Location and Life: How Stenberg v. Carhart Undercut Roe v. Wade

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On January 22, 1973, in its decision entitled Roe v. Wade, the Supreme Court of the United States declared that a fetus enjoys no constitutional protection at any time before birth. Abortion must be available on an elective basis before viability, in that neither federal nor state law may require any maternal health reason for the procedure. Even after viability, the fetus counts only as a "potenti-
ality of human life" and can therefore be destroyed for broadly defined maternal health reasons, amounting virtually to elective abortion, right up to birth. Location—in or out of the womb—thus determined whether actual human life existed and whether it was constitutionally protected under the Roe v. Wade ruling.

Many years later, some physicians began using the "partial-
birth" method of abortion, destroying the fetus at a point when induced delivery was almost complete. The following description of this method, given by a nurse eyewitness, was presented later to the Supreme Court. The doctor had pulled the body of the fetus, up to the head, out of the mother’s uterus. In the words of the nurse:

The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall.

The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp. H.R. 1833 Hearing 18 (statement of Brenda Pratt Shafer).2

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2. Stenberg v. Carhart, 530 U.S. 914, 1007 (2000) (as quoted in the dissenting opinion of Justice Clarence Thomas). The State of Nebraska’s defines partial birth abortion as “an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery. 28-326(9).” Id.
Thirty American states responded by prohibiting this procedure, attempting to protect the fetus as soon as it was located largely outside the womb. Supreme Court Justice Antonin Scalia agreed with them, calling this procedure the “killing of a human child” by “live-birth abortion,” but he was in the minority. In the name of *Roe v. Wade*, in a 5-4 decision, the Supreme Court struck down such bans as unconstitutional in the case of *Stenberg v. Carhart*, dated June 28, 2000.

The concurring opinions of Justices John Paul Stevens and Ruth Bader Ginsburg do not deny that this procedure is, in their words, “brutal” and “gruesome,” and “cruel” and “painful.” But they argue that any prohibition of it is “simply irrational” because it is no more brutal, gruesome, cruel or painful than intrauterine mid- and late-pregnancy abortion where the still-unborn fetus is dismembered alive, with its limbs and then its body pulled out piece by piece before its head is finally crushed. In other words, the two Justices think it irrational for a state to regard a fetus as more worthy of legal protection simply because it is nearly born, located outside the womb up to its neck.

Like these concurring opinions, the Court majority opinion treats fetal location as irrelevant. For the majority, the fact that the fetus is mostly born when the procedure in question causes its death is no reason at all for greater state protection.

Recall, however, that the Court founded the 1973 *Roe* decision on the idea that the location of a fetus, in or out of the womb, is determinative of its humanity and its right to life. The Justices’ opinions in *Stenberg* treated that foundational idea—that location can determine nature and rights—as so irrational that it is not even considered. Has *Stenberg* thus undercut the cardinal principle of *Roe* that perinatal location matters?

Looking back, we shall see that the *Roe* opinion contained the seeds of its own destruction, and that it had gradually disintegrated for twenty-seven years before the *Stenberg* case. *Stenberg* may have merely brought that process to its completion, implicitly overruling *Roe*. This deconstruction of the locationary wall erected by *Roe*

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3. *Id.* at 953 (dissenting opinion of Justice Scalia). Besides Justices Thomas and Scalia, Justice Anthony Kennedy and Chief Justice William Rehnquist also dissented.
4. *Id.*
5. *Id.* at 946 (concurring opinion of Justice Stevens, joined by Justice Ginsburg).
6. *Id.* at 952 (concurring opinion of Justice Ginsburg, joined by Justice Stevens, citing opinion of Judge Richard Posner in Hope Clinic v. Ryan, 195 F.3d 857, 881 (7th Cir. 1999)).
7. 530 U.S. at 924-26, 938-46.
8. *Id.* at 930. For further analysis of the *Stenberg* opinions, see *infra* notes 48-63 and accompanying discussion.
means that the right to destroy life in the womb is now constitutionally free to expand beyond the process of birth. This Article examines the conceptual strategies that might secure abortion rights while halting this expansion to some degree.

The Roe Court’s Naive Realism

From the beginning, the Roe decision contained a deep contradiction, which can be understood as a conflict between nominalism and a sort of realism. The Court asserted in Roe, in effect, that the unborn child has no real nature and that what the courts call it is solely a matter of semantic convention. Yet the Court assumed that the moment of birth marked an essential difference, a real, not merely conventional, transition to a living entity human in nature. This “birth wall” shielded the rest of us from the vulnerability legally imposed on fetuses.

The Roe Court’s nominalism is revealed most simply in the majority opinion of Justice Harry Blackmun, who asserts that the Court “need not resolve the difficult question of when life begins” in order to justify the Court’s requirement that legislators treat the fetus at most as “the potentiality of human life” right up to the moment of birth. There is no need to answer this question, he says, because the diversity of answers given by others shows the question to be unanswerable, at least at present. Yet surely the law may take controvertible stands, and it may seek to minimize the possible harm of error even where it has no access to truth. Blackmun’s insistence that what we call the fetus does not matter, implies a much more radical agnosticism: the assumption that the names we give to unborn human beings are wholly conventional, that one can in principle never say that abortion really takes a human life.

Blackmun’s justificatory history of permissive abortion practices bears out this appearance of deep-seated nominalism. In order to decide whether practices of past ages are justified today, we ought to look not only at the practices themselves (i.e., practices of permitting abortion), but also at the beliefs about values and facts upon which societies based those practices. If those underlying values now seem to us quite mistaken, the practices arising from those beliefs acquire no precedential authority for us today.

9. 410 U.S. at 159.
10. Id. at 164-65.
11. For example, if we looked only at historical popularity, there is one legal and moral practice we ought to adopt immediately. It has existed in almost every major civilization from
Similarly, we cannot honestly invoke the authority of past scientific conclusions if we now see that the data upon which the science of the past based its conclusions were incomplete or mistaken. If we seek to know what is real, we cannot rest content with labels, we must inquire into reasons.

Yet, throughout Justice Blackmun's lengthy surveys of past practices allowing abortion, he never once asks whether the beliefs upon which those societies based practices are in fact ones that he considers admirable or accurate. By contrast, he occasionally does try to rebut past reasons for restricting abortion—such as to protect the mother's life.

