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## How Abortion Laws Do and Don't Work

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## HOW ABORTION LAWS DO AND DON'T WORK

*Michelle Oberman*<sup>†</sup>

### *Abstract*

As conservative U.S. states undertake the recriminalization of abortion, those on all sides of the abortion war should be wondering what happens next. When abortion law “on the books” changes in the United States, what might the law “on the ground” look like? One answer lies in examining what happens today in countries with restrictive abortion laws. Israel’s 1977 law bars abortion unless approved by a “pregnancy termination committee.” Drawing on interviews with abortion committee members, lawmakers, advocates and others, this Article presents an ethnographic study of one country’s experience with a law criminalizing abortion.

Israel’s approach, limiting abortion access to those with qualifying conditions, is likely to be in play for some U.S. states in the years to come. But the significance of Israel’s experience lies beyond what it teaches us about the choices and challenges surrounding the implementation and enforcement of a restrictive abortion law. It surfaces vital questions about what abortion laws actually accomplish—questions this Article answers by identifying six distinct functions of abortion laws: criminal sanction, market-structuring force, informal adjudicatory process, shame sanction, expressive function, and truce. This Article describes these functions in turn, first considering the ways in which each one manifests in Israel, and then exploring the implications for U.S. states intent on recriminalizing abortion. The upshot is this: each of these functions brings into precise focus the ways in which forthcoming U.S. abortion crimes, on the ground, will necessarily struggle and fail to be seen as legitimate exercises of state authority.

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## INTRODUCTION

Half a century into the United States' war over abortion's legality, a dramatic shift is in sight. As the conservative majority on the Supreme Court returns to the states the question of whether and when abortion ought to be legal, the dueling platitudes of choice and life will become obsolete.<sup>1</sup> The next phase in our abortion war will feature states experimenting with ways to outlaw abortion.

It will be a time of legal chaos. Experts estimate that abortion will remain legal in twenty-one states.<sup>2</sup> Meanwhile, lawmakers in the other twenty-nine will endeavor to enact abortion laws that will satisfy constituents who elected them, at least in part, on a promise that they would do something about abortion. Their task will be complicated by a rapidly expanding black market in abortion

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1. With the Supreme Court's 2021 decision to allow Texas S.B. 8 to take effect, it would seem that the question is not whether or how the Court will eviscerate the Constitutional right to abortion, but when. See S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021); see also Adam Liptak, J. David Goodman & Sabrina Tavernise, *Supreme Court, Breaking Silence, Won't Block Texas Abortion Law*, N.Y. TIMES, <https://www.nytimes.com/2021/09/01/us/supreme-court-texas-abortion.html> [<https://perma.cc/YZS3-HXEG>] (updated Oct. 15, 2021); see also David D. Savage, *New Analysis: Supreme Court Signals Roe vs. Wade Will Fall After Allowing Texas to Ban Most Abortions*, L.A. TIMES (Sept. 2, 2021), <https://www.latimes.com/politics/story/2021-09-02/the-supreme-court-signals-that-roe-vs-wade-will-fall-now-that-texas-may-ban-early-abortions> [<https://perma.cc/6HP4-4Y49>] ("The Supreme Court's conservative majority has sent its strongest signal to date that Roe vs. Wade will fall, having given a green light to the nation's second-most populous state to outlaw abortions after six weeks of pregnancy.").

2. *What If Roe Fell?*, CTR. FOR REPROD. RTS. (Aug. 28, 2019), <https://maps.reproductiverights.org/what-if-roe-fell> [<https://perma.cc/VGN3-SV9D>].

medications, which will escalate to meet demand.<sup>3</sup> Law enforcement challenges will abound—how to detect the crime, who to prosecute for it, and what to do about the reality that abortion, legal or otherwise, remains commonplace.<sup>4</sup> Solutions will be elusive.

One thing everyone will agree on as we adjust to life in a post-*Roe* landscape is that it will no longer make sense to frame our debate over abortion law in simple terms of legality. Beyond the legal v. illegal binary lie urgent questions about how abortion laws work in practice, about what they are meant to accomplish and about whether they actually succeed in meeting their intended purposes. There will be no ducking these questions because their answers will determine the legitimacy and longevity of any law criminalizing abortion.

In an effort to answer these questions—to better understand the nature and function of contemporary abortion laws—I decided to investigate one country's experience with its law criminalizing abortion. Specifically, I chose to study Israel's abortion law.<sup>5</sup> Enacted in 1977 and still in force today, it is unusual. It

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3. See Lynn M. Morgan, *Reproductive Governance, Redux*, 38 MED. ANTHROPOLOGY 113 (2019) (discussing the economic dimension of regulating reproductive behaviors and the marketing of misoprostol); see also Claire Cain Miller & Margot Sanger-Katz, *Why America's Abortion Rate Might Be Higher Than It Appears*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/20/upshot/abortion-pills-rising-use.html> [<https://perma.cc/7JMX-38EP>]; see also Cecilia Nowell, *Use of 'At-Home Abortion Pills' Rises Amid Pandemic and Faces New Threats*, GUARDIAN (Nov. 1, 2020), <https://www.theguardian.com/us-news/2020/nov/01/at-home-abortion-pills-increasingly-in-demand-amid-pandemic-under-new-threats> [<https://perma.cc/2GX7-YMZ3>].

4. See *infra* notes 61–67 and accompanying text for a discussion of the challenges of enforcing abortion crimes; see generally MICHELLE OBERMAN, *HER BODY, OUR LAWS: ON THE FRONT LINES OF THE ABORTION WAR, FROM EL SALVADOR TO OKLAHOMA* (2018) (describing the challenges of law enforcement in an era of abortion medications).

5. I struggled with my decision to study Israel's abortion law. It is a problematic example, and not just because the quirkiness of the law and the idiosyncrasies of Israeli culture make it an unlikely model for whatever comes next in the ongoing U.S. battle over abortion law. It feels problematic to me, personally, because of my opposition to Israel's ongoing occupation of territories seized in the 1967 war, and to the humanitarian crisis it has wrought. At a profound level, it feels irresponsible to ignore the Occupation when writing about Israel. Nor is the abortion law unrelated to the Occupation. Indeed, Israel's abortion law can be seen as part of a broad set of policies reflecting what is sometimes called Israel's demographic project. Whether for reasons of religious nationalism or secular Zionism, since the state's founding in 1948, the Israeli government has engaged in a large settlement enterprise and endeavored to increase the Jewish population in the region. See BARUCH KIMMERLING, *ZIONISM AND TERRITORY: THE SOCIO-TERRITORIAL DIMENSIONS OF ZIONIST POLITICS* (1983). But I am not a scholar of the Occupation. For a time, I considered expanding my research to include questions about how those living under Israeli occupation in the West Bank and Gaza accessed abortion. See, e.g., Françoise Daoud & Angel M. Foster, *Navigating Barriers to Abortion Access: Misoprostol in the West Bank*, in *ABORTION PILLS, TEST TUBE BABIES, AND SEX TOYS: EMERGING SEXUAL AND REPRODUCTIVE TECHNOLOGIES IN THE MIDDLE EAST AND NORTH AFRICA* 58 (L.L. Wynn & Angel M. Foster, eds., 2016). Ultimately, I decided I lacked the background and skills needed to mount a serious inquiry into these questions. Although I met with Israeli Arabs, including human rights lawyers and a committee social worker, a meaningful consideration of how Israel's abortion law affects both minority women living in Israel and those living in the Occupied Territories is beyond the scope of this project. In the end, I persevered with the project because it became clear that, in answering the narrow

makes abortion a crime unless it is approved by a “pregnancy termination committee,” which must be comprised of two doctors and a nurse or social worker.<sup>6</sup> The law specifies the grounds on which a committee may approve a petition, although it does not mandate approval. It does mandate that at least one of the committee members be a woman.<sup>7</sup>

As an academic, I was drawn to Israel because its law seemed to pose an intermediate position between the all-out abortion bans in places like El Salvador, the site of my past research, and the current legality of abortion in the United States. Going into this project, I understood the world’s abortion laws as falling along a spectrum from least to most restrictive.<sup>8</sup> I located Israel in the middle of this spectrum, given that abortion was not available by right, but rather, only when permitted by committee.<sup>9</sup> The committee process intrigued me both because the U.S. used a similar system prior to *Roe*, and also because every indication is that it will once again become relevant, as states move to recriminalize abortion. Even the broadest ban must make an exception for life-threatening pregnancies.<sup>10</sup> Doing so will require states to create some sort of adjudicatory process to rule on how and when a person qualifies for such an exception.<sup>11</sup>

But, in the spirit of full disclosure, I was also drawn to study Israel’s law because I am an abortion-rights advocate. The idea of having to give one’s reasons for wanting an abortion and having to seek permission from strangers

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question of how Israel’s abortion law worked, I was coming to understand vital lessons about how abortion laws work, in general. The more perspectives I heard on Israel’s law, the more I began asking new questions about our own battle over abortion law. In a sense, then, this Article is not so much about Israel as it is about the challenges we face in the U.S. as we approach the prospect of recriminalizing abortion.

6. § 315, Penal Law, 5737-1977, LSI Special Volume (1977), as amended (Isr.), [https://knesset.gov.il/review/data/eng/law/kns8\\_penallaw\\_eng.pdf](https://knesset.gov.il/review/data/eng/law/kns8_penallaw_eng.pdf) [https://perma.cc/N9QZ-8JEV].

7. *Id.*

8. See *The World’s Abortion Laws*, CTR. FOR REPROD. RTS., [https://maps.reproductiverights.org/sites/default/files/WALM\\_2021update\\_V1.pdf](https://maps.reproductiverights.org/sites/default/files/WALM_2021update_V1.pdf) [https://perma.cc/EX7S-P2E4] (last modified Feb. 23, 2021). For a critique of the map, see Rachel Rebouché, *Comparative Pragmatism*, 72 MD. L. REV. 85, 149–54 (2012).

9. I was mistaken. Indeed, as I demonstrate in this Article, the question of legality is only a small part of the picture when it comes to understanding how abortion laws function in practice.

10. See Richard H. Fallon Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS UNIV. L.J. 611, 625–26 (2007); see generally OBERMAN, *supra* note 4, at 119–38. There is surprisingly little consensus on what qualifies as a “life-threatening” condition during pregnancy. For a description of how experts can vary in their definition of whether a pregnancy poses a threat to life, see *id.* at 19–29 (describing a case in which the Supreme Court of El Salvador denied an abortion to a woman suffering from lupus on the grounds that death was not imminent). There are other exceptions commonly embraced, even by the majority of people who identify as pro-life, including permitting abortion in cases of rape, incest, or several fetal anomalies. Each of these exceptions comes bearing questions regarding how states might define and determine eligibility. For an elaboration on these questions, see *infra* note 115.

11. For a discussion of how these processes might inform abortion access, see *infra* notes 115–130 and accompanying text.

appalled me. I wanted to see how their system operated because it struck me as outrageous and degrading, and because I hoped that what I learned might prove useful to those who, like me, are preparing to meet the challenge of securing reproductive autonomy in a context in which states can make pregnancy compulsory.

Over the course of several years (2017–2019), I set out to study Israel's abortion committees by interviewing those with direct experience of how they worked. This qualitative research employed a snowball methodology,<sup>12</sup> which began by identifying eight experts, selected for their work on abortion committees and/or for their familiarity with the law. After interviewing them, I enlisted their help in connecting me with those who might shed additional light on the way the abortion law functioned. In all, over the course of my research, I conducted twenty-four interviews, meeting not only with committee members from various sectors of the country, but also with academics, advocates, doctors, politicians and scholars of Jewish law.<sup>13</sup>

At its core, the result is a narrow and descriptive case study, reflecting one country's experience with criminalizing abortion. As is so often true of comparative studies, it offers little predictive value. No matter the road the U.S. takes when we turn away from *Roe*, it will not be the same as that taken in Israel.<sup>14</sup>

And yet, in attending closely to the details of another country's experience with criminalizing abortion, I found I could think about abortion law without triggering the state of limbic arousal that so impedes our collective—and my personal—engagement with the subject. In the quiet space afforded by curiosity, I found myself better able to see the ways in which abortion laws work in practice in the twenty-first century.

Specifically, my study identifies and analyzes six distinct functions of modern abortion law: criminal sanction, market-structuring force, informal adjudicatory process, shame sanction, expressive function, and truce. Using the extended example of Israel's abortion law, I describe each of these functions in

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12. Snowball sampling in sociology and statistical research is a recruitment technique of study where existing subjects are asked to identify future subjects from among their acquaintances. See generally Mark S. Handcock & Krista J. Gile, *Comment: On the Concept of Snowball Sampling*, 41 SOCIO. METHODOLOGY 367 (2011).

13. Early on, I decided against interviewing patients. Doing so in a rigorous manner would have complicated my study, posing methodological challenges as well as triggering the need for heightened oversight, given the sensitivity of the issue. Instead, I elected to focus my research on those who could help me to understand the purpose and the impact of the law. *But see infra* notes 49–51 and accompanying text, describing one patient's experience. For a study conducting interviews of committee members, see Nitzan Rimon-Zarfaty & Alan Jotkowitz, *The Israeli Abortion Committees' Process of Decision Making: An Ethical Analysis*, 38 J. MED. ETHICS 26 (2012).

14. Comparative law scholars caution against aiming beyond description. In his 1985 critique of comparative law scholarship, Professor Gunther Frankenberg observed that, “[a]s long as we understand foreign places as like or unlike home, we cannot begin to fully appreciate them, or ourselves. We travel as if blindfolded: visiting only landmarks of our past . . . . Only close attention to detail—variety and heterogeneity—can prevent our leveling others in images taken from our vision of the order of our own world.” Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 412 (1985).

turn, first considering the ways in which they manifest in Israel, and then exploring how they might play out in the U.S. as states set about recriminalizing abortion.

A word about tone: in the pages below, I describe each of these functions in a largely dispassionate manner. It is true to the academic gaze through which I processed the intricate details of Israel's abortion regime. What is left unsaid, more often than not, is my discomfort and outrage at the way Israel's law, like any law criminalizing abortion, asserts dominion over the bodies and lives of anybody who might become pregnant. As you will see, Israel has a system in which abortion is illegal, yet everyone has access. But that access is predicated on a process that I find both absurd and degrading.

I have endeavored to omit my personal opinions because they only distract from the important lessons I would have you take from this Article. Regardless of your opinion on abortion's legality, I want you to come away with a more systematic understanding of how contemporary abortion laws work in practice. By understanding each of the six functions of Israel's abortion law, we are provided with guideposts that can help us navigate what lies ahead.

Part One provides an overview of Israel's abortion committee process by presenting selections from interviews with committee members and those directly familiar with the committee process. It serves as a foundation for the subsequent analysis. Part Two examines what the law accomplishes, calling attention to the relationship between the law on the books and the law in practice, and highlighting the practical functions of Israel's abortion law. Part Three highlights and interrogates the expressive function of abortion laws. Using Israel's law as a test case, I probe the messages abortion laws send and the factors that inform whether those messages are received. Part Four reflects on the reasons why Israel's law has endured for almost fifty years, despite the fact that no one is happy with it. This final section matters to a U.S. audience not because Israeli accord is a model that will work here, but rather because it illuminates the trade-offs implicit in our battle over abortion law.

#### PART ONE: THE COMMITTEE PROCESS

In 1977, the Israeli Knesset, the unicameral legislature of Israel, repealed an abortion law that Israel had inherited from the British when it became a country in 1948.<sup>15</sup> The British Mandatory Criminal Law Ordinance of 1936 had banned abortion unless necessary to save the life of the pregnant person.<sup>16</sup> By the mid-1970s, along with other countries around the world, Israel decided to reconsider its position on abortion.<sup>17</sup> At the time, there was widespread

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15. Criminal Code Ordinance No. 74 of 1936, §§ 175–77, 1936 Palestine Gazette 633 p. 1009–10, [https://www.nevo.co.il/law\\_word/law21/pg-e-0633.pdf](https://www.nevo.co.il/law_word/law21/pg-e-0633.pdf) [<https://perma.cc/SZ2Z-ER9W>]. For a discussion of the historical background, including the legislative history, of Israel's current abortion law, see Noya Rimalt, *When Rights Don't Talk: Abortion Law and the Politics of Compromise*, 28 YALE J.L. & FEMINISM 327, 332–50 (2017).

16. Rimalt, *supra* note 15.

17. Rebecca Steinfeld, *Wars of the Wombs: Struggles over Abortion Policies in Israel*, 20 ISR. STUD. 1, 7–11 (2015). See Rimalt, *supra* note 15, at 333–34; see also Noga Morag-

consensus that the old law was ineffectual. Abortion was commonplace, and prosecutions were all but nonexistent.<sup>18</sup> Lawmakers were spurred into action by a broad coalition of feminists, doctors, and a general public troubled by the risks associated with clandestine abortion.<sup>19</sup>

The 1977 law provides that abortion is illegal unless approved by a committee.<sup>20</sup> These committees operate out of hospitals and clinics across the country.<sup>21</sup> In addition to specifying the composition of committees, the new law

provided that in order to obtain a legal abortion, a woman must fulfill one of five criteria: (1) the woman is under marriage age or over forty; (2) the pregnancy is the result of criminal, non-marital, or incestuous relations; (3) the fetus is likely to have a physical or mental defect; (4) continuation of the pregnancy is likely to endanger the woman's life or cause her physical or mental harm; or (5) family or social conditions dictate the abortion.<sup>22</sup>

Other than one amendment in 1979, which eliminated the fifth criterion, the law remains in force today.<sup>23</sup>

At first blush, the law—with its many exceptions—seems puzzling. Before my initial research trip to Israel, I read everything I could find about it. There is not much: a scattering of academic studies across four decades, and some recent newspapers stories.<sup>24</sup> Some things confused me from the start. I learned that

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Levine, *Abortion in Israel: Community, Rights, and the Context of Compromise*, 19 L. & SOC. INQUIRY 313, 321–22 (1994).

