

RABBI YIGAL SHAFRAN



ON THE BORDERS
OF LIFE AND DEATH

*The Chief Rabbinate of Jerusalem
The Religious Council of Jerusalem*

The Department of Medicine and Halachah

A Lack of Authority

Horizons in Bioethics

On the Borders of Life and Death

by
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MEDICAL BACKGROUND

A 33 year old woman, married with two children, and suffering from epilepsy suddenly lost consciousness during the twenty-eighth week of pregnancy. She fell and sustained a head injury. She was rushed to the emergency room and found to be unconscious, with hemorrhaging in the right nostril and ear, and dilated, nonresponsive, pupils. Glasgow scale reading of 4. Computerized tomography of the brain revealed a minimal sub-dural hemorrhage on the left side with severe oedema of the left hemisphere and marked right shift of the midline. Upon arrival, she was immediately intubated and hyperventilated. Pentithol and mannitol

were administered. Despite the treatment her neurological condition deteriorated, resulting in brain death. Ultrasound examination of the fetus showed a live fetus weighing approximately 950-1150 grams.

After determination of the mother's brain death, the attending physicians wished to perform a Caesarean section to save the life of the fetus. The father refused. A judge from the district court was called to the hospital. He ruled that he lacked authority to grant the physicians' request to permit the surgery. The operation was not performed. The mother and fetus perished.

VERDICT

Re: Section 68 of the Legal Capacity and Guardianship Law.

Attorney Frank, representing the hospital, requested an order in compliance with Section 68 of the Law to extract the fetus from the womb of Mrs. Novick and thereby save its life.

Mr. Novick said, "It will be extremely difficult for me to raise my two children, a six year old daughter and a ten year old son. I am employed in a public office. I do not know what would happen if the infant would be born deformed, but I am positive that the house would be a shambles. My wife suffered from severe epileptic attacks. If the hospital can guarantee me that the fetus will be healthy both physically and mentally, I am prepared to comply. If not, I request that the court take into consideration the possibility of the child being born crippled or retarded."

Dr. Shine replied, "We cannot guarantee that the child will be healthy."

Decision:

1. The request is beyond the realm of Section 68 of the Law, for it does not involve a minor, an incompetent, or a ward, only an unborn fetus. Therefore, due to lack of authority, the request must apparently be denied.
2. Moreover, with respect to the request itself, it is impossible to grant permission to perform any medical procedure, for such action is unnecessary in protecting the health of the childbearing mother.
3. For these two reasons, the request is denied.

CHAPTER 1.

HALACHIC PERSPECTIVES

The event depicted here touches upon a well-known law concerning the Sabbath: "If a woman dies in childbirth (on the Sabbath), a knife is brought and an incision is made in her womb to extract the fetus" (*Arachin 7a*).¹ The Talmud considers this statement trivial and asks why it was discussed in the study hall. It comes to teach, the Talmud concludes, that a knife may be carried through a public domain. If this operation may be performed on the Sabbath, halachah (Jewish law) would certainly sanction its performance on a weekday.

However, the opposite opinion is found in a responsum of the Geonim. The Geonim were asked the following question.

"Regarding a woman who died in childbirth and the fetus is moving in her womb, are we permitted to make an incision in her uterus to extract the fetus?" The reply was, "She is not to be cut open, rather she is to be left alone and a stone should be placed on her stomach until the fetus dies and then she is to be buried."² This ruling is obscure, for it contradicts the aforementioned Talmudic decision, and should therefore not be relied upon in practice.

Therefore, after it was determined that Mrs. Novick was dead, the refusal of the court to intervene runs contrary to the fundamental halachah which obligates post-mortem delivery of the fetus.

1. *Rambam, Shabbat 2:15.*

2. *Teshuvot HaGeonim 248. Both Shevut Ya'akov I, no. 13 and Seridei Aish I, p. 316 attempt to explain the opinion of the Geonim.*

The later authorities³ discuss an event similar to the Novick case that occurred three hundred years ago. Thugs decapitated a pregnant woman with a sword. Fetal movements were detected immediately after her death. An attempt was made to save the fetus but it was found dead. The halachic discussion of this incident is relevant to our case, for important points not mentioned in the Talmudic source were raised: Does halachah require saving the fetus of a woman who is not yet parturient? Must an attempt be made to deliver the fetus when it is reasonable to assume that it is dead? What is the halachic status of the fetus?

Rabbi Ya'akov Reisher (1670-1734), analyzed the case in his *Shevut Ya'akov*.⁴ He concluded that the operation must be performed at all times, even if the fetus is not considered viable and the mother is not in childbirth. Accordingly, he wrote, the man who desecrated the Sabbath in his attempt to deliver the fetus acted properly.

3. *Eshel Avraham to Orach Chaim* (hereinafter: *O.Ch.*) 330, note 6, citing *Teshuvot HaRema* no. 5 and *Teshuvot HaRit* no. 94; *Pitchei Teshuvah*, ad. loc., note 5.

4. Vol. 1, no. 13. Authorities previous to, and following the *Shevut Ya'akov* discussed this matter, but his responsun is considered the halachically compelling precedent.

Those who maintain that the Sabbath must be desecrated only when the mother is in labor and the process of childbirth has begun include *Tosafot Baba Batra* 142b, s.v. *Dehu*; *Tosafot Nidah* 44a, s.v. *Ihu*; *Rashi* quoted in *Shitah Mekubetzet to Arachin* 7a; *Semah to Choshen Mishpat* (hereinafter: *Ch.M.*) 276, note 7; *Shulchano shel Avraham* 330:5; *Bikurei Ya'akov Zrihan* no. 6, p. 26; *Shevet Halevi* III, *O.Ch.* no. 38; *Rabbi Ovadiah Yosef in Leviat Chen*, p. 161 (regarding the opinion of the *Mishnah Berurah* 330). Others rule that the Sabbath must always be violated to save the fetus even when the mother is not in childbirth. See *Rashi to Arachin* 7a, s.v. *U'mekarin et keraisa*; *Magen Avraham O.Ch.* 330, note 10 (he states that *Maimonides* and the *Shulchan Aruch* also agree with this); *Teshuvot HaRema* no. 40; *Kaf HaChaim O.Ch.* 330, note 30 who decides like *Magen Avraham*; *Rabbi Ovadiah Yosef's personal opinion in Leviat Chen*, loc. cit.

Another disagreement centers around if the fetus must be fully formed or if the law includes

Because this decision of Rabbi Reisher has been accepted as precedential; the proper course of action in the case of Mrs. Novick might have been to perform the Caesarean section even though she was not in childbirth. However, the extent to which the Novick case resembles the incident recorded by Rabbi Reisher is dependent

any embryo older than forty days. *Mishnah Berurah* 330, note 29 cites *Magen Avraham* who states that the law refers to a fully formed fetus. Likewise, *Imrei Yosher* 1:177:2. Most authorities maintain that the law also applies to a fetus which is not fully formed. See *Ritva, Nidah* 44b and the explanation of *Biur Halachah* 330:7, s.v. *O safek ben shivah*; *HaEshkol* part II, *Hil. Milah*, no. 36, p. 117 and *Nachal Eshkol* there; *Chazon Ish, Yoreh Deah* (hereinafter: *Y.D.*) 155:4; *Rabbi Ovadiah Yosef in Leviat Chen*, loc. cit.; *Minchat Shlomo* end of no. 34, p. 189.

[*Shemirat Shabbat KeHilchatah*, ch. 36, note 24 cites *Rabbi S. Z. Auerbach* who maintains that only if the fetus is fully formed do we violate the Sabbath to save its life, even if it will live only shortly (*cha'yei sha'ah*), but for the short life of a nefel the Sabbath is not desecrated, even today when we have incubators. If the fetus is fully formed, the Sabbath is violated even if the child is mongoloid or treifa. This seems to contradict his decision in *Minchat Shlomo*. Apparently *Rabbi Auerbach* asserts that if it is known that the eight month old fetus will not live long (*cha'yei sha'ah*), the Sabbath may not be violated, but if the delivery and the incubator will enable it to live (*cha'yei olam*), the Sabbath must be desecrated.]

A.S. Avraham in "Tinok HaNolad im Mum Kasheh," *Sefer Amek Halachah - Shut Beinyanei Refuah*, vol. 2, p. 207, cites *Rabbi Auerbach* as follows: "According to the letter of the law, if we are certain beyond any doubt that the infant will live for only a short time, we may not desecrate the Sabbath by performing a Biblically prohibited act. (When in doubt we do violate the Sabbath and this is not similar to an eighth month old fetus for whom we do not desecrate the Sabbath, for we do not even violate the Sabbath for a fetus where there is uncertainty if it is seven or eighth months old). Despite this, in the hospital, it is permissible and obligatory to desecrate the Sabbath even by Biblically prohibited acts, for it is a public place that employs many people... there is a risk that they will be negligent in the care of an infant who has a chance to live."

Rabbi Shaul Yisraeli told me that if the fetus is eight months old it is doubtful if it may be defined as "alive" and not a nefel.

This distinction is not hard and fast. In a statement dated 18 Menachem Av, 5751 (1991),¹³ Rabbis Shalom Yosef Elyashiv and Shlomo Zalman Auerbach announced their decision regarding the transplant of the heart or other organs. If the heart is still functioning, even though the brain, including the brain stem, is dead, no organs may be removed, for this constitutes murder. How would they rule in a situation similar to the Novick case? I asked Rabbi Auerbach on 8 Cheshvan, 5752, and he replied that the fetus should have been delivered. In his opinion, medically determined brain death has not yet been proven to be equivalent to total absence of the brain (= absolute death). On the other hand, we cannot consider such a person to be viable and he is to be regarded as a *treifa* (a person so ill that his survival is deemed impossible from a medical point of view). We may assume that a pregnant woman who is a *treifa* wants her child to be born, and the delivery is permissible because no active murder is involved, and her death, should it occur, is unwanted.¹⁴

Rabbi Yosef Karo, following the Talmud, ruled in the *Shulchan Aruch* that when a woman dies in childbirth, a knife is to be brought on the Sabbath, even through a public domain, in order to cut open the mother and try to save the fetus.¹⁵ An apparent precedent for prohibiting delivery in the Novick case is the gloss of Rabbi Moshe Isserles (Rema) to this law. He writes: "The reason we are not accustomed to do so today, even on a weekday, is that we lack competence to determine the exact moment of maternal death so that the fetus may live."¹⁶ Death is a prolonged process. The Rema was concerned that the process

13. *Yated Ne'eman*, 12 Tishrei, 5792 (1991).

14. He disagrees with Rabbi Waldenberg (see note 17 below) and feels that the Talmud in *Arachin 7a* permits delivery only during childbirth. This matter still requires further study.

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may not have terminated and he therefore ruled that even if the mother appears to be dead, the fetus may not be delivered.

