

Abortion: Major Wrong or Basic Right?

RABBI ROBERT GORDIS

This paper was adopted as a Majority Opinion on August 23, 1983 by a vote of 16-0-1. Members voting in favor: Rabbis Kassel Abelson, Ephraim L. Bennett, Ben Zion Bokser, David M. Feldman, Morris Feldman, Edward M. Gershfield, Robert Gordis, Wolfe Kelman, David H. Lincoln, George Pollak, Mayer E. Rabinowitz, Barry S. Rosen, Morris M. Shapiro, Harry Z. Sky, Henry A. Sosland and Alan J. Yuter. Abstaining: Rabbi Joel Roth.

Note: "Prenatal Testing and Abortion" by Rabbi Kassel Abelson, "Abortion: The Jewish View" by Rabbi David Feldman, and "A Teshuvah on Abortion" by Rabbi Isaac Klein, were also adopted as Majority Opinions of the Committee. These papers appear elsewhere in this section.

Undoubtedly the most highly charged issue in the area of sexual ethics in our time is abortion. The question is by no means limited to the United States. Controversy has swirled around the problem everywhere, in Catholic Italy, in the State of Israel, and in Communist China, to cite only a few instances. In Italy, the long struggle by the Roman Catholic Church against legalizing abortion proved unavailing and the Parliament adopted a highly permissive law on the subject. In the State of Israel, a recent study claimed that 46.7 percent of all Israeli women had had at least one abortion by the time they reached forty. Estimates of the number of abortions in the country range from forty to seventy thousand a year. The Orthodox rabbinate fought strenuously against legalizing the practice. Its efforts ended in failure, when the Israeli Knesset adopted an abortion law January 31, 1977, the provisions of which will be discussed below. In Communist China, abortion is recognized not merely as legal but as an act worthy of praise as a service to the revolution.

In the United States, as we have seen, there has been a steady rise in the rate of *reported* abortions in recognized hospitals and by reputable physicians, ever since the practice was legalized in most of the states of the Union. The adjective in italics is important because its significance has often been overlooked in heated discussions on the subject. Available data indicate that legal abortions are on the increase among both married and unmarried women. For the former, it serves as a method of family

limitation, especially after the birth of a number of children. The rate of abortion has been rising even more rapidly in the case of unmarried women, for self-evident reasons.

From a purely rational point of view, one would have imagined that abortions would have declined in popularity in view of the ready availability of contraceptive means, which do not entail the destruction of incipient life. In this connection, one would have thought that the old adage applied: "An ounce of prevention is worth a pound of cure." Nevertheless, the fact is that hundreds of thousands of women -- and the number is increasing -- are undergoing abortions. The reason may be ignorance or negligence, or the fact that sexual intercourse had not been expected and the partners, therefore, were not prepared with contraceptives. One must also suspect that the rapid rise in abortions and the call for abortion on demand point to another disquieting factor -- a lack of sensitivity with regard to the moral issues that may be involved.

During the past few decades, many states of the Union have legalized abortion within their borders, some with various limitations. These statutes have been challenged in the courts, but they were upheld by the Supreme Court in 1976; the Court reaffirmed the right of a woman to decide whether she will undergo an abortion. Many of the restrictions subsequently imposed by state legislatures have been declared unconstitutional on the ground that they were basically efforts to circumvent the original Court decision.

The victories that the right-to-abortion forces have achieved in legislatures and the courts have stimulated the unfortunate tendency, to which Americans are particularly prone, of identifying the legal with the moral and concluding that what the law permits is, therefore, ethically sound. This fallacy is particularly disastrous in the area of personal morality and family ethics.

The acceptance of abortion as legitimate is, of course, far from unanimous. On the contrary, it has evoked passionate opposition from the Right to Life movement and other groups whose original impetus derived from Catholic theology but whose ranks include people of other persuasions as well. What the anti-abortion movement may lack in numbers and practical influence is largely compensated for by its zeal and dedication. All Americans, including those who do not share its position, owe the movement a debt of gratitude for reminding the American people that moral issues cannot be settled merely by a majority in the legislature or by the decisions of judges.

Catholicism has been confronted by some special theological problems. For many centuries, Catholic theologians have debated the casuistic question of "ensoulment," i.e., just when the soul enters the fetus. The

Abortion -- Major Wrong or Basic Right?

consensus among Catholic theologians, at least up to the present, has been that the soul enters the fetus at the moment of conception, so that the destruction of the embryo is tantamount to murder. Moreover, since Augustine, the Church has taught that an embryo must be baptized if it is not to suffer eternal damnation. These theological attitudes explain the passion with which the Catholic clergy and many of the laity react against abortion.

