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From Roe v. Wade to Dobbs v. Jackson – Between Women’s Rights Discourse and Obligations Discourse

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FROM ROE V. WADE TO DOBBS V. JACKSON – BETWEEN WOMEN’S RIGHTS DISCOURSE AND OBLIGATIONS DISCOURSE

Pnina Lifshitz-Aviram[†] & Yehezkel Margalit^{††}

ABSTRACT

Recently, the U.S. Supreme Court published its decision in *Dobbs v. Jackson Women’s Health Organization* overturning the landmark abortion case, *Roe v. Wade*. In 1973, two groundbreaking abortion decisions were handed down by the same Court – *Roe v. Wade* and *Doe v. Bolton* – recognizing a woman’s fundamental constitutional right to obtain an abortion until fetal viability. The ensuring nationwide judiciary recognition of women’s basic rights was abruptly shaken by the *Dobbs v. Jackson’s* ruling that “the Constitution does not confer a right to abortion.” *Dobbs’* reversal of these prior cases has created a legal, political, and public upheaval. Indeed, the element of the human rights discourse in the context of the abortion debate has been among the most prevalent, dominant, and polarizing in the modern era. Concomitantly, recent decades have witnessed a strengthening of the obligations, commitments, and responsibilities discourses, particularly in family law, including the issue of the parent-child relationship. The aim of this article is to reconsider the interface of the abortion and the point of view

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of these new discourses, which have been notably missing in the entirety of the modern discussion of the abortion debate, in the context of the *Dobbs v. Jackson* decision. We seek to bridge the current lacuna between these new discourses and the context of abortion by differentiating between pregnancy as the result of consensual sex or nonconsensual sex. In the first scenario, we claim that the new family-centric discourses should be paramount, whereas in the latter, the women’s rights discourse should govern, drawing on the unique Jewish ethical conception of obligations to justify this differentiation. In essence, we seek to bolster the new and challenging civil discourses with the “strong” traditional Jewish ethical viewpoint. This discussion, which may be considered a partial revitalization of *Roe v. Wade*, can prove valuable in normatively resolving at least one aspect of the abortion, thereby determining a new compromise Archimedean point for women’s rights discourse and the abovementioned discourses.

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And tens of millions of American women have relied, and continue to rely, on the right to choose [...] With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.¹

INTRODUCTION - THE NEW ERA OF POST-*ROE V. WADE*

On June 24th 2022, a dramatic and far-reaching moral and legal tectonic earthquake shook the United States – with the announcement of the U.S. Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization* overturning the landmark abortion case, *Roe v. Wade*. While the uncompromising draft of the majority opinion was shamefully leaked several weeks before the official decision was handed down, the ultimate result – overturning the last five decades of legal practice regarding abortion – nevertheless came as a shock inside the United States and throughout the world.² In 1973, two groundbreaking abortion decisions were handed down by the U.S. Supreme Court: *Roe v.*

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1. *Dobbs v. Jackson Women’s Health Org.*, 596 U.S. 1, 32, 60 (2022). For an initial academic discussion of this groundbreaking ruling, see, for the meantime, Sarah Parshall Perry & Thomas Jipping, *Dobbs v. Jackson Women’s Health Organization: An Opportunity to Correct a Grave Error*, HERITAGE FOUND., at 1 (Nov. 17, 2021), <https://www.heritage.org/sites/default/files/2021-11/LM293.pdf>; Marc Spindelman, *Justice Gorsuch’s Choice: From Bostock v. Clayton County to Dobbs v. Jackson Women’s Health Organization*, 13 CONLAWNOW 11 (Aug. 27, 2021); Jeffrey Hannan, *Dobbs v. Jackson Women’s Health Organization and the Likely End of the Roe v. Wade Era*, 17 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 281 (2021–2022).
 2. See Richard Storrow, *The Leaked Draft Decision in Dobbs: Context and Content*, L. PROFESSOR BLOG NETWORK (May 4, 2022), https://lawprofessors.typepad.com/reproductive_rights/2022/05/index.html [<https://perma.cc/4479-TRLW>]; I. Glenn Cohen et al., *What Overturning Roe v. Wade May Mean for Assisted Reproductive Technologies in the US*, J. AM. MED. ASS’N 15 (July 5, 2022); Reva B. Siegel et al., *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 1 (forthcoming 2023), https://law.yale.edu/sites/default/files/documents/pdf/ssrn_-_siegel-mayeri-murray-ep_abortion_dobbs_colum_jgl_5-19-22_sm.pdf.

Wade and *Doe v. Bolton*.³ The common dominator of these central and substantive rulings was recognizing and legalizing, for the first time in American history, the constitutional right of a woman to abort her fetus, thereby making abortion legal in all 50 states. Any pregnant woman was thereby personally endowed with the autonomous basic human right to decide whether or not to carry a pregnancy to term.⁴ Sixteen years later, this right was reinforced by the U.S. Supreme Court ruling that a woman seeking to end her pregnancy does not need to first secure approval from her parents (if she is a minor) or from her husband (if she is married).⁵

The ensuing fifty years of nationwide constitutional recognition of women's basic right has been halted by the recent *Dobbs v. Jackson* ruling that –"the Constitution does not confer a right to abortion."⁶ Indeed, the year 2019 has been defined by

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3. See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). For their mutual substantial importance in recognizing the constitutional women's right to abortion, see Norman Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 HASTINGS L. J. 867 (1974); Richard Delgado & Judith Droz Keyes, *Parental Preferences and Selective Abortion: A Commentary on Roe v. Wade, Doe v. Bolton, and the Shape of Things to Come*, 1974 WASH. U. L. Q. 203 (1974); Stephen M. Krason, *Abortion: Politics, Morality, and the Constitution: A Critical Study of Roe V. Wade and Doe V. Bolton and a Basis for Choice*, 1 UNIV. PRESS AM. (1984).
 4. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). See also Clarke D. Forsythe & Donna Harrison, *State Regulation of Chemical Abortion After Dobbs*, 16 LIBERTY UNIV. L. REV. 377, 410–11 (2022); Caitlin Knowles Myers, *Confidential and Legal Access to Abortion and Contraception in the USA, 1960–2020*, 35 J. POPULATION ECON. 1385, 1389 (2022).
 5. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). For the substantial importance of this ruling, see Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on Planned Parenthood of Southeastern Pennsylvania v. Casey*, 68 NOTRE DAME L. REV. 11 (1992); Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 YALE J. L. & FEMINISM 317, 325–26 (2006); Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L. J. 1318, 1345 (2009).
 6. *Dobbs v. Jackson Women's Health Org.*, *supra* note 1, discussed by Ronald Stockton, *Alito's Leaked Draft Ruling Overturning Roe v Wade*, DEEP BLUE DOCUMENTS (May 10, 2022), <https://deepblue.lib.umich.edu/>

some experts in the field as “a critical time for abortion rights,”⁷ since during the first half of the year alone, almost 60 abortion restrictions were enacted in 19 American states, including 26 abortion bans, and many more restrictions have since been introduced by state legislators.⁸ This trend came to a head in 2021 with the enactment of the Texas Abortion Law (SB8), effective September 1, 2021. This state law, which at the time was considered the most prohibitive one in the United States, bans abortion after only six weeks of gestational age, even in cases of rape and incest. On the date the Texas law took effect, the U.S.

bitstream/handle/2027.42/172458/AlitoDobbsDecision.pdf?sequence=1&isAllowed=y [https://perma.cc/D2TA-PNHM]; Susan Jaffe, *Health Organizations Fear Effects of US Abortion Ruling*, 399 LANCET 1854, 1854 (2022); Jamie Naylor, *SCOTUS Overturns Roe v. Wade, Ohio Reinstates Heartbeat Law*, GUARDIAN STUDENT NEWSPAPER (June 24, 2022). Actually, in recent years, a number of scholars have been anticipating the inevitable reversal of *Roe v. Wade*. See, e.g., Dov Fox et al., *June Medical Services v Russo—the Future of Abortion Access in the US*, 1 J. AM. MED. ASS’N HEALTH FORUM 1 (2020); I. Glenn Cohen et al., *The Supreme Court, the Texas Abortion Law (SB8), and the Beginning of the End of Roe v Wade?*, 326 J. AM. MED. ASS’N 1473, 1474 (2021).

7. Elizabeth Nash, *Abortion Rights in Peril — What Clinicians Need to Know*, 381 NEW ENG. J. MED. 497, 497 (2019); Pnina Lifshitz-Aviram & Yehezkel Margalit, *Towards A New Archimedean Point for Maternal Versus Fetal Rights?* 81 LA. L. REV. 447, 448 (2020).
8. Elizabeth Nash et al., *State Policy Trends at Mid-Year 2019: States Race to Ban or Protect Abortion*, GUTTMACHER INST. (July 1, 2019), <https://www.guttmacher.org/article/2019/07/state-policy-trends-mid-year-2019-states-race-ban-or-protect-abortion> [https://perma.cc/P3XM-JQUX]; THE POLICY SURVEILLANCE PROGRAM, *State Abortion Laws* (Oct. 1, 2021), <http://lawatlas.org/datasets/abortion-laws> [https://perma.cc/6SK5-QJAH]; MARY ZIEGLER, *ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT* 205 (2020). For the abortion restrictions on that year, see, e.g., Laura Portuondo, *Abortion Regulation as Compelled Speech*, 67 UCLA L. REV. 1 *passim* (2020); Niraj Chokshi, *Ohio’s Fetal Abortion Ban is Latest in Roe v. Wade Battle*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/us/ohio-abortion.html> [https://perma.cc/QBW9-YAY6]; Elizabeth Nash, *Louisiana Has Passed 89 Abortion Restrictions Since Roe: It’s About Control, Not Health*, GUTTMACHER INST. (Feb. 11, 2020), <https://www.guttmacher.org/article/2020/02/louisiana-has-passed-89-abortion-restrictions-roe-its-about-control-not-health> [https://perma.cc/H4CP-CDQ7].

Supreme Court declined to block it,⁹ thereby eliminating all abortion services in Texas. Not surprisingly, that same year, 12 other states enacted similar “fetal heartbeat laws,” prohibiting abortion once any embryonic cardiac activity can be detected.¹⁰

Considering the ongoing tsunami of commentary since the *Dobbs* decision and the resulting return of regulatory authority over abortion to the fifty states, it is surprising that little has been written on the obligations, duties and responsibility aspects of this dramatic change.¹¹ Traditionally, as reflected even in the *Dobbs* decision, the abortion debate has revolved – and evolved – around two or even three central issues: the status of the fetus and whether s/he should be conceptualized as having personhood with the rights and obligations of a mature person; women’s basic right of bodily integrity as well as other substantial constitutional

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9. Whole Woman’s Health v. Jackson, 594 U. S. ____; 142 S. Ct. 522 (2021). For an academic discussion of this landmark ruling, see Alexander J. Lindvall, *Texas, Abortion, and State Action*, 74 SMU L. REV. F. 139, 139–40 (2021); Alexi Pfeffer Gillet, *Civil Disobedience in the Face of Texas’s Abortion Ban*, 106 MINN. L. REV. 203 (2021) <https://ssrn.com/abstract=3919868> [<https://perma.cc/ZYH7-8H9T>]. Compare Family Law, *Ohio May Follow Texas’ Abortion Ban*, L. PROFESSOR BLOG NETWORK (Nov. 4, 2021) https://lawprofessors.typepad.com/family_law/2021/11/ohio-may-follow-texas-abortion-ban.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+typepad%2FVMI+28Family+Law+Prof+Blog%29 [<https://perma.cc/A2MU-DXJK>] with Family Law, *A Federal Judge Rules Against Several Indiana Abortion Laws*, L. PROFESSOR BLOG NETWORK (Aug. 14, 2021) https://lawprofessors.typepad.com/family_law/2021/08/a-federal-judge-rules-against-several-indiana-abortion-laws.html [<https://perma.cc/UW7M-5KMU>].
 10. For these recent laws, see M. Akram Faizer, *Federal Abortion Rights Under a Conservative United States Supreme Court*, 69 DRAKE L. REV. DISCOURSE 101, 107-09 (2020); POLLING AMERICA: AN ENCYCLOPEDIA OF PUBLIC OPINION, 3 (Kelly N. Foster et al. eds, 2d ed. 2020); Charles W. Rhodes & Howard Wasserman, *Solving Procedural Puzzles of Texas’ Fetal-Heartbeat Law*, FLA. INT’L UNIV. LEGAL STUD. RSCH. PAPER NO. 21-15 (2021).
 11. For a seminal academic discussion of these aspects, see ROSAMUND SCOTT, RIGHTS, DUTIES AND THE BODY: LAW AND ETHICS OF THE MATERNAL-FETAL CONFLICT (2002); RITA JOSEPH, HUMAN RIGHTS AND THE UNBORN CHILD (2009). See also HENRIK FRIBERG-FERNROS, MAKING A CASE FOR STRICTER ABORTION LAWS (2017).

values, such as dignity, freedom, autonomy, etc.; and “whether gender equality arguments strengthen the arguments for rights to abortion.”¹² In the context of women’s rights discourse, some scholars have argued that states have basic human rights obligations¹³ towards women that include abortion care, and that they must ensure that such care will be accessible and affordable.

