

# HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY

## 57 - JUDAISM AND THE UNBORN CHILD - ABORTION: PART 1 OU ISRAEL CENTER - SUMMER 2017

### A] ETHICS AND HALACHA - TWO WORLDS OR ONE?

- The Euthyphro dilemma<sup>1</sup> - is halacha good because it is the word of God or is did it become the word of God because it is good?
- In other words - does the command of God define what is right and correct, irrespective of any external moral system, or is there an external objective concept of ethics and morality to which halacha confirms since it is the right and correct way to behave?
- Does 'ethics' exist outside of halacha?

1. חובות המוסריות המה לפעמים גוף אחד עם פסקי ההלכה וההלכה היא המכרעת את האסור ואת המותר של תורת המוסר

חזון איש - ס' אמונה ובטחון ר' פ' ג

*The Chazon Ish is convinced that there is no distinction between halacha and morality.*

2.

Plato's dilemma is elegant because it forces us to make a choice between two invidious possibilities: religion is either opposed to ethics or superfluous to it. In fact, however, Plato's dilemma belongs to a particular time and place, Athens in the fourth century BCE. The culture of Plato's day was mythic and polytheistic. The gods fought and committed appalling crimes. Kronos castrates his father Uranus, only to be murdered by his son Zeus in turn. Greek myth is amoral or pre-moral, and what Plato represents is one of the earliest attempts to think morally by breaking free from the mythological past. Looking back with the hindsight of history, we can see that for Plato, to be moral was to liberate yourself from the world of myth – much as Abraham, in Jewish tradition, could only arrive at truth by breaking his father's idols. In their different ways, Abraham and Plato were both iconoclasts.

In Judaism, the Euthyphro dilemma does not exist. God commands the good because it is good. Without this assumption, Abraham's challenge over the fate of Sodom – 'Shall not the Judge of all the earth do justice?' – would be incomprehensible. God and humans are equally answerable to the claims of justice. But the good is what God commands because God-the-lawgiver is also God-the-creator-and-redeemer. Morality mirrors the deep structure of the universe that God made and called good. Plato's challenge arises because the Greek gods were not creators. Matter was eternal. The gods had no special authority except for the fact that they were held to be powerful. Plato was therefore correct to challenge the popular cults of his day by, in effect, drawing a principled distinction between might and right. The gods may be strong, but that is no reason to invest them with moral authority. For the Bible, however, God who teaches us how to act in the world is also the maker of the world in which we act. This means that in monotheism, morality means going with, not against, the grain of the cosmos and history. God himself empowers his prophets to challenge kings – even himself – in the name of justice or mercy. To be sure, there are occasions – most famously, the binding of Isaac – in which God seems to demand pure obedience; but this itself suggests that the story may be more subtle than it seems.<sup>6</sup> Taken as a whole, Judaism embodies divine faith in the moral capacity and literacy of humankind.

To Heal a Fractured World, Rabbi Jonathan Sacks p164-5

### B] THE PROHIBITION AGAINST ABORTION

#### B1] ABORTION AS THE MURDER OF ACTUAL LIFE

3. וְכִי יִצְוּ אֲנָשִׁים וְנָגְפוּ אִשָּׁה הָרָה וַיִּצְאוּ יְלֶדֶיהָ וְלֹא יִהְיֶה אֶסּוֹן עָנוּשׁ יַעֲנֹשׁ (רש"י - לשלם דמי ולדות לזכר) כִּפְּאֻשֶׁר יָשִׁית עָלֶיךָ בְּעַל הָאִשָּׁה וְנָתַן בְּפִלְלִים: וְאִם אֶסּוֹן יִהְיֶה וְנִתְּנָה נֶפֶשׁ תַּחַת נֶפֶשׁ

שמות כא:כב, כג

*Abortion is referred to in the Torah in the context of accidental physical injury to a pregnant woman, causing her to lose her baby. The verse makes clear that, if the woman dies from the injury, this will be treated as a case of homicide. However, for the killing of the unborn child, the Torah simply refers to a 'punishment'.*

1. As set out in Plato's dialogue Euthyphro (10a), in which Socrates asks Euthyphro, "Is the pious loved by the gods because it is pious, or is it pious because it is loved by the gods?"

