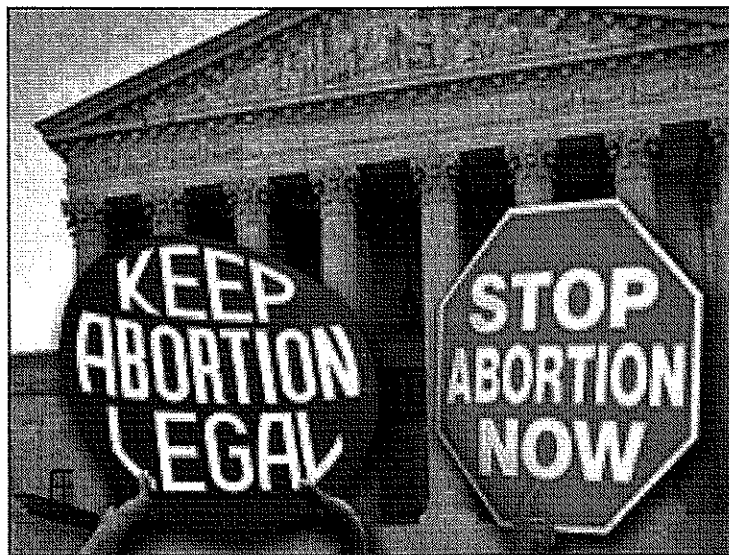


Reflections on 40 Years Since Roe v. Wade

A Jewish Perspective on Abortion



Rabbi Efrem Goldberg
Boca Raton Synagogue



1. Wikipedia



Roe v. Wade

In deciding *Roe v. Wade*, the Supreme Court ruled that a Texas statute forbidding abortion except when necessary to save the life of the mother was unconstitutional. The Court arrived at its decision by concluding that the issue of abortion and abortion rights falls under the right to privacy. In its opinion it listed several landmark cases where the court had previously found a right to privacy implied by the Constitution. The Court did not recognize a right to abortion in all cases;

State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

The Court held that a right to privacy existed and included the right to have an abortion. The court found that a mother had a right to abortion until viability, a point to be determined by the abortion doctor. After viability a woman can obtain an abortion for health reasons, which the Court defined broadly to include psychological well-being.

A central issue in the *Roe* case (and in the wider abortion debate in general) is whether human life or personhood begins at conception, birth, or at some point in between. The Court declined to make an attempt at resolving this issue, noting: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." Instead, it chose to point out that historically, under English and American common law and statutes, "the unborn have never been recognized ...as persons in the whole sense" and thus the fetuses are not legally entitled to the protection afforded by the right to life specifically enumerated in the Fourteenth Amendment. So rather than asserting that human life begins at any specific point, the court simply declared that the State has a "compelling interest" in protecting "potential life" at the point of viability.

Jane Roe and Mary Doe

"Jane Roe" of the landmark *Roe v. Wade* lawsuit, whose real name is Norma McCorvey, is now an anti-abortion advocate. McCorvey writes that she never had the abortion and became the "pawn" of two young and ambitious lawyers who were looking for a plaintiff who they could use to challenge the Texas state law prohibiting abortion. However, attorney Linda Coffee says she does not remember McCorvey having any hesitancy about wanting an abortion.

"Mary Doe" of the companion *Doe v. Bolton* lawsuit, the mother of three whose real name is Sandra Cano, maintains that she never wanted or had an abortion and that she is "ninety-nine percent certain that [she] did not sign" the affidavit to initiate the suit.

National Right to Life Issues New Report: “The State of Abortion in the United States”

• January 21, 2014 • [2014 Press Releases](#)

WASHINGTON – Today, the National Right to Life Committee (NRLC), the federation of 50 state right-to-life affiliates and more than 3,000 local chapters, issued a new report, “The State of Abortion in America.” The report summarizes key legislative developments at the state and federal levels, finds that the annual number of abortions continues to decline, and shows that a majority continue to oppose the vast majority of abortions allowed under the doctrine of *Roe v. Wade*.

“While the most recent data indicate a decrease in the annual number of abortions, tragically, more than 3,000 unborn children are still killed every day in the United States under the legal doctrine of *Roe v. Wade* and *Doe v. Bolton*,” said National Right to Life President Carol Tobias. **“As we observe the 41st anniversary of the twin decisions that legalized abortion in America, the pro-life movement remains committed to restoring legal protection to unborn children and providing help and support to their mothers.”**

As noted in the report, on the basis of the most recent reports from the U.S. Centers for Disease Control and by the Guttmacher Institute (originally founded as a special research arm of the Planned Parenthood Federation of America), National Right to Life estimates that there have been more than 56 million abortions in America since 1973, the year that the U.S. Supreme Court legalized abortion on demand.

The report also observes that after reaching an all-time high of over 1.6 million in 1990, the number of abortions performed annually in the U.S. appear to have dropped to around 1.1 million a year.

This drop in the annual number of abortions can be traced to pro-life legislative efforts at the state and federal level that have raised awareness about the humanity of the unborn child. These laws not only encourage life-affirming alternatives to abortion, they seek to inform and empower women facing unexpected pregnancy.

“Laws enacted at the federal and state levels have helped immensely in reversing the disturbing trend established by *Roe* and *Doe*,” observed Tobias. **“As just one example, it is estimated that the Hyde Amendment, which prevents the use of taxpayer dollars to fund abortions in the Medicaid program, has saved well over one million unborn children since it was first enacted in 1976.”**

The report also discusses National Right to Life’s major legislative priority, the Pain-Capable Unborn Child Protection Act. The legislation breaks new ground in the fight to protect mothers and their unborn children by acknowledging the large body of scientific evidence showing that unborn children are capable of feeling excruciating pain by at least 20 weeks after fertilization and recognizing that states have compelling interest to protect these pain-capable unborn children.

As discussed in the report, the NRLC model legislation has now been enacted in 10 states. In addition, a federal version of the bill has been introduced, and National Right to Life has declared it to be the organization’s top legislative priority for the current Congress.

“Abortion remains widely available. But after years of being told that abortion was ‘the best choice’ or ‘their only choice,’ women are learning that there are alternatives to abortion that affirm their lives and the lives of their children,” added Tobias. **“The bottom line is simple: the right-to-life movement is succeeding because even after 41 years and more than 56 million abortions, the conscience of our nation knows that killing unborn children is wrong.”**

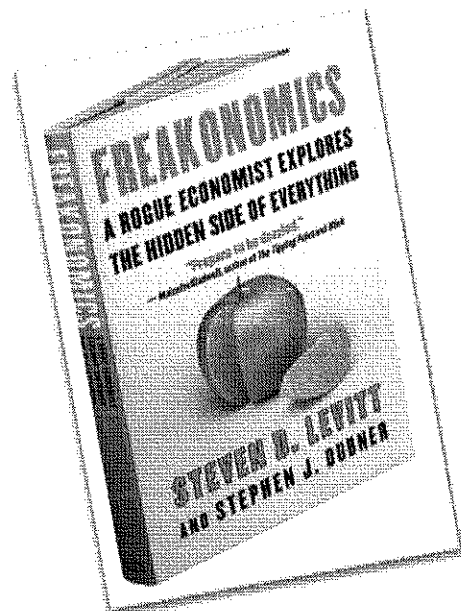
The report is available from the National Right to Life Communications Department here:

<http://www.nrlc.org/communications/stateofabortion>

Founded in 1968, National Right to Life, the federation of 50 state right-to-life affiliates and more than 3,000 local chapters, is the nation’s oldest and largest grassroots pro-life organization. Recognized as the flagship of the pro-life movement, NRLC works through legislation and education to protect innocent human life from abortion, infanticide, assisted suicide and euthanasia.

3. *Freakonomics*

Steven D. Levitt and
Stephen J. Dubner



productive class.

In the first year after *Roe v. Wade*, some 750,000 women had abortions in the United States (representing one abortion for every 4 live births). By 1980 the number of abortions reached 1.6 million (one for every 2.25 live births), where it leveled off. In a country of 225 million people, 1.6 million abortions per year—one for every 140 Americans—may not have seemed so dramatic. In the first year after Nicolae Ceausescu's death, when abortion was reinstated in Romania, there was one abortion for every *twenty-two* Romanians. But still: 1.6 million American women a year who got pregnant were suddenly not having those babies.

Before *Roe v. Wade*, it was predominantly the daughters of middle- or upper-class families who could arrange and afford a safe illegal abortion. Now, instead of an illegal procedure that might cost \$500, any woman could easily obtain an abortion, often for less than \$100.

What sort of woman was most likely to take advantage of *Roe v. Wade*? Very often she was unmarried or in her teens or poor, and sometimes all three. What sort of future might her child have had? One study has shown that the typical child who went unborn in the earliest years of legalized abortion would have been 50 percent more likely than average to live in poverty; he would have also been 60 percent more likely to grow up with just one parent. These two factors—childhood poverty and a single-parent household—are among the strongest predictors that a child will have a criminal future. Growing up in a single-parent home roughly doubles a child's propensity to commit crime. So does having a teenage mother. Another study has shown that low maternal education is the single most powerful factor leading to criminality.

