PERSONHOOD AND THE POST-*DOBBS* ABORTION DEBATE

*Teresa Stanton Collett**

ABSTRACT

This Article engages the major philosophical defenses of a broad right to abortion in light of the biological realities of pregnancy, the legal status of the unborn, and the rights and duties of pregnant women. The implications of these realities and the legal obligations for care of children outside the context of abortion form the basis for the argument that induced abortion should be strictly limited, and that such limitations are now possible in light of the Supreme Court's overruling of Roe v. Wade *and* Planned Parenthood v. Casey.

TABLE OF CONTENTS

* Professor of Law and Director of the Prolife Center at the University of St. Thomas (MN). I am grateful to Professor Mark Kende for his invitation to participate in the 2023 Drake Law School Constitutional Law Symposium, and his vigorous critique of my position during the conference. This Article is much improved as a result. I am also grateful to my colleagues Robert Delahunty, Julie Jonas, and Joel Nichols for their insightful comments. I would be remiss if I did not also acknowledge the aid of my research assistants—Stephanie Pavelko, Eyuel Yared, and Tate Thielfoldt—in reviewing the large body of legal writing on the analogy between slavery and abortion, and in confirming my sources.

In 1967, the late Supreme Court Justice Abe Fortas observed:

> One may look all through the Constitution and yet not find any reference to nonpersons. But if one is honest about our constitutional system, one cannot pretend that the rights guaranteed by the Constitution have been extended to all persons. Accordingly, one is tempted to suggest the existence of a category of nonpersons or its reasonable facsimile.[1]

While Justice Fortas was primarily referring the treatment of African Americans and women, his observation is equally true for all human beings denied important legal protections in this country.[2] Just six short years later, a majority of the Court created a "category of nonpersons" in *Roe v. Wade*, declaring unborn children to be nonpersons.[3]

Roe's creation of the "nonpersons" category of human beings is *sui generis*. It did not exist during U.S. debates over the moral and legal status of slaves[4] and indigenous peoples.[5] Neither the courts nor the drafters of the Constitution denied at least the partial personhood of these human beings. Instead, the courts (and legislatures) debated questions about what legal rights such "persons" enjoyed or should be afforded under U.S. law.[6]

1. Abe Fortas, *Equal Rights-For Whom*, 42 N.Y.U. L. REV. 401, 404–05 (1967).

2. *See id.* at 402.

3. *See generally* Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

4. *See* Groves v. Slaughter, 40 U.S. 449 (1841).

> The constitution treats slaves as persons. In the second section of the first article, which apportions representatives and directs taxes among the states, it provides, 'the numbers shall be determined, by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.' And again, in the third section of the fourth article, it is declared, that 'no person, held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.'

Id. at 506 (Mclean, J., dissenting).

5. *See* Johnson v. M'Intosh, 21 U.S. 543, 590 (1923) (describing Native Americans as "fierce savages" who "were as brave and as high spirited as they were fierce"); United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 697 (D. Neb. 1879) (finding that a Native American is a "person" within the meaning of the law and has standing to seek a writ of habeas corpus in a federal court).

6. *See, e.g.*, *Crook*, 25 F. Cas. at 697.

In this Article, I argue that *Dobbs v. Jackson Women's Health Organization*[7] provides the opportunity to reject the Court's cruel creation of "nonpersons" and continue to argue for recognition of the constitutional personhood of the unborn.[8] This is only possible because *Dobbs* restored questions surrounding abortion to the people and their elected representatives in the states.[9] Absent text in the national constitution or evidence of long-standing recognition of extra-textual rights, our collective right of self-determination requires that citizens debate and ultimately resolve fundamental questions of who is to be protected by law. In the context of abortion, this requires answers to two questions—first, what exists within the pregnant woman's body and what legal status should be afforded that entity;[10] and second, what should be the legal response to a pregnant woman's desire to end her pregnancy prior to childbirth given the proper legal status of that which is within her.[11]

Part I of this Article establishes that pregnancy, by definition, involves the presence of a tiny separate human being within the woman's body.[12] This biological and medical reality necessarily requires us to consider how society (and positive law as a social construct) should characterize and respond to claims that these tiny human beings have moral or natural rights that should be recognized and protected in law.

Part II of the Article shifts the focus from the nascent human being within the woman's body to the pregnant woman whose body shelters the tiny human being during the child's early development—development most commonly

7. 597 U.S. 215 (2022).

8. Roe v. Wade, 410 U.S. 113, 157 (1973), *overruled by Dobbs*, 597 U.S. 215.

9. *Dobbs*, 597 U.S. at 302.

10. *See infra* Part I.A.

11. *See infra* Part III.

12. *See infra* Part I. Absent the presence of such a live tiny being, the woman is not pregnant; therefore, any removal of fetal remains is not an abortion. The Center for Disease Control and Prevention defines "induced termination of pregnancy" as "the purposeful interruption of an intrauterine pregnancy with the intention other than to produce a live-born infant and which does not result in live birth. This definition excludes management of prolonged retention of products of conception following fetal death." U.S. DEP'T OF HEALTH & HUM. SERVS.: CTRS. FOR DISEASE CONTROL & PREVENTION, STATE DEFINITIONS AND REPORTING REQUIREMENTS FOR LIVE BIRTHS, FETAL DEATHS, AND INDUCED TERMINATIONS OF PREGNANCY 5 (U.S. Gov. Printing Off. 1997), https://www.cdc.gov/nchs/data/misc/itop97.pdf [https://perma.cc/WA5M-TXZG]. And any legal questions surrounding her medical choices such as removal of the remains of a spontaneous abortion or contraception and sterilization differ intrinsically from questions surrounding abortion.

identified by the use of various terms such as zygote,[13] blastocyst,[14] embryo,[15] and fetus.[16] This Part of the Article addresses the pregnant woman's moral or natural rights that should be recognized and protected in law, as well as her duties to the new life within her.[17] The nature and breadth of these rights and duties are the heart of the post-*Dobbs* debate.[18] Part II will lay out my argument that, while a woman's rights may include terminating her pregnancy by means other than childbirth in a small universe of cases, such rights should be strictly limited by law to a well-defined set of circumstances—circumstances largely recognized in common law and the pre-*Roe* law of many states.[19] My argument is predicated, in part, upon the claim that a woman has moral and natural duties to the being in her womb in almost all circumstances, and that the law should enforce these duties until such point in time, currently childbirth, when others can fulfill the duties to the child in her stead.

Part of III this Article contrasts the arguments surrounding legal rights and duties related to the unborn with the pre-civil war debate surrounding the legal rights and duties of those human beings held in chattel slavery and the people who owned them.[20] It reluctantly concludes that protection of the unborn is most secure when it results from political agreement, and not judicial imposition, absent a clear constitutional mandate.

I. WHAT IS WITHIN A WOMAN'S BODY THAT RESULTS IN THE DIAGNOSIS THAT SHE IS PREGNANT?

Many post-abortive women have reported that abortion providers and others have told them that what exists within their wombs is "a blob of cells" or some equally dehumanizing term or phrase.[21] This characterization of the tiny human

13. The zygote is the being recognized from the moment the egg and sperm unite through its initial stages of growth through cell division for about one week after union. *Fetal Development*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/articles/7247-fetal-development-stages-of-growth [https://perma.cc/9V9C-DVL4] (Mar. 3, 2023).

14. Dianne N. Irving, *When Do Human Beings Begin? Scientific Myths and Scientific Facts*, 19 INT'L J. SOCIO. & SOC. POL'Y 22, 28 (1999) (beginning at five to seven days).

15. *Id.* (beginning at two to three weeks).

16. *Id.* at 30 (beginning at week eight).

17. *See infra* Part II.

18. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

19. *See infra* Part II; Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. 215.

20. *See infra* Part III.

21. *See* Brief of 3,348 Women Injured by Abortion and the Justice Foundation as Amici Curiae Supporting Respondents at 6, 19, 20, 29, Whole Woman's Health v. Hellerstedt, 579

being within the woman is largely due to providers' desire to encourage or affirm a woman's decision to end the life of the being within her.[22] A pro-choice newspaper columnist, Kathleen Parker, states, "[o]nce a pregnancy is viewed as a human life in formation, rather than a 'blob of cells,' it is less easy to terminate the contents of one's vessel."[23] Setting aside the mind and body dualism inherent in characterizing the woman's body as a "vessel," it is encouraging to read a pro-choice commentator recognizing the gravity of the question of what is it that exists within the woman's womb and her recognition that many of her fellow citizens would respond that it is a developing human being.[24]

As Parker argues, any decision regarding abortion necessarily requires a woman to consider the nature of what is within her.[25] Basic biology establishes that within a woman's womb is a human being or a *homo sapiens*. But this biological definition does not necessarily answer the legal question of "what is a human being?"

U.S. 582 (2016) (No. 15-274). For a recent journalistic claim to the same effect, see Adam Rogers, *'Heartbeat' Bills Get the Science of Fetal Heartbeats All Wrong*, WIRED (May 14, 2019, 6:00 AM), https://www.wired.com/story/heartbeat-bills-get-the-science-of-fetal-heartbeats-all-wrong/ [https://perma.cc/N5MB-E2XK] (asserting the validity of statutory "use of the phrase 'unborn human individual' . . . depends on whether you think a 3- to 4-millimeter-long, partially organized blob of cells is a human individual or not").

22. Declaration of Dr. Bernard N. Nathanson, M.D. Pursuant to 28 U.S.C. 1746 at 4, Planned Parenthood Minn. v. Rounds, 375 F. Supp. 2d 881 (D.S.D. 2005) (No. 05-4077).

