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## Engaging in Good Faith: Ethics, Archives, and Critical Constitutionalisms

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2012]

ENGAGING IN GOOD FAITH: ETHICS, ARCHIVES, AND CRITICAL  
CONSTITUTIONALISMS—AN INVITED RESPONSE TO SAMUEL W.  
CALHOUN, *STOPPING PHILADELPHIA ABORTION PROVIDER KERMIT  
GOSNELL AND PREVENTING OTHERS LIKE HIM: AN OUTCOME THAT  
BOTH PRO-CHOICERS AND PRO-LIFERS SHOULD SUPPORT*

PENELOPE PETHER\*

“‘It’s not that the [*Roe*] judgment was wrong, but it moved too far too fast,’ Ginsburg told a symposium at Columbia Law School marking the 40th anniversary of her joining the faculty as its first tenure-track female professor. . . . ‘The court made a decision that made every abortion law in the country invalid, even the most liberal,’ Ginsburg said. ‘We’ll never know whether I’m right or wrong . . . things might have turned out differently if the court had been more restrained.’”<sup>1</sup>

I. A CULTURE OF OPPOSITION

LIKE Professor Calhoun,<sup>2</sup> I hold little hope for an end to this distinctive national battle in what Australian constitutional law scholars Tony Blackshield and George Williams, echoing Justice Scalia’s opinion in *Romer v. Evans*,<sup>3</sup> aptly call our “‘culture war’ over issues of sexuality.”<sup>4</sup> Other battles in this war, such as the current litigation in the federal courts over the constitutionality of bans on same-sex marriage or the controversy of the Obama Administration’s departure from its “science standard” in refusing the National Institutes of Health’s recommendations that the “morning after pill” be made available over-the-counter to minors, presently dot the jurisdiction, just as those named Antietam, Bull Run, and Gettysburg marked the nation’s territory in their era.

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1. David Crary, *Ginsburg Questions 1973 Abortion Ruling’s Timing*, BOSTON.COM, Feb. 10, 2012, [http://articles.boston.com/2012-02-10/news/31047317\\_1\\_ginsburg-abortion-law-wade-case](http://articles.boston.com/2012-02-10/news/31047317_1_ginsburg-abortion-law-wade-case) (alteration in original).

2. See Samuel W. Calhoun, *Stopping Philadelphia Abortion Provider Kermit Gosnell and Preventing Others Like Him: An Outcome That Both Pro-choicers and Pro-lifers Should Support*, 57 VILL. L. REV. 1, 2 (2012) (concluding that “[i]t is obvious that the abortion controversy is a passionate dispute that is certain to continue”).

3. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (contending that “[t]he Court has mistaken a Kulturkampf for a fit of spite”).

4. TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW & THEORY: COMMENTARY AND MATERIALS 320 (5th ed. 2010).

(79)

What both wars have in common is the evidence of what legal historian Christopher Tomlins has aptly called the “republic’s foundational commitment to bisectionalism.”<sup>5</sup> In his “Great American Novella,” *The Crying of Lot 49*, Thomas Pynchon makes the question of bisectionalism—or, in the language of poststructuralist theory, “binary oppositions” (such as “pro-life” and “pro-choice”)—an explicitly American one, and identifies the price we pay for this practice of polarity. His heroine, Oedipa Maas, laments the “ones and zeroes,” the binary oppositions that have come to structure America, and the way they have stifled the potential of what she labels the “diversity” that America had once promised.<sup>6</sup> The teeming middle grounds have been excluded by commitments to understanding the world through opposition, dividing it into us and others.

In poststructuralist thought, the zero (the “other” term) is inferior, a negative through which the dominant “one” defines itself. In the debate over legal regulation of abortion in the United States, “pro-life” increasingly occupies the rhetorical space of the “one”; “pro-choice” has assumed the rhetorical position of the other, “zero.”<sup>7</sup> It can only do so, I will go on to suggest, if our foundational national history—encoded in the 1808 Atlantic Slave Trade Clause,<sup>8</sup> the grounds for the domestic slave-breeding industry that replaced trafficking via the Middle Passage in its critical role in constituting the nation—is forgotten.<sup>9</sup> This constitutional provision and what it memorialized and promised branded the nation, apparently

5. CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580-1865*, at 522 (2010).

6. THOMAS PYNCHON, *THE CRYING OF LOT 49*, at 181-82 (1966).

7. Gallup records a drop from 56% to 50% of American adults polled agreeing that abortions should “sometimes” be legal between 2004 and 2011; it also showed that the percentage of adults nationwide polled who considered abortion to be “morally wrong” increased from 45% to 50% between 2001 and 2010, and the percentage of those who considered it to be “morally acceptable” decreased from 42% to 38%. *See Abortion and Birth Control*, POLLINGREPORT.COM, <http://pollingreport.com/abortion.htm> (last visited Jan. 18, 2012). CBS News Poll showed that in 2010, 62% of adults polled nationwide thought abortions should not be permitted or should be available under stricter limits. *See id.* Fox News/Opinion Dynamics records an increase from 40% to 50% of registered voters nationally between 1997 and 2001 describing themselves as “pro-life,” and a decrease from 50% to 42% over the same period in the numbers of those identifying themselves as pro-choice. *See id.* Gallup’s poll of American adults shows different totals but a similar (although less marked and consistent) trend in the increase of those who identify themselves as pro-life: from 2001 to 2011 the number identifying themselves as pro-choice rose from 47% to 49% and the number identifying themselves as pro-life rose from 41% to 45%. *See id.*

8. U.S. CONST. art. I, § 9, cl. 1 (prohibiting Congress from outlawing importation of persons until 1808).

9. *See, e.g.,* Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11, 42 (2001) (proposing “integrated narrative linking slavery with reproductive oppression”).

indelibly, with the “politics of hatred”<sup>10</sup> that makes fertile ground for a national imaginary structured by bisectionalism.

I will go on to complicate the apparent moral inferiority of “choice” as measured against “life” as I excavate the constitutional history of forced reproduction in this nation at this Essay’s conclusion. The discursive construction of the moral bankruptcy of choice is clearly signaled by Professor Calhoun’s reproduction (in what is often a thought-provoking essay) of this “hypothetical that appears periodically in the abortion debate”:<sup>11</sup>

“From time to time, for rhetorical purposes, the prom-dress girl is invoked—a fictional teenager who has suddenly decided she’s too pregnant for her formal and walks into a clinic at twenty-eight weeks demanding to have it taken care of. Nobody has ever produced an actual prom-dress girl; the point about the prom-dress girl is theoretical, and in a theoretical way it is true: under *Roe*, and under *Casey*, in the unlikely event that the prom-dress girl were able to find a suitably cooperative doctor, she too would theoretically be able to claim a legal right to abortion—a constitutionally protected ‘right to choose.’”<sup>12</sup>

Professor Calhoun’s response to the tawdriness, the banality of evil that the hypothetical both depicts and constitutes, is this:

Let this sink in for a moment. The law in the United States, as it stands right now, is that a woman who is well into her third trimester or even on the verge of a full-term delivery, can obtain a legal abortion if she decides she wants to look better in a prom dress. *All she must do is find an abortion provider who is willing to do the procedure and willing to say it is necessary because of concerns about her emotional well-being.*<sup>13</sup>

I am a legal scholar with a law degree and a research doctorate in literary studies. Words and their power, then, interest me. Let me make three brief points about prom-dress girl. First, dignifying this pure fabrication with the term “hypothetical” (the term for constructed factual scenarios used in law school examinations to test students’ knowledge of the law and their ability to interpret how it would work in the real world) in constructing the paradigmatic seeker of a late-term, legal, “elective” abortion, this moral vacancy of a young woman, still of school age, who seeks to abort a viable fetus so she can fit into a fancy frock for a national rite of teenaged passage, does (its own) rhetorical work.

10. CLIVE STAFFORD SMITH, *EIGHT O’CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTÁNAMO BAY* 252 (2007).

11. Calhoun, *supra* note 2, at 38.

12. *Id.* (quoting Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything to Lose*, *HARPER’S MAG.*, Nov. 2004, at 40).

13. *Id.* at 39 (emphasis added) (footnote omitted).

Next, the fabricated prom-dress girl brings to mind the many real stories of teenagers who give birth—and hide that they do so—in conditions which frequently coincide with the death of their infant, including the real-life infanticidal prom girl, Melissa Drexler. Drexler's hidden (and apparently externally physically invisible<sup>14</sup>) pregnancy led to a delivery of her live infant in a rest room toilet during her high school's prom, held at a New Jersey catering facility. Drexler placed and then tied the baby in a plastic garbage bag, discarded the child into the trash, and she was subsequently charged with aggravated manslaughter, which resulted in a fifteen-year prison term.<sup>15</sup> At sentencing, Drexler's attorney described her as “an immature, disoriented and frightened person who was in denial throughout her pregnancy and during the trip to the prom.”<sup>16</sup>

There are many other similar stories, for example that of Brian C. Peterson, Jr. and Amy S. Grossberg, college freshmen “whose son was found in a trash container outside the Comfort Inn in Newark, Del.,” leading to their being charged with crimes including capital murder.<sup>17</sup> Or, even closer to home, Drexel University freshman Mia Sardella who, like Drexler and Grossberg, apparently hid her pregnancy, only to deliver a son who was “found suffocated in the trunk of a car,” resulting in multiple charges including first-degree murder.<sup>18</sup>

All these young, desperate, pregnant women were convicted of varying offenses related to what courts concluded was infanticide. The *New York Times* reported:

Tracking this crime is difficult, because many corpses are never discovered. Using Justice Department statistics, one estimate puts the number at about 250 a year. Dr. Phillip J. Resnick, a professor of psychiatry at Case Western Reserve medical school, who coined the term “neonaticide” in 1970, said that the number is on the decline because of the availability of birth control and abortion.

Typically, neonaticides are committed by young, isolated women in severe denial of their pregnancy. If they have irregular menstrual periods, they may not realize that they are pregnant soon enough to have an abortion. Doctors say that small, fit women may not develop a belly; one mother said she had seen her

14. See Abby Goodnough & Bruce Weber, *Before Prom Night, a Suspect Was the Girl Next Door*, N.Y. TIMES, July 2, 1997, at B1 (quoting mother of friend who had gone prom-dress shopping with Drexler several weeks before prom as saying “[s]he was trying on small sizes”).

