**Abortion and Coronavirus – Between Women's Rights Discourse and Obligations Discourse**

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**Abstract**

The year 2019 has been defined by some experts as “a critical time for abortion rights.” Added to that the coronavirus outbreak and subsequent economic crisis in 2020 have severely jeopardized women’s basic right to abortion both inside and outside the United States. Indeed, the human rights discourse is the most prevalent and dominant in the modern era. Simultaneously, however, recent decades have witnessed a strengthening also of the obligations, commitments and responsibilities discourses, particularly in family law, including the issue of the parent-child relationship. The aim of this article is to reevaluate the nexus of the old abortion decision and the perspective of these new discourses’ perspective While there is a lacuna between these new discourses and the context of abortion, we will try to bridge this gap by differentiating between pregnancy as the result of consensual sex or nonconsensual sex. In the first scenario, we claim that the new family-centric discourses should be paramount, whereas in the latter, the women’s rights discourse should govern, drawing on the unique Jewish ethical conception of obligations to justify this differentiation. In essence, we seek to bolster the new and challenging civil discourses with the traditional Jewish ethical viewpoint. This discussion can prove valuable in in normatively resolving at least one aspect of the abortion decision, thereby determining a new compromise Archimedean point for women’s rights discourse and the abovementioned discourses.

One such issue that has received comparatively less attention
but is of the gravest importance in its own right and in relation
to the abortion debate is the issue of parental obligation.[[1]](#footnote-1)

**Introduction**

The year 2019 has been defined by some experts in the field as “a critical time for abortion rights,”[[2]](#footnote-2) since during the first half of the year alone, almost 60 abortion restrictions were enacted in 19 American states, including 26 abortion bans, and many more have been introduced by state legislators.[[3]](#footnote-3) Added to that, the COVID-19 of 2020 has profoundly jeopardized women’s rights throughout the world. This article will focus on the impediments to women’s basic right to abortion, as will be extensively elaborated in the next section.[[4]](#footnote-4) This was particularly true in the first stages of the pandemic outbreak, when there was a huge deficit of personal protective equipment (PPE ),[[5]](#footnote-5) Although when PPE later became available, the concern that unessential medical procedures would drain this much needed equipment was much alleviated.

The jeopardy to human rights generally, more specifically to women’s rights, during the COVID-19 outbreak is only part of the larger picture. The epidemic has brought to the forefront the substantial place of social solidarity,[[6]](#footnote-6) demonstrating that despite our desire to be individual and atomistic, ultimately, we are both profoundly interdependent and inseparable from our environment on more than even a mere technical level.[[7]](#footnote-7) There is a strong social accountability, in both the national and international context, among individuals and, inter alia, also towards pregnant women. That is even truer in light of the latest global medical, social and economic crisis.

The abortion debate has been evolving around two or even three central issues: the status of the fetus and whether s/he should be conceptualized as having personhood with the rights and obligations of a mature person; women’s basic right of bodily integrity as well as other substantial constitutional values, such as dignity, freedom, autonomy, etc.; and “whether gender equality arguments strengthen the arguments for rights to abortion.”[[8]](#footnote-8) In the context of women’s rights discourse, some scholars even claim that states have basic human rights obligations towards women that include abortion care, and they must ensure that it will be accessible and affordable.

The burden on states to protect women’s abortion rights is that much stronger in light of the coronavirus pandemic outbreak, which, due to the unavailability of abortion services during the lockdown and/or stay at home orders, has rendered this procedure more life-threatening than in the past, especially if it is conducted illegally or in the course of a late abortion,. The dramatic ramifications for women’s health of any unwanted pregnancy and the fear that women will be coerced into undertaking unsafe and dangerous procedures in their homes or elsewhere are clear, immediate,[[9]](#footnote-9) and become much more pressing during a crisis situation. As was concluded in a recent article:

States’ international human rights obligations to respect, protect and fulfill the rights to health, life and non-discrimination, among other rights, are not suspended in times of crisis. Measures to prevent unsafe abortion and to ensure access to critical sexual and reproductive health services, including abortion services, are non-derogable core obligations of states, even in emergencies.[[10]](#footnote-10)

The recent “human rights obligations” concept has been discussed and applied in various fields and aspects of human life,[[11]](#footnote-11) including abortion.[[12]](#footnote-12) There is no doubt that this concept represents an application of Wesley Hohfeld’s well-known assumption of complete correlativity between rights and duties. Thus, in the Hohfeldianconception, a legal right is seen as imposing an obligation on third parties, not infrequently the state.[[13]](#footnote-13) The aim of this article is to substantively reevaluate the old abortion decision from the new perspective of the obligations,[[14]](#footnote-14) commitments,[[15]](#footnote-15) and responsibilities discourses.

Modern, western-liberal countries have traditionally significantly strengthened the human rights discourse, including in various family matters, such as the parent-child relationship. Indeed, in recent years there has been a surge in the scholarly literature regarding these discourses generally speaking, and more specifically in family law,[[16]](#footnote-16) as well as regarding the parent-child relationship.[[17]](#footnote-17) In stark contrast to these tectonic shifts, our basic argument is that this central point of view regarding the abortion debate hasn’t received the attention it deserves in the scholarly literature. We will focus on elaborating the required implementation of these elements in the context of this sensitive issue by distinguishing between whether the pregnancy has resulted from consensual or nonconsensual sex, including the possible misuse of contraceptive methods, such as condom failure.[[18]](#footnote-18) In the first scenario, we will claim that the new human rights discourses should be paramount, whereas in the latter, the women’s rights discourse should govern. We hope that the theoretical and practical discussion in this article may go some way towards filling bridging the gap between the human rights discourse and the women’s rights discourse with respect to abortion.

The article proceeds as follows: Section I explores the recent complications and challenges the unpredictable coronavirus outbreak has caused regarding abortion all over the globe, especially within the United States, which has suffered the most from this disease.[[19]](#footnote-19) Section 2 elaborates on the modern human rights discourse among the liberal western states regarding general family matters as well as the parent-child relationship and the abortion debate, while Section 3 sheds light on the strengthening in the discourses in general and regarding family issues and the parent-child relationships. Section 4 then discusses the ancient Jewish ethical conception of the abovementioned elements of obligations, commitments, and responsibilities, including the modern implementation of the Jewish obligation ethics in Israeli law.[[20]](#footnote-20) As far as we know, Israel is the only western jurisdiction to adopt such a unique conception of obligations discourse on a practical level. With this background in mind, in Section 5, we explore the nuanced and delicate normative implementation of these ethics in the abortion decision. Essentially, we seek to reconcile the traditional Jewish ethical point of view with the fresh and challenging emerging civil discourses before concluding the article.

1. Coronavirus and Its Profound Challenges to Abortion

In the United States, myriad attempts have been made by the anti-abortion movement to exploit the pandemic situation to ban abortion. These include expedited legislation; accelerated closure of abortion clinics; trying to ensure that the emergency governmental aid doesn’t include any financial assistance to these clinics; blocking patients’ way to abortion clinics, harassing and threatening them by gathering, physically trying to touch them and/or coughing on them;[[21]](#footnote-21) prohibiting telemedicine that would otherwise be used to provide access to abortion medication, which has become very prevalent in and outside the United States, etc.[[22]](#footnote-22) As has been described elsewhere:

[I]n just two weeks the novel coronavirus managed exactly what anti-abortion activists struggled for nearly five decades to accomplish: it is the biggest threat to legal abortion in America ever imagined […] We have walked straight into a post-RoeAmerica and it’s far worse than we ever expected.[[23]](#footnote-23)

These inroads on women’s right to an abortion have had international repercussions, with the U.N., as well as other central worldwide regulators, issuing a special manifesto declaring that the rights of women in their entirety should be absolutely preserved, including the right to abort a pregnancy.[[24]](#footnote-24) Despite an initial survey of sex-disaggregated data for coronavirus that showed equal numbers of cases for the two genders, there are sex differences in morbidity, mortality, and vulnerability to the disease. That is true due to the mere fact that, regardless of the locality, most of the caregivers in hospitals and clinics are women, which dramatically increases their chances of catching the virus, to their detriment and to the detriment of their fetuses.[[25]](#footnote-25) The acceleration in the exposure of women to the epidemic and their higher chances of suffering from it should accordingly amplify the urgent need to preserve their healthcare rights, including that of abortion. As was recently summarized:

Global responses to the coronavirus disease 2019 (COVID-19) pandemic are converging with pervasive, existing sexual and reproductive health and justice inequities to disproportionately impact the health, wellbeing, and economic stability of women, girls, and vulnerable populations. People whose human rights are least protected are likely to experience unique difficulties from COVID-19 […] Moreover, pregnant women could be at risk of pregnancy-related complications during the COVID-19 pandemic.[[26]](#footnote-26)

2. The Modern, Liberal Western Human Rights Discourse

* 1. Family Issues and the Parent-Child Relationship

Recognition of the human rights discourse is central to the modern, liberal Western world.[[27]](#footnote-27) In this article, we will limit our deliberation only to family matters and to the parent-child relationship, which are much closer to our issue at hand, abortion. During ancient times, traditionally the status of both the husband and the father accorded them primarily rights in their wives and children, with basically no obligations toward their wives nor commitments toward the children. However, since then, the rights of the individuals, including women, who are part of an intact marriage, have evolved considerably.

The application of the women’s rights discourse was mainly fueled by the privatization of the family process during the end of the 18th and beginning of the 19th century.[[28]](#footnote-28) This significant phenomenon is a direct consequence of the modern premise that spouses, even women, are autonomous agents who are free and independent to regulate their marriage and should no longer be treated as a possession of their husbands or even only a partial segment of the entire family lacking in specified rights.

This shift offered a number of important advantages in this process of bolstering women’s rights: correcting the distortions which the traditional marital status had imposed on women in depriving them of certain civil and economic rights and their capability to independently enter into a contract; enforcing spousal agreements that may reshape the stereotypical, non-egalitarian and unequal home tasks; enhancing the autonomy of wives and affording them more flexibility and pluralistic variety as opposed to the once fixed and rigid marital status.[[29]](#footnote-29)

Similarly, in the past, the child was conceptualized socially and legally as an object belonging to the father. Since the child wasn’t recognized as a subject with independent legal status, the child, too, was deprived of any legal rights or recognized interests. However, the gradual recognition of children’s rights began in the 18th century, reaching its peak in the mid-20th century. With judicial recognition of children’s constitutional rights,[[30]](#footnote-30) the emergence of social movements, such as the children’s rights movement,[[31]](#footnote-31) and the enactment of international conventions bolstering children’s rights, the most important being the 1989 United Nations Convention on the Rights of the Child (CRC).[[32]](#footnote-32) To summarize this section, the abandonment of the exclusive husband/father’s rights discourse in favor of a growing embrace of a discourse of his commitments, responsibilities, and obligations, which is the mirror image of the strengthening of women’s and children’s rights, has been well documented in the last decades.[[33]](#footnote-33)

* 1. The Abortion Decision

It is well-known that the right to abort is one of the most basic human rights every pregnant woman has, since it is the ultimate intimate, personal decision with far-reaching ramifications that a given woman can make in her entire lifetime.[[34]](#footnote-34) Whether she decides to give birth or to abort her fetus, the dangers and benefits, the advantages and disadvantages will be mainly hers. Abortion undoubtedly touches on some of women’s most important and central values and arguments concerning choice,[[35]](#footnote-35) liberty,[[36]](#footnote-36) freedom, and autonomy. It straightforwardly has been claimed that the woman’s rights should be superior to that of the fetus she is carrying, and that she should have the autonomy to abort her fetus.[[37]](#footnote-37) This liberty is a pregnant woman’s alone, and she does not need to first secure approval either from her parents or from her husband.[[38]](#footnote-38)

When we debate over the appropriate range of women’s right to autonomous and unfettered access to abortion, the obvious converse to this is a possible critical infringement of the fetus’s right to be born[[39]](#footnote-39) or to its inviolability.[[40]](#footnote-40) The mere fact that the abortion debate still seems to be at an impasse is strongly connected to the fact that recent decades have witnessed a dramatic strengthening of both women’s as well as fetuses’ rights.[[41]](#footnote-41) Indeed, the debate over the fetus’s rights has continued to spark much moral and ethical discussion,[[42]](#footnote-42) draw media attention and give rise to an immense amount of legal scholarship. The main reason for this stalemate is the fact that the recognition of fetal rights should reasonably be derived from the more basic but extremely complicated question of whether a fetus is indeed a person and has personhood in philosophical and legal terms, a dilemma that the Supreme Court has elegantly dodged to this day.[[43]](#footnote-43) Furthermore, even if one assumes that the fetus is a person,[[44]](#footnote-44) the question remains as to how the fetus’s rights and the woman’s rights should justly be balanced. As was recently concluded:

We should honestly admit, however, that the surge in legislative and judiciary abortion restrictions of recent years has brought us closer than ever before to a new Archimedean point of maternal vs. fetal rights, with the latter being awarded much more credit and room at the expense of the former.[[45]](#footnote-45)

Our present article is aimed at adding an additional and supplemental layer to this old-new dilemma. Before elaborating our normative suggestion, however, we should first explore the modern prevailing commitment, responsibility and obligation discourses.

3. The Recent Surge in Commitment, Responsibility and Obligation Discourse

1. General

Together with the prevailing dominant human rights discourse in the modern era, there has also been a strengthening of the obligations, commitments, and responsibilities discourse over recent decades. At the outset of this descriptive chapter, we want to characterize each of these substantial notions. There is no doubt that slowly but surely, the exclusivity and dichotomy of the human rights terminology have been narrowed in the past half-century, while the use of the obligations, commitments, and responsibilities discourse has expanded. Similarly, the meanings of some of the latter terms have been dramatically transformed from the public sphere and/or the gender context to the private and gender-neutral private realm.

