Quasi Person

The Week 24 Abortion Watershed

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Dedication

To my beloved children:
Vered, Amir, Alon, Erez

To my beloved grandchildren:

Maya, Adam, Ella, Yoav, Adi, Ofir, Romi, Aviv and Liv

You bring boundless happiness and joy to my life
Taking me on remarkable physical, mental, and emotional journeys.
Each one of you holds a significant place in my heart.
Thank you

I would like to thank my Academic home, Zefat Academic College, for ongoing support in my research and the long conceiving process of this book.

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Chapter 1
Introduction

Abortion (after week 24, induced termination of pregnancy) is a highly charged and controversial issue involving medical, moral, ethical, and religious questions. On one side are those who claim that abortion is an expression of a woman's right over her body; and on the other side are those who see the fetus as a living being entitled to the protection of its life. In practice, different countries restrict abortion in different ways in their legislation. It is known that abortion can affect women who undergo it, both physically and mentally. It is important, therefore, to stimulate public debate about both the theoretical and practical aspects of the issue, so that abortions are properly regulated and supervised.

Since the 1950s, a process of liberalization has been underway in Western countries, which resulted in a decline in abortion-related morbidity and mortality.[1] The *Dobbs* ruling of the US Supreme Court, in 2023, has raised concern that if abortions are restricted, a black market of unsupervised abortions may develop, increasing the number of complications and mortality rates. In most countries, restrictions on abortion depend on the stage of pregnancy.

It is common to divide pregnancy into three trimesters of about three months each. In this book, I divide pregnancy into two periods: the first, up to the viability stage, and the second, from week 24 of pregnancy onward, which is the stage of the viable fetus. The book does not deal with the first period and the dilemmas concerning abortion at this stage. It focuses instead on the rights of the fetus in the second period, the viable stage. I do not dispute the fact that in case of danger to the woman or her health, her life takes precedence over that of the fetus,

[1] Pinter at al., "Accessibility and availability of abortion in six European countries," The European Journal of Contraception and Reproductive Health Care, March 2005, 10 (1): pp. 51-58.

and I do not dispute the fact that if there is a concern for the life or health of the fetus, an abortion can be performed in the second period as well.

Since it is not possible to discuss the human rights of the fetus during the viable stage without reviewing the legislation concerning the first period, I provide a brief overview of the situation in the US and Israel. Until the mid-19th century, there were no restrictions on abortion in the US, and they were carried out quite freely. From that time until the 1960s, most states began imposing restrictions on abortion. In 1973, two groundbreaking abortion decisions were handed down by the US Supreme Court: *Roe v. Wade* and *Doe v. Bolton*, which for the first time in American history recognized the constitutional right of a woman to abort her fetus, making abortion legal in all 50 states. Sixteen years later, this right was reinforced by the Supreme Court ruling that a woman seeking to end her pregnancy does not need to first secure the approval of her parents or husband *(Planned Parenthood v. Casey*).

Opponents of abortion in the US did not accept these rulings and waged a legal and political struggle for nearly 50 years, culminating on June 24, 2022, when the Court issued its new ruling in *Dobbs v.Jackson. Dobbs* overruled *Roe v.Wade* and held that the US Constitution did not confer a right to abortion, returning the right to decide to the states. *Dobbs* concerned a Mississippi law banning abortion after the 15th week of pregnancy. The Court, with Justice Samuel Alito writing for the six-justice majority, ruled that the Mississippi law was legal and that *Roe v.Wade* and *Planned Parenthood v.Casey* (upholding abortion as an essential right) were invalid. Four judges concurred with his verdict. Chief Justice, John Roberts, wrote a separate opinion, arguing that the part of the *Roe* ruling that prevents states from banning abortions before the fetus can survive outside the womb should be overturned. He concluded that the Mississippi law was legal, but did not wish to overturn *Roe* in its entirety. Three justices, identified with the liberal element of the Court, dissented from the majority ruling, which upheld laws in 13 states that made abortions illegal.

Dobbs has again ignited intense public and political passions. In its wake, the US and other parts of the world are wracked more than ever by the controversy about the right to abortion and the conflict between the right of women to autonomy and the right, if any, of the fetus to life. For example, opponents of abortion in the US are now seeking to pass a federal law prohibiting abortions in all 50 states and five US permanent territories.

