

KERMIT GOSNELL'S BABIES: ABORTION, INFANTICIDE AND LOOKING BEYOND THE MASKS OF THE LAW

*By Richard F. Duncan**

I. INTRODUCTION

If, as Laurence Tribe has observed, “all law tells a story,”¹ this Article tells two stories occurring forty years apart—the story of Justice Harry Blackmun and the unborn human beings he covered with the legal mask of “potential” lives in *Roe v. Wade*² in 1973, and the story of Doctor Kermit Gosnell and the unmasked babies he was convicted of murdering in his Philadelphia abortion clinic in 2013.³ As Professor Tribe also observes, these stories amount to “a clash of absolutes, of life against liberty,”⁴ and therefore they are stories that must be told time and again, until we get them right. These stories also demonstrate how legal concepts can be used to mask reality, and how peeking beneath the masks of the law⁵ can blow away the fog of legal illusion and give society a starkly different perspective from which to view an old constitutional issue.

II. THE MASKS OF THE LAW

A. *Legal Concepts That Conceal Persons*

One of the great constitutional law scholars of the past fifty years, Judge John T. Noonan, Jr. of the Ninth Circuit, has observed that “[i]t is a propensity of professionals in the legal process to dehumanize by legal

* Sherman S. Welpton, Jr. Professor of Law, University of Nebraska College of Law. In writing this Article I stand on the shoulders of an intellectual giant of the law, Judge John T. Noonan of the Ninth Circuit. This Article is dedicated to him and to his enormous contribution to the legal profession.

¹ LAURENCE H. TRIBE, *ABORTION THE CLASH OF ABSOLUTES* 27 (1990).

² *See* *Roe v. Wade*, 410 U.S. 113 (1973).

³ *See* Jon Hurdle & Trip Gabriel, *Philadelphia Abortion Doctor Guilty of Murder in Late-Term Procedures*, N.Y. TIMES, May 13, 2013, http://www.nytimes.com/2013/05/14/us/kermit-gosnell-abortion-doctor-found-guilty-of-murder.html?pagewanted=all&_r=0; *See generally* Report of the Grand Jury, *In re* Cnty. Investigating Grand Jury XXIII, Misc. NO. 0009901-2008, (Pa. Ct. Com. Pl. Jan. 14, 2011) [hereinafter cited as Grand Jury Report]. As the Grand Jury Report made clear, Gosnell's standard late-term abortion technique was to induce premature birth of “live, viable, babies in the third trimester of pregnancy —and then murder[] these newborns by severing their spinal cords with scissors.” *Id.* at 1.

⁴ TRIBE, *supra* note 1, at 3. Of course, the right to life is really the most fundamental means of protecting liberty, because without life there is no liberty. So it is probably more correct to describe this issue as concerning a clash between life *and* liberty on one side, and liberty and autonomy on the other.

⁵ *See generally* JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1976).

concepts those whom the law affects harshly.”⁶ He calls this process of dehumanization the “masks of the law.”⁷

What Noonan means by the masks of the law is the law’s ability to use rules and legal concepts to conceal persons who are treated harshly by the law. He puts it this way: “By masks in this context I mean ways of classifying individual human beings so that their humanity is hidden and disavowed.”⁸

Perhaps the best historical example of legal masks used to conceal human persons is the law’s treatment of the issue of slavery in the United States. Suppose the law wants to permit and even sanction slavery, as was the case in America before the Civil War. The mask that the legal system used to disavow the human dignity of slaves was the mask of “property.”⁹ The mask of “property” was what allowed champions of liberty, such as George Wythe and Thomas Jefferson, to own slaves and to accept the power of the law to treat slaves harshly.¹⁰

For example, as a judge in the state of Virginia, George Wythe, a signer of the Declaration of Independence and its embrace of all men being created equal, was able to preside over the sale and inheritance of slaves.¹¹ In one case, Wythe declared that “[t]he property of slaves, whatever be their number . . . may be transferred with as little judicial ceremony as a single quadruped or article of house or kitchen furniture.”¹² As Noonan observes, when deciding cases involving slaves, Wythe “could not have compassion for each of them as a person and still be a judge. His role in a slave system necessitated the use of masks.”¹³

As in the case of Wythe, so too in the case of other great Virginians, including Thomas Jefferson and John Marshall; economic and cultural pragmatism caused them to accept the institution of slavery and “the power of the law to convert persons into [property].”¹⁴ As Noonan observes, “[a]t the critical moments,” these great men employed “the masks of the law [to] cover [] the faces of the slaves.”¹⁵

Noonan, quoting Montesquieu, explains even more clearly the need for the masks of the law in an age of slavery: “It is impossible that we

⁶ JOHN T. NOONAN, JR., *A PRIVATE CHOICE* 153 (1979).

⁷ NOONAN, *supra* note 5, at 54.

⁸ *Id.* at 19.

⁹ *Id.* at 39–40.

¹⁰ *Id.* at 29–64.

¹¹ *Id.* at 29.

¹² *Id.* at 56 (citing *Fowler v. Saunders*, 8 Va. (4 Call) 361 (1798)).

¹³ *Id.* at 58. To his credit, after the death of his wife in 1787, Wythe “freed their slaves, a decision made easier by a lack of children expecting an inheritance.” ALAN TAYLOR, *THE INTERNAL ENEMY: SLAVERY AND WAR IN VIRGINIA, 1772-1832* 105 (2013).

¹⁴ NOONAN, *supra* note 5, at 59–60.

¹⁵ *Id.* at 60.

should suppose those people to be men, because if we should suppose them to be men, we would begin to believe that we ourselves are not Christians.”¹⁶ Thus, the law’s masking of slaves served a dual function – it hid the humanity of slaves, so judges and the law could treat them like an animal or an inanimate chair, and it allowed the white ruling classes to think well of themselves by masking the tyranny of the legal system they had created.

Interestingly, the law only treated slaves as nonpersons when it served the interests of slave owners to do so. Remarkably, when slaves were charged with crimes, they were often held to be legal persons.¹⁷ For example, in *United States v. Amy*,¹⁸ a slave named Amy was treated both as “the property of Samuel W. Hairston” and as a “person” who could be held criminally responsible for stealing mail from a post office.¹⁹ Chief Justice Taney, sitting as a circuit justice, held that although “[i]t is true that a slave [was] the property of the master . . . and it [was] equally true that he is not a citizen,” nevertheless a slave was indeed a person when charged with a crime under the criminal laws.²⁰ According to John M. Gregory, the federal prosecutor in the case, the evidence of Amy’s status as a person under federal criminal law was palpable: “I cannot prove more plainly,” argued Mr. Gregory, “that the prisoner is a person, a natural person, at least, than to ask your honors to look at her. There she is. She is beyond doubt a human being.”²¹ Thus, the law masked Amy as the property of her master for some purposes, and removed the mask and “look[ed] at her” when she was charged as a person who had unlawfully stolen mail from a post office.²² Such are the masks of the law. As we sometimes tell our students, the law often treats “X as Y for the purposes of Z.” But when X is a human being, and Y is a nonperson, great injustices may occur.

However, the jurisprudential magic of the masks of the law can be broken if we dare to look beneath the masks, even for the purposes of Z, and see the real persons who have been concealed underneath.²³ For example, consider what happens when Batman’s mask slips, and everyone sees Bruce Wayne’s unmasked face. The secret identity is destroyed, and everyone now knows that Batman is Bruce Wayne. He is no longer the Dark Knight striking fear in the hearts of criminals, but instead merely a

¹⁶ *Id.* at 48.

