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The Wages of Crying Life: What States Must Do to Protect Children After the Fall of Roe

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The Wages of Crying Life: What States Must Do to Protect Children After the Fall of *Roe*

Leah A. Plunkett and Michael S. Lewis*

Abstract

In the post-Roe world, can a state rationally claim that the value of human life justifies the imposition of abortion bans but does not demand that a state protect the vulnerable young who are “born human beings”—commonly called “minors” or “children”—and are entitled to protection under a state’s laws? This essay advances the claim that it cannot. This essay asks that those who say they are “Pro-life” in politics and law demonstrate that they protect vulnerable life beyond the abortion context, and that they do so in the most minimal fashion: through a demonstrated commitment to protecting the basic welfare of the most vulnerable children. The proposed “wage for crying life” (a play on John Hart Ely’s famous phrase) is a set of remedies for the sake of rationality and for other obvious public ends to be paid by multiple stakeholders. These stakeholders, both public and private, must participate in measuring and meeting basic standards for ensuring the protection of children from child abuse and neglect in a jurisdiction before that jurisdiction may rationally ban abortion. Using the authors’ home state of New Hampshire as a case study, this essay offers an initial application of the proposed broad framework to show how one state’s record of

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permitting massive child abuse prevents it from rationally claiming the “Pro-Life” status it claims its abortion ban achieves.

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*“I meant to talk about the suffering of mankind in general, but better let us dwell only on the suffering of children. That will reduce the scope of my argument about ten times, but even so it’s better if we keep to children.”*¹

I. INTRODUCTION

In the post-*Roe* world, can a state rationally claim that the value of human life justifies the imposition of an abortion ban but does not demand that a state protect the vulnerable young who are “born human beings”—more commonly called “minors” or “children”—and are entitled to protection under a state’s laws?² This essay advances the claim that it cannot. The title is a play on the famous comment by Professor John Hart Ely critiquing *Roe v. Wade*. That comment featured prominently in the *Dobbs* decision reversing *Roe v. Wade* this term.³ Our turn of phrase gives voice to a demand long-simmering beneath the surface of the abortion debate, coming more to the surface now in some quarters.⁴ That demand insists that those who say they are “Pro-life”⁵ in politics and law⁶ demonstrate that they protect vulnerable life beyond the

1. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV*, 37 (Richard Pevear & Larissa Volokhonsky trans. 2002).

2. See *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228, 2243 (2022) (“It is time to heed the Constitution and return the issue of abortion to the people’s representatives”). We use the term “born human beings” to build on the language in *Dobbs* and the new generation of post-*Roe* state abortion bans, which refer to “unborn human beings.” *Id.*

3. *Id.* at 2241 (quoting John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926, 947 (1973)).

4. See, e.g., Jeff Stein and Leigh Ann Caldwell, *Post Roe, Some GOP Wage Uphill Battle to Offer Families More Support*, WASH. POST (Aug. 7, 2022, 6:00 AM EST), <https://www.washingtonpost.com/us-policy/2022/08/07/republicans-family-benefits-roe-dobbs/> (“Pro-Life conservatives now have an obligation to address the financial insecurities associated with childbirth and parenthood,” according to Samuel Hammond.).

5. See NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA*, 4-5 (2009 ed.) (“It is an argument premised on the idea that all human beings are intrinsically valuable and intentional taking of human life by private persons is always wrong.”); but see Michael S. Lewis, *Questions of Life and Death for Neil Gorsuch*, BOSTON GLOBE (Mar. 17, 2017), <https://www.bostonglobe.com/opinion/2017/03/17/questions-life-and-death-for-neil-gorsuch/lkmglo-HivqkgmnEG0m6xb1/story.html> (questioning Gorsuch’s carve out for life taking by public officials).

6. See generally WILLIAM N. ESKRIDGE JR., ET AL., *SEXUALITY, GENDER, AND THE LAW*, 200 (4th ed. 2018) (“Recent scholarship by Professors Reva Siegel and Linda Greenhouse . . . calls into question the understanding [“conventional wisdom” by early 1990s] that the backlash [against *Roe*] originated as a kind of natural reaction to an extreme decision . . . social conservatives then [roughly late 1970s] began framing it [*Roe*] as a symbol and rallying point against a cluster of women’s autonomy issues.”). For the sake of engaging in arguments around legal doctrine, this essay accepts the premise that the overriding principle behind restriction of abortion is, as stated in *Dobbs*, the protection of “unborn children.” At least one author understands the actual principles of many of the

abortion context, and they do so in the most minimal and obvious fashion by committing, at least, to protecting the basic welfare of the most vulnerable children.⁷

Following Ivan to Alyosha in their most famous of discussions, we aim lower than we could. We seek principled follow-through by focusing only on the welfare of children in jurisdictions that have imposed abortion bans and also adopted systems of mandatory response to child abuse.⁸ We acknowledge that there are very serious concerns that this approach is far too limited. This would include in regard to the multitude of instances where a state fails to protect many adult populations and, instead, too often criminalizes them or leaves them otherwise under-protected.⁹ We are nevertheless persuaded by our study of the public's stated special legal commitment to children, and by the sort of sympathy expressed by Ivan, that building a foundation upon the welfare of children is the fastest and best way to achieve some

stakeholders who claim publicly a “pro-life” position to be as much, if not more, about misogyny, white supremacy, and other principles grounded in hate, not in affirmatively valuing life. RANDALL BALMER, *BAD FAITH: RACE AND THE RISE OF THE RELIGIOUS RIGHT*, 80 (2021) (“Leaders of the Religious Right can gussy up their movement by rallying behind such high-minded issues as opposition to abortion or (disingenuously) religious freedom, but that does not change the inconvenient fact that the founders of the movement in the 1970s organized to allow evangelical institutions to perpetuate their policies of racial exclusion.”); Fintan O’Toole, *The Irish Lesson*, THE NEW YORK REVIEW OF BOOKS, 19 (Aug. 18, 2022), <https://www.nybooks.com/articles/2022/08/18/the-irish-lesson-fintan-otoole/> (“The underlying fixation of these pioneers of the American antiabortion movement [who used Ireland as a laboratory in the 1970s and 1980s] remains familiar in the worldview of the far right in the United States and Europe: the allegedly catastrophic decline of white populations. Hence Republican congresswoman Mary Miller recently hailing the overturning of *Roe v. Wade* as a ‘historic victory for white life.’”); MARY ZIEGLER, *DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT* (2022); GEOFFREY R. STONE, *SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA’S ORIGINS TO THE TWENTY-FIRST CENTURY*, 91 (2017).

7. Cf. STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES*, 15 (1999) (“All rights make claims upon the public treasury.”); see also RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011) (“Value is one big thing. The truth about living well and being good and what is wonderful is not only coherent but mutually supporting; what we think about any one of these must stand up, eventually, to any argument we find compelling about the rest.”).

8. See Dostoevsky, *supra* note 1, at 237 (“The more unprofitable for me, of course. But, first, one can love children even up close, even dirty or homely children (it seems to me, however, that children are never homely. Second, I will not speak of grown-ups because, apart from the fact that they are disgusting and do not deserve love, they also have retribution: they ate the apple, and knew good and evil, and became ‘as gods.’”).

9. See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE*, 55 (Harvard University Press 2011) (“Poor [B]lack neighborhoods thus receive the worst of both worlds: too much punishment in settings where punishment does only modest good (as is probably true of imprisonment for drug crimes and too little in cases where punishment is most needed to preserve social peace—meaning crimes of violence.”).

threshold success in the area of principled life-protection after the fall of *Roe*. Among other things, with Ivan, we agree that this faster track is mostly true because the public does not blame victimized children for their lot in life and may be more willing to act to protect children than adults.¹⁰

The key features of the kind of principled follow-through we propose proceed from the following premises:

1. Abortion bans¹¹ use state enforcement action to protect “unborn” life at a substantial cost to maternal freedom (understood to include both autonomy and liberty), maternal health (understood to encompass all aspects of health—physical, psychological, and emotional), and, in some instances, maternal life (understood as death that occurs as a result of risky pregnancies, deliveries, and post-partum situations)¹²;
2. Abortion bans are only rational if they are based on the belief that the lives of “unborn human beings” are of such enormous value to the public that the freedom, health, and, in some instances, lives of born human beings (often known as mothers, usually but not always female)¹³, who are pregnant, rationally can be sacrificed to protect these

10. See YASCHA MOUNK, *THE AGE OF RESPONSIBILITY, LUCK, CHOICE, AND THE WELFARE STATE*, 19 (2017) (describing and criticizing a “responsibility framework” that conditions public assistance on claims regarding one’s past choices).

11. For a frequently updated list of state abortion laws, see *State Laws and Policies*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>, (last visited Oct. 10, 2022). In this piece, we use “abortion bans” to refer to abortion restrictions that would not have been upheld under the *Roe* and *Casey* framework but are now constitutional under *Dobbs*.

12. See *State Laws and Policies*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions> (last visited Oct. 10, 2022). To date, the nine states with abortion bans at conception in effect do make *de jure* exceptions to permit abortion to save the life of the mother. As a *de facto* matter, however, abortion bans, even with exceptions, may still lead to increased maternal mortality because “such exceptions are so vague or narrow that abortion providers are unlikely to invoke them—especially if they fear they could be charged with a crime.” Michael Ollove, *Critics Fear Abortion Bans Could Jeopardize Health of Pregnant Women*, PEW CHARITABLE TRUSTS (June 22, 2002), <https://www.pewtrusts.org/en/research-and-analysis/blogs/state-line/2022/06/22/critics-fear-abortion-bans-could-jeopardize-health-of-pregnant-women>.

13. See Jo Yurcaba, *Law Professor Khiara Bridges Calls Sen. Josh Hawley’s Questions About Pregnancy ‘Transphobic,’* NBC NEWS (July 13, 2022), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/law-professor-khiara-bridges-calls-sen-josh-hawleys-questions-pregnanc-rcna38015>. This article refers generally to people with the capacity to become pregnant as “female” or “women” and to people who gestate and deliver babies as “mothers,” while recognizing and respecting, as Professor Khiara Bridges recently reviewed with the U.S. Senate, that there are “‘trans men’ who are capable of pregnancy and non-binary people who are capable of pregnancy.”

unborn lives;

3. The same valuation of human life, to be rational across different spheres of life protection, demands—at minimum—fully-funded and effective intervention programs to protect young “born human beings” (that is, “children”) from child abuse and neglect, where a state, by law, has already committed itself to protecting the children it knows are at risk and state intervention (through “child abuse and neglect” or “child welfare” statutes) but fails to implement its systems of response; and
4. A state that fails to carry through on fulfilling condition 3 is not behaving rationally (at least) and, as a result, is not “Pro-Life,” under the standard of life valuation it sets for itself. Instead, that state is “crying life.” It is claiming to care about life, “fetal life,” but cheapening the credibility of the claim to care about “life” by failing to protect the lives of vulnerable children who are born and unable to protect themselves from life threatening circumstances, where a state has already said, by law, that the state must act to protect them.

