

ACHIEVING RESULTS – LESSONS FROM CIVIL RIGHTS MOVEMENTS: TRANSCRIPT

*Burt Neuborne**
*Bebe Anderson***
*Peggy Cooper Davis****
*Richard Blum*****

This panel contextualized the LGBTQIA movement as one of a number of attempts to use courts, legislatures, organizing, and other means of advocacy to achieve social change. The panel facilitated a conversation among experts on different social-change movements—including those for racial, gender, and economic equality—to examine how these other efforts have proceeded after the Supreme Court recognized or rejected broad constitutional principles. The panelists discussed the roles of litigation, legislation, and social change campaigns in each of these movements, and also evaluated how each of these strategies can be effectively leveraged to address the different issues that the LGBTQIA community now faces.

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Amanda Sterling:

[0:00] I'd like to introduce our moderator for the second panel of the day, Professor Burt Neuborne, one of NYU's own. Professor Neuborne is the Norman Dorsen Professor of Civil Liberties here at NYU, where he is also the Founding Legal Director of the Brennan Center. Previously he served as the National Legal Director of the ACLU, [and] Special Counsel to the NOW Legal Defense and Education Fund. He also served on the NYC Human Rights Commission, among other illustrious positions. Please join me in welcoming Professor Neuborne and our second panel.

BURT NEUBORNE

Thank you. Thanks for coming on a Friday afternoon, and thank you to the first panel, which was really quite wonderful. If I were going to rename this second panel in plain language instead of legalese, I would just call it "What Works."

It is appropriate for us to end the discussion today by thinking [1:00] about what works. . . . "Between the word and the deed lies the shadow."¹ The word is easy for us to say—we know what we want; the deed is what we aspire to achieve; and the question is: what is the shadow? How do we get from the word to the deed? What actually works? We have three terrific panelists who themselves have led illustrious struggles in getting from the word to the deed in different contexts. That's what—I hope—will make this panel such a rich panel.

Bebe Anderson is at the Center for Reproductive Rights, where she is the Vice President of United States Legal Program. . . . She was a successful private practitioner at the [2:00] Legal Aid Society; she has a brilliant academic record at a law school north of here, where she was a Harlan Fiske Stone Scholar and won the Samuel I. Rosen-

mission on Sexual Orientation and Gender Identity. He was an original member of Pride at Work and is a signatory of *Beyond Marriage*. Blum was a founding board member of Queers for Economic Justice (QEJ) and has written for QEJ's *A New Queer Agenda*. Blum received his J.D. from New York University School of Law, where he was a Hays Fellow.

1. See FRANTZ FANON, *THE WRETCHED OF THE EARTH* (1961).

man Prize at graduation. She has dedicated her career to effective protection of reproductive rights, and women's rights to control their reproductive lives in a time of extraordinary politicization. If there is anyone who can think about what works in the give and take of powerful political currents it will be Bebe. I look forward to hearing her speak.

My colleague Peggy Davis and I have been on this faculty for longer than either of us will admit. We have been colleagues for a very long time. There is no dearer friend that I have on this faculty than Peggy. [3:00] If there is a title for Peggy, she's a philosopher of change. If there is anyone who has thought effectively about what it takes to actually achieve change in a culture that is stuck in a bad place and wants to move to a better place, it's Peggy. Professor Davis's work on the relationship of cognitive psychology, ethics, communication, interrelation, and human interrelation is essentially a map for how you change people's minds and hearts. No one has thought harder and done more to achieve that in both areas of race and gender than Peggy.

Our third panelist is Richard Blum, from the Legal Aid Society. He was a welfare litigator [4:00] for much of his career. I am proud to claim him as a graduate of this law school. He is a founder of Queers for Economic Justice, and has written really interesting work including a recent article on anti-strike injunctions and the Thirteenth Amendment. Richard's work is maybe the hardest of all. It is hard enough to change people's minds and hearts in settings where they are stuck in stereotypical visions of what the world should be like; but if you work hard enough, it is possible to effect change. But the hardest place to make change is where the injustice is dug in because of economic self-interest. To try to persuade people to change their conception of what is economically fair when it might cost them something [5:00] is among the hardest things to achieve, and its people like Richard who dedicate their lives to trying to achieve change in that context, who are great heroes of the movement.

I am anxious to hear what each of our panelists is going to tell us about what works and their conception of what works and how. Individually each will speak for about fifteen, eighteen minutes, then we will have some cross questioning. I may say something about change in the area of religion and speech if there is a little time. And then we will open it up to you, because it's very important that we hear from the audience on this. So if you don't mind Bebe, would you start us off?

BEBE ANDERSON

Thank you, Burt, and thank you to the organizers of this Symposium and thank you for inviting me to be on the panel. I think it's a great topic. Certainly, the last panel was very interesting—a lot to think about and I hope we will provide some of that for you as well. [6:00] As mentioned, I'll focus on the reproductive rights movement which is sort of a subset of the move for gender equality in the country, but obviously a key part of the women's rights movement because—as you know—the Supreme Court famously said in *Casey*, “The ability of women to participate equally in the economic and social life of the [Nation has been] facilitated by their ability to control their reproductive lives.”² So obviously crucial.

So I am going to talk a little about the . . . arc of the reproductive rights litigation, because I think it's informative in the context of where marriage equality is and also very informative because, as some of you already know, the Supreme Court has just decided—they announced today—that they are taking the Texas abortion case and it will be decided this Term.³ So this is a very timely topic. And then, I am going to touch very briefly on some similarities and differences between the reproductive rights and the marriage equality movement, and then conclude with talking [7:00] about some tactics and social change campaigns aside from the litigation tactic.

But certainly, litigation will be the main focus of my talk: it is only one tactic but it is an important tactic, and it has certainly been an important but not fully successful tactic in the reproductive rights movement. It started out successfully. It started out—of course as most of these movements do—with moving towards the harder issues, so it started with contraception. In 1965, the right of married people to use contraceptives was protected by the Supreme Court.⁴ A few years later, they decided that also unmarried persons could use contraceptives.⁵ And those were really focused, the first case in particular, on the right of marital privacy so it was very much going to that conservative institution of marriage and then broadened for unmarried people.

2. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

3. *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *rev'd and remanded sub nom.* *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), *cert. granted*, 136 S. Ct. 499, 193 L. Ed. 2d 364 (2015), *rev'd and remanded*, 136 S. Ct. 2292 (2016).

4. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

5. *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972).

But then of course, very importantly, in 1973, the Supreme Court turned to abortion [8:00] and the *Roe v. Wade* decision was issued.⁶ At that time, there had been some movement in the states. There had been four states that had repealed their anti-abortion laws and [fourteen] had reformed them, but still abortion was criminalized throughout the vast majority of the states in the country.⁷ And so, in its decision, the Supreme Court recognized that there was a right to reproductive choice within the U.S., protected by the U.S. Constitution, and that abortion could not be outlawed entirely and that there were constitutional limits on states' ability to restrict the provision of and access to abortion.⁸ And there has been a lot of criticism of the *Roe* decision, in particular, and it sort of heated up again with marriage equality and contrasting the two movements, but a lot of criticism saying the Supreme Court acted too soon, and that it acted before the country was ready for it. There weren't enough states that had reformed their laws and obviously there have been a lot of critiques [9:00] on both sides of that.

Always hindsight is easier than the analysis at the time, but I just want to make two comments about that. I think in particular Reva Siegel and Linda Greenhouse have very fully looked at what was the real situation before the *Roe* decision, and through that information have sort of debunked some of the claims about how really the political opposition to abortion really just was triggered by the *Roe* decision, by the Supreme Court's action, and that the politicization—in terms of the party politics coming into it—had really started before the Supreme Court stepped in on abortion.⁹

But another thing I think is always important to keep in mind is that, at the time of the *Roe* decision, when abortion was criminalized, women were dying throughout the country. Many women who were not dying were becoming seriously, grievously, physically harmed through unsafe abortions, and so that was obviously an important impetus for having the Supreme Court address that decision. And in fact, the [10:00] safety record of abortion has shown how incredibly safe legal abortion is in contrast to illegal or self-induced abortion as a general medical matter in terms of medical risks.¹⁰

6. 410 U.S. 113 (1973).

7. *Id.* at 140 n.37.

8. *Id.* at 164–67.

9. Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

10. Brief for American College of Obstetricians and Gynecologists et al. as Amici Curiae Supporting Petitioners at 6, *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) (No. 15-274) 2016 WL 74948 (citing Karen Pazol et al., *Abortion Surveil-*

But it is certainly undisputed that the Supreme Court's decision in *Roe* did generate a lot of opposition and galvanized a lot of opposition, and a lot of that has been very successful over the years, and there [have] been sort of waves of restrictions passed at various times. After *Roe*, there were restrictions testing the boundaries of it to see which restrictions could pass.¹¹ A lot of those were struck down by the Supreme Court. But then, there were two really important early reductions of the right under *Roe* that happened—really in the first ten years after *Roe*—and one of them was that the right of women to be able to exercise the right was weakened when the Supreme Court said it is alright [11:00] for the federal government to say that insurance coverage for abortion under federal programs, such as Medicaid, can indeed be treated differently than the coverage for any other medically necessary treatment.¹² It is alright, according to the Supreme Court, to deny women, who depend on Medicaid for their insurance coverage, to get coverage; and then also young women, another group that is often given lesser rights.¹³

That was true in the abortion context as well when in 1979 the Supreme Court said it was alright for a state to require that a young woman have the permission of a parent before getting an abortion as long as the law gave her the option of going to some other adult, like a judge, to get permission to obtain an abortion.¹⁴ And there were, during this time period, also a lot of attempts to both outright have *Roe* overturned, but also, to just again, test the contours of the right—sort of define how much is allowed [12:00] under the *Roe* decision—but the next big weakening of the standard under *Roe* was with the *Casey* decision.¹⁵

There was a lot of concern that the *Casey* decision—the *Planned Parenthood v. Casey* decision—would actually lead to an overturning

lance—United States, 2012, 64 MORBIDITY & MORTALITY WKLY. REP. 1, 11, 40 tbl. 23 (2015)) (“Between 1978 and 2007, the national mortality rate, as reported in five-year periods by the Centers for Disease Control and Prevention, ranged from 0.52 per 100,000 (or 0.00052 percent) to 0.78 per 100,000 (or 0.00078 percent). Between 2008 and 2011, the most recent period for which data is available, the national mortality rate was 0.73 per 100,000 (or 0.00073 percent).”).

