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# Towards a New Archimedean Point for Maternal Versus Fetal Rights?

*Pnina Lifshitz-Aviram\* & Yehezkel Margalit\*\**

## ABSTRACT

*Some experts in the field have defined the year 2019 as “a critical time for abortion rights,” since during the first half of the year alone 19 American states enacted almost 60 abortion restrictions, including 26 abortion bans, and state legislators have introduced many more. This Article reevaluates whether these recent shifts may amount to a real legal tsunami that could yield a new Archimedean point for women’s and fetuses’ rights, or only a temporary and shallow wave, which will probably abate after the Trump presidency. After exploring in a nutshell the recent restrictive as well as liberal developments in American abortion regulation, this Article will extensively elaborate on the real meaning and consequences of the 2019 Alabama case of “Baby Roe.” This Article will critically examine whether this is indeed a groundbreaking precedent with far-reaching results or just an additional local ruling in a state with one of the most stringent policies on abortion in the United States. After briefly exploring the two main and central doctrines—best interests of the child and protection of his rights—this Article will thoroughly and comprehensively discuss their problematic and nuanced implementation in the hotly debated issue of abortion. Finally, this Article will discuss whether the country is slowly but surely stepping towards a new conceptualization of the fetus’s rights and more broadly towards a new Archimedean point for maternal versus fetal rights.*

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## INTRODUCTION

Some experts have defined the year 2019 as “a critical time for abortion rights,”<sup>1</sup> since during the first half of the year alone 19 American states enacted almost 60 abortion restrictions, including 26 abortion bans, and state legislators introduced many more.<sup>2</sup> Furthermore, as will be extensively elaborated in the next section, by March 4, 2020, all clinics intending to comply with the Trump Administration’s new gag rule must have submitted a statement along with evidence that they have separated facilities providing Title X services from those providing abortion services or referrals.<sup>3</sup> Indeed, the hotly debated abortion issue has been featured

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1. Elizabeth Nash, *Abortion Rights in Peril — What Clinicians Need to Know*, 381 N. ENGL. J. MED. 497, 497 (2019).

2. Elizabeth Nash et al., *State Policy Trends at Mid-Year 2019: States Race to Ban or Protect Abortion*, GUTTMACHER INST. (July 21, 2019), <https://www.guttmacher.org/article/2019/07/state-policy-trends-mid-year-2019-states-race-ban-or-protect-abortion> [<https://perma.cc/7PAZ-E9A8>]; see also Laura Portuondo, *Abortion Regulation as Compelled Speech*, 67 UCLA L. REV. 2 (2020); *Ohio’s Fetal Abortion Ban Is Latest In Roe v. Wade Battle*, FAM. L. PROF. BLOG (Apr. 21, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/04/ohios-fetal-abortion-ban-is-latest-in-roe-v-wade-battle-.html](https://lawprofessors.typepad.com/family_law/2019/04/ohios-fetal-abortion-ban-is-latest-in-roe-v-wade-battle-.html) [<https://perma.cc/7CL8-WGK9>].

3. Korin Miller & Zahra Barnes, *Here’s Why the Gag Rule on Abortion Is So Dangerous and Misguided*, SELF (Aug. 21, 2019), <https://www.self.com/story/domestic-gag-rule-abortion-what-this-means> [<https://perma.cc/7BFD-6DAU>];

strongly in the 2020 presidential campaign, as in all the previous ones.<sup>4</sup> This time, however, it has played a much more substantial and central role, especially in light of the current majority-conservative makeup of the American Supreme Court.<sup>5</sup>

Indeed, abortion has been and remains one of the most bitter and controversial dilemmas—medical, political, moral, legal, religious, social, psychological, and demographic—throughout human history.<sup>6</sup> From time immemorial, this complicated issue has been one of the most intractable problems, inextricably intertwined with moral values and medical facts. Some view it as unresolvable<sup>7</sup> because the two sides on the issue are so

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see Carole I. Chervin *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401 (1989); Kumar Anuradha et al., *Conceptualising Abortion Stigma*, 11 CULTURE, HEALTH & SEXUALITY 625 (2009); Ann M. Starrs, *The Trump global gag rule: an attack on US family planning and global health aid*, 389 LANCET 485 (2017).

4. See, e.g., Maris A. Vinovskis, *Abortion and the Presidential Election of 1976: A Multivariate Analysis of Voting Behavior*, 77 MICH. L. REV. 1750 (1979); Byron W. Daynes & Raymond Tatalovich, *Presidential Politics and Abortion, 1972–1988*, 22 PRESIDENTIAL STUD. Q. 545 (1992); Ashutosh Mishra, *Partisan Issue Linkages in Presidential Campaign Speeches: A Case Study of Abortion*, CUREJ: C. UNDERGRADUATE RES. ELECTRONIC J. (2019); *On Abortion Rights, 2020 Democrats Move Past ‘Safe, Legal and Rare,’* FAM. L. PROF. BLOG (Nov. 25, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/11/on-abortion-rights-2020-democrats-move-past-safe-legal-and-rare.html](https://lawprofessors.typepad.com/family_law/2019/11/on-abortion-rights-2020-democrats-move-past-safe-legal-and-rare.html) [<https://perma.cc/PV4M-XYJN>].

5. See, for example, Susan Jaffe, *US election 2020: public health*, 396 LANCET 946 (2020); Erin O’Leary, *Raising the Stakes: When a Supreme Court Justice Dies during an Election Year*, SLU L. J. ONLINE 49 (2020), available at <https://scholarship.law.slu.edu/lawjournalonline/49> [<https://perma.cc/KZ7K-M695>]; Lawrence O. Gostin et al., *Health Policy in the Supreme Court and a New Conservative Majority*, 324 JAMA 2157 (2020), available at <https://jamanetwork.com/journals/jama/fullarticle/2772515> [<https://perma.cc/P5G8-5D2D>].

6. See AVRAHAM STEINBERG, ENCYCLOPEDIA OF JEWISH MEDICAL ETHICS (Fred Rosner trans., 2003); see, e.g., JOHN M. RIDDLE, CONTRACEPTION AND ABORTION FROM THE ANCIENT WORLD TO THE RENAISSANCE (1992); N. E. H. HULL & PETER C. HOFFER, *ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY* (2010); MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* (2015).

7. See ENCYCLOPEDIA OF BIOETHICS (Stephen G. Post ed., 2003); see also EILEEN L. McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996); Walter Block & Roy Whitehead, *Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy*, 4 APPALACHIAN J. L. 1 (2005); Caitlin E. Borgmann, *Roe v. Wade’s 40th Anniversary: A Moment of Truth for the Anti-Abortion-Rights*

adamantly opposed. What for one side is the basic human right of any woman to autonomously control her pregnant body, is for the other side nothing less than killing a human being and feticide.<sup>8</sup> In other words, equally thoughtful moral theories and reasoning have produced greatly divergent conceptions of abortion. Even in 2019, as of this writing, the longstanding debate appears to be in a deadlock.<sup>9</sup>

From ancient times until today, the morality of medically assisting a pregnant woman to abort her fetus has been dubious, for most cultures.<sup>10</sup> An absolute prohibition on rendering medical assistance to abort a fetus features in the Hippocratic Oath, which dictates, “I shall not give a woman an abortive pessary.”<sup>11</sup> Roman Catholicism has a similar, stringent approach, which has always treated abortion as a serious sin,<sup>12</sup> whereas the

*Movement?*, 24 STAN. L. & POL’Y REV. 245, 269 (2013) (“There will surely never be a lasting cease-fire between opponents and supporters of abortion rights.”).

8. See, e.g., Nancy K. Rhoden, *The New Neonatal Dilemma: Live Births from Late Abortions*, 72 GEO. L. J. 1451 (1984); Alison Tsao, *Fetal Homicide Laws: Shield against Domestic Violence or Sword to Pierce Abortion Rights?*, 25 HASTINGS CONST. L. Q. 457 (1998); Frank A. Chervenak & Laurence B. McCullough, *An ethically justified practical approach to offering, recommending, performing, and referring for induced abortion and feticide*, 201 AM. J. OBSTETRICS & GYNECOLOGY 560 (2009).

9. See, e.g., Angel Li, *Northern Ireland deadlock impedes abortion rights progress*, 393 LANCET 1794 (2019); N. E. H. HULL ET AL., *THE ABORTION RIGHTS CONTROVERSY IN AMERICA: A LEGAL READER* (2018); JENNY BROWN, *WITHOUT APOLOGY: THE ABORTION STRUGGLE NOW* (2019).

10. See, e.g., Isabel De La Fuente Fonnest et al., *Attitudes among health care professionals on the ethics of assisted reproductive technologies and legal abortion*, 79 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 49 (2000); ROBERT YOUNG, *MEDICALLY ASSISTED DEATH* (2007); Julian Savulescu & Udo Schuklenk, *Doctors Have no Right to Refuse Medical Assistance in Dying, Abortion or Contraception*, 31 BIOETHICS 162 (2016).

11. Thomas Rütten & Leonie von Reppert-Bismarck, *Receptions of the Hippocratic Oath in the Renaissance: The Prohibition of Abortion as a Case Study in Reception*, 51 J. HIST. MED. & ALLIED SCI. 456 (1996); see also Howard Markel, *“I Swear By Apollo”—On Taking the Hippocratic Oath*, 350 N. ENGL. J. MED. 2026, 2027 (2004); STEVEN H. MILES, *THE HIPPOCRATIC OATH AND THE ETHICS OF MEDICINE* 81 (2005).

12. See John T. Noonan, Jr., *Abortion and the Catholic Church: A Summary History*, 12 NAT. L. F. 85 (1967); TIMOTHY BYRNES & MARY C. SEGERS, *THE CATHOLIC CHURCH AND THE POLITICS OF ABORTION: A VIEW FROM THE STATES* (1991); Rishona Fleishman, *The Battle against Reproductive Rights: The Impact of the Catholic Church on Abortion Law in Both International and Domestic Arenas*, 14 EMORY INT’L L. REV. 277 (2000); Michele Dillon, *Cultural Differences in the Abortion Discourse of the Catholic Church: Evidence from*

Protestant point of view has been much more complex and varied.<sup>13</sup> Judaism has a much more lenient conception, which takes a compromising view, allowing abortion under several circumstances, if there are justified moral grounds.<sup>14</sup> Likewise, in Islam, there is a general permission to abort on medical and health grounds, but only up to a certain stage of pregnancy.<sup>15</sup>

In modernity, by contrast, during the past three years, U.S. states and countries abroad have taken some liberal steps. It is noteworthy that in 2017 a federal district court blocked a Texas ban on the safest and most popular practice of medicated abortion, and simultaneously an Oklahoma district court blocked a restriction on women's access to medicated abortions.<sup>16</sup> In addition, against the Trump Administration's attempts to reduce access to birth control, members of the U.S. Senate and House of Representatives have introduced the Protect Access to Birth Control Bill.<sup>17</sup>

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*Four Countries*, 57 SOC. RELIGION 25 (1996); Kenneth Mulligan, *Pope John Paul II and Catholic Opinion Toward the Death Penalty and Abortion*, 87 SOC. SCI. Q. 739 (2006).

13. See Wm. Alex McIntosh & Jon P. Alston, *Acceptance of Abortion among White Catholics and Protestants, 1962 and 1975*, 16 J. SCI. STUD. RELIGION 295 (1977); Barbara Finlay, *Gender Differences in Attitudes toward Abortion among Protestant Seminarians*, 37 REV. RELIGIOUS RES. 354 (1996); D. Paul Sullins, *Catholic/Protestant Trends on Abortion: Convergence and Polarity*, 38 J. SCI. STUD. RELIGION 354 (1999).

