. That is, they are not the objects of its attention. But we human animals turn our attention on to our perceptions and desires themselves, on to our own mental activities, and we are conscious *of* them. That is why we can think *about* them.<sup>12</sup>

Whether *higher* animals have a level of self-awareness sufficient for personhood is beyond the scope of this paper. Regardless of whether they do, however, self-awareness seems to be necessary for personhood. If so, when it comes to the philosophical definition of a person, it would seem that the “Three Ss” are necessary: a person is a being that is sentient (capable of perceiving and feeling), sapient (intelligent), and self-aware (conscious of one’s own feelings and intelligence). For ease of reference, given that these are all usually thought of as mental characteristics (although, again, unminded computers can still be intelligent), it is possible to say that a being who has the Three Ss is “fully-minded.” Thus, a person (as defined here) is a being who is fully-minded.

Of course, this definition leads to one last complication. As Jenny Teichman points out in her article, “The Definition of Person,” requiring things like sapience and self-awareness for personhood has the unfortunate consequence of entailing that things that are not currently sapient or self-

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<sup>11</sup> Locke’s further comments on this topic are problematic because they seem to entail that persons are states of mind, not beings. For more, see Jenny Teichman, “The Definition of Person,” *Philosophy* 60, no. 232 (1985): 175–85, [doi.org/10.1017/S003181910005107X](https://doi.org/10.1017/S003181910005107X), from which I borrowed heavily for this section of the article.

<sup>12</sup> Christine M. Korsgaard, *The Sources of Normativity*, ed. Onora O’Neill (1996; repr., New York: Cambridge University Press, 2003), 92–93, <https://doi.org/10.1017/cbo9780511554476>; italics in original. Cf. Angus Taylor, “Animal Rights and Human Needs,” *Environmental Ethics* 18, no. 3 (1996): 249–64, <http://dx.doi.org/10.5840/enviroethics199618316>.

aware—like infants or the senile—are not currently persons (when they are widely regarded as such). Consider the fact that, although mature dogs are likely more intelligent than toddlers, we consider the latter persons but (usually) not the former. This problem is easily solved, however, by echoing the arguments of Boethius and Aquinas and granting that a being is a person if it belongs to a kind, or set of beings, the vast majority of which have the relevant qualities under discussion.<sup>13</sup> Generally, members of the human species are fully-minded, and so all humans are persons (even though not all humans, at all times, possess full-mindedness). Or, it might be said, all humans are persons because most humans are fully-minded. Thus, we can more precisely say that a being is a person *if and only if* it is the kind of being that is typically fully-minded.

### Discoveries about the Mind

If possessing full-mindedness is necessary and sufficient for personhood, it is important first to take a look at what philosophic and scientific research has discovered about the mind before the issue of abortion is addressed.

#### Problems of the Soul

For centuries, being “minded” was thought to be directly related to having a soul. Indeed, the conceptions of Boethius, Aquinas, and many other philosophers were highly influenced by their belief that persons have souls—a non-material entity that houses one’s mentality and separates from the body upon death. It was in virtue of having souls that they thought persons were sentient, sapient, and self-aware. The concept of the soul was most famously popularized by Plato and notably defended by René Descartes in his meditations.<sup>14</sup> But the concept of the soul has fallen on hard times since then—philosophically, scientifically, and even theologically.

The philosophical problems begin by realizing that when it comes to existential matters (questions regarding the existence of something), the burden

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<sup>13</sup> It should be noted, however, that I do not mean to appeal to any platonic or Aristotelian ideas that Boethius or Aquinas had in mind. I take it that the reader can understand what it is for a being to belong to a species, or a set, without appealing to such notions.

<sup>14</sup> For some of Plato’s arguments for the immortality of the soul, see *Phaed.* 69e–84b. For Descartes’ arguments that the mind is a substance separable from the body, see René Descartes, *Meditations On First Philosophy*, ed. John Cottingham (New York: Cambridge University Press, 2013), *Meditatio Sexta*, <http://dx.doi.org/10.1017/cbo9781139042895>.

of proof is on the believer.<sup>15</sup> When it comes to the existence of souls, that burden has not been met. Descartes' famous arguments certainly fail. For example, the fact that one can doubt that they have a body but not doubt that they have a mind does not entail that the body and mind are separable objects—that one's mentality must be housed in a separate substance (i.e. a soul). Descartes may only be able to doubt one and not the other because he is ignorant of their nature. Lois Lane cannot doubt that Superman is a hero but does doubt that Clark Kent is; yet, that does not mean they are separate individuals. In the same way, Descartes may simply not appreciate the dependence of the mind on the body (or, more specifically, the brain) and can only imagine that one exists without the other because of that ignorance.<sup>16</sup>

Another philosophical objection that the soul hypothesis has never overcome is the "problem of downwards causation."<sup>17</sup> How can a non-physical entity like a soul causally effect a physical entity like a body? Why, for example, does a decision by one person's soul to raise their hand move only that one arm and not someone else's? It cannot be because a person's soul is nearer to their body; location is a physical property that a non-physical entity does not have. So, how can a soul be connected to a body such that it can move that body's arm but not another's? This may seem simple, but no satisfactory answer to the question has ever been given; this makes the soul hypothesis untenable. Even if one were to provide an answer, non-material entities reaching down from beyond the physical world to cause physical events would violate basic laws of physics, like the Conservation of Energy and Conservation of Momentum, as well as basic established principles like the causal closure of the physical.

This hints at the scientific challenges the soul faces, but the most damning scientific problems are the result of developments in the field of neuroscience. Cases like that of Phineas Gage (whose personality changed after a brain injury), and the discovery of how specific areas and pathways in the brain are essential for specific kinds of mental functions, made it essentially impossible to maintain that mentality was housed in a soul or could occur in the

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<sup>15</sup> This point was made quite expertly in the "celestial teapot" example from Bertrand Russell, "Is There a God? [1952]," in *Last Philosophical Testament, 1943–68*, ed. John G. Slater and Peter Köllner, vol. 11, *The Collected Papers of Bertrand Russell* (New York: Routledge, 1997), 542–49.

<sup>16</sup> Descartes' other arguments fail for similar reasons, which I have laid out elsewhere in David Kyle Johnson, "Do Souls Exist?," *Think* 12, no. 35 (2013): 61–75, <http://dx.doi.org/10.1017/s1477175613000195>.

