

# A Talmudic Overview of Abortion

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**D**uring the past few years, the question of legalized abortion has been a heated topic of political debate in the U.S.. The popular culture has labeled the two opposing camps as (a) the pro-life group, generally against abortion except under certain circumstances, and (b) the pro-choice group, usually in favor of abortion under any circumstances and during any stage of pregnancy.

In 1973 the Supreme Court rendered its first decision regarding abortion in *Roe vs. Wade*, and as recently as 1989 reviewed the issue in the *Webster* case. Distilled, the *Webster* decision gives individual states, through their state legislatures, the right to set guidelines as to when abortion should be permitted. It is this decision that has spawned renewed, serious debate about abortion.

Abortion is the intentional destruction of the fetus inside a woman's womb. This procedure has been practiced, for various reasons, throughout history. As with so many other questions of law and morality, Judaism, through its Torah, Talmud, and rabbinic responsa, has addressed the issue, starting as far back as 2500 years ago.

There are two major principles that must be clarified when discussing the status of a fetus. First, is a fetus, while yet in a mother's womb, a form of life? Second, if it is life, is it an actual human being?

Talmudic and later-rabbinic authorities emphatically assert that a fetus, certainly after 40 days, is a form of life; they disagree, however, whether a fetus is an actual human being. It is this mixed conclusion — that a fetus is life though not actually a human being — that places Judaism in a middle position, one which generally dis-favors abortion since the fetus is life but allows it under special circumstances.

Talmudic rabbis were aware that when referring to a human being the Torah employs the word *nefesh*. Thus they combed Torah verses to see whether the term *nefesh* is used when describing the fetus. They found their answer in Exodus 21:22,23. Torah states: "If two men struggle (with the intention of killing each other) and accidentally assault a pregnant woman so that she miscarries: if she herself is not killed, the combatants shall pay monetary damages for the dead fetus; if, however, she is killed, a *nefesh* shall be given for a *nefesh*," i.e., a life for a life. Scripture, here, refers to the woman as

*nefesh*, not her fetus. Since a fetus is not labeled *nefesh*, it is not, in Torah's view, a full human being.

While not a full human being, the miscarried fetus is nonetheless characterized by Torah, in this verse, as *y'ladehah*: her children. This characterization of the fetus as children communicates Torah's belief that a fetus is much more than mere tissue, it is a form of life.

Rabbi Yishmoel, a leading Talmudic sage, argued that a fetus is an actual human being.<sup>1</sup> He cites the verse in Genesis 9:6, "Whosoever shall spill the blood of human in human, shall his blood be spilled." Who, Rabbi Yishmoel asks, is "human in human"? None else but the fetus inside its mother. Since in cases of murder, Torah calls for capital punishment only when an actual human being is killed, then a fetus must be a human being since Torah demands death for he who kills "human in human," a fetus.

Because Rabbi Yishmoel considers a fetus a human being — a *nefesh* — he necessarily interprets the verse in Exodus in a different manner from what was previously mentioned. The fetus in the Exodus passage is not characterized as *nefesh* because it is less than 40 days old, and has not yet formed (*a'son*), as evidenced by a unique reading of that verse. Philo of Alexandria also interprets the verse in this fashion. Rabbi Yishmoel would further suggest that since it was an accidental death — the two men had not intended to kill the fetus — "life for life" would not devolve as it does when the mother is killed, but would indeed be applicable when a fetus is the intended target.

**T**he majority of Talmudic rabbis held fast to the original interpretation of Exodus 21:22,23, that a fetus is not *nefesh*. As a result, they interpret the Genesis verse as follows: "Whosoever shall spill the blood of human, *by human* shall his blood be spilled," i.e., man is obliged, by God, to establish courts to administer punishment to those who commit murder. In no way, they contend, does the verse ever allude to the question of abortion; it refers strictly to the issue of establishing courts.

Abortions for the sake of mere convenience were never condoned by any of the Rabbis. As a result, the question of whether a fetus — a potential form of life — is *nefesh* remained academic until compelling reasons for abortions surfaced.

The Mishna in *Ohalot* (7,6) raises such a circumstance: "If a woman is undergoing a perilous pregnan-

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1. *Sanhedrin*, 57 b.

cy, the fetus may be destroyed since her life takes precedence over its life.” As with all cases where a human being’s life is in jeopardy, here too, the fetus may be destroyed even though it is not absolutely certain the mother will die; a reasonable doubt is sufficient.

The pivotal phrase “since her life takes precedence over its life” was seen by Rashi as an affirmation of the majority view that a fetus is not a full human being and thus the mother’s life, that of an actual human being (*nefesh*) takes precedence over that of the fetus, a non-*nefesh*.