In other words, the very factors that drove millions of American women to have an abortion also seemed to predict that their children, had they been born, would have led unhappy and possibly criminal lives.

To be sure, the legalization of abortion in the United States had myriad consequences. Infanticide fell dramatically. So did shotgun marriages, as well as the number of babies put up for adoption (which has led to the boom in the adoption of foreign babies). Conceptions rose by nearly 30 percent, but births actually *fell* by 6 percent, indicating that many women were using abortion as a method of birth control, a crude and drastic sort of insurance policy.

Perhaps the most dramatic effect of legalized abortion, however, and one that would take years to reveal itself, was its impact on crime. In the early 1990s, just as the first cohort of children born after *Roe v. Wade* was hitting its late teen years—the years during which young men enter their criminal prime—the rate of crime began to fall. What this cohort was missing, of course, were the children who stood the greatest chance of becoming criminals. And the crime rate continued to fall as an entire generation came of age minus the children whose mothers had not wanted to bring a child into the world. Legalized abortion led to less unwantedness; unwantedness leads to high crime; legalized abortion, therefore, led to less crime.

4. Mishna
Ohalos 7:6

If a woman suffer hard labour in travail, the child¹ must be cut up in her womb² and brought out piecemeal³, for her life takes precedence over its life; if its greater part has [already] come forth, it must not be touched⁴, for the [claim of one] life can not supersede [that of another] life.

האשה שהיא מקשה לילד, מתחכין את הילד במעייה, ומוציאין אותו אברים אברים, מפני שחיייה קודמין לחייו; יצא רובו, אין נוגעין בו, שאין דוחין נפש מפני נפש.

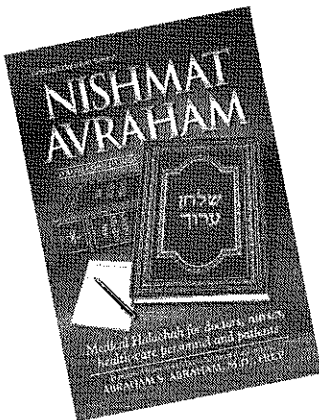
5. Rashi
Sanhedrin 72b

האשה לילד ומסוכנת וקטני ריחא המיה טושטס ידה ומוחלתו ומולדתו לכל זמן שלא יאל לאויר העולם לאו נפש הוא וניתן לטורגו ולהגיל את אמו אבל יאל ריחא אין טנפים צו לטורגו דהוא ליה כילוד ואין דוחין נפש מפני נפש וחס האחר מעשה דשבת בן בכרי (שמואל ג כ) דהה ריחא מושק אלך דדחו נפש מפני נפש האם משום דאשילו לא מטרזו לו היה טורג בעיר כשימועטנה יואב וכן כהרגין עמו אבל אם היה הוא גיטל אש"פ סהן כהרגין לא היו רשאים למטרזו כדי להגיל טנפון אי גמי משום דמטרזי במלכות הוא והכי משרט לה בתוספתא (דחמורה) :

The Gemara states the source for R' Yishmael's view:

IN THE NAME OF R' YISHMAEL THEY SAID: A Noahite is liable EVEN FOR killing FETUSES. What is the reason of R' Yishmael? For it is written in the next verse:^[10] *Whoever sheds man's blood, by man shall his blood be shed.* This verse also alludes to killing one human that is inside another human.^[11] Which is the human that is inside another human? You would say a fetus that is in its mother's womb.

6. Sanhedrin 57b



7. Nishmas Avraham
Rabbi Dr. Avraham S. Avraham

The *Achiezer*^[21] writes that although the accepted ruling is that the Torah forbids an abortion, the *Ran*^[22] believes that the prohibition is Rabbinic and the *Maharash Engel*^[23] believes that this is also the *Rambam's* opinion. *Rav Chaim Palaggi*,^[24] the *Beit Yehudah*^[25] and the *Maharash Engel* himself^[26] all rule that the prohibition is Rabbinic.^[27]

In summation, the majority of *rishonim* and *acharonim* rule that aborting a fetus is prohibited by the Torah if there is no danger or possible danger to the mother's life as a result of the pregnancy or labor. The *Chikrei Lev*^[30] writes that the deciding ruling is like that of the *Tosafot*,^[31] that aborting a fetus is prohibited by Torah law, and this is also the *Rambam's* opinion, according to the *Torat Chesed*.^[34] This is also the ruling of the *Maharam Shick*,^[35] *Tzafnat Pa'aneach*,^[36] *Achiezer*,^[37] *Or Same'ach*,^[38] *Beit Yitzhak*,^[39] *Sdei Chemed*,^[40] *Yabia Omer*,^[41] *Igrot Moshe*,^[42] *Rav Auerbach zt"l* and *Rav Eliashiv shlita*.


8. Rambam
Hilchos Rotzei'ach 1:9

עיקרן מן אף זו מצות לא תעשה שלא לחום על נפש הרודף. לפיכך הורו חכמים שהעוברת שהיא מקשה לילד מותר לחרוץ העובר במיעוטה. בין במס בן כיד מפני שהוא כרודף אחרית להורגה. ואם משחוציא ראשו אין נוגעין בו שאין דוחין נפש מפני נפש והו' מבעו של עולם: * אחד הרודף אחר רבויו להרוג או רודף אחר נערה באורסה לאונסה, שנאמר כי כאשר יקום איש על רעהו ורצחו נפש כן הדבר הזה. וחדי הוא אוטר צעקה הנערה המאורסה ואין מושיע לה, הא יש לה מושיע מושיעה בכל דבר שיכול להושיע ואפילו בהרגת הרודף: * והוא הדין ילשאר כל העריות חוץ מן

This, indeed, is one of the negative mitzvot - not to take pity on the life of a *rodef*.

On this basis, our Sages ruled that when complications arise and a pregnant woman cannot give birth, it is permitted to abort the fetus in her womb, whether with a knife or with drugs. For the fetus is considered a *rodef* of its mother.

If the head of the fetus emerges, it should not be touched, because one life should not be sacrificed for another. Although the mother may die, this is the nature of the world.



9. Igros Moshe (c.m. 2:69)
R. Moshe Feinstein
(1895-1986)

כתבתי כל זה לענין הפרצה הגדולה בעולם המלכותי והרבה מדינות המירו לערוג עובדים ובתוככם גם ראשי המדינה במדינת ישראל וכבר נהרגו עובדים לאין מספר שבוהיו הא עוד יש צורך לעשות סיג לתורת וכיש כלא לעשות קולות באיסור רציחת הזמור ביחוד, שלכן נשתוממתי בראותי תשובה מתכם אחי בא"י הנבנת למנהל ביה"ח שערי צדק ונדפס בחוברת אסיה י"ג המהיר והלדות טע"י בהינות הרופאים כשהוא עובר יותר מג"ח שהעובר הוא במחלת תיי"סקס להפילו, ומצד זה הקדים טעמם הריגת העובדים הוא להרבה חסידים רק מדרבנן ואף אם הוא מאוריינתא הוא רק משום גדר בנינו של עולם אבל מחמת איבוד נפשוה אין נודע כלל, הניא ממדינת התשובה דסימן צ"ט המהיר ולא הוכיח שבסימן צ"ו אוטר האדרבה הוא כתב שגם בתשובה סימן צ"ו מותר, וגם כתב שהשאלת יב"ץ מותר אף שאמר במירושו, בשביל לשון וגם בעובר כשר יש צד להקל לצורך גדול, אף שכבוד ופסוס דלעזין יש צד להקל הוא כאמר שיותר צדדיכ איכא לאמור ובמסיים העב"ץ צ"ו וצ"ע, ועל שו"ת רב פעלים שג"כ היה ירא למסוק בזה שלכן מטיק להתיר בתי"סקס להפיל צד שבנת חדשים, ולא מבין ומן זה שלא פשיטו כלל, וברור ופסוס מכתבתי הלכה הברורה צ"ט רבותינו וראשונים המפרשים החוסקים ממש שאמור בדין רציחה ממש כל עובר בין כשר בין ממור בין שהם עובדים ובין ורודפים לחולי תיי"סקס שסילן אמרין מדינא ממש, ואין לשנות ולסמוך על תשובת חכם זה ושוי ליה מריה בוח הכו"ח לכבוד התורה ודין האמת.

חוקק כאבין בל"ג.

משה פיינשטיין

בענין הפלת עובר לברר שאסור אף בשביל צער האם

אסרו"ח סיכות תשל"ו

פ"כ ותרי כגרי הרב הגאון מהר"ר ר' משה דוד סנדלצו שליט"א.

