Abortion

A MOUTH FOR THOSE

WITH NO VOICE -

The Unspoken Imbalance between the Woman
and her Fetus

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2021

Chapter One - Introduction and Introducing the
Dilemma

The cry of our ancestress Rachel, „Give me children, else I die", (Genesis 30, 1), mentioned by my colleague Justice Tal in his opinion, the silent cry of Hannah „speaking in her heart, only her lips moved, but her voice was not heard" (I Samuel 1, 13) and praying „for this child" (I Samuel 1, 27) and countless other cases in our literature and that of other nations are a striking expression of the force of the yearning for a child, which is unrivalled in its intensity. This yearning encompasses man"s will to continue, through his descendants, the physical and spiritual existence of himself, his family and also his people. It reflects his aspiration to realize himself and even to fulfil his dreams that have not yet been realized. It contains his love for his descendants, those who have been born and those as yet unborn; a love of „would that I had died in your stead" (II Samuel 19, 1), which overrides a person"s desire for his own life^..].[[1]](#footnote-1) [[2]](#footnote-2)

These words were uttered by Justice Y. Turkel in the Israeli *Nahmani v.*

*Nahmani* case some twenty years ago, and I ask myself: is it like this nowadays, too? Is the primal yearning for a child indeed a pure and simple desire for a child (no matter what sex, no matter what height, no matter what it looks like or how fit it is) or is it rather a desire for a healthy, “perfect” child? What lies behind the term “perfect” or “healthy”? Do the rights of a live fetus (whatever its flaws) have a proper value and deserve legal protection by the society and defense of the law? or is it in fact respect for the woman, her freedom and her autonomy to choose the child she will bring into the world that are the proper values needed to protect the society and defense of the law?

I am assuming that a pregnancy exists (whether planned or unplanned) and that

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the woman has decided to end it and destroy the live fetus. The discussion takes into account that the reasons for the woman's decision not only concern the fetus, its state of health, its genetic profile, its sex or its facial features but those aspects relating to the woman herself - her desires, convenience, financial state, mental state, and others. This book is not about the right of the woman to terminate the pregnancy that came about against her will as a result of the violent nature of her personal relationship, such as incest, rape and the like. In cases like these, the pregnancy is terminated in the first or second trimester. The debate I would like to open is not only one about law or rights - the rights of the woman and those of the fetus; I also want to stimulate a discussion about ethics, morality, philosophy and values. Which rights ought to have a stronger defense in any given society, those of the woman or those of the fetus? When should a spark of potential life be protected? Does the fetus have a natural right to life? Hasn't the time come to create a balance between the rights?

If a person's identity (genetic characteristics) is established at the moment of creation, and if a human being is the sum of his genetic characteristics, it stands to reason that a fetus is human at the very moment of conception and a fortiori a live

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fetus.[[3]](#footnote-3) If a human identity begins to form only during the developmental stage when it can exist outside the womb as a live fetus (“viable fetus”),[[4]](#footnote-4) then the viability itself gives it the right to life. If a human identity forms when the brain starts becoming active, i.e. in the sixth week after conception, then I could say that the fetus is a human even before becoming a live fetus. If the fetus is a human being with rights only from the moment of birth, that implies it has no rights during pregnancy.

Could the courts adopt the attitude that the live fetus has full rights? Could it be claimed that the rights of a live fetus are equivalent to the rights of a child? Is there a chance that the legal system would determine that in certain cases**,** and taking all aspects into consideration, (including those concerning the rights of the woman and her best interests) they would “bow down” and consider the rights and best interests of the live fetus? Is it appropriate to make an analogy between a child and a live fetus? I doubt whether the system will go so far as to give preference to the rights of “beginning of life”; even that of a live fetus, over human rights.[[5]](#footnote-5)

The grim reality is that approximately 213 million pregnancies occurred in 2012, up slightly from 211 million in 2008. The global pregnancy rate decreased only slightly from 2008 to 2012, after declining substantially between 1995 and 2008. Similarly, the most recent survey estimated that the global rate for 2010-2014 was 35/1000 women aged 15 to 44 while estimating that the real abortion rate may well be 20 to 25% greater than officially reported, as also reflected by the uncertainty interval whose upper limit in 2010-2014 was 44/1000 women.[[6]](#footnote-6) It is noteworthy that Doctors enable terminations up to the 7th week of pregnancy by prescribing a pill. Terminations from the 8th to the 24th week are carried out by dilatation and curettage. This is not the case when terminating the pregnancy of a live fetus beyond 24 weeks of gestation. **At this stage it is known as feticide**, because at this stage the fetus can survive ex utero. This procedure is known as “inducing childbirth”.[[7]](#footnote-7)

In this book I will discuss only the acute dilemma whether a live fetus has a right to be born and a right to be born healthy at a stage of viability, according to the latest technological developments.[[8]](#footnote-8) Amongst others, I will cite Thomson's opinion, according to which even stipulating that the fetus is a person**,** does not prevent the woman's right to terminate a pregnancy. Thomson was the first woman to assume that even if we claim that the fetus has a moral status similar to that of a person, a pregnancy can still be terminated. Thompson additionally asserts that the right to life does not include the prerogative to ensure life[[9]](#footnote-9) because it is wrong to declare that the right to life always wins. This highly respected and well-reasoned argument is most pertinent and I will discuss it at length:

You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidney can be used extract poisons from his blood as well as your own. The director of the hospital now tells you “Look, we're sorry the Society of Music Lovers did this to you - we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from his ailment, and can safely be unplugged from you”. Is it morally incumbent on you to accede to this situation?

If so - what should we consider as the paramount factor when making a decision about the rights of a live fetus and its best interests? Is it possible to establish that its best interests involve terminating the process of its development so it won't be born with a defect? Does it have a right to be born even if will suffer from an impairment or a defect? Should the severity of the impairment or defect be considered when deciding to terminate a pregnancy? Can it be stipulated that it is in the best interests of the fetus not to be born to a woman who doesn't want it, either because of its looks or for any other reason? Should the thread of its future life be severed because of the rights of others? Thomson claims that even though the fetus has a right to live, and the termination renders this right null and void, it does not always mean that a life-stopping act is necessarily prohibited on a moral level. She maintains that the moral status of the fetus does not establish the morality of a decision to terminate or not to terminate a pregnancy, as in the above case of the violinist.[[10]](#footnote-10) I can accept this view when a pregnancy has occurred as a result of rape or incest, but not otherwise.

Thomson even maintains that just as the act of unplugging the man from the violinist may seem to be moral to the majority of people because the violinist was attached to him without his consent, in the same way, the woman can detach from the fetus. Thus Thomson makes a comparison between the man and a woman whose pregnancy was forced upon her and not to a woman whose pregnancy was not enforced, so I am of the opinion that the analogy is wrong and I cannot accept Thomson's viewpoint. The law-maker should attempt to create a balance between the rights described above: the pregnant woman is a person with a legal capacity. She carries the fetus in her womb, where it breathes, is nourished and develops. Sometimes she became pregnant deliberately and wanted it and sometimes she became pregnant by chance and did not want it.[[11]](#footnote-11) Although the legal capacity of the woman and her rights as a human being are recognized by law, the lawmaker should allow her to terminate a pregnancy whenever she likes or for any reason.

The live fetus “stands” vis-a-vis the pregnant woman and her rights with barely a legal leg to stand on.[[12]](#footnote-12) It is not a person and has no legal capacity; it has no desires or insight; it exists physically but minimally and is totally dependent on the woman. Some consider the fetus as “hardly a person” inside a person and others consider it as “the beginnings of a person” inside a person.[[13]](#footnote-13) I maintain that the definition indicates the context in which the person who is defining perceives what is being defined, so I defined the fetus at the live stage as a live fetus. I am inclined to think that even those who take a feministic viewpoint - according to whom the woman's rights over her own body are intrinsic to her autonomous right to terminate a pregnancy as a basic right - would agree with me that a live fetus is neither hardly a person nor hardly living but rather a “life beginning”. I hope that defining the live fetus as a “human beginning” with its own rights will be the beam that lights up the depths of our world perception when it comes to both ethics and the law. I would like the live fetus to receive the status of “almost” a person with the rights of a human being in the process of formation.

Diverse jurisdictions chose different ways to make a balance between the rights of the woman and those of the fetus. Some preferred the “life beginning” of the fetus and did not allow women to terminate the pregnancy at any stage; others preferred the autonomy of the woman over her own body and her right to self-determination, and allowed her to terminate the pregnancy at any stage, including the live stage;[[14]](#footnote-14) others chose the middle way that takes the age of the fetus into consideration, its ability to survive and its state of maturity at the time the decision was made to terminate a pregnancy. In my opinion, any legal system should chose the middle way by making it clear that any woman who wants to terminate a pregnancy would be subject to this balance which should exist between the different rights.

International statistics relating to terminating pregnancies[[15]](#footnote-15) reveals that about 97% of countries permit termination when the fetal life is endangered, about 67% of countries permit termination to avoid a physical risk that is not life-threatening to the woman, 49% of countries permit termination in cases of rape or incest, and 34% of countries permit termination for financial or social reasons[[16]](#footnote-16) such as fear of honor killing in certain families, etc. In addition, one in three women in the world makes the decision to terminate a pregnancy, some 70% do so in the first trimester, every ten minutes a woman dies from complications resulting from the illegal abortion (52,650 women a year worldwide) and one in half a million women die from complications during the termination of a pregnancy.[[17]](#footnote-17)

The high rates of pregnancy terminations should set off alarm bells. We are living in an era of advanced technology, typified by scientific developments in the field of the human genome and other technologies that enable cloning,[[18]](#footnote-18) stem-cell removal, IVF, identifying fetal defects, choosing the sex of the fetus and checking its state of health, genetic testing of fetal health and its physical characteristics before it has been implanted in its mother's womb and throughout the duration of the pregnancy (chorionic villi, amniotic fluid and genetic testing). Because of easy access to technological advances and the vast amount of information at the fingertips of human society dilemmas arise on levels that are legal, social, ethical and moral regarding the issue under discussion. The development of technology that enables us to access so much information about the fetus and the live fetus during the course of the pregnancy, gives the woman a constantly increasing number of options to use her autonomous right and terminate the pregnancy. In my opinion, this represents a threat to the rights of the live fetus, and there is an imminent danger that racial profiling[[19]](#footnote-19) will emerge as a result.

Society may decide that only a certain type of person has a right to be born - with a specific height, weight, appearance and IQ. Modern society may liable to begin sliding down the slippery slope as a result of the vast number of prenatal tests, and owing to the perception according to which a perfect baby is a “good baby” and one that does not correspond to certain parameters is a “bad baby” and must be eliminated. Society may liable to encourage births of “perfect” humans[[20]](#footnote-20) - not necessarily births of healthy ones. I wonder if modern society is mature enough to use the vast amount of data offered by technology: should we use the information available to us or would it be more appropriate to limit its use to enable our society to become more patient, tolerant and understanding? Is the aim to bring only “perfect” people into the world, and if so, how should we define “perfect”? Should the description “perfect” be applied to people who are completely healthy, tall, slim, blue-eyed with a shock of hair? Are people suffering from a physical or mental defect “imperfect”? Should only people who can hear, speak, walk and run be brought into the world?

Should society allow only the births of fetuses with the potential to become loving, attentive people, or with the potential to become people who are clever, bright and equipped with an especially high intellectual capacity? How would a society look with members who are all “perfect”? Will there not always be people who are less “perfect”? What sort of society would be one that legitimizes the destruction of “imperfect” people - a society intolerant of people suffering from defects, impairment, low stature, excess fat, idiocy, stuttering, deafness, mental illness... where are the limits? The ability to choose the sex of the fetus, its height, the color of its eyes and a minimum number of disabilities could be a frightening prospect because of the concern of adopting the fundamentals of eugenics,[[21]](#footnote-21) which vividly recall sinister regimes. However, the ideals that establish the absolute right to give birth to a child - whatever its defects, without taking into consideration the financial aspect and the costs of maintaining it, are unrealistic.[[22]](#footnote-22) Whose responsibility is it to raise a child that is dumb, deaf, lame, or suffering from mental defects - the parents', or ours as a society?

I believe that a live fetus has the right to develop as a complete human being, even if the woman[[23]](#footnote-23) decides otherwise. I maintain that the state should intervene and prevent the destruction of an unwanted fetus because it is not “perfect”, because of the low probability of defects or simply out of convenience. A modern society should respect the potential life of a live fetus and offer it protection both from a third party and from the woman who wants to destroy it. Now the time has come to recognize a claim of damages of a fetus against the woman, either post-partum or by means of a trustee if its birth was purposely prevented for reasons that were not in its best interests.

The parents and the child are two separate entities whose rights and best interests do not always coincide. I contend that a live fetus is almost-a-person inside a person and therefore two separate entities are involved. One entity should not be allowed to harm another. Even if the fetus is not defined as a person,[[24]](#footnote-24) it does not necessarily mean that it lacks rights. The law recognizes the facts that a person in a coma is not “hardly a person” and therefore should not be forcibly removed from life-preserving machines;[[25]](#footnote-25) neither is a person suffering from Alzheimers' “hardly a person” and it is unthinkable to hasten his death. Society cannot decide when there is no longer a point to the life of someone who might be “hardly a person” and cause him to die.

In this day and age we witness the empowerment of individual rights, respect for autonomy, self-determination and freedom. I assume that there will be many critics who will claim that the thesis proposed in the book contradicts the progressive concepts regarding human rights, feminism and autonomy. I am not against respecting the rights of the woman as a person, but I do insist on respecting the rights of the other inside her - the live fetus.

“Brave New World”[[26]](#footnote-26) is a book written in 1932, before Hitler's rise to power in Nazi Germany. It describes an efficient police state in which perfect people are created in incubators by a modern process of fertilization - people who are intended for different aims and different positions. In the book I found a quote from Nikolai Berdyaev:

Utopias now appear much more achievable than we used to think. We are now faced with a different new concern: how to prevent them becoming achieved.

[...] Utopias are achievable. Life marches ahead towards utopias. And a new century may begin, a century in which the intellectuals and the intellectual class will rediscover the means to evade utopias and return to a non-utopian society, one that will be less “perfect” and more liberal.

Some consider parenthood as a value.27 Others are of the opinion that the right to

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be a parent is one that emanates from free will,28 with no legal obligations, either in the relationships between the state and its citizens or in the relationships between the couple themselves. And others consider that the right to be a parent is one whose interpretation 29

should be narrowed down in order to limit it under certain circumstances.29 A perception that sees parenthood as a value generates a perception that if a right to be a parent exists, there should also be a right not to be a parent,30 i.e. a pregnancy may be

1. Indeed, in the sociological scholarly literature one can find a variety of academic opinions as to how exactly parenthood should be defined - whether it is a responsibility, entitlement, benefit or enrichment. Nevertheless, it seems that the conceptualization of parenthood as an entitlement and right, on the one hand, and as a responsibility, on the other hand, is drawing more and more support.
2. This is the essence of the intentional parenthood . For the land mark literature that support this brand new conception of the legal parentage, see John L. Hill, *What Does it Mean to be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U.L. REV. 353, 413-20 (1991); Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 367-99 (1995); Perri Koll, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parents in Surrogacy Custody Disputes,* 18 CARDOZO J.L. & GENDER 199, 223-24 (2011); Jesse M. Nix, “*You Only Donated Sperm”: Using Intent to Uphold Paternity Agreements*, 11 J. L. & FAM. STUD. 487, 494 (2009); Jason Oller, *Can I Get That in Writing?: Established and Emerging Protections of Paternity Rights* [In re K.M.H.*, 169 P.3d 1025 (Kan. 2007*)], 48 WASHBURN L.J. 209, 220-23, 235-37 (2008); Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 227-53 (2012); Marjorie Maguire Shultz, *Reproductive Technology and Intent­Based Parenthood: An Opportunity for Gender Neutrality,* 1990 WIS. L. REV. 297, 321-98 (1990); Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 192-208 (1986); Katherine M. Swift, *Parenting Agreements, The Potential Power of Contract, And the Limits of Family Law*, 34 FLA. ST. U.L. REV. 913, 930-57 (2007); Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U.J. GENDER SOC. POL'Y& L. 379, 388-89 (2007); Catherine Villareale, *The Case of Two Biological Intended Mothers: Illustrating the Need to Statutorily Define Maternity in Maryland* , 42 U. BALT. L. REV. 365 (2013); Mary Patricia Byrn & Erica Holzer, *Codifying the Intent Test*, 41 WM. MITCHELL L. REV. 130 (2015); Heather Kolinsky, *The Intended Parent: The Power and Problems Inherent in Designating and Determining Intent in the Context of Parental Rights*, 119 PENN ST. L. REV.

801 (2015); Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 Buff. L. Rev. 465 (2016) and more extensively YEHEZKEL MARGALIT, DETERMINING LEGAL PARENTAGE - BETWEEN FAMILY LAW AND CONTRACT LAW (Cambridge University Press, forthcoming, 2018).

1. Daniel Statman, *The Right to Parenthood: An Argument For a Narrow Interpretation*, 10 ETHICAL PERSPECTIVES 224, 229 (2003). For a discussion of this unique opinion, see [Sarah Chan](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=CHAN%2C+SARAH) & [Muireann](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=QUIGLEY%2C+MUIREANN) [Quigley,](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=QUIGLEY%2C+MUIREANN) *Frozen Embryos, Genetic Information and Reproductive Rights,* 21(8) BIOETHICS 439 (2007); Rhona Schuz, *The Developing Right to Parenthood in Israeli Law*, 2013 INT'L SURV. FAM. L. 197, 201 n.25 (2013).
2. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008); ibid, *The Right Not to be a Genetic Parent?* 81 S. CAL. L. REV. 1115 (2008); Christopher Bruno, *A Right to* terminated by right. Accepting these viewpoints could lead to the conclusion that preventing parenthood is also a free choice and thus the woman is at liberty to decide if she prefers not to become a mother.

In the Israeli *Nahmani v. Nahmani* case, Justice Goldberg stated that the basis of the right to prevent parenthood is rooted in autonomy of personal wishes, i.e. respecting the desire of the individual to exercise control over his life and his obligations.[[27]](#footnote-27) [[28]](#footnote-28) Justice Dorner made her standpoint clear that the right of the woman to terminate a pregnancy 32

derives from the autonomy she has over her body and her right to privacy,[[29]](#footnote-29) and Justice Strassberg-Cohen determined as follows:

The right not to be a parent is also a liberty. It is the right of the individual to control and plan his life [...] The protected value in non-parenthood is the liberty, privacy, freewill, self-realization and the right to make intimate decisions without interference. These are protected basic values of supreme importance, from which the liberty not to be coerced into parenthood is derived [.] Regarding freewill as a liberty leads to the conclusion that every person is free to choose and decide whether or not to be a parent [.] the State may not impose parenthood on a person, either directly or through the courts. Consequently, I do not accept the position of those who consider the right not to be a parent as a right of less value than the right to be a parent.[[30]](#footnote-30)

Even if we do accept the view that alongside the right to be a parent is the right not to be a parent, a distinction should be made between the existence of that right before conception and its existence after conception. After conception, and arguably more so after 24 weeks of pregnancy, we are no longer dealing only with the woman's liberty and her rights but also with the rights of another entity, the fetus. As the woman takes advantage of her liberty to the full extent, this action leads to it's the destruction of the fetus. The issue in this book is not about the right to be a parent or the choice to prevent parenthood, because this decision is the concern of the individual and not that of a liberal, modern state - at least as long as it is not required to cover the costs of exercising that right.

The decision to become a parent or to refrain from doing so is an autonomous, familial, internal decision and the law should not intervene in it, unless there are serious reasons to do so. This book deals with a completely different issue: the right not to be a parent at the stage of viability of the fetus. This way the book confronts the right of the woman to cease potential parenthood with the right of the fetus to be born, and be born as healthy as possible. Certainly when deciding whether to force parenthood on someone who does not want it, at a stage where termination is still an option, it is essential to consider a number of aspects, including, among others, the woman's right over her own body, the right of the father-to-be and, especially, the best interests of the future child who will be born to a woman who does not want it.

In the case of *Davis v. Davis* the American Supreme Court determined that the essence of the right to privacy is, at the very least, non-intervention in the decision to implement parenthood:

If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[[31]](#footnote-31)

In the case of *Skinner v. Oklahoma* the American Supreme Court ruled that marriage and procreation are “one of the basic rights of man”.[[32]](#footnote-32) As I have already mentioned, I will not deal with this issue. Choosing parenthood or non-parenthood is a matter for religious belief, culture or the woman's decision. I will only ask if there should be increased regulation in matters pertaining to termination of pregnancy, or would that be intervention in the very core of the human “sanctum”. In the past I was adamant that the state should intervene in the parents' decision, even if there was no question regarding the life or death of their infant child, and my present viewpoint is that the state should intervene in the decision of the woman if it is a matter of life-and- death for the fetus.

It is true that terminating a pregnancy is a matter belonging to the intimate aspect of a person's life, yet when the life of another potential person, who in late in development in the womb is involved; the state should intervene and limit even further the liberty of the woman and her right over her body. In my opinion, recognition of the right of the live fetus is a value important enough to justify intervention such as this. This way a balance can be made between the different values, and the value of human dignity and the woman's autonomy vis-a-vis the value of the potential life of the fetus at the live stage.[[33]](#footnote-33)

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Nowadays prenatal screening[[34]](#footnote-34) allows us to identify a large number of syndromes from which a fetus is suffering, or may be suffering; and I assume that the day will come when additional methods will be found to discover more defects. The question is whether it is justified to find every genetic illness by force, and whether society has the right, or maybe even the obligation, to limit permission to terminate pregnancy because of deficiencies of varying severity. The claim that the live fetus has a legal status and its own rights turns the termination of its life into murder of an “almost” live human being. The issue of terminating pregnancy touches upon the issue of the destruction of helpless human beings, such as people suffering from dementia, or in a permanently comatose state, and the like.

In my opinion the appropriate legal model should recognize the rights of the live fetus even if it suffers from deficiencies that do not detrimentally affect its quality of life or lifestyle. These procedures should be recognized by the state, even at the expense of restricting the autonomy of the woman.

Chapter Two - The Woman's Right to Self-
Determination and Autonomy: The Doctrine of
Informed Consent

Recognition of a woman's right to make decisions regarding her life and her body, including the right to terminate a pregnancy, even of a live fetus, is based on recognizing a woman's autonomy over her own body.[[35]](#footnote-35) Virtually every human being assumes they have such rights. The doctrine of informed consent favors autonomous interpretation to liberal interpretation,[[36]](#footnote-36) according to which the woman has an unconditional right over her own body, even during pregnancy, when she carries potential life inside her.

Kant, one of the fathers of deontological thinking, and Rousseau[[37]](#footnote-37) maintain that every autonomous person conducts himself according to a program common to everyone else. John Stuart Mill[[38]](#footnote-38) as well as other liberal philosophers, maintain that every autonomous person can do whatever he wants. This fact expresses the unique nature of humans as opposed to other beings. Kant, Rousseau and Mill believed that it is incorrect to say that the right of an autonomous person is absolute, nor is it correct to say that an autonomous right will never yield to a paternalistic right. According to this approach, it could be said that the right of a woman and her autonomy over her own body is not an absolute right, especially as the live fetus is dependent on the “accommodation” she provides for it. Paternalistic legislation may impose upon the woman certain behaviors during the course of the pregnancy or prevent her from certain activities.

Kant would also ask the question, what is society's duty to the mother vs. the live fetus.? Society has conflicting values on this matter. There are those values of a woman's right to control her own body. This is understandable, and especially relevant in light of thousands of years of oppression by physically dominant males. Now that we live in a technological age, where the survival prospects of the fetus are always improving, the right of the live fetus to become a live human being is beginning to tip the scale towards a respect for the rights of the unborn. In addition, human physical prowess is not as dominant a survival attribute as in the past. The woman believes that she, not society's morality, or religious institutions have to decide what happens to her body.

There are times when further treatment to the fetus is required in addition to the primary treatment given to the woman; there are times when the additional treatment is needed to prevent serious risk to the fetus and does not put the woman in any dangerous states other than those she is aware of - according to the current legislation today, she must give her informed consent to additional treatment.

This is the doctrine of informed consent as adopted in the vast majority of the jurisdictions.[[39]](#footnote-39) Not infrequently, the law states that the woman has a right to be provided with information and a right to decide what treatment to receive. The woman's consent to receive medical treatment[[40]](#footnote-40) means that she gives her consent of her own free will and 7

that she has understood her medical state.[[41]](#footnote-41) Consent that is legally valid is consent that complies with a number of initial requirements. The woman must be fit cognitively and intellectually, and she must give her consent of her own free will with no external pressure. The woman must consent for treatment, and she must be consent for a legal procedure.[[42]](#footnote-42)

Hence, consent to terminate a pregnancy that that does not comply with the law will never be considered informed consent. The woman's consent must not be given fraudulently, and in this regard, non-disclosure of a fact is comparable to fraud. For example, if the doctor thinks that the woman who is about to undergo medical treatment has an erroneous opinion about the treatment she is about to undergo, he is obliged to correct her error and if he does not do so this is considered fraud. Does the doctor's silence in itself, not create an intentionally misrepresentation.[[43]](#footnote-43) This would be the case only if he had the obligation to disclose. An example would be a doctor who was silent when he should have disclosed information, it comparable to a doctor who created intentionally misrepresentation. It is logically to maintain that no weight whatsoever will be given to consent based on incorrect information.[[44]](#footnote-44)

For example, according to the Israeli Patients' Rights Law,[[45]](#footnote-45) consent may be given in writing or orally or according to patient's conduct. Regarding particularly difficult treatments**,** that are included as an addendum to the Patients' Rights Law, it is stipulated that consent must be given in writing only, and prior to receiving it, a shortened version of the explanation given to the patient must also be recorded in 12

writing.[[46]](#footnote-46) As mentioned above, a signature on a treatment consent form, does not constitute informed consent. Prior to signing the consent the woman must be given information and a proper explanation regarding the nature of the treatment and its inherent risks. If the woman has received a full explanation regarding the treatment, and she understood the explanation and expressed willingness to receive the treatment, but has not signed addendum a formal consent form,[[47]](#footnote-47) her consent is valid even without her signature in writing. This holds true as long as the said medical treatment is not one that is listed in the addendum to this Patients' Rights Law. Written consent is required only in these six types of special treatment.[[48]](#footnote-48)

Can the state enact a law that contradicts the doctrine of informed consent[[49]](#footnote-49) and enforce upon the woman treatment for the benefit of the live fetus? Can the state prevent her from terminating a pregnancy? Can the state oblige her to undergo a caesarian section to save a live fetus?

The expression “informed consent” relates to the legal obligation of a doctor to provide the woman with the information relevant to making a decision, and to receive her consent prior to any medical procedure being carried out on her body, be it the termination of a pregnancy, or an invasive procedure such as amniocentesis or a C- section. The way to receive informed consent starts by diagnosing the medical problem and providing general information, and continues with the obligation to convey specific details of the treatment method.[[50]](#footnote-50) At this stage the description given about the treatment being offered[[51]](#footnote-51) should be examined, the description provided regarding alternatives, results and ramifications,[[52]](#footnote-52) the inherent risks (death or bodily harm),[[53]](#footnote-53) problems that may arise during convalescence, and any other infor1mation that doctors supply in similar circumstances.[[54]](#footnote-54)

In this context it is necessary to examine the woman's competence and her ability to comprehend the information she has received. There is no question that if the woman is of unsound mind (owing to madness, mental deficiency, drugs or inebriation), her consent or lack of consent to medical treatment is invalid. However, the problem is not with extreme cases, but rather in situations that occur on a daily basis. It is with cases such as these that it is necessary to make sure that the woman has reached a decision based on the information given to her by the doctor and that he has not exerted any pressure on her.

The stages detailed above are ongoing and mandatory; only one needs to be missing to render the woman's consent invalid, and then it will not be considered informed consent. There is no question that the woman's right over her body, and her liberty, that includes her right to make decisions relating to her own life. It is essential for doctors to receive informed consent to every treatment, so there is no question that there is an expression of the woman's autonomy and respect for her as a person.

The term “informed consent” has two components: “inform” and “consent”.[[55]](#footnote-55) The basis of being informed is the basis for revealing the information. For the woman to consent to treatment during pregnancy, or to a surgical procedure at its end, whether the treatment is intended for her own benefit or whether it is for the benefit of the live fetus; she must receive proper information about her medical state and that of the fetus. The woman must receive additional proper information about the nature of the recommended treatment, the inherent risks, and the available alternatives.[[56]](#footnote-56) A woman's consent to treatment, given without having knowledge of the expected results of the treatment, does not constitute lawful consent.

The question is how much information and what type of information should be given to the woman to enable her consent to be truly “informed”? How much information is appropriate for the woman to receive regarding treatment during the course of the pregnancy, regarding termination of a pregnancy, or a C-section. Ruling and literature have yet to provide a definitive answer to these questions.[[57]](#footnote-57) The conceptual foundation of the obligation to disclose essentially requires that the woman 24

be a partner in every decision taken about her,[[58]](#footnote-58) so that decision won't be a coercive one for her. The current Israeli tests regarding the extent of disclosure required from the doctor include the reasonable doctor test,25 the good medical practice test26 or the reasonable patient test, that tests what medical information should be expected by a reasonable patient before consenting to the treatment.

The American courts that debated the issue of informed consent to receive or

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refuse medical treatment based themselves on the constitution27 or on freedom of religion.28 Nowadays there is no longer any need to resort to these sources and there is a primary assumption that this right is a basic right of a human being that derives from the right to autonomy.29 The leading ruling in the US was given in the case of *Canterbury v. Spence*30 when it was determined as such. The Canadian Supreme Court accepted the reasonable patient test in the case of *Arndt v. Smith*31 and rejected the medical practice

1. A paternalistic test that checks what information a reasonable doctor conveys to the patient. For an academic survey of this test, see [Robert Schwartz &](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Schwartz%2C+Robert) [Andrew Grubb, *W*](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Grubb%2C+Andrew)*hy Britain Can't Afford Informed Consent*, 15(4) HASTINGS CENTER REPORT 19 (1985); Carole B Pinnock, *PSA Testing In General Practice: Can We Do More Now?*, 180 MEDICAL JOURNAL OF AUSTRALIA 379, 379 (2004), [https://www.mja.com.au/system/ffles/issues/180 08 190404/pin10813 fm.p](https://www.mja.com.au/system/files/issues/180_08_190404/pin10813_fm.pdf)df; Rob Heywood et al., *Informed Consent in Hospital Practice: Health Professionals' Perspectives and Legal Reflections*, 18(2) MEDICAL LAW REVIEW 152, n. 46-7, 50 (2010).
2. DOCTORS, PATIENTS AND THE LAW 47, 65 (Clare Dyer ed., 1992).
3. Especially in light of the ruling in Roe v. Wade, 410 U.S. 113 (1973). For a discussion of this land make verdict, see the references I enumerated in Chapter One, p. [] n.8.
4. In some cases the right of patients not to consent to medical treatment was recognized by virtue of religious beliefs. *See*, for example, In re Estate of Bro oks , 205 N.E.2d 435 (1965).
5. On this matter, see also the following sources: A. D. Nieuw, *Informed Consent*, 12 MED. LAW 125 (1993); Margaret A. Somerville*, Labels Versus contents: Variance Between Philosoply, Psychiatry and Law in the Concepts Governing Decision Making*, 39 MCGILL L.J. 179 (1994); EDWARDS RICHARDS & KATHARINE RATHBUN, LAW AND THE PHYSICIANS A PRACTICAL GUIDE §§ 145 (1993); GEORGE POZGAR, LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION 301 (1993).
6. Canterbury v. Spence, 464 F.2D 772 (1927), who based the obligation of disclosure required by the doctor on the trust between him and the patient. For an academic discussion of this ruling, see Thomas A. Knapp & Richard L. Huff, *Emerging Trends in the Physician's Duty to Disclose: An Update of Canterbury v. Spence*, 3(1) JOURNAL OF LEGAL MEDICINE 31 (1975); Editorials , *Consent For Transfusion : A Duty of Care*, 315(7105) [BMJ](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2127273/) 380, 380 (1997); *Influence of the Law on Risk and Informed Consent*, 327 BMJ 731, 732 (2003).
7. Arndt v. Smith, 126 D.L.R. (4th) 705 (1995), in the opinion of Justice Lambert; Arndt v. Smith, 148, D.L.R. (4th) 48 (1997). *See* the following dis cussions of this verdict: Mitchell McInnes, *Failure to Warn in Medical Negligence -- a Cautionary Note From Canada: Arndt v. Smith*, 6(2) Torts Law Journal 135 (1998); Erin Nelson & Timothy Caulfield, *You Can't Get There from Here: A Case Comment on Arndt v. Smith,* 32 U. Brit. Colum. L. Rev. 353 (1998); Vaughan Black, *The Rise and Fall of Plaintiff-Friendly Causation*, 53 ALTA. L. REV. 1013, 1014 n.5 (2016).

test. However in the case of *Rogers v. Whitaker*,[[59]](#footnote-59) the Australian High Court determined that the law must recognize the doctor's obligation to warn the patient about the possible risks to a reasonable patient in his or her state of health.

Samuels[[60]](#footnote-60) maintains that the doctor's general obligation to disclose information derives from both the doctor's professionalism, and the patient's interests. Hence it can be wrongly assumed that the obligation of disclosure by the doctor to the woman arises specifically from her interests. The extent of the disclosure should be further extensive broadened. When the pregnant woman asks to undergo a medical procedure**,** or refrain from one so that it should include the medical state of the live fetus.

This matter was debated, among others, in the Israeli case of Kohari v. State of Israel,[[61]](#footnote-61) in which it was determined that the woman must be provided with an explanation regarding the fundamental risks that a normal patient would consider important when making a decision to agree to medical treatment. In other words, the reasonable patient test or. In the matter under discussion the issue is a reasonable woman test. The doctor must act with the utmost loyalty towards his patients, and this loyalty infers that he must tell the woman what she should expect to undergo.

It can be deduced from this standpoint that for a woman to make an informed consent to medical treatment on her body for the benefit of the live fetus she is carrying, subjective matters factors should be considered, such as the woman's age, character, personality, mental and medical history, and the nature of the treatment being offered.

The consent is the final stage in a process that starts with the initial meeting between the woman and the doctor, continues with receiving details regarding the risks, the chances and alternatives to the treatment, and ends in giving consent. The law maintains that in certain circumstances the doctor should obtain further information regarding options for medical treatment, consult with experts, and provide the woman with all the information he has at his disposal regarding medical treatment.

The amount of information the doctor is obliged to give the woman is estimated according to an objective test: the doctor must find out every piece of information necessary for a reasonable woman to decide whether or not to consent to the treatment offered, be it treatment for her benefit or treatment in the interests of the live fetus, including a C-section. This test was used in Israel for the first time in the *Noam Raibi v.*

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*Dr. Kurt Weige* case.[[62]](#footnote-62) When the treatment is of an innovative nature, the woman must be informed that it is, in fact, innovative.

All the above-mentioned information within the framework of the doctrine of informed consent is basically intended to deal only with the health of the patient, who is the woman. The concept did not foresee, when initially considered, the provision of information referring to a live fetus. Tests during the course of pregnancy and the expectation to give birth to a “normal” fetus broadened the requirement to include supplying information regarding its health. Is there a legal requirement to provide the woman with information regarding the fetus within the framework of the doctrine of informed consent, as defined in the Israeli Patients' Rights Law?[[63]](#footnote-63) The answer to this question is relevant both when discussing the rights of a viable fetus during the pregnancy and when discussing the dichotomy that might arise when the “rights” of a live fetus to “receive information and treatment” are provided by means of another factor; the woman; whose wishes and consent to treatment do not always fall into line with its benefit on an objective level.

The basis of the consent expresses the autonomy fundamental to every person. Hence the right of every woman to make decisions regarding her own life and body and to act accordingly. As a by-product to the woman's right over her own body, comes her liberty to prevent medical action being taken on her body without consent.[[64]](#footnote-64) This is the case when the action is intended purely for the benefit of the live fetus she is carrying, both where medical treatment for the live fetus during the pregnancy is concerned and concerning an enforced C-section.[[65]](#footnote-65)

From this claim it can be derived that the woman has a right to prevent medical treatment for the live fetus during the course of the pregnancy, even if this treatment is likely to improve its health or save its life. Is this viewpoint the right one, even when the woman is about to give birth and refuses a C-section? The reality of the vast majority of the justice systems all around the globe is that a woman can refuse a C-section, and that doctors will not operate on her against her will, even if her refusal leads to the death of the live fetus. This is the case even if she is in her 38th week of pregnancy.

Does not the fact that the woman is having contractions, and has admitted herself to the delivery room, imply consent to a surgical procedure. Ought this procedure be done without her consent? Should the procedure proceed even if her life or health is not at risk? Is it not possible to infer from her conduct, that her implied consent has been given to any life-saving medical procedure for her, or the live fetus, including a C- section? Referring to implied consent, it can be established that there is an assumption that anyone entering the hospital of his own free will agrees by implication to standard medical treatment such as taking blood pressure, blood tests, etc. Therefore, separate consent is not required for every treatment of this type. However, when unusual or non­routine treatment is involved, informed consent must be received. An example of the difference between general consent and special consent appears on the Israeli informed consent form for amniocentesis.[[66]](#footnote-66) This is the case on other forms for different procedures. On the informed consent form for amniocentesis for example, there is an explanation about the nature of the test, and its attendant risks.

Printed on the form, is a declaration by the woman that she has received full explanatory details. The name of the person providing the explanation must be specified, together with the woman's signature on the declaration. These details express the requirement that every woman about to undergo amniocentesis must have been given a full explanation about the nature of the test and the risks involved.[[67]](#footnote-67) The Israeli Patients' Rights Law allows urgent medical treatment to be provided even in the absence of informed consent in emergency situations.[[68]](#footnote-68) The law additionally allows informed consent to be given verbally in any case of one of the special treatments enumerated in the addendum to this law. This verbal consent is given on condition that the fact of consent be recorded in writing afterwards.[[69]](#footnote-69)

This means that in the present legal situation, treatment may even be provided without the woman's informed consent if she is unable, be it physically or mentally, to provide such consent.[[70]](#footnote-70) If her life is in serious danger, yet she refuses treatment, the doctor, or person treating her is allowed to do so even against her will.[[71]](#footnote-71) The section does not actually deal with emergency situations, but it does allow the ethics committee to provide substitute consent instead of the patient. In light of the doctor's legal obligation to provide the woman with information concerning the fetus during the course of the pregnancy, this section could be in effect also when the fetus is exposed to mortal danger if it is not removed from the womb by C-section.

In the Israeli Kaira case it was determined that the doctor is allowed to assume from the conduct of the woman who came back to him for further follow-up treatment, that she has consented to treatment by implication.[[72]](#footnote-72) Can it be inferred from this that a woman in the advanced stages of labor consents to any treatment of the fetus in order to save its life? The opinion of the Israeli law is not to recognize consent by implication of a patient to be treated by a doctor while it is actually a deviation from the original treatment to which she gave her consent. This is the case, unless during the treatment to which she had consented, the need arises for additional treatment that could not have been reasonably expected.

This opinion that was accepted in Israel, influenced by American law, is founded on the assumption that the patient was unable, physical or mentally, to give de facto consent to the additional treatment.[[73]](#footnote-73) In general, the doctor's obligation to disclose is extensive. This is the case in situations where the operation, or treatment is not intended to prevent immediate danger, and if the treatment can be delayed without causing the situation to deteriorate. If the woman has consented to the anticipated medical treatment, but during the treatment it was clear that further, non-urgent treatment was necessary, yet delaying it would not put her life and health at risk; the additional treatment should not be administered in light of her autonomy, which grants her the right to make a decision.[[74]](#footnote-74)

Where implied consent is involved it is of great importance to check the means whereby consent is given in similar cases, in the same medical institution, and in other medical institutions. Usually no objections are raised regarding implied consent when complex, non-standard treatment is concerned, as opposed to conventional treatment. Informed consent is not required from a patient if, as mentioned above; during the course of the treatment to which consent has been given a need arises for further 48

treatment that was unlikely to have been foreseen.[[75]](#footnote-75) The Israeli Justice Shamgar made this clear in the *Noam Raibi v. Dr. Kurt Weige* case:[[76]](#footnote-76)

The argument [...] upon which the inferior court leans, is founded on the thesis according to which, if consent has been given to medical treatment intended for a specific purpose [...] enfolded within this consent is also consent to include in the scheduled treatment similar treatments , as far as their purpose and substance are concerned. Assuming that the patient's consent to the original treatment was based upon full details regarding the essential parameters involved in the treatment, such as the risks and chances involved therein, it may be assumed, according to this line of thought, that the patient would have consented to the additional treatment, which is not essentially different from the suggested treatment.

Meisel and Roth[[77]](#footnote-77) presented the results of a research carried out by Boreham and Gibson about providing explanatory details by doctors to their patients in private clinics.[[78]](#footnote-78) They concluded that doctors do not have the habit of explaining alternative methods of treatment and the risks and chances unless they are asked specifically, and even less so during the patient's next visit to their clinic. Doctors tend to relate to a second visit as implied consent to all future treatments, although a visit cannot be compared to an invasive procedure.

The same concept exists in the US. The Murray case examined a situation where a woman arrived at the hospital in order to give birth and the doctor had to perform a C- section. During the procedure the doctor discovered some tumors on the uterine walls. The doctor estimated that future pregnancies and births in such a situation might endanger the woman's life, so he decided to tie her fallopian tubes during the course of the C-section to prevent future pregnancies. The court decided that the doctor was not

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entitled to take a step such as this without the woman's consent.[[79]](#footnote-79)

Chapter Three - The Fetus

1. The Development of the Fetus

1. **Developmental Stages of the Fetus as Described in Ancient Times** A “fetus” is a living being that is created as a result of fertilization and it survives in the womb of mammals; a “neonate” is the description given to a fetus after birth. In ancient times, the stages of fetal development in the womb from the moment of fertilization until the moment of birth were described by scholars according to the data at their disposal at the time.[[80]](#footnote-80) Pythagoras was of the opinion that the sperm incubates in the heat of the womb, and the formation of a fetus results from this incubation, composed of three parts: a human part, an animal part and a vegetal part. The brain creates the human part of the fetus, the heart creates the animal part of the fetus and the umbilicus creates the vegetal part of the fetus. Contrary to others, Aristotle claimed that the development of the fetus is gradual and he wrote an essay describing fetal formation and development, including the umbilical cords, and noted that the development actually begins with the heart.

In his time it was believed that the fetus is a whole being, albeit miniature, from the moment of fertilization. Galinus maintained that fetal development actually begins in the liver, moves to the heart and only then is the brain created. He describes the blood-filled fetal organs (such as the liver**)** as organs that emanate from the woman and the sperm-filled fetal organs (such as the brain) as organs that emanate from the man.[[81]](#footnote-81) The researchers of ancient times also had differing opinions regarding exactly where the formation of the fetus begins: Pliny described fetal development as beginning in the heart whereas Alcmaeon claimed that it begins in the head. In fact, until the Middle Ages, no other description existed; Leonardo da Vinci was the first to use imagery to describe the offspring in its mother's womb in the way we know it today. It was only in the 17th century, with the invention of the microscope, that a significant development took place in understanding the stages of creation and development of the fetus: Graff discovered the follicles in the ovary that release the ova, and Leeuwenhoek discovered sperm cells.

1. **Developmental Stages of the Fetus as Recognized in Modern Times** In the 19th century the modern perception was already developing regarding the stages of pregnancy as a continuous process from the moment of fertilization until the moment of birth. Nowadays it is common to discern two main stages in fetal development: the first stage - the “embryo” - that begins at the moment of fertilization and ends at the completion of eight full weeks of pregnancy.[[82]](#footnote-82) At the end of this stage the skeleton starts to form and sex gland activity affects the specific development related to the sex of the fetus. At this stage the fetus weighs about one gram and is about 30 millimeters long. The second stage is the “fetus”,[[83]](#footnote-83) which lasts from the end of the eighth week until the

birth.[[84]](#footnote-84) It seems that from the 23rd week the fetus is able to hear the woman's voice and other external noises, and its lungs are almost completely formed. In the 32nd week the fetus is almost complete, with open eyes. During this week the fetus takes up most of the womb space and its movements are limited. At the end of the 35th week the average weight of a fetus is 2.5 kilo, and from the 36th week of pregnancy its head starts to move down into the birth canal.

This is a very general description and developmental changes can take place, but these are unusual. In this book, I differentiate between a fetus in the developmental stage until 24 weeks and I call the fetus in the viable stage - that begins in the 24th week of pregnancy - “a live fetus”. In the past[[85]](#footnote-85) a pregnancy could be discovered only when the woman missed a menstrual period, and later on, only when the fetus began to

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move.[[86]](#footnote-86) Nowadays a pregnancy can be discovered at a much earlier stage using advanced state-of-the-art technology such as ultrasound, etc.

The developmental stages of the fetus pose questions regarding how to relate to its existence in an ethical, moral, cultural and religious way. There is a pertinent question whether, owing to the information at our fingertips today about the fetus in the woman, can we establish that a live fetus is a person or almost a person? Nitzan Rimon- Zarfati asked Israeli students this question in her research.[[87]](#footnote-87) The results of the research revealed that the students made a distinction between the pre-fetal stage and the stage at which the fetus is a person. While the students did not define the term “person”, we can infer that on some level the live fetus has rights.

The knowledge we have today about fetal development makes it obligatory to utilize medical technology that enables the follow-up of the fetus inside the womb. To utilize this technology would allow us to track the fetus at almost all stages of development. If during the 1970s and 1980s, prenatal tests were aimed at diagnosing defects in the number of chromosomes in the fetus, such as Down syndrome, cleft palate or hydrocephalus and other serious genetic disorders. In the present era, prenatal tests are also aimed at diagnosing minor fetal defects, such as short stature, deafness, asymmetrical limbs and other findings enabled by new technology. All these findings are offered to the woman during the pregnancy and allow her to decide to terminate. Some do so because they are not prepared to give birth to a child with a serious defect. Others do so, however, even when the defect is minimal.[[88]](#footnote-88)

2. The Rights of the Fetus

1. Introduction

Maureen Ott, a mechanical engineer aged 39 from Pittsburgh, had tried to become pregnant over a period of seven years but with no success. In August 1996, at the St. Barnabas Medical Center in Livingstone New Jersey, Maureen Ott agreed to undergo an experiment that involved extracting her ova and injecting her husband's sperm into them together with a small amount of cytoplasm from the ovum of another woman. The ova were reinserted into her womb and a normal fetus started to grow with the genetic material of three people (Ott, her husband and the other woman.)10 The fetus developed, and a baby girl was born.11

Some might consider that this procedure is the beginning of the end of the human race; and that promoting it would be entering a new era of eugenics theory; that of creating a “perfect” fetus. Others, are convinced that this is an amazing medical procedure that will produce a tri-parental fetus. Opinions about the rights of the fetus and its status are different from one religion to another. These opinions varied widely from ancient times to modern times, and from one culture to another. When relating to fetal rights; scientific developments should be taken into consideration, and it should be expected that in the foreseeable future there will be not only tri-parental fetuses, but also fetuses that can live and develop outside the maternal womb in an artificial womb.12

1. On 3 Feb. 2014, it was announced in England that for medical purposes, it would be permitted to produce a child from three different genetic donors, se[e Ritesh R Jaiswal](http://thescience.co.in/author/thescience/)[, *Three Parent IVF / Three*](http://thescience.co.in/three-parent-babies-three-parent-in-vitro-fertilisation/)[*Parent Baby*,](http://thescience.co.in/three-parent-babies-three-parent-in-vitro-fertilisation/) THE SCIENCE, [19.02.15, h](file:///E%3A/19.02.15)[ttp://thescience.co.in/tag/three-parents-ivf](http://thescience.co.in/tag/three-parents-ivf/)/. For an academic discussion of this option, see Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J. L. FAM. STUD. 231 (2007); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. FAM. STUD. 309 (2007); [Jacques Cohen](http://www.sciencedirect.com/science/article/pii/S147264831300134X) & [Mina](http://www.sciencedirect.com/science/article/pii/S147264831300134X) [Alikani,](http://www.sciencedirect.com/science/article/pii/S147264831300134X) *The Biological Basis for Defining Bi-Parental or Tri-Parental Origin of Offspring From Cytoplasmic and Spindle Transfer*, 26(6[) REPRODUCTIVE BIOMEDICINE ONLINE](http://www.sciencedirect.com/science/journal/14726483) 535 (2013), <http://www.sciencedirect.com/science/article/pii/S147264831300134X>; June Carbone & Naomi Cahn, *Changing American State and Federal Childcare Laws: Parents, Babies, and More Parents*, 92 CHI.- KENT L. REV. 9 (2017). The option of designating more than two parents for a given child has been accepted in several leading rulings around the world. For cases of two legal fathers and one mother, see Smith v. Cole, 553 So.2d 847 (La.1989); State on behalf of J.R. v. Mendoza, 240 Neb. 149 (Neb 1992); T.D. v. M.M.M., 730 So.2d 873 (La.1999); In re Nicholas H., 28 Cal.4th 56 (Cal. 2002); In re Jesusa V., 32 Cal.4th 588 (Cal. 2004); J.R. v. L.R., 386 N.J. Super. 475, 902 A.2d 261 (N.J. 2006). For cases of two mothers and one father, se[e LaChappelle v. Mitten, 607 N.W.2d 151, 160 (Minn. Ct. App. 2000);](https://www.lexis.com/research/buttonTFLink?_m=9f43e97c9aadf5fada67f05ff03eb2de&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b9%20J.%20L.%20Fam.%20Stud.%20309%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=243&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b607%20N.W.2d%20151%2cat%20160%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzz-zSkAt&_md5=5e51472eeade9fe6a9f7314073643cab) A.A. v. B.B., [2007] 220 O.A.C. 115, P 14 (Can.); Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa.Super., 2007).
2. For a fuller description of this cutting edge medical treatment, see Kim Tingley, *The Brave New World of Three-Parent I.V.F.,* The New York Times Magazine June 27, 2014m, [https://www.biologylane.com/uploads/1/0/5/4/105462819/the\_brave\_new\_world\_of\_three -](https://www.biologylane.com/uploads/1/0/5/4/105462819/the_brave_new_world_of_three-parent_i.v.f.pdf) [parent\_i.v.f.pdf](https://www.biologylane.com/uploads/1/0/5/4/105462819/the_brave_new_world_of_three-parent_i.v.f.pdf).
3. This notion of artificial womb is known also as "ectogenesis". *See*, for e xample , Jessica H. Schultz, *Development ofEctogenesis: How Will Artificial Wombs Affect the Legal Status of a Fetus or Embryo?,* 84 CHi.-KENT L. REV. 877 (2010); ECTOGENESiS: ARTiFiCiAL WOMB TECHNOLOGY AND THE FUTURE OF HUMAN REPRODUCTiON (Scott Gelfand & John R. Shook eds., 2006); Hyun Jee Son, *Artificial Wombs, Frozen Embryos, andAbortion: Reconciling Viability's Doctrinal Ambiguity*, 14 UCLA Women's L.J.

213 (2005).

1. Historical Review: Religious Attitudes

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1. **The Jewish Approach**

Judaism relates to the life of a fetus as God's property and maintains that life is given to a person as a loan. During pregnancy the women is placed in charge of the fetus' life as a loan. Since God only has the right to harm the life of a person, the woman cannot terminate the pregnancy at will. Therefore Jewish law forbids the termination of a pregnancy at any stage, even without giving legal rights to the fetus. In general, Jewish law does not consider termination of a pregnancy to be murder,[[89]](#footnote-89) [[90]](#footnote-90) although it is forbidden to do so without serious justification because it implies harming something that Jewish law relates to as a live being. However, according to Jewish law, the fetus reserves the right not to be harmed during pregnancy, and whoever harms it while it is in the womb, must pay damages, either to the fetus itself or to the woman.[[91]](#footnote-91)

Despite the absolute prohibition to terminate a pregnancy, some approaches can be found in Judaism: in the book of Genesis[[92]](#footnote-92) it is written that according to the Noahide laws, aborting a helpless fetus is considered murder. The Torah makes a distinction between two cases. In one; when the injury causes the death of the woman, it is considered murder and the person doing the harm is prosecuted; in another case the fetus dies during a fight, and then the offender must pay damages only, and this is not considered manslaughter. The basis for this is to establish the punishment for the person who caused the fetus to abort during the fight**.** “If men struggle and hurt a woman with child, so that her fruit depart from her [.. ,]”,[[93]](#footnote-93)

From the moment of conception until the 40th day after conception Jewish law considers the fetus as “only water”, so terminating a pregnancy before the 41st day of fertilization is less problematic than doing so later on; indeed, in multi fetal pregnancies it is permissible to dilute the number of fetuses to ensure the survival of the remaining fetuses. The status of the fetus increases and becomes more viable in the second and third trimesters of the pregnancy.

