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ABORTION IN HALAKHIC LITERATURE

There are three [persons] who drive away the *Shekhina* from the world, making it impossible for the Holy One, blessed be He, to fix His abode in the universe and causing prayer to be unanswered: . . . [The third is] he who causes the fetus to be destroyed in the womb, for he destroys the artifice of the Holy One, blessed be He, and His workmanship . . . For these abominations the Spirit of Holiness weeps . . . (*Zohar, Shemot 3b*)

Throughout the history of civilization abortions have been performed on a surprisingly wide scale among even the most primitive of peoples; feticide is singled out as one of the "abominations of Egypt" which the Torah sought to suppress. Despite the clause in the Hippocratic Oath in which the physician declares, "... non will I give to a woman a pessary to procure abortion," artificial interruption of pregnancy, both legal and illegal, remains a widespread practice. While Judaism has always sanctioned therapeutic abortion in at least limited circumstances the pertinent halakhic discussions are permeated with a spirit of humility reflecting an attitude of awe and reverence before the profound mystery of existence and a deeply rooted reluctance to condone interference with the sanctity of individual human life.

In recent years many attempts have been made in the legislative bodies of various states to implement changes in the laws governing the performance of induced abortions. Such proposals are designed to liberalize existing statutes by enlarging the criteria under which legal sanction would be granted for the interruption of pregnancy and destruction of the fetus. The ensuing discussion and the inevitable requests made of individual rabbis and communal spokesmen for an explication of the position of normative Judaism regarding this question has made it imperative that we

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examine this issue and acquaint ourselves with the teachings of our tradition regarding this area of serious concern.

There can be no doubt that a pregnancy contraindicated by considerations of social desiderata and personal welfare poses grave and tragic problems. We are, indeed, keenly aware of the anguishing emotional ramifications of such problems and are acutely sensitive to their moral implications. Yet when we are confronted by these and similar dilemmas our response cannot simply echo humanistic principles and values, but must be governed by the dictates of Halakhah. An authentically Jewish response must, by definition, be found in and predicated upon halakhic prescriptions. To us, in the words of the *Chazon Ish*, "Ethical imperatives are . . . at one with the directives of Halakhah; it is Halakhah which determines that which is permitted and that which is forbidden in the realm of ethics."¹

This review of the halakhic literature concerning abortion has been undertaken as an attempt to refer the reader to the basic sources and relevant responsa and to direct attention to the halakhic intricacies upon which the issues revolve. In order to understand the manner in which halakhic rulings evolve it is necessary to focus attention upon the deductive process by means of which definitive *pesak* is derived from fundamental principles. If the resultant *masa u-matan shel halakhah* (halakhic discussion) is at times somewhat involved it must be emphasized that only by means of the halakhic dialectic is it possible to appreciate the halakhic process as it is employed *le-hasik shemattesa aliba de-hilkhata*, in reaching definitive conclusions on the basis of pertinent sources.

BASIS OF THE PROHIBITION

The basic halakhic principle governing abortion practices is recorded in the Mishnah, *Oholot* 7:6, in the declaration that when "hard travail" of labor endangers the life of the mother an embryotomy may be performed and the embryo extracted member by member. This ruling is cited as definitive by Rambam, *Hilkhot Rotzeach* 1:9 and *Shulkhan Arukh, Choshen Mishpat* 425:2. The halakhic reasoning underlying this provision is incorporated in the text of the Mishnah and succinctly couched in

the explanatory phrase “for her [the mother’s] life has priority over its [the fetus’] life.” In the concluding clause of the Mishnah a distinction is sharply drawn between the status of the fetus and that of a newly born infant. The Mishnah stipulates that from the moment at which birth, as halakhically defined,² is considered to have occurred no interference with natural processes is permitted since “one life is not to be set aside for the sake of another life.”

The inference to be drawn from the incorporation of the justificatory statement “for her life takes precedence over its life” is that destruction of the fetus is prohibited in instances not involving a threat to the life of the pregnant mother.³ *Tosafot* (*Sanhedrin* 59a; *Chullin* 33a) states explicitly that feticide, although entailing no statutory punishment, is nevertheless forbidden.⁴ Elsewhere we find that according to Rabbinic exegesis (*Mekhilta*, Exodus 21:12; *Sanhedrin* 84a) the killing of an unborn child is not considered to be a capital crime—an implication derived from the verse “He that smiteth a *man* so that he dieth, shall surely be put to death” (Exodus 21:12). *Tosafot*, basing himself on the Mishnah, apparently reasons that although feticide does not occasion capital punishment, the fetus is nevertheless sufficiently human to render its destruction a moral offense.

An offense not entailing statutory punishment is certainly not an anomaly. Many such prohibitions are known to be Biblical in nature. Others are recognized as having been promulgated by the Rabbis in order to create a “fence” around the Torah or in order formally to prohibit conduct which could not be countenanced on ethical grounds. Under which category is the prohibition against feticide to be subsumed? Is this offense Biblical or Rabbinic in nature? At least three diverse lines of reasoning have been employed in establishing the Biblical nature of the offense. R. Chaim Ozer Grodzinski demonstrates that the remarks of *Tosafot*, taken in context, clearly indicate a biblical proscription rather than a Rabbinic edict.⁵ Feticide, as *Tosafot* notes, is expressly forbidden under the statutes of the Noachidic code. The Noachidic prohibition is derived by Rabbi Ishmael (*Sanhedrin* 57b) from the wording of Genesis 9:6. Rendering this verse as “Whoso sheddeth the blood of man *within man* shall his blood be shed” rather than

"Whoso sheddeth the blood of man *by man* (i.e. through a human court) shall his blood be shed." R. Ishmael queries, "Who is a man *within* a man? . . . A fetus within the womb of the mother." *Tosafot* deduces that this practice is prohibited to Jews as well by virtue of the Talmudic principle "Is there anything which is forbidden to a Noachide yet permitted to a Jew?" Application of this principle clearly establishes a Biblical prohibition.

R. Meir Simchah of Dvinsk, in his Biblical novellae, *Meshekh Chokhmah*, Exodus 35:2, offers an interesting scriptural foundation for this prohibition demonstrating that, while not a penal crime, the killing of a fetus is punishable by "death at the hands of heaven."⁶ He observes that Scripture invariably refers to capital punishment by employing the formula "*mot yumat*—he shall surely be put to death." The use of the single expression "*yumat*—he shall be put to death" as, for example, in Exodus 21:29 is understood in Rabbinic exegesis as having reference to death at the hands of heaven. Thus, R. Meir Simchah argues, the verse ". . . and he that smiteth a man shall be put to death—*yumat*" (Leviticus 24:21) is not simply a reiteration of the penalty for homicide but refers to such destruction of life which is punishable only at the hands of heaven i.e. the killing of a fetus. Reference to the fetus as "a man" poses no difficulty since the fetus is indeed described as "a man" in the above cited verse (Genesis 9:6) prescribing death for feticide under the Noachidic code.

Most interesting is the sharply contested view advanced by R. Elijah Mizrachi in his commentary on Exodus 21:12 that in principle feticide and murder are indistinguishable. The Biblical ban on murder extends equally to all human life, including, he claims, any fetal life which, unmolested, would develop into a viable human being. In theory, continues Mizrachi, feticide should be punishable by death since the majority of all fetuses will indeed develop into viable human beings.⁷ In practice it is technically impossible to impose the death penalty because punishment may be inflicted by the *Bet Din* only if the crime is preceded by a formal admonition. Since some fetuses will never develop fully, a definite admonition cannot be administered because it cannot be established with certainty that any particular fetus would develop in this manner. Noahides, on the other

hand, require no such admonition. Therefore since the major number of fetuses are viable feticide is to be punished by death under the Noachidic dispensation.

Differing from these various views are the opinions of the many scholars who have espoused the diametrically opposite position that the prohibition against feticide is Rabbinic in origin. There is evidence that so early an authority as Rabbenu Nissim is to be numbered among the latter group. Reb Chaim Ozer cites Rabbenu Nissim's explanation of the reason for the ruling of the Mishnah (*Eruchin* 7a) that the execution of an expectant mother must not be delayed in order to allow the delivery of her child. Rabbenu Nissim (commentary on *Chullin* 58a) fails to offer the explanation adopted by other commentators; namely, that the fetus is regarded as but an organic limb of the mother having no inherent claim of its own to inviolability and hence considerations of its welfare cannot interfere with the statutory provision for immediate execution of the condemned in order to avoid subjecting the convicted criminal to agonizing suspense between announcement of the verdict and execution of the sentence. Rabbenu Nissim offers a simple explanation to the effect that the fetus has not yet emerged into the world and therefore we need not reckon with its well-being. Since Rabbenu Nissim's remarks certainly cannot be construed as sanctioning wanton destruction of a fetus, Reb Chaim Ozer infers that it is Rabbenu Nissim's opinion that the prohibition against taking fetal life is of rabbinic origin.⁸ Considered as a rabbinic edict it is understandable that the Rabbis suspended their ban in order to mitigate the agony of the condemned woman, giving considerations of her welfare priority over the well-being of the unborn child.

There are a number of latter-day authorities who are explicit in their opinion that feticide is a Rabbinic rather than a Biblical offense. Perhaps the most prominent of these is the renowned seventeenth-century scholar R. Aaron Samuel Kaidanower, author of the famed commentary on *Seder Kodshim*, *Birkhat ha-Zevach*. His views regarding this matter are recorded in his collection of responsa, *Emunat Shmu'el* (Frankfort-am-Main, 5443), no. 14. This position is also espoused by R. Chaim Plaggi, *Teshuvot Chaim ve-Sholom* (Smyrna, 5632), I, no. 40, and forms

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the basis for a number of decisions issued by the contemporary halakhic authority, R. Eliezer Yehudah Waldenberg. The rulings issued by R. Waldenberg, who serves as head of the Jerusalem *Bet Din*, are recorded in his voluminous work, *Tzitz Eli'ezer*.⁹

A tentative distinction between the stringency of the prohibition against abortion involving direct physical removal of the fetus and abortion induced by chemical means is found in a responsum bearing the signature of R. Jacob Schorr and included in the *Teshuvot Ge'onim Batr'ai* (Prague, 5576), a compendium edited by the *Sha'agat Aryeh*. While the author of this responsum makes no pertinent halakhic distinction between these two methods, he does draw attention to the fact that Maimonides found it necessary to state definitively that in cases of danger "it is permitted to dismember the fetus in her [the mother's] womb, whether by chemical means or by hand." The implication is that if not explicitly obviated a theoretical distinction might have been drawn between physical dismemberment of the fetus and abortion by indirect means (*gerama*)¹⁰ such as imbibing abortifacient drugs in order to induce the expulsion of the fetus. Such a distinction is in fact made by R. Judah Eiyush, *Teshuvot Bet Yehudah* (Livorno, 5518), *Even ha-Ezer*, no. 14, who maintains that abortion induced by chemical potions is of Rabbinic proscription, whereas direct removal of the fetus is forbidden on Biblical grounds.¹¹ On this basis R. Eiyush grants permission to induce an abortion in a woman who became pregnant while still nursing a previous child in order that the life of the nursing infant not be endangered.¹²

Preservation of human life is commonly seen as the rationale underlying the ban against induced abortion. Each of the diverse authorities heretofore cited considers the essence of the prohibition to be closely akin to that of homicide. There are, however, other authorities who deem the destruction of a fetus to be unrelated to the taking of human life but nevertheless forbidden on extraneous grounds. Chief among these are the opinions which maintain that feticide is precluded as constituting a form of destruction of the male seed or that it is forbidden as a form of unlawful flagellation. R. Shlomo Drimer (*Teshuvot Bet Shlomo, Choshen Mishpat*, no. 132) contends that the

destruction of a fetus cannot be a form of homicide since the fetus cannot be viewed as "a life" in its pre-natal state.¹³ He does not, however, spell out the nature of the crime committed in causing the death of a fetus. The origin of this view can be traced to the *Teshuvot haRadvaz* (N. Y. 5727), II, no. 695, in which the author states explicitly that destruction of a fetus is not a form of homicide. R. Yair Chaim Bacharach (*Chavot Ya'ir*, no. 31), argues that feticide is included in the interdiction against onanism¹⁴ and reasons that destroying the fetus is within the scope of the verse ". . . slaying the children in the valley under the clefts of the rocks" (Isaiah 57:5) which is interpreted by the Gemara, *Niddah* 13a, as having reference to the destruction of the male seed.¹⁵ The author of *Zechuta de-Avraham* offers an identical opinion adding that feticide and onanism incur the self-same penalty — "death at the hands of heaven."¹⁶ In his responsum *Chavot Ya'ir* accepts the ruling of *Tosafot* (*Yevamot* 12b) that women are also bound by the prohibition against destroying the male seed. He notes that even according to the view of Rabbeinu Tam that women are not included in this specific prohibition,¹⁷ these practices are nevertheless forbidden to them for women, too (*Tosafot*, *Gittin* 41b), are bound to bring to fulfillment the divine design of a populated world to which reference is made in Isaiah 45:18, ". . . He created it [the earth] not a waste, He formed it to be inhabited."¹⁸

A number of objections to *Chavot Ya'ir's* position are raised in later works. R. Meir Dan Plocki¹⁹ expresses the view that with the promulgation of the Sinaitic covenant Noachides were absolved from the obligation of procreation and also from the prohibition against wanton emission of semen.²⁰ Granting this point, it follows that according to *Chavot Ya'ir's* reasoning there would be no apparent grounds for denying Noachides the right to commit feticide. Such a conclusion would be contrary to the clear-cut recognition that destruction of a fetus continues to constitute a capital crime under the Noachidic code. R. Plocki further states that feticide cannot be punishable by "death at the hands of heaven." Such punishment, he avers, would be incompatible with the exaction of monetary compensation for loss of the fetus, as

prescribed by Exodus 21:12, in light of the general rule that a single act cannot result in the infliction of both capital punishment and punitive financial compensation—a principle which R. Nechunyah b. Hakanah (*Ketubot* 30a) extends not only to the forms of capital punishment imposed by the *Bet Din* but to “death at the hands of heaven” as well. R. Plocki arrives at the conclusion that the ban against onanism is operative only with regard to the wasting of one’s own seed since such an act contravenes the obligation “be fruitful and multiply” but is inapplicable with regard to the destruction of fetal progeny other than of one’s own parentage.

