

## LIFT THE SCARLET LETTER FROM ABORTION\*

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Thank you so much. I am delighted and honored to be here this evening to deliver the Bauer Lecture. I want to thank the students for inviting me and in particular thank them for what I understand was an interest in reproductive rights that prompted the invitation. Clearly you are compatriots in the campaign to lift the stigma from abortion. I am particularly delighted to receive this invitation from students at a law school headed by my dear friend and person extraordinaire Matthew Diller. It is a treat, pure and simple, to join you this evening. Thank you so much.<sup>1</sup>

A few years ago, I was invited to give the Constitution Day talk at Oberlin College. After I accepted the invitation to speak, I asked the staff who had most recently graduated from college what I should discuss. “What would be of most interest to students—marriage for same-sex couples, religious refusals, abortion?” To a one they responded: “What would be really bold would be to talk about abortion. No one does that. That would be really bold.”

So that’s what I’m going to do today. I’m going to be bold. I’m going to talk about what is increasingly the A word in America today: Abortion. I’m going to talk about it by way of four broad points:

- The challenge of the times.
- What troubles me most.
- The reason for passion.
- The reason for hope.

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<sup>1</sup> This Essay was written to be heard, rather than read; thus, it attempts to preserve the lecture largely as spoken. Sentence fragments and colloquialisms remain, crafted for emphasis in delivery.

I appreciate that I'm at a law school, giving a talk that will be published in a law review, but my talk will not focus on the law and doctrine. My talk is instead a call to your heart. From that, other changes will flow.

First, the challenges of the times. Honestly, I'm left almost speechless by what is happening in the country as to abortion. The story is one of the states. Thinking just about last year, the nicest thing I can say is that it is a big hot mess. It was one of the worst years in recent decades. It was a big huge hot fiery mess.

Here's what's happened: Arkansas passed a ban on abortions after twelve weeks.<sup>2</sup> North Dakota banned abortions after six weeks, a time before many women even know they are pregnant.<sup>3</sup> Four states—North Dakota,<sup>4</sup> Alabama,<sup>5</sup> Wisconsin,<sup>6</sup> and Texas<sup>7</sup>—adopted requirements that doctors providing abortions have admitting privileges at local hospitals. That may sound okay, but you've probably heard how that story has been going down in Texas. The reality is that such requirements are not imposed on other surgical facilities, hospitals often refuse to provide privileges because of the controversy, and privileges often turn on other factors like local residency and a guarantee to admit a certain number of patients each year—requirements abortion doctors often don't satisfy. Here's what these requirements mean—the one clinic in North Dakota risked closing, the provision could close half the clinics in Alabama and Wisconsin, and in Texas, the doors keep closing, leaving women, particularly poor women, to travel vast distances for care. Ohio passed a provision barring public hospitals from providing written transfer agreements to doctors who provide abortions—agreements required as a condition of providing abortions.<sup>8</sup> Indiana enacted a law that imposes regulations unnecessary even for surgical facilities on clinics that provide only medication abortions.<sup>9</sup> Four more states restricted abortion coverage in their insurance exchanges, bringing the total of states that virtually ban abortions in their exchanges to twenty-four.<sup>10</sup> And my personal favorite. South Dakota passed a law saying that its seventy-two hour waiting period—the time a woman by law must wait after receiving state mandated counseling

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<sup>2</sup> ARK. CODE ANN. §§ 20-16-1301 to -1307 (2014).

<sup>3</sup> N.D. CENT. CODE §§ 14-02.1 to -05.1 (2014).

<sup>4</sup> *Id.* § 14-02.1-04.

<sup>5</sup> ALA. CODE § 26-23E-4(c) (2014).

<sup>6</sup> WIS. STAT. § 253.095 (2014).

<sup>7</sup> TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.041 to 048, 171.061.064, 245.010.011 (West 2014); TEX. OCC. CODE §§ 161.052, 164.055 (West 2014).

<sup>8</sup> OHIO REV. CODE ANN. §§ 3702.30, 3702.302 to .308, 3727.60 (LexisNexis 2014).