<sup>17</sup> See Janos Szentagothai, "Downward Causation?," *Annual Review of Neuroscience* 7, no. 1 (1984): 1–11, <http://dx.doi.org/10.1146/annurev.ne.07.030184.000245>.

absence of a functioning brain.<sup>18</sup> How could damage to Phineas' frontal lobe change his personality if his personality was housed in a soul? How could decisions about what words to use occur in the soul given the central role we know that Wernicke's area (a patch of neutral tissue located in the parietal and temporal lobe) plays in the understanding and use of language? For every mental function that was thought to reside in the soul—speech, reasoning, decision making, sight, hearing, tactile sensation, emotion, etc.—we now know is a function of different areas of the physical brain. And when those parts of someone's brain cease to function, that part of their mentality disappears. It is now impossible to rationally maintain that one's mind is housed in a soul and thus can float away from one's body after one's brain has ceased to function.

### Minds are Not Souls

It is important to note that this does not threaten belief in the existence of minds. To be fair, according to some philosophers, like Patricia Churchland, it does; they are what is known as eliminative materialists. They think the developments of neuroscience entail minds (and thus consciousness, and sentience) do not exist at all.<sup>19</sup> Most philosophers maintain, however, that minds exist and persons have them; they just argue about their nature. Identity theorists, for example, suggest that minds are identical to brains in the same way that Clark Kent is identical to Superman. They are one in the same object.<sup>20</sup> Others disagree because mental happenings seem to have properties or "qualia" that physical events lack. A visual sensation might be green, for example, while no part of the brain is. Property dualists therefore suggest that the mind is a property of the brain. There is only one object, the brain, because there is only one substance: material. But it has two kinds of properties: physical properties (like location) and mental properties (like greenness). The latter emerges from the brain's activity but has unique causal powers that cannot be reduced to, or

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<sup>18</sup> See Rita Carter, *Mapping the Mind*, rev. ed. (Berkeley, CA: University of California Press, 2010), chap. 1. This book can also confirm the statements made about the state of neuroscience in this paragraph.

<sup>19</sup> Patricia Smith Churchland, *Neurophilosophy: Toward a Unified Science of the Mind/Brain* (Cambridge, MA: The MIT Press, 1986).

<sup>20</sup> For more on identity theory, see J. J. C. Smart, "The Mind/Brain Identity Theory," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Stanford, CA: Center for the Study of Language and Information, 2017), <https://plato.stanford.edu/entries/mind-identity/>.

explained by, brain activity.<sup>21</sup> The question of how something non-physical can causally affect something physical remains unsolved, however, and motivates other philosophers to hold that while the mind most certainly exists, it does not actually do anything. All the causal work is done by the brain (and its physical properties). These philosophers are called epiphenomenalists.<sup>22</sup>

No such philosophers, however, think the mind is a non-material substance that can separate from the body upon death (like a soul). Indeed, in one survey, only 27% of philosophers accepted anything like a non-physicalist (soul-like) view of minds, and this statistic likely includes those who endorse property dualism and epiphenomenalism.<sup>23</sup> A full 56.5% endorsed what the authors of the study called “physicalism,” which is likely some variety of identity theory where the brain and the mind are one and the same object.

### Theological Fallout

The philosophic and scientific problems that belief in a soul faces has even caused some religious thinkers—like Christian philosopher Nancey Murphy, public theologian Brian McLaren, philosophical theologian Leron Shults, New Testament scholar Joel Green, and even evangelical theologian Stanley Grenz—to completely abandon substance dualism and the notion that souls are separable entities.<sup>24</sup> To what extent such a change is a return to what the Bible teaches about persons is debatable.<sup>25</sup> However, it is most certainly a departure from what many (if not most) Christians, both the laity and clergy, believe today. It is, therefore, fair to say that the theological doctrine that souls exist is a doctrine in crisis. It is well established that the mind is not housed in

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<sup>21</sup> For more on property dualism, see Howard Robinson, “Dualism,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Stanford, CA: Center for the Study of Language and Information, 2017), <https://plato.stanford.edu/entries/dualism/>.

<sup>22</sup> For more on epiphenomenalism, William Robinson, “Epiphenomenalism,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Stanford, CA: Center for the Study of Language and Information, 2019), <https://plato.stanford.edu/entries/epiphenomenalism/>.

<sup>23</sup> David Bourget and David J. Chalmers, “What Do Philosophers Believe?,” *Philosophical Studies* 170, no. 3 (2013): 465–500, [dx.doi.org/10.1007/s11098-013-0259-7](https://doi.org/10.1007/s11098-013-0259-7).

<sup>24</sup> For more on these scholars and why they reject substance dualism, see R. Scott Smith, “Emergents and the Rejection of Body-Soul Dualism,” *Christian Research Institute*, June 21, 2011, <https://www.equipt.org/article/emergents-and-the-rejection-of-body-soul-dualism/>. See also, Darren M. Slade, “The Logic of Intersubjectivity: Brian McLaren’s Philosophy of Christian Religion” (PhD diss., Liberty University, 2019), 201–2.

<sup>25</sup> For more on this, see Oscar Cullmann, *Immortality of the Soul or Resurrection of the Dead? The Witness of the New Testament* (1964; repr., Eugene, OR: Wipf and Stock, 2010).

a separable non-physical substance but is, instead, produced by the physical brain. As such, there are no characteristics that traditional theology has assigned to the soul that is not, in fact, a property of the brain.<sup>26</sup>

The consequence of all this is clear. If the mindedness of humans is produced by a properly functioning brain, and what is required for personhood is full-mindedness, then what makes humans persons is the functioning of their brain. Of course, some humans do not have properly functioning brains. Nonetheless, given what was discussed last section, it is possible to say that all humans are persons because all humans belong to a set of beings whose physical brains generally (albeit, not uniformly) produce full-mindedness.

### **Persons, Mindedness, and the Morality of Abortion**

In one way, when it comes to the debate on abortion, the ramifications of what has been laid out above are huge. Opposition to abortion is usually couched in the assumption that a fetus is a person. The argument goes that if a fetus is a person, then a fetus deserves all the rights and privileges that other persons (such as children and adults) have. Therefore, since it is morally wrong to kill a person, the act of terminating the fetus must also be morally wrong. But the assumption that a fetus is a person is often informed by religious notions, like the notion that humans have a soul. If having a soul is what makes you a person, the argument might go, and a fetus has a soul, then a fetus is a person. As an evangelical friend of mine communicated in the wake of the so-called “heartbeat bills” passed in Ohio, Georgia, and Missouri in June 2019, “I know this might offend someone. But I believe if there is a heart beat [*sic*], there’s a soul.” Except, if the notion that souls exist has been rejected on philosophic, scientific, and even theological grounds, this line of argumentation becomes very problematic (irrelevant and immaterial).

