

# Never Get Out'a the Boat

## Stenberg v. Carhart and the Future of American Law

John M. Breen<sup>+</sup>  
&  
Michael A. Scaperlanda<sup>++</sup>

Francis Ford Coppola's *Apocalypse Now*<sup>3</sup> is a powerful film full of many gripping scenes. Since its release in 1979, the movie has provided viewers not only with haunting images of the Vietnam War, but also with a story that has a great deal to say about human nature and the nature of violent conflict. In its own way, the Supreme Court's opinion in *Stenberg v. Carhart*<sup>4</sup> tells an equally gripping story. Unfortunately, the case is not a work of fiction, but a declaration of what our Constitution demands. Moreover, unlike Coppola's graphic depiction of war, the majority's depiction of partial birth abortion in *Stenberg* is deliberately understated. Despite these apparent dissimilarities, the movie – and one scene in particular – serves as a poignant commentary on *Stenberg* and, by extension, the future of American law.

*Apocalypse Now* is largely based on Joseph Conrad's short novel, *Heart of Darkness*.<sup>5</sup> In the film, Martin Sheen plays Captain Benjamin Willard, a Special Forces officer ordered to assassinate Colonel Walter Kurtz, a renegade American played by Marlon Brando. Confronting the brutal truth of their command – the murder of a fellow American soldier – requires an

---

<sup>1</sup>Associate Professor, Loyola University Chicago School of Law.

<sup>2</sup>Gene and Elaine Edwards Family Chair and Professor, University of Oklahoma College of Law.

<sup>3</sup>*Apocalypse Now* (Paramount Pictures 1979).

<sup>4</sup>*Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>5</sup>JOSEPH CONRAD, *HEART OF DARKNESS* (1902).

honesty that Willard's superiors cannot muster. Thus, they do not directly tell Willard to "kill Colonel Kurtz." Instead, in the sanitized jargon of military operations, Willard is ordered to "terminate the Colonel's command." Indeed, the CIA case worker present at Willard's briefing tells him "Terminate with extreme prejudice."

To find Kurtz and carry out his mission, Willard is ferried up the Nung River to Cambodia on a Navy Swift boat manned by a crew of four. At one point on their journey, the men stop the boat and rest for a while along the river bank. "Chef," a cook who serves as the boat's machinist, goes into the jungle in search of mangoes, accompanied by Willard. As they make their way into the bush, Chef explains how a man trained as a saucière in New Orleans came to work as a machinist. Their friendly banter suddenly ends, however, as Willard hears something, tenses up and moves forward, pointing his M-16 in the direction of the sound. Willard's quiet intensity frightens Chef. It might be "Charlie" lurking in the bush, waiting to ambush them. They stop, pause, a shadow moves, and a tiger bounds out of the jungle. The two men fire their weapons and Chef yells in terror as they run back to the boat. They jump on board and the boat races away, firing its guns into the jungle. Overwhelmed by the incident, Chef becomes hysterical. Not only must the men contend with the constant threat of death by the Viet Cong, but as Chef exclaims "I almost got eaten by a fucking tiger!" He screams at the top of his lungs, "Never get out'a the fucking boat! I gotta remember, never get out'a the fucking boat!" In a voice-over, Willard – a man trained in the art of killing, a man who knows the jungle – expresses his agreement: "Never get out'a the boat. Absolutely god damn right . . . Unless you were going all the way."

In this scene, the boat and the jungle are not only places where the drama unfolds. They

also function as metaphors for, respectively, a society in which human conduct is bound by the limits of moral restraint, and a place which has no such limitations. That is, not unlike the *Pequod* in Melville's *Moby Dick*,<sup>6</sup> the patrol boat in *Apocalypse Now* represents civilization. Compared to the near total insanity and chaos of the wider conflict around them, the boat offers its crew and passenger a place of relative safety. On the boat the men eat and sleep and smoke together. They answer their mail and brush their teeth. Although the strictures of military discipline are somewhat lax, on the boat the men can protect themselves from the dangers of a hostile world. Indeed, in maintaining the rationality and order necessary to survive "the Shit" of Vietnam, the boatmates share a common fate.

To get off the boat is to abandon civilization and with it the moral order that makes social life possible. To get off the boat and venture into the jungle is to leave behind the norms of civil society and enter a place where violence is neither right or wrong, only "necessary." It is a place beyond good and evil, where freedom knows no bounds. Without the constraints and security provided by social custom and the protection afforded by law, one must be willing to suspend one's moral judgment and go "all the way." That is, one must have the will to do what others cannot bring themselves to do. One must have the strength to act like the Viet Cong who, as Kurtz later recounts, hacked off the little arms of all the children in a village simply because the Americans had inoculated them against polio. A man who gets off the boat and ventures into the jungle must, as Kurtz says, be able "to kill without feeling, without passion, without judgment, without judgment, because it is judgment that defeats us." No longer encumbered by the moral judgments of civilization, which temper the exercise of individual will, one is free to act in any

---

<sup>6</sup> HERMAN MELVILLE, *MOBY DICK* (1851).

way deemed desirable.

“Never get out’a the fucking boat.” Sound advice, not only for Swift boat grunts tempted to venture out into the jungle, but also for federal judges and elected officials, indeed, for anyone who hopes to live in a society in which the dignity of the human person is respected and ordered liberty is preserved.

In *Stenberg v. Carhart* the Supreme Court “got out’a the fucking boat” and showed that it was willing to go “all the way.” All the way to declaring that the State may not protect a child in the process of being born.<sup>7</sup> All the way to saying that what is indisputably a human being does not, under the Constitution, enjoy the benefit of law.<sup>8</sup> All the way to the brink of infanticide.<sup>9</sup>

---

<sup>7</sup>See *National Abortion Federation v. Gonzales*, \_\_\_ F.3d \_\_\_, \_\_\_ (2006)(Walker, J., concurring)(the *Carhart* Court, “effectively held that the deeply disturbing--and morally offensive--destruction of the life of a partially born child cannot be banned by a legislature without an exception for the mother's health (as determined by her doctor)”; *Id.* at \_\_\_ (Straub, J. dissenting)(“I find the current expansion of the right to terminate a pregnancy to cover a child in the process of being born morally, ethically, and legally unacceptable”); James Bopp, Jr. & Curtis R. Cook, *Partial Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 *Issues L. & Med.* 3, 4 (1998)(“Partial-birth abortion is the final frontier of abortion jurisprudence because it involves the killing of the child during birth.”). Citing the American College of Obstetricians and Gynecologists Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997), the Supreme Court said: “The American College of Obstetricians and Gynecologists describes the D & X procedure [partial-birth abortion] in a manner corresponding to a breech-conversion intact D & E, including the following steps:

- “1. deliberate dilation of the cervix, usually over a sequence of days;
- “2. instrumental conversion of the fetus to a footling breech;
- “3. breech extraction of the body excepting the head; and
- “4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.” *Id.* at 928. It concluded that “[d]espite the technical differences . . . , intact D & E and D & X [abortion methods] are sufficiently similar for us to use the terms interchangeably.” *Stenberg, supra* at 928.

<sup>8</sup> See generally Kathleen A. Cassidy Goodman, *The Mutation of Choice*, 28 *ST. MARY'S L.J.* 635, 661 (1997) (“Partial-birth abortion must be viewed not only as a morally questionable practice in the already controversial realm of abortion, but also as an indicator of the direction the United States is moving with regard to respect for all human life”); and Stephanie D. Schmutz, *Infanticide or Civil Rights for Women: Did the Supreme Court Go Too Far in Stenberg v. Carhart*, 39 *HOUS. L. REV.* 529, 531

Of course, the Supreme Court does not say this directly. Because the majority recognizes the sheer barbarism of what they say the Constitution requires,<sup>10</sup> they are unwilling to express themselves with genuine candor. Instead, like Captain Willard's superiors, the *Stenberg* court articulates its decision in language that conceals the true nature of the conduct involved, making it morally palatable to those who like to think of themselves as members of civilized society. But all of this is subterfuge. Behind the cloak of polite verbiage Willard's superiors are ordering him to kill Kurtz by any means necessary, and the Supreme Court is declaring that the

---

(2002) (“The gruesome detail with which this law describes the procedure it restricts indicates just how far we have denigrated the rights of unborn children”).