15. *Id.* (relating acts committed by Drexler on prom night); Robert Hanley, *Woman Gets 15 Years in Death of Newborn at Prom*, N.Y. TIMES, Oct. 30, 1998, at B1.

16. Hanley, *supra* note 15, at B1.

17. Jan Hoffman, *The Charge Is Murder; An Infant's Death, an Ancient Debate*, N.Y. TIMES, Dec. 22, 1996, § 4, at 4.

18. Amy Buckman, *Teen Mom Surrenders in Baby Death Case*, 6ABC.COM, May 22, 2007, <http://abclocal.go.com/wpvi/story?section=news/local&id=5327923>.

teen-age daughter naked the night before she gave birth and had not noticed anything remarkable about the girl's figure.

Profoundly unprepared, the women find themselves giving birth in department store bathrooms and college dorms. The trauma of delivery, followed by the crying of a newborn, crashes through the thickest walls of denial. Women try to stifle the wails by strangling the baby, stuffing tissues down its throat, drowning it in the toilet. Then they throw the tiny corpses in trash compactors, leave them in dresser drawers, even toss them out windows.<sup>19</sup>

Who are we, then, as a nation which produces real-life prom-dress-girl infanticides and transmutes their stories onto the stock character of the bitter national debate about the legality of abortion, and particularly late-term abortion? How did we come to be constituted thus as a people?

History provides part of the answer. In constitutionalizing (however obliquely) the question of slavery, Madison had wished to remove it from the zone of politics, a judgment or a species of wishful constitutional thinking that the Civil War demonstrated was excessively hopeful. This theory is espoused in modern U.S. constitutional thought by Cass Sunstein, who advocates constitutionalizing socially divisive issues as a strategy to

[t]ake . . . [them] off the political agenda . . . as a means not of disabling but of protecting politics, by reducing the power of highly controversial questions to create factionalism, instability, impulsiveness, chaos, stalemate, collective action problems, myopia, strategic behavior, or hostilities so serious and fundamental as to endanger the governmental process itself. In this respect, the decision to use constitutionalism to remove certain issues from politics is often profoundly democratic.<sup>20</sup>

If Madison's judgment about this strategy was flawed, albeit arguably situationally necessary at the point of constitution-making, his decision loses much of both its democratic legitimacy and strategic appeal when the constitutionalizer is the Supreme Court. Both legitimacy and appeal diminish still further when the Court's doctrinal vehicle for doing so is as dubious—because so manifestly politicized—as substantive due process had been in even its initial iteration.<sup>21</sup> That dubiousness and the legitimacy of both Court and common law constitutional *corpus juris* deepened as the instability of the emerging doctrine in its privacy rights housing became manifest.

19. Hoffman, *supra* note 17, at 4.

20. Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 642 (1991).

21. This issue led President Roosevelt to "call[ ] for reforms that would ensure that the American people had the final say over important constitutional questions." Thomas Donnelly, *A Voters' Veto to Overrule the Courts*, WASH. POST, Dec. 30, 2011, at A17.

I will return to the question of constitutionalizing the “right” to abortion—as to what the original constitutional compact and the immediate legal prehistory of *Roe* might offer in that regard—at the conclusion of this Essay.

## II. CONTEXTUALIZING CONTEMPORARY U.S. ABORTION LAW

Professor Calhoun, long a (relatively lonely) voice among legal academics in the pro-life camp, makes good on his promise to reach for common ground with those he sees in the pro-choice one. At the same time, he evidences how unlikely it is that common ground will be found in his or my lifetime with his diagnosis that “[p]ro-lifers in Virginia seem determined to”<sup>22</sup> “seek[ ] excessive [clinic] regulations . . . with the hidden objective of driving abortion providers out of business,”<sup>23</sup> and his conclusion that “[i]f an abortion clinic performs only first-trimester abortions, it goes too far to impose the enhanced standards applicable to outpatient surgical facilities.”<sup>24</sup> I agree with Professor Calhoun that every lawyer and every citizen, woman or man, pro-choice or pro-life, and those of us whose positions on the legality of abortion lie in the complex legal, ethical, and constitutional territory which that binary excludes, should stand with him and condemn Kermit Gosnell and his inhumane practices: the butchery Kermit Gosnell practiced on women on whom he performed abortions,<sup>25</sup>

22. Calhoun, *supra* note 2, at 20.

23. *Id.* at 19.

24. *Id.* at 21. Recent Pennsylvania legislation has a similar effect, for example by “hold[ing abortion] clinics to the same safety standards as out-patient surgery centers—such as requiring wider hallways and doorways, bigger operating rooms, and full-time nurses”—and subjecting them to “unannounced inspection[s].” See Marc Levy, *New Rules for Pa. Abortion Clinics*, PHILA. INQUIRER, Dec. 23, 2011, at B3. Virginia has subsequently made national news by introducing trans-vaginal ultrasounds before abortion, and a fetal life bill, which would effectively outlaw abortion in the state. See *Va. House OKs 2 Antiabortion Bills*, PHILA. INQUIRER, Feb. 15, 2012, at A10.

25. See Report of the Grand Jury at 96-97, *In re Cnty. Investigating Grand Jury XXIII*, Misc. No. 0009901-2008 (Pa. Ct. Com. Pl. Jan. 14, 2011), available at <http://www.phila.gov/districtattorney/PDFs/GrandJuryWomensMedical.pdf> (revealing that in Gosnell’s early abortion practice he had agreed to use his abortion patients in unauthorized trial of a “device [fashioned of] plastic razors that were formed into a ball. . . . They were coated into a gel, so that they would remain closed. These would be inserted into the woman’s uterus. And after several hours of body temperature, . . . the gel would melt and these things would spring open, supposedly cutting up the fetus, and the fetus would be expelled” (internal quotation marks omitted)). Gosnell tested the device despite prior testing showing that when they had been used by their developer on Bangladeshi women raped by Pakistani soldiers, “[t]hose women suffered a high rate of complications.” *Id.* at 97. Gosnell’s “experimental” patients suffered complications including “a punctured uterus, hemorrhage, infections, and retained fetal remains,” and in one case a hysterectomy was needed. *Id.* (internal quotation marks omitted).

whether legal or otherwise,<sup>26</sup> which led to maternal injury,<sup>27</sup> infection,<sup>28</sup> and in some cases death;<sup>29</sup> Gosnell's repeated performance of illegal abortions;<sup>30</sup> and, most depraved of all, the institutionalizing in his filthy West Philadelphia charnel house, denominated a clinic, a practice of neonaticide at once both casual and callous.<sup>31</sup>

However, I approach what Kermit Gosnell's alleged crimes—the factual bases of which some of his co-accused have admitted as they pled guilty to charges laid against them<sup>32</sup>—have to tell us about the way we live now from a place rather different from that occupied by Professor Calhoun. That different situatedness leads to my registering a number of insights generated by reading against the grain both Professor Calhoun's essay and Philadelphia District Attorney Seth Williams's grand jury report on what was discovered about Kermit Gosnell's abortion clinic in the wake of the death on the premises of one of his patients, Karnamaya Mongar. I then pose questions left unasked by essay or report, terminating with this especially pressing one, What brought Mrs. Mongar to Gosnell's Women's Medical Society, and brings other women to licensed backyard abortionists like Gosnell? But as I do so, let me register that the forensically driven narrative of the grand jury report, setting in chain the pressing and prosecution of criminal charges against Gosnell and his wife and staff, leaves much unanswered as to what brought Gosnell his patient-victims; that is not its rhetorical job. Absent access to the messiness of witness testimony from which the report was constructed, many of the questions of the legal and literary investigator find no clear answers but only merely suggestive shadows, illuminated to some degree by contexts.

26. *See id.* at 26-27 (noting that while Gosnell's clinic performed first-, second-, and third-trimester abortions, he increasingly relied on abortions past twenty and even beyond twenty-four weeks).

27. *See id.* at 25 (“He perforated bowels, cervixes and uteruses. He left women sterile.”).

28. *See id.* (finding that “[h]e left an arm and a leg of a partially aborted fetus in the womb of another woman, and then told her he did not need to see her when she became sick days later, having developed a temperature of 106 degrees”); *see also id.* at 102-03 (describing case of seventeen-year-old girl whose fetus (of at least thirty-two-weeks development) was delivered through use of abortifacients and then killed by slitting its neck, and who subsequently developed infection that nearly killed her but whose symptoms Gosnell did not think worthy of clinic visit).

29. *See id.* at 23, 25.

30. *See id.* at 25 (finding that “Gosnell and his employees performed abortions long after the legal limit”).

31. *Id.* (“He [ ] killed live, viable, moving, breathing, crying babies. He killed them by cutting their spinal cords after their mothers had delivered them after receiving excessive amounts of medication designed to induce active labor. This report documents multiple murders of viable babies. The evidence makes a compelling case that many others were also murdered.”). *See generally id.* at 99-116 (“Section IV: The Intentional Killing of Viable Babies”).

32. *See* Joseph A. Slobodzian, *Worker in Gosnell's Abortion Clinic Pleads Guilty to Two Murders*, PHILA. INQUIRER, Nov. 10, 2011, at B1.



The place from which I write on this difficult subject of law and its intersections with what some might label morality, which I will term ethics (to signal what we owe in good faith to each other), is a complex one. Among the contexts producing those complexities are these: I am a member of the faculty of a Catholic law school; I am a practicing Christian who is a member of an Episcopalian parish; and I am the stepmother of a much-loved adopted child whose unmarried birth mother gave life to him in a nation where to raise him, as a single woman, would have been marked with cultural shame that would have had many real consequences for mother and son. And I am all too aware as a scholar of the ways in which *both* forced reproduction and legally or culturally coerced abortion have been used and continue to be used, in the service of genocide, racism, misogyny, or economic greed backed by the sanction of law which reduced human beings to livestock or only valued them if they were stamped at birth with the material cachet of maleness, in this nation and beyond it, in the realms of then and now.

