

A Teshuvah on Abortion

RABBI ISAAC KLEIN

This paper, originally published in Conservative Judaism (Fall 1959), was adopted as a Majority Opinion on August 23, 1983, by a vote of 11-1-5. Members voting in favor: Rabbis Kassel Abelson, Ephraim L. Bennett, Ben Zion Bokser, David M. Feldman, Morris Feldman, Robert Gordis, David H. Lincoln, George Pollak, Barry S. Rosen, Morris M. Shapiro and Henry A. Sosland. Voting in opposition: Rabbi Alan J. Yuter. Members abstaining: Rabbis Edward M. Gershfield, Wolfe Kelman, Mayer E. Rabinowitz, Joel Roth and Harry Z. Sky.

Note: "Prenatal Testing and Abortion" by Rabbi Kassel Abelson, "Abortion: The Jewish View" by Rabbi David Feldman, and "Abortion: Major Wrong or Basic Right?" by Rabbi Robert Gordis, were also adopted as Majority Opinions of the Committee. These papers appear elsewhere in this section.

SHE'ELAH

Is abortion permitted according to Jewish Law?

TESHUVAH

We first have to define the word "abortion." Medically, abortion is the term indicating the spontaneous or artificial termination of a pregnancy before the 28th week, at which time the infant, theoretically, first becomes able to carry on an independent existence.¹ In our case the question applies only to the artificial (not spontaneous or natural) termination of the pregnancy at any time before the complete birth of the child and involving the death of the embryo or the fetus.

The main talmudic source for this question is found in the Mishnah which states:

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

If a woman is having difficulty in giving birth, it is permitted to cut up the child inside her womb and take it out limb by limb because her life takes precedence. If the greater part of the child has come out it must not be touched, because one life must not be taken to save another. (*Ohalot* 7:6)

This is repeated in the Tosefta with slight variations:

האשה שמקשה לילד מחתכין את העובר שבמעיה אפילו בשבת ומוציאין אותו איברים איברים מפני שחייה קודמין לו. יצא ראשו אפילו ביום השני אין נוגעין בו שאין דוחין נפש מפני נפש.

If a woman is having difficulty in giving birth, it is permitted to cut up the child in her womb even on the Sabbath, and take it out limb by limb because her life takes precedence. If its head came out it may not be touched even the second day, because one life may not be taken to save another. (*Tosefta Yevamot* 9:9)

On the above Mishnah we have the following comment of the Talmud:

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

Once his head has come forth he may not be harmed because one life may not be taken to save another. But why so? Is he not a pursuer? There it is different, for she is pursued by heaven. (*Sanhedrin* 72b)

What is the reason that we permit taking the life of the unborn child when it endangers the life of the mother? Rashi, in his comment on the above passage, gives the following reason:

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

For as long as it did not come out into the world it is not called a living thing and it is permissible to take its life in order to save its mother. Once the head has come forth it may not be harmed because it is considered born, and one life may not be taken to save another.

Thus, according to Rashi, the reason for the permission to take the life of the unborn child is that the embryo is not considered a living thing, and

A Teshuvah on Abortion

hence, taking its life cannot be called murder.

This view is supported by the biblical law concerning harm done to a pregnant woman in which case the Bible prescribes:

וכי ינצו אנשים ונגפו אשה הרה ויצאו ילדיה ולא יהיה אסון ענוש יענש כאשר
ישית עליו בעל האשה ונתן בפלילים. ואם אסון יהיה ונתח נפש תחת נפש.

If men strive and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall surely be punished, according as the woman's husband will lay upon him; and he shall pay as the judge determines. And if any mischief follow, then thou shalt give life for life. (Exodus 21:22-23)

The mischief in the verse refers of course to the death of the woman. It is only in the case that death results to the mother from the hurt that capital punishment follows. The death of the unborn child is punishable by fine only.

From Maimonides it would appear that the reason the life of the unborn child may be taken when it endangers the life of the mother is based on the law of the "pursuer" (*rodef*). In his code Maimonides says:

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

This is, moreover, a negative commandment, that we have no pity on the life of a pursuer. Consequently, the Sages have ruled that if a woman with child is having difficulty in giving birth, the child inside her may be taken out, either by drugs or by surgery, because it is regarded as one pursuing her and trying to kill her. But once its head has appeared, it must not be touched, for we may not set aside one human life to save another human life, and what is happening is the course of nature. (Rambam, *Hilkhot Rotzeah* 1:9)

This opinion of Maimonides is followed by Joseph Karo in *Hoshen Mishpat* 425:2.