¹⁷ See Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1748 (2001).

¹⁸ 24 F. Cas. 792 (C.C.D. Va. 1896) (No. 14,445).

¹⁹ *Id.* at 793.

²⁰ *Id.* at 809.

²¹ *Id.* at 795; see also Note, *supra* note 17, at 1748–49.

²² See generally *United States v. Amy*, 24 F. Cas. 792.

²³ See NOONAN, *supra* note 5, at 58–59.

billionaire, playboy vigilante missing his mommy! There is no getting the toothpaste back in the tube once the “spell is broken” and the human face under the mask is revealed.²⁴ In order to abolish slavery, you must dispel the magic of the masks of the law, and invite society to look into the eyes of the real persons concealed by the masks.²⁵

B. *Literature and Popular Culture Peeking Beneath Legal Masks*

“[T]he masks of the law” are a type of legal fiction, “magical ways by which persons are removed from the legal process.”²⁶ As Noonan explains lucidly, “[a]t the points of a legal system where it is too much to recognize that a human being exists, a mask is employed. The intolerable strain is relieved.”²⁷

But great literature and even the popular culture often give us a peek behind the masks of the law and enable society to see the real persons concealed by legal fictions.²⁸ For example, in Mark Twain’s *The Adventures of Huckleberry Finn* there is a passage concerning a steamboat explosion in which Aunt Sally asks Huck if anyone was injured.²⁹ When Huck replies “No’m” and notes that only a slave had been killed, Aunt Polly responds: “Well, it’s lucky: because sometimes people do get hurt.”³⁰ The reader, of course, is aware that Aunt Sally is looking at the mask of property, not the real human being who was killed in the explosion.

There is also a powerful example of slavery and the masks of the law in the recent Oscar-winning film, *Twelve Years a Slave*.³¹ It is the scene in which the cruel slave-owner, Master Epps, brutally whips Patsey, a female slave.³² He literally tears the flesh off her back with a bull whip for a minor act of disobedience.³³ Solomon Northrup, who was kidnapped and sold into slavery, denounces Epps for his inhumanity: “Thoudevil!” says Solomon. “Sooner or later, somewhere in the course of eternal justice, thou shalt answer for this sin!” To which Epps replies with a mask: “Sin? There is no sin. A man does how he pleases with his property.”³⁴ Of course, the

²⁴ *Id.*

²⁵ *See id.*

²⁶ *Id.* at 25–26.

²⁷ *Id.* at 26.

²⁸ *See generally* MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* (The Floating Press 2008) (1884).

²⁹ *Id.* at 397; NOONAN, *supra* note 5, at 11.

³⁰ TWAIN, *supra* note 28, at 398.

³¹ *Twelve Years a Slave* (20th Century Fox Home Entertainment 2013).

³² *Id.*

³³ *Id.*

³⁴ *Id.*; *12 Years a Slave*, IMDB, http://www.imdb.com/title/tt2024544/?ref_=nv_sr_1 (last visited Mar. 27, 2015).

modern viewer clearly recognizes that Epps is using a legal concept to mask his unjust treatment of a real human being.

C. *Warfare and Physical Distance as a Mask*

Scholars of warfare also recognize this concept of masking the enemy and how physical distance makes it easier to kill.³⁵ For example, in a book with the remarkable title *On Killing*, a standard textbook studied in The Marine Corps, Lieutenant Colonel Dave Grossman has a chart that demonstrates the spectrum of killing from up close and personal (for example, hand-to-hand combat) to maximum range by means of bombs or missiles.³⁶ Colonel Grossman demonstrates that “the resistance to killing becomes increasingly more intense” as we move from long range killing to close range killing.³⁷

It is far easier for a bomber to kill an entire city of noncombatants with a bomb or missile, than for a soldier to kill an enemy combatant with a bayonet, or in hand-to-hand combat.³⁸ For example, Colonel Grossman talks about how during World War II bomber crews on both sides killed countless women, children, and other noncombatants in cities such as Hamburg, Dresden, Tokyo and Hiroshima,³⁹ and he describes how they were able to do this without thinking of themselves as monsters:

The pilots, navigators, bombardiers, and gunners in these aircraft were able to bring themselves to kill these civilians primarily through application of the mental leverage provided to them by the distance factor. Intellectually, they understood the horror of what they were doing. Emotionally, the distance involved permitted them to deny it From a distance, I can deny your humanity; and from a distance, I cannot hear your screams.⁴⁰

It is emotionally traumatic to look into the eyes of another human being and drive a bayonet into his heart at close range—even when you know he is trying to do the same thing to you.⁴¹ It is much easier to push a button from thousands of feet above the ground and drop a bomb on a populated city, when all you can see are buildings and ant-like dots on the

³⁵ See generally DAVE GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY* 97 (rev. ed. 2009).

³⁶ *Id.* at XV, 98.

³⁷ *Id.* at 98.

³⁸ *Id.* Colonel Grossman graphically explains how psychologically difficult it is to kill an enemy at close range: “This process culminates at the close end of the spectrum, when the resistance to bayonetting or stabbing becomes tremendously intense, and killing with the bare hands (through such common martial arts techniques as crushing the throat with a blow or gouging a thumb through the eye and into the brain) becomes almost unthinkable.” *Id.*

³⁹ *Id.* at 100–02.

⁴⁰ *Id.* at 101–02.

⁴¹ See *id.* at 97–98.

ground.⁴² The humanity of the women and children and other noncombatants living in the city being bombed is masked by distance, the bombardiers launch their bombs and missiles at “targets” not at fellow human beings.⁴³

D. What Should Judges and Lawyers Do About the Masks of the Law?

If the masks of the law are legal concepts or legal fictions used to conceal persons who are treated harshly by the law,⁴⁴ how should ethical judges and lawyers respond? Judge Noonan suggests that there are two very different types of masks employed in the legal system—“those imposed on others and those put on oneself.”⁴⁵ One class of masks is used to conceal persons wronged by the law, such as the use of the mask of “property” to conceal human beings subjected to slavery.⁴⁶ A second type of mask is used to conceal individual judges, lawyers, and law professors when they employ the first type of mask to oppress others. For example, a judge will speak of a decision by “the court,” thus becoming “[t]he masked author of a judicial opinion;”⁴⁷ and judges, lawyers and law professors, when working with legal concepts created to conceal the humanity of others, may claim that they have no choice but to follow the commands of “[t]he law” or the Constitution.⁴⁸ As Noonan puts it, “The masks of the law . . . are invented and employed by the ruling class to cover their own aggression, to cover over the faces of those they exploit.”⁴⁹

Thus, if justice is to prevail, and the legal system is to speak the truth and reflect reality, judges, lawyers, law professors and other legal professionals must look beyond the masks and the fictions of the law and focus on all persons with a stake in a legal decision or rule. We must speak out when we see a legal mask, and seek to restore the person concealed by the mask by responding with “rational criticism” and “historical

⁴² *See id.*

⁴³ *See id.* at 108. Many years ago, the French philosopher, Denis Diderot, said something similar: “I feel quite sure that were it not for fear of punishment, many people would have fewer qualms at killing a man who was far enough away to appear no larger than a swallow than in butchering a steer with their own hands.” Denis Diderot, *Letter on the Blind For the Use of Those Who See*, in *DIDEROT’S SELECTED WRITINGS* 17 (Lester G. Crocker, ed., Derek Coltman trans., 1966).

⁴⁴ *See* NOONAN, *supra* note 5; *see also* NOONAN, *supra* note 6, at 153.

