

Abortion: The Jewish View

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Note: "Prenatal Testing and Abortion" by Rabbi Kassel Abelson, "Abortion: Major Wrong or Basic Right?" by Rabbi Robert Gordis, 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.

The abortion question in talmudic law begins with an examination of the fetus' legal status. For this the Talmud has a phrase, *ubar yerekh imo*, a counterpart of the Latin *pars viscera matris*. The fetus is deemed a "part of its mother" rather than an independent entity. Of course, this designation says nothing about the right of abortion; this is found only in more theoretical contexts. In the case of an embryo found in a purchased animal, the embryo is intrinsic to its mother's body; its ownership is defined -- it belongs to the buyer. Moreover, in the religious conversion of a pregnant woman, her unborn child is automatically included and requires no added ceremony. Nor does the fetus have power of acquisition. Gifts or transactions made on its behalf, except by its father, are not binding; it inherits from its father only, in a natural rather than transactional manner.

Germane as such information might seem to the question of abortion, it tells us little more than, in the words of a modern writer on Roman and Jewish law, that in both systems the fetus has no "juridical personality" of its own. The morality of abortion is a function, rather, of the legal attitude to feticide as distinguished from homicide or infanticide. The law of homicide in the Torah, in one of its several formulations, reads: "*Makkeh ish...*" (He who smites a man...) (Exodus 21:12). Does this include *any* "man," say, a day-old child? Yes, says the Talmud, citing another text: "*ki yakkeh kol nefesh adam*" (If one smite any *nefesh adam*) (Lev. 24:17), literally, any human person. The "any" is understood to *include* the day old child, but the "*nefesh adam*" is taken to *exclude* the fetus in the womb

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

for the fetus in the womb is *lav nefesh hu* (not a person) until he is born. In the words of Rashi, only when the fetus "comes into the world" is it a "person."

The basis, then, for denying capital crime status to feticide in Jewish law, even for those rabbis who may have wanted to rule otherwise, is scriptural. Alongside the *nefesh adam* text is another basic one in Exodus 21:22, which provides:

If men strive, and wound a pregnant woman so that her fruit be expelled, but no harm befell [her], then shall he be fined as her husband shall assess, and the matter placed before the judges. But if harm befell [her], then shall you give life for life.

The Talmud makes this verse's teaching explicit: only monetary compensation is exacted of him who causes a woman to miscarry. Though the abortion spoken of here is accidental, the verse is still a source for the teaching that feticide is not a capital crime (since even accidental homicide cannot be expiated by monetary fine).

This important passage in Exodus has an alternate version in the Septuagint. One word change there yields an entirely different statute on miscarriage. Prof. Viktor Aptowitz's essays analyze the disputed passage; he calls the school of thought it represents the Alexandrian school, as opposed to the Palestinian, that is, the talmudic view set forth above. The word in question is *ason*, rendered above as "harm," hence: "If [there be] no harm [i.e., death, to the mother], then shall he be fined...." The Greek renders the word *ason* as "form," yielding something like: "If [there be] form, then shall you give life for life." The "life for life" clause is thus applied to the fetus instead of the mother, and a distinction was made, as Augustine will formulate it, between *embryo informatus* and *embryo formatus*, a fetus not yet "formed" and one already "formed"; for the latter, the text so rendered prescribes the death penalty.

Among the Church Fathers, the consequent doctrine of feticide as murder was preached by Tertullian (second century), who accepted the Septuagint, and by Jerome (fourth century), who did not (whose classic Bible translation renders the passage according to the Hebrew text accepted in the Church). The *Didache*, a handbook of basic Christianity for the instruction of converts from paganism, follows the Alexandrian teaching and specifies abortion as a capital crime. Closer to the main body of the Jewish community, we find the doctrine accepted by the Samaritans and Karaites and, more important, by Philo, the popular first-century philosopher of Alexandria. On the other hand, Philo's younger contemporary, Josephus, bears witness to the Palestinian (halakhic) tradition. Aside from its textual warrant, the latter is the more authentic in the view of Aptowitz, while the

other is a later tendency, "which, in addition, is not genuinely Jewish but must have originated in Alexandria under Egyptian-Greek influence."¹

In the rabbinic tradition, then, abortion remains a non-capital crime at worst. But a curious factor further complicates the question of the criminality of the act. This is the circumstance that one more biblical text (this one in Genesis and hence "before Sinai" and part of the Laws of the "Sons of Noah") served as the source for the teaching that feticide is indeed a capital crime -- for non-Jews. Genesis 9:6 reads, "He who sheds the blood of man, through man (i.e., through the human court of law) shall *his* blood be shed." Since the Hebrew (*shofekh dam ha'adam ba'adam....*) allows for a translation of "man, in man," as well as "man, through man," the Talmud records the exposition of Rabbi Ishmael: "What is this 'man in man'? It refers to the fetus in its mother's womb." The locus of this text in Genesis, standing as it does without the qualifying balance of the Exodus (Sinaitic) passage, made feticide a capital crime for non-Jews (i.e., those not heir to the Sinaitic covenant) in Jewish law. Some modern scholars hold this exposition to be more sociological than textually inherent, representing a reaction against abuses among the heathen. In view of rampant abortion and infanticide, they claim, Rabbi Ishmael "forced" the above exegesis out of the Genesis text to render judgment against the Romans.