Obligation is very well-known legal notion, and we will therefore discuss it only briefly, whereas commitment will be explored much more extensively, since it has been profoundly transformed in recent years. Obligation can be defined as a deed or action that the individual is legally obligated to do or fulfill with or without his consent, since it is statutorily, contractually, or judicially imposed on him.[[46]](#footnote-46) As defined in the following dictionary entry, an obligation is:

[A] moral or legal requirement; duty; the act of obligating or the state of being obligated; a legally enforceable agreement to perform some act […] a person or thing to which one is bound morally or legally; something owed in return for a service or favour; a service or favour for which one is indebted.[[47]](#footnote-47)

One may be morally or legally obligated, despite having been passive and done nothing to obligate oneself with the obligations that will be imposed. The legal logic behind this phenomenon is the correlativity between rights and obligations—since obligation is the correlative of right,[[48]](#footnote-48) one may be obligated to fulfill one’s obligation, even without any intent and despite never having actively done anything. Essentially, the social, moral, and/or legal obligation actually governs the behavior and attitudes of the individual towards others, including one’s spouse and children. For example, the spousal and child obligations have dramatically changed both during their lifetimes together as well as after divorce:

The obligation of support was turned into an obligation to share the marital property […] In the parent/child relationship […] it was regarded as inappropriate to enforce an obligation on the non-resident parent to maintain contact with a child. Instead, that parent’s obligation towards his or her child was, until recently, primarily to be fulﬁlled through the payment of maintenance for the child.[[49]](#footnote-49)

In contrast to obligation, the essence of commitment, at least in the modern era, is the voluntary assumption of responsibility for any given undertaking rather than having it coercively imposed on the individual. It has been characterized by Janet Finch and Jennifer Mason as follows:

[T]he meaning of “commitment” has expanded from a narrow sense of some kind of financial or perhaps moral burden, to including dedication or allegiance to a relationship or life plan, often marked by an explicit promise to “commit” to this. The essence of modern commitment seems to be that, in contrast to obligation, it is taken on voluntarily rather than imposed.[[50]](#footnote-50)

Furthermore, some scholars have argued that commitment is composed of two central sub-elements: personal dedication, namely “the desire of an individual to maintain or improve the quality of his relationship for the joint benefit of the participants”; and constraint commitment, namely the “forces that constrain individuals to maintain relationships regardless of their personal dedication to them.”[[51]](#footnote-51) In family law, such commitments currently prevail both in the horizontal spousal relations and in the vertical parent-child relationship. In the first context, the spouses commit themselves to each other during their lifetimes together, whether they are officially married or even just cohabiting. In the latter scenario, parents commit to the endeavor of both begetting and raising their children. It is worth noting that such parental commitments can be found not only in adoptions and with foster parents,[[52]](#footnote-52) but also in the assisted reproduction technologies through the notion of precommitment.[[53]](#footnote-53)

Other scholars have divided commitment into three subcategories—personal, moral, and structural. The first has been conceptualized as follows:

Personal commitment is the extent to which the person wishes to stay in the relationship, affected by attraction to the person, attraction to the relationship itself, and its importance to his or her own identity. It is the form of commitment recognised by Giddens in the pure relationship and the sense of commitment as dedication or allegiance already considered.[[54]](#footnote-54)

Structural commitment has been defined, following the abovementioned two central sub-elements of commitment, as “the sense that one is morally obligated to continue a relationship.”[[55]](#footnote-55) Indeed, another ongoing and stark modern shift—from structural commitment to personal commitment—can be found in the familial context, as will be explored in the next section.[[56]](#footnote-56)

Responsibility can be characterized either as “having the ability or authority to act or decide” or as “accountability.”[[57]](#footnote-57) Unfortunately, it is beyond the scope of this article to extensively elaborate on the larger notion of responsibility in the modern era, so we will restrict ourselves to quoting the following description:

It becomes the individual’s responsibility to shape his or her own life; but equally, it will be that person’s responsibility if his or her choices and actions fail to deliver self-fulfillment. This seems to fit well with the ideology of autonomy and self-responsibility promoted in liberal societies.[[58]](#footnote-58)

It bears emphasizing that the family has extensively been equated with dictating and demanding the fulfillment of various basic responsibilities, not only as reciprocal among the family members, but also vis-à-vis third parties, mainly the state. As has been asserted:

[F]amily law’s purpose is to determine responsibility for responsibility, including the responsibilities of individuals to each other and the responsibilities of families and the state and the community to each other.[[59]](#footnote-59)

 In this section, we will elaborate on the strengthening of the discourse of commitment, responsibility, and obligation in various family matters, more specifically in the parent-child relationship. Keeping this background in mind will help us to explore the nuanced implementation of these notions that is required in the abortion decision.

1. Family Issues

The modern prevalence of the commitment, responsibility, and obligation discourses in various family matters is also clearly reflected in the scholarly literature. Obligation has been discussed mainly regarding the reciprocal spousal obligations among married couples,[[60]](#footnote-60) as well as cohabitants.[[61]](#footnote-61) Likewise, in recent years, there has been a clear tendency away from the discourse of parental rights towards a terminology of parental responsibility.[[62]](#footnote-62) As was sharply suggested decades ago:

I propose that we attempt to re-direct the law applicable to disputes over parental status toward a view of parenthood based on responsibility and connection […] And in evaluating (and thereby giving meaning to) that relationship, the law should focus on parental responsibility rather than reciprocal “rights” […].[[63]](#footnote-63)

This is the situation already in the United Kingdom, as in many other countries.[[64]](#footnote-64) In our opinion, this trajectory is a very welcome shift, since it sends a clear message specifically to parents and, more generally, to all of society, that parental rights should be awarded only after fulfillment of the parental obligations in light of parents’ basic responsibility toward their children.[[65]](#footnote-65)

Commitment has been discussed regarding either the mutual spousal relationship[[66]](#footnote-66) or its breakdown followed by divorce.[[67]](#footnote-67) The shift from structural to personal commitment is well articulated in the phenomenon of the privatization of the family process, which was extensively elaborated upon in section 2a above. Thus, in the past, the wife’s and mother’s commitments were gender-based, fixed and rigid, first and foremost in their primary role of caregivers within the private family sphere toward their spouses, as well as toward their children. In contrast, over the past decades, these commitments have become much more personal rather than moral and/or structural. These shifts are clearly reflected in the dramatic increase in the numbers of divorces, cohabitation, and out-of-wedlock birth rate. It bears emphasizing that the far-reaching ramifications of these familial relationships are central and tangible not only when the spouses are living together, but also after the breakdown of the family. As was correctly observed regarding the nexus of the spousal and parental relations:

[…] the law has sought to categorise what has at various times been referred to as custody, care, access, contact or involvement in the life of a child […] how far the law has been used to support the personal commitment of a parent to a child, and how far it has imposed structural commitments in order to maintain their relationship.[[68]](#footnote-68)

1. Parent-Child Relationship

The notions of commitment, responsibility,[[69]](#footnote-69) and obligation[[70]](#footnote-70) have become central in the past decades also in the context of the parent-child relationship. This is literally a tectonic shift, since the entire moral and legal infrastructure of the parental obligations towards their children has traditionally been very vague and amorphous. As was asserted, “both the spousal and parental obligations of support seem to have been recast as social or moral norms rather than legal duties.”[[71]](#footnote-71) It is commonly argued in both the legal and philosophical literature that the parental obligation is an absolute ethical obligation (moral postulate). Consequently, inter alia, legal parenthood is treated as an absolute moral postulate and therefore nonnegotiable; it is impossible to add to or delete any of the parental obligations. Nonetheless, we would like to cast doubt on this basic conception and inquire whether the parental obligation is indeed a moral postulate.[[72]](#footnote-72)

Philosophers, law scholars, and the judiciary system emphasized already at the beginning of the twentieth century that the parental obligations towards the child basically derive from natural law and definitely not only from the positive law.[[73]](#footnote-73) This contention maintains that the regular order of the creation is that a parent will do the best he or she can to care for their offspring, due, inter alia, to the natural desire of the male, in the vast majority of cases, to duplicate and actually preserve his genetic heritage through his DNA found in his biological child. Put differently, the natural human inclination is to provide everything the child needs and there is no need for the legal system to intervene in this unique relationship in order to make sure that the parent indeed fulfills this basic obligation.[[74]](#footnote-74) Parents are inclined to invest more in raising their biological children, to care much more for them as a very unique responsibility, and even to sacrifice themselves for their offspring. This is much less likely to occur when the child is not their biological descendant, especially when the child has not been adopted by them. Even in the modern legal discourse, one can find several justifications for grounding the parental obligations in terms of ethical and not legal obligations.[[75]](#footnote-75)

Numerous legal scholars have argued that there is a consensus around the understanding that the parental responsibility for the offspring is, first and foremost, a moral postulate. This is one of the most basic public axioms both inside and outside the United States[[76]](#footnote-76) However, the sociological-empirical research of family law teaches us that, practically speaking, human nature is much more complex. Not infrequently, parents don’t fulfill their natural and ethical obligations towards their offspring, and on occasion, the emotional bond, which should carry a promise of shelter for the children, does not derive naturally from the genetic connection and from the delivery.

Indeed, the biological connection often does create a strong basis for the emotional engagement needed for taking care of the best interests of the child; but can we, as a responsible society, trust parents to fulfill their moral obligations when it is only reasonable but not certain that they will? Some scholars, including David Archard,[[77]](#footnote-77) argue that it the biological connection is definitely not enough. Similarly, Hugh Lafollette[[78]](#footnote-78) has claimed that legal parenthood should be awarded to a certain individual only after he has qualified for a “parental license.” According to this line of argument, since there is an acute need for training and providing some level of knowledge and ability to this person and any parental misstep may cause enormous damage to a third party, the child, we should build a social infrastructure for licensing parents.

Lafollette argues that the natural blood connection is not a sufficient indicator for the existence of the basic knowledge required to appropriately care for the child and to prevent the option of causing him harm. The genetic lineage and natural law are therefore an unreliable basis on which to exclusively establish legal parentage. Other law scholars have maintained that the obligations of a male to his child are similar to his obligations towards his wife, and both are not actually moral obligations, but more akin to social rules, and therefore they are not absolute and may change from one society to another. This is most often the case in cultures where women commonly support themselves and children are cared for by the society as a whole.[[79]](#footnote-79) Due to the weakness of the abovementioned justifications, some have claimed that the parental obligations towards the descendant should be based also on the following two additional rationales: concern for the prosperity of the child specifically and more generally of all humankind; and the imposition of those obligations on the shoulders of the biological parents, as will be explored in the next section.[[80]](#footnote-80)

To conclude this section, in light of the shortcomings of the contention that one has an absolute moral obligation to support one’s offspring, and despite the intuitive attractiveness of constructing the parental obligations as a moral postulate, the philosophical-bioethical infrastructure for doing so is very complex, tentative, and insufficiently defined.[[81]](#footnote-81) Even the philosophical-ethical justifications are arguable and definitely do not provide a sufficient basis for a moral postulate. It is not surprising, then, that prominent scholars in the field of parent-children relationships have turned to supplemental routes in order to more successfully base the parental obligations on much more personal justifications, among which one finds benevolence and responsibility, stewardship, and gratitude.[[82]](#footnote-82) The failure of the abovementioned argumentation, which cannot rest on the basis of imposing only an ethical obligation on the parent, should guide us in an entirely different direction.

4. The Jewish Ethics – Obligations Discourse

As has been elsewhere extensively elaborated,[[83]](#footnote-83) one of the most basic and central differences between Jewish law and modern, liberal civil law is their respective and completely differently articulated conceptualizations of the relationship between a person and his sovereign. Whereas Jewish law structures the relationship between an individual and his Creator in terms of obligations, civil law conceptualizes the relationship between individuals, or between individuals and a sovereign, in terms of rights. Put differently, in Jewish law, a person must ask himself what his obligations in this world are, whereas in civil law, a person primarily has rights and the role of the law is to protect his human rights.[[84]](#footnote-84) Likewise, conjugal relations and the consequent procreation and raising of children are referred to as halakhic obligations which are binding upon all Jews, apart from certain exceptions.[[85]](#footnote-85) The gap between the civil human rights discourse and the Jewish obligations discourse was noted by Robert Cover, who wrote as follows:

The principal word in Jewish law, which occupies a place equivalent in evocative force to the American legal system’s “rights,” is the word “mitzvah” which literally means commandment but has a general meaning closer to “incumbent obligation.”[[86]](#footnote-86)

In addition to calls to adopt this unique Jewish legacy in the United States,[[87]](#footnote-87) this approach has been explicitly anchored in modern Israeli law, which dictates that the parental obligation as guardians includes the obligation and the right to care for the needs of their minor children. As such, parents have the:

[O]bligation and the right to care for the needs of the minor, including his education, studies, training for work, occupation, and employment, as well as preserving, managing and developing his assets; also attached to this right is the permission to have custody of the minor and authority to represent him and to determine his place of residence.[[88]](#footnote-88)

Following Jewish law’s unique conception, Israeli legislation substantively and not only technically conceptualizes the parental obligation as both an obligation and right at the same time. Put differently, in the parent-child relationship, the obligation is simultaneously also a right and the right is actually an obligation. These intertwined legal terms are ultimately reflections of the other. Therefore, we should treat any entitlement of the parents regarding their children also as a moral and legal obligation and not merely a self-centered legal right. Another challenging conceptual attempt to bridge the alleged gap between the civil human rights discourse and Jewish law’s obligations discourse was made by Ronit Irshai, as follows:

As a duties-grounded system, Judaism is portrayed as diametrically opposed to liberal philosophy […] I argue that the claim that the duties discourse of Judaism contradicts rights discourse is superficial, misleading […] To my mind, duties discourse provides strong protection for rights […] I find this argument nothing more than empty rhetoric because, as noted, rights and obligations are largely correlative concepts.[[89]](#footnote-89)

Although the abortion decision in Jewish law has been extensively discussed in the scholarly literature,[[90]](#footnote-90) the unique angle of the possible implementation of the obligations discourse hasn’t received the attention it deserves. Among the scant literature on this angle, see, for example, the following statement:

The exercise of man’s procreative faculties, making him “a partner with God in creation,” is man’s greatest privilege and gravest responsibility […] Liberal abortion laws would upset that balance by facilitating sexual indulgences without insisting on corresponding responsibilities.[[91]](#footnote-91)

We will try to fill in this lacuna in the following normative chapter.

