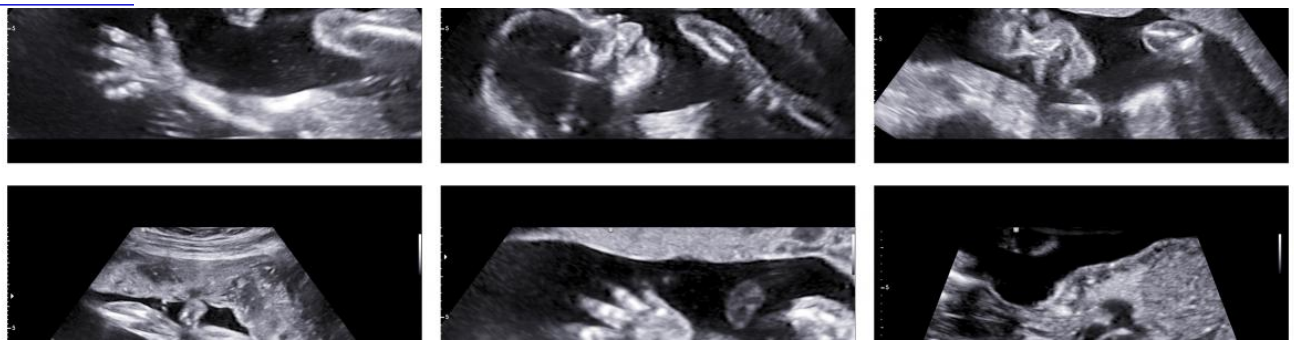
ZIKA, HALAKHA AND THE POLITICS OF ABORTION

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By Dr. Richard Grazi

Zika is all over the news. About 10-30% (we don't know the exact percentage just yet) of pregnant women infected with the Zika virus will deliver babies with microcephaly, or smaller than normal heads. The medical consequences of this condition are those derived from restricted growth of the brain and include poorly developed sections of the brain, enlarged brain ventricles, and even abnormalities outside the skull such as congenital joint contractures. , [1,2] All of the described anomalies are life-altering for the babies as well as for the families into which they are born.

So where does that leave a woman who wishes to terminate her pregnancy because her fetus is doomed to be born severely disabled, or to never reach sentient life? These are the situations under which many women seek to terminate their pregnancies, and are virtually always the reason why a late termination is done. Would, for example, aborting a fetus diagnosed with a Zika infection be halakhically permissible?

This came to mind earlier this year, during the presidential primaries, as one Republican candidate after another announced the intent to criminalize the "murder of unborn children." [3] Of course, following the Supreme Court's decision announced this past June, [4] the chances of abortion again becoming illegal in this country seem remote. Still, the pressure being brought by conservative religious groups on what they see as a child-killing industry is

unrelenting and has resulted in severely restricted access to abortion in many states. Some Orthodox Jews reflexively support those efforts. After all, how can God-fearing persons not consider themselves “pro-life”?

What follows is not a political discourse or an opinion about who should win our votes. It is meant to provide basic information about abortion from a traditional Jewish perspective, with the hope that the Torah-observant community can be vigilant about the matter regardless of the outcome of November’s election. Delving into the abortion debate is surely risky business, given the passion with which many cling to their beliefs on the matter. It may also seem strange coming from someone whose professional life has been devoted to procreative medicine. But although most of our patients are desperate to become pregnant, someone is and wants just as desperately not to be. This happens when there is an in utero diagnosis of severe fetal anomalies, be they genetically based or acquired by other means.

