

A Fetus Is Not an Independent Life: Abortion in the Talmud

The rabbis distinguish four stages in the fetus' development towards personhood. For the duration of the pregnancy, until the commencement of active labor, “a fetus is like its mother's thigh” (עוֹבֵר לִיָּדָא אִמּוֹ).

Dr. Ronit Irshai



Study of a Fetus in the Womb by Leonardo da Vinci, ca. 1511; Talmud

tractate Niddah. Wikimedia / 123rf

Rabbinic literature offers no systematic discussion of abortion, and whether the act is permissible or forbidden and under what circumstances.^[1] Nevertheless, several rabbinic texts discuss the status of the fetus as well and even abortion in certain specific scenarios, and this allows us to extrapolate on what the classical rabbis' attitude may have been towards abortion in general.

First 40 Days of Pregnancy: “Merely Water”

The Mishnah states that a fetus miscarried within its first forty days does not induce birth-related ritual impurity, for there is no concern that a child had already been formed:

משנה נדה ג:ז המפלת ליום ארבעים, אינה חוששת לולד. ליום ארבעים ואחד, תשב לזכר ולנקבה ולגדה.

m. Niddah 3:7 [If] a [woman] miscarries on the fortieth day, she need not be concerned about [it being] a fetus. On the forty-first day, she should count [her birth impurity as] for both male and female, and her menstrual impurity.^[2]

רבי ישמעאל אומר, יום ארבעים ואחד, תשב לזכר ולגדה. יום שמונים ואחד, תשב

R. Ishmael says: [On] the forty-first day, she should count [her birth impurity as] for a male and her menstrual impurity. [On] the eighty-first day, she

לְזָכַר וּלְנַמְקָהּ וּלְגַדְהָ, שֶׁהַזָּכָר נִגְמָר לְאַרְבָּעִים
וְאַחַד, וְהַנְּמָקָה לְשָׁמוֹנִים וְאַחַד.

should count [her birth impurity as] for both male
and female, and her menstrual impurity, since the
male [fetus] is completed on the forty-first day, and
the female [fetus] on the eighty-first.

וְחֻקֵּימִים אוֹמְרִים, אֶחָד בְּרִיַת הַזָּכָר וְאַחַד
בְּרִיַת הַנְּמָקָה, זֶה וְזֶה לְאַרְבָּעִים וְאַחַד.

But the Sages say: The creation of male and female
are one and the same— both [are completed] on the
forty-first day.

The Mishnah here follows the Aristotelian concept of fetal development (epigenesis), dominant in Hellenistic medicine of the time, that argued that embryos develop distinct parts at forty days for males and three months for females.^[3]

The Priest's Pregnant Daughter Eating Ritual Food

The Talmud applies this distinction to the law that the daughter of a kohen (priest) from Leviticus 22:13: If she is married to a non-kohen, she may no longer eat *terumah* (the consecrated food of the kohen), but if she is widowed, and did not have children, she may return to her father's house and eat *terumah* again (Mishnah Yebamot 9:6). In this context, Rav Chisda, a third generation Babylonian Amora, discusses the question of pregnancy:

בבלי יבמות סט: [מייבנן 95] אמר רב חסדא:
"טובלת ואוכלת עד ארבעים יום."

b. Yebamot 69b Rav Chisda said: "She may immerse
herself [as purification] and then eat up to forty
days [after a possible conception]."

The Talmud then explains the logic behind this ruling:

אי לא מעברא הא לא מעברא. ואי מעברא,
עד ארבעים יום מיא בעלמא היא.

If she is not pregnant, she is not pregnant. If she is
pregnant, until the fortieth day it [the fetus] is
merely water.

In sum, according to the Mishnah and the Talmud, before forty days, the embryo doesn't have the status of a fetus, since it does not have human form, and thus, ritually, the miscarriage counts as the equivalent of a woman's period, and the pregnancy counts as nothing. What about after 40 days?

