

Carol Sanger. *About Abortion: Terminating Pregnancy in Twenty-First-Century America*. Cambridge: Belknap Press, 2017. 320 pp. \$29.95.

In *About Abortion* Carol Sanger serves up a textured, heavily referenced analysis that, in keeping with her other work, is also witty and highly readable. By connecting three themes, “law, talk and imagery” (xi) the book is a definitive multidisciplinary account of twenty-first-century abortion policy in the United States.

Sanger observes that “unlike other medical procedures performed at about the same rate—knee surgery, for example—abortion has a social and political economy of its own: a mix of private decision making and public policy, constitutional rights and statutory constraints, with moral conviction standing firm, for the most part, on both sides of the issue” (x). Consider that abortion is safe, cost-effective care and demanded by approximately one in three women in the United States, yet it alone enjoys heightened constitutional protection relative to other health services. At the same time, abortion is often excluded from standard health law and policy curricula across academia. Why? If health lawyers, professors, and policy practitioners do not consider abortion to be health care, then what is it? *About Abortion* invites pedagogical introspection and regulatory shifts to include abortion in mainstream health policy.

Readers from a variety of disciplines will find the book accessible. It is at once a comprehensive historical and sociological overview and a guide to emerging issues in law and policy. Importantly, the book traces three pillars

of Supreme Court abortion jurisprudence—*Roe v. Wade* (1973), *Planned Parenthood v. Casey* (1992), and *Whole Woman's Health v. Hellerstedt* (2016)—and reviews relevant intervening case law. The book presents sophisticated legal and multidisciplinary analysis, thus maintaining accessibility for nonlawyer audiences. Law students, lawyers, and legal scholars will likely engage in the economics, epidemiology, and social science research around abortion. Her book adds value to existing abortion libraries by linking astute sociological observations with multibranch government activity regulating abortion. Sanger aims to limit secrecy around abortion, noting that “the willingness of women and others to talk about abortion will over time make an immense difference to its legislative fate, for legislatures are where states go toe-to-toe with the abortion right” (216).

Sanger untangles eras of abortion jurisprudence including regime shifts, jurisprudential trends, and composition of the bench. As scholars of public health law know well, under rational basis review courts traditionally defer to legislative and executive branch public health activity, and as Sanger notes, “since 1992 a state’s rendition of facts as laid out, say, in a statute’s preamble was accepted as true” (49). But the era of blind judicial deference to targeted regulation of abortion providers ended in the landmark 2016 Supreme Court decision in *Whole Woman’s Health v. Hellerstedt*. In this tide-turning case, Sanger writes, the Court “put state legislatures on notice that there are constitutional limits to abortion regulation after all.” The Court struck down Texas’s laws requiring facilities providing abortions to meet standards for outpatient surgical clinics and for physicians to have hospital admitting privileges in order to provide abortion care. The Texas legislature claimed “women’s health” protection as justification for such provider requirements—an arguably pretextual claim that in earlier cases would have been upheld by courts under an interpretation of separation of powers doctrine. But here, as Sanger notes, “in a fact-saturated 5–3 decision, Justice Breyer explained that neither the admitting privileges nor the ambulatory surgical center requirement could be justified as advancing the state’s interest in women’s health” (35). Sanger interprets *Whole Woman’s Health*, concluding that “with this judicial shot across the bow, legislators have increased incentive to use evidence-based facts rather than aspirational ones in regulating the provision of abortion” (49).

For health lawyers and policy experts, the concepts of privacy and confidentiality are basic, core to patient autonomy and enshrined in federal law and best practices. Yet abortion exists outside standard legal health law practice in many significant ways. As Sanger notes, those seeking abortion strive to keep it secret, often opt not to use insurance coverage out of fear of