<sup>9</sup> IND. CODE § 16-18-2-1.5(a) (2014).

<sup>10</sup> Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: 2013 State Policy Review*, GUTTMACHER INST., <http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html> (last visited Apr. 18, 2014).

before getting an abortion—doesn't run during the weekends or holidays.<sup>11</sup> (More on that to come.)

And this is on top of everything else—more than ninety lawsuits in the country protesting the requirement that insurance cover contraception (yes, contraception);<sup>12</sup> requirements that providers show women having abortions an ultrasound and describe the image;<sup>13</sup> laws to prohibit government dollars from going to facilities that provide abortion (the issue, to be clear, is not funding for abortion, but it is a ban on any funding going to an organization that, with other monies, provides abortion);<sup>14</sup> the twenty-six states that require a waiting period before an abortion;<sup>15</sup> and the eight that ban abortion in any insurance.<sup>16</sup> It is an extraordinary time. And I thought it was a constitutional right we were discussing. I'm glad my fortieth birthday looked better than *Roe's*.

Yes, there are the courts. We are there. And it makes a difference. Clinics in Alabama,<sup>17</sup> Wisconsin,<sup>18</sup> Mississippi,<sup>19</sup> and Indiana,<sup>20</sup> for example, are still open because of litigation. But the list of measures passed is long.<sup>21</sup> The list of what we can challenge is shorter. And the list of what we will win is shorter still.

I feel confident we can win our challenges to the bans—or at least to the ones that bar abortion earlier in pregnancy. But don't let those capture all your attention. They are distracting. In the face of the bans, other restrictions start to look reasonable. Who notices the seventy-two hour waiting periods or the insurance bans when states are banning abortions at six weeks? Indeed, who even notices the clinic closures? People paid attention to Texas, but that had a lot to do with Wendy Davis. There was no similar outpouring about Alabama or Wisconsin—

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<sup>11</sup> S.D. CODIFIED LAWS § 34-23A-56 (2014).

<sup>12</sup> *Challenges to the Federal Contraceptive Coverage Rule*, ACLU (Apr. 8, 2014), <http://www.aclu.org/reproductive-freedom/challenges-federal-contraceptive-coverage-rule>.

<sup>13</sup> *E.g.*, N.C. GEN. STAT. §§ 90-21.80 to .92 (2014).

<sup>14</sup> *E.g.*, IND. CODE § 5-22-17-5.5 (2014).

<sup>15</sup> GUTTMACHER INST., STATE POLICIES IN BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION (as of Apr. 1, 2014), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_MWPA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf).

<sup>16</sup> GUTTMACHER INST., STATE POLICIES IN BRIEF: RESTRICTING INSURANCE COVERAGE OF ABORTION (as of Apr. 1, 2014), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RICA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf) (banning coverage except for lifesaving abortions).

<sup>17</sup> *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280 (M.D. Ala. 2013).

<sup>18</sup> *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 13-cv-465-wmc, 2013 WL 3989238 (W.D. Wis. Aug. 2, 2013).

<sup>19</sup> *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416 (S.D. Miss. 2013).

<sup>20</sup> *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. State Dept. Health*, No. 13-cv-1335-JMS-MJD, 2013 WL 6181113 (S.D. Ind. Nov. 26, 2013).

<sup>21</sup> *E.g.*, *Major Restrictions on Abortion Access Enacted 2013*, ACLU (Dec. 16, 2013), <http://www.aclu.org/reproductive-freedom/major-restrictions-abortion-access-enacted-2013>.

where at least half the clinics risked closure but for the lawsuits. What happens to those restrictions in the courts?

When you think about the courts, think about the backdrop. We live in a country where the highest authority on the federal constitution is the John Roberts Court. We live in a country where our ultimate success turns on the views of Justice Kennedy. We live in a country where the standard by which abortion restrictions are judged for their constitutionality is the undue burden standard. It is a standard so supple, shall we say, that judges have tremendous room to maneuver. It seems, as with pornography, they know it when they see it, and, in the case of abortion, they rarely see unconstitutionality.