5. Resolving the Abortion Decision – Between Human Rights Discourse and Obligations Discourse

In her groundbreaking article “A Defence of Abortion,” Judith. J. Thomson rejects the claim that the fetus acquires the right to the use of his mother’s body, since the mother essentially invited the fetus to use it. Thus, even the recognized right of the fetus to life does not entail the right to use another person’s body for continued sustenance. In other words, even if the fetus is granted full moral status or personhood with all the accompanying moral and legal rights, inter alia, to be born healthy, the woman’s right to abort can still be defended.[[92]](#footnote-92) Although Thomson’s general argumen in her seminal article has drawn considerable objections as well as support, for our part, in rights terminology, we may agree with her.[[93]](#footnote-93) But she raises and doesn’t reject the following fundamental consideration in her conclusion:

Suppose a woman voluntarily indulges in intercourse, knowing of the chance it will issue in pregnancy, and then she does become pregnant; is she not in part responsible for the presence, in fact the very existence, of the unborn person inside her?[[94]](#footnote-94)

In other words, even Thomson herself agrees that if a woman hadn’t taken any contraceptive methods and/or hasn’t aborted her fetus in the earlier stages of her pregnancy, she has taken the responsibility for this pregnancy and the resulting child and she cannot claim to have been coerced. She assumes:

[…] that the fetus is dependent on the mother, in order to establish that she has a special kind of responsibility for it, a responsibility that gives it rights against her which are not possessed by any independent person—­such as an ailing violinist who is a stranger to her.[[95]](#footnote-95)

Thus, the responsibility discourse yields a totally different conclusion. Since the mother invited the fetus to dwell inside her womb, and now the fetus has become entirely dependent on her, she has clear responsibilities and therefore also obligations vis-à-vis the fetus.[[96]](#footnote-96) That is even truer if we assume that the fetus has personhood, to varying degrees, with all the derivative rights and obligations,[[97]](#footnote-97) as was briefly deliberated at the outset of this article. We want to endorse her claim by arguing that nonetheless, the U.S. Supreme Court hasn’t ascribed full legal personhood to the fetus, nor has it rejected the possibility of it being treated as a person in other contexts and situations.[[98]](#footnote-98) As has been elsewhere concluded:

Contrary to popular belief, the Supreme Court's pronouncement in Roe did not forestall all state determinations of legal personhood […] not only is the legal status of embryos and fetuses an open question under the current law of Roe v. Wade, but it will remain an open question even if the case is overruled.[[99]](#footnote-99)

Furthermore, this special stage in the development of human life has a moral meaning and ramifications that should be respected. This unique interim human being should be morally and even legally treated as a juridical person[[100]](#footnote-100) although it is definitely not a natural person.[[101]](#footnote-101) We totally agree with the following claim that:

[…] even in the absence of natural personhood protections prior to birth, the fetus is entitled to significant moral status—status which may be recognized under a juridical personhood framework.[[102]](#footnote-102)

Such a category of personhood would obligate other individuals, requiring them to act in a clear fashion towards that fetus. It is our opinion that when a woman intentionally brings a fetus into existence by not aborting it in the first stages of the pregnancy, she clearly strengthens her commitment and responsibilities towards it. There is no doubt that the most meaningful and far-reaching interest of the fetus is to be born and not aborted, and therefore aborting it later on in the advanced stages of the pregnancy should be prohibited.[[103]](#footnote-103) Moreover, even Thomson agrees that:

It may be said that what is important is not merely the fact that the fetus is a person, but that it is a person for whom the woman has a special kind of responsibility issuing from the fact that she is its mother […] Surely we do not have any such “special responsibility” for a person unless we have assumed it, explicitly or implicitly.[[104]](#footnote-104)

Likewise, Joel Feinberg proposes that the obligation of the woman to carry the fetus to its term is, inter alia, a derivative, to varying degree, of her responsibility for the existence of this pregnancy. He differentiates among seven different scenarios where the degree of the woman’s responsibility for her pregnancy may dramatically vary.[[105]](#footnote-105) It is actually an application of a much broader moral rule that imposes obligations on the individual who intentionally causes a third party to be dependent on him, even though he is a total stranger to him.

Finally, there are feminist scholars who strongly oppose abortion and actually endorse a “pro-life” conception drawing on responsibility and commitment discourse. Consider the following nonconformist statement:

When abortion is available to all women, all male responsibility for fertility control has been removed. A man need only offer a woman money for the abortion and that’s it: no responsibility, no relationship, no commitment.[[106]](#footnote-106)

Similarly, Robin West maintains that the right and the responsibility for the fetus should be conceptualized as intertwined, as connected vessels.[[107]](#footnote-107) Society should respect human rights not only as a prerequisite for personal freedom but also as a condition for personal responsibility, since without the latter, freedom is meaningless and even morally problematic. Since any decision regarding abortion not infrequently involves contradicting responsibilities, we should contemplate not only the woman’s freedom of procreation but also, and maybe even more importantly, the responsibility that is the derivative of this freedom:

The abortion decision typically rests not on a desire to destroy fetal life but on a responsible and moral desire to ensure that a new life will be born only if it will be nurtured and loved.[[108]](#footnote-108)

West also criticizes the ethics of care theory, claiming that it should endorse the responsibility discourse, even though it undermines abortion rights. As she sharply puts it:

The ethic of care, from a liberal perspective, emphasizes and then valorizes precisely the interrelationships, the dependency, the lack of agency, the identification with care and nurturance, the relegation to the private sphere, and in short the sex and gender linked differences that have been used, when an excuse was needed, to justify the two-century-long project of continuing the subordination of women even in a liberal society that should seemingly be committed to ending it.[[109]](#footnote-109)

Likewise, it has been claimed that the ethics of care a priori may undermine and not support the legitimacy of abortion:

The interconnection between the two shows that the standard individualised approach is particularly inappropriate in relation to the foetal status. The relational approach argues that rather than asking what rights or responsibilities are owed to an individual in response to their status, we ask what responsibilities and rights are owed in relation to a relationship.[[110]](#footnote-110)

More specifically, the variant relational ethics of care doesn’t focus on the reciprocal rights and obligations any given individual has in light of his specific status, but inquires what responsibilities are owed regarding any given relationship.[[111]](#footnote-111) As was concluded, “A relational approach can recognise that pregnancy can create responsibilities for pregnant woman […] Abortion decisions are complex and not reducible to straightforward analysis of my rights against the non-person.”[[112]](#footnote-112)

Furthermore, and this time in direct continuation of Thomson’s rights deliberation, even if we assume that the rights of the woman are superior to her fetus’s rights, there is an additional consideration that should be added to the equation. In the vast majority of cases where consensual sex has resulted in the pregnancy, we should consider the essence of having a sexual relationship as actually being an implied agreement to accept the obvious resulting outcomes of this action—the pregnancy. As was aptly asserted:

Willingly engaging in behaviour that runs the risk of creating a child, or failing to terminate a pregnancy […] seems a valid moral basis for imposing the prior obligation to “take care of” that child […].[[113]](#footnote-113)

In our opinion, we should differentiate between whether consensual or nonconsensual sex, including possible misuse of contraceptive methods, such as condom failure,[[114]](#footnote-114) has yielded the pregnancy. In the first scenario, the new discourses about obligation, commitment and responsibility should be superior, whereas in the latter, the women’s rights discourse should govern. From the ethical and legal standpoints, such voluntary acceptance should dramatically incline us towards rejection of any claim of “coerced parenthood,” on the part of either the father or the mother, including the responsibility of the pregnant woman toward the fetus in her womb to allow it to be born.[[115]](#footnote-115) As was elsewhere argued:

In my opinion, in any case of imposition of parental status, especially its legal obligations, we should consider the essence of having a conjugal relationship as actually being an implied agreement to accept the obvious resulting outcomes of this action. Therefore, the obligation to provide for the child’s support and all his other needs can be deduced from the implied intention to accept the legal parentage that may derive from having sexual relations with the conceived child’s mother.[[116]](#footnote-116)

Consequently, if indeed the woman hasn’t aborted the fetus at earlier stages of the pregnancy and will carry the fetus to its term, the obligation to provide for the child’s support and all his other needs can be deduced from the implied intention to accept the legal parentage that may derive from having intentional sexual relations.[[117]](#footnote-117) Put differently, the voluntary sexual relationship can teach us about the explicit or at least implied agreement to accept the obvious consequences of this action—bringing the fetus into the world and fulfilling all his or her needs. This argument is supported by several contentions of different scholars who have claimed that structuring the sexual relations in contractual terminology will yield the ultimate conclusion that this action can be understood as an agreement to fulfill the legal responsibilities and obligations stemming from it.[[118]](#footnote-118) As has been asserted:

The parents of a particular child have this obligation to him, and not someone else, because they are his biological parents; because they, and not someone else, begot and conceived the child. It is the biological bond that creates the obligation of parents to take care of their children, and also the rights that accompany this obligation. This obligation came into existence at conception-fertilization, when the event that grounds the obligation occurred. In begetting and conceiving the child, the parents brought him into existence; they also brought into existence, by the same act, their obligation to nourish and protect him.[[119]](#footnote-119)

Moreover, the foregoing discussion is also morally and legally supported by the contention that such implied acceptance of the far-reaching ramifications of having sexual intercourse and not aborting the fetus should be conceptualized as a self-commitment of the woman towards her fetus. In our deliberation in section 2a regarding the shift from structural commitment to personal commitment, we defined the latter as “the sense that one is morally obligated to continue a relationship.”[[120]](#footnote-120) Indeed, if a woman has chosen to intentionally have sexual intercourse with a man and deliberately has chosen not to abort the fetus at the outset of her pregnancy, she has committed herself toward the potential child. Pregnancy is a gradual process that takes a long period of time. During this time, the fetus gradually grows and becomes more and more morally dependent on the host, the woman. Thus, step by step, the self-commitment of the woman to become the mother of this fetus is clear. As was concluded by Gillian Douglas:

This shift, I suggest, reflects the general predominance of liberal thought in western societies regarding autonomy and individual rights, giving primacy to the argument that family obligations should be based on consent. It helps explain the growing conceptualisation of “commitment” as a personal […] It also shows why the concept of structural commitment, in the sense of felt burden or obligation, has lost traction as an ideological and moral imperative […].[[121]](#footnote-121)

The gradually growing self-commitment of cohabitants and married couples toward their spouses in imposing increasingly interdependent spousal obligations is well known.[[122]](#footnote-122) It may even result in the oppressed party, usually the woman, being awarded a larger portion in the [division of matrimonial assets](https://www.jstor.org/stable/43109322) in the event of a breakdown of the family. Similarly, the personal commitment of the woman toward the fetus she has deliberately chosen to create imposes on her (pre)parental obligations, at least morally speaking. Furthermore, the longer the woman lets the pregnancy continue, the more she morally can be said to be committing to the child’s existence and assuming a responsibility to care for it when born.

There is no gender-based discrimination here; it is definitely not a structural commitment, due to her being a woman, but a gender-neutral personal commitment, since she has chosen to become a parent.[[123]](#footnote-123) Men and women are equal in committing themselves towards their forthcoming child. As a woman should be held to all her maternal obligations, likewise the man should be held to all his paternal obligations. Any claim of “paternity fraud” should be rejected out of hand,[[124]](#footnote-124) if the man deliberately had sexual intercourse and there were no extreme circumstances of intentional misrepresentation on the side of the woman.[[125]](#footnote-125) Therefore, with all due respect, we absolutely disagree with I. Glenn Cohen’s following statement:

[I]t is unclear why being responsible for pregnancy should lead to an obligation to gestate when it would not impose obligations derived from violating bodily integrity on genetic fathers vis-à-vis the children for whom they are responsible for creating.[[126]](#footnote-126)

The old-new perception of the obligation, responsibility, and commitment discourses has been considered by some prominent scholars inside and outside the United States. Prof. Cohen has interestingly suggested the following:

A final argument to save the rape and incest exceptions, and in general the one I find the most persuasive, flips the argument on its head in a Hohfeldian way: instead of discussing under what circumstances women have (rape and incest) or do not have (all other cases) a right to abort, we ask under what circumstances they owe a duty to the fetus to gestate it and suggest that no duty is owed uniquely in the circumstances of rape and incest.[[127]](#footnote-127)

Considering the foregoing discussion, we would like to reconsider the following conclusions, which have been claimed in the scholarly literature in the past half-century. Prof. Thomson has comprehensively argued as follows:

They may wish to assume responsibility for it, or they may not wish to. And I am suggesting that if assuming responsibility for it would require large sacrifices, then they may refuse.[[128]](#footnote-128)

Similarly, Jonathan Herring has concluded as follows:

The relational approach offers a solution for these concerns. Through her care and love for the foetus in a wanted relationship it accepts this relationship is deserving of especial moral status. But, where the relationship is unwanted, it has a different moral status and the legal response can be completely different.[[129]](#footnote-129)

These two statements are based on the working premise that the Good Samaritan principle should be interpreted as imposing, at most, obligations of the sort that Prof. Thomson has called “the Minimally Decent Samaritan.”[[130]](#footnote-130) Moreover, in most American jurisdictions, the dominant moral and legal norm is the “No duty to rescue” rule, even when the assistance is costless, and what’s at stake is life or death.[[131]](#footnote-131) Indeed, it was concluded that the prominent scholars debating the abortion decision have used this minimal standard to argue that no moral obligation can be imposed on the mother to give birth to the fetus: “Indeed, as Regan and Manninen point out, we may in tort have duties to aid those who we have put into harmed states, but there is no case law suggesting we must do it with our bodies!”[[132]](#footnote-132)

However, Jewish law, which is characterized by its obligations discourse, imposes a much broader “duty to rescue” obligation.[[133]](#footnote-133) This obligation, which obliges someone to use his body and even to jeopardize himself in order to save the life of a third party, “is deeply imbedded in the Exodus metanarrative of slavery and utter hopelessness in Egypt, followed by rescue and redemption by God, revelation on Sinai, and a perpetual covenant of holiness between the rescuer and the rescued.”[[134]](#footnote-134) A good example of this unique perspective can be deduced from the bystander’s obligation to rescue. As summarized by Aaron Kirschenbaum:

In Judaism, the bystander’s duty to come to the rescue of his fellow man who is in peril is religious, ethical and legal. A citizen is expected to engage in the act of rescue both personally and with his financial resources. He is required, however, neither to give his life nor to place his life in substantial jeopardy to save his fellow.[[135]](#footnote-135)

In other words, in the state of the law throughout the common law world, there is no duty to rescue, except when the endangered person and the potential rescuer are linked in a special relationship. In Judaism, however, social solidarity is much stronger and has far-reaching moral and even legal ramifications. The default starting point is completely the opposite of that of the law of states: any individual Jew is obligated to rescue another Jew and/or even a gentile, insofar as it does not profoundly jeopardize himself. One of the best-known Jewish dicta is “[…] and whosoever preserves a single soul of Israel, scripture ascribes [merit] to him as though he had preserved a complete world.”[[136]](#footnote-136) In stark contrast to other legal systems, in Judaism, according to this dictum, any individual is strongly obligated to save the *Imago Dei* (Image of God)[[137]](#footnote-137) of any other human being as a religious duty.

This is even truer in the case of pregnancy and procreation, due to the first Jewish commandment, both chronologically and in importance, to be fruitful and multiply.[[138]](#footnote-138) Since every couple is thoroughly obligated to procreate and give birth to children, in any case of doubt regarding to give birth or terminate the pregnancy, the decision should incline towards the former, insofar as there is no clear and immediate threat to the welfare of the mother. It bears emphasizing that this obligation is fulfilled only when the woman has intentionally chosen to procreate following consensual sex and definitely not where she was coerced to become pregnant or where nonconsensual sex, including possible misuse of contraceptive methods, such as condom failure, has yielded the pregnancy. Finally, this commandment and its consequential strong inclination not to terminate the pregnancy is the answer to a possible question why Jewish law would not say, since childbirth is statistically more dangerous than early abortion, that the duty of rescue does not, in fact, apply to a pregnant woman, as she would be putting her life in jeopardy by continuing the pregnancy.

