The Abortion Rhetoric Within Orthodox Judaism: Consensus, Conviction, Covenant

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The abortion rhetoric provides the hermeneutic key whereby the contemporary contenders to the faith franchise called "Orthodox Juism" reveal the moral essences of their alternative constructions of religious reality. At stake in this conversation is the meaning of Masorah, a culturally encrusted code word. According to the Judaism of the Rabbinic canon, or book-based Orthodox Judaism, it is the transmitted oral Torah as preserved for the collective of Israel in the public, vetted literature of the rabbis up to and including the Babylonian Talmud. Masorah is however also invoked as the retort of last resort to resolve the often occurring conflicts between the canonical Torah library and the living culture of affiliating Orthodox Jews. While in theory, the Orthodox Jew consults the canon, the literary trove of which is both necessary and sufficient source of normative value, in practice this trove is mediated by rabbis, known as gedolim, great ones, or hakhmei ha-Mesorah, Masoretic sages, whose divinely inspired intuition is empowered to parse divine intent and to preserve the cohesiveness of culture based Orthodox Judaism.
This study contrasts the legal rhetoric regarding the abortion issue. What does the plain sense of the canonical library actually prescribe? And what is the view of that version of Orthodox Judaism that bases itself on the intuitive consensus of an elite group of rabbis through a kind of "continuous revelation?"

To accomplish this goal, we examine:

1. the apologia and rhetoric of "pro-life" Orthodox Judaism
2. the actual values encoded in the Judaism of the canonical documents regarding [a] fetal life and [b] the grounds for authorizing an abortion
3. the actual position of the Judaism of the canonical documents regarding abortions
4. the self-understandings of the two Orthodox Judaisms that compete with each other, in pre-modern and in modern times

1. The apologia and rhetoric of "pro-life" Orthodox Judaism

This version of Orthodox Judaism reflects the publicly proclaimed consensus of those who are self-authorized, empowered, and emboldened to speak as spokesmen [women have no voice in this Judaism] for Torah. The pronouncements of this dialect of Orthodox culture are apodictic, dogmatic, authoritative and authoritarian. For this Orthodox Judaism, conversation is condemned as disrespectful to God because God's vicarious spokesmen alone are authorized to speak--because they are intuitively endowed-- on God's behalf. Persuasion of peers is for this Orthodox Judaism pointless because those issuing bold, culture conservative apodictic rulings are, by their own account, without peer. According to Rabbi Herschel Schachter's understanding of his teacher, Rabbi Joseph B. Soloveitchik, great rabbis may rule from intuition or "from the gut," but most other Orthodox rabbis may not even entertain the right to articulate a reasoned, dissenting opinion. After all, these second tier rabbis do not understand Torah deeply and intimately because they [1] have not been vetted as great rabbis by the clique of great rabbis and [2] these second rate Orthodox rabbis, by dint of their corrosive exposure to non-Jewish and non-ultra-Orthodox culture, are presumably under the influence or spell of un-Jewish heretical ideas, ideologies, and sensibilities. Therefore, in order to be considered to be legitimate Orthodox rabbis, second tier rabbis are required to defer to the pious policies of the truly great rabbis, those untainted by secularity, forgoing the role of poseq [religious authority] and assuming the role of police, who deferentially and piously enforce the policies, positions, and proclamations of the truly authentic great rabbis. To this view, citing relevant sources is insufficient, and otherwise compelling logic is spiritually inadequate. Only those accepted as great rabbis are authorized as Masoretic sages to preserve the ethic, ethos and spirit of authentic Judaism. In this Judaism, authentic Torah opinion, Da’as Torah, resides primarily in the charismatic person, rather than in the canonical object, which is the revealed, canonical text. In this Judaism, the sacred Torah serves as the rhetorical resource trove which is sifted, shifted, and manipulated in order to justify the apodictic rulings of the actual and ultimate source of living Torah, the inspired intuition of

great rabbis, the actual word of the Lord that applies in contemporary times.

