

## *Abortion: A Challenge to Halakhah*

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MY STOMACH TIGHTENS AT THE THOUGHT OF getting involved in a controversy over abortion, even with myself. Emotionally, theologically, as a Jew, and most of all as a mother who is daily nurtured by the sights and sounds of her children, I am opposed to abortion. And yet, the other facets of unwanted pregnancy are inescapable—fatigue and harrassed parents, the shame of rape, the premature end of youth because of a foolish mistake, the degradation and danger of coat-hanger abortion, and, not the least, the overwhelming and exclusive claim that a child makes on a woman's life for many of her strongest years. Therefore, I supported and pressured for legalized abortion reform in the United States, with the full knowledge of the inconsistency and ambivalence of my position.

There are many conflicts and some truth in every argument, which is why I believe that the abortion issue will be here for a long time. There are conflicts between the generally accepted halakhic position on abortion and the individual needs of women. There is conflict in issues such as world population explosion and the need for numbers in the question of Jewish survival. There is conflict between the need for increased medical knowledge and the truth about the excesses of fetal experimentation; conflict in the majesty of the life-creative processes and the violence involved in aborting a human fetus; in the special love that an unplanned child receives and the increasing incidence of the battered child syndrome; conflict in the guilt and the relief; conflict even in the confusion of options. Then, too, there is conflict in areas of control assigned to religion or state or individual; one must ask, on a larger scale, what changes does a society undergo when greater areas of morality become matters of individual conscience?

But one is forced to make choices. Because everything in life is a trade-off and all decisions, halakhic and otherwise, are made with competing claims in mind (this I believe to be the underlying concept of *she-elot* and *tshuvot*), I must tenuously come down on the side of legal abortion. Furthermore, I would challenge my Orthodox community to broaden its interpretation of the halakhah concerning abortion, rather than maintaining the unqualified negative stance that it has taken. As a community, we should support liberalized, legalized abortion; we should do so with regrets, perhaps, and with grave reservations; we

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should do so with a sense of urgency to inform our people, and society at large, of our own value system.

This means new roles and responsibilities for the halakhic community, rather than the expenditure of time and energy that is now wasted in trying to impose its current interpretation of Jewish law upon a whole nation which has painfully moved in the other direction. To permit abortion as a medical option, yet to educate and infuse society with a transcending perspective might be the greatest contribution that moral and religious communities could make. Ultimately, it might end a long and grizzly history of illegal abortions, yet, simultaneously begin to halt facile abortions. It might also help a searching society to internalize an ethic which incorporates a sense of the preciousness of human relationship and of life itself.

The anti-abortion elements in the Jewish community summon three arguments: 1) the dangers to which legalized abortions could lead—i.e., abuses of scientific manipulation, such as eugenics or euthanasia; 2) the majority halakhic tradition (opinions); 3) the devaluation of human life in the abortion process itself—of men and women taking matters into their own hands, transcending their role as humans, playing God . . . (RCA statements).

1. What it could lead to: Although the notion of *s'yag* is a powerful one, and gives full credence to an understanding of human nature as it basically is, I do not believe that abortion will necessarily lead to eugenics and euthanasia, nor that prohibiting abortion would guarantee their elimination. And part of the responsibility of the halakhic community is not to say that it will, but to be ever watchful that it does not. To be a halakhic Jew means to split hairs as well as to determine what is a *s'yag* and what is an end in itself. Sweden liberalized its abortion laws many years ago, yet Germany, without a long history of legalized abortion, conceived of, and executed, the Aryan master race plan and the Mengele medical experiments. This domino argument is really not particularly relevant to the abortion controversy.

2. The halakhic position: In reviewing the literature<sup>1</sup> one finds that there are a number of different strands, some lenient and some strict. These all build upon several basic sources—Torah, Mishnah, Gemarah of which the most direct halakhah is the Mishnah in *Oholot*, 7:6:

If a woman is having a hard labor, and her life is in danger, then the fetus may be cut up and extracted limb by limb, for her life takes precedence over that of the fetus. But if the greater part of the fetus has already been born, one may not touch it for the life of one person may not be taken for that of another.