In view of the heat with which the issue is argued today, it is of interest to note that Catholic teaching on the subject has fluctuated through time. In the fourth century, St. Basil condemned abortion at any stage, but the Code of Justinian in the sixth-century exempted from penalty abortions during the first forty days. This position was reaffirmed repeatedly by Papal decree for nearly ten centuries. In 1588, Pope Sixtus V declared all abortions to be murder, but less than three years later, Gregory XIV rescinded his decree. Not until 1869 was the prohibition reinstated by Pope Pius IX.¹ It is this position that is now official Catholic doctrine.

What are the facts on the attitude of Jewish tradition toward abortion? The first point to bear in mind is that Catholic theological problems such as ensoulment and baptism have no counterpart in Judaism. In Jewish sources random speculations as to when life begins are to be encountered, but they play no significant role in connection with abortion. In fact, Jewish law has a variety of time periods applicable to different issues as to when a newborn child is *bar kayyama* (independent and viable). To cite one familiar example, the *pidyon haben* (the redemption of the first-born) does not take place until the thirty-first day of the baby's life. What is fundamental is that halakhah explicitly recognizes that the fetus is not a viable being while it is in its mother's womb, since its life cannot be sustained outside its natural shelter there.

The basic sources on abortion in the Bible and the Talmud are very sparse. In Exodus 21:22-25 we read:

When men strive together and hurt a woman with child, so that there is a miscarriage, and yet no harm follows, the one who hurt her shall be fined, according as the woman's husband shall lay upon him; and he shall pay as the judges determine. If any harm follows, then you shall give a life for a life, an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot...

In other words, the Torah commands that if the woman is not injured and only the fetus is destroyed in the encounter ("no harm follows"), there is to be financial compensation to the husband for the embryo. But if the woman is killed or hurt ("if any harm follows") as a result of the quarrel, the assailant is guilty of a capital or major crime. The destruction of the

fetus is clearly not treated as co-equal with the death of the mother in the text of the Hebrew Bible.

However, an alleged biblical source for a prohibition of abortion has been derived from this same passage, on the basis of an enigmatic and an almost certainly erroneous translation of the Hebrew text in the Septuagint. This ancient Greek version renders the Hebrew word *ason* (harm, injury) inexplicably as "form, shape," a meaning for which scholars are unable to offer a warrant or even a credible explanation.² The passage then emerges as "But if it (the embryo) be perfectly formed, you shall give a life for a life."³ This dubious rendering has been used in the Christian Church as a biblical support for treating abortion as murder.

The second passage bearing directly upon the subject of therapeutic abortion occurs in rabbinic literature. The Mishnah reads:

If a woman is having difficulty in childbirth (so that her life is endangered), one cuts off the embryo, limb by limb, because her life takes precedence over its life. If most of the fetus (or the head) has emerged, it may not be hurt, for we do not set one life aside for the sake of another (*Ohalot* 7:6).

This classical passage clearly embodies the principle that the fetus is a limb of its mother.⁴ In Rashi's words, "The life of the mother in childbirth takes precedence over that of the embryo to the very last moment of pregnancy."⁵

Maimonides, who summarizes this provision of the Mishnah in his code, adds an explanation which has had the practical effect of limiting the permissibility of abortion among some later authorities. He explains that the permission to destroy the embryo set forth in the Mishnah is due to the fact that the embryo is "like a pursuer seeking to kill the mother."⁶ This explanation would seem to permit abortion only when and if the mother's life is in danger. This interpretation of Maimonides, which Feldman rightly calls "a surprising position,"⁷ is clearly more restrictive than the talmudic provision.

I would suggest that the reason that Maimonides and other medieval codifiers diverge from the Mishnah may inhere in the same conditions that led them to disregard the clear talmudic warrants for birth control. They were leaders of a community perpetually engaged in a desperate struggle for survival against disease, expulsion and massacre. They felt keenly the necessity for bringing many children into the world and thus preserving the Jewish people against extinction. Since group survival took precedence over individual well-being, they sought to limit such practices as abortion and birth control, or to forbid them altogether, in spite of the clear provisions in the Mishnah and the Talmud.