18. See generally Steinfeld, *supra* note 17, at 6–11.

19. *Id.*

20. Rimalt, *supra* note 15, at 334. §§ 313–21, Penal Law, 5737-1977, LSI Special Volume (1978), as amended (Isr.).

21. See Steinfeld, *supra* note 17, at 15–16.

22. Rimalt, *supra* note 15, at 334. “The legal age of marriage in Israel used to be seventeen; in 2013, the Knesset passed a bill that raised the minimum marriage age to eighteen. See Marriage Age Law (Amendment No. 6), 5774-2013, SH No. 2416 p. 58 (Isr.)” *Id.* at 334 n.23.

23. *Id.* at 334 nn.22–24. For a discussion of why the fifth criterion might have been eliminated, see *infra* note 178 and accompanying text.

24. Rimalt, *supra* note 15; Steinfeld, *supra* note 17; Michal Raucher, *The Cultural and Legal Reproduction of Poverty: Abortion Legislation in Israel*, 30 J. FEMINIST STUD. RELIGION 147 (2014); Daphne Barak-Erez, *Reproductive Rights in a Jewish and Democratic State*, in CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 228, 231–36 (Susanna Mancini & Michel Rosenfeld, eds., 2014); Delila Amir & Niva Shoshi, *Israeli Abortion Law: Feminist and Gender Implications*, in STUDIES OF LAW, GENDER AND FEMINISM (Daphne Barak-Erez et al. eds., 2007); Mairav Zonszein, *Israel's Abortion Committees*, N.Y. TIMES (June 12, 2015), <https://www.nytimes.com/2015/06/14/opinion/sunday/israels-abortion-committees.html> [<https://perma.cc/QV2M-2A8L>]; Renee Ghert-Zand, *Black Market Abortions in Israel*, FORWARD (Feb. 5, 2013), <https://forward.com/life/170506/black-market-abortions-in-israel/> [<https://perma.cc/2AXT-G87T>] (summarizing a Hebrew study by Shosh Mula, *The Underground of Black Abortions*, YEDIOT AHRONOT (Feb. 1, 2013)); Elana Maryles Sztokman & L. Ariella Zeller, *Abortion in Israel: When the Nation Enters the Womb*, LILITH (Dec. 11, 2011), <https://lilith.org/articles/abortion-in-israel/> [<https://perma.cc/PL6Z-TF73>];



upwards of ninety-eight percent of all petitions for abortion are approved,<sup>25</sup> yet the law is settled and uncontroversial. Rare efforts at amending it, such as by adding a religious leader to the committees, or by eliminating the committees altogether, have failed.<sup>26</sup>

To understand what the law looked like in practice, I set about interviewing key stakeholders. In the pages that follow, I'll introduce you to them via excerpts drawn from our longer conversations.

#### A. *The Committee Members*

As a first step toward understanding how the law worked, I met with Dr. D'rorit Hochner, an obstetrician-gynecologist at Jerusalem's Hadassah Hospital—the preeminent hospital in the city, if not the country. When we met in May 2017, she had been the chair of Hadassah's pregnancy termination committee for forty years.<sup>27</sup>

“Abortions are illegal,” Hochner told me. “I mean, you can't just go to see your gynecologist, or something and have an abortion because you don't want the pregnancy.”

“Here,” she said, reaching for a paper atop a stack of files and unfolding a 2' x 3' form on her desk. She stood over it, indicating the fine print in the upper right-hand corner. “This is the law, here. You cannot do an abortion without filling out one of these forms. And these are actually the paragraphs stating when you can approve an abortion.”

“So, either the woman is below 17 or above 40. Or the second paragraph, if the pregnancy results from illegal or forbidden sexual

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Carmel Shalev & Sigal Gooldin, *The Uses and Misuses of In Vitro Fertilization in Israel: Some Sociological and Ethical Considerations*, 12 NASHIM: J. JEWISH WOMEN'S STUD. & GENDER ISSUES 151 (2006); Larissa I. Remennick & Amir Hetsroni, *Public Attitudes Toward Abortion in Israel: A Research Note*, 82 SOC. SCI. Q. 420 (2001); Morag-Levine, *supra* note 17; Delila Amir & Orly Biniamin, *Abortion Approval as a Ritual of Symbolic Control*, 3 WOMEN & CRIM. JUST. 5 (1992).

A couple of articles have appeared in the Hebrew press: Ofra Eidelman, *Even in 2016, at the Abortion Committee, It's Forbidden to Tell the Truth*, MARKER (June 10, 2016), <https://www.themarker.com/misc/themarkersmartphoneapp/premium-1.2972318> [<https://perma.cc/MZ8M-TFBD>]; Aviva Lori, *Lies I Told the Committee*, HAARETZ, <http://www.haaretz.co.il/misc/1.1127665> [<https://perma.cc/T946-JNCE>] (Aug. 31, 2011, 3:47 AM).

25. The Ministry of Health published abortion statistics in Israel in December 2015. In 2014, ninety-eight percent of all requests for a legal abortion were approved by the committees. Rimalt, *supra* note 15, at 366. According to one of my sources, it could be closer to ninety-nine percent. Interview with Professor D'rorit Hochner, OBGYN, Hadassah Hosp., Mt. Scopus, in Jerusalem, Isr. (May 21, 2017).

26. See *infra* note 208 and accompanying text for a description of one such failed endeavor. See *infra* note 211 and accompanying text for an explanation of the law's staying power.

27. See Interview with D'rorit Hochner, *supra* note 25. My research for this article was approved by Santa Clara University's Institutional Review Board. All interviews were taped and transcribed, and are kept on file with me. For the sake of clarity, I have made occasional minor edits.

relations. So, rape, or incest, or if the woman is unmarried or divorced, or something like this. Or if a woman comes and says: 'Okay, I'm married, I have two children, but this pregnancy is actually from somebody else.' You know, an affair."

"The third one is that we suspect that the fetus might suffer from a physical or a mental disorder. And then there's the fourth paragraph which is that the continuation of the pregnancy might risk the health of the woman—physically or psychologically."

"So, this is, you know, it's kind of a door out. Because if a woman, she is married, she has three children, and everything looks okay, and she and the baby both seem to be okay, but still she doesn't want the baby . . . So, then she can go to see a psychiatrist and say listen I'm considering abor—er, suicide and he will give her a kind of recommendation, that the continuation of the pregnancy might interfere with her . . . psychological situation. And this would be a certain approval."

"In general, we want to help women. Because you know, when a woman comes, a married woman, with kind of a normal environment. When she comes and asks for an abortion, it means that she is in agony: she needs it."

"So first of all, she'll come to the gynecologist, who will help her. Then she will come to the social worker at the hospital. We ask her to fill this form and also, we fill it: what's her gestational age, how many fetuses, and we explain the risks associated with the termination of pregnancy—the abortion."

"And the social worker is very experienced: she knows, according to what she learns whether the patient will be approved, but usually, the women are prepared, usually they know when they come that they'll get an approval."

"That's why it's almost . . . you know, automatically approved. But, it's according to the law; we're not going to do something which is not. And if the social worker sees this is a case [that is] going to be approved, then she'll do the committee, kind of – the committee: she comes to me, she comes to another physician, and that's the committee."<sup>28</sup>

The conversation with Dr. Hochner, one of my first interviews on this project, made me a little concerned about what I was going to do with my findings. I worried that, by writing about them, I might get my sources in trouble, or worse, that my writing might call unwanted attention to a system that, however flawed, was working to provide access to safe, legal abortions. I did not want to trigger any controversy.

My curiosity was piqued, though, so I went ahead with my interviews, knowing that I could revisit the question of publication further down the road. Later conversations put my concerns to rest, and ultimately I came to see that

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28. *See id.*

nothing I might say would pose such a risk because there is no abortion war in Israel. Israel's law represents an enduring truce; no one is happy about it, but everyone is willing to live with it.<sup>29</sup>

Dr. Hochner had solved the mystery of why committees approve close to 100% of all cases that come before them: anyone who does not meet the law's criteria gets screened out ahead of time by the nurse or social worker.<sup>30</sup> To understand the way that Israel's abortion committees function, you must begin by understanding the pre-screening process, typically conducted by the committee's social worker.<sup>31</sup> The next set of interviews describes that screening process, which begins long before the appointment with the pregnancy termination committee.

Dr. Hochner introduced me to Ms. Gila Segev, the social worker who has served with her on Hadassah Hospital's abortion committee for the past eighteen years. Ms. Segev detailed the various steps a person must take before obtaining an abortion and helped me understand the social worker's role.<sup>32</sup>

Patients first see their own doctors in clinics outside the hospital . . . to do an ultrasound and blood test before they come here. Then she tells her doctor she wants an abortion, and they will tell her to call a committee at the hospital. Then, the secretary will give her an appointment. Most of the time they have to wait up to a week, but sometimes less. For example, if the lady in the office says: "I don't have a place for you." And the girl says: "But you know, I'm six weeks, and I don't want to wait too much, because I want to do it with pills, so I really have to do it urgent." So, the lady in the office doesn't say no, she says: "You know, let me ask the social worker." So, they are calling us, and we will take her, put her in. Sometimes, you know, they have, I don't know, ten cases for the committee already that day, but we say, "Just come without an appointment. You can wait and we'll try to fit you in." It can take some time. First you need to get the permission from the committee, and then you schedule the abortion. The wait for the committee and for an abortion is different from

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29. On the question of truce, *see infra* Part 4.

30. The law permits nurses or social workers to serve on committees, where they typically pre-screen patients. Although I interviewed both, I refer to them here as social workers. For a fascinating discussion about the social workers' role, *see* Amir & Biniamin, *supra* note 24. At the same time, our conversation raised another mystery. There was—to my outsider's eyes—a surprising degree of informality in the committee process: no meetings, just a social worker getting signatures on forms. *See infra* notes 95–101 and accompanying text for an exploration of questions relating to informal adjudicatory processes.

31. It bears noting that, at some hospitals, a nurse plays this role. *See* Interview with Sharon Orshalimy, Exec. Dir., Open Door, in Tel Aviv, Isr. (May 26, 2017) (describing the ways in which some committees screen applicants via nurses, while others use social workers).

32. Interview with Gila Segev, Soc. Worker, Hadassah Hosp., in Jerusalem, Isr. (May 21, 2017).

hospital to hospital. After that, the problem is you can wait sometimes three weeks to have the abortion.<sup>33</sup>

By the time they meet with the social worker, the typical patient will already have had a series of encounters—with their own doctor, with those performing the ultrasound and blood tests and with the abortion committee's secretary, who will prepare them for the meeting with the social worker.

Upon reading the law, I assumed that the abortion committees functioned like informal tribunals. That one seeking to end a pregnancy was required to plead one's case before such panels. These interviews suggested I was wrong. Although everyone I interviewed described their particular process for obtaining three signatures on the government's form, only some of the committee members I met actually required the pregnant patient to appear before the full committee. Indeed, it turns out that at least some committees, like Dr. Hochner's, never actually convene.

Instead, the patient will meet with the social worker ahead of time. During that meeting, the social worker will help identify the ways in which the patient might qualify for one of the law's "indications" or exceptions, thereby securing permission to have an abortion. If a patient is successful, they will leave the hospital not with an abortion, but rather with a prescription for an abortion. With that prescription in hand, the patient can begin making calls in order to schedule the procedure at a hospital of their choosing.<sup>34</sup>

Through Ms. Segev's contacts and a few of my own, I was able to get a sense of how various social workers approach these meetings. I met with another social worker, a ten-year veteran of a Jerusalem hospital abortion committee. She provided a detailed description of her approach:

First, I ask her, "How are you?" I just start with an open question, and if I see that they struggle with that open question, then I'll start asking specific questions. My goal is, first of all, just to hear how they are, you know. "How are you approaching this whole thing in your life? Where are your thoughts? Obviously, you're pregnant. I know that already, I don't need to ask that. Obviously, you're coming for an abortion, but maybe you are not decided on the abortion. Are you decided on the abortion, or is that still an open question for you?"

Of ten women who come in, I would say, maybe, two, three women, are less sure of themselves. There are always some that, in the end, after going through the whole process, even though they sounded really sure of themselves, decide not to do it. Like, some of them say, "No way can I have this baby." And I sometimes play devil's advocate. I bring up issues, I bring up questions. I want them to think it through. I want them—and I say that to them, openly: "I'm going to ask you things that, maybe you don't want to talk about, and you can tell me, 'I don't want to talk about that.'" But I see my job as making

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33. *See id.*

34. *Id.* Note that this can be a lengthy process—two or three weeks. *Id.*

sure that you've thought it through, and that you're making the right decision for you."

I'm worried that afterwards they'll have some psychological problems because they're not sure about it. I also want to make sure they're not being pressured by somebody else. It could be the spouse, the boyfriend, or whatever. It could be the parents.

And I sometimes try to get them to really focus: Is it the pregnancy? Is it the birth? Is it raising a child? You know. And sometimes I feel that there's some kind of psychological problem here because you have all the reasons why it should work, why you should have this baby. You don't have that many children, your children aren't that young, you have money, you're not that old, you know. And I do try to understand that and—those are the ones that, I think, surprise me more. It's that, they're so sure that they can't handle it.

I didn't talk about how I help them fit into the law, but . . . the major problem is the married women. So, you know, during the conversation, probably not in the beginning, but more middle, if there's a married woman, and she doesn't have a reason, and I know that the committee's not going to approve it, I will tell her that. And really the only way to get it approved is to send her to a psychiatrist.

That's a part of it that I'm uncomfortable with, and they often are very angry about. Not often—there are women who just play along with the game and go to the psychiatrist. But there are occasionally women who've expressed a lot of anger about that. They think it's ridiculous. They think that the psychiatrists are making money off of their situation. They have no psychological problem; they don't need to see a psychiatrist. And I try to explain to them that this is the law. For now, this is the way it is, and I'm trying to help them.<sup>35</sup>

There is a built-in variability to these pre-committee appointments, as they are primarily personality-driven. Not all of the social workers I interviewed spent as much time on the process. Some saw ten or more patients a day, twice a week. Others, only six or seven a week. Not all were inclined to push their patients to clarify their reasons for wanting an abortion. Indeed, some social workers and committees approached their work in a rather perfunctory manner. One committee member put it this way, when I asked if there were ever cases that he found challenging:

We don't judge her. If she wants to study for her exams and can't have a child now, that's fine. The only time a woman will be denied is when she won't use one of the excuses. Like if she says, "I don't want to answer these questions; they're stupid."<sup>36</sup>

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35. See Interview with Anonymous Soc. Worker, in Jerusalem, Isr. (May 2017).

36. Interview with Anonymous Comm. Members at Large Pub. Hosp., in Tel Aviv, Isr. (Dec. 7, 2017).

Given the ninety-eight percent permission rate, it seems safe to say that most social workers share Dr. Hochner's sense that, "in general, we want to help women" qualify for an abortion. To be sure, there are hospitals—typically religious ones—that opt out of performing abortions.<sup>37</sup> As such, when choosing from the list of hospitals from which to seek a committee's permission, a patient is unlikely to encounter a social worker who objects to abortion, and therefore outright refuses to help them navigate the steps required to secure the committee's approval.

That said, I did hear stories involving committee members who disapproved of abortion, at least in some cases. In fact, many of those I interviewed described "strict" committees, which were marked not so much by a refusal to grant permission, but rather, by how they treated the patients that came before them. Consider this description from one Jerusalem social worker, who had recently attended a national meeting of abortion committee social workers:

[T]hey were, like, shocked that the women don't stand before the committee with us. It's really a big ordeal, and why should we put the women through that? But they had situations, at this conference, where the doctors were, you know, saying things like, "Well, why are you pregnant again?" Like berating these women. And I was like, "What? We wouldn't . . ." You know, we might berate the woman, but certainly not like . . . Well, anyway, it works very differently at every hospital.<sup>38</sup>

#### B. *The Committee Proceedings*

The variability of Israel's abortion committee process is reflected not only in the divergent attitudes and approaches of the committee members I met, but also in the ways in which the committees reach their determinations. Some committees used nurses to quickly fill out the forms then took the patient before the full committee on the same day. Some convened at the end of the day, without patients present. Some never met, but just had the social worker or a nurse "do the running," as one social worker put it, describing the process of collecting signatures from one doctor, then the other.<sup>39</sup>

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37. See Steinfeld, *supra* note 17, at 15 and accompanying text ("Though all hospitals with gynecology departments are required to provide abortions, many do not."). It bears noting that Israel is the size of New Jersey, and has an extensive public transportation infrastructure, *What You Need to Know About Public Transportation in Israel*, MASA ISR. JOURNEY (May 1, 2021), <https://www.masaisrael.org/what-you-need-to-know-about-transportation-in-israel/> [https://perma.cc/YT2J-6AYP], so unlike the U.S., there is no significant access challenge created even when religious hospitals opt out of providing abortion care. See, e.g., Stephanie Goldberg, *Why Illinois' Newly Recognized 'Fundamental Right' is Getting Harder to Exercise*, CHI. BUS. (July 12, 2019, 3:11 PM), <https://www.chicagobusiness.com/health-care/why-illinois-newly-recognized-fundamental-right-getting-harder-exercise> [https://perma.cc/FF7V-GH22]. See generally Lori R. Freedman & Debra B. Stulberg, *The Research Consortium on Religious Healthcare Institutions: Studying the Impact of Religious Restrictions on Women's Reproductive Health*, 94 *CONTRACEPTION* 6 (2016).

38. Interview with Anonymous Soc. Worker, *supra* note 35.

39. Interview with Gila Segev, *supra* note 32.

One issue that is particularly inconsistent is the process for establishing a mental health crisis. This issue represents one of the only ways for a married woman to obtain permission for an abortion. Most of the social workers I interviewed described counseling such patients to see a psychiatrist and return to the committee with a written diagnosis confirming a mental health crisis. Here's what one said about her committee's approach to cases involving otherwise healthy married women seeking to end normal pregnancies:

The current committee chair usually demands a letter from a psychiatrist. He just wants a doctor—he wants it to be from a doctor. So, then we have to send the patients to these psychiatrists. And it could be somebody who's in therapy, you know, in care of a psychologist, and could bring us a real letter instead of some fictional letter that—you know, not fictional, but from somebody who met the woman for five minutes.<sup>40</sup>

By contrast, I spoke with a Tel Aviv doctor and social worker, both committee members at a large metropolitan hospital.<sup>41</sup> There, a married woman might avoid the need for an external psychiatric consultation because the committee includes a psychiatrist as one of the two doctors.<sup>42</sup> She will have to appear before the full committee and will have to explain why the pregnancy threatens her mental health, but she will complete the entire process in a single day.<sup>43</sup>

Beyond variability, I was interested in the more fundamental question of the experience of getting permission to have an abortion. Although I had decided against interviewing abortion patients,<sup>44</sup> I wanted to understand how the process worked for marginalized and vulnerable people. Intersectionality theory teaches that power structures are best revealed by viewing them through the experiences of the most disempowered.<sup>45</sup>

Toward that end, I met with Sharon Orshalimy, the executive director of Open Door, an Israeli non-profit organization dedicated to helping teens and other vulnerable populations access sexual and reproductive health.<sup>46</sup> Her description of her clients' experiences offers a helpful lens for understanding the abortion committee process as a whole.