Indeed, we live in a country where the U.S. Supreme Court last year let a law in Texas take effect—a law that risked forcing one third of the state’s clinics—thirteen of thirty-six—to close.<sup>22</sup> We live in a country where the State of Texas said that even if the law could prevent as many as one third of women from getting abortions, there was no showing this was an undue burden.<sup>23</sup> And we live in a country where, in the context of an application for a stay, the dissent in the Supreme Court characterized as difficult the question of whether we are likely to prevail in showing the Texas law is unconstitutional.<sup>24</sup> That’s the dissent. Our friends. Really? As one ACLU attorney said to me, “If Texas’s law is not unconstitutional, what restriction short of a ban is?”

So that’s the state of affairs. It’s one of audacity in the state legislatures. Each new restriction is a brick in a wall, added to the one from last year, and the year before, and the year before that. The question is: “How high will the courts make a woman jump?”

Which takes me to my next point. What scares me most. That’s right. I haven’t told you yet what that is. It’s not the legislatures. It is the stigma surrounding abortion. It has increased dramatically in the last two decades. Here are just a few examples:

- President Obama’s statement on the anniversary of *Roe v. Wade*. Guess what word was missing—on the anniversary of *Roe*, on the anniversary of the decision recognizing constitutional protection for the right to abortion? Yes, missing was the word “abortion.”<sup>25</sup> It’s not missing because President Obama is anti-choice; he’s not. Rather, it’s missing because there’s nothing to gain, and only something to lose, it seems, by referencing abortion now. Even in the context of a statement marking *Roe*.

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<sup>22</sup> Planned Parenthood Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506 (2013).

<sup>23</sup> Memorandum in Opposition to Emergency Application to Vacate Fifth Circuit’s Stay Pending Appeal at 28–29, *Abbott*, 134 S. Ct. 506 (No. 13A452).

<sup>24</sup> *Abbott*, 134 S. Ct. at 509 (Breyer, J., dissenting).

<sup>25</sup> Press Release, White House, Office of the Press Sec’y, Statement by the President on *Roe v. Wade* Anniversary (Jan. 22, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/01/22/statement-president-roe-v-wade-anniversary>.

- One of my former assistants—who went to a seven sister college and worked at the ACLU—said to me one day: “This statistic, that one in three women have an abortion<sup>26</sup>—I find it so strange; I’ve never met anyone who had an abortion.” I don’t think so.
- Doctors and staff in clinics increasingly report that the women obtaining abortions distance themselves from the issue—as if they are not somehow having an abortion—and openly say they are not like the other women in the waiting room.
- A cast of leaders in my field was recently talking about what we say when people ask us what we do. Answers: “I work in women’s health.” “Women’s rights work.” A lesson in how not to say “abortion.”
- And then there is the movie *Knocked Up*. Shma-shmortion.<sup>27</sup>

The word is unspeakable—in popular culture, in conversation among women, even by the President of the United States. But it’s not such a surprise that this is happening. Our policies reinforce or create this culture. Many hospitals will not let doctors perform abortions.<sup>28</sup> Many medical schools won’t teach abortion.<sup>29</sup> We treat as constitutional laws that require doctors to read women scripts meant to dissuade women from getting abortions.<sup>30</sup>

And now, throughout the country, we have measures being proposed to punish organizations that perform abortions—by denying them any funding because they provide abortion. These are not measures about refusing to fund abortions, but laws to deny funding for

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<sup>26</sup> See Rachel K. Jones & Megan L. Kavanaugh, *Changes in Abortion Rates Between 2000 and 2008 and Lifetime Incidence of Abortion*, 117 *OBSTETRICS & GYNECOLOGY* 1358, 1365 (2011).

