

Abortion: Perspectives from Jewish Traditions

The issue of abortion in Jewish life is both complex and multi-faceted, with roots going back to the Bible. Its complexity is due, in large measure, to the reluctance of Jewish legal authorities to establish a single principle by which to determine the morality of abortion. Within the context of an overriding Jewish concern for the sanctity of human life, legal authorities have relied largely on individual cases and derivative legal concepts in determining when an abortion may take place. Especially during the 20th century, the increased diversity of traditions and practices within the Jewish community has naturally led to a diversity of approaches to the abortion issue. Nonetheless, out of this complex diversity a clear, general concept can be adduced from the centuries of Jewish tradition; and it is that concept which this article will address.

There are four aspects to the issue of abortion in Jewish tradition: (1) the legal status of the embryo/fetus, (2) the time of ensoulment, (3) conditions under which a therapeutic abortion may take place, and (4) conditions under which a non-therapeutic abortion may take place.

The Legal Status of the Embryo/Fetus

According to Jewish law, a fetus is not considered a full human being and has no juridical personality of its own. While recognizing the potentiality of becoming human, Rashi, the great 12th century commentator on the Bible and Talmud, states clearly of the fetus "*lav nefesh hu—it is not a person.*" The Talmud contains the expression "*ubar yerech imo—the fetus is as the thigh of its*

mother," i.e., the fetus is deemed to be part and parcel of the pregnant woman's body.

The biblical foundation for this statement is Exodus 21:22ff:

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 as the woman's husband may exact from him, the payment to be based on reckoning. But if other damage ensues, the penalty shall be life for life...

The Jewish legal interpretation of this passage states specifically that only monetary compensation is necessary for one who causes the death of a fetus. The unborn fetus is not worthy of the "life for life" punishment demanded if the woman herself is killed. This clearly implies that the fetus is not accorded the same legal status as the woman herself, namely that of an independent human being.

Further proof of the Jewish legal principle that the fetus is to be regarded as part of the pregnant woman is contained in two examples from the Talmud. The first involves the sale of a cow which, subsequent to the sale, is found to be pregnant. The legal determination is that the fetus in the womb of the cow belongs to the buyer, and that the seller can make no claim for further compensation. The second example concerns the conversion to Judaism of a woman who is pregnant. Jewish law regards the conversion valid for her future child as well, requiring no separate conversion for it after birth.

While all of the above is not totally sufficient to determine the Jewish attitude toward abortion,

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it does set the stage. Jewish law is quite clear: while the fetus in the womb is to be protected as a potential human being, it has no personhood; it is not a *bar kayamah* (a viable, living being), thus, it is not accorded any of the rights or privileges of a human being.

The Time of Ensoulment

While the status of a fetus is of interest with regard to the ultimate question of the morality of abortion, so, too, is the issue of ensoulment. Namely, at what moment does the soul enter the body? In Jewish legal tradition, there are several theories. The most famous text in this regard is from the Talmud and concerns a somewhat strange dialogue between the Roman Emperor Antoninus and Rabbi Judah the Patriarch, the compiler of the Mishna. (The Mishna is the first post-Biblical compilation of Jewish law and tradition, compiled at the beginning of the third post-Christian century.)

“Antoninus asked Rabbi Judah: ‘From when is the neshamah (soul) endowed in man: from the time of birth, or from the moment of intercourse?’ Rabbi Judah answered, ‘From the time of birth.’ The Emperor then asked, ‘Can meat remain three days without salt and not putrify?’”

As obscure as this dialogue may seem, Rabbi Judah understood it. According to Talmudic dictum, it can take as long as three days from the moment of intercourse until the ovum is fertilized. What, then, keeps the sperm (i.e., meat) vital through that period of time? There must be a vitalizing life force (i.e., salt) present. From the conclusion of their discussion, it appears that due to the questions of a Roman emperor, Rabbi Judah changed his mind and adopted the position that ensoulment occurs at conception.

However, the rabbis of his and succeeding generations have taken such a view to task. They have expressed a variety of opinions, citing proofs for ensoulment as early as the act of intercourse itself and as late as the time a child learns to speak! The rabbis were saying, in effect, that the moment of ensoulment is unclear at best and subject to a great deal of speculation and disagreement. They state, therefore, that is one of the “secrets of God” that will be revealed only when the Messiah comes. As a result, the issue of ensoulment plays virtually no role in Jewish considerations of the morality of abortion.

Conditions for Therapeutic Abortions

The issue of therapeutic abortion itself is first dealt with in a second century Jewish legal text quoted in the Mishna.

