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MY BODY, MY CHOICE: BIBLICAL, RABBINIC, AND CONTEMPORARY HALAKHIC RESPONSES TO ABORTION

*Adena Berkowitz**

ABSTRACT

Since the Supreme Court grounded the right to an abortion in a constitutional right to privacy, legal and societal debate has continued around the status of a fetus in utero, a woman's countervailing claims, and the interests of states and society as a whole. As American courts have faced an issue that intertwines legal, moral, and philosophical questions, so too the halakhic process confronts analogous complexities. The main line of Jewish tradition makes a much-needed contribution to the discussion of abortion. Without sharing the view that the fetus is from conception fully a person, it stops short of a complete dismissal of the value problem in destroying a fetus. However, whatever value attaches to "potential life," the primary concern lies with the woman. She exists. Her voice and her needs must be heard. And her life, (no matter how slim her chances of survival), health, and mental well-being come first.

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MY BODY, MY CHOICE: BIBLICAL, RABBINIC, AND CONTEMPORARY HALAKHIC RESPONSES TO ABORTION

In the forty-eight years since the Supreme Court grounded the right to an abortion in a constitutional right to privacy,¹ legal and societal debate has continued around the status of a fetus in utero, a woman's countervailing claims, and the interests of states and society as a whole. When we examine the Jewish discussion surrounding abortion, we confront similar issues: the personhood of the fetus, the interest of the woman, and the quality of life anticipated both by the developing fetus and the bearing woman. As American courts have

¹ *Roe v. Wade*, 410 U.S. 113, 155 (1973). The Court in *Roe* determined that the Due Process Clause of the Fourteenth Amendment provided a fundamental right to privacy that encompassed a woman's decision whether to terminate her pregnancy. *Id.* at 153. The Court determined that the right was not absolute and said it must be balanced against the government's interest in protecting her health as well as prenatal life. *Id.* at 154. In determining this balance, the Court established a trimester system. *Id.* at 164. Under this system, a determination could be made as to state regulation of abortion. In the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. In the second trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. In the third trimester, subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. *Id.* at 164-65. The Court's trimester system attempted to balance the rights of a woman to make this decision with the ability of the fetus to live outside the womb, which they said occurred after the second trimester of pregnancy.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Id. at 163-64.

However, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), overturned the *Roe* trimester framework, and replaced it with a viability analysis which opened the door to establishing abortion restrictions in the first trimester of pregnancy but only to safeguard the woman's health. *Id.* at 873-74. Viability can be earlier than the third trimester, and any regulation—pre-viability—that imposes a substantial obstacle preventing a woman from obtaining a legal abortion is an undue burden that violates her constitutional right to abortion. *Id.* at 877.

faced an issue that intertwines legal, moral, and philosophical questions, so too the halakhic process confronts analogous complexities.

To understand the halakhic approach to this complex issue, we turn to many sources that assess the personhood of the fetus and the justification for allowing an abortion. Many of the commentaries approach the topic by asking what is the status of the fetus? Is it human life? In the Torah (Hebrew Bible), we can find one source in Exodus that touches on the personhood of the fetus:

When men fight and one of them pushes a pregnant woman and a miscarriage results, but no other damage ensues, the one responsible shall be fined according as the woman's husband may exact from him, the payment to be based on reckoning. But if other damage ensues, the penalty shall be life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.²

This is understood by most biblical scholars to mean that as long as there is no fatal injury to the woman following her miscarriage, the inflictor only needs to compensate the husband financially for the loss of the fetus. The fetus, then, is seen as possessing monetary value making one liable in tort. For example, the *Mekhilta* (a source of midrashic halakha) explains that “no other damage” refers to the woman, and “the one responsible shall be fined” refers to compensation for the loss of the fetus.³ If the fetus is not a human life, then is it just excess tissue until born? And if so, is there any problem with aborting a fetus, especially if its “quality of life” is taken to be minimal? In the Talmud, we find reference that during the first forty days, the fetus should be considered mere fluid, “*maya b'alma*.”⁴ In other Talmudic passages, the fetus is described as “*ubar yerekh imo*,” translated, literally, as, a fetus is the thigh of the mother.⁵ Throughout

² Exodus 21, 22-25.

³ See *Mekhilta d'Rabbi Yishmael* 21, 23; see also Babylonian Talmud, Bava Kamma 42a.

⁴ Babylonian Talmud, Yevamot 69b.

⁵ Babylonian Talmud, Hullin 58a; Babylonian Talmud, Gittin 23b.

rabbinic literature, we find recognition that although the fetus is not a person in a juridical sense,⁶ it nevertheless represents potential life.⁷

As to the juridical status of the fetus, we turn to the Talmud in Sanhedrin 72b, which examines laws pertaining to using deadly force to stop a burglar who breaks into someone's house.⁸ The sages taught that such a burglar is to be considered a "*rodef*," a pursuer, and as such, anyone may kill a pursuer to rescue the one being pursued, without any kind of forewarning. In discussing a minor who was pursuing another person in order to kill him, Rav Huna said that the pursued party could be saved by killing the pursuer.⁹ One of the other sages, Rav Hilda, raised an objection by referencing a *baraita* (a teaching in Jewish oral tradition not incorporated into the Mishnah) of a woman giving birth and her life being endangered by the fetus. The life of the fetus may be sacrificed in order to save the mother. But once its head has emerged during the birthing process, the fetus may not be harmed in order to save the mother because one life may not be pushed aside to save another life.¹⁰

Rashi, commentator on the Hebrew Bible and Talmud, explains that the fetus in utero may be forfeited because *lav nefesh hu*, it is not a person.¹¹ And yet, the rabbis understood a fetus as representing potential life. For example, in the Talmud, dispensation is given to

⁶ See generally Babylonian Talmud, Sanhedrin 72b; see also Babylonian Talmud, Arrakhin 7a.

⁷ See *infra* note 29 and accompanying text (explaining Maimonides's different reasoning).

⁸ Babylonian Talmud, Sanhedrin 72b.

⁹ *Id.*

¹⁰ Mishnah Ohalot 7:6; Babylonian Talmud, Sanhedrin 72b, translated in *The William Davidson Talmud*, SEFARIA, <https://www.sefaria.org/Sanhedrin.72b?lang=bi> (last visited Jan. 10, 2021). Here, in the Gemara, an interesting question is raised as to why the rabbis would differentiate between a minor and a fetus:

If one is permitted to save the pursued party by killing the minor who is pursuing him, why is this so? [After all,] [t]he fetus is a pursuer who is endangering his[/her] mother's life. The Gemara answers: This is not difficult, as it is different there, with regard to the woman giving birth, since she is being pursued by Heaven. Since the fetus is not acting of its own volition and endangering [the] mother of [its] own will, [the] life [of the fetus] may not be taken in order to save its mother.