14. See generally DAVID M. FELDMAN, *BIRTH CONTROL AND JEWISH LAW: MARITAL RELATIONS, CONTRACEPTION, AND ABORTION AS SET FORTH IN THE CLASSIC TEXTS OF JEWISH LAW* (1968); DAVID M. FELDMAN, *MARITAL RELATIONS, CONCEPTION AND ABORTION IN JEWISH LAW* (1978); DANIEL SCHIFF, *ABORTION IN JUDAISM* (2002); STEINBERG, *supra* note 6; YECHIEL M. BARILAN, *JEWISH BIOETHICS: RABBINIC LAW AND THEOLOGY IN THEIR SOCIAL AND HISTORICAL CONTEXTS* (2014).

15. See, e.g., Leila Hessini, *Abortion and Islam: Policies and Practice in the Middle East and North Africa*, 15 REPROD. HEALTH MATTERS 75 (2007); Kiarash Aramesh, *Abortion: An Islamic Ethical View*, 6 IRAN J. ALLERGY, ASTHMA & IMMUNOLOGY 29 (2007); Yassar Abdullah Alamri, *Islam and Abortion*, 43 J. ISLAMIC MED. ASS'N N. AM. 39 (2011); Vardit Rispler Chaim, *The Right Not To Be Born: Abortion of the Disadvantaged Fetus in Contemporary Fatwas*, 89 MUSLIM WORLD 130 (1999); Oren Asman, *Abortion in Islamic Countries – Legal and Religious Aspects*, 23 MED. & L. 73 (2004); Leila Hessini, *Islam and Abortion: The Diversity of Discourses and Practices*, 39 IDS BULLETIN 18 (2009).

16. *Whole Woman's Health v. Paxton*, 280 F. Supp. 3d 938 (W.D. Tex. 2017); *Okla. Coal. For Reprod. Just. v. Cline*, 441 P.3d 1145 (Okla. 2019) (noting the lower court decision).

17. Ursula Barry, *Ireland on the Frontline: Challenging Foetal Rights Ideologies*, in *DEBATING THE EIGHTH: REPEAL OR RETAIN?* (Conor O'Riordan ed.,

At the end of October 2019, California became the first state to mandate free access to abortion medication at public colleges as a compulsory duty.<sup>18</sup> Similarly, from a global perspective, during the past two years Ireland, Chile, South Korea, Argentina and Mexico have all legalized abortion.<sup>19</sup> New Zealand has moved to decriminalize abortion and, more generally, since the year 2000 a total of 27 countries have broadened legal access to abortion.<sup>20</sup>

This Article will reevaluate, at the beginning of 2020, whether the abovementioned tectonic shifts amount to a real legal tsunami that could

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2018). *But see* Edgar Walters, *Three Texas Towns Vote in Favor Of “Sanctuary Cities for the Unborn,” Hoping to Ban Abortion*, TEX. TRIBUNE (Jan. 15, 2020), <https://www.texasstandard.org/stories/three-texas-towns-vote-in-favor-of-sanctuary-cities-for-the-unborn-hoping-to-ban-abortion/> [<https://perma.cc/46EP-5U4L>]; Jeffrey B. Bingenheimer & Patty Skuster, *The Foreseeable Harms of Trump’s Global Gag Rule*, 48 STUD. FAM. PLAN. 279 (2017); Nathan C. Lo & Michele Barry, *The Perils of Trumping Science in Global Health—The Mexico City Policy and Beyond*, 376 N. ENGL. J. MED. 1399 (2017); Melissa Murray, *Intimate Choices, Public Threats — Reproductive and LGBTQ Rights under a Trump Administration*, 376 N. ENGL. J. MED. 301 (2017).

18. S.B. 24, Reg. Sess. (Cal. 2019); *California Is First State to Mandate Access to Abortion Medication at Public Colleges*, FAM. L. PROF. BLOG (Oct. 24, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/10/california-is-first-state-to-mandate-access-to-abortion-medication-at-public-colleges-.html](https://lawprofessors.typepad.com/family_law/2019/10/california-is-first-state-to-mandate-access-to-abortion-medication-at-public-colleges-.html) [<https://perma.cc/LJS8-HLGS>]; *see also* Alexandra Desantis, *Massachusetts Bill Would Allow Abortion until Birth*, NAT’L REV. (Jan. 3, 2020), <https://www.nationalreview.com/corner/massachusetts-bill-would-allow-abortion-until-birth/> [<https://perma.cc/MH87-V9MH>]; Marie Albiges, *Virginia Democrats plan to remove many abortion restrictions Republicans have supported*, VIRGINIAN-PILOT (Jan. 27, 2020), <https://www.pilotonline.com/government/virginia/vp-nw-abortion-bills-20200127-z6p7rzzlzbaporukek66y5rje-story.html> [<https://perma.cc/J39Z-F7L9>].

19. *See* JOHAN A. ELKINK ET AL., *THE DEATH OF CONSERVATIVE IRELAND? THE 2018 ABORTION REFERENDUM* (2019), [www.ucd.ie/geary/static/publications/workingpapers/gearywp201911.pdf](http://www.ucd.ie/geary/static/publications/workingpapers/gearywp201911.pdf) [<https://perma.cc/CN4H-QD36>]; VIVALDI MACHO & LIETA VALERIA, *ABORTION IN CHILE: BIOPOLITICS AND CONTEMPORARY FEMINIST RESISTANCE* (2019); LAURA RAHM, *GENDER-BIASED SEX SELECTION IN SOUTH KOREA, INDIA AND VIETNAM: ASSESSING THE INFLUENCE OF PUBLIC POLICY* 101 (2020); *Mexico’s Supreme Court Affirms Abortion Access as Right*, REPROD. RTS. PROF. BLOG (Nov. 22, 2019), [https://lawprofessors.typepad.com/reproductive\\_rights/2019/11/mexicos-supreme-court-affirms-abortion-access-as-right.html](https://lawprofessors.typepad.com/reproductive_rights/2019/11/mexicos-supreme-court-affirms-abortion-access-as-right.html) [<https://perma.cc/XL3E-K2R8>].

20. *See New Zealand Moves to Decriminalize Abortion*, FAM. L. PROF. BLOG (Aug. 6, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/08/new-zealand-moves-to-decriminalize-abortion.html](https://lawprofessors.typepad.com/family_law/2019/08/new-zealand-moves-to-decriminalize-abortion.html) [<https://perma.cc/JP4B-MJXB>]; Nash, *supra* note 1.

yield a new Archimedean point for women's and fetuses' rights. As was recently concluded, in the Trump era in the United States, fetal rights have gained traction in the most dangerous of ways, reflected in the undermining of contraceptive access and support services, the attack on Obamacare, and escalating hostility towards abortion services and providers.<sup>21</sup>

Or it may all be just a temporary and shallow wave, which will probably abate after the Trump presidency. It should be emphasized that when society debates over the appropriate range of women's rights to autonomous and unfettered access to abortion, the obvious flip side is a possibly critical infringement of the fetus's right to be born.<sup>22</sup> That the abortion debate seems to be at a dead end is strongly connected to the fact that recent decades have witnessed a dramatic strengthening of both women's<sup>23</sup> as well as fetuses' rights.<sup>24</sup> This strengthening in turn fuels the lively discussion of this issue, which urgently requires fresh and up-to-date reevaluation of this subject as suggested in this Article.

After this brief introduction and outline of its main goal, this Article will start with a discussion in Part I by exploring the latest restrictive steps in American abortion regulation, including the recent national laws and federal and administrative actions, as well as the most up-to-date liberal movements in the opposite direction, as briefly enumerated above. Bearing in mind these contradictory and colliding shifts, in Part II this Article will extensively describe the bizarre facts and innovative ruling in the 2019 Alabama "Baby Roe" case, which has been harshly criticized by many scholars, not least as "a troubling court decision for reproductive

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21. Barry, *supra* note 17.

22. See Robert F. Drinan, *The Inviolability of the Right to Be Born*, 17 W. RES. L. REV. 465 (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. 356 (1986); Shiva M. Singh et al., *Fetal Alcohol and the Right to Be Born Healthy*, 5 FRONTIERS GENETICS 356 (2014).

23. See Suzanne M. Alford, *Is Self-Abortion a Fundamental Right?*, 52 DUKE L. J. 1011 (2003); KATE GREASLEY & CHRISTOPHER KACZOR, *ABORTION RIGHTS: FOR AND AGAINST* (2017); UDI SOMMER & ALIZA FORMAN-RABINOVICI, *PRODUCING REPRODUCTIVE RIGHTS: DETERMINING ABORTION POLICY WORLDWIDE* (2019) ("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.").

24. See CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* (1996); Katheryn D. Katz, *The Pregnant Child's Right to Self-Determination*, 62 ALB. L. REV. 1119 (1999); RITA JOSEPH, *HUMAN RIGHTS AND THE UNBORN CHILD* (2009).



rights.”<sup>25</sup> This Article will critically examine whether this is indeed a groundbreaking precedent with far-reaching results or only an additional local ruling in a state with one of the most stringent stances on abortion in the United States.

This recent ruling will serve as a springboard for exploring, in Part III, the full range of emerging fetal rights as stemming from the much broader process of the entrenchment of two doctrines—the best interests of the child and the protection of his rights. Part IV will discuss whether the abovementioned ruling, together with legislative and administrative shifts, may actually amount to a new conceptualization of the fetus’s rights. This inquiry will directly lead to the main section of the Article, Part V, which will deal with the much more complicated question of whether society is slowly but surely stepping towards a new Archimedean point for maternal versus fetal rights.

#### I. RECENT RESTRICTIVE DEVELOPMENTS IN AMERICAN ABORTION REGULATION

As briefly mentioned at the outset of this Article, during the past half-decade, the number and severity of legislative restrictions on abortion have surged across the United States.<sup>26</sup> Some abortion activists have claimed that the ultimate target of these restrictions is to challenge the traditional, permissive attitude of the U.S. Supreme Court.<sup>27</sup> In their view, these harsh

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25. See Dov Fox et al., *A Troubling Court Decision for Reproductive Rights: Legal Recognition of Fetal Standing to Sue*, 322 JAMA 23 (2019).

26. See *Rape and Incest Exceptions Stripped from South Carolina Bill Banning Most Abortions*, CBS NEWS (Oct. 23, 2019), <https://www.cbsnews.com/news/rape-and-incest-exceptions-stripped-from-south-carolina-bill-banning-most-abortions/> [<https://perma.cc/PHR2-XUMD>]; *South Carolina Governor Says There’s “No Constitutional Right To Abortion,”* FAM. L. PROF. BLOG (Nov. 5, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/11/south-carolina-governor-says-theres-no-constitutional-right-to-abortion-.html](https://lawprofessors.typepad.com/family_law/2019/11/south-carolina-governor-says-theres-no-constitutional-right-to-abortion-.html) [<https://perma.cc/6234-84EB>]; *Overview of States Who Passed Abortion Restrictions*, FAM. L. PROF. BLOG (Nov. 6, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/11/overview-of-states-who-passed-abortion-restrictions-.html](https://lawprofessors.typepad.com/family_law/2019/11/overview-of-states-who-passed-abortion-restrictions-.html) [<https://perma.cc/PV7S-H6D4>].