We propose that the wage for crying life in these situations be a set of remedies for the sake of reason and for obvious public ends. We also propose that the wage be paid by multiple stakeholders. These stakeholders, both public and private, must participate in measuring and meeting basic standards for ensuring the protection of children from child abuse and neglect in a jurisdiction before that jurisdiction may rationally ban abortion.¹⁴ Jurisdictions then must set up and satisfy credible standards to meet these demands to be deemed “Pro-Life” in any rational sense.

We understand our proposals as “disciplining policy.” Such policies attempt to impose discipline upon government action by demanding that laws or regulations adopting a set of goals be subject to an analysis regarding the extent to which the goals sought achieve their ends consistent with the

14. We do not argue that only purported “Pro-Life” jurisdictions are obligated to protect children from abuse and neglect. We believe that all jurisdictions have this overarching legal (and ethical, although we do not focus on ethical arguments outside of their inherent presence in legal ones) obligation. Our focus in this piece is on one way—but not the only and certainly not the optimal way—for jurisdictions to be bound to this obligation.

demands of rationality.¹⁵ In constitutional law, disciplining policies are embodied in the Takings Clause, which requires the government to pay a just price for taking property from someone.¹⁶ They also take the form of the demand, in the Fourth Amendment, that a government express a good reason before trespassing on private property to gather information.¹⁷

Whether such policies also appear as “balance budget amendments,” or “tax caps,” or “tax pledges,” “disciplining policies” aim to achieve rationality by assessing whether the costs and benefits of adopting regulation net out positive and voiding policies that fail to balance out.¹⁸ Sometimes, such policies even take the form of virtue signaling by interest groups. Groups like the National Rifle Association, for instance, use rating and branding to convey a qualitative commitment to constituencies as a reward or a demerit associated with a specific public policy orientation.¹⁹

We mobilize the precedent set by this array of “disciplining policies” as a “wage” for crying life through abortion bans. The wage may be thought of as the minimum amount a state must “pay out” in the form of investing a desired principle consistently across domains. For abortion bans, then, the “Pro-Life” wage is the lowest level of consistency across the domains of unborn and born children a state with an abortion ban must invest in to be rational in its protection of the lives of children.²⁰

Our argument in favor of our position and in support of the outlines of a solution proceeds as follows:

In the first section, we outline basic principles regarding justified state

15. Cf. CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION*, 6–7 (2018) (describing President Reagan’s Executive Order 12291, imposing general requirements upon the adoption of additional federal regulation, including that they be assessed to determine whether their adoption maximizes “aggregate net benefits to society.”).

16. U.S. CONST., amend. V. (“[N]or shall private property be taken without just compensation.”)

17. U.S. CONST., amend. IV. (“The right of the people to be secure in their persons... against unreasonable searches shall not be violated, and no warrants shall issue[], but upon probable cause supported by Oath or affirmation....”)

18. *See id.*

19. *See Cigarette Labeling and Health Warning Requirements*, *infra* note 106.

20. *See, e.g., Policy Basics: Property Tax Caps*, CENTER ON BUDGET AND POLICY PRIORITIES (Dec. 8, 2008), <https://www.cbpp.org/research/property-tax-caps> (“Proponents [of property tax caps] argue that tight property tax caps will force localities to provide services more cost-effectively, or to eliminate services that are not needed.”) In this way, there is an analogy between what we propose and the justification underlying property tax caps adopted in states and municipalities. *See generally* Trevor J. Brown, *Strict Property Tax Caps: A Case Study for Massachusetts’s Proposition 2 1/2, its Shortcomings, and the Path Forward*, 16 U.N.H. L. REV. 359, 361–62 (2018) (describing how municipalities that have adopted such caps have been able to meet their obligations).

action, focusing on rationality as an acknowledged, necessary, though not sufficient, condition for governing justifiably and with integrity. We do so to offer a broad-brush outline of what actions should be rationally expected for life valuation, inside circumstances where the state asserts, by law, that one (“unborn”) life’s interest in life matters more than another life’s interest (the mother’s) in freedom, health and, in some instances, their own life.²¹

In the second section, we turn to a case study of our home state of New Hampshire and outline the new *Dobbs* world for New Hampshire, drawing preliminary observations about how New Hampshire compares to the nation when it comes to claims regarding the value of a child’s life. We use this section to begin to describe specific characteristics of an “Anti-Life” regime that, when it exists, would undermine a state’s claim to be rationally “Pro-life” for the lives of children.

In the third section, we propose the adoption of a “Pro-Life” metric that would permit a state to become rationally “Pro-life”²² under the very low bar we set for states. We also make initial proposals for disciplining policies that may be deployed by key public and private actors to move jurisdictions to take seriously their claim to value life—specifically the lives of children—in restricting maternal freedom, health, and life to advance that interest. Any state, like New Hampshire, which fails to meet the basic set of legal standards it has already set for itself in regard to responding to child abuse and neglect will be deemed not sufficiently committed to protecting the lives and welfare of children and deemed not “Pro-Life.”

We argue that the “Pro-Life” metric may be used for certification purposes by key non-governmental actors in the public health space, like medical societies, to call attention to a jurisdiction’s consistency as it relates to

21. See, e.g., Chuck Johnston, *A Man was Charged in the Rape of a 10-Year-Old Who Traveled to Indiana for an Abortion*, CNN.COM (July 14, 2022), <https://www.cnn.com/2022/07/13/us/ohio-10-year-old-girl-columbus-man-charged-indiana-abortion/index.html> (describing a 10-year-old child’s travels to Indiana to obtain a legal abortion after she was forcibly impregnated by an adult rapist).

22. See, e.g., MICHAEL C. DORF & SHERRY F. COLB, *BEATING HEARTS: ABORTION AND ANIMAL RIGHTS*, 4 (2016) (“[T]o be pro-life is to believe that the rights of the unborn outweigh any interest a pregnant woman might have in terminating a pregnancy.”); *id.* at 77 (“To put the point provocatively, women who are denied the right to have abortions are placed in a kind of reproductive servitude in which dairy cows and laying hens are held.”); Ely, *supra* note 3, at 923 (“Let us not underestimate what is at stake: Having an unwanted child can go a long way toward ruining a woman’s life.”); *see id.* at 26 (“The child may not fare so well either.”); *see id.* at 6 (“Abortion is wrong, these people believe, because from the moment of conception, human beings possess an immortal soul in the image of God.”); *see also* MARY ZIEGLER, *ABORTION AND THE LAW IN AMERICA*, 11 (2020) (“For the most part...abortion foes primarily focused what they described as a constitutional right for the unborn child.”).

protecting life or, as a matter of public enactment, as a rationality defense to any abortion-related enforcement action against a medical provider, pregnant woman, or other actor who supports abortion care. If used in litigation, we would say that the metric constitutes a “Pro-Life” defense to abortion prosecution. We also see a place for a more robust notion of rationality around abortion more generally as state and federal constitutional litigation over abortion unfolds.²³

Our goal in offering these proposals is to engage in the multi-stakeholder, multi-fora discussion underway in legislatures, courts, the press, non-profits, and broader civil society around the public’s commitment to life.²⁴ We hope this proposal might bring parties together who disagree on much to reach an agreement that protecting born children is an indispensable part of the project of rationally valuing life.²⁵ We believe that such agreement is long overdue because of the law’s longstanding perspective of children as a vulnerable class of people and newly pressing because of the new federal constitutional recognition of “Pro-Life” principles to justify abortion bans.²⁶

23. See, e.g., *infra* note 130.

24. See Adam Roberts, *Arkansas to Seek Federal Help with Material Health Care Due to Effects of Abortion Ban*, 4029TV.COM (Aug. 9, 2022, 5:40 PM CST), <https://www.4029tv.com/article/arkansas-maternal-health-foster-families/40847490#> (“Gov. Asa Hutchinson said there will be an increase in at-risk pregnancies in Arkansas as a result of the state’s ban on nearly all abortions.”); see *id.* (“So you’re going to have potentially up to 3,000 new births this year in circumstances in which the mom might have otherwise considered an abortion. Those could be at-risk pregnancies; they might have other issues there. So that obviously calls for increased level of investment and support.”).

25. Cf. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE*, 98 (1993) (describing a general need to invest in public, non-profit, and community resources to address child welfare needs); cf. ALLEN BLOOM, *THE REPUBLIC OF PLATO*, 31 (2016 ed.) (“For surely, Thrasymachus, it’s injustice that produces factions, hatreds and quarrels among themselves, and justice that produces unanimity and friendship. Isn’t it so? Let it be so, so as not to differ from you.”).

26. See Anne B. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1451 (2018) (“[O]ur approach highlights that children’s lives are more than lesser versions of adult lives or way stations on the road to autonomous adulthood.”); see also *The Door Opens to Infanticide*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (2000), <https://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/the-door-opens-to-infanticide> (“In June 2000, the U.S. Supreme Court expanded the right to kill, from children in the womb [*Roe v. Wade*] to children almost completely born [*Stenberg v. Carhart*].”). At least one author believes that the current *Dobbs* regime will collapse over time, as did Ireland’s abortion ban, because “for the anti-abortion project, absolutism [total abortion ban] is both imperative and impossible . . . this necessary extremism [total ban] is also, in a democracy, politically unsustainable.” O’Toole, *supra* note 6, at 20. While exploring the various governance means—including state and federal legislation as well as state and federal constitutional amendments—that could bring about the fall of *Dobbs* is an essential inquiry, it is beyond the scope of this article. This article is focused on an immediate call to action in the new *Dobbs* era on behalf of baseline rationality and protection of born children.

II. THE DEMANDS OF RATIONALITY: WHAT WE THINK A RATIONAL
“PRO-LIFE” POSITION WOULD REQUIRE FOR PROTECTING
CHILDREN BEFORE A JURISDICTION COULD BE CALLED “PRO-
LIFE.”

This essay is grounded in what we understand to be the basic demands of rationality.²⁷ Rationality provides a floor for assessing legitimate governance: a standard that just systems embrace, and unjust systems reject.²⁸ A rational law is one that seeks to achieve identified ends through the authorization of legalized action that could achieve those ends.²⁹ A law authorizes the government to prosecute murder, for instance. Such a law is rational if, among other things, it concludes that punishing murder achieves the end of protecting innocent human life from extermination. The rational relationship between the end (the protection of innocent human life) and the means (the prosecution of murder and the outcomes of such a prosecution) requires an assessment of the effectiveness of the mechanism of prosecution, or the threat of it, in achieving the desired end.³⁰

A rational legal system can be assessed against the same standard as a rational law. In assessing the rationality of a legal system, one would

27. See, e.g., JOSEPH RAZ, PRACTICAL REASON AND NORMS, 15 (2002 ed.) (“Reasons are referred to in explaining, in evaluating, and in guiding people’s behavior.”); *id.* at 17 (“Reasons must, of course, be subject to rational analysis since they figure in practical reasoning....”); *id.* (“It should be remembered that reasons are used to guide behavior, and people are to be guided by what is the case, not by what they believe to be the case.”); see also JONATHAN GLOVER, CAUSING DEATH AND SAVING LIVES, 24 (1977) (“We can often supply a chain of reasoning when challenged to defend a moral belief about what ought to be done. Any such chain of argument seems either to involve an infinite regress or else to end with an ultimate belief.”); *id.* at 27 (“rationality in ethics involves trying to formulate a coherent set of beliefs that does justice to as many of one’s responses as possible.”); HARRY J. GLOVER, INTRODUCTION TO LOGIC (2017) (“[L]ogic deepens our understanding of philosophy—which can be defined as *reasoning about the ultimate questions of life.*”) (emphasis in original).

