

Thinking About Women in Abortion Controversies

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In the twenty years since the Supreme Court grounded the right to an abortion in a constitutional right to privacy,¹ controversy has raged about the status of the fetus, the mother's countervailing claims, and the interests of fathers and other parties to the dispute. When we examine the Jewish discussion surrounding abortion, we confront the same issues: the personhood of the fetus, the interests of the mother, and the quality of life anticipated both by the developing fetus and the bearing woman. As American courts have faced an issue that intertwines legal, moral, and philosophical questions, the halakhic process confronts analogous complexities.

To understand the halakhic approach to this complex issue, we turn to many sources that assess the personhood of the fetus and the justification for allowing an abortion. Many of the commentaries approach the topic by asking what is the status of the fetus. Is it a human life?²

¹*Roe v. Wade*, 410 U.S. 113 (1973).

²In the Bible, one source that touches on the personhood of a fetus is Exodus 21:22ff.: "If men strive and hurt a woman with child so that her fruit depart from her and yet no further harm ensue: he shall surely be punished, according as the woman's husband lay upon him; and he shall pay as the judges determine. But if any harm ensue, then thou shalt give life for life. Eye for eye, tooth for tooth..." This is understood by most biblical scholars to mean that as long as there is no fatal injury to the woman following her miscarriage, the inflictor only need compensate the father (*cont.*)

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Is it just excess tissue until born? And if so, is there any problem with aborting a fetus, especially if its "quality of life" is taken to be minimal? We find reference in the Talmud that during the first 40 days, the fetus should be considered mere fluid.³ In other talmudic passages, the fetus is described as *'ubar yerekh 'imo* [*lit.* a fetus is a thigh of its mother].⁴ Throughout the rabbinic literature we find recognition that although the fetus is not a person in a juridical sense,⁵ it nevertheless represents potential life.⁶ Therefore, a fetus is to be treated with a certain reverence that would permit its destruction only in the most egregious circumstances; for example, if at any time the mother's life⁷ or mental health are threatened, the pregnancy may be terminated.

financially for the loss of the fetus. Thus the fetus is seen as possessing monetary value making one liable in tort. See, e.g., *Mekhila Exodus, N'zikin* 8 that "no other misfortune" refers to the woman; "the one responsible shall be fined" refers to compensation for the loss of the fetus.

³*Y'vamot* 69b (*mayah b' 'almah*).

⁴*Hullin* 58a; *Gittin* 23b.

⁵See, e.g., *Sanhedrin* 72b and Rashi's understanding that the fetus may be forfeited *in utero* because it is not a person [*Lav nefesh hu*].

⁶An example of the fetus representing potential life can be found in *Yoma* 85b where dispensation is given to carrying a knife on Shabbat in order to aid in the delivery of a child. "Violate this Sabbath so that there will be many more to observe" says the text.

⁷*Mishnah 'Ohalot* 7:6 in very graphic terms, discusses this conflict and directs us in the event of a threat to the mother to tear the fetus apart limb by limb, if necessary. But once its head has emerged it is considered a living person and cannot be touched; as we cannot set aside one life for the other.

In a contemporary responsum, R. Eliezer Waldenberg concluded that in principle, an abortion is permissible as late as the sixth month of pregnancy if tests reveals a Tay Sachs or Down's Syndrome afflicted fetus. In justifying an abortion even at that late date, his concern was not the possibility of a physical threat to the mother, but rather the mental health of the mother who bears a fatally ill or deformed child.⁸ As R. David Feldman explains, "[T]he principle that the mother's pain 'comes first,' however, is the most pervasive of all factors in the consideration of the abortion question."⁹ In his view, if a woman seeks an abortion on the grounds that the born child would not have a normal life, permission should be declined (after all, Jewish law does not grant permission to kill born defectives). He concludes, "If, however, an abortion for the same potentially deformed child is sought on the grounds that the possibility is causing severe *anguish to the mother*, permission would be granted."¹⁰

