

## **“Partial Birth Abortion” and the Question of When Human Life Begins**

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**Sheilah:** When is an intact dilation and extraction procedure, popularly referred to as a “partial-birth abortion,” permitted to be performed?

### **Teshuvah:**

The question of the halakhic permissibility of the intact d and x abortion procedure, popularly referred to as a “partial birth abortion,” relates to several questions under Jewish law that will be dealt with sequentially below:

- (1) At what point does Jewish law consider a child born and how does that relate to the Jewish answer to the question of when human life begins?
- (2) Under which conditions is a late term abortion permitted under Jewish law?
- (3) Under what conditions would an intact d and x procedure, popularly labeled “partial birth abortion,” be permissible under Jewish law?

### **1. At what point does Jewish law consider a child born and how does that relate to the Jewish answer to the question of when human life begins?**

Biblical and rabbinic literature are not systematic theological texts that would, in an organized fashion, answer the question of when human life begins. However, we can draw out from them certain theological assumptions about the value of life and the definition of when human life begins.

#### **Defining Human life**

Judaism is a life affirming religion. The Biblical statement, *v'hai bahem* was interpreted by the Rabbis as a commandment to affirm life, placing the value of human life above almost all other commandments.<sup>1</sup>

Nevertheless, there are different aspects or qualities of life, and not all forms of life are equivalent nor can lay claim to the same rights and protections.

Aristotle identified three such aspects of life: vegetative life, common to all organic life from the single cell organism to the human being; animal life, described as the animal soul; and

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<sup>1</sup> The classic exceptions are murder, idolatry, and *gilui arayot*, i.e. sexual crimes such as incest, adultery, and rape. See Babylonian Talmud (BT) Sanhedrin 74a.

human life, described as the rational or human soul.<sup>2</sup> Aristotle posited that the rational soul entered a developing fetus on the 40th day of gestation for a male, and on the 80th day for a female. These dates were equalized for legal purposes under Roman law.<sup>3</sup>

Our Rabbis also distinguished between different forms of life. They used the term *neshama* to describe animal life,<sup>4</sup> as distinguished from the term used for human life, *nefesh*.<sup>5</sup> As the Gemara makes clear, the term *nefesh* specifically refers to an independent and viable human being. The fetus was specifically excluded from such a category.<sup>6</sup>

Rabbinic law established the time of ensoulment as taking place on the 40th day, irrespective of the sex of the fetus.<sup>7</sup> Before the 40th day, the fetus is considered merely liquid (*maya d'alma*) by the Rabbis<sup>8</sup> and, if miscarried before that time, does not affect the status as first born of any future offspring.<sup>9</sup>

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<sup>2</sup> *De animalibus historiae* VII, 3

<sup>3</sup> Justinian Code.

<sup>4</sup> E.g., BT Sanhedrin 107b.

<sup>5</sup> Yad Ramah on BT Sanhedrin 72b.

<sup>6</sup> BT Sanhedrin 84 b, citing Leviticus 24: 17.

<sup>7</sup> Mishnah Niddah. 3:7. R. Ishmael is cited as distinguishing between male (40 days) and female (80 days) but the Sages determined that their creation was equal. There is another tradition in Greek philosophy which is reflected in rabbinic thought as well: that full (let us say human) ensoulment does not take place until birth. The Stoics taught that the soul, *pneuma*, joins the body at birth (*Encyclopedia of Religion and Ethics*, VI, 56, cited by R. David Feldman, *Birth Control in Jewish Law* (NY; NYU, 1968), 272,n 26). Similarly, at least one source credits Rebbe as holding that the soul is not endowed until birth (Midrash Genesis Rabbah 34:10 , Theodore and Albeck, 321, cf. Sanhedrin. 91b, that has Rebbe holding that ensoulment takes place at *yetzirah*, 40 days). According to both sources Rebbe holds that the *Yetzer Hara*, evil inclination, is not endowed until birth. Much has been written about the contradiction between these two sources. According to Aptowitz, Midrash Genesis Rabbah represents the more authentic tradition not only because it reflects Stoic teaching, but because, he posits, it served as the basis for the rabbinic position regarding feticide. (“The Status of the Embryo in Jewish Criminal Law,” *JQR* XV 1924m 115 ff). The Torah presents a 40/80 day gender distinction regarding the purity period of the parturient in Leviticus 12.

<sup>8</sup> BT Yevamot 69b, cf. BT Niddah 30a.

<sup>9</sup> BT Niddah 3:7, Shulhan Arukh, Yoreh Deah 305:23.

One of the most important distinctions between Catholic canon law and rabbinic law is that the rabbinic view of ensoulment (when the soul enters the body) does not translate into a juridical definition equating an ensouled fetus with human life.<sup>10</sup> R. Meir Abulafia (d. 1244) perhaps best explained it in his comment on the Gemara that *nishmat ruach hayim*, the soul of the spirit of life, enters at conception but a fetus is *lav nefesh hu*, is not considered a human life, until it is born.<sup>11</sup>

If the fetus is not human life, what is it?

Rabbinic law views the fetus as part of its mother's body, *ubar yerekh imo*<sup>12</sup> (the fetus is [like] the thigh of its mother), and it is to be treated as such.<sup>13</sup> So, for example, the rabbis ruled that if a pregnant slave is freed, so is any progeny she is carrying.<sup>14</sup> Similarly, when a pregnant woman undergoes religious conversion, no additional or separate ceremony is required for the fetus she carries either at the time of the mother's conversion or at its birth.<sup>15</sup> Neither gestational age nor viability serves to grant the fetus a legal or religious identity independent of its mother prior to birth. Similarly, Rabbi Yair Bachrach reasons that the Sabbath cannot be violated to save a fetus in distress, since it is not a person, arguing instead that the Sabbath could only be violated for the sake of the mother's health, to which a miscarriage could present a danger.<sup>16</sup>

Our Sages rely upon Toraitic sources to determine that a fetus has no juridical identity. The classic source is found in Exodus:

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<sup>10</sup>R. Immanuel Jakobovits, *Jewish Medical Ethics*, 332, n. 138 cited by R. Feldman 272, n. 27; Preuss, *Biblical and Talmudic Medicine*, German ed. 450.

<sup>11</sup>Yad Ramah on BT Sanhedrin 72b. As with many such philosophical discussions, the nature of the soul of a fetus in the womb becomes part of the secrets of God, but has no bearing on the practical, jurisprudential issues of feticide. R. David Feldman points out that since there is no concern for original sin in Judaism (*neshamah shnatatah bi tohorah hi*, the soul You gave me is pure), as distinguished from Christianity which requires baptism for life in the next world, the soul of a fetus could enter the next world from the time of ensoulment. For a discussion about ensoulment, see Feldman, 271-275.

<sup>12</sup>BT Gittin 23b, cf. BT Hullin 58a (where this term is used to refer to animal embryos).

<sup>13</sup>See R. David Feldman, "Abortion: The Jewish View," *Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement, 1980-85* (NY: RA, 1988), 11.

<sup>14</sup>BT Gittin 23b.

<sup>15</sup>Shulhan Arukh, Yoreh Deah 268:6.

<sup>16</sup>R. Yair Bachrach, Responsum 31, drawing upon BT Arakhin 7a, see discussion *infra*. Bachrach would allow the Sabbath to be violated for the sake of the fetus if labor has already begun, based on his reading of Mishnah Arakhin 1:4, because then the fetus has begun to assert its individuation.

**כב** וכי-ינצו אנשים, ונגפו אשה הררה וינצאו ילדיה, ולא יהיה, אסון--ענוש יענוש, ישית עליו בעל האשה, ונתן, בפללים. **כג** ואם-אסון, יהיה--ונתתה נפש, תחת נפש. פאשר

When men fight, and one of them pushes a pregnant woman and a miscarriage results, but no other damage ensues, the one responsible shall be fined according as the woman's husband may exact from him based on reckoning. But if other damage ensues, the penalty shall be life for life...<sup>17</sup>

While the death of the woman would be a capital offense according to the Torah, the destruction of the fetus is not, for clearly the fetus is not a person under the law. The Rabbis agreed, as, for example, in the Mekilta which explains that “yet no other damage ensues” refers to harm to the woman (i.e., her life) while “he shall be fined,” refers to compensation for the loss of the fetus.<sup>18</sup> This position was affirmed by later Talmudic commentators.<sup>19</sup> Some commentators understood the verse to teach that until birth, the fetus remains potential life rather than a *ben kayyama*, a viable living being.<sup>20</sup> However, even if the fetus had been carried full term, it still would not be considered a *ben kayyama* until it was actually born.<sup>21</sup>

<sup>17</sup>Exodus 21:22-23. All English translations of Scripture are taken from *Etz Hayim* and the JPS *Tanakh* unless otherwise specified. See also Leviticus 24:17 and BT Sanhedrin 84 b.

<sup>18</sup> Mekilta de Rabbi Ishmael, Exodus, Nezikin 8 (p. 65, ed. Jacob Lauterbach).

<sup>19</sup>Rashi and Yad Ramah to BT Sanhedrin 57b and 72b; Ramban and Ran to BT Niddah 44b; Meiri to BT Shabbat 107b. See the discussion in Feldman, 254-57.

<sup>20</sup> R. Eliyahu Mizrahi (d. 1526) cited by Feldman, 255-6.

