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WHEN IS A HUMAN BEING NOT A LEGAL PERSON?: LETHAL RAMIFICATIONS AT THE BEGINNING OF LIFE

Dwight G. Duncan*

The 2013 conviction of Dr. Kermit Gosnell for murdering three newly delivered babies whose mothers had come to him for abortions raises a number of questions. Not the least of them concerns the sharp dichotomy that live birth involves: a doctor deliberately taking the life of a woman’s infant seconds after birth with or without the woman’s permission is infanticide, but a doctor deliberately taking the life of a woman’s infant any time before birth is effectuating the woman’s constitutionally protected right to abortion. Incidentally, the legal term for what Dr. Gosnell did is first-degree murder, which, in Pennsylvania, is punishable by the death penalty. Dr. Gosnell escaped the death penalty only because he plea bargained for a life sentence in lieu of appealing his conviction. As Anthony Esolen commented,

Kermit Gosnell was not sentenced to life imprisonment for running a dirty clinic. He was not sentenced to life imprisonment for fleas. He was not sentenced to life imprisonment for clogging up the garbage disposal with the bodies of aborted babies. He was sentenced to life imprisonment for murder. . . . He was sentenced to life imprisonment for doing just what his perhaps slightly more presentable colleagues do every day, in every large city in the nation.1

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I. WHEN DOES A HUMAN BEING ACQUIRE LEGAL PERSONHOOD, SUCH THAT IT CAN ASSERT LEGAL RIGHTS AND HAVE ITS CONSTITUTIONAL RIGHTS TO LIFE, LIBERTY, AND PROPERTY RESPECTED?

When does a human being acquire legal personality? I would like to stand on the shoulders of giants in order to address the rights of the tiniest human beings, for what is at issue is nothing less than the very notion of human rights. Human embryos and fetuses, however small and vulnerable, are unquestionably living human beings of the species Homo sapiens. If we possess any human rights, it is purely and simply because we are human. I was once a living human embryo and am still a living human being, last I checked. If I have human rights, I had them when I began to be a living human being.

Perhaps Dr. Seuss’s Horton the Elephant, throwing his massive weight around, said it most succinctly, “A person’s a person, no matter how small.” But in a law school setting, I do not suppose that qualifies as legal authority. Too bad. How about William Blackstone, then? And for this, I must acknowledge the magisterial work of a University of St. Thomas School of Law professor, Michael Stokes Paulsen, who wrote an article last year titled, “The Plausibility of Personhood,” where he draws attention to the importance of Blackstone’s _Commentaries on the Laws of England_ in ascertaining the meaning of personhood in the U.S. Constitution. It is Blackstone, for example, who indicates why corporations are persons within the meaning of the Constitution.

Here is what Blackstone says, following the traditional order of legal subjects, present in Justinian’s _Institutes_, of dealing with the law of persons before the law of things:

Persons . . . are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as . . . are . . . created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

As is well known, the Supreme Court of the United States considers corporations to be persons within the meaning of the Constitution. Why not unborn human beings, in accord with Blackstone? The reason is that _Roe v._

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Wade rejected that argument in 1973.\textsuperscript{5}

II. \textit{ROE V. WADE FOLLOWED THE DUBIOUS EXAMPLE OF DRED SCOTT V. SANDFORD} in finding a class of human beings (unborn babies rather than black slaves) to be non-persons and thus not entitled to constitutional rights.

\begin{quote}
Roe \textit{v. Wade} determined that unborn human beings, what the Court chose to call “fetuses,” were not persons within the meaning of the Fourteenth Amendment of the U. S. Constitution.\textsuperscript{6} As such, they were not in possession of legally cognizable rights.\textsuperscript{7} At most, there could be a government or state interest in what Justice Harry Blackmun, speaking for the Court, called “potential human life,” but not an individual right of his or her own. Notice that Justice Blackmun uses the word “potential” in an ambiguous sense. Obviously, an unborn human being is “potential” in the sense that he or she is not yet all that he or she could be. But that could be said of any human being, born or unborn. And, as Robert George and Christopher Tollefsen demonstrate in their book, \textit{Embryo: A Defense of Human Life}, an unborn human being is an actual human life, not merely a potential one.\textsuperscript{8} But then, we all know that.

