

# CHILDREN, THE UNPROTECTED MINORITY: A CALL FOR THE REEXAMINATION OF CHILDREN'S RIGHTS IN LIGHT OF *STENBERG V. CARHART*

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The moral fabric of a civilization can be seen in how it treats its most vulnerable members.<sup>1</sup>

Charles Colson

## I. INTRODUCTION

We live in a post-September 11 world. America, the defender of individual rights, has, perhaps for the first time, taken a look into the rights afforded women and children in the countries of Afghanistan, Iraq, and other places to which most of us had never given much thought. In our self-righteousness, we smugly declare that such degradation and violation of the rights of the weak, the innocent, and the young would not occur in our country. We have laws and a Constitution, we tell ourselves, that protect the powerless and minorities from being trampled. We have civil rights for everyone, whether that everyone is a minority, a woman, a disabled person, an elderly person . . . or a child. Or do we?

A look at the legal and practical landscape as it relates to civil rights for children suggests that we do not. In 1973,<sup>2</sup> there were an estimated 167,000 cases of child abuse.<sup>3</sup> By 1982, that number had increased over 400% to 929,000; by 1991 the number had ballooned to 2.5 million.<sup>4</sup> The number of children in the foster care system due to

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The author gives thanks to the Lord for His countless blessings, not the least of which is the daily miracle called life. She also thanks her parents, Dick and Jean, her husband, Tom, and her children, Chad, Kara, Jim, Donny, Christina and Marty, for their love and encouragement. Of all the titles that she has received, the most important one to her is simply "Mom."

<sup>1</sup> *A Classless Act: A Tale of Two Ads* (Breakpoint radio broadcast, Oct. 9, 2000), available at <http://www.breakpoint.org/Breakpoint/ChannelRoot/FeaturesGroup/BreakPointCommentaries> (last visited Mar. 8, 2003).

<sup>2</sup> This was the year of the landmark decision of *Roe v. Wade*, 410 U.S. 113 (1973), which legalized abortion.

<sup>3</sup> RANDY ALCORN, PRO-LIFE ANSWERS TO PRO-CHOICE ARGUMENTS 111 (Rodney L. Morris ed., 1994) (citing REPORT OF THE NATIONAL CENTER OF CHILD ABUSE AND NEGLECT, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, 1973-1982).

<sup>4</sup> *Id.*

neglect, abuse, or abandonment by their own parents more than doubled in just five years from 1995 to 2000, from 250,000 to over 550,000.<sup>5</sup> There was a 1000% increase in the white illegitimacy rate in the thirty years ending in 1991, from just over 2% in 1960 to just under 22% in 1991, while the black illegitimacy rate increased over 200%, from 22% in 1960 to 68% in 1991.<sup>6</sup> Courts have held that parents have the so-called legal "right" to deny their child a life-saving, routine medical operation to cure a birth defect. In one case, the courts supported the parents' wishes to starve their child to death because the child had Down's Syndrome, in spite of several offers of adoption.<sup>7</sup> There are also several documented cases in which newborns were denied medical treatment and instead placed on a metal table or in a soiled linen closet to die.<sup>8</sup> The newborns had been born alive despite an attempted abortion. There are other documented accounts of physicians drowning or beating newborn babies that were born alive when abortions have gone awry.<sup>9</sup> There are many children and adults who are permanently disabled with missing limbs, cerebral palsy, paralyzed bodies, and blindness as a result of surviving an attempted abortion.<sup>10</sup> The legal recourse for these

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<sup>5</sup> Timothy Roche, *The Crisis of Foster Care*, TIME, Nov. 13, 2000, at 74, 74. While certainly arguments could be made that social service agencies and courts are more diligent in their efforts to protect children from harmful circumstances and are, therefore, more inclined to report abuse and put children in foster care, it seems implausible that this dramatic increase in only five years is due only to increased diligence. The more logical answer is that the actual number of abuse and foster care cases are significantly increasing.

<sup>6</sup> GERTRUDE HIMMELFARB, *THE DEMORALIZATION OF SOCIETY: FROM VICTORIAN VIRTUES TO MODERN VALUES* 223-24 (IEA Health & Welfare Unit ed., 1995).

<sup>7</sup> *Origins and Scope of Roe v. Wade: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 55-56 (1996) [hereinafter *Origins and Scope of Roe v. Wade*] (testimony of Mary Ann Glendon, Learned Hand Professor of Law, Harvard Law School).

<sup>8</sup> *Born-Alive Infants Protection Act: Hearing on H.R. 4292 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 17-18 (2000) [hereinafter *Hearing on H.R. 4292*] (testimony of Allison Baker, R.N., Charlottesville, Virginia). The Born-Alive Infants Protection Act was passed into law on August 5, 2002. Pub. L. No. 107-207, 116 Stat. 926 (2002) (codified at 1 U.S.C.A. § 8 (West Supp. 2003)).

<sup>9</sup> 145 CONG. REC. S12,917-18. Senator Smith of New Hampshire read the account of a fetal body parts wholesaler who was given live, perfectly formed, twenty-four-week-old twin babies who were moving and gasping for air. The abortionist presented her with the "specimens" with the intent that she would dissect the babies for sale to research laboratories. He would receive a fee for the "donation" to the wholesaler. When the body parts wholesaler protested that she could not dissect live babies, the abortionist filled up the pan the babies were in with water until the water covered their mouths and noses so that they drowned. See also Celeste McGovern, *Unholy Harvest*, CITIZEN, Jan. 2000, at 15, 17. *Citizen* is a monthly publication of Focus on the Family, a not-for-profit, pro-family organization.

<sup>10</sup> *Hearing on H.R. 4292*, *supra* note 8, at 17-18 (testimony of Gianna Jessen, survivor of an attempted saline poisoning abortion). Although precise numbers are

unfortunate souls is doubtful at best, because the torture to which they were subjected was perfectly legal. In addition, there are a growing number of highly publicized cases of newborns being killed by young mothers who feel no remorse.<sup>11</sup>

Adding to the list of atrocities committed against our children is fetal tissue trafficking, that is, researchers buying human body parts from abortionists. Fetal tissue trafficking is a large international business with an estimated global market of \$1 billion in 2002, up from \$428 million in 1996.<sup>12</sup> According to the 1999 price list for one national broker, the going rate for a baby's eyes is \$50;<sup>13</sup> \$150 for limbs;<sup>14</sup> \$150 for lungs and heart;<sup>15</sup> \$325 for a spinal cord;<sup>16</sup> and \$999 for an eight-week brain.<sup>17</sup> The vast majority of "work orders"<sup>18</sup> specify that the specimen must be "fresh," "normal," free of abnormalities, and shipped on wet ice

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unavailable, the sheer number of abortions over the last thirty years, estimated in excess of 40 million, suggests that the numbers of those who have been permanently disabled as a result of surviving an attempted abortion is significant.

<sup>11</sup> *Prom-Birth Teen Charged With Murder*, CHI. TRIB., June 25, 1997, at N10. One of the more publicized cases involved Melissa Drexler, a high school girl who excused herself from her high school prom dance; self-delivered a healthy, six-pound, six-ounce baby into the toilet; wrapped the healthy, live newborn in a trash bag; and discarded the baby into the trash. She then went back to the dance floor. *Id.*

<sup>12</sup> 145 CONG. REC. S12,916 (1999). Although buying and selling human body parts is prohibited by federal statute (42 U.S.C. § 274(e) (1994) prohibits the purchase of human organs; 42 U.S.C. § 289g-2(a) (1994) prohibits profiting from the sale of organs or fetal tissue), the fetal tissue industry has sidestepped this legal technicality by calling each of the so-called "prices" in their price lists of body parts a "service fee" for services such as dissection, blood tests, preservation, and shipping, or a "site fee" to allow for fetal tissue brokers to station an employee in the abortion clinic to harvest the "donors." 145 CONG. REC. S12,916 (1999); 145 CONG. REC. E2406 (1999). When this little known industry was brought to the attention of Congress in 1999, it was denounced as "among the most ghastly imaginable," and a resolution calling for oversight hearings was raised. 145 CONG. REC. E2406 (1999).

<sup>13</sup> 145 CONG. REC. H11,724 (1999).

<sup>14</sup> 145 CONG. REC. E2406 (1999).

<sup>15</sup> 145 CONG. REC. H11,723 (1999).

<sup>16</sup> 145 CONG. REC. E2406 (1999).