11. *See, e.g., Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *Planned Parenthood Ass’n of Kan. City, Mo. v. Ashcroft*, 462 U.S. 476 (1981); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

12. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980).

13. *Id.*; *see Bellotti v. Baird*, 443 U.S. 622, 651 (1979).

14. *Bellotti*, 443 U.S. at 651.

15. *See, e.g., Danforth*, 428 U.S. at 52; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

of *Roe*. It did not do that, so there was a lot of relief that that was not the case but undeniably it did weaken the standard: because in *Roe* you really had kind of a strict scrutiny standard, but then in *Casey* the plurality, which included Justice Kennedy, along with Souter and O'Connor, set out this undue burden standard.¹⁶ They said that for one thing they were motivated by the decisions between *Roe* and *Casey*: the Supreme Court felt at the time of *Casey* that lower courts had not given enough credence or enough weight to the state's interest in potential life and that it had been undervalued under the *Roe* trimester framework and so it was [13:00] important to modify the standard and apply this undue burden test.¹⁷

And so the undue burden test, which was articulated in that decision, says that if the restriction has the purpose or the effect of placing a substantial obstacle in the path of a woman choosing to exercise her right to terminate a pregnancy it is an unlawful undue burden.¹⁸ Not a lot of clarity on the term "substantial obstacle" or what it is really. When does a burden become "undue" and "purpose or effect"? How are we going to analyze those? It didn't give a lot of clarity in the decision, but it did find most of the challenged restrictions in the Pennsylvania law were constitutional under this undue burden standard, though some of them were of the same type as restrictions that had been found by the Court unconstitutional under the *Roe* standard.¹⁹ And the one that it did strike down was a requirement that a woman had to have her spouse [14:00] notified before she could get an abortion if she were married.²⁰

[The main problem with *Casey* though really wasn't just that it did weaken *Roe*, but that it was unclear, in part, and there has been a lot of vehement opposition on the part of many, including in the judiciary, to reproductive rights.] The decision in *Casey* and the application of the *Casey* standard has been weakened by the way that lower courts have both misinterpreted it and misapplied it and have come out with varying results. But as a result, there have been a variety of restrictions that have been passed and challenged and found to be constitutional, and others have been found to be unconstitutional.²¹ So what

16. *Casey*, 505 U.S. at 874–75 (plurality opinion).

17. *See id.* at 871–73.

18. *Id.* at 877–78.

19. *Id.* at 900.

20. *Id.* at 901.

21. *See, e.g., Karlin v. Foust*, 188 F.3d 446, 497 (7th Cir. 1999) (finding Wisconsin's requirements for obtaining informed consent for abortions did not impose an undue burden); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 159 (4th Cir. 2000) (finding abortion licensure and operational requirements constitutional, revers-

we've had is really through a combination: through all of this legislative activity throughout the country and also all the various court decisions and inconsistent court decisions at the lower court level, we end up with a patchwork where, not unlike what was true before *Roe*, [15:00] certainly your ability to exercise your reproductive rights depends on where you live. Even if in theory you have the same right, your actual ability to access abortion services is very dependent on where you live.

So that's really led us to exactly where we are right now: which is this afternoon the Supreme Court issued its order saying that it has granted certiorari in the challenge to Texas's abortion restrictions in the *Whole Women's Health v. Cole* case.²² And that's a case in which two different restrictions in the Texas omnibus law were challenged.²³ One is an admitting privileges requirement, and that requirement says that any physician performing abortions in Texas has to have admitting privileges from a local hospital within thirty miles of the abortion facility, and then also requires that any facility providing abortions at [16:00] any stage of pregnancy conform to ambulatory surgical center requirements, which is sort of mini-hospital requirements applicable to out-patient treatment.²⁴ But they're typically applied to the type of out-patient surgery that uses anesthesia, requires a certain level of sterility, and a kind of variety of other features that really are not at all the case—especially with first trimester abortions, not even with second trimester abortions, but in particular first trimester abortions, which this law now applies to, do not need. They're not comparable to the other types of medical procedures that are done and required to be done in ambulatory surgical centers, but under this law those requirements have to be met.²⁵

There's another case that we haven't heard [from the Court on], so I don't know if we'll hear on Monday: whether the Supreme Court has denied cert in the Mississippi challenge to its admitting privileges

ing district court); *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 918 (9th Cir. 2014) (finding plaintiffs showed likelihood of success in establishing that Arizona's restrictions on provision of medication abortions imposed unconstitutional undue burden); *Isacson v. Horne*, 716 F.3d 1213, 1235 (9th Cir. 2013) (finding Arizona ban on abortion at 20 weeks unconstitutional).

22. *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *rev'd and remanded sub nom. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), *cert. granted*, 136 S. Ct. 499, 193 L. Ed. 2d 364 (2015), *rev'd and remanded*, 136 S. Ct. 2292 (2016).

23. *Id.* at 566–67.

24. *Id.*

25. *Id.* at 595.

requirement or if the Court has simply decided to hold that case.²⁶ [17:00] They were both conferenced yesterday.²⁷ Both of them are cases where the Center for Reproductive Rights is representing the abortion providers who challenged the laws. And the Mississippi law, the appeal is on a preliminary injunction, and in that case actually both the trial court and the Fifth Circuit panel found that the requirements in the Mississippi law were unconstitutional.²⁸ And so the Court has not indicated one way or the other whether it's doing anything with that case as of now.²⁹ But the Texas case was after a full trial, and the trial court found that both restrictions—both individually and when you put them together [combining] the effect of them on women and their access—were unconstitutional. They were an undue burden, and [the trial court] also found that. Then the Fifth Circuit reversed that to a large extent with some minor tweaks but basically found both restrictions were indeed constitutional [18:00] and did not fail the *Casey* standard.³⁰

So, this Texas case is going to squarely put in front of the Court: “What did you mean in the *Casey* decision?” And again, this goes to the sort of arc of litigation as a tactic: you can get a great win, and then it could be enforced, and then it can be diluted, and then it can come back up, and it needs to be re-clarified. And this is certainly an opportunity for the Court to say, “We meant what we said in the *Casey* decision. We did not give a blank check to states to say they can restrict abortion and they can impose any restriction in the name of saying it's protecting women's health.”

Here we have a situation where Texas said that both of these requirements will protect women's health.³¹ The full evidence at trial showed that in fact they don't protect women's health; in fact, they

26. *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 2536 (2016).

27. Search Results for Docket No. 14-997, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/search.aspx?filename=/Docketfiles/14-997.htm> (last visited July 8, 2016) (select “Docket” above search bar and search for “14-997”); Search Results for Docket No. 15-274, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/search.aspx?filename=/Docketfiles/15-274.htm> (last visited July 8, 2016) (select “Docket” above search bar and search for “15-274”).

28. *Currier*, 760 F.3d at 458.

29. Search Results for Docket No. 14-997, *supra* note 27, *cert. denied*, 136 S. Ct. 2536 (2016).

30. *Whole Woman's Health v. Cole*, 790 F.3d 563, 584–90 (5th Cir. 2015), *rev'd and remanded sub nom. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), *cert. granted*, 136 S. Ct. 499, 193 L. Ed. 2d 364 (2015), *rev'd and remanded*, 136 S. Ct. 2292 (2016).

31. *Id.* at 576.

would hurt women's health.³² The State argued that it doesn't matter what the evidence shows; the State felt it would protect women's health and that's good enough.³³ And the Fifth Circuit said, "Yes, that's good enough. If the State has some rational basis [19:00], even a rational speculation, to say it will help women's health, that's good enough, and the trial court was wrong to look underneath that and to really engage in meaningful review."³⁴

So here's the opportunity for the Court to say it is a constitutional right, meaningful review is required.³⁵ And when you look at what the law does and doesn't do, both in terms of how it does not improve health and in fact harms women, we feel confident the Court will indeed [reverse]. Justice Kennedy will [show he] mean[t] what he said in *Casey*, and he will find that it is unconstitutional. And, that will be incredibly important obviously for the women of Texas, because under these restrictions we've seen a seventy-five percent drop in the number of clinics in Texas.³⁶ It went from over forty to now only ten facilities that provide abortions in Texas and if this law is upheld, that will go down.³⁷ That number will stay at ten right now; there are some more because the Supreme Court [20:00] has stayed parts of the Fifth Circuit's decision.³⁸ But, Texas is the second largest state in the country, both in terms of population and in terms of landmass,³⁹ so the impact of having that dramatic reduction in access is huge. And meanwhile there are other challenges, and there are other admitting privileges requirements that have been blocked by other court cases not only in Mississippi but also in Alabama and Wisconsin and Oklahoma and Louisiana.⁴⁰ And so the Supreme Court's review of this is needed at this time and is particularly timely.

32. See *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 684–85 (W.D. Tex. 2014), *aff'd in part, modified in part, vacated in part, and rev'd in part* by 790 F.3d 563 (5th Cir. 2015).

33. See *Whole Woman's Health v. Cole*, 790 F.3d at 584–85.

34. *Id.*

35. See *id.* at 584 (applying rational basis review).

36. See, e.g., Petition for Writ of Certiorari at 25, *Whole Woman's Health v. Cole*, 790 F.3d 563 (No. 15-274).

37. *Id.* at 33.

38. *Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (2015).

39. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (last visited July 8, 2016); *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU (2010), <http://www.census.gov/geo/reference/state-area.html>.