The Zika crisis has forced many couples to consider the consequences of bringing a severely disabled child into their homes, including the significant impact it might have on their future lives, particularly when there are other children for whom they are responsible. As all of us who have followed the political campaign are now aware, the Catholic and fundamentalist Christian view on abortion, even in such cases, is clear-cut: no abortion under any circumstances. One must not assume, however, that because Judaism prizes life no less than Christianity, devout Jews must also stand opposed. Halakha is more nuanced. In fact, the halakhic approach suggests that the very terminology used to describe the anti-abortion movement – “Right to Life” – has been misappropriated. In this brief paper, I will present some rabbinic decisions that have shaped present day Halakha in regards to abortion. The material that I will present is derived in large part from an analysis of the subject by Rav Moshe Zuriel. [5] But first, a brief accounting of abortion in our current political landscape is in order.

* * *

One’s view on abortion is intimately connected, for obvious reasons, to one’s view of when life begins. So when exactly does life begin? For many people in the United States, the answer is that life begins the moment an egg is fertilized by a sperm. At that point, that one cell embryo is considered fully human, deserving of the same rights and protections of all humans who walk the earth, and any action that disrupts the growth of that embryo, whether as a fetus or even as a bunch of cells in a petri dish, is no different from killing a fully alive human being. Those who share this belief do so with great passion. It is a passion ignited by religious

zeal. They see themselves living in a society that has run amok in its countenance of murder on an industrial scale. And, as we know, that zeal itself too often has had consequences, fueling violence against actually-alive human beings who facilitate or perform abortion. The reader may remember this:

Amherst, N.Y., Oct. 24, 1998 — Dr. Barnett Slepian, an obstetrician with a practice in this Buffalo suburb, returned home from synagogue Friday night with his wife, Lynn, and greeted his four sons. Then he stepped into his kitchen, where a sniper's bullet crashed through a back window and struck him in the chest, the police said.

He fell to the floor, calling for help, and died within two hours.[6].

Dr. Slepian was one of three abortion providers in the Buffalo area. The miscreant who did this killed to defend the “Right to Life.” Unfortunately, there have been others such murders supported and perpetrated and by an offshoot of the “Right to Life” movement who call themselves the Army of God.

This point of view presents great difficulty for reproductive specialists. In the routine course of fertility treatments, we routinely discard embryos, either because – like 80% of embryos formed in the natural process of reproduction – they lack implantation potential, or because we have been requested to do so by former patients. [7] Notwithstanding the pro-life nature of in vitro fertilization (IVF) – without it, millions of babies would never have been born – the technique has engendered fierce opposition in fundamentalist communities. Their calculation is simple: IVF is no different than abortion; be it a fetus in the womb or a one cell embryo in a test tube, ending their existence is murder. American voters ignore the consequences of this view at their own peril: in July, the House Appropriations Committee of the US Congress agreed to an amendment that, if passed, would deny funding of IVF treatment to military personnel whose wounds prevent them from having children by any other means.[8] Beyond the ethical implications of such a policy, a moratorium against federal funding of research involving human embryos was put into effect in 1976 and its ripple effects continue to slow the pace of advancements in IVF and its spin-off technologies, including stem cells.[9]

Even more far-reaching is the “Personhood Amendment,” a brilliant new political tactic being used by those who wish to see legal abortion in this country disappear. It seeks to set a new definition of the word "person." Its importance stems from the original Roe v. Wade decision in 1973,[10] wherein Supreme Court Justice Harry Blackmun ruled that that the equal protection clause of the

Fourteenth Amendment does not refer to the fetus because it is not legally considered a person. Personhood Amendments seek to redefine the term “person" as something that begins when an egg is fertilized by sperm and ends when the last breath is taken. Were this definition of personhood accepted, the right to life for an embryo or a fetus would then be guaranteed specifically by the Fourteenth Amendment.