A somewhat similar objection is voiced by the late Rabbi Yechiel Yaakov Weinberg of sacred memory.²¹ *Chavot Ya’ir* maintains that women, although not bound by the commandment “be fruitful and multiply” are nevertheless obligated to fulfill the intent expressed in the verse, “He formed it [the earth] to be inhabited.” This consideration, *Chavot Ya’ir* maintains, precludes feticide even on the part of women. R. Weinberg rebuts this contention asserting that the obligation set forth in Isaiah 45:18 is understood by the authorities as paralleling the injunction “be fruitful and multiply” in that such considerations apply only to one’s own progeny. Accordingly, argues R. Weinberg, assimilation of the prohibition against feticide to the ban against onanism would lead to the bizarre conclusion that a woman might be permitted to perform an abortion upon any woman other than herself—a conclusion not to be found in any halakhic source.

The early seventeenth century scholar, R. Joseph Trani of Constantinople, author of *Teshuvot Maharit*, also endeavors to show that the taking of fetal life, while forbidden, nevertheless cannot be considered as constituting a form of homicide.²² The Mishnah, *Eruchin* 7a, indicates that an expectant mother who has been sentenced to death, so long as she has not already “sat on the birth stool,” must be executed without delay in order to spare her the agony of suspense. Whereupon the Mishnah exclaims “*Peshita!*—Of course!” R. Joseph Trani argues, if destruction of the fetus is tantamount to the taking of human life the amazement registered by the Gemara is out of place. The Gemara provides that the mother be struck on the abdomen against the

womb in order to cause the prior death of the fetus. This is done in order to avoid the indignity which would be inflicted upon her body as a result of an attempt on the part of the fetus to emerge after the death of its mother. An act of murder certainly would not be condoned simply in order to spare the condemned undue agony or to prevent dishonor to a corpse.²³ R. Joseph Trani then advances an alternative basis for this stricture. In his opinion destruction of an embryo is within the category of unlawful "wounding" which is banned on the basis of Deuteronomy 25:3.²⁴ This consideration is of course irrelevant in the case of one lawfully sentenced to death, and hence the Gemara raises an objection to the need for specific authorization for the execution of a pregnant woman sentenced to death. A more recent authority, R. Joseph Rosen expresses a similar view.²⁵

The dispute concerning classification of the nature of the stricture against feticide is of more than mere speculative interest. It will be shown that various halakhic determinations regarding the permissibility of therapeutic abortion in certain situations hinge directly upon proper categorization of this prohibition. This issue is also the focal point of an intriguing problem discussed by Rabbi Isser Yehudah Unterman, the present Ashkenazic Chief Rabbi of Israel. Writing in *No'am*, VI, 52, Rabbi Unterman refers to an actual question which arose in the course of the German occupation of Poland and Lithuania during World War I. A German officer became intimate with a Jewish girl and caused her to become pregnant. Becoming aware of her condition the officer sought to force the young lady in question to submit to an abortion. The German officer ordered a Jewish physician to perform the abortion. Upon the doctor's refusal to do so the officer drew his revolver and warned the physician that continued refusal would result in the latter's own death. If the prohibition against taking the life of a fetus is not subsumed under the category of murder thereby constituting an *avizra* or "appurtenance" of murder there arises no question of an obligation on the part of the physician to forfeit his own life; on the contrary, he is halakhically bound to preserve his own life since preservation of life takes precedence over all other considerations. If, however, feticide is considered an *avizra* of murder and akin to homicide,

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which is one of the three grave offenses which dare not be committed even upon threat of death, then the principle "Be killed but do not transgress" is germane.

Rabbi Unterman, however, argues that even if, halakhically, feticide be deemed a lesser form of murder it may be committed in face of a compelling *force majeure*. His reasoning is based upon the ruling of R. Moses Isserles, *Yoreh De'ah* 157:1, that while sacrifice of one's life is required in face of coerced infractions of even *avizraya* or "appurtenances" of the three cardinal sins even though the appurtenances themselves do not involve capital culpability, nevertheless, this is demanded only with regard to violation of those *avizraya* which are themselves explicit negative commandments pertaining to the three cardinal sins. Since feticide is not numbered among the 365 negative precepts it does not fall within this category.²⁶

Another argument in support of the contention that the admonition "Be killed but do not transgress" does not apply to an act of feticide was advanced at a much earlier date by R. Joseph Babad in his *magnum opus*, *Minchat Chinukh*.²⁷ He reasons that this principle, as enunciated with regard to homicide, is based upon an *a priori* principle propounded in the Gemara's rhetorical question, "How do you know that your blood is redder than the blood of your fellow man?" The import of this dictum is to emphasize the intrinsic value of every human life and graphically to underscore the fact that no man dare consider his existence to be of higher value than that of his fellow. For in the sight of G-d all individuals are equally "sweet" and all alike are of inestimable value. Since, however, a fetus is not accounted as being a full-fledged *nefesh* or "life" and since as an outgrowth of the unborn child's inferior status Jewish law exempts its killer from the death penalty the fetus' "blood" is quite obviously assessed as being "less sweet."²⁸ Therefore, reasons the author of *Minchat Chinukh*, when confronted by the impending loss of either one's own life or of the life of the fetus, the killing of the unborn child is to be preferred as constituting the lesser of two evils. This conclusion is inescapable, argues *Minchat Chinukh*, since the Mishnah specifically authorizes the sacrifice of a fetal life in order to save its mother. The mother's life is of no greater intrinsic value

than that of any other individual. If destruction of the fetus is sanctioned in order to preserve the mother then it must be permitted in order to save the life of any other person.

ABORTION WITHIN THE FIRST FORTY DAYS OF GESTATION

We find a declaration by Rav Chisda (*Yevamot* 69b) that the daughter of a *kohen* widowed shortly after marriage to an Israelite may partake of *terumah* during the first forty days following consummation of her marriage despite the fact that she has become a widow in the interim. Permission to eat *terumah* is a privilege accorded an unmarried daughter of a *kohen* or a widowed daughter who has no children. The concern in the case presented to Rav Chisda is that the widow, unknown to herself, may be pregnant with child in which case *terumah* would be forbidden to her. Rav Chisda argues, if the widow is not pregnant there is no impediment to her partaking of *terumah*, if she is pregnant the embryo is considered to be "mere water" until after the fortieth day of pregnancy. Therefore she may continue to eat *terumah* for a full forty days after her marriage. The ruling of Rav Chisda indicates that fetal development within the initial forty days of gestation is insufficient to warrant independent standing in the eyes of Halakhah. Another source for this distinction is the Mishnah (*Niddah* 30a), which declares that a fetus aborted less than forty days following cohabitation does not engender the impurity of childbirth ordained by Leviticus 12:2-5.²⁹ Similarly, *Mishneh le-Melekh* according to (*Hilkhot Tum'at met* 2:1) the defilement associated with a dead body is not attendant upon an embryo expelled during the first forty days of gestation. Furthermore, in the opinion of many authorities, a fetus cannot acquire property prior to the fortieth day of development.³⁰

The result is that the status of an embryo's claim to life during the first forty days following conception is not entirely clear. Is the prohibition against feticide operative during this early stage of fetal development during which the embryo is depicted as "mere water"? It would appear that according to the grounds advanced by *Chavot Ya'ir* no distinction can be made between the various stages of fetal development for accord-

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ing to this opinion feticide is prohibited not because it is tantamount to the taking of a human life but because it is a form of "destroying the seed." The fact that no specific reference is made in *Chavot Ya'ir* to the status of the embryo during this period in no way vitiates this conclusion. In the absence of a distinction there is no reason for such reference.³¹ Yet the considerations advanced in *Chavot Ya'ir* can explain only the nature of the ban against feticide under the Sinaitic covenant. Feticide, a capital offense in Noachidic law, may well be viewed as a form of homicide under that code leaving the possibility of such a distinction with regard to the conduct of Noachides an open question.

Whether or not there is an halakhic distinction with regard to this prohibition during the first forty days of gestation according to the authorities who advance other considerations as the grounds for the banning of feticide remains to be considered. Rabbi Weinberg states flatly (*op. cit.*, p. 249) that R. Joseph Trani's (Maharit) thesis, according to which feticide is a case of unlawful wounding, precludes extension of this prohibition to an embryo of less than forty days since it is deemed as "mere water" throughout this period. Rabbi Weinberg interprets Maharit's reference to "wounding" as depicting the harm inflicted upon the fetus. Despite the cogency of R. Weinberg's reasoning regarding "wounding" of the fetus his reasoning is inapplicable in cases of abortion by means of dilation and curettage which certainly involves "wounding" of the mother as well, irrespective of the stage of pregnancy at which this procedure is initiated. Following this line of thought it should be forbidden other than for therapeutic considerations which constitute licit grounds for "wounding." Moreover, R. Aryeh Lifschutz, a nineteenth century scholar, in his *Aryeh de-Bei Ila'i* (*Yoreh De'ah*, no. 14, p. 58a), interprets Maharit's view that feticide is forbidden as a form of "wounding" as being predicated upon consideration of the wounding of the mother rather than of the unborn child. R. Lifschutz contends that it would be somewhat incongruous to prohibit the wounding of a being which it is not specifically forbidden to kill. Approached in this manner there is no room for differentiating between the various stages of pregnancy.

There is further evidence pointing to a prohibition against

destroying the life of a fetus during this early period. Nachmanides notes that according to the opinion of *Ba'al Halakhot Gedolot* the Sabbath may be violated even during this forty-day period in order to preserve the life of a fetus.³² The author of *Chavot Ya'ir*, citing *Tosafot Niddah* 44b, shows that the right to violate the Sabbath for the sake of saving a prenatal life is incompatible with permission to kill it deliberately.³³ It follows that according to *Ba'al Halakhot Gedolot* induced abortion during this period is forbidden. Responding to a specific inquiry R. Plocki grants permission for termination of pregnancy within this forty-day period only when the life of the mother is threatened.³⁴

Drawing a parallel from the commandment against the kidnapping and subsequent sale of a person into involuntary servitude, R. Unterman³⁵ cites the opinion of Rashi (*Sanhedrin* 85b) who maintains that this prohibition encompasses the sale of an unborn child as well. Although the fetus may not be considered a fully developed person his kidnapper is culpable because he has stolen an animate creature whose status is conditioned by its potential development into a viable human being. R. Unterman further notes that the unborn fetus lacks human status. Consequently it is excluded from the injunction. "And he [man] shall live by them" (Leviticus 18:5) which justifies violation of other precepts in order to preserve human life. Numerous authorities nevertheless permit violation of the Sabbath in order to preserve fetal life. R. Unterman views such permission as being predicated upon a similar rationale. Anticipation of potential development and subsequent attainment of human status creates certain privileges and obligations with regard to the undeveloped fetus. Consideration of future potential is clearly evidenced in the Talmudic declaration: "Better to violate a single Sabbath in order to observe many Sabbaths" (*Shabbat* 151b). R. Unterman concludes that reasoning in these terms precludes any distinction which might otherwise be drawn with regard to the various stages of fetal development.

Surprisingly, there is one source which appears to rule that destruction of the fetus by Noachides, at least under some circumstances, does not constitute a moral offense. Maharit³⁶ writes: "I remember having seen in a responsum of the Rashba that he

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bears witness that Ramban rendered medical aid to a Gentile woman in return for compensation in order that she might conceive and aided her in aborting the fruit of her womb."³⁷ It is of course inconceivable that an individual of Nachmanides' piety and erudition would have violated the injunction "Thou shalt not place a stumbling block before a blind person" (Leviticus 19:4) or that he would have actively assisted transgressors. Applying the line of reasoning adduced above R. Unterman draws the conclusion that there is a fundamental distinction between Jewish law and Noachidic law with regard to the assessment of potential life. According to many authorities Noachides are under no obligation to preserve the lives of their fellows, to "be fruitful and multiply" or to refrain from wasting the male seed. They are forbidden to commit homicide and to take the life of "a man within a man" but bear no responsibility for the safeguarding and preservation of seminal life. It would appear then that Halakhah holds them accountable only for *actual* in contradistinction to *potential* life.³⁸ Accordingly, there is no objection to Noachides aborting, or to a Jew giving advice and rendering indirect assistance to Noachides in aborting, a fetus within the first forty days of gestation. Since Halakhah considers that during this initial period the embryo has not as yet developed distinctly recognizable organs or an independent circulatory system it cannot be considered "a man within a man" and hence its destruction does not constitute murder under the Noachidic dispensation. Nachmanides, R. Unterman avers, sanctioned the performance of abortions by Noachides only within this forty-day period.³⁹

R. Unterman's distinction between Jews and Noachides with regard to termination of pregnancy within the first forty days following conception was anticipated by an earlier authority. R. Plocki, in his *Chemdat Yisrael* (p. 176) marshals evidence that an embryo may be destroyed with impunity during the first forty days of its development based upon Rabbenu Tam's interpretation of the Talmudic dispute (*Yevamot* 12a) concerning the "three [categories of] women" who may resort to contraceptive devices in order to prevent conception. Rabbenu Tam explains that the dispute concerns the insertion of a tampon *after* cohabi-

tation. The *Tanna*, Rabbi Meir, rules that use of contraceptive devices by these women is mandatory since pregnancy would place their lives in jeopardy; the Sages assert that such action is not incumbent upon these women stating that the verse "The Lord preserves the simple" (Psalms 116:6) permits reliance upon divine providence to avert tragic consequences. However, according to Rabbenu Tam, the Sages *permit* the use of contraceptives after cohabitation, reasoning that women are not commanded to refrain from "destroying the seed." R. Plocki points out that fertilization most frequently takes place immediately following cohabitation. Contraception following cohabitation is then in effect not destruction of the seed but abortion of a fertilized ovum. If abortion is forbidden even in the earliest stages of gestation how then can Rabbenu Tam permit the use of contraceptive devices following cohabitation? R. Plocki concludes that destruction of the embryo during the first forty days following conception does not constitute an act of feticide but falls rather under the category of "destroying the seed." Since we accept the opinion of those authorities who rule that women are also bound by the prohibition against "destroying the seed," R. Plocki's reasoning (as evidenced by his own remarks) finds practical application only with regard to Noachides. According to those authorities who maintain that the ban against destroying the seed does not apply to Noachides, the latter may be permitted to interrupt pregnancy during the first forty days of gestation.