> One tactic we used was to denigrate and suppress all scientific evidence that supported the conclusion that a human embryos and fetuses are separate human beings. Those in the abortion industry understood that as a purely biological fact that human embryos and fetuses are separate human beings. The tactic we used to suppress this information included the practice of denying what the abortion industry knew was true. The abortion industry would routinely deny the undeniable, that is, that the human embryo and fetus is, as a matter of biological fact, a human being.

Id.

23. Kathleen Parker, *Women Should be Informed Before They Abort*, THE WASH. POST (May 2, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/04/30/AR2010043001671_pf.html [https://perma.cc/DW9H-HARW].

24. *See id.*

25. *See id.*

This question has rarely been directly presented to U.S. courts. Certainly courts have considered the boundaries of citizenship,[26] whether foreign citizens are protected by the U.S. Constitution,[27] whether beings who are indisputably human are "constitutional persons,"[28] whether legal personhood is natural or juridical,[29] whether something has "human characteristics,"[30] and even whether plants, animals, and inanimate objects have standing to vindicate their "rights" in court.[31]

26. Miller v. Albright, 523 U.S. 420, 420–21 (1998) (stating a proof-of-paternity requirement is imposed for citizenship by birth when the citizen parent of child who is born out of wedlock and abroad is the child's father, as opposed to the mother, did not represent unconstitutional denial of equal protection based on sex of citizen parent).

27. *Compare* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (foreign nationals afforded protection under the Fourteenth Amendment), *with* Agency for Int'l Dev. v All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086 (2020) (foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution, while foreign citizens within U.S. territory may).

28. *See* Levy v. Louisiana, 391 U.S. 68, 70–71 (1968) (rejecting claim that non-marital children are "nonpersons" under law of inheritance); Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886) (holding the Fourteenth Amendment's Equal Protection Clause applied to corporations); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 452 (1972) ("The world of the lawyer is peopled with inanimate right-holders: trusts, corporations, joint ventures, municipalities, Subchapter R partnerships, and nation-states, to mention just a few.").

29. In a case involving the ability of a mother to recover for the wrongful death of her non-marital child, the U.S. Supreme Court opined, "[t]o say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." Glona v Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 75–76 (1968); *see also* Hum. Embryo #4 HB-A *ex rel.* Emma & Isabella La. Tr. No. 1 v. Vergara, No. 17-1498, 2017 WL 3686569, at *4 (E.D. La. Aug. 25, 2017) ("Louisiana Revised Statutes § 9:124 provides that an IVF human ov[u]m is a juridical person that has the right to sue and be sued.").

30. Toy Biz, Inc. v. United States, 123 F. Supp. 2d 646, 650 (Ct. Int'l Trade 2000) (stating a doll is a particular figure with more human characteristics while a toy has more non-human characteristics).

31. *See, e.g.*, Palila v. Haw. Dep't of Land & Nat. Res., 852 F.2d 1106, 1107 (9th Cir. 1988) (finding a legal standing for animals) ("[The Hawaiian Palila bird] has legal status and wings its way into federal court as a plaintiff in its own right."); Cetacean Cmty. v. Bush, 386 F.3d 1169, 1175 (9th Cir. 2004) ("Article III does not compel the conclusion that a statutorily authorized suit in the name of an animal is not a 'case or controversy.' As commentators have observed, nothing in the text of Article III explicitly limits the ability to bring a claim in federal court to humans."); Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018) (holding a monkey does not have standing to sue for violation of copyright law because the statute does not so plainly state that animals have statutory standing); Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 926 (N.Y. 2022) ("Habeas corpus is a procedural vehicle intended to secure the liberty rights of human beings who are unlawfully restrained, not nonhuman animals."). *But see* Order

But none of these cases involve a direct challenge to the humanity, and ultimately the personhood, of any living being who is biologically classified as a *homo sapiens*.[32]

Such challenges appear to arise only in cases involving preborn human beings (sometimes referred to as pre-embryos,[33] embryos, zygotes, fetuses, etc.), and arguably in cases involving human beings who are, or have been, grievously injured, suffering from terminal or degenerative illnesses, or suffering from brain malformation.[34] Even in the latter set of cases, typically involving end-of-life

to Issue Subpoenas for the Taking of Depositions Pursuant to 28 U.S.C. § 1782 at 1, Cmty. of Hippopotamuses Living in the Magdalena River v. Ministerio de Ambiente y Desarrollo Sustenible, No. 1:21-mc-23 (S.D. Ohio Oct. 15, 2021) (finding community of Columbian hippos are persons for purposes of conducting discovery in connection with a lawsuit pending in Ecuador). An example of an inanimate object being recognized as having legal personality to bring suit includes *Tucker v. Alexandroff*. 183 U.S. 424, 438 (1902).

> A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name.

Id. at 438.

32. *See* Ian Tattersall, *Homo Sapiens*, BRITANNICA, https://www.britannica.com/topic/Homo-sapiens [https://perma.cc/2JEX-HQ5B] (Feb. 16, 2024). I would note that to say whether a being is human has not been the subject of U.S. jurisprudence is not to say the question will not arise increasingly in the future. *See* Ray Kurzweil, *Nonbiological Man: He's Closer Than You Think*, BRITANNICA, https://www.britannica.com/topic/Nonbiological-Man-Hes-Closer-Than-You-Think-2118807 [https://perma.cc/4UAK-BQUG] (Mar. 23, 2021).

33. This term was introduced into the legal lexicon in *Davis v. Davis*. No. E-14496, 1989 WL 140495, at *3 (Cir. Ct. Tenn. Sept. 21, 1989). But when a medical textbook author attempted to introduce it into the medical literature it was largely rejected and disappeared from subsequent editions of the text. *See* Declaration of Dr. Bruce M. Carlson, M.D., Ph.D. Pursuant to 28 U.S.C. 1746, Planned Parenthood Minn. v. Rounds, 375 F. Supp. 2d 881 (D.S.D. 2005) (No. 05-4077).

34. *See, e.g.*, Chambers v. McKnight, 506 S.W.2d 844 (Ark. 1974).

issues, there are no cases where it is claimed that the injured or suffering human being has never been a person.[35]

So, what does it mean to be a "human" or "human being"? Is that determination relevant to the legal questions surrounding abortion and human procreation? Given the recognition of inanimate objects like ships, and human associations like corporations, as legal persons, being "human" is not a necessary precondition to legal personality, or to recognition as a rights bearer seeking legal protection of those rights.[36] Except for unborn human beings, there are no other cases in which U.S. courts have declared that a human being is a "nonperson" legally.[37]

Prior to the United States Supreme Court decision in *Roe*, federal law had never denied any category of human beings (or *homo sapiens*) recognition as persons, including those human beings held in slavery within the United States.[38] Even in states where slavery was legal, the laws often prohibited the murder of

35. The use of the phrase "persistent vegetative state" among medical personnel has sometimes led to unfortunate statements like "when enough oxygen is shut off from the brain, the brain degenerates and a person becomes a vegetable, which was what she was." *Id.* at 846 (quoting testimony by treating physician); McKim v. Abbott (*In re* Hunter's Estate), 39 N.W.2d 418, 422 (Neb. 1949) ("[S]he was just almost a vegetable."); Harney v. Garvey (*In re* Harney's Estate), 284 P. 464, 465 (Cal. Dist. Ct. App. 1930) ("[H]e was a vegetable, no mental capacity."). But even in these cases, neither the courts nor the parties deny that the human being, as described, was a human being and legal person at one time. *See, e.g.*, *Chambers*, 506 S.W.2d at 846.

36. *See Tucker*, 183 U.S. at 438 (conferring legal personality upon a ship); Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 413 (1886) (referring to corporation as a legal party).

37. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

38. *Compare id.*, *with* Groves v. Slaughter, 40 U.S. 449, 506–07 (1841) (explaining that while federal law recognized the personhood of slaves, it also recognized the institution of slavery, leaving the question of legal recognition of that institution to state law).

> By the laws of certain states, slaves are treated as property; and the constitution of Mississippi prohibits their being brought into that state, by citizens of other states, for sale, or as merchandize. Merchandize is a comprehensive term, and may include every article of traffic, whether foreign or domestic, which is properly embraced by a commercial regulation. But if slaves are considered in some of the states, as merchandize, that cannot divest them of the leading and controlling quality of persons, by which they are designated in the constitution. The character of property is given them by the local law. This law is respected, and all rights under it are protected by the federal authorities; but the constitution acts upon slaves as persons, and not as property.

Groves, 40 U.S. at 506–07.

slaves.[39] *Roe* refused even this most basic protection to unborn children if the mother consents to the killing of the child.[40] It could be argued that the majority's acknowledgment that unborn children were, and could continue to be, recognized by the states as victims of torts and heirs or descendants for inheritance law is implicit recognition of the "partial personhood" of these children; however, such partial recognition did not save the children from abortion any more than the Constitution's recognition of the personhood of slaves was sufficient to save the liberty of those enslaved in the states recognizing that infamous institution.[41]

In response to the state's argument that "apart from the Fourteenth Amendment, life begins at conception . . . therefore, the State has a compelling interest in protecting that life from and after conception,"[42] the majority demurred, opining that "[w]e need not resolve the difficult question of when life begins."[43] "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[44]

A. *Supreme Court Treatment of Personhood of the Fetus or Unborn*

The United States Supreme Court has been offered multiple opportunities to reverse *Roe*'s denial of constitutional personhood, but to date it has declined to reengage on the question of constitutional personhood. Three short examples should suffice.[45]

In 1983, in *City of Akron v. Akron Center for Reproductive Health, Inc.*, the Court reviewed an informed consent statute that required a physician to inform

39. *See* A. E. Keir Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197, 198–99 (1970).

