

About Abortion: Reflection & Response

ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST
CENTURY AMERICA

By Carol Sanger

Harvard University Press, 2017

The Abortion Closet (with a Note on Rules and
Standards)

161

Reflection by David E. Pozen

Closets, Standards, Abortion: A Reply to Professor
Pozen

167

Response by Carol Sanger

THE ABORTION CLOSET (WITH A NOTE ON RULES AND STANDARDS)

DAVID E. POZEN*

An enormous amount of information and insight is packed into Carol Sanger's *About Abortion: Terminating Pregnancy in Twenty-First Century America*. The book is anchored in post-1973 American case law. Yet it repeatedly incorporates examples and ideas from popular culture, prior historical periods, moral philosophy, feminist theory, medicine, literature and the visual arts, and more.

The panoramic ambition of the book, and its correspondingly multi-disciplinary method, are established in the first chapter, in a section titled "What Abortion Is About."¹ By the end of this section, the reader has learned something about: *Roe v. Wade*;² various international treaties on the rights of women;³ abortion training protocols in medical schools;⁴ the neurological development of a fetus;⁵ the 2004 and 2012 presidential primaries;⁶ a 1995

© 2017 Pozen. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author(s) and source are credited.

* Professor of Law, Columbia Law School. This essay is based on the author's spoken remarks at an event celebrating the publication of *About Abortion* at Columbia Law School on March 27, 2017.

1 CAROL SANGER, *ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST CENTURY AMERICA* 5 (2017).

2 410 U.S. 113 (1973); see SANGER, *supra* note 1, at 5–7, 13, 15.

3 Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3; see SANGER, *supra* note 1, at 6–7.

4 See SANGER, *supra* note 1, at 5, 7, 17.

5 See *id.* at 7, 9–10.

6 See *id.* at 8.

papal encyclical;⁷ a 1984 lecture by the New York Governor;⁸ a 2001 concurrence by a Mississippi Supreme Court Justice;⁹ the 2003 recommendation by a Food and Drug Administration advisory committee to approve the “morning-after-pill” for over-the-counter sale;¹⁰ the anti-abortion turn within certain Protestant denominations in the 1970s and 80s;¹¹ sociological research on pro-life activists and their views on sex;¹² anthropological research on pregnancy termination decisions following a diagnosis of fetal disability;¹³ prostitution laws in New York;¹⁴ abstinence-only programs in Texas;¹⁵ President George W. Bush’s Culture of Life;¹⁶ the rise and rise of parental involvement statutes and personhood amendments;¹⁷ the rise and fall of federal support for family planning organizations and abortion services to pregnant soldiers;¹⁸ the intensifying politics of abortion in state judicial elections;¹⁹ the recent *Hobby Lobby* litigation over the Affordable Care Act;²⁰ and the Supreme Court’s decision last Term in *Whole Woman’s Health*.²¹

7 POPE JOHN PAUL II, THE GOSPEL OF LIFE [EVANGELIUM VITAE] (1995), http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html [<http://perma.cc/Q4A6-A9UV>]; see SANGER, *supra* note 1, at 7.

8 Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor’s Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL’Y 13 (1985); see SANGER, *supra* note 1, at 9.

9 R.B. v. Mississippi, 790 So. 2d 830 (Miss. 2001) (Easley, J., concurring); see SANGER, *supra* note 1, at 10.

10 See SANGER, *supra* note 1, at 18.

11 See *id.* at 9.

12 See *id.* at 10–11, 15; see also KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984).

13 See SANGER, *supra* note 1, at 16; see also RAYNA RAPP, *TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA* (1999).

14 See SANGER, *supra* note 1, at 11.

15 See *id.*

16 See *id.* at 11; see also Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 801–08 (2006) (describing President Bush’s promotion of the culture of life, “a vigorous political program organized around the immorality and inherent criminality of abortion”).

17 See SANGER, *supra* note 1, at 12.

18 See *id.* at 13.

19 See *id.* at 14.

20 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); see SANGER, *supra* note 1, at 17.