Some believe that the *Dobbs* decision will result in some women being forced to continue their pregnancy against their will, which will affect the US not only ethically but also economically. They argue that providing access to abortions is better for the American economy because it results in more women working outside the home and studying, which is expected to increase their earning potential. One of these was US Secretary of the Treasury, Janet Yellen, in her testimony before the Senate Banking Committee.

Some, like Daphna Hacker, believe that the ruling turns *The Handmaid's Tale* into reality. In her opinion, *Dobbs* is shocking by any basic democratic measure. She criticizes the ruling for allowing states to prevent access to abortion even in the early stages of pregnancies, in the case of pregnancies of minors and those resulting from rape or incest, and pregnancies that endanger the life of the woman. I disagree with Hacker. *Dobbs* did not turn the US into the Republic of Gilead nor does it hold that the fetus has more rights than the woman. Rather, it permits state legislatures to limit the range of abortion choices that until now were understood to be a constitutionally protected right.

Assessing the ruling strictly from the economic perspective, as Yellen does, is fundamentally mistaken. In my opinion, it is a shame that the opportunity to legislate rules that emphasize the moral or even human rights of the fetus has not been used to discuss the issue of abortion more broadly and substantively. There is normative value in the life of the fetus, especially at the stage when it can live outside the womb, even if it falls short of human life.

This book uses the language of rights and argues that the viable fetus should be granted human or quasi-human rights that under given circumstances can take precedence over those of the mother (for example, the women's right to smoke or use drugs while carrying the fetus). When the life and health of the fetus are examined from the point of view of rights, the fetus, or someone on its behalf, can demand compensation for neglect in the way it was treated. This position has broad implications. What happens if the woman fails to conduct genetic testing early and a defect is detected later, at the viable stage? Where lies the woman's responsibility and what are the rights of the fetus? Technological changes that affect the survivability of fetuses should be reflected in legal changes that affect their rights. The book seeks to define the status of the viable fetus, which is below that of a living person but it should not be nil. Granting the fetus some form of legal status would make it possible to weigh it along with other factors in deciding whether or not to abort. The solution presented in the book is not acceptable to those who hold a firm opinion that the woman has absolute rights to autonomy and self-definition during all stages of pregnancy. The book argues that the state has a responsibility also toward the viable fetus and that abortion of the viable fetus should be preventable even if the fetus has no concrete legal status but it does have rights. If abortion is perceived as a violation of the right of the fetus to be born, it justifies the intervention of the state. In other words, despite the woman's right to autonomy over her body, the right of the fetus to be born and to be born healthy should prevail over the woman's right to bodily autonomy. The book does not accept a woman's right to such sweeping autonomy during the period when the fetus can survive outside the womb. It argues that a woman has the right to perform an abortion up to week 24, an argument that remains valid even if the fetus has a moral right to live and its life has normative value. But even a fetus that is formed as a result of violence, such as incest or rape, has the right to be born and to live if it can survive outside the womb. If necessary, regulatory solutions should be devised by the welfare authorities for infants born as a result of these types of relations.

* * *

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 powerfully express the force of the yearning for a child, one probably unrivaled in its intensity. This yearning reflects the will of humans to continue their personal physical and spiritual existence, and that of their family and people, through their descendants. It reflects the aspiration of humanity to realize each individual's potential and even fulfill dreams that have not yet been realized. It encompasses each individual's 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)," a love even stronger than one's instinct to preserve one's own life.[2,3]

These are the words of Justice Y. Turkel in the Israeli case of *Nahmani v. Nahmani* nearly twenty years ago. Is the primal yearning for a child indeed a pure and simple desire, regardless of sex, height, appearance,

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[2] CFH 2401/95 Nahmani v. Nahmani, Israel Law Reports [1995–6] 1, 84–85 http://ww3.lawschool.comell.edu/AvonResources/RuthNahmaniv.DanielNahmani.pdf. For a discussion of this landmark verdict in the context of abortion, *see, for example*, Noga Morag-Levine, *Imported Problem Definitions, Legal Culture and the Local Dynamics of Israeli Abortion Politics*, 5(2–3) ISRAEL AFFAIRS 226 (1998); Daphne Barak-Erez & Ron Shapira, *The Delusion of Symmetric Rights*, 19(2) OXFORD JOURNAL OF LEGAL STUDIES 297 (1999); Dalia Dorner, *Human Reproduction: Reflections on the Nachmani Case*, 35 TEX. INT'L L. J. 1 (2000).