The fetus is not considered a “soul” before its head emerges, and because only a

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“soul” has rights, the fetus is denied legal status.[[94]](#footnote-94) If the fetus is endangering the woman's life, she can be saved even at the expense of its own life. [[95]](#footnote-95) Maimonides established the point of balance between saving the woman's life and saving that of the fetus. Therefore, rabbinical scholars taught that when the woman is having difficulty giving birth, the fetus may be cut but if its head has already appeared, it cannot be touched, because one soul cannot be saved at the expense of another and that is the nature of the world.[[96]](#footnote-96)

In our generation some rabbinical authorities allow termination of a pregnancy with the proviso that there is the likelihood that continuing the pregnancy will endanger the woman's life. Other authorities are prepared to enable termination of a pregnancy even though continuing the pregnancy might possibly cause severe physical or psychological harm to the fetus. Yeshayahu Leibowitz[[97]](#footnote-97) noted that there is no difference, scientifically and philosophically, between a fetus and a baby that has been born. He maintains that the development of human life progresses on a continuum starting with fertilization, and continuing with pregnancy and after the birth as well, at least until adolescence.

There is no definitive borderline of life apart from the moment of fertilization and the day of death. Therefore, in his opinion, shame on a society that offers the option to deviate from the norm of not harming a living being. As we shall see, Leibowitz's philosophical approach on this matter is very similar to that of Catholicism, and in my opinion this can also be confirmed by the research carried out by Alessandra Piontelli. Piontelli observed fetuses in the wombs of their mothers using 3-dimensional ultrasound scans, and followed up their development at home from birth up to the age of four

22 years.[[98]](#footnote-98) Her central finding is that there is a remarkable continuity of behavior before and after birth and that many small children show signs after birth of being affected by prenatal experiences [...].[[99]](#footnote-99)

If so, Jewish law does not consider terminating a pregnancy as the murder of a

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person, but does prohibit carrying it out without proper justification [[100]](#footnote-100) and makes a

25 distinction between doing so during the first trimester and the other two trimesters.[[101]](#footnote-101) Different theoretical opinions exist regarding the fetal status in the different stages of the pregnancy, but in general the Jewish approach is less rigid than that of Catholicism, as we shall see in the following sections. Until the middle of the nineteenth century, both the Jewish and Christian religions offered no defense to the fetus from the moment of fertilization to the 40th day, when, as noted above, the “soul” comes into being; also known as ensoulment. At about this time Christianity changed its approach and began to relate to the beginnings of fetal life already at the moment of fertilization.[[102]](#footnote-102) The fact that Judaism makes a distinction regarding the rights of a fetus, between life inside the womb (when the fetus is part of its mother) and life outside the womb, dictates the position held by Israeli law today. In Israeli law the fetus lacks legal defense rights until it is born, which is different from the state of the fetus in other western societies, and is similar to that of Christianity and Islam.

1. **T****he Catholic Approach**

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Christian literature dealt extensively with termination of pregnancy.[[103]](#footnote-103) Already in the year 305 AD authorities administered cruel punishments to people who underwent a termination of a pregnancy, and it was only nine years later that restrictions became less severe.[[104]](#footnote-104) As far as when life actually begins, in Thomas Aquinas'[[105]](#footnote-105) opinion, the consciousness and movement of the fetus show evidence that life exists**,** and therefore, like Aristotle, he was in favor of the approach that considers that life begins when the woman feels “the first kick”. Other theologians absolutely accepted Aristotle's view, according to which the soul develops in three stages: a soul of “developing energies” during fertilization, a soul of a minimal life system at a later stage, and finally a complete human soul.[[106]](#footnote-106) The Pope John Paul II's wrote in an Apostolic Letter: “Human lives are holy because they reflect God's work, and His creation, they are fixed in their connection to Him and it is for this purpose that Man was created. God is the Master of life from beginning to end.”[[107]](#footnote-107) In other documents written by Pope John Paul II it was determined that an ultrasound test during pregnancy is legitimate because the intention is to prevent harm to the lives of both the fetus and the woman.

Catholicism was bitterly opposed to termination of pregnancies at any stage of the pregnancy, because adherents of the religion considered the fetus a living being with full human rights from the very moment of fertilization. Even in the 20th century Catholic doctors were adamant that termination of pregnancy should be avoided even if the life of the woman was at stake, because according to them two deaths are preferable 32

to one murder.[[108]](#footnote-108) Another consideration could prohibit dilution of fetuses even nowadays even if the chances of a multiple pregnancy are very low. According to Christianity fetal dilution is the same as throwing a few people off a sinking ship in order to save the others. This attitude was very influential on law-making in western countries, especially when it concerned terminating a pregnancy at the viable stage, when the process is really giving birth to a fetus that was put to death in the womb.

Over the years significant changes took place in the Christian approach following Samaritan law, the Septuagint and the interpretation of [Philo of Alexandria.](https://www.taylorfrancis.com/books/e/9781317245889/chapters/10.4324/9781315630052-16) Christianity had now reached a compromise that distinguished between the stages of fetal development regarding termination of pregnancy. This approach came about from the belief that in male fetuses the creation of the soul ends at the 40th day after fertilization, when the external human form of the fetus is complete, and in female fetuses the process ends later, on the 80th day after fertilization. Establishing the time when the “soul” is created led to relating in a different way to terminating a pregnancy at the beginning of the pregnancy and terminating a pregnancy at later stages, and at the viable stage. These significant changes were rescinded in 1588 when Sixtus V reinstated all the previous punishments regarding termination of pregnancy at any stage of fetal development, regardless of the length of pregnancy. Since then each termination of pregnancy is considered a murder. This principle was also ratified in the punitive laws published by Pius V in 1862 as well as in the last Canonic law that was adopted in 1918.

The Catholic church[[109]](#footnote-109) can be said to maintain that the fetus has its own rights; that the interests of the woman are irrelevant to the decisions concerning the future of the fetus; that there is no justification in initiating an abortion for maternal reasons even if the mother's life is endangered; and that the maternal decision has a legal significance regarding the fetus only because she is the natural guardian of the fetus. The mothers role as guardian is limited as the considerations guiding her are purely the interests of the fetus.

If this is the case, the general trend in the Catholic religion is to oppose termination of pregnancy, even if occasionally it does distinguish between the initial stages of the pregnancy and its later stages.[[110]](#footnote-110) The Catholic Church maintains that the fetus has rights from the moment of fertilization. Nowadays most modern legal systems determine that the right to life begins manifests itself from the moment the fetus is capable of existing independently from the womb. This capability is mostly thought to be from the 24th week of pregnancy. In recent years, however, social processes are tending to revert to the Catholic approach.[[111]](#footnote-111) The struggle in the U.S against termination of pregnancy is becoming more widespread, and those in favor of abortion fight against different “Pro-Life” organizations that oppose termination of pregnancy.

1. **The Islamic Approach**

So far we have established that Catholicism is adamantly opposed to terminating a pregnancy at any stage because it considers the fetus is a living being with human rights. We have also established that Judaism does not consider the fetus a living being until it is born in spite of the protection provided for it in the womb. In Islam the issue of terminating pregnancy is controversial among the scholars. The scholars of the Malaki sect, the Shi'ite, the Abachi and the Thahari, like the Catholics, posit that the fetus already has a soul at the moment of fertilization. Therefore, terminating a pregnancy at any stage is tantamount to murder. Scholars of the Hanbal sect permit the termination of a pregnancy during the first 40 days. Scholars of the Hanafi and Zaidi sects permit terminating a pregnancy during the first 120 days of the pregnancy. As far as the Sha'afi sect is concerned, some scholars permit terminating a pregnancy during the first 80 days, others allow it to be performed until the 120th day and others forbid it outright. Most adjudicators on this issue consistently repeat the motive of endangering the life of the woman: if continuing the pregnancy endangers the woman, saving her life is preferable to the life of the potential fetus.[[112]](#footnote-112)

The human rights discourse was not ignored by Islamic law. The Koran does not adamantly oppose termination of pregnancy, and in a number of Muslim countries differing attitudes and declarations have been accepted by the Organization of Muslim Countries[[113]](#footnote-113) that promote this discourse.[[114]](#footnote-114)

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According to Egyptian law[[115]](#footnote-115) before deciding on an agreement to terminate a pregnancy, it should first be established whether or not the fetus is a human being. Egyptian law[[116]](#footnote-116) forbids terminating a pregnancy unless doing so would save the woman's life,[[117]](#footnote-117) although similar to the Jewish approach, every newborn has rights only at the time of birth. According to Tunisian law, as of 1973, termination of pregnancy is permitted only in the first trimester if the woman requests it, but in the following months it is permitted only if the fetus' life is at stake or if the woman's mental health is in danger. The law in Kuwait from 1960 was amended in 1981 to enable severe punitive measures for carrying out a termination of pregnancy in the first trimester until four months, unless the procedure was intended to save the woman, or the fetus was likely to

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be born with a defect, and with the consent of both parents.[[118]](#footnote-118)

1. The Status of the Fetus in Ancient Times

This chapter will examine how different ancient cultures related to termination of pregnancy and whether this had an influence on legislation in modern times. There was already a tendency in ancient times to separate fetal development into stages[[119]](#footnote-119) in order to decide upon a termination of pregnancy, but stages of development were also established according to the knowledge and technology [[120]](#footnote-120)available at the time. During that era there was an extremely strict approach towards terminating a pregnancy as a forbidden act, hence this held true to carrying it out too. The origin of this is not clear enough: did the prohibition emanate from the fear of interfering with the natural process of the pregnancy45 or from a desire to preserve the future life of the fetus?46 Whatever

47 the reason, there was a great lack of certainty regarding termination of pregnancy47 and each culture had its own reasons for its indecision.

In India the Buddhists forbade termination of pregnancy for religious reasons.48 The ancient Indian law books49 considered termination of pregnancy as murder and thus they forbade the Hindu sect and the Brahmin to carry it out, and anyone who disobeyed was severely punished. The ancient Persians prohibited termination of pregnancy on religious grounds. In ancient Assyria the Code of the Assura50 gave the death sentence to a woman who killed her fetus and after the sentence had been carried out her body was not permitted to be buried. In ancient Greece termination of pregnancy was considered a crime and any woman carrying it out was sentenced to death.51

1. The techniques used in the past to terminate pregnancies were primitive and very dangerous.
2. It should be noted regarding this matter that legislation at the time demonstrated a two-valued approach to the status of the fetus. Until the second half of the 20th century hardly any examples could be found for a lack of conscientious objection to killing the fetus.
3. Halperin, *supra* not[e 14](#bookmark22).
4. According to the perception that the souls of extinct fetuses are considered bad and dangerous.
5. The Aryas and the “Manava Dharma-Shastra”. *See, e.g.*, Ms. Shiney Vashisht, *Manusmriti: Exploring Gender Justice in Ancient Hindu Legal Framework*, in FEMINISM AND LITERATURE TEXT AND CONTEXT 150 (2015), <https://s3.amazonaws.com/academia.edu.documents/52007433/pdf.pdf?AWSAccessKeyId=AKIAIWOW> YYGZ2Y53UL3A&Expires=1543157671&Signature=W8HhlEoMcWABeRW4QLybwd8U93c%3D&re sponse-content- disposition=inline%3B%20filename%3DFeminism\_and\_Literature\_Text\_and\_Context.pdf#page=150.
6. The Code of the Assura, c. 1975 BCE. *See* Ancient History Sourcebook, <https://sourcebooks.fordham.edu/ancient/1075assyriancode.asp>. For a discussion of the Assyrian law's perspective towards the d ile mma of the abortion, see Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. U. L. A. L. REV. 1, 4 (1969); H. Wayne House, *Miscarriage or Premature Birth: Additional Thoughts on Exodus 21:22-25*, 41(1) WESTMINSTER THEOLOGICAL JOURNAL 108, 115-7 (1978), [http://faculty.gordon.edu/hu/bi/ted hildebrandt/otesources/02-](http://faculty.gordon.edu/hu/bi/ted_hildebrandt/otesources/02-)

[exodus/Text/Articles/House-Exod21-WTJ.pdf](http://faculty.gordon.edu/hu/bi/ted_hildebrandt/otesources/02-exodus/Text/Articles/House-Exod21-WTJ.pdf); Daniel B. Sinclair, *The Legal Basisfor the Prohibition on Abortion in Jewish Law*, 15 ISR. L. REV. 109, 111 (1980).

1. In ancient Greece, termination of pregnancy was described by Ovid, Seneca and Juvilenis , as well as other prominent philo sophers, as a crime on the one hand, and as an accepted phenomenon on the other. Pregnancies were terminated on a vast scale there not only because of social constraints but also because of the woman's desire to preserve her figure from the changes that take place from pregnancy and birth. Plato claimed that the fetus is a living being because it moves and is nourished in its mother's womb. On the other hand, the Satua claimed that it is not a living being but rather inside of the mother's organs: since it does not breathe until after it is born, the fact that it lives inside the mother does not give it independent status and it is actually an organ in her body.

Even in ancient Egypt termination of pregnancy was considered a serious crime, but the severity of the punishment is unclear. Infanticide was openly tolerated in ancient Egypt and the Pharoah's royal command “Every newborn male child should be thrown in the river”[[121]](#footnote-121) was neither out of the ordinary nor extreme. Ancient Roman law was in favor of the absolute right of the father regarding family members, including complete ownership and property of his children after their birth, and the fetus was considered a part of the woman's body.[[122]](#footnote-122) The accepted perception up to the second century AD was that killing a fetus is a legal act, and termination of pregnancy was not forbidden by the Roman Caesars.[[123]](#footnote-123)

Ovid[[124]](#footnote-124) was critical of “women who puncture and prick themselves with an instrument or who give a deadly drug to their children before they are born” and he condemned women who terminated their pregnancy themselves, something even wild animals don't do. He was of the opinion that nature punishes these women when the woman herself dies and her body is dragged to the funeral pyre by her uncovered hair, when every spectator declares that this is her punishment.

Some philosophers[[125]](#footnote-125) from the fourth century BC claimed that the fetus is considered a living being from the moment of fertilization and therefore it is forbidden to harm it. Some see this claim as the basis of a famous ruling known as the Hippocratic Oath, which absolutely forbids any assistance to be provided in terminating a pregnancy.[[126]](#footnote-126) Other philosophers differed regarding this perception[[127]](#footnote-127) and claimed that the fetus is a human being only from the moment of birth, and therefore they did not oppose termination of pregnancy at any stage. Plato claimed that every woman over the age of forty should be forced to terminate her pregnancy, but Aristotle - who claimed, as mentioned above, that life begins from the moment the woman feels the fetal movements in her womb - was prepared to accept termination of pregnancy for social reasons,58 [[128]](#footnote-128) on condition that the procedure be carried out before the baby's first kick.

So it appears that the fetus had no rights even in ancient times, and destroying it was forbidden not necessarily for reasons to do with it but rather out of fear of its spirit. Gradual changes regarding the rights of the fetus began to a great extent in the wake of the French revolution, influenced by the legal and medical community that opposed granting full human rights to fetuses that had not yet been born. In the majority of western countries, most of the sections regarding severe punitive measures for those involved in terminating pregnancies were omitted from legislation,[[129]](#footnote-129) although the prohibition itself remained in place for many years almost everywhere in the world. In spite of the objection on the part of the religious institution, and the fact that this right remains in public dispute, the feminist movement has become more influential the world over and as a result the law has been changed in many countries and some criminal prohibitions against terminating pregnancies have been repealed. The law has been changed over the past generation in countries such as the USA, the Netherlands and Israel. Indeed, since the 1970s, the woman's right to be in control of her fertility, whether preventing pregnancy or terminating it, has become the focal point of a crucial and important feminist struggle in most countries in the world.

**D. The Right to Life**

1. **The Right to Life and its Definitions**

In order to discuss the rights of the fetus and its status, we must first discuss whether the right to life is worth protecting. We must remember that this book deals with termination of pregnancy at the viability stage, a stage during which the fetus is capable of surviving outside the womb even if it requires artificial means to do so. At this stage, a great similarity can be seen between a live fetus and a live baby and this similarity leads me to the conclusion that weaves its way like a thread through the book - that a comparison should be made between the ethical status of both. If the ethical status of the fetus is established from the stage of birth it would be difficult, though not impossible, to endorse a thesis that claims that killing a fetus at the viable stage is tantamount to murder.

But if the ethical status of the fetus is not established from the stage of birth but from its ability to live independently outside the womb at the viability stage, I would find it easier to endorse its ethical status and its right to life. There are those who differentiate between the biological development of a person, the human being and his ethical development, as a person, and it would be hard to convince them that there should be a match between biological development and ethical development when it comes to the status of a live fetus. They would probably claim that not every biological creature is entitled to human rights even though it has the ability to live outside the womb. In this chapter I will examine when the biological “creature” can be considered as having a right to life and in any case, as one with ethical rights that should not be exterminated. There is no doubt that this is a person's most basic right, and it is worthy of protection in legal systems the world.

John Locke[[130]](#footnote-130) included the right to life among the “natural” rights of every person as a person per se, purely because of his nature and human dignity. Therefore Locke claimed that this right cannot be restricted by state control. He assumed there exists a sort of social covenant according to which the state of a society of people organised itself purely to achieve, secure and promote the interests of everyone, including the life and integrity of the body. Locke's treatise formed part of the basis of the American declaration of independence from 1778 as well the basis of the human rights declaration in France in 1789. However, the positivist school of thought did not see this in the same light in the nineteenth century: it excluded natural law. Rene Cassin[[131]](#footnote-131) maintained that the source for human rights is religion, in fact, and that a declaration of human rights is merely a rewrite of the Ten Commandments. In spite of the disagreements between the positivists and those in favor of natural law, all member states of the United Nations in 1948 accepted the universal human rights declaration, the main one being, in my opinion, the right to life.

Some noted that the theoretical and practical importance of human rights from a historical perspective is that they are the vital foundation for a life of justice in society.[[132]](#footnote-132) Since the end of World War II there has been a rise in the status of human rights on an international level above and beyond legislation in every country separately. There are international treaties nowadays that deal with the defense of human rights such as convention for the prevention and punishment for the crime of genocide (1948);[[133]](#footnote-133) the convention regarding the women's rights' policy (1953); [the international convention](https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/international-convention-on-the-elimination-of-all-forms-of-racial-discrimination/98B07BE3E5CC97616CA995B4CAF2F136) [on the elimination of all forms of racial discrimination](https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/international-convention-on-the-elimination-of-all-forms-of-racial-discrimination/98B07BE3E5CC97616CA995B4CAF2F136) (1966); [the international](https://eprints.soas.ac.uk/id/eprint/5323) [covenant on economic, social and cultural rights](https://eprints.soas.ac.uk/id/eprint/5323) (1966) the UN declaration against intolerance and discrimination based on religion or belief (1981).[[134]](#footnote-134) Developing socialist countries caring for weaker communities - those suffering from hunger, poverty, sickness, the unemployment and lack of education - exerted pressure on an international level and brought about a sea change in economic, social and cultural rights. Wieacker compiled a list of personal rights, that he considers as those rights accepted nowadays in most western countries.[[135]](#footnote-135) These rights were conveyed in European accords, and in the majority of non-European countries, by adopting international treaties.[[136]](#footnote-136)

Included in this list of rights, amongst others, are human dignity, fair procedures for protection against arbitrary government actions, equality before the law[[137]](#footnote-137) and society's responsibility for the social and economic conditions of its members. In most modern constitutions there is a special section that enumerates the protected individual rights. Until World War I, most of the laws included special sections to protect the “classic” individual liberties, and later basic social rights were added. As we shall see below, the right to life is guaranteed today both in state legislation and in international treaties. Some countries have yet to include in their legislation a section on human rights, but these are in the minority, and over the past few years even they have begun to protect these rights. Different countries have different models regarding social rights that receive constitutional protection. For example, in the USA there exists an effective system of judicial constitutional scrutiny the protection of rights.[[138]](#footnote-138)

The right to life is not mentioned specifically In the American constitution, but the fifth amendment determines that denial of life is subject to due process of law, and the fourteenth amendment places this obligation on the states too. However, the US federal high court held that the term “human” that appears in the fourteenth amendment above, does not include “fetus”, so where it - the fetus - is concerned the obligation to observe “due process” before termination of pregnancy (“taking its life”) does not exist.

Justice Blackmun even ruled specifically: “[...] in short, the unborn have never been 70

recognized in the law as persons in the whole sense[.]”.[[139]](#footnote-139) Many of the questions raised regarding the American constitution arise largely from the fact that when the constitution and the American Bill of Rights were adopted, the idea of a social state was

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not yet conceptualized.[[140]](#footnote-140) In 1973 in most of the United States, there were still strict laws regarding anything connected to termination of pregnancy.

In the *Roe v. Wade* case, the court ruled on a minimum test for constitutionalizing laws regarding termination of pregnancy: it ruled that the legislator cannot intervene in the woman's desire to terminate her pregnancy in the third trimester; although in the second trimester, the state - with the mediation of the legislator - can restrict the right of the woman and prevent termination of pregnancy for health reasons; thus it was ruled that in the third trimester the fetus is already at the viability state and can survive outside the womb, and thus the state may prohibit terminations of pregnancy under certain circumstances. In the U.S. protected rights in society were granted before social rights, but in Europe, in most of the other liberal-democratic countries, the opposite was true. In Germany and France, for instance, the foundations of a welfare state were laid before regimes based on constitutional rights came into being. Thus, for example, the right to life was recognized in the English legal system, although not constitutionally, and only in 1998 did England ratify the European convention for human rights. Thus the protection of human rights was accepted in England.[[141]](#footnote-141)

In comparison to the U.S., in the British model of a welfare state, there is no 73

constitutional judicial review, but legally[[142]](#footnote-142) it is forbidden to cause the death of a viable fetus, subject to the specified restrictions.[[143]](#footnote-143) The law in Britain rules a presumption according to which a fetus is considered viable from 28 weeks, although it can be viable from 24 weeks. Nowadays it is assumed that a fetus is likely to live with a reasonable quality of life from 25 weeks, so in 1990 a change was made to British law and it was ruled that in order to perform a termination of pregnancy there is a presumption that the fetus is viable from the 24th week onwards.[[144]](#footnote-144) In Canada there was a basis for a welfare state even before regimes based on constitutional rights came into being. The term “human” in section 7 of the Canadian Charter protects the right to life and rules, among others, that this right can be denied only according to the basic principles of justice:[[145]](#footnote-145) “Everyone has the right to life, liberty and protection of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.

The right to life is noted in section 1 of the Canadian Charter of Rights,[[146]](#footnote-146) which rules that the right to life can be denied only by due process: “, and the right not to be deprived thereof by due process of law In New Zealand, similar to the Canadian

Charter, the first section of the human rights' law is devoted to the right to life. The law forbids denying life unless it is in accordance with law and the principles of basic justice.[[147]](#footnote-147) The Australian Constitution from 2001 rules that everyone has the right to life.[[148]](#footnote-148) The Irish Constitution[[149]](#footnote-149) rules that the state will respect the right to life and protect it from unjust attacks. The right to life was the focus of a lengthy discussion on the subject of the legal nature of termination of pregnancy, which led to an amendment in the Irish Constitution;80 [[150]](#footnote-150) a referendum in 1983 brought about an addendum ruling that the right of a fetus exists while taking into consideration the woman's right to life.

In Germany, section 2 of the Basic Law rules that every human being has the right to life.[[151]](#footnote-151) The *G. v. Board Uchta'la* case[[152]](#footnote-152) ruled in no uncertain terms that the right to life definitely indicates the right to be born and the right to live. After World War II the constitutional court of Germany ruled that the life of a human being begins from the 14th day after implantation. Until legislation of the Abortion Law in 1974, termination of pregnancy was considered a criminal offense unless it had been given legal ratification. The 1974 law ruled that termination of pregnancy after the 13th week was a criminal offense, and that before this week a termination of pregnancy could be legal if carried out by a doctor with the woman's consent, and if it was justified to prevent endangering the life or health of the woman, or if the fetus had a serious genetic defect.

Pressure from the Catholic church and different organizations for the handicapped led to an amendment to German law in 1995: cancellation of the section that permitted terminating a pregnancy for a medical reason that related to the fetus until the 22nd week and termination of pregnancy was outlawed.[[153]](#footnote-153) As far as terminating pregnancy in the viable stage is concerned, the restriction on terminating a pregnancy for reasons of the woman's physical or mental health was removed, so in practice a pregnancy can be terminated at the viable state for these reasons.85 Sections 38-40 of the Polish Constitution86 rule that the Republic of Poland has an obligation to legally protect the life of every person. The Russian Constitution87 rules that the right to life is given to everyone. The Latvian Constitution88 rules that every person's right to life is protected by law. Similarly, the Constitutions of Romania,89 Croatia,90 the Czech Republic,91 Slovenia,92 Tanzania,93 South Africa94 and even Pakistan,95 India96 and Japan97 protect the right to life.

So it is clear that some of the constitutions, such as those of the Czech Republic and Ireland, rule that the fetus has a right to be protected, and other constitutions rule that only the born child is entitled to protection of its life. In addition, most countries protect the right to life, but when it comes to termination of pregnancy, there are

85 GERMAN NATIONAL ETHICS COUNCIL, GENETIC DIAGNOSIS BEFORE AND DURING PREGNANCY: Opinion, Nationaler Ethikrat (2003) available at [http://www.ethikrat.Org/files/.Opinion genetic- diagnosis-before-and-during-pregnancy.pdf](http://www.ethikrat.Org/files/.Opinion_genetic-diagnosis-before-and-during-pregnancy.pdf). For a discussion ofthe conclusion of this Council, see e.g., THE JANUS FACE OF PRENATAL DiAGNOSTiCS A EUROPEAN STUDY BRiDGiNG ETHiCS, PSYCHOANALYSiS, AND MEDiCiNE 41, 271 ([Eve-Marie Engels](https://www.routledge.com/products/search?author=Eve-Marie%20Engels) et al. eds., 2008); Marianne Leuzinger-Bohleber, *Ethical Dilemmas Due to Prenatal and Genetic Diagnostics. An Interdisciplinary, European Study (EDIG, 2005­2008)*, in ETHiCAL DiLEMMAS iN PRENATAL DiAGNOSiS (Tamara Fischmann & Elisabeth Hildt eds., (2011); [Kathrin Braun, *F*](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Braun%2C+Kathrin)*rom Ethical Exceptionalism to Ethical Exceptions: The Rule and exception Model and the Changing Meaning of Ethics in German Bioregulation*, 17(3) DEVELOPiNG WORLD BiOETHiCS 146 (2017).

1. Republic of Poland Const. articles 38-40.
2. Federation of Russia Const. article 20.
3. Republic of Latvia Const. Chapter Vii, article 93.
4. Romania Const. Chapter ii, article 22.
5. Republic of Croatia Const. article 21.
6. Czech Republic Const.
7. Republic of Slovenia Const. article 18.
8. United Republic of Tanzania Const. article 14.
9. Republic of South Africa Const. article 11. *See also* Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 183-8 (1998); ibid, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47(1) THE AMERiCAN JOURNAL OF COMPARATiVE LAW 67 (1999); Karen A. Trueman & [Makgoale Magwentshu, *A*](https://ajph.aphapublications.org/author/Magwentshu%2C%2BMakgoale)*bortion in a Progressive Legal Environment: The Need for Vigilance in Protecting and Promoting Access to Safe Abortion Services in South Africa*, 103(3) AMERiCAN JOURNAL OF PUBLiC HEALTH 397 (2013).
10. islamic Republic of Pakistan Const. article 9.
11. india Const.
12. Japan Const. article 13.

differing opinions, and some maintain that termination of pregnancy should not be 98

prohibited just because the fetus lacks rights.[[154]](#footnote-154) [[155]](#footnote-155) The right of the fetus to life is not protected in these countries, which even protects animals'right to live.

1. **Definition of “Person"or "Human Being"**

The importance of the discussion in this chapter is to understand the term “person” and examine exactly when life begins in respect of protecting the “life” of the fetus. Does life begin at the moment of fertilization or only after birth? Does life begin in the third trimester of the pregnancy or only when the fetus is viable? Does the term “life” describe life vis-a-vis death or a life with significance? Does the term “person” mean a live fetus, or a fetus at every developmental stage? Is a fetus a living creature and therefore a person? Many legislators did not define the term “person” from the time when life begins, but established the time from when obligations can be handled and rights can be granted. The discussion regarding the meaning of life, its beginnings and its importance is one that is ethical, religious, moral, judicial and social, and the answer to these questions can be found in the actual time at which the live fetus can be considered to have rights.

There are a number of approaches whereby the term “person” can be analyzed: some are physical-biological, some sociological, some psychological. These approaches will be examined with reference to the live fetus, a potential person whose personal identity has yet to be formed (in spite of its genetic makeup), whose moral status is unclear and whose status as a human is in doubt according to society, because it is on the margins of society. According to the biological approach a person should be defined according to his external form. The opposite argument is that having an external form is not enough: the form of a person can be made from different materials and it is still not impossible to see it as a human creature; and what about a person whose human form has been destroyed?! Is he not worthy of protection as a person in and of himself?! If an intelligent creature suddenly appears from another planet, with a different external form from the human shape we are familiar with - will it not have the right to protection of life?! Would killing it not be considered murder!?99

The “genetic” approach maintains that a person is defined according to his genetic characteristics.[[156]](#footnote-156) But this definition is faulty. Should the right to life of every single human cell be protected, thus reaching an absurd point where peeling off some skin from a body is considered murder? The sociological approach claims that a person is every “social animal”, because man reaches perfection only when living in a social environment. However, other populations can be found to exist and function in a social community, such as ants and bees. Perhaps we should define a person according to his intellectual capacity, in his ability to think and express his thoughts?[[157]](#footnote-157) If we define the person, how will we relate to any unfortunate being[[158]](#footnote-158) who has suffered brain damage as a result of a serious disease? And what about people suffering from Alzheimer's and similar maladies? Are they not people? Even Leibniz[[159]](#footnote-159) (who talks about man as an

99 CARL SAGAN, [DRAGONS OF EDEN: SPECULATIONS ON THE EVOLUTION OF HUMAN INTELLIGENCE](https://www.google.com/books?hl=iw&lr=&id=BQxZsou-RdwC&oi=fnd&pg=PA249&dq=%22Carl+Sagan+%22&ots=xuNY17eHeO&sig=66L6pufoQZNbYl2Nt4OFI_dqHwo) (2012).

intelligent creature with self-awareness) and Kant (who maintains that man's unique nature is a result of his intelligence)[[160]](#footnote-160) are unhelpful to us in defining the term.

Therefore the conclusion must be that a person is not composed merely of an external form familiar to us, capable of intelligence, of a spirit or social ability, and he cannot be defined in any of these ways. The conclusion must be that a person is a human creature that we can visualize as a person. This definition can include every person with a defect or a disability, whether physical or mental, a person with limited mental capacity (such as retardation), a deformed person, and, in my opinion - even a live fetus, who is able to live outside the womb.

The scholar Carl Sagan, in his book “The Dragons of Eden”[[161]](#footnote-161) deals with the question of the human brain's comprehension and human intelligence, and amongst others, raised the question asked previously: what is “life”? According to him, the better we understand the human brain, the more this will eventually affect social issues such as the definition of death and termination of pregnancy. He writes that according to the accepted ethic today in western countries, if there is a good reason, non-human mammals may be killed, as well as other mammals, but human beings may not be killed under similar circumstances. He maintains that according to these perceptions the difference arises from the typical human characteristics of the human brain, which are different from other mammals. Sagan found the claim of potential life very weak, because in effect, every human ovum or sperm can become a person under the right circumstances, but according to him, masturbation or involuntary ejaculation are considered normal human behavior and not a reason to be accused of murder.

He claims that the essential human characteristic can only be our intelligence, therefore he ties the sanctity of human life to the functional development of the cerebral cortex. He maintains that complete development of the brain is not necessary to establish that a person is a person, because this takes place many years after birth; but it can be established that the transition to “humanity” takes place when the fetal cerebral cortex activity begins, as revealed by medical technology. If this is the case, according to him a person is eligible for protection when cerebral cortex activity begins. Does this viewpoint help confirm a thesis supporting the right of the fetus to live based on the development of its cerebral cortex? Whoever defines a fetus as a creature developing in the woman's womb and as a conglomeration of cells and tissue, also at the viable stage - would disapprove of this rationale. Embryologists who deal with the scientific aspects of fetuses, and perinatologists who deal with the clinical aspects of fetuses, will certainly find reasons why this developmental definition is not enough to establish that life begins in the womb.

Various scholars describe the approaches to the different phases when it is possible to see the fetus as the beginning of life, as the beginning of a person. According to them, the first moment of the beginning of a person could be the moment of fertilization when the sperm and the ovum meet, when the unique genetic code is created, and so some consider the fetus as a living creature enjoying full human rights from the moment of fertilization.[[162]](#footnote-162) It could also be that the transition to life actually takes place at the end of the first trimester or the beginning of the second trimester of the pregnancy.

Sagan claims that during the course of putting the above ideas into practice, human chauvinism should be avoided, because if intelligent organisms do exist similar to developed human beings, they should be offered the same protection of life that we offer to the fetus at the viable stage. Because there is quite convincing evidence of intelligence in dolphins, whales and monkeys, any ethical approach regarding termination of pregnancy must also include specific injunctions against killing these animals.

The countries in the world have yet to establish if the right to life means protection of life in general or a significant life of quality. An examination of international conventions and legislation in different countries reveals that most of them do protect the right to life but do not define the term “life” and maintain different perceptions regarding when it actually begins. Is it possible to establish when life actually begins?[[163]](#footnote-163) What is the value protected by society and legislation - it this life in and of itself? A meaningful life? A life free of physical or mental defects? Does the legislator only protect a life that is not dependent on anyone or anything?

The answers to these questions are critical as a platform for a discussion on the right to life of a fetus with a defect. If we come to the conclusion that a live fetus

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answers to these definitions of a person,[[164]](#footnote-164) it does indeed have the right to life protected by law even if it has a defect that does not detrimentally affect its life or the length thereof. Socrates declared that life itself is not the main thing, rather it is the good life that counts,[[165]](#footnote-165) and the assumption is that a good life is one that is meaningful. As opposed to this, in the modern era the right to life is protected as a right unto itself, and the philosophical justification to life goes unchallenged.[[166]](#footnote-166)

In Israel[[167]](#footnote-167) there is a similar attitude regarding the right to life, because protection of the right to life is included in protection of human rights.[[168]](#footnote-168) The Israeli legal system considers the recognition of the value, dignity and sanctity of a person's life as a core democratic value that includes the values of universal ethics which recognize the value of life. Basic law: human dignity is very influential in all legal fields in the State of Israel. The courts use the valve terminology in this law to form the correct legal policy, and the legal system provides them with content. Therefore, the dignity of a viable fetus may also be said to have a protected value, even if it has disablities.112 [[169]](#footnote-169)

1. **A Live Fetus (Viable Fetus): Who or What is it?**

A fetus is a living creature that develops in the woman's womb from the beginning of its formation until birth. However, nowadays fetuses can be created using various techniques by means of fertility treatments,[[170]](#footnote-170) as well as IVF,[[171]](#footnote-171) and cryopreservation.[[172]](#footnote-172) I do not intend to discuss the dilemmas faced by researchers of fetal status when dealing with the new presence created outside of the womb. The questions whether a status should be applied to a fertilized ovum, and if so, which it should be; whether it should be called “fetus” or “pre-fetus”; whether destroying fertilized eggs is the same as killing a fetus - these are all dilemmas that are beyond the limits of this book. However, I cannot discuss the status of a viable fetus without saying a few words about a “young” fetus, until the 24th week. There are those who maintain that even a “young” fetus is a potential person and therefore it must not be harmed or destroyed, and others claim that there is no moral issue in destroying such a fetus in the first stages after fertilization with the understanding that this is merely a fertilized ovum and not the beginnings of life.

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Different countries[[173]](#footnote-173) relate differently both legally and morally to the “young” fetus in the first stages after fertilization, and represent the perceptions presented above. A bioethical debate on the status of a viable fetus is simpler, despite the dichotomy between its rights and the rights of the woman. My starting point is that dealing with the status of a live fetus is dealing with the status of a sustainable “creature”, whose human identity, ethical status and “interests” (preserved by others) are that of a potential person, a human organism with a right to life and the right to be born healthy. It can continue to develop outside the womb,[[174]](#footnote-174) and so it can be said that it is biologically independent with the ability to implement its potential for life. There is no doubt that at the viable stage, the more developed the fetus, the stronger its status, and the woman's right to terminate the pregnancy by destroying it in the womb will be diminished.[[175]](#footnote-175)

Some are opposed to termination of pregnancy for reasons that have nothing to do with the status of the fetus, such as “be fruitful and multiply”,[[176]](#footnote-176) but we are dealing with opposing termination of pregnancy solely out of consideration for the fetal status, and we will not deal with other considerations. In his book, David Heyd[[177]](#footnote-177) raised the interesting idea that I am prepared to adopt as an “anti-termination of pregnancy” argument (although this is not his intention):

Nowadays, when developments in medical technology allow us to implant fetuses into another woman's womb, this opens up the way to disconnect between the end of the pregnancy and the death of the fetus. There will be far-reaching ramifications to this possibility also regarding the ethical nature of abortions, at least regarding those who assume that the fetus has the status of a human being. Even if the mother has the right over her own body, even if the fetus is defined as pursuer (“*Rodef*”)[[178]](#footnote-178)- as an unwanted visitor in her womb, the woman can be prosecuted to prevent her from killing the fetus and transferring it to another “home”, in other words, the womb of another woman who is willing to nurture it. Even though the womb is the woman's possession as her property, the fetus itself is not her property in effect, and she cannot do whatever she wants with it. The ova formed in her ovaries may be her own private property, but the moment an ovum is fertilized by the sperm of a man and the developmental process of a separate being begins, the question becomes what will be the fate thereof when the man and society are also involved in the matter. Therefore, the interest of the man and society in the fate of the fetus is weaker than that of the mother, at least as long as the biology of the pregnancy is connected in such a definite way to the woman's body, although we are in the midst of a technological breakthrough that will make a dramatic change even in this

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matter.[[179]](#footnote-179)

This position could help in the case of a live fetus that can continue to grow outside the womb of the woman who became pregnant with it - even in an “artificial womb”, if and when this is relevant. In some jurisdictions, as in Israel, according to which the fetus lacks all rights until it is born, and is dependent on the goodwill of the woman who became pregnant with it, can give rise to absurd situations. For example, a young woman with a mental defect is likely to refuse to undergo an emergency C-section which would save the life of the fetus for fear that the newborn will be taken from her by the social services after she gives birth.

If the medical team applies to the court for a warrant to carry out the surgery in spite of the woman's refusal, the court will not provide the warrant because the aim of the operation is to save the fetus and not the woman, and the fetus, as stated, lacks rights. The principle applied throughout this book is that the fetus does have a status, whatever its ethical content, whether its status emanates from the right to life as a person or whether the right to life as that of a human being because of its potential for life contrary to those in favor of terminating a pregnancy at the viable stage as well, considering that in the rights of potential life, even if these exist, there is not enough to prohibit the realization of rights of living human beings, the woman.

Chapter Four - State Intervention in the Woman's
Autonomy

1. Autonomy Vs. Paternalism

A. Overview

In order to discuss whether the state has a right to force the woman to proceed with a pregnancy or to undergo a C-section without her consent,[[180]](#footnote-180) the following values must be examined: that of paternalism[[181]](#footnote-181) and that of autonomy.[[182]](#footnote-182) In the legal world, does “paternalism” mean “enforcement of ethics”? Roger B. Dworkin defined paternalism as the lawmaker's intervention in a person's liberty, justified by reasons relating only to the well-being of that particular person. If so, it could be claimed that the definition of “ultimate well-being” would be a legitimate objective for a paternalistic body to intervene in a person's liberty. Therefore, in the matter under discussion, paternalism would mean enforcing the continuation of the pregnancy or certain behavior during the course of the woman's pregnancy, as well as enforcing a C-section against her will and without her consent, for her own well-being. How? We will define a basic presumption hereby the best interests of the woman - physically, psychologically and socially - would be to give birth to a live fetus and therefore this is a good enough reason to intervene in her liberty.

Dworkin based his claims on John Stuart Mill, who maintained that it is impossible to justify a person or a group of people telling a mature person that it is in his or her best interests not to do with his or her life what he or she has chosen to do.[[183]](#footnote-183) The starting point of Mill's book “On Liberty”[[184]](#footnote-184) is the point that a person may enable another person's freedom of action to be denied only if it is for the purpose of self­defense. In other words: self-defense or preventing harm to another person sometimes provide enough justification to intervene in his or her freedom of action. Another valid reason is that someone's personal welfare is never justified enough to force anything on him, be it by society in general or by anyone else. According to this standpoint, intervention in the freedom of a woman should not be carried out to prevent her from terminating a pregnancy or to force her to undergo a C-section just because society, with the mediation of the lawmaker, is convinced that these things are done for her own good. Can the terms “paternalism” and “autonomy” also be tested when enforcement is not carried out for the well-being of the person being forced (the woman) but rather in the best interests of another (the live fetus)?

Do the best interests of the live fetus, who is a separate entity from the woman, constitute a legitimate objective for intervention in the woman's freedom? Those who consider the live fetus as part of the woman's body will definitely accept that restricting the woman's liberty for the good of the live fetus is a just cause; those who consider the live fetus as a separate entity could claim that it is unjustified to restrict the woman's liberty for the best interests of the fetus, but could find satisfactory justification in such a restriction for reasons connected to the benefit of another, similar to restricting another person's freedom to smoke in public because it causes harm to others. On these paternalistic grounds, the legislator can determine that a pregnant woman is obliged to maintain a certain weight,[[185]](#footnote-185) to refrain from alcoholic beverages, drugs and smoking.

A perception like this is problematic because it is nearly always possible to find other reasons that do not justify the intervention and that are not paternalistic. Thus, for example, it could be claimed that a woman who takes advantage of her liberty and

chooses to terminate a pregnancy would be healthier mentally, better define her

autonomy, be a perfect person, etc. and it is obvious that there are financial and social reasons and others of course - all for the good of the woman and to carry out her

wishes. In certain situations, for reasons relating to saving public funds and for

everybody's benefit, the lawmaker should actually allow the woman to terminate a pregnancy so that a viable fetus that is unwanted or “unfit” (with a handicap or defect) does not become a liability on society,[[186]](#footnote-186) because according to the paternalistic perception it is society that should decide what is good for the person and not the person himself. Within the context of the approach that claims that paternalism is the correct way to protect the viable fetus, paternalism has a number of definitions, which shall be discussed briefly.

B. Paternalism: Pure or Impure

The definition of “pure paternalism”[[187]](#footnote-187) includes two components: one is intervention in personal liberty and the other refers to reasons concerning benefit to that particular person. “Impure paternalism”[[188]](#footnote-188) is intervention in a person's liberty in order to increase benefit to others, not to the person himself. Dworkin[[189]](#footnote-189) made a distinction between pure and impure paternalism according to which intervention in the liberty or a person or a group of people is carried out taking his or their benefit into consideration, or at least also for his or their benefit too. Dworkin's example of impure paternalism is the legal prohibition of cigarette production to prevent detrimental effects to the health of consumers. In this case damage is caused to the freedom of the cigarette producers' business, and the reason behind it is to benefit consumers. However, the real reason for the legal prohibition is defense of consumers against an action against themselves, i.e. smoking cigarettes.

Dworkin wanted to prove that anti-paternalistic claims can be demolished. Relating to claims made by Mill he maintained that these are factual claims which have insufficient corroboration. Therefore he used Hart's critique regarding the human figure perceived by Mill: according to Hart, when Mill talked about the average person he meant an adult (in the legal sense) and so he attached many adult characteristics to the average person. The aspects that characterize an adult person include relatively steady ambitions, less of a tendency to be influenced by others, knowing what he wants and the things that provide him with satisfaction or pleasure, and having a certain ability to achieve these aims. Mill himself was aware that his factual claims were not always valid in every situation, and so in the discussion about justifying state intervention he stated that there are two exceptions to the assertion that a person is the best judge of his own interests and able to take the necessary steps to promote them: one is when a person is uneducated and another is when a person makes a judgment based on something irrelevant.

This is true when dealing with pure paternalism. Dworkin claimed that certain versions of paternalism could be justified on a moral-philosophical level, such as parental paternalism, and legal paternalism towards adults suffering from a lack of knowledge, cognitive thinking, or the ability to make decisions. Thus Dworkin made a comparison between children considered as disabled and disabled adults.[[190]](#footnote-190)

Even Mill, who was anti-paternalism, was also prepared to consider guiding principles where paternalism could be justified in cases when it is generally considered to be legitimate. Idealistic philosophers used the essence of this idea to devise theories of free will relating to human beings. In favor of expanding paternalism, the claims establish that some people suffer from various knowledge-related defects, and lack the ability for rational thought and decision making. Therefore, when we intervene in their freedom we actually do what they would do if they were rational. In light of these theories of Dworkin and Mill, is pure paternalism[[191]](#footnote-191) justified too? Mill referred to the

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“utilitarianism” theory,[[192]](#footnote-192) that basically claims that the perception that acceptance, willingness and the moral value of actions are measured by their probable and reasonable outcome.

According to this theory a result can be considered acceptable if it has two characteristics. The first feature is that the result causes more pleasure than pain. Pleasure is perceived in terms of different types of gratification, i.e. it is measured by the mental state of the person. The second feature is that testing the probable result does not relate only to people who are the objects of that action (those people who are the objects of the action that is subject to ethical judgment) but rather to everything affected by it (also indirectly). Combining the two features into one definition of a reasonable outcome leads to the conclusion that according to the theory of utilitarianism, a reasonable outcome is one that increases the total amount of pleasure compared with the total amount of pain, because the ultimate aim of utilitarianism is that as much pleasure as possible should be available to the greatest number of people.

I shall use this theory in our discussed issue: is pure paternalism likely to help prove the thesis that justifies intervention in the woman's liberty in order to protect her or the live fetus even against her will? Is the suffering involved in forcing the woman to continue the pregnancy, or by narrowing her autonomy (by preventing smoking[[193]](#footnote-193) or imbibing alcohol etc.) or by forcing her to have a C-section to save the live fetus without her consent greater or smaller than the anticipated pleasure (or the probability thereof) that will be achieved from preventing the death of the live fetus or from its life in pain - after all, paternalistic intervention was intended for its benefit?

According to Mill's utilitarian perception, paternalism is never justified, and therefore he attempts to show that the suffering involved in paternalism will always be greater than the joy that can be expected from it. Mill based this claim, among others, on two factual assumptions regarding the nature of man and the nature of paternalistic intervention. The first assumption is that every person knows best what is good for him and what promotes his sense of serenity, satisfaction, health and the like. The second assumption is that every person wants to promote his own good more than that of others. According to Mill, if a person makes an agreement in which he gives himself up as a slave, this agreement is considered null and void, of no significance at all and non­binding (both legally and morally), because a person is not at liberty to prevent his own liberty: this is the limit of his autonomy.[[194]](#footnote-194) Mill does not consider autonomy as a moral value, rather a more basic matter - a condition required to relate conceptually to the person as a person or a condition to relate in a moral way to the person as a rational being. To relinquish moral autonomy, which is what happens when a person sells himself into slavery, is morally unacceptable.

Dworkin has a different opinion on this matter. According to him a person can be completely autonomous when it comes to relinquishing his autonomy. He can make a choice of his own free will - one that he thinks is justified and that promotes his own interests - to relinquish or limit his freedom in the future. When Mill's argument is understood it becomes clear why he was opposed to paternalism. As with every intervention in a person's freedom that does not come from the desire to prevent an individual from causing harm to others, paternalism limiting the freedom, and denying or preventing the voluntary decision of the individual in matters concerning his life contradict the principle of autonomy. Therefore, intervention cannot be morally justified, whatever the advantage may be to the individual whose freedom has been denied as a result thereof.

These arguments are indeed good when referring to pure paternalism, but if we claim that in our cases the paternalism is impure, these arguments hold minimal weight. I maintain that when a live fetus is involved, those in favor of paternalism would claim that a rational woman who becomes pregnant intentionally, or as a result of negligence in not preventing the pregnancy, would not ask to undergo a termination. A rational woman would want to become a mother, to exercise her right to parenthood,[[195]](#footnote-195) to hold her child in her arms, to show her motherly love, etc. Therefore if the state restricts her autonomy and forbids her to perform a termination of pregnancy, this would not really be restricting her freedom, but would rather be assisting her to exercise her freedom and her true desires.

Obviously, behind this approach is the danger of intervention not only in the life of the pregnant woman but also in the life of a patient who refuses medical treatment,[[196]](#footnote-196) and also in the life of anyone whose autonomous decisions are considered irrational by society. Is paternalism of society towards the woman to save the life or well-being of a live fetus considered impure paternalism? One could say that the purpose of intervention in the freedom of the woman is to promote the best interests of this fetus without having to find explanations related to the woman. Dworkin stated that in cases of impure paternalism, the intention of intervention is not to prevent harm to the person whose freedom is being compromised, but rather to prevent worsening in the active action of a man that would cause harm to him or his health as a result of a person's action. Thus, in the case under discussion, there is no distinction between a live fetus and a newborn who has just emerged from its mother's womb. A live fetus is the one whose life or health will be at risk as the result of an action taken by the woman, both by terminating a pregnancy and by withholding consent to undergo a C-section necessary to give birth to the fetus.

The aim of intervention in the woman's autonomy is to directly further the interests of another - a live fetus. This aspect of impure paternalism makes it completely different from pure paternalism,[[197]](#footnote-197) both where its moral-philosophical essence and where the probable considerations to justify it are concerned. If one accepts the right of a live fetus to be born, and to be born healthy as a significant value, there is no doubt that intervention such as this is easier to justify than intervention in the woman's freedom the aim of which is to protect the woman, while defining her best interests subjectively. Pure paternalism is intervening in the freedom of a person for whom the intervention is intended, and in the case under discussion, intervention in the woman's freedom for her own protection.

Imposing limits on the woman's freedom for reasons concerned with the rights of a live fetus - be they weak or strong, complete or partial - in the name of impure paternalism is morally, socially and ethically justified no less than imposing limits in the name of pure paternalism. Having now understood the term “impure paternalism”, I will attempt to test the extent of the moral justification of intervention by the state/society in the freedom and autonomy of the woman. Whoever makes claims regarding apparent paternalistic intervention, assumes that the woman agrees to relinquish her autonomy in areas where she wants the intervention of the legislator, and therefore no paternalism exists here and hence no loss of autonomy.

1. Apparent Paternalistic Intervention

“Apparent paternalistic intervention” is intervention of the legislator that in effect gives expression to the desires of people whose freedom is restricted theoretically, and these desires can be realized only within the coercive legal limits. When society enacts laws that establish the maximum number of daily or weekly hours of employment for employees[[198]](#footnote-198) it is making sure that there is no competition between workers based on the number of work hours, which would ultimately be to their detriment. This legislation is based on the assumption that workers need law enforcement to give expression to their selves. The legislation is intended to assist workers who request enforcement and the restriction of their autonomy to work as much as they want. This intervention is carried out in a coercive normative context by means of which society ensures the obedience of every single person. Some people claim that this type of intervention should not be considered as intervention in autonomy.

In our context, a claim regarding “apparent paternalistic intervention” would be the woman agreeing to relinquish her autonomy in areas where she wants legislative intervention (like preventing a termination of pregnancy) and therefore no paternalism exists here and hence no loss of autonomy, as I claimed at the end if the orevious section.

According to this perception, can any justification be found for society's intervention in the woman's freedom? We shall examine this question using two 20

schools of thought: utilitarianism and deontologism.[[199]](#footnote-199) According to utilitarianism the claim could be made that the argument for restricting the woman's freedom when it comes to a live fetus is that this restriction improves or prevents deterioration in the 21 state of health of the live fetus and gives it life. According to the utilitarian paternalist,[[200]](#footnote-200) this statement would be correct, always and in every case, because as far as he is concerned, the pregnant woman who did not prevent the pregnancy is incapable of understanding which decision will work in her best interests. She does not understand that her behavior could harm the fetus or even cause it to die, preventing her from becoming a mother, so the positive outcome of the decision “for the woman's sake” is preferable.

That same paternalist would say that improving the health of the fetus and preventing its death would increase the general or average amount of advantages or decrease the general or average amount of suffering. The utilitarian paternalist would not see the result from the aspect of the woman or the fetus specifically and would not demand the increase of pleasure of any specific woman. It would be enough for him that the amount of social pleasure would increase if the decision were to be made by the state rather than the woman, enabling healthy infants to be born. As far as he is concerned, the only important criterion is the benefits from the idea that the state will decide instead of the woman in order to improve the situation from a social aspect. The aim of the restrictions placed on the pregnant woman - this paternalist would say - is to prevent her actions from inflicting harm on herself (prevention of the gain inherent in motherhood) or on the fetus (prevention of danger to the life of the fetus), and so restricting her freedom and her autonomy are aimed at her best interests, from the standpoint of the benefits of society as a whole.

Two problems arise from this theory. Firstly, it may be assumed that the woman cares about herself more than society cares about the woman, because a person is closest to himself; secondly, it may be assumed that the woman “knows” better than the state what is good for her. The paternalist will tend towards the attitude that the definitive paternalistic perception should be adopted and let the state decide instead of the woman, based on the assumption that this is a mean to increase general pleasure on average; in this way he will “overcome” the problems I raised above.

