

CAN A PREGNANT SUBSTANCE-ADDICTED WOMAN BE FORCED TO STOP FETAL DRUG ABUSE? COMPARING CANADIAN LAW AND JEWISH PERSPECTIVE

Noah A Turk, Gideon Koren

The Motherisk Program, Hospital for Sick Children, Toronto, Canada

ABSTRACT

Presently, despite a large number of drug-addicted pregnant women continuing to use drugs and, thus, endangering the fetus, the Canadian law cannot intervene. This paper contrasts the present legal status to the traditional Jewish perspectives. If one of society's prime roles is to protect the vulnerable, especially from irreversible damage, then Canadian society may wish to listen carefully to 3000 years of Jewish tradition.

Key Words: pregnancy, addiction, women, fetus, Canadian law, Jewish tradition

Drug and alcohol dependence are chronic, recalcitrant conditions, adversely affecting the lives of many millions of women and men worldwide.

When a drug or alcohol-dependent woman conceives, her exposure to the addictive chemicals may adversely affect her unborn child. Since the identification of fetal alcohol syndrome, the adverse fetal effects of numerous drugs of abuse have been documented.

Not surprising, the question whether society can or should force a pregnant woman to stop endangering her unborn baby, is heatedly debated in many parts of the world. There are those that argue that it is the pregnant woman's sole right to make her own decisions, as she enjoys by law full autonomy of her body while others maintain that if her actions will be harming the fetus then her rights should be revoked and handled by others. This decision stems from the belief that the woman's choice to have a baby, in and of itself, justifies restricting her actions for the welfare of the baby.

The Canadian Law and Experience

The aim of this present paper is to compare the practiced Canadian law to halakhic Jewish views with the hope that such a discussion will increase awareness and, possible, lead to re-examination.

In the Criminal Code of Canada it states, "A child becomes a human being when it has completely proceeded, in a living state, from the body of its mother".¹ It is under this Act that cases

have been decided upon, when women claimed that according to the law, they have full autonomy over themselves, inclusive of their fetus, therefore, they cannot be forced to enroll in treatment for their addiction during pregnancy.

In August of 1997, a pregnant Manitoba woman was brought to court by the Winnipeg Family and Child Services on the basis that two out of her three children suffered brain damage due to her various addictions (solvent sniffing: glue, nail polish remover, and paint thinner). Child services maintained that the twenty-two year old aboriginal woman should be forced into therapy, as her drug dependency was harming her fetus. By the time the courts had made the decision to pass this onto the Supreme Court, the baby had already been born. By October of that same year, the Supreme Court of Canada ruled that "the courts cannot force a pregnant woman to undergo treatment to prevent harm to her fetus". The Court reaffirms that "a fetus does not have legal rights".² Essentially, Canadian law dictates a person has full autonomy over his/her body and his life, thus including the justification of suicide.

This law is not surprising, because if the unborn baby was a legal entity, then voluntary termination of pregnancy would need to be classified as manslaughter or even murder.

The Jewish Halakha

According to Judaism, we are not masters over what we own, including our bodies. Technically, they are on loan to us, simply put, to house our

souls while in this world. How we view the treatment of animals, people, and even ourselves is seen through a different focus, unique and specific to our code of laws stated in the bible, “You shall take great care for your souls”.³ Judaism dictates that it is not a matter of right, but rather a matter of responsibility to take care of ourselves and others - a responsibility bestowed upon us by God.

Within Traditional Judaism there is an extensive collection of laws classified under the title “*Halakha*”. These laws establish the moral and civil ways by which Jews strive to live their lives and can be found in the Jewish Bible and the Talmud or Mishnah (oral law). It is according to these laws that the definition of ‘life’ is perceived and thus definition of the fetus.

It is stated in the Talmud, “Until forty days it (the fetus) is mere water”⁴ asserting that the development of the embryos basic form requires forty days from conception and until then is not considered a child. From here one might possibly deduce that if a pregnant mother suffers from an addiction, as long as she stops taking drugs before forty days, then there should be no issue. However, the Talmud continues elsewhere, quoting the Bible in saying that, “All who waste their semen, are punishable by death”.⁵ Whereby we can learn that although the fetus isn’t considered human until forty days after conception, one would still not be allowed to eliminate or harm the young fetus prior to that in deference to the semen. Consequently, a mother, according to Jewish law, would absolutely not be allowed to continue her drug usage, even if it is prior to the fortieth day.

Maimonides, a twelfth century physician and highly regarded rabbinic authority, writes in his compendium of halakha that, “if, and only when, the head of the fetus emerges from the womb, the fetus is then considered a child”.⁶ His opinion is in agreement with the Talmud, which states that a fetus is merely “a limb of its mother” being that it is not capable of living by itself outside the womb. In spite of this, Judaism still regards the fetus as a living and growing being. Just because it is not a complete human does not mean that it is still not something of vital importance.

To answer our original question, who may intervene in the case of a mother damaging her fetus? The answer according to Judaism is

anyone. We have been given the responsibility to care for ourselves and others, and once we breach that trust which has been given to us, we no longer have that autonomy over ourselves and even more so, over our baby. As a result, a mother *must* be forced into therapy, if her drug addiction is shown to be harming the baby. This is God’s world, not ours.

In this context it is important to note that there is tremendous frustration in different jurisdictions regarding societal inability to protect the unborn baby against maternal drug abuse due to the legal interpretation of absolute maternal control on her body and the unborn baby not being a separate legal entity entitled for protection.

For example, in many American states cocaine-addicted pregnant women have been charged for testing positive for the substance.⁷ Although, at the present time all charges have been rejected in higher courts, this has often happened with split decisions. This reflects a strong sentiment that a woman has full control of her body and baby, even to the extent of pregnancy termination, but not the right to damage a live fetus. On that level, this emerging sentiment is much closer to the traditional Jewish state of mind than to the present Canadian law.

If one of society’s prime roles is to protect the vulnerable, especially from irreversible damage, then Canadian society we may wish to listen carefully to 3000 years of Jewish tradition.

Corresponding Author: noahturk@gmail.com

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