

(Re)criminalizing Abortion: Returning to the Political with Stories

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Abstract: Abortion stories have always played a powerful role in advancing women's rights. In the abortion sphere particularly, the personal is political. Following the Court's reversal of *Roe v. Wade*, abortion politics, and abortion storytelling, take on an even deeper political role in challenging the bloodless judicial language of *Dobbs* with the lived experience of women.

Most Americans see abortion as a medical procedure and agree that physicians must be involved (at least in nonmedication abortions) to safeguard health.¹ Justice Harry Blackmun in *Roe v. Wade* characterized abortion as a medical decision to be made by a physician — although over the years the core of *Roe* has been seen as implementing a decision made by the pregnant woman in consultation with her physician.² Nobel Prizes are not awarded for profoundly insightful judicial opinions, but this year's Nobel Prize in literature may have been at least partly awarded to French author Annie Ernaux for her powerful abortion memoir *Happening* because the Supreme Court's reversal of *Roe v. Wade* gave her story new political significance.³ Her story resonates with many other pre-*Roe* abortion stories and became more politically compelling in a nation with no *Roe*.⁴

Personal narratives have long been integral to abortion politics, but following *Dobbs*, personal stories from the pre-*Roe* and *Roe* eras will be retold and contrasted with the abstract and bloodless opinion by Justice Alito in *Dobbs*. We will, at least until women's autonomy rights are restored, be returned to a world of stories. While we await the inevitable “restoration” of *Roe*, personal stories rather than abstract judicial opinions will be used to illustrate and argue for reproductive rights.⁵ In this essay, I illustrate what may be termed the post-*Dobbs* restoration of storytelling as a central method of abortion rights advocacy by highlighting and comparing three particularly powerful and different types of stories: the personal abortion story of French author Annie Ernaux (*Happening*); followed by the manslaughter trial of Dr. Kenneth Edelin as sympathetically rendered by the state supreme court that reversed his conviction; and

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finally, John Irving's novel about the life of a Maine obstetrician, *The Cider House Rules*. I conclude by suggesting how personal narratives may help provide ammunition for advocates to find a path to restoring protection for access to abortion and other reproductive care.⁶

The Personal Abortion Story

Ernaux's writing is so intimate that a reader can feel like he (especially) is invading the author's privacy by reading her story. Yet, the author does not feel this way. As she noted in *Simple Passion*, "Naturally I feel no shame in writing these things because of the time which separates the moment when they are written —

It's an indescribable scene, life and death in the same breath. A sacrificial scene."¹⁰

Ernaux experienced painful contractions and her bleeding would not stop. "I thought I was going to die of a hemorrhage ... I needed a doctor immediately." The doctor treated her like a criminal. "He grabbed my chin: 'Why did you do it? How did you do it?... Promise me you will never do it again!'"¹¹ She was convinced that the doctor may have let her bleed to death. Instead he sent her to the local charity hospital, a place she wanted to avoid because everything she had tried to keep private would be revealed. She stayed for five days, treated badly by a physician because he believed she was not in his social class, but a salesgirl or a fac-

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when only I can see them — from the moment when they will be read ..."⁷

Ernaux searched for an abortion when she was a 23-year-old college student near Paris in 1963. Abortion was illegal, but it was assumed that people with money or in the upper classes of society could find a qualified physician to safely terminate an unwanted pregnancy. Ernaux could not, and after failing to end her pregnancy herself using knitting needles, she was directed to a third floor back street residence of a nurse's aide, Madame P-R.⁸ She described herself as ruled by fear while waiting for her treatment. When it occurred, Madame P-R inserted a probe which caused "blinding pain." She returned 3 days later when P-R exclaimed, "you're in labor!" The words a midwife would use. Up to then, it hadn't occurred to me that all this could be likened to a delivery..."⁹

Back at her dormitory, Ernaux went into labor and the fetus "burst forth like a grenade...I couldn't imagine ever having had that inside me...I was a wild beast...to think that I was capable of producing that...

tory worker. Even the nurse asks her why she didn't tell the doctor she was a college student.¹²

Physicians are a crucial part of Ernaux's narrative. They were nothing like the idealized physicians of Justice Harry Blackmun, pursuing patients' health and welfare in a legally-protected doctor-patient relationship. In contrast, the trial of Dr. Kenneth Edelin, like *Roe v. Wade* and unlike Ernaux, involved a Blackmun-style, dedicated physician trying to practice medicine for the good of the patient, and with the patient's informed consent, yet still he was persecuted.

