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## MARRIAGE, ABORTION, AND COMING OUT

*Scott Skinner-Thompson,\* Sylvia A. Law\*\* & Hugh Baran\*\*\**

*Over the past two decades, legal protections for lesbian, gay, and bisexual individuals have dramatically expanded. Simultaneously, meaningful access to reproductive choice for women has eroded. What accounts for the different trajectories of LGBTQ rights and reproductive rights?*

*This Piece argues that one explanation—or at least partial explanation—for the advance of LGBTQ rights relative to reproductive rights is the differing degree to which individuals have come out about their experiences with sexuality compared to coming out about experiences with unplanned pregnancies. In particular, as catalogued in this Piece, popular media portrayals of lesbian and gay individuals have proliferated, broadening the social and judicial understanding of minority sexualities. Meanwhile, popular media portrayals of women confronting unplanned pregnancies remain relatively sparse and, when they do appear, are often inaccurate and unrepresentative.*

*The correlation between positive media portrayals of lesbian and gay individuals and judicial recognition of protections for sexual minorities suggests that in order to halt the erosion of reproductive rights, it will be important to expose society to people exercising their right to abortion on the screen, in the office, and at the kitchen table.*

## INTRODUCTION

In little over a decade, LGBTQ rights advocates were able to radically transform the legal landscape for same-sex couples, moving from a world in which consensual sex could be criminalized (2003) to a world in which states could no longer restrict civil matrimony to opposite-sex couples (2015).<sup>1</sup> By contrast, the picture in relation to the

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1. Compare *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (declaring state criminalization of same-sex sexual intimacy unconstitutional for the first time), with *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (deeming bans on same-sex marriage unconstitutional).

constitutional protection for abortion is relatively bleak.<sup>2</sup> In 1973, the Court, 7-2, recognized that the right to choose abortion was a fundamental civil right.<sup>3</sup> But from the annunciation of the “undue burden test” for evaluating abortion regulations in 1992<sup>4</sup> until 2016, the Supreme Court had only once struck down restrictions on abortion as unduly burdensome,<sup>5</sup> despite the enactment of numerous significant restrictions.<sup>6</sup> Why is it that LGBTQ rights have advanced while women’s reproductive rights have diminished at the same time?

The purpose of this Piece is to tease out one contributing answer to that question. Our impression (or, more accurately, our hunch) is that popular media—specifically, scripted programs on television and in movies—have unequally portrayed lesbian and gay characters, on the one hand, and women exercising rights for reproductive freedom, on the other, and that this disparate treatment has had an impact on both societal and judicial attitudes toward these two social justice movements. The difference in treatment is one of both quantity and quality. That is, not only are there relatively few portrayals of women having abortions—or contemplating such a choice—but the portrayals that do exist are often resolved in ways that deviate meaningfully from actual experience.

The difference in popular culture portrayals of queer relationships relative to women exercising freedom of reproductive choice may not be the determinative factor explaining the advance of same-sex couples’ rights in comparison to abortion rights. And the Piece explores and

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2. While this Piece and the media studies discussed herein focus on portrayals of abortion, it is important to note that abortion is not the only aspect of women’s health that has been threatened. Women face continued hurdles in many areas of health care, including but not limited to accessing contraception and health services. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (striking down the Affordable Care Act’s contraception mandate as applied to closely held corporations for violating the Religious Freedom Restoration Act).

3. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

4. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (plurality opinion) (“In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”).

5. See *Whole Woman’s Health v. Hellerstedt*, No. 15-274, 2016 WL 3461560, at \*34–40 (U.S. June 27, 2016) (striking down an ambulatory-surgery-center requirement and the requirement that doctors have admitting privileges at local hospitals in order to perform abortions); *Stenberg v. Carhart*, 530 U.S. 914, 945–46 (2000) (concluding a state criminal law ban on “partial birth” abortion was broadly and vaguely defined so as to impose felony sanctions on doctors performing the most common forms of abortion, rendering it an undue burden).

6. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (upholding a federal law banning intact-dilation-and-extraction procedure regardless of the viability of a fetus and the health of the woman); see also *An Overview of Abortion Laws*, Guttmacher Inst., <http://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [<http://perma.cc/R98P-XL88>] [hereinafter *Guttmacher Inst., Overview*] (last updated Aug. 1, 2016) (providing a comprehensive listing of current state abortion regulations).

considers alternative, or contributing, explanations, including differences in constitutional doctrine.

Moreover, we wish to stress, most emphatically, that the movements for reproductive choice and queer rights are mutually supportive and not in tension. But juxtaposing the two movements' relative cultural and legal positions helps amplify our tentative conclusion that the legal culture war is impacted by popular culture battles. If this is true, what lessons can the movement for reproductive rights draw from the recent advance of LGBTQ rights? The thesis of this Piece is that it is critical for women to come out about their experiences with reproductive choice both on the screen and within their communities.

This Piece explores its thesis in three Parts. Part I examines evidence suggesting that there is a correlation between positive popular media portrayals of lesbian and gay individuals and the advance of legal protections based on sexual orientation. Part I further highlights that the abortion rights movement has not received the same popular media boost. Part II then discusses the importance of coming out of the closet more broadly. Part III briefly explores alternative explanations for the relative success of same-sex relationship rights vis-à-vis reproductive rights and rejects the suggestion that constitutional protection for same-sex marriage rests on stronger constitutional grounds than claims for reproductive freedom. Finally, the Conclusion summarizes the implications of our analysis—that popular media portrayals play an important role in the attainment and preservation of fundamental rights—for the reproductive rights movement.

## I. THE SCREEN-TO-CREED PIPELINE

Popular media portrayals affect social attitudes, which in turn affect judicial results. This thesis has intuitive appeal and is perhaps uncontroversial. But laying out the correlative evidence is important in making the case that media portrayals of reproductive choices deserve more attention and more accuracy. Section I.A of this Part discusses how positive popular media portrayals of lesbian and gay individuals helped build support for legal protection of same-sex marriage. Section I.B then shows the comparative lack of such portrayals of women experiencing unplanned pregnancies and seeking abortion.<sup>7</sup>

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7. While we use the widely employed terms “unplanned” and “unintended” pregnancies, the use of these terms should not distract from or wash over the fact that abortions are not infrequently sought for pregnancies that result from rape. See, e.g., Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 *Persp. on Reprod. & Sexual Health* 110, 113 (2005).

A. *The Spotlight on Lesbian and Gay Characters*

Positive popular media portrayals of queer individuals presaged and, in some ways, paved the way for legal recognition of same-sex relationships.

Prior to the early 1990s, sympathetic media portrayals of gay and lesbian people were rare.<sup>8</sup> Then things began to change with shows such as *Friends*, *Melrose Place*, and *Seinfeld* featuring gay and lesbian characters in nontrivial roles and/or gay and lesbian subject matter.<sup>9</sup> These were followed by *Ellen*, wherein the character Ellen Morgan came out in 1997.<sup>10</sup>

Most prominently, *Will & Grace*, which first appeared on NBC in 1998 and ran for eight seasons, presented two gay male characters in leading roles and reached a level of popularity and critical acclaim never before enjoyed by a show depicting gay people.<sup>11</sup> Since the early 1990s, there has been a modest explosion of sympathetically presented LGBTQ characters on mainstream media.<sup>12</sup> Examples easily come to mind and include *Modern Family*, *Glee*, *The New Normal*, *The Wire*, *Looking*, *Grace & Frankie*, *Smash*, episodes of *Grey's Anatomy*, and many others.<sup>13</sup> More recently, positive portrayals of transgender characters have also appeared in mainstream, scripted media. *Transparent* and *Orange Is the New Black* are two notable examples (though both are on streaming services, not cable or network television).<sup>14</sup> And there are advocacy organizations, such as the Gay & Lesbian Alliance Against Defamation (GLAAD),

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8. Ron Becker, *Gay TV and Straight America* 3 (2006) (“Throughout its first four decades, television virtually denied the existence of homosexuality . . . . As recently as the early 1990s, in fact, even the most astute viewers could likely spot only a handful of openly lesbian, gay, and bisexual characters in an entire year of network television.”).

9. See *id.* at 150–51, 154, 156–57.

10. See *id.* at 147–68.

11. See Edward Schiappa et al., *Can One TV Show Make a Difference? Will & Grace and the Parasocial Contract Hypothesis*, 51 *J. Homosexuality* 15, 17 (2006).

12. For a detailed discussion of depictions of lesbian, gay, and bisexual characters in network television in the 1990s, see Becker, *supra* note 8, at 136–88.

13. NPR Staff, *How TV Brought Gay People into Our Homes*, NPR (May 12, 2012, 4:30 PM), <http://www.npr.org/2012/05/12/152578740/how-tv-brought-gay-people-into-our-homes> (on file with the *Columbia Law Review*); Brian Stelter, *Gay on TV: It's All in the Family*, *N.Y. Times* (May 8, 2012), <http://www.nytimes.com/2012/05/09/business/media/gay-on-tv-its-all-in-the-family.html> (on file with the *Columbia Law Review*).