According to Rabbi Yishmoel, however, since the fetus is an actual human being (after 40 days), why did the Mishna in Ohalot choose the mother over the fetus? Rambam offers the rationale of *rodef*, pursuer.<sup>2</sup> That is, when one human being pursues another, the pursued may slay his pursuer in *self-defense*. Since the fetus will cause the death of the mother, it is deemed a pursuer, and in self-defense the mother may terminate her pregnancy to save her own life. Furthermore, not only may she destroy the fetus, but, as in all cases of self-defense, she *must* do so, her personal, emotional proclivities notwithstanding.

Unlike normative cases of pursuit which justify self-defense, in this case some are uncomfortable with the interpretation, because the fetus is not a deliberate pursuer; its attack is unconscious. Nevertheless, Rambam clings to the conventional belief that self-defense of one’s life is preeminent, regardless of the source of attack.

Although Rashi and Rambam offer two separate justifications that yield the same conclusion, their differing rationales divide them in other areas of abortion. Using the pursuer analogy, Rambam would allow abortion, as with other cases of pursuit, only when the fetus itself is the pursuer, when its action is the direct cause of jeopardy to the mother. On the other hand, Rashi, opining that a non-*nefesh* fetus is in no way equal to an already birthed human being, would allow abortion even in circumstances where the fetus is not the direct assailant against the mother. Thus, while Rashi and Rambam would permit abortion when (1) the mother’s life is in jeopardy, (2) continued pregnancy will result in such permanent damage as deafness, blindness, or serious heart condition, (3) continued pregnancy exacerbates preexisting terminal sicknesses, (4) a nervous breakdown portends debilitation, Rashi (representing the majority view) and Rambam (representing Rabbi Yishmoel’s view) would disagree in the case of rape.

In the overwhelming majority of rape cases, when the state of pregnancy itself does not endanger the carrier’s life or threaten permanent sickness, Rambam would prohibit abortion since the fetus itself is not directly endangering the carrier. Rashi, on the other hand, would perhaps allow abortion in rape cases under certain con-

ditions, even though the fetus is not directly responsible for the carrier’s anguish. These conditions are (1) that the abortion be performed in the very early stages of pregnancy, before formation — preferable before 40 days, yet up to the end of the first trimester, and (2) that the victim articulates “severe anguish” in having to carry and later raise the child which will constantly remind her of the harrowing experience, causing her emotional imprisonment. Thus, unlike situations where the fetus assaults, directly jeopardizing her life or physical health, the severe emotional anguish due to the rape’s aftereffects would be grounds for abortion, according to Rashi, since the compelling needs of a *nefesh* supersede the rights of a non-*nefesh*.

**T**he rationale of “severe emotional anguish” can be traced to Talmudic sources.<sup>3</sup> It was the practice of the Sanhedrin not to bring to trial a pregnant woman convicted of a capital offense until after her delivery. Since the fetus, as the Rabbis reasoned, is a form of life, they delayed her trial so that if a guilty verdict is rendered, the innocent fetus would not be killed. If, however, the Sanhedrin discovered her pregnant condition after the death verdict had been announced, her execution would be immediate, simultaneously causing the death of the fetus. Why? For to have waited on death-row those many months (until her delivery) pondering her death, would have caused her severe anguish. Thus a mother’s severe emotional anguish is grounds for abortion.

Others (though not Rambam) allow abortion in rape cases on grounds that “a woman is not like mother earth who can be forcibly seeded, against her will, in order to produce fruit.” The Talmud, in a case regarding the conversion of a non-Jewish woman while pregnant, declares that her conversion covers the fetus as well, since the fetus is “but a limb of the mother.”<sup>4</sup> A few misguided clerics have cited the opinion that “a fetus is but a limb of the mother” (used narrowly in the conversion case) as an equivalent to the slogan “a woman’s right to control her body,” espoused by feminists who demand that a woman be able to abort at any time, for whatever reason.

However, this comparison is highly fallacious, for, according to Jewish law, “a woman has no more right to control her body than does a man to control his,” and since Jewish law forbids a person to commit suicide or arbitrarily amputate one’s limb, similarly would a woman and would be forbidden to destroy her fetal limb without compelling reason.