A different paternalist theory might claim the opposite, i.e. allowing the woman to attain her desire is an end which should be advanced, even if by doing so harm will befall the woman (psychological harm from not becoming a mother, or even physical harm) or harm to the live fetus, or loss of its life. Although this approach seems anti- paternalistic, it is not. In my opinion, “the utilitarian of wishes” will calculate all the wishes existing at a given time and ascribe significance to the wishes of the woman and the joy of the fetus. He will remove from the calculation certain wishes because he will assess them as “irrational” “strange” “not clear enough” or “inconsistent with the other wishes of that person”. So although it seems as if significance is being ascribed to the woman's wishes, in fact this paternalistic theory does not really take her into consideration. This theory will claim that the woman's wish to terminate a pregnancy - that, as stated, is likely to cause harm to the woman and destroy the fetus - is not a wish at all, because a person cannot harbor a desire to harm himself or his offspring.

Paternalism assumes that everyone is rational and therefore her wishes should not be considered if she wants to destroy life and prevent preservation of the complete body of the live fetus. If we accept this viewpoint, then we also ascribe irrationality to an adult who chooses not to receive medical treatment and does not give informed consent to medical treatment, thereby signing his death warrant, and his opinion should not be considered. This theory is likely to destroy the basis of the doctrine of informed consent. In my opinion, accepting this extremist attitude means going back to the doctrine of pure paternalism and undermining the perception of recent decades in the matter of the development of a person's autonomy. According to this perception, for example, anyone who refuses to receive painful chemotherapy will be treated forcibly, because by refusing he is acting as an irrational person.[[201]](#footnote-201) It is clear that according to this perception the fact of non-agreement of a person to life-prolonging medical treatment indicates an irrational wish that is not valid.

Another school of thought that justifies the paternalistic attitude is deontologism, which considers human beings with specific talents as those who bear moral responsibility. A pregnant woman is in a specific physical condition which involves her being “used” to accommodate another human being, and anyway we claim that her decision-making skills are awry. Therefore, the deontologist paternalists would claim that her autonomy should be restricted and that a decision should be made in her stead. Kant's theory provides an example of the deontologist perception: if a woman in this state is incapable of taking responsibility it also implies that she has some sort of cognitive deficiency.

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Cognitive deficiencies are defects in the ability for rational thought,[[202]](#footnote-202) and emanate from a standard mode of judgmental skills known in philosophical literature as “practical inference”.[[203]](#footnote-203) This refers to the process whereby we make certain assumptions about ourselves and the world, based on which we infer what we should do. When relating to a pregnant woman, the assumption is that a defect exists in her judgment skills whether to continue or terminate the pregnancy when terminating the life of another being is concerned; because the defect indicates a flaw in the woman's autonomic decision-making ability, inference can be made from this that she does not possess the ability for rational thought. The problem raised by this assumption relates to its ramifications regarding the judgment skills of an invalid: is it right to intervene in the decision of a ill person too? The answer to this question would appear to be negative.

Returning to the question whether paternalism towards the woman according to the deontologist school of thought is justified, Kant's interpretation of autonomy claims that every person can legislate his own ethical laws and act accordingly. A person's action according to these laws is autonomous and not enforced because it is the person himself making the ethical laws and they are chosen by him to express his essence as a rational and free agent. According to this perception, the pregnant woman might not possess the ability for rational thought owing to her physical, hormonal and mental state during the course of the pregnancy, and so her choice not to continue with the pregnancy, her wish to terminate, or her wish to refrain from undergoing a C-section, even at the expense of the fetus' life - all these do not express her essence as a rational and free agent and are not autonomous actions. Autonomy means having personal control, and if the woman is considered unable to have personal control over an action, she is considered devoid of autonomy and the Kantian prohibition of intervention in a

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person's autonomous life[[204]](#footnote-204) does not apply. When a woman has no discretion and no autonomy, the deontologist will suggest that the rational decisions of the legislator should be applied instead of her and for her sake.

The deontological theories were those that brought to the world the ideal of independent human beings. If this is the case, how could it be that the paternalists took those theories and changed Kant's strict individualism[[205]](#footnote-205) to make it become more like the totalitarian doctrine that demands adherence to the commands of the state? The deontologistic paternalist must explain why it is justified to intervene in the absolutely non-autonomous actions of people: man is an intelligent being, but his rationality is incomplete owing to lack of information, haste, illness, pregnancy, tension, etc. and there is no perfect overlap between the idea of autonomy and the idea of complete rationality, as claimed by the Kantian perception. The deontologistic paternalist would maintain that an adult person is mature enough to be autonomous even if actions carried accordingly are likely to be done in a defective and flawed manner, and either way there should be no intervention in his actions.

The attitude towards a pregnant woman as an irrational person could be said to stem from a narrow perception of rationality. A broad perception of this term could also interpret a woman's behavior in this state as rational behavior as far as the woman is concerned compared to other pregnant women in general. Another counterclaim is that an autonomous person is one who constructs his life by means of choices, and that a connection between past choices and present choices does exist. This means that a person is autonomous if he remakes his choices on a daily basis, unconnected to the past, and has even given up forever on the option to shape his life based on his choices.

Let us take as an example the choice of a person who willingly sells himself into slavery (see John Stuart Mill's example above). Paternalists would not justify intervention in an autonomous decision of this kind made by choice even if it involved relinquishing freedom forever - and if so, they cannot justify intervention in the woman's freedom.

The aim of paternalists could also be claimed to promote the woman's best interests (directly or indirectly), promote the best interests of the fetus (directly) and protect whomever society considers as weak. A human being is defined, amongst

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others, by means of the terms “eligibility” and “responsibility”.[[206]](#footnote-206) If the fetus is perceived by society as “not-a-human being” but rather as a “potential human being” who cannot shoulder responsibility and is incapable of utilizing its rights for his best interests - it is, after all, not a human being. Is it right to deny the woman her autonomy for the good of something society does not consider to be a human being? Does denying the woman's autonomy for the benefit of a non-person not mean that the human status has a lesser value? An extreme paternalistic perception of the woman's status may achieve this result, and then the pregnant woman would be considered by society as a “less human being”. It is very doubtful if those in favor of paternalism really meant that.

4. The Right of the Doctor and the Extent of His Judgment

The loss of autonomy can take on some forms and exist on different levels: a person can relinquish his independence for judgment regarding a specific, single issue or regarding types of issue. When an ill person places himself in the care of a doctor, he commits, as it were, to agree to any treatment decided upon by the doctor.[[207]](#footnote-207) In this instance he voluntarily agrees to relinquish his autonomy. Can the doctor be called a paternalist? Can he force his judgment on the patient claiming that the patient agreed to it? And if so, what is the extent of his discretion. When someone follows the instructions of a professional with authority (the doctor) he relinquishes his own judgment or an action based on this judgment. This infers relinquishing autonomy based on an assumption according to which the professional authority (the doctor) has made an assessment - as far as his professional viewpoint is concerned (the medical profession) - that specific actions should be taken. Following the acceptance of the authority's discretion, the person performing the action considers himself exempt from using his own personal discretion. The situation is different when autonomy is relinquished in decision-making and complying with the authority of the state.

I will explain the difference using an analogy between the duty to comply with professional authorities without the loss of autonomy and the duty to obey state authorities in making a decision that prevents a pregnant woman from carrying out a termination of pregnancy, or forcing her to behave in a certain way during the course of the pregnancy, or even in the type of birth, that includes loss of autonomy.

In the case of professional authority - as well as “state authority” - there may be room to presume that the state's instructions (by means of legislation) and the experts' instructions are based on the state's best judgment on the question of what it is appropriate for the person receiving the instructions to do from the viewpoint of the area in which the instructions are given. There may be room to presume that the doctor's instructions are based on his or her best judgment as to what it is appropriate for the patient to do from the point of view of her health.

If I could concur with the argument for paternalism of doctors towards their patients, I could also justify it when it concerns the state and a pregnant woman.[[208]](#footnote-208) The state is akin to a professional authority, both where education and health issues are concerned, and other matters too, and so it legislates laws to regulate these and other areas in the lives of its citizens. It may be assumed that the state should have discretion in the question of the choices of a pregnant woman. Regarding professional authorities,

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the reasons for obeying orders regarding the content of these orders[[209]](#footnote-209) - and not because of the ethical principle that professional authorities must shape their instructions using the best relevant judgment, but rather because there is evidence based presumption that they do actually do so. In the case of state authority, the reasons for obeying rules could also refer an ethical principle that requires this authority because of the content of the rules.

By obeying the law we accept the fact that the law obliges us to perform the action specified therein, even if it is unjustified from a point of view of the area in reference to which it is carried out. This is really the main snag in the duty to carry out the legislator's orders, at least where we are concerned: if there is a duty to obey the orders of the legislator and prevent specific behavior by the pregnant woman, or to oblige her to behave in a specific way, this duty is not based on the evaluated aspect of the legal instructions or what we assume regarding their content. Thus professional authorities and state authorities can be compared and hence relinquishing the woman's autonomy can be justified in this case.[[210]](#footnote-210)

2. A Family in Dilemma

**A. Constitutional Law: The Right to be or not to be a Parent** According to the prevailing perception, the field of childbirth and fertility lies within the field of the person as a private realm.[[211]](#footnote-211) The decision whether or not to be a parent[[212]](#footnote-212) derives from his autonomous status;[[213]](#footnote-213) the right to parenthood is a fundamental right that emanates from the right to freedom of the body and the right to ascribe value to human beings, life, freedom and security. This fundamental right derives from the basic values of freedom and personal value protected by basic law. Every human being has a right to become a parent and the state is not permitted to restrict this right or forbid anyone wanting to use it by means of natural reproduction. The fundamental right to parenthood refers to every human being, including those whose parenthood is considered invalid in advance, such as people with mental or intellectual disabilities who have no criminal 35

liability.[[214]](#footnote-214) The contrasting view of this right is society's duty not to intervene in a way that will impose restrictions upon it.[[215]](#footnote-215) Is the importance of parenthood merely a biological need based on the primal inclination to give birth for purposes of genetic continuity? Is the importance of parenthood a social and political need? And therefore should it be stipulated as a right?

In the *Nahmani v. Nahmani* case, Justice Dalia Dorner wrote:

In human society, one of the strongest expressions of an aspiration without which many will not regard themselves as free in the fullest sense of the word is the aspiration to parenthood. We are not speaking merely of a natural-biological need. We are speaking of a freedom which, in human society, symbolizes the uniqueness of man. „Any person who does not have children is considered as a dead person" said Rabbi Yehoshua ben Levi (Babylonian Talmud, Tractate Nedarim, 64b). Indeed, whether man or woman, most people regard having

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children as an existential necessity that gives meaning to their lives [...].

When accepting the theory that the state is compelled to intervene in the right to parenthood the question should be asked whether the individual's right to parenthood also includes the state's obligation to help the person carry out this right, i.e. to cover the costs of the necessary procedures when it cannot be achieved naturally. Some claim that the existence of different new reproductive technologies, by means of sperm and egg donations, surrogates, fertility preservation, IVF, prevention of illness and parenthood of different types - single parents, same-sex parents, parenting in late age and more - all these detach society from the biological model of reproduction and therefore justify intervention by society and state.[[216]](#footnote-216) [[217]](#footnote-217)

Does the fundamental right to parenthood imply that the state has a duty to finance it? Does a state that does not assist everyone who wants to become a parent, whatever the model, violate the fundamental right of its citizens to achieve parenthood? Does the fundamental right to parenthood include the right to receive medical and technical help to give birth? Does a person's right to decide about parenthood also include the right to be assisted with existing technologies and oblige the state to carry them out and finance them? Some scholars[[218]](#footnote-218) define the right to parenthood as the right of every person to make every possible effort, including those who can only do so by technological means (without violating the rights of others), to create an offspring with a genetic connection or a gestational connection[[219]](#footnote-219) with at least one of the parents intending to raise it.

1. **Relationships in the Family and Pare nting Abilities**

Parenthood is a right. In the previous chapter I explained that the state is prevented from intervening in the right of natural procreation right because this is about a fundamental right; in this chapter I will show that total lack of intervention may actually be to the detriment of the newborn child. It is not enough for someone who has achieved the right to be a parent to have “parenting abilities” or “parenting skills”, and everyone who is able to achieve his natural right to reproduce is not necessarily capable of being a proper parent either, and not merely a biological parent. Society has yet to solve the legal and ethical dilemma regarding the right of every single person to parenthood, which sometimes contradicts the fundamental right of a child to be protected from anticipated abuse by the parent.[[220]](#footnote-220)

The debate on the question whether natural reproduction in cases of lack of parenting abilities should be prohibited is not within the bounds of this book so I will not enter into it, but I do think that the subject of parenting abilities is relevant in the discussion about preventing a termination of pregnancy and the debate on a C-section without the woman's consent. The “formal” preparation for parenting roles is indirectly proportional to the scope of the role and the responsibilities involved therein. The parent does not always understand the essential, important aspects of childcare; behavior patterns learned by a parent from others do not always suit the needs of the specific child, and sometimes ignorance and lack of a suitable personal model might be harmful to the child.[[221]](#footnote-221)

In order to discuss the nature of parenting abilities, the definition of a “good” parent must be examined. If, in the past, a parent who provided the child's physical needs was considered a “good” parent, nowadays the parent-child relationship is the important factor, and parents are expected to emphasize the child's emotional intelligence no less than his or her IQ.[[222]](#footnote-222) Some maintain that because no definition has yet been given to the term “parenting” it is impossible to establish what constitutes a “good” parent.[[223]](#footnote-223)

When the law allows everyone, whatever their mental and cognitive abilities, to bring children into the world, it follows that there will be parents whose emotional needs will become distorted and who will therefore harass their children; there will be parents with childish or immature personalities who will place their own needs at the center of the universe and demand their own gratification before that of the child; there will be parents who will only concern themselves with their own image as parents in the giving process instead of cultivating a mutual relationship with their child;[[224]](#footnote-224) there will be parents who have assigned a specific role in their lives to their child and he will have to carry it out, like a child that is brought into the world to take the place of someone who has died, or one who is intended for a parent's self-realization and the parent does not see him as a separate entity.

Sociologists specializing in the field of families consider that procreation is of major importance. According to the “correct” order of things the family is created for the sake of the child, yet sometimes this order becomes disrupted and then we see children “created” for the sake of the family. An example of this is when a pregnancy is used as a means to force a marriage or to prevent a divorce, but if the child does not “meet expectations” the parent takes it out on him. At times the child becomes a scapegoat whose task it is to diffuse the tension threatening the family unit and its identity and because he is weak and helpless, casting him aside does not directly endanger the family.[[225]](#footnote-225) Sometimes the child itself will choose to become the scapegoat in order to save the family.[[226]](#footnote-226)

Many researchers refuted the popular perception according to which the parents' psychological disturbance is the only causal factor for child abuse.[[227]](#footnote-227) Only 10% of abusive parents can be tested by clinical psychiatry. In contrast to this, the number of mentally defective parents who abuse their children is very high: research carried out in Israel showed that some 50% of parents suffering from mental retardation abuse their children. In discussions with parents like these and after following up the reasons that led to abuse it appears that the abuses resulted from a low frustration threshold, the lack of an ability to control urges and inability to assess the result of their actions. Abusive parental behavior towards a child is also liable to happen as a result of at least two types of stressful situations that lead to lack of control: a difficult socioeconomic situation (such as immigration, unemployment or termination of employment) and family crises, including developmental ones such as pregnancy, birth, adolescence, divorce or illness.

We have seen that new technological means and different family units exist nowadays, and therefore a child can be brought into the world even without being married, or even without sexual intercourse. Every person can plan when he is ready to become a parent and can take only his own interests into consideration, more or less. The fundamental right to procreate and bring children into the world has been expanded over the years. At first it was known only in reference to married couples [[228]](#footnote-228) but today it is known even in reference to single people, with the specific ruling of the court that the right to privacy is granted to every individual and includes the freedom from unjustified state intervention in matters that affect the person in such a fundamental way as the decision whether or not to give birth.[[229]](#footnote-229)

As mentioned before, in extreme cases, preventing official intervention can harm the live fetus and the newborn child, and therefore the time may have come to think in a somewhat paternalistic way. Parallel to preventing termination of pregnancies in the viable stage, with enforcing medical treatment on a woman during the pregnancy and obliging her to undergo a C-section against her will - it is time to consider intervention even in the private lives of individuals and to prohibit pregnancy in cases where it is liable to harm the fetus or the newborn.

1. **A Fetus or a Child with Disabilities**

In the previous chapters I examined parenting rights and parenting abilities - two different terms that are often contradictory. In this chapter I will examine the place of the disabled child in the family to confirm a theory according to which even a child with disabilities has a constitutional right to be born, a right equal in importance to the right of the woman over her own body. The flip side is that an individual is allowed to reproduce even if there is an acute concern that his child will not be very healthy, and even if the progenitor is mentally challenged.[[230]](#footnote-230) So the question is - what is disability? One possible is to define the term “disability” for its legal purposes as a disability that is physical, mental, psychological, emotional, cognitive, developmental, or one that is a combination of a number of these. A person suffering from one disability or more should be considered by the community as “disabled”, and when referring to a child, the term “a disabled child” should be used. In our social culture, the term “disabled person” has negative connotations, sometimes even patronizing.[[231]](#footnote-231)

Impairment may be expressed in bodily functions or body structure, carrying out activities and daily functioning. Disabilities can be blindness, deafness, and dysfunction of olfaction or gustation, disability emanating from the lack of ability to sense heat, cold or pain, impairment of growth, intellectual or physical ability, mental illness, mental retardation and the effects thereof. A disability or defect may cause a person to be limited in carrying out activities compared to other people of his age. A fetus suspected of having a disability or a defect such as those mentioned above is more likely than any other fetus, to be destined for destruction in the viable stage too.

What are defects? What is disability?[[232]](#footnote-232) There are some acute doctors' dilemmas when it comes to establishing what constitutes “disabilities” regarding which a termination of pregnancy is “recommended”, and which are the “disabilities” regarding which continuing the pregnancy is “recommended”. It should be mentioned that some defects appear to be serious during pregnancy but that after birth, the defects are not necessarily serious, and therefore it often happens that a pregnancy is terminated as a result of identifying a defect that is only minor. Some suggested establishing that only newborns with the most serious functional defects should be recognized as defects.

A family has both external and internal limits: the external limits are intended to offer the family privacy and must be stable but also flexible, so that the family can connect with third parties. The internal limits make a distinction between the role of the parents and the role of the children, and help to balance their relationships. A child with disabilities causes specific and often difficult responsibilities to be placed on the family that are likely to fall partly on one parent and isolate the other. He needs over-protection at the expense of the other children in the family, causes dependence on the parent taking care of him and places tasks on both parents that take time and resources away from the other children. Often the family finds it hard to continue functioning as a balanced structure. It is important to make this point clear when claiming that the live fetus has a right to be born even if it is disabled or has a defect.

The writer and artist Christy Brown[[233]](#footnote-233) describes a balanced structure such as this in his book “My Left Foot” in which he describes how he blends into the daily life of his siblings in spite of being totally paralyzed and unable to talk. His brothers and their friends let him join in their activities, carried him on their back or wheeled him around in an improvised cart.

One has to be aware of the fact that when a child is born with disabilities, there an increasing need to depend on factors in and outside the family - mainly doctors, teachers and therapists. Giving birth to such a child may even provide fertile ground for a marital crisis and require the family structure to readjust.[[234]](#footnote-234) Different parents react in different ways to the birth of a child like this. Dealing with the complexity of decision­making regarding children with special needs is important to the discussion, because of the large number of children such as these.[[235]](#footnote-235) After having given birth to a child like this, parents are likely to feel that a heavy burden has been placed on their shoulders. A family that raises a disabled child needs assistance and a great deal of involvement by other parties, especially when it comes to sources of information regarding diagnosis and treatment requirements, actual help on a daily basis, education, therapy and rehabilitation. A family such as this also needs social support to help in reorganizing itself as one of the conditions required for coping with the new situation. Professionals with differing opinions may also be involved in handling the gap between blaming the parents for the medical and psychological misfortunes of the child[[236]](#footnote-236), and sidelining the parents while focusing the therapy on the child.[[237]](#footnote-237)

Featherstone[[238]](#footnote-238) described three factors that are liable to widen the gap between the couple whose child has been born with disabilities, rapidly leading to a family crisis: fear, fatigue and anger. Fear inhibits communication; fatigue lowers the level of patience and makes it difficult to find solutions; the source of anger is the child in question, because the parents do not allow themselves to be angry with him so they take it out on themselves and their spouse. When the child is severely disabled, and the question arises whether or not to institutionalize him or to take medical action, every parent is faced with a dilemma when deciding between his responsibilities towards the child and his obligations to the rest of the family. When one parent has a specific opinion on the matter, the other parent becomes more adamant in her standpoint, and they both find themselves fighting on both fronts - external and internal. For the family to find a balance there must be cooperation in the parental roles. It is important to remember that when a special needs child is born, the parents tend to begin to have serious doubts about the quality and value of their parenthood.

Parents need healthy children in the family to reinforce their faith in themselves as good parents who are capable of giving birth to children and raising them without defects. To fill this need the parents depend on the existing children by means of giving birth to additional children. The healthy children often suffer discrimination as a result. Their relationship with the parents and the special needs child is influenced by the attitude of the parents but is not similar to it. The majority attempt to hide the existence of a disabled sibling from other people. They envy him because of the attention he gets, they are afraid of becoming infected and feel under pressure because of the extra burden on the parents' shoulders.

The parents themselves must give up on their own self-determination and free time in order to take care of the child and all this leads to frustration and as a result - feelings of guilt. The parents are in a constant state of indecision and must find a balance between the contradictory tasks of adaptation. A conflict of interests exists between the immediate needs of the child and future plans; between showering affection on the child and feelings of disappointment and resentment; between continuing to function on a daily basis and giving in to pain and anger; between wanting to place full responsibility on the child and the need to start treating him with others. Life in a family with a special needs child must change, and these are changes in all the areas of life: work habits, social life, sexual activity, relationships with the extended family and expressing emotions.

A fetus “suspected” of having a disability is more likely than any other to be destroyed even at the viable stage. I have yet to find a comprehensive anthropological research dealing with how parents relate to a child with disabilities, but it is clear that the relationship is based upon their cultural world perception.[[239]](#footnote-239) The social definition of a newborn as a “non-person” also forms the basis of the phenomenon known historically as infanticide - intentionally killing a newborn with the agreement of the parents, family or community,[[240]](#footnote-240) making it less difficult to deal with infanticide on a psychological level.

Taking the life of a child with characteristics that contradict the religious ideals of a specific society (such as twins, or a child with a defect) is not considered a crime in these societies. This perception is popular among the Tonga, and the Bantu of south-east Africa and Malaya. Among the Masi a child born without a nose is considered a demon who will wreak havoc in the future and so he is killed; among the Hausa in northern Nigeria a child with a defect is immediately thrown into the river, and in Borneo, his neck is broken. There is also a tendency to kill a newborn that is not considered “a person”. So, for example, “a real person” is defined by Foucault by criteria based on financial capability, the ability to make love, circumcision and fertility. Therefore a sterile woman is not “a real person” and similarly someone who is not yet circumcised and not considered an adult who is able to distinguish between good and bad. Because an androgyne is sterile and unable to be circumcised he is not “a real person”, it is customary to kill him immediately after the birth.

These perceptions are not only typical to the African tribes. In ancient Greece, Rome and Egypt it was customary to kill an infant born with a defect: an infant who was found to be weak or disabled by the council of elders, was thrown into a deep valley, and Plato also recommended that a chronically ill person should be put to death. Other reports about infanticide of female babies were widespread in many societies for hundreds of years. In India among the Rajputs of Kalafur, boys are much more valuable than girls because they are needed for religious duties. At the beginning of the 19th century this preference was still expressed by the killing of female babies. The British tried to do away with this custom and it did become less prevalent, but it still exists. However, until today male children receive preferential medical treatment, which explains why the rate of female infantile mortality is double that of boys.

Many incidences of violence have been known towards those who are physically “ugly”, and children with certain physical characteristics, such as dark skin, who are considered of a lower cultural status, are known to have been victims of infanticide. Literature describes two groups from Madagascar with similar physical characteristics apart from the color of their skin: one was light and the other, dark. A dark-skinned child born in a light-skinned group was put to death even if his parents were not in doubt, with the claim that were he alive he would turn into a sorcerer, a leper, a thief, or be guilty of incest.

Bearing in mind cases that discuss abuse, the opinions of Becan and Sheleff[[241]](#footnote-241) should be noted, as they claim parents feel a basic hostility towards their children. The two researchers related to the term “Oedipus Complex”[[242]](#footnote-242) and maintain that Freud ignored the first part of the Greek story and did not emphasize that the first aggressive impulse was that of the father (Laius) towards his son (Oedipus). As in primitive society, in our society too, a child with a defect, whose looks are associated with the image of an animal or a monster, is exposed to maltreatment by his parents, who relate to him coldheartedly. Just like primitive man, modern man too is particularly influenced by what he sees. Acceptance or rejection of a child with disabilities depends on the interpretation of the body image.

Symbolic interpretation of the body is the mental mechanism that triggers the dynamic process of acceptance or rejection. A review of the literature under the title of “Infanticide” revealed that children whose deformed looks are reminiscent of an image of an animal, are usually subjected to severe harm. In Mexico, for example, infants with “animal-like” faces are killed and according to Evans-Pritchard,[[243]](#footnote-243) the above defect is often reminiscent of an animal or a limb of an animal, which relates to a violation of the totem of the sacred animal. The researcher writes: “I once met a man who had a foot with only three withered toes. I was told that his grandmother had an ostrich totem. Her son in-law injured the ostrich and her daughter gave birth to this child who has a defect in his feet [...] Ostriches, or rather the spirit of ostriches, stamped the ostrich shape on the child”. Because obscurity surrounds a child with disabilities, anthropological literature bases itself upon the symbolization because of an unwillingness to undergo cultural chaos, and man's desire for order.

Research undertaken by Meira Weiss over the course of six years on the topic of how parents see their disabled or sick children provides us with information on this issue.[[244]](#footnote-244) The study revealed that about half of the babies who were discovered to have defects after birth (50.8%) were abandoned by their parents immediately or soon after the birth: parents of these babies refused to take them home and most of them did not even visit them in the hospital. Some of the babies were sent home by force under protection of the law against child abandonment, in a police van or hospital ambulance. Weiss concluded that parents tend to reject a child that is physically deformed, as it is considered a “non-person”. Sometimes parents who abandon their children at the hospital take upon themselves a different sort of responsibility for the life of the child, or decide to take care of him outside of the home. Weiss made a distinction between two important aspects of parental behavior: one is the degree of intimacy or territorial distance with which parents treat their children and the other is the perception of parental responsibility towards their children.

Weiss' research discusses the limits we take for granted in our lives. Cultural norms direct us to relate to parental love as a given and an unconditional obligation. In my book about informed consent of a minor for medical treatment I showed that this is not the case. Parents do not necessarily and in any situation love their children unconditionally.[[245]](#footnote-245) Weiss too, who studied a number of cases, shows that parental love is not an absolute norm. The encounter with the child with a disability puts to the test the perception of the essence of a human being and obscures whether the child is identified as a “person”, and serves actually as a threatening to the parents and makes them anxious that the child's defect will infect them. From this it may be assumed that the term “person” can be defined by means of its opposite: we need the “non-person” to define a “person”.

Relationships between parents and children in many societies are considered extremely intense.[[246]](#footnote-246) Cultural directives define the relationship of the woman with the fetus or the child and establish in what situations the woman would perceive the child, for example, as a “non-person” and abuse him accordingly. Following the birth of a child with a defect the parents may not have yet formed a parent-child relationship so the bond between them is a bond between strangers. In her research Weiss also closely observed the relationships between parents and their children that deviated from the norm as a result of illness after a connection had already been made between them. Parent-child relationships offer an appropriate field to test violent reactions to disabilities and reveal the cultural guidelines establishing whether or not a child should be isolated or nurtured, live at home, be quarantined or sentenced to death. Findings from anthropological literature often show that choosing violent behavior offers a legitimate solution to the problem of a child with special needs.

Many parents behave in a way that expresses the perception that the child will be defined as belonging to them only if he is alright and won't endanger their status and social existence. If their child was born with a defect, or has become disfigured, he is different from a normal human child and therefore is not considered their child.[[247]](#footnote-247) Thus, even if abandoning a child like this in the hospital or transferring him to an institution shortens his life, they have no sense of violence or cruelty towards him because they relate to him as they would to a foreign or strange creature.[[248]](#footnote-248)

Meira Weiss' research deals with how parents influence the body image of their children. Both mothers and fathers tended to reject a child with defects that threatened their own self-definitions. The research shows that the mothers were more active than the fathers in adopting behavior patterns that had been chosen by the couple. When the parents took care of the child, it was mainly the mother who did so, and when that child was abandoned or rejected, it was the woman who was more adamant and decisive about it. The explanation for this may be based in a preconceived idea and a social structure in which the woman is less obliged to working outside the home and is perceived as responsible for raising the child.

The psychoanalytical explanation could also help understand the phenomenon. The pregnant woman makes an emotional and material investment in building the nest. She becomes attached to the fetus with imagery by means of which she sees the child as being perfect. Dreams such as these of a child that has not yet been born are normal: during the pregnancy she sees the child as having characteristics that are similar to her own or other beloved relatives. She idealizes him based on her own idealization. In this respect, the woman makes a greater narcissistic investment than the father in her expectations from the child so for her the crisis is likely to be greater when they fall apart. It is important for the mother to prove that her child is perfect; she is ready to invest in the infant as long as his defect is invisible and does not harm her self-image; however when the defect is apparent he threatens her and her body integrity more than the father.

Nowadays there is a new approach that opposes the perception relating to a disabled person as one who is undergoing a personal tragedy. The medical model relates to the disabled person as an invalid or as one whose life is destined to be full of suffering, and this perception leads to an over-abundance of tests and the possibility of eugenics by means of giving birth to people who will be free of disabilities. Disability studies are opposed to this perception. They consider disabilities as a social phenomenon, i.e. the disability arises not from the defect of the person but rather from the social aspect whereby society exacerbates it, and the disabled are excluded accordingly.[[249]](#footnote-249) Thus, when no access is provided to a certain place, the disabled are made more aware of their disabilities. Society “transmits” to them that they are not wanted and “worth less”.[[250]](#footnote-250) A social attitude like this conveys a message to a woman that she should terminate the pregnancy of a being that will be “worth less”. This leads to the danger of the slippery slope.

I am short but I am not defined as a dwarf in medical terms - does that mean I am disabled? And the contrary: I am tall - is this a disability? Where is the borderline between “normal” and disabled and who decides it? Even if I agree that a fetus with Down Syndrome or a fetus with Tay-Sachs will have a poor quality of life because of his defect and it would therefore be advisable to terminate the pregnancy, how could I agree to doing so when it comes to people who are obese, short, deaf or dumb? A large number of tests to find out if a fetus has a defect and fetal selection based on the rights of the woman, considering the pregnancy as a “conditional” pregnancy and rejecting fetuses with defects - all these are harmful to a society imbued with culture, tolerance for special needs, empathy and compassion.

Disability, like beauty, is in the eye of the beholder.[[251]](#footnote-251) The fertility revolution cannot allow a woman to expel a defective live fetus from her own body. Preventing the woman from so doing does not detract from her autonomy, rather it impresses upon her that she must accept the fetus as it is, with one proviso mentioned above: only if its quality of life as a child and a human being will be poor and limited as a result of illness - then, and only then, for itself and for its own sake, can the pregnancy of a live fetus be terminated. The significance of lack of patience towards the ‘different other' influences us as humans and affects us as a society in all walks of life - work, economy, politics. Whatever we see as different, limited, other, is rejected and cast aside by us. Society loses patience and tolerance and becomes indifferent, even alienated to suffering, chaos, loss. Society relates to the other according to the exterior form and does not always check the inner form, intelligence, thoughts and desires. A society that alienates itself becomes an alienated society.[[252]](#footnote-252) The slope is slippery and it will have to watch out for the future.

1. **“Forbidden” Conduct During Pregnancy and Results Thereof**

How is that? You don't even know me. I've worked and I'm a good mother.

That doesn't matter, says the system. You use drugs, brother. And that the real deal. So out of the clear blue sky. The obnoxious, unidentifiable, anonymous creature Elopes with my son. But that's alright says Uncle Sam. You defaulted your rights The moment you picked up.[[253]](#footnote-253)

I have mentioned that the pregnant woman and the fetus inside her are sometimes considered as one entity. In my opinion the pregnant woman is one entity and the live fetus is a separate entity. If the pregnant woman herself decides not to terminate the pregnancy in the first trimester, I maintain that she is morally obliged to take care of the health and proper development of the fetus.[[254]](#footnote-254) A woman who takes unnecessary risks that are likely to endanger the fetus, defaults on her moral obligation towards it. The moral and legal obligation on the part of the pregnant woman is to care for the good health of the live fetus and to undergo the appropriate tests during the pregnancy to avoid causing damage.

The woman's womb provides the live fetus with “accommodation” so she has a duty to avoid conduct that might be harmful to the guest in the accommodation that forms the bed in which it is developing. She should avoid drinking alcohol, smoking

cigarettes,[[255]](#footnote-255) taking drugs and unnecessary medicines that are harmful to the fetus. She should avoid working in dangerous conditions such as pollution, lack of cleanliness, chemical emissions, while at the same time taking the initiative to do everything necessary to ensure the normal development and good health of the fetus. We have mentioned that there is - or should be - liability for third-party damages towards the newborn for prenatal harm. Most legal systems do have provision for the newborn to receive compensation owing to prenatal damage on condition that it was a live fetus when it happened and was born alive.[[256]](#footnote-256)

Can a child make a claim against the woman because of her “forbidden” conduct during the pregnancy for prenatal damage, if he can prove a causal connection between the behavior and the damage? In other words, does the woman have to make an undertaking that she will care for the fetus, and if she breaks it, he can prosecute her after the birth, not only as a moral obligation but also a legal obligation?

We assume that if the pregnant woman causes deliberate harm to the fetus it is unjustified to protect her from a claim of damages by the born fetus; but if she causes it harm unwittingly, or because of lack of care or negligence, can he then claim damages from her? If during the pregnancy the woman is in the habit of smoking, taking drugs, working with dangerous materials, drinking alcohol in large quantities, taking medicines, etc. and this conduct results in harm to the fetus, we are of the opinion that the fetus who been harmed may claim damages from her after being born, even if we do not define his rights as a fetus as human rights.[[257]](#footnote-257)

It is in the interests of society to relay the message to a pregnant woman that from the minute she has inside of her “the beginnings of a human being”, there are limitations on her conduct and even some loss of autonomy. In this case, loss of autonomy is proportional. Therefore placing responsibility for a tort on the shoulders of a pregnant woman means relaying a message by society.

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In the *Gordin v. Gordin*[[258]](#footnote-258) case the court in Michigan for the first time recognized the rationale in a claim of a child who prosecuted his parents for prenatal injury. During the pregnancy the woman took medication that caused the child's teeth to darken. The court determined that the woman defaulted on her obligation to take care in that she did not check she was pregnant before taking the medication and did not even notify the doctor that she took it when she discovered she was pregnant. In the *Stallman v. Youngquist*[[259]](#footnote-259) case, the court rejected the claim of a child who prosecuted the woman for damage caused to him as a fetus as a result of her negligent driving. The court claimed that placing responsibility for damages on a pregnant woman violates her autonomy, and therefore it is very difficult to place the responsibility on her. Also in the *Chenault v. Huie*[[260]](#footnote-260) case in which a child suffering from developmental defects because the woman had taken drugs during pregnancy, and even in the case of *Dobson v.*

*Dobson*[[261]](#footnote-261) a road accident that caused a child to be born with physical and mental defects - it was determined that the obligations of a pregnant woman to the fetus are moral obligations and not legal one.

What would the criminal law be in such a case? In most western countries a woman cannot be put on trial if her prohibited conduct caused the fetus damage with which it was born. There is a well-known example of a claim filed when the authorities wanted to forcibly commit a woman to drug rehabilitation following the birth of two addicted children and it was feared that the present fetus would be born in the same way. The appeals court filed the claim and ordered enforced commitment for the woman citing mental disturbance, but the decision was overturned by the high court.[[262]](#footnote-262) The legal systems all over the world are unclear whether a pregnant woman should have a legal obligation to take care of the fetus during the pregnancy and they make do with only placing a moral duty on her.[[263]](#footnote-263)

Some are of the opinion that there is a “Unique Symbiotic Relationship”[[264]](#footnote-264) and even total dependence between the woman and the fetus, so an event that took place during the pregnancy should be considered as predestined: “That this is so, is not a pregnant woman's fault: it is a fact of life”.[[265]](#footnote-265) And what happens when the woman causes deliberate harm or has been negligent or “closes her eyes”? In the case of *Winnipeg Child and Family Services v. D.F.G.*[[266]](#footnote-266) the state requested an order that would force the woman to undergo rehabilitation from glue sniffing, but the Canadian high court did not recognize the obligations of a pregnant woman. Some are of the opinion[[267]](#footnote-267) that the woman's right of autonomy over her own body is principle that should not be upheld over the right of the fetus to be born. That is true even they concur that the fetus that will be born has a right to begin his life without defects that came about owing to a violation of the obligation to care, including a violation on the part of the mother. The legal world already recognizes that a child has the right to be born healthy.[[268]](#footnote-268)

I am of the opinion that this is true as long as it refers to the woman's obligation of care towards the fetus and I do not consider it invalid. But it is untrue when it is about using drugs, cigarettes, alcohol and medicines, exposure to dangerous materials, and so on - in such cases the woman has a legal obligation of care towards the fetus. I am aware of the claim that states that the standard of care enforced upon the woman would be too strict, but I don't see this as problematic or likely to undermine the woman's status. In the Gordin case[[269]](#footnote-269) the court ruled that the woman's conduct must be reasonable during the course of the pregnancy but she is not duty-bound to do everything to protect the fetus; a ruling that a woman must avoid work in a place that might endanger the health of the fetus while putting her financial situation at risk and possibly leading to her going hungry is a ruling that undermines the woman and this is not my meaning. A ruling that the woman must avoid driving in case she finds herself in a car accident in which the fetus might be harmed is also a completely illogical ruling in my opinion, and is liable to undermine the woman's status.

A woman is not merely a container or a ‘hostel' for the fetus, and the fetus is not a resident or a lodger in the hostel for a nine-month period. Therefore the ruling that the woman should drive in a reasonable way during the pregnancy aims to prevent deliberately harmful conduct or conduct that is clearly negligent. Smoking or taking drugs are actions carried out with reasonable awareness and the understanding that they are liable to harm the fetus and therefore should be avoided.[[270]](#footnote-270) Such avoidance does not undermine the woman's autonomy, but rather boosts her status as someone who is concerned for the health of the person to whom she will be giving birth. Some claim that recognizing the woman's obligation to care for the fetus creates symbolic significance to consider the woman as selfish and irresponsible; others claim that behavior that seems irresponsible and negligent, like drinking alcohol, taking drugs, smoking, etc. is because of addiction and the woman's specific malady that needs treatment and not “a claim for damages”, because this harmful conduct is unintentional.

Some claim that a pregnant woman is obliged to undergo regular tests during pregnancy, because it is her responsibility to watch her weight and eat balanced meals, to ensure the amount of caffeine and medicine she takes is under control, and of course avoid taking drugs, alcohol, etc.[[271]](#footnote-271) Some maintain that tests can be initiated to establish the scope of the woman's duty of care.[[272]](#footnote-272) Some maintain that the relationship between the woman and the fetus is a special one because the fetus is dependent on the woman. Others claim that the discussion cannot be one about separate rights of autonomy that might harm the interests of the woman.[[273]](#footnote-273) In my opinion, the opposite is correct: the dependence of the fetus does not mean that its rights are assimilated into her rights. Even a newborn infant is dependent on the woman who gave birth to him and he is likely to be dependent on her for a long time until he reaches the independent stage. Is it feasible to say that because of this his rights are not separate from her rights? Of course not: a newborn is defined as a person and therefore has complete legal human rights, including the right to his own autonomy.

Because of this, the rights of a live fetus and the rights of a newborn are not the same, but we still maintain that the live fetus does have rights which are not diminished or compromised because of his dependence on the woman for his life and development. In other words, the dependence of the fetus on the woman does not eliminate her duty to care for him; it does not eliminate the right of the fetus to claim for damages if the duty was neglected with the result that he was born disabled; it does not eliminate, in my opinion, the duty of the state to bring criminal charges against the woman too, if she behaved in this way. I maintain that it is wrong to combine negligent driving by a pregnant woman with conduct involving substance abuse, imbibing alcohol, etc. These actions which are carried out with eyes closed are not “predestined”. The duty of a pregnant woman to the fetus in the viable stage must be according to law, and not only according to ethics. One should not be shocked by a claim by a child against the woman who gave birth to him - at least not on the same level as being shocked by the disdain with which the woman treats the fetus whom she decided to bring into the world.

Taking the nature of the discussion into consideration, many reasons exist for and against the law of torts when it comes to the relationship between parents and their children.[[274]](#footnote-274) In my opinion, providing immunity to parents from their children's lawsuits is tantamount to violating the rights of the children. The court must make a distinction between different behaviors, and which of them should allow the child who was harmed as a fetus to sue - even the woman, his mother - for damages. It is true that any conduct of hers is liable to affect him and it is true that her autonomy will be restricted, but at the end of the day it is not actually restricting autonomy merely because it can be given to a child born with disabilities to sue her.

The pregnant woman's autonomy is a self-imposed restriction because of her decision to become pregnant.96 The decision to “host” the beginnings of a human being within her is far-reaching and significant and holds restrictions for which she must be responsible and of which she must be aware. We require a standard of care to be set for every pregnant woman in the live stage of a pregnancy, the stage at which she is already aware of a fetus within her. She should be expected, at this stage at the very least, to refrain from smoking, imbibing alcohol and taking drugs. She should be expected to stop taking medicines that may harm the fetus. We maintain that at the live stage the

97 pregnant woman should be given a test of a reasonable person. I remain convinced97 that parents and children are not one and the same, and that children should be considered as a different person from its parents and their status and rights should be assessed separately.98

It is legitimate to expect that the family will provide the child with a good life on a reasonable level and protect it, but every family undergoes crises and a pregnancy is a stressful time for the family. Such a situation can lead to different results that are the opposite of what is expected for protection for the fetus. First and foremost, a woman is a person. There is differences between people, and the woman's growth rate also influences her conduct during the pregnancy and afterwards. The family should not always and under any conditions be considered an ideal family and to sneer when a child takes legal action for damages against his mother. Literature describes a number of

1. For a discussion of the pregnant woman's autonomy vs. the obvious required restrictions for keeping the fetus healthy, see Judith Kahn, *Of Woman's First Disobedience: Forsaking a Duty of Care to Her Fetus--Is This a Mother's Crime*, 53 BROOK. L. REV. 807 (1987); Pamala Harris, *Compelled Medical Treatment of Pregnant Women: The Balancing of Maternal and Fetal Rights*, 49 CLEV. ST. L. REV. 133 (2001); Michael Ulrich, *With Child, without Rights: Restoring a Pregnant Woman's Right to Refuse Medical Treatment through the HIV Lens*, 24 YALE J.L. & FEMINISM 303 (2012).
2. Lifshitz-Aviram, *supra* note [31.](#bookmark42) For a discussion of the problematic method to receive an informed consent by minor for medical treatment, see also Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53(6) CHILD DEVELOPMENT 1589 (1982); Committee on Bioethics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, 95(2) PEDIATRICS 314 (1995),

[http://pediatrics.aappublications.Org/content/pediatrics/95/2/314.full.pdf](http://pediatrics.aappublications.org/content/pediatrics/95/2/314.full.pdf); Lawrence Schlam & Joseph P. Wood, *Informed Consent to the Medical Treatment of Minors: Law and Practice*, 10 HEALTH MATRIX 141 (2000).

1. Lifshitz-Aviram, *supra* not[e 31](#bookmark42), at 233.

cases where parents' judgement is faulty when it comes to their children, and specifically the love-hate relationship that exists in the family.[[275]](#footnote-275) I will conclude, therefore, that because the woman has a moral and legal obligation towards the live fetus within her, legal action can be taken against her in any event, both in the civil courts (torts) and in the criminal courts.

Chapter Five - Eugenics: In Sorrow(?) You Shall Not
Bring Forth Boys and Girls

This chapter relates to the dangers inherent in eugenics, some of which are actually relevant nowadays. “Eugenics” is composed of two Greek words: GENES (to be born) and EU (good or fitting), i.e. improved offspring. The case setting out the rights of a live fetus would be incomplete if I do not deal with the danger we face here - eugenics would eventually lead to the elimination of those considered “unfit”, “retarded”, “defective” and the like.[[276]](#footnote-276)

Initiating the termination of pregnancies in general, and at the viable stage in particular, out of fear of giving birth to a defective child, raises an ethical and social issue regarding exercise of control over the next generation - the choice of what “type” of people we want in society, and not necessarily choosing to prevent suffering. Meira Weiss[[277]](#footnote-277) maintains that the “genetic panic” in Israeli society is an expression of a collective ideal that worships a body that is healthy, strong, in good shape and perfect.

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Yael Hashiloni-Dolev[[278]](#footnote-278) has a different opinion: she attempts to explain the differences in attitude between Israel (where opposition to fetal selection and genetic intervention in the next generation is minimal) and other western countries (where opposition is strong). She claims that the reason is based on the difference between the status accorded to the fetus in Israel compared to western countries: in Israel the fetus is considered part of the woman's body whereas in western societies - mainly according to Christian-Catholic precepts - it is considered a living being, autonomous, with equal human rights. For many years now there has been almost a world-wide consensus that humanity cannot preserve itself without limiting the birthrate.

Over the years the move to achieve this aim has been by means of enforced sterilization, government-approved abortion and the dilution of weaker populations in a cruel way. Is this equality? The intention behind the growing number of medical tests nowadays is no doubt to ensure not only the birth of a healthy child but also a perfect one, thus limiting the birthrate of imperfect individuals according to existing standards set by society.

Over twenty five years ago, David Heyd used the term “Genethics” to describe “the problems inherent in the ethics of creating human beings, determining their number and identity”,[[279]](#footnote-279) because they deal with behavior towards as-yet unborn human beings rather than those who have already been born. According to Heyd, modern medical technologies that enable the early discovery of genetic diseases and prevent the birth of babies carrying these diseases give rise to ethical dilemmas regarding the type of life we desire for the child. The growing number of prenatal tests is testament to the woman's desire to create life only if it has a certain “threshold” value. He maintains that it will not be long before society can positively design the characteristics of the newborn with genetic engineering to choose those characteristics they want, and not just to prevent the birth of babies with defects. This seems a possibility in the not-too-distant future and to contemplate it is terrifying. Is society taking giant steps to initiate cloning too, as described in Aldous Huxley's book “Brave New World”?![[280]](#footnote-280)

Another book entitled “Who Should Play God?”[[281]](#footnote-281) opens with the following dedication: “To Aldous Huxley, for his foresight”. Some of the events predicted in Huxley's book from 1932 have transpired. I am sure that what we consider today to be science fiction will more than likely transpire as well.

The origin of eugenics is rooted in a biological-social philosophy dealing with research into the effect of genetics on the mental and behavioral characteristics of human beings, the aim being to find a way to “enhance” humankind.[[282]](#footnote-282) Sir Francis Galton, a British scientist, coined the term “Eugenics” in 1883[[283]](#footnote-283) when he adopted genetic methods in order to improve humankind. He claimed that characteristics such as mental weakness are genetic and typical of people of low social status, and his intention was to enhance the human race by preventing certain genetic states. He spoke of positive eugenics that meant to encourage the birth of newborns with what were considered as positive character traits with the aim to “promote” successful populations.[[284]](#footnote-284) On the other hand, the intention of negative eugenics is to prevent the increase of problematic populations, among others, by sterilizing people considered to have negative characteristics, and in other cases by killing the sick and disabled.

At the beginning of the 1920s, centers for eugenics research were established and functioned successfully in Europe and the US. The first centers began functioning in 1904 in Germany and, later on, even in England. During the 1920s and 1930s tens of thousands of mentally defective people from Sweden were sterilized as a result of this perception; the most extensive network was organized in the US. The large waves of immigration from Europe before and after World War I to the US were a cause for concern that there would be a change in the demographic makeup of the country. So a Eugenics Record Office was established which employed people from the fields of medicine, law and the like.

The office gathered data about the immigrants and ran campaigns to increase awareness about “racial responsibility” that also included avoiding intermarriage. Then immigrants from Eastern Europe were prevented from entering the US, and the psychologist Henry Goddard coined the word “moron”, meaning a person who is “infected” with “defective gene”. This state of affairs reached such a stage that when Indira Gandhi asked President Johnson for humanitarian aid in 1966, he made it conditional on establishing a quota for the birthrate. In order to manage this, the Indians offered money to anyone willing to refrain from giving birth, and this resulted in the sterilization of three million Indians in 1973. Under the regime of Gandhi's son Sanjay, receiving land, water, electricity, food coupons, etc. was conditional upon sterilization.

In Mumbai in 1952 the third international congress for family planning was held where birth-control pioneer Margaret Sanger, together with Elisa Austen-Janssen from Sweden and Lady Rama Rau from India established the large umbrella organization for family planning, known as the International Planned Parenthood Federation. Today some 149 non-profit organizations are active under its auspices in 189 countries.

According to estimates, one quarter of Indian women of reproductive age underwent sterilization between 1966 and 1977, the majority without their consent and some even without their knowledge, in hospitals under the Indian health service.[[285]](#footnote-285) About one-third of all Puerto Rican women underwent sterilization up till 1975 in that country. Similar to population control within the US, in other countries too there was a drive to reduce the birth rate among the weaker populations. The Hindus in India tried to prevent the birth of Muslims and the unclean; the Singhalese in Sri Lanka tried to prevent the birth of Tamils; the Spaniards in Peru wanted to prevent the birth of the Incas; the Serbs in Kosovo attempted to prevent the birth of Albanians, and so on.

It was on the basis of eugenics that the Nazi concept emerged too.[[286]](#footnote-286) In 1933, shortly after Hitler's rise to power, legislation was passed that prohibited termination of pregnancy in general but that made it compulsory to undergo sterilization and termination of pregnancy on the basis of eugenics. Sterilization was forced upon people with genetic diseases such as mental illness, learning disabilities, physical deformities, epilepsy, blindness, deafness and alcoholism. The Nazis began to implement their plan of euthanasia during the years 1939-1941 and called it T-4. At first some 500 babies were put to death by injection of luminal or morphine, and tests were then carried out on their brains. By 1941 more than 79,000 people with mental illnesses had been put to death in six extermination camps in the gas chambers, and by November 1942 some 90,000 had been starved to death, and more than 300,000 people had undergone sterilization.[[287]](#footnote-287) Yael Hashiloni-Dolev[[288]](#footnote-288) writes that the Nazi state forced motherhood on Aryan women under the eugenics plan known as Lebensborn, initiated by Heinrich Himmler. According to this plan, women of upper-class status were imprisoned in a mating farm and forced to copulate with SS officers in order to produce a special generation.

This project involved the copulation of SS officers with women with characteristics that were Aryan, German or Scandinavian, the aim being to create a titanic generation. The relevant babies were born to mothers who were held in the Lebensborn mating farm. Others who answered to the racial criteria were simply snatched from their parents by a special military unit under the auspices of the eugenics project.

Between 1939 and 1941 more than 100,000 people had been put to death under this plan, the majority of them inmates in institutions.[[289]](#footnote-289) In 2008 a book written by Matthew Connelly was published in which an attempt was made to rewrite the story of “The Movement for Population Control” which was a broad coalition that included both activists for human rights and racial quality resulting from newly-opened government archives the world over. In 1942 the Planned Parenthood Federation was established to enable all those adhering strictly to the belief that accelerating human procreation of the lower classes leads to racial degeneration, to break away from the Nazis.

Today, the American Federation for Planned Parenthood extends to more than 820 clinics with an annual budget of one billion dollars, and it is at these clinics that the majority of abortions are carried out in the US.[[290]](#footnote-290) Although the original aims of the eugenics concept were positive, i.e. preventing suffering and improving the human race, its interpretation by the Nazis turned it into a concept to be avoided at all costs. However, other approaches exist today that attempt to revert the concept to its original positive significance.

The Jewish psychiatrists that came from Germany to Israel in the 1930s brought with them the eugenics theory and used difficult treatments - electric shock, insulin injections and lobotomy.[[291]](#footnote-291) In 1944 a psychiatrist by the name of Kurt Levenstein delivered a lecture at a conference held by the Association of Neurologists in Tel Aviv, in which he recommended preventing people suffering from various psychological and neurological disorders - from alcoholism to mania depression and epilepsy - from giving birth to children. He suggested doing this, among other methods, by preventing pregnancy, termination of pregnancy, and sterilization. Levenstein was no exception.

For the sake of balance, I will bring the opinion of Aviad Raz[[292]](#footnote-292) who describes a change in the perception of the eugenics concept to one that is utopian and liberal, which actually emphasizes its advantages nowadays. Liberal eugenics expand the birthing freedom of every woman because they allow her to decide the fate of the fetus.[[293]](#footnote-293) Even if termination of pregnancy is permitted because of defects and severe illnesses that cause a great deal of suffering, minor defects - shortsightedness, deafness or obesity - are reasons that are not good enough to terminate a pregnancy.