14. See, e.g., Liz Calvario, *Transgender Characters on TV: How the Roles Have Grown & Why It's Important*, *IndieWire* (June 10, 2016, 1:19 PM), <http://www.indiewire.com/2016/06/transgender-characters-tv-faking-it-transparent-i-am-cait-1201687526/> [<http://perma.cc/H7XR-S2B6>]; Melissa Maerz, *The Year that Was: In 2014, TV Transformed the Way We Think*, *Entertainment Wkly.* (Dec. 8, 2014, 12:00 PM), <http://www.ew.com/article/2014/12/08/transparent-hedwig-orange-is-the-new-black-transgender> [<http://perma.cc/C22G-U8T2>] (describing the portrayal of transgender characters in *Transparent* and *Orange Is the New Black*).

specifically devoted to ensuring fair treatment of LGBTQ people in popular media.<sup>15</sup>

At the same time that positive popular media portrayals of gay and lesbian individuals increased, so too did positive social attitudes toward same-sex relationships. In 1996, when Gallup first began polling about public support for same-sex marriage, only 27% of Americans said it should be legally valid.<sup>16</sup> In the poll released in May 2015 (just before the Supreme Court issued its opinion in *Obergefell v. Hodges* recognizing same-sex marriage<sup>17</sup>), support for same-sex marriage stood at 60% nationally.<sup>18</sup> As Vice President Joe Biden explained in announcing his support for same-sex marriage, “I think *Will & Grace* probably did more to educate the American public than almost anything anybody’s ever done so far. And I think people fear that which is different. Now they’re beginning to understand.”<sup>19</sup>

Correspondingly, the legal landscape for LGBTQ rights has also undergone a dramatic shift.<sup>20</sup> In October 1972, just three months before it would issue its opinion in *Roe v. Wade*,<sup>21</sup> the Supreme Court dismissed the appeal in *Baker v. Nelson* challenging Minnesota’s refusal to recognize same-sex marriage for “want of a substantial federal question.”<sup>22</sup> More than a decade later, in 1986, the Supreme Court held in *Bowers v.*

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15. See Brooks Barnes, Citing Improvements, GLAAD Ends Annual TV Report, N.Y. Times: ArtsBeat (Sept. 3, 2015), <http://artsbeat.blogs.nytimes.com/2015/09/03/citing-improvements-glaad-ends-annual-tv-report/> (on file with the *Columbia Law Review*) (discussing GLAAD’s efforts to ensure that television networks improve their representation of the LGBTQ community).

16. Justin McCarthy, Record-High 60% of Americans Support Same-Sex Marriage, Gallup (May 19, 2015), <http://www.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx> (on file with the *Columbia Law Review*).

17. 135 S. Ct. 2584 (2015).

18. McCarthy, *supra* note 16.

19. May 6: Joe Biden, Kelly Ayotte, Diane Swonk, Tom Brokaw, Chuck Todd, Meet the Press, NBC News, [http://www.nbcnews.com/id/47311900/ns/meet\\_the\\_press-transcripts/t/may-joe-biden-kelly-ayotte-diane-swonk-tom-brokaw-chuck-todd/#](http://www.nbcnews.com/id/47311900/ns/meet_the_press-transcripts/t/may-joe-biden-kelly-ayotte-diane-swonk-tom-brokaw-chuck-todd/#) [<http://perma.cc/T4G4-PGE7>] (last updated May 6, 2012, 12:57 PM).

20. What follows is a thorough but far from exhaustive history of the same-sex marriage movement. For additional in-depth discussion charting the progression of same-sex marriage litigation and legislative changes, see Roberta Kaplan, *Then Comes Marriage: United States v. Windsor and the Defeat of DOMA* (2015) (giving Edie Windsor’s attorney’s firsthand account of the battle to defeat the Defense of Marriage Act); Marc Solomon, *Winning Marriage: The Inside Story of How Same-Sex Couples Took on the Politicians and Pundits—and Won* (2014) (detailing the campaign to win the right to same-sex marriage through legislative, judicial, and electoral processes); Kenji Yoshino, *Speak Now: Marriage Equality on Trial: The Story of Hollingsworth v. Perry* (2015) (providing a detailed account of the federal lawsuit against Proposition 8).

21. 410 U.S. 113 (1973).

22. 409 U.S. 810, 810 (1972) (mem.).

*Hardwick* that state laws criminalizing same-sex sexual conduct were constitutional.<sup>23</sup>

Throughout the 1990s, the picture for LGBTQ rights remained relatively bleak. Despite the Hawaii Supreme Court's 1993 holding in *Baehr v. Lewin*<sup>24</sup> that the state's refusal to grant same-sex marriages violated the Hawaii state constitutional provision requiring strict scrutiny of laws discriminating on the basis of gender and a subsequent trial court decision concluding that the state had failed to satisfy such scrutiny,<sup>25</sup> Hawaii quickly amended its constitution to specifically permit the exclusion of same-sex marriages.<sup>26</sup> All other states also continued to prohibit same-sex marriage until 2003.<sup>27</sup>

Congress passed two anti-LGBTQ statutes in the 1990s. The Defense of Marriage Act (DOMA) limited the federal definition of marriage to opposite-sex marriages and empowered states to refuse to recognize same-sex marriages granted by other states,<sup>28</sup> and Don't Ask, Don't Tell (DADT) prohibited lesbian, gay, and bisexual individuals from serving openly in the military.<sup>29</sup>

Beginning in the new millennium, however, the trajectory of LGBTQ rights began to shift. First, in the 2003 case of *Lawrence v. Texas*, the Supreme Court took the rare step of explicitly overturning its decision in *Bowers v. Hardwick* and held that state criminal bans on same-sex sexual conduct were unconstitutional.<sup>30</sup> That same year, the Supreme Judicial Court of Massachusetts (the state's highest court) held in *Goodridge v. Department of Public Health* that the exclusion of same-sex couples from civil marriage violated equality and liberty principles of the state constitution and could not be justified under rational-basis review.<sup>31</sup>

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23. 478 U.S. 186, 191 (1986) (explaining the Court's reluctance to recognize "a fundamental right to engage in homosexual sodomy").

24. 852 P.2d 44, 67 (Haw. 1993).

25. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*21 (Cir. Ct. Haw. Dec. 3, 1996), rev'd, 994 P.2d 566 (Haw. 1999) (unpublished table decision).

26. See Michael D. Sant'Ambrogio & Sylvia A. Law, *Baehr v. Lewin* and the Long Road to Marriage Equality, 33 U. Haw. L. Rev. 705, 716–18 (2011) (outlining the history of the *Baehr* same-sex marriage litigation in Hawaii and the legislative aftermath).

27. *Id.* at 720–21 (detailing actions in several states recognizing same-sex marriage after the Massachusetts Supreme Judicial Court first did so in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003)).

28. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996), invalidated by *United States v. Windsor*, 113 S. Ct. 2675 (2013).

29. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670–73 (1993) (repealed 2010).

30. 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent.>").

31. 798 N.E.2d 941, 948–49 (Mass. 2003) (holding that the exclusion of same-sex couples from civil marriage "is incompatible with the constitutional principles of respect for individual autonomy and equality under law").

Of course, the path toward marriage equality was not a straight line of progress. There were setbacks. In the immediate aftermath of *Goodridge*, several states passed constitutional amendments specifically banning same-sex marriage (same-sex marriage was already illegal in many of these states).<sup>32</sup> And no other state would legalize same-sex marriage for almost five years, until both Connecticut<sup>33</sup> and California<sup>34</sup> (albeit temporarily<sup>35</sup>) approved same-sex marriage in 2008. But then, one by one, other states began to recognize same-sex marriages, either through court decisions,<sup>36</sup> legislative action,<sup>37</sup> or plebiscite.<sup>38</sup>

The LGBTQ rights movement also began to see more success at the federal level.<sup>39</sup> Notably, Congress repealed DADT in 2010.<sup>40</sup> In 2013, the

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32. See Steve Sanders, *Mini-DOMAs as Political Process Failures: The Case for Heightened Scrutiny of State Anti-Gay Marriage Amendments*, 109 Nw. U. L. Rev. Online 12, 15 (2014), [http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1016&context=nulr\\_online](http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1016&context=nulr_online) (observing that in the years directly following *Goodridge*, more than twenty-five states passed constitutional amendments forbidding same-sex marriage).

33. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481–82 (Conn. 2008) (holding same-sex couples cannot be denied the freedom to marry under state constitutional provisions).

34. *In re Marriage Cases*, 183 P.3d 384, 452–53 (Cal. 2008) (finding California statutes limiting marriage to opposite-sex couples unconstitutional).

35. The California Supreme Court’s decision legalizing same-sex marriage in the *In re Marriage Cases* in May 2008 was short lived, as the voters of California approved Proposition 8 in November 2008, amending the California Constitution to define marriage as between one man and one woman. See, e.g., John Schwartz, *California High Court Upholds Gay Marriage Ban*, N.Y. Times (May 26, 2009), <http://www.nytimes.com/2009/05/27/us/27marriage.html> (on file with the *Columbia Law Review*) (detailing the passage of Proposition 8 in California).

36. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009) (striking down Iowa statutory provisions limiting civil marriage to opposite-sex couples).

37. See, e.g., Vt. Stat. Ann. tit. 15, § 8 (2009) (defining marriage as the “legally recognized union of two people”).

38. Edith Honan, *Maryland, Maine, and Washington Approve Gay Marriage*, Reuters (Nov. 7, 2012, 4:42 PM), <http://www.reuters.com/article/us-usa-campaign-gaymarriage-idUSBRE8A60MG20121107> [<http://perma.cc/9GKZ-E2BR>] (documenting that voters in Maryland, Maine, and Washington became the first states to legalize same-sex marriage by popular vote).