In a range of ways, then, what I see from where I find myself proceeds precisely from that location: in at least some of the multiple “excluded middles” between the binary (signaled by those banal and inadequate labels: pro-choice and pro-life) for what ethical subjects should commit themselves to in this battle, for a battle of dimensions at once constitutional and nationally epic<sup>33</sup> I indeed take it to be. That is, these oppositions struggle against one another as we reason our way through the question of abortion and its relations with law to account for the phenomenon of Kermit Gosnell across a complex congeries of history, morality, ethics, race, gendered sexual subordination, sexuality, wealth, and power. To the extent that my listing both “morality” and “ethics” in the previous sentence might beg questions, let me note that I take morality to be inculcated by faith or dictate, and ethics—in the sense generated by the Jewish philosopher of ethics Emmanuel Lévinas<sup>34</sup> and his feminist glossators—to stand for the recognition of the primacy of every other subject with whom the ethical subject comes into relation.

But let me begin at the beginning, with the Report of the Grand Jury, apparently authored by Philadelphia District Attorney R. Seth Williams (an adjunct faculty member at the law school where I teach) or a subordinate, summarizing what his investigating grand jury found, and duly accepted by the Honorable Renée Cardwell Hughes, then (before her recent retirement from the bench) a highly respected and experienced member of the Court of Common Pleas in the Criminal Trial Division of the First Judicial District of Pennsylvania (and likewise an adjunct

33. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (writing famously that “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning” and thus that “[f]or every constitution there is an epic”).

34. See generally EMMANUEL LÉVINAS, HUMANISM OF THE OTHER (1972).

faculty member here). But as I begin to do so, let me acknowledge that the grand jury report tells a story of my own community.

Euphemism, like cash, blanketed what really went on at the Women's Medical Society, the abortion clinic for the poor, the marginalized, and the desperate on Lancaster Avenue in West Philadelphia, housed in a brick building in a poverty- and violence-stricken, majority-black section of the city. The grand jury "estimate[d] that Gosnell took in as much as \$10,000 to \$15,000 a night, mostly in cash, for a few hours of work performing abortions. And this amount does not include the money he made as one of the top Oxycontin prescribers in the state."<sup>35</sup> As for the euphemism, a preliminary explanation is in order.

The report suggests that Gosnell's lack of medical skill<sup>36</sup> led to his preferring, in second- and illegal third-trimester abortions, the method of inducing labor and delivering the fetus over dismembering the fetus in utero while removing it; or intact partial-birth abortion (before the latter was banned federally in 2007); or partial-birth abortion's successor technique of choice among those who perform late-term abortions<sup>37</sup> (which make up "[b]arely 1 percent" of the 1.2 million abortions performed nationally<sup>38</sup>), labor-induction abortion, before which the fetus is injected in utero with a feticidal agent. He was, after all, not qualified under Pennsylvania law to be the only licensed medical practitioner at an abortion clinic, which was the state of affairs for many years at the Women's Medical Center. He was not a board-certified OB/GYN, having failed to complete a residency in obstetrics and gynecology early in his career.<sup>39</sup> The alternative explanation for Gosnell's practice was that it enabled his untrained staff to attend to delivery of fetuses or viable infants<sup>40</sup> (who would subsequently be killed) while he was elsewhere.

35. See Report of the Grand Jury, *supra* note 25, at 23; see also *id.* at 28, (noting that as Gosnell's late-term abortion practice relied on patients paying in advance "in full, typically in cash"); *id.* at 100 (noting that Gosnell "normally charged \$1,625 for 23-24 week abortions" and that illegal post-twenty-four week abortions cost \$2,500).

36. See *id.* at 31 (reporting testimony of medical expert who described "significant risks" involved in Gosnell's chosen methods and explained that "labor induction should be performed only in a hospital setting").

37. Brian Palmer, *What Made George Tiller So Special?: He Did the Abortion Procedures that Other Doctors Couldn't or Wouldn't Do*, SLATE (June 1, 2009, 6:48 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2009/06/what\\_made\\_george\\_tiller\\_so\\_special.html](http://www.slate.com/articles/news_and_politics/explainer/2009/06/what_made_george_tiller_so_special.html) (describing labor-induction technique and noting murder of Kansas doctor who performed such abortions).

38. Rob Stein, *Statistics Unclear on Late-in-Pregnancy Abortions*, WASH. POST, July 24, 2011, at A8.

39. See Report of the Grand Jury, *supra* note 25, at 38 (noting that Gosnell was "not an obstetrician or gynecologist, much less a board-certified one").

40. Whether a fetus is "viable" depends on the age of the fetus prior to delivery.

Even when he performed his version of intact dilation and evacuation/extraction,<sup>41</sup> or partial-birth abortion, Gosnell did things in a radically different way. Partial-birth abortion entailed delivering the fetal body intact through the cervix into the vagina<sup>42</sup> with the fetal skull still in the uterus, then “collaps[ing] the fetal skull by making an incision at the base of the neck and suctioning the contents” or reducing the size of the fetal head in some other way, before removing the fetus completely from the uterus and delivering it vaginally.<sup>43</sup>

Gosnell, however, delivered babies head-first, either waiting till the baby was partially or fully outside the vagina before killing viable infants by cutting their spinal cords and then “sometimes suction[ing] skulls as well,”<sup>44</sup> although there was by that stage no reason to do the latter other than the performative (or the ex post facto attempt to defeat investigation as to whether neonaticide or partial-birth abortion had occurred). After 2007,<sup>45</sup> apparently Gosnell

tried a few times to use a new procedure: He tried to inject a drug called digoxin into the fetus’s heart while it was in the womb. This was supposed to cause fetal demise in utero. But because Gosnell was not skillful enough to successfully administer digoxin, late-term babies continued to be born alive, and he continued to kill them by slitting their necks.<sup>46</sup>

Gosnell’s grisly practice was blanketed in euphemism by him and his staff. Live babies whose birth was induced were described as having “precipitated,” including into toilets, where they sometimes stayed for hours,<sup>47</sup> if no one who was charged with killing them was at the clinic. Neonaticide via severing of the spinal cord was referred to by Gosnell and his employees as a “snip.”<sup>48</sup> Under cover of euphemism, depravity bred:

[Clinic employee Kareema] Cross saw [untrained clinic employee Lynda] Williams slit the neck of a baby . . . who had been moving and breathing for approximately *twenty minutes*. Gosnell had delivered the baby and put it on a counter while he suc-

41. See *Gonzales v. Carhart*, 550 U.S. 124, 138-40 (2007) (describing partial-birth abortion procedure).

42. This is in contrast to dismembering the fetus—sometimes with the preparation of injecting a fetical agent—during the process of removing it from the uterus, with attendant risks of fetal parts either damaging the uterus or being left behind.

43. See Report of the Grand Jury, *supra* note 25, at 108; see also *Gonzales*, 550 U.S. at 138-40 (describing alternative procedures for reducing size of fetal head).

44. Report of the Grand Jury, *supra* note 25, at 109.

45. Gosnell told his staff sometime after 2005 that the law had changed and that he had to change his late-term abortion procedure as a result. See *id.* at 111.

46. *Id.*

47. See, e.g., *id.* at 30-31 (referring to “precipitations” as routine practice); *id.* at 64 (setting forth testimony of worker who witnessed precipitations).

48. *Id.* at 112.

tioned the placenta from the mother. Williams called Cross over to look at the baby because it was breathing and moving its arms when Williams pulled on them. After playing with the baby, Williams slit its neck.<sup>49</sup>

I recall noticing the Women's Medical Society as I drove past it before I knew from the media reports after Gosnell's arrest, and then in greater detail from the grand jury report, what happened there. Why? Because it marked the corner where I turned from Lancaster Avenue onto 38th Street, and thus drove towards the University of Pennsylvania. Lancaster Avenue connects Philadelphia's storied Main Line, where I live, a predominantly white and high-income suburban enclave, with the majority-black city of Philadelphia. And as it does so it passes through one of many parts of urban Philadelphia where the poverty that divides black and white America begs to be acknowledged.<sup>50</sup>

Those drives now seem imbued with savage irony: Our SPCA-adopted cat had developed a rare oral tumor, which led to treatment at the University of Pennsylvania's Matthew J. Ryan Veterinary Hospital, the cost of which would have procured an unlawful third-trimester abortion at the hands of Kermit Gosnell<sup>51</sup> or one of his largely untrained and entirely unqualified staff, together with the highest-purchasable level of anesthesia,<sup>52</sup> administered via intravenous sedation by an untrained and unlicensed worker<sup>53</sup> who might have been fifteen-year-old high school sophomore Ashley Baldwin. Had I sought (some)<sup>54</sup> services at Gosnell's

49. *Id.* at 104.

50. See, e.g., FOOD RESEARCH AND ACTION CTR., FOOD HARDSHIP IN AMERICA – 2010: DATA FOR THE NATION, STATES, 100 MSAs, AND EVERY CONGRESSIONAL DISTRICT 6-7 (2011) available at [http://frac.org/wp-content/uploads/2011/03/food\\_hardship\\_report\\_mar2011.pdf](http://frac.org/wp-content/uploads/2011/03/food_hardship_report_mar2011.pdf) (ranking congressional districts in order of food hardship and including Pennsylvania's First Congressional District, which encompasses part of Lancaster Avenue corridor, as congressional district with fourth highest food-hardship risk nationwide).

51. See Report of the Grand Jury, *supra* note 25, app. C.

52. See *id.* app. B.

53. See *id.* at 23-24 (noting that “[e]mployees at the Women's Medical Society] knew that Gosnell chose unlicensed, untrained, and unsupervised workers to anesthetize his abortion patients, and that the drugs, in accordance with his office procedure, were administered in the doctor's absence”).