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<sup>26</sup> For more on the scientific-theological problems relating to the soul, see Warren S. Brown, Nancey Murphy, and H. Newton Malony, eds., *Whatever Happened to the Soul? Scientific and Theological Portraits of Human Nature* (Minneapolis, MN: Fortress Press, 1998); Joel B. Green, ed., *What About the Soul? Neuroscience and Christian Anthropology* (Nashville, TN: Abingdon Press, 2004); and Nancey Murphy, *Bodies and Souls, or Spirited Bodies?* (New York: Cambridge University Press, 2006), <https://doi.org/10.1017/cbo9780511802805>.

## But What If Souls Do Exist?

Even if souls do exist, however, and determine personhood, such arguments are still problematic. For example, there is no way to determine when ensoulment happens. One might argue that society ought to “play it safe” and assume ensoulment happens at conception, so as to ensure the person’s rights are never infringed. However, that suggestion is fraught with problems. For starters, the term conception is ambiguous. Does it mean fertilization, when the sperm reaches the egg and creates a zygote? Does it mean implantation, when the zygote turned embryo attaches to the uterus? Either way this approach is theologically problematic because the vast majority of zygotes and embryos are eliminated by the natural operations of the female reproductive system. Around 70% of fertilized embryos either never implant or are eliminated along with the uterine lining during monthly menstruation.<sup>27</sup> If one assumes God is the one that designed (or is otherwise responsible for) the human female reproductive system, but one also thinks that God ensures all zygotes/embryos are ensouled and thus human persons, one should conclude that God cares very little for the preservation of human life.

To solve this problem, one could insist that ensoulment happens only once a pregnancy is “established,” and thus a birth is likely, but it is unclear when that actually occurs. Is it when a woman would test positive on a pregnancy test? The timeframe of their accuracy varies. Is it when miscarriage is no longer possible? Miscarriages can happen as late as the third trimester. Is it, as my evangelical friend insisted, when a doctor can hear a fetus’ heartbeat at six weeks? In reality, that “heartbeat” is only the cells (that will eventually become heart muscle) fluttering as they first gain the ability to fire electrical signals. They are not pumping blood. Indeed, the heart does not have four clearly defined chambers until eight weeks, and does not have fully formed muscle tissue until the twentieth week.<sup>28</sup> To boot, since the soul is supposed to

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<sup>27</sup> This commonly cited number is disputed by Gavin E. Jarvis, “Early Embryo Mortality in Natural Human Reproduction: What the Data Say,” *F1000Research* 5, no. 2765 (2017), <http://dx.doi.org/10.12688/f1000research.8937.2>. But even on her lower estimates, the number is too high to erase the theological difficulties.

<sup>28</sup> For a readable rundown of these medical facts, see Rachael Rettner, “Is a ‘Fetal Heartbeat’ Really a Heartbeat at 6 Weeks?,” *LiveScience*, May 17, 2019, <https://www.livescience.com/65501-fetal-heartbeat-at-6-weeks-explained.html>. For an academic research paper that confirms these facts, see Eleftheria Pervolaraki et al., “Antenatal Architecture and Activity of the Human Heart,” *Interface Focus* 3, no. 2 (2013), <http://dx.doi.org/10.1098/rsfs.2012.0065>.

house mentality, but we know the heart has nothing to with producing one's mind, the idea that ensoulment happens upon the first beat of a heart has no basis. All in all, it seems that one can only make assumptions about when ensoulment happens arbitrarily; it is thus useless for settling the abortion debate.

### The Difficulty of Determining Fetal Personhood

If (as discussed in the first section) personhood is instead predicated on sentience, sapience, and self-awareness (i.e. full-mindedness) and (as discussed in the second section) such things are a result of sufficiently sophisticated neural activity, then the argument that a fetus is a person would initially seem to have no philosophical legs to stand on. Why? Because a fetus' brain is not sophisticated enough to produce even rudimentary *consciousness* until about twenty-four weeks, and it is certainly not intelligent or self-aware until after birth.<sup>29</sup> Consequently, one might argue, abortion is moral all the way up until the moment of birth because until then a fetus is not a person.

The problem with this argument, of course, is that a fetus is not intelligent or self-aware immediately *after* birth, either. Indeed, those milestones are not crossed until years later. So, by the logic of the argument above, neither a newborn nor a toddler is a person. Clearly that is not right. This problem is solvable, however, by appealing to the definition of person established in the first section. A being is a person if and only if it is *the kind of being* that is capable of possessing full-mindedness. Society considers babies to be persons, even though they are not yet fully-minded, because they clearly belong to a class (or set) of beings that are fully-minded (*Homo sapiens*).

This solution has consequences, however. On one hand, one cannot just assert that a fetus is not a person because it is not fully-minded. But on the other

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<sup>29</sup> In short, although key factors necessary (but not sufficient) for consciousness occur at seventeen- and eighteen-weeks' gestation, it is not until twenty-four weeks that a fetus' cortex (which is also regarded by many neuroscientists to be necessary for consciousness) is connected to the rest of the nervous system, and even possibly developed enough to produce pain. A fetus can produce stress responses before twenty-four weeks, but this is not indicative of a fetus feeling pain, particularly since stress responses can occur in the absence of subjective experience. See Stuart W. G. Derbyshire, "Fetal Pain," in *Prenatal and Preimplantation Diagnosis: The Burden of Choice*, ed. Joann Paley Galst and Marion S. Verp (New York: Springer Cham, 2015), 119–30, [https://doi.org/10.1007/978-3-319-18911-6\\_6](https://doi.org/10.1007/978-3-319-18911-6_6); "Can Fetuses Feel Pain?," *The BMJ* 332, no. 7546 (2006): 909–12, <dx.doi.org/10.1136/bmj.332.7546.909>; and Roland Brusseau, "Developmental Perspectives: Is the Fetus Conscious?," *International Anesthesiology Clinics* 46, no. 3 (2008): 11–23, <dx.doi.org/10.1097/aia.0b013e318181a88e>.

hand, one cannot just assert that a fetus is a person, either. If a fetus is a person, it would be in virtue of the fact that it belongs to a set of things that are generally fully-minded. So, the question of when a fetus should be considered a person reduces to the question of when a fetus should be considered a human being.

