

HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY

58 - JUDAISM AND THE UNBORN CHILD - ABORTION: PART 2 OU ISRAEL CENTER - SUMMER 2017

To summarize so far:-

- All poskim agree that abortion is murder for a non-Jew.¹
- 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 may not be included in this prohibition.
- Abortion would also prevent the Rabbinic mitzvah to populate the world, in which women are included (according to some views).
- Other poskim rule that abortion is the Torah prohibition of unlawful wounding.
- Alternatively, abortion may be a rabbinic prohibition as it resembles murder.

NOTE: Nothing in this shiur (or indeed generally in this series of shiurim) should be taken as an indication of halachic psak in any given circumstance. A competent halachic authority must be consulted on all relevant matters.

A] ABORTION AS UNLAWFUL WOUNDING

1. אסור לאדם לחבול בין בעצמו בין בחבירו, ולא החובל בלבד אלא כל המכה אדם כשר מישראל בין קטן בין גדול בין איש בין אשה דרך נציון הרי זה עובר בלא תעשה, שנ' (דברים כ"ה ג') לא יוסיף להכותו, אם הזהירה תורה שלא להוסיף בהכאת החוטא קל וחומר למכה את הצדיק

רמב"ם הלכות חובל ומזיק פרק ה הלכה א

The Torah prohibits wounding another person or oneself. Some authorities² prohibit abortion on the grounds that it constitutes an unlawful assault, either on the fetus or on the mother.

B] ABORTION IN THE FIRST 40 DAYS

2. מתני'. המפלת ליום מ' - אינה חוששת לולד, ליום מ"א - תשב לזכר ולנקבה ולנדה

נדה ל

The Mishna in Nidda states that a miscarriage before day 40 from conception does not cause tumat yoledet, which a mother would normally have on the birth of a child.

3. אמר רב חסדא: ... עד ארבעים מיהא בעלמא היא

במות סט:

Chazal explain³ that, until 40 days gestation, the embryo is considered halachically as mere 'bodily fluids' of the mother. This is ruled in halacha⁴. So too a pregnancy which ends before 40 day's gestation does not cause Tumat Yoledet or Tumat Met, and does not constitute a 'birth' for Pidyon Haben.

Does this distinction impact on the prohibition of abortion? The answer will depend on the reasons given above. If abortion is murder, there is no concept of murdering mere fluids. However, if the prohibition is destroying potential life, there should be no distinction. If the prohibition is wounding, again, there is no concept of wounding fluid, but there may be an prohibition to wound the mother.

1. See below for discussion of the age of the fetus and whether the non-Jew would be allowed to abort a fetus to save the life of the mother.

2. Such as the Maharit.

3. The context of this discussion is a bat Cohen who has become pregnant (through rape or seduction) from a non-Cohen. She is not allowed to eat terumah once it is established that she is pregnant with a non-Cohen fetus. This does NOT however apply until 40 days' gestation.

4. Shach CM 210:2

4. ומש"כ כת"ר דלפני מ' יום לקליטתו, דהוי כמיא בעלמא לא איקרי נפש, ונראה דב"נ אינו נהרג על זה וגם בישראל אפשר דאין איסור מן התורה.

שו"ת אחיעזר חלק ג סימן סה

R' Chaim Ozer Grodzinski rules that a non-Jew is not liable to capital punishment for terminating a pre-40 day embryo. For a Jew, it would not be a Torah prohibition. This clearly implies that it WOULD be a Rabbinic prohibition.

C] ABORTION IN THE FIRST FEW DAYS AND THE 'MORNING AFTER' PILL

- Is there an argument that pre-implantation the status of the embryo is even lower?
- A pre-implantation embryo will certainly be treated no more strictly than any other pre-40 day fetus, for which termination would be a rabbinic prohibition according to most poskim.
- Additionally, the morning-after pill is generally taken where pregnancy is uncertain. As such, there may be other grounds for leniency in situations of need.⁵
- Rav Shlomo Zalman Auerbach permitted the morning-after pill (or emergency IUD) in the event of rape.⁶
- ly'H we will address in coming shiurim the status of unimplanted embryos which have been genetically tested and found to have abnormalities.