Yet, in fact, the Rema does not disagree with the decision of Rabbi Yosef Karo. Rabbi Karo refers to a situation in which the mother is definitely dead (e.g., decapitation), but not to a case in which she passed away after illness or similar causes. The Rema emphasizes that in a case of uncertain death, the baby may not be delivered, due to the inability to accurately ascertain the death of the mother. No one disagrees with this decision of the Rema (see however, *Tzitz Eliezer* 10, no. 25; *Shevet HaLevi* 6, no. 27, p. 22).

As mentioned, the Rema agrees that if the mother is definitely dead, delivery of the fetus is obligatory; if not, delivery is prohibited. Hence, the decision of whether or not to deliver the child must be made only after the available medical information has been considered and an accurate assessment of the mother's condition has been made. Those authorities who define death as cessation of cardiac activity may rely upon this opinion of the Rema to forbid the delivery of the Novick infant. Because an artificially respired patient is considered alive, extraction of the fetus from the uterus of a live mother is prohibited. In their view, the verdict of the court was correct, but they would have arrived at the conclusion through different routes which will be discussed further on.

Rabbi Eliezer Waldenberg's Opinion

In a responsum¹⁷ dated 26 Shevat, 5749 (Feb. 1, 1989), Rabbi Eliezer Waldenberg ruled on that the verdict of the court does not coincide with the halachah. In his opinion the infant should have been delivered. The major points of his decision are:

1. In his comments to the law in the *Shulchan Aruch* (*Orach Chaim* 330:5), "If a

death may be ascertained by electronic instruments, the Rema's ruling is no longer valid. See *Tzitz Eliezer* X, no. 25, ch. 4.

17. *Tzitz Eliezer* XVIII, no. 31.

upon a legal controversy over the definition of death. The halachah forbids moving a moribund person, for it may quicken his death.⁵ A moribund expectant mother, therefore, may not be delivered, for she is considered a living person in all respects⁶ and her life takes precedence over the life of the fetus.⁷ This law is valid even when it is clear that she will die in the near future.⁸

Rabbi Reisher discussed a pregnant woman who was decapitated. Only if Mrs. Novick's death was as absolute as that of a decapitated woman may the cases be compared.⁹ From a halachic point of view, the primary focus should have been to establish if Mrs. Novick was alive or dead. If she were found to be dead, the decision of the *Shevut Ya'akov* should have been implemented and the operation performed. If she were found to be alive, the surgery would be forbidden.

The judge deemed it necessary to establish the legal status of the fetus, whereas he apparently ignored the question of whether or not Mrs. Novick

was alive. He received a brief medical report, but it concentrated on the physicians' evaluation of fetal life expectancy. Because the fate of the fetus is contingent upon the viability of the mother, her status, not the status of the fetus, is the primary halachic consideration. Evidently the court was convinced that Mrs. Novick had already passed away, but before advancing a verdict, the judge should have heard a complete medical assessment of her health and ascertained her demise.

Halachic Definition of Death

The halachic definition of death was a central issue in a recent controversy over transplants.¹⁰ The Chief Rabbinate of Israel ruled that death occurs when the brain stem which activates the respiratory system irreversibly ceases to function.¹¹ Other authorities disagree and maintain that in addition to the cessation of breathing, diagnostic tests must ascertain the cessation of cardiac activity.¹²

Those who maintain that if the brain stem is dead, the person has died, would have ruled to deliver Mrs. Novick's child. The fact that she was breathing through a respirator does not affect her status. The machine enabled the fetus to live, not the already dead mother. According to the other opinion, however, a patient animated by a respiratory device is still considered alive. Therefore, when the judge was considering the case, Mrs. Novick, in their opinion, was still alive, albeit moribund (through the stimulation of the respiratory machine her heart never stopped beating), and they would not have permitted the doctor to operate.

Additional information regarding the eighth month old fetus may be found in M. Halperin, "Mavo Lesugiyat Ben Shemonah," Assia 44-45 (12, 1-2), Tevet 5749, p. 92; N. Gutel, "Ben Shemonah - Peshet Shitat Chazal Benogei'ah Levladot Bnei Shemonah," Assia, ibid., p. 97 ff. See also the opinion of Rabbi Wosner in note 16 below. Notwithstanding all this, from the responsun of Shvut Ya'akov it emerges that any fetus inside a pregnant woman who died must be saved.

5. *Shiltei Geborim to Rif, Moed Katan (p. 16b in the Vilna ed. of Alfasi); Rema to Y.D. 339:1.*
6. *First sentence of Avel Rabati; Tur and Sh. Ar. Y.D. 339:1.*
7. *Ohalot 7:6 and Tosafot Rabbi Akiva Eiger there; Rashi to Sanhedrin 72b; Rambam, Rotzeach 1:9.*
8. *Minchat Chinuch 34. Cf. Rambam, Rotzeach 2:7 for a distinction between the punishment of one who hastens the death of a person nearly beaten to death and one who quickens the natural death of a moribund person. Recently the reasoning has been put forth that the halachah forbids a lay person to move the moribund but that supervised professional movement is permitted. Even if this is correct, it certainly does not include the traumatic movements necessary to deliver a child.*
9. *In Rambam, Tumat Mei 1:15, decapitation is listed as a classic example of absolute death.*

10. *For a summary and selected bibliography see A. Steinberg, "Keviat Regah HaMavei Vehashtalat Lev," Assia, 44 (11,4) Nisan, 5748, pp. 56-77.*
11. *This decision was reached on 1 Cheshvan, 5747 (1986). See Assia, 47-48 (12, 3-4), Kislev 5750, p. 109.*
12. *Rabbi Waldenberg, who fiercely rejects any other definition of death, explains his opinion at length in "Beisur Hashtalat Lev Vekaved MaAdam Leadam," Assia, 47-48 (12, 3-4) Kislev, 5750, pp. 115-128.*

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As mentioned, the Rema agrees that if the mother is definitely dead, delivery of the fetus is obligatory; if not, delivery is prohibited. Hence, the decision of whether or not to deliver the child must be made only after the available medical information has been considered and an accurate assessment of the mother's condition has been made. Those authorities who define death as cessation of cardiac activity may rely upon this opinion of the Rema to forbid the delivery of the Novick infant. Because an artificially respirated patient is considered alive, extraction of the fetus from the uterus of a live mother is prohibited. In their view, the verdict of the court was correct, but they would have arrived at the conclusion through different routes which will be discussed further on.

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woman dies in childbirth, a knife is brought on the Sabbath even in a public domain and an incision is made in her womb to extract the fetus for it may be found alive," the *Mishnah Berurah* (note 18) writes: "This teaches that even the doubtful saving of the life of the fetus who was never considered alive suspends the Sabbath." *Magen Avraham* (letter 10) cites several opinions that would obligate operating even if the mother is not actually in childbirth and the Sabbath is violated, because the law is lenient in life-threatening situations. Quite likely, all the authorities would agree that on a weekday one is obligated to deliver the fetus even before parturition has begun because it is possible that the fetus will live.

2. The fact that the physician was unable to guarantee that the infant would develop normally after birth is irrelevant. This may be inferred from the ruling recorded in *Orach Chaim* 329:3-4:

"If a building collapsed on someone, and it is doubtful whether he is alive or dead...he is to be rescued even though several doubts are at hand, even if they found him crushed and he can live no longer than an hour...."

The Sabbath is to be violated to save the life of a person, including a mutilated minor, a deaf-mute, and an imbecile,¹⁸ who will live for only a short time. If the person removed from the rubble would live for a longer period, he would not be fit to lead a normal life, yet, the obligation exists to desecrate the Sabbath in order to save his life. Hence, even if the physicians were positive that the Novick child would not develop normally, because Mrs. Novick was in the seventh month of pregnancy when the fetus is generally considered "alive but a door is locked before it,"¹⁹ the surgery, to be performed on a weekday, was obligatory.

Rabbi Waldenberg's opinion is difficult to understand. He maintains that a patient sustained by artificial respiration is

18. See *Biur Halachah*, O.Ch. 329, s.v. *Ela left sha'ah*.

19. See *Ramban in Torat HaAdam*, *Sha'ar HaSakanah*.

considered alive in every respect.²⁰ How then could he permit the physicians to operate on Mrs. Novick, for at the time the judge reached his decision she was moribund and, as mentioned, the Rema forbids moving such a person. My opinion is that the question of whether or not to deliver Mrs. Novick depends on the definition of death as explained above.

Halachic Status of the Fetus

The court refused to rule because the fetus was unborn. This raises the question of fetal status. Four points will be considered:

1. The basic question centers on the definition of the Talmudic phrase, *ubar yerech imo*, literally, the fetus is the thigh of its mother.
2. The status of the fetus in civil law.
3. The personal status of the fetus.
4. The status of the fetus in criminal law.

Ubar Yerech Imo

The Rabbis in the Talmud (*Temurah* 10b; *Baba Kama* 78b) dispute whether the fetus is regarded as a limb of the mother or not. That is, is a fetus considered an organic part of the mother, like, for example, her thigh, or is it an independent entity? The prevalent halachic opinion is that the fetus is to be regarded as a limb of the mother.²¹ This would seem to imply that the unborn fetus lacks status,²² but I am inclined to

20. See his article "Nituach Lev Behalachah," *Assia*, 38, *Elul*, 5744, vol. 10, no. 2, p. 16, which discusses the status of a patient sustained via a heart-lung machine during open heart surgery. More relevant is his definition of death in *Assia* 47-48, pp. 115-128. For a similar opinion see Rabbi Shmuel HaLevi Vosner, "Al Hashtalat Lev - Isur," *Assia*, 42 43, *Nisan* 5747, vol. 11, no. 2-3, pp. 92-4. See also his discussion in *Shevet HaLevi* VI, no. 27, p. 22.

21. *Rambam*, *Avadim* 7:5; *Tosafot*, *Sanhedrin* 80b, s.v. *Ubar yerech imo*. *Ravad*, *Avadim* 7:5 disagrees.

22. See V. Aptowitz, "Emdat HaUbar Bedinei HaOnshin shel Yisrael," *Sinai*, vol. 4 (5702-03), p. 26ff.

doubt this, and would even suggest that the concept *ubar yerech imo* does not apply to the Novick case. The general thrust of the sources is to automatically apply to the fetus legal states acquired by the mother, e.g., proselytization, or to include the fetus in her punishments, as will be explained. The discussion tends to center on the mother, and there is no attempt to negate fetal rights, *per se*, especially those rights independent of maternal rights. On the contrary, the concept *ubar yerech imo* quite likely expands the rights of the fetus, rather than restricting them, and this by virtue of the fact that the fetus lacks independent status.²³

A survey of the many halachot that deal with fetuses reveals that several rights, independent of the stage of pregnancy or the projected date of birth, are granted to it, despite the fact that the fetus lacks legal status as a person.²⁴ The fetus is not considered a "person" to mourn over,²⁵ it is not a "soul" for the laws of impurity of the dead,²⁶ and it is not a "man" to capitally

punish one who murders it.²⁷ Yet, as we shall see, the fetus retains certain property rights.

