

## Fetal Rights and Maternal Obligations

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### Introduction:

Medical and scientific advances coupled with a recent, often litigation-driven resurgence of ethical considerations, have pushed the question of fetal rights to the forefront of national consciousness. Notwithstanding the current secular legality of abortion, certain states have passed laws making it a crime to kill a fetus. In one famous case, a mother who gave birth to a brain-dead child after failing to follow her doctor's instructions has been charged with violating the law.<sup>1</sup> Secular bioethicists have debated many questions raised by this trend. For example, it has long been established that the state cannot force someone to donate any organ, even blood, to save another's life. Can it do more for a fetus? Can the state coerce a woman to take care of her fetus? In more general terms one can ask: What are the responsibilities of a woman towards the fetus she is carrying?

In this article we shall explore the halachic background of these and similar questions. Initially we will investigate the broader problem of coercing a non-cooperative patient to undergo medically sound and acceptable treatment. Following this we will expand the discussion to include the problem of therapies with non-definite

1. Newsweek, International Edition, December 1, 1986, p. 54.

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prognoses. Is it halachically permissible to force anyone to undergo experimental medical treatment, or even standard major invasive surgery, in a situation where its efficacy has not been established? Turning to the fetus, we will summarize the discussions of the *Rishonim* on the relationship between fetal and maternal health, i.e., is a danger to the fetus automatically treated as a danger to the mother? In the event that the fetus's health is treated separately from the mother's health, we can then ask: Is the mother obligated to do all in her power to save the fetus? Finally, even if she is not *obligated* to do so, does the pregnant woman have the option of endangering herself for the sake of the fetus?

The halachic literature includes extensive discussions of the first three questions, with more limited analyses of the last two. Consequently, we shall concentrate on the answers to the first three questions and indicate in more general terms the halachic approach to the other questions posed above.

### Coercive Therapies

The questions of forcing an established or questionable course of treatment on an unwilling patient are clearly discussed in the halachic literature. At the most fundamental level, when one refuses to eat on Yom Kippur even where it is necessary for his health, there are those who say that he can be forced to eat. As the Ran says, he is a *chasid shoteh*,<sup>2</sup> a pious fool. However, this is not exactly the question we are investigating, inasmuch as it is possible to differentiate, halachically, between the intrinsically normal and necessary act of eating and the acts performed during even "routine" medical therapy.

With respect to medicine, the *Magen Avraham*<sup>3</sup> says that a non-cooperative patient can be coerced into taking medicine on Shabbat. Rabbi Akiva Eiger<sup>4</sup> declares that this is so even on weekdays. His statement is explained as follows: It is well known

2. Ran quoted in the Radvaz, Part 1, *Siman* 885.

3. *Magen Avraham*, *Siman* 328 s'k 6.

4. *Hagohot*, Rabbi Akiva Eiger on *Shulchan Aruch* idem.

that the use of medicine on Shabbat is often restricted. Thus, we may interpret the *Magen Avraham's* ruling as pertaining only to an individual who would ordinarily take the medicine but who now declines it for fear of transgressing the Sabbath laws. However, one may conclude that a patient who refuses medicine at any time could not be coerced, in general. Therefore, Rabbi Akiva Eiger states unequivocally that a non-cooperative patient can be coerced into taking medicine at any time that it is determined to be necessary for his health.

What is the biblical source for the rulings of the *Magen Avraham* and Rabbi Akiva Eiger? The *Mor U'Ketziyah*<sup>5</sup> says that this is based on the mitzvah of "Thou shalt not stand by your friend's blood."<sup>6</sup> The Gemara in *Sanhedrin*<sup>7</sup> learns from this verse that one cannot stand by idly as his friend drowns in a river, but must do all that is in his power to save the drowning person. Similarly here, even if the patient chooses pain and death over life, one cannot stand by idly. For example, if someone's leg is infected and endangering him, it can be amputated even against his will. One can do all that is necessary to save the patient's life even against his will. Furthermore, everyone is responsible in such a case because of the commandment "Thou shalt not stand..." This matter is not dependent on the decision of the patient, since his life is not his own possession for him to choose to destroy it.

The *Tosafot Chaim* suggests another source.<sup>8</sup> He brings the Gemara in *Baba Kamma*<sup>9</sup> that cites a verse in *Bereshit*, "Even your own blood of your souls I will require."<sup>10</sup> From this verse the Gemara derives the prohibitions of suicide and of self-inflicted wounds. Note that this is not a binding negative commandment (*lav*) as was the verse cited by the *Mor U'Ketziyah*. On the one hand it is more specific (as it relates to self-imposed harm) and on the other

5. *Mor U'Ketziyah* on the *Magen Avraham*, loc. cit.