D] BREAKING SHABBAT TO SAVE A FETUS

5. האשה שישה על המשבר ומתה בשבת, מביאין סכין ומקרעים את כריסה ומוציאין את הוולד.

ערכין ז.

If a woman dies in childbirth on Shabbat, we must break Shabbat to try and save the fetus.

6. ואפילו בהלל עובר פחות מכן חרבעים יום שאין בו חיות כלל מחללין לדעת בעל הלכות. הרמב"ן שם:

קרוב נתנאל יומא פרק ח"י

The position of the Behag and the Ramban is that this applies EVEN to a pre-40 day fetus

As such, we see that it is permitted to break Shabbat to preserve the life of an fetus, according to some authorities, even a fetus within 40 days. Rav Moshe argues that if Shabbat may be broken to save a pre-40 day fetus on the basis of its future life, is it illogical to suggest that it may be terminated at will? Rav Waldenberg argues that it seems clear from the Behag that the halachic status of the fetus is an entirely separate issue from whether Shabbat can be violated to save it.

If the fetus is indeed not yet considered 'alive', what is the justification for breaking Shabbat to save it? Although it cannot fall into the category of 'v'chai bahem' which allows life to override most mitzvot, the heter to to break Shabbat can still be based on the status of a fetus as a 'life in potential' and, as Chazal say (Shabbat 151b) 'better to break one Shabbat in order to keep many Shabbatot'.⁷ On that basis, the distinction between pre- and post 40 days becomes less clear.

Most poskim rule that abortion before 40 days is a Rabbinic prohibition, although do not allow it without some good reason. However, the magnitude of reason to permit a termination before 40 days will be lower than that required to abort a fetus after 40 days.

E] ABORTION TO SAVE THE MOTHER'S LIFE

7. האשה שהיא מקשה לילד מחתכין את הולד במעיה ומוציאין אותו אברים אברים מפני שחיייה קודמין לחייה. 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, 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'. This is dealing with a breach birth. In a normal delivery, once the majority of the head has emerged, the baby may not be harmed. This is rules in halacha and would appear to indicate that abortion is permitted only to save the life of the mother.

5. See also <http://www.jewishwomenshealth.org/article.php?article=50>

6. see Nishmat Avraham, Choshen Mishpat 425:1:20

7. See Ramban Niddah 54b

8. ... דכל זמן שלא ילא לחורר העולם לאו נפש כוא וניתן להורגו ולהליל את אמו, אזל ילא ראשו - אין נוגעים צו 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.

9. יצא ראשו אין נוגעין בו, לפי שאין דוחין נפש מפני נפש. ואמאי? רודף הוא! - שאני התם, דמשמיה קא רדפי לה

סנהדרין עב:

The Gemara asks why one is not allowed to kill a child even AFTER it starts to emerge, since the child is threatening the life of the mother. This permission would be on the basis of the din of 'rodef' - a pursuer. One is obligated to kill a pursuer who is threatening the life of another person. Why not then kill the partially-born baby? The Gemara answers that this is not a true case of a 'pursuer'. Since the baby is a natural cause of danger, it is as if the mother were being pursued 'by heaven' and we do not intervene by killing the baby.

Note that the 'lower-grade' status of rodef is not because the fetus is innocent (as is argued by Catholicism) but because it is natural. An innocent rodef could still be a rodef - eg if A is about to shoot B, mistakenly thinking he is an animal, one is justified in killing A if there is no other way to stop him.

10. הרי זו מצות לא תעשה שלא לחוס על נפש הרודף. לפיכך הורו חכמים שהעובר שהיא מקשה לילד מותר לחתוך העובר במיעיה בין בסם בין ביד מפני שהוא כרודף אחריה להורגה, ואם משהוציא ראשו אין נוגעין בו שאין דוחין נפש מפני נפש וזהו טבעו של עולם.

