

Citizen-Souls; Translating a Jewish Understanding of Abortion from Algiers to America

By: Margo Hughes-Robinson

The main religious voice in the American discussion of abortion rights is not a Jewish one—the issue has famously been a rallying cry for the Christian Right since the late 1970s^[1]; by contrast Jewish Americans are, by religious affiliation, one of the most pro-choice groups in the country.^[2] While Judaism famously prizes the value of human life over almost all other halakhic obligations, permitting even the violation of many halakhot in order to save a life,^[3] and recognizes the commandment to “be fruitful and multiply”^[4] as the first mitzvah of the Torah, it is also understood that abortion is permitted within the scope of Jewish law, and that the life of a pregnant person is valued over that of the fetus.^[5] While many point to both rabbinic text and later halakhic discourse to emphasize the licit nature of abortion in Jewish law,^[6] the question may still be asked from an existential-ontological point of view: how might religious Jews articulate *why* the termination of a pregnancy is indeed ethical, and how might they voice this articulation not from a place that negotiates Christian notions of life at conception,^[7] but instead from a Jewish understanding? What are relationships of bodies, souls, and human beings in a procedure of medical abortion, and obligations do these subjects owe to one another?

Rabbi Yehuda ibn Ayyash^[8], *av beit din* of Algiers and author of several halakhic works including the 1748 collection of teshuvot known as *Beit Yehudah*, presents an argument in a teshuva concerning the permissibility of medical abortion that has radical implications for what may be deemed not only a Jewish legal perspective on the issue, but also a powerful articulation of how we might understand abortion ontologically: not only whether it may be performed, but what this procedure actually *is*.

In the first part of this article, I provide a complete and original translation of ibn Ayyash’s teshuvah. Ibn Ayyash not only presents a compelling argument in favor of the already extant practice of his community, i.e., of medically terminating pregnancies reasons beyond the scope of *pikuach nefesh*, and supports in his argument the notion that the evaluation of these appropriate circumstances are the right and responsibility of the pregnant person. Even more compelling than his ruling, however, is the framework ibn Ayyash presents for considering the legal and ontological status of the fetus, wherein he presents a conception of an ethical framework for the termination of a pregnancy that might be called uniquely Jewish when compared to a contemporary American legal discourse that often operates around loci determined by a Christian ethic. Ibn Ayyash is not alone in this articulation: while his halakhic and ontological consideration of “ensoulment” of an infant is deeply rooted in his spiritual and historical context, his articulation of female legal subjectivity and vision of legal rights guaranteed within a sphere of mutual obligation points ahead and even resonates within contemporary Jewish thinkers’ views on abortion, in particular that of Judith Jarvis Thomson and her well-known ethical parable of the “famous violinist,” as well as Ronald Dworkin’s

discussion of life's "dominion" and its attendant demand of rights for the *living* individual.

Holding both the parable of the violinist and the *Beit Yehuda* in concert, we may arrive at a new understanding of the existential-ontological "shape" of the Jewish conception of abortion—an interrogation of the system in which this ontology of abortion contextualized and defined.

A NEW TRANSLATION:

From 'She'eilot U'tshuvot' Beit Yehudah, part "Even haEzer," Siman 14

Rabbi Yehudah ibn Ayyash (1700-1761) was the av beit din of Algiers. One of the most famous North African rabbis of his era, his sphere of influence spanned the Mediterranean, from Morocco to Italy to Palestine. The Jewish communities of Algeria and Livorno were closely linked—Ayyash made an extended sojourn in the Livorno during his late-in-life move to Eretz Yisrael, and many of his works were published there, including the 1740 publication of the collection of rabbinic rulings in which this teshuva can be found, known as the "Beit Yehudah." Note that phrases (from this t'shuvah) are quoted or heavily referenced (or at least specific references made to this) in various places, e.g. Ronit Irshai's "Fertility and Jewish Law," and Rabbi Susan Grossman's 2003 teshuva for the Rabbinical Assembly on partial birth abortion, but this is first full modern translation from the Hebrew text (hyperlinked here).]

I was asked and searched my heart/intellect to examine and explore what I had heard about a small group of women who become pregnant and do not want to give birth again, and who do not want to remain pregnant any more [once they had already conceived]. And some of these women, if they become pregnant while nursing [another child] and they suspect the *ayin hara* [evil eye] or danger of the new birth to the living child, and they make a medication and drugs that are known to them to terminate a child, and he will become a *nefel*—a nonviable fetus.