א. לברר שהריגת עובר אסורה באסור רציחה בין כפסידים בין בישראל

הנה לבדו הריגת עובר במצי אמו בישראל אסורש כחסי סנהדרין דף ג"ט ע"א ד"ה ליכא דאמור בפשיטת באיסור רציחה משום דליכא מידעם דלישראל שרי ולעמיים אמור, וכל כן פשיטא להו דהוא אמור ובאיסור רציחה, צד שהקשו למי מה שהיו סבורים בקשייתם ובתירוח ראשון דבעמיים אמור להרוג את העובר להגיל את אמו אך מותר זה בישראל והוציט לתרוך דהוא מאמם דבישראל איכא מצוה להרוג כדי להגיל האם וכמו כללם ליעיל מזה באותו הדבור דבדבר שהוא מצוה לישראל לא אמרינן המי איכא מדי, ואם לא היה זה מאיסור רציחה ממש אלא איסור בעלמא ונימא שכיון שעמיים אמור לישראל נתקיים המי איכא מדי, כדמשמע לכאורה ממוסי תולין דף ל"ג ע"א ד"ה אחד בזה שחירצו על מה שישראל לא גאטר בלאן

10. Ramban

1194-1270

Toras Ha'Adom

הלכך אפי' בהצלת עובר .

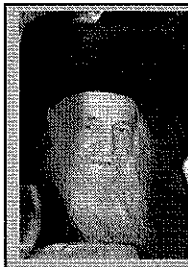
פחות מבן ארבעים יום שאין לו חיות כלל, מחללין עליו, כדעת בעל הלכות, ואיכא דסבירא ליה שאין מחללים משום נפלים * אלא עובריה שהריחה חששא דמיתה דידה היא, שכל המפלת בחוקת סכנה, וטעמא דיושבת על המשבר שמתה, טעמא אחרינא הוא דכיון שמתה הרי הוא כילוד, לאו ירך אמו הוא, ולא בידה תליא אלא חי הוא ודלת גועלת בפניו, ליכא * אלא דלא הוי ליה חזקה דחיותא, וספק נפשות להקל *.

11. Ramban

Nidda 44b

תגן וקרא דגבי דמי ולדות אפילו ביושבת על המשבר היא, ולא אמרינן התם דכילוד הוא, אלא גופא אחרינא הוא דקאמרינן, לומר שממתינין לה עד שתלד ואח"כ ממיתין אותה ולא מיתרבי מגם שניהם, דאפילו קודם שתשב על המשבר כלל אי לאו קרא דגם לא הוה קטלינן לולד כדמפורש התם, אבל לענין לידה דבר ברור הוא שאינו בכלל נפש אדם עד שיוולד כדאמרינן, ולא קושיא היא התם אמרה תורה: חלל עליו שבת אחת כרי שיקיים שבתות הרבה.⁹²

מקשה לילד מביאין סכין ומחתכין אותו אבר אבר, יצא ראשו אין גוגעין בו שאין דוחין נפש מפני נפש, אלמא מעיקרא ליכא משום הצלת נפש.⁹¹ וקרא נמי כתיב דמשלם דמי ולדות.⁹² ואיכא דקשיא ליה.⁹³ מהתא דגרסינן בערכין.⁹⁴ האשה שהיא יושבת על המשבר ומתה בשבת מביאין סכין וקורעין אותה ומוציאין ממנה הולד, ואמאי מחללין שבת כיון שאינו קרויה נפש, וליכא למימר התם ביושבת על המשבר דוקא משום דכיון דעקר גופא אחרינא הוא, כדאיתמר התם בערכין במקשה לילד לא בעינן יושבת על המשבר ו.⁹⁵ ועוד דהכא בן יום א'



12. Shevet Ha'Levi

(7:208)

R. Shmuel Vozner

פחות ממי יום מה"ט ע"כ, ובי"ו כמפורש להיטן מהגנת בעל אגרות מהש ברחמי'ן אלף דעם הרמב"ן דלא מטעם דבכר נקרא נפש מחללין שבת במקרי' של העובר, דלי"כ לא הי' לרין הרמב"ן להסביר מטעם דשמה ימור שבתות הריבה, והנאמן לבי"ט נמשך בכל דבריו אחרי הכנה הנאמן בעל חוס ילודי כ"י דלא יתכן להסביר דין פסוק הריבה עוברין להיכר שילול שבת, ולא נהיה סמוי להכיל דברי הרמב"ן ולמלא, וכי"ה כדכרינו כח' רמב"ן דהה"ד, וטענת סמוי והלבי"ט דלך יתכן דשומר להכריז ול"כ מ"ט מומר להלל שבת מפני פקיד' העובר.

דגדה לין ביה קושיא כלל דלדעת סה"ג הרמב"ן והר"ן ודעמי פשיטא דכחו דמומר להלל שבת מה"ט כ"י להכילו למחייב במטות ה"י"ד וכ"כ דלמור להכריז במטות מה"ט כ"י להכילו לרין מחייב במטות, אלף דלן זה מסבך לדיעה, ונפ"ט להחיל כלושתים דיעוסי.

ב. אלא דהגוס דלמי להנאמן אגרות מהש חו"מ ח"ג כ"י ס"ט ג, שמקט עומד להכריז שיה בלמי אפסרי יס"י מומר מה"ט בהריגת העובר ולעקרי' מומר להלל שבת מפני פקיד' של העובר, דלש מומר להלל שבת כדלפריהא ויה חייב להכילו פשיטא דלמור להכריז, ומנחה כ"י עגרת החולק עליו סה, אשר הויה מדברי הרמב"ן דהה"ד, והאגרות מהש מתוק דעמו מדברי הרמב"ן עמו במשי"כ דלי לאו קרא דעמו גם גטיס לא הוה קטלינן לולד (בערכין ו) אף קודם שיכנה על התעבור, הרי דנקרא נפש, ומנה הויה דעמו סה בכל התעבורה דמשקל הדין לדיעה גמורה הויה מה"ט אף שאין חייבין מיתה, אלף דדעתה מפני נפש סהם השלמים.

ולפי' דעמו הוה דמחיר הרמב"ן להלל שבת על העוברין הי"ט מטעם דליכא בהריגתו גבר לדיעה וגדר נפש מה"ט, ולי' כעמי מה"ט כ"י חלד הרי בהריגתן סוף יומא וברין סה הקב"ה אבי"ג מה"ט דמקן סה"ט המקשה לילד שחוטטים סולד דלמלא משקיל ליה כ"י מה"ט סה"ט נפשות וקשיא לדיעה סה"ג, וכן נמי מה"ט דדיעה מורה בינאמו לרין נק השלמים מה"ט כ"י מי' הרמב"ן והר"ן דלפ"ה לענין שמיחה התעבורה מחללין עליו אחרי מורס הלל עליו שבת וכ"י וסלינו

13. Chavas Yair 31
R' Yair Chaim Bachrach
1639-1702

ואין לומר איך מה זה דמקשה השי"ס על אין ממהנין לה פשיטא דייל כדמפרש גופה
הוא ור"ל מפני שנתחייבת להרג ואדרבה משם ראינו מ"ש גופה היא ולא מקשה סתם פשיטא דמהיכן
תוהי נענדהינה משמע דלולי סברה גופה היא היה סברא להמתין להציל העובר כ"ש שלא נגרום
מיתתו דודאי אסור לכתחילה דלא עדיף מנחמים באלים שוחטי הילדים והפליגו באיסור הוצאת ש"ן
לבטלה והטעם משום שראוי להיות נוצר מכל טיפה זרע קודש.

14. Nishmas Avraham

Rav Auerbach zt"l wrote to me that, in his opinion, just as it is forbidden to rob a fetus of monies belonging to it, so too, it is forbidden to rob it of its life. For the Tosa-fot^[19] write that a fetus can inherit even if it later turns out that it is a nefel.

Rav Neuwirth shlita wrote to me that we also find that a fetus could give its mother (if she is the daughter of a Yisrael and the pregnant widow of a Cohen — author) the merit of being able to eat terumah were it not for a verse that prohibits this.^[20]

יג. לסדר הפלה קודם שנמלאו ארבעים יום מהריונה וגם לרבות קודם ג' חדשים מהריונה הוא קיל בהרבה מלסדר לאחר מיכן ויש על כן לצדד להתיר לסדר הפלה קודם שנמלאו לה כ"ל והעובר איננו עוד בתנועה גם כשיש חשש מבוסס שהעובר שיוולד יצא בעל מום ובעל יסורים.
יד. מאידך להמית הולד כשהאשה יושבת כבר על המשבר והולד כבר נעקר לצאת הוא חמור בהרבה מלפני שנעקר ואין להתיר בכגון זה כי אם במקום סכנה של ממש לאשה.

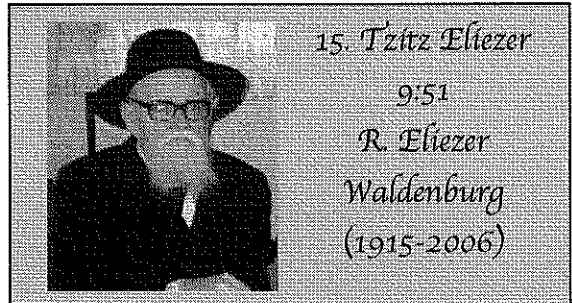
טו. גם במקום שהדין גוזל להתיר הפלה מכל מקום יש לקבל על כך גם הסכמת הבעל כי ממונו הוא.