The aim of this article is to substantively reevaluate the new post-*Roe v. Wade* status of abortion law from the heretofore unexplored perspective of the obligations,¹⁴ commitments,¹⁵ and responsibilities discourses. Indeed, in recent years there has been a surge in the scholarly literature regarding these discourses generally, and, more specifically, in family law,¹⁶ including the question of the parent-child relationship.¹⁷ We argue that in the

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12. For the first two pillars, see Andrew Peach, *Abortion and Parental Obligation*, in LIFE AND LEARNING: PROC. OF THE 14TH UNIV. FAC. FOR LIFE CONF. XIV 193, 193 (Joseph W. Koterski ed., 2004). For the latter, see Jonathan Herring, *Ethics of Care and the Public Good of Abortion*, 2 U. OXFORD HUM. RTS. HUB J. 1, 7 (2019). For a general discussion, see John-Stewart Gordon, *Abortion*, INTERNET ENCYC. PHIL., <https://www.iep.utm.edu/abortion/> [<https://perma.cc/VN96-WDG9>] (last visited Nov. 20, 2022).
 13. See Sigrun I. Skogly & Mark Gibney, *Transnational Human Rights Obligations*, 24 HUM. RTS. Q. 781 (2002); SIGRUN SKOGLY, BEYOND NATIONAL BORDERS: STATES’ HUMAN RIGHTS OBLIGATIONS IN INTERNATIONAL COOPERATION (2006); Hugh King, *The Extraterritorial Human Rights Obligations of States*, 9 HUM. RTS. L. REV. 521 (2009).
 14. See Diane Jeske, *Families, Friends, and Special Obligations*, 28 CANADIAN J. PHIL. 527 (1998); THE LAW OF OBLIGATIONS: CONNECTIONS AND BOUNDARIES (Andrew Robertson ed., 2004); Sarah Clark Miller, *Need, Care and Obligation*, 57 ROYAL INST. OF PHIL. SUPPLEMENT 137 (2005).
 15. See, e.g., Howard S. Becker, *Notes on the Concept of Commitment*, 66 AMERICAN J. OF SOCIO. 32 (1960); JEFFREY BLUSTEIN, CARE AND COMMITMENT: TAKING THE PERSONAL POINT OF VIEW (1991); HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (Robert N. Bellah et al. eds., 1996).
 16. See also BARBARA D. WHITEHEAD, THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND FAMILY (1997); GILLIAN DOUGLAS, OBLIGATION AND COMMITMENT IN FAMILY LAW (2018); Helen Hall, *Obligation and Commitment in Family Law*, 180 LAW & JUST. CHRISTIAN L. REV. 103 (2018).
 17. See John P. Panneton, *Children, Commitment and Consent: A Constitutional Crisis*, 10 FAM. L. Q. 295 (1977); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New*

context of the dramatic changes occurring in the legal and public contexts, the application of this vital perspective of the obligations discourse to the abortion debate has not received the attention it deserves in either the scholarly literature or in the *Dobbs v. Jackson* ruling.

We will focus on detailing how the elements of the obligations discourse should be applied in the abortion context by distinguishing between whether the pregnancy has resulted from consensual or nonconsensual sex, including the possible misuse of contraceptive methods or contraceptive failure, such as condom failure.¹⁸ In the former scenario, we claim that the new discourses should be paramount, whereas in the latter, the women's rights discourse should govern. We hope that the theoretical and practical discussion in this article may go some way towards bridging the gap between the reasoning in the *Roe v. Wade* and *Dobbs v. Jackson* rulings, while reconciling the new civil discourses and the women's traditional rights discourse with respect to abortion.

The article proceeds as follows: Section 1 elaborates on the modern human rights discourse among the liberal western states regarding general family matters as well as the parent-child relationship and the abortion debate, while Section 2 sheds light on the strengthening in the new civil discourses in general and with regard to family issues and the parent-child relationships. Section 3 then discusses the traditional Jewish ethical concept of the abovementioned elements of obligations, commitments, and responsibilities, including the modern implementation of the Jewish obligation ethics in Israeli law.¹⁹ As far as we know, Israel

Language of Morality in Family Law, 60 U. PITT. L. REV. 1111 (1999); Gillian Douglas, *Parenthood: Commitment, Status and Rights*, in *FAMILY LAW IN BRITAIN AND AMERICA IN THE NEW CENTURY: ESSAYS IN HONOR OF SANFORD N. KATZ* 91 (John Eekelaar ed., 2016).

18. See David T Baird et al., *Science, Medicine, and the Future: Contraception*, 319(7215) *BMJ: BRITISH MED. J.* 969 (1999); Nathalie Bajos et al., *Contraception: From Accessibility to Efficiency*, 18(5) *HUMAN REPROD.* 994 (2003); Joseph P. Hornick et al., *Successful and Unsuccessful Contraceptors: A Multivariate Typology*, 4(1-2) *J. SOC. WORK & HUM. SEXUALITY* 17 (2008).
19. It bears emphasis that our discussion focuses only on exploring the unique Jewish perspective of the obligation ethics, which interestingly endorses the shift in the civil discourse. Unfortunately, elaborating on the whole Jewish conception of abortion is beyond

is the only western jurisdiction to adopt such a unique conception of “strong” obligations discourse on a practical level. With this background in mind, in Section 4, we explore the nuanced and delicate normative implementation of these ethics in the abortion. Essentially, we seek to reconcile the traditional Jewish ethical point of view with the fresh and challenging emerging civil discourses before concluding the article.

1. THE MODERN, LIBERAL WESTERN HUMAN RIGHTS DISCOURSE

a. Family Issues and the Parent-Child Relationship

Recognition of the human rights discourse is central to the vast majority of the modern, liberal Western world.²⁰ It is noteworthy that the human rights discourse has not been particularly powerful in U.S. (family) law; in fact, the United States is among the last liberal states that has not ratified 1989 United Nations Convention on the Rights of the Child (CRC).²¹ In this article, we will limit our deliberation only to family

the scope of this article and has been extensively discussed elsewhere. See AVRAHAM STEINBERG, *Abortion and Miscarriage*, ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS: A COMPILATION OF JEWISH MEDICAL LAW ON ALL TOPICS OF MEDICAL INTEREST vol. 1, 1 (Fred Rosner trans., 2003); YECHIEL M. BARILAN, JEWISH BIOETHICS: RABBINIC LAW AND THEOLOGY IN THEIR SOCIAL AND HISTORICAL CONTEXTS 159–86 (2014); Yehezkel Margalit, *Abortion in Jewish Law* (on file with the authors).

20. See generally ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS (1982) (The catalogue of scholarly writing concerning rights is enormous); THEORIES OF RIGHTS (Jeremy Waldron ed., 1985); RONALD DWORIN, TAKING RIGHTS SERIOUSLY (2013); JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (2013).
21. See Jonathan Todres, *Analyzing the Opposition to U.S. Ratification of the U.N. Convention on the Rights of the Child*, in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U/S/ RATIFICATION 19 (Jonathan Todres et. al authors, 2006); T. Jeremy Gunn, *The Religious Right and the Opposition to U.S. Ratification of the Convention on the Rights of the Child*, 20 EMORY INT’L L. REV. 111 (2006); Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child’s Rights Perspective*, 633 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 80 (2011).

matters and to the parent-child relationship, which are much closer to the abortion issue. During ancient times, the status of both the husband and the father generally granted them primarily rights in their wives and children, with essentially no corresponding obligations towards their wives nor commitments towards the children. However, since then, the rights of individuals, including women, who are part of an intact marriage, have evolved considerably.

The application of the women's rights discourse was fueled mainly by the privatization of the family process, i.e., the shift that occurred from the end of the 18th through the beginning of the 19th century from public norms focusing mainly on the family unit to private choice and human rights.²² This significant change is a direct consequence of the modern premise that spouses, even women, are autonomous agents who are free and independent to regulate their marriages and should no longer be treated as a possession of their husbands or a partial segment of the entire family lacking specified rights.

This shift has offered a number of important advantages in the process of bolstering women's rights: correcting the distortions which the traditional marital status had imposed on women in depriving them of certain civil and economic rights and their capability to independently enter into a contract; enforcing spousal agreements that may reshape the stereotypical, non-egalitarian and unequal home tasks; enhancing the autonomy of wives and affording them more flexibility and pluralistic variety as opposed to the once fixed and rigid marital status.²³

Similarly, in the past, the child was conceptualized socially and legally as an object belonging to the father. Since the child was not recognized as a subject with independent legal status, the child, too, was deprived of any legal rights or recognized interests.

22. For a fuller description of this far-reaching process, see Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992); Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U.J. GENDER SOC. POL'Y & L. 415, 422–28 (2005); MARGALIT, *infra* note 27, at 107–15.

23. See respectively Hendrik Hartog, *Marital Exits and Marital Expectations in Nineteenth Century America*, 80 GEO. L.J. 95, 107–09 (1991); ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW 83–97 (1997); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998).

However, the gradual recognition of children's rights began in the 18th century, reaching its peak in the mid-20th century, its expansion continuing to this day. With judicial recognition of children's constitutional rights,²⁴ the emergence of social movements such as the children's rights movement,²⁵ and the enactment of international conventions advancing children's rights, the CRC being the most important among them.²⁶ In summary, the abandonment of the exclusive husband/father's rights discourse in favor of a growing embrace of a discourse of his commitments, responsibilities, and obligations, which is the mirror image of the recent acceleration in the strengthening of women's and children's rights, has been well documented over the last few decades.²⁷

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24. See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 511–17 (1983); Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 400–09 (1997). For a discussion of the personhood of a child in light of the American constitution, see Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 22–34, 110 (1994).
 25. For a description of this movement and its social and legal influence, see JOSEPH M. HAWES, *THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION* (1991); Annie Franklin & Bob Franklin, *Growing Pains: The Developing Children's Rights Movement in the UK*, in *THATCHER'S CHILDREN? POLITICS, CHILDHOOD AND SOCIETY IN THE 1980S AND 1990S* (Jane Pilcher & Stephen Wagg eds., 1996); Gary A. Debele, *Custody and Parenting by Persons Other Than Biological Parents: When Non-Traditional Family Law Collides with the Constitution*, 83 N.D. L. REV. 1227, 1246–52 (2007).
 26. See G.A. Res. 44/25, annex, *Convention on the Rights of the Child* (1989). See also TREVOR BUCK et al., *INTERNATIONAL CHILD LAW* (4th Edition, 2020). For the celebration of the 30th anniversary of this substantial treaty, see Jane Murray, *Happy Anniversary? 30 Years of the United Nations Convention on the Rights of the Child*, 27 INT'L J. OF EARLY YEARS EDUC. 341 (2019); Faith Gordon, Book Review: *The Child's Right To Development*, 25 AUSTL. J. HUM. RTS. 527 (2019); Patricia Nicholl, "For Every Child, the Right to a Childhood" *UNICEF (2019)*, 25 CHILD CARE IN PRACTICE 345 (2019).
 27. For a fuller description of these dramatic legal and social changes, See PNINA LIFSHITZ AVIRAM *INFORMED CONSENT OF MINORS* 147–58 (2006) (Heb.); YEHEZKEL MARGALIT, *DETERMINING LEGAL*

b. *Abortion*

There is a consensus among abortion's proponents that the right to abort is one of the most basic human rights every pregnant woman has, since it is the ultimate intimate, personal decision carrying far-reaching ramifications that a given woman can make in her lifetime.²⁸ Whether she decides to give birth or to abort her fetus, the dangers and benefits and the advantages and disadvantages will be mainly hers. The issues raised by abortion undoubtedly broach some of the most important and central values and arguments concerning choice,²⁹ liberty,³⁰ freedom, and autonomy for women. Indeed, it has been claimed that the woman's rights should be superior to that of the fetus she is carrying, and that she should have the autonomy to abort

PARENTAGE – BETWEEN FAMILY LAW AND CONTRACT LAW, 86–87 (Cambridge University Press, 2019).