28. See, e.g., JOHN RAWLS, JUSTICE AS FAIRNESS, 29 (2001) (“Considered judgments are those given when conditions are favorable to the exercise of our powers of reason and sense of justice; that is, under conditions where we seem to have the ability, the opportunity, and the desire to make a sound judgment; or at least we have no apparent interest in not doing so, the more familiar temptations being absent.”); see also STEPHEN DARWALL, PHILOSOPHICAL ETHICS, 6 (1998) (“The seventeenth-century British philosopher John Locke ... once remarked that no ‘moral rule’ can ‘be proposed, whereof a man may not justly demand a reason.’”).

29. See Michael S. Lewis and Cassandra A. Moran, *Is There a Rational Basis for NH’s War on Marijuana Anymore?*, 20 U.N.H. L. REV. 335, 368 (2022) (describing the same) (footnote and citations omitted).

30. See, e.g., DEREK PARFIT, ON WHAT MATTERS, Vol. 1, 2 (2011) (“According to *objective theories*, we have reasons to act in some way only when, and because, what we are doing or trying to achieve is in some way good, or worth achieving.”) (emphasis in original).

aggregate the efficacy of the legal system as a whole and ask whether all of the relevant laws, put together, achieve or work toward achieving, a given legitimate end.³¹ A legal system could identify the protection of innocent human life from extermination as a paramount goal of a legitimate government.³² When conducting a rationality analysis, any specific law that undermines or thwarts the paramount goal of protecting human life would have to be justified on rational grounds other than the protection of innocent human life from a violent end. A rational assessment of such a law would have to be content with the achievement of some other justified end at the expense of the paramount goal.³³ The same could be said of the missed opportunity to enact life-saving laws, including, as we will discuss later, laws mandating that the government protects life.³⁴

Following this thought framework for rationality, a bill banning abortion at any stage of pregnancy must be grounded in some reason for the ban related to the protection of some end the state identifies that can be protected by law in a rational manner.³⁵ In New Hampshire, where the legislature enacted, and the Governor signed, the first abortion ban in modern history,³⁶ the ban aims to protect what it calls “fetal life”.³⁷ The ban, while purporting to value this

31. See Glover, *supra* note 27, at 20.

32. See GORSUCH, *supra* note 5.

33. See H.L.A. Hart, *Punishment and Responsibility*, 3 (2009 ed.) (“In dealing with these and other questions concerning punishment we should bear in mind that in this, as in most social institutions, the pursuit of one aim may be qualified by or provide an opportunity not to be missed, for the pursuit of others.”).

34. See Cass R. Sunstein and Adrian Vermeule, *Is Capital Punishment Morally Required?—Acts, Omissions, and Life-Life Tradeoffs Ethics and Empirics of Capital Punishment*, 58 *Stan. L. Rev.*, 703 (2005) (“If omissions by the state are often indistinguishable, in principle, from actions by the state, then a wide range of apparent failures to act—in the context not only of criminal and civil law, but of regulatory law as well—should be taken to raise serious moral and legal problems.”).

35. Cf. John Gardner, *Introduction*, in H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY*, xiii (2008 ed.) (“If the system is justified, there must be compensating benefits.”).

36. Fetal Life Protection Act, N.H. RSA 329:44, II (prohibiting abortion after “the probable gestation age of” a “fetus has been determined to be at least 24 weeks”); N.H. RSA 329:43, XI (defining “fetus” as “unborn offspring, from the embryo stage which is at the end of the twentieth week after conception or . . . implantation [if in vitro fertilization]”). See also Annmarie Timmins, *NEW HAMPSHIRE BULLETIN* (June 24, 2022), <https://newhampshirebulletin.com/2022/06/24/roe-decision-leaves-24-week-abortion-ban-intact-in-new-hampshire/> (discussing exceptions for health of mother and addition of “fetal abnormalities” amendment to abortion ban bill).

37. Cf. DIANA GREENE FOSTER, *THE TURNAWAY STUDY*, 2 (2020) (“Forty-three states ban abortions for most women after a certain point in their pregnancy. A third of states currently ban abortion at 20 weeks’ gestation. And in 2019, at least 17 states introduced legislation that would ban abortion at six weeks into pregnancy or even earlier.”).

subset of life, works a very serious incursion upon other interests, including the interests of born humans capable of pregnancy (typically women), in freedom and health, and the interests of physicians in exercising professional judgment to protect a woman's freedom and health.³⁸ Until *Dobbs*, for nearly fifty years, the United States Supreme Court recognized those interests as justifying the protection of an abortion right at various levels of fundamentality such that rational state action would be constitutionally inadequate to justify bans.³⁹

Millions availed themselves of the abortion right before *Dobbs* throughout the United States.⁴⁰ It was a right that protected the personal freedom available to women's lives as well as their health.⁴¹ The right fits with other rights guaranteeing similar freedoms⁴² that our laws protect because life, at

38. See Sherry F. Colb, *Abortion, the Thirteenth Amendment, and a (Hypothetical) Conversation with Justice Souter*, DORF ON LAW (June 8, 2022), <http://www.dorfonlaw.org/2022/06/abortion-thirteenth-amendment-and.html?m=1> (describing restriction on abortion rights as imposing slavery or involuntary servitude); see Sara Perschino, 'I am a Mom Because of the Care I Received from a New Hampshire Abortion Provider,' NEW HAMPSHIRE BULLETIN (July 20, 2022), <https://newhampshirebulletin.com/2022/07/20/i-am-a-mom-because-of-the-care-i-received-from-a-new-hampshire-abortion-provider/> ("My life, my career, and my family are possible because I had access to the full spectrum of reproductive healthcare.").

39. See generally ESKRIDGE JR., ET AL., *supra* note 6, at 199–200 (reviewing *Roe*'s framing as "about individual autonomy and medical professionalism" and the doctrinal evolution to the "undue burden" test in *Casey*).

40. See KATIE WATSON, SCARLETT A THE ETHICS, LAW & POLITICS OF ORDINARY ABORTION, 5 (2019) ("Approximately 3 out of 10 American women who are currently age 45 or older have had one or more abortions."); *id.* at 17 ("According to the latest data, one in five American pregnancies ends in abortion (19%)."); *id.* at 20 (there had been "approximately 55 million abortions" in the United States between 1973 and 2014).

41. See FOSTER, *supra* note 37, at 151 ("The United States is currently facing a crisis in maternal mortality—deaths related to pregnancy and birth. Trends are going in the wrong direction compared to nearly every other country, and it is even worse for women of color. Maternal mortality is now twice as high as it was in 1987, with 17 deaths for every 100,000 live births in the United States.") (footnotes omitted). There is even a prominent set of studies suggesting that abortion protects the quality of life as a cause of the reduction in crime. See John J. Donohue and Steven Levitt, *The Impact of Legalized Abortion on Crime Over the Last Two Decades*, 62 AMER. L. AND ECON. REV. 1, 44 (2020) ("Thus, while many other factors were operating to stimulate or suppress crime, legalized abortion can explain most of the observed crime decline.") (footnote omitted).

42. See *e.g.*, ESKRIDGE JR., ET AL., *supra* note 6, at 277–81 (reviewing marriage equality protections); see also *Dobbs*, 142 S. Ct. at 2261 (discussing *Griswold v. Connecticut* regarding the constitutional right to contraception); *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) (describing the constitutional right to same-sex sex); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (establishing the constitutional right to same-sex marriage as alike in genealogy); Laurence Tribe, *Deconstructing Dobbs*, N.Y. REV. BOOKS 81 (Sept. 22, 2022), <https://www.nybooks.com/articles/2022/09/22/deconstructing-dobbs-laurence-tribe/> (describing the extension of related rights analogous to the abortion right and concluding that "[f]ar from the culmination of a gradual trend toward government control over

least under our home state's motto, if subject to despotism, may not be worth living.⁴³

Abortion bans now purport to elevate a subset of life (fetal life, unborn life, unborn humans, or similar language) over these previously protected maternal interests (which include, in some instances, maternal life). They also substitute the judgment of legislators for the judgment of a medical community who may now be prosecuted for performing medically necessary procedures in line with professional norms.⁴⁴ The rational conclusion one must draw is that the paramount right protected by New Hampshire's abortion ban (and others) is that of a broader subset of life: all lives of all categories of children, including, now, the lives of born children.⁴⁵ After all, abortion bans are not constructed to create and gestate fetuses as fetuses in perpetuity (an irrational goal, given its biological impossibility)—rather, they aim to create and gestate fetuses that will become born children through the (typically grueling and, in too many instances, dangerous and deadly) physical work of pregnancy, labor, and delivery done by the mother to transition the fetus to the status of born child.⁴⁶

people's intimate lives, the decision in *Dobbs*...felt like a bolt from the blue.”)

43. See Joe Bills, “*Live Free or Die*” *The Story of the New Hampshire Motto*, New England Today Living (Nov. 11, 2021), <https://newengland.com/today/living/new-england-history/live-free-or-die-new-hampshire-motto/> (“New Hampshire takes considerable pride in its memorable state motto, ‘Live Free or Die.’”).

44. See Selena Simmons-Duffin, *Doctors Weren't Considered in Dobbs But Now They're on Abortion's Legal Front Lines*, NPR (July 3, 2022, 5:01 AM EST), <https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-weren-considered-in-dobbs-but-now-theyre-on-abortions-legal-front-lines> (“Two dozen medical groups, including the American College of Obstetricians and Gynecologists and the American Medical Association, told the court that abortion is a key part of reproductive healthcare, that it is safe, and that doctors need to be able to treat patients without government interference.”).

45. Cf. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, xix (2013 ed.) (“Our main conclusions about that state are that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified; and that the minimal state is inspiring as well as right.”).