40. *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330 (M.D. Ala. 2014); *Planned Parenthood of Wis. v. Schimel*, 806 F.3d 908 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 2545 (2016); *June Med. Services, L.L.C. v. Gee*, 136 S. Ct. 1354 (2016) (mem.) (vacating the 5th Circuit's stay of the district court's order enjoining Louisi-

One just quick thing about tactics: we [don't] control; we don't, typically in the reproductive rights litigation. It has been largely defensive, because of the legislative onslaught, but the Texas case, we feel, is a particularly good one to have in front of the Court, partly because there is a very full trial record. You've got a trial record. [21:00] It is a very positive trial record. A lot of the other side's witnesses were discredited,⁴¹ strong evidence on our side. But also it's a state [that.] because of its size, because of its political importance to the country, it gets a lot of media attention, and so we've actually seen the media paying a lot of attention to what's happening to women, and I think this is one of the important parts. In order to really have the right protected, we can't just be winning cases; we need to get people to understand, throughout the country, that the right is really at risk and that it is not a real right if so many women can't access the right.

And so it is an important case to have as the next one in front of the Court in part because of that as well as just the legal arguments, and also because the Fifth Circuit's decision is really out of line. It really goes quite far and away from Supreme Court precedent in a variety of ways, and so that's another strength to the case. Again, we didn't choose to lose, [22:00] so we didn't choose to want the Court to take it, but the fact [is] that we've got a decision in the Fifth Circuit that was against us, and we're very glad that the Court is taking it. The Supreme Court, we feel, with this case, will really do the right thing, and it gives the Court an opportunity that we think the Court will really seize to give meaning to the *Casey* decision and really mean[s] that that is a real right.

So this illustrates also one of the key differences between marriage equality and reproductive rights: at a very different stage in the process, at a different stage of the litigation arc. But, again, there are certainly similarities and one important similarity is that both are grounded in the right to liberty. Because the *Casey* decision was grounded in liberty—not privacy, but liberty⁴²—and *Lawrence* cited

ana's admitting privileges law); *Burns v. Cline*, 339 P.3d 887 (Okla. 2014) (per curiam) (Oklahoma Supreme Court temporarily blocked the state's admitting privileges requirement pending further litigation).

41. See *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 680 n.3 (W.D. Tex. 2014), *aff'd in part, modified in part, vacated in part, and rev'd in part* by 790 F.3d 563 (5th Cir. 2015) (explaining why the court discredited the testimony of certain witnesses presented by the State).

42. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("The controlling word in the cases before us is 'liberty.'"); see also, e.g., Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 728-29 (2010) (discussing the *Casey* plurality's doctrinal move).

to *Casey* in deciding its decision based on liberty;⁴³ and then *Obergefell* and *Windsor* both then also relied on liberty,⁴⁴ and so that really is a link, [23:00] an important link to all of these cases.

I want to just quickly mention, though, some social change campaigns, because again litigation isn't going to be enough and it's not going to get us what we need and maintain what we need in terms of the right if it is all that is happening. And even though there are things happening around the litigation, in terms of communication strategies and advocacy strategies, that's not enough either. And just as we've seen with marriage equality, it is so important to change society's views of the people affected by the denial of rights. It's important to do that with reproductive rights as well.

And again, as I mentioned, one of the most devastating litigation losses in the reproductive rights movement was the loss that affected low-income women, and then there were actually a series of those. And so I wanted to mention at the end the All Above All [24:00] campaign, which is focused on undoing both the Court decision but especially the legislative asterisk that caused abortion care and other reproductive health services—although specifically abortion care—to be treated differently from other medical care, specifically in terms of funding and insurance coverage.⁴⁵ And this is a campaign that really is connected to the reproductive justice movement, which is a very important outgrowth of the reproductive rights movement.

It really is a movement that is much broader than reproductive rights and recognizes that reproductive rights by themselves are not going to either get you the right or enable you to keep the right. You have to look at people's entire lives. You have to look at the multiple factors that influence a woman's ability to exercise a right. So anyone's ability to exercise a right is meaningless—having the right is meaningless, if you can't exercise it. So in line with reproductive justice [25:00] ethos, the All Above All campaign is a combination of advocacy strategies at the state, local and federal level, also fieldwork, [and] movement building. The federal legislation that has been introduced to address the coverage issue is getting support from economic and racial justice allies. The group working on the All Above All cam-

43. *Lawrence v. Texas*, 539 U.S. 558, 573–74, 578 (2003).

44. *See* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (holding that “[t]he right of same-sex couples to marry . . . is part of the liberty promised by the Fourteenth Amendment”); *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (“DOMA [Defense of Marriage Act] is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”).

45. *About All Above All*, ALL ABOVE ALL, <http://allaboveall.org/about/about-all-above-all/> (last visited Aug. 4, 2016).

paign [is] joining with the Fight for Fifteen Coalition, and the partner organizations for that campaign are much broader than not only Reproductive Rights and Reproductive Justice and women's health and women's rights, but also include LGBTQ, youth, faith, and other civil rights groups,⁴⁶ and I think that's, I'm just going to end there.

It seems to me that what is most important about any hope for success in any of our movements is to work together, see those linkages, build on those linkages, support one another's campaigns and try to educate the public in as many ways as possible so that the public [26:00] understands those links and so that the rights that we work so hard in court to obtain and to hold onto are actually rights that people are going to be able to exercise in the country.

Burt Neuborne:

Thank you, Bebe. Take heart. The Fifth Circuit finally has achieved its long-term goal of being appointed as the Supreme Court of the Confederacy, so my sense is that the Supreme Court of the United States knows the difference between the Supreme Court of the Confederacy and the Fifth Circuit. I had one question, if you don't mind. Since you're here and you know so much about it, are you concerned about *Hobby Lobby*⁴⁷ and *Little Sisters of the Poor*,⁴⁸ the cases that are going up, which of course are not abortion cases, they're birth control cases, but do you see those cases as a threat to the ability of women to be able to get insurance coverage for birth control?

Bebe Anderson:

Certainly the religious refusal cases are a very big threat. I mean it's interesting to see what's happening [27:00] with marriage equality and other particular rights because right away, religious refusals were used to reduce access to abortion, allowing people in hospitals or OBGYNs to refuse to provide abortion services,⁴⁹ and the broadening

46. Britt Moorman, *NNAF Participates in Fight for 15 Rallies*, NAT'L NETWORK OF ABORTION FUNDS (Apr. 17, 2015), <https://fundabortionnow.org/news/nnaf-participates-fight-15-rallies>; *Partner Organizations*, ALL ABOVE ALL, <http://allaboveall.org/about/partner-organizations/> (last visited Aug. 4, 2016).

47. See *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014).

48. See *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151 (10th Cir. 2015), *cert. granted sub nom.* *S. Nazarene Univ. v. Burwell*, 136 S. Ct. 445 (2015), *cert. granted in part sub nom.* *Little Sisters of the Poor Home for the Aged v. Burwell*, 136 S. Ct. 446 (2015), *vacated and remanded sub nom.* *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

49. See, e.g., *State Policies in Brief: Refusing to Provide Health Services*, GUTTMACHER INST. (Mar. 1, 2016), http://www.gutmacher.org/statecenter/spibs/spib_RPHS.pdf.

of the view of who's entitled or what is entitled to assert a religious objection is troubling with the new cases that the Court is taking. The issue of, you know, certainly the type of burdens that we see with abortion restrictions, we can't sometimes convince a court they're undue. They are so far beyond what the Little Sisters are facing in terms of the burden on their exercise of religion it's sad. It's always worrisome what the Court will, do, but again I think that given what that burden really is I'm optimistic there as well. I don't put money on any of this though, let me just say that.

Burt Neuborne:

Peggy?

PEGGY COOPER DAVIS

[28:00] Looking at the program, it seems that my mission, or it seemed to me before, that my mission was to talk about the relationship between the African American civil rights movement and the LGBT civil rights movement. Burt has inched that along and said that each of us will talk about what works, and I want to disclaim any ability to say what works. But I do want to talk about some common ground that I see between [29:00] the marriage equality struggle—and I'm going to speak narrowly about just that—and the civil rights struggle.

Before I go any further I want to thank the *Journal* for doing this, and want to pay my own tribute to Tom Stoddard. Indeed, when I began to prepare my remarks, I thought, "I should just look back at some of the things that Tom had done and said," and I came across a Talk of the Town piece in the *New Yorker* from when Tom and Walter were married. It was called "Tom and Walter Got Married,"⁵⁰ but they didn't really get married [30:00] because this was in 1993 and they could not marry. But they had a ceremony to celebrate their entry into a civil union, and this little piece—which was very sweet—was all about how anxious everyone is before a wedding and how fraught with symbolism and meaning weddings are, and how tricky it was to manipulate those symbols and meanings. Explaining to some extent their anxiety about the celebration Tom said, "Gay rights is about challenging tradition, and what's more [31:00] traditional than a wedding."⁵¹ And I really feel that that's been a theme throughout the day.

50. Richard Cohen, *Tom and Walter Got Married*, *NEW YORKER*, Dec. 20, 1993, at 55.

51. *Id.* at 56.

On the one hand, we want to celebrate *Obergefell*. On the other hand, there are so many things about marriage and about the way marriage is regulated that are troubling, and so the embrace of it is questioned. Melissa [Murray] and I both teach family law, and you really can't do that without seeing how much change will occur because of *Obergefell* in the institution of marriage and in the ways that courts [32:00] interpret the responsibilities and opportunities of marriage and read the line between marriage and something else. So, I'm with some trepidation going to walk into those waters where, to some extent, I'm dealing with both the concern that the movement has idealized marriage and a desire to acknowledge significant victory in *Obergefell*. And I admit that's tricky, so please bear with me, but I think *Obergefell* is a much more profound challenge than has been generally acknowledged. [33:00] And I think it's much more important than has been generally acknowledged.

