

**INSTRUMENTALISM: ON THE ETHICS OF USING FETAL TISSUE**

INSTRUMENTALISM: ON THE ETHICS OF USING FETAL TISSUE  
IN  
MEDICAL RESEARCH

By  
CLAUDIA A. EMERSON, B.Sc.(Hons.)

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AUTHOR: Claudia A. Emerson, B.Sc.(Hons.) (University of Guelph)

SUPERVISOR: Dr. Elisabeth Boetzkes

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## ABSTRACT

Within the context of medical ethics the term ‘instrumentalism’ is broadly understood as the practice of ‘using people’ to achieve some end, where the end is considered to be of some good. It is a practice that has recently come under fire in light of developments in medical research that propose to use fetal tissue obtained from elective abortions. Ethicists opposed to this kind of instrumentalism usually invoke Kant’s dictum that one should never treat humanity only as a means but always as an end in itself, and allege that the instrumental use of others is ‘dehumanizing’ and immoral. Moreover, opponents of fetal instrumentalism claim that using fetal tissue in research is a morally tainted, ‘doubly’ offensive practice since it depends on tissue obtained from voluntary abortions. In this thesis, I challenge both of these claims and argue that using fetal tissue in medical research constitutes an acceptable kind of instrumentalism. Furthermore, I argue that the issue of abortion and the use of fetal tissue in research are two ethically separable issues that warrant distinct ethical judgments. My project begins with an analysis of instrumentalism, which is then applied to show how using the aborted fetus to attain valuable therapeutic goals is a morally justified instrumentalism. I then proceed with an evaluation of the arguments central to the instrumentalist debate, and show how the normative separation between abortion and fetal tissue use is possible.

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## TABLE OF CONTENTS

<b>INTRODUCTION</b>	1
<b>CHAPTER 1: A Theory About Instrumentalism</b>	7
1.1 Instrumentalism Defined	7
1.2 The ‘Instrumentalising Self’	9
1.3 Institutionalizing Instrumentalism	15
1.4 Simple Users, Pure Bargainers, and False Friends	20
1.5 Failing to Respect and Harm: The Conditions for Unethical Use	23
1.6 Can We Justify Wrongful Use?	26
<b>CHAPTER 2: The Fetus as Instrument</b>	28
2.1 Of Relationships and Instrumentalism	29
2.1.1 Not Just a Case of Simple Using	32
2.2 Means and Ends	34
2.3 Deontological Concern for Respect	34
2.4 Consequentialist Concerns of Harm	35
2.4.1 Harm to the Fetus	36
2.4.2 Harm to Others	37
2.5 Harm of a Different Kind: Symbolic Harm	39
2.6 The Harm of Abstaining from Fetal Tissue Research	42

<b>CHAPTER 3: Separating the Morality of Abortion from the Morality of Fetal Tissue Use</b>	44
3.1 The Special Features of Fetal Tissue	45
3.2 The Connection between Abortion and Fetal Tissue Research	46
3.2.1 Complicity in Abortion	47
3.2.2 Encouraging Abortion Through Donation Incentives	52
3.2.3 The Issue of Legitimate Consent	55
3.2.4 Alteration of the Abortion Timing and Method	59
3.2.5 Tissue Procurement Procedures	66
3.3 Guidelines for Conducting Ethical Fetal Tissue Research	73
<b>CHAPTER 4: Conclusion</b>	75
<b>BIBLIOGRAPHY</b>	77

## Introduction

### I

Most people would agree that it is wrong to ‘use’ others. This is largely due to the pejorative sense of the term ‘use’ which suggests exploitation. However, one need not exploit others in our ‘use’ of them. It is true that people use people everyday in the most innocuous transactions: we *use* cab drivers for transportation; students *use* professors to extort knowledge; children *use* parents for basic sustenance, and as Don Marrieta Jr. notes, “we begin life using the body of a mother.”<sup>1</sup> Yet no one would seriously argue that these are morally offensive uses of people. In fact, the term ‘use’ seems quite inappropriate in these examples since no one is genuinely exploited (and hence harmed) in these situations. Thus what is needed is a distinction between the moral and immoral use of people.

Ethicists usually appeal to Kant’s dictum that one should never treat humanity merely as a means, but always as an end in itself,<sup>2</sup> to distinguish between the moral and immoral use of people. The phrase ‘merely as a means’ captures the essence of what is objectionable about using people. To use someone merely as a means is to objectify them, and treat them less than human. That one may not use people simply as objects towards some end seems intuitively clear; for people are not objects, they are beings worthy of respect.

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<sup>1</sup> D.E. Marrieta Jr., “On Using People” (1972) 82 *Ethics* p. 232.

<sup>2</sup> I. Kant, *Grounding for the Metaphysics of Morals*, translated by James W. Ellington (Indianapolis: Hackett Publishing Company, Inc., 1993), p. 36.

Yet Kant's imperative provides no instruction on how we are to assess when we treat someone merely as a means and when we treat them as an end. That is, on what grounds can we make the distinction between moral and immoral instrumentalism? This is one of the questions I propose to address in this thesis.

## II

The World Health Organization (WHO) estimates that four million people worldwide are afflicted with Parkinson's disease.<sup>3</sup> In the United States alone, over one million people are affected, and over 100,000 cases have been diagnosed in Canada.<sup>4</sup> Parkinson's disease is a progressive neurological disorder of the central nervous system characterized by a decrease in spontaneous movement, postural instability, rigidity, and tremor that gradually interfere with the patient's ability to carry out the essential activities of daily life.<sup>5</sup> Presently there is no cure, and existing drug therapies are largely ineffective and result in unacceptable side effects.<sup>6</sup>

The exact causes of Parkinson's are unknown, however, researchers do know that it occurs when neurons in the region of the midbrain called the *substantia nigra* degenerate and fail to secrete dopamine.<sup>7</sup> Research experiments with animals have shown that fetal dopaminergic neurons grafted into adult rats and monkeys can restore normal movement

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<sup>3</sup> Statistic obtained from WHO website: [www.who.int/health\\_topics/parkinson\\_disease/sn/](http://www.who.int/health_topics/parkinson_disease/sn/)

<sup>4</sup> Statistic obtained from Parkinson's Disease Foundation Inc. website: [www.pdf.org/aboutdisease/overview/index.html](http://www.pdf.org/aboutdisease/overview/index.html)

<sup>5</sup> A. Fine, "The Ethics of Fetal Tissue Transplants" (1988) Jun-Jul *Hastings Center Report* p. 5.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

in experimentally induced Parkinson's.<sup>8</sup> Since fetal cells are undifferentiated and grow rapidly, they have the capacity to integrate well into host tissues and regenerate or replace faulty mature cells. All this holds much promise for the treatment and cure of Parkinson's – and a host of other diseases. An appreciation for the unique biological properties of fetal tissue suggests a wide range of possible applications, summarized here by Kathleen Nolan:

Other avenues for research include the use of fetal neural cells in the treatment of Huntington disease, Alzheimer's disease, spinal cord or other neural tissue injuries, and possibly some forms of cortical blindness. The use of fetal liver cells for treatment of radiation-induced bone marrow failure has been attempted, and these cells may prove helpful for treating other diseases of the bone marrow, such as leukemia and aplastic anemia, or certain hereditary disorders, including sickle cell anemia, thalassemia, and hemophilia. Embryonic and early fetal cells might also be employed in various forms of genetic therapy.<sup>9</sup>

Consider now that over 1.5 million abortions are performed every year in the United States, and approximately one hundred thousand in Canada.<sup>10</sup> Surely not every abortus will be suitable or available for tissue donation, and not every patient will be a candidate for fetal tissue therapy; still we cannot ignore the numbers. The potential exists to help hundreds of thousands of patients per year by using fetal tissue that will otherwise be discarded. Why would anyone object to using fetal tissue in medical research when it could potentially save so many lives?

The objection can be understood if we re-frame the question in normative terms. What we really should be asking is, "Is there anything wrong with using an aborted fetus

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<sup>8</sup> *Id.*

<sup>9</sup> K. Nolan, "Genug ist Genug: A Fetus is Not a Kidney" (1988) *Dec Hastings Center Report* p. 13.

<sup>10</sup> From The Alan Guttmacher Institute, the incidence of induced abortion reported on the website: [www.agi-usa.org/pubs/fb\\_induced\\_abortion.html](http://www.agi-usa.org/pubs/fb_induced_abortion.html). Canadian statistic from Health Canada website: [www.hc-sc.gc.ca/hpb/lcdc/brch/factshts\\_e.html](http://www.hc-sc.gc.ca/hpb/lcdc/brch/factshts_e.html).

in medical research?” or “Ought we to use aborted fetuses in medical research?”.

Opponents of fetal tissue use offer a variety of reasons as to why such use is morally offensive. In my opinion, such reasons fall into one of two available avenues of argument. I identify the first as ‘the objection to instrumentalism’, and the second as ‘the abortion connection’. To elaborate, those opposed to instrumentalism decry that using fetal tissue in medical research turns the fetus into a ‘means towards an end’ which in Kantian terms is morally objectionable. And further, they usually invoke a series of arguments tied to the abortion debate, claiming that fetal tissue use is ‘morally tainted’ as a result of the abortion which makes the tissue available.

On the other side, proponents of fetal tissue use adopt a utilitarian defense and point to the greater social good which may be possible through medical research that makes use of aborted fetuses.

In this thesis, I argue in favor of fetal tissue use in medical research. I do not so much appeal to ‘the end justifies the means’ approach usually employed by utilitarians; rather my strategy is focused on dismantling the opposition’s arguments. In my view, it is ethical to use fetal tissue in medical research if: 1) it can be shown that it is a morally acceptable kind of instrumentalism; and 2) that it is disconnected from the morality of abortion. Thus my project is centered on demonstrating these two arguments.

In chapter 1, I undertake an investigation into the nature of instrumentalism. My objective is to distinguish between the ethical and unethical uses of people, and subsequently to show that fetal instrumentalism falls into the category of ethical uses. My investigation leads first into an inquiry about the concept of instrumentalism, where I

seek to understand what it means to ‘instrumentalise’ or use others. In developing a theory of instrumentalism, I adopt ecofeminist Val Plumwood’s ego-instrumentalist model of humans versus nature, and argue that this model is consistent with human instrumentalism as well. Next, I inquire into the different forms of instrumentalism with the aim of uncovering the features which distinguish morally acceptable instrumentalism from the morally unacceptable. I appeal to theories espoused by the moral philosophers Don Marrieta Jr. and Norvin Richards whose views are unmistakably distinct, but share several common aspects nonetheless. I take these common points as a basis for distinguishing between the ethical and unethical use of people. The chapter concludes with a discussion on respect and harm, which my analysis of instrumentalism shows to be the crucial elements for assessing the ethical use of others.

In chapter 2, I apply the theory developed in chapter 1 to illustrate how using the fetus in medical research constitutes an acceptable kind of instrumentalism. The analysis reveals that fetal instrumentalism does not satisfy the conditions of morally objectionable instrumentalism. First, an examination of the practice shows that the principle of respect is not violated when the aborted fetus is employed in medical research. Second, an evaluation of harm with respect to fetal tissue use indicates that no substantial harm results from this controversial practice. The analysis concludes that a failure to pursue valuable research will cause greater harm than if we abandon the research altogether.

Chapter 3 centers on the instrumentalist debate which, for the most part, is an extension of the abortion debate. Opponents of fetal tissue use claim that using aborted fetuses in medical research is unethical because it makes one complicitous in abortion,

and that it promotes further abortions. My task in this chapter, therefore, is to show that the abortion issue is ethically separable from fetal tissue use, so that one should not feel morally apprehensive about using aborted fetuses in medical research. I expose and attack the opposition's five main arguments thereby disconnecting the morality of abortion from the morality of fetal tissue use. The chapter concludes with a suggestion for policy direction in fetal tissue research that can effectively maintain the separation of the normative conflict.

The concluding chapter ends with some remarks about points for further discussion in this contentious debate.

## -- Chapter 1 --

### A Theory About Instrumentalism

#### *1.1 Instrumentalism Defined*

Recent promising results from fetal tissue transplants in the treatment of Parkinson's disease have sparked enormous ethical debate.<sup>1</sup> The debate centers on whether it is morally permissible to use tissue from aborted fetuses in medical research. Proponents of this type of research point to the immeasurable gains that may be garnered from the use of fetal tissue in the treatment, and possible cure of seriously debilitating illnesses such as Parkinson's, Alzheimer's, other neurological disorders, spinal cord injuries, diabetes, and a host of other ailments. Opponents decry how it is dehumanizing and morally offensive to use humanity in such a callous way. The issue then, is one of instrumentalism.

Instrumentalism with respect to persons is broadly defined as *the use of a person as a means towards another's end.*<sup>2</sup> Within medical ethics, instrumentalism refers to *the use of a person* in research or for tissue donation, denoting how the person serves as an 'instrument' in some practice. Instrumentalism within this context may be more easily tolerated than in other contexts. The perception is that using people to potentially save lives is at the very least excusable, and perhaps may even be commendable.

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<sup>1</sup> L. Margaret and M. B. Mahowald, "Neural Fetal Tissue Transplants: Old and New Issues" (1996) 13:4 *Zygon*.

<sup>2</sup> I specify 'with respect to persons', since a general definition of instrumentalism is using something as a means towards an end; to make an instrument of something.

However, the concept of instrumentalism generally strikes a sour cord; for we are taught that it is wrong to ‘use’ others. Indeed, it is widely acknowledged that using people simply as a means towards an end is morally wrong, since human beings are persons worthy of respect, and not objects to be used. Kant’s dictum that one should “treat humanity, whether in your own person or in the person of another, always and at the same time as an end and never simply as a means”<sup>3</sup> expresses this basic sentiment. Yet there is widespread disagreement on what constitutes acceptable and non-acceptable uses of people, when people are treated as mere means rather than as ends, and indeed, there is even disagreement on who counts as a person. An adequate treatment of these issues requires that we first understand what the concept of instrumentalism entails.

In this chapter, I offer a theory about the nature of human instrumentalism based on prominent ecofeminist Val Plumwood’s analysis of human’s use of nature. Although Plumwood’s analysis is intended to describe our domination and use of nature,<sup>4</sup> her theory of instrumentalism may be extended and applied to human relationships, for as she notes, “[t]he same basic structures of self which appear in the treatment of nature as lifeless instrument also underlie the rational egoism and instrumentalism of the market, the treatment of those supposedly less possessed of reason as inferior....”<sup>5</sup>. Her analysis thus conforms to, and is consistent with, the patterns of domination that we find in patriarchal society and in many of its established institutions (e.g. medicine), and so it is appropriate here. The aim of this conceptual exercise is to acquire a deeper

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<sup>3</sup> I.Kant, *Grounding for the Metaphysics of Morals*, translated by James W. Ellington (Indianapolis: Hackett Publishing Company, Inc., 1993), p. 36.

