# STOPPING PHILADELPHIA ABORTION PROVIDER KERMIT GOSNELL AND PREVENTING OTHERS LIKE HIM: AN OUTCOME THAT BOTH PRO-CHOICERS AND PRO-LIFERS SHOULD SUPPORT

SAMUEL W. CALHOUN*

## I. INTRODUCTION

Philadelphia abortion provider Dr. Kermit Gosnell achieved infamy due to his "grotesque facility,"[1] the now-closed Women's Medical Society. According to the *Philadelphia Inquirer*, the clinic's "abysmal conditions . . . strain[ed] credulity."[2] These conditions resulted in "[a] searing grand jury report charg[ing] that his filthy [clinic] butchered babies and women for more than three decades."[3] The uproar caused by Dr. Gosnell's clinic provides a rare opportunity for the two sides of the abortion controversy to come together. This Article will explain and defend the proposition that both pro-choicers and pro-lifers should not only applaud that Dr. Gosnell has been stopped, but should also unite to prevent others like him.

There are several ways to describe this hoped-for outcome. "Compromise"[4] and "bridging the gap"[5] are two possibilities. Another is "common ground," the phrase used by the grand jury that investigated Dr. Gosnell:

* Professor of Law, Washington and Lee University School of Law. The author thanks James Cooprider for his very helpful research assistance and the Frances Lewis Law Center, Washington and Lee University, for its support. Thanks also to Jon Burtard, Stephen Calhoun, Cynthia Gorney, Robert Miller, and Brian Murchison for their comments on earlier drafts, as well as to those who attended the presentation of these ideas at Villanova University School of Law, Washington and Lee University School of Law, and the 2011 Conference of University Faculty for Life. Special thanks are due to Penny Pether and Clarke Forsythe for their willingness to write a response to this piece.

1. Karen Heller, *Politics Clouded the Safeguards Against Practices Like Gosnell's*, PHILA. INQUIRER, Jan. 26, 2011, at A2.

2. *Id.*

3. *Id.* Conditions in the clinic were actually "much worse than can be summarized." Tara Murtha, *Political Homicide*, PHILA. WEEKLY, Feb. 2, 2011, at 10.

4. Although "compromise" might intuitively seem to be the obvious choice, this word for me engenders skepticism because in the abortion context it has sometimes been used to describe situations that deviate significantly from a meaningful compromise. Laurence Tribe, for example, labels the result in *Roe v. Wade*, as a compromise. *See* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 78-79 (1992) (discussing Roe v. Wade, 410 U.S. 113 (1973)). Given that *Roe* allows abortion on demand throughout the entire pregnancy, this characterization of the decision can hardly be taken seriously. *See infra* notes 179-89 and accompanying text.

5. In October 2010, an abortion conference at Princeton discussed "emerging opportunities to bridge the abortion divide." Registration Information for Open Hearts, Open Minds and Fair Minded Words: A Conference on Life and Choice in the Abortion Debate, Princeton University (Oct. 15 & 16, 2010). *Slate* columnist William Saletan, in commenting on the Princeton conference, emphasizes the concept of reaching common ground. *See* William Saletan, *Abortion Common Ground: A Pro-Life Agenda: What Pro-lifers Can Learn from the Princeton Abortion Conference*, SLATE (Nov. 16, 2010, 7:59 AM), http://www.slate.com/articles/health_and_science/human_nature/2010/11/abortion_common_ground_a_prolife_agenda.single.html.

> Let us say right up front that we realize this case will be used by those on both sides of the abortion debate. We ourselves cover a spectrum of personal beliefs about the morality of abortion. For us as a criminal grand jury, however, the case is not about that controversy; it is about disregard of the law and disdain for the lives and health of mothers and infants. We find common ground in exposing what happened here, and in recommending measures to prevent anything like this from ever happening again.[6]

Although each of the foregoing terms would appropriately describe pro-choice and pro-life joint condemnation of Dr. Gosnell,[7] a different image is more helpful. It is obvious that the abortion controversy is a passionate dispute that is certain to continue. Sometimes in a conflict, however, the combatants can turn aside to face a common enemy. Think of the 1996 hit movie, *Independence Day*, in which all the people of the world unite to fight alien invaders.[8] But what would the film have shown had the story continued to portray events following the aliens' defeat? The short-term allies would almost certainly have returned to their prior status as adversaries. Similarly, in calling for the two sides to unite in opposing Dr. Gosnell and preventing others like him, there should be no illusion that the underlying abortion conflict is over or that either side will refrain from reengaging once the common threat has been addressed.[9]

But what common threat does Dr. Gosnell represent? According to the grand jury report,

> This 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. The medical practice by which he carried out this business was a filthy fraud in which he overdosed his patients with dangerous drugs, spread venereal

6. Report of the Grand Jury at 1, *In re* Cnty. Investigating Grand Jury XXIII, Misc. NO. 0009901-2008, (Pa. Ct. Com. Pl. Jan. 14, 2011). For William Saletan's focus on common ground, see *supra* note 5.

7. *But see* Frances Kissling, *A Pro-choice Choice: Shift Course or Lose*, WASH. POST, Feb. 20, 2011, at B1. Kissling, former head of Catholics for Choice, supports sensible abortion facility regulation, but rejects "compromise" and "finding common ground" as descriptions of her position:

> These shifts I am suggesting are not about compromising or finding common ground with abortion opponents. Compromise assumes that there are two parties prepared to give up something in return for settling an issue. Neither opponents nor advocates of legal abortion are willing to do that. But, for pro-choice advocates, standing our ground will mean losing ground entirely.

*Id.* For my own misgivings about the word "compromise," see *supra* note 4.

8. INDEPENDENCE DAY (Twentieth Century Fox 1996).

9. Thus, one could appropriately say that this Article asks the two sides to be "cobelligerents" in opposing Dr. Gosnell. This term "refers to groups who are sharply opposed on most other issues but who agree to work in tandem on one particular issue where they agree." TIMOTHY KELLER, GENEROUS JUSTICE: HOW GOD'S GRACE MAKES US JUST 216 n.129 (2010).

> disease among them with infected instruments, perforated their wombs and bowels—and, on at least two occasions, caused their deaths. Over the years, many people came to know that something was going on here. But no one put a stop to it.[10]

This passage emphasizes two aspects of Dr. Gosnell's common threat to the pro-choice and pro-life causes: he flagrantly disregarded the safety of women and he killed born-alive infants. There is a third component to the common threat that the grand jury also condemned: Dr. Gosnell regularly performed illegal post-viability abortions.[11] This Article will address each of these topics: (1) endangering women; (2) killing born-alive babies; and (3) performing illegal post-viability abortions. The goal is to demonstrate why pro-choicers and pro-lifers should join forces to stop such abuses and prevent any future occurrences.

On their face, Dr. Gosnell's actions are so extreme that it would seem a simple matter to achieve consensus in opposing them. The grand jury's account demonstrates that it would be virtually impossible to overstate the horrific conditions inside Dr. Gosnell's clinic.[12] It is hard to imagine anyone who would not want to stop and punish him.[13] Nonetheless, it is important to acknowledge the difficulties faced in asking pro-choicers and pro-lifers to ally against Dr. Gosnell. The two sides view the issue of abortion from diametrically opposing perspectives.[14] To pro-choicers, the freedom to choose abortion is an indispensable aspect of a woman's right to control her own body. Moreover, this freedom to choose, following *Roe v. Wade*, is now cherished as a vital constitutional right. To pro-lifers, a woman who chooses abortion does not simply exercise sovereignty over her own body, but also takes the life of another human being. And pro-lifers view the *Roe*-declared constitutional freedom as illegitimate, a usurpation of the right to democratic self-government on the issue of abortion.

In addition to the combatants' radically different perspectives, the underlying physical facts of pregnancy make it difficult to compromise on abortion. To allow abortion will necessarily destroy fetal life, and to protect fetal life by pro-

10. Report of the Grand Jury, *supra* note 6, at 1.

11. *See id.* at 78-83, 232-35.

12. For a further discussion of the conditions of Dr. Gosnell's office, see *supra* note 10 and accompanying text; *infra* notes 17-21 and accompanying text; and *infra* note 29.

13. *See* Heller, *supra* note 1 ("People on both sides of the abortion debate should have been outraged by what was happening. Such atrocities should rise above ideology, appealing to basic humanity."). Heller hoped that Gosnell's actions would "shame people into demanding stricter supervision of abortion clinics." *Id.* But a later piece by Heller, in which she comments on two proposals then before the Pennsylvania legislature, demonstrates the challenge of actually formulating regulations acceptable to all: "These bills are not about protecting women's health. They are about restricting access to a legal procedure." Karen Heller, *Abortion-Clinic Bills About an Agenda, Not Health*, PHILA. INQUIRER, June 19, 2011, at A2.

14. Professor Cynthia Gorney states "'the nature of this conflict is like some terrible puzzle in philosophy class designed to make you crazy. The essence of each position negates the possibility of the other.'" Phyllis Orrick, *Pro-Fight: The Uses and Misuses of the Abortion Debate*, EXPRESS (OAKLAND), July 17, 1998, at 1, 10. Although each of the points to follow in the accompanying main text paragraph could be exhaustively footnoted, the reader is asked to take the equivalent of "judicial notice" respecting these well-known components of the abortion debate.

hibiting abortion will necessarily and significantly restrict a woman's freedom. Thus, it is not surprising that the two sides have settled into a sullen stand-off and often view each other with suspicion, if not hostility.

But, despite these difficulties, it should be possible for the two sides to join forces in condemning Dr. Gosnell. To encourage this outcome, this Article poses difficult questions for both pro-choicers and pro-lifers. There is no guarantee that these hard questions will be answered to everyone's satisfaction. Rather, the hope is that the longtime adversaries will at least be prompted to reflect upon the real possibility of joint action, not only in opposing Dr. Gosnell as an individual wrongdoer,[15] but also in speaking with a common voice on three significant issues in the ongoing abortion controversy.

## II. ENDANGERING WOMEN

Some of the horrifying consequences of Dr. Gosnell's actions have already been mentioned, including the spread of infection and venereal disease through unsanitary conditions.[16] A subheading in the grand jury report, "Butcher of [W]omen,"[17] in itself is a telling description, but additional quotes from the report more fully convey the grand jury's outrage. Gosnell was "a deadly threat to mothers."[18] He "left dozens of damaged women in his wake. His reckless treatment left them infected, sterilized, permanently maimed, close to death, and, in at least two cases, dead."[19] "Every aspect of [his] practice reflected an utter disregard for the health and safety of his patients, a cruel lack of respect for their dignity, and an arrogant belief that he could forever get away with the slovenly and careless treatment of the women who came to his clinic."[20] "The Women's Medical Society stands as a monument to an absolute disdain for the health and safety of women . . . ."[21]

How could anyone not be appalled by these descriptions? Americans United for Life (AUL) certainly is. A post on the organization's website is entitled "Philadelphia's 'House of Horrors' Abortion Clinic Underscores Need for Stringent Regulation."[22] And one would certainly expect the same call for reg-

15. *See infra* note 23.

16. *See supra* text accompanying note 10.

17. Report of the Grand Jury, *supra* note 6, at 6.

18. *Id.*

19. *Id.* at 99. Dr. Gosnell has been indicted for the murder of Karnamaya Mongar, who died after receiving "high doses of anesthetic for an illegal late-term abortion performed in 2009." Sabrina Tavernise, *Doctor Charged in Deaths of Woman and 7 Babies in Philadelphia Clinic*, N.Y TIMES, Jan. 20, 2011, at A15. The other woman who died under Dr. Gosnell's care is Semika Shaw, "who died from an infection in 2002 after an abortion at the clinic." Sabrina Tavernise, *Squalid Abortion Clinic Escaped State Oversight*, N.Y. TIMES, Jan. 23, 2011, at A25.

20. Report of the Grand Jury, *supra* note 6, at 24.

21. *Id.* at 23.

22. Denise Burke, *Philadelphia's "House of Horrors" Abortion Clinic Underscores Need for Stringent Regulation*, AMS. UNITED FOR LIFE (Jan. 20, 2011), http://www.aul.org/2011/01/philadelphia%E2%80%99s-%E2%80%9Chouse-of-horrors%E2%80%9D-abortion-clinic-underscores-need-for-stringent-regulation/.

ulation from pro-choicers.[23] After all, a principal pro-choice argument for legalized abortion has always been the contrast between the back-alley horrors of the illegal abortion era and safe, legal abortion.[24] Surprisingly, however, although there is some pro-choice support for government regulation of abortion clinics,[25] most pro-choice organizations have long opposed it.

How can this anomaly be explained? Meredith Viera reported a story twenty years ago on *60 Minutes* that gives at least part of the answer.[26] The story focused on the Hillview Women's Medical Surgical Center in Maryland.[27] Several tragic incidents were described. Suzanne Logan went where she assumed she could obtain a safe, legal abortion and came out almost completely paralyzed and unable to speak.[28] Linda Brown almost bled to death before she was transferred to a hospital, where an emergency hysterectomy was performed.[29] Debra Gray's heart stopped while under anesthesia and she never woke up.[30] Viera discovered that many pro-choice leaders knew about the problems at Hillview, but did not want them publicized.[31] Most abortion-rights activists refused to speak on camera for the *60 Minutes* story, but Barbara Radford, head of the National Abortion Federation (NAF), eventually did: "'Well, I think your first reaction from us was this is the last thing we need. *We had hoped that it wouldn't get national publicity because of the political nature of*

23. It is important to note that pro-choicers are uniformly appalled by the reports on Dr. Gosnell's clinic. For example, Dayle Steinberg, CEO of Planned Parenthood of Southeastern Pennsylvania, states that "Planned Parenthood strongly condemns the alleged actions of Kermit Gosnell, and we would condemn any physician or health-care provider who did not follow the law or recklessly endangered the health of others." Dayle Steinberg, *Women's Right Facing Threats*, PHILLY (Jan. 23, 2011, 2:00 PM), http://www.philly.com/philly/blogs/inq_ed_board/Dayle_Steinberg_Womens_right_facing_threats.html.
Most pro-choicers, however, do not believe that additional regulation is the proper response. For Ms. Steinberg's own position, see *infra* note 73 and accompanying text.

24. *See* Heller, *supra* note 1, at A2 ("Abortion is a legal medical procedure. The very reason advocates champion its legality, along with proper oversight, is to avoid exactly the type of back-alley butchery that Gosnell is now charged with inflicting.").

25. *See supra* note 7; *infra* notes 33, 70, and accompanying text; *infra* note 35.

26. *See 60 Minutes: Suzanne Logan's Story* (CBS television broadcast Apr. 21, 1992); *see also* Nat Hentoff, *Covering Up Destructive Abortions*, VILLAGE VOICE, June 18, 1991, at 20.

27. *See* Hentoff, *supra* note 26, at 20.

28. *See id.*

29. *See id.* at 21. At least two of Dr. Gosnell's patients experienced similar tragedies. Thirty-eight-year-old Sherry Thomas woke up after her abortion "soaked in her own blood and feeling scared. People were moving around her, trying to put her in an ambulance. Her uterus had been punctured. She was rushed to the hospital, where she was given a partial hysterectomy." Tavernise, *Squalid Abortion Clinic*, *supra* note 19, at A25. Another nineteen-year-old patient "was held for several hours after Gosnell punctured her uterus. As a result of the delay, she fell into shock from blood loss, and had to undergo a hysterectomy." Report of the Grand Jury, *supra* note 6, at 6; *see id.* at 72.

30. *See* Hentoff, *supra* note 26, at 21. Dr. Gosnell's patient, Karnamaya Mongar, died in the same way. *See* Report of the Grand Jury, *supra* note 6, at 7-8. For a further discussion of the death of Karnamaya Mongar, see *supra* note 19.

31. *See* Hentoff, *supra* note 26, at 21 (explaining that pro-choice leaders attempted to bury story because of bad publicity it would bring to abortion).

*all of this*.'"[32] Mary Boergers, a pro-choice state senator in Maryland, reacted differently. She strongly advocated abortion clinic regulation:

> When we say what we're trying to do is guarantee safe abortions, and eliminate back-alley unsafe abortions, and yet you can demonstrate that there's a woman who died, and another woman who's paralyzed, then not only that argument, but all arguments from the pro-choice community can become suspect.[33]

Sadly, the Maryland episode is not an isolated occurrence. William Saletan of *Slate*, in reaction to the Gosnell debacle, posted an eight-part series in February 2011 entitled, *The Back Alley: How the Politics of Abortion Protects Bad Clinics*.[34] Most of the articles focus on 1989-1990 events in Florida. Horrific conditions had been uncovered in several abortion clinics, which prompted efforts by the state to more fully regulate clinics, which in turn triggered a massive, successful effort by most pro-choice organizations to thwart the regulations.[35] The titles of two of Saletan's individual articles tell the story: (1) "The Sisterhood of Silence: A bad abortion clinic, a dead woman, and a wall of pro-choice denial";[36] and (2) "'Leave Well Enough Alone': How pro-choicers won a political victory by ignoring bad medicine."[37]

32. *Id.* at 21. Ms. Radford not only worried about bad publicity, but also opposed increased clinic regulation. *See id.*

33. *Id.* (emphasis omitted).