טז. כן יש לחזר לסדר ההפלה ע"י שתיית רפואה מעשיית מעשה כידיים.

יז. אשה שחולה במחלה מסוכנת שעומדת למות ממנה וההריון שהיה בו אם תמשיך בו יקרב מיתתה והאשה מתחננת שלא לסדר לה הפלה ולא איכפת לה אם זה יקרב מימתה ובלבד שישאר אחריה זכר, יש מקום להתיר להיות בזה שב ואל תעשה.

אוצר החכמות

יח. כל בני ישראל מוזהרים באזהרה חמורה לא לנהוג קלות ראש בהפסקת ההריון, ואחריות גדולה מוטלת בזה הן על השואל והן על הנשאל, מלבד מה שיש בזה משום גידור פרצת הפרוצות והזוגים אחריתם שגם אומית העולם גדרו עצמם בזה ותיקנו תקנות ועונשים חמורים על העוברים והמביעים, וישראל קדושים המת.



15. Tzitz Eliezer
9:51
R. Eliezer
Waldenburg
(1915-2006)

סיכום

היוצא לנו להלכה מכל האמור בשער זה:
א. בן נהרג על העוברין. ויש דעה שאינו נהרג.
ב. ישראל אינו נהרג על העוברין.
ג. כשיש צורך והדין גוזל שמוותר לסדר לאשה הפלה יש להעדיף לבצע זאת על ידי רופא ישראל.
ד. יש להחמיר בסידור הפלה לעכו"ם מלישראל באשר הגמא מצווין גם על העוברין ועוברים על לפ"ע כשאין אחרים בלעדו שמוכנים ג"כ לבצע זאת. ומכ"ש שאסור זאת כשלא נשקפת סכנה לאשה. וכמו כן כשיש מן הצורך לסדר הפלה לעכו"ם יש להגר שיעשה זה רופא ישראל.
ה. יש סוברים שאף על פי שישראל אינו נהרג על העוברין מכל מקום יש עליו איסור תורה מעשות זאת.
ו. ויש סוברים שגם איסור תורה ליכא ויש רק איסור מדרבנן.
ז. וישנם גם הסוברים שגם מדרבנן האיסור שיש בזה הוא קלוש.
ח. ע"פ תורת הנסתר האיסור בהפלת עובר חמור עד מאד.
ט. כשנשקפת סכנה לאשה בהמשכת ההריון יש להתיר הפלת העובר בשופי.
י. גם נשמע בריאותה של האשה רופף מאד ולשם רפואתה או השקפת מכאוביה הגדולים דרוש לבצע הפלת העובר, אע"פ שאין סכנה ממשית, גם כן יש מקום להתיר לעשות זאת, וכפי ראות עיני המורה המצב שלפניו.
יא. כן יש להתיר כנ"ז כשהאשה מינקת.
יב. אשה איש שונתה או נאנסה ונתעברה ואפילו מעכו"ם שאין הולד ממזר וחזרה בחשובה מצדדים כמה מגדולי הפוס' להתיר לסדר הפלה אי משום בזיונה ואי משום הליל השם ופגם ובזיון המשפחה [ואי משום נימוקים אחרים הנזכרים במגים].

16. Yevamos 69b

טַבֵּלָה וְאוֹבֵלָה עַד אַרְבָּעִים – Rav Chisda said: – אָמַר רַב חִסְדָּא –
 The Baraisa means that she immerses herself and may eat
 terumah until forty days pass. – דָּאֵי לֹא מֵעַבְרָא – For if she has
 not become pregnant, הָאֵי לֹא מֵעַבְרָא – then she is not
 pregnant, and is entitled to eat. – וְאֵי מֵעַבְרָא – And if she has
 become pregnant, עַד אַרְבָּעִים מַיָּא בַּעֲלָמָא חַיָּא – then, until
 forty days pass, [the fetus] is merely water, and is not yet
 considered a child.^[26] For those forty days, then, she is permitted
 to eat even if she is pregnant. Afterwards, though, she is forbidden
 to eat, even if her pregnancy has not yet been confirmed.^[26]

Mishnah – [A woman] who miscarried on the fortieth day following conception^[26]
 אינה ויששח לילד – is not to be concerned that a child was discharged, and therefore the laws of

childbirth tumah do not apply to her.^[26] – לַיּוֹם אַרְבָּעִים וָאֶחָד – But if she miscarried on the forty-first day, חָשָׁב
 לְזָכָר וְלַנְּקֵבָה וְלַנְּדָה – she must observe the tumah laws of a male, birth, of a female birth and of a niddah.^[26]

A dissenting view:
 R' Yishmael says: – יוֹם אַרְבָּעִים וָאֶחָד חָשָׁב לְזָכָר וְלַנְּקֵבָה – If she miscarried on the forty-first day
 following conception, she must observe the tumah laws of a male birth and of a niddah.^[26] – יוֹם שְׁמוֹנִים וָאֶחָד
 חָשָׁב לְזָכָר וְלַנְּקֵבָה וְלַנְּדָה – she must observe the tumah laws of a
 male birth, of a female birth, and of a niddah.^[26] – שְׁמוֹנֶה עָשָׂר לְאֶרְבָּעִים וָאֶחָד – for the basic form of a male
 embryo is completed by the forty-first day, וְשְׁמוֹנֶה עָשָׂר לְשְׁמוֹנִים וָאֶחָד – and the basic form of a female embryo is
 completed by the eighty-first day.

The Mishnah concludes:
 – בִּשְׁמֹנֶה עָשָׂר וָאֶחָד בְּרִייתוֹ וְאֶחָד בְּרִייתוֹ הַנְּקֵבָה – But the Sages say: Both the creation of a male embryo
 and the creation of a female embryo require the same amount of time; – זֶה וְזֶה אַרְבָּעִים וָאֶחָד – this one and that
 one both require forty-one days.

17. Nidda 30a

18. Bioethics
 Rabbi J. David Bleich



It is perhaps of interest to note that Aristotle (*De Historia Animalium*, VII, 3) declares that the male fetus is endowed with a rational soul on the fortieth day of gestation and the female on the eightieth. This distinction corresponds not only to the respective periods of impurity prescribed by Leviticus but to the opinion of R. Ishmael in the Mishnah, *Niddah* 30a, who is of the opinion that the prescribed periods of impurity correspond to the number of days required for the animation of the respective sexes and therefore declares that no impurity results from the miscarriage of a female embryo of less than eighty days. Aristotle's representation of animation as occurring on the fortieth or eightieth day, depending upon the sex of the fetus, was later incorporated in both Canon and Justinian law.²⁷

19. Mishna L'Melech
 Hilechos Tumas Meis 2:1

פ"ב א הנפל אעפ"י שעדיין לא נתקשרו איבריו כו' נראה
 דבנזיר מרובעים יום אינו נקרא נפל ואינו מטמא והכי תנן
 נפרק בתרע דההגות משנה ז' כמה ישהה במוכי ויהיה לרין בדיקה
 ארבעים יום:

(ב) כבר נעוברה

הכ"י כתב דוקא לאחר ארבעים יום דקודם לכן מ"א בעלמא הוא והטור
 ומחבר שכתבו משתט של חלקו וכ"כ ב"י עכ"ל סמ"ע וזו נראה כהר"טב"א
 וכ"י דבין דאמרי' בש"ס פ' אלמנה לבי' גבי תרומה לערין ירושה הבאם
 מאליה דמוך מ' יום מ"א בעלמא הוא וכ"כ הרמב"ם רפ"א מה' תרומה ח"כ
 ס"ס הכא ועיין בר"ש פ' אלמנה לבי' ג'
 ודוק ומהטור אין רחיה דמוך מ' יום לא
 מיקרי עובר כלל: (ג) קנה הוא מטמא
 עיין בא"ח סי' מ"א ס"ג:

20. Shach
 Choshen Mishpat 210:2

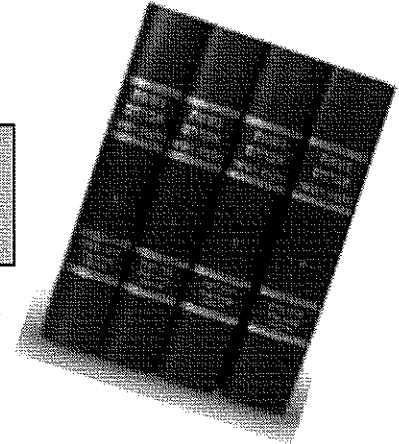
3. ABORTING A PREGNANCY THAT IS OF LESS THAN FORTY DAYS DURATION. It is important to realize that when the doctor talks about the age of a fetus he counts from the beginning of the last period. In *Halachah*, however, the age of the fetus is taken from when the wife immersed herself in the *mikveh* (or from the date of the first *coitus* after this). Thus the true (*halachic*) age of the fetus is about two weeks less than the medical (convenient) age (in a woman with a twenty-eight day cycle, since ovulation occurs fourteen days before the next period).

A fetus then, which according to the doctor is forty days old, is halachically only about twenty-six days old.