[3] I use the term "destruction" deliberately because I ascribe a great deal of significance to terminating pregnancies. I assume that conservatives who are against terminating pregnancies would support the use of this term whereas those favoring termination at any stage would reject its use, at least when referring to the first trimester. I think that when dealing with the stage of viability, when the fetus could technically live outside the womb, those with liberal attitudes may agree that the expression "fetal destruction" is not far off the mark. For an overview of the relation between this 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. LEGIS. 97 (1985); Nancy K. Rhoden, *Trimesters and Technology: Revamping* Roe v. Wade, 95 YALE L.J. 639 (1985–86).

or fitness? Or is there today, instead, a desire for a healthy, "perfect" child? What lies behind the term "perfect" or "healthy"? Do the rights of a viable fetus, whatever its flaws, have a proper value and deserve legal protection by society and the law at a time when the fetus can be treated by medicine as a patient? Or is it rather respect for the woman, her freedom, and her autonomy to choose the child she brings into the world who represents her personal values that require social and legal protection?

I assume that a pregnancy exists, planned or unplanned, and that the woman has decided to end it and destroy the viable fetus. The discussion takes into account that the reasons for the woman's decision involve not only the fetus, its state of health, genetic profile, sex, or facial features, but also factors relating to the woman herself: her desires, convenience, financial state, mental state, and more. This book is not about the right of the woman to terminate a pregnancy that came about against her will as a result of a violent act, such as incest or rape. In cases like these, the pregnancy is terminated in the first or second trimester. The debate concerns more than the rights of the woman and the fetus — I want to stimulate a discussion about ethics, philosophy, and the law. Whose rights should be more strongly defended in any society, those of the woman or those of the fetus? When and under what conditions should this life in the making be protected? Does the fetus have a natural right to life? Should a balance be struck between the rights?

The law does not exist in a vacuum. To be effective, it must be based on the foundations of the values and traditions of society. The issue of abortion is acute yet enduring and complex, and it needs to be addressed comprehensively, especially now, when it will be raised continually in the US at both state and federal levels.

If a person's identity (that is, genetic attributes) is established at the moment of conception and if human beings are the sum of their genetic characteristics, a fetus is human at the moment of conception, and *a*

fortiori a live being.[4] If human identity begins to form only during the developmental stage when it can exist outside the womb as a "viable fetus,"[5] it is viability that grants it the right to life. Finally, if the fetus is a human being with rights only from the moment of birth, it cannot be said to have any rights during pregnancy. But if a human identity forms when the brain starts becoming active, i.e., in the sixth week after conception, I submit that the fetus is human even before becoming a viable fetus.

Could the courts adopt the attitude that the viable fetus has full rights? Could it be claimed that the rights of a viable fetus are equivalent to those of a living child? Is there a chance that the legal system would determine that in certain cases, taking all questions surrounding a pregnancy into consideration (including the rights of the woman and her best interests), they would consider the rights and best interests of the viable fetus? Is it appropriate to make an analogy between a child and a viable fetus? It seems unlikely that the system will go so far as to give preference to the rights of "beginning life" or even that of a viable fetus over human rights.[6]

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[4] Catholics are traditionally opposed to abortion at any stage of pregnancy, from the moment of conception, because they maintain that a human being is created at that moment. *See, e.g.*, John T. Jr. Noonan, *Abortion and the Catholic Church: A Summary History*, 12 NAT. L.F. 85 (1967); 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); TIMOTHY BYRNES & MARY C. SEGERS, THE CATHOLIC CHURCH AND THE POLITICS OF ABORTION: A VIEW FROM THE STATES (1991).

[5] For the correlation between the definition of a viable fetus and the woman's right to abort it, *see* Stephen G. Gilles, *Does the Right to Elective Abortion Include the Right to Ensure the Death of the Fetus*, 49 U. RICH. L. REV. 1009 (2014–15); DOROTHY E. MCBRIDE & JENNIFER L. KEYS, ABORTION IN THE UNITED STATES: A REFERENCE HANDBOOK (2d ed. 2018); Lawrence Nelson, *Provider Conscientious Refusal of Abortion, Obstetrical Emergencies, and Criminal Homicide Law*, 18(7) AMERICAN JOURNAL OF BIOETHICS 43 (2018).