<sup>4</sup> Val Plumwood, *Feminism and the Mastery of Nature* (London: Routledge, 1993).

<sup>5</sup> *Id.*, p. 143.

understanding of what it means to *instrumentalise*, so that the possibility conditions for instrumentalism may be discerned. In the latter half of the chapter I build on this analysis by investigating the different kinds or degrees of instrumentalism through the perspectives of two moral philosophers.

### 1.2 The “Instrumentalising Self”

*Instrumentalism is a way of relating to the world which corresponds to a certain model of selfhood, the selfhood conceived as that of the individual who stands apart from an alien other and denies his own relationship to and dependency on this other.*<sup>6</sup>

(Val Plumwood)

According to Plumwood, instrumentalism depends on the constructed dualism of egoistic *self* and *other*.<sup>7</sup> On this conception, the self as fundamentally egoistic is taken to be the norm of human nature, accepted as the ‘dominant rational mode’.<sup>8</sup> Egoism, understood as the pursuit of self-interest, is accepted as a “politically innocent moral failing”<sup>9</sup> where no other rational alternative exists. Altruism serves but a subsidiary role, one which may be considered praiseworthy, but which is irrational and inconsistent with true human nature.<sup>10</sup> “[T]he concepts of egoism and altruism therefore build in inequality and asymmetry”<sup>11</sup>, thus permitting the evolution of a dualistic selfhood.

It is the dualistic conception of *self* and *other* that ripens the conditions for instrumentalism. For in this model of selfhood appropriately termed the “egoist-instrumentalist” model, “the self erases the other as part of the ethical domain. The other

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<sup>6</sup> *Id.*, p. 142.

<sup>7</sup> *Id.*, p.142-143.

<sup>8</sup> *Id.*, p. 143.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

appears only as a hindrance to or as a resource for the self's own needs, and is defined entirely in relation to its ends."<sup>12</sup> The resulting transactions between self and other can only be of two kinds: 1) one of radical exclusion; or 2) one of incorporation; in either case the other is encountered and treated merely as a means to the self's ends.<sup>13</sup> Thus in its extreme, instrumentalism radically excludes consideration of the other as an end, since the other is not viewed as another self. In its less extreme, it incorporates or ignores the other's ends, since the other is viewed as a member of an instrumentalised category where it already functions only as a means.

Plumwood's account is one of humans versus nature, where humans represent the *self*, and nature is the *other*. In this dyad, the boundaries between the dualistic conceptions of self and other, means and ends, are clearly discernible. But the same cannot be said about the relation between persons. The instrumentalist model which holds between people is far more subtle and disguised. The boundaries between self and other, means and ends, may not be clearly drawn -- as is the case in the relation between mother and child. As Plumwood notes, "Although the mother does not relate to the child as instrumental product, instrumentalism appears in traditional motherhood and the traditional female role through non-reciprocal altruism, and the mother's finding of meaning and significance in and through service to others who are justified as ends in terms of their wider social participation."<sup>14</sup>

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<sup>12</sup> *Id.*, p. 145.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

Human instrumentalism, therefore, seems to admit of degrees. An adequate analysis will thus need to inquire not only about the conditions of instrumentalism, but as well, the kinds or degrees of instrumentalism. Plumwood's account does provide a good starting point however, for it highlights what I shall refer to as the 'basic ingredients' of instrumental transactions. These are identified as the following:

- 1) Instrumentalism requires that subjects be identifiable in the roles of *the user* (self) and *the used* (other).
- 2) Instrumentalism denotes a certain kind of *interaction* between the subjects, one which facilitates the self's use of the other.
- 3) It is solely the user's end which is pursued in the transaction. The used may also have ends, but they are systematically ignored or absorbed.
- 4) The user needs the used in order to achieve its end.
- 5) The *used* is used merely as a means, and not as an end in itself in the specified transaction.

These five conditions are evident in the egoist-instrumental model described by Plumwood, which the following example serves to illustrate. Imagine the owner of a manufacturing company interested only in turning a profit. Such an individual may be accurately described as an egoist, since he is primarily driven by self-interest. His goal of earning large sums of money and being immensely successful is the end. His employees that work long hours in a harsh, inhospitable factory environment and are unfairly remunerated are the means to his end. If we examine each of the five conditions of instrumentalism with respect to this scenario, we find them to be true.

First, we can easily identify the user as the employer, and the used as the employees. Second, the interaction which takes place between the two parties enables

the employer to use his employees. In this case, the interaction is defined in terms of a power imbalance, where the user stands in a position of power and exerts control over the used. Third, it is only the employer's goal of turning a profit that is sought, for no attention has been paid to the employees' goal of earning a fair wage or working in more hospitable conditions. Fourth, the employer needs the employees to achieve his goal; without workers to manufacture his product, he will not be able to make money. Fifth, the employees are merely means to the employer's ends – they are not respected as ends in themselves, evident by the unfair manner in which they are treated. Thus, in this scenario the other (the employee) is radically excluded as an end by the egoist self (the employer).

This is of course a glaring example of instrumentalism that suits our present purpose nicely. Moreover, the egoist-instrumentalist model must necessarily assert that philosophical egoism is true. But what if philosophical egoism is untrue? Can the five criteria still be satisfied in any basic model of instrumentalism? I believe that they can. If we accept the standard definition of instrumentalism as 'the use of a person as a mere means towards another person's end', then the conditions for instrumentalism here outlined may still be identified in transactions which are not based in egoism.

For example, imagine two friends who care about one another. The first of the friends, 'Roger', has an attractive younger sister, 'Carol', whom the second friend 'William' hopes to date. Now suppose that Roger is opposed to Carol dating any of his friends. Despite having many interests in common, there is one activity in particular which Roger enjoys -- gardening, but that William finds boring. Now suppose that

William pretends that he also enjoys gardening so that he may have an excuse to go to Carol's house, where Roger usually tends the garden. Furthermore, assume that William persuades Roger to 'praise his virtues' to Carol, so that he may appear more attractive to her. Might one say that William's use of Roger to get to Carol is an example of instrumentalism?

Since we speak of a friendship, and theoretically a friendship is a relationship based in altruism rather than egoism, it is much more difficult to discern the conditions of instrumentalism made plain by the egoist model. However, our aim is to identify instrumentalism within a specified transaction, so we may put our five criteria to the test in this context.

1) We can identify the subjects in the roles of *user* (William), and the *used* (Roger).

2) Instrumentalism indicates that an interaction occurs between the subjects which facilitates the use in question. In this case, the engagement is one of friendship. Given the trust that exists between friends in the context of a friendship, it is plausible that one may be subject to 'use' by the other, even while being unaware of it.

3) It is solely William's end of uniting with Carol that is pursued in the transaction.

I do not claim that William does not respect Roger or any of his ends; I am merely claiming that in *this* transaction William by-passes Roger's ends in favour of his own. This is evident in the fact that William is not gardening with Roger to enjoy his company or to discover the joys of gardening itself. William is only gardening with Roger to get closer to Carol.

4) William needs Roger to unite with Carol. Roger is the excuse William has for being at the house, and Roger is needed to tell Carol pleasant things about William.

5) *In this transaction* Roger is used merely as a means towards William's end. This last claim surely will raise doubts, that is why I have stressed *in this transaction*, for I want to be clear that William may otherwise treat Roger as end in himself. But with respect to William's goal of dating Carol, Roger is merely a means towards this end.

This second example illuminates the complexity of instrumentalism in human interactions, confirming my position that it may appear subtle and disguised. It further raises the question: Are there different kinds of instrumentalism, given different types of interactions? And if so, how might we identify them? Our analysis thus far seems to point in this direction. We can be certain that some instances of instrumentalism are so clearly objectionable (as in the first example) that they would be easily condemned in the moral community; whereas other instances might not be so apparent, or be tolerated (as in the second example). The first example more accurately depicts exploitation, whereas the second example does not, since William does not genuinely 'exploit' Roger to achieve his end. However, the difference is more a matter of degree than kind. Exploitation is defined as 'use or development for one's own ends'<sup>15</sup>, thus exploitation *is* instrumentalism, but to a heightened degree. For, we can agree that exploitation of any kind is morally objectionable instrumentalism; however, instrumentalism need not be exploitative – as is the case of the mother-child relationship, or it can be less exploitative

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<sup>15</sup> Swannell, J. (ed.) *The Little Oxford Dictionary, 6<sup>th</sup> Edition* (Oxford: Clarendon Press, 1986), p. 191.

-- as it is in the second example. Thus, exploitation may be distinguished as a species in the broader genus of instrumentalism.

### *1.3 Institutionalizing Instrumentalism*

That instrumentalism exists in different kinds or to different degrees is a thesis advanced by philosopher Don E. Marrieta Jr. Professor Marrieta Jr. maintains that instrumentalism itself is not a cause for moral concern, unless an improper or immoral use of persons occurs. According to Marrieta Jr., people ‘use’ each other regularly in ways which are not unethical.<sup>16</sup> Thus what is needed is a way to distinguish between the ethical and unethical use of people. He writes:

None of us is self-sufficient. We can be human only by using other people’s time, bodies, and minds. We use people daily in routine ways, and the most significant and beneficial events in our lives involve using people and being used by them. In loving, in learning, in sharing a meal, in listening to music, someone is being used. To say that one is not really using a person in such cases would be to confuse things semantically. Giving the word *use* a normative significance does not help us think about or talk about the moral issues involved in our relationships. We can make necessary discriminations more effectively by saying that there are good, proper ways and wrong ways of using people.<sup>17</sup>

Marrieta Jr. considers first a motivational factor such as caring or loving as a possible criterion to distinguish between the moral and immoral use of people, but eventually dismisses it as ‘too subjective’.<sup>18</sup> The problem with such a criterion, according to Marrieta Jr., is that it is not a reliable index of morally responsible behaviour, noting how people who care about one another also often hurt each other.<sup>19</sup>

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<sup>16</sup> D.E. Marrieta Jr., “The Ethics of Using People”, (1982) 42 *The Humanist*. p. 27-29. Hereinafter this article will be referred to as TEUP, so not to be confounded with Marrieta Jr.’s other work entitled “On Using People”.

<sup>17</sup> *Id.*, p. 27.

<sup>18</sup> *Id.*, p. 28.

<sup>19</sup> *Id.*

Thus, it is not certain that we act ethically towards someone simply because we care about them. Also, relationships with persons demand that we behave ethically towards them, but this is not necessarily governed by any feelings of care. We can imagine numerous instances where we treat people ethically without ‘caring’ about them, and we may even dislike them.

Thus dissatisfied with the motivational factor of caring as an appropriate indicator for the ethical or unethical use of people, Marrieta Jr. proposes a schema based on ‘institutional ethics’.<sup>20</sup> He takes as his starting point Kant’s imperative to treat people as ends and never merely as a means, which Marrieta Jr. interprets as saying that people can be used, insofar as they are not used as means only. But what does it mean to be used as ‘a means only’? According to Marrieta Jr., a person is used as a means only when that person’s own ends are sacrificed in ways which are inconsistent with the nature of a relationship. The kind of relationship that it is dictates which ends are to be pursued, and which ends are to be abandoned. He states, “In most human interactions, whether a person is being used as a means only is relative to the social institution (formal or informal) which is the context of the relationship.”<sup>21</sup> In other words, the basis for determining whether one’s own ends are sacrificed in a transaction depends on the social institution involved and what ends are appropriate to realize within that particular institution. Marrieta Jr. characterizes this as a sort of ‘investment in the encounter’, to emphasize how persons assume both a risk and the possibility of achieving an end when

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<sup>20</sup> *Id.*, p. 29.

<sup>21</sup> D.E. Marrieta Jr., “On Using People” (1972) 82 *Ethics* p. 232-238.

they engage in an encounter.<sup>22</sup> He offers several distinct examples to illustrate his point. In one example, a gentleman, Mr. X, purchases cigars from a clerk at a convenience store. Marrieta Jr. notes that the institution (of customer and salesperson) that governs this encounter permits Mr. X to rightly use the other person as a salesclerk to obtain his cigars. In turn, Mr. X has an obligation to be honest with the salesclerk and remit the correct amount of money in exchange. If Mr. X vents work related hostility by being rude to the salesclerk or complains about his marital woes, then he misuses her by attempting to realize ends which are inappropriate in this institution. “To involve in an engagement an attempt to achieve ends which are inappropriate is an attempt to use a person wrongly, even though this may not be realized by the participants.”<sup>23</sup>

Another type of misuse involves withholding or interfering with those ends which *are* appropriate to realize within an institution. To illustrate this aspect of instrumentalism Marrieta Jr. cites the example of marriage. He notes that, “In marriage, the other person must be recognized and related to as an end more completely than in any other formal institution.”<sup>24</sup> Since marriage involves an intimate relationship between two people, each person has greater ends to achieve within the context of this relationship more than what would be expected in other relationships. Moreover, each person is more vulnerable to being injured by the other as a result of this intimacy. According to Marrieta Jr., “a person is used as a means only when he is “systematically” subject to injury in the areas of his vulnerability.”<sup>25</sup> If Mr. X uses his spouse for sexual satisfaction

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<sup>22</sup> TEUP, p. 28.

<sup>23</sup> *Id.*, p. 29.

<sup>24</sup> Marrieta Jr., p. 236.

<sup>25</sup> *Id.*, p. 237.

but does not correspond in satisfying his spouse's needs, then he uses her as a means only, since he does not permit her to realize ends which are appropriate to the institution of marriage. "To exclude from fulfillment those ends which are appropriate to the relationship is also an unjust using of a person."<sup>26</sup>

But we are now left with the question of how to determine which ends are to be pursued within the context of a specified relationship? It is unreasonable to expect all legitimate ends to be pursued all the time, so how may one discern which ends to pursue, where and when? It should now be obvious that Marrieta Jr.'s schema relies on social institutions to guide individuals on what type of 'investment' to make and to expect from an encounter. "Custom determines what a person may expect from a relationship or encounter, thereby determining whether he will feel unjustly treated or abused by certain behaviour."<sup>27</sup>

However, this schema is unsatisfactory for several reasons. It falls prey to not only vacuous abstractionism, but moral relativism as well. First, institutional ethics clearly has its limits. Relying on what 'custom requires' assumes that what is customary is moral; I think it is unnecessary to pursue further what should be the obvious flaw of such reasoning. Marrieta Jr. taps into this somewhat when he states, "A most important limitation of depending upon institutions for guidance is the need for means to criticize institutions. Even though institutions generally develop as a trial-and-error response to experimentation in human relations and reflect a sort of wisdom from experience, they do not always facilitate the fullest possible human development, especially when new

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<sup>26</sup> TEUP, p. 29.

