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## Flexible Feminism and Reproductive Justice: An Essay in Honor of Ann Scales

Lynne Henderson

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## Flexible Feminism and Reproductive Justice: An Essay in Honor of Ann Scales

# FLEXIBLE FEMINISM AND REPRODUCTIVE JUSTICE: AN ESSAY IN HONOR OF ANN SCALES

LYNNE HENDERSON<sup>†</sup>

## ABSTRACT

Professor Ann Scales began her distinguished career by taking feminism and reproductive justice seriously. She became a leading feminist voice and influence on a number of topics. In later years, she returned to concerns about reproductive justice by presciently emphasizing the need to preserve women's access to abortions.

This Essay discusses Professor Scales's concerns and feminist method and then turns to reproductive justice. The Essay notes that, with Scales, a right to abortion is foundational for reproductive justice. The Essay then examines the increasing narrowing of access to abortion through law. The Essay next examines a current crisis over access to contraception, including arguments that some contraceptives are abortifacients and therefore should not be available and the debate over insurance coverage for contraception under the Affordable Care Act.

The Essay concludes with an examination of what reproductive justice advocates can do to stop what appears to be a steady undermining of rights to abortion and contraception, drawing in part on Professor Scales's concern with always examining women's voices and using political as well as litigation strategies.

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<sup>†</sup> Professor Emerita, UNLV, William S. Boyd School of Law, Visiting Scholar, Stanford Law School 2012–2013. I want to thank Professor Nancy Ehrenreich and all the hard working people at the Sturm College of Law for their hospitality and wonderful conference. Special thanks to Paul Brest and Ann McGinley for reading and commenting on drafts, and to Annette Mann for her help with word processing and editing. Thank you also to Julie Nichols, J.D. 2012, University of Denver Sturm College of Law, for her excellent assistance with transportation and conversation. This is a fast-developing area of law and politics, and many issues discussed in this Essay remain unresolved.

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## INTRODUCTION

The loss of Professor Ann Scales is incalculable. Her contributions to Feminist Legal Theory, practice, and education cannot be overstated, as participants in this Symposium can all attest.<sup>1</sup> With a humanity and honesty that will be sorely missed, she bravely worked on many subjects throughout her all-too-short life, negotiating dangerous territories among feminists, LGBT activists, and legal scholars. She never deserted feminism as a worthwhile and, forgive me, essential lens through which to view the law and the world as a necessary ground for study for scholars and lawyers.

This Essay examines one of the primary issues of concern to Professor Scales (hereinafter Ann, if it is not too disrespectful) throughout her career: the fact that most females, and no males, have the ability to become pregnant and bear children. This fact, that females after a certain age have the ability to reproduce human life, poses enormous existential questions, but that is not my concern here. My concern is more concrete—I think Ann would like that term—it is that after a brief moment in time that gave females in the United States more power over their reproductive capacities than they had ever had, those who oppose women's power to reproduce have deployed the law again and again to deny them choice and their capacity to decide when and how to bear children.

The current crisis over abortion in many states, and the fights over provisions for contraception under the Patient Protection and Affordable Care Act (ACA),<sup>2</sup> are not only historically familiar, but also encompass

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1. See, e.g., Kathryn Abrams, *The Outsider Within: The Radical, Not-So-Scary Feminist Jurisprudence of Ann Scales*, 91 DENV. U. L. REV. 23 (2013); Patricia A. Cain, *In Her Own Voice: Ann Scales as Philosopher, Storyteller, Feminist, and Jurisprude*, 91 DENV. U. L. REV. 53 (2013); Jane Caputi, *Ann Scales "Imagines Us": From the Eco-Pornographic Story to the Medusan Counternarrative*, 91 DENV. U. L. REV. 65 (2013); Jennifer Chacón, *Feminists at the Border*, 91 DENV. U. L. REV. 85 (2013); Nancy Ehrenreich, *On "Having Fun and Raising Hell": Symposium Honoring the Work of Professor Ann Scales*, 91 DENV. U. L. REV. 1 (2013); Katherine Franke, *Taking a Break from Acrimony: The Feminist Method of Ann Scales*, 91 DENV. U. L. REV. 41 (2013); Shannon Gilreath, *Feminism and Gay Liberation: Together in Struggle*, 91 DENV. U. L. REV. 109 (2013); Tamara L. Kuennen, *"Stuck" on Love*, 91 DENV. U. L. REV. 171 (2013); Catharine A. MacKinnon, *Raising Hell, Making Miracles: The Everlovin' Legal Imagination of Ann Scales*, 91 DENV. U. L. REV. 13 (2013); Ann C. McGinley & Frank Rudy Cooper, *How Masculinities Distribute Power: The Influence of Ann Scales*, 91 DENV. U. L. REV. 187 (2013); Robin Walker Sterling, *On Surviving Legal De-Education: An Allegory for a Renaissance in Legal Education*, 91 DENV. U. L. REV. 211 (2013).

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

one of Ann's major concerns. I deeply regret that Ann is not here for me to thank her personally for bringing reproductive issues back to my attention in a powerful way and to guide all of us on the difficult road ahead.

The term reproductive justice seems to encompass all that Ann cared about: it captures all the legal, social, cultural, and economic concerns raised by women's ability to give life. The term evades the dichotomy of "pro-life" (whose?) and "pro-choice" (under what circumstances?). It stands for the proposition that women should not be forced into stereotyped roles or treated unequally because they bear children. It escapes the frame of either/or that Ann opposed. And, from my point of view, that dichotomy was always a loser: Who can be "anti-life" at a general level, even if "pro-choice" fed into the increasingly atomistic discourse of the late twentieth century? Those frames created a false dichotomy of benefits and burdens that consistently overlooked females. Ann was always against false dichotomies.

Part I of this Essay connects Ann's work and advocacy to reproductive issues. Part II discusses the current crisis status of legal, safe, and rare abortion under U.S. law, long a concern of Ann's. Part III discusses renewed resistance to access to birth control, an issue too easily shrugged off after many victories in courts over forty years ago. Part IV asks what we, as feminists, can do to restore reproductive justice for females.

However one defines feminism, I simply do not believe that anyone can deny that the disadvantages females encounter by virtue of their capacity to give life are feminist issues. Men created the religious beliefs and secular laws about women, sexuality, and human reproduction throughout our history. While we cannot ignore the role(s) of men in ensuring reproductive justice and freedom, we must focus on the unique experiences of females and the effects that regulating or prohibiting abortion and contraception have on women, their lives, and their relationships to others. If we conscript men of goodwill in this fight, all to the good.<sup>3</sup> This is especially crucial now, as I hope to make clear in the following Essay.

## I. SCALES AND REPRODUCTIVE JUSTICE

From the beginning of her career as a Harvard Law student, Ann was concerned with reproductive justice for women. She just knew that the Supreme Court's decision in *Geduldig v. Aiello*<sup>4</sup> was wrong and made no sense.<sup>5</sup> I remember seething at the notion that there was no vio-

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3. I know some feminists who believe men support abortion so they can maintain sexual access to women. That may be a "masculinities" problem. See McGinley & Cooper, *supra* note 1. There are men who pressure women to have abortions, but others who do not and who support their partners in their choices.

4. 417 U.S. 484 (1974).

5. Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 *IND. L.J.* 375, 376-77 (1981).

lation of the Equal Protection Clause because, as the opinion infamously noted, a state law that discriminated against pregnant women in disability coverage was not “discrimination on the basis of sex” because there were “pregnant women and nonpregnant persons.”<sup>6</sup> I seethed, but Ann did something about it: *Geduldig* led her to found the *Harvard Women’s Law Journal* in order to give women a voice in the law and to commit herself to feminism and gender justice.<sup>7</sup>

Ann’s first article, *Towards a Feminist Jurisprudence*, specifically criticizes *Geduldig* for denying women equal status as human beings.<sup>8</sup> Her next article, *The Emergence of Feminist Jurisprudence: An Essay*, noted that legal feminists “have, for example, squandered over a decade discussing what legal standard could have prevented the outrage of *Geduldig* . . . .”<sup>9</sup> She argued that the problem was “not that the Supreme Court used the wrong legal standard. The problem was much more serious: It was that our highest court cavalierly allowed California to disadvantage women with respect to their reproductive capabilities.”<sup>10</sup> In her clear statement about reproductive justice, she noted that the Court “endorsed a modern version of a centuries-old method of domination” that legal feminists failed to address adequately.<sup>11</sup> Unless feminists confronted the built-in gender bias of the law and the habit of the law to exclude women’s experiences and voices, the law would not change. At that time, many believed “liberal feminism” could not get the job done because it was part of a pre-existing legal vision of the human that had excluded women. For many of us, including Ann, “dominance feminism,” as grounded in Catharine MacKinnon’s work, held the promise of “freedom from systematic subordination because of sex.”<sup>12</sup> The antisubordination path does not depend on a theory solely grounded on male dominance, however. An antisubordination approach also creates opportunities to examine other forms of oppression and advantage based on race, LGBT identity, and class, which fits much of Ann’s work.

### A. Scales’s Flexible Feminism

Ann may have started with an outrage over inequalities in law based on women’s reproductive abilities, but she moved on to use feminism to critique vast swaths of law, from causation in torts to the growth of militarism in the United States, from pornography and sexual violence to

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6. *Geduldig*, 417 U.S. at 496 n.20, 501.

7. *Ann C. Scales (1952–2012)*, U. DENV. STURM C. L., <http://www.law.du.edu/index.php/profile/ann-scales> (last visited Jan. 3, 2014).

8. Scales, *supra* note 5, at 377.

9. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1398 (1986).

10. *Id.* at 1399.

11. *Id.*

12. *Id.* at 1395 (citing CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 117 (1979)).

Queer Theory and beyond.<sup>13</sup> Because she was committed to what I term a “flexible feminism,” she deployed her intellect and respect for others in a way that I believe set an example for anyone who refused to abandon the “f-word” and who pursued gender justice.<sup>14</sup>

For Ann, feminism was broadly defined as those who believe women (or females of any age) are full human beings who should have full rights and responsibilities and whose experience and suffering should matter in the law. The law had ignored women for centuries, because it was a male field, and it was feminist jurisprudence’s duty to introduce women’s voices and experiences. Although Ann was strongly influenced by Catharine MacKinnon’s work, she never asserted that there was any one path or “right way” to “do feminism.”