Executing a Pregnant Woman

The rabbis discuss the status of a fetus^[4] in the context of what to do when a pregnant woman convicted of a capital crime is condemned to death. the Mishnah, however, a fetus acquires personhood when its mother is in active labor:

משנה ערכין א:ד האשה שהיא יוצאה להרג אין
ממתנין לה עד שתלד. וְשָׁבָה עַל הַמִּשְׁבֵּר
ממתנין לה עד שתלד.

m. Arakhin 1:4 The woman bound for execution: one
does not wait for her until she gives birth. If she has
sat upon the birthing seat, one waits for her until
she has given birth.^[5]

The implication is that up until she is ready to give birth, a fetus is not considered to be an independent life, and a woman's execution is not stayed just because she is pregnant. The Tosefta works with a similar assumption:

תוספתא ערכין א:ד האשה שיוצאה ליהרג,
הוציא עובר את ידה ממתנין לה עד שתלד,
שאלו ולדה וולדותיה נסקלין.

t. Arakhin 1:4 The woman bound for execution: If her
fetus extends its arm [outside her body], they wait
until she gives birth.^[6] For if it was still considered
just a fetus, it would be stoned [with her].^[7]

Here, only the appearance of a part of the fetus outside the woman gives it a status of independent life, beyond that of a mere fetus.^[8]

They Are One Body: The Talmud

In its discussion of the Mishnah, the Talmud^[9] claims that it is obvious that a mother carrying a fetus is not a reason to stay an execution:

בבלי ערכין ז. פשיטא, חד גופא הוא! b. Arakhin 7a Isn't this obvious? They are one body!

The Talmud answers that the reason the Mishnah even considers the possibility of waiting for the baby to be born before executing the mother is because the fetus represents potential financial value to the father, as we see from the Torah's law that a man who strikes a pregnant woman and kills the fetus must make penalty payment to her husband (see appendix).^[10]

Aborting the Fetus before Execution

Later, the Talmud states that, in order to avoid a spectacle, the court actually has the fetus aborted before executing the woman:

בבלי ערכין ז. אמר רב יהודה אמר שמואל: אהאשה שיוצאה ליהרג מכין אתה כנגד בית הריון כדי שימות ולד תחילה כדי שלא תבא לידי ניוול." b. Arakhin 7a R. Judah said in the name of Samuel: "If a woman is taken out to be executed, they first strike her in the abdomen so that they fetus dies first, to avoid her being disgraced (by a post-mortem miscarriage)."

Again, no concern is expressed about the life of the fetus.

Moved from Its Place

The Talmud also clarifies the reason why active labor marks the independent life of the fetus:

בבלי ערכין ז. מאי טעמא? כיון דעקר גופא אחרניא הוא. b. Arakhin 7a What is the reason [that we stay the execution once she is in labor]? Since [the fetus] has moved from its place [in the uterus], it is a separate body.

The amoraic term "moved from its place" appears to be synonymous with the tannaitic "seated on the birthing stool" in the Mishnah, both referring to the beginning of active labor. Before that period, the fetus is considered part of the mother.

“A Fetus is the Woman’s Thigh”

The concept of the fetus as part of the woman’s body extends well beyond laws about abortion. Indeed, the Babylonian Talmud has a legal phrase for the principle: עובר ירך אמו (*ubar yerekh immo*), “a fetus is its mother’s thigh.”^[11] This phrase is used in several legal cases involving pregnant animals and woman that have nothing to do with the ethics of killing a fetus.^[12]

A goring cow—According to the Torah, if a cow gores a person and the person dies, the cow is stoned to death, and it is forbidden to get any benefit from (literally “consume”) its carcass (Exod 21:28). The Talmud discusses the question of the status of a fetus, if the cow had been pregnant when it gored the person, and rules that if the calf was born before the court’s judgment, a person is permitted to derive benefit from it, but if it was born after the judgment, it is forbidden, since at the time of the judgment, it was simply a limb of its mother, and thus has the same legal status as its mother (b. Sanhedrin 80a; cf b. Baba Kama 46b).

The fetus of a torn animal—The Mishnah records a debate about whether the fetus of a טריפה “torn animal” (i.e., one that was not killed by ritual slaughter) may be offered as a sacrifice. Rabbi Eliezer says “no” and Rabbi Joshua says “yes” (m. Temurah 6:5). One explanation the Talmud offers for the debate is that Rabbi Eliezer believes that a fetus is like its mother’s thigh and Rabbi Joshua does not (b. Chullin 58a; cf. b. Temurah 30b).