28. The ethical and legal writing regarding the woman's right to abort is enormous, so we will only mention the following landmark references: Suzanne M. Alford, *Is Self-Abortion a Fundamental Right*, 52 DUKE L.J. 1011 (2003); UDI SOMMER & ALIZA FORMAN-RABINOVICI, PRODUCING REPRODUCTIVE RIGHTS: DETERMINING ABORTION POLICY WORLDWIDE, BERKELEY LAW/LIBRARY CATALOG, <https://lawcat.berkeley.edu/record/1104158?ln=en> [<https://perma.cc/JYB4-CEKU>] (“With events and movements such as #MeToo, the Gender Equality UN Sustainable Development Goal, the Irish and Chilean abortion policy changes, and the worldwide Women’s March movement, women’s rights are at the top of the global public agenda.”).
29. For a survey of the prochoice movement, see the prolific writing of Suzanne Staggenborg: Suzanne Staggenborg, *Coalition Work in the Pro-Choice Movement: Organizational and Environmental Opportunities and Obstacles*, 33 SOC. PROBLEMS 374 (1986); Suzanne Staggenborg, *The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, 53 AM. SOCIO. REVIEW 585 (1988); SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT (1991).
30. For a woman's unfettered liberty to abort her fetus, see John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REVIEW 405 (1983); Dawn Johnsen, *The Creation of Fetal Rights: Conflict with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L. J. 599 (1986); Francis J. Beckwith, *Thomson's Equal Reasonableness Argument for Abortion Rights: A Critique*, 49 AM. J. JURIS. 185 (2004).

her fetus.³¹ Even the U.S. Supreme Court has ruled that this liberty is a pregnant woman's alone, and she does not need to first secure approval either from her parents or from her husband.³²

When discussing the appropriate scope of women's right to autonomous and unfettered access to abortion, with the traditional restrictions of the U.S. framework that limits access to the point of viability absent a threat to the life or health of a pregnant woman – a limitation that will likely be much more restricted in the post-*Roe v. Wade* era – the obvious obverse of this is a possible critical infringement of the fetus's right to be born³³ or to its inviolability.³⁴ The mere fact that the abortion debate still seems to be at an impasse is strongly connected to the fact that recent decades have witnessed a dramatic strengthening of arguments in support of both women's and fetuses' rights.³⁵ The debate over the fetus's rights has continued

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31. See Rosalind POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE SEXUALITY AND REPRODUCTIVE FREEDOM* (Rev. ed 1990); RACHEL ROTH, *MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS* 246 (2000); *SOCIOLOGY OF THE BODY: A READER* 183 (Claudia Malacrida & eds., 2008).
 32. See *Planned Parenthood v. Danforth*, 428 US 52 (1976); see also *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). For an academic discussion of the latter seminal verdict, see Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 16 (1993); Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L. REV. 713, 714 (2007); Thea Raymond-Sidel, *I Saw the Sign: NIFLA v. Becerra and Informed Consent to Abortion*, 119 COLUM. L. REV. 2279, 2283 (2019).
 33. See Robert F. Drinan, *The Inviolability of the Right to Be Born*, 17 W. RSRV. L. REV. 465, 469 (1965); George Schedler, *Women's Reproductive Rights: Is there a Conflict with a Child's Right to be Born Free from Defects?*, 7 J. LEGAL MED. 3567 (1986); Shiva M. Singh et al., *Fetal Alcohol and the Right to Be Born Healthy . . .*, 5 FRONTIERS IN GENETICS 1, 2 (Stephen Mason ed., 2014).
 34. See Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J. L. & HUMAN 195, 198 (1995); Richard Stith, *On Death and Dworkin: A Critique of His Theory of Inviolability*, 56 MD. L. REV. 289, 310 (1997); Raanan Gillon, *Is There a 'New Ethics of Abortion?'*, 27 J. MED. ETHICS ii5, ii7 (2001).
 35. See CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* 3 (1996); Katheryn D. Katz, *The Pregnant Child's Right to Self-Determination*, 62 ALB. L. REV.

to spark intense moral and ethical discussion,³⁶ draw media attention, and give rise to an immense amount of legal scholarship. The main reason for this continuing stalemate is the fact that, fundamentally, the recognition of fetal rights derives from the more basic but extremely complicated question of whether a fetus is indeed a person and has personhood in philosophical and legal terms, a question that the Supreme Court has elegantly dodged to this day.³⁷

Furthermore, even if one assumes that the fetus is a person,³⁸ the question remains as to how the fetus's rights and the woman's rights should justly be balanced. As we recently concluded:

We should honestly admit, however, that the surge in legislative and judiciary abortion restrictions of recent years has brought us closer than ever before to a new Archimedean point of maternal vs. fetal rights, with the latter being awarded much more credit and room at the expense of the former.³⁹

1119 (1999); RITA JOSEPH, HUMAN RIGHTS AND THE UNBORN CHILD 1 (2009).

36. See sources cited *supra* notes 34, 35. See also Johnsen, *supra* note 30; Lori K. Mans, *Liability for the Death of a Fetus: Fetal Rights or Women's Rights*, 15 U. FLA. J. L. & PUB. POL'Y 295 (2004); Ursula Barry, *Discourses on Foetal Rights and Women's Embodiment*, 2 ABORTION PAPERS IR. 1 (2015).
37. See, e.g., Roger J. Magnuson & Joshua M. Lederman, *Aristotle, Abortion, and Fetal Rights*, 33 WM. MITCHELL L. REV. 767 (2007); Lee R. Collins & Susan L. Crockin, *Fighting 'Personhood' Initiatives in the United States*, 24 REPRODUCTIVE BIOMEDICINE ONLINE 689 (2012); Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J. L. & MED. 573 (2013).
38. See, e.g., Jane English, *Abortion and The Concept of a Person*, 5 CAN. J. PHIL. 233 (1975); Gary B. Gertler, *Brain Birth: A Proposal for Defining When a Fetus is Entitled to Human Life Status*, 59 S. CAL. L. REV. 1061 (1986); Lynne Rudder Baker, *When Does a Person Begin?*, 22 SOC. PHIL. & POL'Y FOUND. 25 (2005).
39. Lifshitz-Aviram & Margalit, *supra* note 7. See June Med. Servs. v. Gee, 905 F.3d 787 (5th Cir. 2018), rev'd, 140 S. Ct. 2103 (2020). For the latter seminal ruling, see Dov Fox, *The Legal Challenge of Abortion Stigma—and Government Restrictions on the Practice of Medicine*, 50 HASTINGS CTR. REP. 13 (2020); Owen Dyer, *US Supreme Court Hears Pivotal Abortion Case as Pro-Lifers Seek To Undermine Roe v Wade*, 368 BMJ m917 (2020); Hanoch Dagan &

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

2. THE RECENT SURGE IN COMMITMENT, RESPONSIBILITY, AND OBLIGATION DISCOURSE

a. General

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

Obligation is very well-known legal notion, and we will therefore discuss it only briefly, whereas commitment will be explored much more extensively, since it has been profoundly transformed in recent years. Obligation can be defined as a deed or action that the individual is legally obligated to do or fulfill with or without his consent, since it is statutorily, contractually, or judicially imposed on him.⁴⁰ As defined in the following dictionary entry, an obligation is:

[A] moral or legal requirement; duty; the act of obligating or the state of being obligated; a legally enforceable

Avihay Dorfman, *The Value of Rights of Action: From Civil Recourse to Class Action* 13 n. 56, 58 (2020).

40. For a much broader discussion of “obligation” in the legal system, see MARY A. WARREN, *MORAL STATUS: OBLIGATIONS TO PERSONS AND OTHER LIVING THINGS* (1997); Elisabeth Beck-Gernsheim, *From Rights and Obligations to Contested Rights and Obligations: Individualization, Globalization, and Family Law*, 13 *THEORETICAL INQUIRIES L.* 1 (2012); *POLITICAL AND LEGAL OBLIGATION* (James Roland Pennock & John William eds., 2017).

agreement to perform some act [. . .] a person or thing to which one is bound morally or legally; something owed in return for a service or favour; a service or favour for which one is indebted.⁴¹

One may be morally or legally obligated, despite having been passive and done nothing to obligate oneself with the duties that will be imposed. The legal logic behind this phenomenon is the correlativity between rights and obligations—since obligation is the correlative of right,⁴² one may be obligated to fulfill one's obligation, even without any intent and despite never having actively done anything. Essentially, the social, moral, and/or legal obligation actually governs the behavior and attitudes of the individual towards others, including one's spouse and children. For example, the spousal and child obligations have dramatically changed both during their lifetimes together as well as after divorce:

The obligation of support was turned into an obligation to share the marital property [. . .] In the parent/child relationship [. . .] it was regarded as inappropriate to enforce an obligation on the non-resident parent to maintain contact with a child. Instead, that parent's obligation towards his or her child was, until recently, primarily to be fulfilled through the payment of maintenance for the child.⁴³

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41. Gillian Douglas, *Towards an Understanding of the Basis of Obligation and Commitment in Family Law*, 36 *LEGAL STUD.* 1, 3 (2016); see also Monica I. Falk, *An Examination of the Value of Overall Trust and Commitment Associated with Service Complexity in Higher Education Information Technology Outsourcing Relationships*, at 4 (April 2021) (unpublished dissertation, Colorado Technical University).
 42. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 186 (Oxford Univ. Press 1986) ("Rights ground duties [. . .] It merely highlights the precedence of rights over some duties [. . .]"); ALON HAREL, *THEORIES OF RIGHTS*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 195 (Martin P. Golding & William A. Edmundson eds., 2005); JAMES GRIFFIN, *ON HUMAN RIGHTS* 97 (Oxford Univ. Press 2008) ("The content of a human right is also the content of the corresponding duty.").
 43. DOUGLAS, *supra* note 16, at 227. The sourcing out (or more precisely in) of the state's obligation to maintain children and obligating their parents to fulfill it has been bitterly criticized in

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

[T]he meaning of “commitment” has expanded from a narrow sense of some kind of financial or perhaps moral burden, to including dedication or allegiance to a relationship or life plan, often marked by an explicit promise to “commit” to this. The essence of modern commitment seems to be that, in contrast to obligation, it is taken on voluntarily rather than imposed.⁴⁴

Furthermore, some scholars have argued that commitment is composed of two central sub-elements: personal dedication, namely “the desire of an individual to maintain or improve the quality of his relationship for the joint benefit of the participants”; and constraint commitment, namely the “forces that constrain individuals to maintain relationships regardless of their personal dedication to them.”⁴⁵ In family law, such commitments currently prevail both in the horizontal spousal relations and in the vertical parent-child relationship. In the first context, the spouses commit themselves to each other during their lifetimes together, whether they are officially married or just cohabiting. It should be noted that in the United States, there is a substantial debate in the scholarly literature whether

the following landmark articles: Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2212 (1995); David L. Chambers, *Fathers, The Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2604 (1995); Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL’Y REV. 89, 96 (1998).

44. DOUGLAS, *supra* note 16, at 223. *See also* JANET FINCH & JENNIFER MASON, *NEGOTIATING FAMILY RESPONSIBILITIES* 94 (1993); MARGARET MEAD, *CULTURE AND COMMITMENT: A STUDY OF THE GENERATION GAP* (1970); PANKAJ GHEMAWAT, *COMMITMENT* (1991); Scott Stanley & Howard H. Markman, *Assessing Commitment in Personal Relationships*, 54 J. OF MARRIAGE AND FAM. 595, 596 (1992).
45. *See* Stanley & Markman, *supra* note 44, at 596; Douglas, *Towards an Understanding of the Basis of Obligation and Commitment in Family Law*, *supra* note 41, at 16.

cohabitants are liable for spousal financial obligations only when they commit explicitly via signing a contract or even without such an official undertaking.⁴⁶ Certainly, parents usually commit to the endeavor of begetting and raising their children without any explicit official agreement. Nonetheless, it is worth noting that such parental commitments can be found not only in adoptions and with foster parents,⁴⁷ but also in the assisted reproduction technologies through the notion of pre-commitment.⁴⁸

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

Personal commitment is the extent to which the person wishes to stay in the relationship, affected by attraction to the person, attraction to the relationship itself, and its importance to his or her own identity. It is the form of commitment recognised by Giddens in the pure relationship and the sense of commitment as dedication or allegiance already considered.⁴⁹

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46. For a bitter criticism of the latter option, see the following seminal articles: Shahar Lifshitz, *Married Against Their Will - Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1567 (2009); Erez Aloni, *Compulsory Conjugalilty*, 53 CONN. L. REV. 55, 55 (2021). See also Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 603–04 (2013) (concerning the intense critique of the American Law Institute (ALI) Principles of the Law of Family Dissolution’s chapter on Domestic Partners suggests).
47. WILLIAM MEEZAN & JOAN F SHIREMAN, CARE AND COMMITMENT: FOSTER PARENT ADOPTION 1 (1985).
48. John A. Robertson, *Recommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 1043–44 (2001); John A. Robertson, *Precommitment Issues in Bioethics*, 81 TEX. L. REV. 1849, 1870–73 (2003); Molly J. Walker Wilson, *Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision-Making Capacity*, 31 J. LEGIS. 329, 329 (2005).
49. Michelle Givertz & Chris Segrin, *Explaining Personal and Constraint Commitment in Close Relationships: The Role of Satisfaction, Conflict Responses, and Relational Bond*, 22 J. OF SOC. AND PERSON. RELATIONSHIPS 757, 771 (2005). See also Douglas, *Parenthood: Commitment, Status and Rights*, *supra* note 17, at 91; ANTHONY GIDDENS, THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES 2 (2013).