For Ann, feminism became a “method” based on women’s experiences as a gender/sex category, rather than an “essentialist enterprise.”<sup>15</sup> While it is true that the original feminist legal scholars and litigators did not attend to the other dimensions of subordination of women based on race and class—because they were drawing on what they “knew” through consciousness raising—at least they were in positions privileged enough to start giving women a voice in the law. Thus, Ann did not label them as hopeless or take an aggressive stance toward them in her work. She saw that we tangled ourselves in knots over issues,<sup>16</sup> only to let the male-dominated system remain in power. Despite hurtful disputes and fragmentations about what feminism was or was not, and whether we should just forget feminism altogether, Ann saw through our respective myopias and reconciled what she could. In her articles, she was respectful and thoughtful about divisions as they developed.

I agree with Ann that the category “female” should not be abandoned. For example, in the introduction to her book published in 2007, she stated that “the feminism I know is concrete, antiessentialist, contex-

13. See, e.g., Ann Scales, “*Nobody Broke It, It Just Broke*”: Causation as an Instrument of Obfuscation and Oppression, in *FAULT LINES: TORT LAW AS CULTURAL PRACTICE* 269, 269–86 (David M. Engel & Michael McCann eds., 2009) [hereinafter Scales, “*Nobody Broke It, It Just Broke*”] (discussing causation and gender bias in torts); Ann Scales, *Soft on Defense: The Failure to Confront Militarism*, 20 *BERKELEY J. GENDER L. & JUST.* 369, 369–93 (2005) (criticizing the gendered nature of militarism and condemning war); Ann Scales, *Poststructuralism on Trial*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 395, 398–99 (Martha Albertson Fineman et al. eds., 2009) [hereinafter Scales, *Poststructuralism*] (describing her work with Equality New Mexico in amending the state Human Rights Act to include “sexual orientation” and “gender identity” (internal quotation marks omitted)). See also other essays for this Symposium cited *supra* note 1.

14. ANN SCALES, *LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY* 9 (2006) (internal quotation marks omitted). In her book, *Legal Feminism: Activism, Lawyering, and Legal Theory*, Ann explained why “feminism” is the most useful term for female-focused study and analysis. *Id.* at 83 (internal quotation marks omitted).

15. Ann Scales, *Disappearing Medusa: The Fate of Feminist Legal Theory?*, 20 *HARV. WOMEN’S L.J.* 34, 38–39 (1997); SCALES, *supra* note 14, at 8.

16. SCALES, *supra* note 14, at 8.

tual, instrumental, eclectic, and open-minded.”<sup>17</sup> She eschewed orthodoxy in favor of what she termed “pragmatism” in many of her works. My interpretation is that she was less a formal philosophical pragmatist in her works—although as a person trained in philosophy, she certainly knew the pragmatic philosophical literature—and more a “pragmatist” in the sense of political flexibility and practicality: If something does not work, abandon it; do not cling to a theory or principle if it does not fit facts or reality; learn from experience. In other words, she was a practical and flexible scholar, teacher, and lawyer.

Ann learned and grew; she saw things from different points of view; she changed or modified her positions when she thought she had been mistaken or had not prevailed. She recognized that human knowledge is never absolute and that facts and circumstances change. Despite her Humean skepticism, or a skeptical attitude towards empiricism, she was willing to venture into that field in her later writings.<sup>18</sup> Throughout her life, she never stopped growing in understanding, while remaining insistent that the category female matters.

Ann did adhere to one basic principle or moral position: Human suffering is deeply wrong. Law should not cause human suffering. And throughout her life, she continued to insist suffering was wrong. She stressed that “[s]olutions once embraced can cease to be useful or can be coopted by others for bad ends.”<sup>19</sup> Thus, there are no ultimate “right” or “wrong” answers. Her perspective reflects her pragmatism or practicality: When what worked once for violence against women or rape reform as a step forward at a latter time might have been co-opted or abused by existing legal habits.<sup>20</sup> For Ann, paying constant attention to developments and gendered hierarchies was crucial.

It is no wonder her feminist “sensors” were out as anti-abortion and anticontraception forces started to pick up political influence in the United States, just as other issues she cared about were also exploding. Thus, in some of her later work, she returned to the issues of pregnancy and gender, especially as the somewhat unclear right to an abortion became increasingly threatened.

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17. *Id.*

18. See Scales, “*Nobody Broke It, It Just Broke*,” *supra* note 13, at 274–75 (noting empirical evidence is “never . . . enough” for feminists or anyone challenging power).

19. SCALES, *supra* note 14, at 111.

20. See ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS (2013) (critiquing and examining unanticipated consequences of rape reform; noting new areas that developed and arguing for addressing these issues); LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 9–17, 28 (2012) (critiquing domestic violence reform and unintended consequences; making suggestions for new approaches in response).



*B. Scales's Concern for Reproductive Justice*

In her book on feminist jurisprudence, and her chapter, *Poststructuralism on Trial*, Ann returned to the theme of reproductive justice.<sup>21</sup> She emphasized the need for legal feminists and queer theorists to turn their attention back to abortion rights.<sup>22</sup> In her book, she used the issue of abortion to illustrate how feminist legal methods could apply to a major legal area involving gender. While writing, “abortion [is not] an end in itself,” she said “[it] is a necessary option for now, and feminists should portray it as such.”<sup>23</sup> Access to abortion is so intertwined with women’s lives and opportunities, including efforts to combat gender stereotypes and stereotypical role assignments, it simply cannot be ignored as an integral part of women’s lives.<sup>24</sup> And, as I shall discuss in more detail later, she was correct in observing that, “winning abortion cases is not nearly enough . . . . If the federal right goes away, the matter will move back to the states and the streets.”<sup>25</sup> Ann presciently concluded that “[t]his is one of those situations where I suspect I’ll tire political muscles that I didn’t know I had.”<sup>26</sup>

In *Poststructuralism*, she urged that “the right to abortion . . . is the most critical solidarity imperative at the moment.”<sup>27</sup> She envisioned a link between feminists and queer theorists that had not existed before. Because abortion is so linked to disciplining the body, recognizing full sexual equality, and the valuing of certain lives over others because of gender, she argued, feminists and queer theorists have many interests in common and should work together in solidarity to preserve the rights of women to obtain safe, legal abortions.<sup>28</sup> Solidarity among those oppressed because of gender and sexuality was not only possible, it was “the only viable option for progressive people.”<sup>29</sup>

I agree with Ann that reproductive justice is a core issue for feminist work, broadly defined as working to resist and overcome subordination and oppression of females. First, abortion and access to contraception have been the way for women in the United States and throughout the world to be safe sexual beings without being forced into a role or status.<sup>30</sup> Forcing women to bear children at whatever cost to them places

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21. SCALES, *supra* note 14, at 147–51; Scales, *Poststructuralism*, *supra* note 13, at 407–10.

22. See ABRAMS, *supra* note 1, at 36–37.

23. SCALES, *supra* note 14, at 112.

24. *Id.*

25. *Id.* at 114.

26. *Id.*

27. Scales, *Poststructuralism*, *supra* note 13, at 407.

28. See SCALES, *supra* note 14, at 148–49.

29. *Id.* at 147.

30. See NANCY L. COHEN, *DELIRIUM: HOW THE SEXUAL COUNTERREVOLUTION IS POLARIZING AMERICA* 9–16 (2012) (describing reactions to the “sexual revolution” started by the birth control pill as being based in “traditional family” values); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 92–94 (1984); Courtney Megan Cahill, *Abortion and Disgust*, 48 HARV. C.R.-C.L. L. REV. 409, 439–46 (2013) (discussing stereotypes and roles as well as Luker’s work);

them back into stereotyped roles and imposes duties on them no men have ever had to bear. Perhaps the core issue is whether females should be required to be “mothers” or bear children by the laws still shaped mostly by men. Even with adoption as a possible choice once the baby is born, forcing women to become pregnant and to carry a pregnancy to term against their own decisions is a denial of a woman’s full human status, because someone else has determined she must give her life and body to another being—presumably because they doubt her full human capacities as a moral and competent decision maker.<sup>31</sup> Abortion opponents also argue that the regret of women who have had abortions justifies prohibition.<sup>32</sup> Opponents omit the grief women may experience in giving up their babies for adoption and the harms to adoptees themselves. Moreover, many infants—especially mixed-race, minority status, and disabled infants—may never be adopted.

By focusing on *Roe*, Ann was perhaps not quite as explicit as she could have been about just how much the right to obtain an abortion had already eroded when she wrote. Perhaps she believed, as she mentioned, that *Maher v. Roe*<sup>33</sup> and *Harris v. McRae*,<sup>34</sup> in which the Court held that there was no right to government-funded abortions for poor women reliant on government healthcare, had already substantially eroded abortion rights. She probably was also more than aware that in those early post-*Roe* years, the Court permitted states to prohibit access to abortions in publically funded hospitals, even when the affected woman could pay full costs and the state would not have to pay for the procedure.<sup>35</sup> Unfortunately, she did not really develop any arguments about the continuing erosion of abortion rights after the decisions in *Planned Parenthood v. Casey*<sup>36</sup> and *Gonzales v. Carhart (Carhart II)*.<sup>37</sup>

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Jack M. Balkin, *Balkin, C.J., Judgment of the Court, in WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION* 31, 41, 45 (Jack M. Balkin ed., 2005) (presenting a “revised” opinion for *Roe v. Wade*); Reva B. Siegel, *Siegel, J., Concurring, in WHAT ROE V. WADE SHOULD HAVE SAID, supra*, at 63, 76.

31. See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1628–30 (1987) (discussing that women are “somehow blameworthy” and have “‘odious’ motives” (quoting Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 175 n.49 (1985))); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1569, 1621 (1979) (arguing Good Samaritan laws should not require such personal sacrifices and articulating non-subordination principle); Robin West, *West, J., Concurring, in WHAT ROE V. WADE SHOULD HAVE SAID, supra* note 30, at 121, 130 (discussing Good Samaritan laws); see also Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 492 (2013) (noting *Carhart II*’s doubt about women’s ability to recognize the goodness of pregnancy until after the abortion occurs).

