What Does *Halakhah* Say About Abortion?

By Noam Stadlan

The discussion of abortion in *halakhah* begins with the life of the mother. *Pikuaḥ nefesh*, the obligation to preserve life—in this case, the life of the mother—trumps every other obligation except for three: murder, sexual immorality, and idol worship. Until the head of the fetus or the majority of its body has exited the birth canal, the life of a fetus is not considered entirely on par with the life of the mother, and abortion is mandatory if the mother's life is in danger.

On the other hand, all *poskim* (halakhic decisors) agree that the fetus is at least a life in potential, and it is forbidden to destroy it for casual reasons. Our bodies are on loan to us from God, and we have an obligation to use them for beneficial purposes.

Two Approaches to Abortion

Many different approaches to abortion exist, but two are predominant—and differ regarding the status of the fetus. One view, popularized by Rabbi Moshe Feinstein, is that the fetus is considered as a human being, and therefore abortion is considered tantamount to murder—the only exception being imminent danger of death of the mother. The other position, popularized by Rabbi Eliezer Waldenberg (*Tzitz Eliezer*), views the fetus essentially as part of the mother, and therefore abortion is considered predominantly as an injury to the mother. Under this approach, there can be competing positive *mitzvot* obligating the physician to alleviate major physical and emotional distress of the mother. If the physical and/or emotional distress that the mother suffers because of the pregnancy is of an adequate magnitude, the obligation to relieve the distress can overcome the prohibition of injury, as injury is allowed when it leads to significant benefit. Both views use the same primary sources, but understand them differently.

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For the sake of convenience, the classification of abortion as murder will be referred to as the restrictive approach and the classification under injury as the permissive approach.

The Torah references abortion once in *Shemot* (21:22):

> 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 to what the woman's husband may exact from him.

Here, the punishment for causing an abortion is a monetary fine. The punishment for murder, even of a one-day-old infant, is different. Because there is a difference in punishment between killing a one-day-old and killing a fetus, it is reasonable to conclude that they are different crimes. However, those who consider abortion to be murder can claim that because there is no certainty that the fetus would have been viable, the abortion resulted in termination of only a *potential* life, and therefore, even though the act was similar to murder, the punishment isn't the same as for actual murder.

The Talmud also mentions abortion, in *Mishnah Ohalot* 7:6:

> If a woman has difficulty in childbirth, one dismembers the embryo within her, limb by limb, because her life takes precedence over its life. Once its head (or greatest part) has emerged, it may not be touched, for we do not set aside one life for another.

The Notion of a *Rodef*

The Rambam's interpretation of this *mishna i*s the prime source for the restrictive approach (*Mishneh Torah*, *Hilkhot Rotzeaḥ U'Shmirat Nefesh* 1, 9):

> The Sages ruled that when a woman has difficulty in giving birth, one may dismember the child in her womb … because he is like a pursuer *(rodef)* seeking to kill her.

The restrictive school concludes that *only* when the fetus is threatening the mother is there a place for abortion. In all other cases, abortion is prohibited. By using the label of *rodef*, the Rambam is elevating the status of the fetus to essentially a human being, as those who chase others with murderous intent are human beings.

However, others interpret the Rambam differently. Rabbi Shneur Zalman of Lublin (*Torat Chesed*, *Even Ha'Ezer*, Vol. II, No. 42) references the Rambam's usage of the term *rodef* in a different context (*Mishnah Torah*, *Hilkhot Hovel U'Mazzik* 8, 15):

> A boat is about to sink from the weight of its load. One passenger steps forward and jettisons the baggage of another to ease the boat's load. He is not liable (to make restitution), because the baggage is like a *rodef* seeking to kill them.

Rabbi Shneur Zalman maintains that the use of the term "like a *rodef*" in the abortion discussion should be understood in the context of this law. The use of the term *rodef* simply indicates that someone who performs an abortion to save the life of the mother is not liable for monetary damages. The term does not have any implications regarding the status of the fetus.

The permissive school also relies on a completely different understanding of the *mishnah*. Rashi states (BT *Sanhedrin* 72b s.v. *yatza rosho*) that abortion in the case of threat to life of the mother is mandated simply because the fetus is not a person. According to this approach, there is no need to invoke the concept of *rodef* or give any other rationale for abortion.

