

Abortion of the Diseased Fetus in Jewish Law

Ari Berger

INTRODUCTION

The legalization of abortion seized a prominent position among the many social upheavals of the 1970s, carrying with it a plethora of questions for ethical debate. Although superficially boiled down to a question of pro-choice versus pro-life, the modern question of abortion is multifaceted and multidisciplinary. While the debate of abortion-on-demand centers around an analysis of a woman's maternal rights over her body versus fetal rights and fetal status, the full scope of pregnancy termination includes questions of fetal quality of life, fetal life expectancy, psychological impact on mother, child, and family, as well as risks to the mother. Abortion is unique amongst the many social revolutions of the later twentieth century in that it remains a hotly debated topic with unusually strong political import and medical attention.

Historically, the treatment of abortion in Halacha was sparse in comparison to the myriad of works and treatises addressing other areas of Torah law, for the simple reason that abortion rarely presented as a question of practical significance requiring conclusive analysis—until the modern era, that is.¹ With the abortion debate flung across America, prominent rabbis and Jewish educators scrambled to enlighten the Jewish community with the halachic perspective on abortion, lest the masses draw their own conclusions based solely on

¹ Dr. Abraham Steinberg, trans. Dr. Fred Rosner, in *Journal of Halacha and Contemporary Society*, vol. 27 (Spring 1994), p. 36. Quoting A. H. Weiss, *Dor Dor v' Dorshav* (New York and Berlin, 1924), vol. 2, p. 23.

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secular argumentation or on insightful teachings of another religion. Thus, numerous articles appeared in Jewish publications with the goal of imparting the Jewish-halachic outlook.² These works gathered the principal, foundational Jewish texts on abortion and then traced how the rabbinic authorities throughout the generations understood and applied these sources. Often, the pages of these texts are filled with complex argumentation regarding details of the law, while the spirit of the law pervades and emerges from the analyses. Both aspects were important to convey to Jewish communities, especially those active in the secular debate.

While expositions of the gamut of halachic literature and Jewish thought on abortion needed to be made available to the Jewish public, there remained a yet greater need for the contemporary halachic decisors, the *poskim*, to evaluate the abortion question with all its modern trappings and issue halachic rulings on the matter. As social reform pushed abortion-on-demand, medical advances yielded a new field of therapeutic abortion. Prenatal diagnostic techniques enabled recognition of fetal anomalies and diseases *in utero*, sparking new ethical conundrums in the age-old question of abortion. A trickle of halachic inquiry commenced as religious couples began to find themselves confronted with these dilemmas. Thus emerged

² The reader is directed to the following articles, among others: J. David Bleich, "Abortion in Halachic Literature," in *Jewish Bioethics* (Hebrew Publishing Co., 1979), pp. 134–177. Basil F. Herring, "Abortion," in *Jewish Ethics and Halacha for Our Time: Sources and Commentary* (Ktav Publishing House, Yeshiva University Press, New York, 1984), pp. 25–45. Aaron Lichtenstein, "Abortion: A Halachic Perspective," trans. Nathaniel Helfgott, in *Tradition*, vol. 25, no. 4 (Summer 1991), pp. 3–12. Fred Rosner, "The Jewish Attitude Toward Abortion," *Tradition*, vol. 10, no.1 (Winter 1968), pp. 48–71. Fred Rosner, "Abortion," in *Modern Medicine and Jewish Ethics* (Ktav Publishing House, Yeshiva University Press, New York, 1986), pp. 139–160. Avraham Steinberg, "Induced Abortion According to Jewish Law," trans. Fred Rosner, *Journal of Halacha and Contemporary Society*, vol. 27 (Spring 1994), pp. 29–52.

a sizable collection of contemporary halachic responsa as reality compelled the generation's rabbinic leaders and Talmudic masters to undertake thorough examination of abortion in halacha and arrive at definitive conclusions.

A few trends surfaced from all this literature. Early and late halachic authorities vary widely in their interpretation of primary texts and consequently in their rulings on abortion. One finds an unusually broad scope of opinions. Regardless of this fact, Judaism halachically and historically eschews abortion-on-demand;³ consequently the major concern of Jewish law, ethics, and the contemporary halachic debate concerns therapeutic abortion, an issue both presented by and evolving with modern science. Maternal concerns in regard to abortion, such as danger to the mother's life and health, psychological well-being, or social standing, have received the bulk of ink in past halachic literature, whereas fetal aspects, such as anatomic malformations or potential developmental delay, have attracted less attention. This paper seeks to explore abortion in Jewish law as it applies to questions of fetuses with suspected or confirmed birth defects, particularly in light of responsa from the last three decades.

Halachic Disclaimer. This article represents an attempt to review, analyze, and present a topic in Jewish law, but should not be used to arrive at any halachic decisions. Every case bears its own unique details and subtleties, thus requiring review by a competent halachic authority capable of prescribing an appropriate course of action in accordance with Jewish law.

DESCRIPTION OF CASES

Factors Requiring Analysis

Many questions abound when one begins to contemplate the ethical implications of pregnancy termination for fetal considerations.

³ Rabbi Yair Bacharach, *Chavot Yair*, no. 31.

The most important of these fall into the following categories, each of which will be briefly addressed in this section: How do we view fetal life and, consequently, the termination of that life? How significant is the life expectancy of the child and the projected quality of its life? How do we consider cases where the fetus's status remains uncertain? Is the anticipated psychological impact on the mother and family of halachic significance? Finally, does the burden associated with raising such a child impact halacha?

Status of Fetal Life. At the extremes, we can view fetal life either as equal to that of an adult human or as an insignificant conglomerate of dividing cells—and numerous possibilities reside in between. If the fetus assumes the status of an adult human, then we should equate its murder, feticide, with homicide and punish accordingly. A fetus viewed as non-human may be considered of absolutely no importance. Alternatively, we might view it as an extension of the sperm and egg, thereby guaranteed at least the same legal protection afforded a gamete.

Along different lines, the fetus may be viewed as a part of the mother or as an alien entity within her. On the one hand, it physically resides within the mother, receiving all its nutrition, oxygen, and protection from her, yet it is also a genetically unique, immunologically foreign, and physically partitioned being. If viewed as its own organism within the mother, then perhaps it should be granted its own rights. Alternatively, when seen as part of the mother, as just another organ, abortion becomes an act of self-mutilation, not one of homicide.

To further complicate the matter, it is conceivable that the fetus's status changes during pregnancy, such that at one point it is considered non-human, while after further development it acquires a higher status. Clarifying the issue of fetal status is most critical: Once we categorize fetal status, it assumes the laws that apply to that category, providing a framework through which to view the fetus.

Life Expectancy. Some congenital diseases minimally shorten the

life expectancy of the afflicted, while others severely truncate life. Is there a stronger argument for terminating a fetus that will only live two decades or only a handful of years? Some prenatally diagnosable diseases allow for survival of mere months or days following parturition; perhaps we should not even consider a fetus or child as alive unless it possesses a certain measure of viability. What of a fetus that cannot survive pregnancy?

Quality of Life. An ultrasound that shows missing limbs preordains a life of physical handicap. Alternatively, some diagnoses carry certainty of reduced mental capacity. Still other diseases implicate a life of illness, infections, hospitalizations, surgeries, or transplants. Does the predicted quality of life play a role in determining the appropriateness of abortion?

Uncertainty of Malady. In many cases an assessment of the facts may disclose one of the following types of situations: An infected fetus will exhibit mental retardation, but the likelihood of infection is only 15 percent. Exposure to a drug causes teratogenicity one-third of the time. The fetus possesses a genetic disease that has 80 percent penetrance. How much weight do these numbers carry when addressing abortion?

Psychological Impact. Raising a child with disability or illness represents a severe emotional toll on the parents. The matter is compounded by expectations of early-childhood demise. The pain and anguish of witnessing the physical deterioration and accompanying suffering of one's own child is unimaginable. Can this play a role in assessing pregnancy termination?

Burden. A child with abnormality or disease places a great burden upon those raising it. It may require arduous attention, assistance, medical care, physical therapy, speech therapy, special education, and medical devices. Furthermore, there is the unfortunate reality that once-stable marriages may be strained to the point of divorce.

