

How to think about Complex Halakhic Questions: The Status of the Fetus and the Status of the Mother

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בעזר החונן דעת

Unstable Controlling Texts

1. Exodus, Chapter 21

22. If men quarrel, and hurt a pregnant woman, so that her fetus departs from her, and yet no further damage follows; he shall be surely punished, according to what the woman's husband will lay upon him; and he shall pay as the judges determine. 23. And if any further damage follows, then you shall give life for life...

(Translated by Rabbi Jeffrey Fox)

שמות פרק כא

(כב) וְכִי יִנָּצוּ אֲנָשִׁים וְנִגְפוּ אִשָּׁה הָרָה וַיֵּצֵאוּ יֶלְדֶיהָ וְלֹא יִהְיֶה אִסּוֹן

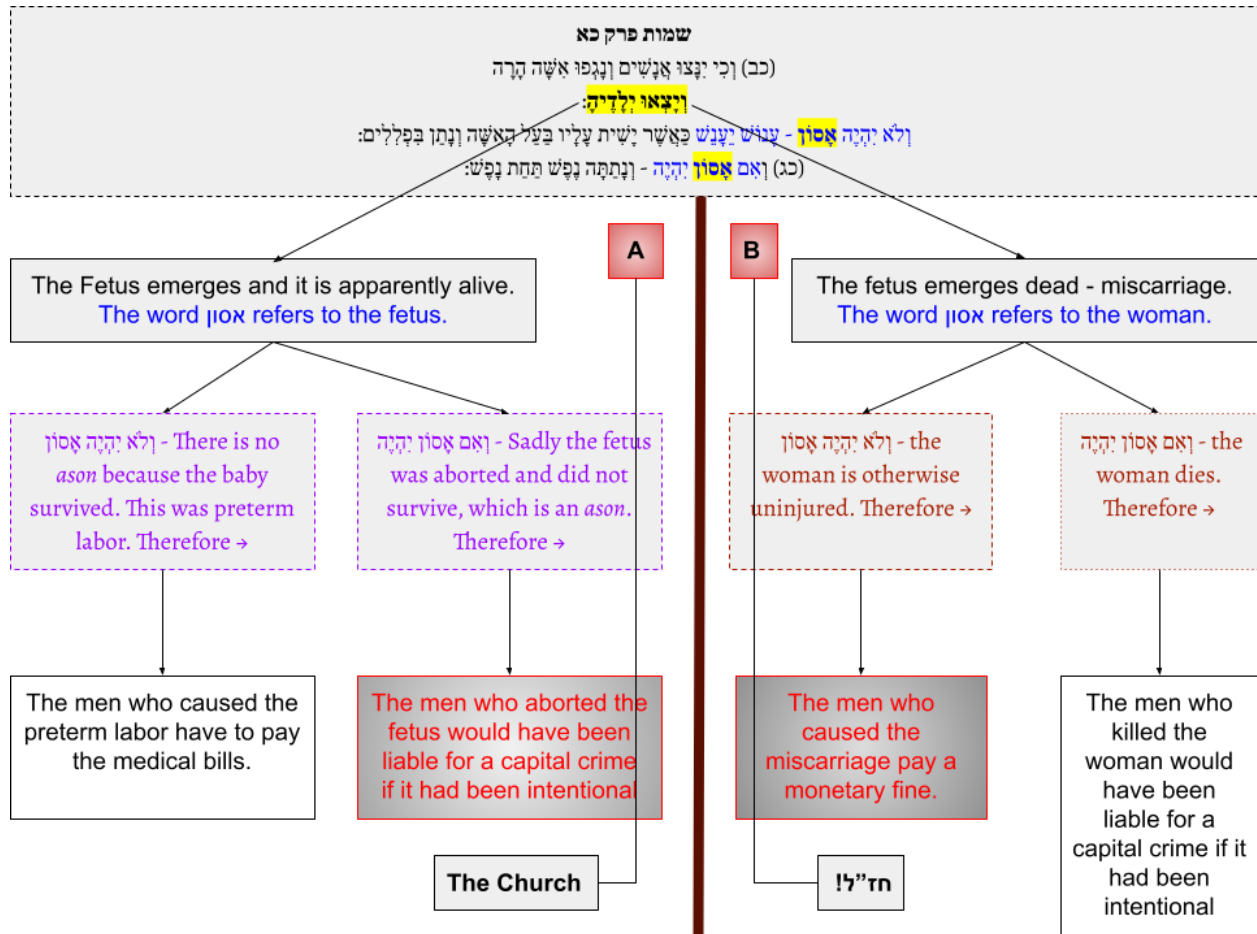
עָנוּשׁ יַעֲנִשׁ כְּאִשֶּׁר יִשְׁתִּית עָלָיו בְּעֵל הָאִשָּׁה וְנָתַן בְּפִלְלִים:

(כג) וְאִם אִסּוֹן יִהְיֶה וְנִתְּתָה נַפְשׁ תַּחַת נַפְשׁ:

2. Exodus , Chapter 21 – from the Septuagint:

22. Now if two men fight and strike a pregnant woman and her child comes forth not fully formed, he shall be punished with a fine. According as the husband of the woman might impose, he shall pay with juridical assessment. **23.** But if it is fully formed, he shall pay life for life...(<http://ccat.sas.upenn.edu/nets/edition/O2-exod-nets.pdf> - translated

by, Larry T. Perkins)



The Debate of the Church Fathers:

- Pythagoras (6th century BCE) – soul enters body at conception.
- Aristotle (384 BC – 322 BC) – vegetable, animal, human soul. At 40 or 80 days the rational soul enters the body.
- Septuagint (3rd to 1st centuries BCE) – distinguish between the death of formed and unformed fetuses as capital crimes.
- Father Tertullian (3rd century CE) – ensoulment at conception.
- St. Gregory of Nyssa (4th century CE) – affirm Tertullian.
- Augustine (5th century CE) – feticide is only a capital crime if the fetus is fully formed – based on Septuagint – either 40 or 80 days.
- Justinian Code (6th century CE) – abortion before forty days is not a capital offense.

- Pope Innocent III (c. 1216) – affirmed Justinian.
- Pope Sixtus V (1588) – feticide equivalent to homicide at any stage. Excommunication for those who counsel abortion.
- Pope Gregory XIV (1590) – rescinded Sixtus' harsh decrees.
- Pope Pius IX (1869) – reinstituted Sixtus' decrees.
- Current Canon Law (1918) – restated Sixtus.

St. Fulgentius (6th century):

It is to be believed beyond reasonable doubt that not only men who are come into the use of reason, but infants whether they die in their mother's womb, or after they are born, without baptism, in the name of the Father, Son and Holy Ghost, are punished with everlasting punishment in eternal fire, because though they have no actual sin of their own, yet they carry along with them the condemnation of original sin from their first conception and birth.

Mishna, Ohalot 6:7

If a woman suffers hard labor,
one cuts up the fetus in her womb
and brings it forth member by member,
because her life comes before that of [the fetus].

משנה אהלות ו:ז

האשה שהיא מקשה לילד
מחתיכין את הולד במעייה
ומוציאין אותו אברים אברים
מפני שחיייה קודמין לחייו.

But if the greater part has proceeded forth,
one may not touch it,
for one may not set aside one person's life
for that of another.

יצא רבו
אין נוגעין בו
שאין דוחין נפש
מפני נפש:

(1) בן נח

The most חמור approach uses the argument from non-Jews to conclude that the destruction of a fetus is akin to murder.

(1) תלמוד בבלי מסכת סנהדרין דף נז עמוד ב

אשכח ר' יעקב בר אחא דהוה כתיב בספר אגדתא דבי רב
בן נח נהרג בדיין אחד ובעד אחד שלא בהתראה מפי איש ולא מפי אשה ואפילו קרוב
משום רבי ישמעאל אמרו אף על העוברין...

מאי טעמיה דרבי ישמעאל?

דכתיב שפיך דם האדם באדם דמו ישפך.¹

איזהו אדם שהוא באדם?

הוי אומר זה עובר שבמעו אמו.