54. Certain services provided by Gosnell might be covered by my medical benefits package, although my insurance likely does not cover abortion. See generally *Restricting Insurance Coverage of Abortion*, STATE POLICIES IN BRIEF (Guttmacher Inst., New York, N.Y.), Mar. 22, 2012, available at [http://www.guttmacher.org/state-center/spibs/spib\\_RICA.pdf](http://www.guttmacher.org/state-center/spibs/spib_RICA.pdf). A federally supported study conducted by the Guttmacher Institute found that in 2002, 87% of typical employer-based insurance policies covered abortions in more than just very limited circumstances (such as rape and incest, or to protect the woman's life). See *Memo on Private Insurance Coverage of Abortion*, GUTTMACHER INST. (Jan. 19, 2011), <http://www.guttmacher.org/media/inthenews/2011/01/19/index.html>. However,

[t]he Kaiser Family Foundation found that 46% of covered workers had coverage for abortion; the data were released as part of Kaiser's 2003 Annual Employer Health Benefits Survey. Another iteration of that survey,

clinic, as occasionally economically privileged white women did,<sup>55</sup> I would have been able to claim at least some of the fee from my medical insurance provider or my Flexible Spending Account.

But the poor women of color who characteristically suffered butchery at the hands of Gosnell and his staff generally paid cash,<sup>56</sup> and were unlikely to be medically insured.<sup>57</sup> Poverty and the concomitant risk of not having health insurance have a significant link with the decision to seek an abortion:

Contraceptive use is a key predictor of women's recourse to abortion. The very small group of American women who are at risk of experiencing an unintended pregnancy but are not using contraceptives account for almost half of all abortions. Many of these women did not think they would get pregnant or had concerns about contraceptive methods. The remainder of abortions occur among the much larger group of women who were using contraceptives in the month they became pregnant. Many of these women report difficulty using contraceptives consistently.<sup>58</sup>

“About half of unintended pregnancies occur among the 11% of women who are at risk but are not using contraceptives. Most of these women have practiced contraception in the past.”<sup>59</sup> Gosnell's illicit abortion prac-

from 2010, found that three in 10 employers said they covered elective abortion, but the 2010 survey had a far higher rate of employers who could not or would not answer the question (71% in 2010 vs. 26% in 2003).

*Id.* The Affordable Care Act leaves private coverage of abortions largely untouched. *See id.* (“[T]he health care reform law passed by Congress in 2010—the Affordable Care Act (ACA)—does not mandate abortion coverage, either now or in the future. Rather, it maintains the legal status quo, under which insurance companies decide whether abortion will be covered in the plans they offer.”). However, if health plans on exchanges offer abortion coverage, “subscribers who get federal subsidies will have to make separate premium payments for the coverage. States can prohibit abortion coverage.” *How the Health Care Overhaul Could Affect You*, N.Y. TIMES, Mar. 21, 2010, <http://www.nytimes.com/interactive/2010/03/21/us/health-care-reform.html>. It has been argued that this will be a disincentive to insurance providers to provide abortion coverage. *See, e.g., Memo on Private Insurance Coverage of Abortion, supra.*

55. *See Report of the Grand Jury, supra* note 25, at 61-62. Had I done so, Gosnell, rather than an untrained staff member, would have administered anesthesia to me had I sought it, as he did only for white patients. I would not have shared filthy waiting rooms which the black and Asian women who formed a large part of Gosnell's clientele were relegated to.

56. *See id.* at 23, 28.

57. This can be inferred from their poverty and their cash payments for abortions.

58. GUTTMACHER INST., STATE FACTS ABOUT ABORTION: PENNSYLVANIA I (2011), available at <http://www.guttmacher.org/pubs/sfaa/pdf/pennsylvania.pdf>.

59. *Facts on Induced Abortion in the United States*, IN BRIEF (Guttmacher Inst., New York, N.Y.), Aug. 2011, at 2, available at [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.pdf](http://www.guttmacher.org/pubs/fb_induced_abortion.pdf).

tice was significantly patronized by black and Asian women: “[e]ight percent of women who have abortions have never used a method of birth control; nonuse is greatest among those who are young, poor, black, Hispanic or less educated.”<sup>60</sup> As the director of government affairs at the Guttmacher Institute puts it,

The truth is that behind virtually every abortion is an unintended pregnancy. . . . Not surprisingly, the variation in abortion rates across racial and ethnic groups relates directly to the variation in the unintended pregnancy rates across those same groups.

Black women are not alone in having disproportionately high unintended pregnancy and abortion rates. The abortion rate among Hispanic women, for example, although not as high as the rate among black women, is double the rate among whites. . . . Black women’s unintended pregnancy rates are the highest of all. These higher unintended pregnancy rates reflect the particular difficulties that many women in minority communities face in accessing high-quality contraceptive services and in using their chosen method of birth control consistently and effectively over long periods of time. Moreover, these realities must be seen in a larger context in which significant racial and ethnic disparities persist for a wide range of health outcomes, from diabetes to heart disease to breast and cervical cancer to sexually transmitted infections (STI), including HIV.

.....

The disparities in unintended pregnancy rates result mainly from similar disparities in access to and effective use of contraceptives. As of 2002, 15% of black women at risk of unintended pregnancy (i.e., those who are sexually active, fertile and not wanting to be pregnant) were not practicing contraception, compared with 12% and 9% of their Hispanic and white counterparts, respectively. These figures—and the disparities among them—are significant given that, nationally, half of all unintended pregnancies result from the small proportion of women who are at risk but not using contraceptives.

.....

. . . Geographic access to services is a factor for some women; however, for many, it is more a matter of being able to afford the more effective—usually more expensive—prescription methods.

Beyond geographic and financial access, life events such as relationship changes, moving or personal crises can have a direct impact on method continuation. Such events are be [sic] more common for low-income and minority women than for others, and may contribute to unstable life situations where consistent

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60. *Id.* at 1-2.

use of contraceptives is lower priority than simply getting by. In addition, a woman's frustration with a birth control method can result in her skipping pills or not using condoms every time. Minority women, women who are poor and women with little education are more likely than women overall to report dissatisfaction with either their contraceptive method or provider. Cultural and linguistic barriers also can contribute to difficulties in method continuation.<sup>61</sup>

One nagging question that the grand jury report leaves only partly answered was how Gosnell was able to fly under the radar of law enforcement and regulators for so long, especially as Karnamaya Mongar was not the first woman to die from the truly inhumane carelessness with which Gosnell and his staff operated.<sup>62</sup> He was apparently widely known on the grapevine of those in the Philadelphia and Mid-Atlantic medical and abortion clinic world who referred patients to him to run a practice that specialized in that rarest of abortion specialties: late-term abortions.<sup>63</sup> Indeed, it was not Mongar's death that brought him to the attention of the authorities. Rather, a raid that was the culmination of a joint federal and local law enforcement investigation into his Oxycontin trafficking indirectly alerted authorities to her case.<sup>64</sup>

Part of the absence of attention paid to Gosnell was governmental.<sup>65</sup> The years I spent professionally investigating institutionalized corruption make me constitutionally suspicious of failures to implement regulation of—let alone criminally investigate—flagrantly unlawful businesses which make millions for their owners, particularly when, as in this case, whistles had been blown.<sup>66</sup> Yet the grand jury report paints a compelling picture of regulators abandoning their duties<sup>67</sup> and falling asleep at the wheel,<sup>68</sup> and of successive governments—both Republican and Democratic—wanting to duck the political bullet they deemed monitoring the operation of abortion clinics to be.<sup>69</sup> That Pennsylvania's abortion clinic-regulation statute, amended in the wake of Gosnell's arrest and charging, includes a provision allowing for the new standards to be waived, and that the state Health Department's announced policy of implementing applications for

61. Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL'Y REV. 2, 2-4 (2008), available at <http://www.guttmacher.org/pubs/gpr/11/3/gpr110302.pdf>.

62. See Report of the Grand Jury, *supra* note 25, at 25 (noting that “[a]t least one other mother died following an abortion in which Gosnell punctured her uterus and then sent her home”).

63. See *id.* at 27.

64. See *id.* at 19-20.

65. See *id.* at 137-212.

66. See *id.* at 143-46.

67. See *id.* at 145-48.

68. See *id.* at 138-43.

69. See *id.* at 147-48.

licensing under the new regulatory regime “on a case-by-case basis,”<sup>70</sup> raise continuing concerns when read against this history of institutionalized abuse of discretion, however. Additionally, when one considers how long Gosnell was able to operate his high-profit chanel house, where abortion seekers from at least as far away as Virginia learned they could get an illegal post-twenty-four-week abortion, one wonders where the anti-abortion protestors were. While protestors readily find legal abortion providers,<sup>71</sup> I can find no evidence that Gosnell’s practice was picketed by pro-life groups, as, for example, was the clinic of the late Dr. George Tiller.<sup>72</sup> How did Gosnell, who specialized in illegal late-term abortions,<sup>73</sup> not attract the attention of those anti-abortion activists who murdered Dr. Barnett Slepian, clinic security guard Robert Sanderson, clinic receptionists Shannon Lowney and Lee Ann Nichols, Dr. John Britton and clinic escort James Barrett, and Dr. David Gunn,<sup>74</sup> and more recently, Tiller, one of the few doctors in the nation willing to perform legal late-term abortions?<sup>75</sup>

After all, in South Dakota earlier this year, the following legislation, justifying the killing of abortion providers and apparently of women seeking abortion, was passed out of Committee:

FOR AN ACT ENTITLED, An Act to expand the definition of justifiable homicide to provide for the protection of certain unborn children.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 22-16-34 be amended to read as follows:

22-16-34. Homicide is justifiable if committed by any person while resisting any attempt to murder such person, *or to harm the unborn child of such person in a manner and to a degree likely to result in the death of the unborn child*, or to commit any felony upon him or her, or upon or in any dwelling house in which such person is.

Section 2. That § 22-16-35 be amended to read as follows:

70. See Levy, *supra* note 24, at B3.

71. *Picket, Vigil, Sidewalk Counseling Sites*, CALENDAR FOR LIFE, <http://www.calendarforlife.org/librarycfl/VigilLibrary01.htm> (last visited Feb. 29, 2012).