This itself is a very difficult question. When a fetus starts to look human is a matter of interpretation and suggesting that anything with unique human genome is a human, and thus a person, is equally problematic. By that definition 1) twins would be the same person (because they originate from the same zygote) and so would clones (because they have the same genome);<sup>30</sup> 2) all zygotes created for fertility treatments would be persons (and thus fertility treatments would be immoral); 3) cancer cells would be persons (because they have a unique human genome);<sup>31</sup> and 4) many humans would be at least two persons because most humans contain a mixture of genetically distinct cells.<sup>32</sup> To use a common metaphor, society would not consider an acorn to be an oak tree even though it has a unique oak tree genome. The question of when the acorn becomes an oak tree—is it when it is planted, or when it sprouts roots, or when it first breaks ground, or when it has its first leaf?—can only be answered with arbitrary assumptions about the nature of oak trees. In the same way, most (including my evangelical friend) would not consider a zygote a human, and the point at which it becomes a human (and thus a person) can only be declared arbitrarily. It is like trying to determine when exactly a pile becomes a heap.<sup>33</sup>

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<sup>30</sup> Interestingly, over time, the DNA of twins diverge. For a readable writeup on the research which suggests this, see Anahad O'Connor, "The Claim: Identical Twins Have Identical DNA," *New York Times*, March 11, 2008. [www.nytimes.com/2008/03/11/health/11real.html](http://www.nytimes.com/2008/03/11/health/11real.html).

<sup>31</sup> Cancer occurs when the DNA of a human's own cells mutate and then those cells replicate. Cancer cells, thus, have a unique human genome (although, they could not together form a living being). Siân Jones et al. argue that the unique genome of human cells and cancer should both be evaluated to aid cancer treatments. See Siân Jones et al., "Personalized Genomic Analyses for Cancer Mutation Discovery and Interpretation," *Science Translational Medicine* 7, no. 283 (2015): 283ra53, <http://dx.doi.org/10.1126/scitranslmed.aaa7161>.

<sup>32</sup> For a readable rundown of this research, see Carl Zimmer, "Every Cell in Your Body has the Same DNA. Except It Doesn't," *New York Times*, May 21, 2018, <https://www.nytimes.com/2018/05/21/science/mosaicism-dna-genome-cancer.html>.

<sup>33</sup> The problem is thus related to the Sorites Paradox. See Dominic Hyde and Diana Raffman, "Sorites Paradox," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Stanford, CA: Center for the Study of Language and Information, 2018), <https://plato.stanford.edu/entries/sorites-paradox/>.

### The Irrelevance of Fetal Personhood

What has been discussed regarding personhood and mindedness, however, might be irrelevant to the morality of abortion. Why? Because convincing arguments exist, from academics on both sides of the debate, which suggests that their conclusions about abortion hold even if one grants the other side their assumptions about fetal personhood. Take, for example, Emeritus Professor of Philosophy at the University of Kansas, Don Marquis. He argues that what makes killing persons morally wrong is not so much the fact that they are a person, but the fact that killing them robs them of meaningful future experiences that they would have otherwise had. This is why, for instance, society finds the death of children more tragic than the death of the elderly: the former has more experiences in their future. If this is right, then even if a fetus is *not* a person, abortion would still be morally wrong because the fetus' future experiences would be terminated. In other words, because it has a "*future like ours*"—because a fetus *will be* fully-minded, even though it is not now—abortion is immoral.<sup>34</sup> Therefore, Marquis maintains, even if a fetus is not a person, abortion (in most cases) is immoral.<sup>35</sup>

Or take the argument of American philosopher Judith Jarvis Thomson, who is famously on the opposite side of the debate. In her essay, "A Defense of Abortion," she argues that even if a fetus is a person, from the moment of conception, a woman's bodily right to autonomy is more important than the fetus' right to life and, thus, a woman's choice to have an abortion is morally permissible.<sup>36</sup> To be sure, Thomson is not arguing that peoples' right to "do whatever they want with their body" trumps other people's right to life. If that were the case, one could justify homicide by claiming, "I was just doing what I wanted with my body." The right to bodily autonomy that Thomson cites is the right to use one's bodily resources (e.g. their kidney, their womb) as they see

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<sup>34</sup> Adopting this position is how someone might be opposed to aborting a newly developed embryo that has successfully implanted into a mother's womb, but not opposed to birth control or abortion in the case of serious birth defects or disposing of an embryo that was created for fertility treatment. In the latter cases, if left alone, the embryo is not likely to have a future like the rest of human life.

<sup>35</sup> Don Marquis, "Why Abortion is Immoral," *The Journal of Philosophy* 86, no. 4 (1989): 183–202, <http://dx.doi.org/10.2307/2026961>.

<sup>36</sup> This, of course, would also apply even if the fetus has the same rights as a person because it has a future like ours. See Judith Jarvis Thomson, "A Defense of Abortion," in *Biomedical Ethics and the Law*, ed. James M. Humber and Robert F. Almeder (1976; repr., New York: Plenum Press, 1977), 39–54, [http://dx.doi.org/10.1007/978-1-4684-2223-8\\_5](http://dx.doi.org/10.1007/978-1-4684-2223-8_5).

fit. If Thomson is correct that a person's right to bodily autonomy is more fundamental than another's right to life, then one has the right to deny the use of their bodily resources to keep another person alive, even if that entails the death of another. Therefore, if a woman does not want to use her womb to keep a fetus alive, Thomson argues, she is not morally obligated to do so, even if a fetus is a person—indeed, even if the fetus is fully-minded and can feel pain.<sup>37</sup>

To bolster the intuition that, in general, one's right to bodily autonomy trumps other peoples' right to life, Thomson uses thought experiments—like one where a person is kidnapped and forced to use their kidney to keep a famous violinist alive for nine months. While the choice to stay “plugged into” the violinist might be noble, she argues, there is nothing immoral about you choosing to unplug from the violinist and to let him die. You would be what Thomson calls a “Splendid Samaritan” if you did choose to save him, but the violinist has no right to claim the use of your kidneys. Indeed, you have the right to use your kidneys as you see fit.<sup>38</sup>

Readers need not appeal to science-fiction-like thought experiments to establish this intuition. If other people's right to life trumped your right to bodily autonomy, then you would be morally obligated to go to the hospital right now and offer as many organs as possible to whoever needs them. Indeed, if you could save multiple lives, you should be donating all your organs, at the expense of your own life. Naturally, even though it would make you a “Splendid Samaritan,” no one thinks you are in the moral wrong for not doing this (even if you were the only person who could save them). The law even codifies this; legally physicians cannot even use a dead person's organs to save a life unless that person consented while they were still alive (even if that dead person's organs were the only way to save the life in question). Even in death, a persons' right to bodily autonomy trumps another (living) person's right to life.<sup>39</sup>

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<sup>37</sup> The woman would, of course, be obligated to keep the fetus alive if she intended to become pregnant and thus wanted to use her womb for this purpose.

