

Ein Dohin Nefesh Mipnei Nefesh

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שאלה

Is “partial-birth” abortion permissible? Are Jews permitted to perform “partial-birth” abortions or have them performed upon them?

תשובה

There has been much agitation and strong efforts the last few years to pass a ban on “partial-birth” abortions both at the state and federal levels. At the federal level, though various such bans have been passed, the bills have been vetoed by the President, and all attempts to override the vetoes have failed¹. At the state level many such bills have passed, only to be prevented from taking effect by judicial activity. Both the United States Court of Appeals for the Sixth and Eighth Circuits have held those laws unconstitutional, either unconstitutionally vague or causing an undue burden on a woman’s right to abortion². Recently, however, the seventh Circuit has upheld the laws passed in Illinois and Wisconsin³. In the summer of 2000, with Justice Stephen Breyer writing the opinion for a 5-4 majority, the Supreme Court held with the Nebraska Appellate Court that the current attempts to ban “partial-birth abortion” were an “undue burden on a woman’s right to make an abortion decision,” and remained unconstitutionally vague. Significantly, Justice O’Connor, recognized as the soft swing vote in an otherwise evenly divided court, wrote in her concurring opinion that a bill “that only prescribed D & X [n.b.: see infra, the procedure generally described as “partial-birth abortion”]... and included an exception to preserve the life and health of the mother would be constitutional in my view,” leaving the matter very much open. Ours is not the question of the proper public policy for the United States, nor for any state, but rather the more limited question whether Jews should avail themselves of such a procedure, should it remain legal, and whether Jewish physicians should perform it.

Defining Terms

The first step in this responsum must be one of defining the terms of discussion, for they are in no wise clear. “Partial-birth” abortion has been so named by its opponents, who sought by its name to indicate that this was akin to infanticide. As defined by the Partial Birth Abortion Ban Act, it is “an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing delivery.” The procedure is described more fully by Dr. Martin Haskell in the 1992 paper, “Dilation and Extraction for Late Second Trimester Abortions”, as follows:

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

With a lower extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities. The skull lodges at the internal cervical os... [T]he surgeon then forces...scissors into the base of the skull... The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents.

While “partial-birth” abortion has been the name favored by its opponents, no one alternative term has been accepted by the medical profession. The first to popularize the procedure, Dr. James McMahan, termed it “Intact Dilation and Evacuation” to distinguish it from the more common technique whereby the fetus is dismembered before removal from the womb [D & E], but he included within that rubric the delivery of dead babies as well as live ones. Dr. Haskell admits to coining the term, “Dilation and Extraction” [D & X]. The procedure is also known, perhaps more technically, as “Intrauterine Cranial Decompression.” However, the term “partial-birth abortion” is the popularly recognized term and closely matches the assumptions of the primary halakhic source that addresses a similar situation.

Those seeking to ban this procedure, while initially seeking its complete ban, have conceded some ground by allowing that it might be permitted to save the life of the mother. President Clinton has consistently vetoed the bill, insisting that it must include “language that says, serious, adverse health consequences to the mother.” Those favoring it have largely argued the right of physicians to determine proper treatment for their patients.⁴ The grounds for using the procedure, however, remain in dispute. Its supporters insist that it is often indicated, because standard D & E procedures require reaching into the womb with instruments to dismember the fetus, risking trauma to the cervix and uterus. Its detractors see risk of cervical incompetence due to the forced dilation of the cervix and, if anything, worry more about uterine trauma associated with the turning of the fetus prior to D & X than that associated with dismemberment in D & E.⁵ Studies to date, however, have not distinguished these two methods. Dr. Janet Epner, writing for an American Medical Association panel, finds that “In the absence of controlled studies, the relative advantages and disadvantages of the procedure in specific circumstances remain unknown.” Dr. C. Everett Koop, former surgeon General of the United States, insists that “no competent physician with state-of-the-art skill... needs perform a partial-birth abortion” and the American Medical Association has conceded that the procedure is “not medically indicated” and supported the legislation which would ban the procedure. Their expert panel was unable to find “any identifiable situation” in which the D & X procedure was “the only appropriate procedure to induce abortion.” Similarly, the Board of ACOG [the American College of Obstetrics and Gynecology], issued a statement in January 1997, stating that its select panel “could identify no circumstances under which this procedure... would be the only option to save the life or preserve the health of the woman,” but that “an intact D & X ... may be the best or most appropriate procedure.” It must be noted, however, that it is precisely the definition of “best and most appropriate” that is at issue.

Here it must be noted that obfuscation of the issue for political purposes has ruled the American civic debate and does so still. The proponents of abortion choice worry that the movement to ban “partial-birth” abortion is but a wedge to move toward the banning of all abortion, and they regularly characterize this movement as an attempt to ban all late-term abortion. And this may well be so. The opponents of abortion choice, meanwhile, depict this procedure as akin to infanticide, which would likely be judged inappropriate if that characterization were accepted. They may wish, ultimately, to ban all abortion, or all late-term abortion, but it should be possible to consider the D & X procedure apart from the political machinations of any faction. Of the former claim, let me reiterate that halakhah permits and even mandates certain abortions, even in late-term, as will become clear when we turn to text. What remains at issue is whether the particular procedure known as “partial-birth” abortion, or D & X, is, in fact, akin to infanticide, and whether other safe methods are available. Thus, the AMA itself, which took a decision criticized as political to support one of the abortion bans, “recommends that the intact dilation and extraction procedure not be used unless alternative procedures

pose materially greater risk to the woman.” Significantly, [Annas] “Both sides admit that even if the technique of intact dilation and extraction is outlawed, it is unlikely that even one abortion will be prevented.”

The Guiding Precedent

From the perspective of Jewish law, the question of potential infanticide demands the serious moral attention of halakhic thinkers. What is the meaning of the claim that the D & X procedure is “akin to infanticide?” Is it, perhaps, truly infanticide? Or is it, while not really infanticide, likely to lead to infanticide? Or is this simply a scare tactic on the part of those seeking a ban? The guiding precedent in Jewish Law is a Mishnah in Oholot, a tractate in the order Tohorot which has neither Babylonian nor Palestinian Talmud on it. Before introducing the Mishnah, let it be stipulated that Jewish Law recognizes the permissibility of abortion and considers the fetus in utero less than fully human. This determination is based on a verse, Exodus 21:22, which was understood by the Rabbis to accept payment for damages if a miscarriage results from a blow.⁶ Nevertheless, the Mishnah in Oholot 7.6 presents the following situation:

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.

[When] a woman experiences difficulty in labor — one dismembers the fetus in her womb and removes it limb by limb, for her life takes precedence over its life. If a majority [of the fetus] has emerged — one does not touch it, for one does not set aside one life on account of another.

Delivery serves as a bright line distinguishing the rights of a fetus in utero from those of a born infant. Should this be insufficiently clear, Rashi, the patient teacher par excellence,⁷ presents a full paraphrase of this Mishnah in his commentary on Sanhedrin 72b, as follows:

אשה המקשה לילד ומסוכנת... החיה פושטת ידה וחותרתו ומוציאתו לאברים,
דכל זמן שלא יצא לאויר העולם לאו נפש הוא וניתן להורגו ולהציל את אמו.
יצא ראשו אין נוגעים בו להורגו דהוה ליה כילוד, ואין דוחין נפש מפני נפש.
אבל

When a woman experiences difficulty in labor and she is in danger — the midwife reaches in and dismembers and removes it [the fetus] in pieces [lit.: by limbs], for as long as it has not emerged into the open air [lit: the air of the world], it is not a living soul and it is permissible to kill it to save its mother. But if his head had emerged — one does not touch him to kill him, for it is as if he is born and one does not set aside one life on account of another.

This precedent is set in law in Maimonides [henceforth Rambam⁸]’s *Mishneh Torah, Hilkhhot Rotzeah uShmirat HaNefesh 1.9*, in the following somewhat changed language:

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' וזהו טבעו של עולם.

The sages instructed that when a pregnant woman experiences difficulty in labor, it is

permissible to dismember the fetus in her womb, either pharmaceutically or surgically, for it is as if it is pursuing her to kill her. But once he has pushed out his head, one does not touch him, for one does not set aside one life on account of another, and this is the way of the world.

This language, under Rambam's controlling influence, is the language codified in the *Shulhan Arukh*, Hoshen Mishpat 425.2. It will be necessary, as we continue, to pay close attention to these and other language cues as we negotiate the intricacies of interpretation of this law.