<sup>27</sup> Marrieta Jr., p. 237.

knowledge and new opportunities make possible a better way of doing things.”<sup>28</sup> An additional and significant criticism is that not all relationships are classifiable according to a given institution; there may be uncertainty about which institution governs a particular relationship. “Many factors must be taken into account in defining an encounter as one type or another. There is not just one clerk-customer institution...”<sup>29</sup> Additionally, institutions are not static entities – they change and vary according to people and circumstance. As Marrieta Jr. is keen to point out, “There are several reasons why an institution cannot be the final arbiter”.<sup>30</sup>

Marrieta Jr. also considers “voluntary participation” as a possible criterion for distinguishing between the ethical and unethical use of people. The logic is that if one consents to being used (even wrongfully used), then it cannot be unethical since prior consent is obtained. But clearly this is an inadequate moral criterion, since people may voluntarily participate in relationships and encounters which are clearly unjust (e.g. slavery). Conversely, people may be ethically used in relationships in which they have not volunteered to participate (e.g. we may ‘use’ our children in morally acceptable ways though their participation in the relationship is not voluntary).

It seems that the lack of criteria for distinguishing between the moral and immoral use of people leaves us in an ethical quandary. Nevertheless, Marrieta Jr. believes that we can assess the difference – we need only consult our moral intuition. “We must judge each use of a person, relying finally on the ethical principles and the values which

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<sup>28</sup> TEUP, p. 29.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

underlie our general moral position.”<sup>31</sup> In other words, all that we may conclude from his analysis is that we have to rely on the basic deontological principle of respect and the teleological principle of utility to assess ethical conduct within a relationship.<sup>32</sup>

Unfortunately, this appears to leave us right back where we started.

But Marrieta Jr.’s analysis of instrumentalism is not entirely amiss. In suggesting that the ethical use of people is dependent on the type of interaction involved, he has tapped into an observation that appears consistent with our basic notion of instrumentalism: that ‘using’ certain people in certain ways is more acceptable than using other people in other ways. For example, most people would be outraged at the thought of someone using another person to obtain food, shelter and clothing, at the expense of that person without even so much as a thank you in return. Surely the actions of such a ‘free-loader’ would be labelled despicable, were it not in the context of a mother-child relationship. Thus the relationship that holds between two people can provide a clue into what kind of instrumentalism will be permissible between them. Even if we cannot articulate the precise criteria for the ethical use of people, it is helpful to understand that it must be discerned within the boundaries of the interaction that takes place between them.

#### ***1.4 Simple Users, Pure Bargainers, and False Friends***

Norvin Richards in his paper “Using People” attempts to decipher what kind of interaction people have when wrongful use occurs. Like Marrieta Jr., he believes that the ethical use of people is determinable through the kind of relationship that holds between

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<sup>31</sup> Marrieta Jr., p. 238.

<sup>32</sup> *Id.*

them. He also maintains that instrumentalism is a matter of degree, or that “it can be more or less wrong to use someone.”<sup>33</sup> But while both agree that using people is not wrong per se, Richards takes ‘care’ to be the standard for ethical assessment while Marrieta Jr. explicitly rejects it. He states, “...it isn’t always wrong to use someone; that since using is failing to care, it is only wrong to use someone when failing to care endangers him in some way.”<sup>34</sup>

Apart from the standard of ‘care’ which Richards perceives to be a necessary element for the ethical use of people, his account does not offer definitive criteria for assessing the unethical use of people. However, he does characterize the unethical use of people in terms of three specific models of interaction, or types of relationships. Specifically, Richards maintains that the unethical use of people falls into one of three types of using. The first type of using is ‘simple use’, and it is the kind that one might readily object to. In this type of interaction “we use people in order to get things for ourselves, or in order to hurt a third person, or as sacrifices to causes.”<sup>35</sup> It is the kind of using where the person used exemplifies the role of the ‘other’ articulated by Plumwood. As Richards poignantly remarks, “...if you are being used, the purpose for which you are being used will not even refer to you.”<sup>36</sup> Moreover, in cases of simple use the person used will not share the purpose for which he is used. Richards notes that deception and physical compulsion may play a role in such cases, but it is not necessary and may even be absent.

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<sup>33</sup> N.Richards, “Using People” (1978) 87 *Mind* p.103.

<sup>34</sup> *Id.*, p. 98.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

But if a lack of caring is indeed the defining feature of wrongful use, one could easily be found guilty of simple use even if the other person shares our purpose, for one would still act in the same manner he proposed to act when the other person did not share the purpose, in short, because they are unconcerned either way. In judging such cases, one needs to keep in mind that for Richards a lack of caring only matters when it *harms* the other person in some way.<sup>37</sup> Thus it would not be wrongful use, unless the other person was harmed.

A second sort of using and being used is what Richards refers to as ‘pure bargaining’.<sup>38</sup> In this type of relationship two parties enact a bargain to serve each other’s purpose. That is, A serves B’s purpose only because B will serve A’s. Richards states:

The nature of enacting a bargain is most clearly shown, then, when instrumental value is the *only* reason A has for serving B – since they are doing nothing but enacting a bargain. Wise parties to such a *pure* bargain would regard each other as vending machines with a nasty capacity for deception. Whatever one does for the other is entirely for the sake of a further purpose directed elsewhere. Beyond that usefulness, the other person and his plans hold no interest; and when the usefulness ceases, so does the relationship.<sup>39</sup>

Pure bargains, like simple cases of using, are limited to the pursuit of one’s own interest. But is the pursuit of one’s own interest enough to judge it a case of wrongful use? The egoist-instrumentalist model which maintains that instrumentalism involves the unilateral pursuit of the *self*’s own ends while the *other* and his ends are systematically excluded could argue that it is, but not so, according to Richards; much more than having

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*, p. 100.

<sup>39</sup> *Id.*

an ‘extra purpose’ is required for wrongful use to take place. Richards claims that it is a lack of caring which specifically characterizes the immoral use of others.<sup>40</sup> He illustrates this through the third type of interaction wherein wrongful use takes place – a false friendship. In such a relationship a supposed ‘friend’ uses us to obtain some good. Richards notes, “The important thing about a friend, I think, is that sometimes his desire for something is sufficient motivation in itself for you to provide it and sometimes your desires are sufficient motivation for him. You move each other because you are friends, not because it’s ‘good business’,...”<sup>41</sup> However, false friends are not so moved by any of our desires, thus they are not true friends. In fact, false friends do not have the ‘extra purpose’ that one might expect to see in a case of simple using or pure bargaining, since whatever purpose a false friend might have is readily adopted by the person used. So, according to Richards what is common to all three interactions, and what characterizes wrongful use, is the lack of caring on the part of the user which harms the person used by inducing her to serve purposes she would not otherwise serve. “What ties together false friends, pure bargainers, and simple users is that each intentionally causes someone to satisfy a purpose directed away from him, while not caring enough about him to be moved by similar desires of his.”<sup>42</sup>

### ***1.5 Failing to Respect and Harm: The Conditions for Unethical Use***

Richards is correct in his observation that a lack of caring seems to coincide with instances of wrongful use. Nonetheless, as Marrieta Jr. noted, caring (or lack thereof)

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<sup>40</sup> *Id.*, p. 101.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

need not accompany every ethical or unethical treatment of persons. Care may thus not be the appropriate ethical standard for assessment, but it can certainly be captured under the broader concern for respect which is at the root of the deontological objection to instrumentalism.<sup>43</sup> Consider Richards's analysis from this wider perspective: 1) a case of simple use easily exemplifies a lack of respect for the other, for it is clear that we do not respect persons as ends when 'we use them to get things for ourselves, or to hurt others, or as sacrifices to causes'; 2) in cases of pure bargaining, neither party respects the other in the sense of caring about them as a person and being responsive to their interests out of genuine concern; 3) and evidently, 'false friends' do not respect us when they deceive us.

Respect for persons is also consistent with Marrieta Jr.'s analysis of what counts as morally acceptable instrumentalism. The ethical use of people demands that we realize appropriate ends within the proper institution, so to respect the other person as an end in herself. To see how this is true, consider the cigar clerk / Mr. X interaction – an example of where this fails. By imposing his grievances on the cigar store clerk, Mr. X has trespassed the boundaries set by this inter-personal encounter which requires that he respect the clerk in this role and not attempt to use her as a 'sounding board'. Thus by forcing the clerk to endure his complaints, Mr. X demonstrates a lack of respect towards her.

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<sup>43</sup> Respect, by definition, is treating others with consideration. [*The Little Oxford Dictionary* (Oxford: The Clarendon Press, 1986), p. 465]. Thus if my behaviour towards S is respectful of S, then I treat S in a manner which is consistent with 'caring', though I need not 'care' about S in any real or affectionate sense.

The notion of respect is also in line with Plumwood's egoist-instrumentalist model when we consider that the exclusion or incorporation of the other implies a genuine failure to respect the other as an end.

Thus a lack of respect, rather than a failure to care, more accurately characterizes instances of unethical use. Instrumentalism, however, may be 'more or less wrong'. What makes one case of bad instrumentalism worse than another? The example of the tyrant employer may be able to shed some light here. The fact that the employer does not respect his employees as persons makes it a case of bad instrumentalism, but that he uses them in such a way that compromises their safety and well being seems to make it worse. This is clearly a case of *harmful* instrumentalism, which must be distinguished from cases such as those of the cigar store clerk in which she is merely inconvenienced by the exchange, but not harmed. While in both cases persons are not respected as ends in themselves, the harm that results from the tyrant employer-employee interaction appears to compound the wrongness of this instrumental transaction. Thus harm, as well as failing to respect, is a distinguishing feature of morally objectionable instrumentalism. And in fact, harm can be said to worsen a case of wrongful use.

Plumwood, Marrieta Jr. and Richards each offer a very different perspective of how and why wrongful use of persons occur, yet each account has several factors in common which are helpful in understanding the nature of wrongful use.

First, each account makes plain the idea that the unethical use of people takes place in interactions that create an opportunity for the used party to be vulnerable to the user.

Second, it is clear that the wrongful use of persons involves the unilateral pursuit of the user's end, without due regard to the used person's ends.

And third, and quite importantly, all three authors concede that there is a moral difference between the degrees of improper use; that is, it can be more or less wrong to use someone.

Notwithstanding the fact that none suggest specific criteria for distinguishing between the moral and immoral use of persons, it is evident from our analysis that the unethical use of persons involves a failure to respect the other as an end. Additionally, unethical use may result in harm to the person used. We can establish therefore, that using others is not wrong per se, it is only wrong when it fails to respect them and/or it harms them.<sup>44</sup> Thus, I propose that the presence of either one of these conditions is sufficient for morally objectionable instrumentalism: 1) failing to respect the other person in our use of them; or 2) harming the other person as a result of the use.

### ***1.6 Can We Justify Wrongful Use?***

With the defining features of morally objectionable use in hand, the next question to ask is whether all such uses must be condemned since they are, after all, morally objectionable. The answer depends on whether identifying wrongful use is different from its justification. If you believe, as I do, that it is, then there is moral recourse to justifying what may be considered objectionable instrumentalism. Consider the following example:

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<sup>44</sup> I say 'and/or' because it is possible to have instrumental transactions where the *user* does not respect the *used*, and the used is harmed as a result of the transaction. Or, we can have interactions where the *user* does indeed respect the *used* party, but the latter is nevertheless harmed as a result of the transaction (because the *user* was unable to predict the dire consequences of his action). This would still be considered 'bad' instrumentalism because someone was harmed, though moral appraisal in such cases would have to register agent motives. However, that is a concern well beyond the scope of this thesis; here I am only concerned with discerning the features of morally objectionable instrumentalism.

Suppose that I use S in order to pursue my purpose of feeding one hundred starving children by lying to S about investing her money in a mutual fund, and using the money instead to buy food for the hungry children. Suppose further that S will be harmed as a result of my deception because she will not be able to afford a much needed vacation and will suffer a great deal of stress as a result. Clearly I can identify my use of S as morally objectionable since a) I do not respect S as an end by lying to her, and b) S is harmed as a result of my use of her. But consider the alternative of allowing the one hundred children to starve to death. It is true that I use S wrongfully, but it is a morally justifiable use when judged against the consequences of the alternative. Thus I need not cast wholesale condemnation upon an instance of wrongful use, if such use is shown to be morally justifiable.<sup>45</sup>

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<sup>45</sup> *What* justifies wrongful use is a discussion that will not be pursued here since my objective is not to justify wrongful use, only to show that it is possible to justify it. [My argument (of the next chapter) is not that fetal tissue use is justified – my argument is that it is not morally objectionable use in the first place.] The point I wish to make is that even wrongful use cannot be systematically rejected as a course of action just by virtue of being ‘wrongful’, let alone those actions which are perceived as ‘questionably’ wrongful – such as fetal tissue use in medical research.

## -- Chapter 2 --

### The Fetus as Instrument

Perhaps one of the best examples of human instrumentalism is that of the aborted fetus employed for use in medical research. I can think of no other example that so clearly highlights the caveats of instrumentalism articulated in the previous chapter. We find the fetus in the role of the 'other', one who stands apart from, and is vulnerable to his user, used merely as a means towards ends which are not its own. Clearly a case of 'simple using', one might readily pronounce it morally objectionable instrumentalism were it not for the small detail that differentiates this type of simple using from others of its kind: the fetus is already dead. Indeed a small, but immensely significant detail in the overall ethical calculus. For, the fact that the fetus is dead matters insofar as this will affect its ability to satisfy the conditions of wrongful use.

