

NOTE

DEFENDING AMERICA'S CHILDREN: HOW THE CURRENT SYSTEM GETS IT WRONG

I. INTRODUCTION

The United States prides herself on recognizing the individual rights of every citizen. Americans are shocked by the treatment of women in Afghanistan, Saudi Arabia, and other foreign countries; they are embarrassed by their nation's own history of slavery and female disenfranchisement. Americans consider themselves superior in this respect; they have risen above these injustices and now inhabit a modern society that should be the envy of and blueprint for the rest of the world.

Despite these advances, the United States is not doing a very good job protecting the rights to life, liberty, and the pursuit of happiness of this nation's children, who lack the capacity to defend their rights on their own.¹ Every day, thousands of children are beaten, starved, abandoned, and sexually abused. Courts and social services try to step in when they can, and when society hears of the most horrific cases, individuals are quick to express their outrage and anger. Nevertheless, the same situations are perpetrated again and again. In a nation that seems so dedicated to honoring the individual rights of each and every human being, why do so many adults feel entitled to treat children this way?

This Note will explore the connection between the mistreatment of children and the dehumanization of unborn children,² and will argue that both wrongs stem from the misguided premise that human lives only deserve constitutional rights once a set level of development is reached. True recognition of the civil rights of children will not meaningfully progress until America learns to value children at all stages of development. Part II of this Note will explore how the Supreme Court's abor-

1. *See infra* Part III.B.

2. Because I believe the term "fetus" has been used by both courts and abortion-rights advocates to remove the personhood from the developing entity, I will use the term "unborn" to refer to that developing life.

tion cases have denied the personhood of unborn children, therefore failing to give the developing life any individual consideration separate from the governmental interests involved. Part III will examine cases in which courts have undervalued children by focusing on state and parental rights, rather than the individual child's interests. This section will also outline two of the most serious ways in which such a scheme has negatively affected our children: child abuse and infanticide. Part IV will discuss the connection between the lack of personhood afforded unborn children and the dearth of judicial consideration of individual children's rights. Finally, Part V will offer an alternative framework, one that explicitly recognizes the innate right of all individuals to have their existence recognized and honored by the government and courts. Although this new framework might not change the outcome of many children's-rights or abortion cases, by giving explicit acknowledgment to the individual rights of every human life and considering these rights in the balancing process, courts will reaffirm the honor and dignity of every individual, a change that would benefit not only children, but everyone in society.

II. ABORTION AND THE SUPREME COURT: WOMEN VERSUS THE STATE

A. *Child or Choice?*

The Supreme Court's abortion decisions, even though impacting the lives, or potential lives,³ of unborn children, cast the central issue as the woman's right to choose whether to bear a child versus the state's right to protect potential life.⁴ The un-

3. See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (characterizing the unborn child as "potential life").

4. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("First is a recognition of the *right of the woman* to choose to have an abortion before viability and to obtain it without undue interference from the State. . . . Second is a confirmation of the *State's power* to restrict abortions after fetal viability, if the law contains exceptions for . . . the woman's life or health. And third is the principle that the *State has legitimate interests* from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."); *Roe*, 410 U.S. at 154 ("[T]he right of personal privacy includes the abortion decision, but . . . this right is not unqualified and must be considered against important *state interests* in regulation."); *id.* ("[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.") (all emphases added).

born child's right to maintain his life does not enter the equation because the developing entity, as the *Roe v. Wade* Court asserted, is simply not a person within the meaning of the Constitution.⁵ The *Roe* Court sidestepped the difficult matter of considering the humanity of that subpopulation's constituent members, instead reducing the question to one of state power.

After arriving at the biologically anomalous determination that an unborn baby is not a person,⁶ the Court determined exactly when the unborn should be worthy of protection, setting deadlines and drawing boundaries between when life should be protected and when it should be disposable by the person the *Roe* Court referred to as the mother.⁷ The Court concluded that for the first three months after conception, the unborn baby can be destroyed without any state oversight.⁸ For the next three months, the state may take an interest in the lives of only its adult citizens. Regulations designed to protect the life and health of the adult woman are permitted, while measures aimed at saving the unborn life remain unconstitutional.⁹ Only after a full six months of growth and development may the state protect the unborn child.¹⁰ Thus, the Court not only accepted but mandated the conclusion that lives become worthy of institutional respect only after a certain judicially determined point of development. Moreover, even when the state is permitted to proactively protect unborn life, states have no

5. *Roe*, 410 U.S. at 158 (“[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”).

6. For a brief summary of several medical texts' opinions on when life begins, see *Nealis v. Baird*, 996 P.2d 438, 453 n.69 (Okla. 1999). The Court's refusal to acknowledge medical evidence on when life begins suggests to many a desire to avoid the issue entirely. See STAFF OF S. COMM. ON THE JUDICIARY, 97TH CONG., REPORT ON THE HUMAN LIFE BILL (Comm. Print 1981) (containing Senator East's submission from the Subcommittee on Separation of Powers).

7. See *Roe*, 410 U.S. *passim*. It is curious that the Court finds that the woman is a mother, but does not acknowledge that any child exists.

8. *Id.* at 164 (“For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.”).

9. *Id.* (“[S]ubsequent to . . . the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.”).

10. *Id.* (“[S]ubsequent to viability, the State in promoting its interest . . . may, if it chooses, regulate, and even proscribe, abortion except where it is necessary . . . for the preservation of the life or health of the mother.”) (emphasis added).

duty to defend viable fetuses, as the unborn child has no individual right to protection.

Nineteen years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹¹ the Court altered its delineation of when life has enough meaning to merit state protection, but did not deviate from the fundamental framework of valuing human existence based on an entity's developmental stage.¹² Although acknowledging that states have legitimate interests in protecting the life of the unborn infant from conception onward,¹³ the idea that rights change based on gestational age was reiterated, this time with the focus on viability.¹⁴ Additionally, the Court again failed to recognize any independent right of the unborn baby to have his life interests considered and balanced by the courts. The precise formula changed somewhat, as the state's interests can be implemented earlier, but rights of the unborn child remain absent from the equation.