Perhaps the parents feel unequipped and unprepared for this situation or wary of the financial responsibility. Additionally, to some, such a child will frankly inconvenience them and sorely disrupt their current lifestyle with which they are content. How are these issues evaluated when considering abortion?

CASE STUDIES

A concise presentation of some of the more common cases that face Jewish couples may prove most effective in enabling the reader to properly conceptualize the issues at hand. It is in these contexts that the multitude of aforementioned theoretical questions must be asked, argued, elucidated, and applied.

Down Syndrome. Trisomy of chromosome 21 causes the common and characteristic disease known as Down syndrome. On average, these patients live into the fifth decade of life⁴ and exhibit marginal mental retardation. Down children manifest a higher rate of congenital abnormalities and greater health risks for specific problems. However, many children and adults with Down syndrome possess near-normal health status on a daily basis. A karyotype performed following amniocentesis or chorionic villi sampling (CVS) can confirm this diagnosis prenatally and is considered definitive.

Cystic Fibrosis. Mutation of the CFTR gene leads to the autosomal recessive disease called cystic fibrosis. Patients with cystic fibrosis are now expected to live into their thirties.⁵ Cystic fibrosis is characterized by variable expression, such that symptoms can range from mild to life-threatening. Although mental capacity remains normal,

⁴ Q. Yang, S.A. Rasmussen, and J.M. Friedman. "Mortality Associated with Down Syndrome in the USA from 1983 to 1997: A Population-based Study," *Lancet* (March 2002), 359: 1019–25.

⁵ Cystic Fibrosis Foundation, Patient Registry 2003 Annual Report (Bethesda, Maryland), p. 4.

some individuals affected with cystic fibrosis live difficult lives that often include a myriad of medications, many hospitalizations, surgeries, and even transplantation. Amniocentesis or CVS enables prenatal diagnosis by genetic testing. This results in a definitive diagnosis, especially if the mutations were previously identified in the parents.

Tay-Sachs Disease. Tay-Sachs disease represents another autosomal recessive disease caused by mutation of the Hexosaminidase A gene. However, in contrast with cystic fibrosis, Tay-Sachs is uniformly fatal in early childhood, with a relatively uniform onset and progression of symptoms. The disease begins to present at about six months of age and progresses to manifest any combination of the following: loss of acquired abilities, vision loss, hearing loss, paralysis, and behavioral changes. The child's health progressively deteriorates until death at around age five.⁶ Prenatal diagnosis for Tay-Sachs is accomplished in the same manner as cystic fibrosis.

Thalidomide. The tranquilizing drug thalidomide came into use in the early 1960s. Among the indications for use was the alleviation of the morning sickness that commonly accompanies pregnancy. Regrettably, researchers later realized that thalidomide therapy posed devastating teratogenic effects, most commonly phocomelia-agensis of the limbs. Thalidomide was subsequently removed from the market; however, many currently prescribed medications are known to cause significant birth defects. Deleterious exposure to the fetus can occur even before the mother discovers that she is pregnant.

Anencephaly. Anencephaly is a failure of the brain and skull to completely form during fetal development. Tragically, even if the fetus

⁶ National Tay-Sachs & Allied Disease Association (www.ntsad.org/pages/t-sachs.htm).

survives to pregnancy, it will only live a few hours to days.⁷ This condition can sometimes be diagnosed prenatally by ultrasound.

ABORTION IN HALACHA

This section aims at identifying and exploring the primary sources—Biblical, Talmudic, and medieval—associated with the issue of abortion in halacha. These serve as the springboard for developing a legitimate halachic perspective regarding pregnancy termination. Two critical tasks lie at hand. First, is termination halachically prohibited? Second, if halachically prohibited, what is the source of the prohibition? Whatever laws apply to the source will apply similarly to abortion.

Biblical and Talmudic Primary Sources

Bereishit 9:6. The verse in Genesis 9:6, an injunction issued to Noah following the flood, states: *Shofeich dam ha' adam ba' adam damo yishafeich*—“One who spills the blood of a man, by a man, his blood shall be split.” Translated in this way, the basic meaning of the verse teaches that one human who slays another is put to death by Noachide law. However, a purely literal translation renders the verse as “one who spills the blood of *a man within a man (ha' adam ba' adam)*, his blood shall be spilt.” The Talmud, Sanhedrin 57b, expounds as follows:

Mishum Rabbi Yishmael amru af al ha' ubarim. Mai ta' amah di' Rabbi Yishmael? Dichtiv “shofeich dam ha' adam ba' adam damo yishafeich.” Eizehu adam shehu ba' adam? Havei omer ze ubar she' bimiei imo.

⁷ National Institute of Neurological Disorders and Stroke (www.ninds.nih.gov/disorders/anencephaly/anencephaly.htm)

They said in the name of Rabbi Yishmael: [A non-Jew is put to death] even for fetuses. What is the reason for Rabbi Yishmael? Because the verse states “One who spills the blood of a man within a man, his blood shall be spilt.” Who is *a man within a man*? Say this is a fetus in the insides of its mother.

Thus, this verse prohibits abortion to non-Jews. While this statement goes unchallenged in the gemara, some nevertheless maintain that it represents only the view of Rabbi Yishmael, and that the matter is actually a subject of Talmudic debate.⁸ The fact that the Talmud learns about feticide from a verse dealing with homicide suggests a similarity, if not an equation, between the two.

Shemot 21:22. Exodus 21:22–23 reads,

Vi' chi yinatzu anashim vi' nagfu isha harah vi' yatzu yiladeha . . . anosh yianeish ka' asher yashit alav ba'al ha' isha . . .

When men fight and they strike a pregnant woman and her offspring come out . . . he shall surely be punished in accord with what the husband of the woman assesses against him . . .

This verse imposes upon an individual responsible for the miscarriage of a fetus the payment of monetary compensation, known as *dimei vladot*, to the father of the fetus. It indicates that feticide is viewed as a monetary violation, not a capital crime.⁹ Further evidence comes from the verse *vi' lo tikchu kofer la' nefesh rotzeiach asher hu rasha lamut ki mot yumat*—“and you shall not take atonement-money¹⁰ for the life of a killer who is guilty for death, for he

⁸ See *Achiezer*, vol. 3, no. 65:14. Also, *Shu"t Tzitz Eliezer*, vol. 9, no. 51, chap. 2 sec. 3.

⁹ Both the *Yad Remah* in his commentary to Sanhedrin 72b and the Ramban in *Toras Ha'Adam* (p. 28, Chavel ed.) bring up this seeming discrepancy.

¹⁰ Translation of *kofer* as “atonement-money” is taken from Nosson Sherman, *The Chumash*, Stone ed. (Mesorah Publications, 1998), p. 932. The oral tradition, in

must be put to death” (*Bamidbar* 35:31); this explicitly prohibits monetary recompense in place of the death penalty as punishment for murder. If so, the Biblical requirement to pay *dimei vladot* appears to indicate that we do not categorize feticide as murder.¹¹

Ohalot 7:6 and *Sanhedrin* 72b. The mishna in *Ohalot* 7:6 states:

Ha' isha she' hi mikashe leileid michatchin et ha' vlad bi' meieha u' motziin oto eivarim eivarim mipnei she' chayyeha kodmin li' chayyav. Yatzah rosho ein nogin bo she' ein dochin nefesh mipnei nefesh.

The woman who is in difficult labor, we cut up the fetus in her insides and remove it piece by piece, because her life takes precedence to its life. If the majority of it emerged, we may not touch it, for we do not push aside life in place of life.

A number of points may be raised regarding this mishna. First, the mishna clearly states that maternal life takes precedence over fetal life. A number of reasons can be suggested. Perhaps fetal life holds

Sifrei 161, teaches that the word *kofer*, usually meaning spiritual atonement, here refers to monetary payment—as if the murderer desires to atone for the crime by paying with his money instead of paying with his life.