27. See Nash et al., *supra* note 2; Nash, *supra* note 1, at 498; Mattie Quinn, *Restrictive Abortion Laws Have Consequences That Reach Far Beyond State Lines*, SELF (July 31, 2019), <https://www.self.com/story/abortion-restrictions-ripple-effect> [<https://perma.cc/N6QV-RECH>]. See generally CAROL SANGER, *ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST CENTURY AMERICA* (2017). See also *Amicus Brief Filed by Members of Congress Invites the Supreme Court to Overrule Roe and Casey, What Is Really Making the Court’s Abortion Precedent “Unworkable”?*, REPROD. RTS. PROF. BLOG (Jan. 10, 2020),

restrictions are aimed at proscribing some, most, or even all sorts of abortions. But even if the nightmare they allege does not come fully true, so far the tough and detrimental consequences of these restrictions and bans on women's health are clear and immediate.<sup>28</sup> The current American turmoil regarding the abortion dilemma also has far-reaching and substantial effects outside the United States,<sup>29</sup> as well as in the international context.<sup>30</sup>

As part of the Trump administration's stringent attitude towards abortion, the traditional "gag rule,"<sup>31</sup> which prevents health clinics from receiving federal funding for family planning services if they perform

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[https://lawprofessors.typepad.com/reproductive\\_rights/2020/01/amicus-brief-filed-by-members-of-congress-invite-the-supreme-court-to-overrule-roe-and-casey-what-is-really-making-the-court.html](https://lawprofessors.typepad.com/reproductive_rights/2020/01/amicus-brief-filed-by-members-of-congress-invite-the-supreme-court-to-overrule-roe-and-casey-what-is-really-making-the-court.html) [<https://perma.cc/4WX6-GWY4>].

28. See, e.g., *As Abortion Restrictions Increase, Women Partake In "Self-Induced" Abortions*, FAM. L. PROF. BLOG (Sept. 27, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/09/as-abortion-restrictions-increase-women-partake-in-self-induced-abortions-.html](https://lawprofessors.typepad.com/family_law/2019/09/as-abortion-restrictions-increase-women-partake-in-self-induced-abortions-.html) [<https://perma.cc/L43K-K6U3>]; Barry, *supra* note 17 ("[A] Toronto woman died from a self-induced, coat-hanger abortion."); ENCYCLOPEDIA OF BIOETHICS, *supra* note 7, at 19 ("[S]elf-induced abortion has often involved risky procedures . . .").

29. See DAPHNA HACKER, LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION 117–48 (2016); *Dutch Doctor Provides Abortion Pills to U.S. Women, Sues FDA*, REPROD. RTS. PROF. BLOG (Oct. 7, 2019), [https://lawprofessors.typepad.com/reproductive\\_rights/2019/10/dutch-doctor-provides-abortion-pills-to-us-women-sues-fda.html](https://lawprofessors.typepad.com/reproductive_rights/2019/10/dutch-doctor-provides-abortion-pills-to-us-women-sues-fda.html) [<https://perma.cc/T4CZ-U2DW>]; SOMMER & FORMAN-RABINOVICI, *supra* note 23.

30. See, e.g., Ariana Eunjung Cha, *U.S. joins 19 nations, including Saudi Arabia and Russia: 'There is no international right to an abortion,'* WASH. POST (Sept. 24, 2019), <https://www.washingtonpost.com/health/2019/09/24/us-joins-nations-including-saudi-arabia-russia-there-is-no-international-right-an-abortion/> [<https://perma.cc/4D78-VL9Y>]; see also JEAN VAN DER TAK, ABORTION, FERTILITY, AND CHANGING LEGISLATION: AN INTERNATIONAL REVIEW (1974); Stellina Jolly, *Right to Abortion under International Law*, 23 EUBIOS J. ASIAN & INT'L BIOETHICS 72 (2013); Carole J. Petersen, *Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities*, 28 J. L. & HEALTH 121, 144–60 (2015).

31. See Miller & Barnes, *supra* note 3; Chervin, *supra* note 3; Anuradha et al., *supra* note 3; Starrs, *supra* note 3; *Rust v. Sullivan*, 500 U.S. 173 (1991); Scott E. Johnson, *Rust v. Sullivan: The Supreme Court Upholds the Title X Abortion-Counseling Gag Rule*, 94 W. VA. L. REV. 209 (1991); Michael Fitzpatrick, *Rust Corrodes: The First Amendment Implications of Rust v. Sullivan*, 45 STAN. L. REV. 185 (1992); Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587 (1993).

abortions or even just refer patients to clinics that do, has been dramatically expanded.<sup>32</sup> As a result, any physician, nurse, or family planning consultant who is eager to fulfill their basic duty to share with the patient the full picture of her medical situation or possibilities must conceal all of the information regarding abortion. Moreover, they are even forbidden to answer a patient's questions about how to access an abortion and to refer her to other clinics, where she may be exposed to this option.

As a direct result of this international and domestic gag rule, many Title X grantees announced that they would leave the Title X program instead of complying with this draconian rule. This federal program, which makes family planning and other preventive health services more affordable and accessible, used to finance around 4,000 clinics, which allowed them to assist over 4 million people each year.<sup>33</sup> Now the gag rule requires them to implement a "financial and physical separation" between both facilities and programs that provide any kind of health service and those that provide abortions.<sup>34</sup>

Planned Parenthood, which serves around 1.5 million Title X patients every year, or about 40% of all people who receive care from a Title X clinic, left this federal family planning program on August 19, 2019. Presumably, it is the first important organization to quit the federal

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32. See Barry, *supra* note 17; Walters, *supra* note 17; Bingenheimer & Skuster, *supra* note 17; Lo & Barry, *supra* note 17; Murray, *supra* note 17; Daniel Grossman, *Sexual and Reproductive Health under the Trump Presidency: Policy Change Threatens Women in the USA and Worldwide*, 43 J. FAM. PLAN. & REPROD. HEALTH CARE 89 (2017); Jerome A. Singh & Salim S. Abdool Karim, *Trump's "Global Gag Rule": Implications for Human Rights and Global Health*, 5 LANCET GLOB. HEALTH 387 (2017); Sarah Pugh et al., *Not Without a Fight: Standing Up Against the Global Gag Rule*, 25 REPROD. HEALTH MATTERS 14 (2017).

33. See Chervin, *supra* note 3; Alexandra A. E. Shapiro, *Title X, the Abortion Debate, and the First Amendment*, 90 COLUM. L. REV. 1737 (1990); Christina I. Fowler et al., *Patterns and trends in contraceptive use among women attending Title X clinics and a national sample of low-income women*, 1 CONTRACEPTION: X 100004 (2019).

34. See, e.g., Janice Hopkins Tanne, *Trump's proposals would restrict US abortions and deny sexual health services for millions*, 361 BMJ 1 (2018); Eve Espey & Charlotte Pickett, *Don't mess with Title X, vital for women's health*, 63 CONTEMPORARY OB/GYN (Sept. 2018); Lesley M. Harlem, *Federal Court Grants Nationwide Preliminary Injunction Blocking New Title X "Gag Rule" from Taking Effect*, SYRACUSE L. REV. (May 2, 2019), <https://lawreview.syr.edu/federal-court-grants-nationwide-preliminary-injunction-blocking-new-title-x-gag-rule-from-taking-effect/> [<https://perma.cc/25QQ-N9GS>].

program, but certainly not the last.<sup>35</sup> Those individuals who use Title X-funded clinics are often the youth, members of the LGBTQ+ community, low-income people of color or with disabilities, and those living in rural communities who are underinsured or uninsured. Consequently, these groups will be left especially vulnerable to reduced access to healthcare, if any at all.

## II. THE INNOVATIVE? 2019 ALABAMA “BABY ROE” CASE

Alabama no doubt has become one of the most conservative states in the country regarding abortion. In the past, its legislature has traditionally prevented women from accessing abortion, unless their health or lives were in danger. Similarly, in 2013, in the case of *Ex Parte Ankrom*, the Alabama Supreme Court ruled that the state’s chemical endangerment law, originally written to protect children from dangerous labs, can be used to prosecute women who use drugs during pregnancy.<sup>36</sup> Furthermore, in 2019 Alabama enacted a total ban on abortion with a consequent criminal penalty of imprisonment for up to 99 years for physicians who perform it. Consequently, “unborn children” are legal people for all intents and purposes. For example, in Alabama’s criminal code the word “person” refers to an “unborn child in utero at any stage of development, regardless of viability,”<sup>37</sup> and another law states that it is the “public policy of this

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35. See Sarah Primrose, *The Attack on Planned Parenthood: A Historical Analysis*, 19 UCLA WOMEN’S L. J. 165 (2012); *Planned Parenthood Withdraws From Title X Due To Trump’s Abortion Rule*, FAM. L. PROF. BLOG (Aug. 29, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/08/planned-parenthood-withdraws-from-title-x-due-to-trumps-abortion-rule-.html](https://lawprofessors.typepad.com/family_law/2019/08/planned-parenthood-withdraws-from-title-x-due-to-trumps-abortion-rule-.html) [<https://perma.cc/UA22-8UR3>]; Janice Hopkins Tanne, *AMA and Planned Parenthood sue to halt new US restrictions on abortion*, 364 BMJ 1102 (2019).

36. See Alisha Marano, *Punishing Is Helping: An Analysis of the Implications of Ex Parte Ankrom and How the Intervention of the Criminal Justice System Is a Step in the Right Direction toward Combating the National Drug Problem and Protecting the “Child,”* 35 U. LA VERNE L. REV. 113 (2013); Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781, 788 (2014); Catherine Langford, *On Making <Person>s: Ideographs of Legal <Person>hood*, 52 ARGUMENTATION & ADVOC. 125, 135 (2015); see also Alex Wigglesworth, *Her baby was stillborn because of meth, police say. Now she’s charged with murder*, L.A. TIMES (Nov. 8, 2019, 12:31 PM), <https://www.latimes.com/california/story/2019-11-08/woman-charged-with-murder-after-delivering-stillborn-baby> [<https://perma.cc/TZV4-N9ZZ>].

37. See Kristie M. Pierce, *Pregnancy, Drug Use, and the Unborn Child: When a Baby’s Lifeline Leads to Neonatal Drug Withdrawal*, 9 LIBERTY U. L. REV. 181, 191 n.94 (2014); Marion Abecassis, *Artificial Wombs: The Third Era*

state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate.”<sup>38</sup>

In March 2019, the “Baby Roe” case in Alabama sparked a bitter debate about the real meaning and possible far-reaching consequences of the court’s ruling in taking Alabama’s pro-life conception to an extreme.<sup>39</sup> Judge Frank Barger of the Madison County Probate Court allowed a man, Ryan Magers, whose girlfriend had ended a pregnancy two years earlier, to sue an unknown pharmaceutical company, the manufacturer of the pill she had used, and the clinic that gave it to her, Alabama Women’s Center for Reproductive Alternatives, LLC. This 21-year-old man had been in a relationship with his girlfriend, age 14, when she became pregnant, but they never got married. He claimed that when they discovered she was pregnant in early 2017, he “repeatedly pleaded” with her to carry the pregnancy to term and give birth, but she wanted to have an abortion.<sup>40</sup> The bottom line of his complaint was as follows:

On February 10, 2017, per the appointment, the Mother went to the Alabama Women’s Center to proceed with the abortion. Baby Roe was approximately six weeks old on February 10, 2017. The Defendants gave the Mother a pill, which she took, that induced

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*of Human Reproduction and the Likely Impact on French and U.S. Law*, 27 HASTINGS WOMEN’S L. J. 3, 13 n.83 (2016); Myrisha S. Lewis, *Criminalizing Substance Abuse and Undermining Roe v. Wade: The Tension between Abortion Doctrine and the Criminalization of Prenatal Substance Abuse*, 23 WM. & MARY J. WOMEN & L. 185, 202–03 (2017).

