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## *Articles*

LOLITA BUCKNER INNIS\*

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\* Dean and Provost’s Professor of Law, University of Colorado Law School. J.D., University of California, Los Angeles; LL.M., Ph.D., Osgoode Hall Law School, York University. I thank research assistants Hannah Borowski and Katherine Kacena for their assistance. [linniss@colorado.edu](mailto:linniss@colorado.edu).

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#### INTRODUCTION

This Article explores the 1820 criminal case of Connecticut minister Ammi Rogers. Rogers was charged with “a high crime and misdemeanor in a brutal and high handed assault upon the body of Asenath Caroline Smith,”<sup>1</sup> a young woman over two decades his junior.<sup>2</sup> The assault claim, premised first on Rogers’s fornication with Smith, resulted in an out-of-wedlock pregnancy, which Rogers attempted to terminate by first compelling Smith to ingest an abortion-inducing substance and then administering a surgical abortion.<sup>3</sup> Throughout the proceedings, Rogers maintained his innocence, asserting that the prosecution stemmed from vengeful civic and religious authorities who resented his popular but subversive ministering. Authorities faced procedural and legal difficulties in

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<sup>1</sup> REPORT OF THE TRIAL OF AMMI ROGERS, FOR A HIGH CRIME AND MISDEMEANOR, IN A BRUTAL AND HIGH HANDED ASSAULT ON THE BODY OF ASENATH CAROLINE SMITH, OF GRISWOLD, CON. ii (1820) [hereinafter REPORT OF THE TRIAL].

<sup>2</sup> As the prosecuting attorney, James Lanman, asserted during his closing statement in the trial of Rogers:

High crimes and misdemeanors, are offences not precisely defined. . . . Such nameless deeds of guilt as the virtuous lawgiver would never have conceived, are embraced in this extensive term. . . . Every crime of this sort, from its nature, depends upon its own circumstances. It is more or less a high crime, as it is accompanied with traits of aggravation more or less mischievous to mankind, or horrid and malign in the motives by which it was conceived.

*Id.* at 41–42. An annotation in an early nineteenth-century version of Connecticut criminal statutes explained that “[a] *high crime* and *misdemeanor*, at common law, is an immoral and unlawful act, nearly allied and equal in guilt to felony, but not coming strictly within that denomination.” HENRY DUTTON, THE CONNECTICUT DIGEST 533 (1833) (citing *State v. Howard*, 6 Conn. 475 (1827)).

<sup>3</sup> This Article uses the term “surgical” abortion to describe any abortion that involves removing contents of the uterus with an instrument or other physical mechanism. *See, e.g.*, Lauren Hoyson, *Rape Is Tough Enough Without Having Someone Kick You from the Inside: The Case for Including Pregnancy as Substantial Bodily Injury*, 44 VAL. U. L. REV. 565, 584–85 (2010). This use of “surgical” does not imply the abortion was precise, antiseptic, or administered by a medical professional.

convicting Rogers, and he was ultimately sentenced to just two years in prison.<sup>4</sup>

According to the official case report, Rogers began to frequent the Smith home and soon declared an “ardent and honourable” affection for Asenath and promised to marry her.<sup>5</sup> Rogers used his promise to “seduce[] and dishonor[]” Smith.<sup>6</sup> When she told him she was pregnant with his child, he replied that he would marry her only if she “destroyed [the] child,” which he then forced her to do by administering an abortifacient.<sup>7</sup> When she became ill yet remained pregnant, Rogers resorted to other means to end the pregnancy and procured tools he used to “penetrate the womb.”<sup>8</sup> After days of agonizing pain, Asenath’s pregnancy ended.<sup>9</sup> According to a doctor attending to Asenath at the time, she had been between four- and six-months pregnant.<sup>10</sup>

To ensure that Asenath would not reveal Rogers as the would-be father, Rogers took her to Massachusetts. She remained there with him for several months in anticipation of marriage.<sup>11</sup> Once it became clear that Rogers would not marry her, Asenath returned to Connecticut and reported the matter to a magistrate who initiated the case against Rogers.<sup>12</sup> But while awaiting trial, Rogers abducted Asenath. Hoping to have the legal case against him dropped, he pressured her to deny the whole matter.<sup>13</sup> Based on evidence presented at trial, Rogers also attempted to abduct Asenath’s younger sister, Maria Smith. Rogers believed that by removing both sisters—the only witnesses able to testify in detail to his sexual relations with Asenath—from the jurisdiction, he could not be tried or convicted.<sup>14</sup>

The difficulties of prosecuting Rogers in the face of these lurid facts drove the enactment of an 1821 Connecticut statute criminalizing the provision of abortifacients after “quickening.” Rogers’s case, with all its sensational plot twists and turns, relied heavily upon a set of protection narratives about constraining women’s moral and sexual autonomy, limiting the influence of heterodox ideas and people, and

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<sup>4</sup> REPORT OF THE TRIAL, *supra* note 1, at 55.

<sup>5</sup> *Id.* at vii.

<sup>6</sup> *Id.* at viii.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at ix.

<sup>9</sup> *Id.* at x.

<sup>10</sup> *Id.* at 15–16.

<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Id.* at x.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

challenging interventions in reproduction. Connecticut's statute on abortion was one of the first formal legal pronouncements on the topic, and the protection narratives surrounding Rogers's case persisted, even beyond the Supreme Court's decision in *Roe v. Wade*<sup>15</sup> 150 years later.

A protection narrative is a story that encourages the creation of defenses against attack, invasion, injury, or other loss.<sup>16</sup> Protection narratives have played a central role in contemporary debates regarding abortion.<sup>17</sup> Such narratives often center on the need to protect women, their fetuses, and wider social customs and moral codes, from the harms of abortion. Protection narratives define risks against which numerous interests must be defended.<sup>18</sup> These narratives also invoke the need for individual and collective social regulation, which do not have the binding force of formal law but often establish the groundwork for formal legal regulation.<sup>19</sup> Creating protection narratives has frequently acted as a goal unto itself, where the story alone is the point.<sup>20</sup> These narratives have also acted as the rhetorical impetus for exerting

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<sup>15</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>16</sup> See, e.g., JUDITH H. AKS, WOMEN'S RIGHTS IN NATIVE NORTH AMERICA: LEGAL MOBILIZATION IN THE US AND CANADA 104 (2004) (discussing how the Canadian Indian Act functioned as a protection narrative attempting to protect and promote sovereignty, autonomy, and other aspects of the welfare of aboriginal people, even though in some instances it failed in this regard as it concerned women); GUNNAR TRUMBULL, STRENGTH IN NUMBERS: THE POLITICAL POWER OF WEAK INTERESTS 173 (2012) (considering how the foundation of United States drug policy was a protection narrative against unsafe and ineffective drugs). I note here that while this Article's focus is protection narratives meant to limit women's access to abortion, it is possible to articulate narratives that do the opposite: mediate for protecting women's bodily autonomy by elevating women's voices in the debate over abortion. See, e.g., Pamela D. Bridgewater, *Transforming Silence: The Personal, Political, and Pedagogical Prism of Abortion Narrative*, in CRITICAL RACE FEMINISM: A READER 149 (Adrien Katherine Wing ed., 2d ed. 2003).

<sup>17</sup> For example, much of the discussion about "fetal personhood"—the status of an embryo or fetus as a human being with moral and legal rights—centers on whether, when, and how to protect the fetus via criminal law statutes limiting abortion. See April L. Cherry, *Shifting Our Focus from Retribution to Social Justice: An Alternative Vision for the Treatment of Pregnant Women Who Harm Their Fetuses*, 28 J.L. & HEALTH 6, 29–30 (2015).

<sup>18</sup> TRUMBULL, *supra* note 16, at 27–28.

<sup>19</sup> *Id.* at 28.

<sup>20</sup> See, e.g., Joel James Shuman, *The Story Is the Point: Alasdair MacIntyre, Reading Literature, and Teaching Ethics*, 14 EXPOSITIONS 64, 67–68 (2020), <https://expositions.journals.villanova.edu/index.php/expositions/article/view/2525> [<https://perma.cc/C9FK-PPFT>] (arguing that reading certain types of literature is indispensable to understanding ethical or moral frameworks, and that narrative is, by itself, a vital aspect of moral philosophy).

control over weak or endangered people.<sup>21</sup> Protection narratives were especially prevalent during the early national period of the United States, from 1783 through the 1830s.<sup>22</sup>

One specific set of protection narratives seen from the early 1800s were termed “heart balm” laws.<sup>23</sup> These laws provided recourse for women wronged by men, whether by a false promise to marry or alienation of affection. Such laws—especially those concerning breach of promise, and later in the 1800s, seduction—gained special prominence over the course of the “long nineteenth century,” the period from 1789 to until roughly 1914 and the outbreak of World War I.<sup>24</sup> At the foundation of these protective laws were assumptions that women were fragile beings, susceptible to vice stemming from their own

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<sup>21</sup> ALICE MASSARI, VISUAL SECURITIZATION: HUMANITARIAN REPRESENTATIONS AND MIGRATION GOVERNANCE 140 (2021) (considering how narratives concerning the protection of migrants operate as both policy objectives and as “powerful rhetoric to legitimize control measures”).

<sup>22</sup> The early national period, or the early republic, describes the period immediately after the American Revolutionary War up to the 1830s. SARAH J. PURCELL, THE EARLY NATIONAL PERIOD ix (2009). This period represented a radical reconfiguring of United States law and society. The country engaged in external and internal wars with European powers and Native American groups—the latter resulting in vast national territorial expansion. This period also saw the shift away from African enslavement in northern states and its deepened entrenchment in southern states. Changes were also made to ideas regarding whiteness as a racial and civic identifier. As one scholar wrote: “Whiteness—formerly associated primarily with British aristocratic elites—was increasingly extended, actually democratized, to define civic identity in the early national period.” Dana D. Nelson, *Consolidating National Masculinity: Scientific Discourse and Race in the Post-Revolutionary United States*, in POSSIBLE PASTS: BECOMING COLONIAL IN EARLY AMERICA 201, 203 (Robert Blair St. George ed., 2000).

<sup>23</sup> For much of U.S. legal history, a suite of civil laws operated to address disruptions to sanctioned sociosexual relationships. These were often called “heart balm” or amatory laws. JILL ELAINE HASDAY, INTIMATE LIES AND THE LAW 100 (2019). The heart balm laws were criminal conversation, alienation of affection, breach of promise to marry, and civil seduction. Criminal seduction laws also existed.

<sup>24</sup> SASKIA LETTMAIER, BROKEN ENGAGEMENTS: THE ACTION FOR BREACH OF PROMISE OF MARRIAGE AND THE FEMININE IDEAL, 1800–1940, at 1 (2010). Although common law actions for breach of promise to marry originated in the mid-seventeenth century, it was not until the long nineteenth century that they saw their rise to prominence. *Id.* The long nineteenth century is a means of characterizing history, the arts, law, and other disciplines over an extended period of world history that brought numerous changes. The phrase is most often attributed to Eric Hobsbawm. See E.J. HOBBSAWM, THE AGE OF EMPIRE: 1875–1914, at 8 (1987). Although a summary understanding of the long nineteenth century sees it as a way of describing the wide-ranging progress that occurred during the period, there was also, as one author notes, “a lot of bad news throughout the long [nineteenth] century.” Alfred L. Brophy, Book Review, 52 AM. J. LEGAL HIST. 499, 567–68 (2012). This included the supplanting of slavery with Jim Crow. *Id.*

“ungoverned impulses,”<sup>25</sup> or innocents who could become prey to the seduction of “dissolute” men who might cause them to suffer one of the most visible signs of feminine victimhood: out-of-wedlock pregnancy.<sup>26</sup> Women who suffered this fate often faced scorn, stigma, and exile.<sup>27</sup> Aborting a pregnancy was one way to avoid these perils. But abortion had its own risks, among them loose legal regulations surrounding the practice.

Common law abortion norms, and later statutory formulations on abortion, also purported to protect women and unborn children from the health risks associated with abortions, which were often provided by midwives.<sup>28</sup> However, the protection narratives buttressing these laws shifted over the transition from common law norms to statutory regulation during the colonial and early national periods of the United States. Relative to other woman-protective legal regulations, early abortion laws were not widely enforced.<sup>29</sup> The case of Ammi Rogers, despite stemming from a local matter, catalyzed the enactment of an

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<sup>25</sup> Over the course of the nineteenth and early twentieth centuries, this phrase often referred to the embrace of one’s own sexuality. *See, e.g.*, THOMAS PECKETT PREST, KATHLEEN: OR, THE SECRET MARRIAGE 429 (1842). Some social crusaders tied any “unconventional manifestation of sex in an unmarried woman as” evidence of “‘moral imbecility’ or ‘mental deficiency’” and susceptibility to engage in prostitution. A. MAUDE ROYDEN, DOWNWARD PATHS: AN INQUIRY INTO THE CAUSES WHICH CONTRIBUTE TO THE MAKING OF THE PROSTITUTE 131 (1916).

<sup>26</sup> Although much moral reform in the eighteenth-century United States focused on women’s moral failings, by the late eighteenth and early nineteenth centuries, social and legal regulations paid increasing attention to female vulnerability and the libertine men who “ruined” innocent girls before such girls could distinguish between “virtue and vice.” *See, e.g.*, MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN 87 (1793).

<sup>27</sup> The practice of sending women away to avoid the stigma of out-of-wedlock pregnancy persisted for centuries and still occurs in modern times. *See, e.g.*, ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE *ROE V. WADE* (2006). Fessler, describing the last decades of the twentieth century, explained how unmarried pregnant women were often spirited away from their home communities to give birth elsewhere, using pretexts like kidney infections or the need to care for an ailing aunt. “Almost every graduating class had a girl who disappeared.” *Id.* at 2.

<sup>28</sup> LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 73–75 (1997). Reagan describes how midwives were often vilified as “evil” and “dangerous” because they performed abortions, even though doctors, mostly male at the time, also sometimes engaged in the practice.

<sup>29</sup> *See, e.g.*, Lolita Buckner Inniss, *Bridging the Great Divide—A Response to Linda Greenhouse and Reva B. Siegel’s Before (and After) Roe v. Wade: New Questions About Backlash*, 89 WASH. U. L. REV. 963, 966 (2012). Connecticut is the first state to enact explicit criminalization of post-quickening abortion. However, between 1821 and 1841, ten states criminalized abortions, chiefly by making providers of abortifacients and mechanical abortion procedures subject to prosecution and criminal penalties. CONTROLLING REPRODUCTION: AN AMERICAN HISTORY 138 (Andrea Tone ed., 1996).

antiabortion statute in Connecticut in 1821. This was the first such state statute anywhere,<sup>30</sup> and it was replicated throughout the country.