Impurity from a mixture of corpse dust—A corpse causes seven-day impurity, requiring ritual cleansing (the red cow ritual), as does its רקב, i.e., decomposed dust or rot. Nevertheless, the rabbis assert that if two corpses are buried together, the *galgallin* “mixture” of their decomposed dust does not cause this impurity. Rabbi Jeremiah then asks about the decomposed remains of a pregnant woman: does the fetus in her womb simply count as the mother’s appendage, and thus it is as if only one person was buried there, and thus the corpse dust from this burial place causes impurity? Or, does the fact that babies are eventually born (if they survive) mean that it counts as a separate burial for the purposes of causing impurity? (b. Nazir 51a)

Manumission of slave’s fetus—According to Rabbi Yohanan, a slave cannot accept a document of manumission on behalf of a fellow slave if they have the same master. This contradicts the law that if a master says to his enslaved woman “you are to remain enslaved but your fetus is free,” that the baby thus acquires its freedom upon birth. One of the Talmud’s explanations is that since a fetus is really like the woman’s limb, it is as if she is accepting the manumission for part of her body, not on behalf of another person. (b. Gittin 23b)

From all these places, it seems clear that the rabbinic concept of the fetus as the mother’s appendage goes well beyond the ethics of abortion and reflects an overall worldview that a fetus lacks personhood until the woman goes into active labor.

Desecrating Shabbat to Save a Fetus

That the fetus gains a status of life when the mother goes into active labor is also highlighted in the Talmud’s discussion of saving the life of a fetus by violating Shabbat:^[13]

<p>בבלי ערכין ז'. אמר רב נחמן אמר שמואל: "האשה שישבה על המשבר ומ[ת]ה בשבת מביאין סכין ומ[ק]ר[ע]ין לה כריסה ומוציאין את הולד."</p>	<p>b. Arakhin 7a–b R. Nachman said in the name of Samuel: “If a woman was seated on the birthing stool and died on the Sabbath, a knife is brought, her belly is opened, and the fetus is removed.”</p>
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The Talmud then asks what this Mishnah is adding; we already know the principle that we violate Shabbat to save a life, even in a case that we don’t know for sure whether the person is alive or not. For example, we dig out a person who is believed to be buried in rubble. The Talmud answers:

<p>מהו דתימא? התם הוא דהוה ליה חוקה דחיותא מעיקרא אבל הכא דלא הוה ליה חוקה דחיותא אימא לא? קא משמע לן.</p>	<p>You might have said: there [in the case of the rubble] the person was alive and is presumed to have remained alive; here [in the case of the fetus] there was no such presumption of life, so it teaches us [that the Sabbath is nevertheless to be desecrated].</p>
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Samuel’s phrasing of the law—“a woman sitting on the birthstool”—implies that it is active labor that gives the fetus a status of presumed life, permitting the violation of halakha to save its life.^[14]

Abortion During a Dangerous Childbirth

The Mishnah addresses the question of whether an abortion is permissible when the mother's life is in danger during childbirth:

משנה אהלות ז:ז[*1] האשה שהיא מקשה לילד, מחתכין את הנלד במעיה, ומוציאין אותו אברים אברים, מפני שחיייה קודמין לחייו. יצא רבו, אין נוגעין בו, שאין דוחין נפש מפני נפש.^[15]

m. Ohalot 7:6[*7] When a woman is in difficult labor, one may cut up the fetus in her womb and take it out limb by limb, for her life takes precedence over its life. Once most of it^[16] has come out one may not touch it, for one may not push aside one soul for another.

The latter part of the Mishnah makes it clear that the fetus is considered an equal life only once it is (mostly) born. Even then, the Talmud grapples with why the baby can't simply be killed anyway, since it should be considered a *rodef*, a "pursuer," i.e., equivalent to a person who chases another with murderous intent, and thus killing it should be considered an act of self-defense.^[17]

The opening case of the Mishnah is often interpreted as a general rule that killing an unborn fetus is only permitted when the mother is in danger. Nevertheless, the Mishnah is specifically about a woman in active labor, at which point the fetus gains a status of independent life, as noted above in the Mishnah about a woman being executed.

Fetuses in the process of delivery but before emerging are on one hand considered an independent life but on the other hand, not yet of equal value to the living, breathing, mother, which is why it may only be killed if it poses a threat to the mother. Thus, this Mishnah does not imply a prohibition to abort the fetus before the woman goes into labor.