Structural commitment has been defined, following the abovementioned two central sub-elements of commitment, as “the sense that one is morally obligated to continue a relationship.”⁵⁰ Indeed, another ongoing and stark modern shift—from structural commitment to personal commitment—can be found in the familial context, as will be explored in the next section.⁵¹

Responsibility can be characterized either as “having the ability or authority to act or decide” or as “accountability.”⁵² Unfortunately, it is beyond the scope of this article to extensively elaborate on the larger notion of responsibility in the modern era, so we will restrict ourselves to quoting the following description: “It becomes the individual’s responsibility to shape his or her own life; but equally, it will be that person’s responsibility if his or her choices and actions fail to deliver self-fulfillment. This seems to fit well with the ideology of autonomy and self-responsibility promoted in liberal societies”.⁵³

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50. Michael P. Johnson et al., *The Tripartite Nature of Marital Commitment: Personal, Moral, and Structural Reasons to Stay Married*, 61 J. OF MARRIAGE AND THE FAM. 160, 161 (1999); Marie-Christine Saint-Jacques et al., *The Processes Distinguishing Stable From Unstable Stepfamily Couples: A Qualitative Analysis*, 60 FAM. RELATIONS 545, 557 (2011); Douglas, *Towards an Understanding of the Basis of Obligation and Commitment in Family Law*, *supra* note 41, at 235.
51. For this angle in both the spousal and parental relations, see respectively Johnson et al., *supra* note 50, at 161; Michael P. Johnson, *Personal, Moral, and Structural Commitment to Relationships*, in HANDBOOK OF INTERPERSONAL AND RELATIONSHIP STABILITY. PERSPECTIVES ON INDIVIDUAL DIFFERENCES 73 (Jeffrey M. Adams & Warren H. Jones eds., 1999); Frances E. Brandau-Brown & J. Donald Ragsdale, *Personal, Moral, and Structural Commitment and the Repair of Marital Relationships*, 73 S. COMM’N J. 68, 80 (2008); Kay Pasley et al., *Effects of Commitment and Psychological Centrality on Fathering*, 64 J. MARRIAGE AND FAM. 130, 130 (2004); Ramona Faith Oswald et al., *Structural and Moral Commitment Among Same-Sex Couples: Relationship Duration, Religiosity, and Parental Status*, 22 J. FAM. PSYCH. 411, 411 (2008).
52. DOUGLAS, *supra* note 16, at 8; see also the following landmark books: ERIK H. ERIKSON, *INSIGHT & RESPONSIBILITY* (1994); JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY & CONTROL: A THEORY OF MORAL RESPONSIBILITY* (2000); HANNAH ARENDT, *RESPONSIBILITY & JUDGMENT* (2009).
53. DOUGLAS, *supra* note 16, at 66. See also JONATHAN GLOVER, *RESPONSIBILITY* (1972); HANS JONAS, *THE IMPERATIVE OF*

It bears emphasizing that the family has extensively been equated with dictating and demanding the fulfillment of various basic responsibilities, not only as reciprocal among the family members, but also vis-à-vis third parties, mainly the state. As has been asserted: “[F]amily law’s purpose is to determine responsibility for responsibility, including the responsibilities of individuals to each other and the responsibilities of families and the state and the community to each other”.⁵⁴

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

b. Family Issues

The modern prevalence of the commitment, responsibility, and obligation discourses in various family matters is also clearly reflected in the scholarly literature. Obligation has been discussed mainly regarding the reciprocal spousal obligations among married couples,⁵⁵ as well as cohabitants.⁵⁶ Likewise, in recent

RESPONSIBILITY: IN SEARCH OF AN ETHICS FOR THE TECHNOLOGICAL AGE (1984); ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITY (1985).

54. Alison Diduck, *What is Family Law For?* 64 CURRENT LEGAL PROBLEMS 287, 287 (2011). *See, e.g.*, Vickie L. Henry, *A Tale of Three Women: A Survey of the Rights and Responsibilities of Unmarried Women Who Conceive by Alternative Insemination and a Model for Legislative Reform*, 19 AM. J. L. & MED. 285, 287, 290–91 (1993) (discussing the possibility of acquiring parental responsibilities via assisted reproduction technologies); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 311 (2007); Liezl Van Zyl, *Intentional Parenthood: Responsibilities in Surrogate Motherhood*, 10 HEALTH CARE ANALYSIS 165, 168, 174 (2002).
55. The literature is enormous. *See, e.g.*, Scott Fitzgibbon, *Marriage and the Good of Obligation*, 47 AM. J. JURIS. 41, 41 (2002); Lucinda Ferguson, *Family, Social Inequalities and the Persuasive Force of Interpersonal Obligation*, 22 INT’L J. L., POL’Y & FAMILY 61, 64 (2008).
56. *See, e.g.*, Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 817–18 (2005); Lisa Glennon, *Obligations Between Adult*

years, there has been a clear tendency away from the discourse of parental rights towards a terminology of parental responsibility.⁵⁷ As was sharply suggested decades ago:

I propose that we attempt to re-direct the law applicable to disputes over parental status toward a view of parenthood based on responsibility and connection [. . .] And in evaluating (and thereby giving meaning to) that relationship, the law should focus on parental responsibility rather than reciprocal “rights”⁵⁸

This is the situation already in the United Kingdom, as in many other countries.⁵⁹ In our opinion, this trajectory is a very welcome shift, since it sends a clear message specifically to parents and, more generally, to all of society, that parental rights should

Partners: Moving from Form to Function?, 22 INT’L L. J., POL’Y & FAM. 22, 25, 27 (2008).

57. See, e.g., Andrew Bainham, *Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions*, in WHAT IS A PARENT?: A SOCIO-LEGAL ANALYSIS 37 (Andrew Bainham et al. eds., 1999); B BRENDA M. HOGGETT, PARENTS AND CHILDREN: THE LAW OF PARENTAL RESPONSIBILITY 5 (4th ed.1993); JO BRIDGEMAN, PARENTAL RESPONSIBLY, YOUNG CHILDREN AND HEALTHCARE LAW 84 (2007).
58. Katharine Bartlett, *Re-expressing Parenthood*, 98 YALE L. J. 293, 295 (1988). For a discussion of an American federal attempt to legislatively anchor the parental responsibilities and obligations, see the Congressional bill “Parental Rights and Responsibilities Act” (PRRA); see Barbara B. Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L. J. 393, 395 (1996); see John C. Duncan, *The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 NEB. L. REV. 1240, 1295–98 (2005).
59. In the UK, this is one of the scarlet threads of the Children Act 1989. For a survey of the legal shift that this act has sparked and for a general overview of parental responsibility in Britain and Wales as well as in Australia, see respectively N.V. Lowe, *The Allocation of Parental Rights and Responsibilities – The Position in England and Wales*, 39 FAM. L.Q. 267, 267-268 (2005); Aleardo Zanghellini, *Who is Entitled to Parental Responsibility - Biology, Caregiving, Intention and the Family Law Act 1975 (CTH): A Jurisprudential Feminist Analysis*, 35 MONASH U. L. REV. 147, 147 (2009).

be awarded only after fulfillment of the parental obligations in light of parents' basic responsibility toward their children.⁶⁰

Commitment has been discussed regarding either the mutual spousal relationship⁶¹ or its breakdown followed by divorce.⁶² The shift from structural to personal commitment is well articulated in the phenomenon of the privatization of the family process. Thus, in the past, the wife's and mother's commitments were gender-based, fixed and rigid, first and foremost in their primary role of caregivers within the private family sphere toward their spouses, as well as toward their children. In contrast, over the past decades, these commitments have become much more personal rather than moral and/or structural. These shifts are clearly reflected in the dramatic increase in the numbers of divorces, cohabitation, and out-of-wedlock birth rate. It bears emphasizing that the far-reaching ramifications of these familial relationships are central and tangible not only when the spouses are living together, but also after the breakdown of the family. As was correctly observed regarding the nexus of the spousal and parental relations:

[. . .] the law has sought to categorise what has at various times been referred to as custody, care, access, contact or involvement in the life of a child [. . .] how far the law has been used to support the personal commitment of a parent

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60. See, e.g., Yehezkel Margalit, *To Be or Not to Be (A Parent)? — Not Precisely the Question; the Frozen Embryo Dispute*, 18 *CARDOZO J. L. & GENDER* 355, 374 (2012); Yehezkel Margalit, *Bridging the Gap Between Intent and Status: A New Framework for Modern Parentage*, 15 *WHITTIER J. CHILD & FAM. ADVOC.* 1, 27 (2016); MARGALIT, *supra* note 27, at 158–63.
61. See, e.g., Jeffrey M. Adams & Warren H. Jones, *Conceptualization of Marital Commitment: An Integrative Analysis*, 72 *J. PERSONALITY & SOC. PSYCH.* 1177, 1177 (1997); Johnson et al., *supra* note 50, at 74; see also Jamie A. Aycok, *Contracting Out of the Culture Wars: How the Law Should Enforce and Communities of Faith Should Encourage More Enduring Marital Commitments*, 30 *HARV. J. L. & PUB. POL'Y* 231 (2006).
62. WHITEHEAD, *supra* note 16; Susan E. Jacquet & Catherine A. Surra, *Parental Divorce and Premarital Couples: Commitment and Other Relationship Characteristics*, 63 *J. MARRIAGE AND FAM.* (2004); Sarah W. Whitton et al., *Effects of Parental Divorce on Marital Commitment and Confidence*, 22 *J. FAM. PSYCH.* 789, 791 (2008).

to a child, and how far it has imposed structural commitments in order to maintain their relationship.⁶³

c. Parent-Child Relationship

The notions of commitment, responsibility,⁶⁴ and obligation⁶⁵ have become central in the past decades also in the context of the parent-child relationship. This represents a substantial shift, since the entire moral and legal infrastructure of the parental obligations towards their children throughout the legal history of humankind until recent decades has traditionally been vague. As was asserted, “both the spousal and parental obligations of support seem to have been recast as social or moral norms rather than legal duties.”⁶⁶ It is commonly argued in both the legal and philosophical literature that the parental obligation is an absolute ethical obligation (moral postulate). Consequently, *inter alia*, legal parenthood is treated as an absolute moral postulate and therefore nonnegotiable; it is impossible to add to or delete any of the parental obligations. Nonetheless, we would like to cast doubt on this basic conception and inquire whether the parental obligation is indeed a moral postulate, *i.e.*, “that the parental duties towards the child basically derive from natural law and definitely not only from the positive law.”⁶⁷

Philosophers, law scholars, and the judiciary system emphasized already at the beginning of the twentieth century

63. DOUGLAS, *supra* note 16, at 163.

64. See JULIE WALLBANK, *Parental Responsibility and the Responsible Parent: Managing the “Problem” of Contact*, in RESPONSIBLE PARENTS AND PARENTAL RESPONSIBILITY 295 (Jonathan Herring et al. eds., 2009); see also John Eekelaar, *Parental Responsibility: State of Nature or Nature of the State?*, 13 J. SOC. WELFARE & FAM. L. 37, 37 (1997); see also JONATHAN HERRING, PARENTAL RESPONSIBILITY, HYPER-PARENTING, AND THE ROLE OF TECHNOLOGY, THE OXFORD HANDBOOK LAW, REGULATION & TECHNOLOGY 404 (Roger Brownsword et al. eds., 2017).

65. See John Eekelaar, *Are Parents Morally Obligated to Care for their Children?* 11 OXFORD J. LEGAL STUD. 340, 340 (1991); MAVIS MACLEAN & JOHN EEKELAAR, THE PARENTAL OBLIGATION I (1997); Merle H. Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 VILL. L. REV. 135, 135 (2014).