Babylonian Talmud, Sanhedrin 72b.

¹¹ See Rashi on Sanhedrin 72b.

violating the rules of Shabbat to save a fetus: “Desecrate one Sabbath on his behalf so that he will observe many Sabbaths) i.e. violate one Sabbath to stay alive and then be able to observe many more in the future)”¹² Therefore, a fetus is to be treated with a certain reverence that would permit its destruction only in the most egregious circumstances; for example, if at any time the woman’s life is in danger. The Mishnah discusses this conflict in graphic terms and directs us to tear the fetus apart limb by limb, if necessary, in the event of a threat to the mother. But once the majority of the fetus has emerged (understood to be its head), it is considered a fully living person and cannot be touched; as we cannot set aside one life for another.¹³

When we examine contemporary responsa, we see some *decisors* expanding the category of risk to the woman. The first halakhic source that incorporated psychological suffering is found in a responsa from Rabbi Jacob Emden (eighteenth century).¹⁴ He discusses the permissibility of an abortion for a married woman pregnant from an adulterous union.¹⁵ In allowing the abortion to take place, he relied on what he called the “great need” and “great pain” (*tzar gadol*) of the mother; that is, the anguish she would suffer from the prospect of bearing a child, a “*mamzer*” (bastard), from an illicit affair.¹⁶ In a twentieth century responsum, Rabbi Eliezer Waldenberg

¹² See Babylonian Talmud, Yoma 85b; see also Chiddushei Ramban on Nidda 44b (regarding desecrating Shabbat for the possibility of saving the fetus’s life); Babylonian Talmud, Arakhin 7b.

¹³ See sources cited *supra* note 10 and accompanying text; see also Shulkhan Arukh, *Hoshen Mishpat* 425:2.

¹⁴ See Responsa of Rabbi Jacob Emden, *Sh’eelat Yavetz* 1:43.

¹⁵ *Id.* Under Jewish law, a child is only classified as a bastard if the mother is married and the child was born from an affair or the mother did not receive a Jewish divorce from her former husband and bears a child from a new relationship. See *Deuteronomy* 23:2 (King James); Mishnah Yevamot 4:13; Shulchan Aruch, *Even HaEzer* 4:19.

¹⁶ Responsa of Rabbi Jacob Emden, *Sh’eelat Yavetz* 1:43; see also Rabbi Judah D. Bleich, *Abortion in Halakhic Literature*, 10 TRADITION: J. ORTHODOX JEWISH THOUGHT 72, 102-03 (1968); DAVID M. FELDMAN, MARITAL RELATIONS, BIRTH CONTROL, AND ABORTION IN JEWISH LAW 288-89 (1974); see also Rabbi Bacharach, *Chavat Yair*, no. 31 (who saw no legal bar to abortion in the case of an adulterous woman but did not sanction it on sociological grounds i.e. as a safeguard against further immorality); cf. Rabbi Yosef Chaim of Baghdad, *Even Haezer*, in 1 RESPONSA PE’ALIM 4 (19th-20th cent.) (the Ben Ish Chai); Rabbi Jacob ben Asher, *Yoreh Deah*, in 1 RESPONSA RAV PE’ALIM 14. When the Ben Ish Chai was asked

concluded that in principle, an abortion is permissible as late as the sixth month of pregnancy if tests revealed a Tay-Sachs or Down's Syndrome/genetically anomalous fetus.¹⁷ In justifying an abortion even at that late date (and even in the case of an indefinite diagnosis), his concern was not the possibility of a physical threat to the mother but rather the risks to her mental health.¹⁸ In this *teshuvah*, R. Waldenberg notes that "psychological suffering is in many ways much greater than physical distress."¹⁹ Rabbi David Feldman explained that the principle that the mother's "pain comes first," however, is the most pervasive of all factors in the consideration of the abortion question.²⁰ In his view, if a woman seeks an abortion on the grounds that the born child would have diminished physical or mental/neurological capacity, permission should be declined; after all, Jewish law does not grant permission to kill those born with any type of defect.²¹ "If, however, an abortion for [the] same potentially deformed child [is] sought on the grounds that the possibility is causing severe anguish to the mother, permission would be granted."²² Various *decisors* differ on consideration of health including mental health risks as a ground for abortion. For example, former Israeli Chief Rabbi, Rabbi Issur Unterman, viewed abortion as akin to murder and permitted it only in the case of saving the life of a mother;²³ while former Chief Rabbi, Rabbi Ben Zion Uziel, allowed an abortion if it was intended to serve the mother's physical needs, even if not life threatening. In this case, it was to save the mother from a doctor's diagnosis of probable deafness if the woman continued with the pregnancy.²⁴ Rabbi Shlomo Zalman Auerbach allowed a woman who was raped to use a method to prevent a pregnancy due to the extreme emotional toll of carrying the

whether a married woman who became pregnant from an affair could have an abortion, he declined to specifically answer but instead referred the questioner to three earlier opinions including Rabbi Bacharach and Rabbi Emden's *Teshuvot*. See BEN ISH HAI, 1 RESPONSA RAV PE'ALIM 4 (1903).

¹⁷ Rabbi Eliezer Waldenberg, *Tzitz Eliezer*, 13:102, 14:102.

¹⁸ *Id.* at 13:102.

¹⁹ *Id.*

²⁰ FELDMAN, *supra* note 16, at 294.

²¹ *Id.* at 292.

²² *Id.* at 292 (emphasis omitted).

²³ See *Be-inyan Pikuach Nefesh Shel Ubar*, in NO'AM 6 (1963).