breached confidentiality (from dependent to policyholder), and frequently hide the abortion from their “real doctor.” Individual experiences of abortion are therefore missing from the legal and regulatory contexts in which the abortions are sought, provided, delayed, and denied. Said another way, because secrecy and stigma surrounding abortion create barriers for women’s voices to enter the marketplace of ideas, the abortion policy “market” fails. In the chapter titled “Abortion Privacy/Abortion Secrecy” Sanger excavates this singular treatment of abortion and assesses recent strategic efforts to amplify voices of women who choose abortion without regret, including social media campaigns such as #ShoutYourAbortion. Sanger takes special note of the amicus briefing in *Whole Woman’s Health v. Hellerstedt* as a “good example of abortion talk,” highlighting one of three “personal story” amicus briefs offered in support of the right to abortion by “Janice MacAvoy, Janie Schulman, and Over 110 Other Women in the Legal Profession Who Have Exercised Their Constitutional Right to Abortion.” Such efforts are among the remedies Sanger offers in tandem with a central argument, “that the secrecy surrounding women’s personal experience of abortion has massively, though not irreparably, distorted how the subject of abortion is discussed and how it is regulated” (xi).

Sanger seeks to “expose how the law often works to make the lives of women with unwanted pregnancies harder than they have to be” (xiv). As she points out, abortion is the only health care service for which a call to targeted regulatory action is usually a guise to disrupt abortion access. Although patient safety is typically first order of business in health care regulation, increasingly aggressive regulatory tools of health law are manipulated to smother abortion access, with very little if any focus on harms resulting from overregulation and limited access to abortion. As Sanger notes in the chapter “Normalizing Abortion,” for example, “within two weeks of *Whole Woman’s Health* [Texas] announced a new regulation requiring that all fetal remains, whether from an abortion or a miscarriage, must be either buried or cremated” (235).

Sanger notes: “In both content and timing the [fetal remains] regulation was a defiant finger in the Supreme Court’s eye . . . [and] came into being through the rule-making procedure of the Texas Health and Human Services Commission, an administrative agency that draws less public attention than the statehouse” (235). Sanger details similarly ambitious antichoice regulations emerging in South Carolina and Kansas. Although doubtful these executive actions are constitutional under *Whole Woman’s Health*, Sanger acknowledges that, nevertheless, “until the matter is settled they will siphon off pro-choice energies, for even the preposterous must be

challenged” (34). Thus, *About Abortion* also suggests that such efforts are deliberately designed to deplete reproductive rights organizations of scarce litigation resources.

In two chapters, “The Eye of the Storm” and “Facing Your Fetus,” Sanger presents a social history of fetal life, including a dynamic historical review of fetal imagery in art, film, and literature. Such observations are seen in public health texts but less so in law books and are a welcome addition to prompt deeper reflection on cultural influences impacting policy. Sanger offers unique insight into the psychosocial role of fetal imagery on both personal decision making and population-based policy making, unpacking assertions of relevance of fetal imagery to informed consent and the impact of fetal imagery on juries during trials with pregnant murder victims. For example, Sanger reviews artist Damien Hirst’s installation of fourteen sculptures documenting “the process of gestation from conception to birth,” beginning with a sixteen-foot-tall embryo and concluding with a forty-six-foot “Godzilla-style” newborn, as well as “fetus-themed” horror movies such as *Rosemary’s Baby*. Sanger notes that, although in cases of wanted pregnancy ultrasounds and fetal imagery are typically exciting and happy, mandatory ultrasound requiring fetal image viewing with the option to “avert your eyes or plug your ears” are pretextual, designed to manipulate women to select childbirth over abortion. Sanger argues that, “unlike a medical scan, which provides medical information to the doctor, the mandated scan is meant to provide nonmedical information to the patient” (120). Although mandatory ultrasound laws may be craftily couched in informed consent language familiar to health lawyers, they often amount to gratuitous, distressing encounters inflicted as obstacles to one’s constitutional right to abortion and bear no resemblance to carefully vetted informed consent protocols established by health policy lawyers and advocates over decades. Physicians typically order ultrasounds discretionarily, when in their professional opinion they are medically indicated. Mandated ultrasound laws, unique to abortion and specifically introduced by antichoice legislators, remove physician discretion because “the purpose of the ultrasound is to do everything possible to shift the woman’s thoughts, her experience, and her expectations from someone who has decided not to remain pregnant into the position of an ordinary mother-to-be” (122).