[6] For a discussion of the correlation between the "beginning of life" and human rights, *see* Rhonda Copelon et al., *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13(26) REPRODUCTIVE HEALTH MATTERS 120 (2005); Kathleen Chambers & Paul Buka, *The Beginning of Life to Adulthood: Human Rights*, in PATIENTS' RIGHTS, LAW AND ETHICS FOR NURSES: A PRACTICAL GUIDE 49 (Paul Buka ed., 2d ed. 2014); Catarina

Today, until the seventh week, pregnancy can be terminated by taking a pill. Terminations from the eighth to the twenty-fourth week are carried out by dilatation and curettage. This is not the case when terminating the pregnancy of a viable fetus beyond the twenty-fourth week. At this stage, because the fetus can survive *ex utero*, the procedure, commonly referred to as inducing childbirth,[7] is also known as feticide.

In this book, I discuss only the acute dilemma of whether a viable fetus has a right to be born healthy at the stage of viability, in light of the latest technological developments.[8] Among the scholarship I discuss is the important work of the legal scholar, Judith Thomson, an abortion advocate, who contends that even stipulating that the fetus has a moral status similar to that of a person in no way infringes on a woman's right to terminate a pregnancy. Thomson additionally asserts that the right to life does not include the prerogative to ensure life[9] because it is unreasonable to conclude that the right to life always prevails. This highly respected and well-reasoned argument begins with a metaphorical scenario of pregnancy:

Delaunay, *The Beginning of Human Life at the Laboratory: The Challenges of a Technological Future for Human Reproduction*, 40 TECHNOLOGY IN SOCIETY 14 (2015).

[7] For the connection between the definitions of feticide and childbirth, *see* Dennis J. Horan & Thomas J. Marzen, *The Moral Interest of the State in Abortion Funding: A Comment on Beal, Maher & (and) Poelker*, 22 ST. LOUIS U. L.J. 566 (1979); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69(3) VIRGINIA L. REV. 405 (1983); Nancy K. Rhoden, *The New Neonatal Dilemma: Live Births from Late Abortions*, 72 GEO. L. J. 1451 (1984).

[8] My credo is based on authoritative cases such as *Roe v. Wade*, 410 U.S. 113 (1973), where the US Supreme Court allowed abortions to be performed in the first trimester, limited abortions in the second trimester, and prohibited them entirely during the third trimester. *See also* Donald H. Regan, *Rewriting* Roe v. Wade, 77(7) MICHIGAN L. REV. 1569 (1979); 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).

[9] Judith J. Thomson, RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY vii–x (1986); Judith J. Thomson, *A Defense of Abortion*, 1 Phil. & Pub. Aff. 47 (1971); THE ETHICS OF ABORTION 30 (Robert M. Baird & Stuart E. Rosenbaum eds., 1989).

> 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 to 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?

Even if there is an element of reality in this description, there remains the question of what should be the paramount factor when making a decision about the rights of a viable 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 it 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 determined that it is in the best interests of the fetus not to be born to a woman who does not want it, either because of its looks or any other reason? Should the thread of its future life be severed because of the rights of others? Thomson claims that even conceding that the fetus has a right to live, and that the termination renders this right null and void, does not always mean that a life-stopping act is necessarily prohibited at a moral level. She maintains that the moral status of the fetus does not affect the morality of a decision to terminate or not to terminate a

pregnancy, as in the above case of the violinist.[10] This view may be justifiable when the pregnancy is the result of rape or incest, but not otherwise. Thomson maintains that just as the act of unplugging the man from the violinist may seem moral to the majority of people because the violinist was attached to him without his consent, a woman's decision to detach from the fetus is equally moral. Thomson's comparison between the man in her story and a woman whose pregnancy was forced upon her may have validity. But in the case when a pregnancy was not the result of the use of force, the analogy is not valid, and Thomson's conclusion cannot be supported. Lawmakers must balance the competing rights of the mother and fetus. A pregnant woman is a person with legal capacity. She carries the fetus in her womb, where it breathes, is nourished, and develops. At times, the woman deliberately became pregnant and wanted the child and at other times she became pregnant by chance and did not want it.[11] Following Thomson's line of reasoning, given the woman's legal capacity and her rights as a human being recognized by law, the lawmaker should allow her to terminate a pregnancy whenever she likes and for any reason.