<sup>9</sup> Some have argued that partial birth abortion should not fall within the Court's abortion jurisprudence since it involves the killing (infanticide) of a partially birthed human baby. See e.g., James Bopp, Jr. & Curtis R. Cook, *Partial Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 ISSUES L. & MED. 3, 32 (1998) (The partial-birth extraction and cranial decompression procedure constitutes infanticide and is not governed by abortion jurisprudence). “[T]he abortion right applies only to those who are unborn. A baby who is partially delivered cannot properly be termed unborn. In the partial-birth abortion procedure as described by practitioners, the baby is three-fourths delivered. Only three inches of the baby could arguably be said to be unborn. The baby as a whole is partially-born, not unborn. As a result, abortion jurisprudence does not apply to a partially delivered child.” *Id.* at 26. See also *National Abortion Federation v. Gonzales*, 437 F.3d 278, \_\_\_ (2d Cir. 2006) (Straub, J. dissenting) (“In addition to vindicating the right to life of those in the process of being born, the State has a compelling interest in protecting the line between abortion and infanticide”); Jill R. Radloff, *Partial-Birth Infanticide: An Alternate Legal and Medical Route to Banning Partial-Birth Procedures*, 83 MINN. L. REV. 1555, 1557 (1999) (arguing that partial-birth infanticide is an accurate description of what is commonly called partial-birth abortion because “the child dies during the birth process”); and Steven Grasz, *If Standing Bear Could Talk ... Why There is No Constitutional Right to Kill a Partially-Born Human Being*, 33 CREIGHTON L. REV. 23, 26 (1999) (“partial-birth abortion cases can, and should, be decided outside the legal framework of *Roe* and its progeny”). But see Eric Johnson, *Habit and Discernment in Abortion Practice: The Partial-Birth Abortion Ban Act of 2003 as Moral Legislation*, 36 RUTGERS L.J. 549 (2005) (While “it is true that to the layperson dilation and extraction bears a close resemblance to infanticide ... physicians need not and probably will not perceive dilation and extraction as closely resembling infanticide, [therefore] there is no good reason to suppose that their use of this technique ultimately will prevent them from acquiring or maintaining a habit of respect for persons”).

<sup>10</sup> E.g., *Carhart*, *supra* at 946 (Stevens, J. concurring) (“Although much ink is spilled today describing the gruesome nature of late-term abortion procedures, that rhetoric does not provide me a reason to believe that the procedure Nebraska here claims it seeks to ban is more brutal, more gruesome, or less respectful of ‘potential life’ than” many other abortion methods”).

Constitution forbids the States from banning a practice in which a child, who is within inches of being fully born, can have its skull split open by a pair of scissors and its brains sucked out by a vacuum.

At the beginning of his majority opinion in *Stenberg*, Justice Stephen Breyer notes that the act of abortion can be described in disparate ways. He acknowledges that some people believe that the abortion license is necessary to ensure the “equal liberty” of American women, while others hold that “an abortion is akin to causing the death of an innocent child.”<sup>11</sup> Even

---

<sup>11</sup>*Carhart, supra* at 920. The Second Circuit recently echoed Breyer’s observation regarding the disparate views held concerning abortion: *See National Abortion Federation v. Gonzales*, 437 F3d 278, \_\_\_ (2d Cir. 2006) (“Some consider abortion the illegitimate killing of a person. Others consider abortion a legitimate medical procedure used by a pregnant woman, in consultation with her doctor, to terminate a pregnancy prior to birth. Those on both sides of the controversy acknowledge that the fetus is a living organism, starting as a collection of cells just after conception and developing into a recognizable human form as the time for birth approaches. The destruction of a fetus is a distressing event, whether one views abortion as the killing of a person or a pregnant woman’s personal choice concerning her body.”).

Justice Breyer considers these views “virtually irreconcilable.” *Carhart, supra* at 920. If by this he means that each side in the abortion debate has strongly held views and that neither side is likely to alter its perspective, he may well be right. As a logical matter, however, the two views are not mutually exclusive. That is, it may well be the case *both* that the abortion license gives women greater freedom to direct their lives than they would have if it was not available *and* that the abortion procedure causes the death of an innocent child. There is no formal contradiction in these two claims.

Those who once held that the earth was flat and those who held that the earth was round held mutually exclusive views. The law of the excluded middle precludes the possibility of the earth being both round and flat in the same way at the same time. But those who contended that the South needed slavery to compete on equal footing with the North and those who believed in the dignity of all persons, including enslaved African-Americans, did not hold “virtually irreconcilable” views. In the first case, the flat earther’s were proved wrong. In the second case, whether the equality proposition was true or false, the United States decided to subordinate the economic equality claim in favor of the liberty claim.

In the abortion context, social critic Naomi Wolf reconciles Breyer’s “virtually irreconcilable” positions by subordinating the life of the unborn child in favor of women’s equality. She calls for pro-choice advocates to stop “entang[ing] our beliefs in a series of self-delusions, fibs and evasions.” Naomi Wolf, *Our Bodies, Our Souls*, THE NEW REPUBLIC, October 16, 1995, at 26. She argues for “contextualiz[ing] the fight to defend abortion rights within a moral framework that admits that the death of a fetus is a real death.” *Id.* She goes on to say that “[f]ree women must be strong women, too; and strong women, presumably, do not seek to cloak their most important decisions in euphemism.” *Id.* at 32. For Wolf, the exercise of power must be accompanied by an honest recognition of what that power accomplishes. Thus, although she maintains “that a woman’s equality in society must give her some irreducible rights unique to her biology, including the right to take the life within her” she insists that “we

here, however, Breyer finds it difficult to state the pro-life position in unvarnished form. Opponents of abortion do not believe that the act is merely *akin* to causing the death of an innocent child but that it *is* the deliberate and intentional killing of an innocent child. Regardless of the specific articulation, it seems that for Breyer such description is merely rhetorical gloss. He gives no indication that there is any truth beyond the political preference for or against abortion that would support or refute such a description.<sup>12</sup> There is only the “truth” constructed by the Court according to which abortion is a constitutional right, a right that the Court “has determined and then redetermined” in the course of a generation,<sup>13</sup> first in *Roe v. Wade*<sup>14</sup> and later in *Planned Parenthood v. Casey*.<sup>15</sup> Thus, in giving constitutional sanction to partial birth abortion, the *Stenberg* court does not bother to deny that the subject of this gruesome procedure is in fact a human life, a human being, a child in the process of being born. Indeed the unspoken premise upon which the *Stenberg* decision turns is that the humanity or inhumanity of the entity aborted is irrelevant to the constitutionality of the act. Apparently, like Willard’s commanders, Breyer believes that some things are better left unsaid.<sup>16</sup>

---

don’t have to lie to ourselves about what we are doing at such a moment.” *Id.* at 33.

<sup>12</sup>*Cf.* John T. Noonan, Jr., *The Root and Branch of Roe v. Wade*, 62 NEB. L. REV. 668, 673 (1984) (arguing that the *Roe* court “felt free to impose its own notions of reality” such that “the biological reality” of the developing child in the womb “could be subordinated or ignored by the sovereign speaking through the Court”).

<sup>13</sup>*Stenberg, supra* note \_\_ at 921.

<sup>14</sup>*Roe v. Wade*, 410 U.S. 113 (1973).

<sup>15</sup>*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>16</sup> Paradoxically, the fact that the Court acted like Willard’s commanders, and left the truth unspoken, is a sign of hope. If the Court had been confident in the absence of moral objection to its ruling, if it thought that barbarism was now widely accepted, there would be no need for it to fail to admit

Unable to make the argument that a healthy six, seven, eight, or nine-month-old fetus subject to partial birth abortion is not a human being, the Court likewise finds itself unable to tell the American public that the question of the fetus' humanity is irrelevant to the issue of whether or not the State may ban the procedure. Instead, the Court avoids the embarrassment of such a failed argument by ignoring the issue altogether. In doing so, it employs a strategy reserved for those privileged institutions that have the final say with respect to a given matter. As Justice Robert Jackson famously observed, the members of the Court "are not final because we are infallible, but we are infallible only because we are final."<sup>17</sup> The *Stenberg* decision not only manifests the Court's fallibility,<sup>18</sup> it also exposes the folly of any institution that would hope to resolve such a sensitive and divisive issue without having "the courage to look the truth in the

---

the fact that a partially delivered baby is indeed a human person. Deep in the jungle, the Court could openly acknowledge the partially delivered child's humanity and still license others "to kill ... without judgment, without judgment, because it is judgment that defeats us." At the edge of the jungle, the Court must still act in a strategic fashion, sparing in its use of candor.