In the two centuries since Connecticut enacted the first abortion statute, abortion has grown in civic and legal importance, frequently serving as a litmus test for politicians and judicial candidates. Many of these public figures have embraced carefully crafted protection narratives in their efforts to shape their personal, political, and jurisprudential identities.<sup>31</sup> For example, today's political and legal conservatives often argue against abortion by promoting narratives that center on protecting unborn children and women.<sup>32</sup> The unborn are often central to these narratives, even trumping the circumstances leading to pregnancy. When abortion protection narratives focus on women, they center on preventing pregnant women from being the "victims" of abortion providers and protecting them from sinister physical and mental post-abortion ailments, such as the apocryphal "post-abortion [stress] syndrome."<sup>33</sup> Hence, there is more often a dual

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<sup>30</sup> CONTROLLING REPRODUCTION: AN AMERICAN HISTORY, *supra* note 29.

<sup>31</sup> Here I use the concept "personal-political identity" as a corollary to what scholars have described as personal narrative identity. Personal narrative identity refers to a person's internal and always evolving life story that is crafted from selected life events, both actual and reconstructed, and from the speculative self—how we imagine ourselves, and how others imagine or perceive us. MAUREEN WHITEBROOK, *IDENTITY, NARRATIVE AND POLITICS* 23–24 (2001). Narrative identities often have thematic elements of personal stories that are premised upon numerous constructs such as agency, redemption, contamination, or communion. DAN P. MCADAMS, *THE REDEMPTIVE SELF: STORIES AMERICANS LIVE BY* xiv, 68–69, 183 (2013). One might view the crafting of personal-political identities in much the same way. WHITEBROOK, *supra*, at 8–9. Jurisprudential identity has been described as the judicial goal of rendering formal justice to litigants in cases, treating "like treatment for like cases," even though this often diminishes the importance of substantive considerations that challenge notions of sameness and difference. Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI.-KENT L. REV. 451, 476 (1990). Also consider how many states—in the wake of *Dobbs*—have put into place draconian antiabortion statutes whose asserted purpose is to protect fetuses.

<sup>32</sup> Protection of the unborn has long been the paramount narrative in the contemporary antiabortion debate. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1713 (2008).

<sup>33</sup> Post-abortion stress syndrome is the name sometimes given to the psychological aftermath of abortion and is premised on post-traumatic stress disorder. Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1196 (2010). Post-abortion stress syndrome is not a term that has been accepted by the medical establishment, but medical professionals acknowledge that there may be various physical and mental abortion aftereffects in women. Instead, since the 1980s when it was first used, post-abortion stress syndrome has been defined and discussed by lay people employing it as a therapeutic call to arms discourse within the antiabortion movement. It was used primarily among women volunteers and clients in the "crisis pregnancy" network during a period when "the antiabortion movement generally argued the moral and political case against abortion in fetal-focused terms." Reva B. Siegel, *The Right's Reasons*:

aspect to protecting against abortion: the “fetal-focused and increasingly confrontational line of argument” that was long the dominant voice of the antiabortion movement, as well as the protection of women themselves from the “dangers” of abortion.<sup>34</sup>

In contrast, contemporary, liberal politicians and legal minds often promote a different protection narrative: one that valorizes women’s autonomy and the right to choose whether to carry a pregnancy to term. However, protecting women’s autonomy is a highly context-specific endeavor that mediates relationships of power.<sup>35</sup> Although political and jurisprudential liberals in the abortion debate chiefly see autonomy as the “right to choose,” it is not clear that all choices will be deemed valid. This is because notions of “postfeminist sensibility” have given rise to a contemporary world where ideas of autonomy, choice, and self-improvement often work alongside growing norms of surveillance that enable the vilification and discipline of those women who make the “wrong” choices.<sup>36</sup> Depending on the social, economic, or political context, choosing to continue a pregnancy can be viewed as “wrong” (ill-considered and self-regarding) or “right” (heroic and selfless). Given these definitions of right and wrong options, women can either be emancipated by the protection of “choice” or further subjugated by

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*Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1657 (2008).

<sup>34</sup> Siegel, *supra* note 32, at 1713, 1722.

<sup>35</sup> CLAIRE E. RASMUSSEN, *THE AUTONOMOUS ANIMAL: SELF-GOVERNANCE AND THE MODERN SUBJECT* xv (2011).

<sup>36</sup> Rosalind Gill, *Postfeminist Media Culture: Elements of a Sensibility*, 10 EUR. J. CULTURAL STUD. 147, 147 (2007). Though political liberals frequently laud a woman’s right to choose or not choose abortion, whether that choice is deemed irrational, properly self-governing, or just plain “right,” often depends upon factors like the race or class of the woman who chooses. See CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 217 (1985). Moreover, not all exercises of choice are liberatory. Agency does not always signal resistance, and “too often, entrenched hierarchies and structures of power follow participants” despite their exercise of binary choices. Lolita Buckner Inniss, *Should I Stay or Should I Go?*, 26 GREEN BAG 2D 19 (2023) (discussing, in the context of the *U.S. News & World Report* survey of law schools, whether law schools who choose not to participate are actually making a difference in how they are perceived). Women of color are especially likely to fall prey to both actual surveillance techniques and surveillance discourses meant to render the maternal or potentially maternal body legible, “leading to a preoccupation with the visible properties of motherhood.” Lolita Buckner Inniss, *It’s the Hard Luck Life: Women’s Moral Luck and Eucatastrophe in Child Custody Allocation*, 32 WOMEN’S RTS. L. REP. 56, 78 (2010). In some cases, “choice architects,” those who structure the ways in which choices are offered and perceived, and the extent to which or whether information about each choice is offered, may act to promote their own ideals and interests and not those of the chooser, thus undermining the value of choosing. Richard H. Thaler et al., *Choice Architecture*, in *THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY* 428, 429 (Eldar Shafir ed., 2013).



it depending on the circumstances.<sup>37</sup> In the pregnancy context, what “choice” really means is the opportunity for women to govern their own fates without either social or formal legal constraints.

Although abortion has occurred throughout U.S. colonial and postcolonial history, the protection narratives that undergird the social and legal regulation of abortion have varied, and those variations are reinforced in law and society.<sup>38</sup> These narratives have persisted via multiple (and sometimes dueling) ideas concerning morality and sex, beliefs that alter when and if a pregnancy begins or ends, and pervasive social and cultural changes that threaten to redefine social hierarchies related to gender, race, and class.<sup>39</sup> As with many other types of narratives, protection narratives about abortion often presuppose the audience’s familiarity with the actors, aims, and conflicts.<sup>40</sup> Such narratives often signal efforts at social transformation, either desired or undesired.<sup>41</sup> These protection narratives persist even in the modern period. These narratives continue to pit the powerful against the powerless and, in many cases, men against women.<sup>42</sup> But despite the

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<sup>37</sup> JENNIFER M. DENBOW, *GOVERNED THROUGH CHOICE: AUTONOMY, TECHNOLOGY, AND THE POLITICS OF REPRODUCTION* 4–5 (2015). Denbow notes that poor women, especially poor women of color, are often castigated for choosing to procreate and for using welfare subsidies for themselves and their children. *Id.* at 83; *see generally* RICKIE SOLINGER, *BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES* (2001). In other instances, women of color may be framed as victims of “genocide” when they undergo abortion. Khiara M. Bridges, *Race in the Roberts Court*, 136 *HARV. L. REV.* 23, 25 (2022). Bridges notes that in *Dobbs*, Chief Justice Roberts relies on outmoded and even specious claims about racism and uses “the Due Process Clause to ‘protect’ black people from what conservative actors have proposed is a genocide perpetrated by abortion providers.” *Id.* at 25.

<sup>38</sup> SMITH-ROSENBERG, *supra* note 36, at 217.

<sup>39</sup> SOLINGER, *supra* note 37, at 170–72.

<sup>40</sup> Narrative theory presupposes that both fictional and nonfictional accounts are framed by paradigmatic structural elements that have particular functions, such as interdiction and violation, actors who inhabit particular roles, such as villains or victims, and conflicts that may be identified by existing tropes, such as rescue or escape. *See, e.g.*, BERT O. STATES, *DREAMING AND STORYTELLING* 93 (1993).

<sup>41</sup> GÉRARD GENETTE, *NARRATIVE DISCOURSE REVISITED* 18–19 (Jane E. Lewin trans., 1988).

<sup>42</sup> To say that men are typically more powerful than women is an essentialist assertion that accounts for much of the way that power has been and is allocated by gender in the United States since its founding. The assertion assumes interraciality because there are often different gender and power dynamics across racial categories. Consider, for example, the widely circulated images of the 2017 “Freedom Caucus” that included many well-known white, male conservative politicians, led by U.S. Vice President Mike Pence, who sought to dismantle insurance coverage for women’s reproductive and sexual health. Michelle Goodwin & Mariah Lindsay, *American Courts and the Sex Blind Spot: Legitimacy and Representation*, 87 *FORDHAM L. REV.* 2337, 2340–41 (2019). It is possible, however, to use essentialism in the service of marginalized groups as an exercise in what has been called

persistence of women's relative social, political, and legal powerlessness (particularly regarding sexual and reproductive autonomy), protection narratives have been reshaped as the public has learned that legal abortion is not a road to dystopia, single-minded excess, and anarchy.<sup>43</sup> Instead, access to a legal abortion may be part of a narrative that affords women reproductive autonomy and creates a more inclusive, just society. Many Americans have also come to understand that the potential scourge of abortion stems not from the act itself but from the reactionary protection narratives that opponents of abortion have engendered. Given the lurid nature of Rogers's case, it is tempting to tell Rogers's story as a purely legal recitation without providing context or positing any additional analytical framework. This Article explains why a purely legal recitation is inadequate and why it is important to understand the narrative context of abortion.

This Article uses an analytical, legal, and historical approach to explore the story of Ammi Rogers and what his story offers to our understanding of contemporary considerations of abortion. This Article, however, goes well beyond the historic account conveyed in legal documents and incorporates an approach more often seen in literature—a narrative analysis of law. The combination of legal, historical, and narrative analysis reveals the history, culture, and politics that have played a part in how we understand abortion in the United States. Moreover, this hybrid theoretical approach supports

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“strategic essentialism.” GAYATRI CHAKRAVORTY SPIVAK, *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* 205 (1988). Strategic essentialism differs from regular essentialism in two important respects. First, definitions are generated internally; the “essential attributes” are defined by the group itself, not by external hegemonic forces. Second, strategic essentialism does not deny that the “essential attributes” are in fact constructs. Instead, signifiers of racialized identity are inverted and used to undermine discourses of oppression. LISA NAKAMURA, *CYBERTYPES: RACE, ETHNICITY, AND IDENTITY ON THE INTERNET* 128 (2002).

<sup>43</sup> See NORMAN BARNESBY, *MEDICAL CHAOS AND CRIME* 211 (1910) (asserting, among other claims, that the desire of modern women to avoid pregnancy was selfish and undermined society, that the increased need for gynecologists was evidence of “national decadence, physical and moral,” and that criminal abortion was a “crime against posterity”); see also KAREN WEINGARTEN, *ABORTION IN THE AMERICAN IMAGINATION: BEFORE LIFE AND CHOICE, 1880–1940* (2014). The author considers how abortion discourses became increasingly explicit toward the end of the nineteenth and into the twentieth century, and how both fictional and nonfictional abortion accounts moved away from euphemistic mentions and more toward sensationalistic, melodramatic discussions of the topic. *Id.* at 2–4. As Weingarten notes, a number of canonical fiction writers such as Gertrude Stein, Theodore Dreiser, and others took up the topic of abortion. *Id.* at 147.

broadening the understanding of history as a living discipline that, in turn, strengthens developments in the present.<sup>44</sup>

This Article makes this methodological intervention in three Parts. Part I reviews the history of early U.S. abortion laws and the protection narratives that supported these laws. Part II addresses the official and unofficial legal cultures<sup>45</sup> that existed at the time of the *Rogers* case and explores how these different legal cultures served as vehicles to transmit protection narratives, especially those in the form of seduction narratives. Part III compares the *Rogers* case to the seduction narrative literature that was pervasive in popular fiction in the late-eighteenth and early- to mid-nineteenth centuries. That Part also discusses how the individuals connected to the *Rogers* litigation can be analyzed through the lens of narrative theorist Vladimir Propp's character typologies. This Article concludes with two reminders: the presence of protection narratives (both stated and unstated) in shaping abortion ideologies is longstanding and ongoing, and these narratives have a pervasive presence—not only in law but also in politics.

## I

### HISTORIC ABORTION LAWS AND THE SHIFTING PROTECTIVE NARRATIVES AT THEIR FOUNDATION

The use of surgical or medicinal means to end an abortion was well-known in Connecticut and elsewhere by the early 1700s. Despite the ubiquity of the procedure, throughout much of the early history of the United States, abortion was rarely the subject of either formal legal or social regulation. One reason for this regulatory void was that during much of this early period, abortion was widely permitted in the United States—if performed before quickening.<sup>46</sup> “Quickening” was a method of assessing the calendrical development of a pregnancy based

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<sup>44</sup> See, for example, the work of H. Patrick Glenn, who asserts that there is an ever-changing “presence of the past,” a dynamic, critical view of law and history that accounts for culture, politics, and other factors. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 1–3 (3d ed. 2007).

<sup>45</sup> Legal culture refers to the shared values, ideas, attitudes, expectations, and beliefs that characterize legal undertakings. See Jo Carrillo, *Links and Choices: Popular Legal Culture in the Work of Lawrence M. Friedman*, 17 S. CAL. INTERDISC. L.J. 1, 1–10 (2007).

<sup>46</sup> Inniss, *supra* note 29, at 966. Though Connecticut represents the first explicit state criminalization of post-quickening abortion, between 1821 and 1841, ten states passed laws that criminalized abortions, chiefly by making providers of abortifacients and surgical abortion procedures subject to prosecution and criminal penalties. CONTROLLING REPRODUCTION: AN AMERICAN HISTORY, *supra* note 29.

upon when the pregnant woman experienced fetal movement.<sup>47</sup> While such movement typically occurs around sixteen weeks after conception, it may happen anytime from ten to twenty-six weeks into the pregnancy.<sup>48</sup> Quickening divided a pregnancy into two distinct periods. Pre-quickening, when a pregnancy was neither socially nor legally cognizable, and post-quickening, when a fetus had legally cognizable rights.<sup>49</sup> Within this regime, protection narratives were at work from conception through birth.

