

## On Abortion

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Abortion is one of the most divisive and passion-charged moral issues of our time. This is particularly (though not exclusively) true of the United States, where as of this writing a number of state legislatures are adopting stringent limitations upon the procedure and where numerous court cases are raising serious challenges to the existing constitutional guarantee of a woman's right to terminate her pregnancy.

Where does Jewish law stand on abortion? That, unsurprisingly, is the subject of a *mahloket* (dispute). On the one hand, Orthodox rabbis tend to rule quite [restrictively](#); on the other hand, progressive *halakhah* holds that a woman is entitled under Jewish law to [choose abortion](#) in a much [wider range](#) of [circumstances](#).

On what Jewish legal grounds do progressive halakhic thinkers base their opinions? The following set of texts and discussion can serve as a brief summary.

### 1. Exodus 21:22-23

וְכִי יִנְצְוּ אֲנָשִׁים וְנָגְפוּ אִשָּׁה הָרָה וַיִּצְאוּ יְלָדֶיהָ וְלֹא יִהְיֶה אֶסּוֹן עָנּוּשׁ יַעֲנֹשׁ בְּאִשֶּׁר יִשִּׁית עָלֶיהָ בְּעַל הָאִשָּׁה  
וְנָתַן בְּפִלְקִים : וְאִם אֶסּוֹן יִהְיֶה וְנָתְתָה נַפֶּשׁ תַּחַת נַפֶּשׁ :

When men fight, and one of them pushes a pregnant woman so that a miscarriage results, but no harm (*ason*) ensues, the one responsible shall be fined an amount to be exacted by the woman's husband. But if harm (*ason*) occurs, the penalty shall be life for life (*nefesh tahat nefesh*).

#### Rashi

ולא יהיה אסון - באשה  
ענוש יענוש - לשלם דמי ולדות לבעל.  
ואם אסון יהיה - באשה :

*But no harm* – i.e., to the woman.

*(The one responsible) shall be fined* – to pay the valuation of the fetus to the woman's husband.

*But if harm occurs* – to the woman.

From here we learn that, according to *halakhah*, feticide is not classified as an act of “murder.” The Rabbinic tradition, as summarized by Rashi's explanation, is unanimous that the word *ason* in both verses applies to the woman: i.e., the “harm” that initiates the criminal penalty for murder (“life for life”) is the death of the woman and not the death of the fetus.<sup>1</sup> The one who kills the

fetus pays a fine and is *not* liable either for capital punishment or for exile, the standard Biblical penalty for accidental murder.

Why does the killing of a fetus not call forth the same penalties as the killing of another human being? The answer is suggested in the following text, the only reference to therapeutic abortion (i.e., abortion for medical purposes) in all of classical Rabbinic literature.

## 2. Mishnah Ohalot 7:6

האשה שהיא מקשה לילד מחתכין את הולד במעיה ומוציאין אותו אברים אברים מפני שחייה קודמין לחייו יצא רובו אין נוגעין בו שאין דוחין נפש מפני נפש.

When a woman experiences a dangerous childbirth, the fetus may be dissected and extracted limb by limb from her womb, **because her life takes precedence over its life**. Once the major part of [the fetus; other versions: “its head”] has emerged, it may not be harmed, **because one *nefesh* is not sacrificed on behalf of another *nefesh***.

The *mishnah* speaks to a medical situation that demands a tragic choice between the mother’s life and that of the fetus during childbirth. That choice, though painful, is clear: the mother is saved at the expense of the fetus, because her life “takes precedence”<sup>2</sup> over its life. The mother’s advantage disappears, however, once the fetus emerges from the womb. At that point, neither life takes precedence. We might say that each *nefesh* enjoys the same “right to life,” so that neither may be favored over the other.

Notice that the term *nefesh* – “legal person” – is applied to the fetus *only* upon emergence and not before that moment in the birth process. This implies that until birth the fetus is *not* considered a legal person and that, because it enjoys a lesser legal status than that of the woman, it is sacrificed in order to save her life. It would also explain why the killer of the fetus in Exodus 21:22-23 is not culpable for murder: he has not killed a *nefesh*, a legal person enjoying the full moral protection of the community.<sup>3</sup> But could there be another explanation for why the fetus is sacrificed on behalf of the woman who bears it? This brings us to the following text.