34. The first article in the series is William Saletan, *What Happened to the Women: A Grand Jury Says Kermit Gosnell Mistreated and Killed Abortion Patients. Why Did Nobody Stop Him?*, SLATE (Feb. 16, 2011, 5:34 PM), http://www.slate.com/articles/news_and_politics/the_back_alley/2011/02/what_happened_to_the_women.single.html. Subsequent articles in the series can be accessed through a link found within the first article.

35. One iteration of the proposed Florida regulations was "quite modest," requiring only that abortion providers, "[a]s part of their annual license renewal, . . . submit the names of their doctors to the state Department of Health and Rehabilitation Services. In turn, HRS would have to verify with Florida's Department of Professional Regulation that each doctor was licensed." William Saletan, *Choosing Sides: The Abortion Clinic Debate that Tore Apart Florida's Pro-choice Coalition*, SLATE (Feb. 25, 2011, 7:15 AM), http://www.slate.com/articles/news_and_politics/the_back_alley/2011/02/choosing_sides.single.html. Planned Parenthood's Florida affiliates and the Florida Coalition for Choice "endorsed the bill," but it was opposed by the Florida Abortion Rights Action League, Florida NOW, the Florida ACLU, the Florida Abortion Council, and the Protectors of Women's Abortion Rights. *See id.* The bill passed the Florida Senate, but not the House. *See id.* Pro-choice state senator Mary Grizzle "was mystified by the opposition. She feared for every woman in South Florida who opened the Yellow Pages to find an abortion clinic. To her, the issue wasn't choice; it was safety." *Id.*

36. William Saletan, *The Sisterhood of Silence: A Bad Abortion Clinic, a Dead Woman, and a Wall of Pro-choice Denial*, SLATE (Feb. 18, 2011, 7:47 AM), http://www.slate.com/articles/news_and_politics/the_back_alley/2011/02/the_sisterhood_of_silence.single.html.

37. William Saletan, *"Leave Well Enough Alone": How Pro-choicers Won a Political Victory by Ignoring Bad Medicine*, SLATE (Feb. 23, 2011, 6:39 AM), http://www.slate.com/articles/news_and_politics/the_back_alley/2011/02/leave_well_enough_alone.single.html.

Accounts of pro-choice opposition to clinic regulation in Maryland and Florida naturally evoke a question: How can pro-choicers, who have long extolled the safety of legal abortion, possibly oppose state regulation designed to ensure that abortion clinics are safe in fact?[38] One proffered explanation is that clinic regulation is not actually aimed at protecting women, but instead has the goal of shutting down abortion clinics.[39] Meredith Viera reported in 1991 that pro-choice activists feared that pro-lifers would use clinic regulation "as a backdoor way to stop abortions."[40] These fears were still rampant in 2011 Pennsylvania.[41] Pro-lifers who support such regulations say "not so."[42] For

38. For a further discussion of how opposition to regulation of abortion providers runs counter to the pro-choice goal of safe abortion, see *supra* notes 24, 35, and accompanying text.

39. *See, e.g.*, A. Barton Hinkle, *Clinic Controls Could Create Converts*, RICHMOND TIMES-DISPATCH, Mar. 4, 2011, at A9. Hinkle sees nothing surprising in this type of complaint:

> Abortion-rights supporters fume that the new rules really have nothing to do with protecting consumers and are, instead, part of an ideological campaign to "get" their industry. The same might be said about other industries fighting other regulations--e.g., payday lenders. Many people also find those operations morally odious and want to regulate them out of existence as well. Ditto the production of silicone breast implants, genetically modified crops, factory farming, and so on. That people with agendas exploit government power for political ends is not exactly news. Want to stop them? Limit government power in the first place.

*Id.* For a further discussion of Virginia's abortion clinic regulations, see *infra* note 43 and accompanying text. Hinkle makes an interesting point, but it should be noted that he offers no evidence that the Virginia regulations were in fact intended to shut down abortion clinics. He also does not even discuss the merits of government intervention in each of the situations he mentions. He simply assumes it would be unwarranted.

40. *See* Hentoff, *supra* note 26; *60 Minutes: Suzanne Logan's Story*, *supra* note 26. Similarly, William Saletan reports that Charlene Carres, a pro-choice opponent of abortion clinic regulation in Florida, believed that alleged safety concerns were "a front for pro-lifers . . . 'who would like to see abortion made illegal because they consider it murder.'" William Saletan, *Fighting the Gestapo: Why Good Abortion Providers Refused to Cooperate with Florida Health Inspectors*, SLATE (Feb. 24, 2011, 10:21 AM), http://www.slate.com/articles/news_and_politics/the_back_alley/2011/02/fighting_the_gestapo.single.html. For another example of this same pro-choice criticism of pro-life motivation, see *infra* note 110.

41. Pro-choice advocates branded one regulatory bill proposed in the wake of Dr. Gosnell's indictment a "Trojan horse, appearing on its surface to protect women but instead harboring a teeming horde of regulations and restrictions supported by anti-abortion and right-wing interests. The actual aim, these advocates say, is to shut down the state's abortion clinics." Holly Otterbein, *Hiding in Plain Sight? Is a Bill That's Supposed to Protect Women at Abortion Clinics Actually an Anti-abortion Trojan Horse?*, PHILA. CITY PAPER, Apr. 21, 2011. Pro-choicers likewise criticize Pennsylvania's new clinic regulation measure as enacted in December 2011. *See Corbett Signs New Abortion Clinic Rules*, NBC10 PHILA. (Dec. 22, 2011, 11:33 AM), http://www.nbcphiladelphia.com/news/local/Governor-Tom-Corbett-Signs-New-Abortion-Clinic-Rules-136072498.html. Although the law's proponents claim "it will help protect the health and safety of women seeking an abortion . . . opponents said it is a back-door attempt to outlaw abortion." *Clinic Operators in Pa. Brace for Tough New Facility Standards for Performing Abortions*, WASH. POST (Dec. 23, 2011), http://www.washingtonpost.com/national/clinic-operators-in-pa-brace-for-tough-new-facility-standards-for-performing-abortions/2011/12/21/gIQAEZAa9O_story.html. A *Philadelphia Inquirer* editorial agrees with the critics: protecting women "is not the true motivation behind this legislation. This bill represents a blatant attempt to shut down even those abortion clinics

example, Jill Holtzman Vogel, a Virginia state senator, states: "'This is not about banning abortion . . . . It is simply caring for women who are about to have an invasive surgical procedure. And creating an environment for them where they have the opportunity to have that in a place that's safe.'"[43] Similarly, the Executive Director of the Pennsylvania Pro-Life Federation supports tougher clinic regulation by referring to "'the manner in which women were brutalized'" in Gosnell's clinic.[44] Changes are needed "'to protect women.'"[45]

But don't pro-choicers have reason to question the sincerity of such statements from pro-lifers? On reflection, isn't it odd that a pro-lifer would want to make abortion clinics safer? From the pro-life perspective, the women are killing their innocent, helpless, unborn children. If one genuinely believes babies are being killed in clinics, it would make sense to use whatever legal means possible, including safety regulations, to shut them down.[46] Why would pro-

that have operated safely and without incident for years." Editorial, *New Abortion-Clinic Rules Would Harm Women*, PHILLY (Dec. 16, 2011, 3:01 AM), http://articles.philly.com/2011-12-16/news/30524905_1_abortion-clinics-kermit-gosnell-abortion-coverage. For another example of this particular pro-choice criticism of what motivates pro-lifers to regulate abortion clinics, see *infra* note 110.

42. There are, however, some pro-lifers who admit to using clinic regulations to limit abortions. *See infra* note 46, 101.

43. Rosalind S. Helderman, *Abortion Clinics in Virginia Will Face New Regulations*, WASH. POST, Feb. 25, 2011, at A1. Senator Vogel's statement was made in reference to a bill, passed by the Virginia General Assembly in February 2011, which subjected first-trimester abortion clinics that perform at least five procedures a month to the same regulations applicable to outpatient hospitals. *See id.* As might be expected, "[a]bortion–rights supporters fume[d] that the new rules really have nothing to do with protecting consumers and are, instead, part of an ideological campaign to 'get' their industry." Hinkle, *supra* note 39. According to Rosemary Codding, director of patient services at a first-trimester abortion clinic, "'This has nothing to do with quality care for women . . . They are denying what *Roe v. Wade* said we could do.'" Helderman, *supra*. Regulation opponent Senator Dick Saslaw was derisive: "'Anyone who thinks this debate was about women's health, get a life . . . .'" Chelyen Davis, *Virginia Passes Tougher Abortion Standards*, FREDERICKSBURG, Feb. 24, 2011, *available at* http://fredericksburg.com/News/FLS/2011/022011/02242011/1298578733fls. For similar contradictory assessments of the regulations passed to implement this statutory change, see *infra* note 94.

44. Steven Ertelt, *Corbett Fires State Employees After Gosnell Abortion Horrors*, LIFENEWS.COM (Feb. 15, 2011, 4:29 PM), http://www.lifenews.com/2011/02/15/gov-announces-major-changes-after-gosnell-abortion-horrors/.

45. *Id.* Safer clinics would seem inevitably to lead to reduced harm to the women using them, but this increased safety is not absolutely certain. If safer clinics lead to more abortions, the overall harm to women could increase--e.g., if regulations increased the number of abortions by twenty percent, but reduced a ten percent injury rate to nine percent, the result is more injured women, not fewer.

46. Some pro-lifers openly articulate this motivation in supporting clinic regulation. Proponents of a new regulatory scheme in Virginia argued "alternately that abortion amounts to killing and that the clinics must be more stringently regulated to ensure safety of the women who use them." Jim Nolan, *Health Board Adopts Abortion Clinic Regulations*, RICHMOND TIMES-DISPATCH, Sept. 15, 2011, http://www2.timesdispatch.com/news/2011/sep/15/25/pro-choice-anti-abortion-advocates-address-regulat-ar-1312067/. One regulation proponent left no question whatever about her true motivation: "'Just because something is legal, that does not make it morally right . . . No person has the right to kill another, especially a mother killing her child.'" Anita Kumar, *Stricter Va. Rules on Abortion Gain*, WASH. POST, Sept. 16, 2011, at B1 (quoting Frances Bouton). For other pro-lifers' apparent approval of using regu-

lifers want to make what they consider to be killing safer for those acquiescing in their own children's destruction?[47]

Pro-lifers might respond to this challenge by reaffirming that the pro-life movement truly cares about women. As stated by Victoria Cobb, president of the Family Foundation of Virginia, "'The pro-life movement has multiple goals. One is to protect unborn life . . . And the other is protecting and caring for women.'"[48] Strong evidence of this concern for women is the effort expended to provide women with meaningful alternatives to abortion.[49] These alternatives not only save unborn children's lives but also prevent the harm that pro-lifers believe abortion inflicts upon women.[50]

But caring for women in the effort to prevent abortion differs dramatically from caring for women who are participating in an abortion. Pro-lifers, however, believe that women are in an important sense victims of the legal abortion establishment. The law victimizes women by not only making abortion legal, but also by exalting abortion as a constitutional right.[51] The abortion industry victimizes women by hard-selling abortions with such tactics as withholding information about fetal development[52] and other subjects,[53] and, even worse,

lations to shut down clinics, see *infra* note 101. Some pro-choicers have implicitly recognized that this strategy would be expected conduct by one with the pro-life perspective. *See supra* note 40. Others might think that a pro-lifer would naturally adopt a completely opposite attitude toward clinic regulation--oppose any safety rules to keep the procedure unsafe as a deterrent to a woman's choosing abortion. This approach, however, would contradict the sympathy that pro-lifers feel for women as victims of the existing legal abortion regime. *See infra* notes 51-56 and accompanying text.

47. An analogy might clarify the point of this paragraph. Imagine a pro-life physician who believes that abortion kills a baby. In addition, the physician knows of and greatly regrets instances of harm to women from unsafe abortion procedures. Assume that the physician, being greatly skilled, could perform abortions more safely than an ordinary abortion provider. Nonetheless, wouldn't it be inconceivable for the physician to offer abortion services to better protect women? Admittedly, a pro-lifer who supports clinic regulation is not complicit in the abortion procedure to the degree of a performing physician, but doesn't support of clinic regulation at the very least implicitly signal endorsement of what happens inside?

48. Brigid Schulte, *Abortion Providers Wary of New Law*, WASH. POST, Feb. 27, 2011, at C1.

49. Two prominent examples are Feminists for Life's College Outreach Program and the nationwide work of hundreds of Crisis Pregnancy Centers. *See generally College Outreach Program*, FEMINISTS FOR LIFE, http://www.feministsforlife.org/cop/brochure.html (last visited Nov. 6, 2011) (describing work of Feminists for Life's College Outreach Program); *Welcome to Heartbeat!*, HEARTBEAT INT'L, http://www.heartbeatinternational.org/services-about-us/about-us-home (last visited Nov. 6, 2011) (describing work of one particular network of Crisis Pregnancy Centers).

50. This pro-lifer belief has led to such organizations as Rachel's Vineyard, the Silent No More Awareness Campaign, and Women Exploited by Abortion. *See* CAROL EVERETT & JACK SHAW, BLOOD MONEY 69 (1992); ABBY JOHNSON, UNPLANNED 62, 210, 245 (2010). For further discussion of the negative effect of abortion upon women, see THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION (Erika Bachiochi ed., 2004).

51. From the pro-life perspective, "victimization" is an accurate concept because the law encourages abortion and its attendant damage to women. For a further explanation, see *supra* note 50 and accompanying text.

52. For example, in 1986, Dr. Sally Faith Dorfman, who co-authored a Planned Parenthood (PP) critique of the pro-life film, *The Silent Scream*, spoke at the annual meeting

providing false information.[54] Moreover, once a woman in a clinic has decided to proceed with an abortion, the chance to save the fetus's life has been lost.[55]

of the American Public Health Association. She recommended use of sonography as a way to ascertain fetal age prior to an abortion, but also during the procedure itself, "both as a teaching tool and as a means of enhancing safety." *Warns of Negative Psychological Impact of Sonography in Abortion*, OB. GYN. NEWS, Feb. 15-28, 1986, at 42. But Dorfman also warned of possible "psychological hazards. Seeing a blown-up, moving image of the embryo she is carrying can be distressing to a woman who is about to undergo an abortion . . . . [Dorfman] stressed that the screen should be turned away from the patient." *Id.*; *see also* EVERETT & SHAW, *supra* note 50, at 98 (training in selling abortions included order to stop showing fetal development information). Despite Dr. Dorfman's advice, at least one abortion provider--former PP clinic director, Abby Johnson, who has now become pro-life--did offer women the opportunity to see an ultrasound photo of the fetus. *See* JOHNSON, *supra* note 50, at 46, 59. The abortion industry, however, is opposed to a legal duty that abortion providers show fetal ultrasounds to women contemplating an abortion. PP, for example, has filed a lawsuit challenging a 2011 Texas statute that imposes such a requirement. *See* Zach Zagger, *Rights Group Asks Judge to Block Texas Abortion Law Requiring Sonogram*, JURIST (July 3, 2011, 12:18 PM), http://jurist.org/paperchase/2011/07/rights-group-asks-judge-to-block-texas-abortion-law-requiring-sonogram.php.

A federal judge has issued a preliminary injunction blocking the law. Jim Forsyth, *Judge Blocks Parts of Texas Abortion Law on Sonograms*, REUTERS, Aug. 30, 2011, *available at* http://www.reuters.com/article/2011/08/31/us-abortion-texas-idUSTRE77U06F20110831 ; *see also* Tex. Med. Providers Performing Abortion Servs. v. Lakey, No. A-11-CA-486-SS, 2011 WL 3818879, at *31 (W.D. Tex. Aug. 30, 2011) (placing injunction on Texas ultrasound law), *vacated in part*, No. 11–50814, 2012 WL 45413 (5th Cir. Jan. 10, 2012). "Abortion rights advocates [also] oppose laws that require ultrasounds, even if viewing the images is voluntary." Kevin Sack, *In Ultrasound, Abortion Fight Has New Front*, N.Y. TIMES, May 28, 2010, at A1.

53. Steven Ertelt, *Louisiana: Gov. Jindal Signs Bill to Stop Coerced Abortions*, LIFENEWS.COM (July 6, 2011, 4:24 PM), http://www.lifenews.com/2011/07/06/louisiana-gov-jindal-signs-bill-to-stop-coerced-abortions/. PP opposes a recent Louisiana law designed to prevent coerced abortions. The law requires that abortion clinics post "signs inform[ing] women that they can't be forced to abort against their will, the father is liable for support, adoptive parents may pay costs of prenatal care and childbirth, and there are many public and private resources to help during and after pregnancy." *Id.* Pro-choicers object to such laws for several reasons, pointing out that they, among other things, "discount women's decision-making . . . and interfere with the relationship between women and their health care providers." *A Year in Review: 2009 Legislative Wrap-Up*, CENTER FOR REPRODUCTIVE RTS. (Feb. 1, 2010), http://reproductiverights.org/en/project/a-year-in-review-2009-legislative-wrap-up. These reasons ring hollow in the face of the core pro-choice commitment to presenting women with genuine choices in dealing with an unwanted pregnancy. Moreover, at least in the case of abortion providers like PP, advocacy decisions no doubt are heavily influenced by marketing considerations and the desire to profit from performing abortions. For direct evidence of how important profit is to PP, see *infra* note 84.