Since in the vast majority of the cases the continuation of the pregnancy is not life-threatening for the woman, we should morally enlist Jewish law’s “strong” obligations discourse together with the emerging “weak” civil obligations, commitments and responsibility discourses to determine the following guiding principle: in any case of nonconsensual sex, including possible misuse of contraceptive methods, such as condom failure, that yielded the pregnancy, we should adhere to the women’s rights discourse and not obligate a woman to continue the pregnancy to its term. Contrarily, if the pregnancy is the result of consensual sex, insofar as there is no medical indication of substantial jeopardy to the physical and/or mental welfare of the woman, the abovementioned obligations discourse should govern, even in its “strong” conceptualization, and abortion should be prohibited.

Conclusion

The coronavirus pandemic has further intensified the already heated American debate over abortion rights, following the profound challenges in this field seen in 2019.[[139]](#footnote-139) In the second half of 2021, life slowly but surely will have returned to normal and the dust of the COVID-19 outbreak settled somewhat. Even now, as of this writing, it is not surprising that even the dramatic, worldwide pandemic-induced upheaval to mankind hasn’t resolved the longstanding deadlock the abortion debate seems to have still been in at the end of 2019.[[140]](#footnote-140) What the ramifications of the coronavirus for pregnant women and their babies will be is something we will have to wait and see.[[141]](#footnote-141)

In any event, this article has sought to find a compromise, a new Archimedean point for the women’s rights discourse and the obligations discourse by differentiating between whether a pregnancy is the result of consensual or nonconsensual sex, including possible misuse of contraceptive methods, such as condom failure. We have argued that in the first scenario, the new discourses should prevail, whereas in the latter, the women’s rights discourse should govern. First and foremost, we have provided the descriptive infrastructure by exploring the growing prevalence of the obligations, commitments, and responsibility discourses in general, as well as more specifically, in family law and the parent-child relationship. This article has mainly attempted to apply these new discourses in the context of the abortion decision. In support of this attempt, we have enlisted traditional Jewish law’s unique “strong” obligations discourse, which easily can be reconciled with the abovementioned civil shift.

In essence, this article has sought to reevaluate the old-new abortion decision from the old-new perspective of obligations discourse alongside the prevailing civil human rights discourse. As mentioned at the outset of the article, the coronavirus pandemic has intensified and advanced the crucial place of both social solidarity and accountability toward everyone, as in the strong Jewish perception of these elements. In our opinion, in the second abovementioned scenario of a pregnancy resulting from nonconsensual sex, these social elements strongly incline towards supporting a coerced pregnant woman’s right to abort. Since she hadn’t freely chosen to be pregnant and become a mother, there are clear social interests in not coercing her to become what she hadn’t chosen to become of her free will and with informed consent. However, in the first scenario of a pregnancy resulting from consensual sex, these basic social pillars incline toward preserving the interests of the fetus, because we cannot ignore its conception and that it actually becomes a juridical person, which intensifies the social interest in bringing it into existence.[[142]](#footnote-142)

It is our hope that the theoretical and practical discussion in this article may go some way towards filling the substantial gaps in this complicated issue, as this old-new conception of the abortion debate never has received the attention it deserves in either civil or Jewish law scholarly literature.