<sup>21</sup>R. Lowe of Prague in Gur Aryeh to Ex. 21:22. See Feldman 256. On the question of viability, see Mishnah Baba Kama 4:6 and Niddah 26 b (*can bnefel*, *can ben kayyama*) both of which distinguish between a premature birth (*nefel*), assumed to be unviable, and a full term birth, considered a viable birth (*ben kayyama*). Historically in terms of Jewish law, full viability was not assumed until thirty days after birth, even after a full term pregnancy. See, for example, BT Shabbat 135b. That is why full Jewish mourning rituals were not traditionally observed for a newborn who died within its first 30 days, on the assumption that the mourning rituals were a hardship for the family. ( Shulhan Arukh, Yoreh Deah 374:8; Mishnah Torah Hilkhoh Avel 1:6) Where mourning rituals would be a comfort for the family, they are permitted even when death occurs before the 31<sup>st</sup> day, according to a 1992 Committee on Jewish Law and Standards ruling.” Jewish Ritual Practice Following the Death of an Infant Who Lives Less Than Thirty-One Days,” by Rabbi Stephanie Dickstein in *Responsa 1991-2000: The Committee on Jewish Law and Standards of the Conservative Movement* (NY: Rabbinical Assembly, 2002), 439-449. Rabbi Reisner has argued in the past that viability can now be applied to infants born prematurely after seven months due to medical advances. (“Kim Li: A Dissenting Concurrence,” op. cit., 451.) Such a position, however, is only applicable to infants already born into the world. Though a fetus may have the potential for viability outside its mother following premature birth (with the

According to rabbinic law, then, the fetal life is not granted the rights and protections due human life until birth. (On defining the moment of birth according to rabbinic literature, see below.)

### Competing Claims on Life

There are times when the needs of different forms of life compete. While the Rabbis clearly valued and affirmed all forms of life, they saw the needs of animal and vegetable life as clearly subservient to the needs of human life. For example, while we are enjoined from needlessly harming animals, we are permitted to utilize them, in as humane a way as possible, to benefit human health and well-being, for food, clothing, and medical treatment.

Humility, awe and reverence surround our appreciation for the miracle and preciousness of life and the desire to see human life come to fruition with birth. Therefore Judaism, as a rule, does not warrant the destruction of a fetus without cause.<sup>22</sup> Recognizing the sacred potential for human life vested in the fetus, as a work in progress by the Holy One,<sup>23</sup> rabbinic law nevertheless did not grant the fetus the status of human life. Furthermore, when faced with situations in which the well being of the mother, as a fully human life, and that of the fetus are at odds, the Mishnah consistently finds in favor of caring for the needs of the mother. This appears to be the *peshat*, the plain or original meaning of the Mishnah in Oholot:

האישה שהיא מקשה לילד--מחתכין את הוולד במעיה, ומוציאין אותו אברים אברים: מפני שחיייה קודמין לחייו. יצא רובו--אין נוגעין בו, שאין דוחין נפש מפני נפש.

If a woman is in hard labor, one dismembers the fetus within her, removing it limb by limb, because her life takes precedence over its life. Once its greater part<sup>24</sup> (or head<sup>25</sup>)

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help of medical advances) as long as it is within the womb it remains part of its mother and therefore under Jewish law is considered only potential life until its actual birth into the world.

<sup>22</sup> “A Statement on the Permissibility of Abortion,” Rabbis Ben Zion Bokser and Kassel Abelson. *Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement 1980-1985*. (NY: RA, 1988), 37. Traditionally, restrictions on abortion would fall under the prohibition of *habbalah*, wounding. See BT Baba Kama 90b, Mishneh Torah (Yad) Hilkhoh Rotzeach 1:4, Genesis 9:5. However, we are allowed to wound in order to heal: BT Sanhedrin 84b and Rashi, s.v. *va’ahavtah*, based on Leviticus 19:18: “Love your neighbor as yourself.” On the obligation to cure, see BT Baba Kama 85a on Exodus 21:19: “and you shall surely heal.” (Translation my own.) Mishneh Torah, Hovel Umazzik 5:1 ; Shulhan Arukh Hoshen Mishpat 420:6 after BT Baba Kama 90b, prohibiting hurting oneself. Yad Ramah and Tur Hoshen Mishpat *ad loc* hold it is not forbidden to damage oneself. See the discussion in R. Elliot Dorff, *Matters of Life and Death: A Jewish Approach to Modern Medical Ethics* (Phila.: JPS, 1998), esp. 26-29, 128.

<sup>23</sup>E.g. Zohar, Shemot 3b.

<sup>24</sup> This describes a breech birth, in which the lower body exits first.

has emerged, one does not touch it, because one does not set one life aside for another.<sup>26</sup>

The care giver (in the Mishnah, the midwife) is obligated to give the mother's life precedence, if destroying the fetus is necessary to save the mother, even after labor has begun and the fetus has begun to become differentiated, until the moment of birth. The fetus does not become a *nefesh*, a life independent of the mother, until birth. Birth is defined as once its head or the majority of its body has exited her body<sup>27</sup>. At this point the fetus becomes a child, its legal status changes from an *ubar* to a *nefesh*, an independent human being, with the right to the full protections due human beings under Jewish law. Its life then is equal to that of its mother. Her needs no longer take precedence, according to the plain meaning of the Mishnah.

It is important to note, however, that a number of poskim, cognizant that the mother could still be endangered, would allow intervention even when the majority of the body or head of the fetus has exited the mother's body, to save the mother's life and possibly even to protect her health.<sup>28</sup> Meiri, for example, relies on the concept of *rodef* (pursuer) here for a *kula* (a leniency), permitting the mother to save herself by dismantling the child extruding from her. Alternatively, she could appoint an agent, for example her doctor, to do so on her behalf.<sup>29</sup>

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<sup>25</sup> Tosefta Yevamot 9, ed. Zuckerman (Jerusalem: Wahrman, 1970), 251, l. 8-10; also BT Sanhedrin 72b.

<sup>26</sup> Mishnah. Oholot 7:6. Cf. Mishnah Niddah 3:5.

<sup>27</sup> See discussion below *infra* on defining the moment of birth.

<sup>28</sup> If the alternative is death to both, most responsa permit the fetus to be dismembered to save the mother. *Responsa M'lammed L'Ho'il*, Vol. II, no. 69; *Responsa Binyan David* (Meisels), Vol. 1, No. 47; *Responsa She'elat Yitzhak*, No. 64. Meiri on BT Sanhedrin 72b argues that the woman herself can dismember an emerged fetus as a *rodef*, a pursuer. Notably, even if another were not permitted to initiate intervention on her behalf, she would be permitted to protect herself, even at the expense of the emerging fetus, and could, according to at least one opinion, appoint a physician as her agent to act for her defense. (Resp. Beit Yitzhak, Smelkes, Vol. II, No. 162, cited in Feldman, 284 n. 94.) See the discussion in Feldman, 283 ff.

Others would permit dismembering the fetus to protect the mother's health. The Radbaz permits the taking of the life of a *rodef*, the pursuer threatening another with physical harm, even where the threat to another is only of a limb rather than of the victim's life per se (*Responsa Radbaz* 627). Based on this, R. Israel Shepansky reasons that when a pursuer threatens the physical wholeness of the victim, i.e., by inflicting permanent physical or other damage, then the pursuer should be killed. (*Or haMizrah* 1970 (20), 24-25). See the discussion in Basil Herring, *Jewish Ethics and Halakhah for Our Time* (NY: Ktav, 1984), vol.2, 147, 151-2, cf. 116. Following this reasoning, not only would a late term abortion be permitted where physical danger to the mother existed, but the abortion procedure used must be the one least likely to result in permanent damage to the mother.

<sup>29</sup> Meiri on BT San. 72b.

**Defining Birth:**

A number of rabbinic sources refer to the moment when the fetus “emerges” as indicating the moment of birth, without specifying from what part of the mother’s body the fetus has emerged, as if it would have been *peshita*, obvious, to anyone familiar with midwifery.<sup>30</sup> Rashi on Oholot explains that by exiting, the Mishnah means that the head (or majority of the body) must emerge into the open air (*l’avir haolam*).<sup>31</sup> It is at this point, and not before, that the fetus becomes fully human and its life becomes as valuable as that of its mother. Like Rashi, Rabbi Yom Tov Lippman Heller allows for no ambiguity, ruling that a fetus is not to be considered a *nefesh* (an independent human life) until it has egressed into the open air.<sup>32</sup>

There is good rabbinic precedent for their interpretation, for both the Tannaim and Amoraim are explicit in specifying that birth does not take place until the baby exits the mother’s body and enters into the “air of the world,” *l’avir haolam*.

For example, Tosefta Oholot is explicit in identifying the moment of birth as exiting from the mother’s body *l’avir haolam*, into the air of the world.<sup>33</sup> Rava understands the moment of human birth as not taking place until the fetus *sheyatza l’avir haolam*, exits into the air of the world (referring to the birth of a child conceived by the deceased as releasing the widow from the necessity of levirical marriage).<sup>34</sup> Rav Yehudah understands animal birth similarly as not taking place until fetus *sheyatza l’avir haolam*, exits into the air of the world (referring to the permissibility of maiming an animal to exempt it from sacrifice).<sup>35</sup> The assumption must have been so accepted that we see even that aggadic material assumes that entering into the air of the world defines the exact moment of birth (that an angel causes every person to forget all the Torah they learned in the womb by touching them on their mouth at birth, when they come into the air of the world).<sup>36</sup> Later sources, perhaps most notably, both R Yehoshua Falk and R.,

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<sup>30</sup> In addition to Mishnah Oholot 7:6, see Mishnah Niddah 3:5.

<sup>31</sup> Rashi on BT Sanhedrin 72b s.v. *yatza rosho*.

<sup>32</sup> Rabbi Yom Tov Lippman Heller on Mishnah Oholot 7:6. Contextually, Fred Rosner reads Rambam and Karo as also defining birth as external to the mother’s body. *Modern Medicine and Jewish Ethics* (NY and Hoboken, NJ: Yeshiva University and Ktav, 1991), 137-9.

<sup>33</sup> Tosefta Oholot 8:8. R. Avram Reisner, in his *teshuvah Ein Dohin Nefesh Mipnei Nefesh* (CJLS, Dec. 2001), seems to dismiss this source as a matter of dispute between individuals. Such a concern misses the point. Rather, this source shows that the Tannaim used the term *yatza* to mean exiting from the mother’s body.