In “Sending Pregnant Teenagers to Court,” Sanger argues that judicial bypass hearings (in states in which pregnant teenagers without parental consent must appear in court to ask a judge’s permission to access abortion services) operate as methods of punishment. She claims that “bypass

hearings should concern us not only because of individual indignities but because of a more systemic issue: the misuse of the legal process to harass pregnant minors” (159). In this chapter, she reviews the extension of rights under *Roe* to minors and highlights complex judicial obstacle courses required of teens to pursue her central question: “Are there limits to what a pregnant girl should be asked to do in exchange for exercising her rights under *Roe*?” (180). Sanger describes that judges may, at their discretion, tell the petitioner that she is “going to hell,” appoint a lawyer for the fetus, decline to hear a petition (thereby delaying the hearing date as the pregnancy progresses), require a teen to visit a “Save-a-Life” prolife center before granting consent, and count “stammering and other inadequacies of speech such as slang or blurting” against petitioners (170). In fact, “depending on the judge, the successful petitioner’s story may include not only her grade point average but some indication of why she deserves to have her petition granted. This requires an appropriate shading of the tale, one that gestures toward contrition for the mess she has gotten herself into and from which she now asks the court’s help to escape” (173). Sanger notes that 87 percent of all state and local judges now run for office, and “bypass hearings come in for special attention because of the judiciary’s intimate involvement in the process” (177). Indeed, the “official 2006 platform of the Texas Republican Party called for the ‘electoral defeat of all judges who through raw judicial activism seek to nullify the Parental Consent Law by wantonly granting bypasses to minor girls seeking abortion’” (178). Thus, bypass proceedings, which occur only for abortion and only for girls (though the judge is often male), epitomize Sanger’s observations of abortion’s singular and secretive treatment relative to other health care.

In a dynamic contemplative exercise designed to “shake abortion loose from gender’s grip” (190). Sanger considers “Fathers and Fetuses—What Would Men Do?” In this chapter, Sanger approximates male decision making as if men were consumers of abortion services, “untether the subject of abortion from the anchor of motherhood by investigating what men would do if the disposition of an embryo or fetus were up to them” (190). Presumably due to the imperfection inherent in such simulation, such an exercise is rarely attempted but here adds an important dimension to Sanger’s brand of “abortion talk.” She rejects polling data and instead, in an effort to secure “insight into what men . . . have done,” explores “(1) disputes over the disposition of cryogenically frozen embryos; (2) commercial surrogacy contracts between men seeking a biological child and women willing not only to be impregnated with the man’s sperm but who

also agree to abort the pregnancy under certain circumstances; and (3) cases in which men must decide whether to withdraw care from brain-dead or comatose pregnant women, understanding that to do so ends the fetus's life as well" (193). The resulting analysis is headline worthy. In making such decisions, Sanger notes that men deliberate termination similarly to women by considering "enormous emotional, psychological and financial burden" and unwillingness to "bring a child into a relationship that is already divorced and so acrimonious" (197). In surrogacy contracts, men require "the [gestational surrogate] woman's agreement to terminate the pregnancy if prenatal testing reveals a fetal condition that the commissioning man has specified in the contract is ground for termination" and in "identifying what conditions trigger [the male consumer's right to demand termination of the pregnancy] adds to the list of men's reasons for desiring abortion" (198). Sanger proves the case that, when in positions most closely approximating women facing undesired parenthood, men bargain for an abortion option. She concludes that "differences seem to fall less along absolute gender lines than along such markers as situational stability, relationships, support networks, finances and stamina" (209).

Ultimately, *About Abortion* is an accessible, probing, and definitive account of abortion for students and practitioners of health law and policy interested in exploring the scope of needs and the opportunity for more effective abortion policy making. As a teaching tool, the book would engage graduate and advanced undergraduate students in both law and public health. Readers of all backgrounds will take away a deep understanding of Sanger's concluding observation: "As abortion becomes less stigmatized, as it will in time, it will come to be regarded like other medical decisions—thoughtfully taken and exercised without a gauntlet of picketers on the pavement or hard looks at home" (238).

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