Court Authority for an Abortion

The Tosefta discusses a case of a medical abortion gone wrong, which seemingly suggests that court permission is required:

תוספתא גיטין ז"ג [צוקרמנדל] המחתך את העובר במעי אשה ברשות בית דין והזיק בשוגג פטור במזיד חייב מפני תקון העולם:

t. Gittin 3:13 If one dismembers a fetus in a woman's belly with the sanction of the court and causes injury [to the woman], if it was unintentional, he is not liable; if intentional, he is liable for reasons of sound social policy.

The Tosefta does not explain why the abortion is taking place, but it is likely referring to the case in Mishnah Ohalot, in which the mother is having a dangerous birth.^[18] If so, the necessity of obtaining a court's authorization would be because the mother's having entered into labor already gives the fetus a status of an independent, if still second-tier, life.^[19]

The Four Stages of the Fetus

If we read these texts in light of each other, a clear picture emerges of a four stage process:

1. Until the fetus is formed—40 days in the Hellenistic medical concept—the fetus has no status at all.
2. From 41 days until the beginning of active labor, the fetus is a part of the mother.
3. At active labor, the fetus is an independent, though inferior, life.
4. Once the head (or more) of the fetus is outside the mother, it is a human life like any other.

While the rabbis never address the question of abortion in the first two stages, nothing in these texts implies it would be forbidden. Certainly, they would not have seen it as a form of murder. Only at stage 3 does the fetus become a life, and even there it has an inferior status to living, breathing people. Only upon leaving the mother’s body, does the baby become a full life in rabbinic thinking, making it equal in value to that of its mother.

----- **Appendix** -----

Causing a Miscarriage

Much of the contemporary debate about the ethics of abortion hinge on whether or not a fetus has personhood. The rabbis, of course, looked to the Bible for answers, but the Bible never discusses purposeful abortion, only miscarriage, specifically as a consequence of assault:^[20]

<p>שמות כא:כב וְכִי יִצְאוּ אֲנָשִׁים וְנָגְפוּ אִשָּׁה הָרָה וַיֵּצֵאוּ יָלְדֶיהָ וְלֹא יָהִיה אִסּוֹן עָגוּשׁ יַעֲנֹשׁ כְּאִשֶּׁר יִשִּׁית עָלָיו בְּעַל הָאִשָּׁה וְנָתַן בְּפִלְלִים.</p>	<p>Exod 21:22 When [two or more] parties fight, and one of them pushes a pregnant woman and the fetus comes out, but there is no 'āsôn, the one responsible shall surely be punished according as the woman's husband may exact, the payment to be based on reckoning.</p>
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<p>כא:כב וְאִם אִסּוֹן יִהְיֶה וְנָתְתָה נֶפֶשׁ תַּחַת נֶפֶשׁ.</p>	<p>21:23 But if there is 'āsôn, the penalty shall be life for life.</p>
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The Hebrew word אִסּוֹן, *āsôn* means “harm” or “fatal accident,”^[21] but who is being harmed?

Fetus—It could refer the fetus, and the case would be: When the man strikes the woman and the baby comes out early, if it is alive, the assailant only pays a fine to the husband (not the woman!) for the trauma, but if the baby dies, he is executed for killing the baby.

Woman—The other, more likely, possibility is that it refers to the death of the pregnant woman. According to this understanding, the woman miscarries regardless, and the question is only whether the woman dies as a result of the trauma. The verse clarifies that the death penalty is only applicable if the woman is killed, but that the death of the fetus is punished only with a fine, payable to the man whose child this would have been had it lived. According to this reading, the Torah does not attribute personhood or independent status—what the rabbis term *nefesh* “life”—to the fetus.