1. See David Feldman, *Birth Control and Abortion*, the section on abortion, for a comprehensive and insightful review of the literature; also, Fred Rosner and J. Bleich, in *Tradition* (Winter 1968), for two good summaries in shorter form.

Until its birth, then, the fetus is not a *nefesh*. The halakhah does not view abortion as murder, worthy of capital punishment; nor does it ascribe rights to a fetus (which explains the relative absence of the "right to life" stance in the Jewish anti-abortion campaign). Exodus 21:12, 22-23 teach us that if a man strikes a pregnant woman and kills the fetus, he is fined only damages for property (which, ironically, are paid to the husband, since it is considered his property). Around these themes there has arisen a whole body of rabbinic literature, dealing with such questions as the fetus as pursuer, the status of the fetus before and after 40 days, and what constitutes legitimate circumstances for abortion.

On the whole, the traditional Jewish view of abortion has been more lenient than has the traditional Christian view. Yet, even where it was permitted, it was only in cases of therapeutic abortion, where there existed a grave threat to the life or health of the mother. With very few exceptions, the health of the fetus was not a valid reason for abortion; even in those minority opinions validating abortion for malformed fetuses, such as in the thalidomide cases, the rabbinic decisions were based on the threat to the mother's health, and not on considerations of the potential suffering of the child. (Although this seems most harsh, it actually contains a perfect legal symmetry. If the perfect fetus was not considered an entity in cases where it represented a threat to the mother's health, then it was also not considered an entity in any other deliberations).

However, the new issue that we face today is not therapeutic abortion (an argument which many apologists use to try to show that the Jews were there first and, thereby, foreclose a discussion of the current problem) but *abortion on demand*.

There are very few responsa dealing with abortion based on personal, economic, or family planning reasons. This can be understood historically:

a) In the life of the traditional Jewish communities in pre-modern times, where even birth control was carefully restricted and where the procreative function was high on the *mizvah* list, Jewish babies and new life were valued, particularly so because the life of a Jew was fragile; you had to have eight children if you wanted four to survive. Furthermore, until modern times, abortion was not common in the general culture and Jews in the Diaspora have always been affected by what was, or was not, manifest in the societies around them.

b) In our times, when most Jews opt to have one or two children and when the issue of abortion has assumed national importance, most Jews do not look to rabbinic leadership for decisions in these areas. It is even more startling that, within the modern Orthodox community, most women do not ask rabbis for *tshuvot* on such issues. To wit, a

friend in her late thirties with children well into school, recently appeared at a gathering of traditional women, all *shomrei mizvot*, *shomrei Shabbat*. After the first gasps of surprise when we learned that she was pregnant and healthy—but somewhat overwhelmed—the universal response was “Why don't you have an abortion? I know someone who . . .”

Further proof of a breakdown of communication and interaction in these areas: Traditional Jewish couples, just like their Catholic counterparts, have long since made their personal and independent decisions on birth control. There are very few families with eight or ten children (even before the halakhically permissible pill), which would be the case for most normal, happily married couples. Perhaps they asked no questions because they sensed what the categorical answer would be . . .

Thus, since there are no precedents for what we call abortion on demand, one obvious way to maintain some integrity within the halakhic framework would be to broaden the interpretation of therapeutic abortion, to extend the principle of precedence of the mother's actual life and health to include serious regard for the quality of life as well.

And there exist in the halakhic literature some precious few precedents where exactly that has been done. In the 19th and 20th centuries, there have been some *tshuvot* permitting abortion in cases of rape of a married woman, in cases where the birth would cause extended suffering to the mother, or, as mentioned above, in the minority decisions on malformed fetuses. These decisions were made by respected halakhists who, in their application of the law, moved from purely physical to mental and emotional considerations of the mother, which is what the current abortion issue is all about.