It is here that my opinion differs. With the development of human abilities and the advancement of the human genome, we will see progress in genetic science.[[294]](#footnote-294) When mapping of the human genome is complete we will be able in the future to see more and more personality traits, behavioral indications, as well as to foresee severe illnesses. According to the standpoint of liberal eugenics, the woman will be able to choose whether to terminate her pregnancy according to genetic potential even if this is uncertain yet probable, and the trend towards eugenics will become increasingly popular.

I find it unacceptable that the present legal situation allows for the woman to initiate a termination of pregnancy, whether the fetus has a defect or concerning the fetus in general, even at the live fetal stage. I find it unacceptable that a woman can choose whether to give birth to a child with specific characteristics. Pre-birth genetic intervention is not the same as intervening in the raising of a child after birth. The woman's choice and the fertility revolution - that enable her to decide when, how many and with whom she wants to reproduce - must be limited because of the right of the live fetus to be born, even with a disability that will not become a serious disease. In my opinion, the woman's right to choose does not include choosing a fetus according to her tastes, preference, her attitude in regard to a life worth living, her religion, sexual preference, etc.

Choosing fetal characteristics is, more than anything, an expression of an extremist society in which humans are “manufactured”. It won't be long before humans will be created by IVF and not means of sexual relations; it won't be long before characteristics that appear to be negative from a preimplantation genetic diagnosis test (PGD) will be rejected for every fetus and not specifically per fetus, as is the situation

today. A futuristic society of this kind is frightening, cold, mechanized.[[295]](#footnote-295) Genetic diagnostics and fetal selection are terms generally ascribed to sinister regimes, that turn the child into a “commodity”.[[296]](#footnote-296)

Chapter Six - Is There an Answer?

Chapter One: Introduction

In this book I venture to claim that the rights of a live fetus should be considered almost the same as “one that is born”. In her book Alessandra Piontelli[[297]](#footnote-297) quotes Freud[[298]](#footnote-298): “There is much more continuity between intra-uterine life and earliest infancy than the impressive caesura[[299]](#footnote-299) of the act of birth would have us believe.”[[300]](#footnote-300) The editor of the book noted that Piontelli observed fetuses in the wombs of their mothers using 3-dimensional ultrasound scans, and followed up their development at home from birth up to the age of four years. Her main finding is that there is a remarkable continuity of behavior before and after birth, and that every fetus - just like every human being - is unique.[[301]](#footnote-301) The book is controversial and is liable to raise a number of questions, although other testimonies confirm this viewpoint.

A National Geographic program aired in 2005 showed some amazing footage of the journey of the human fetus from the moment of conception until birth. The film was taken from the aspect of the fetus and focused on the development of its primary senses during the course of the pregnancy. The film, made with advanced photography technology and using four-dimensional ultrasound, showed the behavior of the fetus inside the womb. In the 32nd week the fetus is already fully developed. From this stage onwards, during deep sleep, its eye movements are similar to those of an adult; it wakes up as a result of touch or a shout; it makes characteristic and unique movements; it reacts to sounds; he feels pain (during amniocentesis or a blood test from the skull he reacts with a jolt from the prick of the needle); his behavior changes according to the stimuli.

In the previous chapters I discussed the importance society places on both regular prenatal checkups and prenatal diagnosis. I tried to show that society wants perfect human beings and not necessarily healthy humans, and this distorted perception of the desire for a “perfect child” is the reason for the increasing number of prenatal diagnoses, with tests and close follow-up prior to the birth. I have attempted to show that this perception turns the medical system into “defensive medical care” and harms the principle of “the sanctity of life”, which is part of the Jewish perception. I spoke of the precept of eugenics, that encourages “selection” of fetuses and rejects people that are disabled, even rejecting fetuses with disabilities, whatever the stage of the pregnancy. Eugenic perceptions did not exist only in repressive regimes. As we pointed out, they began in the United States, but also began to appear in other states. It is very dangerous to reawaken these perceptions nowadays society.

Is there a definitive answer? Can the written law provide a solution? I cannot claim to offer an outright solution; the answer is in a proper balance, a dialogue about rights on a legal, moral,[[302]](#footnote-302) ethical[[303]](#footnote-303) and philosophical level that recognizes that a fetus of 24 weeks onwards is almost a person with almost exactly the same rights as those of a human being.[[304]](#footnote-304) Determining that the viable fetus is a beginning of a person would keep a balance between his rights and the autonomous rights of the woman, in a way that situations will arise where his rights will override her rights.[[305]](#footnote-305) These rights of his will enable the state to prevent the fetus from being destroyed at the viable stage if there is no high probability of a serious defect; they will enable the state to force the woman to treat the fetus during the pregnancy to prevent the defect or to heal it and enable it to be born, as long as long as continuing the pregnancy does not put the woman in danger. These rights will allow the state to enforce a C-section if the fetus' life is at risk as long as the surgery does not put her life at risk.

Chapter Two: Voluntary Termination of Pregnancy at the Viable Stage: Destroying the Fetus

The consequences of terminating a pregnancy at the viable stage are far-reaching: essentially it means giving birth to a viable fetus that is no longer alive.[[306]](#footnote-306) Destroying a fetus is carried out by inserting a long needle through the wall of the abdomen and the uterine wall until it reaches the amniotic fluid sac. The needle penetrates the chest wall of the fetus, and potassium chloride (KCI) is injected into its heart causing it to stop beating, thereby killing it, and at the end of this procedure, an enforced birth is performed and the “contents” are expelled by means of medication. This is why western countries absolutely prohibit this or subject them to severe restrictions?? Israeli law even bans it if it is not carried out according to the procedure stipulated by law: according to penal law, the committee for termination of pregnancy can authorize or reject a request for a termination of pregnancy according to its discretion and under the terms specified under law. The guidelines for using discretion of this nature were set out in the Director General's Circulars.[[307]](#footnote-307)

According to the Israeli law, a woman who wants to terminate a pregnancy must get permission to do so from the relevant pregnancy committee that makes decisions according to law, and the termination of the pregnancy must be carried out in a recognized medical institution and after having given informed consent. It should be noted that the father of the fetus has no rights to appear before the committee for termination of pregnancies and has no status on the committee, and therefore his consent to terminate the pregnancy is not required; it should also be mentioned that a minor can terminate a pregnancy even without parental permission.[[308]](#footnote-308)

Terminating a pregnancy that is not at the viable stage, i.e. up to 24 weeks, will be authorized if the regular committee for termination of pregnancies allows it or if based on a uterine ultrasound that will confirm the stage of the pregnancy under certain circumstances: if the committee is convinced that the mental or physical health of the fetus is at stake; if the mental or physical health of the woman is at stake; if the woman is younger than 18 or older than 40; if the fetus was produced as a result of an extramarital relationship or rape or incest. In the past committees for the termination of pregnancies were permitted to consider the woman's difficult financial situation as a reason to terminate the pregnancy; it was known as “the social clause” and has been erased over the years owing to pressure by the orthodox political parties.

Terminating a pregnancy at the viable stage, from the 24th week onwards, is permitted if authorized by the special committee, known as the Termination of Pregnancy Committee at the Viable Stage[[309]](#footnote-309),[[310]](#footnote-310). A committee such as this is composed of five members, among them a specialist in gynaecology and obstetrics, a senior social worker and a director of a genetic institute, and other specialists may be consulted. The committee's authorization is valid for two weeks only, and all discussions must be documented. For the committee to authorize a termination of pregnancy at the viable stage the members have to be convinced that the fetus will have at least a 30% chance of having a moderate to serious defect, described below.

The guidelines in the Director General's Circular are compatible with the approach accepted worldwide, according to which the more advanced the pregnancy the more serious the physical abnormality expected to be found in the newborn, and at least a significant probability of 30% of the existence of said abnormality, in order to justify terminating a pregnancy at the viable stage. The circular states in absolute terms that the said instruction is set out in guidelines only and that they do not hold the authority to restrict the discretion of the committee members.

The circular establishes that “a suspected physical or psychological defect should be considered according to criteria that test the functioning of the physical and/or developmental limitation, after receiving medical treatment The following are the

criteria for assessing the serious nature of the defect: **mild handicap, moderate handicap** and **severe handicap**. The committee's decision should be influenced by the severity of the defect, according to the standard set by experts.14 [[311]](#footnote-311) A **mild handicap** is described as a physical or developmental handicap the severity of which does not impair the ability to blend in with society or the need to be dependent on others; a **moderate handicap** is described as a physical or developmental handicap that will impair the ability to blend in with society, but the level of severity does not necessarily require lifelong dependence on others; a **severe handicap** is described as a physical or developmental handicap the severity of which needs lifelong help by others.

A **moderate handicap** is described as a handicap the severity of which does not require lifelong dependence on others, like a severe handicap. In other words, a moderate handicap means that the person has mobility, and is able to create a meaningful life for himself both on a mental and emotional level. For example, there is a heart or lung defect which allows for a reasonable quality of life and life expectancy but restricts the options for physical effort; a defect in the digestive tract that prevents ingestion of certain foods.[[312]](#footnote-312)

A **mild handicap** is described as a defect in a fetus whose mental and emotional development is expected to be completely normal; a minimal physical handicap that is usually a skeletal defect or deformation such as missing a hand, a shorter thigh bone, clubfoot, a cosmetic defect in the makeup of the face such as cleft lip,[[313]](#footnote-313) asymmetry or distortion of the shape of the ear, etc. These are defects that involve discomfort and limited functioning, but not enough to significantly affect the quality of life and ability of the person born with these defects to live an independent life and blend in with society. According to the Director General's Circular permission should not be granted for a termination of pregnancy because of a mild functional handicap.

It should be noted that according to the Director General's Circular, the expression “requires lifelong help of others” as part of the description of “**a severe handicap**” means total lifelong dependence on a physical level (e.g. help in getting dressed, eating, etc.), or a mental or emotional handicap (e.g. a lack of ability to function and exist independently). Examples such as these include structural abnormalities in the brain, blindness, missing both hands, and genetic syndromes related to a significant developmental disorder. According to this perception, “[...] we stand before a dam that is about to burst and lead to an uncontrolled surge in the number of termination of pregnancies and an unnecessary excess of pregnancy tests, something that will harm the foundations of medical practice and we, as doctors, are morally obliged to preserve the sanctity of life”.

I am convinced though, that the above clinical guidelines that set a standard of functional disability (physical, psychological and mental) at a rate of 30% cannot be implemented, and that an assessment of disability cannot be predicted in most cases. If my hypothesis is correct, these clinical guidelines can only help prevent a termination of pregnancy at the viable stage and they don't add anything to the previous guidelines.

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This hypothesis is confirmed by an important research published in 2014[[314]](#footnote-314) by Amir Aviram on the subject of the rate of late termination of pregnancy (LTOP), the findings of which state that the rate of planned LTOP did not change to any degree following the publication of the Director General's Circular with the new guidelines.

Israel is the leading country in the world in everything concerned with pregnancy tests to detect fetal defects, as noted in the chapter describing the different available tests. Some tests are invasive, some are not; some may harm the woman and some may even harm the fetus (such as radiation to the fetus from a CT scan to diagnose minor flaws in the vertebrae or bones); some provide the woman with conclusive information and others provide her with statistical data. In any event, it is not yet possible to make a prognosis of every possible defect, be it minor or major, according to the expectations of the pregnant woman, but present tests are enough to cause termination of pregnancy of fetuses with a high probability of a healthy birth and a life of significance.

David Head writes in the book “Ethics and Medicine”[[315]](#footnote-315):

Prometheus stole fire from the gods and gave it to man. His great sin in this act was the sin of pride, hubris. The audacious pretension of knowledge that crosses the lines of what is permitted, the attempt to compete with the powers of the gods, constituted the crime for which Prometheus was sentenced to endless suffering by Nemesis, the goddess of vengeance. According to one of the accepted interpretations of the story of Prometheus, man's hubris embeds with it the seed of punishment: the actual digging for knowledge and the power attached thereto takes its revenge on the prideful person. The social philosopher Ivan Illich perceives that this myth of Prometheus is a powerfully symbolic expression of the history of modern medicine. Medicine expresses man's boastful pretensions to achieve divine control by overcoming man's morbidity, and at the same time containing the punishment for these pretensions. According to Illich Nemesis is clothed in a doctor's white coat and hence the name of his book “Medical Nemesis”.[[316]](#footnote-316)

Nemesis wears the doctor's white coat and the coat, or cloak, of modern society too in this book. By an overabundance of tests, establishing defects and morbidity, genetic mapping - modern society and medicine decide which fetuses will live and which will not. With the thrust of the decision of a special committee and with a slight touch on the lawmaker's trigger the sin of hubris is given free rein,[[317]](#footnote-317) which is evident in the liberal view of deciding who will live and who will die in modern society. This decision is enabled owing to the excessive number of tests during the pregnancy and allowing the woman to decide to terminate the pregnancy also at the stage when the fetus is “almost a person” or “at the beginning of life”.

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David Head[[318]](#footnote-318) [[319]](#footnote-319) noted that more than a decade ago, during the course of an argument concerning terminating pregnancies, a question was put to the liberals who allow termination of pregnancy at any stage, whether they would allow these abortions if the pregnancy were taking place in a transparent womb. The question arose from the assumption that if those in favor of termination of pregnancy at any stage were to actually see the fetus (obviously a viable fetus), they would not reject its status and rights as a person and would not authorize its destruction. As mentioned above, the fetus can be monitored in its mother's womb during the course of the pregnancy by means of ultrasound and it can be seen in various states: asleep, moving, sucking its fingers.[[320]](#footnote-320) Is this not a sort of “substitute” for the imaginary transparency suggested above? Is termination of pregnancy at the viable stage not a typical expression of the sin of hubris?

The complete opposite is argued by the feminist viewpoint according to which “the legal system methodically and systematically harms the intrinsic right of women to life, personal protection and body integrity”.[[321]](#footnote-321) This argument emanated from an attitude according to which the right of a woman to control her own fertility is an important and basic aspect of the right of a woman over her own body.[[322]](#footnote-322) Orit Kamir[[323]](#footnote-323) raised the issues that arise from this control over fertility:

The woman has a right to behave during her pregnancy in a way that endangers the fetus; is she justified to behave this way in the context of her freedom of action and her rights over her own body, or are her obligations to the fetus, or to society, to be careful to minimize as much as possible any danger to the fetus? For example, should a woman who drinks alcohol, smokes cigarettes or takes drugs during her pregnancy, be exposed to a claim - by the newborn or by society for danger to the fetus in her womb?

Orit Kamir considers the right to terminate a pregnancy as a fundamental aspect of the right to control fertility. In contrast, on the subject of controlled fertility I see the main right of the woman only as the right not to conceive. Orit Kamir is of the opinion that “the feminist struggle focuses on the woman's freedom of choice and her right over her own body”.[[324]](#footnote-324) I don't disagree with this perception as long as it doesn't refer to the rights of another human being, so I believe that a viable fetus is a person, and I maintain 28 that it has rights based on the sanctity of life and the prohibition of murder.[[325]](#footnote-325)

We have seen that there is an ongoing lack of tolerance towards people with disabilities or people who are “imperfect”. A society that considers a fetus with handicaps as one that should be destroyed is a society that considers a handicapped person as one whose life is less valuable because of his handicap. To decide that it is preferable for a handicapped fetus to die rather than live with its handicaps leads to the real danger of a slippery slope. I maintain that people with disabilities are citizens with rights and a status that should be respected by society from the moment the defect is discovered, while still in the fetal stage, and not only from the moment of birth. The improvements in technological advancement should not lead to distorted ethical philosophies that have turned Israel into a world record holder in regular prenatal tests and prenatal diagnosis for pregnant women.[[326]](#footnote-326) Some of these tests are presented herewith:

Diagnosis of genetic diseases, non-invasive techniques to assess the state of the fetus in utero during the different stages of pregnancy, and even invasive procedures to assess the state of the fetus in utero, such as Chorionic Villus Sampling; VS, Cordocentesis, fetal biopsy, fetal liver tissue biopsy, fetal muscle tissue biopsy. In the previous chapters I have presented data regarding ultrasound imaging in pregnant women to detect fetal defects, discover congenital heart defects, confirming the length of the pregnancy, identifying multifetal pregnancies, and discovering intrauterine growth retardation.[[327]](#footnote-327)

The aim of all these tests, and especially ultrasound scans, is to discover defects in all body systems including the skull and different parts of the brain, the face and neck area, the spine, the chest, the digestive tract, the sexual and renal systems, the heart and blood vessels, the abdominal wall, the skeleton and limbs. However, early discovery of defects while the fetus is still in vitro has been a blessing in that it can prevent what could be prolonged and severe suffering by the newborn and his family. On the other hand, early detection of defects can lead to difficult legal and ethical issues that have no solution as yet: do the parents have a moral right to decide to have an abortion, i.e. to end the life of the fetus that is developing in the womb? How serious is the defect that justifies terminating a pregnancy and who decides for all the parents and doctors or a special committee set up by society for this purpose - what week of pregnancy is the latest when it is justified to terminate a pregnancy.

Improved technology must help the fetus to be born from the point of view of its life, health and rights as the top prerogatives. Differentiating between disabilities is a problematic distinction that does not make an unequivocal differentiation between disabilities (even though they have been defined in percentages, dependence and quality of life).

Instead of performing a “selection” of fetuses, a social and legal system should set up to support people who suffer from handicaps, both financially and ethically. A society that knows how to respect people who are different is one that is tolerant, ethical, moral and more worthy. Ongoing medical technology is quickly becoming more advanced than the ability of society to formulate moral and ethical approaches relating to the data it provides us. When it comes to creating life, this gap has an almost frightening significance of “the Golem who overcame his creator”. Prenatal genetic

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diagnosis[[328]](#footnote-328) - that is often the ability for statistical prediction - is becoming more and more prevalent as we speak.

The ability for genetic prediction also includes uncertainty regarding findings and even information about illnesses for which a cure may be found in the future. Defensive medicine will take the attitude that calls for the destruction of fetuses that have a statistical chance or uncertainty regarding a defect or a specific illness even in the distant future. As I will show, evidence shows from the data at our disposal that the committees for termination of pregnancy almost always agree - including the special committees for termination of pregnancies in the viable stage - to any request to initiate a termination of pregnancy at any stage of the pregnancy, under the “cover” of punitive law that does not limit the stage of pregnancy - the developmental stage of the fetus - at which an abortion can be carried out.

In the Israeli *Hammer v. Amit* 32 case, Justice Rivlin said:

Quantification of the damage of a person with disability - in comparison to the possibility that he would not have been born at all or in comparison to a person with no disability - is itself a violation of the value of his life and of the presumption, which is not to be negated, that the value of the lives of people with disabilities is absolute, and not relative [...] the very decision that there are situations in which it would have been better for a person not to have been born since he has a defect contains a problematic societal-moral statement which contradicts fundamental values of society regarding human dignity and the sanctity of life.33

He continued:34

Indeed, naturally the point of view of the parents usually changes after the birth of their child. Naturally, once their child has been born, his parents love him. The disability only intensifies the love. Nonetheless, they are often capable - and the court too is capable - of separating their present love for their child from their sincere statement that if they would have been given the choice in advance, before their child was born and became a person, they would have chosen not to bring into the world a child with disability like his.

I maintain that we should see into the future in both senses of the word. Terminating a pregnancy because of the fetus's future handicap that does not involve a serious defect, is a prime example of not seeing into the future in any respect.

Some scholars are of the opinion that there should be no discussion about the rights of a non-existent being.35 This is an approach that I think can lead to the danger of the slippery slope (i.e. destroying a fetus at the viable stage for any reason other than

1. CA 1326/07 *Hammer v. Amit* (28.5.2012), versa.cardozo.yu.edu/sites/default/files/upload/opinions/Hammer%20v.%20Amit.pdf. For a discussion of this land mark verdict, see Paola Frati et al., *Preimplantation and Prenatal Diagnosis, Wrongful Birth and Wrongful Life: A Global View of Bioethical and Legal Controversies*, 23(3) HUMAN REPRODUCTION UPDATE 338 (2017); Barbara Pfeffer Billauer, *Abortion, Moral Law, and the First Amendment: The Conflict between Fetal Rights & Freedom of Religion*, 23 WM. & MARY J. WOMEN & L. 271, 285 n.70 (2017).
2. *Hammer v. Amit*, ibid, at para. 27, 8 of Justice Rivlin's ruling.
3. *Hammer v. Amit*, *supra* no[te 32](#bookmark64), at para.38 of Justice Rivlin's ruling.
4. For this issue of the Non-Identity problem, see I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187, 1131 n.48 (2011-12); ibid, *Beyond Best Interests*, 96 MINN. L. REV. 1187 (2011-12); Margalit, *supra* not[e 21](#bookmark62), at 121 n.82, 249 n.257.

being a result of incest, endangering the life of the mother or the fetus, or a defect that will prevent the newborn from living a life with dignity). This is a danger that must be prevented. A fetus is a being that does exist, even if its existence is minimal. It has its own identity and interests, and at the viable stage these interests might be contradictory to those?? of the woman who became pregnant with it. I have shown above that even Israeli legislation considers the fetus as a being with rights for certain needs.

In the 15th Israeli parliament (*Knesset*) some members' proposed a bill of law for the definition of a person/human being (amendment of a law) 2000.[[329]](#footnote-329) In section 1 of the bill of law it says:

Amendment of Interpretation Law.

In the Interpretation Law of 1981, in section 4 after “when relating to a human being” add “including a human creature, a fetus from the day it is created”.

In section 2 of the bill of law it says:

In penal law, 1977, instead of section 308, add: “A person from when [...] FOR this act - from the day the fetus is created it is considered a person”.

In the note to the bill it states that drafting the competence law, according to which a person is competent to hold rights and liabilities from birth till death, does not imply that the fetus - the “potential” person - lacks rights. Further note indicates that the said legal wording does not detract from the possibility that the fetus is a person, yet the law attached the validity of its rights and liabilities to a defined period of time, in other words: from the end of the birth until its dying day. Because the law does not define “the end of the birth”, it is open to interpretation. In the clarifications, different dictionary definitions are brought for the term “fetus” in its different states of development, the definition of a fetus as an organism - among others. Based on all these definitions, the drafters of this bill came to the conclusion according to which “when relating today to the law of human rights, the fetus should also be taken into consideration. One can venture to claim that a fetus is a person”. The bill was not passed and I am of the opinion that today attempts should be made to redraft it. Today, with progress in different fields such as genetics, genomics, and maternal-fetal medicine, the status of the fetus should be redefined by legislation, at least at the viable stage.

Pregnancy monitoring is carried out nowadays by various parties such as the Ministry of Health, the National Council for Gynaecology, Neonatology and Genetics, all of whom indicate the importance of the health of the fetus and its medical state. Court legislations indicate a complex legal practice where there is no match between the medical attitude to the fetus and the legal attitude to it. Doctors treating pregnant women are exposed to lawsuits for damages according to the high rate determined by the ruling concerning the obligation of a physician to notify a pregnant woman and a 37

gamut of endless options for means to discover the state of the fetus.[[330]](#footnote-330) The legal world expresses its attitude of concern for the health of the fetus. Now is the time, for the sake of equipoise, that even the legislature should have a say in regard to the legal “state” of the viable fetus, in other words, its legal “status”.

Nowadays, some 20 years after the bill, I venture to stand up and say that a viable fetus is the beginnings of a human being and has rights, even if evidence exists regarding the handicaps or disabilities described above. The legislature should “venture” to provide him with rights according to law, and it is not enough for there to be a ruling stating that there is no longer a cause because of wrongful life.[[331]](#footnote-331) The state must intervene unequivocally in the woman's autonomy over her body when the fetus is viable, and prevent terminations of pregnancy by means of amending the penal law. Ahuva Ticho[[332]](#footnote-332) referred to the case of *Hammer v. Amit* that states that the committee's decision to terminate a pregnancy should be the basis to a *prima facie* presumption regarding the position taken by the parents on the termination of the pregnancy, and that “a logical probability correlation is required between the considerations brought by the committee in their decision and the considerations by which the parents are guided, a place in which they ask to receive permission to terminate a pregnancy”.40

In Yael Hashiloni Dolev's41 research on the history of the policy of terminations of pregnancy in Israel, she notes that in contrast to Germany, Israel takes a liberal position and the very high number of requests to terminate pregnancy is authorized.

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Yonatan Davis presented data from the Israeli Ministry of Health42 that show, according to him, that the rate of termination of pregnancies is actually lower in Israel compared with most European countries. As mentioned, data from the Israeli Central Bureau of Statistics show that in 2010, 99.1% of the requests to terminate a pregnancy were authorized43 and data from 2011 and 2012 were similar.44

Amir Aviram45 et al.46 actually confirm the supposition that no change was made in the committee's decisions to authorize terminations of pregnancy at the viable stage following the publication in 2007 of the Director General's Circular. Where we are concerned, it is interesting to note that as the pregnancy progresses, the more

1. *Ibid*, p. 30; *Hammer v. Amit*, *supra* not[e 32,](#bookmark64) at para. 32 of Justice Rivlin's judgment. Regarding parental capability and relating to a child with a defect, see above pp. ][; *see also* Lifshitz-Aviram, *supra* n[ote 1](#bookmark60)2.

41 YAEL HASHILONI DOLEV, [A LIFE (UN) WORTHY OF LIVING: REPRODUCTIVE GENETICS IN ISRAEL AND](https://www.google.com/books?hl=iw&lr=&id=3UlIAAAAQBAJ&oi=fnd&pg=PR2&dq=%22Yael+Hashiloni+Dolev%22&ots=9beI8bP8n8&sig=MR0BG9GrlqaUHnimQedGZv-PNKQ) [GERMANY (](https://www.google.com/books?hl=iw&lr=&id=3UlIAAAAQBAJ&oi=fnd&pg=PR2&dq=%22Yael+Hashiloni+Dolev%22&ots=9beI8bP8n8&sig=MR0BG9GrlqaUHnimQedGZv-PNKQ)2007). For a discussion of this book, see, amongst others, Roy Gilbar, *Between Unconditional Acceptance and Responsibility: Should Family Ethics Limit the Scope of Reproductive Autonomy*, 21 CHILD & FAM. L. Q. 309, 321 n.64, 324 n.80 (2009); Silke Schicktanz et al., *The Cultural Context of End- of-Life Ethics: A Comparison of Germany and Israel*, 19 CAMBRIDGE Q. HEALTHCARE ETHICS 381, 381 n.3 (2010); Daphne Barak-Erez, *IVF Battles: Legal Categories and Comparative Tales*, 28 DUKE J. COMP. & INT'L L. 247, 250 n.5 (2018).

1. Yonatan Davis, *The Question of the Causal Connection in “Wrongful Birth” as a Consequence of the Hammer v. Amit Case*, MEDICINE AND LAW 54 (Special Issue, January 2015) (Heb.).
2. Central Bureau of Statistics “Terminations of Pregnancies” is available on the Bureau website: [www.cbs.gov.il/reader/cw\_usr\_view\_SHTML?ID=752](http://www.cbs.gov.il/reader/cw_usr_view_SHTML?ID=752).
3. In 2011 20,945 women requested to undergo a termination of pregnancy and 20,576 requests were granted. In 2012 21,689 women applied to the committee for termination of pregnancy and 20,063 of these requests were granted and the pregnancies terminated.
4. Doctor, Resident in Gynaecology, Gynaecology Dept. Schneider Hospital. Rabin Medical Center, Petach Tikva. For disclosure - my son.
5. Amir Aviram et al., 125 INT. J. GYNAECOL OBSTET. 141, 141-143 (2014). This research was discussed by [Ronit D. Leichtentritt](https://www.sciencedirect.com/science/article/abs/pii/S0277953616304981%23%21) & [Galia Weinberg-Kurnik,](https://www.sciencedirect.com/science/article/abs/pii/S0277953616304981%23%21) *No One Sees the Fathers: Israeli Fathers' Experience of Feticide*, 1[68 SOCIAL SCIENCE & MEDICIN](https://www.sciencedirect.com/science/journal/02779536)E 159 (2016).

authorizations were provided by the committee for termination of pregnancy based on the clause “Risk of Fetal Defect”, and even more during the last trimester of the pregnancy (from the 24th week onwards, the stage at which the fetus is viable), when 87.5% of requests were granted for this clause. Bilha Kahana mentioned that she did not find any data that differentiate between the regular committees that authorize termination of pregnancies at the pre-viable stage, until the 24th week, and the special committees, that authorize termination of pregnancies at the viable stage.[[333]](#footnote-333)

Some may contend that a woman has a constant right over her own body, at any stage, and my response would be that sometimes the rights must take second place to other rights for reasons of social balance and attaching weight to different values. From the time when the woman becomes pregnant and the pregnancy has reached a developmental stage at which the fetus can survive in another environment - it should be given rights that will sometimes override her rights. Some may say that the burden of bringing up a handicapped child will be carried by the woman so there should be a separation between theory and practice, and my response would be that it is here that the state must construct a system that will help to bring up the handicapped child and provide it with financial support.

When discussing the balance of the rights suggested between the woman's right over her own body and the rights of the viable fetus, even I accept that cases will arise which justify a termination of pregnancy even at the viable stage, but only from the point of “the best interests of the fetus”[[334]](#footnote-334) according to an objective evaluation. If the life expectancy of the fetus as a newborn is certain to be very short; if it is expected to live with very severe disabilities and endure endless suffering, to be severely mentally challenged or have a terminal illness - in cases such as these it should be already helped when it is still a fetus and the pregnancy should be terminated at any stage. In keeping with this viewpoint, I maintain that the same practice should be extended to people who are legally capable and who no longer wish to live.

In this matter I see no difference between human rights and the rights of a viable fetus. This is the appropriate balance between the rights. I maintain that legal acknowledgment of human value, sanctity of life and freedom49 and acknowledgment of the right of people with disabilities to equality50 must lead to a new medical, social and ethical discourse on the subject of the rights of the viable fetus. The above expresses very clearly the dilemma and thesis at the basis of this book. The real question is the weight to be attached to the interests of the fetus to be born, and to be born healthy, as against the interests of the woman whose task it will be to bring up a child with a handicap.51 Israeli legislation has already dealt with rights afforded the fetus and even though the father has no legal status in the decision to perform a termination of pregnancy, he still has the right to claim for damages from the person who caused the damage to the woman if there is proof of prenatal negligence.52

As we have seen, the aim of the Israeli Ministry of Health's Director General's

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Circular of 19.12.200753 was to rearrange the mandates of the committees for

1. Basic Law: Human Dignity and Freedom. For a discussion of this substantial law, see, e.g., Aharon Barak, *A Constitutional Revolution: Israel's Basic Laws*, 4 CONST. F. 83, 83-4 (1993); [Eyal Benvenisti,](https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=Eyal%20Benvenisti&eventCode=SE-AU) *The Influence of International Human Rights Law on the Israeli Legal System: Present and Future*, 28(1) ISRAEL LAW REVIEW 136 (1994); [David Kretzmer, *T*](https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=David%20Kretzmer&eventCode=SE-AU)*he New Basic Laws on Human Rights: A Mini­Revolution in Israeli Constitutional Law?*, 26(2) ISRAEL LAW REVIEW 238 (1992).
2. Law of Equal Rights for People with Disabilities. *See also* ANN FRYE, DISABLED AND OLDER PERSONS AND SUSTAINABLE URBAN MOBILITY: THEMATIC STUDY PREPARED FOR GLOBAL REPORT ON HUMAN Settlements 38 (2013), <https://unhabitat.org/wp->

[content/uploads/2013/06/GRHS.2013.Thematic.Disabled.and .Older .Persons.pd](https://unhabitat.org/wp-content/uploads/2013/06/GRHS.2013.Thematic.Disabled.and_.Older_.Persons.pdf)f; Edna Zafrir & Stan Nicolae Cristian, MORE THAN A RAMP: IS THE ACADEMY ACCESSIBLE? 340 (2018),

https ://[www.futureacademy.org.uk/files/images/upload/ERD2017F41.pdf](http://www.futureacademy.org.uk/files/images/upload/ERD2017F41.pdf).

1. Because the father has no legal status, and because nowadays there are s ingle -parent families, we are not dealing with a burden on the family unit but on the birth mother alone. According to the penal law and directives from the Israeli Ministry of Health the father of the fetus has no legal status in the eyes of the committee for termination of pregnancies and his informed consent is not required to terminate the pregnancy. *See* C.A. 413/80 Roe v. Doe, P.D. 35(3), 57, 95-6. For a discussion of this land mark ru lin g, see Daphna Hacker, *Single and Married Women in the Law of Israel - A Feminist Perspective,* 9 FEMINIST LEGAL STUDIES 29, 44 n. 23 (2001).
2. C.A. 754/05 Levi v. Share Zedek Hospital (2007) IsLR 2007, 131 (Heb.), was cited by CA 10085/08 Tnuva Central for the Marketing of Agricultural Produce in Israel v. Raabi Estate para. 54 (2011) , http ://versa.cardozo .yu.edu/sites/default/files/upload/opinions/Tnuva%20Central%20Cooperative%20v.% 20Raabi%20Estate.pdf.
3. The Israeli Director General's Circular (Termination of Pregnancy Committee at the Viable Stage)

works in conjunction with the Israeli Ministry of Health “Director General's Circular : Committee for Termination of Pregnancy at the Viable Stage” No. 23/07 (19.12.2007) (Heb.),

<https://www.health.gov.il/hozer/mr76_1994.pdf> details the Medical Services Circular 76/94 “Regional Committees for termination of pregnancy in pregnancies from 24 full weeks onward, i.e. 24/07 weeks as termination of pregnancy at the viable stage, including the structure of the committees, and also the establish a clinical guideline according to which a committee for termination of pregnancy can authorize a termination of pregnancy at the viable stage only when the probability of a fetal defect or functional disability is above the rate of 30%. However, often the level of the future handicap in practice cannot be foreseen.[[335]](#footnote-335) [[336]](#footnote-336) We have seen that prenatal follow-up can detect defects, but it is doubtful if statistical accuracy can be predicted regarding the functional ability of the fetus with its defect.

Often the doctors do not know whether the defect is actually applicable to a known syndrome or whether the defect is random.[[337]](#footnote-337) An ultrasound scan may raise suspicions of a genetic syndrome and lead to additional tests.[[338]](#footnote-338) One of the genetic tests in the Israeli medical basket recommended as a prenatal test is to detect the deafness gene. Should a fetus with this defect be sentenced to death? Prenatal genetic tests nowadays allow for the discovery of anomalies of the sex chromosomes that might cause sterility in the future. Should a fetus with this defect be sentenced to death? The Circular even tries to provide legal defense for the committee members who fulfill a legal function according to law.

According to the accepted opinion that was even ratified in the Director General's Circular, a fetus at the viable stage is a fetus from 24 weeks of pregnancy onwards.[[339]](#footnote-339) Yonatan Davis[[340]](#footnote-340) noted the difficulty found by the committee members to predict the percentage of functional handicap that the fetus will experience: “The clinical guidelines that stipulate a future level of 30% functional disability are inapplicable and said assessment cannot be predicted in most cases”. In spite of this, the special committees do authorize in practice on an annual basis terminations of pregnancy in the last trimester of the pregnancy.[[341]](#footnote-341) Hence the urgent and increasing need for a medical, social, ethical and moral discourse about everything connected to the termination of pregnancy of a viable fetus.[[342]](#footnote-342)

Chapter Three: The Right of the Fetus “Over its Own Body”: Can the Woman be Forced to have Medical Treatment for the Fetus, and Undergo a Caesarian Section without Informed Consent?

1. **Introduction**

To confirm a thesis that prohibits terminations of pregnancy at the viable stage (as only at this stage is it possible to detect fetal defects)[[343]](#footnote-343) a discourse must be held about another aspect that restricts the woman's autonomy and requires a balance between the rights. In this chapter I will deal with the issue of medical treatment for the woman against her will during the pregnancy with the aim of improving or enabling the good health of the live fetus; I will then discuss the question whether it is correct to force a woman to undergo a C-section without her informed consent. Contrary to the questions discussed in previous chapters, the discussion in this chapter is the open confrontation between human rights and the rights of a “beginnings of a person” and an attempt to present a justified paternalistic viewpoint to arrive at a decision that, in my opinion, fulfills a social-ethical function.

Whereas the previous chapters described the positive law, in this chapter I venture to establish new guidelines setting out specifically how the law should be interpreted or drafted in future. This is not a pretentious request considering the state-of- the-art medical technology and the means available to society in the form of eugenics. Over the last few decades considerable progress has been made where both technology and science are concerned, that has led to a better understanding of fetal anatomy[[344]](#footnote-344) and physiology, and has even improved medical capabilities to a great extent in detecting fetal deformities and pathologies during pregnancy.

This has resulted in a significant change in the direction of modern obstetrics, which, amongst others, is evident in the change of terminology from “High Risk Pregnancy” to “Maternal-Fetal Medicine”.[[345]](#footnote-345) However, until recently diagnostics provided the only way to detect a fetal defect or pathology, and modern medicine was unable to offer solutions for treatment apart from terminating the pregnancy. Nowadays, the option of intrauterine treatment allows for correction or improvement of different fetal conditions inside the womb, either by means of medication or surgery. Most treatments, of course, involve a certain percentage of failure, and some might even end in a completely opposite result from the original aim, i.e. the death of the fetus or losing the pregnancy owing to premature birth.

1. **Intrauterine Tre atme nt**

The types of treatment provided during the fetal life can be placed into three categories: interventions related to the type of birth or when it should take place to provide the best treatment for the newborn, medical treatment and surgical treatment.

Interventions related to the type of birth or when it should take place include an elective C-section in cases where defects are likely to interfere with the procedure in a normal birth, or in cases where an immediate surgical solution is required for a fetal defect under sterile conditions. Such cases include e.g. a serious defect in the abdominal wall, hydrocephalus (accumulation of fluid in the brain cavity causing a significant increase in the size of the fetal head), spinal defects, spinal tumors, etc. Cases that require premature birth include renal and urethral disorders, Hydrops Fetalis and a significant disorder in intrauterine growth.

1. **Medical Treatment**

Neural Tube Defects - NTDs: this is a group of defects that affect the development of the spinal canal often leading to severe neurological disability. Nowadays treatment with folic acid prior to the pregnancy and during the first trimester is known to reduce the risk of the developing of these defects by 80%.[[346]](#footnote-346)

Congenital Adrenal Hyperplasia - CAH: these fetuses develop in the wombs of women suffering from CAH. These women require treatment with steroids in the first weeks of pregnancy to ensure the proper sexual development of the fetuses. If a male fetus develops the treatment can be discontinued, and if it is female, treatment should continue.[[347]](#footnote-347)

Fetal Thyrotoxicosis: this can be found in fetuses whose mothers suffer from hyperthyroidism. The mother should be treated with medication that suppresses the activity of the thyroid in order to treat the fetus.[[348]](#footnote-348)

Hypothyroidism: in extreme cases hypothyroidism in the fetus can be treated with an intrauterine drip of hormone replacement.

Lung Immaturity: the fetal respiratory system reaches maturity at a relatively late stage in the pregnancy. Therefore, when born prematurely these fetuses are more prone to respiratory disorders after birth. Many studies have proven that treatment with steroids for women who are liable to give birth prematurely significantly reduces the risk of respiratory problems in the newborn.

Hydrops Fetalis: this is a fetal syndrome that is likely to occur for a number of reasons. One is connected to the development of antibodies to the fetal red blood cells, resulting in the destruction of the red blood cells and fetal anemia. Treating pregnant women with blood type Rh- with an antibody known as Anti-D reduces the risk of the destruction of red blood cells in the next pregnancy.

Neonatal Alloimmune Thrombocytopenia - NAIT: disproportion between the antibodies of the paternal and maternal platelets, causing destruction of the fetal platelets and a greater tendency for bleeding (especially cerebral hemorrhage). In such cases the woman can be treated with intravenous immunoglobulin and steroids to reduce the risk to the fetus.

Fetal Arrhythmia: these are mainly benign disorders that disappear by themselves, although in certain cases they can be treated with medicine (such as Digoxin) to normalize the fetal arrhythmia.

1. **Surgical Treatment**

Surgical treatment is divided into three groups of intervention: minimally invasive procedures by means of guided ultrasound, laparoscopic procedures, and open surgery.

The ultrasound-guided procedures include inserting a drain to draw out fluids accumulating in the fetus into the amniotic fluid cavity, and also to perform cordocentesis and intrauterine blood transfusion for the fetus. Laparoscopic procedures mainly include cauterizing the fetal blood vessels in the placenta to reduce the risk of death and neurological disabilities in twins (recently there was a case where a spinal defect was corrected by laparoscopy). Open surgery is carried out in a few medical centers in the world, where the aim is to correct major defects such as spinal defects. Obviously the more significant the surgical intervention, the greater the risk of complications such as intrauterine infection, premature rupture of membranes, premature birth and fetal death.

Obstructive Uropathy: when there is an obstruction in the urinary tract, urine collects in the bladder and kidneys, which can lead to kidney failure. In such cases the fetal bladder can be drained by means of guided ultrasound and even by inserting a drain from the fetal bladder into the amniotic sac. This will allow for a reduction in pressure until the birth, and surgical correction of the urinary system.67

Hydrocephalus: in cases where there is an obstruction in the spinal cord, spinal fluid can collect in the fetal brain exerting pressure on the brain tissue. Pressure on brain tissue can cause both defective development of the fetal brain and a noticeable growth in the size of the head. In such cases a drain can be inserted into the brain chambers to draw off the excess fluid from the amniotic sac.

Hydrothorax: accumulation of fluids in the lungs of the fetus can cause damage to the development of the lungs. In such cases a drain can be inserted to draw off excess fluid into the amniotic sac.[[349]](#footnote-349)

Neural Tube Defects - NTDs: defects in the spinal canal can be treated with open surgery with a high success rate (up to 50% reduction in neurological disability) although there is a high risk of premature birth. As noted, there have been reports of

1. For the most recent discussion of this fetal anomaly, see, amongst others, Colin J. Down et al., *Practical Management of Fetal Obstructive Uropathy*, 5([1) JOURNAL OF FETAL MEDICINE](https://link.springer.com/journal/40556) 37 (2018); Mustafa Z. Mahmoud, *Real Time Brightness Mode Ultrasound in Determining the Causes and Complications of Obstructive Uropathy* 19 J. BIOL. SCI. 181 (2019), [https://www.researchgate.net/profile/Mustafa Z Mahmoud/publication/329717620 Real Time Brightne](https://www.researchgate.net/profile/Mustafa_Z_Mahmoud/publication/329717620_Real_Time_Brightness_Mode_Ultrasound_in_Determining_the_Causes_and_Complications_of_Obstructive_Uropathy/links/5c65193945851582c3e6f9dd/Real-Time-Brightness-Mode-Ultrasound-in-Determining-the-Causes-and-Complications-of-Obstructive-Uropathy.pdf) [ss Mode Ultrasound in Determining the Causes and Complications of Obstructive Uropathy/links/5](https://www.researchgate.net/profile/Mustafa_Z_Mahmoud/publication/329717620_Real_Time_Brightness_Mode_Ultrasound_in_Determining_the_Causes_and_Complications_of_Obstructive_Uropathy/links/5c65193945851582c3e6f9dd/Real-Time-Brightness-Mode-Ultrasound-in-Determining-the-Causes-and-Complications-of-Obstructive-Uropathy.pdf) [c65193945851582c3e6f9dd/Real-Time-Brightness-Mode-Ultrasound-in-Determining-the-Causes-and-](https://www.researchgate.net/profile/Mustafa_Z_Mahmoud/publication/329717620_Real_Time_Brightness_Mode_Ultrasound_in_Determining_the_Causes_and_Complications_of_Obstructive_Uropathy/links/5c65193945851582c3e6f9dd/Real-Time-Brightness-Mode-Ultrasound-in-Determining-the-Causes-and-Complications-of-Obstructive-Uropathy.pdf)

[Complications-of-Obstructive-Uropathy.pdf](https://www.researchgate.net/profile/Mustafa_Z_Mahmoud/publication/329717620_Real_Time_Brightness_Mode_Ultrasound_in_Determining_the_Causes_and_Complications_of_Obstructive_Uropathy/links/5c65193945851582c3e6f9dd/Real-Time-Brightness-Mode-Ultrasound-in-Determining-the-Causes-and-Complications-of-Obstructive-Uropathy.pdf); Mukesh Chandra Arya et al., *Transcaval Ureter: A Rare Embryological Anomaly of Inferior Vena Cava Causing Obstructive Uropathy*, Urol Sci, [http ://www.e-](http://www.e-urol-sci.com/preprintarticle.asp?id=243104) [urol-sci.com/preprintarticle.asp](http://www.e-urol-sci.com/preprintarticle.asp?id=243104)?.

therapeutic trials on defects such as these using laparoscopy, and the initial results of these trials on animals are encouraging.

Fetal Anemia: this can cause fetal edema. It can be treated by inserting a needle into the umbilical cord using ultrasound guidance and an intrauterine blood transfusion into the fetus. Two or three transfusions are usually enough to transfer red blood cells to the fetus that will suffice until the birth.

Twin-to-Twin Transfusion Syndrome - TTTS: in cases of fetuses sharing one placenta there is an assymetrical transfer of blood from one fetus to the other, so that most of the blood flows to one of the fetuses (the “recipient”) who suffers from an excess blood supply, and drains from the other fetus (the “donor”) who suffers from fetal anemia. This phenomenon can be treated in different ways, although the accepted and most beneficial treatment nowadays is by laparoscopy using a laser to cauterize the placental blood vessels connecting the blood supplies of the fetuses.

Congenital Diaphragmatic Hernia: a defect in the partition between the chest thorax and the heart. In cases of a diaphragmatic hernia in the fetus, the abdominal organs migrate into the chest wall and prevent normal development of the lungs. The fetal windpipe can be obstructed by means of a balloon, enabling the lungs to grow and pressing the abdominal organs back in place.[[350]](#footnote-350)

In certain cases the risks to the mother or the fetus are likely to be higher than the chances of a good prognosis. In addition, complications can occur in any medical intervention, even the loss of the pregnancy. Some treatments are more effective, some are less (e.g. the chances of a fetus surviving after a correction of a diaphragmatic hernia are lower than 30%). Therefore the above list does not provide a “magic solution” to all the possible fetal problems, and sometimes a termination of pregnancy is really the best possible option.[[351]](#footnote-351)

1. **A Live Fetus : A Human Being inside a Human Being**

The option of applying medical treatment to a fetus in the womb of its mother raises additional ethical and moral questions: who is the “patient” - the woman or the viable fetus? Can the woman refuse medical treatment for the fetus inside her body even if doing so would endanger the fetus? Can the woman refuse medical treatment for the fetus inside her body even if there were no risk to herself, but it would save the fetus or help to heal or alleviate the illness after birth? Can the woman be forced to take medical treatment of any kind for the fetus, also if she refuses treatment even if the treatment does not endanger her own body, in the name of the “patient” - the fetus? Can a woman be forced to undergo a C-section if the fetus if healthy and she refuses it?

In the “name of the fetus” I maintain that its intrauterine life should not be cut off by means of a voluntary termination of pregnancy unless in special cases - if the fetus is found to have a defect or serious disabilities. I maintain that it is not right to do so. I maintain that a viable fetus, that is expected to live an independent life on its own or with medical assistance, has rights that sometimes override those of the woman.

In this vein, I go even further and make the following claim: when treating pregnant women doctors must take into consideration that they have two patients with a biological connection, and they must consider both the health of the woman and the health of the live fetus. Most pregnant women would probably agree to a certain amount of personal risk in order to give birth to a healthy child. The discussion is not concerned with women such as these, but rather about women who refuse treatment offered for the fetus during the pregnancy, or who refuse to undergo a C-section despite the medical need to save its life. The complicated ethical issues are raised only when the woman refuses said treatment.

Advanced medical technology allows doctors to apply treatments to a viable fetus which are sometimes life-saving and sometimes improve quality of life. Contrary to claims that a viable fetus has no legal status, is not a person and therefore legally unfit and not entitled to rights, I maintain that a viable fetus has at least a moral personality and therefore must be protected. In most countries the legal status of the fetus develops as the stages of pregnancy progress. The stage of viability must signify a change in its legal status. Quite a few doctors are convinced of this. One of these is Prof. Blickstein:

Sometimes, the interests of the fetus the “patient” conflict with the interests of the woman. However, the doctor's duty to the fetus is absolute, in just the same way as the doctor's duty to the woman. This duty - is meant in a positive sense, i.e. the doctor has a duty to treat the fetus (including follow-up) in the best possible way, even when it is still inside the womb. The doctor, however, is restricted by the mother, owing to her autonomy over her own body, from providing it with invasive treatment. In any event, the doctor is never duty bound to harm a viable fetus or to destroy it, even if this is what the mother wants. The only exception (and there are also those who disagree) is when there is absolutely no doubt that a serious defect exists, and when proved without a 71 shadow of a doubt - that the defect would prevent it from having a decent life.[[352]](#footnote-352)

I am convinced and insist that a viable fetus and the woman are not a single entity.[[353]](#footnote-353) The fetus is a “patient” and its right to be born, and to be born healthy, should be protected. We have seen that a fetus that is born can take legal action against a third party if this caused it prenatal damage; under certain circumstances a fetus has the right to inherit; under certain circumstances it has the right to receive child support. We maintain that if the woman refuses to provide informed consent for a C-section, at a stage when the fetus is viable and refusal of this nature is liable to cause it damage - the woman should be forced to undergo the C-section. Legislation protecting certain plants/shrubs[[354]](#footnote-354) and wildlife[[355]](#footnote-355) must also care for a viable fetus by means of an amendment of the penal law. The penal law does not protect the fetus by exacting a penalty for destroying a fetus, also when a fetus is destroyed at the viable stage by an injection straight into the heart.

There is a real gap between protecting the fetus and protecting the human being: legal policy states that the newborn should be protected from the very instant it emerges from the womb - but what is the point in making a distinction between a newborn baby and a fetus at the viable stage, a few weeks before it emerges into the world? There is a lack of legal uniformity, and efforts should be made to amend it. I have shown above that the conduct of a pregnant woman that endangers the fetus is conduct that should be

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punished.[[356]](#footnote-356) If so, using this as an analogy, this principle should also be upheld in cases where providing the fetus with medical treatment and undergoing a C-section are met with refusal.

These are also behaviors that harm the viable fetus. What is the difference between a woman who takes drugs and medication while ignoring the effect they have on the viable fetus in her womb, and a woman who ignores the health and fate of this fetus by refusing the above? The fetus should be considered an entity in every respect for purposes of third-party claims - in my opinion from the woman too - if it was treated with negligence and lack of care. Although these claims are only recognized from the stage at which the fetus becomes a newborn, but in the event of lack of treatment for the fetus or refusing a surgical procedure there will be no newborn, and therefore I maintain he can sue by a trustee in its name.

The fetus has the right to prenatal treatment if the treatment does not pose a danger to the woman, and it has the right to be born, and be born healthy, even if this involves a C-section that the woman refuses. A woman who denies it this right must be tried both by the criminal court and the civil court under the Torts Law. When dealing with the potential rights of the fetus the scope of the pregnant woman's autonomy over her body should be restricted. One person's autonomy does not justify harming the rights of another person - or a potential person. Even those who are convinced that the woman's autonomy over her own body is the most important aspect must agree that this autonomy should not be enjoyed at the expense of others. If the woman chose the pregnancy - and even if not - when the fetus reaches the viable stage, it is right to abide by a presumption that she would like it to be full-term, unless for very serious reasons. It is important to note that both in England and in the US, C-sections have been carried out against the woman's wishes by court order.[[357]](#footnote-357)

The argument to the contrary is that even if the fetus can be considered an entity in and of itself, it is still hard to recognize its claim against the woman who gave birth to it.[[358]](#footnote-358) I am aware that enforcing a C-section by court order on a woman who refuses to undergo one, raises complex ethical questions. One is the lack of consistency in legal policy that on the one hand makes it necessary for any mature person to provide informed consent to a surgical procedure, and on the other hand forces a mature pregnant woman to undergo surgery against her will. Another problem is that enforcing a C-section on the woman might be detrimental to the doctor-patient relationship on both sides. The American College of Obstetrics and Gynaecology published the following opinion on the matter:

Obstetricians should refrain from performing procedures that are unwanted by pregnant woman [...] The use of the courts to resolve these conflicts is almost never warranted.[[359]](#footnote-359)

The response to these claims is that when performing a regular surgical procedure no other potential person is involved, and that the doctor-patient connection results from building a relationship that ought not to be detrimentally affected by orders from above if it is good and appropriate.

When discussing cases of claims for wrongful birth, David Heyd states:

A human being that has yet to be created does not exist, it has no identity and no interests whatsoever, let alone rights against anyone - parent or advisor. It would however be misleading to consider the parents as guardians of the child when the parents themselves have not yet decided whether or not to bring the child into the world! [...] If the law were to aim to protect the rights of the fetus not to be born (under certain circumstances when a severe handicap is suspected), the law would obligate the mother and the doctors to carry out an abortion, thus protecting the right of the fetus not to be born. But naturally no legal system works this way: abortions are an issue permitted by law, at best, but never enforced [.].

