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A SUPREME LEAK: ABORTION RIGHTS (AND WRONGS)

Adapted from the writings of Dayan Yitzhak Grossman

ROE V. WADE AND ITS DISCONTENTS

The recently leaked draft of Justice Samuel Alito's proposed majority opinion in *Dobbs v. Jackson Women's Health Organization*, potentially one of the most important and consequential Supreme Court rulings in a generation, declares:

We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision...

Roe was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division. It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.

Major national Orthodox Jewish organizations have often been ambivalent about efforts by the anti-abortion movement to ban abortion. On the one hand, there is a unanimous consensus that the Torah generally forbids abortion, and that "abortion on demand" is prohibited, but on the other hand, if the more extreme elements

of the anti-abortion movement get their way, abortion might become legally prohibited even in circumstances where it is permitted and even mandated by the Torah. As the Orthodox Union stated in reaction to the leak:

The Orthodox Union is unable to either mourn or celebrate the news reports of the U.S. Supreme Court's likely overturning of *Roe v. Wade*. We cannot support absolute bans on abortion—at any time point in a pregnancy—that would not allow access to abortion in lifesaving situations. Similarly, we cannot support legislation that permits "abortion on demand"—at any time point in a pregnancy—and does not confine abortion to situations in which medical (including mental health) professionals affirm that carrying the pregnancy to term poses real risk to the life of the mother...¹

Agudath Israel of America has previously adopted a similar stance:

Jewish tradition teaches that a human fetus has status and dignity; and that termination of

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¹ Statement by the Union of Orthodox Jewish Congregations of America on US Supreme Court's Potential Overturning of *Roe v. Wade*, May 3, 2022.

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PARSHAS EMOR A BLEMISHED OFFERER

Excerpted and adapted from a shiur by
 Rav Moshe Yitzchok Weg

Speak to Aharon, saying: Any man of your offspring throughout their generations in whom there will be a blemish shall not come near to offer the food of his G-d.

Vayikra 21:17

A kohein may not offer a *korban* as a *ba'al mum*, and the same applies to a non-kohein offering *korbanos* on a *bamah* (temporary *mizbei'ach*) in earlier times (Zevachim 116a). May a non-Jew (who in principle is permitted to offer a *korban* even today on a *bamah*) bring a *korban* as a *ba'al mum*?

The Midrash Tanchuma says that No'ach was injured by the lion on the *teivah* during the flood, so the *korbanos* offered after the flood (Bereishis 8:20) were brought by his son Sheim. This implies that a non-Jewish *ba'al mum* may not offer *korbanos*. But the Gemara (Sanhedrin 105a) says that Bil'am was lame, yet he brought *korbanos* (Bemidbar 23:4).

The Rogatchover Gaon answers that "*vayei'lech shefi*" (Bemidbar 23:3) means that Bil'am walked normally, concealing his limp. Since the *mum* was not noticeable, perhaps it would not be disqualifying.²

A second answer is that a non-Jew who is

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¹ See Zevachim 115b-116b.

² The Rogatchover says that although Bil'am also was blind in one eye, that happened later.

Q&A from the
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Case Law

Q During Shacharis, after removing my tefillin from their plastic cases, may I prop up my siddur on the cases to daven?

A Tefillin, mezuzos, and sifrei Torah have *kedushah*, and their bags and cases are thus defined as *tashmishei kedushah* (accessories of holiness), which may not be used for mundane purposes. As the Shulchan Aruch (O.C. 42:3) says, "A cloth that was designated to wrap tefillin permanently and was then used to wrap tefillin even once, may not be used to wrap money."