In Kantian terms, there is no question that the fetus is used as 'a mere means' when it comes to fetal tissue research. What must be shown is that its use is of the morally objectionable kind. Instrumentalism, after all, can be more or less wrong<sup>1</sup>. To that end, I shall in this chapter evaluate fetal instrumentalism with respect to the theory developed in chapter 1. The analysis will show that fetal instrumentalism does not satisfy the conditions of unethical use. That is, the use of fetal tissue in medical research neither violates the principle of respect, nor does it result in harm. It will be clear that the interaction between the aborted fetus and the medical researcher is inconsistent with a

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<sup>1</sup> Argument advanced by Don Marrieta Jr. and Norvin Richards. See chapter 1.

transaction containing elements of wrongful use. Moreover, the treatment accorded to aborted fetuses used in medical research is consistent with respect for human persons.

In this context, harm may be appraised with respect to three scenarios: harm to the fetus, harm to others, and symbolic harm.<sup>2</sup> Furthermore, these harms must be weighed against the harm of failing to pursue fetal tissue research and thus failing to assist needy patients. The analysis will show that the harm incurred by needy patients is substantial, and far outweighs any harm (if any) that results from using fetal tissue in medical research.

### ***2.1 Of Relationships and Instrumentalism***

The fact that the fetus is used is not in question; what is in question is whether such use is morally acceptable. To render fetal tissue use in medical research morally unacceptable, at least one of the following conditions must be satisfied: 1) that such use is disrespectful to the fetus as a human being, and 2) that the fetus or others are harmed as a result of the use. Thus we must assess fetal instrumentalism by considering the common caveats that underlie the unethical use of persons. From chapter 1, those caveats are:

- 1) The unethical use of persons occurs in transactions that create opportunities for the *user* to exploit the *used*.
- 2) Wrongful use involves the unilateral pursuit of the user's end.
- 3) There is a moral difference between the degrees of improper use.

With respect to fetal tissue research, this last caveat will not be considered, since the analysis will show that such use is not improper.

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<sup>2</sup> An excellent discussion of symbolic harm is given by Elisabeth Boetzkes in "Symbolic Harm and Reproductive Practices" (2000) 3 *Law and Medicine* 327.

In chapter 1, I argued that the unethical use of people transpires within interactions that somehow facilitate such questionable use.<sup>3</sup> Marrieta Jr. characterized it in terms of an ‘investment’ in the encounter between two people, where each assumes a risk and the possibility of achieving an end. Richards described it as a failure to care about the person used. In either case, there is the sense in which the used party is exploited in an interaction that is supposed to afford some kind of protection. The nature of the interaction or relationship that holds between two people is key in determining what kind of instrumentalism will be tolerated between them. As Plumwood notes, the kind of instrumentalism that appears in the traditional role of caregiver (e.g. motherhood) may be justified<sup>4</sup>, as is the kind we saw in the example of the two friends, Roger and William, whereas the instrumentalism exemplified in the tyrant-employer is clearly unjust. Here, the employee and employer are supposed to have a relationship of mutual trust, since each depends on the other for goods: the employer depends on the employees for good workmanship; the employees depend on the employer for fair wages and benefits. By exploiting the employees, the employer uses them in a way which is inconsistent with the relationship. A relationship of mutual trust should afford protection from injury in areas of our vulnerability; in the case of the employees, they are vulnerable to their work environment.

Richards broadly characterized the unethical use of persons in terms of three types of relationships or models of interaction: simple using, pure bargains, and false friends.<sup>5</sup>

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<sup>3</sup> See D. Marrieta Jr., “On Using People” (1972) 82 *Ethics* 232; and N. Richards, “Using People” (1978) 87 *Mind* 98.

<sup>4</sup> See Plumwood, p. 146.

<sup>5</sup> See Richards, p. 103.

Using fetal tissue in medical research may be categorized as an interaction of the first kind, wherein “we use people in order to get things for ourselves, or in order to hurt a third person, or as sacrifices to causes”<sup>6</sup>. Specifically, the fetus is deemed a sacrifice to causes. Simple using is generally perceived as morally objectionable because it harms the person used.<sup>7</sup> However, using fetal tissue in medical research is not a plain case of ‘simple using’. The fetus employed in medical research is dead and likely not intact. This state of affairs has much to bear on how we ethically assess fetal instrumentalism.

First, it is not clear how to describe the ‘interaction’ or ‘relationship’ that unfolds between the abortus used in research and the researcher who uses it. It seems more accurate to say that no relationship exists at all. What kind of relationship or engagement can we have with the dead? Perhaps family members can claim they have a relationship with lost loved ones built on memories, and lasting attachments to mementos. Such relationships have a ‘history’ -- of feelings, and of events. But no prior history exists between the researcher and his subject; there are no feelings and events to speak of. Prior to the actual research encounter, the researcher was not even aware of his subject’s existence. Moreover, the concept of a relationship is absurd when you consider that the researcher probably only has a representative tissue sample from the fetus.

With no tangible relationship between researcher and fetus, how may we determine what kind of instrumentalism is appropriate between them? Marrieta Jr.’s, institutional ethics clearly fail here, for we have no indication of what ends are to be pursued in the context of a ‘non-relationship’. Furthermore, it is bizarre to think that a (dead) fetus has

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<sup>6</sup> Richards, p. 98.

<sup>7</sup> *Id.* Injury is of the non-specific kind; may be physical, psychological or of some other kind.

ends which are potentially subverted. What ends can a dead being possibly have?

Richard's account is equally unhelpful, for it does not suggest what standard of care we owe someone with whom we have no relationship. This is further complicated by the fact that the fetus is dead. Certainly we have a prescribed ethic of conduct in our treatment of the deceased. In terms of fetal tissue research, the fetus is afforded the same protective measures as other human research subjects under the Uniform Tissue Gift Act in Canada, and the UAGA framework in the United States.<sup>8</sup> Effecting the research cannot in itself be morally troubling, as that would render research on human subjects, particularly adult cadavers, unethical. On the contrary, research of this kind is considered praiseworthy. So why is there a disparity in how we view research that appears to have similar goals and follows similar ethical protocols? The answer to this question will have to wait until chapter 3.

### ***2.1.1 Not Just a Case of Simple Using***

A case of simple using is defined by a purpose which does not refer to the person used.<sup>9</sup> This argument, however, is not fully applicable to the unique situation that exemplifies research involving human subjects. On the one hand, you can say that a cure for Parkinson's disease is a purpose so far removed from the fetus<sup>10</sup> that it most certainly would never share in it. While on the other hand, you can say that any research which endeavors to improve the human condition is a purpose that can be shared by every

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<sup>8</sup> The principal law governing human tissue use, as reported in the Final Report of the Royal Commission on New Reproductive Technologies (1993) Vol. 2 *Proceed With Care*, p. 990. UAGA – Uniform Anatomical Gift Act; Federal policy which governs the donation and use of human cadavers in medical research. More on this in the next chapter.

<sup>9</sup> Richards, p. 98.

<sup>10</sup> As opposed to research in the area of maternal-fetal medicine, for example, which would be of greater relevance to a fetus.

human being. In this regard, fetal instrumentalism does not fit with the classic model of 'simple using', because it must assert that the fetus does not share the research purpose; yet, we cannot be certain of what purpose (if any) the fetus would have.<sup>11</sup> Once again, our analysis is ill-fitted to describe the fetus's unique condition. To illustrate how 'simple using' does not accurately describe fetal tissue research, we need only compare it with research involving other human cadavers. In the case of adult cadavers whose tissue and organs are used for transplant or research, society perceives its use as something good derived from the loss. Provided informed consent has been given to use the tissue, it is not perceived that we wrongly use the cadavers and reduce them to the status of instrument. Yet, this is precisely the perception held by opponents towards fetal tissue research, though consent is also obtained to use fetal remains. Following this analogy, one is led to suspect that what opponents object to is not the actual research, but the abortion that makes the research possible.<sup>12</sup>

Moreover, the hallmark of 'simple using' is that it injures the person used. However, the abortus is not injured further by participating in fetal tissue research. Claims that it is injured by denigrating its human dignity are unfounded. Current policy demands that fetal remains be treated with the same respect and dignity as other human remains.<sup>13</sup>

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<sup>11</sup> Qua fetus, it seems more plausible to say it has no purpose whatsoever.

<sup>12</sup> This argument is pursued in chapter 3.

<sup>13</sup> S.B.Rae, "Spare Parts from the Unborn?: The Ethics of Fetal Tissue Transplantation" (1991) Fall *Christian Research Journal* 320.

## ***2.2 Means and Ends***

The second aspect of morally objectionable instrumentalism gleaned from our analysis in chapter 1, is that it usually entails the unilateral pursuit of the user's end. This is morally troubling because it implies that the used party's ends are subverted or ignored in favor of the user's ends. In the case of fetal instrumentalism, this leaves little room for argument when we consider that the researcher who employs fetal tissue in his research solely pursues his ends, or the ends of others.<sup>14</sup> Indeed this would be a cause for moral concern, were it not for the exception of those instances where there is only one end to pursue. This is what occurs in fetal tissue research. The researcher rightly pursues his end, and cannot be morally faulted for doing so because it is not done at the expense of the fetus -- the fetus has no end. We can only morally reprimand someone if they pursue their end at the expense of the other who is used.

## ***2.3 Deontological Concern for Respect***

We concluded in chapter 1 that the unethical use of persons will satisfy at least one of the following conditions: 1) the use is disrespectful of the person used; 2) the use results in harm. Thus a satisfactory moral appraisal of instrumental transactions requires an evaluation of these deontological and consequentialist concerns. From a deontological perspective, the moral uneasiness of using fetal tissue in medical research lies in the potential disrespect to the human fetus through its use as a 'mere means' to an end. Yet, from all we can gather about the current practice of fetal tissue research, this concern is unfounded. Human fetal research subjects are assured the same ethical treatment as all

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<sup>14</sup> The patients who would otherwise suffer from the pertinent disease.

other human cadavers employed in medical research.<sup>15</sup> Under current Canadian policy, fetal tissue research must satisfy the requisite ethical guidelines that preserve respect and dignity for human life.<sup>16</sup> And though it is true that the fetus is a means in our research practices, “[a] genuine moral respect for embryos can be joined – without incongruity but not without careful attention to how that respect is displayed – with their use and destruction in legitimate research”.<sup>17</sup> Meyer and Nelson’s argument that one can respect what one destroys, provided the right attitude and practices are adopted in the process, can be extended to fetal tissue research.<sup>18</sup> By viewing fetal cadavers as other human cadavers and demanding that they be treated as such, we bestow them the same dignity and respect that is owed to all human beings. Moreover, one can argue that by virtue of their inclusion in valuable therapeutic research we recognize and respect fetuses for their contribution to the human community. Thus, the claim that fetal tissue research is inherently disrespectful of human life is clearly disingenuous.

#### ***2.4 Consequentialist Concerns of Harm***

Fetal tissue research is largely a meritorious enterprise, for who would dispute that the possibility of relieving millions of suffering people from crippling disease is a worthy cause. Nevertheless, its implications are of significance and must be given due weight. Major implications, mostly concerned with the contentious issue of abortion, will be considered in the next chapter. Here I would like to direct my attention to the issue of

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<sup>15</sup> Royal Commission’s Report, p. 979, 990.

<sup>16</sup> *Id.*

<sup>17</sup> M. J. Meyer and L. J. Nelson, “Respecting What We Destroy: Reflections on Human Embryo Research” (2001) Jan-Feb *Hastings Center Report*, p. 17.

<sup>18</sup> Meyer and Nelson’s argument is specifically geared towards embryo destruction for research purposes. That is, of course, an extraneous concern here since we are not proposing to destroy fetuses for use in research.

harm. For in assessing whether an instrumental transaction is morally objectionable, there is a second condition to consider: whether the use of the person results in harm. Having shown that fetal tissue research does not violate the principle of respect, we must now evaluate whether this practice meets our second condition. In relation to harm, three relevant subjects emerge: the fetus, others, and symbolism. I shall consider each one in turn.

#### **2.4.1 Harm to the Fetus**

*A fisherman once told me that fish have neither sense nor sensation but how he knew this he could not tell me.*<sup>19</sup>

*(Bertrand Russell)*

To be harmed requires having interests, and having interests requires, at the very least, sentience. Unlike Russell's fisherman, we know for certain that the fetus employed in research is not a sentient being, because it is already dead. Thus an objection to fetal tissue research for fear of harming the fetus is groundless, since the fetus has no interests to be harmed. Following death, the fetus cannot incur further harm beyond the dismemberment that may inevitably occur so that organs and tissues may be excised, but an objection on these grounds is pointless. The fetus may not be intact as a result of the abortion, thus protesting against additional manipulation seems absurd. Also, we would have to object to autopsies, anatomy classes in medical school, and adult organ and tissue retrieval. Thus an objection of this nature is of no moment.

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<sup>19</sup> B. Russell, *Human Knowledge, its Scope and Limitations* (London: George Allen and Unwin, 1948).

### 2.4.2. Harm to Others

Two groups of individuals are candidates for being harmed by fetal tissue research. The first are the tissue handlers and researchers that conduct the research, what some consider “examples of nice people doing nasty things in the name of science and authority.”<sup>20</sup> Arguments have surfaced alleging that those who handle human fetal tissue are brutalized and become desensitized to the value of life.<sup>21</sup> This is a serious moral consequence, since if true, these attitudes would permeate every aspect of the person’s life. Such concerns prompted a team of investigators to examine the feelings and ethics of those involved in fetal tissue research.<sup>22</sup> Fortunately, the results of their study found that participating in this type of research is essentially psychologically benign. The researchers concluded:

The results of our survey indicate that most researchers who handle human fetal tissue do have transient initial reactions, with over one-third being unable to lose their initial aversion. However, we found no difference in attitudes toward a range of moral and ethical issues between those who work with human fetal tissue and those who do not. We believe that there is, therefore, no justification for saying that people who work with human fetal tissue are rendered inhuman or brutalized.<sup>23</sup>

The second group at risk of harm from fetal tissue research are the recipients of the tissue. Harm may manifest itself in terms of a bad therapeutic outcome or in the moral consequences of employing vulnerable patients in research trials. In either case, there are ways to protect these patients. As with all research involving human subjects, obtaining

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<sup>20</sup> S. J. Youngner, “The Psychological and Moral Consequences of Participating in Human Fetal-Tissue Research” (1993) Winter *The Journal of Clinical Ethics* 356.