That is just one of the dubious features of the \textit{Roe} opinion. Another is the strange asymmetry between how the issue of personhood is analyzed, and how the contours of the woman’s privacy right to “terminate her pregnancy” are determined.\textsuperscript{9} Having found that the fetus is not a person, and thus not the possessor of any rights of his or her own, the Court concluded that wherever the privacy/abortion right is grounded, whether in the Ninth Amendment, or in the Fourteenth Amendment’s Due Process Clause, the right was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”\textsuperscript{10}

The Court does not engage in a historical parsing of the word “liberty,” to determine whether it included, at the time the Fourteenth Amendment was ratified in 1868, the freedom to abort one’s child. Indeed, it seems obvious that, given that abortion was widely criminal at the time, the claim that liberty included an abortion right historically speaking is a non-starter. Instead, of course, the Court notes how impactful an unwanted pregnancy would be on
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\begin{flushright}
\begin{tabular}{l}
6. \textit{Id.} \\
7. \textit{Id.} \\
10. \textit{Id.}
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a pregnant woman; and thus, in effect, it has to be covered, wherever and however that happens.\(^{11}\)

Let us turn the tables now and apply the Court’s more abstract philosophical argument to the word “person,” instead of the word “liberty.” In other words, let us be as broad and inclusive with defining who a “person” is as the Court was with defining what “liberty” is. Call it a penumbra of personhood. And let us be just as concerned, for the sake of argument, with what sorts of impacts a “person” undergoes. In that case, obviously, being terminated is highly impactful on the unborn fetus. In addition, of course, the infant en ventre sa mere was considered a person by Blackstone.\(^{12}\) And the Court, like Blackstone, considers corporations to be legal and constitutional persons.\(^{13}\) If a corporation is a person, how much of a stretch is it to define a fetus as a person? Obviously, it is not any kind of stretch. So fetuses would be considered persons. Then apply the historical understanding of the word “liberty.” In that case, the fetus has rights, and the pregnant woman does not have an abortion right. My point is that the constitutional methodology the Court uses is not consistent. Flip the treatment of “person” and “liberty” and you get the opposite result.

Of course, that would also be a constitutional methodology as inconsistent as the one the Court itself used in Roe. If you use a consistent historical methodology, or a consistent philosophical and abstract methodology, to determine the meaning of the terms “person” and “liberty,” you cannot reach the result the Court reached in Roe.\(^{14}\) No person’s freedom extends as far as killing or harming another person.

In 1972, apparently responding to Justice Potter Stewart’s question to Roe’s lawyer at oral argument, “if it were established that an unborn fetus is a person . . . you would have almost an impossible case here, would you not?”\(^{15}\) Justice Harry Blackmun developed the “fetus is not a person” line of argument.\(^{16}\) For our purposes, it is instructive to realize that this strategic rhetorical move of taking a class of human beings and claiming they are not “persons” and thus not entitled to rights of their own was not without precedent. In fact, it is too bad Justice Blackmun did not cite the case that may have given him the idea in the first place. About 115 years earlier, a man who had lost his liberty sued in a federal court asking the court to grant him liberty. His name was Dred Scott. If he were a person, legally speaking, then his claim to freedom would have been compelling. But the U.S. Supreme Court decided that he could not sue in federal court because he was not a

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11. Id.
citizen.\textsuperscript{17} He was a slave, and since he did not count (or at least did not count as more than \(3/5\) of a person for apportionment purposes), the slave-owner was the only one who had constitutional rights. In this case, to assert that freeing his slave amounted to a deprivation of his property without due process of law. On that basis, the Court ruled that slavery could not constitutionally be outlawed in the federal territories.\textsuperscript{18}

Indeed, even \textit{Dred Scott} did not rule that the descendants of African slaves were not persons, only that they were not citizens and thus not entitled to sue in federal courts.\textsuperscript{19} In one part of his opinion, Chief Justice Taney wrote that, "\textit{[i]t will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves.}\textsuperscript{20}

If these persons were not citizens, they were nonetheless property. The Supreme Court declared unconstitutional Congress’ Missouri Compromise which outlawed slavery north of Missouri.\textsuperscript{21}

\[N\text{o word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.}\textsuperscript{22}

Presumably, this is because of the Fifth Amendment’s guarantee against persons being deprived of their property without due process of law by the federal government.