⁴⁵ NOONAN, *supra* note 5, at 21.

⁴⁶ *See id.* at 29–64.

⁴⁷ *Id.* at 23.

⁴⁸ *See id.* at 22. For example, “a judge may speak and even think of the law as an invisible companion telling him what he must do.” *Id.*

⁴⁹ *Id.* at 23. Thus, the masks used to exploit others “have been stamped with official approval by society’s official representatives of reason.” *Id.* at 22.

reconstruction.”⁵⁰ In other words, we must always look beyond the masks of the law and seek the truth, the whole truth, and nothing but the truth about the law and the human beings affected by the law.

III. MASKING LIFE IN THE WOMB: HARRY BLACKMUN’S “POTENTIAL” LIVES AND THE SUPREME COURT’S ABORTION JURISPRUDENCE

A. *The Masks of Roe*

Although the Thirteenth and Fourteenth Amendments were ratified to abolish slavery, remove the mask of “property” from the human faces of the former slaves, and provide for their full and equal citizenship,⁵¹ these Amendments did not mark the end of judicial masking of those subjected to harsh treatment by the law. Indeed, the Fourteenth Amendment, or at least the Supreme Court’s *living, breathing* version of the Fourteenth Amendment, is the source of *Roe v. Wade*⁵² and its masking of unborn human beings as mere “potential lives.”⁵³

Although the Constitution does not speak of abortion nor even hint that there is a constitutional right of sexual privacy or reproductive autonomy, the Court in *Roe* created a “super-protected right” of abortion,⁵⁴ a right that invalidated the abortion laws of each and every one of the several states.⁵⁵ However, since creating a constitutional right to abortion would result in, to say the least, “harsh treatment” of human life in the womb, the Court first needed to conceal the unborn child with a legal mask.⁵⁶

Justice Blackmun’s majority opinion recognized that in a civilized society there can be no general right to kill innocent human beings; thus

⁵⁰ *Id.* at 25. Noonan suggests that this process of critical analysis will result in “recognition of the persons who speak to us through rules and of the persons to whom the rules are spoken.” *Id.* at 28.

⁵¹ U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude . . . shall exist within the United States”); U.S. CONST. amend. XIV, § 1 (providing for equal citizenship and equal protection under the law).

⁵² *Roe v. Wade*, 410 U.S. 113, 158, 164 (1973).

⁵³ *See id.* at 162, 164.

⁵⁴ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935–36 (1973) (“What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers’ thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation’s governmental structure.”); *see also Roe*, 410 U.S. at 129, 164–66. *See generally* Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63 (2013) (discussing reproductive rights in United States Supreme Court jurisprudence).

⁵⁵ *See* CLARKE D. FORSYTHE, ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE 293 (2013) (explaining how *Roe* and its companion case *Doe v. Bolton*, 410 U.S. 179 (1973) “together invalidated the laws of all fifty states”).

⁵⁶ *See* NOONAN, *supra* note 6, at 153.

the nature of the fetus was the critical issue before the Court in *Roe v. Wade*.⁵⁷ Acknowledging “the well-known facts of fetal development,”⁵⁸ Justice Blackmun admitted that if the Court were to recognize the fetus as “a ‘person’ within the language and meaning of the Fourteenth Amendment,”⁵⁹ the case for a right to abortion would “collapse[], for the fetus’ right to life would then be guaranteed specifically by the Amendment.”⁶⁰ Indeed, even if the fetus is not a constitutional person within the express understanding of the Fourteenth Amendment, which after all was ratified to deal with the issues of slavery and race not those of the sexual revolution and the reproductive autonomy of modern women,⁶¹ the case for an abortion liberty would fail if the Court were simply to acknowledge that the fetus is a living human being whose life may be protected by state laws prohibiting abortion. In *Roe*, the State of Texas argued this point explicitly, urging the Court to recognize that it had a compelling state interest “in protecting [human life in the womb] from and after conception.”⁶²

Justice Blackmun, however, while purporting to take no position on “the difficult question of when life begins,”⁶³ in fact did take a position and held that the fetus was neither a “person” within the protection of the Constitution,⁶⁴ nor an actual human life within the protection of state laws restricting abortion.⁶⁵ Instead, Justice Blackmun said that the states may not “adopt[] one theory of life” in prohibiting abortion,⁶⁶ because the fetus is only a “potential[] . . . human life.”⁶⁷ In other words, Justice Blackmun’s majority opinion in *Roe* created a legal mask concealing the actual living human life in the womb with the mask of a mere “potential life.” The being in the womb was viewed by the court as a “human nonperson,” a mere potentiality with no actuality.⁶⁸

⁵⁷ See *Roe*, 410 U.S. at 134, 156–57.

⁵⁸ *Id.* at 156.

⁵⁹ *Id.*

⁶⁰ *Id.* at 156–57.

⁶¹ *Slaughter-House Cases*, 83 U.S. 36, 71 (1872) (holding that “the one pervading purpose” of the Civil War Amendments was “the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”); see also *Roe*, 410 U.S. at 157.

⁶² *Roe*, 410 U.S. at 159.

⁶³ *Id.*

⁶⁴ *Id.* at 158.

⁶⁵ See *id.* at 162.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See generally *id.*; see also Robert P. George & Patrick Lee, *Acorns and Embryos*, THE NEW ATLANTIS 90, 95–96 (Fall 2004/Winter 2005), available at

But, of course, “a potential X must be an actual Y.”⁶⁹ Surely, there is something in the womb, or there would be no need to seek an abortion, something living in the womb, or there would be no need to kill it surgically or chemically. Indeed, as Robert P. George and Patrick Lee have observed, “the well-known facts of fetal development”⁷⁰ tell us exactly what is actually present in the womb of a pregnant woman:

[The] claim that human embryos are not human beings, or not “full human beings,” or merely “potential human life,” simply cannot be squared with the facts of human embryogenesis and developmental biology. Briefly, modern embryology shows the following: (1) The embryo is from the start *distinct* from any cell of the mother or the father, for it is growing in its own distinct direction and its growth is internally directed to its own survival and maturation. (2) The embryo is *human*, since it has the genetic constitution and epigenetic primordia characteristic of human beings. (3) Most importantly, the embryo is a *complete* or *whole* organism, though immature. From conception onward, the human embryo is fully programmed, and has the active disposition, to develop himself or herself to the next mature stage of a human being.⁷¹

Of course, Justice Blackmun was correct to point out that there are many reasonable theories of moral personhood. For example, in *Roe* the State of Texas argued that moral personhood “begins at conception and is present throughout pregnancy.”⁷² Other theories have focused on the first signs of fetal movement in the womb (“quickening”), and “[t]here has always been strong support for the view that life does not begin until live birth.”⁷³

Some contemporary philosophers and bioethicists, such as Peter Singer of Princeton, go so far as to argue that only beings with “characteristics like rationality, autonomy, and self-consciousness”⁷⁴ count as human beings. Singer is honest enough to admit that, since “[i]nfants lack these characteristics,” infanticide “cannot be equated with

<http://www.thenewatlantis.com/publications/acorns-and-embryos> (discussing how fetuses are never “human nonpersons”).

⁶⁹ PETER KREEFT, *THE UNABORTED SOCRATES* 38 (1983).

⁷⁰ See *Roe*, 410 U.S. at 156.

⁷¹ George & Lee, *supra* note 68, at 94–95. Remarkably, the Court itself has come to realize that “by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.” *Gonzales v. Carhart*, 550 U.S. 124, 147 (2007). Of course, it is also clear that a human fetus is human, thus the being in the womb is a living *human* organism.

