

Restrictions on Abortion from a Comparative Perspective

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Date : July 29, 2022

Michelle Oberman, [How Abortion Laws Do and Don't Work](#), 36 *Wisc. J. L., Gender & Soc'y* 163 (2022).

With the Supreme Court's rejection of a constitutional right to abortion in the United States, it is instructive to look overseas for lessons from other countries that have restricted abortion rights. In a fascinating account, *How Abortion Laws Do and Don't Work*, Michelle Oberman considers the Israeli experience and what we might learn from a nation that enacted a criminal ban on abortion in 1977.

In Israel, abortion is a crime unless it is approved by a "[pregnancy termination committee](#)." Each three-person committee must include two doctors and a nurse or social worker, at least one member of the committee must be a woman, and the law specifies grounds upon which the committee may approve an abortion. Such an approach is similar to state laws in the pre-*Roe* era, and in the new post-*Dobbs* world, many states have decided to criminalize abortions, with different approaches on exceptions and the process to decide whether a pregnant patient can invoke an exception.

As Oberman is quick to observe, we cannot deduce from one other country's experience with an abortion ban what will happen in the United States. One important limitation is that laws in some states will be more restrictive than the Israeli law. On a spectrum of abortion laws that runs from least restrictive to most restrictive, Oberman places the Israeli law in the middle. (Oberman has previously written about a country at the most restrictive end of the spectrum, [El Salvador](#).)

Still, we can learn valuable lessons from the comparative exercise. Oberman organizes these lessons in terms of six functions of abortion law—criminal sanction, market-structuring force, informal adjudicatory process, shame sanction, expressive function, and truce—and this review touches on some of these functions.

As mentioned, Israel specifies exceptions to its ban on abortion. Abortion is permitted when (1) the patient is younger than the marriage age (currently 18) or older than 40; (2) the pregnancy is the result of criminal, non-marital, or incestuous relations; (3) the fetus is likely to have a physical or mental defect; or (4) the continuation of the pregnancy is likely to endanger the patient's life or cause physical or mental harm. As one might expect, this last ground allows considerable freedom for a committee to authorize an abortion, and in fact, committees approve 98-99% of requests overall. Yet, the law is well settled and uncontroversial, which takes us to the truce function of abortion law.

While it is often thought that abortion provokes persistent controversy in the United States because of the strong and irreconcilable views on the issue, Israel demonstrates otherwise. As Oberman writes, "there is no abortion war in Israel. Israel's law represents an enduring truce; no one is happy about it, but everyone is willing to live with it," even in the ultra-religious community. A key reason for the truce lies in the observations of a former legislator from Israel's Communist Party,

There are many, many issues shaping the left-right continuum in the Israeli polity. But the whole political arena is concentrated on one axis, which involves security, war, peace, Jews, Arabs, settlements, and occupation. These are the issues that organize politics in Israel; there is no real place for an issue like abortion.

Whether abortion is a major part of the left-right continuum in a country, then, is not simply the result of the highly

charged nature of the issue, but the political context. In the United States in the 1970's and 80's, abortion became an effective [wedge issue](#) for the Republican Party to split socially conservative voters from the Democratic Party, and it has since remained a potent vehicle for mobilizing voters.

The Israel-United States comparison also is instructive in terms of the expressive function of abortion law. As Oberman notes, a law's expressive function depends on its context and how well the law's message aligns with other messages that the government sends its citizenry. In Israel, a ban on abortion lines up quite well with the country's efforts to promote procreation. Israel guarantees paid maternity leave for 26 weeks (compared to our 12 weeks of unpaid leave), parents can easily find high-quality, subsidized day care, and the "government pays everyone — rich and poor alike — a small monthly allowance for each child under 18." In the United States, the law does very little to help prospective parents deal with the costs of childrearing that they cannot afford. It's difficult to promote respect for the unborn when one doesn't also try to promote respect for the born.

As mentioned, pregnancy termination committee approval rates are very high. Perhaps the existence of the law discourages some patients from seeking an exception, and others may not make it past the pre-committee screening. But while Israel's law may have a limited impact on preventing abortions, it may do more in terms of the shaming function of law. Patients must explain why they want an abortion multiple times to multiple people—their physician, the secretary for the committee, the social worker or nurse on the committee who screens requests for abortion, and in some cases, the full committee. For a number of patients, committee members may respond in a judgmental way to the request for an abortion. As one social worker said,

when it's a 16-year-old girl that says, 'You know, I was at a party, and I drank something, and I wasn't thinking, and I did it.' You know, I can understand her. I can't understand a married woman, 35 years old, has her three children that she planned. You're a grown up? Why didn't you go to your doctor and put in an IUD, or take some pills! You're not a little child. I will help her because she needs it, and she wants it, . . . but sometimes, it gets me to be angry with them.

There are other important points in Oberman's article. Making abortion a crime doesn't mean there will be prosecutions for violations of the law. Despite the fact that thousands of abortions are performed each year in Israel without committee approval, no one has been prosecuted in the 45 years that the abortion ban has been on the books. Indeed, abortion prosecutions generally are rare, whether one looks at El Salvador today or the United States before *Roe*. And Texas wants to use lawsuits by private parties to punish those who provide, or facilitate the provision of, abortions.

While we won't have a complete sense of the impact of *Dobbs* for some time, Oberman tells us much about the kinds of factors that will matter.

Cite as: David Orentlicher, *Restrictions on Abortion from a Comparative Perspective*, JOTWELL (July 29, 2022) (reviewing Michelle Oberman, *How Abortion Laws Do and Don't Work*, 36 *Wisc. J. L., Gender & Soc'y* 163 (2022)), <https://health.jotwell.com/restrictions-on-abortion-from-a-comparative-perspective/>.