Abortion: A Halakhic Perspective

Based on a lecture by Harav Aharon Lichtenstein

Translated by Rav Nathaniel Helfgot

The problem of abortion raises highly complicated halakhic issues and several of the ramifications interact with a variety of halakhic areas. It is likewise difficult to speak of the definitive halakhic approach in each area, as a number of fundamental issues are the subject of dispute. Nevertheless, it is possible to identify those positions which appear to be most faithful to the basic sources and which have been accepted by the mainstream of major halakhic authorities. The purpose of this discussion, then, is to adumbrate the fundamental problems; to summarize briefly the positions of the decisors; and here and there to express my personal view. This is not the forum for a detailed presentation involving subtle analysis of textual proofs and extensive halakhic give and take. My purpose is to convey a picture that is general, necessarily incomplete, yet as clear as possible. One hopes that the need for conciseness in this outline will enhance discussion of the topic.

REASONS FOR THE PROHIBITION

Aborting an existing fetus is unequivocally prohibited. The famous Mishna (Ohalot 7:6) records:

> "If a woman suffers hard labor in travail, the child (fetus) must be cut up in her womb and brought out piecemeal, for her life takes precedence over its life. If its greater part has already come forth, it must not be touched, for the [claim of one] life cannot supersede [that of another] life."

The first case mentioned in the mishna sanctions killing the fetus only because of the danger posed to the mother's life (implying that, in general, abortion of the fetus is prohibited). Several questions arise regarding the details of this prohibition, particularly respecting its sources and scope, the responses to which carry significant practical implications.

Most basic is the origin and source of the prohibition. Is it biblical or rabbinic? What is the nature of the stricture and how should it be categorized? As to the first aspect, there is, indeed, a view according to which the entire prohibition on abortion is only rabbinic. Assuming that we set aside certain general ethical and religious norms such as "You shall do that which is upright and good," "You shall be holy," and "You shall follow in the ways of God," there would be,

according to this view, no biblical prohibition to kill any fetus. However, in my opinion, this view should not be accorded serious weight, not only because it is disturbing from a moral point of view, but because it also seems to contradict an explicit halakha. Sanhedrin 57b cites the view of R. Yishmael that a Noachide who aborts a fetus has the legal status of a murderer. Maimonides (Hilkhot Melakhim 9:4) codifies the law in accordance with the view of R. Yishmael, and though the Talmud cites a differing view, to the best of my knowledge no decisor disputes Rambam's ruling. If so, it is inconceivable that this action would be permitted to a Jew given the great halakhic principle which states: "Can there be any act which is permitted to a Jew and at the same time prohibited to a Noachide?" (Chullin 33a). In other words, no action forbidden to a non-Jew, of whom the Torah requires a less exacting moral standard, can be permitted to the Jew. Hence, we must conclude that there must be some situations in which abortion is biblically proscribed. This indeed is the conclusion of most decisors. The question then remains: What is the specific prohibition? Several possibilities immediately come to mind:

(1) **Homicide**. Though a Jew who kills a fetus is not punished by the judicial system as a murderer, he has nonetheless violated the prohibition of murder. It is like the case of one who has killed a treifa (an individual with a fatal wound or defect); he is not liable for capital punishment, though he has violated the prohibition on murder and is liable for divine retribution.

(2) **Ancillary to Homicide (senif retzicha)**. Abortion would fall under a category similar to "improper emission of seed," an act which is viewed by the Talmud (Nidda 13a) as tantamount to "the shedding of blood" and one about which Maimonides (Hilkhot Issurei Biah 21:18) writes,

> "Not only is it a grave prohibition, but he who acts in this manner should sit in a state of excommunication; of him Scripture says: 'Your hands are full of blood' and it is as if he had killed a human being."

According to this position, abortion does not constitute homicide proper. However, it is part of a network of strictures revolving around the prohibition of murder but extending beyond it. This would be akin to the concept of avizraihu (actions ancillary to a specific sin) which appears in other halakhic contexts. For example, according to a number of Rishonim, the requirement of giving up one's life rather than transgressing the prohibitions on idolatry, illicit sexual relations, and murder, applies not only to these acts proper but to their appurtenances as well.

(3) **Tort (chabbala)**. Even if the fetus is not a human being whose killing comes under homicide, abortion of the fetus should still be proscribed as a consequence of its being an organic reality bound up with the person of the mother, a status which therefore prohibits intentional injury to it.