Status of the Fetus in Civil Law

The Rabbis disagreed if the fetus has property rights (*Baba Batra* 141b; *Yevamot* 67a). In general, the halachah is that the fetus cannot acquire property sold to it by another.²⁸ However, the authorities disagree if the fetus can inherit or acquire a gift from its father. Some assert that the fetus takes possession in both instances,²⁹ others maintain that it cannot acquire a gift but can inherit,³⁰ while others rule that it acquires a gift from its father only if the father is on his deathbed (*shechiv merah*).³¹ The circumscribed ability of the fetus to acquire does not indicate that it is a non-entity; rather, it is the result of its limited powers of acquisition. When the transfer of property is made through a mode which does not require an act of acquisition, the transaction is valid. Thus, the fetus inherits because the inheritance "comes by itself"³² and it acquires a gift from its father because "a man is favorably disposed toward his son."³³ If the halachah does not consider the fetus to be an entity, these transactions would also be invalid, for no one would inherit or receive the gift.

Personal Status of the Fetus

The fetus has no status in nuptials.³⁴ One opinion maintains that a father may betroth his female embryo and that the engagement will be partially valid after birth, but practically speaking, such a betrothal is

23. Thus, for example, it is possible to explain the halachah in *Arachin* 7a that the fetus is regarded as a limb of the mother and therefore a pregnant woman sentenced to death is to be executed along with her fetus, as due to the Scriptural decree "and they both shall die" (*Deut.* 22: 22), and not because the fetus lacks status. The word "both" implies that the mother and the fetus are of equal status. See E. Ellinson, "HaUbar Behalachah," *Sinai*, vol. 66, p. 27.

24. Providing it is not "merely water." See Rambam, *Terumot* 8:3; *Issurei Bi'ah* 10:1. Some, however, forbid aborting a fetus which is "merely water." See note 39 below.

Tosefta (*Shabbat* 16:4) discusses when a newborn is considered viable. The Talmud (*Shabbat* 136a) rules like Rabbi Shimon ben Gamliel that after thirty days a newborn is not a nefel. This is irrelevant to our case for it deals with an infant after birth. See Rabbi N. Gutel, "HaPagot Leor HaHalachah," *Assia*, no. 44, *Nisan* 5748, vol. 11, no. 4, p. 6; *idem*, *Assia*, no. 45-46, *Tevet*, 5749, vol. 12, no. 1-2, p. 97.

25. *Mishnah*, *Nidah* 5:3. See Haamek She'eilah to *She'iltah* 167, note 17. R. Shimshon b. Avraham of Sens in his commentary to *Sifra*, *Negaim* 1:1 (*Jer. ed.*, p. 60b), states that the fetus is considered a person.

26. *Sifri*, *Bamidbar* 127.

27. *Sifra* to *Lev.* 24:17.

28. Conclusion of the Talmud in *Baba Batra* 142b.

29. Ravad to *Hil. Terumot* 8:4; *Shiltei Giborim* (to *Yevamot* 67a) in the name of Hasagot HaRavad al HaRif.

30. Alfasi, *Yevamot* 67a (p. 22b in the Vilna ed. of Alfasi).

31. *Chiddushei HaRamban* to *Yevamot* 67a, s.v. *Mai kamashmalan*; *Ch.M.* 210:1.

32. *Baba Batra* 142a.

33. *Ibid.* Although the Talmud says that "everyone agrees" in reference to the father's gift, the authorities dispute whether the Talmud refers to every father or only to a *shechiv merah*.

34. *Mishnah Kidushin* 3:5.

invalid and must be repeated after birth.³⁵ Regarding proselytization, it was already mentioned that when the mother performs the proselyte's immersion in a *mikveh*, the fetus is automatically proselytized along with her.³⁶ However, Rabbi Yechezkel Landau requires that the mother intend to include the fetus in her proselytization before the immersion, a requirement which suggests the independent status of the fetus.³⁷

Status of the Fetus in Criminal Law

One who commits feticide cannot be tried in court,³⁸ yet he is liable in the heavenly tribunal and transgresses a prohibition whose basis is biblical.³⁹ Rabbi Meir Simchah of Dvinsk maintains that he is liable for death in the heavenly court.⁴⁰ Discussion of induced abortion is irrelevant here, for the Novick case involves a passive, "hands off," approach toward the ethical demand of the child to be born. The punishment for passive wrongdoing is always less severe than the punishment for active criminal acts. Hence, those authorities who forbid abortion would distinguish between one who aborts and one who hinders birth, even if the consequences are identical.

Does the halachah mandate the employment of active, positive means to save the fetus in cases similar to the Novick case? The aforementioned law which permits violation of the Sabbath in order to extract the fetus from the womb of the deceased mother implies that active efforts must be employed to save it. Although the words "an incision is made in her womb to extract the child" do not mandate saving the life of a fetus,⁴¹ in the Novick case I agree

with those who maintain that such action is mandatory and not elective, for if it were optional, the Sabbath may not be desecrated. The Sabbath may be violated only when the called for action is absolutely incumbent.⁴²

Another proof that active action is required may be inferred from the two reasons cited by the authorities to obligate removal of the fetus from the uterus of the dead mother: "It is as if it is placed in a container,"⁴³ and "It is alive but the door is locked before it."⁴⁴ Essentially, both versions refer to the same thing. A fetus in the womb of a dead mother deserves to be saved, it is an endangered living being and the door must be opened before it. While the mother is alive the fetus is regarded as her limb, yet her death signals its independence, and from that moment on the fetus is alive and must be removed from its confines. Accordingly, failure to remove the fetus is equivalent to failure to save a life, and one who acts in this manner does not actually transgress the prohibition of "Do not stand by your brother's blood"

of the fetus is not obligatory, even though the Sabbath must be violated to save its life. See Ramban, Torat HaAdam, Inyan HaSakanah, s.v. U'vehilchot (Chavel [ed.], Kitvei HaRamban, vol. 2, p. 29); Tosafot to Nidah 44b, s.v. Ihu; Chavot Yair, no. 31; Haamek She'eilah, Deut., no. 148, note 16. Rabbi Moshe Feinstein (in the Rabbi Yechezkel Abramsky Memorial Volume, p. 462) wrote that these words of the Tosafot are a scribal error. Beit Yitzchak, Y.D., part 2, no. 162 advances a similar opinion. Rabbi Uziel in Mishpatei Uziel, Ch.M., part 3, no. 46 writes that Tosafot refers to a situation when the mother's life is endangered. See also Nishmat Avraham, O.Ch. 330:5, (p. 230).

42. See Rabbi Y. Neuwirth, *Shemirat Shabbat Kehilchata*, ch. 36, par. 3. The author rules that if the life of the fetus is endangered, the mother may be operated on during the Sabbath even though her life is not endangered. Clearly, the obligation to save the life of the fetus exists. In a note there it seems that Rabbi Shlomo Zalman Auerbach also agrees with this. Although the fetus lacks status in the laws of impurity (see note 26 above), these authorities rule that it is considered "a soul" whose life must be saved.

43. Tosafot to Nidah 44b, s.v. Ihu.

44. Ramban, *Torat HaAdam*, loc. cit.

35. *Even HaEzer* (hereinafter: E.H.) 40:8.

36. *Yevamot* 78a.

37. *Dagul Marevavah* to Y.D. 268:6.

38. *Mishnah Nidah* 5:3; *Rambam, Rotzeach* 2:6; *Semah* to Ch.M. 425, note 8; *Nodah Bihudah II*, Ch.M. 59; et al.

39. *Gen.* 9:6, *Sanhedrin* 57b; *Rambam, Melachim* 9:4; et al.

40. *Meshech Chochmah, Ex.* 35:2.

41. For this, and other reasons, some assert that when the mother suffers difficulty in childbirth, delivery

(Lev. 19:16),⁴⁵ but he is guilty of transgressing an ancillary injunction.⁴⁶

Maimonides also seems to imply that active means must be employed to save a fetus. He writes:

"This is also a negative commandment, not to take mercy on the life of a pursuer (*rodeif*). Therefore, our Sages ruled that when a woman has difficulty in birth, one may dismember the fetus in her womb, either with medication or by hand (surgery), for it is like a pursuer seeking to kill her. Once its head has emerged, it may not be touched, for one soul may not be substituted for another and this is the natural course of the world."⁴⁷

A pursuer is to be killed at all times. If Maimonides defines the fetus as a pursuer,⁴⁸ why does he forbid it to be killed after the head has emerged? Several early commentators understood this to mean that the fetus may not normally be dismembered, for it has status in criminal law, and only when it endangers the life of the mother, its life must be taken.⁴⁹ Relying on Maimonides, Rabbi Yechezkel Landau⁵⁰ explicitly states that saving the fetus is obligatory, and that only when it is a pursuer, and precisely because it is a pursuer, its life must be forfeited to save the life of the mother.

45. See Ch.M. 426:1; O. Ch. 329:5,8.

46. However, he is not punishable in court, for the fetus is still considered a nefel. See note 39 above and Teshuvot MaHaRit 1:97 who writes that the fetus in the womb of the deceased mother is regarded as alive in all respects as it is no longer an integral part of her body, but on the other hand, he defines it as a doubtful nefel in regard to capital law.

47. Rotzeach 1:9.

48. A definition contradicted by the conclusion of the Talmud (Sanhedrin 72b) which states that the birth process is the pursuer, not the fetus. See Rabbi S. Yisraeli, *Amud HaYimini*, no. 16, ch. 4.

49. See, for example, commentaries to Ch.M. 425:2; *Chavot Yair*, no. 31; *Teshuvot HaGeonim Batry*, no. 42; *Chiddushei Rabbeinu Chaim HaLevi*, *Rotzeach* 1:6; *Even HaEzel*, *Rotzeach* 1:6; *Panim Me'iroi III*, no. 8; *Mishpatei Uziel*, Ch.M., nos. 46-47.

50. *Nodah Bihudah II*, Ch.M., no. 59.

The Jerusalem Talmud (*Sanhedrin* 8:9) supports Rabbi Landau's view. It states that the mother is not to be saved after the fetus' head has emerged, for then the mother herself pursues it, and once the fetus is considered alive, its life may not be terminated in favor of the life of its mother. This implies that while the fetus is yet in the uterus, it is continually being pursued, and only because it is not yet considered alive, the life of the mother takes precedence. The duty to save the pursued begins with her death.

The Obligation of the Hospital

The physician's obligation to heal is included in the precept to save life, and if he refrains from doing so, he is a murderer.⁵¹ The physician is dutybound to treat every living person whom he is able to assist.⁵² If the fetus in Mrs. Novick's womb was alive, it is possible that the doctor was obligated to deliver the infant, and any reluctance on his part was unsubstantiated.