My own work, a lot of my own work, in addition to the work that Burt referred to, has had to do with anti-slavery movements and the relationship between anti-slavery movements and civil rights movements. And so the first thing I want to do is talk about slavery, in part to call in question the analogy that has been drawn between *Obergefell* and *Loving*.⁵² And then I want to try and make a point about what I regard as the special importance of *Obergefell*. The *Loving* analogy is apt [34:00] and familiar to us. The assault against anti-miscegenation laws and the quest for gay marriage certainly had similarities, but I want to argue that there is a difference between being restricted in marriage choices and not having one's familial relationships recognized at all. And I acknowledge that gay marriage was perhaps on the cusp. There's a way in which you could argue that, that gay people were being coerced into heterosexual unions by the prohibition [35:00] of marriage. Coerced to, as my colleague Kenji Yoshino would say, cover in an extreme way. But I think it's instructive to look at a different analogy. Not to anti-miscegenation laws, but to the laws during slavery that said that slaves—and sometimes said that other people who had been slaves or were African American—could not marry at all.

52. See, e.g., Jeffrey Toobin, *God and Marriage Equality*, NEW YORKER, June 26, 2015, <http://www.newyorker.com/news/daily-comment/god-and-marriage-equality> (asserting that *Obergefell* is “the modern analogue to” *Loving v. Virginia*, 388 U.S. 1 (1967)); Peter Wallenstein, *The Straight Interracial Couple Who Paved the Way for Gay Marriage*, DAILY BEAST (June 29, 2015), <http://www.thedailybeast.com/articles/2015/06/29/how-loving-v-virginia-paved-the-way-for-nationwide-gay-marriage.html> (comparing the two cases).

So I am going to argue that the laws and customs of slavery, which denied recognition of marriage at all by slaves and refused to recognize their [36:00] familial ties, had an effect that is painfully and importantly similar to the effect of denying gay and lesbian people the right to marry. And so just a couple of words about the relationship between denying family ties and being enslaved. And here I rely a lot on the work of Orlando Patterson, with whom I often disagree, but who, I have to confess, has written brilliantly about how western understandings of liberty have been informed by western experiences with slavery.⁵³ And he argues that the social death of slaves, which is what he calls the state of slavery—a social death—resulted from three overlapping [37:00] factors: degradation, powerlessness and, importantly for our contexts, natal alienation.⁵⁴

And natal alienation is the outsider status that results when a society refuses to recognize one's belongingness—one's kin, one's sense of kind—and that of course was a defining feature of slavery: the slave was a child of no one.⁵⁵ The slave's relationships with partners could be disregarded, could be destroyed by sale or simple transfer. And this represented, in a profound way, an inability to participate in the culture and in the politics of the nation. And, [38:00] you know I see a funny connection here because you think about one of the *Obergerfell* companion cases, the *DeBoer* case, and the women in that case who had several children but they couldn't together adopt these children because the laws of Michigan didn't permit it.⁵⁶ And one of them was quoted as saying, "In Michigan, we are legal strangers. A judge could give our kids to anybody,"⁵⁷ and slave partners were legal strangers and their kids were regularly given to anybody.

So, why is that important? I think it's important because, it was accepted, almost immediately after emancipation, even in the Confederate states, [39:00] that if people were to be free and if people were to be citizens, they would automatically be entitled to marry. And so, although there was a great deal of struggle about other rights, every one of the Confederate states very quickly recognized the right of free people to marry and also retrospectively recognized the marriages of

53. See generally ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982).

54. *Id.* at 1–16.

55. *Id.* at 5–10.

56. See *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

57. See Richard Wolf, *Michigan Couple Poised to Make Gay Marriage History*, USA TODAY (Jan. 16, 2015), <http://www.usatoday.com/story/news/2015/01/15/supreme-court-gay-marriage-michigan/21768849/> (quoting Jayne Rowse, one of the plaintiffs in *DeBoer*).

people who had partnered in slavery but not been able legally to marry.⁵⁸ And there was even an enhanced presumption of legitimacy, so that when a court encountered a couple, it would assume that what they understood and lived as a marriage was a marriage entitled to [40:00] legal recognition, even beyond the ordinary presumption of legitimacy that applied in cases involving white couples.⁵⁹ So there was an immediate sense that there was a special connection between freedom and free citizenship and the right to marry.

Now, I've written a lot and I don't want to talk a lot here about the extent to which that was acknowledged in the debates of the Reconstruction Amendments, but I was very surprised when I first discovered—and have kind of reported repeatedly and tediously, probably—how many times [41:00] the legislators who were debating the language of the Thirteenth, Fourteenth and Fifteenth Amendments, more the Thirteenth and Fourteenth of course than the Fifteenth—insisted that the right of family, the right to marry, the right to parent, was an ingredient of freedom. So I've used that to try to argue that the absence of an explicit right of family, or right to marry, in the Constitution is kind of beside the point—that from the very beginning, people understood that if you were to be a citizen and you were to be free, you would have the right to marry.

Now, I want to connect this understanding of marriage [42:00] as an essential ingredient of citizenship and freedom, and the opportunity that I think *Obergefell* presents for us to broaden our sense of the way in which our Constitution protects human rights. This relates in part to the long-standing debate about whether the right of marriage equality was an equal protection right or a due process right: whether substantive due process is something that should live. And with all the complexities of the *Obergefell* opinion, it seems to me terribly important that it did not rely exclusively on equal protection. [43:00]

First to that, it did not rely exclusively on equal protection, but relied on an idea of substantive due process.⁶⁰ I wish of course that it had also relied on an idea of the privileges and immunities of citizenship, but that's another very long conversation that we won't go into now. But it is important again that *Obergefell* relied on the substantive core of the Fourteenth Amendment, whatever we want to say that that is. And I think that's important for a reason that is not all that grace-

58. Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 316 (2006).

59. *Id.* at 299.

60. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598–99 (2015) (holding that there is a fundamental right to marriage as a matter of substantive due process).

fully articulated in the majority opinion: the conceptual overlap [44:00] between equal protection and due process. And in pointing to that conceptual overlap, I want to quote Danielle Allen, who has written beautifully about our Declaration of Independence and who has said that “from a commitment to equality emerges the people itself—we, the people—with the power . . . to create a shared world in which all can flourish.”⁶¹

So this insistence on my part that we see a substantive core in the Reconstruction Amendments is part of a desire to see us understand our Constitution, not as the Constitution of the founders, which was tainted by its compromise with slavery, but as the Constitution [45:00] of emancipation and Reconstruction. And I want to argue that that Constitution is one that we can understand as a Constitution that intended to give—almost universally, not entirely universally of course—certain fundamental rights to all people. It was beyond the emancipation of slaves from their bondage; it was the creation of an understanding of citizenship that had substantive content. So some students and some colleagues and I filed an amicus brief in the *Obergefell* case, and in it, we put forth [46:00] this analogy of slavery’s denial to the right to marry and the denial of the rights of LGBT people to marry.⁶² We put forward our argument that we hoped that the enlightened heritage of Reconstruction, rather than the compromised heritage of the original founding, would guide the Court’s deliberations in the *Obergefell* case.

There is just one more thing I want to say about that, and that is that I want also to call attention to Justice Kennedy’s reference to the idea of dignity.⁶³ And I want to suggest that the substantive content that we’re searching for—and that I’m trying to argue for in the Reconstruction Amendments—is very much bound up with the idea of [47:00] the recognition of human dignity. And that recognizing it—and in beginning to understand that there is a need to recognize human dignity at the core of the Reconstruction Amendments and therefore the core of our new Constitution—[brings] us in line with other countries: with the countries whose post-World War II constitutions have explicitly used the word “dignity” and have been interpreted as being explicitly reactive to atrocities.

61. See DANIELLE ALLEN, *OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY* 269 (2014).

62. Brief for Experiential Learning Lab at N.Y. Univ. Sch. of Law as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14–556).

63. See *Obergefell*, 135 S. Ct. at 2594–96 (discussing the concept of dignity as it pertains to the question of the right to same-sex marriage).

In that connection, my argument is that just as the German constitution was reactive, and has been interpreted to some extent [48:00] as being reactive, to the atrocity of the Holocaust, and just as the South African constitution is very clearly and explicitly interpreted as being a reaction to the atrocity of Apartheid, our Constitution ought to be understood as a reaction to the atrocity of slavery. And so there is value in thinking about freedom as slavery's opposite; and, therefore, perhaps value in either adding to, or substituting for, the *Loving* and anti-miscegenation analogy, an analogy between the familial alienation of slaves and the familial alienation of LGBT people before *Obergefell*.

Burt Neuborne:

Thank you, [49:00] Peggy. Where do you put religion in that? [*Audience laughter.*] Because it's so deep in the core of dignity as well, and because the Court seems to be so fixated on it at this point. When religion and equality come into conflict, how do we decide, either under your approach or any approach, which should take precedence?

Peggy Cooper Davis:

I want to think of it as when religion and respect for dignity come into conflict. I want to understand that somehow we learn—as we react to and respond to horrible mistreatment of a people on ideological grounds, [50:00] racial grounds, and very often religious grounds—we become better able to appreciate the need to respect the human dignity and independence of each person. And, of course, that's going to mean compromise.

It's going to mean that if I am of a religion that believes that racial integration is against the will of God, things will happen in a culture that's diverse that make me uncomfortable; but I think there's an important value in understanding that we cannot—on the basis of group membership, or on the basis of a religious belief or an aesthetic belief or a belief about how society ought [51:00] to be organized—constrain people in particular ways. And it's very hard to say where the line is and what those ways are, but I think it's important to say it. It's the difference between always being vulnerable to the whims of majorities and having some fundamental protections. And the question, of course, is always, “Where does that fundamental protection begin?”

Burt Neuborne:

Thanks, Peggy. Richard.

RICHARD BLUM

Well, I think there's something odd about me being invited to speak on a panel whose topic is, "What works?" As I was commenting to Burt before the panel, when I was doing welfare rights litigation and other advocacy in the 1990s in the Clinton, Pataki, the Giuliani years—usually I don't say [52:00] Giuliani's name without a grogger—I was reminded often of Burt's comment at my law school orientation, when he likened his role as Legal Director of the ACLU during the Reagan years, to that of the general left behind by Napoleon to lead the retreat from Moscow. I felt a kinship.