Many later authorities attempted to explain away Maimonides' limitation

Abortion -- Major Wrong or Basic Right?

and to harmonize it with the broader principle laid down in the Mishnah, a discussion that has continued to the present.⁸ While some would restrict the provision permitting abortion only to cases when the mother's life is in danger, the majority of decisions recognize that physical injury to the mother, even if death is not involved, should also be a legitimate ground for abortion.

Other factors also command impressive rabbinic support. Some authorities explicitly permit an abortion if the pregnancy adversely affects the feeding of an existing child.

The dominant attitude of the halakhah, which is derived from the mishnaic statement already quoted, is summarized by Rabbi Ben Zion Uziel, former Chief Rabbi of Israel, who declared that abortion is permitted even for "a very thin reason," such as avoiding pain for the mother.⁹ The mother's anguish at the possibility of bearing a defective child is also admitted as grounds for abortion. So is the element of disgrace and the threat of suicide by a woman who has been raped or has become pregnant as a result of adultery. The twentieth-century authority Rabbi Yehiel Weinberg ruled that "the authorities who differ with Maimonides are *in the majority*," and he therefore agreed with Rabbi Jacob Emden in permitting abortion to spare the mother pain.¹⁰

In spite of the luxuriant variety of views and nuances to be found in rabbinic sources, it is clear that the halakhah on abortion may be fairly described as lenient. It surely cannot be regarded as establishing a blanket prohibition. Indeed, the broad interpretation of the rabbinic attitude is entirely justified, since it is a fundamental principle of the Mishnah, amply confirmed by modern medicine, that an embryo is not an independent living being.

The rabbinic discussions on the subject are primarily concerned with *therapeutic abortions*. There are several types of abortion that may be described as extensions of the therapeutic category into the mental area. On these, a broad consensus of agreement probably exists in contemporary society, except possibly for some of those bound closely to Catholic dogma. Earlier Jewish authorities devote little attention to the problem of women who become pregnant as a result of incest or rape, yet, undoubtedly, both of these evils existed in the past. Perhaps we are more conscious of these crimes today because of a greater recognition of women as independent personalities. Whatever the reason, it will be generally agreed that the victims of such atrocities have already undergone major psychological trauma even if they did not suffer additional physical violence.

To permit such a pregnancy to run its course means to bring into the world a permanent reminder of the terror and the shame that the woman experienced at the time the crime was committed. Furthermore, the child

would forever bind her to one who had viciously violated the sanctity of her person. Moreover, the child himself, who is totally free from guilt, would carry a stigma almost too heavy to bear throughout his life. Moreover, since a human being is an amalgam of spirit and body, the mental well-being of the mother is as important as her physical health.

There is warrant in rabbinic responsa for permitting abortion if the mother is deeply concerned about the health of her unborn child.¹¹ If, therefore, there is a possibility that the child may be born defective because the mother is a drug addict or has taken some medication with aftereffects dangerous to the offspring, the pregnant woman's worry is sufficient ground for an abortion because of the debilitating effects psychologically or otherwise on her well-being. Under any of these circumstances, few would be disposed to oppose abortions designed to prevent a major traumatic episode from being converted into a lifetime tragedy. These instances may fairly be regarded as falling within a broadened category of therapeutic abortion.

While therapeutic abortions are by no means negligible in number, the gravamen of the struggle today lies in the area of non-therapeutic abortions, where the woman simply does not wish to have the child born -- so-called abortion on demand. Her motive may be the size of her family or the fact that she is unmarried or simply a desire not to be burdened by the responsibility of child-raising.

On the one hand, it may be argued that there is no urgency to permit such non-therapeutic abortions, particularly in view of the variety of moral issues that have been raised with regard to the right to life of the unborn fetus. On the other hand, we have seen that such issues as ensoulment and the baptism of unborn infants are strictly dogmatic in character and are applicable only to believing Catholics.¹² For other elements of the population in general, and for Jews in particular, the weight of authoritative opinion, both religious and scientific, does not regard the fetus as a viable and independent human being or abortion as murder.¹³

When, therefore, a woman asks for an abortion for one of the reasons mentioned, we cannot in justice ignore several other aspects of the situation that are of valid social and ethical concern. What destiny awaits a child who cannot be properly cared for, because he is being born into a family where there are already far too many mouths to feed? What about a child who is not wanted because he is the result of extramarital intercourse? In the latter case, does the mother deserve life-long punishment for a single indiscretion? What about the handicaps for a child growing up in a home without a father, from which the mother is often absent, with no one to supervise and guide the youngster because she must work for a living? Think what we may of a woman who does not wish to bear and raise a child simply because she consults only her own convenience and comfort, what environment awaits an unwanted child born under such