38. ALA. CONST. amend. 930, § (b); see Craig A. Shirley, *Alabama’s Wrongful Death Act and the Unborn Plaintiff*, 49 CUMB. L. REV. 195, 199–200 (2018); Rebecca B. Reingold & Lawrence O. Gostin, *State Abortion Restrictions and the New Supreme Court: Women’s Access to Reproductive Health Services*, 322 JAMA 21 (2019); Kari White et al., *Change in Second-Trimester Abortion After Implementation of a Restrictive State Law*, 133 OBSTETRICS & GYNECOLOGY 771 (2019).

39. See Fox et al. *supra* note 25.

40. See, e.g., Jill Filipovic, *The terrifying case of a six-week embryo suing an abortion clinic*, GUARDIAN (Mar. 8, 2019), <https://www.theguardian.com/commentisfree/2019/mar/08/the-terrifying-case-of-a-six-week-embryo-suing-an-abortion-clinic> [<https://perma.cc/7KJ3-LS4R>]; Ariana Eunjung Cha & Emily Wax-Thibodeaux, *Alabama judge allows man to sue clinic on behalf of aborted fetus*, WASHINGTON POST (Mar. 6, 2019), <https://www.washingtonpost.com/health/2019/03/06/alabama-judge-allows-man-sue-clinic-behalf-aborted-fetus/> [<https://perma.cc/7TVR-8B8L>]; Nicole Rojas, *Alabama Man Suing Abortion Clinic on Behalf of His Girlfriend’s Unborn Fetus*, NEWSWEEK (Mar. 6, 2019, 7:04 PM), <https://www.newsweek.com/alabama-man-allowed-sue-abortion-clinic-behalf-his-unborn-fetus-1354404> [<https://perma.cc/C3K5-ZMZE>].

the death of Baby Roe. As a result of the Defendants' actions, Plaintiff's child, Baby Roe, was killed. . . . The pill that Defendants manufactured, distributed, and gave to the Mother caused Baby Roe's death. Defendants, separately and severally, wrongfully caused Baby Roe's death.<sup>41</sup>

Normatively speaking, this case recognizes, for perhaps the first time in American history, the legal rights of an aborted embryo, awarding him full status as a person and, *inter alia*, countenancing his status as a co-plaintiff in suing for his "wrongful death."<sup>42</sup> As mentioned at the outset of this article, some scholars described the case as "a troubling court decision," because "[b]y elevating the legal status of the fetus, the Alabama judgment provides at least indirect support for all manner of restrictions on women's interests and reproductive freedom. . . . Magers' suit reflects a troubling trend in the dozen states that let fetal interests supersede that of women."<sup>43</sup>

In these scholars' view, as if this dramatic ruling were not troubling enough from a substantive aspect, it is also problematic on procedural grounds. Due to the fact that the new Alabama anti-abortion law is unenforceable because it directly contradicts the Supreme Court ruling of *Roe v. Wade*, what this means jurisprudentially is that the latter overrides the former. In stark contrast to the legislative avenue, however, this new case does not necessarily require overturning *Roe v. Wade*. Furthermore, these scholars are deeply worried about opening Pandora's Box by allowing physicians to be sued by fetuses and other bizarre possibilities that accompany expanding the variety of potential defendants.<sup>44</sup>

The latter concern is viable, for since this case was decided in March 2019, at least one court has rendered a more troubling and astonishing ruling concerning fetal rights. Marshae Jones, age 27, was five months

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41. See Complaint at 3–5, *Magers v. Ala. Women's Ctr. for Reprod. Alternatives, LLC*, No. 47-CV-2019-900259.00 (Cir. Ct. Madison Cnty. Feb. 5, 2019).

42. See Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965); Timothy Stoltzfus Jost, *Rights of Embryo and Fetus in Private Law*, 50 AM. J. COMP. L. 633, 642, 646 (2002); DOV FOX, *BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW* (2019).

43. Fox et al., *supra* note 25, at E1; see also Cha & Wax-Thibodeaux, *supra* note 40; see also Rosemary Westwood, *What Will Alabama's 'Baby Roe' Lawsuit Mean for the Abortion Debate?*, PAC. STANDARD (Mar. 15, 2019), <https://psmag.com/social-justice/an-alabama-lawsuit-is-bringing-mens-desires-into-the-abortion-debate> [<https://perma.cc/H428-DHYH>].

44. Fox et al., *supra* note 25, at E1.

pregnant when she got into a fight with a 23-year-old coworker in December 2018 in Alabama. The coworker was losing the fight when she pulled out a gun and fired. The bullet killed Jones' five-month-old fetus. Jones was arrested after a grand jury issued an indictment asserting that she intentionally caused the death of her fetus by starting a fight, charging her with the loss of her own pregnancy, based on the claim that being pregnant, and being the victim of what would ordinarily be viewed as a crime, is itself a crime.<sup>45</sup>

Thus, as some scholars foresaw, a pregnant woman was convicted, with the protection of "unborn life" providing the basis for her arrest, only because she was pregnant, and even though she was herself a shooting victim. This occurrence relates to Michele Goodwin's longstanding critique of how women can be punished unjustly only because they are pregnant,<sup>46</sup> since the only reasonable justification for turning Jones from the victim of a crime into a criminal perpetrating no less than a felony is her pregnancy.

Arguably, on the other hand, one may cast doubt on the allegedly revolutionary and far-reaching meaning and consequences of the Alabama "Baby Roe" case. A careful examination of the state's judicial history reveals the clearly stringent trajectory of its jurisprudence even long before this "troubling court decision." During the years 1972 to 1974, there was a cluster of three cases before the state supreme court.<sup>47</sup> The first ruling in this trilogy, *Huskey v. Smith*, determined that courts should recognize a

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45. See Francie Diep, *The Alabama Woman Charged With Her Fetus' Death Is Part of a Long History of Blaming Black Women for Harm to Their Unborn*, PAC. STANDARD (June 28, 2019), <https://psmag.com/news/the-alabama-woman-charged-with-her-fetus-death-is-part-of-a-long-history> [<https://perma.cc/RL8F-W3RP>]; Josiah Bates, *An Alabama Woman Was Charged After Someone Else Killed Her Fetus. Critics Say New Laws Are 'Criminalizing Pregnancy.'* TIME (July 3, 2019, 4:37 PM), <https://time.com/5616371/alabama-woman-charged-criminalizing-pregnancy/> [<https://perma.cc/9B9H-8HAN>]; National Advocates for Pregnant Women, *Alabama Must Stop Prosecuting Pregnant Women*, MS. (July 5, 2019), <https://msmagazine.com/2019/07/05/alabama-must-stop-prosecuting-pregnant-women/> [<https://perma.cc/3W3X-UZPM>].

46. Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657 (2007); Michele Goodwin, *The Pregnancy Penalty*, 26 HEALTH MATRIX 17 (2016); MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2019); see also Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH, POLITICS & POL'Y L. 299 (2013).

47. See *Huskey v. Smith*, 265 So. 2d 596 (Ala. 1972); *Wolfe v. Isbell*, 280 So. 2d 758 (Ala. 1973); *Eich v. Town of Gulf Shores*, 300 So. 2d 354 (Ala. 1974).

wrongful death claim arising from a prenatal injury to a fetal child, even though he had been born alive but later died.<sup>48</sup> The second, *Wolfe v. Isbell*, enabled the parent of a child to bring a wrongful-death cause of action when the latter, who had been born alive, died from prenatal injuries that were negligently inflicted on the fetus, even though it was nonviable.<sup>49</sup> Lastly, in *Eich v. Town of Gulf Shores*, in very similar circumstances, the court dealt with the case of a child who suffered prenatal injuries and was not born alive.<sup>50</sup>

In its reasoning in the *Eich* decision, the court explicitly stated that “due to the pervading public purpose of our wrongful death statute, which is to prevent homicide through punishment of the culpable party,”<sup>51</sup> parents were permitted to bring a wrongful-death action for the death of their stillborn fetus. Contrarily, approximately 20 years later, in two cases decided on the same date,<sup>52</sup> the court regressed from the trend of expanding the meaning of “minor child” as set previously. Eventually, however, two more recent cases<sup>53</sup> again adopted the same broader interpretation,

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48. See *Huskey v. Smith*, 265 So. 2d 596 (Ala. 1972); see also Gary J. Rickner, *Wrongful Death - Prenatal Injuries - Claim Allowed Where Fetus Viable at Time of Injury and Child Born Alive*, 4 CUMB.-SAMFORD L. REV. 200, 200–01 (1973); Juliet G. St. John, *Wrongful Death - Prenatal Injuries - Action Allowed Where Fetus Is Eight and One-Half Months at Time of Injury and Subsequently Stillborn*, 5 CUMB.-SAMFORD L. REV. 362, 363–66 (1974); David W. McDowell, *Torts - Wrongful Death - Nonviable Fetus Is Not a Minor Child under Alabama's Wrongful Death Act*, 24 CUMB. L. REV. 159, 161–75 (1993).

49. *Wolfe*, 280 So. 2d 758; see also Frank J. Hartye, *Tort Recovery for the Unborn Child*, 15 J. FAM. L. 276, 280, 287 (1976); Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 47–54, 120 (1993); Marisa L. Mascaro, *Preconception Tort Liability: Recognizing a Strict Liability Cause of Action for DES Grandchildren*, 17 AM. J. L. & MED. 435, 438, 441 (1991).

50. See *Eich*, 300 So. 2d 354; see also David Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 MO. L. REV. 639, 642–62 (1980); Sheryl Anne Symonds, *Wrongful Death of the Fetus: Viability Is Not a Viable Distinction*, 8 U. PUGET SOUND L. REV. 103, 104–08 (1984); Rodney A. Max, *A New Tort in Alabama: Wrongful Employment Termination in Violation of Public Policy*, 12 AM. J. TRIAL ADVOC. 39, 50–51 (1988).

51. *Eich*, 300 So. 2d 354; see also Max, *supra* note 50, at 50; Shirley, *supra* note 38, at 207.

52. *Gentry v. Gilmore*, 613 So. 2d 1241 (Ala. 1993); *Lollar v. Tankersley*, 613 So. 2d 1249 (Ala. 1993).

53. See *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011) (“[The Brody Act’s] change constitutes clear legislative intent to protect even nonviable fetuses from homicidal acts.”); *Stinnett v. Kennedy*, 232 So. 3d 202 (Ala. 2016); Shirley, *supra* note 38, at 222.



reinforcing the extremely stringent conception of fetal rights in Alabama. Moreover, under the state's current Wrongful Death Act, the term "minor child" now includes any person, or fetus, regardless of viability, and physicians are not exempt from any civil liability for a death that occurs as a result of their actions. As was precisely summed up recently, "The Alabama Supreme Court's recent holdings in *Mack* and *Stinnett* have continued the trend started by the trilogy of rulings in *Huskey*, *Wolfe*, and *Eich* expanding the wrongful-death law in favor of unborn children and have done away with viability as a standard."<sup>54</sup>

Presumably, it can still be claimed that the "Baby Roe" ruling is more extreme than all its predecessors, since it does not deal with a married couple who together sue a third party for the loss of their almost mature, stillborn baby. In the "Baby Roe" case, the man—who was not married to the 14-year-old minor—sued the two third parties that had been involved in the abortion, the unknown pharmaceutical company, and the clinic that had given her the medication, while wisely not suing the woman. One could reasonably doubt whether it makes any sense to give birth to a child under such circumstances, where a young minor was not married to the father, which may profoundly damage his best interests and basic rights.<sup>55</sup> Furthermore, the abortion had been conducted only six weeks into the pregnancy, early in the first trimester, which is when almost all induced abortions occur, and only a handful of states, namely, Louisiana, Georgia, Kentucky, Mississippi, and Ohio, prohibit abortion at this early stage of gestation.<sup>56</sup>

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54. Shirley, *supra* note 38, at 222; *see also* Hamilton v. Scott, 97 So. 3d 728 (Ala. 2012) ("Viability is irrelevant to determining the existence of prenatal injuries, the extent of prenatal injuries, or the cause of prenatal death. Viability is irrelevant to proving causation . . .").