It was [about this circumstance that I needed] to closely investigate, whether there was suspicion of an *isur* [prohibition] in this circumstance. It seems [initially] to me that there is no *isur* in this matter: while one who kills a fully gestated child [*literally, a child who "is known to have all his months"*] is held accountable, one who kills a *nefel* is not held accountable. This is just as we learn from the Rambam, z"l, (i.e. Maimonides, 1138-1204) in chapter 2 of the Mishneh Torah section entitled "Murderer and the Preservation of Life,"^[9] which says: "One who kills a major, or a minor even a day old, male or female, behold— he must be executed if them murder was deliberate, or exiled if he killed unwittingly." But if [a child] was born premature [*literally, "with less than nine months"*], behold: that child is like a *nefel* until he reaches thirty days of age. (This matter [is discussed] by the Rivash, in *siman* 447.^[10]) And we do not execute the one who kills a [premature] child within thirty days [of that child's premature birth].

And this is understood from a source taught in BT Niddah 44b in the chapter “Caesarean Births” [chapter 5], that anyone who kills a one-day-old baby is held liable [for execution or banishment]. And the Gemara explains: “as it is written^[11], ‘And he who smites any man mortally [“*kol nefesh*”]’ is liable...” This case is also brought in Tractate Sanhedrin, at the beginning of the chapter^[12] “The Strangled,” which agrees with the reasoning in Tractate Niddah: “Here we are dealing with a case where one is certain that its months of gestation were completed, and therefore it is certainly a viable newborn.”^[13]

And if not, here teaches the Rashbag, (Rabban Shimon ben Gamliel, d. 70 CE), that “any [prematurely-born child] who remains alive for thirty days are not [considered] a *nefel*. And according to this, we must say that here it is taught in the chapter^[14] of the “Stubborn and Rebellious Son” daf 72b, “But once his head has emerged during the birthing process, he may not be harmed in order to save the mother, because one life may not be pushed aside to save another life.” Here we have a case where an infant has completed all of its months of gestation, whereas here in our case [taken up by the teshuva] under discussion is a *nefel* who has not completed full gestation, and not lived thirty days post-birth.

And even though we say that here our sages disagree with that opinion of the Rashbag, in any case we rely upon the opinion of the Rambam, z”l, and we rely upon his *psak* [ruling]. And despite the fact that it is written there “when his [the infant’s] head emerges” at the beginning of the chapter [in Mishneh Torah 2:6] “The Murderer...”, it is necessary to state like what I have written, and that afterwards it seems to me that apparently for the duration of a period where a child is not viable, one who kills such a child is not liable [for execution or banishment]. Be that as it may, there is nothing that permits one to say in that in any case it is forbidden [to attempt an abortion]. Rashi (Rabbi Shlomo Yitzhaki, France, 1040-1050), comments on the first clause of this *braita*^[15]:

“With a woman that is experiencing difficulty giving birth and is in [mortal] danger. And it is taught in the first section [of this teaching], “the midwife extends her hand and cuts it up and extracts [the pieces];” as the entire time that that it has not gone out into the air of the world, it is not [considered] a soul, and [so] it is possible to kill it and to save its mother.”^[16]

Perhaps one would conclude that even though [the infant] does not have a *nefesh* until it is fully birthed [literally, “*it has emerged into the air of the world*”], it is not [permissible] to kill him unless to save the life the one [ie, the mother] with a *nefesh*; and that if this action does not save [the mother] it is forbidden to kill him. And indeed, this is what is written by the Tosafot^[17] in chapter “Four Deaths”^[18] on the lemma “there is nothing,”^[19] for it says there that “for [the killing of] a fetus, a non-Jew is liable,” as it was also taught there in BT Sanhedrin 57b, that “a descendant of Noah is executed even for [killing] fetuses.” And Rashi explains there that since he strikes the woman, and she lost her child, they are executed. And in the like case of a Jewish person, [he is not held liable] until [the child] is fully birthed, as we are taught that a killer is liable for even a

one-day-old infant. Here we are certain that this [refers to a case where the child] is not premature, and is not a *nefel*, and for the Israelite it is permitted. And indeed it is proven from that which was said in chapter 3 of Tractate Moed Katan, “that the one who throws his fingernails is called wicked, lest a pregnancy woman pass over them and miscarry.”^[20] One might conclude that someone who did not directly induce [a miscarriage] but rather caused it to happen, that this is forbidden. And [rather] they are called “wicked,” even though this is permitted.^[21]

And the text explains that “it is not permitted...etc.” Look over there, and indeed it is written by the Tosafot in tractate Chulin, chapter 2 daf 33a on the trigger word “a Gentile and an Israel may eat it,” and it is written by the Re’em^[22] z”l in his comments on parashat Mishpatim about the phrase “and a man strikes any person [literally *kol nefesh*]” (Exodus 21:22). And it does not say “a woman,” since they are not obligated in the commandment to be fruitful and multiply. And it is said in Tractate Shabbat in the chapter “Eight Creeping Things”^[23] that [a woman] is not warned that she will become sterile, and is permitted to drink a *kos shel ikarin*.^[24] For this reason, she is also permitted to drink a drug that will abort her pregnancy, for it [her fetus] does not have a *nefesh*. And we say because of this that in this case the life of the woman overrides [that of the fetus], and we [say this of a woman] who kills [a person] directly, and accordingly who sterilizes [another, presumably a man] directly, in that she is forbidden.... But to drink an abortive drug, this is like that case where she is permitted to drink a *kos shel ikarin*— since she is not touching a male member— and here too she is permitted. Here it is not that the reason for permitting depends upon the fact that she is not commanded in the commandment to be fruitful and multiply, and for that she is not commanded regarding sterilization. And this matter is [discussed] in the Tosafot regarding the word “and wasn’t it taught...”^[25]