For example, Blackmun refers often to "quickening" as a popular dividing line, without once mentioning that modern medical knowledge shows this "event," as he calls it, to be an illusion. The overall impression that Blackmun gives is that whether and when the law permits abortion is an open choice, with most cultures opting for abortion.

earliest history right down to the nineteenth century. I am speaking of slavery. Why do we not imitate past social practices and reintroduce slavery? Obviously, we reject slavery because we think these the peoples of the past based the acceptance of this practice upon unacceptable values (as in the ancient world, where the intrinsic dignity of human beings was not an article of faith) or erroneous facts (the myth of black inferiority that helped support the American slave system). Consequently, this almost universal historical practice of slavery provides no precedent whatsoever for the reintroduction of slavery today.

Similarly, it may be that those pre-twentieth century societies that permitted abortion have always done so for reasons that we today would reject. For example, Justice Blackmun appeals to ancient Rome and Greece for precedent, but the ancient world lacked both modern scientific knowledge of life in the womb and our modern belief in the sanctity of the human individual. Rome, for example, permitted what our modern law considers infanticide as well as abortion. On the other hand, Hippocrates, the author of the Hippocratic Oath, which stands as the great ethical foundation of modern medicine, believed both in the continuity and in the sanctity of life—and the Oath forbids abortion. Which precedent is more compelling should depend on which underlying beliefs we today find more plausible.

During many of the Christian centuries there was a widely-held biological theory which placed the beginning of life at what was called "quickening" ("quick" here meaning "alive"), which supposedly occurred in mid-pregnancy. One can hardly fault these centuries for considering abortion less serious prior to quickening, because even though they believed in our modern value of the individual, their facts were wrong. We now know that quickening designates only the mother's sudden perception of movement, rather than an infusion of life. In fact, we now know that bodily movement begins very early in pregnancy, and heartbeat still earlier, long before it can be perceived without the aid of medical instruments. Two centuries ago a morally serious person could permit early abortion because she could honestly believe that life had not yet begun, but this position could not be honestly and seriously so grounded today.

13. Id. at 148-49.
14. Id. at 160.
15. If, on the other hand, Justice Blackmun had factored out all erroneous medical data as well as all purely religious doctrines about ensoulment and the like, especially the ones in
At the same time, Blackmun suggests, without explicitly stating it, that birth makes a real difference. Such a claim is arguably implicit in his refusal to find that constitutional personhood and actual human life begin “before live birth.” In any event, Justice Stevens, writing thirteen years later in support of Roe, makes clear the necessity of what we above called the “birth wall.” Concurring in a 1986 case, he insists that “there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures.” In the next sentence, Stevens makes clear that, in his view, even “the 9-month-gestated, fully sentient fetus on the eve of birth” is not yet a human being.

Stevens does not explain his claim that a fundamental non-human to human change at birth is required in order to justify legal abortion; but one basis for his view is surely the principle of human equality that underlies both our ethics and our law. There must be a real and deep difference between human and non-human entities in order to give force and limit to the normative demand for equal protection for all humans. If all entities could be defined at will into and out of humanity, human equality would have no practical significance. Insofar as human equality does make practical demands on us, it follows that we are committed to ontological realism. Stevens has to claim a split in nature between fetus and infant in order to avoid recognizing a right to life in principle equal

which no one any longer believes, he might have found far more agreement that the continuity and dignity of developing human life demand its protection.

16. 410 U.S. at 156-59. Blackmun concludes that the fetus at no stage possesses constitutional personhood before asking whether the fetus counts as a living human being. Thus Roe must clearly be read to be wholly nominalist with regard to the legal name “person,” even if not with regard to the extra-legal name “human being,” since Blackmun thinks that the extent of that legal appellation can be ascertained by looking only at positive law, without yet considering natural realities.

17. Id. at 161-62.

18. Id. at 161. Blackmun is not explicit about what I have called “the birth wall” only in that he does not state in so many words that actual human life exists even after birth, nor does Roe explicitly condemn postnatal killing. However, the opinion does say that there “has always been strong support for the view that life does not begin until live birth,” and it seems fair to read Blackmun in 1973 as not taking a culturally radical stance favoring infanticide. Id. at 160.


20. 476 U.S. at 779.

21. Id. The clarity of Stevens’ birth wall depends on the highly plausible assumption that he would consider a newborn baby to be “a human being.” Certainly, there is no hint in his opinion of the openness to infanticide discussed later in this essay.
before and after birth. Only if expulsion from the womb gives the fetus a human nature for the first time is virtually elective late-term abortion easily justifiable.

The position of Justices Blackmun and Stevens has a prima facie appeal. It is easy to imagine that the fetus is being constructed in the womb, piece by piece, by external forces. Just as it would seem purely stipulative to insist that an automobile suddenly comes into existence at some mid-production point in the factory, so too the exact point at which a fetus in mid-production becomes a human being could seem a mere matter of nominalist labeling. On the other hand, we tend to agree that an automobile is present once it rolls out of the factory onto the street, and likewise that the fetus is definitely a human being once it emerges "complete" from the womb.

The Blackmun-Stevens conceptualization of life does have serious problems, however. No one thinks that merely coming out of the factory door changes what is not a car into a car. Indeed, those earlier ages that lacked modern biological knowledge, and so falsely imagined that a fetus is put together solely by outside forces rather than developing itself, all took the external construction phase to be complete sometime considerably prior to birth—often at what they called "animation" or "quickening," which they believed manifested that a soul had been added and had taken charge of its own development. Furthermore, the newborn infant is not yet "complete" in the sense that the automobile out on the street is complete. Newly born human life goes on developing itself for years after birth, continuing a process that began at conception. Nevertheless, the common, quasi-conscious belief that humans are constructed in the womb and are complete when born surely lent and lends an initial plausibility to the legal birth wall built by the Court in Roe.

We were thus bequeathed a curious antinomy by Roe. We were to presume that the unborn child or fetus has no inner nature of its own. What it is called is a matter of convention or preference, for it is not "really" anything at all. At the same time, we had to assume

22. This is not to say that fetal location might not dictate different techniques of protection. Consider, for example, the German abortion cases (see infra notes 71-73, and accompanying text), which hold that despite the unborn child's constant right to life throughout pregnancy, abortion may sometimes go unpunished in order to facilitate protective counseling.

that birth is a bright line, a moment when (in reality, not merely in convention) by leaving the uterus, simply by passing through the birth canal, the fetus becomes undeniably one of us. In other words, we were to be skeptical nominalists before birth, but credulous realists about birth itself.

It should have been obvious, even to Justice Stevens, that the notion of a clear, fundamental difference at birth was not viable. For one thing, the many postmodern nominalists among us, especially among academics, could hardly accept the assertion that a bright line between non-human and human exists at birth. If definition in principle is a social construct, those who have the political will to do so (i.e., those interested in protecting the unborn or in justifying infanticide) must inevitably deconstruct Stevens' definition of humanity.