## 3. Talmud, B. Sanhedrin 72b

אמר רב הונא: קטן הרודף ניתן להצילו בנפשו.  
קסבר: רודף אינו צריך התראה, לא שנא גדול ולא שנא קטן.  
איתיביה רב חסדא לרב הונא: יצא ראשו - אין נוגעין בו, לפי שאין דוחין נפש מפני נפש. ואמאי? רודף הוא!  
שאני התם, דמשמיא קא רדפי לה.

Rav Huna said: A minor who pursues [another person] with intent to kill may be stopped at the cost of his life.

He reasons: a *rodef* [pursuer] does not require forewarning,<sup>4</sup> whether he is an adult or a child.

Rav Ḥisda raises an objection to Rav Huna's position: "Once the major part of it has emerged it may not be harmed, because one *nefesh* is not sacrificed on behalf of another *nefesh*" [*M. Ohalot* 7:6]. But why not? Is the fetus not a pursuer?

[The Talmud responds, defending Rav Huna] That case is different, because the mother is being "pursued" from Heaven.

Citing *M. Ohalot* 7:6 (Text No. 2) as a difficulty against Rav Huna's ruling, Rav Ḥisda suggests that, upon emergence, the fetus becomes a *katan rodef*, "a minor who pursues." If so, why are we forbidden to kill the child in order to save the mother, its victim? (Note that he says nothing about the status of the fetus so long as it remains *in utero*.) The Talmud defends Rav Huna by declaring that the "pursuit" in this case – i.e., the threat to the mother's life – is an "act of God," an exceptional circumstance that is not covered by the law of the *rodef*. This discussion concerns the law of capital punishment and does not deal at all with the subject of therapeutic abortion. Still, a conflict over its interpretation between two eminent *rishonim* ("early" – pre-1500 – halakhists) helps to determine the direction of all subsequent rabbinical thinking on our question.

#### 4. Rambam (Maimonides), *Mishneh Torah, Hilkhot Rotze'ah* 1:9

הרי זו מצות לא תעשה שלא לחוס על נפש הרודף. לפיכך הורו חכמים שהעוברת שהיא מקשה לילד מותר לחתוך העובר במיעיה בין בסם בין ביד מפני שהוא כרודף אחריה להורגה, ואם משהוציא ראשו אין נוגעין בו שאין דוחין נפש מפני נפש וזהו טבעו של עולם.

The Torah commands that we show no mercy to the life of the pursuer. The Sages therefore ruled that when a pregnant woman experiences a dangerous childbirth it is permitted to dissect/destroy the fetus in her womb, whether by means of a drug or by surgery, **because it is akin to a pursuer (*k'rodef*) seeking to kill her**. But once its head has emerged it may not be harmed, because one *nefesh* is not sacrificed on behalf of another *nefesh*. This is the nature of the world.

Rambam's *p'sak* (ruling) is based on *M. Ohalot* 7:6 (Text No. 2) and filtered through the discussion in *B. Sanhedrin* 72b (Text No. 3). In his view, the Talmud defines the *mishnah*'s dangerous childbirth as a case of *rodef*; thus, so long as it is *in utero* we may sacrifice the fetus in order to save the life of the mother. But this raises the question: why, if the fetus is "akin to a pursuer," are we not permitted to destroy it in order to save the mother once its head has emerged from the womb? Rambam answers with an appeal to "nature" – if in the Talmud's language the mother is being "pursued by Heaven," then we are not allowed to favor either the mother or the child once the latter has emerged.

The difficulty with this approach is that, in explaining the rule in the *mishnah*, Rambam ignores the explanations that the *mishnah* itself provides. According to the *mishnah*, the fetus is

destroyed while *in utero* because “the mother’s life takes precedence” over its own, and we are forbidden to harm the child upon its emergence “because one *nefesh* is not sacrificed on behalf of another *nefesh*.” Rambam says nothing about the legal status of the fetus compared to that of the mother. He explains the *mishnah* according to the Talmudic discussion, which in his view defines the fetus in this case as a *rodef*.

But our second eminent halakhist contradicts this approach.

##### 5. Rashi to B. Sanhedrin 72b, s.v. yatza rosho

יצא ראשו - באשה המקשה לילד ומסוכנת, וקתני רישא: החיה פושטת ידה וחותכתו ומוציאתו לאברים, דכל זמן שלא יצא לאויר העולם לאו נפש הוא וניתן להורגו ולהציל את אמו, אבל יצא ראשו - אין נוגעים בו להורגו, דהוה ליה כילוד ואין דוחין נפש מפני נפש.