²⁴ Responsa of Rabbi Ben Zion Uziel, *Mishpatei Uziel*, *Hoshen Mishpat* 3:46.

fetus to term.²⁵ Rabbi Moshe Feinstein only permitted an abortion if a doctor determined that the mother faced a high likelihood of dying if the pregnancy would continue.²⁶ He also disagreed with Rabbi Waldenberg's position permitting aborting a fetus with Tay-Sachs; in fact, Rabbi Feinstein prohibited it unless there was almost absolute certainty that the mother would succumb to grief.²⁷

Rabbi Eliezer Melamed (Twenty-first Century Israel) has written regarding a case of a woman's emotional illness which cannot be treated with medicine and it is caused by the pregnancy. He points out that "since emotional illness is generally considered a threat to life, she may abort her fetus to protect her life".²⁸

When we review the decisions by some *decisors* to allow abortion, in the main they reject the invitation to assess the quality of life anticipated by a fetus diagnosed in utero with diminished physical and neurological defects. To do otherwise, they reason, would be to think that we are God, capable of determining the quality of life suitable to being born.²⁹ Jewish tradition is committed to the sanctity of life. However, though it has been unwilling to evaluate the fetus's anticipated quality of life, the qualitative interests of the woman, whose life and mental well-being are at stake, are primary. Although halakhic sources do not recognize either a "right to privacy" or a "right of ownership" of one's body in the same vein as understood by the Supreme Court/American Jurisprudence,³⁰ Jewish law views the well-

²⁵ See Rabbi Shlomo Zalman Auerbach & Rabbi Yehoshua Neuwirth, *Hoshen Mishpat*, in 3 NISHMAT AVRAHAM 262, 262-77 (2004).

²⁶ Rabbi Moshe Feinstein, *Igros Moshe*, *Hoshen Mishpat* 2:69; Rabbi Moshe Feinstein, *Igros Moshe*, *Even Haezer* 1:65.

²⁷ *Id.* In addition, Rabbi Feinstein did not permit an abortion where the pregnancy was the result of an affair and the child would be classified as a *mamzer*. R. Yechiel Yaakov Weinberg, *Seridei Eish* permitted a woman who contracted German measles during her pregnancy to have an abortion. Responsa of R. Yechiel Yaakov Weinberg, *Seridei Eish* 3:127 (Jerusalem, 1966). Doctors had advised that the fetus would be born with severe physical and mental defects including blindness or deafness. *Id.*

²⁸ See <https://ph.yhb.org.il/14-09-12/>

²⁹ See Jakubovits, *infra* note 32.

³⁰ See *Roe v. Wade*, 410 U.S. 113 (1973). Jewish tradition teaches that we were created in the image of God and our bodies are viewed as being on loan from God. As the "custodians" of our bodies, we need to treat them with reverence and not harm, permanently mar, nor destroy our bodies. See, e.g., *Genesis* 9:5; *Leviticus* 19:28. In addition, the concept of privacy in Jewish law manifests itself in visual privacy-modesty and damage caused by looking. See *Genesis* 9:20-27; *Mishnah*

being of the woman as paramount.³¹ Rabbi Immanuel Jakobovits (former Chief Rabbi of the United Kingdom) explained the balancing of fetal personhood and physical and mental health risks to the mother as, on the one hand, a refusal to grant full human inviolability to the unborn child from conception, and on the other hand, clear recognition that potentiality for life must not be compromised except for the most substantial medical reasons.³²

We do find that one strain in Jewish thought does come close to treating the fetus as a person. It is true that after the fetus's head emerges, it is considered a person. However, one might infer from Maimonides' reasoning about a fetus who threatens the life of the mother, that a fetus is considered a person *in utero*.³³ Rambam reasoned that a threatening fetus should be considered as *akin* to a pursuer, *k-rodef*: if only persons are pursuers, then Rambam's analysis presupposes that the fetus is a person or at least akin to a person.³⁴ Yet there is no reason to assume that the conditions for being treated as an aggressor are the same as for being treated as a person. Even if the fetus is not a person, it cannot be treated as though it were like external tissue, say a fingernail,³⁵ and discarded cavalierly. Indeed, there are some Halakhists who regard induced abortion as tantamount to

Bava Batra 3:7; Bava Batra 60a; Shulchan Aruch, *Hoshen Mishpat* 154:7 (forbidding standing at one's window and looking into your neighbor's courtyard, lest you harm your neighbor by looking into their private space). This does not match the constitutional understanding of privacy.

³¹ See generally Eric Schmitt, *After Battle on Abortion, A Struggle to Recover*, N.Y. TIMES, Jan. 12, 1990, at B1. A poignant example of the conflict between the well-being of a woman and fetus occurred in February 1989 when Nancy Klein, eighteen weeks pregnant, was in a car accident that left her comatose. *Id.* Her husband's legal battle to be appointed her legal guardian and have the fetus aborted was supported by all segments of the Jewish community, which manifested outrage at the attempts to deny this Jewish woman, whose life was at stake, an abortion. *Id.* "Despite fears that Mrs. Klein might never come out of her coma, she did on January 12, 1990, and began her long road to recovery, learning to talk, walk, and regain her memory." Editorial, *The Chutzpah of Pro-Lifers*, THE JEWISH PRESS, Feb. 24, 1989, at 5.

³² See Immanuel Jakobovits, *The Status of the Embryo in the Jewish Tradition*, in THE STATUS OF THE HUMAN EMBRYO 66 (G.R. Dunstan & M.J. Sellars eds., 1988); Immanuel Jakobovits, *Jewish Views on Abortion in Jewish Bioethics*, in JEWISH BIOETHICS 118 (Fred Rosner & J. David Bleich eds., 1979); see also Rabbi Unterman, *Hatorah VHamedinah* 25, 29 (4th ser. 1952).

³³ See Mishneh Torah, Hilchos Rotzeach uShmirat Nefesh 1:9.

³⁴ See *id.*

³⁵ See Seymour Siegel, *A Bias for Life*, 5 HASTINGS CTR. REP. 23, 24 (1975).

homicide.³⁶ However, their statements should be carefully scrutinized in each case to determine whether they express recognition of a fetus's personhood, or rather a concern about a "slippery slope" from abortion to infanticide, which would certainly be considered homicide. For example, in the view of Rabbi J. David Bleich, Judaism regards the killing of an "unborn child" to be a serious moral offense, to be performed only for the gravest of reasons. Judaism, he says is opposed to abortion on intrinsic grounds, not simply because it may lead to infanticide, but in addition because the erosion of sensitivity to the sanctity of human life magnifies the odium associated with abortion.³⁷ Yet, the dominant line of thought in the Jewish sources is that the health and well-being of the fetus is considered from the standpoint of the fetus's impact on the woman.