The Judaism "of the canonical documents" is the alternative Orthodox Judaism that challenges the claims of the charisma-led Orthodoxy described above. According to Rabbi Marc Angel, this is the Judaism of the Oral Torah applied appropriately to current settings. And according to Prof. Jacob Neusner, this is the Judaism of the Dual, i.e., Oral and Written Torah, which alone expresses God's will as it was proclaimed at Sinai, in the wilderness sojourn, in the Prophetic writings and Hagiographa, and in the Oral Torah library. Contemporary Orthodox Judaism has undergone change in modernity because it is self-conscious about its religious choice and identity, which is not the case for pre-modern Traditional Jewish religious communities. Modern Orthodoxy's adherents and advocates, this writer included, believe that God is revealed in the sacred, canonized Torah text as explained persuasively by whoever makes the most reasonable, persuasive, and compelling reading of that canon. Apodictic rulings, declaratory judgments, and ex cathedra decrees are not recognized to be legitimate value statements according to the version of Jewish Orthodoxy that is encoded in the Oral Torah canon. These apodictic rulings may only issue with authority from a Sanhedrin sitting in plenum, but not from post-Talmudic self-selective clerics sitting in clergy conclaves, whose intuition is taken to represent God's will.

The charismatic Orthodox Judaism opposes an expanded abortion license by appealing to the sanctity of life and human humility, a code term intended to intimidate ethical initiatives, demean the rectitude of the individual moral conscience, and to foster legal passivity

by besmirching and delegitimating those who would dare to revisit classical texts in order to reconsider and perhaps revise practices and policies, based upon a philological reading of the sacred canon. While for the Judaism of the Oral Torah, halakhic discourse rejects mysteries and vague platitudes out of hand, [Dt. 29:28] "pro-life" culture conservative Judaism, representing what it takes to be the moral high ground, with its accompanying legitimating stringency, cannot tolerate a conversation regarding what the canon actually records because with conversation comes the moral demand for accountability.

2. The actual values encoded in the Judaism of the canonical documents regarding [a] fetal life and [b] the grounds for authorizing an abortion

The most relevant Biblical passage informing the abortion controversy is:

“When [at least two] men fight and [inadvertently] strike a pregnant woman and [as a consequence of the blow] the fetuses abort but there is no calamity [i.e. the pregnant woman survives the blow] [the offending culprit] must assuredly be

punished as to be mandated by the woman's husband in court." [Ex. 21:22-23]

In this passage, the incidence of unintentional feticide is punished by a fine, but the offending culprit is not consigned to a city of refuge, which would be the case were this accidental abortion to be viewed as a homicide [Ex. 21:23]. Therefore, the assault upon the fetus is, according to the Pentateuchal document that every version of Orthodox Judaism accepts to be the will and word of God, the human fetus carries the status of property, but not person.
However, the canonical library of the Oral Torah, the foundation documents of which are also sacred canon for Orthodox Judaism, provides the literary, theological, and legal filter whereby Biblical norms are legally processed and culturally applied. The approaches of our two contending Orthodox Judaisms to this canonical legal filter reveals, en passant, that there are two competing and ideologically incompatible Orthodox Judaisms contending for recruits, recognition, and the collective soul of the Orthodox affiliating community.

The tendentious reading of this passage advanced by pro-life Orthodoxy cites the following Talmudic comment, with its accompanying ideological spin, to be the final, exhaustive, and to its view unquestionable will and word of God:

[In the case of] a woman in hard labor [the court mandates] the cutting of the unborn fetus and removing it [from the womb] limb by limb because her [i.e. the mother's] life takes precedence over its [i.e. the fetal] life. [bSan 72a]