The discussion about the fetus prior to the viable stage diverges from the topic dealt with in this book and even so I beg to differ. When the fetus is at the viable stage it does not matter if the woman has chosen whether or not to bring the child into the world. We assume that if the woman has not applied to the committee for termination of pregnancy up until that week, it means that she wants the pregnancy and she wants the child. Indeed, the law does not protect the right of the fetus not to be born, on the contrary: by determining that the woman who wants to terminate a pregnancy should apply to the committee, the legislature expresses the opinion that there is supervision over the autonomy and choice of the woman, and to a certain extent, protection of the fetus.

I claim that there is a way to escape the impasse by means of legislation that will decide the status of a fetus at the viable stage and provide it with rights.[[360]](#footnote-360) World perceptions of a social and financial nature examine the main function of the law both socially and ethically, and not only the accepted law in practice. In my search for the desired law I venture to offer a way in which the law can promote this function. Protection for a viable fetus as a future citizen is a proper aim as far as society and ethics are concerned. Providing medical treatment for a viable fetus in order to improve its quality of life or to save it during the pregnancy, without endangering the woman's life, is a good and correct outcome, and thus also a C-section the aim of which is to save the fetus' life with minimal risk to the woman.

In the chapter on paternalism I attempted to show that sometimes the rules of paternalism are justified (e.g. wearing a helmet while riding a motorcycle and wearing a seatbelt while travelling in a motorized vehicle). In philosophical discourse about utilitarianism the perception of the outcome is raised as the main principle. In our case I maintain that the possible result of forcing a woman to undergo treatment the aim of which is to improve the health or save the life of a viable fetus is a good result. A legal ruling that will anchor it in a law of freedom would, in my opinion, be correct and good in an ethical sense. As I showed above, the utilitarian perception is that a good result is a result that causes more joy than suffering, when relating to joy in its entirety.

Sociological jurisprudence talks of the need for balance.[[361]](#footnote-361) I too am raising the issue of balance: balance between interests that may be contradictory. One method to balance must be established by the legislature which must decide on the preferred interests; another method to balance must be implemented by the court which decides on a balance of interests in a casual way, about a case that has already taken place. In a case of balance between the right of a woman over her own body which is the interest of the woman as an individual, between the right of a viable fetus “over its own body”, the decision should be made from the woman's point of view, from that of the viable fetus; from that of society - how it maintains that the right for keeping the body complete of a living individual or a potential individual; and from a public viewpoint - how the state wants to keep the interests to penalize someone who harms the completeness of another person's body.

There are several ways to maintain a balance between interests: they can be set on the same standard, but it is doubtful if this system would help in our case, since we are dealing with human rights as opposed to rights of someone that is not yet defined as human. A formula for balance can be decided upon: this formula will establish the relative weight of the conflicting interests - those of the woman and those of the viable fetus. Such a formula should be established in advance by the legislature, and not in retrospect by the court.

Alessandra Piontelli,[[362]](#footnote-362) who observed 11 fetuses in the womb using ultrasound, after which she observed their development at home from birth until age four, presented in her book detailed reports from her observations as well as descriptions of psychoanalytical treatment in small children, whose behavior in analysis clearly showed their involvement in the experience they had had in the womb.[[363]](#footnote-363) The fact that the viable fetus is visible using ultrasound technology reinforces its “status” and emphasizes its

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human aspect.[[364]](#footnote-364) A viable fetus can survive ex utero: terminating a pregnancy at the viable stage is carried out by means of an especially cruel procedure, by injecting potassium chloride into the fetal heart in order to kill it.

The choice whether or not to perform this procedure is in the hands of the woman, subject to approval by the special committee, but is this really a question of freedom of choice? With the policy of recoiling from the handicapped and the disabled, when the state offers such an abundance of tests to identify fetuses like these at every stage of the pregnancy, and the culture encourages the choice of abortion at every stage - does a woman really have a choice in a state like this? The committee for termination of pregnancy is composed of doctors and a social worker, and the woman's interests are well represented,84 as are the state's interests85 and the “interests” of the medical system,86 but the interests of the life of the viable fetus are unrepresented and not brought before the committee. It is up to the legislature to offer a fair representation for these interests too.

At the end of the day, the proper model that is recommended is unequivocal legislative intervention, based on an ethical consensus and social policy that will justify providing the viable fetus with rights on the one hand, and will impose tort liability on a woman who prevents these rights on the other hand. Society must apply standards of conduct to the pregnant woman; to impose upon her a legal obligation to provide the viable fetus with a proper and ideal environment for growth and enable it to be born and have a healthy life in spite of its disability (in accordance with clear and defined 87

medical data regarding its condition) - and not only an ethical obligation.

I am aware of the perception claiming that there is a unique symbiotic connection, and total dependence, between the woman and the fetus. Therefore I maintain that the court should be charged with the role of interpretation: it is the court that should decide the obligation of the pregnant woman where caution is concerned and

1. According to the Roman approach: to perform a termination of pregnancy at any time according to her own discretion only, to sell the fetal membranes for scientific research, to allow experiments to be carried out on the fetus, etc, because the fetus is a part of her.
2. Halperin maintains that when the fetus is harmed by being in the woman's womb, it is precisely the fetus who is the prosecutor: “The main obligation is to the fetus itself, and the father is entitled to monetary compensation under the law of inheritance, but only if the fetus dies. But if it is harmed - the obligation is to the fetus itself. And if the fetus dies inside the mother, the father inherits its right [...] thus whoever harms a fetus pays the fetus itself. According to Maimonides, only when the fetus is killed no money is paid to the father [.] but if the damage is to the fetus, it is judged according to the law concerning a person who harms his frien d , and the payment belongs to the fetus”. *See* Mordechai Halperin, *Termination of Pregnancy - Legal, Moral and Halachic Aspects,* in The Right to Life WITHOUT A DEFECT - FROM CREATION OF A FETUS UNTIL ITS BIRTH AS A HUMAN BEING, SELECTION OF ARTiCLES ON SCiENCE, ETHiCS AND LAW 67, 76 (Yonatan Davis & Avraham Sahar eds., 2007) (Heb.).
3. Some scholars assumes that the medical system, motivated by considerations of legal policy and defensive medicine, might recommend actions that serve these motives and are not objective and professional in themselves.
4. As opposed to the perception raised in Chenault v. Huie, 989 S.W. 2d 474 (1999). For an academic discussion of this verdict, see e.g., Dana Hirschenbaum, *When CRACK Is the Only Choice: The Effect of a Negative Right of Privacy on Drug-Addicted Women*, 15 BERKELEY WOMEN'S L.J. 327, 334 n.55 (2000); Edward Sylvester, *Chenault v. Huie: Denying the Existence ofa Legal Duty Between a Mother and Her Unborn Children*, 31 AKRON L. REV. 107 (2000); [Tsachi Keren-Paz, *O*](https://journals.sagepub.com/author/Keren-Paz%2C%2BTsachi)*n Mothers, Babies and Bathwater: Distributive Justice, Tort Law and Prenatal Duties,* 14(2) SOCiAL & LEGAL STUDiES 179 (2005).

the level of knowledge expected of her regarding conduct that will not harm the viable fetus during the course of the pregnancy and even in the pre-pregnancy stage. The autonomous right of the woman regarding anything to do with her body should be restricted when there is another entity inside of her. The court will have to take into consideration the woman's background, her culture, her intellect, her mental state, financial state, and state of health. In a model of fragile equipoise between the rights of the different entities, and after the legislature has decided upon this issue, the role of interpretation will be left to the court. The court will have to take great care when exacting a legal duty - the extent of the duty, the appropriate standard and the legal policy; the court will assess the reasonable pregnant woman and set an appropriate standard of conduct.[[365]](#footnote-365)

In the effort for equipoise and setting a new standard for rights, there is apparently the danger of the slippery slope. This could happen, for example, if the court recognizes negligence by the woman that took place years before the pregnancy - for example if she used drugs that endanger the fetus or chose a place of work where there

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was a danger of malignancy, etc.[[366]](#footnote-366) Because the court will accountable for deciding the extent of the obligation for caution, this danger concern me. The court can make a distinction between a pregnant woman who drank a reasonable amount of alcohol and a woman who drank herself to oblivion thus causing harm to a child who will experience severe learning difficulties. The court can decide when using heavy narcotics that harm the newborn is a breach of legal duty that will lead to a ruling regarding lack of maternal capability; the court is the one to decide when the refusal to give medical treatment to the fetus during the course of the pregnancy, leading to death or irreversible damage to the newborn, is a breach of this duty.

The western world does not recognize the woman's responsibility to the newborn and a random analysis of rulings is a cause for dilemma in these countries. On the one hand, Tedeschi[[367]](#footnote-367) in his research describes a court case won by a child, who was born suffering from syphilis with which the father had infected the mother; on the other hand, in other places, this claim was rejected. Even in the US the court recognized the claim of the child who sued the woman because of his dental problems and the dark color of his teeth - damage caused as a result of medication taken by the woman during the course of the pregnancy; on the same issue the court ruled that there is no difference between a third party and the woman's responsibility towards the fetus and she was ruled responsible.[[368]](#footnote-368) A child who sued the woman won in yet another case: the pregnant woman crossed a road negligently, without using a pedestrian crossing. In the ensuing accident, the fetus was badly injured.[[369]](#footnote-369)

In Australia it was ruled that a fetus born with injuries caused by the woman's negligence in being involved in a traffic accident can sue her if she was negligent not only towards the fetus.[[370]](#footnote-370) On the other hand, in other cases similar claims against the woman were rejected.[[371]](#footnote-371) Comparative law does not help us in the task of equipoise. Between 1976 and 2006 the percentage of childless women between the ages of 40-44 doubled to more than one-fifth of women in the world; in October 2015 for the first time a conference entitled “NotMom Summit” took place in Cleveland. Numbers have dropped since 2006. This is my response to the feminists' claim according to which the right to terminate a pregnancy is one of the foundations of the right of the woman. Assisted Reproduction technologies enable every woman to have sexual relations without becoming pregnant and to choose whether she wants to avoid bringing children into the world.[[372]](#footnote-372) But at the same time, the minute she does decide to bring another person into the world - the woman has both a moral and a legal responsibility.

Epilogue: Equipoise

"[...] Who is wise? He who discerns what is about to come to pass."[[373]](#footnote-373) A viable fetus is a person at the very beginning of life; it is a human entity. It should be considered an entity with interests that are its own and are different from those of the woman carrying it. The woman has a legal obligation towards the viable fetus. I believe that the viable fetus has a moral status as a human being from the viable stage,[[374]](#footnote-374) and therefore I adopt the individual-biological model of theoreticians who consider the fetus and the woman as two separate individuals.

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Ronald Dworkin,[[375]](#footnote-375) like others, maintains that it is not really necessary to assign a moral status to the fetus in order to prohibit a termination of pregnancy. In spite of different viewpoints, I maintain that the discourse cannot be complete without determining the legal and moral status of the fetus, a viable one at the very least. There should be a dialogue on the matter in order to deal with feminist perceptions maintaining that the woman has ultimate rights over her own body.

Glaucon[[376]](#footnote-376) claimed that the law is an agreement made by people who commit not to harm each another, the basis of the agreement being the desire of every person not to be harmed himself. Plato claimed otherwise, in the name of Socrates. According to him, the agreement is not a social contract between people but rather a political arrangement emanating from the nature of the world. Locke, as we have seen, maintains that also in a natural state, a person has a basic right, i.e. the right to life, freedom and ownership. The purpose of legislation, according to this perception, is preserving the rights.[[377]](#footnote-377) Throughout the book I have advocated that this model be used and that the legal duty should be placed on the pregnant woman vis-a-vis the viable fetus.

However the approach that suggests restricting state intervention in the life of the individual as much as possible, is liable to justify legislation that establishes the status of the viable fetus and its right to life, based on the principle of harm. The act of terminating a pregnancy is similar to preventing the provision of informed consent to necessary medical treatment while still in the womb or to performing a C-section when this is necessary to give birth to the fetus, and causes harm to the viable fetus.[[378]](#footnote-378) Increasing state jurisdiction to intervene in the right of the woman over her own body is even justified for paternalistic reasons too when a person's autonomy is not unlimited, certainly when another potential human life is involved. Justice Blackmun (who wrote the majority opinion) states in the case of Roe v. Wade:[[379]](#footnote-379)

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.103

The court is aware of the difficulty in defining the status of the fetus vis-a-vis the status of the woman who is detrimentally affected as a result of legislation that prohibits a termination of pregnancy, and therefore it stipulates that formal restrictions are justified only during the third trimester of the pregnancy only, i.e. when the fetus is at the advanced stage of intrauterine life. Lockhart104 calls this system “PRDF - Principle of the Rights of Doubtful Persons”, i.e. when a conflict exists between an individual with a moral status like a pregnant woman as opposed to an individual with an uncertain moral status, the woman will prevail.

The approach presented in the book does not dispute this attitude and does not insist on reaching a conclusion or make a standpoint on the debate in principle between those who oppose terminating a pregnancy (known as pro-life) who claim that the fetus has a moral status and those in favor of it (known as pro-choice),105 who claim that the woman has the right to autonomy. I do not take issue with the right of the woman over her own body, rather I maintain that, as with every right, this is not an absolute right when we are dealing with a live fetus and a balance must be made between those rights.

\* \* \*

In the legal history of plenty jurisdictions all over the globe not infrequently

1. For a discussion of this very often quoted statement, see, for example, John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 920 n.9, 925 n.41 (1972-1973); Gary B. Gertler, *Brain Birth: A Proposal for Defining When a Fetus Is Entitled to Human Life Status*, 59 S. CAL. L. REV. 1061, 1065 (1986); Jason M. Horst, *The Meaning of Life: The Morning-After Pill, the Question of When Life Begins, and Judicial Review*, 16 TEX. J. WOMEN & L. 205, 206 (2007).
2. TED LOCKHART, MORAL UNCERTAINTY AND ITS CONSEQUENCES 127-9 (2000). For the most recent discussions of this book, see Maria Lasonen-Aarnio, *Enkrasia Or Evidentialism? Learning to Love Mismatch,* Philos Stud 1 (2018), h[ttps ://link.springer.com/content/pdf/10.1007%2Fs11098-018-1196-](https://link.springer.com/content/pdf/10.1007/s11098-018-1196-2.pdf) [2.pdf;](https://link.springer.com/content/pdf/10.1007/s11098-018-1196-2.pdf) [Itai Sher,](https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=Itai%20Sher&eventCode=SE-AU) *Comparative Value and the Weight of Reasons,* 35(1) Economics & Philosophy 103 (2019); RALPH WEDGWOOD, MORAL DISAGREEMENT AND INEXCUSABLE IRRATIONALITY (2019), https ://www-bcf.usc.edu/~wedgwood/inexcusable\_irrationality.pdf.
3. For a discussion of this hot debated dispute, see, amongst other[s, RUTH coLKER](https://scholar.google.co.il/citations?user=vutgaKgAAAAJ&hl=iw&oi=sra), [ABoRTioN AND](https://www.google.com/books?hl=iw&lr=&id=uVD9TdluiR0C&oi=fnd&pg=PR9&dq=%22pro-life%22+and+%22pro-choice%22+debate&ots=puo_dtzpDO&sig=m4DdNDQLWvGAPMOj8KQFKCmrYX8) [Dialogue: Pro-Choice, Pro-Life, and American Law](https://www.google.com/books?hl=iw&lr=&id=uVD9TdluiR0C&oi=fnd&pg=PR9&dq=%22pro-life%22+and+%22pro-choice%22+debate&ots=puo_dtzpDO&sig=m4DdNDQLWvGAPMOj8KQFKCmrYX8) (1992); Kathy Rudy, Beyond Pro-Life and PRo-cHoicE: MoRAL DiVERSiTY iN THE ABoRTioN DEBATE (1997); RANDY ALcoRN, [PRo-LiFE ANSWERS](https://www.google.com/books?hl=iw&lr=&id=xdlDo8vTG_sC&oi=fnd&pg=PA25&dq=%22pro-life%22+and+%22pro-choice%22+debate&ots=TMfb8MDtJo&sig=cEIKVe8qTl2LPlz-s0a_alS94fs) [To PRo-cHoicE ARGuMENTS (2009).](https://www.google.com/books?hl=iw&lr=&id=xdlDo8vTG_sC&oi=fnd&pg=PA25&dq=%22pro-life%22+and+%22pro-choice%22+debate&ots=TMfb8MDtJo&sig=cEIKVe8qTl2LPlz-s0a_alS94fs)

there has been an attempt to make a distinction in legislation between the different stages of pregnancy. The difficulties raised in the past in passing legislation initially regarding the status of the fetus and making a distinction between the different stages of pregnancy should not hinder our efforts.

Already in the Greek period Glaucon maintained[[380]](#footnote-380) that the law is an agreement whereby people make a commitment not to harm each another, the basis of the agreement being the desire of every person not to be harmed himself. Plato, in the name of Socrates, claimed otherwise and said that the agreement is not a social contract between people but rather a political arrangement emanating from the nature of the world. Locke, as we noted above, was of the opinion that also in a natural state man has the basic right which is the right to life, liberty and ownership. The aim of the 107

legislation, according to this perception, is preserving the rights.[[381]](#footnote-381) I maintain that this historical and philosophical basis, together with the technological knowledge to which we have access, enable a reevaluation by any given state's parliamentary body regarding the status of a fetus at the viable stage.

I would truly like to believe in Freud's standpoint that a mother will always love her children, yet a mother can hate her children.[[382]](#footnote-382) We have seen that some people are convinced that voluntary terminations of pregnancies should be prohibited out of hand, and others are of the opinion that they should be allowed at any stage of the pregnancy. As noted, the book does not deal with this discourse. Rather, the book aspires to see both the woman and the fetus in its intrauterine environment and therefore achieving a balance and enhanced regulation in the field of voluntary terminations of pregnancy at the viable stage.

Throughout the entire book I have seen fit to establish this model and have sought to place a legal and moral obligation for the viable fetus on the pregnant woman. In a similar way, even an approach that sees fit to minimize state intervention in the life of the individual to a great extent, could justify legislation that determines the status of the viable fetus and its right to life based on the principle of harm. This is because the act of voluntary termination of pregnancy at the viable stage, or refraining from being provided with intrauterine medical treatment for the fetus at the viable stage in the absence of the woman's informed consent (when minimal risk exists for the woman and there is a good chance of curing the fetus). Similarly, carrying out a C-section when needed to give birth to the fetus without informed consent - all these are liable to cause irreversible harm.[[383]](#footnote-383) Expanding the authority of the state to intervene even in the woman's rights over her own body is still justified for this reason and even for an appropriate paternalistic reason. A person's autonomy is not unlimited, and certainly not where another potential human life is concerned.

A viable fetus is a beginning-of-a-person and even a beginning-of-a-person is entitled to rights similar in essence to the rights of a human being.[[384]](#footnote-384)

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2. I use the term “destruction” deliberately, because I place a great deal of significance on terminating pregnancies. I assume that those conservatives, who are against terminating pregnancies, would support the use of this term whereas the liberals, who are in favor of termination at any stage, would reject its use, at least when referring to the first trimester. I am of the opinion that when dealing with the stage of viability, when the fetus could technically live outside the womb, those with liberal attitudes might agree that the expression “fetal destruction” is not so far-fetched. For an overview of the nexus of the latter notion and the stage of viability, see Patrick T. Conley & Robert J. McKenna, *The Supreme Court on Abortion - A Dissenting Opinion*, 19 CATH. LAW. 19 (1973); Jeffrey A. Parness, *Crimes against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97 (1985); Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639 (1985-1986). [↑](#footnote-ref-2)
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15. I use the term “termination of pregnancy” whenever I refer to terminating a pregnancy at will, and “abortion” when referring to a natural abortion. [↑](#footnote-ref-15)
16. Data are correct as of 2013 and are taken from UN publications on the UN website -<http://www.un.org/en/> development/desa/population/publications/policy/world-abortion-policies-2013.shtml. For a discussion of the most updated regulations and policies around the globe, see [Marge Berer, *A*](https://www.ncbi.nlm.nih.gov/pubmed/?term=Berer%20M%5BAuthor%5D&cauthor=true&cauthor_uid=28630538)*bortion Law and Policy Around the World: In Search of Decriminalization*, 19([1) HEALTH HUM RIGHTS](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473035/) 13 (2017); ALLISON GUENTHER, REVIEW OF UNITED STATES ABORTION POLICY (2018),

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17. Data were taken from the website Women On Web [,https://www.womenonweb.org,](https://www.womenonweb.org/) and from a report

published by the [WORLD HEALTH ORGANIZATION](https://www.google.co.il/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjtoYbo59rcAhXELFAKHdJbAB8QFjAAegQIARAC&url=http%3A%2F%2Fwww.who.int%2F&usg=AOvVaw3_2bOyLYSAyAElFOSwTHBc) (WHO), FACTS ON INDUCED ABORTION WORLDWIDE: FACTS SHEET (January 2012) on website

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21. I will discuss extensively the concern of eugenics in the [] chapter of this book. *See*, in the meantime, the most recent discussions of the nexus of this issue and abortion: SHARON M. LEON, AN IMAGE OF GOD: THE CATHOLIC STRUGGLE WITH EUGENICS (2013); ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2017); BARBARA ROGERS, [A MATTER](http://www.authoramp.com/2018/02/matter-life-death/) [OF LIFE AND DEATH-WOMEN AND THE NEW EUGENICS (](http://www.authoramp.com/2018/02/matter-life-death/)2018). [↑](#footnote-ref-21)
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33. For the interplay between human rights, woman's autonomy and abortion, see Kristen Boon, *Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625 (2000-2001); [Jennifer Denbow, *A*](https://scholar.google.co.il/citations?user=mao_S_YAAAAJ&hl=iw&oi=sra)*bortion: When Choice and Autonomy Conflict*, 20 BERKELEY J. GENDER L. & JUST. 216 (2005); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19(4) EUROPEAN JOURNAL OF INTERNATIONAL LAW 655 (2008). [↑](#footnote-ref-33)
34. For a discussion of the far-reaching influence of the parental screening on the rate of abortions, see [R.](https://ajph.aphapublications.org/author/Faden%2C%2BR%2BR) [R. Faden](https://ajph.aphapublications.org/author/Faden%2C%2BR%2BR) at el., *Prenatal Screening and Pregnant Women's Attitudes toward the Abortion of Defective Fetuses,* 77(3) American Journal of Public Health 288 (1987); [Paivi Santalahti](https://www.sciencedirect.com/science/article/pii/S0277953697100387%23%21) et al., *Women's Decision-Making in Prenatal Screening*, 46[(8) SOCIAL SCIENCE & MEDICINE](https://www.sciencedirect.com/science/journal/02779536) 1067 (1998); [Susan](https://www.sciencedirect.com/science/article/pii/S0277953699000970%23%21) [Markens](https://www.sciencedirect.com/science/article/pii/S0277953699000970%23%21) et al., *'Because of the risks': How- US Pregnant Women Account for Refusing Prenatal Screening*, 49(3[) SociAL SciENcE & MEDiciNE](https://www.sciencedirect.com/science/journal/02779536) 359 (1999). [↑](#footnote-ref-34)
35. The word “autonomy” comes from the Greek “autos” (self) and “nomos” (law), i.e. self-government (hereinafter: autonomy). For the seminal literature regarding autonomy generally speaking and more specifically in the context of bioethics, see RICHARD LINDLEY, AUTONOMY (1986); ONORA O'NEILL, [AUTONOMY AND TRUST IN BIOETHICS](https://www.google.com/books?hl=iw&lr=&id=F_2z0qJgrUoC&oi=fnd&pg=PR9&dq=%22O%27Neill,+Onora%22+%22autonomy+and+trust%22&ots=CaP48zCsMK&sig=2mIEo-8g3qGJTX67r-yyLzl-r2g) (2002); ANDREW SNEDDON, AUTONOMY (2013). [↑](#footnote-ref-35)
36. Autonomous interpretation, like Kantianism, considers “autonomy” as subjecting a person to rational principles under which he acts. An irrational act is not an autonomous act, thus paternalistic intervention in an irrational decision is actually the autonomous realization of the patient. Liberal interpretation considers “autonomy” as also including a person's right to act in an irrational manner. For the interplay of autonomy and Kantianism, se[e Thomas E. Hill,](https://philpapers.org/s/Thomas%20E.%20Hill) *The Kantian Conception of Autonomy*, in THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 91 (John Philip Christman ed., 1989); [Robert S. Taylor,](http://journals.sagepub.com/action/doSearch?target=default&ContribAuthorStored=Taylor%2C+Robert+S) *Kantian Personal Autonomy*, 33(5) POLITICAL THEORY 602 (2005); REATH ANDREWS, [AGENCY AND](http://merhav.nli.org.il/primo-explore/fulldisplay?docid=ULI_Main007033235&context=L&vid=ULI&lang=iw_IL&search_scope=ULI&adaptor=Local%20Search%20Engine&tab=default_tab&query=any,contains,autonomy&sortby=rank&offset=0) [AUTONOMY IN KANT'S MORAL THEORY](http://merhav.nli.org.il/primo-explore/fulldisplay?docid=ULI_Main007033235&context=L&vid=ULI&lang=iw_IL&search_scope=ULI&adaptor=Local%20Search%20Engine&tab=default_tab&query=any,contains,autonomy&sortby=rank&offset=0) (2006). [↑](#footnote-ref-36)
37. JEAN JACQUES ROUSSEAU, AN INQUIRY INTO THE NATURE OF THE SOCIAL CONTRACT, OR, PRINCIPLES OF POLITICAL RIGHT (translated from the French, 1791), was discussed recently by [Michael Sonenscher,](https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=MICHAEL%20SONENSCHER&eventCode=SE-AU) *Jean-Jacques Rousseau and the Foundations of Modern Political Thought*, 14(2) MODERN INTELLECTUAL HISTORY 311 (2017); Gal Michal, *The Social Contract at the Basis of Competition Law*, in COMPETITION POLICY: BETWEEN EQUITY AND EFFICIENCY (forthcoming, Lianos & Gerard eds., Cambridge University Press, 2018), [https://ssrn.com/abstract=3014354](https://ssrn.com/abstract%3D3014354)[; CHRISTOPHER BERTRAM](https://philpapers.org/s/Christopher%20Bertram), THE ROUTLEDGE GUIDEBOOK TO ROUSSEAU'S THE SOCIAL CONTRACT (2018). *See also* IMMANUEL KANT, CRITIQUE OF PURE REASON (1899). For the most recent discussion of this land mark research, see Allen Wood, *The Final Form of Kant's Practical Philosophy*, in IMMANUEL KANT (Arthur Ripstein ed, 2017); Stephen Howard[, *Review of*](https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1929509&context=L&vid=Lirias&lang=en_US&tab=default_tab)[*Immanuel Kant: The Very Idea of a Critique of Pure Reason by J. Colin McQuillan*,](https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1929509&context=L&vid=Lirias&lang=en_US&tab=default_tab) 50(3) CONTINENTAL PHILOSOPHY REVIEW 403 (2017); YIRMIYAHU YOVEL, KANT'S PHILOSOPHICAL REVOLUTION: A SHORT GUIDE TO THE CRITIQUE OF PURE REASON (2018). [↑](#footnote-ref-37)
38. JOHN STUART MILL: ON LIBERTY (1955). For the recent discussions of this land mark author and book, see [Sharon Stanley,](https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=Sharon%20Stanley&eventCode=SE-AU) *John Stuart Mill, Children's Liberty, and the Unraveling of Autonomy*, 79(1) [THE](https://www.cambridge.org/core/journals/review-of-politics) [REVIEW OF POLITICS](https://www.cambridge.org/core/journals/review-of-politics) 49 (2017); JOHN STUART MILL: AUTOBIOGRAPHY (MARK PHILIP ED., 2018); Anshuman A. Mondal, *On Liberty on Listening: John Stuart Mill and the Limits of Liberal Responsiveness*, i[n ETHICAL RESPONSIVENESS AND THE POLITICS OF DIFFERENCE](https://link.springer.com/book/10.1007/978-3-319-93958-2) 41 (Tanja Dreher, Anshuman Mondal eds., 2018). [↑](#footnote-ref-38)
39. For a discussion of this acute doctrine, see RUTH R. FADEN & TOM L. BEAUCHAMP[, A HISTORY AND](https://www.google.com/books?hl=iw&lr=&id=jgi7OWxDT9cC&oi=fnd&pg=PA3&dq=%22the+doctrine+of+informed+consent%22&ots=ZhISY_XmSc&sig=1UA7Z2LmF1A-y_VGy8ty3rlHTrU) [THEORY OF INFORMED CONSENT (](https://www.google.com/books?hl=iw&lr=&id=jgi7OWxDT9cC&oi=fnd&pg=PA3&dq=%22the+doctrine+of+informed+consent%22&ots=ZhISY_XmSc&sig=1UA7Z2LmF1A-y_VGy8ty3rlHTrU)1986); William J. Morton, *The Doctrine of Informed Consent*, 6 MED. [↑](#footnote-ref-39)
40. L. 117 (1987); Sharon N. Perley, *From Control over One's Body to Control over One's Body Parts: Extending the Doctrine of Informed Consent*, 67 N.Y.U. L. REV. 335 (1992).

For a discussion of this point regarding adult and minor women, see respectively Linda S. Martell, *Leyson v. Steuermann: Is There Plain Error in Hawaii's Doctrine of Informed Consent*, 8 U. HAW. L. REV. 569, 569 (1986); Harriet F. Pilpel & Ruth J. Zuckerman, *Abortion and the Rights of Minors*, 23 CASE W. RES. L. REV. 779, 799 - 800 (1972). [↑](#footnote-ref-40)
41. As an aside I would mention that the signature required by law on a consent form is merely a formality and proof of consent. The consent required by law is an inner consent, genuine, of free will and from a coherent position based on medical information. This component also includes the satisfactory ability of the woman to understand the essence of the medical treatment, its expected benefits and its inherent risks. [↑](#footnote-ref-41)
42. Some claim that consent to an illegal procedure by a doctor is invalid, and thus the doctor who performed an illegal procedure based on consent such as this, is liable to be sued as if no consent was given to his procedure. [↑](#footnote-ref-42)
43. JOSEPH CHITTY, CHITTY ON CONTRACTS paras. 127-267 (31 ed., 2014). [↑](#footnote-ref-43)
44. One could bring the following example: a doctor is about to perform surgery on a patient and he knows that the operation will result in the patient becoming sexually dysfunctional. He also knows that if the patient were aware of this information, he would not agree to the operation. He decides not to disclose this to the patient anyway and receives his consent: this is consent obtained under intentionally misrepresentation because the patient has been deliberately deceived and has not been provided with full information. It is common sense that when a deception has caused a deliberate error in the patient's comprehension, this error renders consent null and void. [↑](#footnote-ref-44)
45. Sec. 14(a) of Patients' Rights Law. [↑](#footnote-ref-45)
46. Sev c. 14(b) of Patients' Rights Law. Prior to the enacting of this law, apart from the formal consent on a signed form, the requirement for informed consent was rooted in a legal construct as follows: it was common to say that consent to medical treatment is a declaration of a wish aimed to achieve a legal outcome, and therefore the Israeli instructions of contract law (general law) 1973 are applicable. Pursuant to the section 61(b) of this law, the patient's signature on the consent form is merely proof of the patient's consent to a medical procedure (see Karp v. Cooley, 349 F Supp, 827 (1972)) and therefore it has been rebuttable. If it was proven that this consent was not informed, it could be contended that at the time of signing the patient had not decided to agree owing to a lack of information, and therefore the formal consent is also rendered null and void. Similarly, as well in cases where there are defects in forming a contract - if the patient signed the consent form in error, or was misled or forced to do so - the consent can be rendered invalid. For a discussion of this land mark verdict, see Joseph Gary Trichter & Peter W. Lewis, *Informed Consent: The Three Tests and a Modest Proposal for the Reality of the Patient as an Individual*, 21 S. TEX. L.J. 155, 156 n.3, 159 (1980); Eve R. Green Koopersmith, *Informed Consent: The Problem of Causation*, 3 MED. & L. 231, 233 (1984); George J. Annas, *Death and the Magic Machine: Informed Consent to the Artificial Heart*, 9 W. NEW ENG. L. REV. 89, 95 n.19 (1987). [↑](#footnote-ref-46)
47. According to Sec. 14(a) of Patients' Rights Law. [↑](#footnote-ref-47)
48. On the other hand, the common law and English law did not require written consent, although in practice the patients were given a form to sign. The practice arose because the doctors thought that something that was in writing was proof and would prevent the patient filing a statement of claim after treatment. This claim is essentially erroneous as the fact of writing in and of itself does not prevent the patient from filing a claim if his consent was uninformed. *See* Hernandez v. United States, 465 F. Supp. 1071-1073 (1979) that indicates that the position of the common law and the position of American judicial decision are not different from one another in this case. For a discussion of this ruling, see Abraham P. Ordover, *Surprise-That Damaging Turncoat Witness is Still with Us: An Analysis of Federal Rules of Evidence 607, 801 (d)(1)(A) and 403*, 5 HOFSTRA L. REV. 65, 72 n.40 (1976); Karen A. Ruzic, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT L. REV. 265, 276 n.104 (1994); Erron W. Smith, *Apprendi v. New Jersey: The United States Supreme Court Restricts Judicial Sentencing Discretion and Raises Troubling Constitutional Questions Concerning Sentencing Statutes and Reforms Nationwide*, 54 ARK. L. REV. 649, 695 n.265 (2001). [↑](#footnote-ref-48)
49. Sec. 13 of Patients' Rights Law. [↑](#footnote-ref-49)
50. Ladonna L. Griffith, *Consent: Informed Consent-Patient's Right to Comprehend*, 27 HOWARD L.J. 975, 975-993 (1984); Alan Meisel & Loren H. Roth, *Towards an Informed Discussion of Informed Consent: A Review and Critique of Empirical Studies*, 25 ARIZONA L. REV. 265, 265-346 (1983). For the recent discussions of the latter article, see Janet Dolgin, *The Legal Development of the Informed Consent Doctrine: Past and Present*, 19(1) CAMBRIDGE QUARTERLY OF HEALTHCARE ETHICS 97, n. 49 (2010); Christopher Robertson, *Should Patient Responsibility for Costs Change the Doctor-Patient Relationship*, 50 WAKE FOREST L. REV. 363, 374 n.64 (2015); CAMILLA LOUISE SCANLAN, THE LEGAL AND ETHICAL LIMITS OF CONSENT IN HIGH RISK MEDICAL INTERVENTIONS: AN EMPIRICAL STUDY 124 n.441, 141 n.490 (Doctor of Philosophy (Medicine) Thesis, University of Sydney, 2015). [↑](#footnote-ref-50)
51. Hartwell v. Pittman, 428 So. 2nd 1049 (1983) (physician required to inform high risk patient of material risks of non-emergency surgery for a non-critical ailment). For a recent discussion of this case, see Griffith, ibid, at 976 n.3; JAMES WALKER SMITH, HOSPITAL LIABILITY 10-21 n.58 (2018). [↑](#footnote-ref-51)
52. Holland v. Sisters of Saint Joseph of Peace, 523 P. 2nd, 211 (1974). This ruling dealt with the issue of a cancer patient who had undergone radiotherapy after he had given his consent. His consent was considered invalid because he had not been offered alternatives to radiation, such as a surgical procedure or chemotherapy. For an academic discussion of this ruling, see Walter Probert, *Nibbling at the Problems of Medical Malpractice*, 28 U. FLA. L. REV. 56, 60 n.28 (1975); Prentiss E. Feagles et al., *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE LAW JOURNAL 1417 (1976); Jon F. Merz, *An Empirical Analysis of the Medical Informed Consent Doctrine: Search for a Standard of Disclosure*, 2 RISK 27, 60 n.73 (1991). [↑](#footnote-ref-52)
53. *See* Cobbs v. Grant, 8 Cal, 3rd 299, 502 P. 2nd 1 (1972), in which it was determined that non-disclosure of the inherent risks invalidate the patient's consent. For a discussion of this very often cited verdict, see Timothy W. Kenna, *The Patient-Physician Relationship: Present Law and Trends for the Future Implied in Cobbs v. Grant*, 8 U.S.F. L. REV. 320 (1973); Alan J. Weisbard, *Informed Consent: The Law's Uneasy Compromise with Ethical Theory*, 65 NEB. L. REV. 749, 750, 756, 762 n.31 (1986); [Lawrence](https://jamanetwork.com/searchresults?author=Lawrence+O.+Gostin&q=Lawrence+O.+Gostin) O. Gostin, *Informed Consent, Cultural Sensitivity, and Respect for Persons*, 274(10) JAMA 844 (1995). [↑](#footnote-ref-53)
54. The Holland v. Sisters of Saint Joseph of Peace, ibid. [↑](#footnote-ref-54)
55. *See* PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SPLICING LIFE: THE SOCIAL AND ETHICAL ISSUES OF GENETIC ENGINEERING WITH HUMAN BEING, vol. 3, 7 (1982),

[https://bioethics.georgetown.edu/archives/Presidents-Commission-for-Study-of-Ethical-Problems-in- Medicine-and-in-Biomedical-and-Behavioral-Research-Original-Archive-Finding-Aid.pdf](https://bioethics.georgetown.edu/archives/Presidents-Commission-for-Study-of-Ethical-Problems-in-Medicine-and-in-Biomedical-and-Behavioral-Research-Original-Archive-Finding-Aid.pdf). [↑](#footnote-ref-55)
56. Sec. 13(b) Patients' Rights Law. [↑](#footnote-ref-56)
57. In this context the term “reasonable” is used both referring to the amount of conveyed information and referring to the reasonable nature of the information to be conveyed, see *supr*[*a* n](#bookmark5)ote 1. [↑](#footnote-ref-57)
58. As determined by the Israeli Supreme Court in the Berman case. *See* CA 434/94 Berman v, Mor, IsrSc 51(4), 205, 213 (1997), where it was determined that “the paternalistic approach, that maintains that the doctor fulfilled his obligation to the patient regarding conveying information If he acts according to the accepted medical practice was nonetheless overruled. In our judgment the standard of disclosure was determined, that can be found in American judiciary and accepted in Canada and Australia, based on the patient's needs that are required to consolidate consent to medical treatment”. For a discussion of this verdict, see CA 5604/94 Osama Hemed and Ibrahim Hemed v. The State of Israel, IsrSc 58(2) 498 (2004), [http://www.hamoked.org/files/2015/5510 eng.pdf](http://www.hamoked.org/files/2015/5510_eng.pdf); Sagit Mor, *The Dialectics of Wrongful Life and Wrongful Birth Claims in Israel: A Disability Critique*, 63 STUDIES IN LAW, POLITICS, AND SOCIETY

113 (2014), law.haifa.ac.il/images/Publications/Sagit\_Mor\_-\_The\_Dialectics\_of\_WL\_and\_WB\_- \_Print.pdf. [↑](#footnote-ref-58)
59. Rogers v. Whitaker, 175, C.L.R 479, 490 (1992). This case was extensively discussed in the scholarly literature. *See*, for example, Don Chalmers & Robert Schwartz, *Rogers V. Whitaker and Informed Consent in Australia: A Fair Dinkum Duty of Disclosure*, 1(2) MEDICAL LAW REVIEW 139 (1993); R. C. Pincus, *Has informed consent finally arrived in Australia? A comment on the law following the decision of the High Court of Australia in Rogers v. Whitaker*, 159(1) THE MEDICAL JOURNAL OF AUSTRALIA 25 (1993); I. H. Kerridge & K. R. Mitchell, *Missing the Point: Rogers V Whitaker and the Ethical Ideal of Informed and Shared Decision Making*, 1 JOURNAL OF LAW AND MEDICINE 237(1994). [↑](#footnote-ref-59)
60. A. Samuels, *What the Doctor Must Tell the Patient*, 22 MED. SCI. LAW 41 (1982). This research was discussed by Alan G Fraser, *Do Patients Want To Be Informed? A Study of Consent for Cardiac Catheterization*, 52(4) BR. HEART J. 468, 470 (1984); [Kathryn M. Taylor](https://www.sciencedirect.com/science/article/abs/pii/0277953687902462%23%21) & [Merrijoy Kelner,](https://www.sciencedirect.com/science/article/abs/pii/0277953687902462%23%21) *Informed Consent: The Physicians' Perspective*, 24(2) [SOCIAL SCIENCE & MEDICINE 1](https://www.sciencedirect.com/science/journal/02779536)35 (1987); Frances H. Miller, *Informed Consent for the Man on the Clapham Omnibus: An English Cure for the American Disease*, 9 W. NEW ENG. L. REV. 169, 172 n.18 (1987). [↑](#footnote-ref-60)
61. CA 323/89 Kohari. v. State of Israel, IsrSc 45(2), 142 (1991), discussed by [Baruch B](https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=Baruch%20Bar-Alon&eventCode=SE-AU)ar-Alon, *A Digest of Selected Judgments of the Supreme Court of Israel*, 28(4) ISRAEL LAW REVIEW 685 n.32-33 (1994); Oren Asma & Nili Tabak, *Professional Standards Expected of Nurses From an Israeli Legal Perspective*, MEDICINE AND LAW 53, 59 n.25-6 (2017). [↑](#footnote-ref-61)
62. CA 3108/91 Noam Raibi v. Dr. Kurt Weige, Isr. Sc 47(2) 497, 509 (1993), discussed by Haim Povarsky, *Jewish Law Report*, 7 JEWISH L. REP. 1, 30 (1994); Jonathan Davies, *Legal and Forensic Medicine in Israel*, in THE LEGAL AND FORENSIC MEDICINE ENCYCLOPEDIA 475 (2013); Limor Malul, *The Role of the Israeli Courts in Formulating the Physician-Patient Relationship*, 33 MED. & L. 61, 73 n.57 (2014). [↑](#footnote-ref-62)
63. For an overview of this law, see [Michael L. Gross, *A*](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=GROSS%2C+MICHAEL+L)*utonomy and Paternalism in Communitarian Society: Patient Rights in Israel*, 29(4) HASTINGS CENTER REPORT 13 (1999); Gil Siegal et al., *Physcians' Attitudes towards Patients' Rights Legislation*, 20 MED LAW 63 (2001[); Gila Yakov](https://philpapers.org/s/Gila%20Yakov) et al., [*Nurses'*](https://philpapers.org/go.pl?id=YAKNPO&proxyId=&u=http%3A%2F%2Fdx.doi.org%2F10.1177%2F0969733010368199)[*Perceptions of Ethical Issues Related to Patients' Rights L*](https://philpapers.org/go.pl?id=YAKNPO&proxyId=&u=http%3A%2F%2Fdx.doi.org%2F10.1177%2F0969733010368199)*aw*, [17(4) NURSING ETH](https://philpapers.org/asearch.pl?pub=2754)ICS 501 (2010). [↑](#footnote-ref-63)
64. *See* Roger B. Dworkin, *Medical Law and Ethics in the Post-Autonomy Age*, 68 IND. L. J. 727,733 (1993) (“It is a physical concept rather than an intellectual one. If you touch me or eavesdrop me, you have injured my autonomy by invading my space. If you actually do something to change my body, you have injured my autonomy by changing the very constitution of what I am”.). For discussing this research, see Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice through Law*, 74 WASH. U. L. Q. 47, 88 n.200 (1996); Mark A. Hall, *A Theory of Economic Informed Consent*, 31 GA. L. REV. 511, 515 n.10 (1997); Lars Noah, *Informed Consent and the Elusive Dichotomy between Standard and Experimental Therapy*, 28 AM. J.L. & MED. 361, 365 n.14 (2002). [↑](#footnote-ref-64)
65. It is important to remember that the component of consent forms the basis of private law in its entirety. *See* Danuta Mendelson, *Historical Evolution and Modern Implications of Concepts of Consent To, and Refusal of, Medical Treatment in the Law of Trespass*, 17 J. LEG. MED. 1 (1996) and the following consequential articles: Adam A. Milani, *Better Off Dead than Disabled: Should Courts Recognize a Wrongful Living Cause of Action When Doctors Fail to Honor Patients' Advance Directives*, 54 WASH. & LEE L. REV. 149, 156 n.42 (1997); Joan H. Krause, *Reconceptualizing Informed Consent in an Era of Health Care Cost Containment*, 85 IOWA L. REV. 261, 267 n.9, 275 n.40 (1999); William Grizzle et al., *Recommended Policies for Uses of Human Tissue in Research, Education, and Quality Control*, 123 ARCH. PATHOL. LAB. MED. 296, 300 n.18 (1999). [↑](#footnote-ref-65)
66. Peoples Health Regulations (Amniocentesis) 1980. [↑](#footnote-ref-66)
67. *Noam Raibi v. Dr. Kurt Weige, supra* n[ote 3](#bookmark8)5, accrding to Justice Shamgar [↑](#footnote-ref-67)
68. Sec. 15(3), Patients' Rights Law. [↑](#footnote-ref-68)
69. Ibid, Sec. 14(d). [↑](#footnote-ref-69)
70. Ibid, Dec. 15(1). [↑](#footnote-ref-70)
71. Ibid 15(2). [↑](#footnote-ref-71)
72. C.C. (T.A.) 1425/57 Kaira v. The Attorney General, P.M. 73 (1959). Discussed by Zeev Weil & Dana Gruber, *The Doctrine of Two Schools of Thought - A Shield or a Sword*, 19 MED. & L. 663, 687 n.126 (2000). [↑](#footnote-ref-72)
73. Millard v. Nagle, 587 A. 2D 10 (1991). For an academic discussion of this ruling, see Grant H. Morris, *Dissing Disclosure: Just What the Doctor Ordered*, 44 ARIZ. L. REV. 313, 335 n.120 (2002); Thaddeus Mason Pope, *Clinicians May not Administer Life-Sustaining Treatment without Consent: Civil, Criminal, and Disciplinary Sanctions*, 9 J. HEALTH & BIOMEDICAL L. 213, 262 n.319 (2013); Ibid, *Certified Patient Decision Aids: Solving Persistent Problems with Informed Consent Law*, 45(1) THE JOURNAL OF LAW, MEDICINE & ETHICS 12 n.32 (2017). [↑](#footnote-ref-73)
74. CA 253/85 Kupat Holim Klalit v. Amiel (1987), [https://www.nevo.co.il/psika html/elyon/NOPADI- NX-9-066-L.htm,](https://www.nevo.co.il/psika_html/elyon/NOPADI-NX-9-066-L.htm) discussed by Bar-Alon, *supra* note [33,](#bookmark7) at 697 n.30, ruled that a surgeon who decided during the course of an operation to change the course of the operation in a way that increases the risks, should have interrupted the operation to consider an alternative treatment and even to warn the patient about the risks of the secondary plan. Likewise, in a similar case Justice Beinisch ruled that as long as the operation or treatment was not intended to avoid immediate danger, and as long as it is possible to delay treatment without worsening the situation, so that the patient can receive information and give informed consent, so the doctor's obligation of disclosure is more extensive. [↑](#footnote-ref-74)
75. *Noam Raibi v. Dr. Kurt Weige, supra* n[ote 3](#bookmark8)5, at 506. [↑](#footnote-ref-75)
76. *Noam Raibi v. Dr. Kurt Weige, supra* n[ote 3](#bookmark8)5, at 754. [↑](#footnote-ref-76)
77. Meisel & Roth, *supra* no[te 16](#bookmark6), at 274, 277, 323. [↑](#footnote-ref-77)
78. *See* Boreham & Gibson, *The Informative Process in Private Medical Consultations: A Prelminary Investigation*, 12 SOC. SC. & MED. 409 (1978). [↑](#footnote-ref-78)
79. *See* Murray v McMurchy [1949] 2 DLR 442 (Sup Ct BC), discussed by Brian Bromberger, *Patient Participation in Medical Decision-Making: Are the Courts the Answer*, 6 U.N.S.W.L.J. 1 (1983) passim; Editorial, *Consent and the Anaesthetist*, 43 ANAESTHESIA 265, n.4 (1987); MA Branthwaite, *Consent and the Incompetent Adult - The Legal Perspective*, 10(3) CLINICAL INTENSIVE CARE 77 (1999), <https://www.tandfonline.com/action/showCitFormats?doi=10.3109%2Ftcic.10.3.77.79>. [↑](#footnote-ref-79)
80. All data has been taken from AVRAHAM STEINBERG, ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS: A COMPILATION OF JEWISH MEDICAL LAW ON ALL TOPICS OF MEDICAL INTEREST vol. 1, s.v. ‘fetus' (Fred Rosner trsn. 2003). [↑](#footnote-ref-80)
81. *See* the parallel description of the Babylonian Talmud *Niddah* 31a: “the child's bones, sinews, nails, the brain in his head and the white in his eye” - are formed, and his mother supplies “the semen of the red substance out of which are formed the child's skin, flesh, hair, blood and the black of his eye”. This was discussed by YEHEZKEL MARGALIT, THE JEWISH FAMILY - BETWEEN FAMILY LAW AND CONTRACT LAW 155 n.92 (2017) [=ibid, *Towards Establishing Parenthood by Agreement in Jewish Law,* 26(2) AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW 647, 671 n.90 (2018). [↑](#footnote-ref-81)
82. During the fertilization process two mature germ cells meet in the fallopian tube: the male sperm and the female ovum. The two cells become one zygote. The zygote divides into two cells, and then each cell divides itself again and again into two cells (two cells become four, four become eight, and so on) until a morula is formed (*morus* in Latin is a mulberry tree), after which a blastocyst - a mass of cells some of which will be differentiated to form the fetus and others differentiated to the components of the placenta. While the ovum is dividing up it begins to move down through the fallopian tube to insert itself in the womb. During five to seven days after fertilization the blastocyst reaches the womb and is absorbed by the uterine mucosa. At this stage the process of differentiation begins of the blastocyst cells to form the fetus and its supporting elements (placenta, amniotic sac, etc.) At the end of the second week of formation the fetus has the shape of a head and tail and then the cells differentiate to tissues that comprise the fetus, heart, brain, urinary and digestive systems, etc. This stage is characterized by fast development, both in structure and in pre-fetal functioning. In the fourth week of fertilization the back of the fetus begins to curve, its heart starts to develop in a functional form as well as the central nervous system, the kidneys and urinary tract. The fifth week sees the budding of the tongue, the eyes, ears, lungs, heart and limbs. The development of the heart, the nervous system and the renal system continues and the fetus measures about eight millimeters. The sixth week sees the development of the teeth, nose, intestines, spleen and reproductive system. The fetus already has a head and neck and its ears and eyes begin to bud. It now measures 13 millimeters. In the seventh week the skeletal muscles and fingers begin to grow, the back and head start to move and the reproductive system continues to develop. The tiny fetus now measures about 17 millimeters. In the eighth week enamel begins to form on the teeth, soft muscles develop and limbs start to bud on the sides of the fetus. [↑](#footnote-ref-82)
83. For the medical, ethical and legal differences between these two stages, see Carson Strong, *The Moral Status of Preembryos, Embryos, Fetuses, and Infants*, 22(5) THE JOURNAL OF MEDICINE AND PHILOSOPHY: A FORUM FOR BIOETHICS AND PHILOSOPHY OF MEDICINE 457 (1997); ROBERT P. GEORGE &

CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE (2008); BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES (2011). [↑](#footnote-ref-83)
84. Steinberg, *supra* note [1.](#bookmark13) This stage of fetal development is typified mainly by functional development: nails, bone marrow, external sexual signs with clear differentiation between the testicles and the ovaries, increasing movements and reactions to outside stimuli (for example, an increase in heart beat during amniocentesis). At this stage the fetal muscles begin to work; it can move its arms and legs, and also open and close its hands; the spine and ribs harden and its nails are formed. In the 12th week it is already possible to identify the sex of the fetus by means of an ultrasound test. The nervous system is not yet complete and its eyes are shut. The fetus is already active, kicking and turning over, and by the 20th week its average weight is between 200 and 250 gram and the woman can already feel its movements. [↑](#footnote-ref-84)
85. Only some 150 years ago. [↑](#footnote-ref-85)
86. These movements are known as “quickening”. For the correlation between these movements and the legality of the abortion of this viable fetus, se[e Robert H. Blank,](http://journals.sagepub.com/action/doSearch?target=default&ContribAuthorStored=Blank%2C+Robert+H) *Judicial Decision Making and Biological Fact: Roe v. Wade and the Unresolved Question of Fetal Viability*, 37(4) POLITICAL RESEARCH QUARTERLY 584 (1984); Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L. REV. 713 (2007); ibid, *Gonzales, Casey, and the Viability* Rule, 103 NW. U. L. REV. 249 (2009). [↑](#footnote-ref-86)
87. Nitzan Rimon-Zarfaty, Aviad E. Raz & Yael Hashiloni-Dolev, *When does a Fetus Become a Person? An Israeli Viewpoint*, 37 JOURNAL OF FAMILY AND REPRODUCTIVE HEALTHCARE 216 (2011). For a discussion of this research, see Carlos Y**.** Valenzuela, *The Ontogenetic Origin of Human Beings in the*

