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## EVERYTHING YOU KNEW ABOUT JEWISH LAW AND ABORTION IS WRONG

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### INTRODUCTION

In a world of shouting extremes, Jewish law is the adult in the room. We do not believe that full human identity is established at conception; and we do not believe that abortion is a morally neutral choice made by a subject about an object. Our stable and coherent position reflects the consensus of Rabbinic scholars over millennia. It represents the clear dictates of Scripture and Talmud rather than a messy ongoing attempt to responsibly and empathetically balance radically conflicting opinions about law, ethics, and public policy. However, this is true only with regard to abortions committed by Jews. Halakhah regards abortion committed by nonJews as a capital crime, even when done to save the life of the mother.

Not.

The modality of this essay is "Show and Tell." I'll present a winding chain of halakhic abortion rulings and discussions. Then, with only a few words of framing, I'll leave you to decide what you think about this Dvar Torah's title and opening paragraph.

### BODY

Mishnah Ohalot 7:6 reads:

*If a woman is having a difficult labor  
we cut up the fetus in her womb and remove it limb by limb  
because her life precedes its life.*

*If most (of the fetus) has emerged –  
we may not touch it*

*because we do not push aside one nefesh for the sake of another nefesh.*

In his Commentary to Talmud Sanhedrin (72a), Yad Ramah ([Rabbi Meir Abulafia](#), 1170-1244) explains this Mishnah on the basis of a halakhic midrash attributed to Rabbi Yishmael on Talmud Sanhedrin 57b:

*as Scripture writes:*

The shedder of the blood of an *adam*/human in a human –  
*Which is a "human in a human?" Say this is a fetus.*

Rabbi Yishmael's position is that the Noachide prohibition against bloodshedding extends to abortion. By citing his rationale to explain Mishnah Ohalot, Yad Ramah signals that the same prohibition applies to Jews. He next connects the Mishnah to

Shemot 21:22, which is understood to establish a financial penalty as the punishment for an assault that leads to a miscarriage.

*But this is specifically when most of the fetus has emerged,  
but so long as it is within – it is not a nefesh, and the Torah did not take  
pity on it.*

*We can know this because the Torah does not make one liable to execution for  
killing it,*

*as Scripture writes (Shemot 21:22):*

and her offspring emerge . . . he must surely be punished.

How can Yad Ramah claim that abortion is not a capital crime, when a) all Noachide prohibitions are punishable by death, and b) the verse which prohibits abortion states that the perpetrator "shall have his blood shed?!" The answer is that the prohibition against abortion – for both Jews and Noachides – applied only once the fetus has partially emerged. Prior to that, the fetus is neither a "nefesh" (for the Mishnah) nor an "adam" for the Torah.

Yad Ramah's position is noted by [Rabbi Meir Don Plotzky](#) (1866-1928), known as "the K'li Chemdah," in his book [Chemdat Yisroel](#) (p.88a). Rabbi Plotzky was bothered by the formal rule that prohibitions found in the Torah preceding the Sinaitic Revelation, and not repeated afterward, apply only to Jews. If so, how can the prohibition against abortion apply only to Noachides? His solution is that the prohibition is repeated after Sinai, in Leviticus 24:27:

*A man who strikes kol nefesh adam must certainly be killed*

The seemingly extraneous word *kol*/all includes a viable fetus within the scope of the prohibition. Once the prohibition is repeated, it applies to both Jews and nonJews, as Yad Ramah said. However, Rabbi Plotzky understands the verse as establishing a prohibition against abortion even before the fetus has emerged at all.

This prohibition is capital for nonJews, and noncapital for Jews, for tangential reasons having to do with rules about legal presumptions. Rabbi Plotzky concludes that even for Jews, the punishment for aborting even a pre-emergent fetus is "death at the hands of Heaven, because surely it is **no better** than spilling seed, which the Shulchan Arukh holds deserves that punishment."

Yet what are we to do with Exodus 21:22, which establishes a financial penalty for abortion? Doesn't the Talmudic rule *kim lei b'derabban minei* (= we administer only the more severe penalty) prove that there is no death at the hands of Heaven?

Rabbi Plotzky responds that the rule applies only to punishments, not to opportunities for atonement/*kapparah*.

But doesn't Bamidbar 35:31 explicitly ban accepting atonement money/*kofer* in lieu of the penalty for murder?

Rabbi Plotzky responds that Bava Kamma 83b reads the verse as limiting the ban to *kofer* for a murderous *nefesh*, but allowing money to replace “an eye for an eye” and other permanent injuries. Since the fetus is not a *nefesh*, the *kofer* does not stand in for the perpetrator's *nefesh*, and can be accepted.