According to Rabbi J. David Bleich, only in this case, where the fetus endangers the life of the gestating mother, may an abortion be condoned, and in other cases, i.e., when the gestating mother is not in mortal danger, the abortion procedure is by implication forbidden. [Contemporary Halachic Problems, New York, 1977, 327) But the Talmudic context cited here only refers to a legally mandated abortion. Philologically parsed, this canonical statement prescribes that in a case in which the maternal life, i.e., a legally defined person carrying moral rights, is endangered by a life threatening fetus, which prior to birth is considered to be not a person but property, Oral Torah law mandates the destruction of the fetus, which is property, in order to spare the actual living human person, the gestating mother. The claim, advanced by R. Bleich and others, that an abortion is in fact forbidden by statutory implication, reflects the a priori ideology of the exegete but neither the philological sense of the statute nor the actual norm encoded in that statute. Maimonides astutely and precisely ruled [Laws of the Murderer and Life Preservation 1:9] that this case, when the gestating mother is herself endangered by the fetus she carries, is akin [but not identical] to that of the pursuer, when it appears that one person pursues another person with

apparent intention to commit rape or murder, a bystander may take the requisite vigilante action to stop the pursuer, even by killing the presumptive culprit, should circumstances so require.

3. The actual position of the Judaism of the canonical documents.

According to what Orthodox Jewish believers, committed to the Written Law as filtered by the Oral Law, are supposed to maintain, the penalty for fetal destruction is a fine, indicating that in Israel's canon, feticide is a tort, not a crime, an assault upon property, not person. The identical definition recorded in Israel's sacred canon also appears in Hammurabi's code. [CH 210, ANET 17-19] The only, but critical, difference between the ethic of the Torah and the ethos of Hammurabi's code is that for the latter, human and property worth inhabit the same moral universe, while for the Torah ethic the human person carries moral rights because s/he carries the image of God and may not be reduced to or treated as property.
Orthodox Judaism ignores the astonishing fact that the religiously canonical bArakhin 7a-b actually fills the gap of the wrongly and ideologically imputed silence of bSanhedrin 72a. The claim that non-therapeutic abortions “must” be halakhically forbidden is based [or biased] upon an ideological reading of a passage that only and explicitly deals with a mandated abortion. In bArakhin 7a-b, a woman about to be executed by the court is, if pregnant, aborted, [a] even though the biological father has property rights to the unborn, because the court is empowered to confiscate property, in this case, the fetus for which there is a paternal claim of property interest, and [b] the grounds for taking this action, the destruction of the fetus, is the shame that the condemned woman would endure if executed while pregnant. Therefore, the condemned woman's shame provides sufficient warrant to confiscate what Jewish law in its canonical statement defines as property. We have in this passage an explicit warrant for discretionary abortion.

In search of an anti-abortion argument, Rabbi Aharon Lichtenstein ["Abortion: a Halakhic Perspective," Tradition 25 (Summer 1991), 4] contends that [a] since the Israelite law must be more rigorous for an Israelite than non-Israelite, [bHullin 33a], and [b] a non-Israelite is executed for the crime of feticide, [bSan 57a] , R. Lichtenstein concludes syllogistically, abortion "must" be forbidden to Jews by implication because it is forbidden explicitly to non-Jews. Like R. Bleich, R. Lichtenstein is ideologically predisposed to justify a restrictive abortion ruling and not to read the canon as an objective text scholar applying philological controls, going where the data leads, being disinterested in the resultant findings, and to

use R. Bleich's very felicitous idiom, letting "the chips fall where they may." R. Lichtenstein's very clever construction is however parried by the legal fact that non-Israelites suffer execution for assaults on property, while Israelites are not so sanctioned. Thus, the claims that Israelite law "must" be stricter than other legal systems and that only therapeutic abortions are by implication licit, must be addressed philologically, not ideologically. Therefore, in its canonical version, Orthodox Judaism requires an abortion when there is a danger to human life, and considers shame to be a ground to authorize other, i.e., discretionary abortions. Were Jewish law to outlaw abortions undertaken to avoid shame, then the bArakhin 7a-b passage would not appear in the Talmudic canon. In the case of a woman pregnant with an illegitimate fetus, R. Yair Bacharch [Havot Ya'ir 31] was restrictive on public policy grounds, conceding that a lenient ruling might be justified if the letter of the law were the only relevant consideration. Jewish law does allow for policy strictures, but not for ideologically driven misrepresentations of the evidence, here evidence of the popular refusal to deal with or address the implications of the bArakhin 7a-b evidence. Furthermore, the Lichtensteinian position, that stricture is per se a quality of Torah ethic, while finding roots in Tosafot, does not seem to reflect the religion of sacred canon. After all, Nadab and Abihu were both extra strict and extra wrong. [Leviticus 10:1-7]