<sup>34</sup> BT Yevamot 36a.

<sup>35</sup> Recorded as authoritative in BT Bekhorot 3b, 35a, 53b, and BT Temurah 24b.

<sup>36</sup> BT Niddah 30 b. Other Talmudic sources include: BT Berakhot 10 a; BT Betzah 4a; BT Yevamot 67 b, 71b (// BT Niddah 30b); BT Hullin 67 b, 68b-69a; 74b; BT Temurah 29a; BT

Eliezer Waldenberg also determine that birth takes place when the fetus emerges into the air, in their own responsa on abortion.<sup>37</sup>

While the term *yatza l'avir haolam* is unambiguous in referring to the moment of birth, other rabbinic sources use a different term, *hutz l'prozdor*, outside the *prozdor*, to identify the moment of birth from which the eight days leading towards brit milah should be counted.<sup>38</sup>

The Rishonim and Ahronim disagree about what the term *hutz l'prozdor* means. Rashi understands the baraita at Niddah 42b as referring to the head of the fetus coming out of the womb but still being within the mother's body,<sup>39</sup> even though on Oholot he defines birth as taking place only once the head or majority of the body exits into the air of the world. Such a contradiction may be explained by the fact that Rashi is concerned with reflecting what he understands as the meaning of the text at its location, rather than discovering a consistent rabbinic position, a project left to his grandchildren. Even so, Rashi's interpretation seems stretched. Later commentators are not universally convinced that the term *hutz l'prozdor* here means within the mother, some arguing instead that it refers to the head extending outside the mother's body.<sup>40</sup>

Furthermore, a close look at how the term *prozdor* was used in tannaitic literature in the context of the ancient world seems to support the *peshat* that the Tannaim would have used *hutz l'prozdor* to refer to an anatomical location that exited the body, as we shall see below.

Professor Lieberman, z'l, taught that the usage of Greek terms in their original Greco-Roman context can uncover how the rabbis understood and utilized such foreign terms.<sup>41</sup>

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Niddah 24a-b.

<sup>37</sup> R. Yehoshua Falk, *Sefer Meirat Einayim* to Shulhan Arukh Hoshen Mishpat 425:2; Panim Meiroi I, 7; R. Meshullam (Weifush) ben Shmuel of Cracow in *Responsa Bayit Hadash* 34. *Havvot Yair* 31, *Beit Yehudah*, Even Haezer 14, *Seridei Esh* III 127; R. Eliezer Waldenberg, *Tzitz Eliezer* IX, 51, 3 .

<sup>38</sup> BT Niddah 42b, BT Yevamot 71b.

<sup>39</sup> BT Niddah 42b s.v., *kgib shehotzi vlad tosho hutz l'prozdor*; Cf. BT Sanhedrin 72b s.v. *yatza rosho*..

<sup>40</sup> Maharsha, BT Niddah 42b, s.v. *ukr' Oshaia*; Meromei Sadeh, *ibid*, s.v. *kgoan shehotzi*; Sidrei Taharah to Yoreh Deah 194:26. Rabbi Reisner has suggested that Tur Yoreh Deah 194; Shulhan Arukh Yoreh Deah 194.10 and 262 supported Rashi's reading at Nid. 42b that *hutz l'prozdor* is a location within the mother's body. However neither source specifically states that the location is within the mother's body. Rather they distinguish between when the baby is fully external to the mother (*yotzer mamash*) and when it is only *hutz l'prozdor*. This can just as easily (and more logically) refer to the fetal head exiting the vaginal orifice while the body is still stuck within the vaginal canal.

<sup>41</sup> For example see Saul Liebermann's studies, *Greek in Jewish Palestine* (NY: JTS,

The term *prozdor*, vestibule, for example, is used in Greco-Roman literature to refer to a part of a house.

Vitruvius, first century B.C.E. author of the only complete architectural treatise to survive from antiquity, in his description of the various rooms of a residential house, describes the *prozdor* as a vestibule or portico with columns on three sides and two widely separated columns on the fourth side.<sup>42</sup> The space between these two columns, and possibly the entire vestibule, can be referred to as the *prozdor*. This is where the guests would assemble before going into the *triclinium*, the banquet hall. Thus its usage in Pirke Avot 4:16, where *prozdor*, seen as the confined vestibule of this world, refers to that which opens upon the wide and unlimited after world.

Compare the usage of the term in Mishnah Niddah:

משל משלו חכמים באישה--החדר, והפרוזדוד, והעלייה

The Sages drew an analogy (*marshal*) with regard to the female (genitalia): the chamber (*heder*), the vestibule (*prozdor*), and the loft (*aliyah*).<sup>43</sup>

The parallel is apt for our Mishnah, where *prozdor*, vestibule, also refers to an opening from one world to the other, from the narrow and confined world inside the mother before birth, to the wide world outside the mother after birth.

Even more compelling is the analogy, the *marshal*, the Tannaim in our Mishnah are drawing between the female genitalia and the parts of a house, the terms of which they are specifically using to describe the parts of the female genitalia.<sup>44</sup> The analogy works perfectly when we understand it correctly: the labia that stand on each side of the vaginal orifice are equivalent to the two widely placed pillars that stood on the south or external side of the Greco-Roman *prozdor*, the vestibule. The term *prozdor*, or vestibule, in rabbinic literature, therefore, refers to the bottom of the vagina which opens into the air via the vaginal orifice.<sup>45</sup> Indeed the

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1942) and *Hellenism in Jewish Palestine* (NY: JTS, 1950).

<sup>42</sup> Vitruvius 6:7, quoted by Julius Preuss in *Biblical and Talmudic Medicine*, transl. and ed. by Fred Rosner (Northvale, N.J.: Jason Aronson, 1993), 116.

<sup>43</sup> Mishnah Niddah 2:5. Albeck interprets *prozdor* here as the *ulva*, or external genitalia.

<sup>44</sup> It is interesting to note that elsewhere the Rabbis compare a wife to a house.

<sup>45</sup> Preuss and Rosner would agree. Cf. Op. Cit. 116. R. Reisner, in his *teshuvah Ein Dohin Nefesh Mipnei Nefesh* prohibiting partial birth abortion except to save the life of the mother, argues that this Mishnah is a tour from inside out and therefore is forced to interpret the *prozdor* as the cervix. However, tannaitic literature is notorious for not following what the contemporary reader might consider the logical ordering in lists. Preuss, for example, cites Mishnah Hullin 3:1 listing the stomachs of ruminants, as another tannaitic example where body

space between the labia, the vaginal orifice, is still today referred to as the vestibule in medical terminology.<sup>46</sup>

It is worthwhile for us to take a moment to consider Niddah 17b, another example of a Talmudic tour of the woman's reproductive tract, that has engendered much commentary.

רמי בר שמואל ורב יצחק בריה דרב יהודה תנו נדה בי רב הונא אשכחינהו רבה בר רב הונא דיתבי וקאמרי החדר מבפנים והפרוזדור מבחוץ ועלייה בנויה על שתיהן ולול פתוח בין עלייה לפרוזדור

Rami b. Samuel and R. Isaac son of Rav Judah learned the tractate of Niddah at R. Huna's. Rabba son of R. Huna once found them while there were sitting at their studies and saying: The chamber (*heder*) is within, the antechamber (*prozdor*) is without, and the upper chamber (*aliyah*) is built above them, and a duct (*lul*) opens between the upper chamber (*aliyah*) and the antechamber (*prozdor*).<sup>47</sup>

This Babylonian Amoraic text is difficult to decipher, as Preuss/Rosner make clear.<sup>48</sup>

Maimonides, in his commentary to the Mishnah, seems to interpret *prozdor* here as the external cervical os.<sup>49</sup> However, Maimonides cannot be used as the definitive guide to how the Tannaim or Amoraim meant the term. Preuss/Rosner explain: "One should begin by stating (on Maimonides' commentary on our Mishnah here and in the Arabic version) that neither of them transmits correct anatomical information. I cannot determine whether or not they correspond to the viewpoints of Arabic physicians of that era since the assertions of Maimonides' contemporary Avicenna are unclear..." Preuss/Rosner points out, as an example, that the same term was utilized by the Arabic physicians for vagina and uterus.<sup>50</sup> However, it is the very distinction here between these two parts of female anatomy that would make all the difference in how we understand what the Rabbis meant by the term *prozdor*.

It is worth noting that the incomprehensibility of ancient descriptions of female anatomy seems universally applicable to all ancient authors.<sup>51</sup> Perhaps they were squeamish, as

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parts are not listed in anatomical order from inside out. *Op. cit.*, 115 and n. 1179.

<sup>46</sup> *Gray's Anatomy*, ed. Peter Williams, Roger Warwick, Mary Dyson, and Lawrence H. Bannister, 37th edition (Edinburgh, London, Melbourne, New York: Churchill Livingstone, 1989), 1446 and fig. 8:217.

<sup>47</sup> BT Niddah 17b.

<sup>48</sup> Preuss/Rosner, 116-118.

<sup>49</sup> Commentary to the Mishnah Niddah 2:5.

<sup>50</sup> Preuss/Rosner, 117.

<sup>51</sup> Preuss/Rosner 116, 117.

Preuss/Rosner seem to imply, albeit with incredulity. Or, perhaps more likely, ancient writers did not generally have access to systematic and scientific dissections which would have provided more accurate information. The lack of accurate information is certainly clear when we compare the descriptions offered by these writers to what we know today about female anatomy.

Furthermore, it is important to remember in any discussion of the Talmudic understanding of women's anatomy that the Sages did not have access to what we would today refer to as a "pelvic examination."<sup>52</sup> So, for example, when the Mishnah mentions that blood is found *in* the *prozdor*, it is not referring to the cervix, but rather to an area that the woman can easily reach *within* for self-examination, i.e., the vaginal canal. She cannot herself reach the cervical os or the normally closed cervix.