Rights of the Father

The court allowed the father's plea. However, I have not found a halachic source that grants the father the right to prevent the birth of his child. The mishnah states: "The court does not wait for a pregnant woman [sentenced to death] to give birth before executing her" (*Arachin* 7a). The Talmud asks: Is not the father entitled to monetary compensation for the loss of his offspring, as it says, "If men strive and hurt a woman with child...he shall be surely fined, according as the woman's husband will lay upon him...." (Ex. 21:22)? The conclusion is that a Scriptural decree negates the father's monetary claim. This seems to imply that in the absence of Scriptural decree, the father possesses rights and that he may forfeit his monetary claim and allow the fetus to perish. However, to my mind, the Talmudic discussion proves just the opposite. The father wishes to have his

51. Ramban, *Torat HaAdam*, *Sha'ar Hasakanah*; *Tur and Sh. Ar.* Y.D. 336:1. Cf. *Meir Ayin to Mechilta Ex. 21:19*.

52. *Turei Zahav*, Y.D. 336:1.

child delivered before his wife is executed but Scriptural decree prevents it. In the absence of Scriptural decree, the father retains the right to demand that his child be delivered.

Several authorities maintain that the prohibition to abort is derived from the prohibition to destroy semen.⁵³ Accordingly, a special obligation rests upon the father to bring his child into the world. Thus, my conclusion is solid, the father has no right to prevent the birth,⁵⁴ even in the tragic circumstances of the Novick case.

This is in principle, but in practice, Mr. Novick wished to avert the birth because he fostered doubts about the physical and mental wellbeing of the child. The later authorities disagree if delivery of a fetus known to be deformed is mandatory.⁵⁵ Quite possibly, even those who forbid abortion of a deformed fetus would agree that passive restraint from delivery is permissible when the fetus is known to be severely deformed or retarded. If the fetus is not considered a "living creature behind a locked door," this argument is correct and forms the only possible basis for Mr. Novick's plea. But from the time at which the fetus is defined as viable, all agree that it may not be aborted, for it is a living cripple whom we are obligated to save.⁵⁶ However, Mr. Novick's physician did not voice any concern about the deformity of the fetus

and therefore it should have been delivered.

Honoring the Wish of the Deceased

The court stated that the delivery of the fetus was unnecessary for Mrs. Novick's wellbeing. This reason is obscure. Obviously the action which the court was asked to permit was directed toward the welfare of the fetus and not the welfare of the mother. If the court was sincerely interested in preserving maternal interests, it should have considered that any living mother would certainly wish to save her baby. Halachic authorities throughout the generations have always taken the position that when the mother dies, we may assume that she wanted her child to live and that she would be willing to renounce all of her rights that would delay its delivery.⁵⁷ Certainly, then, we may assume that Mrs. Novick would have preferred that her baby live, and not die with her, as it says, "Then spoke the woman whose child was the living one to the king...O my lord, give her the living child, but do not slay it" (I Kings 3:26).

Authority of the Court

The court decided that it lacks authority to intervene in the "life" of a fetus. Even if the legal status of the fetus is disregarded, this position is not in accord with the halachah. As mentioned above, the fact that the fetus is yet unborn does not prevent it from being classified as living. When Mrs. Novick died, the fetus in her womb was a living orphan. If anyone retains authority and the obligation to administer to fetal needs, it is the court. The rabbinic court is the "father of orphans"⁵⁸ and must appoint a guardian for one who died without appointing a guardian for his minor children,⁵⁹ and until it does so, the court remains guardian.

53. *Chavot Yair* no. 31; *Mishpatei Uziel*, vol. 3, Ch.M. no. 46; *Beit Yehudah*, E. H. no. 14; *Divrei Yisachar*, Ch.M. no. 168. However, many disagree. Cf. *Otzar HaPoskim* E.H. 23:1:1.

54. Cf. *Tzitz Eliezer* IX, no. 51, gate 3; *She'ilat Yeshurun*, vol. 1, no. 39.

55. *Rabbi Unterman* in "Pikuach Nefesh shel Ubar," *Noam*, vol. 6, p. 1, wrote: "We have not heard that a fetus may be killed in order to save it from deformity." However, *Rabbi Shaul Yisraeli* in *Amud HaYimini*, no. 32, wrote: "It seems that abortion is permissible in such cases as long as expert doctors know that most of the infants are seriously deformed or imbeciles."

56. *Rabbi Waldenberg*, who tends to be lenient in aborting deformed fetuses who have no hope of living, ruled that Mrs. Novick should have been delivered, even if it were known that her fetus was deformed.

57. *Binyan Tzion*, no. 171. He expands this logical assumption to include all of her heirs. See also *Tzitz Eliezer* IV, no. 14.

58. *Baba Kama* 37a; *Rambam*, *Nachalot* 10:5. The court is "father" of minors, not adults. See *Ran*, *Baba Kama*, beginning of ch. 4; *Rema*, Ch.M. 290:1.

59. *Rambam*, *loc. cit.*; *Tur* and *Sh. Ar.*, Ch.M. 290:1.

The term court (*beit din*) generally refers to any court of three judges, but either the city court or the most prominent authorities are charged to care for the orphan.⁶⁰ However, in our case, the secular court is also responsible, for it involves saving the life of a fetus.⁶¹ If so, the secular court is invested with the powers of the *beit din* and as "father of orphans" and their legal guardian, it should have ruled to save the life of the fetus.⁶² Its refusal to do so is reminiscent of one who is authorized to render legal decisions but refrains from doing so, an act to which the Talmud (*Avoda Zara* 19b) applies the verse, "For she has cast down many wounded, and many have been slain by her" (Prov. 7:26).

60. *Responsa of Rosh*, klal 85, no. 26; *Rema*, Ch.M. 290:1.

61. According to Rabbi Shaul Yisraeli, rulings of the secular court in these matters is valid and the court is not considered as *archa'ot* (civil courts).

62. The verse emphasizing the authority of *beit din* to rule in a specific case is related to fetuses. The plain meaning of the verse in Ex. 21:22, "If men strive, and hurt a woman with child so that her offspring depart from her...and he shall pay as the judges determine" (*venatan biflilim*) implies that the judges must rule in a case where the fetus was aborted. Although the verse refers to the court's authority to hear the father's monetary claims, it does not limit judicial authority in all matters concerning fetuses on the ground that they are unborn.

Summary

1. The decision is contingent upon the definition of death.
2. The Chief Rabbinate of Israel ruled that death of the brain stem is considered death.
3. Mrs. Novick was considered halachically dead before the discussion of the fate of the fetus had begun.
4. According to the halachah, a fetus in the womb of a dead mother is considered alive and it must be delivered. The verdict of the court is not in accord with the halachah.
5. Halachah grants a certain status to the fetus.
6. There is an obligation to actively save a fetus in the womb. Therefore, the attending physician should have performed the delivery.
7. A father has no right to prevent the birth of his offspring.
8. We may assume that the mother wanted her child to live.
9. The court is authorized to rule in this case and is responsible for the welfare of the fetus.

CHAPTER 2. DIDACTIC SUGGESTIONS

The event depicted in the film touches upon many facets of human life: its essence, its beginning and end, and especially, mutual rights and obligations. When planning the lesson, single out those topics which you consider to be the most important. Take into consideration the level of your audience - the breadth of their knowledge, their spiritual maturity and intellectual capabilities - and determine your educational goals and specific didactic objectives accordingly. The final decision as to which approach to employ may be reached only after you have carefully distinguished between the primary and secondary points of interest. The first step, then, is to become thoroughly familiar with the material, to discover its structure, and to classify it.

We certainly shall not limit ourselves to spurring intellectual study, cognitive absorption and understanding; we also desire to affect the value system of the pupil, in particular his attitude toward human life. Our aim is to teach him the basic pertinent halachot, to interest him in them, and to assist him in understanding them to the best of his ability.

The logical sequence of a system of ideas and arguments is usually not identical with the psychological-didactic sequence which it is preferable to adopt when teaching. Watching the film, for example, is more stimulating than participating in a discussion. On the other hand, when watching the film, it is preferable to discuss each issue at the moment it appears, when it is "right there in front of us," and to thereby link the abstract discussion with sensual impressions; yet, no one would think to stop the film several times and interrupt the flow of events. You

must therefore plan the sequence, didactic means, and activities (watching the film, studying source material, holding an open discussion and debate, and so forth), that you will employ to teach the material.

Several methodological considerations are important. Besides the intellectual-spiritual level of the participants, circumstances also affect the lesson. How much lesson time is available? Two hours divided by a short intermission or three one hour periods on different days? Is it possible to invite an expert (a physician, rabbi, jurist, thinker) to lead the discussion, or must you rely upon your own, perhaps limited, pedagogical talents and resources? Should this unit be presented as one part in a series of lectures on ethical or halachic topics or is it advantageous to present it in an independent forum? All these, and other considerations, influence your didactic approach.

The following remarks are offered as general guidance rather than as operative. They are designed to familiarize you with the material, to distinguish between the various facets of the issue, to determine specific educational objectives, and to assist you in choosing the most effective means and methods to achieve those aims.

The Incident

Information about the event is found in "Medical Background." The question of whether or not to perform the Caesarean section has many speculative, as well as pragmatic facets.

Medical aspects. Was it possible to save the life of the fetus? What means were available? Was there a reasonable possibility that the newborn would live, grow up, and enjoy a normal, healthy life? The medical profile of the parents, the stage of pregnancy, and the available diagnostic equipment all influence the final outcome. The physician is the only professional qualified to answer these questions, and in the case of Mrs. Novick, the attending physician utilized the data at hand before he suggested operating on her.

Legal aspects. Is it permissible, according to the law of the state, to perform this operation? Who is authorized to permit this action which directly affects three people (father, mother, and child), two of whom are unable to voice their opinion? Is the father's consent sufficient? Mr. Novick refused to give consent to operate, does anyone else have authority to override him? Assuming that such authority does exist and that the child will be born, is it possible to coerce the belligerent father to raise, maintain, and educate his son?

Because these are legal questions, the physician and hospital officials apparently acted correctly by summoning the judge to the hospital. The judge refused to render the order. True, there is a contrary legal opinion (see ch. 4, "Legal Perspectives"), but the details of the controversy are of interest to students of jurisprudence, not the general audience. Yet, the very fact that a legal disagreement exists over the interpretation of a secular law passed in Israel in 1962 is worthy of special attention. It can also teach us humility. A judge can also err, even in a matter of life and death.

Ethical aspects. Ethics is a branch of philosophy dealing with questions of good and evil, permissible and forbidden, and right and wrong in human action, not from a legal or religious viewpoint, but from a secular, rationalist one. The ethical man acts according to the dictates of his conscience.

Imagine that Mrs. Novick is lying before us. She is breathing, her heart is beating. The liver, lungs, and kidneys are functioning. But the doctors say that she is dead, for the brain stem has irreversibly ceased to function. One medical opinion states that ventilatory assistance (and other appropriate medications) is providing her with artificial life. Can this opinion be relied upon to authorize surgical intervention? Is anyone obligated to bring the fetus, unwanted by its father, into the world? Many people believe in elective abortion, especially when the fetus is unwanted by its mother, for societal, personal, or other

reasons. Assuming that feticide is not manslaughter, should certain risks be taken to deliver the child?