<sup>17</sup> 145 CONG. REC. H11,727 (1999). There is a thirty percent discount if the part is "significantly fragmented." *Id.* Thus, a whole body that is intact is significantly more valuable than simply a dismembered arm or leg. Fetal tissue brokers also market themselves by providing on-site technicians at abortion clinics who are employees of the broker, thus eliminating any cost or overhead to the abortionist for providing baby parts and increasing the abortionist's profitability. 145 CONG. REC. S12,913 (1999). The on-site technicians are responsible for harvesting, packing, and shipping the baby body parts to the end customer in a manner specified by the customer. The technicians are faxed work orders on a daily basis informing them of the customer needs and the type of acceptable body parts. *Id.*

<sup>18</sup> See *supra* note 17 for a description of "work orders."

by Federal Express within hours of the abortion procedure.<sup>19</sup> Therefore, in order to be fresh, normal and intact, the saline poisoning abortion procedure and the D&E abortion procedure (in which babies are dissected limb from limb) cannot be used; moreover, because the body parts must be free of abnormalities, brokers will only accept babies who were healthy before they were aborted.<sup>20</sup> Thus, in order to meet the specifications and to procure the highest price possible, the D&X partial birth abortion method on healthy babies is preferred to other abortion procedures on deformed babies.<sup>21</sup> The financial incentives afforded by the sale of fetal tissue actually encourage abortions in general and partial birth abortions in particular, the very procedure that many find so barbaric.

Understandably, this is a dichotomy between our supposed civil rights and the atrocities committed upon children in ever-increasing numbers. We cannot be a nation of civil rights and equality and justice for all when we clearly do not view children with the same degree of importance as others. This deplorable lack of civil rights for children is fundamentally related to the lack of civil rights for unborn children. Our national "schizophrenia" in providing more and more rights for some minorities while taking rights away from others has its roots in the Supreme Court's decisions allowing abortion on demand. As a country, either we knowingly allow the torture and murder of our youngest citizens, or we are just ignorant of what really goes on in the backrooms of hospitals, in abortion clinics, and in government agencies charged with protecting our youngest and most innocent.<sup>22</sup> If abortions are

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<sup>19</sup> 145 CONG. REC. E2406 (1999); 145 CONG. REC. H11,723 (1999); 145 CONG. REC. S12,916 (1999). Some require that the parts be dissected and put on wet ice within ten minutes from the time of the abortion. 145 CONG. REC. S12,915 (1999).

<sup>20</sup> 145 CONG. REC. S12,915 (1999).

<sup>21</sup> *Id.* at S12,914 (1999).

<sup>22</sup> According to a Gallup Poll, nine out of ten Americans do not have an accurate understanding of the holding of *Roe v. Wade* and its progeny, resulting in the fact that Americans seem to be both supportive of abortion rights while condemning the procedure as immoral. *Origins and Scope of Roe v. Wade*, *supra* note 7, at 44. While a Los Angeles Times poll indicates that Americans support the ruling in *Roe v. Wade* by a 46% to 35% margin, the same poll indicates that Americans believe by an even larger margin of 57% to 34% that a woman should not be able to obtain an abortion for any reason. *Id.* at 53. Thus, while purporting to support a woman's right to an abortion, most Americans are unaware of how broadly that right has been interpreted by the courts and how broadly available late-term abortions are. Indeed, even most physicians were unaware of the availability and technique of partial birth abortions until it became well publicized by the Congressional hearings and the news media. *The Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the Senate Comm. on the Judiciary*, 104th Cong. 80 (1995) (statement of Pamela Smith, M.D., Director of Medical Education, Department of Obstetrics and Gynecology, Mt. Sinai Medical Center, Chicago, Illinois). When asked more specific questions, compared to the general inquiry of whether they support *Roe v. Wade*, the general public's lack of awareness becomes apparent. A Gallup Poll asked respondents if

supposedly performed so that unwanted and unloved children are not brought into this world, the availability of abortions should reduce, not increase, the skyrocketing illegitimacy and child abuse rates. The availability of relatively inexpensive birth control should reduce, not increase, the number of abortions, which stands at approximately 1.6 million per year.<sup>23</sup> All these so-called “benefits” that abortion was promised to bring have, unsurprisingly, never come to pass.

There is a causal connection between how we view and afford rights to unborn children and how we view and afford rights to children. The growing devaluation of the rights of children and other powerless members of our society, in conjunction with the devaluation of the rights of unborn and half-born children, suggests that the rights and value given to children are inextricably intertwined with the rights and value bestowed upon unborn children. Society has devalued born children because they have devalued unborn children.

“What is the difference,” asks a pregnant woman or a woman with a newborn, “if I kill my baby ten weeks before my due date or if I just kill my baby when he is born – or later?” Indeed, what difference does ten weeks make? Or ten months? Or ten years? Where does one draw the line? Why bother to draw a line at all?

Justice Scalia warns us that the holding in *Stenberg v. Carhart*, which legalized partial birth abortions, not only will legalize the killing of children who are “half-born,” but also will affect the rights of children who are born by giving “live birth abortion free rein.”<sup>24</sup> This author agrees, not because it is a logical argument, but because that is the chilling reality of abortion practice in America. This article addresses the rights interwoven between unborn children and born children. In so doing, it examines three logical premises, which are based upon the truths and values held by our society. First, great strides have been made in the last century for advancing civil rights for women, minorities, the disabled, and the elderly because of the intrinsic value that society places on individuals and the members of those various groups. However, despite these advancements in civil rights, protection for the rights of children has lagged far behind protection for those of other

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they would favor a law banning abortions after the third month of pregnancy unless required to save a woman's life: 73% favored such a ban while 20% opposed it. *Origins and Scope of Roe v. Wade*, *supra* note 7, at 52. Only 13% of registered voters believed that abortion should be legal at any time for any reason, which is, in practice, the status of abortion today. *Id.*

<sup>23</sup> Charles Leroux, *Facing Facts: Abortions Cross Racial, Economic, Religious Lines*, CHI. TRIB., July 5, 1992, at P1. Although numbers vary year to year, the rate of 1.6 million abortions per year was consistent throughout the 1980's and early 1990's. *Id.* The number of live births in 1990 was 4,179,000, resulting in an abortion rate of approximately one-third of all pregnancies. *Id.*

<sup>24</sup> *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

groups because society, particularly as it is reflected by the judiciary, does not value children as much as it values other members of society. Second, each child has the right to life and to freedom from abuse. Disabled children are entitled to the same rights as able-bodied children, including the same right to education, opportunities, life, and freedom from abuse. Third, children at all stages of development are entitled to civil rights. Children's rights should not be dependent upon their age or their ability to care for themselves.

Based on the foregoing, this article makes two conclusions. First, the rights of born children are inextricably interwoven with those of unborn children, and recognition of the civil rights of children will not progress until society values all children, both born and unborn. Second, abortion rights, which are given merely by the Supreme Court, are inconsistent with children's rights because abortion rights are predicated on the assumption that younger children who are less developed and younger children who are less developed with disabilities have no rights. Abortion advocates consider children as expendable, and this view, which originated with regard to unborn children, has spread to include half-born children, newborn children and even older children. Thus, society has devalued born children because it has devalued unborn children.

## II. DISCUSSION

### *A. Civil Rights Have Significantly Progressed in the Last Century*

Great strides have been made, particularly in the last half of the twentieth century, to recognize civil rights for women, minorities, the disabled, and the elderly. Americans as a society place a tremendous value on the individual, regardless of his or her monetary contribution to society. These societal values are reflected in our Declaration of Independence, Constitution, and civil rights laws passed over the past two hundred years.

The Declaration of Independence tells us that "all men are created equal" and that we "are endowed by [our] Creator with certain unalienable rights" including "Life, Liberty, and the pursuit of Happiness."<sup>25</sup> The Constitution, particularly the Bill of Rights and the Equal Protection Clauses of the Fifth and Fourteenth Amendments, provides the basis for a number of civil rights statutes. The Constitution and these civil rights statutes stand for the long-held belief that an individual must not be deprived of "life, liberty or property" at the hands

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<sup>25</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

of the federal or state government without due process, and that each person is entitled to equal protection under the law.<sup>26</sup>

The Emancipation Proclamation<sup>27</sup> and the Thirteenth Amendment<sup>28</sup> made owning another person both illegal and unconstitutional. The various titles of the Civil Rights Act of 1964 and its later amendments were passed so that all people regardless of race, religion, national origin, or sex would have equal opportunities in the areas of employment, housing, and education.<sup>29</sup> The Americans with Disabilities Act (ADA) provides disabled Americans with many of the same opportunities as able-bodied individuals, requiring employers to provide not only equal accommodations, but also additional "reasonable accommodations," to disabled persons.<sup>30</sup> Older workers are protected from age discrimination in the workforce by the Age Discrimination in Employment Act of 1967 (ADEA);<sup>31</sup> similarly, the Age Discrimination Act of 1975 protects older individuals from age discrimination in programs and activities receiving federal assistance.<sup>32</sup>

Each of these laws reflects the following values of American society, the cornerstones upon which our forefathers established this country: life is sacred; liberty is extremely important; and individuals have innate value as human beings, regardless of their sex, race, national origin, religion, age or disability.

### *B. Recognition of Children's Civil Rights Lags Far Behind the Recognition of the Civil Rights of Other Groups*

In spite of the progress of civil rights for other groups in society, recognition of the civil rights of children lags far behind the recognition of the civil rights of adults. This lack of recognition has been the topic of much attention in recent years.<sup>33</sup> The primary reason for the lack of recognition of children's rights is the lack of value society places on children.