We know that elsewhere in rabbinic literature, the *lul* is described as the staircase which ascends to the *aliyah*,<sup>53</sup> an upper chamber somewhat removed from the hubbub of the rest of the house and perhaps even having its own entrance.<sup>54</sup> Based on this material, Preuss/Rosner identify the *aliyah* as the vagina, the *lul* as the vaginal orifice, and the *prozdor* as the vulva, or external female genitalia.<sup>55</sup> This seems closer to the original intent of the Sages than does Maimonides' interpretation. However, like with the interpretation of Maimonides, it leaves the problem of how the *aliyah* could be above both the *prozdor* and the *heder* (the uterus, or womb) while still being connected only to the *prozdor* via the *lul*.

To find a possible answer, it is worth turning to the anatomist Vesalius (1514-1564), also referred to as Vesal, who relied on his own autopsies as a counterpoint to the work of the preeminent Greco-Roman author of medicine, Galen (c. 126-199 CE).<sup>56</sup>

Vesal describes the neck of the bladder as emptying into the vagina.<sup>57</sup> That Vesal thought that the bladder opened into the vagina is not surprising because, to the eye, it seems to do exactly that, since the external urethral orifice does indeed end in the vaginal orifice. To the ancients, it was clear that the bladder and vaginal orifice were somehow connected, just as it would have been clear to the observer that bladder excretion did not flow directly through the

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<sup>52</sup> Preuss, 115. (They are unclear whether the *lul* is the orifice between the vagina and the vulva or the vagina and the womb, i.e. the cervical os. See my discussion *infra* which would resolve the problem. )

<sup>53</sup> BT Menahot 34a.

<sup>54</sup> Such may be implied in BT Baba Batra 144a, regarding transfer of ownership of a house which does not include the transfer of its upper chamber.

<sup>55</sup> Preuss/Rosner, 115.

<sup>56</sup> Vesalius, *De Corpus Hum.Fabrica*. Preuss/Rosner find him more reliable than Maimonides when it comes to an accurate understanding of the human body.

<sup>57</sup> Preuss/Rosner 117, n. 1197, citing picture 27 on folio 409 of the edition by Boerhave.

entirety of the vaginal canal through which the baby passed. Today we know that this is achieved via the urethra which is embedded in the anterior vaginal wall.<sup>58</sup>

This anatomy lesson may help explain the difficulties in Niddah. 17b, if the *aliyah*, the upper chamber, were to be identified not as the vagina but as the bladder. One could describe the bladder as “built above” both the vagina (*prozdor*) and the uterus (*heder*), being above the former and anterior to (in front of) the later, yet connected by the *lul*, an open passageway consisting of the part of the vagina Vesal would have understood to be between the bladder (*aliyah*) and the vaginal orifice (the *prozdor*), and which we today understand as embedded in the vaginal wall.<sup>59</sup>

Alternatively, and perhaps more elegantly, the difficulty in the text can be resolved by the *gersa* (textual variant) in the Palestinian Talmud which makes no mention of a *lul* but merely refers to the opening of the *aliyah*.<sup>60</sup> This reading would support Preuss/Rosner who read the *aliyah* as the vagina and the *prozdor* as the external genitalia.

A contextualized look at these tannaitic and amoraic sources, therefore, does not support a definition of *prozdor* as the cervical os leading from the womb. Rather, the rabbinic definition of *prozdor* as the vaginal orifice, at the external female genitalia, or vulva, and possibly including the lower vagina immediately preceding it, stands up very well in light of what our Sages would have assumed about female anatomy, and their use of architectural terms to describe it.

Let us look at one last Talmudic source to see how well this understanding of *hutz lprozdor* would work within the structure of its sugyah.

רב שרביא אמר כגון שהוציא ראשו חוץ לפרוזדור ומי חיי והתניא כיון שיצא לאויר העולם נפתח הסתום ונסתם הפתוח שאלמלא כן אין יכול לחיות אפילו שעה אחת הכא במאי עסקינן כגון דזנתיה אישתא אישתא דמאן אילימא אישתא דידיה אי הכי כל שבעה בעי אלא דזנתיה אישתא דאימיה ואיבעית אימא הי"מ היכא דלא מעוי אבל היכא דמעוי מחייה חיי

R. Sherabia replied: Where, for instance, the child put forth his head out of the fore chamber (*prozdor*). But can such a child survive? Surely it is taught: As soon as the child emerges into the air of the world the closed organ (the mouth) is opened and the opened (the navel connecting to the placenta) is closed, for otherwise he could not survive even for one hour. Here we deal with a case where the heat of the fever sustained him. Whose fever? If his own fever be suggested, he should, if such was the case, be allowed a full period of seven days. It means where the fever of his mother sustained him. And if you prefer I might say that the statement applies only when the child does not cry. When however, it cries, it undoubtedly survives.<sup>61</sup>

<sup>58</sup> *Gray's Anatomy*, 1445.

<sup>59</sup> Although, cf. Preuss/Rosner, 119.

<sup>60</sup> Jerusalem Talmud Niddah 50a.

<sup>61</sup> BT Yevamot 71b.

If we were to assume that the head of the child is still within the mother's body, then a problem presents itself with the internal logic of the sugyah. If still within the mother's body, the fetus should be able to survive because of its continued connection to the placenta, which the rabbis understood provided food and air to the fetus as long as its head was within the mother and had no access to the air.<sup>62</sup>

This problem is resolved if we understand that R. Sherabia is referring to a case in which the child's head has indeed emerged from the mother's body, using the term *prozdor* to refer to the exterior of the vagina or vaginal orifice.

The argumentation of the Gemara would work this way: The Gemara raises the objection, how could such a child survive, bringing as proof of the problem the source about one orifice opening (the mouth) and the other closing (the placenta) when the child's head reaches the air. In responding, not with a reference to the placenta, which would have made sense if the head were still within the mother's body, but to the mother's body heat to protect it, the Gemara is operating on the assumption that the fetus' head is outside the mother's body: for normally the fetus, if it were within the body, would be able to survive from the placenta. Now emerged, the child would have to survive by receiving nourishment through its mouth, something it cannot do since it is stuck to the mother and cannot reach her breast to suck. This is how Rashi also understands the sugyah.<sup>63</sup>

The reference to crying also clarifies the location of the child, i.e. that the baby's head is outside the mother's body. According to the many obstetricians and high risk pregnancy experts I consulted, a baby cannot cry within the vaginal canal but only once its head clears the outside of the mother's body and reaches the open air. The location of the baby was nevertheless misunderstood by a number of commentators who struggle to explain how a baby could cry in utero, probably based on a Rashi on Niddah 42b.<sup>64</sup> Such efforts at an explanation lead to another problem: if the placement of the action is within the mother's body, how could the sugyah have suggested that the fetus would not survive unless it cried? Clearly crying in utero, or even in the vaginal canal, is not a prerequisite for survival. The text clearly states: "If you prefer I might say the statement applies only when the child does not cry." However, there is no fear that a child which does not cry while inside the mother would not survive.<sup>65</sup> Crying, therefore, was evidence that the child was breathing, a necessary prerequisite to survival for a child whose head has

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<sup>62</sup> R. Reisner acknowledges this problem when he cites this sugyah as a proof that *hutz lprozdor* means within the mother's body but he does not offer a solution.

<sup>63</sup> Rashi, BT Yevamot 71b, s.v. *ein ychol lhiyot*.

<sup>64</sup> Rashi, BT Niddah 42b s.v., *kgib shehotzi vlad tosho hutz lprozdor*. See notes 39 and 40 above and discussion *infra* on the contradictions within Rashi.

<sup>65</sup> Maharam, ad loc. clearly struggles with this problem, suggesting a rather forced solution that air entering the placenta would destroy the fetus' innards, which we know could not be the case medically.

emerged from the mother, according to the rabbinic conception that the placenta had stopped working, and therefore stopped delivering food and oxygen, once the head was exposed to the air. If a baby were outside the mother and did not cry, then there would be cause for concern, and only then. Therefore, when the Gemara answers that with crying, the assumption is the child will survive, it is assuming the head is external to the body of the mother.

The use of the term *prozdor* in Yevamot 71b, then, refers to a location on the woman's body that is on the outside of her vaginal area and would allow for the head of a child to be exposed to the air even as part of its body remained (stuck) within her. (The high risk obstetricians I consulted assured me that it is possible for the head to exit but the rest of the body to be stuck within the mother for a number of reasons.)

Our exploration of Yevamot 71b shows that it is not only possible to read the sugyah utilizing the term *prozdor* as referring to something that opens directly to the open air, but that such a meaning is preferable in understanding the sugyah<sup>66</sup>.

In light of all of the above, there is sufficient basis upon which to determine that the term *hutz lprozdor* refers to the fetus extending outside from the vaginal orifice, to the external female genitalia, into the open air.

Now we can turn to the question with which we began this section: At what point does Jewish law consider a child born and when does human life begin?

Tannaic and amoraic literature define birth, described by the terms *yatza rubo* and *hutz lprozdor* in the tannaic and amoraic sources, as when the child exits into the air of the world. Such a definition is supported by what we know of the Greco-Roman architectural term *prozdor*, as the Tannaim would have understood it and applied it to women's anatomy. While Rishonim and Ahronim disagree over the meaning of the term *hutz lprozdor*<sup>67</sup>, there are sufficient opinions among the Rishonim and Ahronim defining birth as occurring only when the fetus exits into the air of the world, external to the mother's body, and for the interpretation of *hutz lprozdor* as referring to external genitalia. Therefore we can certainly rely upon the *peshat* of the tannaic and amoraic sources, as well as the commentators who support it, that the moment of birth takes place when the fetal head or majority of its body exits the mother's body into the air of the world. It is at this moment, and not before, that the fetus changes from an *ubar*, considered *gufah hu*, part of the mother's body, to a *nefesh*, an independent soul, i.e., a human life, deserving of the rights and protections of a human being.

