



Naso

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***Who Shoulders the Cost of Saving Lives?
Reappraising a Teshuvah of Rav Moshe
Feinstein***

Yonah Lavery-Yisraeli lives in Queens, NYC, and learns and teaches at Yeshivat HaHakshava, among other places.

In 5713, the third Bobover Rebbe, R. Shlomo Halberstam, wrote to Rav Moshe Feinstein with a question: while he was attempting to flee the Nazis, he had borrowed money to smuggle other Jews out of Hungary as well. Having arrived in America, he now wanted to know if Jewish law required him to pay these loans back.

Rav Moshe answered that R. Halberstam was, in

fact, required to pay back the loans. His response is important for the ruling itself, which establishes his view on who should bear the cost of Jewish safety. Additionally, it is an important window into Rav Moshe's outlook on foundational issues of financial responsibility in Jewish law. I will argue that both of these are reasons to contend thoughtfully with Rav Moshe's *pesak*. It is especially important to gain clarity on what we owe one another, as Jewish communities return to states of heightened vulnerability.

For the sake of accuracy, Rav Moshe's *teshuvah* is translated here in full:¹

Re. the obligation to pay back

¹ All translations are my own.

money borrowed to save lives.
Tuesday, Vayeitzei, 7 Kislev 5713
(1953)

To my very honored friend, the great one, our rabbi, Rav Shlomo Halberstam, the Bobover Rebbe, Shlita,

Regarding the money that you borrowed during the World War to send to Europe in order to save Jewish lives from the slaughter, and your intention being that the community would pay back this debt, and that at the moment you are being sued to repay it; regarding this matter, you write that your claim is that you have no strictly legal obligation to repay, but since you are accustomed to act only in an exemplary manner above and beyond what is legally required, you wish to pay little by little in small increments. This reasoning would also allow you to pay whomever you choose [i.e., to triage repayment to different debtors as you choose].

Asking your pardon, you are obligated to repay by Torah law, and this obligation is absolute. There is no room for discussion, because whether to save oneself or to save others, one who saves using

third party money is obligated to pay it back, as is known from the Gemara and *posekim*. As to the *takkanah* which Rabah mentioned in *Bava Kamma* 117b and *Sanhedrin* 74a, viz. "One saving another from a *rodeif* who damages property in the course of the rescue is exempt from repayment, because if we did not say so no one would save another from a *rodeif*," it was only issued with regard to damaging property, and then only with regard to obstructions to the rescue process. It does not exempt anyone from repaying what was stolen or borrowed [to save another]. And even in the realm of damages, anything not directly obstructing [the rescue], such as that which the *rodeif* already broke, is also beyond the scope of the *takkanah*.

Therefore, if it were not for the rule that a king may break another's fence to make himself a road, they would have been obligated to pay for the sheaves (in *Bava Kamma* 60b), even though it was done to save many. It was not an expense covered by the *takkanah*. Thus, this *din Torah* (suit) by the rabbis, in substance only regards what is owed, which you say is 3,000 and they say is 10,000, regarding which

even though you have promised and signed to the amount they request, if it were not the same as their claim, you would have a claim from the *sugya* (discussion) in *Bava Kamma* 116a about one escaping prison who encounters a ferry, etc. The *beit din* needs to decide if your case is similar [to the ferry], and to investigate how that might impact the amount, but the sum which you agree is owed you are obliged by law to pay, and consequently are obligated to pay it [specifically] to Mr. Benedict, per the *shi'abuda de-Rabi Natan* (Rabbi Natan's indebtedness clause), and according to what was ruled, since it is less than 4,000. Neither may you withhold what you have admitted until after the *beit din's* ruling.

Presumed Legal Relationships Between *Hezek*, *Gezel*, and *Halva'ah*

Rav Moshe identifies a *takkanah* enacting that, contrary to Torah law, a rescuer does not have to pay for objects broken in the rescue process. Rav Moshe reads this narrowly: *only* damages receive special exemption. Expenses occurred in other ways – he names loans and robbery – are not covered by the *takkanah*, meaning that the rescuer absorbs the cost.

In the Gemara, the stated reason for the *takkanah* is:

Because if you didn't say so, nobody would save their fellow from a pursuer.