54. *See* EVERETT & SHAW, *supra* note 50, at 133-35 (discussing how abortion providers profit by falsely telling women they were pregnant). Abortion providers also use language that, while not literally false, is so obfuscating as to be seriously misleading. *See* JOHNSON, *supra* note 50, at 47 (describing effect of abortion drug, in PP terminology, as "removing an unwanted pregnancy" rather than "killing a fetus").

55. Pro-lifers have been successful in enacting and defending laws to compel abortion providers to act in ways that could influence women not to abort--e.g., observe mandatory waiting periods, provide fetal development information, and offer the opportunity to view a fetal ultrasound examination. Such laws are consistent with the principle that a state is allowed "to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a[n] [abortion] decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." Planned Parenthood of Se. Pa.

The second-best outcome is to help ensure that the woman herself is not injured or killed. She should not be abandoned to her fate at the hands of abortion providers such as Dr. Gosnell.[56] But even if one assumes the genuineness of the professed pro-life motivation to protect women through abortion clinic regulation, many pro-choicers still oppose government intervention. Numerous arguments are made, but most are unpersuasive.

One early pro-choice response to Dr. Gosnell's arrest was a press release by the NAF, explaining itself to be "the professional association of abortion providers in North America . . . [whose] mission is to ensure safe, legal, and accessible abortion care, which promotes health and justice for women."[57] The NAF sought to reassure its readers by emphasizing that Gosnell's clinic was "an outlier and not typical of the high-quality abortion care provided by NAF members."[58] In fact, Gosnell was rejected for NAF membership "because his facility did not meet NAF's standards for quality care."[59] The NAF concluded by again contrasting Gosnell's "one facility" with the legitimate, safe abortion providers in Pennsylvania.[60]

The NAF's implicit argument is that government regulation is not needed because most abortion providers are competent professionals.[61] But the press

v. Casey, 505 U.S. 833, 883 (1992) (plurality opinion).

56. Pro-choicers will no doubt be quick to point out that the ultimate goal of the pro-life movement is to prohibit most, if not all, abortions. If this objective is ever accomplished, won't pro-lifers be abandoning those women who still seek abortions to the illegal abortion market? What about the safety and health of these women? Doesn't pro-life pursuit of prohibition thus irrefutably demonstrate a lack of commitment to women's safety? This argument might initially seem difficult for a pro-lifer to answer. Actually, though, it is not, as long as one does not forget the broader national context in which Dr. Gosnell acted. This Article urges pro-choicers and pro-lifers to come together to support clinic regulation in this present era of legal abortion. Pro-lifers, though, believe that abortion unjustifiably takes a human life. Thus, they will naturally keep working to make most abortions illegal again. Pro-lifers believe that illegalization will substantially reduce the number of abortions by signaling society's disapproval. Thus, fewer women will be subjected to the risks of the procedure. But, tragically, some women undoubtedly will still seek abortions. Pro-lifers believe that protecting the lives of unborn children is an important enough goal to warrant this risk to women, which they contend, will not be that severe anyway. *See infra* note 88. Pro-choicers obviously would not agree, but this difference between the two sides is unavoidable given the clash of their underlying presuppositions. *See supra* note 14 and accompanying text.

57. Press Release, Vicki Saporta, Pres., Nat'l Abortion Fed'n, Open Letter to Patients: Despite Recent Headlines, Quality Abortion Care is the Norm (Jan. 21, 2011), *available at* www.prochoice.org/news/releases/20110121.html.

58. *Id.* Dayle Steinberg, president and CEO of Planned Parenthood of Southeastern Pennsylvania, worries that abortion opponents will "'take this really isolated case and use it as an opportunity to make a case that this is what all abortion providers are like and how 'unsafe' it is.'" Murtha, *supra* note 3.

59. Press Release,Open Letter to Patients, *supra* note 57.

60. *Id.*

61. *See id.* Although this press release did not explicitly refer to governmental regulation of abortion clinics, the NAF has long been opposed to such measures. *See* Hentoff, *supra* note 26 (describing pro-choice opposition to regulation of abortion clinics). The argument that abortion is generally a safe procedure was also made in the 1989-1990 Florida dispute by those opposing regulation. Charlene Carres, a lobbyist for the Protectors of Women's Abortion Rights, denied that there was "'a safety problem with abortion in Florida.'" Saletan, *su-*

release itself contradicts this position by noting that NAF members "care for more than half the women who choose abortion each year in the United States, Canada, and Mexico City."[62] What about the remainder of women who go to non-NAF members?[63] The very fact that the NAF imposes "a rigorous application process" for membership, including compliance with its "Clinical Policy Guidelines (CPGs), which set the standards for quality abortion care in North America," demonstrates that the organization acknowledges the necessity of specific safety requirements.[64] Yet, at present, many women lack such safeguards.[65] Is the NAF unconcerned for them?[66]

Another long-standing pro-choice argument against clinic regulation has resurfaced in the Gosnell situation. Dayle Steinberg, president of Planned Parenthood of Southeastern Pennsylvania, asserts that because abortion is already regulated, "'no new regulations can stop a physician who decides to disregard the law.'"[67] This argument proves too much because its premise—that

*pra* note 40.

62. Press Release, Open Letter to Patients, *supra* note 57.

63. William Saletan writes of the failure twenty years ago of the "private quality-control system" in Florida. Saletan, *supra* note 36. The NAF, "[u]nsatisfied by the clinic's methods or conduct," had rejected the membership application of the deplorable Dadeland Family Planning Center. *Id.* "But [this] verdict[] carried no force. Women seeking abortions wanted them done quickly and anonymously. They relied on ads in the Yellow Pages. Under these circumstances, the clinic's poor record hadn't hurt business." *Id.*

64. Press Release, Open Letter to Patients, *supra* note 57 (underline omitted).

65. For a response to the argument that it is hypocritical for pro-lifers, who seek to make abortion illegal, to insist upon safe abortion conditions for women, see *supra* note 56.

66. The NAF presumably is quite embarrassed by its interaction with Dr. Gosnell. The NAF press release touts the fact that Dr. Gosnell was rejected for membership, but fails to disclose that the NAF did not reveal the clinic's many shortcomings. *See supra* note 59 and accompanying text. The Gosnell grand jury report notes that the NAF evaluator believed his clinic to be "the worst . . . she had ever inspected." Report of the Grand Jury, *supra* note 6, at 13. Yet, she "never told anyone in authority about all the horrible, dangerous things she had seen." *Id.* The report later questions why "an evaluator from NAF, whose stated mission is to ensure safe, legal, and acceptable abortion care," failed to report Dr. Gosnell. *Id.* at 95. The NAF's silence was predictable based on its past conduct, as it also failed to disclose the "awful" conditions of Florida's Dadeland clinic when its membership application was rejected. *See* Saletan, *supra* note 36. Saletan later notes, however, that the NAF's Massachusetts affiliate was "outraged" at the failure of knowledgeable colleagues to report an abortion provider's "sexual misconduct with a female patient." William Saletan, *The Next Gosnell: Reckless Rogue Abortionists and What We Can Learn from Them*, SLATE (Feb. 25, 2011, 7:16 AM), http://www.slate.com/articles/news_and_politics/the_back_alley/2011/02/the_next_gosnell.single.html. If the silent ones thought "'they were protecting the abortion rights movement, they could not have been more wrong. They certainly were not protecting the women of this state.'" *Id.* (quoting spokesperson for NAF's Massachusetts affiliate). The NAF's acknowledgment of a duty to report sexual assault is laudable, but, as the Gosnell, Maryland, and Florida situations demonstrate, women also need protection from the harm done to them by abortion providers who either will not or cannot satisfy the NAF's safety standards. For refutation of the argument that abortion-seekers should, under free-market principles, themselves decide the level of safety for which they want to pay, see *infra* note 74.

67. Marie McCullough, *Grand Jury Faults State Regulators for Not Stopping Abortion Doctor Charged with Murders*, PHILA. INQUIRER, Jan. 20, 2011, at A1. Professor Tracy Weitz agrees: "'You don't need more regulations for people operating outside the bounds. It's a horrendous situation and we are all taking different lessons from the story, but the lesson

the law is no constraint to those determined to break it—would destroy the justification for all laws on any subject. Moreover, Ms. Steinberg presupposes that "the law" she refers to is adequate for its purposes. Finally, her stance is strikingly inconsistent with the posture of Planned Parenthood (PP) in the earlier Florida conflict over clinic regulation. At that time, Florida PP affiliates did not perform abortions, but they did refer "several thousand women to abortion providers each year."[68] PP "regularly and thoroughly inspected any clinic or doctor's office that sought patient referrals for abortions."[69] But PP, concerned about the safety of all Florida abortion providers and not just its own referrals, also supported state clinic regulation.[70] "How could it oppose standards less stringent than its own?"[71] Contrast this approach with Ms. Steinberg's position. She extols the safety of PP clinics: "Planned Parenthood maintains strict policies and procedures to ensure the highest standard of health care."[72] But she opposes any state involvement in clinic regulation beyond an annual inspection.[73] Where is her concern for women who do not go to PP clinics?[74]

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none of us should take is more regulation, because [Gosnell] was already outside the regulations.'" Murtha, *supra* note 3. This argument also appeared during the Florida controversy. The ACLU claimed: "'No matter how many laws are passed, there will always be a very small number of individuals who will disregard the law and disregard their responsibilities to the people they serve. . . . More laws will not change unscrupulous people's hearts.'" Saletan, *supra* note 36.

68. Saletan, *supra* note 40.

69. *Id.*

70. *See id.* PP's lobbyist, Carolyn Pardue, referring to those pro-choice groups that supported regulation, stated:

> "They are committed to insuring that women referred to clinics have the best assurance they can that the state and clinics have worked together to provide safe environments and safe physicians. These groups realized that, under current enforcement procedures, they cannot have confidence that the clinics are meeting uniform standards that insure [sic] safety."

Saletan, *supra* note 35.

71. Saletan, *supra* note 40. The "simple sanitation standards" that the bill's sponsor wanted to include "were paltry compared to" those of PP. Saletan, *supra* note 35. Although Florida PP is to be commended for persevering in its support of regulation despite opposition from many other pro-choice groups, a more complete commitment to women's safety would have led it to push for statewide standards equivalent to its own. *See id.*; *supra* note 35.

72. Steinberg, *supra* note 23.

73. *See* Stacey Burling, *Foes of Abortion See Opportunity to Make Rules Stricter*, PHILA. INQUIRER, Jan. 24, 2011, at B1 ("As for stepping up regulation, [Steinberg] said it was a good idea for the state to inspect abortion clinics annually, but that other rules could just increase bureaucracy and heighten barriers for patients."). William Saletan argues that the Florida clinic experience demonstrates how inadequate a simple inspection system can be. *See* Saletan, *supra* note 36.

74. One could conceivably make a "free-market" objection to abortion clinic safety regulations. The argument is that safety standards must always be evaluated in relation to cost. Some people are willing to pay more for greater safety, whereas others are willing to pay less, recognizing that this will mean less safety. It is best to leave such decisions to individuals. A current example of this debate involves table saw safety. Available technology, Sawstop, could significantly reduce the 4,000 amputations Americans suffer each year via table saw accidents. *See* Chris Arnold, *If Table Saws Can Be Safer, Why Aren't They?*, NPR (June 18, 2011), http://npr.org/2011/06/18/137258370/if-table-saws-can-be-safer-why-arent-they. Major manufacturers, however, have not installed Sawstop because they do not think it

Thus, the NAF and PP appear not to be wholly committed to women's safety. Within its own jurisdictional confines, each insists that abortion providers meet strict standards, yet each is willing to accord less protection to women seeking abortions in other places.[75] This is an anomaly that needs correcting, but the rigorous internal requirements that both organizations impose reveal the weakness of several other pro-choice arguments against clinic regulation. One claim is that no new regulations are needed. It is asserted, for example, that Dr. Gosnell would have been stopped had Pennsylvania officials only complied with existing law.[76] Even if this proposition is true,[77] an anti-regulation stance

would be profitable. *See id.* The National Consumers League wants to make Sawstop mandatory. *See id.* The power tool companies' response: "'Sawstop is currently available in the marketplace to any consumer who chooses to purchase it.'" *Id.* (quoting their attorney).
As another component of its free-market perspective, the industry supports "voluntary table-saw safety rules." *See* Jayne O'Donnell, *Consumer Agency Pushes Ahead on Table-Saw Rules*, USA TODAY, Aug. 29, 2011, at 1B. Nonetheless, the Consumer Product Safety Commission (CPSC) has unanimously approved an advance notice of proposed rulemaking on table saws. Statement of Chairman Inez M. Tenenbaum on the Commission Decision to Issue an Advance Notice of Proposed Rulemaking (ANPR) for Performance Requirements to Address Table Saw Blade Contact Injuries (Oct. 5, 2011), *available at* http://www.cpsc.gov/pr/tenenbaum10052011.pdf. For a helpful summary of this controversy, see Chris Arnold, *2012 Could See New Regulations for Table Saws*, NPR (Dec. 29, 2011), *available at* http://www.npr.org/2011/12/29/144417825/2012-could-see-new-regs-for-table-saws.
A "leave-it-to-consumer-choice" argument would be unpersuasive if offered by pro-choice organizations that, by implementing their own stringent safety standards, have likely profited from the increased business that enhanced safety presumably brings. *See infra* note 84. Moreover, for decades these groups have touted the safety of legal abortions over illegal abortions. *See supra* note 38 and accompanying text. To argue that Gosnell's patients chose to buy the particular level of safety that he provided would evince a startling lack of true concern for the many women he severely injured, and, in some cases, killed. In addition, unsafe abortion practices are not limited to Dr. Gosnell. The horrific Maryland and Florida episodes have already been discussed. *See supra* notes 26-37 and accompanying text. AUL describes evidence from other states showing "that abortion clinics are the true 'back-alleys' that abortion advocates warned us about." Denise M. Burke, *Introduction* to AMS. UNITED FOR LIFE, ABORTION PATIENTS' ENHANCED SAFETY ACT: MODEL LEGISLATION & POLICY GUIDE 3 (2010) . "Legalized abortion has not eliminated substandard medical care, kept people without medical licenses from performing abortions, ended the use of dirty, unsanitary procedure rooms and unsterile, inadequate instrumentation, ensured competent post-abortion care, nor prevented women from dying from unsafe abortions." *Id.* at 2-3. One would hope that PP would be concerned about helping to ensure the safety of all women, rather than telling them to decide for themselves how much safety they are willing to pay for. For more thoughts related to a free-market critique of state clinic regulation, see *supra* note 39, *infra* notes 105-08, and accompanying text.

75. For an argument that pro-lifers, who seek to make most abortions illegal, are not subject to this critique, see *supra* note 56.

76. *See* Otterbein, *supra* note 41.

77. The Gosnell grand jury concludes that several government agencies could have shut down Dr. Gosnell had they only done their jobs. *See* Report of the Grand Jury, *supra* note 6, at 8-13; *see also* Amy Worden, *Crackdown on Abortion Clinics Clears Pa. Senate*, PHILA. INQUIRER, June 15, 2011, at B1. The most interesting finding, however, is why the Pennsylvania Department of Health (PDH), the "first line of defense," failed. Report of the Grand Jury, *supra* note 6, at 8 (noting that PDH was the "first line of defense"). The PDH conducted a few inspections between 1973 (when Gosnell's clinic opened) and 1993, but it did not inspect the clinic again until February of 2010. *See id.* at 9, 44. What was the reason for what

is not advanced because existing Pennsylvania law requires "all abortion facilities to meet state-mandated administrative, professional qualification, patient testing, and physical-plant requirements."[78]

Pro-choicers also complain that government regulations will increase the cost of abortion and thus drive women to unsafe providers.[79] But what about the safety regulations that both the NAF and PP themselves impose? Don't they presumably have the same impact?[80] The NAF and PP no doubt would argue that they require only what is necessary to ensure women's safety, a response that alludes to a principal pro-choice critique of state clinic regulation—that it goes too far by imposing needless requirements.[81] In principle, this is a fair point. To the extent that state regulation is not reasonably related to ensuring women's health, it unnecessarily increases the cost of abortion.[82] This, in turn, could push women toward more risky providers by forcing some clinics to close and putting those that remain open beyond the financial reach of some women,[83] who might then choose cheaper, presumably less safe, alternatives.[84]

one columnist calls this "[a]stonishing[]" inspection-free gap? Heller, *supra* note 13. It was politics--more specifically, pro-choice politics. "With the change of administration from [pro-life] Governor Casey to [pro-choice] Governor Ridge, officials concluded that inspections would be 'putting a barrier up to women' seeking abortions. Better to leave clinics to do as they pleased, even though, as Gosnell proved, that meant both women and babies would pay." Report of the Grand Jury, *supra* note 6, at 9.