B. Women Versus Children?

Regardless of the interests of the unborn, some argue that abortion is necessary for women's equality. Similar to courts' presentation of the abortion debate as one of women's autonomy versus state power, abortion-rights groups often frame the issue as female freedom versus fetal existence. When the developing fetus is not considered a human life,¹⁵ the answer appears simple: Human freedoms should always trump non-human concerns, so women's interests should govern, and access to abortion must be open and unfettered. A closer analysis of the facts, however, calls this conclusion into doubt; even if one accepts the premise that the fetus is not a human life, the correct result may not be so straightforward.

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

12. *Id.* at 870 (abandoning *Roe's* trimester framework in favor of viability alone).

13. *Id.* at 846 ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.").

14. *Id.* (describing the opinion as "a recognition of the right of the woman to choose to have an abortion *before viability*" and "a confirmation of the State's power to restrict abortions *after fetal viability*") (emphasis added).

15. See, e.g., Brief of Appellants at 119, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18) ("[A]n unborn fetus is not a 'human being.'").

In direct opposition to the founders of the feminist movement,¹⁶ abortion advocates now insist that abortion-on-demand is a central tenet of feminism, necessary to accomplish true gender equality.¹⁷ They claim not to be in favor of abortions per se, but instead argue that access to abortion is necessary to protect women.¹⁸ Thirty-three years after *Roe*, however, many women now see that their liberation brought much greater costs than anyone ever imagined. Aside from physical complications such as increased risk of infertility, ectopic pregnancies, sterility, miscarriages, and breast cancer,¹⁹ clinical research now shows that severe psychological complications can result from having an abortion.²⁰ As technology advances, women are now able to see the tiny bodies of their unborn children, and many post-abortive women come to realize that it was not merely a so-called lump of tissue that they excised from their bodies, but a human being, with tiny hands, feet, and eyes.²¹ Still, pro-choice groups continue to fight informed-consent rules surrounding abortions, insisting that such information is coercive;²² they would have a woman remain ignorant, not realizing the potential harms until after it is too late for both the mother and un-

16. For a discussion of the pro-life attitudes of feminists like Elizabeth Cady Stanton, Susan B. Anthony, and Mary Wollstonecraft, see *Feminists for Life of America*, *Feminist History* (2004), <http://www.feministsforlife.org/history/index.htm>.

17. See, e.g., Claire Pomeroy, *Redefining Public and Private in the Framework of a Gendered Equality*, http://serendip.brynmawr.edu/sci_cult/courses/knowbody/f04/web3/cpomeroy.html (last visited Jan. 13, 2006).

18. See NARAL, *Choice: Defending a Fundamental American Freedom*, <http://www.naral.org/generation/faq.cfm#q6> (last visited Jan. 13, 2006).

19. For a full discussion of physical complications and side effects of abortion, see Nat'l Right to Life Comm., *Is Abortion Safe?: Physical Consequences*, <http://www.nrlc.org/abortion/ASMF/asmf13.html> (last visited Jan. 13, 2006).

20. For example, in congressional hearings on the impact of abortion, psychologist Wanda Franz, Ph.D. testified to clients' nightmares of children calling to them from trashcans full of blood and body parts. *Medical and Psychological Impact of Abortion: Hearing Before the Subcomm. on Human Resources and Intergovernmental Relations of the H. Comm. on Government Operations*, 101st Cong. 111 (1989) (statement of Wanda Franz, Ph.D., Vice President, Nat'l Right to Life Comm., on behalf of the Ass'n for Interdisciplinary Research in Values & Social Change).

21. See Mary Ann Castle, et al., *Listening and Learning from Women About Mifepristone: Implications for Counseling and Health Education*, 5 *WOMEN'S HEALTH ISSUES* 130, 132-33 (1995).

22. See Brief of Petitioners and Cross-Respondents at 8-9, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902); see also American Civil Liberties Union, *Biased Counseling Against Abortion* (April 11, 2001), <http://www.aclu.org/reproductiverights/abortion/16402res20010411.html>.

born baby. Moreover, many women now suffer from what has been termed “post-abortive syndrome,” characterized by extreme guilt and anxiety, drug and alcohol abuse, difficulty in personal relationships, sexual dysfunction, communication difficulties, damaged self-esteem, and even suicidality.²³ In fact, new organizations and publications have emerged to deal with the serious psychological complications facing post-abortive women and the tremendous guilt and shame they face because of their choices.²⁴

Besides ignoring the interests of the unborn child, courts also leave unexamined the real best interest of the women whose rights they attempt to protect. Because they deem it unnecessary to weigh the life interests implicated, and instead focus on autonomy, privacy, and state power, the difficult question of what might best serve all of the parties involved remains hidden. The issue is clouded behind rhetoric and broad assertions that the availability of abortion is a woman’s issue, making it difficult for politicians and legislatures to deal with the facts freely and openly. Ironically, by failing to challenge such generalized concepts as “women’s issues” or “female autonomy,” those who claim to stand up for the well-being of our society’s underprivileged and underrepresented may actually be doing the opposite; not only do they work against the life interests of the unborn by declaring them inhuman, but the widespread availability and acceptance of abortion may actually be harming the women they claim to help.²⁵

C. *The Next Step: Stenberg v. Carhart*²⁶

Since *Roe v. Wade*, perhaps no issue has so invigorated the pro-life movement as partial birth abortion. Far from the clan-

23. See NRLC, *Is Abortion Safe?: Psychological Consequences*, <http://www.nrlc.org/abortion/ASMF/asmf14.html> (last visited Jan. 13, 2006). One Finnish study investigating the severity of abortion’s psychological consequences found that the risk of suicide increases significantly in women of reproductive age following an abortion, even more so than after miscarriage. Mika Gissler et al., *Suicides After Pregnancy in Finland, 1987–94: Register Linkage Study*, 313 BRIT. MED. J. 1431 (1996), available at <http://bmj.bmjournals.com/cgi/content/full/313/7070/1431>.