40. *See Roe*, 410 U.S. at 164–67. Absent the pregnant woman's consent, about two-thirds of states protect both the mother and the unborn child (at least after the child attains some stage of development) through fetal homicide law. WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 965–66 (3d ed., Thompson Reuters 2017).

41. *See Roe*, 410 U.S. at 161–62; *Groves*, 40 U.S. at 506–07 (affirming the personhood of slaves but not granting freedom from slavery); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 453–54 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (rejecting the interpretation of the Missouri Compromise that would have resulted in slaves brought into the territories having the rights of national citizenship).

42. *Roe*, 410 U.S. at 159.

43. *Id.*

44. *Id.*

45. *See infra* Part I.A.

patients that "the unborn child is a human life from the moment of conception," and opined that the "requirement [was] inconsistent with the Court's holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions."[46]

Six years later in *Webster v. Reproductive Health Services*, the Court again rejected an opportunity to review the question of what deprives tiny human beings within their mothers' bodies of their legal personality and thus the constitutional right to life and protection "'of each human being begins at conception,' and . . . that ['u]nborn children have protectable interests in life, health, and well-being.'"[47] Abortion providers challenged these findings on the basis that the legislature impermissibly adopted a theory of "when life begins as the foundation of the state's regulation of abortion."[48] The district court granted the plaintiffs' motion *in limine* to preclude the presentation of evidence related to the challenged statements.[49] Hence, the record was devoid of any evidence regarding the biological truth of the statement that "[t]he life of each human being begins at conception."[50] Instead the court treated the challenges as pure questions of law and struck the preamble as violating the ruling of *Roe*.[51] The Court of Appeals for the Eighth Circuit affirmed the lower court's reasoning and upheld its decision.[52]

When the case reached the Supreme Court, the Justices were less persuaded that the provision was properly before the courts.[53] The Court characterized the statement found in *Roe* and *City of Akron* that "a State may not adopt one theory of when life begins to justify its regulation of abortions" as mere dictum,[54] and ruled that the challenge to the preamble was not ripe since the provision was capable of being interpreted as merely a statement of values and it had not been applied to the enforcement of any abortion statutes.[55]

46. 462 U.S. 416, 444 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (citing *Roe*, 410 U.S. at 159–62).

47. Reprod. Health Serv. v. Webster, 851 F.2d 1071, 1076 (8th Cir. 1988), *rev'd sub nom.* Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

48. *Id.*

49. Reprod. Health Servs. v. Webster, 662 F. Supp. 407, 413 (W.D. Mo. 1987), *aff'd in part, rev'd in part sub nom.* Reprod. Health Serv. v. Webster, 851 F.2d 1071 (8th Cir. 1988), *rev'd sub nom.* Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

50. *Id.*

51. *Id.*; *see also Roe*, 410 U.S. 113.

52. *Reprod. Health Serv.*, 851 F.2d at 1073.

53. *See generally Webster*, 492 U.S. 490.

54. *Id.* at 505–06.

55. *Id.* at 506–07.

The third and most recent example of the Court declining to reconsider the legal personality of the unborn is *Dobbs*.[56] None of the parties directly placed the personhood question before the Court,[57] nor did the Court raise the issue *sua sponte*, perhaps mindful of Justice Harry Blackmun's candid admission in *Roe* that if the unborn were recognized as constitutional persons, the failure of states to afford robust protection of their lives would raise serious constitutional issues.[58]

56. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

57. Petition for a Writ of Certiorari at i, *Dobbs*, 597 U.S. 215 (No. 19-1392), presented only three questions:

> 1. Whether all pre-viability prohibitions on elective abortions are unconstitutional.
>
> 2. Whether the validity of a pre-viability law that protects women's health, the dignity of unborn children, and the integrity of the medical profession and society should be analyzed under *Casey*'s "undue burden" standard or *Hellerstedt*'s balancing of benefits and burdens.
>
> 3. Whether abortion providers have third-party standing to invalidate a law that protects women's health from the dangers of late-term abortions.

Id. In his concurring opinion Chief Justice John Roberts laments the expansion of the case to encompass the question of whether *Roe* and *Casey* should be overruled:

> When the State petitioned for our review, its basic request was straightforward: "clarify whether abortion prohibitions before viability are always unconstitutional." Pet. for Cert. 14. The State made a number of strong arguments that the answer is no, *id.*, at 15–26—arguments that, as discussed, I find persuasive. And it went out of its way to make clear that it was *not* asking the Court to repudiate entirely the right to choose whether to terminate a pregnancy: "To be clear, the questions presented in this petition do not require the Court to overturn *Roe* or *Casey*." *Id.* at 5, 87 S.Ct. 1817. Mississippi tempered that statement with an oblique one-sentence footnote intimating that, if the Court could not reconcile *Roe* and *Casey* with current facts or other cases, it "should not retain erroneous precedent." Pet. for Cert. 5–6, n. 1. But the State never argued that we should grant review for that purpose.
>
> After we granted certiorari, however, Mississippi changed course. In its principal brief, the State bluntly announced that the Court should overrule *Roe* and *Casey*. The Constitution does not protect a right to an abortion, it argued, and a State should be able to prohibit elective abortions if a rational basis supports doing so. See Brief for Petitioners 12–13.

Dobbs, 597 U.S. at 352 (Roberts, C.J., concurring).

58. *See Dobbs*, 597 U.S. at 215; *see also* Roe v. Wade, 410 U.S. 113, 157 n.54 (1973), *overruled by Dobbs*, 597 U.S. 215.

This is not to say that some *amici* supporting Dr. Thomas Dobbs as State Health Officer of the state of Mississippi did not vigorously argue for review of the legal and constitutional personhood of unborn children.[59] In fact, the issue was directly presented by Professors John M. Finnis and Robert P. George in their *amici* brief where in the first proposition they argue,

> [T]he Fourteenth Amendment, like the Civil Rights Act of 1866 it was meant to sustain, codified equality in the fundamental rights of persons—including life and personal security—as these were expounded in Blackstone's *Commentaries* and leading American treatises. The *Commentaries'* exposition *began* with a discussion (citing jurists like Coke and Bracton) of unborn children's rights as persons across many bodies of law. Based on these authorities and landmark English cases, state high courts in the years before 1868 declared that the unborn human being throughout pregnancy "is a person" and hence, under "civil and common law," "to all intents and purposes a child, as much as if born."[60]

Professors Finnis and George then methodically examine the history of the legal status of unborn children.[61] Beginning with William Blackstone's *Commentaries on the Laws of England* and proceeding to early cases, statutes, and other treatises, the professors built their case that unborn children have been recognized as rights bearers from as early as the fourteenth century in the English

---

> When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?
>
> There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, supra, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

Roe, 410 U.S. at 157 n.54.

59. *See, e.g.*, Brief of Scholars of Jurisprudence John M. Finnis and Robert P. George as Amici Curiae Supporting Petitioners at *3, *Dobbs*, 597 U.S. 215 (No. 19-1392).

60. *Id.*

61. *See id.* at *5–29.

common law, and that those rights continued to be recognized until the mid-1900s when courts confronted cases brought by abortion rights activists seeking to impose their will through judicial decrees.[62]

Ultimately the Supreme Court declined to address the central proposition of the Finnis-George brief observing that "[f]or the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens."[63] The only explicit reference to the brief was a footnote recognizing the professors' claims regarding quickening.[64] In sum, notwithstanding the efforts of a wide variety of states, cities, and others, the Supreme Court has stubbornly refused to revisit the question of the constitutional personhood of unborn children (or "potential life" as characterized by the *Roe* majority).[65]

B. *How Does Science Identify That Which Is Within the Pregnant Woman's Body?*

The fact that the U.S. Supreme Court has refused to consider arguments and evidence supporting the legal personality of unborn children is not to say that no federal court has ever received evidence on the biological and metaphysical identity of the being within the pregnant woman's womb. The United States Court

62. *See id.* A detailed history of the political battles over abortion is provided by Daniel Williams in his book. DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* (Oxford Univ. Press 2016).

63. *Dobbs*, 597 U.S. at 225. As a prelude to this statement, and in explanation of the Court's position, the majority observed:

> Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.

Id. at 223–25.

64. *Dobbs*, 597 U.S. at 242 n.24 ("Compare Brief for Scholars of Jurisprudence as *Amici Curiae* 12–14, and n. 32 . . . ('"a quick child"' meant simply a 'live' child, and under the era's outdated knowledge of embryology, a fetus was thought to become 'quick' at around the sixth week of pregnancy), with Brief for American Historical Association et al. as *Amici Curiae* 6, n. 2 ('quick' and 'quickening' consistently meant 'the woman's perception of fetal movement').").

65. *Id.* at 228–29; *see also* Roe v. Wade, 410 U.S. 113, 163 (1973), *overruled by Dobbs*, 597 U.S. 215 (using the phrase "potential life").

of Appeals for the Eighth Circuit reviewed *en banc* a robust evidentiary record developed during a challenge to South Dakota's informed consent statutes.[66] South Dakota statutes required doctors inform women seeking abortions that an abortion will "'terminate the life of a whole, separate, unique, living human being' and will terminate her relationship with that human being."[67] Planned Parenthood of Minnesota, North Dakota, and South Dakota challenged the requirement, arguing that the statements violated doctors' free speech rights.[68] Ultimately, the abortion providers lost.[69] "Planned Parenthood cannot . . . show that it is *likely* to prevail, on the merits of its claim that the disclosure required by § 7(1)(b) is untruthful, misleading or not relevant to the decision to have an abortion."[70]

The ruling was based in large part on the fact that the challenged provisions were subject to the Act's definition of "human being" as "an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation."[71] The parties presented testimony from numerous experts opining on the truthfulness of the statements that abortion will "terminate the life of a whole, separate, unique, living human being" and that abortion "will terminate her relationship with that human being."[72]

The essence of the plaintiffs' claims was presented by their expert, Dr. Anne Lyerly:

> The fundamental reason why science and medicine cannot answer the question whether an embryo or fetus is a "human being," or when human life begins, is that "human being" is not a scientific or medical term. For example,

66. *See* Planned Parenthood Minn. v. Rounds, 530 F.3d 724 (8th Cir. 2008).