No Mortal Harm to the Woman: The Mekhilta

In its reading of the verse, the Mekhilta de-Rabbi Ishmael—a 3rd century C.E. midrash halakha on Exodus from the Rabbi Ishmael school—entertains the possibility that killing the fetus could be considered killing a person but rejects it:

<p>מכילתא דרבי ישמעאל נויקון ח "לֹא יִהְיֶה אִסּוֹן" – באשה. "עָגוּשׁ יַעֲנֹשׁ" – בולדות.</p>	<p>Mekhilta de-Rabbi Ishmael Nezikin 8 “And there is no mortal harm” (Exod 21:22)—to the woman. “He shall surely be fined” (<i>ibid</i>)—for the fetus.^[22]</p>
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A similar midrash appears in the Rabbi Akiva school version of the midrash halakha on Exodus:

<p>מכילתא דרבי שמעון בר יוחאי כא:כב "לֹא יִהְיֶה אִסּוֹן" – שומע אני אסון באשה או אסון בולדות ת"ל (שמות כא:יב) "מִכָּה אִישׁ</p>	<p>Mekhilta de-Rabbi Shimon bar Yochai 21:22 “And there is no mortal harm”— Do I take this to mean mortal harm to the woman or mortal harm to the fetuses? A verse teaches (Exod 21:12): “He who strikes a man [and he</p>
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ת"ל "ולא יקה אסון" באשה ולא בולדות.
[נמת מות יומת] פרט לולדות הא מה

dies, is surely put to death]” — [the reference to “a man”] excludes fetuses [which do not have personhood yet]. What, then, is the meaning “and there is no mortal harm”? Harm to the woman, not to the fetuses.^[23]

In sum, both *Mekhilot* raise alternative readings but definitively reject the possibility that the fetus is treated legally as a life. The only consequence of killing the fetus is a penalty payment. All classic Jewish interpreters follow the *Mekhilot* and reject the application of personhood to a fetus.

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Footnotes

Published May 11, 2023 | Last Updated May 27, 2023

1. This piece is based on the opening section of “Chapter 3: Halakhic Rulings on Abortion” from Ronit Irshai, *Fertility and Jewish Law: Feminist Perspectives on Orthodox Responsa Literature*, trans. Joel A. Linsider (Waltham, MA: Brandeis University Press, 2012). It has been revised by the editors to fit the presentation style of TheTorah, with input from the author.

2. Translation of Charlotte Elisheva Fonrobert in *Oxford Annotated Mishnah*, 3.837–838.

3. Aristotle writes:

History of Animals 7:3 In the case of a male embryo aborted at the fortieth day, if it be placed in cold water, it holds together in a sort of membrane, but if it be placed in any other fluid, it dissolves and disappears. If the membrane be pulled to bits the embryo is revealed as big as one of the large kind of ants; **and all the limbs are plain to see**, including the penis, and the eyes also, which as in other animals are of great size. But the female embryo, if it suffer abortion during the first three months, is as a rule found to be undifferentiated; if however it reach the fourth month **it comes to be subdivided and quickly attains further differentiation**.

English from Jonathan Barnes, ed., *The Complete Works of Aristotle: The Revised Oxford Translation*, Bolington Series 71.2 (Princeton, NJ: Princeton University Press, 1991 [repr. of 1984]), 1.914. This Hellenistic-medical concept, especially as presented in the Mishnah, likely connects to the parturient laws in Leviticus 12, which has a 40/80 day scheme. See Zev Farber, “[Postpartum Impurity: Why Is the Duration Double for a Girl?](#)” *TheTorah* (2020).

4. The text doesn’t specify that the fetus is older than 40 days. This is likely assumed though, as will be clear, it doesn’t really matter, practically speaking.

5. Translation from Jonah Steinberg in, *The Oxford Annotated Mishnah*, ed., Shaye J.D. Cohen, Robert Goldenberg, and Hayim Lapin (Oxford, UK: Oxford University Press, 2022), 3.215.

6. The odd notion of an arm coming out first may be connected to the biblical story of the birth of Jacob in Genesis 25:26 Zerah in Genesis 38:28. See discussion of these texts and the reasoning behind them in Eran Viesel, “[Why Does the Torah Describe Babies Born Hands First?](#)” *TheTorah* (2018).

7. This last line is both difficult to parse and textually uncertain. The text here follows the Vienna MS, as noted by Lieberman in his *Tosefet Rishonim* (ad loc.) The Erfurt MS, as it appears in the Zuckermendel edition, reads שאלו ילדה את ולדותה נסקלין, “for if she had given birth to the fetus, would it be stoned?” As for what the line phrased this way could mean, R. Yehezkel Abramsky, in his *Chazon Yechezkel* commentary, explains the point as follows: The law of the goring cow condemns a calf to die with its mother, even after it was born, as long as the court condemned the mother (cow) before she gave birth. The Tosefta here is noting that this is certainly not the law for humans. R. David Pardo, in his *Chasdei David*, also understands the point of the line this way. Nevertheless, he thinks even with this interpretation, the text as is

unreadable as is. Thus, he suggests an emendation: שאילו הפרה היא ולדותה נסקלין: “for if she were a cow, its fetus would be stoned [in this scenario],” but she is human, so this doesn’t apply.