When rabbinic writers consider the permissibility of abortion, they reject the invitation to assess the quality of life anticipated by a deformed fetus. To do otherwise, they reason, would be to think that we are God, capable of determining the quality of life suitable to being born. Jewish tradition is committed to the sanctity of life. Though it has been unwilling to evaluate the fetus's anticipated quality of life,

⁸Tzitz Eliezer, Pt. 13, #102. In this *t'shuvah*, R. Waldenberg notes that "psychological suffering is in many ways much greater than the suffering of the flesh." The classic example was provided by R. Jacob Emden in his often cited *t'shuvah* (*Sh'elat Yavetz* 43). He discusses the permissibility of an abortion for a married woman pregnant from an adulterous union. In allowing an abortion to take place, he relied on what he called the "great need" and "great pain" of the mother, that is, the anguish she would suffer from the prospect of bearing a child, a *mamzer*, from an illicit affair. See J.D. Bleich, "Abortion in Halakic Literature" in *Contemporary Halakic Problems*, (New York: Ktav Publishing Co., 1977) p. 364. See also D. Feldman, *Marital Relations, Birth Control and Abortion in Jewish Law* (New York: Schocken Books, 1974), pp. 288–289 [hereinafter FELDMAN].

⁹See FELDMAN, p. 294.

¹⁰*Id.* at 292.

tradition has not ignored the qualitative interests of the woman, whose life and mental well-being are at stake. Although the Jewish sources do not recognize either a woman's right to privacy or the secular right of a woman to control her own body and make procreative decisions, we nonetheless find a standard in Jewish law that views the well-being of the mother as its primary concern.¹¹

One strain in Jewish thought comes close to treating the fetus as a person. It is true that after the fetus's head emerges, it is considered a person. One might infer that from Maimonides' reasoning about a fetus who threatens the life of the mother,¹² that the fetus is considered a person. Rambam reasoned that a threatening fetus should be considered as *akin* to a pursuer [*k-rodef*]; if only persons are pursuers, then Rambam's analysis presupposes that the fetus is a person or at least *akin* to a person. Yet there is no reason to assume that the conditions for being treated as an aggressor are the same as for being treated as a person. Even if the fetus is not a person, it cannot be treated as though it were like external tissue, say a "fingernail,"¹³ and discarded cavalierly. Indeed, there are some Halakhists who regard induced abortion as tantamount to homicide. Their statements should, however, be carefully scrutinized in order to determine, in each case, whether they express recognition of a fetus's personhood or rather a

¹¹A poignant example of the conflict between the well-being of a woman and fetus occurred in February 1989 when Nancy Klein, 13 weeks pregnant, was in a car accident that left her comatose. Her husband's legal battle to be appointed her legal guardian and have the fetus aborted was supported by all segments of the Jewish community, which manifested outrage at the attempts to deny this Jewish woman, whose life was at stake, an abortion. (See "The Chutzpah of Pro-Lifers," Editorial, *The Jewish Press*, February 24, '89, p. 5.) Despite fears that Mrs. Klein might never come out of her coma, she did on January 12, 1990, and began her long road to recovery, learning to talk, walk, and regain her memory. ("After Battle on Abortion, A Struggle to Recover," *New York Times*, Jan. 12, '90, p. B1.)

¹²See *Hilkhot Rotzeach uSh'mirat Nefesh* 1:9.

¹³R. Seymour Siegel, "Fetal Experimentation: A Bias For Life," *Conservative Judaism*, 29(4), (Summer) 1975, p. 43.

concern about a "slippery slope" from abortion to, say, infanticide.¹⁴

In any case, the dominant line of thought in the Jewish sources appears to be that the health and well-being of the fetus can be considered only from the standpoint of the fetus's impact on the mother. To appreciate the implications of this rabbinic view, which puts the woman first, we turn to several contemporary problems requiring a halakhic assessment of abortion.