<sup>27</sup> *KNOCKED UP* (Universal Pictures 2007). In the movie, the female lead has an unplanned pregnancy. The male lead’s friend suggests an abortion without saying the word: “Tell me you don’t want him to get an ‘A’ word?” “Yes, I do, and I won’t say it for little Baby Ears over there, but it rhymes with ‘Shma-shmortion.’ . . . You should get a shma-shmortion at the shma-shmortion clinic.” *Id.*

<sup>28</sup> See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509–13 (1989) (upholding state law banning abortion in public hospitals); GUTTMACHER INST., *STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES* (as of Apr. 1, 2014), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf) (forty-four states allow health care institutions to refuse to provide abortion services); see also LOIS UTTLEY ET AL., AM. CIVIL LIBERTIES UNION & MERGERWATCH PROJECT, *MISCARRIAGE OF MEDICINE: THE GROWTH OF CATHOLIC HOSPITALS AND THE THREAT TO REPRODUCTIVE HEALTH CARE 4* (Dec. 2013), available at <http://www.aclu.org/files/assets/growth-of-catholic-hospitals-2013.pdf> (detailing bans on abortions in Catholic hospitals and finding that nearly one in ten acute care hospitals is Catholic-affiliated or sponsored).

<sup>29</sup> Katherine L. Eastwood et al., *Abortion Training in United States Obstetrics and Gynecology Residency Programs*, 108 *OBSTETRICS & GYNECOLOGY* 303 (2006) (stating that ten percent of program directors responding to survey of obstetrics and gynecology residency programs report they offer no training in abortion).

<sup>30</sup> E.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877–78, 881–84 (1992).

family planning, for example, because the entity provides abortion.<sup>31</sup> Or even to deny a tax credit because the entity refers for abortion.<sup>32</sup>

We recently saw a case of nurses objecting even to providing care to women before and after abortion. The issue wasn't about being in the operating room—it was about taking blood pressure, having women change into gowns, inquiring whether women had rides homes, and providing pain medication.<sup>33</sup>

In other words, anyone associated with the business is increasingly a pariah. We don't want to associate with them, them being those who provide or assist with abortion. And the woman seeking an abortion is untouchable. It's no wonder she is silent. There is a scarlet A on her hospital johnny and an A on her doctor's scrubs. Abortion comes with a badge of shame.

The Justices in some sense may be our modern day Puritans. By announcing that the government can use its power to discourage the exercise of the right, they unleashed a culture that has fostered this shame. That's what worries me most. No right can last, no movement can survive, if it lives in shame and silence.

This brings me to my third point—the reason for passion. I spend a lot of time thinking about why younger people, particularly someone coming of age, would care about abortion, at least where the threat is short of a ban. I know why I'm here and why I'm still here after more than twenty-five years—years in which I've watched my wins disappear, conferences come with bomb dogs, and my doctor colleagues have been threatened and stabbed and even murdered.

I came of age in a different world. I always knew that the world wasn't fair for women, and I knew that kids, unplanned, could wreak havoc in women's lives. My mother spoke of the challenges of unplanned pregnancies. I saw her frustration—at what wasn't possible for her and what wasn't possible for other women. I saw how unequal the world was—my youth was the time of Ella Grasso, the first woman to become governor on her own;<sup>34</sup> of Billy Jean King's famous match

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<sup>31</sup> *E.g.*, IND. CODE § 5-22-17-5.5 (2014), *enjoined by* Planned Parenthood of Ind. v. Comm'r of Ind. State Dep't Health, 794 F. Supp. 2d 892 (S.D. Ind. 2011), *aff'd in part, rev'd in part*, 699 F.3d 962 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2736, 2738 (2013).

<sup>32</sup> *E.g.*, ARIZ. REV. STAT. ANN. § 43-1088 (2014), *enjoined by* Ariz. Coal. Against Domestic Violence v. Greene, No. 11-cv-1626 (PHX) (ROS) (D. Ariz. Dec. 23, 2011) (preliminary injunction), (D. Ariz. Jan. 30, 2012) (permanent injunction).

<sup>33</sup> *See, e.g.*, Defendants' Brief in Opposition to Plaintiffs' Application for Preliminary Injunctive Relief at 7–8, Danquah v. Univ. of Med. & Dentistry of N.J., No. 2:11-cv-6377-JLL-MAH (D.N.J. Nov. 22, 2011); *see also* Affidavit of Tammy Ludwig ¶¶ 9–11, Danquah v. Univ. of Med. & Dentistry of N.J., No. 2:11-cv-6377-JLL-MAH (D.N.J. Nov. 22, 2011).

