

Prenatal Testing and Abortion

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Note: "Abortion: The Jewish View" by Rabbi David Feldman, "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.

SHE'ELAH

The trend to later marriages has raised new questions. Women begin child bearing at a later age, increasing the risk of birth defects in children. Many physicians advise that amniocentesis and/or other prenatal tests be performed to ascertain whether there are detectable birth defects in the fetus. Such tests are also advised for younger women when there may be reason to suspect hereditary genetic defects, or when the parents may be Tay-Sachs carriers. Implicit in these prenatal tests is the assumption that should the fetus have serious defects, the parents will have to choose whether to abort the fetus. What is the Jewish view of abortion? Is it permitted to abort a defective fetus? Should we advise women who fall into categories where there is a risk of bearing a defective fetus to have such prenatal tests?

TESHUVAH

The question of abortion has long been a troubling one for religious, moral and economic reasons. Today, the development of medical technology forces us to examine the question anew, and to grapple with new aspects of this old question.

Though there is no direct reference to abortion in the Torah, the status of the fetus may be inferred from the biblical law concerning injury to a

pregnant woman:

וכי ינצו אנשים ונגפו אשה הרה ויצאו ילדיה, ולא יהיה אסון, ענוש יענוש כאשר ישית עליו בעל האשה ונתן כפללים. ואם אסון יהיה ונתת נפש תחת נפש.

When men fight, and one of them pushes a pregnant woman and a miscarriage results, but no other damage ensues, the one responsible shall be fined according as the woman's husband may exact from him, the payment to be based on reckoning. But if other damage ensues, the penalty shall be life for life (Exodus 21:22-23).

It is obvious that the Torah considers the death of the woman a capital offense, while the death of a fetus is a lesser offense, punishable only by a fine. Hence, it seems that the act of destroying the fetus is not considered murder because the Torah does not seem to consider the fetus a person in law. This same attitude toward the status of the fetus is implied in a mishnah, which is the main rabbinic statement on abortion:

האשה שהיא מקשה לילד, מחתכין את הולד במעיה, ומוציאין אותו אברים אברים, מפני שחייה קודמין לחייו; יצא רובו, אין נוגעין בו, שאין דוחין נפש מפני נפש.

If a woman is having difficulty giving birth, the child must be cut in her womb and brought out limb by limb, for her life takes precedence over its life. If the greater part of the child has already come forth, he must not be touched, because one life must not be taken to save another. (*Ohalot* 7:6)

An innocent person may not be killed to save the life of another person. However, the fetus in the womb may be destroyed in order to save its mother's life, for it is not a person, and the case is therefore not comparable to the case of killing one person to save the life of another.

The Talmud speculates as to why the partially emerged child is spared:

יצא ראשו אין נוגעין בו, לפי שאין דוחין נפש מפני נפש. ואמאי רודף הוא? שאני התם, דמשמיה קא רדפי לה.

If the head has emerged he may not be harmed, for we do not take one life to save another. Why? Is he not a *rodef*, a pursuer? This case is different, for she (the mother) is pursued by heaven. (*Sanhedrin* 72b).

Under normal circumstances one person may not be killed to save another. However, it is permitted to kill a *rodef*, a potential murderer, to

Prenatal Testing and Abortion

save the life of the intended victim. The partially emerged child is considered a *nefesh*, a person, but not a *rodef*, a potential murderer, for the child is innocent of any intention to harm its mother. Since the threat to the mother's life comes from natural causes, there is no reason to kill one *nefesh* to save another.

Rashi makes explicit the underlying principle in his comment on the passage:

דכל זמן שלא יצא לאויר העולם לאו נפש הוא וניתן להרגו ולהציל את אמו. אבל יצא ראשו אין נוגעין בו להורגו דהוה ליה כילוד ואין דוחין נפש מפני נפש.

Until the child has emerged into the world, it is not considered a person (*lav nefesh hu*), and it is permitted to destroy it to save the mother's life. However, once the head has emerged, it is considered as born, and one may not harm it, for one life may not be taken to save another.