55. *See* I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187, 1203 n.48 (2012); DAVID BOONIN, *THE NON-IDENTITY PROBLEM AND THE ETHICS OF FUTURE PEOPLE* (2014).

56. *See* Yehezkel Margalit, *Abortion*, in *MARRIAGE AND DIVORCE IN AMERICA: ISSUES, TRENDS, AND CONTROVERSIES* (Jaimee L. Hartenstein ed., forthcoming 2021); *ENCYCLOPEDIA OF BIOETHICS*, *supra* note 7, at 4–6; Nash, *supra* note 1, at 498.

## III. THE BEST INTERESTS OF THE CHILD AND PROTECTING HIS RIGHTS

As recently explored elsewhere,<sup>57</sup> in the last few decades society has witnessed a strengthening of the rights of individuals who are part of an intact marriage, including children's rights.<sup>58</sup> In the past, the law treated the child socially and legally as an object that belongs to his parents. Because the law did not recognize children as subjects with independent legal status, they were deprived of any legal rights or recognized interests. Put differently, childhood status denied the child the rights and interests that society ascribes to any mature person. However, the gradual reduction of this status began in the 18th century and reached its peak in the mid-20th century, with judicial recognition of children's constitutional rights,<sup>59</sup> the emergence of social movements such as the Children's Rights Movement,<sup>60</sup> and the enactment of international conventions bolstering children's rights, the most important being the United Nations Convention on the Rights of the Child (CRC).<sup>61</sup> Notably, several scholars, whom we would like to join, forcefully claim that the revolution in children's rights

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57. See YEHEZKEL MARGALIT, DETERMINING LEGAL PARENTAGE: BETWEEN FAMILY LAW AND CONTRACT LAW 85–89 (2019); see also THE OXFORD HANDBOOK OF CHILDREN AND THE LAW (James G. Dwyer ed., 2019).

58. See HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 5–13 (2005); see also Sarah Abramowicz, *Childhood and the Limits of Contract*, 21 YALE J. L. & HUMAN. 37 (2009); see also MARGALIT, *supra* note 57, at 107–15; 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).

59. See Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 400–09 (1997); Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 22–34, 110 (1994).

60. 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 94 (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).

61. See G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989); see also TREVOR BUCK, INTERNATIONAL CHILD LAW (2014).

has not yet reached its peak, and that we should continue to fight to reach this deserving destination.<sup>62</sup>

The shift in the legal status of children is clearly reflected in two main doctrines: the best interests of the child (BIC) and the protection of the child's rights. The former is much older and has long served as the ultimate factor in any process of making decisions or conducting any legal action regarding children. It is embedded explicitly in various jurisdictions, both in local legislation<sup>63</sup> and in the judiciary system, as well as in international conventions. Likewise, over time, but especially since the end of the 20th century with the strengthening of the human rights discourse, the BIC doctrine has also been invigorated. Calls for the recognition of children's rights were heard already in the 1960s to 1970s,<sup>64</sup> but they have become amplified in the writing in this field since then.

Thus, with the penetration of the human rights discourse into the institution of marriage and family law, and with the assimilation of the understanding that children are autonomous agents,<sup>65</sup> society is witnessing an accelerated legal discussion of children's rights in a variety of scenarios: the right of the child to receive his maintenance and all his needs; the child's entitlement to demand his separation from his parents; the cancellation of tort immunity for parents and the consequent flood of negligence claims by children against their parents; the right of the child to be represented separately from his parents in any legal procedure and to be directly heard by the judge regarding his custody; and more. These entitlements are very important in any case where conflict may arise between a child and his parents, such as when considering whether to rescind the latter's legal parenthood due to their neglect or abuse of the child; the right of the child to know his genealogical origins and the identity of his parents; the entitlement to be adopted; any dilemma of relocation, which requires consideration of the BIC; and recognition of the

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62. See, e.g., JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006); BARBARA B. WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* (2008) .

63. See RESTATEMENT (SECOND) OF CONTRACTS § 191 (AM. L. INST. 1981).

64. See, e.g., PAUL ADAMS ET AL., *CHILDREN'S RIGHTS: TOWARD THE LIBERATION OF THE CHILD* (1971); Henry H. Foster & Doris J. Freed, *A Bill of Rights for Children*, 6 FAM. L. Q. 343 (1972).

65. See Katherine H. Federle, *An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585 (1995); see also Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 C.D. L. REV. 255, 260–81 (1979).

equal or even special rights of children born to same-sex couples or, alternatively, to racial minorities and other protected groups.<sup>66</sup>

As mentioned above, several international conventions anchor the rights of children as a basic human right due to their special needs, including the BIC as a central consideration in any legislation aimed at promoting children's welfare.<sup>67</sup> Moreover, several scholars and rulings have held that in any given conflict between the parents' rights and the rights of the children, the latter should prevail.<sup>68</sup> In the present context, the issue is whether the law should extend this brand new conception to the prenatal fetus also, with all the obvious difficulties and challenges that entails. There are even radical calls for abolishing the parental right to raise one's children and for converting it into only a narrow parental legal privilege to make any decision regarding the children, if it is not damaging to one of the child's interests.<sup>69</sup> It should be emphasized that the discourse on children's rights is clearly undermining the traditional framework of both family autonomy and parental authority, and actually outspokenly criticizes the accepted social order.

There is a contrary opinion, unsurprisingly, that maintains that children's rights cannot exist independently from their parents' rights.<sup>70</sup> In the context of abortion, one might justly claim that the absolute rights of the mature mother should easily override the contested rights of the unborn fetus. In addition, others argue that there is an irrebuttable presumption

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66. See Yehezkel Margalit, *Determining Legal Parentage by Agreement* 74–75 (2011) (Ph.D. thesis, Bar-Ilan University) (on file with author).

67. See G.A. Res. 44/25, *Convention on the Rights of the Child* (Nov. 20, 1989); see also LAWRENCE J. LEBLANC, *THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS* (1995); Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J. L. & POL'Y 41, 59–62 (2016).

68. See Janet L. Richards, *Redefining Parenthood: Parental Rights Versus Child Rights*, 40 WAYNE L. REV. 1227 (1994) (arguing that the BIC should trump the rights of the parents); Dolgin, *supra* note 59 (arguing that the BIC is the superior factor over parental autonomy); see also Annette R. Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L. J. 141, 171 (2004); Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 42 (2008).

69. See James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371 (1994).

70. MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 13–14 (2005); Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635 (2002); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071 (2003); Emily Buss, *Children's Associational Rights? Why Less is More*, 11 WM. & MARY BILL RTS. J. 1101 (2003).

that what is good for the parents will always be good also for their children.<sup>71</sup> Thus, the law definitely should not withdraw the parents' rights because of the rights of their children, especially since the harm to the entitlements of the former cannot be constitutional.<sup>72</sup> An even more extreme contention maintains that in the long run giving exaggerated consideration to children's rights may be harmful to children themselves,<sup>73</sup> due to, *inter alia*, the fact that the rights of children are too wide and amorphous, and have still not been accorded enough political and philosophical recognition. Because the human rights discourse has been created in the adult world, unfortunately the appropriate method for translating it into the children's realm has not yet been found.<sup>74</sup>

#### IV. A NEW CONCEPTUALIZATION OF THE FETUS'S RIGHTS?

After having explored the general strengthening of the two doctrines—the BIC and the protection of their rights—this Part, the main normative chapter of this Article, will start the exploration with one of the most substantial and central pillars of the abortion dilemma: whether the fetus has any rights at all. A supplementary question is whether the recent shifts and developments in the American legal system have elevated these rights to a new high.

The debate over fetal rights is ancient. Nonetheless the ontological status of the fetus can be treated as a separate and independent issue apart from its moral status, though they traditionally have been discussed as an intertwined dilemma.<sup>75</sup> Although we absolutely agree with the claim that

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71. 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 (2005).

72. See *id.*; David D. Meyer, *Reforming Parentage Laws: The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857 (2006); see also Naomi Cahn, *Parental Rights and CRISPR*, SMU SCI. & TECH. L. REV. (forthcoming 2021).

73. See Barbara B. Woodhouse, *Talking About Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 FAM. L. Q. 105, 107 (2002); Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BYU L. REV. 606 (1976).

74. See Appell, *supra* note 68; Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267 (1995).

75. ENCYCLOPEDIA OF BIOETHICS, *supra* note 7, at 8; see also Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 531 (1989); MARY A. WARREN, *MORAL STATUS: OBLIGATIONS TO PERSONS AND OTHER LIVING THINGS* (1997); STEPHEN NAPIER,

“critical debate over the moral status of an embryo or fetus waits in the shadows,”<sup>76</sup> this Part focuses only on one aspect of it: the fetus’s rights.

Undoubtedly, one of the most important turning points in the recognition of the legitimate rights of the fetus is the oft-cited American ruling of *Roe v. Wade*.<sup>77</sup> In this seminal case, as well as in *Doe v. Bolton*,<sup>78</sup> the U.S. Supreme Court recognized and legalized the right of a woman to abort her fetus only during the first trimester. During the second trimester, however, the state may regulate abortion, if it reasonably relates to the preservation and protection of the woman. After the point of viability, when the fetus is capable of surviving outside the womb, approximately 23 to 24 weeks into pregnancy,<sup>79</sup> the state has a compelling interest in protecting human life.<sup>80</sup> Thus, states can regulate or even proscribe entirely

PERSONS, MORAL WORTH, AND EMBRYOS: A CRITICAL ANALYSIS OF PRO-CHOICE ARGUMENTS (2011).

76. Borgmann, *supra* note 7, at 263.

77. *Roe v. Wade*, 410 U.S. 113 (1973); *see also* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005); HULL & HOFFER, *supra* note 6; MARY ZIEGLER, BEYOND ABORTION: *ROE V. WADE* AND THE BATTLE FOR PRIVACY (2018); Bertha John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973); D. H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); Bertha A. Manninen, *Rethinking Roe v. Wade: Defending the Abortion Right in the Face of Contemporary Opposition*, 10 AM. J. BIOETHICS 33 (2010).

78. *See* Norman Vieira, *Roe and Doe: Substantive Due Process and the Right of Abortion*, 25 HASTINGS L. J. 867 (1974); Richard Delgado & Juith 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* (1984).

79. As if the accurate determination of the viability point were not vague and amorphous enough, there have been bitter criticisms of this point as the appropriate watershed line between permissible and non-permissible abortion. *See* Hyun Jee Son, *Artificial Wombs, Frozen Embryos, and Abortion: Reconciling Viability’s Doctrinal Ambiguity*, 14 UCLA WOMEN’S L. J. 213 (2005); Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L. REV. 713 (2007); I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 J. L., MED. & ETHICS 235 (2011).