8. Pardo (*Chasdei David*, ad loc) understands the Tosefta as disagreeing with the Mishnah and holding a stricter position. In contrast, Abramsky (*Chazon Yechezkel*) sees the Mishnah and the Tosefta as expressing the same view.

9. Aramaic text follows MS Vatican 120–121 (12th/13th cent. Ashkenaz, with abbreviations filled in, punctuation added, and corrections (from the editor of The Friedberg Project) in brackets).

10. The passage reads:

איצטרך סלקא דעתך אמינא הואיל וכתב "כאשר ישית עליי בעל האשה" ממונא דבעל הוא ולא נפסדיה, קא משמע לן.	It is necessary, for otherwise, you might think that I would say that inasmuch as it is written (Exod 21:22) “according as the woman’s husband may exact from him” —[the fetus] is the husband’s property, which he should not be made to lose. Therefore, the Mishnah stated the rule [that the execution is not stayed].
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11. It is possible the meaning here is womb or “female parts,” with thigh as a euphemism, as it may also be in the biblical law of *sotah* (Numbers 5:21, 27).

12. Ephraim Urbach notes in this regard that even though the phrase “a fetus is its mother’s thigh” is not tannaitic phrasing (or even early Amoraic), no *tanna* believes the fetus to be a body in its own right or considers it a “life.” See Ephraim Urbach, פרקי אמונות ודעות, *[The Sages Their Concepts and Beliefs]* (Jerusalem: Magnes, 1971 [orig. 1969]), 214–218.

13. This comes up in the context of the Mishnah’s rule (Yoma 8:7) that “saving a life [*nefesh*] supersedes Shabbat.” Notably, the Mishnah is very lenient when it comes to the life of the pregnant woman:

משנה יומא ח:ה[*ד] עברה שהריחה, מאכלין אותה עד שתשיב נפשה. חולה, מאכלין אותו על פי בקיים; ואם אין שם בקיים, מאכלין על פי עצמו, עד שיאמר דין.	m. Yoma 8:5[*4] If a pregnant woman smelled [food], one may feed her until she regains her energy. If someone is ill, one feeds him according to specialists, and if there are no specialists available he is fed according to his wishes until he says “Enough!” (Translation of Yonatan S. Miller from <i>Oxford Annotated Mishnah</i> , 1.623–624.)
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The Talmud extends this permission to other halakhic violations:

בבלי יומא פב. [הספרייה הבריטית 400] תנו רבנן עברה שהריחה בשר הקודש או בשר דבר אחר תוחבין לה כוש ברוטב אם נתיישה דעתה מוטב ואם לאו מביאין לה רוטב עצמו אם נתיישה דעתה מוטב ואם לאו מביאין לה שומן עצמו, שאין לך דבר שעומד בפני פיקוח נפש יותר מעבודה זרה ושפיכות דמים וגילוי עריות.	b. Yoma 82a It was taught [in a baraita]: If a pregnant woman smells sacrificial meat or another (i.e. pig) meat [and is seized by a craving for it], a small stick is dipped in its gravy. If her mind comes to be at ease, good; if not, she is fed the sauce itself. If her mind comes to be at ease, good; if not, she is fed the fat of the item itself, for nothing stands in the way of protecting life except for [the prohibitions on] idolatry, incest, and bloodshed.
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In sum, even a biblical prohibition is waived in a case of mortal danger to the mother but, as Ephraim Urbach (*The Sages*, 216) says, “there is no indication that the ‘mind’ of the fetus is taken into account.”

14. Moreover, the Tosafot, a 12th century French commentary on the Talmud (b. Niddah 44a–b, s.v. איהו) notes that in this case, the fetus cannot be considered part of the mother, since the mother has already died and the fetus is therefore no longer dependent on her for sustenance; it is כמונה בקופסא דמי “as one situated inside a box.”