What is the difference here? That the reason for the *isur* is due to the killing of a *nefesh*, and if so, if the drinking of a medicinal cup to miscarry was forbidden. Be that as it may, from the perspective of the rabbis a pregnant woman who is also nursing is permitted to drink what she is able in order to miscarry, since there is danger in bearing children, that even though the rabbis disagree with the statement of Rabbi Meir, (a student of Rabbi Akiva), in Yevamot 12b regarding the three women who may use a *mokh*,^[26] [which includes] a nursing mother, lest she wean her already-born child too early and he will die. And our sages understand that she may use it in her regular manner, and her ways are accepted here [ie, she should not use a *mokh* and instead engage in sexual intercourse in “typical” way]. In that case [in Yevamot] the principle that “G-d protects the simple”^[27] was particularly relied upon, but here [in the case of the women of this teshuva] there is suspicion about the pregnancy [and is potential for harm is acknowledged, and women are therefore permitted to ingest this medication].

Behold— we have before us exactly what everyone acknowledges [is an acceptable situation where an abortion would be permitted], to illustrate the danger to the [living] child, and [the mother] is permitted to drink an abortive drug, so it seems, according to my understanding of the issue— and may G-d instruct me in the straight path, and atone for my errors.

ANALYSIS:

A. When “Life” Begins

A primary question at stake in both ibn Ayyash’s *teshuva* as well as contemporary American discourse about abortion, is that of life itself: when does it begin? The binary presented by current political debate often centers around the moment of conception, or more liberally, the first trimester of pregnancy. As Dworkin deftly (and somewhat depressingly, as the arguments seems to have budged little in the almost thirty years since his book’s publication) summarizes in “Life’s Dominion,”

“One side thinks the fetus is already a moral subject, an unborn child, from the moment of conception. The other thinks that a just-conceived fetus is merely a collection of cells under the command not of a brain but only a genetic code, no more a child, yet, than a just-fertilized egg is a chicken.”^[28]

Classical rabbinic material approaches the binary of these questions with, instead, a spectrum of life during pregnancy. For the first forty days after conception, a fetus is considered *maya d’alma*, liquid.^[29] After this point, a fetus may experience a ontological ensoulment (although at least one amoraic source insists that this occurs only at birth^[30]), or at minimum, is deemed a solid legal being, and is regarded as a pregnancy.^[31]

However, this being is not yet described as a *nefesh*, a living person whose soul is bound up in the web of halakhic obligation. Rather, the loss of a pregnancy at this stage is addressed through the legislation of the kind of ritual impurity it imbues to the pregnant woman— it is her observance of a *niddah* practice (and by extension, the effect of her body and actions upon her sexual partner) that are under consideration, not the experience of the newly formed fetus.

As the fetus continues to develop, it is understood to contain within it the *nishmat ruach hayyim*,^[32] but is not a *nefesh*—that is to say, the fetus has been quickened with the ‘spirit of life,^[33]’ but does not have the legal status of a human being, a legal “soul,” until it is born. Up until the birth process progresses to the point where a child is at least partially out of the womb, the fetus is considered to be part of the body of the pregnant person, as stated in Tractate Gittin.^[34] The animality of the fetus’ status is further emphasized by the repetition of this assertion in relation to not just human fetuses, but also unlaid eggs of chickens^[35] and of fish^[36] elsewhere in the Talmud. Until birth, the fetus is not a legal soul, and therefore not yet bound in the web of halakhic obligation— noted early on in ibn Ayyash’s *teshuva* and frequently repeated through his argument that the status of a terminated pregnancy at any stage of gestation not as a *met*— a dead body that was once living— but rather as a *nefel*, a nonviable fetus.

B. Woman as Halakhic Actor

In this *teshuva*, from his 1746 collection known as the *Beit Yehuda*, Rabbi Yehudah ibn Ayyash explores the halakhic and spiritual ramifications of what today would be called medical abortion— a procedure where a pregnant person ingests an abortifacient medication to terminate a pregnancy. Significantly, ibn Ayyash notes in the first few lines of this *teshuva* that this procedure is already being performed in his community by a number of women, and they have not asked him for permission. Rather, he is aware of the ongoing practice, and has been asked to “search his heart” regarding whether or not this procedure is actually licit, or is in fact forbidden.