80. *See, e.g.*, Mary Anne Wood & Lisa Bolin Hawkins, *State Regulation of Late Abortion and the Physician’s Duty of Care to the Viable Fetus*, 45 MO. L. REV. 394 (1980); Sam S. Balisy, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209 (1987); PNINA LIFSHITZ-AVIRAM, *ABORTIONS - A MOUTH FOR THOSE WITH NO VOICE: WOMEN’S RIGHT*

a woman's right to end the life of her unborn child once the child is considered viable. Put differently, the flip side of these groundbreaking verdicts is the constitutionally recognized right of the viable fetus to be born, and the rights of the pregnant woman should at the least be restricted in light of this right.<sup>81</sup>

But even after these revolutionary rulings and as of this writing,<sup>82</sup> the debate over the fetus's rights has continued to spark much moral and ethical discussion,<sup>83</sup> to draw media attention, and to give rise to a prolific legal scholarship. The main reason for this unusual phenomenon is that the recognition of fetal rights should reasonably derive from the more basic but extremely complicated question of whether a fetus is indeed a person and has personhood in philosophical and legal terms—a dilemma that the Supreme Court elegantly dodged.<sup>84</sup> Furthermore, even if one assumes that the fetus is a person,<sup>85</sup> or even equivalent to that, the question remains as to how the fetus's rights and the woman's rights should justly be balanced.

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V. FETUS RIGHTS – DOES A FETUS HAVE A MORAL PERSONALITY? (forthcoming 2021, on file with the authors).

81. Barry, *supra* note 17 (“The term *foetal rights* came into wide usage following the *Roe v. Wade* case . . .”); see also Jeffrey L. Lenow, *The Fetus as a Patient: Emerging Rights as a Person*, 9 AM. J. L. & MED. 1 (1983); Charles J. Dougherty, *The Right to Begin Life with Sound Body and Mind: Fetal Patients and Conflicts with Their Mothers*, 63 U. DET. L. REV. 89 (1985).

82. See, e.g., CAROLE E. JOFFE, DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER *ROE V. WADE* (1995); ZIEGLER, *supra* note 6; JOHANNA SCHOEN, ABORTION AFTER *ROE*: ABORTION AFTER LEGALIZATION (2015).

83. See, e.g., Drinan, *supra* note 22; Schedler, *supra* note 22; Singh et al., *supra* note 22; Dawn Johnsen, *The Creation of Fetal Rights: Conflict with Woman's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L. J. 599 (1986); 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*, in ABORTION PAPERS IRELAND: VOLUME 2 (Aideen Quilty et al. eds., 2013).

84. See 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 REPROD. BIOMED. ONLINE 689 (2012); J. F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 39 AM. J. L. & MED. 573 (2013).

85. See, e.g., Jane English, *Abortion and the Concept of a Person*, 5 CANADIAN 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 25 (2005); Naomi Cahn & June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459 (2007).

However, in stark contrast to the debate over abortion, which, as mentioned above, is still stuck in a deadlock, the academic discussion of the fetus's rights has been strengthening exponentially. Even a superficial survey of the ethical and legal literature over the past two decades quickly reveals the extent to which the recognition of these rights has expanded. Since the start of the 2000s, every year scholars have written approximately 100 to 150 articles regarding the fetus's rights, with the peak around the years 2012 to 2017.<sup>86</sup> There are at least two main reasons for this strengthening process. First, there is the more general ascension of the discourse of the BIC and the protection of his rights, which have been penetrating step by step into the abortion dilemma. Second, there are the endless efforts of the pro-life movement to outlaw abortion at any cost.<sup>87</sup> As already noted above, the dilemma of whether a fetus is a person, or at least equivalent to that, with all the obvious consequential rights, is one of the bitterest bones of contention between the supporters and opponents of abortion.<sup>88</sup>

As opposed to the traditional contentions that only a mature person should have the full range of human rights, and that the fetus, even one who is fully viable and about to be born, should be excluded from them,<sup>89</sup>

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86. See, e.g., JUDE IBEGBU, RIGHTS OF THE UNBORN CHILD IN INTERNATIONAL LAW (2000); JOSEPH, *supra* note 24; EMMA CAVE, THE MOTHER OF ALL CRIMES: HUMAN RIGHTS, CRIMINALIZATION AND THE CHILD BORN ALIVE (2018); Philip Alston, *The Unborn Child and Abortion under the Draft Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156 (1990); Nova D. Janssen, *Fetal Rights and the Prosecution of Women for Using Drugs during Pregnancy*, 48 DRAKE L. REV. 741 (2000); Tanya Goldman, *Vo v. France and Fetal Rights: The Decision Not to Decide*, 18 HARV. HUM. RTS. J. 277 (2005).

87. See CAROL MASON, KILLING FOR LIFE: THE APOCALYPTIC NARRATIVE OF PRO-LIFE POLITICS (2002); ZIAD W. MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS (2010); Joonas Räsänen, *Why pro-life arguments still are not convincing: A reply to my critics*, 32 BIOETHICS 628 (2018).

88. See *supra* notes 83–84; see also David Westfall, *Beyond Abortion: The Potential Reach of a Human Life Amendment*, 8 AM. J. L. & MED. 97 (1982); JEAN REITH SCHROEDEL, IS THE FETUS A PERSON?: A COMPARISON OF POLICIES ACROSS THE FIFTY STATES (2000); Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J. L. & PUB. POL'Y 539 (2017).

89. See, e.g., Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 OXFORD REV. 5 (1967); Karen G. Crockett & Miriam Hyman, *Live Birth: A Condition Precedent to Recognition of Rights*, 4 HOFSTRA L. REV. 805 (1976); Rhonda Copelon et al., *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 REPROD. HEALTH MATTERS 120 (2005).



more and more philosophers and legal scholars, whom we would like to join,<sup>90</sup> argue precisely the opposite: that a fetus, especially a viable one, is much more akin to a person than otherwise and therefore should have rights. As has been pointedly argued, “If a state has an obligation to protect the life of this child the moment after it is born, the state undoubtedly should exercise its right to protect this child the moment before it is born.”<sup>91</sup>

Similarly, although scholars have debated the notion of fetal rights over the past decades in many jurisdictions through their courts and legal systems, only recently have several countries explicitly anchored the rights of the fetus both judicially and legislatively. For example, “Ireland, as one of a small number of countries that have integrated fetal rights into statute and constitutional law . . . could influence future decisions in an altered U.S. Supreme Court.”<sup>92</sup>

Obviously, the debate over which kind or range of rights precisely should be ascribed to the fetus is legitimate, but, in any event, the most basic human right to be born is among them.<sup>93</sup> As one scholar recently concluded:

A viable fetus is a beginning-of-a-person and even a beginning-of-a-person is entitled to rights similar in essence to the rights of a human being. . . . I have seen fit to establish this model and have sought to place a legal and moral obligation for the viable fetus on the pregnant woman. In a similar way, even an approach that sees

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90. See PNINA LIFSHITZ-AVIRAM, DELICATE BALANCE (2016); LIFSHITZ-AVIRAM, *supra* note 80.

91. Wood & Hawkins, *supra* note 80, at 422; see also Jessica L. Waters, *In Whose Best Interest?* New Jersey Division of Youth and Family Services v. V.M. and B.G. and the Next Wave of Court-Controlled Pregnancies, 34 HARV. J. L. & GENDER 81, 111 (2011) (“In doing so, the court extended the child welfare statute to cover a woman’s actions prior to giving birth and essentially deemed a fetus to be a ‘child’ under the law.”).

92. Barry, *supra* note 17; Samuel Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed Human Life Legislation*, 68 VA. L. REV. 333 (1982); Howard Minkoff & Lynn M. Paltrow, *The Rights of ‘Unborn Children’ and the Value of Pregnant Women*, 36 HASTINGS CTR. REP. 26 (2006). *But see Northern Ireland Considering Decriminalization Of Abortion*, FAM. L. PROF. BLOG (Oct. 23, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/10/northern-ireland-considering-decriminalization-of-abortion-.html](https://lawprofessors.typepad.com/family_law/2019/10/northern-ireland-considering-decriminalization-of-abortion-.html) [<https://perma.cc/L5BL-EFHS>].

93. See *supra* note 22, 24, 83; see also Lynn D. Wardle, *When Does a Right to Life Arise?*, in THE OXFORD HANDBOOK OF CHILDREN AND THE LAW (James G. Dwyer ed., 2019).

fit to minimize state intervention in the life of the individual to a great extent, could justify legislation that recognizes the status of the viable fetus and its right to life based on the principle of harm.<sup>94</sup>

Incidentally, the discourse of the rights of the fetus is not infrequently used merely to disguise the attempt by the pro-life movement to block the option of abortion.<sup>95</sup> This movement has made countless attempts to add to the U.S. Constitution a Human Life Amendment to protect the life and rights of the fetus. Starting in 1974, one week after the Supreme Court decided the famous case of *Roe v. Wade*, lasting through 1983, when the Senate held its first and only floor vote on this amendment, and continuing up to the date of this writing, proponents of this amendment have proposed or introduced hundreds of versions of it.<sup>96</sup> While these constant efforts have not yet succeeded, nonetheless numerous American states have sought to amend their local legislation to prohibit the vast majority of abortions, on the ground of protecting the fetus's rights. Besides Alabama,

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94. LIFSHITZ-AVIRAM, *supra* note 80.

95. See KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1985).

96. See *The Personhood Movement: Where it came from and where it stands today*, PROPUBLICA, <https://www.propublica.org/article/the-personhood-movement-timeline> [<https://perma.cc/DJ7F-APQ9>]; see also Westfall, *supra* note 88; Manninen, *supra* note 77; Bertha Alvarez Manninen, *Beyond Abortion: The Implications of Human Life Amendments*, 43 J. SOC. PHIL. 140 (2012).

these states include Louisiana,<sup>97</sup> Kentucky, Georgia,<sup>98</sup> Mississippi, Ohio, Missouri,<sup>99</sup> and others.

## V. TOWARDS A NEW ARCHIMEDEAN POINT OF RIGHTS?

Not to discount the foregoing discussion regarding the accelerating recognition of the BIC and the protection of their rights, extending also to fetuses, but that is only the first question. We turn now to the much more acute supplemental question—how these rights should be balanced against the mother’s rights. At the outset, it is crucial to untie the Gordian knot between both these sets of rights and the legitimacy of abortion, for the following three reasons.

First, it is doubtful whether all the sophisticated deliberations around the dilemma of abortion concern only rights. Despite the central

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97. See *Louisiana Law on Abortion To Be Signed by Governor*, FAM. L. PROF. BLOG (May 30, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/05/louisiana-law-on-abortion-to-be-signed-by-governor-.html](https://lawprofessors.typepad.com/family_law/2019/05/louisiana-law-on-abortion-to-be-signed-by-governor-.html) [<https://perma.cc/TEB4-ZKQK>]; *Louisiana Seeks Supreme Court’s Permission For State Abortion*, FAM. L. PROF. BLOG (July 26, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/07/louisiana-seeks-supreme-courts-permission-for-state-abortion-law-.html](https://lawprofessors.typepad.com/family_law/2019/07/louisiana-seeks-supreme-courts-permission-for-state-abortion-law-.html) [<https://perma.cc/NX7C-9SRX>]; *Louisiana May Become First State Without Abortion Access*, FAM. L. PROF. BLOG (Oct. 21, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/10/louisiana-may-become-first-state-without-abortion-access-.html](https://lawprofessors.typepad.com/family_law/2019/10/louisiana-may-become-first-state-without-abortion-access-.html) [<https://perma.cc/Y7YJ-AS66>].