In the last five years, thirteen states have attempted to place “personhood” measures on the ballot. Only two states – Colorado and Mississippi – have put such measures to a vote, and voters rejected them. Nevertheless, their derivative, the so-called fetal homicide laws, are already being used in many states to arrest and prosecute women who miscarry pregnancies or are otherwise seen as “harming” the fetus.[11] In Indiana earlier this year, the governor enacted a law that would prosecute any doctor who performs an abortion for almost any reason, including fetal abnormalities, for wrongful death. By that same law, any woman undergoing an abortion at any stage and for any reason would also be required to pay for burial or cremation of the fetus.[12] Appropriately, this law has not been carried out due to an injunction issued by a federal judge this past June.[13]

At the federal level, two similar pieces of legislation – the Sanctity of Human Life Act and the Life at Conception Act – are introduced in Congress year after year; they have failed on each occasion. This past winter, however, every Republican candidate indicated support for these bills.

* * *

Although abortion on demand is anathema to the ethics of the Halakha, in Jewish law there are many situations in which a pregnancy may be terminated. Within the first 40 days of pregnancy, in particular, the embryo is considered by the Talmud to be “mere water.”[14] By inference, an embryo outside the womb certainly has no status as a human life. Thus, as Rabbis Mordechai Eliyahu ZS”L and Haim David Halevi ZS”L pointed out,[15,16] , fertilized eggs in a petri dish may be discarded. In their responsa, neither of these authorities offers any detailed analysis of his legal ruling, considering the position to be obvious and noncontroversial from the perspective of Halakha.

Halakha also does not consider abortion a capital crime. The source for this is in the Torah itself:
If two men fight and they collide with a pregnant woman and she miscarries, but she is not fatally wounded, the one who struck her shall pay damages as

assessed by the husband of the woman.
Exodus 21:22

Additionally, there are situations when Halakha mandates abortion. The examples that follow will illustrate this point.

Consider the Talmudic account of a woman has been convicted of a capital offense and is sentenced to death. The court rules that the sentence must be carried out immediately. Even if she is pregnant, the court determines that she, along with her unborn child, must die. Wishing tospare her the agony of anticipating her own death, the court will not wait a single extra day. It discounts any consideration of her fetus. In fact, the iconic amora, Shemuel, rules that the fetus must first be intentionally killed – by striking the woman's abdomen – before she is executed. He wishes to save her the embarrassment of contemplating the miscarriage and bleeding that will follow her death.[17] Of course, this is only a theoretical discussion – the death penalty was rarely, if ever, practiced in Jewish law, and certainly not in the era of the Talmud. Still, the discussion sheds light on how hazal viewed the fetus. In this case they make clear that a fetus is not a nephesh; it has no independent status as being alive, and it is certainly not a human being.

The Talmud also teaches that if the childbirth process is interrupted and the mother's life is in danger, the fetus is killed and the body is removed piecemeal in order to rescue the mother's life.[18] We learn from this passage that up until the moment that the fetus emerges it is not considered a separate individual. It instead has the status of an inner organ of the mother, just like her kidneys or liver. Therefore, if she needs life, we may destroy that part. As Rashi comments there, the fetus has no soul. It does have ruah hayim, or spirit of life, but that is derived from, and is dependent on, its mother. The soul is only acquired upon birth. The notion that killing a fetus is tantamount to murder was not one that he or any of our early sages would recognize.

An example of how this is relevant was given by the Radbaz (Rabbi David ben Zimra, Sephardic, 16th century) who ruled on the case of a kohen who hit a pregnant woman and caused her to miscarry. The question was whether the kohen must thereafter refrain from reciting birkat kohanim because, by Halakha, a murderer is disqualified from all priestly services. Radbaz ruled that the kohen is permitted to continue since a fetus is not yet a soul.

While it would be safe to say that no halakhic authorities allow abortion only for the sake of convenience, all of them accept that in the case of piquah nefesh –

where the fetus is jeopardizing the mother's life – her life comes first. But what do we make of a situation where a woman's pregnancy does not pose a physical danger to her, only an emotional one?