To appreciate the implications of this rabbinic view, which puts the woman first, it's illuminating to look at several ethical problems that first arose in the 1980's and 1990's that required a halakhic assessment of abortion; some of these issues still remain an ethical challenge today. Beginning in the 1980's, with the development and increased use of assisted reproductive technological treatments, including fertility drugs, in vitro fertilization, and ovarian stimulation, there was a large increase in multifetal pregnancies.³⁸ Ethical questions arose concerning women carrying three or more fetuses. Carrying so many fetuses to term generated a double risk: first, exposing women to greater risks to their health in general, including a larger increase in the risk of maternal morbidity and mortality; and second, the increase of perinatal morbidity and mortality would minimize the possibility that any of the fetuses would be born alive or survive the birth trauma.³⁹ Under these circumstances, was it

³⁶ See *id.*

³⁷ See RABBI J. DAVID BLEICH, JUDAISM AND HEALING: HALAKHIC PERSPECTIVES 103 (2002); see also Issur Unterman, *B'Inyan Pikuach Nefesh Shel 'Ubar*, in 6 NOAM, 1963, at 1-11; Daniel Korobkin, *Open Debate: Is N.Y.'s Abortion Law Halachic?*, JEWISH J. (Feb. 6, 2019) <https://jewishjournal.com/commentary/analysis/293441/open-debate-is-n-y-s-abortion-law-halachic/Abortion> (discussing recent revision of the New York Abortion law Reproductive Health Act signed January 22, 2019 that split Orthodox rabbinic opinion).

³⁸ See JOYCE A. MARTIN ET AL., TRENDS IN TWIN AND TRIPLET BIRTHS, D.H.H.S. No. 99-1120, at 2 (1999).

³⁹ Committee Opinion, *Multifetal Pregnancy Reduction*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Sept. 2017),

halakhically permissible to reduce the number of fetuses by aborting some to allow others to be born? At a conference held at the Mount Sinai School of Medicine, Rabbi David Feldman argued that it would be permissible to reduce the number of fetuses carried to term.⁴⁰ The relevant halakhic standard utilized would be the increased health risk to the mother of carrying so many fetuses. In addition to the physical danger, he identified a high mental health risk to the mother of delivering stillborn infants or those likely to die. In his analysis, the risk that a fetus would be born with diminished physical or neurological function was not a compelling halakhic reason for abortion; nor was the economic burden that a family would incur with so many children. The justification for fetal reduction, in his eyes, had to be the health risks endangering the woman.⁴¹

Rabbi Shlomo Zalman Auerbach, when faced with two cases, a woman with a pelvis too small to support a pregnancy with quadruplets and a woman pregnant with sextuplets, allowed reduction of fetuses, due to the high risk that the pregnancy would end in miscarriage of all the fetuses. He based his decision on the *rodef* standard: each fetus had the status of *rodef*, but here the fetuses were pursuing *each other*.⁴² While other rabbinic authorities posited that the abortions should be done as early as possible, during the first forty days when the fetus is considered *maya b'alma*—mere water, Rabbi Auerbach allowed the abortion of any of the fetuses even after the first forty days of gestation as the procedure was safer when done later. Rabbi Yitzchak Zilberstein raised the question of whether in the case

<https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/09/multifetal-pregnancy-reduction>. In the intervening years, physicians have been able to decrease the incidences of multifetal pregnancy by limiting the numbers of embryos transferred or by cancelling a gonadotropin cycle when the ovarian response suggests a high risk of a multifetal pregnancy. *Id.*

⁴⁰ Dr. Richard Berkowitz & Rabbi David Feldman, *Medical Ethics: The Jewish Point of View: Selective Reduction of Multi-fetal Pregnancies at Mount Sinai School of Medicine*, 51 MOUNT SINAI J. MED., Nov. 1988.

⁴¹ *See id.*; *see also* Dr. Richard L. Berkowitz et al., *Selective Reduction of Multifetal Pregnancies in the First Trimester*, 318 NEW ENG. J. MED. 1043, 1043-47 (1988); John C. Hobbins, *Selective Reduction—A Perinatal Necessity?*, 318 NEW ENG. J. MED. 1062, 1062-63 (1988); ABRAHAM S. ABRAHAM, *THE COMPREHENSIVE GUIDE TO MEDICAL HALAKHA* 206 (1990).

⁴² *See* Daniel Eisenberg, *Multifetal Pregnancy Reduction in Jewish Law*, AISH (Jan. 18, 2004), <https://www.aish.com/ci/sam/48949016.html> (citing Rabbi Yitzhak Zilberstein, *Induced Abortion for Multiple Fetuses*, 8 ASSIA, 1995, at 7-13).

of a pregnancy that did not directly threaten the life of the pregnant woman, a physician was permitted to reduce the number of fetuses, which could lead to the appearance of choosing one “life” over another. He referenced the case in the Talmud where bandits attack a group and ask their captives to give up one member of their group to be killed or else all of them will be executed.⁴³ He pointed out that while the Talmud and most authorities ruled that the entire group would have to die rather than turning over anyone, some authorities allowed a lottery where an innocent person was chosen to be handed over to save the rest of the group.⁴⁴ At times in very limited circumstances people could be sacrificed to save the larger group. Based both on this concept and due to the fetuses not being yet fully viable humans and being in utero, Rabbi Zilberstein permitted multi fetal reduction.⁴⁵ Rabbi Zilberstein also concluded that since it is likely that all the fetuses may die if they are all left in utero, he permitted reduction to save some of the fetuses.⁴⁶ Rabbinic opinion has also weighed in as to how one chooses which fetuses to abort. For example, is it permissible to choose to abort a fetus with genetic abnormalities? One rabbinic authority, Rabbi Eliezer Waldenberg, ruled that one could if it was likely to die in utero and pose a risk to the remaining healthy fetuses.⁴⁷

At the 1988 conference, physician Dr. Richard Berkowitz added that many, if not most physicians, would refuse to reduce the number of fetuses to fewer than two, even if the parents do not want more than one child.⁴⁸ In more recent years, anecdotal evidence points to more physicians being open to a patient’s choice to reduce to a singleton and instead allowing for patient choice, especially given

⁴³ See Palestinian Talmud, Terumot 8:10; see also Maimonides, Mishneh Torah, Yesodai HaTorah 5:5.

⁴⁴ See sources cited *supra* note 43.

⁴⁵ See Daniel Eisenberg, *Multifetal Pregnancy Reduction in Jewish Law*, AISH (Jan. 18, 2004) <https://www.aish.com/ci/sam/48949016.html> (citing ASSIA MAGAZINE, no. 45-46, 1989, at 12:1-2, reprinted in Rabbi Yitzhak Zilberstein, *Induced Abortion for Multiple Fetuses*, 8 ASSIA, 1995, at 7-13).

⁴⁶ *Id.* He analogized it to people trapped under a collapsed building. By using a tractor to try to save some of the people buried under the rubble, it could kill others while searching for survivors but also many more could be rescued. Yet by doing nothing, it would lead everyone to die. *Id.*

⁴⁷ Rabbi Eliezer Yehuda Waldenberg, *Tzitz Eliezer*, 20:2.