24. See, e.g., *Hope After Abortion, Resources*, <http://www.hopeafterabortion.com> (last visited Jan. 13, 2006).

25. For a more thorough analysis of the negative impact of abortion on women, see generally ERIKA BACHIOCHI, *THE COST OF CHOICE* (2004).

26. 530 U.S. 914 (2000).

destine procedures accompanying early term abortions, these methods, known as D&E and D&X,²⁷ involve the destruction of something that looks almost identical to the newborns cherished in the labor and delivery section of the hospital. Procedures deemed to be a matter of fundamental right no longer result only in the destruction of unrecognizable embryos, but fully formed and developed half-born, or even fully born, children.

Dissatisfied with their inability to protect unborn children, several state legislatures, including that of Nebraska, enacted statutes criminalizing the most gruesome D&X procedures, which some liken to barbarous infanticide.²⁸ By 2000, however, the Court had become so entrenched in the idea that a baby who is not completely physically separated from the mother has no constitutionally protected rights, that it was unable to acknowledge the right of a state to protect an unborn child from an immensely painful procedure, though still allowing the woman to terminate the pregnancy by other methods. Without exceptions for the health and safety of the mother, the Court deemed laws aimed at protecting the dignity of the last few moments of the unborn child's existence unconstitutional.²⁹ The state is now prohibited from protecting the life of the unborn baby and also severely restricted from regulating the methods by which that life may be ended.

Unborn children are thus in a uniquely unprotected position. Most other living beings in our society, from rabid animals to serial murderers, are protected from this manner of death by torture or cruelty laws.³⁰ For example, drawing and quartering,

27. "D&E" refers to dilation and evacuation, a procedure where a doctor inserts forceps through the cervix to grasp parts of the unborn baby and then tears away these parts until the entire body is removed from the womb. *See id.* at 924–26. "D&X" refers to dilation and extraction, where the unborn child's body, up to the neck, is drawn feet first through the cervix; the doctor then inserts a sharp object into the skull, inserts a vacuum tube, and extracts the brain. The head contracts, and the intact body is removed from the woman. *See id.* at 927–29.

28. *See id.* at 982 (Thomas, J., dissenting) ("Today, the Court inexplicably holds that the States cannot constitutionally prohibit a method of abortion that millions find hard to distinguish from infanticide and that the Court hesitates even to describe."); *see also id.* at 954 (Scalia, J., dissenting) (characterizing the law struck down by the majority as humane and anti-barbarian).

29. *See id.* at 930.

30. *See, e.g.,* 18 U.S.C. § 2340 (2000) (criminalizing torture of human beings in one's custody or control); 7 U.S.C. § 2143 (2000) (establishing minimum standards for the humane treatment of animals).

a method of execution eerily similar to D&E abortions, was banned over a century ago as inhumane for a civilized society to inflict on criminals.³¹ Because unborn children do not have lives recognizable in a court of law, however, they are not granted Eighth Amendment or any other protections against cruel and unusual treatment.

This is not to say that the Court acted completely irrationally in *Stenberg* or in other abortion cases. Indeed, valid interests and considerations exist on both sides of the various debates. The problem, however, is in the Court's refusal to acknowledge all of the interests at stake. Women's bodily autonomy and desire to choose, along with their doctors, the most appropriate medical procedures, are important and valuable concerns, as the Court acknowledges.³² By failing to recognize the life and dignity rights of the half-born child involved in a D&X abortion, however, the Court does far more than decide against those interests; it denies that such interests even exist. Were the Court to say that autonomy and medical privacy were more important than the half-born child's right to be free from excess pain, many would still disagree. But at least the Justices would be acknowledging the interests of the unique entity involved, rather than viewing the unborn child as a thing that the state has a potential interest in protecting, but deserving no protection in its own right.

III. THE INVISIBLE CHILD

A. *Children's Rights: Parents Versus the State*

Family courts claim to be guided by the ever-present "best interest of the child" rule,³³ but although the nebulous standard is often discussed, it is rarely conclusive. Instead of asking questions such as what the child would want or what would best serve the child, courts repeatedly frame the key issues in ways that bury the child's own concerns, with final outcomes usually based on either parental or state interests. Similarly to the way in which the rights of pregnant women and the state receive

31. The penalty, originally ordained in England for treason, was outlawed in 1870. Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 855-56 (1969).

32. See *Stenberg*, 530 U.S. at 931-32.

33. See, e.g., *In re Nancy*, 822 N.E.2d 1179, 1182 (Mass. 2005).

prime focus in the abortion context to the virtual exclusion of the unborn child's interests, these family court cases focus on the interaction between the rights of parents to control the upbringing of their children and the rights of the state to pass rules it believes will lead to a better society. Which side accurately reflects the child's actual best interest, if either side does, is too often left unanswered.

For example, in *Meyer v. Nebraska*,³⁴ one of the first Supreme Court cases to address what limits the state might place on parental freedoms, the Court held that a law prohibiting teaching German to elementary school children unconstitutionally interfered both with educators' right to teach and parents' right to direct the education of their children: "[The teacher's] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth A]mendment."³⁵ The child's corresponding right to learn German did not play a significant role in the outcome. Similarly, although the Court considered the state's interest in English becoming the primary language for all children reared in Nebraska,³⁶ it ignored children's interests in becoming successfully integrated into their society.

A nearly identical analysis emerged two years later in *Pierce v. Society of Sisters*,³⁷ where the Court held that Oregon could not require children to attend public schools because that requirement would interfere with private schools' ability to sustain their businesses and the obstruction of parents' right to educate their children in the manner they deem fit.³⁸ The Court did acknowledge the presence of a third party, but the role given to the child remained tangential, focused only on the child's right to influence the parent's decision,³⁹ as opposed to a

34. 262 U.S. 390 (1923).

35. *Id.* at 400.

36. *See id.* at 398 ("The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state.").

37. 268 U.S. 510 (1925).

38. *See id.* at 534–35.