The *Gemara*^[45] and *Rambam*^[46] write that a fetus that is less than forty days old is considered “as merely water” since it is not fully formed before then. This concept raises some difficulty since at forty days (that is, eight weeks of pregnancy counting from the date of the last period) the fetus is clearly visible by sonography as a formed being. On the other hand, the *Rambam*^[47] writes that the form and features of the baby are not complete until forty days after conception. This is borne out by a description taken from a standard textbook of gynecology^[48] which states: “Organogenesis occurs from developmental days 28 to 56. It is characterized by the formation of organs ... The face forms ... The heart tube folds, and its chambers and outflow tracts are formed ... The fetal period begins after eight weeks of life and continues until birth.” Thus, before forty days, since its form and features are incomplete, *Chazal* considered it to be “mere water.” Moreover, some 30 percent of spontaneous abortions take place before the woman is even aware that she is pregnant.^[49] *Chazal*’s description that up to forty days the fetus is considered to be “merely water” could therefore also be interpreted to mean to refer to its risky state of viability consequent upon its not yet being completely formed.

Therefore many *acharonim* tend to be more lenient with regard to the abortion of such a fetus.^[50] But, although the *Achie-*

21. *Nishimas Avraham*
Rabbi Dr. Avraham S. Avraham



zer^[51] writes that it is possible that a *ben Noah* will not deserve capital punishment if he aborts a fetus less than forty days after conception, and even for a Jew this is not forbidden by the Torah. *Rav Unterman zt"l*^[52] writes that even if the mother took ill with *Rubella* (German measles) it is forbidden to abort her fetus even if it is less than forty days old (see 17, page 291 below). The *Igrot Moshe*^[53] also rules that it is forbidden to abort a fetus even if it is less than forty days old. Elsewhere,^[54] he writes that one transgresses the sin of murder in aborting a fetus. Therefore, even if we know that the child will be ill throughout its short life, needing much more care than the mother can give it, and even if there is the possibility that she will become ill as a result, it may not be aborted. One must realize that everything comes from Heaven and it does not help to try and be too clever in order to escape one’s fate and punishment by listening to the doctors. Heaven has many ways (of ensuring its will). She must accept whatever *Hashem* does and by merit of this and through her trust in Him, together with her prayers, He will bless her to have a viable and healthy child who will live a long life (end of quote from the *Igrot Moshe*).

Certain diseases, such as *Tay Sachs*, can be diagnosed in the fetus before it is forty days old by the technique of *CVS* (*chorionic villus sampling*). The procedure is usually carried out at 10-12 weeks of gestation and carries a 2.3 percent risk of a miscarriage of a normal fetus; there is an additional risk of inducing congenital

defects. In a study published in June ’02, *CVS* was carried out in 82 Orthodox women at 7-8 weeks of gestation (counting from the first day of the last period, which is before forty days following conception — author); the rate of miscarriage of a normal fetus was 5 percent at less than 28 weeks.^[55]

Rav Neuwirth shlita wrote to me that he had spoken to *Rav Auerbach (zt"l)* who told him that in certain cases it would be permitted to carry out *CVS* and, if it were done before the forty days had lapsed, it would be permitted to abort an affected baby. In a subsequent letter, *Rav Neuwirth shlita* wrote to me that the abortion would best be done by a Jew.^[56] The test may not be done until it has first been established that both parents are carriers of the disease. (In spite of the fact that *CVS* done before forty days after conception carries a 5 percent risk of aborting a normal fetus, there is obviously no intention to do so. Besides, the pregnancy is at the stage of being “merely water” and the abortion occurs spontaneously some time after the procedure — author. *Rav Neuwirth shlita* agreed with this line of reasoning to permit a lenient ruling.)

6. WHEN THE PREGNANCY ITSELF IS DANGEROUS TO THE MOTHER.

In such a situation where the danger to the mother is certain or even probable there is no question that the fetus must be aborted if there is no other way that her life can be saved. An abortion is then obligatory and this is the ruling of the *Shulchan Aruch* here. However if, for example, the baby can also be saved by performing a Caesarian section, this must be done where possible. The *Pachad Yitzchak*^[79] only permits an abortion in these circumstances but prohibits it if the mother is dangerously ill because of a disease and not because of the pregnancy. However, *Rav Auerbach zt"l* wrote to me that his ruling requires further study for since the mother is now ill the fetus is certainly considered a *rodef* (and must be aborted to save her life — author).

Rav Vosner shlita^[80] discusses the *Rambam's* ruling^[81] that the fetus can be killed to save the mother when she is in labor because although it is now no longer considered part of its mother it is still considered a *rodef*.^[82] However, before this stage, when it is part of and entirely dependent on its mother and is not a separate entity at all, her life takes precedence even without the necessity to apply the concept of *rodef*. Therefore, there is no need to go into too many details and act strictly thinking that the *Mishnah*^[83] only permits killing the fetus during labor, since it is obvious then that it is endangering the mother's life. This is not so. The *Rambam* and the *Mishnah* only discuss a situation that is common during labor. The mother's life takes precedence not only during birth when the fetus is a separate entity, but even more so before labor starts when it is still part of, and entirely dependent on, her. This is true not only according to a superficial reading of the *Tosafot*^[84] that killing a fetus is only a Rabbinic prohibition but even according to the *Tosafot* elsewhere^[85] that it is forbidden by Torah law. Throughout the pregnancy, however, and until labor has started, when the question arises of the life of the fetus or that of the mother, since it is not yet a full-fledged Jewish being as opposed to the mother, her life takes precedence. Therefore, in such a case the Torah ruled leniently, that even where the possibility of danger to the mother is only remote, the fetus should be aborted,

as the *Ran* writes.^[86] However, the *Chazon Ish* told *Rav Vosner shlita* that one must be careful before permitting an abortion since, in his experience, doctors tend to be rather carefree in proclaiming a situation as being possibly dangerous to the mother when, in truth, there is no danger at all (end of quote from *Rav Vosner shlita*).^[87] From this responsum we can also see that it is permissible to perform an abortion no matter what the cause of the danger to the mother's life, even if it is only possible that the fetus is responsible for the danger.

Rav Zilberstein shlita^[88] was asked about a woman in the early stages of pregnancy who was found to have cancer which obligated chemotherapy. Would it be permitted to abort the fetus since the pregnancy might endanger her during the therapy, even though the fetus itself was not a *rodef*? He replied that as long as the fetus was not self-sufficient but was dependent on its mother who gives it of her life she need not take its welfare into consideration. However, *Rav Auerbach zt"l* wrote to me that this requires study for such a situation would only permit a passively induced abortion but would not permit an active act of abortion. After all, she willingly became pregnant accepting that she would have to sustain the fetus.

I asked *Rav Auerbach zt"l* that it would appear that his ruling would apply only if the woman became pregnant after the diagnosis of cancer had been made. However, *Rav Zilberstein shlita* discusses a situation where the diagnosis was only made after she was already pregnant. The *Rav zt"l* answered that it would be permitted to abort the fetus before starting chemotherapy so as to minimize the danger to the mother. Since it is the mother that provides the fetus with its life she may say that she no longer wishes to continue to do so since this may now endanger her life. (Besides, even though we rule that it is forbidden to abort a fetus by Torah law since such an abortion is punishable by death when performed by a *ben Noah*, nevertheless there are *poskim* who rule that abortion of a fetus is only a Rabbinic transgression) (end of quote from *Rav Auerbach zt"l*).

7. WHERE THE DANGER TO THE MOTHER STEMS FROM AN ILLNESS THAT PRECEDED THE PREGNANCY. This can arise from a number of reasons such as advanced heart or kidney disease and the like where the additional stress of the pregnancy or labor or both can endanger the mother's life. The *Yabia Omer*^[89] permits an abortion where there is a good possibility that continuation of the pregnancy will endanger the mother's life, particularly if the pregnancy is of less than three months duration. The fetus is considered a *rodef* that endangers the mother's life. This is also the ruling of the *Tzitz Eliezer*.^[90] Both, however, discuss the problem of the reliability of doctors. The *Yabia Omer* writes that one may rule leniently if another doctor in a separate consultation gives the same opinion as the first. This is also the ruling of other *acharonim*.^[91] (See also what I have written in *Rav Neuwirth shlita's* name regarding the credibility of medical opinion, *Siman* 276A above, page 240).

The *Igrot Moshe*,^[92] however, writes that it is forbidden to permit an abortion unless the opinion of the doctors is that the mother will almost certainly die if the fetus is not aborted. Since this is only permitted because the fetus is considered a *rodef*, one must be almost certain that it is indeed a *rodef*.

Rav Auerbach zt"l wrote to me that this requires further study, for the *Rambam* rules that a fetus is considered to be a *rodef*. If so, why should the fetus not be looked at in the same way as a son who comes to steal from his father. Even though it is only a possibility that the son comes prepared to kill his father were he to stand in his way, the father is nevertheless permitted to kill his son; see the *Gemara*.^[93] (The *halachah* is that since a thief who breaks in to steal may be prepared to kill the owner were he to stand in his way, the owner is permitted to kill him first, even if the thief is his son^[94] — author.)