As background to Rav Zuriel's analysis, he states that the Torah is certainly concerned with savlan shel ha'beriot, the "suffering of humanity." Here is a partial listing of the responsa that he cites, specifically regarding a married woman who has conceived as the result of an adulterous relationship and requests an abortion:

(A) Chavot Ya'ir – (Rav Yair Bachrach, Ashkenazi, 17th century) – permitted.
(B) She'ilat Ya'avetz – (Rav Ya'akov Emden, Ashkenazi, 18th century) – permitted.
(C) Ben Ish Chai – (Rav Yosef Hayyim, Sephardic, 19th century) – permitted.[19]
Mishpetei Uzziel (Rav Ben-Zion Meir Chai Uzziel, Sephardic, 20th century) was asked by a sick woman who feared becoming deaf in both of her ears due to childbirth. Relying on the passage in the Talmud cited above, he permitted abortion, even though it was not a matter of life and death. He specifically states that the reason the court is permitted to abort the fetus before the execution has nothing to do with the fact that they are both destined to die; rather, as clearly stated in the Talmud, it is done for the good of the woman, to spare her embarrassment.

* * *

While there are halakhic decisors who, following the rulings of their respective gedolei hador, disallow termination of such a pregnancy, there are nevertheless many poskim of major import whose views differ. Here is a sampling of 20th Century poskim who considered the subject:

(1) Rabbi Shaul Yisraeli, Rosh Yeshiva of Mercaz HaRav, was asked by a woman who took thalidomide during pregnancy. This drug caused severe birth defects in many but not all exposed fetuses, and he permitted abortion. His hidush was that even if not all such fetuses are in danger, but the obstetricians claim that a sizeable percentage born in such situations are damaged severely, this is enough to support performing an abortion.
(2) Rabbi Dr. Ya'akov Yechiel Weinberg, a mid-20th century European master of Torah as well as secular studies, author of Seridei Eish, was asked by a woman who was sick with German measles during her pregnancy, and who was advised by her doctors that many such fetuses are born deaf, blind and mentally impaired. He, too, permitted abortion.
(3) Rabbi Ovadia Yosef, ZS"L also permitted abortion for suitable medical causes

but only to the end of the first trimester.
(4) Finally, the late Rabbi Eliezer Yehuda Waldenberg, ZS”L author of the Tzitz Eliezer, went to great length to prove why abortion of a sick fetus is permissible. He allowed first trimester abortion of a fetus that would be born with a deformity that would cause it to suffer and, famously, termination of a fetus with a lethal fetal defect such as Tay-Sachs disease up to the conclusion of the seventh month of pregnancy.

With this in mind, we must ask, why would any posek condemn a woman pregnant with a Zika-damaged fetus to carry her pregnancy to term? Rabbi Moshe Feinstein, ZS”L considered abortion except when the mother’s life is clearly endangered to be impermissible.[20] In his teshuva he explains why. His reasons are many and varied and include not only his detailed halakhic analysis but also his distrust of doctors’ motivations. He also believed that even a brief and painful life would merit the newborn tehiyat hameitim. Many contemporary poskim, despite their great respect for Rav Moshe, discounted his objections. What prompted Rav Moshe to take his strict position cannot be known. We do know that it was penned in 1976, shortly after abortion was legalized in the United States and in the midst of a new sexual freedom sweeping across the country. It is possible he foresaw that the collusion of these phenomena could bring undesirable consequences for the Jewish world.

In any event, not all poskim accept Rav Moshe’s psak. Rav Zuriel concludes his survey with the notion that koach d’heteira adif. In this regard, the reader should recall the words of Rav Aharon Lichtenstein, ZS”L who wrote the following with the same matter in mind:

A sensitive posek recognizes both the gravity of the personal circumstances and the seriousness of the halakhic factors…. He might stretch the halakhic limits of leniency where serious domestic tragedy looms, or hold firm to the strict interpretation of the law when, as he reads the situation, the pressure for leniency stems from frivolous attitudes and reflects a debased moral compass.[21]

Regardless of which halakhic analysis is deemed more “correct,” any couple facing the looming tragedy of pregnancy with a sick fetus and who chooses to terminate that pregnancy may lean on the wisdom of many giants of Torah. In the language of our sages, yesh al mi l’smokh.