72. See Joe Stumpe & Monica Davey, *Abortion Doctor Slain by Gunman in Kansas Church*, N.Y. TIMES, June 1, 2009, at A1.

73. See Report of the Grand Jury, *supra* note 25, at 27-28.

74. See NARAL PRO-CHOICE AM. FOUND., ANTI-CHOICE VIOLENCE AND INTIMIDATION 2-3 (2010), available at <http://www.prochoiceamerica.org/assets/files/abortion-access-to-abortion-violence.pdf>.

75. I use the term to distinguish Tiller’s practice from Gosnell’s, while registering that critics of Tiller have made similar allegations to some of those leveled at Gosnell, with the exception of neonaticide.



22-16-35. Homicide is justifiable if committed by any person in the lawful defense of such person, or of his or her husband, wife, parent, child, master, mistress, or servant, *or the unborn child of any such enumerated person*, if there is reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and imminent danger of such design being accomplished.<sup>76</sup>

I will return to this legislative initiative and another, less obviously homicidal, yet also failed one from Mississippi that is nonetheless being widely promoted nationally as I conclude this Essay. But then I suspect that backyard abortionists rarely were or are so picketed or targeted by community-based vigilantes: they are providing a service that only the poor and desperate in their local community or communities of poverty or color (linked to them by the informational capillary of desperation) seek, and that desperation keeps communities quiet and the backyard abortionists, licensed or unlicensed, who serve them invisible to the authorities, otherwise protected. But other questions persist.

Why does a woman who can afford and obtain a legal abortion by competent, licensed medical practitioners with expertise in the operation, in desperate need or moral peril (depending on where one stands on complex questions of individual morality and free will and patriarchal power and economic inequality and racial, socioeconomic, and sex equality), come to butchers like Gosnell?<sup>77</sup> Why do they come so late in their pregnancies?

Let me start with the woman, now dead, in the absence of whose desperation the law would not apparently have caught up with Kermit Gosnell. *En passant*, let me address the practices of those few doctors who are willing to perform late-term abortions, legal or illegal—a group significantly over-represented among victims of contemporary domestic terrorism—and the types of conditions under which such doctors, unlike Kermit Gosnell or the imaginary doctor who might have removed the unsightly bulge in prom-girl's dress, agree to perform such surgery. Gosnell was, to put it bluntly, no more than a medically licensed backyard abortionist, as my reading of the grand jury report that led to his charging has suggested. He was also one of the few licensed medical practitioners in the country who would perform third-trimester abortions.<sup>78</sup>

Some of his brethren are clearly arrant scofflaws, careless of their patients' safety, evidently in it for the money. Take late-term abortionist

76. H.B. 1171, 2011 Leg. Assemb., 86th Sess. (S.D. 2011), *available at* <http://legis.state.sd.us/sessions/2011/Bills/HB1171HJU.pdf>.

77. *See* Report of the Grand Jury, *supra* note 25, at 24-25 (noting that Gosnell's employees certainly did not have adequate training).

78. *See id.* at 27-28; *see also* Palmer, *supra* note 37.

Steven Brigham,<sup>79</sup> whose history of injuring women led to the termination of his licenses to practice medicine in Pennsylvania, New York, and Florida and the suspension of his license in New Jersey.<sup>80</sup> He also flouted the law in other ways: in April 2010, a \$234,536 lien for unpaid payroll taxes was imposed on him by the IRS.<sup>81</sup> His most recent business operation involved performing late-term abortions, putatively in Maryland, which has some of the least restrictive laws on late-term abortions in the nation,<sup>82</sup> but where Brigham is not licensed yet maintains an office.

With his New Jersey medical license reinstated, he evaded the restrictions that New Jersey's ban on late-term abortions (none of his N.J. clinics can meet the standards for performing abortions after the fourteenth week of pregnancy). Notwithstanding his lack of a Maryland medical license, he continued to put women's lives and health at risk. He developed a scheme whereby abortions were begun in New Jersey by means of inserting rods designed to widen the cervix (a practice not covered by New Jersey abortion law), and then led caravans of women, each following him in a separate car, to his Maryland clinics, where Maryland-licensed surrogates performed the late-term abortions the patients sought.

In one such case, an eighteen-year-old woman, twenty-one weeks pregnant, having had dilating rods inserted in her cervix by Brigham on August 12, followed him to Maryland on August 13, where he supervised a Maryland-licensed family physician in performing an abortion which left the woman with a perforated uterus and cuts in the walls of her bowel and vagina, bleeding, and semiconscious. Brigham then put the woman in the back of a rental car and drove her to a nearby hospital, where he and his surrogate effectively dumped her, being evasive with hospital staff in the process,<sup>83</sup> the surrogate having earlier refused to call an ambulance at the request of the woman's mother and boyfriend. Her injuries were sufficiently severe and complex for her to be airlifted to Johns Hopkins.

As in Gosnell's case, the subsequent clinic raids failed to find the patient records they sought, but they did find evidence that abortions had been performed on fetuses thirty-six weeks in age, just two weeks before the full term of a normal pregnancy. Brigham and Nicola Riley, the surrogate who performed this abortion, have been charged with varying counts of murder and conspiracy to commit murder under Maryland's fetal homicide law based on the finding of thirty-five "later-term fetuses, about 20 to

79. See Marie McCullough, *Abortion Provider Steven Brigham Charged with Murder in Maryland*, PHILA. INQUIRER, Dec. 31, 2011, at A1.

80. *See id.*

81. *See id.*

82. *Cf.* Peter Hermann, *Doctors in Botched Elkton Abortion Face Murder Charges*, BALTIMORE SUN, Dec. 30, 2011, <http://www.baltimoresun.com/news/breaking/bs-md-elkton-abortion-arrests-20111230,0,3963352.story> ("Maryland is one of 38 states with a fetal homicide law. But unlike many, Maryland does not define when it is too late to perform an abortion.")

83. *See id.*

35 weeks old, in a freezer” at the doctors’ Elkton clinic.<sup>84</sup> The murder charges also relate to the seriously injured victim’s 21.5-week-old fetus.<sup>85</sup>

Then there are the “legal” late-term abortionists, who are depicted as—and often depict themselves as—crusaders. Their work is controversial not merely because they abort viable fetuses, but because the legal rubric under which they do so is regarded by anti-abortionists as a cipher for abortion on demand. The late George Tiller, developer of the outpatient labor induction abortion technique, was renowned for his ability to ensure maternal safety in the case of labor inductions.<sup>86</sup> Other doctors and indeed hospitals referred patients to Tiller because of his expertise in “treating the emotional and physical strain” of these abortions.<sup>87</sup> Tiller himself claimed that most of the abortions he performed (which were more or less exclusively late-term) were due to the health of the mother, with the balance due to fetal abnormality.<sup>88</sup> A significant number of the fetuses were viable; in the case of every viable fetus, maternal health was the reason for the abortion.<sup>89</sup>

Most of the maternal health problems, which made up the significant majority of the late-term abortions performed by Tiller, whether or not the fetus was viable at the time of the abortion, were “mental health” problems.<sup>90</sup> It is this diagnosis which, as indicated *supra*, anti-abortionists regard as allowing abortion on demand, and to which Tiller obliquely referred to when he said “it is unplanned and unwanted motherhood that shipwrecks women’s lives, not unplanned pregnancy.”<sup>91</sup> Most of Tiller’s patients were out-of-state referrals.<sup>92</sup> LeRoy Carhart, on the other hand, discussing his recent decision to travel from his home state of Nebraska to

84. Peter Hermann, *2 Doctors Face Murder Charges under State Fetal Homicide Law*, WASH. POST., Dec. 31, 2011, at B4. The fetuses had apparently been injected with feticidal agents in Voorhees, N.J., and then were removed in Elkton, MD. See Marie McCullough, *Murder Charges for Abortion Doctor*, PHILA. INQUIRER, Jan. 7, 2012, at B1.

85. See McCullough, *supra* note 84, at B4.

86. See W. Martin Haskell et al., *Surgical Abortion After the First Trimester*, in A CLINICIAN’S GUIDE TO MEDICAL AND SURGICAL ABORTION ch. 10 (Maureen Paul et al. eds., 1999), available at [http://nafresources.org/textbook/pdf/Chapter\\_10.pdf](http://nafresources.org/textbook/pdf/Chapter_10.pdf).

87. Palmer, *supra* note 37.

88. See Julie-Ann Davies, *Abortionist Backs Sex Selection*, AGE (Austl.), Nov. 15, 1999, at 3.

89. See Brian D. Parks, *Statistics on Post-viability Abortions Performed by George Tiller*, ABORTION ESSAY (July 13, 2002), <http://www.abortionessay.com/files/Tiller.html>.

90. See *id.*

91. *Id.* (citation omitted) (quoting George R. Tiller).

92. See *id.* (estimating that 97% of Tiller’s patients came from outside Kansas).

Maryland to perform abortions, claims that “severe fetal abnormalities” are the reason for women turning to him for late-term abortions.<sup>93</sup>

As with Gosnell, although Tiller’s skill level was clearly vastly superior to Gosnell’s and Tiller operated inside the law, one wonders why these women were candidates for late-term abortion if they could have obtained lawful abortions before undergoing the grueling horror of partial-birth abortions, of abortions Gosnell-style, or, after the Federal Partial-Birth Abortion Ban Act of 2003, of digoxin induction. The statistics give some indication. Many of Tiller’s patients were young: a staggering 217 in 1999 were under the age of twenty.<sup>94</sup> This fits with national statistics: 18% of those who have abortions in the United States are teenagers, and “[w]omen in their 20s account for more than half of all abortions.”<sup>95</sup> A significant majority are also poor.<sup>96</sup> Tiller claimed:

We have made higher education possible. . . . We have helped correct some of the results of rape and incest. We have helped battered women escape to a safer life. We have made recovery from chemical dependency possible. We have helped women and families struggle to save their unwell, unborn child a lifetime of pain.<sup>97</sup>

What else led them to travel to Kansas, or indeed to West Philadelphia, so late in their pregnancies? Perhaps a lack of access to legal abortion in their local area? Eighty-seven percent of United States counties lacked an abortion provider in 2008.<sup>98</sup> And the history of the personnel who performed abortions and the locations where they were practiced post-*Roe* is signal: The practice moved out of hospitals into clinics, and medical schools stopped teaching the procedure because it was stigmatized and because it was dangerous.<sup>99</sup> There were murders of abortion providers and clinic staffers, attempted murders, arsons, bombings and bomb threats, threats to an abortion-provider’s wife, and other intimidation to contend with.<sup>100</sup>

93. See Lena H. Sun, *From Abortion Provider to Activist*, WASH. POST., July 25, 2011, at A1. Carhart’s Maryland abortions are performed between eighteen and twenty-four weeks and may be performed as late as thirty-two weeks. *Id.* at A8.