46. See ESKRIDGE JR., ET AL., *supra* note 39, at 640. “Even without medical complications [such as high-risk delivery or maternal death], childbirth temporarily disables a sizeable minority of the American workforce at some point(s) in their lives.” When such complications do occur, they occur disproportionately for women of color; notably, “Black women are three times more likely to die from a pregnancy-related cause than [w]hite women.” *Working Together to Reduce Black Maternal Mortality*, CENTERS FOR DISEASE CONTROL & PREVENTION (Apr. 2022), <https://www.cdc.gov/healthequity/features/maternal-mortality/index.html#:~:text=Black%20women%20are%20three%20times,structural%20racism%2C%20and%20imPLICIT%20bias;see%20also%20Don%20Marquis,%20Why%20Abortion%20is%20Immoral,86%20J.%20PHIL.>

A number of state legislatures have drawn lines at the earliest stages of pregnancy, including bans as of conception and bans as early as six weeks of gestation.⁴⁷ This suggests that those legislatures value “life” regardless of its attainment of consciousness. Such bans cover a stage in pregnancy where “unborn life” has not demonstrated the same level of certainty about its present condition as “life,” or its viability as potential “life.”⁴⁸ To understand the interest in the protection of unborn life, as described and embraced by those who support various abortion bans and call themselves “Pro-Life,” we look to statements by organizations like the United States Conference of Catholic Bishops that we are responsible for and must protect the children we create.⁴⁹ Rationality requires a principle that generalizes beyond the abortion context, perhaps most aptly to the domain of the state’s obligation to protect children from child abuse and neglect. We say “most aptly” because the rhetoric

183 (1989) (arguing that rational claims favoring abortion bans are best grounded on the claim that a fetus has defensible moral interest in a future life).

47. See *State Laws and Policies*, *supra* note 11 (identifying nine states that ban abortion from conception and four states that ban as of six weeks since last menstrual period).

48. See *id.* Here, we make a modest point: it strains credulity to consider ascribing consciousness to a fetus prior to the point of viability, when “a fetus can sustain survival outside the uterus” as an independent being, which “generally . . . [occurs] between 24 and 28 weeks LMP [the beginning of pregnancy calculated from the start of the most recent menstrual period].” We do not take a position on whether it might be reasonable to consider ascribing consciousness, under one or more plausible definitions, to a fetus after it attains viability.

49. See *The Door Opens to Infanticide*, *supra* note 26 (“The Court had said, in essence, that we were a people who could not be expected to commit to the children we helped create.”). We must cite the morality teachings of the Catholic Church with hesitation, given its very serious record of “anti-life” and anti-children conduct. We consider these teachings because, broadly understood, they capture a religiously grounded position on “life” that has broad political, social, and other followings in the United States. See *Vatican Documents Show Secret Back Channel Between Pope Pius XII and Hitler*, PBS NEWS HOUR (June 7, 2022), <https://www.pbs.org/newshour/show/vatican-documents-show-secret-back-channel-between-pope-pius-xii-and-adolph-hitler> (“The Vatican released a statement in, I think 1998 . . . in which they said . . . their own demonization of the Jews had absolutely nothing to do with the Holocaust”); Michael Rezendes, *Church Allowed Abuse by Priests for Years*, BOSTON GLOBE (Jan. 6, 2002), <https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTlRAT25qKGvBuDNM/story.html> (detailing failure of Catholic Church authorities to respond to and protect children from child abuse by its priests). In New Hampshire, sparring over the role of the Catholic Church in the priest abuse scandals has led to sparring between leading attorneys in the most high-profile instance of institutionalized child abuse the state has faced. See Annemarie Timmins, *Attorney Who Represented Church Abuse Victims Defends State’s YDC Settlement Plan*, N.H. BULLETIN (Aug. 3, 2022), <https://newhampshirebulletin.com/2022/08/03/attorney-who-represented-church-abuse-victims-defends-states-ydc-settlement-plan/> (“The (objection) from David Viciananzo and Rus Rilee is truly Orwellian . . . Since the 1990s, Nixon Peabody (Viciananzo’s firm) has represented the employer of over 50 priests who beat, sodomized, and otherwise violated 100s of children who trusted men of god.”).

surrounding abortion analogizes the procedure to infanticide and elicits the imagery of the vulnerable infant to support its claims. We therefore further contend that a state, like New Hampshire, which claims to cherish life—in particular, the lives of the very young—at minimum would have to demonstrate that it lives up to its own stated obligations to protect children from threats the state acknowledges threaten their health and lives.

That some states protect “fetal life” after a certain point in pregnancy does not save these abortion bans from this rational extension of the principle and the state public responsibilities that flow from it. New Hampshire’s abortion ban, again, claims to protect “fetal life” at a later stage of pregnancy. By setting a ban only on fetal life after it has reached twenty-four weeks, however, this specific bill establishes that protected “life” does not begin until some stage of fetal development that approaches consciousness, or at a stage of development reposing greater confidence that “life” will develop as pregnancy progresses toward childbirth. Even under this relatively later-stage timeline for protecting fetal life (“later” relative only to other new abortion bans in the *Dobbs* era), New Hampshire is still protecting “fetal life” in a manner that is only rational if it is understood to encompass protection for all lives of children who will be born.⁵⁰

Indeed, this understanding of principle would, at least, demand further support for policies, regulations, or laws that protect the welfare, health, and lives of “born” children under our laws.⁵¹ Some may respond that protecting some life, through abortion bans, remains rational policy, even if it fails to carry through its obligation to other life. However, that position, at minimum, requires the adoption of a series of balancing compromises that proponents of most abortion bans reject with regard to discussions of life protection and abortion.⁵² Where a state has adopted policies that ban abortion on the ground

50. See Holly Ramer, *Exception Added to New Hampshire’s 24-Week Abortion Ban*, AP NEWS (May 27, 2022), <https://apnews.com/article/abortion-health-new-hampshire-state-budgets-5d9196e6618a2feaba871a11f1beb303>. The New Hampshire ban does make exceptions to protect the life and health of mother and to terminate pregnancy with a fetus incompatible with life. With these carve-outs, the NH ban offers more recognition of maternal rights than other recent bans, but, even with this recognition, the ban’s protection of fetal life is only rational if fetal life is understood as a precursor to born life.

51. Cf. ALLEN BLOOM, *THE REPUBLIC OF PLATO* (2016 ed.).

52. See, e.g., O’Toole, *supra* note 6, at 20 (explaining that “[t]he ideological core of the [anti-abortion] movement is the [relatively recent] Catholic theological dogma that the human person comes fully into existence at the precise moment of the fertilization of the ovum . . . for those who do [share this ideology], it imposes a duty to be extreme. There is no acceptable moderate response to mass slaughter.”).

that the state values life before birth, it is, in very many jurisdictions, taking a position on the value of life that requires government intervention to protect life because it has concluded that every life matters, regardless of its stage of development, and regardless of very substantial countervailing life, freedom, and health interests of the mother.⁵³ Where a state's policy requires the carrying to term of a child into a life protected by laws designed to protect that child from known harm, no state could rationally justify such a claim to intercede in that life to protect it, only to expose it to known threats to life the child faces upon birth that the state acknowledges exists for many of the same children.

Consider, further, the following response to the claim that it is rational for a state to protect against the purposeful taking of life (in this case, fetal life) but not protect (short of preventing death) this life through steps it has already imposed upon itself, by law, to protect the same life (child welfare statutes). This argument claims that a state has limited resources and so must choose to deploy them to respond to homicide at one life stage (here, fetal life) rather than forestall homicide or severe but non-fatal harms before they happen. The problems with this argument are obvious. If life is as valuable as "Pro-Life" advocates proclaim, relying only on deterrent measures criminalizing past acts is, at best, an ineffective partial step that requires the acceptance of lost life in the first instance, as a predicate to protecting other lives. This argument also runs into the demonstrable enforcement problems created by state-imposed abortion bans. The state's policy assumes that it will be effective in creating new life by implementing penalties against the destruction of some life that will only be apparent once the life is destroyed. A state that fails to commit itself to the protection of life post-birth ignores what it acknowledges as a matter of law in the sphere of child protection policy: that same life will be threatened by additional risks at a future date that a state's own policy (failure to implement child welfare statutes) is exacerbating by adding to the population children the state must protect under its own laws.

To bring the nature and meaning of the state's role here into further focus, consider the following hypothetical future scenario: reproductive medicine has evolved rapidly. Embryos can now be created, gestated, and birthed from test tubes surgically implanted in the bodies of people without the biological

53. *Cf.* Tribe, *supra* note 42, at 83 ("The decisive issue is whether [a state's interest] in fetal life can properly be made by judicial decree into an interest so absolute that it completely eclipses the undeniably enormous interest of a pregnant woman in what goes on in her own body and what becomes of her own life.").

capacity for pregnancy (typically men). A state decides to assert its interest in fetal life by passing the following statute: all men who engage in vaginal sex with people who have the capacity for pregnancy (typically female or women) must register with the state for a “selective breeding service” draft. At random,⁵⁴ the state selects men from among this group for surgical implantation as test tube embryo carriers. Even if the surgical implantation causes economic disruption, health problems, or all types of other troubles including the men’s death, the men are not permitted to remove the embryos until the embryos have become “born lives” (that is, babies). Once the embryos are born lives, the state says it will not act on their behalf, other than maintaining (and frequently under-enforcing) criminal laws that prohibit killing them.

In this scenario, the state has compelled the creation of fetal life in the hope that it will become born life only to wash its hands of responsibility for born life—leading to the conclusion that the state has behaved irrationally (acted to compel creation of life as some type of punishment or sanction against men for having sex). It could be argued the state is being rational—after all, the law says that killing life (fetal or born) is illegal, while other harms to this life, at any stage, are not—but this argument misses that the state has created a new population of lives (both in the hypothetical about test tubes and in real world abortion bans), creating a unique responsibility to those compelled lives to, at minimum, enforce the obligation the state has already placed upon itself to protect all born lives (children), whether or not their existence is state-compelled.⁵⁵

III. NEW HAMPSHIRE AS A CASE STUDY: HOW A STATE’S RECORD OF PERMITTING MASSIVE CHILD ABUSE PREVENTS IT FROM THE “PRO-LIFE” STATUS IT CLAIMS ITS ABORTION BAN ACHIEVES.

The focus of the essay is of great salience, now, in New Hampshire, the state where we live and are raising a family and where we are seeing first-

54. The randomness here is less invasive than requiring, as some states now are, that minor females who become pregnant through rape continue their pregnancies.

55. The potential argument that it would be rational for the state to prioritize implementation of child abuse and neglect statutes for those children who are born as the result of abortion bans, directly or indirectly, but not other children would fail on equal protection grounds, even assuming rational basis review. Children have no agency to determine whether, when, why, how, and to whom they are born. It would be unfair to protect their safety and lives differently under baseline state commitments to child welfare based on the “why” behind their existence.

hand the dynamic we assess in this essay.⁵⁶ New Hampshire, again, adopted its first abortion ban in modern history about a year ago, a ban that will now be enforced in a *Dobbs* world. It did so while local and national news also reported that New Hampshire has failed to protect its children from very serious harm with devastating consequences.⁵⁷ We see these two policy realities as reflecting policy approaches at cross-purposes and of such a degree as to suggest utter irrationality.