During the colonial and early national periods in the United States, the common law acknowledged that women had the right to protect their own health by removing “blocks” or “obstructions” to the regular functioning of their menstrual periods so long as action was taken pre-quickening.<sup>50</sup> Prioritizing a woman’s health and choice pre-quickening was widely accepted, including in medical and religious establishments.<sup>51</sup> If a woman stopped menstruating, she was able to address her health issue by taking readily available herbs, and her decision was not scrutinized.<sup>52</sup> Moreover, taking the herbs was not viewed as a pretext for abortion; rather, it was a practice viewed as protecting a woman’s health that also happened to terminate an early-stage pregnancy.<sup>53</sup>

During that same time, terminating a pregnancy post-quickening was a crime, and the protection narratives supporting these laws centered on protecting the fetus.<sup>54</sup> But women were rarely prosecuted for having abortions, in part because the prosecution could not assemble sufficient proof to support the case (absent the death of the

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<sup>47</sup> *Roe v. Wade* described quickening as the first recognizable movement of a fetus in utero. CONTROLLING REPRODUCTION: AN AMERICAN HISTORY, *supra* note 29, at 132.

<sup>48</sup> ROBERT LYALL, THE MEDICAL EVIDENCE RELATIVE TO THE DURATION OF HUMAN PREGNANCY xvi (1826).

<sup>49</sup> See Lolita Buckner Inniss, *(Un)Common Law and the Female Body*, 61 B.C. L. REV. E. SUPP. I.-95, I.-101 (2020) (citing J. SHOSHANNA EHRLICH, WHO DECIDES?: THE ABORTION RIGHTS OF TEENS 3 (2006)).

<sup>50</sup> REAGAN, *supra* note 28, at 8. See also WILLIAM BUCHAN, DR. BUCHAN’S DOMESTIC MEDICINE 595–96 (1812). Buchan’s work was popular as a home reference book from the time of its first publication in London in 1769 until the middle of the nineteenth century. Although Buchan did not encourage abortion, his detailed discussion of what could cause abortion effectively provided women with knowledge they needed to attempt a pregnancy termination. *Id.* at 599–601.

<sup>51</sup> REAGAN, *supra* note 28, at 8.

<sup>52</sup> *Id.* at 9; see also LAUREL THATCHER ULRICH, A MIDWIFE’S TALE: THE LIFE OF MARTHA BALLARD, BASED ON HER DIARY, 1785–1812, at 56 (1990).

<sup>53</sup> REAGAN, *supra* note 28, at 9.

<sup>54</sup> *Id.*

woman herself). For example, in 1742, a woman died in Pomfret, Connecticut, after becoming ill in the aftermath of a botched surgical abortion.<sup>55</sup> The case became the subject of a legal inquiry solely because the woman died. During this era, prosecutors were more likely to intercede in cases where death of the pregnant woman occurred or where forcible conduct (i.e., rape) resulted in an unwanted pregnancy.<sup>56</sup>

Given the legal permissibility of abortions pre-quickening and lax prosecution of abortions post-quickening, abortion existed in something of a regulatory vacuum in early U.S. law. Even where American legal authorities in the early national period looked to English common law for guidance, they found no clearly established common-law crime of abortion.<sup>57</sup> And although England passed Lord Ellenborough's Act (a statute outlawing all abortions), it was not automatically adopted in the United States, and abortions pre-quickening were still permissible.<sup>58</sup> For example, in *Commonwealth v. Bangs*, the first post-Revolutionary War case addressing abortion, a Massachusetts court dismissed the charges because the prosecution was unable to prove that the woman had experienced quickening prior to the abortion.<sup>59</sup>

In 1821, Connecticut enacted the first statutory abortion regulation—marking the beginning of the criminalization of abortion in the United States.<sup>60</sup> The statute, however, was limited in scope and permitted surgical abortions performed before quickening.<sup>61</sup> In this respect, the statute codified existing legal norms that criminalized post-quickening abortion induced only by “deadly poison, or other noxious and

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<sup>55</sup> Cornelia Hughes Drayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 WM. & MARY Q. 19, 21–22 (1991).

<sup>56</sup> MARY P. RYAN, *WOMEN IN PUBLIC: BETWEEN BANNERS AND BALLOTS, 1825–1880*, at 97 (1990). This is perhaps in keeping with what scholar Anita Bernstein calls “the common law inside the female body,” the notion that Anglo-American common-law traditions, in what is perhaps a surprise to many, have long supported women's rights to say no to unwanted pregnancy. ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* 151–65 (2019).

<sup>57</sup> *Roe v. Wade*, 410 U.S. 113, 136 (1973).

<sup>58</sup> Lord Ellenborough's Act, 43 Geo. 3 c. 58 (Eng.), [https://en.wikisource.org/wiki/Lord\\_Ellenborough's\\_Act\\_1803](https://en.wikisource.org/wiki/Lord_Ellenborough's_Act_1803) [<https://perma.cc/LBB4-L5SQ>].

<sup>59</sup> *Commonwealth v. Bangs*, 9 Mass. (1 Tyng) 387, 388 (1812).

<sup>60</sup> 22 CONN. PUB. STAT. § 14 (1821).

<sup>61</sup> Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2034 (2011); see Inmiss, *supra* note 29; see also N.E.H. HULL & PETER CHARLES HOFFER, *ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY* 12 (2001).

destructive substance.”<sup>62</sup> Connecticut’s statute also integrated select aspects of Lord Ellenborough’s Act,<sup>63</sup> which made aborting a quickened fetus a capital crime for persons who caused medicinal or surgical abortions<sup>64</sup> but provided lesser penalties for aborting an unquickened fetus.<sup>65</sup> Connecticut’s statute did not impose the death penalty for post-quickening abortions—but it did impose a life sentence.<sup>66</sup> Furthermore, Connecticut’s statute punished only abortion providers (including people who provided abortifacients) and not the pregnant women themselves, who were largely cast as victims in need of protection. While not as punitive as Lord Ellenborough’s Act, the Connecticut statute nevertheless marked a profound transformation—the creation of more bright-line, statutory norms for abortion that

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<sup>62</sup> 22 CONN. PUB. STAT. § 14 (1821). The statute in full reads:

Every person who shall, willfully and maliciously, administer to, or cause to be administered to, or taken by, any person or persons, any deadly poison, or other noxious and destructive substance, with an intention him, her, or them, thereby to murder, or thereby to cause or procure the miscarriage of any woman, then being quick with child, and shall be thereof duly convicted, shall suffer imprisonment in new-gate prison during his natural life, or for such other term as the court having cognizance of the offence shall determine.

*Id.*

<sup>63</sup> Lord Ellenborough’s Act, *supra* note 58. The Act did not concern only abortion; rather, it was aimed at “the further prevention of malicious shooting and attempting to discharge loaded fire-arms, stabbing, cutting, wounding, poisoning and the malicious using of means to procure the miscarriage of women; and also the malicious setting fire to buildings.” *Id.* Notably, the Act also explicitly repealed a 1624 Act, which was meant to “prevent the destroying and murdering [*sic*] of bastard children.” 21 Jac. c. 27 (Eng.), <https://statutes.org.uk/site/the-statutes/seventeenth-century/1623-21-james-1-c-27-to-prevent-the-destroying-and-murdering-of-bastard-children/> [https://perma.cc/2APW-9ZNR]. Infanticide and abortion, though clearly distinct, were sometimes linked in discussions of women’s reproduction in the eighteenth and nineteenth centuries. See R. Sauer, *Infanticide and Abortion in Nineteenth-Century Britain*, 32 POPULATION STUD. 81, 81–84 (1978).

<sup>64</sup> Lord Ellenborough’s Act, *supra* note 58, at para. I (Eng.).

<sup>65</sup> *Id.* at para. II. Portions of Lord Ellenborough’s Act concerning abortion were largely aimed at persons who aided women in causing or procuring abortions and not at women themselves. After 1837, the Act was amended to eliminate the death penalty. See PAUL SAURETTE & KELLY GORDON, *THE CHANGING VOICE OF THE ANTI-ABORTION MOVEMENT: THE RISE OF “PRO-WOMAN” RHETORIC IN CANADA AND THE UNITED STATES* 94 (2015). However, it also eliminated the distinction between quickened and unquickened pregnancies, making intentional pregnancy terminations criminally actionable before and after quickening. *Id.*

<sup>66</sup> This statute was amended to reduce the penalty to several years in prison in 1830. JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900*, at 21 (1978).

largely superseded the thicket of common-law norms and local customs that had previously prevailed.<sup>67</sup>

Other states soon followed Connecticut's lead, adopting similar laws restricting abortions.<sup>68</sup> Connecticut's statute was not the only catalyst for subsequent, related legislation in other states. Its role as the first statute is arguably substantial, if only because its law served as model legislation.<sup>69</sup> Other drivers of legislation outlawing abortion include efforts to protect women from the allegedly harmful influences of nineteenth century "penny press." Penny press was a term used to describe the business practice of producing tabloid-style newspapers. These tawdry, widely distributed journals highlighted sensational stories—including stories about murder and sex scandals. They were also filled with advertisements promoting abortion.<sup>70</sup> The growth of antiabortion legislation may thus have been propelled by both the new law in Connecticut and, simultaneously, the anxieties around publications condoning—or normalizing—abortion in public discourse. These anxieties are evident in and illustrated by the competing narratives of the *Rogers* case. These ostensibly real-life narratives often paralleled the fictional accounts of women's sexual vulnerability that were common features of nineteenth-century literature.

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<sup>67</sup> Notably, during the same legislative period, the Connecticut legislature also amended its statute on sodomy, making it possible for only men to be the victims. 22 CONN. PUB. STAT. § 60 (1821). Connecticut's 1821 sodomy law was not the first time that the state's legislature had treated the offense, but the changes enacted greatly altered the nature of the crime. In 1821, the legislature abolished the death penalty for the act, thereby making it a less serious act. *Id.* Also added was a reference to "carnal knowledge" of a man, thereby narrowing the class of victims. *Id.*

<sup>68</sup> Between 1821 and 1841, ten states passed laws that criminalized abortions, chiefly by making abortifacients providers and performers of mechanical abortion procedures subject to prosecution and criminal penalties. CONTROLLING REPRODUCTION: AN AMERICAN HISTORY, *supra* note 29, at 138.

<sup>69</sup> States have long enacted similar legislation as a result of borrowing from other states' legislation on particular topics. Such similarities are perhaps even more pervasive today where a number of states rely on the same model codes that establish frameworks for various legislative actions, and where states often follow the "gravitational pull" of federal laws in shaping their own laws. See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 707–08 (2016).

<sup>70</sup> The first penny press journal came in the 1830s, quickly followed by several others. See ANDIE TUCHER, FROTH AND SCUM: TRUTH, BEAUTY, GOODNESS, AND THE AX MURDER IN AMERICA'S FIRST MASS MEDIUM 1–2 (1994).

## II

## FACT IN THE FORM OF FICTION: OFFICIAL AND UNOFFICIAL LEGAL CULTURES AND TRANSMISSION OF PROTECTION NARRATIVES

Extralegal protection narratives in the form of seduction narratives often supplemented informal social stewardship and formal law.<sup>71</sup> By generating fear of sexual peril, seduction narratives (narrower forms of protection narratives typically promulgated in novels and other fictional renderings) sought to cultivate greater moral responsibility in its predominantly female readership. Seduction narratives accomplished this work by recounting tales of naive, unmarried women who have fallen from grace after seduction by unscrupulous men.<sup>72</sup> As one scholar observed, “The grim destiny of seduced women in the [seduction] novels is to suffer social disgrace and isolation. This, we are told, is a woman’s sexual fate. Equally inevitable is that the men suffer few sexual consequences.”<sup>73</sup> These seduction narratives were accessible to a large audience thanks to growing literacy, accessible prose, affordable books, and the rising popularity of lending libraries during the early national period.<sup>74</sup>

Significantly, many new readers were women.<sup>75</sup> To attract this new pool of readers, journalistic and legal report writers began to mirror this literary style in their coverage of analogous real-world events involving women imperiled by “villainous” men. News and legal outlets publicized and disseminated stories using narrative techniques typical of seduction narratives, including the use of titillating details

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<sup>71</sup> “Social stewardship” has been defined as efforts to promote greater social stability via measures such as widening access to resources and concerns with human potential. LUC TAYART DE BORMS, *FOUNDATIONS: CREATING IMPACT IN A GLOBALISED WORLD* 162 (2005). Though the phrase frequently appears in contemporary human rights and governance literature, it has a long history. Social stewardship, for example, was the goal of some late nineteenth- and early twentieth-century reformers who wanted to promote social values such as chastity, orderliness, sobriety, and dependability. DOUGLAS FLAMMING, *CREATING THE MODERN SOUTH: MILLHANDS AND MANAGERS IN DALTON, GEORGIA, 1884–1984*, at 42 (1992); see also *PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION* 13 (1913) (describing social stewardship as the need for those of “larger knowledge and power” to minister to those of “restricted life” in order to promote honest, sincere, efficient, and faithful community members).

<sup>72</sup> ELIZABETH BARNES, *STATES OF SYMPATHY: SEDUCTION AND DEMOCRACY IN THE AMERICAN NOVEL* 8–9 (1997).

<sup>73</sup> Jane E. Larson, “*Women Understand So Little, They Call My Good Nature ‘Deceit’*”: *A Feminist Rethinking of Seduction*, 93 *COLUM. L. REV.* 374, 377 (1993).

<sup>74</sup> RICHARD GODBEER, *SEXUAL REVOLUTION IN EARLY AMERICA* 265–66 (2002).

<sup>75</sup> *Id.*



and forlorn heroines.<sup>76</sup> This was true of the coverage of the *Rogers* case, where the style and content of both the official and unofficial case reports closely resembled a seduction narrative.

Contemporary readers of the official *Rogers* case report may be struck by the inflammatory and prejudicial commentary contained in an official government report. However, many case reports dating from the early national period through the late nineteenth century were often journalistic renderings that incorporated narrative techniques commonly found in seduction literature. Thus, case report authors often incorporated commonly known fables to convey meaning or changed facts to make them more salacious.<sup>77</sup> Even case reports commissioned and undertaken by official actors in the early national period were often biased, erroneous, sparse, or absent all together.<sup>78</sup> Collectively, this approach to case reports created an unofficial legal culture where fictional seduction tales gave birth to salacious court reports and vice versa. This mutual reinforcement between official and unofficial legal cultures was at work in *Rogers*, and the clash between official and unofficial legal cultures is what allows the case to be read as a nonfiction seduction narrative.