21 *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); see SANGER, *supra* note 1, at 18.

This section lasts fourteen pages. It is a testament to Sanger’s skill as a writer and to her synthetic capacities as a thinker that one comes away from this whirlwind tour feeling not vertigo, but rather an enhanced sense of clarity about the arc of abortion regulation. While the pace soon slows down, the rest of the book maintains a relentless inquisitiveness, ever collecting and connecting data points to help guide the reader through complex socio-legal terrain.

Most of the chapters could stand on their own as original accounts of one facet or another of American abortion controversies. Chapter Seven, on “Sending Pregnant Teenagers to Court,” advances an especially powerful critique of judicial bypass hearings as cruel and frequently arbitrary degradation ceremonies.²² But the main throughline of the book is its catalog of the ways in which Sanger believes this country’s abortion discourse, or “abortion talk,”²³ has been lacking—and in consequence how abortion policymaking has been lacking. Not in passion or commitment, to be sure, but lacking in evidence, lacking in candor, and lacking in appreciation and respect for the distinctive circumstances and perspectives of women.

* * *

Secrecy is a big part of this story. The book’s “central argument,” Sanger writes in the preface, is that “the secrecy surrounding women’s personal experience of abortion has massively . . . distorted how the subject of abortion is discussed and how it is regulated.”²⁴ These “distortions” take myriad forms. Politically, secrecy means that our debates about abortion often paint a misleading picture, as by overstating its health risks or understating its bases of support. Culturally, secrecy means that abortion often gets coded as a deviant practice, which reinforces the desire for concealment regarding abortion decisions, which in turn reinforces the sense that there is something ignominious to be hidden away, and on and on in a self-perpetuating cycle. And throughout the public sphere, secrecy means that any number of dubious, paternalistic, or factually erroneous claims about the harms of abortion are able to circulate with less pushback than one might expect in a more open conversational climate, while “claims about abortion’s *benefits* . . . go unspoken.”²⁵

22 SANGER, *supra* note 1, at 154–84.

23 *Id.* at x.

24 *Id.* at xi.

25 Carol Sanger, *Carol Sanger Replies to David Pozen: Rules, Standards, Abortion*, CONCURRING OPINIONS

Abortion, in other words, is in the closet.

Sanger doesn't expressly adopt this framing of abortion secrecy, although she draws an analogy to sexual orientation "closetedness" in chapter three that suggests she would be amenable to it. Closetedness, as Sanger observes, refers to "a form of concealment that is both furtive and debilitating," set against a "shadow of disapproval."²⁶ We know from other contexts that such closets are costly for inhabitants. They stigmatize, they suffocate, they alienate, they create vulnerability, they obscure reality. The abortion closet paradoxically makes our society both more obsessed with abortion—because like all taboos, it becomes an object of fascination and fear—and yet less familiar with abortion—because many of our disputes about it are disconnected from women's actual experiences.

One may wonder whether secrecy deserves such emphasis. Statistics on abortion are regularly compiled and circulated. Many pro-choice women have been vocal about their beliefs on abortion, pregnancy, procreation, and related issues. Their views, however, are liable to be discounted or discredited by competing discourses that flourish alongside their own. The problem here may have less to do with ignorance and "unknowing"²⁷ than with a refusal of empathy. It is not at all clear that secret-keeping, of whatever sort, has been as central to the development of abortion regulation as the closet historically has been to gay subordination.

That said, abortion secrecy *is* very real, and underexplored, and my sense is that Sanger has opened up significant conceptual and political opportunities in pointing to the abortion closet.²⁸ The analogies and disanalogies to the gay closet warrant sustained attention.

Moreover, if secrecy is at the core of Sanger's diagnosis of what ails the American

(May 2, 2017), <https://concurringopinions.com/archives/2017/05/carol-sanger-replies-to-david-pozen.html> [<http://perma.cc/BGJ6-RLG3>].