39. *Id.* at 532 ("[T]he Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the *right of the child to influence the parents' choice* of a school, [and] the right of schools and teachers therein to engage in a useful business or profession . . .") (emphasis added).

right to have his specific interests or desires considered as a separate constitutional matter. The question of whether children have an independent interest in attending a school that meets their various educational and social needs not only went unanswered, it went unasked. A possible response to this apparent omission is that parents are in the best position to determine what schooling is most appropriate for their children, making an explicit right of the child unnecessary. This response, however, further confuses the issue. An independent assessment of the child's best interest is most necessary when children's needs do not overlap entirely with their parents' decisions. Children are put at the most severe risk when parents are unable or unwilling to give due consideration to their children's best interest when making decisions regarding their upbringing, but if courts refuse to acknowledge the possibility that those interests may diverge, children will be unable to challenge parental choices that could have devastating effects on their well-being and future.

Two decades later in *Prince v. Massachusetts*,⁴⁰ the Court ruled that although a parent or guardian must have freedom to raise his children as he sees fit, the state can limit that liberty if its objective is the protection of children, in this case through child labor protections.⁴¹ The Court gave more attention to the individual child, but the principal frame of discussion remained unchanged: It is not the child's right to be safe, but the state's interest in keeping him safe that matters.⁴² Had the state not acted to make the sale of periodicals by children illegal, the child in *Prince* would have no right to remain free from the form of labor forced upon her by her guardian. Thus, the Court succeeded in realizing that children's well-being is not necessarily identical to parental decisions, but still failed to recognize the independent interests of children. Only when the state claims an injury from the mistreatment of children may parental determinations be disputed; children have no individual right to challenge harmful parental determinations should the state not decide to intervene and legislate on their behalf.

40. 321 U.S. 158 (1944).

41. *See id.* at 166–67.

42. *Id.* at 165 (“Against these [parental rights and religious freedom] interests, basic in a democracy, stand the *interests of society* to protect the welfare of children”) (emphasis added).

*Wisconsin v. Yoder*⁴³ finally tackled the question of whether children should have unique liberty interests separate from those espoused by their parents or the state, though only in a dissenting opinion. In a case dealing with a parent's ability to defy state educational requirements for religious reasons, Justice Douglas criticized the majority for framing the issue as parent-versus-state without directly dealing with either the free exercise or educational rights of the teenage children involved.⁴⁴ According to the dissent, the religious freedom issue was not solely, as the majority professed, whether parents should have the right to direct their children's religious upbringing as they saw fit, but also whether those children should have the right to pursue the religious tenets of their own choice.⁴⁵ According to Justice Douglas, "these children are 'persons' within the meaning of the Bill of Rights,"⁴⁶ and as such, their right to forego state-mandated educational requirements that conflict with their religious beliefs should be considered. The same argument for inclusion of children's individual rights could have been made when framing the state's interest. Instead of asking only whether the state could constitutionally require all children to obtain a certain level of education, the Court could have asked whether children have a unique liberty interest in becoming educated, regardless of their parents' wishes. Both these modes of analysis, however, escaped serious discussion by the majority. Instead, the parent-state dichotomy received more attention, with children once again caught in an invisible middle ground.

The parent-state analysis is not merely a judicial artifact. In 2000, the Supreme Court again failed to consider explicitly children's individual interests when deciding a case with direct impact on the children's lives. *Troxel v. Granville*⁴⁷ dealt with the constitutionality of a Washington statute permitting anyone to petition a court for child visitation, regardless of a parent or

43. 406 U.S. 205 (1972).

44. *See id.* at 241 (Douglas, J., dissenting).

45. *Id.* ("The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.")

46. *Id.* at 243.

47. 530 U.S. 57 (2000).

guardian's approval of contact with that individual, and allowing a court to grant visitation simply by finding it in "the best interest of the child."⁴⁸ Ruling that such a scheme unduly interferes with the due process rights of parents to make decisions concerning the care, custody, and control of their children, the Court found the statute unconstitutional.⁴⁹ Because the statute did not require that the child's guardians first be deemed unfit, the presumption that the parents were acting in their child's best interest was not rebutted;⁵⁰ therefore, an independent judicial analysis and decision of what is best was unwarranted.

The problem presented by *Troxel* is not so much the outcome as the process by which the Court's decision was rendered. As Justice Stevens pointed out in his dissent, the Court applied a bipolar balancing test of parent versus state in deciding who should have the final authority to determine a child's best interest.⁵¹ Missing from the majority's analysis was the child, the very person whose interests and well-being were impacted by each decision made under the Washington law. The Court failed to consider the possible interest a child might have in preserving various relationships with non-parent adults.⁵² The other side of the *Troxel* question could similarly be framed in children's-rights terms. For example, the Court could have acknowledged that it might not be in a child's best interests to have too many parent-like relationships because of the disruption in their lives caused by judicial hearings, disagreements between caregivers, or enmity among adults.⁵³ By recognizing only the decisional rights of fit parents and ignoring possible corollary rights of children, the Court reaffirmed the perception that children are property, not unique entities to be factored into judicial balancing tests.⁵⁴

It must be emphasized, however, that there are legitimate reasons why a court may not wish to rely too heavily on chil-

48. WASH. REV. CODE ANN. § 26.10.160(3) (West 2005).

49. See *Troxel*, 530 U.S. at 66–67.

50. *Id.* at 68.

51. See *id.* at 86 (Stevens, J., dissenting).

52. See *id.* at 88–89.

53. See Laurence C. Nolan, *Beyond Troxel: The Pragmatic Challenges of Grandparent Visitation Continue*, 50 DRAKE L. REV. 267, 283–84 (2002).

54. See *Troxel*, 530 U.S. at 86 (Stevens, J., dissenting) (arguing that it is improper to presume that parents will always act in their children's best interests because "even a fit parent is capable of treating a child like a mere possession").

dren's decisions or preferences. The unworkability of a system where children may challenge parental determinations argues strongly in favor of parental deference. When the Court fails to recognize that children have interests independent of the state and their parents, though, it misses the opportunity to include such factors in the balancing tests. Although inclusion of children's independent interests may not change the outcomes of many cases, such a recognition could change the way courts, and eventually society, regard children. Rather than deeming them entities to be dealt with as property by parents and the state, society could begin to take broader steps toward recognizing children as unique persons in a constitutional sense.