¹¹ Furthermore, the Talmudic dictum *kim lei bi' dirabbah minei* teaches that when a crime incurs two punishments, a Jewish court only metes out the more severe punishment. One opinion in the Talmud posits that even in cases where the severe punishment cannot be implemented, the less severe punishment is still deferred. This argues against feticide as a capital crime, for if it is, there should be no monetary compensation whether or not a more severe punishment is imposed. This argument is advanced by Rabbi Meir Plocki, *Chemdat Yisrael*, p. 175, as quoted by Rabbi J. David Bleich, *op. cit.*, p. 139. However, one may argue that feticide is indeed a capital crime, and specifically because there is generally no monetary payment in such an instance did the Torah have to explicitly obligate *dimei vladot*. Alternatively, as shown below, a Jew never receives capital punishment for feticide; therefore, the obligation of *dimei vladot* may be considered the only punishment that exists.

a lower status than an adult life. Alternatively, fetal viability may be considered uncertain, dictating that the mother, whose status as living is certain, takes precedence.¹² Maybe the mother comes first solely because she is the provider and maintainer of the fetus, and therefore it is secondary to her needs. Maybe maternal life is viewed as actual, whereas fetal life is merely potential.

The final line of the mishna teaches that once the baby has emerged from the womb, it may no longer be killed to save the life of the mother. The mishna now identifies it as a *nefesh*, a life. This implies that the unbirthed fetus is not a *nefesh*,¹³ possibly explaining why we terminate it to save the mother. Still, the phrase “her life takes precedence to his life” implies that the fetus does have some sort of life, *chayyim*.¹⁴ The exact difference between the mishnaic usage of *nefesh* versus *chayyim* is unclear. Last, how do we understand the scope of the mishna’s case, “the woman who is in difficult labor”? Does this mean to permit abortion only when the fetus threatens the mother’s life?¹⁵ Maybe the mishna limits abortion to a woman in clear, imminent danger from the fetus, such as a failing delivery. What if the danger is certain but not yet imminent? Alternatively, we can read the mishna as teaching the opposite: even once labor has begun, we can abort the pregnancy; certainly prior to labor we can abort.¹⁶

¹² *Shita Mikubetzet*, Talmud Arachin 7a, n. 5.

¹³ Rashi, Sanhedrin 72b, s.v. *yatza rosho*.

¹⁴ *Sheilot U'Tshuvot Maharit*, vol. 1, no. 97.

¹⁵ The mishna’s terminology, *mikashe leileid*, appears to come from the verse in Bereishis 35:16, *vi'yisu mi'beit el . . . va'teled Rachel va'tikash bi'lidtah*, “And they traveled from Beit El . . . and Rachel gave birth and she had difficulty in her labor.” In this incident the danger to Rachel apparently arose during the labor itself, and it led to her untimely death.

¹⁶ Rabbi Ben Zion Uziel entertains both of these possibilities. The rationale behind the final idea is that once labor has begun, the fetus is detached from the mother and could be viewed as its own entity. If we permit abortion even at this stage, we would certainly permit it when the fetus remains attached to the mother. See *Mishpitei Uziel*, vol. 3, Choshen Mishpat, no. 46, secs. 1 and 2.

The gemara in Sanhedrin 72b expounds upon this mishna:

Amar Rav Huna: Katan ha'rodeif nitan li' hatzilo bi' nafsho. Kasavar rodeif eino tzarich hatra'ah lo shna gadol vi' lo shna kattan. Eisvei Rav Chisda li' Rav Huna: "Yatzah rosho ein nogin bo she' ein dochin nefesh mipnei nefesh" vi' amai rodeif hu? Shani hatam di' mishmaya ka radfi lah.

Rabbi Huna said: A minor who is a *rodeif* [pursuer] may be killed in order to save [the pursued]. He holds that a *rodeif* does not require *hatra'ah* [warning]. Rabbi Chisda challenged Rabbi Huna [from the mishna in Ohalot]: "If the majority of it emerged, we may not touch it, for we do not push aside life in place of life." But why, he is a *rodeif*? [The implication is that this fetus is threatening the life of the mother, giving it the status of *rodeif*, yet we are not permitted to kill it. The gemara questions that it must be because a *rodeif* requires proper *hatra'ah*, thus posing a challenge to Rabbi Huna's position.] There it is different, because she is being pursued from heaven.

Should the fetus that endangers its mother's life be considered a *rodeif*, as the questioner in this gemara assumes, then it may be killed at once, as the law provides for anyone who pursues the life of another.¹⁷ However, attributing the status of *rodeif* to a fetus would prove quite novel, since a fetus obviously lacks malicious intent, nor is it even responsible for being in such a position.¹⁸ Whether we indeed view a fetus as a *rodeif* depends on how we understand the gemara's answer. One possible interpretation understands that "pursued from heaven" rejects the notion of a fetus as a *rodeif*; the lack of intent or culpability makes it ridiculous to deem a fetus a pursuer;

¹⁷ Provided that killing the pursuer is the only viable option for thwarting the murder.

¹⁸ *Tiferet Yisrael*, Ohalos 7:6, n. 10.

instead, any time a fetus endangers its mother we should view it as a heavenly decree. If so, we need to find another reason why the ante-partum fetus is killed to spare the mother. Alternatively, we could interpret the answer as referring only to the time of birth. A fetus really *can* be a *rodeif*; the gemara's answer only informs us that once the fetus has emerged, we no longer view the situation as fetal pursuit but as heavenly pursuit.¹⁹

Niddah 44a. The mishna in *Niddah* 43b–44a teaches:

Tinok ben yom echad . . . vi' hahorgo chayyav . . .

A one-day-old baby . . . one who kills him is liable . . .

At face value this source permits abortion, teaching that one is culpable only for the murder of a birthed fetus. Alternatively, the mishna may refer merely to liability for the death penalty, teaching that one is put to death only for committing infanticide, not feticide. Nevertheless, feticide would remain strictly forbidden regardless of the punishment ascribed to it. How could abortion be considered an act of murder yet remain unpunishable? Perhaps the death penalty cannot be imposed due to a legal technicality, such as the inherent inability to prove that the offender killed a viable conceptus.²⁰ While other technical-legal answers are suggested,²¹ Meiri posits that capital execution was withheld from the offender because of its relative

¹⁹ This is possibly Ramban's understanding, as will be presented further on.

²⁰ Rabbi Yeshayah Pick as explicated by Bleich, op. cit., p. 173, n. 70.

²¹ Rabbi Eliyahu Mizrahi surmises that since the majority of pregnancies yield viable offspring, the preceding argument would fail to spare a criminal from the death penalty. However, he proposes the following similar—albeit one step more technical—argument: Since there is lack of certainty regarding the viability of the fetus at the time of the crime, the *hatra'ah* given to the offender would be considered *hatra'at safek* thereby precluding a death sentence from ever being issued in such a case. (*Hatra'ah*, warning, is a legal concept prerequisite to the trying of any capital case in a Jewish court of law. Briefly, it requires warning

swiftness and decency. In its stead, divine providence orchestrates a more painful, protracted, torturous death for the perpetrator of so heinous a crime.²²

Arachin 7a. The mishna and gemara in Arachin 7a discuss a novel case:

Mishna: *Ha'isha she'yatza leihareig ein mamtinin lah ad she'teiled. Yashva al ha'mashbeir mamtinin lah ad she'teiled...*

Gemara: *Peshita, gufa hi! Itztarich salka datach amina ho'il u'ketiv "ka'asher yashit alav ba'al ha'isha" mimona di'baal hu vi'lo lifsidei minei; ka mashma lan. Vi'eima hachi nami? Amar Rabbi Avahu amar Rabbi Yochanan: Amar kra "u'meitu gam shneihem" li'rabbot et ha'vlad.*

"Yashva al ha'mashber, etc." Mai taama? Keivan di'akar gufa achrina hu.

Amar Rav Yehudah amar Shmuel: Ha'isha ha'yotza leihareig makin otah kineged beit harayon kidei she'yamut ha'vlad techila kidei she'lo tavo lidei nivul.

Mishna: A [pregnant] woman who is going out to be killed, we do not wait for her to give birth. If she has sat on the birthing stool, we wait for her to give birth.

the criminal that the crime he is about to commit is a capital crime punishable by death, thereby assuring his full awareness of the gravity and consequences of his impending actions. *Hatra'at safek*, literally a doubtful warning, is a technically invalid form of *hatra'ah*.) Rabbi Eliyahu Mizrachi, commentary to Exodus 21:12, as quoted by Bleich, op. cit., p. 137.