Once its head has emerged – this refers to the case of the woman experiencing a dangerous childbirth. The first part of that *mishnah* states that the woman may dissect [the fetus] and extract it limb by limb, **for so long as it has not emerged from the womb it is not a *nefesh*** and it is permissible to kill it to save its mother. But once its head has emerged – it may not be harmed, for it is like a born child (*yilud*), and one *nefesh* is not sacrificed on behalf of another *nefesh*.

Rashi, unlike Maimonides, explains the rule in *M. Ohalot* 7:6 (Text No. 2) in accordance with the *mishnah*’s own language. Abortion is prohibited following emergence because one *nefesh*, legal person, is not sacrificed in order to save another *nefesh*. It follows that prior to emergence, while the fetus is yet *in utero*, the abortion is permitted, not because the fetus is a *rodef* (as Rambam says) but because it is not yet a *nefesh* and therefore the mother’s life takes precedence over its own. This point is driven home by R. Yehoshua Falk Katz (d. 1614) in his *Sefer Me’irat Einayim*, a leading commentary to the *Shulhan Arukh*. Here, Katz speaks to a passage of the *Shulhan Arukh* that repeats almost verbatim the language of Rambam in Text No. 4, and particularly the interesting phrase “this is the nature of the world.”

##### 6. Sefer Me’irat Einayim to Shulhan Arukh Hoshen Mishpat 425, no. 5

וזה טבעו של עולם. הוצרך לכתוב זה, שלא תאמר הולד הרי הוא רודף ויצילו את אמו בנפשו, קמ"ל כיון שטבע של עולם בכך, אין דין רודף עליו, ואעפ"כ בעודו במעיה מותר לחתכו אף על פי שהוא חי, שכל שלא יצא לאויר העולם אין שם נפש עליו, והא ראייה דהנוגף אשה הרה ויצאו ילדיה ומתו משלם דמי הולדות ואין שם רוצח ומיתה עליו.

“This is the nature of the world.” He needed to state this in order to forestall the inference that (because) the fetus is a *rodef* it may be killed in order to save its mother. He tells us, rather, that because this is the nature of the world, the fetus is not considered a *rodef*. Yet even so, as long as it is *in utero* it is permitted to destroy it even though it is alive, for so long as the fetus has not emerged from the womb is not defined

as a *nefesh*. Proof of this may be found in the case of the one who pushes a pregnant woman and thereby causes a miscarriage [see Text No. 1]: he is required to pay monetary damages for the loss of the fetus, but he is not called a murderer and is not culpable for death.

The fetus in *Mishnah Ohalot* (Text No. 2) is not a *rodef*, because it can form no intent to harm the mother. The danger it poses to her is an element of “the nature of the world,” the natural course of the birth process. Therefore, the *mishnah*’s permit of therapeutic abortion does not rest upon the doctrine of the “pursuer.”<sup>5</sup> The fetus is sacrificed on the mother’s behalf because, as a *nefesh*, her life is of higher legal status and takes precedence over that of the fetus.

If this is the case, then the question arises: is abortion permissible in cases where childbirth does not endanger the mother’s life? Are there instances other than mortal danger in which the interests of the mother, who is a legal person, outweigh the life of the fetus, which isn’t? That’s difficult to establish on the basis of the texts that we’ve studied so far, which deal with life-threatening childbirth. Another text, however, is quite instructive.

#### 7. *Mishnah Arakhin* 1:4

האשה שהיא יוצאה ליהרג אין ממתנינן לה עד שתלד על המשבר ממתנינן לה עד שתלד.

If a woman is about to be executed, we do not wait for her to give birth (before carrying out the sentence of death). But once she goes into labor, we do wait for her to give birth.

However unpleasant its subject matter, this text tells us a great deal as to how *halakhah* balances the competing interests of a pregnant woman and her fetus.<sup>6</sup> The pregnant woman, like all who are convicted of a capital crime, is executed quickly, even at the cost of the life of the fetus. The reason, according to an important comment of *Tosafot*, because we wish to spare the mother (as we wish to spare all condemned persons) *inu’i hadin*, the agony of waiting a protracted time for her execution.<sup>7</sup> From this we might learn that the emotional health of the mother, who is a *nefesh*, takes precedence over the fetus’s claim to protection.