4. The self-understandings of the two Orthodox Judaisms that compete with each other, in pre-modern and in modern times

While taken in amazement with the creative, innovative, and dazzling apologias for the pro-life position, argued brilliantly by Rabbis Bleich and Lichtenstein, both nevertheless seem to arrive at their respective conclusions prior to their investigation of the data. Neither rabbi advocates a strict construction reading of the canonical law but both appeal to "morality," derived from culture bias, a self-defined "spirit of the law," and what appears to be culture conservative subjective taste. R. Lichtenstein also suggests that there is a normative morality that is beyond the halakhah that is nevertheless binding. Pro-life culture traditionalist Orthodox rabbis read the canonical documents as if their intuitions reflect God's intentions, and accordingly read the sacred canon selectively, finding in the Torah that ethic which they are programmed, conditioned, and expected to find, and will ignore and, in the case of bArakhin 7a-b, suppress facts, however canonical those facts may be, when those facts fly in the face of deeply revered sensibilities, self-evident intuition, and consensus social policy. According to the Orthodoxy encoded in the Oral Torah library, God transmitted a textual Torah book to all Israel but did not transmit a secret, private, hidden interpretation code entrusted only to a special self-select elite. By allowing the book/text of the Jewish sacred

canon to be superseded by policy driven poseqim, albeit with the best of intentions and moral instincts, pro-life Orthodox Judaism de jure claims that God's Torah, while divine and from Heaven, is transferred to their human hands and authority and is no longer in Heaven. According to the Judaism of the Oral Torah, only the Great Sanhedrin is invested with this power, and without this legislative/judicial institution, Torah is entrusted to all Israel and is read with literary and historical tools and with a public conversation, not with intuitive explanations bereft of review, dialogue, and persuasion.

The abortion debate has a long history in Jewish law. One Tosafist view allows abortion, and another does not, arguing that Judaism cannot be less strict than non-Jewish religions. The restrictive view is often cited, the lenient view is not. While to his abiding moral credit, Rabbi Feinstein unflinchingly cited and addressed the lenient Tosafist view. He argued from conjecture and without a shred of supporting evidence that the lenient view must be rejected because the Tosafist text is corrupt. Maimonides argues that the claim "Judaism must be stricter than other religions," is inadmissible, that Judaism’s canonical documents alone defines Judaism, and we do not spin texts in order to find what we wish to find. [Iggeret ha-Shemad] So for Maimonides, [1] Torah religion is about obeying God's law and not being reflexively strict, and we argue that [2] before one claims that a given text should be discarded because it is corrupt, that corruption must be identified and defined, and not merely proclaimed because the textual content conflicts with the interpreter's positions.

The pro-life Orthodox culture conservatives are what Professor Jeffery Gurock calls modernity "resisters," while the scientific modern Orthodox who are committed to a philological parsing of the canon, seek to "accommodate" modernity. For the former, Halakha is not primarily what the Jew must do, it is the lomdus/conceptualism that the rabbinic elite imposes upon the canon so that religious culture not change, the cohesiveness of Orthodox society not become unglued, and its leadership status not be challenged. But lomdus, or "learningness," is a term unattested in Israel's canonical library; it is an invented culture construct created to empower an exclusive rabbinic elite to monopolize the interpretive access to the canon in order to make theologically correct normative judgments. This elite is unabashedly and passionately opposed to the philological reading of the canon because, in the words of the late R. Ahron Soloveichik, academic, philological readings of the canon undermine "the sanctity of Torah." To this view, allowing public access to parse the divine word is a recipe for theological, communal, and sectarian anarchy.