The slaves and their descendants cannot assert their rights vis-à-vis their masters, but the masters have their property rights in the slaves constitutionally protected. Sound familiar? It is the same asymmetry with abortion. The fetuses have no rights, but women have a constitutional right to abortion.

Professors Gerard Bradley and John Finnis have both persuasively pointed out the equal protection problem that is raised by making the doctor who performs abortions constitutionally privileged to take unborn human life, while continuing to criminalize other third parties who kill a fetus outside the context of an abortion.

Here is how Gerry Bradley illustrates the problem, drawing his facts from

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\item \textsuperscript{17} \textit{Scott v. Sandford}, 60 U.S. 393, 398 (1856).
\item \textsuperscript{18} \textit{Id.} at 413.
\item \textsuperscript{19} \textit{Id.} at 421.
\item \textsuperscript{20} \textit{Id.} at 403.
\item \textsuperscript{21} \textit{Id.} at 452.
\item \textsuperscript{22} \textit{Id.}
\end{itemize}
Matthew Bullock and Lisa Hargrave were having a baby. Hargrave was 22 to 23 weeks pregnant on New Year’s Eve 2002, when she and Bullock consumed some alcohol and cocaine at a party. After returning to their apartment, Hargrave did some more cocaine. Bullock asked her to stop for the baby’s sake. When Hargrave ignored his request, they argued and—according to Bullock’s later statement to the police—he blacked out. Next thing he knew he was on top of Hargrave, strangling her. Because he feared that Hargrave would call the police on him, Bullock bound and gagged her. After she struggled to break free Bullock returned and strangled her to death. Their unborn child died, too, as a result. Just after Christmas 2006 the Pennsylvania Supreme Court affirmed Bullock’s multiple convictions, including one for Voluntary Manslaughter of his (and Hargrave’s) unborn child.

Bradley cites a number of similar cases.

Professor John Finnis comments on Bradley’s point as follows:

These offenders are being convicted and punished for conduct substantially identical to the kind of conduct by mothers and their agents that Roe v. Wade and its successors declare incapable of being made a crime. Of course, in some cases the mother and her agents would be entitled, under standard laws against homicide (or child destruction), to be acquitted, their conduct being justified as self-defense; and doubtless very few of those charged now with fetal homicide or child destruction could in practice (given the circumstances of their lethal conduct) avail themselves of such a defense. But the plea of denial of Equal Protection has its bite because the mother and her agents, unlike offenders of the kind highlighted in Bradley’s essay, can never now be put in a position where she or they might need to raise such defenses, in relation to conduct the same as (if not even more purposefully lethal than) these offenders’.26
In his recent article, "The Priority of Persons Revisited," Professor Finnis proffers:

Justices who recognize the constitutional-doctrinal falsity of *Roe* and *Casey* can (I suggest) no longer treat the issue as one of states’ rights, but must in reason recognize that the Fourteenth Amendment’s requirement—that no state “deny to any person within its jurisdiction the equal protection of the laws”—is a requirement the content of which is determined by the truth about persons.27

He quotes the Supreme Court of Iowa from the year 1868, the very year that the Fourteenth Amendment was ratified:

The common law is distinguished, and is to be commended, for its all-embracing and salutary solicitude for the sacredness of human life and the personal safety of every human being. This protecting, paternal care, . . . not only extends to persons actually born, but, for some purposes, to infant *in ventre sa mere*. 1 Black. Com. 129. The common law stands as a guardian holding its aegis to protect the life of all.28

This compelling argument that equal protection of the laws requires that the essential holding of *Roe v. Wade* be undone, contrasts dramatically with the opinion oft expressed by Justice Ruth Bader Ginsburg, who has argued that the abortion right is best grounded, not on the Fourteenth Amendment’s Due Process Clause, but rather on its Equal Protection Clause.29

Professor Michael McConnell has definitively answered that claim that laws prohibiting abortion are an unconstitutional form of sex discrimination:

[A] law does not violate the Equal Protection Clause merely because it burdens one race or sex more heavily than another. Such a law is subject to heightened judicial scrutiny only if the legislature had an intent to discriminate. There exists no substantial evidence that abortion laws, as a matter of historical fact, were motivated by such an intent to discriminate against women. Indeed, the history of abortion laws shows that they were principally a response by the medical profession to improvements in the technology of abortion