The viable fetus faces the pregnant woman and her rights with barely a legal leg to stand on.[12] Until the *Dobbs* decision, the fetus was not considered at all. Even after Dobbs it has no legal rights but is seen as

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[10] For a discussion of her perception, *see, for example*, Keith J. Pavlischek, *Abortion Logic and Paternal Responsibilities: One More Look at Judith Thomson's "A Defense of Abortion,"* 7(4) PUBLIC AFFAIRS QUARTERLY 341 (1993); David Boonin-Vail, *A Defense of "A Defense of Abortion": On the Responsibility Objection to Thomson's Argument*, 107(2) ETHICS 286 (1997); Eric Wiland, *Unconscious Violinists and the Use of Analogies in Moral Argument*, 22 JOURNAL OF MEDICAL ETHICS 466 (2000).

[11] For the possible correlation between having sex and taking responsibility for the resulting pregnancy and birth, *see* Holly Smith, *Intercourse and Moral Responsibility for the Fetus*, in ABORTION AND THE STATUS OF THE FETUS 229 (William B. Bonderson et al. eds., 1983); Harry S. Silverstein, *On a Woman's "Responsibility" for the Fetus*, 13(1) SOCIAL THEORY AND PRACTICE 103 (1987); Alec Walen, *Consensual Sex without Assuming the Risk of Carrying an Unwanted Fetus: Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051 (1997).

[12] For the generally problematic status of the fetus, *see, e.g.*, Bonderson et al., *supra* note 10; Gary B. Gertler, *Brain Birth: A Proposal for Defining When a Fetus Is Entitled to Human Life Status*, 59 S. CAL. L. REV. 1061 (1986); BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES (2011).

existing physically but minimally, entirely dependent on the woman. Following *Dobbs*, each state can consider whether and at what point a fetus has rights. Some consider the fetus "hardly a person" inside a person; others consider it as "the beginnings of a person" inside a person.[13] By contrast, I maintain that the definition of the status of the fetus reflects the context in which the person defining this status perceives what is being defined. For example, I define the fetus at the viable stage as a person with moral or even human rights. I believe that even those who take a feminist viewpoint, according to which the woman's right to terminate a pregnancy is intrinsic to her rights as an autonomous person, would agree that, at the very least, a viable fetus is a "life beginning." I hope that defining the viable fetus as a "human beginning" with its own rights can be the beam that lights up the depths of our understanding of both ethics and the law. I argue that the viable fetus should receive the status of "almost" a person with the rights of a human being in the process of formation.

Diverse jurisdictions have chosen different ways to balance the rights of the woman against those of the fetus. Before the *Roe v. Wade* decision, some preferred the "life beginning" definition of the fetus and did not allow women to terminate the pregnancy at any stage; others gave preference to the autonomy of the woman over her body and her right to self-determination, allowing her to terminate the pregnancy at any stage, including the viable stage;[14] others yet chose a middle ground that takes the age of the fetus into consideration, its ability to survive outside the womb, and its state of maturity at the time the decision is made to terminate the pregnancy. Now, with *Roe v. Wade* no longer the

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[13] For strong disagreement, *see* Jeffrey A. Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. LEGIS. 97 (1985); John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76(3) VIRGINIA L. REV. 437 (1990); Jed Rubenfeld, *On the Legal Status of the Proposition That "Life Begins at Conception,"* 43(3) STAN. L. REV. 599 (1991).

[14] This is better known as the "pro-life" vs. the "pro-choice" debate. *See, for example*, RUTH COLKER, ABORTION AND DIALOGUE: PRO-CHOICE, PRO-LIFE, AND AMERICAN LAW (1992); KATHY RUDY, BEYOND PRO-LIFE AND PRO-CHOICE: MORAL DIVERSITY IN THE ABORTION DEBATE (1997); RANDY ALCORN, PROLIFE ANSWERS TO PRO-CHOICE ARGUMENTS (2009).

law, each state can make these complex decisions again, and intense discussions will be held at the state and national levels. In this book, often resorting to the example of Israel, I show why all jurisdictions should choose the middle ground where a balancing test between the rights of the woman and of the beginning life is applied to any woman who wants to terminate a pregnancy.

