

Rashi explains as follows:

[the pasuk of] “כי יכה כל נפש אדם” implies even a fetus so the Torah teaches “מכה איש” to say you are not liable until you hit a “lasting person,” someone who is viable to become an Ish

כי יכה כל נפש אדם אפילו נפלים במשמע, תלמוד לומר מכה איש, שאינו חייב עד שיכה בן קיימא, הראוי להיות איש

QUESTIONS TO CONSIDER

- Why would the death penalty only apply to someone who hits one who is viable to become an Ish?

Rashi, quoting a medrash, states that the Torah only imposed the death penalty on the murder of a viable human being. This seemingly would only apply to a born child, or maybe also a fetus after the 7th month. This ruling is also reflected in a Mishna in Niddah (44a) which says that the death penalty for killing a child only begins on the first day of his life and seemingly not a day earlier.

We see that the punishment for murder excludes killing a fetus. If this is the case, from where would the prohibition against abortion be derived?

IF IT WORKED FOR THEM...

Interestingly, the Gemara unequivocally rules abortion to be forbidden to a non-Jew. The Gemara states regarding the prohibition of murder for Gentiles:

Sanhedrin 57b

They said from Rabbi Yishmael: [murder for a non-Jew] applies even to a fetus. For what reason? Because it is written (Bereishit 9:6) “If one spills the blood of a person- in a person- his blood shall be spilt” What is a person in a person? They said it is a fetus inside its mother

משום רבי ישמעאל אמרו אף על העוברין מאי טעמיה דרבי ישמעאל דכתיב (בראשית ט:ו) “שופך דם האדם באדם דמו יישפך” איזהו אדם שהוא באדם הוי אומר זה עובר שבמעיי אמו

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The Gemara says that when Hashem commanded Noach regarding murder, He forbade him to kill even an unborn child. This is striking, since nowhere does the Gemara explicitly say this is forbidden for Jews. That something could be permitted to a Jew and forbidden to a non-Jew is an interesting possibility. In fact, Tosfot (Sanhedrin 59a) think that it is so interesting it must not be true. Tosfot invoke the principle of ליכא דאסור מידעם דלישראל שרי ולבני נח אסור - There is nothing that for a Jew is permissible and for a non-Jew is prohibited. Tosfot derives from here that there must be a prohibition against abortion, one that is akin to murder. When Hashem commanded Noach, He meant to include Jews as well.

QUESTIONS TO CONSIDER

- Why must everything which is prohibited to a non-Jew also be prohibited to a Jew?

Tosfot would explain that the previous sources which exempt a Jew from killing a fetus merely mean he doesn't receive the death penalty but the action is nevertheless forbidden and he is punished by Hashem.

A problem with this approach can be seen in the following Mishna:

Ohalot 7:6

A woman who is having difficulty giving birth, we cut up the fetus and remove it limb by limb because her life is more important than his. If most of his body has emerged, we do not touch him because we do not “push-off” one life for another

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

The Mishna says that if a woman is being threatened by her fetus, we abort the fetus to save the life of the mother. This is very problematic for Tosfot who say abortion is murder. If so, why do we do it to save a life? As the Mishna says, after the baby is delivered, we don't kill it to save the mother, because we don't murder to save a life. So why is the din different if the baby is still in utero?

Rambam (Hilchot Rotzeach 1:9) comes to answer this question. When he formulates the two above halachot he explains the difference between a fetus and a live baby:

Rambam, Hilchot Rotzeach 1:9

For this reason, the sages ruled that in the case of a pregnant woman in a dangerous labor, it is permissible to abort the fetus, whether with a drug or by hand, because it is like a rodeif pursuing her to kill her. However, once his head has emerged, one may not touch him, as we do not set aside one nefesh [soul] for another, and this is the natural way of the world

לפיכך הורו חכמים שהעובר שהיא מקשה לילד--מותר לחתוך העובר במעיה, בין בסם בין ביד: מפני שהוא כרודף אחריה להורגה. ואם משהוציא ראשו, אין נוגעין בו, שאין דוחין נפש מפני נפש, וזה הוא טבעו של עולם

Rambam says that the reason for allowing the abortion of a fetus is unrelated to whether or not it is considered killing. Rambam says it is certainly murder. However, it is nonetheless permitted due to the concept of rodeif, which dictates that if someone threatens your life, you may kill him as a form of self-defense. Here too, the fetus is considered a person, and if he is threatening the life of his mother, he may be killed for this reason and no other. Why this is no longer true after the baby emerges is an issue debated amongst the Acharonim who offer several possible explanations. The fact remains that Rambam certainly maintains that a fetus may not be killed unless it is threatening the life of the mother.

**QUESTIONS TO
CONSIDER**

- How would killing a fetus as a rodeif differ from killing a fetus as non-viable?

INTERIM SUMMARY

- The penalty of murder does not apply to killing a fetus
- Tosfot: Abortion is murder because it is murder for a non-Jew, and nothing can be forbidden to a non-Jew yet permitted to a Jew
- Rambam: abortion is murder and is only permissible if the fetus has a din of a rodeif

There are, however, indications that abortion is in fact not such a problem. The Mishna discusses the case of a pregnant woman who is sentenced to death. The Mishna states:

Arachin 7a

A woman who has left [Bet Din] to be killed we do not wait for her to give birth. A woman who has sat on the birthing stool (a.k.a. begun labor) we wait until she gives birth

האשה שיצאה ליהרג אין ממתנין לה עד שתלד
האשה שישבה על המשבר ממתנין לה עד שתלד

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The Gemara questions the necessity of the first ruling of the Mishna: “פשיטא גופה היא - It’s obvious [that you kill the fetus]; its part of her body!”

The Gemara answers that you may have thought that the fetus is the property of the husband and we don’t want to punish him also; nevertheless we still kill the fetus.