4. **ענוש יענש** - ממון. אתה אומר ממון, או אינו אלא מיתה, הרי אתה דן, נאמר כאן ענוש ונאמר להלן (דברים כ"ב:ט) וְעָנְשׁוּ אֹתוֹ. מה להלן ממון, אף כאן ממון

מכילתא דרבי ישמעאל משפטים - מס' דנויקין פרשה ח

Chazal explain that the punishment is financial compensation, payable to to parent of the unborn child<sup>2</sup>. It is clear therefore that the killing of the unborn child, in this context at least, is not considered homicide.

5. **מַכָּה אִישׁ וְמוֹת מוֹת יוֹמָת**

שמות כ"א:ב

The prohibition of murder in the Torah, which attracts the death penalty, refers to striking an 'ish'.

6. **מכה איש**. אין לי אלא שהכה את האיש, הכה את האשה ואת הקטן מנין, ת"ל (ויקרא כ"ד:יז) וְאִישׁ כִּי יַכֶּה כָּל-נַפְשׁ אָדָם [מוֹת יוֹמָת] להביא את שהכה את האשה ואת הקטן... שומעני אף בן שמונה במשמע, ת"ל מכה איש, מגיד שאינו חייב עד שיהרוג בן קיימא.

מכילתא דרבי ישמעאל משפטים - מס' דנויקין פרשה ד ד"ה מכה איש

Whilst 'ish' here includes women and children, Chazal explain that it specifically excludes from the death penalty the killing of a fetus. This does NOT however mean that it is not murder (some murder is technically exempted from the death penalty). It certainly does not suggest that it is permitted!

7. **תנוק בן יום אחד ... וההורגו חייב ...**

משנה נדה ה:ג

The killing of a baby, even at one day old, is full-blown murder which is liable to the death penalty.

8. בן נח נהרג ... משום רבי ישמעאל אמרו: אף על העוברין. ... מאי טעמיה דרבי ישמעאל? - דכתיב (בראשית ט"ו) שֹׁפֵךְ דַּם הָאָדָם בַּאֲדָם דָּמוֹ יִשְׁפָּךְ כִּי בְצַלֵּם אֱלֹקִים עָשָׂה אֶת-הָאָדָם, איזהו אדם שהוא באדם - הוא אומר זה עובר שבמעני אמו.

סנהדרין נ:

Chazal learned that, in the 7 Noachide laws, the prohibition of murder for non-Jews does include killing a fetus.

9. בן נח שהרג נפש אפילו עובר במעני אמו נהרג עליו

רמב"ם הלכות מלכים פרק ט הלכה ד

The Rambam rules this as the halacha - a non-Jew who kills a fetus is a murderer and is subject to the death penalty.

10. ... דליכא מידי דלישראל שרי ולעובד כוכבים אסור ... ואע"ג דבן נח נהרג על העוברים כדאמר התם וישראל אינו נהרג נהי דפטור מ"מ לא שרי

תוספות חולין לג. ד"ה אחד עובד כוכבים

Tosafot raise the talmudic concept of 'leica midi' - i.e. since the Jewish people were elevated at Har Sinai to a higher level of kedusha than the nations of the world, it cannot be that something which is forbidden to a non-Jew could be permitted to a Jew! Since it is considered murder for a non-Jew to kill a fetus, it MUST also be prohibited for a Jew. The question is - what is the nature of that prohibition? Murder? Another Torah prohibition? A Rabbinic prohibition?

R. Chaim Ozer Grodzinsky and others understood that the prohibition is indeed murder, albeit which is not subject to capital punishment for technical reasons (similar to someone who murders a 'treifa' - a person who is terminally ill anyway. Such an act is fully murder, yet is exempt from the death penalty).

11. **וּמַכָּה בְּהֵמָה יְשַׁלְּמֶנָּה וּמַכָּה אָדָם יוֹמָת**

ויקרא כ"ד:כא

Elsewhere, the Torah states that the penalty for striking down an 'adam' is death.

2. See Rashi on this verse.

12. (ב) שבת שבתון לה' כל העושה בו מלאכה יומת. הנה בכל מקום דכתיב מיתה כתוב "מות יומת", לבד ממקומות יוצאין מן הכלל. וכתוב (לעיל כא:כט) הַשׁוֹר יִשְׁקָל וְגַם-בְּעֵלְיוֹ יוּמָת, וְזוּה מִיְתָה בְיַד שָׁמַיִם כְּדַרְשֵׁי בְּמִכְלִילָא (מסכתא דנזיקין פרשה י). וכן הא דכתיב בפרשת אמור (ויקרא כד:כא) וַיִּמְכְּרָה בְּהֵמָּה וַיְשַׁלְּמֶנָּה וַיִּמְכְּרָה אֶדְם יוּמָת ... ויתכן ד'מכה אדם' קאי על עוברין, שכן כתוב (בראשית ט:ו) שׁוֹפֵךְ דַּם הָאָדָם בָּאָדָם - היינו עובר - בָּאָדָם (דמו) יִשְׁפֹךְ - שבן נח נהרג עליהן, וישראל נמסר מיתתו לדיני שמים

