

# HALACHIC AND HASHKAFIC ISSUES IN CONTEMPORARY SOCIETY

## SERIES 2: 24 - JUDAISM AND THE UNBORN CHILD - ABORTION: PART 2 OU ISRAEL CENTER - SPRING 2022

- In Part 1 we began to analyze the halachic and hashkafic factors involved in the question of abortion.
- To summarize the position so far:-
  - All poskim agree that abortion is murder for a non-Jew.<sup>1</sup>
  - Some poskim rule that it also murder for a Jew, just not subject to capital punishment for technical reasons.
- We will proceed in this shiur to look at a number of other halachic approaches to abortion, including:
  - Poskim who rule that it not murder, but rather the (Torah) prohibition of destroying seed/potential life. According to some views, women may not be included in this prohibition.
  - The Rabbinic mitzvah to populate the world, in which women are included (according to some views).
  - Other poskim rule that abortion is the Torah prohibition of unlawful wounding.
  - Alternatively, abortion may be a rabbinic prohibition as it resembles murder.
- We will also examine the complex halachic issue of 'rodef' and other specific cases of abortion.

**NOTE:** Nothing in this shiur (or in this series on the unborn child) should be taken as an indication of halachic psak in any given circumstance. A competent halachic authority must be consulted on all relevant matters.

### A] OTHER HALACHIC APPROACHES TO ABORTION

- We saw in Part 1 that R. Moshe Feinstein, and other poskim, take the position that abortion is murder. However, we also saw approach of R. Shaul Yisraeli, who rules that abortion is NOT murder, but falls under other halachic categories<sup>2</sup>.

#### A1] ABORTION AS THE DESTRUCTION OF 'POTENTIAL LIFE'

1. שלא נגרום מיתתו דודאי אסור לכתחילה ... באיסור הוצאת ש"ז לבטלה והטעם משום שראוי להיות נוצר מכל טיפה זרע קודש.

ש"ת חוות יאיר סימן לא

*R' Yair Bachrach (France, late 17C) claims that issue is derived from the prohibition of destroying male seed. A fetus, even if not halachically 'alive', is still a potential life - certainly no less than a sperm!*

2. אסור להוציא שכבת זרע לבטלה ... שאיסור גדול הוא ... וכאילו הרג הנפש.

רמב"ם הלכות איסורי ביאה פרק כא הלכה יח

*Wasting seed is a very serious prohibition and, according to many authorities, is a Torah prohibition. Rambam describes it as tantamount to murder. But are women included in the prohibition of destroying seed?*

3. שלש נשים משמשות במוך: קטנה, מעוברת, ומניקה.

יבמות יב:

*The Gemara states that three groups of women are allowed to use a 'moch' - a contraceptive cloth or sponge - during marital relations to prevent pregnancy which may be medically dangerous for her or her existing baby. These are (i) a young girl; (ii) a pregnant woman and (iii) a nursing mother.*

1. See below for discussion of the age of the fetus and whether the non-Jew would be allowed to abort a fetus to save the life of the mother.  
2. One technical argument which challenges the view that abortion is murder is based on the principle of קם ליה בדבריה מיניה. This states that where a transgression simultaneously mandates two punishments, only the greater of the two is applied. As such, if abortion is also murder, how can the Torah (Shemot 21:22-23) require monetary payment? One answer could be that the verse actually strengthens the case for classifying abortion as murder since it has to specify a payment in a situation that normally would not require one.

4. שלש נשים משמשות במוך - פי' הקונטרס מותר לשמש צמוך אבל שאר נשים אכור משום השחתת זרע אע"ג דלא מיפקדה אפריה ורביה ... ור"ת אומר ... אם נותנת מוך אחר תשמיש אין נראה לאכור ... והאשה שנותנת אח"כ מוך לא הוזכרה בהשחתת זרע כיון דלא מיפקדה אפריה ורביה.

תוספות שם

As to whether *other* women are generally allowed to use contraception, there is a difference of opinion. Rashi's view is that they are included in the prohibition of destroying seed and may not use a moch even *after* relations to avoid pregnancy. However, Rabbeinu Tam rules that women are not included in the prohibition of destroying seed and may use a moch *after* relations, but not before, as this changes the nature of the sexual relations and could involve the husband in the prohibition of wasting seed.

5. כי כה אמר ה' בורא השמים הוא האלקים יצר הארץ ועשה הוא כוננה לא תהו בראה לשבת יצרה אני ה' ואין עוד.

