

2017

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## Recommended Citation

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

Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/1076](https://scholarship.law.columbia.edu/faculty_scholarship/1076)

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## 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."<sup>1</sup> By the end of this section, the reader has learned something about: *Roe v. Wade*;<sup>2</sup> various international treaties on the rights of women;<sup>3</sup> abortion training protocols in medical schools;<sup>4</sup> the neurological development of a fetus;<sup>5</sup> the 2004 and 2012 presidential primaries;<sup>6</sup> a 1995

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

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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://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.<sup>22</sup> 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,"<sup>23</sup> 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."<sup>24</sup> 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."<sup>25</sup>

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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."<sup>26</sup> 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"<sup>27</sup> 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.<sup>28</sup> 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

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(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”<sup>29</sup>; 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.

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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.<sup>30</sup> 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

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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.<sup>31</sup> 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.

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Sanger begins her book with “the possibility of conversation at a lower decibel by women concerning their own abortion decisions and experience.”<sup>32</sup> 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.<sup>33</sup>

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.