Orshalimy laughed when I started our interview by asking how a teen ever navigated the complex committee system. Here's how she responded:

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40. Interview with Anonymous Soc. Worker, *supra* note 35 (also noting that this delay matters—a woman might be forced to wait as long as three weeks before having her abortion).

41. Interviews with Anonymous Tel Aviv Doctor and Soc. Worker, in Jerusalem, Isr. (Dec. 7, 2017).

42. *Id.*

43. *Id.*

44. *See supra* note 13 (detailing the reasons for my decision).

45. *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

46. Interview with Sharon Orshalimy, *supra* note 31.

I always say, “How does a woman go through an abortion without talking to me first?” The system is so, so difficult! I run a national network of counseling and treatment centers for young people on issues of sexual health and reproduction. Most committees require an appointment, so you will need to first come to the secretary who will fill out the necessary paperwork and collect the fees.<sup>47</sup> And then you wait for your meeting with the social worker.

It’s amazing, when you go to the committee you sit in the waiting room and it’s all women. Except for the couples who have a problem with the pregnancy. . . . Then you see, when it’s a wanted pregnancy that didn’t develop, you see the men. It’s amazing to see.

And the social worker is nice, she has a nice social worker’s face. They sometimes think they’re doing good when they’re actually doing bad. For instance, the question, “Why didn’t you use contraception?” rather than, “What made it hard for you to use contraception?” or “Was it hard for you to ask for contraception?”

But they’re nice and it’s fine. And then, she meets the committee . . . . The minor will give the doctors the form she completed with the social worker, but they don’t even look at it. And sometimes the doctor will say, “Next time use the pill,” and she might have used it and it didn’t work, and they don’t know anything about her life. If it’s a girl that got raped, they don’t even look at what the social worker wrote and they say, “Next time use the pill.” And if it’s a second abortion, then they’ll start being very educational and very judgmental.<sup>48</sup>

Orshalimy’s attitude inspired confidence that she could successfully and compassionately shepherd her clients through the committee process. But her description of the process itself offered little assurance that those moving through it on their own can count on finding the support they might need. True, the social workers are there as guides, helping people get from one step to the next. And indeed, I heard no stories of folks getting lost in the shuffle. Still, one cannot help but see how the idiosyncratic, personality-dependent nature of the system renders the quality of one’s experience largely a matter of chance.

The best insight I got into how an adult seeking an abortion might experience the committee process came from my interview with Noya Rimalt, a law professor at Haifa University.<sup>49</sup> Professor Rimalt is one of only a handful of academics to have studied and written about Israel’s abortion laws. In 2016 and 2017, she published two long articles, one in the *Tel Aviv University Law Review* and the other in *Yale Journal of Law & Feminism*, in which she advocates for the

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47. Although national health insurance will, in most cases, cover the costs of the abortion, patients are responsible for paying the relatively minimal costs associated with the committee process.

48. Interview with Sharon Orshalimy, *supra* note 31.

49. Interview with Noya Rimalt, Professor of L., Univ. of Haifa, in Tel Aviv, Isr. (May 29, 2017).



abolition of Israel's abortion committees.<sup>50</sup> Her opposition is based on principled arguments in favor of individual rights, but it also grows out of her personal experience. Here is the story she shared with me:

[A]s a young married woman I experienced an unwanted pregnancy and I was so certain this was not right for me right now, you know. I was very young . . . . So anyhow, I went to my doctor. I was very determined. I told him I must have an abortion—that there was no doubt in my mind. And then I learned that I could not just have an abortion; that I would have to articulate my reason for wanting an abortion in legal terms. My doctor explained to me that you go to the committee and if you tell them that you didn't know that you were pregnant and you took some sort of medication that is not recommended for pregnant women—that is when you get approval of the committee.

My doctor gave me a letter. I went to the committee—I actually never saw the committee members. I only met a social worker. She was very paternalistic in the sense that she asked me, “Do I need to give you some information about how to prevent future pregnancy?” I told her, “Not necessary. You know, these things happen. I know all about contraception.” She told me to wait and she went with the form. And after several minutes, I got the approval of the committee . . . .

At that time the thought of the committee didn't feel mortifying at all, because the way that my doctor gave me the information it felt—as he said to me, it was basically technical. There are no obstacles . . . . And even right afterwards, you know, it didn't feel humiliating. Only when I thought about it later, how I was lectured about contraceptives and about safe sexual behavior, and about how I needed to lie in order to exercise my rights—I mean, these feelings came later. At the time I was so focused about getting what I wanted in the safest way possible. And in the end, it was very fast. I went to a private hospital for the committee, and I also did the procedure in a private hospital.<sup>51</sup>

Professor Rimalt's story illuminates two new aspects relevant to our understanding of Israel's abortion committees. First, there is the question of fraud arising out of the story of how her doctor helped her qualify for an abortion. The fact that her doctor helped her pass the committee by giving her a phony prescription suggests, at the very least, that the committee process is susceptible to corruption.<sup>52</sup>

Second, Professor Rimalt raised the issue of private sector medicine and how it intersects with abortion in Israel. Israel's National Health System—the

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50. See Rimalt, *supra* note 15; see also Noya Rimalt, *From Unjust and Partial Access to Just Legislation: Toward a New Paradigm of Abortion Law in Israel*, 39 TEL AVIV U. L. REV. 415 (2016).

51. Interview with Noya Rimalt, *supra* note 49.

52. For a discussion of the role of fraud in the abortion committee process, see *infra* notes 102–107 and accompanying text.

public system—provides universal basic health care to its residents, enabling them to access doctors and hospital care at little or no cost.<sup>53</sup> Alongside this public system is a private system that consists of doctors practicing across the full range of specialties.<sup>54</sup> Many work out of private clinics, typically providing care on a fee-for-service basis.<sup>55</sup>

Since 2014, abortion has been included as a covered treatment—if you are approved for the procedure, your insurance will pay for it.<sup>56</sup> But rather than going to a public hospital, Professor Rimalt sought care from the private sector, first obtaining permission from a private hospital's abortion committee, and afterwards, having her abortion at a private facility.

In order to understand the difference between the public and the private processes, I met with Dr. Danny Laor, a Jerusalem gynecologist in practice for four decades. He explained it bluntly:

If you go to a committee in a public hospital, it's free. If you go to a private hospital then it's on you. You have to pay. There are committees all around in public and private hospitals, but you will have to wait at a public hospital. So, if, for example, you heard that doctor X is a very good professional—he is fast and has excellent results—you would pay out of your pocket to go to see him.<sup>57</sup>

Dr. Laor's summary made short work of answering the question of why one might go to a private facility. It's faster. But his description of the informality of his clinic's "committee" underscored the extent to which the country's entire abortion committee structure seemed to be a mindless bureaucracy—offering process for process's sake, rather than yielding any meaningful oversight over abortion access:

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53. All Israelis are entitled to basic health care as a fundamental right. See Ruth Waitzberg & Bruce Rosen, *International Health Care System Profiles: Israel*, THE COMMONWEALTH FUND (June 5, 2020), <https://www.commonwealthfund.org/international-health-policy-center/countries/israel> [<https://perma.cc/W37L-DZNS>].

54. See *id.* for an overview of the relationship between Israel's national health plan and the private health care system that supplements it.

55. *Id.*

56. To be precise, abortion is available without cost for anyone under age thirty-three, and for those age thirty-three and above if their pregnancy is the result of unlawful sexual intercourse, the pregnancy endangers the life of the woman, or the fetus has a physical or mental anomaly. *Apply to Terminate Pregnancy (Abortion)*, GOV.IL (Nov. 18, 2020), <https://www.gov.il/en/service/pregnancy-termination-permission> [<https://perma.cc/F5BU-JCRN>]. The Knesset drew a somewhat arbitrary line at age thirty-three for budgetary reasons, but the plan is to eventually raise the age to forty. See Ido Efrati, *Israel to Fund All Abortions for Women 20–33 Starting Next Year*, HAARETZ, <https://www.haaretz.com/premium-israel-expands-abortion-funding-1.5306031> [<https://perma.cc/5QDX-NRAK>] (Apr. 10, 2018); see also Michele Chabin, *Israeli Government Offers Women Aged 20 to 33 Free Abortions*, WASH. POST (Jan. 7, 2014), [https://www.washingtonpost.com/national/religion/israeli-government-offers-women-aged-20-to-33-free-abortions/2014/01/07/99155cc2-77b7-11e3-a647-a19deaf575b3\\_story.html](https://www.washingtonpost.com/national/religion/israeli-government-offers-women-aged-20-to-33-free-abortions/2014/01/07/99155cc2-77b7-11e3-a647-a19deaf575b3_story.html) [<https://perma.cc/N8ZY-SB9F>].

57. Interview with Dr. Danny Laor, Physician, Priv. Prac., in Tel Aviv, Isr. (Dec. 8, 2017).

That's it. I was performing. I was signing for other people who were performing. You have to have 3 signatures. There is a social worker and two doctors, and you sign. It's not a problem.<sup>58</sup>

C. *The Take-Away*

It has taken me the better part of five years to make sense of what is going on with Israel's abortion law. Why are they satisfied with a process that on so many levels seems to me like a farce? What is the law accomplishing?

I went to Israel intent on measuring the difference between our legal abortion regime and their illegal one. In the words of comparative law scholar Gunther Frankenberg, I was traveling "blindfolded," seeking to understand Israel's abortion law only by noticing how it differed from U.S. law.<sup>59</sup> My interviews removed the blinds; I was astonished, then mesmerized by the details of how Israel's law actually worked. And in losing myself in those details, in chasing down answers to my stray questions about how and why it worked, I came to a deeper understanding of how abortion laws function, wherever they exist.

A word of caution: this is a small story—one country's experience with its law criminalizing abortion. It is not a law we are likely to see in the U.S.—not in red states or blue states, nor in any states in between. Rather, Israel's experience is useful to Americans in the manner of a looking-glass. By noticing the ways in which Israel's law works, we can better understand the choices we are making as we fight over abortion law here in the U.S.

In the sections that follow, we will consider two distinct ways in which abortion crimes might be thought to operate. First, there is the way they mediate abortion access. Second, there is the way they send—or endeavor to send—a message about abortion. In exploring each of these functions, I use Israel's experience as an extended example prior to considering whether and how a given function might be different in the U.S. In Part Two, I describe four ways in which laws criminalizing abortion serve to mediate access to abortion. After analyzing these practical impacts of abortion laws, Part Three turns to the question of how abortion crimes might serve a symbolic or message-sending function.

PART TWO: RESTRICTING ACCESS TO ABORTION AND THE REGULATORY FUNCTIONS OF ABORTION LAW

This section considers how abortion crimes operate in practice. Using Israel as a test case, I identify four distinct functions served by the law: criminal sanction, market-structuring force, informal adjudicatory process, and shame sanction.

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58. *Id.*

59. *See* Frankenberg, *supra* note 14.

A. *Abortion Laws as Criminal Sanctions*

Perhaps the first thing to notice about Israel's abortion law is that the crime of illegal abortion is almost never prosecuted.<sup>60</sup> The lack of enforcement, however, is not a reflection of its rarity. Indeed, the country likely sees thousands of illegal abortions—ones that happen without a committee's approval—every year.<sup>61</sup> In spite of these numbers, I could not find even one instance in which someone was prosecuted for performing an illegal abortion.<sup>62</sup> Not one, in almost 50 years.

The lack of abortion prosecutions is not surprising. We know that abortion prosecutions were rare in the U.S. in the decades prior to *Roe v. Wade*. As historian Leslie Reagan notes in her history of U.S. abortion prosecutions, apart from sporadic, isolated efforts at law enforcement, such cases were rare.<sup>63</sup> A variety of factors inhibited prosecutions. Illegal abortion is, by definition, a clandestine affair. Absent medical complications, there are no witnesses. Historically, prosecutions focused on doctors, rather than on the person who had the abortion. The doctors typically had resources that permitted them to evade arrest. When they did face trial, courts sometimes resisted convicting, showing a disinclination to punish those whom they saw as victims or the doctors who helped them out of a desperate situation.<sup>64</sup>

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60. See Steinfeld, *supra* note 17, at 14. See also Sztokman & Zeller, *supra* note 24. It bears noting that Israel's law criminalizes performing an abortion, not having one. See § 313, Penal Law, 5737–1977, LSI Special Volume (1977), as amended (Isr.) (“Any person who knowingly interrupts a woman’s pregnancy, either by medical treatment or in another manner, shall be liable to imprisonment for five years . . .”). In addition, it explicitly excludes prosecuting those who have abortions. See § 320, Penal Law, 5737–1977, LSI Special Volume (1977), as amended (Isr.) (“A woman upon whom an offence under this article is committed shall not bear criminal responsibility in connection with that offence.”).

61. Sources commonly assert that there are as many illegal abortions as there are legal ones. See, e.g., Rimalt, *supra* note 15, at 369. But see *infra* note 80 for why this estimate seems unfounded.

62. In all my interviews, I heard only one story of the government getting involved in response to an illegal abortion. The case involved a doctor who allegedly performed an abortion in his private office, without a committee. There was a medical complication, and although the patient survived, the incident triggered an inquiry by a government ethics committee. In the end, no charges were filed. Interview with Sharon Orshalimy, *supra* note 31. Estimates of illegal abortions in Israel vary widely, and despite my persistent efforts, I could not find experts who could explain how the figures were calculated, let alone whether they were verified. The most commonly cited figure in the media is 15,000 per year, yet it comes from an anti-abortion advocacy group, rather than researchers, so it may be inaccurate. Marissa Newman, *15,000 Illegal Abortions Performed in Israel Each Year, Activists Claim*, TIMES OF ISR. (Jan. 3, 2017), <https://www.timesofisrael.com/15000-illegal-abortions-performed-in-israel-each-year-activists-claim/> [<https://perma.cc/7F8L-BGXF>]. See *infra* notes 80–87 and accompanying text for a discussion of illegal abortion in Israel.

63. See LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 114, 164 (1997).

64. *Id.* See, e.g., Dupuy v. State, 325 S.W.2d 238 (1959). This attempt abortion prosecution involved a sting operation against an illegal abortion provider, and it illustrates the extent to which a state court might reach to avoid convicting those likely to have been involved in providing illegal abortions. *Id.* The case involved a pharmacist who arranged to

Abortion prosecutions remain rare in countries around the world today. In Chile, which until recently banned abortion under all conditions, there were seldom more than five abortion prosecutions a year.<sup>65</sup> The example of El Salvador, where abortion is likewise banned, is particularly instructive because the government actively endeavors to enforce its law.<sup>66</sup> There is a full-throttle effort at vigorous enforcement of the law banning abortion under all circumstances, featuring the requirement that health care providers report those suspected of having deliberately ended a pregnancy.<sup>67</sup> Nonetheless, typically there are fewer than ten prosecutions a year.<sup>68</sup> This figure is striking in a country where even government officials estimate that there are 35,000 abortions annually.<sup>69</sup>

As U.S. states embrace the chance to recriminalize abortion, it is not clear how much effort they will focus on prosecution. After so many years of working to make it illegal, it stands to reason there will be an appetite for enforcing the law. Perhaps states will follow Texas's example, and take aim at those who aid and abet abortion—the partners, friends and family, the doctors—rather than the pregnant persons themselves.<sup>70</sup> Indeed, as of now, some states explicitly bar prosecuting the person who has the abortion.<sup>71</sup> Abortion medicines will complicate this strategy, as the availability of mail-order abortifacients mean that much of the time, there will be no one else to prosecute. Certainly no doctor, as mail-order abortion medications eliminate the need for the doctors who once were the targets of abortion prosecutions.

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meet the purportedly pregnant patient in a room, had laid out the surgical instruments and was prepared to perform the procedure when he was arrested. *Id.* The court, after noting that it took the woman several times to persuade the pharmacist to help her, acknowledged that, “he would no doubt have carried out this attempt had he not been thwarted in his efforts by the arrival of the police.” *Id.* at 239–40. Nonetheless, it overturned his conviction finding that the defendant had yet to touch her, and instead was “merely preparing” to perform the illegal act, and therefore not guilty of the attempt. *Id.*

65. See OBERMAN, *supra* note 4, at 8–9, 127.

66. *Id.* at 43–67.

67. *Id.* at 46–63 (describing the ways in which the government endeavors to enforce its abortion ban).

68. Agrupacion Ciudadana, *Del Hospital a la Cárcel: Consecuencias para las Mujeres por la Penalización, sin Excepciones de la Interrupción del Embarazo en El Salvador, 1998–2019* (Feb. 2019), <https://agrupacionciudadana.org/download/del-hospital-a-la-carcel-tercera-edicion/> [<https://perma.cc/KR78-DRJW>].

69. See OBERMAN, *supra* note 4, at 44 n.3. It bears noting that these prosecutions are marked by false accusations and wrongful convictions, targeting the poorest and most marginalized segments of the Salvadoran population. *Id.* at 54–60.

70. S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021). See Julia Kaye & Marc Hearron, *Even People Who Oppose Abortion Should Fear Texas's New Ban*, WASH. POST (July 19, 2021), <https://www.washingtonpost.com/outlook/2021/07/19/texas-sb8-abortion-lawsuits/> [<https://perma.cc/PX34-LW33>].