6. *Vayikra* 19:16

7. *Sanhedrin* 72a.

8. *Tosafot Chaim* on the *Chaye Adam*, Chapter 142, Sect. 43.

9. *Baba Kamma* 91b.

10. *Bereshit* 9:5; see *Torah Temima* there.

hand it is more general (as it definitely includes non-fatal situations).

In this article we have used the term coercion rather than force since coercion can mean either persuasion or actual preemptive physical force. In fact, the *Aruch Hashulchan* only mentions coercion by persuasion,<sup>11</sup> while the *Mor U'Ketziyah* implies that physical force can be used,<sup>12</sup> since he states that it is even permissible to amputate a limb against the patient's will.

There seems to be a source in the Gemara for coercion by physical compulsion: The Mishna at the end of Chapter 7 in *Ketubot* says that a man who is a "mukah sh'chin" (explained as leprous in the medical, not halachic, sense) must divorce his wife because she will cause him to rot.<sup>13</sup> The Gemara says that we force them to get divorced even if both are agreeable to the marriage; this is one of the cases where the Beth Din can force a *get* through physical coercion.<sup>14</sup> Rashi's comment that "his skin will rot" is amplified by the *Tosafot Rid* who explains that he will be harming himself since marital relations will cause pieces of his rotting skin to fall off.<sup>15</sup> This does not seem to be a life-threatening situation, since the Mishna states "because of the loss of flesh," rather than "because of the threat to his life," and yet physical coercion is permissible. Consequently, this could be construed to be a proof for the *Mor U'Ketziyah*, that the coercion is even in the physical sense.

While one could claim that from this Gemara we can only prove that Beth Din has the power to stop someone from actively damaging himself, *Mor U'Ketziyah* quite specifically allows the compulsion of any definitive therapeutic measure. He discusses two potential situations: In the case of an internal disease, where the doctor himself is unsure as to the nature of the disease and/or its therapy, if another doctor, or even the patient alone, doubts the effectiveness of the medicine, the patient has the right to reject it. In

11. *Aruch Hashulchan*, *Siman* 618, s"k 4.

12. *Mor U'Ketziyah*, loc. cit.

13. *Ketubot* 77a.

14. *Shulchan Aruch*, *Even ha'Ezer*, *Siman* 154, Sects. 1 and 21.

15. *Ketubot* 77b.

such a case, "fortunate is he who refrains from doctors in general and does not place his trust in flesh and blood but in the hands of the Healer."

However, in a case where the disease is external and obvious, and the therapy is known and effective, one is allowed to administer any medicine or perform any operation, including an amputation,<sup>16</sup> even against the patient's will. Thus, *Mor U'Ketziyah* quite clearly defines the ability of Beth Din to coerce a patient when there is a clear-cut cure. One could argue that nowadays, with the host of modern diagnostic tools available, even an internal disease may be included in the category of "open and obvious" diseases. This must be decided obviously on a case by case basis.

It is written that the Riva, when he was sick with the illness that eventually proved fatal, still refused to eat on Yom Kippur. When asked why, he replied with the well known halachic dictum, "A definite and a doubtful, the definite takes precedence." The Radvaz, when asked about this story, said that one cannot generalize from this case. The halacha is that even the slightest chance of prolonging life, and even for the shortest amount of time, overrides any halachic consideration of Yom Kippur. He therefore suggests that the Riva could have felt that even eating would not help his condition. This is what his statement meant: "My definite knowledge that eating would not help takes precedence over the doctor's possible knowledge that eating would help." The Radvaz mentions that he had ruled on a similar case previously and had stated that this is not piety, it is tantamount to murder.<sup>17</sup>

In a recent article in *Techumin* a similar case is discussed. A person brought to the hospital was told that he needed an immediate operation, but the operation would either cure him or he would not survive it. The patient, afraid that his body would be used for an autopsy if he did not survive the operation, refused to permit the operation. The author marshalls all his sources to prove

16. *Mor U'Ketziyah*, loc. cit.

