***“Woman or Eve” – Abortion in Contemporary Orthodox Halakhic Discourse***

**Ronit Irshai/Brandeis University, 3/7/2022**

Halakhah – feminism – abortion. It sounds like the Bermuda Triangle, where any discussion that would attempt to connect these three points is doomed to failure.

I believe, however, that Halakhah and feminism do not have to contradict each other. As long as Halakhah is faithful to its interpretive methods and does not adopt stringent positions that emerge from conservative ideology as a defense against the “slippery slope,” and as long as feminism abandons its stance that “religion” is by definition a repressive patriarchal construct and that religious women serve this construct against their gender interests – dialogue is possible. On the topic of abortion, a halakhic feminist dialogue becomes even simpler, because there is a firm foundation for a tolerant and lenient approach to the topic in early Halakhah.

In my opinion, the most plausible reading of the rabbinic sources indicates that a fetus does not have the status of a person under Jewish law. This is the view that emerges from the Mishnah (regarding a fetus whose birth threatens the mother’s life), which I believe accords both with the Talmudin *Arakhin* and with a long series of interpretations by both earlier and later halakhic authorities. Even Maimonides’s analogy of the fetus to a “pursuer” (רודף) in the case of a threat to the mother’s life, does not, I believe, necessitate attributing personhood to it, and this understanding is supported by the majority of those authorities (I have checked them all). The dominant position, throughout the ages, has been the lenient one, according to which the fetus is not a person, and there is consequently no sweeping biblical ban against abortion.

There has been somewhat of a reversal of this trend in the twentieth century, with an escalating tendency to adopt the stringent approach and to view the prohibition of abortion as directly ordained by the Torah.

These stringent approaches have tended more and more to view the fetus as a “person” (in clear opposition to the classical halakhic positions) while relegating the needs of women, in the broad sense of the term, to the bottom of the list of considerations. In other words, the trend that views the fetus as a “person” has gained ground (to a great extent because of technological innovations) and has deeply affected contemporary halakhic discourse, which has also reacted negatively and polemically to modern sensitivities to the status and rights of women. The early halakhic foundation that did not view the fetus as a “soul” could have served as a platform for a lenient halakhic ruling, especially in light of changes in the status of women and the understanding that they should be seen as full human beings and not just as a means to bring new life into the world. To use the terms of Rabbi Yitzhak Arama, the sixteenth-century biblical exegete, a woman is identical to a man in her abilities, and her human purpose “ to understand and to become proficient in intellectual matters and piety,” in his words, overrides the procreative function assigned to women, a function embodied in the name חוה, Eve, as the mother of all living beings.

This stringent stance, adopted in the 20th century, is directly linked to the legalization of abortion, to the opposition to the women’s movement and new perceptions of gender, to demographic concerns (The Holocaust, the Israeli-Palestinian conflict), and as a response to Christian attitudes.

Thus, for example, when Rabbi Moshe Feinstein first voiced his views on birth control while still in Russia in the 1920s, the context was its legalization in the newly founded Soviet Union, which became the first country in the world to allow free and legal abortion. This is also the context in which one can read Rabbi Yonah Zweig’s stringent opinion on the matter. Rabbi Zweig, who was the chief rabbi of Switzerland, explicitly writes that the Jewish stance on abortion should not be more lenient than that of the Catholic Church.

In his words:

Moreover, not only do the great physicians and jurists oppose allowing abortion even in the case we discuss, the priesthood and its leader, the pope, have issued a declaration that prohibits, by their faith, the killing of a fetus even if it would be born with a defect or as an abnormal creature. Thus, there is another prohibition, because of *hillul ha-Shem* [profanation of the Name], if we allow it... such an act would cause, heaven forbid, the profanation of the Divine Name throughout the world, and on such a matter it was said, certainly because you are a holy people you should not let another people be holier than you.

This statement firmly supports my argument that there is no equivalence between the fetus and the woman. “*Hillul ha-Shem*” occurs if the female perspective or female interests in this issue are not perceived as morally equivalent to the moral status of the fetus. If indeed the fetus is the main subject of the question of abortion, whoever seeks to protect it holds a superior moral stance. But it could easily be argued that if concern for the health, dignity, desires, and needs of the woman is perceived as a moral consideration, the claim of “*hillul ha-Shem*” loses some of its force; on the contrary, it could be reversed.