On its face, the reason applies equally to any means by which a rescuer would incur expense, since loss itself is what might deter rescue – whether I tear my one good suit for a tourniquet or pay for your ambulance, I am still financially stressed. Nevertheless, Rav Moshe reads it narrowly to apply only to *hezek* (damage). Perhaps he is simply taking his cue from the case illustration in the Gemara, which is of breaking objects. But the case illustration might not be intended to be read narrowly. It is not a rule, after all, but a past-tense description of a scenario in which someone shatters vessels on their way to save someone's life. If we choose not to understand it as an illustration of what might occur, but rather as a complete description of the scope of the *takkanah*, why stop the narrow reading at *hezek*? Why not go further and say it only applies to *mitaltelin* (moveable property)?

A difficulty in reading this *teshuvah* is that Rav Moshe does not spell out his reasoning; perhaps he thinks it is obvious. This means that when trying to reconstruct his thought, we should look for what might reasonably seem obvious. To me, that excludes reliance on an obscure source or a clever, idiosyncratic reading. It suggests that we should rather pursue two lines of investigation: a simple, unforced reading of the *gemara* he brings, and common sense approaches to real life. When it comes to the first line of investigation, I return to the plain fact that the Gemara speaks of *hezek*.

Rav Moshe's position urges us to take this seriously, as a significant communication from Rabbah on behalf of the *hakhamim*. His would be in many ways a naturalistic reading, and it is reasonable to suppose that only something compelling should draw us from it.

As to the second line of investigation, we can further ask what about this position makes sense, what might have provided Rav Moshe with the confidence and clarity to apply it directly to a difficult circumstance in real life. How do we experience *hezek* differently from other forms of harm – differently enough that reasoning across halakhic categories should not automatically cross-pollinate? Perhaps we differentiate between damage, which is an inevitable part of life, and the agreements we make (e.g., loans), which we therefore must be careful to honour. Everyone suffers damage, but not everyone has to suffer from others' infidelity in business.

There are signs that Rav Moshe is thinking along just these lines in his comparison of loans and robbery. Robbery was not part of the question at all, but its surprising interjection demands that we consider: is a borrower who refuses to repay not engaged in some type of theft?² Does a robber who takes something fully intending to replace it not have something in common with a borrower? How easily we slip into entitlement to that which was never ours. And this illustrates another factor which may make *hezek* more palatable than other

types of damage: It does not necessarily involve overt *hana'ah* (benefit) to the one who inflicts it. Malfeasance does, generating more suspicion of the perpetrator; it is perhaps harder to shake off the impression that whoever did it, for whatever apparently noble goal, has an undisclosed self-interest which may continue to cause problems for others.

Fortunately, financial malfeasance of all subtypes is, to greater and lesser degrees, responsive to well-crafted legal pressure; we can be pushed to be more accountable as to when and how we take from others. From this perspective, we understand what is repulsive about voiding interpersonal responsibility incurred in the process of saving life. Even saving life cannot come at the cost of the ethical character of society. If this is indeed Rav Moshe's undergirding thought, it explains the blunt, even chiding tone of his *teshuvah*, the minimal argumentation of which leaves little grist for self-defensive disagreement. R. Shlomo Halberstam did something extraordinary in finding ways to rescue Jews from the Holocaust, Rav Moshe surely would agree. But to duck out of loan repayment – to verge on robbery after the fact?

And yet, there is more to the story. That loans and robbery shade into one another is clearly true. That being said, a fair question is if all forms of harm do not shade into one another. For example, if *gezel* shares some characteristics with loans (I

² See R. Yaakov Tzvi Yehudah on the failure to repay a loan constituting *gezel*:
<https://www.psakim.org/Psakim/File/878>.

snatch your purse, and may even intend at some point to return it, just not by prior agreement), it is as easily compared with *hezek* (I snatch your purse and throw it into the sea). In fact, *gezel* is compared to *hezek* by *Imrei Binah*, who notes that just as one causing damage is exempt from payment if they have the permission of the one whose property was damaged, so too is the robber exempt if the entire “robbery” was by command of the sages, e.g., forcibly redistributing resources as a judge.³

In other words, built into the very definition of both forms of harm is that they are unwanted, either by an individual or society. Even in breakdown, there is a difference between infection and fermentation, between pollution and seasoning. And *Imrei Binah* points out that rabbinic will is even stronger than what an individual can bestow. Certainly a social mandate, according to which a person *must* act a certain way, is even stronger than an individual’s permission, by which a person *may* act a certain way. The logic applies as strongly to *piku’ah nefesh* (saving a life) as it does to *Imrei Binah*’s analysis of the operation of the justice system. Although he does not spoonfeed us his thought process the way that *Imrei Binah* does – he considers it “obvious” – Rashba says the same thing when he points out that it is absurd to call someone a “robber” who, dying of thirst, drinks from someone else’s water bottle without permission.⁴

³ II:30.