⁴⁸ See Berkowitz & Feldman, *supra* note 40.

increased health risks to carrying twins.⁴⁹ Halakhic opinion in the main rejects reducing fetuses from twins to singletons for reasons other than risk to a woman's health.⁵⁰ An additional ethical issue which also arose concerned the technological ability to determine the sex of the fetuses and using gender as a criterion for which fetuses to choose or reduce. Aborting a fetus not of the desired sex was deemed halakhically unacceptable.⁵¹ And in the words of one medical recommendation from the American Society for Reproductive Medicine, "when two or more fetuses are equally accessible and there is no medical benefit to reducing one over another, the physician should randomly select the fetus to be reduced, therefore eliminating physician bias or subtle discrimination in making this determination."⁵² The use of sex alone as a consideration in determining which fetus to reduce, poses ethical challenges that are beyond the scope of this Committee Opinion and are discussed by others elsewhere.⁵³ The criteria then that are used in selecting those to

⁴⁹ See Mark Evans & David Britt, *Multifetal Pregnancy Reduction: Evolution of the Ethical Arguments*, 28 SEMINARS REPRODUCTIVE MED. 295, 300 (2010).

Historically, controversy has surrounded decisions regarding reduction of twin or higher-order multifetal pregnancies to a singleton. For some women, a multifetal pregnancy reduction to a singleton may be an appropriate or desired option for medical reasons or nonmedical reasons, such as financial, social, or emotional concerns. Certain medical or obstetric considerations can significantly increase the risks of carrying even a twin pregnancy compared with a singleton pregnancy. Specific examples include a müllerian anomaly, a history of cervical insufficiency, or preeclampsia with severe features in a previous pregnancy. During patient counseling, physicians should consider discussing reduction to a singleton pregnancy based on their understanding of the particular patient, her unique medical situation, and her values. When a woman with a twin gestation requests such information, whether for medical or nonmedical reasons, it should be provided in a timely manner and without bias.

Committee Opinion, *supra* note 39.

⁵⁰ See Richard V. Grazi & Joel B. Wolowelsky, *Multifetal Pregnancy Reduction and Disposal of Untransplanted Embryos in Contemporary Jewish Law and Ethics*, 165 AM. J. OBSTETRICS & GYNECOLOGY 1268, 1270 (1991).

⁵¹ *Id.*

⁵² See Ethics Comm. of the Am. Soc. for Reproductive Med., *Use of Reproductive Technology for Sex Selection for Nonmedical Reasons*, 103 FERTILITY & STERILITY 1418, 1418-22 (2015).

⁵³ *Id.*

be aborted are medical, that is, the chances of survival. The justification that physicians who perform fetal reduction rely on is if action is not taken, all may die. This is a typical halakhic conundrum of choosing which life to save, often under conditions of limited resources. A decision must be made; and as we have seen earlier, if we sit idly by, we will be letting those die who might be saved.⁵⁴

In recent years, though, the debate around pre-natal sex selection has evolved with the technology surrounding implanting embryos. In general, halakhic views of embryos, which can be a day old but are less than eight weeks old, differs from the status of a fetus.⁵⁵ Halakhic opinions have stated that all non-transplanted embryos artificially fertilized in vitro have no standing as fetuses in Jewish law.⁵⁶ Rabbi Haim David HaLevi, (former Chief Rabbi of Tel Aviv), ruled, “(O)ne may discard them (embryos) if they were not chosen for implanting; as the law of abortion applies only to [procedures in] the womb . . . [b]ut in vitro, as was said, there is no prohibition at all.”⁵⁷ Rabbi Mordechai Eliyahu, former Chief Rabbi of Israel, stated that “all eggs which are destined to be implanted in the mother’s womb should not be destroyed, as a live fetus will yet develop from them. But those

⁵⁴ On this point there is a debate in rabbinic literature. See Babylonian Talmud, Pesachim 25b; Babylonian Talmud, Bava Metzia 62a; Rabbi Moshe ben Maimon (“Maimonides”), *Hilchot Yesodei haTorah* 5:5; Rabbi Joseph Karo, *Kesef Mishneh Rotzeach* 1:14.

⁵⁵ See Rabbi Yitzchok Breitowitz, *The Preembryo in Halacha*, JEWISH LAW ARTICLES, <https://www.jlaw.com/Articles/preemb.html> (last visited Aug. 26, 2021) (quoting Rabbi Haim David HaLevi, *On Fetal Reduction*, 12 ASSIA, 1990, at 47-48 (1990) (“The law of abortion applies only to procedures in the womb but in vitro, there is no prohibition at all.”)); *Id.* (quoting 8 MOSHE STERNBUCH, BISHEVILAI HAREFUAH 29 (Kislev 5747) (“The prohibition against abortion is in the woman’s uterus for [the embryo] has the potential to develop and become complete in her womb and it is destroyed. This also appears to be the implicit assumption of R. Shaul Yisraeli in an essay published as an Appendix to the Entzyklopedia Hilchatit Refuit, Volume 4, where he discusses the Nachmani case.”)). See also *Donating Excess Embryos*, NISHMAT’S WOMEN’S HEALTH & HALACHA (Feb. 8, 2005), <https://www.yoatzot.org/questions-and-answers/1063>.

⁵⁶ Grazi & Wolowelsky, *supra* note 50, at 1289.

⁵⁷ Grazi & Wolowelsky, *supra* note 50 (quoting Rabbi Haim David HaLevi, *Responsum to Richard Grazi*, 12 ASSIA, 1990, at 47-48).

eggs which have not been chosen for implantation may be discarded.”⁵⁸

However, the development of an in vitro process known as pre-implantation genetic diagnosis (“PGD”) has led to diverse halakhic views regarding sex selection in embryos. In the newest form of PGD, scientists do a Trophectoderm biopsy on day five or six. They take cells at the blastocyst stage of development from embryos created via in vitro fertilization.