I believe that a halakhic position that sees the prohibition of abortion as biblically ordained, even though it is not at all necessitated by the earliest halakhic sources, reduces the idea of the sanctity of life to purely biological terms, constructs the female gender as a subject who does not stand on its own, and emphasizes the treatment of the woman as “Eve,” the mother of all life, and not as a being in her own right, as a “woman” who is not only, and also not primarily, a vessel to bring new life into the world.

Thus, for instance, we may interpret the position of Rabbi Moshe Feinstein, who represents one of the most stringent positions on the topic of abortion:

Thus, by law... the prohibition of murder from “you shall not murder,” also applies to the fetus, only that its killer is exempt from the death penalty, and it is forbidden to kill it even to save a life of all other people; only to save its mother’s life so she does not die at its birth is it permitted, and not for any other need of the mother since that is obviously prohibited.... In any case it is forbidden to kill the fetus unless the doctors’ evaluation is that it is almost certain that the mother will die. … I have written all this concerning the great breach in the world, since the authorities of many nations have permitted killing fetuses, among them the leaders of the State of Israel. Innumerable fetuses have already been killed so that in our time a fence should be erected around the Torah, and all the more so, not to make leniencies in the very grave prohibition of murder.

That is, according to Rabbi Feinstein’s position, if there is no clear and present danger to the mother’s life but there is still a degree of danger to her life or one of her organs, all the more so to her psychological well-being, the woman is not allowed to defend herself. This position, according to which an abortion is allowed only in a case of the woman’s certain death, attests in my view to a gender world view that sees the procreative purpose of the woman as almost entirely constituting her full personhood, which is defined mostly in biological terms of preserving life. Thus Rabbi Feinstein reduces her value as a person to merely a means for serving the purpose of procreation, even at the price of her health and quality of life. A view that defines the value of a woman’s life in merely functional or biological terms can be problematic even for the view that sees a woman as “equal but different,” since the difference is not supposed to contradict her essential equality. Moreover, the definition of the value of a woman’s life in functional terms assumes her essential inferiority. Rabbi Feinstein notes that his words are meant to create a fence around the Torah. If we unpack the rabbi’s words, this is how they should be understood: in the war against liberal trends regarding abortion, women are called upon to pay the price with their very bodies, not to mention their psychological or social well-being.

But my argument goes beyond that. The range of possibilities and flexibility to allow abortion is greater according to those halakhic views that hold that the prohibition of abortion is not biblically ordained, but only a rabbinic prohibition. Nevertheless, even these views contain problematic gender constructs.

Most recently, halakhic decisors have become increasingly aware of issues relating to fetal abnormalities. Their permission to abort in such cases, and in cases of danger to the mother’s health, is based on the determination that the fetus is not a person. One might think that this determination would justify abortion on other grounds as well, but, at least in published decisions (as opposed to oral responses given in individual cases), this has not been the case. For example, R. Moshe Tzuriel summarizes the prevalent halakhic opinions on this matter as follows:

It is clear that it is not permitted to abort a healthy fetus when there is no danger to the mother’s life. Any other justification for abortion—financial considerations, a wish not to hinder the woman’s “career” (quotation is in the original) or to preserve an attractive appearance, crowded living conditions, etc.—is unacceptable. In this article, we are concerned only with the abortion of a fetus known in advance to have a serious mental or physical defect.

R. Tzuriel goes on to present a very lenient position, stating that the fetus does not have the status of a person and quoting a series of halakhic decisors who permit abortion even when there is no danger to the mother. I maintain that if the fetus is not a person, it is implausible, at least analytically, to differentiate in principle between abortion on the grounds of physical or mental defects, and abortion based on needs unconnected to the fetus itself. What is the categorical difference between the two cases? One possible response is that there is some guiding principle by which abortions that go against the value of “the sanctity of human life” may be distinguished from those that do not. But is that value really more challenged by the abortion of a fetus whose birth might harm his mother’s dignity or life plan than by that of a defective fetus? And what about the value of preserving a woman’s esteem and her ability to manage her life in a way that conforms to her intellectual, professional, and emotional needs?