In 1970 the California Medical Association predicted the need for precisely this strategy in order to secure wide-spread acceptance of the abortion license. In an editorial in its magazine, the Association argued that "semantic gymnastics" would need to be employed to avoid "the scientific fact, which everyone already knows, that human life begins at conception and is continuous whether intra or extra uterine until death." The medical profession must deny what it referred to as "the undeniable fact of the fetus' humanity" until such time as society would accept abortion without judgment. Such obfuscation would be necessary in order "to separate the idea of abortion from the idea of killing." *A New Ethic for Medicine and Society*, CAL. MED., Sept. 1970, 67, 67-68.

<sup>17</sup>Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>18</sup> On the potential fallibility of a court vested with final authority, *see e.g.*, Jack Wade Nowlin, *Constitutional Violations by the United States Supreme Court: Analytical Foundations*, 2005 U. ILL. L.REV. 1123, 1196 (2005)("the concept of constitutional violations by the Supreme Court has significant support as a matter of analytic jurisprudence and constitutional analysis"). Questioning Supreme Court finality or supremacy, *see e.g.*, Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals From the Twenty-First Century*, 59 ALB. L. REV. 671, 691 (1995)(arguing that "[i]t is time to explode the myth of judicial supremacy and judicial exclusivity in constitutional interpretation -- a myth that has lived long but ought not be allowed to prosper," Paulsen offers four proposals for reform).

eye and call things by their proper name.”<sup>19</sup>

Unfortunately, the Court does more than fail to call things by their proper name. Like Willard’s commanders, the *Stenberg* majority hides behind a rhetoric which is intended to strike the reader as neutral and unobjectionable. Indeed, the Court claims that “[t]here is no alternative way,” that such language is necessary “to acquaint the reader with the technical distinctions among different abortion methods and related factual matters.”<sup>20</sup> Thus, the Court is able to describe an innocuous medical procedure in which “the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix.”<sup>21</sup> Clearly, the humanity of the victim of this procedure is not among the “factual matters” addressed by the Court. By not judging the matter, the Court hopes to finally resolve it.

As such, Kurtz’s prescription for victory in war aptly describes the Court’s decision in the case. Indeed, it is an epithet for the morbid liberalism that currently defines the Court’s jurisprudence. In *Stenberg* the Court takes decisive action, but “without judgment, without judgment, because it is judgment that defeats us.” The Court does not pause to consider the status of the child struggling to be born, victimized by the procedure it approves. Without judgment the Court is free to act. The irony cannot help but appeal to post-modern sensibilities. By not judging, the judges judge in favor of a virulent tolerance. Put another way, the majority has decided that in order to preserve the liberty that defines American civilization, the law must ensure that women are free to act with extreme prejudice toward children in the process of being

---

<sup>19</sup>JOHN PAUL II, ENCYCLICAL LETTER *Evangelium Vitae* ¶ 58 (1995).

<sup>20</sup>*Stenberg*, 530 U.S. at 923.

<sup>21</sup>*Id.* at 927.

born. The absence of judgment in *Stenberg* has been replicated by virtually every federal court to consider a subsequent state restriction on partial birth abortion.<sup>22</sup> Indeed, the nearly lockstep fashion in which federal courts have struck down these statutes shows that, notwithstanding all their vaunted independence, judges with life tenure no less than soldiers can follow the orders of their superiors without question, without judgment. Of course, some might argue that curtailing if not entirely eliminating the judgment of lower courts is precisely the point of *stare decisis*. Respect for established precedent and settled legal principle guarantees continuity and thus stability in the legal system in much the same way that the chain of command prevents enlisted men and officers of lower rank from second-guessing the military plans formulated by their superiors. Still, as important as the chain of command is, it cannot excuse or legitimate acts of barbarism.<sup>23</sup> It cannot prevent even the lowliest front-line conscript from recognizing the humanity of a non-combatant and refusing to obey an order that directly targets innocent human life.<sup>24</sup>

---

<sup>22</sup>*See, e.g.*, *Richmond Medical Center for Women v. Hicks*, 409 F.3d 619 (4<sup>th</sup> Cir. 2005)(striking down Virginia statute); *Planned Parenthood of Central New Jersey v. Attorney General of State of New Jersey*, 297 F.3d 253 (3<sup>rd</sup> Cir. 2002) (striking down New Jersey statute); *Hope Clinic v. Ryan*, 249 F.3d 603 (7<sup>th</sup> Cir. 2001) (striking down Illinois statute); *Rhode Island Medical Society v. Whitehouse*, 239 F.3d 104 (1<sup>st</sup> Cir. 2001) (striking down Rhode Island statute). The sole exception has been *Women’s Med. Prof. Corp. v. Taft*, 353 F.3d 436 (6<sup>th</sup> Cir. 2003)(upholding Ohio’s statute). Of the nine Circuit Court judges to consider the constitutionality of the federal ban on partial-birth abortion, one dissented from the conclusion that the statute is unconstitutional in light of *Stenberg*. *See National Abortion Federation v. Gonzales*, 437 F.3d 278, \_\_ (2d Cir. 2006) (Staub, J. dissenting).

<sup>23</sup> How a lower court judge should resolve the conflict between her duty as a judge to apply the positive law and her duty as a human being to refrain from participation in acts of barbarism is beyond the scope of this essay.

<sup>24</sup> The Uniform Code of Military Justice provides that any soldier who acts “with intent to usurp or override lawful military authority, refuses, in concert with any other person, to obey orders or otherwise do his duty or creates any violence or disturbance is guilty of mutiny” 10 U.S.C. chap. 47,

Even in times of war, civilization is not without its defenders. In 2003, Congress passed and President Bush signed a federal ban on partial birth abortion.<sup>25</sup> The statute was immediately challenged by advocates of the procedure in three federal actions filed in New York, San Francisco and Omaha. The district court in each of these lawsuits ruled that the federal statute, like its state counterparts, violated the constitutional freedom set forth in *Stenberg*.<sup>26</sup> The Second, Eighth, and Ninth Circuit Courts of Appeal have in turn affirmed each of these respective decisions.<sup>27</sup> To date, every court to consider the matter found that the statute was deficient because it lacked a “health” exception that would allow the procedure where, in the language of *Casey*, it was deemed “necessary, in appropriate medical judgment for the preservation of the life

---

§894. A soldier may, however, disobey an order by his or her superior to murder non-combatants because such an order would not be made with “lawful military authority.” *See id.* at \_\_\_.

<sup>25</sup> Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, (2003), 117 Stat. 1201, 1201, codified at 18 U.S.C. §1531. *See* Scott Hodges, *Constitutional Law: Beyond the Bounds of Roe: Does Stenberg v. Carhart Invalidate the Partial-Birth Abortion Ban Act of 2003*, 57 OKLA. L. REV. 601 (2004)(arguing that the Act is constitutional). *But see* Melissa C. Holsinger, *The Partial-Birth Abortion Ban Act of 2003: The Congressional Reaction to Stenberg v. Carhart*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 603 (2002-2003)(arguing that the Act is unconstitutional); Tamara F. Kushnir, *It's My Body, It's My Choice: The Partial-Birth Abortion Ban Act of 2003*, 35 LOY. U. CHI. L.J. 1117 (2004)(same). Others have suggested that the Act is unconstitutional on federalism grounds. *See* Allan Ides, *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 CONST. COMMENT. 441, 443 (2003-2004)(arguing that the Act “ is subject to serious doubt under current commerce clause doctrine”); Alissa Schecter, *Choosing Balance: Congressional Powers and the Partial-Birth Abortion Ban Act of 2003*, 73 FORDHAM L. REV. 1987(2005)(arguing that Act is unconstitutional on federalism grounds); and David Kopel & Glenn Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59 (1997)(“the argument for a congressional power to regulate abortion under the Interstate Commerce Clause seems dubious at best”).

<sup>26</sup>*See* Planned Parenthood Federation of America v. Ashcroft, 320 F.Supp. 2d 957 (N.D. Cal. 2004); National Abortion Federation v. Ashcroft, 330 F.Supp. 2d 436 (S.D.N.Y. 2004); Carhart v. Ashcroft, 331 F.Supp. 2d 805 (D. Neb. 2004).