<sup>34</sup> *E.g.*, CTR. FOR AM. WOMEN & POLITICS, RUTGERS THE STATE UNIV. OF N.J., HISTORY OF WOMEN GOVERNORS (Feb. 2013), *available at* [http://www.cawp.rutgers.edu/fast\\_facts/levels\\_of\\_office/documents/govhistory.pdf](http://www.cawp.rutgers.edu/fast_facts/levels_of_office/documents/govhistory.pdf) (Ella Grasso served as Governor of Connecticut from 1975 through 1980. She was the first woman governor not to succeed a husband.).

with Bobby Riggs;<sup>35</sup> of front pages of the newspaper devoid of women's images; and of married women sometimes unable to get credit cards in their own names.<sup>36</sup> It was in my face that women weren't equal and that unplanned pregnancy was a big factor. I didn't like it. Not one bit.

But my story can't be your story. For those of you a generation younger, the country has problems, but thankfully, it looks very different from my time. Women have a very different, albeit imperfect, place in the work force, in politics, and in culture. There is greater contraception access and methods, and abortion is legal and available, albeit not accessible to everyone. So the urgency on women's rights is not as great. And there are other issues—LGBT rights, for one—with the promise of dramatic and meaningful change. Why then step up, in the face of stigma, to make abortion your issue? There are a few core reasons:

First, if you have plans for your life, if you have dreams, if you have a desire to direct your future, you should be on my team. As the plurality said in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>37</sup> Access to abortion affects our ability to pay the rent, to go to school, to feed our children, or to run a company. And our ability to do those things—by our, I mean, women's—affects the course of men's lives as well.

Second, if you've ever had sex, or heterosexual sex I should say, not planning on having a child, you are on my team. That's true for women and it's true for men. Again, the plurality in *Casey*: “[P]eople have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.”<sup>38</sup> Really the availability of abortion is a backdrop against which many of us live our lives.

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<sup>35</sup> In 1973, twenty-nine-year-old five-time Wimbledon Champion Billie Jean King faced off against fifty-five-year-old U.S. Open and Wimbledon winner Bobby Riggs, after the latter claimed that women's tennis was inferior to men's. King won the match in three sets. See, e.g., Neil Amdur, *Mrs. King Defeats Riggs*, 6-4, 6-3, 6-3, *Amid a Circus Atmosphere*, N.Y. TIMES, Sept. 21, 1973, at A1, available at <https://www.nytimes.com/learning/general/onthisday/big/0920.html>; Jesse Greenspan, *Billie Jean King Wins the “Battle of the Sexes,” 40 Years Ago*, HISTORY (Sept. 20, 2013), <http://www.history.com/news/billie-jean-king-wins-the-battle-of-the-sexes-40-years-ago>.

<sup>36</sup> E.g., Bryce Covert, *Will Better Consumer Protection Lead to a Credit Crunch for Women?*, THE NATION (Apr. 26, 2011), <http://www.thenation.com/article/160180/will-better-consumer-protection-lead-credit-crunch-women> (stating that, until the passage of the Equal Credit Opportunity Act of 1974, “credit cards were issued only with a husband's signature”).

<sup>37</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 835 (1992).

<sup>38</sup> *Id.* at 856.

But I fear that's not enough. Those reasons may make sense, they would motivate if we faced a ban. But why should you care, why should you act to oppose the current regulations, which don't ban, but chip away at the right? Why make opposing the incremental chips your issue? Why take this on in the face of stigma?

I'm going to offer a few specifics, but they are all variations on a theme. I invite you to care about abortion and the incremental chipping away of abortion because how we treat abortion says a lot about how we treat, or at least think of, women. And how we think about women says a lot about how we treat men. And what gender stereotypes we reify says a lot about how we treat and think of LGBT people.