94. See Parks, *supra* note 89.

95. *Facts on Induced Abortion in the United States*, *supra* note 59, at 1.

96. See *id.* (noting that “[42%] of women obtaining abortions have incomes below 100% of the federal poverty level” and 27% “have incomes between 100-199% of the federal poverty level”).

97. David Barstow, *An Abortion Battle, Fought to the Death*, N.Y. TIMES, July 26, 2009, at A1 (internal quotation marks omitted).

98. See *Facts on Induced Abortion in the United States*, *supra* note 59, at 2.

99. See generally Emily Bazelon, *The New Abortion Providers*, N.Y. TIMES, July 18, 2010, at MM30.

100. See NARAL PRO-CHOICE AM. FOUND., *supra* note 74, at 3-7 (detailing threats to abortion providers and their family members). This intimidation included chemical attacks and anthrax threats. See *id.* at 5-7.

One pro-life organization sent a “joke” booklet to over 33,000 medical students “recommend[ing] that physicians who provide abortion care should be shot, attacked by dogs, and buried in concrete,” and the organization has begun distributing a pamphlet to potential providers of RU 486 threatening that “[p]hysicians who perform chemical abortions will be identified, labeled, exposed, stigmatized, ostracized, and in every way treated exactly the same as conventional abortionists.”<sup>101</sup> Even after pushback about the low training rates, political will was rallied to limit its effect via federal legislation: Only about half the nation’s OB/GYN residency programs offer abortion training.<sup>102</sup> For another 40%, it is elective.<sup>103</sup>

Even so, why pay so much money to a butcher like Gosnell and, as in Karnamaya Mongar’s case, travel so far to find him? Early surgical abortions are relatively cheap and relatively easy to secure, provided that one has physical access to a clinic and can meet the relevant state’s requirement for a lawful abortion. In 2009, \$451 was the average charge for a “nonhospital abortion with local anesthesia at 10 weeks gestation.”<sup>104</sup> While 95% of abortion providers “offer abortion at eight weeks from the last menstrual period[,] . . . [o]nly 11% of all abortion providers offer abortions at 24 weeks.”<sup>105</sup> Since the FDA approval of RU 486, 59% of abortion providers offered it, with 9% or more only providing early-medication abortion. In 2008, early-medication abortion made up “about one-quarter of abortions before nine weeks’ gestation.”<sup>106</sup>

One thing we can conclude from all of this is that Gosnell’s practice, like the incidence of illegal abortion in the United States before *Roe*, is evidence that banning or legislatively limiting the availability of legal abortions does not stop women from seeking illegal abortions or unscrupulous providers from providing them, often in conditions that put poor women at a disproportionate risk of death or maiming.<sup>107</sup> It is also evident that women who seek late-term abortions are likely to be desperate. And indeed the statistics bear that out: “Teens are more likely than older women to delay having an abortion until after 15 weeks of pregnancy,” and “[f]ifty-eight percent of abortion patients say they would have liked to have had their abortion earlier. Nearly 60% of women who experienced a delay in obtaining an abortion cite the time it took to make arrangements and raise money.”<sup>108</sup> We know something, then, about who has abortions, particularly late-term abortions, in the post-*Roe* United States. The distinctive

101. *Id.* at 9 (quoting pamphlet distributed by Life Dynamics, Inc.).

102. *See* Bazelon, *supra* note 99.

103. *See id.*

104. *Facts on Induced Abortion in the United States*, *supra* note 59, at 1.

105. *Id.*

106. *Id.*

107. LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court’s Ruling* 3, 7-8 (2010).

108. *Facts on Induced Abortion in the United States*, *supra* note 59, at 2.

history of U.S. abortion law should also inform the frame of reference through which we seek to understand what drove women to Gosnell, to Brigham, to the backyarders likely to be operating throughout the United States whether licensed or not, and what drove some women to self-abort “with medications like misoprostal (which induces painful contractions and eventual delivery) or herbal concoctions,” even in jurisdictions like New York where legal abortions can be obtained. We should note, in the cases of women who self-abort, the effects of being both uninsured and unable to afford the large cash payments Gosnell’s patients routinely made, or of possessing a cultural “mistrust [of] the medical system.”<sup>109</sup> One of this last group is Yaribely Almonte, who has recently been charged in New York with self-abortion of a male fetus.<sup>110</sup> But before we turn to history, what can the woman who put an end to Gosnell’s practice by paying with her life add to the story?

Karnamaya Mongar gazes out from a page of the grand jury report.<sup>111</sup> A smile hovers around her lips. Her husband’s hand is draped affectionately over the shoulder of her simple print dress. They are both thin and look tired. This is unsurprising. She had arrived in the United States only four months before her death. She died as a result of a fatal drug overdose at Gosnell’s clinic, which followed its usual procedure for aborting a fetus as developed as Mrs. Mongar’s. Mrs. Mongar was nineteen-weeks pregnant, within the second trimester, and thus not subject to the extra regulations that are required for a request for the abortion of a fetus at twenty-four or more weeks from gestation—the viability standard.

Before Mrs. Mongar arrived in the United States with her husband Ash, three children, and one grandchild, she had spent the preceding twenty years in a refugee camp in Nepal.<sup>112</sup> The Mongar family and many of their Bhutanese countrymen and women had been expelled from Bhutan following pro-democracy agitation, and the Mongar family was finally settled in Virginia on July 19, 2009, as the result of a humanitarian resettlement initiative.<sup>113</sup> Ash found a job in a chicken factory.<sup>114</sup> It is unclear at what time in this resettlement saga Mrs. Mongar became pregnant; but, at eighteen weeks and accompanied by a family friend, she sought an abortion at a clinic in Virginia and one in Washington, D.C., neither of which would perform a second-trimester abortion. Those clinics referred her to Gosnell, who “had a reputation for performing abortions regardless of gestational age.”<sup>115</sup>

109. Anemona Hartocollis, *After Fetus Is Found in Trash, a Rare Charge of Self-Abortion*, N.Y. TIMES, Dec. 2, 2011, at A32.

110. *See id.*

111. *See* Report of the Grand Jury, *supra* note 25, at 117.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 118.

We do not know why Karnamaya Mongar sought an abortion. We do know:

[T]hree-fourths [of American women] cite concern for or responsibility to other individuals [as their reason for seeking an abortion]; three-fourths say they cannot afford a child; three-fourths say that having a baby would interfere with work, school or the ability to care for dependants; and half say they do not want to be a single parent or are having problems with their husband or partner.<sup>116</sup>

We also know that very young women and poor women disproportionately seek abortions and that 45% of women who seek abortions are single.<sup>117</sup> Black women and Hispanic women seek abortions at rates in excess of their representation in the community—30% and 25%, respectively<sup>118</sup>—and black and Hispanic women experience unintended pregnancies at rates of 64% and 54%, respectively.

We also know that some other groups of women are at higher risk for finding themselves pregnant in situations where any pregnancy that results, like the sex that produces it, is compelled. College women in the United States, for example, experience sexual victimization at high rates.<sup>119</sup> The recent prosecution of a member of Northern Virginia’s “violent Mara Salvatrucha street gang” for prostituting a twelve-year-old runaway, which followed on the heels of a conviction of another gang member for prostituting two juveniles,<sup>120</sup> read against Philippe Bourgois’ social anthropology of a criminal gang subculture,<sup>121</sup> suggests there are places in both our colleges and in our cities where girls and very young women are subject to sexual coercion that is so normalized that they may not understand it as constituting rape.

If that is the picture now, who had abortions in the tumultuous years leading up to *Roe*? “Between 1951 and 1962, over 92 percent of women who received hospital abortions in New York City were white, while over three-quarters of those who died from illegal abortions in the city were women of color.”<sup>122</sup> In 1967, the Clergy Statement on Abortion Law Reform and Consultation Service on Abortion reported that a “1965 report shows that 94% of abortion deaths in New York City occurred among Ne-

116. *Facts on Induced Abortion in the United States*, *supra* note 59, at 1.

117. *See id.*

118. *Id.*

119. *See generally* BONNIE S. FISHER ET AL., U.S. DEP’T OF JUSTICE, NCJ 182369, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

120. Victor Zapana, *Gang Member Convicted of Prostituting Girl*, 12, WASH. POST., July 29, 2011, at B3.

121. *See generally* PHILIPPE BOURGOIS, IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO 213-317 (2d ed. 2003).

122. Susan Brownmiller, *Everywoman’s Abortions: “The Oppressor Is Man”*, in GREENHOUSE & SIEGEL, *supra* note 107, at 127, 127.

groes and Puerto Ricans.”<sup>123</sup> In 1969, Frances Beal reported that “[n]early half of the child-bearing deaths in New York City were attributed to abortion alone and out of these, 79% are among non-whites and Puerto Rican women.”<sup>124</sup> College-level women were also over-represented among those seeking abortions in the late 1950s.<sup>125</sup> The collateral “price” of an abortion, frequently exacted on women of color<sup>126</sup> but not exclusively so,<sup>127</sup> was that she agree to be sterilized. One doctor testified:

That [the doctor] . . . had to decline almost daily requests over the years, many of which were medically or psychiatrically indicated but illegal under the law; that many of the pregnant women turned away later had illegal abortions by unqualified persons; that [the doctor] has had to treat many women, including some of those [she] declined to abort, who were infected, some of whom were in serious Danger [sic] of death.<sup>128</sup>

Many of the early efforts to procure safe abortions for women were available to the moneyed. For example, legal abortions were available to American women in Japan,<sup>129</sup> and Yale founded an early Sex Counseling Service for its students in 1969 that arranged for safe medical abortions.<sup>130</sup>

### III. COMPARATIVE AND HISTORICAL PERSPECTIVES

Let me frame the concluding, constitutional section of my engagement with Professor Calhoun by suggesting that the social harm represented by Kermit Gosnell has to do with the constitutionalization of an increasingly limited—and indeed in my judgment constitutionally fragile—“right” to an abortion under the differing statutory schemes adopted by the states after *Roe*,<sup>131</sup> and adjusted in the wake of *Roe*’s progeny, in-

123. Clergy Statement on Abortion Law Reform and Consultation Service on Abortion (1967), *reprinted in* GREENHOUSE & SIEGEL, *supra* note 107, at 29, 30.