Before I actually begin my remarks, I just want to say something about this religion issue, since I'll probably be asked a question about it anyway. One of the things that made me crazy about the *Hobby Lobby*⁶⁴ decision, is that, of course, this all sort of began in a sense with the—I can't remember the name of the case—the peyote decision about employment insurance.

Burt Neuborne and Peggy Cooper Davis:

*Smith.*⁶⁵

Richard Blum:

Smith, where the issue was [that] these were people in a religious minority, a somewhat persecuted minority, who were seeking subsistence benefits as workers, and they were being denied so it seemed particularly unjust.⁶⁶ They lost under the Constitution,⁶⁷ and RFRA [53:00] was supposedly an answer to that,⁶⁸ and so it's really ironic that it's being used against workers on behalf of a powerful employer to deny them both their religious freedom and their freedom as women to have access to their own reproductive autonomy. So I think that we have to keep in mind that political power context as well when thinking about religion and how it has been played in all of these battles.

64. *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014).

65. *Emp't Div. v. Smith*, 494 U.S. 872 (1990), *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in Hobby Lobby Stores*, 134 S. Ct. at 2760–61.

66. *See id.* at 874–75.

67. *Id.* at 890.

68. *See Hobby Lobby Stores*, 134 S. Ct. at 2761.

When I was invited to speak on this panel and looked at this—at least my reading of the topic—as sort of “Where is the movement going?” as a poverty lawyer and as a queer economic justice activist, my first question was “Which movement?” or “Whose movement?” Just days before *Obergefell*—and thank you for teaching me how to pronounce that, I didn’t know where the accent went until today—my friend Joseph DeFilippis, who actually really was the [54:00] founder of Queers for Economic Justice—I was one of the founding board members, but he was really the person behind the whole thing and the first executive director—successfully defended his doctoral dissertation, which argued that there really are two distinct movements in this country: one might argue more but—a sort of an LGBT movement, or an LGB-mostly movement, about assimilation, equality as sort of being allowed into the existing institutions of this country where marriage is the signature piece of that movement, access to the military, as Kevin was saying, has been another; and a movement that’s more about transforming those institutions, profoundly, and looking at sexual and gender liberation in the context of racial liberation, of class conflict, and so forth.

This is partly a question of recognizing the intersectional needs and [55:00] identities of the membership of our community, because our community is an extremely diverse community in terms of class and race and other criteria, and also recognizing the ways in which institutions that exist in this country are oppressive on different axes which do intersect such as race, and class, and sex. So marriage—or marriage equality—was never really a part of that second type of movement, I would argue. And even, as Melissa argued, I think for many of us it was seen as a step backward, and particularly in the way that it came out in *Obergefell*.

I had the same reaction of horror when I read it, because I was really hoping against hope—and I didn’t really believe this was going to happen, but I still had some hope—that maybe they would echo the arguments that had been introduced by Sylvia Law in [56:00] the late 1980s about sexual orientation discrimination as a form of sex discrimination,⁶⁹ which I still think is an incredibly powerful argument, and one which I’m working on in the context of Title VII with some people at Lambda and elsewhere in support of what the EEOC has done.⁷⁰ So thank you, Sylvia. And I should say actually that that argument for me personally—and you know the personal is political—was

69. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 236 (1988).

70. See *Baldwin v. Foxx*, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

very important. I read that at a time when I was just on the cusp of coming out, and it really resonated with me. . . . This was when I was able to say, “Well, wait a second. This oppression that I’m experiencing, or this feeling of being an outsider, being excluded, and being wrong, is part of a larger form of oppression that I do recognize and is familiar to me.” And that helped me along on a very personal level, so thank you again, Sylvia. [*Audience laughter.*]

So, when thinking about the context, if I’m invited as a poverty lawyer to talk about [57:00] where that movement has gone in comparison to the LGBT etc., movement—for me, I don’t separate them in my work at Legal Aid, in my work outside of Legal Aid, they’ve all been of a piece because I see the community that I’m part of as fighting against these different kinds of, forms of, intersecting oppressions; and I don’t see them as separate. The way I frame it—have framed it for years—in talking about queer issues in particular is to say, “Look, most people I know depend on some combination of three sources of income for their livelihood or even survival: the labor market, family, and the government.” And when you think about queer people, it doesn’t take a lot of thinking to realize that we have a problem with all three of those institutions, and there’s a reason why we are often poor. There’s a reason why we’re often homeless—and I’m not speaking only about youth [58:00]—why we are homeless at different stages of our lives, why we fight all sorts of institutions in this country: because we are excluded from every source of, or are abused in, every source of material support that most people rely on. So in the labor market, of course, we know that it doesn’t get better often—sorry, Dan Savage—and that bullying and a need to be in the closet continues well after high school. No matter where you live in the country.

There’s a wonderful book that I want to recommend, called *Steel Closets*, that came out last year by Anne Balay, where she interviewed a number of LGBT steel workers in the mills in Gary, Indiana about their experiences and the harrowing stories about survival and about the inability to be out, either as sexually or gender non-conforming, in an environment where, if your coworkers don’t support you, you can find yourself falling into molten lead, or if you are attacked, [59:00] you can be somewhere lying around for days before anyone finds you.⁷¹ So these are very material, immediate issues of survival, and people are still living with them very much today. And of course, the exclusion of trans people from access to employment is something

71. ANNE BALAY, *STEEL CLOSETS: VOICES OF GAY, LESBIAN, AND TRANSGENDER STEELWORKERS* (2014).

that is just a national scandal and severe. And it leads then of course to rampant homelessness and the consequences of severe poverty. In fact, at a conference I helped organize this past year on what we called Queer Survival Economies, one of the panelists said, “How can we be even talking about work or issues of equality or nondiscrimination at work? We have no access to work in the first place; it’s just not even a part of a lot of our lives.”⁷²

Family: I don’t think a lot needs to be said about the problem of exclusion there. I remember Carl Siciliano from the Ali Forney Center saying years ago that we say “Come out, come out wherever you are” as [1:00:00] sort of a political mantra; but just like the steel workers in Indiana for whom it’s rather dangerous to come out, for a lot of youth who do come out, of course, it’s extremely dangerous.⁷³ They get discarded, abused, and then we’re only talking about marriage. Meanwhile, there aren’t nearly enough beds in the city for them to sleep in, every night, so where have we turned our attention as a movement? We’re not paying attention to this exclusion from the family. And for older folks who wind up having to go back into the closet to survive in their later years, this is also a problem. So those are two institutions that routinely fail us and leave us dependent, often, on government.

Where are we at with the government? Well, this is where my work comes in to some extent, or my past work. The big debate about welfare reform really was, “is welfare supposed to be a safe harbor from these other institutions—the labor market, family—or is it supposed to reinforce the discipline of the labor market and the family and make sure that you’re a good worker, on the terms of someone like [1:01:00] Rudy Giuliani, and that you are a good family member? Are you living your life in the way that someone is supposed to in a family? Are you getting married, are you getting married to someone of the opposite sex and so forth?” So, welfare can be extremely problematic for people who are not conforming, who do not conform, to these rules of the game, including an awful lot of workers, just generically, but also particularly queer people who are gender non-conforming and sexually non-conforming.

72. See *Invisible Lives, Targeted Bodies: The Impacts of Economic Injustice on LGBTQ Communities – New Labor Forum*, JOSEPH S. MURPHY INST. FOR WORKER EDUCATION AND LABOR STUDIES (Jan. 13, 2013), <http://newlaborforum.cuny.edu/2013/01/13/upcoming-event-at-the-murphy-institute/>.

73. See, e.g., *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, UNITED NATIONS GEN. ASSEMBLY HUMAN RIGHTS COUNCIL (May 4, 2015), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_23_en.

And these institutions like welfare and, of course, even more extremely, the shelter system, become a form of policing, and one of the things that came up at this conference was that at every single panel—whether it was on migration, or health care, or the workplace—every topic that was covered, people were talking about policing and surveillance of queer people.⁷⁴ The title of the conference was “Invisible Lives, Targeted Bodies,” because in so many ways we are rendered invisible in all of these institutions, [1:02:00] but, at the same time, we’re targeted.⁷⁵ That’s something of a paradox, but it’s a lived paradox in which we can be brutalized; and we often are invisible because we’re closeted to avoid being brutalized in all of these institutions. And particularly, ironically, in the case of welfare, shelters, things that some of us have fought very hard to preserve or build up, they are turned around from being institutions that are supposed to help people, to institutions that themselves abuse by reinforcing these disciplines.

And then of course, you have things like foster care and the prison system. I mean the prison system, in particular, is really a way of literally torturing people who don’t fit in. And unfortunately, so many of Legal Aid’s clients have experience with that system either as youth or later on in their lives, or both. So given this sort of problem, it’s not hard to see why a look at where the LGBTQ etc. movement should be going has to include a critique of all these institutions and how they affect all of us, [1:03:00] the entire society. And so it’s not just a question of saying, “Well, we have members in our community who live these problems every day: people of color who are dealing with the police, poor people who are dealing with welfare” and so forth and so on; but that [these are] the kinds of oppression that are directed along these other axes of oppression, particularly at us. And we have to understand them as part of our movement, as part of our goal setting, when we look at what we need to be doing in litigation and other kinds of advocacy and political organizing.

And so the four topics that sort of come up in the agendas of the organizations I worked with as a result of this as priorities are income security, whether that’s through the workplace or the welfare state; housing — access to decent affordable housing; access to health care—and I don’t say “health insurance” I say “health care” because

74. See *Invisible Lives, Targeted Bodies—Impacts of Economic Injustice on Vulnerable LGBTQ Communities*, QUEER SURVIVAL ECONOMIES, <http://queersurvivaleconomies.com/conference/> (last visited Aug. 5, 2016).