<sup>38</sup> Thomson finds this situation to be analogous to one a woman can find herself in after being raped. She essentially has a person (who requires her bodily resources for survival) “tethered” to her without consent. However, she does not think that this thought experiment establishes that abortion is moral in all or most cases.

<sup>39</sup> Notice that this thought experiment also derails the following objection: “What about the bodily autonomy of the fetus being terminated? Is it not being violated when an abortion is performed?” No, it is not. You violate a person's right to bodily autonomy when you make them use their bodily resources in a way that they do not wish. Since, in the scenarios in question, neither the fetus, violinist, nor the people in the hospital are being asked to use their bodily resources for anything, their right to bodily autonomy is not in play. Their right to life is

### Owning Up to Your Responsibilities

When it comes to pregnancy, there is often a difference that weakens these analogies (that Thomson herself recognizes) and thus complicates the matter. The violinist, and the people at the hospital, need your organs to survive through no fault of your own. You did nothing to make their survival dependent upon your bodily resources. In the case of pregnancy, however, unless it is due to rape or incest, this is not true. You willingly did an action that you knew could result in some (at least potential) person needing your bodily resources to survive. This is why many who believe a fetus is a person are willing to admit that abortions are morally acceptable in cases of rape and incest, but not in cases where pregnancy is the result of consensual sex. A victim of rape, it is argued, is not morally obligated to use her womb to house her rapist's offspring; her right to bodily autonomy is paramount. On the other hand, when a woman willingly engages in sexual intercourse knowing that pregnancy is a risk, the argument goes, the woman implicitly gives any resulting fetus the right to use her bodily resources. So, if a pregnancy does result from consensual sex, the woman must "own up to her responsibilities." "When you take risks, you have to pay the full consequences of those risks." That, at least, is the principle to which people commonly appeal. As my previously mentioned evangelical friend said in the same communication, "Choices have consequences."

It is clear, however, that this principle is not true in all cases. For example, in 2011, when I helped the local West Pittston Library clean out their muddy basement after a flood, I knew that slipping, falling, and breaking my leg on the slippery wooden stairs was a risk. Had I fallen, though, no one would have said, "Sorry. I'm not helping you up. I'm not taking you to the hospital. You knew breaking your leg was a risk; you have to pay for the consequences of your actions." This situation, of course, would not be analogues to a pregnancy; but it does show that the principle "a person should always pay the full consequences for any risk they take" is not universal.

### A New Thought Experiment

To see whether the principle holds when an unwanted pregnancy is the result of consensual sex, consider what I take to be a much more analogous

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being violated, of course, but Thomson's argument is that the other person's right to bodily autonomy outweighs their right to life.

situation. You are driving on the interstate and get into an accident; you are fine, but the person in the other vehicle is injured and needs a kidney to survive. Suppose you are the only matching donor candidate available. Are you morally obligated to give them your kidney? Like with consensual sex, you were partaking in an activity that you knew came with risks. Everyone knows that every time you drive, an accident that injures another person in exactly this way is possible. And had you not been on the road, the accident would not have happened—just like an unwanted pregnancy cannot happen without sex. So, are you obligated to give the other driver your kidney? Or does your right to bodily autonomy outweigh their right to life?

Notice that your answer here likely turns on the details. Were you being careless—weaving in and out of traffic, at twenty miles over the speed limit, while watching a movie on your iPhone? If so, a case could be made that you are morally obligated to give the other driver your kidney; they only need it to survive because of your careless actions. If, however, you were driving in an ordinary safe fashion, it seems you are not morally obligated. Yes, driving always comes with the risk of accident, but you were not doing anything immoral. While you would be a Splendid Samaritan if you did give the other driver your kidney, they do not have the moral right to demand your kidney and you are not acting immoral if you refuse.

If this analogy holds, contrary to what just about anyone has ever said in the public debate about abortion, the disagreements about the morality of abortion may not actually be motivated by differences in opinion about whether a fetus is a person; instead, they may be motivated by differences in opinion about the morality of recreational sex (i.e. sex not for the purpose of reproduction). To be clear, this article is not suggesting that anyone has ever made the argument, “Abortion is wrong because recreational sex is immoral” (or vice-versa).<sup>40</sup> What is being suggested is that, despite what people say, their widely diverging intuitions about the morality of abortion may not be due to differing conclusions about fetal personhood but, instead, be a result of diverging hidden assumptions about the morality of recreational sex.

In other words, it may be the case that many who say they are “pro-choice” are not on one side of the debate strictly because they do not think a fetus is a person. They are “pro-choice” because they view recreational sex as a morally neutral act (analogous to ordinary driving on the interstate) such that

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<sup>40</sup> Although, it should be noted that *concupiscence*—the sinful desires expressed during intercourse—is still an undergirding (though often neglected) part of Catholic and Protestant theology.

the woman involved is not doing anything morally wrong and is, thus, not morally obligated to “pay for the consequences” of her actions in the case of an accident (i.e. unwanted pregnancy). And they would likely still think this is true, even if they became convinced that a fetus is a person. Conversely, many who say they are “pro-life” may not be on the other side of the debate because they think that a fetus is a person. Rather, they may view recreational sex as an immoral act (analogues to reckless driving), which was done primarily for the sake of pleasure at the expense of risking pregnancy. As such, they think a woman is morally obligated to use her bodily resources to carry the fetus to term in the case of an accident, and they would still think this is true even if they became convinced that a fetus was not a person.<sup>41</sup>

### The Relevance of Fetal Personhood

The question of a fetus’ personhood status becomes relevant again however, even if recreational sex is not immoral, once the question of abortion is asked in a more nuanced way. Is whether the woman took precautions against pregnancy relevant to whether an abortion is immoral? If she did, this would be analogues to vigilantly operating a vehicle, cautiously driving the speed limit in the right-hand lane with both hands on the steering wheel. In such a case, the argument is even stronger that the victim has no right to your kidney; likewise, if protection is used, the case seems even stronger that a fetus has no claim to the mother’s womb (even if it has the same moral rights as a person). However, willingly avoiding safe precautions would be much more akin to driving recklessly. So, if a fetus does have the same rights as a person, an argument could be made that in the case of unprotected consensual recreational sex, abortion is immoral. Just like the victim of the reckless driver has a right to the driver’s kidney, the victim of the woman’s recklessness has a right to the mother’s womb. Of course, if a fetus does not have the same rights as a person, it would not seem to matter either way; abortion would be permissible regardless of whether protection was used or not. Thus, the question of fetal personhood becomes relevant once again.

