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Parshat Korach

WHAT DOES JEWISH LAW THINK AMERICAN ABORTION LAW OUGHT TO BE?

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With all the ink spilled over the overturning of *Roe v. Wade* and the resulting return of regulatory authority over abortion to the fifty states, it is surprising that little has been written on this question: what does Jewish Law think the abortion law of the United States or any particular state ought to be?¹ Surely, neither *Roe*, nor its repeal, exactly parallels what Jewish Law thinks secular abortion law should actually be.² If Jewish law could fashion the abortion law for America, what would the

law look like? More broadly, what does Jewish Law want from secular law?

This article presents four basic ideas to answer this question. First, Jews have no halakhic obligation to encourage non-Jews to observe Noahide law. Second, even in the absence of a technical obligation, doing so may sometimes be a wise idea and good policy. Third, since encouraging certain conduct can also sometimes be unwise politically and practically for the Jewish community, it sometimes trumps the priority to encourage Noahide law observance when its cost is high. Finally, since abortion is prohibited for Gentiles under Noahide Law more strictly than for Jews under Jewish Law—a rare case where Jewish Law is more permissive than Noahide

¹ Thanks to Rabbi Barry Kornblau, founder of [Meisharim: Illuminating Priorities for Orthodox Communities](#), for his extensive assistance with this article, as well as to Ari Liberman of Emory University for his technical assistance.

² Indeed, Jewish tradition is, unsurprisingly, entirely silent on whether or which of America's states, its federal government, or its courts have the right to control access to abortion. Federalism and the precise dividing line between the branches of American government are hardly Jewish topics.

Law—it is almost impossible to fashion a secular law regulating abortion which is consistent with both Jewish Law and Noahide law. Thus, I think that the proper Jewish framework for thinking about secular abortion law is not Judaism’s approach to abortion but rather its embrace of individuals’ freedom to act in many life and death matters in accordance with their assessment of their personal circumstances.

Clearly, *Roe* and abortion are raw, emotional topics. Changes in abortion laws will directly affect women’s access to abortion, with great consequences for public health and for countless individuals’ lives. These are critical issues. Nonetheless, this paper addresses only a very narrow question: Jewish Law’s view of what American abortion law ought to be. I hope that this piece will inspire others to consider new approaches to secular policy in other areas in the future.

³ Much of this material in this section is from my article “The Obligation of Jews to Seek Observance of Noachide Laws by Gentiles: A Theoretical Review,” in [Tikkun Olam: Social Responsibility in Jewish Thought and Law](#) eds. David Shatz, Chaim I. Waxman, & Nathan J. Diament (Aronson, 1997), 103-143, available online at [The Obligation of Jews to Seek](#)

I: Jewish Law does not Obligate Jews to Encourage non-Jews to Observe Noahide Law.³

Although a small minority of halakhic authorities⁴ aver that Gentiles are no longer obligated to obey the Noahide code, most authorities reject that view and rule that Noahide Law is binding on Gentiles. They argue that it is difficult to accept that all of the Talmudic discussions concerning Noahide Law are only theoretical and predicated on an unstated abrogation of these obligations. The many discussions of the *rishonim* and *aharonim* who codified Noahide Law support this approach. Furthermore, there are numerous deliberations within the *Shulhan Arukh* and its commentaries which simply assume that Noahide Law is binding. Thus, one must conclude that Jewish Law treats Noahide Law as binding.⁵ Thus, one must conclude that Jewish Law treats Noahide Law as binding.

Is there, then, a halakhic obligation for Jews to urge non-Jews to follow Noahide Law?

Rambam (*Hilkhot Malakhim* 8:10) seems to

⁴ See, Broyde, “The Obligation of Jews to Seek Observance,” section II:1, in text accompanying notes 5 to 14.

⁵ Ibid. at text and notes accompanying note 15 to 20.

indicate that Jews share an obligation to participate in and enforce Noahide Law, but nearly all other *rishonim* disagree. Led by Raavad, Ramban, and Tosafot (and implicitly by Rashi and Rashba), nearly all *rishonim* besides Rambam recognize no duty to compel Gentiles to obey Noahide Law.⁶ Indeed, Shakh rules not only that a Jew has no obligation to stop a Gentile from violating Noahide Law, but that a Jew can even help a Gentile violate a Noahide Law when the Gentile can do so without the Jew's assistance. Most agree with Shakh, including Magen Avraham, Gra, Levush, Beit Shmuel, Mahatzit ha-Shekel, Dagul Merevavah and many more.⁷ Indeed, most *poskim* of the last 500 years permit a Jew, for his or her economic benefit, to participate in a transaction even if a Gentile in the transaction thereby violates Noahide Law. This speaks volumes about practical Jewish Law on this subject.