<sup>27</sup> Planned Parenthood Federation of America v. Gonzales, 435 F.3d 1163 (9<sup>th</sup> Cir. 2006); National Abortion Federation v. Gonzales, 437 F.3d 278 (2d Cir. 2006); and Carhart v. Gonzales, 413 F.3d 791 (8<sup>th</sup> Cir. 2005), *cert. granted* Gonzales v. Carhart, \_\_\_ U.S. \_\_\_ (2006).

or health of the mother.”<sup>28</sup> Although these words sound like words of limitation, from the beginning of its abortion jurisprudence, the Court has given the term “health” an exceedingly broad reading. Indeed, in *Doe v. Bolton*, the companion case to *Roe*, the Court defined “health” to mean “all factors - - physical, emotional, psychological, familial, and the woman’s age - - relevant to the well-being of the patient.”<sup>29</sup>

It is this nearly boundless understanding of “health” coupled with a woman’s inviolable desire to obtain an abortion that allows the Court to go “all the way.” Indeed, it mandates the result in *Stenberg*. Thus, it is hard to take issue with Justice Antonin Scalia’s conclusion that *Stenberg* is not “a regrettable misapplication of *Casey*” but the “logical and entirely predictable consequence” of that decision.<sup>30</sup>

Notwithstanding the rhetoric of “health” and the *Stenberg* court’s calculated efforts to understate the sheer horror of what it approves, some people can still read a map. Some people know when they’ve gone overboard. Some people can look at their surroundings and know in an instant that they have left civilization behind and are now heading deep into the jungle. After reviewing all the evidence in the New York lawsuit challenging the federal statute, District Judge Richard Casey concluded that partial birth abortion, “is a gruesome, brutal, barbaric, and uncivilized medical procedure.”<sup>31</sup>

---

<sup>28</sup>*Casey*, 505 U.S. at 879 (quoting *Roe*, 410 U.S. at 165).

<sup>29</sup>*Doe v. Bolton*, 410 U.S. 179, 192 (1973). For an extended discussion of the “health exception” in the context of mental health, see Brian D. Wassom, *The Exception that Swallowed the Rule?: Women’s Medical Professional Corporation v. Voinovich and the Mental Health Exception to Post-Viability Abortion Bans*, 49 CASE W. RES. L. REV. 799 (1999).

<sup>30</sup>*Stenberg*, 530 U.S. at 954 (Scalia, dissenting).

<sup>31</sup>*Nat. Abortion Federation v. Ashcroft*, 330 F.Supp. 436, 479 (S.D.N.Y. 2004).

Recognition of this fact would cause most people to run out of the jungle and climb back on board the boat as fast as they can. But “health” gets in the way. Indeed, health as “well-being” makes the retreat back to civilization exceedingly difficult. In the bizarre world created by *Stenberg*, the Constitution demands that the state not interfere with the “gruesome, brutal, barbaric, and uncivilized” acts that are “necessary” to kill a child in the process of being born. After all, the emotional, psychological, or familial “well-being” of a woman may dictate that she be able to choose the method of her child’s execution. She may wish to be reassured that her baby will die quickly and without pain, or that her abortion will be conducted in such a way as to eliminate the possibility of a live birth, or simply in order to please the doctor whom she trusts, the doctor who simply wants to avoid any “unnecessary complications.” The point is that “well-being” is broad enough to encompass all of these sorts of considerations, as well as countless others. As such, “health” is no longer firmly rooted in medical science. It is now a word that artfully conceals the exercise of power “without judgment, without judgment.”

\* \* \*

Later in the film, the boat and its crew make their way up the river, and Willard eventually locates Colonel Kurtz. He discovers, however, that Kurtz is truly insane. As Willard remarks, “Kurtz got off the boat” and “split from the whole fucking program.” The rotting corpses and severed heads that decorate his compound testify to this fact. But it is not an insanity derived from the absence of any rationality. Instead, Kurtz’s insanity is the result of subscribing to two contradictory rationalities simultaneously. In the film, this contradiction is presented as the paradox of war: To save civilization man must abandon the moral limits of

---

human conduct and act with brutal savagery. For Coppola, however, this is no paradox, only perverse absurdity. Indeed, the absurd way in which the war is conducted is a recurring theme throughout the film: The Armed Forces Radio tells nineteen-year-old GI's trained to kill that the mayor of Saigon wants them to hang their laundry up "indoors instead of off the window sills" in order to "keep Saigon beautiful!"; military commanders fly three *Playboy* centerfolds into the middle of the jungle to dance for the troops and are surprised to find that the boys want to storm the stage; an Army chaplain and a few soldiers celebrate mass on a smoke-filled landing zone as a tank flame-thrower torches an enemy bunker; and one American officer, obsessed with catching the perfect wave in Vietnam, has his soldiers surf as enemy rounds explode around them.

Early in the film we are told that Kurtz was "a good man . . . a humanitarian man, a man of wit and humor." But it is this absurd juxtaposition of civilization and war, of moral order and immoral violence, of the desire to protect life and the utter disregard for life that drives Kurtz insane. As Kurtz says moments before Willard kills him: "They train young men to drop fire on people, but their commanders won't allow them to write 'Fuck' on their airplanes because it's obscene!" For Kurtz the contradiction is unbearable. It causes him to collapse from the inside. As Willard puts it, Kurtz first broke from his superiors "and then he broke from himself. I've never seen a man so broken up and ripped apart."

The law suffers a similar collapse when it embraces two contradictory principles, two competing rationalities that cannot be reconciled with one another. *Stenberg* constitutionalized this kind of insanity, injecting it into our fundamental law by elevating an extreme conception of freedom above the obligation to treat every human being as a subject deserving of equal concern

and respect. In doing so, the Court lifted human liberty to unnatural heights while simultaneously destroying its foundation. Indeed, the Court reasoned that to preserve the equal dignity of women in society it is necessary to abandon the moral limits of human freedom. Respect for women's autonomy requires that the state not intervene when a child in the process of being born is met with brutal savagery. In both an immediate and in an ultimate sense, however, the dignity and liberty of one individual cannot rest firmly on the right to destroy another innocent human being. Thus, by embracing an exaggerated understanding of human freedom, the Court corrupted the very notion equal dignity and respect and laid clear the path into the jungle.

To be sure, liberty and equality are two principles, two rationalities that must be embodied in law. Indeed, each of these principles constitutes an indispensable aspect of human dignity such that each is necessary to safeguard that dignity in the legal and political order. At the same time, however, as commentators from Plato to de Tocqueville have observed, liberty and equality stand somewhat in tension with one another.<sup>32</sup> Taken to an extreme, the principle of equality subverts liberty, and the principle of liberty undermines equality. That is, if equality is not limited to formal equality before the law but is broadened to include equality of condition, then individuals may no longer distinguish themselves through the free exercise of their talents

---

<sup>32</sup> For a taste of the extensive literature exploring the real world tension and theoretical reconciliation of liberty and equality, see e.g., Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finances in the Design of a Comprehensive and Contemporary "Ownership Society,"* 79 S. CAL. L. REV. 45 (2005); Peter Shane, *Compulsory Education and the Tension Between Liberty and Equality: A Comment on Dworkin,* 73 IOWA L. REV. 97 (1987); John Attanasio, *The Constitutionality of Regulating Human Genetic Engineering: Where Procreative Liberty and Equal Opportunity Collide,* 53 U. CHIC. L. REV. 1274 (1986); and Frank Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawl's Theory of Justice,* 121 U. PENN. L. REV. 962 (1973).

and resources. Similarly, unbounded liberty not only exacerbates the natural differences that exist among individuals, if left unchecked, it renders even formal legal equality chimerical. The true dignity of the human person instead requires a proper ordering, a kind of equilibrium between these two competing principles.

Throughout most of our modern constitutional history, the Supreme Court has preserved a balance between liberty and equality. The Court has allowed Congress and the states to ensure some basic level of equality of condition through the provision of public services and social insurance benefits. In construing the meaning of equality under the Constitution, however, the Supreme Court has not insisted on equality of condition or equality of outcome. Instead, the Court has largely limited its interpretation to formal legal equality. This understanding of equality requires public authorities to treat all individuals with equal concern and respect simply by virtue of their status as human beings, and nothing more.<sup>33</sup> Thus, in what is undoubtedly the modern Court's most celebrated decision, *Brown v. Board of Education*, the Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the government from segregating children in public schools on the basis of race. To do so would violate their inherent dignity.<sup>34</sup>

Beyond the field of public education, this same concern for formal legal equality has

---

<sup>33</sup> Cf. *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (striking down statute denying children born out of wedlock the right to recover for the wrongful death of their mother and asserting that "illegitimate children are not 'non-persons.' They are humans, live and have their being"). As noted below, the principle of equal concern and respect does not require the state to treat all human beings exactly alike in every respect. See, e.g., *Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding statute forbidding illegitimate children from inheriting from their fathers by intestate succession even with convincing proof of paternity following the father's death).