רמב"ם הלכות רוצח ושמירת הנפש פרק א הלכה ט

Although we stated above that Rashi explains the justification for aborting a fetus to save the mother was because the fetus is not a 'nefesh', the Rambam does not take the same position. Rather, he explains that the fetus is like a pursuer and we can kill it like any other pursuer until it emerges from the womb. The problem is that this line of argument was rejected by the gemara!! How can the Rambam use it in the halacha!!?⁸ Is the heter to kill a fetus based on the fetus not being 'alive' or it being a 'pursuer' (which implies that the fetus IS alive/a 'person')?

One resolution is that the Rambam effectively needs both criteria to be satisfied before the fetus may be killed:- (i) the fetus must be pre-'nefesh'; and (ii) must also be a pursuer (or at least a quasi-pursuer). Based on this understanding, some poskim make a distinction between a pregnancy which directly threatens the mother's life, where abortion would be allowed, and a situation where the pregnancy exacerbates an existing condition in the mother (e.g. organ failure) where it is less easy to permit the abortion. We do not invoke the heter of 'rodef' where the risk is indirect. For example, if A is in line to take the last dose of life-saving medicine and B, who is standing behind him, will therefore die, A is not considered a rodef who can be killed to save B!

Another resolution is that there are three stages for the Rambam. (i) Before fetal engagement (where the widest part of the baby's presenting part (usually the head) enters the pelvic brim), the fetus is simply 'part of the mother' and abortion is permitted to save the mother on the grounds that the fetus is not 'alive'; (ii) After fetal engagement, but before birth, the fetus has ceased to be part of the mother and killing it to save the mother is permitted on the joint grounds that the fetus is not yet alive and is a quasi-pursuer. (iii) After partial emergence, the baby IS considered alive and the weak ground of quasi-pursuer alone is not enough to permit an abortion, even to save the mother.

Another implication to the Rodef analysis is the situation where the baby MAY be a threat to the life of the mother. A Rodef may be killed preemptively only if there is a clear and present danger. As such, if the baby may or may not threaten the life of the mother - and one would have to determine the relevant statistical cut off - the Rodef rule will not apply to the fetus. On the other hand, if the principal operative factor is that the fetus is not 'alive' and terminating the fetus is not murder, just as we mandate breaking almost every Torah prohibition even if there is a small likelihood of danger to life, so too here we will permit terminating the fetus.

8. Assuming that he does!!! In fact the Rambam NEVER said that a baby was a Rodef. He said - כרודף - like a Rodef ie a quasi-Rodef, which fits well with the Gemara.

Note: as we saw in Part 1, all authorities agree that, in the case of non-Jews, abortion is a capital crime. Is this a product of the status of the person carrying out the abortion, or does it reflect the status of the child? Is the non-Jewish fetus a fully fledged human being which cannot be killed, even to save the mother. Or, on the other hand, perhaps the status of ALL fetuses is still 'pre-human', in which case it may well be permitted for a Jewish doctor to terminate the fetus to save the mother on the basis of the above analysis. It is therefore more questionable whether a non-Jewish fetus may be aborted to save the life of the mother.

CONCLUSIONS⁹

- Where the fetus itself is causing a definite danger to the mother's life all authorities allow a Jewish doctor to abort the fetus at any stage up to birth.
- Where the fetus is aggravating a secondary threat to the mother's life, many authorities will allow the fetus to be aborted but some will not, even to save the life of the mother.
- Where the fetus is causing a possible danger to the mother's life, many authorities will not allow a late-stage abortion. However, an abortion before 40 days in these circumstance will be allowed. Some authorities would allow abortions in this category up to 3 months.

F] ABORTION TO SAVE THE MOTHER'S LIFE WHERE THE FETUS HAS PARTIALLY EMERGED BUT WILL DIE IN ANY EVENT

11. מיהו גיל צשאפשר כשתמות האם ינלל הולד או ששניהם ינללו. אצל אם כשלא נמיתו ימותו שניהם מעממן אפשר שמותר להמית הולד כדי להזיל עכ"פ אמו וכמעשה דשצט בן בכרי

תפראת ישראל על אהלות ז"ו

If we are presented with choice of the mother or the baby, the halachot discussed above assume that we will at least be able to save the baby, even if the mother may die. Where the baby will die in any event, the Tiferet Yisrael on the Mishna in Ohalot compares the case to the story of Sheva ben Bichri

Sheva ben Bichri was a rebel against David Hamelech who was guilty of a capital crime. He escaped to a town and claimed sanctuary there. Yoav, commander in chief of the army, besieged the town and demanded that they hand over Sheva ben Bichri, or he would destroy the town and kill it's inhabitants.