*Scientific-Ethics Perspective and its Implications on Abortion*, 4 J CLIN RES BIOETH 148, n.42 (2013), [https://pdfs.semanticscholar.org/9aec/f4ce09c828424c98b433a5238e2265afd0e0.p](https://pdfs.semanticscholar.org/9aec/f4ce09c828424c98b433a5238e2265afd0e0.pdf)df; Aviad Raz et al., *Donation of Surplus Frozen Pre-Embryos to Research Israel: Underlying Motivations*, 5 ISRAEL JOURNAL OF HEALTH POLICY RESEARCH 25 n.15 (2016),

[https ://ijhpr.biomedcentral.com/track/pdf/10.1186/s 13584-016-0085-](https://ijhpr.biomedcentral.com/track/pdf/10.1186/s13584-016-0085-4)4[; Yael Hashiloni-Dolev](https://www.sciencedirect.com/science/article/pii/S2405661817300126%23%21) & [Silke](https://www.sciencedirect.com/science/article/pii/S2405661817300126%23%21) [Schicktanz,](https://www.sciencedirect.com/science/article/pii/S2405661817300126%23%21) *A Cross-Cultural Analysis of Posthumous Reproduction: The Significance of the Gender And Margins-Of-Life Perspectives*, [4 REPRODUCTIVE BIOMEDICINE & SOCIETY ONLINE](https://www.sciencedirect.com/science/journal/24056618) 21 (2017), https ://www.sciencedirect.com/science/article/pii/S2405661817300126. [↑](#footnote-ref-87)
88. For a discussion of the phenomenon of aborting every not "perfect fetus", see GLENN MCGEE, , THE

PERFECT BABY: A PRAGMATIC APPROACH TO GENETICS (1997); [Larissa Remennick,](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Remennick%2C+Larissa) *The Quest for the Perfect Baby: Why Do Israeli Women Seek Prenatal Genetic Testing?*, 28(1) SOCIOLOGY OF HEALTH & ILLNESS 21 (2006); Ruth Kannai, ‘*Maybe It Would Be Better If You Spoke To My Mother?'—Genetic Counseling and Personal Experience*, 8[0(2) PATIENT EDUCATION AND COUNSELIN](https://www.sciencedirect.com/science/journal/07383991)G 260 (2010). [↑](#footnote-ref-88)
89. *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-89)
90. Although some consider this possible; see Mordechai Halperin, *Termination of Pregnancy: Legal, Moral and Jewish Aspects*, 6(2) JEWISH MEDICAL ETHICS AND HALACHA 41(2008). Halperin maintains that when the fetus is harmed by being in the woman's womb, it is precisely the fetus who is the prosecutor: “The main obligation is to the fetus itself, and the father is entitled to monetary compensation under the law of inheritance, but only ifthe fetus dies. But if it is harmed - the obligation is to the fetus itself. And if the fetus dies inside the mother, the father inherits its right [...] thus whoever harms a fetus pays the fetus itself. According to Maimonides, only when the fetus is killed no money should be paid [.] but if the damage is to the fetus, it is judged according to the law concerning a person who harms his friend, and the payment belongs to the fetus”. [↑](#footnote-ref-90)
91. Raphael Weinberger, *Claim for Damages of the Fetus*, 8-9 MAGAL 103, 114 (1992) (Heb.). Weinberger opines that the fetus has no right to make a claim and that only the woman can make a claim because it is her body that has been damaged: “It is possible that its claim will be rejected until the day it emerges into the world and has its own mind, but the court could provide it with a custodian, or pass a special bye-law for it, thus enabling it to claim for damages even before it is born”. [↑](#footnote-ref-91)
92. Genesis 15. [↑](#footnote-ref-92)
93. Exodus 21, 22-23. [↑](#footnote-ref-93)
94. Although it is absolutely forbidden to harm it, so it is possible to recognize the obligation to be careful with it. [↑](#footnote-ref-94)
95. Tosefta with the commentary *Hasdei David*, Tractate *Ohalot* 87b. For a general discussion of the Tosefta, see Paul Mandel, *The Tosefta,* in THE CAMBRIDGE HISTORY OF JUDAISM vol. 4: The Late Roman-Rabbinic Period 316 (Louis Finkelstein et al. eds., 1984). But, compare this commentary to this that is being cited by Daniel B. Sinclair, *The Legal Basis for the Prohibition on Abortion in Jewish Law*, 15 ISR. L. REV. 109, 113 n.24 (1980). [↑](#footnote-ref-95)
96. Maimonides, ibid, Laws of a Murderer and Self-Preservation, 1, 9, 2. [↑](#footnote-ref-96)
97. Yeshayahu Leibowitz, *Medicine and the Values of Life*, in PROCEEDING OF THE CATHEDRA OF THE MEDICINE HISTORY 1, 2, 12 (1977) (Heb.). [↑](#footnote-ref-97)
98. ALESSANDRA PIONTELLI, FROM FETUS TO CHILD, AN OBSERVATIONAL AND PSYCHOANALYTICAL STUDY (2003). For a discussion of this book, see JOAN RAPHAEL-LEFF, PREGNANCY: THE INSIDE STORY (2001); KAY MILTON[, LOVING NATURE: TOWARDS AN ECOLOGY OF EMOTION](https://www.taylorfrancis.com/books/9781134525393) (2002); DEBORAH MARKS, [DISABILITY: CONTROVERSIAL DEBATES AND PSYCHOSOCIAL PERSPECTIVES](https://content.taylorfrancis.com/books/download?dac=C2004-0-00772-4&isbn=9781136215087&format=googlePreviewPdf) (2014). [↑](#footnote-ref-98)
99. Ibid, in the introduction. [↑](#footnote-ref-99)
100. Proper justification is taken into consideration from its very terminology, although there is no doubt that when the fetus endangers the woman's life, a termination of pregnancy can be performed. [↑](#footnote-ref-100)
101. More on this issue, see Yehiel M. Bar-Ilan, *Za'ar Gufa Kodem: Induced Abortion in Halakhah and Israeli Law*, in THE RIGHT TO LIFE WITH NO MALFORMATION 81 (Jonathan Davies & Avraham Sahar eds., 2007) (Heb.), discussed by Daphne Barak-Erez, *Reproductive Rights in a Jewish and Democratic State*, in CONSTITUTIONAL SECULARISM IN AN AGE OF RELIGIOUS REVIVAL 232 n.19 (Michel Rosenfeld & Susanna Mancini eds., 2014). [↑](#footnote-ref-101)
102. Shai Levi, *The Paradox of Jewish Bioethics in Israel: The Cast of Reproductive Technologies*, in Religion in Biotehischen Diskurse. Interdiszplinare, Internationale und Interreligiose PERSPEKTIVEN 81-102 (2010). For the recent consequential discussion of this research, se[e Eimi Lev,](https://content.sciendo.com/search?f_0=author&q_0=Eimi+Lev) *Prenatal Googling: Online Information Seeking by Israeli Women During Pregnancy*, 3(2) iNTERNATioNAL REViEW oF soCiAL REsEARCH 69, 70, 72, 80 (2013); shirin G. Naef, [*Modern*](https://www.google.com/books?hl=iw&lr=&id=IIG-CQAAQBAJ&oi=fnd&pg=PA157&ots=sz8GMSaPHw&sig=vieFx1roo_OToW8TnZagNYfmhBw)[*Reproductive Technologies in the Light of Traditional Ontologies: An Anthropological Reflection on*](https://www.google.com/books?hl=iw&lr=&id=IIG-CQAAQBAJ&oi=fnd&pg=PA157&ots=sz8GMSaPHw&sig=vieFx1roo_OToW8TnZagNYfmhBw)[*Assisted Reproduction in Iran*](https://www.google.com/books?hl=iw&lr=&id=IIG-CQAAQBAJ&oi=fnd&pg=PA157&ots=sz8GMSaPHw&sig=vieFx1roo_OToW8TnZagNYfmhBw), in sELBsTGEsTALTuNG DEs MENsCHEN DuRCH BioTECHNiKEN 157, 171 (Narr Francke Attempto et al., eds., 2015); [Hashiloni-Dolev &](https://www.sciencedirect.com/science/article/pii/S2405661817300126%23%21) [schicktanz,](https://www.sciencedirect.com/science/article/pii/S2405661817300126%23%21) *supra* note [8.](#bookmark14) *See also* more generally BioETHiCs AND BioPoLiTiCs iN isRAEL : soCio-LEGAL, PoLiTiCAL, AND EMPiRiCAL ANALYsis (Hagai Boas et al., 2018). [↑](#footnote-ref-102)
103. steinberg, *supra* no[te 1](#bookmark13). [↑](#footnote-ref-103)
104. *See* Halperin, *supra* no[te 14](#bookmark22). [↑](#footnote-ref-104)
105. A 13th-century pries t . [↑](#footnote-ref-105)
106. Pope innocent iii and Gregory iX supported this approach in this century. [↑](#footnote-ref-106)
107. *See* also the prolific writing of Pope John Paul II regarding this issue. For a discussion of his legacy, see, for example, JAMES J. MCCARTNEY, UNBORN PERSONS: POPE JOHN PAUL II AND THE ABORTION DEBATE (1987); Michele Dillon, *Cultural Differences in the Abortion Discourse of the Catholic Church: Evidence from Four Countries*, 57(1) SOCIOLOGY OF RELIGION 25 (1996); [Kenneth Mulligan, *P*](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Mulligan%2C+Kenneth)*ope John Paul II and Catholic Opinion Toward the Death Penalty and Abortion*, 87(3[) SOCIAL SCIENCE](https://onlinelibrary.wiley.com/journal/15406237) [QUARTERLY](https://onlinelibrary.wiley.com/journal/15406237) 739 (2006). [↑](#footnote-ref-107)
108. ALPHONSUS BONNAR, THE CATHOLIC DOCTOR (9th ed. 1948). For a discussion of this book, see, e.g., ROSS A. ARMSTRONG, PRIMARY AND SECONDARY PRECEPTS IN THOMISTIC NATURAL LAW TEACHING 186 (2012); NICHOLAS P. CAFARDI, VOTING AND HOLINESS: CATHOLIC PERSPECTIVES ON POLITICAL PARTICIPATION (2012). [↑](#footnote-ref-108)
109. Yonatan Davis, *Saving a Fetus in the body of a Dead Woman - Legal Aspects,* in Collection of ARTICLES FOR THE SECOND CONGRESS OF MEDICINE, ETHICS AND JEWISH LAW 727-730 (1996). [↑](#footnote-ref-109)
110. Halperin, *supra* not[e 14](#bookmark22). [↑](#footnote-ref-110)
111. For the far-reaching influence of the stringent Catholic perspective on both the American and the international law, see John T. Jr. Noonan, *Abortion and the Catholic Church: A Summary History*, 12 NAT. L.F. 85 (1967); TIMoTHY BYRNES & MARY C. SEGERS, THE CATHoLIC CHURCH AND THE PoLITICS oF ABoRTIoN: A VIEW FRoM THE STATES (1991); Rishona Fleishman, *The Battle against Reproductive Rights: The Impact of the Catholic Church on Abortion Law in Both International and Domestic Areas*, 14 EMoRY INT'L L. REV. 277 (2000). [↑](#footnote-ref-111)
112. For an overview of the Islam's point of view regarding the abortion debate, see, for example, Leila Hessini, *Abortion and Islam: Policies and Practice in the Middle East and North Africa*, 15(29) REPRODUCTIVE HEALTH MATTERS 75 (2007); Kiarash Aramesh, [*Abortion: An Islamic Ethical View*,](http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.835.7088&rep=rep1&type=pdf) 6 (Suppl. 5) IRAN J ALLERGY ASTHMA IMMUNOL 29 (2007),

[http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.835.7088&rep=rep1&type=](http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.835.7088&rep=rep1&type=pdf)pdf; Yassar Abdullah Alamri, *Islam and Abortion*, 43(1) JOURNAL OF THE ISLAMIC MEDICAL ASSOCIATION OF NORTH America 39 (2011). [↑](#footnote-ref-112)
113. These declarations lack legal validity but do indicate the present attitude to termination of pregnancy, emanating from discourse on human rights. [↑](#footnote-ref-113)
114. A Muslim declaration regarding human rights that was recognized on 19.9.81 can be found i[n SHAHEEN](https://www.amazon.com/s/ref%3Ddp_byline_sr_book_1?ie=UTF8&text=Shaheen+Ali&search-alias=books&field-author=Shaheen+Ali&sort=relevancerank) [ALI,](https://www.amazon.com/s/ref%3Ddp_byline_sr_book_1?ie=UTF8&text=Shaheen+Ali&search-alias=books&field-author=Shaheen+Ali&sort=relevancerank) GENDER AND HUMAN RIGHTS IN ISLAM AND INTERNATIONAL LAW: EQUAL BEFORE ALLAH, UNEQUAL BEFORE MAN? 287-97 (2000); Islamabad Declaration on the Role of Muslim Women Parliamentarians in the Promotion of Peace, Progress and Development of Islamic Societies, accepted on 1st -3rd August 1995. For an overview of this declaration, see Shaheen Sar Da R Ali, *Women's Rights, CEDAW and International Human Rights Debates: Toward Empowerment?*, in RETHINKING EMPOWERMENT : GENDER AND DEVELOPMENT IN A GLOBAL/LOCAL WORLD (Jane L. Parpart et al eds., 2002); KATRINA RIDDELL, ISLAM AND THE SECURITISATION OF POPULATION POLICIES: MUSLIM STATES AND SUSTAINABILITY (2009); *1st World Muslim Women Summit & Exhibition (WISE 2016): Conference Report*, 24(2) INTELLECTUAL DISCOURSE 333, 336 (2016). [↑](#footnote-ref-114)
115. Ibid, Sec. 2(A). [↑](#footnote-ref-115)
116. Sec. 61 of the criminal code (1937). [↑](#footnote-ref-116)
117. Cairo Declaration, Note 129 above, Sec. 7(A). [↑](#footnote-ref-117)
118. This is different from other existing legal systems, including Israeli law, where the father has no status in this matter. It was also established in Kuwait in 1984 that the committee for termination of pregnancy must confirm the request and that all committee members must be Muslim. For an overview of the different current perspectives of the various Muslim jurisdictions, see, for example, Vardit Rispler Chaim, [*The Right Not To Be Born: Abortion of the Disadvantaged Fetus in Contemporary Fatwas*](http://onlinelibrary.wiley.com/doi/10.1111/j.1478-1913.1999.tb03674.x/full), 89(2) THE MUSLIM WORLD 130 (1999); Oren Asman, *Abortion in Islamic Countries - Legal and Religious Aspects*, 23 MED. & L. 73 (2004); [Leila Hessini, *I*](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Hessini%2C+Leila)*slam and Abortion: The Diversity of Discourses and Practices*, 39(3) IDS BULLETIN 18 (2009). [↑](#footnote-ref-118)
119. *See* John M. Riddle & J. Worth Estes, *Oral Contraceptives in Ancient and Medieval Times*, 80(3) AMERICAN SCIENTIST 226 (1992); JOHN M. RIDDLE, CONTRACEPTION AND ABORTION FROM THE ANCIENT WORLD TO THE RENAISSANCE (1992); IBID, EVE'S HERBS: A HISTORY OF CONTRACEPTION AND ABORTION IN THE WEST (1999). [↑](#footnote-ref-119)
120. In ancient times there were two main methods of performing abortions: (a) puncturing the fetus through the vagine (b) using pharmacological methods (swallowing certain substances) that caused the pregnancy to terminate and evacuate. Ancient literature describes other procedures to terminate a pregnancy, such as external heat, physical activity and extreme self-starvation. [↑](#footnote-ref-120)
121. Exodus 1:22. [↑](#footnote-ref-121)
122. Pars viscerum matris. For a legal discussion of this dictum, see B. Frey, *Injuries to Infants En Ventre Se Mere*, 12 ST. LOUIS L. REV. 85, 91 (1927); Robert M. Byrn, *The Abortion Question: A Nonsectarian Approach*, 11 CATH. LAW. 316, 317 (1965); David A. Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 582 (1965). [↑](#footnote-ref-122)
123. Although many terminations like these ended in infection and death. [↑](#footnote-ref-123)
124. A poet who lived between 23 BCE until 17 AD. For his significant influence on the abortion dilemma, see Sheila K. Dickison, *Abortion in Antiquity*, 6(1) ARETHUSA 159 (1973); W. J. Watts, *Ovid, the Law and Roman Society on Abortion*, 16 ACTA CLASSICA 89 (1973); M. K. Gamel, *Non sine caede: Abortion Politics and Poetics in Ovid's Amores*, 16 HELIOS183 (1989). [↑](#footnote-ref-124)
125. The Pythagoras philosophers. [↑](#footnote-ref-125)
126. From the Hippocratic oath 4th century BCE: “I will never give to a woman a drug or instrument to perform an abortion”. *See e.g.*, James S. Murray, *The Alleged Prohibition of Abortion in the Hippocratic Oath,* 35(3) ECHOS DU MONDE CLASSIQUE: CLASSICAL VIEWS 293 (1991); Ben A. Rich, *Postmodern Medicine: Deconstructing the Hippocratic Oath, 65* U. Colo. L. Rev. 77, 87-119 (1993); Thomas Rutten & Leonie von Reppert-Bismarck, *Receptions of the Hippocratic Oath in the Renaissance: The Prohibition of Abortion as a Case Study in Reception*, 51(4) JOURNAL OF THE HISTORY OF MEDICINE AND ALLIED SCIENCES 456 (1996). [↑](#footnote-ref-126)
127. The Platonic and Stoic philosophers. [↑](#footnote-ref-127)
128. Such as multiple child families. For a discussion of Aristotle's perception of the abortion, see, for example, Anthony Nathan Cabot, *History of Abortion Law*, 1980 ARIZ. ST. L.J. 73, 77-86 (1980); Patrick Gray, *Abortion, Infanticide, and the Social Rhetoric of the Apocalypse of Peter*, 9(3) JOURNAL OF EARLY CHRISTIAN STUDIES 313 (2001); [Carrie-Ann Biondi,](https://www.researchgate.net/profile/Carrie_Ann_Biondi?_sg=8ggJvJlAU8SQtZrgRoOrY8z9_aN_0vXaKGxYVjwmnFKi_-BqL495nL3abbMJ5UwU6whnh7w.ItfbQzx3x3z35L9OmOJfQUqmY2agJtEYvJ6oKlZQA4lOWfAkPkAoz7ZCB8_SRJsA1onlpzHQ0jMNM41FCqmsiw) *Aristotle's Moral Expert: The phronimos*, in ETHICS EXPERTISE. PHILOSOPHY AND MEDICINE 87 (Lisa Rasmussen ed., 2005). [↑](#footnote-ref-128)
129. Thus the death penalty was repealed in Prus s ia in 1837. [↑](#footnote-ref-129)
130. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT (1689) was the main thinker among the liberal philosophers who spoke about human rights as natural rights. For a discussion of this landmark research and its influence on the abortion dilemma, see John D. Gorby, *The Right to an Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court's Birth Requirement*, 4 S. ILL. U. L.J. 1, 6 (1979); Michael W. McConnell, *God is Dead and We Have Killed Him: Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163 (1993) passim; Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59, 72 n.37 (1993). [↑](#footnote-ref-130)
131. A jurist who was head of the United Nations committee for the formulation of the universal declaration regarding human rights, adopted by the organization in 1948. For his unique input for our discussed issue, see, for example, Kenneth Cmiel, *The Recent History of Human Rights*, 109(1) THE AMERICAN HISTORICAL REVIEW 117 (2004); Daniel Cere, *Human Rights and the Family*, 22(1) [ACADEMIC](https://link.springer.com/journal/12129) [QUESTIONS](https://link.springer.com/journal/12129) 63 (2009); Tania Penovic, *Reviewed Work: Human Rights and the Unborn Child by Rita Joseph*, 33(1) HUMAN RIGHTS QUARTERLY 229 (2011). [↑](#footnote-ref-131)
132. Ruth Gavison & Hagai Schneider, HUMAN RIGHTS AND THE CITIZEN IN ISRAEL: READINGS 1, 26 (Tali Ben-Gal et al. eds, 1991) (Heb.). [↑](#footnote-ref-132)
133. Discusses by Harry M. Rhea, *The Nuremberg Effect on Contemporary International Criminal Justice*,

21(4) CRIMINAL JUSTICE STUDIES 361 (2008),

[https://www.tandfonline.com/doi/full/10.1080/14786010802554246?scroll=top&needAccess=tr](https://www.tandfonline.com/doi/full/10.1080/14786010802554246?scroll=top&needAccess=true)ue;

KRISTIN E. HENDERSON, MISSING LINK: THE REHABILITATION OF CHILD SOLDIERS 86 (unpublished

Thesis, Political Science, California State University, Chico, 2015). [↑](#footnote-ref-133)
134. For this substantial treaty, se[e Donna J. Sullivan,](https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=Donna%20J.%20Sullivan&eventCode=SE-AU) *Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination*, 82(3) AMERICAN JOURNAL OF INTERNATIONAL LAW 487 (1988); Ruth Lapidoth, *Freedom of Religion and of Conscience in Israel*, 47 CATH. U. L. REV. 441, 442 n.2 (1997-8); PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 391 (2005). [↑](#footnote-ref-134)
135. Franz Wieacker, *Foundations of European Legal Culture*, 38 AM. J. COMP. L. 1, 29 (1990). (a European legal historian). For a discussion of this often cited article, see Reiner Schulze, *European Legal History - A New Field ofResearch in Germany,* 13(3) The Journal of Legal History 270, 287 (1992); FRANCIS SNYDER, [THE UNFINISHED CONSTITUTION OF THE EUROPEAN UNION: PRINCIPLES, PROCESSES](http://opj.ces.uc.pt/portugues/novidds/comunica/FrancisSnyder.pdf)

[AND CULTURE 2](http://opj.ces.uc.pt/portugues/novidds/comunica/FrancisSnyder.pdf)0 n.69 (2003), opj.ces.uc.pt/portugues/novidds/comunica/FrancisSnyder.pdf; Rafal Manko[, *The Culture of Private Law in Central Europe After Enlargement: A Polish Perspective,*](https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-0386.2005.00275.x) 11(5) EURoPEAN LAW JoURNAL 527 (2005). [↑](#footnote-ref-135)
136. *Ibid*. Wieacker notes there, righteously, that if adopting international treaties and standards don't come about by putting the principles into practice, but become mere “lip service”, many countries, especially those of third-world status, cannot hope for a decent existence for their citizens. [↑](#footnote-ref-136)
137. For this basic human rights, see, e.g., *Equality before the Law*, 8 VA. L. REG. n.s. 481 (1922-1923); David M. Byrne, *Equality b efo re the Law*, 2 DUBLIN U. L. REV. 40 (1970); AUSTRALIA LAW REFoRM CMSSN AUSTRALIA, EQUALITY BEFoRE THE LAW (1993). [↑](#footnote-ref-137)
138. Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. REV. L. 519, 521 (1992). [↑](#footnote-ref-138)
139. *See* Roe v. Wade, 410 U.S. 113 (1973) (in this case the “quickening” test was ruled out whereby the development of the fetus is established, and the “viability” test was recognized instead). This significant quote has been discussed in plenty articles, amongst others, John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1972-3); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, THE SUPREME COURT REVIEW 159 (1973); David Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639 (1980). [↑](#footnote-ref-139)
140. Furthermore some three-quarters of the 160 constitutions existing today in the world (that were formulated into one document) have been adopted since 1965. *See Roe v. Wade*, ibid at 520. [↑](#footnote-ref-140)
141. AUSTEN G. GOWERS, JOHN TINGLE & TOM LOUISE, HEALTH CARE LAW: THE IMPACT OF THE HUMAN Rights Act 1998 (2001). For a discussion of this book, see Jonas Wadstrom & Robert Gaston, [LIVING DONOR KIDNEY TRANSPLANTATION: CURRENT PRACTICES, EMERGING TRENDS AND EVOLVING](https://www.google.com/books?hl=iw&lr=&id=znJgKHXMQO0C&oi=fnd&pg=PP1&dq=%22Living+Donor+Kidney+Transplantation:+Current+Practices,+Emerging+%22&ots=KoVCzUvrfh&sig=tq2SuvT279Kkifh7TivvIn8d6Jc) [CHALLENGEs](https://www.google.com/books?hl=iw&lr=&id=znJgKHXMQO0C&oi=fnd&pg=PP1&dq=%22Living+Donor+Kidney+Transplantation:+Current+Practices,+Emerging+%22&ots=KoVCzUvrfh&sig=tq2SuvT279Kkifh7TivvIn8d6Jc) 164 (2005); ELIZABETH WICKs, HUMAN RIGHTs AND HEALTHCARE 277 (2007); Austen Garwood-Gowers , *Time to Address the Problem of Post-Mortem Procurement of Organs for Transplantation Occurring without Proper Pre-Mortem Consent*, 20 EUR. J. HEALTH L. 383, 386 n.10 (2013). [↑](#footnote-ref-141)
142. Infant Life (Preservation) Act, 1929, 19 Goe, c. 34 [↑](#footnote-ref-142)
143. Human Fertilization and Embryology Act, 1990 c. 37 [↑](#footnote-ref-143)
144. Abortion Act, 1967, c. 87. [↑](#footnote-ref-144)
145. Canadian Charter of Rights and Freedom, #7. For a discussion of this article and the dilemma of abortion, see, for example, SHEILAH L. MARTIN, WOMEN'S REPRODUCTIVE HEALTH, THE CANADIAN Charter of Rights and Freedoms and the Canada Health Act (1989); Joanne Barker, *Gender, Sovereignty, and the Discourse of Rights in Native Women's Activism*, 7(1) MERIDIANS 127 (2006); Federico Fabbrini, *The European Court of Human Rights, the EU Charter of Fundamental Rights, and the Right to Abortion: Roe v. Wade on the Other Side of the Atlantic*, 18 CoLUM. J. EUR. L. 1, 25 n.216 (2011). [↑](#footnote-ref-145)
146. Ibid, #1 [↑](#footnote-ref-146)
147. New Zealand Bill of Rights Act, Part 1. [↑](#footnote-ref-147)
148. GEoRGE WILLIAM, HUMAN RIGHTs UNDER THE AUsTRALIAN CoNsTITUTIoN (2002). *See also*, George Williams, *Race and the Australian Constitution: From Federation to Reconciliation* , 38 osGooDE HALL L. J. 643, 747 n.18 (2000); Elizabeth Handsley, *Reviewed Work: Human Rights under the Australian Constitution by George Williams*, 73(2) AUSTRALIAN QUARTERLY 34 (2001); David Clark, *Human Rights under the Australian Constitution*, 37 U.N.S.W.L.J. 231 (2014). [↑](#footnote-ref-148)
149. Ireland Const. article 40, 3.2 [↑](#footnote-ref-149)
150. Ireland Constition, amend. VIII. [↑](#footnote-ref-150)
151. Basic Law of the Federal Republic of Germany, 1949, ##2. For a general discussion of the German regulation of the various human rights, se[e SABINE MICHALOWSK](https://www.amazon.com/Sabine-Michalowski/e/B001HCV1NA/ref%3Ddp_byline_cont_book_1)I [& LORNA WOODS](https://www.amazon.com/s/ref%3Ddp_byline_sr_book_2?ie=UTF8&text=Lorna+Woods&search-alias=books&field-author=Lorna+Woods&sort=relevancerank) GERMAN CONSTITUTIONAL LAW THE PROTECTION OF CIVIL LIBERTIES (1999); Ernst Benda, *The Protection of Human Dignity (Article 1 of the Basic Law)*, 53 S.M.U. L. REV. 443 (2000); Matthias Mahlmann, *The Basic Law at 60 - Human Dignity and the Culture of Republicanism*, 11 GERMAN L.J. 9 (2010). [↑](#footnote-ref-151)
152. G. v. Board Uchta'la IR 32, 69 [1980]. [↑](#footnote-ref-152)
153. For this acute amendment, see, for example, Eva Maleck-Lewy, *Between Self-determination and State Supervision: Women and the Abortion Law in Post-unification Germany*, 2(1) SOCIAL POLITICS: INTERNATIONAL STUDIES IN GENDER, STATE & SOCIETY 62 (1995); Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273 (1995); Nanette Funk, *Abortion Counselling and the 1995 German Abortion Law*, 12 CONN. J. INT'L L. 33 (1996). [↑](#footnote-ref-153)
154. Christian Lawyers Association of SA v. The Minister of Health (11) BCLR 1434.49. For a discussion [↑](#footnote-ref-154)
155. of this matter, see ZIYAD MOTOLA & CYRIL RAMAPHOSA, CONSTITUTIONAL LAW: ANALYSIS AND CASES (2002). [↑](#footnote-ref-155)
156. For some possible applications of this approach, see, for example, Lawrence C. Becker, *Human Being: The Boundaries of the Concept*, 4(4) PHILOSOPHY & PUBLIC AFFAIRS 334 (1975); John M Goldenring, *The Brain-Life Theory: Towards A Consistent Biological Definition of Humanness*, 11 JOURNAL OF MEDICAL ETHICS 198 (1985); Thomas A. Magnani, *The Patentability of Human-Animal Chimeras*, 14 BERKELEY TECH. L.J. 443 (1999). [↑](#footnote-ref-156)
157. Rene Descartes, Discourse On the Method (2018). For a consequential discussion of his unique attitude, see e.g., John Cottingham, *Descartes on Mind and Body*, 2(2[) COGITO](https://www.pdcnet.org/collection-anonymous/browse?fp=cogito) 10 (1988), <https://www.pdcnet.org/cogito/content/cogito_1988_0002_0002_0010_0013>; Yakare-Oule Jansen, *The Right to Freely Have Sex Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 AKRON L. REV. 311, 311 n.1 (2007); Brendan F. Pons, *The Law and Philosophy of Personhood: Where Should South Dakota Abortion Law Go from Here*, 58 s.D. L. REV. 119, 141-2 (2013). [↑](#footnote-ref-157)
158. People who are neither deaf nor dumb, who can communicate with others by means of lip reading. [↑](#footnote-ref-158)
159. GOTTFRIED WILHELM LEIBNI[Z, THE MONADOLOGY AND OTHER PHILOsOPHIcAL WRITINGs (Robert](https://books.google.co.il/books?id=fEfuAgAAQBAJ&pg=PA319&lpg=PA319&dq=THE+NEW+SYSTEM+AND+OTHER+WRITINGS+ON+MONADOLOGY+&source=bl&ots=y1hdfILMcw&sig=DpZWKkDbwr27E-BsDU87opGRazo&hl=iw&sa=X&ved=2ahUKEwiFu9aun6TfAhUObVAKHc4PA0YQ6AEwAnoECAYQAQ) [Latta](https://books.google.co.il/books?id=fEfuAgAAQBAJ&pg=PA319&lpg=PA319&dq=THE+NEW+SYSTEM+AND+OTHER+WRITINGS+ON+MONADOLOGY+&source=bl&ots=y1hdfILMcw&sig=DpZWKkDbwr27E-BsDU87opGRazo&hl=iw&sa=X&ved=2ahUKEwiFu9aun6TfAhUObVAKHc4PA0YQ6AEwAnoECAYQAQ) Trans., 2014). For a discussion of the approach of this substantial thinker, see, for example, [BENsON](https://www.amazon.com/Benson-Mates/e/B001IXO2HA/ref%3Ddp_byline_cont_book_1) [MATEs,](https://www.amazon.com/Benson-Mates/e/B001IXO2HA/ref%3Ddp_byline_cont_book_1) THE PHILOsOPHY OF LEIBNIZ: METAPHYsIcs AND LANGUAGE (1989); [BERTRAND RUssELL,](https://scholar.google.co.il/citations?user=Xov8WxMAAAAJ&hl=iw&oi=sra) A [cRITIcAL EXPOsITION OF THE PHILOsOPHY OF LEIBNIZ (1992); JOHANN G. FIcHTE, INTRODUcTIONs TO](https://books.google.co.il/books?id=fEfuAgAAQBAJ&pg=PA319&lpg=PA319&dq=THE+NEW+SYSTEM+AND+OTHER+WRITINGS+ON+MONADOLOGY+&source=bl&ots=y1hdfILMcw&sig=DpZWKkDbwr27E-BsDU87opGRazo&hl=iw&sa=X&ved=2ahUKEwiFu9aun6TfAhUObVAKHc4PA0YQ6AEwAnoECAYQAQ) [THE WIssENscHAFTsLEHRE AND OTHER WRITINGs, 1797-1800](https://books.google.co.il/books?id=fEfuAgAAQBAJ&pg=PA319&lpg=PA319&dq=THE+NEW+SYSTEM+AND+OTHER+WRITINGS+ON+MONADOLOGY+&source=bl&ots=y1hdfILMcw&sig=DpZWKkDbwr27E-BsDU87opGRazo&hl=iw&sa=X&ved=2ahUKEwiFu9aun6TfAhUObVAKHc4PA0YQ6AEwAnoECAYQAQ) (1994). [↑](#footnote-ref-159)
160. For some consequences of his unique attitude, see THE MORAL STATUS OF PERSONS: PERSPECTIVES ON BIOETHICS 3 (Gerhold K. Becker ed., 2000); D. Scott Bennett*, Chimera and the Continuum of Humanity: Erasing the Line of Constitutional Personhood*, 55 EMORY L.J. 347 (2006); [Michael F](https://www.researchgate.net/scientific-contributions/2024090756_Michael_Friedman?_sg=xkRbhRApOTUFMiO-W7yT0qsojySZfqDQCn-ZyvBK3PulSSApxC3hyaDR0yp9QKTY_UJHhiE.gub-OAZe3mGv_TLTY3hDKMYVstp1YCYFAGSfgD3OGrurq8HuiD5XI7KCfW9KAfcVH8f1SYSdEK7AaNXychLL-A)riedman, *Kant on Geometry and Experience*, in MATHEMATIZING SPACE: TRENDS IN THE HISTORY OF SCIENCE (Vincenzo De Risi eds., 2015). [↑](#footnote-ref-160)
161. *See* Sagan, *supra* no[te 99](#bookmark28). [↑](#footnote-ref-161)
162. *See*, for example, The Christian approach, described above at *supra* note [26 -](#bookmark23) [35 a](#bookmark24)nd accompanying text. *See also* RONALD DWORKIN, LIFE'S DOMINION (1993); JONATHAN GLOVER, CAUSING DEATH AND SAVING LIVES (1977). For a discussion of the first book, see Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329 (1993); Nancy S. Jecker & Courtney S. Campbell, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, 3 CAMBRIDGE Q. HEALTHCARE ETHICS 303 (1994); Samuel A. Gunsburg, *Frozen Life's Dominion: Extending Reproductive Autonomy Rights to in Vitro Fertilization*, 65 FORDHAM L. REV. 2205 (1997). For an academic discussion of the latter book, see Choo Han Teck, *Termination of Non-Viable Life*, 21 SING. L. REV. 230, 233 n.25, 241 n.69, 252 n.138 (2000-2001); Stephen W. Smith, *The Killing of Severely Disabled Newborns: The Spectre behind the Legalisation of Physician-Assisted Suicide and Euthanasia*, 24 MED. & L. 791, 802 (2005); Meredith Blake, *Whose Life Is it anyway - A Comment on the Terri Schiavo Case*, 10 INT'L TRADE & BUS. L. REV. 69 (2006) passim. [↑](#footnote-ref-162)
163. Steinberg, *supra* no[te 1](#bookmark13). [↑](#footnote-ref-163)
164. And even if it does not come under the definition of a person, it should be given rights as almost-a- person. [↑](#footnote-ref-164)
165. *See* the Dialogue Between Plato and Aristotle (PLATO[, THE COLLECTED DIALOGUES OF PLATO](https://muse.jhu.edu/book/46363) (1961)), where the classic socratic perception appears regarding the good life, when Socrates refuses to save his own life and escape from prison when he is sentenced to death. [↑](#footnote-ref-165)
166. The world of medicine, for example, promises life expectancy and prolonging life even when the illness is terminal, such as treating patients who are unconscious, or who suffer from Alzheimer's, etc. In such cases it goes unquestioned whether the patient's life is good or meaningful, but rather life is valued in and of itself. This perception will help us claim that the life of a viable fetus with a defect is one that deserves protection. [↑](#footnote-ref-166)
167. Yoram Dinstein, *Human Rights: The Quest for Concretization*, 1 ISRAEL YEARBOOK ON HUMAN RIGHTS 13 (1971). Dinstein lists five main groups of human rights in Israel, according to the five recognized categories which also can be found in international law: civil, political, economic, social and cultural. In the past human rights were defined only in the first two groups - civil and political. Dinstein maintains that civil rights include the right to life, freedom and security; freedom of thought, religion and expression; freedom of movement, gathering and corporation; the right to nationality and the right to due process. For a discussion of this research, see Thomas Buergenthal, *International and Regional Human Rights Law and Institutions: Some Examples of Their Interaction*, 12 TEX. INT'L L. J. 321, 324 n.15 (1977); Luis Kutner, *Soviet Jewry and World Habeas Corpus*, 37 OKLA. L. REV. 495, 527 n.86 (1984); Sinai Deutch, *Are Consumer Rights Human Rights*, 32 OSGOODE HALL L. J. 537, 545 n.31 (1994). [↑](#footnote-ref-167)
168. RUTH GAVISON, HUMAN RIGHTS IN ISRAEL 32 (1994) (Heb.). *See also* Shlomo Hasson & David Ley, *Neighborhood Organizations, the Welfare State, and Citizenship Rights*, 33(1) URBAN AFFAIRS REVIEW 28 (1997); Russell A. Stone, *Human Rights within Israel*, in MIDDLE EAST AND NORTH AFRICA (Paul Magnarella ed., 1999); Alek D. Epstein, *The freedom of conscience and sociological perspectives on dilemmas of collective secular disobedience: The case of Israel*, 1(3) JOURNAL OF HUMAN RIGHTS 305 (2002). [↑](#footnote-ref-168)
169. For a discussion of the interplay of this basic law and the dilemma of the abortion, see, e.g., Doron Shultziner, *Human Dignity: Functions and Meanings*, in PERSPECTIVES ON HUMAN DIGNITY: A Conversation 73 (JeffMalpas & Norelle Lickiss eds., 2007); [Christoph](https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=Christoph%20M%d6%b3%c2%b6llers&eventCode=SE-AU) Mollers, *Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Law*, 42(2) ISRAEL LAW REVIEW 416 (2009); Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B. C. INT'L & CoMP. L. REV. 331, 340 n.66 (2012). [↑](#footnote-ref-169)
170. Israel is the only country in the world that covers the full cost of fertility treatments for single women, married women, lesbians and others. *See*, for example, SUSAN M. KAHN, REPRoDUCING JEWS: A Cultural Account of Assisted Conception in Israel (2000); Leslie King, *From Pronatalism to Social Welfare? Extending Family Allowances to Minority Populations in France and Israel*, 17 EUR. J. PoPuLATioN 305 (2001); Larissa Remennick, *Contested Motherhood in the Ethnic State: Voices from an Israeli Postpartum Ward*, 8 ETHNiCiTiEs 199 (2008). [↑](#footnote-ref-170)
171. in vitro fertilization. For a discussion of the various legal far-reaching ramifications of these procedures, see Nicole L. Cucci, *Constitutional Implications of In Vitro Fertilization Procedures*, [72 sT.](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=10ffdb7785abf5c9467a940c03a30b2a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b18%20Cardozo%20J.L.%20%26%20Gender%20355%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=268&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b72%20St.%20John%27s%20L.%20Rev.%20417%2cat%20431%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=059ffbe5e97369d7daaa7d9404bb84c1) [JoHN's L. REV. 417 (1998); o](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=10ffdb7785abf5c9467a940c03a30b2a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b18%20Cardozo%20J.L.%20%26%20Gender%20355%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=268&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b72%20St.%20John%27s%20L.%20Rev.%20417%2cat%20431%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=059ffbe5e97369d7daaa7d9404bb84c1)livia Lin, *Rehabilitating Bioethics: Recontextualizing In Vitro Fertilization Outside Contractual Autonom*[*y*, 54 DUKE L.J. 485 (2004);](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=10ffdb7785abf5c9467a940c03a30b2a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b18%20Cardozo%20J.L.%20%26%20Gender%20355%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=280&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b54%20Duke%20L.J.%20485%2cat%20490%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=665a060b6e67d4003282a0f95904890b) Daphne Barak-Erez, *IVF Battles: Legal Categories and Comparative Tales*, 28 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 247 (2018). [↑](#footnote-ref-171)
172. Preservation in a frozen state. *See*, for example, the vivid academic discussion of the "cryopreserved embryos", as Sara D. Petersen, *Dealing with Cryopreserved Embryos upon Divorce: A Contractual Approach Aimed at Preserving Party Expectatio*[*ns*, 50 UCLA L. REV. 1065 (2003); S](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=10ffdb7785abf5c9467a940c03a30b2a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b18%20Cardozo%20J.L.%20%26%20Gender%20355%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=371&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b50%20UCLA%20L.%20Rev.%201065%2cat%201080%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=92d206f66d868a770fd9a61aaa9a497c)usan B. Apel, *Cryopreserved Embryos: A Response to "Forced Parenthood" and the Role of Intent*[, 39 FAM. L.Q. 663](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=10ffdb7785abf5c9467a940c03a30b2a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b18%20Cardozo%20J.L.%20%26%20Gender%20355%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=165&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b39%20Fam.%20L.Q.%20663%2cat%20664%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=b2d4b80f3a2f535500387a518cd256ea) [(2005);](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=10ffdb7785abf5c9467a940c03a30b2a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b18%20Cardozo%20J.L.%20%26%20Gender%20355%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=165&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b39%20Fam.%20L.Q.%20663%2cat%20664%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=b2d4b80f3a2f535500387a518cd256ea) Fotini A. Skouvakis, *Defining the Undefined: Using a Best Interests Approach to Decide the Fate of Cryopreserved Preembryos in Pennsylva*[*nia*, 109 PENN. ST. L. REV. 885 (2005](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=10ffdb7785abf5c9467a940c03a30b2a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b18%20Cardozo%20J.L.%20%26%20Gender%20355%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=364&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b109%20Penn%20St.%20L.%20Rev.%20885%2cat%20904%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=37eb94735c6200a15c5e938cd04c1703)). [↑](#footnote-ref-172)
173. In countries such as Sweden, Denmark and Spain it is permissible even to do research on these fetuses, and in others, such as Norway, Switzerland and France, this is forbidden. In Israel these fetuses are unprotected by law. [↑](#footnote-ref-173)
174. Treatment of premature babies has become much more sophisticated in recent years. [↑](#footnote-ref-174)
175. This position has been ratified in the US in the case *Roe v. Wade*, *supra* note [70.](#bookmark27) In the judgment it was ruled that a pregnancy can be terminated in the first trimester, under certain circumstances it can be done even in the second trimester, but in the third - the viable stage - it is absolutely forbidden. Thus the courts empowered the status of the fetus. [↑](#footnote-ref-175)
176. DAVID HEYD, ETHICS AND MEDICINE 56 (1989) (Heb.). According to this argument, it is commanded to bring children into the world because of man's obligation to God, society, increasing joy in the world, and the like. For a discussion of the centrality and importance of this commandment, see Feldman, Birth Control, *supra* not[e 13](#bookmark21), at 46-50; RICHARD V. GRAZI, BE FRUITFUL AND MULTIPLY: FERTILITY THERAPY AND THE JEWISH TRADITION (1994); Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis*, 9 DUKE J. GENDER L. &, POL'Y 91, 120-2 (2002); RONIT IRSHAI, FERTILITY AND JEWISH LAW: FEMINIST PERSPECTIVES ON ORTHODOX RESPONSA LITERATURE 225 (Joel A. Linsider trans., 2012). [↑](#footnote-ref-176)
177. Heyd, ibid, at 59. [↑](#footnote-ref-177)
178. For this Jewish notion, see *Justification and Excuse in the Judaic and Common Law: The Exculpation of a Defendant Charged with Homicide*, 52 N.Y.U. L. REV. 599 (1977); Marilyn Finkelman, *Self-Defense and Defense of others in Jewish Law: The RODEF Defense*, 33 WAYNE L. REV. 1257 (1987); Mark C. Alexander, *Religiously Motivated Murder: The Rabin Assassination and Abortion Clinic Killings*, 39 ARIZ. L. REV. 1161 (1997). [↑](#footnote-ref-178)
179. *See* how this conservative stance is represented in BARUCH.A. BRODY, [ABORTION AND THE SANCTITY](https://philpapers.org/rec/BROAAT-4) [OF HUMAN LIFE: A PHILOSOPHICAL VIEW (](https://philpapers.org/rec/BROAAT-4)1975). For a discussion of this book, see e.g., George P. II Smith, *Defective Newborns and Government Intermeddling*, 25 MED. SCI. & L. 44, 47 n.32 (1985); Francis J. Beckwith, *Thomson's Equal Reasonableness Argument for Abortion Rights: A Critique*, 49 AM. J. JURIS. 185, 187 n.8 (2004); Margaret Olivia Little, *Abortion and the Margins of Personhood*, 39 RUTGERS L.J. 331, 331 n.1 (2008). [↑](#footnote-ref-179)
180. For the option of forced C-section, see Monica K. Miller, *Refusal to Undergo a Cesarean Section: A Woman's Right or a Criminal Act*, 15 HEALTH MATRIX 383 (2005); V. Chandis & T. Williams, *The Patient, the Doctor, the Fetus, and the Court-Compelled Cesarean: Why Courts Should Address the Question through a Bioethical Lens*, 25 MED. & L. 729 (2006); Theresa Morris et al., *Forced and Coerced Cesarean Sections in the United States*, 16(2) CONTEXTS 24 (2017). [↑](#footnote-ref-180)
181. This notion has been discussed in numerous books and articles. *See, e.g.*, Gerald Dworkin, *Paternalism*, 56(1) THE MONIS 64 (1972); [JAMES F. CHILDRESS,](http://journals.sagepub.com/author/Childress%2C%2BJames%2BF) WHO SHOULD DECIDE? PATERNALISM IN HEALTH CARE (1982); ANTAL SZERLETICS, PATERNALISM (2015). [↑](#footnote-ref-181)
182. For this notion in the context of medical ethics, see, for example, G. M. Stirrat & R. Gill, *Autonomy in Medical Ethics After O'Neill*, 31 J. MED. ETHICS 127 (2005); ALFRED I. TAUBER, PATIENT AUTONOMY AND THE ETHICS OF RESPONSIBILITY (2005); ANDREW SNEDDON, AUTONOMY (2013). [↑](#footnote-ref-182)
183. Roger B. Dworkin, *Medical Law and Ethics in the Post-Autonomy Age*, 68 IND. L. J. 727, 733 (1993) ("It is a physical concept rather than an intellectual one. If you touch me or eavesdrop on me, you have injured my autonomy by invading my space. If you actually do something to change my body, you have injured my autonomy by changing the very constitution of what I am.”). Discussed by DAVID ORENTLICHER ET AL., BIOETHICS AND PUBLIC HEALTH LAW (2018). [↑](#footnote-ref-183)
184. JOHN STUART MILL, ON LIBERTY (1871). For the importance of this seminal book, see [GERTRUDE](https://philpapers.org/s/Gertrude%20Himmelfarb) [HIMMELFARB,](https://philpapers.org/s/Gertrude%20Himmelfarb) ON LIBERTY AND LIBERALISM: THE CASE OF JOHN STUART MILL (1974); JOHN C. REES, JOHN STUART MILL'S ON LIBERTY (1985); JOSEPH HAMBURGER, JOHN STUART MILL ON LIBERTY AND CONTROL (1999). [↑](#footnote-ref-184)
185. *See, e.g.*, the new restricted regulation In the U.K for the eligibility to use I.V.F., *inter alia*, by demanding the woman to loss weight before starting these procedures, see, for example, NATIONAL COLLABORATING CENTRE FOR WOMEN'S AND CHILDREN'S HEALTH (UK), FERTILITY: ASSESSMENT AND TREATMENT FOR PEOPLE WITH FERTILITY PROBLEMS (2013),

[https://www.nice.org.uk/guidance/cg156/evidence/full-guideline-pdf-1885394](https://www.nice.org.uk/guidance/cg156/evidence/full-guideline-pdf-188539453)53; Value Based CLINICAL COMMISSIONING POLICIES HAMBLETON, RICHMONDSHIRE AND WHITBY CCG VERSION FOR GB RATIFICATION - 25/05/17 (2017),

[https://www.hambletonrichmondshireandwhitbyccg.nhs.uk/documents/6631319/11909076/Item+10+App](https://www.hambletonrichmondshireandwhitbyccg.nhs.uk/documents/6631319/11909076/Item%2B10%2BApp) endix+1+Clinical+Commissioning+Policy+25.05.17.pdf/696ef478-9a5e-4b90-9dec-afaf672d4318. [↑](#footnote-ref-185)
186. For a close attempt to determine an ethical limit to the maximum number of children that a poor single­parent family should produce, see the hotly debated discussion following the bizarre case of the octomom, Nadya Suleman. *See*, for example, Jennifer M. Collins, *Eight is Enough*, 103 NW. U. L. REV. COLLOQUY 501 (2009); Kimberly D. Krawiec, *Why We Should Ignore the "Octomom"*, 104 NW. U. L. REV. COLLOQUY 120 (2009); Debora L. Spar, *As You Like It: Exploring the Limits of Parental Choice in Assisted Reproduction*, 27 LAW & INEQ. 481 (2009). Similarly, in order to save the public fisc, the federal authorities in the United States have been fighting for the last four decades to establish legal parenthood for all newborn children. Scholars differ in their opinions as to whether this effort has been crowned with success. Some feel that they have not succeeded and have even tried to introduce reforms. *See*, for example, *Changing American State and Federal Childcare Laws*, 92 CHI.-KENT L. REV. 3-208 (2017). [↑](#footnote-ref-186)
187. For this notion, see Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 513 (1990); Mario J. Rizzo & Douglas Glen Whitman, *Little Brother is Watching You: New Paternalism on the Slippery Slopes*, 51 ARIZ. L. REV. 685, 720 (2009); Willem H. van Boom; Anthony Ogus, *Introducing, Defining and Balancing Autonomy v. Paternalism*, 3 ERASMUS L. REV. 1, 1­2 (2010). [↑](#footnote-ref-187)
188. *See, e.g.,* John Hospers, *Libertarianism and Legal Paternalism*, IV (3) JOURNAL OF LIBERTARIAN STUDIES 255, 259 (1980); Kalle Grill, *The Normative Core of Paternalism*, 13 RES PUBLICA 441, 453 n.24 (2007); Emma C. Bullock, *A Normatively Neutral Definition of Paternalism*, 65(258) THE PHILOSOPHICAL QUARTERLY 1 (2015). [↑](#footnote-ref-188)
189. *See* Dworkin, *supra* not[e 4](#bookmark35). [↑](#footnote-ref-189)
190. For the last issue, se[e F. James Hoffmann e](http://journals.sagepub.com/author/Hoffmann%2C%2BF%2BJames)t al., *Needs of Learning Disabled Adults*, 20(1) JOURNAL OF LEARNING DISABILITIES 43 (1987); JEAN MARTIN & AMANDA WHITE, THE FINANCIAL CIRCUMSTANCES OF DISABLED ADULTS LIVING IN PRIVATE HOUSEHOLDS (1988); [JEAN MARTIN E](https://www.google.co.il/search?hl=iw&tbo=p&tbm=bks&q=inauthor:%22Jean+Martin%22)T AL., DISABLED ADULTS: SERVICES, TRANSPORT AND EMPLOYMENT (1989). [↑](#footnote-ref-190)
191. For the attitude of Mill towards paternalism, see John D. Hodson, *Mill, Paternalism, and Slavery*, 41(1) ANALYSIS 60 (1981); Fred D'Agostino, *Mill, Paternalism and Psychiatry*, 60(4) [AUSTRALASIAN JOURNAL](https://aap.tandfonline.com/toc/rajp20/current) [OF PHILOSOPHY 319 (1982);](https://aap.tandfonline.com/toc/rajp20/current) [L.O.Gostin & K.G.Gostin,](https://www.sciencedirect.com/science/article/pii/S0033350609000043%23%21) *A Broader Liberty: J.S. Mill, Paternalism and the Public's Health*, 123([3) PUBLIC HEALTH](https://www.sciencedirect.com/science/journal/00333506) 214 (2009). [↑](#footnote-ref-191)
192. *See,* for exampl[e, John S. Mill](https://scholar.google.co.il/citations?user=1hKAITgAAAAJ&hl=iw&oi=sra), [Utilitarianism](https://www.google.com/books?hl=iw&lr=&id=HCY2AQAAMAAJ&oi=fnd&pg=PA1&dq=Mill+utilitarianism+&ots=klAL4dcWL2&sig=CatDTEPmPO43XtsBs9CXiDiDBbY) (1910); John S. Mill & Jeremy Bentham, UTILITARIANISM AND OTHER ESSAYS (ALAN RYAN ED., 1987); [JOHN S. MILL,](https://scholar.google.co.il/citations?user=1hKAITgAAAAJ&hl=iw&oi=sra) [ON LIBERTY,](https://www.google.com/books?hl=iw&lr=&id=70K4CAAAQBAJ&oi=fnd&pg=PP1&dq=Mill+utilitarianism+&ots=8myCsqvFMm&sig=nU5kVIInPYKiWVJ7DJDs2w8DzcM) [UTiLiTARiANiSM, AND oTHER ESSAYS](https://www.google.com/books?hl=iw&lr=&id=70K4CAAAQBAJ&oi=fnd&pg=PP1&dq=Mill+utilitarianism+&ots=8myCsqvFMm&sig=nU5kVIInPYKiWVJ7DJDs2w8DzcM) (2015). [↑](#footnote-ref-192)
193. The correlation between preventing smoking during the pregnancy and the newborn' welfare is well

known in the scholarly literature. *See. e.g.*, Bernstein, Ira M. et al., *Maternal Smoking and Its Association With Birth Weight*, 106 (5) OBSTETRICS & GYNECOLOGY 986 (2005)[; CENTERS FOR DISEASE CONTROL](https://www.cdc.gov/) [and Prevention,](https://www.cdc.gov/) Preventing Smoking and Exposure to Secondhand Smoke Before, During, AND AFTER PREGNANCY (2007),