משך חכמה שמות לה:ב

*Meshech Chochma suggests that this is the prohibition of murder for a Jew killing an embryo. Use of the single phrase מות יומת rather than the normal double expression מות יומת indicates that the punishment is from Heaven and not man.*

13. הנה בדבר הריגת עובר במעי אמו בישראל מפורש בתוס' סנהדרין דף נ"ט ע"א ד"ה ליכא דאסור בפשיטות באיסור רציחה משום דליכא מידעם דלישראל שרי ולעכו"ם אסור, וכל כך פשיטא להו דהוא אסור ובאיסור רציחה .... כתבתי כל זה לענין הפרצה הגדולה בעולם שהמלכיות דהרבה מדינות התירו להרוג עוברים ובתוכם גם ראשי המדינה במדינת ישראל וכבר נהרגו עוברים לאין מספר שבזה"ז הא עוד יש צורך לעשות סיג לתורה, וכ"ש שלא לעשות קולות באיסור רציחה החמור ביותר ...

שו"ת אגרות משה חלק חו"מ ב סימן סט

*Rav Moshe Feinstein is also quite clear that abortion is murder. Interestingly, he also appears to have been inclined to reach this psak (which for reasons set out below is not an obvious psak in light of previous lenient precedents) in view of what he perceived as a need to move away from the societal perversion of abortion 'on demand'.*

14. דלגבי קדושת המצות ודאי דמצווין אחר מתן תורה מה שהיו מצווין קודם, רק לענין עונשין אם עבר ועשה טפי חסה רחמנא על דם ישראל

אור שמח הלכות איסורי ביאה פרק ג

*The Ohr Someyach (also the author of Meshech Chochma) understands that Jews are always bound by the halacha for non-Jews. However, the Torah at Sinai introduces a 'rachamim' when it comes to the required punishment<sup>3</sup>.*

15. האשה שהיא מקשה לילד מחתכין את הולד במעיה ומוציאין אותו אברים אברים מפני שחייה קודמין לחייו. יצא רובו - אין נוגעין בו שאין דוחין נפש מפני נפש

משנה מסכת אהלות פרק ז משנה ו

*The principal source dealing with abortion for medical reasons is a Mishna in Ohalot. This states that a fetus must be killed in order to save the life of the mother. However, (in a breach birth) once the majority of the new-born has emerged from the mother at birth, it may no longer be killed to save the mother since 'one life cannot be taken to save another'. In a normal delivery, once the majority of the head has emerged, the baby may not be harmed. This is ruled in halacha and would appear to indicate that abortion IS permitted to save the life of the mother.*

16. ... דכל זמן שלא יצא לאויר העולם לאו נפש הוא וניתן להורגו ולהזיל את אמו, אבל יצא ראשו - אין נוגעים בו להורגו, דכוח ליה כילוד ואין דוחין נפש מפני נפש

רש"י סנהדרין עב: ד"ה יצא

*Rashi understands that the permission to kill a fetus in these circumstances, where the life of the mother is threatened, is based on the fact that, before birth, the fetus is not defined as a 'nefesh' - a living being - and so can be killed to save a living person. Once the baby has emerged, however, it IS considered to be a living being and thus cannot be killed to save another person.*

But if abortion is murder, how can the life of the fetus be taken to save the life of the mother!?

17. ורוצח גופיה מנא לן? סברא היא. דההוא דאתא לקמיה דרבה, אמר ליה: אמר לי מרי דוראי: קטליה לפלניא, ואי לא קטילנא לך. אמר ליה: נקטלך ולא תקטול. מאי חזית דדמא דידך סומק טפי? דילמא דמא דההוא גברא סומק טפי.

יומא פב:

*Chazal state that a person may not murder to save his own life. Who said that your life is more valuable than the other persons'? Even if we categorize abortion as murder, it seem clear from the Mishna in Ohalot (above) that we DO kill a fetus to save a mother. As such the status of the fetus is of a lower level of 'life' than someone already born.<sup>4</sup>*

3. Maharal in Gur Aryeh also raises this question and suggests that the inability to carry out the death penalty can in fact be seen as a stricter standard when it comes to the Jew.