Regardless of its rationale, the doctrine remains part of theoretical Jewish law, as Maimonides systematically defines it:

A "Son of Noah" who killed a person, even a fetus in its mother's womb, is capitally liable....(The Jewish court is obliged to provide judges for the resident alien to adjudicate for them in accordance with these laws [of the Sons of Noah] so that society not corrupt itself. The judges may come either from their midst or from the Israelites.)
(*Hilkhot Melakhim* 9:4; 10:11)

Therapeutic abortion is not, of course, included in this Noahide restriction. Nor is an abortion during the first forty days of pregnancy included, according to some. The implications of this anomaly of a different law for "Sons of Noah" were dealt with in a responsum of the eighteenth century:

It is not to be supposed that the Torah would consider the embryo as a person (*nefesh*) for them (Sons of Noah) but not a person for us. The fetus is not a person for them either; the Torah merely was more severe in its practical ruling in their regard. Hence, therapeutic abortion would be permissible to them, too.²

In the rabbinic system, then, abortion is not murder. Nor is it more than

murder, as would be the case if "ensoulment" were at issue. Talmudic discussions speak of the moment -- conception, birth, post-birth, etc. -- at which the soul joins the body. This is seen to be irrelevant to the abortion question, because the soul is immortal no matter when it enters or leaves the body. And, more important than being immortal, it is a pure soul, free of the taint of "original sin." In the sixth century, St. Fulgentius ruled that "original sin" is inherited by the soul of the fetus at conception, which made baptism in utero necessary in cases of miscarriage, and which made abortion worse than murder, in the sense that the fetus was being "killed in this world and the next." Judaism has no concept of "original sin" of this kind and, in the words of the Talmud and Daily Prayer Book, "My God, the soul with which Thou has endowed me is pure."

Murder (of the innocent) is forbidden even to save life. But with abortion removed from the category of murder, then therapeutic abortion becomes permissible and, in fact, mandated. The Mishnah sets forth the basic talmudic law in this regard:

If a woman has [life-threatening] difficulty in childbirth, the embryo within her should be dismembered limb by limb, because her life takes precedence over its life. Once its head (or its greater part) has emerged, it may not be touched, for we do not set aside one life for another (*Ohalot* 7:6).

In analyzing such provisions, the Talmud suggested that the reason could well be that the fetus is in the category of an "aggressor"; its life is forfeit under the law which permits killing a "pursuer" in order to save the intended victim. The Talmud, however, dismisses this reasoning, since the fetus is an innocent being, and since one cannot know "who is pursuing whom"; the pursuit must therefore be deemed an "act of God," and this factor does not apply. In the *Mishneh Torah*, Maimonides also used the term "aggressor," but only figuratively; in truth he and his commentators concluded that the argument does not apply. It is either inapplicable or at best superfluous, because the fetus is not yet a person and murder is not involved. Maimonides formulates the talmudic law as follows:

This, too, is a [negative] commandment: Not to take pity on the life of a pursuer. Therefore, the Sages ruled that when a woman has difficulty in giving birth, one may dismember the child in her womb, either with drugs or by surgery, *because it is like a pursuer seeking to kill her*. Once its head has emerged, it may not be touched, for we do not set aside one life for another; this is the natural course of the world (*Hilkhot Rotzeah U'Shemirat Nefesh* 1:9).

Some commentators of the Mishneh Torah suggest that although abortion is not technically murder, it is still so grave an offense that Maimonides resorted to the aggressor argument in order to buttress the permission for abortion; its justification is that the fetus is at least *like* an aggressor.

The subsequent rabbinic tradition seems to align itself either to the right, in the direction of Maimonides, or to the left, in the direction of Rashi. The first approach can be identified especially with the late Chief Rabbi of Israel, Issar Unterman, who sees any abortion as "akin to homicide" and therefore allowable only in cases of corresponding gravity, such as saving the life of the mother. This approach then builds down from that strict position to embrace a broader interpretation of life-saving situations, which include a threat to her health, for example, as well as a threat to her life. The second approach, associated with another former Chief Rabbi of Israel, Ben Zion Uziel, and others, assumes that no real prohibition against abortion exists and builds *up* from that lenient position to safeguard against indiscriminate abortion. This includes the example of Rabbi Yair Bachrach in the 17th century, whose classic responsum saw no legal bar to abortion, but would not permit it in the case before him. The case was one of a pregnancy conceived in adultery; the woman, in "deep remorse," wanted to destroy the fruit of her sin. The author concludes by refusing to sanction the abortion, not on legal grounds but on sociological ones, as a safeguard against further immorality. Other authorities disagreed on this point, affirming the legal sanction of abortion for the woman's welfare, whether life or health, or even avoidance of "great pain."

