

## Chapter 1: Introduction and Introducing the Dilemma

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?

## Chapter 2: The Woman's Right to Self-Determination and Autonomy: The Doctrine of Informed

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.<sup>1</sup> Virtually every human being assumes they have such rights. The doctrine of informed consent favors autonomous interpretation to liberal interpretation,<sup>2</sup> 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<sup>3</sup> maintain that every autonomous person conducts himself according to a program common to everyone else. John

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<sup>1</sup> 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* (2002); ANDREW SNEDDON, *AUTONOMY* (2013).

<sup>2</sup> 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, see Thomas E. Hill, *The Kantian Conception of Autonomy*, in *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 91 (John Philip Christman ed., 1989); Robert S. Taylor, *Kantian Personal Autonomy*, 33(5) *POLITICAL THEORY* 602 (2005); REATH ANDREWS, *AGENCY AND AUTONOMY IN KANT'S MORAL THEORY* (2006).

<sup>3</sup> 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, *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),

Stuart Mill<sup>4</sup> 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

### **Chapter 3: The Fetus-**

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

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<https://ssrn.com/abstract=3014354>; CHRISTOPHER BERTRAM, 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 Immanuel Kant: The Very Idea of a Critique of Pure Reason by J. Colin McQuillan*, 50(3) CONTINENTAL PHILOSOPHY REVIEW 403 (2017); YIRMIYAHU YOVEL, KANT’S PHILOSOPHICAL REVOLUTION: A SHORT GUIDE TO THE CRITIQUE OF PURE REASON (2018).

<sup>4</sup> JOHN STUART MILL: ON LIBERTY (1955). For the recent discussions of this land mark author and book, see Sharon Stanley, *John Stuart Mill, Children’s Liberty, and the Unraveling of Autonomy*, 79(1) THE 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*, in ETHICAL RESPONSIVENESS AND THE POLITICS OF DIFFERENCE 41 (Tanja Dreher, Anshuman Mondal eds., 2018).

normal fetus started to grow with the genetic material of three people (Ott, her husband and the other woman.)<sup>5</sup> The fetus developed, and a baby girl was born.<sup>6</sup>

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.<sup>7</sup>

#### Chapter 4: State Intervention in the Woman’s Autonomy

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<sup>5</sup> 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, see Ritesh R Jaiswal, *Three Parent IVF / Three Parent Baby*, THE SCIENCE, 19.02.15, <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 & Mina Alikani, *The Biological Basis for Defining Bi-Parental or Tri-Parental Origin of Offspring From Cytoplasmic and Spindle Transfer*, 26(6) REPRODUCTIVE BIOMEDICINE ONLINE 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, see *LaChappelle v. Mitten*, 607 N.W.2d 151, 160 (Minn. Ct. App. 2000); *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).

<sup>6</sup> 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-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).

<sup>7</sup> This notion of artificial womb is known also as "ectogenesis". See, for example, Jessica H. Schultz, *Development of Ectogenesis: 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, and Abortion: Reconciling Viability's Doctrinal Ambiguity*, 14 UCLA WOMEN'S L.J. 213 (2005).

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 are 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 cases where parents' judgement is faulty when it comes to their children, and specifically the love-hate relationship that exists in the family.<sup>8</sup> 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.<sup>9</sup>

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<sup>10</sup> 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 .

#### Chapter 6: Is There an Answer?

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<sup>8</sup> FYODOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* (1958); LEV TOLSTOY, *KREUTZER SONNET* (1975).

<sup>9</sup> For a discussion of the close interplay between eugenics and abortion, see, for example, John R. Jr. Harding, *Beyond Abortion: Human Genetics and the New Eugenics*, 18 PEPP. L. REV. 471 (1991); ANN FARMER, *BY THEIR FRUITS: EUGENICS, POPULATION CONTROL, AND THE ABORTION CAMPAIGN* (2008); Darrin P. Dixon, *Informed Consent or Institutionalized Eugenics - How the Medical Profession Encourages Abortion of Fetuses with Down Syndrome*, 24 ISSUES L. & MED. 3 (2008).

<sup>10</sup> MEIRA WEISS, *THE CHOSEN BODY: THE POLITICS OF THE BODY IN ISRAELI SOCIETY* (2002). See also *IBID*, *CONDITIONAL LOVE: PARENTS' ATTITUDES TOWARDS THE HANDICAPPED* (1994); AVIAD E. RAZ, *COMMUNITY GENETICS AND GENETIC ALLIANCES: EUGENICS, CARRIER TESTING AND NETWORKS OF RISK* (2009).

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<sup>11</sup> quotes Freud<sup>12</sup>: “There is much more continuity between intra-uterine life and earliest infancy than the impressive caesura<sup>13</sup> of the act of birth would have us believe.”<sup>14</sup> 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.<sup>15</sup> The book is controversial and is liable to raise a number of questions, although other testimonies confirm this viewpoint

#### Epilogue: Equipoise

"[...] Who is wise? He who discerns what is about to come to pass."<sup>16</sup> 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,<sup>17</sup> 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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<sup>11</sup> Dr. Alessandra Piontelli, trained in Medicine and Neuropsychiatry in Italy, and in Paediatric Psychiatry in England.

<sup>12</sup> 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* (2002); DEBORAH MARKS, *DISABILITY: CONTROVERSIAL DEBATES AND PSYCHOSOCIAL PERSPECTIVES* (2014).

<sup>13</sup> *Ibid.* Today it is already a known fact that the fetus is able to hear and react to noises within the intrauterine environment.

<sup>14</sup> 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).

<sup>15</sup> 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.

<sup>16</sup> Babylonian Talmud *Tamid* 32a, <http://ancientworldonline.blogspot.co.il/2012/01/online-soncino-babylonian-talmud.html>. See also Stephen D. Solender, *Pursuing Excellence in Jewish Communal Policy, Program, and Professional Practice in Times of Change*, JOURNAL OF JEWISH COMMUNAL SERVICE 35, 41 (1992).

<sup>17</sup> 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-biological 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

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64 n.14 (2016), <https://ijhpr.biomedcentral.com/track/pdf/10.1186/s13584-016-0119-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 Enforcement*, 81 VA. L. REV. 2377, 2383 n.22 (1995), discussed at Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 Wm. & Mary J. Woman & L. 423, 435 n.45 (2014) [= *ibid*, Margalit, *supra* note **שגיאה! הסימניה אינה מוגדרת.**, at 58.