<sup>21</sup> B.E. Tuch, S. M. Dunn, V. de Vahl Davis, “The Effect on Researchers of Handling Human Fetal Tissue” (1993) 4:4 *The Journal of Clinical Ethics*, p. 319.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, p. 325.

informed consent to participate is imperative. Some ethicists have suggested requiring researchers to make a clear distinction between *research* and *therapy*, so not to incite false hopes in desperate patients.<sup>24</sup> Also, ensuring that a sufficient body of animal studies is conducted beforehand will arm researchers with as much knowledge as possible to take necessary precautions.<sup>25</sup> Additional comfort may be taken in knowing that studies which are publicly funded are carefully designed and controlled, and must comply with rigid government standards. As Nora and Mahowald note, “One advantage of requiring public funding for FTT (fetal tissue transplant) is the increased rigor to which it is thereby subjected, i.e. having to meet the ethical requirements of institutional and government review boards.”<sup>26</sup>

Physical harm will be more difficult to prevent, as there are always risks associated with surgery and transplant, and one can never be certain of the side effects that result from a medical procedure. Nonetheless, the same care and caution may be taken with fetal tissue transplants as with all surgical procedures. Sterile handling and testing of tissue for transmissible diseases are routine safety measures.<sup>27</sup> One concern often raised in connection with fetal neurotransplantation in the treatment of neurological disorders is the fear of ‘personality transfer’ from the fetal donor to the host recipient.<sup>28</sup> Such fears are unfounded, however, since personality is undeveloped in the few isolated cells from the early fetus which are usually selected for transplant. Boer confirms that, “[i]f

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<sup>24</sup> L.M. Nora and M.B. Mahowald, “Neural Fetal Tissue Transplants: Old and New Issues” (1996) 31:4 *Zygon* 615.

<sup>25</sup> G.J. Boer, “Ethical Issues in Neurografting of Human Embryonic Cells” (1999) 20 *Theoretical Medicine and Bioethics*, p. 469.

<sup>26</sup> Nora and Mahowald, p. 622.

<sup>27</sup> G.J. Boer, p. 468.

<sup>28</sup> *Id.*, p. 470.

personality transfer were possible at all, it would require the transplantation of large pieces of intact fetal brain, which, moreover, must be able to survive, to further mature, and to integrate as a network in an existing, fully developed (adult) brain.”<sup>29</sup> Evidently, this is one of those issues requiring that a sound understanding of the science precede the ethics. Nevertheless, public fears may be assuaged by adopting a policy similar to that advocated by the European Union’s network on transplants, which, “in its aim to provide a firm ethical basis for neurotransplantation, has therefore adopted a cautious approach and advised only cell suspensions or small fragments of the brain to be used for grafting.”<sup>30</sup> Based on these concerns, harm to others does not provide a reason to pronounce fetal tissue research unethical.

### ***2.5 Harm of a Different Kind: Symbolic Harm***

The third type of harm which is relevant to fetal tissue research is of the symbolic kind. Unlike the other harm-based objections which are consequentialist in nature, symbolic harm is grounded in deontologic concerns.<sup>31</sup> Opponents of fetal tissue research allege that society as a whole suffers when human life is systematically devalued by engaging in practices that diminish human dignity – practices such as using aborted fetuses in medical research.<sup>32</sup> They claim that by treating the aborted fetus as a source of ‘spare parts’ we not only denigrate their inherent worth as human beings by viewing them as market commodities that are more valuable dead than alive, but we also lose some of

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, p.71.

<sup>31</sup> E. Boetzkes, “Symbolic Harm and Reproductive Practices”(2000) 3 *Law and Medicine*, p. 328.

<sup>32</sup> K. Nolan, “*Genug ist Genug: A Fetus is Not a Kidney*” (1988) *Dec Hastings Center Report*, p. 16.

our own humanity in the process.<sup>33</sup> The symbolic nature of this harm is tangible in the provocative imagery expressed in this passage:

One of the basic images that lends death its horror is that of the devourer. Particularly powerful and threatening are symbols of the devouring mother. Hence, part of the horror associated with the thought of a woman using a fetus purely to benefit herself or another springs from an ineluctable subconscious association of these acts with a primordial or archetypal image – that of a mother turning and eating her child. The intended beneficence of the act is impotent to wash away the defilement implicit in such imagery...No matter that the fetus is dead – mothers should still fend off the scavengers.<sup>34</sup>

The problem with symbolic harm is that it is difficult to substantiate, both from a conceptual and from a practical point of view. As Elisabeth Boetzkes notes, “The conceptual difficulty in recognizing symbolic denigration as a deontological harm has to do with the legal notion of harm itself. Within liberalism to be harmed is to suffer a wrongful setback of welfare or ulterior interests.”<sup>35</sup> Under this model, the fetus is harmed through the abortion, but not through participation in the research. And, as I will argue in the next chapter, these are two ethically distinct practices. From a practical point of view there is no way to settle the issue, since symbolism is largely subjective. While an opponent of fetal tissue research will view it as an attack on human dignity, a proponent might view it as redeeming abortion – making something good out of something bad. Boetzkes argues that symbolic harm may be objectively discerned, however.<sup>36</sup> She suggests that one way to accomplish this is to look toward the meaning of the practice.

Acts, events, and objects within practices--practice constituents—gain their identity from their role in the practice, and that identity can be traced ‘backward to its generation by the practice’s ideology and forward to a manifestation in the

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<sup>33</sup> A. Fine, “The Ethics of Fetal Tissue Transplants” (1988) Jun-Jul *Hastings Center Report*, p. 8.

<sup>34</sup> Nolan quoting William May, p. 16-17.

<sup>35</sup> Boetzkes, p. 329.

<sup>36</sup> Boetzkes, p.331-334.

practice's supporting institution.' Thus, 'the practice-informed identity of practice constituents is nonsubjective and determinate'.<sup>37</sup>

Moreover, when the meaning of a practice is in dispute, Boetzkes instructs us to "scrutinize both the context and the relation between the governing ideology and its outcomes for a plausible interpretation."<sup>38</sup> So for example, a raised arm in a political rally is more likely to be a salute than a request to speak.<sup>39</sup>

What is more likely to be the meaning of fetal tissue research, an assault on human dignity or an attempt to save lives? Those who participate in fetal tissue research would claim it to be the latter. Consider in greater detail the practice and its constituents: we have medical researchers; a supply of aborted fetal tissue that would otherwise be inconspicuously discarded; and we have needy, suffering patients, hoping that someone else's tragedy becomes their life-saving chance. Apart from medical progress, the basic ideology fuelling fetal tissue research is the potential to alleviate suffering and save lives.<sup>40</sup> Could anyone seriously argue that fetal tissue research is undertaken for the express purpose of making a mockery out of aborted human beings? We cannot so easily dismiss the goals and (potential) therapeutic benefits of fetal tissue research as meaningless in the practice. Thus, if we consider the meaning of the practice as morally praiseworthy, we cannot pronounce the practice itself immoral.

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<sup>37</sup> *Id.*, p. 331.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> P. McCullagh, *The Fetus as Transplant Donor: Scientific, Social, and Ethical Perspectives* (Chichester: John Wiley & Sons, 1987).

## ***2.6 The Harm of Abstaining from Fetal Tissue Research***

We stated earlier that to declare an instrumental transaction immoral, it would have to meet one of the conditions sufficient for morally objectionable use. Our analysis has shown that fetal tissue transplant does not meet either of the proposed conditions; it neither violates the principle of respect, nor does it result in substantial harm to those connected with the practice. Nevertheless, it is worth considering what the harm of *not* using fetal tissue might be, for if the harm of abstaining from fetal tissue use was deemed significant, then we would have an even stronger reason to defend fetal tissue research.

The enormity of the harm that could result if we abstained from fetal tissue research cannot be ascertained, only speculated. But we do know that it would be far-reaching. Consider the millions of patients whose hopes for a cure would be dashed. Consider the impact their illness has on their family, friends, and society in general in terms of the costs of health care and loss of productivity. Additionally, consider that future generations could have been spared a similar fate, had we only found a cure now. When viewed from this perspective, it is clear that the harm of abstaining from research far exceeds any potential harm incurred by pursuing it.

In this chapter I have shown that using fetal tissue in medical research constitutes a morally acceptable practice by demonstrating that it does not meet the conditions of morally objectionable use. I have evaluated the claim that fetal tissue use violates the principle of respect, and considered the perceived harms associated with fetal tissue research and found arguments for these unsupported. On these grounds, a case for fetal tissue research can be made. Convincing opponents, however, will require much more

than showing that fetal tissue research is acceptable instrumentalism. What remains to be shown is that fetal tissue research is ethically distinct from abortion, and that is the subject of the next chapter.

-- Chapter 3 --

**Separating the Morality of Abortion  
from the Morality of Fetal Tissue Use**

'Using' fetal tissue in medical research is the subject of much debate primarily because of its association with elective abortion. This is evident in the fact that using fetal tissue from spontaneous or therapeutic abortions is not generally protested against.<sup>1</sup> Unlike other cadaveric tissue which is routinely used for research and transplant without any moral qualms, there is a moral uneasiness attached to the use of aborted cadaveric fetal tissue, in part because of the controversial manner in which it becomes available for use. As Kathleen Nolan, notes, "The welfare of another being has been sacrificed, however legitimately, for the good of society or someone else. A moral intuition insists that being used once is enough."<sup>2</sup> Thus in pursuing the use of fetal tissue for research purposes, there is an important sense in which the fetus is used twice: first, through the abortion; and second through the tissue donation. But while the morality of the first use is not here in question (indeed the morality of abortion remains an unsettled issue)<sup>3</sup>, the morality of the second use can arguably be shown to be ethical.

In this chapter I argue that the issue of abortion and fetal tissue use are two separate (though admittedly related issues) that warrant distinct ethical judgments. I argue that one may consider the use of fetal tissue for medical purposes as ethical, regardless of one's position on abortion. Indeed, one may be morally opposed to abortion, and still

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<sup>1</sup> S. B. Rae, "Spare Parts from the Unborn?: The Ethics of Fetal Tissue Transplantation" (1991) Fall *Christian Research Journal* 320. Also the general view espoused by Canadians in the Royal Commission's Final Report, p. 969-971.

<sup>2</sup> K. Nolan, " *Genug ist Genug: A Fetus is Not a Kidney*" (1988) Dec *Hastings Center Report* 13.

<sup>3</sup> The abortion issue is lengthy and complex, well beyond the scope of this thesis.

sanction the use of fetal remains for research and therapeutic goals. Since we established in the previous chapter that using fetal tissue in medical research is morally acceptable instrumentalism, winning the argument in this chapter will lead to the conclusion that there is nothing unethical about using aborted fetuses in medical research.

My strategy is to expose and critique the central arguments in the instrumentalist debate. Arguments against fetal tissue use largely depend on connecting it with the morality of abortion; they argue that since abortion is immoral, a practice that would use its products is also immoral. By showing that such arguments are unfounded, I can show that the morality of fetal tissue use does not depend on the morality of abortion – that the two issues are in fact ethically distinct. Once this analytical work is done, I propose some revisions to current policy that can satisfactorily maintain the normative separation between abortion and fetal tissue research.

### ***3.1 The Special Features of Fetal Tissue***

Fetal tissue is desirable for transplantation and shows great promise in the treatment of disease, largely because of its unique physiological properties: it is less immunologically reactive than adult tissue, grows easily, is pluripotent<sup>4</sup>, and its lack of differentiation means that it can readily adapt once transplanted.<sup>5</sup> Specifically, prior to twelve weeks of life, fetal tissue lacks the immunologic markers that tend to precipitate graft vs. host rejection which is common in mature adult tissue transplants.<sup>6</sup>

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<sup>4</sup> Its ability to develop into different cell types.

<sup>5</sup> M. B. Mahowald, J. S. Silver, and R. A. Ratcheson, "The Ethical Options in Transplanting Fetal Tissue" (1987) Feb *Hastings Center Report* 9.

<sup>6</sup> L. M. Nora and M.B. Mahowald, "Neural Fetal Tissue Transplants: Old and New Issues" (1996) 31:4 *Zygon* 615.

Additionally, fetal cells are easily manipulated and can be stored in vitro or frozen for later use.<sup>7</sup>

These special characteristics of fetal tissue have interested researchers since the 1920's, when the first attempts to transplant human fetal tissue were made.<sup>8</sup> Since then, the use of fetal tissue has played an important role in many medical milestones, e.g fetal tissue was instrumental in the development of the polio vaccine in the 1950's, and fetal thymus grafts have been successful in treating DiGeorge syndrome since 1968.<sup>9</sup> Currently, interest in fetal tissue is directed towards neural tissue transplant therapy for the treatment of a variety of serious neurological disorders, among them Parkinson's, Alzheimer's, Huntington's, multiple sclerosis and central nervous system trauma.<sup>10</sup>

### ***3.2 The Connection between Abortion and Fetal Tissue Research***

Prior to the 1973 *Roe vs. Wade* decision which legalized abortion in the U.S., the subject of fetal tissue use was of little or no concern.<sup>11</sup> Following this decision, and as developments in fetal tissue research continued, the abortion debate engendered new issues as the public became increasingly aware of the proposed uses for aborted fetuses.<sup>12</sup>

A central issue in the instrumentalist debate can be summarized in terms of one major question: whether the morality of elective abortion can be ethically separable from

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<sup>7</sup> G.J. Boer, "Ethical Issues in Neurografting of Human Embryonic Cells" (1999) 20 *Theoretical Medicine and Bioethics* 461.

<sup>8</sup> Nora and Mahowald, p. 617.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* *Roe vs. Wade* granted every woman the right to obtain an abortion up to the end of the second trimester; aborting at any stage of the pregnancy is permissible for compelling medical reasons.

<sup>12</sup> In 1993, The Final Report of the Royal Commission on New Reproductive Technologies reported that Canadians were far less aware of fetal tissue use than other medical procedures in the Commission's mandate (Vol. 2, p. 969). This suggests that the issue is less debated in Canada than it is in the United States.

the morality of using aborted fetuses in medical research. Proponents of fetal instrumentalism argue, as I do, that it can; while opponents of fetal tissue research passionately disagree.<sup>13</sup> I identify five major ethical concerns that arise in this context:

- 1) Complicity in abortion
- 2) Encouraging abortion through donation incentives
- 3) The issue of legitimate consent
- 4) Alteration of the abortion timing and method
- 5) Tissue procurement procedures

I shall examine each argument in turn.