67. Planned Parenthood Minn. v. Rounds, 375 F. Supp. 2d 881, 886 (D.S.D. 2005), *vacated*, 530 F.3d 724 (8th Cir. 2008) (quotations omitted).

68. *Id.* at 887.

69. Planned Parenthood Minn. v. Rounds, 653 F.3d 662, 668 (8th Cir. 2011), *vacated in part*, 662 F.3d 1072 (8th Cir. 2011).

70. *Planned Parenthood Minn.*, 530 F.3d at 736.

71. *Planned Parenthood Minn.*, 653 F.3d at 667 (quoting S.D. CODIFIED LAWS § 34-23A-1(4) (2024)).

72. *Compare, e.g.*, Report or Affidavit of Dr. Bruce M. Carlson, M.D., Ph.D. at *2, *Planned Parenthood Minn.*, 375 F. Supp. 2d 881 (No. 05-0477) ("In my opinion the post-implantation human embryo is a whole, distinct individual human being, a complete separate member of the species, *Homo sapiens*, and is recognizable as such."), *with* Report of Anne D. Lyerly, M.D., M.A. at * 3, *Planned Parenthood Minn.*, 375 F. Supp. 2d 881 (No. 05-4077) ("[T]he use of the phrase 'whole, separate, unique, living human being' to describe the embryo or fetus in a mandated disclosure to patients is problematic because the phrase conveys much more than just biologic information.").

> Dorland's Medical Dictionary does not contain an entry for "human being." In contrast, "fetus" and "embryo" are scientifically defined terms, whose definitions do not state that they are "human beings." Labeling an embryo or fetus as a "human being" involves the application of a label based on non-scientific or non-medical factors such as a person's values, religious, moral and/or philosophical beliefs, or the intertwining of these factors with medical or scientific information. Thus, the assertion that to contest whether an embryo or fetus is a "human being" is to raise only a value question, not a scientific or medical question, is wrong because science and medicine cannot alone answer the question whether an embryo or fetus is a "human being."[73]

Defendants' response to these arguments was well articulated in the reports of Dr. Marie Peeters-Ney and Dr. Bruce M. Carlson.[74] Dr. Peeters-Ney writes:

> In her report, in section 7, Dr. Lyerly states that human being is not a scientific or medical term. This is inaccurate. When a Pubmed (online service of the National Library of Medicine and of the National Institute of Health) search using the keyword "human being" was done on November 29, 2005, it displayed 9,181,156 references (publications) which have "human being'' as a metatag or keyword. This term is still very much in use as is demonstrated by the fact that when limits are set to the search and only articles written between January 2005 and October 2005 are researched, there are 264,483 articles. When the keywords "human being in utero" are used, 53,739 references are found. This would certainly indicate that the term human being is generally used in medical publications and is scientifically accepted.[75]

Dr. Carlson directly addressed Dr. Lyerly's claim that the term "human being" necessarily incorporated non-biological or non-medical considerations:

> 5. The post implantation human embryo is a distinct individual human being, a complete separate member of the species *Homo sapiens*, and is recognizable as such.
>
> 6. From a purely scientific and biological point of view, this fact is indisputable.

73. Report of Anne D. Lyerly, M.D., M.A., *supra* note 72, at *7.

74. *See* Disclosure of Dr. Marie Peeters-Ney, M.D., *Planned Parenthood Minn.*, 375 F. Supp. 2d 881 (No. 05-CV-4077); Report or Affidavit of Dr. Bruce M. Carlson, *supra* note 72, at *2.

75. Disclosure of Dr. Marie Peeters-Ney, *supra* note 74, at *1–2.

> 7. This biological fact should not be confused with value judgments or legal concepts concerning [the] legal or moral status of the human being during the gestational period.
>
> 8. It is important that the biological term human being, which is supported by empirical scientific evidence, should be preserved to denote the biological facts and should not be misused as having a meaning that connotes policy, law, moral or value judgments, which are not f[a]ctual or supported by biological facts.
>
> 9. An example of a t[e]rm that has confounded scientific discourse and has potentially detrimental consequences is "pre-embryo". The term "pre-embryo" has been used to refer to a human embryo in the very early stages. This term was created in the 1970's and has no scientific basis. The problem with the term is that it leaves the impression that the human embryo during the stage at which it is referred to as "pre-embryo" is [s]omehow [sic] less than an embryo. In fa[c]t, it is a human embryo, and scientists have always recognized that fact. The term "pre-embryo", to my knowledge, was used only once in one embryology text in one edition. Its use was met with such negative response within the scientific community that this one author withdrew its use and it has not appeared in any of the subsequent editions of his text. Unfortunately, the term continues to be used by some individuals and remains the source of some confusion.
>
> 10. Attempts to confuse the simple biological term human being to take on meanings which include value judgments or legal concepts should be resisted.
>
> 11. Limiting the inquiry to one that is purely factual in nature leads to the inescapable conclusion that the embryo, at any age or stage, is a separate, individual, human being.[76]

The United States Court of Appeals for the Eighth Circuit ultimately held that the disputed provisions withstood First Amendment scrutiny because the provisions must be read together with the Act's definition of human being.[77] Because "human being" has only a narrow, species-based meaning in this context, the advisory conveys scientific and factual information that "should be clear in context to a physician."[78] Accepting the biological reality that the pregnant woman has a separate but intimately connected human being within her body, the next

76. Declaration of Dr. Bruce M. Carlson, *supra* note 33; *see also* Disclosure of Dr. Marie Peeters-Ney, *supra* note 74 ("Any expression denying the humanity of the unborn human being confuses the biological question with philosophical or value judgments.").

77. Planned Parenthood Minn. v. Rounds, 530 F.3d 724, 736–38 (8th Cir. 2008).

78. *Id.* at 736.

question that must be addressed is what principles of morality govern the relationship between the tiny dependent human being and the woman whose body is sheltering that being.

C. *Do Unborn Human Beings Have Moral or Natural Rights?*

For some who self-identify as "pro-choice" this answer to this question is an unqualified "no." The philosopher Mary Anne Warren takes this position in her famous essay, *On the Moral and Legal Status of Abortion*,[79] as does Michael Tooley in his 1972 essay, *Abortion and Infanticide*.[80] Tooley argues that, "[a]n organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity."[81]

Professor Warren initially argued that personhood could be attributed only to beings that exhibit at least some of five traits: consciousness (including the capacity to feel pain), reasoning, self-motivated activity, the capacity to communicate, and self-awareness.[82] Based on this reasoning she asserted:

> Some human beings are not people, and there may well be people who are not human beings. A man or woman whose consciousness has been permanently obliterated but who remains alive is a human being which is no longer a person; defective human beings, with no appreciable mental capacity, are not and presumably never will be people; and a fetus is a human being which is not yet a person, and which therefore cannot coherently be said to have full moral rights.[83]

79. Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 MONIST 43 (1973).
80. Michael Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB. AFFS. 37 (1972).
81. *Id.* at 44.
82. Warren, *supra* note 79, at 55.
83. *Id.* at 56–57. Perhaps even more provocatively Professor Warren asserts,

> Citizens of the next century should be prepared to recognize highly advanced, self-aware robots or computers, should such be developed, and intelligent in habitants of other worlds, should such be found, as people in the fullest sense, and to respect their moral rights. But to ascribe full moral rights to an entity which is not a person is as absurd as to ascribe moral obligations and responsibilities to such an entity.

Id. This speculation has been a theme in popular culture and a topic of scholarly discussion for decades but takes us too far afield from the question of abortion for discussion in this Article. *See, e.g.*, Trystan E. Goetze, *Should Robots Have Rights? Lt. Commander Data v. the United Federation of Planets*, BLOG OF THE APA (Mar. 1, 2022), https://blog.apaonline.org/2022/

In the absence of full moral status, and thus personhood of the unborn, the pregnant woman is the only "person" whose experiences should be considered in assessing her actions in choosing to continue or terminate a pregnancy.[84] "[A] woman's right to protect her health, happiness, freedom, and even her life, by terminating an unwanted pregnancy, will always override whatever right to life it may be appropriate to ascribe to a fetus, even a fully developed one."[85]

Subsequently in her book, *Moral Status: Obligations to Persons and Other Living Things*, Professor Warren reduced the five traits for personhood to one.[86]

> Membership in the human species is highly relevant to the moral status of an individual who is already sentient, or who once was sentient and may someday return to sentience. However, prior to the initial occurrence of conscious experience, there is no being that suffers and enjoys, and thus has needs and interests that matter to it.[87]

She defines sentient as "capable of experiencing pleasure and pain."[88] She continues to maintain her position that there are people (meaning human beings who have been birthed and live independent of their mothers) who are human beings, but not persons, and that given the uncertainty of when sentience begins, unborn children do not have the moral status of persons.[89] Based on this, in her view, pregnancy involves only one "person" and thus, the decision whether to continue or terminate a pregnancy should be left to that person.[90]

In this way, Professor Warren gives some philosophical structure or underpinnings to the *Roe* majority's decision to strike down the Texas prohibition of abortion by denying constitutional personhood to the unborn.[91] But that structure is gravely mistaken about the relationship of mother and child. As Professor Carter Snead argues in his book, *What It Means to Be Human: The Case for the Body in*

03/01/should-robots-have-rights-lt-commander-data-v-the-united-federation-of-planets/ [https://perma.cc/E2QZ-LPZT]. For a topic of scholarly discussion, see Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C.L. REV. 1231 (1992).