Refining Terms

On its face, the guiding precedent seems to support the intuition of the opponents of "partial-birth" abortion that once an infant is born, or as Rashi puts it, emerges into the open air, that infant is no longer subject to abortion, but is to be treated as a separate and sacred life. But a question may be raised, both in American law and in the halakhah, which serves to qualify that understanding, for the moment of birth needs definition. Is the moment of birth to be understood as the moment when the infant exits the womb into the vaginal canal, or is birth accomplished only at the moment that the infant exits the vagina?⁹ This uncertainty, while it was not the focus of the Federal Courts of Appeals who have dealt with the matter, appears to be a part of the "unconstitutional vagueness" addressed by the District Court in New Jersey¹⁰ and points out some of the politically motivated shading of language that has been rife in this matter. The common understanding is clearly that birth happens, as Rashi says explicitly, when the baby emerges into the open air. This is the climax in the delivery room. This is the time, not before, when the mother has completed her pushing of the baby (disregarding the additional pushing to expel the placenta). This is the time of birth recorded on hospital records and given the state for the birth certificate. Yet the D & X procedure happens before that time, when the infant is still fully or largely in the birth canal.

Attend carefully to Dr. Haskell's description, given in greater detail than above:

The fetus is oriented dorsum or spine up. At this point, the right-handed surgeon slides the fingers of the left hand along the back of the fetus and "hooks" the shoulders of the fetus... [T]he surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curve down, along the spine and under his middle finger until he feels it contact the base of the skull...

The surgeon is working blind, on a subject that he can feel but cannot see. Indeed, Dr. Haskell's description was of delivery of the fetus into the vaginal canal, not delivery from the vagina into the open air. Thus it is unclear, despite the propaganda of its opponents, whether birth had occurred yet at all. This was confirmed for me quite recently, when, in the New York Times article about the Supreme Court accepting a hearing on the "partial-birth" abortion laws³, the general counsel for the National Right to Life Committee was quoted as saying that the court's precedents permitting abortion should not apply to the D & X procedure, which he characterized as, "the killing of living infants who are only inches away from being fully born." This impression was further confirmed for me in conversation with an OB-GYN of my acquaintance. It was confirmed, finally, by the official definition of "partial-birth" abortion adopted by ACOG [The American College of Obstetrics and Gynecology, the primary professional group in its field] cited by the court in *Carhart v Stenberg*. They define "partial-birth" abortion as:

a method of abortion (commonly called dilation and extraction, or D & X) involving extraction, *from the uterus into the vagina*, of all the body of the fetus except the head, following which the fetus is killed by extracting the contents of the skull. *There-*

after, the dead but otherwise intact fetus is taken from the mother's body [my emphasis].

The infant has not yet been delivered, and yet, this type of abortion is labeled “partial-birth” abortion, in effect claiming that birth has occurred at the earlier moment of delivery from the womb into the birth canal.¹¹

It is in response to that objection that increasingly the opponents of “partial-birth” abortion have sought to move the definition of birth to that earlier point through several stratagems. In response to the critique of the courts that the Partial-Birth Abortion Ban Act has been unconstitutionally vague, the state of Missouri is now considering a more clearly defined law, Missouri No. 565.300 which specifies that,

If vaginally delivered, a child is partially separated from the mother when the head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the mother's cervical os. If delivered abdominally, a child is partially separated from the mother when the head in a cephalic presentation, or any part of the torso above the navel in a breech presentation, is outside the external abdominal wall.¹²

This definition adheres closely to the wording of the Mishnah, save that the Mishnah, as we understood it, referred to the emergence from the vagina, birth as commonly understood, and this definition has pushed the moment of birth back several crucial moments. Going a step further, however, is the American Family Association (an anti-abortion group) which proposes that “partial-birth” abortion law should be based on the “Inevitable Delivery Theory.” Not yet the model of any extant law, it seeks to define birth and the proposed prohibition, as follows:

The dynamic irreversible process of birth, which begins when the membranes are ruptured and the fetus emerges through the cervical os into the vaginal canal, concluding with the complete separation of the infant from the mother.

Legislation proscribing the procedure(s) described herein regulate... the killing of a live intact infant in the process of being born... The protrusion of *any* portion of the fetus... however slight, through the cervical os into the vaginal canal... marks the beginning of a birth and the point at which the legislation will apply¹³ [italics in original].

This definition does not comport with the description in the Mishnah, which may refer to the later point of emergence from the body, and which, in any case, requires delivery of a majority of the body, not merely “any portion”. Clearly, we cannot assume convergence between any eventual American legislation and the halakhah.

The Terms of the Halakhah

In truth, the words of the Mishnah have many of the same ambiguities as does the language of the several Partial-Birth Abortion Acts. Clearly, the Mishnah does not support the position of the American Family Association that upon the emergence of “any portion” of the fetus it should be considered as born. It speaks of רוב — a majority. That rule is made clear in another place, in Mishnah Niddah 2.5:

יצא מחותך או מסורס — משיצא רובו, הרי הוא כילוד. יצא כדרכו — עד שיצא רוב ראשו. ואיזהו רוב ראשו? משתצא פדחתו.

If [the fetus] emerged in pieces or breech — when the majority had emerged, it is as if he is born. If [the fetus] emerged normally — [he is not considered born] until most of his head had emerged. And what constitutes “most of his head?” When his forehead

had emerged.¹⁴

We need to determine, however, whether the emergence assumed by the Mishnah was emergence from the vagina or emergence from the womb. Surprisingly, that proves to be a virtually insurmountable problem.

Several texts seem clearly to indicate that the emergence that we speak of is emergence from the mother's body into the open air. Thus:

1) A baraita on Niddah 29a offers an alternative to Mishnah Niddah 2.5, answering the question *ואיזהו רוב ראשו* — And what constitutes “most of his head?”, with the proposal *משיראו קרני ראשו* — [Most of his head has emerged] when one can see... (?). The meaning of *משיראו קרני ראשו* is unclear, but the essential point, for our purposes, is that the visual reference indicates emergence from the body.

2) The Mishnah in the fourth chapter of Hullin, speaking of an animal¹⁴, considers the case in which a fetus extends a hand and it is cut off (viz. what is the hand and the fetus' status in terms of kashrut and purity law). Again, the action of cutting it off implies, though it does not prove, that the extension spoken of is outside of the body.

3) A derashah by Rav Simlai on Niddah 30b:

דרש רב שימלאי: למה הולד דומה במעי אמו? לפנקס שמקופל ומונח ידיו על שתי צדעיו שתי אציליו על שתי ארכובותיו ושתי עקביו על שתי עגבותיו וראשו מונח לו בין ברכיו, ופיו סתום וטבורו פתוח' ואוכל ממה שאמו אוכלת ושותה ממה שאמו שותה ואינו מוציא רעי שמא יהרוג את אמו. וכיון שיצא לאויר העולם נפתח הסתום ונסתם הפתוח' שאלמלא כן אינו יכול לחיות אפילו שעה אחת...

Rav Simlai expounded as follows: What is a fetus like in its mother's womb? It is like a notebook that is folded shut, with its hands resting on its temples, its upper-arms at its knees, its heels by its genitals, and its head between its knees. Its mouth is sealed and its umbilicus open. It eats what its mother eats and drinks what its mother drinks, and does not defecate lest it kill its mother. As soon as it emerges into the open air that which is sealed opens and that which is open is sealed, for were this not the case it could not survive even one hour....¹⁵

4) Rav Yehudah claims, in a dictum reported on Temurah 24b and Bekhorot 3b, 35a and 53b and regarded as authoritative, that it is permitted to maim a first born *היולם* *שיוצא לאויר היולם* — before it emerges into the open air. This, too, appears to revolve around the moment of birth, when the first born first fulfills the requirement that it be a *פטר רחם* — a “first issue of [the] womb”.¹⁶ This phrase is used as well by amoraim in other contexts: By Rava, concerning the birth of a son releasing a woman from the obligation of Levirate marriage, on Yevamot 34a. By R. Yohanan, in a midrashic twist attributed to Rabban Shimon bar Yohai about David's career composing songs and psalms, on Berakhot 10a. It is reflected several other times in the discussions of the anonymous Talmud.¹⁷

5) Rashi's review in Sanhedrin, cited on page 3 of this responsum. At several other places in Sanhedrin, Hullin and Niddah he employs the same terms. Substantially similar language was adopted in the *Sefer Me'irat Einayim* commentary to *Shulhan Arukh*, H.oshen Mishpat 425.2.¹⁸

6) That is the opinion argued clearly by *Panim Me'ivot* I, 7 and by R. Meshullam (Weifush) ben Shmuel

of Cracow in *Responsa Bayit Hadash* [*Hadashot*] 34; and Rashi's language is then adopted without further comment in various responsa concerning abortion, among them, *Havvot Yair* 31, *Beit Yehudah*, Even HaEzer 14, *Seridei Esh* III, 127 and *Tzitz Eliezer* IX, 51, chapter 3.¹⁹

7) This position seems to gain dramatic confirmation from the explicit language of Tosefta Oholot 8.8:

אמר ר' יוסי: אני אומר דבר אחד והם אמרו דבר אחד. אני אומר להן... והם אמרו לי — אין לו לילד טומאה עד שיצא לאויר העולם.

R. Yosi said: I say one thing and they say one thing. I say to them... and they said to me — The child does not cause impurity until he has emerged into the open air.