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 Andrew Peach, *Abortion and Parental Obligation*, in Life and Learning: Proceedings of the 14th University Faculty for Life Conference XIV 193, 194 (Joseph W. Koterski ed., 2004). [↑](#footnote-ref-1)
2. Elizabeth Nash, *Abortion Rights in Peril — What Clinicians Need to Know*, 381 N. Engl. J. Med. 497, 497 (2019); Pnina Lifshitz-Aviram & Yehezkel Margalit, *Towards A New Archimedean Point of Maternal vs. Fetal Rights*? 81 Louisiana Law Review 447 (2021). [↑](#footnote-ref-2)
3. [Elizabeth Nash](https://www.guttmacher.org/about/staff/elizabeth-nash) et al., *State Policy Trends at Mid-Year 2019: States Race to Ban or Protect Abortion*, Guttmacher Institute (2019), <https://www.guttmacher.org/article/2019/07/state-policy-trends-mid-year-2019-states-race-ban-or-protect-abortion>; The Policy Surveillance Program, State Abortion Laws (2019), <http://lawatlas.org/datasets/abortion-laws>; Mary Ziegler, Abortion and the Law in America: Roe v. Wade to the Present [(2020).](https://www.google.com/books?hl=iw&lr=&id=nOpODwAAQBAJ&oi=fnd&pg=PP1&dq=%22Beyond+Abortion:+Roe+v.+Wade+and+the+Battle+for+Privacy%22&ots=ufLMVLjgYS&sig=NLTpz6TZtfpptloXFkliktn9Lu0) For the abortion restrictions, see, for example, Laura Portuondo, *Abortion Regulation as Compelled Speech*, 67 UCLA Law Review 1 (2020) passim, [Abortion Regulation as Compelled Speech | UCLA Law Review](https://www.uclalawreview.org/abortion-regulation-as-compelled-speech/); Family Law, [*Ohio’s Fetal Abortion Ban Is Latest In Roe v. Wade Battl*](http://feedproxy.google.com/~r/typepad/VMiI/~3/mmjjaKQH_OQ/ohios-fetal-abortion-ban-is-latest-in-roe-v-wade-battle-.html?utm_source=feedburner&utm_medium=email)*e*, [Family Law Prof Blog](https://lawprofessors.typepad.com/family_law/) 04.21.19, <https://lawprofessors.typepad.com/family_law/2019/04/ohios-fetal-abortion-ban-is-latest-in-roe-v-wade-battle-.html>; [Elizabeth Nash](https://www.guttmacher.org/about/staff/elizabeth-nash), *Louisiana Has Passed 89 Abortion Restrictions Since Roe: It's About Control, Not Health*, Guttmacher Institute (2020),https://www.guttmacher.org/article/2020/02/louisiana-has-passed-89-abortion-restrictions-roe-its-about-control-not-health#. [↑](#footnote-ref-3)
4. Kelli Stidham Hall et al., [*Centring Sexual and Reproductive Health and Justice in the Global, COVID-19 Response*, The Lancet (2020), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30801-1/fulltext‏](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2820%2930801-1/fulltext). [↑](#footnote-ref-4)
5. Aziza Ahmed, *How The COVID-19 Response Is Altering the Legal and Regulatory Landscape on Abortion*, 7(1) Journal of Law and the Biosciences, 1, 2-3 (2020); Martin Andersen et al., *COVID-19 Surgical Abortion Restriction Did Not Reduce Visits to Abortion Clinics*, National Bureau of Economic Research WORKING PAPER 28058 5 (2020), [COVID-19 Surgical Abortion Restriction Did Not Reduce Visits to Abortion Clinics (iza.org)](http://ftp.iza.org/dp13832.pdf) (“In response to the COVID-19 pandemic, many states chose to enact restrictions on medical procedures to conserve the use of personal protective equipment […] states included surgical abortion in these bans despite the time sensitive nature of this procedure.”). But, compare with Rachel K. Jones et al., *COVID-19 Abortion Bans and Their Implications for Public Health*, 52(2) [Perspectives on Sexual and Reproductive Health](https://www.guttmacher.org/journals/psrh) 65, 66 (2020) (“[…] the claim that abortion procedures strain the supply of PPE is inaccurate and misleading. First-trimester in-clinic procedures require very little PPE, and the provision of medication abortion—which accounts for at least one-third of all abortions in the country—can be safely offered with virtually no use of PPE.”). [↑](#footnote-ref-5)
6. *See* the following statement: “[O]ur bodies may belong to us, but we are ourselves belong to a greater body composed of many bodies. We are, bodily, both independent and dependent,” For its source and a discussion of it, see respectively Eula Biss, On Immunity: An Inoculation 126 (2015); Efrat Ram-Tiktin, *The Tragedy of the Commons and Population Health: The State’s Intervention in an Individual’s Actions and Choices from a Capability Perspective*, 19(4) Journal of Human Development and Capabilities 438 (2018). [↑](#footnote-ref-6)
7. For an academic discussion of COVID-19 and social solidarity, *see* [Kar Keung Cheng](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2820%2930918-1/fulltext) et al., [*Wearing Face Masks in the Community During The COVID-19 Pandemic: Altruism and Solidarity*,](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2820%2930918-1/fulltext) The Lancet, 04.16.20 (2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30918-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2820%2930918-1/fulltext); Callum McGregor, [*Coronavirus, Community and Solidarity*‏](http://concept.lib.ed.ac.uk/article/view/4365), 11 [Concept Covid-19 Supplementary Issue (](http://concept.lib.ed.ac.uk/issue/view/328)2020); [Mary Raygoza](https://scholar.google.co.il/citations?user=VKUv9jsAAAAJ&hl=iw&oi=sra), [*COVID-19, Exponential Growth, and the Power of Showing Up in Social Solidarity: The Math Behind the Virus*,](file:///C%3A%5CUsers%5Cruvik%5COneDrive%5C%D7%9E%D7%A1%D7%9E%D7%9B%D7%99%D7%9D%5CGeneral%20Academics%5Chezi%20margalit%20book%5CCOVID-19%2C%20Exponential%20Growth%2C%20and%20the%20Power%20of%20Showing%20Up%20in%20Social%20Solidarity%3A%20The%20Math%20Behind%20the%20Virus%2C) (2020), https://digitalcommons.stmarys-ca.edu/school-education-facultyworks/1806/. [↑](#footnote-ref-7)
8. For the first two pillars, see Peach, *supra* note 1, at 193. For the latter, see Jonathan Herring, [*Ethics of Care and the Public Good of Abortion*](http://ohrh.law.ox.ac.uk/publications/jonathan-herring-ethics-of-care-and-the-public-good-of-abortion-2019-u-of-oxhrh-j-1/), 2 University of Oxford Human Rights Hub Journal 1, 7 (2019), <https://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2018/12/U-of-OxHRH-J-Ethics-of-Care-1.pdf>. For a more general discussion, seeJohn-Stewart Gordon, *Abortion*, in [Internet Encyclopedia of Philosophy](https://www.iep.utm.edu/?p=601), <https://www.iep.utm.edu/abortion/>. [↑](#footnote-ref-8)
9. *See*, for example, the following representative references: Encyclopedia of Bioethics vol. 1, entry “abortion,” 7, 19 (Stephen G. Post ed., 2004) (“self-induced abortion has often involved risky procedures […]”); Ursula Barry, *Ireland – On the Frontline: Challenging Foetal Rights Ideologies*, in Debating the Eighth: Repeal or Retain? (Conor O’Riordan ed., 2018) (“[…] a Toronto woman, died from a self-induced, coat-hanger abortion.”); [Family Law](https://lawprofessors.typepad.com/family_law/2019/09/as-abortion-restrictions-increase-women-partake-in-self-induced-abortions-.html), [[*As Abortion Restrictions Increase, Women Partake In "Self-Induced" Abortions*](https://lawprofessors.typepad.com/family_law/2019/09/as-abortion-restrictions-increase-women-partake-in-self-induced-abortions-.html)](http://feedproxy.google.com/~r/typepad/laDc/~3/xh-HInuUmrE/dutch-doctor-provides-abortion-pills-to-us-women-sues-fda.html?utm_source=feedburner&utm_medium=email), [Family Law](https://lawprofessors.typepad.com/family_law/2019/09/as-abortion-restrictions-increase-women-partake-in-self-induced-abortions-.html) Prof Blog 09.27.19, <https://lawprofessors.typepad.com/family_law/2019/09/as-abortion-restrictions-increase-women-partake-in-self-induced-abortions-.html>. [↑](#footnote-ref-9)
10. [Jaime Todd-Gher](https://www.tandfonline.com/author/Todd-Gher%2C%2BJaime) & [Payal K Shah](https://www.tandfonline.com/author/Shah%2C%2BPayal%2BK), [*Abortion in the Context Of COVID-19: A Human Rights Imperative*](https://lawprofessors.typepad.com/reproductive_rights/2020/04/abortion-in-the-context-of-covid-19-a-human-rights-imperative.html), Sexual and Reproductive Health Matters 2 (2020), <https://www.tandfonline.com/doi/full/10.1080/26410397.2020.1758394>. *See also* Michelle J. Bayefsky et al., [*Abortion During the Covid-19 Pandemic—Ensuring Access to an Essential Health Service*‏](https://www.nejm.org/doi/full/10.1056/NEJMp2008006), The New England Journal of Medicine 1 (2020), https://www.nejm.org/doi/full/10.1056/NEJMp2008006. [↑](#footnote-ref-10)
11. *See, e.g.*, Sigrun I. Skogly & [Mark Gibney](https://scholar.google.co.il/citations?user=IrQ8eakAAAAJ&hl=iw&oi=sra), [*Transnational Human Rights Obligations*‏](https://www.jstor.org/stable/20069627), 24(3) Human Rights Quarterly 781 (2002); Sigrun Skogly, [Beyond National Borders: States' Human Rights Obligations in International Cooperation (2006)‏](https://www.google.com/books?hl=iw&lr=&id=i8ldLN2vDrAC&oi=fnd&pg=PR7&dq=%22human+rights+obligations+%22&ots=S6ECZrwVib&sig=KlyjP5695AfXHqlVc8ThPl0FTok); Hugh King, [*The Extraterritorial Human Rights Obligations of States*, 9(4)‏](https://academic.oup.com/hrlr/article-abstract/9/4/521/683701) Human Rights Law Review 521 (2009). [↑](#footnote-ref-11)
12. *See*, for example, [Rebecca J. Cook](https://scholar.google.co.il/citations?user=qE9R8iIAAAAJ&hl=iw&oi=sra) &  [Bernard M. Dickens](https://scholar.google.co.il/citations?user=mFQ3CM0AAAAJ&hl=iw&oi=sra), [*Human Rights Dynamics of Abortion Law Reform‏*](https://www.jstor.org/stable/20069652), 25 Human Rights Quarterly 1 (2003); Christina Zampas & Jaime M. Gher, [*Abortion as a Human Right—International and Regional Standards*,](https://academic.oup.com/hrlr/article-abstract/8/2/249/677800) 8(2) Human Rights Law Review 249 (2008); [Johanna B. Fine](https://www.semanticscholar.org/author/Johanna-B.-Fine/38490850) et al., [*The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*,](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473039/) 19(1) Health and Human Rights 69 (2017). [↑](#footnote-ref-12)
13. *See* his landmark article, Wesley Newcomb Hohfeld*, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913-1914). *See also* David Lyons, *The Correlativity of Rights and Duties*, 4 Nous 45, (1970). For the extent to which this genuine conception of rights has massively influenced legal thinking, see, among others, Max Radin, *A Restatement, of Hohfeld*, 51 Harv. L. Rev. 1141 (1938); Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. Rev. 975 (1982); Pierre Schlag, *How to Do Things with Hohfeld*, 78 Law & Contemp. Probs. 185 (2015). *See also* the references we bring at *infra* note 43. [↑](#footnote-ref-13)
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20. It bears emphasis that our discussion focuses only on exploring the unique Jewish perspective of the obligation ethics, which interestingly endorses the shift in the civil discourse. Unfortunately, elaborating on the whole Jewish conception of abortion is beyond the scope of this article and has been extensively discussed elsewhere. *See*, for example, Avraham Steinberg, Encyclopedia of Jewish Medical Ethics: A Compilation of Jewish Medical Law on All Topics of Medical Interest vol. 1, 1, s.v. ‘abortion and miscarriage’ (Fred Rosner trans., 2003); Yechiel M. Barilan, Jewish Bioethics: Rabbinic Law and Theology in Their Social and Historical Contexts 159-86 (2014); Yehezkel Margalit, *Abortion in Jewish Law* (on file with the authors). [↑](#footnote-ref-20)
21. *See* respectively [Family Law](https://lawprofessors.typepad.com/family_law/2019/09/as-abortion-restrictions-increase-women-partake-in-self-induced-abortions-.html), *House Republicans Tried To Capitalize On Coronavirus To Sneak Anti-Abortion Language Into Law,* [Family Law](https://lawprofessors.typepad.com/family_law/2019/09/as-abortion-restrictions-increase-women-partake-in-self-induced-abortions-.html) Prof Blog 03.24.20, <https://lawprofessors.typepad.com/family_law/2020/03/house-republicans-tried-to-capitalize-on-coronavirus-to-sneak-anit-abortion-language-into-law-.html>; [Robin Marty,](https://time.com/author/robin-marty/) *How Anti-Abortion Activists Are Taking Advantage of the Coronavirus Crisis*, Time 03.24.20, https://time.com/5808471/coronavirus-abortion-access; [Reproductive Rights](https://lawprofessors.typepad.com/reproductive_rights/2019/10/dutch-doctor-provides-abortion-pills-to-us-women-sues-fda.html), [*Anti-Abortion Protesters Continue to Gather at Clinics Despite Stay at Home Orders*](https://lawprofessors.typepad.com/reproductive_rights/2020/04/april-21-2020-as-states-impose-social-distancing-requirements-and-emergency-measures-to-ensure-adequate-medical-resources-t.html), [Reproductive Rights](https://lawprofessors.typepad.com/reproductive_rights/2019/10/dutch-doctor-provides-abortion-pills-to-us-women-sues-fda.html) Prof Blog 04.21.20, <https://lawprofessors.typepad.com/reproductive_rights/2020/04/april-21-2020-as-states-impose-social-distancing-requirements-and-emergency-measures-to-ensure-adequate-medical-resources-t.html>. [↑](#footnote-ref-21)
22. *See, among others,* Julia E. Kohn et al., *Medication Abortion Provided Through Telemedicine in Four US States*, 134(2) Obstetrics & Gynecology 343 (2019); Lisa H. Harris & Daniel Grossman, [*Complications of Unsafe and Self-Managed Abortion*,](https://www.nejm.org/doi/full/10.1056/NEJMra1908412) 382 New England Journal of Medicine 1029 (2020); [Kunal K. Sindhu](https://jamanetwork.com/searchresults?author=Kunal+K.+Sindhu&q=Kunal+K.+Sindhu) & [Eli Y. Adashi](https://jamanetwork.com/searchresults?author=Eli+Y.+Adashi&q=Eli+Y.+Adashi), [*Over-the-Counter Oral Contraceptives to Reduce Unintended Pregnancies*‏](https://jamanetwork.com/journals/jama/article-abstract/2762320), JAMA (2020). [↑](#footnote-ref-22)
23. [Family Law](https://lawprofessors.typepad.com/family_law/2019/09/as-abortion-restrictions-increase-women-partake-in-self-induced-abortions-.html), [*Abortion In Jeopardy Due to Coronaviru*](http://feedproxy.google.com/~r/typepad/VMiI/~3/RWoN4LucU98/abortion-in-jeopardy-due-to-coronavirus.html?utm_source=feedburner&utm_medium=email)*s,* [Family Law](https://lawprofessors.typepad.com/family_law/2019/09/as-abortion-restrictions-increase-women-partake-in-self-induced-abortions-.html) Prof Blog 03.29.20, <https://lawprofessors.typepad.com/family_law/2020/03/abortion-in-jeopardy-due-to-coronavirus.html>. For the dramatically high rates of usage of these medications to abort up to the 10th week of pregnancy, see Dan Carden, [*Indiana Governor Signs Abortion Law Encouraging Return of Embryonic Remains*](https://outlook.office.com/mail/AAMkAGVmODRiZDA2LTNmNWUtNGYwMy1iZWQ2LTU2OTg0ODE4OTU1YwAuAAAAAADBUuit6C9DSak8C2Q92ds/AQDLoUiDJxT/S5wDs7N1DTJEAAAAOGhRAAA%3D/id/AAQkAGVmODRiZDA2LTNmNWUtNGYwMy1iZWQ2LTU2OTg0ODE4OTU1YwAQADmeqXsGeo1IrUGs5uczK2k%3D#x_1), NWI.COM 03.19.20, <https://www.nwitimes.com/news/local/govt-and-politics/indiana-governor-signs-abortion-law-encouraging-return-of-embryonic-remains/article_40724127-f536-54b1-810a-12fe8383fdc7.html> (“State records show 41% of the 8,037 abortions completed in Indiana in 2018, the most recent year with complete data available, were pill-induced.”). Some sates, such as Arkansas, Texas, [Ohio, Alabama](https://www.cnn.com/2020/03/30/politics/texas-order-abortion-block-coronavirus/index.html) and [Oklahoma](https://www.cnn.com/2020/04/06/politics/oklahoma-abortion-block-coronavirus/index.html), were sued for limiting abortion access during the Coronavirus pandemic, see [Family Law](https://lawprofessors.typepad.com/family_law/2019/09/as-abortion-restrictions-increase-women-partake-in-self-induced-abortions-.html), [*Arkansas Sued Over Abortion Restrictions*](https://lawprofessors.typepad.com/family_law/2020/04/arkansas-sued-over-abortion-restrictions.html), [Family Law](https://lawprofessors.typepad.com/family_law/2019/09/as-abortion-restrictions-increase-women-partake-in-self-induced-abortions-.html) Prof Blog 04.14.20, https://lawprofessors.typepad.com/family\_law/2020/04/arkansas-sued-over-abortion-restrictions.html. [↑](#footnote-ref-23)