Rabbi Ya'akov bar Aha found that it was written in a book of *Aggadot* in the study hall of Rav: Contrary to the *halakha* with regard to a Jew, a descendant of Noah is executed on the basis of the verdict of even one judge, and by the testimony of even one witness, and without being given forewarning before committing the transgression. He can be judged or testified against only by the mouth of a man and not by the mouth of a woman; but even a relative may judge his case or testify against him. The Sages said in the name of Rabbi Yishmael that a descendant of Noah is executed even for killing fetuses. It is stated in that book of *Aggadot* that the Sages said in the name of Rabbi Yishmael: A descendant of Noah is executed even for killing fetuses. The Gemara asks: What is the reason for the opinion of Rabbi Yishmael? The Gemara answers: It is derived from that which is written: "One who sheds the blood of a person, by a person [*ba'adam*] his blood shall be shed" (Genesis 9:6). The word *ba'adam* literally means: In a person, and is interpreted homiletically: What is a person that is in a person? You must say: This is a fetus that is in its mother's womb. Accordingly, a descendant of Noah is liable for killing a fetus.

(2) תלמוד בבלי מסכת סנהדרין דף נט עמוד א

¹ בראשית פרק ט:א-ז] (א) ויברך א-להים את נח ואת בניו ויאמר להם פרו ורבו ומלאו את הארץ: (ב) ומוראכם וחתכם יהיה על כל חית הארץ ועל כל עוף השמים בכל אשר תרמש האדמה ובכל דגי הים בידיכם נתנו: (ג) כל רמש אשר הוא חי לכם יהיה לאכלה פניק עשב נתתי לכם את כל: (ד) אך בשר בנפשו דמו לא תאכלו: (ה) ואף את דמכם לנפשותיכם אדרש מיד כל חיה אדרשנו ומיד האדם מיד איש אחיו אדרש את נפש האדם: (ו) שפיך דם האדם באדם דמו ישפך כי בצלם אלהים עשה את האדם: (ז) ואתם פרו ורבו שרצו בארץ ורבו בה:

There is nothing that is permitted to a Jew and forbidden to a gentile.

The logical argument is quite simple:

- 1) The destruction of a fetus is a capital crime for a non-Jew.
(We even have a *drasha* that confirms this argument!)
- 2) Anything prohibited to a non-Jew must also be prohibited to a Jew.
- 3) Therefore, when a Jew destroys a fetus it must also be a capital crime akin to murder.

The principle of ליכא מידעם needs to be addressed in general sense. For anyone who wants to argue that the destruction of a fetus is less than a Torah prohibition, they need to account for these passages.

Rabbi Dr. David Novak makes the following claim, "(pg. 29)...it is difficult to see how liberal ethicists of any kind can draw the line at birth with any cogency. In other words, it is hard to see how drawing any line later than the moment of conception itself is not purely arbitrary. Surely the difference between the vital independence of an embryo, a fetus, or an infant is a matter of degree rather than kind, as anyone who knows a nursing mother can easily recognize...(pg. 39 - after quoting the *midrash* on אדם באדם) Again, the verse is not being interpreted to make new prescriptions; it is interpreted to state an accepted fact that human life beings at conception, and killing it at any stage of it intruterine development is tantamount to murder."

categorized? As to the first aspect, there is, indeed, a view according to which the entire prohibition on abortion is only rabbinic. Assuming that we set aside certain general ethical and religious norms such as “You shall do that which is upright and good,” “You shall be holy,” and “You shall follow in the ways of God,” there would be, according to this view, no biblical prohibition to kill any fetus. However, in my opinion, this view should not be accorded serious weight, not only because it is disturbing from a moral point of view, but because it also seems to contradict an explicit halakha. Sanhedrin 57b cites the view of R. Yishmael that a Noahide who aborts a fetus has the legal status of a murderer. Maimonides (*Mishneh Torah, Hilkhot Melakhim* 9:4) codifies the law in accordance with the view of R. Yishmael, and, though the Talmud cites a differing view, to the best of my knowledge no decisor disputes Rambam’s ruling. If so, it is inconceivable that this action would be permitted to a Jew given the great halakhic principle which states: “Can there be any act which is permitted to a Jew and at the same time prohibited to a Noahide?” (Hullin 33a). In other words, no action forbidden to a non-Jew, of whom the Torah requires a less exacting moral standard, can be permitted to the Jew. Hence, we must conclude that there must be some situations in which abortion is biblically proscribed. This indeed is the conclusion of most decisors. The question then remains: What is the specific prohibition? Several possibilities immediately come to mind:

It is interesting to note the way Rav Aharon frames his opposition to abortion. His point of departure is that there must be an ethical and legal problem regarding abortion. Once he enters into the Sea of the Talmud with that predisposition, he finds a support for his moral intuition. There is a certain irony to deciding matters of Jewish Law based on a claim made by the *gemara* regarding how Noahide law ought to function.