We cannot determine, however, whether that position of an individual in a non- authoritative source, was normative, or precisely, a matter of dispute.

But there exists another text that suggests that the language above is not precise, and that the moment of birth is, in fact, several moments earlier, upon the emergence of the fetus from the womb. For a dictum by R. [H]oshaia which is received by the Talmud as authoritative gives a physical description of the locus of the “emergence,” and at least some sources suggest that he is describing not the exit from the mother's body into the open air, but the exit from the womb at the cervix. On Hullin 72a, cited again on Niddah 42b, R. [H]oshaiah identifies birth as occurring when the head of the fetus emerges לפרוזדור — out of the “prozdor”. This is accepted as normative by Rava on Niddah 42b and by Rav Sharavia on Yevamot 71b and by anonymous Talmudic discussions on Niddah 42b, Hullin 72a and Bekhorot 46b. The anatomical reference is shrouded in controversy.

The simplest solution would be to take “prozdor” as the vagina, so that הוציא את ראשו חוץ לפרוזדור — stuck its head out of the “prozdor”, is equivalent to יצר לאויר העולם — emerged into the open air.²⁰ Any indications that the child remains fully within the mother can be answered by imagining that the situation is one where the fetus partially emerged, then withdrew. That is, in fact, the solution preferred by Panim Me'iroi.

However, the specific usages suggest otherwise:

A) On Yevamot 71b, when Rav Sharavia cites the case of a fetus which had stuck its head out of the “prozdor” but failed to be delivered for several days, the Talmud responds with astonishment. How is it possible to live in such a condition, when breathing and eating do not begin until the fetus emerges into the open air? The situation described is, then, antecedent to emerging from the mother's body, as understood by the Talmud there. While it is possible that the Talmud imagines an infant stuck for a period of days partially protruded from its mother's body, however, since its head was said to be the portion protruding, there would be no bar to breathing or eating in that situation. If, however, the fetus had only emerged from the womb, but remained within its mother's birth canal, then the Talmud's astonishment would follow. This case is susceptible to the retort that the fetus emerged then withdrew, but it is not clear that the fetus would need to breathe in such a case, according to the Talmud, and no mention of that material fact is evident.²¹

B) Indeed, on Niddah 42b, the Talmud presents the case of לפרוזדור — stuck its head out of the “prozdor”, as the example of birth impurity within the mother. In support of that possibility it offers a strange case that came before Rava, concerning a fetus that was heard crying before it was born. Rava concluded that its head must be outside the “prozdor”, for otherwise it could not cry. Therefore the child must be considered born from that moment, hence circumcision follows on an eight day count beginning then, despite any delay in delivery. Clearly, an observer did not see this child and it was represented as having cried

before it was born, yet Rava deduced that the head was outside the “prozdor” and the child was, in fact, born. Outside the “prozdor”, here, appears to be outside the womb but within the birth canal²² — and birth is considered complete. “Prozdor”, in each of these cases, appears to be, not the vaginal canal, but the cervical canal, although the solution of emergence and withdrawal remains possible. Now, the definition of “prozdor” would seem to be a simple factual matter. One would be inclined to check a dictionary. Unfortunately, aware of the obscurity of the rabbinic texts, Jastrow, in his Talmudic dictionary, defines “prozdor”, in its relevant meaning, as: “the forepart of female genitals, the lower end of the vagina or uterus.”

C) Rashi, in interpreting Niddah 42b, is explicit:

כגון שהוציא ולד ראשו חוץ לפרוזדור — ואוליד. וקאמר דא[ן] ע[ל] ג[ב] דאכתי
ראשו בפנים הוא, דהיינו בבית החיצון, הוי כילוד... מדרבא נמי שמעינן דראשו
חוץ לפרוזדור הוי כילוד.

As an example: where [the fetus] stuck its head out of the “prozdor” — thereby giving birth. This asserts that even though the head is still inside, that is, in the vagina, it is as if he is born... and from Rava we also learn that where its head sticks out of the “prozdor” [cervix] it is as if he is born.

D) Rif (R. Yitzhak ben Ya’akov Alfasi) codifies this story of Rava as does Rosh (R. Asher bar Yehiel), without giving clues as to what physical situation they understood it to describe. Ritba (R. Yom Tov ben Avraham Ishbili) seems to understand, like Rashi, that the fetus remains in the vaginal canal.²³ R. Ya’akov bar Asher, codifies Rashi’s understanding fairly clearly in *Tur*, Yoreh Deah 194. He writes:

ומאימתי מונין לולד ימי טומאה וטהרה? אם יצא כדרכו דרך ראשו — ומשיצא
רוב פדחתו חשוב כילוד... ואפי, לא יצא לגמרי לחוץ אלא משהוציא רוב ראשו
חוץ לפרוזדור — חשוב כילוד... היתה מקשה לילד ושמעו קולו של הולד —
חשוב כילוד. אי אפשר שלא הוציא ראשו חוץ לפרוזדור.

From what point do we count the days of impurity and purity for an infant? If [the infant] emerged normally, with his head — then when the majority of his forehead has emerged he is considered to be born... and even were he not fully outside, but had stuck most of his head out of the “prozdor” — he is considered to be born... if [the mother] were experiencing difficulty in labor and they heard the voice of the infant — it is considered to be born. It is not possible that it has not stuck its head out of the “prozdor”.²⁴

E) R. Yosef Caro, in *Shulhan Arukh*,²⁵ is clearer still. He writes in Yoreh Deah 194.10, as follows:

משתצא פדחתו ה[רי] ז[נה] כילוד... ולא סוף דבר שיצא לחוץ ממש, אלא אפילו
משיצא חוץ לפרוזדור.

When his forehead emerges he is considered born... Not only when he literally emerges outside, but even if he only emerged outside the “prozdor”.

Here, there can be little question that Caro intends to flag the emergence from the womb, based, apparently, on the story of Rava in the Talmud, a fact that is confirmed by his comments in *Beit Yosef* to the *Tur* in 262. He,

too, codifies the circumcision count beginning when the head exited the “prozdor”, even where the infant was only heard, in *Shulhan Arukh*, Yoreh Deah 262.

F) This case of the child who cried inside the mother became an issue for several other early Ashkenazic authorities, as well. They inquired in the context of setting the date of circumcision in such a case — the context in which the case came to Rava — if any physical facts would be considered sufficient to override Rava’s presumption that the child, to cry, must surely have emerged from the womb, so that the count would not start at that time. R. Moshe Isserles, in his gloss to *Shulhan Arukh*, Yoreh Deah 262.4,²⁶ rules that though Rava’s presumption holds where no contradictory facts emerge, if, however, the mother attests that the fetus is still in her womb, she is to be believed. *Pithei Teshuvah*, there, #7, rules first, that one ought not to rely on Rava’s presumption to allow an eighth day circumcision on Shabbat, and then proposes, against both Caro and Tur, that is better to count from the “actual birth” (לדירו ממש)²⁷. R. Yoel Sirkes, in his commentary *Bayit Hadash* to *Tur*, Yoreh Deah 194, cites a responsum of R. Yaakov Weill (#25) which cites Ravyah (R. Eliezer ben Yoel haLevi), as follows:

על תינוק שצעק במעי אמו ולא היתה מקשה, ומשמשה והרגישה שראש הולד מונח בחדר, ולא הוציא ראשו חוץ לפרוזדור, ולאחר [כך] ביום ג' נולד הולד, פסק דמונין מיום הלידה ולא מיום הצויחה, א[ן] ע[ל] ג[ב] דאמר... דודאי הוציא ראשו חוץ לפרוזדור, אפילו רוב פעמים הוי בכך... היכא דהאם סותרת, נאמנת... דאם איתא דהוציא הרגישה, והתם לא הרגישה משום דטרודה בצערה...

Concerning the infant who cried out in his mother’s womb when she was not in labor and she probed and felt that the fetus’ head was lying inside the womb, and it had not stuck its head out of the “prozdor”, and thereafter, the child was born on the third day — he ruled that one counts [with regard to circumcision] from the date of birth and not the date of the cry, for even though [The Talmud] claimed... that it had certainly stuck its head out of the “prozdor”, even though that is so in most cases... when the mother denies it, she is believed... for if it were the case that it had stuck [its head] out, she would have felt it. In that case [that came before Rava in the Talmud] she did not [feel it] because she was preoccupied by her pain...

In this responsum, “to probe” is a precise word dealing with vaginal swabbing and “out of the prozdor” is clearly the opposite of “inside the womb”. Thus all these halakhic rulings are predicated on the notion that birth takes place when the fetus exits the womb into the birth canal, and not when it exits the mother’s body.