⁷² *Roe*, 410 U.S. at 159.

⁷³ *Id.* at 132, 160.

⁷⁴ See PETER SINGER, *PRACTICAL ETHICS* 182 (2d ed. 1993); see also *Faculty*, PRINCE UNIVERSITY CENTER FOR HUMAN VALUES, <http://uchv.princeton.edu/people/faculty.php> (last visited Feb. 27, 2015).

killing normal human beings.”⁷⁵ Indeed, Singer is so bold as to suggest that parents should have a period of time—he suggests “twenty-eight days after birth”—to decide whether “it is better not to continue with a life that has begun very badly.”⁷⁶ He suggests that parents might consider a post-birth abortion of a newborn human nonperson as a way of “saying no to a new life that does not have good prospects.”⁷⁷ Incredibly, in a recent article published in the *Journal of Medical Ethics*, two distinguished bioethicists concluded that because an infant lacks the properties necessary for personhood, it has no “moral right to life,” and therefore “killing a newborn could be ethically permissible in all the circumstances where abortion would be,” including in cases in which “the well-being of the family is at risk” by birth of an infant child.⁷⁸ The authors suggest that the practice of killing infant human children be called “‘after-birth abortion’, rather than ‘infanticide’,” in order to reflect their view that “the moral status of the individual killed is comparable with that of a fetus.”⁷⁹ This, of course, is nothing more than an attempt to cover the harsh treatment of infants with the mask of abortion, to wit, an infant is comparable to a fetus, neither is a human being, and thus killing either is ethically acceptable.

To return to *Roe*, Justice Blackmun noted that there are many reasonable views of when human life begins, and claimed the virtue of humility on the question of moral personhood:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.⁸⁰

But speculate the Court did. By forbidding states from protecting human life from the moment of conception, and by holding that an unborn child is not an actual human being with a moral right to life, but only a “potentiality of human life,”⁸¹ the *Roe* decision created a mask covering the humanity of the unborn and placed the Supreme Court’s imprimatur on a new constitutional right to take life in the womb from conception until

⁷⁵ Singer, *supra* note 74, at 182.

⁷⁶ PETER SINGER, RETHINKING LIFE AND DEATH 217 (1994).

⁷⁷ *Id.* at 214. Singer goes on to opine that “our culture” has much to learn from other “cultures that practised infanticide.” *Id.* at 215. In a world in which “we must limit family size,” the practice of infanticide is “on solid ground.” *Id.*

⁷⁸ Alberto Giubilini & Francesca Minerva, *After-birth Abortion: Why Should the Baby Live?*, 39 J. MED. ETHICS 261, 262 (2012).

⁷⁹ *Id.* at 261–62.

⁸⁰ *Roe v. Wade*, 410 U.S. 113, 159 (1973).

⁸¹ *Id.* at 162–63.

birth.⁸² This is not humility; it is what Justice White referred to as “an exercise of raw judicial power.”⁸³

Indeed, since the Constitution is silent about a right to abortion, and since it is at least reasonable to believe that abortion results in the violent death of many innocent human beings, authentic judicial humility might well have led the Court and Justice Blackmun to defer to state legislatures and the process of democratic self-government to resolve the difficult moral and legal issue of when human life begins. Suppose Justice Blackmun had rephrased the issue before the Court as follows: “Given that there is reasonable doubt among intelligent people of good will concerning whether abortion violently takes the life of an innocent human being, should we allow state legislatures to resolve this doubt in favor of protecting unborn human beings by enacting laws prohibiting abortion?” Rather than raise and answer that important question, the Court instead created the legal mask of potentiality of human life, and forty-one years and more than fifty million abortions later, we are still talking about abortion, human life in the womb, and the Constitution.

B. *The Extremism of Roe*

Of the many myths and misunderstandings about *Roe*, by far the worst is the one that describes the decision as a modest compromise that legalized abortion only during the early stages of pregnancy. A colleague of mine actually directed that myth at me during a recent conversation in the faculty lounge. He was stunned when I described the extreme scope of the abortion liberty as actually decreed by the Court.

This myth about *Roe*’s moderation is ubiquitous. It was repeated by Thomas Edsall in a New York Times article published in April of 2014, in which he described the abortion liberty created in *Roe* as protecting a right to “abortion during the first trimester of pregnancy.”⁸⁴ Indeed, even Supreme Court Justices, who certainly should know better, sometimes describe *Roe* as “holding that the Constitution protects a woman’s right to terminate her pregnancy *in its early stages*.”⁸⁵

But these attempts to play down the extremism of *Roe* and its progeny are, not to put too fine a point on it, dead wrong. In fact, as the Learned Hand Professor of Law at Harvard Law School, Mary Ann

⁸² For a discussion of the extremism of *Roe*’s abortion doctrine, see *supra* notes 74–98 and accompanying text.

⁸³ *Doe v. Bolton*, 410 U.S. 179, 221–22 (1973) (White, J., dissenting) (explicitly stating that his dissenting opinion in *Doe* also applied to *Roe*).

⁸⁴ Thomas B. Edsall, *Abortion Endures as a Political Tripwire*, N.Y. TIMES (Apr. 15, 2014), http://www.nytimes.com/2014/04/16/opinion/why-does-abortion-endure-as-a-political-tripwire.html?_r=0.

⁸⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (joint opinion of O’Connor, J., Kennedy, J., & Souter, J.) (emphasis added).

Glendon has explained, the abortion liberty created by the Court in *Roe* “established a regime of abortion-on-demand for the entire nine months of pregnancy.”⁸⁶

The myth of *Roe* as a modest compromise based upon fundamental constitutional values is itself a mask that serves to conceal the nearly absolute abortion liberty created *ex nihilo* by the Court. The reality of *Roe* is this—a pregnant woman has a constitutional right to terminate a pregnancy at any time during the pregnancy and for any reason.⁸⁷ Late term abortions are protected by *Roe*, right up until the moment of live birth; a woman is free to abort her unborn child because it is the wrong gender, or the wrong race, or because the child has Down syndrome or another disability, or for any other reason that seems sufficient to her.⁸⁸ My source for this description of the abortion liberty is the Supreme Court itself and its decisions in *Roe* and *Roe*’s progeny.

To start at the beginning, the holding in *Roe* includes the following five features:

1. *Abortion as a Fundamental Right.* The Court held that “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁸⁹ This liberty is a fundamental constitutional right, and thus a law restricting this right is unconstitutional unless the state justifies the restriction by showing that it was enacted to advance a “compelling state interest” and that the law was “narrowly drawn to express only the legitimate state interests at stake.”⁹⁰
2. *The Trimester Framework: the First Trimester.* Although “the State . . . ha[s] important and legitimate interest[s]” in “protecting the health of the pregnant woman” and “the potentiality of human life” in the womb,⁹¹ neither of these interests is compelling during the first trimester of pregnancy.⁹² Thus, until “approximately the end of the first trimester,”⁹³ all state laws restricting abortion are unconstitutional and “the attending physician, in consultation with his patient, is free to determine, without

⁸⁶ Mary Ann Glendon, *From Culture Wars to Building a Culture of Life*, in *THE COST OF CHOICE: WOMEN EVALUATE THE IMPACT OF ABORTION* 5 (Erika Bachiochi ed., 2004); FORSYTHE, *supra* note 55, at 150–51.

⁸⁷ See *Roe*, 410 U.S. at 164–65; see also *Doe*, 410 U.S. at 192.