Therefore, I could conceive of a halakhic stance which would say that abortion is to be avoided for all of the traditional and theological reasons. Yet, the circumstances under which it would be permissible would be widened. Unless one is physically and emotionally unable to cope, not yet settled in marriage, etc., abortion should be avoided. However, if these conditions do exist, such as the need to support self and/or husband through school, the need for time for a marriage to stabilize, overwhelming responsibilities to other children and so forth then abortion should be seen as a necessity rather than as an evil. Many *mizvot* are interdependent functions of timing and of the conditions which they regulate.

Before elaborating, let us reckon with the third argument against abortion:

c) The devaluation of human life and its dehumanizing effect upon those involved and upon a society at large. Here I believe that the RCA statements on abortion have real merit, for the problem

with easy abortion is that it can become simply a means of birth control and run the risk of lack of seriousness re the mystery and miracle of human conception and birth. (To date, it has not been shown to do so. For example, Bronx abortion clinic records for 1973 indicate to the contrary; in 1973, only 5% of 2001 abortions were repeats. However, with lower costs, wider dissemination, and greater availability, this development could easily take place...)

I understood when I read of the strike of nurses in a large Baltimore hospital. They could no longer abide the continual sight of aborted fetuses piled high in the bins of the abortion theater. The image that followed in my mind was the heaps of corpses which numbed the Allied inspection teams in Auschwitz, 1945, and which numb the Jewish people forever. It is the ultimate desecration of the images of God. Here, truly, is the dialectic in the abortion issue that one must come to grips with.

The obvious question then arises: how can one retain the principles of reverence for life which are built into the halakhah, while yet widening the grounds for abortion?

One way is simply that the sanctions for abortion—or against it—be set within some sort of total theological framework which takes conception and birth very seriously. One should ask, and answer, personal questions with wider reference to a religious code which has God and community as its value-source. This is the reverse of how abortion decisions are most often made today—within a very narrow frame of reference.

Secondly, it will take courage for *poskim*—and future *poskot*—to say that, in certain instances, abortion is the higher morality if one operates with the overall principles of *k'vod ha-b'riot* and *zelem elokim*, principles which are sometimes lost in the myriad of halakhot that have been developed to express these historical and theological priorities.

Some examples: a) The original principle was to protect the mother's life and health; in their responsa, this was extended by Rabbis Emden, (18th century) Waldenberg and Weinberg (20th century) to include her psychological health as well. Those *tshuvot* could support new ones which would encompass such variables as physical strength, stress, even delay in child-raising for purposes of family planning or a career.

b) In an interesting *tshuvah*, Rabbi Yitzhak Oelbaum (in *She-elot Yizhak* 64), ruled for abortion where the danger was not to the pregnant mother but to the sibling who would suffer should the milk dry up. Abortion for family planning could be based on a broader interpretation of that ruling.

c) The fact that, in Jewish law, love and human sexuality are positive values should allow room to cope with cases where a wife

becomes pregnant before the couple has a chance to develop a good relationship.

d) *Vehai bahem* could conceivably be applied where a *Tay-Sachs* or deformed fetus could be aborted. Here the dignity of *zelem elokim* must be interpreted, not as opposing abortion lest it lead to dehumanization, but, rather, in the light of what hell this image of God and his/her parents will have to suffer when the child inexorably decays and dies at four years of age. It is true that some children with deformities are more loved and evoke deeper feelings of compassion than do perfect specimens. Yet institutions are full of pathetic, rejected, malformed, non-functioning children who eke out a miserable, inhuman life and whose parents have deep wells of guilt. In this situation, forced birth is the dehumanizing experience.

e) The fact that the Gemarah conceived of a fetus as water until the 40th day allows further room for abortion under wider circumstances.

Beyond these, in new situations which are not covered by a broad interpretation of the existing halakhic position, halakhists should not be fearful of extending the halakhah to create a better meshing of personal needs with traditional dictates. This does not mean that halakhah must legitimate itself by simply saying "yes;" it does mean that in moving towards a more realistic position—saying yes under a wider variety of circumstances—its value judgments of "no" will also be taken seriously.

By moving in these directions, we would not be compromising the halakhah. The Rabbis took the goals of the Torah and the prophets and showed how to strive for the ideal in a real life with all of its conflicting claims. By opening its stance on abortion, traditional Judaism would go on to develop new roles and responsibility for itself today.