Indeed, New Hampshire's long-standing and highly documented failure to protect children across the state (in all living arrangements) from child abuse and neglect, where it must act as a matter of law, became a matter of public debate after it lost, inexplicably, a young girl named Harmony Montgomery, whom New Hampshire has yet to find.⁵⁸ The case continues to make national news.⁵⁹ Authorities recently acknowledged that they will never find Harmony alive, and their investigation is now a homicide case.⁶⁰ Just a few

56. In addition, one author is a former assistant attorney general who prosecuted homicides that occurred within families in New Hampshire; the other author is a former legal aid lawyer who represented vulnerable youth clients across New Hampshire.

57. New Hampshire also cuts off abortion, as a matter of fact, by defunding health care providers whose services include abortion. See Ali Fam and Josh Rogers, *Executive Council Rejects Family Planning Contracts, N.H. Health Centers Brace for Loss of Funding*, NHPR (Dec. 22, 2021), <https://www.nhpr.org/nh-news/2021-12-21/nh-health-centers-loss-of-funding> (documenting the vote to cut off funding to Planned Parenthood and other abortion service providers in New Hampshire and quoting public health officials regarding consequences for families arising from unplanned pregnancies); see also Adam Sexton, *New Hampshire Executive Council Again Rejects Funds for STI, Cancer Screenings at Abortion Providers: Health Officials Say Refusal to Accept Federal Funds Will Hurt State's Efforts Against Monkeypox*, WMUR (July 27, 2022), <https://www.wmur.com/article/new-hampshire-executive-council-again-rejects-funds-for-sti-cancer-screenings-at-abortion-providers/40735171#> (“The fight over abortion and family planning funds continued Wednesday in the New Hampshire executive council with councilors again voting to reject federal dollars earmarked for treatment of sexually transmitted infections and cancer screenings.”).

58. See Elizabeth Koh, *Long Before Harmony Montgomery's Disappearance, New Hampshire's Child Welfare System Struggled to Keep Kids Safe*, BOSTON GLOBE (Jan. 29, 2022), <https://www.bostonglobe.com/2022/01/29/metro/long-before-harmony-montgomerys-disappearance-new-hampshires-child-welfare-system-struggled-keep-kids-safe/>.

59. See *Missing Harmony Montgomery: Timeline of New Hampshire Girl's Disappearance*, FOXNEWS.COM (June 21, 2022), <https://www.foxnews.com/us/missing-harmony-montgomery-timeline> (“New Hampshire 8-year-old Harmony Montgomery has been missing since September 2019, and police are asking for anyone with details about her to come forward.”).

60. See Chuck Johnston, *Investigators Conclude 5-Year-Old Harmony Montgomery was Murdered in December 2019. Her Remains Have Not Been Located*, CNN.COM (Aug. 12, 2022), <https://www.cnn.com/2022/08/11/us/harmony-montgomery-murder-investigation/index.html> (“New Hampshire Attorney General John Formella says that investigators have concluded from biological evidence that Harmony Montgomery was murdered in Manchester...that the case is now officially a homicide investigation.”).

years earlier, the deaths of a set of other children under the supervision of a failed child abuse and neglect response apparatus caused New Hampshire to solicit a third-party audit to shine a light on systemic deficiencies.⁶¹ The results of the audit revealed massive failures which New Hampshire has yet to remedy, though more children have died.⁶²

This record demonstrates that New Hampshire, like other states with similar records of massive failures in child protection⁶³ has not taken the lives of its children seriously, and so cannot claim to be sufficiently “Pro-Life” to justify an abortion ban.⁶⁴ New Hampshire is just one of many states that faces a conflict in principle with respect to how proponents of its abortion ban have failed to follow through with respect to protecting the lives of children after birth. New Hampshire, like other states, has enacted a comprehensive series of laws to combat child abuse and neglect.⁶⁵ These laws conscript the entire state in the effort of protecting the lives of children.⁶⁶ Everyone is obliged to report child abuse and neglect or face criminal prosecution for doing so.

61. See Press Release, *Contract for Independent Review of DCYF Approved by Governor and Council*, GOV. MARGARET WOOD HASSAN (Mar. 9, 2016), <https://www.nh.gov/news/2016/documents/pr-2016-03-09-dcyf-review.pdf> (“In response to concerns raised by law enforcement after the murder of a Manchester toddler last year...Governor Hassan announced that the State would undertake a comprehensive, independent review, which will...be conducted by the Center for the Support of Families (CSF).”).

62. See Michael S. Lewis, *The Greatest Civil Rights Crisis in NH History, Why Hasn't the State Stepped Up to Address its Massive Child Protection Failures*, N.H. BUS. REV. (Sept. 28, 2018), <https://www.nhbr.com/the-greatest-civil-rights-crisis-in-nh-history/>.

63. For instance, New Hampshire is in the company of states like Texas, which have records of significant failure to protect born children even as abortion bans are put in place. See, e.g., Reese Oxner, *Judge Plans to Levy 'Substantial Fines' After Texas Failed to Comply with Court-Ordered Fixes to Its Foster Care System*, TEXAS TRIBUNE (June 6, 2022), <https://www.texastribune.org/2022/06/06/texas-foster-care-sanctions/>. Texas now bans abortion as of conception. See *State Laws and Policies*, *supra* note 11.

64. It is even possible that New Hampshire's failure to protect life could give rise to an argument that it fails to provide “equivalent” value sufficient to meet the contractarian demands of the New Hampshire Constitution, Part I, Art. 3 (“When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such equivalent, the surrender is void.”).

65. See N.H. RSA 169-C (titled the Child Protection Act).

66. See N.H. RSA 169-C, I (“It is the primary purpose of this chapter, through the mandatory reporting of suspected instances of child abuse or neglect, to provide protection to children whose life, health or welfare is endangered.”); *id.* at II (“Each child coming within the provisions of this chapter shall receive, preferably in the child's own home, the care, emotional security, guidance, and control that will promote the child's best interest...This chapter seeks to coordinate efforts by parents and state and local authorities, in cooperation with private agencies and organizations, citizens' groups, and concerned individuals....”).

Almost all traditional privileges are swept to the side in this process.⁶⁷ Reporting must be made to state officials. The same state officials are then obliged to assess the reports and, in some cases, take immediate action to protect children at risk.⁶⁸ The state's response is deemed a matter of life or death for children. Implicit in the range of obligations the state assumes, is the further acknowledgement that the state must not only protect the lives of children from homicides, but also protect the quality of their lives to assure that they will not suffer other harms, including neglect.⁶⁹

New Hampshire has failed to meet these legal obligations. While the public has taken their obligations to report seriously, their representatives have failed to implement a system that ensures that there is a qualified, stable response system in place to perform legal mandates required to protect children. New Hampshire solicited a third-party audit of its child protective services system, and that audit revealed a series of major deficits in New Hampshire's response system.⁷⁰ Federal authorities came to similar conclusions. The result has been that children have either died, or have been badly injured, some in unrecoverable ways.⁷¹ When news regarding these instances became unavoidable, New Hampshire took some legislative action to establish greater oversight, including the establishment of an Office of the Child Advocate.

For reasons that defy rational explanation, the government entities subject to oversight have refused to cooperate with Office of the Child Advocate.⁷²

67. *See id.*; N.H. RSA 169-N.H.-C:29 (imposing mandatory reporting obligations on all citizens, regardless of professional status, including doctors and clergy members, but not including attorneys); N.H. RSA 169-C:30 (describing the nature and content of a report); N.H. RSA 169-C:39 (imposing misdemeanor liability for violating the provisions of RSA 169-C).

68. *See, e.g.*, N.H. RSA 169-C:34 (imposing response duties upon the N.H. Department of Health and Human Services).

69. *See* N.H. RSA 169-C:3, XIX (“‘Neglected child’ means a child...[w]ho is without proper parental care or control, subsistence or education’ or whose ‘parents, guardian or custodian are unable to discharge their responsibilities to and for the child because incarceration, hospitalization or other physical or mental incapacity.’”).

70. *See Quality Assurance Review of the Division of Children, Youth and Families*, THE CENTER FOR THE SUPPORT OF FAMILIES (CSF), 3-5 (Dec. 19, 2016), https://ncwwi.org/files/Data-Driven_Decision_Making_CQI/Quality_Assurance_Review_of_the_Division_of_Children_Youth_and_Families.pdf (setting forth substantial deficits detected in child abuse and neglect response system, including failures in staffing and quality assessment and review).

71. *Id.*

72. *See* Ryan Lessard, *Former NH Child Advocate: Governor and Health Commissioner Didn't Support Office*, MANCHESTERLINK.COM (Apr. 25, 2022), <https://manchesterinklink.com/former-nh-child-advocate-governor-and-health-commissioner-didnt-support-the-office/> (“Moira O’Neil, the state’s first-ever Child Advocate, who stepped down from the role earlier this month after four years,

In the news report detailing this obstruction, the Office of Child Advocate observed that New Hampshire was failing to provide proper sources to respond to cases of reported child abuse and neglect.⁷³ The stakes with regard to information sharing, assessment, and response are enormous. The Office of the Child Advocate found that one specific child's death in 2018 could have been prevented with minor governmental interventions that were absent because the state failed to calibrate its response systems to data about the welfare of the child.⁷⁴ Later, the Office of the Child Advocate noted that these services could not be provided because of an absence of sufficient public investment in the hiring of public employees to provide these services.⁷⁵ The desperation reached such a level that, in 2018, officials issued a report, imploring: “[f]inally, the time has come to stop waiting for children to appear bruised and battered before we step in to help.”⁷⁶

Perhaps even more shockingly, New Hampshire even has failed to protect the subset of vulnerable children over whom they have the most immediate control: those in state residential custody. New Hampshire has been forced to develop a \$100 million victim fund to compensate hundreds of victims of child abuse, who suffered this abuse at the hands of state employees at the Sununu Youth Detention Center in Manchester, New Hampshire, and elsewhere.⁷⁷ State officials continue to mismanage the implementation of the

said her efforts were hindered by a contentious relationship with Gov. Chris Sununu and two consecutive commissioners of the Department of Health and Human Services.”).

73. *Id.*

74. See Michael S. Lewis, *The Greatest Civil Rights Crisis in NH History, Why Hasn't the State Stepped up to Address its Massive Child Protection Failures?*, N.H. BUS. REV. (Sept. 28, 2018), <https://www.nhbr.com/the-greatest-civil-rights-crisis-in-nh-history/> (“In March 2018, the Office of Child Advocate issued a public release stating that the death of a child at the hands of his father was a ‘clear case of a family that could have benefitted from Voluntary Services if they existed...Voluntary Services are supports for families at risk, but not found to be abusive or neglectful. They were eliminated in New Hampshire in recent years, a key deficiency noted by an independent review of DCYF in 2016.’”).