⁸⁸ See *Roe*, 410 U.S. at 164–65; see also *Doe*, 410 U.S. at 192.

⁸⁹ *Roe*, 410 U.S. at 153. In other words, the abortion liberty is protected by the Due Process Clause of the Fourteenth Amendment as a matter of substantive due process. *Id.* at 164.

⁹⁰ *Id.* at 155.

⁹¹ *Id.* at 162.

⁹² *Id.* at 149, 162–63.

⁹³ *Id.* at 163.

regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."⁹⁴

3. *The Trimester Framework: The Second Trimester.* According to the Court, the state's interest in regulating abortion to protect the health of the pregnant woman becomes compelling at the start of the second trimester.⁹⁵ Thus, although the state may not restrict her right to choose abortion, it "may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."⁹⁶ The abortion liberty is still triumphant, but the states may regulate abortion as a medical procedure to ensure the safety of women undergoing abortion.⁹⁷

4. *The Trimester Framework: The Third Trimester.* Finally, the states interest in protecting the "potential life" of the fetus becomes "compelling" at the point of fetal "viability,"⁹⁸ which the Court defined as the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."⁹⁹ This, says the Court, usually occurs "at about seven months (28 weeks) but may occur earlier, even at 24 weeks."¹⁰⁰

"If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother."¹⁰¹ Finally, for the stage of pregnancy "subsequent to viability,"¹⁰² a state may act to protect what the Court continues to mask as the mere "potentiality of human life" by prohibiting abortion.¹⁰³ But there is a catch. Even after viability, during the third and final trimester of pregnancy right up to the moment of live birth, a pregnant woman has a right to choose abortion whenever "it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."¹⁰⁴

5. *The Trimester Framework: The Scope of Post-viability "Health" Abortions.* If late-term abortions are constitutionally protected so long as the pregnant woman's health is advanced by abortion, the crucial issue becomes

⁹⁴ *Id.*

⁹⁵ *Id.* at 164–65.

⁹⁶ *Id.* at 163.

⁹⁷ *Id.* Examples of permissible health regulations are those relating to "the qualifications of the person who is to perform the abortion," and "to the facility in which the procedure is to be performed." *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 160.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 163–64.

¹⁰² *Id.* at 164.

¹⁰³ *Id.* at 164–65.

¹⁰⁴ *Id.* at 165.

how the Supreme Court defines maternal health. The answer to that question is provided in *Roe*'s companion case, *Doe v. Bolton*,¹⁰⁵ which, says the Court, must be "read together" with *Roe*.¹⁰⁶ In *Doe*, Justice Blackmun, again writing on behalf of the majority, said that in determining whether an abortion is necessary to preserve maternal health, the attending physician should exercise his medical judgment "in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."¹⁰⁷ Thus, a pregnant woman has a constitutional right to choose a late-term, post-viability abortion whenever the abortion doctor determines that her health, including her emotional and familial well-being, is served by an abortion.¹⁰⁸ In other words, although states have a theoretical power to proscribe post-viability abortions, no such law may be enforced to prohibit any abortion, no matter how late in the pregnancy, if the doctor performing the abortion determines in his medical judgment that the abortion will protect the emotional or even the familial well-being of the pregnant woman. As Clark Forsythe puts it, because the maternal health exception for post-viability abortions is so infinitely broad, "[t]here may be prohibitions after viability on the books, but they are unenforceable, and any time limits that abortion providers observe are only *voluntary*."¹⁰⁹ Far from being a modest holding protecting abortion during early stages of pregnancy, the abortion liberty created by the Court in *Roe* is almost infinitely extreme; under Justice Blackmun's decree, until the human being in the womb completes his or her journey through the birth canal and is safely born alive, the general "well-being" of the pregnant woman "take[s] precedence" over the life of even a fully-developed, nearly-born child.¹¹⁰

As Clark Forsythe has observed, the combination of *Roe* and *Doe* places abortion law in the United States at the extreme end of the spectrum "as one of approximately nine countries that allow abortion after fourteen weeks and one of only four nations (with Canada, China, and North Korea) that allows abortion for any reason after fetal viability."¹¹¹ The Court also nationalized an issue that since the Founding had been "determined by state legislatures, state governors, state courts, local prosecutors, and state public health officials."¹¹²

¹⁰⁵ 410 U.S. 179 (1973).

¹⁰⁶ *Roe*, 410 U.S. at 165.

¹⁰⁷ *Doe*, 410 U.S. at 192.

¹⁰⁸ *See id.*

¹⁰⁹ FORSYTHE, *supra* note 55, at 151.

¹¹⁰ Ely, *supra* note 54, at 921 n.19.

¹¹¹ FORSYTHE, *supra* note 55, at 9.

¹¹² *Id.* at 12.

C. Casey Reaffirms Roe's Extremism and Roe's Masks

In 1992, almost twenty years after *Roe* was decided, the Supreme Court came within one shaky vote of overruling *Roe* along with its masks and its nearly unlimited abortion liberty. Instead, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹¹³ the Court reaffirmed the “essential holding” of *Roe*,¹¹⁴ and thereby, in the words of one scholar, sought both to “perpetuate *Roe*” and to “entrench[] abortion rights” in the Constitution.¹¹⁵ Although *Casey* modified *Roe*'s doctrine to allow some abortion regulations to be enacted so long as they do not impose an undue burden on a woman's right to abortion,¹¹⁶ it reaffirmed the right of pregnant women to abort their unwanted pregnancies both pre-viability and post-viability, and continued *Roe*'s masking of unborn human beings in the womb by making clear that “[a]t the heart” of the abortion liberty “is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹¹⁷

In other words, whether the unborn child in the womb of a pregnant woman is a human life is completely subjective—a matter of opinion—and only one opinion counts, that of the woman exercising the right to abortion. If a pregnant woman is pleased with her pregnancy and wishes to recognize the unborn child as a human life, then it is a human life; but if the pregnancy is unwanted, and the pregnant woman chooses not to recognize the humanity of the child she is carrying, then it is not a human life and it may be treated harshly by the woman and her doctor. Such is the reality of *Casey*'s “mystery of human life” passage.¹¹⁸ The mask of potential life continues to cover the humanity of lives in the womb, if their mothers decide to opt for abortion.

This is not about liberty. It is about power, the ultimate power to decide the value of human life. It is as though the Court channeled feminist legal scholar Frances Olsen, who once claimed that “[w]omen create children from fertilized eggs; children do not just happen. To think a zygote is a baby is to devalue the work that pregnancy requires of a woman.”¹¹⁹ According to Olsen's feminist legal philosophy, the human being in the womb does “not have significant value as a person until the

¹¹³ 505 U.S. 833 (1992).

¹¹⁴ *Id.* at 846.

¹¹⁵ Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 998 (2003).

¹¹⁶ See *Casey*, 505 U.S. at 874–78.

¹¹⁷ *Id.* at 851 (emphasis added).

¹¹⁸ *Id.*

¹¹⁹ Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 121 n.71 (1989). “Treating a fetus as morally equivalent to a child obscures the active role that mothers play in procreation and is yet another example of society's tendency to devalue the work that women do.” *Id.* at 120–21.

woman carrying the fetus instills it with such value.”¹²⁰ *Casey* constitutionalizes this philosophy to empower pregnant women to mask the subjects of the abortion liberty as human non-persons.