28. *Id.* (citing *State v. Moore*, 25 Iowa 128, 135–36 (1868)).
and to newly-discovered information about embryology. . . . [T]he
nineteenth century anti-abortion movement was strongly supported
by the women’s movement. . . . It is an odd interpretation of the Equal
Protection Clause to say that it prevents states from extending
protection to the vulnerable and unrepresented. 30

The only logical way out of this problem, it seems to me, is to say that
the fetus is the property of the mother. Thus, an outsider who kills the fetus
can be said to have committed a crime, but not the mother and the contractor
she hires to kill the fetus. Why, then, charge someone else who kills the fetus
with a crime against a person? Perhaps animal cruelty or malicious
destruction of property less than $250 would be a better way to go.

III. THE NON-RECOGNITION OF THE PERSONHOOD OF THE UNBORN FOR
PURPOSES OF ABORTION POSES A SIGNIFICANT TENSION WITH MODERN
TRENDS IN CRIMINAL, TORT, AND INHERITANCE LAW.

Another giant in this field, Paul Benjamin Linton, has written an article
recently in this journal on the many ways in which other aspects of the law
recognize the legal personhood of the unborn child. 31 His article “explores
the multi-faceted ways in which state law protects unborn children outside
the context of abortion—in criminal law, tort law, health care law, property
law and guardianship law.” 32 He concludes that “[t]he legal protections States
have accorded unborn children outside the scope of abortion have withstood
repeated constitutional challenges.” 33

This double standard, which Linton calls “surely an anomaly,” whereby
human fetuses are protected in “every area of the law but one—abortion,” 34
highlights the equal protection problem discussed earlier. If a woman and her
doctor kill an unborn infant via abortion, they are exercising a constitutional
right. If another third-party does so, he is engaging in the criminal act of fetal
homicide. As Linton documents, “the most common approach, the one that
has been adopted in more than one-half of the States, has been to make the
killing of an unborn child a crime without regard to any arbitrary gestational

30. Michael McConnell, How Not to Promote Serious Deliberation About Abortion, 58 U.
CHI. L. REV. 1181, 1187–90 (1991), as quoted in JESSE H. CHOPER, RICHARD H. FALLON, JR., YALE
KAMISAR & STEVEN H. SHIFFRIN, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 446
(11th ed. 2011).
31. Paul Benjamin Linton, The Legal Status of the Unborn Child Under State Law, 6 UST.
32. Id. at 143.
33. Id. at 155 & n.48.
34. Id.
age. While Linton does mention a number of cases that reject an equal protection challenge to these laws, in distinguishing between the woman consenting to an abortion and "the violent acts of third parties," none of these cases really come to terms with the argument made by Bradley and Finnis above.

This double standard is not confined to the criminal law. Tort law in thirty states allows civil liability for "nonfatal" prenatal injuries and allows actions to be brought for such injuries without regard to the stage of pregnancy when they were inflicted. Tort recovery for wrongful death is allowed in eleven states "regardless of the stage of pregnancy when the injury and death occur." In the field of health care advance directives, most of the states, "[s]ubject to limited exceptions . . . prohibit the withdrawal or withholding of life-sustaining treatment from a pregnant woman patient under the authority of an advance directive." Similarly, "[t]he rights of unborn children are also protected by property law", and "all States . . . permit a guardian ad litem to be appointed to represent the interests of an unborn child in various matters including estates and trusts."

Importantly, for purposes of federal law, Congress in 2004 enacted the Unborn Victims of Violence Act, which makes the infant in utero a legal victim, if injured or killed in the commission of any of the over sixty listed federal crimes of violence. The law defines "child in utero" as "a member of the species homo sapiens, at any stage of development, who is carried in the womb."