ישעיהו מה"ח

In addition to the Torah mitzvah of *pru u' revu* (to have children) Chazal identified a Rabbinic mitzvah of 'lashevet' - that the world was created to be inhabited by people and to ensure that this goal is promoted wherever possible. According to many poskim, women are included in this obligation.

6. אף כי י"ל דאשה נמי נהי דלא מפקדא אפריה ורביה מ"מ שייך בה קצת מצוה לשבת יצרה.

שו"ת חוות יאיר סימן לא

The Chavot Yair considered that women are included somewhat in this obligation, which would be result in a (weaker) prohibition on a woman performing an abortion. Other poskim disagree with this. On the basis of the above analysis, the Tzitz Eliezer says that in circumstances where an abortion may be carried out, it should wherever possible be carried out by a *Jewish and female* doctor.

- The question of Bal Tashchit will also be balanced by utilitarian counter-pressure in a way that murder is not! What is considered 'unjustified' waste, or waste 'for no legitimate reason'? Where there is a strong justification for the 'waste', it may not be prohibited.

## A2] ABORTION AS UNLAWFUL WOUNDING?

7. ארבעים יפנו לא יסיף פן יסיף להכתו על אלה מפה רבה ונקלה אחיה לעיניך.

דברים כה"ג

8. אסור לאדם לחבול בין בעצמו בין בחבירו, ולא החובל בלבד אלא כל המכה אדם כשר מישראל בין קטן בין גדול בין איש בין אשה דרך נציון הרי זה עובר בלא תעשה, שנ' (דברים כ"ה ג') לא יוסיף להכותו, אם הזהירה תורה שלא להוסיף בהכאת החוטא קל וחומר למכה את הצדיק

רמב"ם הלכות חובל ומזיק פרק ה הלכה א

The Torah prohibits wounding another person or oneself. Some authorities<sup>3</sup> prohibit abortion on the grounds that it constitutes an unlawful assault, either on the fetus or on the mother.

## A3] IS A FETUS 'PART OF THE MOTHER' - RABBINIC PROHIBITIONS?

9. מתני'. האשה שיצאה ליהרג - אין ממתינין לה עד שתלד. האשה שישבה על המשבר - ממתינין לה עד שתלד. גמ'. פשיטא! גופה היא! איצטריך - ס"ד אמינא הואיל וכתוב (שמות כא) כַּאֲשֶׁר יֵשִׁית עָלֶיךָ בְּעַל הָאִשָּׁה. ממונא דבעל הוא ולא ליפסדיה מיניה, קמ"ל. ... ישבה על המשבר וכו'. מ"ט! כיון דעקר, גופא אחרינא הוא.

ערכין ז.

If a woman who has been sentenced to death is then found to be pregnant, we do not delay the execution until the child has been born. This is in order not to cause further anguish to the condemned woman by making her wait for execution. If however she is already 'sitting on the birthing stool' i.e. has started the birth process, we are not allowed to harm the child. The Gemara explains that the baby in utero is defined as part of the woman's body and not a separate entity. However, once the baby moves to begin birthing process, it 'detaches' itself from the mother and now becomes a separate entity. What is the relevance of classifying the fetus as simply a part of the mother's body?

3. Such as the Maharit.

10. ולולד – כיון שלא יצא לאויר העולם לא חיישינן.

הר"ן על הרי"ף מסכת חולין יט.

*In case of the death penalty for the mother, the Ran explains that, since the fetus has not emerged, we do not take it into account at all. Some authorities<sup>4</sup> understand that the Ran considers abortion to be rabbinic prohibition. Others<sup>5</sup> understand that the Ran may consider it a Torah prohibition.*

11. שאלת ... בנשים שמתות מחמת לידה והולד מפרפר בבטנה והנשים מכות על בטנה במכבדת לקרב את מיתתו אם יש בזה משום נטילת נשמה ...

**תשובה** ודאי ראוי לגעור בנשים העושות ככה משום דמחזי כעין רציחה ... אבל אין בדבר לא משום רציחה ... לענין רציחה פשיטא דאין נהרג עליו כיון שלא יצא לאויר העולם. והא דמחללין עליו את השבת משום דספק הוא ומספקא דנפשות מחללין עליו את השבת אבל מספיקא לא קטלינן ... כיון שעדיין לא יצא לאויר העולם ולא היה לו חזקת חיות ההורגו לא פגע בספק נפשות. ואע"ג שהוא מתנוועע לאו חיות הוא מידי דהוה אזנב הלטאה ... ומ"מ מונעין אותו שלא יקרבו את מיתתו בידים.

