RECENTERING WOMEN IN JUDICIAL DECISIONS ON REPRODUCTIVE PRACTICES: U.S. AND ISRAELI CASE STUDIES

SHARON BASSAN*

Abstract

In the dynamic landscape of legal academia, narrative analysis emerges as an essential avenue of study. Narratives shape laws, policies, and societal norms, urging parties and observers to recognize the profound influence of stories in legal discourse. Yet, the role of storytelling, particularly within the nuanced sphere of court rulings, has been undertreated by legal scholars. This Article explores how storytelling converges with legal, ethical, and feminist perspectives in court, where narratives wield transformative power, offering a critical reading of the rhetoric and narrative structure in two court cases that address the constitutionality of restricted access to reproductive practices. The first, a ruling from the Supreme Court of Israel, Arad-Pinkas v. Committee for Approval of Embryo Carrying Agreements*, establishes the eligibility of same-sex couples and single men for domestic surrogacy services after years of ineligibility. The second,* Dobbs v. Jackson Women's Health Organization*, holds that the right to abortion is no longer considered a fundamental right guaranteed by the Fourteenth Amendment of the U.S. Constitution. This Article contends that the narratives underpinning legal proceedings are not mere rhetorical devices but wield ethical and practical significance, shaping society's implicit image of women, their societal role, and the opportunities they are afforded. Through this analysis, this Article uncovers the underlying values, assumptions, and narratives that courts rely on and, perhaps more significantly, dismiss. Findings reveal tensions between women's rights and competing interests—those of single men who rely on a woman's body to achieve parenthood (in the Israeli case) and those of fetuses (in the* Dobbs *case). In both contexts, legal narratives centering these other figures are used to systematically downplay women's interests, restrict their opportunities, and minimize their autonomy. This Article advocates for centering women in the legal narrative when discussing reproductive practices performed on women's bodies. The failure to do so, it argues, causes far-reaching*

* Ph.D., Tel Aviv University. Head of Innovation in Law, Policy, and Ethics at the Louis Brandeis Institute for Society, Economy, and Democracy. I would like to thank Ruth Zafran, Barry Furrow, and Robert Field for their helpful comments for this Article.

harm to women's experiences and life opportunities. Lessons from both cases are relevant to ongoing and future advocacy fights and the women whose well-being depends on their outcomes.

INTRODUCTION

I. Narrative Analysis of Court Rulings

Narratives and rhetoric shape our understanding of reality.[1] They serve overlapping but distinct functions. Rhetoric, Michel Foucault suggests, is not merely the art of persuasion but a structuring force that organizes discourse and, in doing so, shapes the world itself.[2] By defining systems of thought, categorizing knowledge, and establishing authority, rhetoric underpins the very framework wherein meaning and power operate.[3] Narrative, by contrast, provides coherence and significance to the categorization of knowledge by constructing meaningful relationships between events.[4] Narratives help shape understandings of reality, convey significance, and give meaning to certain statements.[5] Narratives influence public opinion by presenting a coherent and emotionally compelling framing of data and events that resonates or clashes with a recipient's personal values and aspirations, influencing how information is perceived—negative and condemnable, or positive and acceptable.[6] Together, rhetoric and narrative construct the way people make sense of the world and

1 *See* Shulamit Almog, *From Sterne and Borges to Lost Storytellers: Cyberspace, Narrative, and Law*, 13 FORDHAM INTELL. PROP., MEDIA, & ENT. L.J. 1, 4 (2002).

2 *See, e.g.*, MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE 228 (A. M. Sheridan Smith trans., 1972) [hereinafter FOUCAULT, ARCHAEOLOGY]; MICHEL FOUCAULT, WRONG-DOING, TRUTH-TELLING: THE FUNCTION OF AVOWAL IN JUSTICE (Fabienne Brion & Bernard E. Harcourt eds., Stephen W. Sawyer trans., 2014) (1981); *see also* Anthony T. Kronman, *Rhetoric*, 67 U. CIN. L. REV. 677, 690 (1999) (discussing Foucault's influence on narrative theory and its application in legal discourse).

3 *See* Kronman, *supra* note 2 at 690 ("A fundamental premise of Foucault's work is that 'words' shape 'things,' that our ways of speaking, our habits of expression and the modes of thought they express, constitute the order of things, that they determine the organization of the world by establishing and validating its division into various disciplines, authorities, jurisdictions and the like.").

4 *See* Catherine Kohler Riessman, *Analysis of Personal Narratives*, *in* HANDBOOK OF INTERVIEW RESEARCH: CONTEXT & METHOD 695, 696 (Jaber F. Gubrium & James A. Holstein eds., 2002).

5 *See* MEMORY, IDENTITY, COMMUNITY: THE IDEA OF NARRATIVE IN THE HUMAN SCIENCES 343 (Lewis P. Hinchman & Sandra K. Hinchman eds., 1997); Peter Brooks, *The Law as Narrative and Rhetoric*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 14, 22 (Peter Brooks & Paul Gewirtz eds., 1996).

6 *See* Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983).

their experiences, create conventions that define what they think, know, and believe, and, eventually, what they may allow or forbid in their societies.[7]

A. Narrative and Public Opinion

Different disciplines offer perspectives on narrative's ability to influence societal norms. Communication scholars focus on the persuasive power of narratives and the role of media in shaping public opinion.[8] Their research explores how narratives are disseminated through mass media, social networks, and other communication channels.[9] Having analyzed narratives in terms of their structure, characters, plotlines, and framing devices, communication research examines how narratives affect audience attitudes, beliefs, and behaviors and interact with other forms of persuasion, such as arguments and evidence.[10] In marketing, products and services are situated within narratives that resonate with consumers' values and aspirations.[11] By crafting a captivating narrative, marketers can mold public opinion and sway consumer behavior, prompting individuals to perceive a brand as an essential component of their own personal narrative.[12] In politics, narratives are a tool for political messaging and persuasion.[13] Politicians use narratives to construct perspectives of people within their environment and alter relationships between social

---

7 *See* Margaret. J. Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1882 (1987) ("Facts are theory-dependent and value-dependent. Theories are formed in words. Fact- and value-commitments are present in the language we use to reason and describe, and they shape our reasoning and description, and the shape (for us) of reality itself."); RICHARD DELGADO, THE LAW UNBOUND!: A RICHARD DELGADO READER 5 (Adrien Katherine Wing & Jean Stefancic eds., 2016) ("Narrative habits, patterns of seeing, shape what we see and that to which we aspire.").

8 *See* ALISTER MISKIMMON, BEN O'LOUGHLIN & LAURA ROSELLE, STRATEGIC NARRATIVES: COMMUNICATION POWER AND THE NEW WORLD ORDER 7 (2013).

9 *See id.* at 7.

10 *See* Kurt Braddock & James Price Dillard, *Meta-Analytic Evidence for the Persuasive Effect of Narratives on Beliefs, Attitudes, Intentions, and Behaviors*, 83 COMMC'N MONOGRAPHS 446, 446 (2016).

11 *See* João Ricardo de Oliveira Júnior et al., *A Story to Sell: The Influence of Storytelling on Consumers' Purchasing Behavior*, 40 PSYCH. & MKTG. 239, 239 (2022).

12 *See, e.g.*, Patrícia Dias & Rita Cavalheiro, *The Role of Storytelling in the Creation of Brand Love: The PANDORA Case*, 29 J. BRAND MGMT. 58, 58 (2022).

13 *See* Peppi Talonpoika, *Storytelling and Politics: Uses of Personal Narratives in Contemporary Public Communication* (2023) (M.A. thesis, University of Padova), https://thesis.unipd.it/retrieve/4dba98a1-ce4e-476d-b45b-a8aebe76c142/ Talonpoika%20Peppi.pdf [https://perma.cc/KTZ9-SMF7].

groups and individuals.[14] Narratives create influence through the value they communicate, not necessarily because they tell the truth.[15]

The role of narratives in law is similarly influential. Since legal activities depend on the ability to identify plots, manipulate stories, and process them, narratives can shape the way that citizens perceive their laws and establish their expectations of legal systems.[16] Courtrooms are a site of struggle between competing narratives of the same events presented to influence the judge or jury.[17] Legal advocates must use rhetoric to construct arguments, promote their interpretation of events and precedent, and shape perceptions that could lead to a meaningful alternative narrative.[18] Putting facts into coherent form and presenting them persuasively makes a "case." Lawyers have long recognized that rhetoric matters for the court to reach a final narrative and determinative outcome.[19] They use rhetorical strategies within their arguments in court to affect the audience and the court's ruling.[20] Within the restrictions of evidence rules and the risk of defamation, for example, lawyers

---

14 *See* Josefin Graef, Raquel da Silva & Nicolas Lemay-Hebert, *Narrative, Political Violence, and Social Change*, 43 STUD. CONFLICT & TERRORISM 431, 431 (2018).

15 *See* Francesca Polletta & Jessica Callahan, *Deep Stories, Nostalgia Narratives, and Fake News: Storytelling in the Trump Era*, 5 AM. J. CULTURAL SOCIO. 392, 392–93 (2017).

16 *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 999 (1985) ("Law, like every other cultural institution, is a place where we tell one another stories about our relationships with ourselves, one another, and authority . . . [and also] limit the stories we can tell."); Almog, *supra* note 1, at 10.

17 *See* Almog, *supra* note 1, at 12.

18 *See* Kristin M. Langellier, *Personal Narrative*, *in* ENCYCLOPEDIA OF LIFE WRITING: AUTOBIOGRAPHICAL & BIOGRAPHICAL FORMS 699, 699–701 (Margaretta Jolly ed., 2001); Jonathan Yovel, *Narrative Justice*, 18 BAR-ILAN L. STUD. 283, 284 (2002).

19 *See* ANTHONY G. AMSTERDAM & JEROME S. BRUNER, MINDING THE LAW: HOW COURTS RELY ON STORYTELLING, AND HOW THEIR STORIES CHANGE THE WAY WE UNDERSTAND THE LAW—AND OURSELVES 110 (2000) ("[T]he law is awash in storytelling . . . This endless telling and retelling, casting and recasting is essential to the conduct of the law. It is how law's actors comprehend whatever series of events they make the subject of their legal actions. It is how they try to make their actions comprehensible again within some larger series of events they take to constitute the legal system and the culture that sustains it.").

20 *See id.*

can manipulate an argument as they see fit.[21] They weave compelling stories to not only influence the court but also to resonate with broader audiences.[22]

Legal opinions are shaped by precedent and legal reasoning, but they also construct authoritative narratives that are influenced by—and can influence—broader cultural and societal understandings.[23] A ruling's narrative constructs a meaningful sequence of events and experiences, sending a message of validation. The language in legal opinions aims to reflect the meaning of the law, and the ruling's narratives shape the behavior of people following the case. Accordingly, the narratives within courtrooms hold ethical and pragmatic weight. When rhetoric is credited and relied upon by the court's ruling, the court incorporates a chosen narrative. Court rulings create official and implicit narratives connecting arguments, whether adopting one of the parties' narratives or creating a new one, in a coherent and purposeful way to make sense of a case's legal issues and its implications.[24] The ruling's narrative is constitutive of an implicit "reality" in that it physically shapes public perceptions and therefore has symbolic power, lending ethical and pragmatic significance in shaping the public discourse.[25] The use of functional narratives and rhetoric in the adversarial environment of the court is similar to that used in the policy-

---

21 *See* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 53 U. CHI. L. REV. 684, 687–88 (1985).

22 *See* JAMES BOYD WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 802 (1973) ("From the beginning you know where the lawyer wants to come out, and every word points that way . . . But the judge is bound to keep an open mind, to keep his reader in suspense as long as he can, if he is to express fairly the process of his decision. There is a difference between an opinion that reaches a conclusion and one that is aimed there . . . [I]f it is to express the process by which the original intention is worked out, the judicial narrative must keep the reader in a sort of suspense or open-mindedness, during which he is exposed one by one to the facts and arguments that seem important to the judge, until the reader has them all, at which point he should find himself agreeing with the judgment. Very few opinions do this.").

23 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (declaring segregation in schools unconstitutional in response to growing support for the Civil Rights Movement); Miranda v. Arizona, 384 U.S. 436, 467 (1966) (reshaping police procedures in response to growing concerns of abuse); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (striking down a federal statute barring corporate expenditures for election communications, allowing companies to exert influence over politics with limited government insight).

24 *See generally* Bernard S. Jackson, *Narrative Theories and Legal Discourse Narrative*, *in* NARRATIVE IN CULTURE: THE USES OF STORYTELLING IN THE SCIENCES, PHILOSOPHY, AND LITERATURE 23, 23–51 (1990).

25 *See* Vivien Lowndes, *Narrative and Storytelling*, *in* EVIDENCE-BASED POLICYMAKING IN THE SOCIAL SCIENCES: METHODS THAT MATTER 103, 103 (Gerry Stoker & Mark Evans eds., 2016).

making process where narratives are essential to creating specific norms.[26] Since narratives impose meaning, law relies on them to make sense of legal ideas.[27] During the legislative process, rhetoric used in public debates translates into competing implicit narratives that influence the chosen policy.[28] Each narrative competes for the right to influence the chosen policy during the legislative process,[29] and legislators rely on those narratives to justify the legitimacy of their chosen paths.[30]

B. Narrative Analysis Methodology and Contribution

Beyond their legal determinations, judicial decisions are also stories about conflicts embedded in and reflecting upon social and cultural narratives. Recognizing that, narrative research analysis is particularly valuable in understanding the broader implications of court rulings. Narrative analysis of court rulings pays attention to the details of a ruling's language, the perspectives of the judges, and the position of a ruling in relation to legal precedents and societal context.[31] Centering court rulings in this research uncovers the interplay between legal reasoning, social dynamics, and individual experiences.[32] Court rulings not only reflect the personal values of individual judges but also illuminate the social and cultural contexts in which a ruling takes place. Awareness of the social values underlying courtroom narratives leads to a more context-sensitive analysis of how courts implement public policies. Moreover, by employing narrative analysis specifically to

---

26 *See generally* Andreas von Arnauld, *Norms and Narrative*, 18 GERMAN L.J. 309, 313 (2017); Elizabeth A. Shanahan et al., *Narrative Policy Framework: The Influence of Media Policy Narratives on Public Opinion*, 39 POL. & POL'Y 373 (2011) (presenting quantitative research that explores what elements of policy narratives are most persuasive).

27 *See* Lowndes, *supra* note 25, at 103.

28 *See, e.g.*, Sharon Bassan, *Donations for Sale - Rhetorical Methods in the Service of Compensated Egg Recruitment in Israel*, 20 GEO. J. GENDER & L. 1, 8–18 (2018) [hereinafter Bassan, *Donations*].

29 *See* Brooks, *supra* note 5, at 6; Shaul R. Shenhav, *Political Narratives and Political Reality*, 27 INT'L POL. SCI. REV. 245, 249 (2006); Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239, 242 (2012).

30 *See, e.g.*, Ronald N. Jacobs & Sarah Sobieraj, *Narrative and Legitimacy: U.S. Congressional Debates About the Nonprofit Sector*, 25 SOCIO. THEORY 1 (2007) (explaining the basic narrative structures that informed congressional debates about nonprofit tax legislation).

31 *See* FLORA DI DONATO, THE ANALYSIS OF LEGAL CASES: A NARRATIVE APPROACH 28 (2019) ("Within the narrative analysis of legal cases, the notion of context gives due consideration to the broader context where the story of the client originates.").

32 *See* Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 896 (2013).

court rulings, researchers can explore a ruling's meanings and implications through the consideration of the time and place of the ruling, as well as the broader legal and cultural landscape that influenced its development. Narratives, therefore, allow understanding and comparison of individual experiences within historical contexts.[33]

Narrative research analysis allows for a comprehensive exploration of a narrative's content—how the events and arguments presented in the ruling are ordered and connected, the structure of arguments— and identification of the overarching plot and themes that emerge.[34] It focuses on the details of storytelling, including how stories are constructed, the incorporation of images and explanations, and the position of the narrator in relation to the story events and audience.[35] In narrative analysis, common thematic elements are identified across cases, taking into account the context of narration and imposing meaningful patterns on seemingly random or unconnected events and circumstances.[36] By examining a narrative structure, researchers can also assess the coherence, consistency, and persuasive power of arguments.[37]

Court decisions can offer valuable insights into underlying or hidden social conventions in several ways. First, judges' opinions often establish legal precedents that reflect prevailing social norms and conventions.[38] Critical reading of the rhetoric in legal cases is essential to expose and explore the values, assumptions, and implicit narratives credited and relied upon by courts—as well as those that are dismissed. Narrative analysis of court cases allows researchers to uncover the meanings embedded within a court ruling, the motivations that underpin a court's decision-making process, and how different elements contribute to the overall narrative.[39] The analysis clarifies how social conventions transform over time

---

33 *See* Elliot G. Mishler, *Validation in Inquiry-Guided Research: The Role of Exemplars in Narrative Studies*, 60 HARV. EDUC. REV. 415, 427 (1990).

34 *See* Donald E. Polkinghorne, *Narrative Configuration in Qualitative Analysis*, 8 INT'L J. QUALITATIVE STUD. EDUC. 5, 12 (1995).

35 *See* Riessman, *supra* note 4, at 696 ("[N]arrative analysis takes as its object of investigation the story itself.").

36 *See id.* at 696–97.

37 *See id.*

38 *See* Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 786 (1966).

39 *See, e.g.*, LYNN BUTLER-KISBER, QUALITATIVE INQUIRY: THEMATIC, NARRATIVE AND ARTS-INFORMED PERSPECTIVES 73 (2010); Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141 (1997);

and how legal systems can adapt to better reflect evolving values. For example, landmark cases related to civil rights, gender equality, or discrimination reveal the evolving social conventions and norms over time.[40] By examining the reasoning and arguments presented in these narratives, we can gain a deeper understanding of the social conventions that shape legal frameworks and guide their interpretation and of the societal values and beliefs that influence legal outcomes.

Second, since narratives have the power to impact the way social identities are formed, "including those addressing law-related issues, such as race, community, gender, and the practice of law,"[41] a more nuanced critical analysis of court rulings' uses of narrative is required. Unpacking narratives used in court exposes how legal structures that privilege certain groups while marginalizing others are formed.[42] Analysis of the language, tone, and framing used in court opinions can reveal hidden social conventions, biases, power dynamics, and prejudices held by judges, lawyers, and witnesses.[43] For instance, narratives related to criminal trials often indicate how societal biases affect the treatment of defendants based on their race, socioeconomic status, or other identity categories.[44] By examining how courts construct narratives through their rulings and how these narratives shape the development of the law and its impact on society, narrative analysis may challenge prevailing norms that perpetuate injustice.[45]

Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

40 *See, e.g.*, Geoffrey R. Stone, *The Road to* Roe*,* 43 LITIGATION 43 (2016); Nicholas Short, *The Story of "the Court": A Narrative Analysis of* Planned Parenthood v. Casey, 34 HASTINGS CONST. L.Q. 477 (2007); Paul Wilson, *The Genesis of* Brown v. Board of Education, 6 KAN. J.L. & PUB. POL'Y 7 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397 (1987).

41 *See* Almog, *supra* note 1, at 3.

42 *See id.*

43 *See, e.g.*, Douglas Rice, Jesse H. Rhodes & Tatishe Nteta, *Racial Bias in Legal Language*, 6 RSCH. & POL. 1 (2019) (showing that, in legal opinions, African American names are more frequently associated with unpleasant or negative concepts, while European American names are more frequently associated with pleasant or positive concepts).

44 *See id.*

45 *See id.*

Finally, consistent narrative inquiry can document social change and progress.[46] A historical-cultural context related to larger societal narratives and struggles often underlies social narratives.[47] Court narratives often reflect power dynamics within society.[48] Narrative analysis emphasizes the multiplicity, fluidity, and reflexivity of understanding social life and can make sense of complex phenomena such as hybrid social movements.[49] Contextual analysis of narratives could be relevant to ongoing and future advocacy. Foucault describes discourse as a specific way of engaging with the world and relating to it.[50] He understands discourse as a "strategic situation" that determines the distribution of power between actors, both enabling and constraining them by shaping their field of opportunities and limiting their freedom.[51] Narrative approaches can challenge traditional models of knowledge by recognizing multiple truths constructed by socially and historically situated individuals about a dynamic world.[52] The understanding of hidden or underlying societal norms and power dynamics is invaluable to understanding how change occurs and how individual lives are connected to social structures.[53] The realistic analysis suggested here and the

46 *See* Cover, *supra* note 6, at 10 ("Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.").

47 *See* Riessman, *supra* note 4, at 706; *see also* Susan E. Bell, *Becoming a Political Woman: The Reconstruction and Interpretation of Experience Through Stories*, *in* GENDER AND DISCOURSE: THE POWER OF TALK 97–123 (Alexandra Dundas Todd & Sue Fisher eds., 1988).