Although *Casey* reaffirmed what it described as the essential holding of *Roe*, *Roe*’s trimester framework was reworked into a two-pronged, pre-viability and post-viability test.¹²¹ Prior to viability, “the woman’s right to make the ultimate decision” concerning abortion is protected against state laws imposing an “undue burden” on her right to abort.¹²² A state may regulate abortion to further its interests in maternal health and potential life, but may not impose an undue burden on the abortion liberty.¹²³ “[A]n undue burden is an unconstitutional burden,” and a regulation will be struck down as “unduly burdensome” if it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹²⁴ After viability, *Casey* reaffirms *Roe*’s rule allowing the states to prohibit “abortion except where it is necessary . . . for the preservation of the life or health of the mother.”¹²⁵ Thus, under *Casey* as under *Roe*, the woman’s ultimate decision to choose abortion is protected post-viability, right up to the moment of live birth, so long as the abortion doctor determines that a late-term abortion is an appropriate means of protecting the mother’s physical, psychological, emotional, or familial well-being.¹²⁶

If *Casey* has any redeeming quality or silver lining, it is its holding allowing states to regulate abortion to protect fetal life, even before viability, so long as the regulation does not unduly burden the woman’s ultimate decision to terminate her pregnancy.¹²⁷ Thus, laws “which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose” abortion.¹²⁸ The states may beg for the life of a child, but they may not act to protect its life.¹²⁹ But still, this is more than *Roe* allowed, so

¹²⁰ *Id.* at 131.

¹²¹ *Casey*, 505 U.S. at 876–79.

¹²² *Id.* at 877–78.

¹²³ *Id.* at 878.

¹²⁴ *Id.* at 874, 877. The Court made clear that “a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.” *Id.* at 879.

¹²⁵ *Id.*

¹²⁶ See *supra* notes 98–111 and accompanying text.

¹²⁷ *Casey*, 505 U.S. at 877.

¹²⁸ *Id.*

¹²⁹ States may “take measures to ensure that the woman’s choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.” *Id.* at 878.

perhaps it is best to be grateful for some recognition by the Court of the value of human life in the womb.

D. Gonzales v. Carhart: Partial Birth Abortions Banned So Long as Not One Life Saved

In *Gonzales v. Carhart*,¹³⁰ the Supreme Court upheld the federal Partial-Birth Abortion Ban Act of 2003.¹³¹ Although the Court allowed Congress to prohibit “partial-birth abortions,” it did so only because another method of abortion was permitted. Indeed, as Justice Ginsburg observed in her impassioned dissent, “[t]he law saves not a single fetus from destruction, for it targets only a *method* of performing abortion.”¹³²

As both the majority and dissenting Justices explained in *Gonzales*, there are two common methods used to perform late term abortions (i.e., those performed after the first three months of pregnancy)—the standard or “nonintact D & E” and the “partial-birth” or “intact D & E.”¹³³ When performing a standard D & E procedure, the abortion doctor first dilates the pregnant woman’s cervix, and then “inserts grasping forceps” into the uterus and uses the forceps “to grab the fetus” and literally “tear [it] apart” piece by piece:

For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed.¹³⁴

On the other hand, when performing a partial-birth D & E, the abortion doctor “extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart,” lodges its head in the cervix, makes an incision with scissors into the base of the skull of the fetus, and finally uses a suction catheter to “evacuate[] the skull contents.”¹³⁵ Or as a nurse who witnessed a partial-birth abortion testified before the Senate Judiciary Committee, the abortion doctor “deliver[s] the baby’s body and

¹³⁰ 550 U.S. 124 (2007).

¹³¹ 18 U.S.C. § 1531 (2003); see also *Gonzales*, 550 U.S. at 169.

¹³² *Gonzales*, 550 U.S. at 181 (Ginsburg, J., dissenting).

¹³³ *Id.* at 136, 178. The initials “D & E” refer to a surgical procedure known as “dilation and evacuation.” *Id.* at 135; see also *id.* at 180–81 (Ginsburg, J., dissenting).

¹³⁴ *Id.* at 135–36.

¹³⁵ *Id.* at 137–38.

the arms—everything but the head,” and then, using scissors and a suction tube, literally “suck[s] the baby’s brains out.”¹³⁶

As interpreted by the Court, the Act prohibited only intact D & E abortions.¹³⁷ Thus, although one method of abortion was forbidden by the Act, it did not prohibit the standard D & E procedure.¹³⁸ This was critical to the Court’s decision, because, since the law did not prohibit any woman from making the ultimate decision to abort the child she was carrying, it did not impose an undue burden on the right to choose abortion even though it applied “both previability and postviability.”¹³⁹ As Justice Ginsburg noted, the Act did not save even one child “from destruction,” because it prohibited only one “method” of abortion.¹⁴⁰ Ginsburg concluded that this rendered the Act completely irrational, because it did not serve its stated objective of “preserving life.”¹⁴¹ Although Justice Kennedy and the majority seemed to believe that, since partial birth abortions are shockingly similar to the killing of a newborn baby, the law served to draw a bright line between abortion and infanticide.¹⁴² Justice Ginsburg reasoned, the “notion that either of these two equally gruesome procedures . . . is more akin to infanticide than the other . . . is simply irrational.”¹⁴³

It is difficult to reject Ginsburg’s logic—in effect the Act says it is unlawful to kill an unborn child in the living room, but it is perfectly lawful to kill the same child in the kitchen. Surely, if partial birth abortions are akin to infanticide, so too are nonintact D & E abortions. Why should it matter where the violent act occurs? However, *Roe* and *Casey* require that state laws regulating abortion are constitutional only if they do not impose a substantial obstacle on the abortion decision; accordingly, the Constitution as created by the Court *requires* that at least one of the two “equally gruesome” methods of taking life must be allowed.¹⁴⁴ Such is the extremism of the abortion liberty in Kermit Gosnell’s America.

¹³⁶ *Id.* at 138–39 (quoting H.R. Rep. No. 108–58, at 3 (2003)).

¹³⁷ *Id.* at 150.

¹³⁸ *Id.* at 150–51.

¹³⁹ *Id.* at 146–47, 150.

¹⁴⁰ *Id.* at 181 (Ginsburg, J., dissenting).

¹⁴¹ *Id.* at 182.

¹⁴² *Id.* at 158 (majority opinion).

¹⁴³ *Id.* at 182 (Ginsburg, J., dissenting) (quoting *Stenberg v. Carhart*, 530 U.S. 914, 946–47 (2000) (Stevens, J., concurring)).

¹⁴⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877–79 (1992); *Gonzales*, 550 U.S. at 182 (Ginsburg, J., dissenting).

IV. KERMIT GOSNELL'S MURDER CONVICTION: A PEAK BEHIND THE MASKS OF THE LAW

The saga of Kermit Gosnell is a true story “about a doctor who killed babies and endangered women.”¹⁴⁵ It is a tale about an abortion doctor who specialized in late-term abortions¹⁴⁶ and whose standard abortion technique “was to induce labor and delivery of intact fetuses.”¹⁴⁷ The Grand Jury in Gosnell’s criminal case explained what happened when Gosnell performed late-term abortions by inducing premature labor:

When you perform late-term “abortions” by inducing labor, you get babies. Live, breathing, squirming babies. By 24 weeks, most babies born prematurely will survive if they receive appropriate medical care. But that was not what the Women’s Medical Society was about. Gosnell had a simple solution for the unwanted babies he delivered: he killed them. He didn’t call it that. He called it “ensuring fetal demise.” The way he ensured fetal demise was by sticking scissors into the back of the baby’s neck and cutting the spinal cord. He called that “snipping.”¹⁴⁸

Of course, when your standard method of “abortion” is to violently kill living, newborn babies, you may well find yourself charged with multiple counts of murder. Indeed, Gosnell was charged, tried and convicted of first-degree murder for killing “Baby A, Baby C, and Baby D,” three newborn infants who “lived a few fleeting moments outside their mothers’ wombs before their spinal cords were severed” by the good doctor.¹⁴⁹ Gosnell is currently in prison serving three life sentences without the possibility of parole.¹⁵⁰

A. *Gosnell’s Serial Murder of Born-Alive Babies*

Although Gosnell was probably guilty of killing hundreds—or even thousands—of born-alive human infants, “there was only enough evidence to indict him for seven, and of those he was ultimately convicted for three”

¹⁴⁵ Grand Jury Report, *supra* note 3, at 1.