שו"ת רדב"ז חלק ב סימן תרצה

*The Radvaz (16C) is quite clear that abortion, whilst clearly prohibited, is certainly NOT murder<sup>6</sup>.*

- In Part 1 we saw the halachic principle of 'leica midi' - that anything prohibited to a non-Jew MUST be prohibited to a Jew too? In fact this is not so straightforward and it may be that the majority view in the Gemara does not actually accept this.<sup>7</sup> In fact many Acharonim understand that the Rambam does not accept the principle. He rules that an animal which has been properly slaughtered but is still twitching is NOT kosher for a non-Jew (as Ever Min Hachai) but IS kosher for a Jew since it has been shechted<sup>8</sup>.

- The question of whether abortion is murder or a lesser prohibition is extremely important when deciding what level of extenuating circumstance will permit an abortion e.g. danger to life; illness; rape; psychological damage; social pressures; financial constraints etc.

- For example, in WWI, a halachic question was brought in the case of a German officer who raped a Jewish girl, who became pregnant. He took her to a doctor and demanded that the doctor abort the baby. When the doctor refused, he took out a gun and threatened to kill the doctor if he did not proceed with the abortion. Does the doctor have to give up his life rather than perform the abortion?

- Clearly, for those poskim who rule that abortion is murder, there will be almost no circumstances that permit it, other than danger to the life of the mother. For those poskim who rule that the prohibition is lesser, more extenuating circumstances will permit abortion.

## **B] ABORTION IN THE FIRST 40 DAYS**

12. מתני'. המפלת ליום מ' - אינה חוששת לולד, ליום מ"א - תשב ליצר ולנקבה ולנדה.

נדה ל.

*The Mishna rules that a miscarriage before day 40 from conception does not cause tumat yoledet, which would normally apply to a mother on the birth (or later miscarriage) of a child.*

13. אמר רב חסדא: ... עד ארבעים מיהא בעלמא היא

יבמות סט:

*Chazal explain<sup>9</sup> that, until 40 days gestation, the embryo is considered halachically as mere 'bodily fluids' of the mother. This is ruled in halacha<sup>10</sup>.*

- Does this distinction impact on the prohibition of abortion? The answer will depend on the reasons given above. If abortion is murder, there is no concept of 'murdering' bodily fluid. However, if the prohibition is destroying potential life, there should be no distinction. If the prohibition is wounding, again, there is no concept of wounding fluid, but there may be an prohibition to wound the mother.

4. R. Chaim Ozer Grodzinsky (Achiezer 3:65) and R' Benzion Uziel (Mishpetei Uziel 3:46).

5. R. Moshe Feinstein (Igrot Moshe CM 2:69).

6. It sounds from the wording כעין רציחה that it may be a rabbinic prohibition since it appears like murder.

7. See Sanhedrin 59a. The Noda BeYehuda also questions the application of this principle here, since the Jew IS obligated, just to a different degree.

8. Note that some authorities also question whether eggs are permitted for non-Jews since they may be *ever min hachai!*

9. The context of this discussion is a bat Cohen who has become pregnant (through rape or seduction) from a non-Cohen. She is not allowed to eat teruma once it is established that she is pregnant with a non-Cohen fetus. This does NOT however apply until 40 days gestation.

10. Shach Choshen Mishpat 210:2. A pregnancy which ends before 40 days gestation does not cause tumat yoledet or tumat met and will not constitute a 'birth' for Pidyon Haben.

14. ומש"כ כת"ר דלפני מ' יום לקליטתו דהוי כמיא בעלמא לא איקרי נפש .... ונראה דב"נ אינו נהרג על זה וגם בישראל אפשר דאין איסור מן התורה.

שו"ת אחיעזר חלק ג סימן סה

*R. Chaim Ozer Grodzinski rules that a non-Jew is not liable to capital punishment for terminating a pre-40 day embryo. For a Jew, it would not be a Torah prohibition. This clearly implies that it WOULD be a Rabbinic prohibition.*

## C] ABORTION IN THE FIRST FEW DAYS AND THE 'MORNING AFTER' PILL

- Is there an argument that before implantation the status of the embryo is even lower?
- A pre-implantation embryo will certainly be treated no more strictly than any other pre-40 day fetus, for which termination would be a rabbinic prohibition according to most poskim.
- Additionally, the morning-after pill is generally taken where pregnancy is uncertain. As such, there may be other grounds for leniency in situations of need.<sup>11</sup>
- R. Shlomo Zalman Auerbach permitted the morning-after pill (or emergency IUD) in the event of rape.<sup>12</sup>
- ly'H we will address in coming shiurim the status of unimplanted embryos which have been genetically tested and found to have abnormalities.