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<sup>41</sup> Notice that the analogy could also be used to explain why some people would not object to abortion in the case of a broken condom or failed birth control, but would be opposed if the person willingly had unprotected sex even though protection was readily available. This could be why people who think that abortion should be safe and legal also do not think it should be used as (or in place of) birth control.

Or consider whether fathers have a moral right to what Brown University professor Frances Goldscheider calls “financial abortions,” the refusal to support a child after it is born (if the father does not want the financial responsibility).<sup>42</sup> It would make sense to suggest that a mother *does* have a moral right to a medical abortion but that a father does *not* have a right to a financial abortion if a fetus is not a person but a baby is. Our moral obligations to persons and non-persons differ.<sup>43</sup> However, if one thinks that a mother has the moral right to withhold her bodily resources even if a fetus *is a person*, why would a father not have the moral right to withhold his financial resources even though a baby is a person?<sup>44</sup> After all, if you are not morally obligated to give someone your kidney, you are not morally obligated to buy them one either.<sup>45</sup>

It should be clear by now how difficult the questions surrounding abortion are, how it is not a simple dichotomous for/against issue, and how answers regarding such questions can be informed by the questions we have considered regarding personhood and mindedness. Again, it is not the article’s intention to determine where to “draw the line” regarding when abortion

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<sup>42</sup> Frances K. Goldscheider, “Men, Children and the Future of the Family in the Third Millennium,” *Futures* 32, no. 6 (2000): 525–38, [http://dx.doi.org/10.1016/s0016-3287\(00\)00005-7](http://dx.doi.org/10.1016/s0016-3287(00)00005-7).

<sup>43</sup> One could also appeal to the difference in consciousness between a fetus in the first and second term (when abortion is legal) and a baby. Our obligations to conscious and non-conscious entities differ, as well.

<sup>44</sup> Given what has been discussed, there is one logically consistent way to hold this position: to judge the morality of male and female recreational sex differently. If the male sexual act is immoral but the female sexual act is not, one could argue that the former must pay for the consequences of his actions but the latter does not. This asymmetrical moral judgment would need strong argumentation, however.

<sup>45</sup> One might think that fetal personhood is also relevant to whether a pregnant woman drinking alcohol or doing drugs amounts to child abuse. This, however, would neglect to realize that alcohol use during pregnancy is objectionable because of its long-term effects—what it will do to children after they are born (when they are unquestionably a person). Thus, alcohol use during pregnancy is morally wrong regardless of whether a fetus is a person. (It is actually illegal in some states. See “Serving Alcohol to Pregnant Women,” Alcohol.org, July 5, 2019, <https://www.alcohol.org/laws/serving-alcohol-to-pregnant-women/>). Of course, this tempts one to argue that if alcohol use during pregnancy is immoral, abortion must be, too. However, alcohol use during pregnancy is different than abortion in two ways that make this argument faulty. First, and most obviously, abortion prevents the fetus from having a future and thus does not, unquestionably, affect a person. Second, if a woman has decided to remain pregnant, she has implicitly agreed to allow the fetus to use her bodily resources for its development. This agreement, presumably, also requires the mother to behave responsibly. In other words, I am not obligated to let the violist use my kidney; but if I do choose to do so, I am obligated not to hire someone to repeatedly punch me in that kidney while he is using it.

starts/stops being moral. But given what has been discussed, readers should now be in a better position to consider things like fetal personhood, their future full-mindedness, and the morality of sex to come to a logically consistent answer about the morality of abortion for themselves.

### **Personhood, Mindedness, and the Legality of Abortion**

People often object to abortion's legality on religious grounds. Political philosophers, however, have long recognized the dangers of governmental enforcements of religious norms and allowing people's particular religious sensibilities to influence legislation. John Locke, for example, knowing firsthand the horrendous consequences of religious factions fighting for political power in England, argued that political power is derived from a mandate from the masses, not God, and that the practicing of one's religion should be a private affair.<sup>46</sup> It was because they were influenced by such philosophers that American founding fathers like Thomas Jefferson intended to erect what he called "a wall of separation between church and state."<sup>47</sup> Freedom of religion grants one the right to practice their religion, not impose their religious sensibilities onto others through law. The fact that one's own religion prohibits abortion, therefore, does not entail that abortion should be illegal.

Of course, those opposed on religious grounds will often argue that it is not religious prohibitions against abortion that entail it should be illegal; their religion forbids it because it is immoral and it is because it is immoral that it should be illegal. Nevertheless, as it has already been demonstrated: 1) the debate about whether/when abortion is immoral is far from settled; and 2) legal issues are generally separate from moral issues. The fact that something is immoral does not necessarily mean it should be illegal. Indeed, many argue that although abortion is immoral, it should be legally permissible.

#### The Analogy with Animal Cruelty

That is not to say that many immoral things (like murder) are not illegal or that morality is always irrelevant to questions of legality. Laws against animal cruelty, for example, might be useful in identifying problematic members of society, but the primary motivations for such laws is the immorality

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<sup>46</sup> John Locke, *Two Treatises of Government* (London: Whitmore and Fenn, 1821).

<sup>47</sup> Thomas Jefferson, "To the Danbury Baptist Association," *Founders Online*, January 1, 1802, <https://founders.archives.gov/documents/Jefferson/01-36-02-0152-0006>.

of animal cruelty. Laws are often aimed at protecting the innocent because mistreating the innocent is immoral. It seems, therefore, that arguments against abortion because it is immoral (or more specifically, because legal prohibitions against abortion would protect the innocent) do have some legs to stand on.