39. The federal level successes, such as the repeal of DADT, were part of carefully organized efforts by groups such as the Servicemembers Legal Defense Network to publicize the stories of lesbian, gay, and bisexual servicemembers—a form of coming out of the closet. See Christina Caron, *Dan Choi Explains ‘Why I Cannot Stay Quiet,’* ABC News (May 13, 2009), <http://abcnews.go.com/US/story?id=7568742> [<http://perma.cc/G6WQ-8PK3>] (describing the experience of a servicemember who was discharged after coming out as gay). Similarly, in response to DADT, several schools refused to allow the military to recruit on campus because it violated their commitment to nondiscrimination on the basis of sexual orientation. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 47 (2006). Congress, through the Solomon Amendment of 1996, threatened to withdraw all federal funds, including student loans and medical research, to schools that refused to host discriminatory military recruiters. *Id.* at 47–48. Many schools challenged the federal policy as a violation of constitutionally protected speech and



Supreme Court struck down the Defense of Marriage Act<sup>41</sup> and affirmed the decisions of influential circuit courts.<sup>42</sup> The Court's decision in *Obergefell v. Hodges*, making same-sex marriage the law of the land, followed just two years later in 2015.<sup>43</sup> As such, there is a rough correlation between popular media portrayals of lesbian and gay individuals and their relationships and both social and judicial attitudes toward LGBTQ individuals.

This is not to say that sympathetic popular media portrayals of queer individuals were the “but for” cause of legal recognition of same-sex marriage or that LGBTQ characters are adequately or proportionally represented in popular media.<sup>44</sup> Certainly, there are several explanations for the success of the marriage movement, including the careful litigation strategy and plaintiff selection.<sup>45</sup> Nor are the presentations of gay and lesbian individuals often in scripted television shows and movies without problems—namely, reinforcing stereotypes regarding gay and lesbian behavior.<sup>46</sup> And certainly much work remains to be done as queer individuals, particularly transgender people, face legalized discrimination (and violence) in many jurisdictions, as evidenced by the recent passage

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association. *Id.* While the Supreme Court rejected the constitutional claims in *Rumsfeld*, years of open struggle over the military's discriminatory policy likely contributed to the repeal of DADT. *Id.* at 68–70.

40. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010) (codified at 10 U.S.C. § 654 (2012)).

41. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

42. See, e.g., *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 10–11 (1st Cir. 2012).

43. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

44. See, e.g., Stacy L. Smith et al., *Inst. for Diversity & Empowerment at Annenberg, Inclusion or Invisibility? Comprehensive Annenberg Report on Diversity in Entertainment 11–12* (Feb. 22, 2016), <http://annenberg.usc.edu/pages/~media/MDSCI/CARDReport%20FINAL%2022216.ashx> [<http://perma.cc/5FGT-SVXV>] (demonstrating empirically that “LGBT individuals are still underrepresented” in popular media even in 2014 and 2015, with intersectionality being a particular problem as most LGBT characters are white males); see also GLAAD, *2015–16 Where We Are on TV* (2015), <http://www.glaad.org/files/GLAAD-2015-WWAT.pdf> [<http://perma.cc/699B-YG9N>] (enumerating the percentage of lesbian, gay, bisexual, and transgender characters represented in the 2015–2016 television season).

45. See Cynthia Godsoe, *Perfect Plaintiffs*, 125 *Yale L.J. Forum* 136, 137–40 (2015) [http://www.yalelawjournal.org/pdf/Godsoe\\_PDF\\_w3e8dk2x.pdf](http://www.yalelawjournal.org/pdf/Godsoe_PDF_w3e8dk2x.pdf) [<http://perma.cc/JW98-2BPD>]; Suzanne B. Goldberg, *Multidimensional Advocacy as Applied: Marriage Equality and Reproductive Rights*, 29 *Colum. J. Gender & L.* 1, 33–37 (2015) [hereinafter Goldberg, *Multidimensional Advocacy*]; Scott Skinner-Thompson, *The “Straight” Faces of Same-Sex Marriage*, *Slate* (Apr. 24, 2015, 2:19 PM), [http://www.slate.com/blogs/outward/2015/04/24/the\\_straight\\_faces\\_of\\_same\\_sex\\_marriage.html](http://www.slate.com/blogs/outward/2015/04/24/the_straight_faces_of_same_sex_marriage.html) [<http://perma.cc/39XP-PB7B>].

46. See, e.g., Becker, *supra* note 8, at 10 (“Although the amount of gay material increased significantly during [the late 1990s and early 2000s], the range of LGBTQ representations remained highly circumscribed.”); Deborah A. Fisher et al., *Gay, Lesbian, and Bisexual Content on Television: A Quantitative Analysis Across Two Seasons*, 52 *J. Homosexuality* 167, 185 (2007) (noting critiques of stereotypical portrayals of homosexual men as promiscuous).

of anti-LGBTQ legislation in North Carolina, Mississippi, and elsewhere.<sup>47</sup>

Instead, our claim is more modest: The correlation between an increase in LGBTQ people “coming out” on television and at the cinema with the rise of jurisdictions recognizing the importance of non-discrimination based on sexual orientation, including through the extension of marriage rights to same-sex couples, suggests that these media portrayals had a softening effect on theretofore negative attitudes toward queer individuals. A comparison of the relative dearth of media portrayals of women confronting unplanned pregnancies and the reproductive choice movement’s comparatively halting progress bolsters this claim and suggests that more numerous and accurate portrayals of women exercising reproductive liberty are needed if that liberty is to remain legally secure.

#### B. *Abortion Remains Offstage*

By contrast, media portrayals of women dealing with an unintended pregnancy are relatively rare. While in 1972—a few months before *Roe v. Wade* was decided—Maude, the forty-seven-year-old lead character in the popular eponymously titled CBS show, had an abortion, mainstream media in general rarely presents women confronting unintended pregnancy and even more rarely depicts them electing to exercise their right to choose abortion.<sup>48</sup> A rigorous, systemic study by Gretchen Sisson and Katrina Kimport shows that prior to *Roe v. Wade* in 1973, there were fewer than ten depictions per decade of women confronting unintended pregnancy in film or on television.<sup>49</sup> Since 1973, the number of such depictions in all movie and TV media grew from twenty-four per decade to 116 depictions in the decade between 2003 and 2012, an all-time

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47. See Scott Skinner-Thompson & Ilona M. Turner, Title IX’s Protections for Transgender Student Athletes, 28 Wis. J.L. Gender & Soc’y 271, 297 (2013) (highlighting discrimination confronting transgender individuals); Sarah Kaplan, Mississippi’s Senate Just Approved a Sweeping ‘Religious Liberty’ Bill that Critics Say Is the Worst Yet for LGBT Rights, Wash. Post (Mar. 31, 2016), <http://www.washingtonpost.com/news/morning-mix/wp/2016/03/31/mississippi-senate-just-approved-a-sweeping-religious-liberty-bill-that-critics-say-is-the-worst-yet-for-lgbt-rights/> (on file with the *Columbia Law Review*); Dave Philipps, North Carolina Bans Local Anti-Discrimination Policies, N.Y. Times (Mar. 23, 2016), <http://www.nytimes.com/2016/03/24/us/north-carolina-to-limit-bathroom-use-by-birth-gender.html> (on file with the *Columbia Law Review*).

48. How TV Shows Deal with Abortion: A Timeline, Week (Apr. 24, 2012), <http://theweek.com/articles/476169/how-tv-shows-deal-abortion-timeline> [<http://perma.cc/V2BN-8XYF>] (listing examples confronting unintended pregnancies post-*Maude*, including *Degrassi High* (1989), *Melrose Place* (1992), *Beverly Hills: 90210* (1994), *Felicity* (2000), *Dawson’s Creek* (2000), *Everwood* (2003), *Sex and the City* (2003), *Six Feet Under* (2003), *Degrassi: The Next Generation* (2004), *Desperate Housewives* (2009), *Mad Men* (2010), and *Grey’s Anatomy* (2011)).

49. See Gretchen Sisson & Katrina Kimport, Telling Stories About Abortion: Abortion-Related Plots in American Film and Television, 1916–2013, 89 J. Contraception 413, 415 (2014) [hereinafter Sisson & Kimport, Telling Stories].

high.<sup>50</sup> In a separate study released in 2016, Sisson and Kimport document that in television shows from 2005 to 2014 seventy-eight plotlines involved women considering abortion.<sup>51</sup> While that is a significant increase, the study shows that there are still only a few stories of women confronting unintended pregnancy being told. Almost half of the pregnancies in the United States are unintended, and roughly 40% of those unintended pregnancies end in abortion; in 2011, over a million abortions were performed.<sup>52</sup> Every one of these pregnancies is a story.