## D] BREAKING SHABBAT TO SAVE A FETUS

15. האשה שישבה על המשבר ומתה בשבת, מביאין סכין ומקרעים את כריסה ומוציאין את הוולד.

ערכין ז.

*If a woman dies in childbirth on Shabbat, we must break Shabbat to try and save the fetus.*

16. .... ואפילו צהללת עובר פחות מכן חרבעים יום שאין בו חיות כלל מחללין לדעת צעל הלכות (הרמב"ן ע"ס).

קרבו נתנאל יומא פרק ח"י

*The position of the Behag and the Ramban is that this applies EVEN to a pre-40 day fetus*

As such, we see that it is permitted to break Shabbat to preserve the life of a fetus, according to some authorities even for a fetus within 40 days of gestation. R. Moshe Feinstein argues that if Shabbat may be broken to save a pre-40 day fetus on the basis of its future life, is it illogical to suggest that it may be terminated at will? R. Waldenberg argues that it seems clear from the Behag that the halachic status of the fetus is an entirely separate issue from whether Shabbat can be violated to save it.

If the fetus is indeed not yet considered 'alive', what is the justification for breaking Shabbat to save it? Although it cannot fall into the category of 'v'chai bahem' which allows life to override most mitzvot, the permission to break Shabbat can still be based on the status of a fetus as a 'life in potential' and, as Chazal say (Shabbat 151b) 'better to break one Shabbat in order to keep many Shabbatot'.<sup>13</sup> On that basis, the distinction between pre- and post 40 days becomes less clear.

Most poskim rule that abortion before 40 days is a Rabbinic prohibition, although do not permit it without some good reason. However, the magnitude of reason to permit a termination before 40 days will be lower than that required to abort a fetus after 40 days.

## E] ABORTION TO SAVE THE MOTHER'S LIFE

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

משנה מסכת אהלות פרק ז משנה ו

*The principal source dealing with abortion for medical reasons is a Mishna in Ohalot. This states that a fetus must be killed in order to save the life of the mother. However, once the majority of the new-born has emerged from the mother at birth, it may no longer be killed to save the mother since 'one life cannot be taken to save another'. This deals with a breach birth. In a normal delivery, once the majority of the head has emerged, the baby may not be harmed.*

11. See also <https://www.yoatzot.org/family-planning/579/>

12. See Nishmat Avraham, Choshen Mishpat 425:1:20.

13. See Ramban Nidda 54b.

18. ... דכל זמן שלא ילא לחויר העולם לאו נפש הוא וניתן להורגו ולהליל את אמו, אבל ילא ראשו – אין נוגעים בו להורגו, דכזה ליה כילוד ואין דוחין נפש מפני נפש

רש"י סנהדרין עב: ד"ה יצא

*As we saw in Part 1, Rashi understands that the permission to kill a fetus in these circumstances, where the life of the mother is threatened, is based on the fact that, before birth, the fetus is not defined as a 'nefesh' - a living being - and so can be killed to save a living person. Once the baby has emerged, however, it IS considered to be a living being and thus cannot be killed to save another person.*

19. יצא ראשו אין נוגעין בו, לפי שאין דוחין נפש מפני נפש. ואמאי? רודף הוא! - שאני התם, דמשמיה קא רדפי לה

סנהדרין עב:

*The Gemara asks why one is not allowed to kill a child even AFTER it has emerged, since the child threatens the life of the mother. This permission would be on the basis of the halachic principle of 'rodef' - a pursuer - since one is obligated to kill a pursuer who is threatening the life of another person. Why not then kill the partially-born baby? The Gemara answers that this is not a true case of rodef. Since the baby presents a natural cause of danger, it is as if the mother were being pursued 'by heaven' and we may not intervene by killing the baby.*

• Note that the 'lower-grade' status of rodef is not because the fetus is innocent (as is argued by Catholicism) but because it is natural. An innocent rodef could still be a rodef - eg if A is about to shoot B, mistakenly thinking he is an animal, one is justified in killing A if there is no other way to stop him.