66. DOUGLAS, *supra* note 16, at 229.

67. For a fuller deliberation of this basic theme, see MARGALIT, *supra* note 27, at 79–82.

that the parental obligations towards the child basically derive from natural law and definitely not only from the positive law.⁶⁸ According to this presumption, in the regular order of creating and raising children, a parent will do the best he or she can to care for their offspring, due, inter alia, to the natural desire of the male, in the vast majority of cases, to reproduce and actually preserve his genetic heritage through his DNA found in his biological child.⁶⁹ Put differently, the natural human inclination is to provide everything the child needs and there is no need for the legal system to intervene in this unique relationship in order to make sure that the parent indeed fulfills this basic obligation.⁷⁰ Parents are inclined to invest more in raising their biological children, to care much more for them as a very unique responsibility, and even to sacrifice themselves for their offspring. This is much less likely to occur when the child is not their biological descendant, especially when the child has not been adopted by them. Even in the modern legal discourse, one can find several justifications for grounding the parental obligations in terms of ethical, not legal, obligations.⁷¹

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68. JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 56, at 216 (David Hart ed., 2014); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, VOL. 1, at 447 (1962); *Stanton v. Willson*, 3 Day 37, 51 (Conn. 1808); *Van Valkinburgh v. Watson*, 13 Johns 480, 480 (N.Y. Sup. Ct. 1816); *Lewis v. Lewis*, 174 Cal. 336, 339 (Cal. 1917).
69. MATT RIDLEY, THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE, 16 (1993). *See also* the following seminal scholarly literature: RICHARD DAWKINS, THE SELFISH GENE (1989); ROBERT WRIGHT, THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE (1994).
70. *But cf.* Don S. Browning, *Biology, Ethics, and Narrative in Christian Family Theory*, in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 119–50 (David Blankenhorn et al. eds., 1996). The appeal to evolutionary biology to show that the “male problematic” (as Don Browning coined it) makes it imperative that marriage be created as a social institution to anchor men to mothers and children. *See also* Linda C. McClain, *The ‘Male Problematic’ and the Problems of Family Law: A Response to Don Browning’s ‘Critical Familism’*, 56 EMORY L. J. 1407, 1409 (2007); DON S. BROWNING ET AL., FROM CULTURE WARS TO COMMON GROUND: RELIGION AND THE AMERICAN FAMILY DEBATE 22 *passim* (2000).
71. *See, e.g.*, *Moorman v. Walker*, 773 P.2d 887, 889 (Wash. App. 1989).

Numerous legal scholars have argued that there is a consensus around the understanding that the parental responsibility for the offspring is, first and foremost, a moral postulate. This is one of the most basic public axioms both inside and outside the United States⁷² However, the sociological-empirical research of family law teaches us that, practically speaking, human nature is much more complex. Not infrequently, parents don't fulfill their natural and ethical obligations towards their offspring, and on occasion, the emotional bond, which should carry a promise of shelter for the children, does not derive naturally from the genetic connection and from the delivery.

Indeed, the biological connection often does create a strong basis for the emotional engagement needed for taking care of the best interests of the child; but can we, as a responsible society, trust parents to fulfill their moral obligations when it is only reasonable but not certain that they will? Some scholars, including David Archard,⁷³ argue that the biological connection is definitely not enough. Similarly, Hugh LaFollette⁷⁴ has claimed that legal parenthood should be awarded to a certain individual only after he has qualified for a "parental license." According to this line of argument, since there is an acute need for training and providing some level of knowledge and ability to this person and any parental misstep may cause enormous damage to a third party, the child, we should build a social infrastructure for licensing parents.

LaFollette argues that the natural blood connection is not a sufficient indicator for the existence of the basic knowledge required to appropriately care for the child and to prevent the option of causing him harm. The genetic lineage and natural law are therefore an unreliable basis on which to exclusively establish legal parentage. Other law scholars have maintained that the obligations of a male to his child are similar to his obligations towards his wife, and both are not actually moral obligations, but more akin to social rules, and therefore they are not absolute and may change from one society to another.⁷⁵ This is most often the

72. This is the conclusion of Murphy, *supra* note 17, at 1127–30, 1195–97, 1204.

73. DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* 103 (1993).

74. Hugh LaFollette, *Licensing Parents*, 9 PHIL. & PUB. AFFS. 182, 182 (1980).

75. MARGALIT, *supra* note 27, at 81.

case in cultures where women commonly support themselves and children are cared for by the society as a whole.⁷⁶ Due to the weakness of the abovementioned justifications, some have claimed that the parental obligations towards the descendant should be based also on the following two additional rationales: concern for the prosperity of the child specifically and of all humankind more generally; and the imposition of those obligations on the shoulders of the biological parents, as will be explored in the next section.⁷⁷

To conclude this section, in light of the shortcomings of the contention that one has an absolute moral obligation to support one's offspring, and despite the intuitive attractiveness of constructing the parental obligations as a moral postulate, the philosophical-bioethical infrastructure for doing so is very complex, tentative, and insufficiently defined.⁷⁸ Even the philosophical-ethical justifications are arguable and definitely do not provide a sufficient basis for a moral postulate. It is not surprising, then, that prominent scholars in the field of parent-children relationships have turned to alternative routes in order to more successfully base the parental obligations on much more personal justifications, among which one finds benevolence and responsibility, stewardship, and gratitude.⁷⁹ The failure of the

76. Herbert L.A. Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 82, 103–04 (Abraham I. Melden ed., 1958); H. L. A. HART, *THE CONCEPT OF LAW* 165–67 (1961).

77. Eekelaar, *supra* note 65, at 351–53.

78. For this argument, see Gregory A. Loken, *Gratitude and the Map of Moral Obligations Toward Children*, 31 *ARIZ. ST. L. J.* 1121, 1124 (1999). Carbone also has complained that the traditional axiom regarding the parental responsibility has been inspected only rarely. See June Carbone, *Incoming Sharing: Redefining the Family in Terms of Community*, 31 *HOUS. L. REV.* 359, 389 (1994). Other scholars have also pointed out that even though the parental obligation to provide for the child's needs is determined in all the states of the U.S., the roots of this obligation in the common law are vague. See Deborah H. Bell, *Child Support Orders: The Common Law Framework-Part II*, 69 *MISS. L. J.* 1063, 1063 (2000).

79. See Bartlett, *supra* note 58, at 294. See also Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *CARDOZO L. REV.* 1747, 1755 (1993). For a critique of conceptualizing the parental obligation only as gratitude and for the fear of weakening the sufficiency of good parenthood in terms of the final results, according to the consequentialism theory, see Loken, *supra* note 78, at 1139. For the third statement and for an offer to base the parental (as well as the state) obligations

abovementioned argumentation, which cannot rest on the basis of imposing only an ethical obligation on the parent, should guide us in an entirely different direction.

3. THE JEWISH ETHICS – “STRONG” OBLIGATIONS DISCOURSE

As has been extensively discussed elsewhere,⁸⁰ one of the most basic and central differences between Jewish law and modern, liberal civil law is their respective and completely differently articulated conceptualizations of the relationship between a person and the sovereign. Whereas Jewish law structures the relationship between an individual and the Creator in terms of obligations, civil law conceptualizes the relationship between individuals, or between individuals and a sovereign, in terms of rights and obligations. Put differently, in Jewish law, a person must ask himself what his obligations in this world are, whereas in civil law, a person primarily has rights and the role of the law is to protect those human rights.⁸¹ Likewise, conjugal relations

towards the child on the ground of gratitude following the affection, love and obedience that children show their parents, *see* Loken, *supra* note 78, at 1171–203. For other range of bases for parental obligations, not only biology, but also contract, estoppel, etc., *see* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL’Y 1 (2004); Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute’s Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL’Y 285 (2001); Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 29–30 (2008).

80. *See* YEHEZKEL MARGALIT, *THE JEWISH FAMILY — BETWEEN FAMILY LAW AND CONTRACT LAW* 135–43 (2017). *See also* HAIM H. COHN, *HUMAN RIGHTS IN JEWISH LAW* 19 (1984); DAVID NOVAK, *COVENANTAL RIGHTS: A STUDY IN JEWISH POLITICAL THEORY* 27 (2009).
81. *See* Moshe Silberg and Amihud I. Ben Porath, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 311 (1961) (“[T]he law itself does not only order relationships between man and man but also between man and God. The system in its entirety is religious in origin and therefore involves obligations to God.”). *See also* Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis*, 9 DUKE J. GENDER L., & POL’Y 91, 125–26 (2002); Yehezkel Margalit, *On the*

and the consequent procreation and raising of children are referred to as *halakhic* (Jewish law) obligations which are binding upon all Jews, apart from certain exceptions.⁸² The gap between the civil human rights discourse and the Jewish obligations discourse was noted by Robert Cover, who wrote as follows: “The principal word in Jewish law, which occupies a place equivalent in evocative force to the American legal system’s “rights,” is the word “mitzvah” which literally means commandment but has a general meaning closer to “incumbent obligation.”⁸³

In addition to calls to adopt this unique Jewish legacy in the United States,⁸⁴ this approach has been explicitly anchored in modern Israeli law, which dictates that the parental obligation as guardians includes the obligation and the right to care for the needs of their minor children. As such, parents have the:

Dispositive Foundations of the Obligation of Spousal Conjugal Relations in Jewish Law, XVIII JLAS 161, 164-6 (2008).

82. See Benjamin Porat, *Deciding Between Contradicting Norms: Rights-Based Law vs. Duty-Based Law and Their Social Ramifications*, 70 AM. J. COMP. L. 399, 404 (2022) (containing a comparative discussion of Jewish law sources and demonstrating this typical obligations-based legal system) (forthcoming). See also Benjamin Porat, *Ownership and Exclusivity: Two Visions, Two Traditions*, 64 AM. J. COMP. L. 147, 188 (2016).
83. Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. L. & RELIGION 65, 65 (1987). For an academic discussion of this quotation, see, e.g., MICHAEL WALZER, *LAW, POLITICS, AND MORALITY IN JUDAISM* (Princeton Univ. Press 2009); DOUGLAS HODGSON, *INDIVIDUAL DUTY WITHIN A HUMAN RIGHTS DISCOURSE* (Ashgate 2017); Joshua Cypess, *End-of-Life Decision Making in Orthodox Judaism: The Case of the 1977 Conjoined Twins*, 39 CONTEMP. JEWRY 211, 217 (2019). For another challenging attempt to bridge this gap, see Ronit Irshai, *Judaism, Gender, and Human Rights: The Case of Orthodox Feminism*, RELIGION AND THE DISCOURSE OF HUMAN RIGHTS 412, 423 (2014) https://en.idi.org.il/media/6207/religion_and_human_rights.pdf (“If we accept Raz’s argument, then there is some basis for the claim that Judaism can be characterized analytically as a religion of rights (at least regarding the realm of interpersonal duties).”).
84. See the following representative call: Michael J. Broyde & Steven S. Weiner, *Do Not Stand Idly at Your Neighbor’s Blood: The Jewish View on the Obligation of Bystanders to Intervene and Rescue (and Some Contrasts with the Current American Model)* (on file with the authors).

[O]bligation and the right to care for the needs of the minor, including his education, studies, training for work, occupation, and employment, as well as preserving, managing and developing his assets; also attached to this right is the permission to have custody of the minor and authority to represent him and to determine his place of residence.⁸⁵

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

As a duties-grounded system, Judaism is portrayed as diametrically opposed to liberal philosophy [. . .] I argue that the claim that the duties discourse of Judaism contradicts rights discourse is superficial, misleading [. . .] To my mind, duties discourse provides strong protection for rights [. . .] I find this argument nothing more than empty rhetoric because, as noted, rights and obligations are largely correlative concepts.⁸⁶

85. See § 15, Capacity and Guardianship Law, 5722-1962, LSI 380 106 (1962-), (Isr.). For an academic discussion and practical implementation of it, see Moussa Abou Ramadan, *The Transition from Tradition to Reform: The Shari'a Appeals Court Rulings on Child Custody (1992-2001)*, 26 FORDHAM INT'L L. J. 595, 614 (2003); Yitshak Cohen, *The Right of a Minor to Independent Status - Three Models*, 10.1 NW. J. L. & SOC. POL'Y, 1, 17 (2015); CivA 506/88 Shefer v. State of Israel, 170 IsrLR 1, 119 (1992); HCJ 3429/11 Alumni Association of the Arab Orthodox School in Haifa v. Minister of Finance 45 [2011], <https://versa.cardozo.yu.edu/topics/education>; HCJ 7245/10 Adalah – The Legal Ctr. For Arab Minority Rts. in Israel v. Ministry of Soc. Aff., § 45 (2013).