## (2) Under what conditions is a late term abortion permitted under Jewish law?

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<sup>66</sup> Dr. Judy Hauptman, for example, in private correspondence, agrees that BT Yevamot 71b and Mishnah Niddah both clearly indicate that the Tannaim and Amoraim both used *hutz lprozdor* as the moment of birth to refer to the exiting from the mother's body and should not be interpreted in any other way.

<sup>67</sup> It is interesting to note that the term *hutz lprozdor* does not generally appear within the context of Talmudic discussions about abortion or about safeguarding the woman's life or health.

Much has been written about abortion in Jewish law.<sup>68</sup> The purpose of this *teshuvah* is not to review this material. The Committee on Jewish Law and Standards, in a series of *teshuvot* written in the 1980s, addressed and approved the general permissibility of abortion under Jewish law for maternal cause.<sup>69</sup> It is important to note that congregants are to be encouraged to seek counsel from their rabbis whenever considering an abortion.

The human body belongs to God, and as such we are prohibited from *habbalah*, from wounding it. The Rabbis learned this from the verse in Genesis; “But for your own blood I will require a reckoning.”<sup>70</sup> However, we are allowed to inflict a wound (or allow a wound to be inflicted on our behalf) in an effort to heal.<sup>71</sup> Therefore, the woman, or those caring for her, would be prohibited from wounding (or by extension destroying) the fetus just as she would be prohibited from wounding any part of her body, except for the purpose of providing for her overall well being. In other words, the woman, or those caring for her-- would be allowed, and at times required, to destroy the fetus if necessary to heal her.<sup>72</sup>

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<sup>68</sup> For example, R. David Feldman’s *Birth Control in Jewish Law* (NY: NYU, 1968); Basil Herring, *Jewish Ethics and Halakhah for Our Time* (NY: Ktav, 1984); R. Immanuel Jakobovits, “Jewish Views on Abortion” and R. J. David Bleich, “Abortion in Halakhic Literature,” in Fred Rosner and R. J. David Bleich, ed., *Jewish Bioethics* (Hoboken, NJ: Ktav: 2000) 139-196; etc.

<sup>69</sup> *The Proceedings of the Committee on Jewish Law and Standards of the Conservative Movement, 1980-1985* (NY: RA, 1988), include *teshuvot* by Rabbis Abelson, Feldman, Gordis and Klein as well as a Statement on the Permissibility of Abortion, 3-40; These *teshuvot* are reprinted in *Life and Death Responsibilities in Jewish Biomedical Ethics*, ed. Aaron Mackler (NY: JTS, 2000), 193-232.

<sup>70</sup> Genesis 9:5. See the discussion at BT Baba Kama 90b and Mishneh Torah, Hilkhhot Rotzeach 1:4.

<sup>71</sup> BT Sanhedrin 84b and Rashi, s.v. *va’ahavtah*, based on Leviticus 19:18: “Love your neighbor as yourself.” On the obligation to cure, see BT Baba Kama 85a on Exodus 21:19: “and you shall surely heal.” (Translation my own.) Mishneh Torah, Hovel Umazzik 5:1 ; Shulhan Arukh Hoshen Mishpat 420:6 after BT Baba Kama 90b prohibit hurting oneself. Yad Ramah and Tur Hoshen Mishpat *ad loc* hold it is not forbidden to damage oneself. See also the discussion in R. Elliot Dorff, *Matters of Life and Death: A Jewish Approach to Modern Medical Ethics* (Phila.: JPS, 1998), esp. 26-29.

<sup>72</sup> There is a debate about whether non-Jews may perform abortions in the halakhic literature. Although R. Ishmael derives the prohibition of feticide among the Noachide laws from Genesis 9:6, whosoever sheds the blood of man within man (BT Sanhedrin 57b), Tosafot argue that the prohibition is applicable also to Jews, for is there anything prohibited to a Noachide that is permitted to a Jew? See the discussion in R. J. David Bleich, “Abortion in Halakhic Literature,” in Fred Rosner and R. J. David Bleich, *Jewish Bioethics* (Hoboken, NJ: Ktav, 2000), 156-163. Alternatively, *Teshuvot Beit Shelomoh, Hoshen Mishpat* 132 (Bleich, 160) argues that

The Conservative Movement approved the use of abortion not only to protect the life of the mother, but also to protect her physical and mental health.<sup>73</sup> These *teshuvot*, as well as other *teshuvot* on bioethical decisions about abnormal fetuses, include detailed discussions regarding the circumstances under which a late term abortion would be permitted under Conservative Jewish law. Permission for a late term abortion is not limited to the purpose of protecting the life of the mother. Conservative and some Orthodox responsa permit late term abortion also when the fetus is discovered to be severely damaged and the mental anguish to the mother would be considerable if she were forced to bring such a non-viable or otherwise severely damaged fetus to term. (See the discussion below.)<sup>74</sup>

Rabbi David Feldman, in his classic work, *Birth Control and Jewish Law*, defines four stages of pregnancy relevant to our discussion.<sup>75</sup>

1) The first forty days: Because the developing fetus is considered *maya dalma* (mere water),<sup>76</sup> and not yet ensouled,<sup>77</sup> responsa on abortion exhibit the most leniency in permitting abortion during these first forty days.<sup>78</sup> Theoretically, RU486 would be most consistent with this rabbinic time table.

2) The first trimester, or first three months: Until the third month, the pregnancy is not necessarily noticeable and fetal movements are not yet discernable to the mother. Rabbinic preferences for first trimester abortions rely on the fact that the fetus has not yet even begun moving (quickening) and that first trimester abortions offer significantly less danger to the

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abortion cannot be homicide because the fetus is not a human life in its prenatal state. He suggests it is prohibited because of the prohibition on unlawful flagellation. Bleich n.71, 193

<sup>73</sup> See n. 69 above.

<sup>74</sup> For an example, see “*Peri and Neo-Natal Natology*,” Avram Reisner (CJLS, 1995), which determined that abortion under such circumstances is permitted throughout the pregnancy. Interestingly, R. Reisner, in his *teshuvah* prohibiting the intact d and x procedure except to save the life of the mother, permits the use of other abortion procedures for late term abortions without restrictions. The problem, of course, is that these other procedures can be more dangerous medically for the mother, as discussed below, *infra*.

<sup>75</sup> Feldman, 265-6. I am presenting them in inverse order from his presentation.

<sup>76</sup> BT Yevamot 69b.

<sup>77</sup> BT Niddah 15b; 30 a-b; BT Berachot 60a;

<sup>78</sup> Ahiezer, Vol. III, No. 65; *Resp. Beit Shlomo*, H.M. No. 132; *Resp. Tshurat Shai*, Second Series, No. 62; *Resp. Tzofnat Pa’aneah*, No. 59; Zweig, *Noam VII*, 53; and Weinberg, *Noam*, p. 213, cited by Feldman, 266 n83 .

mother than later abortions.<sup>79</sup>

3) From the end of the first trimester up until labor has begun: From the moment of quickening, the Rabbis made little distinction between second and third trimester pregnancies. Regardless of gestational age and viability, and until labor begins, the rabbis considered the fetus *gufah hu*, part of the mother's body and therefore treated it as such in assessing the mother's needs.

A number of commentators draw their positions on abortion from how the fetus is treated under the Sabbath laws, which are to be suspended if human life is in danger. A fetus is not considered human life in this context either, Ramban defining human life here as referring to independent life of a person.<sup>80</sup> In most cases, the Sabbath laws can be superceded for the mother's case only, and not for the fetus, for it is not yet human life. However, since a miscarriage would endanger the mother, all might be done to ensure her care.<sup>81</sup>

All agree that the mother's life takes precedence over that of the fetus. Some limit justification for abortion solely for the purpose of saving the life of the mother.

Others permit abortion to protect her physical health. Ovadiah Yosef permits an abortion when a woman has already had three caesarean sections to protect her health.<sup>82</sup> Rabbi Solomon Drimmer of Skola, in a nineteenth century responsum, permits abortion whenever continuing the pregnancy is more dangerous to the woman's health than having the abortion.<sup>83</sup> The overall health of the woman should take precedence. The beauty of this position is that it focuses on the needs of the mother, while not providing a blanket approval for abortion on demand for convenience sake. It also allows the mother and health care professionals to make the determination as to what is in the best health interests of the mother.

Others also permit abortion, based on Talmudic precedents, out of a concern for the health of children she already has.<sup>84</sup>

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<sup>79</sup> Resp. Pri HaSadeh, Vol. IV, n. 50.

<sup>80</sup> Ramban, *Torat HaAdam, Shar HaSakkanah*, in the name of some authorities, brought by Feldman, 263 n66, Ramban *Hiddushim* to Niddah 44.

<sup>81</sup> BT Yoma 82 a and Rashi. The Talmud permits instruments to be brought to remove a fetus from the body of its dead mother. But here the fetus has shown itself to be an independent life, since it at least is temporarily surviving its dead mother, and so even though it is only potential life, the Sabbath may be broken so that perhaps it could live. (BT Arakhin 7a, b).

<sup>82</sup> R. Ovadiah Yosef, Resp. Yabbia Omer Vol. IV, no .1 (Jer., 1964).

<sup>83</sup> Resp. Bet Shlomo, HM 132, cited by Feldman, 265, n 76. As for the danger of induced abortions, Feldman points out that the author of *Resp. Lvushaei Mordecai* (1913) HM 39, argues that under medical auspices, abortions do not pose a risk to the mother and therefore are not to be prohibited for fear of endangering the mother's well being.