Abortion -- Major Wrong or Basic Right?

circumstances? A study of the mounting tide of child abuse and child murder by parents might well disclose this attitude as a motive for crime.¹⁴

Finally, we cannot, in all honesty, ignore the fact that all too often the issue is not whether or not an abortion is to take place, but under what circumstances. Will it be done through proper procedures by experts, or under unsanitary and dangerous conditions by incompetents or charlatans who threaten the life or health of the mother? We cannot overlook the fact that the affluent and the well-educated have always had access to abortions on demand. All that is being asked is to make the same procedures available to the poor and the under-privileged as well. In effect, opposition to legalizing properly performed abortions on demand amounts to a flagrant form of economic discrimination. Not altogether unjustly, therefore, the movement against legalizing abortion is often charged with being both hysterical and hypocritical.

No wonder, too, that the liberalization of abortion laws is proceeding apace throughout the world. In 1976, a United Nations study found that two-thirds of the world's population lived in countries where legal abortion was relatively easy, as compared with only one-third five years earlier. During the last decade, thirty-three countries have liberalized their abortion laws, and twelve permit abortion on demand during the first three months of pregnancy. The record discloses that no democratic nation has ever moved to make abortion more restricted.¹⁵

Do these considerations effectively dispose of the case against abortion on demand and justify the practice? Such a conclusion would be premature.

The alleged right of abortion on demand is generally supported by the argument that a woman has rights over her own body. This is a contention which Judaism, and indeed all high religion, must reject on both theological and ethical grounds as being essentially a pagan doctrine. It is basic Jewish teaching that no human being is master of his own body, because he did not create himself; male and female alike have been fashioned by God in His image.

This conviction lies at the heart of the Jewish insight that in addition to *mitzvot bein adam laMakom* (commandments between a person and God) and *mitzvot bein adam le'havero* (commandments between person and person), we may posit another category, *bein adam le'atzmo* (obligations and prohibitions between person and self). These include debasing one's character through degrading habits and demeaning actions, injuring one's body through addictive drugs or excessive drinking, or other sins of the first magnitude. When the human body and the human spirit are injured, a sin is committed against the handiwork and the property of God. This is the root of the religious prohibitions of suicide and of self-mutilation.

Moreover, abortion on demand is a threat to a basic ethical principle

which Judaism enunciated centuries before Albert Schweitzer. An embryo in its mother's body is not actually a living creature, but it is potential life, not to be lightly cast aside. Obviously, what is only potential must be sacrificed when necessary for saving what is actual, but where no such threat exists, potential life too must be safeguarded. When an embryo is aborted, we are, in the fine rabbinic phrase, "diminishing the Divine image in which man is fashioned."¹⁶

In sum, while the law does not categorically rule out abortion since it is not "murder," the spirit of Judaism, reinforced by a realistic understanding of human motivation, must look askance at any blanket provision for abortion on demand. Long before Albert Schweitzer enunciated his justly famous ethical doctrine, Judaism sought to inculcate in its adherents -- and largely succeeded -- reverence for life and hatred of violence and bloodshed.

This all-important principle is imperiled today. If the law were to remove all conditions and restrictions, the increased practice of abortion on demand would further erode reverence for life, which has already been tragically weakened in our violence-riddled society. It cannot be denied that the casual attitude toward potential life implied in the practice is one more instance among many of the cheapening of life in contemporary society.

Are we confronted once again by an insoluble dilemma? On the one hand, refusal to legalize abortion is obviously discriminatory. On the other hand, permitting abortion on demand means sanctioning a practice that at best is ethically dubious and socially corrosive. Such permission undermines what is perhaps the most sacred value in the Hebraic tradition, the sense of life as holy.

Actually, the contradiction involved in balancing opposite positions and opposing what is legally permitted is only apparent. It can be understood as an extension of the traditional rabbinic doctrine of *seyag* (a fence around the law), a "margin of protection" to safeguard a fundamental article of faith or practice.

It may also be suggested that here we have another illustration of the valuable tension between law and society that has been noted in the attitude of the Jewish tradition toward divorce and birth control. The law on abortion is and should be liberal, to meet genuine cases of hardship and misery that are not soluble in any other way. But society has an obligation to educate its members to ethical standards that rise above the level of abortion on demand. In other words, abortion should be legally available but ethically restricted, to be practiced only for very good reasons. Men and women must be persuaded that though the abortion of a fetus is not equivalent to taking an actual life, it does represent the destruction of potential life and must not be undertaken lightly or flippantly.