Ultimately, ibn Ayyash affirms the practice of his community, ruling that a procedure of medical abortion is permitted not only in circumstances of immediate maternal danger, but also in situations where a woman is concerned about the effects a pregnancy will have on a child she is already nursing, as well as even in situations where she experiences a psychological concern about pregnancy, voiced through a fear of the *ayin hara*.^[37] To draw this conclusion, the *Beit Yehudah* explores several threads of halakhic argument from both Talmudic and medieval sources. At play are issues of commanded reproduction and liability for murder, as well as theological concerns about ensoulment and a question of what is actually destroyed when a pregnancy is terminated.

The *Beit Yehudah* handles the halakhic issue regarding the overall permission of abortion deftly— although he is careful to examine the Talmudic sources supporting his claim, he makes it clear that he relies upon the Rambam’s assertion in the *Mishneh Torah* that one who terminates a pregnancy is not liable for murder. The issue of whether or not a woman is permitted to prevent a pregnancy is slightly more complicated: while women are not understood to be obligated in the commandment to “be fruitful and multiply” and are permitted to ingest medication that carries risks of infertility,^[38] there is significant halakhic concern over any action that serves as a barrier to semen (a concern raised in Jewish discourse as early as Genesis 38). While ibn Ayyash makes reference to this concern with his quotation of the Talmudic discussion in Tractate Yevamot, which examines the situations where women might seek to use a barrier method of birth control due to their concern about their body’s ability to bear a pregnancy,^[39] this concern is dismissed by Rabbi Meir and later, by the communal voice of the sages, as being inconsequential. Women with this concern, the text insists, should engage in sexual intercourse without a barrier and should instead rely upon the Almighty for safety in the subsequent pregnancy, quoting the book of Psalms, “The Lord preserves the simple.”^[40]

Rabbi ibn Ayyash, however, takes a decisively different tack away from the conversation in the Gemara, rejecting the argument that the “simple” will be preserved and instead rooting his analysis in the lived experience of pregnant people, listening to their concerns about their bodies and their families. While the Talmudic conversation centers itself around the hypothetical needs of three straw-women who fear the *potential* harm of pregnancy^[41], ibn Ayyash draws his readers’ attention to the material harm present in his community: this practice is ongoing, which assumes that there already have existed and continue to exist real pregnant people who are concerned about the impact of their

pregnancies on their health, or on the health of their living children, and who have subsequently sought out medical abortion as a solution.

What is most striking in this *teshuva* may be not what ibn Ayyash says, permitting mothers to terminate pregnancies out of concern for the needs of their unweaned children, but what (in comparison to our own contemporary American conversation) is missing. Nowhere in this *teshuva* is a mention of the pregnant woman's partner, and his desires. Nowhere too, in this text, is the woman required to consult with any rabbinic authority in order to validate her concern for the well-being of her living child for her to be able to make this decision. This is in striking contrast to the clear requirements declared by rabbinic authorities concerning questionable stains from vaginal discharge and adjudicating *niddah* status, where menstruants are required to consult with rabbis for resolutions determining the state of their ritual fitness.^[42] While a woman may generously be "deemed credible"^[43] regarding the "evidence" she brings before her local rabbinic authority, the Talmud establishes the norm that it is the rabbi who accredits her evidence.

What is required of a pregnant person in the situations that ibn Ayyash outlines in his *teshuva*, however, is only her knowledge of how to prepare this medication, and her conviction that it is an appropriate action. While it may be argued that this agency is compromised by the fact that it is arbitrated on the page of the *teshuva* by their *mara d'atra*, ibn Ayyash understands the women in his community to be halakhic subjects in these cases, and not objects (as the fetus is, having not yet been ensouled as a *nefesh*). A woman need not ask permission to proceed with a medical abortion in this situation: rather, it is her own apprehension of the situation that creates the permission for her to proceed.

ibn Ayyash's expansion of the reasons that a pregnant person may desire to terminate a pregnancy to include concern for the welfare of a nursing child, while not by any measure nor anachronism to be called "feminist," is compelling in the ways that ibn Ayyash brings to bear both ancient and extant rabbinic assumptions about the halakhic purview of women. While the Talmud acknowledges that a nursing woman may *theoretically* wish to avoid pregnancy in order not to impact the nursing experience of a living child,^[44] ibn Ayyash acknowledges that a nursing mother who has already become pregnant is permitted to have an abortion. The great demands of child-rearing were additionally invoked by both influential Sepharadi^[45] and Ashkenazi^[46] rabbis of the past century in order to emphasize the "special nature" of women that precluded them from obligation in many time-bound positive commandments, thereby rendering adult Jewish women and people of other genders more often *objects* of halakha—those who are legislated *about*, rather than legislated *for*—than their male counterparts. In contrast, ibn Ayyash's positioning of the law makes it such that it is a mother's particular emotional and bodily involvement in her nursing child's life and needs that renders her permitted to terminate her pregnancy. Her embodied understanding of the issues at stake, as well as her obligation to the *nefesh* at her breast, render her uniquely able to make a decision to take an abortifacient; the same social conditions and experiences that motivate other halakhic authorities to exclude mothers and their subjectivity from the Jewish legal sphere enable

these same women, in this context, to make essential decisions for their health and for their families.