71. See NAT'L INST. FOR REPROD. HEALTH, WHEN SELF-ABORTION IS A CRIME: LAWS THAT PUT WOMEN AT RISK (June 2017), <https://www.nirhealth.org/wp-content/uploads/2017/06/Self-Abortion-White-Paper-Final.pdf> [<https://perma.cc/CGH7-S34C>]; see also Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POL'Y REV. 70 (2015).

Although pro-life advocates generally maintain that they will not prosecute those accused of ending their own pregnancies, even where legally permissible, there is no “national policy” against prosecuting self-abortion. The U.S. legal system vests law enforcement decisions in locally elected prosecutors who exercise broad discretion in deciding which cases to bring.<sup>72</sup> Their choices may be informed by many factors: staff resources, strength of evidence, perception of public will, moral crusade, and bias—whether conscious or unconscious. As Judge Stephanos Bibos notes, there is no check on “idiosyncratic prosecutorial discretion.”<sup>73</sup>

In the context of abortion-related crimes, prosecutorial discretion in the U.S. already has led to a pattern of selective enforcement of abortion-related laws in response to cases involving miscarriages, stillbirths, or perceived risks taken while pregnant. Lawyers at the National Advocates for Pregnant Women have identified over 413 such prosecutions in forty-four states in the years since 1973.<sup>74</sup> Poor people of color, and in particular, Black pregnant people, are vastly overrepresented in these prosecutions—a fact that researchers attribute to the greater willingness of health care providers to notify law enforcement, along with increased arrest rates, and a greater likelihood of facing felony charges.<sup>75</sup>

As states recriminalize abortion, law enforcement patterns will vary widely. But the pattern of race- and class-bias observed in abortion-related prosecutions in the years since 1973 suggests that enforcement will remain selectively targeted against the most marginalized, vulnerable members of society—those whom prosecutors view, or at least believe others will be willing to view, not as victims but rather, as villains.

Finally, because laws criminalizing abortion necessarily activate adjacent crimes, states might endeavor to enforce their abortion laws by prosecuting the purchase of abortion drugs—whether by the pregnant person or another.<sup>76</sup> For that matter, a host of crimes could be brought against those who aid and abet

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72. See Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009).

73. Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369 (2010).

74. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL., POL’Y & L. 299, 304–05 (2013) (discussing these findings and the limitations of the research which led the authors to conclude that their findings represent a substantial undercount of cases).

75. Lynn M. Paltrow, *Roe v Wade and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. PUB. HEALTH 17, 19 (2013).

76. Such prosecutions are becoming more common. See, e.g., Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, N.Y. TIMES (Sept. 22, 2014), <https://www.nytimes.com/2014/09/22/magazine/a-mother-in-jail-for-helping-her-daughter-have-an-abortion.html> [<https://perma.cc/ZE98-V799>]. In Spring 2021, one of the U.S.’s leading reproductive justice organizations announced the creation of a legal defense fund dedicated to serving those prosecuted for self-managed abortion. See REPRO LEGAL DEF. FUND, <https://reprolegaldefensefund.org/> [<https://perma.cc/E25P-7W86>] (last visited July 12, 2021).

someone in ending a pregnancy.<sup>77</sup> Indeed, we may see states creating a de facto surveillance state in an effort to curb illegal abortion.

But the reality remains that no state will manage to prosecute its way out of the demand for abortion. We know from our inability to control access to illegal drugs generally that when there is a strong, latent demand for the product in question, the market always wins.<sup>78</sup>

### B. *The Market-Structuring Impact of Criminalizing Abortion*

An obvious, yet interesting function of Israel's abortion law is the way it sets the terms of the country's markets for both legal and illegal abortion. Specifically, by establishing the boundaries around legally permissible abortion, the law simultaneously determines the reasons why a person might opt for an illegal abortion.

This effect is true of any criminal law, at some level. As Professor David Jaros notes, "in a basic sense, lawmakers are in the business of creating criminal markets. All forms of regulation have the potential to drive unwanted behavior underground. Criminalizing the sale of illicit drugs creates a black market for drugs. Closing the borders creates a market for human smuggling."<sup>79</sup>

One key impact of abortion laws is that, as they restrict access—even if only by delaying the process of ending a pregnancy or driving up the costs—they help determine the scope of the population that will seek illegal abortions.

In Israel, as elsewhere, it is challenging to determine illegal abortion rates.<sup>80</sup> Officially, Israel has one of the lowest abortion rates in the developed world—in

77. See, e.g., MO. REV. STAT. § 188.250 (2021) (Missouri's aid and abet abortion law). See also Michelle Oberman & W. David Ball, *When We Talk About Abortion, Let's Talk About Men*, N.Y. TIMES (June 2, 2019), <https://www.nytimes.com/2019/06/02/opinion/abortion-laws-men.html> [<https://perma.cc/9XXN-GL5F>]; Michelle Oberman, *When Abortion Is a Crime, What Happens to the Accomplices?*, WHAT WOULD A POST-ROE AMERICA LOOK LIKE?, DEBATABLE (N.Y. TIMES, New York, N.Y.), Dec. 10, 2021, <https://www.nytimes.com/2021/12/10/opinion/supreme-court-abortion-roe.html> [<https://perma.cc/RMC6-LKXN>].

78. See, e.g., Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST: POL'Y ANALYSIS (Apr. 12, 2017), <https://www.cato.org/policy-analysis/four-decades-counting-continued-failure-war-drugs#> [<https://perma.cc/Z7VX-SGR5>].

79. David Michael Jaros, *Perfecting Criminal Markets*, 112 COLUM. L. REV. 1947, 1949 (2012). Economists have long identified government regulation as one of a variety of factors that structure the market for any good or service. See E.T. Grether & Robert J. Holloway, *Impact of Government Upon the Market System*, 31 J. MKTG. 1 (1967).

80. Recall that sources assert that Israel sees as many illegal (non-committee approved) abortions as legal ones. See Rimalt, *supra* note 15, at 369. Estimates are particularly squishy in Israel, because people refer to all abortions outside of the public hospital system as "private" abortions, yet some of these private abortions have the approval of private committees. See, e.g., Interview with Danny Laor, *supra* note 57 and accompanying text; see also Interview with Sharon Orshalimy, *supra* note 31 (discussing the existence of both types of "private" abortions).

On measuring rates, demographers and sociologists typically derive estimated abortion rates by using an algorithm that considers the number of women of reproductive age, contraceptive

2016, there were 9 abortions per 1,000 women of reproductive age, as compared to the European and North American rate of 17 per 1,000 in 2015–2019.<sup>81</sup> If the numbers are sound, Israel appears to have both the lowest abortion rates and the highest birthrates of any country in the Organisation for Economic Cooperation and Development (OECD).<sup>82</sup> And yet, these rates are undercut by reports that as many as half of all abortions in Israel are performed outside of the committee process and are hence, illegal.<sup>83</sup>

Yet when one searches for data supporting the claim that half of all abortions are illegal, it is nonexistent. None of those I interviewed could point me in the direction of any study that helps assess the size of the illegal abortion market in Israel.<sup>84</sup> Whatever the size of the market, though, it likely has shrunk in the years since 2014, when the government began including abortion as a

prevalence, and numbers of reported abortions. From those figures, one can project an anticipated birth rate. Any downward deviation from that rate suggests the existence of illegal abortion. Additional data such as hospital admissions for miscarriage or pregnancy loss helps to supplement these estimates. The widespread use of abortion medications poses new challenges for such measurement. See Susheela Singh, Fatima Juarez, Elana Prada & Akinrinola Bankole, *Estimating Abortion Incidence: Assessment of a Widely Used Indirect Method*, 38 POPULATION RSCH. & POL'Y REV. 429 (2019); see also GUTTMACHER INST., *METHODOLOGIES FOR ESTIMATING ABORTION INCIDENCE AND ABORTION-RELATED MORBIDITY: A REVIEW* (Susheela Singh, Lisa Remez & Alyssa Tartaglione eds., 2010), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/compilations/IUSSP/abortion-methodologies.pdf> [<https://perma.cc/GT6L-V8RA>].

81. See Ido Efrati, *Israel's Abortion Rate Falls as Birth Control, Traditional Mores Rise*, HAARETZ (May 13, 2018), <https://www.haaretz.com/israel-news/.premium-israeli-abortion-rate-falls-as-birth-control-traditional-mores-rise-1.6078515> [<https://perma.cc/E8KR-3T96>]. Between 2015 and 2019, the worldwide abortion rate is estimated at 39 per 1,000. See Jonathan Bearak, Anna Popinchalk, Bela Ganatra, Ann-Beth Moller, Özge Tunçalp, Cynthia Beavin, Lorraine Kwok & Leontine Alkema, *Unintended Pregnancy and Abortion by Income, Region, and the Legal Status of Abortion: Estimates from a Comprehensive Model for 1990–2019*, 8 LANCET GLOB. HEALTH 1152 (2020); see also *Unintended Pregnancy and Abortion Worldwide*, GUTTMACHER (July 2020), <https://www.thelancet.com/action/showPdf?pii=S2214-109X%2820%2930315-6> [<https://perma.cc/U4T8-UD8Z>].

82. Today, Israel has the highest fertility rates of any country in the OECD, an intergovernmental economic organization comprised of thirty-eight countries with high-income economies. According to the OECD, Israeli families have an average of 3.1 children. See *Family Database: Fertility Rates*, ORG. ECON. COOP. DEV., [https://www.oecd.org/els/family/SF\\_2\\_1\\_Fertility\\_rates.pdf](https://www.oecd.org/els/family/SF_2_1_Fertility_rates.pdf) [<https://perma.cc/5J2Y-YGWG>] (last updated June 2021).

83. See Rimalt, *supra* note 15, at 369.

84. Sharon Orshalimy of Open Door described the practice of illegal abortion in Israel by explaining that in addition to committees and procedures performed at large public hospitals, one might get an abortion in a private clinic by paying out of pocket:

In the private sector, you have two types of abortions. You have one that goes through a committee [which is technically legal] and one that doesn't go through a committee, which is the illegal one . . . . No doctor will say he does abortions without a committee, [but] I know who does abortions without a committee so if I get a call from a woman who has a husband and there's no medical problem with the baby, I know where to refer her to.

Interview with Sharon Orshalimy, *supra* note 31.



covered benefit under National Health Insurance.<sup>85</sup> As a result, as Dr. Danny Laor told me, the market for non-committee abortions quickly contracted.<sup>86</sup>

There are two populations that continue to seek illegal abortions in Israel. First, there are those whose abortions won't be covered because they are not citizens, and therefore lack access to national health insurance.<sup>87</sup> Second, there are those who opt out of the committee process, perhaps because they are married and don't want to go through the hassle (or charade) of getting a psychiatric diagnosis,<sup>88</sup> or perhaps because they object to the process altogether.

Throughout my research, I struggled with how to characterize the abortion committee process. It seems intrusive and insulting to me, yet most Israelis I met seemed to view it as more of a bureaucratic hassle rather than an ordeal to be survived. Still, there is no getting around the fact that the process is cumbersome. There are multiple meetings with strangers to whom one must recount details about how and why they became pregnant and why they want an abortion.<sup>89</sup> The delay routinely takes two, or even three weeks—which might feel like eons for one who has resolved to end their pregnancy.<sup>90</sup> Then there's the fact that the delay may bring negative health consequences, in addition to psychological distress.<sup>91</sup> In short, for those who have the money and who value their time, there is ample reason to skip the committee process.

From a distance, we can see how the factors driving illegal abortion in Israel are not all that different from those driving illegal abortion anywhere else in the world. They are a response to the de facto costs associated with obtaining a legal abortion.

Consider the costs associated with obtaining an abortion in the U.S. In states around the country, restrictive abortion laws such as those requiring waiting periods or banning telemedicine have increased the time and expense of obtaining a legal abortion.<sup>92</sup> One impact of these laws is a rapid rise in self-

85. See *supra* notes 53–56 and accompanying text.

86. Interview with Danny Laor, *supra* note 57.

87. Israel hosts significant populations of refugees and visiting workers, neither of which are covered. Israel's refugee population in 2020 was around 398,000. *Refugee Population by Country or Territory of Origin – Israel*, WORLD BANK DATA, <https://data.worldbank.org/indicator/SM.POP.REFG.OR?end=2020&locations=IL&start=1988&view=chart> [<https://perma.cc/P66F-36YB>] (last visited July 4, 2021). The population of guest workers in Israel is estimated at 250,000. *Israel Society & Culture: Foreign Workers*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/foreign-workers-in-israel> [<https://perma.cc/KJ7F-ZXQ7>] (last visited July 10, 2021).

88. See *infra* notes 104–07 and accompanying text regarding the question of whether people lie to the abortion committees.

89. See discussion *infra* at notes 131–49 and accompanying text on shame sanctions.

90. See Interview with Sharon Orshalimy, *supra* note 31; see also Interview with Gila Segev, *supra* note 32.

91. See Interview with Sharon Orshalimy, *supra* note 31. Furthermore, given the country's present cut off of seven weeks for eligibility to use medical abortion, the delay may well necessitate a surgical abortion.

92. One study examined the impact of Wisconsin laws on the cost of abortion. Although the abortion procedure itself cost on average \$593.00, for a single mother in rural Wisconsin, the actual cost was much higher. Additional costs triggered by the waiting period and the

managed abortion, typically using medications purchased from overseas pharmacies.<sup>93</sup> With the average cost far lower than that associated with clinic abortions, it is ever more common for people to manage their own abortions outside of the law.<sup>94</sup>

What is evident, in view of the struggles associated with law enforcement, is that criminalizing abortion does a far better job creating a market in illegal abortions than it does at making abortion disappear.

### C. *Criminalizing Abortion with Exceptions and Reliance on Informal Adjudication Processes*

Our focus on the enforcement challenges facing abortion crimes should not distract us from the ways in which these laws operate as laws, at a practical level. Whenever a law restricts access to legalized abortion, it must necessarily erect a mechanism for determining when and whether a person meets the criteria for a legal abortion. Administrative law scholars would call such mechanisms “informal adjudicatory processes,” denoting systems in which the legal rights of individuals are adjudicated through a protocol wherein the decisionmaker is not required to conduct an evidentiary hearing, as would be customary in a formal legal proceeding.<sup>95</sup> Many government decisions involving individuals are the result of informal adjudication.<sup>96</sup> In the U.S., for example, informal adjudicatory settings range from relatively formal proceedings, such as those seen in cases

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distance to a clinic included gas, lodging, childcare and missed work, so that in the end, the abortion actually costs \$1,380. See Erica Hellerstein & Tara Culp-Ressler, *Pricing American Women Out of Abortion, One Restriction at a Time*, THINKPROGRESS (Feb. 25, 2015), <https://archive.thinkprogress.org/pricing-american-women-out-of-abortion-one-restriction-at-a-time-c545c54f641f/> [<https://perma.cc/5ETS-79SL>].

93. See Lauren Ralph, Diana G. Foster, Sarah Raifman, M. Antonia Biggs, Goleen Samari, Ushma Upadhyay, Caitlin Gerdtz & Daniel Grossman, *Prevalence of Self-Managed Abortion Among Women of Reproductive Age in the United States*, 3 JAMA NETWORK OPEN 2 (Dec. 18, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774320> [<https://perma.cc/DM6E-RWDE>]; see also Abigail R.A. Aiken, Kathleen Broussard, Dana M. Johnson & Elisa Padron, *Motivations and Experiences of People Seeking Medication Abortion Online in the United States*, 50 PERSP. ON SEXUAL & REPROD. HEALTH 157 (2018); Diana G. Foster, *Dramatic Decreases in U.S. Abortion Rates: Public Health Achievement or Failure?*, 107 AM. J. PUB. HEALTH 1860 (2017); Rachel K. Jones, Elizabeth Witwer & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2017*, GUTTMACHER INST. (Sept. 2019), [https://www.guttmacher.org/sites/default/files/report\\_pdf/abortion-incidence-service-availability-us-2017.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf) [<https://perma.cc/6WF8-XCT8>].

94. *The Availability and Use of Medication Abortion*, KAISER FAM. FOUND.: WOMEN'S HEALTH POL'Y (June 16, 2021), <https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/> [<https://perma.cc/P4YB-NKYA>].

95. See Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739, 741 (1976). See generally MICHAEL ASIMOW, FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT (2019), <https://www.acus.gov/publication/federal-administrative-adjudication-outside-administrative-procedure-act> [<https://perma.cc/SV6L-U77N>].

96. See ASIMOW, *supra* note 95, at 1–2 (describing that many decisions involving individuals are made through the processes of adjudication).

involving termination of government benefits to those variable, loosely structured processes such as school disciplinary hearings.<sup>97</sup>

The key to an effective informal adjudicatory process lies in being seen as legitimate by all players and parties.<sup>98</sup> Without their buy-in, the system cannot be sustained. Legitimacy encompasses three core values: accuracy (meaning that the process enables the adjudicator to reach an objectively correct result),<sup>99</sup> efficiency (in terms of minimizing cost and delay), and satisfaction (meaning that the individual subject to the procedure perceives it to be fair).<sup>100</sup> Typically, fairness is associated with being permitted to tell one's side of the story to an impartial and respectful adjudicator.<sup>101</sup>

With this background in mind, notice that Israel's abortion committees constitute a relatively informal adjudicatory system. Rather than setting specifics about the proceedings, the law provides only the barest of guidelines. It specifies the membership requirements for committees (two doctors, one social worker, at least one woman) and the grounds upon which they might approve an abortion. But the law is silent as to how, or even whether, the committees convene. There are no guidelines for deliberations, nor is there any check against bias, save for that inherent in the membership requirements.

As we have seen, the result is an adjudication process that is variable in the extreme. Some committees never meet; others convene to review medical records; others require the petitioner to appear before the full panel of decision-makers.

To my outsider's eye, this variability, along with the ease with which anyone can meet the conditions for what purports to be a law limiting access to abortions, suggested that this was not a legitimate adjudicatory process. But from the perspective of the three-fold test for legitimacy that applies to informal adjudications—accuracy, efficiency, and satisfaction to participants—one can make a surprisingly strong case for a process-based legitimacy that explains why Israel's system endures.