This is a newer technique that utilizes biopsy at a later stage of embryonic development. At the blastocyst stage there has been some differentiation of the cells into an inner cell mass (destined to become the fetus) and the trophectoderm (precursor to the placenta). A small portion of the trophectoderm cells are removed for the biopsy. The inner cell mass is not disturbed.⁵⁹

Since the embryos need to be transferred by day five or six, and it takes twenty-four hours to get the result back from the biopsy, the embryos will be frozen “and subsequently thawed and transferred later after results of testing are available. Trophectoderm biopsy is less traumatic to the embryos than blastomere biopsy and therefore results in a higher success rate.”⁶⁰

Through this type of genetic testing prior to implantation, PGD is used to screen for genetic diseases and disorders as well as see if embryos have compatible tissue for a sick sibling. PGD is also 100% effective in identifying the sex of the embryo, which has been helpful in screening for gender linked diseases such as hemophilia.⁶¹ “About 85% of American Jews have an Ashkenazi Jewish background, originating from Eastern or Central Europe; as many as 1 in 4 Ashkenazic Jews is a carrier of an AJ genetic condition.”⁶²

⁵⁸ *Id.* (quoting Rabbi Mordechai Eliyahu, *Responsum to Richard Grazi*, in 11 *TECHUMIN* 272, 272 (1991)).

⁵⁹ *See PGD, Preimplantation Genetic Diagnosis for genetic Disorders*, ADVANCED FERTILITY CTR. CHI., <https://advancedfertility.com/fertility-treatment/ivf/pgd/> (last visited Aug. 26, 2021).

⁶⁰ *Id.*

⁶¹ *See* Leslie A. Pray, *Embryo Screening and the Ethics of Human Genetic Engineering* 1 *NATURE EDUC.* 207 (2008).

⁶² *What is the Ashkenazi Jewish Genetic Panel?*, WEBMD, <https://www.webmd.com/a-to-z-guides/ashkenazi-jewish-genetic-panel> (last visited Aug. 26, 2021).

The use of PGD then, can be very helpful to avoid a child being born with a genetic condition. Yet some of the moral challenges include a fear of a slippery slope leading to eugenics, unintended edits in DNA that can have dire long-lasting permanent effects,⁶³ a fear of seeing PGD produced children as mere instruments, as well as gender bias among parents who may prefer boys over girls.⁶⁴ While in many European countries boundaries have been put in place regarding assisted reproduction, including sex selection, the United States has not prevented PGD for sex selection.⁶⁵ The State of Israel has one of the highest uses of reproductive technology (compared to the United States, Israel has 1,657 in vitro procedures per million people versus 126 per million),⁶⁶ and has responded to the use of PGD for sex selection by enacting certain requirements. In the early 2000's, two fervently Orthodox couples who needed to use donated sperm, wished to utilize

⁶³ See generally Amy Dockser Marcus, *Gene Editing in Embryos Isn't Safe or Effective for Clinical Use Yet, Report Says*, WALL ST. J. (Sept. 3, 2020), <https://www.wsj.com/articles/gene-editing-embryos-should-be-only-for-disease-prevention-report-says-11599145913>.

⁶⁴ See Lily Kuo, *China: New Rules To Prevent Sex-Selective Abortions Raise Fears*, THE GUARDIAN (June 22, 2018), <https://www.theguardian.com/world/2018/jun/22/china-new-rules-jiangxi-province-prevent-sex-selective-abortions> (regarding a new rule in Jiangxi province stipulating that women more than fourteen weeks pregnant have to have signed approval from three doctors confirming an abortion is medically necessary before any procedure; this is seen as an attempt to prevent sex selection abortions which are illegal in China). Sex selection abortions became very commonplace in the late 1980's in China (due to the one child rule) and India, where there was a strong preference for male children. *Id.* Using ultrasound machinery, they were able to determine the sex of the fetus; this led to unbalanced gender ratios. *Id.* India eventually banned prenatal sex selection in 1994. *Id.* See generally HANDBOOK ON PRE-CONCEPTION & PRE-NATAL DIAGNOSTIC TECHNIQUES ACT, 1994 AND RULES WITH AMENDMENTS, MINISTRY OF HEALTH & FAM. WELFARE (2006). About 336 million abortions have been performed in China since 1971, due to the one child rule. China was left with a massive gender imbalance of 30 million more men than women. In 2004, Guizhou province enacted the first ban on aborting female fetuses. *Id.*

⁶⁵ Ariana Eunjung Cha, *From Sex Selection to Surrogates, American IVF Clinics Provide Services Outlawed Elsewhere*, WASH. POST (Dec. 30, 2018, 1:32 PM), https://www.washingtonpost.com/national/health-science/from-sex-selection-to-surrogates-american-ivf-clinics-provide-services-outlawed-elsewhere/2018/12/29/0b596668-03c0-11e9-9122-82e98f91ee6f_story.html.

⁶⁶ Naomi Zeveloff, *Is Israel Cracking Open Door to Sex Selection?*, FORWARD (Aug. 14, 2015), <https://www.google.com/amp/s/forward.com/news/318481/a-babys-sex-determined-by-a-unique-law/%3fgamp>.

gender selection when choosing which embryos to implant. They sought Rabbinic/Hospital ethics committee approval of using PGD to determine the sex of the embryo for a non-medical reason.⁶⁷ Permission was granted, and it led the Israeli Ministry of Health on May 9, 2005, to allow gender selection for non-medical reasons.⁶⁸ The regulations implemented only allow couples with four or more children of the same sex to apply. Couples appear before a panel appointed by a health minister which includes an ethicist, psychologist, social worker, doctor and clergy of the applicant's religion.⁶⁹ Additionally, they must provide written consent and prove that one or both parent's mental health is at risk if they are not able to bear a fifth child of the preferred sex; the procedure is not covered by insurance.⁷⁰ As of 2015, out of 639 applications, the panel approved eighty-one cases.⁷¹

⁶⁷ *Id.* In one case, the couple wanted a girl and not a boy. The father was a Kohen and by using donated sperm, a son would not be considered a Kohen. They wanted to avoid anyone in their community knowing the circumstances of the birth of their child, which would arise when a male child would not participate in any ritual connected to being of priestly lineage. A second couple sought the complete opposite result- they wanted a female child as they followed a rabbinic opinion that with donated sperm, it may be considered yichud for a father to be in the same room with a daughter, who technically was not related to him. In Jewish law, the laws of "Yichud" prohibits a man and a woman who are not married to each other to be secluded alone in a room or private space. *See id.*; Judy Siegel-Itzkovich, *Israel Allows Sex Selection of Embryos for Non-medical Reasons*, 330 BEST MED. J. 1228 (May 28, 2005); *see also* Richard V. Grazi & Joel B. Wolowelsky, *Addressing the Idiosyncratic Needs of Orthodox Jewish Couples Requesting Sex Selection by Preimplantation Genetic Diagnosis*, 23 J. ASSISTED REPRODUCTION & GENETICS 421, 424-25 (Dec. 2006).