Not only are the stories of women confronting unintended pregnancy in the media rare relative to the number of unintended pregnancies that occur each year, but they are also resolved in ways that are different from actual experience. The 2014 Sisson and Kimport study of abortion depictions in movie and TV media found that from 2003 to 2012, 9% of fictional women placed newborns for adoption, whereas in real life the number is much lower.<sup>53</sup> Overall, the media depicted a 9% rate of death of women caused directly by abortion, while the reality is that the risk of death from abortion is statistically zero.<sup>54</sup> A total of 15.6% of women were depicted dying following an abortion, the additional deaths not caused directly by the abortion often being the result of murder.<sup>55</sup> No evidence supports these stories.<sup>56</sup>

Sisson and Kimport's 2016 study documenting abortions in television shows from 2005 to 2014 reveals that the fictional women obtaining abortions are disproportionately white, affluent teenagers, in

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50. See *id.*

51. See Gretchen Sisson & Katrina Kimport, Facts and Fictions: Characters Seeking Abortion on American Television, 2005–2014, 93 *J. Contraception* 446, 447 (2016) [hereinafter Sisson & Kimport, Facts and Fictions].

52. Lawrence B. Finer & Mia R. Zolna, Declines in Unintended Pregnancy in the United States, 2008–2011, 374 *New Eng. J. Med.* 843, 848 (2016); James Trussell et al., Cost Effectiveness of Contraceptives in the United States, 79 *J. Contraception* 5, 5 (2009); Induced Abortion in the United States, Guttmacher Inst. (May 2016), [http://www.guttmacher.org/sites/default/files/factsheet/fb\\_induced\\_abortion.pdf](http://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf) [<http://perma.cc/B8EC-2S3Q>] [hereinafter Guttmacher Inst., Induced Abortion].

53. See Anjani Chandra et al., Nat'l Ctr. for Health Statistics, Ctrs. For Disease Control and Prevention, No. 306, Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States 9 tbl. 5 (May 11, 1999), <http://www.cdc.gov/nchs/data/ad/ad306.pdf> [<http://perma.cc/7SHG-L3XL>]; Sisson & Kimport, Telling Stories, *supra* note 49, at 417.

54. See Sisson & Kimport, Telling Stories, *supra* note 49, at 417.

55. See *id.* Others have highlighted the social-control function of disproportionate media portrayals of certain demographic groups being targeted for killing in scripted portrayals. See, e.g., George Gerbner, Death in Prime Time: Notes on the Symbolic Functions of Dying in the Mass Media, 447 *Annals Am. Acad. Pol. & Soc. Sci.* 64, 69 (1980).

56. See Katrina Kimport et al., Analyzing the Impacts of Abortion Clinic Structures and Processes: A Qualitative Analysis of Women's Negative Experience of Abortion Clinics, 85 *J. Contraception* 204, 204 (2012) (showing that, contrary to popular negative characterizations of abortion, women are overall highly satisfied with the abortion care they receive).

contrast to the demographics of women obtaining abortions in reality.<sup>57</sup> They recognize that this may be attributable to the fact that media underrepresents people of color and lower-income people generally.<sup>58</sup> But, in addition, the fictional women often do not already have children, while most women who have abortions do.<sup>59</sup> The authors observe that “[a]lthough no research suggests that parents are underrepresented on television, they were notably underrepresented among characters obtaining an abortion.”<sup>60</sup> More generally, television portrayals of women choosing to have an abortion do not represent women as full, complete characters but rather present them as women with one narrow reason for the abortion.<sup>61</sup> And this unrepresentative picture contributes to abortion stigma. As others have explained, “over-simplifying and denying the frequency with which abortion occurs is fundamental to the creation of [abortion stigma]. In addition, widespread practices of under-reporting and intentionally misclassifying abortion procedures by women and providers alike results in misconceptions about prevalence.”<sup>62</sup>

Moreover, women confronting unintended pregnancies in mainstream media often decide to continue the pregnancy, even in circumstances in which the decision is far from the obvious one. *Juno* and *Knocked Up*, both released in 2007, are two relatively recent examples. The larger point is that “[b]y consistently making abortion the option that dare not speak its name, no matter how rational a choice it might be, its validity and acceptability is diminished.”<sup>63</sup>

At other times, abortion is not even mentioned or highlighted as an option, but completely avoided. Well-established, successful, and edgy media creators report resistance to plot lines that include abortion. Shonda Rhimes, creator of *Grey’s Anatomy*, *Private Practice*, and *Scandal*, describes a conflict with ABC in 2004 in the first season of *Grey’s Anatomy*.<sup>64</sup> Rhimes planned for a lead character, Dr. Christina Yang, played by Sandra Oh, to get pregnant and choose to have an abortion.<sup>65</sup> Rhimes reports, “[T]he network freaked out a little bit. No one told me I couldn’t do it, but they could not point to an instance in which anyone

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57. See Sisson & Kimport, Facts and Fictions, *supra* note 51, at 448.

58. *Id.*

59. *Id.*

60. *Id.* at 449.

61. *Id.* at 448.

62. Anuradha Kumar et al., Conceptualising Abortion Stigma, 11 *Culture, Health & Sexuality* 625, 629 (2009).

63. Sarah Erdreich, More than Forty Years After Maude, Abortion Remains Taboo on TV, Talking Points Memo (May 19, 2014, 6:16 AM), <http://talkingpointsmemo.com/caffe/cristina-yang-grey-s-anatomy-abortion> [<http://perma.cc/TZ7N-8J2U>].

64. Laura Stampler, Why 2014 Should Be the Year We Talk About Abortion on TV, Time (Jan. 23, 2014), <http://entertainment.time.com/2014/01/23/why-2014-should-be-the-year-we-talk-about-abortion-on-tv/> [<http://perma.cc/A9LD-3EFX>].

65. See *id.*

had. And I sort of panicked . . . ”<sup>66</sup> Instead, Dr. Yang suffered an ectopic pregnancy, where a fertilized egg implants outside of the uterus.<sup>67</sup> Eventually, in 2011, Dr. Yang became pregnant again, and the character did choose to have an abortion.<sup>68</sup>

Similarly, Jean Passanante, a veteran writer of daytime dramas, including *The Young and the Restless* and *As the World Turns*, reports, “I’ve never gotten away with telling a story of any character having an abortion,” even though her shows present “plenty of romance and sex.”<sup>69</sup> This, she asserts, is “largely due to the reluctance of advertising sponsors and the shows’ corporate owners to affiliate themselves with such a hot-button subject during early broadcast hours.”<sup>70</sup>

Our impressionistic sense is that since 2014 more women have had abortions in popular media. For example, the movie *Obvious Child*, released in 2014, presents a sympathetic portrait of a stand-up comic who has an abortion.<sup>71</sup> In the 2015 movie *Grandma*, Lily Tomlin starred as a cash-strapped grandmother raising money from friends for her granddaughter’s abortion.<sup>72</sup> And in a recent season of *Girls*, character Adam Sackler’s girlfriend, Mimi-Rose Howard, has an abortion and informs Adam of the abortion after the fact, communicating to him that it was not a practical time in her life to have a child.<sup>73</sup> In a November 2015 episode of *Scandal*, lead character Olivia Pope, played by Kerry Washington, had an abortion, marking the first time a black female lead character had an abortion, notwithstanding the fact that black women represent a disproportionate share of the women obtaining abortions in the United States.<sup>74</sup>

66. See *id.* (internal quotation marks omitted).

67. See *id.*

68. See *id.*

69. The Double XX Files: Health and Justice for Women, Hollywood, Health & Soc’y (Apr. 17, 2015), <http://hollywoodhealthandsociety.org/events/double-xx-files-health-and-justice-women> [<http://perma.cc/4ZG2-MN2Z>] (quoting Passanante).

70. *Id.*

71. See Karley Sciortino, ‘Abortion Rom-Com’ *Obvious Child* Is Important—Because It’s So Ordinary, *Guardian* (June 12, 2014, 4:41 PM), <http://www.theguardian.com/film/2014/jun/12/obvious-child-rom-com-jenny-slate-ordinary> [<http://perma.cc/G8W9-73Y9>] (noting that “in films and on TV, [abortion] is still largely uncharted, controversial territory”).

72. See A. O. Scott, Review: In ‘Grandma,’ Lily Tomlin Energizes an Intergenerational Road Trip, *N.Y. Times* (Aug. 19, 2015), <http://www.nytimes.com/2015/08/21/movies/review-in-grandma-lily-tomlin-energizes-an-intergenerational-road-trip.html> (on file with the *Columbia Law Review*).

73. See Lauren Duca & Emma Gray, ‘Girls’ Finally Went There with an Abortion Storyline, *Huffington Post* (Feb. 22, 2015, 9:35 PM), [http://www.huffingtonpost.com/2015/02/22/girls-abortion-storyline\\_n\\_6716744.html](http://www.huffingtonpost.com/2015/02/22/girls-abortion-storyline_n_6716744.html) [<http://perma.cc/7BB2-5UMK>] (last updated Feb. 26, 2015).