48 *See* God'sgift Uwen, *Objection Overruled: Language Dynamics and Power Relations in Courtroom Interactions*, 54 LANGUAGE MATTERS 21, 37 (2023) ("The asymmetry and gradation in the allocation of social power . . . are determined by social roles and power relations exercised through regulated language in the courtroom context.").

49 *See Narrative Analysis: The Constructionist Approach*, *in* THE SAGE HANDBOOK OF QUALITATIVE DATA ANALYSIS 203–16 (Uwe Flick et al. eds., 2014).

50 *See* FOUCAULT, ARCHAEOLOGY, *supra* note 2 at 231; Peter H. Feindt & Angela Oels, *Does Discourse Matter? Discourse Analysis in Environmental Policy Making*, 7 J. ENV'T POL'Y & PLAN. 161, 164 (2005).

51 *See* FOUCAULT, ARCHAEOLOGY, *supra* note 2 at 165.

52 *See* Ruard Ganzevoort, *Narrative Approaches*, *in* THE WILEY BLACKWELL COMPANION TO PRACTICAL THEOLOGY 214, 214 (Bonnie J. Miller-McLemore ed., 2011); *see also* Cover, *supra* note 6, at 6–7 ("The precepts we call law are marked off by social control over their provenance, their mode of articulation, and their effects. But the narratives that create and reveal the patterns of commitment, resistance, and understanding—patterns that constitute the dynamic between precept and material universe—are radically uncontrolled. They are subject to no formal hierarchical ordering, no centralized, authoritative provenance, no necessary pattern of acquiescence.").

53 For the use of narrative to understand the dynamics of social movements, see generally Francesca Polletta & Pang Ching Bobby Chen, *Narrative and Social Movements*, *in* THE OXFORD HANDBOOK OF CULTURAL

implicit narratives that this analysis exposes will enable more thoughtful framing in future cases challenging existing social conventions. The hope is that an awareness of the implicit narratives used in the courtroom will help lawyers, activists, and policymakers strategize accordingly.

C. Narrative Analysis in the Context of Reproductive Practices

Following a current, global culture war is the divergent framing of reproductive practices by various policymakers, citizens, and courts. Understanding reproductive technologies without language and context is incomplete because those can help or hinder our understanding of the Assisted Reproductive Technology ("ART") that protects or harms those who use it. As a result, analyzing the court rulings that create narratives about reproductive practices is especially important to understand a central point of tension in contemporary society. Through the imposition of certain narratives, courts play a significant role in shaping not only the discourse around pregnancy and reproduction but also the image of women, who bear the implications following narrative manipulations.[54] For example, using rhetoric that conceptualizes women as market actors, rather than language depicting women as a vulnerable population in need of protection, fundamentally determines how cases about commercialized assisted reproduction are decided.[55] Framing gamete donors as donors or genetic parents; framing a gestational surrogate as a surrogate or a mother; or framing an embryo as an embryo, a fertilized egg, a blastocyst, a "potential life," or an "unborn human being" can all lead to different legal conclusions.[56] This Article therefore combines the legal, ethical, and feminist lenses of reproductive practices with a narrative analysis.

SOCIOLOGY (Jeffrey C. Alexander et al. eds., 2012); Francesca Polletta, *Contending Stories: Narrative in Social Movements*, 21 QUALITATIVE SOCIO. 419 (1998).

54 *See* Laurie Penny, *The Criminalization of Women's Bodies Is All About Conservative Male Power*, NEW REPUBLIC (May 17, 2019), https://newrepublic.com/article/153942/criminalization-womens-bodies-conservative-male-power [https://perma.cc/4EF6-3ZAW]; Shulamit Almog & Sharon Bassan, *The Politics of Pro and Non-Reproduction Policies in Israel*, 14 J. HEALTH & BIOMEDICAL L. 27, 80 (2018).

55 *See, e.g.*, Sharon Bassan, *Different but Same: A Call for a Joint Pro-Active Regulation of Cross-Border Eggs and Surrogacy Markets*, 28 HEALTH MATRIX 323, 348 (2018) [hereinafter Bassan, *Different but Same*].

56 *See* Susan Crockin et al., *The Supreme Court Overturns Right to Abortion, Raising Questions and Uncertainties for ART Patients and Providers*, SOC'Y FOR ASSISTED REPROD. TECH. (July 21, 2022), https://www.asrm.org/news-and-events/asrm-news/legally-speaking/the-supreme-court-overturns-right-to-abortion-raising-questions-and-uncertainties-for-art-patients-and-providers/ [https://perma.cc/H2PK-9K7A].

The narratives surrounding reproductive practices also have profound implications for the LGBTQ+ community, particularly in the context of access to ART and the legal recognition of familial structures.[57] Rhetoric that centers on traditional heteronormative notions of the family can marginalize LGBTQ+ individuals and couples seeking to build families through ART.[58] For instance, framing surrogates as "substitute mothers" or emphasizing genetic ties as the foundation of parenthood risks excluding or invalidating the familial bonds of non-biological parents, particularly same-sex parents.[59] Moreover, legal narratives that fail to explicitly recognize the diverse needs and experiences of LGBTQ+ people can perpetuate systemic inequities, reinforcing legal barriers based on physiological rather than social criteria.[60] Understanding and challenging these implicit biases within reproductive narratives is critical for advancing both social and legal equity for LGBTQ+ families.

Contextual narrative analysis is relevant to ongoing and future advocacy in the area of reproductive technologies. Reproductive rights cases often reveal the profound influence of legal framing on shaping public opinion, judicial outcomes, and future policy directions.[61] This Article offers a critical point of view on the rhetoric and narratives that lead to final rulings in two specific cases, which, despite arising from vastly different cultural and political contexts, share striking commonalities. The first, a Supreme Court ruling from Israel, establishes the eligibility of same-sex couples and single men for domestic surrogacy services after years of ineligibility.[62] The second, *Dobbs v. Jackson*

---

57 *See* KIMBERLY D. RICHMAN, COURTING CHANGE: QUEER PARENTS, JUDGES, AND THE TRANSFORMATION OF AMERICAN FAMILY LAW 19 (2009) (examining how family law has evolved to accommodate LGBTQ+ parenting).

58 *See* Rose Vacanti Gilory, *The Law of Assisted Reproductive Technologies: Imposing Heteronormative Family Structures onto Queer Families*, 31 TUL. J.L. & SEXUALITY 27 (2022).

59 *See* ELLY TEMAN, BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF 22 n.88 (2010); *see also* Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS 969, 970 (2010).

60 *See, e.g.*, Margaret Besse et al., *Experiences with Achieving Pregnancy and Giving Birth Among Transgender Men: A Narrative Literature Review*, 93 YALE J. BIOLOGY & MED. 517 (2020) (examining studies on the pregnancy and birth experiences of transgender men).

61 *See, e.g.*, Holly J. McCammon & Cathryn Beeson-Lynch, *Fighting Words: Pro-Choice Cause Lawyering, Legal-Framing Innovations, and Hostile Political-Legal Contexts*, 46 LAW & SOC. INQUIRY 599, 599 (2021); *see also* Holly J. McCammon, *A War of Words Over Abortion: The Legal-Framing Contest Over the Undue Burden Standard*, 43 JUST. SYS. J. 623, 623 (2022).

62 HCJ 781/15 Arad-Pinkas v. Comm. for Approval of Embryo Carrying Agreements Under the Embryo Carrying Agreements L. 5756-1996 (2020) (Isr.) [hereinafter *Arad-Pinkas II*].

Women's Health Organization,[63] is used as a reference point to further understand the effect of narratives on women's life opportunities. Both cases involve reproductive practices performed on women's bodies amidst politically charged debates, and both confront constitutional questions around access to these practices. Yet, the cases diverge in their underlying objectives and outcomes. While *Arad-Pinkas II* expands access to surrogacy in Israel, affirming the rights of those seeking to become parents, *Dobbs* empowers U.S. states to impose restrictions on abortion, curbing reproductive autonomy.[64] Together, these cases offer a compelling lens to examine how courts navigate the intersection of reproductive justice and broader societal narratives. This Article analyzes how each court's narrative choices dramatically affect women's life opportunities.

In order to understand the Israeli court's ruling, Part II reviews how two competing sets of values—liberal and conservative—shaped Israeli discourse surrounding reproductive practices, particularly surrogacy.[65] In light of the Israeli socio-political context and its ideological conflict, Part III analyzes the rhetoric and narratives used in the court's ruling on gay eligibility for domestic surrogacy and their implications.[66] Beyond telling the story about the fight for gay eligibility for domestic surrogacy in Israel, Part IV of the Article builds upon the analysis to offer a comparative evaluation of the use of narratives and rhetoric in *Dobbs*.[67] Finally, the Article concludes by portraying the implicit narratives the courts impose on the women behind these rulings and recognizing that official and implicit narratives have direct effects on court rulings and the power dynamic between parties. When discussing reproductive practices, activists, lawyers, and courts would benefit from considering who is most impacted by the narratives they create and recentering women when issuing rulings relevant to women's bodies, autonomy, and opportunities.[68]

---

63 597 U.S. 215 (2022).

64 *See Dobbs*, 597 U.S. at 232 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

65 *See* discussion *infra* Part II.

66 *See* discussion *infra* Part III.

67 *See* discussion *infra* Part IV.

68 *See* discussion *infra* Conclusion. This Article is the third piece of a series of articles that illustrate the interaction between sociopolitical forces and regulatory changes in the fields of law and reproductive practice. The first article addresses narrative changes in the pro- and non-natalist reproductive practices. *See* Almog & Bassan, *supra* note 54. The second article addresses rhetorical tools that shape the discourse around reimbursed egg donation. *See* Bassan, *Donations*, *supra* note 28.

II. The Development of the Discourse Surrounding Reproductive Practices in Israel

Israel defines itself, as stated in its basic laws, as a democratic and Jewish state.[69] Accordingly, it is influenced by two sets of ideologies: On one hand, inspired by democratic and liberal values, Israel recognizes autonomous choice, bodily autonomy, and other human rights as foundational principles of its legal system.[70] On the other hand, various references to Israel's unique status as a Jewish state generate a clear pro-natalist, and therefore more conservative, vision.[71] The Law of Agreements to Carry Embryos of 1996 (hereinafter "The Surrogacy Act") simultaneously expresses both very liberal and very conservative values regarding surrogacy.[72] It is the first piece of legislation in the world to regulate commercial surrogacy and largely represents a liberal, pro-natalist vision compatible with democratic as well as Jewish religious values.[73] However, until the Israeli Supreme Court's ruling established the eligibility of same-sex couples and single men for domestic surrogacy services, the law also reflected a conservative view of the normative family, as it excluded single women and men.[74]

Two generations of discourse surrounding reproductive practices in Israel reflect a longstanding tension between these two approaches.[75] Influenced by different cultural sources, the first generation arose following the enactment of the National Health Insurance Law (1994) and the Surrogacy Act (1996), reflecting the pro-natalist narrative as a liberal,

---

69 Basic Law: Human Dignity and Liberty, 5752-1992, SH 1391 (1992) (Isr.).

70 *See id.* §§ 1, 1a, 4, 5; *but see* § 312-21, Penal Law, 5737-1977, SH 864 (1977) 226 (Isr.) (criminalizing abortion except when it is approved by a special committee under certain circumstances); *see also* Almog & Bassan, *supra* note 54, at 28 ("[T]he vast majority of requests to approve abortions . . . are positively answered.").

71 *See* Almog & Bassan, *supra* note 54, at 34–36; Gila Stopler, *Biopolitics and Reproductive Justice: Fertility Policies Between Women's Rights and State and Community Interests*, 18 U. PA. J.L. & SOC. CHANGE 169, 184–86 (2015) (describing the origins and rationale of Israeli pro-natalist viewpoints).

72 The Law of Agreements to Carry Embryos, 5756-1996, SH 176 (1996) (Isr.).

73 *See* Almog & Bassan, *supra* note 54, at 34 (describing Judaism's pro-natalist stance across cultural sources, including religious scripts, philosophical and political thought, and historic events).

74 *See id.* at 58.

75 *See id.* at 27 (describing the two generations); Maayan Sudai, *Governance Feminism in Israel: Surrogacy as a Case Study*, 9 MAASEI MISHPAT 55 (2018) (outlining the feminist approaches).

positive, nationally-supported value.[76] In the second generation, subtle resistance has undermined the hegemonic pro-natalist narrative in favor of alternative, more nuanced narratives about reproduction.[77] The second-generation discourse has emerged in the last twenty years, after the first generation's impact was analyzed and regulatory initiatives were implemented according to lessons learned.[78]

Continuous cultural exposure to religious scripts, philosophical and political discussion, and historic events has entrenched a pro-natalist reproduction narrative in Israel, which elucidates the enthusiastic acceptance of natalist practices.[79] In particular, there are four intersecting attributes of (in)fertility that shape Israeli reproductive policy.[80] The first is a traditional pro-family discourse leading towards a convention of giving birth to "at least" two children.[81] The second is a genetic-based discourse that compels genetic, rather than social, parenthood.[82] The third can be considered a collective national discourse propelled by a sense of political and demographic threats to Israel related to the conflict with neighboring Arab countries and the memory of the six million annihilated Jews in the Holocaust.[83] Finally, a liberal discourse assumes a right to happiness via the experience of parenthood and the realization of one's self.[84] All these components make the Israeli state

---

76 *See* Almog & Bassan, *supra* note 54, at 29.

77 *See id.*

78 *See id.*

79 *See id.* at 34.

80 *See* Sigal Gooldin, *Cultural Competence and Ethical Incompetence: Notes from a Study of the New Reproductive Technologies in Israel*, 8 DIVERSITY HEALTH & CARE 45, 49 (2011) (explaining traditional, pro-family, national, and liberal discourse present in Israel).

81 *See id.* (describing pro-family discourse as a normative compulsion to have multiple children).

82 *See id.* (analyzing prevalence of pro-natal discourse as measured by above-average total fertility rate in Israel); Daphna Birenbaum-Carmeli, *Genetic Relatedness and Family Formation in Israel: Lay Perceptions in the Light of State Policy*, 29 NEW GENETICS & SOC'Y 73, 73 (2010) ("Israel's reproductive policy stands out in the discrepancy it creates between genetic and non-genetic modes of kinship. Whereas fertility treatments receive almost unrestricted state funding, adoption entails severe applicant screening and long years of waiting, or else, if conducted abroad, high private expenditure and intricate bureaucracy.").

83 *See* Gooldin, *supra* note 80, at 49 (linking national discourse to historically negative events involving Jewish populations globally).

84 *See id.* (describing the liberal discourse focusing largely on the emotional side of parenthood).

a fertility superpower where the state actively encourages and supports child-rearing and reproductive practices.[85]

It is therefore not surprising that ART treatments are embraced by potential recipients and that the percentage of people treated for fertility in Israel is among the highest in the world.[86] Israel is the only country where in vitro fertilization (IVF) is almost entirely state-subsidized.[87] Neither marital status, sexual orientation, nor the number of children from previous relationships affects eligibility for public funding of IVF.[88] Amid high demand for IVF, the number of IVF treatments per capita has increased over the years, and lawmakers have continuously expanded the criteria for entitlement to publicly funded treatments.[89] It is in this environment that discussion regarding the passage of the Surrogacy Act, which regulates surrogacy arrangements via direct state oversight, took place.[90] The Surrogacy Act requires a statutory committee to review applications and contracts to ensure that

---

85 *See* Almog & Bassan, *supra* note 54, at 27; Daniel Sperling, *Commanding the "Be Fruitful and Multiply" Directive: Reproductive Ethics, Law, and Policy in Israel*, 19 CAMBRIDGE Q. HEALTHCARE ETHICS 363, 365–66 (2010) (citing Israel's religion, culture, politics, public policy, and law encouraging fertility and high birthrates); Dina Kraft, *Where Families Are Prized, Help Is Free*, N.Y. TIMES (July 17, 2011), http://www.nytimes.com/2011/07/18/world/middleeast/18israel.html [https://perma.cc/R95B-M7XG] (referencing Israel as the world capital of in vitro fertilization and the home to the busiest fertilization clinics); Alon Tal, *Israel's Looming Demographic Crisis*, N.Y. TIMES (July 25, 2016), https://www.nytimes.com/2016/07/23/opinion/israels-looming-demographic-crisis.html [https://perma.cc/LK26-8LMD] (noting Israel's highest developed-world birthrate stemming from reproduction motivated by patriotic duty and Holocaust losses).

86 *See* Almog & Bassan, *supra* note 54, at 39; Daphna Birenbaum-Carmeli & Martha Dirnfeld, *In Vitro Fertilisation Policy in Israel and Women's Perspectives: The More the Better?*, 16 REPROD. HEALTH MATTERS 182 (2008); *see also* COMM. FOR PROMOTION OF WOMEN'S STATUS, Comm. Discussion, 1st Knesset No. 44 (Sept. 16, 2003) (Isr.) [on file with *Columbia Journal of Gender & Law*]; Carmel Shalev, *Reproductive and Genetic Technologies in Israel*, *in* ISRAELI BIOETHICS 140, 163 (Gil Segal & Efrat Ram-TikTin eds., 2015); Gooldin, *supra* note 80, at 48; Ellen Waldman, *Cultural Priorities Revealed: The Development and Regulation of Assisted Reproduction in the United States and Israel*, 16 HEALTH MATRIX 65, 81 (2006).

87 *See* Almog & Bassan, *supra* note 54, at 39; SUSAN KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL 232 (2000); *see also* Daphna Birenbaum-Carmeli, *"Cheaper than a Newcomer": On the Social Production of IVF Policy in Israel*, 26 SOCIO. HEALTH & ILLNESS 897, 907 (2004).

88 *See* Almog & Bassan, *supra* note 54, at 39.

89 *See id.*; Daphna Birenbaum-Carmeli, *Contextualizing a Medical Breakthrough: An Overview of the Case of IVF*, 24 HEALTH CARE WOMEN INT'L 591, 593 (2003) (mentioning that, in Israel, IVF was implemented before having undergone full clinical testing procedures); *see also* Kraft, *supra* note 85 ("1,657 in vitro fertilization procedures per million people per year were performed in Israel.").

90 *See* Rhona Shuz, *The Developing Right to Parenthood in Israeli Law*, INT'L SURV. FAM. L. 197, 206 (2013) ("Israel was the first country in the world to regulate surrogacy by legislation.").

the rights of the newborn and the parties are not undermined, to verify that the parties have entered the contract freely, and to confirm the parties' compatibility.[91] If surrogacy is approved, the intended mother's egg retrieval (if applicable) and artificial insemination are publicly funded.[92] Payment to gestational surrogates is capped and usually amounts to 140,000–165,000 NIS ($41,000–$48,000).[93] However, miscellaneous related expenses are also covered by the intended parents (reaching a total amount of about 220,000 NIS or $64,000).[94]

A review of the socio-political context is therefore necessary to understand the Israeli Supreme Court's decision in *Arad-Pinkas II* about surrogacy in Israel. The next section reviews the development of the discourse surrounding surrogacy regulation and the way it reflects the tensions between liberal and conservative values and feminist approaches. It shows that this development engendered several types of tensions: first, between conservative Jewish and liberal values; second, between liberal and radical feminist approaches; and third, between the policy goals of women's organizations and those of gay men involved in the LGBTQ+ movement.

A. The First Generation of Discourse (1994–2006): Feminist Tensions

Commercial surrogacy is a controversial practice because it commodifies the creation of future life in an alternative way to the natural process, thereby regulating women's bodies.[95] In traditional surrogacy, the surrogate provides both an egg and a womb.[96] Now,

---

91 § 4(a)(6) Law on Agreements for the Carrying of Fetuses, 57754-1996, SH 176 (1996) (Isr.).

92 *See* Carmel Shalev & Sigal Gooldin, *The Uses and Misuses of In Vitro Fertilization in Israel: Some Sociological and Ethical Considerations*, 12 NASHIM 151, 155 (2006).

93 *See* Daphna Birenbaum-Carmeli & Piero Montebruno, *Incidence of Surrogacy in the USA and Israel and Implications on Women's Health: A Quantitative Comparison*, 36 J. ASSISTED REPROD. & GENETICS 2459, 2460 (2019); Etty Dekel, Sec'y, Surrogacy Comm. Ministry of Health, Address at Webinar of the Aguda: The Association for LGBTZ Equality in Israel (July 27, 2022) (Isr.). *See also* Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, *in* THE TANNER LECTURES ON HUMAN VALUES 89, 96–103 (Mark Matheson ed., 2000); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 198 (1983); Allen Verhey, *Commodification, Commercialization, and Embodiment*, 7 WOMEN'S HEALTH ISSUES 132 (1997).

94 *See* Dekel, *supra* note 93.