<sup>84</sup> For example, R. Eiyush grants permission to induce an abortion in a woman who became pregnant while still nursing so the life of infant will not be endangered. He sees

The most lenient decisions also permit abortion to protect the mother's mental health which has sometimes been broadly defined. The Mishnah and Gemara already provide a precedent for considering the mother's emotional concerns, in protecting her from embarrassment even in the latest stages of pregnancy.<sup>85</sup> A number of responsa permit abortion when carrying to term would seriously impact the mother's mental stability, her family situation or her ability to support herself and her family.<sup>86</sup> For example, in responding to a question about a couple who already had two children with disabilities and were trying to conceive a healthy child, R. Eliezer Waldenberg permits an abortion even in the seventh month if tests show the fetus to be severely deformed.<sup>87</sup> The Committee on Jewish Law and Standards has passed *teshuvot* that permit the abortion of a severely deformed fetus or a fetus with little chance for survival (such as with Tay Sachs), even in the eighth or ninth month, if continuing the pregnancy would cause significant emotional distress to the mother.<sup>88</sup>

As Rabbi David Feldman points out, rabbinic literature developed in two directions based on Mishnah Oholot, both directions presume the fetus is not a person:

...One approach builds down and the other builds up. The first can be identified especially with Chief Rabbi Unterman, who sees any abortion as akin to homicide, and therefore permissible only in cases of corresponding gravity, such as saving the life of the mother.<sup>89</sup> It then builds *down* from this strict position to embrace a broader interpretation

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chemical induction of an abortion as rabbinic and therefore easier to justify. *Teshuvot Beit Yehudah* (Livorno, 5518), *Even HaEzer*, no. 14. Cf. *Tzitz Eliezer* VIII, 219, and IX, 239. Cited in "Abortion in Halakhic Literature," by R. J. David Bleich, in *Jewish Bioethics*, ed. Fred Rosner, R. J. David Bleich, 159.

<sup>85</sup> BT .Arakhin 7a, directing that the fetus of a condemned woman be killed before her execution to avoid the possible embarrassment to the condemned of a spontaneous abortion (miscarriage). See the discussion below *infra*.

<sup>86</sup> I personally know of a case in which an ultra Orthodox *bet din* (religious court) in Brooklyn in the early 1980s did not prohibit a pregnant divorcee from having an abortion based on her concerns that she would be fired from her job and unable to support her existing child if she brought her pregnancy to term.

<sup>87</sup> R. Eliezer Waldenberg, *Tzitz Eliezer* 2<sup>nd</sup> ed. (Jerusalem, 1985), vol. 15, no. 43. He specifies that the deformity need not be as severe as Tay Sachs.

<sup>88</sup> For example, A. Reisner, "Peri and Neonatology: The Matter of Limiting Treatment," YD 339.1995 Responsa 1991-2000 (CJLS) 347-356, esp. 350. While it can be argued that the claim on life proceeds as the fetus grows closer to birth, until birth it is still only potential life and therefore the best interests of the mother, as viable human life, must take precedence.

<sup>89</sup> *Shevet Miyudah* (1955), 26-30, 49,50; *Noam* VI (1963), 1-11; *Resp. Divre Yissaker* No.

of lifesaving situations which include a threat to her health, for example, as well as a threat to her life.<sup>90</sup> The other viewpoint (identifiable with the late Chief Rabbi Uziel and others, and to which we shall return) assumes no real prohibitions against abortion at any time, except perhaps during the most advanced stages of pregnancy, and builds up from this lenient position to safeguard against indiscriminate abortion.<sup>91</sup>

Two distinct trains of halakhic thought developed around Mishnah Oholot, growing out of the language of this Mishnah which states, her life takes precedence. These two trains of thought follow, respectively, the comments of Maimonides, on one hand, and Rashi, on the other.

Maimonides justifies the abortion based upon the concept of *rodef*, that the fetus is equivalent to a pursuer endangering her. The fetus therefore can be killed because it is seeking to kill her.<sup>92</sup> Those who follow Rambam therefore suggest that abortion is permitted, even required, (especially at such a late gestational age) only to save the mother's life.

For Rashi, the Mishnah stands on the proposition that the fetus is *lav nefesh hu*.<sup>93</sup> The issue of *rodef* is not pertinent, for the fetus does not have an independent juridical identity as long as the fetus is within the mother. *Poskim* (rabbinic authorities) following this train of thought (as cited above) have been more lenient, allowing even late term abortions not only to save the mother's life, but to protect her physical and mental health.

In light of the *teshuvot* passed by the CJLS that permit even late term abortions when faced with the severe deformity of the fetus, it is clear that we in the Conservative Movement can consider ourselves squarely in the camp that followed Rashi in this regard, permitting even late term abortions for significant maternal cause.

4) Once the birth process begins, the fetus begins to take on a separate status, *gufa aharina*, but is not yet legally a person in its own right.

A hierarchy of distinctions is clear when we compare the discussion in Oholot to one in Arakhin in which the execution of a pregnant woman is not postponed to allow her to give birth unless she is already in the midst of labor, at which point the fetus begins to differentiate from its mother. However, up until the moment labor starts, the Talmud requires even a very late term abortion to protect the mother, even if only from embarrassment.

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168, etc.

<sup>90</sup> For example, R. Ovadiah Yosef, op. cit., n.81 above.

<sup>91</sup> Feldman, *Birth Control in Jewish Law*, 284.

<sup>92</sup> *Hilkhot Rotzeach Ushmirat Nefesh* 1:9 (Laws of the Pursuer and Preserving Life). See the discussions in San. 72b, that the woman is being pursued by heaven; and JT San. XIV: 4, VII: 9, that one can no longer determine who is pursuing whom.

<sup>93</sup> Rashi on BT Sanhedrin 72b s.v. *yatza rosho*.

**משנה** האשה שיצאה ליהרג אין ממתינין לה עד שתלד האשה שישבה על המשבר ממתינין לה עד שתלד האשה שנהרגה נהנין בשערה בהמה שנהרגה אסורה בהנאה :

**גמרא** ...

אמר רב יהודה אמר שמואל האשה היוצאה ליהרג מכין אותה כנגד בית הריון כדי שימות הוולד תחילה כדי שלא תבא לידי ניוול

Mishnah: The execution of a pregnant woman who is condemned to death is not postponed until she gives birth. But once she is on the birth stool, the execution is postponed until after she gives birth.

Gemara:... Said R. Judah in the name of Samuel: Before such a woman is executed she is struck across her abdomen so that the fetus will die prior to the execution, to prevent her dishonor at the time of execution. <sup>94</sup>

As the fetus begins to assert its individuality with labor, its claim on rights and protections begins also to be asserted on its behalf. Therefore, the mother's emotional pain no longer supercedes its claim to be born. However, Oholot shows us that even during labor, the fetus' claim on being born is subservient to the mother's physical well being.

Oholot clearly shows that late term abortions are permitted even after labor begins to save the mother's life. Several poskim would permit taking her health into consideration even after labor begins. <sup>95</sup> This is especially important since waiting to perform an abortion until her life is actually in danger may needlessly endanger her life to the point that she could not be saved. <sup>96</sup>

When is a late term abortion permitted under Conservative Jewish law? A late term abortion is never permitted for the mere convenience of the mother or as a form of birth control. However, an abortion even in the latest stages of pregnancy is permitted under Jewish law for maternal cause, when continuation of the pregnancy poses a significant risk to the mother's physical well being, as determined by her physician, or in the face of maternal emotional distress, for example as when faced with a fetus with severe abnormalities.

### **3) Under what conditions would an intact d and x procedure, popularly labeled “partial birth abortion” be permissible under Jewish law?**

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<sup>94</sup> BT Arakhin 7a.

<sup>95</sup> See n. 28 above.

<sup>96</sup> See discussion below infra.

### **The Procedure and the Question of Maternal Well Being:**

Late term abortions are often the result of heart-rending decisions made by the mother and her family, upon learning late in the pregnancy that the fetus has severe abnormalities, has little or no chance of surviving, or that continuing to carry would endanger the mother's life or her physical health. Lacking definitive information earlier in the pregnancy and/or in an attempt to bring a much wanted fetus to term, the mother and her doctor could not have made the painful decision to abort any earlier in the term of the pregnancy.<sup>97</sup>

For example, the mother may experience severe preeclampsia for any number of reasons due to the pregnancy. Sometimes preeclampsia is a result of carrying a severely deformed fetus, with cystic hygroma (a tumor on the back of the neck) or hydrocephaly (in which water compresses the brain so that there is not enough brain left to be compatible with life). Such conditions result in an abnormally large amount of amniotic fluid which extends the uterus beyond normal and which therefore impinges on the other bodily functions of the mother. The fetal head becomes so enlarged, larger than even the head of the largest of full term fetuses, that the head could not exit the woman's body naturally. The fetus itself has no chance for viability.

To give another example, the mother may be facing the possibility of kidney failure, difficulty with respiration, or be in danger of stroke or seizure due to dangerously high blood pressure. In such cases the only cure would be to evacuate the uterus. According to Johns Hopkins' Director of Contraceptive Research and Programs, Dr. Paul Blumenthal, an Associate Professor of Gynecology and Obstetrics at Johns Hopkins Medical Center and one of their top specialists in high risk pregnancies, this happens most often in women who have a high blood pressure condition, in young women in their first pregnancies, and in older women after not having had a pregnancy for some time. Alternatively, a mother could experience a burst blood vessel in the brain but brain surgery could not be performed while the woman was pregnant, so a late term abortion would be required.

In all these cases, the question is not whether or not to perform the abortion: some abortion procedure is necessary. Conservative Jewish law, as determined by the CJLS in 1983, would permit an abortion in all these and similar cases.<sup>98</sup> The question, therefore, is which procedure is the safest to ensure the mother's well being.

Physicians rely on the intact dilation and extraction procedure (henceforth to be referred

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<sup>97</sup> Dr. Judith Pratt Rossiter, assistant professor of Obstetrics and Gynecology and assistant director of the Prenatal Diagnostic Center, with a joint appointment in the Center for Medical Genetics, at Johns Hopkins Hospital, in her testimony before the Maryland State Senate against Maryland Senate Bill # 695. She explains that it is not unusual that such information is not available until the 18 -20 week sonogram indicates there is a problem and then it takes several weeks to determine the exact nature of the problem and what options are available to the mother.