26 SANGER, *supra* note 1, at 62–63.

27 See Eve K. Sedgwick, *Privilege of Unknowing: Diderot's The Nun*, reprinted in TENDENCIES 23 (1993); see also Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1788 (1996) (observing in 1996 that "society's blindness toward the gay community" has been "carefully cultivated . . . through the exercise of what [Sedgwick] calls the epistemological privilege of unknowing").

28 For an argument that "coming out" about abortion experiences could be legally and politically transformative, see Scott Skinner-Thompson, Sylvia A. Law & Hugh Baran, *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126 (2016).

discourse on abortion, the book also identifies a range of supplementary causes. One is the persistence of stark disparities in the social roles and responsibilities of men versus women, with women bearing not only most of the practical burden of raising children but also most of the moral burden of responding to unwanted pregnancies. A number of newer developments that might seem to enrich the conversation, meanwhile, only end up deepening the closet—from the proliferation in popular culture of fetal images that foster an association with personhood; to the proliferation of terminology, such as partial birth abortion and unborn child, that gives pro-life advocates the “rhetorical advantage”²⁹; to the proliferation of policies, such as mandatory ultrasounds and informed consent protocols, that dictate what women see and hear in their physicians’ offices.

The pro-life push to control the conversations that abortion providers have with their patients, Sanger suggests, betrays an anxiety about frank dialogue. Proponents of Women’s Right to Know laws and informed consent protocols recognize the importance of the discursive space; their prescriptions generate a steady stream of abortion talk. Much of this talk, however, is scripted and unidirectional. It purports to promote more knowledgeable and responsible choices, yet in reality serves to deter and demean women and to interfere with their decisional processes.

* * *

Among other contributions, Sanger’s subtle indictment of contemporary abortion discourse sheds light on a classic subject in legal theory: the distinction between rules and standards. Whereas rules are thought to limit case-by-case discretion through crisp ex ante directives, standards leave much of their content to be worked out by future enforcers and interpreters. Rules are precise, standards imprecise. Some legal theorists have suggested that the very imprecision of standards ought to make them better at facilitating moral and democratic deliberation.³⁰ Rather than apply a rule by rote, citizens faced with a standard are forced to think hard about whether they are acting appropriately and why.

But as Sanger shows, standards in abortion law may have just the opposite effect. In the 1992 case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court famously replaced *Roe v. Wade*’s trimester system with the “undue burden” test

29 SANGER, *supra* note 1, at 106.

30 See Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010); see also *id.* at 1217 nn.18–19 (collecting sources making related arguments).

to govern when abortion may be restricted.³¹ In so doing, the Court shifted the doctrinal framework from a relatively rigid set of rules to a relatively hazy and open-textured standard. On the rosy view of standards as deliberation-forcing, *Casey* should have led to richer public argument about the stakes involved in terminating a pregnancy, in each trimester, and about whether any given regulatory plan seems reasonable and respectful of women or alternatively whether it seems excessive and unjustified.

Sanger, however, suggests that the shift from *Roe* to *Casey* occasioned no such elevation of our deliberations about abortion, no salutary spur to collective self-reflection. On the contrary, in her telling, *Casey* largely enabled a *diminishment* of the quality and integrity of these deliberations, as well as a diminishment of the abortion right. When you combine *Casey*'s malleable language of undue burden—a test that teeters on the edge of tautology—with all the broader factors that threaten to “distort” abortion talk and policy, it turns out that you invite endless cycles of opportunism and obstruction, not sensitive and honest debate.

One general lesson we might take from Sanger's account, then, is that the relationship between legal doctrine and cultural practice in such a politically charged field may be poorly predicted by abstract propositions about the comparative merits of rules, standards, or the like. Open-minded judges, in particular, might learn from Sanger's implicit yet emphatic demonstration of the need for more realistic, empirically informed, and sociologically grounded approaches to abortion regulation.

* * *

Sanger begins her book with “the possibility of conversation at a lower decibel by women concerning their own abortion decisions and experience.”³² Less heat, more light, is her proposal. Less secrecy and shame, “more openness and generosity,” as she puts it in the book's closing line.³³

Sanger's book does not simply offer an eloquent brief in support of this proposal. The book also offers, through the author's own exemplary openness and generosity, a model of what such conversations about abortion might be like. And what we find is that they can be intensely illuminating.