<sup>34</sup> *Brown v. Bd. of Ed.*, 347 U.S. 483, 494 (1954).

informed the Court's decisions in a variety of other areas. These areas include the right to vote,<sup>35</sup> the composition of civil and criminal juries,<sup>36</sup> the right to marry<sup>37</sup> and the disposition of property.<sup>38</sup>

The duty to treat all human beings with equality, that is, as subjects worthy of equal concern and respect, does not require the state to treat every individual exactly alike in every way. Indeed, the state has "a wide scope of discretion in enacting laws which affect some groups of citizens differently from others."<sup>39</sup> Rather, the state violates the principle of legal equality when its classification of human beings "rests on grounds wholly irrelevant to the achievement of the State's objective."<sup>40</sup> Thus, for example, the government may not deny admission to a state-sponsored university on the basis of race, ethnicity, religion or gender.<sup>41</sup> It may, however, restrict admission on the basis of perceived intelligence and aptitude for study.<sup>42</sup> By contrast,

---

<sup>35</sup>*Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

<sup>36</sup>*Talyor v. Louisiana*, 419 U.S. 522 (1975); *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303 (1879); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Georgia v. McCullum*, 505 U.S. 42 (1992); *Powers v. Ohio*, 499 U.S. 400 (1991); *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127 (1994).

<sup>37</sup>*Loving v. Virginia*, 388 U.S. 1 (1967). Here, of course, the definition of marriage is limited to one man and one woman. The Supreme Court has held that laws prohibiting polygamy are not unconstitutional. Obviously, the heterosexual nature of marriage is under assault today in a number of courts and legislatures.

<sup>38</sup>*Shelley v. Kramer*, 334 U.S. 1 (1948) (banning the enforcement of racially restrictive covenants). *Hunter v. Erickson*, 393 U.S. 389 (1969) (declaring unconstitutional an ordinance that treated housing transactions on the basis of race).

<sup>39</sup>*McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

<sup>40</sup>*Id.* at 426.

<sup>41</sup>*Sweatt v. Painter*, 339 U.S. 629 (1950); *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>42</sup>*Cf. Washington v. Davis*, 426 U.S. 229 (1976).

however, the government may not limit or enhance an individual’s right to free speech, or freedom of religion, or due process based on perceived intelligence. Because they protect fundamental aspects of human dignity, the state may not choose to dispense these rights in any manner it sees fit and remain faithful to the principle of equality. As a subject of equal concern and respect by virtue of his or her humanity, every human being is entitled to the enjoyment of these rights.

Similarly, in construing the principle of liberty, as a general matter, the Court has not viewed the law as an instrument of radical, individual autonomy. Indeed, in setting forth the meaning of “freedom under law” the Court has not been guided by the extreme view of *liberty as license* so much as a concern for *ordered liberty*.<sup>43</sup> Thus, although the Court has typically interpreted the various individual rights granted under the Constitution in a generous and expansive manner, the Court has also found that these rights are subject to reasonable limitations required by the common good.

For example, although the Court has found that a competent adult may refuse to receive medical treatment,<sup>44</sup> an individual may not decline to be vaccinated against a communicable disease that poses a risk to the public health.<sup>45</sup> Parents have the right to raise their children and educate them as they see fit,<sup>46</sup> but this right of family autonomy does not include the right to

---

<sup>43</sup>The phrase “ordered liberty,” which has become a staple in American constitutional law, originated in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>44</sup>*Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 210 (1990).

<sup>45</sup>*Jacobson v. Massachusetts* 197 U.S. 210 (1905).

<sup>46</sup>*Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

neglect children in their upbringing or engage in child abuse.<sup>47</sup> Individuals have the right to freely practice the religion of their choice, and the state may not question the truth of any particular theological tenet to which they subscribe, but this freedom is not unbounded. The state may prohibit even sincere religious adherents from engaging in acts barred by laws of general applicability.<sup>48</sup> Likewise, individuals may own, use, and dispose of property as they see fit, but the government may control the use of property through zoning restrictions, the provision of rights of access and environmental regulations, and the designation of landmark status.<sup>49</sup> Indeed, an individual has no right to have a racially restrictive covenant enforced by the state in a real estate transaction.<sup>50</sup>

Even the right to free speech, perhaps the broadest and most cherished liberty guaranteed by the Constitution, is limited by the principle of harm to others. This harm may take the form of reputational, psychological, or physical injury. Thus, for example, the state may, consistent with the First Amendment, allow a private litigant to sue for damages for speech that constitutes libel.<sup>51</sup> Likewise, the government may ban the creation and distribution of child pornography, precisely because of the severe harm inflicted on the children depicted in such materials.<sup>52</sup>

---

<sup>47</sup>Prince v. Massachusetts, 321 U.S. 158 (1944).

<sup>48</sup>Employment Division v. Smith, 494 U.S. 872 (1990).

<sup>49</sup>Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Young v. American Mini-Theaters, Inc., 427 U.S. 50 (1976); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978), rehearing denied 439 U.S. 883 (1978).

<sup>50</sup>Shelley v. Kraemer, 334 U.S. 1 (1948).

<sup>51</sup>New York Times v. Sullivan, 376 U.S. 254 (1964); Gertz v. Welch, 418 U.S. 323 (1974); Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

<sup>52</sup>New York v. Ferber, 458 U.S. 747 (1982).

Finally, and perhaps most importantly, the state may prohibit and punish speech that is designed to incite violence against others.<sup>53</sup> That is, notwithstanding the express constitutional guarantee of free speech, a state may criminally punish advocacy speech that is intended to incite and likely to produce “imminent lawless action,”<sup>54</sup> as well as “fighting words” directed toward a specific individual and likely to provoke a violent response.<sup>55</sup>

There is no constitutional provision that expressly guarantees the right to abortion,<sup>56</sup> yet the Court has fashioned a right that far exceeds the boundaries of express guarantee of free speech.<sup>57</sup> Indeed, *Stenberg* constitutionalized a right to violence, a right to harm another human being in the most gruesome way imaginable. In its First Amendment jurisprudence, the Court permits the state to curtail speech because of the state’s even more basic interest in curtailing the

---

<sup>53</sup>*Brandenburg v. Ohio* 395 U.S. 444 (1969).

<sup>54</sup>*Id.* at 447.

<sup>55</sup>*Cohen v. California*, 403 U.S. 15 (1971).

<sup>56</sup>In *Roe* the Court forthrightly acknowledged that “[t]he Constitution does not explicitly mention any right to privacy” and that the location of this right in the constitutional text is somewhat in doubt. *Roe v. Wade*, 410 U.S. 113, 152-153 (1973) (noting that the right may be “founded in the Fourteenth Amendment’s concept of personal liberty” or in “the Ninth Amendment’s reservation of rights to the people”). Nevertheless, the Court held that such a right exists and that it “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Id.* at 153. With the passage of time the Court has grown more confident in pinpointing the source of this right. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (“Constitutional protection of the woman’s decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall ‘deprive any person of life, liberty, or property, without due process of law.’ The controlling word in the cases before us is ‘liberty.’”). For a defense of unenumerated rights as such and the right to an abortion in particular see Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overturned*, 59 U.CHI.L.REV. 381 (1992); LAWRENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 77-112 (1990).

<sup>57</sup>U.S. Const. Amend. 1 (“Congress shall make no law ... abridging the freedom of speech...”).

possibility of violence.<sup>58</sup> The violence in partial birth abortion is no mere possibility. It is a deadly certainty. Nevertheless, in *Stenberg* the Court held that the state may not act to prevent the extermination of a human life, a human being, a child in the process of being born, all in the name of freedom.

The Court is able to ignore this violence because, in the case of abortion, it has abandoned the idea of ordered liberty in favor of a maximal conception of human freedom. As the Court noted in *Wisconsin v. Yoder*, “the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.”<sup>59</sup> Yet this is precisely the kind of liberty – the freedom to make one’s own standards on matters of life and death, the freedom to kill a child in the process of being born – that the Court embraces in *Stenberg*. Although this understanding of freedom can be found throughout the Court’s abortion jurisprudence, it is most clearly stated in *Casey*’s now famous mystery passage: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>60</sup> Although much maligned by those critical of the result in *Casey*, the passage is not without some merit. A society that values freedom will not want its government to supply *all* of the answers to life’s questions. Indeed, a free society will, within the bounds of ordered liberty, welcome a plurality of responses to the

---

<sup>58</sup>*See, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *See also* Daniel Kobil, *Advocacy on Line: Brandenburg v. Ohio and Speech in the Internet Era*, 31 U. TOL. L. REV. 227, 237 (2000) (“The *Brandenburg* test also works in a First Amendment sense for another reason. The test focuses governmental law enforcement efforts on preventing harmful conduct rather than on the questionable goal of limiting provocative speech”).

