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CCAR RESPONSA

Abortion to Save Siblings from Suffering

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She'elah

I understand that abortion may sometimes be permissible under Halakhah if it is done to alleviate maternal suffering. Does this extend to relieve suffering of other family members that might be affected by this birth? For example, parents might choose to abort a handicapped fetus because they are concerned that it would impose an undue hardship on their other children who would be burdened by caring for this child in the future. The distinction is that the abortion would not be to spare the mother suffering, but rather to spare the anguish of other family members. Would this be interpreted as a permissible reason for abortion?

Teshuvah

The circumstances under which an abortion may be performed are the subject of intense debate within the halakhic literature. The one basic principal upon which there is agreement – at least as a theoretical truth – is that fetal life has a lesser status than maternal life. This is evident from the Toraitic account (Exodus 21:22-23) of a fight between two men in which a pregnant woman is accidentally injured. If the fetus is lost but the woman survives, then the aggressor is punished with a fine, but if the woman is killed it is considered a capital crime, a case of “nefesh tachat nefesh”, demanding the life of the guilty party in recompense for the life lost.

This thinking is clearly reflected in the classic Mishnaic statement on abortion in Ohalot 7:6: “If a woman is in [life-threatening] difficulty giving

birth, the one to be born is dismembered in her abdomen and then taken out limb by limb, for her life comes before its life. Once most of the child has emerged it is not to be touched, for one nefesh (person) is not to be put aside for another.” Clearly, then, in cases where the mother’s life hangs in the balance, the tradition supports abortion.

There is, however, a pivotal difference of opinion as regards the reasoning that leads to permission for abortion in such cases. Rashi, in a commentary to Sanhedrin 72b, states his conviction that – if the mother’s life is threatened – so long as “the fetus has not emerged into the air of the world, it is not a nefesh and one is allowed to kill it in order to save its mother.” Once it has emerged, it would become a case of “nefesh tachat nefesh.” Rashi plainly bases his view, that it is permitted to kill the unborn fetus, on the grounds that the fetus – though alive – does not have the status of being a nefesh, and may, therefore, be sacrificed in the interests of saving the mother who is a fully developed nefesh.

Maimonides, however, while arriving at the same practical conclusion, does so via a very different route. In his Mishneh Torah (Hilchot Rotzeach 1:9) Maimonides takes up a theme – previously discounted by the rabbis in the Talmud – that the fetus who poses a threat to its mother’s life should be seen as a rodef, as a pursuer coming to kill. The halakhah encourages the killing of a rodef in order to prevent the rodef from killing. Maimonides puts it this way: “This, too, is a negative commandment: one must not take pity on the life of a rodef. Consequently, the sages taught: if a pregnant woman’s labor becomes life threatening it is permitted to dismember the fetus in her abdomen, either by a medication or by hand, for it is like a rodef who is pursuing her to kill her...” Maimonides does not refer to any lesser status of the fetus; rather, he permits the killing of the fetus – so long as it has not yet emerged – because it is behaving like a rodef coming to kill its mother, and ought to be killed like any other rodef.

Maimonides, then, has been understood by numerous judges of the halakhah to be of the view that in those instances where the fetus is not behaving like a rodef, no sanction exists to kill it. The prominent halakhic strand which follows this outlook holds that the only acceptable circumstances for abortion are those in which the fetus poses a direct threat to the life of the mother. It should be noted that there are those within this school of thought who include the probability of insanity in the mother as a reason for abortion, since they regard insanity as a life-threatening condition. In the twentieth century, the halakhic consensus, as represented by such figures as Chief Rabbi I. Y. Unterman and Rabbi Moshe Feinstein, continues to be characterized by this approach (Noam 6 – 1963: 1-11; Igerot Moshe, Hoshen Mishpat, Vol. 2, No. 69).

It should be noted that unlike Rashi's interpretation – which closely tracks the plain sense of the Talmud – Maimonides' reasoning process, though popular, does not so readily conform to the thrust of the text. Later halakhic literature clearly has to stretch in order to explain issues raised by Maimonides' rodef explanation. For example, why does a fetus that may be aborted because it is a rodef, cease to be a rodef upon emergence from the womb (see Sefer Me'irat Einayim to Choshen Mishpat 425, No. 8)? It can well be argued, therefore, that those positions that are based on Rashi's explanation may well be grounded in a more coherent understanding of the Talmud's intent than those which follow the stricter Maimonidean approach.

While the majority of traditionalists nevertheless adhere to the Maimonidean interpretation, a minority does base its position on Rashi's logic. Since Rashi's approval for abortion – under conditions of a threat to the mother's life – is rooted in the inferior status of the fetus, it is possible to conceive of other menacing situations where the mother's superior interests might permit abortion. This is the line of reasoning used by those who take a more permissive approach to the question of acceptable criteria for abortion.

The earliest authority to deal with abortion for reasons other than mortal danger to the mother was Rabbi Joseph Trani (1568-1639). Trani, who permits abortion in the interests of maternal health, follows Rashi's approach, without even mentioning that of Maimonides (Teshuvot Maharit, Vol. I, Nos. 97 and 99). An even more direct expression of this position was given by Rabbi Jacob Emden (1697-1776), as part of a responsum on the permissibility of aborting an illegitimate fetus (Sh'eilat Ya'avetz, No. 43). Emden notes that even in the case of a legitimate fetus, "there is room to permit abortion for 'great need'; so long as the birth process has not begun, even if the reason is not to save her life – even if only to save her from the 'great pain' it causes her." Emden not only plainly articulates an outlook that countenances abortion for reasons less than a threat to the life of the mother, but he also points to the central halakhic concern of the more lenient respondents: "great pain" caused to the mother.