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

רמב"ם הלכות רוצח ושמירת הנפש פרק א הלכה ט

*Although Rashi explains that the justification for aborting a fetus to save the mother is because the fetus is not a 'nefesh', the Rambam does not appear to take this position. Rather, he explains that the fetus is 'like a pursuer' and we may kill it until it emerges from the womb. The problem is that this line of argument was rejected by the Gemara, so how can the Rambam use it in his halachic ruling!?'<sup>14</sup> Is the permission to kill a fetus based on the fetus not being 'alive' or it being a 'pursuer' (which implies that the fetus IS alive/a 'person')?*

• One resolution is that the Rambam effectively needs both criteria to be satisfied before the fetus may be killed:- (i) the fetus must be pre-'nefesh'; and (ii) must also be a pursuer (or at least a quasi-pursuer). Based on this understanding, some poskim distinguish between a pregnancy which directly threatens the mother's life, where abortion would be permitted, and a situation where the pregnancy exacerbates an existing condition of the mother (e.g. organ failure), where it is more difficult to permit the abortion. We do not invoke the heter of 'rodef' where the risk is indirect. For example, if A is in line to take the last dose of life-saving medication and B, who is standing behind him, will therefore die, A is not considered a rodef who can be killed to save the life of B!

• Another resolution could be that the Rambam understands that there are three stages of fetal development:  
 (i) Before fetal engagement (where the widest part of the baby's presenting part (usually the head) enters the pelvic brim), the fetus is simply 'part of the mother' and abortion would be permitted to save the mother on the grounds that the fetus is not 'alive';  
 (ii) After fetal engagement, but before birth, the fetus has ceased to be a 'part' of the mother and killing it to save the mother would be permitted on the joint grounds that the fetus is not yet alive and is also a quasi-pursuer.  
 (iii) After the fetus has (majority) emerged, it IS considered alive and the weaker ground of quasi-pursuer is not sufficient alone to permit killing the fetus, even to save the mother.

• Another possible implication of the 'rodef' analysis is a situation where the baby may possibly constitute a threat to the life of the mother, but may not. A rodef may be killed preemptively only if there is a clear and present danger. As such, if the baby may or may not threaten the life of the mother (one would have to halachically determine the relevant statistical cut off and medically determine the risks) the rodef rule will not apply to the fetus. On the other hand, if the principal operative factor is that the fetus is not 'alive', and terminating the fetus is not murder, just as we mandate breaking almost every Torah prohibition even if there is a small likelihood of danger to life, so too we would permit termination of the fetus in such a case.

14. Assuming that he does! In fact the Rambam NEVER said that a baby was actually a rodef. He said - כרודף - like a Rodef ie a quasi-Rodef, which fits well with the Gemara.

• Note: as we saw in Part 1, all authorities agree that, in the case of a non-Jew, abortion is a capital crime. Is this a product of the status of the person carrying out the abortion, or does it reflect the status of the child? Is the non-Jewish fetus a fully fledged human being which cannot be killed, even to save the mother? Or, on the other hand, perhaps the status of every fetus (Jewish or not) is still 'pre-nefesh', in which case it may be also permitted for a Jewish doctor to terminate the fetus to save a mother on the basis of the above analysis. It is therefore questionable whether a non-Jewish fetus may be aborted to save the life of the mother.

#### CONCLUSIONS<sup>15</sup>

- Where the fetus itself is causing a definite danger to the mother's life all authorities allow a Jewish doctor to abort a Jewish fetus at any stage up to birth.
- Where the fetus is causing a possible danger to the mother's life, many authorities will not allow a late-stage abortion. However, an abortion before 40 days in these circumstance will be allowed. Some authorities would allow abortions in this category up to 3 months.
- Where the fetus is aggravating a secondary threat to the mother's life, many authorities will allow the fetus to be aborted but some will not, even to save the life of the mother.

### F] WHERE THE FETUS HAS EMERGED BUT WILL DIE IN ANY EVENT

21. ... מיהו נ"ל בשאפשר כשתמות האם ינצל הולד או ששניהם ינאלו. אבל אם כשלא נמיתו ימותו שניהם מעלמן אפשר שמותר להמית הולד כדי להליל עכ"פ אמו וכמעשה דשצט בן זכרי ...