C. A Network of Obligation

While Dworkin frames his discussion about the legality of abortion in an American sphere as one of “rights and interests”^[47] afforded to both the fetus and its mother, a halakhic worldview asks its actors and arbitrators to consider law and its praxis as a web, what might be called a matrix of obligation— a sphere within which accountability and mutual liability can be understood and legislated. To speak of “rights” is to insist upon an inherent, univocal *correctness* stemming from the inalienable nature of a human being, or at least of a citizen. Within a halakhic sphere, however, an actor is either *permitted* or *forbidden*^[48] to engage in specific praxis, based upon their positioning within the matrix of obligation; a matrix which is subject to multiple viewpoints by arbiters who are themselves bound within the system, where each move within the sphere of accountability mirrors a greater web of more ultimate obligation to the Divine.

As explored above, the Jewish legal sphere of accountability that surrounds the pregnant person and the fetus is tightly woven. Rabbi ibn Ayyash explores this sphere in detail— indeed, it comprises the majority of the *teshuvah*’s body, even before the question of *kos shel ikarin* is ever raised. A non-Jew or a Jewish person who harms the pregnant person and causes a miscarriage is (albeit differently) accountable for the damage caused by making the fetus a *nefel*. So too, the person who indirectly creates the circumstances that cause a miscarriage is held culpable, though in a less severe manner than the aforementioned characters. A fetus is also bound halakhically to its mother in the case that it poses risk to her health, whereupon the Rambam understands the fetus to be a *rodef* [i.e. one who chases after a potential victim with an intent to cause harm], whom the mother may kill.^[49] The halakhic binds upon the fetus, however, are unidirectional. As a being with the potential to become a *nefesh* but who is not yet ensouled with legal personhood, the fetus can make no demands in this way upon its mother— she is not obligated towards her fetus, who has not yet passed via birth into the halakhic sphere of obligation and mutual accountability. As the only operant halakhic actor in the relationship, she can extend obligation onto the world around her, but the unformed legal soul cannot yet make the same demands on its own behalf.

Judith Jarvis Thomson, herself a descendent of prominent Ashkenazi rabbis (and whose Czech Catholic mother met her father at a socialist summer camp)^[50] describes in her famous 1971 essay “A Defense of Abortion” what is perhaps her most well-known analogy exploring the morality of abortion, that of the “famous violinist.” In her ethical parable, a reader is asked to imagine herself to be suddenly awakened in a hospital setting, where the Society of Music Lovers have kidnapped her, and are using her kidneys and circulatory system to preserve the life of a famous violinist. In this situation, asserts Jarvis Thomson, *a person cannot be compelled to preserve the life of the another*; and could detach herself from the wires and tubes secured to their body, leaving the famous violinist in jeopardy.^[51]

Reading the teshuva of Yehudah ibn Ayyash, it appears that at least one ‘early Modern’ voice in Jewish legal discourse takes this assertion one step further: not only can a pregnant woman not be compelled (a situation he references through the statement of Rabbi Meir, but rejects), but she is in fact permitted to electively terminate her pregnancy when it impacts her wellbeing or the wellbeing of those closest to her.

THE NATURE OF ABORTION

Late twentieth century American ethical thinking may rightly answer back to a rabbinic framework that the extension of an animalian legal status to a fetus right up until labor, and a halakhic system that permits late-term abortions and D and X surgeries brings with it its own questions that are difficult to stomach. Thomson makes this issue explicit:

“...to choose a point in this development and say “before this point the thing is not a person, after this point it is a person” is to make an arbitrary choice, a choice for which in the nature of things no good reason can be given...Similar things might be said about the development of an acorn into an oak trees, and it does not follow that acorns are oak trees, or that we had better say they are.”^[52]

It may indeed be correct that in a secular worldview, the notion of a fetus’s “life” and when it begins is an arbitrary notion— and in the lived experience of many pregnant people and expectant families, notions of a living fetus to which its parent(s) and the legal system are obligated are wrapped up in both deep feelings and a wide variety of encounters with the spectrum of fetal viability before and after birth. But within a worldview proscribed by halakhic action, the notions of “life” and what Dworkin terms “the *character* of abortion^[53]” and when it begins is not only a legal question, but a profoundly ontological one.