Yet even realists must reject, in the end, the birth wall thesis, because it claims that what something is depends upon where it is. It makes the fundamental nature of the perinatal entity depend solely upon location. Location, however, cannot determine a being's inner nature, though location may well affect how that being functions for others and thus affect what others name it. Birth often matters so much to parents—the child can be held, its sex can finally be known—that they give it a new common as well as proper name. But it is their relationship, not the child, that is new.

The jurisprudence of Justices Blackmun and Stevens thus abjured the search for the nature of the fetus before birth, where a realist would search it out, while relying on a common sort of naive realism about birth itself, where the fetus-infant difference cannot be more than nominal. In more concrete terms, Justices Blackmun and Stevens would have us believe the child born prematurely at seven months to be a human being, while its more developed cousin in the womb overdue at nine and a half months is still a creature without a fundamentally human nature. Without an appeal to some supernatural change, such as the insertion of a soul at first breath, an appeal which neither judge makes nor constitutionally could make, such a belief is—upon reflection—simply irrational, beyond the limits of even the most extreme credulousness.

The Casey Court Breaches Roe's Wall

The absurdity of the birth wall did not cause it to fall immediately. The United States Supreme Court reaffirmed Roe v. Wade in
1992, in its decision *Planned Parenthood v. Casey*, but it did so without claiming that birth really makes a difference, explicitly avoiding any claim that the Court rightly decided *Roe* in the first place. Instead, *Casey* based the right to abort in large measure on *stare decisis*, the Anglo-American doctrine of binding precedent, which is for *Casey* a doctrine of Court vanity and legal positivism. The Court, according to *Casey*, cannot overturn past decisions just because they reached the wrong conclusion. Fidelity to the Constitution is not by itself a sufficient reason to right old wrongs. Erroneous holdings can only be overturned based on new information not available to the earlier Court. Except in those circumstances, correcting past mistakes would undermine the Supreme Court’s prestige, the Court argued in *Casey*, particularly so on matters of great controversy. *Roe*’s abortion fiat stands, but only

24. Planned Parenthood of Southeastern Pennsylvania v. *Casey*, 505 U.S. 833 (1992). The joint opinion of Justices O’Connor, Kennedy and Souter spoke for a majority of the Court with regard to its statement of holdings. However, its arguments were joined by a majority only with regard to its reasons (e.g., its strong doctrine of *stare decisis*) for reaffirming the core holdings in *Roe* and the medical emergency provisions of the Pennsylvania abortion statutes at issue; it also commanded a majority in its argument for striking down Pennsylvania’s spousal notification provision. The arguments of the joint opinion do not represent a majority with regard to its reasons for upholding most sections of the Pennsylvania statutes (e.g. the informed consent provisions) nor for overruling Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) or *Thornburgh*. As to these non-majority portions of the joint opinion, Justices Stevens and Blackmun would have preferred stronger abortion rights arguments, while Justices Rehnquist, White, Scalia, and Thomas would have preferred weaker abortion rights arguments.

25. Referring to the cases upholding a constitutional right to contraception, the Court says clearly, “We have no doubt as to the correctness of those decisions.” 505 U.S. at 852. The Court then contrasts its view of *Roe*, stating that “the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.” Id. at 853.

26. The Court stated:

Because neither the factual underpinnings of Roe’s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.

*Id.* at 864.

27. The Court lists various sorts of such new information: unworkability in practice, no significant reliance on the erroneous decision, later contrary case law, and changed factual understandings. *Id.* at 855.

28. *Plessy v. Ferguson*, 163 U.S. 537 (1896), the decision approving racial segregation, was wrongly decided from the beginning, according to *Casey*. 505 U.S. at 863. Nevertheless, it was appropriately overturned by *Brown v. Board of Education*, 347 U.S. 483 (1954) only because the “facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions.” 505 U.S. at 863. Had no new
as such. Not willing to deny that abortion destroys existing human life, the majority in *Casey* says simply that the Court has spoken, *causa finita est*. Referring to "the interest of the State in the protection of 'potential life,'" also characterized as "a legitimate interest in promoting the life or potential life of the unborn," the decisive joint opinion of Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter went on to declare:

We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe*’s wake we are satisfied that the immediate question is not the soundness of *Roe*’s resolution of the issue, but the precedential force that must be accorded to its holding. And we have concluded that the essential holding of *Roe* should be reaffirmed.

Despite this belabored support for *Roe*, anti-abortionists could be pleased with *Casey*, in that, because the Court no longer assumed as dramatic a transformation at birth, the identity of the child before and after birth could be affirmed in American law, provided always that the ultimate right to abortion be preserved. The law could recognize the essential continuity of human life. Realism could begin to replace nominalism with regard to prenatal development. If the child has real dignity outside the womb, it must have dignity inside, since location cannot make an ontological difference. In the words of Justices O'Connor, Kennedy, and Souter, "Regula-

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29. *Id.* at 871.
30. *Id.* at 870.
31. *Id.* at 871. Although this portion of the *Casey* opinion was joined in only by Justices O'Connor, Kennedy, and Souter, when the votes of the four justices who wished to overrule *Roe* entirely (Rehnquist, Scalia, Thomas, and White) are added in, there is a solid majority of seven that refuses to endorse *Roe*’s reasoning, along with a bare majority of five in favor of reaffirming its core holdings.
tions which do no more than create a structural mechanism by which the State... may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."

For example, laws requiring a woman contemplating abortion to be fully informed about the procedure, including what it does to the fetus, were declared constitutional by Casey, overruling a contrary 1983 holding that read Roe to forbid state attempts to dissuade women from having abortions."

Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term...

Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in Roe...

Though it still used the opaque and demeaning phrase "potential life," as well as the words "life" and "child," for the human fetus, the Casey decision clearly permitted state anti-abortion laws to be motivated by the "legitimate goal of protecting the life of the unborn," so long as their purpose remained "to persuade the woman to choose childbirth" rather than forcibly to stop her from choosing abortion. Indeed, already in the 1989 Webster case, the birth wall had weakened to the point where the Court had upheld Missouri legislation requiring the unborn child, from the moment of conception, to be treated as a legal person.

32. Id. at 877. Again, seven justices would uphold such regulations. See comment at supra note 31.

33. Id. at 882, overruling Akron and Thornburgh insofar as each case gave insufficient "acknowledgment of an important interest in potential life..."

34. Id. at 872. Note the opinion's explicit affirmation that there are non-religious, "philosophic and social arguments" against abortion.