74. See Rachel Larris, Kerry Washington: TV Should Show Moments like Abortions to Reduce Stigma, *Media Matters for Am.* (Jan. 28, 2016, 4:29 PM), <http://mediamatters.org/blog/2016/01/28/kerry-washington-tv-should-show-moments-like-ab/>

That said, recent studies have demonstrated that the lack of women confronting unplanned pregnancies in television and film is part of a larger problem of a relative lack of women being represented in speaking roles. In fact, an empirical study published by the Annenberg School in 2016 concluded that across scripted media platforms, male speaking roles outnumber female speaking roles by two to one.<sup>75</sup> This study also showed that to the extent women were featured, they were disproportionately sexualized in comparison to men.<sup>76</sup> A separate study of over 2,000 screenplays documented that women have the lead role—that is, the most dialogue—in only 22% of films.<sup>77</sup> Studies, including the Annenberg study, have documented similar problems with regard to the lack of prominent roles depicting racial minorities.<sup>78</sup>

Hopefully the observed uptick in the number of more representative popular media portrayals of women confronting unplanned pregnancies will have an impact on legal protections for reproductive choice. As popular depictions of unplanned pregnancies over the past several decades have remained relatively closeted or misrepresentative, the legal protections for abortion rights have, on the whole, diminished, the Supreme Court's June 2016 decision in *Whole Woman's Health v. Hellerstedt* notwithstanding.<sup>79</sup>

In 1973 the Supreme Court confronted in *Roe v. Wade* whether women have a constitutional right to obtain an abortion and held that the right of privacy guaranteed by the Due Process Clause “is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.”<sup>80</sup> The Court recognized that state-forced maternity could

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208247 [<http://perma.cc/QA2S-9T7S>]; see also Maureen Ryan, ‘Scandal’ & More TV Shows Tackle Abortion Issue Head-On, *Variety* (Apr. 28, 2016, 10:00 AM), <http://variety.com/2016/voices/columns/scandal-abortion-greys-anatomy-transparent-nashville-1201760340/> [<http://perma.cc/P25P-MA78>].

75. See Smith et al., *supra* note 44, at 1–2.

76. *Id.* at 2 (“The sexualization of characters on screen also was assessed. Females were more likely than males to be shown in sexy attire (Females=34.3% vs. Males=7.6%), with some nudity (Females=33.4% vs. Males=10.8%) and physically attractive (Females=11.6% vs. Males=3.5%).”).

77. See Hannah Anderson & Matt Daniels, *Film Dialogue*, *Polygraph* (Apr. 2016), <http://polygraph.cool/films/index.html> [<http://perma.cc/L74E-Y2EF>].

78. See, e.g., Smith et al., *supra* note 44, at 7 (concluding that “most stories fail to reflect or match the demographic composition of the [United States]” and that “28.3% of all speaking characters were from underrepresented racial/ethnic groups, which is below (-9.6%) the proportion in the U.S. population”).

79. No. 15-274, 2016 WL 3461560, at \*6 (U.S. June 27, 2016) (finding certain Texas statutory provisions regulating abortion to be unconstitutional). That said, public opinion regarding the legality of abortion has remained relatively stable over time, with 75% saying it should be legal under all or some circumstances in 1975 and 79% holding such views in 2016. Abortion, Gallup, <http://www.gallup.com/poll/1576/abortion.aspx> (on file with the *Columbia Law Review*) [hereinafter *Abortion, Gallup*] (last visited Aug. 18, 2016).

80. 410 U.S. 113, 153 (1973). The *Roe* decision built off Supreme Court decisions in the late 1960s and early 1970s recognizing the right to privacy over the decision to use

inflict several kinds of harm on a woman, including medical harm from the pregnancy itself, financial harm from the cost of raising additional offspring, psychological harm, and, somewhat backwardly, social harm in the form of stigma if a single woman was forced to raise a child on her own.<sup>81</sup> Because the woman's right to choose whether to bear a child is fundamental, "regulation limiting these rights may be justified only by a 'compelling state interest' . . . [and] legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."<sup>82</sup>

But the Court concluded that the woman's right to have an abortion was not absolute and that the state's interests in prenatal life may override the woman's right when the fetus has developed to the point of viability.<sup>83</sup> With regard to the state's interest in the potential life, the Court held that states may prohibit abortion only post-viability (roughly the beginning of the final trimester), except when necessary to preserve the life or health of the woman.<sup>84</sup> The Court held that the Texas law at issue in *Roe* criminalizing abortion except when necessary to save the life of the mother and without regard to the stage of the pregnancy was unconstitutional because it swept too broadly.<sup>85</sup>

But since *Roe*, the Court and Congress have failed to consistently protect abortion rights. Quite the opposite. For example, in 1976 and in several years since, Congress passed the so-called Hyde Amendment, an appropriations rider that excludes funding for abortions through Medicaid.<sup>86</sup> The Supreme Court then rejected an equal protection challenge to the Hyde Amendment in the 1980 case of *Harris v. McRae*.<sup>87</sup>

Thereafter, in the 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court abandoned the relatively clear and protective principles of *Roe* in favor of the "undue burden" test.<sup>88</sup> Under this framework, while the government could not prohibit abortion pre-viability, it could "enact rules and regulations designed to encourage [women] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term."<sup>89</sup> According to the Court, "Only where state

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contraception for both married couples and single people. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

81. See *Roe*, 410 U.S. at 153.

82. *Id.* at 155.

83. See *id.* at 164–65.

84. See *id.* at 163–64.

85. See *id.* at 164.

86. Hyde Amendment, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

87. 448 U.S. 297, 324–26 (1980).

88. 505 U.S. 833, 874 (1992) (plurality opinion).

89. *Id.* at 872.

regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."<sup>90</sup>

A finding of an undue burden is "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."<sup>91</sup> As an abstract standard, this might have been comprehensible, but as applied in *Casey*, it was not.

Applying this standard, the Court in *Casey* overturned the spousal notification requirement at issue.<sup>92</sup> After decades of litigation between Pennsylvania and pro-choice advocates, Pennsylvania had adopted a spousal-notification law that affected relatively few women overall.<sup>93</sup> To avoid the spousal-notification requirement, women only had to tell their doctors that they were not married, that they were not pregnant by their husband, or that their husband was abusive or not available.<sup>94</sup> Nonetheless, the Court found this to be an undue burden, relying on the common reality of domestic violence and concluding that "[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."<sup>95</sup>

But the Court upheld Pennsylvania's informed-consent requirement, twenty-four-hour waiting period, and parental-consent requirement (among other provisions), under a standard that demands plaintiffs show these requirements would be an undue burden for "a large fraction" of the women affected.<sup>96</sup> The trial court had found that the cumulative effect of the in-person informed-consent requirement with the twenty-four-hour waiting period would have a serious adverse impact on many women.<sup>97</sup> In Pennsylvania, as in most other states, abortion providers are concentrated in urban areas. They often only operate a few days per week. Women with kids, jobs, school obligations, and other commitments confront difficulties in traveling long distances for two separate appointments, the first for giving "informed consent" and then the second for a

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90. *Id.* at 874.

91. *Id.* at 877.

92. *Id.* at 895.

93. *Id.* at 894.

94. *Id.* at 887.

95. *Id.* at 894; see also *id.* at 886–87 (disagreeing with the district court that the "particularly burdensome" effects of the requirement on some women necessitate its invalidation, as the fact that the burden falls on a particular group does not sufficiently show it to be a substantial obstacle even to that group (quoting *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990))).

96. See *id.* at 894–95.

97. See *id.* at 937 (Blackmun, J., dissenting) ("The District Court found that the mandatory 24-hour delay could lead to delays in excess of 24 hours, thus increasing health risks . . . , travel time, exposure to further harassment, and financial cost[,] . . . [posing] especially significant burdens on women living in rural areas . . .").



procedure. Despite the trial court findings, the Supreme Court upheld the informed-consent, waiting-period, and parental-consent requirements.

The core *Casey* holdings are flatly inconsistent. Should we judge the legitimacy of a restriction on liberty on the basis of its impact on a particular person or rather on whether it limits the liberty of a substantial portion of the people it affects? Since *Casey*, lower courts have tended to follow the requirement that plaintiffs show an undue burden on a large group of those affected, ignoring the suggestion in *Casey*'s invalidation of the spousal-consent requirement that an impact on an individual counts as a constitutional violation.<sup>98</sup> Significantly, as noted at the outset, from the time *Casey* was issued twenty-four years ago to the start of 2016, the Supreme Court had only once overturned abortion regulations as unduly burdensome, while the number and reach of such restrictions continues to grow.<sup>99</sup>

That case was *Stenberg v. Carhart* in 2000, in which the Supreme Court overturned a state "partial birth" abortion regulation in a 5-4 decision.<sup>100</sup> The Court found that the regulation was so broadly and vaguely worded as to risk felony sanctions for doctors performing even the most common forms of abortion, thereby imposing an undue burden.<sup>101</sup> But thereafter, in the 2007 case of *Gonzales v. Carhart*, the Supreme Court upheld a federal law banning intact-dilation-and-extraction procedure regardless of the viability of a fetus and the health of the woman.<sup>102</sup>

This summer in *Whole Woman's Health v. Hellerstedt*, the Court overturned Texas laws that required medical facilities where abortions are performed to meet standards for ambulatory surgical centers and required doctors that perform abortions to have admitting privileges at local hospitals.<sup>103</sup> These requirements were imposed even though abortion patients infrequently require hospitalization and doctors who perform abortions "would be unable to maintain admitting privileges . . . because the fact that abortions are so safe meant that providers were unlikely to have any patients to admit."<sup>104</sup> The admitting-privileges requirement resulted in the closure of roughly half of Texas abortion clinics, preventing many women from exercising their constitutional freedom to have an abortion.<sup>105</sup>

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98. See Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 *Yale J.L. & Feminism* 317, 355–56 (2006).

99. See Guttmacher Inst., *Overview*, *supra* note 6 (describing the "lattice work" of abortion regulations and documenting the hundreds of new abortion regulations passed from 2011 to 2015).