#### A. Official and Unofficial Legal Cultures

In the early national period, the United States had lax standards for the preparation of formal legal case reports—if reports were prepared at all.<sup>79</sup> Connecticut was among the earliest states to publish case

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<sup>76</sup> SARI EDELSTEIN, *BETWEEN THE NOVEL AND THE NEWS: THE EMERGENCE OF AMERICAN WOMEN'S WRITING 2* (2014). One scholar has also asserted that fictional techniques of gothic literature were also used to frame real-life tales of villainous men who victimized women. See Karyn Valerius, *A Not-So-Silent Scream: Gothic and the US Abortion Debate*, 34 *FRONTIERS: J. WOMEN STUD.* 27, 27–29 (2013). Valerius describes gothic literature as “the literary genre that entertains readers by scaring them.” *Id.* at 27. Some of its formal features are “sensational rhetoric; suspense-driven narrative; plots involving persecuted heroines and sinister villains” and “characteristic tropes such as the unspeakable; manifestations of the fantastic (super-natural encounters) and of the grotesque (monsters).” *Id.* at 27–28. Gothic is meant to explicitly terrify the reader, and to thus evoke a more pronounced and immediate emotional impact upon the reader. *Id.* at 29–30. In the context of gothic, abortionists are portrayed as “depraved villains who prey on female victims in vice-ridden urban spaces.” *Id.* at 28.

<sup>77</sup> See Daniela Carpi, *Fables of the Law, a Literary Perspective*, in *FABLES OF THE LAW: FAIRY TALES IN A LEGAL CONTEXT* 3, 25 (Daniela Carpi & Maret Leiboff eds., 2016).

<sup>78</sup> Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 *AM. J. LEGAL HIST.* 28, 32 (1959).

<sup>79</sup> *Id.* One noteworthy exception was the work of Alexander James Dallas, who wrote the first compilation of Pennsylvania legal cases in 1790. Dallas's work was widely praised for its quality. *Id.* at 34.

compilations written by a single compiler, dating from a 1785 state law that required judges in certain tribunals to prepare their decisions in writing.<sup>80</sup> But the mandate for judges to prepare written accounts did not mean that every case before every state tribunal would be compiled or published. Although this law created some impetus for the professionalization of the court reporting process, the earliest official compilers of cases in Connecticut sometimes had scarce resources, which limited many of their writing and publication efforts. In practice, this meant that cases heard in the Connecticut Supreme Court of Errors were more often the subject of close attention from professional case reporters instead of lower court cases. This led to a separate system of case reporting where publishers filled the void in reported cases by producing pamphlet case reports that were also designated as “official” renderings by those undertaking them. The pamphlet format was especially common for cases of broad public interest like *Rogers*, which was heard in the Superior Court in New London and was not reported in the larger formal compilation.

Because both lawyers and nonlawyers engaged in legal pamphlet writing, and because judges in lower courts sometimes lacked the expertise of their higher court brethren, pamphlet case reports were sometimes more imprecise, embellished, or enhanced versions of what went on in a legal proceeding. This generated a legal culture—shared notions of how law operates in a particular context—where even the “official” case accounts were sometimes infused with misleading or false information.<sup>81</sup>

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<sup>80</sup> Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1295, 1297–98 (1985). Judges of the Supreme Court of Errors and the Superior Court were required “to give in writing the reasons of their decisions upon points of law[] and lodge them with their respective clerks, with a view, as the statute expressly declares that the cases might be fully reported.” *Id.* at 1297–98 (quoting “An act establishing the wages of the judges of the superior court,” 3 State Rec. May Sess. 1784 at 9).

<sup>81</sup> See Sally Engle Merry, *What Is Legal Culture? An Anthropological Perspective*, 5 J. COMP. L. 40 (2010) (including Merry considering how people produce and experience legality as part of legal culture). In contrast, while contemporary legal reports may contain the occasional error, rarely do they stray far from the facts adduced in legal proceedings. Notably, modern courts will sometimes forego rendering full opinions in cases, choosing to leave those cases “unpublished” so that they will not be considered legal precedent. But most contemporary courts reduce outcomes to writing in at least some cursory, unofficial form. Courts often decide not to publish cases for three main reasons: (1) there are already many similar cases in the given jurisdiction, (2) the case does not have legal merit, and (3) the need to ensure quality by limiting the number of published opinions written. There may also be instances in which courts choose to leave decisions unpublished because of the alarming or inflammatory nature of the details. See, e.g., Lolita Buckner Inniss, *It’s About Bloody Time and Space*, 41 COLUM. J. GENDER & L. 146, 152 (2021) (discussing how courts

The *Rogers* case almost escaped wide public notice entirely. The matter first came before Judge Jeremiah Brainard of the Connecticut Superior Court in January 1820.<sup>82</sup> At the time, two of the principal witnesses in the matter, the alleged victim Asenath Smith and her sister Maria Smith, were unavailable to testify, making the first proceeding so brief that there was little to report. Rather than letting the matter go, it was pursued, especially after the prosecution established that the women were absent because defendant Ammi Rogers took them out of Connecticut to prevent them from testifying. The prosecution argued that the record of statements that the women had made previously in the Court of Inquiry be admitted as evidence in the trial.<sup>83</sup> Rogers's counsel objected, and the court agreed to hold the matter over until October, when the women would be present. Thus, Rogers's case came before Judge Asa Chapman<sup>84</sup> for a full criminal trial spanning three days in October 1820.<sup>85</sup>

Various details about the case can be drawn from multiple, sometimes conflicting accounts in a legal summary found in the official case publication, news reporters' descriptions of the proceedings, and Rogers's own written account of what occurred at trial. As the author of the official case report account observed, *Rogers* was a case about which much had been "incorrectly said."<sup>86</sup> The case was full of "indelicate" and "disgusting" facts, but ones that should be told, the author insisted, in order "to furnish the public with an *authentic* statement of facts" that would supplant scurrilous news reports and gossip.<sup>87</sup> In contrast, the official report hoped to be "safe, even for

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frequently chose not to publish child sexual assault cases). For example, in some contemporary cases, appellate court summaries of evidence given at proceedings below may be vivid, sequential, and declarative, which can possibly give inaccurate narrative accounts of testimony that was originally given in a more static, less decisive, question and answer format without an immediately evident narrative thread. See, e.g., Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 *YALE J. L. & HUMANS*. 1, 7–8 (2006).

<sup>82</sup> REPORT OF THE TRIAL, *supra* note 1, at 12.

<sup>83</sup> *Id.*

<sup>84</sup> Judge Asa Chapman was a judge of the Connecticut Supreme Court who sat as a Superior Court judge in this matter. Chapman was described as a man of "good humor, genial temper, and great colloquial powers, which he exercised very freely on the trial of cases." DWIGHT CANFIELD KILBOURN, *THE BENCH AND BAR OF LITCHFIELD COUNTY, CONNECTICUT, 1709–1909*, at 77 (1909). It is hard to imagine that a trial on a topic so baneful as *Rogers* could have left room for the exercise of any of these qualities.

<sup>85</sup> See Lord Ellenborough's Act, *supra* note 58.

<sup>86</sup> *Id.*

<sup>87</sup> REPORT OF THE TRIAL, *supra* note 1, at iv.

female perusal.”<sup>88</sup> The author noted, however, that given the subject matter, some women might find it offensive or unsuitable.<sup>89</sup>

In addition to the state sanctioned case reports, newspapers offered purportedly neutral accounts of the trial. Some papers promised to publish the proceedings in full, but most journalistic accounts either failed to remain objective or exaggerated facts. For example, an article published in the *Hampden Patriot*<sup>90</sup> explained that Rogers was accused of “seducing a young woman . . . a widow’s daughter, begetting her with child,” performing an abortion, and thereby endangering her life that she “scarcely surviv[ed].”<sup>91</sup> Similar accounts appeared in other Connecticut newspapers.<sup>92</sup> Many journal reports quickly descended into barbed, harsh commentary, declaring Rogers to be someone evincing “baseness”<sup>93</sup> and a “cold calculating depravity of heart.”<sup>94</sup> Journalists also labelled him “a clerical monster”<sup>95</sup> and a “degraded priest.”<sup>96</sup>

Rogers countered the official case report and newspaper stories with his own memoir, which was first widely distributed in 1826.<sup>97</sup> Rogers further elaborated on the trial in eight revised editions of his memoir, published between 1830 and 1848. Rogers’s own account resembled a protection narrative, but one that offered a cautionary tale for men like himself whom he perceived to be potential victims of social, religious, and legal institutions. For example, the summary of his 1826 memoir claimed he was “persecuted in the state of Connecticut, on account of religion and politics, for almost twenty years[,] [a]nd finally, falsely accused and imprisoned.”<sup>98</sup> Another protective goal of Rogers’s memoir was, according to him, to offer an accurate source of the facts and to protect the public record by countering perjured testimony from Smith and other witnesses. Rogers’s own account served, in his own view, as a shield against these other informants, whom he described as

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at iv–v.

<sup>90</sup> *State of Connecticut, vs. Ammi Rogers*, HAMPDEN PATRIOT, Oct. 11, 1820, at 3.

<sup>91</sup> *Id.*

<sup>92</sup> *From the New-London Gazette*, MANUFACTURERS’ & FARMERS’ J., Oct. 16, 1820, at 1.

<sup>93</sup> *Norwich; Superior Court; Connecticut; Ammi Rogers; Clergyman; County*, ESSEX PATRIOT, Oct. 21, 1820, at 3.

<sup>94</sup> *Id.*

<sup>95</sup> *A Clerical Monster New-London Oct. 11*, CONNECTICUT HERALD, Oct. 17, 1820, at 2.

<sup>96</sup> THE RECORDS OF CONVOCATION: A.D. 1790–A.D. 1848 190 (Rev. Dr. Samuel Hart & Rev. Joseph Hooper eds., 1904) [hereinafter THE RECORDS OF CONVOCATION].

<sup>97</sup> AMMI ROGERS, MEMOIRS OF THE REV. AMMI ROGERS A.M. (2d ed. 1826).

<sup>98</sup> *Id.* at 1.

“poor, unfortunate[, and] miserable creatures” steeped in “sin” and “baseness.”<sup>99</sup>

One issue that arises from situations like the *Rogers* case, where there are competing case reports, is the sometimes contentious relationship between historic truth<sup>100</sup> (verifiable, consistent, and widely accepted accounts of what actually occurred in a situation) and legal truth<sup>101</sup> (whatever legal fact finders, whether judges or lay jurors, find as truth in the context of a legal proceeding). Although there are widely held assumptions that the two truths should coincide, truth in the context of legal proceedings is sometimes shaped by narrowly constrained binary predicates,<sup>102</sup> and is often synthesized into a single strand by narrative truth<sup>103</sup> (stories or descriptive frameworks for processing testimony). This is largely because law is a bridge that attempts to connect reality with alterity, and these bridges are built from the commitments inherent in myths, tales, and other fictional communal texts.<sup>104</sup>

Oftentimes, the formal laws that governed everyday life were shaped by fictional accounts of illicit sex and other taboo-breaching behavior, especially in the guise of seduction narratives and other forms of protective narratives. The historical legal regulation of sexuality and reproduction in the United States accordingly relied upon sets of protection narratives that structured the formal legal norms proscribing it. Ammi Rogers’s case clearly demonstrates this. This reason is why applying a narrative analysis of law in conjunction with legal historic methods can provide an especially cogent platform for understanding abortion law as a protection narrative.

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<sup>99</sup> *Id.* at 5–6.

<sup>100</sup> For a discussion of historical truth in the context of scholarly endeavors, see, for example, Dorothy Haecker, *A Theory of Historical Truth*, 13 PHIL. TOPICS 267, 267 (1985). Historical truth is also sometimes called substantive truth. See Robert S. Summers, *Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases*, 18 L. & PHIL. 497, 497 (1999).

<sup>101</sup> Summers, *supra* note 100, at 498.

<sup>102</sup> See, e.g., Lolita Buckner Inniss, “Other Spaces” in *Legal Pedagogy*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 67, 68–69 (2012) (discussing how, for example, criminal trials are governed by false dichotomies like the distinction between “guilty” and “not guilty,” and false harmonies such as “not guilty” and “innocent”).

<sup>103</sup> Lisa Kern Griffin, *Narrative, Truth and Trial*, 101 Geo. L.J. 281, 285 (2013) (considering how the “story model” may distort outcomes because of, among other things, “the expectations it raises for the sequence, significance, and coherence of evidence”); see also Marianne Wesson, *Historical Truth, Narrative Truth, and Expert Testimony*, 60 WASH. L. REV. 331, 333 (1985).

<sup>104</sup> Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–7 (1983).

### B. Narrative Analysis of Law

Formal legal writings are often organized and presented to tell a particular legal story. These stories are composed of facts but may also incorporate well-established fictions.<sup>105</sup> These fictions help fill holes in evidence, broaden the foundation for establishing the relevance of norms, and help enhance the persuasiveness of the narrative. The official report of Ammi Rogers's case presents this reciprocating process between law and the stories that frame it. One way of exposing how narratives operate is through narrative analysis.

Narrative analysis is a means of interpreting stories told within a particular context.<sup>106</sup> Specifically, narrative analysis is the process whereby a person observes uniquely identifiable actions or events and, through analysis, recasts them as coherent stories or narratives. Scholars who conduct narrative analysis focus on different parts of a story including its structure, functions, substance, performance method, and the characters who perform within it. Law offers a veritable treasure trove of interlocking stories, including caselaw, statutes, witness statements, and courtroom testimony.<sup>107</sup> Legal stories cast people into roles and reframe facts as legally cognizable elements of a claim.<sup>108</sup> Narratives in law do not “simply recount happenings;

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<sup>105</sup> One common example of a legal fiction is the doctrine of attractive nuisance in tort law. The attractive nuisance doctrine presumes that trespassing children who were injured on a property were invitees, even though such children had never been invited. Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1466 (2007) (citing LON L. FULLER, *LEGAL FICTIONS* 9 (1967)).