²² Quoted by Rabbi M. D. Tandler during his undergraduate bioethics course at Yeshiva University, September 23, 2003. The author was unable to locate where in his writings Meiri offers this comment.

Gemara: This is obvious, it's her body! We need it because I might have thought that since the verse writes "as the husband of the woman will impose upon him," [the fetus] is the property of the husband and he should not lose it; therefore this law is taught [i.e., to kill the mother with her fetus]. And let us say this [i.e., not to allow the fetus to die, since legally it is the monetary property of the father]? Rabbi Avahu said in the name of Rabbi Yochanan: The verse says, "and also the two of them shall die," to include a fetus.

"If she has sat on the birthing stool, etc." What is the reason [that we wait until she delivers]? Once [the fetus] detached, it is a separate entity.

Rabbi Yehudah said in the name of Shmuel: A woman who is going out to be killed, we strike her opposite the uterus in order that the fetus should die first in order that she not become repulsive.

Here, the Talmud seemingly regards fetal life quite lightly. Not only does the mishna say that we kill a fetus along with its condemned mother, but the gemara exclaims that this should be obvious!²³ Furthermore, Shmuel states that we do not simply allow the fetus to die with the mother, but we actively terminate its life prior to her execution. Why? Merely because it will be more shameful to the deceased mother should a partially living fetus emerge from her mutilated and disfigured body. Thus, the concern to preserve the remaining vestiges of this criminal's dignity after her death suffices to permit feticide. Moreover, the statement "it's her body" bears uncanny resemblance to the contemporary pro-abortion argument that a woman is entitled to exercise her wishes over her own body.²⁴ Indeed, this

²³ See *Chavot Yair*, no. 31.

²⁴ In truth, the statement *gufah hi* is not a reference to a woman's autonomy over her body, but espouses the perspective of the fetus as a part of the mother's body.

gemara can be understood as defining a fetus as an organic part of the mother's body and not a separate entity unto itself.

However, there exist alternative ways to comprehend this gemara. Perhaps the court executes the fetus along with its mother because it was included in the sentence of death.²⁵ Once destined to die, an issue of human dignity, however slight, may permit a termination that hastens fetal death by only a few minutes. We can additionally suggest that Rabbi Yochanan comes to teach that the death of the fetus along with its condemned mother is a Biblical directive, necessary specifically because we would have thought otherwise. The Torah obligates this course of action despite the gravity of feticide in most other instances.

Arachin 7a–b. The gemara in Arachin continues discussing tragic pregnancies and presents the following law:

Amar Rav Nachman amar Shmuel: Ha'isha sheyashva al ha'mashber u'meitah ba'shabbat miviin sakin u'mikarin et kreisa u'motziin et ha'vlad.

Rabbi Nachman said in the name of Shmuel: A woman who sat on the birthstool and died on the Sabbath, we bring a knife and cut open her abdomen and remove the fetus.

Mainstream Jewish thought does not identify with the attitude that an individual has the right to do with his body whatsoever he desires, as exemplified by the Biblical prohibition on tattooing (see *Vayikra* 19:28). Rather, one's body is viewed as a gift and a tool whose utilization in this world is both an opportunity and a responsibility. The way one uses one's body is thus governed and guided by halacha.

²⁵ Rashi to Arachin 7a. Rashi understands that waiting for the fetus to be born depends on whether the mother went into labor before the trial's conclusion or not. Apparently, if the trial concluded and then the mother entered labor, we could still kill the fetus along with her even though it is no longer part of her body.

This source obliges one to violate the Sabbath in order to save the life of a fetus.²⁶ This suggests that fetal life is true life whose preservation requires forgoing even Biblical commandments.²⁷ However, we could argue that until the mother dies we view the fetus as an appendage of her, not qualifying for the violation of the Sabbath on its behalf. Only once the mother has died do we view the fetus as a distinct, live entity trapped inside what is now a mere carcass.²⁸

Yoma 82a. The mishna here reads as follows:

Ubrah she' hiricha maachilin otah ad she' tashiv nafsha.

A pregnant woman who smelled [food on Yom Kippur and has an urge to eat it], we feed her until her desire subsides.

This seems to represent another source that permits the transgression of severe Biblical statutes in order to save a fetus. Here, a pregnant woman immersed in the fast of Yom Kippur feels an urge to eat. Perhaps the anxiety and angst engendered by this craving will endanger the fetus. We therefore permit her to eat despite the gravity of the Yom Kippur fast.²⁹ This perspective places fetal life in high regard. However, the gemara can be understood as concerned with the mother's health, not with that of the fetus. One could argue that we would rather the fetus miscarry than transgress the laws of Yom Kippur, except that a miscarriage compromises the health of the mother.³⁰ If so, the concern is actually for the safety of the mother.

²⁶ See the gemara's continuation for a discussion of the details of the case as regards the violation of Shabbat.

²⁷ See *Behag* as quoted by Ramban, *Torat HaAdam*, Chavel ed., *Kisvei HaRamban*, vol. 2. pp. 28–29. See also *Ritvah*, Niddah 44a, s.v. *dichtiv*.

²⁸ See *Tosfot*, Niddah 44a, s.v. *ihu*; Ramban, loc. cit.

²⁹ *Behag* as quoted in the *Ran*, *Yoma 3b*, in the pages of the *Rif*, s.v. *vi'katuv*.

³⁰ Ramban, loc. cit. *Chavot Yair*, no.31.

Sanhedrin 84b. The Talmud here is amidst a discussion detailing what crimes are subject to the death penalty. It questions the implication of the disparate language employed by the Torah regarding murder:

Vi' itztarich limichtav "makeh ish," vi' itztarich limichtav "kol makeh nefesh." Di'i katav rachmana, "makeh ish va'meit," hava amina ish di'bar mitzvah in, kattan lo; katav rachmana "kol makeh nefesh." Vi'i katav rachmana, "kol makeh nefesh," hava amina afilu nefalim afilu ben shimona; tzrichi.

And we need the verse “One who strikes a man [and he dies, he shall surely be put to death]” (Exodus 21:12), and we need the verse “Anyone who strikes a soul [according to witnesses should the killer be killed . . .] (Numbers 35:30). Because if God had [only] written, “One who strikes a man . . .,” I would have thought “a man” who is Bar Mitzvah yes, but a minor no; therefore, God wrote, “Anyone who strikes a soul . . .” [to teach that one is also put to death for the murder of a child]. And if God had [only] written, “Anyone who strikes a soul . . .,” I would have thought [one is put to death for the murder of] even a nonviable infant, even a nonviable fetus [therefore, God wrote, “One who strikes a man . . .” Thus, both verses are] needed.

Through Biblical exegesis this passage derives that a Jew is not put to death for terminating the life of a nonviable infant or fetus. The initial reaction to this gemara asserts that the offense must not be a capital crime.³¹ Others, however, understand the gemara as teaching that abortion does not incur the death penalty despite remaining a capital crime (this notion was treated above in the discussion of Niddah 44a). Indeed, that is the context of the passage—the question of

³¹ Rabbi Yosef Trani, *Teshuvot Maharit*, vol. 1, no. 99.

what crimes actually receive the death penalty. Regardless, this passage remains altogether inconclusive, because it speaks of one who kills a nonviable fetus but does not discuss the law of a viable fetus, the latter being arguably more morally problematic.

Yevamot 69b.

Amar Rav Chisda . . . vi' i mi' abra ad arba' im maya bi' alma hi.

Rabbi Chisda said . . . and [even] if she becomes pregnant, until forty [days] it is merely water.

This source seemingly states that a fertilized egg achieves no status as human until forty days of gestation.³² If this is indeed the case, then we may guiltlessly terminate any embryo within forty days from conception. We find other laws tied into this forty-day period. Anytime a woman gives birth she commences a phase of ritual impurity. This holds true even if she miscarries; however, the loss of an embryo less than forty days old does not engender such impurity.³³ Furthermore, the first issue of the womb, whether alive or not, receives the status of *bechor*, firstborn; however, should the birth be that of a fetus less than forty days old, it is not considered the first issue of the womb and the subsequent birth is deemed the firstborn.³⁴

Primary Sources: Rishonim

Having discussed the critical sources in the Torah, Mishna, and Gemara, we now turn to the *rishonim* (medieval rabbinic authorities),

³² Interestingly, forty days of gestation is now embryologically closely associated with the initiation of the fetal heartbeat.