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pregnancy raises profound moral concerns. Agudath Israel accordingly has urged the Supreme Court to reconsider its holding in Roe v. Wade and supports legislation that restricts abortion on demand. At the same time, in line with its support for religious freedom, Agudath Israel opposes initiatives that would make abortion unlawful even in situations where termination of pregnancy is mandated by religious law as it is, for example, under Sinaitic Jewish law when the pregnancy endangers the life of the mother.²

BLACK, WHITE, AND GRAY

Unfortunately, however, some Orthodox organizations and individuals, in their entirely understandable zeal to repudiate the liberal doctrine of a woman's absolute right to choose, have occasionally exaggerated or oversimplified the Torah's opposition to abortion. In actuality, there are a number of major halachic authorities (including R' Yaakov Emden, R' Shneur Zalman Fradkin (the Toras Chessed of Lublin), and R' Eliezer Yehudah Waldenberg (the Tzitz Eliezer³) who do allow abortion in certain limited circumstances where the mother's life is not at stake. (See R' Yehuda Dovid Bleich's 1968 *Tradition* article, "Abortion in Halakhic Literature.") Although these may constitute a minority faction, their position is taken seriously by many important recent authorities, as we shall *iy"H* discuss in a follow-up to this article.

The Torah discussion of abortion comprises two closely intertwined groups of questions, one theoretical and conceptual, the other practical and concrete:

1. What is the basis and rationale for the prohibition of abortion? In particular, does abortion constitute murder, or is it only

prohibited on other, less stringent grounds? Is the prohibition Biblical or Rabbinic?

2. Under what circumstances is abortion permitted? It is unanimous that it is permitted in order to save the mother's life, but under what circumstances, if any, short of that is it permitted?

These two groups of questions are, of course, tightly coupled: If abortion is murder, and more generally, if it is prohibited *mide'Oreisa*, then it is much more difficult to justify on any grounds other than the need to preserve the mother's life. If it is not murder, and certainly if it is only Rabbinically prohibited, then it is much easier to argue that other exigent circumstances can also justify abortion.

In the remainder of this article, we consider the former questions; in a follow-up article, we will *iy"H* consider the latter.

IS ABORTION MURDER? IS IT PROHIBITED *MIN HATORAH*?

As we have indicated, the fundamental question in the Torah-based discussion of abortion is whether it constitutes murder or not, and whether the prohibition is Biblical or Rabbinic. Numerous authorities insist that it does constitute murder and is Biblically prohibited, for both Jews and non-Jews.⁵ One of the most important and prominent exponents of this view is R' Moshe Feinstein, who is quite emphatic about it.⁶

While there is also a significant opinion that (for a Jew) it is not murder and only Rabbinically prohibited,⁷ the most prominent defender of which is the Tzitz Eliezer,⁸ the consensus seems to reject the view that it is only Rabbinic.⁹ As R' Aharon Lichtenstein declares (in an essay originally delivered orally at the Knesset as an expert opinion¹⁰):

In my opinion, we should not grant this opinion (that the prohibition of abortion is entirely

² National Public Policy Position Paper. Agudath Israel of America. Cf. R. Avrohom Gordimer. Sorry, Liberal Jewish Leaders—Judaism Is Not Pro-Abortion. *Cross-Currents*. Sep. 12, 2021; R. Yaakov Menken. Another pre-Yom Tov Response. *Cross-Currents*. Sep. 27, 2021.

³ R. Elli Fischer enumerates a list of "Modern halakhists who permit abortion in cases where mother's life isn't threatened" here, although some of the entries are not entirely accurate. He includes Shu"t Maharit *cheilek 1 siman 97*, but while Maharit does indeed rule (in *siman 99* *ibid.*) that it is permitted to perform an abortion "for the need of the mother," many *Acharonim* argue that the implication of *siman 97* is otherwise, and there is accordingly considerable debate over whether Maharit in *siman 97* was retracting his leniency of *siman 99*, and additionally over whether the dispensation of "the need of the mother" in *siman 99* indeed extends (as a simple reading of Maharit's language admittedly indicates) even to the case where the mother's life is not in danger, or is limited to where it is (see the sources and discussion in Shu"t Yabia Omer *cheilek 4 E.H. siman 1 osios 7-8*). Rav Fischer includes Shu"t Rav Pe'alim E.H. 1:4, but while the Rav Pe'alim does cite the lenient view and accordingly concludes that there is basis for leniency, he repeatedly qualifies that he is "unwilling to respond in the form of *hora'ah*, neither to prohibit nor to permit," and that he is not revealing his opinion.

⁴ R' Yehuda Dovid Bleich, Abortion in Halakhic Literature, *Tradition* Winter 1968 Issue 10:2.

⁵ See, e.g., the numerous sources assembled in Yabia Omer *ibid.* (in particular *osios 5 and 8*).