75. See Dave Solomon, *State Still Falling Short in Protecting Children, Report Says*, N.H. UNION LEADER (Jan. 15, 2019), https://www.unionleader.com/news/safety/state-still-falling-short-in-protecting-children-report-says/article_75a79afe-300c-53df-93ee-83e8101808f8.html (describing the deaths of five children known to state officials in 2018 whose cases have not been reviewed, a 2,000 plus case backlog of complaints, and overworked state officials who are not returning emails or calls).

76. See 2018 Annual Report, *Office of the Child Advocate*, STATE OF NEW HAMPSHIRE (2018), <https://www.childadvocate.nh.gov/documents/reports/2018-Annual-Report.pdf>.

77. See *Gov Signs into Law \$100M Fund for Youth Center Abuse Victims*, AP NEWS (May 28, 2022), <https://apnews.com/article/politics-new-hampshire-sexual-abuse-e7afdd9cbe22401d4546b9caeb10afc140132706> (“The Legislature had approved creating a fund to compensate those who were abused as children at the Sununu Youth Services Center, formerly the

fund, delaying compensation and some form of justice to the victims of state-sponsored and perpetrated violence against children it has taken from their families and housed in state facilities.⁷⁸

New Hampshire is not alone with respect to this state of affairs.⁷⁹ In 2019, approximately 7.9 million children were reported to authorities as possible cases of child abuse and neglect.⁸⁰ Of that 7.9 million, 3.5 million are confirmed to have suffered some level of injury, constituting “more than 5 percent of the population of children in the US.”⁸¹ “Children in their first year of life are the most likely to be victimized. So are children with disabilities. Black and Native American children are about twice as likely to be victims of maltreatment as the national average.”⁸² It has long been the case that states have failed to fund child abuse and neglect response systems with proper resources sufficient to perform legally mandated obligations to children.⁸³ This has been true despite the fact that public officials have been on notice for some time that “[h]omicide is the leading cause of infant death to injury.”⁸⁴ New Hampshire and other states know these are the realities for children, and they have even adopted response systems acknowledging responsibility through laws imposing substantive duties and obligations.⁸⁵ When a state like New

Youth Development Center.”).

78. See Annmarie Timmins, *Fiscal Committee Declines to Approve Plan to Compensate YDC Victims*, NEW HAMPSHIRE BULLETIN (Aug. 11, 2022, 5:25 AM), <https://newhampshirebulletin.com/2022/08/11/fiscal-committee-declines-to-approve-plan-to-compensate-ydc-victims/> (“After citing multiple concerns, lawmakers declined Wednesday to approve the Attorney General’s Office’s proposed plan for compensating hundreds of people who were sexually and physically abused while held at the Youth Development Center.”).

79. See NAOMI SCHAEFER RILEY, *NO WAY TO TREAT A CHILD*, 18 (2021).

80. See *id.* (providing statistics).

81. *Id.*

82. *Id.* at 20.

83. See, e.g., *id.* at 22 (“More than half of the states in this country are operating under federal consent decrees or pending litigation, the result of class-action litigation on behalf of foster kids.”) (footnote omitted); ELIZABETH BARTHOLET, *NOBODY’S CHILDREN*, 98 (2005 ed.) (“There is widespread agreement that we are in the midst of a child welfare crisis: too many children are victimized by abuse and neglect, too many are growing up in foster and institutionalized care, and the current child protective system is overwhelmed.”); *Child Abuse and Neglect*, AMERICAN ACADEMY OF PEDIATRICS, <https://www.aap.org/en/patient-care/child-abuse-and-neglect/> (“It is estimated that 1 in 4 children experience some form of child abuse or neglect in their lifetimes and 1 in 7 children have experienced abuse and neglect in the last year. In 2019, 1,840 children died of abuse and neglect in the United States.”).

84. See NAOMI SCHAEFER RILEY, *NO WAY TO TREAT A CHILD*, 63 (2021).

85. See MONICA L. MCCOY & STEFANIE M. KEEN, *CHILD ABUSE AND NEGLECT*, 44, 49 (2014 ed.) (describing mandatory reporting laws in the majority of states in the United States and the penalties imposed upon citizens for failing to report).

Hampshire then fails to meet the duties and obligations it has embraced, it is only the highly ephemeral distinction between omissions and commissions⁸⁶ that shields the state from credible allegations that it has engaged in conduct that is “too much like infanticide.”⁸⁷

Another way to ask the question is: How can a state, with all of its resources and all of its personnel, vested, as it is, by the people with so much mandatory responsibility to protect children it is aware are at risk, less blameworthy than a criminally negligent driver who kills by failing to take care of the interests of others?⁸⁸ There can be no principled answer from a proponent of an abortion ban, one who would impose such a ban on the ground that all life is sacred and cannot be taken under any circumstances, or, only in circumstances where the most substantial countervailing interests justify life-taking.⁸⁹ A failed state child protective service system on a systemic scale is at least as blameworthy as a person who engages in negligent infanticide, if not more so, given the resources at the state’s disposal.⁹⁰

Yet even as constitutional law permits abortion bans, paving the way for what public officials acknowledge will be the births of many children to disadvantaged lives with greater risks and exposure to life-threatening situations, constitutional law itself remains hostile to children who suffer the worst forms of life-altering abuse. Devastatingly, this dynamic became grist for at least one important United States Supreme Court decision, *DeShaney v.*

86. See, e.g., MOUNK, *supra* note 10, at 40 (“The principle of utility . . . makes no room for the distinction . . . between acts and omissions”).

87. Cf. Ely, *supra* note 3, at 927 (“Abortion is too much like infanticide on the one hand, and too much like contraception on the other, to leave one comfortable with any answer; and the moral issue it poses is as fiendish as any philosopher’s hypothetical.”) (footnote omitted).

88. Cf. FINDLAY STARK, *CULPABLE CARELESSNESS: RECKLESSNESS AND NEGLIGENCE IN CRIMINAL LAW*, 3 (2016) (“There nevertheless appears to be an acceptance, in much of the theoretical literature on criminal law, that culpability is demonstrated through the defendant’s *insufficient concern* for the interests of others.”) (emphasis in the original).

89. See Daniel Hemel, *Want to Improve the Lives of Children? Expand the Child Tax Credit*, WASH. POST (Aug. 18, 2022, 1:18 PM ET), <https://www.washingtonpost.com/outlook/2022/08/18/child-tax-credit-romney-rubio-carlin/>. Some proponents of abortion bans acknowledge the existence of governmental obligation and are putting forward some measures to meet the obligation. See *id.* (“But in recent weeks, three antiabortion Republicans have put forward a proposal to expand the federal child tax credit, challenging [George] Carlin’s claim that pro-lifers don’t care about life after birth—a proposal that, despite its flaws, is projected to life more than 1 million children out of poverty.”).

90. Cf. Michael S. Lewis, *Lewis: Why we Can’t Wait to Address NH’s Child Abuse and Neglect Crisis*, N.H. BUSINESS REV. (May 7, 2019), <https://www.nhbr.com/lewis-why-we-cant-wait-to-address-nhs-child-abuse-and-neglect-crisis/>.

Winnebago County Dept. of Social Services,⁹¹ which hollows out the barest moral components of constitutional law. There, the United States Supreme Court ruled that a child has no affirmative substantive due process right to protection from the most devastating forms of child abuse.⁹² The description of the predicament of the child victim in the case is viscerally upsetting. In his famous dissent, Justice Blackmun wrote:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes . . . “dutifully recorded these incidents in [their] files” . . . now is assigned to live out the remainder of his life profoundly retarded.⁹³

In denying to Joshua, who had been beaten to this permanent state by his father on the watch of the only other available, legally recognized authorities able to protect him, the Court gave no weight to the separate status of the child, as a dependent whose safety is secured, by law and fact, by the state and by other responsible parties.⁹⁴ It drew an unsupported distinction between affirmative and negative freedoms, where those distinctions are not present in the text of the Constitution and are not reflected in the practices and policies that liquidated since its enactment, including the demanding proactive public cultivation and protection of children.⁹⁵ Governments, including the

91. *See* *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 191 (1989) (“Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that was the case, but nonetheless did not act to remove petitioner from his father’s custody.”).

92. *Id.* (“Petitioners sued respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.”); *Id.* at 195 (“But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.”).

93. *Id.* at 213 (Blackmun, J., dissenting).

94. *Id.* at 200 (limiting state obligation to any citizen, whether adult or child, to circumstances where the state has taken custody of the citizen without any discussion of the separate status of the child, as an acknowledged legal dependent).

95. *See, e.g.*, John M. Lewis and Stephen Borofsky, *Claremont I and II—Were They Rightly Decided, and Where Have They Left Us*, 14 U.N.H. L. REV. 1, 7–16 (2016) (describing the development of public education mandates in New Hampshire and other states).

government in DeShaney, have been in the business of interceding, affirmatively, in the lives of citizens, to direct action from citizens, to commit themselves to a series of affirmative actions designed to protect life and the quality of life, and to protect vulnerable citizens, through legal structures that express the public's commitment to these ends.

At least under circumstances where the state, by law, is committed to protecting the lives of children, as is the case of New Hampshire, we contend that if a state has a record of systemic and significant failures like New Hampshire's when it comes to protecting the lives of vulnerable children who are reported as such, it cannot claim to be principled, in a rational sense, in embracing life as a value justifying the abortion ban it has enacted. We therefore offer New Hampshire as an example of a jurisdiction that has not been "Pro-Life" as a matter of fact and further propose that "Pro-Life" principles create rational imperatives that must be evaluated and enforced as a threshold before New Hampshire rationally may enforce its "Pro-Life" policies in the abortion context.

To resist such a metric would suggest that proponents of "Pro-Life"⁹⁶ policies in the abortion context do not have sufficient commitment to their claims regarding life valuation to justify the incursions upon freedom abortion restrictions demand. We go further and claim that they are not, in fact, "Pro-Life," at all, and that their failure to engage in rational follow-through with the same energy commitment renders them vulnerable to accusations ranging from insufficient care given to principled reflection to the most profound and contradictory hypocrisy to evil motivations (including misogyny, white supremacy, and other hateful philosophies)⁹⁷ when it comes to the lives and welfare of children.⁹⁸

As in the hypothetical outlined above, the demand for rational, consistent adherence to "Pro-Life" principles is a specific imperative where New

96. See Laurel Marlantes, *I Had a Late-Term Abortion. But Saying I'm 'Pro-Choice' is a Problem*, WASH. POST (Aug. 22, 2022), <https://www.washingtonpost.com/opinions/2022/08/18/late-term-abortion-pro-choice-pro-life/> (criticizing the use of these terms based upon first-hand experience obtaining an abortion). The terms "pro-life" and "pro-choice" are imperfect labels and, by some powerful, first-hand accounts, may be profoundly reductionist.