84. *See* Warren, *supra* note 79, at 60–61.

85. *Id.* at 60.

86. *See* MARY ANNE WARREN, MORAL STATUS: OBLIGATIONS TO PERSONS AND OTHER LIVING THINGS (Oxford Univ. Press 1997).

87. *Id.* at 204.

88. *Id.* at 205.

89. *See id.* at 204–07.

90. *See id.* at 222–23.

91. *See id.*; Roe v. Wade, 410 U.S. 113, 166–67 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

Public Bioethics,[92] the Court's refusal to recognize and give weight to the humanity and thus personhood of the unborn child:

> frames the public question [of abortion] as a zero-sum conflict between isolated strangers, one of whom is recognized as a person, with the other deemed a sub-personal being whose moral and legal status is contingent upon the private judgment of others. It offers no comprehensive support for the vulnerable persons involved, including especially the unborn child and her mother. . . . In response to the bodily, psychic, and financial burdens of unwanted pregnancy and parenthood, American abortion jurisprudence offers nothing more than the license to terminate the developing human life *in utero*.[93]

A more accurate description of the interests involved not only requires restricting abortion, as Justice Blackmun noted,[94] but also compels us to consider the community's obligation to support and assist pregnant women and their families, including their unborn children.[95]

92. O. CARTER SNEAD, WHAT IT MEANS TO BE HUMAN: THE CASE FOR THE BODY IN PUBLIC BIOETHICS (Harvard Univ. Press 2020).

93. *Id.* at 271–72. This argument is repeated in various amicus briefs by Professor Snead and others. *See* Brief of Professor Carter Snead et al. as Amici Curiae Supporting Respondents, Okla. Call for Reprod. Just. v. O'Conner, 526 P.3d 1123 (Okla. 2023) (No. PR-120543); Brief for Professors Mary Ann Glendon & O. Carter Snead as Amici Curiae Supporting Petitioners, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392).

94. *Roe*, 410 U.S. at 157 n.54.

95. An example of this can be seen with the Texas legislature's expansion of Medicaid coverage for new moms from two months to a year after the passage of the Texas law limiting abortion to cases prior to detection of a fetal heartbeat. Eleanor Klibanoff, *Texas Legislature Passes Bill to Offer New Moms a Year of Medicaid Coverage*, THE TEX. TRIB., https://www.texastribune.org/2023/05/26/texas-postpartum-medicaid-extension/ [https://perma.cc/Z2CN-ZMFY] (May 28, 2023). This support for pregnant women and their families (including unborn children) is also evidenced by a 2019 study of pregnancy centers conducted by the Charlotte Lozier Institute finding that pregnancy centers provided services for almost one million clients, with a total estimated value of $266,764,916.00 for all services combined. CHARLOTTE LOZIER INST. REP. TEAM, PREGNANCY CENTERS STAND THE TEST OF TIME 16 (2020), https://lozierinstitute.org/pcr/ [https://perma.cc/ADP4-EYNX] (pdf available for download). Professor Shari Motro has argued for the creation of an unmarried father's legal responsibility to provide support to a woman who is pregnant with his child, and the congressional creation of a federal tax deduction for taxpayers who support pregnant women, in the same way alimony is tax deductible. *See* Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 648–50 (2011); *see also* Candice Marie Reder, *Framing Preglimony: Exploring the Implications of Pregnancy Support Models Through Family Law Values*, 20 DUKE J. GENDER L. & POL'Y 325 (2013).

The Court's ostensible refusal to engage the question of when human life begins, and therefore may be recognized as a constitutional person, has also been criticized as "self-refuting and question-begging."[96] "For once one claims that certain individuals (pregnant women) have the right to bestow personhood and/or value on unborn human, one affirms a theory of humanity which in practice excludes unborn humans from constitutional protection."[97] Another scholar sharpens this point:

> *Roe* and *Casey* "answer[ed] that question based not on neutral principles of constitutional law, but on [their] own" understanding of when human life begins. How do we know that? Because the Court expressly stated that no one can "resolve the difficult question of when life begins." Thus, *Roe*'s determination that a fetus is merely a potential life is necessarily grounded in the Court's own sense of the beginning (and meaning) of human life.[98]

One cannot argue that a claim is both unanswerable and indeterminate, yet go on to render judgment, as the majority does in *Roe*.[99]

Nor does the Court's implicit appeal to tolerance or pluralism adequately justify the outcome in *Roe*.[100] Professor Francis Beckwith explains:

> If you believe[], as abortion opponents do, that a class of persons were being killed by methods which include dismemberment, suffocation, and burning, wouldn't you be perplexed if someone tried to ease your outrage by telling you that you didn't have to participate in the killing if you didn't want to? That is exactly what abortion opponents hear abortion rights supporters tell them, "Don't like abortion, don't have one" or "I'm pro-choice, but personally opposed." In the mind of the abortion opponent, this is like telling the abolitionist "Don't like slavery, don't own one" or telling Dietrich Bonhoeffer, "Don't like the Holocaust, don't work in a concentration camp."[101]

96. Francis J. Beckwith, *Ignorance of Fetal Status as a Justification of Abortion: A Critical Analysis*, *in* THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE 33, 36 (Brad Stenson ed., ABC-CLIO 1996).

97. *Id.*

98. Scott W. Gaylord, Roe *as Potemkin Village: Fallacies, Facades, and Stare Decisis*, 83 U. PITT. L. REV. 229, 258 (2021) (alteration in original).

99. *See Roe*, 410 U.S. at 163–67.

100. *See id.* at 116.

101. Beckwith, *supra* note 96, at 40. Professor Beckwith also rejects any claim that *Roe*'s denial of personhood is justified by appeal to the precautionary principle or what he calls "the benefit of the doubt" argument or by claims that the question of the personhood of the unborn

That the Justices in *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* opine that the natural and legal personhood of the unborn is unknowable does not make it so, nor does it absolve those persuaded to the contrary of a duty to seek legal protection from lethal violence for these tiny persons.[102] "Denials of personhood to categories of human beings have been used throughout history to subjugate, oppress, and extinguish groups of people that those in power wanted to eliminate."[103] There is little reason to believe that the justifications for abortion are different.

Recognition that a pregnant woman and the unborn child are separate but intimately related (through the physical location of the child) leads us to explore the questions of what responsibilities, if any, a pregnant woman has to the human being within her body, the responsibilities of the mother's sexual partner who participated in the creation of the tiny human being she carries, and ultimately what responsibilities, if any, the society in which they live has to the growing family.

II. WHAT ABOUT THE RIGHTS (AND DUTIES) OF THE PREGNANT WOMAN?

Prior to the overruling of *Casey*, the Supreme Court constructed a jurisprudence in which a pregnant woman was the sole decisionmaker regarding whether to terminate or continue a pregnancy, and a father, whether married to the mother or not, had no legal right to even know of the pregnancy if the woman decided to not inform him of the decision to abort their child.[104] The *Roe* Court declaration "[t]he pregnant woman cannot be isolated in her privacy[,]"[105] as well as its recitation in subsequent decisions, rang hollow when viewed against the backdrop of such decisions.[106]

is intrinsically religious and thus beyond the competence of the Court. *Id.* at 36–39. Professor Beckwith expands and refines his arguments in Francis J. Beckwith, *Critical Notice—Defending Life: A Moral and Legal Case Against Abortion Choice*, 34 J. MED. ETHICS 793 (2008).

102. *See Roe*, 410 U.S. at 161–62; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870–72 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

103. RYAN T. ANDERSON & ALEXANDRA DESANCTIS, TEARING US APART: HOW ABORTION HARMS EVERYTHING AND SOLVES NOTHING 33 (Regnery 2022).

104. *See, e.g.*, *Casey*, 505 U.S. at 898 (rejecting the Pennsylvania spousal notification law as unconstitutional); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976) (rejecting Missouri's spousal consent law as unconstitutional).

105. *Roe*, 410 U.S. at 159. However, the Court stated in a footnote that the Court has not occasioned to address the "father's rights, *if any* exist in the constitutional context, in the abortion decision." *Id.* at 165 n.67 (emphasis added).

106. *See Casey*, 505 U.S. at 898; *Danforth*, 428 U.S. at 69.

This is not to say that the Court refused to acknowledge that abortion impacts far more people than the mother and child.

> [Abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.[107]

But that impact, whether weighed collectively or individually, did not persuade a majority of the Court that these others should have any legal capacity to intervene (or even know) when the woman was contemplating abortion.[108] The majority viewed the "suffering" a mother bears when bringing a child to full term—a suffering "too intimate and personal" to be weighed against the suffering of the father, grandparents, and other family members who would have willingly welcomed and nurtured the child after birth—as requiring rejection of any legal obligation to involve these "others" in the decision to nurture or abort the child or grandchild.[109]

Nor, in the majority's view can the woman's choice be outweighed by a deep and societal conviction that the intentional killing of a child, no matter how young and undeveloped, is a grave wrong.[110] All the pain of these people—the child, the father, the extended family, and the community—must be subordinated to the will of the woman.[111] "The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[112]

Even more striking, the Supreme Court failed to address the role of the pregnant woman in bringing about the conception of the unborn human life—an

107. *Casey*, 505 U.S. at 852; *see also Danforth*, 428 U.S. at 69 ("We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying.").

108. *See Casey*, 505 U.S. at 852, 897–98.

109. *See id.*

110. *See id.* at 852.