The high rate of pregnancy terminations should set off alarm bells. We are living in an era of advanced technology, including scientific developments in the field of the human genome and other techniques that enable cloning,[15] stem-cell removal, IVF, identification of fetal defects, choice of the sex of the fetus, evaluation of the state of its health, genetic testing for fetal health and the physical characteristics of an embryo before it has been implanted in a mother's womb. Various types of genetic testing are available throughout the duration of pregnancy. Because of the ease of access to these technological advances and the vast amount of information available at the click of a mouse, many legal, social, ethical, and moral dilemmas about this issue are more palpable than ever. The development of technology that enables access to abundant information about the fetus and the viable fetus in the course of pregnancy gives women increasing information that may prompt them to exercise their right to autonomy and terminate the pregnancy. This represents a threat to the rights of the viable fetus and raises the real and imminent danger that it will result in racial and other profiling.[16]

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[15] For the recent discussion of this cutting-edge biomedical innovation, *see* Henry T. Greely, *Human Reproduction in the Twenty-First Century*, 1(2) JOURNAL OF POSTHUMAN STUDIES 205 (2017); Arthur L. Caplan, *Monkey See, Humans Won't Do—The Misguided Reaction to the First Cloning of Primates*, EMBO REPORTS (2018), http://embor.embopress.org/content/early/2018/02/21/embr.201845912.full; Shai Lavi, *Cloning International Law: The Science and Science Fiction of Human Cloning and Stem-Cell Patenting*, 14(1) LAW, CULTURE AND THE HUMANITIES 83 (2018).

[16] For a discussion of this concern in relation to abortion, *see* Rene Bowser, *Racial Profiling in Health Care: An Institutional Analysis of Medical Treatment Disparities*, 7 MICH. J. RACE & L. 79 (2001–02); Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163 (2002); Norma I. Gavin et al., *Racial and Ethnic Disparities in the Use*

Society may decide that only a certain type of person has a right to be born: one with a certain height, weight, appearance, and IQ. Modern society may adopt eugenics based on a combination of prenatal tests, and the growing perception that only a perfect baby is a "good baby," so that the fetus that does not correspond to certain parameters must be eliminated. There is a danger that society may begin to encourage the births of "perfect" humans,[17] not necessarily of simply healthy ones.

At the same time, the ideals that support 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.[18] Whose responsibility is it to raise a child that is dumb, deaf, lame, or suffering from mental defects? Is it the parents' or ours as a society?

In this book, I discuss the moral, philosophical, ethical, and legal reasons why I believe that a viable fetus has the right to develop into a human being, even if the woman[19] believes otherwise. I maintain that in such cases, the state should intervene and prevent the destruction of a fetus that is unwanted because it is not "perfect," because of a low probability of defects, or simply out of convenience. Legislatures should enact laws that respect the potential life of a fetus and offer it

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of Pregnancy-Related Health Care Among Medicaid Pregnant Women, 8(3) MATERNAL AND CHILD HEALTH JOURNAL 113 (2004).

[17] *See, for example*, Ruth F. Chadwick, *The Perfect Baby: Introduction*, in Ethics, Reproduction AND Genetic Control 93 (Ruth Chadwick Ed., 1993); GLENN MCGEE, THE PERFECT BABY: PARENTHOOD IN THE NEW WORLD OF CLONING AND GENETICS (2000); Larissa Remennick, *The Quest for the Perfect Baby: Why Do Israeli Women Seek Prenatal Genetic Testing?*, 28(1) SOCIOLOGY OF HEALTH & ILLNESS 21 (2006).

[18] For a special attempt to determine an ethical limit to the maximum number of children that a poor single-parent 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).

[19] In this book, I use the term "woman" and not "mother" because "mother" implies an emotional connection between the woman and the fetus. I do not consider a woman who decides to terminate a pregnancy in the viable state as a person with an emotional connection to the fetus inside her.

protection. The courts should recognize a claim of damages of a fetus against the woman, either post-partum or by means of a trustee, if it was damaged or aborted for reasons that were not in its best interests.

The parents and the child are separate entities whose rights and best interests do not always coincide. A viable fetus is almost a person inside a person, and consequently, two separate living entities are involved in this decision. One entity should not be allowed to harm another. Even if the fetus is not defined as a person,[20] it should not mean that it lacks rights. The law recognizes the fact that a person in a coma is not "hardly a person" and therefore should not be forcibly removed from life-support devices.[21] Neither are people suffering from Alzheimer's disease "hardly a person," and it is unthinkable to hasten their death. Society cannot decide when there is no longer a point to the life of someone who might be "hardly a person" and assist in that person's death.