Of course, there have always been dissenters. In the last century, the great dissenter was the late Lubavitcher Rebbe, Rabbi Menachem

Schneerson. He writes—after reviewing the literature—that:

From all of the above, it is clear that anyone who has in his ability to influence, in any way, a Noahide to keep the seven commandments, the obligation rests on him to do so, since that was commanded to Moses our teacher.⁸

But this is clearly a minority opinion. The majority of halakhic authorities have never understood Jewish Law as requiring a Jew to stop a Gentile from sinning when the Gentile does not need the Jew's assistance. If the Gentile will sin anyway, many even allow a Jew to assist the Gentile in such a violation—the exact opposite of what Rabbi Schneerson suggests. As Shakh simply avers, there is just no obligation to separate a non-Jew from sin in cases in which the non-Jew does not need this particular Jew's assistance.⁹ If a Jew is permitted to aid a Noahide when he sins, it is

⁶ Ibid. at text and note accompanying section IV:B.

⁷ Ibid. at IV:B in text and notes accompanying notes 122 to 137.

⁸ See Menachem Mendel Schneerson, "Sheva Mitzvot Shel Benai Noach," *Hapardes* 59:9 (5745): 7-11.

⁹ Shakh on *Yoreh Deah* 151:6.

not a violation of Jewish Law, or even odious (in my view), to do so.¹⁰

II: Perhaps it is Nonetheless Wise to Encourage Gentiles to Obey Noahide Law?

Even though Halakhah sees no technical obligation in most situations for Jews to ensure that Noahides obey their laws, doing so might still be morally laudatory. Surely God smiles on those who seek to help others obey God's will.¹¹ More tangibly, there may be practical reasons for ensuring Noahide Law obedience. As Rabbi J. David Bleich forcefully articulates:

In the context of influencing legislation, it would appear that the Jewish community is under no binding obligation aggressively to advocate legislative implementation of Halakhah even as it pertinent to non-Jews....Despite the absence

of a specific *obligation* to influence non-Jews to abide by the provisions of the Noahide Code, the attempt to do so is entirely legitimate. Apart from our universal concern, fear lest "the world become corrupt," as Rambam puts it, it is also very much a matter of Jewish concern and self-interest. Disintegration of the moral fabric of society affects everyone. Particularly in our age we cannot insulate ourselves against the pervasive cultural forces which mold human conduct. Jews have every interest in promoting a positive moral climate.¹²

But what's legitimate and wise in one time and place may not be so in another time or place. Indeed, the absence of a "specific obligation" is

¹⁰ The logic is as follows. There is a Torah prohibition for a Jew to aid a Jew or a Gentile to sin only when such aid is necessary for the sin to occur; i.e., without the Jew's aid, the sin cannot occur. Rabbinic law sometimes prohibits a Jew from even assisting in sin (i.e., the sinner will sin even without the Jew's help) as part of the Jew's duty to separate fellow Jews from sin. This rabbinic prohibition does not apply to Gentiles, as Shakh notes. For more on this, see Michael Broyde and David Hertzberg, "Enabling a Jew to Sin: The Parameters," *Journal of Halacha and Contemporary Society* 19:5 (1990).

¹¹ See, for example, the formulations of Rabbi Samson Raphael Hirsch ([commentary](#) on Gen. 12:2-3) and the Netziv (*Ha-Amek Davar* commentary, Exod. 12:51). Notably, no legal sources discuss this idea as far as I can determine.

¹² Rabbi J. David Bleich, "Teaching Torah to Non-Jews" in [Contemporary Halakhic Problems Vol. II](#) (Ktav, 1983), 339 (emphasis in the original).

why American Orthodoxy regularly supports religious freedom for all—civil rights for pagan rites, if you will—rather than automatically supporting restrictions that diminish paganism in accordance with Noahide Laws: American Orthodoxy clearly understands that the Jewish community gains from religious freedom even as others used this religious freedom to violate Noahide Law. In my view, American Orthodoxy’s decision to support the expansion or contraction of civil or political rights in American law has never been a Jewish Law discussion, nor will it ever be.