<sup>59</sup>*Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

<sup>60</sup>*Planned Parenthood v. Casey* 505 U.S. 833, 851 (1992).

question of value, the question of what kind of life is truly worth living.

At the same time, the freedom to define the “mystery of human life” celebrated in *Casey* cannot include the facts of human life, and ordered liberty does not require the government to remain silent and inactive with respect to these facts. The scientific fact of when human life begins – when *a* human life begins – has not been in doubt since the advent of the modern study of human reproduction. As Keith L. Moore succinctly states in his standard medical text on embryology: “Development begins at fertilization when a sperm fuses with an ovum to form a zygote . . . The zygote is the first cell of a new human being.”<sup>61</sup> This new human life exhibits a radical discontinuity with the gametes that joined to form it, and with each of its parents. It is not a “part” of either its mother or its father. Instead, it possesses the genetic constitution, functional integration and material continuity of a distinct, new, human organism. Moreover, it will manifest this identity, its identity, the identity of a human being throughout each stage of its development as an embryo, fetus, infant, child, adolescent and adult. These basic facts of biology were well-known in 1973 when *Roe* was decided. They were true then, and they remain true today.

Justice Harry Blackmun, the author of *Roe*, recognized that neither the American public

---

<sup>61</sup>KEITH L. MOORE, *BEFORE WE ARE BORN: BASIC EMBRYOLOGY AND BIRTH DEFECTS* 23 (2d ed. 1983). Because this point is not in dispute, numerous other standard medical texts setting forth the same basic fact could be cited. A non-exhaustive list of such citations might include BRUCE M. CARLSON, *HUMAN EMBRYOLOGY & DEVELOPMENTAL BIOLOGY*\_\_ (2d ed, 1999) (“The time of fertilization represents the starting point in the life history, or ontogeny, of an individual.”); RONAN O’RAHILLY & FAIOLA MULLER; *HUMAN EMBRYOLOGY AND TERATOLOGY*\_\_ (1996) (“Although life is a continuous process, fertilization is a critical landmark because, under ordinary circumstances, a new, genetically distinct human organism is thereby formed.”); LESLIE BRAINERD AREY, *DEVELOPMENTAL ANATOMY*\_\_ (7<sup>th</sup> ed., 1974) (“The formation, maturation and meeting of a male and female sex cell are all preliminary to their actual union into a combined cell, or zygote, which definitely marks the beginning of a new individual.”).

nor the logic of American law would accept an opinion that, on the one hand, recognized the humanity of the unborn child and, on the other hand, the right to kill such a human being.<sup>62</sup> Because there was no genuine dispute with respect to the science of when human life begins, in order to vindicate the right to abortion, the *Roe* court was compelled to invent a controversy where none in fact existed. Thus, the Court referred to “the theory that a new human life is present from the moment of conception”<sup>63</sup> and “the belief that life begins at conception.”<sup>64</sup> Although Blackmun makes frequent mention of “potential life,”<sup>65</sup> “potential human life,”<sup>66</sup> and “the potentiality of human life,”<sup>67</sup> he deliberately avoids engaging the medical literature that addresses the question of when a human being first comes into existence. Blackmun knew well the lesson that Breyer would later follow: Some things really are better left unsaid.

Blackmun’s reticence was, however, quite selective. Despite the felt need to provide a seemingly comprehensive history of abortion from antiquity to the present<sup>68</sup> in an opinion exceeding fifty pages, Blackmun was content to make a single, oblique reference to “the well-

---

<sup>62</sup>To simultaneously recognize both the humanity of the unborn child and the right to kill that child would lead to an internal collapse similar to the one suffered by Kurtz. Blackmun could not fashion a principle capable of reconciling these two propositions. To avoid such an intellectual collapse in the opinion, Blackmun simply denied the humanity of the unborn child.

<sup>63</sup>*Roe*, 410 U.S. at 150.

<sup>64</sup>*Id.*

<sup>65</sup>*Id.* at 150, 154.

<sup>66</sup>*Id.* at 159.

<sup>67</sup>*Id.* at 162.

<sup>68</sup>*See id.* at 129-147.

known facts of fetal development”<sup>69</sup> without elaboration. These facts, it seems, were so well-known they could safely be ignored.

Having established the existence of a dispute, at least rhetorically, it then suited Blackmun’s purposes to declare the matter insoluble: “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>70</sup> Of course, it would not have been necessary “to speculate as to the answer” of when human life begins had the Court bothered to consult “those trained in the . . . discipline[] of medicine.” The Court failed to do precisely that. Instead, Blackmun’s only reference to the medical profession is a skewed history of the American Medical Association’s policy with respect to the permissibility of abortion. That is, Blackmun notes that the AMA adopted a policy favoring restrictive abortion laws in 1857 in order to protect “the independent and actual existence of the child before birth, as a living being”<sup>71</sup> and that the AMA revised its policy in 1970 in response to certain “changes in state laws and by the judicial decisions which tend to make abortion more freely available.”<sup>72</sup> Blackmun fails to note, however, that during the intervening period there was no change in the medical conclusion that the victim of abortion is a living human being. The only change in judgment was political in nature, not medical.

---

<sup>69</sup>*Id.* at 156.

<sup>70</sup>*Id.* at 159.

<sup>71</sup>*Id.* at 141.

<sup>72</sup>*Id.* at 143.

Confronting a question which he insisted did not have an answer, Blackmun could then assume a posture of judicial modesty. Indeed, by not speculating as to “this most sensitive and difficult question”<sup>73</sup> he could portray the Court as exercising restraint in the service of freedom. The state, said Blackmun, could not restrict the pregnant woman’s freedom of choice “by adopting one theory of life.”<sup>74</sup> Employing Kurtz’s strategy, Blackmun sought to resolve the matter by decisively acting “without judgment.”

There is, of course, nothing *modest* in pretending that science has not resolved the answer to a particular scientific question when in fact it has. And there is nothing *restrained* in ignoring the conclusions of the medical profession that represent the exercise of medical judgment simply in order to reach a particular result. There is, however, something plainly *ludicrous* in suggesting that a judge can decide a case without judging. Just as Kurtz’s jungle fighters exercise judgment in their murderous use of violence, so the Court’s prohibition against adopting a “theory of life” constitutes a judgment – a judgment that human life worthy of protection begins only after birth, a judgment that under the Constitution one member of the human family may be violently sacrificed at the altar of autonomy in order to vindicate the “dignity” of another.

In declaring that the state must, as constitutional matter, ignore the humanity of the victim subject to abortion, the Court in *Roe* abandoned both the principle of equal concern and respect and the principle of ordered liberty in favor of the idea of liberty as license. This license,

---

<sup>73</sup>*Id.* at 160.

<sup>74</sup>*Id.* at 162.

as *Casey* said, includes “the right to define one’s own concept of existence, of meaning, of the universe, and the mystery of human life,” even if the process of self-definition entails extinguishing the life of another. *Stenberg* lays bare the full implications of this license. The *Stenberg* court does not trouble itself with *Roe*’s fatuous claim that it “need not resolve the difficult question of when life begins.” The majority *knows* that the life at issue in the case has already begun. Indeed, *it is in the process of being born*. By embracing what it believes is a maximal conception of human freedom, the Court licenses the brutal killing of what is undeniably an innocent human being. Turning its back on civilization, the Court marches proudly into the jungle.

Accordingly, *Stenberg* makes apparent, as never before, the absurd contradiction that the Court has placed at the foundation of our legal system. This absurdity derives from the fact that the Court still routinely invokes the language of human dignity and the sanctity of human life.<sup>75</sup> Indeed, these invocations appear scattered throughout the Court’s reported decisions. Thus, for example, in striking down the Texas anti-sodomy statute in *Lawrence v. Texas*, the Court informed us that it would “demean the[] existence” of homosexuals if the state could “control their destiny by making their private sexual conduct a crime.”<sup>76</sup> Likewise, the Court recently held that the State of Hawaii could not limit those eligible to vote for a state-wide office to

---

<sup>75</sup>*See, e.g.*, *Washington v. Glucksburg*, 521 U.S. 702 (1997). In rejecting the Ninth Circuit’s use of the “mystery passage” from *Casey* to fashion a constitutional right to assisted suicide, the Supreme Court held that the state has an “unqualified interest in the preservation of human life.” *Id.* at 728. Indeed, the Court relied on the observation contained in the Model Penal Code that “the interests in the sanctity of life that are represented by the criminal homicide laws are threatened by one who expresses a willingness to participate in taking the life of another.” *Id.* at 728-729. This interest includes “protecting vulnerable groups-- including the poor, the elderly, and disabled persons--from abuse, neglect, and mistakes.” *Id.* at 731.