24. *See*, respectively, [Reproductive Rights](https://lawprofessors.typepad.com/reproductive_rights/2019/10/dutch-doctor-provides-abortion-pills-to-us-women-sues-fda.html), [*UN Issues Statement on Ensuring Women's Human Rights During COVID-19 pandemi*](http://feedproxy.google.com/~r/typepad/laDc/~3/QzpKeC1nFbM/un-issues-statement-on-ensuring-womens-human-rights-during-covid-19-pandemic.html?utm_source=feedburner&utm_medium=email)*c*, [Reproductive Rights](https://lawprofessors.typepad.com/reproductive_rights/2019/10/dutch-doctor-provides-abortion-pills-to-us-women-sues-fda.html) Prof Blog 04.20.20, https://lawprofessors.typepad.com/reproductive\_rights/2020/04/un-issues-statement-on-ensuring-womens-human-rights-during-covid-19-pandemic.html; Council of Europe, Committee on Bioethics (DH-BIO) DH-BIO Statement on Human Rights Considerations Relevant to the COVID-19 Pandemic (2020), <https://rm.coe.int/inf-2020-2-statement-covid19-e/16809e2785>; American College of Obstetricians and Gynecologists, Novel Coronavirus 2019 (COVID-19) Practice Advisory, <https://www.acog.org/clinical/clinical-guidance/practice-advisory/articles/2020/03/novel-coronavirus-2019>. *See also* Julia Hussein, *COVID-19: What Implications For Sexual and Reproductive Health and Rights Globally?*, 28(1) Sexual and Reproductive Health Matters 1, 2 (2020), https://www.tandfonline.com/doi/pdf/10.1080/26410397.2020.1746065. [↑](#footnote-ref-24)
25. *See* respectively The Novel Coronavirus Pneumonia Emergency Response Epidemiology Team, *The Epidemiological Characteristics of an Outbreak of 2019 Novel Coronavirus Disease (COVD-19)*, 2 China CDC Weekly 113 (2020); Clare [Wenham](https://scholar.google.co.il/citations?user=nn5EcyMAAAAJ&hl=iw&oi=sra) et al., [*COVID-19: The Gendered Impacts of the Outbreak*, The Lancet (2020),](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2820%2930801-1/fulltext) [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30526-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2820%2930526-2/fulltext) (“[…] data from the State Council Information Office in China suggest that more than 90% of health-care workers in Hubei province are women, emphasising the gendered nature of the health workforce and the risk that predominantly female health workers incur.”). [↑](#footnote-ref-25)
26. Kelli Stidham Hall et al., *supra* note 4. [↑](#footnote-ref-26)
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43. *See*, among others, Roger J. Magnuson & Joshua M. Lederman, *Aristotle, Abortion, and Fetal Rights*, 33 Wm. Mitchell L. Rev. 767 (2007); [Lee R. Collins](https://www.sciencedirect.com/science/article/abs/pii/S147264831200209X#!) & [Susan L. Crockin](https://www.sciencedirect.com/science/article/abs/pii/S147264831200209X#!), *Fighting ‘Personhood’ Initiatives in the United States*, 24(7) [Reproductive BioMedicine Online](https://www.sciencedirect.com/science/journal/14726483) 689 (2012); Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39(4) American Journal of Law & Medicine 573 (2013). [↑](#footnote-ref-43)
44. *See, e.g.*, Jane English, *Abortion and The Concept Of A Person*, 5(2) Canadian Journal of Philosophy 233 (1975); Gary B. Gertler, *Brain Birth: A Proposal for Defining When a Fetus Is Entitled to Human Life Status*, 59 S. Cal. L. Rev. 1061 (1986); [Lynne Rudder](https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=Lynne%20Rudder%20Baker&eventCode=SE-AU) Baker, *When Does a Person Begin?*, 22(2) Social Philosophy and Policy 25 (2005). [↑](#footnote-ref-44)
45. Lifshitz-Aviram & Margalit, *supra* note 2. *See*, for example, June Med. Servs. v. Gee, 905 F.3d 787 (5th Cir. 2018), rev'd, 140 S. Ct. 2103 (2020). For the latter seminal ruling, see [Dov Fox](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Fox%2C+Dov), *The Legal Challenge of Abortion Stigma—and Government Restrictions on the Practice of Medicine*, 50(2) Hastings Center Report 13 (2020), <https://onlinelibrary.wiley.com/doi/full/10.1002/hast.1096>; Owen Dyer, *US Supreme Court Hears Pivotal Abortion Case as Pro-Lifers Seek To Undermine* *Roe v Wade*, 368 BMJ m917 (2020), <https://www.bmj.com/content/368/bmj.m917.abstract>; Hanoch Dagan & Avihay Dorfman, *The Value of Rights of Action: From Civil Recourse to Class Action* 13 n. 56, 58 (2020), [https://ssrn.com/abstract=3566438](https://ssrn.com/abstract%3D3566438). [↑](#footnote-ref-45)
46. For a much broader discussion of “obligation” in the legal system, see Mary A. Warren, Moral Status: Obligations to Persons and Other Living Things (1997); Elisabeth Beck-Gernsheim, *From Rights and Obligations to Contested Rights and Obligations: Individualization, Globalization, and Family Law*, 13 Theoretical Inquiries in Law 1 (2012); Political and Legal Obligation (James Roland Pennock‏ & John William eds., 2017). [↑](#footnote-ref-46)
47. Cited in the following references: [Monica I](https://search.proquest.com/indexinglinkhandler/sng/au/Falk%2C%2BMonica%2BI/%24N;jsessionid=C46CE4BF6EF9B8D2C9A79950836B00D6.i-0569e6ea837fd0363). Falk, An Examination of the Value of Overall Trust and Commitment Associated with Service Complexity in Higher Education Information Technology Outsourcing Relationships (unpublished Dissertation, Colorado Technical University, 2012); Gillian Douglas, *Towards an Understanding of the Basis of Obligation and Commitment in Family Law*, 36 Legal Stud. 1, 3 (2016); Douglas, *supra* note 13, at 8. [↑](#footnote-ref-47)
48. *See* the references previously brought at *supra* note 10. *See also* Joseph Raz, The Morality of Freedom 186 (1986) (“Rights ground duties […] It merely highlights the precedence of rights over some duties […]”); Alon Harel, *Theories of Rights*, in Blackwell Guide to the Philosophy of Law and Legal Theory 191 (Martin P. Golding & William A. Edmundson eds., 2005); James Griffin, On Human Rights 97 (2008) (“The content of a human right is also the content of the corresponding duty.”). [↑](#footnote-ref-48)
49. *See* respectively Douglas, *supra* note 13, at 3, 227. The sourcing out (or more precisely in) of the state’s obligation to maintain children and obligating their parents to fulfill it has been bitterly criticized in the following landmark articles: Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 Va. L. Rev. 2181 (1995); David L. Chambers, *Fathers, The Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 Va. L. Rev. 2575 (1995); Martha L.A. Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 Stan. L. & Pol'y Rev 89 (1998). [↑](#footnote-ref-49)
50. Janet Finch & Jennifer Mason, Negotiating Family Responsibilities 94-6 (1993); The Oxford English Dictionary, as was cited by Douglas, *supra* note 13, at 18. *See also* [Margaret Mead](https://scholar.google.co.il/citations?user=BuIHPK4AAAAJ&hl=iw&oi=sra), [Culture and Commitment‏](http://www.repositorio.cenpat-conicet.gob.ar/bitstream/handle/123456789/483/cultureAndCommitment.pdf?sequence=1): A Study of the Generation Gap (1970); Pankaj Ghemawat, Commitment (1991); Scott Stanley & Howard H Markman, *Assessing Commitment in Personal Relationships*, 54 Journal of Marriage and Family 595 (1992). [↑](#footnote-ref-50)
51. *See* Stanley & Markman, ibid, at 595-6; Douglas, *supra* note 13, at 26. [↑](#footnote-ref-51)
52. William Meezan & Joan F. Shireman, Care and Commitment: Foster Parent Adoption (1985). [↑](#footnote-ref-52)
53. John A. Robertson, *Recommitment Stategies for Disposition of Frozen Embryos*, 50 Emory L.J. 989, 1043-4 (2001); John A. Robertson, *Precommitment Issues in Bioethics*, 81 Tex. L. Rev. 1849, 1870-2 (2003); Molly J. Walker Wilson, *Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity*, 31 J. Legis. 329 (2005). [↑](#footnote-ref-53)
54. Douglas, *supra* note 13, at 27, and more extensively at [Michelle Givertz](https://journals.sagepub.com/action/doSearch?target=default&ContribAuthorStored=Givertz%2C+Michelle) & [Chris Segrin](https://journals.sagepub.com/action/doSearch?target=default&ContribAuthorStored=Segrin%2C+Chris), *Explaining Personal And Constraint Commitment In Close Relationships: The Role Of Satisfaction, Conflict Responses, And Relational Bond*, 22(6) [Journal of Social and Personal Relationships](https://journals.sagepub.com/home/spr) 757 (2005); Anthony Giddens, The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies‏ (2013). [↑](#footnote-ref-54)
55. *See* Michael P. Johnson et al., *The Tripartite Nature of Marital Commitment: Personal, Moral, and Structural Reasons to Stay Married*, 61(1) Journal of Marriage and Family 160, 161 (1999); [Marie‐Christine Saint‐Jacques](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Saint-Jacques%2C+Marie-Christine) et al., *The Processes Distinguishing Stable From Unstable Stepfamily Couples: A Qualitative Analysis*, 60(5) [Family Relations](https://onlinelibrary.wiley.com/journal/17413729) (2011); Douglas, *supra* note 42, at 16. [↑](#footnote-ref-55)
56. For this angle in both the spousal and parental relations, see respectively Johnson et al., ibid; Michael P. Johnson, *Personal, Moral, and Structural Commitment to Relationships*, in Handbook of Interpersonal Commitment and Relationship Stability. Perspectives on Individual Differences 73 (Jeffrey M. Adams & Warren H. Jones eds., 1999); Frances E. Brandau-Brown & J. Donald Ragsdale, *Personal, Moral, and Structural Commitment and the Repair of Marital Relationships*, 73(1) Southern Communication Journal 68 (2008); [Kay Pasley](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Pasley%2C+Kay) et al., *Effects of Commitment and Psychological Centrality on Fathering*, 64(1) [Journal of Marriage and Family](https://onlinelibrary.wiley.com/journal/17413737) 130 (2004); [Ramona Faith](https://psycnet.apa.org/search/results?term=Oswald,%20Ramona%20Faith&latSearchType=a) Oswald et al., *Structural and Moral Commitment Among Same-Sex Couples: Relationship Duration, Religiosity, and Parental Status*, *22*(3) Journal of Family Psychology 411 (2008). [↑](#footnote-ref-56)
57. Douglas, *supra* note 13, at 8. *See* *also* the following landmark books: Erik H. Erikson, Insight and Responsibility (1994); John Martin Fischer‏ & Mark Ravizza, Responsibility and Control: A Theory of Moral Responsibility (2000); Hannah Arendt, [Responsibility and Judgment‏](https://www.google.com/books?hl=iw&lr=&id=vp7W56sVUeUC&oi=fnd&pg=PR30&dq=responsibility&ots=z8tO6HotfV&sig=J1hJNdwl5Thsvf47QCgSdiDrRpU) (2009). [↑](#footnote-ref-57)
58. Douglas, *supra* note 13, at 66. *See also* Jonathan Glover, Responsibility (1970); Hans Jonas, The Imperative of Responsibility: In Search of an Ethics for the Technological Age (1984); Robert E. Goodin, Protecting the Vulnerable: A Reanalysis of our Social
Responsibility (1985). [↑](#footnote-ref-58)
59. Alison Diduck, *What is Family Law For?* 64 Current Legal Problems 287 (2011). For a discussion of the possibility of acquiring parental responsibilities via assisted reproduction technologies, see, for example, Vickie L. Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 Am. J. L. and Med. 285 (1993); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. Fam. Stud. 309 (2007); Liezl Van Zyl, *Intentional Parenthood: Responsibilities in Surrogate Motherhood,* 10 Health Care Analysis 165 (2002). [↑](#footnote-ref-59)
60. The literature is enormous, see Scott Fitzgibbon, *Marriage and the Good of Obligation*, 47 American Journal of Jurisprudence 41 (2002); Lucinda Ferguson, *Family, Social Inequalities and the Persuasive Force of Interpersonal Obligation*, 22(1) International Journal of Law, Policy and the Family 61 (2008). [↑](#footnote-ref-60)
61. *See, e.g.*, Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA Law Review 815 (2004-5); Lisa Glennon, *Obligations Between Adult Partners: Moving From Form to Function?*, 22 International Journal of Law, Policy and the Family 22 (2008). [↑](#footnote-ref-61)
62. *See, e.g.*, Andrew Bainham, *Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions*, in What is a Parent?: A Socio-Legal Analysis 25 (Andrew Bainham et al. eds., 1999); Brenda M. Hoggett, Parents and Children: The Law of Parental Responsibility (1993); Jo Bridgeman, [Parental Responsibility, Young Children and Healthcare Law](https://idc-primo.hosted.exlibrisgroup.com/primo_library/libweb/action/display.do;jsessionid=CB692FAB37EA47670485F80D43B78E37?frbrVersion=2&tabs=detailsTab&ct=display&fn=search&doc=972IDC_INST_ALMA5131821920003105&indx=1&recIds=972IDC_INST_ALMA5131821920003105&recIdxs=0&elementId=0&renderMode=poppedOut&displayMode=full&frbrVersion=2&vid=972IDC_INST_V1&mode=Basic&dscnt=0&vl(freeText0)=991906472503105&dstmp=1504598192847) (2007). [↑](#footnote-ref-62)
63. Katharine Bartlett, *Re-expressing Parenthood*, 98 Yale L.J. 293, 295 (1988). For an American federal attempt to legislatively anchor the parental responsibilities and obligations, see the Congressional bill “Parental Rights and Responsibilities Act” (PRRA), which was discussed by Barbara B. Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 Ohio St. L.J. 393, 395 (1996); John C. Duncan, *The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 Neb. L. Rev. 1240, 1295-8 (2005). [↑](#footnote-ref-63)
64. In the UK, this is one of the scarlet threads of the Children Act 1989. For a survey of the legal shift that this act has sparked and for a general overview of parental responsibility in Britain and Wales as well as in Australia, see respectively N.V. Lowe, *The Allocation of Parental Rights and Responsibilities – The Position in England and Wales*, 39 Fam. L.Q. 267 (2005); Aleardo Zanghellini, *Who is Entitled to Parental Responsibility - Biology, Caregiving, Intention and the Family Law Act 1975 (CTH): A Jurisprudential Feminist Analysis*, 35 Monash U. L. Rev. 147 (2009). [↑](#footnote-ref-64)
65. *See* in the following references: Yehezkel Margalit, T*o Be or Not to Be (A Parent)? - Not Precisely the Question; the Frozen Embryo Dispute*, 18 Cardozo J. L. & Gender 355, 372-4 (2012); Ibid, *Bridging the Gap Between Intent and Status: A New Framework for Modern Parentage,* 15(1) Whittier Journal of Child and Family Advocacy 1, 26-8 (2016); Margalit, *supra* note 28, at 158-63. [↑](#footnote-ref-65)
66. *See, e.g.*, Jeffrey M. Adams and Warren H. Jones, *Conceptualization of Marital Commitment: An Integrative Analysis*, 72 Journal of Personality and Social Psychology 1177 (1997); Johnson et al., *supra* note 50; Jamie A. Aycock, *Contracting Out of the Culture Wars: How the Law Should Enforce and Communities of Faith Should Encourage More Enduring Marital Commitments*, 30 Harv. J.L. & Pub. Pol'y 231 (2006). [↑](#footnote-ref-66)
67. Whitehead, *supra* note 13; [Susan E. Jacquet](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Jacquet%2C+Susan+E) & [Catherine A. Surra](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Surra%2C+Catherine+A), *Parental Divorce and Premarital Couples: Commitment and Other Relationship Characteristics*, 63(3) [Journal of Marriage and Family](https://onlinelibrary.wiley.com/journal/17413737) (2004); [Sarah W.](https://psycnet.apa.org/search/results?term=Whitton,%20Sarah%20W.&latSearchType=a) Whitton et al., *Effects of Parental Divorce on Marital Commitment and Confidence, 22*(5), Journal of Family Psychology 789 (2008). [↑](#footnote-ref-67)
68. Douglas, *supra* note 13, at 163. [↑](#footnote-ref-68)
69. *See*, for example, the various chapters of the book: Responsible Parents and Parental Responsibility (Jonathan Herring et al. eds., 2009), such as Julie Wallbank, *Parental Responsibility and the Responsible Parent: Managing the “Problem” of Contact*, in Responsible Parents and Parental Responsibility 296 (Jonathan Herring et al. eds., 2009). *See also* John Eekelaar, *Parental Responsibility: State of Nature or Nature of the State?* 13:1 Journal of Social Welfare & Family Law 37 (1997);[Jonathan Herring, *Parental Responsibility, Hyper-Parenting and the Role of Technology*, in The Oxford Handbook of Law, Regulation and Technology 404 (](https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199680832.001.0001/oxfordhb-9780199680832)Roger Brownsword et al. eds., 2017). [↑](#footnote-ref-69)