Ethical questions have recently arisen concerning women on fertility drugs who often find themselves pregnant with five or six fetuses. Carrying so many fetuses to term generates a double risk: first, of exposing these women to greater health risks, and second, of minimizing the possibility that any of the fetuses will be born alive or survive the birth trauma. Under these circumstances, is it permissible to reduce the number of fetuses by aborting some to allow others to be born?

At a conference held in 1988 at Mount Sinai School of Medicine, R. David Feldman argued that it would be permissible to reduce the number of fetuses carried to term. The relevant halakhic standard should be the increased health risk to the mother. In addition to the physical danger, the emotional risk to the mother of delivering stillborn infants or those likely to die can be quite high. The risk that a fetus would be born brain-damaged is not a compelling halakhic reason for abortion; nor is the economic burden that a family would incur with so many children. The justification for

fetal reductions must be the health risks endangering the mother.¹⁵

As reported by Dr. Richard Berkowitz, many if not most physicians, refuse to reduce the number of fetuses to fewer than two, even if the parents do not want more than one child. The criteria used in selecting those to be aborted are medical, that is, the chances of survival. He and other physicians who perform fetal reduction rely on the justification that if action is not taken, all may die. This is a typical conundrum of choosing which life to save, often under conditions of limited resources. A decision must be made; we cannot sit idly by and let those die who might be saved.¹⁶

Ethical dilemmas are also posed when women become pregnant for the sole purpose of donating the fetal tissue after an abortion, to provide anticipated aid to an individual, usually a blood relative suffering from Parkinson's disease, diabetes, or Alzheimer's disease. In probing whether it is permissible, halakhically, to benefit from such a donation, some Jewish scholars distinguish between voluntary and spontaneous abortions. A type of "exclusionary principle" is endorsed. Donations from individuals who have undergone abortions for the sole purpose of donating tissue are to be rejected; tissue donated from spontaneous abortions are acceptable. The argument is that benefitting from the donated tissue constitutes

¹⁴ See J. David Bleich, *Judaism and Healing* (New York: Ktav Publishing House, Inc., 1981), p. 96. In his view, Judaism regards the killing of an "unborn child" to be a serious moral offense, to be performed only for the gravest of reasons; Judaism, he says is opposed to abortion on intrinsic grounds, not simply because it may lead to infanticide, but in addition because the erosion of sensitivity to the sanctity of human life magnifies the odium associated with abortion. See also R. Issur Unterman, "B'Inyan Pikuach Nefesh Shel 'Ubar," *Noam: A Forum for the Clarification of Contemporary Halakhic Problems: Vol. 6* (Jerusalem: Torah Sh'lemah Institute, 1963), pp. 1-11.

¹⁵ Notes from the conference on "Medical Ethics: The Jewish Point of View: Selective Reduction of Multi-fetal Pregnancies," Dr. Richard Berkowitz and Rabbi David Feldman, Mount Sinai School of Medicine, November 1, 1988. At this symposium the issue of fetal-to-fetal conflicts was also raised. See also "Selective Reduction of Multifetal Pregnancies in the First Trimester," *The New England Journal of Medicine*, 318(16), Apr' 21, '88, pp. 1043-1046; "Selective Reduction—A Perinatal Necessity," *op. cit.*, pp. 1062-1063. See also A. Abraham, *The Comprehensive Guide to Medical Halakhah* (Feldheim Books, 1990), p. 206n9, citing Rabbi Shlomo Zalman Auerbach.

¹⁶ On this point there is a debate in rabbinic literature. See, e.g., *Pesachim* 25b, *Baba Metzi'ah* 62a, Maimonides' *Yesudei Torah* 5, and *Kesef Mishneh*.

approval and complicity in an impermissible abortion.