### ***3.2.1 Complicity in Abortion***

The first argument one is sure to encounter in the debate is the ‘complicity argument’ -- that using the aborted fetus for medical research is tantamount to complicity in abortion.<sup>14</sup> In short, the claim is that sanctioning the use of fetal tissue which results from elective abortions is the same as endorsing abortion itself. Those who defend this argument claim that it is inconsistent to be morally opposed to abortion, or ambivalent about it, and advocate the subsequent use of the dead fetus in medical research. To illustrate this point, Scott B. Rae draws the analogy of a banker who willingly accepts drug money despite being opposed to the drug trade. He writes, “[A] better parallel might be a banker who regards the drug trade as morally wrong, yet agrees to accept drug money at his bank in order to finance low income housing for the community. This

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<sup>13</sup> *Id.*, p. 618.

<sup>14</sup> Henceforth known as the ‘complicity argument’.

banker would be involved in complicity with the drug trade, even though he is not involved with the actual sale of narcotics.”<sup>15</sup>

Rae’s analogy, however, is not a good one; it fails on several important fronts. The researcher who uses fetal tissue obtained from elective abortions differs from the banker who accepts drug money in several morally relevant aspects. First, the researcher usually has no direct knowledge of the source of the tissue – whether it was obtained from a spontaneous or elective abortion, or from a therapeutic termination. The banker, on the other hand, is fully knowledgeable about the source of the drug money. The researcher may be morally opposed to abortion and feel apprehensive about using it if she suspects the source of the tissue to be an elective abortion, but since she is uncertain of its exact source, she is neither compelled to refrain from using it, nor morally faulted if she does.

One may object to this line of argument by noting that the researcher has good reason to believe that the tissue is likely to be from an elective abortion, and that this is not morally different from a banker who is uncertain of the source of the money, but is aware nonetheless that it is likely to be drug money. However, these scenarios are morally different, in the relevant sense that abortion is a legally accepted practice in our society, whereas drug trafficking is an illegal activity. Debating the ethics of fetal tissue research only makes sense because abortion is legal. No one doubts that fetal tissue research is *practically* dependent on abortion, the argument I want to advance is that it is *ethically* independent of it.

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<sup>15</sup> Rae, p. 322.

A second significant difference is that the researcher has no immediate connection to the abortion. That is, she is not in contact with the aborting woman, the physician carrying out the abortion, or the facility where it takes place. The researcher generally obtains the tissue from an independent third party – usually a tissue procurement agency. It is difficult to see how the researcher is complicitous in the act of abortion, if she is neither directly nor indirectly involved in its execution. This is quite unlike the banker who explicitly agrees to accept drug money directly from the drug dealer.

A better analogy to using aborted fetuses, one that is often invoked by proponents of fetal tissue research, is that of the murder victim who becomes an organ donor. The analogy is as follows: using tissue from an aborted fetus is analogous to using organs from an adult murder victim; and since we find the latter to be morally acceptable, we must also consider the former acceptable.<sup>16</sup> John A. Robertson elaborates,

A useful analogy is transplant organs and tissue from homicide victims. Families of murder victims are often asked to donate organs and bodies for research, therapy, and education. If they consent, organ procurement agencies retrieve the organs and distribute them to recipients. No one would seriously argue that the surgeon who transplants the victim's kidneys, heart, liver, or corneas, or the recipient of the organs becomes an accomplice in the homicide that made the organs available, even if aware of the source.<sup>17</sup>

Since organs and tissue from murder victims may be used without being complicitous in the murder that makes them available, likewise, one may use organs and tissue from aborted fetuses without being complicitous in abortion.

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<sup>16</sup> L. Gillam, "Arguing by Analogy in the Fetal Tissue Debate" (1997) 11:5 *Bioethics*, p.398.

<sup>17</sup> J. A. Robertson, "Rights, Symbolism and Public Policy in Fetal Tissue Transplants" (1988) Dec *Hastings Center Report*, p. 6.

The problem with the complicity argument is that it makes the unwarranted assumption that researchers who use fetal remains applaud the abortion that made the tissue available. Yet one need not approve of abortion simply because one derives benefits from it. Indeed, even if this were true, it alone would not imply complicity in abortion. Robertson notes, “X may disapprove of Y’s murder of Z, even though X gains an inheritance or a promotion as a result...Applauding Y’s murder of Z might be insensitive or callous. But that alone would not make one morally responsible for, complicitous in, the murder that has already occurred.”<sup>18</sup> Thus, the beneficiary of another’s wrongful death is not complicitous in that death if one has no part in causing it.

However, Lynn Gillam argues that the analogy between murder victims and aborted fetuses does not hold. To fully dispel the complicity argument, we must entertain her challenge to the analogy. According to Gillam, the circumstances which lead to the demise of homicide victims and fetuses differ in a morally relevant way. Supposedly, each action will yield morally significant long term consequences. Gillam states, “Abortion, unlike ‘criminal murder’, is an organized professional activity, planned in advance, committed by known people at known places and times...In contrast, murder is clearly against the law in all jurisdictions.”<sup>19</sup> Gillam explicates that since murder is so clearly an odious activity, its illegality and moral condemnation is unlikely to change. Society will never approve of murder and consider it an acceptable way to harvest needed organs. As such, it is unlikely that we will ever see an increase in murders to meet organ donor demands. However, abortion is not viewed in the same way as murder; it is both

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<sup>18</sup> *Id.*

<sup>19</sup> Gillam, p. 405.

legally and morally accepted in some circles. Thus in the future, it is conceivable that we might see an increase in the number of abortions to meet organ demands.<sup>20</sup> Moreover, Gillam claims that it is the ‘swing’ group most likely to give this scenario some force. The ‘swing’ group is that segment of society that neither condemns abortion nor gives it vocal support; these people are either ambivalent towards it, or hold the view that abortion is acceptable in certain situations. Gillam finds that, “The willingness of the medical profession to use tissue from abortions may help to legitimate abortion in the eyes of such people.”<sup>21</sup> This would presumably lead to a climate where ‘less social stigma’ would be attached to abortion, and where individual women would more easily decide in its favor knowing that fetal tissue would be used in a positive way.<sup>22</sup>

But Gillam’s argument has one serious flaw – it assumes that fetal research activity influences abortion practices. In fact, there is no evidence now, nor is there any reason to believe that using fetal tissue in medical research leads to an increase in abortion. The past decade has seen a substantial increase in research involving fetal remains, yet this has had no impact on the rate of abortion. The main reason for seeking abortion continues to be the desire to avoid an unwanted pregnancy.<sup>23</sup> Robertson appears to be correct when he states that “[t]he fact that fetal remains may be donated for transplant will continue to be of little significance in the total array of factors that lead a woman to abort a pregnancy.”<sup>24</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, p. 406.

<sup>23</sup> Robertson, p. 6.

<sup>24</sup> *Id.*

Gillam takes the relevant moral difference between homicide and abortion to be the *consequence* of each practice; she claims that organ and tissue donation is unlikely to lead to an increase in the former, but likely to do so in the latter. However, Gillam has no evidence to support this assumption. Granted there are significant logistical differences between homicide and abortion (which Gillam points out <sup>25</sup>) but these are negligible in terms of the analogy. What is relevant, and what holds the analogy together, is that we may consider both murder victims and aborted fetuses victims of wrongful killings, and in each case we may donate tissue and organs from the victims without being complicitous in the act of killing, or supportive of future acts.

### ***3.2.2 Encouraging abortion through donation incentives***

A second argument intended to tie abortion to fetal tissue use runs along the same lines as the complicity argument. The objection is that using fetal remains in medical research legitimizes, entrenches and encourages abortion.<sup>26</sup> The argument claims that abortion will be encouraged in the following circumstances: first, there is the undecided woman who will opt to terminate a pregnancy, knowing that the aborted fetus will be subsequently used for a worthy cause; second, there is the woman who will purposively conceive and abort in order to donate tissue to a relative; third, there is the altruistic individual who will purposively conceive and abort to donate tissue simply because there is a medical need for such; and fourth, the individual who conceives, aborts, and donates tissue for financial gain.

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<sup>25</sup> 1) Murder is a criminal activity, abortion is not; and 2) The involvement of a physician in abortion.

<sup>26</sup> Robertson, p. 6.

Before addressing each of these circumstances, it is important to note that despite the legality of abortion and its wider social acceptance, women who undergo abortions do so with much reservation. The decision to abort is a difficult one, involving a great deal of psychological anguish. Moreover, women must assume a degree of physical risk. Even the greatest proponents of choice admit that it is the least desirable method of contraception. Most women would avoid abortion if they could.<sup>27</sup> Thus the likelihood that many women would adopt a nonchalant attitude towards abortion, and systematically subject themselves to its trauma to make a fetal tissue donation, is doubtful. A report issued by The National Institute of Health (NIH) on this very suggestion acknowledged “[t]hat there is no evidence, despite over thirty years of highly productive and lucrative use of human fetal tissue in research and therapy, that women voluntarily increase the number of abortions they have to donate fetal tissue, or that any mechanism for enticing them to do so has arisen.”<sup>28</sup> At the very least, the claim that fetal tissue donation provides an incentive for abortion is one that requires empirical proof.

Each of the above scenarios may well be avoided by erecting safeguards in fetal tissue donation policy. In the first place, we can approach women with the subject of fetal tissue donation *after* the decision to abort has been made. Currently, women who decide to abort provide consent for the abortion, and are only subsequently approached about consent to donate fetal remains.<sup>29</sup> So far, this procedure has not impacted the

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<sup>27</sup> Planned Parenthood website: [www.plannedparenthood.org/library/facts/emoteff\\_010600.htm](http://www.plannedparenthood.org/library/facts/emoteff_010600.htm).

<sup>28</sup> W. Kearney, D.E. Vawter, and K.G. Gervais, “Fetal Tissue Research and the Misread Compromise” (1991) *Sep-Oct Hastings Center Report*, p. 10.

<sup>29</sup> Robertson, p.7. This practice varies throughout the Canadian provinces; some standard hospital consent forms contain a general waiver that gives the institution authorization to ‘dispose’ of bodily tissues and parts, where it is implicitly understood that disposal may include research or education purposes.

incidence of abortion in the United States. Perhaps it is true that a number of undecided women will choose abortion because of the knowledge that fetal tissue may be donated, but this number is unlikely to significantly alter the rate of abortion. As Robertson notes, “it is highly unlikely that donation – as opposed to contraceptive practices and sex education – will contribute significantly to the rate of abortion.”<sup>30</sup>

In the second scenario, we may prevent women from purposively conceiving and aborting to donate tissue to a relative by adopting the recommendation made by the Royal Commission that “Designation of recipients of fetal tissue by women undergoing abortion be prohibited.”<sup>31</sup> As well, amend the policy currently advocated by the Uniform Anatomical Gift Act (UAGA) which does permit either parent to designate a recipient, to one which prohibits directed donations.<sup>32</sup> In the case of other human cadavers, donated organs and tissue are indiscriminately distributed to needy patients. Donors and their next of kin cannot direct organ donations towards specified recipients. By imposing the same rigid standard on fetal tissue and organ donations, we can discourage women from conceiving and aborting to help a loved one.

The third scenario is one we are unlikely to see as long as abortion continues to be a legal option for women. Each year approximately 1.5 million voluntary abortions are carried out in the United States,<sup>33</sup> and nearly 80% are performed in the first trimester

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Other institutions provide separate consent forms. The point however, is that one consents to the abortion first.

<sup>30</sup> Robertson, p. 7.

<sup>31</sup> The Royal Commission’s Final Report (1993, Vol 2), p. 1000.

<sup>32</sup> Mahowald et. al., p. 11.

<sup>33</sup> Reported by The Alan Guttmacher Institute: [www.agi-usa.org/pubs/fb\\_induced\\_abortion.html](http://www.agi-usa.org/pubs/fb_induced_abortion.html). The figure is much smaller in Canada, where approximately 100,000 abortions are performed, 90% in the first trimester (Health Canada Statistics, [www.hc-sc.gc.ca/hpb/lcdc/brch/factsheets\\_e.html](http://www.hc-sc.gc.ca/hpb/lcdc/brch/factsheets_e.html)).

when fetal tissue is most suitable for research and transplant purposes.<sup>34</sup> With such a vast supply of tissue available, no need exists now, or in the foreseeable future to conceive and abort for the sole purpose of obtaining fetal tissue. Moreover, it is unlikely that we would encounter so many altruistic individuals that the number of abortions actually performed for this reason would be cause for alarm.

The fourth scenario is the least likely to encourage abortion, since legislation currently forbids the sale of human organs and tissue.<sup>35</sup> So long as we prohibit the commerce of human body parts, we need not be concerned about women impelled to conceive and abort for financial gain. As noted above, abortion is not a decision that women make lightly. The financial incentive would have to be substantial, and the need great, for any woman to be encouraged to assume the risks associated with abortion.

### ***3.2.3 The issue of legitimate consent***

A third issue that frequently surfaces in the debate is that of consent to donate the aborted fetal remains. Currently, donation of fetal tissue is governed by the UTGA framework which treats fetal cadavers as other human remains. Under this policy, consent of the next of kin is required prior to organ or tissue retrieval.<sup>36</sup> Pregnant women are generally considered the most appropriate surrogates to provide consent on behalf of their fetuses, since in principle, the mother has the best interest of the fetus at heart. However, when a woman chooses to end her pregnancy, some claim that she has systematically forfeited her right to be the surrogate for her fetus in virtue of this

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<sup>34</sup> Robertson, p. 5.

<sup>35</sup> A. Fine, "The Ethics of Fetal Tissue Transplants" (1988) Jun-Jul *Hastings Center Report* 5. This is the case in both Canada and the United States.

<sup>36</sup> UTGA (Uniform Tissue Gift Act); its counterpart in the United States is the Uniform Anatomical Gift Act (UAGA), which operates under similar principles. Rae, p. 322.

decision. Opponents of fetal tissue use thus declare that valid consent for tissue donation is impossible. Scott B Rae remarks, “The mother cannot give morally legitimate consent, since she initiated the termination of the pregnancy.”<sup>37</sup> If we accept this argument, we are left with two undesirable alternatives: either procuring fetal tissue without parental consent, or banning fetal tissue use altogether.

Who should consent to the use of tissue harvested from an aborted fetus? To eliminate consent and enter into a system of routine salvage would further objectify the fetus by denying it the same basic treatment assured to other human cadavers under the UTGA or UAGA frameworks. Omitting consent from the process of fetal tissue donation could only be morally justified if a system of routine salvage for *all* human cadavers was ordered.