³³ Niddah 30a, as cited by Bleich, op. cit., p.143.

³⁴ Bechorot 47a, as cited by Lichtenstein, op. cit., p. 6.

whose interpretations of the above sources form the framework for understanding the topic at hand. Our understanding and legitimate interpretation of Talmudic literature comes through the approaches and understandings advanced by the *rishonim*, as they represent the primary commentators on the gemara.

Tosfot, Sanhedrin 59a and Chullin 33a. In two places, *Tosfot* discuss the Talmudic dictum that “there is nothing which is permissible for a Jew but prohibited to a non-Jew.”³⁵ They question how this applies to the law of feticide, for which the death penalty applies to the gentile but not to the Jew. They answer that both Jews and gentiles are equally prohibited from feticide and differ only in the punishment meted to them. According to this opinion, the prohibition for Jews is Biblically ordained, just as it is for gentiles.

Tosfot, Niddah 44a. Here *Tosfot* ostensibly adopt the diametrically opposing view.³⁶ *Tosfot* assume that there exists no prohibition of feticide employing the strong language *mutar li’ horgo*—“it is permissible to kill it.”³⁷

Ramban, Toras Ha’Adam. The position taken by Ramban (Nachmanides) in his work *Torat Ha’Adam* begs presentation because it brings to bear a number of the above sources, providing an insight into the various ways of interpreting and aligning them.³⁸ Ramban cites the opinion of *Behag* that we violate Yom Kippur, and hence other commandments too, in order to preserve the life of a fetus.

³⁵ Sanhedrin 59a, s.v. *leka*. Hullin 33a, s.v. *echad*.

³⁶ s.v. *ihu*.

³⁷ Note that we do not consider these differing opinions within *Tosfot* an internal contradiction, for this commentary was compiled from the contributions of hundreds of scholars over a few generations. It stands in contrast to a work authored by one individual, where we go to great lengths to resolve apparent contradictions.

³⁸ *Torat Ha’Adam*. Chavel ed., *Kitvei HaRamban*, vol. 2. pp. 28–29.

Behag apparently derives this law from the mishna in Yoma quoted above. Additionally, the gemara in Arachin makes a similar provision by permitting Sabbath desecration to save the fetus of a mother who has died in labor.

Ramban attacks this position with three immediate questions. First, the mishna in Ohalot 7:6 says that when the mother experiences difficulty in her delivery, we dispose of the fetus; there is no requirement to save its life. If so, why should we concern ourselves with saving its life on Yom Kippur or the Sabbath? Moreover, the mishna in Niddah 44a records that we only put to death one who murders an infant, not a fetus. Again this implies that fetal life is of marginal importance. Finally, the Torah imposes monetary penalty (*dimei vladot*) upon the terminator of pregnancy, not capital punishment, indicating that it views a fetus more as property than as human life. We know that we violate commandments such as Sabbath and Yom Kippur only when necessary to preserve human life, but if these three sources all imply that fetal life is not equivalent to human life, then how can *Behag* defend his view?

Ramban has now presented five sources, two of which he claims support the notion that fetal life equals human life and three that seem to oppose it. Methodologically, resolving such a contradiction requires siding with one group of sources and understanding the second group in light of the veracity of the first. Alternatively, one could posit that the two groups represent dissenting opinions within the Talmud and that the issue is actually a Talmudic debate. However, Ramban chooses neither of these, claiming instead that while he has accurately presented both groups of sources, another factor requires consideration. True, the latter three sources show that fetal life is not of great significance, yet we still violate commandments to preserve this life in accord with *Behag*'s two sources. Ramban invokes the Talmudic principle that rationalizes Sabbath violation for an individual in need of medical care: "Violate over him one Sabbath in order that he may observe many [future] Sabbaths."³⁹

³⁹ Shabbat 151b.

If so, argues Ramban, we may violate the Sabbath even for a fetus, whose life is yet insignificant, because one day he will grow to observe many Sabbaths.

However, Ramban quotes a second opinion in resolving this contradiction: Really fetal life is insignificant in accord with the latter three sources; the former two require reinterpretation, as follows. On Yom Kippur one feeds the mother because her own life will be imperiled should she miscarry, not due to our concern for the fetus. The second source only permits Sabbath desecration after the mother has died. While the mother is alive, the fetus relies upon her for life and therefore is considered subordinate to and part of her body. At this point it may be killed and the Sabbath may not be violated on its behalf. However, once the mother dies, the fetus becomes its own entity, achieving the status of an adult human whose life must be saved. Note that Ramban does not entertain the possibility of viewing fetal life as human life while reinterpreting the latter three sources, yet this apparently is the position of *Behag*.

Rambam, Mishna Torah. Rambam (Maimonides) codifies this law in the most unusual, unique manner:⁴⁰

Harei zu mitzvat lo taaseh she'lo lachus al nefesh ha'rodeif. Lifikach horu chachamim sheha'ubra she'hi mikashe leileid mutar lachtoch ha'ubar bi'meieha bein bi'sam bein bi'yad mipnei she'hu ki'rodeif achareha lihorga. Vi'im mishe'hotzi rosho ein noggin bo she'ein dochin nefesh mipnei nefesh vi'zehu tivo shel olam.

This is a negative commandment [of the Torah]: To not have mercy on the life of a pursuer. Therefore, the Sages directed that the pregnant woman who is in difficult labor, it is permissible to sever the fetus in her innards whether by medication or by hand because it is like he is pursuing after her to kill her.

⁴⁰ *Mishna Torah, Hilchot Rotzeiach* 1:9.

But if it is from [the time that] he has emerged his head, we do not touch him, for we do not push aside life in place of life, and this is the nature of the world.

Questions abound concerning this passage. What compelled Rambam to append this law of abortion to the law of not acting mercifully toward one who pursues the life of another? Why does Rambam call the fetus a *rodeif* (pursuer)? Can we even attribute to a fetus the halachic status of *rodeif*? Moreover, why does Rambam say that the fetus is “like he is pursuing,” and not simply that “the fetus is pursuing after her to kill her”? If the fetus is indeed a *rodeif*, what difference does it make if his head has emerged or not—either way he is endangering his mother’s life and should be killed to save her? Finally, Rambam adds his own closing phrase, “and this is the nature of the world.” Where does this come from, what does it mean, and why is it necessary?

Proper interpretation of this Rambam is of utmost importance because his halachic work is considered among the most preeminent and because another great, authoritative codifier of halacha, Rabbi Yosef Cairo, chose to codify this law by quoting Rambam almost verbatim.^{41,42} Opinions abound regarding this Rambam; one contemporary medical-halachic work compiles fourteen variant explanations by Maimonidean commentators, many of which differ vastly from one another.⁴³ Because a lengthy analysis lies beyond the scope of the present essay, this source is best left without further comment rather than risk misrepresenting or undermining the true breadth of the matter.

⁴¹ *Shulchan Aruch*, Choshen Mishpat 425:2.

⁴² Bleich, op. cit., p. 147. *HaRefuah Li’Ohr HaHalacha*, p. 25, notes that both the *Smag* (*Hilchot Ritzichah*, negative precept 164), and *Rabbeinu Bechayei* (*Devarim* 22:26) closely follow the Rambam’s position and language as well.

⁴³ Michael Stern, *HaRefuah Li’Ohr Ha’Halacha* (2000, Institute for the Investigation of Medical Halacha, Jerusalem), chap. 8.

Maharit. Rabbi Yosef Trani of Constantinople, known by the acronym Maharit, represents another important early source.⁴⁴ Much controversy centers around correctly evaluating Maharit's position, since two contradictory responsa appear a few pages away from one another in his work. Nevertheless, Maharit is noted for suggesting that the prohibition of abortion for Jews stems from the prohibition of inflicting a wound upon another individual—the act of *chabbalah*, itself learned from the verse in *Devarim* 25:3.⁴⁵ With this he demonstrates that the general abortion prohibition need not derive from the laws of murder. Yet even if we accept this as the position of Maharit, ambiguity remains: Is the problem one of wounding the fetus or of wounding the mother? Perhaps Maharit innovates that while murder is defined only as terminating a full human life, a fetus is still enough of an entity that one may not physically harm it.⁴⁶ Alternatively, Maharit may view the fetus as a mere limb of the mother; nevertheless, just as one may not damage the mother's arm, so too one may not damage her embryo. Either way, the innovation lies in finding abortion Biblically prohibited but not deriving from murder. Categorizing abortion under the rubric of *chabbalah* carries with it numerous leniencies. Clearly, the prohibition of *chabbalah* does not ban inflicting wounds necessary for medical treatment. If so, abortion could be permitted should the pregnancy present the mother with illness, pain, or anguish, even though not life-threatening.