31 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

32 SANGER, *supra* note 1, at xiii.

33 *Id.* at 238.

CLOSETS, STANDARDS, ABORTION: A REPLY TO PROFESSOR POZEN

CAROL SANGER*

I am grateful for David Pozen's thoughtful observations regarding *About Abortion*. They have sharpened my understanding of how to think about the problem of abortion—or more accurately, about how abortion is kept problematic—as a matter of law and of social practice. I invoke the word “problematic” to describe the cultural setting in which abortion sits: although the procedure is legal, common, and safe, it is often treated as though it were not legal, or barely so; not common, except perhaps for women and girls who have nothing to do with you; and not at all safe, but rather an invitation to life-long suffering. These disconnects between abortion's reputation and its actuality are illuminated through Pozen's discussions of the “abortion closet” and of his application of “rules and standards” to abortion. In this reply, I expand briefly on his insights, beginning with closets.

Pozen states that like other behaviors “coded as shameful or deviant,” abortion “is in the closet.”¹ I agree. But what perplexes is *why* this is so—why the closet is still considered to be abortion's natural habitat some forty-five years after the procedure was decriminalized in *Roe v. Wade*.² To be sure, some believe that whatever its legal status, abortion is inherently immoral: a killing that would be a murder but for the United States Supreme Court.³ As Mississippi Supreme Court Justice Easley explained in a 2001 opinion, “Ever since the abomination known as *Roe v. Wade* . . . became the law of the land, the morality of our

© 2017 Sanger. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits the user to copy, distribute, and transmit the work provided that the original author(s) and source are credited.

* Barbara Aronstein Black Professor of Law, Columbia University. These remarks expand on ideas first presented in Carol Sanger, *Carol Sanger Replies to David Pozen: Rules, Standards, Abortion*, CONCURRING OPINIONS (May 2, 2017), <https://concurringopinions.com/archives/2017/05/carol-sanger-replies-to-david-pozen.html> [<http://perma.cc/BGJ6-RLG3>].

1 David E. Pozen, *The Abortion Closet (with a Note on Rules and Standards)*, 35 COLUM. J. GENDER L. 161, 164 (2017).

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

3 Mark Joseph Stern, *Mike Pence's March for Life Address was Mawkish Double Speak*, SLATE (Jan. 27, 2017), http://www.slate.com/blogs/xx_factor/2017/01/27/mike_pence_s_march_for_life_address_was_mawkish_double_speak.html [<https://perma.cc/2T6E-BEC7>].

great nations has slipped ever downward to the point that the decision to spare the life of an unborn child has become an arbitrary decision based on convenience.⁷⁴ On this account, the disrepute, ostracization, and stigma that often attach to immoral conduct (adultery and homosexuality were common twentieth century examples) are rightly bestowed in cases of abortion. Others additionally link abortion's immorality to the necessary predicate of sex. On this view, the procedure operates as a get-out-of-jail-free card for women seeking to avoid the wages of sin (the sex). If the sinner can hide the second sin (the abortion) by barricading herself in the abortion closet, normal unstigmatized life may proceed apace, the burdens of deception and suffering notwithstanding.

Yet the abortion closet is more unjust and more complicated than I have described. It is unjust because the closet's architects are not simply citizens who by the power of their moral suasion have created a culture where abortion operates as a dirty secret. Religions too, Roman Catholic and Evangelical churches, for example, have also played their part.⁵ But it is the state's intervention that has made closeting a more durable and enduring phenomenon. Following *Roe v. Wade*,⁶ and particularly since *Planned Parenthood v. Casey*,⁷ law itself has become the great anti-abortion moralizer, throwing heavy-weight regulatory punches that fall just short of traditional punishment. Much of this regulation is aimed at showing the woman that whether she chooses to call this procedure an abortion or a termination, from the state's perspective, it is murder plain and simple. That is why before a woman can give legal consent, she must undergo ultrasound and be offered a look at "the image of her unborn child."⁸ It is why in other states she must listen to a doctor read out a legislatively drafted script about her fetus's stage of development,⁹ and why in Texas and elsewhere she is informed that she must bury or cremate the post-abortion remains.¹⁰ The message being