This devaluation of children is also reflected in the dramatic increase in the number of children held as wards of the state, the result of an ever increasing number of parents who view their own children as expendable. In 1995, approximately 250,000 children were in the United

<sup>26</sup> U.S.CONST. amends. I-X, XIV.

<sup>27</sup> Emancipation Proclamation, 12 Stat. 1268, 1268-69 (1863).

<sup>28</sup> U.S. CONST. amend. XIII.

<sup>29</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000a-2000h-6 (2000).

<sup>30</sup> Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12,112-12,117 (2000).

<sup>31</sup> Age Discrimination Employment Act (ADEA) of 1967, 29 U.S.C. §§621-34 (2000).

<sup>32</sup> Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107 (2000).

<sup>33</sup> See *Children: New Kids on the Human Rights Block*, 26 A.B.A. SEC. INDIVIDUAL RTS. & RESPS. 1 (1999). The entire volume is devoted to children's rights.

States' foster care system; however, by 2000, that number had more than doubled to approximately 550,000.<sup>34</sup> In Illinois alone, the number of children under the care of the Illinois Department of Children and Family Services ("DCFS") increased from 15,000 in 1988 to approximately 50,000 in 1996.<sup>35</sup> Overall, DCFS receives approximately 367,000 calls per year on their child abuse and neglect hotline.<sup>36</sup> However, despite these astounding figures, only 2,229 adoptions were reported in 1998 and 7,315 in 1999.<sup>37</sup>

Children are held by DCFS "because the state has deemed that it is unsafe to return them to their parents."<sup>38</sup> However, it is not only the parents who place so little value on the lives and well being of their children; even the DCFS staff and the judiciary disregard the value of these innocent and helpless little ones. Frequently, the children live a life of neglect, abuse, and torture, all too often ending in murder.<sup>39</sup> Sadly, the individuals whose responsibility it is to protect these children are the same ones who abuse and murder them. Horrific stories in the child welfare system are so prevalent they are too numerous to list. A few examples are presented here to highlight the kinds of horrors to which children are exposed. In April 1993, a three-year-old Chicago boy was hanged by his mother after a judge returned him to her custody at the request of DCFS and other agencies.<sup>40</sup> In November 1993, a five-year-old boy, weighing only eighteen pounds, malnourished and near death, was brought to a South Side Chicago hospital.<sup>41</sup> Three DCFS workers visited the home only months earlier, finding evidence of malnourishment and beatings, however, not even one worker made an effort to remove him from the home.<sup>42</sup> In February 1994, Chicago police removed nineteen children from a filthy West Side apartment.<sup>43</sup> Although a DCFS worker had been called to the apartment earlier, she was refused entry and made no effort to follow up with police to gain entry.<sup>44</sup> Terrell Petersen

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<sup>34</sup> Roche, *supra* note 5, at 74.

<sup>35</sup> Sue Ellen Christian, *Fixing DCFS Easier Said Than Done; State, ACLU Call First Reform Effort a Failure*, CHI. TRIB., July 15, 1996, at N1.

<sup>36</sup> Rob Karwath, *DCFS On Way to Heartbreaking Record*, CHI. TRIB., June 8, 1994, at N1.

<sup>37</sup> *DCFS Registers Big Jump in Adoptions*, CHI. TRIB., Aug. 29, 1999, at C3. While certainly not all wards of the state are available for adoption, the disproportion of these figures indicates an alarming increase in children that are wards of the state with a relatively small number of those children being adopted.

<sup>38</sup> Karwath, *supra* note 36, at N1.

<sup>39</sup> See *infra* text accompanying notes 40-46.

<sup>40</sup> Karwath, *supra* note 36, at N1.

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

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

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



was a twenty-nine-pound, six-year-old boy who had been beaten, tortured, burned, and eventually killed by his foster grandmother in Georgia after foster care workers closed his case.<sup>45</sup> And little Octavius Sims was starved, immersed in boiling water, and beaten to death three days before his first birthday, despite repeated reports to social workers of the foster family's neglect.<sup>46</sup>

In contrast to the delay, bureaucratic quagmires, and judicial indifference of the child welfare system, observe how swiftly and effectively the judiciary and government officials react to matters of perceived importance, such as monetary or election issues. When gas prices shot up to the highest ever in the summer of 2000, Illinois lawmakers were swift to provide relief in the form of lower gasoline taxes through the end of the year.<sup>47</sup> In the 2000 presidential election, high-priced lawyers on both sides of the political aisle were quick to file suits regarding a recount in Florida, and the judiciary accommodated the suits by putting them on the fast track, even meeting on Thanksgiving Day.<sup>48</sup>

The message that society sends is the following: when matters of great importance are at issue, such as money or politics, the lawyers, the judiciary, and the government should and do act swiftly and effectively; children are not a priority or a matter of great importance, and they, therefore, suffer at the hands of uncaring bureaucrats, judges, and governmental agencies.

Although there are laws, policies, and procedures designed to protect our children, officials responsible for enforcing the laws admit that they are not being enforced. As Georgia Governor Roy Barnes aptly pointed out after ordering a sweeping investigation into Georgia's deplorable foster care system, "We have not made this a high enough priority."<sup>49</sup>

Further indications of the value, or lack thereof, that society places on our children are the salaries that teachers receive to educate them. Even on the North Shore of Chicago, where salaries and housing prices are relatively high compared to other parts of Illinois and the country, the average salary for an elementary school teacher with 11 years of experience is only \$46,582 per year.<sup>50</sup> This is a paltry sum compared to

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<sup>45</sup> Roche, *supra* note 5, at 74, 76.

<sup>46</sup> *Id.*

<sup>47</sup> Ryan Keith, *Lawmakers OK Cutting State's 5% Gas Tax*, CHI. TRIB., June 29, 2000, at N1 (reporting that the governor called legislators into a special session to repeal the tax when gas prices climbed to over two dollars a gallon).

<sup>48</sup> Jess Bravin & Robert S. Greenberger, *Bush Warns Top Court of 'Electoral Catastrophe'*, WALL ST. J., Nov. 24, 2000, at A7.

<sup>49</sup> *Id.* at 76.

<sup>50</sup> LAKE FOREST SCH. DIST. 67, 2000 SCHOOL REPORT CARD 4 (2000).

other professions. Starting salaries at major law firms across the country are \$125,000 or more.<sup>51</sup> The average starting salary for recent college graduates is just under \$45,000, while those with MBA's command an average of \$93,000 per year.<sup>52</sup> At eighteen years old, the "Queen of Teen," Britney Spears, earned \$15 million in 1999,<sup>53</sup> while basketball superstar Kobe Bryant signed a \$71 million, six-year contract with the Los Angeles Lakers at the age of twenty-one.<sup>54</sup>

Furthermore, the lack of value that we place on our children is reflected in the growing trend of childless adults who establish "child-free" neighborhoods and "child-free" zones in public places such as cinemas and restaurants.<sup>55</sup> The child-free movement objects to employer subsidized day care and the federal child tax credit, claiming unfair employment policies and discriminatory tax laws.<sup>56</sup> The movement has organizations with over fifty chapters.<sup>57</sup>

It is difficult to imagine how discriminatory conduct such as this could be directed at any other demographic group, such as gays, women, the disabled, or minorities, without a public outcry and swift legal action by some civil rights organization. Unfortunately, the rights of children and families are not protected by any cohesive movement or organization with the strength and political clout anywhere near that of those organizations established to protect the rights of gays, women, minorities, the disabled, and abortionists. Parents, the most logical people to establish such a movement or organization, may simply be too exhausted from the everyday challenges of raising children to have any energy left to defend the rights of children and families. Furthermore, some parents may believe, as has historically been true, that the rights of children and families are adequately protected by legislatures and judges due to society's moral and social values, thereby reducing the need for a special interest group for families and children.<sup>58</sup> That is no longer the case.

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<sup>51</sup> Michael Oray, *Law Firms Ponder Major Changes to Fund Leap in Starting Salaries*, WALL ST. J., May 12, 2000, at B1.

<sup>52</sup> Rachel Emma Silverman, *What's News in Recruitment and Pay*, WALL ST. J., July 25, 2000, at B10.

<sup>53</sup> Peter Kafka, *The Queen of Teen*, FORBES, Mar. 20, 2000, at 162, 165.

<sup>54</sup> Brett Pully, *Shooting for World Profits*, FORBES, Mar. 20, 2000, at 162, 162.

<sup>55</sup> *Red and Yellow, Black and White, Kids are Annoying*, CITIZEN, Sept. 2000, at 11, 11.

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

<sup>57</sup> *Id.*

<sup>58</sup> See *Poe v. Ullman*, 367 U.S. 497, 551-53 (1961) (Harlan, J., dissenting).