There is a clear distinction between the reasoning of Rashi and that of Maimonides. According to Rashi the embryo is not considered a living thing 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 result also differences in legal decisions. According to Maimonides we would permit abortion only where 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.

The interpretation of Maimonides offers many difficulties. There is no indication in the Mishnah that in the case of an embryo the law of the pursuer applies. On the contrary: the Mishnah clearly states that the life of the mother takes precedence as long as the child is unborn. The Talmud suggests using the reason of the "pursuer" only where the child is already born. The answer that the Talmud gives for not applying the reason of the "pursuer" in the case of a child already born applies just as much to the unborn child. Many of the commentators try to give answers, but they seem forced.² Hence, we prefer to follow the reasoning of Rashi that the whole problem revolves around the question of whether the fetus is considered a living being.

The ancients spoke of this in their idiom, e.g., the following conversation between the compiler of the Mishnah and the Roman Emperor:

אמר ליה אנטונינוס לרבי: נשמה מאימתי ניתנה לאדם, משעת יצירה או משעת פקידה? א"ל: משעת יצירה. א"ל: אפשר חתיכה של בשר עומדת ג' ימים בלא מלח ואינה מסרחת? אלא משעת פקידה. אמר רבי: דבר זה למדני אנטונינוס וקרא מסייעו שנאמר: ופקודיך שמרה נפשי (איוב י: יב)

Antoninus said to Rabbi: When is the soul given unto man, at the time that the embryo is formed, or at the time of conception? He replied, at the time the embryo is already formed. The emperor objected: Is it possible for a piece of meat to stay for three days without salt and not putrefy? It must therefore be at conception. Said Rabbi: This thing Antoninus taught me and Scripture supports him, as it is said: And thy visitation has preserved my spirit, i.e., my soul (Job 10:12). (*Sanhedrin* 91:2)

According to Aristotle the rational soul is infused the fortieth day after conception in the case of a male and the eightieth day in the case of a female. The Platonic tradition was that the soul entered at conception. The Stoics believed that the soul entered at birth. Roman jurists followed the Stoics and held therefore that abortion was not murder. According to Common Law, too, taking a life is punishable only after there has been complete extrusion of the child from the body of the mother.

The Catholic Church evidently followed the Platonic tradition because it forbade all abortions. Even in the case of ectopic pregnancies the official ruling of the church issued by the Congregation of the Holy Office, March

A Teshuvah on Abortion

5, 1902 is: No, it (abortion) is not lawful. Such a removal of the fetus is a direct killing of the fetus and is forbidden.

A *fatwa* of the Grand Mufti of January 25, 1937, states that therapeutic abortions are absolutely forbidden after the embryo has "quickenened."

Medical science considers the fetus a living thing from the moment the ovum is fertilized.³

Actually, being a living thing and being a separate entity are two separate matters. Even if it is a living thing we can say that the fetus is *pars viscera matris* or to use the talmudic expression, *ubar yerekh immo hu*. The fetus is, thus, accounted as the loin of its mother. When abortion is therapeutic there can be no objection to it because, as in any surgery, we sacrifice the part for the whole.

This is the attitude the Rabbis have taken. Abortion is forbidden. Though it is not considered murder, it does mean the destruction of potential life.⁴ If, however, the purpose is therapeutic, this objection is removed. I have chosen a number of responsa dealing with the question.

Rabbi Yair Hayyim Bachrach (1639-1702), the author of *Responsa Havvot Ya'ir*, had this strange case. A married woman committed adultery and became pregnant. She had pangs of remorse and wanted to do penance. She asked whether she could swallow a drug in order to get rid of the "evil fruit" in her womb. In answer, Rabbi Bachrach made it clear immediately that the question of the permissibility of abortion had nothing to do with the legitimacy of the child to be born. The only question involved was whether abortion is accounted as taking a life or not. Rabbi Bachrach drew distinctions between the various stages of the development of the fetus, i.e., forty days after conception, three months after conception. Then he concluded that it might be theoretically permitted at the early stages of the pregnancy, but we do not do so because of the custom adopted both by the Jewish and the general community against immorality.