70. *See* the following seminal researches: John Eekelaar, *Are Parents Morally Obliged to Care for their Children?* 11 Oxford Journal of Legal Studies 340 (1991); Mavis Maclean & John Eekelaar, The Parental Obligation (1997); Merle H. Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 Villanova Law Review 135 (2014). [↑](#footnote-ref-70)
71. Douglas, *supra* note 13, at 229. [↑](#footnote-ref-71)
72. For a fuller deliberation of this basic theme, see Margalit, *supra* note 28, at 72, 79-82. [↑](#footnote-ref-72)
73. John Locke, Two Treatises of Government § 56, 347 (Peter Laslett ed., 1965); William Blackstone, Commentaries on the Laws of England 435 (1962); Stanton v. Willson, 1808 WL 85 (Conn. 1808); Van Valkinburgh v. Watson, 13 Johns. Ch. 480, 480 (N.Y. Ch. 1816); Lewis v. Lewis, 174 Cal. 336 (Cal. 1917). [↑](#footnote-ref-73)
74. *See* in the following seminal scholarly literature: Richard Dawkins, The Selfish Gene (1989); Robert Wright, The Moral Animal: Evolutionary Psychology and Everyday Life (1994); Matt Ridley, The Red Queen: Sex and the Evolution of Human Nature (1993). [↑](#footnote-ref-74)
75. *See, e.g.*, Moorman v. Walker, 773 P.2d 887, 889 (Wash.App.1989). [↑](#footnote-ref-75)
76. This is the conclusion of the following research: Murphy, *supra* note 71, at 1195-7, 1127-30, 1204. [↑](#footnote-ref-76)
77. David Archard, Children: Rights and Childhood 103 (1993). [↑](#footnote-ref-77)
78. Hugh Lafollette, *Licensing Parents*, 9(2) Philosophy and Public Affairs 182 (1980). [↑](#footnote-ref-78)
79. Herbert L.A. Hart, *Legal and Moral Obligation*, in Essays in Moral Philosophy 82, 103-4 (Abraham I. Melden ed., 1958); Ibid, The Concept of Law 165-7 (1961). [↑](#footnote-ref-79)
80. Eekelaar, *supra* note 65, at 351-3. [↑](#footnote-ref-80)
81. For this argument, see Gregory A. Loken, *Gratitude and the Map of Moral Obligations Toward Children*, 31 Ariz. St. L.J. 1121, 1124 (1999). Carbone also has complained that the traditional axiom regarding the parental responsibility has been inspected only rarely. *See* June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 Hous. L. Rev. 359, 389 (1994). Other scholars have also pointed out that even though the parental obligation to provide the child’s needs is determined in all the states of the U.S., the roots of this obligation in the common law are vague. *See* the references enumerated by Deborah H. Bell, *Child Support Orders: The Common Law Framework-Part II*, 69 Miss. L.J. 1063, 1063 n.1 (2000). [↑](#footnote-ref-81)
82. For the first statement, see Bartlett, *supra* note 58, at 294. For the second contention, see Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 Cardozo L. Rev. 1747, 1755 (1993). For a critique of conceptualizing the parental obligation only as gratitude and for the fear of weakening the sufficiency of good parenthood in terms of the final results, according to the consequentialism theory, see Loken, *supra* note 76, at 1139. For the third statement and for an offer to base the parental (as well as the state) obligations towards the child on the ground of gratitude following the affection, love and obedience that children show their parents, see Loken, *supra* note 76, at 1171-203. *See also* the extensive deliberation of Lifshitz-Aviram, *supra* note 28 at 166-7. [↑](#footnote-ref-82)
83. *See* Yehezkel Margalit, The Jewish Family – Between Family Law and Contract Law 15-7 (2017). *See also* Haim H. Cohn, Human Rights in Jewish Law 18 (1984); David Novak, Covenantal Rights: A Study in Jewish Political Theory 27 (2009). [↑](#footnote-ref-83)
84. *See* Moshe Silberg’s seminal article, *Law and Morals in Jewish Jurisprudence*, 75 Harv. L. Rev. 306, 311 (1961) (“the law itself does not only order relationships between man and man but also between man and God. The system in its entirety is religious in origin and therefore involves obligations to God.”). *See also* Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis*, 9 Duke J. Gender L., &, Pol'y 91, 125-6 (2002); Yehezkel Margalit, *On the Dispositive Foundations of the Obligation of Spousal Conjugal Relations in Jewish Law*, XVIII JLAS 161, 164-6 (2008). [↑](#footnote-ref-84)
85. For a recent article which contains a comparative discussion of Jewish law sources and demonstrates this typical obligations-based legal system, see Benjamin Porat, *Deciding between Contradicting Norms: Rights-Based Law vs. Duty-Based Law* (on file with the authors). *See also* ibid, *Ownership and Exclusivity: Two Visions, Two Traditions*, 64 Am. J. Comp. L. 147 (2016). [↑](#footnote-ref-85)
86. Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. L. & Religion 65, (1987). For an academic discussion of this quotation, see, among others, Michael Walzer, [Law, Politics, and Morality in Judaism‏](https://www.google.com/books?hl=iw&lr=&id=MWz1g-UYS0wC&oi=fnd&pg=PR1&dq=%22The+principal+word+in+Jewish+law,+which+occupies+a+place+equivalent+in+%22&ots=eU1xeZPb-2&sig=k9NghdKiHQqBTnyfCzcpniuvgCI) (2009); Douglas Hodgson, [Individual Duty Within a Human Rights Discourse (](https://www.google.com/books?hl=iw&lr=&id=B2xBDgAAQBAJ&oi=fnd&pg=PT7&dq=%22The+principal+word+in+Jewish+law,+which+occupies+a+place+equivalent+in+%22&ots=kgPK72_GQr&sig=NNjpXa0TYomSXY4lWJgOsB99amg)2017); [Joshua](https://link.springer.com/article/10.1007/s12397-019-09282-6#auth-1) Cypess, *End-of-Life Decision Making in Orthodox Judaism: The Case of the 1977 Conjoined Twins*, 39 Cont Jewry 211 (2019). For another challenging attempt to bridge this gap, see Ronit Irshai, *Judaism, Gender, and Human Rights: The Case of Orthodox Feminism,* in Religion and the Discourse of Human Rights 412, 423 (Hanoch Dagan et al. eds., 2014), <https://en.idi.org.il/media/6207/religion_and_human_rights.pdf> (“If we accept Raz’s argument, then there is some basis for the claim that Judaism can be characterized analytically as a religion of rights (at least regarding the realm of interpersonal duties).”).  [↑](#footnote-ref-86)
87. *See* the following representative call: Michael J. Broyde & Steven S. Weiner, *Do Not Stand Idly at Your Neighbor’s Blood: The Jewish View on the Obligation of Bystanders to Intervene and Rescue (and Some Contrasts with the Current American Model)* (on file with the authors). [↑](#footnote-ref-87)
88. Capacity and Guardianship Law, 5722-1962, 380 Laws of the State of Israel (LSI) 120, § 15 (1962) (Isr.). For an academic discussion and practical implementation of it, see Moussa Abou Ramadan, *The Transition from Tradition to Reform: The Shari'a Appeals Court Rulings on Child Custody (1992-2001)*, 26 Fordham Int'l L.J. 595, 614 (2003); Yitshak Cohen, *The Right of a Minor to Independent Status - Three Models*, 10 Nw. J. L. & Soc. Pol'y [i] 17 n.66 (2015); CA 506/88 Shefer v. State of Israel, IsrLR 170, 119 [1992-4], <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Shefer%20v.%20State%20of%20Israel.pdf>; HCJ 3429/11 [Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance](https://versa.cardozo.yu.edu/opinions/alumni-association-arab-orthodox-school-haifa-v-minister-finance) 45 [2011], <https://versa.cardozo.yu.edu/topics/education>; HCJ 7245/10 [Adalah – The Legal Center for Arab Minority Rights in Israel v. Ministry of Social Affairs](https://versa.cardozo.yu.edu/opinions/adalah-%E2%80%93-legal-center-arab-minority-rights-israel-v-ministry-social-affairs) 45 (2013), https://versa.cardozo.yu.edu/topics/discrimination. [↑](#footnote-ref-88)
89. Irshai, *supra* note 81, at 419-22. For a similar conclusion, but from a civil perspective, see Peach, *supra* note 1, at 201 (“The language of rights, at least in its American version, is simply incapable of capturing much of the reality of our moral lives, especially the reality of obligations. In part, then, the pro-choice position […] is based on a confusion of the logic of obligations with a (highly dubious) logic of rights.”). [↑](#footnote-ref-89)
90. *See*, generally, David M Feldman, Birth Control and Jewish Law: Marital relations, Contraception, and Abortion As Set Forth in the Classic Texts of Jewish Law (1968); Ibid, Marital Relations, Conception and Abortion in Jewish Law (1978); Daniel Schiff, Abortion in Judaism (2002). [↑](#footnote-ref-90)
91. Immanuel Jakobvits, *Jewish Views on Abortion*, 17 W. Res. L. Rev. 480, 49 (1965). [↑](#footnote-ref-91)
92. Judith. J. Thomson, *A Defence of Abortion,* 1 Philosophy and Public Affairs 47 (1971). For a comprehensive discussion of her main thesis and its logical consequences, see respectively, for example, Bertha A. Manninen, *Rethinking 'Roe v. Wade': Defending the Abortion Right in the Face of Contemporary Opposition*, 10(12) American Journal of Bioethics 33 (2010); Keith J. Pavlischek, *Abortion Logic and Paternal Responsibilities: One More Look at Judith Thomson's "A Defense of Abortion"*, 7(4) Public Affairs Quarterly 341 (1993). [↑](#footnote-ref-92)
93. For an overview of her supporters and opponents, see the references brought by Lifshitz-Aviram & Margalit, *supra* note 2, at ns. 109-110. [↑](#footnote-ref-93)
94. Thomson, *supra* note 87, at 47. *See also* Gregory Dolin, *Defense of Embryonic Stem Cell Research*, 84 Ind. L.J. 1203, 1234 (2009) (“Having so consented, and voluntarily taken on the responsibility to care for the baby, the woman may then be prevented from taking actions which would result in the baby's death.”). [↑](#footnote-ref-94)
95. Thomson, *supra* note 87, at 48. [↑](#footnote-ref-95)
96. For this specific angle, see Pavlischek, *supra* note 87; David Boonin-Vail, *A Defense of "A Defense of Abortion": On the Responsibility Objection to Thomson's Argument*, 107(2) Ethics 286 (1997); Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J.L. & Pol'y 97 (2008). [↑](#footnote-ref-96)
97. *See* the following references: Melanie G. McCulley, *The Male Abortion: The Putative Father's Right to Terminate his Interests in and Obligations to the Unborn Child*, 7 J.L. & Pol'y 1 (1998); Sally Sheldon, *Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?* 66 Mod. L. Rev. 175 (2003). [↑](#footnote-ref-97)
98. *See* Roe v Wade, 410 U.S. 113, 158 (1973); Jessica Berg, *Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 Hastings L.J. 369, 373 (2007) ("Likewise, the Supreme Court's determination in Roe v. Wade that fetuses are not persons under the Fourteenth Amendment did not answer the question of whether or not they should be considered persons with respect to other areas of law".); Michael Holzapfel, *The Right to Live, the Right to Choose, and the Unborn Victims of Violence Act*, 18 J. Contemp. Health L. & Pol'y 431 (2002). [↑](#footnote-ref-98)
99. Berg, ibid, at 392. [↑](#footnote-ref-99)
100. For this notion in the context of abortion, see, for example, Leonard W. Sumner, Abortion and Moral Theory 57 (1981); Kristin Luker, [Abortion and the Politics of Motherhood](https://www.google.com/books?hl=iw&lr=&id=S6IwDwAAQBAJ&oi=fnd&pg=PR9&dq=abortion&ots=KjUhOOvRzm&sig=9oA6-HNLWIKwDtP2mcCtoSZEzxM) 3 (1985); Britta van Beers, *The Changing Nature of Law's Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person*, 18 German L.J. 559, 565, 585 (2017). [↑](#footnote-ref-100)
101. Berg, *supra* note 98, at 393 (“If this is the case, then the lack of legal personhood recognition will not negate the moral claims of the entity in question. The entity may still have certain moral rights, and others will have moral obligations to respect those rights.”). For an academic discussion of the juridical person in the abortion decision, see the following seminal articles: Jenny Teichman, *The Definition of Person*, 60(232) Philosophy 175, 177-82 (1985); Will, *supra* note 43, at 603 n.249; Ligia M. De Jesus, *The Inter-American Court on Human Rights' Judgment in Artavia Murillo v. Costa Rica and Its Implications for the Creation of Abortion Rights in the Inter-American System of Human Rights*, 16 Or. Rev. Int'l L. 225, 243 (2014). [↑](#footnote-ref-101)
102. Berg, *supra* note 98, at 393. *See also* ibid, at 399 (“Likewise, there may be a variety of restrictions on what can be done to a pre-sentient fetus based on the interests of currently recognized persons […] In the period of time between sentience and natural personhood, there may be reasons to provide fetuses the status and protections of juridical persons […] as the fetus develops closer to a newborn infant, both its interests and the interests of others that form the basis for juridical personhood protections may increase.”). [↑](#footnote-ref-102)
103. Berg, *supra* note 98, at 400 (“fetuses […] are considered juridical persons with specific, but not complete, rights […] As a result, we may choose to provide personhood protections for sentient fetuses without granting them the same rights as fully recognized natural persons. Juridical personhood is not a unitary concept; there are different kinds of juridical persons and different rights which may adhere.”). [↑](#footnote-ref-103)
104. Thomson, *supra* note 87, at 54.  [↑](#footnote-ref-104)
105. Joel Feinberg, Freedom and Fulfillment: Philosophical Essays 64-8 (1992). [↑](#footnote-ref-105)
106. Quoted by Kathy Rudy Beyond Pro-Life and Pro-Choice- Moral Diversity in the Abortion Debate 110 (1996). *See also* Ronald Dworkin, [Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom](https://www.google.com/books?hl=iw&lr=&id=7c6Zd3XP5CcC&oi=fnd&pg=PR10&dq=abortion+%22human+rights%22+fetus&ots=XqKQO73qlh&sig=-Nuxn5Gg_vZUxuQ_pARKGBtJTck) 51 (2011); Ronit Irshai, Fertility and Jewish Law: Feminist Perspectives on Orthodox Responsa Literature 111 (Joel A. Linsider trans., 2012). [↑](#footnote-ref-106)
107. Robin West, *Foreword: Taking Freedom Seriously*, 104 Harv. L. Rev. 43 (1990). *See also* ibid, *Liberalism and Abortion*, 87 Geo. L.J. 2117 (1999); ibid, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 Yale L. J. 1394 (2009). [↑](#footnote-ref-107)
108. *See* West, Foreword, ibid, at 83, which was discussed by Jean Braucher, *Tribal Conflict over Abortion*, 25 Ga. L. Rev. 595, 618 n.132 (1991); Linda C. McClain, *The Poverty of Privacy*, 3 Colum. J. Gender & L. 119, 163 (1992); Gender and Law: Theory, Doctrine, Commentary (Katharine T. Bartlett eds, 2016). [↑](#footnote-ref-108)
109. West, Liberalism, *supra* note 96, at 2142. [↑](#footnote-ref-109)
110. Jonathan Herring, *The Termination of Pregnancy and the Criminal Law*, in Homicide in Criminal Law: A Research Companion 136, 145 (Alan Reed et al. eds., 2018). *See also* Virginia Held [The Ethics of Care: Personal, Political, And Global‏](https://www.google.com/books?hl=iw&lr=&id=zd0CboPGFNUC&oi=fnd&pg=PR9&dq=%22+The+Ethics+of+Care+%22+held&ots=DjnGbXxIio&sig=eUOGMHBu_QeSBHcNin7_XPQBKU4) 1 (2006); Jonathan Herring, *Caring*, 159 Law & Just. - Christian L. Rev. 89, 100 (2007); Herring, *supra* note 5 at 8 (“But Wolf-Devine is correct that such powerful justifications for abortion rights, sit a little uncomfortably with the language of care and relationality promoted by ethics of care.”). But compare with Eugenie Gatens-Robinson, [*A Defense of Women's Choice: Abortion and the Ethics of Care*](http://web.a.ebscohost.com/ehost/viewarticle/render?data=dGJyMPPp44rp2%2fdV0%2bnjisfk5Ie46bNRrqmzTK6k63nn5Kx95uXxjL6urUq3pbBIr6%2beSriqr1Kwq55Zy5zyit%2fk8Xnh6ueH7N%2fiVaunr0qurrJPsKe2PurX7H%2b72%2bw%2b4ti7iObipIzf3btZzJzfhrvGxmSvqLFKrqavPuTl8IXf6rt%2b8%2bLqjOPu8gAA&vid=19&sid=26088f55-b87a-4e1d-8c69-55a61f1992ac@sessionmgr4008), 30(3) Southern Journal of Philosophy 39 (1992). [↑](#footnote-ref-110)
111. For this branch of the ethics of care, see the following seminal articles: [Helga Kuhse](https://ezproxy.ono.ac.il:2161/action/doBasicSearch?si=1&Query=au%3A%22Helga+KUHSE%22), [*Against The Stream : Why Nurses Should Say "No" To A Female Ethics Of Care*, 49(193) Revue internationals de Philosophy 285, 301 (1995);](https://ezproxy.ono.ac.il:2161/stable/23954797?Search=yes&resultItemClick=true&searchText=%22Relational+Ethics+of+Care%22&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3D%2522Relational%2BEthics%2Bof%2BCare%2522&ab_segments=0%2Fbasic_search%2Fcontrol&refreqid=search%3A106a6ba1d5862323fd2094503422fffd) Fiona Robinson, *Globalizing Care: Ethics, Feminist Theory, and International Relations*, 22(1) Alternatives: Global, Local, Political 113, 118, 130 (1997); [Carolyn Ellis](https://scholar.google.co.il/citations?user=ZTuBij4AAAAJ&hl=iw&oi=sra), *Interviewing and Storytelling From a Relational Ethics of Care*, in The Routledge International Handbook on Narrative and Life History 431 (Ivor Goodson et al., 2016). [↑](#footnote-ref-111)