Rav Brandesdorfer shlita^[95] writes about a woman who was both a diabetic and hypertensive. She was told by a number of doctors that her pregnancy was endangering her life and that she must have an abortion. He rules that since in the opinion of the doctors the fetus is endangering her life, it is possible that we can rely on the *acharonim*^[96] who rule that even if the danger to the mother is not as yet certain, the fetus is still to be considered a *rodef*. And, since according to the doctors the continuation of the pregnancy is a greater danger than an abortion, the abortion would be permitted. He writes that he consulted with *Rav Yitzchak Weiss (zt"l)* who ruled that the abortion should be permitted.

woman who was admitted to the hospital with high blood pressure before forty days had lapsed from conception. The gynecologist thought that she must have an immediate abortion, otherwise the pregnancy would intensify her disease and endanger her life. On the other hand, the internist thought that there was no need for an immediate abortion and that one should first try to treat the high blood pressure through medication. If this failed one could then abort the fetus. *Rav Zilbershtn shitta* ruled that it would be forbidden to abort the fetus at this stage (even though she was still within forty days of conception when it is easier to permit an abortion) since there is a possibility that her blood pressure could be controlled without the necessity of an abortion.

Rav Auerbach z"l wrote to me that it would nevertheless appear that the gynecologist is more experienced (in a situation such as this) and even if the internist is as experienced as he, it would still be permitted to have the abortion immediately.

9. DANGER TO A LIMB. The *Torah Chesed*⁽¹⁰⁸⁾ permits a woman to have an abortion even if the pregnancy only endangers one of her organs, even according to those who rule that an abortion is forbidden by Torah law. The *Mishpelei Uziel*⁽¹⁰⁷⁾ was asked about a woman with a disease of the ears who became seriously ill when she became pregnant. The doctors warned her that if she did not have an abortion she would become totally deaf in both ears. The *Gemara*⁽¹⁰⁹⁾ states that the fetus of a pregnant woman (con- demned to death by *Sotah*⁽¹¹⁰⁾) is killed first before she is killed to prevent disgra-

cing her after her death. Based on this, it should be permitted to abort a fetus to prevent the mother becoming totally deaf and thus being maimed and miserable for the rest of her life and repugnant in her husband's eyes. See, however, 10 and 14 below.

Rav Auerbach z"l wrote to me that the proof brought by the *Mishpelei Uziel* from the *Gemara* is not conclusive. The *halachah* is that it is permitted to carry out the death sentence immediately (even though she is pregnant) and the fetus will most probably also die (soon after). Therefore one is not permitted to then carry out a postmortem Caesarian to save the baby. Since the chances of success in these circumstances is so remote we may not desecrate the body of the corpse. There is therefore no proof from this that it is permissible to actively abort a fetus to prevent the mother from becoming deaf.

10. SEVERE SUFFERING DURING THE PREGNANCY BUT WITHOUT DANGER. The *Maharsh"l*⁽¹¹²⁾ permits aborting a fetus to cure the mother's illness or to prevent her becoming repugnant to her husband even when there is no danger to her life, but appears to contradict himself in another responsa.⁽¹¹³⁾ The *Tzitz Eliezer*⁽¹¹⁴⁾ agrees, writing that if the mother's health is fragile and in order to cure her or to stop her very severe pains, it would be necessary to abort the fetus, there is room to permit this, even if there is no danger to her life. This will depend on the impression the *posek* has of the situation. However, the *Igrat Moshe*⁽¹¹⁵⁾ disagrees with him (as does *Rav Auerbach z"l*, see 9 above). This is also the ruling of the *Yabia Omer*⁽¹¹⁶⁾ who

writes that one may only permit a surgical abortion when there is danger to the mother's life. However, there is room to permit taking medication to abort the fetus (see 4 page 282 above). The *Law Aryeh*⁽¹¹⁷⁾ writes that when there is no danger to the mother's life it is forbidden by Torah law to abort the fetus.

The two different opinions cited here and in 9 above are based on the controversy whether an abortion is forbidden by Torah or Rabbinic law. Thus the minority, lenient opinion believes that it is only Rabbinic law that forbids an abortion. The majority, stricter opinion rules that an abortion is forbidden by Torah law and only permitted when the pregnancy endangers the mother's life.

11. PSYCHIATRIC ILLNESS. The *Levushet Mordechai*⁽¹¹⁸⁾ permits an abortion if according to medical opinion, there is a danger that the mother will become so severely psychiatrically ill that it will endanger her life.⁽¹¹⁹⁾

I have spoken to experienced psychiatrists who assure me that depression during and after a pregnancy is a treatable disease and there is no indication for aborting the fetus. The woman must be under close psychiatric care during this and all future pregnancies to prevent her from becoming depressed. Both *Rav Auerbach z"l* and *Rav Neuwirth shitta* agreed that she must not undergo abortion.

12. ONE WHO BECAME PREGNANT IN SPITE OF THE DANGER TO HER LIFE. The *Maharsh Engel*⁽¹²⁰⁾ writes that if a woman knew that becoming pregnant would endanger her life, but never-

theless became pregnant willfully, thus necessitating an abortion, her act can be considered criminal; it is similar to what the *Tosafot*⁽¹²¹⁾ write about. In such a case the prohibition of abortion cannot be set aside and it would be forbidden to abort the fetus. However, before the pregnancy is forty days old — when the fetus is considered as mere water, it would be permitted. And according to the *Ramban* that one may circumcise a baby even if this may lead to the necessity of setting aside Sabbath laws because of danger to the baby's life, this applies only in such a case. For the *Ramban* believes, like the *Ravuz*, that Sabbath laws are not merely set aside but completely abrogated in the context of saving life (i.e. the *Sabbath* is considered to be a *weekday* — *author*) since whatever is done would not in itself be forbidden if it were not for the Sabbath. But an abortion, as is the case with all other transgressions (which are forbidden in their own right — *author*), is only permitted to save the mother's life and therefore, in this case, will be clearly forbidden.

This ruling would appear to follow the opinion of the *Chochmat Shlomo*⁽¹²²⁾ that any voluntary act that could endanger the life of the person concerned does not allow Sabbath laws to be set aside to save him. This opinion of the *Chochmat Shlomo*, however, is not accepted by the *acharonim* and by the *poskim* of our generation⁽¹²³⁾ who rule that Sabbath laws, even of Torah force, are set aside to save someone who attempted to commit suicide. See also 11 above.

will cause its death and even if the treatment will not cure her, but only lengthen her *chayei sha'ah*. And, although in our times one can treat very premature babies born after six months of gestation, which shows that the baby is viable and not dependent on its mother, this argument is not true. The baby cannot leave its mother except by Caesarian section or by inducing birth through medication, and this requires its mother's permission. Therefore it is still considered dependent on her and has no life without her, particularly since it is not certain that it will live if treated.

Rav Auerbach z"l wrote to me that this argument only permits not intervening to save the life of the fetus, but not that one may abort it. (Although its life is entirely dependent on her) It was she who knowingly and willingly brought it into the world to share part of her life (see 6, page 284 above — *author*).

15. SOCIAL, FINANCIAL AND OTHER SUCH REASONS. Abortian is not permitted for such reasons even if the fetus is less than forty days old. Abortion is forbidden not only according to those *poskim* who rule that it is a Torah transgression unless there is danger to the mother's life, but even according to those who rule that it is only forbidden by Rabbinic law. The *Tzitz Eliezer*,¹³⁶⁰ who is well-known as one of the *poskim* who tends to rule leniently on certain matters concerning abortion, writes that it is a serious transgression to abort a fetus when it is not done as treatment for the mother's illness. Elsewhere¹³⁶¹ he writes that the words of the *Zohar*,¹³⁶² should strike fear and deter all those who are wont to abort with contempt and flippancy because of some small inconvenience, imagined or not.

PROBLEMS CONCERNING THE FETUS. I will now list a number of situations which I found discussed by the *poskim* where the fetus had a medical problem but the mother was healthy. Most *poskim* forbid abortion in such cases, as long as there is no danger or possible danger to the mother.

16. TAY-SACHS DISEASE. This is an inherited genetic disease, one hundred times more common among Ashkenazi Jews than in the general population, that is characterized by a failure of the baby to develop during the first year of its life. There is rapidly progressive neurological deterioration, visual loss, seizures and severe muscle weakness. The baby will die within four to five years of birth, blind and paralyzed. Today we also recognize a juvenile form of the disease (which can be differentiated from the classic type by specialized genetic testing) which starts later in life and has a much slower progression. The following discussion is limited to the classic neonatal disease.

Prenatal diagnosis of the disease can be made by *amniocentesis* that is usually done between 15 and 17 weeks of pregnancy. *Chorionic villus sampling* is usually carried out between 10 and 12 weeks of pregnancy. However, it can be done, at 7-8 weeks of pregnancy (counting from the beginning of the last period and therefore, in fact, 5-6 weeks following conception, that is, when the fetus is less than forty days old), see 3 above (page 280).