12. בני אדם שהיו מהלכין בדרך ופגעו להן גוים ואמרו תנו לנו אחד מכם ונהרוג אותו ואם לאו הרי אנו הורגין את כולכם. אפילו כולן נהרגין לא ימסרו נפש אחת מישראל. ייחדו להן אחד - כגון שבע בן בכרי - ימסרו אותו ולא ייהרגו. אמר רבי שמעון בן לקיש והוא שיהא חייב מיתה כשבע בן בכרי. ורבי יוחנן אמר אף על פי שאינו חייב מיתה כשבע בן בכרי

תלמוד ירושלמי מסכת תרומות פרק ח ה"ד

A group of people may not hand over another person to be killed, even in order to save multiple lives. However, if the murderers specify an individual to be handed over, it is permitted to hand them over. Chazal differ as to whether the person handed over to be killed must be guilty or not. R. Yochanan rules that, provided the individual is 'specified' he may be handed over for death, even if innocent. The Rishonim are divided as to whether the halacha follows R. Yochanan or Reish Lakish.

In the medical context, if we follow R. Yochanan and the fetus is the one who is threatening both lives, the fetus may be 'handed over' for death to save the mother. Many poskim object to this comparison on a number of grounds including: (i) the fetus is not a real 'pursuer' as pointed out above -the 'pursuit' is a natural birth process; (ii) The case of Sheva ben Bichri is where there will inevitably be a murder. The abortion scenario does not inevitably involve a murder - why should we not say here: 'better two deaths than one murder?'

CONCLUSIONS

- Where the fetus is endangering the mother's life and, in the event of the mother's death, both mother and fetus will die, some authorities will allow an abortion even if the baby has partially emerged.

9. As noted above, nothing in these shiurim should be considered to be a halachic ruling. A competent halachic authority must be consulted on all practical issues.

G] ABORTION OF A DEFORMED FETUS

- As we saw above, Rav Moshe Feinstein regarded abortion as murder¹⁰ and was unwilling to consider abortion, even of a severely deformed fetus, unless there was danger to the life of the mother. As such, a deformed or disabled would be treated no differently to any other fetus.
- The Tzitz Eliezer took a much more lenient approach which permitted abortion in the event of grave abnormality, in some cases up to 6 months.
- Most poskim today fall somewhere between R' Moshe and The Tzitz Eliezer and permit abortion in the event of some grave abnormality, but only in early stages.
- Most poskim would allow an abortion in these situations of a pre-40 day embryo.
- Rav Waldenberg brings many persuasive arguments and other poskim¹¹ who support his position and expresses astonishment that Rav Moshe had not seen and take account of them! Rav Moshe dismisses them all and has his own understanding of the sources.¹²
- The mental and physical health of the mother would be taken into account in this situation - see below.

Rav Avraham Steinberg summarized the positions of Rav Shlomo Zalman Auerbach:

13. Rabbi Auerbach prohibits the abortion of a Tay Sachs fetus¹³ but allows the abortion of an anencephalic fetus.¹⁴ In cases of multifetal pregnancy such as quadruplets or more, he permits the selective abortion of some of the fetuses to save the mother and the other fetuses.¹⁵ Rabbi Auerbach rules that an anesthesiologist is forbidden to give anesthesia to a woman for an abortion that is halachically prohibited, even if he may lose his job.¹⁶ An expert in ultrasound should not perform an ultrasound examination for a forbidden abortion but need not lose his job because of it.¹⁷ Finally, Rabbi Auerbach permits an autopsy of an abortus after repeated miscarriage in order to determine the reason for the repeated miscarriage.¹⁸