4 R.B. v. Mississippi, 790 So. 2d 830, 835–36 (Miss. 2001) (Easley, J., concurring).

5 See ROBERT WUTHNOW, *ROUGH COUNTRY: HOW TEXAS BECAME AMERICA'S MOST POWERFUL BIBLE-BELT STATE* 418–19 (2014); Leslie Griffin, *Talking About Abortion*, CONCURRING OPINIONS (Apr. 3, 2017), <https://concurringopinions.com/archives/2017/04/talking-about-abortion.html> [<https://perma.cc/PA6M-78ZM>].

6 *Roe*, 410 U.S. 113.

7 *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

8 ALA. CODE § 26-23A-4 (2014).

9 Irin Camron, *The Ultrasound Fallacy*, SALON (Feb. 28, 2012), http://www.salon.com/2012/02/28/the_ultrasound_fallacy/ [<https://perma.cc/E3YN-743Z>].

10 Janice Williams, *Texas Abortion Bill: New Law Requires Fetuses to be Buried or Cremated*, NEWSWEEK, (Mar. 30, 2017), <http://www.newsweek.com/abortion-texas-fetus-law-2017-576863> [<https://perma.cc/6KNR-NQ4B>].

pounded here is clear: abortion operates on a person, not a fetus. With that as state policy, it is no wonder that women don't want anyone to know what they have done, and what kind of person they really are.

The last phrase raises a further complication of the abortion closet. Unlike other once stigmatized categories, such as “being gay” or “being black,” “having had an abortion” is not “being” anything. It is not a constitutive aspect of identity, but rather a singular event, an occasion, a procedure, a decision, one moment in a woman's reproductive life. Yet in the public prolife narrative, abortion has been converted to something closer to an indelible trait. I am reminded of the Mary Tyler Moore episode from the 1970s where Mary learned that Mr. Grant was breaking up with his girlfriend because he had heard she was “that sort of woman.”¹¹ Disgusted, Mary pushes back and demands to know, “Mr. Grant, just how many men is a woman allowed to have before she becomes “that sort of woman?”¹² Lou takes the smallest of pauses and replies, “Six.”¹³ The answer for abortion is one.

Of course, for abortion to work this kind of reputation damage, the fact of the abortion must be made public, for unlike other acknowledged sources of stigmatization, abortion is neither a visible trait, a constitutive commitment, nor a chronic condition. In this way, the stigma that keeps women closeted is to some extent self-imposed. It is the *fear* of being stigmatized, the fear of losing a relationship with parents or partner that keeps the closets filled. In this way, women who cannot talk about an abortion, even to a close friend or relative, do more than just comply with the humiliating laws around consent—the waiting periods, ultrasound, burial instructions and so on. Some internalize the moral suppositions of the legislative framework. In this way, the laws that mark abortion as deviant enlist women in the cause. For even if women do not *actually* feel guilty or stained by having had an abortion, failing to disclose their decision means they are acting as though they are guilty or stained. Whatever inner confidence they may have about having made the right decision carries no public weight, and this helps keep those louvred doors shut.

Yet if half of the fifty-nine million women who have had an abortion would tell just two people, this might illuminate—if not defang—the closet in useful ways.¹⁴ The awareness that

11 *Mary Tyler Moore Show: Lou and that Woman* (CBS television broadcast Oct. 5, 1974); *Lou and that Woman*, YOUTUBE (Oct. 5, 2009), <https://www.youtube.com/watch?v=6OIXkivNanU> [<https://perma.cc/YCC6-8RT4>].