Animated by ibn Ayyash’s halakhic navigation is this same ontological question: within a halakhic context, what is an abortion? While he (and most halakhic discourse) make it plain that a fetus does not qualify as a *nefesh*, an ensouled being, the language of the teshuva suggests that a fetus still experiences a kind of death during the termination of a pregnancy: the question for the teshuva’s first section is not whether or not this being is killed, but rather if a halakhic actor (the pregnant woman, a man who hits her, or even a person who throws his fingernails astray where they may induce miscarriage) is *liable* for that killing. In a bifurcated contemporary discourse around abortion, where reproductive agency is often coded as a question of “choice”, and a theological discussion of when “life” begins dominates religiously-inflected legal policy, it can be difficult to map the halakhic narrative around the permissibility of abortion onto a present-day theological articulation in support of reproductive agency.

Legally, abortion is understood in halakha *not* to be murder. However, a fetus has within it the breath of life, the animating and animalian spirit that may be called a *neshama* or *ruach chayim*. As is clear in ibn Ayyash’s writing, that fetus dies when a pregnancy is

terminated— the *neshama* is separated from its body, and the fetus becomes a *nefel*. Legally (and it follows, ontologically) this being is not a person, precisely because it is not able to demand accountability on its own behalf. While rabbinic literature is rife with descriptions of the fetus as a pre-person,^[54] and even one with a particular relationship to the Divine that voids (or at the very least, supersedes) the body of the mother,^[55] it may be argued that this is less an exploration of ontological reality and instead a literary exploration that is only available to the sages because of the fetus' lack of *actual* life and personhood.

The (unmistakably male, as he appears in rabbinic literature) fetus can only be so metaphorized because he is unable to be “real,” i.e., a halakhic actor. As feminist scholar Renita Weems has emphasized, patriarchal control of women allowed for male authors of the prophetic Biblical texts to not only experience power over women, but to translate that dynamic of power into the spiritually potent metaphor for the relationship between God and enfranchised men.^[56] The women of biblical prophetic narrative are not enfranchised as actors within the culture that produced these texts, and may be read not as “real” women, but instead metaphoric expressions of the biblical male self in the guise of the patriarchal relationship.

A pregnant person, on the other hand, is both a legal *nefesh* and a halakhic actor. Once it is established (and reaffirmed, through centuries of Jewish legal discourse from Algiers to New York City) that her termination of her pregnancy is licit, her abortion is fundamentally about *her*. It is she who makes the decision, about a pregnancy that is gestating within her and is understood to be part of her own body. While not fully enfranchised as halakhic citizens, women are within this system considered to be separate human beings and therefore, halakhic actors— not just as objects of metaphor. The fetus, on the other hand, has no legal personhood, and was often explored within midrashic narrative as a sort of platonic ideal of the rabbinic man.^[57] The more one becomes a legal player in the real world of halakha, it seems, the less one is vulnerable to the textual metaphorizing impulse.

CONCLUSION:

To make it plain, the fetus is no more and no less than the embodied property of the pregnant person. Her own juridical identity as a pregnant person— and, in the case of ibn Ayyash's nursing mother, as the caretaker and nourisher of a very vulnerable and dependent *nefesh*— requires her to steward the *neshama* within her according to the values of life affirmation and avoidance of unnecessary destruction, not only because of the extraordinary communal investment, both metaphorically-spiritually and actual,^[58] of the Jewish community within her sphere of accountability, but because this is also her obligation in all actions that she takes with her body, for whom she— as a *nefesh*— is accountable to God. While, as Ayyash readily demonstrates in his teshuva— Jews and non-Jews alike can be held responsible for physical harm done to a pregnant woman that induces a miscarriage, it is not because the abuser is obligated to the gestating fetus. Instead, the hurt done is to the mother— it is the adult Jewish woman to whom the

assailant is accountable, and who is acknowledged as harmed. Because the actions taken by an adult pregnant person involve only one enfranchised member of the Jewish legal matrix of obligation (the fetus, yet to be legally ensouled, is excluded from this system), the woman who chooses to take an abortifacient is not under the same halakhic scrutiny that dictates so many other aspects of her embodied Jewish experience. As a menstruant, her body is subject to heavily legislated practice lest she transfer *tumah* to a sexual partner. Her vows^[59], her dress^[60], and her marriage^[61] are frequently restricted and under the purview of extensive rabbinic attention in part because they affect the status and praxis of the men in her life— while these actions are intensely hers to make, the sages are extremely sensitive to the ways in which those actions will affect other *nefashot* who are in her sphere. In short, an abortion is a matter of *her body*, *her choice*, because the fetus is question is not only not a person, but is, legally and ontologically, *her body*.