98. See *A Comparison of the Alabama v. Georgia Abortion Bills*, FAM. L. PROF. BLOG (May 25, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/05/a-comparison-of-the-alabama-v-georgia-abortion-bills.html](https://lawprofessors.typepad.com/family_law/2019/05/a-comparison-of-the-alabama-v-georgia-abortion-bills.html) [<https://perma.cc/MM3M-BJNM>]; *Georgia Abortion Providers Bring Suit Against State’s “Fetal Heartbeat” Law*, FAM. L. PROF. BLOG (June 7, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/07/georgia-abortion-provides-bring-suit-against-states-fetal-heartbeat-law.html](https://lawprofessors.typepad.com/family_law/2019/07/georgia-abortion-provides-bring-suit-against-states-fetal-heartbeat-law.html) [<https://perma.cc/3H8S-29ES>]; Laura E. Anderson, *A Qualitative Content Analysis of Crisis Pregnancy Center Websites to Assess Medical Misrepresentation in Georgia* (2019) (Ph.D. thesis, Georgia State University), available at [https://scholarworks.gsu.edu/iph\\_theses/667](https://scholarworks.gsu.edu/iph_theses/667) [<https://perma.cc/P9D7-S97V>].

99. See Nash, *supra* note 1, at 498; *Missouri Passes Bill Banning Abortion After 8 Weeks*, FAM. L. PROF. BLOG (May 24, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/05/](https://lawprofessors.typepad.com/family_law/2019/05/) [<https://perma.cc/M9JA-Y5N9>]; *Missouri May Soon Become the First State With No Abortion Clinics*, FAM. L. PROF. BLOG (June 24, 2019), [https://lawprofessors.typepad.com/family\\_law/2019/06/missouri-may-soon-become-the-first-state-with-no-abortion-clinics.html](https://lawprofessors.typepad.com/family_law/2019/06/missouri-may-soon-become-the-first-state-with-no-abortion-clinics.html) [<https://perma.cc/6LEY-6RWQ>].

importance of the rights discourse in the modern, liberal Western world,<sup>100</sup> it is only one facet of the abortion dilemma. This issue undoubtedly touches on some of the most important and central values and arguments concerning, on the one hand, choice,<sup>101</sup> liberty,<sup>102</sup> freedom and autonomy,<sup>103</sup> and, on the other hand, the sanctity of life,<sup>104</sup> parental responsibility,<sup>105</sup> and commitments and duties.<sup>106</sup> Suffice it to mention

100. See ALAN GEWIRTH, *HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS* (1982); THEORIES OF RIGHTS (Jeremy Waldron ed., 1985); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (2013).

101. See 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. REV. 585 (1988); Suzanne Staggenborg, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* (1991).

102. See John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983); Johnsen, *supra* note 83; Francis J. Beckwith, *Thomson's Equal Reasonableness Argument for Abortion Rights: A Critique*, 49 AM. J. JURIS. 185 (2004); *Planned Parenthood v. Danforth* 428 U.S. 52 (1976) (establishing that this liberty is the pregnant woman's own privilege, and she does not need to first secure approval either from her parents or from her husband); see also *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

103. The feminist criticism straightforwardly has claimed that the woman's rights should be superior and the woman should be autonomous to abort her fetus. See ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, & REPRODUCTIVE FREEDOM* (1990); RACHEL ROTH, *MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS* (2000); *FETAL RIGHTS: A NEW ASSAULT ON FEMINISM* (Claudia Malacrida & Jacqueline Low eds., 2008).

104. This is one of the most important, contested pillars of the abortion dilemma. See, e.g., MARVIN KOHL, *THE MORALITY OF KILLING: SANCTITY OF LIFE, ABORTION AND EUTHANASIA* (1974); BARUCH A. BRODY, *ABORTION, AND THE SANCTITY OF HUMAN LIFE: A PHILOSOPHICAL VIEW* (1975); Christopher Belshaw, *Abortion, Value and the Sanctity of Life*, 11 BIOETHICS 130 (1997).

105. See Keith J. Pavlischek, *Abortion Logic and Paternal Responsibilities: One More Look at Judith Thomson's "A Defense of Abortion,"* 7 PUB. AFFAIRS Q. 341 (1993); David Boonin-Vail, *A Defense of "A Defense of Abortion": On the Responsibility Objection to Thomson's Argument*, 107 ETHICS 286 (1997); Priscilla J. Smith, *Responsibility for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J. L. & POL'Y 97 (2008).

106. See Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985); Wendy K. Mariner et al., *Pregnancy, Drugs, and the Perils of Prosecution*, 9 CRIM. JUST. ETHICS 30 (1990); ROSAMUND SCOTT, *RIGHTS,*

only Ronald Dworkin, who argued in his famous book *Life's Dominion* that the abortion debate is about the sanctity of life and not whether fetuses have rights.<sup>107</sup> Furthermore, Joseph Raz argues in general that framing abortion and other controversial ethical issues only in terms of rights is irrelevant or narrow.<sup>108</sup> As has been previously concluded, “the moral paradigm of *rights* and a reductive biological definition of individuality are inappropriate in trying to understand the moral dimension of the relationship between a pregnant woman and the fetus which she is carrying.”<sup>109</sup>

Second, even within the rights discourse, there is room for the contention that the fetus is indeed a person, with the claimed right to be born, but nonetheless the right of the woman to abort may prevail. As Judith J. Thomson has famously argued, 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, including a healthy birth, the woman's right to abort can still be defended.<sup>110</sup> As Thomson claimed:

It seems to me that the argument we are looking at can establish at most that there are some cases in which the unborn person has

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DUTIES AND THE BODY: LAW AND ETHICS OF THE MATERNAL-FETAL CONFLICT (2002).

107. RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (2011). Some scholars, however, have claimed that the abortion debate may focus more on whether fetuses have rights than Dworkin assumed. See, e.g., Robert P. George, *Book Review, "Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom,"* 88 AM. POL. SCI. REV. 444 (1994); Chris Naticchia, “*Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom,*” by Ronald Dworkin, 10 J. L. & POL. 339 (1994); Frances M. Kamm, *Book Review, "Abortion and the Value of Life: A Discussion of Life's Dominion,"* 95 COLUM. L. REV. 160 (1995).

108. See Joseph Raz, *Against Right-Based Morality*, in THEORIES OF RIGHTS 182 (Jeremy Waldron ed., 1985); Rosamond Rhodes, *Abortion and Assent*, 8 CAMBRIDGE Q. HEALTHCARE ETHICS 416, 416 (1999); THE OXFORD HANDBOOK OF REPRODUCTIVE ETHICS (Leslie Francis ed., 2017).

109. Eugenie Gatens-Robinson, *A Defense of Women's Choice: Abortion and the Ethics of Care*, 30 S. J. PHIL. 39 (1992).

110. Judith J. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47 (1971); Manninen, *supra* note 77; Christopher Meyers, *Maintaining the Violinist: A Mother's Obligations to the Fetus She Decides to Keep*, 23 J. SOC. PHIL. 52 (1992); Pavlischek, *supra* note 105.

a right to the use of its mother's body, and therefore some cases in which abortion is unjust killing. . . . [But] at any rate the argument certainly does not establish that all abortion is unjust killing.<sup>111</sup>

Her illustration of the abortion dilemma in terms of the ailing violinist, of course, has drawn considerable objection<sup>112</sup> as well as support.<sup>113</sup> Nonetheless, her basic point that even rights argumentation does not necessarily yield the inevitable conclusion that abortion should be prohibited is illuminating. On the one hand, she definitely agrees that in some cases this practice should be permissible, as in cases of early abortion or during all of pregnancy in the case of rape, although she is inclined to accept that the fetus is a "human person" even before its delivery.<sup>114</sup> On the other hand, however, she has no intention of claiming that the woman has the right to secure the death of the fetus.<sup>115</sup> Thus, between these two extreme poles, she argues "for the permissibility of abortion in some cases," since even granting full moral status to the fetus and recognizing his most basic human right to be born does not, as a matter of fact, override the mother's basic right to decide what will happen with and inside her body. Thomson asks, "Or should we add to the mother's right to life her right to decide what happens in and to her body, which everybody seems to be ready to grant—the sum of her rights now outweighing the fetus's right to life?"<sup>116</sup> She goes on to conclude:

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111. Thomson, *supra* note 110, at 49; *see also* DAVID BOONIN, *BEYOND ROE: WHY ABORTION SHOULD BE LEGAL—EVEN IF THE FETUS IS A PERSON* (2019).

112. John Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*, 2 *PHIL. & PUB. AFFAIRS* 117, 122–24 (1973); Kenneth Einar Himma, *Thomson's Violinist and Conjoined Twins*, 8 *CAMBRIDGE Q. HEALTHCARE ETHICS* 428 (1999); Mathew Lu, *Defusing Thomson's Violinist Analogy*, 39 *HUM. LIFE REV.* 46 (2013).

113. *See, e.g.*, Boonin-Vail, *supra* note 105; Eric Wiland, *Unconscious Violinists and the Use of Analogies in Moral Argument*, 22 *J. MED. ETHICS* 466 (2000); DAVID BOONIN, *A DEFENSE OF ABORTION* (2003).

114. Thomson, *supra* note 110, at 56, 39, 47–49, 51, 37; *see also* 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 (2015); Clement Dore, *Republicans on Abortion Rights*, 14 *THINK* 9 (2015); Goodwin, *supra* note 46.

115. *See infra* note 131.

116. Thomson, *supra* note 110, at 40; JUDITH J. THOMSON, *RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY* (1986); Walter E. Block, *Judith Jarvis Thomson on Abortion: A Libertarian Perspective*, 19 *DEPAUL J. HEALTH CARE L.* 1, 7–8 (2017).

I am arguing only that having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body—even if one needs it for life itself. So the right to life will not serve the opponents of abortion in the very simple and clear way in which they seem to have thought it would.<sup>117</sup>

To summarize this point, despite the recent acceleration in the bolstering of the fetus's moral status and recognition of its rights,<sup>118</sup> the bitterness and acrimony of the abortion debate will not necessarily abate. Since even the human rights discourse is very volatile, vague, and contradictory, to address only this aspect of the issue is inadequate and incomplete.

Third, in direct continuation of Thomson's discussion, but in the contrary direction, even if one assumes that the rights of the woman override her fetus's rights, there is a supplemental consideration. In the vast majority of cases where consensual sex has yielded the pregnancy, as has been intensively argued elsewhere, one should consider the essence of having a conjugal relationship as being an implied agreement to accept the obvious resulting outcome of this action: the pregnancy. From an ethical and legal aspect, such voluntary acceptance should incline towards rejection of any claim of "coerced parenthood," both from the side of the father as well as from the side of the mother.<sup>119</sup> Thus, the pregnant woman

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117. Thomson, *supra* note 110, at 46; see also Michael Tooley, *Abortion and Infanticide*, 2.1 PHIL. & PUB. AFFS. 37, 52 (1972); Himma, *supra* note 112, at 429; Manninen, *supra* note 77, at 39.

118. See Kimberly Mutcherson, *Fetal Rights in the Trump Era*, 95 TEX. L. REV., available at <https://texaslawreview.org/fetal-rights-trump-era/> [<https://perma.cc/FD36-3SRU>].