Judicial Storytelling

The abortion that led to Dr. Edelin's trial for manslaughter was performed on October 3, 1973, less than a year after the *Roe v. Wade* decision, at a time when Massachusetts had no criminal laws specifically on abortion. The Massachusetts Supreme Judicial Court, in an opinion reversing his conviction and ordering acquittal, described the abortion of a borderline viable

fetus in clinical (and arguably political) terms, yet also from the physician's perspective.¹³

On September 30, 1973, an unnamed patient and her mother came to the outpatient department of what was then Boston City Hospital (now Boston Medical Center), requesting an abortion. She was interviewed by the chief of the outpatient obstetrics/gynecology service and advised of the alternatives to abortion. After a physical exam she was estimated to be twenty weeks pregnant and was approved for amniocentesis with saline infusion, a process of inducing fetal death and a miscarriage by introducing a salt solution into the amniotic sac containing the fetus. Dr. Edelin made his own determination of gestation at 21 to 22 weeks.

"Dr. Edelin inserted a long needle through the abdominal skin at a selected, locally anesthetized spot, ... but the needle had not gone into the amniotic sac. To introduce salt solution elsewhere than in the sac might endanger the patient." His supervisor agreed to attempt a saline abortion the following morning and if it failed Edelin would then perform a hysterotomy.¹⁴ "The abortion by hysterotomy involved incision of the uterus to reach and remove the products of conception [under general anesthesia] ... [a]s he had diagnosed an anterior placenta [as an explanation for the earlier bloody tap]."¹⁵ "Upon removal of the fetus, ... finding no heartbeat or other sign of life, he placed the fetus in a stainless-steel basin held for the purpose by an attending nurse...The patient recovered without incident."¹⁶

The judicial opinion cannot show it, of course, but no one is likely to be surprised to learn Dr. Edelin is Black. This can be inferred from the hospital he works at (a "safety net" hospital in the South End of Boston with a large Black population), and the fact that he was arrested and tried for manslaughter for performing a voluntary medical procedure following medical guidelines. Since Dr. Edelin was also found guilty of manslaughter of a fetus, one might not be surprised to learn as well that the jury that convicted him was all white, and included 9 men and 10 Roman Catholics.¹⁷ The prosecutor was also Catholic, and it seems fair to describe the prosecution itself as political. The opinion does not note that a photo of the fetus was shown to the jury, "and some said they were 'shaken' by it."¹⁸

The U.S. Supreme Court is similarly skewed today, with only one-third women and a majority Catholic. Perhaps more important, however, is that *Dobbs* did not deal with any particular abortion, and so doesn't even have to mention physicians, let alone confront the role of the physician and the doctor-patient relationship in safely performing what can be a challenging surgical procedure. This is somewhat surprising in that anti-*Roe* judges have seemed to linger over late

second trimester abortions, and especially "partial-birth abortions," seemingly using purposely horrific language.¹⁹

Many stories have been told about the role of the Catholic Church in supporting state legislators in making abortion a criminal offense. Annie Ernaux supplied a postscript to her abortion with another short story: "On another afternoon I entered Saint Patrice's Church...to tell a priest that I'd had an abortion. I immediately realized this was a mistake. I felt bathed in a halo of light and for him I was a criminal. Leaving the church, I realized that I was through with religion."²⁰

Storytelling in Fiction

The winner of the 2017 Nobel Prize in Literature, the Turkish novelist Orhan Pamuk, has astutely observed, "The art of the novel is based on the craft of telling our own stories as if they belong to others, and of telling other people's stories as if they were our own." The novel under discussion, *The Cider House Rules*, was written by a white male and features a white male hero — a physician named Wilbur Larch, who had obstetrics training at Boston City Hospital in the pre-*Roe v. Wade* era.