B. Child Maltreatment

Although legislatures have been proactive in protecting children's safety and security rights through child maltreatment laws,⁵⁵ child abuse and neglect nonetheless remain omnipresent threats to society's most vulnerable members.⁵⁶ When judges rule on children's issues without expressly discussing and considering the unique claims of the children involved, they send a message that children are property rather than unique and precious persons with the same interests in life, liberty, and happiness as their adult caregivers. When adults share this view, it is not only children's freedom that suffers, but also children's safety. Unfortunately, in a variety of contexts, parents and other adults act on the idea that children are less than full persons and exist at the mercy of those in authority over them. This section will briefly discuss two of the most severe dangers that America's children face at the hands of the adults who are expected to protect them: physical abuse and infanticide.

1. Physical Abuse

Few crimes have a more directly adverse effect on children than physical abuse from their parents or guardians. Even in these instances, however, children's rights to remain free from

55. See, e.g., 42 U.S.C. § 5101 (2000) (establishing the federal Office of Child Abuse and Neglect); 42 U.S.C. § 13031 (2000) (federal child abuse reporting law).

56. For a detailed analysis of the prevalence and severity of child abuse in this country, see ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 61-65 (1999).

pain and suffering often take a back seat in court to parental freedoms and state police power. For example, in *In re Juvenile Appeal*,⁵⁷ the Connecticut Supreme Court ruled that it was a violation of a mother's procedural due process rights to lose temporary custody of her children following the suspicious death of their sibling, applying only a fair preponderance of the evidence standard rather than the higher clear and convincing evidence standard.⁵⁸ The court found it must look with strict scrutiny at any situation denying parents control over their children for any length of time, even when the state has a legitimate reason, such as a sibling's possible murder, to fear for the lives of those children. Instead of discussing the children's right to live in a safe environment, the court lumped their interests into a vague discussion of family integrity, completely intertwined with the rights of their parents.⁵⁹ Children's separate right to live in safety and to have that safety proactively protected by the state was not considered. Perhaps it is in children's best interest to have a heightened level of scrutiny attached to temporary custody terminations, as the use of this standard may minimize disruptions in their lives. The court's failure to consider these interests specifically in a manner divorced from parental rights and autonomy, however, gives the impression that children's happiness and well-being are not the guiding factor, or even a significant factor, in some child custody cases.

Even when children look like young adults, courts still may refuse to recognize their rights to be protected from pain and suffering. For example, in *Chronister v. Brenneman*,⁶⁰ after a father whipped his sixteen-year-old daughter across the buttocks with a folded belt as punishment for lying, a Pennsylvania appellate court held that the trial judge impermissibly infringed

57. 455 A.2d 1313 (Conn. 1983).

58. *Id.* at 1323.

59. *Id.* at 1318 ("[T]he right to family integrity is not a right of the parents alone, but encompasses the reciprocal rights of both parents and children. It is the interest of the parent in the companionship, care, custody and management of his or her children, and of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association, with the parent. This right to family integrity includes the most essential and basic aspect of familial privacy—the right of the family to remain together without the coercive interference of the awesome power of the state.") (citations omitted).

60. 742 A.2d 190 (Pa. Super. Ct. 1999).

on parental freedom by making a judicial finding of abuse and ordering the father not to continue his conduct.⁶¹ Parental liberties receive such deference that even judicial disapproval of punishment causing physical pain may be considered improper.

Although many find the issue of corporal punishment troublesome, situations like *Chronister* barely scratch the surface of the problem. In this country nearly three million cases of child abuse and neglect are reported each year,⁶² up from an estimated 167,000 in 1973, the year *Roe v. Wade* was decided.⁶³ Over 550,000 children languish in foster care⁶⁴ because of abuse, neglect, or abandonment at the hands of parents who could not or did not draw the line that courts seem so loath to delineate: the line separating appropriate parental discipline and unacceptable abuse.

When abuse happens, the state will often try to intervene, but it is questionable whether courts provide what children deserve. Even if children are saved from violent and abusive families, too many children end up in a stream of foster homes or group shelters, unable to find a family they can call their own.⁶⁵ Children who have been rightfully removed may be denied even the chance at a new family because the Supreme Court has ruled that protection of parents' due process right to maintain control over their children is more important than either the state's or the child's interest in breaking ties with an abusive or neglectful parent.⁶⁶ Furthermore, if the state does nothing to protect a child it knows to be at risk, the child will

61. *See id.* at 193.

62. Shari Shink, *Justice for Our Children: Justice for a Change*, 82 DENV. U. L. REV. 629, 629 (2005).

63. RANDY ALCORN, PRO-LIFE ANSWERS TO PRO-CHOICE ARGUMENTS 143 (1992).

64. Timothy Roche, *The Crisis of Foster Care*, TIME, Nov. 13, 2000, at 74.

65. *See* BARTHOLET, *supra* note 56, at 81-97.

66. *See Santosky v. Kramer*, 455 U.S. 745 (1982) (ruling that, even when the child is no longer in the custody of the biological parent, a preponderance of the evidence standard of proof is not constitutionally sufficient in parental termination proceedings). *Santosky* also reiterates the Court's use of a parent-versus-state framework in analyzing child custody decisions, characterizing the interests in favor of a lesser standard of proof as the state's interests in protecting the child and in fiscal and administrative convenience, not the child's interest in severing ties with an abusive parent or forming a new and permanent parental relationship with loving adults. *Id.* at 766.

have no remedy against the state.⁶⁷ In short, the Court holds that the state does not owe anything to children; it might take action, but if it decides not to, the child has no recourse. And even when the state does intervene, court rules and limitations will often stifle the ability of the system to make a real difference,⁶⁸ as courts will defer to parents' interests, rather than the child's right to be in a safe environment and loved and nurtured by a consistent and stable family.