<sup>106</sup> Note that the process of narrative inquiry has sometimes been bifurcated into two distinct types of inquiry: analysis of narrative and narrative analysis. Analysis of narrative involves paradigmatic analysis, where the data itself consists of narratives or stories and the outcome is paradigmatic typologies or categories. Narrative analysis is where the data consists of actions, events, or happenings. And these are, via the process of analysis, understood as coherent stories or narratives. Donald E. Polkinghorne, *Narrative Configuration in Qualitative Analysis*, in *LIFE HISTORY AND NARRATIVE* 5–6 (Amos Hatch and Richard Wisniewski eds., 2002). Some recent scholarship combines these types of inquiry, and notes that while there are potentially many ways to undertake narrative analysis, it is the goals of such analysis that are crucial—especially in the context of law. One scholar writes that narrative analysis of law may, for example, help to reconstruct facts within a certain context, and help to recover the voices of silent or marginalized figures in legal discourse. Flora Di Donato, Book Review, 27 INT'L J. SPEECH, LANGUAGE & L. 107 (2019).

<sup>107</sup> Leon Wolff, *Let's Talk About Lex: Narrative Analysis as Both Research Method and Teaching Technique in Law*, 35 ADELAIDE L. REV. 3, 4 (2014). As the Honorable Richard Posner wrote, “Stories play a big role in the legal process. Plaintiff and defendant in a trial each tell a story, which is actually a translation of their ‘real’ story into the narrative and rhetorical forms authorized by law, and the jury chooses the story that it likes better.” Richard A. Posner, Book Review, 64 U. CHI. L. REV. 737, 738 (1997).

<sup>108</sup> Wolff, *supra* note 107, at 4.

they give them shape, give them a point, argue their import, proclaim their results.”<sup>109</sup> But despite the role of narrative in law, there is limited scholarly recognition of how narratives shape our understanding of the law.<sup>110</sup> Instead, narrative existed as a shadow mechanism in legal accounts, with legal opinions including narrative devices more typically seen in popular fiction.

Perhaps it is not surprising that the official reporting of the *Rogers* case evokes one of the most popular literary genres of the early national period: the seduction narrative. This genre, meant to elicit reader sympathy and discourage women from breaching norms of moral propriety, played a significant role in nineteenth-century United States and Britain. It also helped shape some women’s conceptions of their own vulnerability and of their corresponding need for protection. A feature that makes Rogers’s case a particularly potent seduction narrative is the way that figures in his case fit character typologies found in some literary analytical frameworks.

Classical or traditional readings of legal cases assume that figures appearing in cases, whether plaintiff or defendant, victim or witness, are a random assortment of people who inhabit no particular role. But to give direction to the raw story<sup>111</sup> of law-related matters, the figures that appear are assigned roles to make the story coherent and render conflicts closer to resolution. This commonly appears in accounts about breaches of law or other norms that rely on the binary narrative construct of “good guys” versus “bad guys.”<sup>112</sup> More complex renderings are seen in multi-actor narrative role assignments set forth by literary theorists. Applying these more complex narrative role

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<sup>109</sup> Brooks, *supra* note 81, at 13.

<sup>110</sup> *Id.* at 9.

<sup>111</sup> Raw story, or *fabula*, is a literary concept developed by Vladimir Propp and advanced by other theorists. Raw story refers to a typical, chronological, ostensibly objective account of a story as experienced by characters in the story. This contrasts with the concept of *syuzhet*, the shape and sequence of events as they are presented to the reader, listener, or viewer. See HANS BERTENS, *LITERARY THEORY: THE BASICS* 37–39 (2001). While an idealized understanding of legal accounts is that the raw story and *syuzhet* coincide, those charged with telling and making sense of stories in law, whether legislators, policemen, lawyers, or judges, typically do by applying narrative frames that may bear little resemblance to the raw story experienced by actors.

<sup>112</sup> See Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 *CARDOZO L. REV.* 1019, 1020–23 (2004) (describing how deciding a conflict over legal liability for a traffic accident required, even at the earliest stages, viewing one participant as the “good guy” and the other as the “bad guy”).

frameworks helps draw lines of similarity between fictional seduction narratives and nonfiction legal accounts like Ammi Rogers's case.

### III

#### THE TRIAL OF AMMI ROGERS AS SEDUCTION NARRATIVE: WOMAN-PROTECTIVE DISCOURSE AND PROPP'S NARRATIVE ROLES

Ammi Rogers stood trial for impregnating a young woman, having promised her marriage, and subsequently providing her with an abortion. These charges offered a plot line like some contemporaneous, widely read seduction narratives. One such novel was *Charlotte Temple*.<sup>113</sup> In the novel, a fifteen-year-old English schoolgirl falls for a dashing military officer who brings her to the United States, and ultimately leaves her pregnant and impoverished. In another novel, *The Coquette*, a Connecticut woman engages in an adulterous relationship, becomes pregnant, and subsequently dies pregnant and alone.<sup>114</sup> These novels, popular from the late eighteenth through the mid-nineteenth centuries, mediated the tensions between greater freedom, autonomy, and education for women and the dangers of out-of-wedlock sex. The seduction narrative then evolved from a literary subgenre to a broader protection narrative frame and sociological theory that offered "proof" that promiscuous women were more "sinned against than sinn[er]," that their promiscuity was the result of male seducers, and that they needed protection from these ills.<sup>115</sup> The seduction narrative also served as a regulatory mechanism that enhanced or, in some instances, superseded the power of formal law.<sup>116</sup> The *Rogers* case did not produce the first

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<sup>113</sup> SUSANNA HASWELL ROWSON, *CHARLOTTE TEMPLE* (Cathy N. Davidson ed., 1986). Rowson was very explicit in stating the purpose of her novel, and wrote in the introduction:

[C]onscious that I wrote with a mind anxious for the happiness of that sex whose morals and conduct have so powerful an influence on mankind in general; and convinced that I have not wrote a line that conveys a wrong idea to the head or a corrupt wish to the heart, I shall rest satisfied in the purity of my own intentions, and if I merit not applause, I feel that I dread not censure.

*Id.* at 6.

<sup>114</sup> HANNAH WEBSTER FOSTER, *THE COQUETTE* (Cathy N. Davidson ed., 1987).

<sup>115</sup> Karen J. Renner, *Seduction, Prostitution, and the Control of Female Desire in Popular Antebellum Fiction*, 65 *NINETEENTH-CENTURY LITERATURE* 166, 167 (2010).

<sup>116</sup> Notably, reading into fiction regarding the power of social or legal regulation may have some perils. Looking to works of fiction as a source of legal understanding may be "like reading *Animal Farm* as a tract on farm management." Lolita K. Buckner Inniss, *Bicentennial Man – The New Millennium Assimilationism and the Foreigner Among Us*, 54 *RUTGERS L. REV.* 1101, 1102 (2002) (citing Richard Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 *HARV. L. REV.* 1431, 1433 (1986)). But this is an outsized concern. Literature has been, and continues to be, an important tool for understanding law. *Id.* There are contemporary legal paradigms that look to narrative as a



or the last official case report to harness the power of early American seduction narratives.<sup>117</sup> It is, however, among the earliest and most widely publicized.<sup>118</sup>

Seduction narratives were precursors to the woman-protective discourse that contemporary opponents of abortion use to justify legal restrictions on abortion.<sup>119</sup> Woman-protective discourse places real people connected to abortion into the one-dimensional roles of hero, villain, or victim.<sup>120</sup> Woman-protective discourse also addresses themes such as concerns with medical and scientific authority and the shaping of gender and racial roles via legal narratives.<sup>121</sup> Woman-protective discourse conveys woman-protective narratives.<sup>122</sup> To

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means of understanding or articulating legal concepts, such as narrative criminology. See, e.g., NARRATIVE CRIMINOLOGY: UNDERSTANDING STORIES OF CRIME (Lois Presser & Sveinung Sandberg eds., 2015).

<sup>117</sup> Andrea L. Hibbard & John T. Parry, *Law, Seduction, and the Sentimental Heroine: The Case of Amelia Norman*, 78 AM. LITERATURE 325, 325–26 (2006). In support of this claim Hibbard and Parry cite MARY P. RYAN, *WOMEN IN PUBLIC: BETWEEN BANNERS AND BALLOTS, 1825–1880*, at 127 (1990). In the decades immediately after *Rogers*, novels of seduction were sometimes the backdrop for what has been described as the politicization and the legal regulation of sex that coincided with the democratic and participatory politics of the 1830s and 1840s. Some scholars have even suggested that seduction literature could be read as metanarratives about the almost-feminine vulnerability of the newly formed United States. CLARE A. LYONS, *SEX AMONG THE RABBLE: AN INTIMATE HISTORY OF GENDER AND POWER IN THE AGE OF REVOLUTION, PHILADELPHIA, 1730–1830*, at 297–98 (2006).

<sup>118</sup> *The Scarlet Letter*, by Nathaniel Hawthorne, may have some remote connection to the case of Ammi Rogers. A 2018 article reported that Hawthorne may have learned about the story of Rogers's involvement with Asenath Smith from a family that knew both Hawthorne and Rogers. There are some similarities between the story of the Rogers case and *The Scarlet Letter*. In *The Scarlet Letter*, protagonist Hester Prynne is, like Asenath Smith, apparently torn between two lovers: a minister and a physician. Like Smith, Prynne becomes pregnant and is held up to public scrutiny. See Patricia Suprenant, *Does 'The Scarlet Letter' Have Connecticut Roots?*, THE J. INQUIRER (May 26, 2018), [https://www.journalinquirer.com/living/does-the-scarlet-letter-have-connecticut-roots/article\\_3fabf946-6049-11e8-957c-1fc0a3626743.html](https://www.journalinquirer.com/living/does-the-scarlet-letter-have-connecticut-roots/article_3fabf946-6049-11e8-957c-1fc0a3626743.html) [<https://perma.cc/2WJR-VFG2>].

<sup>119</sup> See Siegel, *supra* note 32. Siegel largely discusses how such woman-protective discourses are at the heart of many antiabortion legal norms.

<sup>120</sup> SAURETTE & GORDON, *supra* note 65, at 278–80.

<sup>121</sup> *Id.* at 42–43, 47.

<sup>122</sup> Although the words *discourse* and *narrative* are sometimes used interchangeably, there are significant epistemological, theoretical, and functional differences. The key distinctions are that discourse is the active role of language in the production of knowledge and power. MONA LIVHOLTS & MARIA TAMBOUKOU, *DISCOURSE AND NARRATIVE METHODS: THEORETICAL DEPARTURES, ANALYTICAL STRATEGIES AND SITUATED WRITINGS* 4 (2015). In contrast, a narrative is a recounting of a set of events into a coherent whole with a continuant subject. *Id.* at 39. Narratives are characterized by temporality (they represent a sequence of events), meaningfulness (they are vested with rich meanings), and sociality (they have an intended audience). *Id.*

illuminate the woman-protective narratives at work in *Rogers*, this Article employs a tool of narrative analysis: literary theorist Vladimir Propp's character typologies.

*A. Hero or Villain?*

*The Defendant Ammi Rogers, the Rock and Roll Reverend*

Vladimir Propp was a Russian literary theorist and folklorist who studied the narrative structure of folktales by breaking down numerous folktales into their smallest narrative units.<sup>123</sup> In this way, Propp was able to arrive at a typology of narrative structures. In his studies of folktales, Propp reduced a large diversity of details within tales to single plots consisting of limited elements.<sup>124</sup> He concluded that there were seven recurring character typologies.<sup>125</sup> Key among these include the hero (or heroine), the villain (or false hero), the princess, the helper, and the donor. Heroes (or heroines) have physical or moral courage and overcome daunting challenges. Propp's heroic actors are divided into two categories: seeker-heroes and victim-heroes.<sup>126</sup> Seeker-heroes seek out specific challenges or are dispatched on some task, often by a donor. In contrast, victim-heroes leave home to find adventure and combat evil, but in a less directed or focused manner.<sup>127</sup> The victim-hero is one whose departure and fate are at the center of the tale.<sup>128</sup> The villain acts in an evil manner, whether disturbing the peace, creating danger, or causing harm.<sup>129</sup> In some cases, the villain operates under the guise of the hero, making the character a false hero.<sup>130</sup> The princess is traditionally feminine, sought after, and the object of other (typically male) figures in a tale.<sup>131</sup> The helper supports the hero or otherwise advances the plot. Helpers effortlessly understand problems and help

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<sup>123</sup> See V. PROPP, MORPHOLOGY OF THE FOLKTALE 19–65 (2d ed. 1968).

<sup>124</sup> VLADIMIR PROPP, THEORY AND HISTORY OF FOLKLORE ix, xii (Anatoly Liberman ed., Ariadna Y. Martin & Richard P. Martin trans., 1984).

<sup>125</sup> PROPP, *supra* note 123, at 64–79; ARTHUR ASA BERGER, POPULAR CULTURE GENRES: THEORIES AND TEXTS 15 (1992). Propp claimed that all folk or fairy tales had two recurrent features: the function of the characters, and the types of roles they inhabit. Propp determined that the seven character types were the villain, the donor, the helper, the princess (and her father), the hero, and the false hero.

<sup>126</sup> BERGER, *supra* note 125, at 15.

<sup>127</sup> PROPP, *supra* note 123, at 39.

<sup>128</sup> *Id.* at 36.

<sup>129</sup> *Id.* at 15.

<sup>130</sup> *Id.* at 60–62.

<sup>131</sup> ELAINE ASTON, AN INTRODUCTION TO FEMINISM AND THEATRE 35–36 (1995).

find solutions to difficult tasks.<sup>132</sup> Donors test heroes, usually before revealing a gift or agent that will aid the hero.<sup>133</sup> Thus, donors may also be helpers.<sup>134</sup>

Although Propp's work focused on Russian folktales, some scholars have applied his analytical methods to other types of fiction and nonfiction.<sup>135</sup> Propp's framework is also applicable to both protection narratives found in seduction literature and legal cases.<sup>136</sup>

Whether Ammi Rogers was a hero, victim, or villain/false hero, depends on the storyteller. Rogers was frequently described in heroic terms: he was a charismatic figure of "pleasing appearance and insinuating address"<sup>137</sup> who "made strong friends for himself"<sup>138</sup> and had a substantial following of parishioners. He was especially popular among women. One congregation described him as someone who "uniformly lived piously, honestly, and soberly," and they professed an inability to understand why others thought ill of Rogers.<sup>139</sup> He was, according to another account by members of the Episcopal Church, "talented, witty and pleasing in his manner" and "seemed to have many of the qualities of a true minister of Christ."<sup>140</sup> This same account, however, cast Rogers as a false hero; it went on to say that Rogers's Christ-like demeanor "was only in appearance; for he was morally worthless."<sup>141</sup> What accounted for these conflicting views of Rogers?