The Cider House Rules was published more than 20 years after Ernaux's abortion and before she wrote *Happening*, which gave her an opportunity to comment on the novel and its portrayal of men in general and male physicians in particular. Ernaux wrote about a discussion with a fellow student who slowly understood that she was telling him she had had an abortion: "When the truth dawned on him he froze, staring at me with bulging eyes, mesmerized by some imaginary scene, utterly fascinated, as I remember all men were."²¹ This provocative sentence gets the longest footnote in a book that has only five — a comment on *The Cider House Rules*:

I immediately identified the same feeling, powerfully expressed, in John Irving's novel *The Cider House Rules*. Through one of his characters [Wilbur Larch] the author sees women who abort clandestinely die in terrible circumstances then opens a model clinic where he performs clean abortions, bringing up the children they have left behind. *Entertaining fantasies of wombs and blood, he assumes the right to dispose of the life and death of women in the manner he chooses.*²²

Here Ernaux mistakes Larch for someone else. Dr. Larch is a strange man, but his views on a woman's

right to make her own decision about continuing a pregnancy are not in doubt and are consistent with Justice Blackmun's vision. In the first part of the book Larch makes a career choice after performing an abortion for a wealthy family's daughter, deciding how to conduct life as an obstetrician: "he delivered babies into the world. His colleagues called this 'the Lord's work.' And he was an abortionist: he delivered mothers too. His colleagues called this 'the Devil's work,' but it was *all* the Lord's work to Wilbur Larch..."²³ He did work at an orphanage, where he described the abortion choice of a woman as deciding whether to have "an orphan or an abortion."²⁴ He did not make the decision for his patients, and also tried to place every infant born at St. Cloud's with a suitable adoptive family.

Post-Dobbs Storytelling

Cider House Rules provides a useful contemporary metaphor for the current Supreme Court's *Dobbs*-endorsed state criminal "rules" on pregnancy and abortion. The rules were written by the owner and ignored by the workers, who made no attempt to understand them. Justice Samuel Alito's opinion is abstract, with virtually no insight into pregnancy or childbirth, and no concept of what role a physician might play in helping people to make and implement the uniquely personal decision of whether or not to continue a pregnancy.²⁵ This may help explain why Justice Alito found it unexceptional for him to travel to the Vatican to tell his own story almost immediately after promulgating his opinion in *Dobbs*.

The Nobel Prize committee awarded the 2022 Prize in literature to Annie Ernaux "for the courage and clinical acuity with which she uncovers the roots, estrangements, and collective restraints of personal memory." Focusing on just one of her books, *Happening*, it should be impossible not to conclude that pregnancy is uniquely experienced by women, and that attempting to control a pregnancy is to attempt to control a pregnant person's life. Physicians can (and should) help patients to review their medical options and help them obtain the medical care they need to continue or terminate a pregnancy. Drs. Edelin and Larch would likely agree. Telling stories about abortion experiences, especially pre-*Roe* and post-*Dobbs* stories, is becoming normalized.

Concluding thoughts on literature and abortion were captured by Ernaux in her acceptance speech for her Nobel Prize, when she persuasively argued in words that could apply directly to reproductive rights advocacy, "...a book [story] can contribute to change in private life, help to shatter the loneliness of experiences endured and repressed, and enable beings

to reimagine themselves. When the unspeakable is brought to light, it is political."²⁶

Note

The author has no conflicts to disclose.