78. Burke, *supra* note 22 (citing 28 PA. CODE § 29.33 (2011)).

79. *See Frontline: Interview Bonnie Scott Jones* (PBS television broadcast Nov. 8, 2005) [hereinafter *PBS Interview*], *available at* http://www.pbs.org/wgbh/pages/frontline/clinic/interviews/scottjones.html. A young woman who spoke against Virginia's proposed new clinic regulations included pregnant women themselves as potential unsafe abortion providers: "'Hopefully you're thinking a little bit about what you're voting for . . . . About where young women are going to go for these procedures, about whether they're going to try and do them for themselves.'" Nolan, *supra* note 46. These regulations were ultimately adopted. *See infra* note 94.

80. Tyhisha Hudson's experience is evidence of the effect of PP's regulations on cost. She had a "gruesome experience" at Dr. Gosnell's clinic after choosing him over a PP clinic due to his lower cost. Otterbein, *supra* note 41. This unfortunate occurrence does not mean that PP should relax or abandon its standards. The goal of safe abortions is legitimate and should be pursued, even if a collateral effect may be that some women will go to unsafe providers.

81. *See PBS Interview*, *supra* note 79.

82. Impact on the cost of abortion is a key element in evaluating the constitutionality of clinic regulations under the federal "undue burden" standard. *See* Tucson Woman's Clinic v. Eden, 379 F.3d 531, 541-42 (9th Cir. 2004); Greenville Women's Clinic v. Bryant, 222 F.3d 157, 169-72 (4th Cir. 2000); *infra* note 85.

83. Clinic closings are not a bad thing per se. If a clinic is forced to close due to the inability or unwillingness to meet appropriate safety standards, the closing properly advances the goal of protecting women's health. It is only inappropriate safety requirements that are problematic.

84. Even appropriate regulations could make complying clinics too expensive for some women. These clinics, however, could still very well garner increased overall business from an enhanced reputation for safety. Achieving this competitive advantage is no doubt one reason that PP (for its in-house abortion business) and NAF (for the clinics it endorses) insist upon high safety standards. For any who doubt that a major reason PP promotes abortion is the profit the procedure produces, see JOHNSON, *supra* note 50, at 114-15, 121, 130, 137, 143-44, 152, 174-75, 204, 246. Johnson, a former PP clinic director who now is pro-life, also suspects

Moreover, excessive state regulation could well be unconstitutional.[85]

It is beyond the scope of this Article to outline a specific regulatory scheme that provides enough protection, but not too much. Both sides of the abortion controversy, however, should commit to working together to hammer out appropriate rules. Although there is likely to be disagreement about what requirements are reasonable at every stage of pregnancy,[86] first-trimester abortions will likely be a chief point of contention. They are safer than later procedures,[87] and thus they require less stringent regulation.[88] Later abortions

that the "big money to be made" explains PP's decision to begin offering late-term abortions in Houston, Texas. *See id.* at 111-12.

85. Invalidation might be based on the federal "undue burden" standard.

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. . . . In our considered judgment, an undue burden is an unconstitutional burden.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion). This principle applies to "[r]egulations designed to foster the health of a woman seeking an abortion." *Id.* at 878. "Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* Under this formulation, an unnecessary regulation would not ipso facto be unconstitutional. There must also be a finding that the regulation had the purpose or effect of creating a substantial obstacle to a woman's obtaining an abortion. *See* Mazurek v. Armstrong, 520 U.S. 968, 973-74 (1997) (overturning preliminary injunction against Montana statute restricting performance of abortions to licensed physicians even though evidence suggested that physician-assistants were equally competent). *But see* Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 891 n.118 (2007) (arguing that unnecessary regulation may be unconstitutional even if it does not constitute undue burden). Even if a statute was upheld against a federal constitutional challenge, it could still be invalidated under state law. *See* Armstrong v. State, 989 P.2d 364, 376 (Mont. 1999) (invalidating Montana "physician-only" statute under state constitutional principles that accord more protection to women's privacy than federal undue burden standard). Some state constitutional challenges, of course, could fail. *See* Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists, 257 P.3d 181 (Ariz. Ct. App. 2011) (upholding physicians-only requirement for surgical abortions). For a comprehensive evaluation of how state constitutional law impacts abortion, see PAUL BENJAMIN LINTON, ABORTION UNDER STATE CONSTITUTIONS: A STATE-BY-STATE ANALYSIS (2008).

86. For the argument that it is excessive to subject second trimester abortion clinics to the same requirements imposed upon ambulatory surgical centers, see Bonnie Scott Jones & Tracy A. Weitz, *Legal Barriers to Second-Trimester Abortion Provision and Public Health Consequences*, 99 AM. J. PUB. HEALTH 623 (2009). Whatever the merits of this claim, the Supreme Court, even before its adoption of the more lenient undue burden standard, has allowed the states considerable latitude in promulgating health and safety regulations for later abortions. For example, in *Simopoulos v. Virginia*, the Court first reaffirmed "that a State has an 'important and legitimate interest in the health of the mother' that becomes 'compelling . . . at approximately the end of the first trimester.'" Simopoulos v. Virginia, 462 U.S. 506, 510-11 (1983) (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)) (internal quotations omitted). The Court then upheld a Virginia law that required that all second-trimester abortions "be performed in an outpatient surgical hospital . . . licensed as a 'hospital' by the State." *Id.* at 515, 518-19.

87. *See* Christine Dehlendorf & Tracy Weitz, *Access to Abortion Services: A Neglected Health Disparity*, 22 J. HEALTH CARE POOR & UNDERSERVED 415, 417 (2011) ("For each week of gestation after 8 weeks, the risk of mortality increases and most abortion-related mortalities could be eliminated if women obtained their abortions prior to 8 weeks of pregnancy. As such, there are significant health consequences from delayed access to care." (citation

merit greater safety restrictions, but these too must be fine-tuned to assure that they do not go too far[89] or, even worse, are irrelevant to health risks altogether.[90]

This collaborative process would require both sides to resist temptation. Pro-lifers must avoid seeking excessive regulations, whether in good faith or with the hidden objective of driving abortion providers out of business.[91] Pro-choicers must resist the temptation to fight any state regulation, no matter how benign.[92] If the opponents can accomplish these objectives, they will have im-

omitted)).

88. Pro-lifers implicitly acknowledge this fact by minimizing the impact on women's safety should abortion ever again be generally prohibited. They argue that advances in abortion practice have dissipated the specter of back-alley abortions so commonly relied upon by pro-choicers. *See* JOHN C. WILLKIE & BARBARA H. WILLKE, WHY NOT LOVE THEM BOTH? QUESTIONS & ANSWERS ABOUT ABORTION 213-23 (1997); *see also* BERNARD N. NATHANSON & RICHARD N. OSTLING, ABORTING AMERICA 196-98 (1979).

89. A likely example of excessiveness is requiring all abortion providers to "'have admitting privileges at a local hospital'" in situations in which the abortion "'clinic is already required to have a transfer agreement with a hospital 15 minutes away . . . [to] accept the patients of the clinic in an emergency and treat them.'" *PBS Interview*, *supra* note 79.

90. *See* Amalia W. Jorns, Note, *Challenging Warrantless Inspections of Abortion Providers: A New Constitutional Strategy*, 105 COLUM. L. REV. 1563, 1594 (2005) ("Provisions regulating the width of doorways or mandating that areas outside a clinic are 'kept free of rubbish, grass, and weeds' should make a court skeptical of whether the actual purpose of these [regulations] . . . is to protect the safety of women receiving medical treatment at abortion clinics." (footnote omitted)). Jorns makes a good point with the exception of doorway width. It is prudent to ensure that doorways are wide enough to accommodate any reasonably foreseeable passage requirements of medical personnel and equipment. There are numerous other examples of irrelevant provisions. *See, e.g.*, Tucson Woman's Clinic v. Eden, 379 F.3d 531, 554 (9th Cir. 2004) (discussing requirement that patients be informed of their right "'[t]o be treated with consideration, respect, and full recognition of the[ir] dignity and individuality'"); *PBS Interview*, *supra* note 79 (discussing requirement that clinic "'be located in an attractive setting'"). The first example has been invalidated as unconstitutionally vague. *See Tucson Woman's Clinic*, 379 F.3d at 555.

91. Integrity issues arise for any pro-lifers who claim that regulations are designed to protect women's health, not to shut down clinics, yet then knowingly advocate measures not reasonably related to women's safety. For an example of a pro-life legislator who opposed, on integrity grounds, proposed Indiana regulations that she thought were intended to close abortion clinics, see Dawn Johnsen, *"TRAP"ing* Roe *in Indiana and a Common-Ground Alternative*, 118 YALE L.J. 1356, 1373-74 (2009).

92. Pro-choicers have coined the phrase, TRAP (Targeted Regulation of Abortion Providers) law, to describe abortion clinic regulations. *See* Schulte, *supra* note 48. "TRAP" was obviously selected for its perceived rhetorical power. The underlying objection is that such provisions "singl[e] out abortion clinics over similar medical practices." Michael Martz & Jim Nolan, *Abortion Regulations Tougher than Others; Rules Not Like Those for Other Outpatient Procedures*, RICHMOND TIMES-DISPATCH, Feb. 26, 2011, at A1; *see PBS Interview*, *supra* note 79. Even if one assumes that singling out has occurred, one response is that this result is entirely understandable given that it is a public tragedy or exposé of scandalous conditions that often flags abortion clinics for legislative attention. Arizona, for example, enacted new regulations over a decade ago due to "the 'horrific events' surrounding the practice of abortion doctor John Biskind," who was charged with (and later convicted of) manslaughter for killing Lou Anne Herron and "allegedly nearly abort[ing] a 37-week-old fetus he claim[ed] he thought was younger." Tom Collins, *Tucson Lawsuit Aims to Block New Abortion Law*, TUCSON CITIZEN, Mar. 2, 2000, at 1C; *see* Denise M. Burke, *Abortion Clinic Regulation: Combating the True "Back Alley"*, *in* THE COST OF "CHOICE": WOMEN EVALUATE

plemented what William Saletan says is the "lesson of Florida": "[T]hat pro-choicers should surrender this categorical aversion to legislation. And pro-lifers should respect the neutrality of clinic safety regulation instead of using it to impede abortions."[93]

Evidence already exists of how difficult it will be for both sides to resist these temptations. Pro-lifers in Virginia seem determined to subject first-trimester abortion clinics to the standards applicable to outpatient hospitals.[94] This is an outcome supported by AUL, which promotes the Abortion Patients' Enhanced Safety Act (APESA).[95] This model statute "requires abortion clinics to meet the same health, safety, staffing, and other standards as ambulatory surgical centers, healthcare facilities that specialize in providing outpatient surgeries."[96] AUL refers to this law "as the 'gold standard' of abortion care."[97] This no doubt is true, but it is questionable whether the law comports with AUL's

THE IMPACT OF ABORTION, *supra* note 50, at 122, 124 (providing additional examples of how revelation of poor clinic conditions led to state regulation). Moreover, exactly why is singling out problematic? If abortion clinic regulations are limited to those that protect women, one would think that pro-choicers would be glad that women will receive extra protection even if others similarly situated do not. Instead, they complain that women are being denied the equal protection of the laws. *See id.*; Dena Potter, *Va. OKs Bill to Likely Close Most Abortion Clinics*, ABC NEWS, (Feb. 25, 2011, 9:43 AM),http://abcnews.go.com/US/wireStory?id=12994256#.TzAkqsVbc24.
Since the 1992 *Casey* decision, such equal protection claims have not fared well in court. *See Tucson Woman's Clinic*, 379 F.3d at 543-49; Greenville Women's Clinic v. Bryant, 222 F.3d 157, 172-75 (4th Cir. 2000). For one scholar's argument that equal protection attacks on abortion regulations are likely to fail, see Metzger, *supra* note 85, at 882-98. Metzger thinks that ordinary administrative law offers a more promising alternative for policing unnecessary abortion clinic regulations. *See id.* at 898-906.

93. Saletan, *supra* note 66.

94. *See supra* note 43. Prior to the Virginia State Board of Health's promulgation of applicable standards, it was not certain what the new Virginia law would actually impose. Pro-life advocates argued that the Board would impose only "'appropriate regulations,'" but pro-choicers feared "'completely unnecessary'" requirements that could drive some abortion clinics out of business. Helderman, *supra* note 43. It is not surprising that the combatants are similarly contradictory in characterizing the regulations ultimately adopted by the board on September 15, 2011. A pro-life advocate applauded the vote. "'Today's action . . . ensures that those women who make the unfortunate choice of abortion will at least go to abortion centers that have met minimal safety standards.'" Nolan, *supra* note 46 (quoting vice president of Family Foundation of Virginia). The executive director of NARAL Pro-Choice Virginia, however, stated that "'[w]e are here today not because of a concern over women's health . . . [but] because of a political battle that has raged in this state for decades.'" Kumar, *supra* note 46. Governor Bob McDonnell recently approved the regulations previously adopted by the board. *See McDonnell Approves New Abortion Clinic Regulations*, ABC13 WVEC (Dec. 29, 2011, 7:20 PM), http://www.wvec.com/home/McDonnell-approves-new-abortion-clinic-regulations-136403983.html.

95. *See* AMS. UNITED FOR LIFE, ABORTION PATIENTS' ENHANCED SAFETY ACT: MODEL LEGISLATION & POLICY GUIDE (2010) [hereinafter AUL MODEL ACT] (outlining proposed legislation). The APESA is one of two model acts promulgated by AUL. The other is the Women's Health Protection Act (WHPA), which "is based on national abortion care standards." AMS. UNITED FOR LIFE, WOMEN'S HEALTH PROTECTION ACT (ABORTION CLINIC REGULATIONS): MODEL LEGISLATION & POLICY GUIDE [hereinafter MODEL LEGISLATION & POLICY GUIDE](2011).

96. *See* Burke, *supra* note 74, at 4.

97. Burke, *supra* note 22.

goal of imposing only those requirements that are "medically-appropriate."[98] The APESA, for example, applies to any abortion facility, "other than an accredited hospital, in which five or more first trimester abortions in any month . . . are performed."[99] If an abortion clinic performs only first-trimester abortions, it goes too far to impose the enhanced standards applicable to outpatient surgical facilities.[100] AUL's support of excessive requirements not only belies its stated policy,[101] but also risks invalidation under both *Planned Parenthood of Southeastern Pennsylvania v. Casey*'s "undue burden" standard[102] and perhaps

98. *See id.*

99. *See* AUL MODEL ACT, *supra* note 95, at § 3(b). The Act also applies to a clinic that performs "any second or third trimester abortions." *Id.*

100. As already noted, pro-choice advocates argue that these requirements are excessive even if limited to second-trimester abortions. *See* Jones & Weitz, *supra* note 86. The above text, however, levies an excessiveness charge only against first-trimester abortions. Evidence from the AUL itself suggests that the allegation is accurate. AUL refers to the APESA as the "'gold standard'" of abortion regulations, a description corroborated by the phrase "Enhanced Safety" in the Act's title. *See* Burke, *supra* note 22 (discussing APESA). The implication is that a less rigorous regulatory scheme would be sufficient. This in fact is AUL's position, as demonstrated by its promotion of the WHPA. *See* MODEL LEGISLATION & POLICY GUIDE, *supra* note 95. The AUL offers this alternative model legislation "[t]o help remedy the epidemic of substandard conditions at the nation's abortion clinics." Burke, *supra* note 74, at 4. Moreover, in promoting the APESA, AUL refers to "states that have already enacted minimal health and safety regulations for abortion clinics." *AUL MODEL ACT*, *supra* note 95. This reference would obviously include those states that had enacted the WHPA or something similar. It thus seems that AUL believes that the APESA is not essential for women's health and safety.

101. *See supra* text accompanying note 98. In a recent book, AUL Senior Counsel Clarke Forsythe uses language suggesting that the goal of supporting clinic regulation may actually go beyond protecting women. He describes such laws as one example of a "fence[] around *Roe* . . . . [I]t is understood by virtually all legislators and lobbyists that [such] regulations are intended to limit the abortion right because prohibitions are not possible." CLARKE D. FORSYTHE, POLITICS FOR THE GREATEST GOOD: THE CASE FOR PRUDENCE IN THE PUBLIC SQUARE 175 (2009); *see* Johnsen, *supra* note 91, at 1360 (describing similar statement by James Bopp of National Right to Life Committee); Heller, *supra* note 13 (claiming that Bopp's statement makes it "nonsense" to argue that one's stance on clinic regulation has nothing to do with one's position on abortion). Forsythe goes on to say that "regulatory fences [including abortion clinic regulation] have significantly reduced the number of abortions." FORSYTHE, *supra*, at 178. These statements make it doubtful that Forsythe would agree with this Article's endorsement of William Saletan's advice to respect the neutrality of clinic regulations and not use them to restrict abortion per se. *See supra* notes 91-93 and accompanying text. If so, this would be unfortunate. Forsythe criticizes the Supreme Court for subjecting women to the risks of unsafe providers. *See* FORSYTHE, *supra*, at 184. Carefully tailored safety regulations are the best way to protect women. Excessive measures simply invite litigation. *See infra* notes 102-03 and accompanying text.