The restrictive approach also derives support from the

mandate to violate Shabbat in order to save a fetus. The Talmud (BT *Arakhin* 7a–b) states:

> Rabbi Nachman said in the name of Shmuel: If a woman who has been sitting on the birth stool died on Shabbat, one may bring a knife and cut her womb open to take out the child.

Shabbat may be violated only to save human lives. The fact that carrying in public areas and making an incision (both considered work, *melakhah*, on Shabbat) are mandated to rescue a fetus seems to confer the status of human life on the fetus.

The permissive school points out that this case is limited to a woman already in labor, when the fetus would be viable outside the womb. They distinguish between a fetus at the time of labor and prior to labor. Once labor has begun, the fetus takes on more of the status of a life, and the unfortunate dead mother at this point is only an impediment to the life of the baby. It is only under this circumstance that the fetus assumes more of the status of a life.

The words *autonomy* and *rights* do not appear in the discussion. However, that does not mean that choice is not present.

Another source supporting the connection of abortion to murder is found in *Sanhedrin* (BT *Sanhedrin* 57b):

> In the name of Rabbi Yishmael they said: [a Noahide receives capital punishment] even for [destroying] a fetus. What is the reason of Rabbi Yishmael? It is the verse "he who sheds the blood of man, in man *(adam ba'adam)* shall his blood be shed *(Bereishit 9:6)*. What is the meaning of "man in man"? This can be said to refer to a fetus in its mother's womb.

Rabbi Yishmael's exegesis, despite not being the plain meaning of the verse, provides a basis for establishing that feticide is a capital crime, at least for non-Jews.

On the previous page in the Talmud, it is written (BT *Sanhedrin* 59a):

> There is nothing that is permitted to a Jew but prohibited to a non-Jew.

From the proximity of these two passages, the *Tosafot* wrote (s.v. *lica*):

> A Jew is forbidden to cause its [the fetus's] death, but is not culpable. Even though [a Jew] is not culpable, nevertheless it is not permitted.

From these sources, a connection between abortion performed by Jews and murder can be made. Alternately, those of the permissive approach would note that the prohibition is given only in the name of Rabbi Yishmael, and it is possible/probable that the other sages did not agree. Furthermore, the *Tosafot* elsewhere (BT *Ḥullin* 33a s.v. *ehad*) state that although abortion is not permitted for Jews, they are not liable for capital punishment. And in one other instance (BT *Niddah* 44b s.v. *ihu*) they state that "it is permitted to kill it [the fetus]."

Prohibition Against Injury

If abortion is not considered murder, what then is the basis for the prohibition? The most commonly accepted basis for the permissive position is that abortion violates the prohibition against injury (*ḥavalah*).

The Talmud (BT *Arachin* 7a) states:

> Before a [pregnant] woman is executed, she is struck across her abdomen, so that the fetus will die prior to the execution, to prevent her dishonor at the time of execution.

The restrictive school would note that because the woman is sentenced to death, the fetus inside the woman is essentially sentenced to death as well. Therefore, the mandate to abort a fetus that has no realistic chance at life cannot be generalized to fetuses that have an expectation of life.

However, based in part on this source, Rabbi Joseph Trani (1568–1639) (*Maharit* Vol. 1: 97 and 99) ruled that abortion was prohibited based on the prohibition against wounding oneself or others. Therefore, the prohibition could be overridden for the need (*tzorekh*) of the mother, including, as in this case, preventing the dishonor of the mother. This position is supported by the concept that for some purposes, such as conversion or states of ritual purity/impurity, the fetus is considered part of the mother—*ubar yerakh imo*—literally the fetus is considered like the thigh of the mother. (Other examples appear in BT *Baba Kamma* 78a, *Nazir* 51a, and *Yevamot* 78a–b.) Those of the restrictive school would point out that this concept was not applied automatically, but was used in situations in which there were changes in legal status.