2. *Infanticide*

At the very least, murder of an infant should present an easy case in which to recognize the full personhood of the child. Because of the status of the victim and his relationship to the offender, however, infanticide and neonaticide⁶⁹ are frequently treated as fundamentally different from other murders.⁷⁰ Advocates of differential treatment of infanticide argue that unfair societal expectations of mothers are to blame for these crimes, rather than the women committing them.⁷¹ The fact that the victimizers are in the unique position of having to care for these babies, advocates argue, militates in favor of lesser punishment when they take the life of a human being who has no one else on whom to rely.⁷²

Some cases of neonaticide and infanticide generate remarkable media and public outrage,⁷³ falsely suggesting that these

67. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (holding that a child severely injured by a biological parent has no recourse against the state for failure to protect, even when the state was already involved in the child's case).

68. See, e.g., *Santosky*, 455 U.S. at 747–48 (insisting on a heightened standard of proof for permanent parental termination); *In re Juvenile Appeal*, 455 A.2d 1313, 1317–18 (Conn. 1983) (requiring a fair preponderance of evidence standard even for temporary removal).

69. Neonaticide refers to children murdered within twenty-four hours of birth. Infanticide refers to infants murdered after the twenty-four-hour mark.

70. See, e.g., Michelle Oberman, *Understanding Infanticide in Context: Mothers Who Kill, 1870–1930 and Today*, 92 J. CRIM. L. & CRIMINOLOGY 707, 708 (2002); see also Christine A. Fazio & Jennifer L. Comito, Note, *Rethinking the Tough Sentencing of Teenage Neonaticide Offenders in the United States*, 67 *FORDHAM L. REV.* 3109 (1999).

71. See Oberman, *supra* note 70, at 708.

72. See Fazio & Comito, *supra* note 70, at 3110.

73. See Kevin Rothenstein, *A Crime Driven by Fear; Experts: Killing Baby a Desperate Act*, *PATRIOT LEDGER*, June 14, 2002, at 1, for a discussion of several notorious cases, including the so-called Prom Mom, who disposed of her newborn baby in a trashcan during her senior prom, returning to the dance only minutes later. De-

cases are dealt with in a swift and severe manner. The majority of such cases, however, remain hidden and are treated as something other than true murder. In many cases, charges are never filed against mothers who kill very young infants; when such mothers are prosecuted, it is not uncommon for sentences of probation to be preferred over prison.⁷⁴ In many developed nations, there are even separate statutes governing the murders of very young children, mandating that they be treated only as manslaughters, with probationary sentences and counseling as punishment for the death of a child.⁷⁵ Among countries with specific laws governing infanticide, all but one define it as something less than murder.⁷⁶ This is not to suggest that legislatures and courts do not view these deaths as something to be mourned, but the refusal to treat these cases like other intentional homicides suggests a view that something other than a full life was taken.

It is undeniable that there are potential psychological defenses that justify reduced charges or sentences in many of these cases. Moreover, public outrage should never dictate the sentence someone receives, no matter how horrifying the crime. The widespread diminishment of penalties, however, suggests that the legislative and judicial response to neonaticide and infanticide is owed not to an individualized assessment of the mothers' culpability based on mental state, but rather to an institutional sense that the lives of the very young are not worth as much as adult lives.

spite the media blitz and public outrage the case generated, the Prom Mom, Melissa Drexler, served only thirty-seven months of a fifteen-year term for manslaughter. Karen Demasters, *Briefing: The Law; "Prom Mom" Released*, N.Y. TIMES, Dec. 2, 2001, § 14, at 6.

74. See Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 AM. CRIM. L. REV. 1, 25–26 (1996); see also *id.* at 17 (“Western history reveals that, in spite of the moral turbulence infanticide generates, communities have withheld harsh punishment from most mothers who kill their infant offspring.”).

75. See *id.* at 17–19.

76. *Id.* at 18 & n.68 (citing laws from Luxembourg, which is the one exception with an increased penalty for the killing of children, and from Austria, Colombia, Finland, Greece, India, Italy, Korea, New Zealand, Turkey, New South Wales, Western Australia, and Tasmania).

IV. WHEN PRIVACY GOES TOO FAR: THE OVERLAP BETWEEN CHILD ABUSE AND ABORTION

Where do the boundaries of protectable human life lie? *Stenberg* tells us that a child partially within a woman is not a human life necessarily worthy of judicial protection.⁷⁷ The judicial treatment of many child abuse and infanticide cases indicates that newly born lives will not be valued as highly as older children and adults by the criminal courts. This inequality of treatment raises several questions: If the point at which personhood begins is continually changeable,⁷⁸ what is to prevent a doctor from believing the disposability of a child extends a few minutes after live birth? If a child is born prematurely, after a mother makes an abortion decision, but before she can fulfill her wishes, is that child a person under the law? Pro-life advocates have long argued that physical delivery is an arbitrary demarcation of where life begins,⁷⁹ and now pro-choice groups have joined this rallying cry. For example, in *Planned Parenthood of Central New Jersey v. Farmer*,⁸⁰ the Third Circuit Court of Appeals accepted an argument by one of this nation's leading abortion providers⁸¹ that a child's legal right to life does not depend solely on the baby's location in relation to the mother, but instead on the mother's intentions.⁸² Although the child is often completely outside of the mother except for the head in a procedure the New Jersey legislature attempted to outlaw, the court refused to acknowledge that birth was occur-

77. *Stenberg v. Carhart*, 530 U.S. 914, 923 (2000) (characterizing the half-born child as only potential human life).

78. Personhood begins at six months after conception under *Roe*, five and one-half months after conception (dependent on medicine's ability to save premature babies) under *Casey*, and, in some cases, nine months after conception under *Stenberg*.

79. See, e.g., Brief of Catholics United for Life et al. as Amici Curiae Supporting Respondents and Cross-Petitioners at 11, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902) ("[H]istory, science, logic, law, and justice all militate against the imposition of any such arbitrary limitation on personhood as birth or viability.").

80. 220 F.3d 127 (3d Cir. 2000) (finding New Jersey's partial birth abortion ban unconstitutionally vague and also impermissible because of the undue burden it placed on a woman's right to choose an abortion).