102. 505 U.S. 833, 874 (1992). As noted, the mere fact of excessiveness does not in itself guarantee invalidation. *See supra* note 85 and accompanying text. Still, excessiveness invites judicial scrutiny. This is a real risk despite *Greenville Women's Clinic v. Bryant*, which upheld South Carolina's abortion clinic regulations against an undue burden challenge. *See* Greenville Women's Clinic v. Bryant, 222 F.3d 157, 166-72 (4th Cir. 2000). It is true that the requirements in dispute, like those in the APESA and in the new Virginia regulations, applied to any clinic "'in which any second trimester or five or more first trimester abortions are performed in a month.'" *Id.* at 160 (citation omitted); *see supra* note 43 and text accompanying note 99. There is a major distinction, however, between the South Carolina regulations andthe other two examples. The latter subject first-trimester abortion clinics to the standards

more rigorous state constitutional principles.[103] Pushing excessive health and safety standards also provides pro-choicers with a valuable strategic opportunity, one of which they are well aware—the chance to "portray abortion foes as radical."[104]

Pro-choicers also need to change. Many still evince a virtually blanket opposition to state regulation. Some have even resisted state efforts to impose minimal regulations like the NAF's own internal standards for approving clinics.[105] Pro-choicers invoke the National Rifle Association (NRA) to explain such total opposition. Fighting state regulation of abortion clinic safety is likened to the NRA's stand against governmental gun control.[106] "'The essence of true conservatism . . . is keeping government out of your private life.'"[107] This general anti-government sentiment is too vague to advance the debate. Even the most ardent libertarian supports government intervention under certain circumstances.[108] What one does in a particular case depends upon balancing the perceived positives and negatives of state intervention. What will state regulation accomplish? Are these desired outcomes worth what must be given up to attain them? The question for pro-choicers is this: If clinic regulations are

of ambulatory surgical facilities, whereas South Carolina imposed requirements substantially consistent with those endorsed by major pro-choice organizations, including PP and the NAF. *See Greenville Women's Clinic*, 222 F.3d at 169. Thus, *Greenville Women's Clinic* does not ensure that a law like the APESA would necessarily be upheld. It should also be noted that the Ninth Circuit found enough merit in a challenge to Arizona's clinic regulations, which were like those of South Carolina, to deny the defendants' motion for summary judgment. *See infra* note 111.

103. For an example from Montana, see *supra* note 85.

104. *See* Emily Bazelon, *The Reincarnation of Pro-life*, N.Y. TIMES MAG., May 29, 2011, at MM13.

105. *See* William Saletan, *The Sunshine State: What Reporters and Health Inspectors Found in Florida's Worst Abortion Clinics*, SLATE (Feb. 22, 2011, 7:23 AM), http://www.slate.com/articles/news_and_politics/the_back_alley/2011/02/thesunshinestate.single.html. For another example of pro-choicers' antipathy to even the mildest regulations, see *supra* note 35.

106. *See* Saletan, *supra* note 36 (comparing anti-regulatory stance in abortion to gun control).

107. *Id.* (quoting director of Florida pro-choice organization). For an earlier discussion of a general anti-regulatory stance, see *supra* notes 39, 74.

108. A. Barton Hinkle argues that conventional labels like "conservative" and "liberal" are not predictive of where one stands on clinic regulation. "[M]any so-called conservatives believe in limited government everywhere except the uterus." Hinkle, *supra* note 39. And "[s]uddenly, outraged liberals are sounding remarkably like libertarian advocates of laissez-faire capitalism and the industries they defend." *Id.* How can one explain "[t]he fact that progressive defenders of abortion rights suddenly sound like Milton Friedman and Ronald Reagan"? *Id.* One possibility

> is that abortion providers differ from every other entity in the universe--that they are uniquely pure of heart and incapable of error, and therefore ought to be left alone to do their good work in peace while beneficent government agencies impose increasingly strict oversight on the troglodytes and imbeciles who run everything else.

*Id.* "The other," clearly Hinkle's view, "is that when it comes to the excesses of the modern regulatory state and the danger of giving government in general too much power, the Milton Friedmans and Ronald Reagans of the world might--just might--have a tiny shred of a point." *Id.*

limited to measures protective of women, what reasons justify continuing opposition?

Pro-choicers could assert that once the door is opened to state safety regulations, lawmakers will branch out to regulate abortion more broadly. This argument is grounded in the venerable maxim: "Don't let the camel's nose into the tent." The argument's weakness in this context is that legislators have already acted vigorously to regulate abortion in a variety of ways.[109] They have not needed the "camel's nose" of safety regulations. Perhaps, though, this explosion of pro-life-supported restraints shows a more persuasive reason for pro-choice concern. Can ardent pro-lifers be counted on to confine the regulations to legitimate health and safety issues? Pro-lifers must demonstrate that they can be trusted by not overreaching.[110] Pro-choicers can also take solace in the fact that the courts are available as a deterrent to regulations not reasonably related to protecting women.[111]

109. For a discussion of various abortion regulatory measures, see *supra* note 55. A recent *New York Times* article states that in April 2011 alone, thirty state anti-abortion laws were passed, and at least sixty-four have passed "since Republicans took control of half the country's statehouses [in 2011]." Bazelon, *supra* note 104.

110. An example of pro-life overreaching contributed to an ongoing dispute in Kansas concerning its recently enacted licensing requirements for abortion clinics. The new regulations were apparently implemented on an expedited basis that made it impossible for opponents to comment, much less comply. *See* Press Release, Ctr. for Reproductive Rights, Center for Reproductive Rights Files Lawsuit Against Kansas Abortion Clinic Regulations (June 28, 2011), *available at* http://reproductiverights.org/en/press-room/center-for-reproductive-rights-files-lawsuit-against-kansas-abortion-clinic-regulations. Critics also allege that the new standards are not really about women's safety. According to Nancy Northup, president of the Center for Reproductive Rights, "'These requirements range from the impossible to the absurd . . . . They're not designed to protect patient safety; they're designed to shut down abortion providers.'" A.G. Sulzberger & Monica Davey, *New Law in Kansas Seen as a Threat to Abortions*, N.Y. TIMES, June 24, 2011, at A11. Pro-lifers respond that the Kansas standards are based in large part on the NAF's own requirements. *See* Ciara Matthews, *Abortion Backers Not Interested in Health, Safety of Women*, LIFENEWS.COM (July 21, 2011, 4:54 PM), http://www.lifenews.com/2011/07/21/abortion-backers-not-interested-in-health-safety-of-women/ ("What is being done in Kansas is not new, radical or extreme. It constitutes reasonable oversight of an industry that performs very invasive procedures . . . . If the pro-abortion community really were as 'pro-woman' as it claims, it would welcome any protections aimed at keeping women safe."). The United States District Court for the District of Kansas issued a preliminary injunction blocking the licensing provision. *See* Ashley Hileman, *Federal Judge Blocks Kansas Abortion Law Requiring Licenses for Clinics*, JURIST (July 2, 2011, 11:29 AM), http://jurist.org/paperchase/2011/07/federal-judge-blocks-kansas-abortion-law-requiring-licenses-for-clinics.php. The ruling was based in "large part . . . on the very short time frame" given for compliance with the new rules. Brad Cooper, *Federal Judge Blocks New Abortion Kansas Licensing Rules*, KANSAS CITY Star, July 1, 2011, http://www.womenhealthwizard.com/federal-judge-blocks-new-abortion-kansas-licensing-rules. For an argument that Pennsylvania's recently enacted clinic regulation measure also reflects pro-life overreaching, see *supra* note 41.

111. For a discussion of the applicable legal standard from the *Casey* decision, see *supra* note 85 and accompanying text. Pro-choice litigators lament the difficulty of convincing a court that *Casey* has been violated. *See PBS Interview*, *supra* note 79 ("'I have not yet seen a case striking down a TRAP law on the grounds that it violates that *Casey* standard.'"). "[T]his new *Casey* standard really seems to make it difficult, if not impossible, to challenge TRAP laws . . . ." *Id.* Some outcomes support this pessimistic assessment. *See supra* note

Both adversaries in the abortion controversy will find it challenging to join forces to impose reasonable clinic regulations. Despite its difficulty, the effort is worthwhile for all those truly committed to women's safety.

## III. KILLING BORN-ALIVE BABIES

Dr. Gosnell was indicted for the murder of seven babies born alive and then killed.[112] After using medication to induce labor and delivery,[113] he stuck scissors into the babies' necks and severed their spinal cords. He called this process "snipping."[114] According to the grand jury,

> These killings became so routine that no one could put an exact number on them. They were considered "standard procedure." Yet some of the slaughtered were so fully formed, so much like babies that should be dressed and taken home, that even clinic employees who were accustomed to the practice were shocked.[115]

Dr. Gosnell joked about the size of one of the babies he killed: "'This baby is big enough to . . . walk me to the bus stop.'"[116] The evidence also showed that often these babies were breathing, moving, and/or crying before they were killed.[117]

Other employees would sometimes perform the job of cutting babies' necks. On one occasion, a baby had moved and breathed for approximately twenty minutes when one clinic employee called another employee over to look because this baby was moving its arms when they were pulled.[118] "After play-

102; *see also* Planned Parenthood Arizona, Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists, 257 P.3d 181 (Ariz. Ct. App. 2011) (upholding Arizona abortion clinic regulations against state constitutional challenge by applying *Casey* standard). There has, however, been at least one partial success. In *Tucson Woman's Clinic v. Eden*, the Ninth Circuit sustained an undue burden challenge to Arizona's abortion clinic regulations against a motion for summary judgment. *See* Tucson Woman's Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004). The court held that "a reasonable fact-finder could find that the challenged set of statutes and regulations is unnecessary and has the effect of imposing a substantial obstacle on women seeking an abortion." *Id.* at 542. The lawsuit was ultimately settled. *See* Denise Burke, *Arizona Abortion Clinic Regulations Finally Go Into Effect*, AMS. UNITED FOR LIFE (Oct. 29, 2010), http://www.aul.org/2010/10/arizona-abortion-clinic-regulations-finally-go-into-effect/. It is also important to note that state law principles could very well offer a promising avenue of redress against excessive clinic regulations. *See supra* note 85.

112. *See* Presentment, *In re* Cnty. Investigating Grand Jury XXIII, Misc. NO. 0009901-2008, (Pa. Ct. Com. Pl. Jan. 19, 2011), at 23-24, *available at* http://www.phila.gov/districtattorney/PDFs/PresentmentFinalWomensMedical.pdf (describing indictment).

113. Report of the Grand Jury, *supra* note 6, at 25, 105.

114. *Id.* at 4. The grand jury found this term to be "misleading" because of the pressure necessary to cut through the vertebrae and spinal cord. *See id.* at 112.

115. *Id.* at 99-100.

116. *Id.* at 102.

117. *See id.* at 103, 112, 114.

118. *See id.* at 104.

ing with the baby, [the first employee] slit its neck."[119]

These abhorrent facts should appall both pro-lifers and pro-choicers. While pro-lifer condemnation is obvious, pro-choicers also have no reason to defend the killing of these babies. Once delivery has occurred, there is no longer an ongoing abortion procedure. Consequently, *Roe* and the concept of a constitutional right to an abortion have no application.[120] In addition, the underlying philosophical premise of the pro-choice position is a woman's right to control her own body. Once outside the mother, a baby does not impinge on a woman's sovereignty over her body. The two sides should thus unite in opposing the killing of born-alive infants. This assertion will hopefully achieve consensus, but a related claim might be more controversial—that born-alive infants are entitled to legal protection regardless of viability.

The grand jury report repeatedly states that the babies born alive were viable when they were killed,[121] thereby suggesting that viability is a key criterion. Pennsylvania law defines viability as "[t]hat stage of fetal development when . . . there is a reasonable likelihood of sustained survival . . . outside the [mother's] body . . . , with or without artificial support."[122] But what of infants born alive who are not viable? Should Dr. Gosnell or anyone else be able to kill them with impunity?

A person is guilty of murder under Pennsylvania law only if one intentionally kills a "human being."[123] There is compelling evidence that a baby born alive, regardless of viability, is a human being entitled to the law's protection.[124] The most direct proof of the irrelevance of viability is Pennsylvania's infanticide statute, which provides that the Commonwealth's laws "shall not be construed to imply that any human being born alive in the course of or as a result of an abortion or pregnancy termination, no matter what may be that human being's chance of survival, is not a person under the Constitution and laws of this Commonwealth."[125] Double negatives often cause confusion, but not here.

119. *Id.*

120. *Roe* makes plain that its impact is limited to the duration of the pregnancy. *See* Samuel W. Calhoun, *"Partial-Birth Abortion" Is Not Abortion:* Carhart II*'s Fundamental Misapplication of* Roe, 79 MISS. L.J. 775, 779-80, 801-02 (2010).

121. *See* Report of the Grand Jury, *supra* note 6, at 99, 105, 107 (explaining that Gosnell killed viable, born-alive babies).

122. 18 PA. CONS. STAT. § 3203 (1998). This definition technically does not apply to a born child because the statute pertains to a determination of the survival chances outside the woman's body of an unborn child who, at the time of the viability assessment, is still within the womb. *See id.* The viability concept originated, though, in evaluating the survival chances of premature infants. Randy Beck, Gonzales, Casey, *and the Viability Rule*, 103 NW. U. L. REV. 249, 257 (2009).

123. *See* 18 PA. CONS. STAT. §§ 2501(a), 2502(b).

124. The Pennsylvania criminal statutes do not define the term "human being." *See* Commonwealth v. Brown, 6 Pa. D. & C.3d 627, 630-31 (Pa. Ct. Com. Pl. 1978) ("[W]e observe that the words [human being] are not defined in section 2501, describing criminal homicide, or in section 2502, describing the degrees of murder. Neither are they defined in any other section of the Crimes Code.").

125. 18 PA. CONS. STAT. § 3212(a) (2000). "Born alive" is defined as complete separation from the mother, followed by "breath[ing] [,] . . . beating of the heart, pulsation of the umbilical cord, definite movement of voluntary muscles or any brain-wave activity." 18 PA.

To state that Pennsylvania law should not be construed to mean that a pre-viable, born-alive infant "is not a person" is equivalent to saying that such an infant is a person. This is confirmed by the duty of care imposed upon medical personnel regarding "a child who is born alive during the course of an abortion"—it must be provided "that type and degree of care and treatment which, in the good faith judgment of the physician, is commonly and customarily provided to *any other person* under similar conditions and circumstances."[126] Thus, for born infants, being alive, not viability,[127] is the chief determinant of legal personhood.[128]

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CONS. STAT. § 3203. Although not expressly stated, it is implied that a baby totally outside the mother, but still attached by the umbilical cord, satisfies the complete separation criterion. *Cf. id.* Professor Cynthia Gorney points out that this definition could be construed to cover a post-abortion dismembered fetus that, however fleetingly, "has a pulsating umbilical cord or a beating heart." *Cynthia Gorney: Parsing the Politics of Abortion*, NPR (Oct. 30, 2008), *available at* http://www.npr.org/templates/transcript/transcript.php?storyId=96316327. Even if true--and a court could well say that these statutes were intended to cover only intact infants--no significant consequences would follow. There would be no need to attempt resuscitation of dismembered fetuses facing imminent, unavoidable death. *See infra* note 127.

126. 18 PA. CONS. STAT. § 3212(b) (emphasis added). The Gosnell grand jury recommended that he be charged with infanticide for his conduct in regard to two viable babies, the only such instances not barred by the statute of limitations. Report of the Grand Jury, *supra* note 6, at 228-29. In suggesting that the infanticide statute applies only to viable infants, the grand jury ignored the plain language of subsection 3212(a), which states that the personhood of born-alive babies does not depend on "chance of survival." *See supra* text accompanying note 125. It would be supremely ironic to interpret subsection 3212(b)'s duty of care as limited to viable infants when subsection 3212(a) states that *no Pennsylvania law*--which presumably includes the very next subsection of the same statute--shall be interpreted to mean that any born-alive baby, regardless of chance of survival, is not a person.

127. Viability would be relevant in evaluating what medical care should be given to born-alive infants. Viable infants should be given care to enhance their chance of survival. Non-viable infants should be given palliative care to ease their impending deaths. *See infra* note 133. But differentiation in type of care does not signal a distinction in legal status. The Pennsylvania infanticide statute treats all born-alive babies, viable and non-viable, as persons entitled to appropriate medical care. *See supra* notes 125-26 and accompanying text. These provisions contradict the suggestion in the Pennsylvania Administrative Code that this duty applies only post-viability. *See* 28 PA. CODE § 29.35 (2011). Such an inference might be drawn from the section's title, "Abortion after viability." The language in the governing statute should trump anything to the contrary in the implementing regulations. *Cf.* 28 PA. CODE § 29.42 (explaining that Board of Health may grant exceptions to its regulations "excepting statutory requirements").