The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right . . . [T]he intimacy of husband and wife is necessarily

In summary, the lack of safeguards for our children and lower salaries for individuals in child-related professions, compared to the protection of financial and political concerns elsewhere, reflect the following values of American society: children are not valued as much as adults; and the lives, education, and care of children are not valued as much as the practice of law, sports, entertainment, business, financial concerns, and politics.

*C. Disabled Children Should Have the Same  
Civil Rights As Able-Bodied Children*

Most Americans would agree that disabled children should enjoy the same civil rights as those of able-bodied children. In particular, disabled children are entitled to the same access to education and extra-curricular opportunities as able-bodied children, as well as to the basic human rights to life and to freedom from abuse or torture. These shared societal values are reflected in our laws, which protect, by their silence on the subject, both disabled and able-bodied persons, including children, from crimes and torts. For example, clearly our laws do not, and should not, make distinctions between the murder of an able-bodied adult and the murder of a disabled individual or child. Furthermore, the Individuals with Disabilities Education Act (IDEA) provides disabled children access to public education.<sup>59</sup> Similarly, the ADA requires that employers take additional steps to provide “reasonable accommodations” to disabled, but qualified, individuals.<sup>60</sup>

These laws manifest the American principles that disabled persons are valued, not for their abilities or lack thereof, but because they are members of the human race. By and large, society embraces the teachings of Immanuel Kant, who teaches that individuals have intrinsic value by the simple fact that they are human, not for what they can accomplish, monetarily or otherwise.<sup>61</sup> Our value as humans exists not because the lives of individuals are a means to an end, but because life is an end in itself.<sup>62</sup>

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as essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every stage it has fostered and protected.

*Id.*

<sup>59</sup> Individuals with Disabilities Education Act (IDEA) of 1970, 20 U.S.C. §§ 1400-1427 (2000).

<sup>60</sup> 42 U.S.C. §§ 12,111-17 (1994).

<sup>61</sup> Axel Kahn, *Clone Mammals . . . Clone Man?*, 386 NATURE 119, 119 (1997).

<sup>62</sup> The rules of the military also reflect this value. Search and rescue missions require many to risk their lives for the sake of one or a few. In combat, a squadron does not leave an area until all known living members are rescued.

*D. Children at All Stages of Development Are  
Entitled to the Same Civil Rights*

Although Americans, as a society, have a long way to go to recognize the rights of children, most of us would agree that all, not just some, children are entitled to the same rights, the most basic of which are the right to life and freedom from abuse and torture. These principles are represented in our existing statutes which, simply by their silence regarding the victim's age, set no minimum age for protections against murder, assault, battery, and a litany of other crimes. Other criminal statutes, such as sexual abuse or assault statutes, actually provide special protection to younger victims of crime. Civil law, such as tort law, also places no limit on the age of the victim.

Indeed, there are several statutes that criminalize injuring or killing an unborn baby.<sup>63</sup> However, after *Roe v. Wade*, these criminal statutes were amended to provide an exception for instances when the mother is the one killing or injuring the baby.<sup>64</sup> Indeed, statutes that were amended because of the legalization of abortion are the only statutes that provide an exception so that the rights of a crime victim

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<sup>63</sup> See, e.g., 720 ILL. COMP. STAT. 5/9-1.2 (2002) (applying to the intentional homicide of an unborn child); 720 ILL. COMP. STAT. 5/9-2.1 (2002) (applying to the voluntary manslaughter of an unborn child); 720 ILL. COMP. STAT. 5/9-3.2 (2002) (applying to involuntary manslaughter and reckless homicide of an unborn child); 720 ILL. COMP. STAT. 5/12-4.4 (2002) (applying to the aggravated battery of an unborn child); 720 ILL. COMP. STAT. 5/12-3.1 (2002) (applying to the battery of an unborn child). The Unborn Victims of Violence Act bill would provide that any individual who injures or kills an unborn child during the commission of certain federal crimes would be guilty of a separate offense. H.R. 503, 107th Cong. (2001); H.R. REP. NO. 107-42, pt. 1, at 2 (2001).

<sup>64</sup> See, e.g., 720 ILL. COMP. STAT. 510/1 (2002).

It is the intention of the General Assembly of the State of Illinois to reasonably regulate abortion in conformance with the decisions of the United States Supreme Court of January 22, 1973. Without in any way restricting the right of privacy of a woman or the right of a woman to an abortion under those decisions, the General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposed of the unborn child's right to life and is entitled to the right to life from and declares that the longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.

*Id.*, see also 720 ILL. COMP. STAT. 5/9-1.2 (2002); 720 ILL. COMP. STAT. 5/9-2.1 (2002); 720 ILL. COMP. STAT. 5/9-3.2 (2002) (providing that the definition of offender "shall not include the pregnant woman whose unborn child is killed").

vary from no rights to full rights depending upon the perpetrator of the crime and the age of the victim.<sup>65</sup> No other criminal statute provides full exemption based on the identity of the perpetrator (in this case, a mother) or the fact that the victim is a young child.

More recently, legislation has been introduced which would recognize and protect the rights of unborn and newly born children. The Innocent Child Protection Act would bar any state from executing a woman while she is pregnant.<sup>66</sup> The bill, introduced pursuant to the International Covenant of Civil and Political Rights, guaranteeing the right to be free from torture or cruel and inhumane treatment, "will protect unborn children by preventing innocent human life from being sentenced to death."<sup>67</sup> The bill passed the House of Representatives on July 25, 2000 by a unanimous 417-0 vote,<sup>68</sup> a further acknowledgment, even by pro-abortion members of the House, that children *in utero* are entitled to protection and that an innocent child should not suffer for the decisions of others.

In addition, the Born-Alive Infants Protection Act, introduced in response to *Stenberg v. Carhart*, and for "the simple reason that live birth abortions are already occurring," affirmatively establishes that any infant outside the mother's womb, including those that were targeted for abortions that failed, is a person under the law and is entitled to all the rights associated with that legal status.<sup>69</sup> The Act's legislative history clearly acknowledges that abortion rights have paved the way for infringement on children's civil rights. "[The *Roe v. Wade*] decision has given us early abortion on demand, late abortion on demand, partial birth abortion, and now its precedent has given us outright infanticide."<sup>70</sup> The bill passed the House of Representatives on September 26, 2000, by a vote of 380 to 15.<sup>71</sup> On August 5, 2002, the bill was finally passed into law.<sup>72</sup>

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<sup>65</sup> See, e.g., Illinois Criminal Code of 1961, as amended. 720 ILL. COMP. STAT. 5/1-1 to 47-25. Indeed, many criminal statutes provide *additional*, not less, protection to younger victims of crimes. See, e.g., 720 ILL. COMP. STAT. 130/0.01 to /3; 150/0.01 to /501; 675/0.01 to /2 (2002); see also *id.* § 5/9-1 (2002) (providing for the death penalty if "the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty").

<sup>66</sup> Innocent Child Protection Act of 2000, H.R. 4888, 106th Cong. § 2 (2000); see 146 CONG. REC. H6792 (2000).

<sup>67</sup> 146 CONG. REC. H6793 (2000) (statement of Rep. Hutchinson).

<sup>68</sup> 146 CONG. REC. H6841 (2000).

<sup>69</sup> H.R. 4292, 107th Cong. (2000); see 146 CONG. REC. H8161 (2000); 148 CONG. REC. H792 (2002).

<sup>70</sup> 146 CONG. REC. H8161 (2000) (statement of Rep. Chenowath-Hage).

<sup>71</sup> *Id.*

<sup>72</sup> Born-Alive Infants Protection Act of 2002, Pub. L. No. 107-207, 116 Stat. 926 (2002).

These types of laws indicate that American society agrees that children's rights should not be dependent upon children's age, ability, or capacity to care for themselves. A one-year-old does, and should, have the same rights as a ten-year-old. These laws, many of which were established long ago, stand in stark contrast to the present realities of child abuse and abortion described in the previous section. This inconsistency is illuminated by the conflict between legislatures and the Supreme Court. On one hand, the legislatures, which are bodies elected to represent the will of Americans, pass laws to protect the unborn and newly born. On the other hand, the justices of the Supreme Court, which is an elite, academic group of appointed lawyers who presumably represent the viewpoint of the president by whom they were appointed, too often strike down the laws protecting the unborn and newly born passed by the legislatures.

Many criminal statutes and state laws which protect individuals of all ages, not merely adults or other children were established years ago, some even dating back to the beginning of our nation, and reflected the shared societal values at that time. At that time, based on Judeo-Christian traditions, it was widely felt that children were a blessing and barrenness a curse. However, recent developments in American society, most significantly the legalization of abortions upon demand for the entire term of the pregnancy, have led to the exponential increase in child abuse<sup>73</sup> and presumably to the related lack of enforcement of the child protection laws. Both of these trends reflect society's growing devaluation of children. As opposed to being considered a blessing, there is a growing view in society that children are expendable, an unwanted annoyance, and an inconvenience to relationships and careers.