100. 530 U.S. 914, 945–46 (2000).

101. See *id.*

102. 550 U.S. 124 (2007).

103. See No. 15-274, 2016 WL 3461560, at \*1–2 (U.S. June 27, 2016).

104. *Id.* at \*19.

105. *Id.* at \*20.

In striking down these provisions, the Court clarified *Casey* in at least two respects. First, the Court held that in determining whether an undue burden is present for a “‘large fraction’ . . . the relevant denominator is ‘those [women] for whom [the provision] is an actual rather than an irrelevant restriction,’” which is “a class narrower than ‘all women,’ ‘pregnant women,’ or even ‘the class of women seeking abortions identified by the State.’”<sup>106</sup> Second, the Court clarified that judicial proceedings play an important role in determining whether evidence actually justifies the abortion regulation at issue and that courts are not required to accept the state’s *carte blanche* assertion that the regulation confers a medical benefit. Instead, courts are to “consider the burdens a law imposes on abortion access together with the [purported] benefits those laws confer.”<sup>107</sup>

Notwithstanding the significance of *Whole Woman’s Health*, the right to abortion remains under constant pressure and erosion, and the Texas regulations exemplify the national trend away from reproductive freedom over the past several decades.<sup>108</sup> As highlighted, this erosion corresponds with a relative dearth of representative portrayals of abortion in scripted media.

## II. COMING OUT IN DAILY LIFE

The rough correlation outlined in Part I between the increase in sympathetic media portrayals of lesbian and gay characters and the increase in legal protections, juxtaposed to the contrasting trend with regard to abortion, supplements existing analyses identifying “coming out” as centrally important to the changes in public attitudes and constitutional doctrine toward LGBT people.<sup>109</sup> Many openly queer people have complex, moving stories of coming out to friends, parents,

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106. *Id.* at \*28 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894–95 (1992) (plurality opinion)).

107. *Id.* at \*16.

108. The recent challenge to the scope of the Affordable Care Act’s contraceptive-coverage mandate, and the Supreme Court’s subsequent nondecision on the case, further highlights the trend toward judicial skepticism of women’s reproductive rights. See generally Brief for the Respondents, *Zubik v. Burwell*, 136 S.Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191), 2016 WL 537623. And despite the many predictions that other Targeted Regulation of Abortion Provider laws are finished after *Whole Woman’s Health*, many other state-level restrictions may remain unaffected by the decision. See Danielle Paquette, *Planned Parenthood Announces It Will Fight Abortion Laws in Eight States After Supreme Court Ruling*, Wash. Post: Wonkblog (June 30, 2016), <http://www.washingtonpost.com/news/wonk/wp/2016/06/30/planned-parenthood-announces-it-will-fight-abortion-laws-in-eight-states-after-supreme-court-ruling/> [http://perma.cc/TU8Z-BVFL]. Moreover, as the fallout from *Brown v. Board of Education*, *Roe*, *Windsor*, and *Obergefell* demonstrates, protection of constitutional rights requires constant vigilance.

109. See, e.g., Steven Seidman, *Beyond the Closet: The Transformation of Gay and Lesbian Life* (2002).

teachers, students, bosses, complete strangers, and others. As often as the experience is joyful, it is painful, and it is not a singular event.<sup>110</sup> Nonetheless, LGBTQ people coming out has been centrally important to political change in both legislative and constitutional disputes.

Commenting on the 2003 decision in *Goodridge* establishing marriage equality in Massachusetts, former Congressman Barney Frank noted: “[I]f the Massachusetts constitution could have been amended the day after, it would have been.”<sup>111</sup> But as time passed and same-sex couples got married, marriage “bec[a]me boring” and thereby acceptable, with the new question being: “What do you get your lesbian neighbors from Crate and Barrel?”<sup>112</sup> As Professor William Eskridge has explained, the LGBTQ rights movement relied on people coming out of the closet not just to change social attitudes but also to garner new movement members—and members with votes.<sup>113</sup> According to Eskridge, “Anecdotal evidence of changed attitudes (‘I came out to my Mother, and she said: ‘I used to fear you people but now realize that gay is great!’”) will not suffice unless widely experienced and reported.”<sup>114</sup> Relying on contact hypothesis or theory, Professor Suzanne Goldberg has similarly argued that coming out plays an important role in breaking down what she labels “sticky intuitions” regarding queer individuals.<sup>115</sup>

The importance of coming out to the LGBTQ movement is further suggested by the now twenty-eight-year-old tradition of National Coming Out Day, promoted by the Human Rights Campaign precisely because “[w]hen people know someone who is LGBTQ, they are far more likely to support equality under the law. Beyond that, our stories can be powerful to each other.”<sup>116</sup> Indeed, one of us (Professor Scott Skinner-Thompson) recalls fondly the personal experience of coming out as gay to his family but also the profound political impact it had on his

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110. See, e.g., Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* 58–65 (2006).

111. Barney Frank, Representative of Mass., Keynote Address at the Williams Institute 4th Annual Update on Sexual Orientation Law and Public Policy (May 9, 2005), <http://www.uctv.tv/shows/Sexual-Orientation-Law-2005-4th-Annual-Update-on-Sexual-Orientation-Law-and-Public-Policy-Part-One-9308> [<http://perma.cc/GP7U-CSD2>].

112. *Id.*

113. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419, 461–63 (2001).

114. *Id.* at 463; see also William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2443 (1997) (observing that “coming out” is a decidedly political act and one that builds on feminist notions that the personal is political).

115. Suzanne Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. Rev. 1375, 1409–10 (2010).

116. National Coming Out Day, Human Rights Campaign, <http://www.hrc.org/resources/national-coming-out-day> [<http://perma.cc/9PFM-SPJ5>] (last visited Aug. 17, 2016).

previously conservative, Southern-reared father. There are thousands, if not millions, of analogous anecdotes.<sup>117</sup>

One tale regarding the importance of coming out for LGBTQ rights has become something of lore. When deliberating how to decide *Bowers v. Hardwick*, Justice Powell allegedly said that he did not know any gay people even though one of his clerks was gay—but closeted.<sup>118</sup> Many have speculated about whether *Bowers* would have been decided differently had the clerk come out to Justice Powell.<sup>119</sup>

Similarly, women speaking out about their personal experiences of abortion have also played an important role in the struggle for reproductive freedom.<sup>120</sup> Members of the reproductive freedom movement have long recognized the importance of such stories. For example, in 1969, when the all-male New York legislature debated the bill that eventually legalized abortion in that state in 1970, the Redstockings, a self-proclaimed radical feminist group, protested the absence of women in the conversation and organized speak-outs in which women told stories of their own abortions.<sup>121</sup> And in the inaugural issue of the feminist *Ms.* magazine in 1972, fifty-three famous women signed a statement saying that they had had an abortion.<sup>122</sup>

As another example, in 1977, Joseph A. Califano, President Jimmy Carter's Secretary of the Department of Health, Education, and Welfare, was an honored guest at New York University School of Law. He was openly opposed to abortion and had been quoted on *Meet the Press* saying

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117. See, e.g., It Gets Better Project, <http://www.itgetsbetter.org/> [<http://perma.cc/X7KN-DZLH>] (last visited Aug. 17, 2016) (exhibiting videos of LGBTQ youth sharing their “coming out” experiences).

118. Kenji Yoshino, *Covering*, 111 *Yale L.J.* 769, 820 (2002) (“In 1986, Justice Powell’s gay clerk failed to come out to his Justice before oral argument in *Bowers v. Hardwick*. After confiding to his clerk that he had never met a homosexual, Powell went on to cast the deciding vote in *Bowers*.”).

119. The clerk, C. Cabell Chinnis, has suggested Justice Powell had met his boyfriend and must have known he was gay. According to Chinnis, Justice Powell may have disclaimed knowing any homosexuals to protect Chinnis and other gay clerks. Adam Liptak, *Exhibit A for a Major Shift: Justices’ Gay Clerks*, *N.Y. Times* (June 8, 2013), <http://www.nytimes.com/2013/06/09/us/exhibit-a-for-a-major-shift-justices-gay-clerks.html> (on file with the *Columbia Law Review*).

120. The same holds true for other marginalized identities. For example, members of the HIV rights movement, such as the Treatment Action Campaign (TAC) in South Africa, have often utilized t-shirts declaring that one is “HIV Positive” to help destigmatize the disease. See, e.g., Treatment Action Campaign, *Fighting for Our Lives: The History of the Treatment Action Campaign* 39 (2011), <http://tac.org.za/files/10yearbook/index.html> (on file with the *Columbia Law Review*) (“TAC’s HIV-positive t-shirts were printed in 1999 as a tool to break down the secrecy, shame and stigma that surrounded HIV.”).

121. See Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claim that Engendered Roe*, 90 *B.U. L. Rev.* 1875, 1880 (2010) (describing the role of the Redstockings).