15. Hebrew follows the Kaufmann MS as it appears on the AlHaTorah website.

16. The Jerusalem Talmud (j. Sanhedrin 26c) reads ראשו ורובו “its head and most of it,” and the Babylonian Talmud (b. Sanhedrin 72b) reads ראשו “its head.”

17. The discussion hinges on whether or not the baby is protected because he is a minor. In the Jerusalem Talmud, the problem is presented thus:

j. Sanhedrin 8:9 [27c] An adult who became (i.e. was overpowered by) a minor, may the adult be saved at the expense of the minor's life? R. Jeremiah asked: Is it not taught [in the Mishnah], "If its head or most of its body has emerged, it is not touched, for one life is not set aside for another?" R. Yossi bar Bun said in the name of R. Chisda: "That case is different, for you do not know who killed whom."

יְהוֹשֻעַ מִטְהַרְרֵין ח:ט j. Sanhedrin 8:9 [27c] אָדוּל שֶׁנִּבְעַשׂה קָטָן מְהוּ לְהַצִּיל אֹת הַגְּדוֹל בְּנַפְשׁוֹ שֶׁלְקָטָן. הַתִּיב רַבִּי יִרְמְיָהוּ. וְהַתְנִינוּ. יָצָא רֹאשׁוֹ וְרֹבּוֹ אֵין נִוְגָעִין בּוֹ. שְׂאֵין דּוֹחִין נֶפֶשׁ מִפְּנֵי נֶפֶשׁ. רַבִּי יוֹסִי בַר בּוּן בְּשֵׁם רַב חִסְדָּא. שְׂנִיָא הֵיא תַמָּן שְׂאֵין אָתְּ יוֹדְעֵי מִי הֲרַג אֶת מִי.

The point is that as the mother could also be seen as killing the child, they are both pursuers and there is no way to judge. The Babylonian Talmud presents it a little differently:

b. Sanhedrin 72b Rav Huna said: "A minor in pursuit may be stopped at the expense of his life." Thus he maintains that a *rodef*, whether an adult or a minor, need not be formally admonished. Rav Chisda challenged Rav Huna [from the Mishnah]: "If its head has emerged, it is not to be touched, for one life is not set aside for another." But why should that be? [The fetus] is a *rodef*! "No, that case is different because she is pursued by [decree of] Heaven."

בבלי סנהדרין עב: [מבנין 95] אמר רב הונא: "קטן הרודף ניתן להציל [לו] בנפשו." קסבר רודף אינו צריך התראה, לא שנא גדול ולא שנא קטן. איתביה רב חסדא לרב הונא: "יצא ראשו ורובו אין נוגעין בו לפי שאין דוחין נפש מפני נפש!" ואמאי? רודף הוא! "שאני התם דמשמאי קרדפי לה."

See how R. Ezekiel Landau in the *Noda Bi-Yehuda (Mahadura Tenina, Hoshen Mishpat 60)* understands their dispute as pertaining to the essence of the law of *rodef*. Noam Zohar argues that the moral basis for the law of *rodef* lies primarily in the attacker's guilt. Accordingly, a minor, a small child, and certainly a fetus that unknowingly endangers another cannot be regarded as a *rodef*. See Noam Zohar "הלכה, פוליטיקה וחיידוש התורה" [Halakha, Politics, and Renewal of Torah], in *הציונות הדתית בראיה מחודשת* [Religious Zionism in New Perspective], ed. Moshe Roth (Ein Tzurim: Ne'emanei Torah Ve-Avodah, 1998), 203–2010.

18. In his *Tosefta KePeshutta* commentary, Lieberman notes that, unlike in the previous case, this does not say the person was a doctor, and thus argues that the Tosefta wants to emphasize that a non-medical person in a crisis needs permission to operate, and then is treated the same as a doctor who is operating.

19. What I am discussing in this article is the rule for Jews. In its treatment of Noahide (gentile) law, the Talmud takes a very strict position, arguing that abortion is forbidden and even a death penalty offense:

b. Sanherin 57b Rav Jacob bar Acha found written in a book of *aggadah* in Rav's study hall: "A Noahide may be sentenced to death by a single judge, on the basis of [testimony by] a single witness, without admonition, on the basis of [testimony by] a man but not by a woman, but even [by a witness who is] a relative. It was said in the name of Rabbi Ishmael: Even for [killing] fetuses

בבלי סנהדרין נז: [מבנין 95] אשכח ר' יעקב בר אהא דהוה כתיב בספר אגדתא דבי רב בן נח נהרג בדיין אחד ובעד אחד ושלא בהתראה מפי איש ולא מפי אשה ואפילו מפי קרוב משום ר' ישמעאל אמרו אף על העוברין.