<sup>76</sup>*Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

people of Hawaiian ancestry because “it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”<sup>77</sup> Similarly, a generation ago, in *Cohen v. California* the Court held that the state could not prosecute a man for wearing a jacket emblazoned with the words “Fuck the Draft” because such a restriction on free expression would not “comport with the premise of individual dignity and choice upon which our political system rests.”<sup>78</sup>

The point is not that these cases do not involve difficult questions of human dignity – of freedom and equality. The point, instead, is that from the juxtaposition of these cases with *Stenberg* we are led to believe that restrictions on speech, sexual conduct, and voting are offensive to human dignity, but that human dignity is not at issue in the case of partial birth abortion – or rather, that human dignity *requires* the state not to interfere with the brutal murder of a child in the process of being born. Thus, although the language of human dignity, of equal concern and respect, still lingers on in precedent, and the Court continues to mouth these words in new decisions, the meaning of equality based on a common humanity is gone. When read against the background of *Stenberg v. Carhart*, each of these references to human dignity can be seen for what it is: a hollow declaration that decency and civility still reign, that barbarism does not define us, that we are not in the jungle. Some people, however, can still read a map. The unadorned facts that underlie *Stenberg* remind us where we are.

References to human dignity and the value of human life are especially common in the

---

<sup>77</sup>Rice v. Cayetano, 528 U.S. 495, 517 (2000).

<sup>78</sup>Cohen v. California, 403 U.S. 15, 24 (1971).

Court's Eighth Amendment jurisprudence, and in particular its review of capital punishment. Here, the Court has repeatedly set forth its belief that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."<sup>79</sup> Indeed, Justice William Brennan, perhaps the most forceful proponent of this view, insisted that "[a] punishment is cruel and unusual . . . if it does not comport with human dignity."<sup>80</sup> For Brennan, the "true significance" of such "barbaric punishments" as the rack, the thumb-screw, and the death penalty itself "is that they treat members of the human race as non-humans, as objects to be toyed with and discarded."<sup>81</sup> As such, these acts are "inconsistent with the fundamental premise" of our law "that even the vilest criminal remains a human being possessed of common human dignity."<sup>82</sup>

During his tenure on the Court, Justice Brennan was an unwavering supporter of the abortion license. Although it is surely to Brennan's credit that he could still perceive the fundamental human dignity of a violent criminal, it is more than a little ironic that, in the case of abortion, he approved of the treatment of "members of the human race as non-humans, as objects to be toyed with and discarded." Beyond irony, it is absurd that our law acknowledges the "common human dignity" of a violent criminal but refuses to recognize this same dignity in an innocent child struggling to be born.

---

<sup>79</sup>Trop v. Dulles, 356 U.S. 86, 100 (1958) (Warren, C.J.).

<sup>80</sup>Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, concurring). *See also* Carol Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 771 (2005)(suggesting that Brennan's concurrence in *Furman* is the "most prominent exposition" of argument that the death penalty violates human dignity).

<sup>81</sup>*Id.* at 272-73.

<sup>82</sup>*Id.* at 273.

This absurdity is even more pronounced when the holding in *Stenberg* is juxtaposed with the panoply of federal and state efforts intended to extend the protection of law to unborn children, to acknowledge them as members of the human family. It is absurd for the law to make available to grieving parents a cause of action for wrongful death and loss of society for the “death” of an unborn child caused by the negligence of another when the Supreme Court has declared that it cannot resolve the difficult question of when “life” begins.<sup>83</sup> It is absurd for the law to allow for individuals to be prosecuted for homicide for deliberating causing the death of an unborn child when *Roe* and its progeny allow a woman to pay her doctor to deliberately exterminate the same child.<sup>84</sup> If *Stenberg* is correct, if the unborn child has no legal standing up to and including the time of birth, then it is difficult to make sense of federal statutes like the Born-Alive Infants’ Protection Act,<sup>85</sup> the Unborn Victims of Violence Act (“Laci and Conner’s Law”),<sup>86</sup> and similar measures.

In the *Apocalypse Now*, an American photojournalist and follower of Kurtz, played by Dennis Hopper, remarks that the Colonel is “clear in his mind, but his soul is mad.” After *Stenberg*, the same could truly be said of American law, without exaggeration. The freedom of

---

<sup>83</sup> See, e.g., *Connor v. Monkem Co., Inc.*, 898 S.W. 2d 89 (Mo. 1995) (wrongful death statute allows recovery for death of nonviable fetus). For a survey of states that treat fetuses as persons under wrongful death statutes see Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising from the Death of an Embryo or Fetus and Michigan’s Struggles to Settle the Question*, 37 AKRON L.REV. 41, 53-70 (2004).

<sup>84</sup> See, e.g., *Bailey v. State*, \_\_ S.W.3d \_\_, \_\_ (Mo. App. 2005) (pre-viable “unborn child is a person for purposes of first-degree murder” under Missouri statute acknowledging that life begins at conception).

<sup>85</sup> Pub. L. No. 107-207, 116 Stat. 926 (2002).

<sup>86</sup> Pub. L. No. 108-212, 118 Stat. 518 (April 1, 2004).

the autonomous self to kill a child in the process of being born is not ordered liberty. It is the disorder of liberty run amok. It embodies what Joseph Ratzinger recently referred to as “a dictatorship of relativism that does not recognize anything as definitive and whose ultimate goal consists solely of one’s own ego and desires.”<sup>87</sup> Under this new regime, law is no longer the rational ordering of human conduct in support of the common good.<sup>88</sup> It is the triumph of the strong over the weak. It is the legal extermination of certain members of the human species deemed inconvenient by those in power.

As such, our law now embodies a kind of insanity. It is, as Willard says of Kurtz, “broken up and ripped apart” on the inside, wavering toward collapse. The law is insane because it cannot rationally affirm the dignity and equal worth of every human being and at the same time sanction the intentional killing of an innocent human being in the name of freedom. Indeed, in the hierarchy of values, human freedom cannot trump innocent human life since the right to

---

<sup>87</sup>Joseph Cardinal Ratzinger, *Homily at Mass for the Election of the Supreme Pontiff* (April 18, 2005), at [http://www.ewtn.com/pope/words/conclave\\_homily.asp](http://www.ewtn.com/pope/words/conclave_homily.asp) (last visited \_\_\_\_).

<sup>88</sup>Among the various conceptions available, the “constitutive integral common good” represents “the most traditional sense of the common good.” Daniel Sulmasy, *Four Basic Notions of the Common Good*, 75 ST. JOHN’S L. REV. 303, 306-307 (2001) (“ This is what Aristotle meant when he said man or people are political animals. St. Thomas said every man or every one of us is part of the community, so that we belong to the community in virtue of what we are. The relationship of being in the community is the value of the constitutive common good”). “The constitutive common good refers to those more robust notions of the common good that hold that being in a community of relationships with other human beings is itself a good. Therefore, being in a relationship, being part of the community, being part of each other is itself a good. It is a good that either partly or completely desires what is the good for me. This means that part of my good is the good of the community.” *Id.* See, e.g., Lee Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Central Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL’Y 909 (2005). For a modern classic on the common good, see JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* (Scott Fitzgerald, trans., 1947).

life enjoys a kind of logical priority over every other right.<sup>89</sup> The freedom to live is a necessary condition to the enjoyment of every other kind of freedom, including the freedom to define the meaning and mystery of human life extolled in *Casey*.

Moreover, the desire to maximize freedom cannot be the criterion by which a human being is excluded from the protection of the law as a subject of equal concern and respect. Put another way, the recognition of a human being as a legal person, as a rights-bearer, cannot be contingent on the desire of someone else to act in a particular way.<sup>90</sup> Ordered liberty demands that we tolerate the inconvenience of other people.