128. There is other substantiating evidence. Direct support comes from *Hudak v. Georgy*, which held that a wrongful death and survival action can be brought on behalf of a baby born alive, but not viable. Hudak v. Georgy, 634 A.2d 600 (Pa. 1993). The court stated that to "interject[] the concept of viability into a situation where a child [is] born alive confuses the issue. Viability describes the capacity of the unborn to survive outside the womb, and is not relevant when an infant survives birth." *Id.* at 602. "[T]oday we are reaffirming the unremarkable proposition that an infant born alive is, without qualification, a person." *Id.* at 603.

Additional evidence of viability's irrelevance to the personhood of born babies comes from the common law's "born alive rule," long followed in Pennsylvania. *See Brown*, 6 Pa. D. & C.3d at 635-38. Under this principle, a homicide prosecution could be maintained for killing a fetus via pre-birth injuries only if the fetus was born alive and then died. Commonwealth v. Booth, 766 A.2d 843, 849 (Pa. 2001) ("In its simplest statement, the 'born alive rule' prescribes that only one who has been born alive can be the victim of homicide"). To prove live

The Pennsylvania approach is consistent with the law in other states[129] and

birth, one had to demonstrate that "'the fetus [was] totally expelled from the mother and show[ed] clear signs of independent vitality.'" *Id.* at 850 (quoting State v. Amaro, 448 A.2d 1257, 1259 (R.I. 1982)). Breathing after birth satisfies this test. *See id.* The *Booth* court never even mentions the concept of viability in discussing the "stringent" "[r]equirements for proof of live birth." *See id.* at 849-50.

In 1997, Pennsylvania expanded the law's protection of unborn children beyond that provided by the born alive rule. In the Crimes Against the Unborn Child Act (Unborn Child Act), the Commonwealth created five separate crimes, including murder, for "violence directed against unborn children." *See* 1997 Pa. Legis. Serv. 44 (West) (codified at 18 PA. CONS. STAT. §§ 2601-09 (1998)); *Booth*, 766 A.2d at 853. This law, although not directly pertinent to the issue of the personhood of born, but non-viable, babies, does demonstrate the irrelevance of viability to satisfying the "aliveness" criterion necessary for a murder prosecution under the born alive rule. The Unborn Child Act protects the unborn at all stages of pregnancy by incorporating the definition of "unborn child" from Pennsylvania's Abortion Control Act: "an individual organism of the species homo sapiens from fertilization until live birth." *Compare* 18 PA. CONS. STAT. § 2602 (1998), *with* 18 PA. CONS. STAT. § 3203 (2000). The definition plainly makes viability irrelevant, which led to a claim that the statute was unconstitutionally vague because "the concept of death is difficult to understand relative to a fetus that is not viable." Commonwealth v. Bullock, 913 A.2d 207, 212-13 (Pa. 2006). The Supreme Court of Pennsylvania rejected the vagueness challenge:

> [T]he concepts of life and its cessation are readily understandable to persons of ordinary intelligence . . . [T]o accept that a fetus is not biologically alive until it can survive outside of the womb would be illogical, as such a concept would define fetal life in terms that depend upon external conditions, namely, the existing state of medical technology . . . . Accordingly, viability outside of the womb is immaterial to the question of whether the defendant's actions have caused a cessation of the biological life of the fetus.

*Id.* at 213. If viability is irrelevant to assessing the aliveness of fetuses still within the womb, it should certainly be irrelevant in evaluating whether fetuses once born are alive so as to be proper subjects for the protection of the murder laws.

129. Support from other states takes various forms. First, viability is irrelevant under most state born-alive infant protection acts, enacted to confer legal protection upon babies born alive following an attempted abortion. *See* Calhoun, *supra* note 120, at 791-92, 807 n.164. Second, other states have agreed with Pennsylvania that viability is not a prerequisite for a wrongful death action concerning a baby who died following live birth. *See* Nealis v. Baird, 996 P.2d 438, 455 (Okla. 1999) ("Reason dictates that a child, once born alive, must be recognized as a person regardless of its ability to sustain life for any particular period of time thereafter." (emphasis omitted)); Grp. Health Ass'n, Inc. v. Blumenthal, 453 A.2d 1198, 1206 (Md. 1983) ("[V]iability has no role . . . where the child is born alive."); *supra* note 126. Third, at least one court has stated that a doctor can be convicted of murder for killing a nonviable, born-alive infant following an abortion attempt. *See* Showery v. State, 690 S.W.2d 689 (Tex. App. 1985). *But cf.* People v. Chavez, 176 P.2d 92, 94-95 (Cal. Dist. Ct. App. 1947) (stating that viability is required, but belying this fact by reciting evidence that sufficed to demonstrate that "child was born alive and became a human being"). The *Showery* opinion is potentially confusing because, while at one point it states that a murder charge cannot be constitutionally sustained for killing "a nonviable fetus," the court elsewhere emphasizes that the only "viability" necessary is proof that the baby "had been born alive and was alive at the time of the alleged conduct." *Showery*, 690 S.W.2d at 692. "If life is present, it may not be affirmatively terminated regardless of the probability of natural or assisted survival." *Id.* at 693; *see also id.* at 694 (stating that "actual life, *however fragile*, at the time of the . . . [accused's] conduct," is all that is needed (emphasis added)). The *Showery* facts bear a grim linguistic relationship to Dr. Gosnell's actions. The defendant in *Showery* suffocated a born-alive baby by "placing the placenta over its face, immersing it in liquid and sealing it in a plastic trash bag." *Id.* at 691. When the Gosnell grand jury asked its "medical experts if there could be any legitimate, medical purpose behind Gosnell's practice [of severing the spinal

with the 2002 federal Born-Alive Infant Protection Act. According to the Act, for purposes of federal law, "the words '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."[130] This outcome is plainly correct. Viability should not be a prerequisite for the legal personhood of a baby born alive.[131] Those with lingering doubts should consider a hypothetical from Douglas Johnson of The National Right to Life Committee:

> "Let's say you have a baby born at twenty-two and three-quarters weeks . . . You have two neonatologists standing over the incubator, arguing about whether they should do this or that, whether it's futile, whether this baby has a chance. Suddenly somebody rushes in from the corridor and strikes the baby on the head with a hammer. Does anyone dispute that a homicide just occurred? No. One neonatologist may say a certain intervention is futile here. Another may say, 'No, we should do this or that thing.' But they're both going to grab that guy and call the cops."[132]

Johnson's scenario persuasively demonstrates the irrelevance of viability once live birth occurs,[133] but an alteration makes it even more pertinent to the

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cord], one said: 'it would be the same as putting a pillow over the baby's face, that the intention would be to kill the baby.'" Report of the Grand Jury, *supra* note 6, at 112.

130. 1 U.S.C. § 8(a) (2006). For a discussion of the constitutionality of born-alive infant protection acts, see Calhoun, *supra* note 120, at 792 n.86.

131. This is true even though the pre-viable baby could have been legally aborted prior to its birth. There is nothing unreasonable about taking advantage of all that the law now allows--protecting the born pre-viable child. *See id.* at 812-821 (describing reasonableness of partial birth abortion bans). Those who want to extend that protection to the unborn pre-viable child will have to wait until the impediment of *Roe* is overcome.

132. Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything to Lose*, HARPER'S MAG., Nov. 2004, at 33, 44. It is unclear whether Johnson's reference to a birth date of just under twenty-three weeks refers to that length of time from conception or instead from the beginning of the woman's last menstrual period, the standard method of measuring the length of a pregnancy. *See infra* note 138. From the context, however, he obviously intends to describe a situation in which the baby's viability is possible, but uncertain.

133. It might be objected that Johnson's hypothetical appears to refer to a normal delivery, not a live birth during an attempted abortion. This difference, however, is irrelevant. Real-world facts must be faced. A baby born alive is a baby born alive, regardless of the attendant circumstances. Pennsylvania law recognizes this in the wide scope of its infanticide statute. *See supra* note 125 and accompanying text. As previously noted, an abortion context also does not preclude the application of born-alive infant protection acts. *See supra* notes 129-30 and accompanying text. Two pro-choice scholars have implicitly corroborated the irrelevance of viability to the personhood of an infant born alive in an abortion context. Glenn Cohen and Sadath Sayeed pose a hypothetical in which a woman in an abortion clinic "goes into active, uncontrollable labor and . . . deliver[s] an extremely premature newborn." I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 J.L. MED. & ETHICS 235, 237 (2011). Given the child's "long odds"--i.e., its likely non-viability--the woman asks the clinic to provide

> care . . . to[] maximiz[e] comfort and ensur[e] dignity during the dying process. This palliative choice is respected by her providers because in the U.S. pediatrics community, there is generally consensus that neonates born below 23 weeks by

Gosnell facts. Imagine that it is not an intruder who delivers the fatal hammer blow, but the doctor who believed that the child was not viable. Even if one presumes this was an accurate diagnosis, can it be doubted that the physician should be prosecuted for homicide? Once a baby is born alive, its personhood should not be contingent on its viability.[134] This is the actual state of Pennsylvania law, and it is hoped that the Gosnell grand jury report's contrary suggestion will cause minimal confusion.[135]

## IV. PERFORMING ILLEGAL POST-VIABILITY ABORTIONS

Dr. Gosnell was indicted on thirty-three counts of performing illegal late-term abortions,[136] defined under Pennsylvania law as those performed at a gestational age of twenty-four weeks or greater.[137] It may seem curious that this subsection discusses illegal post-viability abortions when the Pennsylvania statute's definition of illegality does not even use the term "viability." Discussing viability is appropriate because the legislature's apparent intent was to prohibit post-viability abortion.[138] Consequently, for purposes of discussion, the Penn-

LMP should not be resuscitated given their poor chance of survival without significant disability.

*Id.* For a discussion of "LMP" (last menstrual period), *see infra* note 138. It is telling that the authors do not envision an alternative method for dealing with these early neonates--simply crush their heads with a hammer. Palliative care would also be the only appropriate treatment for live, non-viable, babies born not from premature labor, but from their intentional or unintentional extraction from the womb during an abortion procedure. Again, a baby born alive is a baby born alive, however this occurs.

134. For an argument that the beginning of the birth process should trigger legal protection, see Calhoun, *supra* note 120, at 790-811.

135. William Saletan clearly appears to have been influenced by the grand jury report. In commenting on Gosnell's killing of born-alive infants, he emphasizes that the babies were viable. William Saletan, *The Baby Butcher: Pro-choice Absolutism and the Grisly Abortion Scandal in Philadelphia*, SLATE (Jan. 20, 2011, 8:48 AM), http://www.slate.com/articles/health_and_science/human_nature/2011/01/the_baby_butcher.single.html.

136. Presentment, *supra* note 112, at 33. This is a surprisingly small number given that the grand jury believed "that Gosnell performed scores more such abortions." Report of the Grand Jury, *supra* note 6, at 232. Many patient files, however, were missing. *See id.* at 233. In addition, Pennsylvania law has a two-year statute of limitations. *See id.*

137. 18 PA. CONS. STAT. § 3211(a) (2000). The late-abortion prohibition has two exceptions: one for abortions reasonably believed to be necessary to protect the life or physical health of the woman, and the other for abortions of fetuses reasonably thought to be under twenty-four gestational weeks of age. *See id.* § 3211(b). The grand jury never discussed the potential application of either of these exceptions, presumably because the underlying facts warranted neither.

138. The statute defines "gestational age" as "[t]he age of the unborn child as calculated from the first day of the last menstrual period [LMP] of the pregnant woman." Id. § 3203. Twenty-four weeks gestation by LMP is within the range of fetal viability. Cohen & Sayeed, *supra* note 133, at 236. A gestational age of twenty-four weeks by LMP, however, does not refer to a child twenty-four weeks from conception because "[c]onception is assumed to occur between 11 and 21 days after the first day of the LMP. The standard estimated gestational age by LMP, then, typically includes two 'extra' weeks prior to actual fertilization." *Id.* at 235 n.3. Thus, the Pennsylvania cut-off for legal abortion is roughly twenty-two weeks from conception. For other indications of the legislature's underlying interest in viability, see 18 PA.

sylvania statute will be treated as drawing the line for legal abortion at viability.[139] Can both pro-choicers and pro-lifers agree with this line?

As for pro-choicers, it is fair to say that state restrictions on post-viability abortions have not been a primary focus. This is so for two reasons. First, the vast majority of abortions occur before fetal viability.[140] Second, the Supreme Court will uphold a state prohibition of post-viability abortion only if the statute has an exception allowing the abortion when the life or health of the mother is at risk.[141] "Health" has been broadly construed,[142] so that in reality there are

CONS. STAT. §§ 3211(c)(4)-(5).

Pennsylvania's focus on gestational age as a proxy for viability is problematic for two reasons. On the one hand, the statutory scheme does not do enough to ensure accurate calculations of gestational age. While testing for gestational age must be performed and reported, there is no immediate check of the reliability of the results. 18 PA. CONS. STAT. § 3210(a). It would be a simple matter for an abortion provider to falsify tests to escape the constraints imposed on twenty-four-week abortions. Dr. Gosnell, for example, taught his staff to manipulate ultrasound machines to produce false readings of younger fetuses. Report of the Grand Jury, *supra* note 6, at 79-80. To truly deter late abortions, the assessment of gestational age should require the contemporaneous judgment of an independent physician, one with no business relationship with the abortion provider. Although making age testing more rigorous would be beneficial, doing so would highlight the second problem with Pennsylvania's approach--its prohibition of late abortion is not expressed directly in terms of viability. The Supreme Court has made it clear that a state can generally prohibit abortion only after viability. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992) (plurality opinion) (recognizing that after viability, state's interest in protecting fetus becomes compelling); Webster v. Reproductive Health Servs., 492 U.S. 490, 516, 516 n.14 (1989) (plurality opinion) (noting compelling state interest in potential human life after viability). Pennsylvania in effect assumes the viability of all unborn children at twenty-four weeks gestational age, but the Supreme Court has made it clear "that the determination of viability is a matter for the judgment of the attending physician, and that therefore the legislature could not give one element, such as gestational age, dispositive weight." Jane L. v. Bangerter, 102 F.3d 1112, 1115 (10th Cir. 1996) (citing *Webster*, 494 U.S. at 516-17). The current statutory scheme may therefore be invalid. A different approach could have stressed gestational age in a manner likely to be constitutionally defensible--the statute could have presumed viability at twenty-four weeks gestational age, but given the abortion provider the opportunity for rebuttal by "tests indicating that the fetus is not viable prior to performing" the procedure. *Webster*, 492 U.S. at 515. The Supreme Court has upheld this approach for a statute in effect presuming viability at twenty weeks gestational age. *See id.* at 515-21.

139. *But see supra* note 138 (arguing that gestational age may be inadequate proxy for viability).

140. One pro-choice advocate states that "'only 1.5% of abortions occur after 21 weeks of pregnancy.'" William Saletan, *The Baby Butcher, Revisited: Is It OK to Abort a Viable Fetus? An Answer to Pro-choicers on Kermit Gosnell*, SLATE (Jan. 24, 2011, 8:04 AM), http://www.slate.com/articles/health_and_science/human_nature/2011/01/the_baby_butcher_revisited.single.html (quoting Vanessa Valenti). Although the overall percentage of post-viability abortions is small, their number is large enough to be a serious concern. As Saletan notes, "1.5 percent of 1.2 million abortions per year is 18,000 very late abortions." *Id.* To put this figure into perspective, consider this statement in a recent advocacy message from Allstate Insurance Company in support of the STANDUP Act, a measure designed to reduce teen traffic fatalities: "If 9 fully loaded jumbo jets crashed every year, *something would be done about it*. Every year, more than 4,000 teens die in car crashes." Allstate, Advertisement, WEEK, May 6, 2011, at back cover.

141. *See Casey*, 505 U.S. at 879. It is important to note that the Court in *Roe* did not accord any independent legal status to fetuses at viability. The Court only held that the states, should they decide to do so, can prohibit post-viability abortions so long as they also enact the

no meaningful legal restraints on a woman's ability to obtain a late abortion.[143] One could be tempted from the relative quiet on this particular issue to assume that all pro-choicers are generally happy with the current state of the law. But this conclusion would be wrong.

William Saletan also addressed the post-viability aspect of the Gosnell situation.[144] In his initial piece, he quoted several examples of what he called pro-choice absolutists.[145] One such absolutist is Marge Berer, founding editor of *Reproductive Health Matters*. She says that "'anyone who thinks they have the right to refuse even one woman an abortion can't continue to claim they are pro-choice.'"[146] Ann Furedi, chief executive of the British Pregnancy Advisory Service, questioned:

> "Is there anything qualitatively different about a fetus at, say, 28 weeks that gives it a morally different status to a fetus at 18 weeks or even eight weeks? . . . Why should we assume later abortions are 'bad'—or, at least, 'more wrong' than early ones? . . . [I]n later pregnancy, too, I believe that the decision, and the responsibility that comes with it, should rest with the pregnant woman. . . . We either support women's moral agency or we do not. . . . There is no middle ground to straddle.[147]

mandated exceptions. Roe v. Wade, 410 U.S. 113, 164-65 (1973) ("For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."). *Casey* reiterates this formulation. *See Casey*, 505 U.S. at 879. Some states have done nothing to protect viable fetuses. *See infra* note 176 and accompanying text.