95 *See* Richard J. Arneson, *Commodification and Commercial Surrogacy*, 21 PHIL. & PUB. AFFS. 132, 160–64 (1992).

96 *See* Brian Clowes & Marisa Cantu, *The Ethics of Surrogacy*, HUM. LIFE INT'L (June 5, 2023), https://www.hli.org/resources/surrogacy-ethical-issues/ [https://perma.cc/V7MT-SXCC].

following the advancement of reproductive technology, women can opt for gestational surrogacy, which enables the transportation of a fertilized egg into the surrogate's uterus. Now, women can carry a child unrelated to their own genetic material, "conceived" by the gametes of other people. This process can utilize the genetic material of one or of both intended parents, if of opposite sex.[97] Many arguments about the intrinsic value of reproductive goods—surrogacy services or eggs purchased as commodities in the economic market—have to do with their impact on women's bodies and life opportunities and, consequentially, on the character of society as a whole.[98] The discourse has been focused on questions such as where, when, and how the influence of these reproductive markets should be limited.[99]

Across feminist scholarship, the way in which the body is conceptualized is deeply embedded in political ideologies and theoretical presuppositions that have important implications for social policy.[100] In the Israeli context, Maayan Sudai, a legal feminist scholar, analyzes the period prior to and contemporaneous with the enactment of the Surrogacy Act, during the first generation of discourse.[101] She shows the tension between liberal and radical feminist approaches in the policymaking sphere.[102] Sudai addresses the Aloni Commission, an expert body whose mandate was "to examine the legal, social, ethical, and religious issues raised by reproductive practices."[103] She shows that the 1991 report of the Aloni Commission manifests the spirit of liberal feminism.[104] Liberal feminists saw in surrogacy a path for self-fulfillment of surrogates that could give women an opportunity to

---

97 *See id.*

98 *See* Bassan, *Donations*, supra note 28, at 10.

99 *See* Lisa Herzog, *Markets*, STANFORD ENCYCLOPEDIA OF PHIL. (Aug. 30, 2021), https://plato.stanford.edu/entries/markets/ [https://perma.cc/LWW7-RM5G]; *see also* Sandel, *supra* note 93 (claiming that the cost-benefit parameter transforms market transactions from private capitalistic acts between autonomous individuals into a public concern of all citizens, even those that do not take part in the market mechanism); *compare with* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 331 (1974).

100 *See, e.g.*, CAROL WOLKOWITZ, BODIES AT WORK (2006).

101 *See* Sudai, *supra* note 75.

102 *See id.* at 57.

103 MIN. JUST., REP. NO. 177-410, *The Report of the Public-Professional Commission in the Matter of In Vitro Fertilization* (1994) (Isr.) [https://perma.cc/WFY7-CLQE] [hereinafter ALONI REP.].

104 *See* Sudai, *supra* note 75, at 64.

exercise their freedom of choice, bodily autonomy, and reproductive rights, as well as the potential to elevate the economic value of motherhood and their place in society.[105]

Given this liberal approach, the radical feminist approach faced an ideological conflict: they aimed to avoid moral legitimacy for surrogacy.[106] The radical feminist approach takes pride in "going to the root" of women's oppression.[107] Radical feminism around the world originally identified surrogacy as a violation of human dignity and the dehumanization of the surrogate and women in general as a result of the commercialization of their bodies. Surrogacy was analogized to other extreme ethical issues—such as human trafficking, prostitution, and slavery—as violating human dignity.[108] Radical feminists in Israel therefore saw surrogacy as an extreme exploitation of women in economic distress, nullifying the ideal of free autonomous decision.[109] Critics across disciplines claim that, since the human body deserves an entirely separate sphere of valuation based on its intrinsic value, it is degrading to assign a monetary value to body parts or functions as if they belong in markets with other commercialized goods.[110] This line of argument, which I term the intrinsic-value-based argument, is critical of the market itself as well as any form of commercialized reproductive services. Intrinsic-value-based arguments imply that commercializing surrogacy services may contradict the public good or pose other moral hazards requiring regulation to abolish the practice.[111] Thus, proponents of the intrinsic-value theory seek to abolish the surrogacy market entirely, or at least minimize it.

---

105 The Aloni Report emphasized these values thanks to the Secretary General of the Aloni Commission, Dr. Carmel Shalev, whose book *Birth Power* encouraged individual contract freedom. *See* ALONI REP., *supra* note 103; *see* CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY (1989) (portraying a liberal feminist approach).

106 *See* Sudai, *supra* note 75, at 66.

107 Rebecca Whisnant, *Our Blood: Andrea Dworkin on Race, Privilege, and Women's Common Condition*, 58 WOMEN'S STUD. INT'L F. 68, 69 (2016).

108 *See, e.g.*, D. KELLY WEISBERG, THE BIRTH OF SURROGACY IN ISRAEL 147–48 (2005); GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS (1985); JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM (1993); DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS (2010).

109 *See* WEISBERG, *supra* note 108, at 148.

110 *See generally* Sandel, *supra* note 93, at 72; WALZER, *supra* note 93, at 9; Verhey, *supra* note 93, at 132–33 (1997).

111 *See id.*

However, Israel's cultural embrace of natalist practices and the supportive liberal feminist approach taken by the Aloni Commission made complete delegitimization unattainable.[112] Surrogacy was a *fait accompli*. Israeli radical feminists—who had initially opposed surrogacy entirely—refocused their ideological fight on influencing the design of the contractual surrogacy relationship.[113] While it might have been easier to call on the opposition to abolish the practice, they instead took the pragmatic approach in order to be at the center of the decision-making process.[114]

This strategic refocusing of their advocacy efforts enabled radical feminists to have a seat at the negotiating table, despite their inability to stop the legislative process.[115] Informed by the politics of patriarchal domination, this pragmatic approach shifted from the margins to the center of discussion, calling for responsible balancing.[116] In an effort to improve the status and rights of the surrogate woman under the agreement, they recognized power disparities and worked to install institutional mechanisms to protect women from impoverishment and to empower them.[117] Women's organizations articulated the problematic nature of surrogacy through the prism of the unequal power dynamic between the surrogate mother and the intended parents, as well as economic and social factors involved in the process, to shape the contractual-regulatory relationship.[118] They addressed issues such as whether consent to become a surrogate is freely given, bargaining and status gaps between the surrogate mother and the intended couple, and surrogates' emotional alienation from the babies growing in their womb.[119] Practically, radical feminists' efforts contributed to reducing the required number of medical experts or religious members of the approving committee and, instead, made sure that considerations of social welfare, women, and ethics would be part of the deliberations.[120] Additionally, they demanded that the committee's

112 *See* Sudai, *supra* note 75, at 66.

113 *See id.* at 64–67.

114 *See id.*

115 *See* Sudai, *supra* note 75, at 66.

116 *See* Daphne Barak-Erez, *Introduction* to LEGAL FEMINISM IN THEORY AND PRACTICE (Daphne Barak-Erez, ed., Idit Shorer, trans., Resling Publ'g 2005) (arguing that legal institutions must take into consideration opposing values as well); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 20 (1984).

117 *See id.*

118 *See id.* at 64.

119 *See id.* at 66.

120 *See id.* at 65.

eventual agreement be approved by the court, and they lobbied to ensure surrogates' rights to make decisions regarding their bodies during pregnancy and to terminate their contracts at will.[121] They also insisted that surrogates be represented by legal advocates throughout the process and that a midwife represent the surrogates.[122]

Eventually, even though most discussions at the time—both in committee and following debates in the Knesset (the Israeli parliament)—were primarily concerned with the appropriate level of access to reproductive practices by intended parents, the proposal of the Surrogacy Act actually walked back some of the Commission's liberal arguments.[123] The initial policymaking promoted the pro-natalist Israeli narrative of reproduction. In the spirit of liberal feminism, the Aloni Commission embraced liberal values, which concluded that access to fertility treatments should be universal, reasoning that individuals have rights to "privacy and intimacy in their personal lives" regardless of factors such as marital status.[124] The Commission thus recommended that there be minimal state intervention in access to reproductive care.[125] But then-Minister of Health Efraim Sneh's political-pragmatic approach eventually required greater consideration of conservative positions, and eligibility was restricted to heterosexual couples,[126] leaving individuals and same-sex couples ineligible to use domestic surrogacy services.[127] This was thanks to the swing votes that Orthodox Jewish political parties have in Israeli Parliament, which strictly adhere to

---

121 Although these organizations avoid drawing an explicit link between at-will termination and abortion, their discussion likely implies abortion since gestational surrogates are genetically unrelated to the embryo and authorities routinely approve abortion applications (approximately 98.9% of abortion applications were approved in 2014). *See Applications for Pregnancy Termination in 2014,* ISRAELI CENT. BUREAU OF STAT., https://www.cbs.gov.il/en/Statistics/Pages/Generators/Time-Series-DataBank.aspx?level_1=4 [https://perma.cc/S8GX-TR63]. However, this theory has never been tested in court.

122 *See* Sudai, *supra* note 75, at 65.

123 *See id.* at 64.

124 *See* ALONI REP., *supra* note 103, at 18 (explaining the proposal for universal fertility treatments regardless of marital status).

125 *See* Sudai, *supra* note 75, at 64.

126 § 1 Law of Agreements to Carry Embryos, 5756-1996, 1577 SH 176 (amended 2010) (Isr.) ("A man and woman *who are a couple*, who are connecting with a surrogate mother for the purpose of having a child.") (emphasis added).

127 *See* Sudai, *supra* note 75, at 64.

Jewish law and traditions (*Haredi*).[128] The desire to balance the Aloni Commission's liberal approach against conservative pushback resulted in a conservative, arguably homophobic approach, which suppressed both liberal and radical feminist approaches.[129]

Accessibility to surrogacy services continued to be a bargaining chip between these competing parties. LGBTQ+ activists successfully fought the eligibility issue through legal actions and political lobbying.[130] Adi Moreno, an Israeli sociologist and activist, strategically reviews petitions submitted to the Israeli Supreme Court in order to advance equal family rights and eligibilities.[131] According to her research, based on the individual right to equality, during the first generation of discourse, LGBTQ+ activists achieved access to state-funded sperm donations and fertility treatments for lesbian couples and single women; legal recognition and marital rights in Israel for officially married same-sex couples who married outside of Israel; the registration of parenthood for same-sex partners as legal guardians of each other's children, acknowledging "second-parent adoption" and granting a "parenthood decree"; and legal recognition for same-sex couples and parenting rights for non-genetic parents as legal parents for their partners' genetic children.[132] The Surrogacy Act remained the last law to grant heterosexual couples exclusive access to a reproductive resource in order to create a family. In a previous Israeli Supreme Court case, the court addressed the equal right to assisted reproduction.[133] Although the court had ruled

---

128 *See* Waldman, *supra* note 86, at 83–84 (explaining the political influence of religious parties on public policy); Shuz, *supra* note 90, at 220 ("Accordingly, it is to be expected that the religious parties will vote against any new law, which expressly allows access to ART to single parents and same-sex couples. Indeed, the difficulty in passing legislation without the support of these parties is one of the reasons for the fact that many issues relating to ART, such as sperm donation, have been regulated by secondary legislation and administrative guidelines.").

129 *See* Sudai, *supra* note 75, at 64.

130 *See* Carmel Shalev et al., *Transnational Surrogacy and the Earthquake in Nepal: A Case Study from Israel*, *in* BABIES FOR SALE?: TRANSNATIONAL SURROGACY, HUMAN RIGHTS AND THE POLITICS OF REPRODUCTION 49, 51–52 (Miranda Davies ed., 2017) [hereinafter Shalev et al., *Transitional Surrogacy*].

131 *See* Adi Moreno, Crossing Borders: Remaking Gay Fatherhood in the Global Market 18 (2016) (Ph.D. thesis, University of Manchester) (ProQuest), https://pure.manchester.ac.uk/ws/portalfiles/portal/54583857/FULL_TEXT.PDF [https://perma.cc/WPL7-HXKS].

132 *See id.*

133 *See* HCJ 2458/01 New Family v. Approvals Comm. for Surrogate Motherhood Agreements, Ministry of Health, 57(1) PD 419 (2001) (Isr.) [hereinafter *New Family*] (holding that denying a single mother's legal access to surrogacy services is egregious discrimination).

that the law was discriminatory and violated the principle of equality, the legal structure kept unmarried women and men ineligible, emphasizing religious-orthodox values.[134]

B. The Second Generation of Discourse (2006–Present): LGBTQ+ Perspectives

After analyzing the first generation's impact and implementing regulatory initiatives according to the lessons learned, initiatives for legal regulation of reproductive practices in the last twenty years followed the rising use of practices involving the bodies of other women, such as egg donation and surrogacy, beyond traditional IVF treatments performed on infertile patients themselves.[135] Alongside an increasing social acceptance of these reproductive practices, the second-generation discourse added new voices and critical points of view regarding women's reproductive roles and the normative heterosexual family.[136] Gay men's fight for eligibility for domestic surrogacy is therefore inherently connected to this discourse.

In 2010, for example, Israel amended its laws to allow reimbursement for egg donation from women not undergoing fertility services, expanding an existing practice that had

---

134 *See New Family*, 57(1) PD at 460; *Arad-Pinkas II*, ¶ 38.

135 *See* Almog & *Bassan*, *supra* note 54, at 57–58.

136 A prominent trend in the second generation of discourse is the shift from advocates' and scholars' focus on the legality of surrogacy to their focus on the regulation of surrogacy, in light of its ongoing practices. *See id.* at 58. This shift allows for a more complex picture of women's interests to emerge, where risks to women's health are noticed. *See id.* at 59. Feminists have voiced concerns about the extensive use of reproductive technology to deal with infertility. *See id.* at 62. However, while the second-generation criticism offers an opportunity to raise alternative expressions that reflect women's diverse identities and interests, it has not changed the hegemonic pro-natalist reproductive narrative. *See id.* at 79; *see also, e.g.*, COMM. FOR PROMOTION OF WOMEN'S STATUS, *Surrogacy in Israel - The Current Situation and Proposal for Change*, Comm. Discussion, 18th Knesset No. 142 14–17, 19 (May 30, 2012) (Isr.), https://main.knesset.gov.il/Activity/Committees/Women/Pages/CommitteeAgenda.aspx?tab=3&ItemID=470358 [https://perma.cc/BEL5-L2DK] ("The health risk to a woman by getting pregnant and giving birth is significantly higher than by donating a kidney . . . Women take this risk with the purpose of bringing a child into the world . . . People say organ donation is irrelevant because organ donation poses a health risk and pregnancy does not. I say pregnancy is a health hazard, but we see the goal before our eyes and we say, this risk is worth it, which is a legitimate decision . . . I will tell you frankly, the only difference is that this concerns women, whose bodies it is legitimate to exploit in exchange of payment.") (statement of Efrat Levy-Lahad, the head of the Genetics Department at Shaare Zedek Medical Center); *id.* at 19 ("We all sit here with rose colored glasses and see an amazing, wonderful picture. There are many surrogacy services like that, but this is not the whole picture. I suggest that we take off the glasses . . . We took upon ourselves a heavy responsibility. They have mentioned here before that we do not do experiments on human beings—this is a supreme lab. We perform experiments all right, and we neither follow up nor monitor.").

allowed only uncompensated donation from women undergoing egg recruitment for themselves.[137] In the same year, a professional-public commission led by Dr. Mor Yosef was established to address legislative regulation of reproduction and birth-related issues in Israel, attempting to balance the interests of intended parents with those of future children and surrogates.[138] A resulting report of the Mor Yosef Commission in 2012 reiterated the liberal tone set by the Aloni Commission, saying that reproduction is an intimate matter that requires great latitude in terms of individual autonomy.[139] In line with the more culturally palatable pro-natalist narrative, the report supported expanding eligibility for commercial surrogacy services to single women with medical problems that prevent pregnancy; in the spirit of more conservative views, it also supported expanding eligibility to single men only for altruistic surrogacy, without compensation.[140] (The minority position advocated for restricting commercial options entirely, allowing only altruistic surrogacy.)[141]

Cross-border surrogacy considerations appeared throughout both generations of the discourse since 2005.[142] While domestic surrogacy has been a viable option for some, citizens whose right to reproduction (as they perceived it) could not be fulfilled within Israel—in particular, Israeli gay men—turned to cross-border markets.[143] By 2009, the number of children resulting from cross-border surrogacy was slightly higher than the number of children born in domestic surrogacy in Israel.[144] Consequentially, parents who would have been ineligible for surrogacy in Israel returned with children from cross-border

---

137 Egg Donation Law 5770-2010, 2242 SH 520 (Isr.).

138 *See* MIN. HEALTH, THE REPORT OF THE PUBLIC COMMITTEE TO ADDRESS THE LEGISLATIVE REGULATION OF REPRODUCTION AND BIRTH IN ISRAEL 4 (2010) (Isr.) [https://perma.cc/BH2C-A25Q] [hereinafter MOR YOSEF REP.].

139 *See* ALONI REP., *supra* note 103, at 12 (discussing private decisions regarding reproduction with sociological and ethical considerations).

140 *See* MOR YOSEF REP., *supra* note 138, at 4 (detailing the specifics and regulations around the process of reproductive assistance in Israel).

141 *See* Moreno, *supra* note 131, at 155 ("[T]he committee was well aware that most surrogacy practices by Israeli citizens take place overseas.").

142 *See id.* at 20, 149 (explaining that, by 2010, surrogacy was already a customary practice among Israeli citizens either within the state or across borders). A group of same-sex couples petitioned the court, demanding equal access to domestic surrogacy. *See New Family*, 57(1) PD at 419.

143 *See* Almog & Bassan, *supra* note 54, at 58.

144 *See id.* at 22.

surrogacy and posed a registration problem for the Israeli authorities.[145] To overcome the new concern, the state issued a series of administrative regulations, defining paternity for children born through cross-border surrogacy and granting them citizenship rights.[146] Following the Mor Yosef Commission, an amendment to the Surrogacy Act passed first call in 2014, proposing to equalize access to domestic surrogacy services for same-sex couples and single intended parents (men and women alike); additionally, the bill addressed the challenges of cross-border surrogacy transactions.[147] The bill passed in the Knesset at the first reading in 2014, but the legislative process remained incomplete because the general election resulted in a change of government administration and respective political priorities.[148] In March 2015, this version of the bill was removed. Access to domestic surrogacy services was not expanded, and the implications of cross-border surrogacy remained unaddressed.

In April 2015, six to seven hundred Israelis and twenty-five newborns gestated by Indian surrogates in Kathmandu were caught in an earthquake in Nepal.[149] Increased media coverage of the earthquake attracted public attention and opened yet another public discussion about surrogacy.[150] This time, the discussion surrounded same-sex couples traveling across borders because they were ineligible for domestic surrogacy services.[151] The implications of the cross-border market have been discussed in various

---

145 *See id.* at 58.

146 *See* Moreno, *supra* note 131, at 20.

147 § 9 Draft Bill Amending the Law of Agreements to Carry Embryos (No. 2), 2014, HH 916 (Isr.).

148 Press Release, Knesset, Surrogacy Law Approved on First Reading (Oct. 27, 2014), https://main.knesset.gov.il/news/pressreleases/pages/press271014-hkhk.aspx [https://perma.cc/GKU5-U36S?type=standard].

149 *See* Jonah Mandel, *Israel to Airlift 25 Babies From Nepal Born to Surrogates*, UNION CATH. ASIAN NEWS (Apr. 27, 2015), https://www.ucanews.com/news/israel-to-airlift-25-babies-from-nepal-born-to-surrogates/73456 [https://perma.cc/6N5S-2PF6]; Debra Kamin, *Israel Evacuates Surrogate Babies From Nepal but Leaves the Mothers Behind*, TIME (Apr. 28, 2015), https://time.com/3838319/israel-nepal-surrogates/ [https://perma.cc/AU9X-PAC9].

150 *See* Mandel, *supra* note 149; Kamin, *supra* note 149.