<sup>98</sup> The permissibility for abortion in the case of damage to the fetus is dependent not upon concern for the fetus but solely out of concern for the mother. See discussion in *teshuvot* in *CJLS Proceedings*, op. cit.

to as an intact d and x)<sup>99</sup> when, in their medical opinion, they have determined it provides the safest procedure to protect the short and long term health of the mother under such conditions.

The procedure is as follows: The cervix is chemically and manually dilated, the body of the fetus is manually extracted from the womb feet first. (Labor technically does not take place except in a small percentage of situations, for example when the mother was already in labor and the necessity for the procedure became clear due to maternal danger.) The majority of the fetus remains within the woman's body, usually only the feet, and sometimes also the legs possibly extend outside her body. (In other words, at no time is the majority of the fetal body external to the mother.) The head remains within the womb and its intracranial contents are extracted. The fetus is therefore terminated before its head leaves the womb and before the majority of its body is external to the mother's body. Following extraction of its intracranial contents, the head is compressed, which permits it to be withdrawn through the vagina without the necessity of performing surgery on the mother. The terminated fetus and womb lining are evacuated manually and/or, as necessary, with the help of suction through the vagina.<sup>100</sup>

An intact d and x is one of a number of procedures available to a physician to terminate a late term pregnancy.<sup>101</sup>

What are the alternatives to an intact d and x? One option, when time and the health of the mother allows, is for an intact d and e (dilation and evacuation), which allows the physician to dissect the fetus while still wholly within the mother's womb. While medical literature is split over whether the intact d and x or the intact d and e offer the least danger or medical trauma to the woman herself, high risk obstetrics specialists at Johns Hopkins University assure me that the intact d and e is no longer a viable procedure for the latest term abortions, at which point the bones of the fetus are already formed and the danger exists that bone chips could rip the mother's uterus. The d and x procedure does not pose the same dangers because the fetal body is withdrawn intact into the vaginal canal.

Another option, when time, facilities and the health of the mother allow, is to administer an injection into the fetal heart (referred to as a "cardiac stick") to terminate the pregnancy before the intact d and x takes place. This is only possible where highly sophisticated ultrasound

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<sup>99</sup> The term's use here is designed to be distinguished from an intact dilation and evacuation (an intact d and e) in which the dismemberment of the fetus takes place wholly within the mother's womb. In medical literature, the abbreviated term intact d and e is sometimes used for one or the other of these two procedures. The distinctions between the two terms is discussed in Janet E. Gans Epner, Harry Jonas, Daniel Seckinger, "Late Term Abortion," *Journal of the American Medical Association* 280:8 ( Aug.,26, 1998), 725.

<sup>100</sup> See detailed description in Gans Epner, et. al., 726.

<sup>101</sup> My appreciation to Dr. Jessica Beinstock, Residency Program Director of Gynecology and Obstetrics of Johns Hopkins University, and Dr. Paul Blumenthal, Associate Professor of Gynecology and Obstetrics at Johns Hopkins University and Director of Contraceptive Research and Programs at Johns Hopkins Bayview, both specialists in high risk obstetrics, for offering their medical expertise on this issue. Any errors are, of course, my own.

equipment and interpretation are available to guide the cardiac stick procedure, and when medical providers are trained in this procedure. Specialists assure me that the majority of abortion providers are not trained in such a procedure nor are the facilities available for such a procedure in the majority of hospitals. In addition, some doctors refuse to use this injection because of concern that it might expose some women to a small but unnecessary risk.<sup>102</sup>

Another alternative would be to perform a hysterotomy, a somewhat more risky procedure than a caesarian section.

Caesarian sections are relied upon routinely in medical practice. However, even for a relatively healthy woman, a caesarean section presents not only additional and significant pain during recovery (as any woman who has undergone caesarean section can attest) but it presents a real risk to the life and health of the mother, as does all surgery, due to blood loss and infection, and, specifically for caesarean sections, due to risk of uterine rupture. The risk to the mother is not insignificant: the mortality rate for caesarean section is 21.8 deaths per 100,000 women compared to the mortality rate for vaginal deliveries, which is 3.6 deaths per 100,000 women. In other words, a woman who undergoes a caesarean section is more than six times more likely to die than is a woman who undergoes a vaginal delivery. Consequently, the reliance upon caesarean section is currently being reevaluated in the medical field.<sup>103</sup>

A woman may willingly undergo this danger in an effort to bring a healthy baby to term. However, when the fetus is severely deformed and/or has no hope of survival and/or endangers the mother's well being, such a risk is questionable.

The scenario becomes even more dire when we realize that, in the cases of the women cited above who are choosing a therapeutic abortion with no hope of bringing a normal and healthy baby to term, the alternative to an intact d and x is not a caesarean section but the much more risky hysterotomy.

In contrast to a caesarean, a hysterotomy requires a much larger and vertical incision of the uterus. More tissue is cut and more bleeding occurs than with a normal caesarian section. Infections are much more likely. The danger of adhesions is great, and with it future fertility is often affected. If a future pregnancy results, and if it comes to term, a caesarean must be performed, thereby presenting further risk to the mother. Statistics on morbidity rates of hysterotomies are so high that medical practitioners generally stopped performing them once the intact d and e and, for late term abortions, the intact d and x procedures became available.<sup>104</sup>

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<sup>102</sup> Gans Epner, et. al., 726. Reisner's reliance, in his *teshuvah*, on the cardiac stick is therefore unrealistic and poses a material danger to the mother if tried in all but the most limited of cases.

<sup>103</sup> L. Yolef and S. Maschich, "Increased Maternal Mortality in Caesarean Section As Compared to Vaginal Delivery? Time for Reevaluation," *American Journal of Obstetrics and Gynecology* 178 (1998), 1, cited in Gary Cummingham, ed., *Williams Obstetrics*, 21st edition (MacGraw Hill, 2001). For mortality rates, see, p. 545.

<sup>104</sup> Dr. Christopher Tietze in a study for the Joint Program for the Study of Abortion.

According to Dr. Paul Blumenthal, an intact d and x has a much lower morbidity rate than does the hysterotomy (or even a caesarean section) precisely because the intact d and x is a vaginal delivery.

Under such conditions, Dr. Blumenthal argues, it is critical that the decision to perform an intact d and x not wait until the mother's life is in danger, because by then it may be too late. The doctor should be free to choose the medical procedure which has the best chance of protecting his or her patient's health and well being.

### **The Larger Context of the Debate:**

This procedure has generated much controversy in the public arena. Opponents of abortion have labeled it "partial birth abortion" in their effort to elicit sympathy for their cause. Under pressure from the anti-abortion forces, the AMA recommended that the intact d and x procedure not be used unless other procedures pose greater maternal risk. This position seemed to put into question the necessity of ever needing to rely on the intact d and x procedure, according to both those who supported and opposed the decision, thereby influencing public debate on this issue.<sup>105</sup> A number of specialists in the field of high risk obstetrics subsequently resigned their AMA membership in protest that the AMA had turned away from the best interests of their patients since the intact d and x is, at times and without doubt, the safest procedure for their patients.

Though the number of women for whom the intact d and x would be the safest treatment may be low in raw numbers statistically, there nevertheless exists a significant number of women whose health would be endangered or compromised if the intact d and x were not an available option upon which the physician could rely.<sup>106</sup>

In January 1997, the Board of the American College of Obstetrics and Gynecology determined that while intact d and x is not the only option available to practitioners:

An intact d and x, however, may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstance can make this decision.<sup>107</sup>

The ACOG argues that it is essential that decisions about whether to utilize an intact d

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<sup>105</sup> Indeed, Rabbi Resiner, in his *teshuvah Ein Dohin*, reads the AMA position in this exact way, arguing that doctors find no real medical necessity for the intact d and x procedure since other procedures can be substituted. However, the medical specialists I have consulted assure me otherwise.

<sup>106</sup> Testimony, Dr. Judith Pratt Rossiter, op. cit.

<sup>107</sup> Gans Epner, et. al., 728. Interestingly, R. Reisner, in his *teshuvah Ein Dohin Nefesh Mipnei Nefesh* (CJLS, Dec. 2001) omits the latter part of this ACOG statement which contradicts his position.

and x be left to the physician and his or her patient based upon each particular woman's specific health needs, in effect arguing that a decision about what is medically best for the woman must of necessity be made on a case by case basis by the person who would know best, i.e., the woman's physician. Similarly in response to Congressional efforts to ban the intact d and x procedure in 1995, the ACOG criticized Congress for trying to supersede the medical judgment of trained physicians.<sup>108</sup>

### **Summary of Halakhic Considerations**

The fetus is considered part of its mother's body rather than an independent identity until birth. We have seen that there is sufficient precedent in Jewish law to define birth as taking place not until the head or the majority of the body of the fetus exits outside the mother's body into the air of the world. In the intact d and x procedure, termination takes place while the head and majority of the body of the fetus remain within the mother's body. The procedure would therefore be permitted under Jewish law.