97. See *supra* note 6.

98. Cf. Dottie Rosenbaum and Zoe Neuberger, *President's 2021 Budget Would Cut Food Assistance for Millions and Radically Restructure SNAP*, CENTER ON BUDGET AND POLICY PRIORITIES (Feb. 18, 2020), <https://www.cbpp.org/research/food-assistance/presidents-2021-budget-would-cut-food-assistance-for-millions-and> (working families with children will "bear the burn of the cuts" to programs delivering basic nutrition benefits to families).

Hampshire's policies will result in the births of children to families who will struggle to support them, economically and financially, without proactive and supportive interventions by the state.⁹⁹ Indeed, if abortion bans have their intended effect, millions of new children will be born each year to mothers who would have terminated their pregnancies absent the bans.¹⁰⁰ Data suggests that there is a risk that this population of children will be born into disadvantaged circumstances with many facing risks of legal neglect,¹⁰¹ at least, as states define the term.¹⁰² In a post-*Dobbs* world, it has become even more urgent than it was under *Roe* that jurisdictions be held accountable for the public and private impact to families and children that abortion-bans create. Our proposal is grounded in the concept of rational state choice. Jurisdictions can assert they are "Pro-Life" under a definition that includes "abortion bans." That choice will come with serious costs to freedom, to the lives and health of mothers and families, and to the health and lives of children. Jurisdictions must account for and remain principled about that choice. In our view, they must go much further than they currently do to protect the additional lives they are requiring families to support.

99. See Annemarie Timmins, *Planned Maternity Ward Closure Draws AG's Attention, Raises Concerns Among Health Care Leaders*, NEW HAMPSHIRE BULLETIN (Aug. 15, 2022, 5:35 AM), <https://newhampshirebulletin.com/2022/08/15/another-maternity-ward-closure-draws-ags-attention-raises-concerns-among-health-care-leaders/> (Closure of one regional maternal ward constituted the "11th maternity ward to shutter since 2000 and leave just 15 hospitals and 5 free-standing clinics, with midwives, delivering babies in the state when births here are up"). Even as it has initiated an abortion ban, New Hampshire's legal and economic structure has resulted in accelerated closure of maternity wards, raising more questions regarding where children will be born and whether they will have access to the medical care they will need upon birth.

100. See *United States Abortion*, GUTTMACHER INSTITUTE, https://www.guttmacher.org/united-states/abortion?gclid=Cj0KCQjw_7KXBhCoARIsAPdPTfjduCQuXNtXkNG69WlzvLNnx-ULPcm3oDoYkyuPPxJ965PibJrltUaAhwKEALw_wcB (reporting that there were 860,000 abortions performed in the United States in 2017 alone).

101. See MONICA L. MCCOY & STEFANIE M. KEEN, *CHILD ABUSE AND NEGLECT* (2d. ed. 2014) (defining neglect as the failure to provide for the needs of children at a sufficient level).

102. *Id.*; *United States Abortion Demographics*, GUTTMACHER INSTITUTE, <https://www.guttmacher.org/united-states/abortion/demographics> (last visited Oct. 10, 2022); see also *Induced Abortion in the United States*, GUTTMACHER INSTITUTE (Sept. 2019), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states> ("Some 75% of abortion patients in 2014 were poor [having an income below the federal poverty level of \$15,739 for a family of two in 2014] or low-income [having an income of 100-199% of the federal poverty level]") (footnote omitted).

IV. DISCIPLINING THE “PRO-LIFE” MOVEMENT THROUGH POLICIES OF
PRINCIPLED FOLLOW-THROUGH.

Public and private action may assist in implementing “Pro-Life” policies that move state action toward rationality when protecting life.¹⁰³ We envision responses that range from the “branding” of jurisdictions that fail to meet “Pro-Life” thresholds to legislative defenses preventing jurisdictions from enforcing abortion restrictions while they remain in “Pro-Life” areas, to constitutional defenses that force the issue of double standards in the context of abortion-restriction challenges.

Turning first to branding, as a general matter, the certification of goods and services can have a powerful impact on behavior. In the context of environmentally friendly products,¹⁰⁴ or organic products,¹⁰⁵ or with regard to aspects of dangerous products, such as tobacco,¹⁰⁶ credible private and public actors have had an enormous influence on the choices made by the public in the marketplace.¹⁰⁷ *Dobbs* will pose a series of important choices for citizens and businesses who live in jurisdictions that either restrict or permit abortions at various levels, like New Hampshire, and so implicate the rationality concerns with failing to value life in a principled manner.

Third party non-governmental actors, possessing distinctive credibility, can play a role in assisting the citizenry in determining which jurisdictions are principled about life and which jurisdictions are not. Since abortion bans are

103. *Cf. Child & Family Wellbeing Accelerator*, HARVARD KENNEDY SCHOOL GOVERNMENT PERFORMANCE LAB, <https://govlab.hks.harvard.edu/child-family-wellbeing-accelerator> (proposing public and private partnerships to reconfigure support structures for families with children facing immediate threats, including those arising from parents with substance abuse disorders, in the first stages of life).

104. *See The Changing Face of Environmental Marketing Claims*, 22 NAT. L. REV. (Aug. 5, 2021), <https://www.natlawreview.com/article/changing-face-environmental-marketing-claims> (describing the industry of pro-environment marketing and the regulatory response to it).

105. *See, e.g.,* Rita-Marie Reid, *Trademark Law and the National Organic Program*, 59 IDEA 541, 543–46 (2019), https://law.unh.edu/sites/default/files/media/2019/05/trademark_law_and_the_national_organic_program.pdf (describing statutory regime for branding of food as “organic” through various monikers).

106. *See Cigarette Labeling and Health Warning Requirements*, FDA.GOV (Aug. 25, 2021), <https://www.fda.gov/tobacco-products/labeling-and-warning-statements-tobacco-products/cigarette-labeling-and-health-warning-requirements> (describing mandatory labeling for tobacco products).

107. *See* Philip Bump, *52 Senators Have an A-Minus NRA Rating or Higher – Including Four Democrats*, WASH. POST (Feb. 15, 2018, 3:04 PM ET), <https://www.washingtonpost.com/news/politics/wp/2018/02/15/52-senators-have-an-a-minus-nra-rating-or-higher-including-four-democrats/> (“One of the ways that the National Rifle Association exerts influence over elected officials is by giving them letter-grade ratings on gun issues.”).

directed at physicians and medical practices in many cases, the community of affected medical providers, including those who are at the very frontlines when it comes to protecting life, appear to be at least one potential source for this sort of branding.¹⁰⁸

The predicament faced by Dr. Caitlin Bernard, an Indiana physician, demonstrates how vital the perspective of physicians is with respect to the questions of the life and health of children in this context.¹⁰⁹ Dr. Bernard, an obstetric physician, came to national attention after reports that she provided an abortion “to a 10-year-old rape victim.”¹¹⁰ The case presents a combination of the two issues this essay addresses: a child who is a clear victim of child abuse and neglect within a jurisdiction that claims to care about the lives of children (by protecting “unborn” children through an abortion ban) without sufficient safety protocols in place to protect the life of the 10-year-old rape victim impregnated by an adult assailant.

Since Dr. Bernard’s procedure was reported, she has been the subject of harassment and threats of the type that medical personnel who perform abortions have long faced.¹¹¹ Physicians who perform abortions have had their lives threatened and they have been murdered for performing duties they deem medically required.¹¹² Jurisdictions like Indiana are raising the stakes for physicians, whose licenses and privileges may be threatened by legislators who impose policies physicians do not believe are consistent with medically justified standards of care.¹¹³

Dr. Bernard was a co-signatory on a letter “signed by hundreds of health professionals” who “implore[d]” Indiana’s governor not to provoke more restrictive abortion bans than are already in place in that state.¹¹⁴ These factors

108. See Emily M. Godfrey and Adelaide H. McClintock, *How Primary Care is Poised to Support Reproductive Health and Abortion in the Post-Roe Era*, NEW HAMPSHIRE BULLETIN (Aug. 15, 2022), <https://newhampshirebulletin.com/2022/08/15/how-primary-care-is-poised-to-support-reproductive-health-and-abortion-in-the-post-roe-era/> (describing the substantial role primary care physicians play in providing reproductive health care services, through birth control care to abortion case).

109. See Sheryl Gay Stolberg and Ava Sasani, *An Indiana Doctor Speaks Out on Abortion, and Pays a Price*, N.Y. TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/us/politics/abortion-doctor-caitlin-bernard-ohio.html>.

110. *Id.*

111. *Id.*

112. See, e.g., Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. TIMES (Nov. 29, 2015), <https://www.nytimes.com/interactive/2015/11/29/us/30abortion-clinic-violence.html> (reviewing the “long history of violent attacks on facilities or doctors providing abortions”).

113. See Stolberg and Sasani, *supra* note 109.

114. *Id.*

suggest that physicians have an active and vested interest in testing the rationality of public policies so vital to questions regarding public health.¹¹⁵

Within this community, medical societies throughout the country play a unique role in advocating for health care in numerous jurisdictions and take public health positions on various issues.¹¹⁶ They are the care providers for abortion treatment and for children, and they are not subject to criminal penalties if they act in a manner consistent with what they view as ethically demanded for patients, such as giving public support to policy positions.¹¹⁷ They must manage and maintain appropriate specialty care practices by attracting doctors to their jurisdictions.¹¹⁸ They are also a source of child abuse and neglect reports and have first-hand knowledge of the pathology facing child victims.

In this context, medical societies have great incentive to, and should, adopt “Pro-Life” metrics that assist their members, and those who would travel or do business in any jurisdiction, with the process of determining whether a given jurisdiction, in fact, values life, and to what extent.¹¹⁹ To

115. See Perry Stein and Devlin Barrett, *Justice Dept. Sues Idaho Over Near-Total Abortion Ban Coming Aug. 25*, WASH. POST (Aug. 2, 2022, 2:23 PM EST), <https://www.washingtonpost.com/national-security/2022/08/02/idaho-abortion-justice-lawsuit-garland/> (US DOJ files suit against Idaho “trigger” law citing “several medical conditions that would require a doctor to perform an abortion for lifesaving reasons, including septic infections and ectopic pregnancies—when the fetus implants outside the uterus and the pregnancy cannot be viable.”).

116. See, e.g., *Membership*, NEW HAMPSHIRE MEDICAL SOCIETY, <https://www.nhms.org/Membership/Member-Services/> (“With a multi-pronged portfolio of benefits, including timely and useful information, advocacy, discounts for business and personal services and tools for you to be more effective in your profession, NHMS is a great value.”); See *Medical Societies and Associations*, THE PHYSICIANS FOUNDATION, <https://physiciansfoundation.org/medical-societies-and-associations/> (last visited Oct. 10, 2022) (listing medical societies throughout the nation); see also *Caring for Patients at the End of Life: CEJA Reports*, AMERICAN MEDICAL ASSOCIATION (2010), <https://www.ama-assn.org/councils/council-ethical-judicial-affairs/caring-patients-end-life-ceja-reports> (announcing development of ethical standards for end of life care).