G) The correctness of this position is argued explicitly at “the end” of *Responsa Darkhei Noam* [which I have not seen]²⁸ and at length in *Sidrei Tohorah* 194.26, which is found at the back of the Yoreh Deah volume of *Shulhan Arukh*, as reported by *Pithei Teshuvah* #6 to Shu”a, Y.D. 262. *Sidrei Tohorah* identifies this position as a debate between R. Aharon Halevi, perhaps the author of *Sefer HaHinnukh*, (who argues that the prozdor is the cervix and birth follows upon emergence from the womb) and unnamed opponents. His description of the debate is the fullest and clearest I have seen. He writes:

ועיקר מחלוקתם: מהו הפרוזדור האמור בענין זה. אם ר[צוננו] ל[ומר] שמן צואר הרחם וחוץ לצואר הרחם עד סוף שפתות הערוה הכל נכלל בכלל פרוזדור, ולא נקרא יצא חוץ לפרוזדור כ[ן] א[ם] כשיצא לאויר העולם או דנימא דגבול יש שעד אותו הגבול נקרא פרוזדור ומשם ואילך א[ן] ע[ל] פ[ן] שעדיין הוא תוך גוף האשה מ[כל] מ[קום] אינו נקרא פרוזדור אלא חוץ לפרוזדור מיקרי א[ן] ע[ל]

פ[ני] שעדיין לא יצא לאויר העולם ועדיין הוא בבית[ת] הח[יצו]ן מ[כל] מ[קום]
חוץ לפרוזדור הוא...

The heart of their dispute: What is the vestibule referred to in this matter? Does it wish to state that the cervix and beyond the cervix to the external labia all that is included in [the term] “prozdor”, and it is not designated as “outside the prozdor” unless it has emerged into the open air or should we say that there is a border and that up until that border it is called “prozdor” and beyond that, even though it is still within the woman’s body, nevertheless, that is not designated “prozdor” but “outside the prozdor” even though it had not yet emerged into the open air, and remains inside the vaginal canal, nonetheless that is outside the vestibule...²⁹

In the commentary *Ha’amek She’elah* by R. Naftali Berlin, to *Sh’ilta*, Genesis 9 (Lekh Lekha) which deals with the laws of circumcision, he concludes that the vagina hypothesis was that of the Rif and *Sh’iltot*, supported by Maharam Haviv, whereas the cervix hypothesis was that of Rashi and Tosafot, supported by the son of *Darkhei Noam*.³⁰

H) This position, that birth is complete outside the cervix, is assumed by R. Yehezkel Landau in *Noda BiYehudah*, Mahadurah Tinyanah, Yoreh Deah, 120 and by R. Moses Sofer in the *Responsa of Hatam Sofer*, Yoreh Deah 167. This position has been taken, with some slight twist, by the recently deceased R. Shlomo Zalman Auerbach in an unrelated matter concerning menstruation. Of the great debate described here, Auerbach writes:

וכידוע נחלקו גדולי הדורות בהאי כללא דיצא ראשו חוץ לפרוזדור חשיב כילוד.
דאיכא דסברי דבעינן שיצא דוקא לאויר העולם' ואיכא דסברי ... מיד כשנכנס
לבית החיצון כבר חשיב כילוד.

As is known, the great sages of the ages have differed with regard to this dictum that when the head has emerged from the “prozdor” the infant is considered to be born. There are those who believe that we require emergence into the open air, and those who believe... immediately upon entrance to the vagina the infant is already considered born.³¹

The Mishnah’s Own Definition

Oddly, the Tannaim were aware of the potential for obscurity in considering the female anatomy and went to great lengths, ultimately unsuccessfully, to draw a clear picture for their students. A Mishnah in Niddah 2.5 tries valiantly to elucidate this matter clearly.

משל משלו חכמים באשה: החדר והפרוזדור והעלייה.

The sages drew an analogy with regard to the female [genitalia]: The chamber, the vestibule and the loft.

The plain meaning of this text appears to take us on a tour from inside out³² — the womb, the cervix and the vagina. The Mishnah continues to state that bleeding in the womb confers impurity, that blood in the cervix does so out of a likelihood that its source is in the womb (rather than the walls of the cervix itself), and, in language that appears in the Mishnah of the Talmud, but does not appear in the Mishnah of Mishnah collec-

tions, that blood found in the vagina does not confer impurity.³³ This Mishnah appears to side with the latter group of texts, establishing that “prozdor” refers to the cervix. But, the early amoraic interpretation, on Niddah 17b, serves to complicate matters to the point of leaving them beyond sensible interpretation. In defining this Mishnah the talmud begins with an amplification, as follows:

רמי בר שמואל ורב יצחק בריה דרב יהודה תנו נדה בי רב הונא. אשכחינהו רבה
בר רב הונא דיתבי וקאמרי: החדר מבפנים, והפרוזדור מבחוץ, והעלייה בנוייה
על שתייהן, ולול פתוח בין עלייה לפרוזדור. נמצא מן הלול ולפנים — ספקו
טמא, מן הלול ולחוץ — ספקו טהור.

Rami bar Shmuel and Rav Titzhak brei d’Rav Yehudah taught Niddah at the academy of Rav Huna. Rabbah bar Rav Huna chanced upon them, sitting [in study] and saying: The chamber is interior, the vestibule is exterior, the loft is built above them both with an open passageway between the loft and the vestibule. If [blood] is found from the passageway inward — where we are uncertain [as to its provenance], it is impure. [If blood is found] from the passageway outward — where we are uncertain [as to its provenance], it is pure.

While this passage could still be read in line with the plain interpretation of the Mishnah, arguing that the vestibule is to be understood as the cervix, which is somewhat more toward the outside than the womb itself, the vagina is the loft that is “above them”, and the passageway is the external cervical os; still, it was much easier for most commentators to understand “prozdor” here as the vagina, reaching to the outside. As for the “passage-way”, there is no consensus whatsoever on the anatomical details being referred to. Whereas Rambam writes in his *Commentary to the Mishnah*, here, that “whosoever is a bit familiar with dissection [anatomy?] will fully understand all that we’ve written, here,” Julius Preuss, in his *Biblical and Talmudic Medicine*, throws up his hands and admits “I believe I have fulfilled the... conditions of Maimonides; nevertheless I have not achieved the result which he promised.” Of Rabbah bar Rav Huna’s explication, he writes, “I cannot reconcile my attempt at explaining the individual terms with the explanation of the above Mishnah given in the Talmud by the school of Rabbi Huna.”³⁴

Rambam himself seems to have been aware of the plain meaning of the Mishnah, but allowed the interpretation of the school of Huna to control subsequent developments in the law. In his *Commentary to the Mishnah*, here, he writes:

חדר הוא חלל הרחם... ופרוזדור צואר הרחם, ועליו שתי תוספות דומות לשני
קרנים אשר על צואר הרחם, ואמנם מה הם? הם הביצים... ואם נמצא דם
בפרוזדור, והוא צואר הרחם, בין המקום אשר בו אלה התוספות ובין פה הרחם
אשר יטה לחיצוני הגוף...

The chamber is the interior of the womb... and the vestibule is the neck of the womb, upon which are two addenda which resemble horns on the neck of the womb, and what are they? The ovaries... If blood is found in the vestibule, which is the neck of the womb, between the place where these addenda are [attached] and the mouth of the womb which leads toward the exterior of the body...

Rambam’s translator, based on Rambam’s own usage, as we shall see, uses the term “neck of the womb”, which is, today, the term used for the cervix. He takes pains to repeat that that is what is meant by prozdor, and places it inward of the “mouth of the womb” which appears to be our external cervical os. Unfortunately, any

reliance on Rambam's expertise in these matters is precluded by his identification of the loft with the ovaries and his placement of them at the cervix, which is problematic. Unfortunate, too, is that Rambam may not stand solidly behind his anatomical description of the Mishnah, and in *Mishneh Torah*, in Hilkhoh Issurei Biah 5.3-4 he, arguably, seems to accept a broader position, in order to accommodate the explication of Rabbah bar Huna. There, he writes:

משל משלו חכמים באשה: הרחם שנוצר בו הולד, הוא הנקרא מקור... וקוראין אותו חדר לפי שהוא לפני ולפנים. וצואר הרחם כולו, והוא המקום הארוך שמתקבץ ראשו בשעת העיבור כדי שלא יפול הולד, ונפתח הרבה בשעת לידה, קוראין אותו פרוזדור, כלומר שהוא בית שער לרחם. ובשעת גמר ביאה האבר נכנס בפרוזדור ואינו מגיע עד ראשו שמבפנים...

The sages drew an analogy with regard to the female [genitalia]: the womb, wherein the fetus is formed, is called the source... and they call it the chamber since it is deeply interior. The neck of the womb, in full, that is the long passage that closes at its head at the time of pregnancy in order that the fetus should not drop, and which dilates greatly at the time of birth — they call it the vestibule, that is to say that it is the gatehouse of the womb. At the climax of intercourse the penis enters the vestibule, but does not reach its head, which is internal...