Let's start with the thorny question of accuracy. If accuracy requires that committees reach objectively correct results under the law, there really is only one challenge for Israel's box-ticking approach: that of married women with healthy pregnancies. As discussed, these women typically get permission by

97. *Id.* at 3–4 (classifying these hearings into three categories).

98. *See* Verkuil, *supra* note 95.

99. *Id.* at 742. *See also* Roger C. Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 VA. L. REV. 585, 591–93 (1972). Accuracy is thought to be the result of a sound process, which in the U.S. is informed by the Due Process Clause's basic procedural guidelines for fairness: notice, opportunity for comment, and an impartial tribunal. For a classic formulation of this standard, *see* *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976).

100. Special thanks to Professor Michael Asimow for his help summarizing this literature. For more detail, *see* ASIMOW, *supra* note 95.

101. *See* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 135–59 (1990). It bears noting that the value of fairness may be in tension with the other values. For example, insofar as fairness requires greater attention to process, it may impede efficiency.

invoking mental distress.<sup>102</sup> Evaluating the accuracy of the committee process requires ascertaining whether they are telling the truth.<sup>103</sup>

Curious, I asked committee members whether they thought women ever lied.<sup>104</sup> Some were more skeptical than others. One social worker referred to the process of getting a psychiatrist's approval as "play[ing] the game."<sup>105</sup> Others testified to the accuracy of mental distress claims, understating the psychiatrist's role as bearing witness to the obvious truth that an unwanted pregnancy can trigger a mental health crisis. Ms. Segev understood how the psychiatrists' letters might seem like an evasion of the law, but she insisted, "[S]he doesn't have to lie. She's not lying! She's under pressure, she doesn't want the pregnancy, she has lots of problems . . . She has a mental condition that she can't adapt to."<sup>106</sup>

In the end, there is no way to validate the "accuracy" of committee approvals based on maternal mental health grounds, in part because the process outsources the determinations to external experts, and in part because we have no other basis from which to evaluate the empirical "accuracy" of such claims.<sup>107</sup> What clearly is true is that without reliance on experts the committees would struggle to devise an unbiased, neutral strategy for ensuring accuracy.

Turning to the comparatively simple question of efficiency, I was surprised to hear so little objection to the bureaucratic thicket one had to navigate in order to secure access to a legal abortion. It turns out that Israelis are accustomed to

102. So-called "mental health" exceptions to abortion bans are widespread; approximately half of the world's countries permit abortion on the grounds that a pregnancy threatens the woman's health, which is widely interpreted to include mental health. See Rachel B. Vogelstein & Rebecca Turkington, *Abortion Law: Global Comparisons*, COUNCIL ON FOREIGN RELS. (Oct. 28, 2019), <https://www.cfr.org/article/abortion-law-global-comparisons> [https://perma.cc/8B9S-QZPC].

103. There have been "exposés" in the Israeli media suggesting the possibility of fraud. See, e.g., Lori, *supra* note 24; Tali Kord, *Unwanted Pregnancies and Women's Right to Choose in Israel*, JERUSALEM POST (Feb. 11, 2017), <https://www.jpost.com/magazine/unwanted-pregnanciesand-womens-rightto-choose-478228>? [https://perma.cc/7T4V-NF5U].

104. The so-called mental health exception is sure to be controversial in U.S. jurisdictions, as pro-life advocates commonly view it as a loophole that permitted too many to obtain abortions in the pre-*Roe* era. See OBERMAN, *supra* note 4, at 69–95.

105. Interview with Anonymous Social Worker, *supra* note 35.

106. Interview with Gila Segev, *supra* note 32. In Haifa, feminist activist Hedva Eyal put the matter this way:

To be pregnant when you don't want to be pregnant is a crisis. This is what happens: they call me, and when they realize they cannot [just] have an abortion, it takes one or two days and they call again and they are in mental breakdown. They cry and they say "I can't sleep, I can't eat, I can't do anything. I don't know how I can face this." I don't know a psychiatrist who will say she's in "good health." If it's not something that she came in with—pre-existing mental problems—then the pregnancy and the fear that she won't be allowed an abortion creates a mental health crisis.

See Interview with Hedva Eyal, Coordinator, Isha L'Isha, in Haifa, Isr. (May 19, 2017).

107. On the silences surrounding abortion stories, see KATIE WATSON, *SCARLET A: THE ETHICS, LAW, AND POLITICS OF ORDINARY ABORTION* (2018). For a creative response to abortion stigma, see *The Untold Stories Project*, SEA CHANGE, <https://www.seachangeprogram.org/our-work/untold-stories-project/> [https://perma.cc/H58F-GQAJ] (last visited July 10, 2021).

navigating bureaucracy when accessing any number of government benefits, as well as to the government's intrusion into their personal lives.<sup>108</sup> None of those I interviewed objected to the multi-step process as inefficient. Instead, they viewed the system as efficient because it produces consistent results. Those seeking abortion can count on the process to yield the desired outcome in their individual case. Even Professor Rimalt, who opposes Israel's abortion committees, acknowledged: "When you compare Israel to the United States, certainly Israeli women are better off. I mean, there's no doubt about it. You experience an unwanted pregnancy, you can get an abortion soon and it's safe and affordable. Certainly, on this level, it's much better."<sup>109</sup>

In terms of satisfaction to participants, this result-driven analysis also explains why participants might find it acceptable in spite of the ways it is simultaneously farcical. Some committee members I interviewed mentioned that occasionally patients express frustration, or even anger, with the process.<sup>110</sup> But these responses were, by all accounts, atypical. And even then, there is a difference between frustration with having to complete yet another step, and dissatisfaction with the entire process. Although there are signs of disgruntlement evidenced in the occasional media exposés decrying the hypocrisy of the committee process,<sup>111</sup> there is no meaningful opposition to the law itself.<sup>112</sup>

At the end of the day, the best evidence of satisfaction with Israel's adjudicatory process lies in its staying power. As interpreted and applied, the law secures access to safe, legal, and affordable abortion and the committees enjoy widespread acceptance as a sound system for securing that access. As Israeli feminist activist Hedva Eyal put it, "This is the story with abortion in Israel: it's not a story."<sup>113</sup>

Things will be different in the U.S., in ways that will intensify the challenge of establishing a legitimate process.<sup>114</sup> As states move to recriminalize abortion, they necessarily will face the challenge of devising adjudicatory processes because even the broadest ban must make an exception for life-threatening

108. Perhaps the most notable is mandatory conscription into military service, but there are a host of additional interventions. On bureaucracy in Israel and Israeli attitudes toward it, see Brenda Danet & Harriet Hartman, *Coping with Bureaucracy: The Israeli Case*, 51 SOC. FORCES 7 (1972).

109. Interview with Noya Rimalt, *supra* note 49.

110. Interview with Anonymous Social Worker, *supra* note 35 and accompanying text.

111. See *supra* note 103.

112. In 2015, Professor Noya Rimalt helped draft a bill to abolish the committees altogether. Several members of Knesset signed on to it, but it quickly stalled. See *infra* note 208 and accompanying text for a discussion of why the law endures.

113. See Interview with Hevda Eyal, *supra* note 106.

114. A recent report by the Columbia University Law, Rights and Religion Project documents the presence of informal adjudicatory processes that, even where abortion is legal, operate to restrict abortion access in Southern hospitals across the U.S. ELIZABETH REINER PLATT, KATHERINE FRANKE, CANDACE BOND-THERIAULT, LILIA HADJIVANOCA & AMY LITTLEFIEND, COLUM. L. SCH.: THE L., RTS., & RELIGION PROJECT, THE SOUTHERN HOSPITALS REPORT: FAITH, CULTURE, AND ABORTION BANS IN THE U.S. SOUTH (2021), [https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Reports/The\\_Southern\\_Hospitals\\_Report.pdf](https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Reports/The_Southern_Hospitals_Report.pdf) [<https://perma.cc/ZNX3-H5XJ>].

pregnancies.<sup>115</sup> Such a process might involve formal hearings before judges, but concerns of accuracy (there is surprisingly little agreement on what constitutes a life-threatening pregnancy)<sup>116</sup> and efficiency (given the urgent, technical nature of the inquiry) might argue for an informal, expert-driven adjudicatory process.<sup>117</sup>

Americans are so deeply divided about abortion that we necessarily will struggle to create impartial, fair processes. In thinking through the challenge, it is fascinating to revisit the work of Stanford law professors Herbert Packer and Ralph Gampell, whose 1959 study of so-called therapeutic abortion committees sheds light on the ways in which local entities—specifically hospitals—undertook to police access to legal abortion.<sup>118</sup> Their study took place in California which, along with thirty-one other U.S. states at that time, prohibited abortion unless necessary to save life.<sup>119</sup> Rather than specifying mechanisms for

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115. See *supra* note 10. It bears noting that, even among people who favor criminalizing abortion, the majority support exceptions in cases of rape, incest, or several fetal anomalies. The General Social Survey conducted by the University of Chicago's National Opinion Research Center has polled individuals since 1972 regarding whether it should be possible to obtain a legal abortion if the woman's health is seriously endangered by the pregnancy. Between 1972 and 2018, support for bans regardless of the woman's health ranged between seven and fourteen percent. See Nat'l Op. Rsch. Ctr. at Univ. of Chi., *Current Affairs: Abortion if Woman's Health Seriously Endangered*, GSS DATA EXPLORER, <https://gssdataexplorer.norc.org/trends/Current%20Affairs?measure=abhlth> [<https://perma.cc/N8JW-GVXP>] (last visited July 8, 2021). Each of these issues raises complicated definitional questions. For example, what proof must one have of an alleged rape or a case of incest? Must there be a concurrent criminal case? Is it enough to file a police report? To have visited an emergency room?

116. For a description of how experts can vary in their definition of whether a pregnancy poses a threat to life, see OBERMAN, *supra* note 4, at 19–29 (describing a case in which the Supreme Court of El Salvador denied an abortion to a woman suffering from lupus on the grounds that death was not imminent). See also DAVID S. COHEN & CAROLE JOFFE, *OBSTACLE COURSE: THE EVERYDAY STRUGGLE TO GET AN ABORTION IN AMERICA* 209 (2020) (quoting Ohio doctor, Chrissy France, decrying this standard in U.S. practice today, “She cannot be seen at our public hospital unless pretty much she’s going to die today or maybe tomorrow.”).

117. For example, states requiring parental notification or consent currently use judicial bypass hearings to assess minors’ claims that they should be permitted to end their pregnancies without parental involvement. See Kari White, Subasri Narasimhan, Sophie A. Hartwig, Erin Carroll, Alexandra McBrayer, Samantha Hubbard, Rachel Rebouché, Melissa Kottke & Kelli Stidham Hall, *Parental Involvement Policies for Minors Seeking Abortion in the Southeast and Quality of Care*, SEXUALITY RSCH. & SOC. POL’Y (Jan. 18, 2021), <https://link.springer.com/content/pdf/10.1007/s13178-021-00539-0.pdf> [<https://perma.cc/RQ8Y-84BP>].

118. Herbert L. Packer & Ralph J. Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 418 (1959) (Noting these questions, among others: is the procedure limited to cases where its purpose is to avoid shortening the pregnant woman’s life? If so, how do we determine whether carrying the child to term will shorten life? If not, what other considerations are relevant? Is a threat to health necessarily a threat to life? Must the threat to life (or health) be on account of a somatic illness? Or is the woman’s mental condition also to be considered? If so, is a probability that suicide will ensue a justification for therapeutic abortion?). For a searing indictment of U.S. therapeutic abortion committee practices in the mid-twentieth century, see Rickie Solinger, “A Complete Disaster:” *Abortion and the Politics of Hospital Abortion Committees, 1950–1970*, 19 FEMINIST STUD. 241 (1993).

119. Packer & Gampell, *supra* note 118, at 418.

ascertaining whether a patient's condition qualified, state laws were general, leaving the medical profession to devise its own ways of determining eligibility.<sup>120</sup>

Doctors felt uncomfortable making these decisions on their own. In addition to the lack of consensus on qualifying abortions, they also expressed concern over the legal implications of their decisions, worrying that an approval could bring prosecution, and a rejection might lead to a civil lawsuit, as in wrongful death, should the pregnant patient die.<sup>121</sup> By the mid-twentieth century, hospitals around the country began to embrace so-called "therapeutic abortion committees" as a means of remedying these uncertainties.<sup>122</sup> Packer and Gampell canvassed twenty-six committees, asking them to rule on an abortion's permissibility in a series of hypothetical scenarios that were either clearly legal, questionable, or plainly illegal.<sup>123</sup> Their findings offered a stinging indictment of both the committees, and of the law itself. Fueled in part by committee members' lack of consensus over what constituted a "valid" reason for terminating a pregnancy, whether legally or morally, three-quarters of the hospitals openly acknowledged diverging from the law's narrow requirements.<sup>124</sup>

It is easy to see how these therapeutic abortion committees were illegitimate. Even setting aside the challenge of rendering accurate decisions without a clear definition of what is meant by a life-threatening pregnancy, the process failed to meet the basic requirements associated with satisfaction. Decisions were biased by the importation of extraneous considerations such as the decision-makers' personal beliefs about abortion, alongside their concerns about legal liability for themselves and their institutions.<sup>125</sup>

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120. The law did not specify a mechanism for evaluating individual cases. Instead, it fell to hospitals, which is where any qualifying abortion would be performed, to determine protocols. Packer and Gampell suggest that hospitals developed protocols at least in part as a defensive measure: to protect themselves from potential downstream criminal or civil liability. *See id.* at 421. *See also* CAROLE JOFFE, DOCTORS OF CONSCIENCE 31 (1995) (describing how doctors who performed abortions illegally would do so outside of the hospital setting, but legal abortions that met the test of necessary to save life would necessarily have been performed in a hospital, thereby implicating both medical and hospital oversight).

121. Packer & Gampell, *supra* note 118, at 449 ("[R]eputable members of the medical profession may well find it galling that their freedom from criminal and civil liability turns merely on the nonenforcement of provisions of law which, on their face, appear to embrace the conduct in question."). Texas's S.B. 8 law employs such a threat by way of subjecting doctors who provide abortions as early as six weeks to civil suit. *See supra* note 70.

122. Packer & Gampell, *supra* note 118, at 421 (citing Alan F. Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, in THERAPEUTIC ABORTION 12, 15 (Harold Rosen ed. 1954)).

123. *Id.* at 425–26.

124. *Id.* at 430. Their study concluded with a call for law reform—a call that was echoed by their Canadian counterparts in the 1977 Badgley Report, which found "gross inequities existed in the availability of therapeutic abortion to the women of Canada." W.D.S. Thomas, *The Badgley Report on the Abortion Law*, 116 CAN. MED. ASS'N J. 966, 966 (1977).

125. Interestingly, some of the Israeli committee members I interviewed noted a tendency to approve requests because of a fear of later being sued by petitioners. This was particularly so in disability-related requests for termination.

Nor was it possible to insulate oneself from this bias by seeking recourse by requesting a different committee.<sup>126</sup> Petitions to U.S. committees were brought by the patient's physician at the hospital in question, which then determined whether or not to pass on the petition.<sup>127</sup> Any recourse for a denial would have required the pregnant woman to find a new doctor who had privileges at another hospital. It was implicit in the process—brought by the doctor, rather than the patient—that the patient had no right to be heard, let alone by an impartial and respectful adjudicator. Nor was there a right to comment or appeal a denial.<sup>128</sup>

All of these challenges will arise as states recriminalize abortion. The struggle to define life-threatening pregnancies is just the start. More complicated still is the challenge of devising an impartial and fair process. Which parties' interests will be represented, and by whom, when a pregnant person petitions for an exception? By what criteria will we select our adjudicators?

Whatever the deliberative process, it must be more robust than either Israel's or that of the midcentury U.S. committees. U.S. law accords increased due process rights when vital interests are at stake.<sup>129</sup> Will the pregnant person be entitled to a lawyer? Will the fetus? If unhappy with the outcome, can either party try a different committee? Will there be an expedited appeals process? And how will we safeguard against inequities, such as those that would follow from an inability to afford private counsel?<sup>130</sup>

Navigating the details of this challenge lies beyond the scope of this article, but the importance of doing so cannot be overstated. To the extent that the law relies on a process that is insufficiently accurate, efficient, and satisfactory to participants, it will be seen as illegitimate.

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126. In Israel, a committee rejection is not a binding decision. One can simply try another committee. Interview with Sharon Orshalimy, *supra* note 31.

127. See Packer & Gampell, *supra* note 118, at 421–22 (citing Alan F. Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, in THERAPEUTIC ABORTION 12, 15 (Harold Rosen ed. 1954)).

128. See Carole Joffe & Jody Steinauer, *Opinion: Even Texas Allows Abortions to Protect a Woman's Life. Or Does It?*, N.Y. TIMES (Sept. 12, 2021), <https://www.nytimes.com/2021/09/12/opinion/abortion-texas-roe.html> [<https://perma.cc/9752-LA9G>] (summarizing the research on pre-*Roe* therapeutic abortion committees, and speculating about the ways in which such committees might operate in a post-*Roe* landscape).

129. See *Mathews v. Eldrige*, 424 U.S. 319, 335 (1976) (“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail”); See also Simona Grossi, *Procedural Due Process*, 13 SETON HALL CIR. REV. 155, 158 (2017) (“[A] . . . procedural law that is not supported by logic, fairness, and efficiency considerations . . . violates due process.”).

130. For a thoughtful consideration of the constitutional protections of a pregnant person in light of state-compelled pregnancy, see Meghan Boone, *Reproductive Due Process*, 88 GEO. WASH. L. REV. 511, 526 (2020) (“Beyond its flexibility and ability to evolve, a third feature of due process is simply its function as a catchall constitutional backstop for determining the fairness of government action.”).