Twentieth-Century Responses

As noted previously, two giants of the past generation debated abortion in a number of *teshuvot* (responsa). In 1967, Rabbi Waldenberg (*Tzitz Eliezer,* vol. 9, no. 51) wrote that the prohibition against abortion is not the same as the prohibition against murder, and that there is a basis to permit abortion for a nursing mother, a married woman who has committed adultery, or a woman who has been raped. He also noted that there is a basis for abortion when the woman is suffering emotional but not physical anguish. He allowed for abortion "if there is a grounded fear that the child will be born with a defect or with restrictions." Although he encouraged abortion prior to 40 days of gestation, he allowed it up to three months. Later, in 1975 (*Tzitz Eliezer,* vol. 13, no. 102), he wrote, regarding a child with Tay-Sachs disease, "It is permissible to terminate the pregnancy until seven months have elapsed, in a way in which no danger will befall the mother." The basis for his opinion was: "Is there greater pain and suffering than that which will be inflicted upon the woman in our case if she gives birth to such a creature whose very being is one of pain and suffering and his death is certain within a few years, and the parents' eyes will witness without any capacity to alleviate it?"

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Rabbi Moshe Feinstein (*Iggerot Moshe, Hoshen Mishpat* II no. 69) responded that the prohibition of abortion was indeed based in the prohibition of murder, and that abortion is strictly prohibited except when there is a clear threat to the life of the mother.

Rabbi Waldenberg (*Tzitz Eliezer,* vol. 14, no. 100/101) reiterated that abortion was allowed if the mother's distress amounted to "great need." Although Rabbi Waldenberg did include in some of his responsa some consideration of the distress of the future child, the major factor in permitting abortion was the alleviation of the physical or mental distress of the mother. He concluded one of his *teshuvot* with these words:

> All Jews are warned strictly not to terminate pregnancies lightly. A great responsibility is placed on both the inquirer and the responding rabbi.

The mother and family are the only people who can adequately convey the amount of physical or emotional distress that they are suffering.

"Autonomy and Rights" Are Not Discussed

The words *autonomy* and *rights* do not appear in the discussion. However, that does not mean that choice is not present. The *halakhah* presents *mitzvot*—obligations. Abortion for convenience is prohibited. On the other hand, if carrying the fetus imposes significant distress on the mother, she should discuss the issue with her rabbinical authority. The answer that this authority provides will depend on the facts of the case and his/her understanding of the halakhic sources. Although it is frowned upon to seek an opinion from a specific authority only because of its leniency (or stringency, if that is what one is looking for), it is perfectly valid and reasonable to seek someone who shares the questioner's fundamental approach to Orthodoxy and someone who understands the person who is asking the question.

In addition, the mother and family are the only people who can adequately convey the amount of physical or emotional distress that they are suffering—pain and distress are, to a great measure, subjective. What is extreme stress and unbearable distress to one family is manageable to another. Ultimately, each rabbinical authority needs not only to understand the *halakhah*, but also to understand the people who have come to him or her for *p'sak*/advice/support.

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The Politics of Abortion

By Gail Katz

The typical pro-choice and anti-abortion positions in debate in American society today do not line up well with halakhic views on abortion. *Halakhah* never frames the issues in terms of individual choice, nor does *halakhah* talk in absolutes around the theology of when life begins. Rather, the issues are framed in terms of the value of life—the value of the mother's emotional and physical self, balanced with the level of development of the fetus into a living being. Thus, the question arises for Jewish advocacy groups and individuals—how do we advocate for our ability to preserve and practice *halakhah* in the face of secular laws that really don't fit within the halakhic framework?

Jews have a rich history of weighing in on secular law when it comes to freedom of religion. Generally, though, we weigh in when secular laws impose an obstacle to our ability to practice our religion. Decades ago, Jewish groups took a fairly uniform approach in front of the Supreme Court, seeking the broadest possible reading of the Constitution to protect religious freedoms. Jewish groups weighed in frequently on behalf of themselves, as well as other religious minorities, including Muslims. Examples included advocating for the Jewish man who wanted to wear his *kippah* in the military, and for the Native American tribe that wanted to smoke peyote. (Peyote is a banned substance under secular law, but is used in the tribe's ritual practice.) Jews across the board, from both traditional and secular Jewish organizations, have weighed in to assert broad rights of freedom of religion under the Constitution on behalf of all religious minorities.