⁶⁸ Grazi & Wolowelsky, *supra* note 50, at 423. For objection from outside the religious community, see <http://www.haaretz.com/hasen/pages/ShArtVty.jhtml?sw=traubman&itemNo=578274>.

⁶⁹ Naomi Zeveloff, *Is Israel Cracking Open Door to Sex Selection*, FORWARD (Aug. 15, 2015), <https://forward.com/news/318481/a-babys-sex-determined-by-a-unique-law>.

⁷⁰ *Id.*

⁷¹ *Id.* News reports have shown that Israeli Arab women travel to the West Bank to utilize PGD for sex selection. Doctors at the Razan Center for Infertility in Nablus perform more than 500 sex selection procedures a year, according to a clinic spokesperson. *See* Shaina Shealy, *An Israeli Woman Traveled to the West Bank So She Could Be Sure She'd Have a Boy*, THE WORLD (Nov 29, 2017, 11:30 AM), <https://www.pri.org/stories/2017-11-29/israeli-woman-traveled-west-bank-so-she-could-be-sure-she-d-have-boy>.

Some rabbis have opposed sex selection for personal parental satisfaction or even family balancing as antithetical to traditional Jewish values,⁷² while others approved it.⁷³ Yet, at the heart of

⁷² See Grazi & Wolowelsky, *supra* note 57, at n.6 (citing Rabbi Zilberstein, *Selecting a Fetus for Implantation: Avoidance of Birth Defects and Determining Sex*, 8 NOAM, Nov. 1991, at 47); see also Nishmat Avraham, *Even Haezer* 1:1 (explaining how Rabbi Shlomo Zalman Auerbach who did not allow sex selection for family balancing but allowed it for avoiding hemophilia); see also R. Landau, *Sex Selection for Social Purposes in Israel: Quest for the "Perfect Child" of a Particular Gender or Centuries Old Prejudice Against Women?*, J. MED. ETHICS, Sept. 2007–Apr. 2008, at 1. In 2006, the health ministry's chief adviser on ethics, the gynecologist and Orthodox rabbi Mordechai Halperin, declared that there is no justification in Jewish law for performing in vitro fertilization and preimplantation genetic diagnosis for couples who are not at high risk of genetic disorders and who do not have fertility problems. It would, however, be up to the committee to decide the exact criteria. See Judy Siegel Itzkovich, *Israel Allows Sex Selection of Embryos for Non-Medical Reasons*, THE BMJ (May 26, 2005), <https://www.bmj.com/content/330/7502/1228.2.full>.

⁷³ Tamara Traubmann, *Doctors, Rabbis Call for End to Ban on Embryo Gender-Selection*, HAARETZ (Oct. 31, 2006), <https://www.haaretz.com/1.4926998>. Rabbi Yuval Sherlo and Professor Noam Zohar, a bio-ethicist from Bar Ilan University, felt the restrictions were too great and Zohar opposed limitations in the name of individual freedom. *Id.* Dr. Richard Grazi and Rabbi Joel Wolowelsky cite Rabbi Ovadia Yosef who ruled that PGD for sex selection could be used by a couple who had six children of one sex and who would not have any more children unless they were sure that the seventh would be of the opposite sex; and R. Mordechai Eliyahu permitted sex selection for a couple who had five children of the same sex. See Joel B. Wolowelsky, *Sex Selection and Halakhic Ethics: A Contemporary Discussion*, J. ORTHODOX JEWISH THOUGHT, Vol. 40, No. 1, at 45-76 (2007). The authors look to family balancing as having "a certain halakhic impetus. A man has not fulfilled the mitzvah of peru u-revu until he has a son a daughter (Shulhan Arukh, Even ha-Ezer 1:5.)" *Id.* Rabbi Kenneth Brander notes "The Talmud (Shabbat 31a) lists a menu of questions asked to each of us after our passing in the heavenly court. One of the questions is: 'asakta be-pirya ve-rivya?'" *Id.* The Talmudic framing of this question is fascinating. "Were you involved in trying to fulfill the commandment of procreation (of having a male and female child)?" Notice the phraseology of the question. It is not "kiyamta pirya ve-rivya"—did you fulfill the mitzva or procreation, but rather, did you try? Having a male and female child is not in our hands. Our responsibility is to try to have both genders. This concern seemed to resonate in a written dialogue between R. Menachem Burstein, dean of Machón Puaah, and various posekim in Israel. Among the questions that Rabbi Burstein posed in letters to key posekim was the question of using PGD for preventing genetic anomalies as well as for gender selection." See Kenneth Brander, *Playing God: Can I Choose my Child? PGD and Genetic Screening* (Feb. 1, 2006), <http://www.yutorah.org/showShiur.cfm?shiurID=713523>.

rabbinic approval for use of sex selection in the two cases cited above, was the degree of despondency and mental anguish that either one of the parents could experience. It calls to mind the same halakhic factors that rabbis have used in cases of women who seek abortions. Procreative liberty, beneficence, and autonomy⁷⁴ might be secular considerations, allowing for either an abortion or gender selection, but when employing a halakhic analysis, the decision is based on a mental health factor — severe risks to the mental health of either the husband or wife.⁷⁵

Another ethical dilemma that has arisen concerns fetal tissue research. Fetal tissue is any tissue or organ obtained from a fetus that was fertilized at least eight weeks earlier, or from an embryo, which is from implantation until the eighth week of pregnancy.⁷⁶

Scientists use human fetal tissue to study and develop therapies for diseases and conditions from diabetes to congenital heart defects to blindness. They also use the tissue to develop mice with humanlike immune systems to conduct research on infectious diseases, particularly HIV. Such mice could also be useful in the fight against the new coronavirus, proponents argue. In 2018, scientists at an [National Institute of Health] meeting, attended by [Health and Human Services] leaders, argued that human fetal tissue remains the “gold

Sephardic Chief Rabbi Amar permitted PGD for genetic reasons, as well as for *peru u-revu*, and *shalom bayit*. However, others, including R. Yehoshua Neuwirth, R. Ariel, and R. Meir Nissim Mazouz pointed out concerns for such permissibility, except when it came to preventing genetic anomalies. R. Neuwirth warned that such permissibility creates an environment in which humankind begins to play God and warned against using PGD for this purpose.

Id. at 55-56.

⁷⁴ Julian Savulescu, *Sex Selection: The Case For*, 171 *MED. J. AUSTRALIA* 373, 373-75 (1999).

⁷⁵ However, left unclear is how significant it has been to the committee making decisions *vis a vis* mental distress if the desire of wanting a male child is to fulfill “be fruitful and multiply? Or to carry on a family name in light of the Holocaust? Or the desire to have a male child to say kaddish?”