111. *See* Anton Sorkin, "*A Trial of Strength in Scenes of Violence": Building a Case for the Prenatal Rights of Willing Fathers Towards Custody*, 22 CARDOZO J.L. & GENDER 463, 474 (2016) ("While the reasoning in *Casey* is driven largely by the interest to protect women, it fails to consider the interest of the willing father and his fundamental rights to the child—unless it is first assumed *de facto* that no interest and no rights exist."); *see also* Lynne Marie Kohm, Roe*'s Effects on Family Law*, 71 WASH. & LEE L. REV. 1339 (2014).

112. *Casey*, 505 U.S. at 852.

essential element in determining rights and duties in every other area of law.[113] Generally, American law imposes no duty to protect a stranger.[114] But a "duty to rescue" does exist where there is an established relationship between the bystander and victim,[115] some contractual obligation,[116] or other special relationships.[117]

The relationship of parent to child has long been recognized as a relationship that creates rights and imposes duties on parents.[118] "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." [119] "[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court."[120] But that interest requires parents to exercise their authority to protect the child from harm.[121]

In the case of pregnancy, this duty to protect a child from harm is reinforced by the general principle that a duty to protect others arises when the person has

113. *See id.* at 898.

114. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 314 (AM. L. INST. 1965) ("The rule [that there is no affirmative duty to rescue] is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection."); Folsom v. Burger King, 958 P.2d 301, 309 (Wash. 1998) (applying this rule in holding that Burger King as franchisor had not retained sufficient control to expose it to liability for failure to provide adequate security for employees at franchised restaurant).

115. *See, e.g.*, RESTATEMENT OF CHILD. & THE L. § 1.40 (AM. L. INST., Tentative Draft No. 5, 2023).

116. *See, e.g.*, *Folsom*, 958 P.2d at 309–11 (stating the security company undertook the explicit promise to render aid when it initially entered into the security service agreement with the restaurant, but the contract was terminated by the employer; thus, the company had no further contractual duty).

117. *See, e.g.*, Webstad v. Stortini, 924 P.2d 940, 946–50 (Wash. Ct. App. 1996) (holding that social host was not liable for guest's suicide since state law criminalized the promotion of a suicide attempt without imposing a general duty of prevention).

118. Parham v. J.R., 442 U.S. 584, 602 (1979).

119. *Parham*, 442 U.S. at 602 (first citing Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925); then Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); then Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and then Meyer v. Nebraska, 262 U.S. 390, 400 (1923)).

120. Troxel v. Granville, 530 U.S. 57, 65 (2000).

121. *See* RESTATEMENT OF CHILD. & THE L. § 2.30(1)(b) (AM. L. INST., Tentative Draft No. 1, 2018) ("A parent does not have authority to consent to medical procedures or treatments that provide no health benefit to the child and pose a substantial risk of serious harm to the child's physical or mental health.").

created the risk of harm.[122] In the vast majority of cases, the very existence of the child is the result of voluntary actions by both the pregnant woman and her sexual partner.[123] Professor Warren agrees this is a crucial point—at least in cases involving human beings with full moral rights.[124]

> My own intuition, however, is that *x* has no more right to bring into existence, either deliberately or as a foreseeable result of actions they could have avoided, a being with full moral rights (*y*), and then refuse to do what [they]

122. Seebold v. Prison Health Servs., Inc., 57 A.3d 1232, 1246 (Pa. 2012).

> In scenarios involving an actor's affirmative conduct, he is generally "under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act." RESTATEMENT (SECOND) OF TORTS § 302, cmt. a (1965); *see also* Cardi & Green, *Duty Wars*, 81 S. CAL. L.REV. at 716 (describing the proposition that a defendant owes a duty of care not to act in a way that creates a risk of harm for others as "black letter law repeated by an overwhelming majority of courts"). This duty appropriately undergirds the vast expanse of tort claims in which a defendant's affirmative, risk-causing conduct is in issue. Generally, however, there is no duty to protect or rescue someone who is at risk on account of circumstances the defendant had no role in creating. *See, e.g.*, Yania v. Bigan, 155 A.2d 343, 346 (Pa. 1959) (citing Section 314 of the Restatement of Torts for the proposition that a mere observer has no duty to rescue).

Id.

123. *See* Tessa Longbons, *Fact Sheet: Reasons for Abortion*, CHARLOTTE LOZIER INST., https://lozierinstitute.org/fact-sheet-reasons-for-abortion/#_ednref3 [https://perma.cc/Y25Y-TE96] (Jan. 14, 2023). Reliable data on the number of pregnancies resulting from rape is exceedingly difficult to find. Numerous factors contribute to this problem. There is no national reporting requirement regarding abortion, and the Centers for Disease Control, which gathers limited data on the demographics related to abortion does not solicit or require reporting on the reasons women obtain an abortion. According to the Charlotte Lozier Institute, only eight states collect such data. *Id.* However, based on these reports, approximately 0.3 percent of abortions are performed on women whose pregnancies are the result of rape. *Id.* This percentage is lower than older data published sporadically during the past several years. *See* Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL REPROD. HEALTH 110, 113 (2005). According to the American Congress of Obstetricians and Gynecologists (ACOG), a single act of rape has about a five percent chance of resulting in pregnancy in victims aged 12 to 45 who are not using birth control. ACOG: Committee on Health Care for Underserved Women, *Sexual Assault*, 133 OBSTETRICS & GYNECOLOGY e296, e297 (2019), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2019/04/sexual-assault.pdf [https://perma.cc/8GQV-DLVY]. This percentage may fluctuate greatly depending on a host of related factors, for example, if the rape occurred during a woman's ovulation cycle and if the rapist ejaculates into the vagina.

124. *See* Warren, *supra* note 79, at 51–52.

> knew beforehand would be required to keep that being alive, than [they have] to enter into an agreement with an existing person, whereby [they] may be called upon to save that person's life, and then refuse to do so when so called upon. Thus, *x*'s responsibility for *y*'s existence does not seem to lessen [their] obligation to keep *y* alive, if [they] are also responsible for *y*'s being in a situation in which only [*x*] can save [*y*].[125]

Ultimately, however, Professor Warren rejects this reasoning in the case of abortion because of her conviction that the unborn child (or "fetus") is not a person "with full moral rights."[126]

In contrast Tooley and Judith Jarvis Thomson reject any such responsibility, even if the fetus is a person with full moral rights.[127] Professor Thomson is the author of a widely-read article arguing that a woman has a right to disconnect with the unborn child by analogizing the pregnant woman to an kidnap victim who is connected to the circulatory system of a famous violinist because the victim is the only person who can provide the necessary life support to sustain the violinist life.[128] Given the involuntary nature of the connection, the analogy is only apt to pregnancies that are the result of rape.[129] The more interesting part of the article is Professor Thomson's consideration of cases where pregnancy results from a voluntary act of sexual intercourse.[130] She concedes that this fact might alter the moral status of abortion, but ultimately rejects such responsibility, at least in the cases where the woman is contracepting.[131]

---

125. *Id.* at 51.

126. *Id.* at 51–52.

127. *See id.* at 49–51. *But see* Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47, 48–49 (1971); Tooley, *supra* note 80, at 37.

128. Thomson, *supra* note 127, at 48–49.

129. *See id.*

130. *See id.* at 57–58.

131. *See id.* at 57–59. Professor Thomson has little to say about women who choose to engage in sex without contracepting. These choices are rarely the subject of discussion, notwithstanding the impact such choices may have on the moral analysis. Kristin Luker is one of the leading researchers in this area based on her seminal book, KRISTIN LUKER, TAKING CHANCES: ABORTION AND THE DECISION NOT TO CONTRACEPT (Univ. of Cal. Press 1978).

> Prior to Luker's work, the prevailing explanations of unwanted pregnancies centered on either contraceptive ignorance (women don't know how not to get pregnant) or intrapsychic conflict (women do know how but unconsciously want to be pregnant so they make mistakes). Luker found, however, that women were both more educated and more rational than these earlier theories had posited [based on the medical records

> [I]t is not at all plain that this argument [some moral responsibility arises in cases of voluntary uncontracepted sexual intercourse] really does go even as far as it purports to. For there are cases and cases, and the details make a difference. If the room is stuffy, and I therefore open a window to air it, and a burglar climbs in, it would be absurd to say, "Ah, now he can stay, she's given him a right to the use of her house—for she is partially responsible for his presence there, having voluntarily done what enabled him to get in, in full knowledge that there are such things as burglars, and that burglars burgle." It would be still more absurd to say this if I had had bars installed outside my windows, precisely to prevent burglars from getting in, and a burglar got in only because of a defect in the bars. It remains equally absurd if we imagine it is not a burglar who climbs in, but an innocent person who blunders or falls in.[132]

Professor Thomson's analysis fails to consider two dispositive differences between ejecting a burglar, or "an innocent person who blunders or falls in" and removing a developing previable child.[133]

First, the child is no stranger to the woman. As she concedes, the very existence of the unborn child is the result of the mother's (and father's) actions.[134] Second, there is no reason to presume that ejecting the burglar or innocent person exposes him or her to certain death, while removing a previable child from the mother's womb will result in the child's death. This distinction is critical since a property owner may be entitled to use force to defend his property, but he is not entitled to use deadly force absent a threat of serious harm to the owner.[135] In fact,

---

> of 500 women seeking abortions and personal interviews with another 50]. The women she studied articulated a range of costs associated with the use of contraception, such as price and availability, male attitudes toward the use of male or female contraception (spoiling spontaneity), biological side effects (such as weight gain from the pill), and social costs, such as acknowledging the fact of intercourse at all (will I look promiscuous?). The benefits of pregnancy included proof of fertility, shoring up an existing marriage, having a child to love, and testing a man's commitment or a parent's control.