Distinctions pertaining to the early period of gestation are echoed by numerous other authorities. Reb Chaim Ozer (*Teshuvot Achi'ezer*, III, no. 65, sec. 14) writes, "It appears that a Noachide is not put to death for this and perhaps even with regard to an Israelite there is no Biblical prohibition." *Torat Chesed, Even ha-Ezer*, no. 42, sec 33, states explicitly that the prohibition against destroying an embryo within the first forty days following conception is Rabbinic in nature. R. Joseph Rosen (*Tzofnat Paneach*, no. 5a) comments, "Before the fortieth day there is not such a stringent prohibition according to many authorities." In an earlier collection of responsa, *Teshuvot Bet Shlomoh* (*Choshen Mishpat*, no. 162), R. Solomon Drimer of Skole concludes that there is no prohibition against destroying

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an embryo less than forty days old and notes that in punishment for performing such a deed "even a Noachide is not put to death." An even more permissive view is cited by R. Waldenberg. He quotes a responsum included in *Teshuvot Pri ha-Sadeh* (Vol IV, no. 50) which extends this distinction to the entire first three months of pregnancy. Relying upon this opinion R. Waldenberg *Tzitz Eli'ezer*, IX, 236) permits the performance of an abortion within the first three months when there are definite grounds to fear that the child will be born deformed or abnormal. R. Waldenberg, however, denies such permission even within this period once fetal movement is perceived. R. Weinberg in his original responsum (*No'am* IX, 213f) also concluded that it is permissible to induce abortion prior to the fortieth day of pregnancy, but later added in a note (*Seridei Esh*, III, 350, note 7) that having seen a contrary opinion expressed by R. Unterman in *No'am* (VI, 8f),⁴⁰ he reserves decision pending consultation with other halakhic authorities. The late R. Mosheh Yonah Zweig of Antwerp, writing in *No'am* (VII, 48) concurs in the view which forbids abortions even during the first forty days of pregnancy other than on medical grounds.

THERAPEUTIC ABORTION OF PREGNANCY INVOLVING DANGER TO LIFE

Authority for performance of an embryotomy in order to preserve the life of the mother is derived from the previously cited Mishnah, *Oholot*, 7:6. Virtually all authorities agree that the Mishnah does not merely sanction but deems mandatory⁴¹ that the life of the fetus be made subordinate to that of the mother. At the same time the Mishnah expressly forbids interference with natural processes after the moment of birth which is defined as the emergence from the womb of the forehead or the greater part thereof.⁴² In the ensuing Talmudic discussion (*Sanhedrin* 72b) the child is described as being in effect an aggressor "pursuing" the life of its mother. As such, its life is forfeit if necessary to save the innocent victim so pursued.⁴³ At this point the question is raised, why should an embryotomy not be performed in such circumstances even in the final stages of partruition? It is answered by pointing out that the law of pursuit does not apply when the

mother is "pursued by Heaven," i.e., her danger is the result of natural occurrences rather than malevolent human activity. The apparent inference to be drawn from this discussion is that there is no need for resort to the law of pursuit in order to justify destruction of the fetus prior to birth. On the contrary, were there need for such justification, the law of pursuit would be of no avail since it cannot be validly applied in cases where such "pursuit" arises as a result of the processes of nature. Rashi (*ad loc.*) explains that the fetus is sacrificed in order to spare the life of the mother because, even though the fetus has a claim to life and is sufficiently human to render its destruction a moral offense, neither this claim nor its status as a human life is equal to that of the mother: "So long as it [the fetus] has not emerged into the light of the world it is not a human life."

Maimonides codifies the law emerging from this discussion in the following manner: "This also is a negative precept: not to have compassion on the life of a pursuer. Therefore the Sages ruled [regarding] a pregnant woman in hard travail that it is permitted to dismember the fetus in her womb, whether by chemical means or by hand, for it [the fetus] is as one pursuing her in order to kill her; but if it has already put forth its head it may not be touched, for [one] life may not be put aside for the sake of [another] life. This is the natural course of the world." (*Hilkhot Rotzeach* 1:9). This formulation is problematic in that Maimonides invokes the law of pursuit as justification for the performance of an embryotomy in the early stages of labor, whereas the Gemara implies that the deliberate sacrifice of the unborn child is permitted simply because its life is subservient to that of the mother. Furthermore, the explanation offered seems to be contradictory in nature since Maimonides in his concluding remarks follows the Gemara in dismissing the applicability of the law of pursuit on the grounds that nature, not the child, pursues the mother. The question of proper interpretation of Maimonides is of utmost halakhic relevance because in this instance his phraseology is adopted *verbatim* by the *Shulkhan Arukh*, *Choshen Mishpat*, 452:2.

In an attempt to resolve these difficulties R. Yechezkel Lan-

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dau⁴⁴ points out that the killing of a fetus, while not constituting an act of homicide, is nevertheless an odious offense. Just as there is no justification for the sacrifice of a person suffering from a fatal injury — the killing of whom does not technically constitute murder — for the purpose of preserving the life of a normal person, so also destruction of the embryo in order to safeguard the life of the mother would not be condoned if not for its being, at least in measure, an aggressor. R. Ya'ir Bacharach⁴⁵ and R. Chaim Soloveitchik⁴⁶ employ similar reasoning in explaining Maimonides' position.⁴⁷ A somewhat different explanation is offered by R. Issur Zalman Melzer in the name of R. Chaim Soloveitchik. R. Unterman, in his work *Shevet mi-Yehudah*,⁴⁸ attempts a further clarification of Maimonides' position by explaining that the ban against destroying the life of a fetus stems not from an actual prohibition against the act of feticide *per se* but from an obligation to preserve the life of the fetus.⁴⁹ Since killing of a fetus is antithetical to its preservation, embryotomy is permissible only when the fetus is, in point of fact, an aggressor. Once the child is born the prohibition against homicide becomes actual and, since technically it is nature which is the pursuer, the law of pursuit is not operative.

Resolution of the difficulties surrounding Maimonides' ruling and the reasoning upon which it is based is of great significance in terms of practical Halakhah. According to the explanations offered by R. Yechezkel Landau, R. Chaim Soloveitchik and others following in the same general mode, therapeutic abortion would be permissible only in instances where the "pursuer" argument may be applied, i.e., where the threat to the life of the mother is the direct result of the condition of pregnancy. Reb Chaim Ozer⁵⁰ and R. Weinberg⁵¹ both contend that a pregnancy which merely complicates an already present medical condition thereby endangering the life of the mother does not provide grounds for termination of pregnancy according to such analyses of Maimonides' position. In these cases the fetus cannot be deemed an aggressor since the mother's life is placed in jeopardy by the disease afflicting her. It is this malady, rather than her pregnant condition, which is the proximate cause of impending tragedy. An identical conclusion was reached much

earlier by R. Isaac Schorr (*Koach Shor*, no. 20) who points out that the law of pursuit encompasses only cases where the pursuer seeks to perform an overt act of homicide. If the act only leads indirectly to the death of the pursued, e.g., when the pursuer merely seeks to incarcerate the victim so that he die of starvation or seeks to cut off the intended victim's supply of oxygen in order to cause asphyxiation the law of pursuit is not applicable, for "we have not heard that the pursued may be saved by taking the life of one who is desirous of preventing a benefit necessary for the life of his fellowman." A fetus which itself is not the cause of danger but whose presence thwarts the efficacy of medical remedies clearly falls within this category. At least one other authority, R. Isaac Lampronti, author of the *Pachad Yitzchak* (*Erekh Nefalim*, 79b) states unequivocally that danger caused by an extraneous disease does not warrant performance of an abortion in order to save the mother. R. Schorr emphasizes that (according to Maimonides) it must be known with certainty that the pregnancy *per se* constitutes this danger. This rules out abortion in instances where there is doubt as to whether the pregnancy is the actual cause of danger or whether the pregnancy merely complicates a previously existing condition.

The aforementioned discussions concern themselves only with cases in which failure to terminate pregnancy will indubitably result in the loss of life to the mother. The question of termination of a pregnancy which, while jeopardizing the life of the pregnant mother, will not *necessarily* result in imminent loss of life again centers around Maimonides' invocation of the law of pursuit. Citing Rashi, *Sanhedrin* 72b and *Pesachim* 2b, R. Schorr demonstrates that the law of pursuit cannot be invoked in cases of doubt. Hence abortion may be permitted only when there exists incontrovertible medical evidence that the pregnancy *per se* will result in the loss of the life of the pregnant mother. R. Solomon Drimer (*Bet Shlomoh, Choshen Mishpat*, no. 120), however, reaches the opposite conclusion, at least in theory. Following the authorities who maintain that a fetus is "not a life" and hence its destruction does not constitute an "appurtenance" of homicide, R. Drimer concludes that feticide is no differ-

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ent from other transgressions which may be violated even in cases of possible or suspected danger.⁵² Nevertheless, in practice, R. Drimer, on the basis of other considerations, withholds permission in cases of merely possible danger to the life of the mother. The Gemara (*Yoma* 82a) specifies that a pregnant woman who becomes agitated at the smell of food on the Day of Atonement may, if necessary, partake of the food which causes this excitement lest she suffer a miscarriage and her fetus be spontaneously aborted. Maimonides, Rabeinu Asher, and Rabeinu Nissim interpret this provision as being based, not on a concern for the preservation of the unborn child, but on a concern for the life of the mother. According to their view expulsion of the fetus *ipso facto* constitutes a threat to the life of the mother. Accordingly, reasons R. Drimer, even if continuation of pregnancy jeopardizes the life of the mother this consideration is counterbalanced by the fact that termination of pregnancy in itself constitutes a parallel jeopardy. Therefore a course of "sit and do not act" is preferable. Even if physicians advise that there is no danger involved in performance of the abortion their advice is to be disregarded just as medical opinion is ignored when it fails to recognize cases of "danger" which are delineated by Halakhah as constituting a threat to human life. Halakhah specifies that a woman's life is in jeopardy for a minimum period of three days following childbirth and hence during this time she is permitted to partake of food on the Day of Atonement, the Sabbath is violated on her behalf, etc. Since Halakhah defines childbirth as a "danger," medical opinions to the contrary or protestations of well-being on the part of the patient are disregarded. R. Drimer reasons that the same considerations should apply to the conditions surrounding abortion.

A very different conclusion is reached by R. Mordecai Leib Winkler⁵³ who finds reason to distinguish between miscarriages and abortions performed by medical practitioners. Since there is no explicit reference to the latter those authorities who state that abortion *per se* constitutes a threat to the life of the mother may not have intended their remarks to encompass therapeutic abortion surrounded by medical safeguards. R. Winkler also introduces the notion of comparative danger and seems to indicate

that while abortion may itself constitute a danger in the opinion of these authorities this danger may not be acute since dispensation for violation of Shabbat and Yom Kippur is granted for even the slightest threat to life. Abortion should therefore be sanctioned in order to obviate a more acute danger. Furthermore, the remarks of these authorities fail to demonstrate that miscarriage *per se* jeopardizes the life of the mother. Their pronouncements are consistent with the conclusion that danger will result only if the woman fails to receive proper care pursuant to the expulsion of the fetus. Since such care would involve desecration of Yom Kippur in any event the woman may break her fast in order to prevent the necessity for such later violations. R. Winkler concludes that there is then no evidence that a therapeutic abortion performed under proper medical conditions and with provision for proper convalescence constitutes a jeopardy to the life of the mother.

Relevant to this issue is the tragic case of a pregnant woman suffering from a terminal case of cancer which is pondered by R. Waldenberg (*Tzitz Eliezer*, IX, 239). Medical authorities predict that continuation of pregnancy to term will foreshorten her life but the expectant mother is steadfast in her desire to be survived by a child. Normally her desire would be irrelevant to a halakhic determination that preservation of maternal life is sufficient reason to abort the fetus. In this case R. Waldenberg concludes that since R. Drimer and other authorities withhold permission to abort the fetus on grounds that the abortion itself also constitutes a danger to the life of the mother, in this case one is justified in acceding to the wishes of the mother and adopting a stance of passive non-interference.