The Gemara thought it obvious that just because the mother was sentenced to death the fetus must also die for the reason that the fetus “is the woman’s body”. This seems to echo sentiments of pro-choice activists who argue that a woman should have control over her body and be able to perform abortions.

In fact, the Ran leans similarly:

Ran, Chulin 58a

As for the fetus, since it has not yet entered the air of the world, we pay no concern

לולד, כיון שלא יצא לאויר העולם, לא חיישינן

The Ran is saying that the reason we kill the fetus is that since it hasn’t been born yet, it has a lower halachic significance than a born human, and we don’t apply all the normal considerations that a live person would have.

Many Acharonim point out that if Bet Din can kill a fetus for no other reason than that it is a fetus, a woman should similarly have no problem killing a fetus for any other reason. These Acharonim unequivocally agree that this would only be true on a biblical level, but rabbinically forbidden. As the Radbaz says:

Radbaz, Responsa. 2:695

It is certainly fitting to chastise women who do this [abortions] because it looks like killing

ודאי ראוי לגעור בנשים העושות ככה משום
דמחזי כעין רציחה

These people explain the Ran to mean that there is no biblical problem with abortion, yet it is still rabbinically forbidden.

QUESTIONS TO CONSIDER

- What would change about abortion if it was only rabbinically forbidden?

IS IT WORTH SAVING?

One could bring a challenge to the position of the Ran from that same Gemara in Arachin:

Arachin 7a

Rav Nachman said in the name of Shmuel: a woman who sat on the birthing stool and then died on Shabbos, we bring a knife and cut open her stomach and extract the baby

א”ר נחמן אמר שמואל האשה שישבה על
המשבר ומתה בשבת מביאין סכין ומקרעים את
כריסה ומוציאין את הוולד

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The Gemara says that for this same baby in utero, we are mechalel Shabbos to save it. How could it be that we consider it valuable enough to save on Shabbos, yet disposable enough to just toss away?

Ramban (Niddah 54b) deals with this question. First, he concurs with the Ran's ruling that a fetus is not regarded as a human life. He then asks, if so, why be mechalel Shabbos to save it? Ramban answers that we apply the principle of *הלל עליו שבת אחת כדי שיקיים שבתות הרבה* - we allow a one-time desecration of Shabbos in order to allow for more Shabbos observance later. We really have no strict halachic rationale to save the fetus, but we do so anyway in order to enable it to keep countless Shabbatot down the line.

Both the Ran and Ramban would say about *ליכא מידעם דלישראל שרי ולבני נח אסור* that it is not a universal principle and only applies in specific cases per specific tana'im.

INTERIM SUMMARY

- The Gemara says that if a pregnant woman is sentenced to death, we also kill the fetus, because it is part of her body
- The Ran implies that a fetus is not Halachically considered a person
- However, we violate Shabbos to save the baby, which implies the opposite
- Ramban answers that the only reason we violate Shabbos is because it will enable the fetus to keep many more Shabbatot in the future

A BATTLE OF GIANTS

The issue of whether abortion constitutes biblical murder became a dispute between two of the most prominent poskim of the later 20th-century.

Rav Eliezer Waldenberg, in *Tzitz Eliezer* (13:102), ruled like the Ran and Rambam that abortion is not biblically prohibited. He therefore allowed aborting a fetus that has been determined to suffer from the Tay-Sachs disease. He ruled that this would be permissible through the seventh month of pregnancy, after which point the fetus might already be ready for birth, such that abortion would constitute murder.

Rav Moshe Feinstein (*Igrot Moshe* C.M. 2:69) came out strongly against the opinion of Rav Waldenberg. He contended that the generally accepted view is that killing a fetus constitutes outright murder and is thus forbidden on the level of Torah law. As such, he maintained, it is permissible only when the fetus poses a direct, life-threatening risk to the mother, but not under other circumstances, even when the baby will suffer from a serious disease.

WHERE DO WE START?

Amongst those who say abortion is biblically forbidden, there is an additional question of how far back into the pregnancy this applies.

There is a rule in Parshat Emor (12:13) that the daughters of Kohanim may not eat Teruma if they have a child with a Yisrael. The Gemara discusses when after pregnancy the child prohibits her from eating:

Yevamot 69b

She may eat [trumah] for 40 days [after relations] Because if she isn't pregnant, she isn't pregnant. And if she is, for the first 40 days [the fetus] is merely water

אוכלת עד ארבעים דאי לא מיעברא הא לא מיעברא ואי מיעברא עד ארבעים מיא בעלמא היא

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The Gemara employs a very strong language to diminish the status of a fetus during the first 40 days, referring to it as “merely water”. The Beis Shlomo (C.M 132) derives from here that even if one says abortion is forbidden, it would be permitted during the first 40 days when the fetus is מֵיָא בְעֵלְמָא.

QUESTIONS TO CONSIDER

- What would be the defining factor about 40 days that would alter the Halacha?

Rav Moshe Feinstein argued and said that even then abortion would be forbidden. He bases this off the din that we are mechalel Shabbos to save the life of the fetus even before 40 days. (He obviously didn't agree with the read in the Ramban that the two are unrelated.)

CONCLUSION

Although there is no death penalty for abortion, some poskim maintain that it is murder and only allowed if the fetus threatens the mother's life. Others maintain that it is merely forbidden rabbinically because it resembles killing and can be allowed under extraneous circumstances, such as incurable and debilitating illnesses. Given the contentious nature of the disagreement and large ramifications of the decision, a competent posek should be asked for all questions.

DISCLAIMER:

The views and opinions presented in this sourcesheet should not be taken as *halachah l'maaseh*. Before applying these halachos to real-life situations, one must consult with a competent halachic authority.