¹⁴⁶ *Id.* at 105. The Grand Jury reported that Gosnell “specialized in patients who were well beyond 24 weeks.” *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 4. Gosnell’s abortion clinic, the “Women’s Medical Society,” was located at 3801 Lancaster Avenue in Philadelphia. *Id.* at 19.

¹⁴⁹ Brady Dennis, *Jury Convicts Abortion Provider Kermit Gosnell of Murder*, WASH. POST (May 13, 2013), http://www.washingtonpost.com/national/health-science/2013/05/13/b4444bdc-bbda-11e2-97d4-a479289a31f9_story.html.

¹⁵⁰ Cheryl Wetzstein, *Gosnell Receives Three Life Sentences in Abortion Case*, WASH. TIMES (May 15, 2013), <http://www.washingtontimes.com/news/2013/may/15/gosnell-receives-three-life-sentences-abortion-cas/>; Jon Hurdle, *Doctor Starts His Life Term in Grisly Abortion Clinic Case*, N.Y. TIMES (May 15, 2013), http://www.nytimes.com/2013/05/16/us/kermit-gosnell-abortion-doctor-gets-life-term.html?_r=0. Gosnell agreed to this sentence and waived his right to appeal in order to avoid a possible death sentence for his gruesome crimes. *Id.*

counts of first-degree murder.¹⁵¹ The Grand Jury concluded that the killing of live, viable babies “really had to be part of Gosnell’s plan,”¹⁵² because “[t]he policy he instituted and carried out was not to try to revive live, viable babies. It was to kill them.”¹⁵³

Gosnell specialized in late-term abortions, those involving pregnancies that “were well beyond 24 weeks.”¹⁵⁴ The best way to understand the horror of Gosnell’s abortion practice is to focus on his tiny victims. These are some of their stories.

1. Baby Boy A



Baby Boy A was born in Gosnell’s abortion clinic in July of 2008 to a seventeen year old mother.¹⁵⁵ Although one of Gosnell’s employees, Kareema Cross, recorded a gestational age of 29.4 weeks,¹⁵⁶ a neonatologist testified that the child “was at least 32 weeks, if not more.”¹⁵⁷ Doctor Gosnell induced labor and the mother gave birth to a living, breathing, moving baby boy.¹⁵⁸ Baby Boy A was large, so large in fact that Gosnell joked that “[t]his baby is big enough to walk around with me or walk me to the bus stop.”¹⁵⁹ Gosnell completed this post-birth abortion by snipping Baby Boy A’s neck and placing him in a shoebox for disposal.¹⁶⁰ Cross, a witness to this gruesome procedure, testified that “she

¹⁵¹ STEVE VOLK, *GOSNELL’S BABIES: INSIDE THE MIND OF AMERICA’S MOST NOTORIOUS ABORTION DOCTOR* 71 (Kindle ed. 2013) (pages may differ based on the device used to read the book). The Grand Jury reported evidence that killing “live, viable babies” by inducing labor and cutting the babies’ spinal cords was Gosnell’s “standard procedure” for late-term “abortions.” Grand Jury Report, *supra* note 3, at 105. See generally *id.* at 105–16.

¹⁵² Grand Jury Report, *supra* note 3, at 105.

¹⁵³ *Id.* at 108.

¹⁵⁴ *Id.* at 105.

¹⁵⁵ *Id.* at 100.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 102. The neonatologist’s opinion was based on a photograph of the infant and “the baby’s size, hairline, muscle mass, subcutaneous tissue, well-developed scrotum, and other characteristics.” *Id.*

¹⁵⁸ *Id.* at 100–01.

¹⁵⁹ *Id.* at 102.

¹⁶⁰ *Id.* at 101.

saw the baby move after his neck was cut, and after the doctor placed it in the shoebox.”¹⁶¹ In testimony before the Grand Jury, a neonatologist opined that the fact that the infant victim “continued to move after his spinal cord was cut with scissors means that he did not die instantly” and that “his few moments of life were spent in excruciating pain.”¹⁶² Doctor Gosnell was convicted of first-degree murder for this horrific, post-birth abortion of Baby Boy A.¹⁶³

2. Some of Gosnell’s Other Victims

Although “Baby Boy A was among the more memorable babies that Gosnell killed,”¹⁶⁴ there were many more. Ashley Baldwin, another of Gosnell’s employees, “remembered Gosnell severing the neck of a baby that cried after being born.”¹⁶⁵ Gosnell also trained his staff to cut the spines of born-alive babies.¹⁶⁶ Steve Massof, an unlicensed medical school graduate hired by Gosnell to practice medicine in his clinic,¹⁶⁷ was trained by Gosnell to cut the spines of born alive babies.¹⁶⁸ Massof testified what Gosnell expected of him when babies were born alive when Gosnell was away from the clinic: “So what I would do is, I’d make sure that when—if the fetus precipitated, the cord was cut. Also, a standard procedure, the cervical spine was cut.”¹⁶⁹ He further testified that “Gosnell cut the spinal cord ‘100 percent of the time’” in late-term abortions “and that he did so after the baby was delivered.”¹⁷⁰ The Grand Jury Report summarizes the shocking testimony of Gosnell’s employees as follows:

Gosnell’s staff testified about scores of gruesome killings of such born-alive infants carried out mainly by Gosnell, but also by employees Steve Massof, Lynda Williams, and Adrienne Moton. These killings became so routine that no one could put an exact number on them. They were considered “standard procedure.” Yet some of the slaughtered were so fully formed, so much like babies that should be dressed and taken home, that even clinic employees who were accustomed to the practice were shocked.¹⁷¹

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See* Dennis, *supra* note 149.

¹⁶⁴ Grand Jury Report, *supra* note 3, at 103.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 228.

¹⁶⁷ *Id.* at 39 (“In 2003, Gosnell hired Massof to work as a doctor at the clinic despite the fact that he knew that Massof was not licensed to treat patients.”).

¹⁶⁸ *Id.* at 103–07.

¹⁶⁹ *Id.* at 106.

¹⁷⁰ *Id.* at 112.

¹⁷¹ *Id.* at 99–100.

The bottom line on Gosnell's career as a late-term abortion doctor is that his practice made him "America's most horrifying serial killer."¹⁷² Although he was convicted of only three murders, he probably "killed thousands of live, viable children throughout the course of his decades long career in Philadelphia."¹⁷³

The question one should ask in the wake of the Gosnell case is this—if all can agree that what Gosnell did was not just morally wrong, but horrifically, morally wrong, what does this tell us about the larger question of *Roe* and its extremism? If post-birth abortions are infanticide, and partial-birth abortions are wrong because they are practically indistinguishable from post-birth abortions, "what else follows?"¹⁷⁴

B. After Gosnell: Looking Beyond the Masks of the Law

It is a matter of nearly universal consensus that Kermit Gosnell is a "monster,"¹⁷⁵ a "serial killer,"¹⁷⁶ a "butcher,"¹⁷⁷ and a justly-convicted murderer of innocent children.¹⁷⁸ And yet, his crime was a mere "matter of geography."¹⁷⁹ Whether a particular abortion takes place inside or outside the womb is the difference between a fundamental constitutional right and first-degree murder.¹⁸⁰ How can this be?