*Make this one of your issues* if you believe women can think. Today, the regulations about abortion say a lot about our decision-making capacity. Today, in many states, the doctor has to give us a booklet about fetal development.<sup>39</sup> He or she has to tell us about carrying to term. Today, in many states, it's a crime not to make us wait anywhere from twenty-four to seventy-four hours after this state mandated counseling before we can get an abortion.<sup>40</sup> That's true even if we've talked to our family and our friends and our doctor and our faith leader. That's true no matter how long we've considered our decision. Twenty-four hours. Forty-eight hours. Seventy-two hours. No matter what. That's true no matter how sure we are. In South Dakota, the doctor has to tell us that abortion kills a living human being.<sup>41</sup> And now, states want doctors to do "show and tell" for us—show us the ultrasound and tell us what it shows.<sup>42</sup> These provisions and others are justified as a way of protecting us from regret.

Here's what that all says to me. It means we can't be trusted to ask questions—why else do we need to be spoon-fed information. It means we can't be trusted to proceed with the abortion at our own pace. We can't be trusted to make decisions. We can't be trusted to mean yes when we say yes. In South Dakota, where weekends and holidays don't count for the waiting period, we can't even be trusted to think on Saturdays and Sundays. And we can't be trusted to know what an abortion is. Really? Because I think I and others feel pretty sure we know what not an abortion is. You have to ask yourself, "Do they think we're stupid?" And who gets protected from regret? From upset? Children. Is that the view you want of women? Of yourself? Of your friends? Of your partner?

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<sup>39</sup> See, e.g., GUTTMACHER INST., *supra* note 15.

<sup>40</sup> *Id.*

<sup>41</sup> S.D. CODIFIED LAWS § 34-23A-10.1 (2014).

<sup>42</sup> GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (as of Apr. 1, 2014), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RFU.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf).



If not, if you believe women are able to think and make decisions and ask questions, you are on my team.

*Make this one of your issues* if you think you should not feel guilty about pursuing an education, controlling the size of your family, or dealing with a mistake. Consider with me the debate about abortion. So much of it is about the cases that may prompt public sympathy—women who seek abortion because the pregnancy resulted from rape or incest, or because something went awry with the pregnancy, with the health of the woman or the fetus. Women who did nothing “wrong”—they either didn’t choose to have sex or they wanted the pregnancy.

But the majority of women who have abortions are doing it for different reasons—so we can finish school, so we can care for the children we have, because we just can’t manage it, because we have a vision of what we want for our children, a vision we simply can’t fulfill then, or, frankly, because we made a mistake.

Those stories—the stories of the sort that show that life is messy—simply don’t get told today. And when they do, the reaction all too often is that the woman is selfish. She should assume responsibility for her actions. Even pro-choice people are incredibly judgmental.

This judgment sounds more like the world in which my mother lived. Had she lived in a different time, she might have decided to have all of her children, four of us, spanning fifteen years, but she didn’t have a choice. She didn’t have a choice to pursue other dreams—to act on admission to art school, a job to restore Italian paintings, a desire not to risk another case of severe post-partum depression, or a simple desire not to have another infant. Is it really selfish to have such visions? More selfish than for my father to have hopes for his career? Or to want to earn enough to care for us in the way he thought right? I don’t think so. If you agree, if you are with me, you are on my team.

*Make this one of your issues* because you think motherhood is not the only proper role for women, even for women who get pregnant. The regulations sailing through legislatures now say a lot about the proper role for women. Again, back to *Casey*. There the Court held that a state may use its power to express a preference for childbirth over abortion.<sup>43</sup> That was not okay before. Before, the states had to be neutral, at least where funding was not concerned.

In 2007, in upholding a ban on certain abortions, Justice Kennedy wrote: “Respect for human life finds an ultimate expression in the bond of love the mother has for her child.”<sup>44</sup> That’s in the context of an abortion case—where he refers to the doctors who provide abortion as abortionists.

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<sup>43</sup> *Casey*, 505 U.S. at 877–78, 881–88.