Like Rabbah bar Rav Huna's passage itself, this passage could be read consistent with our understanding of the *Commentary to the Mishnah*, but then Rambam appears to claim that the penis actually enters the cervix at the height of intercourse. If not, one is forced to understand that Rambam has elided the cervix and vagina into one long passageway,

the gatehouse of the womb, the cervix being the head of that passage, which is internal and closes to guard a pregnancy, whereas the lower portion, the vagina, accepts the penis during intercourse.³⁵

My own speculation is that, in the early period, the Tannaim understood prozdor to be the cervix and birth to occur at the point of emergence from the womb; and indeed, that might well have been Rabbah bar Huna's intent, along with the other amoraim Rava and Rav Sharavia, who indicate that that is their position, as a matter of law. That seems to have remained clear even to the Rishonim,³⁶ who all codify that position. The early references to *יצא לאור העולם* are, I think, non-technical references that used the obvious moment when the baby is brought forth from its mother to indicate the birth which had transpired moments before, there being, usually, no significant delay between release of the infant into the birth canal and its delivery out of its mother's body. Asked to identify an exact moment of birth, I suspect that they would say, the emergence from the womb.³⁷ Thereafter, as the phrase *יצא לאור העולם* gained currency, it was the Aharonim who cast that as the true moment of birth. Be this as it may, it is not acceptable to expect that settled halakhah should accord with my speculation, and no clear determination is possible.

Out of the Morass

Where uncertainty reigns, determination of the halakhah must follow a canon of caution, seeking modes of action that are appropriate in the presence of doubt. Since we deal, here, on the margins of the serious issue of taking life, caution bids us rule conservatively. My conviction that the Mishnah and gemara may indeed point in that same direction yields a second impetus to prohibit abortion ex-utero, that is, abortion in the vaginal canal. Thus the prohibition of the D & X procedure, "partial-birth abortion", to Jewish women follows. The rules of determining action in cases of doubt seem, equally, to lean in that direction, this being, clearly, *ספק דאורייתא* — doubt in a matter of Biblical valence, in which we rule *לחומרא* — in favor of the stricter formulation of the law.³⁸ Thus, without ultimately determining the proper understanding of the Mishnah

and of Rabbah bar Huna's explication thereof, we seem able, nonetheless, to arrive at a proper understanding of what we are to do, that is, the הלכה למעשה — the law in practice.³⁹

It must be stated, clearly, that, once we have determined that the moment of birth should be accounted to be the moment of emergence of the fetus from the womb, the Mishnah in Oholot expressly disallows an exception even for the protection of the life of the mother. But here, the matter of our doubt and our reverence for life manifest themselves differently. Whereas we are inclined to rule out of doubt in the stricter vein, ספק לחומרא, especially so given the weightiness of the issue, yet when we are faced with certain risk to a known life, that of the mother, caused by one whose claim to life is uncertain, the applicable principal is no longer that of לחומרא — be strict in matters of doubt — but rather, ברי ושמוא ברי עדיף — in the clash between a certain claim and an uncertain one, the certain claim prevails.⁴⁰ Were we able to ascertain that the fetus was to be accorded the full consideration given to one who has been born, we would be facing the one to one confrontation that the Mishnah anticipates. Since we are unable to be certain, then, out of our concern for the life of the mother, we must resolve our uncertainty in such a way that we may act on her behalf.⁴¹ Thus a “partial-birth” abortion is better referred to in Jewish law as the abortion of a disputed, or doubtful, birth.

Two other matters altogether

(1) A challenge to the above analysis may be raised from a similar close analysis of other terms in the Mishnah in Oholot and in Rambam's translation thereof. The Mishnah, it is pointed out, speaks of האשה לילד שהיא מקשה לילד — a woman who experiences difficulty in labor, and Rambam specifies והו טבעו של עולם — this is the way of the world. In the case before us, the woman neither experienced labor nor was delivery at all “the way of the world”. Perhaps this Mishnah is altogether misapplied in this context. Since abortion, itself, is legitimate in this context, any sequelae of an intended abortion should be permitted.

There are strengths and weaknesses to such an interpretation. Its greatest strength is its fidelity to the language employed by the Mishnah and by Rambam. Its weakness, however, lies in a significant, counterintuitive ramification. That ramification: that where an abortion procedure was begun absent labor, even were the child viable and delivered fully out of the mother, active termination of that infant would be permissible, since the abortion was begun artificially for the purpose of aborting that fetus. The intuitive line between abortion and infanticide, which seems so clearly to be the intended distinction of the Mishnah, would be lost.

Moreover, there are some clear indicators that several of the latter halakhists would reject such a reading. *Noda BiYehudah*, Mahadurah Tinyana, Hoshen Mishpat 59 addresses a similar proposal by R. Yeshayahu Pick, that the Mishnah in Oholot should be limited to viable⁴² babies, since only in that case would one who murdered the born infant be guilty of a capital offense. In his response, R. Landau avers that a premature infant born naturally would be seen as a טריפה — as a terminal patient — and one might avoid capital punishment for infanticide in that case⁴³ for one is not clearly and solely responsible for his death, but that wherever the fetus might naturally have attained viability but for your intervention this would not be the case. Thus he would rule that even though the intervention began as a licit abortion, where the child was born, one would be responsible for any further action taken to terminate the infant. So, too, R. Eliezer Waldenburg, in *Tzitz Eliezer* IX, 51.3.6 notes approvingly the response of the Maharal of Prague to the commentary of R. Eliyahu Mizrahi. Mizrahi had sought to explain the Biblical text that monetary damages are paid for causing a miscarriage, the basis of allowing abortion, by arguing that the fetus in utero is always considered non-viable. Maharal responded that that is not possible, since we sometimes know full-well that the fetus is viable, and, referencing the Mishnah in Oholot, that it is birth and not viability which is the relevant measure.⁴⁴ That same insistence that this Mishnah intends to establish a bright-line criterion at the moment of emergence, not dependent on any other factor, can serve as a critique of this suggested analysis of this Mishnah.

It is likely, then, that the reference to האשה שהיא מקשה לילד — a woman [who] experiences difficulty in labor — is only a standard reference to a situation in which a woman would find herself at risk, triggering the provisos of the Mishnah.⁴⁵

(2) A second confusion has arisen from Rambam's language which must be set to rest, although it is not directly material to the matter at hand. Though I cited the text of Rambam's ruling in *Mishneh Torah*, *Hilkhot Rotzeah u'Sh'mirat HaNefesh* 1.9, on page 5 of this responsum, I will repeat it since it is our focus, here:

הוורו חכמים שהעוברת 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, והוורו טבעו של עולם.

The sages instructed that when a pregnant woman experiences difficulty in labor, it is permissible to dismember the fetus in her womb, either pharmaceutically or surgically, for it is as if it is pursuing her to kill her. But once he has pushed out his head, one does not touch him, for one does not set aside one life on account of another, and this is the way of the world.

Rambam appears to say that abortion is permitted only because the infant is ruled a רודף, that is, a pursuer. There are two flaws in this analysis of his words. Since the law of the pursuer applies equally to anyone, this appears to treat the fetus as a full-fledged life. And given that it is that, there seems no cause to distinguish the latter case from the former, since the pursuit is identical, and the law of the pursuer precisely provides that one may set aside one life in that situation (that of the pursuer) on account of another (to save the pursued). Moreover, Rambam's words seem to fly in the face of the Talmud's explicit rejection of this characterization of the Mishnah.

On Sanhedrin 72b, Rav Hisda cites the latter portion of our Mishnah from Oholot to Rav Huna, and asks about it: ואמאי רודף הוא? — “Why (does one not set aside one life on account of another)? He is a pursuer!” But the gemara retorts (it is not made clear if this is Huna's own response) that he is not classed as a pursuer, rather: דמשמיה קא רדפי לה — “That case is different (the case of the Mishnah of Oholot), since it is heaven that is in pursuit of her.” The perception that heaven is in pursuit would seem to apply throughout the birthing process and not exclusively after the fetus exits the womb. Thus the Talmud, it seems, clearly rejects the characterization of the fetus as a pursuer.

(In the similar discussion in Yerushalmi, Sanhedrin 8.9, another question is on the table, namely whether a minor may be classed as a pursuer. R. Yirmiyah cites this latter clause of the Mishnah to prove that a minor, even at birth, may not be so classed, but R. Yosi ben R. Bun answers in the name of that very Rav Hisda: מי שנייא היא תמן, שאין את יודע הרג את מי — “That case is different since you don't know who's pursuing whom.” Here the question and answer are about those already born, and they conclude that this is not about a pursuer situation. Nor, it follows, is the former clause.)