Returning to our central problem, many authorities take a different view with regard to embryotomy in cases where pregnancy endangers the life of the mother by complicating an already present medical condition. R. Weinberg (*No'am* IX, 204, *Seridei Esh*, III, 343f) offers a radically different approach to the resolution of the complex difficulties surrounding the previously cited statements of Maimonides, *Hilkhhot Rotzeach* 1:9, in light of the latter's remarks in *Hilkhhot Choveil u-Mazik* 8:4. Maimonides rules that although property belonging to others

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may be appropriated in order to preserve one's own life compensation must nevertheless subsequently be paid to the lawful owner. R. Weinberg notes that the provision is modified in the event that the property itself is the source of danger (*Nizkei Mamon* 8:15). The paradigm case is that of threat to the lives of passengers sailing on an overly laden ship which is in danger of sinking. One who lightens the load by throwing cargo overboard is absolved from payment of property damages since the cargo itself is deemed to be "a pursuer." R. Weinberg opines that Maimonides invokes this provision in his exposition of the law surrounding danger arising from pregnancy. Maimonides does not resort to the law of pursuit, argues R. Weinberg, in order to justify sacrifice of the life of the fetus; this is warranted on the basis of Rashi's explanation that it is not fully "a human life." Rather, continues R. Weinberg, Maimonides invokes the pursuer argument in order to provide a basis for exemption from satisfaction of the husband's claim for monetary damages normally incurred as a result of destruction of a fetus as provided by Exodus 21:22.

Reb Chaim Ozer, in another responsum (*Achiezer*, III, no. 72), points out that Maimonides' phraseology refers specifically to a woman in "hard travail." As previously noted, the Talmud regards a fetus which has "torn itself loose" from the normal uterine position as a separate body. According to Reb Chaim Ozer, Maimonides deems it necessary to rely upon the law of pursuit only because he refers to a fetus which, although yet unborn, is already a separate body. The Gemara speaks of earlier stages of pregnancy and hence has no need for recourse to this line of reasoning. Maimonides recognizes that prior to the mother's "sitting on the birth stool," the fetus is but an organic limb of her body. It is of course not merely permissible but mandatory to amputate a limb in order to save a life. Therefore, concludes Reb Chaim Ozer, even according to Maimonides it is permissible to perform an abortion in cases involving danger to the life of the mother irrespective of the source of such danger provided this procedure is performed before the fetus has "torn itself loose."⁵⁴ R. Chaim Ozer adds the stipulation that the physicians advising this medical procedure be highly expert and

certain in their opinion that the operation itself does not constitute a danger.

R. Weinberg (*No'am* IX, 205; *Seridei Esh*, III, 344) objects to this line of reasoning because it is predicated upon the consideration that the fetus is to be accounted as "a limb of the mother." His objection is based upon the remarks of *Tosafot* (*Sanhedrin* 80b) that the principle "a fetus is a limb of the mother" applies in all instances save with regard to the laws of *tereifah*, of an animal mortally wounded or afflicted with a terminal disease. The prohibition of a *tereifah* is based upon the animal's lack of "animation." Since a fetus possesses "independent animation" and may survive even though the mother is doomed, consideration of the fetus as a limb of the mother does not render it a *tereifah* simply because the mother has become a *tereifah*. Similarly, argues R. Weinberg, since the fetus is possessed of "independent animation," it does not follow that its abortion is comparable to the removal of a limb in order to save the body. Accordingly R. Weinberg concludes that abortion is not permitted according to Maimonides in cases where extraneous illness would lead to the mother's death if pregnancy were allowed to continue.

THERAPEUTIC ABORTION OF PREGNANCY INVOLVING DANGER TO MATERNAL HEALTH

A further ramification of these diverse analyses of Maimonides' views relates to the permissibility of therapeutic abortion in situations deleterious to the health of the mother, but not endangering her life. The most permissive ruling with regard to therapeutic abortion, one to which later authorities take strong exception, is that of R. Jacob Emden⁵⁵ who permits performance of an abortion not only when the mother's health is compromised but also in cases of "grave necessity" such as when continuation of the pregnancy would subject the mother to great pain.⁵⁶ Such abortions are sanctioned by R. Emden when performed before the onset of labor at which time the fetus has "torn itself loose" from the uterine wall. Citing *Chavot Ya'ir*'s explanation that the basis of the law against feticide is the prohibition against destroying the seed, R. Emden maintains that destroying the seed

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is forbidden only when such emission or destruction is without purpose but may be permitted when it serves a medical function. It should, however, be noted that *Chavot Ya'ir* himself quotes Rashi's commentary, *Sanhedrin* 72b, "a woman who is in hard labor *and whose life is in danger*" from which *Chavot Ya'ir* deduces that other than in cases of actual danger to maternal life abortion cannot be sanctioned.

A view similar to that of R. Jacob Emden is voiced by R. Ben Zion Uziel, the late Sephardic Chief Rabbi of Israel, in his *Mishpetei Uziel, Choshen Mishpat*, III, no. 46. The case brought to his attention concerned a woman threatened with approaching deafness if her pregnancy were permitted to run its normal course. R. Uziel, following the line of reasoning advanced by R. Emden, rules that abortion is permissible when indicated by any consideration of merit provided it is performed before the onset of labor at which time the fetus is considered to have "torn itself loose."

This determination leads R. Uziel to the discussion of an interesting question. A pregnant woman is forbidden to contract a levirate marriage since her deceased husband will no longer remain childless if the pregnancy culminates in the birth of a viable infant. If, however, the widow entered into the marriage with her brother-in-law and later discovered that at the time of consummation she was already bearing the child of her previous husband, the marriage is annulled and a sin-offering brought in expiation of this inadvertent transgression. Why, R. Uziel was asked, is she not advised simply to abort the fetus thereby eradicating her transgression *ab origine*? Obviation of sin certainly constitutes a "grave need" and fulfills the criterion established by R. Emden. R. Uziel answers that since the husband enjoys rights of proprietorship with regard to the fetus and is indeed entitled to monetary compensation for its loss (*Exodus* 21:22) the woman has no right to destroy her dead husband's property in order to absolve herself retroactively from the prohibition against cohabitation with a brother-in-law.

On a later occasion R. Uziel seems to have reversed his opinion with regard to the salient point of the responsum. In a responsum dated the following month (*op. cit.*, no. 47) R. Uziel

specifically cites the opinion of R. Emden but reserves decision in cases not involving a threat to the very life of the mother.

R. Joseph Trani, in a somewhat more restricted ruling, (*Teshuvot Maharit*, I, no. 99), sanctions abortions when performed in the interests of maternal health. This decision follows logically from his thesis that feticide is not a form of homicide but is forbidden because removal of the fetus constitutes an act of "wounding."⁵⁷ It of course follows that any wound inflicted for purposes of healing is not encompassed by this prohibition.

R. Weinberg (*No'am IX*, BVE; *Seridei Esh*, III, 350) observes that according to the previously cited explanations of *Mishneh Torah*, *Hilkhot Rotzeach* 1:9, by R. Yechezkel Landau and R. Chaim Soloveitchik, abortion would not be sanctioned by Maimonides except when there exists an imminent threat to the life of the mother. R. Weinberg adds, however, that in view of the fact that many authorities dispute Maimonides' position, "perhaps" the lenient ruling of R. Emden may be relied upon if continuation of pregnancy until term would be detrimental to the health of the mother.

In a similar vein, R. Waldenberg notes (*Tzitz Eliezer*, IX, 239) that "there is room for leniency" if the state of maternal health is very precarious or if necessary in order to secure relief from severe pain. As noted earlier, R. Mosheh Yonah Zweig (*No'am*, VII, 48) rules that abortion on these grounds is permissible within the first forty days of gestation.

Among the authorities not previously cited who forbid destruction of the fetus other than in face of a definite threat to the life of the mother are: *Koach Shorr*, no. 21; *Levushei Mordechai*, *Choshen Mishpat*, no. 36; *Bet Shlomo*, *Choshen Mishpat*, no. 132; *Pri ha-Sadeh*, IV, no. 50; *Binyan David*, no. 47; *Avnei Zedek*, *Choshen Mishpat*, no. 19; *Afarketa de-Aryeh*, no. 169; *Tzur Ya'akov*, no. 141.

PRESERVATION OF MATERNAL LIFE DURING PARTURITION

The Mishnah, *Oholot* 7:6, is emphatic in its ruling against embryotomy once the major portion of the child has been delivered. The inferred presumption is that the abandonment of

one life will assuredly save the other. There is, however, no specific statement of halakhic determination dealing with cases where non-interference would lead to the loss of both mother and child. The halakhic grounds which justify an embryotomy under such conditions, even subsequent to the commencement of partruition, are delineated by R. Israel Lipschutz, author of the *Tiferet Yisra'el*, in his commentary on this Mishnah. The issue hinges upon the applicability of a law recorded by Maimonides in his *Mishneh Torah, Hilkhhot Yesodei Torah* 5:5 "... if the heathen said to them, 'Give us one of your company and we shall kill him; if not we will kill all of you,' let them all be killed but let them not deliver to them [the heathens] a single Jewish soul. But if they specified [the victim] to them and said, 'Give us so and so or we shall kill all of you,' if he had incurred the death penalty as Sheba the son of Bichri they may deliver him to them . . . but if he had not incurred the death penalty let them all be killed but let them not deliver a single Jewish soul."

Maimonides' ruling is based upon the explication of the narrative of II Samuel 20:4-22 found in the Palestinian Talmud, *Terumot* 8:12. Joab, commander of King David's troops, had pursued Sheba the son of Bichri and besieged him in the town of Abel and demanded that he be delivered to the king's forces. Otherwise Joab threatened to destroy the entire city. From the verse "Sheba the son of Bichri hath lifted up his hand against the king, against David" (20:21) Resh Lakish infers that acquiescence with this demand can be sanctioned only in instances where the victim's life is lawfully forfeit such as was the case with regard to Sheba ben Bichri who is described as being guilty of *lese majeste*; in instances where the victim is innocent all must suffer death rather than become accomplices to murder. Reb Yochanan maintains that the question of guilt is irrelevant but that the crucial element is rather the singling out of a specific individual. Members of a group have no right to select one of their number arbitrarily and deliver him to death in order to save themselves since the life of each individual is of inestimable value. However once a specific person has been marked for death in any event, either alone if surrendered by his com-

panions or together with the entire group if they refuse to comply, those who deliver him are not accounted as accessories. Maimonides' ruling is in accordance with the opinion of Resh Lakish.⁵⁸

In a medical context, when confronted by the imminent loss of both mother and child, dismemberment of a partially delivered child having no possibility of survival in order to save the mother would be advocated by those authorities who require merely that the victim be "specified" since they do not require that he necessarily be guilty of a capital offense. However, according to Maimonides, the intended victim must be culpable as well and a newly born child is certainly guilty of no crime. Furthermore, this line of reasoning does not apply to the many cases where either the mother or child may be saved through the sacrifice of the other; in such situations the crucial element of "specification" is totally absent.

Yet another crucial discrepancy between our case and the paradigm instance of "specification" is stressed by R. Chaim Sofer.⁵⁹ The provision regarding specification is a direct outgrowth of the law of pursuit. Sheba ben Bichri's refusal to surrender himself was the direct source of danger to his townspeople. This made him, in effect, a pursuer since it was within his power to remove the danger. Justification for turning him over to Joab was simply the application of the law of pursuit to this novel situation. The situation surrounding childbirth, argues R. Sofer, is not at all comparable. Since the birth process is not at all within the control of the child he cannot be deemed a "pursuer" in permitting the genesis of a threat to the life of the mother. Since we are dealing with a natural process totally independent of human volition, the mother must be deemed as "pursued by Heaven." Even if the element of "specification" were present (i.e., the life of the mother could be saved by sacrificing the child but not vice versa), such "specification" would not render the partially-born child a "pursuer," inasmuch as he cannot in this instance "surrender," even if he were capable of such choice.

R. Sofer further asserts, on the basis of a contrary-to-fact hypothetical argument, that even if Halakhah were to sanction

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the taking of another's life in order to save one's own, this provision would be based solely on the consideration that an act of murder is inevitable in any event. However, death in childbirth, barring human interference, occurs through natural causes without any mortal becoming sullied by the crime of bloodshed. If so, "better two deaths than one murder." Accordingly, R. Sofer refuses to grant permission to destroy the child in order to save the mother even though its life is doomed in any event.

Presenting a second argument which would render this practice permissible R. Israel Lipschutz reasons that Halakhah suspects that each newly born child may be premature and possibly incapable of survival and provide that the child's status remain in doubt until it demonstrates viability through survival for a minimum period of thirty days.⁶⁰ Therefore, argues R. Lipschutz, since there is an objective criterion for granting priority to the life of the mother the usual principle "on what account is his blood redder than yours" does not apply and hence the child may be sacrificed in order to spare the life of the mother.⁶¹

This problem is discussed in the writings of several other authorities as well. In his commentary on the Mishnah, R. Akiba Eiger⁶² poses the question regarding the permissibility of killing a child in order to save the mother where failure to do so would result in the death of both. Quoting *Panim Me-iroi*,⁶³ he concludes that the ultimate decision in this instance requires further deliberation. R. Moses Schick,⁶⁴ without citing R. Lipschutz's *Tiferet Yisra'el*, agrees with these conclusions in substance. However, noting a previously expressed opinion of *Chatam Sofer*,⁶⁵ he adds that facts ascertained solely through the testimony of medical practitioners can be accepted as establishing only a *safek*, i.e., as possibly being the case, but cannot be regarded as having been established with conclusive certainty. Since there remains an element of doubt, a decision, on our part to terminate the life of the child is unwarranted. However, if the physician himself be confident of the certainty of his diagnosis and of his assessment of the medical prognosis, he may rely upon his own certainty and govern his own actions accordingly. R. Schick's responsum concludes with the statement that the matter requires further deliberation and that these

views are not to be regarded as definitive decisions. In response to a similar query R. David Hoffmann, citing the relevant sources expresses his agreement with the opinion of *Tiferet Yisra'el*.⁶⁶ R. Isaac Judah Schmelkes (*Teshuvot Bet Yitzchak*, II, *Yoreh De'ah*, no. 162) expresses some reservation but agrees that R. Schick's ruling may be relied upon provided that the pertinent medical facts are established on the basis of the concurring opinions of two physicians of the Jewish faith.