151 *See*, *e.g.*, COMM. FOR INTERIOR & ENV'T AFF., Comm. Discussion, 19th Knesset no. 198, at 26 (Jan. 26, 2014) (Isr.) [hereinafter COMM. ENV'T AFF.] [https://perma.cc/C8VG-Z4P5] (discussing policy discourse regarding surrogacy) ("Every person has a right to raise a family and have children, even same sex couples.") (statement of MK Nitzan Horovitz). *See also* SPECIAL COMM. FOR APP. GOV'T INFO. ACCESSIBILITY & PRINCIPLES PUB. TRANSPARENCY, Comm. Discussion, 20th Knesset no. 25, at 5 (Feb. 23, 2016) (Isr.) [https://perma.cc/MY9K-4BWQ] ("Gay couples, LGBT couples, all deserve a family, the right to parenthood.") (statement of Iddo Vulkan). Especially interesting are the words of Heidi Moses, an ultra-Orthodox woman and member

contexts and Knesset committees.[152] These discussions incorporated the voices of many stakeholders, including surrogacy agencies, women's organizations, and others, reflecting the aforementioned tension between the hegemonic pro-natalist narrative, conservative views, and the second-generation criticism about the implications of current practices.[153]

Among other arguments, the 2015 incident raised concerns regarding the inadequate protections for foreign surrogates in cross-border transactions with Israeli intended parents.[154] Theoretically, evidence of unethical practices connected with surrogacy services in low-income countries such as Nepal could have led to a discussion about preventive measures for commercial surrogacy, or at least its cross-border version.[155] Alternatively, it could have led to a clear differentiation between domestic surrogacy services in Israel and foreign services. Such differentiation could have implied that it would be better for both surrogates and same-sex couples to perform these procedures in Israel, legally, under the protective measures of the Surrogacy Act, to be followed by a condemnation only of foreign practices.

In reality, the reaction was mixed. Newborns and their families abroad won strong public support in a time of crisis, and the Israeli government was cooperative in providing aid.[156] The emphasized narrative was of same-sex couples' need to rely on surrogacy services in foreign countries and the fact that this practice involved burdensome consequences for them which do not apply to opposite-sex intended parents who go through the process

---

director in the LGBT association, at the Committee for Public Inquiries, regarding the access to surrogacy services. *See id.* ("As someone who comes from the ultra-Orthodox world, I have learned that there is a commandment to 'be fruitful and multiply and fill the earth.' We must see that this mitqua will take place and we stop with the burden on the gay community and on gay men in particular.").

152 *See supra* note 151.

153 *See* Almog & Bassan, *supra* note 54, at 58.

154 *See, e.g.*, Guy Ezra & Rabbi Neuwirth, *The Surrogacy Industry Is No Different Than Slave Trade*, SRUGIM NEWS (Apr. 27, 2015), [https://perma.cc/YTK4-A7KM] (raising concerns about the "immoral exploitation of women of socio-economic status who sell their bodies into slavery for money").

155 For questionable practices in poorer countries, see, e.g., Sharon Bassan, *Can Human Rights Protect Surrogate Women in the Cross-Border Market?*, *in* WOMEN'S HUMAN RIGHTS AND THE ELIMINATION OF DISCRIMINATION (Maarit Jänterä-Jareborg & Hélène Tigroudja eds., 2016) [hereinafter Bassan, *Cross-Border Market*].

156 *See* Kamin, *supra* note 149 (discussing the evacuation and portraying the need for domestic accessibility of surrogates).

in Israel.[157] In the policy realm, the incident reignited the call for expanded access to better-monitored domestic surrogacy and the right to create alternative same-sex families because every person, same-sex couples included, has a right to have a family and raise children.[158] Socially, a side effect of a narrative portraying such a broad view of the right to parenthood was the legitimization of the use of cross-border commercial surrogacy, particularly when this right was restricted by domestic legislation.[159] However, expanding eligibility to domestic surrogacy was in tension with classical arguments, which highlight the implications of involving an additional number of assisting female third parties—such as egg donors and surrogates—who undergo medical treatments and face increased risks due to expanded eligibility for domestic surrogacy services.

Despite their similar experience of gender- and sexuality-based oppression, experiences around the world suggest that a feminist-gay alliance is uncertain in an area so charged with issues of women's autonomy and bodily integrity.[160] Feminists and LGBTQ+ activists often protect different, even conflicting, interests when it comes to surrogacy. Reproductive practices are gendered and inherently linked with power relations.[161] The feminist view centers its analysis almost exclusively on the experience of the female surrogate, whether it supports women's participation in commercial surrogacy (e.g., liberal feminism) or objects to it and to the oppression of women within the process (e.g., radical feminism).[162]

---

157 *See* Sigrid Vertommen, *Surrogacy at the Fertility Frontier: Rethinking Surrogacy in Israel/Palestine as an (Anti)Colonial Episteme*, 14 HIST. PRESENT 108, 120 (2024) (discussing the Israeli media's framing of couples pursuing surrogacy as "reproductive exiles").

158 *See, e.g.*, COMM. ENV'T AFF., *supra* note 151; SPECIAL COMM. FOR APP. GOV. INFO. ACCESSIBILITY & PRINCIPLES PUB. TRANSPARENCY, *supra* note 151.

159 *See* Ruth Zafran & Daphna Hacker, *Who Will Safeguard Transnational Surrogates' Interests? Lessons from the Israeli Case Study*, 44 LAW & SOC. INQUIRY 1141, 1151–52 (2019).

160 *See* Connor Cory, *Access and Exploitation: Can Gay Men and Feminists Agree on Surrogacy Policy?*, 23 GEO. J. ON POVERTY L. & POL'Y 133, 137 (2015); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 129 (2009) ("[T]he coalition was a curious one: feminists and civil liberties groups seldom ally with traditional religious organizations—particularly on issues relating to the regulation of reproductive choices.").

161 *See* Marcia C. Inhorn & Daphna Birenbaum-Carmeli, *Assisted Reproductive Technologies and Culture Change,* 37 ANN. REV. ANTHROPOL. 177, 180 (2008) (describing power relations and differences in ART procedures for men and women); Shalev & Gooldin, supra note 92, at 167–68 (noting the existence of power relations between men and women, Jews and Arabs, and others).

162 *See, e.g.*, Julie Shapiro*, For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?*, 89 WASH. L. REV. 1345, 1348 (2014) ("[M]y first concern is with the effect of surrogacy on the surrogate herself. I am accordingly less concerned with the intended parents.").

Gay men's surrogacy eligibility depends on surrogates' bodies, especially in Israel, which presents substantial barriers for gay men to adopt children.[163] Ideologically, it can be challenging for feminists to align with the reality of such practices for the benefit of white gay male couples who often enjoy higher earning capacities and fewer societal barriers than many other segments of the LGBTQ+ community.[164]

On the other hand, both feminist and LGBTQ+ ideologies are concerned with structures of power that sustain gender- or sexuality-based oppression and wish to provide an updated and more cohesive framework for traditional views.[165] Members of both communities in Israel have shared some common understandings around surrogacy as an opportunity to disrupt cultural norms and gender roles, like the concept of the traditional family.[166] Therefore, many stakeholders, feminist and LGBTQ+ organizations included, supported both equal access for single men and same-sex couples while also supporting proper medical standards and minimization of medical risks.[167] Moreover, activists called for a

163 Moreno, *supra* note 131, at 120.

164 Cory, *supra* note 160, at 137.

165 *See, e.g.*, Martha Fineman, *Gender and Law: Feminist Legal Theory's Role in New Legal Realism*, 2005 WIS. L. REV. 405, 407 (2005) ("Feminism, as a discipline, is focused on the significance of gender and the societal inequalities resulting from values and assumptions based on gender.").

166 Although racism tends to affect reproductive justice, it is beyond the scope of this Article concerning the Israeli case. Domestic surrogacy in Israel is open only to Israeli citizens. § 5(a)(1) Law of Agreements to Carry Embryos, 5756-1996, 1577 SH 176 (amended 2010) ("The Approval Committee may, after considering all the data arising from the opinion, documents and statements made before it, approve the agreement for the carrying of embryos, or approve it with conditions, if it is satisfied that all of the following have been met: (1) The mother of the carrier and the intended parents are residents of Israel"). Surrogates are also Israeli citizens. *Id*. As a result, the Israeli case concerns whether queer couples, who are predominantly white, can access the services of Israeli surrogates, who are also primarily white. For literature on other reproductive technologies and race-related issues such as Sephardi and Ashkenazi or Arab and Jew issues in Israel, see, e.g., Himmat Zu'bi, *Palestinian Fertility in the Israeli Sphere: Palestinian Women in Israel Undergoing IVF Treatments*, *in* BIOETHICS AND BIOPOLITICS IN ISRAEL: SOCIO-LEGAL, POLITICAL, AND EMPIRICAL ANALYSIS 160 (2018); Gala Rexer, *Borderlands of Reproduction: Bodies, Borders, and Assisted Reproductive Technologies in Israel/Palestine*, 44 ETHNIC & RACIAL STUD. 1549 (2021); Naomi Gershoni & Corinne Low, *The Power of Time: The Impact of Free IVF on Women's Human Capital Investments*, EUR. ECON. REV. 133 (2021); Almog & Bassan, *supra* note 54, at 27.

167 *See* Moreno, *supra* note 131, at 89. Throughout the resistance to gay-rights activists' efforts to gain eligibility through legal action and political lobbying, they were also conscious about the inappropriateness of harmful practices. For example, in a parliamentary debate over a crisis that emerged in 2014 due to Thailand's new anti-surrogacy regulation, the representative of an organization for gay parents said: "We need to find a solution to regulating surrogacy in Israel with equality for men, regardless of their sexual orientation, and we need to regulate surrogacy abroad. Because we also, although not everybody thinks so, are in favor of the

change in the public discourse that is more compatible with radical-practical feminism, perhaps in acknowledgment that an expansion of surrogacy access would be a matter of time.[168] They emphasized the need for protective regulation to advance Israeli surrogates' interests, such as informed consent and medical standards, rather than discussing "old school" arguments about poor surrogates' profit-making ability.[169] Although the feminist critique of surrogacy may have been opposed to widened commercial surrogacy, it did not object to the idea of equal accessibility and non-discriminatory criteria to restrict the market.[170] When they called to restrict commercial surrogacy, they were willing to accept such restrictions on an equal basis.[171]

Similarly, many members of the LGBTQ+ community have been sensitive to surrogates' rights and interests and have consistently tried to minimize exploitative practices. For example, an Israeli initiative called "Responsible Surrogacy" is meant to expose potential consumers of cross-border surrogacy to information about the questionable aspects of the procedure, with the hope that it will drive consumers to demand agreements that incorporate ethical considerations.[172] The motivation for this project stems from an understanding—originating from same-sex couples—that the moral responsibility lies with the intended parents and that their stance may change the procedure in favor of all involved.[173] Such a change can help parents who use surrogate services be more transparent with their children about the process through which they came into the world. But at the political level, other than a minor agreement between an LGBTQ+ organization and a feminist coalition objecting to a normative family, there were no meaningful, effective alliances between the organizations, and finding a common ideological ground for collaboration was not easy.

---

woman surrogate [being able to] do it with consent, in a country in which it is regulated, that she will not be poor, that she will have other choices and will want to do it." COMM. ENV. AFF., *supra* note 151, at 26.

168 *See, e.g.*, Carmel Shalev et al., *Ethics and Regulation of Inter-Country Medically Assisted Reproduction: A Call for Action*, 5 ISR. J. HEALTH POL'Y RSCH. 1, 9–10 (2016) [hereinafter Shalev et al., *Ethics and Regulation*].

169 *See* Zafran & Hacker, *supra* note 159, at 1153.

170 *See* detailed position paper regarding the proposed law on embryo transfer agreements, Oct. 26, 2014 [on file with *Columbia Journal of Gender and Law*].

171 *See, e.g.*, Shalev et al., *Ethics and Regulation*, *supra* note 168, at 3, 10.

172 *See Responsible Surrogacy*, FACEBOOK, https://www.facebook.com/rsurrogacy/ [https://perma.cc/FL3R-5Z88].

173 *See id.*

Ultimately, the 2015 earthquake incident did not affect eligibility for domestic surrogacy in Israel. Same-sex couples (as well as single individuals at the time) remained ineligible for domestic surrogacy. Meanwhile, cross-border surrogacy earned legitimacy despite maintaining dubious practices with respect to surrogates and despite awareness of foreign surrogates' vulnerabilities.[174] From the judicial regulatory perspective regarding cross-border surrogacy, the interests of the Israeli intended parents dominated the perceptions of the public and private actors concerned. 100% entry and citizenship approval has been granted by the state for babies born from cross-border surrogacy with at least one Israeli genetic parent.[175] Other interests, including those of foreign surrogates or the children born through surrogacy, were marginalized.[176] This trend was contrary to what was happening at the time in the world; more and more countries had begun to close their doors to foreign intended parents (e.g., India, Nepal, Thailand), moving the market to fewer destination countries with permissive regulation.[177] The clear beneficiaries of the Nepal incident in Israel were surrogacy agencies, whose industry was unsupervised and booming, further commercializing cross-border surrogacy.[178]

III. The Women Behind *Arad-Pinkas*

Feminist perspectives that have influenced the legal framework of surrogacy in Israel highlight the tension between respecting women's autonomy, safeguarding their best interests, and accommodating conservative views, which limit accessibility to domestic surrogacy services to heterosexual couples. It is in this social environment that later on in 2015, a same-sex couple, Etai and Yoav Arad-Pinkas, petitioned the Israeli Supreme Court against the Committee on the Surrogacy Law.[179] Their petition asked the court to expand the definition of "prospective parents," those eligible for domestic surrogacy arrangements in Israel, to include same-sex couples and single men, with or without a genetic relationship

---

174 *See* Vertommen, *supra* note 157, at 108.

175 *See* Zafran & Hacker, *supra* note 159, at 1159.

176 *See id.* at 1151 (showing that in the judicial regulatory perspective regarding cross-border surrogacy, the interests of the Israeli intended parents dominate the perceptions of the public and private actors concerned, and that all other interests, including those of the surrogates and the children born through surrogacy, are marginalized).

177 *See* Bassan, *Different but Same*, *supra* note 55, at 334.

178 *See* Shalev et al., *Transnational Surrogacy*, *supra* note 130, at 62–63.

179 *Arad-Pinkas II*.

to the newborn.[180] A partial ruling immediately rejected the proposition that those who are not genetically related to the newborn at all should be eligible as intended parents.[181] However, the claim regarding domestic services for single men and same-sex couples with a genetic relationship to the newborn remained pending.[182] The court returned authority to the legislature to decide how to incorporate the ruling.[183] Because the government indicated that a proposed bill would change the law accordingly, the court suspended its decision to provide the legislature time to address the issue; only in July 2018 was the bill brought up for second and third readings in the Knesset.[184] The amended law expanded the definition of "designated parents" only to single women, leaving single men and same-sex couples ineligible.[185] In this case, the swing-vote power that Haredi parties enjoyed again enabled political pressure, and, as a result, Netanyahu's promise to support the bill was not kept.[186] The new law was perceived as discriminatory, leading to a wave of high-profile social and political protests by the LGBTQ+ community that summer.[187] The protests included an economic strike supported by leaders in different business sectors and peaked in a mass demonstration of 80,000 participants in Rabin Square, Tel Aviv.[188]

---

180 *Id.*

181 HCJ 781/15 Arad-Pinkas v. Comm. for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements L. 5756-1996 (2017) (Isr.) [hereinafter *Arad-Pinkas I*].

182 *Arad-Pinkas II*, ¶ 1.

183 *Arad-Pinkas II*, ¶ 38.

184 *Surrogacy Agreements Law (Approval of Agreement and Status of the Newborn) (Amendment No. 2)*, KNESSET NAT'L LEGIS. DATABASE (2018), https://main.knesset.gov.il/activity/legislation/laws/pages/lawbill.aspx?t=lawsuggestionssearch&lawitemid=2019559 [https://perma.cc/2ZP9-HFMN] [hereinafter "Surrogacy Agreements Law"].

185 *See* Shalev et al., *Transitional Surrogacy*, *supra* note 130.

186 *See* Jonathan Lis & Chaim Levinson, *Netanyahu Votes Against Surrogacy Births for Gay Men Despite Voicing Support*, HAARETZ (July 18, 2018), https://www.haaretz.com/israel-news/2018-07-18/ty-article/netanyahu-votes-against-surrogacy-births-for-gay-men-despite-voicing-support/0 [https://perma.cc/H6ZX-FFNZ].

187 *See* Bauman Bar Rivnai, *This Is How a Protest Is Created: Behind the Scenes of the LGBT Protest Bauman Bar Rivnai*, GLOBES (July 7, 2018), https://www.globes.co.il/news/article.aspx?did=1001247044 [https://perma.cc/67JN-FKYX].

188 *See Thousands to Join Day-Long Strike Sunday by LGBT Community over Surrogacy Law*, TIMES OF ISR. (July 21, 2018), https://www.timesofisrael.com/israel-gears-up-for-strike-protests-by-lgbt-community-over-new-surrogacy-law/ [https://perma.cc/6ZRP-HLU3].

The eligibility discussion remained open until the court issued another partial ruling on February 27, 2020, in which it established the eligibility of same-sex couples and single men for domestic surrogacy services.[189] That ruling is the subject of the following analysis. This Part analyzes the rhetoric and narratives, official and implicit, formed by the court's decision and how they depict the image of women involved.[190] The following critical reading of the narratives used will position the ruling and its consequences in the context of the previously discussed political and cultural setting. Four arguments in the ruling worked together to create a narrative around same-sex eligibility for domestic surrogacy: (1) emphasis on the centrality of family regardless of sexual orientation; (2) the effectiveness of current regulation safeguarding surrogates' health in the process that would persist in any size of the market; (3) the lack of future shortage in surrogates in the face of increased demand; and (4) the agency and autonomy of women to decide to enter the market. The arguments illustrate the way rhetoric translates to implicit narratives and conceptualizations that serve the pro-natalist national value and what they may imply regarding women's rights and life opportunities.

A. Framing and Past Meanings: An Equal Right to a Family and Risks for Women's Bodies

The *Arad-Pinkas* case arose out of equality concerns, sparking a debate about whether the option to use surrogacy applies only to patients with medical fertility problems or includes non-medical social needs of fertile same-sex couples and single men.[191] Against the appellants' argument for the centrality of family regardless of sexual orientation, the state argued that the need to use surrogacy for procreation must be considered in light of the need to prevent the commercialization of women's bodies and to protect the surrogates from the medical, economic, and emotional risks involved.[192]

The court framed the discussion according to the original purpose of the Surrogacy Act.[193] The Aloni Commission, whose advocacy preceded the enactment of the Surrogacy

189 *See Arad-Pinkas II*.

190 *See* discussion *infra* Part III.

191 *See Arad-Pinkas II*, ¶¶ 4–7.

192 *See Arad-Pinkas II*, ¶ 5.

193 *See Arad-Pinkas II*, ¶¶ 17–25.

Act, never intended to withhold from single men and women the right to become parents.[194] But the later Mor Yosef Commission's report mentioned that the Israeli legislature originally saw surrogacy as a solution for bringing children to a specific "end group": a heterosexual couple who was denied the possibility of having children due to a physiological issue preventing the woman from carrying a pregnancy or when, because of the pregnancy, a woman may risk her life.[195]

In the name of equality, the *Arad-Pinkas* court determined that gender and sexual orientation did not change a person's aspiration or right to have a family, which is the principle underlying the Surrogacy Act:

> I find it difficult to find a relevant reason for distinguishing between single women and single men in all matters concerning the exercise of the right to become a parent . . . It is clear that the principle of equality also prevails over the gender difference between women and men, and it seems to me, without setting any concrete rules on the matter, that restricting access to medical techniques for procreation to one gender and not another raises questions.[196]

The court further asserted that "[t]he sweeping exclusion of the group of homosexual men from the application of the surrogacy arrangement is seen as 'suspected' discrimination, which attributes an inferior status to this group, and thus constitutes an additional, severe, and humiliating violation of human dignity based on gender or sexual orientation."[197] Alternative options to establish a family suggested by the state, such as joint parenthood and adoption, did not satisfy the request for equality because they were available to women as well.[198]

But note that the quest to determine the Surrogacy Act's original purpose resulted in differences between the partial ruling of 2017 and that issued in 2020. The first ruling

---

194 *See* ALONI REP., *supra* note 103, at 18 (explaining the proposal for universal fertility treatments regardless of marital status).

195 MOR YOSEF REP., *supra* note 140, at 56 (stating that surrogacy, which is carried out using a woman's body, involves medical, emotional, and ethical implications for her and for her family).

196 *Arad-Pinkas II*, ¶ 10 (citing *Arad-Pinkas I*, ¶ 49).

197 *Arad-Pinkas II*, ¶ 19.

198 *See id.*

concluded that the Act "intended to regulate the surrogacy procedure in Israel in order to fulfill the right to become a parent, while guaranteeing the dignity and integrity of the surrogate and regulating the status of the newborn and his relationship to the intended parents."[199] In the later ruling, the court reframed the purpose of the Surrogacy Act as fulfilling a specific aspect, "the right to parentage under genetic relationship to one of the intended parents."[200] The second part concerning surrogates ("while guaranteeing the dignity and integrity of the surrogate and regulating the status of the newborn and his relationship to the intended parents")[201] is absent from the court's reframing, unless referring to Arad-Pinkas I. "Missing voice" rhetoric is the result of the intentional or unintentional exclusion of an interested group, but its power is the unbalanced weight or intensity given to alternate narratives.[202] Justice Hayut clearly confirms that the final ruling revolves "around men who, without egg donation, are unable to fulfill their right to parenthood, either as individuals or within their family unit as same-sex couples."[203]

The court thus determined that gender and sexual orientation do not change a person's aspiration or right to have a family.[204] According to the court, denying surrogacy services to men because their need is social, rather than medical, ignores the social importance of family, particularly with respect to genetic parenting. Between the harms caused by the increased use of surrogacy and the harms of violating the right to parenthood of ineligible intended parents, the court concluded that the harm to the right to parenthood is far greater than the potential harm of increasing the demand for surrogacy arrangements.[205] It is not that surrogate women are not mentioned later on in this ruling, but rather that they are not included in the formal framing of the discussion.[206]

---

199 *Arad-Pinkas I*, ¶ 38.