32. See *infra* p. 164 and note 147.

33. 432 U.S. 464, 464 (1977) (upholding state’s refusal to fund abortions for poor women).

34. 448 U.S. 297, 302, 326 (1980) (upholding the so-called Hyde Amendment prohibiting Medicaid funding for abortions for poor women unless their lives were at stake or, in this iteration, the pregnancy was a result of rape or incest).

35. See *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (upholding ban on abortions in public hospitals in St. Louis); see also *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 491–92 (1989) (upholding ban on use of public hospitals and facilities for abortions in Missouri).

36. 505 U.S. 833, 874–76 (1992) (upholding all but one restriction on abortions under Pennsylvania law and adopting an “undue burden” test for state regulation).

## II. THE EROSION OF ABORTION AS PART OF REPRODUCTIVE JUSTICE

Those who support abortion as part of reproductive justice have lost so much ground in the past few years that *Time Magazine* recently published a cover story on the erosion of abortion rights.<sup>38</sup> Indeed, countless news stories have appeared in the past year noting numerous new state restrictions and virtual, if not total, attempts to abolish abortion after the 2012 elections. When *Time Magazine* declares that we are worse off than we were forty years ago, when the Court held 7–2 that women had a liberty right or interest in access to abortion in *Roe*, we should be alarmed. This Part discusses the steady erosion of protections for women that has occurred.

*Casey* undermined the strength of a woman’s liberty interests in abortion, subordinating those interests to the “[s]tate’s profound interest in potential life” from conception—whatever that means.<sup>39</sup> “[A] State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures *do not further a health interest*.”<sup>40</sup> Therefore, states could go far in promoting “life” over women’s health and physical, psychological, and social well-being.

Abortion opponents have used *Casey*’s weakening of a woman’s “interests” in obtaining abortions and its increased focus on fetal and states’ interests and rights to justify increasing restrictions on abortion. In *Casey*, three Justices set the standard of review for abortion regulations: Regulations that do not impose an “undue burden”<sup>41</sup> or that were not enacted for the “purpose or effect of presenting a substantial obstacle” to a woman’s access to abortion<sup>42</sup> are constitutional. The three Justices undertook a cursory review of a number of Pennsylvania’s regulations, and ignored the district court’s factual findings with one exception: The opinion drew heavily on the district court’s fact-finding and other information about domestic violence to hold that obtaining the consent of a husband was an undue burden because of dangers married women might face.<sup>43</sup>

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37. 550 U.S. 124, 132, 166 (2007) (upholding the federal “Partial-Birth Abortion Ban Act of 2003” as prohibiting a certain late-second trimester procedure as, I guess, within the Commerce power. I say “I guess” because Justice Kennedy’s opinion for a 5–4 Court only adverted to congressional power to regulate under the Commerce Clause). The Court had struck down a state’s ban on all partial-birth abortions in *Stenberg v. Carhart*, 530 U.S. 914 (2000). *Id.* at 922.

38. Kate Pickert, *What Choice?: Abortion-Rights Activists Won an Epic Victory in Roe v. Wade. They’ve Been Losing Ever Since*, TIME, Jan. 14, 2013, at 38.

39. See 505 U.S. at 878. *From conception* could mean once an egg is fertilized or when there is implantation in the uterus. As untold—and unknown—numbers of fertilized eggs never reach implantation for reasons beyond birth control, such as a regular menstrual cycle or other factors, it seems surreal to say conception begins at fertilization.

40. *Id.* at 886 (emphasis added).

41. *Id.* at 874.

42. *Id.* at 878.

43. See *id.* at 887–98. The Justices also mentioned the history of legal subordination of married women as a factor in striking this provision, providing a hint of equality concerns. *Id.* at 897.

The three Justices looked at each individual regulation separately, rather than noting the cumulative effects that so many regulations would have in creating obstacles to abortion. Thus they myopically overlooked the coercive effect that the regulations as a whole could exert on women. Waiting times, travel requirements, requirements that doctors tell women the risks of abortion and childbirth along with the “probable . . . age of the unborn child[.]”<sup>44</sup> parental notification requirements (as long as there was some form of “judicial bypass” for minors),<sup>45</sup> the requirement that women hear readings on the “father’s duty” to support the child even if the pregnancy was caused by rape,<sup>46</sup> and everything else—although clearly intended to create obstacles to abortion—passed constitutional muster. Moreover, the state could prohibit abortions altogether once the fetus became “viab[le]” unless the woman’s life or health were at stake.<sup>47</sup>

Exactly what “the life or health” of the woman meant—or means—remains unclear.<sup>48</sup> Perhaps worse, the three Justices implied that women could not comprehend the “full consequences” of having an abortion and suggested that women would be psychologically devastated unless the state mandated that doctors inform them of the nature of the procedure, the age of the fetus, and the loss of life involved.<sup>49</sup> The arguments of anti-reproductive rights advocates about the harm of abortion to women, and judicial doubt about women’s moral decision-making capacities became part of the Court’s reasoning, if not the specific “law,” as *Carhart II* illustrates.

In *Carhart II*, the Court upheld the Federal Partial-Birth Abortion Ban Act of 2003, which prohibited the performance of one type of procedure used in late-second trimester abortions.<sup>50</sup> Not only did Congress have the power to regulate abortion, presumably under the Commerce Clause, but also Justice Kennedy’s opinion made it clear that he doubted women’s capacity to engage in moral decision making. Congress could step in because women were not moral agents who could make decisions about the procedure used.<sup>51</sup> So much for “informed consent”! The majority seemed to take note of abortion opponents’ co-optation of the argument feminists had used that women are harmed by unwanted pregnancy by observing women might be harmed by having had an abortion, espe-

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44. *Id.* at 881 (internal quotation marks omitted). I dispute that *in utero* human development can be reduced to this image. A fertilized egg is not an unborn child.

45. *Id.* at 946.

46. *Id.* at 903.

47. *Id.* at 861, 879.

48. *See id.* at 866, 878–80 (concluding that the interpretation of the circuit court was “sufficient[.]”).

49. *Id.* at 882.

50. *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 124, 168 (2007) (upholding the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2012)).

51. *See id.* at 159.

cially of this rare type, instead of carrying the pregnancy to term and giving birth.<sup>52</sup>

Since the Court decided *Casey* and *Carhart II*, opportunistic state legislatures and governors have enacted a proliferation of restrictions on abortions and abortion providers.<sup>53</sup> The recent trends to require ultrasounds, to require doctors to “show the pictures” from the ultrasounds to women in the interests of “informed consent,”<sup>54</sup> and so on, are troubling. Trends in many states require doctors to tell women that the fetus is a full human being from the time of conception—in some laws, from the time of fertilization, not implantation<sup>55</sup>—and increasingly regulate abortion clinics on such matters as hall space and medical technologies in order to force them to close.<sup>56</sup> In several states now, doctors who perform abortions must be admitted to practice at a local hospital, but there are no hospitals that give these doctors admitting privileges.<sup>57</sup> Most recently, several state legislatures have passed laws prohibiting doctors from performing abortions once a fetal heartbeat can be detected—at six or twelve weeks, depending on how intrusive the procedure used to hear it is—effectively criminalizing even first trimester abortions. North Dakota’s legislature passed a ban on abortion “if a fetal heartbeat can be detected, or as early as six weeks into a pregnancy.”<sup>58</sup> Wisconsin recently joined this group of Republican-controlled states.<sup>59</sup> “Supporters say their goal is to challenge the Supreme Court’s 1973 *Roe v. Wade* ruling . . . .”<sup>60</sup> Arkansas passed a ban on “most abortions” after twelve weeks “when a fetal heartbeat can be detected using an abdominal ultrasound.”<sup>61</sup> Texas has enacted restrictions perhaps making many abortions

52. See *id.* at 159–60; see also Bridges, *supra* note 31, at 479–80 (discussing the effectiveness of the argument in *Carhart II* that abortion harms women); Cahill, *supra* note 30, at 439–46.

53. John Eligon & Erik Eckholm, *New Laws Ban Most Abortions in North Dakota*, N.Y. TIMES, Mar. 27, 2013, at A1.

54. See Michael P. Vargo, *The Right to Informed Choice: A Defense of the Texas Sonogram Law*, 16 MICH. ST. U. J. MED. & L. 457, 458 (2012), for an article that argues this is good for women, does not harm them, and helps in making a moral choice.

55. See H.B. 2253, 85 Leg., 119 Sess. (Kan. 2013).

56. Associated Press, *Abortion Clinics Face Strict Rules Under New Bill*, S.F. CHRON., Apr. 4, 2013, at A7.

57. Jackson Women’s Health Org. v. Currier, 940 F. Supp. 2d 416, 421–24 (S.D. Miss. 2013) (enjoining enforcement of law requiring admitting privileges as an undue burden because women would have to leave the state); Michael Martinez & Greg Botelho, *Alabama Gov. Robert Bentley Signs Law Raising Requirements for Abortion Clinics*, CNN, <http://www.cnn.com/2013/04/09/politics/alabama-abortion-law> (last updated Apr. 9, 2013, 19:05 EDT) (describing Alabama law requiring doctors to have admitting privileges and clinics to meet stringent requirements).

58. Associated Press, *Most Restrictive Bans on Abortion in Nation Advance*, S.F. CHRON., Mar. 16, 2013, at A6.

59. Associated Press, *Court Challenge Filed to Restrictive Abortion Rules*, S.F. CHRON., July 6, 2013, at A10.

60. Associated Press, *Most Restrictive Bans on Abortion in Nation Advance*, S.F. CHRON., Mar. 16, 2013, at A6.

61. *Id.*

impossible in that state, despite efforts to oppose the legislation.<sup>62</sup> Maybe these states will agree that abortion is only permissible if a woman's life is endangered, resulting in judicial and medical fear of even determining whether the woman will die.<sup>63</sup>

At the federal level, the House passed a bill to prohibit abortions after twenty weeks.<sup>64</sup> Other bills introduced in Congress have come close to defunding Planned Parenthood entirely because it provides some small number of abortions.<sup>65</sup> Congress also excluded abortion from required coverage under the Affordable Care Act.<sup>66</sup>

As it stands now, the laws of most states forbid any insurance funding for abortions.<sup>67</sup> Since *Harris v. McRae*, Congress has forbidden federal funding for most abortions under Medicare and has allowed states to refuse funding under Medicaid.<sup>68</sup> Therefore, I have to disagree respectfully with advocates and scholars I admire deeply who have argued the abortion issue should be "left to Congress." We will need to work with courts and states right now; if times change, then we can change our approach—a pragmatic approach Ann might approve. Yet many states are not promising either.