(4) **Hatzala (the obligation to preserve life and the corollary prohibition of negligence)**. This concept is derived either from the commandment "Lo ta'amod al dam re'ekha" (You shall not stand idly by while your brother's blood is shed), or from the obligation of hashavat aveda (return of lost property, which includes restoration of the body), or the concept of "Ve-chai ba-hem" (You shall live by them). Even if the prohibition of murder applies solely to persons already born, the positive obligation to preserve life may extend to the fetus because of its potential existence. Where an obligation to promote life exists, its truncation would clearly be forbidden.

As noted, I definitely favor adopting the first possibility, based on the proof-text regarding the Noachide. Indeed, the Mekhilta records the position of Isi ben Akiva that whatever is forbidden to the Jew: "Before revelation we were enjoined from shedding blood, after revelation in place of forbidding such an action shall we now permit it?! Verily they said people who commit these acts are exempt from human punishment but are liable for divine retribution" (Mishpatim, Mesekhet Nezikin, 4). Though the punishment of the Jew in certain types of homicide may be lighter, the fact that he has violated the prohibition of homicide does not vary. Therefore, it seems clear that in any case where a Noachide abortionist is liable for murder, a Jew is considered a murderer as well.

STAGES OF PREGNANCY

Here, however, we enter the area of the second fundamental issue: the scope of the prohibition. Does it apply to all fetuses in all situations or only to certain ones? If there are limitations, how are they determined? This question can, of course, be raised in relation to all the possible rationales listed above. Clearly, these rationales are not mutually exclusive. Some abortions may come under all the categories of prohibition; some may be permitted. To return for the moment to the violation of homicide and the proof from Noachide law, it seems to me that the Noachide is only liable in those instances where the fetus had developed to the point of independent viability (outside the uterus) at that time. In such circumstances, a Jew committing an abortion is exempt from capital punishment only because of the child's status as a fetus, i.e., not having left the womb and entered the world; this exemption is not granted to

the Noachide. Hence the Jew would violate the prohibition of homicide and would be subject to divine punishment. In the early stages of pregnancy, however, the missing element of full human life is not merely that birth has yet to occur, but rather the absence of full development and the fact that in its current state it is not viable outside the womb. It would thus be logical to assume that such an abortion would not be classified as an act of murder. Murder, it would appear, is defined as the termination of currently existing life, and not the curtailment of potential life. Therefore, it would seem that the prohibition of murder proper should be limited to the latter part of pregnancy – practically speaking, more or less the last trimester.

The less severe prohibitions listed above require a separate treatment. Poskim have suggested a number of possible stages within the period of pregnancy. Each of these can be analyzed regarding the question of whether all, some, or none of the prohibitions apply. The proposed stages are as follows: (1) the initial period; (2) after the forty-day mark; (3) after the first trimester; (4) after the quickening of fetal movement. Of these intermediate categories, the only one mentioned in the Talmud as a criterion is forty days (three months appears as a measure of recognition of pregnancy, not as a measure of the viability of the fetus). Prior to that stage, the Talmud records, the embryo is viewed as maya be alma (mere liquid). For instance, a stillborn child ordinarily precludes the next child from the halakhic status of first-born. Yet, if the miscarriage occurred prior to the fortieth day of gestation, it is disregarded and the next male offspring is considered the peter rechem (the first of the womb) (Berakhot 47a). As a result, it is proper to give greater weight to the forty-day mark, with implications for the detailed discussion below. If we go on to analyze the latter three prohibitions mentioned above in relation to these stages of pregnancy, the following conclusions may be drawn:

(1) **Serakh retzicha (ancillary to homicide)**. If abortion is literally a case of hashchatat zera (destruction of seed), and not merely analogous to that category, the prohibition obviously would come into play from the first moment. If, however, we assume that the specific prohibition on hashchatat zera does not apply in this case (e.g. if we adopt the view of Chazon Ish that hashchatat zera only applies to the person who ejaculates the semen, perhaps only at the moment of ejaculation), we are dealing with a distinct prohibition which is an appurtenance to murder. Then it would be possible to divide the period of pregnancy halakhically; the most reasonable measure is of course the forty-day mark.

(2) **Chabbala (prohibition on injuring and wounding human beings, including oneself)**. This can be further divided into two possibilities: First, one may not injure

the fetus itself because of its status as a living organism. There is no prohibition of murder because that requires the extinction of a self-sustaining life. However, the stricture against intentional wounding might apply even to a human organism sustained by another biological organism. Second, abortion is proscribed because of the physical injury to the mother; the fetus is no less significant than any other limb of the mother which is not to be dismembered unnecessarily.