(2) הָאִשָּׁה שֶׁהִיא יוֹצֵאָה לְהָרֵג

(1) תלמוד בבלי מסכת ערכין דף ז עמוד א משנה א:ד

הָאִשָּׁה שֶׁהִיא יוֹצֵאָה לְהָרֵג אֵין מְמַתִּינִין לָהּ עַד שֶׁתֵּלֵד

יִשְׁבָּה עַל הַמְּשֻׁבֵּר מְמַתִּינִין לָהּ עַד שֶׁתֵּלֵד. {רש"י: דכיון דעקר ונע ממקומו גופא אחרינא הוא.}

In the case of a pregnant **woman who is taken** by the court **to be executed**, the court **does not wait to** execute **her until she gives birth**. Rather, she is killed immediately. But with regard to a **woman** taken to be executed **who sat on the travailing chair** [*hamashber*] in the throes of labor, the court **waits to** execute **her until she gives birth**.

גמ'.

פשיטא גופה היא?

איצטריך ס"ד אמינא הואיל וכתיב כְּאִשֶּׁר יִשִּׁית עָלֶיהָ בְּעַל הָאִשָּׁה²

ממונא דבעל הוא ולא ליפסדיה מיניה, קמ"ל...

ישבה על המשבר וכו'.

מ"ט? כיון דעקר גופא אחרינא הוא.

Isn't it **obvious** that the court executes the pregnant woman rather than waiting? After all, **it is** part of **her body**. The Gemara answers: It **was necessary** for the mishna to teach this, as it might **enter your mind to say** that **since it is written**: "And if men strive together, and hurt a woman with child, so that her offspring depart...he shall be fined, **as the woman's husband shall place upon him**" (Exodus 21:22), the fetus **is** considered to be the **property of the husband**. If so, the court should wait until she gives birth before executing her, **and not** cause **him to lose** the fetus. Consequently, the mishna **teaches us** that the court does not take this factor into account...§ The mishna teaches: With regard to a woman taken to be executed who **sat on the travailing chair** in the throes of labor, the court waits to execute her until she gives birth. The Gemara asks: **What is the reason** for delaying the execution in this case? The Gemara answers: **Once** the fetus **uproots** from its place and begins to leave the woman's body, **it is** considered **an independent body** and may not be killed together with the mother.

² שמות פרק כא פסוק כב] וְכִי יִנָּצוּ אֲנָשִׁים וְנִגְפוּ אִשָּׁה הָרָה וַיִּצְאוּ יְלָדֶיהָ וְלֹא יִהְיֶה אִסּוֹן עָנוּשׁ יַעֲנֹשׁ כְּאִשֶּׁר יִשִּׁית עָלֶיהָ בְּעַל הָאִשָּׁה וְנָתַן בְּפָלְלִים

אמר רב יהודה אמר שמואל הַאִשָּׁה הַיּוֹצֵאָה לְהָרֵג מְכִין אוֹתָהּ כְּנֶגֶד בֵּית הַרְיוֹן
כְּדֵי שִׁמּוֹת הוֹלֵד תַּחֲלִילָה כְּדֵי שֶׁלֹּא תִבָּא לִידֵי נִיוּל...}

{ר' גרשום: שאם היה העובר חי לאחר מיתת אמו היה מפרסם ויוצא

והיתה שופעת דם מאותו מקום ותתנוול בפני הכל הילכך מכין אותה בבטן כנגד הוולד}

Rav Yehuda says that Shmuel says: In the case of a pregnant **woman who is taken** by the court **to be executed, one strikes her opposite the womb**, i.e., on the abdomen, **so that the fetus dies first and so that she not suffer disgrace** as a result of publicly bleeding from labor.