117. See N.H. Rev. Stat. § 329:46 (2022) (health care provider who violates NH abortion ban statute subject to class B felony liability).

118. See Annmarie Timmins, *OB-GYNs Say Abortion Ban Will Keep Much Needed Maternal Fetal Specialists Away*, NEW HAMPSHIRE BULLETIN (Feb. 21, 2022), <https://newhampshirebulletin.com/2022/02/21/ob-gyns-say-abortion-ban-will-keep-much-needed-maternal-fetal-specialists-away/> (an abortion ban that threatens imprisonment for doctors will deter OB-GYNs from practicing in New Hampshire, inhibiting recruitment in the area).

119. See *Preventing, Identifying & Treating Violence & Abuse, Code of Medical Ethics Opinion 8.10*, AMERICAN MEDICAL ASSOCIATION, <https://www.ama-assn.org/delivering-care/ethics/preventing-identifying-treating-violence-abuse> (last visited Oct. 10, 2022) (“In light of their obligation to promote the well-being of patients, physicians have an ethical obligation to take appropriate action to avert harms caused by violence and abuse.”).

make the inquiry intellectually and computationally manageable, we recommend that any jurisdiction that has mandatory child abuse and neglect response laws, like those in New Hampshire, but that also has a documented record of systemically and significantly failing to abide by those laws, be branded “Not Pro-Life” (or even “Anti-Life”). “Pro-Life” metrics could be both qualitative and quantitative in nature. A qualitative metric could draw on state-generated reports and facts compiled in litigation to assess whether the state is meeting its obligations to protect children born and raised into disadvantaged circumstances in the jurisdiction. A quantitative metric could ask whether the state is investing sufficiently to meet the financial demands of protecting and fostering the same set of children.

Certifications of this sort would place public pressure on legislators to address unprincipled positions regarding their value of life and could unearth motivations¹²⁰ such as retrogressive attitudes toward the rights and welfare of women, that many, including the authors of this piece, believe comprise the true roots of the so-called “Pro-Life” movement as it is known today.¹²¹ They would also provoke intense and nuanced debate about the valuation of life that could push the public, generally, to engage these questions at a greater level of philosophical rigor than debates about abortion tend to reflect.¹²² In a jurisdiction like New Hampshire, voters and public officials would have to consider the level of financial commitment they are willing to make to forestall child abuse and neglect of the sort New Hampshire has facilitated in institutions like the Sununu Center and failed to protect children from suffering, more generally.

To this end, public officials could (and should) adopt rules or laws that prohibit the enforcement of abortion bans where life is not otherwise protected under the same principles underlying a ban in order to meet the demands of baseline rationality. In New Hampshire, for instance, public health and safety

120. Cf. Chris Good, *Norquist’s Tax Pledge: What It Is and How It Started*, ABC NEWS (Nov. 26, 2012), <https://abcnews.go.com/blogs/politics/2012/11/norquists-tax-pledge-what-it-is-and-how-it-started> (“Known in Republican circles simply as ‘The Pledge,’ the Americans for Tax Reform (ATR) Taxpayer Protect Pledge has steered GOP tax policy for decades, applying pressure to any candidate, lawmaker, or president who would raise taxes.”).

121. Even if we are, in fact, correct in our understanding of the true roots of the self-proclaimed Pro-Life movement, the *Dobbs* decision has established, as matter of federal constitutional law, that protection of unborn life rationally justifies deep intrusions into the freedom, health and, in some instances, lives of pregnant people (usually women) such that the project of analyzing what other rational action may be required to protect children’s lives is a reasonable and vital inquiry.

122. See, e.g., TRACIE MARTIN, INTERESTS IN ABORTION: A NEW PERSPECTIVE ON FOETAL POTENTIAL AND THE ABORTION DEBATE, 1 (2000) (seeking a so-called “moderate” solution).

officials could (and should) implement policies staying the enforcement of abortion bans while the state's system of child abuse and response remains ineffective. Such policies would, effectively, serve as a moratorium on abortion-regulation enforcement; a moratorium which will remain in effect until the state creates a record of valuing life consistent with a rationally "Pro-Life" jurisdiction. It would have the added advantage of creating a strong incentive for those who claim to be "Pro-Life" to develop and support plans that will respond to the needs of the additional lives of children born to disadvantaged families, some facing abuse and neglect a state must respond to, and forestall, as a matter of law, and under an application of life valuation, that "Pro-Life" policies claim to support.

There is precedent for discipline approaches of this sort across all levels of United States government. The adoption of "disciplining policies" from the public sector, including through legislation and executive action, would have at least as powerful an impact as this private side, non-profit action. In their current form, these policies take the form of balanced budget laws, tax cap laws, and restrictions on the implementation of executive branch regulation.¹²³ The goal of these policies is to ensure greater governmental accountability and rationality.

The goal of disciplining affirmative government action that interferes with zones of privacy and ownership has a constitutional heritage. The Fifth Amendment exacts a qualitative and monetary price by demanding that a taking must be for a public purpose and must be paid for.¹²⁴ The Fourth Amendment extracts a qualitative price by demanding that a trespass is warranted upon a qualitative demonstration of public need.¹²⁵

Following suit, a state policy could require, for instance, that the state present and defend a child-support financial model that assess the cost of raising a child and the opportunity costs imposed on mandated motherhood as a precondition to the state's demand that a mother be required to bear and raise a child. The state could then have to carry through with a payment program, backed by a remedial structure that would assure access to enforcement

123. See *Introduction*, *supra* note 35.

124. See Rebecca L. Rausch, *Reframing Roe: Property Over Privacy*, 27 BERKELEY J. GENDER L. & JUST. 28, 39 (2012) (discussing the Taking Clause demand of just compensation for government interference with property in the context of abortion regulation).

125. See Akhil Amar, *The Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (discussing constitutional reasonableness as the better ground for government trespass for the public purpose of a criminal investigation).

power, including the provision of attorney's fees through private counsel to ensure that a mandated mother be made financially whole.¹²⁶

Disciplining policies already play a powerful role in restraining federal administrative law. Professor Sunstein describes sets of policies he studied and implemented while responsible for overseeing the federal budget. These included policies implemented to discipline executive branch rule-making to ensure that the adoption of a rule by a federal agency be assessed to assure that its projected net benefits are confirmed.¹²⁷ His defense of disciplining policies includes his concern that specific interest groups are able to extract favorable regulatory treatment by exploiting cognitive biases, including through hysteria.¹²⁸ He writes, “[w]hen interest groups exploit cognitive mechanisms to create unwarranted fear or diminish concern for serious problems, it is desirable to have institutional safeguards.”¹²⁹ He favors a disciplined cost-benefit analysis. Under our conception, government capital is accrued for the purpose of intervention through a demonstrated commitment to the principle of valuing life, which the government claims justify the imposition of an abortion ban. A state that claims to value the life of an unborn child at the expense of its mother's decision not to continue a pregnancy should bear the additional cost of supporting the child in ways consistent with the valuation that choice implies.¹³⁰ If it fails, its regulation should be voided.

An approach of this sort by government officials could mitigate the strength of the development of rationality and other sorts of litigation that point out governmental hypocrisy around claims of life valuation. *Dobbs*, of course, leaves the question of the rationality of abortion-bans to litigation, where we also hope our arguments will take hold. Court processes have played a robust role in developing and testing records of rationality in contexts

126. Cf. Press Release, *Broad Coalition of Texas Abortion Providers, Doctors, Clergy, Abortion Funds, and Practical Support Networks Sue to Block the State's Radical New Abortion Ban Set to Take Effect Sept. 1*, ACLU (July 13, 2021), <https://www.aclu.org/press-releases/lawsuit-filed-stop-texas-radical-new-abortion-ban> (“[Texas’s SB 8] law creates monetary rewards for any member of the public who successfully sues an abortion provider or those who ‘aid and abet’ someone getting an abortion after six weeks.”). There are very high-profile examples of efforts to value life that demonstrate how this process could work. See SUNSTEIN, *supra* note 15, at 40 (describing the value of a statistical life figure and stating that it is about \$9 million per life).

127. See SUNSTEIN, *supra* note 15, at 34.

128. *Id.*

129. *Id.*

130. We further believe that the rational extension of principle calls for supporting the needs of the parent(s) of born children to basic safety and subsistence, at minimum, but have chosen in this piece to focus our analysis on the imperative of protecting born children.

that include civil rights. Rationality litigation could include claims that aim to negate false claims regarding the valuation of life, as a means of demonstrating the irrationality and arbitrariness of some abortion-bans. One of us has criticized the rational basis review doctrine as not a true rationality test and has called for a recalibration of the test to reflect the demands of rationality.¹³¹ Even if federal jurisprudence lags in this regard, challenges under state constitutional law may provide a more favorable platform to create a record and test the rationality of the range of abortion bans presented throughout the nation. The New Hampshire Constitution, for instance, includes provisions that, by text, place an emphasis on rationality where the state exercises power that infringes on liberty.¹³² States, generally, have manifold, unique constitutional provisions, which, if studied, may provide a basis by which litigants may demand rationality when it comes to policies that claim to value life in the context of a larger enforcement apparatus that clearly does not.¹³³

V. CONCLUSION

We are both very skeptical about claims made by the “Pro-Life” adherents when they speak about state intervention and the value of life. We are skeptical, at least in part, because those claims have focused so intensely on abortion regulation, without attacking child abuse and neglect with the same intensity of purpose. *Dobbs* took a right away from millions of citizens who now face draconian state regulations with life-altering and, in too many instances life-threatening, consequences. To fail to protect life, and now, so

131. See Lewis and Moran, *supra* note 29, at 373 (calling for a more robust and more authentic deployment of rationality review when reviewing the rationality of marijuana prohibition). The notion that the demands of reason must be watered down as a matter of constitutional law appears in conflict with at least one articulation of what the founding generation embraced in the era of early national conception. See e.g., GEOFFREY R. STONE, *SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA’S ORIGINS TO THE TWENTY-FIRST CENTURY*, 91 (2017) (“The United States was conceived ‘not in an Age of Faith . . . but in an Age of Reason.’ The Framers were highly critical of what they saw as Christianity’s excesses and superstitions. They believed people should be free to seek truth through the use of ‘reason and the dictates of conscience,’ and they concluded that a secular state, ‘supporting no religion, but protecting all, best served that end.’”) (footnote omitted).

132. See, e.g., N.H. CONST. pt. I, art. 3 (“Where men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is void.”).

133. See RANDY J. HOLLAND, STEPHEN R. MCALLISTER, JEFFREY M. SHAMAN & JEFFREY S. SUTTON, *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE*, 753 (2d. ed. 2016) (“There is a wide variety of state constitutional provisions, some of which have no counterparts in the Federal Constitution.”).

many additional lives, with resources sufficient to support a healthy childhood, is not rational. At best, it is hypocritical. More likely, it is cruel. Our essay draws upon legal precedent to make a low-bar request to try to be rational with respect to protecting vulnerable life in the new *Dobbs* era.