Let us assume that Mrs. Novick is indeed legally dead and that the law requires that the fetus be delivered. The Caesarean section will disfigure her body. Is this not a desecration of the dead? Perhaps the operation should be prohibited since this definite desecration outweighs the doubtful possibility of delivering a healthy infant? Who is able to decide which factor is most important?

Halachic aspects. A God-fearing Jew confronted by the aforementioned questions will seek expert rabbinic guidance. The rabbi will thoroughly study the medical information and the doctor's recommendations, but the ethical and legal considerations are irrelevant to him. He will advance the questions in a fashion similar, and perhaps identical, to the ethical man, but will seek the solutions in the halachic literature.

Chapter 1 of this pamphlet, "Halachic Perspectives," details the pertinent halachic issues. For our purposes it will suffice to summarize the basic questions that must be answered:

- A. Is there an obligation to deliver the fetus? If so, does this duty exist even if the father refuses to give his consent?
- B. Is brain stem death considered legal death?
- C. Assuming that the answer to these questions is positive, is the duty, or permission, to perform the operation contingent upon other factors?

The rabbi will answer each of these questions by comparing the Novick case to the vast sources of the Oral Law. Because the sources are numerous and the very nature of halachic reasoning is ramified and complex, you must choose the sources most appropriate for your audience. If the author of a source you choose to teach did not cite his references, you must provide the unlearned student with this "background" information.

It is likely that the halachic rulings will coincide with the ethical considerations of the moralists and the physicians, Jewish and non-Jewish alike.¹ But not always. Halachically speaking, the physicians and the hospital officials involved in the Novick case should have sought rabbinic guidance instead of turning to a judge whose expertise is limited to the secular laws of the state.

The following brief presentation of the personages involved in the Novick case and the nature of their involvement precedes a detailed examination of the halachic sources.

Personages

The physician. He had to decide if he should operate. He could have decided himself and taken full responsibility for his decision or he could have sought the expert guidance of a judge, a moralist, or a rabbi qualified to rule in these matters. Alternatively, he could have complied with the father's wishes. In fact, the doctors turned to a judge and requested a legal order. Because the judge refused to grant the order, the physicians did not operate. Were they correct? The court order did not explicitly forbid them to operate. Sometimes one must act according to his conscience, even when there is no "authority" to tell him to do what he feels must be done.

The father. He refused to give his consent to deliver the child unless the hospital could guarantee that it would be healthy. He was not prepared to raise a handicapped child, a burden that he felt would disrupt his life

1. *The relationship between Torah and morality can perhaps be shown by comparing the Torah's command "Love your neighbor as yourself, I am God" (Lev. 19:18) to the humanistic imperative "Love your neighbor as yourself" (without "I am God"). The content of the latter is the same as the former, that is, love of fellow man will perhaps be arrived at in the same manner, but the underlying basis of the commands and their meaning is entirely different. The former is a divine commandment, its performance is an act of worship. The latter flows from the dictates of conscience, its performance is the fulfillment of an inner need.*

and the lives of his other two children. Because the physicians could not provide a definite positive prognosis, the question arises, does the father have authority to decide what should be done? Should his wish be carried out?

The mother. She was unable to communicate, but an assessment of maternal nature allows us to assume that she would have demanded that everything possible be done to prevent her offspring from perishing. Support for this assumption may be found in the verse of Solomon's judgement, "Then spoke the woman whose child was the living one to the king, for her love was kindled towards her son, and she said: O my lord, give her the living child, but do not slay it" (I Kings 3:26).

The judge. He refused to grant the requested order because in his opinion the court lacks authority to act for the welfare of an unborn human (who apparently has no rights) and because the operation was not for the mother's welfare.

The fetus. It was unable to communicate, but it is reasonable to assume that every human being wants to live, at least when it first comes into the world.

The Primary Halachic Sources

A. *Pikuach Nefesh* (saving life)

One is obligated to employ all the means at his disposal to save an endangered human being. The Talmud says:

"How do we know that if one sees a person drowning in a river or being dragged by a wild beast or being attacked by thieves that he is obligated to save him? The verse says, 'Do not stand by your brother's blood'" (Lev. 19:16)(*Sanhedrin* 73a).

B. Is the Fetus Considered a "Soul" that must be Saved?

The Talmud says:

"If a woman dies in childbirth (on the Sabbath), a knife is brought...to extract the fetus. Obviously, what did he do, he only cut flesh (and did not violate a Biblical

prohibition)? Rabba said, 'It means that it is permissible to carry a knife in a public domain.' If it is coming to teach us that the Sabbath may be desecrated in a doubtful case, we already learned it in a mishnah: 'If a building collapsed and it is doubtful whether someone is there or not, it is doubtful whether he is alive or dead, it is doubtful if he is a gentile or a Jew, he is to be uncovered from the rubble.' I would have thought that in that case he is considered alive (and the Sabbath may be violated) but in this case (of the woman) it (the fetus) was never considered alive (and I would have thought that the Sabbath may not be desecrated)" (*Arachin 7a-b*).

The precept of saving life suspends Sabbath observance, even if the possibility of saving the endangered soul is uncertain, even if it involves a fetus who has not yet functioned as an independent living creature. Yet, important rabbis have ruled that only obligatory actions suspend Sabbath observance² and the question is, at exactly what stage of pregnancy does the obligation to save the fetus begin. Mrs. Novick was in the seventh month of pregnancy. The fetus at that stage is "ready to be born" and should be considered "a live being before whom the door is locked." Therefore, the fetus should have been delivered.

C. Is There a Direct Connection between this Case and the Right of a Mother to Abort her Child?

If post-mortem delivery of the fetus is obligatory, active feticide is certainly forbidden. A woman does not "own" her body and she may not decide when to abort the fruit of her womb. In general, no one "owns" their body or life. According to halachah one is not allowed to damage his body, and suicide is a severe transgression.³

This does not mean, of course, that abortion is absolutely forbidden. If the fetus

jeopardizes the mother's life or there is another serious reason to terminate the pregnancy, a qualified rabbi may permit abortion. When abortion is prohibited, delivery of the child may sometimes be passively delayed. Thus, it is impossible to infer from the prohibition of abortion that the fetus must be delivered. Every case requires individual attention. However, the basic halachah is that feticide is forbidden, and that if the life of the fetus is endangered, one is obligated to save it.⁴

D. The Extent of Homicide

Murder is one of the severest transgressions. "Do not murder" (Ex. 20:13) is the sixth of the ten commandments. The prohibition of homicide is one of the seven Noahide laws (*Sanhedrin 56a*), and one of the three cardinal transgressions which if one transgresses them, even under duress, he desecrates God's Name (Rambam, *Yesodei HaTorah 5:4*). The Talmud says:

"Rabbi Yochanan said in the name of Rabbi Shimon ben Yehotzadak: They voted and decided in the attic of the house of Natza in Lod, regarding all of the transgressions in the Torah - if a person is told to transgress and not be killed, he should transgress and not be killed, except for idolatry, illegal sexual relations, and homicide...homicide...the source? It derives from logic (*sevara*)...Who says that your blood is redder than the next man's?" (*Sanhedrin 74a*).

In explaining this paragraph, it is important to emphasize that Jewish law does not differentiate between the character or station of men when life is at stake. The commandment, "Be killed," includes the wise, the honorable, the young, the healthy, the beloved, and the righteous. The injunction, "and do not transgress," refers to all - do not kill another person, be he stupid, lowly, feeble and aged, or a criminal.

2. See ch. 1, note 42.

3. Some consider this the severest of all transgressions, for one who transgresses cannot repent.

4. See ch. 1, note 24 and the sections "Personal Status of the Fetus" and "Status of the Fetus in Criminal Law."

The mishnah says that "one life may not be set aside for another life" (*Ohalot* 7:6).

This prohibition also applies to killing a moribund person. At the beginning of the tractate *Avel Rabati* it says, "The moribund person is considered alive in all respects." The mishnah says, "One who closes the eyes of a dying man as his soul departs is a murderer" (*Shabbat* 23:5).

In reference to the fetus, our Sages (*Sanhedrin* 57b) expounded the verse, "He who sheds man's blood in man, his blood shall be shed (Gen. 9:6) - 'Who is the man that is in man? The fetus in its mother's womb.'" One who commits feticide is not liable to punishment in court, but he is liable in the heavenly court and transgresses a prohibition whose root is biblical.⁵

Despite the severity of the prohibition of homicide, if the fetus endangers the mother's life, it must be killed. The mishnah says:

"If a woman has (life threatening) difficulty in childbirth, one cuts up the fetus in her womb limb by limb, for her life takes precedence over its life. But if the greater part (or the head) has emerged, it is not to be touched, for one soul may not be set aside for another soul" (*Ohalot* 7:6).

As long as the fetus is yet unborn, the life of its mother (and any other person) has priority, and only after it is born (when the greater part has emerged), it is considered a "soul" that may not be set aside for another soul.

E. Did the Fetus Endanger Mrs. Novick's Life?

The obligation to deliver the endangered fetus in Mrs. Novick's womb has been demonstrated above. Certainly, as long as Mrs. Novick was alive, even moribund, if the Caesarean section would have endangered her life, halachah forbids it. The crucial question is the definition of death. If Mrs. Novick was considered alive, the operation would be homicide, if she was

considered dead, the surgery would be mandatory to save the child's life.

F. Brain Stem Death

Some contemporary halachic authorities contend that a person who breathes with ventilatory assistance and whose heart beats is considered alive. The Chief Rabbinate of Israel, however, ruled that if brain stem death is irreversible, the person is dead.⁶ According to this opinion, Mrs. Novick's child should have been delivered by a Caesarean section. Additional factors, such as mutilation of the body of the deceased or the welfare of Mr. Novick and his other two children, do not override the injunction of "Do not stand by your brother's blood" or the obligation to save the fetus from death. According to the halachah, neither the father nor the court had authority to prevent the delivery.

Methodological Guidelines

It is recommended that you first show the video and then hold an open discussion in which the participants are invited to express their reactions, raise questions, offer their opinions, and so forth. Guide the discussion by summarizing the various aspects of the issue on the blackboard in the following manner:

- a. The people involved and their responsibilities (see "Personages").
- b. The various standpoints from which the event may be viewed and the basic pragmatic questions that must be answered (see "The Incident").

During the discussion or shortly thereafter, it would be helpful to replay excerpts from the video that illustrate the abstract concepts which have been discussed. Here are two examples:

- a. To illustrate the concept of brain death, show the section where the woman is connected to the respiratory apparatus and other instruments.
- b. To illustrate "the father's disapproval," replay the scene where Mr. Novick presents his arguments, reiterates his

5. See the section in ch. 1, "Status of the Fetus in Criminal Law."

6. See ch. 1, section "Definition of Brain Death."

concern for his wife, and not the child, and refuses to give his consent to operate.