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Notes

1. [See Politico article on The Real Origins of the Religious Right ↑](#)
2. [See VICE article on The Argument for Abortion as a Religious Right ↑](#)
3. BT Avodah Zara 27b ↑
4. Genesis 1:28 ↑
5. Mishnah Oholot 7:6 ↑
6. The issue of abortion's legality within a halakhic framework is most excellently characterized in Rabbi Susan Grossman's 2003 *teshuva* which ruled that partial-birth abortion and "d and x" procedures are acceptable within the scope of Jewish law. For additional background, see David M. Feldman, "This Matter of Abortion," ch. 9, *Health and Medicine in the Jewish Tradition. L'Hayyim – to Life* (New York: Crossroad, 1986), and see the discussion of Israel's abortion laws in ["Her Pain Prevails" by YM Barilan in Cambridge Press' Journal of Law and Religion. ↑](#)
7. As Feldman notes: in canon law and in broader Catholic thought, the soul is thought to be placed inside of the fetus at conception— a soul that requires redemption through baptism. Through this lens, termination of a pregnancy at any stage runs the risk of condemning an unredeemed soul to hell. This is obviously not an operative view of in the broader Jewish conversation about abortion. ↑
8. Yehudah ibn Ayyash is referred to by a number of different names and spellings, e.g. "Ayyāsh", "Ayash", and "Judah Ayash"; I am following this particular spelling in this piece for both diacritic clarity and to reflect the pronunciation and spelling used by many Sepharadi communities in Hebrew and Arabic. ↑
9. Maimonides, Moses. *Mishneh Torah: Sefer Nezikin (Injuries: criminal and tort law). Hilchot Rozeah Ushemirat Nefesh 2:6*. Roma, 1470. ↑

10. The 518 teshuvot of Rabbi Isaac ben Sheset (1326-1408, Spain) were published in Constantinople in 1546 [↑](#)
11. Leviticus 24:17 [↑](#)
12. BT Sanhedrin 84b, chapter 10: “These are the Ones who are [liable to be] Strangled” contains a discussion of the differences between the Torah’s use of “anyone who strikes an *ish*,” and “anyone who strikes a *nefesh*.” [↑](#)
13. BT Niddah 44b [↑](#)
14. BT Sanhedrin Chapter 8: “The Stubborn and Rebellious Son” [↑](#)
15. A *braita* is a statement within the Babylonian Talmud, attributed to a sage from the tannaitic era (c.10-220 CE) [↑](#)
16. Rashi on the phrase “*yatza rosho*” in Sanhedrin 72b [↑](#)
17. the collective writings of scholars in Ashkenazi during the generations after Rashi [↑](#)
18. BT Sanhedrin Chapter 7: “Four Deaths” [↑](#)
19. *Leika miyadam*, “there is nothing permitted to a Jew and forbidden to a Gentile”, BT Sandhedrin 59a [↑](#)
20. BT Moed Katan 18a. Ie, the person who does this is called wicked, but is not liable for murder even though his actions caused a miscarriage. The line between folk magic and practices (like the concern that toenail clippings could indirectly induce a miscarriage) and recognized medical intervention (such as the drinking of a “*kos shel ikarin*” to induce sterility) was blurrier in the ancient world than in contemporary law. Outside the scope of this essay, there exists a larger question of how to best translate this nuance into a modern ethical framework that accounts for the medical efficacy of prescribed practices. [↑](#)
21. The sages here understand this action that, while technically permitted within the scope of Jewish law, should *not* be undertaken, and so designate it as “wicked.” They disprove of the action even though they cannot enforce punishment for one who makes such a choice. [↑](#)
22. Rabbi Eliyahu Mizrahi, (1455-1526/1526, Constantinople), in his supercommentary of Rashi’s commentary on the Exodus 21:22 [↑](#)
23. BT Shabbat chapter 14, entitled “Eight Creeping Things” [↑](#)
24. Discussed in BT Shabbat 110a, a *kos shel ikarin* is a kind of medicine for jaundice and for treating a *zava*, and while effective was known to sometimes cause infertility. [↑](#)
25. Tosafot on BT Shabbat 110b [↑](#)
26. In BT Yevamot 12b, three categories of women may use an absorbent cloth to prevent pregnancy: a minor bride, a pregnant woman, and a nursing woman. Rabbi Meir asserts that a “minor” belongs to the specific age of eleven years old and a day to the age of twelve years old and a day. [↑](#)
27. Women should not fear pregnancy that they have reason to believe would harm them, the Gemara says in Yevamot, because “G-d protects the simple” [↑](#)
28. Dworkin, “Life’s Dominion,” pg. 10 [↑](#)
29. BT Yevamot, 69b [↑](#)
30. Genesis Rabbah 34:10 [↑](#)
31. Mishna Niddah 3:7 [↑](#)