17. *Responsa Radav*, loc. cit. and *Siman* 1139.

that halachically the doctors had the right to coerce him, even if his fears were well grounded.<sup>18</sup>

Rav Moshe Feinstein, *z'tl*, also discusses this issue, but approaches the matter from a totally different aspect. In order for coercion to be allowed, he introduces the condition that the psychological harm suffered by a patient who is coerced into treatment may not outweigh any benefit gained from the treatment. If the treatment is itself dangerous (i.e., potentially fatal) but the majority of patients undergoing this treatment live, although the patient should undergo the treatment he is not coerced. However, if the treatment will cure him, even if he will be left a cripple, the patient can be physically compelled to accept the treatment. While Rav Moshe Feinstein raises the possibility that we may not be allowed to coerce an adult who is fully aware of what he is doing, his final opinion leans towards allowing the use of physical compulsion, qualified by the previously mentioned requirement that the possible psychological harm not outweigh the physical benefit.<sup>19</sup> Interestingly, Rav Feinstein does not quote any earlier sources in his discussion of the problem.

To summarize, it seems from the above discussion that in general, one can force a patient to be healed against his will, unless the psychological damage caused by the coercion outweighs the benefit.

### Relationship of Fetal and Maternal Health:

The main source for answering our third question, whether a danger to the fetus is also a danger to the mother, is the Gemara in *Yuma* (82a). The Mishna says, "A pregnant woman who smelled [and therefore craves] food on Yom Kippur is fed until she is satisfied." Rashi comments, "The fetus smells the food and desires it, and if she does not eat both are in danger." The Rosh quotes the *Be'hag*, "A pregnant woman can be fed when we are sure that if she does not eat her fetus will uproot itself [i.e., abort], even in a

18. *Techumin*, Part 2, pp. 325-336.

19. *Iggerot Moshe, Choshen Mishpat*, Part 2, Chaps. 73-74.

situation where a live birth after eating is only a possibility." The Ramban says that from this halacha it seems that where there is the danger of miscarriage alone, one can eat on Yom Kippur. He explains that while there are those who say that for a fetus alone one does not transgress, the reasoning of the *Tanna* in this Mishna is that every miscarriage entails an assumption of danger to the mother and vice-versa, for every woman who miscarries is assumed to be in danger. The Rosh also states that Rashi agrees with him, as Rashi says, "Both are in danger."<sup>20</sup> Thus it would seem to be an argument between Rosh, Ramban, and Rashi, who say that there is a strong tie between fetal and maternal health, and the *Be'hag* who rejects this point of view. The *Dagul MeRevavah* accepts the view of Rosh and Ran as normative halacha.<sup>21,22</sup>

The *Mishnah Berurah*<sup>23</sup> says that in the case brought in the Gemara (*Yuma* 82a) the mother and fetus are endangered and it makes no difference when in the pregnancy this happens. However, in the *Sha'ar Ha'Tziyun*<sup>24</sup> he says that according to Rashi this danger only begins on the fortieth day of pregnancy. He deduces this from Rashi's statement that "the fetus desires,"<sup>25</sup> since a fetus

20. Rosh, *Yuma*, Chapt. 8, *Siman* 13.

21. *Dagul Me'Revavah* on the *Shulchan Aruch*, loc. cit.

22. The *Tur* formulates this halacha by stating that either the mother or the fetus may be in danger. The *Beit Yosef* cites Rashi, Rosh, and Ran that it is impossible for one to be in danger without the other. In the *Shulchan Aruch* no distinction is made between a danger to the mother or to the child. This is in accordance with his decision in the *Beit Yosef* which follows Rashi. The *Dagul Me'Revavah* says, "If there is only danger to the fetus, see *Magen Avraham* in *Siman* 330, but the Rosh and Ran wrote that one never finds a danger to the fetus without an accompanying danger to the mother, because every miscarriage is assumed to be dangerous to the mother." The text of *Magen Avraham* which he quotes cites the argument between Ramban and the *Be'hag* as to whether one can desecrate Shabbat for a fetus. The *Dagul Me'Revavah* then points out that for our question the argument has no relevance, because they were discussing the status of a fetus whose mother dies during childbirth. We are discussing a mother and fetus during pregnancy when their lives are tied together. See *Tur* and *Shulchan Aruch*, *Orach Chaim* 617:2.

23. *Mishnah Berurah*, *Siman* 617, s"v 1.

24. *Sha'ar Hatziyun*, *ibid.*, s"v 1.