* * *

Collectively, we hope and pray that none of us finds ourselves personally involved in such situations. They are heartbreaking, no doubt. But, as Torah-observant Jews, these situations must not always lead to endless pain and suffering. Our approach does not coincide with the fundamentalist sentiment sweeping America. While the Jewish perspective is indeed pro-life, its conclusion is different. To be pro-life halakhically means to be in favor of a pregnant woman retaining her dignity and for the couple in question to be allowed to live their life without the emotional trauma that accompanies the birth of a dying or damaged child. While we certainly respect those who choose to take on that burden, the Torah does not require women to do so. To be pro-life is also to support the use of IVF, when necessary, to build families, including lots of Jewish families.

Zika is a very complicated subject, too new and too potentially threatening for even the medical world to have answers. Curiously, its emergence as a serious threat to the health of American women and children at the very same time that the presidential elections are in full gear reminds us that the abortion issue – and the opposing platforms of the candidates – must be taken seriously. Redefining life as beginning at fertilization discounts the problem of savlan shel ha'beriot and ignores the cruel repercussions that such a policy would engender. As such, this doctrine is in conflict with Halakha and cannot be countenanced by those who are committed to Torah values.

[1]Johansson MA, Mier-y-Teran-Romero L, Reefhuis J, Gilboa SM, Hills SL. Zika and the risk of
microcephaly. NEJM. 2016;375(1):1-4.
[2]http://www.bmj.com/content/354/bmj.i3899
[3]The thesis of this article is that an unborn child is not a recognized entity in Halakha. As long as it is unborn, it is called a fetus; only once it has emerged is it a child. I have therefore been careful to avoid use of such terms as "fetus in the womb" as needlessly duplicative. If it is a fetus, it can only be in the womb and if it is a child it can only be out.
[4]http://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html?…
[5]Tehumin 2005. A (less-detailed) summary is available in English at http:/
www.torahmusings.com/2013/08/abortions-that-are-kosher/
[6]http://www.nytimes.com/1998/10/25/nyregion/abortion-doctor-in-buffalo-s…
[7]The outcome of any given in vitro fertilization cycle is unpredictable. Embryos that are not transferred to the womb in the process of treatment are typically frozen for potential future use. However, those for whom IVF has been successful and who have finished growing their families may prefer not to keep their excess embryos in perpetual storage.
[8] http://www.nytimes.com/2016/08/13/us/politics/congress-embryo-ivf.html?…

[9]http://www.pbs.org/wgbh/americanexperience/features/general-article/bab...
[10]It is worth noting that the case was decided by a 7-2 majority, reflecting public sentiment. Americans still support legal abortion by a significant majority. See http://www.pewresearch.org/fact-tank/2016/06/27/5-facts-about-abortion/
[11]https://rewire.news/article/2014/01/09/feticide-laws-advance-personhood...
[12]http://www.nytimes.com/2016/03/25/us/indiana-governor-mike-pence-signs-...
[13]http://www.nytimes.com/2016/07/01/us/federal-judge-blocks-indiana-abort...
[14]Yevamot 69b
[15]Eliyahu M. Responsum to Richard Grazi.10 Shevat 5749 (Jan 10, 1989). Tehumin 1991; vol 11
[16]Halevi HD. Responsum to Richard Grazi.19 Tevet 5749 (Dec 27, 1988). 1990; 12:3-4; Assia nos 47-48
[17]Arachin 7a
[18]Sanhedrin 72b
[19]One can argue about this response, because of the oblique manner in which it was given. However, the intent and meaning of the response is clear.
[20]Iggrot Moshe H”M, 2: 69
[21]Lichtenstein A: Abortion: A halakhic perspective. Tradition. 25(4):11, 1991