The criterion in both approaches becomes maternal rather than fetal. The principle in Jewish law is *tza'ar gufah kadim*, that her welfare is primary. Rabbinic rulings on abortion are thus amenable to the following generalization: If a possibility or probability exists that a child may be born defective, and the mother seeks abortion on the grounds of pity for a child whose life would be less than normal, the rabbi would decline permission. Since we do not know for sure that it will be born defective, and since we do not know how bad such a defective life will be for the child, and since no permission exists in Jewish law to kill born defectives, permission on those grounds would be denied. If, however, an abortion for the same potentially deformed child were sought on the grounds that the possibility is causing severe anguish to the mother, permission would be granted. The fetus is unknown, future, potential, part of the "secrets of God"; the mother is known, present, alive and asking for compassion.

One rabbinic authority, writing in Rumania in 1940, responded to the case of an epileptic mother who wanted to interrupt her pregnancy for fear that her child too would be epileptic. He first discusses the question of epilepsy itself, then writes:

For fear of possible, remote danger to a future child that, maybe, God forbid, he will know sickness -- how can it occur to anyone to actively kill him because of such a possible doubt? This seems to me very much like the laws of Lycurgus, King of Sparta, according to which every blemished child would be killed....Permission for abortion is to be granted only because of fear of mental anguish for the mother. But for fear of what might be the child's lot -- "the secrets of God are none of your business."⁵

In the current Tay-Sachs screening controversy, rabbinic authorities recommend screening before rather than during the pregnancy. This is because the alternative would be to resort to amniocentesis after the first trimester of pregnancy, with possible abortion on the basis of its results. This abortion for fetal rather than maternal indications would not ordinarily be sanctioned by Jewish law. True, rabbinic opinion permitting abortion for fetal reasons alone is not altogether lacking, but the normative rabbinic view is to permit it for maternal indications only. Yet, the one can blend into the other, as fetal risk can mean mental anguish on the part of the mother, so that the fetal indication becomes a maternal one. The woman's welfare is thus the key to warrant abortion.

Implicit in the Mishnah above is the teaching that the rights of the fetus are secondary to the rights of the mother all the way up until the moment of birth. This principle is obscured by the current phrase, "right to life." In the context of abortion questions, the issue is not the right to life, which is very clear in Jewish law, but the right to be born, which is not as clear. The right to be born is relative; the right to life for existing persons is absolute. "Life" may begin before birth, but it is not the life of a human person; animal life, plant life or even pre-human life are not the same as human life. Rabbinic law has determined that human life begins with birth. This is neither a medical nor a court judgment, but a metaphysical one. In the Jewish system, human life in this sense begins with birth. Of course, potential life already partakes of the potential sacredness of actual life, since the latter can have its inception only through the former.

Another slogan-like phrase is dealt with in the same Mishnah, wherein it is ruled that "once the fetus has emerged from the womb, it cannot be touched" even to save the life of the mother, "for we cannot set aside one life for another." The "quality of life" slogan or concept is thus inadmissible. The life of the mother has more "quality"; she is adult, has a husband, children, associations, while the newborn has none of these yet. Still, the sanctity of life principle means that life is sacred regardless of differences in quality; mother and newborn babe are equal from the moment of birth.

Talmudic statements do use the term "murder" in a figurative sense, of

course, to describe even the neglect to conceive. Procreation is a positive mitzvah, and he who fails to fulfill this mitzvah is called "guilty of bloodshed." And much of the pro-natalist attitude of Judaism helps account for its abhorrence of casual abortion. There may be legal sanction for abortion where necessary, but the attitude remains one of hesitation before the sanctity of life and a pro-natalist respect for potential life.

Accordingly, abortion for "population control" is repugnant to the Jewish system. Abortion for economic reasons is also not admissible. Taking precaution by abortion or birth control against physical threat remains a mitzvah, but never to forestall financial difficulty. Material considerations are improper in this connection. In the Jewish community, today, with a conscious or unconscious drive to replenish ranks decimated by the Holocaust, contemporary rabbis invoke not the more lenient, but rather the more stringent responsa of the earlier authorities. The more permissive decisions, they point out, were in any case rendered against the background of far greater instinctive hesitation to resort to abortion. Against today's background of more casual abortion, rabbis are moving closer to the position associated with Maimonides and Unterman, allowing abortion only for the gravest of reasons.

NOTES

1. Viktor Aptowitz, "Observations on the Criminal Law of the Jews," *Jewish Quarterly Review* 15 (1924): 85ff.
2. R. Isaac Schorr, *Responsa Koah Shor*, vol. I, no. 20; Kolomea 1888.
3. R. David Sperber, *Responsa Afarkasta D'Anyah*, no. 169; Satmar 1940.