122. Barbaralee D. Diamonstein, *We Have Had Abortions, Ms.*, *Spring 1972*, at 34–35, <http://images.nymag.com/images/2/promotional/11/11/week1/mrs-abortionsb.pdf> [<http://perma.cc/L3GE-AWFB>].

that he had “never known a woman who wanted an abortion or who was happy about having an abortion.”<sup>123</sup> Women at NYU Law organized to greet him.<sup>124</sup> Many in the audience held up hangers, and some presented a large pro-choice banner.<sup>125</sup> During the Q&A, many women who had abortions, before and after *Roe*, told their stories, and the exchange was covered on the national evening news.<sup>126</sup>

More recently, in 2014, an online campaign entitled the “1 in 3 Campaign” featured videos of women telling the stories of their own abortions.<sup>127</sup> Another online campaign organized by a group called UltraViolet educates people about the fact that many women have abortions and that most of them are mothers of one or more children.<sup>128</sup> In September 2015, activists launched an effort to make abortion stories go viral through the hashtag “#ShoutYourAbortion.”<sup>129</sup>

Significantly, over 100 lawyers (including coauthor Professor Sylvia Law) submitted an amicus brief to the Supreme Court in the *Whole Woman’s Health* challenge to Texas’s abortion regulations, testifying to the beneficial role the decisions to have abortions had in their lives.<sup>130</sup> For many of these women, the ability to have an abortion allowed them to pursue their careers in the law.<sup>131</sup>

Overall, however, there are relatively few examples of women publicly discussing their abortion experiences, which highlights the

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123. Joseph A. Califano, *Governing America: An Insider’s Report from the White House and the Cabinet* 79 (1981).

124. See *id.*

125. See *id.*

126. See *id.* at 79–80. Secretary Califano recalled one woman in particular:

[A]bout halfway down the aisle in the NYU auditorium, a woman rose to the microphone . . . “Look at me, Mr. Califano,” she shouted with defiant emotion. “I want you to see a woman who wanted an abortion. I want you to see a woman who was happy at having an abortion. I want you to see a woman who had an abortion two weeks ago and who intends to have another abortion . . . I want you to go back to Washington knowing that there are women who are happy who have had abortions, knowing that there are women who want abortions. I don’t ever want you to make a statement like the one you made saying that you have never known a woman that wanted to have an abortion or never known a woman who was happy about having an abortion. You have now met one.

*Id.* at 79–80.

127. Advocates for Youth, *1 in 3 Campaign*, <http://www.lin3campaign.org/> (on file with the *Columbia Law Review*) (last visited Aug. 16, 2016).

128. Abortion: End the Pretending, UltraViolet, [http://act.weareultraviolet.org/sign/abortion\\_facts](http://act.weareultraviolet.org/sign/abortion_facts) [<http://perma.cc/XCB4-YYKX>] (last visited Aug. 16, 2016).

129. Mission, Shout Your Abortion, <http://shoutyourabortion.com/mission/> [<http://perma.cc/N6S7-URL5>] (last visited Aug. 16, 2016).

130. See Brief of Janice Macavoy, Janie Schulman, and Over 110 Other Women in the Legal Profession Who Have Exercised Their Constitutional Right to an Abortion as Amici Curiae in Support of Petitioners at 2, *Whole Woman’s Health v. Hellerstedt*, No. 15-274, 2016 WL 3461560 (U.S. June 27, 2016) (No. 15-274), 2016 WL 74949.

131. See *id.* at 4.

general rule: Stigma has continued to limit discussion of abortion stories in public discourse.<sup>132</sup> So powerful is the stigma associated with abortion that allegedly a hospital that provides abortion services has even attempted to silence one of its doctors from openly advocating for reproductive justice.<sup>133</sup> Anecdotally, in our experience, women do not routinely share stories about abortion. We separately count as friends many women colleagues, students, coconspirators in various campaigns, and neighbors. With many, we know personal information about their relations with kids, parents, partners, siblings, health problems, financial issues, as well as views about culture, politics, and the nature of the universe. But, with some exceptions, we do not know the abortion stories of many people we know very well in other ways.

Beyond our own experiences, Professor Sarah Cowan has documented how tightly abortion is held secret. In the data Cowan examined, “[t]hree-quarters of Americans say they know someone who had a miscarriage” while only “half report knowing someone who had an abortion.”<sup>134</sup> According to Cowan, “[g]iven that abortion is more common than miscarriage . . . this is a striking indication that abortion secrets have not been communicated as often as miscarriage secrets.”<sup>135</sup> This may explain why public perceptions regarding the prevalence of abortion, and its safety, are inaccurate. As a recent poll concluded, Americans underestimate the number of women who have exercised their rights to reproductive choice and overestimate the safety risks of having an abortion.<sup>136</sup>

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132. See, e.g., Katha Pollitt, *How to Really Defend Planned Parenthood*, N.Y. Times (Aug. 5, 2015), <http://www.nytimes.com/2015/08/05/opinion/how-to-really-defend-planned-parenthood.html> (on file with the *Columbia Law Review*) (arguing that women need to come out of the closet about their abortions to help overcome stigma); Meaghan Winter, *My Abortion*, N.Y. Mag. (Nov. 10, 2013), <http://nymag.com/news/features/abortion-stories-2013-11/> [<http://perma.cc/FD3D-YBSD>] (noting that while one in three women will have had an abortion by the time they are forty-five, stigma continues to stifle personal discussion of the topic). It is not just abortion that is silenced but reproduction more generally. In 2015, Mark Zuckerberg, CEO of Facebook, posted that his wife was pregnant after experiencing three miscarriages. Dino Grandoni, *Mark Zuckerberg Posts on Facebook: After Miscarriages, We’re Having a Baby*, N.Y. Times: Bits (July 31, 2015), <http://bits.blogs.nytimes.com/2015/07/31/the-zuckerbergs-announce-theyre-expecting-a-baby-after-a-personal-struggle/> (on file with the *Columbia Law Review*). Within an hour, he received 335,000 responses, mostly thanking him for being open about a common experience that is ordinarily stigmatized. *Id.*

133. See Erik Eckholm, *Doctor, Warned to Be Silent on Abortions, Files Civil Rights Complaint*, N.Y. Times (May 2, 2016), <http://www.nytimes.com/2016/05/03/us/doctor-warned-to-be-silent-on-abortion-files-civil-rights-complaint.html> (on file with the *Columbia Law Review*).

134. Sarah K. Cowan, *Secrets and Misperceptions: The Creation of Self-Fulfilling Illusions*, 1 *Sociological Sci.* 466, 475 (2014).

135. *Id.*

136. Sarah Kliff, *We Polled 1,060 Americans About Abortion. This Is What They Got Wrong*, Vox (Feb. 29, 2016), <http://www.vox.com/a/abortion-statistics-opinions-2016/poll> [<http://perma.cc/C2RK-8MSL>] (describing poll results and noting that misperceptions

Of course, while the above discussion suggests that public discussion of coming out of the closet and media portrayals of both LGBTQ individuals and unplanned pregnancies can have a meaningful impact on public and judicial attitudes, it is undeniable that coming out regarding one's abortion history is a deeply personal decision over which each individual should exercise control. As we have suggested elsewhere, just as the right to privacy supports the right to have an abortion, privacy regarding the fact of an abortion must also reside completely with each individual woman in order for that decision to be meaningful in practice.<sup>137</sup>

It is also worth noting that coming out about abortion may be different than coming out about sexual orientation in important ways.<sup>138</sup> For many people, sexual orientation is a status and is stable over time. By contrast, an unintended pregnancy is an event that will be resolved in one way or another in a short period, albeit with a potentially profound impact on a woman's life. Sexual orientation can influence social relations over a lifetime, while an unintended pregnancy does not necessarily do so.

Nonetheless, the rough correlation between an increasing number of people coming out both on and off the screen and the cementing of legal protections for lesbian and gay individuals, in light of the relative dearth of social discussion regarding experiences with abortion, suggests that broader exposure to positive stories regarding the impact of abortion on individuals' lives may have a meaningful effect on legal protection for reproductive choice.<sup>139</sup> Coming out about abortion is personal, but cumulative public discussion can be politically powerful.<sup>140</sup>

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may "relate to the fact that abortion rarely gets discussed, so it seems shadowy and unknown").

137. See, e.g., Scott Skinner-Thompson, *Outing Privacy*, 110 Nw. U. L. Rev. 159, 211 (2015) ("The right to limit the government's ability to disseminate and collect sexual or medical information is closely related to the subject matter of these fundamental rights. In order for many of these fundamental rights to have real, practical meaning, . . . privacy over intimate information seems required.").

138. See Goldberg, *Multidimensional Advocacy*, supra note 45, at 28 (comparing the experience of coming out about one's sexuality with coming out about an abortion).

139. See Irin Carmon, *Amid Backlash to Anti-Gay Bills, Abortion Rights Falter*, MSNBC (Apr. 2, 2016, 1:00 PM), <http://www.msnbc.com/msnbc/amid-backlash-anti-gay-bills-abortion-rights-falter> [<http://perma.cc/UK7H-QUTP>] (observing that while anti-LGBT bills continue to garner significant public opposition, restrictions on abortion rights incite less attention, perhaps because people may not know they are close with someone who has had an abortion); Nicholas Kristof, *Opinion, Why Are 2016 Candidates Ignoring Women's Health?*, N.Y. Times (Apr. 28, 2016), <http://www.nytimes.com/2016/04/28/opinion/candidates-lets-talk-about-womens-health.html> (on file with the *Columbia Law Review*).

140. David J. Phillips, *From Privacy to Visibility*, 23 Soc. Text 95, 97 (2005) ("Coming out' is, then, an act both of personal empowerment and of political claim staking.").