32. Yad Ramah on BT Sanhedrin 72b [↑](#)
33. This phrase is associated not with specifically human life, but is also used in respect to animals– the removal of a *neshama* results in the death of an animal, see YT Bava Kama 6a [↑](#)
34. BT Gittin 23a [↑](#)
35. BT Chullin 58a [↑](#)
36. BT Chullin 64a [↑](#)
37. In this, his opinion is regularly cited as more protective of a pregnant person's choice than other poskim. See Irshai's "Fertility and Jewish Law" for further discussion. [↑](#)
38. BT Shabbat 110a-b [↑](#)
39. BT Yevamot 12b [↑](#)
40. Psalms 116:2 [↑](#)
41. From BT Yevamot 12b: It is acknowledged that a minor, an already-pregnant woman, and a nursing woman who engage in sexual intercourse may not wish to become pregnant (the text does not seem to correlate already gestating a fetus as a state that makes a second pregnancy impossible) because of the impact to themselves, their fetus, or their nursing child. [↑](#)
42. Even when they know the law better than the rabbinic authorities present, as explored in BT Niddah 20b with an episode concerning Yalta, the wife of the exilarch. This particular dynamic has been discussed at length by scholars including Rabbi Dr. Gail Labovitz ["Rabbis and 'Guerrilla Girls': Thematizing the Female (Counter) Voice in the Rabbinic Legal System." *Journal of Textual Reasoning*, vol. 6, no. 2, Mar. 2011.] and Dr. Charlotte Fonrobert in her book *Menstrual Purity* (Stanford University Press, 2000.) [↑](#)
43. BT Niddah 20b [↑](#)
44. BT Yevamot 12b [↑](#)
45. Rav Ben-Zion Uziel (Jerusalem, 1880-1953): "It seems to me that the reason that [women] are exempt is that by their nature and the essence of their role in life, they are subject to spending their time running their households and raising and dealing with their children, and their time is not theirs." (*Responsa Mishpetei Uziel*, IV, *inyanim kelaliyim* 4) [↑](#)
46. Rav Moshe Feinstein (1895-1986, born in Belarus, died in New York): "And that which the Torah exempted women from time-bound positive commandments... for the majority of women in the world are not rich and they have the responsibility of raising the children, which is the most important work for the sake of God and the Torah. Similarly, God implanted in the nature of all the species of animals that the females should raise their young, and even the human species is not excluded from this rule, for women are more naturally fit to raise children. So it was for this reason that the Torah was lenient in exempting them from the obligation of learning Torah and from time-bound positive commandments." (*Iggerot Moshe, Orach Chayyim*, IV, 49) [↑](#)
47. Dworkin, *Life's Dominion*, pg.12 [↑](#)
48. or even, as we have seen in BT Moed Katan 18a, an actor may in some cases may engage in an action that is designated as *permitted, but socially unacceptable*.

- While carelessly discarding one's fingernails (and thereby perhaps indirectly inducing a miscarriage) is considered "wicked," a pregnant person who terminates their pregnancy is not branded with the same appellation. While the rabbinic community's social stigma surrounding the termination of pregnancy is outside the scope of this piece, it is notable that both the Talmudic voices and ibn Ayyash approach this subject with a very different social register than American discourse today. [↑](#)
49. *Hilkhot Rotzeach Ushmirat Nefesh* 1:9. This position is also found in the Talmud itself, in BT Sanhedrin 72b [↑](#)
 50. See [the Jewish Women's Archive on Judith Jarvis Thompson](#) [↑](#)
 51. *Ibid.* [↑](#)
 52. Jarvis Thomson, J. (1971). A Defense of Abortion. *Philosophy and Public Affairs*, 1(1). doi:<https://spot.colorado.edu/~heathwoo/Phil160,Fall02/thomson.htm> [↑](#)
 53. Dworkin, "Life's Dominion," pg. 9 [↑](#)
 54. Leviticus Rabbah 14:2– the womb is likened to a prison in which the fetus is cared for by God before ultimately being release [↑](#)
 55. BT Sotah 31a– "And it is really so– could the fetuses not see [the miracle of the red sea]? Rabbi Tanchum says, '[their mothers']]stomach[s] were transformed for them like crystal, and they could see.'" [↑](#)
 56. Weems, Renita J. *Battered Love: Marriage, Sex, and Violence in the Hebrew Prophets*. Fortress Press, 1995. pp. 65 [↑](#)
 57. See Gwenn Kessler's "Famous Fetuses," pg.185; particularly the way that the fetal patriarchs are imagined to play out notions of identity and difference [Kessler, Gwynn. "'Famous' Fetuses in Rabbinic Narratives." *Imagining the Fetus*, 2008, pp. 185–202.] [↑](#)
 58. This anxiety may be observed in relation to both the post-Holocaust Jewish population and American rates of intermarriage in Rabbi Elliot Dorff's "Halakha (Jewish Law) in Contemporary Judaism," within *Judaism: A Compendium*, Vol. 3, pg. 54 [↑](#)
 59. BT Nedarim 3a [↑](#)
 60. BT Bava Batra 57b [↑](#)
 61. BT Yevamot 20a [↑](#)

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