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Closets, Standards, Abortion: A Reply to Professor Pozen

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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.”⁴ 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 Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 MICH. J.L. REFORM 239 (1991).

27 *Minors' Access to Contraceptive Services*, GUTTMACHER INST'T. (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>].