If a woman is in hard labor (that threatens her life), one dismembers the fetus within her

and removes it limb by limb, because her life takes precedence over its life. Once the greater part of it emerges it may not be touched, for we do not set aside one life for another.

In commenting on this passage, later authorities further define the phrase “the greater part of it.” During a normal delivery, this refers to the emergence of the forehead, while during a breech birth, this means more than half the body.

There are two principles employed here to arrive at the conclusion that the abortion is justified. The first and foremost of the two is that the fetus remains only a potential human life until its emergence from the birth canal. One must, therefore, sacrifice the potential life in order to save a fully existent human life, i.e., the pregnant woman in labor.

The second principle deals with the concept of self-defense. In Jewish law, one is permitted to defend oneself, even to the extent of taking the attacker's life should one's own life be in jeopardy. This point was brought into the discussion on abortion when some authorities in the Talmud challenged the prohibition stated above, of the taking of the life of the now fully human child in order to save the life of its mother. It was argued that the principle of the aggressor ought to apply here. Since it was pursuing its mother with intent to kill, one should be permitted to kill the fetus if necessary, even the fetus whose greater portion had already emerged. This argument was rejected, however, in favor of a position that the mother is being pursued “from Heaven,” i.e., that the difficulties she is encountering are an act of God, and that it is impossible to know, in reality, who is pursuing whom. The principle of pursuer and self-defense, therefore, cannot be applied in the case of the child in the process of being born and need not be applied prior to birth since in that case the pursuer is not a person.

Nonetheless, in the legal code of Maimonides, the great Jewish sage of the 13th century, the argument of the pursuer was used once again. In commenting on the passage from the Mishna quoted above, and in stating the rules governing abortion in his code, Maimonides utilizes the pursuer justification, using the example of a boat about to sink from its load. In order to lighten the load, a passenger without baggage steps forward and proceeds to throw overboard the baggage and a mule belonging to the others. Maimonides states that that person is not liable for restitution to the owners, for the baggage and the mule are pursuers, “seeking” to kill them all.

In using the justification of the pursuer, Maimonides clearly complicates the meaning of the Mishna passage. There are those who believe that Maimonides' intent in using the pursuer argument was to limit abortions only to those cases where the pursuer argument applies, i.e., in life-threatening

situations. There are others, however, who believe that he was using the language only as an illustration and had no intention to contradict the authorities of the Talmud who had rejected the pursuer argument. In any event, Maimonides' use of the principle and its assumption by later authorities in their codes of Jewish law became a point of contention in deciding the permissibility of non-therapeutic abortions.

In dealing with therapeutic abortions, one final point must be made. It is important to note that the Mishna text does not present either the pregnant woman or her physician with options. If her life is threatened, the unborn fetus must be sacrificed; she may not make the decision to sacrifice her own life for that of the fetus within. And, equally as compelling, once the child is born, no decision may be made to sacrifice its life in order to save that of its mother. They both have an equal claim on life.

Conditions for Non-Therapeutic Abortions

The guidelines for deciding cases of accidental and therapeutic abortion, then, are reasonably clear-cut, even though there is some disagreement concerning the proper justification. Such cannot be said once one turns to the topic of a non-therapeutic abortion. Here the relevant literature is the Responsa—questions written to and responses written by rabbinic authorities from the 10th century to today. It is also here that a divergence in opinion begins to emerge. Such divergence is due initially to differing understandings of Maimonides' use of the pursuer argument, cited above. Later, in the 19th and 20th centuries, it becomes part and parcel of the diversity within Judaism itself as liberal streams of Jewish tradition and observance emerge. There are many relevant Responsa concerning abortion, several of which follow. In all of them, the principles are those described above. Note, however, how different understandings of these principles lead to different conclusions.

The first case concerns a child who is nursing and cannot survive without his mother's milk, being allergic to all other forms of nutrition. The mother, however, having become pregnant once again, sees that her milk has now ceased flowing. Here, where the issue is saving the life of a third party, as opposed to the pregnant woman herself, two different authorities mandate the performance of an abortion to save the life of the existing child.

Other cases emerge today as a result of a better understanding of mental health issues. The question is whether or not suicidal tendencies in a pregnant woman (tendencies that might, as a result of the pregnancy itself, impel the woman to take her own life) justify the performance of an abortion. In this case, even the most stringent of authorities permit an abortion to save the life of the pregnant woman.