According to the first possibility, the most reasonable cut-off mark is again the fortieth day of gestation. Prior to that, this stricture would certainly not apply, and the later stages are not sufficiently clear-cut to be used as standards. According to the second possibility, the fate of the fetus itself is subservient to its status as part and parcel of the mother; if so, the forty-day mark might become irrelevant. Here too, nonetheless, one might suggest that prior to the forty-day mark, removal of the fetus (categorized as "mere liquid") does not constitute injury to the mother, while removal after forty days does involve injury. This is because the fetus, having become a significant halakhic entity, renders the abortion a significant injury to the mother. This last point, however, is far from conclusive; there is definitely room to consider later stages as standards. Among these, three months seems to me the most reasonable, as it does appear in Halakha as the stage of "recognition of the fetus" conferring the status of "pregnant" on the mother (Nidda 8b).

(3) **Hatzala (the obligation to preserve life)**. Rishonim debate whether the obligation of pikkuach nefesh (violating prohibitions of the Torah, including Shabbat, to save a life) applies to a fetus. May one, for example, violate Shabbat to avoid an abortion? Some permit this violation because the fetus has the status of nefesh (person), though this status applies to the post-forty-day embryo. Others are more lenient of the basis of the rationale that "The Torah stated, violate one Shabbat for him in order that he may observe many Shabbatot in the future" (Yoma 85b). This justification for the concept of pikkuach nefesh applies to the pre-forty-day embryo as well. Others, however, forbid the violation of Shabbat in all cases, inasmuch as they do not view the fetus as a nefesh.

Following the first view, abortion after the fortieth day would clearly be prohibited. Prior to that point, however, it is still an open question, as the exponents of this view only ruled that saving such a fetus does not justify the abrogation of various prohibitions. However, they did not propose that, where the effort to save life does not collide with Torah prohibitions, there is no obligation to preserve the fetus. According to the second view, it is reasonable that abortion would be

prohibited even before the forty-day mark. Though the fetus does not yet have the status of nefesh, it is difficult to imagine that the Torah would, on the one hand, permit abrogation of Shabbat laws to save such a fetus and, on the other hand, permit its arbitrary abortion. The third view allows both sides of this issue, even after the forty-day mark, perhaps as far as the last trimester, similar to the position that would be held by the first view regarding the initial stage.

RATIONALES WHICH MAY PERMIT ABORTION

So far we have examined the scope of the prohibition of abortion in terms of certain stages of pregnancy. We now turn to the circumstances and the reasons for the abortion, and the possible sanction for it in light of various factors. Here too, the scope of the prohibition or, if you will, the scope of the possible exemptions, clearly depends on the source and origin of the prohibition. Here too we shall analyze the issue point by point:

(1) **Homicide**. This prohibition is, of course, waived only in the face of actual threat to life. Pikkuach nefesh is generally defined as real danger of loss of life, even if the chances of harm occurring are slim. There are some poskim who included in this category even spiritual danger such as the threat of apostasy or psychological danger. However, it must be emphasized that even this position considered actual insanity that could be brought on by having the child, not simply a sense of frustration, perplexity, bad nerves, or some neurosis or psychosis. Wherever this prohibition pertains (in my opinion, the last trimester), abortion should therefore be sanctioned only when the life of the mother (or in the unlikely event, someone else's life) is in danger or, according to some poskim, if the sanity of the parents is threatened. Furthermore, it must be noted that the expansion of the definition of "preservation of life" which derives from these authorities' opinion was originally stated regarding the suspension of Shabbat, kashrut, and other similar restrictions where saving an individual threatened with insanity does not come at the cost of another life. In our case, by contrast, the parents' "rescue" comes at the cost of fetal life, and it may very well be that in such circumstances even these authorities would view a lenient course of action with reservation. For this reason, such leniency must be employed, if at all, only in extreme circumstances. Similarly, the famous principle that "One does not follow probability in cases of preserving a life" (Yoma 84a), which allows for violation of Halakha to save lives even when the threat is statistically small, may not be operative when the prohibition to be set aside is murder. Even in cases of physical danger, the gravity of the situation should be weighed carefully.