⁶ Shu"t Igros Moshe C.M. *cheilek 2 siman 69 and siman 73 os 8*.

⁷ Shu"t Eruvas Shmuel *siman 14 s.v. Uvazeh meyushav*; Shu"t Chaim Veshalom (*cheilek 1*) end of E.H. *siman 40 s.v. Ki chein ha'oleh*. Toras Chessed (*cheilek 2 E.H. siman 42 os 31*) argues that this is the position of a number of *Rishonim*. Shu"t Maharash Engel *cheilek 7 siman 170 os 2* states that "there are many opinions" that abortion (for a Jew) is only Rabbinically prohibited, and in *cheilek 5 siman 89* he invokes this opinion to recommend that where an abortion is necessary to preserve the life of the mother, it should be performed by a Jew rather than a non-Jew, since for a Jew "there are many leniencies." Cf. Sdei Chemed, *Ma'areches Ha'alef-Klalim*, Pe'as Hasadeh *os 52*; Rav Bleich *ibid.* pp. 76-77.

⁸ Shu"t Tzitz Eliezer *cheilek 7 siman 48 os 8 #3; cheilek 8 siman 36*.

⁹ See Yabia Omer *ibid.* *os 8*.

¹⁰ See Alan Jotkowitz, "Halakhah Loved Not The Parents Less, But The Child More": R' Aharon Lichtenstein on Abortion. *Tradition 47:4* (2015) p. 140 n. 9.

does not specifically list bringing a *korban* as a *ba'al mum*, it seems that this is included. If so, perhaps No'ach was an exception to the rule for other reasons.³

³ It is possible that both Jews and non-Jews bringing *korbanos* before *Matan Torah* had to be firstborns, who were appointed to offer *korbanos* before the Lev'im replaced them following *cheit ha'eigel* (see Keren Orah to Zevachim 115b, who may hold this way). No'ach was therefore disqualified due to his injury, but later non-Jews may not have had this requirement.

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The Mishnah Brurah (*ibid.* 13) notes that not only is a mundane use forbidden, but so is a lower-level holy use, like storing a siddur in a tefillin bag, as a siddur's *kedushah* is lower than that of tefillin. Therefore, your tefillin cases, which are *tashmishi kedushah*, may not be used to prop up your siddur.



RAV ARYEH FINKEL

Even the cloth tefillin bag should preferably not be used to prop up a siddur. Some *poskim* (see Biur Halacha 34:4) don't consider the bag *tashmishi kedushah*, because today tefillin are placed in cases, which are then put in the bag, rather than being placed in the bag directly. Others do consider it *tashmishi kedushah* because the *retzuos*, which are not covered by cases and are directly covered by the bag, have *kedushah* (*Minchas Elazar 1:27*).

Such use is permitted if a *tenai* was made initially. The Rama (*ibid.*) writes that one can stipulate when designating a bag for tefillin that it will be used for other purposes too. By doing this, you limit the *kedushah* of the bag. (This works for the cases too.)

The above applies only to *tashmishi kedushah*, not *mitzvah* objects generally. Tzitzis, a lulav, a shofar, and other such objects don't have inherent *kedushah* and are called *tashmishi mitzvah*; these may be used for mundane things (O.C. 21:1). Still, one must exercise care not to degrade the *mitzvah* (*ibid.*).

Rabbinic) the status of a serious position to which we can give much consideration, and this is not only because it is startling from an ethical perspective, but because it apparently contradicts an explicit halacha...¹¹

(Even if it is assumed that the prohibition is Biblical, it still does not necessarily follow that it constitutes murder, as there are other suggestions for the basis for the prohibition. A detailed discussion of this issue is beyond the scope of this article.¹²)

¹¹ See Jotkowitz *ibid.* Rav Lichtenstein's essay is available online here.
¹² See Rav Lichtenstein *ibid.*; Rav Bleich *ibid.* pp. 77-80.



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a *ba'al mum* may offer *korbanos* on a *bamah*. The Chazon Ish

appears to hold this way, as he writes that things that disqualify *korbanos* of a Jew, including *pigul* and *tum'ah*, do not disqualify *korbanos* offered by a non-Jew. Although he

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