Rabbi Meir Eisenstadt (1670-1744), in his *Panim Me'ivot*, asked the following question: If a woman has difficulty in giving birth because the child came out feet first, is it permitted to cut up the child limb by limb in order to save the mother? This seems to be the very question explicitly answered in the Mishnah. The only problem that is introduced is a discrepancy between the Mishnah and Maimonides. Whereas the Mishnah states that if the greater part of the child has come out of the mother's body, we do not take the life of the child in order to save the mother, Maimonides says that if the head of the child or the majority thereof came out first, it is considered as born and we do not take its life in order to save the mother.

The commentators tried to resolve this contradiction by saying that

extrusion of the head or the major part thereof, or, in cases when the head came last, the extrusion of the majority of the body, constitutes birth. The author then poses the question: If at this stage death could result to both if we let nature take its course, is it still forbidden to take the life of the child in order to save the mother? He leaves the question unanswered.⁵

Rabbi Eliezer Deutsch (1850-1916), the author of *Responsa Peri Hasadeh*, treats the following problem: A woman who had been pregnant a few weeks began to spit blood. Expert physicians insisted that she take a drug in order to induce a miscarriage for, should she wait, it would not only become necessary to take out the child by cutting it up, it would also endanger the life of the mother; if they acted immediately, it would be possible to bring forth the child with a drug. Is it permissible to do so?

Rabbi Deutsch answered that in this case it is certainly permitted. He made a distinction between the various stages in the development of the fetus, *gufa aharina* ("a separate body"), *ne'ekar havlad* ("the fetus has become detached"), between the use of drugs and the use of surgery, and between another person doing it or the woman herself. The conclusion was that it is permitted in this case for three reasons: (a) Before three months after the conception there is not even a fetus; (b) There was no overt act involved in this case, i.e., surgery; and (c) The woman herself was doing it and it is thus an act of self-preservation.

In current literature I found a responsum dated 5709 - I, *Hayyei Sarah* by Rabbi Yitzhak Oelbaum of Czechoslovakia, now of Canada. This is the question: A woman had a weak child. According to the doctors, it would not live unless it was breast fed by the mother. The mother had been pregnant for four weeks and had felt a change in her milk. Could she destroy the child she was carrying by means of an injection, she inquired, in order to save the child she was nursing?

The author first of all discussed the reliability of doctors in these matters, claiming that they sometimes exaggerate, and whether a proper formula for bottle-feeding could be substituted. He concluded that if there was expert evidence that danger might result if the abortion was not performed, then it is permitted.

In this responsum a new issue is introduced. Until now we have spoken of danger to the mother. Here there is no danger to the mother, but rather to another child. This opens new possibilities which we shall not pursue here.

An even more recent responsum on the subject is by Rabbi Gedaliah Felder of Toronto, published in *Kol Torah* (Heshvan 5719), a rabbinic periodical published in Jerusalem. Here the question is as follows: A pregnant woman was afflicted with cancer of the lungs. The doctors said that if a premature birth was not effected, the cancer would spread faster and hasten her death. Is it permissible to have an abortion where the

A Teshuvah on Abortion

mother is saved only temporarily?

Before we sum up, it would not be out of place to bring in a comment from the medical profession. This was called to my attention by Dr. Hiram Yellen, a most prominent obstetrician of the City of Buffalo:

There is abundant evidence that the frequency of criminal induction of abortion is increasing at an alarming rate, although accurate statistics cannot be obtained. Numerous reasons may be advanced for this deplorable situation, the most probable being: (1) Twentieth-century standards of living have made children an economic liability for a large percentage of the population. This may be contrasted with more primitive rural conditions where a large family was considered an economic asset; (2) As a by-product of the women's freedom movement, a very large number of women have come to believe that pregnancy should be regulated by their personal desires; and (3) The present-day lack of religious feeling and the wide teaching that pregnancy may be controlled have contributed to a lowering of moral standards among women, with a resulting increase in the number of undesired pregnancies....⁶

Our conclusion, therefore, must be that abortion is morally wrong. It should be permitted only for therapeutic reasons.

NOTES

1. Titus and Wilson, *The Management of Obstetric Difficulties* (New York, 1955), p. 210.
2. See *Tosefot R. Akiva Eiger* on the Mishnah in *Ohalot*, and *Hiddushei R. Hayyim Halevi ad loc.* and comments in some of the responsa that deal with this question.
3. See *Obstetrics*, Joseph B. De Lee, 4th Edition, p. 274.
4. See *Tosafot, Hullin 33a, s.v., Ehad Akum*
5. See, however, *Melammed leHo'il v. 2*, responsum 69.
6. Carl Henry Davis, *Gynecology and Obstetrics* (1937), Ch. X, p. 1.