Rabbi Plotzky's reading seems against the plain words of Yad Ramah, and he also acknowledges a major irony: the term *nefesh* in the Mishnah is intended to exclude the fetus before most of it emerges, whereas he claims that the term *nefesh* in the verse is intended to include the fetus before any of it emerges. Rabbi Yechiel Yaakov Weinberg (*S'ridei Eish* 1:162) therefore rejects this reading out of hand.

But Rabbi Weinberg is unwilling to accept the plain meaning of Yad Ramah either. Instead, he asserts “there must have befallen here some accidental deletion, because Ramah actually meant to say that only Noahides are liable for killing a fetus, as in the verse *who sheds the blood etc.*, but not Jews, or else this paragraph was copied by mistake from somewhere else. It is well known that publishers of our predecessors in years past were not very precise and did not make the effort to find multiple manuscripts, by means of which they would have been able to rescue the books from gross distortions. It is not appropriate to multiply *pilpulim* only for the sake of resolving the distortions of scribes and copyists.”

Rabbi Weinberg was responding to a question from an Orthodox medical association in London. Britain's single-payer National Health Service required doctors to test for and to offer abortion of rubella-affected pregnancies after the first trimester, with no religious conscience exemption. The Orthodox doctors asked whether they were required to risk severe consequences to avoid participating.

The first text Rabbi Weinberg cites is the ending of Tosafot Niddah 44a s.v. ihu:

*If you were to ask:*

*On the assumption that it is muttar (=permitted) to kill a fetus in the womb even if its mother has died, and we do not treat as merely 'resting in a box,' why do we desecrate Shabbat for it by bringing a knife through a public domain to incise the mother, as is established on Arakbin 7b?*

*One can answer:*

*Nonetheless, for its pikuach nefesh we desecrate Shabbat, even though it is muttar (=permitted) to kill it . . .*

The simple meaning of Tosafot is that abortion is simply permitted, even of a fetus that would survive outside the womb. Rabbi Weinberg cites Maharatz Chajes as accepting this reading, but Rabbi Yaakov Emden and Rabbi Yair Bachrach (Shu"t Chavot

Yair 31) as rejecting it out of hand, for different reasons. Rabbi Emden writes simply that “who would permit killing a fetus for no reason, even if it is not a capital crime?” Rabbi Bachrach thinks that the idea that one may desecrate Shabbat to save a life that one could kill with impunity is ridiculous. Rav Moshe Feinstein (Igrot Mosheh CM 2:69) states that the text of Tosafot is obviously corrupt and should read *patur* (=exempt) rather than *muttar*.

Rabbi Weinberg reaches a lenient but tentative conclusion. His responsum ends on a cautionary note:

I must emphasize that everything we have written to permit abortion in order to save a woman from illness is only according to those *rishonim* who held that the Mishnah's permission in the case of a difficult childbirth is because a fetus is not called '*nefesh*.' But according to the position of our master Rabbi Chayyim Halevi (Soloveitchik), that Rambam permitted the dismembering of the *vlad* in the mother's womb only because it is a 'pursuer,' but when it is not a pursuer – it is forbidden, and this position is also taken by Noda B'Yehudah, R. Yeshayah Pick, and the author of Chavot Yair – one cannot permit except when the *vlad* is in the category 'pursuer.' But since most *rishonim* disagree with Rambam, as cited above, perhaps one can permit by relying on the author of Sh'eilat Yaavetz, as I wrote above, especially as some disagree with our master regarding the proper understanding of Rambam – see Shu"t Achiezer 3:72 at the end of section 3.

He adds a postscript 15 years later:

Now that I have seen in (the periodical) Noam vol. 6 that the Gaon Rabbi I. Y. Unterman, the Chief Rabbi in the Land of Israel *shlita*, forbids aborting the fetus of an ailing woman even during the first 40 days, in practice one must consult with great decisors . . .

Rabbi Yitzchak Zilberstein (*Chashukei Chemed* to Bava Metziah 85a) addresses whether a woman can conceive and then abort a fetus as a donor of nerve tissue to her father, who suffers from Parkinsons. Rabbi Zilberstein responds in the negative, on the ground that the fetus cannot possibly be viewed as “pursuing” the father. In other words, he adopts Rabbi Soloveitchik's understanding of Rambam under which feticide is considered bloodshedding for Jews, as it is for Gentiles, and permitted only under the rubric of 'pursuer,' which also permits killing adults.

CONCLUSION:

What we've seen above are mainstream and broad halakhic positions on abortion ranging from technical permission (social policy is a separate matter) to life-begins-before-conception to this-is-essentially-murder. This range of opinions can be expanded and greatly nuanced (look for this in an upcoming Winter Beit Midrash!). My hope is that this narrow exercise will enable readers to broaden and nuance their understandings of the halakhah itself and of the relationship of halakhic discourse to the ongoing political and legal controversy in the United States.

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