Presently, UAGA gives the mother the right to make or withhold donations of fetal remains, subject to objection by the father.<sup>38</sup> Obtaining consent is an important aspect of fetal tissue donation, for it is what distinguishes human remains from other animal remains. In a sense, it preserves the humanity of the fetus by demanding that it be treated with the same respect as other human beings. This is the view that probably led UAGA to amend its policy in 1988 to include fetal organs and tissues under the definition ‘human’.<sup>39</sup> A symbolic gesture, some might say, in view of the manner in which the fetus meets its demise. It raises the question: why should we treat the remains as ‘human’, when it is because we deny it is a full human being in some sense, that we can justify

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

abortion? But it is one thing to respect the dead, and another to respect an individual woman's choice to terminate her pregnancy; one should not determine the other. We ought to respect human cadavers, and treat them with dignity regardless of the circumstances which have led to their death. I do not believe anyone would advocate treating the executed bodies of convicted murderers with less dignity and respect that we extend to all human beings. Consent to retrieve their organs is routinely sought from their next of kin.

The mother is the most suitable candidate to give consent for disposition of the fetus since it is a product of her body, and it remains as such even when expelled from it. To deny a woman the basic right to dispose of her fetus as she sees fit, is a violation of personal autonomy. As Christine Overall notes, “[d]eliberately withholding the determination of the disposition of the foetus from the biological mother is yet another example of the takeover of reproduction from women.”<sup>40</sup> Those who oppose this view generally impute the notion of ‘proxy’ to the meaning of consent. The claim is that the woman loses her right to act as proxy for the fetus since she has chosen to abort, because a proxy is supposed to act as a guardian protecting the best interests of the fetus. But this is a mistaken interpretation. As Robertson states, “deceased persons or fetuses no longer have interests to be protected, as the notion of proxy implies”.<sup>41</sup> In the disposition of human remains consent is obtained from next of kin not only because they are best situated to carry out the deceased's final requests (if any exist), but more especially

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<sup>40</sup> C. Overall, “Biological Mothers and the Disposition of Foetuses” in *Human Reproduction: Principles, Practices, Policies* (Toronto: Oxford University Press, 1993), p. 74.

<sup>41</sup> Robertson, p. 9.

because they have particular reasons and feelings for disposing of a loved one in a certain way. In the case of the fetus, it is particularly bizarre to speculate on what wishes it might have had for its own disposition. Thus it is appropriate that the mother determine in accordance with her own wishes the fate of the fetal remains.

Robertson notes that there is a second mistaken assumption underlying the argument against consent – that a woman has no interest in what happens to her aborted fetus.<sup>42</sup> But there is in fact no evidence to support this. On the contrary, a woman's desire to donate fetal tissue suggests otherwise – that she in fact cares about whether the fetal remains contribute to research or therapy to help others. Some women reportedly inquire about what happens to the fetus following abortion, which is inconsistent with being uninterested or ambivalent about the fetus.<sup>43</sup> If nothing else, we must acknowledge that a woman choosing for her own compelling reasons to terminate a pregnancy is not reason enough to disqualify her from retaining control over her fetus's remains.

There is an additional and rather significant reason to give consent to the woman. Fetal tissue employed for research or transplant must be tested for transmissible disease, thus the woman should provide consent since the results of testing impact directly upon her, particularly in the case of HIV infection.<sup>44</sup>

The alternative of banning fetal tissue use altogether because 'legitimate' consent is unobtainable, is simply unjustifiable. This solution just throws the proverbial 'baby out with the bathwater'. How can we justify discarding fetal tissue that may otherwise save

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<sup>42</sup> *Id.*

<sup>43</sup> Planned parenthood website: [www.plannedparenthood.org/library/facts/fetaltis\\_010600.htm](http://www.plannedparenthood.org/library/facts/fetaltis_010600.htm)

<sup>44</sup> G.J. Boer, "Ethical Issues in Neurografting of Human Embryonic Cells" (1999) 20 *Theoretical Medicine and Bioethics*, p. 468.

someone's life, simply because we cannot agree about who should provide consent? Far more than being impractical, this suggestion is arguably immoral. We must ask ourselves, "What kind of obligation do we have to those whose suffering we can relieve?" We can at least agree that we have a greater obligation to the living than to the dead. If this is so, we have much more than a good reason to prevent fetal remains from being woefully discarded, we may actually have a moral obligation to use them.

Obtaining consent for fetal donation is an important step in the process which fulfills this obligation.

### ***3.2.4 Alteration of the Abortion Timing and Method***

There is a fourth issue pertaining to consent that attempts to link abortion to fetal donation. The previous objection focused on the woman's ineligibility to provide 'morally legitimate' consent; this objection centers on the provision of alleged 'coerced' consent. The fear is that women will consent to abortion having learned about the prospect of fetal donation, and as a consequence, the abortion may be delayed or an alternate abortion method chosen to coincide with fetal development that can surrender optimal tissue.<sup>45</sup> An association of this nature between abortion and fetal donation would certainly undermine our efforts to portray the latter as ethical. Thus it is important to demonstrate how the decision to abort and the decision to donate are ethically distinct.

As previously noted, the knowledge of fetal donation does little to influence the abortion decision in the first place.<sup>46</sup> Moreover, if consent for the abortion is obtained *first*, and the request to donate is only made *after* consent for the abortion is obtained, it

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<sup>45</sup> Robertson, p. 9.

<sup>46</sup> See my arguments in section 2.2.2.

will assure that fetal donation does not become a prerequisite for abortion. Altering the method of abortion or its timing to secure qualitatively better specimens should not be permitted, as federal policy currently mandates. “Federal regulations governing fetal research also state that ‘no procedural changes which may cause greater than minimal risk to the fetus or pregnant woman will be introduced into the procedure for terminating the pregnancy solely in the interest of the activity.’”<sup>47</sup> This is a sound protective measure for both mother and fetus, intended to prevent later or more painful abortions.

Although obtaining consent to donate fetal remains once the abortion has been performed would definitively separate the two issues, it would be impractical and likely to add little protection.<sup>48</sup> Fetal tissue used in research usually needs to be harvested immediately after the abortion takes place. It would not be feasible to wait until the woman recovered from the procedure and straight away bombard her with requests to donate fetal remains. The current practice of obtaining a woman’s consent to abort first, and thereafter initiate a discussion to donate, seems the most practical and ethically responsible.

It is both unnecessary and unwise to accede to a proposal made in 1991 that would have women certify ethical intent for abortion.<sup>49</sup> According to this proposal, women who agree to donate fetal tissue for transplant research would have to certify in writing that they did not undertake the abortion just to make a tissue donation. These written

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<sup>47</sup> Robertson, p. 9. This is also one of the recommendations (#283) put forth by the Royal Commission in its Final Report, p. 999.

<sup>48</sup> *Id.*

<sup>49</sup> W. Kearney, D.E. Vawter, and K.G. Gervais, “Fetal Tissue Research and the Misread Compromise” (1991) Sep-Oct *The Hastings Center Report* 7. The proposal is a provision in part 2 of Bill H.R. 2507 that restores federal funding for human fetal tissue research.

declarations would then be kept on file in the researcher's possession, and be subject to 'audit' by federal and state officials.<sup>50</sup> Such a draconian measure to ensure an ethical separation between abortion and tissue donation is unnecessary because it is well established that the latter does not influence the decision to undergo the former. More significantly, such a measure is unwise because it is a clear violation of the woman's privacy; first, by demanding that a woman's reasons to abort are congruent with what the state deems appropriate. As Kearney et al. state,

Never before has the state been held to have an interest in establishing that the motivations of women who seek abortion meet certain moral criteria...H.R. 2507 would alter that by implying that there are substantive criteria for determining good and bad reasons for abortion at any time during pregnancy and establishing in law a new policy that women seeking a legal, widely disseminated medical procedure that has not generally been declared unethical, in certain instances should have their individual motives for seeking the procedure examined.<sup>51</sup>

And second, threatening the confidentiality of the woman's statements by taking them outside of the traditional doctor-patient relationship and placing them in the broader public sphere. As Kearney et al. remark, "Signed documents pertaining to private medical matters would be moved out of the fiduciary relationship between doctor and patient, not on the basis of the woman's individual consent or her health needs, or to protect her interests, but rather because the government deems it proper for those involved in requesting and using the tissue to scrutinize her motives for ethical acceptability."<sup>52</sup> This issue is of particular concern, since the government does not offer assurances about how it would regulate those who have access to the information, and

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* p. 9.

<sup>52</sup> *Id.* p. 8.

when and why they would need to view it. In effect, it leaves the woman vulnerable to public scrutiny about an intensely private matter.

In addition to the undesirable implications it would have on individual privacy, such policy would threaten a woman's right to obtain an abortion. Suppose the woman refuses to sign a declaration of intent; an abortion provider may interpret the refusal as a sure sign she intended to abort in order to donate, and may decline to perform the abortion.<sup>53</sup> Women could systematically be denied a right which is supposed to be constitutionally guaranteed.

A policy such as H.R. 2507 goes to excessive lengths to separate abortion from tissue donation, including the willingness to jeopardize individual rights and privacy, but actually, it does not succeed in its efforts. For, there is no way to ascertain whether the declarations made by women are true. A woman desperately seeking an abortion, for whatever reason, will agree to sign the documentation necessary to obtain the abortion. Furthermore, making the issue of donation the subject of such intense examination actually has the opposite of the intended effect; rather than separate it from the abortion issue, such a policy intimates that the two are hopelessly tied together. Thus, it is futile to demand certifications of ethical intent.

Some proponents of fetal tissue research advocate changes in abortion procedure that enhance tissue procurement without posing additional risk to the mother and fetus. "For example, reductions in the amount of suction, use of a larger bore needle, and ultrasound-guided placement of the suction instrument in evacuation abortions would,

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<sup>53</sup> *Id.*

without increasing risk, facilitate tissue retrieval by preventing maceration of the fetus.”<sup>54</sup> However, this kind of thinking leads inevitably to a moral pitfall. On the one hand you cannot insist on an ethical separation between abortion and fetal donation, and in turn, be willing to make procedural changes to accommodate tissue procurement. This shifts the locus of the initial objective of performing the abortion, to securing fetal tissue. Under these circumstances, the tissue may not be considered ‘morally neutral’ as it seems to have been purposively sought, rather than accidentally obtained.

More problematic is the view advanced by Mahowald and associates, that pregnancy may be prolonged and riskier abortion procedures may be undertaken, so long as the woman provides free and informed consent.<sup>55</sup> In the future, it is conceivable that second trimester abortuses may be more valuable for transplant purposes. Should such a need arise, Mahowald et al. claim that there is nothing unethical about a woman agreeing to undertake the additional risks. Mahowald writes, “If midgestation is the optimal time for human transplantation (a possibility that has not been established), a woman who would otherwise undergo abortion during the first trimester might be asked to continue her pregnancy until the second trimester. Maintaining the pregnancy is comparable to maintaining vital functions of a cadaver donor through mechanical support.”<sup>56</sup>

But Mahowald and colleagues are mistaken -- such a request is clearly unethical. Even if the woman freely consents, it is not the kind of policy we should readily adopt towards fetal tissue donation. Not only does it indubitably connect abortion to fetal

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<sup>54</sup> Robertson, p. 9.

<sup>55</sup> Mahowald et al., p. 13.

<sup>56</sup> *Id.*

donation, raising moral objection to the later practice; but asking women to assume additional risks is wholly undesirable. It creates a tremendous potential to exploit women in the effort to fuel the fetal research industry. Also, I fail to see how 'free and informed' consent may be obtained. Informing the woman of the requisite alterations in procedure and its associated risks does not secure informed consent; the mere suggestion that it be done to retrieve tissue that will possibly save someone's life is coercive. Does a worthy therapeutic goal justify putting a woman at additional risk? This just seems to pit the welfare of the woman against that of another individual; in effect, the well being of the woman is sacrificed to *potentially* help another. Overall is correct in her observation that, "Pregnant women are not morally required to exhibit 'moral heroism' by putting their own lives at risk for the sake of a possibly viable fetus. Nor are women compelled to undergo less safe forms of abortion in order to provide intact foetal tissue for purposes of transplant or research."<sup>57</sup>

Mahowald's suggestion that maintaining a pregnancy is analogous to a cadaver donor on mechanical support is thoroughly amiss. I would think that the differences between a living fetus and a cadaver are so apparent as to not merit comment. But I will catalog the relevant differences nonetheless, so that there may be no question as to why developing fetuses may not be considered cadaver donors. The most obvious difference is that the cadaver donor has already been pronounced brain dead. Having obtained consent from the next of kin to retrieve organs, the deceased is maintained on mechanical support so that the organs may remain suitable for transplantation. The fetus, on the

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<sup>57</sup> Overall, p. 75.

other hand, is not dead. If the pregnancy is allowed to continue, the fetus continues to grow and thrive. It is not merely the fetus's organs which are maintained 'fresh and suitable' for transplantation, but the entire being is maintained alive. A living person is not thought of as 'maintained on mechanical support'. This highlights one crucial difference: that of the cadaver donor and the living donor. But living donors are not usually killed to obtain their donations.<sup>58</sup> Whether it is because we lack the appropriate concepts or language to describe the unique situation befitting the fetus, it is reasonable to conclude that we cannot rightfully consider the fetus a 'cadaver donor' while it is alive in its mother's womb.

This leads us to a second crucial difference between the fetus and the cadaver donor. It is noteworthy that the cadaver donor is pronounced 'brain dead' before it is considered for organ donation. This declaration in effect separates the 'the person that was' and the expired 'body that is', and it provides a justification for maintaining the 'body' on mechanical support. For, the person is dead, and what remains alive are its parts. The artificial life support is intended directly for the parts and nothing more. But the same is not true of the fetus; it is a conceptual whole that cannot be separated from its parts, until it is likewise dead. For this reason, the womb is not analogous to a life support machine. A womb is a life support system for the whole, and not merely for the sum of its parts.

A third issue, perhaps the most morally troubling, is that allowing the pregnancy to advance to the second trimester will permit the fetus to become sentient. The fetus may

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<sup>58</sup> Living donors donate, kidneys, bone marrow, blood, semen, etc..., and are not usually injured as a result of the donation.

thus experience pain during a mid-gestation abortion. This is clearly unacceptable, since cadaver donors are not subject to pain in the interest of providing suitable organs and tissue. At present, federal regulations do not permit tissue retrieval from living nonviable fetuses, in part because pain is taken into account when experimenting on living beings.<sup>59</sup> If we refuse to cause the fetus pain in one instance, even for the sake of optimal organ retrieval, then it follows that we should be equally hesitant to do so in another. Furthermore, federal law instructs physicians to rescue potentially viable and viable fetuses, which can occur at or around twenty-two weeks gestation.<sup>60</sup> Permitting mid-gestation abortions for the sake of optimal organ retrieval may lead to a surge of potentially viable fetuses which are rescued in accordance with the law. What shall we do with so many orphans? Clearly Mahowald et al. have not given serious thought to all of the implications of late stage abortions. Thus for the reasons stated above, it is not ethically permissible to alter the abortion method and timing for the sake of tissue procurement.