⁷⁶ KAVYA SEKAR ET AL., *CONG. RSCH. SERV.*, R44129, *HUMAN FETAL TISSUE RESEARCH: FREQUENTLY ASKED QUESTIONS* 8-10 (2019); *see also* Michelle Andrews, *FAQ: How Does New Trump Fetal Tissue Policy Impact Medical Research?*, *KAISER HEALTH NEWS* (June 7, 2019), <https://khn.org/news/faq-how-does-new-trump-fetal-tissue-policy-impact-medical-research>.

standard” for developing such mice. In 2019, NIH spent \$109 million on about 175 projects that used human fetal tissue; this year, it expects to spend \$116 million.⁷⁷

In the 1980’s, ethical dilemmas arose related to media reports of women who became pregnant for the sole purpose of having an abortion and then donating fetal tissue after the abortion to provide anticipated aid to an individual, usually a blood relative, suffering from Parkinson's disease, diabetes, or Alzheimer's disease.⁷⁸ In probing whether it was permissible, halakhically, to benefit from such a donation, some Jewish scholars distinguished between voluntary and spontaneous abortions. A type of “exclusionary principle” was endorsed. Donations from individuals who had undergone abortions for the sole purpose-of donating tissue were to be rejected; tissue donated from spontaneous abortions were acceptable.⁷⁹ The argument was that benefitting from the donated tissue constituted approval and complicity in an impermissible abortion.⁸⁰

In responding to whether “research upon fetal tissue derived from an induced abortion implies moral acquiescence or complicity with the antecedent abortion,” Rabbi David Bleich noted that there is “no principle of Jewish law or ethics that would preclude the use of information gleaned as a result of unethical research.”⁸¹ Furthermore, “[a]lthough performance of an abortion is a grievous offense, Jewish law does not posit a ‘Miranda principle’ or an exclusionary rule that would, *post factum*, preclude use of illicitly procured tissue for an otherwise sanctioned purpose.”⁸² However, he too was concerned that

⁷⁷ Meredith Wadman, *New U.S. Ethics Board Rejects Most Human Fetal Tissue Research Proposals*, AM. ASS’N ADVANCEMENT SCI. (Aug. 18, 2020, 10:00 PM), <https://www.sciencemag.org/news/2020/08/new-us-ethics-board-rejects-most-human-fetal-tissue-research-proposals>.

⁷⁸ See Christine Gorman, *A Balancing Act of Life and Death. New Uses Of Fetuses And Brain-Absent Babies Trouble Doctors*, 131 TIME, Feb. 1, 1988, at 49 (1988).

⁷⁹ J. David Bleich, *Survey of Recent Halakhic Periodical Literature: Fetal Tissue Research: Jewish Tradition and Public Policy*, 24 TRADITION: J. ORTHODOX JEWISH THOUGHT 69, 69 (1989).

⁸⁰ *Id.* Subsequent federal law specified conditions under which human fetal tissue could be used in federally funded research involving fetal tissue for therapeutic transplantation including a ban on the woman donating knowing the identity of any recipient and prohibited the sale or trafficking; see also SEKAR, *supra* note 76, at 8-10.

⁸¹ *Id.* at 82.

⁸² *Id.*

utilization of such tissue would involve collusion or encouragement of induced abortions, or any action or policy that would lead to an increase in the number of abortions performed.⁸³

The practice of tissue donation provoked national controversy. Federal moratoriums on fetal tissue research from elective abortions in federally financed scientific research were put in place during several presidential terms, ranging from Ronald Reagan to George H.W. Bush to Bill Clinton (who restored the research with bipartisan support). Most recently, the ban was reinstated by the Trump Administration in 2019.⁸⁴ This ban was short-lived, as the Biden Administration renewed researchers' abilities to use fetal tissue shortly after taking office.⁸⁵ Although there has been success in using stem cells from umbilical cords, as well as adult stem cells and organ lids, artificially grown cells that mimic organs, scientists still see great value in using fetal tissue, in particular from elective abortions.⁸⁶

The deep questions raised by abortion, as well as interconnected reproductive technologies and research, challenge us to assess the limits that ethical and moral sensibilities should impose on

⁸³ *Id.* at 82-84.

⁸⁴ See Andrews, *supra* note 76 (“[The Federal government announced that the] National Institute of Health would no longer conduct research with human fetal tissue obtained from elective abortions after using up any material that was on hand Federally funded research at other institutions could continue until their grants expired.”). In addition, in July 2020, the Human Fetal Tissue Research Ethics Advisory Board, appointed by Health and Human Services Secretary Alex Azar, reviewed fourteen proposals to do medical research using human fetal tissue donated after elective abortions. *Id.* The applications made to the U.S. National Institutes of Health (“NIH”) had already been recommended for funding by scientific reviewers and had met existing legal requirements for ethical use of the tissue. *Id.* In August 2020, the ethics board delivered the results to Secretary Azar and Congress and recommended that thirteen of them be rejected. *Id.* They were the first applications considered under the new regulations in which projects by extramural, NIH-funded scientists using human fetal tissue need to pass an extra layer of ethics review. See Wadman, *supra* note 76; SEC’Y HEALTH & HUM. SERVS., N.I.H. HUMAN FETAL TISSUE RESEARCH ETHICS ADVISORY BOARD – FY2020 CHARTER (2020).

⁸⁵ See Apoorva Mandavilli, *Biden Administration Ends Limits on Use of Fetal Tissue for Research*, N.Y. TIMES (Apr. 17, 2021), <https://www.nytimes.com/2021/04/17/health/fetal-tissue-abortion-biden.html>; see also Wadman, *supra* note 77.

⁸⁶ See Andrews, *supra* note 77. In addition, most scientists see fetal tissue from elective abortions, rather than miscarriages, as generally superior because miscarriages often result from chromosomal or other abnormalities that could make the tissue not suitable for research. *Id.*

a woman's Constitutional right to make reproductive decisions. The main line of Jewish tradition makes a much-needed contribution to the discussion of abortion. Without sharing the view that the fetus is from conception fully a person, it stops short of a complete dismissal of the value problem in destroying a fetus. However, whatever value attaches to “potential life,” the primary concern lies with the woman. She exists. Her voice and her needs must be heard. And her life, (no matter how slim her chances of survival), health, and mental well-being come first.⁸⁷

⁸⁷ Contrast this idea with the court’s ruling in *In Re A.C.*, where the potentiality of the fetus was chosen over the life of the pregnant woman who was dying. See 533 A.2d 611, 617 (D.C. 1987).