This is an argument from analogy, however. “Animals are innocent and it is illegal to mistreat them. Fetus’ are innocent and, therefore, it should be illegal to mistreat them, as well.” And arguments from analogy stand or fall based on the relevant similarities and dissimilarities between the things being compared. Unfortunately for those make this argument, there are some relevant differences between animals and fetuses that weaken such arguments significantly. For example, animals are unquestionably sentient and do not require our bodily resources for survival. People know that abusing an animal causes it pain and an animal never requires humans to forfeit their bodily autonomy to keep it alive.<sup>48</sup> But as was revealed in the previous sections, neither of these things is true of a fetus, especially in the first and second trimester. For example, the portions of a fetus’ brain necessary to produce consciousness are not developed until twenty-four weeks.<sup>49</sup> To boot, at least when it comes to pet animals, people are consenting to take care of them when they take them on as a pet and the animals become dependent on their human caregivers. As already shown, the issue of whether a woman consents to allowing a fetus to use her womb by having recreational sex is far more complicated.

What is more, it is legally permissible to abuse (cause pain and kill) animals when doing so in the interest of human survival.<sup>50</sup> Humans can kill animals for food and conduct medical experiments on them, as well. There are limits, of course, and many raise moral objections to such actions—but they are

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<sup>48</sup> Note that even if animals did need our bodily resources, people would balk at a law that required people to donate a kidney to keep them alive.

<sup>49</sup> Of course, given the problem of other minds, and thus for the same reason that one cannot *know for certain* anyone else feels pain, no one can *know for certain* when a fetus starts feeling pain. No person can be directly aware of anyone’s experiences but their own. But given what the science suggests about the role that the brain plays in producing consciousness, and what we know about fetal development, the conclusion that a fetus cannot feel pain before twenty-four weeks is fairly well established. For a simple explanation of how inference to the best explanation can be used to solve the problem of other minds, see John Perry, “The Problem of Other Minds,” *Philosophy Talk*, May 28, 2014, [philosophytalk.org/blog/problem-other-minds](http://philosophytalk.org/blog/problem-other-minds).

<sup>50</sup> For a moral defense of the idea that animals have rights, but that interference with them is permissible when it is necessary for human “vital needs,” see Taylor, “Animal Rights and Human Needs.” 249–264.

generally legal.<sup>51</sup> So, there is legal precedent for the mistreatment of innocents when greater human rights and needs are at stake. Thus, the argument that it should be legal to abort an innocent fetus because the legal rights and concerns of the mother are more paramount, also has solid legs to stand on. (Notice also that, at least in the political world, those who defend animal rights do not generally object to abortion's legality, and those who argue against the morality of abortion do not generally argue for animal rights. If this argument under consideration is cogent, however, it seems that both sides are being inconsistent in what they deem immoral.)

### Should Abortion be Illegal Because It is Immoral?

Regardless, if abortion's immorality is to be the basis for its illegality, then its immorality must be established. This, however, is a very difficult thing to do. At least publicly, such arguments often revolve around when a fetus becomes a person, but such a thing is difficult to determine. People would need to define a "person" legally (a difficult task in itself) and then determine when a fetus has reached personhood status; but as was discussed earlier with the acorn example, it would seem that any such determination could only be made arbitrarily. And if personhood starts at fertilization or conception, fertility treatments are immoral, and most human life has been extinguished by the natural processes of the female reproductive system (or God). Alternatively, if life does not begin until a miscarriage is no longer possible, then life does not begin until well into the third trimester.

Following Marquis, we might suggest that a fetus should be said to belong to set of all humans once it has a future like ours—or, to be more precise, once it is *likely* to have a future like ours if left alone. But, again, this is difficult to determine; every pregnancy is different and pregnancy tests vary in how early they can be used and how accurate they are. (Do fetuses become human beings at a later stage than others in women who are more prone to miscarriage or preeclampsia?) To boot, one is forced to ask: how *likely* does a fetus having a future like ours have to be in order for it to be considered a human (and thus a person)? Generally, as the pregnancy develops, the probability slowly increases, but at what point is it high enough? Again, it seems that the answers to such questions are arbitrary; and without clear answers to such questions, it would be problematic to use morality as a basis for restricting abortion's legality.

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<sup>51</sup> Normally, of course, the law forbids humans from abusing animals unnecessarily—for our own entertainment, for example; but no one is aborting fetuses for entertainment.

In addition, given what was discussed last section, if abortion's illegality is determined by its immorality, society would have to answer a host of seemingly unanswerable ethical questions about the morality of sex and whether, in consenting to have sex, a woman implicitly agrees to let a potential fetus use her bodily resources for survival. What is worse, if abortion is going to be illegal because it is immoral, the government would likely have to ascertain very granular details about people's private lives on an individual, case-by-case basis—things like whether the woman intended to get pregnant, whether protection was used, whether contraception was even available or if the mother knew how to use it, whether the male exerted pressure not to use protection or coerced her into having sex in the first place. The list could go on. Such laws would thus either be unenforceable or require a level of government intrusion into our private lives that would be unacceptable and intolerable.<sup>52</sup> In my opinion, this is why the morality of abortion is usually not cited as a justification for when and why abortion should be legal. Most lawmakers recognize that it is not the government's job to answer such questions. Each person should have the right to make such moral determinations for themselves.

Still, if abortion is going to be legal at all (like in cases where it is necessary to save the life of the mother), but not legal all the time (like right before birth), the government has to draw the line somewhere—a line that determines when abortion is legally permissible and when it is not. So, the question of abortion's legality is the question of where, and on what grounds, that line should be drawn.

### The Fifth Amendment

The Fifth Amendment reads (in part), “[no] person [shall] be deprived of life, liberty, or property, without due process of law.” Consequently, one might think that the line should simply be drawn wherever fetal personhood begins. Such a position, however, is fraught with difficulties. First of all, one might argue that since abortion has already been ruled on by the courts, abortion (when legal) does not deprive a fetus of its life *without due process of law*. Because the courts have ruled, due process has already determined when a fetus

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<sup>52</sup> To help illustrate this point, imagine what it would take to enforce a law which dictated that if you are morally at fault for an automobile accident (like the one described above), you are legally obligated to donate your organs to save the other person. The government would essentially have to have a camera in everyone's car.

can be deprived of its life and when it cannot. So, the Fifth Amendment is no longer relevant to the abortion debate.