תפראת ישראל אהלות ז"ו

*If we are presented with choice of the life of the mother or that of the baby, the halachot discussed above assumed that we will at least be able to save the baby, even if the mother may die. Where, however, the baby will die in any event, the Tiferet Yisrael compares the case to the account of Sheva ben Bichri<sup>16</sup>.*

22. בני אדם שהיו מהלכין בדרך ופגעו להן גוים ואמרו 'תנו לנו אחד מכם ונהרוג אותו ואם לאו הרי אנו הורגין את כולכם'. אפילו כולן נהרגין לא ימסרו נפש אחת מישראל. ייחדו להן אחד, כגון שבע בן בכרי, ימסרו אותו ולא ייהרגו. אמר רבי שמעון בן לקיש והוא שיהא חייב מיתה כשבע בן בכרי. ורבי יוחנן אמר אף על פי שאינו חייב מיתה כשבע בן בכרי.

תלמוד ירושלמי מסכת תרומות פרק ח ה"ד

*One may not hand over another person to be killed, even in order to save multiple lives, and even where that person will also die! However, if the murderer specifies an individual to be handed over, it is permitted to hand them over to save other lives. Chazal differ as to whether the person handed over to be killed must be guilty or not. Reish Lakish insists that he must also be guilty. R. Yochanan rules that, provided the individual is 'specified', he may be handed over for death, even if innocent. The Rishonim are divided as to whether the halacha follows R. Yochanan or Reish Lakish.*

- In the medical context, if we follow R. Yochanan and assess that the fetus is threatening both its own life and that of the mother, the fetus may be 'handed over' for death to save the mother.
- However, many poskim object to this comparison on a number of grounds including: (i) the fetus is not a real 'pursuer' as pointed out above -the 'pursuit' is a natural birth process; (ii) the case of Sheva ben Bichri applies where there will inevitably be an active killing (perhaps constituting murder). The abortion scenario does not inevitably involve a murder, so why should we not say: 'better two deaths than one murder?'

#### CONCLUSIONS

- Where the fetus is endangering the mother's life and, in the event of the mother's death, both mother and fetus will die, some authorities will allow an abortion even if the baby has partially emerged.

15. As noted above, nothing in these shiurim should be considered a halachic psak. A competent halachic authority must be consulted on all practical issues.

16. Shmuel 2 Chapter 20. Sheva ben Bichri was a rebel against David Hamelech who was guilty of a capital crime. He escaped to a town where he claimed sanctuary. Yoav, commander in chief of the army, besieged the town and demanded that they hand over Sheva ben Bichri, or he would destroy the town and kill its inhabitants. The people of the town killed the rebel and through his head to Yoav.

## **G] ABORTION OF A DEFORMED FETUS**

- As we saw in Part 1, Rav Moshe Feinstein ruled that abortion is murder<sup>17</sup> and was unwilling to consider abortion, even of a severely deformed fetus, unless there was also danger to the life of the mother. As such, a deformed or disabled fetus would be treated no differently to any other fetus.
- R. Eliezer Waldenberg<sup>18</sup> took a more lenient approach which permitted abortion in the event of grave abnormality, in some cases up to 6 months gestation.
- Many poskim today fall somewhere between these two positions and permit abortion in the event of grave abnormality, but only in early stages.
- Most poskim would allow an abortion in these situations of a pre-40 day embryo.
- The mental and physical health of the mother will also be taken into account in this situation - see below.

R. Avraham Steinberg summarizes the positions of Rav Shlomo Zalman Auerbach as follows:

23. Rabbi Auerbach prohibits the abortion of a Tay Sachs fetus<sup>19</sup> but allows the abortion of an anencephalic fetus.<sup>20</sup> In cases of multifetal pregnancy such as quadruplets or more, he permits the selective abortion of some of the fetuses to save the mother and the other fetuses.<sup>21</sup> Rabbi Auerbach rules that an anesthesiologist is forbidden to give anesthesia to a woman for an abortion that is halachically prohibited, even if he may lose his job.<sup>22</sup> An expert in ultrasound should not perform an ultrasound examination for a forbidden abortion but need not lose his job because of it.<sup>23</sup> Finally, Rabbi Auerbach permits an autopsy of an abortus after repeated miscarriage in order to determine the reason for the repeated miscarriage.<sup>24</sup>

## **H] ABORTION TO IMPROVE THE MOTHER'S HEALTH**

- If abortion constitutes murder it would not be permitted in order to avoid pain or improve health.
- If, however, the prohibition is wasting seed, many authorities (including R. Ya'akov Emden - 18C) rule that there is no prohibition of wasting seed if the seed is 'wasted' is for a productive purpose - here to stop the illness of the mother. R. Ben-Tzion Uziel (20C Sefardi Chief Rabbi of Israel) permitted an abortion, even in late stages (until birth), where the continued pregnancy would cause the deafness of the mother.
- Similarly, if the prohibition is wounding, there would be no prohibition to cause a wound if this were done for the overall wellbeing of the mother (as in any other medical operation).