Many of the new state laws seem to violate even *Casey*. The laws appear to be designed to reach a conservative Supreme Court that abortion opponents believe may now overturn *Roe* and *Casey*. After all, if corporations are persons under the First Amendment, how can unborn humans not be?<sup>69</sup> Thus, the Court could hold that a fetus or unborn child

62. See Manny Fernandez, *Filibuster in Texas Senate Tries to Halt Abortion Bill*, N.Y. TIMES, June 26, 2013, at A14 (noting that the bill sought to ban abortions after twenty weeks, require clinics to meet the standards of other surgical centers, and require doctors to have admitting privileges); Manny Fernandez, *Abortion Restrictions Become Law in Texas, but Opponents Will Press Fight*, N.Y. TIMES, July 19, 2013, at A12 ("The measure, House Bill 2, bans abortions after [twenty] weeks of pregnancy, requires abortion clinics to meet the same standards as hospital-style surgical centers and mandates that a doctor have admitting privileges at a hospital within [thirty] miles of the facility where he or she performs abortions."); Christy Hoppe, *Federal Judges Question Whether Texas Abortion Law Has Forced Clinics to Close*, DALL. MORNING NEWS, Jan. 7, 2014. The case is currently in the Fifth Circuit. See *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012). Attempts to stay the implementation of the law failed; Justice Scalia denied a stay on September 29, 2011. See Supreme Court of the U.S., *No. 11A335*, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11a335.htm> (last visited Feb. 5, 2014).

63. Associated Press, *Bill Allowing Life-Saving Abortions Passers 1st Round*, S.F. CHRON., July 3, 2013, at A3.

64. Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Cong. § 3(b)(2)(A) (2013).

65. See, e.g., H.R. 217, 113th Cong. (2013); H.R. 61, 113th Cong. (2013).

66. See 42 U.S.C. § 18023 (2012); 45 C.F.R. § 156.280 (2012); Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*, 15 CUNY L. REV. 391, 392–93, 416–17 (2012).

67. The State of Washington may go the opposite way and approve a requirement that health care insurers in that state cover abortion. Associated Press, *Legislation Seeks to Make Insurers Cover Abortion*, S.F. CHRON., Mar. 24, 2013, at A12.

68. See *supra* note 34 and accompanying text; Soohoo, *supra* note 66, at 392.

69. *Citizens United v. FEC*, 558 U.S. 310, 342, 372 (2010) (holding that corporations are persons under the First Amendment for purposes of the Free Speech Clause).

is a person under the Fourteenth Amendment. That would effectively nullify any right to abortion, as “life” trumps “liberty” and presumably women’s equality.

At minimum, the “right to life” could create procedural hurdles to abortion under the Due Process Clause similar to those the Court rejected in *Doe v. Bolton* in 1973.<sup>70</sup> Or, more likely, the Court could simply hold that abortion regulation should be left entirely up to the states on the basis that *Roe* was wrong from the beginning and should be entirely reversed. To preserve women’s access to safe, legal, and rare abortions, feminists will have to use every tool and all the energy we have. No woman or girl should have to endure an unwanted pregnancy because the state coerces her into that “decision”—no matter what the circumstances.<sup>71</sup>

Not only do we face difficulties in providing reproductive justice for women in the abortion context, but we are also facing a crisis in birth control. Not only is abortion at issue, so is contraception. First, there is a spillover effect—opponents to contraception, abortion, or both have become adept at characterizing certain methods of contraception as abortifacients. An abortifacient can range from anything that interferes with fertilization under some religious doctrines to anything that interrupts implantation in the uterus. Second, the Affordable Care Act overlooked the subterranean controversy over payment for birth control that had been brewing. Whether employers—or pharmacists or whoever—should have to obey laws requiring payment for insurance coverage against their religious or moral beliefs has become a battleground under the ACA. The one leading case on requiring employer insurance payments for birth control was the California Supreme Court’s decision in *Catholic Charities of Sacramento v. Superior Court*,<sup>72</sup> but California has been quite protective of abortion rights for many years. In the meantime, “conscience clauses” enacted in many states had already exempted employers, insurers, and pharmacists from providing contraception to employees or customers on religious grounds.<sup>73</sup> Now the fight is obvious and national. The next Part discusses the obstacles for women needing contraception.

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70. *Doe v. Bolton*, 410 U.S. 179, 198 (1973).

71. As Donald Regan noted in 1979, “Anyone who attempts simply to deny that there is an intrinsic horror to unwanted pregnancy lacks either imagination or compassion.” Regan, *supra* note 31, at 1617

72. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 80 (Cal. 2004) (setting out four-point test for insurance coverage for those employed by religious businesses).

73. See Jed Miller, Note, *The Unconscionability of Conscience Clauses: Pharmacists’ Consciences and Women’s Access to Contraception*, 16 HEALTH MATRIX 237, 241–45 (2006); *Protecting the Rights of Conscience of Health Care Providers and a Parent’s Right to Know: Hearing Before the H. Subcomm. on Health of the Comm. on Energy and Commerce*, 107th Cong. 29–31 (2002) (statement of Lynn Wardle, Professor of Law, J. Reuben Clark Law School, Brigham Young University), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_house\\_hearings&docid=f:80684.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:80684.pdf).

### III. EROSION OF THE “RIGHT” TO ABORTION AND SPILLOVERS INTO CONTRACEPTION

In *Griswold v. Connecticut*,<sup>74</sup> the Supreme Court held that the choice whether “to bear or beget a child”<sup>75</sup> was a “fundamental right”<sup>76</sup> for heterosexual married people under the Constitution.<sup>77</sup> A few years later, in *Eisenstadt v. Baird*,<sup>78</sup> the Court held that the right to access to birth control was an “individual right” that did not depend on marital status.<sup>79</sup> That right, of course, did not require government subsidies under the Constitution, but it did reinforce the importance of every individual’s “decision whether to bear or beget a child.”<sup>80</sup> Over the past forty years, the growth of Republican “social conservatism” and power has endangered even the fundamental right to contraception.

As the Managing Editor of the *Thirteenth Annual Review of Gender and Sexuality Law* in the *Georgetown Journal of Gender and the Law* noted in the *Foreword*, “Who would ever have guessed that birth control would be *the* issue at the dawn of the 2012 election?”<sup>81</sup> Yet it was a major issue.<sup>82</sup> Religious organizations and socially conservative Republican and Democratic members of Congress opposed coverage for birth control. For example, House Republicans refused on procedural grounds to allow then-law student Sandra Fluke to testify before the House Oversight and Government Reform Committee on rules regarding “Conscience Clause Exceptions” to contraception.<sup>83</sup> Subsequent attacks on her when she spoke to the House Democratic Steering and Policy Committee on the need for insurance coverage for contraception made it quite clear that there are those who would deny access to insurance coverage for contraception for women under the ACA—or under any insurance policies.<sup>84</sup>

As we know, opposition to birth control is a part of our country’s history. Obtaining access to birth control became a major, and long-

74. 381 U.S. 479 (1965).

75. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

76. *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring).

77. *Id.* at 485 (majority opinion).

78. 405 U.S. 438.

79. *Id.* at 453.

80. *Id.*

81. Dustin F. Robinson, *Foreword*, 13 *GEO. J. GENDER & L.* 107, 108 (2012).

82. The Democratic Party tried to portray these issues as part of a “War on Women” by the Republicans in the 2012 presidential election campaign. See COHEN, *supra* note 30 (discussing the evolution of arguments over sexuality, contraception, and reproductive choice that dominated both parties from the 1960s up to the 2012 election).

83. See Jenna Johnson, *Sandra Fluke Says She Expected Criticism, Not Personal Attacks, over Contraception Issue*, WASH. POST (Mar. 3, 2012), [http://www.washingtonpost.com/local/education/sandra-fluke-says-she-expected-criticism-not-personal-attacks-over-contraception-issue/2012/03/03/gIQAJq1UpR\\_story.html](http://www.washingtonpost.com/local/education/sandra-fluke-says-she-expected-criticism-not-personal-attacks-over-contraception-issue/2012/03/03/gIQAJq1UpR_story.html).

84. *Id.*; Robinson, *supra* note 81, at 107 (“[W]e believe in civilized discourse . . . We stand by our fellow Journal member to the fullest, and we condemn those who would use vile and vitriolic rhetoric to disparage and shame anyone who calmly and rationally expresses an opinion.”).



fought, feminist issue.<sup>85</sup> Since the decisions in *Griswold* and *Eisenstadt*, states may not prohibit the sale, use, or access to birth control. Federal laws governing Medicaid insurance provide for birth control coverage. But financing for over-the-counter, non-prescription sales of contraceptive drugs is doubtful.<sup>86</sup> Religious organizations and others frequently frame arguments against access, sales, and even approval, of particular forms of birth control as abortifacients, and therefore a violation of a right to life. Many opponents would deny access to artificial methods of birth control entirely on religious grounds, others on less specific grounds. In either case, women in many states could lose access to many forms of contraception, which undoubtedly leads to unwanted pregnancies, which of course leads back into the abortion loop.

### *A. Rape and Emergency Contraception*

Current federal funding for the poor that prohibits the use of public funds to pay for abortions does have an exception for “rape or incest” or the “life of the mother.”<sup>87</sup> But to qualify, a woman must meet the onerous requirements for coverage—the victim must cooperate with law enforcement, for example, in order to be eligible.<sup>88</sup> Moreover, because much of law enforcement still disbelieves women who say they were raped, it is a slim thread upon which to rely.<sup>89</sup> Despite decades of reform in rape law, police and prosecutors, as well as medical providers, are still wedded to biases about what “real rape” is.<sup>90</sup> Worse yet, funding for Emergency Contraception (EC)—most commonly referred to as “Plan B” contraception, although a generic exists—for rape victims who are brave enough to go to Emergency Rooms (ERs) has become ensnared in the battle over abortion. Therefore, even in the case where the law does provide an exception to the prohibition on abortion funding, finding coverage is still difficult.