124. Frances Beal, *Black Women’s Manifesto; Double Jeopardy: To Be Black and Female*, *reprinted in* GREENHOUSE & SIEGEL, *supra* note 107, at 49, 52.

125. Mary Steichen Calderone, *Illegal Abortion as a Public Health Problem*, *in* GREENHOUSE & SIEGEL, *supra* note 107, at 22, 22.

126. *See* Beal, *supra* note 124, at 51 (noting that continuation of welfare benefits for poor women of color seeking abortions was often made contingent on sterilization).

127. *See* Brownmiller, *supra* note 122, at 129.

128. Affidavit of Dr. Jane E. Hodgson, *State v. Hodgson* (D. Ct. Minn. 2000), *reprinted in* GREENHOUSE & SIEGEL, *supra* note 107, at 21, 21.

129. *See generally* GREENHOUSE & SIEGEL, *supra* note 107, at 8-11 (reprinting “list of instructions for getting an abortion in Japan” from unknown source).

130. *See generally* Phillip M. Sarel & Lorna J. Sarrel, A Sex Counseling Service for College Students, *reprinted in* GREENHOUSE & SIEGEL, *supra* note 107, at 58; Pamphlet, Student Comm. on Human Sexuality, Sex and the Yale Student (1970), *reprinted in* GREENHOUSE & SIEGEL, *supra* note 107, at 63.

131. *See generally* *Roe v. Wade*, 410 U.S. 113 (1973) (establishing abortion right emanating from constitutionally derived right to personal privacy and generating trimester-based metric for constitutionality of state regulation of abortion, with its particular emphases on first trimester and fetal viability).



cluding *Webster v. Reproductive Health Services*,<sup>132</sup> *Hodgson v. Minnesota*,<sup>133</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>134</sup> *Stenberg v. Carhart*,<sup>135</sup> and *Gonzales v. Carhart*.<sup>136</sup> It is, thus, distinctively American: the late Justice Brennan famously spoke of our national habit of turning social problems into legal problems for resolution by the Supreme Court.<sup>137</sup> It

132. 492 U.S. 490, 520 (1989) (conceding that *Roe*'s holding involved "a liberty interest protected by the Due Process Clause," rejecting *Roe*'s trimester system, and upholding state law that required testing for fetal viability before performing abortion after twentieth week of pregnancy).

133. 497 U.S. 417 (1990) (upholding two-parent notification law with judicial-bypass provision).

134. 505 U.S. 833, 879 (1992) (plurality opinion) (holding that before fetal viability, state law "may not prohibit any woman from making the ultimate decision to terminate her pregnancy"). A state may not impose an "undue burden" on a woman's right of reproductive choice, which would be constituted by a law whose "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability," but not by one which did "no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn [and does not constitute] . . . a substantial obstacle to the woman's exercise of the right to choose." *Id.* at 877-78.

135. 530 U.S. 914, 922 (2000) (finding unconstitutional Nebraska statute that banned partial-birth abortion on vagueness grounds and because, contrary to undue burden test articulated in *Casey*, it provided no exception for health of mother).

136. 550 U.S. 124, 133 (2007) (holding that Federal Partial-Birth Abortion Ban Act was constitutional). The Act outlawed "a variation on" the "usual second-trimester abortion procedure, 'dilation and evacuation,'" "intact dilation and extraction," or "dilation and extraction," which entailed the delivery of all of the fetus except the head:

"At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down).

"While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand.

"He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.

"[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.

"The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient."

*Id.* at 138 (alterations in original) (quoting H.R. REP. NO. 108-58, at 3 (2003)) (internal quotation marks omitted). The Court found that the Act furthered legitimate government interests, was not unconstitutionally vague, and did not "impose[] an undue burden on a woman's right to an abortion based on its overbreadth or lack of a health exception"; thus, it survived facial constitutional attack. *Id.* at 147, 161, 168.

137. William J. Brennan, Jr., Speech at the Georgetown University Text and Teaching Symposium (Oct. 12, 1985) ("[F]rom our beginnings, a most important consequence of the constitutionally created separation of powers has been the

is also identifiably American, as I will go on to suggest, as a distinctively problematic variant on the always-contestable incoherence that has defined the development of substantive due process doctrine, which unmoored constitutional law and threatened its claim to be law at all, let alone higher law, by bring it uncomfortably close to the illegitimacy that its entwinement with politics entails.

That proximity to politics was inevitable in this case. Linda Greenhouse and Reva B. Siegel construct a compelling history of the different political pressures that turned a steady stream of striking down state abortion bans on vagueness grounds<sup>138</sup> and the statutory liberalizing of abortion law regimes in some states<sup>139</sup> to a congeries of political pressure from bedfellows as strange as the Black Panthers, the Republican Party, the National Association of Evangelicals, and Pope Paul VI, which led to a movement in the opposite direction: passing increasingly restrictive abortion laws—as happened, for example, in California and New York. It is also no accident that the pushback against the liberalization of abortion laws that set the stage for *Roe* had as its backdrop the sexual revolution of the 1960s, a proximate cause of our present culture wars over sexuality. Reactions ranging from distaste to moral outrage to intimations of the end of civilization as we knew it accompanied what the sexual revolution and the availability of reliable contraceptives had wrought.

Distinctively American, too, was the litigation strategy adopted in *Roe*—to claim a constitutionalized status for the “individual liberty interest” in abortion unregulated by state criminal law—in that it emerged bearing the sublime American legal institutional pedigree of the fruits of a senior project of a law student at NYU which was subsequently published in the University of North Carolina’s *Law Review*.<sup>140</sup> It thus betrays our (legal educational and scholarly) exceptionalism. U.S. law reviews, unlike scholarly journals generally or legal scholarly journals elsewhere, do not peer review but base their publication decisions on the judgments of their student academic elite. Not only are law students, especially those at elite schools, the arbiters of scholarly merit, they are its measure too: a significant majority of the nation’s law professors graduated from a small number of elite law schools and have none of the scholarly research training characteristics of research-based doctorates.

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American habit, extraordinary to other democracies, of casting social, economic, philosophical and political questions in the form of law suits, in an attempt to secure ultimate resolution by the Supreme Court. In this way, important aspects of the most fundamental issues confronting our democracy may finally arrive in the Supreme Court for judicial determination. Not infrequently, these are the issues upon which contemporary society is most deeply divided. They arouse our deepest emotions.”).

138. See Linda Greenhouse, *Constitutional Question: Is There a Right to Abortion?*, reprinted in GREENHOUSE & SIEGEL, *supra* note 107, at 130, 132.

139. See generally Ruth Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, reprinted in GREENHOUSE & SIEGEL, *supra* note 107, at 121.

140. See Greenhouse, *supra* note 139, at 132-39.

I approach the depravity and inhumanity of the practices Kermit Gosnell, a licensed backyard abortionist, visited on women (mainly poor and of color, often young, almost always desperate, and who paid him in cash for abortions, which earned him millions) as a comparative constitutional lawyer, an historian of the American constitutional imaginary, and a student of the inequality that always already haunts my adopted country. As is perhaps typical in scholars from the land of my birth, I find myself always looking beyond national boundaries, to nations where selective abortion is practiced on female fetuses and to the fact that female babies are more frequently given up for adoption at birth in China than in Korea, where cultural constructions of shame and family honor mean that most Korean infants made available for international adoption are male. I watch as whole regions of rural India, say, experience a shortage of marriageable women<sup>141</sup> because of reductions in the female birth rate through a range of violent methods, including sex-selective abortion and infanticide, used to avoid paying dowries, resulting in trauma for the women<sup>142</sup> and in some cases polyandry as a local practice.<sup>143</sup> Abortion is, then, always a matter of gender relations under conditions of patriarchy, of money, and of power, as much as of law and morality, life and choice, and rights.

This global reflection is not meant to suggest that a markedly superior doctrinal result from the pro-life perspective to that achieved in *Roe* would necessarily have emerged had the strategists of the *Roe* doctrine looked outside the United States for sites to ground a constitutional right to abortion, if that was where they had been, uncharacteristically, looking. German abortion law, reflecting the particular string of events in Germany between 1933 and 1935 that gave rise to the development of modern international human rights law, enshrines a constitutional right to unborn life in its Basic Law<sup>144</sup> and thus recognizes the state's broad obligation to protect fetal life. It nonetheless decriminalizes abortion, provided it occurs within the first twelve weeks after conception, after counseling directed "to the protection of unborn life," and after a three-day wait unless the abortion is necessary for medical reasons or the pregnancy results from a

141. See generally Robert Kiener, *Gendercide Crisis: Can the Lethal Prejudice Against Girls Be Changed?*, 5 C.Q. GLOBAL RESEARCHER 473 (2011), available at <http://library.cqpress.com/globalresearcher/getpdf.php?file=cqgr20111004.pdf&PHPSESSID=lfjlm07hd0qbron4kbqsa2ihd6>.

142. See Eve Dwyer, *Unequal Sex Ratio, Bride Shortage & Marriage Migration* 4-10 (2010) (unpublished M.Sc. thesis, London School of Economics & Political Science), available at <http://www2.lse.ac.uk/anthropology/research/CCPN/publications/Dissertations/DissertationsCCP/24258.pdf>.

143. See, e.g., Sara Sidner, *Brothers Share Wife to Secure Family Land*, CNN.COM, Oct. 24, 2008, <http://edition.cnn.com/2008/WORLD/asiapcf/10/24/polygamy.investigation/index.html>.