The position adopted by R. Joseph Saul Nathanson⁶⁷ is most engaging. Citing the decision recorded in *Baba Metzia* 62a⁶⁸ "Your life takes precedence over the life of your fellow" this authority contends that the Mishnah's discussion of treatment of a woman in "hard travail" and the restrictions placed upon efforts to preserve her life refer only to third parties. One lacking personal involvement may not make one life subordinate to another but, as far as one's own life is concerned it takes precedence over the life of one's fellow. R. Nathanson's view is actually an expression of an identical position cited by *Me'iri*, *Sanhedrin* (ed. Abraham Sofer, Frankfort-am-Main, u.d.), p. 271, in the name of the "Sages of the Generations" who permit the mother herself to destroy the child even after final parturition has begun while forbidding others to do so. R. Zweig dismisses this view as "the opinion of an individual" and hence having no standing in determination of Halakhah (*No'am* VII, 55).⁶⁹

MAIMING VS. DESTRUCTION OF FETUS

The law of pursuit provides that the life of the pursuer is forfeit only if his malevolent intention cannot be thwarted by otherwise disabling the pursuer. Thus if it is possible to disable the aggressor by maiming or crippling him his life may not be taken under the law of pursuit. R. Moses Samuel Horowitz⁷⁰ and R. Isaac Schorr (*Koach Shor*, no. 20) both rule that this consideration applies to a fetus as well. Accordingly, when intra-uterine amputation of a limb would suffice to save the mother without recourse to an embryotomy destruction of the fetus cannot be sanctioned. R. Shlomoh ha-Kohen of Vilna, author of the well-known *Cheshek Shelomoh*, deems this conclusion incontestable and concurs in this ruling.⁷¹

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Indeed this interesting ramification serves as a basis for a novel reinterpretation of Maimonides' position. R. Horowitz and R. Schorr, apparently without either having seen the other's work, both note the expression "for it is *as* one pursuing her." They infer that Maimonides does not really intend to invoke the law of pursuit. Instead, he relies on the implicit rationale that the fetus is not "a life." But yet one restrictive aspect of the law of pursuit is applicable; namely, that the fetus, even though it is not deemed to be "a life," cannot be destroyed if it is possible to save the mother by merely crippling her unborn child. This then, they declare, is the intention of the phrase "limb by limb" as used by the Mishnah — first one limb then another is removed in an attempt to deliver the child. While preservation of maternal life is of paramount concern, care must be taken that no unnecessary harm be inflicted upon the fetus.

Interpreted in a similar manner the further provision of the Mishnah . . . "but once the major portion has emerged one may not touch it" [the fetus] implies that even the maiming of a partially born child or amputation of a limb is forbidden in order to save the mother. R. Chaim Sofer (*Machaneh Chaim, Choshen Mishpat*, no. 50) draws such an inference and indicates that the rationale motivating the decision is the fact that the physician "cannot guarantee with certainty" that the child will survive the surgical procedure. However, if non-interference will result in the loss of both mother and child, R. Sofer permits maiming of the child in an attempt to save the life of the mother.

ABORTION OF PREGNANCY ON PSYCHIATRIC GROUNDS

The entire area of psychiatric problems and severe emotional disturbances and their bearing upon halakhic questions has as yet not been adequately explored. Guidelines are to be found in isolated references to various forms of mental illness scattered throughout responsa literature. The earliest references to mental disease sufficiently grave to imperil the life of the afflicted occurs in the *Issur ve-Heter he-Arukh*,⁷² attributed to Rabbenu Yonah of Gerondi. *Issur ve-Heter he-Arukh* cites a specific query addressed to an earlier authority, the Maharam, concerning an

epileptic who sought advice concerning the permissibility of partaking of a forbidden food reported to possess medicinal properties capable of curing his disease. The decision, in which Nachmanides acquiesces, is in the affirmative, provided that the efficacy of the remedy has been established. This decision is predicated upon a determination that epilepsy constitutes a danger to life since at times an epileptic may endanger himself by "falling into fire or water." R. Israel Meir Mizrachi⁷³ relies upon the decision of Nachmanides in ruling that insanity constitutes a danger to life and accordingly permits an abortion when it is feared that the mother may otherwise become mentally deranged. This position is also adopted by *Levushai Mordechai*, *Choshen Mishpat*, no. 39, who is cited by R. Waldenberg, *Tzitz Eli'ezer*, IX, 327.

Other authorities, however, apparently do not regard insanity (at least in all forms) as constituting hazard to life. Thus when R. Moses Sofer⁷⁴ was asked whether it was permissible to have a mentally ill child admitted to an institution where he would be served forbidden foods, he discusses all aspects of the case without at all raising the question of *pikuach nefesh* (danger to life). R. Unterman, in an article contributed to *ha-Torah v'ha-Medinah* (IV, 27), he argues that the instinct for self-preservation is so deeply ingrained and suicidal tendencies are so rare, that one cannot consider mental illnesses as falling under the category of diseases which imperil life.⁷⁵

ABORTION OF A BASTARD FETUS

R. Ya'ir Bacharach was asked whether a dose of ecbolics could be administered to a Jewess who had become pregnant as the result of an adulterous relationship in order to induce the abortion of her bastard fetus. Noting that the prayer "Preserve this child to its father and to its mother" is omitted at the circumcision of the issue of an adulterous or incestuous union because "the proliferation of bastards in Israel" is not desirable, he concludes that while proliferation of such children may not be a social desideratum and hence there is no obligation to offer prayer on their behalf, nevertheless there is no legal distinction between a bastard and a legitimate

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embryo which would sanction any overt action which might threaten its life (*Chavot Ya'ir*, no. 31). An identical query addressed to R. Jacob Emden (*She'elat Ya'avetz*, no. 43) elicited a different response. Taking note of the earlier responsum in *Chavot Ya'ir*, R. Emden finds grounds to differentiate between the seduction of an unmarried maiden and an adulterous relationship with a married woman.⁷⁶ The latter having committed a capital offense is liable to the death penalty. Were we able to execute judgment in capital cases, the pregnant condition of the condemned would not warrant a delay in administering punishment. This is clearly established by the Mishnah (*Eruchin* 7a) even with regard to cases in which pregnancy occurs after commission of the crime. Since in our case the child was conceived in sin, there is all the more reason for immediate execution of the mother. R. Emden adds the rather astonishing opinion that although we no longer administer capital punishment, one who has committed a crime punishable by death may commit suicide without fear of sin. R. Emden even deems self-immolation meritorious in such circumstances. R. Emden reasons that if the mother may destroy herself completely she may certainly destroy a part of her body. Hence he concludes there can be no prohibition against the destruction of a bastard fetus since its life is legally forfeit. From an observation added in the course of his discussion it appears that R. Emden intended his remarks to apply only where formal warning of the nature of the transgression and its punishment was administered prior to the adulterous act since capital punishment is not inflicted by the *Bet Din* in the absence of such warning.

R. Unterman⁷⁷ voices an obvious objection against the above decision. The Mishnah in *Eruchin* which provides for the execution of a pregnant woman is understood by the commentaries as having reference to situations where pregnancy was not detected until the verdict was announced; when pregnancy was known beforehand, the trial was delayed until after confinement in order to spare the life of the child. The status of an adulterous woman in our times is always that of a woman prior to her trial. Accordingly, there is no justification for the destruction of a fetus illicitly conceived.

R. Ben Zion Uziel in his *Mishpetei Uziel, Choshen Mishpat*, III, no. 46, advances an original line of reasoning in substantiation of R. Emden's decision regarding the abortion of a bastard fetus. The Gemara (*Sotah* 37b) declares: "The whole section refers to none other than an adulterer and an adultress — 'Cursed is the man who makes a graven or molten image' (Deuteronomy 27:15). Is it sufficient merely to pronounce such a person cursed? [His transgression is punishable not merely by a curse but by death.] Rather it refers to one who has engaged in immoral intercourse and begets a son who goes to live among the heathen and worships idols. Cursed be the father and mother of this person for this is what they caused him to do." Rashi explains that since such a person is debarred from the assembly and cannot marry a Jewish woman of legitimate birth his embarrassment causes him to mingle with heathens and his heathen associations lead him to idolatry. From this discussion one may deduce that while the act of adultery carries with it a statutory punishment irrespective of future developments there is yet another "curse" incurred if the union leads to the birth of bastard progeny. Therefore, rules R. Uziel, it is permissible to destroy the embryo in order not to incur this curse. It is of course self understood that reference is only to cases of bastards falling under the "curse" and not to the progeny of an unmarried woman for the Torah regards as a bastard only the issue of an adulterous or incestuous union. R. Uziel further declares that only the parents themselves may abort the fetus. His reasoning is that only they incur the curse, hence only they may obviate the curse by destroying the fetus. An outsider who incurs no penalty does not experience the "grave need" deemed essential by R. Emden and has therefore no right to interfere with the development of the unborn child.

R. Moses Yekuthiel Kaufman, author of *Lechem ha-Panim* (Fürth, 5526), unequivocally says (*Kuntres Acharon*, no. 19, p. 58b) that it is forbidden to give a woman a drug for the purpose of aborting a bastard fetus.

ABORTION OF AN ABNORMAL FETUS

The status of abnormal and malformed human beings is well-

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defined by the Halakhah. Physical or mental abnormalities do not affect the human status of the individual. R. Yehudah he-Chassid⁷⁸ refers to the question of terminating the life of a monster-like child born with the teeth and tail of an animal. Indeed, the interlocutor raised the question only on basis of the fear aroused by reports that the creature would later "eat people." R. Eleazar Fleckeles of Prague⁷⁹ rules explicitly that the killing of even a grotesquely malformed child possessing animal features constitutes an act of murder. Challenging the questioner's view that the Talmud's suspension of the usual ritual impurity following the emission of similarly malformed or animal-like embryos indicates that upon birth a child so formed should not be classed as a human being. R. Fleckeles counters that this exclusion is limited to the laws of impurity applicable to miscarriages. The issue of a human mother, no matter how gravely deformed, enjoys human status and may not be destroyed either by overt act or by passively allowing it to die of starvation.

R. Unterman⁸⁰ in dealing with the question of abortion in cases where an expectant mother contracted German measles early in pregnancy and R. Mosheh Yonah Zweig⁸¹ in discussing the deformities caused by thalidomide both conclude that there is no distinction in the eyes of the law between normal and abnormal persons either with regard to the statutes governing homicide or with regard to those governing feticide. R. Waldenberg (*Tzitz Eliezer*, IX, 237) is the only authority who deems abnormality of the fetus to be justification for interruption of pregnancy and even he stipulates that the abortion must be performed in the early stages of pregnancy. R. Waldenberg indicates that the difficulties engendered by the birth of an abnormal child may render abortion a "grave necessity" and therefore permissible according to the previously cited view of R. Emden. R. Waldenberg permits such termination of pregnancy within the first three months following conception provided there is as yet no fetal movement.