35. Id. at 873.

36. E.g., id. at 871. The Casey opinions use the terms "life or potential life" and "life of the unborn." Id. at 825, 870, 883. The pro-Roe majority of the Court goes so far as to refer to the "life of the child his wife is carrying," in denying a father's rights. Id. at 898. If the four anti-Roe dissenting justices were added, this would mean that the Court unanimously affirms the existence of the "life of the child" in the womb.

37. Id. at 883.

38. Id. at 878.

39. Id. at 879.
except insofar as the decisions of the Supreme Court might otherwise require.\textsuperscript{40}

In addition to informed consent, \textit{Casey} approved a minimum twenty-four hour period of reflection between the time the pregnant woman is given the required information and the actual abortion.\textsuperscript{41} \textit{Casey}'s "[p]ersuade, but do not actually block," principle need not stop there. After the Court decided that case, for example, Pennsylvania initiated a system of state subsidies for non-religious, pro-life crisis pregnancy centers, the sort that had previously subsisted almost solely on private contributions and volunteers.\textsuperscript{42}

Since women already in a crisis pregnancy can be given accurate factual information\textsuperscript{43} intended to encourage them to choose life, it follows that public high school students, even as part of a required curriculum, can receive such information in circumstances more likely to promote calm reflection. Information may well be more effectively integrated into personal decision-making if it is provided before a pregnancy-induced sense of desperation. Such an educational initiative began a few years ago in Florida.\textsuperscript{44}

In a sense, the outcome in \textit{Casey} was not surprising. The Court never explicitly extended \textit{Roe}'s birth wall beyond abortion itself. Where the constitutional right to abortion has not been at issue, as in the Missouri case mentioned above, the Supreme Court has long

\textsuperscript{40} Webster v. Reproductive Health Services, 492 U.S. 490, 504-07 (1989). The Court in \textit{Webster} reversed a federal appellate decision holding that \textit{Roe} did not permit states to consider the fetus a human being and a person in regulations affecting abortion. However, the Court approved the Missouri requirement only as a statement of principle, leaving itself room to invalidate some applications at a later date, if they had the effect of actually stopping any abortions. Before \textit{Webster}, only the Supreme Court decisions approving state refusal to fund or otherwise affirmatively support abortion had clearly permitted states to act on a fetus-as-human-life point of view in connection with abortion. See e.g., Poelker v. Doe, 432 U.S. 519, 521 (1977).

\textsuperscript{41} 505 U.S. at 885-87.


\textsuperscript{43} Note that, although \textit{Casey} definitely permits the state to take the pro-life side in seeking to dissuade people from abortion, the three-Justice opinion assumes that all informed consent materials will be "truthful and not misleading" and "aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." 505 U.S. at 882-83.

\textsuperscript{44} See J. C. Willke, \textit{Public Schools Can Teach Pro-Life: Few Realize This, Fewer Still Do It}, LIFE ISSUES CONNECTOR, Apr. 1998, at 1. The article discusses the efforts of John Beasley and his group entitled "Freedom to Learn," which aims at getting every public school in America to openly teach "both sides" of the abortion issue. If the State claimed to be teaching the pros and cons of abortion, then \textit{Casey} would require teachers to present both sides, as Dr. Beasley urges. But if the State, for example, were simply to insist that all biology students be told about the facts of fetal development, I do not see why pro-abortion arguments (i.e., claims of overpopulation) would need to be introduced into the curriculum. Dr. Beasley may be reading \textit{Casey} less generously than he could from a pro-life perspective.
been indulgent regarding state action designed to recognize and protect fetuses. At no point post-Roe has the Court ever struck down any of the many state laws punishing the killing of a fetus without its mother's permission, thus treating the fetus as a second victim of an assault on its mother. In Minnesota, for example, an assailant who intentionally destroys a just-conceived human embryo by battering its mother can be sentenced to life in prison for "murder of an unborn child," even if the mother was on the way to an abortion clinic at the time.

From a pro-choice perspective, the bad news announced in the Casey decision was that Roe's birth wall had been further dismantled, permitting greater recognition and protection for the fetus. Realism seems to be replacing nominalism prior to birth.

Yet there was also bad news from a pro-life point of view in Casey. The newly-conceded weakness of the birth wall, the absurdity of thinking that a fetus's new location ex utero could suddenly bestow a human nature upon it, would seem also to permit nominalism to expand into and after birth. The concession that there is no real change at birth helps pave the way to the Stenberg partial-birth decision.

Casey freed the law to be more consistently pro-life or more consistently pro-choice. The path chosen turns on the status of infants during and after birth.

The Stenberg Court Disregards Location

Roe v. Wade rested necessarily on at least two pillars: the principle that a change in location can bring about a change in nature, and the further proposition that passage out of the uterus and into the light causes such as a transubstantiation. The exact moment of this momentous shift from sub-human to human life—at

45. For example, in 1998, the Court refused to review the South Carolina Supreme Court's decision upholding a state statute punishing drug use by pregnant women as a form of "child endangerment." Whitner v. South Carolina, 523 U.S. 1145 (1998). In this memorandum decision, the Court let the South Carolina Supreme Court decision stand without comment. Whitner v. State, 492 S.E.2d 777 (S.C. 1997).

46. According to the anti-abortion Americans United for Life, twenty-nine states now treat the killing of an unborn child as a form of homicide, including legislation recently enacted in Idaho and Nebraska. See Americans United for Life, States the Prohibit Crimes Against the Unborn Child, at http://www.americansunitedforlife.org/guides/flh_statutes.htm (visited Sept. 14, 2002).

47. State v. Merrill, 450 N.W.2d 318, 321 n.1 (Minn. 1990), cert. denied 496 U.S. 931 (1990) (the Minnesota Supreme Court rejected a defendant's argument that he was being treated unfairly in being prosecuted for killing an embryo or fetus less than one month after conception when others could commit the same act with impunity).
the beginning, in the middle, or at the end of the birth process—was explicitly left undecided by Roe, as explained in its first footnote.48

The thirty states prohibiting partial-birth abortion seem clearly to have intended to track those two foundations of Roe. At least one of Stenberg's important amicus briefs, that of Louisiana and Mississippi, had focused on changed fetal location as the justification for greater fetal protection.49 The prestigious American Medical Association had used Roe-like language to support the bans, arguing that partial-birth abortion is "ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside the womb."50 Three of the four dissenting opinions picked up and emphasized this point as well.51