H] ABORTION TO IMPROVE THE MOTHER'S HEALTH

- If abortion constitutes murder, there is no way to permit it in order to save pain or health.
- If, however, the prohibition is wasting seed, many authorities (including R. Ya'akov Emden - 18C) hold that there is no prohibition of wasting seed if the 'wasting' is for a productive purpose - here to stop the illness of the mother. R. Ben-Tzion Uziel (20C Sefardi Chief Rabbi of Israel) permitted an abortion, even in late stages (until birth), when the pregnancy would cause the deafness of the mother.
- Similarly, if the prohibition is wounding, there is no prohibition to cause a wound when this is done for the overall well-being of the mother (as in any operation).

CONCLUSIONS

- Permission to abort a fetus on the grounds of the health of the mother will depend on (a) the reason accepted by that posek for the prohibition of abortion; and (b) the stage of the pregnancy. As noted in Part 1, pre-40 days gestation the halachic situation is much more lenient.

10. Rav Issur Yehuda Unterman learns that abortion is 'avizreihu' of murder. This is in most situations equivalent to murder but may have different applications if someone is asked to die rather than commit an abortion. One may not be required to die for 'avizreihu'.

11. In particular, the Maharit, R. Yaakov Emden, the Ben Ish Chai and others.

12. This stems in large part from the different methodologies of the two. Rav Waldenberg ascribes significant weight to authority and precedent. Rav Moshe has a different mesorah in psak which he outlines in different places. His mesorah, from the Vilna Gaon, is to assess the sources and analyses them afresh, even if that means that he comes to a different view to other poskim, even Rishonim! He may then give a broad justification for his sevara, even if this is strained or forced. See the interview of R. Dovid Cohen on Headlines May 28, 2016, written up in Headlines 2, Dovid Lichtenstein, p302.

13. Nishmat Avraham, Choshen Mishpat 425:1:15.

14. Ibid. Orach Chayim 330:5.

15. Ibid. Choshen Mishpat 425:1:21

16. Nishmat Avraham, vol. 4, Orach Chayim 656:2.

17. Ibid.

18. Ibid. Yoreh De'ah 349:2:4.

I] ABORTION TO IMPROVE THE MOTHER'S MENTAL HEALTH

Some psychiatric conditions will be considered to be a life-threatening risk, if there is a serious risk of suicide. The issue will therefore depend on psychiatric assessment. Stress or mental imbalance short of suicide risk will often not justify abortion, although, as above, this will depend on (a) the reason accepted by the relevant posek for the prohibition; and (b) the stage of the pregnancy.¹⁹

14. מילדין את האשה וכו'.... אמר מר: אם היתה צריכה לנר - חבירתה מדלקת לה את הנר. פשיטא: - לא צריכא בסומא. מהו דתימא: כיון דלא חזיא - אסור, קא משמע לן: איתובי מיתבא דעתה

שבת קכח:

We break Shabbat on a Torah level to calm a blind woman giving birth by turning on a light, even though the impact on her is purely psychological.

15. בשביל צערו - ואם אין לו צער אחר אלא שמתצייש לילך בין בני אדם שרי דאין לך צער גדול מזכ

תוספות שבת נ:

Halacha treats mental health issues as seriously, if not more seriously, than other health issues.

J] ABORTION OF A MAMZER FETUS

16. אם היה ממזר תלמיד חכם וכהן גדול עם הארץ - ממזר תלמיד חכם קודם לכהן גדול עם הארץ

הוריות יג.

The mamzer is not to suffer any discrimination due to his yichus, other than the halachic restrictions on whom he is allowed to marry. A mamzer talmid chacham has priority even over a Cohen Gadol who is an ignoramus.

Most poskim hold that a mamzer fetus is to be treated no differently to any other fetus. However, the mental and physical health of the mother would be taken into account in this situation, as in any pregnancy. Rav Yaakov Emden permitted this.

19. Rabbi Avraham Steinberg relates that Rav Shlomo Zalman Auerbach would assess each woman individually to understand her psychological situation. Later in life, he declined to rule on such issues as he stated that he was too old to truly understand the mental state of a young pregnant woman.