81. See Hans Zeiger, *The Living Industry of Death*, WORLDNETDAILY, Dec. 16, 2003, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=36163.

82. *Farmer*, 220 F.3d at 144 (holding that the right to a particular abortion procedure "should [not] turn on where in the woman's body the fetus expires," even when the child has already passed through the woman's cervix).

ring because “[a] woman seeking an abortion is plainly not seeking to give birth.”⁸³ Thus, whether a human life or even human birth exists depends not on physical location, but entirely on the mindset and intent of the mother.

In cases defining a child’s life by the wishes of a parent, the door to disaster is opened by the espousal of a belief that children exist only at the mercy of those more powerful. This danger is especially profound given the statistics surrounding child abuse.⁸⁴ A framework that gives the impression that children farther along in development are more worthy of rights and judicial protections puts those already in the greatest jeopardy in even more serious danger. Infants and very young children are at the highest risk of being seriously abused and even killed by their parents and caregivers,⁸⁵ suggesting a need to place heightened importance on the life and safety rights of children at earlier stages of development, instead of delaying such rights until later in their lives.

Some might argue that abortion is fundamentally different from the abuse and neglect of born children, given the special importance of women’s bodily autonomy. This argument has some merit, particularly in light of the Supreme Court’s high level of respect for privacy in situations dealing with sexual freedom and procreation.⁸⁶ It is a similar judicial tradition, however, that puts born children at grave risk; the Court often gives the same level of deference to privacy in personal homes as it does to privacy in the body.⁸⁷ As most children are abused

83. *Id.* at 143.

84. For a detailed summary of child abuse statistics, see BARTHOLET, *supra* note 56, at 61–65.

85. *Id.* at 63.

86. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding Texas’s sodomy prohibition unconstitutional); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (finding that the right to personal privacy includes the abortion decision); *Griswold v. Connecticut*, 381 U.S. 479, 481, 485–86 (1965) (finding that a ban on the sale of contraceptives violates due process rights); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (declaring forced sterilization of certain criminals a violation of the Equal Protection Clause).

87. See, e.g., *Lawrence*, 539 U.S. at 562 (“In our tradition the State is not omnipresent in the home.”); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (finding that the use of a thermal-imaging device aimed at a private home constitutes a search within the meaning of the Fourth Amendment); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (upholding an ordinance against residential picketing targeted at a particular residence as applied to pickets aimed at an abortionist’s home, with the Court observing that “privacy of the home is certainly of the highest order in a

and neglected within their own homes,⁸⁸ reason suggests that we should not be afraid to question areas into which courts have traditionally been loath to go when children's lives are at stake. "It's my body!" and "It's my house!" express the same type of privacy sentiment, with the most vulnerable children victimized in both locations. Privacy is undoubtedly important and should not be abandoned as a key American value. In the context of a child's well-being, however, this country is doing its children a disservice by making certain areas completely off limits to legislatures and courts. Born children are at particular risk because they are within the privacy of the home just as unborn children are at special risk because they are within the privacy of the woman's body.⁸⁹

Moreover, the link between abortion and child abuse is more than purely speculative. Although the research is not extensive, some studies suggest that women who have had induced abortions are more likely both to physically abuse subsequent children⁹⁰ and to use alcohol and drugs during later pregnancies.⁹¹ Additionally, anecdotal evidence suggests that increased anger, depression, self-hatred, and substance abuse linked to abortions can manifest themselves negatively toward future children.⁹² The evidence is too scant to show a causal connection, but it does suggest that there are real interests at stake beyond privacy and state power that deserve our attention. Most courts, however, continually frame the issue in terms of the relative rights of adults, ignoring opportunities to consider the

free and civilized society") (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (holding that while a state can prohibit the sale of obscene pornography, it cannot criminalize the possession of such material in one's private home).

88. Lesa Bethea, *Primary Prevention of Child Abuse*, 59 AM. FAM. PHYSICIAN 1577, 1578 (1999), available at <http://www.aafp.org/afp/990315ap/1577.html>.

89. In addition to the risk of abortion, unborn children face significant dangers from in utero drug, alcohol, and tobacco exposure. See BARTHOLET, *supra* note 56, at 69–73.

90. Philip G. Ney, *Induced Abortion and its Relationship to Child Abuse and Neglect*, ASS'N FOR INTERDISC. RES. IN VALUES AND SOC. CHANGE RES. BULL., Spring 1991, http://www.lifeissues.net/writers/air/air_vol4no1_1991.html.

91. Priscilla K. Coleman et al., *A History of Induced Abortion in Relation to Substance Use During Subsequent Pregnancies Carried to Term*, 187 AM. J. OBSTETRICS & GYNECOLOGY 1673 (2002).

92. See D. REARDON, *ABORTED WOMEN, SILENT NO MORE* 129–30 (1987) (containing anecdotes of several women's post-abortive struggles, including difficulties in raising subsequent children).

rights and well-being of children. The outcome of this blind-eye treatment is largely unknown, but once again, it is children who suffer the brunt of judicial neglect.

V. VALUE IN EACH LIFE: AN ALTERNATIVE FRAMEWORK

The trend of disrespect for early life is not all one-sided. Undeniably, important steps are being taken toward greater recognition and respect for young lives by a Congress motivated, in part, by frustration with judicial refusals to value and protect human life.⁹³ For example, the Born Alive Infant Protection Act of 2002 mandates that children who survive an abortion procedure be treated as full persons under all federal laws.⁹⁴ The Unborn Child Pain Awareness Act is pending before both houses of Congress; it would require abortionists to inform women seeking abortions after twenty weeks of gestation about the capacity of the unborn child to experience pain and offer those women anesthesia for the baby before the abortion procedure.⁹⁵ These modest measures could ensure that, in some instances, the unborn child's life will be treated as unique and separate from the interests of the mother, but both are too recent (the latter remains unenacted) for it to be possible to know whether they will have any meaningful impact. Similar measures aimed at protecting disabled newborns from medical neglect, known as Baby Doe Legislation, have been on the books for about two decades, and it is questionable whether they have had any real impact or effectiveness.⁹⁶ Additionally, these new measures may not survive judicial scrutiny.⁹⁷