75. See, e.g., Maddie Taterka, *Surviving or Thriving: How Economic (In)Justice Matters for LGBT People*, AUTOSTRADDLE (Feb. 5, 2015, 3:00 PM), <http://www.autostraddle.com/surviving-or-thriving-how-economic-injustice-matters-for-lgbt-people-275453/>.

there's no particular reason why there needs to be health insurance, and it is sort of astonishing to me to this day that [1:04:00] LGBT organizations are not the leading groups in the fight for a single-payer system. I just don't understand that, having grown up in the era of AIDS—we're still in the era of AIDS—but having grown up when it came on the scene, and living with it today and watching people die today, plus all the other health needs that come up among poor people, among queer people generally. I don't understand why this is not one of our absolute number one issues and why we haven't been at the forefront of it. It's just astonishing to me, and marriage simply does not solve this issue at all.

And then, finally, the issue of policing. I heard Alicia Garza from Black Lives Matter speak recently, and she emphasized over and over and again the importance of queer people in the Black Lives Matter movement.⁷⁶ Again, it does not take a lot of imagination to understand how it is that policing affects us. It's not only because an awful lot of us are people of color. It's also because an awful lot of us are just targets as queer people, and [1:05:00] we are disorderly. We are almost by definition disorderly, and we are exactly the sorts of people that police see as a problem. And we are particularly seen when we are gender nonconforming, when we are poor, when we are of color, and when we are in gentrifying neighborhoods, so The Legal Aid Society constantly is representing people who are picked up for walking while trans, particularly in gentrifying neighborhoods where they are seen as a threat. And so it is assumed, of course partly because of this exclusion from these sources of income, that trans people—particularly poor trans people; young, poor, trans people in richer neighborhoods—have to be engaging in prostitution or soliciting prostitution.

Of course, that also raises the question of regulation of sex work and the whole issue of the underground economy that people are forced into when they are excluded from these sources of income. That's a huge topic, and I think it's extremely important that a number of LGBT organizations did come out very quickly in support of the [1:06:00] Amnesty International position in favor of decriminalization of sex work.⁷⁷ I think it's just profoundly important. And so, I just

76. Les Fabian Brathwaite, *The New Black Vanguard: Alicia Garza on What Really Matters*, OUT MAGAZINE (May 18, 2016), <http://www.out.com/news-opinion/2016/5/18/new-black-vanguard-alicia-garza-matters>.

77. See *LGBT Rights Organizations Join Amnesty International in Call to Decriminalize Sex Work*, LAMBDA LEGAL (Aug. 20, 2015), http://www.lambdalegal.org/blog/20150820_decriminalize-sex-work.

want to say a couple of words about each of those areas of priority before wrapping up.

On income security we've talked a lot today about anti-discrimination laws. I mentioned Title VII: I said that I'm working on a project in support of the EEOC position that it is sex discrimination to discriminate against gay job applicants or employees.⁷⁸ I think it's all very important. I've also written, and it's online for free, part of a book called *New Queer Agenda* that QJE put out a few years ago.⁷⁹ It's on the website of the Barnard Center for Research on Women, a piece saying that while anti-discrimination laws are very important, and I do believe in them, they are not enough. As an employment lawyer, having to prove that the abuse and poor treatment of an employee was for *this* [1:07:00] reason and not for *that* reason is extremely difficult. And the idea that employers should be able to defend themselves by saying "Well, no, I was abusive and arbitrary for a perfectly legal reason or lack of reason," [audience laughter] it just shouldn't exist.

And so, we have an at-will system that's a problem, but we also live in a world in which unions now represent something like 6.7% of the private workforce, and that is a huge problem.⁸⁰ Not to say that unions have always been supportive of gay rights or of other forms of the fight against discrimination; but unions have been a vital way for people who are excluded to enter into decent jobs in this society. And the evisceration of the union movement has had a profound, and profoundly negative impact, I think, on our communities in general, as they have our society in general. And I make the argument in that piece that if we are serious about fighting against discrimination in the workplace, we have to recognize that there's a fight against unions, [1:08:00] and that we have to be part of the fight in defense of collective power in the workplace. If you don't have collective power in the workplace, you are going to be litigating these cases until the cows come home. And in the few that you win, several years later you'll get some backpay and some emotional distress damages for people, and it's terrible. It's a terrible system, a terrible way of fighting against discrimination in the workplace.

78. See *Baldwin v. Foxx*, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

79. Richard Blum, *Equality with Power: Fighting for Economic Justice at Work*, SCHOLAR & FEMINIST ONLINE, No. 10.1-10.2, Fall 2011/Spring 2012, <http://sfoonline.barnard.edu/a-new-queer-agenda/equality-with-power-fighting-for-economic-justice-at-work/0/?print=true>.

80. See *Economic News Release: Union Members Summary*, U.S. BUREAU LABOR STATS. (Jan. 28, 2016), <http://www.bls.gov/news.release/union2.nr0.htm>.

QEJ had a workplace bullying forum a few years ago where a woman, one of our speakers, was an African American lesbian in the construction trades who came out of NEW,⁸¹ Non-Traditional Employment for Women. I used to do trainings for them, and she actually did trainings for her local on respect in the workplace. And she said that having worked in both union and non-union sites, that for her while there was a tremendous amount of hazing of women that went on generally, not just lesbians, that it was still very important to be in the union setting. She also said to me, and I thought this was very telling, that in her five years, at the time, of working on construction sites that were unionized [1:09:00] where she was an out, a very prominent out, lesbian, no gay man had ever come out to her. That should say something about where we're at in the workplace these days, still.

I've already said what I have to say about health care. I just want to add, about the single-payer point: I do want to call attention to the Legal Aid, Sylvia Rivera Law Project, and Willkie, Farr & Gallagher case, against the state Medicaid system over availability under Medicaid for coverage for sex-reassignment services.⁸² We, through litigation, got the government to relent on some of it.⁸³ One of the issues that we actually might go to trial on is access to hormones and blockers for youth where the government is saying, "We just won't provide that."⁸⁴ So at the most critical moment in a person's life to prevent transition to puberty along undesired sex lines, the government is preventing any sort of remedy for that, and we're still fighting that battle here [1:10:00] in liberal New York where the governor has come out in favor of trans rights.⁸⁵ So these things are still very contested, and we shouldn't lose sight of the importance of Medicaid as a place of battle over the access to health care on all fronts, as you were saying before, Bebe.

The last thing I'll say is that, outside of Legal Aid, I have mostly been involved in grassroots work on these kinds of intersectional queer agendas. There is a community of people doing that kind of work, who recognize these intersectional issues. They see themselves often as quite separate from the national gay-rights organizations. There has not been a particularly harmonious relationship over the

81. See *generally About NEW*, NONTRADITIONAL EMP. FOR WOMEN, <http://www.new-nyc.org/pages/about.html> (last visited Aug. 5, 2016).

82. *Cruz v. Zucker*, 116 F. Supp. 3d 334 (S.D.N.Y. 2015).

83. *Id.* at 338 (describing the government's response to the litigation).

84. N.Y. COMP. CODES R. & REGS. tit. 18, § 505.2(1)(2) (West 2016).

85. *Governor Cuomo Announces New Regulations Protecting Transgender New Yorkers from Discrimination*, N.Y. ST. DIVISION OF HUM. RTS. (Jan. 20, 2015), http://www.dhr.ny.gov/gender_identity_regulations.

years; there are moments when they have collaborated, but it is too infrequent. There are a number of organizations in one building, [1:11:00] where QEJ used to be, on 24th Street: they're sort of their own little colony of these kinds of radical organizations. If people aren't familiar with them, these include FIERCE, Streetwise and Safe, the Audre Lorde Project, and the Sylvia Rivera Law Project, for example. And they have actually, through non-litigation strategies, managed to win some important victories.⁸⁶ I'll just mention two of them that I think sort of give you a sense of how important these things are and how central they are to people's lives.

One was that the Bloomberg administration decided that domestic partnership was not a sufficient proof of being a family when you applied to a homeless shelter as a couple, because they said people would commit fraud and claim to be a couple when they weren't to be able to live together in shelter with a perfect stranger.⁸⁷ This never really made much sense, but what was interesting about it is that when QEJ organized a group of queer organizations to combat this, the compromise position that the Bloomberg administration offered was to say, "Well, [1:12:00] for gay or same-sex couples, it's okay, since with domestic partnership, you have the highest form of relationship you have access to right now; whereas we won't allow it for straight couples—who, by the way, are committing a lot of fraud, since we know a lot of women want to stay with strangers in shelters when they could stay by themselves—because they have access to a higher form of relationship in marriage."⁸⁸ To her credit, Chris Quinn said, "That's sexual-orientation discrimination against straight people. You can't do that," and finally got him to back down on it.⁸⁹ Now, domestic partners do have access, as families, to homeless shelters at the moment when they most need each other, of course.

Similarly, QEJ and some other organizations, including the Sylvia Rivera Law Project, got together; and for years fought, finally,

86. Andrea Ritchie, *New Report Centers LGBTQ Experiences of Mass Incarceration*, HUFFINGTON POST (Feb. 24, 2016, 11:53 PM), http://www.huffingtonpost.com/andrea-ritchie/new-report-centers-lgbtq-_b_9298138.html.

87. See COALITION FOR THE HOMELESS, CLOSING THE SHELTER DOOR: THE BLOOMBERG ADMINISTRATION'S MISGUIDED PLAN TO DENY SHELTER TO HOMELESS FAMILIES AND CHILDREN (2004).

88. See *Ending the Bloomberg Administration's Discriminatory Policy of Denying Shelter to Homeless Domestic Partners*, COALITION FOR THE HOMELESS (Mar. 23, 2005), <http://www.coalitionforthehomeless.org/wp-content/uploads/2014/06/homeless-domesticpartners-statement03232005.pdf>.