Abortion is a serious matter not to be entered into lightly out of respect for the potential for life vested in the fetus. In addition, when faced with tragic information about fetal deformities, prospective parents should remember that all children, regardless of any disabilities, are children of God, equally deserving of dignity, love and care as precious human beings. There have been many advances in our ability to treat various childhood illnesses and disabilities. In addition, education and information sharing have stimulated an increase of support in the Jewish and larger communities for families grappling with the implications of caring for children facing developmental challenges or serious childhood illnesses. Such news may encourage families facing the tragic news of fetal abnormalities to proceed with bringing the pregnancy to term. Nevertheless, not every woman or family is emotionally or physically capable of coping with the knowledge of having a disabled or terminally ill child. Sufficient precedents in Jewish law exist to permit the abortion of a severely deformed fetus, even in the latest stages of pregnancy.<sup>109</sup>

Similarly, while Jewish law does not condone abortion as a form of birth control, abortion is permitted to protect the physical and mental health and well being of the mother. Jewish law as it developed reflects a tightening of justifications for abortion, i.e. a greater hesitancy to permit abortion without significant cause, as the pregnancy proceeds from conception into the last trimester.<sup>110</sup> However, sufficient precedents exist to permit abortion where there is a serious risk to the health of the mother, or in the face of severe fetal abnormalities, even in the last stages of pregnancy. Serious health risk need not be immediately life threatening. Anything which could cause long term damage to the woman or risk further

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<sup>108</sup> Ibid.

<sup>109</sup> See above, n. 88, 89.

<sup>110</sup> It is important to note, however, that Mishnaic materials are more general in their approach, providing a general permissibility for abortion until birth.

complications without appropriate medical intervention would be sufficient to justify an abortion, just as such barometers are used to justify any serious surgery under Jewish law.<sup>111</sup> For example, when faced with severe maternal preeclampsia or fetal abnormalities incompatible with life, such as hydrocephaly, medical intervention utilizing an intact d and x procedure (rather than more invasive alternative procedures) can protect a mother's ability to fully recover and her ability to conceive and safely bring to term future children. Sufficient precedents exist in Jewish law to justify such an abortion even in the latest stages of pregnancy.<sup>112</sup> R. Drimmer's definition is helpful to us here: an abortion is warranted whenever continuing a pregnancy presents more danger to the mother's health than aborting the pregnancy.

The physician is required by halakhah to see that the patient is thoroughly healed, i.e., to do all in his or her power to protect the health and well being of the patient and return her to perfect health when possible.<sup>113</sup> Specialists in high risk obstetrics advise that an intact d and x procedure is the safest medical procedure to utilize for women facing late term abortions. Alternatives, while available, would needlessly jeopardize the woman's physical health in reference to a number of significant risk factors. Specialists in high risk obstetrics also emphasize that it is imperative not to wait until the mother is literally in danger of her life when medical indications first appear that she is at risk.

Therefore the decision to utilize a particular medical procedure, i.e., an intact d and x, may be left to the discretion of the woman's doctor in the effort to do whatever is necessary to protect her health and well being to the best of the doctor's ability and training. If the doctor believes that an intact d and x provides the best option to protect the woman's health and well being, Jewish law would permit the doctor to use that procedure and for the woman to undergo it.

Often the decision to utilize the intact d and x is made by the doctor on short notice, at times under urgent conditions, due to deterioration in maternal and/or fetal condition. However, when time permits, the mother should consult with her rabbi, in addition to her doctor, whenever considering any decision on abortion.

### Clarifying Differences

R. Avram Reisner, in his teshuvah *Ein Dohin Nefesh Mipnei Nefesh*,<sup>114</sup> permits late term abortion utilizing procedures other than the intact d and x, permitting use of the intact d and x procedure only to save the life of the mother.

He bases his decision on his determination that the word *prozdor*, in the rabbinic term

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<sup>111</sup> See notes 22, 70-72 above.

<sup>112</sup> There is even precedent to allow an abortion if the fetal head and/or body were external to the mother, yet still endangering her, for in such a case the new born could be considered a *rodef* (a pursuer) and the physician would be justified as operating in defense of the mother's health as an agent of the mother. See the discussion *infra* and n28 above.

<sup>113</sup> See Exodus 21:19, BT Baba Kama 85a, BT Berachot 60a, Shulhan Arukh Yoreh Deah 336:1 and n70-72 above.

<sup>114</sup> Passed CJLS, Dec. 2001.

*hutz lprozdor*, refers to the cervical os. Reisner argues therefore that, if *prozdor* means the cervical os, then the moment of birth takes place when the majority of the fetal body has passed through the cervical os, even though the head remains within the womb and the majority of the fetal body remains within the mother's body. Since termination of the fetus in the intact d and x procedure occurs precisely when the fetal body is external to the cervical os though still within the vaginal canal, Reisner would prohibit the use of such a procedure under the grounds that *ein dohin nefesh mipnei nefesh*<sup>115</sup>, one does not push aside one life for another. Nevertheless, Reisner acknowledges that he could not be certain that his interpretation is correct. He therefore adds that in the event that the mother's life is in jeopardy, the certainty of her danger would override the uncertainty of his interpretation, and therefore he would permit the use of the intact d and x to save the mother's life.

R. Reisner's *teshuvah* is fraught with substantive difficulties, most notably the fact that the Talmudic sources he cites do not support his contention that the Talmudic Sages were referring to the cervical os in their use of the term *prozdor*. On the contrary, those sources (as discussed above in great detail) show that our Talmudic Sages understood the term *prozdor*, in the context of female anatomy, to refer to a woman's external genitalia, i.e. the vulva and possibly including the vaginal orifice. They consequently understood birth (in relationship to issues of abortion) to take place when the head or majority of the body of the *ubar*, the fetus, exits the mother's body into the open air, and not before.

What do our different approaches mean in practical terms to actual cases?

Let us use as an example a woman who is carrying a severely deformed fetus, for example, with hydrocephaly, a condition in which water compresses the brain so that there is not enough brain left to be compatible with life. In this case, the brain case is so large that natural birth is impossible. Furthermore, the condition of the fetus actually presents a danger to the mother of various complications, from preeclampsia to high blood pressure and stroke, and kidney failure, although her life is not usually actually in danger when the fetal condition is ascertained. Conservative Movement law, even according to Rabbi Reisner, would permit a late term abortion under these circumstances even if the pregnancy itself presented no physical danger to the woman.<sup>116</sup>

However, the procedures available to the doctor and the health impact on the woman would be significantly different according to our two positions.

Since the woman's life is not currently in danger, the relative safety of the intact d and x procedure would be denied her by Rabbi Reisner. He would suggest that a cardiac stick be utilized to terminate the fetus in utero before proceeding with the intact d and x. While theoretically a solution, it is neither practical nor realistic. Only the most advanced and well financed hospitals have the appropriate equipment and even most of these do not have practitioners adequately trained to be able to proceed safely with this procedure. The alternative available to doctors under R. Reisner's *teshuvah* would then be to perform a hysterotomy which

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<sup>115</sup> A reference to Mishnah Oholot 7:6.

<sup>116</sup> Similarly, our Movement permits abortions for other fetal defects which are terminal, such as Tay Sachs, to spare the mother the anguish of watching her child die at a young age.

would require a large and vertical incision of the uterus ( as opposed to the much smaller and horizontal caesarean incision). The hysterotomy creates significantly more bleeding than does a caesarean. While there may have been no question of the mother's life being in danger when the decision to proceed with the abortion was made, or even when the procedure started, the surgery itself can put her in danger. Her blood pressure can begin to fall, her kidneys could be compromised, or any other number of complications could result while the woman was on the table. Should she survive surgery, the chances of her developing complications from blood loss or infection (both of which are significantly more likely with a hysterotomy than with a caesarean) are significant. Furthermore, the larger incision leaves the woman with the risk of uterine rupture and therefore significantly affects future decisions about conception and the safety of her carrying future child to term. Imagine the significant maternal distress such a woman would experience when, following the loss of a wanted pregnancy to the tragedy of severe fetal abnormality, she learns that she can have no further children of her own, especially when there was a safer procedure which could have allowed her the possibility of future children. It is worth remembering at this juncture that the Rabbis not only took into account the emotional distress of the mother when making decisions about abortion (as discussed above)<sup>117</sup> but, furthermore, Jewish law makes great effort to provide women the opportunity to bear children.<sup>118</sup>

The case under consideration is one in which the mother is relatively healthy. To take another case, the mother could have high blood pressure, mild preeclampsia, weakened kidney function or any number of other physical conditions which would not, in and of themselves, be life threatening at the time of the decision not to utilize the intact d and x procedure under R. Reisner's direction. However, according to Johns Hopkins's Dr. Blumenthal, it is critical that a doctor not wait until a woman's life is in danger because the medical situation can deteriorate quickly with a hysterotomy so that it is not until it is too late to save the mother that the medical team even realizes that she is, in fact, in danger, which may explain why the morbidity rates for hysterotomy are so high.

Under my *teshuvah*, the doctor would choose the abortion procedure that would be safest for the mother. Under these circumstances, specialists in high risk obstetrics inform me, an intact d and x procedure would most likely be the preferred treatment, offering the least risk to the mother, i.e. the most chance for a healthy recovery and the ability to carry a future child to term.

## Conclusion:

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<sup>117</sup> See discussions above, *infra*, on M. Arakhin 1:4, Arakhin 7 a-b.

<sup>118</sup> See, for example, BT Yevamot 65 b on which R. Nahman reverses his decision not to grant a woman seeking a divorce her ketubah in response to her plea that she deserves to have children to care for her.

Abortion is a serious matter not to be entered into lightly, out of respect for the potential life vested in the fetus. Nevertheless, Jewish law considers the fetus part of the mother's body and not an independent being until birth. Therefore, while the fetus is to be cherished as potential life, the mother's life and well being takes precedence over that of the fetus until birth. Birth is defined as when the fetal head or majority of its body exits the mother's body into the open air. Since in the intact d and x procedure, termination takes place when the head and majority of the body remains within the mother, an intact d and x procedure would be among the abortion procedures permissible under Jewish law whenever maternal cause exists which otherwise justifies a late term abortion under Jewish law (i.e., to prevent danger to her physical health or in the face of severe fetal abnormalities causing maternal emotional distress) and when the woman's physician determines that the intact d and x is the preferred procedure to protect her health and well being. It is therefore permissible under Jewish law for an intact d and x procedure to be performed whenever the patient's doctor deems it the preferable procedure in the best interests of the woman's health and well being.