The superficial solution of this apparent disregard of the gemara by Rambam is to make the claim that Rambam reads the text as follows: indeed the fetus is to be treated as a pursuer, as Rav Hisda asserted, both before and after birth, save that since it is commonplace for women to die in childbirth, we shall say that after birth, זהו טבעו של עולם — this is the way of the world, or, heaven pursues — and we will say that after birth, when we would not before, because it is no longer possible to distinguish between the two, as the Yerushalmi points out.⁴⁶

This “solution” does not befit the perceptiveness of Rambam (A pursuer pre-birth but not after? The way of the world post-birth, but not before?). Moreover, the law of the pursuer — רודף appears to have an aspect of intentionality about it that it is hard to impute to a fetus. Therefore, it has been hard for many to accept it. It should be noted that it is not necessary to rule with Rambam in this regard.

David Feldman, in his *Birth Control in Jewish Law*, reviews the various attempts to make better sense of Rambam's views on pages 275 and following, finding that most analysts over the years “understood

Maimonides' use of the pursuer merely as a means of defining and applying details of the law of pursuit to the mother-foetus situation." For my part, I reject the simplistic reading of Rambam out of hand, for the logic of the talmud's rejection is clear. Rather, I would focus, as many do, on the fact that Rambam does not claim that the fetus is a pursuer, but that it is "like a pursuer". It is "like a pursuer" in that it may be destroyed to save the one endangered, whereas the one already born is not "like a pursuer" in that regard, although neither is actually one because it is not an intentional actor, and heaven is doing the pursuing, as the talmud notes. It was R. Shneur Zalman of Lublin, in his *Responsa Torat Hesed* I.42, who pointed to just that usage of "like a pursuer" on Bava Kama 117b with regard to baggage on a sinking ship.^{47,48}

Be this as it may, for our purposes it matters not at all, for even with the former solution of his text Rambam remains dependent on the moment of birth to determine whether the fetus will be classed a pursuer or exempt from that classification, and that issue is the one which we have sought to resolve.

Summary

In sum, it appears that there is sufficient reason to ban the D & X procedure as a planned procedure of abortion to Jewish women and to Jewish practitioners since it appears, in the eyes of Jewish law, as at least possible that birth has already occurred.

There are ample voices within the professional community insisting that the procedure is never necessary. So, too, my obstetrical informants agree that the procedure is probably never necessary as a procedure of choice. One worries, however, that there may be rare instances when a fetus might get stuck in breech, in partial removal from the mother's womb, and the distress of the mother may leave little time for other alternatives. It is at that point of emergency that, to save the life of the mother, we may rely on our uncertainty and the corollary dictum *כדאי הוא ר' פלוני לסמוך עלי בשעת הדחק* — that it is appropriate to rely on minority opinion in emergency dispensations⁴⁹ — to permit what we would in all other cases forbid. Thus we favor life in every case. Only the fear of the imminent loss of the mother can justify "partial-birth" abortion.⁵⁰

Between the forces of choice who would grant every woman the freedom to abort at will and those pro-life forces who would define life as beginning at conception and ban abortion completely, halakhah has championed a bright line conception whereby life begins at birth, but abortion proceeds only for good and sufficient cause. This is probably in line with the gut feelings of most Americans, as is broadly reported. But it is not the task of the Committee of Jewish Law and Standards to rule for America. Rather it is our task to rule for Jewish women and Jewish practitioners. The clear line in our sources is birth. The clear intent is to favor life.

Conclusions

- 1) Abortion is permitted before birth, but it is forbidden after the inception of life at the moment of birth.
- 2) The moment of birth is in dispute, wherefore, to protect life, we rule that birth is at the earlier of the two proposed times, that is, when the fetus emerges from the womb into the birth canal with the major part of its head or, when in breech, with the major part of its body.
- 3) Since the D & X procedure, that which is known as "partial-birth abortion," is performed after that time, its use is prohibited on living fetuses both to Jewish women and to Jewish practitioners.
- 4) In the case where a late term abortion is necessary, an injection to cause fetal death in utero before a D & X procedure commences is required.
- 5) However, in emergency situations, when no other procedure is as likely to save the life of the mother or to avert serious threat to her life, then, and only then, the D & X procedure may be used on a living fetus in order to save the life of the mother.⁵¹

NOTES

- 1 The Partial Birth Abortion Ban Act, HR 1833 of 1995, HR 1122 of 1997 (with corollary bills in the Senate) and S. 1692 of 1999, has been voted on and vetoed several times, with an override failing by only a few votes. [Web sources: <http://members.aol.com/abtrbng/pbal.htm> and http://religioustolerance.org/abo_pba.htm]. These sources, plus one source of evident bias used cautiously for its factual data only — www.nrlc.org/abortion/pba — supply the basic secular data presented here. These and other web sources were consulted during the latter half of January 2000. Since web resources change regularly, it is uncertain that this specific data will reside at those sites when consulted, but the specific data should be recoverable.
- 2 Both the Sixth and Eighth Circuits relied on substantially the same information to address varying points of law. The sixth circuit [*Women’s Medical Professional Corporation v. Voinovitch*, 130 F. 3d, 187, 190 (6th circuit 1997)] ruled the statute at issue “unconstitutionally vague” because its language would include D & E as well as D & X procedures (see *infra*). The eighth circuit [*Carhart v. Stenberg*, 192 F. 3d, 1142 (8th circuit, 1999)] ruled the statute at issue similarly unconstitutional, reasoning that since its language included D & E, the most common abortion procedure, therefore it would pose an unconstitutional “undue burden” on a woman’s right to abortion. [Case information throughout this responsum is via Lexis].
- 3 The United States Court of Appeals for the Seventh Circuit most recently upheld two state statutes in October of 1999 [*Hope Clinic, et al. v James E. Ryan, Attorney General of Illinois, et al.*, Docket No. 98-1726 (7th circuit, 1999)]. The Supreme Court accepted the issue for argument in the spring of 2000, using the ruling of the Eighth Circuit as its springboard case [*Don Stenberg, Attorney General of Nebraska, et al., Petitioner v Leroy Carhart*, Docket No. 99-830] and issued its ruling in the case on June 28, 2000, #192 F.3d 1142.
- 4 The issue is well reviewed in an article that appeared in the *New England Journal of Medicine*, vol. 339, no. 4 (23 July, 1998), pp. 279-283, by George J. Annas, entitled, “*Partial-Birth Abortion, Congress and the Constitution.*”
- 5 In an attempt to gain a thorough hold on the issue, the *Journal of the American Medical Association [JAMA]* presented opposing views along with a technical review of the issue of late-term abortion, in their issue of 26 August, 1998, vol. 280, no. 8. The information in this paragraph derives from articles by Dr. Janet E. Gans Epner, et al. (neutral review) and by Dr. M. Leroy Sprang, et al. (opposed), as well as the article by Dr. Annas in the preceding note. Dr. David A. Grimes, author of the supporting article in *JAMA* failed to distinguish D & X procedures from late-term D & E procedures. Among the uncertainties that remain, there is no consensus on how common the use of this procedure is.
- 6 Mekhilta to Exodus, Nezikin, Chapter 8. Rashi, Rashbam and Ibn Ezra ad locum. See David M. Feldman, *Birth Control in Jewish Law*, chps. 14 and 15 [also appeared under the title: *Marital Relations, Birth Control and Abortion in Jewish Law*], and the *Proceedings of the Committee on Jewish Law and Standards*, 1980-1985, pp. 1-37.
- 7 R. Shlomo ben Yitzhak, 11th c. France.
- 8 R. Moshe ben Maimon, 12th c. Egypt.
- 9 This describes a vaginal birth. The definitions need be different for cesarean delivery, but in the context of the D & X procedure, only a vaginal delivery is at issue.
- 10 *Planned Parenthood of Central New Jersey v Verniero*, 41 F. Supp. 2d, 478, (Dist. NJ 1998) which voided the statute in New Jersey “because persons of ordinary intelligence must guess at meaning of phrases such as ‘partially vaginally delivers’ and ‘substantial portion’.” [synopsis by the court in *Carhart v Stenberg*].
- 11 Alternatively, this might be understood to propose a new meaning of partial, referring not to the portion of the fetus that has undergone the delivery, but to the portion of the overall delivery process that has been accomplished. ACOG’s “Statement on Intact Dilatation and Extraction” was issued in January 1997.
- 12 As reported at http://www.abortionfacts.com/partial_birth.htm.
- 13 As reported at <http://www.afa.net/law/990515.htm>, a proposal by the American Family Association Center for Law and Policy.
- 14 Indeed, in the Mishnah in Oholot itself there are variant versions expressing each term. This rule of either a majority or the head, depending on approach, is also found in another context. In Mishnah Hullin 4.1-4 the same criteria are applied to animals as to humans, with the Mishnah stating explicitly that if a fetus stuck out a hand then retracted it, it is still considered part of the mother, but that if a head emerged, even were it retracted, הרי זה כילוד — that animal is considered to have been born. The extrapolation to humans might be suspect, but a human stillbirth is treated there in the same context, and the permissibility of the analogy is expressly defended on Hullin 68a and Bekhorot 46b. A similar either/or criterion, depending on approach, is found with regard to determining if the victim of a cave-in is still alive, see Yoma 85a.
- 15 It should be noted that nowhere does Rav Simlai state that the moment of emergence into the open air is equivalent to the moment of birth. But it is natural to read his comments in that vein.