For rape victims, access to EC that prevents conception can be difficult if not impossible. Even if a majority of Americans believe that a rape victim should get contraception, there is a horrible disconnect be-

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85. See generally C. THOMAS DIENES, *LAW, POLITICS, AND BIRTH CONTROL* (1972) (discussing history from Comstock laws through *Griswold*); LINDA GORDON, *WOMAN’S BODY, WOMAN’S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* (1976).

86. Probably someone could argue that over-the-counter sales of so-called barrier methods also should not be allowed in this topsy-turvy universe. For example, spermicides, condoms, and so on are endangered; diaphragms and cervical caps require prescriptions still, so I haven’t a clue where that leads us.

87. H.R.J. Res. 440, 96th Cong. § 109 (1979). At one point, the so-called Hyde Amendment did not even have a “rape or incest” exception. *Harris v. McRae*, 448 U.S. 297, 302–03 (1980) (internal quotation marks omitted) (citing Act of Sept. 30, 1976, Pub. L. No. 94–439, § 209, 90 Stat. 1418 (1976)).

88. See, e.g., 42 C.F.R. § 457.475 (2012).

89. CORRIGAN, *supra* note 20, at 82–95.

90. *Id.* at 69–74, 82–103.

tween “real rape”<sup>91</sup> and who is really a rape victim. An example: The claim that “legitimate rape victims”—an oxymoron if ever there was one—cannot become pregnant was a factor in the 2012 elections and continues to be.<sup>92</sup> As easy as it is to dismiss extremist statements that victims of “legitimate rape” cannot become pregnant,<sup>93</sup> abortion opponents continue to make that argument. Moreover, Roman Catholic Bishops and others oppose contraception even when the pregnancy is a result of rape. So for a rape victim who seeks contraception, there may be no option—even if she acted “fast enough” and was a “good girl” and went to an ER. Many rape victims/survivors do not go to ERs in time, but for those who do, being denied EC worsens the trauma and horror of rape.

Rose Corrigan’s empirical study of rape crisis centers and counselors in six states, and her book *Up Against a Wall*, make it clear that hospitals may refuse to give rape victims EC either because of religious affiliation or conscience clauses that exempt them from dispensing such medications. Only thirteen states *require* hospital ERs to dispense EC to rape victims “upon request”; six other states only require hospitals to “inform” victims that such contraception exists.<sup>94</sup> Stranger still is that, although in 2009 the FDA approved nonprescription sales of EC for women eighteen years and over and subsequently modified the rule to allow seventeen-year-olds to purchase EC over the counter,<sup>95</sup> doctors in ERs still believe they have to write prescriptions and refuse to do so.<sup>96</sup> Thus the trauma is compounded.

Because Roman Catholic hospitals may fall within religious exceptions, and some hospitals or individual doctors in ERs refuse to inform or administer EC even in states with such laws,<sup>97</sup> rape victims are left to flounder. In areas where hospitals refuse to give victims EC, victims over

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91. *Id.* at 83 (describing law enforcement and prosecutorial skepticism in her study); SUSAN ESTRICH, *REAL RAPE* (1987); STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998); Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 41 (1993).

92. Associated Press, *Republican: Akin ‘Partly Right’ on Rape Comment*, USA TODAY (Jan. 11, 2013, 15:16 EST), <http://www.usatoday.com/story/news/politics/2013/01/11/gingrey-akin-rape/1827489/> (quoting Rep. Phil Gingrey, R-Georgia, an OB-GYN, asserting that adrenaline can sometimes prevent ovulation); Jonathan Weisman, *Obama Camp Seizes on Republican’s Abortion Comments*, CAUCUS: N.Y. TIMES BLOGS, Oct. 24, 2012 (mentioning both Akin’s “legitimate rape” comment in Missouri, and Mourdock’s “God’s will” comment in Indiana).

93. CORRIGAN, *supra* note 20, at 158.

94. *Id.* at 166.

95. See *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 164–69 (E.D.N.Y. 2013) (summarizing FDA changes). The FDA recently announced that Plan B One Step could be sold to fifteen-year-olds and that the medication should be placed on pharmacy shelves instead of behind the pharmacist’s counter. Pam Belluck, *Drug Agency Lowers Age for Next-Day Birth Control*, N.Y. TIMES, May 1, 2013, at A10.

96. See CORRIGAN, *supra* note 20, at 162 (discussing that some, often Catholic, hospitals do not have EC on the premises and suggesting that doctors will write prescriptions for it, but will force women to go elsewhere to fill the prescription. Ultimately, then, these hospitals are not providing any assistance to women seeking EC).

97. CORRIGAN, *supra* note 20, at 178–89.

a certain age may have to travel long distances to obtain what is now an over-the-counter medication to prevent pregnancy, and they must do it in a short period of time.<sup>98</sup> Given “conscience clauses” that allow pharmacies to refuse to sell EC (or any contraception), it may not be possible for a victim who promptly went to the hospital or care facility to obtain EC, even over the counter.

The failure to provide EC for the victim within a few days of the rape—24 hours is optimal, 72 hours may be too late—may mean that a rape survivor will have to find a doctor willing to prescribe RU-486, a medication that causes miscarriage and can be more dangerous to a woman’s health,<sup>99</sup> and a pharmacist willing to sell it to her, or she will have to seek an abortion, a perverse result. Of course another perverse result is that failing to give women the power to decide whether to have an abortion or get EC may increase inaccurate or false claims of rape by women simply to obtain the care they need. Indeed, the original plaintiff in *Roe* initially told the Texas hospital she was pregnant because of a rape, because she did not know the Texas law prohibiting abortion had no exception for rape.<sup>100</sup> These factors argue for requiring EC for rape victims.

### B. Contraception More Generally

Although “[o]ver half of all states have passed legislation that protects women’s right[s] to insurance coverage of contraceptives,”<sup>101</sup> not all states require that health insurance cover contraceptive costs. Even in states that require payment for prescription contraceptives, health insurance may not be required to cover payments for over-the-counter medications, such as Plan B/EC. This issue became more public and apparent with the passage of the ACA, upheld 5–4 by the Supreme Court in *National Federation of Independent Business v. Sebelius*.<sup>102</sup> Under Department of Health and Human Services (HHS) regulations, the ACA has required that health insurance provide coverage for contraception for all women as part of preventive medical care.<sup>103</sup> These regulations have in turn led to numerous challenges from religious groups and individuals,

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98. *Id.* at 161–65, 180–82, 195–96.

99. RU-486 is known generically as mifepristone, and now a battle is going on in the United States Supreme Court over whether Oklahoma doctors can prescribe mifepristone and misoprostol for their off-label prescription effects that minimize health damage under the FDA off-label allowances. *See Cline v. Okla. Coal. for Reprod. Justice*, 133 S. Ct. 2887, 2887 (2013) (granting certiorari and remanding to Oklahoma Supreme Court); Erik Eckholm, *In Mexican Pill, a Texas Option for an Abortion*, N.Y. TIMES, July 14, 2013, at A1; Lyle Denniston, *New Test on Abortion Rights*, SCOTUSBLOG (June 27, 2013, 3:50 p.m.), <http://www.scotusblog.com/2013/06/new-test-on-abortion-rights/>.

100. Texas at the time had no rape exemption. *Roe v. Wade*, 410 U.S. 113, 117–18 (1973).

101. Kelly Lyall & Nicholas Schneider, *Access to Contraception*, 13 GEO. J. GENDER & L. 145, 149 (2012).

102. 132 S. Ct. 2566, 2575 (2012).

103. *See id.* at 2577.

once again making contraception a major political issue.<sup>104</sup> No matter how hard the Obama Administration has tried to accommodate the Free Exercise Clause concerns, the battle has continued.

Troublingly, the authors of *Access to Contraception* in the *Georgetown Journal of Gender and the Law* declared, “Reconciling the controversy over access to contraception necessarily involves a balancing of the conflicting rights of those who are pro-life and those who are pro-choice, of health care providers and their patients, and of employers and their employees.”<sup>105</sup>

Exactly where did the rights and interests of women fall out of consideration in this summary? Exactly why do the authors see a dichotomy between “pro-life” and “pro-choice” when it comes to the right to contraception? Perhaps the authors were so accustomed to typical court frameworks for analyzing abortion that gender disappeared from the consideration of, at a minimum, the fact that “the patient” is always female. The utter silence—or silencing—of organized women’s groups and voices about the importance of reproductive control in their lives because of the dichotomies and doctrinal frameworks that define what is “permissible discourse” or what the mass media thinks deserves attention may have led to exclusion of an Equal Protection analysis. Or, the answer may lie in how successfully anti-choice groups, including Feminists for Life, have managed to characterize many, if not all, methods of birth control into abortifacients.

In fact, the *Georgetown* authors examined EC and concluded that because “EC can prevent the implantation of a fertilized embryo” it is probably an abortifacient, e.g., a method that kills a fetus.<sup>106</sup> That assumption is not true.<sup>107</sup> But even if it were true that EC may prevent implantation of a fertilized egg, it does not stop a pregnancy after implantation. To be effective, EC must be taken within 24 hours, and at most 72 hours, after sexual activity that can produce pregnancy.<sup>108</sup> The “implantation” argument does render RU-486 an abortifacient, as well as DES (Diethylstilbestrol, the emergency medicine available at the time I was raped), because it leads to the expulsion of an implanted embryo. Many think intrauterine devices (IUDs) are abortifacients, because they prevent

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104. See Ethan Bronner, *A Flood of Suits on the Coverage of Birth Control*, N.Y. TIMES, Jan. 29, 2013, at A1.

105. Lyall & Schneider, *supra* note 101, at 150.

106. *Id.* at 152.