Following an intermission, perhaps even the following day, the appropriate halachic solution should be discussed. The reasons put forth by contemporary rabbis in arriving at their decision may be disregarded, for our aim is to promote Torah study and to implant a Torah-true, moral outlook. Rather, focus on the Biblical and Talmudic sources dealing with *pikuach nefesh*, the prohibition of homicide, and so forth. Endeavor, for example, to explain the rationale advanced in *Sanhedrin* 74a⁷ and the other sources cited or summarized in "The Primary Halachic Sources," paragraphs A-F.

It is unnecessary, and even impossible, to teach all of the halachic sources and the minutiae of the verdict of the court. Therefore, this brief summary has omitted the opinion of the Geonim, the ruling of Rabbi Reisher, the status of the fetus in halachah, and the question of the authority of the court discussed in chapter one, "Halachic Perspectives."

You may wish to guide students familiar with the Talmud in studying the two sources dealing with *pikuach nefesh* ("The Primary Halachic Sources," par. A, B), or in studying the *Mishneh Torah* and the *Shulchan Aruch*. Alternatively, encourage the students to discuss the ethical value of life alluded to in paragraph C above. Afterwards, perhaps employing a different approach, they could study the prohibition of homicide and the three mishnaic and talmudic citations found in paragraph D. Indicate that despite the overriding importance of the commandment to save life, an innocent man may not be killed to save another.⁸ In the Novick case, and apparently, only in such a situation, the fetus is not yet considered a "soul" and therefore its mother's life takes precedence. This paves the way to the conclusions in paragraphs E and F.

7. See also *Pesachim* 25b. The teacher should carefully study Rashi's comments to both *Sanhedrin* and *Pesachim* concerning "My chazit".

8. Of course, the principle that "one soul may not be set aside for another" does not contradict the principle of "if one comes to kill you, kill him first" (*Sanhedrin* 72a; see Rashi to *Ex.* 22:1).

It is preferable to conclude the session with a selection from aggadah or Jewish thought. Here are several ideas: God grants life (cf. *Job* 10: 8-12). If one is sensitive, he is aware that life is a gratuitous gift which has been bestowed upon him. Yet, he is formed against his will, born against his will, lives against his will, and dies against his will (Cf. *Avot* 4:29). One may not shorten his life, or the life of another person, unless his Creator commands him to do so, e.g., in the case of an "aggressor" (*Sanhedrin* 73a), or a woman who experiences difficulty in childbirth and the fetus is "pursuing" her (the mishnah in *Ohalot* cited above), or executing one found guilty of a capital crime, or fighting an obligatory war, and so forth.

Killing a human being, even before it is born, for convenience or for economic considerations, out of feelings of mercy or desperation, as a rite or for propaganda purposes, are all diametrically opposed to a genuine Jewish outlook on the sanctity of life. The believing Jew recites each day an affirmative, humble, and optimistic approach to life. When he lies down to sleep he says, "In Your hand are the souls of the living and the dead, 'In His hand is the soul of every living thing and the spirit of every human being' (*Job* 12:10), I commit my spirit into Your hand...." Upon awakening he recites, "My Lord, the soul You have given me is pure. You have created it...So long as the soul is within me, I offer thanks before You...."

Suggest additional questions for study, such as:

- a. Assume that the pregnant woman was not married and that the identity of the father is unknown. Does this change the situation from a halachic, ethical, or legal standpoint?
- b. Assume that the tragedy occurred in the eighteenth week of pregnancy, not the twenty-eighth week. The fetus could be delivered only if the mother was artificially respirated and given medications for a period of ten weeks. Does this change the situation from the three standpoints mentioned above?
- c. The mother left a will stating that if she could not give birth in a normal manner, she does not want her baby to be delivered, and that it should be allowed to die along with her. Does this change the halachah?

CHAPTER 3

MEDICAL AND ETHICAL PERSPECTIVES

Medical Perspectives

The verdict of the court contains no medical facts. Pertinent medical information includes the following: At what stage of pregnancy did Mrs. Novick die? What was her health record during pregnancy? Was she under medical supervision until her death? Which criteria were used to ascertain her death?

Let us assume that the medical facts were as follows:¹ Throughout the pregnancy until her death, Mrs. Novick was healthy. She did not take any medication, was under proper medical supervision, and she enjoyed a complication-free pregnancy. In the twenty-eighth week of pregnancy Mrs. Novick was severely wounded in the head and rushed to the hospital. She was admitted to intensive care and connected to a respiratory apparatus. Several hours later it was determined that her brain had died. Her heart was still beating regularly and her blood pressure was stable. Fetal monitoring showed normal activity.

From a medical standpoint, two considerations are of primary interest. The determination of her death and the prognosis of the child's chance to live and develop normally. To determine brain death, two conditions must be met:

1. Clinical testing must prove that the entire brain, including the brain stem, have ceased to function.
2. The brain death is irreversible.

The brain is composed of several sections, each with a unique function. The

1. Several of these facts are based on newspaper articles and are not necessarily correct.

cerebrum controls, among other things, consciousness, thinking, understanding, memory, and voluntary sensations and movements. The brain stem controls unconscious activity and transfers all of the activity in the cerebrum to the body and vice versa. The brain stem also controls and operates the functioning of the esophagus, the sleep-waking cycle, and primarily, the respiratory and cardiac centers.

When the cerebrum ceases to function, the person becomes unconscious, displays no voluntary movements, and is totally severed from his surroundings. The respiratory, cardiac, and digestive systems, along with the sleep-waking cycle, continue to function normally as long as the brain stem is alive. This is the vegetative state in which the brain has not yet died. When the brain stem dies, the vital centers, beginning with the respiratory system, cease to function, and without ventilatory assistance, the other organs gradually cease to function. If ventilatory assistance and proper medication are administered, the other organs of the body, including the heart, liver, lungs, and kidneys will continue to function, for the respirator replaces the natural breathing center found in the destroyed brain stem. Regular respiratory activity enables the other organs to continue functioning as separate biological units.

Neurological testing is employed to determine that the brain has died and additional testing substantiates the diagnosis. To ascertain if the brain has died irreversibly, the physician must rule out certain types of poisoning, low body temperature, and temporary systematic disorders that generate a false clinical picture of brain death. The symptoms of brain death must be rechecked after intensive treatment has been administered for several hours. If these conditions are met, the brain is considered to be irreversibly dead. From a medical point of view, this determination is absolute. At this stage, cardiac and other vital centers continue to function normally, and organs may be removed for transplants. In the Novick case, we may reasonably assume that the fetus continued to receive all of its

needs and did not suffer damage to its vital organs.

The prognosis for a fetus extracted by a Caesarean section from a pregnant woman whose brain has died is contingent upon the stage of pregnancy at the time of her death.

- A. If it is before the twenty-fourth week, the fetus has no reasonable chance to live, and it is very difficult to properly oxygenate the mother during the long period necessary for gestation.²
- B. If she is in the twenty-fourth to twenty-eighth week, some physicians suggest administering oxygen and blood infusions until the twenty-eighth week. A Caesarean section may then be executed. This option has become available in the last few years thanks to recent advances in resuscitation, the means to determine brain death, and the ability to keep the heart and lungs functioning regularly.
- C. If the twenty-eighth week has passed, the fetus may be delivered immediately after the mother's death. In 1961, Ritter surveyed the medical literature which discusses the performance of post-mortem Caesarean sections. He suggests that the procedure is operative after the twenty-eighth week, even though the procedure at that time was second-rate.³ Similar results were published in a survey conducted ten years later.⁴ In a survey published in

2. Only isolated cases of prolonging biological life for an extended period after brain death have been recorded. For example, one man's life was prolonged for 74 days until the court decided what to do, cf. J.E. Parisi, et al, *N ENGL J MED* no.306, pp. 14-16. A pregnant woman was kept alive for 64 days until her child was delivered, Editorial, *Med World News* 24:20-21, 1983. She was in the twenty-second-and-a-half week of pregnancy and despite complications, the baby was born normal. This case was unusual for several reasons, especially since it is accepted that before the twenty-fourth week of pregnancy the baby will not be healthy.

3. J.W. Ritter, *JAMA*, no. 175, 1961, pp. 715-716.

4. C.E. Weber, *AM J OBSTET GYNECOL*, no. 110, 1971, pp. 158-165.

1982, some two hundred successful operations were reported after the twenty-eighth week of pregnancy.⁵ The current medical view is that from the twenty-eighth week of pregnancy and thereafter, a Caesarean section performed after the mother has died is likely to result in the birth of a normal infant.⁶

Ethical Perspectives

Brain death is defined as death by physicians, jurists, and moralists throughout the world (except in Japan). The Ministry of Health and the Supreme Court in Israel consider brain death to be legal death.⁷ Likewise, the Chief Rabbinate of Israel has ruled that brain death is defined as death.⁸ Hence, there is no moral wrong in the performance of a Caesarean section on a woman whose brain has been diagnosed as dead in order to save the life of the fetus.

The performance of a Caesarean section on a deceased pregnant woman in order to save the life of the fetus or to bury it separately is an accepted social-ethical norm in practically every society.⁹ Until the sixteenth century, the Caesarean delivery was performed primarily, if not exclusively, to extract the fetus, alive or dead, from the dead mother's uterus. The operation is not mentioned in the medical writings of Hippocrates and Galen. Greek mythology attributed this procedure to the gods, due to its mystical aura.¹⁰ The ancient Romans attempted to extract the fetus

5. W.P. Dillon, et al, *JAMA*, no. 248, 1982, pp. 1089-1091.

6. E.H. Loewy, *AM J OBSTET GYNECOL*, no. 157, 1987, pp. 1097-1101.

7. *Blacker vs. State of Israel*, Dec. 3, 1986.

8. *On 1, Marcheshvan, 5747 (1986)*. See *Assia*, no. 42-43, *Nisan*, 5747, pp. 70ff. See also A. Steinberg, *Assia*, no. 44, *Nisan*, 5748, pp. 56ff. However, this definition of death is not accepted by all halachic authorities.

9. Only Islam opposed performing Caesarean delivery and required that the child, a product of the demons, be killed. See J.H. Young, *The History of Caesarean Sections (London)*, 1944.

10. *Ibid*.

alive.¹¹ Christianity sanctioned the procedure and required that every fetus, even a dead one, be removed from the womb in order to baptize it before burial.¹² Quite possibly, the Jews were the first to operate on a pregnant woman who survived the surgery.¹³ However, in those days, the mother usually died, and only in unusual cases did she survive the operation.¹⁴

The modern Caesarean section, the surgical extraction of a live fetus from a live mother (either to save the fetus, the mother, or both) is a rather recent development. Today the fetus may be extracted from the womb after the mother's brain has died, providing that

she is kept biologically alive until the delivery. However, an important ethical distinction must be drawn between the performance of a Caesarean section immediately after the mother's death and between prolonging the biological life of the mother in order to operate at a later date.¹⁵ The former is possible only if the mother died at an advanced stage of pregnancy.¹⁴

The ethical debate surrounding abortion is irrelevant to the Novick case. However, even those who permit elective abortion would agree that in the Novick case, the deceased mother had no rights, and the only right which remained was the right of the fetus to live. Many pro-abortionists also contend that if the fetus has reached the stage of viability, it should not be aborted, for such an action is essentially a premature birth. In conclusion, because Mrs. Novick had no rights, and according to our present knowledge the potential of the fetus to live and lead a normal life was high, failure to deliver the viable fetus caused its death.