*E. Born Children Are Devalued When Unborn Children Are Devalued, and All Children's Rights Suffer When Unborn Children's Rights Suffer*

The crux of this article's logical conclusion is that the rights and value given to children in general are inextricably intertwined with the rights and value bestowed upon unborn children in particular. Society has devalued born children because they have devalued unborn children.

One must begin with the very basic truth that it is wrong to torture and kill an innocent human, because life is sacred and humans have priceless, intrinsic worth. If this principle is true, then it is true at any time, and any point in the lifetime of an individual that one would choose to morally justify killing would be arbitrary. Therefore, if it is morally unjustifiable to torture and kill a child or infant because he or

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<sup>73</sup> ALCORN, *supra* note 3, at 111-13 ("The attitude that results in abortion is exactly the same attitude that results in child-abuse . . . . Once the child-abuse mentality grips a society, it does not restrict itself to abusing only one group of children. If preborn children aren't safe, neither are born children.")

she is unwanted, inconvenient, or disabled, then it is morally unjustifiable to kill an unborn child because the child is unwanted, inconvenient, or disabled. And if this is true, it follows that the corollary is also true. That is, if it is morally justifiable to torture and kill an unborn child, then it is morally justifiable to torture and kill an infant, child, or even an adult if that person is unwanted, inconvenient or disabled.

In other words, once it is determined that killing a person before he or she is born is justifiable, there is no logical reason to stop there. The birth canal is not a magical passageway, a journey through which bestows value upon an individual, if in fact he or she has no value in the first place. Thus, the value of an individual begins not at birth, but at the beginning, where all things begin. If an individual has no rights, and therefore can be killed with impunity before birth, then it follows that the person also has no rights after birth. Therefore, if, as the Supreme Court has deemed, an individual has no rights to life before birth and abortions are allowed literally up until birth, there is no logical reason why one should have rights to life after birth, and thus the killing of unwanted children after birth, "live-birth abortions" as they are called, is a logical extension of the philosophy of abortion rights activists.

Preposterous, one might say. Surely our society would never condone killing innocent children, at least not once they are born. However, we have already started down that slippery slope.

Infanticide, or live-birth abortion, is precisely that which Justice Scalia predicted and warned against in his passionate dissent in *Stenberg v. Carhart*.

I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*. The method of killing a human child – one cannot even accurately say an entirely unborn human child – proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion. And the Court must know (as most state legislatures banning this procedure have concluded) that demanding a "health exception" – which requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (how can one prove the contrary beyond a reasonable doubt?) is to give live-birth abortion free rein.<sup>74</sup>

By holding that an abortionist can kill a full-term baby when only the baby's head remains in the womb, the basic conclusion of the Court in *Stenberg v. Carhart* is that if there is any portion of a child still within the womb, killing that child is legal and permissible and, presumably, morally justifiable. The logical extension of this reasoning, therefore, is

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<sup>74</sup> *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

that if a full term child is fully born, except for say a foot or a hand, the mother and the abortionist are free to kill the child. It is almost beyond belief that in a civilized country such as ours, which prides itself on being the world's leader in human rights, the highest court in the land can sanction such an atrocity.

Given this logical and reasonably foreseeable scenario, one might ask what would happen if, just a second before the abortionist intends to kill her, the child, with her hand or foot still in her mother's womb, flails and in doing so, withdraws her limb from the womb. This child would be born alive. Or, one might also ask what would happen if the baby were born alive accidentally, instead of being aborted as intended. These possibilities pose the question whether the baby now has a right to live. Must the abortionist stuff a limb back into the womb in order to legally kill the baby? In fact, he may simply turn his head the other way, stab the scissors into the baby's skull, and suction the brains out the way he would have done in any other D&X procedure, or he may find some other way to terminate her. Unfortunately, this scenario is not imaginative or far-fetched. It occurs in abortion clinics and hospitals across the country on a regular basis.<sup>75</sup> Killing a baby after an unintended live birth is the entirely logical and foreseeable extension of the Court's ruling. Once it is considered legal and morally justifiable to kill a child at any age, there is no stopping point.

Frighteningly, this is precisely what the Third Circuit held when it determined that a child's status under the law, regardless of his or her location in relation to the mother, depends upon whether the mother intends to abort the child, in which case the child has no legal rights, or intends to give birth, in which case the child is apparently imbued with certain basic rights afforded all citizens.<sup>76</sup>

Thankfully, our Congress has recognized that "society has blurred [the] issue"<sup>77</sup> and that the rights of born children are being extinguished because the rights of unborn children have not been recognized.

Recent court decisions have called into question the rights entitled to newborn babies. Under the logic of the Supreme Court's decision in the *Stenberg v. Carhart* case, the long-accepted legal principle that infants who are born alive are persons entitled to the protections of the law has been called into question, bringing our culture and legal system closer than ever believed possible to accepting infanticide. . . . [T]he

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<sup>75</sup> See H.R. REP. NO. 107-186, at 3, 8-11 (2001). Indeed, this was the reason behind the Born-Alive Infants Protection Act passed into law on August 5, 2002. See also 148 CONG. REC. H792 (2002); 116 Stat. 926 (2002).

<sup>76</sup> *Planned Parenthood v. Farmer*, 220 F.3d 127, 143-44 (3d Cir. 2000) (rejecting the notion that a child who is killed by partial birth abortion is in the process of being born because the mother is seeking an abortion, not a birth, opining that "[e]stablishing the cervix as the demarcation line between abortion and infanticide is nonsensical on its face").

<sup>77</sup> 148 CONG. REC. H795 (2002) (statement of Rep. Hart).



Court's ruling opened the door for future courts to conclude that the location of an infant's body at the moment it is killed during an abortion, even if fully born, has no legal significance whatsoever.<sup>78</sup>

Indeed, as unbelievable as it may sound, the right to kill children at any time, before or after birth, is precisely the position that at least two of the most prominent bioethicists in the world are advocating. Dr. Peter Singer, Chairman of Bioethics at Princeton University, and his colleague, Helga Kuhse, are advocates of both abortion and infanticide. In rejecting the view that birth should provide "the only sharp, clear and easily understood line" between killing a child at will and being subjected to the laws of homicide, Singer writes,

[T]he life of a fetus . . . is of no greater value than the life of a nonhuman animal at a similar level of rationality, self-consciousness, awareness, capacity to feel, etc., and . . . since no fetus is a person no fetus has the same claim to life as a person. Now it must be admitted that these arguments apply to the newborn baby as much as to the fetus. . . . If the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either. . . .

. . . .  
 . . . [T]he newborn baby is on the same footing as the fetus, and hence fewer reasons exist against killing both babies and fetuses than exist against killing those who are capable of seeing themselves as distinct entities, existing over time.<sup>79</sup>

He clearly and unapologetically states that parents should have the right to kill their infant children for any reason at any time:

[T]he grounds for not killing persons do not apply to newborn infants. . . .

. . . .  
 . . . [T]he killing of a newborn infant is not comparable with the killing of an older child or adult. . . .

. . . .  
 Infants lack [rationality, autonomy, and self-consciousness]. Killing them, therefore, cannot be equated with killing normal human beings. . . . No infant – disabled or not – has as strong a claim to life as beings capable of seeing themselves as distinct entities, existing over time.<sup>80</sup>

Singer further states that newborns should not be afforded the "full legal right to life" until some time after birth, "perhaps a month" he suggests, during which time the parents should decide whether or not a child is wanted.<sup>81</sup> He fully supports the right of the parents to kill an unwanted

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<sup>78</sup> 148 CONG. REC. H794 (2002) (statement of Rep. Chabot). As a direct result of recent court decisions, Congress passed the Born-Alive Infants Protection Act of 2002, Pub. L. No. 107-207, 116 Stat. 926 (2002). The U.S. Supreme Court has not yet made any ruling on the constitutionality of this Act, however, a challenge from abortion advocates can certainly be expected.

<sup>79</sup> PETER SINGER, PRACTICAL ETHICS 169, 171 (2d ed. 1993).

<sup>80</sup> *Id.* at 171-72, 182.

<sup>81</sup> *Id.* at 172.

child,<sup>82</sup> something akin to a one-month refund policy. He bases this moral judgment on his philosophy that life without rationality, self-consciousness, awareness, and capacity to feel is of no worth, and that young children have no sense of these characteristics.<sup>83</sup> However, the month long period prior to his bestowing a right to life is, he readily admits, completely arbitrary,<sup>84</sup> as would be any other line. Indeed, there are no medical, developmental, or moral grounds for selecting a time period of twenty-eight days before affirming a right to life.<sup>85</sup> Therefore, the logical and predictable consequence of this line of thinking is the right to kill unwanted or undesirable people at any time.