May such a fetus be aborted when the diagnosis is made by *amniocentesis* well after forty days of conception? The *Tzitz Eliezer*,¹³⁶³ permits abortion until the seventh month of pregnancy. He writes that the matter of abortion is more serious after seven months for in many cases the

child is fully developed by then.¹³⁶⁴ On the other hand, the *Igrot Moshe*,¹³⁶⁵ strongly disallows and forbids the abortion of a *Tay-Sachs* fetus. He also writes¹³⁶⁶ that it is forbidden to have an *amniocentesis* performed since, in any case, one may not have an abortion. The *Tzitz Eliezer*,¹³⁶⁷ however, in a subsequent *responsum*,¹³⁶⁸ replies that he maintains his position and ruling.

The *Lav Aryeh*,¹³⁶⁹ writes that perhaps one would not transgress by aborting such a fetus since it is not destined to become an independent being, as the *Noda B'Yehudah* writes.¹³⁷⁰

Rav Auerbach z"l told me that one must act strictly, following the ruling of the *Igrot Moshe* and neither have an abortion nor undergo *amniocentesis*. See, however, 3 above (page 280).

If, however, the knowledge that she is carrying such a fetus will make the mother seriously psychiatrically ill, see 11, page 288 above.

17. RUBELLA (GERMAN MEASLES). If a woman becomes ill with German measles during the first month of her pregnancy, there is as much as a 50-percent chance that the baby will have physical defects. If she becomes ill during the second month of her pregnancy this figure drops to about 25 percent, and if she becomes ill during the third month, to about 15 percent. Even after the third month of pregnancy there is a possibility that the fetus will be affected although the figures are much lower. However it is important to realize that all these figures

include minor defects or easily correctable defects in the majority of cases.¹³⁷¹

The *Servidei Eshai*¹³⁷² writes that abortion is permitted before forty days of gestation since the pregnancy is then "merely water"¹³⁷³ and this is the ruling of all the great *acharovim*. The *Sheach*¹³⁷⁴ writes that if one bestows a gift upon a fetus less than forty days old it does not gain possession of the gift since it is merely water. And, after forty days, the *Yavetz*¹³⁷⁵ rules leniently if the fetus causes the mother to become ill or to suffer even if there is no danger to her life. However, all that he writes regarding permitting an abortion is only according to those *poskim* who rule that an abortion is permitted since the fetus is not yet an independent being. But, according to *Rav Chaim of Brisk's* interpretation of the *Rambam* that the only reason for permitting an abortion is that the fetus is a *rodef*, if it is not endangering the mother's life, abortion would be forbidden. However, in an addendum to the *responsum* of *Rav Unterman* (above) one must ask the opinion of the great *poskim* (and of *quote from the Servidei Eshai*). The *Tzitz Eliezer*,¹³⁶⁸ also rules leniently, writing that if there is good evidence that the fetus will be born with a defect that will cause him suffering, one may permit an abortion before forty days. Even after that, but before three months when the fetus has not yet started to move, an abortion would be permitted.

On the other hand, *Rav Unterman z"l*¹³⁶⁹ forbids abortion even if the fetus is

less than forty-days old. He states that defects are not concerned with the laws of *pitzeich nefesh*, for whoever heard that one may kill a fetus in order to protect it from defects. The abortion is only done because the parents wish to avoid the trouble of looking after the child (*if he is born with a defect — author*) and one cannot abrogate a transgression that is akin to murder just because of their fear. The *Igrot Moshe*,¹¹⁷ *Mishnei Halachah*¹¹⁸ and *Kenei Bosen*¹¹⁹ also forbid abortion.

18. **DOWN SYNDROME (TRISOMY 21).** The diagnosis can be made from the mother's blood followed by ultrasound (*sonography*) examination of the fetus. If these are inconclusive, *amniocentesis* or *CVS* and *chromosome* analysis is performed.

The *Tzitz Eliezer*¹²⁰ discusses the question of *amniocentesis* for the diagnosis of *Down syndrome* in pregnant women who are thirty-seven years of age or more. Since the incidence of *Down syndrome* reaches one to two percent in women of this age, he permits *amniocentesis*. However, with regard to an abortion if the test is positive, he writes that he cannot give a general permissive ruling to apply to all cases. If the test is positive, a *Kav* must be consulted who will investigate the mental state of the couple. In another responsum¹²¹ he writes that one may not accept the doctor's advice and one may not undergo *amniocentesis*. Instead one should fulfill the verse:¹²² "You shall follow *Hashem* with perfect faith." If, however, the couple already have a child with *Down syndrome*, and she is advised to undergo *amniocentesis* or if she is above the age of thirty-seven years and becomes very upset so that she cannot find rest by day or

by night if she is not permitted to follow the doctor's advice, the test may be permitted.

Rav Auerbach zt"l told me that one must act strictly, following the ruling of the *Igrot Moshe* and neither have an abortion nor undergo *amniocentesis*. See, however, 3, page 280 above.

19. **HYDROCEPHALUS** (skull filled with water). The *Torai HaYode'ot*¹²³ discusses the case of a woman who cannot give birth naturally because of the swollen head of the fetus (*hydrocephalus*). Such a baby will have a short life span, some die within a few days while others live for a few months. One may either insert a needle *in-utero*, to remove some of the water (killing the fetus), but allowing the birth to take place naturally, or alternatively, deliver the baby by Caesarian section and let the child live out its natural life. Is it permitted to kill the fetus or must one operate on the mother? He answers that it is forbidden to kill the fetus and the mother must undergo Caesarian section. In a note¹²⁴ he adds that according to the *Rambam*, since the baby cannot be born naturally because of its large head, but can be delivered by Caesarian section which carries a slight risk for the mother, he does not have the *halachah* of a *rodef*. The *halachah* of a *rodef* only applies to one who is attempting to kill another and not to one who puts another into a situation carrying a small risk to his life. If we do not say this then even a healthy fetus who cannot be delivered naturally may be killed since it puts its mother into the slight risk of a Caesarian section, and this is certainly untrue, just as one may not kill a healthy fetus, so one may not kill a fetus who is a *treifah* who

cannot live for twelve months, as long as it is not a *rodef*.

20. **ANENCEPHALUS** (missing the upper part of the brain). Such a baby has no chance of living, in the majority of cases, for more than a week. Is it permitted to abort it to prevent the mental suffering and possible depression of the mother? *Rav Zilberstein shlitza*¹²⁵ quotes a *Gemara*¹²⁶ that a woman who has a miscarriage of a fetus whose skull is absent does not become ritually unclean (because of the birth, she is, however, ritually unclean as a *niddah* — *author*). This is the ruling of the *Rambam* who defines such a baby as a *nefel*.¹²⁷ The *Rambam* also writes¹²⁸ that the firstborn male child, born after a *nefel* who does not make his mother unclean because of the birth, must be redeemed (*pidyon haben*). Therefore, it would appear that such a fetus does not have the status of a potential person and it will not be a transgression to abort it since it is incapable of living. And even if only a part of the brain is absent, it is treated as if it is totally absent. This is also the ruling of the *Chochem Tzav*.¹²⁸ However, the *Pitchei Teshuvah*,¹²⁹ quoting the *Teshuvah MeAhavah*, writes that a child who was born with severe defects (so that it looked half human, half animal) is not considered a being only in that it does not make his mother ritually unclean because of the birth. Therefore, one may not cause its death even indirectly by starving it (*end of quote*). This will apply to an *anencephalic* baby.

Rav Auerbach zt"l wrote to me that since an *anencephalic* fetus will not live after birth and its mother will not be ritually unclean because of the birth, since it is not a child, it is possible that it is permitted to abort it. However, after its birth if it was born at full term the *halachah* is like the ruling of the *Teshuvah MeAhavah* and it is forbidden to hasten its death in any way. He also told me that if it was born full term, it would be permissible to set aside Sabbath laws, even those of Torah force, to save it. But if there was cardiac or respiratory arrest there is no obligation to attempt to resuscitate the child. See also *Nishmat Avraham*, vol. 1 *Orach Chaim*, page 231, and vol. 2 *Yoreh Deah*, page 318.

21. **MAMZER.** The *Ben Ish Chai*¹³⁰ was asked whether a married woman who became pregnant from another man could drink medication to abort a five-month-old fetus. He replied that he did not wish to give a ruling, neither to permit nor to forbid, but would only quote what he found in the *responsa* literature on the subject. He quotes the *Chavot Yareiv*¹³¹ commenting that it would appear that, given the choice, one should not permit abortion; the *Yavetz*,¹³² who writes that it is permitted and may even be a *mitzvah*; and the *Maharitz*,¹³³ who permits it when there is need to do so for the mother's sake. It would appear that where there is a question of a blemish on the family name, a great disgrace and *chilul Hashem* if the pregnancy is allowed to continue, there is room to argue that this would be considered a pressing situation. However, he repeats that he has already written that he does not add anything of his own nor wish to disclose his own thoughts on the matter. He merely puts

before the questioner the literature on the matter to be brought before a Rav who will rule on the matter. (See 8 above, p. 286, another *responsum* of the Ben Ish Chai.)