12 *Id.*

13 *Id.*

14 *See Abortion Statistics: United States Data and Trends*, NAT'L RIGHT TO LIFE COMM. (2014), <http://www>.

you are not the only woman who has faced the predicament of an unwanted pregnancy—that people you admire and care for also terminated a pregnancy, whether recently or long ago—can clarify the scene. Dahlia Lithwick and Emily Bazelon have written about their mutual discovery that the other had also had a miscarriage—another reproductive secret—and the relief that followed the discovery.¹⁵ Similar solidarity is also possible in the context of abortion, and its importance goes beyond the personal. It also diminishes the appeal or the naturalness of the closet for others, who may observe women do not change who they are by deciding to terminate a pregnancy. Recognizing this as social fact makes the need for a closet itself a musty idea.

I turn now to Pozen's extremely helpful observations about rules and standards. Rules, he explains, "limit case-by-case judicial discretion through crisp *ex ante* directives."¹⁶ In contrast, standards force decision makers "to think hard about whether they are acting appropriately and why."¹⁷ Yet Pozen accepts the counterintuitive consequences of the rules/standards distinction as applied in the context of abortion. His primary example is the "undue burden test" announced in *Casey* as the new measure of whether an abortion regulation is constitutional or not. Pozen explains that the new test "shifted the doctrinal framework from a relatively rigid set of rules to a relatively hazy and open-textured standard."¹⁸ The result has not been "sensitive and honest debate," but as Pozen states, an invitation to "endless cycles of opportunism and obstruction."¹⁹

Having not initially considered my arguments in terms of rules and standards, I see how well the framework fits the anti-abortion legislative effort—particularly when abortion is considered as an issue of family law. For although abortion implicates constitutional law, administrative law, legislation, and so on, it is also and quite profoundly a matter of family law, the decision nothing less than whether or not a new or larger family will come into existence.

nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf [https://perma.cc/7S3A-2RW3].

15 Emily Bazelon & Dahlia Lithwick, "I Went Out Full", in *ABOUT WHAT WAS LOST* (Jessica B. Gross ed., 2007).

16 See Pozen, *supra* note 1, at 165.

17 *Id.*

18 See *id.* at 166. For an analysis of how the Supreme Court made its way from rule to standard in *Casey*, see Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 27–34 (1992).

19 Pozen, *supra* note 1, at 166.

Family law scholars have long been attentive to the rules versus standards problem in other areas of family law and extending its reach to abortion makes great sense.²⁰ I would like to add to Pozen's analysis of the undue burden test with a second example of how the tension between rules and standards plays out in the area of abortion. My example is the judicial bypass process, the regime set up to accommodate the constitutional stand-off between parents and pregnant teens who do not want to involve their parents in their abortion decision even when the law says they must.²¹ To give *Roe* some substance when it comes to pregnant teenagers, the law provides that in lieu of talking to their parents, pregnant minors may avoid or "bypass" their parents by petitioning the local court for permission instead.

The bypass scheme is in the first instance triggered by a rule that determines which teenagers can consent for themselves and which fall into the Scylla and Charybdis of seeking consent from either parent or judge. The bright line age of majority draws the line at eighteen. Pregnant girls under eighteen who don't want to become mothers *or* to involve their parents, must go before a judge who, following an evidentiary hearing, determines whether the minor is mature and informed enough to give consent on her own. These hearings are where discretion raises its hydra heads. Some judges believe that their role is less adjudicatory than like a "rubber stamp."²² Others, particularly in Alabama, have found that nothing less than contemplating the consequences of the decision for the minor's mortal soul will do.²³ Still other judges won't hear bypass cases at all, thus denying minors a forum altogether.²⁴

One way out of what one newspaper headline decried as a "Judicial Crapshoot" would

20 See, e.g., Maryanne Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1985-1986); Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: Child Support Experiment*, 70 N.C. L. REV. 209 (1991); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215 (1991).

21 *Bellotti v. Baird*, 443 U.S. 622 (1979).

22 *Hodgson v. Minnesota*, 648 F. Supp. 756, 766 (D. Minn. 1986), *rev'd*, 853 F.2d 1452 (8th Cir. 1988) ("The decision has already been made before they have gotten to my chambers. The young women I have seen have been very mature and capable of giving the required consent.").