Given humanity's remarkable capacity for compartmentalization, rationalization and

---

<sup>89</sup>For an explication of what is meant by "logical priority" see S.L. Hurley, *Objectivity and Disagreement*, in *MORALITY AND OBJECTIVITY: A TRIBUTE TO J. L. MACKIE* 54, 55 (Ted Honderich ed., 1985) ("In general, to say that one concept or set of concepts is logically prior to another is to say that the latter is properly accounted for and understood in terms of the former and not *vice versa*; someone could grasp the prior concept without grasping the concept understood in terms of it, but not vice versa. To deny a claim of logical priority is to deny that someone could correctly understand one without understanding the other."). Plainly, the right to life enjoys precisely this kind of logical priority over every other right. See, e.g., Sacred Congregation for the Doctrine of the Faith, Declaration on Procured Abortion ¶ 11(1974) ("The first right of the human person is his life. He has other goods and some more precious, but this one is fundamental—the condition of all others. It does not belong to society, nor does it belong to public authority to recognize this right for some and not for others").

Germany's Basic Law embodies this principle. It gives juridical expression to the logical priority of the right to life. Indeed, as Donald Kommers observes, the German "Constitution must be interpreted in the light of public values derived from a reading of the Basic Law as a whole and particularly from its list of guaranteed rights, a list crowned by the inviolate principle of human dignity. ... The German Court has ... declared that these objective values arrange themselves in a hierarchy.... Human dignity, according to the Court, is the Basic Law's supreme value the chief manifestation of which is the right to life," including the right to life for the unborn. Donald Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1 (1993)(other rights "must give way when [they] conflict with the prior right to life").

<sup>90</sup>This is the unfortunate argument put forth at some length in Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L.REV. 599 (1991). This approach to the issue of constitutional personhood, which might fairly be described as the "fallacy of backing-in" to the concept, makes the content of the category "person" contingent on the effect that the possible inclusion of some members (i.e. unborn children) will have on other privileged members (i.e. women).

denial, the fundamental contradiction that now besets American law does not mean that the collapse of our legal system is imminent.<sup>91</sup> Even those who are insane, like Kurtz, can manage to function fairly well day to day. But, if *Stenberg* is not reversed, its continued presence will mark the solidification of a deep-seated intellectual incoherence in the law, an incoherence that will have a corrosive effect on our legal system in myriad ways. Indeed, the longer we stay in the jungle, the harder it will be to recall what authentic civilization looks like and to imagine how it might be recovered.

\* \* \*

At the beginning of the film, when Willard's commanders first order him to kill Colonel Kurtz, Willard is incredulous. He thinks he understands the order, but is uncertain. Could they really mean for him to murder a fellow American? And so he asks for clarification: "Terminate the Colonel?"

The current appeal to the Supreme Court of the three cases striking down the federal ban on partial birth abortion<sup>92</sup> permits us to do the same. It allows the American public to seek clarification. Could the Court have really meant what it appeared to say in *Stenberg v. Carhart*? Did the Court really mean to get out of the boat and wander into the jungle?

Specifically, this appeal allows the public to demand explicit answers to a number of questions: Did the Court in *Stenberg* really mean to say that the humanity of the entity subject to partial birth abortion is irrelevant to the question of whether it comes within the ambit of the

---

<sup>91</sup>See note \_\_, *supra*.

<sup>92</sup>See note \_\_, *supra*.

law's protection? Did it really mean to say that the humanity of a child in the process of being born is irrelevant to its status under the Constitution? If so, the American public deserves to have that proposition stated with utter clarity.

Likewise, if the Court concedes that the victim of partial birth abortion is indeed a “human being” but maintains that it is not a “person” under the Constitution,<sup>93</sup> then the Court must explain its criteria for constitutional personhood. Indeed, if the categories of “human being” and “person” are not coextensive, then the Court must explain why that is the case since – with the notable exception of slavery<sup>94</sup> – our law has always regarded them as such. Because law is a matter of public reason and not simply the expression of individual will, the language of judges must be more honest and forthright than the euphemistic orders of military commanders seeking to avoid the dictates of their own conscience. A judge may not avoid the dictates of the law in order to reach a result that he or she deems desirable. If there are human beings who are

---

<sup>93</sup>The distinction between being a “human being” and being a “person” is a crucial one that occupies an important place in the literature concerning the moral and legal status of abortion. *See, e.g.*, Noonan, *supra* note \_\_; Arthur Leff, *Leff Law Dictionary*, 94 YALE L.J. 1855, 1996-97 (1985); Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 THE MONIST 43, 53-57 (1973); H. Tristram Engelhardt, Jr., *The Ontology of Abortion*, 84 ETHICS 217 (1973-74); PATRICK LEE, ABORTION AND UNBORN HUMAN LIFE (1996). The question presented in the text above is not meant to assume that all “human beings” are “persons” under the Constitution. On the contrary, the question is intended to prompt an honest and intellectually rigorous answer from the Supreme Court, an answer which here to date has been sorely lacking. For a contemporary discussion of “personhood” that regards the concept as problematic and reflective of a deep anxiety in law see Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L.REV. 1745 (2001) and Jens David Ohlin, *Is the Concept of Person Necessary for Human Rights?*, 105 COLUM. L.REV. 209 (2005). For a particularly helpful discussion of the meaning of “personhood” see Daniel Wikler, *Concepts of Personhood: A Philosophical Perspective*, in *Defining HUMAN LIFE: MEDICAL, LEGAL AND ETHICAL IMPLICATIONS* (M. W. Shaw & A. E. Daudera eds., 1983).

<sup>94</sup>*See* *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393, 407 (1857) (holding that blacks, whether free or slave, had “no rights which the white man was bound to respect”). Although far less dramatic in the scope of its application, another notable exception is *Buck v. Bell*, 274 U.S. 200 (1927) (upholding the forced sterilization of mentally handicapped individuals in state institutions).

not entitled to the protections afforded by legal personhood, then it is incumbent on the Court to explain why this is so without ambiguity.

Throughout its abortion jurisprudence the Court has clearly struggled with its own legitimacy in attempting to justify the nearly absolute right it created in *Roe*.<sup>95</sup> Indeed, a preoccupation with the Court's status as the ultimate source of constitutional meaning – and not the merits of the case – was largely responsible for the Court's decision in *Casey*.<sup>96</sup> Answering the questions described above would require the Court to honestly confront the role it has assumed within our republic and the sources of authority that make the exercise of that power legitimate under the Constitution.

But honesty is always accompanied by risk. Fearful that a thorough and intellectually honest response to these questions would expose the true nature of the Court's decision, and threaten the Court's stature as an institution, Breyer and the other signators to *Stenberg* may simply be incapable of this sort of candor. Still, no matter how awkward it might be for the Justices to answer these questions in a manner free of obfuscation, it is not impertinent for us to insist that they do so. The rule of law requires as much. Indeed, the rule of law not only requires

---

<sup>95</sup> See e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (*Roe* is "a very bad decision. [I]t is bad because it is bad constitutional law, or rather because it is not constitutional law"); WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack Balkin ed., 2005).

<sup>96</sup> For example, Michael Stokes Paulsen argues that "*Casey* is not much concerned with [the abortion] question at all. *Casey* is concerned with the question of how overruling *Roe* might affect the public's perception of the Court's legitimacy and its claimed right to 'speak before all others for their constitutional ideals.'" Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L.REV. 671, 680 (1995). Indeed, "*Casey* is, in other words, concerned not with what the Constitution says, but with what people might think of their High Priests in black robes. For these reasons, and no other stated ones, the Court in *Casey* adhered to *Roe*, 'whether or not mistaken.'" *Id.*

the Court to answer these questions directly, it also requires the Court to demonstrate, as best it can, that the Constitution demands the answers it puts forth.<sup>97</sup>

In *Stenberg v. Carhart* the Supreme Court “got out’ a the fucking boat” and led us into the jungle. With partial birth abortion once more before the Court, we again stand at the water’s edge. The jungle lies only a few steps away, and seeing now only dimly the outlines and shadows that mark it, the freedom it promises is powerfully enticing. Thus, the Court and the people it serves must decide: Do we turn our backs on civilization and head further into the bush, embracing the illusion of freedom in the barbarous license of state-sanctioned killing? Or do we turn once more to recognize the fundamental dignity of every human being, the equal dignity which informs ordered liberty and which makes authentic civilization possible? In pondering our response, without a doubt, the best advice that can be had comes from a film about violence and morality, candor and the tenuous nature of civilization: Never get out’ a the boat!

---

<sup>97</sup> In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) the Court provided its articulation of this principle: “The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands. The underlying substance of this legitimacy is of course the warrant for the Court’s decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court’s opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.” *Id.* at 865-866.