Yet the majority opinion in Stenberg not only refuses to permit greater protection to a child mostly born, it claims not to see how location could matter at all. Recall that before birth, even after fetal viability, Roe had acknowledged a state interest in protecting the fetus only as "the potentiality of human life."52 The majority in Stenberg notes that Nebraska, the state prohibiting partial-birth abortion whose law was before the Court, "describes its interests differently. It says the law... 'prevents cruelty to partially born children'. . . . But we cannot see how the interest-related differences could make any difference to the question at hand, namely, the application of the 'health' requirement."53 For the majority of

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48. The Court in Roe recognized:

Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child

Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

410 U.S. at 118.

49. Brief of Amici Curiae Louisiana and Mississippi in Support of Petitioners, 2000 WL 228483, Stenberg v. Carhart, 530 U.S. 914 (2000). The brief cites Justice Marshall's oral statement during Roe's 1972 re-argument that killing a child in the process of birth "is not an abortion." Id. at *4. It also points to various medical authorities which say that pregnancy has already ended once birth has begun, concluding that to uphold partial-birth abortion would "transform the right to terminate pregnancy into a new constitutional right to kill a child even after the pregnancy is terminated." Id. at *14. The brief remarks concisely "Viability' is about gestation; 'partial birth abortion' is about location." Id. at *13.

50. 530 U.S. at 1007 (dissenting opinion of Justice Thomas)(emphasis in original).

51. Justices Scalia, Kennedy, and Thomas emphasized location, but Chief Justice Rehnquist, in his very brief dissent, did not.

52. 410 U.S. at 164-65.

53. 530 U.S. at 930-31. Note that by applying a maternal health standard, the Court seems to focus on post-viability partial-birth abortions, in that before viability there is a right under Roe to a fully elective abortion, not just to abortion for health reasons. 410 U.S. at 164.
the Court, a state interest in “partially born children” counts no more than a state interest in the “potentiality of human life” when balanced against maternal health.

If, under Roe, birth could make a difference, how can the majority not find that partial birth could also make a difference? The Court in Roe would surely have said that a mother could not take the life of her fully ex utero child for reasons of psychological “health”—as she has a right to do just before the beginning of birth. How can the Stenberg majority not at least acknowledge and respond to Nebraska’s argument that the almost born should be treated almost like the born? The Court writes instead as though location could not possibly make a difference.

Even more surprising is Justice Stevens’ concurring argument in Stenberg. Recall that he had averred earlier that there “is a fundamental and well-recognized difference” between “the 9-month-gestated, fully sentient fetus on the eve of birth” and “a human being.” Yet in Stenberg he found the state’s distinction between a fetus on the eve of birth and a fetus almost fully born to be “simply irrational,” so absurd as to make the law in question unconstitutional on the basis of its irrationally alone. Indeed, Justices Stevens and Ginsburg dismiss with disdain the claims on behalf of the nearly born child as mere “rhetoric” and “emotional uproar.”

One might have thought that the majority in Stenberg would wish to reinforce Roe’s birth wall, to make the naively realistic claim that location can at times make a deep difference, but that partial birth is not one of those times because the fetus still lacks those last crucial inches. In so arguing, the Court could politically have strengthened both foundations of Roe. Instead, the Stenberg majority and concurring opinions treat both location and the process of birth as utterly irrelevant to any constitutional permission to protect human life. They smash the twin pillars of Roe, even as they extend its reach.

Justices Stevens and Ginsburg go on to cite with approval the prior appellate court argument of Judge Richard Posner, whose similar opinion supporting partial-birth abortion makes even more obvious its judicial dismissal of Roe’s naive realism. Posner writes candidly

54. 476 U.S. at 779.
55. 530 U.S. at 945-947.
56. Id. at 948, 951. See also discussion supra notes 5-7. The remaining concurring opinion, that of Justice Sandra Day O’Connor, likewise gives no weight whatsoever to fetal location, but without the disdain shown by Justices Stevens and Ginsburg.
From the standpoint of the fetus, and, I should think, of any rational person, it makes no difference whether, when the skull is crushed, the fetus is entirely within the uterus or its feet are outside the uterus.67

There is no meaningful difference between the forbidden and the privileged practice. No reason of policy or morality that would allow the one would forbid the other.68

Line drawing is inescapable but the line between feticide and infanticide is birth. Once the baby emerges from the mother's body, no possible concern for the mother's life or health justifies killing the baby. But as long as the baby remains within the mother's body, it poses a potential threat to her life or health and this threat presents a compelling case (or so at least the Supreme Court believes) for a right of abortion.59

Judge Posner mocks the state's attempt to draw a line between those still fully unborn and those mostly born, and then proceeds to rely on another, quite similar "line drawing"—words that imply a largely nominal difference—between the mostly born and the fully born. Even if letting an infant emerge a few more inches alive could somehow endanger its mother's health, this possibility could not make the nearly born child any less a real human being or "baby"—as Posner himself names it both within and without the mother's body. Surely, "from the standpoint of the fetus," as Posner puts it, its place of destruction on either side of Posner's "fully born" line would not matter.60

Suppose a doctor considered it better for an aborting mother's health not to reach into her body at all, but rather to let the child be fully born naturally and then kill it by omission of care. Either way, the child is equally dead. Despite Posner's nominal adherence to the remnants of Roe's old birth wall, by the logic of his argument, and that of the Stenberg opinions, it would be wholly irrational to deny the mother a healthier abortion simply because death would be imposed on the fetus after it had emerged from the womb.

57. Hope Clinic v. Ryan, 195 F.3d 857, 879 (7th Cir. 1999).
58. Id.
59. Id. at 880. Posner's "fully born" line is one of location alone, in that it does not correspond to the onset of a parental relationship (as discussed supra, in seeking to understand the Blackmun-Stevens birth wall). That relationship has already begun prior to birth. Appellant Hope Clinic, an abortion provider, currently advertises that its aborting "physician has the capability to reconstitute the head with a jelly like substance. This allows a grief-stricken couple to hold their baby wrapped in a blanket, say good-bye, and take an important first step in a very long and difficult grieving process." The Hope Clinic for Women, Ltd., Types of Abortions, at http://www.hopeclinic.com/typesofab.htm (visited Sept. 14, 2002).
60. Hope Clinic, 195 F.3d at 879-80.
This is not in fact a fanciful supposition. A number of hospitals have made fully live-birth abortion a practice, presumably for reasons of maternal health. Labor is induced and then the unwanted newborn is simply abandoned to die. After this practice was revealed in Chicago, a proposed Illinois law requiring "reasonable" care for any child born alive in an abortion was defeated when the American Civil Liberties Union alleged its unconstitutionality and threatened to sue the state.