In past centuries, many other circumstances have come before rabbinical authorities. One case involved a woman whose pregnancy would leave her permanently deaf, and while some authorities rejected this as sufficient grounds for an abortion, no less an authority than a Chief Rabbi of Israel granted her permission.

In cases involving adultery, there is also a division of opinion. Some invoke the principle of "let the fruit of the act bear witness to the deed lest adultery flourish in the land." Others maintain that we must do everything possible to save the pregnant woman from great mental pain and anguish, shame being the greatest mental pain. And in several cases involving rape, this latter principle seems to dominate, with many authorities granting permission to take the steps necessary to ensure that a pregnancy will not result.

Yet, in the light of these cases, might one assume that abortion is justifiable under any and all circumstances? The answer, according to Jewish law, is clearly "no." The majority of Jewish legal sources indicate that abortion is permissible at any stage of the pregnancy if the well-being of the pregnant woman is jeopardized, while it is clearly not permissible if the well-being of the future child is the issue. This distinction can best be illustrated by the following example.

Modern medical technology allows a pregnant woman to be certain, long before the birth of her child, whether it will be born defective due to rubella, genetic factors such as Tay-Sachs disease, systemically transmitted diseases such as HIV, or another such factor. In all of these cases, abortion is not permitted out of fear or concern over what the child might have to endure during its life. Its lot in life is not to be determined nor judged by humanity. Its quality of life is one of the "secrets of God" and is not open to human judgment. However, some rabbinical authorities maintain that if the pregnant woman expresses anguish about her own mental, emotional, or psychological condition resulting from an impending birth, then her pain may warrant an abortion. Other rabbinical authorities would not permit an abortion on such grounds.

In cases of non-therapeutic abortion, then, the major consideration is "the pain of the mother." It is consideration for the woman involved, and not the fate or condition of the fetus, which becomes the determining factor in prohibiting or permitting an abortion. And it is precisely on this issue that diversity of opinion is now the greatest. Not only is the diversity seen among the various movements in Judaism today, but even within each movement itself. In addition to traditional Jewish mores and standards, each movement has its own criteria for determining the permissibility of abortion under other than therapeutic circumstances.

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Summary

For Judaism, the evidence in matters of abortion, then, is reasonably clear. The legal codes and rabbinic teachings tend to depict the fetus as simply a part of a woman's body. Just as one may not wantonly mutilate one's own body, so, too, a woman is not permitted to obtain an abortion merely for reasons of convenience. But just as she is permitted to sacrifice a portion of her body for her greater good, so, too, may she obtain permission for an abortion in order to assure her overall well-being. The fetus is not a person; it has no rights. Questions of ensoulment, while interesting, are essentially irrelevant. Thus, abortion becomes permissible, according to the vast majority of authorities, under a wide variety of circumstances.

However, it must also be said that Judaism as a religious heritage does not tilt absolutely to one side of any issue. Callousness as to the seriousness and the tragedy of an abortion is unacceptable. Abortion as birth control is unacceptable. Abortion as a means of avoiding the responsibility of bearing children is antithetical to Jewish values.

One final point. Due to the general leniency in matters of abortion, as well as to a long-standing Jewish insistence on the separation of religion and government in American life, all four non-Orthodox Jewish movements—Reform, Reconstructionist, Conservative and Humanist—are on record opposing any governmental regulation of abortion. Moreover, many Orthodox authorities take the same position. Whatever their opinions on abortion in any given situation, a vast majority of Jewish thinkers agree that decision-making with respect to abortion must be left in the hands of the woman involved, her husband, her physician, and her rabbi. Out of this

context, in consonance with her Jewish heritage, she can make a decision as she is permitted to do by the United States Constitution.

These, then, become the guiding principles on abortion in Jewish tradition: a woman's life, her pain, and her concerns take precedence over those of the fetus; existing life is always sacred and takes precedence over a potential life; and a woman has the personal freedom to apply the principles of her tradition unfettered by the legal imposition of moral standards other than her own.

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The authors wish to thank David Feldman for his authoritative work in this field: Marital Relations, Birth Control and Abortion in Jewish Law. Readers are urged to consult this work for a more detailed treatment of the issue.

The Religious Coalition for Reproductive Choice, founded in 1973, is the national organization of pro-choice people of faith in the United States. The Religious Coalition—comprising Protestant, Jewish, and other denominations and faith groups, the Clergy for Choice Network, and state affiliates throughout the country—works to ensure reproductive choice through the moral power of religious communities. In all programs, the Religious Coalition seeks to give clear voice to the reproductive health issues of people of color, those living in poverty, and other underserved populations.

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