Rashi states clearly that the fetus is not an independent person (*nefesh*). Rather, the fetus acquires the status of person (*nefesh*) only after it is born. Hence, feticide is not homicide and is permitted. It should be noted, however, that this does not imply blanket permission to kill the fetus. Here, we can conclude that the fetus may only be aborted for therapeutic reasons, to safeguard the mother.

Maimonides, in his *Mishneh Torah*, interprets the permission for therapeutic abortion in a way that leads to more restrictive conclusions than the talmudic precedents seem to require. In the *Mishneh Torah*, he writes:

אף זו מצות לא תעשה שלא לחוס על נפש הרודף. לפיכך הורו חכמים שהעובר שהיא מקשה לילד, מותר לחתוך העובר במעיה בין כסם בין ביד מפני שהוא כרודף אחריה להורגה. ואם משהוציא ראשו אין נוגעין בו, שאין דוחין נפש מפני נפש.

There is also a negative commandment, that we have no mercy for the life of a pursuer (*rodef*). Therefore, our Sages taught that if a woman is having difficulty in childbirth, the fetus may be removed by drugs or surgery, because the fetus is regarded as like a pursuer (*rodef*) trying to kill her. Once its head has emerged, he may no longer be harmed, because we do not take one life to save another. What is happening is natural. (*Hilkhot Rotzeah U'Shemirat Nefesh* 1:9; this same position is also taken by Joseph Karo in *Hoshen Mishpat* 425:2.)

Maimonides departed from the simple meaning of the Mishnah, and introduced the *rodef* (pursuer) argument to justify therapeutic abortion. This argument implies that "only" if the mother's life is endangered by the

pregnancy is there reason to perform an abortion. However, it follows that if the fetus cannot be shown to be a *rodef* (endangering its mother's life), then abortion would not be permitted.

Rabbi Isaac Klein, in his responsum on abortion, points out:

There is then a clear distinction between the reasoning of Rashi and that of Maimonides. According to Rashi, the embryo is not considered a living being and therefore the life of the mother takes precedence. According to Maimonides, the life of the mother takes precedence, because the embryo is in the position of a *rodef*, a pursuer.

From this difference in interpretation may also result differences in legal decisions. According to Maimonides, we should permit abortion only when there is clear danger to the life of the mother. According to Rashi, there might be other adequate reasons beside the threat to the life of the mother. (See "A Teshuvah on Abortion," by Rabbi Isaac Klein, which also appears in this section.)

The difference in the approaches of Rashi and Maimonides is reflected in the later Responsa literature. Rabbi David Feldman, in his excellent book, *Birth Control in Jewish Law*, traces the abortion debate and states:

What generalizations, then, can be made about the rabbinic attitude to abortion at any time? It can best be described as bifurcating into two directions, both of which will presuppose that the fetus is not a person, yet one approach builds *down* and the other builds *up*. The first can be identified especially with Chief Rabbi Unterman, who sees any abortion as "akin to homicide," and therefore permissible only in cases of corresponding gravity, such as saving the life of the mother (Y.L. Unterman, *Shevet Miyehudah* (1955), pp. 26-30, 49, 50; *Noam* VI (1963), pp. 1-11). It then builds down from this strict position to embrace a broader interpretation of lifesaving situations which include a threat to her health, for example, as well as a threat to her life. The other viewpoint (identifiable with the late Chief Rabbi Uziel and others, and to which we shall return), assumes no real prohibition against abortion at any time, except perhaps during the most advanced stage of pregnancy, and builds up from this lenient position to safeguard against indiscriminate abortion.¹

There is no indication in the Mishnah that the fetus is considered a *rodef* and the later commentators therefore struggle to explain why Maimonides applied the term to the unborn fetus. Therefore, it appears that the original premise of the Torah, the Mishnah and the Talmud (that the fetus is not a legal person) is more faithfully expounded by Rashi and those who begin

Prenatal Testing and Abortion

with the premise that there is neither homicide nor even an offense in carrying out an abortion, but which builds up from there, holding that an adequate reason is necessary to avoid indiscriminate abortion. However, what constitutes an adequate reason seems to depend on the judgment of the rabbi and the particular circumstances of the case.