⁴ *Teshuvot* IV:17.

Rashba’s reasoning is the reverse of what we saw above (that it is morally useless to save humans by undermining the ethical commitments of their communities). His insight is that what makes those commitments ethical in the first place is always contingent. This is exactly why we have the concept of the *hasid shoteh*: one who is committed to pious behaviour, but through ignorance of why, how, and when such behaviour should ever be considered pious, ends up applying it improperly. It is no coincidence that the classic case of a *hasid shoteh* is one whose “virtue” prevents them from rescuing someone:

What is an illustration of a *hasid shoteh*? One who sees a woman drowning in a river and says to himself, “It’s improper to look at her [even to] save her.”⁵

To make it clear how little ordinary norms of property matter in a life-and-death emergency, we can note that money is forcibly extracted from a person to pay for their own rescue even should that person actively protest that they do not want to be rescued.⁶ Though some level of financial loss has occurred, classifying the action of the rescuer (even the self-rescuer) according to a counterfactual premise in which their action would have been sinful adds little to our understanding of what really happened or what should happen next. Hence, for Rosh, it is “every

⁵ *Sotah* 21b.

⁶ See *Mareh HaBazak* vol. 8, 142, n. 41.

expense” for which a rescuer must be compensated:

And the rescued person is obligated to pay back the rescuer for every expense incurred. This is because no one is obligated to save their fellow using their own money if the rescued person has money themselves, as we see further on (*Sanhedrin* 74a) that someone being chased who breaks the vessels of the pursuer [in order to escape] is exempt, but who breaks the vessels of a third party must compensate for the loss. If the third party were obligated to save a victim using personal money, then the victim would be exempt from compensating the third party’s broken vessels, since that money was itself mandated to be used in rescue, meaning that they had been broken “with permission” in order that someone be rescued.⁷

In a *teshuvah*, Maharam mi-Rotenberg raises the view that the *takkanah* also covers loan situations. This view is dismissed as not necessary to processing the case at hand, but it is not criticised or undermined in and of itself:

Regarding your question about one who made his friend a guarantor of

Levi, legally speaking it seems to me that he has a responsibility to prevent claims being made against [the guarantor], even to the extent of [protecting him from] a non-Jew illegally plotting against him, since he was only exposed to such distress because he had appointed him a guarantor. That’s how we conduct business in all our jurisdictions. I heard some say the source for that is the *takkanah* for communities, that is, this [level of responsibility] was instituted because, if we did not do so, no one would save their fellow and intervene on their behalf against the non-Jew. But I think this case is actually a matter of Torah law, since in the Gemara (*Bava Kamma* 114a) we read, “A Jew who sells land which borders on Jewish property to a non-Jew, is excommunicated...”

How to read these voices in conversation with Rav Moshe’s claim that *hezek* is different, a lesser wrong which is easier and more appropriate to overrule via *takkanah*? Perhaps with the observation that the ability to make and keep just agreements is every bit as entropic as *hezek*. It is not, in fact, possible to live in a world where everyone behaves well. Some behaviors may be more responsive to legal pressure than others, but

⁷ *Hidushim, Sanhedrin* 8:2.

the fault lines hardly seem as tidy as *hezek* vs. robbery and loans. Our note about the characteristics that *gezel* shares with both *hezek* and loans does not reveal the idiosyncrasy of *gezel*, rather that all interpersonal harm exists on a continuum of intentionality and subterfuge. Though this continuum can be meaningfully divided into broad categories for practical purposes, it is important not to overread the existence of these categories. In the spirit of the principle of *dayo*⁸ (it is sufficient for an *a fortiori* inference to be like its source), one must rather stay focused on sources and ways of understanding directly tied to the issue at hand.