The U.S. Supreme Court case, [*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*](#), offers the clearest and most direct example of this. America’s largest and most prominent Orthodox Jewish organizations submitted a joint amicus curiae (friend of the court) brief to support the right of adherents of the Santeria religion to engage in animal sacrifice as part of their religious worship even though

their theology and sacrificial acts indisputably violate explicit Talmudic prohibitions against idolatry for Noahides.¹³ American Orthodoxy advocates civil rights for pagan rites because it has always held that it is halakhically permissible and entirely proper to publicly advocate for a secular law which permits violation of Jewish Law by Jews or Noahide Law by Gentiles, since we do not view secular law as the suitable vehicle to enforce morality. So while the comments of Rabbi Moses Schick that “any situation that involves judging violators, even if they are Noahides, is a Jewish person’s concern, for others will learn from any wrong done in public and will follow suit and, in the least, the sight of evil is harmful to the soul”¹⁴ may resonate as true, these comments are not mandatory, allow discretion in application, and are sometimes inaccurate. For example, his fear that Jews will follow suit is particularly inapplicable to abortion since, as described below, Jewish Law permits Jews

¹³ See [*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*](#), 508 U.S. 520 (1993); see also the brief of the National Jewish Commission on Law and Public Affairs (“COLPA”) as Amicus Curiae whose brief notes that it is writing on behalf of (a) Agudath Harabonim of the United States and Canada; (b) Agudath Israel of America; (c) National Council of Young Israel; (d) The Rabbinical Alliance of America; (e) The Rabbinical Council of America; (f) Torah Umesorah, National Society of Hebrew Day Schools; (g) The Union of Orthodox Jewish Congregations of America; and (h) The Union of Orthodox Rabbis of the United States and Canada, which

is quite a collection of Orthodox Jewish organizations supporting the rights of pagans to engage in animal sacrifice. Importantly, such briefs are common.

¹⁴ Maharam Schick on *Orah Hayyim* 144. An example of this can also be found in the letter of Moshe Feinstein sent to the New York State governor favoring the implementation of the death penalty for certain crimes. *Iggerot Moshe, Hoshen Mishpat* 2:68.

to have abortions that Noahide Law prohibits to Gentiles.

III: Jewish Bases for An American Abortion Law

We now finally turn to abortion. What does Jewish Law want America's abortion laws to be?

It is well known that the nature of the prohibition for a Jewish woman to abort is disputed in Jewish Law. Some *poskim* rule that nearly all abortions are non-capital murder, permitted only to save a pregnant woman's life. Others rule that abortion is almost never murder but some lesser prohibition, and is permitted for many reasons. Yet others rule that abortion flips from non-murder to non-capital murder in the middle of the

pregnancy.¹⁵ Despite the vast literature on this matter, no consensus has developed. Indeed, it is common practice for *poskim* who view abortion as murder to adopt the policy of Rabbi Shlomo Zalman Auerbach (who ruled that abortion is murder) to decline to rule on real abortion cases and instead to direct such inquirers to *poskim* who are lenient on this matter. This results in halakhic practice that *de facto* permits far more abortions by Jewish women than Halakhah might permit *de jure*.¹⁶

At the same time, it is equally obvious that Noahide Law prohibits more abortions for Gentiles than Jewish Law does for Jews. [As Rabbi Bleich](#) recently wrote: "As far as non-Jews are concerned, there is not even a scintilla of controversy. Abortion is an even more grievous offense under the provisions of

¹⁵ For example, three contemporary *poskim*—Rabbi Aharon Lichtenstein, Rabbi Moshe D. Tendler, and Rabbi Hershel Schachter—divide among these camps. In "[Abortion and Jewish Law: An Interview with Rabbi Moshe Tendler](#)," Rabbi Tendler adopts the view of his father-in-law, Rabbi Moshe Feinstein that "unsanctioned abortion is an act of murder." By contrast, in his "[Abortion in Halacha](#)," Rabbi Schachter avers "I thought like *Torat Chesed* . . . *The Torat Chesed* says that up until *yoshva al hamishbar*, up until the beginning of the 9th month, [it is] only an *issur havalah* [a prohibition against wounding], which is permitted in places of general health concerns." In his "[Abortion: A Halakhic Perspective](#)," *Tradition* 25:4 (Summer 1991), Rabbi Aharon Lichtenstein concludes that viability is the key and "the prohibition of murder proper should be limited to the latter part of pregnancy—practically speaking, more or less the last trimester."

More generally, see Rabbi J. David Bleich's classic encyclopedic article "[Abortion in Halakhic Literature](#)," *Tradition* 10:2 (Winter 1968): 72-120 and "Abortion" in R. Abraham Steinberg, [Encyclopedia of Jewish Medical Ethics](#) (Feldheim, 2003), 1-29.