[http://www.minneapolismn.gov/www/groups/public/documents/webcontent/wcms1q-073351.p](http://www.minneapolismn.gov/www/groups/public/documents/webcontent/wcms1q-073351.pdf)df; [Lisa](https://www.sciencedirect.com/science/article/pii/S0277953608000518%23%21) [Wood](https://www.sciencedirect.com/science/article/pii/S0277953608000518%23%21) et al., *Indigenous women and smoking during pregnancy: Knowledge, cultural contexts and barriers to cessation*, 66([1) SoCiAL SCiENCE & MEDiCiN](https://www.sciencedirect.com/science/journal/02779536)E 2378 (2008). [↑](#footnote-ref-193)
194. For a discussion of the appropriate limits on the freedom of contract, see Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 484 (1908-1909); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92(5) THE YALE LAW JouRNAL 763 (1983); MiCHAEL J. TREBiLCoCK, THE LiMiTS oF FREEDoM oF CoNTRACT (1993). [↑](#footnote-ref-194)
195. For this basic right, see Daniel Statman, *The Right to Parenthood*, 10(3-4) ETHICAL PERSPECTIVES 224 (2003); J. Boivin & G. Pennings, *Parenthood Should be Regarded as a Right*, 90 ARCHIVES OF DISEASE IN CHILDHOOD 784 (2005); Anca Gheaus, *The Right to Parent One's Biological Baby*, 20(4) [THE](https://www.google.co.il/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0ahUKEwiB_t_lnavcAhUCbFAKHVjVBegQgQMIJA&url=http%3A%2F%2Fscholar.google.co.il%2Fscholar%3Fq%3Dthe%2Bjournal%2Bof%2Bpolitical%2Bphilosophy%26hl%3Diw%26as_sdt%3D0%26as_vis%3D1%26oi%3Dscholart&usg=AOvVaw2NHyKHlvtsn4jjVhuITlG7) [JOURNAL OF POLITICAL PHILOSOPHY](https://www.google.co.il/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0ahUKEwiB_t_lnavcAhUCbFAKHVjVBegQgQMIJA&url=http%3A%2F%2Fscholar.google.co.il%2Fscholar%3Fq%3Dthe%2Bjournal%2Bof%2Bpolitical%2Bphilosophy%26hl%3Diw%26as_sdt%3D0%26as_vis%3D1%26oi%3Dscholart&usg=AOvVaw2NHyKHlvtsn4jjVhuITlG7) 432 (2012). [↑](#footnote-ref-195)
196. For the nexus of paternalism and forced medical treatments, see Lisa C. Ikemoto, F*urthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487 (1992); S. Elizabeth & Wilborn Malloy, *Beyond Misguided Paternalism: Resuscitating the Right to Refuse Medical Treatment*, 33 WAKE FOREST L. REV. 1035 (1998); [Matthew McCoy,](https://www.liebertpub.com/doi/pdf/10.1089/acm.2007.0803) *Autonomy, Consent, and Medical Paternalism: Legal Issues in Medical Intervention*, 14(6[) THE JOURNAL OF](https://www.liebertpub.com/journal/acm) [ALTERNATIVE AND COMPLEMENTARY MEDICINE 785 (2008).](https://www.liebertpub.com/journal/acm) [↑](#footnote-ref-196)
197. For the interplay of “impure paternalism” and “pure paternalism” regarding the right of a woman to terminate her pregnancy, see Willem H. van Boom; Anthony Ogus, *Introducing, Defining and Balancing Autonomy v. Paternalism*, 3 ERASMUS L. REV. 1 (2010); Jessica L. Roberts & Elizabeth Weeks Leonard, *What Is (and Isn't) Healthism*, 50 GA. L. REV. 833 (2016). [↑](#footnote-ref-197)
198. *See* the land mark verdict of Lochner v. New York, 198 U.S. 45 (1905); Louis Henkin, *Privacy and Autonomy*, 74(8) COLUMBIA LAW REVIEW 1410 (1974); Owen M. Fiss, *Why the State?*, 100(4) HARVARD LAW REVIEW 781 (1987); Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 TENN. L. REV. 455 (2005). [↑](#footnote-ref-198)
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202. For a discussion of this issue, see Barbara Kellerman, *Allison Redux: Three More Decision-Making Models*, 15(3) POLITY 351 (1983); VIVIEN COELHO, CREATING AMBIENT INTELLIGENCE: APPLICATIONS AND DESIGN GUIDELINES FOR THE HOME (2012),

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Robert C. Roberts & Ryan West, *Natural Epistemic Defects and Corrective Virtues*, 192(8) SYNTHESE 2557 (2015). [↑](#footnote-ref-202)
203. For this philosophic notion, see Georg Henrik von Wright, *Practical Inference*, 72(2) THE PHILOSOPHICAL REVIEW 159 (1963); A. J. Kenny, *Practical Inference*, 26(3) ANALYSIS 65 (1966); [G.H.](http://journals.sagepub.com/author/von%2BWright%2C%2BGH) [von Wright](http://journals.sagepub.com/author/von%2BWright%2C%2BGH), *On So-Called Practical Inference*, 15(1) ACTA SOCIOLOGICA 39 (1972). [↑](#footnote-ref-203)
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208. For a discussion of this point, see [Susan S. Mattingly, *T*](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Mattingly%2C+Susan+S)*he Maternal-Fetal Dyad: Exploring the Two- Patient*, 22(1) OBSTETRIC MODEL 13 (1992); J. Wyatt, *Medical Paternalism and the Fetus*, 27 JOURNAL OF MEDICAL ETHICS ii15 (2001); E. ETTORRE, REPRODUCTIVE GENETICS, GENDER AND THE BODY (2002). [↑](#footnote-ref-208)
209. *See, e.g.*, [Stanley Milgram,](http://journals.sagepub.com/action/doSearch?target=default&ContribAuthorStored=Milgram%2C+Stanley) *Some Conditions of Obedience and Disobedience to Authority*, 18(1) HUMAN RELATIONS 57 (1965); [Neil Lutsky, *W*](https://spssi.onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Lutsky%2C+Neil)*hen is “Obedience” Obedience? Conceptual and Historical Commentary*, 51(3) JOURNAL OF SOCIAL ISSUES 55 (1995); W. Bradley Wendel, *Civil*

*Obedience*, 104 COLUM. L. REV. 363 (2004). [↑](#footnote-ref-209)
210. PNINA LIFSHITZ-AVIRAM, INFORMED CONSENT OF A MINOR TO MEDICAL TREATMENT (2006) (Heb.). [↑](#footnote-ref-210)
211. Yehezkel Margalit, *Scarce Medical Resources? - Procreation Rights in a Jewish and Democratic State* (2011), [https://ssrn.com/abstract=1807908.](https://ssrn.com/abstract%3D1807908) For a discussion of this article, see, for example, AVISHALOM [WESTREICH,](https://scholar.google.co.il/citations?user=2g-jtP4AAAAJ&hl=iw&oi=sra) [ASSISTED REPRODUCTION IN ISRAEL: LAW, RELIGION AND CULTURE](http://booksandjournals.brillonline.com/content/journals/10.1163/24058386-12340002) (2018); YEHEZKEL MARGALIT, DETERMINING LEGAL PARENTAGE - BETWEEN FAMILY LAW AND CONTRACT LAW 125 n.88 (Cambridge University Press, forthcoming, 2019). [↑](#footnote-ref-211)
212. For this fundamental constitutional right, see e.g., Tracey S. Pachman, *Disputes Over Frozen Preembryos & the "Right Not to be a Parent"*, 12 COLUM. J. GENDER & L. 128 (2003); Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008); ibid, *The Right Not to be a Genetic Parent?* 81 S. CAL. L. REV. 1115 (2008). [↑](#footnote-ref-212)
213. For a discussion of this basic human right, see Daniel Statman, *The Right to Parenthood: An Argument for a Narrow Interpretation*, 10(3-4) ETHICAL PERSPECTIVES 224 (2003); Robin Levi et al., *Creating the "Bad Mother": How The U.S. Approach to Pregnancy in Prisons Violates the Right to be a Mother*, 18 UCLA WOMEN'S L.J. 1 (2010); 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 (2012). [↑](#footnote-ref-213)
214. Clause 18, Penal Law. [↑](#footnote-ref-214)
215. The right to bring up children and educate them in their own way derives from the right to be parents. In the present situation, society's right to intervene in this freedom is imposed only after the birth of the infant, because then it becomes an actual person with his own rights and duties. If so, from the moment of birth society is under an obligation to protect the child and prevent it from any harm, be it psychological, spiritual or physical, according to the principles recognized by society in regard to every single person. Resulting from this social obligation many laws were legislated the aim of which is to protect minors and sometimes even the fetus inside its mother's womb. [↑](#footnote-ref-215)
216. CFH 2401/95 **Nahmani v. Nahmani**, Israel Law Reports [1995-6] 1, 62

[http://ww3.lawschool.cornell.edu/AvonResources/RuthNahmaniv.DanielNahmani](http://ww3.lawschool.cornell.edu/AvonResources/RuthNahmaniv.DanielNahmani.pdf).Ddf. [↑](#footnote-ref-216)
217. Yaniv Ron El, *The Limits of Reproductive Freedom from a Liberal Perspective: The Case of Sex Selection*, 32 TEL AVIV U. L. REV. 391 (2010) (Heb.). [↑](#footnote-ref-217)
218. This statement is hotly debated in the scholarly literature. *See, e.g.*, Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 360 (1986); Ann M. Massie, *Symposium on John A. Robertson's Children of Choice: Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH & LEE L. REV. 135 (1995); MARY WARNOCK, MAKING BABIES: IS THERE A RIGHT TO HAVE CHILDREN? 85 (2002); Richard F. Storrow, *The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard for Gatekeeping in Infertility Clinics*, 28 CARDOZO L. REV. 2283, 2295-9 (2007). [↑](#footnote-ref-218)
219. For the unique relationship between the gestational mother and the fetus, see e.g., BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD 44, 97-105, 238-239 (1989); JOHN H. KENNELL KLAUS & MATERNAL-INFANT BONDING 1-15 (1976); MARSHALL H., Jeanne Schuler, *Baby M and the Politics of Gender,* 74 TELOS 126, 130 (1987-1988); Anne Goodwin, *Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements*, 1992 FAM. L.Q. 275 (1992). [↑](#footnote-ref-219)
220. *See*, for example, the more general inevitable contradiction between parental and children's rights: Ferdinand Schoeman, *Parental Discretion and Children's Rights: Background and Implications for Medical Decision-Making*, 10(1) THE JOURNAL OF MEDICINE AND PHILOSOPHY: A FORUM FOR BIOETHICS AND PHILOSOPHY OF MEDICINE 45 (1985); Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE JOURNAL OF GENDER LAW & POLICY 63 (1995); Samantha Brennan & Robert Noggle, *The Moral Status of Children: Children's Rights, Parents' Rights, and Family Justice*, 23(1) SOCIAL THEORY AND PRACTICE 1 (1997). [↑](#footnote-ref-220)
221. This issue reminds me the unforgettable discussion of parenting license offered by Hugh Lafollette, *Licensing Parents*, 9(2) PHILOSOPHY AND PUBLIC AFFAIRS 182 (1980). For a discussion of his unique and problematic proposal, see, among others, Claudia Pap Mangel, *Licensing Parents: How Feasible?*, 22(1) FAMILY LAW QUARTERLY 17 (1988); [David L. Chadwick, *L*](https://jamanetwork.com/searchresults?author=David+L.+Chadwick&q=David+L.+Chadwick)*icensing Parents: Can We Prevent Child Abuse and Neglect?*, 273(22): JAMA 1798 (1995); SHOULD PARENTS BE LICENSED? DEBATING THE ISSUES (Peg Tittle ed., 2004). [↑](#footnote-ref-221)
222. DANIEL GOLDMAN, EMOTIONAL INTELLIGENCE (1995). For an academic discussion of this central human intelligence, see e.g., John D. Mayer, *Emotional Intelligence*, 9(3) IMAGINATION, COGNITION AND PERSONALITY 185 (1990); [John D. Mayer &](https://www.sciencedirect.com/science/article/pii/S0160289696900112%23%21) [Glenn Geher, *E*](https://www.sciencedirect.com/science/article/pii/S0160289696900112%23%21)*motional Intelligence and the Identification of Emotion*, 22(2[) INTELLIGENCE](https://www.sciencedirect.com/science/journal/01602896) 89 (1996); THE HANDBOOK OF EMOTIONAL INTELLIGENCE: THEORY, DEVELOPMENT, ASSESSMENT, AND APPLICATION AT HOME, SCHOOL, AND IN THE WORKPLACE (Reuven Bar-On & James D. A. Parker eds., 2000). [↑](#footnote-ref-222)
223. MARC. H. BORNSTEIN, HANDBOOK OF PARENTIN[G, HANDBOOK OF PARENTING: BEING AND BECOMING](https://content.taylorfrancis.com/books/download?dac=C2010-0-36744-1&isbn=9781135650674&format=googlePreviewPdf) [A PARENT](https://content.taylorfrancis.com/books/download?dac=C2010-0-36744-1&isbn=9781135650674&format=googlePreviewPdf) VOL. 3 (2005). For a discussion of this book, see Nancy Eisenberg et al., *Parental Socialization of Emotion,* 9(4) Psychological Inquiry 241 (1998); [Greg J. Duncan &](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Duncan%2C+Greg+J) [Jeanne Brooks-Gunn,](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Brooks-Gunn%2C+Jeanne) *Family Poverty, Welfare Reform, and Child Development*, 71(1) CHILD DEVELOPMENT 188 (2003); Judith G. Smetana et al., [*Adolescent Development in Interpersonal and Societal Contexts*](https://www.annualreviews.org/doi/abs/10.1146/annurev.psych.57.102904.190124), 57(1) ANNUAL REVIEW oF PSYcHoLoGY 255 (2006). [↑](#footnote-ref-223)
224. A disabled child casts a shadow on the parental image because his birth raises doubts about the parents' ability to create a perfect baby. The number of disabled children who are rejected, neglected or abused is especially high among parents who see the child as a reflection of themselves, and not as a person in his own right. [↑](#footnote-ref-224)
225. Ibid. [↑](#footnote-ref-225)
226. Ezra F. Vogel & Norman W. Bell, *The Emotionally Disturbed Child as a Family Scapegoat*, (10)3 CAN. J. PSYCHIATR. NURS. 5 (1968). *See also* [CARLFRED B. BRODERICK,](https://www.amazon.com/s/ref%3Ddp_byline_sr_book_1?ie=UTF8&text=Carlfred+B.+Broderick&search-alias=books&field-author=Carlfred+B.+Broderick&sort=relevancerank) UNDERSTANDING FAMILY PROCESS: BASICS OF FAMILY SYSTEMS THEORY 261 (1st Edition, 1993); MAGGIE SCARF, INTIMATE PARTNERS: PATTERNS IN LOVE AND MARRIAGE 442 (2008); [PHILIP BARKER](https://www.wiley.com/en-us/search?pq=%7Crelevance%7Cauthor%3APhilip+Barker) [& JEFF CHANG,](https://www.wiley.com/en-us/search?pq=%7Crelevance%7Cauthor%3AJeff+Chang) BASIC FAMILY THERAPY (6th Edition, 2013). [↑](#footnote-ref-226)
227. M.L. BLUMBERG, PSYCHOPATHOLOGY OF THE ABUSIVE PARENT (1974). For a discussion of this book, see, e.g., Hilda Parker & S[eymour Parker, *F*](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Parker%2C+Seymour)*ather-Daughter Sexual Abuse: An Emerging Perspective,* 56(4) [AMERICAN JOURNAL OF ORTHOPSYCHIATRY](https://onlinelibrary.wiley.com/journal/19390025) 531 (1986); CHILDREN AT RISK 141 (Robert Ammerman & Michel Hersen eds., 1990); L.M. Youngblade & J. Belsky, *Social and Emotional Consequences of Child Maltreatment*, in CHILDREN AT RISK 109 (Robert Ammerman & Michel Hersen eds., 1990). [↑](#footnote-ref-227)
228. *See* Griswold v. Connecticut, 381 U.S. 479 (1965), in which the court rejected a criminal injunction on married couples to use birth control. *See also* Catherine G. Roraback, *Griswold v. Connecticut: A Brief Case History*, 16 OHIO N.U. L. REV. 395 (1989); Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court before Griswold v. Connecticut*, 75 IOWA L. REV. 915 (1990); Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*., 82 GEO. L.J. 1519 (1994). [↑](#footnote-ref-228)
229. *See*, amongst others, John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983); ibid, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction,* 59 S. CAL. L. REV. 942 (1986); Douglas NeJaime, *Griswold's Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality*, 124 YALE L.J. F. 340 (2014-5). [↑](#footnote-ref-229)
230. *See* Margalit, Determining, *supra* not[e 32,](#bookmark45) at 119. Conversely, in the ethical-philosophical literature one can find calls to restrict the birthrate of mentally challenged or abusive parents in the name of preserving the resulting child's interests and welfare. *See* Elike-Henner W. Kluge, *Sterilization of the Mentally Severely Handicapped: A Violation of the Right to Have Children?,* in SHOULD PARENTS BE LICENSED? DEBATING THE ISSUES 243, 246 (Peg Tittle ed., 2004) and the various articles in the book. [↑](#footnote-ref-230)
231. The main concern in this regard is the problematic attempt to produce only "perfect" babies. *See*, for example, Ruth F. Chadwick, *The Perfect Baby: Introduction*, in ETHICS, REPRODUCTION AND GENETIC CONTROL (Ruth F. Chadwick ed., 1987); GLENN MCGEE, THE PERFECT BABY: A PRAGMATIC APPROACH TO GENETICS (1997); GLENN MCGEE, [THE PERFECT BABY: PARENTHOOD IN THE NEW WORLD OF](https://www.google.com/books?hl=iw&lr=&id=hCReRQ9ERjcC&oi=fnd&pg=PR5&dq=%22perfect+baby%22&ots=SvoLJCVTYK&sig=ns0vGA4KZYpTLP_kCDwnihLdqmo) [CLONING AND GENETICS (](https://www.google.com/books?hl=iw&lr=&id=hCReRQ9ERjcC&oi=fnd&pg=PR5&dq=%22perfect+baby%22&ots=SvoLJCVTYK&sig=ns0vGA4KZYpTLP_kCDwnihLdqmo)2000). [↑](#footnote-ref-231)
232. For a discussion of the appropriate correlation between disabilities and the abortion dilemma, see [Erik](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Parens%2C+Erik) [Parens](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Parens%2C+Erik) & [Adrienne Asch,](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Asch%2C+Adrienne) *Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, 9(1[) MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES RESEARCH REVIEWS](https://onlinelibrary.wiley.com/journal/19405529) 40 (2003); Irginia Kallianes & Phyllis Rubenfeld, *Disabled Women and Reproductive Rights*, 12(2) DISABILITY & SOCIETY 203 (1997); Marsha Saxton, [*Why members of the disability community oppose*](http://faculty.law.miami.edu/mcoombs/documents/saxton.pdf)[*prenatal diagnosis and selective abortion*](http://faculty.law.miami.edu/mcoombs/documents/saxton.pdf), in THE DISABILITY STUDIES READER 147 (Lennard J. Davis ed., 2006). [↑](#footnote-ref-232)
233. CHRISTY BROWN, MY LEFT FOOT (1969). For the nexus of this book and the abortion dilemma, see, for example, COLIN BARNES, DISABLING IMAGERY AND THE MEDIA: AN EXPLORATION OF THE PRINCIPLES FOR MEDIA REPRESENTATIONS OF DISABLED PEOPLE (1992), [https://disability-studies.leeds.ac.uk/wp- content/uploads/sites/40/library/Barnes-disabling-imagery.pdf](https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Barnes-disabling-imagery.pdf); Jack A. Nelson, *The Media Role in Building the Disability Community*, 15(3) JOURNAL OF MASS MEDIA ETHICS 180 (2000); [Wendy](https://online.liverpooluniversitypress.co.uk/author/Chrisman%2C%2BWendy) [Chrisman,](https://online.liverpooluniversitypress.co.uk/author/Chrisman%2C%2BWendy) *A Reflection on Inspiration: A Recuperative Call for Emotion in Disability Studies*, 5(2) [JOURNAL OF LITERARY & CULTURAL DISABILITY STUDIES](https://online.liverpooluniversitypress.co.uk/loi/jlcds) 173 (2011). [↑](#footnote-ref-233)
234. HELEN A. FEATHERSTONE, DIFFERENCE IN THE FAMILY - LIFE WITH A DISABLED CHILD (1980). For a discussion of this book, se[e Michael Ferrari e](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=FERRARI%2C+MICHAEL)t al., *The Family and the Child with Epilepsy*, 22(1[) FAMILY](https://onlinelibrary.wiley.com/journal/15455300) [PROCESs](https://onlinelibrary.wiley.com/journal/15455300) 53 (1983); [Monica](https://www.researchgate.net/profile/Monica_Cuskelly?_sg=6YXq8raQS9Hzwj2kr3I4krSYmHTILBQDHOSAogAKsfdii28NGZ4XjXw1xfNQrbjAzYg1D3U.3qc3zNa7GYZM7EFq0yAgKGuK4nu6UWgAFQTQ9G0vV-Ta1GqV1OrfJL54d3Pm4ZFxYLf1ZLmWaFn34DL3fO5Wew) Cuskelly, *Adjustment of Siblings of Children With a Disability: Methodological Issues*, 21(2) INTERNATIONAL JOURNAL FOR THE ADVANCEMENT OF COUNSELLING 111 (1999); [Isack Kandel](https://www.hindawi.com/90103147/) & [Joav Merrick,](https://www.hindawi.com/93160762/) *The Birth of a Child with Disability. Coping by Parents and Siblings*, 3 THE SCIENTIFIC WORLD JOURNAL 741 (2003). [↑](#footnote-ref-234)
235. ANN S. KIMAN, CRISIS: PSYCHOLOGICAL FIRST AID FOR RECOVERING AND GROWTH (1978). Some 18 million people with special needs live in the USA. [↑](#footnote-ref-235)
236. MARGARET S. MAHLER, ON CHILD PSYCHOSIS AND SCHIZOPHRENIA. PSYCHOANALYTIC STUDY OF THE CHILD 286-380 (1952). *See also* Guy Da Silva, *The Role of the Father with Chronic Schizophrenic Patients: A Study in Group Therapy*, 8(3) CANADIAN PSYCHIATRIC ASSOCIATION JOURNAL 190, 201 (1963); Allan F. Mirsky, *Israeli High-risk Study: Editor's Introduction*, 21(2) SCHIZOPHRENIA BULLETIN 179, 179 (1995); Edward F. Foulks, *Advocating for Persons Who Are Mentally Ill: A History of Mutual Empowerment of Patients and Profession*, 27(5) [ADMINISTRATION AND POLICY IN MENTAL HEALTH AND](https://link.springer.com/journal/10488) [MENTAL HEALTH SERVICES](https://link.springer.com/journal/10488) 353, 359-60 (2000). [↑](#footnote-ref-236)
237. BRUNO BETTELHEIM, LOVE IS NOT ENOUGH: THE TREATMENT OF EMOTIONALLY DISTURBED CHILDREN (1950). [↑](#footnote-ref-237)
238. Featherstone, *supra* no[te 5](#bookmark46)5. [↑](#footnote-ref-238)
239. For example, in Africa, a child is defined in terms of formation and does not exist as a human being before being subjected to physical or ceremonial modifications which initiate him into adult society and accord him the status of an adult. In the Wunda tribe the infant has no social significance until his teeth begin to appear; he is “water” and not a “person”. In the Nuar tribe an infant only becomes a “person” when he is able to halter cattle and herd goats. A man does not tell anyone he has a son before the child reaches six years of age, as only then does he become a “person” in his own right. For this reason there is no mourning for a child who dies under the age of six. Thus in Africa some conditions must be fulfilled in order for the live creature to become a person unto himself and until then he is essentially not really a human being. These are ideas that are popular on the African continent for the reason that in places where pregnancy and birth in and of themselves are insufficient to provide an individual with the status of a human being, the status of a “person” is acquired gradually and not achieved in full until the individual reaches the age of an adult in the final stages of development. According to literature, by considering an infant as not being part of the field of human beings they are able to accept the rate of infant mortality that is extremely high in these communities. [↑](#footnote-ref-239)
240. For the correlation between infanticide and abortion, see, e.g., Michael Tooley, *Abortion and Infanticide*, 1 PHILOSOPHY AND PUBLIC AFFAIRS 44 (1972); R. Sauer, *Infanticide and Abortion in Nineteenth-Century Britain*, 32(1) POPULATION STUDIES 81 (1978)[; JONATHAN GLOVER, C](https://www.bookdepository.com/author/Jonathan-Glover)AUSING DEATH AND SAVING LIVES: THE MORAL PROBLEMS OF ABORTION, INFANTICIDE, SUICIDE, EUTHANASIA, CAPITAL PUNISHMENT, WAR AND OTHER LIFE-OR-DEATH CHOICES (1990). [↑](#footnote-ref-240)
241. Leon Sheleff, *Generations Apart: Adult Hostility to Youth*, 89 AM. J. SOCI. 509 (1981). For a discussion of this land mark article, see, for example, MARTIN DALY & MARGO WILSON[, HOMICIDE: FOUNDATIONS](https://www.google.co.il/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjBsuWrif_fAhXIJlAKHadBA0EQgQN6BAgAEAE&url=http%3A%2F%2Fscholar.google.co.il%2Fscholar%3Fq%3Dhomicide%3A%2Bfoundations%2Bof%2Bhuman%2Bbehavior%26hl%3Diw%26as_sdt%3D0%26as_vis%3D1%26oi%3Dscholart&usg=AOvVaw28FuG4cdpSwKdQ87blo9g9) [OF HUMAN BEHAVIOR (](https://www.google.co.il/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjBsuWrif_fAhXIJlAKHadBA0EQgQN6BAgAEAE&url=http%3A%2F%2Fscholar.google.co.il%2Fscholar%3Fq%3Dhomicide%3A%2Bfoundations%2Bof%2Bhuman%2Bbehavior%26hl%3Diw%26as_sdt%3D0%26as_vis%3D1%26oi%3Dscholart&usg=AOvVaw28FuG4cdpSwKdQ87blo9g9)1988); MIRIAM M. JOHNSON, STRONG MOTHERS, WEAK WIVES: THE SEARCH FOR GENDER EQUALITY 288 n.6 (1988); FRIENDS IN SCHOOL: PATTERNS OF SELECTION AND INFLUENCE IN SECONDARY SCHOOLS 270 (Joyce Levy Epstein & Nancy Karweit eds., 2014). [↑](#footnote-ref-241)
242. For a discussion of the possible correlation between this term and hostility of parents towards their children, see Leon Shaskolsky Sheleff, *Beyond the Oedipus Complex: A Perspective on the Myth And Reality of Generational Conflict*, 3(1) THEORY AND SOCIETY 1 (1976),

[https://link.springer.com/content/pdf/10.1007/BF00158478.Pdf;](https://link.springer.com/content/pdf/10.1007/BF00158478.pdf) Benjamin Shmueli, *What Has Feminism Got to Do with Children's Rights - A Case Study of a Ban on Corporal Punishment*, 22 WIS. WOMEN'S L.J. 177 (2007) passim; Robert M. Galatzer-Levy, *Women and Children Last*, 69(1) THE PSYCHOANALYTIC STUDY OF THE CHILD 108 (2015). [↑](#footnote-ref-242)
243. MEIRA WEISS, THE CHOSEN BODY: THE POLITICS OF THE BODY IN ISRAELI SOCIETY (2002). *See also* MEIRA WEISS, CONDITIONAL LOVE: PARENTS' ATTITUDES TOWARDS THE HANDICAPPED (1994); AVIAD E. RAZ, COMMUNITY GENETICS AND GENETIC ALLIANCES: EUGENICS, CARRIER TESTING AND NETWORKS OF RISK (2009). “Dor Yesharim” is a non-profit organization founded by the Ashkenazi ultra-orthodox community to test young men and women of marriageable age for genetic diseases. The organization provides data relating to genetic compatibility. Aviad Raz researched ultra-orthodox women regarding lack of transparency of data provided by Dor Yesharim, which revealed that even ultra-orthodox women request access to information about themselves when tests for carrying certain diseases are involved. [↑](#footnote-ref-243)
244. Ibid. [↑](#footnote-ref-244)
245. For a discussion whether we as a responsible society may trust parents to fulfill their moral duties when it is only reasonable but not certain that they will, see 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); DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD 103 (1993) and the other references enumerated by Margalit, Determining, *supra* n[ote 3](#bookmark45)2, at 79-82. [↑](#footnote-ref-245)
246. For the argument that there is an almost mystical bond that exists already between the mother and her fetus, see MARSHALL H. KLAUS & JOHN H. KENNELL, MATERNAL-INFANT BONDING: THE IMPACT OF EARLY SEPARATION OR LOSS ON FAMILY DEVELOPMENT (1976); Janet L. Dolgin, *Solomon's Dilemma: Exploring Parental Rights: The "Intent" of Reproduction: Reproductive Technologies and the Parent­Child Bond*, 26 CONN. L. REV. 1261 (1994); Margaret F. Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*[, 81 VA. L. REV.](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=252&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b81%20Va.%20L.%20Rev.%202377%2cat%202381%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=e6be8507b8a59710fc53f9e02476591c) [2377, 2383 n. 22 (1995).](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=252&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b81%20Va.%20L.%20Rev.%202377%2cat%202381%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=e6be8507b8a59710fc53f9e02476591c) [↑](#footnote-ref-246)
247. For the inevitable correlation between the quest after the perfect baby and the attempt to abort him, see RUTH F. CHADWICK, *The Perfect Baby: Introduction*, IN ETHICS, REPRODUCTION AND GENETIC CONTROL 93 (RUTH CHADWICK ED., 1993); [GLENN MCGEE,](https://scholar.google.co.il/citations?user=B48o_LIAAAAJ&hl=iw&oi=sra) [THE PERFECT BABY: PARENTHOOD IN THE NEW WORLD](https://www.google.com/books?hl=iw&lr=&id=hCReRQ9ERjcC&oi=fnd&pg=PR5&dq=%22perfect+baby%22+abortion&ots=SvnHKBQQRF&sig=xhV8oOwNTe3ft7a4Day6xVVHbmI) [OF CLONING AND GENETICS (2](https://www.google.com/books?hl=iw&lr=&id=hCReRQ9ERjcC&oi=fnd&pg=PR5&dq=%22perfect+baby%22+abortion&ots=SvnHKBQQRF&sig=xhV8oOwNTe3ft7a4Day6xVVHbmI)000); [Larissa Remennick,](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Remennick%2C+Larissa) *The Quest for the Perfect Baby: Why Do Israeli Women Seek Prenatal Genetic Testing?*, 28(1) SOCIOLOGY OF HEALTH & ILLNESS 21 (2006). [↑](#footnote-ref-247)
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249. For a discussion of the abortion dilemma in the prism of the disability studies, see Keith Sharp & Sarah Earle, Feminism, *Abortion and Disability: Irreconcilable Differences?*, 17(2) DISABILITY & SOCIETY 137 (2002); Janice Mclaughlin, *Screening Networks: Shared Agendas in Feminist and Disability Movement Challenges to Antenatal Screening and Abortion*, 18(3) DISABILITY & SOCIETY 297 (2003); Marsha Saxton, [*Disability Rights and Selective Abortion*](https://www.google.com/books?hl=iw&lr=&id=Hgx6DQAAQBAJ&oi=fnd&pg=PT158&dq=%22Disability+studies%22+abortion&ots=DNpkMVZEk9&sig=GUaZ9Z8Kq-CmMT_RP5Tdciy7a1o), in THE DISABILITY STUDIES READER 105 (Lennard J. Davis ed., 2006). [↑](#footnote-ref-249)
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251. For the various possible definitions of disability, see Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the Disability Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405 (1999); Matilde Leonardi et al., [*The Definition Of*](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2806%2969498-1/fulltext?code=lancet-site)[*Disability: What Is In A Name*](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2806%2969498-1/fulltext?code=lancet-site)[*?,* 368(9543](https://www.thelancet.com/journals/lancet/issue/vol368no9543/PIIS0140-6736%2806%29X6214-1)) The Lancet 1219 (2006); Kenneth A. Kavale, *A Time to*

*Define: Making the Specific Learning Disability Definition Prescribe Specific Learning Disability*, 32(1) LEARNING DISABILITY QUARTERLY 39 (2009). [↑](#footnote-ref-251)
252. For a discussion of this notion, see Paulo Freir[e, Cultural Action for Freedom 2](http://www.thinkingtogether.org/rcream/archive/110/CulturalAction.pdf) (1970), [www.thinkingtogether.org/rcream/archive/110/CulturalAction.pdf](http://www.thinkingtogether.org/rcream/archive/110/CulturalAction.pdf); Jaap Kuiper, [*The Scientists Will Save*](https://www.ajol.info/index.php/sajee/article/download/137465/127026)[*the World: Environment Education in an Alienated Societ*](https://www.ajol.info/index.php/sajee/article/download/137465/127026)*y*, 15 SouTHERN AFRiCAN JouRNAL oF ENViRoNMENTAL EDuCATioN 39 (1995); uRSuLA A. FALK & GERHARD FALK, AGEiSM, THE AGED, AND AGiNG iN AMERiCA: oN BEiNG oLD iN AN ALiENATED SoCiETY (1997). [↑](#footnote-ref-252)
253. DAiSY oATMAN, HoMELESS PoET (1990). The poem appears in CLARiCE FEiNMAN, THE CRiMiNALiZATioN oF A WoMAN'S BoDY §§157 (1992). For a discussion of the latter source, see Wendy Chavkin, *Women and Fetus: The Social Construction of Conflict*, 3(2) WoMEN & CRiMiNAL JuSTiCE 71 (1992); Lisa Maher, *Punishment and Welfare: Crack Cocaine and the Regulation of Mothering*, 3(2) WoMEN & CRiMiNAL JuSTiCE 35 (1992); Delila Amir & orly Biniamin, *Abortion Approval as a Ritual of Symbolic Control*, 3(2) WoMEN & CRiMiNAL JuSTiCE 5 (1992). [↑](#footnote-ref-253)
254. During the pregnancy the fetus should be considered as “a child who will be born” and not “a potential child”. These definitions are quoted from MARGARET ATWooD, THE HANDMAiD'S TALE (2012). [↑](#footnote-ref-254)
255. For the correlation between smoking and causing possible defects in the fetus, see Bernstein, Ira M. et

al., *Maternal Smoking and Its Association With Birth Weight*, 106 (5) OBSTETRICS & GYNECOLOGY 986 (2005); [Centers for Disease Control and Prevention](https://www.cdc.gov/), Preventing Smoking and Exposure to SECONDHAND SMOKE BEFORE, DURING, AND AFTER PREGNANCY (2007),

[http://www.minneapolismn.gov/www/groups/public/documents/webcontent/wcms1q-073351.p](http://www.minneapolismn.gov/www/groups/public/documents/webcontent/wcms1q-073351.pdf)df; [Lisa](https://www.sciencedirect.com/science/article/pii/S0277953608000518%23%21) [Wood](https://www.sciencedirect.com/science/article/pii/S0277953608000518%23%21) et al., *Indigenous Women and Smoking During Pregnancy: Knowledge, Cultural Contexts and Barriers to Cessation*, 66([1) soCiAL sCiENCE & MEDiCiNE](https://www.sciencedirect.com/science/journal/02779536) 2378 (2008). [↑](#footnote-ref-255)
256. *See* Jorgensen v. Meade Johnson Lab., 483 F 2d 237 (1973); Renslow v. Mennonite Hospital, 367 N.E. 2d 1250 (1977). in the Jorgensen case damage was caused to the fetus resulting from birth-control pills taken by the woman before becoming pregnant, and the U.s. court decided that if a causal connection could be established between the act or the negligence this would be considered harm that deserves compensation and there is no conclusive importance to the time the tort took place. in the Renslow case, the child prosecuted the hospital for damage caused to him by a blood transfusion his mother had been given eight years before the birth. The law in Australia, Canada, the Us and Britain establishes that a live newborn can claim damages caused to him when still in a fetal stage. *See als*o BoNNiE sTEiNBoCK, LiFE BEFoRE BiRTH: THE MoRAL AND LEGAL sTATUs oF EMBRYos AND FETUsEs §§ 165-189 (2011). [↑](#footnote-ref-256)
257. For a discussion of the interplay between the parental immunity and abortion, see Marjorie M. Shultz, *Abortion and Maternal-Fetal Conflict: Broadening our Concerns*, 1 S. CAL. REV. L. & WOMEN'S STUD. 79, 82 n.7, 83 (1992); Kerry Lorraine McBride, *Minor's Right to Divorce His or Her Parents: Fundamental Liberty Interest and Standing of a Minor Who is Dependent on the Courts to Bring Termination of Parental Rights Proceedings*, 17 J. JUV. L. 68, 70-1 (1996); Janet Malek & Judith Daar, *The Case for a Parental Duty to Use Preimplantation Genetic Diagnosis for Medical Benefit*, 12(4) THE AMERICAN JOURNAL OF BIOETHICS 3 (2012). [↑](#footnote-ref-257)
258. Gordin v. Gordin, 102 Mich 301 N.Y. 2d 869 (1980). [↑](#footnote-ref-258)
259. *See* Stallman v. Youngquist, 531 N.E. 2d 355 (1988) for a historical review of the development of the rationale of wrongful birth. For an academic discussion of this substantial verdict, see Gregg R. Brown, *Prenatal Rights - The Intersection of Parental Immunity and Prenatal Rights: The Nonfamily Activity Exception or Traditional Concepts of Negligence - Stallman v. Youngquist, 129 Ill. App. 3d 859, 473 N.E.2d 400 (1st Dist. 1984)*, 10 S. ILL. U. L.J. 749 (1985); Anthony Jackson, *Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England*, 17 LOY. L.A. INT'L & COMP. L.J. 535, 559-60 (1995); Kathryn S. Banashek, *Maternal Prenatal Negligence Does Not Give Rise to a Cause of Action, Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 335 (1988)*, 68 WASH. U. L. Q. 189 (1990). [↑](#footnote-ref-259)
260. Chenault v. Huie, 989 S.W. 2d 474 (1999). [↑](#footnote-ref-260)
261. Dobson v. Dobson, 2 S.C.R. 753 (1999). *See also* Teresa Foley, *Dobson v. Dobson: Tort Liability for Expectant Mothers*, 61 SASK. L. REV. 177 (1998); Nelson, Erin, *Case Comment: Dobson v. Dobson (Litigation Guardian)*, 8(3) HEALTH LAW REVIEW 30 (2000); Ernest J. Weinrib, *The Passing of Palsgraf*, 54 VAND. L. REV. 803, 810 n.17 (2001). [↑](#footnote-ref-261)
262. Rosamund Scott, *Maternal Duties Toward the Unborn? Sounding from the Law of Tort*, 8 Med. L. Rev. 1 (2000). [↑](#footnote-ref-262)
263. The *Chenault v. Huie*, *supra* n[ote 8](#bookmark47)1. [↑](#footnote-ref-263)
264. *See* Remy v. Macdonald, 801 N.E. 2d 260 (2003). For a discussion of this land mark case in the legal literature, see Kristi Kleiboeker, *Encouraging Responsibility during Pregnancy through Amending the Unborn Victims of Violence Act*, 83 WASH. U. L. Q. 1621, 1629 n.56, 1630 n.62, 1647 n.181 (2005); Kirsten Rabe Smolensky, *Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 299, 322 n.130, 325 n.155 (2008); Christopher J. Wiener, *Transgenerational Tort Liability for Epigenetic Disease*, 13 DEPAUL J. HEALTH CARE L. 319, 326 n.41 (2011). [↑](#footnote-ref-264)
265. The case of *Stallman v. Youngquist*, *supra* [note](#bookmark48) 80. [↑](#footnote-ref-265)
266. Winnipeg Child and Family Services v. D.F.G., 3 S.C.R. 925 (1997). [↑](#footnote-ref-266)
267. *See* Harrison v. Stephens, HC.A. 16 [2006]; Waller.v. James H.C.A. 15 [2006]. This Australian decision ruled that doctors should not be made to pay damages for wrongful life and that life with a defect should not be weighed against lack of life. After the French court ruled that compensation should be granted for wrongful life the French law was revised to prevent these rulings from recurring. For a discussion of this matter, see M.A. Duguet, *Wrongful Life; The Recent French Cour de Cassation Decisions*, 9 EUR. J. HEALTH 139 (2002). [↑](#footnote-ref-267)
268. For the ethical-philosophical difficulties of this argument, whether indeed a fetus has the right to be born healthy, what is well known as the non-identity problem, see Glenn Cohen, *The Constitution and the Rights Not to Procreate*[, 60 STAN. L. REV. 1135, 11131 n.48 (2008);](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=10ffdb7785abf5c9467a940c03a30b2a&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b18%20Cardozo%20J.L.%20%26%20Gender%20355%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=171&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b60%20Stan.%20L.%20Rev.%201135%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=8a7ef7a5143dc6c1c655658c976cfcf0) ibid, *Beyond Best Interests*, 96 MINN. L. REV. 1187 (2011-12). [↑](#footnote-ref-268)
269. The case of *Gordin v. Gordin*, *supra* n[ote 7](#bookmark49)9. [↑](#footnote-ref-269)
270. For the correlation taking drugs during the pregnancy and causing the fetus defects, see [John O. Forfar](https://ascpt.onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Forfar%2C+John+O) [&](https://ascpt.onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Forfar%2C+John+O) [Matilda M. Nelson, *E*](https://ascpt.onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Nelson%2C+Matilda+M)*pidemiology of Drugs Taken By Pregnant Women: Drugs That May Affect the Fetus Adversely*, 14(4[) CLINICAL PHARMACOLOGY & THERAPEUTICS](https://ascpt.onlinelibrary.wiley.com/journal/15326535) 632 (1973); [Michael](https://jamanetwork.com/searchresults?author=Michael+J.+Tueth&q=Michael+J.+Tueth) J. Tueth, *Psychotropic Medications During Pregnancy: Risk to the Fetus*, 270(18) JAMA 2177 (1993); Margaret S Chisolm & Jennifer L Payne, *Management of Psychotropic Drugs During Pregnancy*, 352 BMJ h5918 (2016). [↑](#footnote-ref-270)
271. Margery W. Shaw, *Conditional Prospective Rights of the Fetus*, 5 JOURNAL OF LEGAL MEDICINE 63 (1984). For a discussion of this land mark article, see. e.g., Michael A. Shekey, *Comment: Criminal Liability of a Prospective Mother for Prenatal Neglect of a Viable Fetus*, 9 WHITTIER LAW REVIEW 363 (1987) passim; Patricia King, *Should Mom Be Constrained in the Best Interests of the Fetus*, 13 NOVA L. REV. 393, 395 n.5 (1989); Bonnie Steinbock, *Maternal-Fetal Conflict and In Utero Fetal Therapy*, 57 ALB. L. REV. 781, 789 n.38 (1994). [↑](#footnote-ref-271)
272. For example, Carl Ann Simon, *Parental Liability for Prenatal Injury*, 14 COLUM J.L. & SOC. PROBS. 47, 85 (1979) ("The conduct of the reasonably prudent expecting parent under like circumstances"). For a discussion of this article, see Elizabeth F. Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework*, 22 J. FAM. L. 677, 679 n.12 (1983); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1958 n.59 (1992-1993); Tony Hartsoe, *Person or Thing - In Search of the Legal Status of a Fetus: A Survey of North Carolina Law*, 17 CAMPBELL L. REV. 169, 256 (1995). [↑](#footnote-ref-272)
273. Dawn Johnsen, *The Creation of Fetal Rights: Conflict with Woman's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986). [↑](#footnote-ref-273)
274. *See* Joseph J. Basgier, *Children's Rights: A Renewed Call for the End of Parental Immunity and Arguments for the Further Expansion of a Child's Right to Sue*, 26 L. & PSYCHOLO. REV. 123 (2002); T. Allen-Mills, *Honey, I've been Sued by the Kids*, SUNDAY TIMES (17.3.1996). For an additional academic discussion of this point, see Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489 (1982); David Fisher, *Parental Rights and the Right to Intimate Association*, 48 HASTINGS L.J. 399 (1997); Irene Hansen Saba, *Parental Immunity from Liability in Tort: Evolution of a Doctrine in Tennessee*, 36 U. MEM. L. REV. 829 (2006). [↑](#footnote-ref-274)
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278. *Ibid*. [↑](#footnote-ref-278)
279. *See* DAVID HEYD, [GENETHICS: MORAL ISSUES IN THE CREATION OF PEOPLE (](https://www.google.com/books?hl=iw&lr=&id=cptPOWX7P_UC&oi=fnd&pg=PR11&dq=%22David+Heyd+%22+Genethics&ots=vG0UxfzQUx&sig=UJeU82I6oD-x6Hee982kZx011yo)1992). For a discussion of this often quoted book, see TIM MULGAN, THE DEMANDS OF CONSEQUENTIALISM (PhD thesis, University of Oxford, 1995); Nicholas Agar, *Liberal Eugenics*, 12(2) PUBLIC AFFAIRS QUARTERLY 137, 138 n.5 (1998); [Partha Dasgupta,](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Dasgupta%2C+Partha) *Population and Resources: An Exploration of Reproductive and Environmental Externalities*, 26(4) POPULATION AND DEVELOPMENT REVIEW 643 (2000). [↑](#footnote-ref-279)
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281. TED HOWARD & JEREMY RIFFKIN[, WHO SHOULD PLAY GOD? THE ARTIFICIAL CREATION OF LIFE AND](https://repository.library.georgetown.edu/handle/10822/546763) [WHAT IT MEANS FOR THE FUTURE OF THE HUMAN RAC](https://repository.library.georgetown.edu/handle/10822/546763)E 1 (1977). [↑](#footnote-ref-281)
282. Primitive belief in eugenics led to the Spartan practice of throwing weak or defective babies off a cliff. [↑](#footnote-ref-282)
283. *See, e.g.*, D. J. Galton & C. J. Galton, *Francis Galton: and Eugenics Today*, 24 JOURNAL OF MEDICAL ETHICS 99 (1998); Nicholas W. Gillham, [*Sir Francis Galton and the Birth of Eugenics*](https://www.annualreviews.org/doi/abs/10.1146/annurev.genet.35.102401.090055), 35(1) ANNUAL REVIEW OF GENETICS 83 (2001); IBID, A LIFE OF SIR FRANCIS GALTON: FROM AFRICAN EXPLORATION TO THE BIRTH OF EUGENICS (2001). [↑](#footnote-ref-283)
284. *Ibid*, P. 72: “Attempts to fertilize upper-class women with sperm from Nobel prize winners did not result in the births of geniuses or especially talented people. A similar experiment was carried out in the US in the 1950s; see also DAVID PLOTZ, THE GENIUS FACTORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK (2005), in which he described his disappointing results. "Ultimately, these experiments merely led to ordinary people”. For a discussion of this book, see J. Thomas Oldham, *How an Eccentric Eyeglass Manufacturer Revolutionized Assisted Reproduction in the U.S.: A Review of The Genius Factory by David Plotz*, 39 FAM. L.Q. 781 (2005); Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, 72 LAW & CONTEMP. PROBS. 59 (2009); Dov Fox, *Choosing Your Child's Race*, 22 HASTINGS WOMEN'S L.J. 3, 4 n.4 (2011). [↑](#footnote-ref-284)
285. *See*, for example, Brint Dillingham, *Indian Women and IHS Sterilization Practices*, 3 AM. INDIAN J. 27 (1977); Jane Lawrence, *The Indian Health Service and the Sterilization of Native American Women*, 24(3) AMERICAN INDIAN QUARTERLY 400 (2000); Myla Vicenti Carpio, *The Lost Generation: American Indian Women and Sterilization Abuse*, 31(4) SOCIAL JUSTICE 40 (2004),

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286. For the close connection between the Nazi's perspective and the eugenics practice, see, e.g., Henry P. David et al, [*Abortion and eugenics in Nazi Germany*](https://www.jstor.org/stable/1972501), 14(1) POPULATION AND DEVELOPMENT REVIEW 81 (1988); Robert N. Proctor, *Eugenics in Hitler's Germany*, in DEAF PEOPLE IN HITLER'S EUROPE 32 (Donna F. Ryan ed. 2002); RICHARD WEIKART, [FROM DARWIN TO HITLER: EVOLUTIONARY ETHICS,](https://link.springer.com/book/10.1007/978-1-137-10986-6) [EUGENICS, AND RACISM IN GERMANY (](https://link.springer.com/book/10.1007/978-1-137-10986-6)2004). [↑](#footnote-ref-286)
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[https://search.proquest.com/openview/d8a5e12799a52d183c28923d1147afi51/12pq;](https://search.proquest.com/openview/d8a5e12799a52d183c28923d1147af61/1?pq-origsite=gscholar&cbl=18750&diss=y)

[origsite=gscholar&cbl=18750&diss=y](https://search.proquest.com/openview/d8a5e12799a52d183c28923d1147af61/1?pq-origsite=gscholar&cbl=18750&diss=y)[; Daphna Birenbaum-Carmel](https://www.sciencedirect.com/science/article/pii/S2405661816300090%23%21)i, *Thirty-five Years of Assisted Reproductive Technologies in Israel*, [2 REPRODUCTIVE BIOMEDICINE & SOCIETY ONLINE](https://www.sciencedirect.com/science/journal/24056618) 16 (2016); *Naomi Gershoni & Corinne Low, The Impact of Extended Reproducti ve Time Horizons: Evidence from Israel’s Expansion of Access to IVF* 11, University of Pennsylvania Population Center Working PAPER (PSC/PARC), 2017-15. [https ://repository.upenn.edu/psc\_publications](https://repository.upenn.edu/psc_publications/15)/15. [↑](#footnote-ref-287)
288. *Ibid*. [↑](#footnote-ref-288)
289. Hashiloni-Dolev, *supra* no[te 12](#bookmark53), at 73 [↑](#footnote-ref-289)
290. *Ibid*. [↑](#footnote-ref-290)
291. Lobotomy is a surgical procedure whereby the synapses to and from the frontal lobes of the brain are disconnected, under the assumption that these lobes are the emotional centers and that numbing them will blunt the emotions affecting mental patients. [↑](#footnote-ref-291)
292. Raz, *supra* not[e 2](#bookmark52). [↑](#footnote-ref-292)
293. For a discussion of this modern notion of Liberal eugenics, see, for example, Nicholas Agar, *Liberal Eugenics*, 12(2) PUBLIC AFFAIRS QUARTERLY 137 (1998); Elizabeth Fenton, *Liberal Eugenics and Human Nature: Against Habermas*, 36(6) HASTINGS CENTER REPORT 35 (2006); NICHOLAS AGAR, LIBERAL EUGENICS: IN DEFENCE OF HUMAN ENHANCEMENT (2008). [↑](#footnote-ref-293)
294. For a discussion of the recent most advanced and challenging practices of genetic science, see, e.g., F Ann Ran et al., *Genome Engineering Using the CRISPR-Cas9 System*, 8 NATURE PROTOCOLS 2281 (2013); Le Cong et al., *Multiplex Genome Engineering Using CRISPR/Cas Systems*, SCIENCE (2013); [Patrick D. Hsu](https://www.sciencedirect.com/science/article/pii/S0092867414006047%23%21) et al., *Development and Applications of CRISPR-Cas9 for Genome Engineering*, 157(6) CELL 1262 (2014). *See also* Tara R. Melillo, *Gene Editing and the Rise of Designer Babies*, 50 VAND. J. TRANSNAT'L L. 757 (2017); [Chen Wang e](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2818%2933080-0/fulltext)t al., [*Gene-Edited Babies: Chinese Academy of Medical*](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2818%2933080-0/fulltext)[*Sciences' Response and Actio*](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2818%2933080-0/fulltext)*n*, 393 (10166) THE LANCET 25 (2019). [↑](#footnote-ref-294)
295. *See* PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SPLICING LIFE: THE SOCIAL AND ETHICAL ISSUES OF GENETIC ENGINEERING WITH HUMAN BEINGS (1982). For a discussion of this commission's conclusions, see S. J. Youngner & E. T. Bartlett, *Human Death and High Technology: The Failure of the Whole-Brain Formulations*, 99(2) ANN INTERN. MED. 252 (1983); Ronald Bayer, *Ethics, Politics, and Access to Health Care: A Critical Analysis of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research*, 6 CARDOZO L. REV. 303 (1984); P. J. Greco & K. A. Schulman, *The Patient Self-Determination Act and the Future of Advance Directives*, 115(8) ANN. INTERN. MED. 639 (1991). [↑](#footnote-ref-295)
296. For an outline of the articles which surface the problems of the commercialization and commodification, besides the researches that will be enumerated in this section, see Glenda Labadie- Jackson, *The Reproductive Rights of Latinas and Commercial Surrogacy Contracts English Translation*, 14 TEX. HISP. J.L. & POL'Y 49, 60 n. 109 (2008). *See also* Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND.