References

1. *Survey*, available at <<https://perryundem.com/wp-content/uploads/2022/02/PerryUndem-Abortion-Public-Opinion-Survey-2022.pdf>> (last visited August 2, 2023).
2. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
3. A. Schwartz, "Memory Serves: How Annie Ernaux turns the past into art," *New Yorker*, Nov. 21, 2022.
4. *Dobbs v. Jackson Women's Health*, 597 U.S. (2022). At the other end of life, the right to refuse treatment and "right to die stories have been especially powerful in driving both judicial opinions and state legislatures on this topic." In fact, it is not uncommon to use names of the people who engaged in courtroom battles as a way to summarize end of life decision-making, including Karen Ann Quinlan, Nancy Cruzan, Teri Schiavo, Brittany Maynard, and Diane (with her physician, Dr. Timothy Quill). G.J. Annas, "The Promised End: Physician-Assisted Suicide and Abortion," *Duquesne Law Review* 35 (1996): 183-199; and G.J. Annas, "First Man and Second Woman: Reflections on the Anniversaries of Apollo 11 and *Cruzan*," *SMU Law Review* 73 (2020): 7-25.
5. Abortion narratives have always had a central place in abortion politics. See, e.g., L. Hallgarten, "Abortion Narratives: Moving from Statistics to Stories," *Lancet* 391 (2018):1988-1989; perhaps the best "abortion story" used in political campaigning comes from Ireland: the story of Savita Halappanavar, a healthy 17 week pregnant 30 year old who died in 2012 days after she was refused medication that would have produced a miscarriage and prevented her death because the doctors were convinced that Irish law prohibited an abortion under these circumstances. Her story, and how it invigorated the prochoice movement in Ireland is summarized in Hallgarten *Id.* at 1989; and see also, M. Specia, "How Savita Halappanavar's Death Spurred Ireland's Abortion Rights Campaign," *New York Times*, May 27, 2018; and see generally, C. Craig and S. Dillon, "'Storylistening' in the Science Policy Ecosystem," *Science* 379 (2023): 134-136; for a post-*Dobbs* example in the liberal state of Massachusetts, see Kate Dineen's story of how she had to leave Massachusetts for an early third trimester abortion. Her fetus had suffered a catastrophic stroke leaving him severely brain damaged and unlikely to survive birth, but Massachusetts physicians refused to provide her with an abortion. This was just before *Dobbs* — but after *Dobbs*, and a lot of lobbying, Massachusetts changed its law to cover medical procedures like the one she needed. This is a very early example of the power of storytelling in the post-*Dobbs* era. S. Leung, "Kate Dineen, Out of Tragedy, She Found the Tenacity to Change the Massachusetts Abortion Law," *Globe Magazine*, December 18, 2022, 24-25.
6. I understand that this will seem overly optimistic, maybe even demented, from the perspective of those who have worked in reproductive justice for more than half a century. Nonetheless, I am optimistic, and agree with Linda Greenhouse who wrote in mid-January: "There is a case to be made [based on the mid-terms]...that abortion access has won the culture wars...It is possible, and I'll even be bold enough to say that it is probable, that in *Roe v. Wade's* death lies the political resurrection of the right to abortion." L. Greenhouse, "Does the War over Abortion have a Future?" *New York Times*, January 18, 2023, A23.
7. A. Ernaux, *Simple Passion*, (English trans, Seven Stories Press, NY, 1991) at 30.

8. A. Ernaux, *Happening*, (English trans., Seven Stories Press, NY, 2000) at 59.
9. *Id.* at 68.
10. She sees the nurse's table as an exhibit, but thinks, "I don't believe there is a single museum in the world whose collection features a work called "The Abortionist's Studio." [*Id.* at 67].
11. *Id.* at 77.
12. *Id.* at 79.
13. *Commonwealth v. Edelin*, 371 Mass. 497 (1976).
14. *Id.* Unless otherwise indicated all quotations from this section are from Judge Kaplan's majority opinion in *Edelin*.
15. *Id.*; see also, J. Robertson, "After Edelin: Little Guidance," *Hastings Center Report* 7, no. 3 (1977): 15-17; J. Robertson, "Medical Ethics in the Courtroom," *Hastings Center Report* 4, no. 4 (1974): 1-3. (arguing that medical ethics had not yet dealt with the question of the physician's obligation to a late-term fetus making the prosecution of Edelin understandable).
16. *Id.*
17. R. McFadden, "Kenneth C. Edelin, Doctor at Center of Landmark Abortion Case, Dies at 74," *New York Times*, Dec. 30, 2013. Dr. Edelin called his prosecution a "witch hunt" and he seems correct in this categorization.
18. *Id.* The jury may also have been influenced by the fact that Edelin kept his hand in the uterus — allegedly on the umbilical cord — for 3 minutes, which he timed on the wall clock, before removing the fetus.
19. G.J. Annas, "Trust, Brutality, and Human Dignity: How 'Partial Birth Abortion' Helps Shape American Bioethics," *American Journal of Law & Medicine* 48 (2022): 173-186.
20. *Happening*, *supra* note 8.
21. *Id.* at 89.
22. *Id.* *Emphasis added*.
23. J. Irving, *The Cider House Rules* (William Morrow, NY, 1985).
24. *Id.*
25. Although the doctor-patient relationship model has now been wholly abandoned by the Supreme Court, the opinion of the Massachusetts Supreme Judicial Court in *Edelin* I think remains good law: "A larger teaching of this case may be that whereas a physician is accountable to the criminal law even when performing professional tasks, any assessment of his responsibility should pay due regard to the unavoidable difficulties and dubieties of many professional judgments." *Commonwealth v. Edelin*, 371 Mass. 497, 525 (1976).
26. Ernaux continued, "We see it today in the revolt of women who have found the words to disrupt male power and who have risen up, as in Iran, against its most archaic form." A. Ernaux, Nobel Prize lecture, Dec. 8, 2022.