This first **שמואל** of **מימרא** presents us with a case of competing values. On the one hand, we have the prohibition of **עינוי הדין** - waiting more than twenty hours to mete out justice. This woman has committed a capital crime and must be put to death. On the other hand, we have the potential of **ניוול המת** - disgracing a dead body - caused by the grotesque image of a dead pregnant woman with a live fetus inside. Shmuel therefore demands the destruction of the fetus in order to avoid **ניוול המת**. What is the weight of **ניוול המת** - disgracing a dead body - and how might that serve as a model for us today?

א"ר נחמן אמר שמואל האשה שישבה על המשבר ומתה בשבת
מביאין סכין ומקרעים את כריסה ומוציאין את הוולד.
פשיטא מאי עביד (ז:): מחתך בבשר הוא?
אמר רבה לא נצרכה להביא סכין דרך רשות הרבים.

Rav Nahman says that Shmuel says: In the case of a **woman who sat on the travailing chair** in the throes of labor, **and died on Shabbat, one brings a knife, and tears open her abdomen, and removes the fetus**, as it might still be alive, and it could be possible to save its life. The Gemara asks: But isn't it **obvious** that this is permitted? After all, **what is** the person who cuts her abdomen **doing?** It is merely **cutting flesh**, and there is no reason why it should be prohibited. **Rabba said: No**, the *halakha* concerning cutting open her abdomen is **necessary** only to teach that it is permitted **to bring a knife by way of the public thoroughfare** for that purpose, despite the fact that this constitutes a prohibited labor by Torah law.

This second statement of Shmuel introduces another set of competing values. On the one hand, this woman has sadly died in childbirth on Shabbat. The fetus is now potentially in the situation that the first statement was seeking to avoid. There is a live fetus inside of its dead mother's body. Now we need to save the baby by removing it from the woman's body on Shabbat. According to Rabba the cutting of the woman's flesh is not the concern, rather the carrying of the knife.

The two statements of Shmuel together give us a unified approach of leniency. At first we are taught that a fetus' life can be destroyed for the sake of avoiding potential disgrace to a dead body. Then we discover that we are allowed to violate Shabbat for the sake of the life of a fetus once the woman is in active labor.

Dr. Ronit Irshai wrote, "The moral dilemma from a halakhic perspective could have been formulated very differently, in a way that takes seriously the woman's standing as a subject and assigns it weight; and that could have been done without buying into the liberal ideology of bodily autonomy or reproductive freedom. It is enough to mention Samuel's comment in the passage in *Arakhin* expressing concern about the woman's disgrace and taking account, not only of the fetus's life vis-a-vis the woman's life, but also of the fetus's life vis-a-vis the woman's posthumous disgrace. In that balancing, the fetus's life is outweighed. If the prohibition on "disgracing the deceased" overcomes the life of the fetus, avoiding disgrace to the living should do so a fortiori³."

³ אם הפלה מותרת במקום ניוול המת ק"ו במקום כבוד החיים!

One could not present two positions more diametrically opposed than Rabbi Dr. Novak and Dr. Irshai. They are both able to find an echo of their own approach within the *gemara*. They also both have to basically ignore another set of sources in order to make their arguments. We could basically map Dr. Novak onto Rav Moshe Feinstein and Dr. Irshai on the Tzitz Eliezer (though I think she would not like that).

I chose them as models because neither of them serve as *poskim* in the classic sense. Dr. Novak is a philosopher, deep thinker and brilliant person (father to Rabbi Marriane!). He was a close student of Professor Lieberman at JTS and then a close student / friend to Professor Halivni. They left JTS together over the ordination of women.

Dr. Irshai is a student of Dr. Tamar Ross, and is a serious student of Halakha. She is one of the best readers of שו"ת literature and she takes Dr. Ross' ideas from the ivory tower of abstract philosophy (sorry, Sofia) and tries to apply them to the world of Halakha. The reality of the debate between Rav Moshe and the Tzitz Eliezer and Dr. Novak and Dr. Irshai means that there are (at least) two competing and coherent ways to read the *mesorah*.

Jumping to the 20th Century...