Chavot Yair. Rabbi Yair Bacharach, the author of *Chavot Yair*, is classically quoted as founding the position that the prohibition of abortion stems from *hashchatat zera'*, destruction of seed, which

⁴⁴ *Sheilot U'Tshuvot Maharit*, vol. 1, nos. 97 and 99.

⁴⁵ *Sifrei*, Devarim 25:3. Rambam, Hilchot Sanhedrin 16:12.

⁴⁶ On the other hand, Rabbi Aryeh Lipsheutz, in his *Aryeh Dibeil Ilai*, Yoreh De'ah, no. 14 (as quoted by Bleich, op. cit.), asks whether it makes sense that one is permitted to murder a fetus but there is a prohibition on wounding it: you can cut its throat but not its finger?!

prohibits ejaculation outside the context of marital relations.⁴⁷ Since the embryo develops from the sperm, destruction of the embryo is synonymous with destruction of sperm. A somewhat different formulation: The Torah evidently prohibits *hashchatat zera'* because it desires that the semen be used to create life. If so, destroying an embryo violates this injunction. This represents another approach that recognizes feticide as Biblically prohibited but not as an offshoot of homicide.

Main Perspectives on Abortion

From the preceding discussion emerge a variety of perspectives on how Jewish law views the act of feticide. Four main approaches to this issue are commonly elucidated, each of which carries its own associated laws, halachic principles, and implications. Adopting any view presupposes cogent explanation of Talmudic sources and requires adoption of other principles logically or legally extending from it.

The first approach posits the prohibition of abortion as an act of murder. This position must view the fetus as its own entity with an inherent, undeniable claim to life. Homicide represents one of the three cardinal sins; categorizing abortion as such would imply that a physician must give up his life rather than commit feticide.⁴⁸ The only consent for abortion will come in situations where the Torah sanctions taking of life, such as *rodeif* or capital punishment. Other considerations, no matter how grave, will not permit an abortion. If

⁴⁷ Rabbi Yair Bacharach, *Chavot Yair*, no. 31.

⁴⁸ However, a number of authorities qualify this in various ways. Perhaps feticide is not exactly homicide but an *avizrayhu* (appurtenance) of it. Rabbi Unterman, in *Noam* 6, 52, suggests that only an *avizrayhu* whose prohibition is explicitly stated in the Torah assumes the principle of *yehareig vi'al ya'avor*, "be killed and do not transgress." Since feticide is not explicitly stated but learned by Talmudic exegesis, we would not apply this principle to it even though it falls under the category of murder.

understood as an act of murder, then we can comprehend the fact that non-Jews are put to death for violation of feticide. Further implications include laws that apply to a murderer that should now apply to the aborter; e.g., invalidation as a witness and from performing the priestly blessing ritual.

Maharit's position, which prohibits abortion under the rubric of *chabbalah*, wounding, is altogether different. Here, the fetus might be viewed as an organic part of the mother with no inherent claim to life; rather, its safety is guaranteed vis-à-vis the notion that one may not inflict damage upon their body. Certainly if presented with the option of transgressing the prohibition of *chabbalah* or sacrificing one's life, one must transgress. Furthermore, wounding is permitted in situations of medical need. If our concern regards wounding of the fetus, then we might permit any abortion within forty days of conception, when the fetus is called mere water. Yet, if the issue resides with wounding of the mother, one may not wound her regardless of the stage of pregnancy.⁴⁹ With this perspective, however, it becomes more difficult to explain why non-Jews should be put to death for committing abortion.⁵⁰

The third position views abortion as a prohibition of *hashchatat zera'*, destruction of seed. This too does not call for sacrifice of life and would be permitted in cases of danger to life. This approach perceives the fetus as an extension of the gametes from which it arose, not as its own life form. The issues that must be addressed are those that pertain to the laws of *hashchatat zera'*. Adopting this position demands a rigorous understanding of *hashchatat zera'*, since the differing opinions on that issue will impact its application to abortion.

⁴⁹ Unless by defining a fetus of less than forty days as "mere water" one can claim that the physician is not wounding the mother but removing water from her.

⁵⁰ Rabbi Moshe Feinstein writes that as long as abortion is Biblically prohibited to both Jews and non-Jews (thereby in accord with the principle "there is no thing which is permissible for a Jew but prohibited to a non-Jew"), it matters not that the prohibitions differ in their details or punishments. See *Igrot Moshe*, Choshen Mishpat, vol. 2, no. 69, sec. 1.

The final approach claims that feticide assumes no true Biblical proscription; nevertheless, it is rabbinically prohibited. This view must perceive the fetus as either a non-human or non-living entity within the mother.⁵¹ Accepting this position would engender a very lenient approach to feticide, for the principles regarding rabbinic decrees include *bi'makom tza'ar lo gazru rabbanan*, “in a situation of suffering the rabbis did not decree,” and *bi'makom sakana lo gazru rabbanan*, “in a situation of danger the rabbis did not decree.” These statements inform us that the rabbis enacted their decrees with the stipulation that they do not apply in cases of extenuating circumstances. If so, we find abortion generally prohibited, with the exclusion of cases that qualify as extenuating.

THEORETICAL APPLICATIONS

The entire preceding discussion built a conceptual framework for how to view abortion in halacha; it lays the groundwork for shifting this discussion into practical terms. We can now begin to apply the concepts dealt with in the case studies presented in the second section of this paper.⁵²

If we accept the approach that the Torah bans abortion as an act of *ritzicha* (murder), we immediately sense its severity. The Torah views all human life as imbued with the same basic quanta of sanctity and thus with equal claims to life. Equating termination of an

⁵¹ Presumably, were the fetus to be viewed as an organic part of the mother like any other limb or organ, the issue of *chabbalah* would present.

⁵² This application remains theoretical, serving more as an exercise than an attempt to arrive at proper halachic conclusions. Only the basic, fundamental sources were presented to construct a framework for viewing the topic; the multitude of various analyses, argumentation, and subtle distinctions within each source could not all be addressed. Countless halachic and extra-halachic factors influence the final conclusion of the halachic decisor; therefore, the following discussion aims at presenting a theoretical approach to the practical issues based on the principles that emerge from a basic overview of the topic. How the actual halachic authorities ruled in various cases will be presented in the fifth section.

embryo with homicide effectively assigns the fetus human status. Therefore, just as we murder no human for exhibiting disease or retardation, so too we terminate no embryo earmarked for a life of Down syndrome, cystic fibrosis, or Tay-Sachs. Obviously, the physical, emotional, or financial difficulties that the parents of this child will encounter pale in opposition to murder. The only discussion centers around cases such as the anencephalic, where survival is on the order of days. Here, one could suggest that a mass of cells incapable of survival never assume human status.

Should comprehensive analysis lead one to prohibit abortion as an act of *chabbalah* (wounding), the perspective changes dramatically. If we perceive the offense as a crime against the fetus, then the fetus maintains some sort of quasi-human status: nonhuman in that destroying it fails to qualify as homicide,⁵³ yet enough of a status to prohibit one from assaulting it. Apparently we must view abortion as a Biblical prohibition, but not a cardinal sin. Thus, danger to maternal life could override fetal protection, but financial, emotional, and psychological considerations do not suffice. However, if we view the *chabbalah* of abortion as a crime against the mother, the fetus is no longer endowed with human status but seen as a limb of the mother, and the *mother* is the victim of abortion. From this perspective, we could morally argue to destroy a mass of cells destined to generate a diseased child, since these cells lack inherent value. Halachically, we would reason that destroying a diseased body part destined to produce agony and pain does not constitute *chabbalah*.