Today, society promotes the empowerment of individual rights, respect for autonomy, self-determination, and freedom. Critics of the book may argue that the thesis proposed contradicts the progressive concepts regarding human rights, feminism, and autonomy. I am not opposed to respecting the rights of the woman as a person, but I insist on respecting the rights of the other person inside her, the viable fetus.

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[20] *See, e.g.*, Leonard Glantz, *Is the Fetus a Person? A Lawyer's View*, in ABORTION AND THE STATUS OF THE FETUS 107 (William B. Bonderson et al. eds., 1983); Jean Reith Schroedel, *Is the Fetus a Person?: A Comparison of Policies Across the Fifty States* (2000); Clifford Longley, *Is the Fetus a Person?*, 25(2) Conscience 45 (2004).

[21] For a discussion of this complicated and sensitive issue, *see* David M. Schultz, *Procedures and Limitations for Removal of Life-Sustaining Treatment from Incompetent Patients*, 34 ST. LOUIS U. L.J. 277 (1989–90); George J. Annas, *The Right to Die in America: Sloganeering from Quinlan and Cruzan to Quill and Kevorkian*, 34 DUQ. L. REV. 875 (1995–96); Lois Shepherd, *In Respect of People Living in a Permanent Vegetative State—And Allowing Them to Die*, 16 HEALTH MATRIX 631 (2006).

Some consider parenthood to be a value.[22] Others are of the opinion that the right to be a parent emanates from free will,[23] with no legal obligations, either in the relationships between the state and its citizens or in the relationships between the partners themselves. Others yet consider that the right to be a parent is one whose interpretation should be narrowed to limit it under certain circumstances.[24] A perception that

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[22] In the sociological scholarly literature, we 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 one hand, and a responsibility, on the other, is gaining more and more support.

[23] This is the essence of intentional parenthood. For the landmark literature that supports this latest conception of 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 Intent Based 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 (2018).

[24] 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 & Muireann Quigley, *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).

parenthood represents a value gives rise to a perception that if a right to be a parent exists, there should also be a right *not* to be a parent.[25]

In *Nahmani v. Nahmani*, Justice Goldberg of the Israel Supreme Court stated that the basis of the right to prevent parenthood is rooted in the autonomy of personal wishes, i.e., respecting the desire of the individual to exercise control over his life and his obligations.[26,27] Justice Dorner stated that the right of the woman to terminate a pregnancy derives from the autonomy she has over her body and her right to privacy,[28] 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 liberty, privacy, free will, 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 free will 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.[29]

Even if we accept the view that along with the right to be a parent exists a right not to be a parent, a distinction should be made between the existence of that right before conception and after it. After conception,

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[25] Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008); Glenn Cohen, *The Right Not to Be a Genetic Parent?* 81 S. CAL. L. REV. 1115 (2008); Christopher Bruno, *A Right to Decide Not to Be a Legal Father:* Gonzales v. Carhart *and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141 (2008). Accepting these viewpoints could lead to the conclusion that preventing parenthood is also a free choice and therefore the woman is at liberty to decide whether she prefers not to become a mother.

[26] Nahmani v. Nahmani, *supra* note 1, at 66–79.

[27] *Id*. at 52–66.

[28] *Id*.

[29] *Id*. at 13.

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. When the woman exercises her liberty to the fullest extent, the result can be the destruction of the fetus.

The focus of this book is not 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, internal family decision, and the law should not intervene unless there are serious reasons to do so. This book addresses a different issue: *the right not to be a parent at the stage of viability of the fetus*. It discusses the issues that must be acknowledged in balancing the right of the woman to terminate the possibility of parenthood with the right of the fetus to be born, and to be born as healthy as possible. When deciding whether to force parenthood on someone who does not want it, at a stage where termination is still an option, it is important to consider several aspects, among others, the woman's right over her 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 *Davis v. Davis,* the US Supreme Court determined that the essence of the right to privacy is, at the very least, non-intervention in the decision to enter parenthood:

> If the right to 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.[30]

[30] Davis v. Davis, 588 SW 2d 604, 842 (1992). For a discussion of this statement, *see* Thomas B. Stoddard, Bowers v. Hardwick*: Precedent by Personal Predilection*, 54(2) U. CHI. L. REV. 648, 653–54 (1987); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104(7) HARV. L. REV. 1419, 1466

In a similar vein, in *Skinner v. Oklahoma,* the Supreme Court ruled that marriage and procreation are "one of the basic rights of man."[31]

But this is not the topic of the present book. Choosing parenthood or non-parenthood is a matter of religious belief, culture, and the woman's decision. I ask only whether there should be increased regulation in terminating a pregnancy, or would it represent an intervention in the very core of the human "sanctum." I believe that the state should intervene in the decision of the woman only if it is a matter of life and death for the fetus.