One such responsibility, then, would be to support research on earlier and self-implemented methods of pregnancy detection. If modern science has been able to develop the pill (which is halakhically permissible, despite the fact that it circumvents the goal of procreation) then it is presumably also capable of developing the morning-after-detection-and-antidote kit, which could be used, if we rule the fertilized egg not yet to be human life. It goes without saying that the halakhic community should investigate and develop better methods of contraception and wider education on birth control.

Some additional responsibilities would be the establishment of adoption agencies, continued vigilance and monitoring of the effects of legal abortion lest abuses arise, greater communal sharing of responsibility in raising children, greater sex education and responsibility for one's sexual life.

The halakhic stance should not simply turn into a case of "abortion—no," but, in this particular case, a grudging "yes." The emphasis should

be: The abortion alternatives are there, but the case for children is that each individual is special and unique, that every child has the right to a life of love and care, that children are precious and not something that gets in the way. Having a child is not to be taken for granted or taken lightly. A Jewish theology of abortion should include the statement that the Jewish people, in particular, need to expand the birthrate and replenish themselves after Auschwitz and after four wars in Israel even as we seriously attend to the question, generally, of world overpopulation. These ideas cannot be coerced; rather, they must be set forth as valid and desirable options, competing in a society where the reverse messages are currently more popular.

And what effect would this have upon halakhah itself? It might lead to a reversal of what operates today. As Jews we have always believed in an ethical, juridical system which governs every aspect of our lives, not because it was imposed upon us, but because we had accepted it as binding. There is a great need to reinstate the capacity of halakhah to function that way again in the areas of ethics and morality.

It would also, in effect, encourage more Jews, even those who consider themselves observant of Jewish law, to take more seriously the halakhah as a moral force in their lives. Unfortunately, it has been reduced to the observance of ritual, while ethical, social and sexual decisions are more susceptible to TV advertising messages. I suspect that more women would consider the alternatives to an unthinking abortion if they felt that the halakhic system took their needs seriously. By the same token, the responsibility lies upon those on the fringes, or within the community, to ask the questions; the responsa literature did not grow in a vacuum.

Finally, there are two other areas in which the abortion issue could have fruitful spinoffs, were it to move our religious leaders into action or even to attention.

Abortion is really a symptom of a larger problem. Ours is a society which establishes the value of goods over relationships, of possessions over people, of ease and comfort over labor and a life of giving. As creatures of modernism, we tend to see our daily existence as of cosmic importance while losing sight of our real consequence in the course of human civilization. We try to hide these existential truths of human existence with pills, goods, junk and even sexual ecstasy. I have nothing against ease and comforts, or even against delusions of self-import, but the imbalance in our society is too obvious to miss. As a result, contemporary society borders on the selfish. And Jews are no better than any other group in this respect.

The clamor for abortion points up the way that women feel about their role in society and the constriction of their options as a result of

motherhood. Their umbilical cord has not been cut and they are dependent and powerless. The ultimate expression of this feeling is the notion which many feminists have made central to their pro-abortion claims, the right to control their own bodies. I disagree with this focus. It is simply too narrow a stance when considering the miracle of life creation. It is also too narcissistic, almost bordering on illusions of virgin birth, a notion of which I tend to be suspicious. Furthermore, it releases men from responsibility, both from sexual responsibility and from child-raising, thereby reinforcing the sexist models which it seeks to undermine. On the other hand, moral theologians ought to attend to the climate of disabilities and inequities regarding women—in society in general and in the Jewish community, in the synagogues, in marriage and divorce, in education and in liturgical and religious leadership—so that the situation will not foment into a final crisis with the rejection of child-birth and child-raising as the expression of dissatisfaction.

Thus, hand in hand with greater halakhic responsibility and flexibility regarding abortion, there should be a critique of the society which currently reduces human concerns to such issues. Along with this must come some moral guidance on how a whole society can begin to pull itself up by its boot straps and integrate those values which have at their center reverence for life itself.