62. Mental health reasons may be especially important. "[E]motionally closure of the termination event may be reached sooner with an LI [labor introduction abortion] than with a DE [dilation and evacuation abortion, i.e. one involving dismemberment] because a woman is conscious for the entire process, and there is an intact fetus to say 'good bye' to." Sandy Coe, Comparison of Second Trimester Termination Methods, GENETICS NORTHWEST, Vol. XII, No. 2, Dec. 1998, at 5, available at http://mchneighborhood.ichp.edu/pacnorgg/GNW/121998/121998GNW_tab_method.pdf. Labor introduction was chosen over dilation and evacuation by over a third of the women (114 for LI, to 204 for DE), and may have been the only termination method available "after 20-21 weeks" in this study. "Partial birth abortion" or "DX" is not mentioned as an option. An accompanying article explains further: "Our labor and delivery unit supports all families experiencing a loss by taking pictures and footprints, completing a certificate of life and having families see and hold their babies when possible and desired." Mary Myers, Reflections on the Role of a Chaplain, GENETICS NORTHWEST, Vol. XII, No. 2, Dec. 1998, at 2, available at http://mchneighborhood.ichp.edu/pacnorgg/GNW/121998/121998GNW_chaplain.pdf. A patient's own report reads as follows:

[W]e chose to have a D&E, as opposed to induced birth. With all the facts they gave us, we felt that this would be the least amount of risk.

As the day grew near, I was having increasing difficulty accepting the decision we had made. I just couldn't deal with the thought of never meeting my child. Full-term or not, she was still my baby. I knew that I needed to do all the same things I did with my first child. I needed to count fingers and toes, see what she looked like, and even to dream about what the future might have been if all was well ....

We arrived at the hospital the next morning, unsure whether or not it was too late to change our decision. Much to our relief, it was not. The nurse took us to the maternity ward to induce labor. Four hours later, I was holding my baby girl. Although she was too weak to survive the birth, I was still able to say goodbye. The staff was very understanding; they left us so that we could be alone with our daughter. We had named her Melissa Faith the night before ....

The pain was no less, my grieving time no shorter; but giving birth to my daughter gave me the closure I needed. I was able to meet her, and to say goodbye to her. I did count her fingers and toes, and I know that she looks like her dad and older sister. I couldn't imagine not having a chance to see her and do these special things.


63. Dave McKinney, Bill Proposes Care for Fetus After Abortion, CHI. SUN-TIMES, Mar. 31, 2001, at 1; John O'Connor, Care Rejected for Aborted Live Fetuses, CHI. SUN-TIMES, May 10,
“All Abortion Rights Are at Stake in the Debate over Infanticide”

Perhaps it has always been inevitable that the birth wall would fall, even without Stenberg’s battering ram. Naive realism focusing on location has never made sense, as we have seen. Indeed, support for postnatal infanticide has long been nearly universal among academic supporters of Roe—for they could never discover Stevens’ “fundamental difference” between a nearly born fetus and a newborn infant.

I am thinking here of people like Joseph Fletcher, Michael Tooley, Ronald Green, Jonathan Glover, Peter Singer, and perhaps Steven Pinker, but to my knowledge they represent not just a majority, but a very solid consensus. A survey by Don Marquis in the Journal of Philosophy showed that all pro-choice theories developed by 1989 deny that there is anything prima facie wrong with killing newborn infants. I know of no pro-Roe scholars who have written that there is something intrinsically wrong with early postnatal infanticide. The reason is obvious: if the newborn has inherent or intrinsic dignity, then the same child located in the


64. “The only difference between the fetus and the infant is that the infant breathes with its lungs. Does this make any significant difference morally or from the point of view of values? Surely not . . . . True guilt arises only from an offense against a person, and a Down’s is not a person.” Joseph Fletcher, The Right to Die: A Theologian Comments, ATLANTIC MONTHLY, Apr. 1968, at 62-64.


68. Peter Singer, Killing Babies Isn’t Always Wrong, THE SPECTATOR, Sept. 16, 1995, at 20-22 (Singer has been appointed Professor of Bioethics at Princeton University’s Center for Human Values).

69. Steven Pinker, Why They Kill Their Newborns, N.Y. TIMES MAG., Nov. 2, 1997, at 52. See the illuminating commentaries on Prof. Pinker’s article: John Leo, Litmus Test, Slippery Tools, 24 HUMAN LIFE REV. 105 (1998); George McKenna, Tough Talk on “Neonaticide”, 24 HUMAN LIFE REV. 85 (1998); James Nuechterlein, Infanticide for Beginners, 24 HUMAN LIFE REV. 78 (1998). Pinker later denied that his article had supported infanticide as opposed to providing explanations for it.

70. Don Marquis, Why Abortion is Immoral, 86 J. PHIL. 183, 195-201 (1989) (showing that extant pro-choice theories all deny that there is anything prima facie wrong with killing infants). Nevertheless, Glover (and perhaps Pinker and others) would permit some (not full) legal prohibition of infanticide in order to avoid “side effects” of killing infants. GLOVER, supra note 67.
womb just prior to birth must have equal dignity. Thus if Roe's right to abortion all the way up to birth is to be protected, the human dignity of the newborn must be denied.

More is at stake, however, than simply the fate of infants just before, during, and just after birth. Thoughtful supporters of abortion know that postnatal infanticide must be, in principle, permissible if even very early abortion is to be legitimated. If the human infant has real worth then even the just-conceived human embryo must have a like worth, for the only significant dignity possessed by the newborn is possessed as well by the embryo: human nature, membership in our species, or—what comes to the same thing—design for human community, with its virtues of reason and love.

To say that actual manifestation of these virtues, rather than simply design or potency for them, is required for human dignity would be to exclude the infant along with the embryo. To focus upon the actualized traits already exhibited by the infant but not the embryo (i.e., greater size, more pleasant appearance, ability to survive with less external life support) would be to include many non-human entities and, moreover, would be to point to traits that are ultimately just not very important to our equal human dignity. For these very reasons, the German Constitution Court ruled unanimously in 1975, with an entirely different panel reaffirming unanimously in 1993 that the constitutional right to life must extend to the unborn throughout pregnancy. Since we know that newborn infants have human dignity, despite the fact that their uniquely human virtues subsist only as active design or potency, we cannot deny that same dignity to the embryo. In that court's own realist words:


The process of development which has begun at that point is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life. The process does not end with birth; the phenomena of consciousness which are specific to the human personality, for example, appear for the first time rather long time after birth. Therefore, the protection of [the Basic Law] cannot be limited either to the “completed” human being after birth or to the child about to be born which is independently capable of living. The right to life is guaranteed to everyone who “lives”; no distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life.73

The crux of the abortion debate today, therefore, is the status of the just born. The birth wall is nearly gone, and the embryo and infant survive or perish together. The legal treatment of infanticide will have, in principle, a decisive influence on the future of abortion rights.