(I know this is totally unfair, but we would never get here otherwise)

שו"ת אגרות משה חושן משפט חלק ב סימן סט

בענין הפלת [הריגת ה] עובר לברר שאסור אף בשביל צער האם.

אסרו"ח סוכות תשל"ז - October 17th, 1973.

First *teshuva* on this topic written by Rav Moshe, May 20, 1935⁴

מע"כ חתני כבני הרה"ג ר' משה דוד טענדלער שליט"א.

The Prohibition of aborting [killing] a fetus even to spare the mother suffering.

...

כתבתי כל זה לענין הפרצה הגדולה בעולם שהמלכיות דהרבה מדינות התירו להרוג עוברים ובתוכם גם ראשי המדינה במדינת ישראל. וכבר נהרגו עוברים לאין מספר **שבזה"ז הא עוד יש צורך לעשות סיג לתורה**. וכ"ש שלא לעשות קולות באיסור רציחה החמור ביותר. שלכן נשתוממתי בראותי תשובה מחכם אחד בא"י הנכתב למנהל ביה"ח שערי צדק ונדפס בחוברת אסיא י"ג המתיר הולדות שע"י בחינות הרופאים כשהוא עובר יותר מג"ח = מג' חדשים = שהעובר הוא במחלת תיי-סקס להפילו, ומצד זה הקדים

⁴ [Wiki](#) - In 1920, the Russian Soviet Republic under Lenin became the first country in the world in the modern era to allow abortion in all circumstances, but over the course of the 20th century, the legality of abortion changed more than once, with a ban on unconditional abortions being enacted again from 1936 to 1955. Russia had the highest number of abortions per woman of child-bearing age in the world according to UN data as of 2010. In terms of the total number, in 2009 China reported that it had over 13 million abortions, out of a population of 1.3 billion, compared to the 1.2 million abortions in Russia, out of a population of 143 million people....The Soviet Union, under Lenin, became the first country to have abortion available, on request, often for no cost. There was intense debate among government and medical officials surrounding its legalization. The main arguments used in opposition to legalizing abortion were that it would have a harmful effect on population growth or on the grounds that it was too medically harmful to the woman. By the mid-1920s, hospitals were so severely congested by abortion procedures that special clinics had to be opened to free up beds. The enormous rate of abortions being performed also caused many doctors to become concerned and restrictions started being passed to limit abortion after the third month of pregnancy and to ensure that priority was given only to women deemed too poor, single, or who already had several children...

שעצם הריגת העוברים הוא להרבה פוסקים רק מדרבנן. ואף אם הוא מדאורייתא הוא רק משום גדר בנינו של עולם, אבל מחמת איבוד נפשות אין נדנוד כלל...וברור ופשוט כדכתבתי הלכה הברורה ע"פ רבותינו הראשונים המפרשים והפוסקים ממש שאסור בדין רציחה ממש כל עובר בין כשר בין ממזר בין סתם עוברים ובין הידועים לחולי תיי-סקס שכולן אסורין מדינא ממש, ואין לטעות ולסמוך על תשובת חכם זה ושרי ליה מריה בזה הכו"ח לכבוד התורה ודין האמת.

I wrote this in response to the moral breach in the world, that many governments of different countries, including Israel, legally permit aborting fetuses. Countless fetuses have already been aborted and in our times, there is an additional need to protect the Torah; and all the more so, to not vote to be lenient in support of this severe prohibition of murder any further. For I was astounded when I saw the responsa of one Rabbi in Israel addressed to the administrator of the Shaarei Tzedek Hospital, published in the journal *Asya* 13, that allows for abortion, even after the first trimester, for fetuses, who according to medical tests [will be born with] Tay Sachs. And from this angle, [the Rabbi] began [his legal ruling] by [asserting] that according to many legal experts of Jewish Law aborting fetuses is a rabbinic prohibition [as opposed to a Torah prohibition]. And even if it were a Torah prohibition, it is only because of the requirement to populate the world and not connected to the prohibition of murder. As I wrote, it is clear and straightforward that the explicit Jewish Legal ruling according to the sages, scholars and legal decisors is that [abortion] is absolutely prohibited and is considered actual murder whether the fetus is kosher or a *mamzer* (product of forbidden union), normal...or known to have Tay Sachs...No one should err and follow this Rabbi's responsa and allow this. Written and sealed for the sake of Torah's Honor and True Justice.