This "great pain" has been defined in different ways, and has been understood to incorporate both physical and psychological pain. There is an unwavering consensus, however, that if abortion is to be sanctioned then the "pain" should indeed be "great", and this has usually been understood to refer to a physical or psychological condition harboring exceptionally grave consequences, with long-term implications for the mother's 'normal' functioning. Thus Chief Rabbi Ben Zion Uziel permits abortion for a woman whose pregnancy will result in permanent deafness (Mishpetei Uziel, Hoshen Mishpat 3:46), Rabbi Yehiel Weinberg permits abortion for a woman who contracted rubella during her first trimester (Noam 9 – 1966 and S'ridei Eish, Vol. III, No. 127), and Rabbi Eliezer Waldenberg permits abortion until the end of the second trimester for a tay-sachs fetus (Responsa Tzitz Eliezer, Vol. 13, No. 102).

These permissive responsa almost always base their conclusions exclusively on considerations of maternal pain, and not on the future

potential life of the fetus or any other person. It is the mother's mental or physical anguish which must be weighed, and which is acknowledged to be the sole salient factor in determining whether or not an abortion is permissible, in the view of these lenient approaches to the tradition. The impact of a potential handicap or defect in the fetus is not a consideration, as is evidenced in a 1940 Romanian responsum in the case of an epileptic mother who was concerned that she might give birth to an epileptic child:

For fear of possible, remote danger to a future child that maybe, God forbid, he will know sickness – how can it occur to anyone actively to kill the fetus because of such a possible doubt? This seems to me very much like the laws of Lycurgus, King of Sparta, according to which every blemished child was to be put to death. ... Permission for abortion is to be granted only because of mental anguish for the mother. But for fear of what might be the child's lot? – The secrets of God are not knowable. (Responsa Afrekasta D'Anyah, no. 169)

In only one or two teshuvot have interests other than those of the mother been given any weight. A responsum by Rabbi Yitzchak Oelbaum from earlier this century presents an example. Rabbi Oelbaum was asked about a case in which a pregnant mother had an existent "weak" child who, according to the doctors, would not live unless it was breast-fed by its mother. The woman had noticed a change in her milk around the fourth week of pregnancy that seemed like it might be threatening to the nursing child. The mother wanted to know if she could abort the fetus in order to save the existent child. Oelbaum, while questioning whether the doctors were accurate in their assessment, concluded that an abortion would be permitted if the experts were of the view that the existing child would indeed be in danger (Sh'eilat Yitzchak 64). Oelbaum's judgment in this matter has, however, been the subject of great caution among most poskim, who still view the halakhic justification for abortion as extremis on the part of the mother (see M. Stern, HeRefuah L'Or HaHalakhah, p. 104).

Still, Oelbaum clearly does admit of the possibility of considering the needs of others beyond the mother. It should be noted, though, that Oelbaum provides a warrant for abortion in this circumstance only as a last resort to save the child's life. He would only approve if every other option for saving the child had been exhausted. It is difficult to imagine the conditions under which such a tragic choice would need to be made in our day.

Nevertheless, the inquiry might be made as to whether Rashi's view – that reasons less than a direct threat to the mother's life may call for an abortion – could also be applied to an existing child? Could not the physical or psychological extremis of an existing child also be grounds for abortion? To these queries, Judaism emphatically replies in the negative. The mother is in a unique position in Jewish law because her health – physical and psychological – directly impinges on the developing fetus within her, for the fetus is a part of her, a *yerekh imo*. Hence the future of mother and fetus are tied together in a way that does not exist for any other relationship. As a result, possible serious precariousness in the mother could be a reason to consider abortion in a way that would be unthinkable for any other family member. If the Jewish approach, then, is not even unanimous that the life of an existing child should be saved in preference to the fetus, then certainly an existing child's lesser need could not be agreed to as a reason for abortion.

Reform respondents have, historically, been aligned with those who are prepared to consider circumstances other than a threat to the mother's life as grounds for abortion (American Reform Responsa #171; Contemporary American Reform Responsa #16; Questions and Reform Jewish Answer #155). While tending towards a preference for lenient conditions, however, the thrust of the respondents' position has been succinctly summarized with the words "we do not encourage abortion, nor favor it for trivial reasons, or sanction it 'on demand'" (Walter Jacob, Contemporary American Reform Responsa #16). Indeed, all the Reform responsa concerning this subject are careful to couch their lenient rulings within the general traditional understanding of the importance of alleviating "great pain" to the mother.

None of them suggest that Judaism should countenance any other reason as a valid basis for abortion.

In the sh'eilah that has been presented, the questioner definitively states that the proposed abortion "would not be to spare the mother suffering, but rather to spare the anguish of other family members." While Reform Judaism has, of course, forged new Jewish frontiers where compelling reasons deemed that a new path was the only "right and good" (hayashar ve'hatov) course to take, this case does not appear to warrant such action. Fetal life, though of lesser status than that of the mother, remains human life in potential, and is consequently of great significance. It can only be sacrificed for the most profound of reasons. Speculation and worry about the future are natural aspects of living, but do not themselves constitute a threat to the health of the mother sufficient to justify the termination of unborn life. Hence, Judaism could not give its assent to an abortion under these circumstances. If serious maternal anguish was the result of genuine fears over a defined handicap, then abortion could be contemplated, but certainly not for the sake of "hardship" or "quality of life" issues for other family members. It is the degree to which the mother is suffering "great pain" which remains determinative; the consideration of the anguish of others within the family is not pertinent to the question of an abortion. Perhaps, therefore, the above Romanian responsum could well be embellished as follows: "But for fear of what might be the lot of the other children? – The secrets of God for them too are not knowable."