מאי טעמא דר' ישמעאל דכתיב: 'שופך דם האדם באדם דמו ישפך'. איזהו אדם שהוא באדם? הוי או זה העובר שבמעני אמו.

What is Rabbi Ishmael's reason? For it is written (Gen. 9:6), "Whoever sheds the blood of man by (or "in") a man shall his blood be shed"—Who is a man in a man? A fetus in its mother's womb....

The disagreement between Rabbi Ishmael and the unnamed first *tanna* pertains to whether a Noahide is put to death for feticide, distinguishing them in that regard from Jews.

20. This seems to contradict the principle only a few pages later:

b. Sanhedrin 59a There is nothing that is permissible for a Jew but forbidden for a gentile.

בבלי סנהדרין נט: ליכא מידעם דלישראל לישרי ולגוי אסור.

The maxim is not easily reconciled with various prohibitions applied to gentiles but not to Jews, its veiled premise is that the various prohibitions imposed by the commandments are designed to elevate a person spiritually and that it is Jews who are meant to attain that higher spiritual plane. Rabbi Ishmael takes the view that for Noahides, the prohibition on murder includes feticide, and his view thus seems to pose considerable difficulty if Jews are not likewise forbidden, at least with the same degree of severity, to abort a fetus. It seems to me, however, that the maxim of "nothing permissible" is not so much a formal ruling as a value statement about Torah laws being sufficient. Indeed, if the prohibition is so severe, why was it never conveyed to Israel directly and why was it not repeated at Sinai? It further fits with the general

thrust of the Talmud to make Noahide law exceptionally strict, with death penalties for every violation, even theft of less than a penny's worth (b. Eruvin 62a; b. Yebamot 47b; b. Abodah Zarah 71b). To declare abortion committed by a Noahide to be a capital offense does not necessarily mean that it constitutes murder; it may simply be a prohibited act of lesser degree, and according to all the sources surveyed above, not applicable to Jews.

21. For a discussion of what the Bible does and does not say about abortion, see Shawna Dolansky, "The Bible is Silent on Abortion, but Vocal about When Life Begins," *The Torah* (2023).
22. See HALOT and the *Dictionary of Classical Hebrew*, s.v. אָסוֹן. For a discussion of the LXX understanding of the term as "formed," its sources in Aristotelian thinking, and how this affected the reception of this verse among the church fathers who were familiar with the Bible in Greek, see chapter 2 of Marianne J. Elsackers, *Reading Between the Lines: Old Germanic and Early Christian Views on Abortion*, Ph.D. Dissertation (University of Amsterdam, 2010), 373–392.
23. The midrash continues with a back and forth, questioning this reading then defending it:

אתה אומר כן, או אינו אלא אסון בולדות וענש באשה? תלמוד לומר: "וְאִם אָסוֹן יִהְיֶה." הא מה תלמוד לומר "לא יִהְיֶה אָסוֹן" באשה. "ענש יִעֲנֶשׂ" – בולדות.	Do you say thus? Perhaps the mortal harm is to the fetus and the fine is for the woman (i.e., causing her harm)? The verse teaches you (Exod 21:23), "if there is mortal harm." So what does [the previous verse] mean by "there is no mortal harm"? [It must be referring] to the woman. "He shall surely be fine"—for the fetus.
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Moshe Halbertal (*Interpretive Revolutions in the Making: Values as Interpretive Considerations in Midrashei Halakhah*) [Jerusalem: Magnes, 1997] has noted that many halakhic *midrashim* follow a schema in which two interpretive possibilities are presented and the Midrash decides in favor of one of them. This overall model suggests that the Midrash exercises choice, usually between two possible interpretations, and consciously takes moral considerations into account.

24. The text here is reconstructed from the later medieval Midrash HaGadol collection, which made use of the Mekhilta de-Rabbi Shimon bar Yochai. The original text for this section is lost.



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