(2) **Serakh Retzicha**. Here it is clear that saving a life is not the only sanction for permitting an abortion. This is evident from the Talmudic passage that permits a nursing mother to cohabitate using a mokh (a barrier of cotton or wool) to prevent pregnancy. Strictly speaking, this amounts to hotza'at zera le-battala (improper emission of seed), yet, the halakha does not decree that the woman practice abstinence during this period. Since this prohibition is waived to facilitate normal family relations (which is why the emission in this context is not "wasteful"), it would follow that other ethical and humane factors may also be taken into account. It would seem to me that issues such as kevod ha-beriyot (dignity of persons), shalom bayit (domestic peace) and tza'ar (pain), which all carry significant halakhic weight in other contexts, should be considered in making these decisions. However, it is difficult to set down clear-cut guidelines in this area, especially if we assume that our case is not an example of destruction of seed proper, but a parallel stricture that serves as a type of middle ground between the prohibition on destruction of seed and that of homicide. I cannot now offer evidence or clear-cut arguments which can serve as a solid, compelling basis for defining the factors that militate for leniency in this area.

(3) **Chabbala**. Here too, various factors may be considered. If the prohibition is injuring the mother, there would seem to be no restriction where the abortion is performed for her benefit, for that would be like surgery. Hence, if the health of the mother requires an abortion, even though there is no real danger to life, or if her existence will be devastated by bringing to term a child seriously crippled, then perhaps (though, it seems to me, the justification for leniency here is far weaker) out of concern for social and familial stigma or impediments to the child's halakhic marriageability, there is room for leniency in terms of chabbala (and that is the only prohibition we are addressing right now). On the other hand, if the problem is damage and injury caused to the fetus proper, such a lenient course of action is dubious.

(4) **Hatzala**. This is possibly the most common justification, because it applies to the entire period of pregnancy and is seemingly independent of specific circumstances. At the same time, the obligation to save life may offer the greatest room for flexibility in certain common cases. To begin with, it is a positive rather than negative commandment; it thus brings into play the important principle in Halakha according to which positive commands are more easily set aside than negative ones. Secondly, this obligation involves improving the condition of the fetus rather than prohibition to harm it. Hence, there are situations where one must carefully examine whether the lot of the fetus is indeed being improved. Regarding the first

point, it should be noted that the parameters of the "cost" one must incur to help another human being, or even to save him, have yet (to the best of my knowledge) to be fully elaborated from the sources. Therefore, this obligation may not apply if the continued pregnancy will cause the parents profound physical or psychological distress. This is true, however, only if the obligation to preserve life as rooted in the command "ve-chai ba-hem" (you shall live by them) or hashavat aveda (restoration of property, which includes, a fortiori, restoration of life itself); if, however, the basis is "Lo ta'amod al dam re'ekha" (Do not sit idly by while your brother's blood is shed), there is no room for these considerations. It is certainly possible that the fetus is excluded from the category of "re'ekha" (your brother), and thus to be judged only from the perspective of "va-chai ba-hem." Nevertheless, it is also quite conceivable that the obligation to preserve life is unlimited, extending to the fetus and thus closing off the possibility of leniency.

As to the welfare of the baby, it is possible that there is no obligation to preserve its life during pregnancy if there is a serious chance (or surely a likelihood) that the child, if born, will be so maimed that its life will be filled with suffering. To be sure, neither homicide nor suicide is permitted to end the life of an individual who is suffering intolerably. Yet, Rema (Y.D. 339:1) states normatively, that one is permitted to abstain from acting to prevent the death of a goses (an individual in the throes of death) whose death is naturally approaching. Moreover, Rabbeinu Nissim in his commentary to Nedarim (40b) sets down that one is allowed to pray for the speedy demise of an ailing person who is suffering terribly and awaiting death. Here too, nevertheless, caution should be the rule, as there are many opinions, both stringent and lenient, in the halakhic literature.

So far the discussion has dealt with the various possibilities of biblical prohibitions. According to those who maintain that abortion is only proscribed rabbinically (a position which I regard as untenable regarding the last trimester, though it may be considered for the earlier stages, as noted above), the same possible restrictions may be proposed, albeit on a different plane: homicide on the rabbinic level, the obligation to preserve life on a rabbinic level, and so on. In discussing rabbinic laws, there is some room to expand the range of factors that are likely to tilt the equation towards leniency. We should, for example, include issues such as pain or domestic peace which warrant leniency in the realm of rabbinic prohibitions. Indeed, certain halakhic decisors have responded with a lenient ruling in cases of "great need," presumably because they assumed that the prohibition here is only rabbinic. Several points must, however, be noted: First,

the lenient position is a minority view, perhaps even an isolated one. Second, the concept of "great need" is so flexible and lacking in clear content that it is difficult to apply practically. Third, the lenient respondents saw themselves dealing with the highly exceptional cases rather than charting out a general policy.