The father's demand for a guarantee that his child would be normal is a medical impossibility, and also unnecessary, for in every pregnancy and birth there is a certain risk that a deformed child will be born. It is unthinkable to refrain from delivering the Novick fetus at such an advanced stage of pregnancy.

In an article discussing incidents similar to the Novick case, the author summarized his approach as follows: If the operation is performed from the twenty-eighth week of pregnancy and thereafter, the child is likely to be normal. Delivery at this stage of pregnancy is not experimental. If the future of the fetus is doubtful, the operation should be considered experimental and a relative of the family must give his consent to operate.¹⁶

15. Modern technological advances enable us to prolong the biological life of a woman whose brain has died, but this creates the ethical problem of exploiting a human being, even if she is dead, for the benefit of others. This interesting question is irrelevant to our discussion. A detailed ethical discussion is found in E.H. Loewy (note 6 above).

16. E.H. Loewy (note 6 above).

11. See E.H. Loewy (note 6, above).

12. See note 4 above.

13. See Mishnah Bechorot 8:2: "Yotzei dofen [a child delivered by Caesarean section] and the one following it" - the mishnah apparently means that the woman could become pregnant again and give birth after the operation. However, in his Commentary on the Mishnah, Rambam wrote, "Concerning that which people say, that a woman may survive after her stomach has been torn open and that she can become pregnant and give birth, I do not know the reason, and it is a very strange matter." Therefore he, and those who followed him, explained the mishnah differently. Other sources contradict this opinion: See Tosafot R. Akiva Eiger on the mishnah. Igrot Moshe, Y.D. part 2, no. 74 wrote that nature has changed since then.

14. The origin of the word "Caesarean" is unknown. The prevalent opinion was that Julius Caesar (b. 102) was delivered using this method from his deceased mother and therefore the procedure was called "Caesarean." But this hypothesis is incorrect, for his mother lived many years after his birth. See C.E. Weber, *AM J OBSTET GYNECOL*, no. 110, 1971, pp. 158 - 165. Another possible origin of the term is that other Caesars, unknown to us, were delivered by this method, see Young (note 9 above). Others think that the term originated from the Roman law forbidding burial of pregnant women before the fetus was removed, and the operation was called "Caesarean" due to the requirements of the Caesar. See W.P. Dillon, et al. *JAMA*, no. 248, 1982, pp. 1089-1091. The accepted theory today is that the word originates from the Latin "caedere" which means to cut. Hence, the English expression "Caesarean section," is actually a mistaken usage, for both words have the same meaning. See H.A. Gabert and M. Bey, *N.A.M. OBSTET GYNECOL CLIN*, no. 51, 1988, pp. 591-605.

CHAPTER 4 LEGAL PERSPECTIVES

According to Israeli law, Section 1 of the Capacity and Guardianship Law, 1962, the fetus is not capable of having rights and obligations, that is, its rights and obligations begin only after birth.¹ However, it is sometimes necessary to protect fetal interests at an earlier period and Section 33(6) of the Capacity and Guardianship Law empowers the court to appoint a guardian for the fetus. Section 34 of that Law states that the guardian may be an individual, a body corporate, or the Administrator General. The court may appoint the person who, in the circumstances of the case, seems to be the most appropriate for the welfare of the ward (Section 35).

As the law began to recognize the separate interests of the fetus, the need to create a legal basis for the appointment of a guardian for the fetus arose.² For example, according to Israeli law, Section 3(b) of the Succession Law, 1965, a person who was born 300 days after the death of the deceased is deemed to have been living when the deceased died and may inherit the estate of the deceased.

Israel recognizes the rights of dependents to receive compensation after the death of their maintainer, including the protection of

1. See *Civil Appeal (C.A.) 9/74 Inzel et al. v. Kogelmus et al., Piskei Din (Reports of the Israeli Supreme Court; hereinafter: P.D.) 29 (1) 663-665*, where it says that "a person is not capable of having rights until his birth is completed." However, according to Judge Shamgar in *C.A. 413/80 Plonit v. Ploni P.D.35 (3) 57*, this definition is too general. Cf. Section 38 of the Punishment Law, 1977 and also *Criminal File (Tel Aviv) 854/80 The State of Israel v. Dr. Dolberg Psakim Mehoziim (Reports of the Israeli District Court; hereinafter: P.M.) 5747 (b) 446,454*.
2. Judge Shamgar concerning *C.A. 413/80* above.

the prospective rights of the fetus until it is born and becomes a legal person.³ Similarly, the right of the fetus to sue for corporeal damage caused while it was in the womb has been recognized,⁴ but this right may be executed only after birth.⁵ This approach was adopted in Israel in *Zeitov v. Katz*.⁶ The Supreme Court determined that "there is no special difficulty in holding a physician liable towards a minor for negligence before the mother conceived or before the birth of the minor, if the child would have been born healthy were it not for the doctor's negligence." An abstract duty of care obligates the physician to employ reasonable precautions in the care of minors.⁷ The verdict in the *Zeitov* case followed the American law⁸ which recognizes the crime of wrongful death. The United States also recognizes the right to sue for negligence in inducing premature birth or bringing about the death of a non-viable fetus.⁹ Several countries adopted the assumption that a viable fetus is a "person" in claims of wrongful death.¹⁰

English law limited the liability of the physician when his negligence led to the birth of a deformed child,¹¹ but other legal

3. Section 78 of the *Civil Wrongs Ordinance (N.V.)*.
4. *Montreal Tramways v. Leveille (1933) 4 DLR 331*.
5. *Canada - Duval v. Seguin (1972) DLR (3d) 418*; *England - Williams v. Luff (1978) 122, SJ 164*; *Paton v. British Pregnancy Advisory Service (1978)*; *C. v. S. (1987) 1 All.ER 123*. However, following this verdict, the opinion was voiced that the law must recognize the need to protect the rights of the fetus before it is born; *S.P. de Cryz, "Abortion C.V.S. and the Law" (1987) 17 faml 319 23*; *United States - Hughson v. St. Francis Hospital (1983) 93 AD 131 459 N.Y. Sed 814*.
6. *P.D. 40 (2) 85*, Judge Barak's opinion is on p. 113.
7. *Ibid.*, p. 122.
8. *Harbeson v. Park Davis Inc. 656 P. 2d 483 (Wash. 1983)*; *Curlender v. Bio Science Laboratories 165 Cal. Rptr. 477 1980*; *Cockrum v. Baumgartner 447 NE 2d 385 (Ill. 1983)*; *James v. Caserta 332 SE 2d 872 (W. Va. 1985)*.
9. *Group Health Association Inc. v. Blumenthal 453 A 2d 1198 (Md. 1983)*; *Amadio v. Levin 501 A 2d 1058 (Pa. 1985)*.
10. *Summerfield v. Superior court 698 P2d 712 (Ariz. 1985)*.
11. *Paton v. Trustees of British Pregnancy Advisory Service (1975) 2 All.ER 987, 990*; *McKay v. Essex AHA (1982) 2 All.ER 771 CA*; *C.F. Udaie*

systems have gradually recognized the duty of the physician to care for the fetus,¹² even when the parents requested him to prevent pregnancy or the birth of a deformed child. This duty may also exist when inaccurate or insufficient information has been provided by the physician in cases of genetic counseling or when the physician has been negligent in performing an unsuccessful abortion.¹³

When does the fetus begin to acquire rights? The Catholic church, for example, confers rights from the moment of conception, but most modern legal opinions maintain that the fetus acquires rights at the moment it can live independently, that is, from the twenty-fourth week of pregnancy and thereafter.¹⁴

Today, the right of the fetus to legal protection is practically undisputed,¹⁵ and

since the fetus is unable to consent to medical, or any other type of intervention that may affect it, any proposed treatment must consider its welfare.¹⁶ No distinction is drawn between the rights of a fetus conceived *in vivo* or *in vitro*.¹⁷ However, when the life of the mother is jeopardized, fetal rights are circumscribed.¹⁸ At the same time, several contemporary opinions tend to

v. Bloomsbury AHA (1983) 2 All.ER 522; *C. v. S.* (1987) 1 All.ER 1230; *R. v. Tait* (1989) Times 26.4.89. The right was also limited in the legislation of the Congenital Disabilities (Civil Liabilities) Act 1976.

12. *Germany* - BGH 20 Dec. 1952; BGHZ 8, 243, 11 Jan. 1972; BGHZ 89, 55 7 July 1987 (VIZR 193/86).

The Helsinki Declaration on the rights of the fetus recognizes that the physician is liable for negligence throughout the pregnancy. Revised Declaration of Helsinki (1975/83) I 5-7; App. VII, Council of Europe Recommendation 1046 (1986) No. 5, 5-14 App. XIII 85.

13. *Israel* - C.A. 518/82 Zeitov et al. v. Katz et al., P.D. 40 (2) 85.

America - *Hatke v. Mickelway* 707 F 2d 1544 (DC. Cir. 1983); *James v. Caserta* 332 5e 2d 872 (W. Va. 1985).

Germany - BGH 22 Nov. 1983; BGHZ 89, 85 7 July 1987 (VIZR 193/3).

14. In *Roe v. Wade* 410 U.S. 113 (1973) in the United States, the verdict stated that the state has the right to protect the interests of one who has the ability to live, including an ovum fertilized *in vitro*. In England, the right is recognized from the twenty-eighth week of pregnancy in the Infant Life (Preservation) Act 1929.

15. Various Human Rights Commissions recognize the need to protect a new creature from the moment of fertilization:

England - Report of the Committee of Inquiry into Human Fertilisation and Embryology, ed. Dept. of Health

1984). *The Unborn Children (Protection) Bill*, June 1985 explicitly protects fetuses.

Australia - Australian Senate Select Committee on Human Embryo Experimentation in Australia (Canberra 1986).

Europe - Revised Declaration of Helsinki (1975/83) I 507 App. VII, Council of Europe Recommendation 1046 (1986) no. 6-7 (cf. App XIII).

Germany - German Legal Profession Congress (1986) Resolutions VII 307 App. L. Rev. State ch. 38 sec. 82-26 (7).

Several states in America recognize fetal rights. Illinois defines fertilization as a stage in human development worthy of protection and passed legislation stating that the one responsible for fertilization is responsible for the care and maintenance of the fetus. Cf. Ill.Rev.state ch. 38 sec. 82-26 (7). Minnesota forbids experimentation on human organisms from the moment of fertilization, be they fertilized *in vivo* or artificially.