200 *Arad-Pinkas II*, ¶ 24.

201 *Arad-Pinkas I*, ¶ 38.

202 *See* Bassan, *Donations*, *supra* note 28, at 43.

203 *Arad-Pinkas II*, ¶ 17.

204 *See id.* ¶ 15.

205 *Id.* ¶ 31.

206 *Id.* ¶ 17.

B. Women's Exposure to Medical Risks and Oversight

Several factors inform a woman's decision to become a surrogate, but exposure to medical risks merits particular attention. The court acknowledged that surrogacy procedures involve medical risks for surrogate women.[207] The medical harms surrogate women expose themselves to are not negligible. Carrying someone else's pregnancy requires a woman to undergo nine months of monitored pregnancy to safeguard the well-being of the fetus and the surrogate.[208] Monitoring includes repeated medical examinations, and surrogacy ultimately ends in labor, which has its own set of difficulties and risks.[209] Pregnancy-related medical problems include, for example, anemia, ectopic pregnancy, gestational diabetes, high blood pressure, severe and persistent nausea and vomiting during pregnancy, vaginal bleeding, infections, preterm labor, miscarriage, depression, and further complications that may occur during childbirth.[210] A pregnant woman is likely to experience body aches, breast changes, constipation, dizziness, fatigue and sleep problems, heartburn and indigestion, hemorrhoids, itching, leg cramps, morning sickness, nasal problems, numb or tingling hands, stretch marks and skin changes, swelling, urinary frequency and leaking, and varicose veins.[211] C-sections involve additional pain and risks.[212] Emotional harms might also be involved.[213] Expanding the number of surrogacy arrangements exposes more women to such health risks.[214]

---

207 *Id.* ¶ 30.

208 *See* Julie Bindel, *Outsourcing Pregnancy: A Visit to India's Surrogacy Clinics*, GUARDIAN (Apr. 1, 2016), https://www.theguardian.com/global-development/2016/apr/01/outsourcing-pregnancy-india-surrogacy-clinics-julie-bindel [https://perma.cc/K85W-VYA8].

209 *See id.*

210 For other medical risks and followed restrictions, see Bassan, *Different but Same*, *supra* note 55, at 329; Francesca Laguardia, *Pain that Only She Must Bear: On the Invisibility of Women in Judicial Abortion Rhetoric*, J.L. & BIOSCIENCES 1, 10–16 (2022).

211 *See* Nicole Knight, *American Motherhood—A Taking*, 43 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 171, 181 (2022).

212 *See C-section*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/c-section/about/pac-20393655 [https://perma.cc/ZJ65-PGGX].

213 *See* Katherine Bright & Gisela Becker, *Maternal Emotional Health Before and After Birth Matters*, *in* LATE PRETERM INFANTS: A GUIDE FOR NURSES, MIDWIVES, CLINICIANS AND ALLIED HEALTH PROFESSIONALS 17–36 (Shahirose Sadrudin Premji ed., 2019).

214 *See Arad-Pinkas II*, ¶ 27 (Handel, J., concurring) (noting that expanding eligibility would disadvantage two groups of women: those suffering from a medical problem that prevents them from carrying pregnancy

The court acknowledged that expanding the circle of potential beneficiaries will inevitably increase the number of women exposed to risks.[215] However, given that risk concerns have already been legitimized for surrogates that carry for eligible populations, the court relied on the effectiveness of the existing legal mechanism to protect surrogates, to ensure that they are indeed fit for the procedure, and that their rights are preserved.[216] There is a logic behind this decision. Looser eligibility rules for surrogacy will increase demand, but the risk to an individual surrogate is not related to the number of arrangements in the market. Any medical procedure must provide appropriate standards to protect the patient.[217] Once surrogacy is accepted as safe for one woman under existing legal safeguards, these safeguards should be sufficient in future procedures for any amount of women who are autonomously consenting to take the risk. The exposure of additional women should not make the risk assessment different. The narrative used in the court's ruling implies that the legal safeguards in the current mechanism are considered trustworthy for the number of surrogates that meet the current demand.[218] In this case, they should suffice for any extent of demand, regardless of the scope of the practice.

However, from a policy perspective, an assessment of costs and benefits should take into consideration the number of women involved, not only the fact that the individual risk is the same. The Mor Yosef Commission report raised a concern of a potentially lower standard of governmental oversight in light of the growing number of surrogacy arrangements.[219] According to this argument, a significant expansion of the surrogacy market would inevitably compromise adherence to the necessary conditions for protecting surrogates and may lead to a reduction in oversight requirements.[220] If the court were to accept that increased demand would erode oversight capacities, it would have had to admit that the extended market is not equally protective as what is offered currently. Instead, the court suggests that the safeguards are not lessened by the expanded exposure, in line

---

and those who may be incentivized to bear the risks involved in surrogacy and serve as surrogates if the rising demand would also raise the price).

215 [216] *See id.*

216 *See Arad-Pinkas II*, ¶ 30.

217 *See Patient's Bill of Rights*, ISR. MIN. OF HEALTH (JUNE 15, 2023), https://www.gov.il/en/pages/patient-rights-page [https://perma.cc/9Q34-CMLP].

218 *See Arad-Pinkas II*, ¶ 30.

219 *See* MOR YOSEF REP., *supra* note 138, at 52.

220 *See Arad-Pinkas II*, ¶ 29.

with the appellants' request at the expense of compromised oversight and potential risk for women.

C. Supply and Demand for Childbearing: Does It Matter How Many Women It Takes to Make a Baby?

Relying on the Mor Yosef Commission report, the state raised a second concern that increasing demand will increase the number of surrogacy applications and create a "shortage" of domestic surrogates.[221] Rising demand may lead to competition between intended parents, increase the contract price (since surrogacy prices in Israel are not fixed but vary to some extent) arguably to its natural price, and impose an economic obstacle for some, including currently eligible intended parents, to exercise their right.[222] This situation will undoubtedly increase the inequality between potential intended parents with financial means and those who, due to the high price, will be prevented from the opportunity to bring a child into the world.[223]

Interestingly, although the practice of surrogacy is monitored by the state and is not truly a "free market," the rhetoric chosen was a common market rhetoric. "There will be a *shortage of surrogates* and this will lead to a rise in prices that will prevent women who do not have the means to use this arrangement."[224] "Expanding the arrangement for men will deepen the *existing shortage* and ultimately make it more difficult for women suffering from a medical problem to use surrogacy."[225] The use of market rhetoric such as "shortage in surrogates" functions in two ways. First, it positions surrogates as a resource, an object in "rising demand," rather than an economic agent, a party to the transaction, and a full

---

221 *See* MOR YOSEF REP., *supra* note 138, at 57.

222 *See id.* at 61–62. The Commission stated that an expansion of the existing law, to include individuals who do not normally suffer from medical fertility issues and whose population greatly outweighs the population of women with medical infertility issues, would necessarily come at the expense of the women whom the law sought to address in the first place. *See id.* A possible solution to the problem would be to increase the supply of female surrogates—that is, to allow additional female populations beyond those listed in the law to serve as surrogates in order to respond to an anticipated rise in demand. However, the Commission recognized that increasing the supply of women would be a problematic solution that may harm the surrogate women themselves. *See id.* The Commission therefore recommended expanding eligibility only to some of the populations. *See id.* However, the criteria to become a surrogate have expanded since then.

223 *See Arad-Pinkas II*, ¶ 26.

224 *Id.* ¶ 26 (emphasis added).

225 *Id.* ¶ 28 **(**Fogelman, J., concurring) (emphasis added**)**.

person. Second, terms such as "shortage," "supply," and "demand" construct an implicit narrative that justifies increased and accessible use of women's bodies to fulfill the strong Israeli narrative about reproduction.[226] The focus on shortage diverts the discussion from the number of women impacted by the expansion to the number of intended parents who may or may not find a solution to their problem. The term "shortage"—which involves an economic term ("scarcity")— diverts the discourse on fertility and reproduction into a consumer discourse, where trading in eggs, wombs, and embryos aims at producing babies.[227] Market rhetoric functioned in the same way in a former discourse in Israel concerning reimbursed egg donation in 2010, allowing payment to egg donors who were not undergoing fertility treatments.[228] Labeling the situation as an "egg shortage" implies a sphere where a solution could be found—the market. It highlights the need to expand access to sources in light of an existing shortage, encouraging action to reduce the shortage by allowing payment in exchange for eggs.[229]

To address the potential shortage, the court looked at the applications submitted for status approval of children born via cross-border surrogacy and at the applications to register children following cross-border industry.[230] 65% of the latter were submitted by heterosexual couples,[231] meaning only 35% of cross-border arrangements were submitted by same-sex couples or singles. The court estimated that not all foreign procedures would

---

226 *See* Janice G. Raymond, *Reproductive Technologies, Radical Feminism, and Socialist Liberalism*, 2 J. INT'L FEMINIST ANALYSIS 133 (1989) (noting the push of the narrative for the need of technology in direct continuity with medical and technological progenitors who present these technologies as fulfilling desperate needs of infertile women).

227 Whether commodification is harmful is a contended issue in areas beyond surrogacy. *See* Lauren Jade Martin, *They Don't Just Take a Random Egg: Egg Selection in the United States*, *in* SELECTIVE REPRODUCTION IN THE 21ST CENTURY 151, 167 (Ayo Wahlberg & Tine M. Gammeltoft eds., 2018).

228 *See* Bassan, *supra* note 28, at 25.

229 *See id.*

230 *See Arad-Pinkas I*, ¶ 26 (referencing the statistical information provided by the statutory committee that reviews applications); ISR. MIN. OF HEALTH, THE NUMBER OF APPLICATIONS SUBMITTED TO THE FETUS CARRIAGE AGREEMENTS APPROVAL BOARD AND THE NUMBERS OF BIRTHS, 1996-2017 (2017), https://www.health.gov.il/DocLib/pon_tofes29.pdf). *See also* ORIANA ALMASI, THE KNESSET RESEARCH AND INFORMATION CENTER SURROGACY PROCEDURES IN ISRAEL AND ABROAD AND THE COMPONENT OF COST FUNDED BY THE STATE (2018), [on file with *Columbia Journal of Gender and Law*] (noting that from 2005–2017, 1,513 applications were submitted to family courts to acknowledge kinship for children born through cross-border surrogacy: 50% (740) of the applications were from heterosexual couples; 25% (366) were from same-sex couples; and 27% (407) were from single applicants, who may or may not be part of a same-sex couple).

231 *See Arad-Pinkas II*, ¶ 26.

be pursued domestically, meaning that future applications to pursue domestic surrogacy would not amount to the entire 35%.[232]

By the time of the 2020 ruling, a change in the criteria to become a surrogate expanded the pool of potential surrogates.[233] Additional categories of women were approved to serve as surrogates: the maximum age of surrogates increased from thirty-eight to thirty-nine; the number of previous births for surrogates allowed prior to embarking on a surrogacy procedure increased from three to four; and married women were allowed to become surrogates.[234] Justice Hayut relied on surrogacy agents testifying that waiting periods to find a surrogate have been shortened since the change (to between two and four months), assumed that the number of interested women must have gone up, and that a shortage in surrogates is unlikely.[235] The implied assumption is that since so far there has not been a shortage, and since surrogate supply has increased, then an estimated less-than-35% increase in demand for domestic surrogacy is unlikely to create a shortage.[236]

The reliance on financially interested stakeholders is surprising, and the narrative perhaps implies that the court indeed sees no problem with exposing more women to the risks involved in the practice and instead trusts the mechanism regulating the practice. However, this calculation is incomplete because assessing the number of women exposed to risks by the market should not only take into account the number of surrogates who deliver the babies to be registered. The number of women actually exposed to risks is far greater than the number of women who gave birth to these children.[237] A surrogate-focused narrative would consider the additional women exposed to risks due to clinical preparation for embryo transfer in several cycles of unsuccessful treatments (including repeated clinic visits and intake of medications), as well as those who miscarried and those who invested

---

232 *See id.* ¶¶ 26–27.

233 See *Carrying Agreements Law (Approval of Agreement and Status of the Newborn) (Amendment No. 2), 5778-2018*, KNESSET (last visited Feb. 25, 2025), https://main.knesset.gov.il/activity/legislation/laws/pages/lawbill.aspx?t=lawsuggestionssearch&lawitemid=2019559 [on file with *Columbia Journal of Gender and Law*].

234 *See* Surrogacy Agreements Law, *supra* note 184.

235 *See Arad-Pinkas II*, ¶ 26.

236 *See id.* ¶ 30. *But see id.* ¶ 7 (Hendel, J., concurring) (mentioning that increasing the pool of potential surrogates could raise concerns that their consent is not free).

237 The number of women engaged in surrogacy procedures (and exposed to risks) is substantially higher than depicted by the number of deliveries. *See* Birenbaum-Carmeli & Montebruno, *supra* note 93, at 2466.

time, money, and emotion without successful outcomes.[238] Even if the demand increases by less than 35%, adding more people to the domestic demand curve for surrogates will inevitably increase the number of women exposed to medical risks, which is larger than the number of applications to approve cross-border procedures after successful procedures and deliveries.

D. Women and the Scope of Autonomy: Into and Within the Market

According to the court's ruling, both surrogates' autonomy and the equal access granted to same-sex couples outweigh the concerns associated with expanding the number of women exposed to risk.[239] A narrative of commercial surrogacy as a legitimate social interaction reflects an underlying liberal assumption that modern surrogate women (in Israel) make their own decisions regarding their bodies and childbearing and that minimal safeguards ensure consent of all approved surrogates.[240] If a woman is autonomous, she should be allowed to choose to enter a surrogacy transaction. This narrative is necessary to legitimize the approach to commercial surrogacy in the Surrogacy Act and assumptively underlies the Court's reasoning, but this is only one narrative out of several available. According to some feminist approaches, for example, autonomy cannot be assured in commercial surrogacy because of social perceptions that affect women when they decide, as well as the inability to anticipate the adverse consequences of surrogacy.[241] Therefore, a higher payment may incentivize people with particular vulnerabilities and pressure women into entering the agreement for the economic benefit.[242] The court raised this concern.[243] If the market is harmful or entering it is questionable, there is a concern that increased demand for surrogate women will be a tempting factor for women unsuitable for the process, who

---

238 *See id.* at 2467.

239 *See Arad-Pinkas II*, ¶ 32.

240 *See* Almog & Bassan, *supra* note 54, at 80.

241 For the duality of discourse surrounding reproductive subjects, see Bassan, *Donations*, *supra* note 28, at 30. Reproductive technologies that involve assisting parties leave great room for women's autonomy when it comes to their decision to commodify their reproductive capacity. They may reflect a policy according to which reproduction is something that can be commodified, but at the same time it amplifies the concern for exploitation. *See* Bassan, *Cross-Border Market*, *supra* note 155, at 611.

242 *See* Courtney Crosby, *Keeping Up with Gestational Carrier Agreements: Considerations Regarding the Regulation of Surrogacy*, 17 RUTGERS J.L. & PUB. POL'Y 357, 383 (2020).

243 *See Arad-Pinkas II*, ¶ 3 (Hendel, J., concurring).

did not previously consider becoming surrogates, to enter it.[244] Alternatively, if the court determines, as it did in this case, that surrogacy is considered a well-regulated, women-protecting process, there should not be a concern that women may enter the market.[245] Attracting women to enter a normalized, legitimized, and protected market should be encouraged, in particular for women who could benefit from it. In such a case, the ruling should allow surrogates to benefit from rising demand as part of their autonomous decision and market powers.

Clearly, the ruling takes an approach of surrogates as autonomous agents who can make decisions about their bodies and take risks as part of their rights.[246] But between the two options—limiting the market out of concerns for women's autonomous decision making, and allowing surrogates to exercise autonomy while profiting from rising demand—the ruling strikes a balance by permitting autonomous choice but restricting the economic opportunities the practice could offer surrogates. Instead of a narrative that allows surrogates to enjoy their market advantage in light of rising demand, the court's concern is based on the implications that a shortage would have on the "consumers" in the market, rather than on the welfare of surrogates—the service providers.[247] Justice Hayut suggested either setting a maximum price control in favor of intended parents, which would disturb the natural supply-and-demand curves and cap the price paid for surrogacy services, or enabling altruistic surrogacy,[248] which would essentially limit the possibilities that the market offers surrogates. This is a peculiar approach in light of the faith the court puts in surrogates' autonomy within the market and in the market regulation. While women's autonomy justifies their participation in the market and contribution to reproductive roles, the ruling implies that the scope of women's autonomy ends when they might benefit from market dynamics.

---

244 *See* MOR YOSEF REP., *supra* note 138, §§ 5.1, 5.3. While acknowledging concerns regarding surrogacy, the Commission refrained from addressing all women as 'exploited' or vulnerable. *See id.* Instead, in light of the findings from the Approval Committee for Embryo Carrying Agreements, the Commission assumed that only a few women are capable of undergoing surrogacy procedures without the practice causing them or their children real harm that might justify a complete abolishment of the process. *See id.* The report alerted that increasing the number of women surrogates might relax the scrutiny involved in involving women who are unsuitable for the practice and might end up exploited or hurt. *See id.* The solution of an assisting woman was therefore conceptualized as an "end solution." *See id.*

245 *See Arad-Pinkas II*, ¶ 30 (President Hayut).

246 *See id.* ¶ 29 (President Hayut).

247 *See id.* ¶ 3 (Hendel, J., concurring).

248 *See id.* ¶ 30 (President Hayut).

If the market properly protects women and an expanded market is accepted, the ruling should follow market principles: efficiency and supply-and-demand curves should allow women to gain from the rising demand and the price set by the market. Rather than manipulate it, the market mechanism should work to the benefit of intended parents and surrogates both. One group's equal opportunity should not come at the expense of another group, and both parties should equally benefit from the chosen mechanism. The perception of women as autonomous agents should necessarily be followed by recognition of their right to leverage the market mechanism so that where their services are in increased demand, prices could go up. Both a liberal feminist and a radical feminist, seeing women as agents who can autonomously choose whether to become a surrogate or not,[249] should support a solution in which surrogacy could be an opportunity for women to gain leverage given rising demand. It is understandable that the court suggests capping the price to assist the appellants and other intended parents who might find higher prices out of reach, but the fact remains: when surrogates could benefit from rising demand, the ruling does not rely on the narrative of autonomous agents and bounds their autonomous decision-making powers and the market rationale by capping the price they could earn. Instead, if the court wanted a more constrained market, it could have encouraged regulating surrogacy agencies and brokers who may tamper with surrogates' autonomy and profit.

The middle ground would support restricting criteria to limit the expansion of such a delicate market on a non-discriminatory basis. In order to decrease the number of women exposed to risk or to efficiently monitor the process, regulation would establish a narrower, inclusive, and non-discriminatory eligibility criterion for domestic surrogacy services, which would apply to all and limit the number of transactions. Naturally, with this option, controversy could arise regarding the relevant restricting criteria and how to prioritize conflicting interests.

The inconsistent approach to surrogates' autonomy exposed in the narrative in the Israeli Supreme Court's ruling reveals an underlying social assumption regarding the legitimacy and harmfulness of the surrogacy market. The implicit narrative both reflects and reinforces values and common understandings behind the two-edged discourse about surrogacy in Israeli society.[250] On the one end, where surrogacy services are founded upon the vision of reproduction as a positive value that is nationally supported, the court ruling reaffirms the hegemony of the pro-natalist reproductive narrative, the dominant narrative

---

249 *See* Sudai, *supra* note 75, at 64.