Tellingly, ultra-Orthodoxy denies the “great rabbi” credential to modern Orthodox rabbinic elite rabbis simply because they are "modern." When determining religious legitimacy is ideas based upon political rather than exegetical considerations, it is power rather than persuasion that invests theologically correct ideas with normative, religious valence. Thus, being a "great rabbi" is determined not only by expertise and scholarship, but by politics, culture taste, and social policy. Thus, for Haredi Judaism, Rabbis Lichtenstein and Joseph Soloveitchik cannot be great rabbis because [a] they are Zionists and [b] earned secular doctorates in English and Philosophy, respectively. Furthermore, the reading presented here reflects the influence of Responsa Pisqei Ben Zion Uzziel 52, that has been ignored but not refuted by the popular rabbinic consensus. The Arakhin passage quoted above is in culture conservative Orthodox circles vocalized "erkhin" [sic]. According to Hebrew grammar, the singular erekh, value, in the plural becomes arakhin, not erkhin. And the form erkhin is also grammatically improper because were the form to exist--which it does not--it would be vocalized erkin, with a "k.” In order to condition its affiliating community not to read Israel's sacred canon philologically, like the early authorities, i.e., the rishonim, and in our time, R. Uzziel, there may be no applied study of grammar, syntax, semantics, or hermeneutics in culture conservative, pro-life, modernity resisting Orthodoxy. By obfuscating the tradition/masora of canonically correct Hebrew, the Tradition of canonical text is replaced with and is superseded by the "tradition" of culture conservatives who are singularly endowed to divine God's true intentions.

The other Orthodoxy, populated by the militant moderates of Modern Orthodoxy, are committed to philology because this Orthodoxy pines to hear and obey the actual voice of the living God as it is revealed in the Torah's living words. God did not entrust the Torah to any sacred synod of Torah sages, but to the collective of Israel, Morasha kehillat Ya'aqob. Maimonides ruled not based on human charisma, but the best reasoning based upon the best rendering of the canonical reading. Culture conservative modernity- resisting Orthodoxy prizes conformity in practice, dress, thought and attitude; the moderate militants of Modern Orthodoxy culture accommodators believe that God's unchanging principles apply to ever changing social realities. The culture conservative Orthodox looks to the sociology of the community and is therefore ironically similar to the Reconstructionist approach, which claims that ultimate religious normativity is grounded in social rather than in theological and covenantal concerns.
R. Ya'ir Bachrach [Responsum 31] ruled restrictively regarding the termination of a fetus conceived in adultery on policy grounds. Policy claims must persuade but may not intimidate. They certainly may not claim that their voice is God's voice.

God gave the Torah to "us," the collective called Israel, not to an elite, save the Great Sanhedrin; not to a clique, however convinced it may be by its self-selecting consensus, and not by partisans of any party. Like the statutes/mishpatim that are rational and are intended to persuade, we welcome conversation, not coercion, reason, not reproach, and ideas, not ideology.

The abortion debate within Orthodox Judaism reveals that there are two contenders for the mantle of Orthodoxy. The modernists read the sacred canon and its law literally, the Biblical and rabbinic narratives figuratively, and find God in the sacred text. Orthodoxy's culture conservatives read the law figuratively and the narratives literally so that critical thinking be suppressed, so that God's presence is transferred from the holy text to the holy person. The modernists read texts critically because they want to know how to think and practice; Orthodoxy's anti-modernists read their agenda into the canonical text because [1] the Jew is taught what to think and [2] challenging those who tell others what to think is akin to challenging God. Which version of Orthodoxy do you, the reader, believe to be the true seeker of God's will?