107. See *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 164–69 (E.D.N.Y. 2013) (discussing the medical knowledge about Plan-B and dismissing claim it prevents implantation).

108. “Sexual activity” can mean so many things, and many sexual activities can have nothing to do with heterosexual intercourse. It is a euphemism for anything that could produce a pregnancy. Rape, sexual assault, being drunk when intercourse occurs, or even ejaculation outside the vagina can lead to pregnancy. I guess “sexual activity” here is a stand-in for desired, wanted heterosexual intercourse, which of course does not fit women’s circumstances in all instances. See Henderson, *supra* note 91, at 57–61 (discussing women’s experiences of heterosexual intercourse).

implantation of fertilized eggs. Other forms of birth control prevent implantation too, by interfering with the build-up of the uterine wall—are they too, then abortifacients? How far out will the arguments go that any birth control is indeed an abortifacient or analogous to one? Some of these questions may have to be decided by the courts, but we cannot possibly depend on the courts alone to restore the ability of females to obtain legal, safe contraceptives wherever they live.

The Free Exercise Clause of the First Amendment also provides the basis for current major opposition to the interpretation of the ACA that requires employers of fifty or more employees in secular business enterprises, including education and hospitals, to provide health care coverage for contraceptives for women, the subject to which this Essay now turns.

### C. Religion and Contraception

Religious organizations that run businesses and individual employers of more than fifty employees have sued to be exempt from the requirement that they provide insurance coverage for women's reproductive health, including contraception, based on the Free Exercise of Religion Clause.<sup>109</sup> Despite a series of modifications to regulations proposed by HHS allowing religious organizations under many circumstances to refuse to pay for coverage for contraception, the suits are continuing as of this writing. Although HHS has recently promulgated a "final" rule that could moot the following discussion, the matter is by no means settled.<sup>110</sup>

The Roman Catholic Church, a major employer in schools and hospitals that are subsidized by insurance, taxpayers, and non-Catholics, opposes the use of any "artificial" contraception.<sup>111</sup> A serious battle on abortion has been going on over contraception for some time: Some Bishops have gone so far as to call for refusing communion to pro-choice political candidates who are members of the Church.<sup>112</sup> This battle has extended to contraception with the enactment of the ACA. The U.S. Conference of Catholic Bishops, unhappy with any compromises thus far proposed, filed suit opposing any requirement that Catholic employers provide insurance coverage for contraception under any circumstances.<sup>113</sup>

109. Rachel Zoll & Ricardo Alonso-Zaldivar, *Final Gov't Birth Control Rule for Faith Groups*, ASSOCIATED PRESS: BIG STORY (June 28, 2013, 18:05 EDT), <http://bigstory.ap.org/article/final-govt-birth-control-rule-faith-groups>.

110. See Michael D. Shear, *Obama Waves White Flag in Contraceptive Battle*, N.Y. TIMES, June 12, 2013, at A19; Revised rules, 45 C.F.R. § 147.131 (exempting religious non-profits).

111. Robert H. Brom, Bishop of San Diego, *Birth Control*, CATHOLIC ANSWERS (Aug. 10, 2004), <http://www.catholic.com/tracts/birth-control>; see *The Catholic Church in America: Earthly Concerns*, ECONOMIST, Aug. 18, 2012, at 32.

112. John Thavis, *Cardinal Ratzinger Lays out Principles on Denying Communion, Voting*, CATH. NEWS SERV. (July 6, 2004), <http://www.catholicnews.com/data/stories/cns/0403722.htm>.

113. See, e.g., Memorandum Opinion at 1–3, *Roman Catholic Archbishop of Wash. v. Sebelius*, 920 F. Supp. 2d 8 (D.D.C. 2013) (Civ. No. 1:12-cv-00815-ABJ); Ivan E. Bodensteiner, *Are*

Other employers that are not religious organizations have filed suit claiming that the law would violate their personal religious beliefs, and therefore, the First Amendment bars requiring them to pay for insurance coverage for at least some forms of contraception.<sup>114</sup> Thus far, the lower courts have split on whether private employers have a strong Free Exercise claim.<sup>115</sup> As this Essay was going to print, the Supreme Court granted certiorari on this issue.<sup>116</sup>

It is beyond the scope of this Essay, and beyond the scope of my knowledge, to analyze fully the religious issues. But it is not a promising picture. While the ACA requirements might have passed muster under *Employment Division v. Smith*,<sup>117</sup> because they are laws of general applicability and not intended to discriminate against any particular religion, they may not hold.<sup>118</sup> Congress enacted the Religious Freedom Restoration Act (RFRA)<sup>119</sup> in an effort to overturn *Smith*.<sup>120</sup>

In *City of Boerne v. Flores*,<sup>121</sup> the Court held that Congress could not overrule *Smith* to require applying a compelling interest test to state laws.<sup>122</sup> The majority did not say whether Congress could bind itself to a higher standard. In 2006, however, the Court held 8–0 that the federal government was bound by the “compelling interest” and “substantial governmental interest” tests of RFRA in a case quite similar to *Smith*. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*<sup>123</sup> held that the sacramental use of a controlled substance was protected by RFRA’s required tests for Free Exercise cases, but left open whether RFRA ap-

*Catholic Bishops Seeking a Religious Preference or Religious Freedom?* 3–4 (Valparaiso Univ. Legal Studies, Working Paper No. 13-1, Feb. 2013), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2209772](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209772).

114. See *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1120 (10th Cir. 2013), cert. granted, 134 S. Ct. 738 (2013).

115. See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1296–97 (W.D. Okla. 2012), rev’d and remanded, 723 F.3d 1114 (10th Cir. 2013) (denying preliminary declaratory and injunctive relief from HHS regulations to privately-held corporate employers); *Korte v. Sebelius*, 528 F. App’x 583 (7th Cir. 2012) (issuing injunction against regulations on grounds of substantial burden on Free Exercise under the Religious Freedom Restoration Act); *Order, O’Brien v. Dep’t of Health and Human Services*, No.12-3357 (8th Cir. Nov. 28, 2012) (summarily granting injunction pending appeal).

116. *Conestoga Woods Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), cert. granted, 134 S. Ct. 678 (2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), cert. granted, 134 S. Ct. 678 (2013).

117. 494 U.S. 872 (1990) (upholding the denial of unemployment benefits to Native American Church members who were fired for their use of peyote, a sacramental drug for some Native American religions).

118. See *id.* at 892 (O’Connor, J., concurring).

119. Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (2012)), invalidated by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

120. See *Smith*, 494 U.S. at 890 (holding that the Constitution does not require a religious practice exception to federal laws).

121. 521 U.S. 507 (1997).

122. *Id.* at 511.

123. 546 U.S. 418 (2006).

plied across the board.<sup>124</sup> The Court has also held 9–0 that a teacher at a religious school could not sue for discriminatory firing under the Americans with Disabilities Act, using a broad interpretation of her job duties as “ministerial.”<sup>125</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*<sup>126</sup> suggested that the “ministerial” role of employees of religious organizations meant they could lose their rights under federal antidiscrimination laws.<sup>127</sup> Title VII’s prohibition on discrimination against an employee “because of sex” would not apply if the employee is “ministerial.”<sup>128</sup> The Free Exercise Clause could override federal statutes under either the compelling interest standard or under the definition of employment, because sex discrimination has never had the highest level of protection under the Equal Protection Clause. Thus, a religious employer may not have to contribute to insurance costs for contraception.

If the federal government is bound by RFRA, Free Exercise claims could trump women’s claims of discrimination for denial of contraception under the Equal Protection Clause. At no time has the Court held that discrimination against women is subject to strict scrutiny under the Equal Protection Clause.<sup>129</sup> Insurance coverage might be a closer case, as contraception is a fundamental right subject to strict scrutiny. But the government has no duty to pay for the exercise of even fundamental rights such as birth control; thus, employers could argue they also have no duty under the Free Exercise Clause. Thus, when faced with a balancing between religious freedom and women’s equality, the eventual outcome in the courts is far from clear.<sup>130</sup>

#### IV. SO WHERE DO WE GO FROM HERE?

As Ann wrote, the abortion and contraceptive laws and cases require the exercise of political muscles we may not have used or did not

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124. *Id.* at 423 (finding that the compelling interest test applies to a Controlled Substances Act case under federal law).

125. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 698 (2012).

126. *Id.*

127. *Id.* at 706–07 (holding RFRA and First Amendment preclude anti-discrimination suits by “ministerial”—in the religious sense—employees in a case involving possible retaliatory discharge of teacher in violation of the Americans with Disabilities Act).

128. If the employee’s religion is a Bona Fide Occupational Qualification (BFOQ) under Title VII, she would not have statutory or probable constitutional protection against discrimination on the basis of her use of contraception or pregnancy; if she were a ministerial employee, she would probably have no protection under federal civil rights statutes. Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 1016–18 (2013); see also Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000e-2(e)(1) (2012) (defining BFOQ as including membership in a religion).

129. The Court first established gender discrimination’s governing standard to be intermediate scrutiny in *Craig v. Boren*. 429 U.S. 190, 197 (1976) (rejecting strict scrutiny and requiring a substantial relationship to “important governmental objectives” in sex-based classification cases); see also *United States v. Virginia*, 518 U.S. 515, 531 (1996) (explicitly shifting the burden to the state and requiring an “exceedingly persuasive justification” for sex-based classifications (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (internal quotation marks omitted))).

130. Bodensteiner, *supra* note 113, at 16–20 (discussing weakness of Establishment Clause arguments under current cases); Griffin, *supra* note 128, at 997–99.

know we had. As Carol Sanger wrote in 2012, all of U.S. politics, from school board elections up to the Presidency, has been in part “infected” by the issue of abortion.<sup>131</sup> As others have urged, abortion always should have been left to the political process—and perhaps unfortunately, the time is now. As reproductive justice is now on the defensive, and as political organizing takes time, I first discuss the need to continue litigating. Then, I discuss the silencing of voices for reproductive freedom in the public sphere and politics. Finally, in thinking about how to engage the political process, I pay homage to Kate Michelman’s “*Who Decides?*” campaign<sup>132</sup> because it brings home just how personal and contextual all the things Ann cared about are to the abortion decision and contraception for women.