89. See *Testimony of Coalition for the Homeless Before the New York City Council*, COALITION FOR THE HOMELESS (June 14, 2006), <http://www.coalitionforthehomeless.org/wp-content/uploads/2014/07/TestimonyGeneralWelfareJune142006.pdf>.

successfully, with the Department of Homeless Services, to allow people to self-identify their gender when they're assigned to a homeless shelter.⁹⁰ One of the things about this reliance on institutions— [1:13:00] whether it's forced on you, as in prison, or one you apply for because you need it, like shelter—is that they are all sex-segregated; and sex is policed there, often brutally policed, of course, with a lot of sexual assault which is very common to these institutions. But part of that is that people were not being permitted to say, “Yes, I'm a woman. I want to go to a women's shelter.” Even if you have a problem with the way the whole thing is constructed in the first place, at least within that system, I should be able to choose, and people were not allowed to choose. And it took years of advocacy work and finally it was accomplished, not through litigation, but through advocacy by these grassroots organizations.⁹¹

On the litigation front, to wrap up, the one thing I'll say is, when you're fighting with these kinds of institutions, it's not enough to sort of recognize an interesting legal theory. I mean, that's obviously important, but one of the things about an organization like Legal Aid—and I'll make a plug for it—is that we deal with the day-to-day experience of large numbers of people encountering these kinds of institutions, [1:14:00] and we understand the “logic” of these institutions: why they do what they do; how they do it, and that kind of knowledge is absolutely critical to understanding any piece of the puzzle. So if you want to fight against how the shelter system treats queer people, you have to understand how it treats people altogether. If you want to fight against how foster care mistreats queer kids, you have to understand how the foster system operates altogether; and with that, you need to have an investment of resources that really confronts these institutions, not just around one particular axis, but in general as sort of consuming institutions for people in the classes that rely on them for survival or who are forced into them.

So I think it's critical, looking forward, as a matter of strategy and means, that the self-identified LGBTQ (and so forth) movement ally itself with and support organizations that are fighting these kinds of institutions and to [1:15:00] support their funding and to work with them when queer issues present themselves. There's no reason on earth why an organization like Legal Aid can't focus on queer issues.

90. See *SRLP and Allies Win Victory for Trans Homeless People*, SRLP NEWSLETTER (Sylvia Rivera Law Project, New York, N.Y.), Mar. 2006, at 5, <http://archive.srlp.org/files/March%202006%20Newsletter.pdf>.

91. *Id.*

We are litigating, for example, this Medicaid case.⁹² We are litigating on the lack of access to shelter beds for homeless and runaway youth, who, as a group, are disproportionately queer.⁹³ We can do that work, and we want to have the expertise of self-described LGBT organizations but they also need to have us. I think it's an important alliance and sort of a critical way of thinking about litigation: that it's a very long-term institutional investment, or anti-institutional investment, to be successful, if that's at least the one thing I can offer on the question of what works.

BURT NEUBORNE

Thank you, Richard. Let me steal two minutes, and that's all I will steal, to make a couple of observations. First, it occurred to me as the panel was going on that this is the forty-eighth anniversary [1:16:00] of the very first case that I appeared in in the Supreme Court, which was *Boutilier v. Immigration and Naturalization Service*.⁹⁴ It's worth noting, not because it has anything to do with me, but because it tells something about movements and something about change over time. We have a tendency, all of us—because we are anxious to get things done; we want progress; we are tremendously dissatisfied with the status quo; it's never going fast enough; there is always more to be done—to forget that stuff does get done. Change does happen. It happens at a pace that is a snail's pace; but it happens.

Boutilier was about a young person, a gay man, who went to visit friends in Montreal, and then tried to return to the United States.⁹⁵ When he came back into the United States, he was stopped at the border. He was a Canadian citizen.⁹⁶ [1:17:00] He had a green card, and was coming back into his job in New York City. The border examiner discovered he was gay.⁹⁷ The INS immediately said, "Well, you can't come back; you're an excludable alien. You are an excludable alien because you have a "psychopathic personality."⁹⁸ In those days, being gay was treated as a form of mental illness by the Ameri-

92. *Cruz v. Zucker*, 116 F. Supp. 3d 334 (S.D.N.Y. 2015).

93. *C.W. v. City of New York*, 13 Civ. 7376 (E.D.N.Y. 2013).

94. *Boutilier v. INS*, 387 U.S. 118 (1967).

95. *Id.* at 119–20.

96. *Id.* at 118–19.

97. *Id.*

98. *Id.*

can Psychiatric Association.⁹⁹ Since the 1930s gays had been stigmatized as having a “psychopathic personality.”¹⁰⁰

So, I am just starting my career. I’m still at a Wall Street firm. It’s before I went to the ACLU. I volunteered to write the ACLU amicus brief. I said, “Oh, this is wonderful. It’s my first chance to write a brief in the Supreme Court.” And they said, “Sure, go ahead.” And this is the ACLU, and this is what you would expect to be a sensitized [1:18:00] part of whatever movement was going on. Do you know what my brief was? I didn’t challenge the idea that gays were a psychopathic personality. It didn’t even occur to me that that was an argument I could make. The argument I made was that “psychopathic personality” was void for vagueness.¹⁰¹ [*Audience laughter.*]

That was the limits of imagination. The limits of people’s imagination, as recently as 1967, was the inability to see through the label that had been placed upon gay people. In thinking about movements, this is why I have such debt of gratitude to Peggy’s work, breaking through those labels, breaking through the cognitive trap that allows language and the ordinary way we think about things to put blinders on what we can imagine, is [1:19:00] one of the great achievements of movements. You won’t see it in a case. In fact, we lost *Boutilier* 6-3. You won’t see it in specific legislation. But you could see it if you get inside people’s heads and watch their heads expand as cognitive prisons are broken through and imagination is opened up to be able to reform. As you were all talking, it dawned on me that it’s worth noting that in area after area, we have broken through cognitive prisons; and we have made progress over the last fifty years, and we should be proud of it. It’s not enough? Too slow? Much more to be done.

So, that’s the good side. The bad side is: if you think about the movements that we’ve all worked in and that I’ve hoped that would succeed, like reproductive freedom, the First Amendment, race, gender, and gay rights. In each of those movements, [1:20:00] if you look at them as separate movements—and not as a single movement to-

99. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38-39 (1st ed. 1952) (DSM-I).

100. The 1968 version of the DSM (DSM II) continued to treat homosexuality as a mental deviation. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS (DSM-II) 44 (2d ed. 1968). In 1973, the Board of Directors of the APA rescinded the diagnosis of homosexuality as a form of mental illness. AM. PSYCHIATRIC ASS’N, HOMOSEXUALITY AND SEXUAL ORIENTATION DISTURBANCE: PROPOSED CHANGE IN DSM-II 44 (6th prtg. 1973).

101. Brief for Am. Civ. Lib. Union as Amici Curiae, *Boutilier v. United States*, 387 U.S. 118 (1967) (No. 440), 1967 WL 113945.

ward human dignity as Peggy urges us to do—, one thing comes out, and it comes out starkly and Richard's talk is what brought it to mind.

One thing that comes out starkly is that we've done well in almost all of those movements for comfortable people. The upper middle class has done very well in enjoying reproductive freedom. The rich now own the First Amendment, so they've done very, very well. They even managed to acquire it as a wholly owned subsidiary. Race and gender? Comfortable black people live in ways that would have been inconceivable when I was a boy, in [1:21:00] neighborhoods, in settings, in employment situations. Women? Tremendous strides for middle-class women: a revolution, literally a revolution in a generation, as to how they live. And now, we're living through the same movement for gay rights.

Each one of those, if you look closely at it, there is a forgotten layer in every single one of those movements, and it's the layer at the bottom. It's the poor in each one of those movements. Richard talks about how being a member of one of the despised groups makes it even worse because then you're going to be poorer than otherwise. But even without that additional disability, in each of those movements, there is the poor. And we have not been successful, as reformers; we have not been successful no matter how hard we've tried, in bringing the joy of being able to see [1:22:00] change to the weakest among us.

And so one of the pleas I would make—and this is a wonderful way to honor Tom; Tom would want us to think this way. I think of Tom today, I ran into him years ago accidentally one day when I turned a corner in Paris one May afternoon and I bumped into him on Rue du Bac. He was there on business, and I spent the rest of the day seeing Paris through his eyes, because one of things you want to remember about Tom: he knew how to live. He built a remarkably lovely, elegant, life. And to be part of it that afternoon as we walked through Paris is a memory I'll never forget. It's nice to remember that Tom would want us to say, "Don't forget the people at the bottom. We are not successful if we don't bring them with us."

In Tom's name, I urge us all to start by looking at every human institution from the bottom up. Not from the top down, not from the middle out, but from the bottom up. And if the bottom doesn't succeed, the rest of us don't succeed either. Of course, that's nothing more than an emotional commitment, but it's an emotional commitment that would cause you to say—as Tom would say, and as Richard said now—that allies are tremendously important. The movement is not broken up into little pieces; it's all part of the movement for

human dignity. It's all part of a unified movement, and sometimes I worry that we're broken into silos. And we worry about our identity, and we worry about our cause. And ultimately we forget that there is a unity that binds us together as people who are trying to achieve change, and part of that unity, part of that glue [1:24:00] has to be a commitment to the people at the bottom.

That's the price of being a moderator. I get paid by saying something. Now, I want to give the panelists one chance: if they had any cross-questioning or cross discussions, but I'm very anxious to open it up to the floor. There are mics, and I hope that you'll have questions and observations for various folks. Any last words from the panel?

Richard Blum:

I am going to do a little of “do ask, and do tell.” Does anyone recognize this? [*Holds up magazine to audience.*] This was the original copy of *Out/look* magazine in which the debate between Tom Stoddard and Paula Ettelbrick on whether the gay rights movement should adopt marriage as a priority, as part of its agenda, is to be found.¹⁰² [1:25:00] I actually acquired it at the time and held onto it ever since. I found it this morning in my collection, which someone else might call hoarding. So if anyone wants to take a look at it, I have it right up here.