<sup>44</sup> *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

I value parenthood. I value life. I value children. But as Justice Ginsburg said, “This way of thinking [—that we prefer childbirth and can ban abortions in the name of that value—] reflects ancient notions about women’s place in the family and under the Constitution—ideas that have long since been discredited.”<sup>45</sup>

The message that abortion is wrong—and that motherhood is the proper role for those of us who get pregnant—is of course the most blatant in the state mandate that doctors tell women that abortion kills a living human being. There aren’t too many ways to understand what we are to do then: If you are pregnant, you can choose—killing, or the ultimate expression of respect for human life. That doesn’t sound so twenty-first century to me.

Let me make the point more explicit. The Court held the state can use its resources to discourage us from having an abortion, at the very same time it recognized abortion as essential to women’s equality.<sup>46</sup> What message are we sending? I know what it is, and I’m not down with it. Are you? If not, you are on my team.

*Make this one of your issues* if you think it’s okay for women to be sexual beings. Let’s go back to the stories of women who seek abortions. What people say explicitly there, and what is implicit in much of the regulation, is the following: The woman seeking an abortion needs to accept the consequences of her action. If she didn’t want to get pregnant, she shouldn’t have had sex. (And gentlemen, where are you?) It’s a punitive and puritanical view of women. If you have sex, you pay the price for your decision.

*And make this one of your issues* if you want to make decisions about relationships and who you love. As my boss Anthony Romero said at a recent rally, “Now why does a gay guy like me care about choice? . . . At the base of it . . . [it’s about] who we love and marry . . . and whether or not we are going to have a family.”<sup>47</sup> Abortion is about abortion—and so much more. As a matter of politics and law, it is all part of a piece about how we configure relationships and family. Questions of birth control, of relationships, of equality for LGBT people, of family structure—of how we live and love—are tied up in the questions of abortion as a matter of politics and law.

So, the reason for passion: At core, it’s simple—it’s about respect and fairness and dreams. It’s back to shame. It’s back to heart.

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<sup>45</sup> *Id.* at 185 (Ginsburg, J., dissenting).

<sup>46</sup> *Casey*, 505 U.S. at 856 (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”).

<sup>47</sup> Anthony D. Romero, Exec. Dir., Am. Civil Liberties Union, Remarks at the Stand Up for Women’s Health Rally (Apr. 7, 2011) (video available at <http://www.c-span.org/video/?298900-1/stand-womens-health-rally->).

To my final theme—the reason for hope. Really, it’s you. If you care, there is hope. I talked about stigma. I talked about silence. There are consequences. How many movements succeed if they are silent? If they are ashamed? If they are faceless?

Whether you care matters for the legislatures. And it matters for the courts too. The courts are willing to be one or two steps ahead of the people but not twenty. And our history and tradition—as often reflected in legislation—is expressly part of a test of rights.<sup>48</sup> Consider any number of recent decisions. The decisions to end the death penalty for juveniles<sup>49</sup> or the developmentally disabled.<sup>50</sup> Part of the Court’s analysis was to look at state legislation and practice—had we stepped away from the practice, how many states authorized the practice?<sup>51</sup> Consider *Lawrence*—the Court looked at the history and liberalization of sodomy laws.<sup>52</sup> Consider marriage for same sex couples. We all wanted to ensure some gains—in the states and in the polls—before taking the question to the U.S. Supreme Court. The Court will only go so far. It will advance the culture—but only to a point. And it will retreat in the face of diminished support.

In that sense, you can’t sit back. You can’t be silent. You can’t be invisible. When we are silent, it’s a lot easier to tell lies about us. And the more they tell, the more we shrink, and the easier it is for the lies to take on all appearance of truth. Nothing contradicts it. And when we are silent, it gets easier to deny us our rights.

Abortion already dangles out there. It is provided in freestanding clinics—that can be picketed, bombed, and uniquely regulated. The rest of the medical profession can keep its distance. It is increasingly uniquely singled out for critique by liberal academics. It’s on the outside, barely tethered to the rest of society. Its ties to the rest of our political, economic, and medical spheres can be easily severed. I don’t know if the tie will be severed, but what I know is that it is frayed as I’ve never seen in my time.