### A. Litigation

Justice Ginsburg is often cited for the proposition that the “political process” would have been better than the Supreme Court’s decision in *Roe*.<sup>133</sup> But, to quote another controversial decision, *Brown v. Board of Education (Brown I)*,<sup>134</sup> “we cannot turn the clock back.”<sup>135</sup> Although recent historical scholarship has challenged the accepted belief that *Roe* set off the current potent opposition to abortion (and birth control?),<sup>136</sup> there is no question that widespread academic and political criticism of the opinion in *Roe* has existed since the case was decided.

Because of increasingly repressive laws in some states and challenges to the ACA, we cannot abandon litigation as a strategy, even though it is reactive and perhaps confined to current doctrinal approaches, at least in the lower courts. Indeed, several lower federal courts have struck down extremely restrictive legislation in many states,<sup>137</sup> although what happens on appeal remains unclear. Even in litigation, there is room for some creativity. As a recent article suggests, although abortion may still be framed as a liberty interest and litigators are too overwhelmed to

131. Carol Sanger, *About Abortion: The Complications of the Category*, 54 ARIZ. L. REV. 849, 857–58 (2012).

132. NARAL: REPRODUCTIVE FREEDOM & CHOICE, *Kate Michelman: Biography*, [http://web.archive.org/web/20000815055758/http://www.naral.org/about/kate\\_bio.html](http://web.archive.org/web/20000815055758/http://www.naral.org/about/kate_bio.html) (last visited Jan. 4, 2013).

133. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385 (1985). With all due respect to Justice Ginsburg, whom I admire greatly, Equal Protection themes haunted these cases, but Equal Protection doctrine for women was still quite underdeveloped.

134. 347 U.S. 483 (1954).

135. *Id.* at 492.

136. See BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING (Linda Greenhouse & Reva B. Siegel eds., 2d ed. 2012); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2073 (2011).

137. See, e.g., *Stuart v. Loomis*, No. 1:11-CV-804, 2014 WL 186310, at \*16 (M.D.N.C. Jan. 17, 2014) (holding Right to Know Act violated women’s First Amendment rights); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900–01 (W.D. Tex. 2013) (holding admitting-privileges provision lacked rational basis).



develop equality arguments,<sup>138</sup> there is no reason that litigators have to abandon equality themes that have been developing.<sup>139</sup> Nor need litigators give ground to law review articles and groups claiming women are harmed by abortion. In fact, as Professor Carol Sanger has noted, “[t]here is reliable data on [whether abortion harms women], and studies indicate that the primary emotion women experience after an abortion is relief and a feeling of well-being.”<sup>140</sup> Moreover, although Feminists for Life has promulgated the historical argument that the first major feminists opposed abortion, a recent article persuasively disputes that claim.<sup>141</sup> A number of articles and empirical studies also dispute the use of “judicial bypass” procedures as an adequate protection for minors seeking abortions without parental consent.<sup>142</sup>

At least legal scholars can do the research to help correct the record. We can also work to see that those people litigating cases actually get that scholarship and information in time—something the anti-abortion and anti-contraception forces have managed to do. Certainly in the age of the Internet and online research sources, it should be easier to link practicing lawyers and advocacy groups with current data and information.

### B. The Silencing of Women

One mistake abortion supporters made was to let opponents capture the term “pro-life” as if there were only one life involved in abortions. Rhetorically, “pro-choice,” though it drew on a strand of liberty and freedom arguments deep in U.S. history, was and is weak. “Pro-choice” also missed the point that abortion supporters were also pro-life—the life of the woman, the lives of her existing children, the lives of so many others affected. “Pro-choice” may have resonated in the early 1970s and 1980s under the increasingly individualistic rhetoric of the times, but by then, when pictures of fetuses had already appeared in the Texas brief in *Roe*<sup>143</sup> and “social conservatives” had gained an upper hand in politics, that “libertarian” approach was doomed. Complicating matters further were feminist critiques of choice and consent, as those critiques could

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138. Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 403–06 (2011).

139. *Id.* at 383–84, 407–12 (noting Pregnancy Discrimination Act cases and Equal Protection themes in some Court opinions).

140. Sanger, *supra* note 131, at 876. Sanger also observes that relief doesn’t mean the decision was not difficult or made without regret; however, it was the best decision under the context and circumstances at the time. *Id.*

141. Tracy A. Thomas, *Misappropriating Women’s History in the Law and Politics of Abortion*, 36 SEATTLE U. L. REV. 1, 8–10, 19, 28–31 (2012) (critiquing Feminist for Life’s representations of the historical record, with particular emphasis on statements by Elizabeth Cady Stanton).

142. Thayer Hardwick & Hillary Hodsdon, *Abortion*, 13 GEO. J. GENDER & L. 109, 116–18 (2012) (discussing judicial bypass and whether it is effective in terms of treating adolescents with respect).

143. Henderson, *supra* note 31, at 1621.

easily, although mistakenly, undermine women's power to choose.<sup>144</sup> Thus the term "reproductive justice" may be the better one to use now.<sup>145</sup>

The 2013 *Time Magazine* cover story and others overlook the fact that for many years feminists tried to work with anti-abortion groups to find common ground, using support for women's equality and opportunity, along with access to contraception and healthy families to bridge the gaps.<sup>146</sup> We may be able to work with Catholics for Choice and others on obtaining access to contraception and promoting healthy families and adoptions, but only with the realization that they may not help when we advocate the right to abortion. Still, avoiding abortion is optimal for all concerned, and we should not decline alliances on some issues unless the risks of co-optation are high.

Women's voices in favor of abortion and contraception have been lost—in the legislatures, in the courts, and in the media—especially since *Casey*. Speaking out is crucial if we are to recover the stories of women who support abortion and who have had abortions and are relieved. While abortion opponents have emphasized studies that women regret abortion and posit a non-scientific "post-abortion syndrome" as a harm to women, most, if not all studies demonstrate that women have been helped by abortion and are better off than they would have been had they been forced to bear a child.<sup>147</sup> The framing matters, and so do the stories of the millions of women who have had abortions (and millions more who use contraception!).

### C. Politics: Who Decides?

Carol Sanger has rightly pointed out that "abortion politics" have infected every election from school boards on up.<sup>148</sup> Women may whisper amongst themselves, but few women of prominence, not to mention the rest, speak up publically about having had abortions.<sup>149</sup> Kate

144. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 326–27 (1995) (examining tensions in feminist theory over women's capacity to choose under constrained conditions).

145. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1408, 1425–27 (2009) (emphasizing issues of pregnancy and child care as connected to all parts of reproductive justice, as well as using Critical Legal Studies' rights critique and criticisms of consent and choice in sexuality and pregnancy categories).

146. Pickert, *supra* note 38.

147. See Sanger, *supra* note 131, at 875–76. Sanger also notes that the "relief" doesn't mean that the decision was not difficult or that there is no regret, *id.* at 876; but life is full of hard choices, and we make the best ones we can. There are no algorithms for moral and life choices unless one obeys rules no matter how stupid they are. *Id.*

148. *Id.* at 857.

149. *Id.* at 868. "Coming out" can be dangerous, but maybe our LGBT friends can assist us in finding ways to do this. I have often imagined distributing an anonymous questionnaire to female law professors, lawyers, and students on this issue. Women in power would be next—especially politicians. But I lack the empirical expertise to design a "good instrument" and get past a Human Subjects Committee. This seems so lame now. Maybe I should learn how to do the survey and develop a plan.

Michelman, former director of the National Abortion Rights Action League (NARAL), is one of the few I can recall.<sup>150</sup> Sarah Weddington, the lawyer who argued *Roe* as a young lawyer, is another.<sup>151</sup> *Ms.* magazine submitted to Congress a petition signed by thousands of women who had had abortions that only yielded a few thousand signatories—but maybe *Ms.* as print media could not mobilize the Internet capacities we have now.<sup>152</sup> Prominent women avoid the topic in terms of their stories and personal history for many reasons, including, most important, their personal safety. Indeed, a current Internet effort to gather women’s stories of their abortion decisions, in order to counteract claims that women do not know what they are doing, has succeeded in gathering numerous posts, but many contributors have posted as “anonymous.”<sup>153</sup> I personally am not surprised, because who wants to be harassed by zealots, much less threatened and trashed by other anonymous commenters?

I believe that violence and threats against clinics, doctors who perform abortions, and local women who are abortion activists and speak in favor of abortion, have silenced many who support the right to decide whether to bear a child. Retaliation has its psychic costs for a sex-class vulnerable to violence to begin with. Protestors near abortion clinics force women seeking abortions to run a gantlet, although the Court has held that some restrictions on proximity to clinics and confrontation with patients do not violate the First Amendment.<sup>154</sup> The protests intimidate legal abortion providers and counselors as well. The Court has held that

150. Linton Weeks, *Kate Michelman, the Public Face of a Woman’s Right to Privacy*, WASH. POST, Jan. 12, 2006, at C1.

151. I thank Pat Cain for pointing this out at the conference. See also SARAH WEDDINGTON, A QUESTION OF CHOICE 13–17 (Feminist Press 2d ed. 2013) (discussing the abortion she had as a graduate student in the late 1960s).

152. See *We Had Abortions*, MS. MAG. (Fall 2006), <http://www.ms magazine.com/fall2006/abortionmag.asp>. I thank Khiara Bridges for telling me a *Ms.* petition naming names existed and Stanford Law Library for finding the reference.

153. See *Sharing Our Stories: I Was 16 Years Old...*, MY ABORTION. MY LIFE., <http://myabortionmylife.org/pages/sharing-our-stories.php#Iwas16> (last visited Feb. 5, 2014).

