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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."<sup>1</sup>

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,<sup>2</sup> 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.<sup>3</sup> *Tosafot* (*Sanhedrin* 59a; *Chullin* 33a) states explicitly that feticide, although entailing no statutory punishment, is nevertheless forbidden.<sup>4</sup> 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.<sup>5</sup> 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

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“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.”<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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*.<sup>9</sup>

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*)<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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 haRadva* (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 onanism<sup>14</sup> 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.<sup>15</sup> 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.”<sup>16</sup> 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 Rabbenu Tam that women are not included in this specific prohibition,<sup>17</sup> 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.”<sup>18</sup>

A number of objections to *Chavot Ya'ir's* position are raised in later works. R. Meir Dan Plocki<sup>19</sup> 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.<sup>20</sup> 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

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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.<sup>21</sup> *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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

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*.<sup>27</sup> 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."<sup>28</sup> 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