4. One suggestion made by the Minchat Chinuch (296:24) is that we would normally NOT weigh life against other life since, normally, we cannot judge between one life and another. But maybe in the case of a fetus we can. Although a fetus may be alive to a significant degree, even to the point that it could be murder to kill it, we can still say that the life of the fetus is 'less' than the life of the mother.

**B2] A RABBINIC PROHIBITION?**

18. מתני'. האשה שיצאה ליהרג - אין ממתנינן לה עד שתלד. האשה שישבה על המשבר - ממתנינן לה עד שתלד. גמ'. פשיטא! גופה היא! איצטריך - ס"ד אמינא הואיל וכתוב (שמות כא) פִּאֲשֶׁר יָשִׁית עָלֶיךָ בְּעַל הָאִשָּׁה. ממונא דבעל הוא ולא ליפסדיה מיניה, קמ"ל. ... ישבה על המשבר וכו'. מ"ט! כיון דעקר, גופא אחרינא הוא.

ערכין ז.

*If a woman who has been sentenced to death is then found to be pregnant, we do not delay the execution until the child has been born. This is in order not to cause further anguish to the condemned woman by making her wait for execution. If however she is already 'sitting on the birthing stool' i.e. has started the birth process, we are not allowed to harm the child. The Gemara explains that the baby in utero is defined as part of the woman's body and not a separate entity. However, once the baby moves to begin birthing process, it 'detaches' itself from the mother and now becomes a separate entity. What is the relevance of classifying the fetus as simply a part of the mother's body?*

19. ולולד כיון שלא יצא לאויר העולם לא חיישין

הר"ן על הרי"ף מסכת חולין יט.

*In case of the death penalty for the mother, the Ran says that since the fetus has not come out, we do not take it into account at all. Some authorities<sup>5</sup> understand that Ran considers abortion to be rabbinic prohibition. Others<sup>6</sup> understand that the Ran would consider it a Torah prohibition.*

20. שאלת ... בנשים שמתות מחמת לידה והולד מפרפר בבטנה והנשים מכות על בטנה במכבדת לקרב את מיתתו אם יש בזה משום נטילת נשמה ...

**תשובה** ודאי ראוי לגעור בנשים העושות ככה משום דמחזי כעין רציחה ... אבל אין בדבר לא משום רציחה ... לענין רציחה פשיטא דאין נהרג עליו כיון שלא יצא לאויר העולם והא דמחללין עליו את השבת משום דספק הוא ומספקא דנפשות מחללין עליו את השבת אבל מספיקא לא קטלינן ... כיון שעדיין לא יצא לאויר העולם ולא היה לו חזקת חיות ההורג לא פגע בספק נפשות ואע"ג שהוא מתנועע לאו חיות הוא מידי דהוה אזנב הלטאה ... ומ"מ מונעין אותו שלא יקרבו את מיתתו בידים

שו"ת רדב"ז חלק ב סימן תרצה

*The Radvaz (16C) is quite clear that abortion, whilst clearly prohibited, is certainly NOT murder<sup>7</sup>.*

What about the principle of 'leica midi' - that anything prohibited to a non-Jew **MUST** be prohibited to a Jew too? In fact this is not so straightforward and it may be that the majority view in the Gemara does not actually accept this.<sup>8</sup> In fact many Acharonim understand that the Rambam does not accept the principle. He rules that an animal which has been properly slaughtered but is still twitching is **NOT** kosher for a non-Jew (as Ever Min Hachai) but **IS** kosher for a Jew since it has been shechted.

**B3] ABORTION AS THE DESTRUCTION OF 'POTENTIAL LIFE'**

Other modern day poskim (such as the Tzitz Eliezer) understand however that the prohibition is not murder.<sup>9</sup> What could it be?

21. שלא נגרום מיתתו דודאי אסור לכתחילה ... באיסור הוצאת ש"ז לבטלה והטעם משום שראוי להיות נוצר מכל טיפה זרע קודש.