154. See *Hill v. Colorado*, 530 U.S. 703, 781 (2000) (upholding regulation prohibiting abortion protestors from approaching persons, distributing literature, and displaying signs within eight feet of a health care facility that provides abortions); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377–81 (1997) (upholding “fixed” fifteen-foot buffer zone and striking down the “floating buffer zones” on free speech grounds); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 769–76 (1994) (upholding injunction barring picketing within thirty-six feet of a clinic on public property but exempting private property, and upholding noise injunction but striking down a 300 feet restriction). It is possible, however, *Hill* will be overruled by the United States Supreme Court. The Court granted certiorari in *McCullen v. Coakley*, 708 F.3d 1 (1st Cir. 2013), cert. granted, 133 S. Ct. 2857 (2013). The case is part of a long-running challenge to a Massachusetts law making it a crime for speakers not involved with a “reproductive health care facility” to come within thirty-five feet of entries. *Id.* at 3 (internal quotation mark omitted). Question two of the grant specifically asks if *Hill* “should be limited or overruled.” Petition for Writ of Certiorari, *McCullen*, 133 S. Ct. 2857 (No. 12-1168), 2013 WL 1247969, at \*i.

One of the most outrageous stories about anti-abortion protestors I’ve heard was from a friend whose very-wanted baby died *in utero*, through no one’s fault. Apparently, the safest place for her to have the fetus removed was an abortion clinic; imagine how she felt being yelled at and called a “baby-killer.”

picketing private residences may be regulated or prohibited.<sup>155</sup> But still, the threat of violence remains: As the director of the only clinic in North Dakota, Tammi Kromenaker, a social worker, said, she “takes different routes to work every day to avoid falling into a routine that might make her a target . . . . ‘Even if I’m at Target looking at clothes, I never let my guard down.’”<sup>156</sup>

Even being associated with reproductive justice has cost individual women in other ways: Professor Dawn Johnsen, an extremely well-qualified nominee to head the Office of Legal Counsel (OLC) in the Obama Administration’s Justice Department, was pilloried by Republicans for her decades-old association with abortion rights at the American Civil Liberties Union (ACLU) and as Legal Director of what is now NARAL-Pro Choice America.<sup>157</sup> Eventually, she withdrew from consideration,<sup>158</sup> and there still is no permanent Assistant Attorney General running the OLC.<sup>159</sup> I personally recall Senator Harry Reid, now Senate Majority Leader, trying to negotiate difficult political terrain by “smuggling” Kate Michelman into Nevada to speak to selected Democrats about insurance coverage for contraception under federal law. There was no general public announcement and no local coverage of the meeting. Further, Texas Governor Rick Perry recently attacked Texas State Senator Wendy Davis’s filibuster against an extremely restrictive law, and said that if abortion had been available to Ms. Davis’s mother, Davis would not have “managed to eventually graduate from Harvard Law School . . . . It is just unfortunate that she hasn’t learned from her own example that every life must be given a chance to realize its full potential and that every life matters.”<sup>160</sup>

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155. *Frisby v. Schultz*, 487 U.S. 474, 487–88 (1988) (upholding ban on focused picketing of abortion doctor’s residence under First Amendment).

156. Pickert, *supra* note 38.

157. Professor Johnsen’s curriculum vitae reveals that she was Acting Assistant Attorney General in charge of the OLC during the Clinton Administration. She has also been the Legal Director of the National Abortion and Reproductive Rights League (now NARAL-Pro Choice) from 1988 to 1993, and a lawyer for the ACLU Reproductive Freedom Project. Dawn Johnsen, Curriculum Vitae, available at [http://newsinfo.iu.edu/pub/libs/images/usr/6107\\_h.pdf](http://newsinfo.iu.edu/pub/libs/images/usr/6107_h.pdf). The Republicans never let her nomination to head OLC go forward, and she eventually withdrew from consideration. Charlie Savage, *Long After Nomination, an Obama Choice Withdraws*, N.Y. TIMES, Apr. 10, 2010, at A16. Of course, she also had the temerity to be a Democrat in Indiana. I proudly admit, I am a former colleague of hers.

158. Savage, *supra* note 157.

159. Caroline Diane Krass became the Acting Assistant Attorney General in charge of the Office of Legal Counsel on December 21, 2013; however, as of this writing, she has not been confirmed by the Senate. See *Meet the Leadership: Acting Assistant Attorney General Official Biography*, U.S. DEP’T JUST., <http://www.justice.gov/olc/meet-olc.html> (last updated Jan. 2014).

160. Igor Volsky, *Rick Perry Attacks Wendy Davis: ‘She Was a Teenage Mother Herself,’* THINKPROGRESS (June 27, 2013, 11:57 AM), <http://thinkprogress.org/health/2013/06/27/2227101/rick-perry-attacks-wendy-davis-she-was-a-teenage-mother-herself/>. Exactly how does Governor Perry know that? Who appointed him the ultimate arbiter over women’s decisions?

No wonder people run scared, especially in an age of tweets, Internet defamations from anonymous sources, push-polls implying pro-choice female candidates for elected office had an abortion, and a discourse of trashing, all protected by the First Amendment's Free Speech or Free Press Clauses.

The *Time Magazine* article also speaks of a split between the original activists and younger women who do not identify with the old guard of the feminist movement.<sup>161</sup> The younger women reject the term pro-choice and wish to focus more broadly on "reproductive justice."<sup>162</sup> They have energy and skills to mobilize in new and promising ways; I just hope that intergenerational conflicts can be bridged. Ann built bridges, and there is no reason not to build bridges across generations here because so much is at stake.

One idea I had for mobilization was Kate Michelman's "*Who Decides?*" campaign. It may not work now, but it is worth exploring. Who, indeed, has the power to decide what "reasons" are "good enough" to have an abortion or have access to contraception? A state legislature that decides a rape victim cannot get an abortion because a born child would be "evidence" of the rape? Or one that declares that once a doctor can detect a fetal heartbeat—maybe just as the woman is realizing she is pregnant, having missed a period—there can be no abortion no matter what? Or the legislature that decides abortion is permissible only if the woman's life is in danger? Who decides? What "counts"? For the medical review committee in *Doe v. Bolton*, the companion case to *Roe*, it was not enough that Mary Doe had already lost custody of three children. As Robin West has pointed out, this "mentally unwell, emotionally unstable, economically impoverished, noncustodial mother[,] and abandoned wife" could not obtain permission from a medical panel to have an abortion.<sup>163</sup> While this might smack of eugenics, it also indicates that decisions by supposedly neutral parties may result in anguish and pain.

As for feminist method, women's voices matter. Women I know and love may have wildly varying stereotypes or stories about when and why a woman's reasons for abortion are "good enough." Moral intuitions can vary deeply, and unless one takes an absolutist position against all abortion, moral intuitions provide little guidance for general laws.<sup>164</sup> I keep hearing secondhand stories about women who use abortion as their primary method of birth control and that seems careless. I might think it "enough" reason in a case of a bullied sixteen-year-old who was raped because she became intoxicated at a party, or that it is "enough" reason

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161. Pickert, *supra* note 38.

162. *Id.*; See also West, *supra* note 145, at 1426–32 (summarizing arguments for changing from "choice" to "reproductive justice").

163. West, *supra* note 31, at 123.

164. See generally ROBERT AUDI, *THE GOOD IN THE RIGHT: A THEORY OF INTUITION AND INTRINSIC VALUE* 197–202 (2004) (detailing the concept of intuitionism as moral philosophy).

for a terrified nineteen-year-old in college who had a scholarship and would have had to lose it if she had to carry the fetus to term. Then there is my own story of a “real” rape when I was in the ER demanding DES, and that makes me think any form of unwanted sex is “enough.” For another person, a good enough reason is taking antidepressants or other medications that carry risks to a fetus. For another, it is a boyfriend or husband who has abused her. For another, a woman learns of severe birth defects that her family cannot afford to support. For another, all the woman’s precautions failed, and maybe the man is telling her to “get an abortion.” Or maybe it is only “enough” if the unborn child suffers from a fatal defect and will not survive or the mother’s life is in extreme danger.<sup>165</sup>

What reasons are “good enough?” Should the burden be placed on women to perform according to someone else’s opinions and expectations? Surely the woman or teenager or child who has to bear the pregnancy is in the best position to decide—under the facts and circumstances of her life—whether to carry the fetus to term, not to mention the tragedies when the fetus cannot survive or would have a short life. A woman is certainly in a better position to decide than a legislature or anyone else when she can have a child.

Ultimately as scholars, we may think we lack political skills. But Ann worked diligently with LGBT groups in New Mexico to get modifications to the state antidiscrimination statute for LGBT persons.<sup>166</sup> We have a voice. The result was a substantively important change in the law.<sup>167</sup> Working with local politicians and the legislative process is important. The Democratic Party in Texas may have “failed,” but Wendy Davis and abortion-rights advocates put up an important fight without much time to organize.

We may be naïve about our particular legislature or local government, and the current Congress may be dysfunctional, but there is information out there on how to be effective politically, even without billionaire funding. Understanding how legislators and legislatures work may be difficult, but lawyers are an important category of legislators and staff, so finding common ground and working on proposals is possible.

President Obama recently came out in support of Planned Parenthood, even though anti-abortion attacks quickly followed.<sup>168</sup> But

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165. See Associated Press, *Bill Allowing Life-Saving Abortions Passes 1st Round*, S.F. CHRON., July 3, 2013, at A3 (noting that Ireland’s complete ban was revisited after death of woman because doctors refused to perform surgery).

166. Scales, *Poststructuralism*, *supra* note 13, at 398.

167. *Id.* at 398–99.

168. Peter Baker, *In Speech to Planned Parenthood, Obama Criticizes New Abortion Laws*, CAUCUS: POLITICS & GOVERNMENT BLOG TIMES (Apr. 26, 2013, 1:27 PM), <http://thecaucus.blogs.nytimes.com/2013/04/26/in-speech-to-planned-parenthood-obama-criticizes-new-abortion-laws>.

we have an ally for a while. Many of us may not be good lobbyists, but may know of good lobbyists and have connections through our local bar associations and other groups. Nonprofits may be barred from direct funding or campaigning, but they contribute to dialogue. I am sure there are many other ways to work towards reproductive justice, and I hope that we will find them. Ann did, and we could do worse than follow her courageous example.

#### CONCLUSION

Ann Scales was a brilliant and loving scholar. I have tried to carry through one of her messages as best I can. We can all honor her by trying to carry her love and passion for her work forward.

May the Goddess, Spirits, God, whatever, be with you, dear Ann. You will always be alive in our hearts, and the work you started will continue, as this Symposium attests.