86. Irshai, *supra* note 83, at 8, 3, 11. For a similar conclusion, but from a civil perspective, see Peach, *supra* note 12, at 210 (“The language of rights, at least in its American version, is simply incapable of capturing much of the reality of our moral lives, especially the

Although abortion in Jewish law has been extensively discussed in the scholarly literature,⁸⁷ the unique perspective of the possible implementation of the obligations discourse hasn't received the attention it deserves. Among the scant literature on this point of view, see, for example, the following statement: "The exercise of man's procreative faculties, making him "a partner with God in creation," is man's greatest privilege and gravest responsibility [. . .] Liberal abortion laws would upset that balance by facilitating sexual indulgences without insisting on corresponding responsibilities".⁸⁸

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

4. RESOLVING THE ABORTION – BETWEEN HUMAN RIGHTS DISCOURSE AND OBLIGATIONS DISCOURSE

In her groundbreaking article "A Defense of Abortion," Judith. J. Thomson rejects the claim that the fetus acquires the right to the use of his mother's body, since the mother essentially invited the fetus to use it. Thus, even the recognized right of the fetus to life does not entail the right to use another person's body for continued sustenance. In other words, even if the fetus is granted full moral status or personhood with all the accompanying moral and legal rights, inter alia, to be born healthy, the woman's right to abort can still be defended.⁸⁹

reality of obligations. In part, then, the pro-choice position [. . .] is based on a confusion of the logic of obligations with a (highly dubious) logic of rights.").

87. See, e.g., DAVID M. FELDMAN, BIRTH CONTROL AND JEWISH LAW: MARITAL RELATIONS, CONTRACEPTION, AND ABORTION AS SET FORTH IN THE CLASSIC TEXTS OF JEWISH LAW (1968); DAVID M. FELDMAN, MARITAL RELATIONS, BIRTH CONTROL, AND ABORTION IN JEWISH LAW (1974); DANIEL SCHIFF, ABORTION IN JUDAISM (2002).
88. Immanuel Jakobovits, *Jewish Views on Abortion*, 17 CASE W. RESERV. L. REV. 480, 496 (1965).
89. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47 (1971). For a comprehensive discussion of her main thesis and its logical consequences, see Bertha Alvarez Manninen, *Rethinking 'Roe v. Wade': Defending the Abortion Right in the Face of Contemporary Opposition*, 10 AM. J. BIOETHICS 33 (2010); Keith J. Pavlischek, *Abortion Logic and Paternal Responsibilities: One More Look at Judith Thomson's "A Defense of Abortion,"* 7 PUB. AFFS. Q. 341 (1993).

Although Thomson's general argument in her seminal article has drawn considerable objections as well as support, for our part, in rights terminology, we may agree with her.⁹⁰ But she raises and doesn't reject the following fundamental consideration in her conclusion:

Suppose a woman voluntarily indulges in intercourse, knowing of the chance it will issue in pregnancy, and then she does become pregnant; is she not in part responsible for the presence, in fact the very existence, of the unborn person inside her?⁹¹

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

[. . .] that the fetus is dependent on the mother, in order to establish that she has a special kind of responsibility for it, a responsibility that gives it rights against her which are not possessed by any independent person—such as an ailing violinist who is a stranger to her.⁹²

Thus, the responsibility discourse yields a totally different conclusion. Since the mother invited the fetus to dwell inside her womb, and now the fetus has become entirely dependent on her, she has clear responsibilities and therefore also obligations vis-à-vis the fetus.⁹³ That is even more true if we assume that the fetus

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90. For an overview of her supporters and opponents, see the references brought by Lifshitz-Aviram & Margalit, *supra* note 7, at ns. 109–110.
91. Thomson, *supra* note 89, at 57; see also Gregory Dolin, *Defense of Embryonic Stem Cell Research*, 84 IND. L. J. 1203, 1234 (2009) (“Having so consented, and voluntarily taken on the responsibility to care for the baby, the woman may then be prevented from taking actions which would result in the baby’s death.”).
92. Thomson, *supra* note 89, at 58 (original emphasis omitted).
93. For this specific angle, see Pavlischek, *supra* note 89, at 345; David Boonin-Vail, *A Defense of “A Defense of Abortion”: On the Responsibility Objection to Thomson’s Argument*, 107 ETHICS 286, 290 (1997); Priscilla J. Smith, *Responsibilities for Life: How Abortion Serves Women’s Interests in Motherhood*, 17 J. L. & POL’Y 97, 144–45 (2008).

has personhood, to varying degrees, with all the derivative rights and obligations,⁹⁴ as was briefly deliberated at the outset of this article. We endorse her claim, and argue that while the U.S. Supreme Court has not ascribed full legal personhood to the fetus, it has not rejected the possibility of treating the fetus as a person in other contexts and situations.⁹⁵ As has been elsewhere concluded:

Contrary to popular belief, the Supreme Court's pronouncement in *Roe* did not forestall all state determinations of legal personhood [. . .] not only is the legal status of embryos and fetuses an open question under the current law of *Roe v. Wade*, but it will remain an open question even if the case is overruled.⁹⁶

Furthermore, this special stage in the development of human life has a moral meaning and ramifications that should be respected. This unique interim human being should be morally and even legally treated as a juridical person⁹⁷ although it is definitely not a natural person.⁹⁸ We totally agree with the

94. See Melanie G. McCulley, *The Male Abortion: The Putative Father's Right to Terminate His Interests in and Obligations to the Unborn Child*, 7 J. L. & POL'Y 1, 4 (1998); Sally Sheldon, *Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?*, 66 MOD. L. REV. 175, 181 (2003).

95. See *Roe v. Wade*, 410 U.S. 113, 157–58 (1973); Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 HASTINGS L. J. 369, 373 (2007) (“Likewise, the Supreme Court’s determination in *Roe v. Wade* that fetuses are not persons under the Fourteenth Amendment did not answer the question of whether or not they should be considered persons with respect to other areas of law.”); Michael Holzapfel, *The Right to Live, the Right to Choose, And the Unborn Victims of Violence Act*, 18 J. L. CONTEMP. HEALTH L. & POL'Y 431, 460 (2002).

96. Berg, *supra* note 95, at 392.

97. For this notion in the context of abortion, see, e.g., LEONARD W. SUMNER, ABORTION AND MORAL THEORY 57 (1981); KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 3 (1985); Britta van Beers, *The Changing Nature of Law's Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person*, 18 GERMAN L. J. 559, 565, 585 (2017).

98. Berg, *supra* note 95, at 393 (“If this is the case, then the lack of legal personhood recognition will not negate the moral claims of the entity in question. The entity may still have certain moral rights, and others will have moral obligations to respect those rights.”).

following claim that: “[. . .] even in the absence of natural personhood protections prior to birth, the fetus is entitled to significant moral status—status which may be recognized under a juridical personhood framework”.⁹⁹

Such a category of personhood would obligate other individuals, requiring them to act in a clear fashion towards that fetus. It is our opinion that when a woman intentionally brings a fetus into existence by not aborting it in the first stages of the pregnancy, she clearly strengthens her commitment and responsibilities towards it. It is noteworthy that we are speaking only about an intentional preference not to abort and not a situation where a pregnant woman is prohibited from doing so. The latter situation may become much more prevalent in the post-*Roe v. Wade* era, when women may encounter severe obstacles to accessing abortion even in the earliest stages due to lack of abortion clinics, waiting periods, etc.¹⁰⁰ There is no doubt

For an academic discussion of the juridical person in the abortion, see the following seminal articles, see Jenny Teichman, *The Definition of Person*, 60 PHIL. 175, 177–83 (1985); Will, *supra* note 37, at 603 n.249; Ligia M. De Jesus, *The Inter-American Court on Human Rights’ Judgment in Artavia Murillo v. Costa Rica and Its Implications for the Creation of Abortion Rights in the Inter-American System of Human Rights*, 16 OR. REV. INT’L L. 225, 243 (2014).

99. Berg, *supra* note 95, at 396. See also *id.* at 399 (“Likewise, there may be a variety of restrictions on what can be done to a pre-sentient fetus based on the interests of currently recognized persons [. . .] In the period of time between sentience and natural personhood, there may be reasons to provide fetuses the status and protections of juridical persons [. . .] as the fetus develops closer to a newborn infant, both its interests and the interests of others that form the basis for juridical personhood protections may increase.”).

100. See Cynthia Soohoo & Dana Sussman, *The Threat of Murder Charges for Abortion Already Exists*, REPRODUCTIVE RIGHTS PROF BLOG (May 16, 2022), https://lawprofessors.typepad.com/reproductive_rights/2022/05/the-threat-of-murder-charges-for-abortion-already-exists.html [https://perma.cc/4XKU-CS72]; Family Law, *States Enforce Abortion Ban*, FAMILY L. PROF BLOG (June 26, 2022), https://lawprofessors.typepad.com/family_law/2022/06/states-enforce-abortion-bans.html [https://perma.cc/B84N-FENV]; Family Law, *An Ohio Girl Crossed State for Indiana Abortion Care*, FAMILY LAW PROF BLOG (July 7, 2022), https://lawprofessors.typepad.com/family_law/2022/07/an-ohio-

that the most meaningful and far-reaching interest of the fetus is to be born and not to be aborted, and therefore aborting it later on in the advanced stages of the pregnancy should be prohibited.¹⁰¹ Moreover, even Thomson agrees that:

It may be said that what is important is not merely the fact that the fetus is a person, but that it is a person for whom the woman has a special kind of responsibility issuing from the fact that she is its mother [. . .] Surely we do not have any such “special responsibility” for a person unless we have assumed it, explicitly or implicitly.¹⁰²

Likewise, Joel Feinberg proposes that the obligation of the woman to carry the fetus to its term is, *inter alia*, a derivative, to varying degree, of her responsibility for the existence of this pregnancy. He differentiates among seven different scenarios where the degree of the woman’s responsibility for her pregnancy may dramatically vary.¹⁰³ It is actually an application of a much broader moral rule that imposes obligations on the individual who intentionally causes a third party to be dependent on him, even though he is a total stranger to him.

Finally, there are feminist scholars who strongly oppose abortion and actually endorse a “pro-life” conception drawing on responsibility and commitment discourse. Consider the following nonconformist statement: “When abortion is available to all women, all male responsibility for fertility control has been removed. A man need only offer a woman money for the abortion and that’s it: no responsibility, no relationship, no commitment”.¹⁰⁴

girl-crossed-state-for-indiana-abortion-care.html
[<https://perma.cc/LT4F-8APZ>].

101. Berg, *supra* note 95, at 400 (“fetuses [. . .] are considered juridical persons with specific, but not complete, rights [. . .] As a result, we may choose to provide personhood protections for sentient fetuses without granting them the same rights as fully recognized natural persons. Juridical personhood is not a unitary concept; there are different kinds of juridical persons and different rights which may adhere.”).

102. Thomson, *supra* note 89, at 54.

103. JOEL FEINBERG, FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS 64–68 (1992).

104. KATHY RUDY, BEYOND PRO-LIFE AND PRO-CHOICE – MORAL DIVERSITY IN THE ABORTION DEBATE 110 (1996). *See also* Ronald

Similarly, Robin West maintains that the right and the responsibility for the fetus should be conceptualized as intertwined, as connected vessels.¹⁰⁵ Society should respect human rights not only as a prerequisite for personal freedom but also as a condition for personal responsibility, since without the latter, freedom is meaningless and even morally problematic. Since any decision regarding abortion not infrequently involves contradicting responsibilities, we should contemplate not only the woman's freedom of procreation but also, and perhaps even more importantly, the responsibility that is the derivative of this freedom: "The abortion decision typically rests not on a desire to destroy fetal life but on a responsible and moral desire to ensure that a new life will be born only if it will be nurtured and loved".¹⁰⁶

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

The ethic of care, from a liberal perspective, emphasizes and then valorizes precisely the interrelationships, the dependency, the lack of agency, the identification with care and nurturance, the relegation to the private sphere, and in short the sex and gender linked differences that have been used, when an excuse was needed, to justify the two-century-long project of continuing the subordination of women even in a liberal society that should seemingly be committed to ending it.¹⁰⁷

Dworkin, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 51 (2011); RONIT IRSHAI, FERTILITY AND JEWISH LAW: FEMINIST PERSPECTIVES ON ORTHODOX RESPONSA LITERATURE 111 (Joel A. Linsider trans., 2012).

105. Robin West, *Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990). See also Robin West, *Liberalism and Abortion*, 87 GEO. L. J. 2117 (1999); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L. J. 1394 (2009).

106. Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119, 163 (1992); see also Christina San Filippo, *Why Women Should Make the Abortion Decision: Damned If You Do, Damned If You Don't*, RAMAPO L. & SOC'Y J. 4, 4, 19, 22, 31 (2020).