142. *See infra* notes 179-189 and accompanying text.

143. This well-known fact makes it especially surprising, even galling, to see continued inaccurate descriptions of *Roe*'s impact. *See* Mary Ann Glendon, *From Culture Wars to Building a Culture of Life*, *in* THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION, *supra* note 50, at 6 (noting that "journalists and other opinion leaders . . . have persisted in misdescribing *Roe v. Wade*"). As just one example of many, Yale professor Ian Shapiro states that *Roe* "established that women have a constitutionally protected right to abortion in the early stages of pregnancy." ABORTION: THE SUPREME COURT DECISIONS 1965-2007, at xiii (Ian Shapiro ed., 3d ed. 2007); *see also* Calhoun, *supra* note 120, at 817 n.219 (describing other instances of incorrect accounts of *Roe*). Shapiro's language is particularly misleading in that it does not even allude to the plain fact that under *Roe* the only state abortion regulations allowed during the second trimester of pregnancy were those related to maternal health. *See Roe*, 410 U.S. at 164-65 (holding that, after first trimester, state can regulate to extent that regulation reasonably relates to preservation and protection of maternal health). Thus, Shapiro, by referring only to pregnancy's "early stages," wrongly implies that women have no abortion right during both the second and third trimesters.

144. *See* Saletan, supra note 135 (discussing post-viability in context of Dr. Gosnell).

145. *See id.*

146. *Id.*

147. *Id.* Some pro-choice scholars would expand Furedi's argument about the lack of moral distinctiveness to include the healthy newborn. See generally Alberto Giubilini & Francesca Minerva, *After-birth Abortion: Why Should the Baby Live?*, JME ONLINE FIRST (Mar. 2, 2012), http://jme.bmj.com/content/early/2012/03/01/medethics-2011-100411.full.pdf+html.

In a subsequent article, Saletan reported the responses to a direct question he had earlier posed to pro-choicers about the case against Gosnell: Should women be permitted to obtain post-viability abortions when there is no justifying medical reason?[148] Saletan published the replies of six pro-choicers: Two said "no," i.e., they agree with a prohibition on non-therapeutic post-viability abortions.[149] Four said "yes," i.e., fetal viability should impose no constraints on women's autonomy.[150] One explained that "'being pro-choice means having the strong belief that women's bodies should not be used in any way against their will.'"[151]

It is thus clear that not all pro-choicers accept a cut-off for legal abortion at viability. Is this a defensible position? Should advanced fetal life be so totally subordinated to the will of another person? Pro-lifers, of course, say "no," and thus support the viability line. An interesting question, though, is whether this posture is logically consistent with the underlying presupposition of the pro-life position—that a human life from conception has moral personhood and is entitled to legal protection.[152]

Some pro-lifers have lambasted the viability line as morally reprehensible. For example, University of Georgia law professor Randy Beck stresses the moral randomness of the concept of viability.[153] Viability makes a fetus's potential protected status depend upon four morally irrelevant variables.[154] The first is year of birth. As medicine has advanced, fetuses that were not viable at the time of *Roe* now are.[155] The second factor is geography.[156] Viability depends upon the level of medical technology actually available to a pregnant woman.[157] Fetuses in different locales will therefore receive different levels of

148. *See* William Saletan, *The Viability Question: Is It OK to Abort a Viable Fetus? Six Pro-choice Writers Answer the Question*, SLATE (Jan. 27, 2011, 1:06 PM), http://www.slate.com/articles/health_and_science/human_nature/2011/01/the_viability_question.single.html.

149. *Id.*

150. *Id.*

151. *Id.* (quoting Pema Levy).

152. For a sophisticated secular argument that moral personhood begins at conception, see CHRISTOPHER KACZOR, THE ETHICS OF ABORTION: WOMEN'S RIGHTS, HUMAN LIFE, AND THE QUESTION OF JUSTICE 91-120 (2010). Kaczor states that his book addresses the moral permissibility of abortion, not its legality. *See id.* at 12. However, his conclusion that "[a]ll human beings, from the zygotic to the geriatric, enjoy the same fundamental rights, including, most fundamentally, the right to life," has obvious legal implications. *Id.* at 120.

153. *See* Beck, *supra* note 122, at 257.

154. As noted, viability only creates the possibility of state protection. *See supra* note 141 (showing that viable fetus has no independent legal status); *infra* note 176 and accompanying text.

155. *See* Beck, *supra* note 122, at 257-59.

156. *See id.* at 259.

157. The Pennsylvania Abortion Control Act, for example, in defining viability, speaks of "the most advanced medical technology and information available to" the attending physician. 18 PA. CONS. STAT. § 3203 (2011). Justice Scalia indicated that to him the focus should be on "'the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother.'" Beck, *supra* note 122, at 259 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 989 n.5 (1992) (Scalia, J., concurring in part and dissenting in part)).

legal protection.[158] As a woman changes her location during pregnancy, the fetus could thus move in and out of viability, and therefore in and out of a protected legal status.[159] The third factor is the discretionary nature of the doctor's decision, which can vary with a host of variables, including financial considerations.[160] This financial element is particularly troubling when one considers that the doctor making the viability determination is usually an abortion provider who stands to earn a large fee for the procedure. The fourth factor that demonstrates the indefensibility of the viability line is that research has shown that race and gender significantly influence the likelihood of survival outside the womb.[161] Female and African-American fetuses are more likely to survive premature delivery than their male and Caucasian counterparts.[162] This means that female and African-American fetuses attain viability earlier than males and Caucasians.[163] Female fetuses thus obtain protected legal status earlier than male fetuses. And African-American female fetuses receive legal protection earlier than white female fetuses. Here is how Professor Beck sums up his critique:

> No one drafting a constitution would make the status of an individual—her eligibility for protection by the state—turn on the therapeutic techniques available to address an as yet unrealized medical contingency. Nor would anyone attach controlling significance to the proximity of cutting edge medical facilities or to an "imprecise medical judgment" made by a potentially self-interested physician. Likewise, one hopes that no one today would make an individual's legal status dependent on her race and gender. Why should we accept these corollaries of the viability rule, which seem inexplicable from a moral perspective?[164]

Assume that one finds Professor Beck's moral objections to the viability concept persuasive. Would it then be hypocritical to rely on this morally indefensible principle to the extent that it offers protection to some fetuses? Does depending on the viability line signal that one believes it represents a meaningful moral distinction?[165] One answer was offered by Rev. William S. White, a

158. This assumes, of course, that the particular jurisdictions involved have enacted protection for viable fetuses.

159. *See* Beck, *supra* note 122, at 25.

160. *See id.* at 260. Professor Beck lists such factors as "divergent levels of risk-aversion or conflicting treatment philosophies." *Id.* The "prevailing medical and sociocultural attitudes of a particular society" are also influential. Cohen & Sayeed, *supr*a note 133, at 236. In Japan, for example, resuscitation of "neonates born above 22 weeks by LMP" is more common than in the United States and the United Kingdom. *Id.*

161. *See* Beck, *supra* note 122, at 260-61.

162. *See id.* at 260.

163. *See id.* at 260-61.

164. *Id.* at 261.

165. It can be argued that it is "imprudent" for a pro-lifer to support legal protection for viable fetuses because doing so "serves to reinforce the legal (court-imposed) position and the public view that viability has some intrinsic significance in fetal development. If viability

nineteenth-century pastor, when asked about his support of temperance campaigns. He joined the Sons of Temperance, he said, "not because . . . he thought it the best thing, but because he believed there was nothing wrong in it, and because if he 'could not get a long, straight hickory to kill a snake in his path, he would take any stick he could find, however crooked.'"[166] From the pro-life perspective, the viability line is unpersuasive as a cut-off for according legal protection to preborn life. Even pre-viable fetuses should be protected. But current constitutional law makes it futile for pro-lifers to seek direct legal protection for younger fetuses. This does not make it wrong to take advantage of the Supreme Court's willingness to allow a prohibition on post-viability abortions.[167] To give viable fetuses legal protection is only to accord them the respect they deserve as members of the human family. Viability is a significant factor not because pre-viable fetuses are any less deserving of protection, but because the viable fetus's ability to live outside the woman is inescapable, dramatic proof of an underlying physical reality: a fetus is an individual human life.

Although the foregoing argument provides a satisfactory defense of pro-life utilization of the viability concept to accord legal protection to older fetuses, it is not exactly a ringing endorsement of the moral significance of the viability line. Interestingly, and ironically, some pro-choice advocates have supplied more enthusiastic, if indirect, support. Frances Kissling states that "[v]ery few people would argue that there is no difference between the decision to abort at 6 weeks and the decision to do so when the fetus would be viable outside of the womb."[168] But Kissling does not explain this difference and thus does not really answer Ann Furedi's contention that there is nothing morally distinctive

receives any kind of formal or informal support, it might be more difficult to remove it from the law when . . . *Roe* is overturned." FORSYTHE, *supra* note 101, at 156.

166. REV. WILLIAM S. WHITE, REV. WILLIAM S. WHITE, D.D., AND HIS TIMES: AN AUTOBIOGRAPHY 160 (Rev. H.M. White ed., 1891).

167. Some scholars disagree. Colin Harte opposes "restrictive abortion legislation," i.e., laws that "restrict abortion to particular (categories of) unborn children--the proposals referring to such things as the gestational age of the unborn child, . . . etc." COLIN HARTE, CHANGING UNJUST LAWS JUSTLY: PRO-LIFE SOLIDARITY WITH "THE LAST AND LEAST" 9 (2005). Such laws, by allowing some abortion--here, of pre-viable fetuses--are "intrinsically immoral." *See id.* at 15-16, 109. For Clarke Forsythe's extended refutation of Harte's "moral perfectionism," see FORSYTHE, *supra* note 101, at 147-81. Forsythe emphasizes the examples of William Wilberforce and Abraham Lincoln, politicians who "erect[ed] legal fences against a social evil when they could not prohibit it." *Id.* at 147; *see id.* at 78-110 (citing William Wilberforce's attempt to prevent social evil); 111-46 (referencing Lincoln's position). He argues convincingly that:

> Building fences around a social evil, as part of a larger strategy to secure justice, precludes what can be prohibited now without admitting the legitimacy of what remains unprohibited. By limiting the harm done or lessening the negative consequences, we do not admit or support the rest of the evil that we do not have the power (legal or political) to touch now.

*Id.* at 250; *see id.* at 160, 181 (discussing positives of lessening consequences by limiting harm); Calhoun, *supra* note 120, at 819-21.

168. Kissling, *supra* note 7.

about the viable fetus.[169] Other pro-choice writers, in defending post-viability protection for fetuses, disagree with Furedi. They focus not on viability per se—i.e., survivability—but on aspects of fetal development that coincide with viability. Carl Sagan emphasized that "the earliest onset of human thinking" occurs at six months gestation.[170] This fact justifies prohibiting abortion in the third trimester,[171] the point at which the Supreme Court coincidentally drew the viability line.[172] Ronald Dworkin supports the viability line because it coincides with brain development that allows "a primitive form of fetal sentience"[173]—i.e., the ability to feel pain.[174]

169. *See supra* text accompanying note 147. For another example of a pro-choicer (at the time of expressing the following viewpoint) who opposed post-viability abortions without a fully articulated rationale, see JOHNSON, *supra* note 50, at 97 (after viability the fetus "*is a baby*").

170. Carl Sagan & Ann Druyan, *Is It Possible to Be Pro-life and Pro-choice?*, PARADE MAG., Apr. 22, 1990, at 7.

171. *See id.* at 8 (stating that third-trimester abortion should be allowed only "in cases of grave medical necessity").

172. *See id.* at 7-8. Gregg Easterbrook also emphasizes fetal brain development as the principal factor legitimizing abortion prohibition. He asserts that new fetal science shows that "complex fetal brain activity" begins "at the start of the third trimester." Gregg Easterbrook, *Abortion and Brain Waves: What Neither Side Wants You To Know*, NEW REPUBLIC, Jan. 31, 2000, at 21, 25. Although this brain development milestone occurs "at about the time when life outside the mother becomes possible," Easterbrook argues that "[t]he hopelessly confusing viability standard should be dropped in favor of a bright line drawn at the start of the third trimester." *Id.* at 23, 25. Abortion after this point is "morally odious" and "should be very tightly restricted." *Id.* at 25. David Boonin agrees that fetal brain development ("organized cortical brain activity") should be the governing criterion for a right to life, but argues that this comes well after the point of viability. *See* DAVID BOONIN, A DEFENSE OF ABORTION 115-16, 129 (2003).

173. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 169 (1993).

174. *See id.* at 16-17. Dworkin believes that because "'we should use extreme caution in respecting and protecting possible sentience, a provisional boundary at about twenty-six weeks should provide safety against reasonable concerns. This time is coincident with the present definition of viability.'" *Id.* at 17 (quoting "leading embryologist" expert). This passage suggests that should fetal viability be pushed earlier in the pregnancy, before sentience is possible, Dworkin would abandon viability as a significant line in favor of sentience per se. It should be noted, though, that recent developments demonstrate that fetal sentience may begin prior to twenty-six weeks. Several states have recently passed pain-capable unborn child protection acts, which generally prohibit abortion after twenty-weeks post-fertilization age [twenty-two weeks by LMP (*see supra* note 138)], based on evidence of various kinds that unborn children can experience pain at this stage of development. *See, e.g*, NEB. REV. STAT. §§ 28-3,102 to -3,111 (Supp. 2010); NEB. REV. STAT. § 28-3,104 (describing legislative findings of substantial medical evidence indicating that unborn children can feel pain). The view that fetuses can feel pain at this age is highly contested. The principal argument is that pain perception is impossible without a cerebral cortex, which does not develop "before 24 weeks of gestation." *See* Erik Eckholm, *New Laws in 6 States Ban Abortions After 20 Weeks*, N.Y. TIMES, June 27, 2011, at A10. The necessity of a cortex, however, is called into serious question by a study documenting that a twenty-three week-old fetus, following an abdominal needle injection, showed increased bloodstream concentrations of substances indicative of pain. *See* David Brown, *Late Term Abortions; Who Gets Them and Why*, WASH. POST, Sept. 17, 1996, at Z12. Even if twenty-week fetuses do experience pain while being aborted, it is questionable whether the new statutes are constitutional under present law. The Supreme Court has consistently held that states may only generally prohibit abortion after fetal viability. *See*

Assuming that viable fetuses deserve legal protection,[175] it is problematic that in some states such protection is completely lacking.[176] Moreover, how effective are the laws that have been enacted?[177] What is done to ensure that viable fetuses are identified?[178] And what about the required exception allowing abortions to protect the life and health of the mother?[179] Pro-lifers have long contended that this requirement makes viability protection meaningless.[180] This concern is based on *Doe v. Bolton*,[181] the companion case to *Roe v.*

*supra* note 138. The constitutional issue is unresolved, but two scholars argue that such laws are invalid, although "the question is closer than defenders of the abortion right might like." Cohen & Sayeed, *supra* note 133, at 241. Cynthia Gorney would likely say that the underlying purpose of such laws is not principally to prohibit certain abortions, but rather, like partial-birth abortion bans, to "force people to keep picturing what actually takes place in an abortion-procedure room." Gorney, *supra* note 132, at 36. Emphasizing fetal pain is but another step in right-to-lifers' "force-the-visuals campaign, which has all the explosive public relations potential of its predecessor [partial-birth abortion bans]." *Id.* at 46. Gorney believes that the same right-to-life strategy is reflected in measures requiring that fetal ultrasounds be made available or shown to women contemplating an abortion. *See supra* note 52. This is one more "way to force people to look literally, as well as emotionally, at what the act [of abortion] involves." *Cynthia Gorney: Parsing the Politics of Abortion*, *supra* note 125.

175. To say that the viability line supports protection for viable fetuses does not, from the pro-life perspective, suggest that pre-viable fetuses are not entitled to protection. *See supra* text accompanying notes 165-67.

176. Approximately ten states have no statutory prohibition of late abortions. *See State Policies on Later-Term Abortions*, ST. POLICIES IN BRIEF (Guttmacher Inst., New York, N.Y.) Feb. 1, 2012, at 2, *available at* http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf.