D. *Abortion Crimes as Shame Sanctions*

In addition to its criminal, economic, and regulatory functions, one might also see Israel's law as a variety of "shame sanction."<sup>131</sup> Indeed, one might argue that just enduring the multi-step process is a punishment of sorts. According to Professor James Q. Whitman, shame sanctions are one of the five types of punishments that a society might inflict: "[D]eprivations of life (execution); of liberty (imprisonment); of bodily safety and integrity (corporal violence); of property (fines); and of what we might call 'dignity' (shaming)."<sup>132</sup>

So-called shame sanctions are familiar from early American colonial history.<sup>133</sup> The public admonition, the ducking stool, standing in the pillory, the forced wearing of signs or letters listing one's offense, branding or maiming—all were employed as means of punishment by humiliation.<sup>134</sup> Although less common today, there are contemporary examples, such as sex crimes "prosecution" by publishing the names of those who hire sex workers.<sup>135</sup>

It makes sense that laws against abortion might operate as shame sanctions. After all, shame lies at the heart of our battle over abortion. The argument for abortion shame sanctions goes something like this: those opposed to abortion stake their claim on moral grounds—abortion is *malum in se*, a wrong in and of itself.<sup>136</sup> One ought to be ashamed of doing something that is morally wrong. An abortion shame sanction uses humiliation as a way to punish wrongdoers by exposing them to opprobrium.

Israel's law is not an explicit shame sanction. It does not set out to punish a wrongdoer by *publicly* humiliating them. But one can see how the process it sets in motion is fraught with potential humiliation. To secure a legal abortion, one must explain, over and over, how they became pregnant and why they do not want a baby.<sup>137</sup> This task is hard because as a rule, people do not share abortion

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131. For an interesting essay on how external forces drive abortion stigma, see Anuradha Kumar, Leila Hessini & Ellen M.H. Mitchell, *Conceptualising Abortion Stigma*, 11 CULTURE, HEALTH & SEXUALITY 625 (2009).

132. James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1060 (1998). See also, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

133. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1915 (1991) ("[W]hite colonists lived in intimate, closely bound, and normatively cohesive communities, within which shaming could and did play a signal role in reinforcing standards of behavior.").

134. *Id.* at 1912–15.

135. Whitman, *supra* note 132, at 1056. For an interesting exploration of how shame sanctions might be employed in the context of sexual assault crimes, see Katharine K. Baker, *Sex, Rape and Shame*, 79 B.U. L. REV. 663 (1999).

136. *Malum in se*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A crime or an act that is inherently immoral.").

137. See *supra* Part I.

stories, let alone with strangers.<sup>138</sup> It takes on added weight in a culture that is known for pressuring women to have many children.<sup>139</sup>

I am not claiming that Israel's law has the *effect* of causing women to feel shame.<sup>140</sup> Such an effect would be hard to measure and might vary considerably within and across cultures.<sup>141</sup> What makes it a shame sanction is not whether the law actually causes shame, but rather, whether it attempts to impart it.

Notice how the social worker's screening interview might double as a platform for expressing moral judgment about the validity of pregnant applicants' reasons for seeking an abortion. In fact, in one of the more interesting articles about Israel's abortion law, Professors Delila Amir and Orli Biniamin report on their findings from interviews with twenty-nine committee social workers.<sup>142</sup> Their analysis reveals what they describe as a "ritual" in which "the woman has to confess her . . . wayward behavior such as extra-marital relations, not using contraception, and enjoying sex with no reproductive intentions."<sup>143</sup> The social workers' responses were seen to reinforce normative attitudes toward women, about motherhood, sexuality, and contraception alike.

In my interviews with committee social workers, I encountered evidence of this sort of moral judgment against those who deviate from societal expectations. Consider Gila Segev's response when I asked if she ever struggled to approve an abortion:

138. For a superbly insightful analysis of abortion silence and the void in our cultural awareness of "ordinary abortions," see WATSON, *supra* note 107.

139. From its inception, the state of Israel has encouraged large families. David Ben Gurion, the country's first Prime Minister, famously urged women to do their national duty by having at least four children. Lilach Rosenberg-Friedman, *David Ben-Gurion and the 'Demographic Threat': His Dualistic Approach to Natalism, 1936-63*, 51 MIDDLE E. STUD. 1, 6 (2015), [https://www.researchgate.net/profile/Lilach-Friedman/publication/276116215\\_David\\_Ben-Gurion\\_and\\_the\\_%27Demographic\\_Threat%27\\_His\\_Dualistic\\_Approach\\_to\\_Natalism\\_1936-63/links/56c3127408ae8a6fab59e9d9/David-Ben-Gurion-and-the-Demographic-Threat-His-Dualistic-Approach-to-Natalism-1936-63.pdf](https://www.researchgate.net/profile/Lilach-Friedman/publication/276116215_David_Ben-Gurion_and_the_%27Demographic_Threat%27_His_Dualistic_Approach_to_Natalism_1936-63/links/56c3127408ae8a6fab59e9d9/David-Ben-Gurion-and-the-Demographic-Threat-His-Dualistic-Approach-to-Natalism-1936-63.pdf) [<https://perma.cc/7N5S-GEDL>]; see also Dina Kraft, *Israel Booms with Babies as Developed World's Birth Rates Plummet. Here's Why.*, CHRISTIAN SCIENCE MONITOR (Dec. 14, 2018), <https://www.csmonitor.com/World/Middle-East/2018/1214/Israel-booms-with-babies-as-developed-world-s-birth-rates-plummet.-Here-s-why> [<https://perma.cc/X3Z2-NC8E>]. See *infra* note 172–73, regarding Israel's prenatal policies.

140. At least some women report feeling shamed by the process. See Steinfeld, *supra* note 17, at 16 ("Many experience the committee process as shameful. Health journalist Judy Siegel-Itzkovich told me that she thought 50 per cent of abortions performed illegally were a result of women avoiding the embarrassment and shame of the committee experience."). See also Ruth Eglash, *Redefining 'Pro-Choice,'* JERUSALEM POST (May 26, 2011), <https://www.jpost.com/magazine/lifestyle/redefining-pro-choice> [<https://perma.cc/F2WZ-XSHN>] (citing sociologist Yael Hashiloni-Dolev who regards the process as a "ceremony of shame and guilt" in which women have to "confess their sins or explain very intimate details about themselves to total strangers.").

141. My hunch is that there might be less shame for Israelis than there would be for Americans made to endure the process. There is no public battle over abortion and therefore no rhetoric equating abortion with murder. See *supra* notes 89–92 and accompanying text regarding cultural relativism and my struggle to characterize the committee process.

142. Amir & Biniamin, *supra* note 24.

143. *Id.* at Abstract.

You know, when it's a 16-year-old girl that says, "You know, I was at a party, and I drank something, and I wasn't thinking, and I did it." You know, I can understand her. I can't understand a married woman, thirty-five years old, has her three children that she planned. You're a grown up? Why didn't you go to your doctor and put in an IUD, or take some pills! You're not a little child. I will help her because she needs it, and she wants it, and it's her will, and, you know, I can't be the dispatcher that tells her what to do, or, like one said to me: "The state of Israel can't tell me to have children or not, you know. You are telling me how to plan my life." So, I will help her, if she needs, but sometimes, it gets me to be angry with them.<sup>144</sup>

Again, it is not clear that the committee process actually causes those seeking abortion to feel ashamed. But it is obvious that the process for obtaining one requires being subjected to the moralizing scrutiny of strangers. In that sense, it is clear that one of the functions of Israel's abortion law is to shame those who seek abortions.<sup>145</sup>

It is easy to imagine the ways in which anti-abortion lawmakers in the U.S. might employ abortion laws as shame sanctions. In a sense, they already do.<sup>146</sup> For instance, there is a shaming function at work in laws requiring medically unnecessary scans prior to ending a pregnancy.<sup>147</sup> These tests are not intended for the benefit of doctor or patient, but rather, they are favored because supporters hope the pregnant person will change their mind, after hearing the heartbeat or seeing the ultrasound.<sup>148</sup> What is unclear is why supporters believe this might happen. Is it because they believe people seeking abortions don't know what a fetus looks like—a supposition that seems implausible given the media saturation with fetal imagery? Perhaps it is also because, by inviting strangers into the

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144. Interview with Gila Segev, *supra* note 32. Recall the words of the Anonymous Social Worker, who described pressing women to explain, "[why] they're so sure they can't handle it." See Interview with Anonymous Social Worker, *supra* note 35.

145. Indeed, one of my interviewees, Sharon Orshalimy, suggested that Israel's abortion policy, along with its generous support of infertility treatments and its pronatal stance, is all part of "building the IDF" (i.e., growing the population needed to serve in the country's military). See Interview with Sharon Orshalimy, *supra* note 31.

146. See CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN 21<sup>ST</sup> CENTURY AMERICA 167–71 (2017) (noting that judicial bypass hearings operate as a form of punishment, requiring time and effort and causing distress and humiliation). Abortion shame sanctions also fit into a larger pattern of religious conservatives seeking to use the law to control people's sexuality and reproduction, not just around abortion but also around transgender issues, same-sex marriage, and adoption, etc.

147. See, e.g., Jen Russo, *Mandated Ultrasound Prior to Abortion*, 16 AM. MED. ASS'N J. ETHICS 240 (2014).

148. See, e.g., Jeanne Monahan, *Ultrasound Policy*, ONE PAGER (July 2010), <https://downloads.frc.org/EF/EF10G59.pdf> [<https://perma.cc/L3YT-Y9Q4>] (defending the policy of mandating ultrasounds on "abortion-minded women" unless they have a life-threatening pregnancy or are victims of rape or incest, when, presumably, the shaming function of such scans would be unwarranted).

inherently private abortion decision, these laws attempt to inculcate and weaponize shame.<sup>149</sup>

As states are permitted greater leeway in criminalizing abortion, they might harness the power of law to shame in any number of ways. But the question of how anti-abortion lawmakers will endeavor to weaponize shame exists alongside the arguably better question of whether any such sanctions will remain relevant in the world toward which we are headed. That is to say, a world in which abortion—legal or not—is no longer clinic-based, but instead managed with abortion medications, in the privacy of one's home.

This question recalls us to our broader inquiry into the nature and function of abortion laws in contemporary society. As we have seen, they can have a practical impact on society by mediating abortion access, whether directly or indirectly. But they might also serve a function that is far less concrete. The following section considers the expressive function of abortion laws, evaluating the proposition that in criminalizing abortion, a society sends a message that abortion is wrong.

#### PART THREE: THE EXPRESSIVE FUNCTION OF ABORTION LAW

Conventionally, criminal sanctions are justified as strategies for deterring or punishing disfavored behavior.<sup>150</sup> Making something illegal might also serve an expressive function in that forbidding an activity is a means of denouncing it, even if the law is unenforced and largely fails to deter or to punish those who break it. Think of laws against flag burning, which might be endorsed not out of a need to punish or deter, but rather as symbolic affirmations of the flag's dignity.<sup>151</sup> Or indoor smoking bans, which scholars credit with sending the message that lawmakers believe smoking is hazardous.<sup>152</sup>

In many ways, it is the expressive function of abortion laws that has animated the pro-life movement to date. Proponents of criminalizing abortion look to the law at least in part because of what it says, not what it does. In my previous research, when interviewing pro-life lawmakers, many declared their support for banning abortion not because they thought the law would greatly reduce abortion rates, but rather because they believed the law should “send a message.”<sup>153</sup>

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149. See, e.g., Kim Greene, *So-Called Pro-Life Laws Are Really About Shaming Women Who Seek Abortions*, COURIER J. (July 5, 2019), <https://www.courier-journal.com/story/opinion/2019/07/05/abortion-laws-so-called-pro-life-laws-shaming-women/1522094001/> [<https://perma.cc/BW3Z-NJ84>].

150. WAYNE R. LAFAVE, CRIMINAL LAW 34–35 (6th ed. 2017).

151. Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111 (1990).

152. Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 L. & SOC. INQUIRY 60 (2017).

153. See OBERMAN, *supra* note 4, 85–86 (quoting an anonymous Oklahoma senator: “The purpose of the law is to stop abortion. To send a moral message. To get the message out via the law, to spark a debate in the population. The government’s responsibility is to give people education. It is up to the government to tell them that abortion is wrong. It’s not an acceptable solution.”).

The criminal law's "message sending" function sounds quite simple, but it is not. The following section interrogates the expressive function of abortion law by examining Israel's abortion statute on three levels. First, I consider the narrow message Israel's law sends about abortion. Next, I turn to the law's embedded messages, recognizing that just beneath the surface, the law speaks to the status of fetuses, and of those who might become pregnant, encoding implicit messages about family, marriage, and sex. Finally, I consider the various forces that shape whether Israelis actually receive the messages sent by their abortion law.

*A. The Surface Meaning of Laws Criminalizing Abortion*

According to Professor Richard McAdams, a leading scholar of the law's expressive function, the starting place for assessing a law's message is its conventional meaning—that is, "the meaning derived from applying existing language conventions to the speaker's utterance."<sup>154</sup> Making sense of the plain meaning of Israel's law requires a brief aside on the relationship between secular and religious law in Israel. Israel is a secular democracy, yet, like other democracies in which a majority of the population belongs to a single faith tradition, there is a heavy religious influence throughout civil society, including in its laws.<sup>155</sup> The traces of religion in secular society are most evident in laws that bear on issues about which the religion has something to say, such as abortion.

Israel is a diverse country, and its parliament is comprised of political parties of every stripe: communists, Israeli Arab Christians, Israeli Arab Muslims, Jewish settlers from the Occupied Territories, etc.<sup>156</sup> Typically, the biggest parties—historically, both secular—must enter into coalition with smaller parties in order to garner a majority of votes, and the right to lead the government.<sup>157</sup> Consequently, relatively small parties are able to extract promises and concessions in exchange for joining the coalition. In the years since 2000, neither of the big secular parties has been able to form a winning coalition without including at least some religious parties.<sup>158</sup>

Practically speaking, this means that even a secular government must tread lightly in setting laws governing issues that bear on religious observance.<sup>159</sup> To

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154. RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 19 (2015).

155. Izhak England, *Law and Religion in Israel*, 35 AM. J. COMP. L. 185 (1987).

156. See Alex Lederman, *Knesset Elections 2021: A Guide to Israel's Political Parties*, ISR. POL'Y F. (Mar. 10, 2021), <https://israelpolicyforum.org/2021/03/10/knesset-elections-2021-a-guide-to-israels-political-parties/> [<https://perma.cc/6WXD-EL6Y>].

157. See generally Jacob Miller, *Why Building a Governing Coalition is Difficult in Israel*, HARV. POL. REV. (Oct. 15, 2021), <https://harvardpolitics.com/building-a-coalition-in-israel/> [<https://perma.cc/8U5X-HKF8>].

158. See David Pollock & Tamar Hermann, *The Increasingly Right Stuff: Religious Parties in Israel's Upcoming Election*, FIKRA F. (Sept. 5, 2019), <https://www.washingtoninstitute.org/policy-analysis/increasingly-right-stuff-religious-parties-israels-upcoming-election> [<https://perma.cc/2XB3-M76E>].

159. Typically these issues include marriage and divorce, along with broader issues impacting the ultra-Orthodox community, such as exemptions from military service and

understand the meaning of the simple text of Israel's abortion law, then, you first must understand how the country's dominant religion—Judaism—views the subject.

Although I am Jewish, I needed guidance to understand Jewish law on abortion and the ways in which Israel's abortion statute reflects its tenets. I was fortunate to meet Rabbi Michael Broyde, a U.S. law professor and an ordained Orthodox rabbi. Rabbi Broyde is an expert in Jewish law. He served for decades on the Beth Din of America, the highest court of Jewish law in the U.S. In addition to having a rigorous knowledge of Jewish law regarding abortion, like most Orthodox rabbis in the U.S., he has spent time living in Israel. Thus, he was able to help me make sense of how Israel's abortion statute squared with Jewish law.<sup>160</sup>

Rabbi Broyde began by explaining that, under the dominant normative view of Jewish law, the developing fetus is not considered alive until its head and shoulders emerge from the body.<sup>161</sup> Jewish law holds that life begins at birth, rather than, as many Christians believe, at conception.<sup>162</sup> As such, Rabbi Broyde explained, the fetus lacks a conventional rights-based legal status.<sup>163</sup> Indeed, there is no mention of the fetus in Israel's law, nor is there any line-drawing over the course of pregnancy, whether at viability or any other stage of fetal development.<sup>164</sup>

At the same time, Rabbi Broyde explained that abortion is plainly disfavored under Jewish law:

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government subsidies for religious schools. For a compelling, comprehensive discussion of the impact of these compromises on gender bias, see the works of Daphne Barak-Erez. Barak-Erez is now an Israeli Supreme Court Justice, but previously was a law professor at Tel Aviv University, where she wrote extensively about gender and civil rights in Israel. *See, e.g.,* Daphne Barak-Erez, *Law and Religion Under the Status Quo Model: Between Past Compromises and Constant Change*, 30 *CARDOZO L. REV.* 2495 (2009); Daphne Barak-Erez, *Can Equality Survive Exceptions*, 107 *MICH. L. REV. FIRST IMPRESSIONS* 134 (2009).

160. When I interviewed him, he had just returned from a year-long Fulbright in Jerusalem, and was visiting at Stanford University.

161. Interview with Rabbi Michael Broyde, Professor of Law, Emory Univ. Sch. L., at Stan. Univ. (Nov. 14, 2019).

162. *See* DAVID M. FELDMAN, *MARITAL RELATIONS, BIRTH CONTROL, AND ABORTION IN JEWISH LAW* 264–67 (1987).

163. *See* Interview with Rabbi Broyde, *supra* note 161. Which wasn't to say that the fetus did not matter in his eyes. Here's how he described Judaism's moral position on abortion: Abortion is not black and white; it's more or less problematic. It should happen as early as possible in a pregnancy, because it's less ethically complicated. Not that Jewish law mandates it be done early, but it's better for everyone if it's early: for the women, and for the community—that they shouldn't see pregnancies that result in abortion, that abortion shouldn't be normalized; and for the developing life, whose connection to humanness increases over time. Its rights are always subordinate to the woman's, but the obligation is to do the most ethical thing possible by terminating early. It's less problematic.

164. Until 1994, when Knesset created a secondary review process for late-term abortions, a committee might have approved an abortion at any stage of pregnancy. *See* Rimalt, *supra* note 15, 359–62.