Rabbi Feldman cites three authorities who deal with the question of whether it is permitted to abort a fetus conceived in adultery.² Rabbi Bachrach (17th century) held that while there is no clear prohibition against abortion, nonetheless, to sanction the abortion of the fruit of adultery would open the door to immorality, and therefore he forbade it. R. Jacob Emden (18th century) not only permitted abortion in such cases, but added, "with legitimate fruit too, there is room to permit abortion for 'great need,' as long as the birth process has not yet begun, even if the reason is not to save her life -- even if only to save her from the 'great pain' it causes her. But the matter requires further deliberation" (*She'elat Ya'avetz*, No. 43). And R. Yosef Hayyim ben Eliyahu (19th century) draws the tentative conclusion that "evidently there is room to permit [abortion] when disgrace is involved, which can be called a matter of 'great need.'" However, he adds, "But I am issuing no ruling, merely placing the above before you for consultation with (another) sage." (*Responsa of Rav P'alim*, vol. I, *E.H.* no. 4).

This trend of thought is carried to its logical conclusion by Rabbi Uziel:

It is clear that abortion is not permitted without reason. That would be destructive and frustrative of the possibility of life. But for a *reason*, even if it is a *slim reason* (*ta'am kalush*), such as to prevent her *nivul*, then we have precedent and authority to permit it (*Mishpetei Uziel* vol. III, *H.M.* no. 47; See Feldman, pp. 289-291).

Rabbi Uziel considers the woman's pain as the deciding factor in determining whether there may be an abortion. He does not differentiate between life-threatening situations and those that are detrimental to health. Even mental anguish, a sense of shame, fear of disgrace, or even a slight reason such as fear of disfigurement, would be sufficient to allow abortion.

Most authorities who follow this trend of thinking consider only the mother's physical welfare and mental well-being as determining factors in deciding whether there should be an abortion. However, there are authorities who have taken into consideration factors other than the mother's pain. Rabbi Isaac Klein quotes a responsum by Rabbi Yitzhak Oelbaum (*Hayyei Sara* I, 5709) where Rabbi Oelbaum would permit an abortion for a nursing mother when there is expert evidence that the pregnancy would affect the mother's milk and would endanger the life of the sickly child who is nursing. A new factor has been introduced here

that goes beyond therapeutic abortion: the life and welfare of another child.³ Another noted authority, Rabbi Eliezer Yehuda Waldenberg, also takes into account the future, and the well-being of the fetus. He states: "If there is a substantial risk that the fetus would be born with a deformity that would *cause it to suffer*, it is permitted to terminate the pregnancy within the first three months."⁴ Rabbi Waldenberg adds, "in circumstances where it has been conclusively proven (i.e., by amniocentesis) that the fetus will be afflicted with Tay-Sachs Disease, it is permitted to perform an abortion up to the seventh month of pregnancy."⁵

New techniques of prenatal testing developed in recent years enable the testing of the fetus for life-threatening conditions, and for genetic abnormalities. Most commonly used by doctors for women of all ages is ultrasound. Ultrasound employs sound waves to form live video images of some parts of the fetus that are invisible to X-rays. Ultrasound can show at an early stage whether the fetus is maturing as it should, and reveal several different kinds of birth defects -- especially malformations of the skeleton such as some forms of dwarfism.

Amniocentesis is commonly offered to pregnant women over the age of 35. A physician inserts a sharp syringe through the abdominal wall into the uterus, and draws off a small quantity of the amniotic fluid which bathes the developing fetus. Cells which the fetus has cast off float in the fluid and are examined for clues to fetal well-being.