Killing the unwanted and the "undesirables" is precisely the approach that Dr. Singer and his colleague advocate, based on Singer's utilitarian view of people and his moral theory that "[t]he most obvious reason for valuing life of a being capable of experiencing pleasure or pain is the pleasure it can experience."<sup>86</sup> Therefore, he solves all moral questions by determining whether the action increases or decreases the total sum pleasure of the world. The total sum pleasure of the world can be increased by bringing more beings into the world who experience pleasure, increasing the pleasure of existing beings, or eliminating those beings whose existence brings more pain than pleasure, either to themselves or to others. People, therefore, are simply a means to an end and have no intrinsic value in themselves. Singer supports killing infants if the parents wish; however, "[k]illing an infant whose parents do not want it dead is, of course, an utterly different matter."<sup>87</sup> In Singer's view, humans have value only if others wish them to have value. If a child is more effort than that child is worth, in the parents' opinion, the child should be killed. He also views infants as replaceable.<sup>88</sup> He believes that society already views fetuses as replaceable, in that, when mothers kill their fetus for any one of a variety of reasons, including disability of the fetus, wrong sex, or inconvenience to the mother, many mothers then go on to get pregnant again. Thus, there is no reason why society should not view infants as replaceable as well.<sup>89</sup>

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<sup>82</sup> *Id.* at 190; see also PETER SINGER, *RETHINKING LIFE AND DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS* 217 (1994).

<sup>83</sup> SINGER, *supra* note 79, at 169, 182.

<sup>84</sup> PETER SINGER, *RETHINKING LIFE AND DEATH* 217 (1994).

<sup>85</sup> Robert W. Evans, *The Moral Status of Embryos*, in *THE REPRODUCTION REVOLUTION* 60, 62 (John F. Kilner et al. eds., 2000).

<sup>86</sup> SINGER, *supra* note 79, at 174. Cf. Naomi Schaefer, *Professor Pleasure or Professor Death?*, *WALL ST. J.*, Sept. 25, 1998, at A14.

<sup>87</sup> SINGER, *supra* note 79, at 174.

<sup>88</sup> *Id.* at 188.

<sup>89</sup> *Id.* at 187-88.

[B]irth does not mark a morally dividing line. I cannot see how one could defend the view that fetuses may be "replaced" before birth, but newborn

Regarding non-voluntary euthanasia, Singer supports the right to kill another person, even one who does not choose to die voluntarily, on the grounds that the person lacks "awareness of oneself as a being existing over time, or as a continuing mental self."<sup>90</sup> Singer points out that the disabled,<sup>91</sup> and disabled infants in particular, should be killed if they are not wanted by others; however, he states that if others wish them to live, "the picture may alter."<sup>92</sup> Therefore, he again places the entire value of the child in the hands of those who may, or may not, want it to live. He unequivocally states that "killing a disabled infant is not morally equivalent to killing a person. Very often it is not wrong at all."<sup>93</sup> Viewing children as replaceable, he asserts,

When the death of a disabled infant will lead to the birth of another infant with better prospects of a happy life, the total amount of happiness will be greater if the disabled infant is killed. The loss of happy life for the first infant is outweighed by the gain of a happier life for the second. Therefore, if killing the [disabled] infant has no adverse effect on others, it would . . . be right to kill him.<sup>94</sup>

Singer makes little differentiation between children with severe disabilities, such as spina bifida, and those with minor ones, such as hemophilia, standing equally ready to kill both.<sup>95</sup> And, because he is of the opinion that children do not have the right to live until their parents agree to keep them, he presumably would stand equally ready to kill children with "imperfections" such as the wrong color eyes or hair or the wrong sex, or children with no imperfections at all. He also supports killing disabled adults if their lives are not pleasurable.<sup>96</sup>

Dr. Singer's approach to infanticide appears to have gained a following in the legal community.<sup>97</sup> Unfortunately, it also appears that

infants may not be. Nor is there any other point, such as viability, that does a better job of dividing the fetus from the infant. Self-consciousness, which could provide a basis for holding that it is wrong to kill one being and replace it with another, is not to be found in either the fetus or the newborn infant. . . . [R]eplacability should be considered an ethically acceptable option.

*Id.* at 188.

<sup>90</sup> *Id.* at 183; see also *id.* at 175-217 (cataloging Singer's viewpoints on taking human life in general).

<sup>91</sup> *Id.* at 175-76.

<sup>92</sup> *Id.* at 190.

<sup>93</sup> *Id.* at 191.

<sup>94</sup> *Id.* at 186.

<sup>95</sup> *Id.* at 184-86.

<sup>96</sup> SINGER, *supra* note 79, at 192. According to Singer, lives only "have value if such beings experience more pleasure than pain, or have preferences that can be satisfied; but it is difficult to see the point of keeping such human beings alive if their life is, on the whole, miserable." *Id.*

<sup>97</sup> Charles Hartshone, *Concerning Abortion: An Attempt at a Rational View*, CHRISTIAN CENTURY, Jan. 21, 1981, at 42-45 (arguing that infants are not fully human, infanticide is not murder, and "functional" persons possess more rights than infants).

some in the medical community have adopted Dr. Singer's approach to life and have fulfilled the fears of Justice Scalia regarding live birth abortions.<sup>98</sup> For example, reports from Christ Hospital in Oak Lawn, Illinois, indicate that several babies were born alive when their late-term abortion procedure went awry.<sup>99</sup> Many of the fetuses were past the twenty-week mark, including one that was twenty-three weeks. With proper care and attention by neonatologists and other specialists, they would have had a nearly 40% survival rate.<sup>100</sup> Instead of giving these babies the care associated with a legal right to life after a live birth, however, the babies were merely placed on a metal table or in a soiled linen closet to die.<sup>101</sup> Similar stories have been reported in other hospitals across the country where late-term abortion procedures are performed.<sup>102</sup> Other medical professionals report that when an abortion produces a live birth instead of a dead fetus, the doctor drowns or beats the child until dead.<sup>103</sup>

Other startling legal cases illustrate an alarming extension of *Roe v. Wade* applied to children already born. Courts are finding new "rights" in the Constitution which conflict with society's right to protect children. Courts have developed a newly found "right" to deny medical care to newborn children with physical or mental disabilities. For example, in Indiana, parents of a newborn with a minor birth defect that prevented food from passing into his stomach and which could have been corrected with a routine operation, refused to allow doctors to operate because the child had Down's Syndrome.<sup>104</sup> Despite offers of adoption by several families, the parents and their doctors decided to let the child slowly starve to death in the corner of the hospital nursery.<sup>105</sup> The courts upheld the "right" of the parents to allow the child to starve to death.<sup>106</sup> When the United States Department of Health and Human Services responded to such discrimination with new regulations designed to protect disabled newborn children from such lethal neglect, the new rules were invalidated by a United States District Court, holding that

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<sup>98</sup> *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

<sup>99</sup> *Hearing on H.R. 4292*, *supra* note 8, at 14-16 (testimony of Jill L. Stanek, R.N., Christ Hospital, Oaklawn, Illinois).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 17 (testimony of Allison Baker, R.N., Charlottesville, Virginia).

<sup>102</sup> H.R. REP. NO. 106-835, at 11 (2000) (noting several instances reported by medical professionals where babies who were intended for abortion were born alive but given no medical attention).

<sup>103</sup> *See supra* note 9 and accompanying text.

<sup>104</sup> *Origins and Scope of Roe v. Wade*, *supra* note 7, at 55-56.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

they might "infringe upon the interests outlined in cases such as . . . *Roe v. Wade*."<sup>107</sup>

Surprisingly, a 1977 survey revealed that 59.5% of pediatricians and 76.8% of pediatric surgeons would support a parent's wish to deny life-saving surgery to a child with Down's Syndrome; and nearly three-fourths of those surveyed declared that, if they themselves had a child with Down's Syndrome, they would choose to let the child starve to death.<sup>108</sup>

Indeed, the views of Dr. Singer and his colleagues support the proposition that when life is not valued for its intrinsic worth at all stages, it is not valued for its intrinsic worth at any stage. When society does not place value on the life of unborn children simply because they are the youngest members of the human race, it diminishes the value of born children. When a society does not value those who are less developed or less productive than others, such as our unborn, this diminishes the value we place on our elderly, who may also be less productive than others. When an unborn child lacks the right to live, there is no logical reason why children, or adults for that matter, should enjoy the right to live.

The barbaric views held by Dr. Singer should take no one by surprise; they are simply the logical and entirely predictable extension and conclusion of the views of those who support abortion rights. One cannot diminish the rights of one segment of society without diminishing the rights of all members of society. As a nation, the rights that society enjoys are no better and no worse than those which it bestows on "the least of these." Those advocating the rights of women to kill their unborn children have either ignored or forgotten one inescapable fact: women will have no rights if they are killed in the womb while they are still unborn. Women seeking to impose their rights over those of their unborn are the very beneficiaries of women who have gone before them, namely their mothers, who have valued the rights of their children over their own. Therefore, the rights that society bestows and the value it places upon all segments of our society, both the young and the old, are inextricably intertwined with the rights bestowed and the value placed upon unborn children.

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<sup>107</sup> *Id.* (citing *Am. Acad. of Pediatrics v. Heckler*, 561 F. Supp. 395, 403 (D.D.C. 1983)).