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<sup>132</sup> PROPP, *supra* note 123, at 79–82. Propp's helper figure calls to mind the contemporary trope of the "magical Negro," a fictional character "endowed with superhuman physical capabilities and endurance, wiser and more resilient for navigating oppression, and generous with the use of these gifts in service of white people." Osamudia James, *Valuing Identity*, 102 MINN. L. REV. 127, 148 n.98 (2017).

<sup>133</sup> PROPP, *supra* note 123, at 48.

<sup>134</sup> *Id.* at 80.

<sup>135</sup> DIANE M. SHARON, *PATTERNS OF DESTINY: NARRATIVE STRUCTURES OF FOUNDATION AND DOOM IN THE HEBREW BIBLE 19–20* (2002). Propp's work may be applied to a variety of text corpora and may be used to expose patterns and practices. *Id.*; see also VERN SHERIDAN POYTHRESS, *IN THE BEGINNING WAS THE WORD: LANGUAGE: A GOD-CENTERED APPROACH* 201 (2009).

<sup>136</sup> For decades, this type of narrative analysis of law has been a part of some scholars' methodological approach. Some of the earliest and best known proponents of understanding law as stories, both formal and informal aspects, were adherents of critical race theory. See, e.g., Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 1–4 (1984).

<sup>137</sup> E. EDWARDS BEARDSLEY, *THE HISTORY OF THE EPISCOPAL CHURCH IN CONNECTICUT, FROM THE DEATH OF BISHOP SEABURY TO THE PRESENT TIME* 30 (1868).

<sup>138</sup> *Id.*

<sup>139</sup> *To the Rev. Convocation of the Episcopal Church, in the State of Connecticut, to Be Holden in Stamford, Oct. 16, 1805*, REPUBLICAN FARMER, Dec. 11, 1805, at 1.

<sup>140</sup> DIOCESE OF CONNECTICUT 132 (Centenary Comm. ed., 1897).

<sup>141</sup> *Id.*

Born in Connecticut on May 26, 1770, Rogers was a descendant of some of the earliest English settlers.<sup>142</sup> His immediate forebearers were farmers and municipal leaders in New York and Connecticut, but more distant ancestors included John Rogers, a Church of England cleric who was a key figure in the Protestant Reformation.<sup>143</sup> In 1554, John Rogers was burned at the stake for religious heresy. Known thereafter as “the martyr,” John Rogers was revered in many Protestant accounts.<sup>144</sup> Though born over two centuries later, Ammi Rogers understood himself similarly as a heroic martyr subjected to social and religious persecution.<sup>145</sup>

Rogers’s religious awakening began when he started his studies at Yale College in 1786.<sup>146</sup> Though Yale was then a stronghold of the Congregational Church, and despite the fact that Rogers had been raised as a Congregationalist, he joined the Episcopal Church, a direct offshoot of the Church of England.<sup>147</sup> Rogers decided it was his duty to return to his family’s older religious roots in the conservative Church of England.<sup>148</sup> But Rogers’s desire for conservative traditions and conformity was belied by his idiosyncratic approach to his religious obligations. More troubling was the fact that Rogers’s religious reputation was plagued early on by doubts about his piety, humility, and chastity.

Rogers first butted heads with the Episcopal Church in 1790, shortly after he graduated from Yale and began continued studies in the home of Connecticut clergyman Abraham Jarvis.<sup>149</sup> Rogers’s time as Jarvis’s guest and student was short-lived. Rogers claimed Jarvis provided little instruction,<sup>150</sup> but church accounts disputed Rogers’s story. Church authorities averred Jarvis dismissed Rogers because Rogers had been

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<sup>142</sup> ROGERS, *supra* note 97, at 9. Rogers claimed ancestry back to the Mayflower. *Roger’s Descendants in New England*, 3 THE NOW AND THEN (Muncy, Pa.), June 1892, at 226–27.

<sup>143</sup> ROGERS, *supra* note 97, at 9.

<sup>144</sup> See, e.g., JOSEPH LEMUEL CHESTER, JOHN ROGERS: THE COMPILER OF THE FIRST AUTHORISED ENGLISH BIBLE; THE PIONEER OF THE ENGLISH REFORMATION; AND ITS FIRST MARTYR (1861).

<sup>145</sup> The historic martyr figure is a longstanding archetype that dates back to the Greeks. M. GREGORY KENDRICK, THE HEROIC IDEAL: WESTERN ARCHETYPES FROM THE GREEKS TO THE PRESENT (2010). Heroism is, however, a shifting concept that is linked to thinking about social relations, political authority, religion, and ethical conduct. *Id.* at 33.

<sup>146</sup> ROGERS, *supra* note 97, at 10.

<sup>147</sup> *Id.* at 10, 13–14.

<sup>148</sup> *Id.* at 12–14.

<sup>149</sup> *Id.* at 15.

<sup>150</sup> *Id.*

caught engaging in “a flagrant act of immorality.”<sup>151</sup> This description, while cryptic, left no doubts in some people’s minds regarding Rogers’s character. Rogers left such an unfavorable impression that one Episcopal bishop indicated he would not ordain Rogers. This dispute was a subject of communal concern and press accounts.<sup>152</sup>

Undeterred, Rogers moved to New York, where he sought ordination. But Rogers’s reputation preceded him, causing some of his new would-be colleagues to oppose his ordination. Hoping to sway the opinion of New York Episcopal leaders, Rogers sought a certificate from the Secretary of the Connecticut Episcopal establishment indicating he had neither applied for nor been refused ordination. Although this was technically true, the person authorized to issue such a certificate was away when Rogers made the request. Taking matters into his own hands, Rogers allegedly forged the certificate and was ordained in New York.<sup>153</sup>

Once Rogers settled in New York, he married and started a family. His wife died in 1800, leaving him with three small children.<sup>154</sup> According to one account, shortly after his wife’s death, Rogers once again became the subject of “unpleasant rumors about his integrity and moral character.”<sup>155</sup> Rogers moved back to Connecticut in 1801, where he began preaching.<sup>156</sup> Upon his return, the Episcopalian Church did not temper its longstanding disapproval. Rogers was plagued by allegations of past improprieties, including immoral acts and obtaining his New York ordination under false pretenses. Nevertheless, Rogers continued to minister to an adoring congregation for several years. His Connecticut congregants saw him as a heroic figure, and he was admired for his courage in standing up to church leaders. Meanwhile, church officials portrayed him as a villain whose behavior was

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<sup>151</sup> THE RECORDS OF CONVOCATION, *supra* note 96, at 184.

<sup>152</sup> *To the Bishop and Clergy of the Diocese of Connecticut*, REPUBLICAN FARMER, Nov. 6, 1805, at 3.

<sup>153</sup> See WILLIAM WHITE, MEMOIRS OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, FROM ITS ORGANIZATION UP TO THE PRESENT DAY 188 (2d ed. 1836).

<sup>154</sup> NATHANIEL BARTLETT SYLVESTER, HISTORY OF SARATOGA COUNTY 236 (1878). Rogers’s wife, Margaret Bloore, died six years after her marriage to Rogers.

<sup>155</sup> FRANKLIN BOWDITCH DEXTER, BIOGRAPHICAL SKETCHES OF THE GRADUATES OF YALE COLLEGE WITH ANNALS OF THE COLLEGE HISTORY VOL. IV. JULY 1778–JUNE 1792 687 (1907).

<sup>156</sup> See *id.*

“insulting, refractory[, and] schismatical in the highest degree.”<sup>157</sup> Some of these critics were key witnesses for the prosecution.

### *B. Witnesses for the Prosecution*

Both the official account and Rogers’s unofficial accounts described statements and testimony of several witnesses. The key witnesses were Asenath Smith, the alleged victim; Maria Smith, Asenath Smith’s sister; Eleazer B. Downing, the physician who allegedly treated Asenath Smith in the aftermath of the abortion; and a Black enslaved man, Sam “the Negro” Wheeler, who allegedly saw Rogers and Smith in bed together. Collectively, their statements and testimony questioned the roles of women, medical professionals, and Black people in both law and society during that period. Every figure may be analyzed through the narrative theoretical work of Vladimir Propp.

#### *1. Asenath and Maria Smith as Princesses or Heroines: Protection or Autonomy*

As described above, Propp’s princess is a traditionally feminine figure who is sought after by the hero (as a prize for his valor) or by the villain (for nefarious purposes).<sup>158</sup> Although both Asenath Smith and her sister, Maria, were pursued and abducted by Rogers (who was cast as a villain by most people involved in the drama), there is a question as to whether the women occupied only the role of a princess in Propp’s morphology, or whether they also inhabited dual roles as heroines. Propp made clear that some figures in tales could inhabit more than one role.<sup>159</sup>

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<sup>157</sup> *Id.* at 688.

<sup>158</sup> See PROPP, *supra* note 124, at 79.

<sup>159</sup> *Id.* at 79–80. Other figures in Rogers’s case might conceivably occupy more than one role. Rogers, for example, may be viewed as either a hero or a false hero. One might also conceive of Rogers as a donor or provider, with the abortifacient he gave to Smith construed as an agent that provides the hero with a necessary item that “liquidat[es] . . . misfortune.” *Id.* at 39. As one scholar notes, one especially titillating feature of nineteenth-century trials involving clergy charged with impregnating women out of wedlock was that “recipes” for abortifacients were often given in the course of testimony. When victimized pregnant parishioners sought help from “the authors of the trouble”—their clergyman abusers—they were given actual abortifacients or offered advice on how to obtain or make them. KARIN E. GEDGE, *WITHOUT BENEFIT OF CLERGY: WOMEN AND THE PASTORAL RELATIONSHIP IN NINETEENTH-CENTURY AMERICAN CULTURE* 57 (2003). But Propp writes that his archetypical donors are typically encountered accidentally and not sought out. PROPP, *supra* note 124, at 39. Moreover, seeing Rogers as a donor in Proppian terms would be a dark reading of what is “needed” by Asenath Smith as a heroine, for it was Rogers who needed Smith’s pregnancy to end, not Smith herself. Although Propp allowed for some

Asenath Smith's youth casts her in the role of a princess, particularly when compared with Rogers's seniority. A nineteenth-century woman deserving of social and legal protection was often young, chaste, and could represent the "quintessential angel" and could do so "[m]uch more successfully than her mother."<sup>160</sup> Asenath Smith was between fifteen and twenty years old when Rogers, more than twenty-five years her senior, was first introduced to the family in 1815.

While Asenath and Maria Smith have the attributes of Propp's princess typology, the two women could also fill the role of heroine. Asenath and her sister Maria were independent, free-thinking, and well-educated women. Rogers, an unreliable narrator because of his conflict with Asenath, stated that some local people described the Smith sisters as keeping "private company" with men to whom they were not married.<sup>161</sup> The women were also raised by a single mother who, per Rogers, was on the margins of society.<sup>162</sup> Their strength, in spite of their disadvantaged social status, suggests they might be more aptly characterized as heroines rather than princesses that needed saving.

Perhaps the most heroic act that the two women performed was coming forward with their story. Asenath must have summoned unimaginable strength and resolve to make her story public, to challenge social norms, and to provide testimony against a powerful public figure, even a controversial one like Rogers. Religious institutions, both old and new, often go to great lengths to protect the reputations of both the clergy and the church, even in the face of obvious misdeeds.<sup>163</sup> Although Asenath was not the only woman to challenge the untoward actions of a prominent clergyman in the early nineteenth century,<sup>164</sup> she was also risking her reputation and the

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figures to occupy multiple roles, generally, a heroic figure (if that is what Rogers was) could not act as a donor because donors existed only to provide something necessary to the hero/ine, not to fulfill their own goals.

<sup>160</sup> DEBORAH GORHAM, *THE VICTORIAN GIRL AND THE FEMININE IDEAL* 7 (1992).

<sup>161</sup> See ROGERS, *supra* note 97, at 86–88.

<sup>162</sup> *Id.*

<sup>163</sup> GEDGE, *supra* note 159, at 50.

<sup>164</sup> *Id.* at 51–52. Clergy were brought to trial on a diversity of charges including, adultery, seduction, rape, and murder. *Id.* at 51; see, e.g., JACOB KERR, *THE SEVERAL TRIALS OF THE REVEREND DAVID BARCLAY* 28–29 (1814); WILLIAM SAMPSON, *TRIAL OF MR. WILLIAM PARKINSON* (1811).

reputations of her sister and her entire family. In that era, women in Connecticut seldom appeared in court or other public settings.<sup>165</sup>

The risk of reputational harm was somewhat allayed by the protection the sisters received from the prosecution. The prosecution here easily fits into the Propp typology of “helper.”<sup>166</sup> According to Rogers, the prosecution promised the Smith sisters that their reputations would be shielded if the women were willing to publicly state their claims against Rogers.<sup>167</sup> Although this offer of reputational protection may have been an impetus for the sisters’ agreement to testify, greater protection may have come from an aspect of early nineteenth-century culture that tacitly acquiesced to women’s premarital freedoms. This unofficial culture existed in tandem with an official culture that proscribed women’s freedom and sexual autonomy.

The facts of the case suggest that the Smith sisters recognized this unspoken norm and traveled freely throughout the region, forming friendships and relationships as they pleased. This muted acceptance of feminine liberty sometimes extended to premarital sexual relations, which social, religious, and legal norms formally forbade, but informally condoned when such relations were understood to be the step before marriage.<sup>168</sup> This was seen, for instance, in the eighteenth and nineteenth-century custom of “bundling,” in which courting couples were permitted to spend the night together in bed as long as they remained clothed or kept another physical barrier between them.<sup>169</sup> Although much of late eighteenth and early nineteenth-century New England outlawed extramarital sex, during the Revolutionary era, an estimated thirty to forty percent of brides in some

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<sup>165</sup> Cf. CORNELIA HUGHES DAYTON, *WOMEN BEFORE THE BAR: GENDER, LAW, AND SOCIETY IN CONNECTICUT, 1639–1789* 2, 3, 20 (1995) (noting that although it was not altogether uncommon for women to appear in court during this era—women would wait to plead or give testimony in the courthouse—their subordinate social and political status meant that appearing in court could endanger their reputation).

<sup>166</sup> Vladimir Propp’s helper archetype supported the hero or heroine, and could come in the form of people, animals, magic potions or amulets, or even advice itself. PROPP, *supra* note 124, at 79.

<sup>167</sup> ROGERS, *supra* note 97, at 83.

<sup>168</sup> JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 22 (2d ed. 1997) (“As long as a couple’s sexual relations were channeled toward marriage, colonial society could forgive them.”).