- 16 JPS English translation, Ex. 13:2.
- 17 Beitzah 4a, Yevamot 67b, Hullin 8b, Temurah 29a, Niddah 24a-b.
- 18 *Sefer Meirat Einayim* was composed by R. Yehoshua Falk, Poland, early 17th c. His position, however, is not perfectly clear. In *Responsa Bayit Hadash [Hadashot]* 34 (see infra) he is represented as defending a contrary position, though that may have been a defense of Maimonides' opinion to which he did not subscribe.
- 19 *Panim Meivot* was composed by R. Meir Eisenstadt in 18th c. Poland. R. Meshullam (Weifush) is not known, but he addresses his responsum to R. Yehoshua Falk and it appears in a collection associated with R. Yoel Sirkes, both 17th century contemporaries in Poland. *H.avvot Yair* was composed by R. Yair Bachrach, Germany, late 17th c. *Beit Yehudah* by R. Yehudah Ayyash, Algiers, 18th c. *S'ridei Esh* by R. Yehiel Ya'acov Weinberg, Germany, 20th c. *Tzitz Eliezer* by R. Eliezer Waldenberg, Israel, 20th c. Dr. Avraham Steinberg presents this as the consensus position, in *Entziklopedia Hilkhatit Refuit*, vol VI, pp. 165-167.
- 20 The Talmud, on Shabbat 86b, Hullin 68a and Bekhorot 46b, finds that unlike women, mammals "have no prozdor". In his volume, *Biblical and Talmudic Medicine* (trans. Fred Rosner 1993, p. 119), Julius Preuss claims "to be cognizant of the fact that, in contrast to humans, animals are lacking a manifest portion of the vagina." My web search of resources on the reproductive tract of cows, and consultations with several veterinarians do not confirm either "fact." Nor are we able to supply it with any other referent. The meaning of "prozdor" in this discussion would be helpful to our inquiry, but I cannot determine it. Were it to prove to be the case that the word "prozdor", here, refers to the vagina, this would potentially provide another support to this reading. However, see Tosafot to Bekhorot 46b, s.v. D'adam and Tosafot to Niddah 42b, s.v. shehotzi, which complicate matters. And see an attempt to interpret this by Y. Levinger, *Noam* 10 (5727), pp. 188-191.
- 21 In fact, the fetus would not need to breathe or eat as long as the placenta was intact, which it might be in a case of emergence and withdrawal. But the Talmud's assumptions, and not natural fact, are here at issue. Typically, the placenta is expelled immediately after the baby is delivered.
- 22 The apparent deduction is that the fetus in the womb is in a liquid environment, whereas crying requires an intake and expulsion of air. Here, too, a local gynecologist confirms that prior to the breaking of the membranes no sound would be likely to be heard. He questioned whether sufficient intake and expulsion would be possible even in the birth canal, due to chest compression, but where the chest is still in the womb and only the head is in the vaginal canal it would seem possible. This is recognized by the Talmud as a rare case. Most infants require manual suctioning of fluids before they can utter their first cry.
- 23 *Hiddushei Ritba* Niddah 42b [13th c. Spain] reads: כגון שהוציא ראשו חוץ לפרווגור — פל שהוציא לחוץ דהיינו — פרוודור — where [the fetus] stuck its head out of the "prozdor" means where the fetus stuck its head out, that is, to the "prozdor". Though he understands "prozdor" as vagina, he interprets the physical location as being at the top of the vagina, that is, just outside the cervix. Thus also R. Menahem Meiri [13-14th c. Provence], ad locum, representing an extant alternative version. *Hilkhot haRif*, Shabbat, Chap. 19, #501 [11th c. Fez]. *Hilkhot haRosh*, Shabbat, chap. 19, #9 [13th-14th c. Germany and Spain].
- 24 R. Ya'akov bar Asher, son of the Rosh, Spain, 14th c.
- 25 The *Shulh.an Arukh* was published just before the year 1600. In preparation for that monumental work, Caro wrote his commentaries *Beit Yosef* to the *Tur* and *Kesef Mishneh* to Rambam. Caro lived in Tzfat.
- 26 R. Moshe Isserles, the glossator of Caro's *Shulh.an Arukh*, lived in 17th c. Poland.
- 27 In so doing, *Pithei Teshuvah*, R. Avraham Tzvi Hirsch Eisenstadt in 19th c. Poland, tilts to the other version of "prozdor" over this one.
- 28 *Darkhei No'am* was composed by R. Mordehai haLevi in 17th c. Egypt. I note, however, that this position is attributed instead to the son of *Darkhei Noam* in a pamphlet, *Milh.emet Mitzvah*, by the author of *Ha'amek She'elah*, reference below.
- 29 The author of *Sidrei Tohorah* is R. Elhanan ben Shmuel Ashkenazi, who lived in the 18th c. in a border area which was variously Polish or Prussian. Not much is known about him, but, in an article rehearsing some of this material in *Noam* 8 (5725), p. 149, R. Menah.em Kasher speaks of him thus [my trans]: "It is known that *Sidrei Tohorah* is the right-hand pillar in all matters concerning the laws of menstruants, and all the great Aharonim used him and relied upon him, and one should not depart therefrom." The Aharonim are the later medieval rabbinic authorities, after the year 1600 and the publication of Karo's *Shulhan Arukh*. R. Aharon haLevi bears the name of the 13th c. itinerant author of *Sefer haHinnukh*, known as Aharon haLevi of Barcelona, but there are others by that name, as well.
- 30 R. Naftali Tzvi Yehudah Berlin [the Netziv] lived in 19th c. Russia. Maharam Haviv appears to be the Turkish R. Moshe ben Shlomo ibn Haviv, in the 16th c. We noted the internal contradiction in Rashi, and do not venture an opinion on the strength of Berlin's arguments. Rashi's position is also a focus of R. Elhanan Ashkenazi's analysis in *Sidrei Tohorah*. It was suggested that the laws regarding circumcision and its count may differ from those regarding abortion — one considering birth taking place at the exit from the womb, the other at the exit from the vagina. But if this were the case, the laws of abortion should represent the more restrictive rules, not vice versa.