The *Mishpetei Uziel*¹¹⁶¹ writes that the woman may take medication to abort the fetus or even do so actively before labor has started. However, it is forbidden for another Jew to abort the fetus or for the mother to have the abortion performed by a *ben-Noch*.

*Rav Auerbach z"l*¹¹⁶² wrote to me that if it is obvious that there is distress and shame, why should it only be permissible for the parents to abort the fetus and not anyone else?

Both the *Igrot Moshe*¹¹⁶³ and *Rav Eliezer shikunim* rule that Torah law forbids the abortion of a *manazer*.

22. AIDS. A substantial proportion of the cases of mother-to-child transmission of the disease occurs during birth. The incidence of transmission from mother to child is reduced to 2 percent if the mother receives treatment for the disease and undergoes elective Caesarian section.¹¹⁶⁴ Thus there is no reason to permit an abortion.

23. RAPE. It is possible today to prevent conception in the majority of cases by taking appropriate medication, provided this is done within seventy-two hours of coitus. This would be permitted in a case of rape¹¹⁶⁵ since it does not cause an abortion but inhibits or delays ovulation or prevents implantation.¹¹⁶⁶ An *TO'D* can also be used since it prevents implantation [see *Even HaEzer* Siman 5N(21)] above page 66]. *Rav Auerbach z"l*¹¹⁶⁷ and *Rav Neuwirth shitta* agreed with this.

24. THE EFFECT OF X-RAYS AND MEDICATION. In a small percentage of women who had certain types of X-rays or were given certain medications during the early months of pregnancy, there may be an increase in the number of babies born with congenital defects.

The *Gemara*¹¹⁶⁸ tells us that King Chizkiyahu was told by Yeshayahu the prophet that he would be punished by death, both in this world and the next, since he did not perform the *mitzvah* of having children. He countered that this was because he knew that he would have a wicked son (Memashel). The prophet said that he should not interfere in the ways of Heaven; that he should do what he was commanded to do and that *Hashem* will do as He wishes.

The *Igrot Moshe*¹¹⁶⁹ writes that since aborting a fetus carries the prohibition of murder (*if it is not endangering the mother's life — author*), it is obvious that even if one knows with certainty that the child will only live a short time, will be ill all of his life without any intelligence or understanding, even if the mother will have to lead to him beyond her capability and may even herself become ill as a result, one may not permit the fetus to be aborted. The prohibition of murder applies to such a fetus just as to a completely healthy one. The mother must realize that everything comes from Heaven and it does not help to try and be too clever in order to escape one's fate (and punishment) by listening to the doctors. Heaven has many ways (of ensuring its will). She must accept whatever *Hashem* does and by merit of this and her trust in Him,

together with her prayers. He will bless her to have a viable and healthy child who will live a long life (*end of quote from the Igrot Moshe*).

25. MULTIPLE PREGNANCY AND FETAL REDUCTION. In a case of a woman who was pregnant with sextuplets, *Rav Auerbach z"l*¹¹⁷⁰ told me that it would be permitted to abort some of the fetuses in order to save the others. In another case, a woman became pregnant with quadruplets following IVF. The doctors said that she could not continue the quadruple pregnancy because of a small pelvis. *Rav Auerbach z"l*¹¹⁷¹ permitted her to have one or two of the fetuses aborted as necessary.

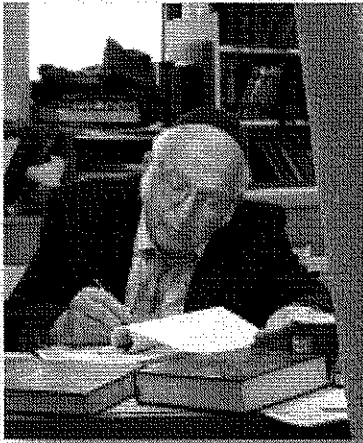
He explained to me that in a situation where a multiple pregnancy has a high risk of ending in the miscarriage of all the fetuses, each fetus has the *halachah* of a *rodef*. Hence the doctor may actively kill (by injection — *author*) some of them to save the others, choosing to kill the ones most accessible and those whose death would result in the least risk of losing all the fetuses in the process. This must be done after forty days of gestation (it is usually done between nine and twelve weeks of gestation) when the doctor feels that the procedure would carry the least risk.

This is also the ruling of the *Tzitz Eliezer*¹¹⁷² who writes that he heard that *Rav Eliezer shitta* also permitted it.

(B) If, however, its head has al-

ready emerged. This means the emergence of its forehead and the *Beit Yosef*¹¹⁷³ writes most of his forehead. In a breech delivery, it would be the birth of most of the baby¹¹⁷⁴ and *Rav Auerbach z"l*¹¹⁷⁵ told me this means up to and including his umbilicus.

The *Shulchan Aruch* here writes that once the baby's head has emerged one may not harm him, for one may not sacrifice one life to save another. The *Tosfot Yom Tov*¹¹⁷⁶ asks that we find¹¹⁷⁷ that Sheva ben Bichri was killed to save the rest of the city, showing that one life was sacrificed to save another. He answers that they were permitted to do so for had he not been killed by them, when Yoav (King David's commander-in-chief) would have captured the city, Sheva and everyone else would have been killed by Yoav and his army. If, however, he could have escaped, even if everyone else would have been killed, they would not have been permitted to kill him. Another answer given is that Sheva rebelled against King David and was deserving of death. This is *Rashi's*¹¹⁷⁸ explanation of what happened. However, the *Méiri*¹¹⁷⁹ writes that if one is threatened that if he refuses to kill another, he and that other will be killed, although it would appear that he could kill that other person, nevertheless he should not, but should instead hand him over. The *Yad Rama*¹¹⁸⁰ also expresses surprise at *Rashi's* explanation (as to why



22. *Rav Aharon Lichtenstein*

This article is a translation of testimony delivered by Harav Lichtenstein to a Knesset committee investigating the Israeli law regarding abortion. This translation, edited by Rav Shalom Carmy, originally appeared in

Abortion: A Halakhic Perspective

Let me conclude this overview with two remarks. First, the reader has surely discerned that in a number of places I have refrained from setting down definitive conclusions, but have been satisfied to indicate general principles, tendencies, and possibilities in the Halakha. This approach is not merely the product of modesty or hesitation in resolving debates among halakhic titans. It is rooted in a view of the nature of pesak in general and regarding this topic specifically. These are areas where, on the one hand, the halakhic details are not clearly fleshed out in the Talmud and Rishonim, and, on the other hand, the personal circumstances are often complex and perplexing. In such areas there is room and, in my opinion, an obligation for a measure of flexibility. A sensitive posek recognizes both the gravity of the personal situation and the seriousness of the halakhic factors. In one case, therefore, he may tend to view the points of contention in one way, while in a second case exhibiting slightly different details, he may tilt the decision on these points in the other direction. He may reach a different kind of equilibrium in assessing the views of his predecessors, sometimes allowing far-reaching positions to carry great weight, while in other cases ignoring them completely. He might stretch the halakhic limits of leniency where serious domestic tragedy looms, or hold firm to the strict interpretation of the law when, as he reads the situation, the pressure for leniency stems from frivolous attitudes and reflects a debased moral compass. This approach is neither evasive nor discriminatory. The flexibility arises from a recognition that halakhic rulings are not, and should not be, the output of human micro-computers, but of thinking human beings; a recognition that these rulings must be applied to concrete situations with a bold effort to achieve the optimal moral and halakhic balance among the various factors. Thus, it is the case that halakhic rulings have more of the character of general directives than specific decisive rulings, within set limits, of course, and when the posek is not absolutely convinced respecting the point at issue. However, as we noted above, this application of pesak must be the outcome of serious deliberation – in the broadest sense of the term – by committed and observant Torah personalities who are, on the one hand, sensitive to both the human and halakhic aspects, and on the other hand, possess the stature and ability to confront the halakhic problems.

Despite this emphasis, I imagine that some may view the ideas presented above as, overall, excessively severe and inflexible. Hence my second concluding remark. Judged by the standard prevalent today in most of the world, at least the Western world, the halakhic approach presented here appears rather stringent. This requires no apologetics. But it is worth making clear, certainly to those who, in seeking a humane approach, are liable to adopt slavishly an overly liberal attitude in this area, that from the perspective of the fetus and those concerned with its welfare, liberality in this direction comes at the expense of humanity, insofar as the caution of Halakha is tied to its intimate concern for the values of kindness and mercy. It is not only the honor of God which obligates us, regardless of the cost, to avoid what is prohibited and to obey the commands of the Almighty that are expressed in this Halakha. It is also the honor of man in Halakha, the humane and ethical element which insists on the preservation of human dignity and concern for human welfare, that rises up in indignation against the torrent of abortions. If the Halakha's course is sometimes onerous for certain families or for those responsible for them – and this fact should neither be denied nor ignored – let us remember, paraphrasing the famous words of Byron, that Halakha loved not the parents less, but the child more.