Everybody knows abortion isn't murder—Rabbi Moshe Feinstein's [position] is plainly not followed and is deemed incorrect in practice. It is permissible for certain vitally necessary situations, according to Rabbi Eliezer Waldenberg . . . . That truth pervades Halacha<sup>165</sup> and informs social policy and explains why Israel's law is uncontroversial. Rabbi Feinstein says it is murder; his view leads to the public posture that abortion is murder. It's not the posture of nearly any competent Halachic authorities in private, though. All rabbis who actually answer such questions, as far as I can see, agree that abortion is a very serious issue, that we're enjoined not to kill it, but that abortion is not murder.<sup>166</sup>

True to Talmudic tradition, in which the meaning of a law's text is not proclaimed but instead debated by commentators,<sup>167</sup> Rabbi Broyde's explanation called into view ongoing arguments among rabbinic scholars over the circumstances in which abortion is permissible under Jewish law. But his overarching conclusion—that Jewish law recognizes specific exceptions to a general moral prohibition against abortion—points the way to understanding both the connection between Jewish law and Israel's statute, and also to the reasons why the country's religious leaders can live with it.<sup>168</sup>

Turning to the surface meaning of Israel's abortion law, one finds that the blanket prohibition and each of the law's exceptions has its analog in Jewish law or custom. The law's broad allowance for abortions when life or health is at stake is consistent with well-established Jewish law. As Rabbi Broyde explained: "The fetus is not considered alive until it is born. Jewish law obligates us to save life

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165. The Hebrew term for Jewish law.

166. See Interview with Rabbi Broyde, *supra* note 161. To understand the significance of his point that, in private, everyone agrees that there are times when abortion is permissible, one must understand how abortion decisions get made in the Orthodox world. If an observant Jew faces an unwanted pregnancy, she would seek the counsel of her Rabbi, telling him her story and asking whether it would be morally permissible to get an abortion. The practice of coming to Rabbis with "Sheylahs" (moral questions) reflects a world view in which all decisions of consequence must be made in keeping with Jewish law, of which Rabbis are the ultimate arbiters.

167. HARRY AUSTRYN WOLFSON, *CRESCAS' CRITIQUE OF ARISTOTLE* 25–26 (HARV. UNIV. PRESS, Harvard Semitic Ser. No. 6, 1929).

168. For example, Agudath Israel, an Orthodox Jewish organization often aligned with the U.S. "pro-life" movement, supports abolishing legal abortion only if such laws include a religious exemption clause. See Ben Sales, *Orthodox Rabbis Compare Abortion to Murder—and Orthodox Women are Angry About It*, JEWISH TELEGRAPHIC AGENCY (Jan. 31, 2019), <https://www.jta.org/2019/01/31/culture/orthodox-groups-come-out-swinging-against-new-yorks-abortion-law> [<https://perma.cc/6WPQ-JYHE>]. Rabbi Broyde translates this position as permitting a woman to terminate a pregnancy in consultation with a religious authority whom she has selected and who permits the abortion. See Email from Rabbi Broyde, Professor of Law, Emory Univ. Sch. L., at Stan. Univ., to author (June 21, 2021) (on file with author). See also *From the Mailbox*, NEWS FROM THE AGUDAH (May 26, 2021), <https://myemail.constantcontact.com/News-From-Agudas-Yisroel-15-Sivan-5781-May-26-2021.html?soid=1101537112001&aid=vIze2MIFKT0> [<https://perma.cc/K4JQ-2WKX>] (regarding the ultra-Orthodox Agudas Yisroel's position on abortion).

and preserve health, so the mother's serious health interests always take precedence."<sup>169</sup>

Long-standing custom helps explain the viability of the other exceptions. Rabbi Broyde noted that there is enormous social stigma in the Orthodox community—unlike the secular community—to having children out of marriage.<sup>170</sup> Community norms favor large families, with children born within wedlock. Permitting abortion for non-marital pregnancies helps to reinforce those norms, and to safeguard the individual's place within her community.

The broad clause permitting abortion in cases of “fear of fetal anomaly” likewise reflects community norms. Rabbi Broyde told me he gets no fewer than fifty inquiries a year from religious women struggling with abortion-related questions.<sup>171</sup> The most common among them involves the permissibility of prenatal genetic testing after age thirty-five.<sup>172</sup> He responds to them pragmatically, rather than juridically: “There's complex social pressure in these cases,” he noted. “We want big families, with lots of children. And a woman comes to me saying, ‘I want more children, but if I can't screen, I won't have more.’ It's the difference between having six and nine kids.”<sup>173</sup>

Rabbi Broyde notes that prenatal screening and abortion, while technically impermissible, is commonly practiced in the Orthodox world.<sup>174</sup> As evidence, he notes that there are lower than expected rates of Down Syndrome and other genetic anomalies among Orthodox women giving birth after age thirty-five.<sup>175</sup>

One final insight about the relationship between Jewish law on abortion and the 1977 statute relates back to the clause that was struck from the law in 1979. Recall that the original law permitted abortions when dictated by “family or social conditions.”<sup>176</sup> This translated into permitting abortion on the grounds that one cannot afford to have a child. Jewish law contains no such exception, and indeed, finds it abhorrent. Rabbi Broyde was adamant: “Economic-related abortion is to be avoided. I'm not comfortable with the ‘three bedrooms, fourth child’ abortion. I tell them the kids can share a room. I reject lifestyle abortion.”<sup>177</sup> His response might help explain why, when the religious parties gained political clout, two years after the abortion law was passed, the Knesset quickly eliminated the fifth clause.<sup>178</sup>

Even if one can trace the outlines of Jewish law within the strictures of Israel's abortion statute, there remains a question of how those who are morally

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169. Rabbi Broyde, personal communication (June 1, 2021).

170. *See id.*

171. *See* Interview with Rabbi Broyde, *supra* note 161 (regarding the practice of seeking rabbinic counsel).

172. *See id.*

173. *Id.*

174. He distinguished these tests from preimplantation genetic diagnosis, which is completely permissible. *Id.*

175. As Rabbi Broyde put it, “There is the public teaching in the community, which is that abortion is murder. Then there is the private teaching, which is that abortion is permissible in situations of enormous need, even if it is below the level of life threatening need.” *Id.*

176. *See supra* notes 20–23 and accompanying text.

177. *See* Interview with Rabbi Broyde, *supra* note 161.

178. *See supra* note 23 and accompanying text.



opposed to abortion square their opposition with the reality that committees will approve virtually anyone who seeks an abortion. When I pressed Rabbi Broyde to explain how religious leaders both inside and outside Knesset could tolerate this situation, he said: “The Orthodox like abortion committees because the specter of having to appear before them will cause women to avoid unwanted pregnancy. We like the law because we don’t want to trivialize human life and dignity. The law has a pedagogic function. It teaches ethical conduct.”<sup>179</sup>

It was surprising to hear Rabbi Broyde invoke the same justification for criminalizing abortion as I had heard from pro-life lawmakers and advocates throughout the U.S. and in places as distant as El Salvador. In the next subsection, I consider his suggestion that, in effect, the entire abortion committee process might be seen as a means for the Israeli government to send a message that abortion is disfavored.

### B. *The Messages Sent by Laws Criminalizing Abortion*

Abortion opponents see criminalizing abortion as a way to broadcast the view that abortion is wrong.<sup>180</sup> But the reality is that if abortion laws send a message, they don’t just send one. Instead, they carry additional messages about sex, pregnancy, marriage, motherhood, the status of those capable of pregnancy, and the status of the developing life.

Consider the law’s message to those who might find themselves pregnant. Israel’s abortion law allocates to the state the power to compel a person to endure pregnancy, labor, and delivery against their will. Even if the committee’s approval is all but guaranteed, its message is an assertion of dominion over the bodies and lives of anyone capable of becoming pregnant.

In addition to this message, Israel’s law has more to say. Each of the permissible grounds for granting abortions sends its own morality message. There are messages about families—specifically, that children should be born to married couples. There are messages about motherhood—that one must have an approved reason for seeking to avoid it.<sup>181</sup> And there are messages about sex.

179. See Interview with Rabbi Broyde, *supra* note 161.

180. See OBERMAN, *supra* note 4, at 79–87.

181. This is particularly so in the absence of a robust embrace of adoption, which is the case in Israel. This, incidentally, is also the de facto case in the U.S., where fewer than five percent of those facing unwanted pregnancies even contemplate placing their child and fewer than two percent ultimately opt to do so. Unlike in pre-*Roe* America, those who do not terminate unwanted pregnancies overwhelmingly opt to raise their babies. See Olga Khazan, *Why So Many Women Choose Abortion Over Adoption*, ATLANTIC (May 20, 2019), <https://www.theatlantic.com/health/archive/2019/05/why-more-women-dont-choose-adoption/589759/> [<https://perma.cc/PT8Z-NRYJ>] (“[A]bout 9 percent chose adoption before 1973, when *Roe v. Wade* legalized abortion. (The figure was higher for white women: 19 percent.”). See also DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING—OR BEING DENIED—AN ABORTION* (2020). The Turnaway Study is a longitudinal study examining the effects of unintended pregnancy on women’s lives, conducted by the ANSIRH at the University of California at San Francisco. For the study and its findings, see *The Turnaway Study*: ANSIRH, <https://www.ansirh.org/research/ongoing/turnaway-study> [<https://perma.cc/VB9E-HZLW>] (last visited July 9, 2021).

Take the rape exception, for example. Rape exceptions to abortion crimes posit that, if a person willingly has sex, it is fair to compel them to continue a pregnancy.<sup>182</sup> By contrast, if the sex was itself a criminal act, then the pregnant person becomes a victim, and cannot justly be forced to carry an unwanted pregnancy. As other scholars have observed, rape exceptions send a message that pregnancy and childbirth are “the price of pleasure.”<sup>183</sup>

Israel’s law also sends a message about the status of people with disabilities. The exception permitting abortion in cases of “fear of fetal anomaly” signals that the government places less value on the lives of individuals with disabilities than on those without disabilities. So great is the difference that the mere fear of disability is sufficient grounds for a committee to permit an abortion.<sup>184</sup>

Professor Sagit Mor, a lawyer specializing in disability rights at Haifa University Law School, put a fine point on the message sent by such a law: “There is a moral question here. Abortion is not inherently problematic, from a disability rights perspective, assuming you’re not interested in any pregnancy at

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182. Indeed, some assert that forced pregnancy is “the price of pleasure.” See Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010). The rape exception is troubling for advocates on both sides of the abortion issue. For those inclined to support reproductive justice, these exceptions seem to treat nine months of pregnancy, with its attendant short and long-term risks to life and health, not to mention mental health, as a just punishment for the “crime” of consenting to sex. From the perspective of those who believe life begins at conception, it seems perverse to permit the destruction of a fetus, no matter how heinous the circumstances surrounding its conception. See, e.g., Paulina Firozi, *The Health 202: Rape Exemptions for Abortion are Dividing Republicans*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2019/05/21/the-health-202-rape-exemptions-for-abortion-are-dividing-republicans/5ce2fefb1ad2e54b957e7fc8/> [https://perma.cc/Q9PX-8QJ4].

183. See Motro, *supra* note 182. For an interesting exploration of the philosophical underpinnings of rape exceptions, see I. Glenn Cohen, *Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?*, 43 J.L. MED. & ETHICS 87 (2014).

184. Fear of disability is baked into Israeli prenatal care, which is characterized by frequent screening for fetal anomalies. Professor Tsipy Ivry’s brilliant ethnographic study comparing prenatal care in Japan and Israel offers insight into Israel’s passionate embrace of prenatal screening. See TSIPY IVRY, *EMBODYING CULTURE: PREGNANCY IN JAPAN AND ISRAEL* (2010). She describes the manner in which even young, healthy pregnant patients are expected to undergo a series of tests and evaluations to insure the fetus is developing normally. Pregnancy in Israel, Ivry concludes, is an anxiety-fueled process in which routine, government-funded prenatal scans and lab tests emerge as both the source of and the response to anxiety about disability. *Id. passim*.

There are a variety of theories about why Israelis might be so focused on producing perfect babies. See, e.g., Yael Hashiloni-Dolev, *Between Mothers, Fetuses, and Society: Reproductive Genetics in the Israeli-Jewish Context*, 12 NASHIM: J. JEWISH WOMEN’S STUD. & GENDER ISSUES 129 (2006); Tsipy Ivry, *The Ultrasonic Picture Show and the Politics of Threatened Life*, 23 MED. ANTHROPOLOGY Q. 189 (2009); Larissa Remennick, *The Quest for the Perfect Baby: Why Do Israeli Women Seek Prenatal Genetic Testing?*, 28 SOCIO. HEALTH & ILLNESS 21 (2006); MEIRA WEISS, *THE CHOSEN BODY: THE POLITICS OF THE BODY IN ISRAELI SOCIETY* (2002).

all. What is morally problematic is to say you want a child, but not this one.”<sup>185</sup> By permitting abortions in response to fear of fetal anomaly, she noted, the state necessarily sends a message that the disabled fetus lies outside of the community of those whom it is obligated to protect.<sup>186</sup>

My point here is a simple one: abortion foes may wish to use criminal law to broadcast their moral opposition, but abortion laws are not straightforward in the same way as flag burning laws. Abortion laws come freighted with ancillary messages. But the complexity of the message is only the beginning of the challenge when it comes to using abortion laws to send a message. The real challenge lies in making sure it gets heard.

### C. *The Challenge of Sending a Message via Abortion Laws*

For all that we might accept the notion that laws can send messages, we know surprisingly little about how the “expressive function” of any law actually operates in practice. One leading scholar, Professor Richard McAdams, offers a “law as information” theory for how it might work.<sup>187</sup> Under this theory, an expressive law reveals the lawmakers’ beliefs, which in turn causes individuals to update their beliefs and ultimately to change their behaviors, usually in the direction of compliance.<sup>188</sup> McAdams posits that, for this theory to work in practice, a law must possess three key ingredients: clear audience meaning, publicity and legitimacy.<sup>189</sup>

Viewing Israel’s law through the lens of these factors shows just how difficult it is for any abortion law, anywhere, to send a message.<sup>190</sup> First, consider

185. Interview with Sagit Mor, Senior Lecturer, Univ. Haifa L. Sch., in Jerusalem, Isr. (May 19, 2017). In flagging the “not *this* child” question, Professor Mor harkens back to the pivotal work of philosopher Adrienne Asch who called attention to the immorality of disability-based abortion. See Adrienne Asch, *Prenatal Diagnosis and Selective Abortion: A Challenge to Practice and Policy*, 89 AM. J. PUB. HEALTH 1649, 1652 (1999) (arguing that, while one can ethically support the right of a person to decide they do not want to have a child now, there is no legitimate moral basis to justify a decision to abort a pregnancy because they fear having a disabled child).

186. Debate over the legality of disability-based abortions is ongoing in the U.S. See, e.g., *Preterm v. McCloud*, 994 F.3d 512, 549–51 (6th Cir. 2021) (upholding an Ohio law banning abortion if the doctor is aware that the patient is obtaining an abortion based on a Down syndrome diagnosis). See also, Stefanija Giric, *Strange Bedfellows: Anti-Abortion and Disability Rights Advocacy*, 3 J.L. & BIOSCIENCES 736 (2016). But rather than contend with the factors that might lead a person to seek prenatal screening and to end a wanted pregnancy if the results indicated a fetal anomaly—that is, rather than focus on offsetting the very real costs associated with raising a disabled child—pro-life lawmakers have largely favored laws prohibiting abortion on the grounds of disability.

187. See MCADAMS, *supra* note 154.

188. *Id.* For a trenchant critique of McAdams on account of the absence of data to support his theory, see Book Note: *Richard H. McAdams, The Expressive Powers of Law*, 129 HARV. L. REV. 1160 (2016).

189. He uses these categories in his Coase lecture. See Richard McAdams, Professor of L., Univ. of Chi., Coase Lecture in Law and Economics: The Expressive Powers of Law (Apr. 15, 2014). In his book, he modifies the categories to expertise and aggregation. See MCADAMS, *supra* note 154, at 180.

190. I am indebted to Professor Janice Nadler for an enriching conversation about the expressive function of Israel’s law. Her work informs my thinking throughout this section.

the question of clear audience meaning. Although Israel's law on the books may send a clear message that abortion is disfavored, it is unlikely the person seeking an abortion will ever hear it. When they first approach their doctor to ask about abortion, the law will be introduced as a bureaucratic process in which approval is a mere technicality. "Here is how to get the abortion," they are told. Not, "The law may prevent you from getting one," let alone, "Abortion is bad." Nor will the social workers or doctors they meet disabuse them of the notion that approval is simply a matter of figuring out how to qualify. How can a law that is viewed—even to those appointed to administer it—as a technicality send a consistent message about "ethical conduct," as Rabbi Brody put it?

Then there is the publicity challenge, because, in order for a law to exert an influence, those it governs must be aware of it. Restaurant indoor smoking bans are able to chill smoking behavior and simultaneously send a message that smoking is bad in large part because the bans happen in public.<sup>191</sup> Israel's abortion law lacks such broad-scale publicity. Outside of an occasional media exposé, the fact that abortion is a settled issue means that there is almost no public discussion about abortion.<sup>192</sup> A law cannot send a message if nobody hears it.

Finally, there is the question of legitimacy, which undergirds the expressive function of law, just as it did the criminal and regulatory functions.<sup>193</sup> The question of how a law's message will be received by the public turns in part on the deference the public is willing to accord to the government on the issue. Professor McAdams notes that government legitimacy is not automatic, but rather, earned.<sup>194</sup> Government actors might gain the necessary credibility by way of "aggregation" or "expertise"—something that signals a reason why the public should trust the conclusions reached by their lawmakers.<sup>195</sup> For example, he points to indoor smoking bans, which gained traction because lawmakers persuaded the public that they were acting on data showing that secondary smoke inhalation required nothing less.<sup>196</sup>

When it comes to abortion, such legitimacy surely will be elusive. Lawmakers cannot lay claim to aggregated data or to special expertise in support of their position that abortion is wrong. It simply is not a question suitably resolved by majority rule.

Beyond these factors lies an even bigger challenge to using abortion law to send a message. Laws do not exist in a vacuum; they are entwined with other

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191. See generally, Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1713–28 (2000) (applying expressive law theory to smoking bans and landlord liability law).