<sup>169</sup> *Id.* (noting that bundling provided couples in New England and the middle colonies with the opportunity for some degree of intimacy). When bundling occurred, “[p]arents and youth shared the expectation that sexual intercourse would not take place, but if it did, and pregnancy resulted, the couple would certainly marry.” *Id.*



New England towns were pregnant at the time of their marriage.<sup>170</sup> One midwife in Maine wrote that almost forty percent of the over 800 births she attended between 1797 and 1812 were out-of-wedlock conceptions.<sup>171</sup> Asenath Smith's relationship with Rogers and the resulting pregnancy was, in this respect, not entirely out of the ordinary.

2. *Formal Medicine Versus Folk Medicine: Dr. Eleazer B. Downing, the (Absent) Protective Helper/Donor*

The official report of the trial indicates that the first witness to testify was Dr. Eleazer Butler Downing. Asenath Smith's family called Downing when Asenath became ill in the aftermath of the abortion. Given his unique skillset and medical knowledge, Downing is best characterized as a helper or donor in Propp's model.<sup>172</sup> Dr. Downing testified that he found Asenath in "excruciating pain." Not knowing her ailment, Downing administered laudanum, an opiate, to reduce her pain.<sup>173</sup> When that failed, he increased her dosage and left, instructing Smith's mother to call him if necessary. When Asenath's condition worsened, Downing returned to find Smith had just delivered "a fetus, in a most offensive and putrid state."<sup>174</sup> Downing claimed that the fetus had been aborted as a result of "foul play," the exact nature of which was not included in the official report, as the details were such that the author of the report stated, "we cannot write, because we fear it could not be read."<sup>175</sup> Downing nevertheless testified that there were "no marks of violence . . . visible on mother or child" and that there was some possibility that it was a miscarriage.<sup>176</sup> His testimony left doubt

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<sup>170</sup> GODBEER, *supra* note 74, at 228.

<sup>171</sup> ULRICH, *supra* note 52, at 52. Strikingly, because social strictures of the time required marriage, only eight percent of the births she attended were outside marriage. *Id.*

<sup>172</sup> Though there were no medical licensing regulations in most U.S. jurisdictions in the early nineteenth century, the rise of scientific medicine introduced guild-like formations such as medical societies. As early as 1763, Connecticut physicians petitioned the colonial legislature to "Distinguish between the Honest and Ingenious Physician and the Quack or Empirical Pretender" by allowing for the establishment of medical societies and licensing regulations. WILLIAM G. ROTHSTEIN, *AMERICAN PHYSICIANS IN THE NINETEENTH CENTURY: FROM SECTS TO SCIENCE* 73 (1992). Downing was a product of this professionalization of medicine that often pitted folk healers, frequently women, against men who had received formal education or served apprenticeships within an all-male medical establishment. DEBORAH LUPTON, *MEDICINE AS CULTURE: ILLNESS, DISEASE AND THE BODY* 153–54 (3d ed. 2012).

<sup>173</sup> REPORT OF THE TRIAL, *supra* note 1, at 16.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

about whether Smith terminated her pregnancy or whether it was a miscarriage.

The official case report and Downing's testimony both fail to describe the abortion attempts, leaving a void in the reader's understanding of what transpired. The lack of detail is unsurprising, given that physicians of the period described abortions in vague terms to general audiences.<sup>177</sup> But the primary allegation against Rogers was forced abortion, and related details should have been central to a successful prosecution.

The seduction narrative literature of the time was similarly silent on details surrounding abortion and childbirth, even as it told stories of women being seduced, impregnated, and abandoned.<sup>178</sup> This silence was all the more pronounced with the growing prominence and presence of male physicians in most areas of medicine except reproductive health, which resisted the rise of professionalized medicine and remained informal and women-centered.<sup>179</sup> Despite the burgeoning scientific medicine in the nineteenth century, childbirth and family planning often remained the province of women health providers well into the twentieth century. This meant that men like Downing, though Proppian helpers or donors in principle, were often absent in the actual practice of women's reproductive health matters at that time. Thus, women, with their informal or folk practices, remained largely in charge of whether and how births occurred.<sup>180</sup>

### *3. Protecting Society and Women from the Racial Other: Helper/ Donor Sam "The Negro" Wheeler*

Sam Wheeler, a Black servant, also offered damning testimony against Ammi Rogers.<sup>181</sup> Wheeler's role in the Proppian archetype was that of helper or donor. He lived with, served, and was likely enslaved

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<sup>177</sup> See, for example, ALEXANDER C. DRAPER, OBSERVATIONS ON ABORTION 6–7 (1839), where a physician offers accounts of some of the means of abortion in order to “convey . . . useful instruction to . . . countrywomen” and to help protect against “atrocious crime[s] in mothers” as well as their “aiders and abettors.” Though the book purported to be a bar to abortion, it acted in effect as an instruction manual, and the book included, for example, a chapter describing common herbs that had been used to produce abortion and their relative effectiveness. *Id.* at 15–30.

<sup>178</sup> Renner, *supra* note 115, at 166–67, 189.

<sup>179</sup> LUPTON, *supra* note 172, at 153–54.

<sup>180</sup> This was especially true given the use of quickening as the divide between permissible and impermissible pregnancy terminations. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 12–13 (1998).

<sup>181</sup> ROGERS, *supra* note 97, at 87.

by Welcome and Martha Browning, Asenath Smith's neighbors.<sup>182</sup> Identified as "Sam the Negro," "Sam, a black boy," or "Browning's black boy" in written accounts of the trial, Wheeler testified that he had seen Asenath Smith and Rogers in bed together.<sup>183</sup> Wheeler's testimony was crucial: paired with the testimony of Asenath Smith and her sister Maria, it was one of the most incriminating pieces of evidence offered against Rogers. Through this testimony, Wheeler ostensibly helped the prosecution succeed. Rogers, however, still painting himself as a hero, saw Wheeler as a social scourge from which society needed protection, and he attempted to rebut Wheeler's testimony by producing a report that Wheeler's master Browning called him a "poor, lying, good for nothing fellow."<sup>184</sup>

Wheeler testified that he was sent to the Smith house to borrow a meal bag<sup>185</sup> one early morning and was subsequently directed upstairs to one of the sleeping chambers. While upstairs, Wheeler saw Rogers and Smith in bed together through a crack in the door to the sleeping chamber.<sup>186</sup> When asked if Rogers and Asenath saw Wheeler when he observed the pair in bed, the author of the official report, likely in an effort to safeguard norms of white supremacy, especially in legal settings, employed the racist language endemic to some nineteenth-

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<sup>182</sup> Based on a review of the census report for 1820, Wheeler was likely an enslaved person. In that report, Welcome Browning lived in a household with a wife, six children, and two enslaved people—a woman and a man between the ages of fourteen and twenty-five. 1820 US CENSUS, GRISWOLD, NEW LONDON, CONN. 718; *see also* ROGERS, *supra* note 97, at 87–88. The enslaved man may have been Sam Wheeler. The enslaved status of Wheeler was more likely based upon conditions of Connecticut enslavement during the time of Rogers's trial. Enslaved people were not as numerous in Connecticut as in the southern United States. But toward the end of the colonial period, more than twenty percent of the male heads of family owned one or more enslaved people at one point in their lives, and enslaved laborers lived in Middletown, Norwich, New London, and other towns. David Sheinin, *Prudence Crandall, Amistad, and Other Episodes in the Dismissal of Connecticut Slave Women from American History*, in *DISCOVERING THE WOMEN IN SLAVERY: EMANCIPATING PERSPECTIVES ON THE AMERICAN PAST* 130–31, 133 (Patricia Morton ed., 1996). Census records are a crucial source of information about the enslaved population in Connecticut, as other references are sparse and often ambiguous, referring, for example, to enslaved people as "workers." *Id.* at 133–34. Slavery did not end in Connecticut until 1848. HORATIO T. STROTHER, *THE UNDERGROUND RAILROAD IN CONNECTICUT* 13 (1962).

<sup>183</sup> ROGERS, *supra* note 97, at 95.

<sup>184</sup> *Id.* This claim directly undercut Browning's trial testimony about Wheeler's truthfulness.

<sup>185</sup> A meal bag is a woven sack used to contain milled grain or seed. Some impoverished nineteenth-century people used meal bags as saddles, in place of coats, or as bedding. *See, e.g.*, L. MARIA CHILD, *THE FREEDMEN'S BOOK* 161–62 (1865).

<sup>186</sup> ROGERS, *supra* note 97, at 95.

century writings.<sup>187</sup> The official report writer noted that Wheeler answered with “one of those grotesque grins that a blackamoor’s white teeth, through a pair of ebony lips, produces.”<sup>188</sup> Wheeler returned home and told his master, Welcome Browning, who urged him not to report what he had seen because Rogers was a minister.<sup>189</sup>

Rogers, however, asserted on his own account that he became aware of Wheeler’s claims and asked Browning to whip Wheeler for lying about what he saw. But after questioning Wheeler once more, Browning was convinced of Wheeler’s truthfulness.<sup>190</sup> Browning described Wheeler “as good as [B]lack boys[] in general, for truth and veracity.”<sup>191</sup> Wheeler’s truthful testimony, and his status as a “good” Black boy, though only faint praise from his likely enslaver, may be viewed as one of Wheeler’s “supernatural” powers in the context of Propp’s model of the helper. This is because the “good negro,” sometimes known as a sambo figure, was not merely an individual characterization or description but rather part of a broader societal ideal that valorized the subservient, obedient, Black person.<sup>192</sup> Servants like Wheeler, who protected and seemingly embraced white supremacy, enabled the white capitalist, imperialist project, while remaining as potential threats to the white power structure.<sup>193</sup> Sam Wheeler, like most Connecticut Blacks during the eighteenth and nineteenth

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<sup>187</sup> REPORT OF THE TRIAL, *supra* note 1, at 28.

<sup>188</sup> *Id.* This may be a reference to the exaggerated “Blackamoor” figurines, jewelry and other objects first popularized in seventeenth century Europe that featured exaggerated features such as enlarged lips and white teeth on figures representing Black, mostly enslaved people. Some suggest that the figures may have appeared even earlier and were originally made in homage to richly dressed Africans who appeared in European capitals in the sixteenth century. SHIRLEY ANNE TATE, DECOLONISING SAMBO: TRANSCULTURATION, FUNGIBILITY AND BLACK AND PEOPLE OF COLOUR FUTURITY 111–15 (2020).

<sup>189</sup> REPORT OF THE TRIAL, *supra* note 1, at 28.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Sambo was a cross-cultural, pejorative term for Black and mixed-race people. “As a socially constructed category sambo was part of the racialised taxonomy of transcultural colonial subjection that enabled the machinery of imperialism, racial capitalism and white European settler colonialism to function.” TATE, *supra* note 188, at 4. In the context of the United States, the sambo figure was seen as a “docile but irresponsible, loyal but lazy, humble but chronically given to lying and stealing; his behavior was full of infantile silliness and his talk inflated with childish exaggeration.” STANLEY M. ELKINS, SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE 82 (1959).

<sup>193</sup> ERICA R. EDWARDS, THE OTHER SIDE OF TERROR: BLACK WOMEN AND THE CULTURE OF US EMPIRE 153 (2021) (discussing the notion of Blackness as protection and how some Black people manage and protect against threats to the wider polity while serving as the “residual embodiment” of threat).

centuries, whether free or enslaved, was socially and civically disenfranchised.<sup>194</sup>

Nineteenth-century Connecticut Black and white people were segregated in almost all social matters and aspects of public life.<sup>195</sup> Crucially, Blacks like Sam Wheeler were often prevented from testifying in courts, mostly due to the belief that they lacked the ability to be truthful.<sup>196</sup> This segregation was in large part due to beliefs in white superiority. Stemming from these overarching supremacist views were widespread fears of Black-white race mixing, and especially of Black sexuality.<sup>197</sup>

Throughout much of United States history, Blacks occupied what one scholar has called a “sexual middle ground,” where Blacks were alternatively hypersexualized and desexualized.<sup>198</sup> This often resulted in accusations of allegations of rape and imputations of inappropriate sexual knowledge, especially in the context of reproduction.<sup>199</sup> Sam

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<sup>194</sup> EDGAR J. MCMANUS, *BLACK BONDAGE IN THE NORTH* 169–73 (1973).

<sup>195</sup> THERESA VARA-DANNEN, *THE AFRICAN-AMERICAN EXPERIENCE IN NINETEENTH-CENTURY CONNECTICUT: BENEVOLENCE AND BITTERNESS* xiv–xix (2014).

<sup>196</sup> THOMAS READ ROOTES COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY: IN THE UNITED STATES OF AMERICA* 226 (1858). A potential exception where Black testimony or statements to authority was historically not only condoned but encouraged during slavery was where Blacks informed on other Blacks in order to support white policing of Blacks. “[S]ince its earliest days, the United States’ approach to policing Blacks’ alleged criminality was often predicated on using Black citizens to target other Black citizens, sometimes fairly and sometimes shockingly unfairly. And these Black experiences of criminal justice policy are claimed to have bred deep distrust of government and informing.” Andrea L. Dennis, *A Snitch in Time: An Historical Sketch of Black Informing During Slavery*, 97 *MARQ. L. REV.* 279, 285 (2013). Concerns about Black truthfulness was not diminished by the free status of Blacks. COBB, *supra*, at 226. The bar on Black testimony is “founded not only upon the servile condition of the negro, but also his known disposition to disregard the truth.” JEANNINE MARIE DELOMBARD, *SLAVERY ON TRIAL: LAW, ABOLITIONISM, AND PRINT CULTURE* 76 (2007).

<sup>197</sup> See JANE DAILEY, *WHITE FRIGHT: THE SEXUAL PANIC AT THE HEART OF AMERICA’S RACIST HISTORY* (2020) (noting that fears of interracial sex and mixed-race reproduction were at the heart of Jim Crow Laws); see also DIANE MILLER SOMMERVILLE, *RAPE AND RACE IN THE NINETEENTH-CENTURY SOUTH* (2004).

<sup>198</sup> Richard Godbeer used the phrase “sexual middle ground” to describe social and sexual relations between Native Americans and whites in colonial and early postcolonial times. Richard Godbeer, *Eroticizing the Middle Ground: Anglo-Indian Sexual Relations Along the Eighteenth-Century Frontier*, in *SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY* 91, 92, 105 (Martha Hodes ed., 1999). This sexual middle ground, sometimes characterized at one extreme by violence, coercion, and hypersexuality, or at the other end by quiet tolerance of and acquiescence to Native American sexual relationships, could also describe some sexual relations between whites and Blacks.