Categorizing feticide under the ban of *hashchatat zera'* carries different notions. While the embryo may not possess inherent value as a human life form, the Torah, by prohibiting its destruction, does place inherent value in its preservation. This again pits a Biblical prohibition against the pain and suffering of raising a diseased child.⁵⁴

⁵³ By nonhuman I do not mean that the fetus is viewed as some other life form, but that it has not yet achieved status as a human life.

⁵⁴ It should be noted that some authorities postulate that if feticide stems from

The final viewpoint on abortion takes the position that no such Biblical prohibition exists; the Torah enlaced an injunction only upon non-Jews. If so, a fetus maintains no status other than as monetary property of the father,⁵⁵ and whimsically terminating it should present no halachic or moral concern. Nevertheless, we presume the act to be rabbinically prohibited, considering the centuries of staunch reluctance to terminate a pregnancy without indication for its necessity.⁵⁶ Reduced in severity, a rabbinic ban both curtails abortion-on-demand and carries the aforementioned leniency of *bi'makom tza'ar lo gazru rabbanan*, "in a situation of suffering the rabbis did not decree." Therefore, the rabbinic prohibition would be suspended where completion of pregnancy will legitimately cause the mother great distress and emotional pain. However, defining with certainty what type of fetus prompts excessive emotional suffering remains open to debate. There are numerous content, emotionally healthy, socially integrated families that have a child with special needs, whether because of chronic illness, physical handicap, or mental retardation. The question of where to draw the line in determining this imprecise "emotional suffering" contains ample subjectivity. One might suggest that the more severe diseases, those with fairly trun-

the prohibition of *hashchatat zera'*, then it should incur the punishment of *mitah bi'yedei shamayim*, "death at the hands of heaven," parallel to violating destruction of seed. See *Zechusa DiAvraham*, cited by *Chemdat Yisrael*, p. 175, no. 7.

⁵⁵ This holds true to the point that whenever an abortion is permitted, the father of the fetus must also consent to the termination, for the fetus is monetarily considered his property. See Rabbi Eliezer Waldenburg, *Shu"t Tzitz Eliezer*, vol. 14, no. 101:4.

⁵⁶ *Chavot Yair*, in the middle of his dense two-page analysis, interjects that based on his preceding analysis abortion would be completely permissible from a Biblical perspective were it not for the clear custom to the contrary in the Jewish community to protect against promiscuity and illicit relationships. This posits the prohibition as *minhag* (custom). Likewise, the responsa *Emunat Shmuel* (quoted by *Tzitz Eliezer* 7:36 and 9:51–3:2:2) feels that feticide is not prohibited even rabbinically but by some lesser means (*kitzat issur*), which he leaves imprecisely defined.

cated life expectancy and extreme debilitation, would achieve this threshold. Diseases with multiple-decade life-spans and marginal suffering would not qualify, because many parents—despite the need for extra effort, expense, and support—have succeeded in such situations. The borderline cases would await professional evaluation of the mother’s emotional stability, optimism, and ability to cope with adversity before arriving at a conclusion.

CONTEMPORARY *POSKIM*

This section will present the positions of numerous contemporary *poskim* (halachic decisors), as well as some of their argumentation and rationale. Frequently, the *posek* will address only the specific question or case as presented to him; however, we can often deduce how he must have understood the issue in general to arrive at his specific conclusion.

Maharit. Rabbi Yosef Trani, a seventeenth-century scholar commonly known by his acronym *Maharit*, authored a pair of well-known responsa published a few pages from each other in his work *Teshuvot Maharit*.⁵⁷ Unfortunately, they are famous, in part, because of their apparent contradiction of each other and seemingly incongruous flow. Nevertheless, in responsum no. 97 *Maharit* is recognized as introducing the idea that the prohibition of feticide derives from *chabbalah*. In no. 99 he concludes that for a Jew—in a case of the mother’s need—performance of an abortion would be permitted “since it is to heal the mother.” This seems to follow from the *chabbalah* position, because the injunction against wounding does not apply to medical procedures. However, much controversy remains surrounding the true position of *Maharit*.

Achiezer. In the *Achiezer*, his collection of responsa, Rabbi Chaim Ozer Grodzinsky concludes that Rambam’s designation of a fetus as

⁵⁷ Rabbi Yosef Trani, *Teshuvot Maharit*, vol. 1, nos. 97 and 99.

a *rodeif* was only necessary for instances where labor had begun, at which time the fetus has detached from the womb.⁵⁸ However, before this stage even Rambam considers the fetus a mere limb of the mother! Of course, we sacrifice one limb to save the entire being. This position also appears to view abortion as prohibited under the rubric of wounding.

Sridei Aish. The following question was presented to Rabbi Yechiel Weinberg and discussed in his *Sridei Aish*.⁵⁹ Doctors say that if a pregnant woman becomes infected with rubella, the majority of fetuses will exhibit deafness, blindness, or retardation; therefore, the law in England requires the termination of such pregnancies. Can a Jewish doctor perform this abortion? After a lengthy discussion, Rabbi Weinberg concludes that termination may take place but only prior to forty days from conception. This is because many authorities imply that before forty days the embryo is not yet halachically considered a fetus, and many others hold that even after forty days there is room for leniency regarding abortion. As for Rambam's opinion that a fetus can be terminated only when deemed a *rodeif*, many commentators vary widely in their understanding of this Rambam, and many others argue with the Rambam. However, Rabbi Weinberg appended a concluding footnote remarking that he had recently discovered Rabbi Unterman's position prohibiting even less than forty days and therefore he prefers to leave the subject to further investigation.

Chazon Ish. We can deduce the view of Rabbi Yeshaya Karelitz from his commentary, the *Chazon Ish*.⁶⁰ He cites the Talmudic teaching that we may not take one life to save another, for we do not know whose life is of greater value. This principle does not ap-

⁵⁸ Rabbi Chaim Ozer Grodzinsky, *Sheilot U'Tshuvot Achiezer*, vol. 3, no.72:3. See also vol. 3, no. 65:14.

⁵⁹ Rabbi Yechiel Weinburg, *Sheilot U'Tshuvot S'ridei Aish*, vol. 3, no. 137.

⁶⁰ Rabbi Yeshaya Karelitz, *Chazon Ish*, Hilchos Rotzeiach 1:9.

ply when one of the entities is a fetus; fetal life is significant, but secondary to human life. Thus, we violate Sabbath to save the life of a fetus, but we will terminate a fetus in order to spare any other life. This position permits feticide only when it may save the life of another individual.

Igrot Moshe. Rabbi Moshe Feinstein, recognized as one of the leading halachic authorities of America in the later twentieth century, voiced his opinion prohibiting feticide as an act of murder (*ritzicha*) in his responsa *Igrot Moshe*.⁶¹ If so, a fetus may be terminated only if it threatens the life of the mother with certainty. This prohibition applies even prior to forty days.

Rabbi Auerbach. Rabbi Shlomo Zalman Auerbach, recognized as one of the leading halachic authorities of Israel in the latter twentieth century, is quoted as ruling stringently in accordance with the opinion of Rabbi Feinstein in all cases.⁶²

Rabbi Yosef. Rabbi Ovadiah Yosef, one of the foremost Sephardic *poskim*, assumes the position that abortion is Biblically prohibited.⁶³ However, he writes that both abortion prior to three months and pharmacologically induced abortion are only prohibited rabbinically. If so, in cases where bearing the child will bring the mother extraordinary pain and anguish, the pregnancy may be ended either within three months or pharmacologically.

Tzitz Eliezer. Rabbi Eliezer Waldenberg, author of the responsa *Tzitz Eliezer*, argues that an exhaustive study of the topic finds legitimate

⁶¹ Rabbi Moshe Feinstein, *Igrot Moshe*, Choshen Mishpat, vol. 2, nos. 69 and 71.

⁶² Rabbi Abraham Abraham, *Nishmat Avraham*, Choshen Mishpat 425:2, subsec. 15 (p. 230). The opinions of Rabbi Auerbach are cited as personal correspondence throughout the section on abortion, pp. 220–239.