I think the answer lies in the masks of the law. When abortions take place inside the womb, the faces of those who are aborted are concealed by the masks of the law and only "potential life" is extinguished. However, if the exact same human beings are the subjects of post-birth abortions, they are unmasked and viewed as actual lives, as living, breathing, newborn babies, and when the abortionist inserts scissors into the back of their necks and cuts their spinal cords he is guilty of murder. In other words, if Baby Boy A had been aborted *in utero* by means of a nonintact D & E procedure, Kermit Gosnell would be in law what he believes himself to be

¹⁷² Katie Pavlich, *Gosnell the Movie: Crowd-Sourcing Campaign Launched to Expose America's Worst Serial Killer Kermit Gosnell*, TOWNHALL.COM (Mar. 31, 2014), <http://townhall.com/tipsheet/katiepavlich/2014/03/31/crowdsourcing-campaign-launched-to-expose-americas-worst-serial-killer-kermit-gosnell-n1816412>.

¹⁷³ *Id.*

¹⁷⁴ Michael Stokes Paulsen, *Kermit Gosnell and Uncle Tom's Cabin*, 8 U. ST. THOMAS J. L. & PUB. POL'Y 1, 6 (2013).

¹⁷⁵ VOLK, *supra* note 153, at 70.

¹⁷⁶ Pavlich, *supra* note 172.

¹⁷⁷ See Paulsen, *supra* note 174, at 1 (referring to Gosnell as the "Butcher of Philadelphia").

¹⁷⁸ See Hurdle, *supra* note 150 (writing in the New York Times about Gosnell's conviction "for the murder of a baby born alive in a botched abortion," also referred to "the trial's gruesome images and searing testimony").

¹⁷⁹ VOLK, *supra* note 153, at 452.

¹⁸⁰ *Id.*

as he sits unrepentantly in prison—a champion of women’s reproductive autonomy and a soldier in the “war against poverty.”¹⁸¹

Which is it? Is Gosnell a hero, or is he a monster? It all depends upon the masks of the law and whether we peek behind the masks and into the faces of Baby Boy A and those like him who are the subjects of the abortion liberty.

Under *Roe* and its progeny, Gosnell’s crime was not killing Baby Boy A and the other victims of his post-birth abortion practice. Gosnell’s crime was a crime of geography—kill Baby Boy A in the kitchen and it is a constitutionally-protected right; kill Baby Boy A in the living room, at the same moment in time, and it is murder. This is so because even post-viability, right up to the moment of live birth, a pregnant woman has a constitutional right to choose abortion so long as her abortion doctor determines that the abortion is necessary to protect her physical, emotional, psychological or familial well-being.¹⁸² In other words, under *Roe* human beings who are indistinguishable from Baby Boy A are killed every day by perfectly legal, late-term abortions that take place in utero.

Baby Boy A was a person under the law not because of who or what he was, but because of where he was when he was aborted. Because he was outside of the womb, the mask was removed and all of America could see his violent death for exactly what it was—an act of gruesome murder.

If the Supreme Court’s abortion jurisprudence is correct, and if Baby Boy A could indeed have been legally aborted *in utero* so long as Doctor Gosnell had determined that his mother’s *well-being* was served by a late-term abortion, then perhaps Gosnell is right to believe that he is a “spiritually innocent” hero rather than a monstrous murderer.¹⁸³ As Michael Stokes Paulsen has put it, “Gosnell followed the horrid moral logic of *Roe* all the way to its horrid logical conclusion.”¹⁸⁴ But if Gosnell is justly guilty of murder for performing abortions outside, rather than inside, the womb, then it seems logical to question the justice of *Roe*’s extremism. As Paulsen puts it:

If what Gosnell did is not wrong, nothing is wrong. But what Gosnell did is not really much different from what any other abortionist does every day. If people can be brought to moral sense with a story that reaches them and convicts them in their hearts and souls, then

¹⁸¹ *Id.* at 619.

¹⁸² See *supra* notes 84–144 and accompanying text.

¹⁸³ Brian Howard, *Exclusive: Kermit Gosnell Says He Is “Spiritually Innocent”-and Sends Abortion-Inspired Poetry from Prison*, PHILADELPHIA (Sept. 23, 2013, 8:56 PM), <http://www.phillymag.com/news/2013/09/23/convicted-abortion-doctor-kermit-gosnell-spiritually-innocent-ebook/>.

¹⁸⁴ Paulsen, *supra* note 174, at 13.

perhaps—perhaps—they can be persuaded to retrace, and repent of, the deadly logic of abortion with their minds.¹⁸⁵

Paulsen is right. By removing the masks of the law from the tiny victims of Gosnell's abortion practice, our Nation had a rare moment of clarity about *Roe* and the abortion liberty. The true story of Gosnell's unmasked babies opened a "window into reality"¹⁸⁶ and gave the nation an opportunity to think and think again about *Roe* and *Casey* and the millions of masked babies whose brief lives continue to be ended by the fundamental liberty of abortion-on-demand.

V. A NARRATIVE AND A CONCLUSION: I'VE LOOKED AT *ROE* FROM BOTH SIDES NOW

I have been on both sides of this issue. I was in law school when *Roe* was decided way back in 1973. To be precise, *Roe* was decided in January of 1973¹⁸⁷ and in August of 1973 I was a brand new, baby 1L at Cornell Law School. I have always had a libertarian streak, and I supported *Roe* at the time and was very strongly pro-choice, so outspokenly pro-choice that my best friend in law school, who was pro-life, wanted to hit me more than a few times.

I have changed my mind over the years, and now I am pro-life. I was not a worse person when I was pro-choice, and I am not a better person now because I am pro-life. I have just thought about the issue for many years, and changed my mind.

However, my change-of-mind was not just a matter of reading and thinking. I had a rush of reason in 1978, when I learned I was going to become a father. Although my son was a mere potential life under *Roe* as he grew in the womb, my then-wife and I already knew that we had a child. We took away the distance factor, looked beneath the mask, and embraced the real, human life that was an actuality, not a mere potentiality.

But now my hair is white and I look at life through the eyes of a much older man. I have three daughters, three beautiful, young women, and I want every one of their dreams to be realized. Much of my energy and treasure is spent helping them get the education and opportunities they need to fulfill their dreams. But is the abortion liberty something upon which they should build their lives and dreams?

I think we all need to keep thinking and talking about the abortion issue, because there is a lot at stake on both sides and it is critically important that we get it right. As one scholar has said: "[a]bortion is too much like infanticide on the one hand, and too much like contraception on

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Roe v. Wade*, 402 U.S. 113 (1973).

the other, to leave one comfortable with any answer [T]he moral dilemma abortion poses is so difficult as to be heartbreaking.”¹⁸⁸

I believe that the only way to resolve this impossibly difficult moral dilemma is to put away all the legal masks and look into the eyes of all the stakeholders in this heartbreaking matter of life and death. The dreams and lives of those who are already born are critically important, but so too are the lives of the actual human beings living in the wombs of their mothers.

¹⁸⁸ Ely, *supra* note 54, at 927, 933.