250 *See* Laguardia, *supra* note 210, at 3.

in Israel.[251] The expansion of the reproduction narrative further widens the already wide availability of reproductive services. On the other hand, it undermines the traditional narrative by offering an updated version, which is sensitive to the diverse meanings that reproductive practices have for different individuals, same-sex couples in particular. Under this framing, the denial of the family model to same-sex couples and single men contradicts the state's Jewish, liberal, and democratic character; does not promote a proper purpose; and does not pass the proportionality tests.[252]

On July 11, 2021, the court finalized its ruling, stating that the term "designated parents" in the Surrogacy Act should be interpreted as referring to heterosexual spouses, same-sex couples, single women, and single men.[253] The legislature was ordered to correct the law to allow same-sex couples and single men access to domestic surrogacy.[254] On December 27, 2021, a director general's circular applied the ruling.[255] The circular changed the previous definition of "intended parents" to a couple or a single *man or woman* with at least one genetic connection to the offspring.[256] It mentions general conditions for eligible intended parents and carrying mothers (surrogates), as well as conditions and procedures for approving the agreements.[257] Although it expands eligible intended parents to individual men or women (and not only couples), it does not, and as an administrative document cannot, restrict the general population's use of surrogacy services in a non-discriminatory way, the suggested restriction in this Article. But at the same time, it does not cap the amount paid to the surrogate. The circular is not a piece of legislation but rather the current policy of the executive branch, the Ministry of Health. It avoids the need to rely on the majority needed in the Knesset for actual legislation, on the one hand.[258] On the other hand, this is a softer legal norm, and each elected government could change it according to its

---

251 *See* Almog & Bassan, *supra* note 54, at 78.

252 *See Arad-Pinkas II*, ¶ 18 (President Hayut).

253 HCJ 781/15 Arad-Pinkas v. Comm. for Approval of Embryo Carrying Agreements under the Embryo Carrying Agreements L. 5756-1996 (2021) (Isr.) [hereinafter *Arad-Pinkas III*].

254 *See* Director General's Circular 7/2021, Law of Agreements to Carry Embryos, 5756-1996 – Guidelines for Application, (2021) (Isr.).

255 *See id.*

256 *Id.* § 2.1.

257 *Id.*

258 *See* Kristopher Kam, *Not Just Parliamentary "Cowboys and Indians": Ministerial Responsibility and Bureaucratic Drift*, 13 GOVERNANCE 365 (2000).

policies. As of May 2023, four babies were born in Israel to gay men, and thirty-two more procedures are ongoing.[259] The wind in the current Israeli government is blowing in more conservative ways and may affect this enabling policy.[260]

IV. The Women Behind *Dobbs*

In June 2022, the United States Supreme Court decided *Dobbs v. Jackson Women's Health Organization*, a challenge to a 2018 Mississippi state law that prohibited abortion after the fifteen-week point in a pregnancy, except in the event that the pregnancy would endanger the mother's life, on the rationale that at this point the fetus begins to "take human form."[261]

The rhetorical framework of the *Dobbs* decision brings forward the wider discussion about abortion in the United States. The *Dobbs* case, just like the Israeli case, was deeply embedded in the context of one of its country's biggest sociopolitical controversies.[262] The complex development of the American legal right to abortion has been thoroughly explored by others and therefore remains beyond the scope of this Article.[263] Instead, this Part reviews the tension that methodological choices create in the Court, the role rhetoric and narrative play within these choices, and the implications the implicit narratives behind the Court's reasoning have on women's rights and life opportunities. The focus of any

---

259 *See White-Blue Surrogacy for Gay Couples*, N12 (May 23, 2023), [https://perma.cc/JBH7-FYCQ]. This number has undoubtedly grown since 2023, but formal statistics are unavailable.

260 *See, e.g.*, Raffi Berg, *Israel's Most Right-Wing Government Agreed Under Benjamin Netanyahu* (Dec. 22, 2022), https://www.bbc.com/news/world-middle-east-63942616 [https://perma.cc/QWV2-Z9GJ].

261 Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

262 *See, e.g.*, Martin Durham, *Abortion and the Politics of Morality in the USA*, 47 PARLIAMENTARY AFFS. 2, 47 (1994); Anshal Tiger et al., *From Marginalization to Empowerment: A Historical Perspective on Advancing Women's Protection and Combating Gender-Based Violence*, INT'L J. RSCH. PUBL'N & REVS. 1867 (2024); Diane Jackson & Jennifer Hoewe, *Congressional Discussions of Abortion: Moral Framing in Context*, 10 PARTISAN RHETORIC & POLARIZATION 89 (2025); Zheng Yuan, *The United States Abortion Controversy in the Context of Institutional Rivalry: The Interweaving of Justice, Politics, and Policy*, 3RD INT'L CONF. ON ART, DESIGN, & SOC. SCI. 157 (2024), https://www.ewadirect.com/proceedings/chr/article/view/15624/pdf [https://perma.cc/PLQ2-X9J5]; Hongkun Wei, *The Debate on Abortion Rights in the United States at the End of the 20th Century*, 9 SAUDI J. HUMANS. & SOC. SCIS. 275 (2024).

263 *See, e.g.*, Barbara Baird & Erica Millar, *Abortion at the Edges: Politics, Practices, Performances*, 80 WOMEN'S STUD. INT'L F. (2020); Linda J. Beckman, *Abortion in the United States: The Continuing Controversy*, 27 FEMINISM & PSYCH. 101 (2017); David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023).

forthcoming analysis is not meant to object to or support one argument or another, but rather to show that the way arguments are framed is inherently political and, as such, has immense implications for women's rights and life opportunities that must be taken into consideration.

A. Framing and Past Meanings: Included/Excluded Narratives

The majority opinion in *Dobbs* centers its ruling around the question of whether the United States Constitution confers an individual right to obtain an abortion or whether states have the authority to regulate abortion as they wish.[264] In answering this question, the majority took an originalist approach to interpreting the Constitution.[265] Originalism is a theory of constitutional interpretation that holds that the Constitution should be read in its historical context, in accordance with the intentions of the Framers who drafted and ratified it.[266] Thus, originalists seek to discern and uphold the intentions of the original Framers, rather than subjecting the Constitution to evolving interpretations based on changing societal norms or the personal views of judges, arguing that this historical approach promotes stability and predictability in the law.[267] In the majority opinion, Justice Alito declares there is no federal right to abortion because it is not mentioned in the Constitution.[268] Therefore, according to the Court, the "Nation's historical understanding of ordered liberty does not prevent the people's elected representatives from deciding how abortion should be regulated."[269]

Through an originalist perspective, the Court determines that "procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or our Nation's history."[270] The majority opinion points out that historically, until the latter part of the twentieth century, there was no legal theory, federal law, or court ruling

---

264 Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

265 *See* Cohen et al., *supra* note 263, at 41; Malinda L. Seymore, *Originalism: Erasing Women from the Body Politic,* 10 ADOPTION & CULTURE 214, 214 (2023) [hereinafter Seymore, *Originalism*].

266 *See generally* MADIBA K. DENNIE, THE ORIGINALISM TRAP: HOW EXTREMISTS STOLE THE CONSTITUTION AND HOW WE THE PEOPLE CAN TAKE IT BACK (2024).

267 *See id.*

268 *Dobbs*, 597 U.S. at 231.

269 *Id.* at 217–18.

270 *Id.* at 221.

suggesting a constitutional right to abortion.[271] "On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until *Roe*'s decision in 1973," and until a few years before *Roe*, no federal or state court had recognized such a right.[272]

However, the Court's narrative can be challenged on several grounds. First, there are, of course, other historical traditions that would support competing interests. To name a few, the Catholic Church has been tolerant of abortion to save the life of the mother, at a minimum, since medieval times.[273] In the wake of the *Dobbs* decision, historians have pointed to evidence that several U.S. states tolerated termination of pregnancies as early as the Antebellum period.[274] According to legal scholar Michele Goodwin, criminalizing abortion was an "economic and political strategy led by male obstetricians who sought to monopolize reproductive healthcare and 'squeeze' [out] skilled midwives" who "'frequently cause[d] abortion openly and without disguise.'"[275] The *Dobbs* Court could have incorporated this narrative when weighing to what extent "a right to abortion is (not deeply) rooted in the Nation's history and traditions."[276] The determination that there was no support in American law for a constitutional right to obtain an abortion can be seen as cherry-picking the factual ground beyond the mere interpretation of the law.[277]

---

271 *See id.* at 216.

272 *Id.* at 250.

273 *See* ANNE STENSVOLD, A HISTORY OF PREGNANCY IN CHRISTIANITY: FROM ORIGINAL SIN TO CONTEMPORARY ABORTION DEBATES 154 (2015); Olivia Campbell, *Abortion Remedies from a Medieval Catholic Nun(!),* JSTOR DAILY (Oct. 13, 2021), https://daily.jstor.org/abortion-remedies-medieval-catholic-nun/ [https://perma.cc/8MRD-TJWC].

274 *See* Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. LEGAL F. 191, 214 (2022) ("In *Dobbs*, the majority claims to canvass history to inform its understanding of the debate involving substantive due process within the reproductive context. Yet, the Court neglects the U.S. Antebellum and Reconstruction histories.") [hereinafter Goodwin, *Involuntary Reproductive Servitude*]; *Historical Abortion Law Timeline: 1850 to Today*, PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/historical-abortion-law-timeline-1850-today [https://perma.cc/ET9B-CHU3].

275 Goodwin, *Involuntary Reproductive Servitude*, *supra* note 274, at 214, 216 (quoting HORATIO R. STORER, WHY NOT? A BOOK FOR EVERY WOMAN 85 (1868)); *see also* Leslie Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973*, in THE REPRODUCTIVE RIGHTS READER 82 (Nancy Ehrenreich ed., 2008)).

276 *Dobbs*, 597 U.S. at 231.

277 *See* Goodwin, *Involuntary Reproductive Servitude*, *supra* note 274, at 214.

Second, the majority's decision frames the discussion as a question of state sovereignty rather than of women's agency.[278] The Mississippi law indeed restricted abortion, but it also restricted women's health rights, their autonomous rights over their bodies, their right to make plans concerning their families and their lives, and many other rights that could and should have been the focus of discussion. The *Dobbs* case could have been framed as a discussion about access to health care,[279] health care disparities that might increase between subpopulations,[280] whether a fetus is a person,[281] or the scope of women's right to make autonomous decisions over their bodies and life opportunities.[282] These concerns are all affected by the law and could have become the center of the legal analysis. But women in general, or their right to make decisions over their own bodies and life options, were seldom mentioned in the majority ruling. If the issue before the Court is framed in a way that leaves out anything not mentioned in the original wording or meaning of the Constitution, it is easy for the Court to exclude women from the ruling.[283] It is hard to weigh something that is absent from available consideration. Obviously, marginalizing certain arguments in the discussion discourages their narratives and helps to promote the chosen, centered perspectives.

---

278 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022).

279 *See, e.g.*, Women's Health Protection Act, H.R.3755, 117th Cong., § 2(a)(1) (2021) ("Abortion services are essential to health care and access to those services is central to people's ability to participate equally in the economic and social life of the United States. Abortion access allows people who are pregnant to make their own decisions about their pregnancies, their families, and their lives.").

280 *The Disproportionate Harm of Abortion Bans: Spotlight on* Dobbs v. Jackson Women's Health, CTR. FOR REPROD. RTS. (Nov. 29, 2021), https://reproductiverights.org/supreme-court-case-mississippi-abortion-ban-disproportionate-harm/ [https://perma.cc/2Z94-63P5].

281 The Court briefly touches on this issue, but only to dismiss the amicus argument that laws prohibiting abortion were passed in bad faith. *Dobbs*, 597 U.S. at 254–55 ("There is ample evidence that the passage of these [state abortion prohibition] laws was instead spurred by a sincere belief that abortion kills a human being . . . One may disagree with this belief (and our decision is not based on any view about when a State should regard prenatal life as having rights or legally cognizable interests), but even *Roe* and *Casey* did not question the good faith of abortion opponents.").

282 *See* Gary J. Simson & Rosalind Simson, *Rescuing* Roe, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 313, 348 (2022) (arguing that the protected right underlying abortion is the right to autonomy rather than the right to privacy); Andrew Koppelman, *Forced Labor, Revisited: The Thirteenth Amendment and Abortion*, 84 NW. L. REV. 480, 510 (2010) (arguing that laws that prohibit abortion violate the Thirteenth Amendment).

283 *See Dobbs*, 597 U.S. at 372 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("If the ratifiers did not understand something as central to freedom, then neither can we.").

Moreover, the Court relied on a previous ruling that had stated that the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women.[284] It therefore ruled that laws regulating or prohibiting abortion are subject to the same standard of review as other health and safety measures, rather than subject to the heightened scrutiny that a discrimination claim would require.[285] In other words, the Court determined that preventing abortion does not constitute discriminatory bias against women. However, while suggesting that abortion is not exclusively a women's issue and thereby implying some equivalent considerations for men, men's reproductive roles and potential competing interests are also not being explored in the ruling.[286] Often, men's roles in human reproduction or arguments that men have a competing interest are rarely discussed in laws about abortion, even though they should be. , they are part of the practice and their interests might not align with those of women.[287] The failure to account for men's role in reproduction, rhetorically and socio-politically, allows jurists and legislators (who are mostly men) the privilege of appearing non-political and objective about decisions that may directly benefit them.[288]

Originalist interpretation has a very clear implication for women's role in the narrative, as well as for their depiction in it: it results in a backward-looking political ruling that perpetuates, reinforces, and obscures an ancient power dynamic with severe

---

284 *Dobbs*, 597 U.S. at 236 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 273–74 (1993)). *But see* Laguardia, *supra* note 210, at 7 (noting that although the right to an abortion is in part based on the same rights of substantive due process and bodily integrity that have been acknowledged by the Supreme Court, historically the burdens of motherhood have not been similarly treated); Koppelman, *supra* note 282, at 510 ("Sexism is as pervasive in the anti-abortion world view as racism was in the Southern peonage system. Just as southern whites typically assumed that blacks were lazy and irresponsible, anti-abortion arguments in contemporary America typically belittle women's capacity for moral agency, often supposing that women who abort simply don't and can't understand what they are doing.").

285 *See Dobbs*, 597 U.S. at 237.

286 *See id.* at 373 (Breyer, Sotomayor & Kagan, JJ., dissenting) (claiming that the majority is not unaware of the connection between abortion and women's health, or that regulations and prohibitions of abortion are governed by the same standard of review as other health and safety measures).

287 *See* Peggy Phelan, *The* Dobbs *Decision: Abortion, Adoption, and the Supreme Court*, 10 ADOPTION & CULTURE 171, 172 (2022) ("Since men's roles in human reproduction are so rarely discussed in laws about abortion, we have tended to ignore the fact that the men making these decisions are also parties to them."). *See also id.* at 176 ("While jurists in *Roe* and *Casey* found that pregnancy impinges on a women's [sic] liberty in a way it does not impinge on men's, they argued that the Fourteenth Amendment made it unconstitutional for her to be compelled to continue a pre-viability pregnancy she did not want."); Penny, *supra* note 54.

288 *See* Phelan, *supra* note 287, at 172.

implications for women's rights and life opportunities.[289] Any ruling based on this method of interpretation automatically excludes under-recognized populations and rights at the time of framing the constitution and obscures the different liberty issues between men and women. With an originalist method of interpretation, the implicit narrative in the Court's ruling is basically written before any claim even reaches the court. The Fourteenth Amendment was written 151 years ago. Because women had no political say at the time of the American Founding, originalism will always be regressive as applied to issues affecting their rights and bodies.[290] This narrative implies that stakeholders, like women, that are not mentioned in the Constitution are not *and will never be* protected by it as a subcategory unless the Court specifically recognizes a case as gender-based discrimination in violation of the Equal Protection Clause.

The dissenting opinion is well aware of the importance of the way the majority frames "the tale."[291] Justices Breyer, Sotomayor, and Kagan point out the inevitable bias behind the majority opinion:

> [O]f course, 'people' did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation.[292]

The dissent points out that when the Fourteenth Amendment was ratified in 1868, women had no legal representation and could not vote.[293] Particularly, it elucidates the rights of those the Founders excluded at the time of the adoption of the Constitution, such as women's rights to vote, own property, maintain custody of their own children, earn wages, and exercise bodily autonomy and reproductive decision making.[294] Recognizing this fundamental limitation, the dissenting opinion therefore employs a different methodological toolset, looking instead at the way the right to abortion is woven into other

---

289 *See* Mary Anne Case, *The Ladies? Forget About Them: A Feminist Perspective on the Limits of Originalism*, 29 CONST. COMMENT. 431, 445 (2013).

290 *See* Seymore, *Originalism*, *supra* note 265 at 214.

291 *Dobbs*, 597 U.S. at 364 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("To hear the majority tell the tale, *Roe* and *Casey* are aberrations.").

292 *Id.* at 372 (Breyer, Sotomayor & Kagan, JJ., dissenting).

293 *Id.* at 373 (Breyer, Sotomayor & Kagan, JJ., dissenting).

294 *See id.*

settled freedoms involving bodily integrity, familial relationships, and procreation, such as the right to purchase and use contraception and the rights of same-sex intimacy and marriage.[295] Centering women, the dissenting Justices argue that prohibiting abortion is the equivalent of "coerced pregnancy" (with rhetoric similar to those who characterize coerced pregnancies as involuntary servitude in violation of the Thirteenth Amendment)[296] and find it absurd that the majority overlooks the clear implications for "a woman's rights to equality and freedom"[297] and her bodily autonomy.[298] They also consider the women who will be denied abortion access and the inevitable future ramifications this ruling will have on their lives,[299] especially given that the fundamental legal and social rationales behind previous rulings mean that *Dobbs*' holding threatens additional constitutional rights.[300] Their analysis shows that centering women in the narrative could enable establishing "the right of individuals—yes, including women—to make their own choices and chart their own futures"[301]—but sadly, this only occurs in the dissent.

B. Women's Exposure to Medical Risks Versus Potential Life

The *Dobbs* Court frames the discourse by focusing on states' authority to regulate abortion, arguing that these regulations must be left to the political process, not the courts.[302] According to the majority, if the Constitution does not protect the right of women to have abortions, the states may regulate abortion for legitimate reasons, and when such regulations are challenged under the Constitution, courts cannot "substitute their social

---

295 *See id.* (Breyer, Sotomayor & Kagan, JJ., dissenting).

296 *See infra* Part IV.D.

297 *Dobbs*, 597 U.S. at 370.

298 *See id.* at 359 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("*Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women . . . Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.").

299 *See id.* at 408 n.27 (Breyer, Sotomayor & Kagan, JJ., dissenting) (discussing the disproportionate effect of the majority's decision on poor women, using evidence from Mississippi's healthcare system as an example).

300 *See id.* at 363 (Breyer, Sotomayor & Kagan, JJ., dissenting).

301 *Id.* at 365 (Breyer, Sotomayor & Kagan, JJ., dissenting).

302 *See id.* at 292. *See also id.* at 274 ("The scheme *Roe* produced looked like legislation, and the Court provided the sort of explanation that might be expected from a legislative body.").

and economic beliefs for the judgment of legislative bodies."[303] The Court maintained that determining what values a state should support when deciding whether to allow or prohibit a reproductive practice is a political endeavor, beyond the authority of the court. The majority opinion mentions that *Roe* and *Casey*, which each struck a balance between the interests of a woman who wants an abortion and the interests of what they termed "potential life,"[304] were criticized because it amounted to "surrender to political pressure."[305] It seems that the Court likes the idea of interpreting the law without interfering with political endeavors because it allows the jurists to present the Court as impartial and objective.[306] The majority opinion in *Dobbs* returns the decision regarding abortion regulations back to the states' legislative bodies, which are in charge of such political decisions.[307]

However, despite using rhetoric about abstaining from the political discourse about abortions, the ruling is political, and the narrative implies several political assumptions. Because Mississippi's Gestational Age Act uses a charged term, "unborn human being,"[308] effectively, the *Dobbs* Court considers the legitimacy of protecting "potential life" as a rational basis for legislation. The Court does not stop there. It goes further and incorporates different historical references to address "the child": "[S]ome manuals repeated Hale's and Blackstone's statements that anyone who prescribed medication 'unlawfully to destroy the child' would be guilty of murder if the woman died."[309] Admittedly, it makes sense that the court focused on the petitioners' claims.[310] Typically, courts address only the narrow question before them. That said, accepting "potential life" as the starting point is in itself a

---

303 *Id.* at 300 (quoting Ferguson v. Skrupa, 372 U.S. 726, 729–30 (1963)).

304 Roe v. Wade, 410 U.S. 113, 150 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).

305 *Dobbs*, 597 U.S. at 291.

306 *See, e.g.*, *Dobbs*, slip op. at 1–3 (Kavanaugh, J., concurring) (positioning the pro-life versus pro-choice conflict at the beginning of his opinion but claiming that the Court is ideologically neutral).

307 *See id.* at 217 ("[T]he people of the various States may evaluate those interests differently.").

308 Gestational Age Act, MISS. CODE ANN. § 41-41-191(4)(b) (2018) ("Except in a medical emergency or in the case of a severe fetal abnormality, a person shall not intentionally or knowingly perform . . . or induce an abortion of an unborn human being if the probable gestational age of the unborn human being has been determined to be greater than fifteen (15) weeks.").