What we see here is that even those decisors who believe that abortion is prohibited on rabbinic rather than biblical grounds discuss it mainly either “from the perspective of the fetus” or in reference to threats to the woman’s health.

According to one rabbi, “no child is unwanted after five years.” What lies behind a remark of this kind? To my mind, it expresses the view that women, by nature, want children, that their primary function and goal is to have them, and that even if a woman declares that she absolutely cannot have another child, because, for example, it might ruin her life plan or her professional aspirations, don't believe her!

In contrast to the positions mentioned above, we can find other twentieth-century opinions that, I believe, fit early halakhic positions, and allow us to derive principles that respect the woman as a subject and see the woman’s dignity and needs as overriding those of the fetus.

In the 1930s, Rabbi Uziel discussed the question of whether a woman should be allowed to abort a fetus in a case where doctors believe with certainty that if she does not do so she will become entirely deaf in both ears. His halakhic analysis shows that the prohibition of abortion is only rabbinic, and that when a rabbinic prohibition is posed against the devastation expected for the mother about to become deaf if she continues her pregnancy and has the child, she is permitted to have an abortion. In other words – the woman’s devastation overrides the continued life of the fetus. To put this ruling in historical context: in the 1930s and 1940s, the Yishuv saw low fertility and birthrates that stemmed mostly, according to Lilach Rosenberg-Friedman, from the use of contraception and abortion by choice, which was prevalent during that period. The fact that Rav Uziel’s responsum takes a lenient position despite this social context powerfully attests that such a cultural reality of permissiveness does not have to elicit a conservative halakhic reaction, as reflected in Rabbi Feinstein’s responsum, or in the position of Rabbi Yehuda Unterman, who was Israel’s chief rabbi in the 1960s and fiercely fought permissive trends on abortion; he wrote one of the most stringent responsum in the history of Halakhah on this issue.

In complete contrast to Rabbi Unterman’s stringent position, Rabbi Shaul Yisraeli, a prominent Religious Zionist rabbi, wrote a very lenient and instructive halakhic decision, despite his 1960s context of a social reality moving toward greater legalization of abortion:

The conclusion of the matter: The fetus is not considered a soul, and the prohibition of killing it is because of the prohibition of causing injury or the prohibition of *lo tashḥit* (“you shall not [needlessly] destroy”). And therefore, where its continuing existence entails the suffering of another, as in this case of the delay of punishment for the mother, even though it is not the cause, but its existence nonetheless hinders the possibility of eliminating the suffering, it is permitted to kill it because of this. (*Amud HaYemini* 36:9)

I believe Rabbi Yisraeli’s words are critically important, first of all, because of his conclusion that if the existence of the fetus causes the suffering of another, it is permitted to abort it. He learned this from the sugya in *Arakhin* regarding delaying punishment for the mother. Second, he permits abortion based on considerations of the future life of the fetus and its expected suffering. Trends in halakhic decisions in the late twentieth and early twenty-first centuries permit abortion mostly for the second reason but abandon the fundamental first reason in Rabbi Yisraeli’s decision regarding the mother’s suffering, although there is a halakhic framework to recognize her suffering and permit the abortion (certainly at early stages of pregnancy).

In conclusion:

Taking a liberal (although not a broadly permissive) position is not a trivial matter for me. As a woman, a mother of five, who is faithful to Halakhah, I would have been expected to take another position. But because of what I have just said, the opposite is true. Children have great meaning for women, but many women do not wish the entirety of their existence and full humanity to be defined only by their children. I believe that the Halakhah, with its range of viewpoints, also does not necessarily contradict the critique I have offered here. Indeed, it could embrace it if it wished. This critique could contribute to a balanced view on the part of halakhic decisors regarding a woman’s needs and allow understanding and empathy for her ability to shape her life, her choices, and her preferences in a dignified way. These should be part of the many considerations that should be taken into account in the so difficult decision that must be made in the question of abortion.