93. See, e.g., 150 CONG. REC. S6443-44 (daily ed. June 3, 2004) (statement of Sen. Brownback).

94. Pub. L. 107-207, 116 Stat. 926 (codified at 1 U.S.C. § 8 (Supp. 2005)).

95. S. 51, H.R. 356, 109th Cong. (2005).

96. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 1007 (2d ed. 2002). See also Mary Crossley, *Infants with Anencephaly, the ADA, and the Child Abuse Amendments*, 11 ISSUES L. & MED. 379, 380 (1996) (stating that Baby Doe Legislation has "received relatively little judicial or scholarly attention, and as a result its application remains something of a question mark"); Steven R. Smith, *Disabled Newborns and the Federal Child Abuse Amendments: Tenuous Protections*, 37 HASTINGS L.J. 765, 818-21 (1986) (suggesting that disabled children have privacy interests separate from their parents, and those interests should be protected by more concrete standards and judicial review).

97. An earlier attempt by Congress to severely limit partial birth abortions through the Partial-Birth Abortion Ban Act of 2003, Pub. L. 108-105, § 3(a), 117 Stat. 1206 (codified at 18 U.S.C. § 1531 (Supp. 2005)), has been declared unconsti-

Presuming its constitutionality and impact, such legislation could enhance societal value of all human life apart from adult or state interests. Courts must also fundamentally change the way they approach cases involving children and infants, whether born, half-born, or unborn. In all cases dealing directly with the future and well-being of children, the best interest of the child should be addressed and evaluated in detail. The specific ramifications of each course of action should be discussed, and the likely impact on children, born or unborn, should receive a prominent place in any balancing the courts attempt among competing interests. This proposal is not, however, as radical as the criticism of so many court decisions may make it appear.

It is quite plausible that this framework will not change the outcome of many cases. For example, a court could find that limiting the number of people who can pursue visitation is in the child's best interest, and *Troxel*⁹⁸ would remain correct. Similarly, a court might determine that, given children's interest in remaining free from coercive labor conditions, *Prince*⁹⁹ should stand. Perhaps a child's religious freedom and education rights do not overcome parental autonomy, and *Yoder*¹⁰⁰ too should go undisturbed.

In the abortion context, explicit recognition of and respect for the life interests of unborn children may not result in the overturning of *Casey*¹⁰¹ or even *Stenberg*.¹⁰² Acknowledgment of a right, even the right to life, does not mean that the right will trump all others.¹⁰³ Perhaps protecting the psychological stabil-

tional by three federal district courts and two federal circuit courts, and injunctions preventing its enforcement have been implemented. *Planned Parenthood Fed'n of Am., Inc. v. Gonzales*, 2006 WL 229900, at *1 (9th Cir. Jan. 31, 2006), *aff'g* *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1034–35 (N.D. Cal. 2004); *Carhart v. Gonzales*, 413 F.3d 791, 803–04 (8th Cir. 2005), *aff'g* *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004); *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 492–93 (S.D.N.Y. 2004).

98. *Troxel v. Granville*, 530 U.S. 57 (2000).

99. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

100. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

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

102. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

103. For example, in the death penalty context, convicted criminals do not lose their personhood, but courts have found that other interests, such as those of community safety and crime deterrence, outweigh the individual life interests at stake. *See Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (upholding the constitutionality of capital punishment and observing that “[t]he death penalty is said to serve

ity of a rape victim justifies allowing her to abort her unborn baby. Given the stigma that attaches to parents of children born of an incestuous relationship, as well as the potential genetic defects such children may face, it may be proper to allow women to end pregnancies conceived through intercourse with a relative. Going further, a court might carefully weigh the right to life of an unborn child and the autonomy and privacy of a potential mother and determine that, given the state of our current society and the difficulties involved with child rearing, we need to continue to allow women to pursue an abortion for any reason at all. Finally, a court might consider the life and dignity of the half-born children terminated by partial birth abortions, including the pain they suffer from the procedure,¹⁰⁴ and still conclude that women's medical autonomy requires that the entire panoply of procedures remains available, at least in situations with potential health risks to the woman.

Although many would remain unsatisfied with the outcomes described above, such a scheme would at least recognize that all human life is valuable, and all human lives deserve our respect and consideration, even in situations where other concerns outweigh these interests. By explicitly including these interests in the balancing equations, courts can send a message that children are not property; they are human beings with dignity and are worthy of respect, even when they are completely dependent on mothers, parents, or guardians. Children, born or unborn, do not exist in a vacuum; their interests, however important, do not necessarily overrule other valid and competing considerations. The existence of those interests, however, is very real, and they cannot be properly honored and respected until they are at least acknowledged.

VI. CONCLUSION

Just as the children's rights debate cannot rest solely on the rights of parents versus the state's interests, the abortion debate should not be confined to a discussion of women's autonomy

two principal social purposes: retribution and deterrence of capital crimes by prospective offenders").

104. For a scientific analysis of unborn children's ability to feel pain at different points of development, see Nat'l Right to Life Comm., *Pain of the Unborn: What Does an Unborn Child Feel During an Abortion?*, http://www.nrlc.org/abortion/fetal_pain/fetalpain091604.pdf (last visited Jan. 13, 2006).

rights and states' interests in protecting potential human life. The real question in both contexts must be whether fundamental human rights—those of life, liberty, and the pursuit of happiness—should be recognized for all Americans, or whether those rights should exist on a continuum, dependent on certain characteristics the Court deems relevant. For now, the United States has taken the latter course, and the interests of children, born or unborn, take a back seat to those of parents and the state. This framework has not granted children the safety and security they deserve, suggesting that a radically new approach is warranted. If society truly wants to protect born children, it must begin by recognizing the right to life of all children, at all stages of development. When our laws establish that human life is in itself valuable, then can Americans be expected to accept that *all* children are worthy of respect and nurturance.

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