144. Grundgesetz Für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I, at art. 2, para. 2, cl. 1 (Ger.), available at <http://www.iuscomp.org/gla/statutes/GG.htm>.

rape.<sup>145</sup> There may be in the German regime, however, some detail that might deter a desperate woman from resorting to a Gosnell. The 1993 German Constitutional Court decision on the 1992 post-reunification German abortion statute defined the state's obligation to "protect unborn life" as extending to

[f]inancial subsidies . . . so that women would not have to abort from fear of being unable to afford the child. The state was obliged to do more to protect women against educational and occupational disadvantages resulting from pregnancy and child rearing, especially considering the [constitutional obligation] to further the equal participation of men and women in working life. Social security law needed to take account of periods spent in uncompensated childrearing. Landlords could be forbidden to terminate leases due to increase in family size. Credit laws could be reformed to ease repayment burdens after the birth of a child. The state needed to do more to create a "child-friendly society," recognizing that the raising of children was a service parents perform to the common benefit.<sup>146</sup>

The hope for justifying a right to fetal life through borrowings from the laws of other nations bound by the European Convention on Human Rights, which enshrines a right to life, is even less promising. In Ireland—a signatory to the convention—events following a test-case over a fourteen-year-old impregnated by a friend's father resulted in a significant majority of the Irish population rejecting a proposed strong "right to life" amendment to the Irish constitution at the ballot box and voting to protect the rights of pregnant women seeking abortion to information about abortion and to travel outside Ireland to obtain it.<sup>147</sup>

So, too, Americanness is inscribed in the fact that abortion-rights proponents of the *Roe* era focused, discursively, on a distinctively inward-looking national ideological battle. The authors of the label pro-choice and the slogan "Free Abortion on Demand" chosen by "woman's rights"<sup>148</sup> proponents were activists so apparently deaf to the power of metaphor, and lacking a litigator's ear for echoes from the future, that myth has placed the latter slogan's authorship in the pens of those who speak from

145. See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 136 (2d ed. 2006) (discussing and quoting German law).

146. Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273, 281 (1995) (footnotes omitted).

147. See JACKSON & TUSHNET, *supra* note 145, at 201.

148. See Memorandum from Jimmie Kimmey (Dec. 1972), in GREENHOUSE & SIEGEL, *supra* note 107, at 33 (discussing Kimmey's preferred slogan for the pro-life movement: "Right to Choose").

the morally compelling place of life<sup>149</sup> over what at times seems the moral bankruptcy of choice.<sup>150</sup>

It seems to the constitutionalist in me, whatever our position on the morality of abortion, that we have two choices if we want to stop Kermit Gosnell and his ilk, licensed or otherwise, from committing neonaticide; killing, infecting, and maiming women; and performing illegal abortions. The first is to leave it to the states and the people to make their voices heard at the ballot box and reflected in legislation. Some of those individuals spoke out in the era before *Roe*, and before the organized backlash against early laws liberalizing legal abortion started, who were sickened and saddened enough by the killing and maiming of poor women of color, college students, and women who would otherwise have been compelled to give birth to and care for life for children with injuries caused by German measles or Thalidomide to legislate to prevent it. Women in Mississippi recently voted down a constitutional provision<sup>151</sup> that enshrines a right to human personhood that begins at conception, one of many current state initiatives to include such sentiments.<sup>152</sup>

A federal constitutional doctrinal alternative to *Roe*'s always-inferentially illegitimate and increasingly fragile rule might also be found. In some of the early suits challenging the constitutionality of state abortion laws in the United States, theories other than vagueness or the substantive due process-derived privacy right saw the light of day, including an economic equal protection argument<sup>153</sup> and a liberty argument not tied to privacy.<sup>154</sup> There is a more compelling textual hook in the Bill of Rights than the Fifth and Fourteenth Amendments' Due Process Clause for a constitutional doctrine equal to Kermit Gosnell and his ilk. Linked both to equality (for all the constitutional vulnerability of economic equality claims) and liberty, that source is the Thirteenth Amendment's ban on badges and incidents of slavery.

Although the Court, having read that provision narrowly, has never found that forced reproduction falls within the definitional aegis of that phrase, both historians and thinkers, including the Rev. Dr. Martin Luther King, Jr. and Bev Cole, have made the link. King excoriated forced reproduction as a constitutional scandal and a badge and incident of slavery both:

149. See Betty Friedan, Call to Women's Strike for Equality (Aug. 26, 1970), reprinted in GREENHOUSE & SIEGEL, *supra* note 107, at 41, 44.

150. "Choice," in this context, connotes willfulness, changeability, consumption, which are all stereotypically negative feminine attributes.

151. See Emily Wagster Pettus, *Women Lead Charge Against Miss. Personhood Measure*, PHILA. INQUIRER, Nov. 10, 2011, at A21.

152. See Esmé E. Deprez, *Abortion Curb Near Passage*, PHILA. INQUIRER, Nov. 5, 2011, at A6.

153. See *Women vs. Connecticut Organizing Pamphlet* (Nov. 1970), reprinted in GREENHOUSE & SIEGEL, *supra* note 107, at 167, 174.

154. See *id.* at 173.

The Negro family for three hundred years has been on the tracks of the racing locomotives of American history and was dragged along mangled and crippled. . . . American slavery is distinguished from all other forms because it consciously dehumanized the Negro. In other cultures slaves preserved dignity and a measure of personality and family life. Our institution of slavery began on the coasts of Africa and because the middle passage was long and expensive, African families were torn apart in the selective process as if the members were beasts. On the voyages millions died in holds into which blacks were packed spoon fashion to live on a journey often of 2 to 6 months with approximately the room for each equivalent to a coffin. The sheer physical torture was sufficient to murder millions of men, women and children. But even more incalculable was the psychological damage. For those who survived as a family group, once more on the auction block many families were ripped apart.

Against this ghastly background the Negro family began the process of organization in the United States. On the plantation the institution of legal marriage did not exist. The masters might direct mating or if they did not intervene marriage occurred without sanctions. There were polygamous relationships, fragile, monogamous relationships, illegitimacies, abandonment, and most of all, the tearing apart of families as children, husbands, or wives were sold to other plantations. But these cruel conditions were not yet the whole story. Masters and their sons used Negro women to satisfy their spontaneous lust or, when a more humane attitude prevailed, as concubines. The depth was reached in certain states, notably Virginia which we sentimentally call the state of presidents. In this state, slaves were bred for sale, not casually or incidentally, but in a vast breeding program which produced enormous wealth for slave owners. This breeding program was the economic answer to the halting of the slave traffic early in the 19th century.<sup>155</sup>

In 1971, the black feminist activist Bev Cole wrote:

The Black woman throughout history has been a breeder—breeder of slaves and breeder of slave owners' bastards. Then today, Black men tell Black women to continue to breed, so that we shall outnumber the White men and seize control. On July 4th, 1970, the Black Panthers came out with the most absurd statement, "Black women love children and like large families." While the Panthers hopscotch on the subject of the Black wo-

155. Dr. Martin Luther King, Jr., Address at Abbott House, Westchester Cnty., N.Y. (Oct. 29, 1965), in LEE RAINWATER & WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 402, 404-05 (1967).

men's innate love for children, and declare that the quantity (not mentioning quality) of forces must be overwhelmed to insure victory, they also say that the Black man and Black woman must fight together against the enemy. How can we have this togetherness on the front if women are busy being balled by night and coping with the results, children everywhere, during each and every day. The gun in the hand of every Black man seems also to mean diaper swinging females following close behind.

That the Black woman's only dream is to reproduce is a false myth, as shown by the fact that 70% of the abortions performed in this country are done on Black and Third World women. The economics of this racist society makes it impossible for many of these women to afford safe abortions, thus illegal, unsafe abortions occur. The poor woman's fate is usually injury or death from having flushed detergents and soaps into herself, or having tried to sever the uterine wall to cut away the multiplying cells. These futile abortive attempts have caused a high death rate among Black and Third World women, so that the Black brother's argument against legal, safe abortion is, in itself, genocidal, killing off Black women in the name of the fetus. A Black brother told one of my girl friends that "if any woman of his got pregnant (note that the fault lies solely with the female) and hurt or killed anything of his inside her, he'd kill her." That's a brother's concern for his sister.<sup>156</sup>

If, increasingly, as limitations, legal or illegal, on the availability of legal abortions proliferate—perhaps leading to a Supreme Court challenge if ballot initiatives declaring fetal personhood, like that which recently failed in Mississippi but are still pending in other states, are successful—with predictable subsequent effects on abortion restrictions at the state law level, then more women will become desperate enough so that the alternative to forced reproduction is a late-term abortion which may or may not be lawful—and which in the latter case puts the life and health of the mother at risk as well as in both cases inevitably leading to feticide or infanticide. If, then, because of the power of organized opposition and the current flow of public sentiment on the question of legalized abortion, the state ballot box proves not to be the answer to attempt to save women from backyard abortionists, as happened in a modest way in the 1960s, then reform of constitutional law doctrine may be one way to stop Kermit Gosnell and others like him. Neither of these alternatives is likely to be palatable to pro-lifers or pro-choicers, and neither would occur without a subsequent surge of successor legal developments. As the German Constitutional Court has shown us, other social changes unlikely to

156. Bev Cole, *Black Women and the Motherhood Myth*, reprinted in GREENHOUSE & SIEGEL, *supra* note 107, at 52, 53.

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be feasible in this nation of bisectionalism might also dry up the supply of patients for butchers like Gosnell.

Finally, many feminists would point to other social changes necessary to ensure that just as reproduction is not forced, women's and girls' participation in sexual intercourse is not coerced. The gap between that position and the one held by those who find potentially procreative sex within a lawful opposite-sex marriage the only morally permissible expression of sexuality is vast. It is the stuff of the culture wars over sexuality which, among other ingrained characteristics of the nation, we have cultivated over the march of history, sending women, *Roe* notwithstanding, to backyard abortionists, licensed or unlicensed, or to the practice of self-abortion, in communities of poverty that many of us thought we had left behind in another age.