On this basis, it seems to me that at least after the forty-day mark, when the critical determinants in my opinion, namely serakh retzicha and chabbala, are applicable (either biblically or rabbinically), there is little latitude to permit abortions for psychological-social reasons. I do not posit this, God forbid, out of a lack of sensitivity to those suffering in these situations, nor out of indifference to their emotional, economic, and social travails. However, in consideration of the halakhic norms which take an extremely serious view of feticide, it is difficult to justify broad sanction for such abortions. To review these norms: (1) The possibility, to say the very least, that we are treading upon biblical commands and prohibitions; (2) Even if the prohibition of abortion or the obligation to save the fetus is rabbinic, it should not be treated lightly. Considering the fetus: who would dare prophesy that its future life is destined to be detrimental? As to the mother, in the overwhelming majority of cases there is no real danger of insanity or physical deterioration. In the absence of such factors it is difficult to see on what basis we can justify general leniency. (3) Moreover, it is a major principle of Halakha that one does not set aside a prohibition that conflicts with a positive obligation where it is possible to fulfill both requirements. In a substantial number of cases, alternate means of dealing with these dilemmas exist – including counseling, monetary assistance, etc. Although in particular instances these means and resources are not always available, a general approach and comprehensive policy should clearly work towards this goal rather than for an expansion of the grounds on which abortions are to be c[arried out]

CONCLUDING REMARKS

Let me conclude this overview with two remarks. First, the reader has surely discerned that in a number of places I have refrained from setting down definitive conclusions, but have been satisfied to indicate general principles, tendencies, and possibilities in the Halakha. This approach is not merely the product of modesty or hesitation in resolving debates among halakhic titans. It is rooted in a view of the nature of pesak in general and regarding this topic specifically. These are areas where, on the one hand, the halakhic details are not clearly fleshed out in the Talmud and Rishonim, and, on the other hand, the personal circumstances are often complex and perplexing. In such areas there is room and,

in my opinion, an obligation for a measure of flexibility. A sensitive posek recognizes both the gravity of the personal situation and the seriousness of the halakhic factors. In one case, therefore, he may tend to view the points of contention in one way, while in a second case exhibiting slightly different details, he may tilt the decision on these points in the other direction. He may reach a different kind of equilibrium in assessing the views of his predecessors, sometimes allowing far-reaching positions to carry great weight, while in other cases ignoring them completely. He might stretch the halakhic limits of leniency where serious domestic tragedy looms, or hold firm to the strict interpretation of the law when, as he reads the situation, the pressure for leniency stems from frivolous attitudes and reflects a debased moral compass. This approach is neither evasive nor discriminatory. The flexibility arises from a recognition that halakhic rulings are not, and should not be, the output of human micro-computers, but of thinking human beings; a recognition that these rulings must be applied to concrete situations with a bold effort to achieve the optimal moral and halakhic balance among the various factors. Thus, it is the case that halakhic rulings have more of the character of general directives than specific decisive rulings, within set limits, of course, and when the posek is not absolutely convinced respecting the point at issue. However, as we noted above, this application of pesak must be the outcome of serious deliberation – in the broadest sense of the term – by committed and observant Torah personalities who are, on the one hand, sensitive to both the human and halakhic aspects, and on the other hand, possess the stature and ability to confront the halakhic problems.

Despite this emphasis, I imagine that some may view the ideas presented above as, overall, excessively severe and inflexible. Hence my second concluding remark. Judged by the standard prevalent today in most of the world, at least the Western world, the halakhic approach presented here appears rather stringent. This requires no apologetics. But it is worth making clear, certainly to those who, in seeking a humane approach, are liable to adopt slavishly an overly liberal attitude in this area, that from the perspective of the fetus and those concerned with its welfare, liberality in this direction comes at the expense of humanity, insofar as the caution of Halakha is tied to its intimate concern for the values of kindness and mercy. It is not only the honor of God which obligates us, regardless of the cost, to avoid what is prohibited and to obey the commands of the Almighty that are expressed in this Halakha. It is also the honor of man in Halakha, the humane and ethical element which insists on the preservation of human dignity and concern for human welfare, that rises up in indignation against the torrent of abortions. If the Halakha's course is sometimes onerous for certain families or for those

responsible for them – and this fact should neither be denied nor ignored – let us remember, paraphrasing the famous words of Byron, that Halakha loved not the parents less, but the child more.

[This article is a translation of testimony delivered by Harav Lichtenstein to a Knesset committee investigating the Israeli law regarding abortion. This translation, edited by Rav Shalom Carmy, originally appeared in Tradition 25:4, Summer 1991.]