⁶³ Rabbi Ovadiah Yosef, *Yabiah Omer*, vol. 4, Even HaEzer, no. 1, as cited by Rabbi Avraham Avraham in *Nishmat Avraham*, vol. Choshen Mishpat 425:2, par. 4.

positions at all points of the spectrum—those who equate feticide to homicide and those who hardly see a prohibition involved.⁶⁴ Therefore, due to the severe emotional pain and suffering of raising a child with a critical disease, one may follow the lenient opinion and opt for an abortion. Rabbi Waldenberg specifically addresses Tay-Sachs disease and initially permitted termination through the first trimester. Upon subsequently learning that doctors could not feasibly diagnose Tay-Sachs within three months, Rabbi Waldenberg re-evaluated the issue. He then extended his lenient ruling to permit abortion until seven months into pregnancy.⁶⁵ Because the fetus could survive birth after this time, he felt that it maintains a more human status and should no longer be terminated. However, Rabbi Waldenberg ruled differently concerning Down syndrome cases. Here, in contrast with Tay-Sachs, he felt it inappropriate to issue a general ruling permitting termination. Children with Down syndrome normally live longer, have manageable medical conditions, can be integrated into society, and can provide their parents with much fulfillment. Nevertheless, recognizing that in some families a Down birth could precipitate emotional instability capable of threatening the family structure or marital relationship, Rabbi Waldenberg permitted evaluation on a case-by-case basis. In cases where such a risk is legitimately suspected, he permits termination.⁶⁶

Mishpitei Uziel. Rabbi Ben Zion Uziel assumes an even more lenient stance.⁶⁷ His initial four pages of analysis bring numerous proofs completely permitting feticide without reservation. However, in the closing two paragraphs he proposes that there remains one argument to prohibit abortion: terminating a pregnancy precludes fulfillment

⁶⁴ Rabbi Eliezer Waldenburg, *Sheilot U'Tshuvot Tzitz Eliezer*, vol. 9, no. 51:3. See also vol. 7, no. 36 and vol. 14, no. 100.

⁶⁵ *Ibid.*, vol. 13, no. 102.

⁶⁶ *Ibid.*, vol. 14, nos. 101 and 102.

⁶⁷ Rabbi Ben Zion Uziel, *Mishpitei Uziel*, vol. 3, Choshen Mishpat, nos. 46 and 47.

of the commandment *piru u'revu u' milu et ha' aretz*, “be fruitful and multiply and populate the land.”⁶⁸ Thus, Rabbi Uziel concludes by prohibiting abortion when the intent is only to kill the fetus, but permits abortion anytime we perform it for the needs of the mother, “even a weak need.”⁶⁹ Note that even this lenient opinion cannot condone the abortion of a diseased fetus for fetal concerns, but only with an argument based on the mother’s needs.

Ya'vetz. Rabbi Yaakov Emden espouses a radical, heavily criticized opinion regarding aborting a *mamzer*, a fetus conceived from an illicit relationship.⁷⁰ Following the bulk of his discussion, an issue beyond our scope, he interjects that “even regarding a regular [i.e., non-*mamzer*] fetus there is room to permit abortion in a case of great need . . . to save the mother from a terrible situation that would cause her great pain.” Nevertheless, Rabbi Emden felt satisfied with a passage in the *Zohar* explicitly prohibiting abortion to issue his halachic conclusion prohibiting abortion in respect to a non-*mamzer* fetus.

Rabbi Goren. Rabbi Shlomo Goren, the first chief rabbi of the modern State of Israel, addresses the issue of terminating a Down syndrome fetus.⁷¹ He writes that from the perspective of the child himself, there is no reason to abort. They live happy lives that are almost normal, and for the most part they are able to care for themselves. Therefore, amniocentesis should not be performed even for women above the age of forty when the incidence of Down syndrome rises to 1–2 percent. However, in a situation where amniocentesis was performed and a diagnosis of Down syndrome resulted, the mother’s and family’s health and emotional state require assessment. If evaluation concludes that a birth will trigger severe problems, then

⁶⁸ Genesis 1:28. Also Genesis 9:7.

⁶⁹ Rabbi Uziel does not consider the embarrassment of a pregnant unwed woman sufficient “need.”

⁷⁰ Rabbi Yaakov Emden, *Sheilat Ya'avetz*, no. 43.

⁷¹ Rabbi Shlomo Goren, *Meorot*, Spring 5740 (1980), vol. 2, pp. 26–27.

abortion can be considered as an exceptional leniency. Rabbi Goren stresses that every case must be examined by a geneticist, a mental health professional, and finally a competent halachic authority who can integrate all the information and issue a *pesak*. Absent from his discussion is the latest gestational time when the abortion can take place.

Rabbi Unterman and Rabbi Zweig.⁷² The recent work *HaRefuah Li'Ohr HaHalacha* (Medicine in the Light of Halacha) dedicates a couple of hundred pages to the topic of abortion in halacha. A chapter addressing the issue of aborting fetuses feared to have contracted rubella cites two more opinions worthy of mention.⁷³ Rabbi Isser Yehudah Unterman, the second chief rabbi of Israel, writes that he cannot permit feticide based on some possibility of fetal anomalies. Even when certain that a fetus lacks a limb, Rabbi Unterman equates terminating a pregnancy with killing a deformed human being. This holds true even prior to forty days of gestation. Rabbi Unterman then offers his own view: Parents only desire an abortion because of the burden inherent in raising a physically or mentally handicapped child. They are frankly not interested in such inconveniences. This is not a valid reason for terminating a pregnancy.

Rabbi Moshe Zweig, former chief rabbi of Belgium, is cited in the same vein. Abortion is permitted only for the health of the mother, which is not the case when the fetus possesses an abnormality. Here, the mother's selfishness drives her to seek an abortion so as to not be burdened with this sort of child. Such parents mask their feelings by claiming that really they seek abortion to spare the baby from a life of suffering, pain, and so on. Rabbi Zweig finds no room for leniency in these cases.

⁷² Rabbi I.Y. Unterman, *Noam*, vol. 6. See also in his work *Shevet MiYehudah*, vol. 1, no.1. Rabbi Moshe Zweig, *Ohel Moshe*, vol. 3, no.15. See also his article in *Noam*, vol. 7, pp. 36–56

⁷³ *HaRefuah Li'Ohr HaHalacha*, ed. Rabbi Michael Stern (Institute for the Investigation of Medicine in Halacha, Jerusalem, 5760/2000), chap. 9, pp. 110–113.

CONCLUSION

Our halachic analysis has brought to bear an unusually broad spectrum of rabbinic perspectives, ranging from those who equate feticide with homicide to those who hardly take issue with it; from those who categorically reject abortion save for cases of imminent threat to the mother's life to those who went to great lengths in assembling a legitimate leniency. It must be noted that each *posek* accomplished this while remaining faithful to the Talmudic texts and to the traditional methodology used in their analysis.

Incredibly, despite the enormous heterogeneity of positions and the numerous impassioned debates, one issue emerges undisputed. The quality of life of the potential child is not taken into account. Absent from the preceding pages is any argument that one should terminate a diseased, malformed, or retarded conceptus in order to spare the forthcoming infant a life of pain or suffering. Rather, every argument permitting termination centers around *maternal* concerns for abortion in conjunction with an analysis of fetal status in halacha: the less the status of the fetus, the more weight maternal needs can assume in the halachic analysis.

Rabbi Moshe Feinstein addresses the mother of two children whose unspecified defect produced illness, suffering, and death by age two. Concerning future pregnancies, even ones predetermined to harbor a diseased fetus, he indicates that while the impact on the mother warrants exploration, from the perspective of “the fetus, it is better for him to be born than to not to be born, for [all opinions agree] that one who is born can enter the world-to-come from the time of birth.”⁷⁴ Thus, life as an infant possesses inherent value; life as a fetus remains debated. Should, in our conclusion, the fetus not attain status as a full life, we still choose life—the life of the mother. We scrutinize the mother's emotional, psychological, and physical

⁷⁴ Rabbi Moshe Feinstein. *Igrot Moshe*, Even HaEzer, vol. 1, no. 62. See Talmud Sanhedrin 110.

status to ascertain whether this pregnancy will impact her detrimentally, and then we act in accordance with the complex demands of her life. Thus, perhaps the two seemingly antithetical positions on abortion become two sides of the same coin—the pursuit, defense, and exaltation of that which Judaism holds most sacred: the sanctity of life itself.