Carol Sanger, *He's Gotta Have It*, 66 S. CAL. L. REV. 1221, 1228–29 (1993) (reviewing RICHARD A. POSNER, SEX AND REASON (Cambridge: Harvard Univ. Press 1992)).

132. Thomson, *supra* note 127, at 57–59.

133. *See id.*

134. *See id.* at 57–58.

135. Note, *Justification for the Use of Force in the Criminal Law*, 13 STAN. L. REV. 566, 575 (1961) ("At common law the privilege to kill in defense of property was recognized only in those cases involving a felonious threat to property, with the additional requirement that the threat also present the danger of serious harm to some person."); *see* People v. Ceballos, 526

the entry of the innocent person who blunders in may be justified under the common law of "necessity" or "choice of evils" if the trespass was necessary to protect the trespasser from serious harm.[136]

A. *Possible Exceptions*

Any discussion of the pregnant woman's responsibilities to her unborn child would be incomplete without addressing two circumstances in which there appears to be a broad consensus that either no maternal duty to continue a pregnancy exists or failure to fulfill such a duty is excused. The first and most universally recognized exception is the absence of the duty to continue a pregnancy where the pregnancy itself threatens the life of the pregnant woman.[137] Both the common law and all pre-*Roe* statutes contained such an exception.[138] Not only can this exception be explained by the reluctance to require heroic virtue as a general rule,[139] but it can

P.2d 241, 246 (Cal. 1974) ("Where the character and manner of the burglary do not reasonably create a fear of great bodily harm, there is no cause for exaction of human life . . . or for the use of deadly force.") (internal citations omitted).

136. RESTATEMENT (SECOND) OF TORTS § 197 (1)(a) (AM. L. INST. 1965) (providing that "[o]ne is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to . . . the actor"); *see also* United States v. Bailey, 444 U.S. 394, 409–10 (1980) ("[T]he defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils."). The application of the necessity defense to the acts of third parties is more limited and has been repeatedly rejected by the courts in the context of abortion and other public protests. *See generally* James O. Pearson, Jr., Annotation, "*Choice of Evils," Necessity, Duress, or Similar Defense to State or Local Criminal Charges Based on Acts of Public Protes*t, 3 A.L.R.5th 521 (1992).

137. *See* Mary E. Harned & Ingrid Skop, *Pro-Life Laws Protect Mom and Baby: Pregnant Women's Lives Are Protected in All States*, CHARLOTTE LOZIER INST., https://lozierinstitute.org/pro-life-laws-protect-mom-and-baby-pregnant-womens-lives-are-protected-in-all-states/ [https://perma.cc/2BHG-BBSC] (Sept. 11, 2023). These laws are either in effect or are enjoined pending litigation. For a discussion of the common law exceptions see Stephen G. Gilles, *What Does* Dobbs *Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion*?, 92 MISS. L.J. 271, 293 (2023).

138. Gilles, *supra* note 137 ("The early American statutes codifying the crime of abortion generally contained life-of-the-mother exceptions or language from which courts could infer that a life-saving abortion would not be 'unlawful.' Without exception, the nineteenth-century statutes, compiled in the Appendices to *Dobbs* permitted life-preserving abortions, and no State subsequently prohibited them.").

139. *Cf. In re* Fiori, 673 A.2d 905, 910 (1996) ("The right of the patient to abstain from medical treatment must be balanced against interests of the state. The four state interests most commonly recognized by the courts are: 1) protection of third parties; 2) prevention of suicide; 3) protection of the ethical integrity of the medical community; and 4) preservation of life.").

also be explained by the limited power of the state to choose between the lives of two innocent citizens.[140] Such instances, absent the most compelling of circumstances, should be left in the realm of private decision-making.[141]

The second set of circumstances that has occasioned exceptions to laws prohibiting abortion are cases in which the pregnancy results from rape. While exact data on how often this occurs is elusive, the fact that some rapes result in pregnancy is undisputed.[142] The issue for our purposes is what duties, if any, the pregnant woman has to the child conceived in rape.

Few people would directly argue that a child conceived through rape loses his or her humanity. If an unborn child has a moral right to life, it should not be conditioned upon who fathered the child. Neither the rape victim nor the innocent child conceived through the vicious act bear blame or moral responsibility for the actions of the rapist. But in condoning the killing of the unborn child, it can be argued that denying the child legal protection is a particularly extreme form of the long-extinguished doctrine of corruption of the blood, whereby children or heirs were punished for the crimes of their parents.[143] From a child rights perspective, exempting abortion in such cases is particularly troubling given U.S. Supreme Court precedent holding that a statute authorizing the death penalty for child rapist violates the Eighth Amendment's prohibition of cruel and unusual punishment.[144]

---

140. *See, e.g.*, Gilles, *supra* note 137, at 294–95.

141. *See id.*

142. *See* Longbons, *supra* note 123. *But see* Finer et al., *supra* note 123, at 113.

143. *Cf.* Lewis v. Grinker, 111 F. Supp. 2d 142, 178–79 (E.D.N.Y. 2000), *aff'd in part, rev'd in part* sub *nom.* Lewis v. Thompson, 252 F.3d 567 (2d Cir. 2001).

> [T]his notion that children should not be penalized for the sins of their parents, commonly referred to as "blood taint," is "deeply embedded" in the Constitution, most notably in the Framers' hostility to the archaic common law penalty of "corruption of the blood," a form of a bill of attainder. Max Stier, Note, *Corruption of the Blood and Equal Protection: Why the Sins of the Parent Should Not Matter*, 44 STAN. L. REV. 727, 729–39 (1992). This hostility to the corruption of the blood penalty finds its textual foundations in Article III, Section 3, Clause 2 of the Constitution, which provides: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained." U.S. Const. art. III, § 3, cl. 2. This provision has been interpreted by the Framers, the Supreme Court, and commentators as "'a declaration that the children should not bear the iniquity of the fathers.'"

Id.

144. Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (holding a death sentence for one who raped but did not kill his eight-year-old stepdaughter is unconstitutional under the Eighth and Fourteenth Amendments).

However, if the question is not the rights of the child, but the rights and duties of the mother, one can easily understand the attraction of creating such an exemption applying the general rule that one has no duty to protect another absent a special relationship. Such a focus would counsel at least a limited exception to any prohibition of abortion—such an exception ending no later than when the child attains viability.[145] In the case of a viable child, the woman could terminate her pregnancy through early delivery, while still respecting the rights of the child to live and continue his or her development.

Contrast this with the relational duties of the rapist father, who should, at the pregnant woman's discretion, remain financially liable to support the child but be barred from visitation and custody.[146] While 49 of the 50 states have laws that allow termination of a father's parental rights for children conceived in rape,[147] the details of such laws vary with some more protective of the mother and child than others.[148]

This analysis of the treatment of abortion in these various legal contexts further illustrates that the "right to abortion" created by *Roe* and perpetuated in *Casey* is anomalous.[149] In no other cases have the courts declared a group of human beings to be nonpersons, and in no other cases have courts disregarded the relationship between parent and child to excuse clear harms to the child through the parent's actions. The majority in *Dobbs* was correct in overturning *Roe* and *Casey*.[150]

145. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (discussing child viability as the time when abortion can be prohibited).

146. Melanie Dostis, Note, *Mommy, Baby, and Rapist Makes Three? Amid Abortion Bans, the Pressing Need for a Nationwide Lower Standard to Strip Parental Rights, Regardless of a Rape Conviction*, 27 WM. & MARY J. RACE, GENDER & SOC. JUST. 963, 983–84 (2021) (discussing statutes in New Jersey and Colorado excusing the mother from the need to attend child support hearings and directing that the whereabouts of the mother and child be treated as confidential).

147. *Id.* at 971. This is due in part to the Rape Survivor Child Custody Act, which incentivizes states to amend family statutes to allow for termination of father's rights if proven that the child was conceived in rape. 34 U.S.C. § 21302 (2017).

148. *See Parental Rights and Sexual Assault*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx#Table [https://perma.cc/N8BF-FCWH] (Mar. 9, 2020).

149. *See* Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 597 U.S. 215; *Casey*, 505 U.S. at 846 (1992), *overruled by Dobbs*, 597 U.S. 215.

150. *See Dobbs*, 597 U.S. 215; *Roe*, 410 U.S. 113; *Casey*, 505 U.S. at 846.

III. THE WISDOM AND FOLLY OF LEAVING THE QUESTION TO THE STATES

Assuming arguendo that the unborn child is properly a subject of legal concern, and that at a minimum, the pregnant woman has a duty to continue the pregnancy in cases resulting from voluntary sexual acts, absent a threat to her life from the pregnancy, is it not incumbent upon our nation to uniformly protect the child from lethal acts of violence? Given the long lessons our nation is still learning from the compromises made by the Founding Fathers and successive generations on the issue of slavery, should not the Court have overturned *Roe* and *Casey*, *and* recognized the constitutional personhood of the unborn *and* affirmed the constitutional necessity of legal protection for these tiny persons?[151] Certainly, that course of action would have vindicated the rights of unborn children and recognized abortion is the unjust taking of another human being's life. Make no mistake, I endorse both of these goals.

But the history of our country's grappling with a comparable moral divide on the issue of slavery suggests the more modest approach embraced by *Dobbs*.[152] Like the Founding Fathers crafting the Constitution at a time when slavery was an established fact in this country, the *Dobbs* court was not writing on a blank slate; Americans had been under the corrupt tutelage of the federal courts for years.[153] The lessons taught by *Roe* and its progeny denied both the personhood of the unborn and the natural relationship of unborn children to both mother and father, as well as the larger community.[154] Those cases also denied the right of citizens to collectively define and enforce their moral judgment on these important issues.