<sup>108</sup> CURT YOUNG, *THE LEAST OF THESE* 118 (1983).

*F. Abortion Is Inconsistent with Children's Civil Rights and with the Value That Society Places on the Individual*

*Stenberg v. Carhart*,<sup>109</sup> the Supreme Court's recent decision which legalized the procedure known as partial birth abortion, is simply another reminder that the rights of children, both born and unborn, are under siege. It is also a reminder to those who value children as precious gifts that the slide down the slippery slope to infanticide has already begun, and there is no end in sight. All abortion, but in particular partial birth abortion, is inconsistent with both the rights of children and with the notion that all members of society have intrinsic worth.

1. Abortion Is Inconsistent with Children's Civil Rights

Abortion stands in stark contrast to children's rights because children's rights do not, and should not, begin only at birth. Children do not become children, and thereby become entitled to certain individual rights, at the moment of birth and not a second before. They become children and are entitled to their rights long before they arrive in this world. The path of childhood is a continuum from conception to late teens. It does not simply begin at birth and terminate upon reaching one's eighteenth birthday. Any point along that path chosen to bestow upon children, or deprive children of, the rights to life and to freedom from abuse is completely arbitrary. Just as the words "toddler," "teenager," and "senior" describe a human at different stages of life, so do the terms "fetus" and "embryo" describe a human at different stages of life. A human being is still a member of the human race, and therefore

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<sup>109</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000). The *Stenberg* Court, in a five-to-four decision, ruled that the Nebraska statute banning the partial birth abortion procedure known as "D&X," or dilation and extraction, was unconstitutional because it did not contain an exception for the health of the mother and because, based on the Court's broad construction of the law, it also could be applied to the "D&E," or dilation and evacuation, procedure. *Id.* at 917. The majority stated that the ruling was based on *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992), which states that subsequent to viability, a State may regulate or proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Stenberg*, 530 U.S. at 921 (quoting *Casey*, 505 U.S. at 874). *Casey* also prohibits a State from imposing an "undue burden" on a woman's ability to choose to have an abortion. *Casey*, 505 U.S. at 874. The dissenters in *Stenberg* point out that, due to a "basic misunderstanding" of *Casey*, the majority have, among other errors, misapplied the holding in *Casey* by 1) ignoring the views of distinguished physicians and medical associations which "could identify no circumstances" under which the procedure at issue would be the only option to save the life or preserve the health of the woman; and 2) misapplying the settled doctrine of statutory construction that statutes will be interpreted narrowly to avoid constitutional difficulties: "[t]o the extent that they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Stenberg*, 530 U.S. at 965-66 (applying *Frisby v. Schultz*, 487 U.S. 474, 483 (1988)).

of inestimable value, regardless of whether the terminology used to describe that human is "fetus" or "teenager." Thus, while abortionists argue that they are merely aborting a fetus, carefully avoiding the word "baby," they are, in fact, destroying a human being. The view that a child who is only weeks or days or, in the case of partial-birth abortion, seconds from birth does not share the same right to life as that of a child who is just born is equally as preposterous as the view that a one-year-old does not share the same right to life as a ten-year-old.

Millions of Americans, including medical professionals, theologians, bioethicists, and philosophers, agree that unborn children are human beings. For example, Dr. Edmund Pellegrino, Professor of Medicine and Ethics at Georgetown University, states, "Human embryos are, at least as I see it, members of the human species in the earliest and most vulnerable stages of their development."<sup>110</sup> Many medical textbooks reveal the biological fact that a new life with its own unique DNA begins when the egg is fertilized by the sperm.<sup>111</sup> Similarly, the Roman Catholic Church considers children to be humans with rights from the moment of conception, with all the moral and social implications associated with the sacredness of life.<sup>112</sup> Several Protestant theologians, including Gilbert Meilander, Ph.D., a Lutheran theologian and Professor of Theology at Valparaiso University, agree with this position.<sup>113</sup> In addition, many bioethicists agree that children are conceived with the rights and dignity afforded all humans.<sup>114</sup>

The holdings of the Supreme Court stand in stark contrast to this position. In *Roe v. Wade*, the Court conceded,

We need not resolve the difficult question of when life begins. 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.<sup>115</sup>

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<sup>110</sup> *Ethics and Theology: A Continuation of the National Discussion on Human Cloning: Hearing Before the Subcomm. on Pub. Health and Safety of the Senate Comm. on Labor and Human Res.*, 105th Cong. 42 (1997) (statement of Edmund D. Pellegrino, M.D., Professor of Medicine and Medical Ethics, Georgetown University).

<sup>111</sup> See, e.g., BRADLEY M. PATTEN, *HUMAN EMBRYOLOGY* 43 (3d ed. 1968); KEITH L. MOORE, *THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY* 1 (2d ed. 1977); J.P. GREENHILL & E.A. FRIEDMAN, *GAMETOGENESIS TO IMPLANTATION, BIOLOGY OF GESTATION* 76 (1968).

<sup>112</sup> Pope John Paul II, *Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation*, 16 *ORIGINS* 697, 700-01 (1987); see also Cardinal Joseph Bernadin, *Science and the Creation of Life*, 17 *ORIGINS* 21, 24 (1987).

<sup>113</sup> Gilbert Meilaender, *A Child of One's Own: At What Price?*, in *THE REPRODUCTION REVOLUTION* 36, 40-42 (John F. Kilner et al. eds., 2000).

<sup>114</sup> See generally JOHN F. KILNER, *LIFE ON THE LINE* (1992).

<sup>115</sup> *Roe v. Wade*, 410 U.S. 113, 159 (1973).

However, the Supreme Court ignored biological facts and its own admission that it was unqualified to determine the point at which a child becomes a child and, thus, entitled to rights. The Court held that the sole prerequisite to the award of rights is the transportation through the few inches of the birth canal. However, as its recent opinion on partial birth abortion illustrates, the Court has diminished the rights of children even further by holding that even full-term children whose entire bodies, except the head, have passed through the birth canal have no right to be free from torture and death.<sup>116</sup>

## 2. Abortion Is Inconsistent with the Value That Society Places on Each Individual

Abortion stands at odds with the value that society places on the individual, regardless of age, sex, or disability. Abortion is inconsistent with the values held by Americans that children at all ages of development are entitled to civil rights, in particular the rights to life and freedom from abuse and torture, and that disabled children are entitled to those same rights. Indeed, all people, regardless of age or ability, have these rights. However, abortion, by its very nature, targets less-developed children and those less-developed, disabled children. These children are chosen to be killed for no other reason than because they are too young to defend themselves and because the Supreme Court has ruled, incorrectly in the viewpoint of millions, that unborn children have no rights.<sup>117</sup>

Consider the words of Justice Kennedy as he describes the barbaric procedures of late term abortion. After such a description, there can be no doubt left that this is torture and killing in its most heinous form and that it would not be tolerated if it were inflicted on any other member of American society.

As described by Dr. Carhart, the D & E procedure requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina. Dr. Carhart uses the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body. The traction between the uterus and vagina is essential to the procedure because attempting to abort a fetus without using the traction is described by Dr. Carhart as "pulling the cat's tail" or "drag[ging] a string across the floor, you'll just keep dragging it. It's not until something grabs the other end that you are going to develop traction." The fetus, in many cases, dies just as a human adult or child would. It

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<sup>116</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>117</sup> *Roe*, 410 U.S. at 158 (holding that a person entitled to rights under the Fourteenth Amendment does not include any child who has not yet been born and noting that if the word "person" included unborn children, the abortion question would be moot).



bleeds to death as it is torn limb from limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. Dr. Carhart agreed that “[w]hen you pull out a piece of fetus, let’s say, an arm or a leg and remove that, at the time just prior to removal of the portion of the fetus, . . . the fetus [is] alive.” Dr. Carhart has observed fetal heartbeat via ultrasound with “extensive parts of the fetus removed,” and testified that mere dismemberment of a limb does not always cause death because he knows of a physician who removed the arm of a fetus only to have the fetus go to be born “as a living child with one arm.” At the conclusion of a D & E abortion no intact fetus remains. In Dr. Carhart’s words, the abortionist is left with “a tray full of pieces.”