ABORTIONS UNDER NOACHIDIC LAW

Noachides are specifically enjoined from destroying fetal life

upon penalty of death (*Sanhedrin* 57b) on the basis of Genesis 9:6. This prohibition is recorded by Maimonides in his *Mishneh Torah, Hilkhoh Melakhim* 9:4. Consequently any aid extended to a gentile in the performance of an abortion is a violation of the precept "Thou shalt not place a stumbling block before the blind" (Leviticus 19:14). This prohibition is clearly enunciated with regard to abortion of a fetus by R. Joseph Trani (*Teshuvot Maharit*, I, no. 97) and confirmed by his pupil, R. Chaim Benevisti (*Sheyarei Kenesset ha-Gedolah, Tur Choshen Mishpat*, 425, no. 6). Maharit, however, notes that the Gemara (*Avodah Zarah* 6b) states that aid rendered to one transgressing a commandment is proscribed only if the sinner could not otherwise have fulfilled his desire. It is, for example, forbidden to bring a cup of wine to a Nazarite who is on the opposite side of the river and could not otherwise reach the wine, but if both the wine and the Nazarite are on the same side of the river and the Nazarite is capable of reaching the wine without assistance, any help extended does not fall under this prohibition. Such an act, while Biblically permitted, is banned by Rabbinic edict legislating against "aiding transgressors." Maharit denies the applicability of the edict to aid rendered non-Jewish transgressors. Accordingly Maharit rules that assistance in the performance of an abortion under these circumstances is forbidden only if no other physician is available; if others are available it is to be considered analagous to the case of both the Nazarite and the wine standing "on the same side of the river." There are nevertheless many authorities who agree that the Rabbinic prohibition against "aiding transgressors" which applies even when both are "on the same side of the river" extends to aiding Noachide transgressors as well.⁸² Furthermore the author of *Mishneh le-Melekh* (*Hilkhoh Malveh ve-Loveh* 4:2) argues that the availability and readiness of another individual to transport the wine over the river does not relieve the one who actually does so from culpability. The prohibition is deemed inoperative only if the transgression could be committed without "the placing of a stumbling block" by anyone else; when the transgression requires aid the one who renders it is liable, according to this view, no matter how many others

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would have been willing to render similar aid.⁸³

But may a Noachide destroy the life of an embryo in order to preserve the life of the mother? *Tosafot* (*Sanhedrin* 59a) poses the question but expresses doubt with regard to its resolution. The question seems to hinge upon the nature of the Noachidic prohibition:⁸⁴ If in extending the death penalty to the killing of a fetus under the Noachidic code the Torah intends to indicate that with regard to Noachides fetal life is to be considered on par with other human life then, of course, the mother's life cannot be saved by a Noachide at the expense of the fetus. The law of pursuit cannot be invoked if the fetus is deemed "a life" under the Noachidic dispensation, just as the law of pursuit does not apply in Jewish law after the commencement of birth at which juncture the fetus is deemed "a life" according to the Sinaitic covenant. On the other hand, the Torah may not deem the fetus to be "a life" even with regard to Noachides, but bans feticide under the Noachidic code as a transgression totally unrelated to the concept of taking human life. If the Noachidic prohibition is extraneous to the exhortation against homicide, it follows that the life of the mother would take precedence over that of the fetus.⁸⁵ A virtually identical discussion is presented by *Tosafot*, *Chullin* 33a but without any suggestion whatsoever of the possibility that destruction of the fetus by a Noachide would be permissible under these circumstances. R. Isaac Schorr (*Koach Shor*, no. 20, p. 32) concludes that since at best the matter remains in doubt the life of the fetus must remain inviolate. He further advances a rather involved argument demonstrating that regardless of the position adopted by *Tosafot* there is no question that Maimonides forbids the destruction of a fetus by Noachides even when the life of the mother is at stake. *Minchat Chinukh*⁸⁶ advances yet another reason which precludes destruction of the fetus by a Noachide even if necessary in order to save the mother. According to this opinion, a Noachide may not transgress any provision of the Noachidic code in order to preserve a human life.⁸⁷

Nevertheless, R. Isaac Schorr finds a basis upon which a non-Jewish physician might be requested to terminate the pregnancy of a Jewish woman. Requesting such aid should normally

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be discountenanced as a violation of "Thou shall not place a stumbling block before the blind." However, this commandment is no different from other negative prohibitions (excepting the three cardinal sins) which may be ignored when life is at stake. Since R. Moses Isserles (*Yoreh De'ah* 157:1) rules that this ban may be violated even if the "stumbling block" is the commission of one of the three cardinal sins, there is no barrier to requesting the non-Jewish physician to undertake such a procedure, if he is willing to do so, provided no Jewish physician is available. If a Jewish physician is available, his aid should be sought in order to obviate the necessity of "placing a stumbling block."⁸⁸

A FINAL CAVEAT

In light of what may at times appear to be a harsh and forbidding stance one might be tempted to conclude that Halakhah manifests an indifferent attitude toward the individual and his plight. It is important that we recognize that, quite to the contrary, Halakhah is motivated first and foremost by concern and solicitude for all living creatures. It is this extreme concern for man's inalienable right to life, both actual and potential, which permeates these many Halakhic determinations.

A Jew is governed by such reverence for life that he trembles lest he tamper unmindfully with the greatest of all divine gifts, the bestowal or withholding of which is the prerogative of G-d alone. Although he be master over all within the world there remain areas where man must fear to tread, acknowledging the limits of his sovereignty and the limitations of his understanding. In the unborn child lies the mystery and enigma of existence. Confronted by the miracle of life itself man can only draw back in silence before the wonder of the Lord:

Where wast thou when I laid the foundations of the earth?
Declare, if thou hast the understanding . . .
Have the gates of death been revealed unto thee?
Or hast thou seen the gates of the shadow of death? . . .
Declare, if thou knowest it all.⁸⁹

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Indeed,

As thou knowest not what is the way of the wind,
Nor how the bones do grow in the womb of her that is with child;
Even so thou knowest not the work of G-d
Who doeth all things.⁹⁰

NOTES

1. *Emunah, Bitachon ve-Od* (Jerusalem, 5714), p. 21.

2. See below, note 42.

This inference is not formulated explicitly by the *Tosafot* cited but is mentioned in passing by R. Ya'ir Chaim Bacharach in his *Teshuvot Chavot Ya'ir*, (Frankfort A.M., 5459), no. 31. The omission of this inference is perhaps intentional on the part of *Tosafot* since such omission is consistent with a distinction drawn by *Tosafot*, *Niddah*, 44a, to the effect that an embryo which has "torn itself loose" from its normal uterine position before the death of the mother enjoys inheritance rights with respect to the mother's property and passes on such rights to its heirs. This provision is based on the premise that the fetus' death is deemed to occur after that of the mother. One might therefore argue that "tearing itself loose" marks the stage at which the fetus is sufficiently viable to be accorded human status. Since the Mishnah refers to a woman who is in "hard travail" there is no evidence therefrom that an embryo in earlier stages of development, i.e., prior to having commenced the process of parturition, is accounted sufficiently human to render its destruction an offense.

Chavot Ya'ir endeavors to demonstrate that prenatal life is inviolate even at earlier stages of fetal development on the basis of the Talmudic discussion concerning the execution of an expectant mother who has incurred the death penalty. The Mishnah (*Eruchin* 7a) rules that the execution must be deferred until after the child's birth only if the convicted mother has already "sat on the birth stool," which the Gemara defines as being synonymous with the fetus' "tearing itself loose." Prior to this, execution is not delayed in order to preserve the unborn child. With regard to this inference the Gemara queries, "*Peshita! gufa he* — Of course! It [the fetus] is an organic part of her [the mother's] body." *Chavot Ya'ir* reasons that since the Gemara adds the phrase *gufa he* in formulating its question, one must conclude that the reason that the child is consigned to the same fate of the mother is that it is an organic part of her body. The logical inference is that were this rational to be lacking, it would be forbidden to cause the death of the unborn fetus.

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For a conflicting inference which ignores this point *vide* R. Joseph Trani, *Teshuvot Maharit* (Fürth, 5528), I, no. 99.

3. For further discussion of the nature of the prohibition against feticide see the sources cited by R. Chaim Chizkeyahu Medini in his *Sedei Chemed* (New York, 5722), *Kelalim, Ma'arechet ha-Aleph*, LII, vol. I, 175ff and *Sheyurei ha-Pe'ah, Ma'arechet ha-Aleph*, XIX, vol. I, 304f.

4. Despite these two unequivocal statements the language employed by *Tosfot Niddah* 44b, led R. Zevi Hirsch Chajes to note in a gloss *ad locum* that *Tosfot* in *Niddah* expresses a contradictory opinion. Writing much earlier both *Chavot Ya'ir* in the above cited responsum and R. Jacob Emden in a gloss (*Niddah* 44b) state without elaboration that *Tosfot* does not intend to express a permissive ruling but simply employs misleading phraseology. R. Jacob Emden adds in wonder, "Who is it that permits the killing of a fetus without reason?" *Vide* also the gloss of R. Shlomo Eiger *ad locum*. A close examination of the line of reasoning employed by *Tosfot* shows that the conclusion reached by *Maharitz Chajes* cannot be supported. *Tosafot* contends that the absence of statutory punishment with regard to the crime of feticide applies only to cases where the mother is alive at the time of destruction of the fetus; when, however, the mother's death precedes that of the fetus, *Tosafot* advances a tentative assertion to the effect that the fetus is independently viable and hence the killing of the fetus in such instances carries the full penalty for murder. If this is not the case and "it is permitted to kill the fetus," queries *Tosafot*, why is it then permissible to violate the *Shabbat* by carrying a knife through a public thoroughfare for the purpose of removing the fetus from the womb of its deceased mother? A literal reading indicates that, according to *Tosfot*, dispensation for the desecration of the Sabbath can be rightfully invoked only in order to preserve such lives which it is forbidden to destroy. For if the life in question may be destroyed deliberately, why then should the Sabbath be desecrated in order to save that which otherwise may be destroyed with impunity? Interpreted in this manner, there is no continuity whatsoever between this query and the previous assertion pertaining to the penalty for taking the life of an unborn child. Feticide might well *not* entail the punishment of homicide yet nevertheless constitutes a moral offense, albeit an unpunishable one. Furthermore, *Tosafot's* refutation of this assumption is unclear if understood in the context of *Maharitz Chajes'* analysis. *Tosafot* negates the prior assumption by asserting that for the purpose of saving a life the Sabbath may be violated even if the life saved be that of one "whom it is permissible to kill." As evidence for this conclusion *Tosfot* cites the rule with regard to a *goses beyedei adam* (one who has suffered a mortal wound, humanly inflicted) for the prolongation of whose life the Sabbath may be violated although "one who murders him is not culpable." According to *Maharitz Chajes'* understanding of the earlier remarks of *Tosfot*, the latter statement provides no substantiating evidence whatsoever. The status of a murderer of a *goses beyedei adam* is clear: The killing is forbidden but carries no statutory punishment. Since it is forbidden to take his life there is no question regarding the permissibility (according to *Tosfot* but cf. responsa *Shevut Ya'akov*, no. 13) of violating the

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Sabbath on his behalf; the absence of statutory punishment is deemed irrelevant. The issue in question, according to Maharitz Chajes, is solely that of the desecration of the Sabbath on behalf of a life. (viz. that of a fetus) which might be destroyed with impunity. *Tosafot* endeavors to disprove the contention that it is somehow incongruous to sanction the desecration of the Sabbath in order to preserve that which there is not only no obligation to preserve but which may even be summarily destroyed. Indeed the logic of this entailment is so strong that it is difficult to fathom its refutation. However, R. Shlomo Drimer, *Teshuvot Bet Shlomo* (Lemberg, 1891), *Choshen Mishpat*, no. 120, adopts a contrary view, reasoning that despite the prohibition against feticide and despite a positive injunction to preserve the embryo the Sabbath may be violated on behalf of an unborn child by application of the principle: "Better to violate one Sabbath in order to observe many Sabbaths." If, on the other hand, we understand *Tosafot's* position in *Niddah* to be identical with that espoused by *Tosafot* in *Sanhedrin* and *Chullin* the line of reasoning is most clear. In support of the assertion that the destruction of a fetus which has been preceded by the death of the mother incurs the full penalty of murder, *Tosafot* endeavors to show that the desecration of the Sabbath is sanctioned only in order to save a life which it is not only forbidden to destroy but which if unlawfully destroyed is juridically punishable as a capital crime. This hypothesis is subsequently rejected by *Tosafot* with the argument that the killing of a *goses beyedei adam* carries no such penalty, yet the Sabbath may be violated on his behalf. The conclusion then is that there is no evidence that the destruction of a fetus whose mother had preceded it in death carries a statutory punishment. That the taking of the life of a fetus is forbidden does not at all come into question according to this understanding of *Tosafot*.

Under any interpretation on the comparison by *Tosafot* of a fetus to a *goses* defies comprehension: The absence of a statutory death penalty with regard to killing of a fetus is due to consideration of the embryo as not possessing independent animation in the degree requisite for consideration as a "life." The killing of a *goses* is not punishable because in the majority of instances the *goses* would die in any event. The Sabbath may be violated on his behalf because consideration of circumstances surrounding the "majority" of cases are irrelevant when a human life is at stake. Halakhah prescribes such measures even when chances that these measures may be efficacious are dim. The life of a *goses* is intrinsically human and hence the Sabbath is violated on his behalf even though chances of recovery are remote; at the same time his murderer cannot be put to death due to lack of definite assurance that the victim was viable. This does not provide demonstrative evidence contradictory to the hypothesis that provision for the rescue of a fetus through violation of the Sabbath *ipso facto* establishes that it is therefore a human life whose destruction is punishable. Cf. R. Yechiel Ya'akov Weinberg, *Seidei Esh*, (Jerusalem, 5726), III, 350, note 7. The approach offered in the name of Rabbi Sternbuch does not appear to resolve this perplexity.

5. *Teshuvot Achi'ezer* (Wilno, 5699) III, 65, sec. 14. Although not adduced by *Achi'ezer* there is ample evidence that the principle "Is there anything which

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is forbidden to a Noachide yet permitted to a Jew?" establishes a Biblical prohibition. *Tosafot*, *Chullin* 33a, states explicitly with regard to *chatzi shi'ur* (which is forbidden to Noachides) that the principle "Is there anything which is forbidden to a Noachide yet permitted to a Jew?" is consistent only with the opinion of R. Yochanan who deems *chatzi shi'ur* to be Biblically forbidden and in contradiction to the opinion of Resh Lakish who deems *chatzi shi'ur* to be rabbinically proscribed. Cf. R. Samuel Engel, *Teshuvot Maharash* (Var-nov, 5696), V, no. 89 and R. Isaac Schorr, *Teshuvot Koach Shor* (Kolomea 5648), no. 20, page 33b; *Vide* also *Sedei Chemed*, I, 175.

6. However, cf. R. Samuel Strashohn, *Mekorei has-Rambam le-Rashash* (Jerusalem, 1957), p. 45, who writes that although feticide is Biblically forbidden "perhaps there is no punishment even 'at the hands of heaven.'"

7. Cf. below note 58.

8. This does not preclude recognition by Rabbenu Nissim of other considerations which would ban feticide under different circumstances on Biblical grounds. See below, notes 18 and 24.