It is this last point that most resembles the Court's unjust ruling in *Dred Scott v. Sanford*.[155] Both *Roe* and *Dred Scott* demanded submission to a judicial fiat on issues of deep moral significance.[156] *Roe* rejected the ability of the people of each state to debate, persuade, and resolve questions regarding the rights and duties of unborn children and pregnant women,[157] while *Dred Scott* denied congressional

151. *See Dobbs*, 597 U.S. 215; *Roe*, 410 U.S. 113; *Casey*, 505 U.S. at 846.

152. *See Dobbs*, 597 U.S. 215.

153. *See id.*; *Roe*, 410 U.S. 113; *see also* Steven Mintz, *Historical Context: The Constitution and Slavery*, THE GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-constitution-and-slavery [https://perma.cc/RY9M-BM9J].

154. *See Roe*, 410 U.S. 113; *Casey*, 505 U.S. at 846.

155. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

156. *See id.*; *Roe*, 410 U.S. 113.

157. *See Roe*, 410 U.S.113.

authority to maintain a political balance between free and slave states so at least national debate on the issue could continue.[158]

By overruling *Roe* and *Casey*, the *Dobbs* majority freed the people of each state to determine the answer to what the *Roe* Court declared unanswerable.[159] The arrogance of the Court in declaring a question too complex for the Court to answer then striking down the answer adopted by the people's elected representatives of Texas is breathtaking.[160] It was only exacerbated by Justice Anthony Kennedy's subsequent demands that all Americans accept the Court's judgment of nonjudgment.[161]

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.[162]

Justice Antonin Scalia retorted,

> The Court's description of the place of *Roe* in the social history of the United States is unrecognizable. Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion; it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve.[163]

In the 50 years between *Roe* and *Dobbs*, state legislatures passed numerous laws testing the limits of the newly minted right to abortion,[164] inviting the Court

158. *See Dred Scott*, 60 U.S. 393. A key difference between the two cases is that the pre-1866 Constitution contained numerous provisions based on recognition of slavery, while the 1973 Constitution was silent on the question of abortion. Mintz, *supra* note 153.

159. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231–32 (2022); *Roe*, 410 U.S. 113; *Casey*, 505 U.S. at 846.

160. *See Roe*, 410 U.S. at 159–61, 166–67.

161. *See Casey*, 505 U.S. at 866–67.

162. *Id.*

163. *Id.* at 995.

164. *See US States Have Enacted 1,381 Abortion Restrictions Since* Roe v. Wade *Was Decided in 1973*, GUTTMACHER INST. (June 21, 2022), https://www.guttmacher.org/infographic/2022/us-states-have-enacted-1381-abortion-restrictions-roe-v-wade-was-decided-1973 [https://perma.cc/U5MN-US7W].

to return the issue to the people. The *Dobbs* majority finally accepted that invitation.[165]

As one who believes in the humanity and personhood of the unborn and in our obligation to protect their lives in the same way we protect the lives of newborns,[166] I recognize the imperfection of returning the issue to the people. As a citizen of a state that allows abortion throughout the entire pregnancy,[167] and proclaims abortion is good,[168] I see the flaws of the democratic process in addressing such grave moral issues. However, this outcome existed in Minnesota and other states before the ruling in *Dobbs*, so the lives of unborn children are at no greater risk than before.[169]

Examples of the extreme measures that were permissible under *Roe* and *Casey* include New York's decriminalizing the killing of a viable unborn child (amending a definition of person that had been on the books for decades at the time).[170] It is difficult to understand how women's autonomy is vindicated by decriminalizing the killing of an unborn child that the woman recognizes as a tiny human being and wants to nurture and care for. The repeal of fetal homicide communicates that regardless of the pregnant woman's "choice," the state considers the life of the unborn child valuable only as an "appendage" of the woman's body.[171] The killing of that child during pregnancy is no different than other physical injuries any non-pregnant woman might suffer during any serious bodily assault. The clear message is the law is only concerned with the killing of the child to the extent it has a physical impact on the woman, and her grief as a grieving mother is either irrational or irrelevant. Yet, parents experiencing perinatal loss of their children suffer tremendous grief, in part, because those

165. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022).

166. Surprisingly, the government's constitutional obligation to protect against private acts of violence has been rejected by the Supreme Court and state laws. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201–03 (1989); *see also* Town of Castle Rock v. Gonzales, 545 U.S. 748, 755, 766 (2005).

167. *See Interactive Map: US Abortion Policies and Access After* Roe, GUTTMACHER INST., https://states.guttmacher.org/policies/minnesota/abortion-policies [https://perma.cc/3BLN-2G82] (Jan. 24, 2024) ("Abortion [in Minnesota] is not restricted based on gestational duration[.]"). Immediately after *Roe*, the Minnesota post-viability abortion ban was ruled to be unconstitutionally vague, and it has not been replaced. *See* Hodgson v. Lawson, 542 F.2d 1350, 1354–55 (8th Cir. 1976).

168. *See* MINN. STAT. § 145.409 (2023).

169. *See Dobbs*, 597 U.S. 215.

170. N.Y. PENAL LAW § 125.00 (McKinney 1970) (amended 2019) (including "an unborn child [over] . . . twenty-four weeks" as a victim in the definition of homicide).

171. *See* sources cited *supra* notes 14–16.

surrounding the parents fail to acknowledge that they are "parents" who have lost a child.[172]

Dobbs was a critical and positive change in the legal status of abortion.[173] Because of *Dobbs*, states like Texas, Mississippi, Idaho, and Louisiana are now free to protect unborn children and their families in those states, while under *Roe* states like New York, Minnesota, and California remain free to ignore the killing of unborn human beings, sometimes regardless of the pregnant woman's desires.[174] That some states can protect unborn children is a victory—a victory worth celebrating. And for today it must be sufficient.

As for tomorrow, all citizens are now free to engage in the hard work of persuading our family, friends, and neighbors who disagree. If successful, any protection of unborn children through new legislation is not at risk of veto by federal courts.[175] That too is a victory.

I recognize the daily cost in human lives in states, like Minnesota, where women receive no counseling regarding the unique risk of abortions and the resources available to help them continue their pregnancies.[176] The state legislature has amended the statute requiring reasonable medical care for infants born alive during an abortion to mandate only comfort care and has repealed any reporting requirement of such live births.[177] Minnesota has defunded grants to pregnancy

172. *See* Katherine Gold et al., *Depression and Posttraumatic Stress Symptoms After Perinatal Loss in a Population-Based Sample*, 25 J. WOMEN'S HEALTH 263, 266 (2015). Parents who experience perinatal loss have four times higher odds of depressive symptoms and seven times higher odds of having symptoms of post-traumatic stress disorder compared with non-bereaved parents. *Id.*

173. *See generally Dobbs*, 597 U.S. 215.

174. *See generally id.*; *Interactive Map*, *supra* note 167.

175. *See generally Dobbs*, 597 U.S. 215; *Interactive Map*, *supra* note 167.

176. *See* Michelle Griffith, *What's in the 2023 Health and Human Services Package*, MINN. REFORMER (June 9, 2023, 8:00 AM), https://minnesotareformer.com/2023/06/09/whats-in-the-2023-health-and-human-services-bill/ [https://perma.cc/AQ2J-B797] ("Lawmakers also eliminated the "Positive Alternatives" program, which funded so-called crisis pregnancy centers that encourage women to carry pregnancies to term and provide resources to them."); Tessa Pieper, *House Lawmakers OK $7.1 Billion Omnibus Health Bill That Seeks to Purge Restrictive Abortion Statutes*, MINN. LEGISLATURE: MINN. HOUSE OF REPRESENTATIVES (Apr. 23, 2023, 11:19 PM), https://www.house.mn.gov/sessiondaily/Story/17956 [https://perma.cc/L7HU-G4T5].

177. S.F. 2993, 93d Leg., Reg. Sess. (Minn. 2023); *see SF 2995: Status in the Senate for the 93rd Legislature (2023-2024)*, MINN. LEGISLATURE: OFF. OF THE REVISOR OF STATUTES, https://www.revisor.mn.gov/bills/bill.php?b=senate&f=SF2995&ssn=0&y=2023 [https://perma.cc/F8LD-JV9T] (indicating passage of Senate File No. 2993).

centers that provide counseling, parenting education, and material support to women who choose to continue their pregnancies.[178] At the same time, the legislature dramatically increased funding for abortions for Minnesotans and others traveling to the state.[179]

I understand the urgency of restoring legal protections to unborn children and their parents. But the issue of abortion is not best addressed by judicial fiat. We must be tireless in our work to advance a culture of life and be creative in our support of families fearful of continuing a pregnancy. We must see this for what it is—the greatest human rights battle of our time. *Dobbs* did not give us victory by judicial decree, but it restored our ability to fight for that victory and preserve the incremental gains we win.[180]

178. *See* Matt Birk, *It's Time for the Pro-Choice People to Come Clean*, STARTRIBUNE (Aug. 10, 2023, 5:30 PM), https://www.startribune.com/matt-birk-its-time-for-the-pro-choice-people-to-come-clean/600296314/ [https://perma.cc/K5JK-HM9G] ("This past legislative session in Minnesota we saw a historic increase of $18 billion to our state budget, bringing the total budget to $71 billion. All sorts of new spending was approved. But do you know what was cut? The $3.5 million Positive Alternatives grant, which helped support the 90 PRCs in Minnesota . . . accounted for 0.00005% of the total budget—less than a rounding error.").

179. *See Health Law Lifts Abortion Restrictions, Provides $1.78 Billion in New Overall Spending*, MINN. LEGISLATURE: MINN. HOUSE OF REPRESENTATIVES https://www.house.mn.gov/NewLaws/story/2023/5545 [https://perma.cc/MDX5-Y7YF].

180. *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).