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<sup>48</sup> *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (“We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.”).

<sup>49</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>50</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>51</sup> *Roper*, 505 U.S. at 563–64 (“inquir[ing] into our society’s evolving standards of decency” and noting that “30 States prohibit the juvenile death penalty” and that “even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent”); *Atkins*, 536 U.S. at 314–15 (noting that at least eighteen states banned execution of developmentally disabled people and stating “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change”).

<sup>52</sup> *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (recognizing in striking Texas’s anti-sodomy law, that “[t]he 25 States with laws [previously] prohibiting the relevant conduct . . . are reduced now to 13” and that “[i]n those States where sodomy is still proscribed . . . there is a pattern of nonenforcement with respect to consenting adults acting in private”).

You can make a difference. For that, I'm not asking that you come out. I'm not asking that you celebrate abortion in some way. I'm asking that you help to normalize it—that you keep it from the closet, that you let politicians know someone cares, that you let those close to you know it matters. If politicians and the courts and medical schools and legal academics don't think it matters to us, why should they stand up? Why should they take on the fight? After all, the other side cares—they vote on the issue, they speak, they cough up dollars. If they speak and we don't, if the stigma continues, I honestly wonder if we will go the way of tobacco—legal, but to partake is to be in the land of pariahs.

I say that knowing that, in some ways, I'm asking you to help put the sand bags in place to protect what we have from the torrent. And I know that can be less satisfying, and less fun than charging forward to make gains. It's less fun to protect, to limit erosion, than to win and gain. Really, it is. I used to win. But to lose ground is real, and every bit we lose has consequences, real consequences for a woman and her family somewhere.

It can be hard to fight the fight year after year. It is hard to see the losses. I stay with it because it matters. I keep a picture of one of my first clients by my desk as a reminder.

One of my first cases was a case in Idaho. I was arguing that the Idaho Constitution required the state to cover abortion in its Medicaid program where it covers childbirth.<sup>53</sup> (The case alone shows how different the times were.) One day I got a call from a nurse who worked for a high-risk OB/GYN. She knew about the case and we had been in touch. She told me they had just seen a woman on Medicaid with a wanted pregnancy. The woman had gotten bad news. Her baby had open spina bifida, a bad case, such that the child, if born, would be paralyzed below the waist, need surgeries, and risk infections, among other issues. The nurse told me she had given the woman my number in case she decided to pursue an abortion and needed help.

The woman, who was known in the case as Linda Koe, later called me. She had talked to friends with children with disabilities. She and her husband had talked. She wanted an abortion. She was eighteen. She said, "We are too young, our marriage is too young." Linda Koe was fortunate. There was a hospital in the area that would provide the abortion. But it required \$5000 up front for the abortion to proceed. Linda Koe was on Medicaid. She didn't begin to have \$5000.

We went to court for an emergency order directing the state to pay for the abortion, as it would pay for childbirth had that been Linda's decision. The judge denied the relief.<sup>54</sup> We raised the money that night

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<sup>53</sup> *Roe v. Harris*, No. 96977, slip op. (Idaho Dist. Ct. Feb. 1, 1994).

<sup>54</sup> Ruling on TRO, *Roe v. Harris*, No. 96977 (Idaho Dist. Ct. Sept. 3, 1993).

for the abortion and for the funeral Linda Koe and her husband wanted for their child. As her lawyers, we couldn't pay. If I'd had your number that night, I would have called any one of you for whatever you would donate. That was 1993.

There has never since been a six-month period when Linda and I haven't been in touch. She sends me pictures of the children she went on to have. She tells me of the ornament she puts on the tree for her son and how she explains it to her children. We've marked her thirtieth birthday and our mothers' passings. When she didn't have a phone, she called me collect from her mother's gas station. When New York had the blackout, the first message I had on my machine was not from my mother. It was from Linda, "Hi Louise. I want to be sure you are all right."

Abortion matters. It's about respect. It's about dreams and the future. It's worth fighting for. It should be given voice.