112. *See* Herring, The Termination, *supra* note 99, at 151 and more extensively at Charles Foster and Jonathan Herring, Identity, Personhood and the Law (2017). *See also* Peach, *supra* note 1, at 197 (“[…] the act of sexual intercourse is not in itself the ground of the obligation; it is merely the act that brought about the existence of the child who is biologically connected to the parents. So, it is not so much the choice to have sex that obligates a couple as it is the reality, the relationship, that is brought about by that choice.”); Simo Vehmas, *Parental Responsibility and the Morality of Selective Abortion*, 5(4) [Ethical Theory and Moral Practice](https://link.springer.com/journal/10677) 463, 475, 463 (2002) (“Also, a conscious decision to procreate should bring about conscious assent to assuming obligations as a parent. This implies a duty of caring for any kind of child […] they do not have a morally sufficient reason to terminate the pregnancy on the grounds of fetal abnormality.”). [↑](#footnote-ref-112)
113. Douglas, *supra* note 13, at 29. *See also* Julian Savulescu & Guy Kahane, *The Moral Obligation to Create Children with the Best Chance of the Best Life*, 23(5) Bioethics 274 (2009). [↑](#footnote-ref-113)
114. For actual such cases, see Wallis v. Smith, 130 N.M. 214 (N.M.App. 2001); Stephen K. v. Roni L., 105 Cal.App.3d 640 (Cal.App.2.Dist). [↑](#footnote-ref-114)
115. *See* Margalit, *supra* note 28, at 82-3. For the close connection between the claim of “coerced parenthood” and the legitimacy of the abortion, see Christopher Bruno, *A Right to Decide Not to Be a Legal Father: Gonzales v. Carhart and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 Geo. Wash. L. Rev. 141 (2008); Reed Boland, *Population Policies, Human Rights, and Legal Change*, 44 Am. U. L. Rev. 1257 (1995); Lifshitz-Aviram & Margalit, *supra* note 2. [↑](#footnote-ref-115)
116. Margalit, *supra* note 28, at 82.But see Melanie B. Jacobs, *Parental Parity: Intentional Parenthood’s Promise*, 64 Buff. L. Rev. 465, 500 (2016) (“It is hard to believe that our legal system of paternity should be predicated on punishing people for having sex […] Ironically, that is exactly the way in which federal paternity establishment works.”) [↑](#footnote-ref-116)
117. *See* the following seminal writing in this vein: Smith Holly, *Intercourse and Moral Responsibility for the Fetus*, in Abortion and the Status of the Fetus 229 (William B. Bonderson et al. eds., 1983); Walen Alec, *Consensual Sex without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 Brook. L. Rev. 1051 (1997); Shari Motro, *The Price of Pleasure*, 104 Nw. U. L. Rev. 917 (2010). [↑](#footnote-ref-117)
118. *See* Laurence C. Nolan, *Legal Strangers and the Obligation of Support: Beyond the Biological Tie - But How Far Beyond the Marital Tie*? 41 Santa Clara L. Rev. 1, 19 (2000). For additional ethical-philosophical justifications, see Jones v. Smith, 278 So.2d 339, 342-3 (Fla. App. 1973); Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 Stan. L. Rev. 1135, 1145, 1162 (2008), who quoted Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. Rev. 478, 483 (1981). For the constitutional aspects of coerced parenthood, see Bruno, *supra* note 104. [↑](#footnote-ref-118)
119. Stephen Schwarz, The Moral Question of Abortion 118 (1990). For an academic discussion of it, see, among others, David Boonin, A Defense of Abortion 229 (2003); Peach, *supra* note 1, at 197; Stephen D. Schwarz & Kiki Latimer, Understanding Abortion: From Mixed Feelings to Rational Thought 70 (2012). [↑](#footnote-ref-119)
120. *See* the references brought by us previously in *supra* note 50. *See also* Douglas, *supra* note 13, at 235. [↑](#footnote-ref-120)
121. Douglas, *supra* note 13, at 36. [↑](#footnote-ref-121)
122. *See, e.g.*, Johnson et al., *supra* note 50; Adams & Jones, *supra* note 61, at 1180; Lucinda Ferguson, *Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation*, 22(1) International Journal of Law, Policy and the Family 61(2008). [↑](#footnote-ref-122)
123. But compare with Douglas, *supra* note 13, at 235 (“[…] the concept of commitment is gendered. It was suggested that for women, commitment may be more likely to be experienced as structural commitment […] Men, by contrast, may be more likely to experience commitment as personal […]”). [↑](#footnote-ref-123)
124. For this notion, see Sally Sheldon, *‘Sperm Bandits’, Birth Control Fraud and the Battle of the Sexes*, 21(3) Legal Studies 460 (2001); Malanie B. Jacobs, *When Daddy Doesn't Want to be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 Yale J.L. & Feminism 193 (2004); Ronald K. Henry, *The Innocent Third Party: Victims of Paternity Fraud*, 40 Fam. L.Q. 51 (2006-2007). [↑](#footnote-ref-124)
125. *See*, for example, Sarah E. Rudolph, *Inequities in the Current Judicial Analysis of Misrepresentation of Fertility Claims*, 1989 U. Chi. Legal F. 331 (1989); Jill E. Evans, *In Search of Paternal Equity: A Father's Right to Pursue a Claim of Misrepresentation of Fertility*, 36 Loy. U. Chi. L.J. 1045, 1048 (2005);Yehezkel Margalit*, "Paternity Fraud" and Known Sperm Donors - Towards A New Archimedean Point of the Best Interests of the Child and Men's Rights?* Haifa Law Review (2021) (forthcoming) (Heb.). [↑](#footnote-ref-125)
126. I. Glenn Cohen, [*Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?*‏](https://journals.sagepub.com/doi/abs/10.1111/jlme.12198?casa_token=7CYuw7J05qAAAAAA:xsUDWRVdt0Bm9mKkan1QjNGxavjVLRn8DOcCxo_AF5fhyEVs0NI-PGObDkNt5_gskcfwyOPiPCHs), 43(1) [J Law Med Ethics](https://www.ncbi.nlm.nih.gov/pubmed/25846041) 87, 99 (2015). *See also* ibid, *The Right Not to be a Genetic Parent?* 81 S. Cal. L. Rev. 1115 (2008). [↑](#footnote-ref-126)
127. Cohen, Are All, ibid, at 96. For the rape and incest exceptions, see also Clement Dore, *Republicans on Abortion Rights*, 14(39) Think 9 (2015); Michele Goodwin, *Prosecuting the Womb*, 76 Geo. Wash. L. Rev. 1657 (2007); ibid, *The Pregnancy Penalty*, 26 Health Matrix 17 (2016). [↑](#footnote-ref-127)
128. Thomson, *supra* note 87, at 55. And compare with her following supplemental statement: “I have been arguing that no person is morally required to make large sacrifices to sustain the life of another who has no right to demand them, and this even where the sacrifices do not include life itself; we are not morally required to be Good Samaritans or anyway Very Good Samaritans to one another.” Thomson, *supra* note 87, at 53-4  [↑](#footnote-ref-128)
129. Herring, The Termination, *supra* note 99, at 148. *See also* Herring, *supra* note 5 at 1-2 (“The promotion of caring relationships requires both the support and sustenance of care; but also the termination of relationships which are not nurturing or marked by care. This is especially important if people are hindered by non-caring relationships from entering caring ones.”); Herring, ibid, at 15 (“[…] it is inconceivable that the law could require a woman to go through pregnancy and birth for a foetus in order to promote a caring relationship. The law is not in the business of coercing relationships through threat of legal sanction, as that undermines the very goodness of a mutually respectful caring relationship.”). For the possible implementation of the relational ethics theory in the parallel context of the frozen embryo, see Claudia Wiesemann, *Relational Ethics and the Moral Status of the Embryo*, in Progress in Science and the Danger of Hubris: Genetics, Transplantation, Stem Cell Research 117 (Constantinos Deltas et al. eds, 2006); Yehezkel Margalit, *From (Moral) Status (Of the Frozen Embryo) To (Relational) Contract and Back Again to (Relational Moral) Status* (under evaluation). [↑](#footnote-ref-129)
130. Thomson, *supra* note 87, at 51-5. For this angle, see, among others, Joel Feinberg, *The Moral and Legal Responsibility of the Bad Samaritan*, 3 Crim. Just. Ethics 56 (1984); Rosamund Scott, [*The Pregnant Woman And The Good Samaritan: Can A Woman Have A Duty To Undergo A Caesarean Section?‏*](https://academic.oup.com/ojls/article-abstract/20/3/407/1553845) 20(3) Oxford Journal of Legal Studies 407 (2000); Jovana Davidovic, [*Are Humanitarian Military Interventions Obligatory?*](https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-5930.2008.00393.x) 25 (2) Journal of Applied Philosophy 134 (2008). [↑](#footnote-ref-130)
131. For this statement, see Shahar Lipshitz, *Distress Exploitation Contracts in the Shadow of No Duty to Rescue*, 86 N.C. L. Rev. 315, 321 (2008) and compare with Sheldon Nahmod, *The Duty to Rescue and the Exodus Meta-Narrative of Jewish Law*, 16 Ariz. J. Int'l & Comp. L. 751, 752 (1999) (“[…] under American common law as conventionally understood there is no affirmative legal duty to rescue, even if the rescue could be accomplished at little or no risk to the prospective rescuer.”). For this legal doctrine, see Jennifer L. Groninger, *No Duty to Rescue: Can Americans Really Leave a Victim Lying in the Street - What Is Left of the American Rule, and Will It Survive Unabated*, 26 Pepp. L. Rev. 353 (1999); Philip W. Romohr, *A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-to-Rescue Rule*, 55 Duke L.J. 1025 (2006); [Virginia Mantouvalou](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Mantouvalou%2C+Virginia), *N v UK: No Duty to Rescue the Nearby Needy?* 72(5) [The Modern Law Review](https://onlinelibrary.wiley.com/journal/14682230) 815 (2009). [↑](#footnote-ref-131)
132. Cohen, Are All, *supra* note 116, at 98, who quotes respectively Donald H. Regan, *Rewriting Roe v Wade*, 77 Mich. L. Rev. 1569, 1601 (1979); Manninen, *supra* note 87, at 42. Thomson, *supra* note 87, at 53, has stepped in the same direction regarding the notorious case of Kitty Genoves, claiming that “Indeed, with one rather striking class of exceptions, no one in any country in the world is legally required to do anywhere near as much as this for anyone else.” For an academic discussion of this case, see John H. Scheid, *Affirmative Duty to Act in Emergency Situations - The Return of the Good Samaritan*, 3 J. Marshall J. Prac. & Proc. 1 (1969); Cucchiara Besser & Kalman J. Kaplan, *The Good Samaritan: Jewish and American Legal Perspectives* 10(1) The Journal of Law and Religion 193 (1994); [Rachel Manning](https://psycnet.apa.org/search/results?latSearchType=a&term=Manning%2C%20Rachel) et al., *The Kitty Genovese Murder and the Social Psychology of Helping: The Parable of the 38 Witnesses*, 62(6) American Psychologist555 (2007). [↑](#footnote-ref-132)
133. *See* generally Ernest J. Weinrib, *The Duty to Rescue: The Case for a Duty to Rescue*, 90(2) The Yale Law Journal 247 (1980); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 Wm. & Mary L. Rev. 423 (1985); David A. Hyman, *Rescue without Law: An Empirical Perspective on the Duty to Rescue*, 84 Tex. L. Rev. 653 (2006). [↑](#footnote-ref-133)
134. Nahmod, *supra* note 120, at 773. For a fuller discussion of this unique perspective, see also Ben Zion Eliash, *To Leave or Not to Leave: The Good Samaritan in Jewish Law*, 38 St. Louis U. L.J. 619 (1994); Michael N. Rader, *The "Good Samaritan" In Jewish Law*, 22(3) Journal of Legal Medicine 375 (2001). [↑](#footnote-ref-134)
135. Aaron Kirschenbaum, *The Bystander's Duty to Rescue in Jewish Law*, 8(2) The Journal of Religious Ethics 204 (1980). *See also* Besser & Kaplan, *supra* note 121; Broyde & Weiner, *supra* note 82 (“Jewish Law’s unique demand for active intervention – in some cases even to the bystander’s own small risk or detriment, as we shall see, but certainly with time and money – expresses a distinctive core value of responsibility for one’s neighbors’ safety and well-being.”). [↑](#footnote-ref-135)
136. BT Sanhedrin 37a, The Online Soncino Babylonian Talmud Translation, <http://ancientworldonline.blogspot.co.il/2012/01/online-soncino-babylonian-talmud.html>. For the landmark researches discussing this statement, *see* Menachem Elon, *Jewish Law and Modern Medicine*, 4 Isr. L. Rev. 467, 474 (1969); Arthur Gross Schaefer & Peter S. Levi, *Resolving the Conflict between the Ethical Values of Confidentiality and Saving a Life: A Jewish View*, 29 Loy. L. A. L. Rev. 1761, 1763 (1996); Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on Eye for Eye and the Death Penalty*, 1998 Utah L. Rev. 505, 541 (1998). [↑](#footnote-ref-136)
137. For this notion, *see* Alexander Altmann, *"Homo Imago Dei" in Jewish and Christian Theology*, 48(3) The Journal of Religion 235 (1968); Stanley J. Grenz, The Social God and the Relational Self: A Trinitarian Theology of the Imago Dei (2001‏); [Y. Michael Barilan](https://brill.com/search?f_0=author&q_0=Y.+Michael+Barilan), *Abortion in Jewish Religious Law: Neighborly Love, Imago Dei, and a Hypothesis on the Medieval Blood Libel*, 8(2) [Review of Rabbinic Judaism](https://brill.com/view/journals/rrj/rrj-overview.xml) 1 (2005). [↑](#footnote-ref-137)
138. For more about this commandment, *see* Laufer-Ukeles, *supra* note 81, at 120-2; David M Feldman, Birth Control and Jewish Law: Marital relations, contraception, and abortion as set forth in the classic texts of Jewish law 46-50 (1968); Yehezkel Margalit, *Towards Establishing Parenthood by Agreement in Jewish Law,*  26(2) Am. U.J. Gender Soc. Pol’y& L. 647, 650-1 (2018). [↑](#footnote-ref-138)
139. *See*, among others, Janice Hopkins Tanne, *Coronavirus Pandemic Stirs Fight Over Abortion Rights In US*, 369 BMJ m1733 (2020); Nadia B. Ahmad, *Re-Reading Anita Bernstein's The Common Law Inside the Female Body from the Bottom of the Well: Analysis of the Central Park Five, Border Drownings, the Kavanaugh Confirmation, and the Coronavirus*, 61 B.C.L. Rev. E.Supp. I.-69 (2020). [↑](#footnote-ref-139)
140. *See*, for example, [Angel Li](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2819%2931003-7/fulltext), *Northern Ireland Deadlock Impedes Abortion Rights Progress*, [393(10183](https://www.thelancet.com/journals/lancet/issue/vol393no10183/PIIS0140-6736%2819%29X0019-7)) The Lancet P1794 (2019), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)31003-7/fulltexthttps://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)31003-7/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2819%2931003-7/fulltext); N. E. H. Hull et al., The Abortion Rights Controversy In America: A Legal Reader (2018); Jenny Brown, [Without Apology: The Abortion Struggle Now](https://www.google.com/books?hl=iw&lr=&id=PROtDwAAQBAJ&oi=fnd&pg=PA1&dq=%22Without+Apology:+The+Abortion+Struggle+Now%22&ots=BKGC4GSzFC&sig=YesF03KEsMjbfnvT5Db-nyC-Pps) (2019). [↑](#footnote-ref-140)
141. *See*, in the meantime, Dany Geraldo Kramer et al., *Coronavirus in Pregnant Women: Literature Review*, 67(1) American Scientific Research Journal for Engineering, Technology, and Sciences (ASRJETS) 73 (2020); [David Baud](https://scholar.google.co.il/citations?user=vjZSYb8AAAAJ&hl=iw&oi=sra) et al., [*Second-Trimester Miscarriage in a Pregnant Woman With SARS-CoV-2 Infection,*](https://jamanetwork.com/journals/jama/article-abstract/2765616)  e207233 JAMA E1 (2020); [Latif Panahi](https://www.ncbi.nlm.nih.gov/pubmed/?term=Panahi%20L%5BAuthor%5D&cauthor=true&cauthor_uid=32232217) et al., *Risks of Novel Coronavirus Disease (COVID-19) in Pregnancy; a Narrative Review*, (1) [Arch Acad Emerg Med](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7092922/) e34 (2020). *See also* the discussion of the abnormal child by Lifshitz-Aviram, *supra* note 28, at 185-91. [↑](#footnote-ref-141)
142. For a similar argument, see Berg, *supra* note 98, at 401. [↑](#footnote-ref-142)