### **CONCLUSIONS**

- Permission to abort a fetus on the grounds of the health of the mother will depend on (a) the reason accepted by that posek for the prohibition of abortion; and (b) the stage of the pregnancy. As noted above, pre-40 days gestation the halachic situation would be far more lenient.

17. R. Issur Yehuda Unterman understands that abortion is 'avizreihu' of (ie ancillary to) murder. As such, in most situations it will be equivalent to murder but it may have different applications if someone is asked to die rather than commit an abortion. The obligation to die rather than transgress may apply differently to 'avizreihu'.

18. R. Waldenberg quotes many other poskim (including the Maharit, R. Ya'akov Emden, the Ben Ish Chai and others) who support his position and he expresses astonishment that R. Feinstein had not taken account of them! R. Feinstein, however, rejects the lenient reading and presents his own understanding of the sources. This difference in approach stems in large part from the different methodologies of the two poskim. R. Waldenberg ascribes significant weight to authority and precedent whereas R. Feinstein has a different mesora in psak, which he outlines in different places. His approach, following that of the Vilna Gaon, is to assess the sources and analyses them afresh, even if that means coming to a view which differs from that of other poskim, sometimes even that of the Shulchan Aruch. He may then give a broad justification for his sevara, even if this is strained or forced. See the interview of R. Dovid Cohen on Headlines May 28, 2016, written up in Headlines 2, Dovid Lichtenstein, p302.

19. Nishmat Avraham, Choshen Mishpat 425:1:15.

20. Ibid. Orach Chayim 330:5.

21. Ibid. Choshen Mishpat 425:1:21.

22. Nishmat Avraham, vol. 4, Orach Chayim 656:2.

23. Ibid.

24. Ibid. Yoreh De'ah 349:2:4.

## **I] ABORTION TO IMPROVE THE MOTHER'S MENTAL HEALTH**

• Some psychiatric conditions will be considered to be a life-threatening risk, especially if there is a significant risk of suicide. The issue will therefore depend on psychiatric assessment. Stress or mental imbalance short of suicide risk will usually not justify abortion, although, as above, this will depend on (a) the reason accepted by the relevant posek for the prohibition; and (b) the stage of the pregnancy.<sup>25</sup>

24. מילדין את האשה וכו'.... אמר מר: אם היתה צריכה לנר - חבירתה מדלקת לה את הנר. פשיטא! לא צריכא בסומא. מהו דתימא? כיון דלא חזיא - אסור, קא משמע לן: איתובי מיתבא דעתה.

שבת קכח:

*It is permitted to break Shabbat by turning on a light to calm a blind woman giving birth, even though the benefit to her is purely psychological.*

25. בשביל צערו - ואם אין לו לער אחר אלא שמתצייש לילך זין בני אדם שרי דאין לך לער גדול מזב.

תוספות שבת נ:

*Halacha treats mental health issues as seriously, if not more seriously, than other health issues.*

## **J] ABORTION OF A MAMZER FETUS**

26. אם היה ממזר תלמיד חכם וכהן גדול עם הארץ - ממזר תלמיד חכם קודם לכהן גדול עם הארץ.

הוריות יג.

*Although there are halachic restrictions as to whom a mamzer may marry, they should not suffer any discrimination due to their status. A mamzer talmid chacham has priority even over a Cohen Gadol who is an am ha'aretz!*

• Most poskim rule that a mamzer fetus should be treated no differently to any other. However, the mental and physical health of the mother would be taken into account in this situation, as in any pregnancy<sup>26</sup>.

25. R. Avraham Steinberg relates that R. Shlomo Zalman Auerbach would assess each woman individually to understand her psychological situation. Later in life, he declined to rule on such issues as he stated that he was too old to truly understand the mental state of a young pregnant woman.

26. R. Ya'akov Emden permitted the abortion of a mamzer fetus in some situations.