L. J. 1223 (2014) and more broadly [Ram Rivlin, *T*](http://www.utpjournals.press/author/Rivlin%2C%2BRam)*he Puzzle of Intra-Familial Commodification*, 67(1) [UNIVERSITY OF TORONTO LAW JOURNAL 68 (2017) (discussing custody agreements and divorce](http://www.utpjournals.press/loi/utlj) [negotiation).](http://www.utpjournals.press/loi/utlj) [↑](#footnote-ref-296)
297. Dr. Alessandra Piontelli, trained in Medicine and Neuropsychiatry in Italy, and in Paediatric Psychiatry in England. [↑](#footnote-ref-297)
298. ALESSANDRA PIONTELLI, FROM FETUS TO CHILD, AN OBSERVATIONAL AND PSYCHOANALYTICAL STUDY (2003). For a discussion of this book, see JOAN RAPHAEL-LEFF, PREGNANCY: THE INSIDE STORY (2001); KAY MILTON, [LOVING NATURE: TOWARDS AN ECOLOGY OF EMOTION](https://www.taylorfrancis.com/books/9781134525393) (2002); DEBORAH MARKS, [DISABILITY: CONTROVERSIAL DEBATES AND PSYCHOSOCIAL PERSPECTIVES](https://content.taylorfrancis.com/books/download?dac=C2004-0-00772-4&isbn=9781136215087&format=googlePreviewPdf) (2014). [↑](#footnote-ref-298)
299. *Ibid*. Today it is already a known fact that the fetus is able to hear and react to noises within the intrauterine environment. [↑](#footnote-ref-299)
300. SIGMUND FREUD, INHIBITION, SYMPTOMS AND ANXIETY §§ 138 (James Strachey, Ed. 1990). For a discussion of this important book, see, e.g., Austin Sarat, *Living in a Copernican Universe: Law and Fatherhood in a Perfect World* , 43 N. Y. L. SCH. L. REV. 843, 849 n.34 (1999); Austin Sarat, *Imagining the Law of the Father: Loss, Dread, and Mourning in the Sweet Hereafter*, 34 LAW & SOC'Y REV. 3, 17 (2000); On Freud's Inhibitions, Symptoms and Anxiety (Samuel Arbiser & Jorge Schneider eds., 2013). [↑](#footnote-ref-300)
301. For example, she describes twins that hit one another in the womb and continued doing so during their childhood; other twins stroked each other and continued this behavior as children. [↑](#footnote-ref-301)
302. For the moral dimensions of the abortion, see, among others, THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES (JOHN THOMAS NOONAN ED., 1970); ABORTION: MORAL AND LEGAL PERSPECTIVES (JAY L. GARFIELD & PATRICIA HENNESSEY EDS., 1984); BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES (2011). [↑](#footnote-ref-302)
303. The ethical and philosophical literature concerning this issue is enormous. *See*, the following land mark books: BARUCH A. BRODY, ABORTION AND THE SANCTITY OF HUMAN LIFE: A PHILOSOPHICAL VIEW (1975); CHRISTOPHER KACZOR, [THE ETHICS OF ABORTION: WOMEN'S RIGHTS, HUMAN LIFE, AND THE](https://www.google.com/books?hl=iw&lr=&id=Imm2BQAAQBAJ&oi=fnd&pg=PP1&dq=abortion+%22human+rights%22+fetus&ots=LG1itK0i8q&sig=xwjAlGz5x7yv8JFTNhfOJl3K0jM) [QUESTION OF JUSTICE](https://www.google.com/books?hl=iw&lr=&id=Imm2BQAAQBAJ&oi=fnd&pg=PP1&dq=abortion+%22human+rights%22+fetus&ots=LG1itK0i8q&sig=xwjAlGz5x7yv8JFTNhfOJl3K0jM) (2011). [↑](#footnote-ref-303)
304. For the seminal books which deal with the fetal rights, see CYNTHIA R. DANIELS, [AT WOMEN'S](https://www.google.com/books?hl=iw&lr=&id=axwVdG9fM-wC&oi=fnd&pg=PP8&dq=abortion+%22human+rights%22+fetus&ots=UG7q5DzdB4&sig=C81TCGrIc8y3yk1el8sPrfV1j5Q) [EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS (](https://www.google.com/books?hl=iw&lr=&id=axwVdG9fM-wC&oi=fnd&pg=PP8&dq=abortion+%22human+rights%22+fetus&ots=UG7q5DzdB4&sig=C81TCGrIc8y3yk1el8sPrfV1j5Q)1996); [FETAL RIGHTS: A NEW ASSAULT ON](http://europepmc.org/abstract/med/11656424) [FEMINISM](http://europepmc.org/abstract/med/11656424) (CLAUDIA MALACRIDA & JACQUELINE LOW EDS., 2008); RITA JOSEPH[, HUMAN RIGHTS AND](https://www.google.com/books?hl=iw&lr=&id=2mSwCQAAQBAJ&oi=fnd&pg=PR5&dq=abortion+%22human+rights%22+fetus&ots=-CY1B2UdJo&sig=7gg3c_BfgmpTV7iXYP-7rw4r9ts) [THE UNBORN CHILD](https://www.google.com/books?hl=iw&lr=&id=2mSwCQAAQBAJ&oi=fnd&pg=PR5&dq=abortion+%22human+rights%22+fetus&ots=-CY1B2UdJo&sig=7gg3c_BfgmpTV7iXYP-7rw4r9ts) (2009). [↑](#footnote-ref-304)
305. For the modern discussion of the woman right to abort her fetus, see, for example, JOHN KENYON MASON, THE TROUBLED PREGNANCY: LEGAL WRONGS AND RIGHTS IN REPRODUCTION (2007); N. E. H. HULL & PETER CHARLES HOFFER, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN (2010); SITAL KALANTRY, WOMEN'S HUMAN RIGHTS AND MIGRATION: SEX-SELECTIVE ABORTION LAWS IN THE UNITED STATES AND INDIA (2017). [↑](#footnote-ref-305)
306. For a discussion of the fetal rights at this stage, see Mary Anne Wood & Lisa Bolin Hawkins, *State Regulation of Late Abortion and the Physician's Duty of Care to the Viable Fetus*, 45 MO. L. REV. 394 (1980); Alan Zaitchik, *Viability and the Morality of Abortion*, 10(1) PHILOSOPHY & PUBLIC AFFAIRS 18 (1981); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99(1) HARVARD LAW REVIEW 330 (1985). [↑](#footnote-ref-306)
307. Termination of Pregnancy Committee at the Viable Stage works in conjunction with the Ministry of Health, *Director General: Termination of Pregnancy Committee at the Viable Stage no. 23/07* (19.12.2007), [www.health.gov.il/hozer/pdf mk-23 2007](http://www.health.gov.il/hozer/pdf%20mk-23_2007) (Heb.). [↑](#footnote-ref-307)
308. PNINA LIFSHITZ-AVIRAM INFORMED CONSENT OF A MINOR FOR MEDICAL TREATMENT (2006) (Heb.). [↑](#footnote-ref-308)
309. On 28th December 1994 a circular for medical services no. 76/94 was published on the subject of special committees for the termination of pre gnancies at the stage of 24 full weeks and more. The circular sets out both administrative and clinical guidelines for work with committees for the termination of pregnancies at the viable stage: application should be made to these committees even when a regular committee has authorized the termination of pregnancy at an earlier stage and the termination was not carried out. The special committees authorize the termination of pregnancy out of respect for the woman's wish but the wish should not be the only deciding factor. Even if there is an permissible reason to le g ally terminate the pregnancy, the committee considers other causes too. [↑](#footnote-ref-309)
310. Director General's Circular, *supra* note [11,](#bookmark59) was published in order to regulate the authority of the committees for termination of pregnancy, to set out directives to authorize a termination of pregnancy at the viable stage and to add guidelines for applying discretion. It is important to note that legally the Director General's Circular s have a lower normative status than primary legislation such as the penal law, and do not detract from it or change its directives. [↑](#footnote-ref-310)
311. In fields such as genetics, cardiology, nephrology, etc. For a fuller discussion of the Israeli unique regulation, see, e.g., Dan Shnit, *Induced Abortion in Israeli Law*, 15 ISRAELI Y.B. ON HUM. RTS. 155 (1985); Yael Yishai, *Abortion in Israel: Social Demands and Political Responses*, in 6 WOMEN IN ISRAEL 287 (Yael Azmon & Dafna N. Israeli eds., 1993); Yael Yishai, *The Hidden Agenda: Abortion Politics in Israel*, 22 J. SOC. POL'Y. 193 (1993); Noga Morag Levine, *Abortion in Israel: Community, Rights, and the Context of Compromise*, 19 L. SOC. INQUIRY 313 (1994); Larissa I. Remennick & Rosie Segal, *Socio­Cultural Context And Women's Experiences Of Abortion: Israeli Women And Russian Immigrants Compared*, 3 CULTURE, HEALTH & SEXUALITY 49 (2001); Larrisa I. Remennick & Amir Hetsroni, *Public Attitudes About Abortion in Israel: A Research Note*, 82 SOC. SCI. Q. 420 (2001); Nitzan Rimon-Zarfaty & Aviad Raz, *Abortion Committees as Agents of Eugenics: Medical and Public Views on Selective Abortion Following Mild or Likely Fetal Pathology*, in KIN, GENE, COMMUNITY: REPRODUCTIVE TECHNOLOGIES AMONG JEWISH ISRAELIS 202 (Daphna Birenbaum-Carmeli & Yoram S. Carmeli eds., 2010); L. Ariella Zeller & Elana Maryles Sztokman, *Abortion in Israel: When the Nation Enters the Womb*, 10 LILITH (2011-12). [↑](#footnote-ref-311)
312. For an academic discussion of the different sorts of disability and the abortion dilemma, see, for example, Ralph Althouse & Nicholas Wald, *Survival and Handicap of Infants with Spina Bifida*, 55 ARCHIVES OF DISEASE IN CHILDHOOD 845 (1980); [Gail Geller e](https://obgyn.onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Geller%2C+Gail)t al., *Attitudes toward Abortion for Fetal Anomaly In The Second Vs. The Third Trimester: A Survey of Parisian Obstetricians*, 13(8) PRENATAL DIAGNOSIS 707 (1993); Souhail Alouini et al., *Termination of Pregnancy for Mild Foetal Abnormalities: Opinions of Physicians*, WebmedCentral 2(3) OBSTETRICS AND GYNAECOLOGY (2011), [https://www.webmedcentral.com/wmcpdf/Article\_WMC001770.pd](https://www.webmedcentral.com/wmcpdf/Article_WMC001770.pdf)f. [↑](#footnote-ref-312)
313. For a discussion of the morality of aborting a fetus with Cleft Li, see Bertram S. Kraus et al., *Malformations Associated With Cleft Lip and Palate In Human Embryos and Fetuses*, 86(3) AMERICAN JOURNAL OF OBSTETRICS & GYNECOLOG (1963); [J. C. Bear,](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Bear%2C+J+C) *Spontaneous Abortion, Sex Ratio and Facial Cleft Malformations*, 13 (1) CLINICAL GENETICS 1 (1978); Ibid, *Additional Data on Spontaneous Abortion and Facial Cleft Malformations*, 24(6) CLINICAL GENETICS 407 (1983). [↑](#footnote-ref-313)
314. Amir Aviram, *Late Termination of Pregnancy in Israel: The Effect of a Policy Change*, 42 INTERNATIONAL GYNAECOLOGY AND OBSTETRICS 49 (2014). The research examined the decisions of the special committees for termination of pregnancy and the issue of authorizations for terminations of pregnancy at the viable stage from 2002 till 2012 at three university medical centers. Requests submitted between 2002 and 2007 were examined - prior to the publication of the Director General's Circular of 19.12.2007, *supra* not[e 11,](#bookmark59) that changed the policy regarding termination of pregnancy at the viable stage, and requests between 2008 and 2012 - following the above publication of the Director General's Circular. The research included 565 submissions for termination of pregnancy at the viable stage at three medical centers. The research results showed that there was no significant change in the rejection of requests for termination of pregnancy following the policy change in the Director General's Circular, and that this was mainly as a result of the difficulty defining a defect of 30%. [↑](#footnote-ref-314)
315. DAVID HEYD, ETHICS AND MEDICINE 22 (2011) (Heb.). [↑](#footnote-ref-315)
316. IVAN ILLICH, MEDICAL NEMESIS (1975). For the most recent discussion of this remarkable book, see, amongst others, Tom Sanders & Diane Roberts, *Social Representations of Diagnosis in the Consultation*, 52(6) SOCIOLOGY 1185 (2018); Fran Toye et al., *A Meta-Ethnography of Health-Care Professionals' Experience of Treating Adults with Chronic Non-Malignant Pain to Improve The Experience And Quality Of Health Care*, NATIONAL INSTITUTE FOR HEALTH RESEARCH. (HEALTH SERVICES AND DELIVERY

Research) (2018), [https://core.ac.uk/download/pdf/157620169.Dd](https://core.ac.uk/download/pdf/157620169.pdf)f; Richard Berlin et al., *Systems Medicine Disease: Disease Classification and Scalability Beyond Networks and Boundary Conditions*, 6 FRONT. BIOENG. BIOTECHNOL. 112 (2018),

https ://[www.frontiersin.org/articles/10.3389/fbioe.2018.001](http://www.frontiersin.org/articles/10.3389/fbioe.2018.001) 12/full. [↑](#footnote-ref-316)
317. For a discussion of the fears of “playing God” and hubris in this sensitive issue, see *See* U.S. CATHOLIC

CONFERENCE, CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION, DONUM VITAE (1987), and more briefly, [↑](#footnote-ref-317)
318. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality,* 1990 WIS. L. REV. 297, 329-30 (1990); YEHEZKEL MARGALIT, DETERMINING LEGAL PARENTAGE - BETWEEN FAMILY LAW AND CONTRACT LAW 184 (Cambridge University Press, forthcoming, 2019). [↑](#footnote-ref-318)
319. Heyd, *supra* not[e 19](#bookmark61), at 61. [↑](#footnote-ref-319)
320. Piontelli, *supra* note [2.](#bookmark56) As mentioned previously, Alessandra Piontelli observed fetuses in the wombs of their mothers using ultrasound scans, and followed up their development at home from birth up to the age of four years. [↑](#footnote-ref-320)
321. ORIT KAMIR, FEMINISM, RIGHTS AND LAW 91 (2002) (Heb.) (that silence in and of itself does not create a false representation). For a discussion of this research, see e.g., Irit Koren, *The Bride's Voice: Religious Women Challenge the Wedding Ritual*, 10(2) NASHIM: A JOURNAL OF JEWISH WOMEN'S STUDIES & GENDER ISSUES 29 (2005); [Efrat Shoham, G](https://journals.sagepub.com/action/doSearch?target=default&ContribAuthorStored=Shoham%2C+Efrat)ender, *Traditionalism, and Attitudes Toward Domestic Violence Within a Closed Community*, 49(4) INTERNATIONAL JOURNAL OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 427 (2005); [Ilan Tamir &](https://journals.humankinetics.com/author/Tamir%2C%2BIlan) [Yair Galily,](https://journals.humankinetics.com/author/Galily%2C%2BYair) *Women's Sports Coverage in Israel: Perception Versus Reality*, 3(1) INTERNATIONAL JOURNAL OF SPORT COMMUNICATION 92 (2010). [↑](#footnote-ref-321)
322. For a discussion of this basic human right, see, e.g., ROSALIND POLLACK PETCHESKY, [ABORTION AND](http://www.popline.org/node/647092) [WOMANS CHOICE: THE STATE SEXUALITY AND REPRODUCTIVE FREEDOM](http://www.popline.org/node/647092) (1990)[; Jennifer Denbow,](https://scholar.google.co.il/citations?user=mao_S_YAAAAJ&hl=iw&oi=sra) *Abortion: When Choice and Autonomy Conflict*, 20 BERKELEY J. GENDER L. & JUST. 216 (2005); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L. J. 1394 (2008-2009). [↑](#footnote-ref-322)
323. Kamir, *supra* not[e 24](#bookmark63), at 129. [↑](#footnote-ref-323)
324. Kamir, *supra* not[e 24](#bookmark63), at 131. [↑](#footnote-ref-324)
325. When conception is the result of incest, rape or a relationship based on force even I am of the opinion that preference should be given to the right of the woman over that of the fet us, but in cases such as these the pregnancy can be already terminated in the initial stages of the pregnancy and there is no need to wait until the fetus is already viable. For a unique discussion whether a rapist should be deprived of his parenthood right following the delivery of a child resulting from this rape, see NORVIN RICHARDS, THE ETHICS OF PARENTHOOD 4 (2010) ("Imagine a rapist who impregnates his victim. He is the biological father of the child, but surely that fact gives him no rights at all where the child is concerned."). [↑](#footnote-ref-325)
326. *See, e.g.*, [Mordechai Shohat](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Shohat%2C+Mordechai) et al., *Prenatal Diagnosis of Down Syndrome: Ten Year Experience in the Israeli Population*, 122A(3) AMERICAN JOURNAL OF PUBLIC HEALTH 215 (2003); [Carron Sher](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Sher%2C+Carron) et al., *Factors Affecting Performance of Prenatal Genetic Testing by Israeli Jewish Women*, 120A(3) AMERICAN JOURNAL OF PUBLIC HEALTH 418 (2003); [Larissa Remennick,](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Remennick%2C+Larissa) *The Quest for the Perfect Baby: Why Do Israeli Women Seek Prenatal Genetic Testing?*, 28(1) SOCIOLOGY OF HEALTH & ILLNESS 21 (2006). [↑](#footnote-ref-326)
327. For an academic discussion of the various required follow-up and prenatal diagnosis during the pregnancy, see, amongst others, Aliza Kolker & B. Meredith Burke, *Grieving the Wanted Child: Ramifications of Abortion after Prenatal Diagnosis of Abnormality*, 14(6) HEALTH CARE FOR WOMEN INTERNATIONAL 513 (1993); A. [Asch, *P*](https://ajph.aphapublications.org/author/Asch%2C%2BA)*renatal Diagnosis and Selective Abortion: A Challenge to Practice and Policy*, 89(11) AMERICAN JOURNAL OF PUBLIC HEALTH 1649 (1999); [Emily Jackson,](https://journals.sagepub.com/action/doSearch?target=default&ContribAuthorStored=Jackson%2C+Emily) *Abortion, Autonomy and Prenatal Diagnosis*, 9(4) SOCIAL & LEGAL STUDIES 467 (2000). [↑](#footnote-ref-327)
328. For a discussion of the interplay between prenatal genetic diagnosis (PGD) and the abortion, see, for example, [David A. Luthy et al., *Pr*](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Luthy%2C+David+A)*enatal Genetic Diagnosis and Elective Abortion in Women Over 35: Utilization and Relative Impact on the Birth Prevalence of Down Syndrome in Washington State*, 7(3) AMERICAN JOURNAL OF MEDICAL GENETICS 375 (1980); [A Asch, *P*](https://ajph.aphapublications.org/author/Asch%2C%2BA)*renatal Diagnosis and Selective Abortion: A Challenge to Practice and Policy*, 89(11) AMERICAN JOURNAL OF PUBLIC HEALTH 1649 (1999); C. Cameron & R. Williamson, *Is There an Ethical Difference Between Preimplantation Genetic Diagnosis and Abortion?*, 29 JOURNAL OF MEDICAL ETHICS 90 (2003). [↑](#footnote-ref-328)
329. Private Bill no.985 presented to the chairman of the *Knesset* and vice-chairmen on 3.1.2000. For an academic discussion of the Israeli legislation regarding abortion, see, amongst others, Yael Yishai, *Abortion in Israel: Social Demands and Political Responses*, in 6 WOMEN IN ISRAEL 287, 292 (Yael Azmon & Dafna N. Israeli eds., 1993); Naomi Chazan, *Israel at 70: A Gender Perspective*, 23(3) ISRAEL STUDIES 141 (2018), Project MUSE, muse.jhu.edu/article/699549; Shulamit Almog & Sharon Bassan, *The Politics of Pro and Non Reproduction Policies in Israel*, 14 J. HEALTH & BIOMEDICAL L. 27 (2018). [↑](#footnote-ref-329)
330. For a discussion of these law suits in this specific medical field, see, for example, Nancy K. Rhoden, *The New Neonatal Dilemma: Live Births from Late Abortions*, 72 GEO. L. J. 1451 (1984); C Brezinka, [*Obstetric Ultrasound and the Many Faces of Malpractice Lawsuits*,](https://obgyn.onlinelibrary.wiley.com/doi/pdf/10.1046/j.1469-0705.2000.00267.x) 16 ULTRASOUND IN OBSTETRICS AND GYNECOLOGY 207 (2000); Kathleen A. Mahoney, *Malpractice Claims Resulting from Negligent Preconception Genetic Testing: Do These Claims Present a Strain of Wrongful Birth or Wrongful Conception, and Does the Categorization Even Matter*, 39 SUFFOLK U. L. REV. 773 (2006). [↑](#footnote-ref-330)
331. *Hammer v. Amit*, *supra* note [32. F](#bookmark64)or a discussion of the advantages and disadvantages of this unique law claim, see Joseph S. Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977); Marten A. Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 2(1) JOURNAL OF LEGAL MEDICINE 85 (1980); [Bonnie Steinbock,](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Steinbock%2C+Bonnie) *The Logical Case for “Wrongful Life”,* 16(2) [HASTINGS CENTER REPORT](https://onlinelibrary.wiley.com/journal/1552146x) (1986). [↑](#footnote-ref-331)
332. Ahuva Ticho, *Critique on the Hammer Decree From The Viewpoint of the Claim in the Wrongful Birth Claims*, MEDICINE AND LAW 20, 30 (special edition January 2015) (Heb.). [↑](#footnote-ref-332)
333. Bilha Kahana, *Conceptual Aspects of the Hammer case According to Torts Law*, MEDICINE AND LAW

43, 51 (Special Edition, January 2015) (Heb.). [↑](#footnote-ref-333)
334. [↑](#footnote-ref-334)
335. well as administrative and clinical guidelines to the committee regarding termination of pregnancy at the viable stage”. [↑](#footnote-ref-335)
336. YIGAL WOLMAN, ULTRASOUND IN BIRTH MOTHERS (2006) (Heb.) noted in his book that when discovering a defect such as club-foot there is a 10%-14% chance of finding other innate abnormalities, and even if this is the only defect, the chances of finding chromosomal defects are 6%-22%. This is a defect in the foot, and many are the doctors who are sure that it does not warrant a termination of the pregnancy. Some 25% of cases are discovered by means of ultrasound and some 10% are mistakenly diagnosed. [↑](#footnote-ref-336)
337. 20% of heart defects are known to be connected to Down Syndrome. [↑](#footnote-ref-337)
338. An ultrasound raises suspicions of a genetically-based syndrome that requires additional tests such as amniotic fluid or a specific cardiac US. [↑](#footnote-ref-338)
339. Yosef Shenkar, *Is There Justification to Destroy a Viable Fetus in the Womb for Medical Reasons?*, HAREFUAH 131 (3,4) 101 (1996) (Heb.). [↑](#footnote-ref-339)
340. Jonathan Davis*, Can the Guidelines in the Director General's Circular Be Used as an Instrument for Self-Defense?”: Comments Resulting From The Ministry Of Health Director General's Circular Regarding Committees for Termination of Pregnancy at the Viable Stage*, MEDICINE AND LAW 39, 203, 203 (2008) (Heb.). [↑](#footnote-ref-340)
341. Data from the Israeli Ministry of Health Department of Computing and Information Services “Terminations of Pregnancy, 1990-1995”. [↑](#footnote-ref-341)
342. In this matter see the British Abortion Law mentioned above; A. Mavroforou & E. Michalodimitrakis, *The British Abortion Act (1967) and the Interests of the Foetus*, 25 MED. LAW 175 (2006). [↑](#footnote-ref-342)
343. According to the Israeli Ministry of Health website, more than 80% of late abortions in Israel are ratified on the basis of the Health of the Fetus clause. [↑](#footnote-ref-343)
344. For a discussion of this emerging field, see, for example, [J. C. Weinreb e](https://pubs.rsna.org/author/Weinreb%2C%2BJ%2BC)t al., *Human Fetal Anatomy: MR Imaging*, 157(3) [RADIOLOGY 7](https://pubs.rsna.org/journal/radiology)15 (1985); [S. M. McCarthy et](https://pubs.rsna.org/author/McCarthy%2C%2BS%2BM) al., *Obstetrical Magnetic Resonance Imaging: Fetal Anatomy*, 154(2[) RADIOLOGY](https://pubs.rsna.org/journal/radiology) 427 (1985); D. Levinee et al., *Fetal Anatomy Revealed With Fast MR Sequences*, 167 AMERICAN JOURNAL OF ROENTGENOLOGY 905 (1996). [↑](#footnote-ref-344)
345. For an academic discussion of this brand new discourse, see, e.g., Ian A. Greer, *The Challenge of Thrombophilia in Maternal Fetal Medicine,* 342(6) N. Engl. J. Med. 424 (2000); [Vassilios Fanos](https://www.hindawi.com/54313724/) et al., *MetabolomicsApplicationinMaternal-FetalMedicine,* Biomed. Res. Int. (2013); [Mary E.D'Alton](https://www.sciencedirect.com/science/article/pii/S0002937812021874%23%21) et al., *Putting the “M” Back in Maternal-Fetal Medicine,* 208(6[) American Journal of Obstetrics and](https://www.sciencedirect.com/science/journal/00029378) [GYNECOLOGY](https://www.sciencedirect.com/science/journal/00029378) 442 (2013). [↑](#footnote-ref-345)
346. *See* only recently Susana Manrique et al., *Maternal Anaesthesia in Open and Fetoscopic Surgery of Foetal Open Spinal Neural Tube Defects*, 36(3) EUROPEAN JOURNAL OF ANAESTHESIOLOGY 175 (2019); Ma'atem B Fofou-Caillierez et al., *Vitamin B-12 and Liver Activity and Expression of Methionine Synthase Are Decreased In Fetuses with Neural Tube Defects*, 109(3) THE AMERICAN JOURNAL OF CLINICAL NUTRITION 674 (2019); [Philippe Lemay e](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Lemay%2C+Philippe)t al., *Whole Exome Sequencing Identifies Novel Predisposing Genes in Neural Tube Defects*, 7(1) MOLECULAR GENETICS & GENOMIC MEDICINE E00467 (2019). [↑](#footnote-ref-346)
347. *See* the following most up to date discussion of this defect: Alessandro Prete et al., *Diagnosis and Management of Congenital Adrenal Hyperplasia in Children and Adult*[*s*, ADVANCED PRACTICE IN](https://link.springer.com/book/10.1007/978-3-319-99817-6) [ENDOCRINOLOGY NURSING](https://link.springer.com/book/10.1007/978-3-319-99817-6) 657 (Sofia Llahana et al., 2019); [Maria I.New e](https://www.sciencedirect.com/science/article/pii/S0015028218322180%23%21)t al., *Fertility in Patients With Nonclassical Congenital Adrenal Hyperplasia*, 111(1) [FERTILITY AND STERILITY](https://www.sciencedirect.com/science/journal/00150282) 13 (2019); [Maria I.New](https://www.sciencedirect.com/science/article/pii/S001502821832226X%23%21) & [Zev Rosenwaks, *I*](https://www.sciencedirect.com/science/article/pii/S001502821832226X%23%21)*ntroduction: Contemporary Perspectives on Congenital Adrenal Hyperplasia: Impacts on Reproduction*, 111([1) FERTILITY AND STERILIT](https://www.sciencedirect.com/science/journal/00150282)Y 4 (2019). [↑](#footnote-ref-347)
348. For the most recent discussion of it, see, e.g., Myrthe M. van Dijk, et al., [M*aternal Thyrotropin*](https://www.liebertpub.com/doi/full/10.1089/thy.2017.0413)[*Receptor Antibody Concentration and the Risk of Fetal and Neonatal Thyrotoxicosis: A Systematic*](https://www.liebertpub.com/doi/full/10.1089/thy.2017.0413)[*Review*](https://www.liebertpub.com/doi/full/10.1089/thy.2017.0413), 28(2) THYROID 789 (2018); Stephanie L. Samuels et al., *Neonatal Thyrotoxicosis*, 45(1) CLINICS IN [PERINATOLOGY 3](https://scholar.google.co.il/scholar?hl=iw&as_sdt=0,5&as_ylo=2018&q=perinatology)1 (2018); Wilburn D. Bolton & Jennifer M. Perkins, *Thyrotoxicosis in Pregnancy*, THYROID DISEASE AND REPRODUCTION 117 (Jennifer Lipkowitz Eaton ed., 2019). [↑](#footnote-ref-348)
349. *See, e.g.,* [Rodrigo A.Mon](https://www.sciencedirect.com/science/article/pii/S0022480417305450%23%21) et al., *Outcomes of Fetuses With Primary Hydrothorax That Undergo Prenatal Intervention (Prenatal Intervention For Hydrothorax)*, 22[1 JOURNAL OF SURGICAL RESEARCH](https://www.sciencedirect.com/science/journal/00224804) 121 (2018); Ruben S G M Witlox et al., *Neonatal Management and Outcome After Thoracoamniotic Shunt Placement For Fetal Hydrothorax*, 103 ARCHIVES OF DISEASE IN CHILDHOOD - FETAL AND NEONATAL EDITION F245 (2018); [Fumio Suyama e](https://obgyn.onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=Suyama%2C+Fumio)t al., *Fetal Lung Size After Thoracoamniotic Shunting Reflects Survival in Primary Fetal Hydrothorax With Hydrops* , 44([7) JOURNAL OF OBSTETRICS AND](https://obgyn.onlinelibrary.wiley.com/journal/14470756) [GYNAECOLOGY RESEARCH](https://obgyn.onlinelibrary.wiley.com/journal/14470756) 1216 (2018). [↑](#footnote-ref-349)
350. *See also* [Pramod S. Puligandla e](https://www.ncbi.nlm.nih.gov/pubmed/?term=Puligandla%20PS%5BAuthor%5D&cauthor=true&cauthor_uid=29378870)t al., *Diagnosis and Management of Congenital Diaphragmatic Hernia: A Clinical Practice Guideline*, 190(4): [CMAJ.](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5790558/) E103-E112 (2018); Matthew Harting, *Aggressive Surgical Management of Congenital Diaphragmatic Hernia: Worth the Effort?A Multicenter, Prospective, Cohort Study*, 267(5) ANNALS OF SURGERY 977 (2018); Christopher J. McLaughlin et al., *Congenital Diaphragmatic Hernia, Clinical Algorithms* in GENERAL SURGERY 487 (Salvatore Docimo, Eric M. Pauli eds., 2019). [↑](#footnote-ref-350)
351. The chapter dealing with intrauterine treatment of a fetus was written by Dr. Amir Aviram and is based mainly on Shelley C. Springer, *Prenatal Diagnosis and Fetal Therapy*, MEDSCAPE WEBSITE (updated 28.4.2014) [(http://emedicine.medscape.come/article/936318-overview](http://emedicine.medscape.come/article/936318-overview)). For the most recent overview of this field, see Maria Laseca Modrego et al., *Prenatal Diagnosis of Foetal Labial Fusion*, 37(2) JOURNAL OF OBSTETRICS AND GYNAECOLOGY 243 (2017); [Amirhossein Moaddab](https://www.sciencedirect.com/science/article/pii/S1521693417300305%23%21) et al., *Ethical Issues in Fetal Therapy*, 43 [BEST PRACTICE & RESEARCH CLINICAL OBSTETRICS & GYNAECOLOGY](https://www.sciencedirect.com/science/journal/15216934) 58 (2017); [The](https://obgyn.onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=The+International+Society+For+Prenatal+Diagnosis) [International Society for Prenatal Diagnosis](https://obgyn.onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=The+International+Society+For+Prenatal+Diagnosis) et al, *Joint Position Statement From the International Society For Prenatal Diagnosis (ISPD), The Society For Maternal Fetal Medicine (SMFM), and the Perinatal Quality Foundation (PQF) on the Use of Genome-Wide Sequencing For Fetal Diagnosis,* 38 (1) [PRENATAL DIAGNOSIS](https://obgyn.onlinelibrary.wiley.com/journal/10970223) 6 (2018). [↑](#footnote-ref-351)
352. Prof. Blickstein's opinion as quoted by Justice Menahem Raniel in (Tel-Aviv( 831/08 Dahan (minor) v. State of Israel Ministry of Health (Nevo 5.2.12) (Heb.), in which the plaintiff was born by C-section in the 28th week of pregnancy with partial moderate CP known as Spastic Diplegia. The plaintiff claimed, among others, that the mother did not have informed consent for a C-section and that the operation could have been avoided thereby increasing the chances that the plaintiff would have died. She therefore claimed for battery, which was rejected. For the most recent discussion of this medical problem, see [Yanxin Zhang & Ye Ma,](https://www.sciencedirect.com/science/article/pii/S0010482519300095%23%21) *Application of Supervised Machine Learning Algorithms in the Classification of Sagittal Gait Patterns of Cerebral Palsy Children With Spastic Diplegia*, 10[6 COMPUTERS IN BIOLOGY](https://www.sciencedirect.com/science/journal/00104825) [AND MEDICINE](https://www.sciencedirect.com/science/journal/00104825) 33 (2019); [Samuel M.T.Jeffery e](https://www.sciencedirect.com/science/article/pii/S1878875019300592%23%21)t al, *Surgical Outcomes of Single-Level Bilateral Selective Dorsal Rhizotomy for Spastic Diplegia in 150 Consecutive Patients*, [WORLD NEUROSURGERY](https://www.sciencedirect.com/science/journal/18788750) (2019); Naglaa A. Zaky et al., *Role of Two Therapeutic Interventions on Balance in Children with Spastic Diplegia and Hemiparasis: A Comparative Study*, *6* PHYS THER REHABIL. 2 (2019). [↑](#footnote-ref-352)
353. *See, e.g.*, Mary Anne Wood & Lisa Bolin Hawkins, *State Regulation of Late Abortion and the*

*Physician's Duty of Care to the Viable Fetus*, 45 MO. L. REV. 394 (1980); [Lawrence J. Nelson &](https://jamanetwork.com/searchresults?author=Lawrence+J.+Nelson&q=Lawrence+J.+Nelson) [Nancy](https://jamanetwork.com/searchresults?author=Nancy+Milliken&q=Nancy+Milliken) [Milliken, *C*](https://jamanetwork.com/searchresults?author=Nancy+Milliken&q=Nancy+Milliken)*ompelled Medical Treatment of Pregnant WomenLife, Liberty, and Law in Conflict*, 259(7) JAMA 1060 (1988); Tu'uhevaha J. Kaitu'u-Lino et al, *Serum Concentrations of Soluble Flt-1 Are Decreased among Women with a Viable Fetus and No Symptoms of Miscarriage Destined for Pregnancy Loss*, PLOS ONE 7(2): e32509 (2012),

https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0032509. [↑](#footnote-ref-353)
354. Protection of Nature Law, 5715 - 1956. [↑](#footnote-ref-354)
355. Animal Protection Law, 5754 - 1994. [↑](#footnote-ref-355)
356. Linda C. Fentiman, *Pursuing the Perfect Mother: Why American's Criminalization of Maternal Substance Abuse is not the Answer - A Comparative Legal Analysis,* 15 Mich. J. GEnder & L 389 (2009). [↑](#footnote-ref-356)
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358. In countries where the legislature has already related to legislation dealing with harming the fetus, see Joanne Pedone, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 COLUM. J.L. & SOC. PROBS. 77 (2009); Andrew S. Murphy, *A Survey of State Homicide Laws and their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 IND. L.J 847 (2014). [↑](#footnote-ref-358)
359. Mary Jo Ludwig, *Maternal-Fetal Conflict* (11.4.2008), [https://deDts.washmgton.edu/bioethx/toDics/matem.ht](https://depts.washington.edu/bioethx/topics/matern.html)ml. *See also* Susan Markens et al, *Feeding the Fetus: On Interrogating the Notion of Maternal-Fetal Conflict*, 23(2) FEMINIST STUDIES 351 (1997); F. S. Oduncu et al., *Cancer in Pregnancy: Maternal-Fetal Conflict*, 129(3[) JOURNAL OF CANCER](https://link.springer.com/journal/432) [RESEARCH AND CLINICAL ONCOLOGY 1](https://link.springer.com/journal/432)33 (2003); [Robert M.Samstein e](https://www.sciencedirect.com/science/article/pii/S0092867412006526%23%21)t al, *Extrathymic Generation of Regulatory T Cells in Placental Mammals Mitigates Maternal-Fetal Conflict*, 150(1) CELL 29 (2012). [↑](#footnote-ref-359)
360. *See, e.g.*, William T. Muse & Nicholas A. Spinella, *Right of Infant to Recover for Prenatal Injury*, 36 VA. L. REV. 611 (1950); Bernice Bird, *Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability among Fetal Pain and Fetal Homicide Laws*, 25 HASTINGS WOMEN'S L.J. 39 (2014); Fatemeh, Ghodrati & Marzieh, Akbarzadeh, *The Rights of the Fetus: Ensoulment as the Cut-Off Point Legislation on Abortion Running Title: The Rights of the Fetus in Legislation Abortion*, 10(1) HEALTH SCIENCE JOURNAL 1 (2016). [↑](#footnote-ref-360)
361. For s discussion of this field in relation to abortion, see, amongst others, Thomas H. Jr. Barnard, *An Analysis and Criticism of the Model Penal Code Provisions on the Law of Abortion*, 18 W. RES. L. REV. 540, 547 n.48, 559 n.114 (1967); David Fuqua, *Justice Harry A. Blackmun: The Abortion Decisions*, 34 ARK. L. REV. 276, 281 (1980); Allan Ides, *The Jurisprudence of Justice Byron White*, 103 YALE L.J. 419, 420 n.3, 429 n.47 (1993). [↑](#footnote-ref-361)
362. Piontelli, *supra* not[e 2](#bookmark56), at 333. [↑](#footnote-ref-362)
363. *Ibid*, on the back cover. [↑](#footnote-ref-363)
364. For an academic discussion of this issue, see, for example, Jacquetin B, et al, *Intrauterine Exchange Transfusion of the Fetus under Ultrasound Guidance: First Successful Report*, 1(4) FETAL DIAGNOSIS AND THERAPY 180 (1986); [Peter A. van Dam e](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorStored=van+Dam%2C+Peter+A)t al., *Application of Ultrasound in the Diagnosis of Heterotopic Pregnancy—A Review of the Literature*, 16(3) JOURNAL OF CLINICAL ULTRASOUND 159 (1988); [Society for Maternal-Fetal Medicine Publications Committee](https://www.sciencedirect.com/science/article/pii/S0002937812000518%23%21) et al, *Doppler Assessment of the Fetus With Intrauterine Growth Restriction*, 206(4) [AMERICAN JOURNAL OF OBSTETRICS AND](https://www.sciencedirect.com/science/journal/00029378) [GYNecology](https://www.sciencedirect.com/science/journal/00029378) 300 (2012). [↑](#footnote-ref-364)
365. Nevertheless I am aware of the opposiite claim, according to which assessment of a reasonable person is unattainable when it comes to a pregnant woman, as follows: “The reasonable person standard, however, is not designed to apply to matters involving intimate, private, and personal decisions. The proposed solution of ‘reasonable pregnant woman' does not resolve many issues presented by applying universal standard to parental conduct”. *See* Joseph S. Badger, *Stallman v. Youngquist - No, You Can’t Sue Mommy in Illinois, The Illinois Supreme Court Rejects Maternal Parental Civil Liability*, 11, N. ILL.

U. L. REV. 409 (1990-1991). For a discussion of this verdict, see Sandra L. Haley, *The Parental Tort Immunity Doctrine: Is It a Defensible Defense*, 30 U. RICH. L. REV. 575, 587 n.55 (1996). [↑](#footnote-ref-365)
366. A slippery slope is an expression according to which recognizing a certain act will lead to another unwanted act. If a woman's legal duty is recognized towards the viable fetus, the concern would be that claims against the woman would be recognized regarding conduct prior to, and during, the course of the pregnancy and her legal duty would be much greater - even to the extent of actually restricting her freedom and autonomy. For a discussion of this argumentation in relation to the abortion dilemmas, see, e.g., [DOUGLAS WALTON,](https://philpapers.org/s/Douglas%20Walton) SLIPPERY SLOPE ARGUMENTS (1992); Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL L. REV. 1469 (1999); den Hartogh, G.A., *The Slippery Slope Argument*, in COMPANION TO BIOETHICS 280 (2009) passim. [↑](#footnote-ref-366)
367. Gad Tedeschi, *On the Problem of Damages for Wrongful Birth*, STUDIES IN LAW 269, 462 (1978) (Heb.). [↑](#footnote-ref-367)
368. Gordin v. Gordin, 102 Mich 301 N.Y. 2d 869 (1980) (The court in Michigan for the first time recognized the rationale in a claim of a child who prosecuted his parents for prenatal injury). [↑](#footnote-ref-368)
369. Bonte v. Bonte, 136 N.H. 286 (1992). For a discussion of this ruling, see Stacie L. Lude, *After Farley v. Sartin: The Consequences of Declaring a Nonviable Fetus a Person for the Purpose of Wrongful Death*, 99 W. VA. L. REV. 339, 354 n.91 (1996); Teresa Foley, *Dobson v. Dobson: Tort Liability for Expectant Mothers*, 61 SASK. L. REV. 177 (1998); Christopher J. Wiener, T*ransgenerational Tort Liability for Epigenetic Disease*, 13 DEPAUL J. HEALTH CARE L. 319, 325 n.38 (2011). [↑](#footnote-ref-369)
370. Bowditch. V. McEwan & Ors, [2002] QSA 172. *See also* Russell Smyth, *Trends in the Citation Practice of the Supreme Court of Queensland over the Course of the Twentieth Century*, 28 U. QUEENSLAND L.J. 39, n.123 (2009); Kate Wellington, [*Maternal Liability for Prenatal Injury: The*](http://sites.thomsonreuters.com.au/journals/files/2010/10/j19_v018_TORTLREV_pt02_wellington.pdf)[*Preferable Approach for Australian Law*](http://sites.thomsonreuters.com.au/journals/files/2010/10/j19_v018_TORTLREV_pt02_wellington.pdf)*?*, 18 TORT LAW REVIEW 89, 90-5 (2010), [http://sites.thomsonreuters.com.au/journals/files/2010/10/j19\_v018\_TORTLREV\_pt02\_wellington.pd](http://sites.thomsonreuters.com.au/journals/files/2010/10/j19_v018_TORTLREV_pt02_wellington.pdf)f; ERIN NELSON, LAW, POLICY AND REPRODUCTIVE AUTONOMY 171 (2013). [↑](#footnote-ref-370)
371. The *Chenault v. Huie* case, *supra* note [87;](#bookmark65) the *Stallman v. Youngquist* case, discussed at *supra* note [88;](#bookmark66) Cullotta v. Cullotta, 678 N.E. 2d 717 (1997). For a discussion of the latter case, see, for example, Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1043 n.6 (1991); Vanessa Merton, *The Exclusion of Pregnant, Pregnable, and Once-Pregnable People (a.k.a. Women) from Biomedical Research*, 19 AM. J.L. & MED. 369, 412 n.186 (1993); Edward Sylvester, *Chenault v. Huie: Denying the Existence of a Bond between a Mother and Her Unborn Child*, 33 AKRON L. REV. 107, 126 n.99 (1999). [↑](#footnote-ref-371)
372. *See also* Margalit, *supra* not[e 21](#bookmark62), at 115 ("In the modern era, however, following the revolution in contraceptive methods, an individual easily can prevent an undesirable pregnancy to a large extent by segregating procreation from the conjugal relationship while preserving his basic right to avoid a coerced parenthood"). [↑](#footnote-ref-372)
373. Babylonian Talmud *Tamid* 32a, [http://ancientworldonline.blogspot.co.il/2012/01/online-soncino- babylonian-talmud.html.](http://ancientworldonline.blogspot.co.il/2012/01/online-soncino-babylonian-talmud.html) *See also* Stephen D. Solender[, *Pursuing Excellence in Jewish Communal Policy,*](http://research.policyarchive.org/10570.pdf)[*Program, and Professional Practice in Times of Change*](http://research.policyarchive.org/10570.pdf), JOURNAL OF JEWISH COMMUNAL SERVICE 35, 41 (1992). [↑](#footnote-ref-373)
374. On this subject see YAEL HASHILONI-DOLEV, THE REPRODUCTIVE REVOLUTION 67 (2013) (Heb.), where she discusses models to help understand the connecting experience between the woman and the fetus: the individual-biolo gical model and the social-contextual model. Hashiloni-Dolev mentions that according to the former model the fetus can be considered as a human entity but not according to the latter model. For discussing her research, see Hagai Boas et al., *Between Individualism and Social Solidarity in Vaccination Policy: The Case of the 2013 OPV Campaign in Israel*, 5 ISRAEL JOURNAL OF HEALTH POLICY RESEARCH 64 n.14 (2016), https ://ijhpr.biomedcentral.com/track/pdf/10. 1 186/s 13584- 016-0119-y. For the almost mystical bond that exists between the surrogate mother and the fetus, see Margaret F. Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcemen*[*t*, 81 VA. L. REV. 2377, 2383 n.22 (1995), discussed at](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=252&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b81%20Va.%20L.%20Rev.%202377%2cat%202381%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=e6be8507b8a59710fc53f9e02476591c) [Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective* , 20 Wm.](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=252&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b81%20Va.%20L.%20Rev.%202377%2cat%202381%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=e6be8507b8a59710fc53f9e02476591c) [& Mary J. Woman & L. 423, 435 n.45 (2014) [= ibid,](https://index.ono.ac.il/f5-w-68747470733a2f2f7777772e6c657869732e636f6d%24%24/research/buttonTFLink?_m=30c1dc86137fdd85a501e71d2257501f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b20%20Wm.%20%26%20Mary%20J.%20of%20Women%20%26%20L.%20423%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=252&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b81%20Va.%20L.%20Rev.%202377%2cat%202381%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAA&_md5=e6be8507b8a59710fc53f9e02476591c) Margalit, *supra* not[e 21](#bookmark62), at 58. [↑](#footnote-ref-374)
375. RONALD DWORKIN, [LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND](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) [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) X (2011), discussed at Elizabeth Harman, *The Moral Status of Early Fetuses and the Ethics of Abortion*, 28(4) PHILOSOPHY & PUBLIC AFFAIRS 310, 313, 322-3 (1999), [https://ethicslab.georgetown.edu/phil553/wordpress/wp-content/uploads/2015/01/Harman-Moral-Status- of-Early](https://ethicslab.georgetown.edu/phil553/wordpress/wp-content/uploads/2015/01/Harman-Moral-Status-of-Early) -Fetus es.pdf; John R Meyer, *Human Embryonic Stem Cells and Respect for Life*, 26 JOURNAL OF Medical Ethics 166, 167 n.11 (2000), [http ://jme.bmj.com/content/26/3/166.shor](http://jme.bmj.com/content/26/3/166.short)t. [↑](#footnote-ref-375)
376. PLATO, THE POLITEIA vol. II, 358-61 (1979). For discussing this dialogue, see CHARLES H. KAHN, [PLATO AND THE SOCRATIC DIALOGUE: THE PHILOSOPHICAL USE OF A LITERARY FORM](https://www.google.com/books?hl=iw&lr=&id=UCkF60ScADAC&oi=fnd&pg=PR13&dq=PLATO+POLITEIA+glaucon+socrates&ots=huZwFdPNUe&sig=kZncndTfF8WBNlL5LYALKsqD5ls) (1996). [↑](#footnote-ref-376)
377. In my humble opinion. [↑](#footnote-ref-377)
378. It is important to point out that these are cases where the woman is not in any danger, when even I agree that the woman's life comes before that of the viable fetus. [↑](#footnote-ref-378)
379. Roe v. Wade, 410 U.S. 113 (1973) when the US Supreme Court allowed abortions to be performed during the first trimester, limited abortions during the second trimester and prohibited them entirely during the third trimester. For a discussion of this land mark verdict, see e.g., Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639 (1985-1986); WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (JACK M. BALKIN ED., 2005); N. E. H. HULL & PETER CHARLES HOFFER, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN (2010). [↑](#footnote-ref-379)
380. Plato, *supra* not[e 99](#bookmark67), at 358-61. [↑](#footnote-ref-380)
381. JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT (1690) was the main thinker among the liberal philosophers who spoke about human rights as natural rights. For an academic discussion of this substantial research and the abortion dilemma, see, for example, John D. Gorby, *The Right to an Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court's Birth Requirement*, 4 S. ILL. U. L.J. 1 (1979); Michael W. McConnell, *God is Dead and We Have Killed Him: Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163 (1993); Steven G. Calabresi et al., *The Rise and Fall of the Separation Powers*, 106 NW. U. L. REV. 527 (2012). [↑](#footnote-ref-381)
382. Donald W. Winnicott*, Hate in the Counter-Transference*, 30 INT'L J. PSYCHO-ANAL 69 (1949). In Winnicot's essay he specified 18 reasons for a mother's possible hatred of her infant, including risk to the woman's body during pregnancy and birth, interference in the woman's private life, etc. for the most up to date discussion of this book, see Johan Berg et al, *Countertransference in Swedish Psychotherapists: Testing The Factor Structure of the Therapist Response Questionnaire, Research* in PSYCHOTHERAPY: PSYCHOPATHOLOGY, PROCESS AND OUTCOME (2019),

[https://www.researchinpsychotherapy.org/index.php/rpsy/article/view/331/2](https://www.researchinpsychotherapy.org/index.php/rpsy/article/view/331/297)97; Mark O'Conne, The PERFORMING ART OF THERAPY: ACTING INSIGHTS AND TECHNIQUES FOR CLINICIANS (2019); PATRICIA HARTE BRATT, MUTUAL GRoWTH IN THE PSYCHoTHERAPEUTIC RELATIoNSHIP: RECIPRoCAL RESILIENCE (2019) passim. [↑](#footnote-ref-382)
383. It is important to note that these are cases where there is no risk to the woman, in which case even I agree that the woman's life would come before that of the viable fetus. [↑](#footnote-ref-383)
384. For a recent landmark verdict supporting my contention, see, for example[, Family Law, *Alabama*](https://lawprofessors.typepad.com/family_law/2019/03/alabama-court-recognizes-aborted-fetus-as-person-with-rights.html)[*Court Recognizes Aborted Fetus as Person With Right*](https://lawprofessors.typepad.com/family_law/2019/03/alabama-court-recognizes-aborted-fetus-as-person-with-rights.html)[*s*, FAMILY LAW PROF BLOG](https://lawprofessors.typepad.com/family_law/) 11.03.19, [https ://lawprofessors.typepad.com/family law/2019/03/alabama-court-recognizes-aborted-fetus-as-](https://lawprofessors.typepad.com/family_law/2019/03/alabama-court-recognizes-aborted-fetus-as-person-with-rights.html) [person-with-rights .htm](https://lawprofessors.typepad.com/family_law/2019/03/alabama-court-recognizes-aborted-fetus-as-person-with-rights.html)l. *See als*[*o* Timothy Williams](https://www.nytimes.com/by/timothy-williams) & [Alan Blinder,](https://www.nytimes.com/by/alan-blinder) *Mississippi Bans Abortions if Heartbeat Can Be Heard. Expect a Legal Fight*, THE NEW YORK TIMES 21.03.19, [https://www.nytimes.com/2019/03/21/us/abortion-laws-states.ht](https://www.nytimes.com/2019/03/21/us/abortion-laws-states.html)[ml; Brie Shea](https://rewire.news/author/brie-shea/), Legislative Lowlights: *Total Abortion Bans Proposed in Colorado, Indiana, and Texas Last Week*, REWIRE. NEWS 22.01.19, [https://rewire.news/article/2019/01/22/legislative-lowlights-total-abortion-bans-proposed-in-colorado-](https://rewire.news/article/2019/01/22/legislative-lowlights-total-abortion-bans-proposed-in-colorado-indiana-and-texas-last-week/) [indiana-and-texas -last-week/](https://rewire.news/article/2019/01/22/legislative-lowlights-total-abortion-bans-proposed-in-colorado-indiana-and-texas-last-week/)[; Debra Cassens Weiss](http://www.abajournal.com/authors/4/), *There's No Due Process Right to Perform Abortions, Says En Banc 6th Circuit in Funding Case*, ABA JOURNAL 13.03.19,

[http://www.abajournal.com/news/article/there-is-no-due-process-right-to-perform-abortions-en-banc-6th- circuit-says-in-funding-case](http://www.abajournal.com/news/article/there-is-no-due-process-right-to-perform-abortions-en-banc-6th-circuit-says-in-funding-case). [↑](#footnote-ref-384)