25. Rashi (*d'h Ubar*), *Yuma* 82a.

is considered cognizant only after the fortieth day. Therefore, Rashi's discussion of the feelings of the fetus implies a fetus at least forty days old. He continues, "Examine Rabbenu Manoach, the matter requires study." The text of Rabbenu Manoach he refers to is a commentary on the Rambam<sup>26</sup> which says that the Mishna's choice of a case involving a pregnant woman was not because this is true only for a pregnant woman. This halacha applies to any person: it is only that the case more commonly arises with a pregnant woman. This would obviously negate the implication from Rashi.<sup>27</sup>

The *Korban Netanel* on the Rosh asks, "How can the Rosh categorically state that one cannot find a danger to the mother without danger to the child? Is it not possible to find a woman who has had numerous miscarriages, and each time it did her no damage at all?"<sup>28</sup> This question is difficult to understand. For example, if someone lived through three heart attacks without medical attention, would one deny him such attention on Shabbat because he is a *muchzak*<sup>29</sup> to survive them? The *Nachal Eshkol* disagrees

26. Rambam, *Hil. Shvitat Asor*, Chap. 2, Halacha 9.

27. The *Sha'ar Hatziyun* also quotes a text of *Eshkol*. The *Eshkol* says that "any pregnant woman whose fetus moved is in danger, both in the beginning and the end of pregnancy." The *Eshkol* does not differentiate between before and after the fortieth day of the pregnancy. It would therefore seem to be an argument between Rashi and the *Eshkol* and Rabbenu Manoach as to whether or not one would eat on Yom Kippur prior to the fortieth day. There is a second argument between Rashi and the *Eshkol* as to whether the tie between fetal and maternal health exists prior to the fortieth day of pregnancy (*Sefer HaEshkol*, Halberstadt Edition, p. 117).

There is one problem I found with the *Sha'ar Hatziyun*. The Ran in *Yuma* on this Mishna explains it in a similar vein as Rashi, "the fetus smells the food and she desires it," and goes on to state that the Mishna's choice of a case about a pregnant woman is purely incidental. This halacha is equally applicable to a man who is healthy. It would seem that according to the *Sha'ar Hatziyun* these two statements are contradictory. The first half is Rashi and the second follows Rabbenu Manoach. Based on the Ran one could say that even Rashi did not mean what the *Sha'ar Hatziyun* claimed he meant. If the implication from Rashi is true, the Ran is contradicting his own second statement.

28. *Korban Netanel*, loc. cit., 20.

29. Established by precedence.

with the *Korban Netanel* in a similar fashion.<sup>30</sup> He says that even if a woman miscarried numerous times, this time, since she is weaker, she may be in danger. And even the application of the principle of *chazakah* (presumption) is questionable, since it is not more generally applicable than the principle of *rov* (majority) which, in a case of danger, is not accepted as a determining factor.<sup>31</sup>

From the above it would seem that the answer to our third question is as follows: There is an argument between the Rosh and *Be'hag* as to whether there is an automatic tie between maternal and fetal health. Since the halacha is decided according to the *Be'hag* in the original case (i.e., does one desecrate Shabbat to save a fetus), one could claim that there is no substantiation for the thesis of the Rosh. However, the Rosh himself says that he is not debating the *Be'hag's* point of halacha, but is stating a fact concerning the fetal-

30. *Nachal Eshkol*, Halberstadt Edition, Part 2, p. 120.

31. The *N'tziv*, in his commentary on the *She'iltot*, raises another issue (*Ha'amek Davar*, 167, s"v 17). He says that even Rashi and the Rosh must agree that not in every case is there an automatic tie between maternal and fetal health. He cites a Gemara in *Yevamot* (42a) which discusses a woman marrying while pregnant. The Gemara says that one cannot marry a pregnant woman because in the course of relations he may crush the fetus. If so, why are we not afraid of this occurring with his own child?

The Gemara answers that in the case of his own child he will be careful. The *N'tziv* says, "If a miscarriage is also a danger to the woman, even if it is not his own child he will be careful not to crush the fetus so as not to endanger his wife." Therefore, the *N'tziv* concludes, we see that only by a miscarriage brought about by weakness or fasting can the Rosh postulate an intrinsic tie, but not in every case.

It would seem though, that the *Dagul Me'Revavah* disagrees with the *N'tziv*. He cites the Rosh as a plain fact without any qualifications. One could possibly disagree with the *N'tziv's* proof from the Gemara for he only cites part of the Gemara. The Gemara continues to say, "If he is careful about his own fetus, he will also be careful about it." A second reason for this halacha as explained by Rashi is that he will be careful even if it is not his own child because a person does not intentionally plan to kill a *nefesh*. One could argue that the use of the word "*nefesh*" means that Rashi refers to the mother rather than the fetus. Rashi in *Sanhedrin* 72a states quite clearly that a fetus is not a *nefesh*. Therefore Rashi is following his own halacha in *Yuma*, that there is a tie between fetal and maternal health, and the question of the Gemara is exactly that: "How can he intentionally kill a *nefesh*, i.e., his own wife?"

maternal relationship. Therefore, inasmuch as *Dagul Me'Revavah* cites the Rosh without qualification or dissent, it would seem to be the view he accepts. From the *Mishnah Berurah*, one could only prove the halacha concerning the case of the Mishna in *Yuma*. The *N'tziv*<sup>31</sup> would disagree with the *Dagul Me'Revavah* and claim that this tie is not universal.