309 *Dobbs*, 597 U.S. at 245.

310 In an adversarial system, this may raise additional questions about who should raise women's interests when an appeal concerns competing interests between the state and men and does not involve women. Given that women's health and life opportunities may be impacted by the decision on the merits, are there legal

political and not a legal question.[311] It is unclear if the determination of whether an unborn child has a "right" to life before birth is an ethical, political, or legal determination.[312] Given that the narrative of the ruling would not extend beyond the original wording of the Constitution, it is unclear whether the Constitution explicitly holds "unborn human being[s]" to be "persons" as protected under the Fourteenth Amendment (the topic of this claim).[313] The *Dobbs* opinion should have further addressed the question of which entities hold rights or are protected by the Constitution. By not doing so, the ruling reaffirms a political rather than a legal narrative—the exact territory the originalist approach aims to avoid. Because the unborn fetus was treated as "potential life," a balancing of competing interests never took place.

Francesca Laguardia sheds light on the narrative choices that are left out of courts' rulings, whether strategically or instinctively, including women's pain and physical burdens from judicial rulings on abortion.[314] According to Laguardia, describing the pain of carrying a pregnancy to term as an unwanted "burden" or "risk" frames the physical trauma many women experience as a mere unpleasantness, aligning with the interests of ideologies that privilege the fetus over the well-being of the mother.[315] This systemic exclusion of women's pain could be explained by the inclination of pro-life and pro-choice lawyers and activists to downplay the actual physical implications of pregnancy.[316] Abortion opponents "portray

---

mechanisms that the Court could and should operate under in order to include what is lost when women are not (or cannot be) at the center of the inquiry (such as intervenors or amici making these arguments)?

311 *See* Dov Fox, *The State's Interest in Potential Life*, 43 J.L., MED., & ETHICS 345, 354 (2015).

312 *See* Patricia A. King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1687 (1978) (showing that the status of a fetus as a legal person varies by jurisdiction and is influenced by political, cultural, and religious views).

313 *See, e.g.*, Gregory J. Roden, *Unborn Children as Constitutional Persons*, 25 ISSUES L. & MED. 185 (2010).

314 *See* Laguardia, *supra* note 210, at 3–4.

315 *See id.* at 2 (arguing that obscuring these details both reinforces and results from a general lack of empathy for women's physical burdens and the refusal to acknowledge that women might have interests of their own). *See also* Almog & Bassan, *supra* note 54, at 47, 18–24 (discussing that downplaying women's exposure to risk is comparable to similar sociopolitical development regarding egg donation, such as in the discussion concerning regulation amendments to the Israeli Egg Donation Act, in which medical risks were deemphasized by decision-makers and functionally promoted the constitutive narrative of procreation).

316 *See* Laguardia, *supra* note 210, at 31.

the fetus's interests as vastly overwhelming the interests of the pregnant person,"[317] and in doing so they objectify and reduce the pregnant woman to a supportive organ to the pregnancy. Pro-choice activists and lawyers often aim to portray a unique right of women, independent of the fetus, rather than talking about competing interests between the woman and the fetus, avoiding the discussion of the fetus's personhood.[318] Their narrative therefore avoids competition and closes the door to a balancing of interests between the pregnant woman and the fetus.

While a right to life is discussed in the *Dobbs* ruling, health rights are not, including the protection of maternal health and safety or the elimination of particularly gruesome or barbaric medical procedures.[319] In *Dobbs*, the pregnant woman is simply not part of the discussion. Both opinions (majority and dissenting) accuse each other of being one-sided: the majority blames the dissenting for ignoring arguments supporting the restriction of abortion,[320] and the dissenting opinion blames the majority for ignoring the interests of women.[321] But the focus on the right to abortion as part of the Constitution, in particular when combined with an originalist approach of interpretation, has driven the discussion away from women's agency and from their bodies, where the potential life is to be carried,

---

317 *Id.*

318 *See, e.g.*, *id.*; Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding a law that bans a specific abortion method, even though the law does not contain an exception for cases that endanger a woman's health); Stenberg v. Carhart, 530 U.S. 914 (2000) (ruling that a state cannot pass an anti-abortion law that does not include an exception for the health of the mother).

319 *See* Selena Simmons-Duffin, *Doctors Weren't Considered in* Dobbs*, But Now They're on Abortion's Legal Front Lines,* NPR (July 3, 2022), https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-dobbs-but-now-theyre-on-abortions-legal-front-lines [https://perma.cc/46WD-7CTP]; Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 270 (2022) (reviewing *Roe*'s balancing of the rights of the mother with the interests of the state based on the trimester).

320 *See Dobbs*, 597 U.S. at 263 ("According to the dissent, the Constitution *requires* the States to regard a fetus as lacking even the most basic human right—to live—at least until an arbitrary point in a pregnancy has passed. Nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that 'theory of life.'").

321 *See id.* at 370 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("The constitutional regime we enter today erases the woman's interest and recognizes only the State's (or the Federal Government's)."); *id.* at 405 (criticizing the majority ruling for revealing "how little it knows or cares about women's lives or about the suffering its decision will cause" and lacking discussion of the possibility for incorporating alternative narratives).

and the medical procedure being performed.[322] It would have been preferable for the Court to craft a narrative that objectifies women rather than completely ignoring them—that is to say, even reducing women to merely "a uterus," disregarding their entire personhood, is more responsible than omitting any concern about them, even health concerns about the well-being of their uteruses.

If the Court's narrative balanced the discussion about potential life with the implications on women's right to health and bodily integrity, restricted access to abortion would potentially be harder to justify. Competing narratives indicate that abortion will be favorable only if medical risks and morbidity are considered. According to the Centers for Disease Control, carrying a pregnancy to term is thirty-three times riskier than having an abortion, at a rate of 20.1 maternal deaths per 100,000 live births compared to 0.6 maternal deaths per 100,000 abortions.[323] Findings of the Turnaway Study, the largest study to examine women's experiences with abortion and unwanted pregnancy in the United States, show that many common claims about the detrimental effects on women's health of having an abortion are unsupported by evidence.[324] Women who have an abortion are not more likely than those denied the procedure to have depression, anxiety, or suicidal ideation.[325] 95% of women report that having an abortion was the right decision for them over five years after the procedure.[326] Amanda Jean Stevenson, a sociologist who studies the impacts of and responses to abortion and family planning policy, notes that in a hypothetical total abortion ban, in the first year of such a ban, estimated pregnancy-related deaths would increase from 675 to 724 (forty-nine additional deaths, representing a 7% increase), and in subsequent years to 815 (140 additional deaths, representing a 21% increase).[327] Estimated

---

322 *See* Stephen G. Gilles, *What Does* Dobbs *Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?*, 92 MISS. L.J. 271 (2023) (arguing that *Dobbs* disregarded the extensive discussions surrounding contentious medical assertions, viewing abortion as a matter of politics rather than medical expertise, and enabled legislative bodies to regulate abortion without considering its medical aspects).

323 KATHERINE KORTSMIT ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, ABORTION SURVEILLANCE — UNITED STATES, 2020 (2022), https://www.cdc.gov/mmwr/volumes/71/ss/pdfs/ss7110a1-H.pdf [https://perma.cc/P2UH-G8UL]; Laguardia, *supra* note 210, at 29 (noting broad acknowledgement that the risk of death is greater in childbirth than in abortion, and the mortality rates of each are often recited).

324 *See* DIANA GREENE FOSTER, THE TURNAWAY STUDY: THE COST OF DENYING WOMEN ACCESS TO ABORTION 20 (2020).

325 *See id.* at 11.

326 *Id.* at 212.

327 Amanda Jean Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, 58 DEMOGRAPHY 2019, 2023 (2021).

pregnancy-related deaths would increase for all races and ethnicities examined, but non-Hispanic Black people would experience the greatest increase in deaths (a 33% increase in subsequent years).[328] According to Stevenson, denying all wanted or induced abortions in the United States would increase pregnancy-related mortality substantially, even if the rate of unsafe abortion did not increase.[329]

A narrative may include or exclude people or ideas, and the choice of whom to include reflects and affects who will benefit and what is to be gained from the Court's ruling.[330] It is clear how a discourse that omits competing interests inevitably leads to a certain implicit narrative that results in an unbalanced picture of the interested bodies in the discussion. If the Court's narrative accounts for the "unborn human being," it should at least also account for the body that carries it.

C. Supply and Demand for Childbearing: Domestic Supply of Infants

To address women's options in a reality where abortion is restricted, the *Dobbs* Court provides a footnote in its opinion, citing a Center for Disease Control study documenting the shortage of "domestic supply" for adoption: "[N]early 1 million women were seeking to adopt children in 2002 (i.e., they were in demand for a child), whereas the 'domestic supply' of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent."[331] The narrative that equates adoption (terminating parental rights) and abortion (terminating pregnancy) implies "the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted"[332] can be "saved" by other people seeking to adopt. Thus, outlawing abortion seems to solve the shortage of adoptable children.[333]

---

328 *Id.*

329 *See id.*

330 *See* Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1572 (1990).

331 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 259 n.46 (2022).

332 *Id.*

333 *See* Phelan, *supra* note 287, at 178. This narrative led many white couples to hold signs proclaiming "We will adopt your baby" during protests after the decision was announced. *See* Jessaca Leinaweaver, *What Is Adopted in* Dobbs*?*, 10 ADOPTION & CULTURE 166, 166 (2022).

It is doubtful that this raw calculation has a hold in reality. There is no mathematical equation that converts abortions into adoptions.[334] It is difficult to know exactly how many "waiting" parents there are across private, public, and international adoption agencies, or how many babies are available. According to the Guttmacher Institute, 930,160 abortions were provided in clinical settings around the United States in 2020.[335] Some of these abortions were done because the fetus was not viable, so it would be misleading to convert these numbers into simple calculations of the "domestic supply" of adoptable children.[336] Moreover, for pregnant women, adoption and abortion are not interchangeable; therefore, banning abortions would not necessarily result in more children for adoption.[337] The Turnaway Study found that among abortion seekers, adoption is infrequently considered or chosen.[338] 91% of people who continued pregnancies against their will did not give the baby up for adoption.[339] The narrative of adoption as an alternative to abortion is not empirically supported.[340]

The *Dobbs* case therefore baselessly implies that, first, proceeding with an unwanted pregnancy is of negligible impact as long as the mother does not have to raise the child. This suggests that families, kinship, and parenthood are all exchangeable.[341] Second, that a pregnancy of fifteen weeks is not different, emotionally or physically, from a pregnancy

---

334 *See* Ashley McGuire, *Cultivating a Pro-Adoption Culture*, INST. FOR FAMILY STUD.: BLOG (June 17, 2019), https://ifstudies.org/blog/cultivating-a-pro-adoption-culture [https://perma.cc/BM3Y-7MFX] ("There are no reliable figures that quantify the number of couples waiting to adopt. Some estimate it to be in the millions. Other estimates say that for every baby placed in adoption, there are 36 couples waiting to adopt.").

335 *Guttmacher Institute Releases 2020 Abortion Provider Census with Important Data on US Abortion Landscape Before the Fall of* Roe, GUTTMACHER INST. (Dec. 1, 2022), https://www.guttmacher.org/news-release/2022/guttmacher-institute-releases-2020-abortion-provider-census-important-data-us [https://perma.cc/GX9Z-KDDZ].

336 *See* FOSTER, *supra* note 324, at 37.

337 *See id.* 175–76.

338 *See id.* at 176.

339 Gretchen Sisson et al., *Adoption Decision Making Among Women Seeking Abortion*, 27 WOMEN'S HEALTH ISSUES 136, 141 (2017).

340 *See* Phelan, *supra* note 287, at 181 ("While some adoption agencies anticipate a slight uptick in the number of people seeking to place unwanted children who might have been aborted otherwise, most recognize that the *Dobbs* decision will not meaningfully increase the 'domestic supply' of infants.").

341 *See* Malinda L. Seymore, *Social Costs of* Dobbs *' Pro-Adoption Agenda*, 57 U.C. DAVIS L. REV. 503, 574 (2023) [hereinafter Seymore, *Social Costs*].

of nine months.[342] Third, that there is little difference between choosing to give birth willingly and being forced to do so.[343] Cynthia Callahan, who explores the role of adoptive kinship in articulating racial and national identities in late nineteenth- and twentieth-century American literature, observes, "To privilege adoption as the optimal alternative to abortion is to substitute one form of disempowerment for another. As a practice, adoption is rooted in pain and loss, even when the outcome is joyful. It is not always joyful. Every family formed through adoption is possible because another family has been broken in some way."[344] Suggesting adoption for women who want to terminate their pregnancies perpetuates the oversimplified depictions of adoption and fails to recognize the complex realities for all those involved.[345] It trivializes the trauma associated with adoption for birthmothers, relinquished children, and adoptive families.

According to Callahan, in an era marked by pervasive consumerism, the process of adoption mirrors a transactional market.[346] Prospective parents engage in a selection process where they evaluate each potential child they encounter. Many potential adoptive parents are reluctant to consider children who do not meet certain criteria, reinforcing the influence of socially constructed preferences in adoption practices. These tendencies are documented in academic research. For instance, a study revealed that 51% of white women expressed a preference for adopting a child of their own race, 60% preferred children under the age of two, and 54% indicated a preference for adopting a non-disabled child.[347] In contrast,

342 *See* Phelan, *supra* note 287, at 180.

343 *See* Seymore, *Originalism*, *supra* note 265, at 2; Erin Chenard, *Maine Voices: Surrogacy Process Throws* Dobbs *Ruling into Sharp Relief*, PRESS HERALD (July 19, 2022), https://www.pressherald.com/2022/07/19/maine-voices-surrogacy-process-throws-dobbs-ruling-into-sharp-relief/ [https://perma.cc/EG7M-9QP3] ("Pregnancy happens inside an existing person. It's not theoretical. Giving birth is unavoidably messy, painful and life-changing. If one has not chosen it, and is not accorded recourse, safety, or respect from beginning to child, it ceases to be a gift and becomes exploitation. No one should ever, ever have the value of a pregnancy placed above their own.").

344 Cynthia Callahan, *Adoption, Abortion, and Ambivalence: Processing the* Dobbs *Decision*, ADOPTION & CULTURE 237, 241 (2022).

345 *See id.* at 239.

346 *See id.*

347 Anjani Chandra et al., *Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States*, 306 ADVANCE DATA 8–9 (1999). The study utilizes data from the National Survey of Family Growth across four survey years—1973, 1982, 1988, and 1995—each based on multi-stage probability samples of civilian, noninstitutionalized women in the United States aged 15–44, ensuring nationally representative estimates. *Id.* Data collection methods and survey design varied across survey years. *Id.* The total sample sizes for these years were 9,797 in 1973, 7,969 in 1982, 8,450 in 1988, and 10,847 in 1995, with the latter including

only 37% of overall respondents were open to adopting a child over the age of twelve, and merely 33% were willing to adopt a child with severe disabilities.[348] These findings highlight the prevailing biases in adoptive-parent preferences.[349] If the first child does not meet a prospective parent's specific criteria, they politely decline and proceed to the next option, ultimately finding the child they deem acceptable. Callahan associates customer choice with adoption and concludes that in the era of consumerism, commercialized adoption validates the adoptive family, seemingly equating the bond formed through adoption with the "chosen baby" to the societal expectation of biological connection.[350]

In this world of supply and demand, the "adoption as alternative" narrative exacerbates an implicit narrative according to which babies are commodified and women are objectified as producers of a scarce resource.[351] This implicit narrative, reinforced in the *Dobbs* opinion, works against contemporary liberal values that emphasize the importance of individual autonomy, equality, and the rejection of any form of dehumanization or commodification, because it objectifies and reduces women to property, valued only for its economic outcomes.[352] This narrative diverts the focus from the child and their best interests, redirecting it toward the desires of prospective adoptive parents, with children being positioned as means to fulfill those desires.[353]

Commodifying narratives also implicate racial disparities. As demand for children to adopt outstripped the supply of white infants, transracial adoptions today represent a significant share of adoptions—21% to about 24% of adoptions between 2000 and

1,553 Hispanic women, 6,483 non-Hispanic white women, 2,446 non-Hispanic Black women, and 365 women of other races. *Id.* However, while the study provides nationally representative findings for U.S. women aged 15–44, its adoption-related conclusions apply specifically to never-married women aged 18–44, resulting in sample sizes of 9,662 in 1973, 4,623 in 1982, 5,280 in 1988, and 6,833 in 1995. *Id.* Adoption is rare among never-married women and those aged 15–17, leading to a number too small for separate statistical analysis. *Id.* Some subgroup analyses, such as adoption preferences by race, may also be affected by small sample sizes, limiting statistical reliability. *Id.*

348 *Id.*

349 *See* Phelan, *supra* note 287, at 178.

350 *See* Callahan, *supra* note 344, at 239.

351 *See* Dahlia Lithwick, *The Horrifying Implications of Alito's Most Alarming Footnote*, SLATE (May 10, 2022), https://slate.com/news-and-politics/2022/05/the-alarming-implications-of-alitos-domestic-supply-of-infants-footnote.html [https://perma.cc/JKP3-F3BW].

352 *See id.*

353 *See* Seymore, *Social Costs*, *supra* note 341, at 504.

2012.[354] As a response to consumers' preferences in this market, adoption agencies have historically exhibited a preference for certain racial backgrounds, often resulting in Black babies being offered at discounted rates to encourage their adoption.[355] Adoption agencies may charge as much as $50,000 to adopt a healthy white infant and as little as $4,000 to adopt a Black infant.[356] Additionally, within this industry, there is interdependence between abortion, adoption, and poverty. Today, poverty is a major factor in the decision to abort.[357] Data collected by Gretchen Sisson indicates that people who relinquish their infants for adoption these days are in their twenties, a majority are already parenting children, and a significant majority earn less than $10,000 a year.[358] The data suggest that low-income relinquishing parents may not have initially planned on putting the baby up for adoption at all, with about one-third reaching out to adoption agencies close to their delivery date.[359] The reality post-*Dobbs* is that the "adoption as alternative" narrative may result in state policies incentivizing low-income populations to give their children to adoption agencies by silencing the abortion option in the adoption decision-making process.[360] If Black babies cost less to adopt than other children, market rationale would encourage babies from this specific subpopulation to satisfy the market. The "adoption as alternative" narrative may imply that, from a commercial point of view, denying access to abortion and forcing

354 Elisha Marr, *U.S. Transracial Adoption Trends in the 21st Century*, 20 ADOPTION Q. 222, 234 (2017).

355 *See* Michele Bratcher Goodwin, *Baby Markets*, *in* BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 6 (Michele Bratcher Goodwin ed., 2010) (pointing out that the usual justification for a two-tiered fee structure based on race is that it is easier to place white children and more difficult to place Black children, but reasoning that if the fees are based on the amount of work it takes to place a child, rather than any intrinsic value of a child, Black children should cost more, not less) [hereinafter Goodwin, *Baby Markets*]; Salendria Mabrey, *Human Discount: Why Do Black Children Cost Less to Adopt?*, FOSTER CARE NEWSL. (Sept. 1, 2016), http://foster-care-newsletter.com/human-discount-black-children-cost-less-adopt/ [https://perma.cc/A92W-HMBF]; NPR Morning Edition, *Six Words: "Black Babies Cost Less To Adopt"*, NPR (June 27, 2013), https://www.npr.org/2013/06/27/195967886/six-words-black-babies-cost-less-to-adopt [https://perma.cc/7PZG-W7BK].

356 Goodwin, *Baby Markets*, *supra* note 355, at 6.

357 *See* Sally Haslanger, *The Adoption "Alternative"*, 10 ADOPTION & CULTURE 278, 281 (2022).

358 *See* Gretchen Sisson, *Who Are the Women Who Relinquish Infants for Adoption? Domestic Adoption and Contemporary Birth Motherhood in the United States*, 54 PERSPS. ON SEXUAL & REPROD. HEALTH 46, 49 (2022).

359 *See id.* at 50.

360 *See* Seymore, *Social Costs*, *supra* note 341, at 504 (outlining many of the potentially coercive tactics that have been employed by adoption professionals to persuade birth parents to relinquish their constitutionally-protected parental rights, including high-tech targeting of potential birth parents, the use of crisis pregnancy centers to steer pregnant persons to adoption, manipulating the emotional stress of pregnancy to procure consent, and taking advantage of the duress of circumstances of poverty).

pregnancy of low-income Black women would result in more children available in the adoption market.[361]

D. Women and the Scope of Autonomy and Political Change

The *Dobbs* majority briefly addresses the argument, raised in *Roe*, that limiting abortion access fundamentally limits women's ability to manage their work and relationships.[362] The majority proposes a counterargument, pointing out that today there is more social tolerance of pregnancy outside of marriage, more legally granted protections in the workplace for pregnant women, greater access to comprehensive healthcare that covers the medical expenses associated with pregnancy, and more laws facilitating putting children up for adoption.[363] But by focusing on the increased support for and alternatives to raising a child, the majority's reasoning does not account for one essential choice women may want available to them: the decision not to continue the pregnancy at all.