A final note is that the commandment to redeem captives in life-threatening situations by paying their ransom money bears strong resemblance to the case of rescuing someone by paying others; in fact, it seems to be a typical manifestation of this same case. This has important ramifications. For example, one who redeems captives can expect to be paid back by the captives themselves⁹ or, under certain circumstances, by their relatives, but is not expected to absorb the cost personally. The exact same reasoning we see in the case of the jar-breaker in our *takkanah* is used to explain the case of one who rescues a captive with money: for without this provision, a person would not redeem another.¹⁰

This language suggests that financial liability for rescuing hostages is understood to be part of the

very same *takkanah* regarding rescuing others in danger. *Arukh Ha-Shulhan*¹¹ states plainly that rescuing hostages has the structure of *din Torah* under which it obligates the rescuer, overruled by a *takkanah* which obligates the rescued:

Even though [the rescued party] could, from the perspective of strict Torah law, ask, “Who asked you [in particular] to do it?” [i.e., since your action was of your own initiative, you assumed the financial burden yourself and I am under no obligation to recompense you.] And this is not similar to the scenario of someone who went into another person’s field without permission and sowed it for them, where the owner has to pay them, as I’ve written above in *Hoshen Mishpat* 375, on the grounds that [the sower] benefited [the field owner]. But in our case, [the rescuer] saved [the rescued] from evil, and scared off a lion, and is exempt. In any case, because of the *takkanah*, [the rescued party] is obligated to compensate immediately.

Rav Moshe would perhaps respond with the observation that the rescuing of hostages is a special circumstance, commanded by no less than

⁸ *Bava Kamma* 25a, et al.

⁹ Rema, *YD* 252:11.

¹⁰ *Shulhan Arukh*, *YD* 252.

¹¹ *YD* 252.

four negative and three positive *mitzvot*,¹² and therefore one cannot so cavalierly generalize from it. Similarities are natural, but do not necessitate a similar *pesak*. Technical points aside, it is indeed true that hostage-taking is a type of violence with clear choreography (abduction, negotiation, exchange), which can be planned and perhaps even budgeted for in a way in which spontaneous crisis cannot. As for Rosh, Rashba, and Maharam, to this Rav Moshe might reply that they are doubtless important perspectives but need not impair a clear-eyed read of what the Gemara itself is saying.

Nevertheless, these Rishonim presage a persistent trend in understanding that all threats to life share significant halakhic DNA.¹³ *Siftei Kohen*, for example, demonstrates that Rema considers them to be aspects of the same case, and expects readers to apply his writing from one *siman* (chapter) to the other.¹⁴ The extent of this persistence is something we will examine in section 3. And it does not seem that Rav Moshe's read is the only "clear-eyed" read of the Gemara, as we will now see.

Self vs. Other: How Rav Moshe Reads His Sources from the Gemara

Turning, then, to Rav Moshe's stated argumentation, we see that an important part of

¹² *Shulhan Arukh*, YD 252:2.

¹³ See *Pithei Hoshen* vol.6, 12:2 and n. 3.

¹⁴ *Siftei Kohen* to *Shulhan Arukh*, *Hoshen Mishpat* 426:1, s.q. 1.

his reading is his assertion that it makes no difference whether one is saving oneself or saving others. This is evident in the way he brings two scenarios in the Gemara: the story of David Ha-Melekh and the sheaves¹⁵ and the story of the escaped prisoner.¹⁶ Both illustrate cases of financial liability. Yet a straightforward reading shows that both deal with saving oneself rather than saving others. Rav Moshe is able to marshal them into his argumentative service by stating early on that there can be no difference between saving oneself and saving others with third party money. This lack of differentiation is most striking in his examination of *Bava Kamma* 60a; perhaps the source itself contributed to a certain muddying of the waters, as follows:

Rav Moshe asserts that the sages of Be'er Sheva told David Ha-Melekh that one may not destroy property in order to save "even many." He thinks this for good reason: the Philistines in the sheaves clearly presented a public threat, not only a private one against the king's person. Supporting Rav Moshe's read, in his *hiddushim*, Rosh agrees that the scenario is about saving many (Jews). Yet, as we have seen, Rosh nevertheless requires that the rescued pay back the rescuer for all expenses. Rosh must therefore be reading the episode of the sheaves as happening prior to the *takkanah*. It therefore has nothing to say about it at all.

¹⁵ *Bava Kamma* 60a.

¹⁶ *Bava Kamma* 116a.

But there is another way of reading the scenario. We see that in his question, David Ha-Melekh did not actually describe his (or any) context. He phrased his nondescript question as being about himself alone. The sages responded to his words, describing the *halakhah* regarding a person facing a private threat. They had no reason to second-guess the question, or to try to read behind the lines, because as phrased it was still a question that might easily come up in war (e.g., taking someone else's armor). Read precisely, the story simply re-inforces the default expectation that the rescued should pay, not the rescuer. This explains why, outside of Rav Moshe's *teshuvah*, it has not been brought to challenge the law that rescuers be paid back.