177. In an insightful essay, Patrick J. Flood argues that a statutory scheme must have four elements to confer meaningful protection on viable fetuses: (1) mandatory viability testing; (2) required independent confirmation of viability; (3) an exception permitting post-viability abortions only for maternal physical health concerns; and (4) required independent confirmation of the exception's applicability. *See* Patrick J. Flood, *Mandatory Viability Testing and Post-viability Abortion Restriction: The Best Way Forward in the Immediate Future?*, *in* LIFE AND LEARNING XI: PROCEEDINGS OF THE ELEVENTH UNIVERSITY FACULTY FOR LIFE CONFERENCE 111, 112-13 (Joseph W. Koterski ed., 2002). Although these measures would undoubtedly confer substantial protection on viable fetuses, they arguably do not go far enough. The context here is a contemplated private killing of a human being that the Supreme Court has said can be protected by the state. If one is truly serious about according this protection, why not require that a guardian ad litem be appointed for any fetus within the range of possible viability? Give the fetus an advocate to evaluate on its behalf whether Flood's four elements have been satisfied.

178. Although some states require viability testing, states generally "do not require a confirming second opinion from a qualified independent physician. Since the first opinion is usually going to come from the abortionist, who has an interest in performing the abortion, there could be reason to lack confidence in the assessment. An independent second opinion is crucial." *Id.* at 112. As noted, Pennsylvania lacks a second-opinion requirement for its equivalent of viability testing--determining the unborn child's probable gestational age. *See supra* note 138 (discussing Pennsylvania law on viability testing). Pennsylvania also precludes liability for any physician who aborts an unborn child beyond the twenty-four-week statutory limit if the doctor reasonably believed, after conducting the required age testing, that the child was younger than that age. *See* 18 PA. CONS. STAT. § 3211(b)(2) (1998).

179. *See supra* note 141 and accompanying text.

180. *See* Stephen G. Gilles, Roe*'s Life-Or-Health Exception: Self-Defense or Relative-Safety?*, 85 NOTRE DAME L. REV. 525, 554-55, 555 n.135 (2010).

181. 410 U.S. 179 (1973).

*Wade*.[182] *Doe*, in speaking to the meaning of "health," stated that the concept included "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[183] In commenting on this language in *Doe*, journalism professor Cynthia Gorney of the University of California at Berkeley says it means that a state cannot interfere if a doctor concludes the woman needs the abortion, "no matter how advanced her pregnancy is."[184] Gorney illustrates this point with a hypothetical that appears periodically in the abortion debate:

> 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."[185]

182. 410 U.S. 113 (1973).

183. *Doe*, 410 U.S. at 192. The *Doe* Court, in discussing the meaning of "health," was not referring to the scope of the required maternal life and health exceptions to any post-viability abortion prohibition, but rather was rejecting a vagueness challenge to a Georgia statute allowing abortion only when necessary in the medical judgment of the attending physician. *See id.* at 191-92. Consequently, some argue that it is incorrect to import *Doe*'s expansive conception of health into *Roe*'s formulation of when abortion may be prohibited post-viability. *See, e.g.*, Gilles, *supra* note 180, at 554-58; Michael J. Tierney, Note, *Post-viability Abortion Bans and the Limits of the Health Exception*, 80 NOTRE DAME L. REV. 465, 470-71 (2004). Other scholars argue that *Roe* must be read in light of *Doe*. *See, e.g.*, LINTON, *supra* note 85, at 3, 3 n.3 (citing lower court endorsement of this interpretation); Glendon, *supra* note 143, at 5, 6; Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 995 n.4, 1022, 1039 n.113 (2003). According to Matthew Franck, *Doe*'s "broad language resulted, in practice, in the total elimination of the state's power to prohibit post-viability abortions, not just a narrow exception to that power." Matthew J. Franck, *The Gosnell Case and American Abortion Law*, NAT'L REV. ONLINE, (Feb. 3, 2011, 4:00 AM), http://www.nationalreview.com/articles/258707/gosnell-case-and-american-abortion-law-matthew-j-franck.

184. Gorney, *supra* note 132, at 39. This standard is correctly summarized by abortion opponents as "'legal at any time, for any reason, all the way through the ninth month of pregnancy.'" *Id.* Other journalists agree with this assessment of *Doe*. *See, e.g.*, Brown, *supra* note 174; Roy Rivenburg, *Partial Truths*, L.A. TIMES, Apr. 2, 1997, at 1. For a discussion of whether the Supreme Court would still require such an unlimited health exception, see *infra* note 194 and accompanying text.

185. Gorney, *supra* note 132, at 40. An interesting exchange on the prom-dress hypothetical took place during the 1997 debates on the Federal Partial-Birth Abortion Ban Act. The NAF's Vicki Saporta decried as insulting to women a pro-life ad using the prom-dress scenario to illustrate the breadth of the health exception. *Partial-Birth Abortion--The Truth: Joint Hearing Before the S. Comm. on the Judiciary and the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 88 (1997). Helen Alvare, representing the National Conference of Catholic Bishops, responded that pro-choicers were "incredibly furious about that ad," indeed, it "was their nightmare because it laid out for the public . . . as clear as one could get, the possible breadth of a health exception." *Id.* at 88-89.

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.[186] 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.[187] It is important to note that Professor Gorney is not an advocate on the abortion issue.[188] But she is troubled by late-term abortions, and wonders about the mile-wide "health" exception to the viability line. If, she says, viability is the point at which the abortion decision should no longer be strictly between a woman and her doctor, "is it sensible or is it evasive to maintain the post-viability catch-all of 'all factors' health?"[189]

186. Some pro-choicers either do not grasp or resist acknowledging this reality. President Bill Clinton, for example, in arguing that any partial-birth abortion ban should have a health exception, stated that exception opponents responded:

> "[W]ell, if we have a health exception you know you could--the doctor and the mother could say anything--they can't fit in their prom dress, that's a health exception—some terrible things like that."
>
> And I said, "No, no, no, I will accept language that says serious adverse health consequences to the mother--those three words. Everyone in the world will know what we're talking about."

President William J. Clinton, *Remarks on Vetoing Partial Birth Abortion Legislation*, 1996 PUB. PAPERS 565, 566, *available at* http://www.gpo.gov/fdsys/pkg/PPP-1996-book1/pdf/PPP-1996-book1-doc-pg565.pdf. Former NARAL head Kate Michelman has "denounced the prom [dress scenario] as a lie." Rivenburg, *supra* note 184. Pro-lifers, however, claim not that the prom-dress situation has actually arisen, but only that it accurately conveys the state of the law. As pro-life professor Helen Alvare once expressed it, "[t]he idea was to shock people into realizing how loose a 'health exception' would be." *Id.*; *see* Glendon, *supra* note 143, at 6 ("[M]ost people . . . have great difficulty wrapping their minds around the idea that the Court would permit the intentional destruction of a healthy infant who was capable of living outside his or her mother's body, when the mother's health (in the ordinary meaning of that word) is not in serious danger.").

187. *See* Paulsen, *supra* note 183, at 996 n.4.

188. What *The Economist* said in 1998 is still true today: Professor Gorney "is an even-handed reporter who does not let her guard slip: her own opinion on abortion remains unknown." *Unwanted Pregnancies: What to Do?*, Article in *Review of Books and Multimedia*, THE ECONOMIST, May 14, 1998, at 12 (reviewing CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS (1998)).

189. Gorney, *supra* note 132, at 46. Although Professor Gorney suggests that the health exception may be too broad--and thus that the post-viability abortion right might be too extensive--she has other concerns that, if addressed via law, would broaden the freedom to abort post-viability. Some, but certainly not all, late abortions occur due to fetal deformity. *See* Brown, *supra* note 174. Professor Gorney struggles with whether post-viability abortions should be allowed in such instances. In 1998, she stated what appears to be a definite opinion. Late-term abortions are "'awful. Everybody thinks so. They make you sick. Nobody thinks it should be okay to do this if your kid does not have some fetal deformity.'" Orrick, *supra* note 14, at 12. In 2004, however, she expressed herself more tentatively by simply posing the question of whether it would be "right or wrong to differentiate" among rationales for a late abortion--e.g., a "woman whose life is a disaster" versus "the woman who doesn't receive the Down syndrome diagnosis until after she has picked out the baby's name." Gorney, *supra* note 132, at 46. Even though Gorney's ultimate position is unclear, present law gives states the power to ban post-viability abortions with only two mandatory exceptions: for the life and health of the mother. *See supra* note 141 and accompanying text. A separate fetal deformity

Pro-lifers would of course be glad to narrow the health exception, but would pro-choicers go along?[190] Here, it is significant to note that the health exception in the Pennsylvania viability statute is much more limited than the broad exception contemplated by *Roe*.[191] Pennsylvania law permits post-viability abortions that a physician believes are "necessary to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman."[192] Is this a narrowing of the abortion

exception is not required. If the health exception is significantly narrowed--a result Professor Gorney seems to support--the change would likely eliminate the argument that fetal deformity abortions must be allowed to protect the woman's emotional or psychological health. A state could therefore freely prohibit post-viability fetal deformity abortions unless a court stretched the required life of the mother exception to cover such situations. Although it is questionable whether any fetal deformity, however severe, could rightly be viewed as jeopardizing the woman's life (unless the threat of maternal suicide is viewed as satisfying this requirement), it presumably would be preposterous to consider some of the fetal defects cited as justifying late abortions--e.g., cleft lip--as satisfying this criterion. *See* Brown, *supra* note 174. None of the above, of course, would prevent a state from allowing post-viability fetal deformity abortions by making such an exception explicit. States considering this step would presumably have to engage the question of what conditions, if any, are severe enough to justify such a late abortion. Would Down syndrome suffice? What signal would sanctioning abortions for such fetuses send to the Down syndrome community? States hopefully would also take into account the correctability of fetal defects, however severe. A recent study, for example, has shown that surgery in utero has clear benefits in treating spina bifida, a spinal column defect that has been relied upon to justify late abortions. *See* Brown, *supra* note 174. "[B]abies who have the operation in the womb were more likely to walk without help and less likely to need a tube to drain fluid buildup in the brain." *Study Supports Surgery in Utero*, ROANOKE TIMES, Feb. 10, 2011, at 8. States hopefully will reject any effort to give pregnant women the discretion to kill viable babies with treatable medical conditions.

190. There is some evidence of pro-choice flexibility. As noted, President Clinton supports an exception requiring "serious adverse health consequences." Clinton, *supra* note 186, at 566. Frances Kissling believes that post-viability abortions should be rejected "except in extreme cases," including "when the woman's health is seriously threatened by a medical or psychological condition that continued pregnancy will exacerbate." Kissling, *supra* note 7. This statement covers mental health, but requires a risk to the woman greater than a reduction in her "well-being." Some pro-choicers have gone further to support elimination of mental health considerations altogether. In 1998, for example, "ten pro-choice U.S. Senators . . . introduced a bill to ban all abortions after viability unless 'continuation of the pregnancy would threaten the mother's life or risk grievous injury to her physical health.'" Flood, *supra* note 177, at 123. But even if pro-choice support for tightening the health exception were universal, any such change would obviously be unavailing were it found to be unconstitutional. *See infra* note 194.

191. *See supra* notes 181-83 and accompanying text.

192. 18 PA. CONS. STAT. § 3211(b)(1) (1998). There is evidence that this tight exception, stricter than in most other states, "was written precisely in order to bring about a confrontation with the on-demand abortion regime the Court created in *Doe*." Franck, *supra* note 183; *see State Policies on Later-Term Abortions*, *supra* note 176. Although this language is much narrower than what *Doe* contemplates, to the pro-lifer Pennsylvania's exception still has significant flaws. Its second-opinion requirement refers to "one other licensed physician," language broad enough to mean another abortion provider, including even someone in a business relationship with the performing physician. *See* 18 PA. CONS. STAT. § 3211(c)(2). The law therefore lacks the critical prerequisite of a second opinion from a disinterested party. *See supra* notes 177-78. Moreover, failure to obtain a second opinion does not make a physician culpable of the substantive felony offense of performing an abortion at or beyond twenty-four weeks gestational age. It is instead treated as a separate crime punishable as a misdemeanor.

right that pro-choicers could live with?[193] Even if so, it is questionable whether the Pennsylvania approach could survive a constitutional challenge.[194]

A brief, final point is necessary. One alleged negative consequence of meaningful constitutional legal protection for viable fetuses is that "[i]f late-term abortions are outlawed, only outlaws will do late-term abortions."[195] William Saletan provides a convincing rebuttal:

> It's true that abortion laws make back-alley butchers like Gosnell more likely. But the same argument has been made about female genital mutilation: if you don't let parents obtain it legally, they'll go to unlicensed underground practitioners. Is there some point at which a

*See* 18 PA. CONS. STAT. § 3211(d). The performing physician can escape a felony charge based on his or her own reasonable belief that the abortion was necessary to avoid the described physical harm to the woman. *See id.* § 3211(b)(1).

193. *See supr*a note 190 and accompanying text (describing potential pro-choice flexibility).

194. This issue includes a state constitutional dimension, but the emphasis here will be on the federal Constitution. *See supra* note 85. Although Pennsylvania's narrow exception is plainly incompatible with *Roe* and *Doe*, *see supra* notes 181-83 and accompanying text, might it survive scrutiny under *Casey*'s undue burden standard? *See supra* note 85. Does the Constitution as now interpreted require that the health exception to any post-viability abortion prohibition cover both mental and physical health? *Casey* did approve a Pennsylvania medical emergency provision that does not mention mental health, but refers only to physical health using the exact language of its post-viability statute. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879-80 (1992) (plurality opinion). This law, however, did not pertain to post-viability abortions, but rather was an exception to various other requirements of Pennsylvania's Abortion Control Act, such as informed and parental consent. *See id.* at 879, 881, 899. Moreover, the Court elsewhere states, also in a context not pertaining to viability, that "[i]t cannot be questioned that psychological well-being is a facet of health." *Id.* at 882. *Casey* therefore provides no clear answer. Nor does the Supreme Court's most recent abortion decision, *Gonzales v. Carhart*, which upheld the Federal Partial-Birth Abortion Ban. *See generally* Gonzales v. Carhart, 550 U.S. 124 (2007). That decision dealt with abortion methods, not post-viability abortions. Moreover, in holding that "the 'significant health risks' test is the current legal standard to which restrictions on abortion methods must conform," the Court "sidestepped the question of its legal meaning." Gilles, *supra* note 180, at 611.
The decision most directly on point is *Women's Medical Professional Corp. v. Voinovich*, in which the Sixth Circuit held that, despite *Casey*, *Doe*'s view that health includes mental health applies to post-viability health exceptions. Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187, 208-210 (6th Cir. 1997). The court, however, did not mean health in the broadest sense of well-being. Its holding was "that a maternal health exception must encompass *severe* irreversible risks of mental and emotional harm." *Id.* at 209. The Supreme Court denied certiorari, but three Justices dissented, arguing "that *Doe* was not controlling, and that whether state postviability bans were required to include explicit mental health exceptions was an important and unresolved question the Court should address." Gilles, *supra* note 180, at 562. The issue "has remained in this somewhat unsettled posture ever since." *Id.*
Also unresolved is the underlying philosophy of the health exception. Is it to be applied "in accordance with self-defense principles, on the theory that the state's interest in viable fetal life should yield to the woman's right to self-preservation"? *Id.* at 527. Or, instead, should relative safety be the governing concept, under which "the state's interest in viable fetal life . . . must yield when, in addition, continued pregnancy would pose greater risks to her life or health than an abortion"? *Id.* Professor Gilles, after "a thorough and rigorous descriptive analysis of the Court's decisions," concludes by criticizing the Court for failing in its duty to state what the law is on this important question. *Id.* at 529, 620.

195. Saletan, *supra* note 140.

> decent society must simply forbid a practice? If killing a viable fetus—a baby that no longer needs a womb to survive—isn't such a practice, what is?[196]

## V. CONCLUSION

One commentator has written that after "abortion doctor Kermit Gosnell and his clinic—run so poorly that Gosnell has been charged with murdering seven babies and one woman—everyone could agree on one thing: Such tragedy should never happen again."[197] Another states that "[p]eople on both sides of the abortion debate should have been outraged by what was happening. Such atrocities should rise above ideology, appealing to basic humanity."[198]

This Article has focused on three of Dr. Gosnell's atrocities: his shameful, destructive treatment of women; his brutal killing of born-alive infants; and his performance of illegal post-viability abortions. Pro-choicers and pro-lifers alike should unite in condemning, stopping, and preventing these abuses. Women seeking abortions need the protection of medically appropriate health and safety regulations;[199] a civilized society should not tolerate the killing of babies, viable or not, once they are born; and viable fetuses deserve meaningful legal protection. The wider abortion controversy is sure to continue, but the combatants should join forces to achieve these three significant objectives.

196. *Id.* The challenge to the most zealous pro-choice advocates is thus clear. "Do they continue to agitate for the regime of abortion on demand that they've been defending for 38 years? [Or d]o they fold this particular hand, and concede that *some* abortions occur too late to be permitted at all?" Franck, *supra* note 183.

197. Otterbein, *supra* note 41.

198. Heller, *supra* note 1.

199. Conflicting views of what requirements are "medically appropriate" will no doubt continue to complicate any regulatory efforts. *See supra* note 41 (describing disagreement over Pennsylvania's recently enacted clinic regulations). This Article urges both sides in the larger abortion controversy to exercise the utmost good faith in interacting on this contentious issue.