The outcome of this infanticide debate is by no means certain. Despite strong opposition by the National Abortion and Reproductive Rights Action League (NARAL) in 2000, when the bill was first introduced,74 the federal Born-Alive Infants Protection Act (H.R. 2175) passed the House of Representatives by voice vote on March 12, 2002, the Senate by unanimous consent on July 18, 2002, and was signed into law by President Bush on August 5, 2002.75 The statute makes clear that, for federal purposes, a newborn infant “at any stage of development” is a legal person once it is completely expelled or extracted and “breathes or has a beating heart . . . regardless of whether the umbilical cord has been cut,” and “regardless of whether the expulsion or extraction occurs as a result

73. Jonas & Gorby, supra note 71, at 638.
74. NARAL called the “Born-Alive Infants Protection Act” (then numbered H.R. 4292) an “anti-choice assault” because it would “effectively grant legal personhood to a pre-viable fetus—in direct conflict with Roe—and would inappropriately inject prosecutors and lawmakers into the medical decision-making process.” NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE, NARAL STATEMENT, ROE V. WADE FACES RENEWED ASSAULT IN HOUSE: ANTI-CHOICE LAWMAKERS HOLD HEARING ON SO-CALLED “BORN-ALIVE INFANTS PROTECTION ACT” (2000), available at http://www.nrlc.org/Federal/Born_Alive_Infants/NARALonlive-born.pdf. Although it passed the House 380-15 on September 26, 2000, the bill died in the Senate at the end of that congressional session. For a detailed analysis of the content and politics of the bill by its primary academic author, see HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE 234-94 (2002).
of natural or induced labor, caesarian section, or induced abortion.

6 The bill says it does not affect the legal status or legal rights of “any member of the species homo sapiens at any point prior to being ‘born alive’ as defined in this section,” yet by this very language the new law makes clear both the humanity of the unborn child and that its right to life at every stage of pregnancy depends solely on location. 7

Lawmakers supporting abortion chose not to renew opposition to the bill this year because, in their view, the bill simply restates existing law. 78 This may well have been a strategic mistake. The law’s deep challenge to abortion rights could not be clearer. 79

77. The bill was quite short. Its entire text reads as follows:
SECTION 1. SHORT TITLE.
This Act may be cited as the “Born-Alive Infants Protection Act of 2002”.
SEC. 2. DEFINITION OF BORN-ALIVE INFANT.
(a) IN GENERAL.—Chapter 1 of title 1, United States Code, is amended by
adding at the end the following:
“§ 8. ‘Person’, ‘human being’, ‘child’, and ‘individual’ as including born-alive infant
“(a) In determining the meaning of any Act of Congress, or of any ruling,
regulation, or interpretation of the various administrative bureaus and agencies
of the United States, the words ‘person’, ‘human being’, ‘child’, and ‘individual’,
shall include every infant member of the species homo sapiens who is born alive
at any stage of development.
“(b) As used in this section, the term ‘born alive’, with respect to a member of the
species homo sapiens, means the complete expulsion or extraction from his or
her mother of that member, at any stage of development, who after such
expulsion or extraction breathes or has a beating heart, pulsation of the
umbilical cord, or definite movement of voluntary muscles, regardless of whether
the umbilical cord has been cut, and regardless of whether the expulsion or
extraction occurs as a result of natural or induced labor, cesarean section, or
induced abortion.
“(c) Nothing in this section shall be construed to affirm, deny, expand, or
contract any legal status or legal right applicable to any member of the species
homo sapiens at any point prior to being ‘born alive’ as defined in this section.”.
(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter
1 of title 1, United States Code, is amended by adding at the end the following
new item:
“8. ‘Person’, ‘human being’, ‘child’, and ‘individual’ as including born-alive
infant.”.
78. Bumiller, supra note 75.
79. President George W. Bush, Remarks by the President in Signing of H.R. 2175, Born
Alive Infants Protection Act (Aug. 5, 2002), available at http://www.whitehouse.gov/news/releases/2002/08/20020805-6.html. The President stated “[U]nborn children are members of the human family, as well.... The Born Alive Infants Protection Act is a step toward the day when every child is welcomed in life and protected in law.” Id. Besides Professor Hadley Arkes, whose writings had inspired the bill, those present at the bill-signing ceremony included Jill Stanek, an original Chicago whistleblower nurse, and Gianna Jessen, who is an abortion survivor. The new law’s negative effect on the practice of Labor Induction abortions, described supra notes 61-63, is clear. Hospitals seeking or
During the greater part of pregnancy, only location distinguishes a fetus without rights and a legal person with full rights, as long as the fetal heart beats before and after birth. The stark and simple reaffirmation of this contrast cannot but have a negative impact on abortion rights insofar as they depend on a belief in the sub-humanity of life in the womb.⁸⁰

The statute does not rebuild Roe's naively realist wall, for it does not claim that human life begins at birth. Rather, it affirms the existence and dignity of postnatal life without denying the same of prenatal life. While it erects a barrier to stop the right to choose from expanding beyond birth, it in no way interferes with the right to life expanding into pregnancy.

**Can Abortion Rights Be Secured Without Endangering Post-Infantile Human Beings?**

With greater foresight, perhaps, pro-Roe academics have been working to protect abortion rights not only by arguing against any right to life for infants irrespective of their location in or out of the womb, but also by reassuring us that divesting newborns of the right to life need not endanger those of us who matter most. These thinkers often seek to discern a bright line at some post-infantile stage of human life, a line at which true human dignity arguably begins. For example, H. Tristram Engelhardt, Jr., once averred that true personhood inheres only in the normal adult human.⁸¹ Such scholars still seek to be realists; they just want to think that what really matters begins quite a bit later than birth. In their favor it must be admitted that almost any developmental point they might choose (i.e., self-consciousness, the age of reason, even puberty) would be more real and so more arguable than Roe's choice of extraterine location.

Can such points, however, remain bright lines in the postmodern era? If the self is a cognitive illusion, as some argue,⁸²

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⁸⁰ The question remains, of course, whether the post-Štenberg Court will uphold the law despite its focus on location.

⁸¹ H. Tristram Engelhardt, Jr., *On the Bounds of Freedom: From the Treatment of Fetuses to Euthanasia*, 40 CONN. MED. 51 (1976). A convert to Orthodox Christianity, Prof. Engelhardt has since changed his views. But see also the quotation from Tooley, *infra* note 83. The other writers listed supra notes 64-69, although tolerant of infanticide, also aver limits to homicide later in the human life span.