The other procedure implicated today is called “partial birth abortion” or the D & X. The D & X can be used, as a general matter, after 19 weeks’ gestation because the fetus has become so developed that it may survive intact partial delivery from the uterus into the vagina. In the D & X, the abortionist initiates the woman’s natural delivery process by causing the cervix of the woman to be dilated, sometimes over a sequence of days. The fetus’ arms and legs are delivered outside the uterus while the fetus is alive; witnesses to the procedure report seeing the body of the fetus moving outside the woman’s body. At this point, the abortion procedure has the appearance of a live birth. As stated by one group of physicians, “[a]s the physician manually performs breech extraction of the body of a live fetus, excepting the head, she continues in the apparent role of an obstetrician delivering a child.” With only the head of the fetus remaining *in utero*, the abortionist tears open the skull. According to Dr. Martin Haskell, a leading proponent of the procedure, the appropriate instrument to be used at this stage of the abortion is a pair of scissors. Witnesses report observing the portion of the fetus outside the woman react to the skull penetration. The abortionist then inserts a suction tube and vacuums out the developing brain and other matter found within the skull. The process of making the size of the fetus’ head smaller is given the clinically neutral term “reduction procedure.” Brain death does not occur until after the skull invasion, and, according to Dr. Carhart, the heart of the fetus may continue to beat for minutes after the contents of the skull are vacuumed out. The abortionist next completes the delivery of a dead fetus, intact except for the damage to the head and the missing contents of the skull.<sup>118</sup>

The notion of this procedure being applied to any person, much less one of such tender age, is incomprehensible and morally reprehensible to many, if not most, in American society. In medieval times, the hardest of criminals were subjected to the punishment of being “drawn and quartered,” consisting of literally pulling the unfortunate individual

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<sup>118</sup> *Stenberg*, 530 U.S. at 958-60 (Rehnquist, C.J. & Kennedy, J., dissenting).

apart limb from limb.<sup>119</sup> Long ago, this medieval form of torture was banned<sup>120</sup> because it was considered inhumane in a civilized society, only to show up centuries later relabeled as abortion and performed on innocent child victims who have committed no crime except that of being conceived.

In contrast, every other member of American society, and even animals, are protected from torture and this barbaric form of execution. Our Constitution protects individuals, namely criminals, from “cruel and unusual” punishment,<sup>121</sup> which should include protection from this heinous and barbaric torture procedure allowed under abortion laws. Furthermore, the disabled and incompetent, who are often the targets of abortion, are protected from this procedure in our civil rights laws. Indeed, even animals are protected from this type of treatment through animal cruelty laws. For example, the destruction of a bald eagle egg bears a fine of \$5,000 with imprisonment up to one year.<sup>122</sup> Thus, it is clear that this type of torture and killing of any living being, including animals, is seen as reprehensible and unjustified in civilized society.

One must ask, given the existing laws, since it is constitutional to protect unhatched eagle chicks, whether this does not lead to the conclusion that it must also be constitutional to protect unborn humans. Perhaps the moral landscape in this country is so convoluted that we value unhatched birds more than unborn children. While many hope that this is not the case, unfortunately, the rulings from the Supreme Court indicate otherwise.

The dichotomy between the Machiavellian “need” to abort disabled, unborn children and the general sympathy felt by Americans for disabled, born children is also striking. As a society, Americans are very empathetic and supportive of those with disabilities, knowing that disabilities strike at random and admiring the strength and courage of the disabled and their families. As a result, disabled people have been granted many rights under our statutes. Americans are also very generous in their time and financial resources in supporting several organizations that enhance the lives of those with disabilities and encourage them to reach their full potential. The Special Olympics is one of the most beloved and supported organizations to help the disabled. As

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<sup>119</sup> See 6 GROLIER ENCYCLOPEDIA 235 (1991); *Drawing and Quartering*, at [http://1911encyclopedia.org/D/DR/DRAWING\\_AND\\_QUARTERING.htm](http://1911encyclopedia.org/D/DR/DRAWING_AND_QUARTERING.htm) (last visited Mar. 1, 2003). This form of punishment was used in England for treason. *Id.*

<sup>120</sup> *Id.* The penalty was first inflicted in 1284. The last execution in this manner was in 1803 against seven co-conspirators for conspiring to assassinate George III. The punishment was abolished in 1870. *Id.*

<sup>121</sup> U.S.CONST. amend. VIII.

<sup>122</sup> 16 U.S.C. §668 (1994). Subsequent convictions carry fines up to \$10,000 per offense with imprisonment up to two years. *Id.*

an example of the support Americans exhibit for the disabled, at a recent gymnastic performance of several Olympic medalists, only the members of the Special Olympic team received a standing ovation, which lasted several minutes after their performance.<sup>123</sup>

Thus, America sends the following message: torture is wrong and should not be inflicted on any member of society. We support children and adults with physical and mental disabilities. They have these disabilities through no fault of their own. We support parents who chose to have children, despite the additional attention, love, time, and resources needed to raise a special-needs child. We value those special-needs children, and we value their parents, who are indeed extraordinary people in difficult circumstances. These people need an extra measure of our understanding and compassion.

However, the Supreme Court sends the following message: torture is acceptable if the victim is too young to defend itself and particularly if that young victim is disabled. We really think that disabled individuals would be better off being killed as a baby before birth so that disabled people would never have been born.

This message leads to the viewpoint, expressed by those in favor of abortion, that the disabled and their parents are leeches on society because they are often supported by taxpayer-funded government programs, and that they should have chosen abortion instead of birth.<sup>124</sup> The logical extension of this mind-set is that the disabled and their families will be viewed as second-class citizens, leading to a further devaluation of their worth, a corresponding reduction in the civil rights that they have fought so hard to obtain, and a decline in government-funded support. Moreover, the foreseeable result of the viewpoint that disabled individuals are second-class citizens leeching off society and should be killed *in utero* is that abortions of the disabled could be required, if not heavily encouraged, due to the reduction in government support. Without government funds to defray the enormous costs needed to support and care for a disabled child, many families would have no meaningful choice whether to abort or keep a child. Another foreseeable

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<sup>123</sup> This author actually attended this World Gymnastics Exhibition which was held at the United Center in Chicago, Illinois on Oct. 27, 2000.

<sup>124</sup> MIRIAM CLAIRE, *THE ABORTION DILEMMA* 202 (1995).

I was surprised to learn . . . that most people don't consider the cost of raising a disabled child when making a decision regarding whether or not to continue a pregnancy after a fetal abnormality has been detected. . . . Decisions are made on the basis of religious and family beliefs. Very few people could afford to take care of a disabled child on their own. . . . In my view, asking the community to fund personal religious beliefs is a questionable way to approach parenthood. If you knowingly bring a disabled child into the world, you should be able and willing to pay for all costs associated with caring for that child.

*Id.* at 201-02.

result is that *any* child born into a family that may require government support could be required, or strongly encouraged, to be eliminated by abortion to avoid wasting precious tax dollars. While this may sound far-fetched, it is precisely the basis behind China's "one-child policy," which has resulted in the deaths of millions of children by either forced abortion or infanticide.<sup>125</sup> If this were the case in America, that is, if death and not life were the presumption, the future of our country would be on very shaky legal and moral ground indeed.

### III. CONCLUSION

The rights of children who are born are inextricably interwoven with the rights of children who are yet to be born. Not only are children devalued when unborn children are devalued, but we all, as members of the human race, are devalued when unborn children are devalued. The human existence is a continuum from conception to old age. There is no magic point along that continuum when one "becomes" human and is, therefore, worthy of basic human rights. Similarly, there is no point at which one ceases to be worthy of rights that have been granted simply because one is a human. We are members of the human race from the point of conception to death and are, therefore, entitled to certain individual rights simply because of our priceless, intrinsic worth as human beings. Our society is in peril of moral and social chaos by permitting some members of the human race to devour, oppress, and victimize other members of the same human race because they are weaker and are, therefore, perceived as less valuable than those who are stronger. This observation is true whether the oppressed are weaker because of sex, race, disability, earning potential, religious affiliation, old age, or young age. Abortion, quite simply, permits people who are stronger to kill those who are weaker by reason of their age and, thus, their perceived lack of value. However, in so doing, the devaluation process has also spread to those children who are born and those who are disabled. It also has the potential to spread to the elderly and the feeble. Much like when water is touched to the corner of fabric and spreads throughout the entire fabric, abortion and the mind-set of the devaluation of humans when touched to one corner of the human race, the unborn, spreads throughout the entire fabric of humanity.

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<sup>125</sup> See STEVEN W. MOSHER, *A MOTHER'S ORDEAL: ONE WOMAN'S FIGHT AGAINST CHINA'S ONE CHILD POLICY* vii-x (1993); *China May Face Chaos in 20 Years From Millions of Alienated Bachelors*, CHI. TRIB., Feb. 9, 1995, at 2; Uli Schetzer, *China Holds a Fist Over Women's Meetings: Officials Fear Overactive Activists*, CHI. TRIB., Aug. 27, 1995, at 3; *9 Million Abortions in China Last Year*, CHI. TRIB., Nov. 23, 1985, at 5; Jesse Zink, *China's One Child Policy*, at <http://axe.acadiau.ca/~043638z/one-child/policy.html> (last visited Mar. 1, 2003).

We must do everything possible to protect the rights of children, both the born and those yet to be born, realizing that the rights of one are dependent on and intertwined with the rights of the other. Perhaps the most eloquent yet simple explanation of this principle comes from one of the most beloved authors of children's books, Dr. Seuss, who explains the basis of children's rights: "A person is a person, no matter how small."<sup>126</sup>

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<sup>126</sup> DR. SEUSS, *HORTON HEARS A WHO!* (1954).