### III. ALTERNATIVE EXPLANATIONS FOR THE EMBRACE OF LGBT RIGHTS AND THE EROSION OF REPRODUCTIVE FREEDOM

What of other explanations for the embrace of lesbian, gay, and bisexual rights and the relative erosion of reproductive freedom? This Part considers three alternative explanations for the progression of LGBTQ rights and the erosion of abortion rights: (1) doctrinal differences, (2) the ability of the LGBTQ rights movement to frame its equality debate in terms of love and relationships, and (3) the belief among some that abortion involves the deliberate destruction of potential human life.

One may be inclined to think that there are doctrinal reasons that account for the differing trajectories of the two movements. While a full accounting of the pertinent constitutional doctrine is beyond the scope of this Piece, at least at a broad level reproductive choice seems no less grounded in core constitutional values than rights for sexual minorities. For example, respect for women's reproductive choices, like respect for consensual same-sex sexual relations, is rooted in respect for decisional privacy.<sup>141</sup> Similarly, both LGBT rights and reproductive freedom implicate important equality principles.<sup>142</sup> And opposition to women's reproductive choice and LGBT rights are both solidly grounded in patriarchal assumptions about gender that were historically assumed to be true and are now culturally and constitutionally suspect.<sup>143</sup>

Viscerally, there may also be reason to believe that by focusing on marriage, the LGBTQ rights movement has been able to frame queer equality in terms of love and relationships. While undoubtedly a useful rhetorical frame, the recent public backlash to laws, such as North Carolina's policing transgender bathroom use, suggests that support for LGBTQ rights is deeply rooted in something more than just sympathy toward relationship recognition.<sup>144</sup> Admittedly, that backlash was far from

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141. Compare *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that the right to privacy includes the ability to engage in same-sex sexual conduct), with *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (recognizing that married couples possess a right to privacy over the decision to use contraception).

142. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade**, 63 N.C. L. Rev. 375 (1985) (arguing that state control of reproduction implicates gender equality); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 425 (1984) (same); Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. Rev. Discourse 160, 162–63 (2013), <http://uclalawreview.org/pdf/discourse60-11.pdf> [<http://perma.cc/VRZ4-PA7R>] (documenting that abortion rights decisions rest firmly on equality principles).

143. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 197.

144. See Scott Cacciola & Alan Blinder, *N.B.A. to Move All-Star Game from North Carolina*, N.Y. Times (July 21, 2016), <http://www.nytimes.com/2016/07/22/sports/basketball/nba-all-star-game-moves-charlotte-transgender-bathroom-law.html> (on file with the *Columbia Law Review*).



universal and, as noted earlier, transgender individuals face significant threats to their very survival.<sup>145</sup>

One obvious potential explanation for why rights to reproductive freedom are less respected than LGBT rights, legally and culturally, is that abortion involves the deliberate destruction of potential human life. Certainly protection of innocent human life is a main message of those who oppose reproductive choice.<sup>146</sup>

But one difficulty with protection of preborn life as an explanation for reduced abortion protections is that the culture and law do not reflect a belief that human life begins at conception. Abortion was legal until the midnineteenth century, when the medical profession successfully lobbied to prohibit a form of medical practice dominated by their competitors.<sup>147</sup> Even when abortion was banned, every state allowed exceptions inconsistent with the notion that the fetus was a full human.<sup>148</sup> Gallup reports that between 1975 and 2016, between 75% and 84% of Americans believed that abortion should be legal in some or all circumstances.<sup>149</sup> Three in ten American women have an abortion by age forty-five.<sup>150</sup> These widespread beliefs and practices suggest that most of us do not think that an embryo or a fetus is a full human being.

Moreover, even though the assertion that abortion is the murder of an innocent human being is a central claim of many of those who support restricting or denying abortion, few argue for punishment of women who engage in this form of purported murder. Donald Trump said, in response to questioning from Chris Matthews of MSNBC, that if abortions are banned, women who have them “should be subject to some form of punishment.”<sup>151</sup> To many, Trump’s comments “reflect the logical

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145. See Jaime M. Grant et al., Nat’l Gay & Lesbian Task Force & Nat’l Ctr. for Transgender Equal., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 2–3* (2011), [http://www.transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf) [<http://perma.cc/K4Z6-H5GY>] (finding that among 6,450 transgender and gender-non-conforming people, 41% reported attempting suicide, compared to 1.6% of the general population; 90% reported experiencing harassment, mistreatment, or discrimination on the job and 47% reported an adverse job outcome).

146. See, e.g., Olivia G. Turner & Mary S. Balch, Nat’l Right to Life Comm., *Defending the Pro-Life Position & Framing the Issue by the Language We Use 4* (2014), <http://www.nrlc.org/uploads/WhenTheySayPacket.pdf> [<http://perma.cc/62XH-6L85>] (arguing that “[w]hen a woman is pregnant, science tells us that the new life she carries is a completely and fully new human being from the moment of fertilization”).

147. James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy 147–48* (1978).

148. *Roe v. Wade*, 410 U.S. 113, 141–43 (1973).

149. See Gallup, *supra* note 79.

150. Guttmacher Inst., *Induced Abortion*, *supra* note 52.

151. Matt Flegenheimer & Maggie Haberman, Donald Trump, Abortion Foe, Eyes ‘Punishment’ for Women, Then Recants, *N.Y. Times* (Mar. 30, 2016), <http://www.nytimes.com/2016/03/31/us/politics/donald-trump-abortion.html> (on file with the *Columbia Law Review*).

conclusion of equating a fetus with any other human being.”<sup>152</sup> While criminal law commonly varies punishment depending on circumstances, it is difficult to understand why a woman who purportedly commits such a serious crime would not be subject to some form of punishment. As a person running to become the Republican candidate for President, Trump understood that he was against abortion and that destroying a fetus was a serious wrong. Nonetheless, most of the leadership of the national anti-abortion movement quickly condemned Trump’s remarks, asserting that women are victims of abortion.<sup>153</sup> As such, the asserted moral status of the fetus provides a weak explanation for the disparity in constitutional protection of women’s claims to reproductive choice and LGBTQ people’s claims to equal dignity and respect. Finally, as Professor Russell Robinson has chronicled, the Supreme Court (and, in particular, Justice Kennedy) has advanced lesbian and gay rights in large part based on perceived animus toward that group, while failing to recognize animus present in cases raising issues of gender or race.<sup>154</sup> But why? Why does Justice Kennedy, and society more broadly, seem to accept sexual minorities but not women who avoid pregnancy?

We believe that the answer lies, at least partly, in the lack of general exposure to the importance of abortion to many women’s lives and the well-being of their already-existing children. As Part I illustrates, the importance of social exposure to abortion stories—through media portrayals and real-life discussion—cannot be underestimated. More needs to be done—and more attention needs to be paid—on both sides of the television screen to help destigmatize the right to reproductive freedom, lest that right continue to be eroded through legislative and judicial action.

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152. Nicholas Kristof, Opinion, Trump and Abortion, *N.Y. Times* (Mar. 30, 2016), <http://www.nytimes.com/2016/03/31/opinion/trump-and-abortion.html> (on file with the *Columbia Law Review*).

153. See, e.g., Christine Rouselle, Pro-Life Orgs Condemn Trump’s Comments on Punishing Women Who Have Abortions, *Townhall* (Mar. 30, 2016), <http://townhall.com/tipsheet/christinerouselle/2016/03/30/prolife-orgs-condemn-trumps-comments-on-abortion-n2141223> [<http://perma.cc/GMT6-J5ZW>].

154. Russell K. Robinson, Unequal Protection, 68 *Stan. L. Rev.* 151, 226–28 (2016). Others have advanced similarly compelling critiques of some of the reasoning in *Obergefell*. See, e.g., Yuvraj Joshi, The Respectable Dignity of *Obergefell v. Hodges*, 6 *Calif. L. Rev. Circuit* 117, 118 (2015), [http://www.californialawreview.org/wp-content/uploads/2015/11/Joshi\\_Respectable\\_Dignity.pdf](http://www.californialawreview.org/wp-content/uploads/2015/11/Joshi_Respectable_Dignity.pdf) [<http://perma.cc/8UX5-N8Q7>] (suggesting that *Obergefell* overlooks the dignity owed to single people or nonmarital relationships); Peter Nicolas, *Obergefell’s Squandered Potential*, 6 *Calif. L. Rev. Circuit* 137, 138 (2015), [http://www.californialawreview.org/wp-content/uploads/2015/11/Nicholas\\_Squandered\\_Potential.pdf](http://www.californialawreview.org/wp-content/uploads/2015/11/Nicholas_Squandered_Potential.pdf) [<http://perma.cc/VDX7-SLJD>] (critiquing the Court’s failure to declare sexual orientation a suspect classification).

## CONCLUSION

The right to reproductive choice is over forty years old and yet in an extremely precarious position. LGBTQ rights are arguably of a more recent vintage but are seemingly more robust. The correlation between popular media depictions of lesbian and gay individuals and legal protections for such individuals, coupled with the relative lack of representative abortion depictions, suggests that social exposure to women embracing their right to reproductive freedom may partially account for the different trajectories of the two movements. To influence judicial and political attitudes regarding the importance of reproductive freedom, advocates should continue efforts to destigmatize abortion, and those in the media should endeavor to more accurately represent the beneficial impacts of reproductive choice.