As women age, they run an increased risk of having a child with the wrong number of chromosomes. The most common chromosomal error leads to Down's Syndrome, the largest single cause of severe mental retardation. Amniotic fluid can also contain high levels of AFP (alpha fetoprotein), which indicates that the fetus may be afflicted with one of two common congenital malformations -- anencephaly and spina bifida -- or neural tube defects. When doctors suspect that a woman may give birth to a child with a particular disorder, the amniotic fluid may be examined for other conditions, including nearly 100 rare genetic diseases, among them Tay-Sachs Disease. Tay-Sachs Disease (TSD) is a degenerative disease of the central nervous system, which begins to manifest itself in an infant of six months with weakness followed by progressive mental and motor deterioration, blindness, paralysis, dementia, seizures and death, usually by three years of age. The incidence of this disease among Ashkenazi Jews is 100 times more frequent than in the non-Jewish population.

Given the horrible fate that awaits a Tay-Sachs baby, it is not surprising that Rabbi Waldenberg singles out Tay-Sachs Disease, and permits abortion of the fetus, even to the seventh month. The seventh month is allowed in this case, though most abortions would be permissible only in the first trimester, because doctors do not do amniocentesis until the end of the fourth month of pregnancy, when sufficient fluid is available. Most

Prenatal Testing and Abortion

tests of the amniotic fluid then take three or four weeks to complete. Rabbi Waldenberg evidently permits sufficient time for the information to be gathered, a decision to be made by the parents, and the abortion to be performed. The amniocentesis test itself is safe, with few unfavorable side effects to fetus or mother (estimated at 1% or less).

At present, all prenatal diagnosis must be performed during the second trimester. However, new tests are being developed, among them the chorion biopsy, where a sample of tissue is taken from the trophoblast (which derives from the fertilized egg and is genetically identical with the fetus) and not from the fetus itself. These tests can be performed in the first trimester of the pregnancy, will be less expensive and will probably be even safer than amniocentesis. The increased knowledge of the development of the status and the genetic defects of the fetus means that parents will have to make decisions based on information not available to previous generations for whom there were no "windows on the womb."⁶

CONCLUSION

There is clear precedent in the tradition, as it has developed to our day, to permit abortion of a fetus to save a mother's life, to safeguard her health, or even for "a very thin reason," such as to spare her physical pain or mental anguish. Some recent authorities also consider the well-being of other children, and the future of the fetus itself as reasons to permit abortion. All agree that there *must be a reason* to justify the destruction of the potential person the fetus will become after birth.

Where there is reason to believe that the fetus may be defective, it is advisable for the mother to go to her obstetrician and undergo amniocentesis and/or other prenatal tests. If the tests indicate that the child will be born with major defects which would preclude a normal life, and which make the mother and the family anxious about the future, it is permitted to abort the fetus.

The rabbi should meet with the mother (and father) and explain the approach of Jewish law to abortion. He should indicate the gravity of the act of aborting the fetus, as well as the extenuating circumstances which Jewish law considers as justification for an abortion. The rabbi should recommend a full discussion with the father and other members of the family in consultation with a physician and a psychiatrist, to help the mother understand the impact the abortion will have on her and other members of the family. The final decision should be made by the mother in consultation with the family.

NOTES

1. David Feldman, *Marital Relations, Birth Control and Abortion in Jewish Law*, Schocken Paperback Edition (New York: Schocken Books, 1974).
2. *Ibid.*
3. See Isaac Klein, "A Teshuvah on Abortion," which also appears in this volume. See also Responsa *Hayyim Veshalom*, vol. I, no. 40; Responsa *Bet Yehuda Even Haezer*, no. 14; Responsa *Tzitz Eliezer*, vol. IX, no. 51:13.
4. *Tzitz Eliezer*, vol. IX, 237; see also Avraham Steinberg, *Jewish Medical Law* (Israel: Gefen Publishing, 1980), 103.
5. Avraham Steinberg, *Jewish Medical Law*, 103.
6. T.M. Powledge, "Windows on the Womb," *American Psychology* (June 1980): 47-53; Mitchell Golbus, "The Current Scope of Antenatal Diagnosis," *Hospital Practice* (c. 1982): 179-186.