That approach has been challenged in recent years by a slew of cases on behalf of a new kind of plaintiff. In the past decade or so, Christian groups, feeling threatened in their religious practice by changing cultural norms on issues such as contraception, sexual orientation, and gender identity, have begun to seek broad protection for their religious practices as well. The practice of a majority religion seeking broad protection from anti-discrimination laws under the guise of religious freedom has placed members of minority religions, including Jews, in the awkward position of pitting the value of expansive freedom of religion against another very necessary value of expansive anti-discrimination laws.

Two Cases that Have Shaped Jewish Advocacy

Two recent cases show the awkward position in which Jewish advocacy groups have been placed. In *Burwell v. Hobby Lobby Stores*, Christian business owners argued that the Affordable Care Act, which mandates that employers provide insurance coverage for their employees, including provisions for contraception, violates their religious freedom because in their religious practice, contraceptives are prohibited. The court ultimately agreed that

this was a violation of their free exercise of religion under the First Amendment.

In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a Colorado baker asserted that Colorado's LGBT anti-discrimination laws violated his practice of his religion in requiring him to provide business services for a same-sex wedding. In that case, the Supreme Court did not decide the issue directly, but found that the Colorado Civil Rights Commission had treated a sincere religious belief with hostility and sent the case back to Colorado to make a neutral, non-hostile determination on the law.

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In both cases, Jewish organizations weighed in, but this time they were split. Some groups advocated on behalf of the Christian business and on behalf of the baker, arguing along traditional lines, that any assertion of a religious practice should be supported and should not be questioned through government intervention, and that these people had a right to assert broad religious freedoms under the law.

Others, however, viewed the case from a very different lens—the lens of discrimination. They argued on varying legal grounds against the baker and against the Christian-owned business, ultimately asserting that the government did have a broad right to enforce anti-discrimination laws, and should prohibit the baker from using religion as a basis to discriminate.

Why Jews Split on Cases

The split highlights the fact that expansive freedom of religion laws, as well as broad anti-discrimination laws, are both necessary for the survival of Jewish and other minority religions in America. Thus advocacy splits in two directions, with organizations trying to balance two important values.

What is interesting to me with respect to abortion is that it actually should be less complicated than these cases. I would argue that there is near consensus in *halakhah* that, at least under certain circumstances, almost every rabbinic decisor holds that an abortion is not only permitted, but likely is mandated. That might occur only under the narrowest of circumstances regarding the *rodef* (pursuer), when the fetus might be endangering the life of the mother. Or one might take a more expansive view and permit or mandate abortion in other circumstances as well. In either case, there is agreement among Jewish legal advocacy groups that for our practice of *halakhah* we need the ability and the legal right to practice abortion in certain circumstances. It is not just theoretical. A ban on abortion would literally limit our ability to practice *halakhah* as we need.

Therefore, our role as Jewish advocates should be clear cut: We should oppose any restrictions on the legal right to abortion. Why? All the proposed restrictions are unhelpful to a halakhic analysis for any observant women's individual case. The boundaries that *halakhah* places on abortion do not line up in any way with the restrictions that states place on abortion. *Halakhah* does not speak in terms of viability. *Halakhah* doesn't identify a specific number of weeks wherein life begins. *Halakhah* doesn't talk about whether the medical provider needs to be board certified. None of those things match up with the boundaries that *halakhah* places on abortion. Women and their *poskim* faced with these restrictions could find themselves without options to make decisions in accordance with their view of the *halakhah*.

Positions Taken by Orthodox Authorities

In 1990 the Rabbinical Council of America (RCA) passed a resolution stating that the RCA:

> Takes note of the different values of the many religious communities in America that are often at variance with one another, in the nature of a politically pluralistic society;
> Is aware that the question of abortion is currently in the forefront of moral concerns in American society;
> Proclaims that neither the position of "pro-life" nor the position of "pro-choice" is acceptable to *halakhah;*
> Precludes the endorsement of legislative measures which would impede the appropriate application of *halakhah;*
> Calls upon the total Jewish community to acknowledge that abortion is not an option, except in extreme circumstances and in consultation with proper halakhic authority.

Thus, the concept that abortion should follow halakhic guidelines without government interference seems to be a reasonable position that a Jewish organization could take.