### ***3.2.5 Tissue Procurement Procedures***

Another issue of ethical concern that arises in the context of tissue donation has to do with tissue procurement. The relevant questions to consider are: 1) Who should be involved in tissue procurement; and 2) Does research using fetal tissue create a market for abortions and fetal tissue donations? We find that through sound policy measures, fetal tissue may be ethically procured and employed in research without commercializing either abortion or fetal tissue donations.

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<sup>59</sup> Mahowald, p. 13.

<sup>60</sup> *Id.*

We have partially answered the first question in our response to the complicity argument. Abortion providers are prohibited from procuring, distributing or using fetal tissue in research from abortions which they have performed. The physician's obligation must remain solely to his patient, thus he may not harvest fetal tissue, for others' use or for his own use. And though the physician obtains consent from the woman to donate fetal remains, this should not be interpreted as 'soliciting' tissue, since he does not benefit from the donation. The physician who performs the abortion has no knowledge of the recipient of the tissue, or details of its intended use. Likewise, recipients, usually researchers and occasionally transplant patients, are ignorant of the source of the tissue, including the identity of the aborting woman, the clinic where the abortion was performed, and the physician who performed it. Generally, an independent third party – a tissue procurement agency- retrieves the tissue directly from the physician's clinic and distributes it to waiting recipients.<sup>61</sup> This is an ideal arrangement, since it effectively separates the abortion provider from the researcher who will use the fetal tissue.

However, opponents of fetal tissue research are not convinced that such a separation can be maintained. As Scott Rae remarks, "For the best medical results there would need to be an institutional, symbiotic relationship with the abortion industry, thereby making the separation of abortion and tissue procurement very difficult".<sup>62</sup> Moreover, they claim that it is financial inducements that make the separation impossible to enforce, since researchers will 'commission' agencies and clinics to furnish necessary tissue.<sup>63</sup> The

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<sup>61</sup> Robertson, p. 10.

<sup>62</sup> Rae, p. 325.

<sup>63</sup> *Id.*

most onerous implication of financially induced tissue procurement is the commercialization of fetal donations. In the late 1980's, one research firm estimated that the total market value for using fetal pancreatic tissue in the treatment of diabetes was approximately six billion dollars annually.<sup>64</sup> Given the lucrative potential of this market, opponents argue that abortion clinics and procurement agencies will reap substantial revenues, and that this will inevitably lead to the 'recruitment' of aborting women.<sup>65</sup>

If this were in fact the case, we would indeed have much to be concerned about. For the commercial buying and selling of human body parts is damaging to human dignity. As Robertson correctly observes, "Such market transactions risk exploiting women and their reproductive capacity and may denigrate the human dignity of aborted fetuses by treating them as market commodities."<sup>66</sup> However, this is not the case, and we may well prevent it from ever occurring. Current policy prohibits market transactions in fetal tissue procurement. "The National Organ Transplant Act of 1984, which bans payment of 'valuable consideration' for the donation or distribution of solid organs was amended in 1988 to ban sales of fetal organs and 'subparts thereof'."<sup>67</sup> Presently, this policy is easily supported, since the vast supply of fetal tissue available for research has been donated rather than sold. There is no reason to believe that women who abort unwanted pregnancies will not continue to donate fetal tissue altruistically. Women who

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<sup>64</sup> *Id.* Figure reported by pharmaceutical giant Hana Biologics, in testimony given to the National Institutes of Health (NIH) panel discussion of fetal tissue transplants. One can only imagine by how much that figure has since grown.

<sup>65</sup> *Id.*

<sup>66</sup> Robertson, p. 10.

<sup>67</sup> *Id.* Laws prohibiting the sale of human organs are now in place in Canada, the United States, and most of Western Europe. However, The Royal Commission recommended changes to Canadian law that would explicitly prohibit the sale of fetal tissue (1993, Vol.2), p. 1002.

donate usually do so with the hopes of deriving some good from what is generally perceived as bad. Thus paying them to donate is unnecessary.<sup>68</sup> Indeed, opponents of fetal tissue research usually charge that fetal donation legitimizes abortion because it assuages the guilt of aborting women. It is interesting that opponents now find ‘guilt-relief’ to be an insufficient motivation for tissue donation.

Currently tissue which results from donations adequately meets research needs. But Robertson entertains the question: “[w]hat if altruistic donations did not produce a sufficient supply of fetal tissue for transplant, or the need for histocompatible tissue required hiring women to be impregnated to produce a sufficient supply of fetal tissue?”<sup>69</sup> Would it be ethical to pay women to ‘donate’? This is really the same thing as asking whether it would be ethical to buy fetuses or fetal parts. Robertson argues that if pregnancy and abortion to produce fetal tissue are ethically defensible, then payment for the same in some circumstances may also be defensible.<sup>70</sup> However, neither of these scenarios is defensible. We have good reasons to prevent women from becoming ‘fetal tissue factories’. Among the strongest reasons is the risk incurred by women, both physically and emotionally, when they purposively conceive, abort and donate. Not to mention the risk of exploiting vulnerable women, and the symbolic costs of denigrating human life so callously. In the above sections, I outlined several arguments supporting the thesis that abortion and tissue donation are two ethically separable issues.

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

In advancing the above arguments, Robertson lends credence to the view that the two issues are in fact indissoluble -- a view which he explicitly challenges.<sup>71</sup> Moreover, by introducing financial incentives into the picture, he unquestionably seals the connection between abortion and tissue donation, a move which undermines his position in defense of fetal tissue research.

There is no ethical defense for buying and selling fetuses and fetal parts. Much more than a devaluation and abuse of human dignity, it is an assault on Kant's kingdom of ends that threatens our very humanity. As Alan Fine remarks, "[W]e have reasons, to do with ourselves rather than them, for not treating [fetuses] as merely disposable."<sup>72</sup> For once we are prepared to buy and sell aborted fetuses, we give way to unrestrained consequentialism. What else are we willing to buy and sell for a good cause? How long before we are sliding down that slippery slope, trying to justify the sale of body parts from stillborn and anencephalic infants, eventually children and adults, to meet worthy therapeutic goals?

Fetal instrumentalism may be morally tolerated because the benefits to needy patients outweigh the perceived harms of using the fetus, and because the practice itself does not inherently violate the principle of respect. But by introducing profit into this scenario, fetal instrumentalism turns ghoulish and perverse, tipping the scale onto the morally unacceptable side. How are we to determine what price to put on a whole fetus? A partially macerated fetus? A tiny fetal limb? The exchange of human body parts for

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<sup>71</sup> *Id.*, p. 5.

<sup>72</sup> Fine, p. 8.

money is a violation of human respect and dignity. Commodification of this kind is simply unjustifiable.

For the above reasons, tissue procurement agencies should not sell fetal tissue, and researchers should not be permitted to buy it. But opponents of fetal tissue research claim that market transactions are unavoidable between the abortion clinic, the procurement agent and the researcher, even if women are not paid to donate tissue. Unfortunately, the ambiguous language of fetal donation policy which prohibits ‘payments of valuable consideration’ for fetal organs and tissue, leaves the market vulnerable to opportunistic ‘for-profit’ agencies. In theory, tissue cannot be bought or sold, but the law does not preclude agencies from recouping costs incurred in tissue retrieval.<sup>73</sup> This legal loophole gives agencies the opportunity to ‘build in’ costs, or receive payments which they claim are not of ‘valuable consideration’. The agency generally compensates the abortion clinic for use of the facilities, and for staff involved in tissue retrieval and preparation. It may also pay the cost of delivering the tissue to recipients. Robertson argues that permitting agencies to recoup these costs is appropriate, and also states that allowing some profit margin is within reason, since “those who organize resources and invest capital to provide viable fetal tissue for transplant are performing a useful social activity.”<sup>74</sup>

It may be reasonable to cover the cost of operating expenses (as is the case with adult organ procurement), but allowing the agency to draw a profit from the ‘fetal parts’ business is macabre. And to countenance this type of profiteering as a social good makes

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<sup>73</sup> Robertson, p. 10.

<sup>74</sup> *Id.*, p. 11.

it that much more base. I see no reason why anyone should profit in the tissue procurement business, least of all an agent claiming to be making a contribution to the social good. Fetal tissue and organs should be handled in the same manner as other human cadaver organs and tissues. Thus policy should be carefully worded and strictly enforced to prevent the middleman from abusing the system. Ideally, the government should take an active role in overseeing tissue retrieval, rather than entrust private corporations with such delicate tasks. A federally funded and regulated tissue retrieval system will reduce the potential for market exploitation. Additionally, it can ensure a fairer distribution of tissue, and one which is contingent with worthy therapeutic goals. Presently, anyone can 'buy' fetal parts and organs, irrespective of the intended research purpose. Ghastly reports of researchers demanding fetal parts for inane and meaningless research experiments are not uncommon.<sup>75</sup>

It is not clear why Scott Rae insists that a 'symbiotic relationship' with the abortion industry is necessary in order to optimize medical success.<sup>76</sup> With the right policy, fetal tissue may be effectively procured without partnering aborting physicians with medical researchers. Enlisting the cooperation of an abortion clinic as a tissue procurement site does not *ipso facto* render the aborting physician an accomplice of the researcher who uses the tissue. A close relationship between the two might certainly be advantageous for the researcher, but without monetary incentives, what would the clinic have to gain? I

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<sup>75</sup>The Catholic Archdiocese of Missouri reports on their website [www.members.aol.com/RCMCC1022/legis/page40.html](http://www.members.aol.com/RCMCC1022/legis/page40.html)) that a researcher in Michigan ordered fetal parts for a hybrid experiment with chimps.

<sup>76</sup>Rae, p. 325.

fail to see the 'symbiosis' of a relationship that is not mutually beneficial. Rae has no evidence to support this assumption; I will consider it that and nothing more.

### ***3.3 Guidelines for Conducting Ethical Fetal Tissue Research***

Throughout this chapter, I have argued that abortion is ethically separable from fetal tissue use in research. Moral concerns about a link between the two issues can be dismissed through responsible public policy regulating the use of fetal tissue in medical research -- policy such as the one advocated by the Royal Commission on New Reproductive Technologies.<sup>77</sup> Some effective measures are currently in place, but we can improve current policy in several respects. I suggest the following basic requirements for conducting ethically responsible fetal tissue research:

- I. The aborting physician ought to be distinct from the researcher that uses tissue from elective abortions. Conflicts of interest may be thus avoided.
- II. Consent to donate should routinely be sought from the mother. The discussion should be initiated only after consent for the abortion has been obtained.
- III. The method or timing of the abortion should not be altered in the interest of obtaining fetal tissue, even if no additional risk is posed to the mother. The health and safety of the woman is the *prima facie* concern over which procedural changes should be made.
- IV. The donor may not designate the recipient of the tissue.
- V. No financial remuneration should be provided in exchange for fetal tissue.

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<sup>77</sup> With the exception of the proposed federal body to oversee tissue procurement (VI), all of the other recommendations are congruent with the Royal Commission's recommendations for conducting fetal tissue research.

- VI.** A federal regulatory body should oversee tissue procurement, retrieval, and distribution. No for-profit agencies should be allowed to operate in this endeavor.
  
- VII.** Researchers must receive federal approval to conduct research that would use fetal tissue. Research must have clear therapeutic goals and value.
  
- VIII.** Experimental research on live, nonviable fetuses should not be permitted.

## -- Chapter 4 --

### Conclusion

Bioethicists often remark that an adequate ethical evaluation of a 'medical' moral dilemma requires a sound understanding of the underlying scientific principles.<sup>1</sup> In what has become known as the "instrumentalist" debate, opponents of fetal tissue research appeal primarily to moral intuition in pronouncing fetal instrumentalism unethical. Unfortunately, they often neglect the 'science' behind the ethics, and too readily dismiss the benefits that may be derived from fetal tissue research. The research community on the other hand, is often too engaged in the science to address the 'ethics', which if overlooked, can lead to that dangerous philosophical incline known as the 'slippery slope'.

In this thesis, I have endeavored to provide an account that tempers the implications of science with appropriate moral constraints. I too appeal to moral intuition -- a thoughtful consideration of relevant deontological principles and consequentialist concerns. This formula shows us that morally objectionable instrumentalism is consistent with the following conditions: 1) failing to respect the person used; or 2) causing harm as a result of the use. Our analysis shows that fetal tissue use in medical research does not satisfy either one of these conditions, thus it may be declared morally acceptable instrumentalism.

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<sup>1</sup> Peter McCullagh, *The Foetus As Transplant Donor: Scientific, Social and Ethical Perspectives* (Chichester: John Wiley & Sons, 1987), p.

There should be no moral trepidation about endorsing fetal tissue research in a society where abortion is legal. Abortion will take place whether fetal research is conducted or not. And though fetal tissue research is *practically* dependent on abortion, the analysis in chapter 3 shows definitively how the two issues are *ethically* distinct; the morality of the former does not depend on the morality of the latter. Furthermore, I have suggested ways in which the normative separation can be maintained.

Perhaps future developments in fetal tissue research will require evaluating current policy to ensure that the ‘ethics’ stays on par with the ‘science’. Issues for future consideration might include distinguishing between research and therapy, should the level of research activity escalate to a point that the public finds morally troubling.

Another issue worthy of consideration is the language employed to describe fetal tissue research. Some ethicists have suggested altering the language of ‘gift’ and ‘donation’ in reference to the fetus, to the more accurate description of ‘contribution’.<sup>2</sup> Such precise conceptual designations may in the future assist in policy formulation.

The concept of instrumentalism will almost always be a cause for suspicious moral concern; for the use of others is not something to be taken lightly. But as our analysis has shown, instrumentalism is a practice that admits of degrees, thus we may consider some uses of others morally acceptable. Fetal instrumentalism in medical research is one such practice.

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<sup>2</sup> Kathleen Nolan, “*Genug ist Genug: A Fetus Is Not a Kidney*”, *Hastings Center Report*, December 1988, p. 15.

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