Second, the Fifth Amendment is not the only relevant legal concern. Legal rights to bodily autonomy are also in play. If the United States took the Fifth Amendment to be as paramount as this argument suggests, people in need of a kidney would be able to sue potential donors for their kidney under the pretense that a refusal to donate deprives them of their life without due process. Or, to put it another way, personhood is not the only determining factor when it comes to legal rights. Both federal and state governments grant persons different rights at different ages, such as the various rights to vote, drink, and drive. Even if a fetus is a person, arguments could be made that its legal right to life does not outweigh the mother's legal right to bodily autonomy.<sup>53</sup>

Lastly, not only is when personhood begins both philosophically and scientifically indeterminate, but most places the line could be drawn non-arbitrarily—fertilization, implantation, heartbeat, birth, and full-mindedness—are legally problematic. If it is drawn at fertilization or conception, fertility treatments become illegal as do some forms of birth control.<sup>54</sup> If the six-week “heartbeat” of a fetus is the cutoff, then every miscarriage after six weeks would require a murder investigation because, without such an investigation, it would remain indeterminate as to whether the miscarriage was natural or the result of an illegal abortion.<sup>55</sup> Drawing the line at birth would entail that non-medically necessary partial-birth abortions should be legally permissible (they are not, and most agree they should not be). Drawing the line at full-mindedness would entail that babies have no legal rights since babies are not self-aware until long after birth. Thus, using the Fifth Amendment as a determiner for abortion's legality is simply impractical.

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<sup>53</sup> Of course, the fetus might have a moral claim if the mother was careless with her birth control, but (as mentioned above) determining such carelessness falls outside the purview of the law and would, ultimately, be practically unenforceable.

<sup>54</sup> In reality, most female forms of birth control prevent fertilization, but some—like the Copper IUD (and possibly Plan B)—could prevent implantation, as well, but they primarily work by preventing fertilization. For a readable rundown of the research on this topic, see Pam Belluck, “Science Does Not Support Claims that Contraceptives are ‘Abortion-Inducing,’” *New York Times*, Sept 7, 2018, <https://www.nytimes.com/2018/09/07/health/kavanaugh-abortion-inducing-contraceptives.html>.

<sup>55</sup> It should also be noted that such a law is almost equivalent to a ban on abortion since many women do not know they are pregnant before six weeks.

## Roe v. Wade

Where the line was drawn in *Roe v. Wade* was “viability.” Abortion cannot be banned by any state until after the fetus is viable—until it can possibly survive outside the mother’s womb—which is around twenty-four weeks, or the beginning of the third trimester.<sup>56</sup> Although the ruling is not without its problems, and plenty of people on both sides do not like *Roe v. Wade* for various reasons, the distinction it draws makes logical, philosophical, and legal sense for three reasons. First, although it is not a legitimate philosophical milestone for personhood, being able to survive outside the womb does seem to be a legitimate milestone for moral and legal consideration. It is a kind of independence that perhaps makes the rights of the fetus separate from that of the mother. It was this, it seems, that was the primary motivation for the court’s decision in *Roe v. Wade*.

Second, by the time a fetus is viable, a woman will have had ample time to consider whether she wants to be pregnant and carry the fetus to full term. So, assuming that abortion before then is legal and available, if a woman has not had one by the time the fetus is viable, it would be reasonable to conclude that the woman has implicitly agreed to let the fetus use her womb, and thus an abortion after that point should be illegal. We might liken this to a kind of adverse position law; if you use someone’s land long enough, and they do not kick you out, it becomes yours.<sup>57</sup>

Lastly, as mentioned above, twenty-four weeks is around the time the relevant parts of a fetus’ brain are active enough to begin (at least potentially) producing consciousness (i.e. it is around this time that the fetus is arguably sentient). It is difficult to know for sure, of course, whether the fetus is sentient—but since being sentient is required for a biological being to not only deserve moral consideration but also legal consideration, and if society is going to err on the side of caution, then somewhere around twenty-four weeks would

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<sup>56</sup> Despite this, some states have laws that ban abortion after twenty weeks. As of this writing in early 2019, many states have passed total bans, or bans before six weeks (which is often before a woman knows she is pregnant). These laws are intended to defy *Roe v. Wade* in the hopes that they will be challenged in court and then appealed to the Supreme Court, which might then lead to overturning *Roe v. Wade*.

<sup>57</sup> On my reading of Thomson, I believe this is something with which she would agree.

be a logical place to draw the line.<sup>58</sup> Moreover, notice that all three of these points could be used not only to argue that abortion should be legal before viability, but that it should be illegal afterwards, as well. To be clear, this article is not saying that arguments do not exist for drawing the line somewhere else, both later and earlier; but given the concerns of personhood and mindedness that are at issue here, drawing the line at viability is at least logically and legally defensible.

### Conclusion

It was not this article's goal to draw the metaphorical line regarding when abortion is moral and should be legal. It was merely the goal to lay out the basics regarding the concept of personhood and what has been discovered about the mind. That way, readers can assess each issue's relevance to a logical evaluation of abortion's morality and legality. Readers can now draw their own conclusions with these more nuanced philosophical and medical considerations. Interestingly, abortion is not the only issue in which questions of personhood and mindedness are highly relevant. They are also relevant in discussions about other religious issues as well, such as end-of-life decisions and the afterlife, which ought to be explored in greater detail in a future article.

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<sup>58</sup> I make the distinction "biological being" here because, legally, non-conscious entities, like corporations, are considered "artificial people" and are granted some of the same rights that conscious biological people have.

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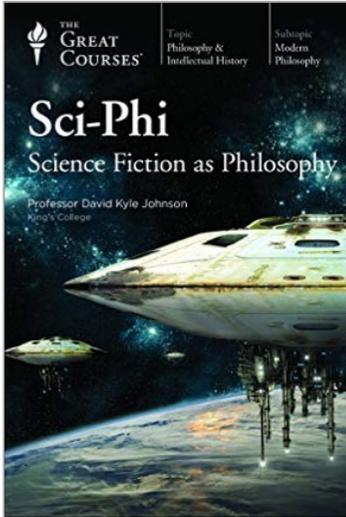
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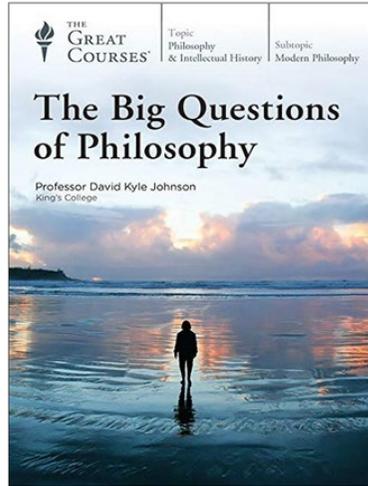
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