¹⁶ In his "[Abortion in Halacha](#)" (minute 22:30 to 23:10), Rabbi Hershel Schachter notes the widely known practice of the late Rabbi Shlomo Zalman Auerbach to tell people that Rabbi Eliezer Waldenberg [*Tzitz Eliezer*] permitted abortions in situations that he, R. Auerbach, prohibited them without even disclosing his own opinion. A student close to Rabbi Aharon Lichtenstein reports that this was his practice, too. In my experience, this is the common approach of those who are strict as a matter of theory. The intellectual basis for this conduct requires elucidation beyond this article's scope.

the Noahide Code. For non-Jews, abortion is a capital offense.” Rabbi Bleich is clearly being polemical since his own scholarship documents the controversy about the precise moment during pregnancy that abortion becomes a capital offense for Gentiles.¹⁷ Nonetheless, Noahide Law governing abortion for Gentiles is stricter than Jewish Law is for Jews.

Without a ‘faith based rule’ distinguishing between Jew and Gentile that is surely unconstitutional under America law, this unusual feature of abortion makes it impossible to write an American law that permits all abortions permitted to a Jew under Jewish Law and also prohibits all abortions prohibited for Gentiles under Noahide Law.¹⁸ Which American law, then, *does* Jewish Law favor to resolve this contradiction? A strict one that increases Gentile observance of Noahide Law but restricts Jews’ ability to have abortions permitted by Jewish Law? A

¹⁷ Rabbi J. David Bleich, “Abortion in Halakhic Literature,” 82-87. Rabbi Ovadia Yosef (*Yabi’a Omer Even Ha-Ezer* 4:1) indicated that abortion is seemingly only prohibited to Noahides beginning in the second trimester, and Rabbi Aharon Lichtenstein (“[Abortion: A Halakhic Perspective](#),” at page 5) states that abortion is only murder for Noahides at fetal viability. In his classic, widely accepted work, *Birth Control in Jewish Law*, Rabbi David M. Feldman, posits that this is the consensus. “Therapeutic abortion is not, of course, included in this Noahidic restriction.” And he provides many sources there to support that claim.

permissive one allowing Jews to act in accordance with often permissive rulings of their halakhic authorities but that will allow abortions that violate Jewish or Noahide Law? Or, some other one?

I believe American Orthodoxy’s relevant governing principle was articulated in 1989 by Rabbi Chaim Dovid Zwiebel of Agudath Israel of America in the related area of brain death:

The principle of religious accommodation is one that has stood the American Orthodox Jewish community in good stead in a wide variety of secular legal contexts ... it is in the interest of the Torah observant community to combat secular laws that preclude individuals from following the guidance of their individual decisors.¹⁹ [Emphasis added.]

¹⁸ This article does not consider the obviously unconstitutional possibility that American law might change to permit laws, relating to abortion of otherwise, that distinguish between Jews and Gentiles.

¹⁹ Rabbi Chaim Dovid Zwiebel, “[Accommodating Religious Objections to Brain Death: Legal Considerations](#),” *Journal of Halacha and Contemporary Society*, 17:49 (1989): 67-68. The issues related to brain

Agudah did not invent this idea; Rabbi Moshe Feinstein wrote as much in 1977. Writing about proposed legislation regarding brain death, he first noted the need, at a minimum, for a conscientious or religious exemption clause in secular laws that mandated a particular view of life and death decision-making²⁰ but ultimately favored a broader view—that governments ought not pass any such laws at all:

Since our country, the United States of America, does not want, God forbid, to force anyone to violate the laws of the Torah, [legislators] must enact a special clause on the law that they pass such that the patient himself and his relatives will not be forced to do anything that [their secular] law would require if they [the

death and abortion share some obvious similarities, making this comparison apt, the most important of which is that both are matters whose status as homicide is disputed, are certainly not capital murder, and present a range of Jewish law opinions from non-capital murder to not at all murder.

patient and his family] do not want to, since this touches upon [the patient's very] body and life [soul]. It would be closer to our view to say that this matter [of determining life and death for an individual] is not a matter relevant to any government or state because it is a private matter to every person himself, and is a matter that touches upon the Torah and Jewish Law of our faith.²¹ [Emphasis added.]

IV: Conclusions

In light of the above, were American Orthodoxy to write an abortion law for the United States, I think it should permit

²⁰ Indeed, this is Agudah's policy on abortion, as Rabbi Avi Shafran somewhat recently [noted](#): "While the Agudah has supported legislation limiting the current right to abortion, it has always taken pains, in legislatures and courts, to stress that it can only support such laws if they include a religious exemption clause." In this vein, it's worth noting Agudah's [most recent statement](#) in the wake of the Supreme Court's decision overruling *Roe v. Wade* that welcomes the overturning of *Roe* but provides no suggestions for what American abortion law ought to be.