⁸² For a deconstruction of various concepts of the self, see RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH 113, 123 (1991).
how can self-consciousness really matter? If reason is only
manipulation, an epiphenomenon of the will to power, why should
it be more significant than, say, muscles? It is vain to suppose that
new attempts to build real walls against killing can be successful in
our age of deconstruction.

Rather than search for a new bright line after birth, more
perspicacious pro-Roe jurists have opted to rid themselves of the
principle to which we pointed early in this essay, a principle that
makes it necessary to have real walls and bright lines in the first
place: human equality. If human beings can be treated in radically
gradated ways, if they need not even in principle be accorded equal
protection under the law, then those who favor abortion rights
should be disturbed neither by the continuity of human life nor by
the Born-Alive Infant Protection Act's recognition of every fetus as
a person as soon as it passes through the birth canal. If discrimina-
tory treatment of human beings is acceptable, Stevens' need to
assert a fundamental difference between fetus and infant disap-
pears. Why bother wracking one's brain to find a real difference
between them if they need not be shown equal respect, even
granting their common humanity and personhood?

Among academics, Ronald Dworkin has perhaps done the most
to advance human inequality in the law. "The less profitable effort
invested in each human being, the less regrettable the killing of that
being" paraphrases an inegalitarian notion that Dworkin applies
long after as well as before birth.83

Some American federal appellate judges, even prior to the
Stenberg case, have likewise cut directly to the quick. Seeking to
justify lesser state protection for the lives of those terminally
disabled, Judge Roger Miner wrote in 1996 for the Second Circuit,
"Surely, the state's interest [in protecting a life] lessens as the

83. See Richard Stith, On Death and Dworkin: A Critique of His Theory of Inviolability,
56 MD. L. REV. 289 (1997) (criticizing RONALD DWORkIN, LIFE'S DOMINION: AN ARGUMENT
ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993)). Michael Tooley has
suggested slightly less elastic criteria dividing postnatal humans into the stages of non-
persons, quasi-persons and persons:

New-born humans are neither persons nor even quasi-persons, and their
destruction is in no way intrinsically wrong. At about the age of three months,
however, they probably acquire properties that are morally significant, and that
make it to some extent intrinsically wrong to destroy them. As they develop
further, their destruction becomes more and more seriously wrong, until
eventually it is comparable in seriousness to the destruction of a normal adult
human being.

potential for life diminishes." For the Ninth Circuit in the same year, Judge Stephen Reinhardt wrote:

Although the state's interest in preserving life may be unqualified, and may be asserted regardless of the quality of the life or lives at issue, that interest is not always controlling. Nor is it of the same strength in each case. To the contrary, its strength is dependent on relevant circumstances, including the medical condition and the wishes of the person whose life is at stake.\(^8\)

Judge Robert Beezer, writing in dissent, countered that the court is thus reexamining "the historic presumption that all human lives are equally and intrinsically valuable," and that this reexamination may be "a mere rationalization for house-cleaning, cost-cutting and burden-shifting—a way to get rid of those whose lives we deem worthless."\(^8\)

Perhaps because of Judge Beezer's forceful challenge, Judge Reinhardt sought to bolster his case with the Supreme Court's Roe jurisprudence denying equal protection to the unborn:

In right-to-die cases the outcome of the balancing test may differ at different points along the life cycle as a person's physical or medical condition deteriorates, just as in abortion cases the permissibility of restrictive state legislation may vary with the progression of the pregnancy. Equally important, both types of cases raise issues of life and death . . . \(^8\)

Judge Beezer did not attempt to deny the majority's analogy to abortion law, only to narrow it:

[In the abortion context, the Supreme Court tells us that the state's interests in fetal life are weaker before viability than they

\(^{84}\) Quill v. Vacco, 80 F.3d 716, 729 (2d Cir. 1996).

\(^{85}\) Compassion in Dying v. State of Washington, 79 F.3d 790, 817 (9th Cir. 1996). Note that the U.S. Supreme Court reversed both the Compassion in Dying and Quill decisions, and has not at this time endorsed Miner's and Reinhardt's inegalitarian argument. See Vacco v. Quill, 521 U.S. 793 (1997); Washington v. Glucksberg, 521 U.S. 702 (1997). On the other hand, the Supreme Court has not required that the lives of infirm persons be protected equally; it has only approved a state interest in so doing:

The State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's.

521 U.S. at 732

\(^{86}\) 521 U.S. at 856-57.

\(^{87}\) Compassion in Dying, 79 F.3d at 800-01.
are once the fetus becomes viable. A state's interest in preserving human life is stronger when applied to viable beings than it is when applied to nonviable beings. Like a first-trimester fetus, a person kept alive by life-sustaining treatment is essentially nonviable. A terminally ill patient seeking to commit physician-assisted suicide, by contrast, is essentially viable. The patient may be inexorably approaching the line of nonviability. But the patient is still on the viable side of that line, and consequently enjoys the full protection of the state's interest in preserving life.\textsuperscript{88}

Of course, since even fully viable fetuses enjoy nowhere near the "full protection" of the Constitution under \textit{Roe} and \textit{Casey}, Judge Beezer's analogy is cold comfort even for the disabled person capable of surviving without life supports. If such a person counts only as much as a viable fetus, he or she will get far less than equal protection from our law.

In denying the constitutional duty of equal protection, were these appellate judges doing anything more than following the lead of \textit{Casey}? In holding that \textit{Roe} must stand even if it was wrongly decided, \textit{Casey} had proclaimed that the State's duty of equal protection fell before \textit{stare decisis} and the prestige needs of the Court. Reinhardt and Beezer had read that case well. Will "the thoughtful part of the Nation"\textsuperscript{89} grade the rest of us and decide the State's interest in preserving each of our lives?

The fall of any location-based wall, the end of \textit{Roe}'s naive realism, thus cuts in two directions. The fact that the same being exists within and without the womb can lead to two opposite conclusions. The law can cut back on abortion rights and begin to treat the unborn with respect more nearly equal to that which we still show to already-born human beings, or it can reaffirm abortion and treat some of those already born with the same disrespect we have shown toward the unborn. We can become more realistic about the entire human life span, or we can begin to doubt the human nature of others thought unwanted and incompetent. Or we may finesse the whole problem of nominalism versus realism by denying the State's duty of equal protection, leaving those less perfect to their own devices regardless of whether they are human in nature or only in name.

\textsuperscript{88} \textit{Id.} at 851 (citations omitted).
\textsuperscript{89} 505 U.S. at 864 (relying on "the thoughtful part of the Nation" to decide fetal and maternal rights).