IV. THE CASEY CASE DEEPENED THE COURT’S COMMITMENT TO THE ANOMALY OF NON-PERSONHOOD FOR THE UNBORN.

Professor Michael Stokes Paulsen has written what I consider one of the greatest law review articles of all time on Planned Parenthood of Southeastern Pennsylvania v. Casey, the 1992 U.S. Supreme Court decision which reaffirmed what it called the "essential holding" of Roe v. Wade. The

35. Id. at 144.
36. Id. at 146 n.25.
37. Linton, supra note 31 at 145.
38. Id. at 147 & n.29.
39. Id. at 148-49 & n.34.
40. Id. at 152 & n.22.
41. Id. at 153.
42. Id. at 154.
44. Id.
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The title of the article, "The Worst Constitutional Decision of All Time," says it all.\textsuperscript{46}

He later reprised his argument in an article on the twentieth anniversary of \textit{Casey}. Professor Paulsen wrote:

The search is . . . for error, egregious error, evil egregious error, intentionally evil egregious error, and enduring, entrenched, intentionally evil egregious error. And on these criteria, \textit{Casey} is the Supreme Court's worst constitutional decision of all time, beating out even \textit{Dred Scott} and \textit{Roe v. Wade} for that dishonor.\textsuperscript{47}

The Court's crucial three-justice opinion by Justices O'Connor, Kennedy, and Souter contains what Justice Scalia calls the "sweet mystery of life" passage,\textsuperscript{48} a section that reads:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Belief about these matters could not define the attributes of personhood were they formed under compulsion of the State.\textsuperscript{49}

Well, it is obvious that personhood must be predicated on born human beings. Some people, like Peter Singer, argue in favor of infanticide; but, as the Doctor Gosnell trial and conviction demonstrate (see below), the killing of born human infants is homicide, pure and simple. Thus, at least that definition of personhood as encompassing born human beings is a "belief . . . formed under compulsion of the State."\textsuperscript{50}

This completely open-ended understanding of liberty would not just destroy abortion law; it would undermine the rule of law altogether.

V. THE LEGAL CLIMATE CHANGED WITH THE PARTIAL-BIRTH ABORTION BANS, WHICH THE SUPREME COURT EVENTUALLY UPHELD, AND THE FEDERAL BORN-ALIVE INFANTS PROTECTION ACT.

By the year 2000, a majority of states had outlawed a practice variously

\begin{itemize}
  \item \textsuperscript{47} Michael Stokes Paulsen, \textit{Casey: Enduring Entrenched, Intentionally Evil Egregious Error}, PUBLIC DISCOURSE (June 29, 2012), http://www.thepublicdiscourse.com/2012/06/5774/.
  \item \textsuperscript{48} Lawrence \textit{v. Texas}, 539 U.S. 558, 588 (2003).
  \item \textsuperscript{49} \textit{Casey}, 505 U.S. at 851.
  \item \textsuperscript{50} \textit{Id}.
\end{itemize}
described as “intact dilation and extraction [D & X] abortion,” or, more colloquially, “partial-birth abortion.” This is a type of late-term abortion in which the unborn baby has its skull punctured by a forceps while still in the birth canal, its brains are vacuumed out, and then his/her lifeless body is extracted from the mother’s body. It is called “partial-birth” abortion because care is taken not to extract the fetus entirely before killing it, lest the abortionist run afoul of the laws against homicide.

In 2000, in the case of Stenberg v. Carhart, the U.S. Supreme Court declared Nebraska’s ban on the practice unconstitutional, because it lacked an adequate health-of-the-mother exception, and because it was unconstitutionally vague, as it banned removing a “substantial portion” of a living fetus; and thus arguably banned the frequently used “dilation and evacuation [D & E] abortion,” and in doing so posed an “undue burden” on a woman’s right to obtain an abortion prior to viability.51 In Casey, the Court said that not constituting an “undue burden” was the constitutionally required test for abortion regulation prior to viability.52

The United States Congress responded in two ways to the Stenberg decision: one was the passage of the Federal Partial-Birth Abortion Ban Act of 2003,53 which the Supreme Court upheld in Gonzales v. Carhart.54 The 5-4 majority relied in part on congressional findings to the effect that the partial-birth abortion procedure is never medically necessary and that its definition was not, unlike in the Stenberg case, void for vagueness. 55

The other way that Congress responded to the earlier Stenberg case was to enact the Federal Born-Alive Infants Protection Act of 2002. That Act, presumably enacted under Congress’ power under Section 5 of the Fourteenth Amendment to “enforce, by appropriate legislation [its] provisions,”56 said that the federal definition of “‘person,’ ‘human being,’ ‘child,’ and ‘individual’ shall include every infant member of the species homo sapiens who is born alive at any stage of development.”57

Perhaps more germane to the subject of this conference on the Dr. Kermit Gosnell case, the federal law defined “born alive” to mean

the complete expulsion or extraction from his or her mother . . . at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the