²¹ Now published in *Iggrot Moshe, Hashkafah 4*, at the end of volume 9.

abortions during the first two trimesters,²² after a mandatory consultation by each pregnant woman with her own chosen religious, ethical, or moral authorities,²³ even though such a law would produce more abortions than the Jewish ideals for either a Jewish or a Gentile society. Such a law should also permit abortions during the final trimester when there is serious risk to the pregnant woman's life or mental welfare, or if the fetus is not viable.²⁴

More broadly, I think American Orthodoxy gains much more than it loses by adopting Rabbi Feinstein's final view, above; i.e., it should oppose secular laws that restrict citizens' personal moral choices. As Rabbi Feinstein noted in a homily commemorating the one hundred fiftieth anniversary of the

United States Constitution in 1939, a mere few years after he immigrated to the United States:

One hundred and fifty years ago, the government of the United States established its law that it will not maintain any faith or viewpoint. Instead, each person will act according to his own will, and the government will ensure that no one swallows up another [i.e., harms another person, as per *Mishnah Avot 3:2*]. It thus follows the will of God, may He be blessed, and it has therefore succeeded and grown during this time. We are obligated to pray for their welfare so that God, may He be blessed, shall cause them to

²² Third trimester abortions are exceedingly rare and almost always due to a serious maternal medical condition or a non-viable fetus. Absent such concerns, there are excellent reasons to restrict third trimester abortions in both the Jewish and Noahide traditions. For more on this from a secular perspective, see Katrina Kimport, "[Is third-trimester abortion exceptional? Two pathways to abortion after 24 weeks of pregnancy in the United States](#)," *Perspect on Sexual and Reproductive Health* 54:2 (June 2022): 1- 8.

²³ I see no constitutional problem with requiring people to consult with "their own chosen religious, ethical, or moral authorities" before making a decision to abort. American law countenances such mandatory consultations in other cases including, for example, medical ethics review committees at hospitals.

²⁴ Nonetheless, if a law that permits abortions only after a mandated consultation by each pregnant woman with her own chosen religious, ethical, or moral authorities could not pass, then I uncomfortably favor an American law with no restrictions on abortion, empowering a woman to have any abortion she desires up until birth. This would allow all abortions permitted by Jewish and Noahide Law, and ensures that the government never coerces people to violate their faith or conscience. See the fine article by Rabbi Jeremy Wieder endorsing this approach, entitled "[Clarifying Abortion In Halacha – And Reasons Not To Favor Overturning Roe v. Wade](#)," *The Jewish Press* (June 2, 2022).

succeed in whatever they undertake.²⁵

Freedom in matters of personal conscience is a better alternative for America, American Jewry as a whole, and American Orthodoxy in particular, than one which suppresses people's liberty by enforcing a particular view regarding widely disputed moral issues such as abortion. Moreover, Halakhah permits—but does not mandate—that policy, by not requiring Jews to seek enforcement of the Noahide laws. Within the ordinary ambit of secular law, Orthodox Jewry should seek to increase religious, social, and cultural freedoms even though this will lead to violations of Jewish or Noahide Law. The alternative reduces our communities' ability to function consistent with Jewish law. Of course, abortion is an exceptionally difficult case because a fetus is neither a finger nor a wart but, according to some *poskim*, a life—or certainly a potential life—even if the prohibition against abortion is not murder according to most *poskim*. Despite abortion's particularly difficult aspects, Jews' religious liberty will be curtailed by abortion

²⁵ Moshe Feinstein, *Darash Moshe* (New York, 1988), *Derushah* 10 of the additional derashot p. 416. This *drashah* seems to have been given on Shabbat, Parshat Zachor (March 4, 1939), to mark the 150th anniversary of

restrictions that prevent people from getting abortions permitted by Jewish Law. Although there is some preference in principle for Jews to help non-Jews live better lives from our Jewish perspective, there is no way to craft such an American abortion law without it concurrently restricting Jews from having abortions permitted by Jewish Law.

FROM KAYIN TO KORAH: THE FELLOW FOUNDERS OF FOMENT

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The insurgency of Korah and his followers against Moshe and Aharon is halted by the earth itself, which opens its mouth to devour the rebels. As remarkable as this physical phenomenon is, the Gemara in [Sanhedrin 37b](#) points out that this is neither the first nor the only place in the Torah where the earth opens its orifice.

Indeed, the first killing in history, Kayin's murder of Hevel, also features the ground

the Constitution. For more on this *derashah*, see Elli Fischer, "[Rabbi Moshe Feinstein on What Makes America Great](#)," *TheLehrhaus.com* (August 31, 2017).