<sup>199</sup> SHARON BLOCK, *RAPE AND SEXUAL POWER IN EARLY AMERICA* 164 (2006). Of the ten executions by hanging recorded in Connecticut between 1790 and 1820, four of those involved Black men executed for rape, even though Black people made up a small

Wheeler's story of observing Rogers and Smith in bed together brought to the foreground the sexualized legal and social opprobrium that Blacks like Sam Wheeler faced during this time.<sup>200</sup> Sam Wheeler may have testified honestly about seeing Ammi Rogers in bed with Asenath Smith, or he may not have testified truthfully, choosing instead to dissemble or obscure the facts. Either way, he likely understood the doubts that had been expressed about his truthfulness. Thus, once admitted as a witness, Wheeler may have carefully crafted his testimony to meet the demands of lawyers, enslavers, or others in power.<sup>201</sup> If that was what he did, he would not have been alone. Even after the Civil War and the general emancipation of enslaved people, Black witnesses sometimes made decisions about what to say in court proceedings based on their understandings of race relations in their communities. Black witnesses sometimes gave testimony premised on their knowledge of applicable laws and the facts of the case.<sup>202</sup>

Sam Wheeler may have similarly shaped his testimony. Whether truthful or not, Sam Wheeler's testimony that a white religious figure had violated sexual norms was a way of offering help—but not in the way that is typically seen in Proppian analysis. Proppian helpers are usually outwardly focused, altruistic figures who act only to help the hero figure. Sam Wheeler, in contrast, is a more complex figure, who may have had significant self-motivation.<sup>203</sup> Shaping his testimony this way might have allowed him to retake some power in a climate where

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percentage of Connecticut's population. Circumstances surrounding the cases of all these men provide a sense of the theatrical and almost carnivalized atmosphere that prevailed in such matters. Many United States trials and formal legal proceedings held before, during, and after the early United States national period, up to and including executions, were intentionally publicly demonstrative and highly theatrical. This was largely to serve a didactic purpose. Lawrence M. Friedman, *Lexitainment: Legal Process as Theater*, 50 DEPAUL L. REV. 539, 540–41 (2001). There was also, however, a pure entertainment function of such rituals. *Id.*

<sup>200</sup> Of course, viewing Black men as sexually dangerous was not unique to this early national period in history. And a further complication in such matters is that some Black men were in fact, like members of any other racial or gender group, sexually or otherwise dangerous. But deeming all Black men dangerous or “undangerous” is equally harmful and leads to situations where potential criminals are made symbols of racial injustice and buoyed by being construed as part of an “endangered species.” See Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 HARV. C.R.-C.L. L. REV. 49, 57 (1997).

<sup>201</sup> Melissa Milewski, *From Slave to Litigant: African Americans in Court in the Postwar South, 1865–1920*, 30 L. & HIST. REV. 723, 747–48 (2012).

<sup>202</sup> *Id.*

<sup>203</sup> A critique of Propp's framework is that it seems to propose a set of relatively straightforward figures who are defined chiefly in relation to the hero. Others have suggested, for example, that Proppian figures may have far more complex characters and motivations. MARIA TATAR, *THE HARD FACTS OF THE GRIMMS' FAIRY TALES* 69 (2003).

Black men were subjected to the death penalty for sexual crimes, and where Blacks, either by force or by limited choice, often dwelled in a sexual underworld.

Given the pernicious, ongoing attribution of licentiousness to Blacks, and the suppression of Black voices in most legal matters, Wheeler may have viewed the legal and social norms of the white Connecticut establishment much like the formerly enslaved woman, Harriet Jacobs, viewed the law.<sup>204</sup> According to Jacobs, the law as it pertained to Black people in the antebellum period was a compilation of “the regulations of robbers, who had no rights that I was bound to respect.”<sup>205</sup> Thus, by testifying for the prosecution and acting as a tool of state power, Wheeler exposed the sordid side of white life and its hypocrisy. Wheeler may have used his testimony to assail the honor of Rogers and the other whites involved, thereby undermining the prevailing social norms of white chastity.<sup>206</sup> Through his testimony, Wheeler may have avenged the ongoing subordination which he and other Black people were frequently subjected.<sup>207</sup> Wheeler was a helper, but his assistance may have been more self-serving than any other figures involved in the *Rogers* case.

#### CONCLUSION

From the time of Ammi Rogers to present, varying protection narratives have shaped abortion ideologies, which in their own time, have often given birth to formal abortion laws. Contemporary abortion

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<sup>204</sup> Harriet Jacobs fled slavery and later wrote about her experience using the pseudonym of Linda Brent. Her memoir is called “the most comprehensive slave narrative written by an Afro-American woman.” See Jean Fagan Yellin, *Harriet Ann Jacobs (c. 1813–1897)*, 5 LEGACY 55, 56–58 (1988).

<sup>205</sup> HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 281 (L. Maria Child ed., 1861). Author Christina Accomando used Jacobs’s words in titling her book, *THE REGULATIONS OF ROBBERS: LEGAL FICTIONS OF SLAVERY AND RESISTANCE* (2001). In her book, Accomando considers how legal, political, and literary discourses of slavery and resistance tended to ignore, disparage, or mischaracterize Black voices, making law a tool of white oppression and a source of illegitimacy. *Id.* at 113–14.

<sup>206</sup> Rickie Solinger, *Bleeding Across Time: First Principles of US Population Policy*, in REPRODUCTIVE STATES: GLOBAL PERSPECTIVES ON THE INVENTION AND IMPLEMENTATION OF POPULATION POLICY 63, 66 (Rickie Solinger & Mie Nakachi eds., 2016) (“In the first half of the nineteenth century, powerful religious, medical, and legal authorities asserted that white chastity depended on legally enforcing the strictest relationship between sex and reproduction . . .”).

<sup>207</sup> ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 51 (2006) (citing Bertram Wyatt-Brown, *The Mask of Obedience: Male Slave Psychology in the Old South*, 93 THE AMERICAN HISTORICAL REVIEW 1228 (1988)).

protection narratives have become so profuse that not only do they serve as the basis for statutory norms and court decisions, but they also form crucial parts of contemporary political platforms.<sup>208</sup> One significant harm of protection narratives, in all forms, is that they often frame their subjects narrowly, ignore or deny the possibility of progressive change, and ultimately suppress possibilities of principled difference.<sup>209</sup> Moreover, a core aspect of abortion law protection narratives is the assumed third-party, medicalized aspects of abortion. In recent times, especially in the wake of *Dobbs*, an increasing number of abortions are either or both self-administered and self-managed.<sup>210</sup> This shift to self-supervision calls for new understandings about what and who should be protected in the context of abortion, and how to effectuate such protection.

Recently, protection narratives affirmatively articulate abortion; but an increasing number, much like some abortion rhetoric of the past, are unstated, and function as silent protection narratives that limit access to abortion.<sup>211</sup> One key example is seen in the U.S. Supreme

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<sup>208</sup> Political candidates have largely featured their views on abortion through specific protection narratives that placed them in well-identified camps. This was seen in the 2016 United States presidential election, when candidates Donald Trump and Hillary Clinton articulated diametrically opposed views on *Roe v. Wade*. Candidate Hillary Clinton asserted that is important “that we not reverse *Roe v. Wade*.” *Transcript of the Third Debate*, N.Y. TIMES (Oct. 20, 2016), <https://www.nytimes.com/2016/10/20/us/politics/third-debate-transcript.html> [<https://perma.cc/K32E-XF7R>]. Then-candidate, and later President, Donald Trump, stated in response to a question as to whether he wanted to overturn the case, that it “would happen, because I am pro-life, and I will be appointing pro-life judges.” *Id.* Interestingly, in the 2020 presidential election, abortion was not a central campaign issue until late in the race, when both incumbent Trump and then-candidate Joseph Biden both began to discuss the issue in light of concerns about the composition of the U.S. Supreme Court. Lisa Lerer & Elizabeth Dias, *Abortion Returns to Spotlight in Dispute over New Justice*, N.Y. TIMES, Sept. 21, 2020, at A20.

<sup>209</sup> VRINDA NARAIN, RECLAIMING THE NATION: MUSLIM WOMEN AND THE LAW IN INDIA 89–91 (2008) (discussing how protection narratives wielded against Muslim women in India limit women’s opportunities for full citizenship).

<sup>210</sup> Yvonne Lindgren, *When Patients Are Their Own Doctors: Roe v. Wade in an Era of Self-Managed Care*, 107 CORNELL L. REV. 151, 157–58 (2021) (noting that hundreds of thousands of pregnant people have successfully managed their own pregnancy terminations using pills obtained online).

<sup>211</sup> Language contained in the preface of the official report of the trial of Ammi Rogers, for example, warned of the potentially scandalous nature of the trial record that followed, and anticipated that some readers will question “[t]he propriety of giving publicity to” the matter, that is, the decision not to remain silent. REPORT OF THE TRIAL, *supra* note 1, at iii. Silence performs many functions. Silence is, among other things, a mechanism of power, and narratives of silence and denial are often methods of protecting certain established ideas. *See, e.g.*, EVIATAR ZERUBAVEL, THE ELEPHANT IN THE ROOM: SILENCE AND DENIAL IN EVERYDAY LIFE (2006). Courts sometimes decline to give decisions, but this does not mean that there is no law or nothing to be said about a matter. Nonetheless, the absence of positive



Court case *EMW Women’s Surgical Center v. Meier*, where the Court declined without comment an appeal challenging Kentucky’s highly restrictive abortion law.<sup>212</sup> There were no noted dissents. This silence obscures what is at stake in the contemporary abortion debate.<sup>213</sup> Protection narratives are also seen in what is the most groundbreaking abortion decision in decades: the opinion in *Dobbs v. Jackson Women’s Health Organization*,<sup>214</sup> written by Justice Samuel Alito. In a startling reversal, *Dobbs* overturned *Roe v. Wade*<sup>215</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>216</sup>

*Dobbs* concerns a Mississippi state statute containing the following provision:

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.<sup>217</sup>

The statute is premised on its own protection narrative of protecting maternal patients.<sup>218</sup> At the center of Alito’s draft opinion are two conflicting claims of protection: protecting “potential life” (that of the fetus) by limiting or forbidding abortion,<sup>219</sup> and protecting the right to have an abortion.<sup>220</sup> Ultimately, Justice Alito opines that the Fourteenth Amendment to the U.S. Constitution does not protect the right to get an abortion, as it is not a fundamental right.<sup>221</sup> Hence, the challenged Mississippi statute does not violate the Constitution.<sup>222</sup>

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affirmations of law may result in a presumption of freedom, for the law’s silence may be “as emphatic as any of its explicit pronouncements.” HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 93 (2011).

<sup>212</sup> *EMW Women’s Surgical Center v. Meier*, No. 19-417, *cert. denied*, Dec. 9, 2019. The case was brought by the only licensed abortion clinic in Kentucky and three physicians who work there. They challenged a 2017 law requiring doctors to provide a detailed description of fetal ultrasound images, including “the presence of external members and internal organs.” *Id.* Doctors are also required to render audible the fetal heartbeat if possible.

<sup>213</sup> PATRICIA ONDEK LAURENCE, *THE READING OF SILENCE: VIRGINIA WOOLF IN THE ENGLISH TRADITION* 99 (1991).

<sup>214</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>215</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>216</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U. S. 833 (1992).

<sup>217</sup> MISS. CODE ANN. § 41-41-191(4)(b) (West 2018).

<sup>218</sup> *Dobbs*, 142 S. Ct. at 2244.

<sup>219</sup> *Id.* at 2236.

<sup>220</sup> *Id.* at 2236–37.

<sup>221</sup> *Id.* at 2242.

<sup>222</sup> *Id.*

The opinion addresses another object of protection: the protection of asserted Fourteenth Amendment liberty interest at the heart of *Roe* and *Casey*.<sup>223</sup> Liberty, as Justice Alito notes, may have several meanings.<sup>224</sup> Citing no less an authority than Abraham Lincoln, Justice Alito asserts, “We all declare for Liberty; but in using the same word we do not all mean the same thing.”<sup>225</sup> And in questioning whether the Fourteenth Amendment protects abortion, Justice Alito warns that the Fourteenth Amendment, as a whole, is in need of protection: “We must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been ‘reluctant’ to recognize rights that are not mentioned in the Constitution.”<sup>226</sup> This type of textualist approach, however, seems to entirely ignore the contexts in which so much of the Constitution was written.

*Dobbs* not only is a harbinger of the loss of abortion rights that hearkens back to the trial of Ammi Rogers, but it also signals that other important rights protected by the Fourteenth Amendment may be under assault because those rights are absent from the text of the amendment. One way to excavate the assumptions and frames at the foundation of protection narratives, whether silent or spoken, is to employ narrative analysis. Claims about women’s reproductive autonomy, though frequently premised on religious, normative, narrow, or individualized moral concerns about social change, are just as often disguised as positive, broad-based, secular, and civic concerns.

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<sup>223</sup> *Id.* at 2242.

<sup>224</sup> *Id.* at 2247.

<sup>225</sup> *Id.* at 2247 n.20 (citing *Address at Sanitary Fair at Baltimore, Md., reprinted in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 301* (Roy P. Basler ed. 1953)). There is, of course, a potent irony in citing Lincoln on the nature of liberty, given his role in helping to emancipate enslaved people during the United States Civil War. Although there is no doubt that Lincoln was pivotal in helping to free enslaved Africans and their descendants, more contemporary accounts have acknowledged that it is facile, and almost inaccurate, to assert that “Lincoln freed the slaves.” The Emancipation Proclamation freed only those enslaved in rebel states; it took the Thirteenth Amendment to the U.S. Constitution to entirely free all enslaved people (and even then, some remained ignorant of the provision until Juneteenth, when those enslaved in the state of Texas learned of their freedom). Lolita Buckner Inniss & Skyler Arbuckle, *Slavery and the Postbellum University: The Case of SMU*, 74 SMU L. REV. 723, 726, 739 (2021). Furthermore, the Emancipation Proclamation itself, while achieving its goal, did so as a bland narrative recitation that lacked memorable language or soaring rhetoric. Instead, the Emancipation Proclamation “had all the moral grandeur of a bill of lading.” RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 169 (1989).

<sup>226</sup> *Dobbs*, 142 S. Ct. at 2247.

Narratives on abortion and other reproductive rights, from advocates and critics, frame how our society views not only the legal parameters of abortion but also broader juridical and social debates about issues such as gender, reproduction, and race. Hence, it is crucial to question abortion's legal, historical, and social antecedents, and the protection narratives at the foundation, both those that are stated and unstated.