שו"ת ציץ אליעזר חלק יד סימן קא

אודות בדיקת מי השפיר כדי לגלות מקרה של מונגולודיזם אצל העובר, ובהפסק הריון במקרים הנ"ל. י' באדר ב' תשל"ח - February 17th, 1978.

לכבוד הרב הגאון רבי אליעזר יהודה וולדינברג שליט"א. אב בית הדין הרבני, בירושלים.

To the Esteemed Rav and Gaon, Rabbi Eliezer Yehuda Waldenberg, Av Beit Din HaRabani in Jersualem...

(ב) ונבוא בזה לבעיה השניה והעיקרית: אם מותר לבצע הפסקת - הריון במקרה שהבדיקה מראה במאה אחוז (כפי שאמר לי כב' בשיחה בע"פ שאמנם כן הדבר שהבדיקה מצביעה בזה במאה אחוז) כי העובר נגוע במונגולודיזם, בהיות והמדובר על לאחר שלשה חדשי הריון?

We approach the second and essential issue: Is it permissible to terminate a pregnancy after three months, in the case where the tests 100% conclusively indicate that the fetus will have Downs Syndrome?

והנה כפי שכבודו בעצמו מרגיש ומדגיש במכתבו: אין להשוות את הילוד עם מחלה זו לילד עם טיי-סקס שלבטח ימות, וכן כי ילד הסובל ממונגולודיזם שונה בתכלית מילד הסובל מטיי-סקס. **על כן נראה דאין לקבוע בזה הוראת היתר כללי** מפורש לביצוע הפסק-הריון בהתגלות מקרה של מונגולודיזם, אלא בהודע תוצאות הבדיקה צריך הרופא לשלוח את האשה (והנהלת בית החולים צריכה להוציא צו בקשר לכך) אל רב מורה הוראה עם נתינת נתונים על תוצאות הבדיקה, **והרב מורה ההוראה יתחקה היטב על המצב הנפשי של הזוג בקשר לכך**, ויחליט בשיקוליו ההלכתיים אם להתיר הפסקת הריון, ורק עם קבלת היתר - חכם מוסמך תיאור הנהלת בית החולים לבצע זאת בין כתליו. הדגשתי לכתוב שאין לקבוי /לקבוע/ בזה הוראת היתר כללי, כי מקום של דיון להיתר יש אבל כן בזה, כי לפי המקורות והנמוקים ההלכתיים שפרטתי ונמקתי בשתי תשובותי הקודמות מדי דברי על אודות הפסקת הריון במקרה של מחלת טיי-סקס, יש מקום די רחב לדון להיתר לפי אותן המקורות והנימוקים גם במקרה של התגלות מונגולודיזם אצל העובר.

And as esteemed [doctor] himself expressed and emphasized in his letter: There is no equivalency between a child with this condition [Downs Syndrome] to a child

with Tay Sachs whose prognosis is death; and a child with Downs Syndrome is entirely different than a child with Tay Sachs. **Therefore, no general heter [rabbinic allowance] can be applied** to permit the termination of a pregnancy in the case of a fetus with Down's Syndrome. Rather when [the patient is] informed of the test results, the doctor ought to send her ... (under the hospital administration's directive) to a rabbinic authority (who decides matters of Jewish Law) with the data and test results. **And the rabbinic authority ought to extensively investigate the couple's psychological state relating to their situation.** [The rabbinic authority] ...will carefully decide based on his considerations in Jewish Law whether to permit the termination of pregnancy. And only after receiving the authoritative rabbinic dispensation, then the hospital administration may agree to perform the procedure on their premises. I emphasize in my writing that no blanket general rabbinic dispensation should be authorized, even though there is room to permit [the termination in certain cases] according to the sources and interpretations of Jewish Law that I specified and explained in my two previous responsa dealing with the termination of a pregnancy [when the fetus] has the condition of Tay Sachs. There is ample room to rule according to these sources and interpretations and allow [termination] in the case of a fetus with Down's Syndrome.