23 *In re Anonymous*, 905 So. 2d 845, 850 (Ala. Civ. App. 2005) (quoting the trial judge as saying "[s]he said that she does not believe that abortion is wrong, so apparently, in spite of her church attendance, there won't be spiritual consequences, at least for the present").

24 CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST CENTURY AMERICA 178-79 (2017).

be to abandon standards and return to rules in the context of pregnant minors.²⁵ States could lower the age of majority for abortion consent from eighteen to sixteen so that at least older teenagers—many of whom are high school seniors, working jobs, planning to go to college—would not have to roll the dice in the bypass crapshoot. After all, legislatures use variable ages of majority for minors all the time.²⁶ In some states sixteen year olds are allowed to consent to sex with another minor, and to obtain birth control without a parent’s consent.²⁷ Surely authority over reproductive matters could reasonably be extended to include abortion. Delaware already exempts pregnant minors over sixteen from the bypass process,²⁸ and West Virginia defines a minor for bypass purposes as “any person under the age of eighteen years who has not graduated from high school.”²⁹

This partial remedy still leaves minors sixteen and under to the whim or prior commitments of whatever judge hears their case, and the variances among bypass decisions read like discretion on steroids. To try to homogenize the process, a number of bypass states have provided judges with guidelines for determining whether a petitioner is sufficiently mature and informed.³⁰ Yet there is plenty of room in the joints for a judge to impose his own view on what manner of awareness is sufficient. One Alabama minor, asked about the medical procedure, testified in some detail, explaining that they

numb[] the bottom half of your body [T]hey would go in there with an aspirator which is like a vacuum or sucking machine. And they go in there around the uterus wall and they just suck it out. That is what [three difference nurses at different clinics] told me.³¹

25 Catherine Candisky & Randall Edwards, *Abortion Waivers are a Judicial Crapshoot*, COLUMBUS DISPATCH, Feb. 29, 1993, at 1A.

26 Carol Sanger & Eleanor Willemssen, *Minor Changes: Emancipating Children in Modern Times*, 25 MICH. J.L. REFORM 239 (1991).

27 *Minors’ Access to Contraceptive Services*, GUTTMACHER INSTIT. (June 1, 2017), <https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive-services> [<https://perma.cc/UD3D-TN4R>].

28 DEL. CODE ANN. tit. 24, § 1782(6) (2017).

29 W. VA. CODE § 16-2F-2 (2016).

30 See 18 PA. CONS. STAT. § 3206(f)(4) (2017) (“[T]he court shall hear evidence relating to the maturity, intellect and understanding of the pregnant woman, the fact and duration of her pregnancy, the nature, possible consequences and alternatives to abortion, and any other evidence the court may find useful.”). Note in particular the final guideline.

31 Ex parte Anonymous, 803 So. 2d 542, 564 (Ala. 2001).

The judge found her insufficiently informed because of his dislike of abortion providers: “This is a beautiful girl with a bright future and she doesn’t need to have a butcher get ahold of her.”³²

Pozen concludes that “the relationship between legal doctrine and cultural practice in such a politically charged field [as abortion] may be poorly predicted by abstract propositions about the comparative merits of rules, standards, or the like.”³³ But abortion as a subject of legal reckoning turns everything topsy-turvy: teenage girls held too immature to consent to abortion are left to become mothers; women are required to bury or cremate aborted fetal remains; the medical procedure is “*abnormalized*” through its omission from Medicaid.³⁴ These various maneuvers are assaults on normal modes of reasoning. Unpacking the failure of traditionally reliable legal concepts is necessary to our collective efforts to appreciate what is going on and how we might conceptualize our own parries and thrusts. This is going to be a long march indeed, and I thank David Pozen for getting more of it going here.

32 *Id.* at 564.

33 Pozen, *supra* note 1, at 166.

34 Khiara M. Bridges, *Abnormalizing Abortion*, CONCURRING OPINIONS, (Apr. 6, 2017), <https://concurringopinions.com/archives/2017/04/abnormalizing-abortion.html> [<https://perma.cc/5QL9-H9WU>].