Until the day comes when ethical standards suffice to govern the actions of men and women without the use of external restraint, how is this tension

Abortion -- Major Wrong or Basic Right?

to be resolved? We must have recourse to secular law, which alone has the power to enforce its norms. Here blanket permissibility would be almost as morally and socially catastrophic as a total ban.

On January 31, 1977, the Israeli Knesset adopted a new law on abortion that was strenuously opposed by the Orthodox rabbinate and did not please Israeli feminists. Nevertheless, the provisions of the law are both realistic and humane, and might well serve as a model for other countries. Under Israeli law, abortion is permitted if carried out in a recognized medical institution, with the woman's approval, and according to one or more of the following criteria: if the birth would endanger the woman's life or injure her physical or emotional health; if it can be determined that the child would be born either physically or mentally handicapped; if the pregnancy was the result of rape, incestuous relations, or intercourse outside of marriage; if the woman is below the age of sixteen or over forty.

Obviously, there can be no totally satisfactory solution to the abortion problem, which is itself a symptom of a tragedy. The choice of the lesser of two evils must be the goal in guiding society to a rational decision.

So long as we must depend upon a legal system rather than upon the human conscience to enforce an ethical code, it is clear that the best solution lies in preserving a basically liberal attitude toward abortion with conservative safeguards. That is to say, proper facilities for an abortion should be generally available to all classes of the population, while precautionary procedures must be established in special cases.

Over and above its intrinsic value, such a system of checks and balances would represent a protest against the pagan notion that human beings are absolute masters, either of the world about them or of their own persons, or of burgeoning life within them. The triumph of paganism, today as in the past, must lead to moral catastrophe and the destruction of civilization.

NOTES

1. This history of the question in Catholicism is conveniently summarized in David Feldman's *Marital Relations, Birth Control and Abortion in Jewish Law*, Schocken Paperback Edition (New York: Schocken Books, 1974), p. 269. He presents a detailed summary of the rabbinic sources in "Abortion," part 5 of his excellent volume, pp. 251-294. Our approach to the issue and the conclusions we have drawn from the vast amount of often contradictory data that he has assembled are our own and diverge at times from the views he apparently holds.

2. The Hebrew words for "form, shape," *tzelem*, *demut*, *tzurah*, are all totally unlike the Hebrew *ason* in appearance or in sound.

3. The Septuagint interpretation is followed by Philo, as well as by the Samaritans and the Karaites. Aptowitz regards this interpretation as a compromise between Plato, who held the fetus to be dependent upon its mother, and the Stoics, who held it to be an independent living human being. See *JQR*, vol. 15 (1924), p. 114, and Feldman, *op. cit.*, p. 259. Actually, the Septuagint seems to be an approximation of the Stoic position rather than a compromise.

4. *Ubar yerekh immo* (*Hullin* 58a; see also *Gittin* 23b). The phrase, as Feldman points out, is the equivalent of the Latin *pars viscerum matris* or *spes animati*.

5. See Rashi and Meiri on *Sanhedrin* 72b, "The fetus in the womb is not a living being (*lav nefesh hu*)."

6. Yad, *Hilkhot Rotzeah U'shemirat Nefesh* 1:9.

7. Feldman, *op. cit.*, p. 277.

8. In Feldman, *op. cit.*, pp. 284-94, a large number of varied responsa are collected and summarized.

9. *Ta'am kalush*, Feldman, *op. cit.*, p. 291.

10. *Noam*, IX, 1966, pp. 193-215.

11. See responsa cited on the subject by Feldman, *op. cit.*, pp. 285-6.

12. See Leo Pfeffer, "Abortion and Religious Freedom," in *Congress Monthly*, June 1976, pp. 9-12.

13. A strongly negative approach to abortion is espoused by Rabbi Immanuel Jakobovitz in "Jewish Views on Abortion," in David T. Smith, *Abortion and the Law* (Cleveland, 1967), chap. 6. The impulse to be more Catholic than the Pope apparently continues to prove irresistible. His view is energetically rebutted by Feldman, *op. cit.*, p. 294, n. 144.

14. On this growing problem, see *The New York Times*, February 1, 1977.

15. According to a report by the International Planned Parenthood Federation, published in *The New York Times*, February 6, 1977.

16. *Mema'atim et hademut* (*Yevamot* 63b). The phrase is applied to those who avoid procreation (without reference to abortion).