52. Casey, 505 U.S. at 876.
55. Id. at 125.
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The umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, caesarean section, or induced abortion.\textsuperscript{58}

Interestingly, the Federal Born-Alive Infants Protection Act went out of its way to clarify that it did not mean to affirm or deny that "any member of the species homo sapiens at any point prior to being 'born alive'" was not in possession of "legal status or legal rights."\textsuperscript{59}

This law was the brainchild of another giant in the field of human rights, Professor Hadley Arkes of Amherst College, who wrote about it in his book *Natural Rights and the Right to Choose*.\textsuperscript{60} As Christopher Tollefsen explains in the recent Hadley Arkes Festschrift, *A Second Look at First Things: A Case for Conservative Politics*,

the Born-Alive Infants' Protection Act was grounded in a principle that could only be rejected at great peril; yet a principle that did indeed have consequences for the wider abortion license. The principle was this: a living human being, exposed to the world, and whether born because of a failed abortion or because of a successful birthing, is no less a person for the circumstances of his or her arrival, or the desires of his or her parents and their doctors, than any other; and thus such living human beings – in this case infants – are entitled to all the legal protections which it is the fundamental purpose of the state to offer.\textsuperscript{61}

VI. TENTATIVE LESSONS CAN BE DRAWN FROM THE TRIAL AND CONVICTION OF DR. KERMIT GOSNELL.

This brings us to the case of Dr. Kermit Gosnell, the Philadelphia abortionist. A report of the grand jury investigating his activities in Pennsylvania concluded by recommending a number of serious criminal charges against him, including murder of a woman obtaining an abortion, murders of infants born alive, and infanticide.\textsuperscript{62}

\textsuperscript{58} § 8 (b).
\textsuperscript{59} § 8 (c).
\textsuperscript{60} See Hadley Arkes, *Natural Rights and the Right to Choose* (2002).
Among the charges of the presentment, which were documented in a 281-page report, was the claim that "[t]his case is about a doctor who killed babies and endangered women. What we mean is that he regularly and illegally delivered live, viable, babies in the third trimester of pregnancy—and then murdered these newborns by severing their spinal cords with scissors."\(^{63}\)

The facts ultimately proven against Dr. Gosnell at trial detail a horror story, a monstrous Gothic tale from Philadelphia’s inner-city that is as sordid as it is shocking. It was all perpetrated behind the legal cloak of the provision of abortion services.

As the Report described the scene, "untold numbers of babies—not fetuses in the womb but live babies, born outside their mothers" had their "brief lives ended in Gosnell’s filthy facility."\(^{64}\) The Report notes that Pennsylvania’s Abortion Control Act “defines ‘born alive’ similarly [to the Federal Born-Alive Infants Protection Act], but adds breathing and brain wave activity as indicators of life.”\(^{65}\)

The conviction and sentencing of Dr. Gosnell to a life sentence and his plea bargain to forego an appeal in order to escape a possible death penalty for his horrendous actions vindicate the principle of the equal humanity of infants that are born alive. Clearly, they are full constitutional and legal persons, possessing the same right to life as any of us. But unborn infant human beings, at least in the context of abortion, and, in spite of possessing myriad other rights in other contexts, have no such equal right to life. It seems hard not to take this double-talk in any way other than, well, personally.

The usual defenders of abortion have been just about silent about Dr. Gosnell. Where is Planned Parenthood? Where are pro-abortion politicians? Where are pro-abortion commentators on television? For the most part, they have nothing to say. Which is, to say the least, unusual. To my knowledge, no one in this country, besides his lawyers, has defended Dr. Gosnell in public.

Had Dr. Gosnell severed the spinal cords of the infants while they were still in utero, as opposed to moments later and inches away, after they had been delivered, then he would not be liable for murder. He would be merely performing a constitutionally protected late-term abortion, one that would arguably be within the safe harbor of safeguarding the mother’s health, which Doe v. Bolton\(^{66}\) had said encompassed “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient.” But why a woman’s health interest, no matter how trivial, should always legally trump the life interest of a viable fetus, no matter how

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63. Id. at 1.
64. Id. at 99.
65. Id. (citing 18 PA. CONS. STAT. § 3203 (1990)).
compelling, illustrates the anomaly of the double standard when it comes to legally recognizing human equality in our abortion culture.