The implications of *Dobbs* on access to abortion for women who do not wish to become parents do not follow directly from the framing of the legal question. However, focusing on whether the state is allowed to regulate pregnancies eliminates the human factor (the women) from the narrative and overlooks the real consequences of unwanted pregnancy and forced labor for them. Andrew Koppelman argues that abortion restrictions have the potential to compel motherhood and strip individuals of their autonomy and "control over one's reproductive capacities."[364] According to him, laws that prohibit abortion violate the Thirteenth Amendment's guarantee of equality because forcing women to be mothers makes them into a servant caste, a group that, by virtue of a status of birth, is held subject to a special duty to serve others and not themselves.[365]

---

361 *See* Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1426 (2006) ("Some agencies, guided by the laws of supply and demand, charge lower fees for African American children, higher fees for children who are only half African American, and the highest fees for all other [non-African American] children . . . Under this framework, the same fee applies to adoptions of Caucasian, Latino, Asian American, or Native American children or any combination thereof.").

362 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 258 (2022) ("Without the availability of abortion, [defenders of *Roe*] maintain, people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors.").

363 *See id.* at 258–59.

364 Koppelman, *supra* note 282, at 508.

365 *See id.* at 483.

Women forced to carry an unwanted pregnancy to term after being denied a wanted abortion have greater odds of living below the Federal Poverty Level ("FPL").[366] They are more likely to experience serious complications from the end of pregnancy, including eclampsia and death; more likely to suffer anxiety and loss of self-esteem in the short term after being denied abortion; more likely to experience poor physical health for years after the pregnancy, including chronic pain and gestational hypertension; and more likely to stay tethered to abusive partners.[367] Existing children, and those born of unwanted pregnancy, may also suffer negative repercussions of abortion denial.[368]

Restricted access to abortion harkens back to a historical past where women lacked autonomy.[369] Koppelman specifically highlights how these restrictions disproportionately affect Black women of childbearing age, asserting that the resulting consequences bear a chilling resemblance to elements of slavery.[370] Black women's bodies were historically controlled in the United States according to slave masters' economic stakes.[371] The legal background surrounding the Fourteenth Amendment's "substantive due process" protections for family liberty and autonomy is rooted in the historical context of slavery and the struggle for equal rights. During the era of slavery, slaves were not afforded equal rights and were treated as property.[372] Black people, including former slaves, were often

---

366 *See* FOSTER, *supra* note 324, at 38.

367 *See id.* at 127.

368 *See* Amalia Londoño Tobón et al., *The End of* Roe v. Wade*: Implications for Women's Mental Health and Care*, 14 FRONTIERS PSYCHIATRY 4 (2023).

369 *See* Goodwin, *Involuntary Reproductive Servitude*, *supra* note 274; Goodwin, *Baby Markets*, *supra* note 355 (asserting that adoption as currently practiced in the United States is a racialized market, analogizing to slave markets).

370 Koppelman, *supra* note 282, at 508 (1990) (arguing that some abortion restrictions have the potential to compel motherhood and strip individuals of their autonomy and "control over one's reproductive capacities," and arguing that these restrictions' disproportionate effect on Black women of childbearing age echoes elements of slavery); *see also* Goodwin*, Involuntary Reproductive Servitude*, *supra* note 274, at 197. The amendment protects a woman's right to abortion because compelled pregnancy is a form of servitude. *See* Derrick Bell, *Racial Realism*, *in* THE DERRICK BELL READER 75 (Richard Delgado & Jean Stefancic eds., 2005).

371 *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 4 (2014).

372 *See* MICHELE GOODWIN, POLICING THE WOMB 47 (2020) (reviewing widespread practices of chattel slavery in the 17th, 18th, and 19th centuries in the United States, when most Black women suffered cruel treatment, including physical bondage, food deprivation, physical torture, reproductive coercion and terror, sexual assault, rape, forced reproduction, and stripping away from offspring) [hereinafter GOODWIN, POLICING THE WOMB].

subjected to oppressive practices that violated their family rights and autonomy.[373] White masters could impregnate slave women, including those married, and steal their babies in order to serve their interests, and the state allowed the violation of slaves' rights through the sale of slaves, disrupting marital bonds, and forcibly separating parents from their children.[374] Post-slavery American society continued to introduce oppressive practices that shaped racial disparities regarding reproductive rights. Practices such as forced sterilization, coercive birth control policies, and the criminalization of Black pregnancies and motherhood continued the tyrannical control over Black women's reproductive rights and bodily autonomy.[375]

The Fourteenth Amendment Due Process Clause has been interpreted by the Supreme Court to include a right to privacy,[376] protections for family autonomy,[377] and a parental right to control the upbringing of their children.[378] The Amendment was originally intended to protect former slaves from historical abuses by their state legislatures and to prevent the state from infringing upon family liberty and autonomy.[379] However, these narratives are central to the ongoing public policy debate on the consequences of abortion and should be central to courts adjudicating the legal issue of abortion bans and forced labor as well. But the *Dobbs* Court declined to uphold the idea of substantive due process rights: "While individuals are certainly free *to think* and *to say* what they wish about 'existence,' 'meaning,' the 'universe,' and 'the mystery of human life,' they are not always free *to*

---

373 *See id.* at 98.

374 *See* Goodwin, *Involuntary Reproductive Servitude*, *supra* note 274, at 207.

375 *See* GOODWIN, POLICING THE WOMB, *supra* note 372; *Impediments to Reproductive Justice: The Criminal Legal System and American Carceral State*, 137 HARV. L. REV. 2320 (2024).

376 *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing the right to marital privacy); Roe v. Wade, 410 U.S. 113 (1973) (establishing the right to choose abortion under the Due Process Clause).

377 *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (holding that family autonomy is a fundamental right under the Due Process Clause); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (holding that procreative rights are a fundamental liberty).

378 *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (establishing the right of parents to control the upbringing and education of their children); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (reaffirming the parental right in the context of school choice); Troxel v. Granville, 530 U.S. 57 (2000) (reaffirming the parental right in the context of grandparent visitation rights).

379 *See generally* Michele Goodwin, *The Pregnancy Penalty*, 26 HEALTH MATRIX 17 (2016); *see also* Phelan, *supra* note 287, at 180.

act in accordance with those thoughts."[380] License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty," as referred to by the Court.[381] "Ordered liberty sets limits and defines the boundary between competing interests."[382] To which the dissenting justices answered, ". . . a State can always force a woman to give birth, prohibiting even the earliest abortions. A State can thus transform what, when freely undertaken, is a wonder into what, when forced, may be a nightmare."[383] Specifically, the failure of the majority of the Justices to acknowledge the individual interests of pregnant women downgrades women's experiences, overrides the autonomy of the pregnant woman, and perpetuates stereotypical and subordinated roles for women.[384]

The only context in which the majority opinion acknowledges women's autonomy is in the political sphere, regarding women's electoral or political power. The Court invites "women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office," because "women are not without electoral or political power."[385] Is this lip service or something more? It is not easy for women to enact change through the political system. First, women have more barriers than men to gain political power. Whether as a reason or a result, men far outnumber women in the legislative and judicial branches of the U.S. government,[386] and it is unquestionable who this power dynamic serves (men) and who bears its cost (women). Even if women tried to enter the political sphere, as Justice Alito suggests, men are the primary arbiters of this sphere. As modern politics looks today, the political officials who have to respond to the Court's decisions like *Dobbs* are largely men,[387] who may not

---

380 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 255–56 (2022).

381 *Id.* at 256.

382 *Id.*

383 *Id.* at 362 (Breyer, Sotomayor & Kagan, JJ., dissenting).

384 *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 358 (1992) ("[T]he objective of abortion-restrictive regulation is to force women to assume the role and perform the work that has traditionally defined their secondary social status.").

385 *Id.* at 289.

386 *See* Phelan, *supra* note 287, at 172.

387 *See* Phelan, *supra* note 287, at 172.

always be aware and sensitive to the burdens and implications of "technical" restrictions on women's life opportunities.[388]

Moreover, experience with the Equal Rights Amendment, originally endorsed by both major parties, corroborates the difficulty of amending the Constitution, as only four decisions of the Supreme Court have been reversed by constitutional amendment.[389] Only very few amendments have been ratified throughout the years. For example, the Nineteenth Amendment was ratified in 1920 and granted women the right to vote.[390] The Supreme Court had previously held that the Equal Protection Clause did not guarantee women the right to vote, but the Nineteenth Amendment overruled that decision and established women's suffrage as a constitutional right.[391] However, significant cooperation of political officials is required to overturn Supreme Court decisions through constitutional amendment.[392] Another example of a Supreme Court decision being reversed by a constitutional amendment related to the Equal Protection Clause is the Twenty-Sixth Amendment.[393] This Amendment, ratified in 1971, lowered the voting age from twenty-one to eighteen.[394] In the case of *Oregon v. Mitchell*, the Supreme Court had upheld a law allowing states to set a higher voting age for state elections, but the Twenty-Sixth Amendment overruled that decision and established eighteen as the minimum voting age for all elections.[395]

---

388 *See* Kathleen Parker, *The Abortion Fight Has Pushed GOP Women Out of South Carolina's Senate*, WASH. POST (June 28, 2024), https://www.washingtonpost.com/opinions/2024/06/28/abortion-south-carolina-republican-women/ [https://perma.cc/GGN6-MDAW]. But note that this issue is not one-dimensional. *See* Leigh Ann Caldwell et al., *Republicans Struggle Over What It Means To Be "Pro-Life" Post* Dobbs, WASH. POST (Sept. 14, 2022), https://www.washingtonpost.com/politics/2022/09/14/republicans-struggle-over-what-it-means-be-pro-life-post-dobbs/ [https://perma.cc/83QY-WTXA].

389 *See generally* Chisholm v. Georgia, 2 U.S. 419 (1793); Dred Scott v. Sandford, 60 U.S. 393 (1857); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (aff'd on rehearing, 158 U.S. 601 (1895)); Oregon v. Mitchell, 400 U.S. 112 (1970).

390 U.S. CONST. amend. XIX.

391 *See* Minor v. Happersett, 88 U.S. 162 (1875); *see also* Michele Goodwin, *Challenging the Rhetorical Gag and Trap: Reproductive Capacities, Rights, and the Helms Amendment*, 112 NW. L. REV. 1417, 1419 (2018).

392 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 46 (1980).

393 U.S. CONST. amend. XXVI; Oregon v. Mitchell, 400 U.S. 112 (1970).

394 U.S. CONST. amend. XXVI.

395 *Mitchell*, 400 U.S. at 118; U.S. CONST. amend. XXVI.

The majority in *Dobbs* pretended to take a constitutionally neutral stance, but its ruling was nakedly political. The choice to avoid certain issues is political and affects the legal result.[396] The so-called neutral position avoids taking accountability for the ruling's implications, and those may be severe.[397] Since *Dobbs*, abortion bans and restrictions have led to dramatic increases in patients forced to cross state lines to permissive states and foreign countries for care.[398] This will pile additional hurdles to abortion in terms of costs, risks of detection, and the risk of criminalization of women who seek abortion.[399] Additional costs and stakeholders' rights affected by forced childbearing and childrearing should have been considered as legitimate interests. Goodwin emphasizes the additional cost for women without financial means:

> Some women, especially women of means, will find ways around the State's assertion of power. Others—those without money or childcare or the ability to take time off from work—will not be so fortunate. Maybe they will try an unsafe method of abortion, and come to physical harm, or even die. Maybe they will undergo pregnancy and have a child, but at significant personal or familial cost. At the least, they will incur the cost of losing control of their lives.[400]

---

396 *See generally* Risa Kaufman et al., *Global Impacts of* Dobbs v. Jackson Women's Health Organization *and Abortion Regression in the United States,* 30 SEXUAL & REPROD. HEALTH MATTERS 22 (2022) (highlighting how restrictive abortion laws disproportionately affect low-income women, women of color, and those residing in rural areas, and how the *Dobbs* ruling has hindered women's ability to make informed decisions about their reproductive health); HUM. RTS. WATCH, HUMAN RIGHTS CRISIS: ABORTION IN THE UNITED STATES AFTER DOBBS (2023), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs [https://perma.cc/B477-BLAP].

397 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022) ("We do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision. We can only do our job, which is to interpret the law, apply longstanding principles of stare decisis, and decide this case accordingly.").

398 *See generally New Data Show that Interstate Travel for Abortion Care in the United States Has Doubled Since 2020*, GUTTMACHER INST. (Dec. 7, 2023), https://www.guttmacher.org/news-release/2023/new-data-show-interstate-travel-abortion-care-united-states-has-doubled-2020 [https://perma.cc/YLR5-PSPG].

399 *See generally* Katrina Kimport & Maryani Palupy Rasidjan, *Exploring the Emotional Costs of Abortion Travel in the United States Due to Legal Restriction*, 120 CONTRACEPTION 1 (2023).

400 *Dobbs*, 597 U.S. at 362 (Breyer, Sotomayor & Kagan, JJ., dissenting). *See also* Jolie McCullough & Neelam Bohra, *As Texans Fill Up Abortion Clinics in Other States, Low-Income People Get Left Behind*, TEX. TRIB. (Sept. 3, 2021), https://www.texastribune.org/2021/09/02/texas-abortion-out-of-state-people-of-color/ [https://perma.cc/G728-W3QR].

The Court in *Dobbs* emphasized that its decision "concerns the constitutional right to abortion and no other right" and that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[401] However, the choice not to interfere with the freedom of state legislatures to regulate will not release the Court from dealing with these and other related political issues in the future, when it will be required to address potential appeals challenging these interests, as the dissenting opinion suggests.[402] But in the future, the narratives reaffirmed in this ruling might further fuel social rejection of women's rights and interests in general, and the rights of pregnant women in particular.[403] Following President Donald Trump's victory in the 2024 election, there was a significant increase in Google searches for "birth control," particularly in states with restrictive abortion laws, potentially due to fear of increased abortion restrictions.[404] The language of Supreme Court opinions carries substantial legal coercive power and authority. Missing or poorly framed judicial narratives can, and, in this case, have already become, part of the social discourse.[405] The post-*Dobbs* period is an opportunity to incorporate new narratives, arguments, and strategies supporting women's rights as well as access to reproductive and medical procedures.[406] These narratives may gain social and political power that becomes the foundation for further political strategy and action.

---

401 *Dobbs*, 597 U.S. at 295.

402 *See id.* at 35 (Breyer, Sotomayor & Kagan, JJ., dissenting).

403 *See generally* Adam Grybowski, *A Shift in Perception After SCOTUS* Dobbs *Decision*, PRINCETON SCH. OF PUB. & INT'L AFFS. (Sept. 22, 2022), https://spia.princeton.edu/news/shift-perception-after-scotus-dobbs-decision [https://perma.cc/HEQ9-KN6G]; Chris Jackson et al., *Has the* Dobbs *Decision Made the Public More Divided on Abortion?*, IPSOS (June 22, 2023), https://www.ipsos.com/en-us/has-dobbs-decision-made-public-more-divided-abortion [https://perma.cc/LRT4-7U69].

404 *See* Laura Ungar, *Birth Control and Abortion Pill Requests Have Surged Since Trump Won the Election*, ASSOC. PRESS (Nov. 13, 2024), https://apnews.com/article/abortion-trump-birth-control-plan-b-iud-347022a5655828da4d59a7f3e571c01d [https://perma.cc/3T9H-789G].

405 *See* Laguardia, *supra* note 210, at 4.

406 *See also* David S. Cohen et al., *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1, 12–13 (2022) ("For instance, religious liberty challenges to state abortion bans, regardless of their present success in the courts, could redefine the conversation around abortion's religious and moral value. Focusing on the Thirteenth Amendment could highlight racial injustice and racial disparities in accessing reproductive healthcare, rebutting the recent antiabortion narrative that abortion bans promote racial equality.").

CONCLUSION

Both cases examined in this Article shed light on the power of framing to construct public opinion, reach a legal result, and affect future regulation. Similar narratives and balancing of interests are constructed by the parties in these two cases regarding reproductive practices that are performed on women's bodies against a politically charged background. Both cases address the constitutionality of restricted access to these reproductive practices and eventually side with the petitioners. Each case is embedded in a very different domestic political and cultural discourse, and their results are seemingly divergent: *Arad-Pinkas* expanded access to surrogacy services, while *Dobbs* allowed restrictions on abortion. However, both cases promoted a pro-natalist approach to reproductive issues and implicitly encouraged more pregnancies.

In both cases, the interests of women are downplayed or even ignored as the courts choose to prioritize pro-birth interests.[407] The Israeli case balances potential harms to surrogate women with the right of gay couples to create a family, but it is so focused on providing a solution to the appellants that it minimizes concerns about women's bodies.[408] The methodological choices and strategic historical narrative presented in *Dobbs* leave the impact that the practice performed on women's bodies has on women's lives and the impact of their rights over their bodies undiscussed, outside the frame of the discussion.[409] Abortion discussions are therefore disconnected from the agent and the body where the potential life is carried.[410] Each ruling not only has an impact on women's bodies and health but also creates a ripple effect on other reproductive practices. For example, if the procedure women are seeking would be considered illegal where they live, it will lead to extraterritorial effects. Ineligibility for domestic surrogacy in Israel and some abortion services in parts of the United States will cause oppressed groups to seek out reproductive services across the borders of their countries or states, if they can afford it.[411]

---

407 *See supra* Parts III.B and IV.B.

408 *See supra* Part III.B.

409 *See supra* Part IV.B.

410 *See* Laguardia, *supra* note 210, at 4 ("[A]bstraction is one of the ways that law may 'without justification submerge the perspectives of women and other marginalized groups,' thereby protecting their continued subordination; and it is one reason feminist legal scholars emphasize the need to increase awareness of the actual experiences of those affected by legal principles.").

411 *See* Christine Vestal, *Privacy, Stigma May Keep Workers from Using Abortion Travel Benefits*, STATELINE (Oct. 3, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/10/03/privacy-stigma-may-keep-workers-from-using-abortion-travel-benefits [https://perma.cc/ENZ7-R2GH].

There is a big difference between the cases in women's autonomous decisions about the respective practices: wanting to avoid pregnancy in the case of abortion or the wish to become pregnant as surrogates. The implicit judicial narratives about the women who are subject to these practices consistently downplay their interests. The woman portrayed in these two rulings is autonomous enough to choose to commodify her uterus but not to enjoy the rising price in the market; empowered enough to use her electoral or political capital to affect the legislative process but not to autonomously make decisions about her body and reproductive capacities. Narrative analysis exposes how the concept of autonomy was used to serve the rulings' chosen hegemonic narratives. In the Israeli case, the autonomous decision of women who want to be surrogates aligns with that of intended parents who want to use surrogacy services as well as with the national narrative and market principles. The court relies on women's autonomy when they want to be part of the market and provide surrogacy services.[412] Both arguments regarding surrogates' autonomy and equal accessibility to same-sex couples outweigh the considerations about the harms involved in expanding their exposure to physical risk.[413] However, according to the implicit narrative, their autonomy is unwelcome when they can leverage rising demand in the market, and the court suggested capping the price. In the name of autonomy over their bodies, they can practice surrogacy, but the ruling suggests that they will not have the autonomy to decide at what price. In *Dobbs*, the Court welcomed women's autonomy to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office.[414] In the name of autonomy, women can use their electoral power, but men can use the same electoral power to enact decisions over women's bodies. In both cases, women are only granted partial autonomy, which reflects only partial aspects of their full personhood. The Israeli case might encourage bodily autonomy by loosening restrictions on how and for whom women can become surrogates, while the *Dobbs* case discourages bodily autonomy, and in both cases, the women whose bodies and lives were most affected by the decision were not given a voice.

This Article advocates for the importance of narrative framing and the severe ramifications of what is undertreated or left outside the scope of the judicial discussion. The work of a good legal advocate is to frame the discussion in the way that will best serve their clients' interests. Narrative analysis reveals that in high court decisions, official and implicit narratives have a direct effect on the ruling and the power dynamic between the parties. Framing the case and the arguments is of major importance to the final ruling and

412 *See supra* Part III.D.

413 *See Arad-Pinkas II*.

414 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 289 (2022).

its implications, as it allows the parties to distinguish appealing and unappealing narratives and instrumentally focus on the narrative that would best serve different interests according to the clients. The importance of narratives could and should therefore be carefully considered by the court when discussing reproductive practices, as well as the distribution of their burdens on women's bodies and health systems. Understanding the importance of constructing the legal narrative around women when their bodies and interests are at stake could be relevant to ongoing and future advocacy struggles. Often, the real fight is over the narrative itself.