Admittedly, the decision to terminate a pregnancy is one of the most intimate and fateful in a person's life. But when the life of another potential person is involved, who is in the late stages of development in the womb, the state should intervene by prohibiting the termination of pregnancy at the viable stage. Recognition of the right of the viable fetus is a value sufficiently important to justify intervention by the state. Such recognition is essential for balancing the various values arising from the question of terminating a pregnancy: that of human dignity and the woman's autonomy vis-à-vis that of the potential life of the fetus at the viable stage.[32]

Today, prenatal screening[33] makes it possible to identify many syndromes from which a fetus is suffering, or may be suffering. In the

(1991); Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1404 n.22 (2004).

[31] Skinner v. Oklahoma, 316 U.S. 355, 541 (1942). *See, for example*, James B. O'Hara & T. Howland Sanes, *Eugenic Sterilization*, 45 GEO. L. J. 20 (1956–57); Wesley D. H. Teo, *Abortion: The Husband's Constitutional Rights*, 85(4) ETHICS 337 (1975); Martha L. A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2189 n.21 (1995).

[32] For the interaction between human rights, women'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 (2000–01); Jennifer Denbow, *Abortion: 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).

[33] For a discussion of the far-reaching effect of parental screening on the rate of abortions, *see* R. R. Faden et al., *Prenatal Screening and Pregnant Women's Attitudes*

future, additional methods will be able to discover more defects and imperfections. The question is whether it is justified to require that every potential genetic defect be found, and whether society has the right, or maybe the obligation, to limit permission to terminate pregnancy because of deficiencies of varying severity. The claim that the viable fetus has a legal status and its own rights changes the termination of its life into the murder of an "almost" live human being. The issue of terminating a pregnancy is related also to that of the destruction of other helpless human beings, such as people suffering from dementia or in a permanently comatose state.

The appropriate legal model should recognize the rights of the viable fetus even if it suffers from deficiencies that do not seriously undermine 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. This book presents the medical, ethical, philosophical, historical, and legal arguments supporting this point of view and suggests practical approaches to balancing the rights of women and fetuses and protecting the fetus's right to life.

Toward the Abortion of Defective Fetuses, 77(3) AMERICAN JOURNAL OF PUBLIC HEALTH 288 (1987); Paivi Santalahti et al., *Women's Decision-Making in Prenatal Screening*, 46(8) SOCIAL SCIENCE & MEDICINE 1067 (1998); Susan Markens et al., *"Because of the Risks": How US Pregnant Women Account for Refusing Prenatal Screening*, 49(3) SOCIAL SCIENCE & MEDICINE 359 (1999).

Chapter 2
Women's Right to Self-Determination and Autonomy

Recognition of a woman's right to make decisions about her life and her body, including the right to terminate a pregnancy, even of a viable fetus, is based on recognizing her autonomy over her own body. Practically all human beings assume they have such rights. The doctrine of informed consent is based less on a liberal interpretation than on an autonomous one,[1] whereby the woman has an unconditional right over her body, even during pregnancy, when she carries potential life inside her.

Emmanuel Kant, one of the fathers of deontological thinking, and the Enlightenment philosopher, Jean-Jacques Rousseau,[2] maintained that

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[1] Autonomous interpretation, like Kantianism, considers an autonomous to be subject to rational principles. An irrational act is not an autonomous one, therefore a paternalistic intervention in the case of an irrational decision does not interfere with the patient's autonomy, indeed, it is the realization of such autonomy. Liberal interpretation considers "autonomy" to include also a person's right to act irrationally. For the interaction between 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).

[2] JEAN JACQUES ROUSSEAU, AN INQUIRY INTO THE NATURE OF THE SOCIAL CONTRACT, OR, PRINCIPLES OF POLITICAL RIGHT (translated from 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 (I. Lianos & D. Gerard eds., 2018), 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 landmark 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,