9. Vol. VII, (Jerusalem, 5723), no. 48, p. 190; vol. VIII, (Jerusalem, 5725), no. 36, pp. 218-219 and vol. IX, (Jerusalem, 5727), no. 51, pp. 233-240; R. Solomon Abraham Rezechte *Bikurei Shlomo* (Pietrokow, 5624), *Yoreh De'ah*, no. 10, sec. 2, and *Orach Chaim*, no. 33, sec. 5, also states that the prohibition is Rabbinic in nature.

10. *Bet Yehudah* (*loc. cit.*) demonstrates that even indirect destruction of fetal life is forbidden on the basis of the Talmudic declaration (*Mo'ed Katon* 18a) that one who casts away his nail pairings is an evil-doer since there is the danger that a pregnant woman may pass by and abort her unborn child. This is clearly an indirect cause and yet the perpetrator is deemed an evil-doer.

11. This is contrary to the opinion of R. Waldenberg in his *Tzitz Eli'ezer*, VIII, 219, who does not recognize any such distinction. Rabbi Waldenberg, incidentally, does not note this distinction as drawn by *Teshuvot Ge'onim Batra'i*. Elsewhere, however, R. Waldenberg indicates that when termination of pregnancy is permissible, it is preferable to induce abortion by use of drugs if possible. *Vide Tzitz Eli'ezer*, IX, 240. Cf. also R. Ovadiah Yosef, *Yabi'a Omer* (Jerusalem, 5724), IV. *Even ha-Ezer*, no. 1, sec. 5.

12. Cf. *Tzitz Eli'ezer* VIII, 219 and IX, 239.

13. R. Drimer similarly argues that the a priori principle, "How do you know that your blood is redder than the blood of your fellow?" cannot be applied in assessing the value of fetal life.

14. This determination is based upon *Tosafot*, *Sanhedrin* 59b, and others who maintain that such practices are Biblically prohibited. For a comprehensive list of sources see *Otzar ha-Poskim* (Jerusalem, 5725), IX, 163-164 and M. Tendler, *Tradition*, IX (1967), no. 1-2, pp. 211-212. Regarding the question of whether Noachides are bound by the prohibition against onanism see *Mishneh le-Melekh*, *Hilkhos Melakhim*, 10:7.

15. Rabbi Jacob Emden, *She'elot Ya'avetz*, (New York, 5721), no. 43, also makes brief mention of this consideration. *Vide* also *Zekhuta de-Avraham* cited by R. Meir Dan Plocki, *Chemdat Yisra'el* (Pietrokow, 5687), p. 175.

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16. Cited by R. Meir Dan Plocki, *Chemdat Yisra'el*, p. 175.
17. It is on the basis of *Chavot Ya'ir's* declaration that feticide is forbidden as a form of "destruction of the seed" and, according to the opinion of Rabbenu Tam, the diminished severity of such an act when performed by a woman, that R. Waldenberg counsels to preferably seek a female (Jewish) doctor to perform even those abortions which are halakhically permissible. *Vide Tzitz Eli'ezer*, IX, 235.
18. Following the line of reasoning, feticide would be Biblically forbidden even according to Rabbenu Nissim who does not consider destruction of a fetus to be a form of homicide.
19. *Chemdat Yisra'el*, p. 175f.
20. See above, note 14.
21. *Seridei Esh* (Jerusalem, 5726), III, 127, p. 344f. This responsum was originally published as an article in *No'am*, IX (1966), pp. 193-215, and was reprinted subsequently in the third volume of *Seridei Esh* with a number of added notes.
22. *Teshuvot Maharit*, I, no. 97 and no. 99.
23. Other authorities refute this evidence on the grounds that the fetus is an organic part of the mother and hence under identical sentence as the mother. Since it will die in any event, there is no reason why it cannot be put to death earlier in order to spare the mother dishonor. Cf. *Chavot Ya'ir*, no. 31; *She'elat Ya'avetz*, no. 43; *Maharit*, I, no. 97, and R. Ben-Zion Uziel, *Mishpetei Uziel* (Jerusalem, 5657), III, *Choshen Mishpat*, no. 46, p. 210.
24. See Note 18. Cf. *Seridei Esh*, p. 249; *vide* Rabbi Moshe Yonah Zweig, *No'am*, VIII (Jerusalem, 5724), 44ff. Cf., however, *Koach Shor*, no. 20, p. 34a, who argues that the prohibition of Deuteronomy 25:3 does not apply to the striking of a minor, much less to the injury of an embryo. The verse in question expressly refers to the punishment of forty stripes imposed by the *Bet Din* and admonishes the court not to administer more than the prescribed number of lashes. Other forms of physical assault are banned by implication. "If the Torah objects to the striking of a wicked man that he be not lashed more than in accordance with his wickedness, how much more so [does it object] to the striking of a righteous person" (Maimonides, *Hilkhhot Sanhedrin* 16:2). R. Schorr differs with *Maharit* and argues that only those who have reached their religious majority are included in this scriptural reference since only they are subject to the flagellation imposed by the *Bet Din*. However, R. Aryeh Lifshutz, *Aryeh de-Bei Ila'i* (Przemysl., 5634), *Yoreh De'ah*, no. 6, advances this argument as conclusively demonstrating that *Maharit* is concerned with "wounding" of the mother rather than with injury of the fetus.
25. *Teshuvot Tzofnat Pa'aneach* (New York, 5714), no. 59. R. Ben Zion Uziel, (*Mishpetei Uziel*, p. 213) explains *Tosafot's* mention of a ban against feticide as referring simply to the general obligation to be fruitful and multiply. One who does not engage in the fulfillment of this precept is accounted "as if he commits bloodshed" (*Yevamot* 63b). Although the context of the quotation deals with passive non-fulfillment of the *mitzvah*, this stricture is applicable all the more to an individual overtly seeking to prevent the development of an already

existing life.

26. Further grounds for this ruling are given by R. Unterman in his work *Shevet mi-Yehudah* (Jerusalem, 5715), p. 29. See below, note 49.

27. *Minchat Chinukh* (Wilno, 5672), no. 296, Part II, p. 218.

28. See, however, below note 61.

29. 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 40th day of gestation and the female on the 80th. This distinction corresponds not only to the respective periods of impurity prescribed by Leviticus but to the opinion of R. Yishma'el 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 80 days. Aristotle's representation of animation as occurring on the 40th and 80th day, depending upon the sex of the fetus, was later incorporated in both Canon and Justinian law. *Vide* I, Jakobovits, *Jewish Medical Ethics* (New York, 1959), p. 175.

30. *Shakh, Choshen Mishpat*, 210-2; *Zofnat Pa'aneach*, no. 59.

31. Reference by the late Rabbi Zweig of Antwerp, (*No'am* VII, 53) to an opinion by *Chavot Ya'ir* to the effect that there is no prohibition during this period is erroneous. *Chavot Ya'ir* in his introductory comments calls attention to the fact that various stages of fetal development are recognized in different contexts, viz. forty days, three months, and independent movement of the fetal limbs, but quickly adds that it is not his desire to render judgment on the basis of "inclination of the mind or reasoning of the stomach." On the contrary, *Chavot Ya'ir's* failure to note such distinctions in the course of developing his own thesis portends his rejection of such a distinction.

It may be of interest to note that this misconstruction of *Chavot Ya'ir* is legend. *Sedei Chemed* cites with perplexity conflicting positions attributed to *Chavot Ya'ir* by other sources with regard to this question and notes in resignation that he does not have access to the responsa of *Chavot Ya'ir* and hence cannot determine which quotation is correct. Upon reading these comments, R. Solomon Abraham Rezechte wrote to the author of *Sedei Chemed* that he had indeed seen the words of *Chavot Ya'ir* in the original and reports that the latter views the prohibition against feticide as binding during the early periods of pregnancy as well. *Vide Bikurei Shlomo* (Pietrokow, 5656), no. 10, sec. 35.

R. Weinberg's summary declaration (p. 350) that such a prohibition does not exist according to the *Ba'al Halakhot Gedolot*, who permits desecration of the Sabbath in order to save an embryo even within this forty day period, is contradictory to the reasoning of *Chavot Ya'ir*, as indicated by Rabbi Weinberg himself (p. 339). R. Weinberg argues that *Chavot Ya'ir* fails to give consideration to the opinion of Nachmanides who maintains that despite the law against feticide the Sabbath may not be violated on behalf of an unborn child. This allegation is readily refutable since *Chavot Ya'ir* argues merely that permission to violate the Sabbath in order to save a fetus logically entails a prohibition against destroying such a life, but not vice versa. It cannot be

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inferred from *Chavot Ya'ir* that absence of such permission necessarily entails license to destroy the fetus.

32. *Torat ha-Adam, Sha'ar ha-Sakanah*, ed. Chaim Chavel, *Kitvei Ramban* (Jerusalem, 5724), II, 29; also cited by Rosh and Ran in their respective commentaries on *Yomah* 82a; vide also *Korban Netanel, Yomah, Perek Yom ha-Kippurim*, no. 10.

33. See above, note 31.

34. *Chemdat Yisra'el*, "Indexes and Addenda," p. 17.

35. *No'am*, VI, 4f; *Shevet mei-Yehudah*, 9f.

36. *Teshuvot Maharit*, I, no. 99.

37. The authenticity of this quotation is highly questionable. R. Unterman (p. 8) notes that he searched the *Teshuvot ha-Rashba* in an unsuccessful attempt to locate this responsum. It seems probable that Maharit's quotation is culled from responsum no. 120 of vol. 1 in the published text, (Bnei Brak, 5718). This responsum deals with the permissibility of rendering medical assistance to Noachide women so that they may be enabled to conceive. In language similar to that quoted by Maharit mention is made of Ramban's actually having done so in return for financial compensation. However, no mention whatsoever is made of Ramban's having assisted in medical abortion. Maharit apparently had a variant textual version. Cf. also R. Samuel Hubner, *Ha-Darom* (5729), no. 28, p. 33, who attempts to resolve the issue by suggesting an alternate punctuation of this quotation.

38. R. Unterman fails, however, to note the comments of R. Jacob Zvi Jalish in his *Meloh ha-Ro'im, Sanhedrin* 57b, who expresses a contrary view. Examination of the phraseology of *Chemdat Yisra'el*, Part I, p. 108, indicates that R. Plocki also had such a distinction in mind. In cases of danger to the mother he permits abortion of embryos of less than forty days without further qualification and adds that there are grounds for permitting abortion at subsequent stages of development provided this procedure is performed by a Jewish physician.

39. The absence, in the Noachidic code, of a ban on feticide during the first forty days of gestation would, in the opinion of the reviewer, provide insight into what is otherwise considered an erroneous translation by the Septuagint of Exodus 21:22-23: "And if men strive together and hurt a woman with a child so that her children depart and yet no harm (*ason*) follow, he shall surely be fined . . . But if any harm follows, then thou shalt give life for life." Rabbinic exegesis regards the term "harm" as having reference to the death of the mother. Compensation is payable to the husband for the loss of his offspring only if the mother survives. Should the mother die as a result of this assault the attacker is absolved from the payment of this fine. The Gemara derives from this that the commission of a capital crime, even if unintentional and hence the penalty not invoked, absolves the offender from the payment of any other compensation. The Septuagint, however, renders these verses as follows: "And if two men strive and smite a woman with child, and her child be born imperfectly formed, he shall be forced to pay a penalty . . . But if it be perfectly formed, he shall give life

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for life." This reading understands the death penalty to which reference is made as being incurred for the killing of the fetus in cases where the fetus is *formed*, i.e., having reached the fortieth day of gestation. It is clearly on the basis of this passage in the Septuagint that such a distinction is drawn by Philo (*De Spec. Legibus*, III, 108-110) and it was this reading of the Septuagint which influenced the attitude of the Church. Cf. Jakobovits, *op. cit.*, pp. 174, 179, 328, note 43, and 333, note 152. Samuel Poznanski, "Jakob ben Ephraim ein Antikaraischer Polemiker des X Jahrhunderts," *Gedenkbuch zur Erinnerung an David Kaufmann*, ed. M. Brann and F. Rosenthal (Breslau, 1900), p. 186, suggests that the mistranslation is based on reading *tsurah* for *ason*. On the basis of R. Unterman's thesis the entire matter is quite readily resolved, particularly in light of the rabbinic tradition which states that modifications were intentionally introduced by the Jewish translators. Addressed to Gentiles the translation may have been intended to incorporate ramifications of Noachidic law. Since a Noachide incurs capital punishment for the destruction of a fetus, provided it is formed, he would be absolved from further punishment even in cases where the mother survives. An exhaustive interpretation of *ason* then signifies death of the mother if the attacker is a Jew, and either death of the mother or of a formed fetus if the attacker is a Noachide. The word *ason* as applied to a Noachide thus includes the death of a formed fetus and is rendered accordingly by the Septuagint. This interpretation is of course founded on the premise that the principle of absolution from the lesser of two simultaneously incurred punishments extends to Noachidic law as well — a matter which bears further investigation. R. Joseph Babad is of the opinion that *him leh be-derabba mi-neh* does not apply to Noachides; *vide Minchat Chinukh*, no. 34. However, there is basis for assuming that the question is the subject of controversy between Rashi and *Tosafot*, *Eruvin* 62a; cf. *Encyclopedia Talmudit* (Tel Aviv, 5711) III, 354.

40. R. Unterman's opinion was actually expressed much earlier in his *Shevet mei-Yehudah*, p. 50.

41. See, however, R. Shlomo ha-Kohen of Vilna, who is of the opinion that such rescue of the mother, although permitted is by no means obligatory. This scholar apparently maintains that the obligation to preserve a life is suspended when such life can be preserved only at the cost of another's life even though such action involves no overt transgression. These views are recorded in a responsum addressed to R. Moshe Horwitz and incorporated by the latter in his *Yedei Moshe* (Pietrokow, 5658), no. 4, sec. 8.