16. The fetus is a ward according to Section 33 (6) of the Capacity and Guardianship Law, 1962, which empowers the Court to appoint a guardian for the fetus. See *Various Requests (Haifa)* 290/78 Hannah Kohen v. Ohanah P.M. 5739 (1) 171. According to Section 68 of the Law, the guardian can make decisions regarding medical intervention for the welfare of the ward. See *Permission for Appeal* 698/86 Attorney General v. Ploni et al., P.D. 42 (2) 661.

17. *Roe v. Wade* 410 45, 113 (1973); See entries "Artificial Insemination" and "Embryo Transfer" in *Duncan Dunstan & Welbourn* (ed.), *Dictionary of Medical Ethics* 15 (London, 1981).

18. *Roe v. Wade* 410 U.S. 113 (1973). The United States Supreme Court determined that the state has the right to protect the interests of one who has the potential to live, but the right of the fetus to develop is limited when the mother's right to privacy and well-being is infringed upon. See also *C.V.S.* (1987) 1 All.ER 123; B.M. Knoppers, "Modern British Technology and Human Rights," *Am. J. Comp. L.* (1988) 33, 1-31, pp. 19ff; J.L. Lenow, "The Foetus as a Patient: Emerging Rights as a Person?" *Am. J. Law Med.*, vol. 9 (1983), p. 1.

recognize other rights of the fetus comparable to the rights enjoyed by the ill, even when those rights conflict with the rights of the mother.¹⁹ When the life of a viable fetus is endangered, the state is empowered to coerce the mother to undergo medical treatment to save it²⁰ if she is a drug addict or an alcoholic,²¹ or if she refuses medical treatment for religious reasons,²² or if medical intervention is required to prevent abnormal fetal development.²³

The question of fetal status and the protection of its rights becomes increasingly important as technological advancements are made in artificial insemination, freezing

of fetuses, use of fetal organs and membranes in research, and using sperm for *in vitro* semination. Many other issues related to fetal rights have arisen in medicine, ethics, and jurisprudence.²⁴

The Israeli Supreme Court raised the question: Does the fetus possess the right to refuse to be aborted in order to acquire legal rights at the time of birth?²⁵ Judge Shamgar determined that the wording of the Capacity and Guardianship Law is insufficient to answer the question even though it apparently contains no restrictions. He therefore concluded that despite the omission of an explicit ruling, the general wording of the law implies that the fetus has no legal status that requires protection. Judge Ben-Ittu is also of the opinion that had the Legislator wished to recognize the rights of the fetus, he would have done so, just as he did in specific laws such as the Succession Law or the Civil Wrongs Ordinance.²⁶ In a case in which the wife requested from the Pregnancy Termination Commission to interrupt her

19. J. Benschof, "Reasserting Women's Rights in Late Abortion", & *Technological Advances in Foetal Viability*, *Fam. Plan Respect.*, vol. 17 (1985), p. 162; S.P. de Cruz, "Abortion C.V. and the Law", *FAM*, vol. 17, 1, p. 319; *Re B (Wardship: Medical Treatment) As minor* (1981) 1 WCR 1421; *CA Superintendent of Family and Child Services and MacDonald Re* (1982) 135 DLR 3rd 330, 336 (BCSC). In Germany, the right of one who has the "potential to live" is protected throughout the period of gestation, even if it conflicts with maternal interests, unless the mother's life is endangered. *German Legal Professions Congress* (1986), Resolutions VII 3-7 App. XII.
20. *Raleigh Firkin - Paul Morgan Memorial Hospital v. Anderson* 201. A 2d. 537 (NJ 1964); *Jefferson v. Griffin Spalding Country Hospital Authority* 274 5e 2d 457 (GA 1981).
21. For children born as alcoholics, see D.C. Bross & A. Meredyth, "Neglect of the Unborn Child - An Analysis Based on the Law in the United States," 1979 3 *Child Abuse Neg.* 643. In *Taft v. Taft* 446 NE 2d 395 (Mass 1983) it was decided that the fetus may file claim for damages incurred by its mother's alcoholism.
22. *Raleigh Firkin - Paul Morgan Memorial Hospital v. Anderson* 201. A 2d. 537 (NJ 1964). A woman in the thirty-second week of pregnancy who had refused treatment on religious grounds was ordered by the court to receive blood transfusions in order to save her fetus.
23. *Canada - Re Childrens Aid Society of Wenora and JC* (1982) 13 L DLR 3d 249; *Re Superintendent of Family and Child Service & MacDonald* (1983) 135 DLR 3d 330.
America - Jefferson v. Griffin Spalding Country Hosp. 274 SE 2d 457 (GA 1981).
England - Re D (A minor) (1986) 3 WLR 85
CA D (A minor) v. Berkshire County Council (1987) 1 All.ER 20 L1H.

24. Dr. Ram Yishi raises several issues in "Mah bein Ubar Lekiliah? Sugiyot Musariot veacharot behashtalat Rikmot Ubariot," *HaRefuah, Iton HaHistadrut HaRefuit*, Jan. 1990, vol. 118, p. 46. In England a governmental committee was established to discuss, among other issues, the question of fetal status in the above mentioned areas. Cf. *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmd. 9314 HMSO) pub. in King's Council (King's College, London, 1985); G. Williams, in *Textbook of Criminal Law*, 2nd. ed. (1983), p. 29, discusses if a physician is guilty of homicide when, during the development of a "test-tube baby," he destroys the test-tube. The "baby" is yet unborn, but it has independent existence, and from a biological standpoint it is alive, even though the legal criteria of heartbeat is absent. (Compare the Israeli decision in Section 308 of the Penal Law and Criminal File 854/80 State of Israel v. Dolberg P.M. 5747 (2) 446). Williams concludes that the "baby" is not yet sufficiently developed to incriminate the physician for murder. In England, a decision was recently passed in which a five month (20 week) old fetus was not considered "another person" by the penal law dealing with threat to life. *R. v. Tait* (1989), *Times* 26/4/1989.
25. C.A. 413/80 *Plonit v. Ploni* P.D. 35 (3) 57.
26. *Ibid.*, p. 82.

pregnancy, the court ruled that the Legislator sought to deny status to the husband and as a result he was not entitled to be heard. Judge Alon voiced a minority opinion when he ruled that the principles of natural justice entitle the father to be heard.

In British law, the husband or father does not have to be consulted in order to authorize termination of the pregnancy.²⁷ However, the notion that the fetus has the right to petition by agency of its father in order to prevent any damage to it has been discussed in the literature.²⁸

Authority of the Court

According to the medical facts, Mrs. Novick was in the twenty-eighth week of pregnancy, generally healthy before the incident, under regular medical surveillance, and enjoying a complication-free pregnancy. According to medical determination, Mrs. Novick's brain had died irreversibly and the judge could not ask her if she wanted to save the fetus in her womb. No conflict existed between saving her life and the life of the fetus.

According to the Israeli law formulated in The Interpretation Law, 1981, the fetus is not defined as a "person." The implication of Section 1 of the Capacity and Guardianship Law, together with the conventionally accepted meaning of the term "person," is that a fetus is not considered a "person" and its parents are not its natural guardians, for they are the natural guardians only of minors until the age of eighteen who are their offspring and who are defined as "legal persons."²⁹

The court ruled in the Novick case that the request exceeded the bounds of Section

68 of the Capacity and Guardianship Law "because we are not dealing with...a ward, but with a fetus who is yet unborn." However, from the Capacity Law itself we may learn that the court did indeed have authority to rule. Section 80 of the Capacity Law defines the term "ward" as one for whom the court has appointed a guardian (according to Section 33) or one for whom the court is permitted to appoint a guardian, even if it is unclear if the conditions necessary for the appointment have been met.

Section 33(6) of the Capacity Law states that the court may appoint a guardian for a fetus, and since the court is permitted to appoint a guardian for the fetus, the fetus is under the court's protection, and as long as a guardian has not been appointed for the fetus, its father is not its guardian. Since the court was the guardian of the fetal ward, it should have considered the welfare of the ward who was liable to be damaged if it were not removed from its mother's womb.

Section 68 of the Capacity Law states that the Court may, at any time, on application of an interested party, take temporary measures which it deems appropriate for protecting the interests of a ward, either by appointing a temporary guardian, or otherwise. Section 68(b) of the Law states that if the request involved a ruling to permit surgery or other medical procedures, the court may not rule unless it is convinced by medical evidence that the proposed means is necessary for the physical welfare of the ward.

In the Novick case, the hospital was the interested party in the framework of Section 68 of the Capacity Law, it initiated the request to extract the fetus from the womb in order to save its life. The welfare of the ward, it would seem, would be to ensure its right to live. Thus, in choosing the appropriate medical procedure, the welfare of Mrs. Novick was not, as proposed by the judge, the crucial factor, only the welfare and benefit of the ward. Precedent for such a conclusion may be found in the Israeli Supreme Court verdict in Attorney General

27. *Paton v. British Pregnancy Advisory Service Trustees* (1979) QB 276; *Paton v. United Kingdom* (1981) 3 EHRR 408; I.M. Kennedy, "Husband Denied a Say in Abortion Decision," *Modern L. Rev.*, vol. 42 (1979), p. 324.

28. D.M. Yorke, "The Legal Personality of the Unborn Child," *SLT* (1979), p. 158; "The Abortion of a Foetus Incapable of Being Born Alive," *ALJ*, vol. 61 (1987), pp. 326, 328.

29. See *Various Requests (Haifa)* 290/78 *Hannah Kohen v. Daniel Ohanah P.M.* 5739 (1) 171.

v. Ploni,³⁰ which discusses the authority of the court to permit removal of a kidney from the body of an incompetent. The Court fixed the following clear, indispensable criteria for applying the provisions of Section 68(b) that enable the court to permit medical intervention.³¹

- A. The court must be convinced that without medical treatment the welfare of the ward will be impaired.
- B. The court must hear a medical opinion. That is, the welfare of the ward must be determined by objective medical facts and not by normative social morals.
- C. The medical treatment is required to protect the welfare of the ward.
- D. The welfare of the ward is the sole reason for medical intervention.
- E. The welfare of the ward must be clear and actual. The welfare of the ward

30. P.D. 42 (2) 661.

31. *Ibid.*, pp. 684, 687.

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must be considered, not the welfare of society.

In conclusion: If we accept the medical opinion that a child delivered by Caesarean section after the twenty-eighth week of pregnancy stands a reasonable chance to develop normally, and consider the fetus to be a ward entitled to protection and the possessor of rights, at least according to the opinion mentioned above which grants rights to the fetus in a case like this, then we may conclude that the court possessed authority to rule in favor of authorizing the medical procedure necessary to preserve the welfare of the fetus and to grant it life.

The last three essays are based on the work of Prof. Moshe Arend of the Department of Education at Bar Ilan University; Dr. Avraham Steinberg, child neurologist at Sha'arei Zedek Hospital, Jerusalem and Chairman of Medical Ethics at the Hadassah Medical School in Jerusalem; and the jurist, Mr. Yonatan Davis, expert in medical law. I thank them for their assistance.

Also, I am grateful to Judge Sarah Frish, chairman of *Piskei Din: Refuah U'Mishpat*, for her assistance.