BURT NEUBORNE

So we've got some time for the audience, both questions and discussion, and I hope you'll direct your question to one of the panelists or one of the issues that was raised. And perhaps other people in the audience might want to comment on the questions as well. I understand there are mics out here? Good, so if you'll raise your hand . . .

Lynn Paltrow (National Advocates for Pregnant Women):

Hi, I'll start with Bebe. I wonder—in terms of the case going to the Supreme Court,¹⁰³ it sounds like the strategy is to sort of say, “You created a standard; now give it meaning.” [1:26:00] And I'm wondering what your thoughts are to the value of having at least some people argue that *Casey* was wrongly decided, because I always think

102. See *Gay Marriage: A Must or a Bust?*, *OUT/LOOK: NAT'L GAY & LESBIAN Q.*, Fall 1989, at 9.

103. *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *rev'd and remanded sub nom. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), *cert. granted*, 136 S. Ct. 499, 193 L. Ed. 2d 364 (2015), and *rev'd and remanded*, 136 S. Ct. 2292 (2016).

of it as a case in which the Court said, “There are a group of people called women who have fundamental rights and we’re taking away your status as people with fundamental rights to be people who now have rights that can be fundamentally burdened.”

And in terms of movement building, arguments about personhood, [which] many populations have not achieved in this country, are movement building and inspirational. So I wonder about that, because the [political] right, way before *Thornburgh*,¹⁰⁴ argued that *Roe* should be overturned, long before it was certified as a question.¹⁰⁵ The other half of that is, above all, exciting and broadening, but it is focusing on one piece of healthcare, access to abortion, and not, as Richard talked about, really taking on the issue of a single payer [system] [1:27:00] which would, if it were really a human rights issue include everything human beings need and that would include abortion for women and hormones for transgender people.

Bebe Anderson:

Yes, thanks. Those were good questions. As you know, with an amicus strategy, there are a variety of approaches to it. I’ve certainly had my issues with the decision in *Casey* and I certainly prefer, in some ways, the decision in *Roe*—though *Roe* certainly has its flaws, as well. In terms of the current Court, I think that we have an excellent chance to get a meaningful “*Casey* Part Two” decision from the current Court. I don’t think we have an excellent opportunity to get a better than *Casey*, back to a strict scrutiny decision from the current Court. [1:28:00] And in terms of amicus strategies, part of it will be amicus briefs that support the various parts of the main briefs. Part of it will be additional arguments supporting probably different voices. And certainly, there could be amicus briefs that are arguing something very different in terms of a more aspirational standard. I think that is how I would frame it. And that I think is part of the whole process.

I think that, as Kevin was saying earlier, as litigators, you want to win. You obviously want to win in the way that you can best win, and so you want to win in a way that will be advancing your cause and not simply a win. But I think that there is an excellent opportunity now to get a win that will indeed address this issue of the impact, of who actually has access. Because again, the women who can afford to travel are not going to be harmed very much at all [1:29:00] if the

104. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

105. *E.g.*, Greenhouse & Siegel, *supra* note 10, at 2028.

Texas restrictions stay in place. They will simply travel wherever they need to travel. If the last clinic in Mississippi has to close, women who can afford to travel out of Mississippi will be able to afford to travel out of Mississippi; but keeping access within a state, and within a state as much access as possible, is going to be especially important for low-income women: for immigrant women who can't travel out of the Rio Grande valley to another clinic because there are various internal immigration check points within the state. And if they don't have the right status, they can't even get to where that other clinic is. So in any event, there are a lot of issues to bring in front of the Court, and there are also a lot of issues to bring in front of the public and to make them aware.

And again, the attention that happens when you have a Supreme Court case is an opportunity to bring attention to the actual real lives of women and how this is playing out. It is certainly true that the insurance coverage piece and the Medicaid piece is really, as you say, just a part of a much bigger [1:30:00] problem. And I think that it is important to work for healthcare reform in a broad way. I think it's also important to work for healthcare reform in this particular area as well and to do it in a way as that campaign is trying to do which is really bringing the links. You have to look at all the factors that affect people's lives in order to give meaning to any right; and I think that's an example of that approach. But there's certainly no loss of extremely important issues to work on, and, I think, in terms of success, working on issues from a variety of angles is one of the ways to advance and get success ultimately.

Burt Neuborne:

Yes. Just an observation, I'm sure most of you remember it, or maybe you're not old enough a lot of you: when *Casey* came down, it came down to relief. I mean we were sure that there were five votes to overturn *Roe* and if you counted the Supreme Court carefully at that point [1:31:00] there were five Justices, all of whom in separate opinions had expressed the belief that *Roe* was either wrong or very controversial and needed re-thinking.¹⁰⁶ And so the assumption was in *Casey* was that we were going to lose, and one of the things that Justice Scalia never forgave Justice O'Connor for, is that he felt that she deserted him on *Casey* and joined the Souter-Kennedy plurality,

106. See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520–21 (1990) (Scalia, J., concurring); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518–19 (1989) (Chief Justice Rehnquist and Justices White and Kennedy); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting).

which is the plurality that set up the unfortunate undue burden test we're living under now. But given the reality of that world, *Casey* was the best we could do at that point. And my sense is it's probably the best we can do now; because, don't forget, you've got four justices on the court that you might be able to persuade to go beyond *Casey* but you've got Kennedy as your swing vote. [1:32:00] And he's not walking away from *Casey*, so the best you can do is do the best you can do with *Casey*.

But you raise a point that I had not seen, which is that it's possible to take this Texas case and use it as a poor person's case. In other words, appeal not just under substantive due process, but also under real economic equality to say that if abortion is indeed a right it has to be available to poor women as well as everybody else. That's an interesting argument.

Melissa Murray:

Melissa Murray from Berkeley Law.

Bebe, I just wanted to ask and, apropos of Burt's point, *Griswold*,¹⁰⁷ which sets all of this up, was actually at least initially sort of put forth to the Court as a kind of poor person's case. The real people who are impacted by the Connecticut Comstock Law were not women of means but their poorer sisters who had to go to birth control clinics; and the law basically closed all of the clinics in Connecticut; and when it was briefed, that was one of the arguments.¹⁰⁸ [1:33:00] And Justice Douglas, who was no stranger to marriage, instead advanced this right to privacy argument that was rooted in marriage, so I wonder how much of the economic equality argument, or this whole idea of not leaving the poor behind, may lose traction just because we have a court that's actually quite comfortable in their circumstances and Justice Sotomayor is really the only one I can think of who actually has lived a life of economic struggle in some regard. So I wonder, is it going to be easy to make those kinds of arguments to a Court that is materially quite well off?

Bebe Anderson:

Well, let me put it this way: I don't think economic justice arguments will be the most compelling to Justice Kennedy; and of course that's often the focus, but I think they will be important, again as part

107. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

108. See Cary Franklin, *Griswold and the Public Dimension of the Right to Privacy*, 124 *YALE L.J. F.* 332, 334–35 (2015).

of the amicus strategy, to get in front of the public. Because, in order to improve the right, protect the right, enhance the right, maintain the right, [1:34:00] the public has to be concerned and has to understand the impact of these types of laws. And I think that, as much as we could do to educate the public, and to the extent to which we can use amicus briefs or op-eds related to those amicus briefs and bring forth those arguments, it will be very important.

It will also, I think, be an important way to help make those connections with other movements, because again, ultimately to be successful all the movements need to be connected. And I think that we'll have an amicus brief, for example, focused on the impact on Latinas in Texas, and that is heavily, not only immigration status but also low income issues in terms of their access and the devastation to some of those communities in terms of losing the only clinic in the Rio Grande Valley and losing the only clinic in East Texas, or West Texas, rather. So I don't think it's a strategy so much that will succeed [with the Court]. I agree with you: given the current Court, I don't think that's going to get us votes [1:35:00] or get us the vote we most need, but it's an important part of the case nonetheless, I think, in terms of the impact. And also to recognize that in terms of who we look at, who is most impacted by the types of restrictions that we're challenging—and by “we” I don't mean just the Center, but obviously the ACLU, Planned Parenthood—most of those restrictions fall most heavily on the people of least means throughout the country, and so even though the courts are not resolving them on economic grounds, really, the impact is there on economic grounds.

Burt Neuborne:

Okay, we have time for one more.

Audience Member:

Hi. I had a question for Richard Blum, and that was regarding other ways to erode employment at will outside of the use of protected categories; because based on what you said I hear what you're saying that you can basically say, “I'm just a mercenary person in general, [1:36:00] I treat people horrendously in general, that wasn't because I have some inaccurate generalization about the protected class that you happen to be in. I just don't have any respect for anybody whatsoever,” and that's a weird defense. And I was wondering, if you had some sense of how that's going to look, or, if that were to evolve, if you did have protections just generally based on general human dignity or do you have any sense as to what that would look like?

Richard Blum:

Sure. That's in my union contract, and that's simple. I mean, this exists in civil service jobs, it exists in unionized jobs, and it exists in places where there's enough of a movement around to make it happen. And part of the Fight for Fifteen is not only to raise the minimum wage, which is clearly an important part of material survival and dignity, but also to have the right, the freedom of association, to form a union and be free of harassment, [1:37:00] which is endemic in this country when it comes to unionizing.¹⁰⁹ So, and they have used various techniques. For example, when strikers were fired, clergymen, council members and so forth and so on accompanied those people to their jobs the next day and said, to the manager of the local McDonald's or whatever, "Don't you really want to take this person back in?" And it happened, so there are sort of grass roots community strategies as well as legal strategies but they all have to do with collective action: I mean the collective activity, collective organizing and building power in the workplace in some fashion. And what it looks like is good cause.

Burt Neuborne:

Well, so I think our time is up. And I want to thank the panel and thank the organizers. I also want to say that I'm sure Tom is in the room. I feel very good about that. So, thank you. [*Audience applause.*] [1:38:00]

109. See, e.g., Steven Greenhouse, *How to Get Low-Wage Workers Into the Middle Class*, ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540/> (describing the mission and work of the Fight for Fifteen campaign).