107. West, *Liberalism & Abortion*, *supra* note 105, at 2142.

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

The interconnection between the two shows that the standard individualised approach is particularly inappropriate in relation to the foetal status. The relational approach argues that rather than asking what rights or responsibilities are owed to an individual in response to their status, we ask what responsibilities and rights are owed in relation to a relationship.¹⁰⁸

More specifically, the variant relational ethics of care does not focus on the reciprocal rights and obligations any given individual has in light of his specific status, but inquires what responsibilities are owed regarding any given relationship.¹⁰⁹ As was concluded, “A relational approach can recognise that pregnancy can create responsibilities for pregnant woman [. . .] Abortion decisions are complex and not reducible to straightforward analysis of my rights against the non-person.”¹¹⁰

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108. JONATHAN HERRING, *LAW AND THE RELATIONAL SELF* 139 (2019). *See also* VIRGINIA HELD, *THE ETHICS OF CARE: PERSONAL, POLITICAL, & GLOBAL* 14 (2006); Jonathan Herring, *Caring*, 159 *LAW & JUST. - CHRISTIAN L. REV.* 89, 100 (2007); Herring, *supra* note 12, at 8 (“But Wolf-Devine is correct that such powerful justifications for abortion rights, sit a little uncomfortably with the language of care and relationality promoted by ethics of care.”). *But cf.* Eugenie Gatens-Robinson, *A Defense of Women’s Choice: Abortion and the Ethics of Care*, 30 *S. J. PHIL.* 39, 40, 42–43 (1992).
109. For this branch of the ethics of care, see the following seminal articles: Fiona Robinson, *Globalizing Care: Ethics, Feminist Theory, and International Relations*, 22 *ALTS.: GLOB., LOC., POL.* 113, 118–19, 121 (1997); Carolyn Ellis, *Interviewing and Storytelling from a Relational Ethics of Care*, in *THE ROUTLEDGE INTERNATIONAL HANDBOOK ON NARRATIVE AND LIFE HISTORY* 431, 435 (Ivor Goodson et al., 2016); Helga Kuhse, *Against the Stream: Why Nurses Should Say “No” to a Female Ethics of Care*, 49 *REVUE INTERNATIONALS DE PHILOSOPHY* 285, 301 (1995).
110. Jonathan Herring, *The Termination of Pregnancy and the Criminal Law*, in *HOMICIDE IN CRIMINAL LAW: A RESEARCH COMPANION* 136, 151 (Alan Reed et al. eds., 2018). *See also* Peach, *supra* note 12, at 197 (“[T]he act of sexual intercourse is not in itself the ground of the obligation; it is merely the act that brought about the existence of the child who is biologically connected to the parents. So, it is not so much the choice to have sex that obligates a couple as it is the reality, the relationship, that is brought about by that choice.”); Simo Vehmas, *Parental Responsibility and the Morality*

Furthermore, and this time in direct continuation of Thomson's rights deliberation, even if we assume that the rights of the woman are superior to her fetus's rights, there is an additional consideration that should be added to the equation. In the vast majority of cases where consensual sex has resulted in a pregnancy, we should consider the essence of having a sexual relationship as actually being an implied agreement to accept the obvious resulting outcomes of this action—the pregnancy. As was aptly asserted: “Willingly engaging in behaviour that runs the risk of creating a child, or failing to terminate a pregnancy [. . .] seems a valid moral basis for imposing the prior obligation to “take care of” that child [. . .]”.¹¹¹

In our opinion, we should differentiate between whether consensual or nonconsensual sex, including possible misuse of contraceptive methods/contraceptive failure, such as condom failure,¹¹² has caused the pregnancy. In the first scenario, the new discourses about obligation, commitment and responsibility should be superior, whereas in the latter, the women's rights discourse should govern. From the ethical and legal standpoints, such voluntary acceptance should dramatically incline us towards rejection of any claim of “coerced parenthood,” on the part of either the father or the mother, including the responsibility of the pregnant woman toward the fetus in her womb to allow it to be born.¹¹³ As was elsewhere argued:

of Selective Abortion, 5 ETHICAL THEORY AND MORAL PRACTICE 463, 463 (2002) (“Also, a conscious decision to procreate should bring about conscious assent to assuming obligations as a parent. This implies a duty of caring for any kind of child. [. . .] [T]hey do not have a morally sufficient reason to terminate the pregnancy on the grounds of fetal abnormality.”).

111. DOUGLAS, *supra* note 16, at 29. *See also* Julian Savulescu & Guy Kahane, *The Moral Obligation to Create Children with the Best Chance of the Best Life*, 23 BIOETHICS 274 (2009).
112. *See, e.g.*, Wallis v. Smith, 130 N.M. 214 (N.M. App. 2001); Stephen K. v. Roni L., 105 Cal. App. 3d 640 (Cal. App. 2d 1980).
113. *See* MARGALIT, *supra* note 27, at 82–83. For the close connection between the claim of “coerced parenthood” and the legitimacy of the abortion, *see, e.g.*, Christopher Bruno, *A Right to Decide Not to Be a Legal Father: Gonzales v. Carhart and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141 (2008); Reed Boland, *Civil & Political Rights and the Right to Nondiscrimination: Population Policies, Human Rights, and Legal Change*, 44 AM. U. L. REV. 1257, 1264 (1995)

In my opinion, in any case of imposition of parental status, especially its legal obligations, we should consider the essence of having a conjugal relationship as actually being an implied agreement to accept the obvious resulting outcomes of this action. Therefore, the obligation to provide for the child's support and all his other needs can be deduced from the implied intention to accept the legal parentage that may derive from having sexual relations with the conceived child's mother.¹¹⁴

Consequently, if indeed the woman intentionally has not aborted the fetus at earlier stages of the pregnancy and will carry the fetus to its term, the obligation to provide for the child's support and all the child's other needs can be deduced from the implied intention to accept the legal parentage that may derive from having intentional sexual relations.¹¹⁵ Put differently, the voluntary sexual relationship can teach us about the explicit or at least implied agreement to accept the obvious consequences of this action—bringing the fetus into the world and fulfilling all his or her needs. This argument is supported by several contentions of different scholars who have claimed that structuring the sexual relations in contractual terminology will yield the ultimate conclusion that this action can be understood as an agreement to fulfill the legal responsibilities and obligations stemming from it.¹¹⁶ As has been asserted:

(defining “coerced parenthood”); Lifshitz-Aviram & Margalit, *supra* note 7, at 476–77.

114. MARGALIT, *supra* note 27, at 82. *But see* Melanie B. Jacobs, *Intentional Parenthood's Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy*, 20 J. GENDER, SOC. POL'Y & L. 489, 500 (2012).
115. *See* the following seminal writing in this vein: HOLLY M. SMITH, INTERCOURSE AND MORAL RESPONSIBILITY FOR THE FETUS 229 (William B. Bonderson et al. eds., 1983); Walen Alec, *Consensual Sex without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051 (1997); Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010).
116. *See* Laurene C. Nolan, *Legal Strangers and the Duty of Support: Beyond the Biological Tie- But How Far Beyond the Material Tie?* 41 SANTA CLARA L. REV. 1, 19 (2000). For additional ethical-philosophical justifications, *see* Jones v. Smith, 278 So.2d 339, 343–34 (Fla. App. 1973). For the constitutional aspects of coerced parenthood, *see* Bruno, *supra* note 113, at 154.

The parents of a particular child have this obligation to him, and not someone else, because they are his biological parents; because they, and not someone else, begot and conceived the child. It is the biological bond that creates the obligation of parents to take care of their children, and also the rights that accompany this obligation. This obligation came into existence at conception-fertilization, when the event that grounds the obligation occurred. In begetting and conceiving the child, the parents brought him into existence; they also brought into existence, by the same act, their obligation to nourish and protect him.¹¹⁷

Moreover, the foregoing discussion is also morally and legally supported by the contention that such implied acceptance of the far-reaching ramifications of having sexual intercourse and not aborting the fetus should be conceptualized as a self-commitment of the woman towards her fetus. In our deliberation in section 2a regarding the shift from structural commitment to personal commitment, we defined the latter as “the sense that one is morally obligated to continue a relationship.”¹¹⁸ Indeed, if a woman has chosen to intentionally have sexual intercourse with a man and deliberately has chosen not to abort the fetus at the outset of her pregnancy, she has committed herself toward the potential child. Pregnancy is a gradual process that unfolds over a period of nine months. During this time, the fetus gradually grows and becomes more and more morally dependent on the host, the woman. Thus, step by step, the self-commitment of the woman to become the mother of this fetus is clear. As was concluded by Gillian Douglas:

This shift, I suggest, reflects the general predominance of liberal thought in western societies regarding autonomy and individual rights, giving primacy to the argument that family obligations should be based on consent. It helps explain the growing conceptualisation of “commitment” as a personal [. . .] allegiance [. . .] It also shows why the

117. STEPHEN SCHWARZ, *THE MORAL QUESTION OF ABORTION* 118 (1990). For an academic discussion of it, see DAVID BOONIN, *A DEFENSE OF ABORTION* 229 (2003); Peach, *supra* note 12, at 197; STEPHEN D. SCHWARZ & KIKI LATIMER, *UNDERSTANDING ABORTION: FROM MIXED FEELINGS TO RATIONAL THOUGHT* 70 (2012).

118. Johnson et al., *supra* note 50. See sources cited *supra* note 51.

concept of structural commitment, in the sense of felt burden or obligation, has lost traction as an ideological and moral imperative [. . .].¹¹⁹

The gradually growing self-commitment of cohabitants and married couples toward their spouses in imposing increasingly interdependent spousal obligations is well known.¹²⁰ It may even result in the injured party, usually the woman, being awarded a larger portion in the division of matrimonial assets in the event of a breakdown of the family. Similarly, the personal commitment of the woman toward the fetus she has deliberately chosen to create imposes on her (pre)parental obligations, at least morally speaking. Furthermore, the longer the woman lets the pregnancy continue, the more she morally can be said to be committing to the child's existence and assuming a responsibility to care for it when born.

There is no gender-based discrimination here; it is definitely not a structural commitment, due to her being a woman, but a gender-neutral personal commitment, since she has chosen to become a parent.¹²¹ Men and women are equal in committing themselves towards their forthcoming child. As a woman should be held to all her maternal obligations, likewise the man should be held to all his paternal obligations. Any claim of "paternity fraud" should be rejected out of hand¹²² if the man deliberately had sexual intercourse and there were no extreme circumstances

119. DOUGLAS, *supra* note 16, at 36.

120. *See, e.g.*, Johnson et al., *supra* note 50; Adams & Jones, *supra* note 61, at 1180; Lucinda Ferguson, *Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation*, 22 INT'L J. LAW. POL'Y & FAMILY 61 (2008).

121. *See also* Douglas, *Parenthood: Commitment, Status and Rights*, *supra* note 17, at 235 ("[. . .] the concept of commitment is gendered. It was suggested that for women, commitment may be more likely to be experienced as structural commitment [. . .] Men, by contrast, may be more likely to experience commitment as personal [. . .]").

122. For this notion, *see* Sally Sheldon, 'Sperm Bandits', Birth Control Fraud and the Battle of the Sexes, 21 LEGAL STUDIES 460 (2001); Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J. L. & FEMINISM 193 (2004); Ronald K. Henry, *The Innocent Third Party: Victims of Paternity Fraud*, 40 FAM. L.Q. 51 (2006-2007).

of intentional misrepresentation on the side of the woman.¹²³ Therefore, with all due respect, we categorically disagree with I. Glenn Cohen's following statement: "[I]t is unclear why being responsible for pregnancy should lead to an obligation to gestate when it would not impose obligations derived from violating bodily integrity on genetic fathers vis-à-vis the children for whom they are responsible for creating".¹²⁴

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

A final argument to save the rape and incest exceptions, and in general the one I find the most persuasive, flips the argument on its head in a Hohfeldian way: instead of discussing under what circumstances women have (rape and incest) or do not have (all other cases) a right to abort, we ask under what circumstances they owe a duty to the fetus to gestate it and suggest that no duty is owed uniquely in the circumstances of rape and incest.¹²⁵

Considering the foregoing discussion, we would like to reconsider the following conclusions, which have been claimed in the scholarly literature in the past half-century. According to

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123. See Sarah E. Rudolph, *Inequities in the Current Judicial Analysis of Misrepresentation of Fertility Claims*, 1989 U. CHI. LEGAL F. 331 (1989); Jill E. Evans, *In Search of Paternal Equity: A Father's Right to Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L. J. 1045, 1048 (2005); Yehezkel Margalit, "Paternity Fraud" and Known Sperm Donors - Towards A New Archimedean Point of the Best Interests of the Child and Men's Rights? 16 HAIFA L. REV. 95 (2022) (forthcoming) (Heb.).
124. I. Glenn Cohen, *Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?*, 43 J. L. MED ETHICS 87, 99 (2015); see also I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115 (2008).
125. Cohen, *Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?*, *supra* note 124, at 96. For the rape and incest exceptions, see also Clement Dore, *Republicans on Abortion Rights*, 14 THINK 9 (2015). For the rape and incest exceptions, see also Clement Dore, *Republicans on Abortion Rights*, 14 THINK 9 (2015); Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657 (2007).