119. It should be emphasized that the moral aspect is much more compelling than the legal one. Since, generally speaking, such personal service is very hard to be enforced in the vast majority of jurisdictions all over the globe and more specifically in the English law where it is very rare for contracts to be specifically enforced. See David Tannenbaum, *Enforcement of Personal Service Contracts in the Entertainment Industry*, 42 CALIF. L. REV. 18 (1954); Edward L. Rubin, *The Enforcement of Personal Service Contracts*, 3 ENT. & SPORTS L. 3 (1984); Larry A. DiMatteo, *Depersonalization of Personal Service Contracts: The Search for a Modern Approach to Assignability*, 27 AKRON L. REV. 407 (1994). Admittedly, the moral angle can deeply influence the legal discourse, by claiming that the woman's moral obligation towards her fetus may legally prevent her from aborting him, due to this unique moral estoppel. Apparently, we are not dealing with enforcing any positive contractual personal service on her but just preventing her from acting against his interests. For the notion of "moral estoppel," see

has also responsibility towards the fetus in her womb, to allow it to be born.<sup>120</sup>

Consequently, if indeed the woman carries the fetus to term, the obligation to provide for the child's support and all his other needs can be extrapolated from the implied intention to accept the legal parentage that may derive from having sexual relations.<sup>121</sup> Put differently, a voluntary conjugal relationship can teach us about the explicit or at least implied agreement to accept the obvious consequences of this action: to bring the child into the world and fulfill all his or her needs. This argument is supported by the contentions of various scholars who have claimed that

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Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L. J. 1059, 1067 (1992); Stephan N. Kinsella, *New Rationalist Directions in Libertarian Rights Theory*, 12 J. LIBERTARIAN STUD. 313, 323–324 (1996); N. Stephan Kinsella, *A Libertarian Theory of Punishment and Rights*, 30 LOY. L. A. L. REV. 607, 628 n.50 (1997); CFH 2401/95 Nahmani v. Nahmani [1996] IsrLR 1 (Isr.); see Ceala E. Breen-Portnoy, *Frozen Embryo Disposition in Cases of Separation and Divorce: How Nahmani v. Nahmani and Davis v. Davis Form the Foundation for a Workable Expansion of Current International Family Planning Regimes*, 28 MED. J. INT'L L. 275, 303 n.201 (2013).

120. See Margalit, *supra* note 56, at 82–83; Christopher Bruno, *A Right to Decide Not to Be a Legal Father: Gonzales v. Carhart and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141 (2008); Reed Boland, *Population Policies, Human Rights, and Legal Change*, 44 AM. U. L. REV. 1257 (1995); Lisa Lucille Owens, *Coerced Parenthood as Family Policy: Feminism, the Moral Agency of Women, and Men's Right to Choose*, 5 ALA. C.R. & C.L. L. REV. 1 (2013). Incidentally, since not infrequently birth control fails and even the most reliable forms of birth control have at least a small potential failure rate, in our opinion, such unintentional procreation is still much more akin to engaging in consensual sex than the rape scenario, where there was no intention or agreement to either the sex or its result. Although our suggestion is most likely to affect lower-income women of color, since the rate of unintended pregnancy varies dramatically by class, unfortunately this jurisprudential issue of equality is beyond the scope of the current discussion. See NAOMI CAHN & JUNE CARBONE, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014).

121. See *Dorsey v. English*, 283 Md. 522 (1978); *D.W.L. v. M.J.B.C.*, 601 S.W.2d 475 (Tex. Civ. App. 1980); see also Smith Holly, *Intercourse and Moral Responsibility for the Fetus*, in *ABORTION AND THE STATUS OF THE FETUS* 229 (William B. Bonderson et al. eds., 1983); Walen Alec, *Consensual Sex without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051 (1997); Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010). See also Margalit Yehezkel & Pnina Lifshitz-Aviram, *Abortion and Coronavirus – Between Women's Rights Discourse and Obligations Discourse* (under evaluation).



structuring conjugal relations in contractual terminology will yield the ultimate conclusion that this action can be understood as an agreement to fulfill the legal consequences, duties, and obligations stemming from it.<sup>122</sup>

Lastly, as will be extensively elaborated elsewhere, the right of the fetus to be born should prevail over the right of his mother not to become a gestational mother due to the following logical argumentation.<sup>123</sup> In the past, people have argued that the mere action of giving birth is not enough, morally and legally, to distinguish between a fetus, which is totally devoid of any rights, and a “mature,” born person, which has all of them.<sup>124</sup> It is true that “[t]here has been little thorough examination of the process of birth.”<sup>125</sup> In response to this intellectual challenge, it is important to add a supplemental layer to this inquiry by claiming that the previous argument should have become much more convincing in recent years.

In light of the recent dramatic developments in biomedicine, it is now possible and safe enough to evacuate the fetus from the womb of his mother and transfer him to an incubator or even an artificial womb. Alternatively, an article recently reported that in the foreseeable future it may be possible to transfer the living evacuated fetus to another woman’s womb.<sup>126</sup> Anecdotally, it is noteworthy that the most ancient discussion of

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122. See Laurence C. Nolan, *Legal Strangers and the Duty of Support: Beyond the Biological Tie – But How Far Beyond the Marital Tie?*, 41 SANTA CLARA L. REV. 1, 19 (2000); Thomson, *supra* note 110; *Jones v. Smith*, 278 So. 2d 339, 342–43 (Fla. Dist. Ct. App. 1973); Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1145, 1162 (2008) (quoting Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 483 (1981)); Bruno, *supra* note 120.

123. See Glenn Cohen, *The Right Not to be a Genetic Parent?* 81 S. CAL. L. REV. 1115 (2008).

124. *But see* Elizabeth Chloe Romanis, *Artificial womb technology and the significance of birth: why gestatelings are not newborns*, 45.11 J. MED. ETHICS 727 (2019).

125. *Id.* at 727; *see also* KATE GREASLEY, ARGUMENTS ABOUT ABORTION: PERSONHOOD, MORALITY, AND LAW (2017); Elizabeth Chloe Romanis, *Artificial Womb Technology and the Frontiers of Human Reproduction: Conceptual Differences and Potential Implications*, 44 J. MED. ETHICS 751 (2018); Nicholas Colgrove, *Subjects of Ectogenesis: Are “Gestatelings” Fetuses, Newborns, or Neither?*, 45.11 J. MED. ETHICS 723 (2019).

126. See Alice Broster, *A British Couple Just Became The First In The World To Carry The Same Baby*, BUSTLE (Dec. 4, 2019), <https://www.bustle.com/p/two-british-women-have-become-the-first-in-the-world-to-carry-the-same-baby-19423705> [<https://perma.cc/9Z6Y-ZDYY>]. It bears emphasis that actually it is simply a creative ruse. The physicians simply prepare a capsule in which they place the egg and sperm, insert this capsule into one of the women so that fertilization takes

this futuristic biomedical innovation can be found in a 5th century Jewish Talmudic hypothetical regarding the uteri of two animals that are adjacent to each other, with the fetus moving from one uterus to the other before being born.<sup>127</sup> The viability of exogenesis, or the latter option, even if it does not resolve the abortion dilemma,<sup>128</sup> nonetheless may strongly incline one towards recognizing the fetus's right to be born.<sup>129</sup> Against the recognized right of the mother not to be coerced to become the gestational parent of the undesired fetus stands the right of the fetus to be born, with the aid of the abovementioned artificial devices, which do not deprive the woman of her basic human right not to become a gestational mother against her will.

Admittedly, the debate is still ongoing whether the woman has a right also to kill her fetus,<sup>130</sup> but in light of the foregoing discussion, in the vast majority of cases, at least where the child is a result of consensual relations, the right of the fetus to be born should prevail. Despite the harsh implications that the process of detaching the fetus will inevitably have for the mother as both a jurisprudential and pragmatic matter. As Thomson already concluded, "I am not arguing for the right to secure the death of the unborn child. . . . I agree that the desire for the child's death is not one which anybody may gratify, should it turn out to be possible to detach the child alive."<sup>131</sup>

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place "inside her body," and then remove the capsule and place the fertilized embryo in the uterus of the second woman for implantation and gestation. *Id.*

127. See Edward Reichman, *Uterine Transplantation and the Case of the Mistaken Question*, 37 TRADITION: J. ORTHODOX JEWISH THOUGHT 20, 32 (2003). Pragmatically speaking, this humane option may dramatically reduce the huge public expense if the fetus is artificially incubated outside the mother's body, given the high rate of abortions.

128. Christopher Kaczor, *Could Artificial Wombs End the Abortion Debate?*, 5 NAT'L CATHOLIC BIOETHICS Q. 283 (2005); see also Eric Steiger, *Not of Woman Born: How Ectogenesis Will Change the Way We View Viability, Birth, and the Status of the Unborn*, 23 J. L. & HEALTH 143 (2010).

129. See Son, *supra* note 79; Jessica H. Schultz, *Development of Ectogenesis: How Will Artificial Wombs Affect the Legal Status of a Fetus or Embryo?*, 84 CHI.-KENT L. REV. 877 (2010); Glenn Cohen, *Artificial Wombs and Abortion Rights*, 47 HASTINGS CTR. REP. (2017), available at <https://onlinelibrary.wiley.com/doi/full/10.1002/hast.730> [<https://perma.cc/8KTE-9GR9>].

130. See Joonas Räsänen, *Ectogenesis, abortion and a right to the death of the fetus*, 31 BIOETHICS 697 (2017); Eric Mathison & Jeremy Davis, *Is There a Right to the Death of the Foetus?*, 31 BIOETHICS 313 (2017); Christopher Kaczor, *Ectogenesis and a right to the death of the prenatal human being: A reply to Räsänen*, 32 BIOETHICS 634 (2018).

131. Thomson, *supra* note 110, at 55–6.

## CONCLUSION

The foregoing discussion has shown the extent to which, despite the recent accelerated process of bolstering the fetus's moral status and recognition of his rights, the bitterness and acrimony of the abortion debate will not necessarily abate, since even if one stays exclusively within the human rights discourse, both sides of the debate may find justification. This issue undoubtedly touches upon some of our most important and central values and arguments concerning, on the one hand, choice, liberty, freedom and autonomy, and, on the other hand, the sanctity of life, parental responsibility, and commitments and duties. Moreover, since even the human rights discourse is volatile, vague, and contradictory, to address only this aspect of the issue is inadequate and incomplete.

Given that the abortion debate has played a large role in American moral, religious, social, and legal history for centuries, it is quite safe to assume that it will continue to do so long after the current Trump presidency. The surge, however, in legislative and judiciary restrictions on abortion of recent years has brought us closer than ever before to a new Archimedean point of maternal versus fetal rights, with the latter being awarded much more credit and room at the expense of the former.<sup>132</sup>

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132. See, e.g., *June Med. Servs. v. Gee*, 139 S. Ct. 663 (2019); Caroline Fredrickson, *The Kavanaugh Hearings and the Search for a Just Justice Submission*, 49 GOLDEN GATE U. L. REV. 67, 72 (2019) (“In his first case in the Court dealing with abortion, Kavanaugh revealed his interest in cutting back on access to abortion. By a 5–4 vote, in *June Medical Services v. Gee*, the Court enjoined a Louisiana statute that would have ended almost all abortions in the state.”); see Jo Yurcaba, *SCOTUS Will Hear An Abortion Rights Case With Major Implications* BUSTLE (Nov. 13, 2019), <https://www.bustle.com/p/scotus-will-hear-abortion-rights-case-with-major-implications-19301430> [<https://perma.cc/F66Z-NRK5>].