The comments of the Rosh concerning the intrinsic relationship between the mother and her fetus lead to another very interesting halachic consideration. If, in halachic terms, something is a danger, but medical science as we now understand it says that it is not, how do we act? The *Shemirat Shabbat K'hilchatah* cites a lengthy list of references on this subject.<sup>32</sup> However, such a discussion is beyond the scope of this article and deserves an article of its own.

### Fetal Rights and Maternal Obligations

The fourth question we raised, as to whether there is an obligation to save a fetus, is an issue discussed by later *Poskim*. They base their conclusions on the argument between the *Be'hag* and the Rosh as to whether one can desecrate Shabbat to save a fetus.<sup>33</sup> The *Tur* seems to side with the view that one can desecrate the Sabbath.<sup>34</sup> Most of the *Poskim* argue that if one is allowed to desecrate Shabbat, then saving a fetus must be an obligation since it is impossible to have a situation where it is an *option* to desecrate Shabbat. The only reason one is allowed to desecrate Shabbat is to fulfill the obligation of saving a life.<sup>35</sup>

The question as to whether the mother can place herself in danger in order to save the fetus is comparable to another question already discussed in the halachic literature. Does one have the responsibility or right to endanger oneself to save a friend? While

32. *Shemirat Shabbat K'hilchatah*, Chap. 32, Note 29.

33. *Yuma* 82, Rosh Sect 17.

34. *Siman* 330.

35. *Iggerot Moshe, Choshen Mishpat*, Part 2, Chapt. 69, Sect. 3. Also see *N'tziv, She'iltot* Chapt. 167, for an opposing view.

the *Sema* quotes the *Yerushalmi* in the affirmative<sup>36</sup>, the major *Poskim* do not mention this *Yerushalmi*. The *Pitchei Teshuva* explains that the *Bavli* (Babylonian Talmud) disagrees with the Jerusalem Talmud, and that is the reason why most *Poskim* do not consider it.<sup>37</sup> However, it seems that the argument between the *Bavli* and *Yerushalmi* is limited to whether or not one is obligated to endanger oneself. If a person is willing to endanger himself, it seems he is allowed to do so. However, this might only be in a case where, by endangering himself, he would definitely save the other person.<sup>38</sup> The situation in the case of a fetus is much more nebulous and would depend on the specific situation. For example, consider the case of a woman who must take a particular medicine in order to maintain her own health. This medicine may be harmful to the fetus. Is she allowed to forego her needed medication for the sake of the fetus? The specifics to consider are related to the severity of the reaction to her stopping the medication and the degree of potential danger to the fetus. Another common problem exists where an expectant mother has premature contractions and the medication prescribed to stop these contractions will affect her heart, with potential permanent damage. Each case would have to be judged on its merits.

However, from this discussion of the halachic background and principles, some guidelines begin to emerge. According to the view of the *Dagul MeRevavah* (that fetal and maternal health are always intrinsically linked), one can conclude that it is permissible to physically coerce a woman to do what is necessary to save her fetus, since she will concurrently keep herself out of danger as well. According to the *N'tziv*, who does not accept this fetal-maternal linkage as being inevitable, permission to coerce would depend on the degree of danger to the mother rather than to the fetus. If the therapy is only for the sake of the fetus, the woman may not be obligated to undergo a life-threatening therapy against her will.

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36. *Sema* on *Choshen Mishpat*, *Siman* 426, s"v 2.

37. *Loc. cit.*, Sect. 2.

38. See further *Minchat Yitzchak*, Part 6, p. 103.

However, she would most likely be allowed to voluntarily place herself in a potentially dangerous situation if the fetus could be saved.

Finally, according to Rav Moshe Feinstein, one must rely on convincing the patient; a patient who is easily frightened cannot be coerced, only convinced. If the patient is already unconscious, one could claim that the *post facto* knowledge that a procedure was done against her will is not sufficient to cancel the procedure.<sup>39</sup> It follows from Rav Moshe Feinstein's reasoning, that where the therapy is not a danger to the woman, it is an obligation to save the fetus. However, this matter still requires further clarification.

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39. See also *Choshen Mishpat*, Part 2, Chapt. 74.