שו"ת חוות יאיר סימן לא

*R' Yair Bachrach (France, late 17C) claims that issue is derived from the prohibition of destroying male seed. A fetus, even if not halachically 'alive', is still a potential life - certainly no less than sperm!*

22. אסור להוציא שכבת זרע לבטלה ... שאיסור גדול הוא ... וכאילו הרג הנפש

רמב"ם הלכות איסורי ביאה פרק כא הלכה יח

*Wasting seed is a very serious prohibition and, according to many authorities, is an issur min haTorah. Rambam describes it as tantamount to murder. But are women included in the prohibition of destroying seed?*

5. R' Chaim Ozer Grodzinsky (Achiezer 3:65) and R' Bentzion Uziel (Mishpetei Uziel 3:46)

6. R. Moshe Feinstein (Igrot Moshe CM 2:69)

7. It sounds from the wording משום דמחזי כעין רציחה that it may be a rabbinic prohibition since it appears like murder.

8. See Sanhedrin 59a.

9. One technical argument which challenges the view that abortion is murder is based on the principle of קם ליה בדרבה מיניה. This states that where a transgression simultaneously mandates two punishments, only the greater of the two is applied. As such, if abortion is also murder, how can the verse require payment? A simple answer could of course be that the verse actually strengthens the case for classifying abortion as murder since it has to specify a payment in a situation that normally would not require one.

23. שלש נשים משמשות במוך: קטנה, מעוברת, ומניקה

יבמות יב:

*The Gemara states that three groups of women are allowed to use a 'moch' - a contraceptive cloth or sponge - before marital relations to prevent pregnancy which may be medically dangerous for her or her existing baby. These are (i) a girl under 12; (ii) a pregnant woman and (iii) a nursing mother.*

24. שלש נשים משמשות במוך - פי' הקונטרס מותר לשמש במוך אבל שאר נשים אסור משום השחתת זרע אע"ג דלא מייפקדה אפריה ורביה ... ור"ת אומר ... אם נותנת מוך אחר תשמיש אין נראה לאסור ... והאשה שנותנת אח"כ מוך לא הוזכרה בהשחתת זרע כיון דלא מייפקדה אפריה ורביה

תוספות שם

*As to whether other women are generally allowed to use contraception, there is a difference of opinion. Rashi's view is that they are included in the prohibition of destroying seed and may not use a moch even after relations to avoid pregnancy. However, Rabbeinu Tam rules that women are not included in the prohibition of destroying seed and may use a moch after relations (but not before, as this changes the nature of the sexual relations and could involve the husband in the prohibition of wasting seed).*

25. פי כה אמר ה' בורא השמים הוא האלקים יצר הארץ ועשה הוא כוננה לא תהו בראה לשבת יצרה אני ה' ואין עוד

ישעיהו מה"ח

*In addition to the Torah mitzvah of pru u'revu - to have children - Chazal identified a Rabbinic mitzvah of 'lashevet' - that the world was created to be inhabited by people and this aim should be promoted where possible. According to many poskim, women are included in this obligation.*

26. אף כי י"ל דאשה נמי נהי דלא מפקדא אפריה ורביה מ"מ שייד בה קצת מצוה לשבת יצרה

שו"ת חוות יאיר סימן לא

*The Chavot Yair considered that women are included somewhat in this obligation, which would be result in a (weaker) prohibition on a woman performing an abortion. Other poskim disagreed with this. On the basis of the above analysis, the Tzitz Eliezer says that in circumstances where an abortion may be carried out (see below), it should wherever possible be carried out by a Jewish female doctor.*

#### B4] ABORTION AS UNLAWFUL WOUNDING?

27. ארבעים יבנו לא יסיף פן יסיף להפתו על אלה מכה רבה ונקלה אחיד לעיניך

דברים כה"ג

*The Torah prohibits wounding another person. Some authorities prohibit abortion on the grounds that it constitutes an unlawful assault, either on the fetus or on the mother*

To summarize so far:-

- All agree that abortion is murder for a non-Jew.
- Some poskim rule that it also murder for a Jew, just not subject to capital punishment for technical reasons.
- Other poskim rule that it not murder, but rather is included in the (Torah) prohibition of destroying seed/potential life. According to one view, women are not included in this prohibition.
- Abortion would also prevent the Rabbinic mitzvah to populate the world, in which women are included (according to some views).
- Alternatively, abortion may be a rabbinic prohibition as it resembles murder.

The question of whether abortion is murder or a lesser prohibition is extremely important when deciding what level of extenuating circumstance will permit an abortion e.g. danger to life; illness; rape; psychological damage; social pressures; financial constraints etc. For example, in WWI, a halachic question was brought in the case of a German officer who raped a Jewish girl, who became pregnant. He took her to a doctor and demanded that the doctor abort the baby. When the doctor refused, he took out a gun and threatened to kill the doctor if he did not proceed with the abortion. Does the doctor have to give up his life rather than perform the abortion?