192. See *supra* note 24, citing to stories from Israel's popular press; Allison Kaplan Sommer, *Shhh! Don't Tell Evangelical Supporters of Israel, but Abortion There is Legal—and Often It's Free*, HAARETZ (May 22, 2019), <https://www.haaretz.com/israel-news/.premium.MAGAZINE-shhh-don-t-tell-evangelical-supporters-of-israel-about-the-country-s-abortion-laws-1.7274968> [<https://perma.cc/VD5R-2KBL>].

193. See *supra* notes 104–113 and accompanying text describing the significance of legitimacy in the Israel's abortion committees' administrative process.

194. See McADAMS, *supra* note 154, at 186.

195. *Id.*

196. *Id.* at 197.

messages sent by the government and by the culture at large.<sup>197</sup> The capacity of an abortion law to send a message depends in part on the extent to which it is in concert with, rather than at odds with, the laws, policies, and cultural norms that inform whether a person might contemplate abortion.

Professor McAdams explains that any law hoping to send a message must distinguish itself against a noisy backdrop:

Individuals are constantly being bombarded by information from sources other than the law: the print media, Internet, social acquaintances, etc. For expression to change beliefs, there must be some factor that makes the legal signal strong enough to stand out against this background.<sup>198</sup>

Interestingly, Israel's law fares comparatively well on the question of how its message aligns with the backdrop. In fact, one might understand Israel's abortion law as consistent with a host of laws and policies that encourage people to have children.<sup>199</sup> In Israel, there is guaranteed paid maternity leave—you can leave your job for twenty-six weeks, still get paid, and your employer cannot fire you.<sup>200</sup> Parents enjoy access to local neighborhood, subsidized day care.<sup>201</sup> In addition to tax deductions, the Israeli government pays everyone—rich and poor alike—a small monthly allowance for each child under eighteen.<sup>202</sup>

197. See Nadler, *supra* note 152.

198. See McADAMS, *supra* note 154, at 180.

199. And they do. Recall that Israel has the highest fertility rates of any country in the OECD. Families have an average of 3.0 children. See *Family Database: Fertility Rates*, *supra* note 82.

200. See *Maternity Leave*, KOL ZCHUT, [https://www.kolzchut.org.il/en/Maternity\\_Leave](https://www.kolzchut.org.il/en/Maternity_Leave) [<https://perma.cc/Q29Q-T6Q6>] (last visited June 19, 2021). By contrast, in the U.S., the only government support lies in family medical leave, which promises twelve weeks of unpaid leave time after the birth of a child. See Family and Medical Leave Act (FMLA), 29 U.S.C. § 2612.

201. See *Childcare in Israel*, EXPAT.COM (Sept. 18, 2017, 9:27AM), <https://www.expat.com/en/guide/middle-east/israel/15420-childcare-in-israel.html> [<https://perma.cc/2Z7S-SJCK>] (describing the relative level of state support that young Israeli families receive, compared to the U.S.). See also, *Register to State Recognized Daycare and Afternoon Care, and Request State Participation in Tuition Fees*, GOV.IL, [https://www.gov.il/en/service/registration\\_for\\_day\\_care\\_centers\\_and\\_nurseries1](https://www.gov.il/en/service/registration_for_day_care_centers_and_nurseries1) [<https://perma.cc/N422-ZPDU>] (last updated Feb. 7, 2020) (a government website describing eligibility for state supported day care). Rates of enrollment in both day care and preschool are among the highest in the developed world. DANA VAKNIN, TAUB CTR. FOR SOC. POL'Y STUD. IN ISR., *EARLY CHILDHOOD EDUCATION AND CARE IN ISRAEL COMPARED TO THE OECD* 26 (July 2020), [https://issuu.com/bernardvanleerfoundation/docs/publication\\_taub\\_center\\_early\\_childhood\\_education\\_#~:text=The%20preschool%20enrollment%20rate%20for%20children%20ages%203%20to%205,percent%20\(OECD%2C%202019\)](https://issuu.com/bernardvanleerfoundation/docs/publication_taub_center_early_childhood_education_#~:text=The%20preschool%20enrollment%20rate%20for%20children%20ages%203%20to%205,percent%20(OECD%2C%202019)) [<https://perma.cc/VJ6M-9BHP>]. Indeed, preschool enrollments rates are double that of the OECD average. *Id.*

202. See, e.g., *Children*, NAT'L INS. INST. OF ISR., <https://www.btl.gov.il/English%20Homepage/Benefits/Children/Pages/default.aspx> [<https://perma.cc/8KE2-3K8L>] (last visited on June 19, 2021).

Although these policies may not significantly offset the costs of having a child, surely, they are a benefit to parents, and, in particular, to Israel's poorest families. Regardless, the abortion law's pronatal message doesn't have to overcome opposing background messages; rather, it is in alignment with the state's ongoing effort to persuade married women to have more babies.<sup>203</sup>

Dwell for a moment on the U.S., whose laws and policies, by comparison, reflect no serious interest in encouraging people to have babies they can't "afford."<sup>204</sup> Of the many disheartening things about the decades-long U.S. war over legalized abortion, there is this: it almost entirely ignores the forces that drive American abortion rates. Outside of the work of reproductive justice advocates, who call attention to the constellation of factors constraining the reproductive and life options of poor people of color,<sup>205</sup> our abortion debate is largely disconnected from any discussion of the laws and policies that lead people to contemplate abortion.

Unlike Israel, the U.S. government does little to encourage poor people to have more children. Instead, a person struggling with whether to have an abortion hears the message that they must shoulder the costs of raising a child. To be sure, many factors contribute to U.S. abortion rates, but let's be clear about how much money matters: almost half of U.S. abortions go to people living below the federal poverty line.<sup>206</sup>

What message is sent by a law banning abortion in a society that offers so little to support parents and children once they are born? Any message about the

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203. See *supra* note 139 and accompanying text.

204. Another example: anti-abortion advocates, keen to condemn abortion on the grounds of fetal anomaly, have enacted laws barring such abortions. See, e.g., *Preterm v. McCloud*, 994 F.3d 512, 549–51 (6th Cir. 2021) (upholding an Ohio law banning abortion if the doctor is aware that the patient is obtaining an abortion based on a Down syndrome diagnosis). At best, these laws offer a mute protest in the face of government policies that treat the costs associated with disability largely as a private matter. Who cares for the child if the mother wishes or needs to earn a salary? Will the state provide services that permit the child to flourish? Against a backdrop of a society that largely ignores the material conditions for disabled children, there is little hope that a message opposing such abortions will be heard, let alone heeded. As Professor Mor noted, when decrying Israel's response: "[T]here is a single pragmatic question behind all of it—the testing, the screening, the abortions. What is the structure of the welfare state in support of disabilities? A symbolic recognition of disability rights is meaningless without improving the material conditions for disabled people." See Interview with Sagit Mor, *supra* note 185.

205. See, e.g., *Mission and Vision*, IF, WHEN, HOW, <https://www.ifwhenhow.org/about/mission-vision/> [<https://perma.cc/3RRJ-LKT5>] (last visited July 12, 2021) (a leading reproductive justice organization, their vision statement reads: "We envision a transformation of the legal systems and institutions that perpetuate oppression into structures that realize justice, and a future when all people can self-determine their reproductive lives free from discrimination, coercion, or violence.").

206. See Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 AM. J. PUB. HEALTH 1904, 1906–07 (2017). On the connection between abortion and poverty, see Jenna Jerman, Rachel K. Jones & Tsuyoshi Onda, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INST. (May 2016), <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014> [<https://perma.cc/2YYJ-W3AX>].

sacredness of life gets distorted by the countervailing messages broadcast by our underfunded social safety net. In a country with no meaningful commitment to offsetting the very real costs of having children, the message sent by laws criminalizing abortion is more a salute to the idea of a baby than a declaration of welcome to the baby itself.

#### PART FOUR: ABORTION LAWS AS TRUCES

I have long wondered why countries continue to support laws outlawing abortion, given how poor a job these laws do either at stopping people from having abortions, or at punishing those who help them do so. The foregoing examination of the limits on abortion law's expressive function eliminates the fall-back justification, showing that it is baseless to defend abortion crimes by claiming they send a message.

How, then, to explain Israel's continued adherence to a law that lacks legitimacy at many levels? It always seemed to me that a corrupt law necessarily undermined the credibility of the entire rule of law. And yet, Israel's law endures and abortion in Israel is a settled issue.

To understand why Israeli lawmakers might be at peace with a law that seems patently illegitimate, I interviewed two members of Knesset. Our conversations called into view one final function of abortion law: it can serve as a negotiated compromise. An abortion crime might endure, even in the face of evident corruption, if lawmakers on all sides of the issue see it as the least-worst alternative.

The first member of Knesset (MK) I met was Meirav Michaeli, the leader of Israel's left-leaning Labor Party. A former television news anchor, she carries herself with the confidence of a celebrity and the passionate conviction of a radical feminist. She is both.<sup>207</sup> In 2015, she co-sponsored a bill that would have abolished the committees,<sup>208</sup> yet when I asked her, several years later, if she was working to overturn the law, her response was surprisingly muted:

Getting rid of the committees would be a good thing. But . . . the reality is that I don't think you can make things better than they are at this point in time. And I don't want, God forbid, to make it more difficult than it is today. I don't want to wake the bears. . . . [T]hey would fight. And they would not simply fight to leave the committees as they are

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207. I met her for the first time when I spotted her having dinner in Jerusalem with Catherine MacKinnon, the renowned U.S. feminist and legal scholar, whom I knew from law professor circles. They have collaborated on various projects, including drafting Israel's powerful victim-centered sexual harassment laws. *See, e.g.* Orit Kamir, *Dignity, Respect, and Equality in Israel's Sexual Harassment Law*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 561 (Catharine A. MacKinnon & Reva B. Siegel, eds., 2003).

208. Hearings were held, but the bill quickly stalled. *See* Draft Bill for Pregnancy Termination, 5766-2015 (Private Member Bill) (Isr.), [https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestions\\_search&lawitemid=567500](https://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestions_search&lawitemid=567500) [<https://perma.cc/G9HZ-U9F5>]. For more on the bill proposing the elimination of the committees, *see* Noya Rimalt, *From Unjust and Partial Access to Just Legislation: Toward a New Paradigm of Abortion in Israel*, 39 TEL AVIV UNIV. L. REV. 415 (2016) (in Hebrew).

today. They would fight to reinforce the whole concept and their control over it.<sup>209</sup>

MK Michaeli pulled back the curtain, reminding me that in a democratic society, many laws are simply negotiated settlements. Michaeli was steely-eyed in her condemnation of the patriarchal stance of Israel's abortion law, and indeed, of Israeli laws in general, when it comes to issues of women and gender. But she also pointed out that Israel's law facilitates abortion access far more effectively than is seen in many countries with more liberal laws. The current law was, to her mind, the best she could do for now.

The other lawmaker I interviewed was MK Dov Khenin. A lawyer with a Ph.D. in political science, Khenin served in the Knesset from 2006–2020 on behalf of Israel's Communist Party.<sup>210</sup> When I asked him to explain the abortion committees' persistence, given their apparent illegitimacy, he responded:

[T]here are many reasons why abortion is a settled issue here, the most obvious of which is that Israeli society is an overloaded society. There are many, many issues shaping the left-right continuum in the Israeli polity . . . . But the whole political arena is concentrated on one axis, which involves security, war, peace, Jews, Arabs, settlements, and occupation. These are the issues that organize politics in Israel; there is no real place for an issue like abortion.<sup>211</sup>

In the end, both lawmakers viewed the abortion law as problematic, but rather than fight to reform it, they understood that it worked well enough to leave it be while they addressed the pressing issues that animated and divided their electorate.

Khenin's response also helped me understand why a similar truce is unlikely here in the U.S. In Israel, abortion is not a part of the left-right continuum.<sup>212</sup> One's stance on abortion does not function as a proxy for political and social identity. In Israel, abortion is just about abortion.

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209. Interview with Meirav Michaeli, Former Member of Knesset, in Tel Aviv, Isr. (Dec. 3, 2017).

210. In 2015, his party teamed up with three Arab parties to form a single voting bloc, the "Joint List," of which Khenin was the only Jewish member. See JOINT LIST, <https://jointlist.org.il/> (last visited June 24, 2021) (Hebrew website); see also JOINT LIST, <http://www.moshtrka.com/> (last visited June 24, 2021) (Arabic website). In January 2020, after twelve years in Knesset, Khenin announced his resignation, saying he could do more to protect Israeli democracy outside of parliament. Jonathan Lis, *Democracy: Dov Khenin, Outgoing Communist Lawmaker, Admits Regrets*, HAARETZ (Jan. 9, 2019), <https://www.haaretz.com/israel-news/.premium.MAGAZINE-i-failed-to-defend-democracy-outgoing-communist-lawmaker-admits-regrets-1.6808565> [<https://perma.cc/8F7E-8F73>]. For more about Khenin's background, see *Members of the Knesset*, THE KNESSET, [https://www.knesset.gov.il/mk/eng/mk\\_eng.asp?mk\\_individual\\_id\\_t=780](https://www.knesset.gov.il/mk/eng/mk_eng.asp?mk_individual_id_t=780) [<https://perma.cc/946C-V36D>] (last visited June 24, 2021).

211. Interview with Dov Khenin, Former Member of Knesset, in Jerusalem, Isr. (Dec. 4, 2018).

212. *Id.* Instead, Khenin noted that Israeli's find such identity by reference to religiosity, or to one's stance on the occupation.



By contrast, as scholars Carole Joffe and Rosaline Petchesky have observed, in the U.S., abortion is a “battering ram,” standing in for a broad agenda of socially conservative issues, from welfare policy to gay rights.<sup>213</sup> Americans rank abortion among the central issues informing our political and social identity. Here, the battle over abortion is at least in part not really about abortion at all. Abortion matters symbolically; it evokes the panoply of socio-political-religious issues that comprise the axis around which our society revolves.<sup>214</sup>

A 2020 Gallup poll found that one in four Americans see abortion as a sort of personal litmus test. Thirty percent of people who consider themselves “pro-life” and nineteen percent of people who consider themselves “pro-choice” say they would only vote for a candidate who shares their view on abortion.<sup>215</sup>

The intensity of our engagement with the abortion issue suggests that we are unlikely to see a truce anytime soon. Instead, activists and voters on all sides will be outraged by the multiple failings of our new abortion crimes.

### CONCLUSION

The coming era in our abortion war won’t be marked by a quick resolution in which abortion laws are settled largely along existing lines of red and blue states. Instead, the laboratories of states aiming to criminalize abortion will need to work overtime as they come to understand the ways such laws function in practice. No longer will it suffice to invoke one’s stance on abortion’s legality as a proxy for one’s commitment to the moral issue itself. Platitudes cannot yield answers to the challenge of how to respond when the new criminal laws fall short of their supporters’ aspirations.

From the start, these laws will face legitimacy challenges. How could it be otherwise, if states turn a blind eye to the forces driving unwanted pregnancy, and look instead to the criminal law to deter and discourage abortion? Implemented according to the private sensibilities and biases of the individuals entrusted to enforce them, these laws will strain notions of fairness even without the reality that abortion will remain legal for those who can afford to travel, and even without a widespread market in abortion medications for those who cannot or prefer not to do so. Such challenges will constitute only part of the noisy

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213. See Carole Joffe, *Abortion and Antifeminism*, 15 POL. & SOC’Y 207 (1987). See also ROSALINE PETCHESKY, *ABORTION AND WOMAN’S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* (1990).

214. See JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* 114–39 (2021) (a comprehensive discussion of Germany’s abortion law, which, like Israel’s, was born of pragmatic compromise). In his book, Greene illustrates how competing visions of rights frame individual and collective identity in the U.S. He decries our attachment to rights, arguing the proliferation of rights-based interests has left courts struggling to “reconcile a diverse, unpredictable array of conflicting, important, and deeply felt individual and group interests with the government’s existential interest in governing.” *Id.* at 78–79.

215. Megan Brenan, *One in Four Americans Consider Abortion a Key Voting Issue*, GALLUP (July 7, 2020), <https://news.gallup.com/poll/313316/one-four-americans-consider-abortion-key-voting-issue.aspx> [<https://perma.cc/KDY7-AVU2>].

background that will corrupt and distort any message about the sanctity of life that lawmakers hope to send by banning abortion.

If there is a reason for optimism with respect to the coming phase of our abortion war, it is this: the manifold challenges to the legitimacy of laws criminalizing abortion are likely to provoke a reckoning with what is and is not accomplished by making abortion illegal.

We might do well, then, to consider how other countries have reached a settled compromise on abortion by centering the question of how best to deter abortion. Consider Germany, whose law—forged as a compromise during reunification—has been settled since 1994.<sup>216</sup> Germany's lasting accord was helped along by a general consensus by those on all sides of the abortion divide that counseling and financial assistance to pregnant women and families protected fetal life far better than a prohibition on abortion.<sup>217</sup> Once criminalization was set aside as a relatively ineffective tool for deterring abortion, German lawmakers came together around a compromise package of laws that focused on offsetting some of the biggest costs associated with having a child.<sup>218</sup> In short, they harnessed the law's capacity to shape reproductive behavior by addressing the needs of those who would keep their pregnancies, if they had the resources to do so.

Even if we don't look beyond our borders to find our path forward, of this I am sure: there is no way for states to recriminalize abortion without quickly finding themselves stumbling. My hope is that this stumbling will alert more of us to a deeper understanding of the nature and function of abortion laws in the twenty-first century. And just maybe, from that place of awareness, we will more wisely navigate the moral crossroads that lie just beyond the legal one now in sight.

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216. See GREENE, *supra* note 214, at 130.

217. *Id.*

218. *Id.* (noting that a key to the accord on abortion, which required a seventy-two hour waiting period and mandatory state-sanctioned counseling, was the simultaneous passage of laws intended to incentivize childbearing:

[F]inancial assistance for stay-at-home parents; a guaranteed return to a parent's prior job if he or she took off *up to three years* to care for a child; extended day care and extensive tax credits for day care costs; increased rates for child support payments; extended paid leave to care for sick children; reemployment guarantees for empty nesters; sex education services; and a host of other measures relating to adoption, housing and taxation.).