On this basis, a number of halakhic authorities sanction abortion when the procedure is undertaken for the mother’s “healing,”<sup>8</sup> a term that need not be restricted to cases of life-threatening danger. Thus, one leading 20<sup>th</sup>-century Orthodox *posek* permits abortion in a case where the birth of the child would result in the mother’s permanent deafness (but where her life is clearly not in jeopardy).<sup>9</sup> Others, significantly, will allow abortion in order to spare the mother the emotional anguish of giving birth to a severely deformed infant<sup>10</sup> or one that will die at a young age of a debilitating genetic disorder.<sup>11</sup> This is by no means the universal position among contemporary Orthodox halakhists. Many of them, following Rambam’s understanding (Text No. 4), will permit abortion only in cases where the birth of the fetus will pose a serious threat to the mother’s life. But the more lenient position does exist in Orthodox *halakhah*. And progressive *halakhah* endorses this lenient position.

*Summary.* From the above, we learn the following essential points.

1. Abortion is not murder, because the fetus is not a *nefesh*. True, progressive responsa regard abortion as a morally fraught decision. If the fetus is not a legal person, it is a *potential* legal person that makes a claim upon our protection. At the same time, abortion is a *morally justifiable* procedure: if a woman has good and sufficient cause for abortion, then her fetus may be sacrificed on behalf of her physical *and* emotional well-being.
2. The definition of “good and sufficient cause” is difficult to specify in the abstract, but as we have seen, it is *not* limited to situations where childbirth poses mortal danger to the woman. The decision must be made on a case-by-case basis, in the context of each particular set of circumstances. And - here is where the line has to be drawn –it cannot be fixed in advance by legal or religious authorities who do not know the woman in question and who are in no position to determine just what counts as *her* physical or emotional well-being. She is the only one in that position. Therefore, the decision for abortion can only be made by the woman herself.
3. For this reason, we ought to oppose legislation that would ban or restrict access to abortion. Such legislation may (or may not) be motivated by good intentions, but in almost every case it denies a woman the option to make a choice that our halakhic tradition would recognize as morally justifiable. This would be an unacceptable violation not only of her personal dignity but also of the freedom of religion that liberal and democratic societies guarantee to their citizens. Indeed, it is more than ironic that the loudest opponents of abortion rights in our communities tend also to be the loudest advocates of “religious liberty.” They should not deny to Jews and to others the possibility of making a choice that, according to our understanding of the *halakhah*, they have every right to make.

## NOTES

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<sup>1</sup>True, the Septuagint, Philo, and the Didache apply the word  $\mu\omicron\sigma\alpha$  in both verses to the fetus. We think the Rabbinic understanding is superior and that it better reflects the tendencies of Biblical law. However, without getting into an argument over all that, we would simply emphasize that our analysis is restricted to the Rabbinic tradition upon which the *halakhah* is founded.

<sup>2</sup> The word  $קודמין$  could be translated as “comes before” – i.e., the mother existed prior to the fetus, which might be the reason why we say her life “takes precedence.” See *Tiferet Yisrael, Yakhin* to the *mishnah*.

<sup>3</sup> See *Sefer Me'irat Einayim* (Text No. 6) and *Siftey Hakhmim* to Rashi, Ex. 21:22, no. 9.

<sup>4</sup> *Hatra'ah*, the warning given to a potential sinner that the act he is about to commit is forbidden and carries with it a specific punishment. Such forewarning is a formal requirement in Jewish law in order to exact certain corporal or capital punishment upon the transgressor. This requirement is waived in the case of the *rodef*, when the victim's life is in clear and present danger.

<sup>5</sup> It's possible that Rambam agrees; see Text No. 4, where he states that in a dangerous childbirth the fetus is  $כרוּדף$ , “like a pursuer.” This is, perhaps, his acknowledgment that the classification of the fetus as a *rodef* is not meant to be taken literally.

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<sup>6</sup> The execution is delayed once labor has begun because at that point the fetus is “a separate entity” (*gufa aḥarina*) and no longer a limb of the mother’s body. See the discussion in *B. Arakhin 7a*.

<sup>7</sup> See *Tosafot, Arakhin 7a, s.v. yashvah al hamashber*.

<sup>8</sup> The earliest precedent is a *t’shubah* by R. Yosef Trani (d. 1639), *Resp. Maharit*, no. 99. He does not cite Rambam and does not mention the “pursuer” analogy.

<sup>9</sup> R. Ben-Zion Meir Hai Ouziel, *Resp. Mishp’tei Ouziel, Hoshen Mishpat 3:46*.

<sup>10</sup> R. Yehiel Yaakov Weinberg, *Resp. S’ridei Eish 3:127*.

<sup>11</sup> R. Eliezer Yehuda Waldenberg, *Resp. Tzitz Eliezer 13:102*. In that particular case, amniocentesis revealed that the fetus was afflicted with Tay-Sachs disease.