- 31 R. Yehezkel Landau lived in 16th c. Prague. R. Sofer, in early 19th c. Hungary. R. Auerbach's responsum is titled, "Kuntres hatza'ah l'takkanat nashim b'iny'nei mada." It appeared first in *Noam* 7 (5724), then in a slightly revised version at the end of his brother's volume of responsa, *Imrei Avraham*, by R. Avraham Dov Auerbach. Section 4 is of greatest relevance, here. Yet another good summary of this dispute may be found in *Teh.umin* 15, pp. 323-324, in an article by R. Yoel and Dr. Hannah Katan, entitled, "P'tza-im b'tzavar hareh.em — hebet r'fui v'hilkhati."
- 32 Subsequent to the December vote on this paper, I discovered another text which appears to confirm this reading of the Mishnah, giving a tour from inside out, with the region nearer the outside referred to as higher. On Niddah 31a a baraita describes fetal development, thus:
- שלושה חדשים הראשונים ולד דר במדור התחתון. אמצעיים ולד דר במדור האמצעי. אחרונים ולד דר במדור העליון וכיון שהגיע זמנו לצאת מתהפך ויוצא — והו חבלי אשה
- The first three months, the fetus lives in the lower region, the middle ones, the fetus lives in the middle region, the final ones the fetus lives in the upper region. When time comes to emerge, it turns over and emerges — these are a woman's labor pains.
- Clearly, the fetus moves from the place of conception in the interior of the woman, here characterized as "lower", and proceeds to an external position, characterized as "upper", whence it simply turns over and emerges. I offer it for the reader's consideration without the imprimature of the CJLS vote.
- 33 This, too, was ultimately determined to impart impurity derabbanan.
- 34 Pp. 116, 118.
- 35 It should be noted that *Sidrei Tohorah* does, in fact, find that Rambam's text is consistent with the interpretation of "prozdor" as cervix, but understands the passage about the penis entering the "prozdor" as not precisely the case, and not the real intention of the wording, which is misleading. R. Menahem Kasher dedicates the bulk of his essay in *Noam* 8 responding to R. Auerbach's suggestion in *Noam* 7, considering how the Rambam might be read and reconciled with the anatomy as we know it. Note, however, that Rambam does not codify the passage about the child crying in the womb, so that one way to read his position is that, while he felt that the Mishnah may have meant delivery to be outside the cervix, as a matter of law, we accept Rabbah bar Huna's interpretation, and Rava's position is not normative; thus *Arukh HaShulhan*, Y.D. 194.54. *Noda BiYehudah*, Mahdurah Tinyana, Yoreh Deah #120, on the other hand, shows astonishment at Rambam's omission.
- 36 Despite R. Berlin's analysis in *Ha'amek She'elah*. The Rishonim are the earlier medieval rabbinic authorities, before the year 1600 and the publication of Caro's *Shulhan Arukh*.
- 37 A case in point regarding such behavior of technically ruling in favor of emergence from the womb, but speaking generally of emerging into the open air is at hand. R. Yehezkel Landau, in *Noda BiYehudah*, Mahadurah Tinyana, Yoreh Deah 120, clearly rules that birth is counted from the emergence from the womb, yet in Mahadurah Tinyana, Hoshen Mishpat, 59, he refers exclusively to *העולם* and *יצא לאויר* שיצאה. While it is unclear if those terms were set by his correspondent, there, yet he makes no effort to clarify. Where the precise moment of birth is not at issue, the general reference will suffice.
- 38 This principle appears only once in the anonymous Talmud, on Beitzah 3b, but it is generally employed by later halakhic literature, being codified as a standard of halakhah in *Halikhot Olam*, chapter 5, an early work on legal principles by R. Yehoshua haLevi of Tlemcen who lived in Algeria and later in Spain in the 15th c. This is, in part, also an issue of uncertainty about the proper Talmud version (see note 23). In R. Kasher's article, p. 345, he argues, citing many Aharonim, that in matters of uncertainty of version we also rule strictly.
- 39 This caution, or humility, in the face of life, has animated other responsa by this author, as well [see "Peri- and Neo- Natology: The Matter of Limiting Treatment," in Aaron Mackler, ed., *Life and Death Responsibilities in Jewish Biomedical Ethics*, JTS, 2000, pp. 386-402]. Indeed, it animates the following determinations as well.
- 40 Ketubot 12b; Bava Kamma 118a. Rabbi Roth adds that the very rule determining actions in a case of uncertainty is itself considered a derabbanan ruling (Rambam, Issurei Biah 18.17; Kilayim 10:27), reinforcing the argument that when competing claims are at issue we may be lenient.
- 41 This goes beyond the ruling that would permit abortion after the delivery of the head or a major portion of the body if it was clear that otherwise *both* the mother and baby would die. See David Feldman, pp. 283-284. After birth into the vaginal canal, according to the interpretation we have preferred, when one life is pitted against another, where the Mishnah is clear that in such a case abortion may not proceed, we will proceed nonetheless due to our doubt about the birth of the fetus at that point. See n. 47 for a precedent of this type of reasoning.
- 42 R. Yeshayahu Pick [Berlin] lived in Breslau in the 18th c.
- The term under discussion, *שכלו לו חדשי*, means full-term, and referred in the talmud and the latter poskim to a baby who had completed nine-months gestation. In several responsa, the CJLS has expanded that term to include born infants who are viable — to wit, 24 weeks, in the responsum "Mourning Practices for Infants Who Die Prior to the Thirty-first Day of Life," by R. Stephanie Dickstein or, alternatively, 31/32 weeks as defined in my "קים לי: A Dissenting Concurrence." Therefore, I refer throughout this discussion to viability although the source refers to full-term.

- 43 Though he warns, less the theoretical be taken as actionable, “Is it permissible to kill a tereifah to save an unimpaired person? That we have never heard.”
- 44 R. Eliyahu Mizrahi was a sage in Constantinople in the late 15th and early 16th century. Maharal, R. Judah Loew ben Bezalel of Prague, lived in the 16th century. R. Waldenberg also refers to the aforementioned responsum of R. Landau’s, focusing on yet another point made by Landau, there. As to Rambam’s formulation, see *Kesef Mishneh*, there [Hilkhoh Rotzeah. 1.9] and *Sefer Me’irat Einayim to Shulhan Arukh*, Hoshen Mishpat 425.8.
- 45 In re the principle בהרה תורה see דברה תורה ב' יוסי הגלילי or מכילתא דכספא פרשה ב'.
- 46 This appears to be the solution of *Kesef Mishnah* ad locum and *Sefer Me’irat Einayim* to Hoshen Mishpat 425.2. It is clearly the solution represented by *Encyclopedia Talmudit* in its article on Ein Doh.in Nefesh Mipnei Nefesh in Volume I (the pagination in this volume changed between printings, so this reference is more precise than would be a page reference).
- 47 R. Shneur Zalman of Lublin, late 18th c. Poland, is not the well-known founder of Habad. I am unable to determine if he was a member of the family.
- 48 Another text which appears relevant but does not help, except by indirection, is that on Arachin 7a that postpones execution for a pregnant woman once she is actively in the birthing process — על המשבר — and permits overriding the Shabbat for her fetus. The talmud suggests that in such a case, the fetus has “left its place” and is, therefore, to be treated as another entity. If that “moving from its place” is identical with leaving the womb, then this matches the Mishnah of Oholot. But even if not, and some earlier point in the birthing process is meant, in both those cases a suspicion of life is sufficient reason to delay the execution or to override Shabbat, but here, a certain life overrides a doubtful one (thus *Shittah M’kubbetzet*, there, by R. Betzalel Ashkenazi of 16th c. Egypt and Israel). Whereas the case is not enlightening in itself, the weighing of certainty versus doubt in our case of the birthing mother sets a precedent for out treatment of the issue.
- 49 Berakhot 9a, Shabbat 45a, Pesahim 51a among others.
- 50 Some have argued that we should at least allow a planned D & X procedure to obviate the need for Cesarean section, with its detrimental sequelae for the mother, when the fetus is known to be severely deformed. We have taken the position, however, that even severe deformity does not permit killing born infants בידים, that is, actively, in a responsum approved by this committee in 1995 (Peri and Neo-Natology: The Matter of Limiting Treatment, in *Life and Death Responsibilities in Jewish Biomedical Ethics*, ed. Aaron Mackler, JTS 2000, p. 386-402, specifically page 392 and note 25). If the D & X procedure is tantamount to birth, as we have argued, then no such leniency is possible save where the fetus has already died in utero. The procedure in a case of severe deformity, when a live birth by cesarean section is undesirable both for the mother and the infant, would be to insure fetal death in utero via injection, and then to perform D & X upon an already aborted fetus. This procedure, known as a “cardiac stick,” can in almost all cases be performed.
- 51 Much energy has been expended in the federal debate over “partial-birth” abortion over the distinction between a law protecting “the life of the mother,” and one protecting “the life and health” of the mother. As noted at the beginning of this paper, former President Clinton consistently vetoed every “partial-birth” abortion bill put before him, insisting that it must include language “that says serious, adverse health consequences to the mother.” The Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (505 US 833, a successor to the more famous *Roe v. Wade* abortion decision), stated that postviability, the State may regulate and even proscribe abortion, “except where necessary, in appropriate medical judgment, for the preservation of the [mother’s] life or health.” In particular, Justice Sandra Day O’Connor, one of the swing justices on the current court, has written that a bill “that only proscribed D & X... and included an exception to preserve the life and health of the mother, would be constitutional in my view” (see n. 3, 4 on pp. 1, 2).
- The concern of those who refrain from including the word “health” has always been that a permission of “partial-birth” abortion for the health of the mother opens the door to so many loose interpretations of what might affect her health as to gut the ban in a word and allow the D & X procedure at choice. The thrust of this t’shuvah has been to support a ban for our coreligionists and to allow exceptions but to severely limit the cases in which they will be claimed. Therefore, the language here was careful not to include the term “health” and, in fact, stresses threats to the life of the mother, and “then and only then.” Nevertheless, this is properly read in the context of halakhic precedents and not of general American usage. It is the case, under Jewish law, that while the general rule is פקוח נפש דוחה שבת — saving a life overrides the prohibitions of Shabbat, nevertheless, the Talmud explicitly permits פקוח נפש — the potential saving of life, to override Shabbat prohibitions, and, as a matter of course, any potential threat to life is considered sufficient to permit desecration of Shabbat. Former Israeli Chief Rabbi Isser Yehudah Unterman is known for his responsum permitting corneal transplants under the rubric of lifesaving, פקוח נפש, although what is saved is only eyesight. He expressly argued that even blindness might pose a potential threat to life.
- Now, in both cases what stood opposed to life was a lesser, though not unimportant, obligation — observing Shabbat and the honor due to the dead. Here what stands opposed to life is another claim of life, albeit a claim

weakened by our uncertainty about the moment of inception of life. Therefore, in this case, the interpretation of פקוח נפש — of what constitutes saving the mother's life, must be narrow, due to the seriousness of the competing claim. It does not, however, become so narrow as to exclude potential threats to life understood to be serious, substantive, and of significant probability, threats such as paralysis or organ failure, for example — threats both immediate and long-term. As in all cases, the specific determination in any case must be made on the ground by the physician (and if possible the mara d'atra, the consulting rabbi). But note that these are emergent situations and the physician, patient, and immediate kin are likely to be left to make this determination on their own best judgment. The tight language of this t'shuvah, plus the proviso that only emergent situations are at issue, are the twin guarantees that the determination will be made with probity as befits the gravity of the situation.