42. *Yoreh Deah* 194:10; *Siftey Kohen*, *loc. cit.*, no. 26; *Sidrei Taharah*, *loc. cit.* *Vide* also David Hoffmann, *Melamid le-Ho'il* (Frankfort A.M., 5696), no. 69 and R. Meir Eisenstadt, *Teshuvot Panim Me'ivot* (New York, 5722), III, no. 8.

43. The law of pursuit requires the bystander to disable the aggressor, by a fatal blow if necessary, in order to thwart the pursuer's intent to kill. *Vide* Maimonides, *Mishneh Torah*, *Hilkhot Rotzeach* 1:6.

44. *Nod'a bi-Yehudah*, *Mahadurah Tinyanah* (Wilno, 5659), *Choshen Mishpat*, no. 59.

45. *Chavot Ya'ir*, no. 31.

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46. *Chidushei R. Chaim ha-Levi, Hilkhhot Rotzeach*, 1:9.

47. *Even ha-Azel* (Jerusalem, 5696), I, *Hilkhhot Rotzeach*, 1:9.

48. P. 26ff. A similar explanation is offered by Rabbi N. L. Rabinovitch, *Ha-Darom* (5729), no. 28, p. 19f. For yet another interpretation of Rambam (albeit one which does not affect our discussion) see R. Isaac Judah Shmelkes, *Teshuvot Bet Yitzhak* (New York, 5720), *Yoreh Deah*, II, no. 162.

49. The principle "Be killed but do not transgress" applies only to actual homicide but imposes no obligation in face of coercion to prevent fulfillment of the obligation to rescue the life of one's fellowman. Since according to R. Unterman killing a fetus does not fall within the category of murder but is inherently contraindicated by the obligation to preserve fetal life, it follows that there is no obligation to sacrifice one's own life rather than to refrain from destroying a fetus.

50. *Teshuvot Achi'ezer*, II, no. 72.

51. *Sedei Esh*, III, 342. Cf. also R. Meir Dan Plocki, (*Chemdat Yisra'el*, "Indexes and Addenda," p. 32, who makes much the same point.

52. The same opinion is recorded by R. David Dov Meisels, *Binyan David* (Ouhel, 5692), no. 47, in the name of *Avnei Zedek*, *Choshen Mishpat*, no. 19.

53. *Levushei Mordechai*, *Mahadurah Tinyana* (Budapest, 5684), *Yoreh De'ah*, no. 87.

54. A similar interpretation of Ramban is offered by R. Ben Zion Uziel, *Mishpetei Uziel*, III, 211.

55. *She'elat Ya'avetz*, no. 43. This opinion was apparently accepted by R. Shlomo Kluger whose views are recorded in *Tzeluta de-Avraham*, no. 60, and by *Tzitz Eli'ezer*, VII, 190; VIII, 219; IX, 237. R. Waldenberg stipulates (IX, 240) that consent of the husband must be obtained in such instances since he is deemed to possess proprietary rights with regard to the unborn child. R. Waldenberg further stipulates (VII, 190) that determination of medical necessity must be made by an Orthodox physician or at the very minimum by a "concerned physician who relates to the laws of the Torah with honor and concern." *Binyan David* no. 60, requires the concurring opinions of two medical practitioners, neither of whom is aware of the diagnosis of his colleague. R. Ovadiah Yosef, *Yabi'a Omer*, IV, *Even ha-Ezer*, no. I, sec. 10, rules that an abortion for the purpose of preserving maternal health may be performed only within the first three months of pregnancy.

56. *Vide also Torat Chesed*, *Even ha-Ezer*, no. 42, sec. 32; *Yabi'a Omer*, IV, no. I, sec. 8.

57. *Teshuvot Maharit*, I, no. 97. This will serve in a measure to resolve the apparent discrepancy between responsa nos. 97 and 99 which is pointed out by *Sedei Chemed*, p. 175. In no. 99 R. Trani states that there is no ban based upon the prohibition against destruction of human life; not mentioned is the prohibition against flagellation to which reference is made in no. 97. The latter prohibition is, of course, inoperative when indicated for therapeutic purposes. The author of *Teshuvot Binyan David* (no. 60), however, regards Maharit as permitting abortions only when the mother's life is in danger. It seems that *Pachad Yitzhak* must also have understood this to be the intention

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of R. Trani since he records the decision of Maharit yet in the same paragraph as previously noted, denies the propriety of an abortion in case of danger to the mother resulting from causes other than the pregnancy *per se*. Cf. also *Yabi'a Omer*, IV, *Even ha-Ezer*, no. 1, sections 6-8. For other attempts to resolve the problems surrounding these two responsa of Maharit see *Teshuvot, Aryeh d'Bei Ila'i, Yoreh Deah* 19 and *Tzitz Eli'ezer* IX, 234, and *Yabi'a Omer* IV, no. 1, sec. 7.

58. Rosh and Ran, however, both rule in accordance with the opinion of Reb Yochanan; R. Moses Isserles, *Yoreh De'ah* 157:1, cites both views without offering a definitive ruling.

59. *Teshuvot Machaneh Chaim* (Munkotch, 5635), *Choshen Mishpat*, no. 50.

60. A similar reservation concerning the status of an unborn child was voiced by Reb Isaiah Fik (as evidenced by the responsum addressed to him by R. Ezekiel Landau, *Noda bi-Yehudah*, II, *Choshen Mishpat*, 49) who apparently was of the opinion that the general ruling that all infants are considered to be viable does not apply to embryos since the generalization is based upon observation that such is the case in the preponderant number of cases. The establishment of such a "majority" is especially limited to experience associated with born children. No such observation is permissible with regard to unborn children. Hence this principle, argued R. Fik, must be limited and considered as encompassing only born infants, i.e., stating only that the majority of fully delivered infants are viable. Cf. also the previously cited commentary of R. Elijah Mizrachi on Exodus 21:12.

61. The view expressed by R. Lipschutz concerning the inapplicability of this principle is somewhat problematic in light of *Kesef Mishneh's* analysis of *Yesodei Torah* 5:5. The Gemara (*Pesachim*, 25b) states that the principle "Be killed but do not transgress" as applied to an act of homicide is an a priori principle based upon reason alone. If so, questions *Kesef Mishneh*, what is the basis for the extension of the ruling "Be killed but do not transgress" to a situation in which the victim is singled out and the entire group warned that if the specified individual is not delivered all will perish. In such cases the dictates of reason would indicate that it is preferable by far to sacrifice a single life rather than to suffer the loss of the entire group. *Kesef Mishneh* concludes that the Sages possessed a tradition extending this principle even to cases in which the a priori reason advanced does not apply.

62. *Tosafot R. Akiva Eiger, Oholot* 6:7, no. 17.

63. R. Meir Eisenstadt, *Teshuvot Panim Me'ivot* (New York, 5722), III, no. 8.

64. *Teshuvot Maharam Schick* (New York, 5721), *Yoreh De'ah*, no. 155.

65. This principle is established by R. Moses Sofer, *Teshuvot Chatam Sofer* (New York, 5718), *Yoreh De'ah*, no. 158. The credence given to even a single witness in matters of halakhic proscription extends only to testimony of observed events. Diagnosis and treatment of medical conditions necessarily contain an element of subjective judgment; hence the judgment of a medical practitioner constitutes a *safek* rather than a certainty. As such, it cannot provide sufficient basis for sanctioning that which is forbidden in cases of "doubt." Elsewhere (*Yoreh De'ah*, 173 and 175) Chatam Sofer states that medical testi-

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mony is indeed sufficient to demonstrate that certain physiological processes do occur. Nevertheless such testimony cannot establish that a specific physiological process is actually taking place in a given patient since such diagnosis involves a subjective judgment.

66. *Melamid le-Ho'il, Yoreh De'ah*, no. 69.

67. *Teshuvot Sho'el u-Meshiv* (New York, 5714), I, no. 22, p. 13.

68. Due to a printer's omission the text appears to say *Baba Metzia* 71 rather than 62a.

69. R. Mosheh Yonah Zweig, *No'am*, VII, 48, errs in ascribing an identical view to the *Machaneh Chaim*. In point of fact, R. Sofer employs the phraseology of a contrary-to-fact conditional, viz., if feticide were at all permissible it would be permissible only if performed by the mother herself. R. Zweig judiciously notes that the *Machaneh Chaim* was not available to him. Apparently he was forced to rely upon secondary sources, a fact which explains the reason for this inaccuracy.

70. *Yedei Mosheh* (Pietrkow, 5658), no. 4, sec. 8. The *Yedei Mosheh* was originally published as an appendix to the *Sefer ha-Parnes* (Wilno, 5651), authored by R. Moses Parnes.

71. This responsum is included in the *Yedei Mosheh*. The reference is to no. 5, sec. 8 of that work.

72. *Issur ve-Heter he-Arukh* (Wilno, 5651), no. 59, sec. 35. Cf. also *Hagahot Maymuniyot, Hilkhot Ma'akhalot Assurot*, 14:15.

73. *Peri ha-Aretz, Yoreh De'ah* (Jerusalem, 5665), III, no. 21. *Vide* also R. Moses Feinstein, *Iggerot Moshe, Even ha-Ezer* (New York, 5721), no. 65.

74. *Teshuvot Chatam Sofer, Orach Chaim*, no. 83. A careful reading of this responsum indicates that, contrary to R. Unterman's assumption, Chatam Sofer may be discussing a case of mental retardation rather than a form of mental illness.

75. At the same time R. Unterman, *ha-Torah ve-ha-Medinah*, IV, 29, sanctions desecration of the Sabbath in order to effect a cure in cases of insanity. R. Unterman maintains that the principle "Better to violate a single Sabbath in order that many Sabbaths be observed" is applicable in such instances.

76. Abortion of a pregnancy resulting from rape, even in the case of a married woman, would not be sanctioned by R. Emden according to this line of reasoning. R. Waldenberg, IX, 237, cites a responsum of *Rav Pe'alim, Even ha-Ezer*, I, no. 4, who argues that the psychological and sociological difficulties involved in the rearing of such a child constitute "great pain" and "grave need" which R. Emden recognizes as sufficient grounds for termination of a pregnancy.

77. *No'am*, VI, 3. He further cites the opinion of *Yesh'uat Malko* to the effect that the Sabbath may be violated in order to save the life of a fetus even if the mother belongs to the class of those liable to death on whose behalf the Sabbath may not be violated. Cf. *Mishpetei Uziel, Choshen Mishpat*, III, 57.

78. *Sefer Chassidim* (Jerusalem, 5720), no. 186.

79. *Teshuvah mei-Ahavah* (Prague, 5669), I, no. 53. Halakhic literature on

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this topic was reviewed by R. Immanuel Jakobovits, *Tradition*, V (Spring, 1963), and *Tradition*, VI (Spring-Summer, 1964), 114 ff.

80. *No'am*, VI, 1-11.

81. *No'am*, VII, 36-56.

82. Cf. *Sedei Chemed*, II, 298.

83. Cf. *Sedei Chemed*, II, 303-304.

84. See below note 87. *Koach Schor* explains the *safek* of *Tosafot* in yet another manner. Since a Noachide is not commanded to "sanctify the Name" he may commit idolatry for the sake of preserving his life. R. Schor argues that this dispensation extends to murder as well and infers that it is the extension of this provision to encompass murder which was the subject of *Tosafot*'s "doubt." However, *Mishneh le-Melekh*, *Hilkhoh Melakhim*, 10:2, states explicitly that the taking of another's life in order to save one's own is forbidden even to Noachides since with regard to homicide this injunction is not derived from the commandment to "sanctify the Name" but upon the a priori principle "Why is your blood sweeter than that of your fellow?" The author's grandson raises this point in a note (p. 35a) appended to this responsum of *Koach Shor* but fails to cite *Mishneh le-Melekh*.

85. Furthermore, since the law of pursuit must be invoked if the fetus is deemed to be "a life," performance of an abortion by a Noachide would be precluded by those authorities who maintain that the law of pursuit is not operative in the Noachidic Code. Cf. *Teshuvot Ben Yehudah*, no. 21; *Sedei Chemed*, II, 14, no. 44. However, *Minchat Chinukh*, II, 215, and *Koach Shor*, p. 32b, argue that the law of pursuit extends to Noachides as well as indeed seems to be indicated by the language of Rambam in *Hilkhoh Melakhim*, 9:4.

86. *Minchat Chinukh*, II, 215.

87. The Gemara (*Sanhedrin*, 74b) states that a Noachide may commit any transgression, including idolatry, in order to preserve his *own* life since it is not incumbent upon him to "sanctify the Name." There is no explicit reference in the Gemara with regard to violations in order to preserve the life of another. *Koach Shor*, p. 33a, adopts a view diametrically opposed to that of *Minchat Chinukh* and asserts that a Noachide may transgress any commandment, including the three cardinal sins, in order to save the life of his fellow.

88. When it is necessary to employ a non-Jew for this purpose, R. Samuel Engel, *Teshuvot Maharash*, V, no. 89, counsels that it is preferable to transmit the request to the non-Jewish physician through another Gentile. This determination is based upon *Avodah Zarah* 14a which rules that one need not avoid making accessible a "stumbling block" to one who in turn will place it before the blind. This indirect procedure thus circumvents the transgression of "placing a stumbling block."

89. Job 38:4-5, 17-18.

90. Ecclesiastes 11:5.