Prof. Thomson's comprehensive argument: "They may wish to assume responsibility for it, or they may not wish to. And I am suggesting that if assuming responsibility for it would require large sacrifices, then they may refuse".¹²⁶

Similarly, Jonathan Herring has concluded as follows:

The relational approach offers a solution for these concerns. Through her care and love for the foetus in a wanted relationship it accepts this relationship is deserving of especial moral status. But, where the relationship is unwanted, it has a different moral status and the legal response can be completely different.¹²⁷

These two statements are based on the working premise that the Good Samaritan principle should be interpreted as imposing, at most, obligations of the sort that Prof. Thomson has called "the Minimally Decent Samaritan."¹²⁸ Moreover, in most

126. Thomson, *supra* note 89, at 55; *see also id.* at 64 ("I have been arguing that no person is morally required to make large sacrifices to sustain the life of another who has no right to demand them, and this even where the sacrifices do not include life itself; we are not morally required to be Good Samaritans or anyway Very Good Samaritans to one another.").

127. Herring, *The Termination of Pregnancy and the Criminal Law*, *supra* note 110, at 148. *See also* Herring, *Ethics of Care and the Public Good of Abortion*, *supra* note 12, at 1–2 ("The promotion of caring relationships requires both the support and sustenance of care; but also the termination of relationships which are not nurturing or marked by care. This is especially important if people are hindered by non-caring relationships from entering caring ones."); *id.* at 15 ("[I]t is inconceivable that the law could require a woman to go through pregnancy and birth for a foetus in order to promote a caring relationship. The law is not in the business of coercing relationships through threat of legal sanction, as that undermines the very goodness of a mutually respectful caring relationship."). *See also* Claudia Wiesemann, *Relational Ethics and the Moral Status of the Embryo*, in *PROGRESS IN SCIENCE AND THE DANGER OF HUBRIS: GENETICS, TRANSPLANTATION, STEM CELL RESEARCH* 117 (Constantinos Deltas et al. eds, 2006) (discussing the possible implementation of the relational ethics theory in the parallel context of the frozen embryo); Yehezkel Margalit, *From (Moral) Status (Of the Frozen Embryo) To (Relational) Contract and Back Again to (Relational Moral) Status*, XX *IND. HEALTH L. REV.* 1, at 22 (2023) (forthcoming).

128. Thomson, *supra* note 89, at 62; *see also* Joel Feinberg, *The Moral and Legal Responsibility of the Bad Samaritan*, 3 *CRIM. JUST.*

American jurisdictions, the dominant moral and legal norm is the “No duty to rescue” rule, even when the assistance is costless, and what’s at stake is life or death.¹²⁹ It was concluded that the prominent scholars debating the abortion have used this minimal standard to argue that no moral obligation can be imposed on the mother to give birth to the fetus: “Indeed, as Regan and Manninen point out, we may in tort have duties to aid those who we have put into harmed states, but there is no case law suggesting we must do it with our bodies!”¹³⁰

ETHICS 56, 58–59 (1984); Rosamund Scott, *The Pregnant Woman and the Good Samaritan: Can a Woman have a Duty to Undergo a Caesarean Section?*, 20 OXFORD J. LEGAL STUD. 407, 414–15 (2000); Jovana Davidovic, *Are Humanitarian Military Interventions Obligatory?*, 25 J. APPLIED PHIL. 134, 138 (2008).

129. Compare Shahar Lipshitz, *Distress Exploitation Contracts in the Shadow of No Duty to Rescue*, 86 N.C. L. REV. 315, 320–21 (2008) and Sheldon Nahmod, *The Duty to Rescue and the Exodus Meta-Narrative of Jewish Law*, 16 ARIZ. J. INT’L & COMP. L. 751, 752 (1999) (“[U]nder American common law as conventionally understood there is no affirmative legal duty to rescue, even if the rescue could be accomplished at little or no risk to the prospective rescuer.”); see also Jennifer L. Groninger, *No Duty to Rescue: Can Americans Really Leave a Victim Lying in the Street? What Is Left of the American Rule, and Will It Survive Unabated*, 26 PEPP. L. REV. 353, 353 (1999); Philip W. Romohr, *A Right/Duty Perspective on the Legal and Philosophical Foundations of the No-Duty-to-Rescue Rule*, 55 DUKE L. J. 1025, 1025 (2006); Virginia Mantouvalou, *N v UK: No Duty to Rescue the Nearby Needy?* 72 THE MODERN L. REV. 815, 823 (2009).
130. Cohen, *Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?*, *supra* note 124, at 98. See also Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1601 (1979); Manninen, *supra* note 89, at 42; Thomson, *supra* note 89, at 63 (claiming the notorious case of Kitty Genoves shows the lack of duty towards others. “Indeed, with one rather striking class of exceptions, no one in any country in the world is legally required to do anywhere near as much as this for anyone else.”). For an academic discussion of this case, see John H. Scheid, *Affirmative Duty to Act in Emergency Situations - The Return of the Good Samaritan*, 3 J. MARSHALL J. PRAC. & PROC. 1 (1969); Anne C. Besser & Kalman J. Kaplan, *The Good Samaritan: Jewish and American Legal Perspectives* 10 J. L. & RELIGION 193 (1994); Rachel Manning et al., *The Kitty Genovese Murder and the Social Psychology of Helping: The Parable of the 38 Witnesses*, 62 AM. PSYCH. 555 (2007).

However, Jewish law, which is characterized by its obligations discourse, imposes a much broader “duty to rescue” obligation.¹³¹ This obligation, which obliges someone to use his body and even to jeopardize himself in order to save the life of a third party, “is deeply imbedded in the Exodus metanarrative of slavery and utter hopelessness in Egypt, followed by rescue and redemption by God, revelation on Sinai, and a perpetual covenant of holiness between the rescuer and the rescued.”¹³² A good example of this unique perspective can be deduced from the bystander’s obligation to rescue. As summarized by Aaron Kirschenbaum:

In Judaism, the bystander’s duty to come to the rescue of his fellow man who is in peril is religious, ethical and legal. A citizen is expected to engage in the act of rescue both personally and with his financial resources. He is required, however, neither to give his life nor to place his life in substantial jeopardy to save his fellow.¹³³

Essentially, in the state of the law throughout the common law world, there is no duty to rescue, except when the endangered person and the potential rescuer are linked in a special relationship. In Judaism, however, social solidarity is much stronger and has far-reaching moral and even legal ramifications. The default starting point is completely the opposite of that of the law of states: any individual Jew is obligated to rescue another

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131. See generally Ernest J. Weinrib, *The Duty to Rescue: The Case for a Duty to Rescue*, 90 YALE L. J. 247 (1980); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 WM. & MARY L. REV. 423 (1985); David A. Hyman, *Rescue without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 655 (2006).
132. Nahmod, *supra* note 129, at 773. For a fuller discussion of this unique perspective, see also Ben Zion Eliash, *To Leave or Not to Leave: The Good Samaritan in Jewish Law*, 38 ST. LOUIS U. L. J. 619 (1994); Michael N. Rader, *The “Good Samaritan” In Jewish Law Lessons for Physicians Attorneys and Laypeople*, 22 J. L. MED. 375 (2001).
133. Aaron Kirschenbaum, *The Bystander’s Duty to Rescue in Jewish Law*, 8 J. RELIGIOUS ETHICS 204 (1980). See also Besser & Kaplan, *supra* note 130, at 196; Broyde & Weiner, *supra* note 84 (“Jewish Law’s unique demand for active intervention – in some cases even to the bystander’s own small risk or detriment, as we shall see, but certainly with time and money – expresses a distinctive core value of responsibility for one’s neighbors’ safety and well-being.”).

Jew and/or even a gentile, insofar as it does not profoundly jeopardize himself. One of the best-known Jewish dicta is “[. . .] and whosoever preserves a single soul of Israel, scripture ascribes [merit] to him as though he had preserved a complete world.”¹³⁴ In stark contrast to other legal systems, in Judaism, according to this dictum, any individual is strongly obligated to save the *Imago Dei* (Image of God)¹³⁵ of any other human being as a religious duty.

This is even truer in the case of pregnancy and procreation, due to a paramount Jewish commandment to be fruitful and multiply.¹³⁶ Since every couple is thoroughly obligated to procreate and give birth to children, in any case of doubt regarding to give birth or terminate the pregnancy, the decision should incline towards the former, insofar as there is no clear and immediate threat to the welfare of the mother. It bears emphasizing that this obligation is fulfilled only when the woman has intentionally chosen to procreate following consensual sex and definitely not where she was coerced to become pregnant or where nonconsensual sex, including possible misuse of contraceptive

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134. Rabbi Jay Kelman, *Sanhedrin 37: 1+1=Eternity*, TORAH IN MOTION (Sept. 7, 2017) <https://torahinmotion.org/discussions-and-blogs/sanhedrin-37-11eternity> [https://perma.cc/ZKB8-537X]. For the landmark research discussing this statement, see Menachem Elon, *Jewish Law and Modern Medicine*, 4 ISR. L. REV. 467, 474 (1969); Arthur Gross Schaefer & Peter S. Levi, *Resolving the Conflict between the Ethical Values of Confidentiality and Saving a Life: A Jewish View*, 29 LOY. L. A. L. REV. 1761, 1763 (1996); Irene Merker Rosenberg & Yale L. Rosenberg, *Lone Star Liberal Musings on Eye for Eye and the Death Penalty*, 1998 UTAH L. REV. 505, 541 (1998).
135. For this notion, see Alexander Altmann, “*Homo Imago Dei*” in *Jewish and Christian Theology*, 48 THE J. OF RELIGION 235 (1968); STANLEY J. GRENZ, THE SOCIAL GOD AND THE RELATIONAL SELF: A TRINITARIAN THEOLOGY OF THE IMAGO DEI (2001); Y. Michael Barilan, *Abortion in Jewish Religious Law: Neighborly Love, Imago Dei, and a Hypothesis on the Medieval Blood Libel*, 8 REVIEW OF RABBINIC JUDAISM 1 (2005).
136. For more about this commandment, see Laufer-Ukeles, *supra* note 81, at 120–22; DAVID M. FELDMAN, BIRTH CONTROL AND JEWISH LAW: MARITAL RELATIONS, CONTRACEPTION, AND ABORTION AS SET FORTH IN THE CLASSIC TEXTS OF JEWISH LAW 46–50 (1968); Yehezkel Margalit, *Towards Establishing Parenthood by Agreement in Jewish Law*, 26 AM. U.J. GENDER SOC. POL’Y & L. 647, 650–51 (2018).

methods/contraceptive failure, such as condom failure, has yielded the pregnancy. Finally, this commandment and its consequential strong disposition not to terminate the pregnancy is the answer to a possible question why Jewish law would not say, since childbirth is statistically more dangerous than early abortion, that the duty of rescue does not, in fact, apply to a pregnant woman, as she would be putting her life in jeopardy by continuing the pregnancy.

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

CONCLUSION – A PARTIAL REVITALIZATION OF *ROE V. WADE*?

The dramatic and far-reaching legal and social ramifications of overturning *Roe v. Wade* will inevitably begin to be seen in the very near future, although at the time of writing this epilogue, it is too early to comprehensively estimate. Nonetheless, this article has sought to bridge the conceptual gap between the rationales of the *Roe v. Wade* and *Dobbs v. Jackson* rulings by finding a compromise, a new Archimedean point for the women's rights discourse and the obligations discourse. We suggest differentiating between whether a pregnancy is the result of consensual or nonconsensual sex, including possible misuse of contraceptive methods/contraceptive failure, such as condom failure. In addition, we have argued that in the first scenario, the new discourses should prevail, whereas in the latter, the women's rights discourse should govern. First and foremost, we have provided the descriptive infrastructure by exploring the growing prevalence of the obligations, commitments, and responsibility

discourses in general, as well as more specifically, in family law and the parent-child relationship. This article has mainly attempted to apply these new discourses in the context of the abortion. In support of this attempt, we have enlisted traditional Jewish law's unique "strong" obligations discourse, which easily can be reconciled with the abovementioned civil shift.

This article has sought to reevaluate, on the precipice of the new post-*Roe v. Wade* era, the old-new abortion from the old-new perspective of obligations discourse alongside the prevailing civil human rights discourse. In our opinion, in the second abovementioned scenario of a pregnancy resulting from nonconsensual sex, these social elements strongly incline towards supporting a coerced pregnant woman's right to abort. Since she hadn't freely chosen to be pregnant and become a mother, there are clear social interests in not coercing her to become what she hadn't chosen to become of her free will and with informed consent. However, in the first scenario of a pregnancy resulting from consensual sex, these basic moral and legal pillars incline toward preserving the interests of the fetus, because we cannot ignore its conception and that it actually becomes a juridical person, which intensifies the social interest in bringing it into existence.¹³⁷

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

137. For a similar argument, see Berg, *supra* note 95, at 401.