We have always advocated for the least restrictive state intervention and for the broadest possible freedom of religion.

However, Agudah chose to take a different tact. Agudah filed an *amicus* brief in 1992 in *Casey v. Planned Parenthood,* the case that followed *Roe v. Wade*. *Roe* had found a constitutional right to abortion, whereas *Casey* determined that the right was not unrestricted and states

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A Call for Open Conversation on Reproduction and Sexuality

By Rivka Cohen

Growing up in a Modern Orthodox community, I did not encounter open or positive discourse about female sexuality. Besides the quick basics of reproduction covered in biology class, little or no effort was made to ensure that the women in my all-girls high school were familiar with our bodies, in touch with our sexuality, or aware of the nuances and debates around reproduction. We didn't discuss common conditions such as vaginismus, polycystic ovary syndrome (PCOS), endometriosis, or postpartum depression. We didn't talk about all-too-common premarital activities such as masturbation, sex, and everything in between. We did not explore the complicated dynamics of premarital relationships, and we did not discuss consent.

This lack of discourse has bred shame, confusion, and loneliness for many women who grew up as I did. In an effort to open up this conversation, a group of observant Jewish women have bared their souls through poetry, prose, and stories, producing a new anthology, *Monologues from the Makom: Intertwined Narratives of Sexuality, Gender, Body Image, and Jewish Identity.*

Discussion of Sexuality = Immodesty

The Orthodox community often deems discussion of sexuality—and especially women's sexuality— immodest. "Relations that happen in the bedroom" should stay within the confines of a marriage, and should neither happen nor be spoken about outside of a marriage. It is assumed that *kallah* classes, which are given just weeks before a wedding, are enough formal instruction to learn about all of the intricacies of sexuality and reproduction within *halakhah*. However, as one writer in the anthology points out,

> *I spent the first two and a half decades of my life being told that sex—that any touch between the*

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could place limits on that right.

Agudah argued that *Roe* had been wrongly decided. It argued that the Constitution does not grant any right to abortion; the Constitution, however, does provide a right to free exercise of religion. Therefore, the only way an abortion is constitutional, according to Agudah, is if a woman asserts her right to an abortion under her freedom of religion right. In essence, Agudah was saying, "Abortion should be banned, unless the woman has a note from her rabbi."

We can advocate for freedom from state intervention while still aligning ourselves with our halakhic views.

In 2019, the RCA shifted from its 1990 resolution in its response to New York's Reproductive Health Act, passed in the same year. The new law lifted restrictions on abortions in the state. The RCA opposed the lifting of the restrictions; in discussing its opposition, the RCA moved away from its 1990 statement, in which the RCA had said that abortion is permitted only when *halakhah* says it is permitted, but here it talked about abortion as murder and even lamented the state of our society "where killing babies is no longer construed as immoral."

Bad Strategy for Freedom of Religion

Putting aside everything that is wrong with that statement, including its horrific language, it—together with the Agudah position—denotes probably the only time that Jews have ever sought for the government to impose restrictions on our ability to practice *halakhah* and then ask to carve out some exceptions for the practice of our minority religion. We have always advocated for the least restrictive state intervention and for the broadest possible freedom of religion. Oddly, however, here Jews are advocating for state restrictions that do not align with *halakhah*. We are really asking the state to act in a way that imposes a burden on our practice of religion.

The state is, by definition, oriented toward the majority. The judges who sit on our highest courts are majority-oriented. For a minority, asking for restrictions and relying on the good will of the majority for carve-outs is the ultimate in a losing long-term strategy. Abortion differs from the *Hobby Lobby* and *Masterpiece Cakeshop* examples, in which the impact of broad freedom of religion laws can come in conflict with the impact of broad anti-discrimination laws. There, advocacy is going to have to be nuanced, and reasonable minds can differ on strategy. In the case of abortion, however, there is simply no need to compromise on either of those principles in our advocacy. We can advocate for freedom from state intervention while still aligning ourselves with our halakhic views. Otherwise, we are playing a dangerous game that relies on the continuing good will of a majority-led legislative body and judiciary to carve out exemptions—now and in the future—for our ability to practice *halakhah* as we define it.

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