Just as one must not amputate their organs or limbs for economic benefit, one must not destroy the “fetus limb” simply for economic reasons or some other consideration. Indeed, the Talmud allows the desecration

3. Er’chin, 7 a.

4. Ye’bamoth 78 a.

2. Rambam; Hilchot Rotzeach, 1:9.

of the Sabbath if that is what is needed to save a fetus. This is understandable, according to Rambam, since the fetus is *nefesh* and one may desecrate the Sabbath to save a life. However, even according to Rashi, who opines that a fetus is not a full, actual human being, desecration of the Sabbath is permitted on behalf of the fetus since the fetus is life, potential *nefesh*. By sanctifying the fetus as quasi-*nefesh* (*sa'fek nefesh*), for whom even the Sabbath can be violated, the Talmud clearly conveys that a fetus' integrity must be protected, that everything must be done to save it, not destroy it. In other words, absent special considerations, abortion is not allowed — a fetus is not merely tissue, a nail, or a clump of hair; it has a right not to be thwarted while en route to birth. Clearly then, social or economic reasons as justification for abortion are absolutely contrary to the quasi-*nefesh* status inherent in the fetus.<sup>5</sup>

An example of a compelling reason is, according to some, a diagnosis of a deformed or Tay-Sachs fetus. Jewish law does not consider a deformed or Tay-Sachs fetus unworthy of being born. It does, however, consider the personal, severe emotional anguish that can accrue to a mother as a result of such a delivery.

As before, Rambam would forbid abortion in such cases since the fetus itself is not directly attacking the carrier. But Rashi would consider abortion a possibility in such circumstances since the severe anguish of an actual *nefesh* overwhelms the rights of a quasi-*nefesh*. However, unlike rape, where an abortion can be performed in the early stages of pregnancy, in deformity or Tay-Sachs cases the knowledge of the aberrant condition may come at much later stages of pregnancy, especially in Tay-Sachs cases where amniocentesis can not be administered until the fourth or fifth month.

Using the severe anguish concept expressed in the Talmud, there are those who would allow abortion even as late as the end of the second trimester.<sup>6</sup> Those who disagree cite the case of the pregnant woman on death row; however, where a diagnosis is rendered as late as the final days of the second trimester, the severe anguish concept would no longer pertain — it's simply too late. At such late stages, only assaults on the mother's life and physical health would be permissible grounds for abortion.

Since, according to most scholars, the severe anguish rationale is dependent upon the particular stage of pregnancy — the earlier the better — it is important to know the extent to which the fetus has developed at its various stages of gestation. The Talmud provides scant discussion on the topic of fetal development. Like Aristotle and Philo, it considers a pre-forty day-old fetus as not yet developed.<sup>7</sup> During the last century, some

Rabbinic authorities have focused on other stages as the final cutoff points. Some look to the end of the first trimester, others to fetal movement, and still others to the end of the second trimester, similar to Roe vs. Wade.

At what gestation stage the severe anguish principle becomes obsolete is open to debate. What is clear, however, is that as medical science makes possible fetal viability outside the womb (through incubators) at even earlier stages, the severe anguish rationale recedes in time.

While Catholicism considers a fetus an actual human being from the moment of conception, since at that point, it asserts the soul is fused into the embryo; Judaism differs since there is no empirical way of knowing when God endows the soul. Though in aggadic material Rabbi Yehuda Ha'nassi prefers that the soul be considered infused at conception, when addressing the halachik (real-life) context, as in the Mishna of Ohalot, he concludes that only at birth (parturition) are we certain of the soul's arrival. Whereas in Catholicism abortion is prohibited since it constitutes a form of birth control, in Judaism abortion is forbidden because the fetus is potential life.

A final comment is due in light of recent legislation passed by some states requiring parental or husband notification prior to abortion. While it is unclear whether Torah would mandate that a girl over 12 be compelled to notify her parents prior to abortion, if state law requires parents to support a young woman and accept financial responsibility for her actions, then (perhaps), according to Torah parents have empowerment over her as long as the state makes them obligated on her behalf.

One thing, however, is unequivocally certain: Except in cases where the wife's life is jeopardized or she may suffer permanent disability due to pregnancy, she must first notify her husband prior to an abortion. For he, too, has (property) rights over the fetus, his biological issue. The Torah itself, in Exodus 21:22,23, affirms his rights over the fetus when it explicitly asserts that he is entitled to monetary compensation from those who caused his wife to miscarry; moreover, he is financially obligated to support children born of his semen. Beside the principle of property rights, he must be notified since abortion constitutes "a destroying of the seed," which is normally forbidden.

Judaism's position is as far removed from the pro-abortion slogan claiming a woman has a right to control her body even to the extent of destroying a fetus as it is from the Catholic position which would compel a woman to forfeit her life for the sake of the fetus. All in all, Judaism displays a middle approach, balancing the aforementioned compelling needs of the mother with a respect for the right of the fetus, as life, to travel uninterrupted to its ultimate destination: birth.

<sup>5</sup> *Fosfor*: Sanhedrin, 59 a; Chulin 33 a.

<sup>6</sup> *Tzitz Eliezer*, Jerusalem, 1983, by Eliezer Yehudah Waldenburg.

<sup>7</sup> *Ye'bamoth* 69 b. *Nidah* 30 b.