In responding to whether "research upon fetal tissue derived from an induced abortion implies moral acquiescence or complicity with the antecedent abortion," R. David Bleich notes that there is "no principle of Jewish law or ethics that would preclude the use of information gleaned as a result of unethical research." Futhermore:

...(a)Although performance of an abortion is a grievous offense, Jewish law does not posit a "Miranda principle" or an exclusionary rule that would, *post factum*, preclude use of illicitly procured tissue for an otherwise sanctioned purpose.

However, he too is concerned that utilization of such tissue not involve collusion or encouragement of induced abortions, or any action or policy that would lead to an increase in the number of abortions performed.¹⁷

The practice of tissue donation has provoked national controversy, with a Federal moratorium on fetal tissue research in federally financed scientific research in place.¹⁸ Even those who support fetal tissue research have asked that certain restrictions stay in place, for example, that an individual not be allowed to designate to whom tissue should be donated nor be paid for the donation.

The deep questions raised by these controversial areas require us to assess the limits that moral sensibilities should impose on a woman's presumptive right to make reproductive decisions. What is the distinctive Jewish voice that should enter the larger public discussion of abortion? The secular courts have determined that a woman's right to privacy encompasses procreative decisions. Unless the State has a compelling interest in, for example, protecting potential life, that right to privacy is protected. However, after viability of the fetus is established,¹⁹ unless the health or life of the pregnant woman is at stake, women can be required to carry a fetus to term. Even under *Roe v. Wade*, a woman's privacy and autonomy must sometimes yield to the state's interest in protecting human life.

The main line of the Jewish tradition would thus seem to make a much needed contribution to the discussion of abortion. Without sharing the Catholic view that the fetus is from conception fully a person, it stops short of a complete dismissal of the value problem in destroying a fetus. However, whatever value attaches to "potential life," the primary concern lies with the mother.²⁰ She exists. Her life, no matter how slim her chances of survival, health, and well-being come first.²¹

¹⁷J. David Bleich, "Fetal Tissue Research: Jewish Tradition and Public Policy", *Tradition*, 24(4), (Summer) 1989, pp. 69-90, pp. 82-84.

¹⁸Although the U.S. House of Representatives voted to lift the ban, veto threats from President Bush have kept the measure from proceeding. See "House Approves Fetal Tissue Research Use in Federally Financed Research," *New York Times*, July 26, 1991, p. A11 and "Steadfast Veto Threats from Bush Keep Abortion Advocates at Bay: Congressional attempts to promote abortion rights are thwarted by the inability to muster enough votes to override President Bush's veto," *Congressional Quarterly*, 49(50), Dec. 14, '91, p. 3642. As of this writing, the Senate Labor and Human Resources Committee voted to end the ban (See "Panel Votes to End Ban on Fetal Research," *New York Times*, Feb. 6, '92, p. B8. Senate approval is still needed to lift the ban.

¹⁹In *Roe v. Wade* viability, defined as the ability of the fetus to live outside the womb, occurs after the second trimester of pregnancy. Medical evidence suggests that viability is occurring earlier than the time frame formulated in 1973. Justice Sandra Day O'Connor queried in a 1982 opinion (*City of Akron v. Akron Center for Reproductive Health*, [103 S.C. 2481 (1982)]) whether *Roe v. Wade* was on a collision course with itself. In one wing of a hospital doctors may be performing an abortion on a woman who is 24-weeks pregnant while, in another unit, doctors are attempting to save the prematurely arrived 24-week-old fetus—now newborn (See *New York Times*, February 15, 1984, pp. B1, B4).

²⁰For a look at how an Orthodox Jewish feminist sees abortion on demand within the halakic framework, see B. Greenberg, "The Issue of Abortion" in *On Women in Judaism* (Philadelphia: Jewish Publication Society, 1981), pp. 147-155.

²¹Contrast this with one court battle in which the potentiality of the fetus was chosen over the life of the pregnant woman who was dying. See *In Re A.C.*, 533 A. 2d. 611 (D.C. App. 1987), vacated, 529 A. 2d. 203 (D.C. App. 1988).