Perhaps the strangest part of Rav Moshe's treatment of this case is that, *contra* to his assertion, a sheaf, hiding an armed attacker, is indeed directly in the way of any rescue that works by targeting a *rodeif*. I found nothing in the text to suggest it is at all addressing the question of indirectness, not from the point of view of figures in the text, nor from its teller Rav Huna, nor from the role the tale plays in the context of the *sugya*. It may be that his actual source for this is the rule that someone whose courtyard is filled with someone else's jugs may break them in order to exit the courtyard – but only those which are directly in the way. But if so, it does not necessarily follow that we should apply the rule from an inconvenience to a life-and-death emergency.

¹⁷ See *Pithei Hoshen* vol. 6, ch. 24, n. 3.

Rav Moshe's disinclination to distinguish between those who save themselves and those who save others in his treatment of the case of the ferryman and the escaped prisoner is equally striking. Rav Moshe brings this to show that though the *sho'eil* (the borrower) is financially liable, he may not be liable for the full amount claimed by his creditors, but only for the actual value of what he spent. Rav Moshe is not bothered by the fact that the prisoner is only seeking to escape incarceration rather than save someone else or even his own life. Yet this a salient difference: someone in an ordinary prison which is known to pose no grave danger is not generally considered to be in a situation requiring the *mitzvah* of even hostage-rescue, and so does not lay the same kind of exigent obligations on others.¹⁷

The question is why it makes sense not to differentiate between the two cases. Perhaps it is not always so easy to differentiate between the two situations: helping another person may just so happen to help me. If so, how does a mutually entangled crisis impact the rescuer's motivations – and how does that in turn impact what course of action seems best?¹⁸ There is a hint of this in Rav Moshe's casting of Rav Shlomo Halberstam as the escaped prisoner, as he too was fleeing the Nazis and required the help of smugglers. I am sure that loans acquired to help himself were kept well separate from those acquired to help others, and so too must Rav Moshe have been sure. But it seems an intuition remained that the *sho'eil's* own

¹⁸ For a discussion of when the rescuer is also one of many people in danger, see *Pithei Hoshen* vol. 6, ch. 12, n. 42.

safety was inextricably linked to the efforts he made on behalf of others. We can absorb this perceptive critique of avowed selflessness and still wonder whether Torah law demands total altruism, and indeed whether total altruism can be said to exist in human society, which has always been messily interdependent.

In recognition of this very observation, we can notice that the scenario of the escaped prisoner would play out differently if life were at stake. A ferryman who refused to operate his boat to rescue another would be liable to flogging for violating the *mitzvah* of “Do not stand on your neighbour’s blood” (Vayikra 19:16). How much more so one who refused to operate his boat to save a village, as we will now discuss.

Communal responsibilities

During a time of antisemitic violence, the calculation may be different than the classic paradigm of watching someone drown. Rema states that refugees from antisemitic violence have no obligation to financially help their brethren who remain behind. On the other hand, if there is reason to believe that the *alilah* (antisemitic incitement) will spread, even other communities of Jews are obligated to step in financially to save whom they can. When WWII was ongoing, it seems entirely reasonable that Jews, even in North America, would have been worried about the spread of the *alilah*, either by

influence or by conquest. Under this position, the ones needing to repay would be neither the rescuers, nor even the survivors, but, as the *sho’eil* appears to have held himself, the broader Jewish community:

If the government is plotting against some Jews, others are not obligated to give them [financial aid]. Even if the plot began against all of them and some fled or evaded the plot through their cleverness, they are exempt (*Teshuvot Maimoniyot De-Kinyan, siman 1; teshuvah of Rashba 1099*). Read further above in *siman 128*. And if there is a plot against [the Jews of] a city, all the communities who could become vulnerable to the plot as it expands are obligated to provide financial aid (*Maharik Shores 4*).¹⁹

The 17th-18th century *poseik* R. Yaakov Reischer, in his responsa collection *Shevut Yaakov*, analyzes this position together with other statements of Rema, and concludes that Rema understands there to be an intensified obligation when an entire community is at risk.²⁰ This intensified obligation mirrors intensified concern: that such a situation is like a pot minded by many people, “which grows neither hot nor cold.” The talmudic expression means that when many people are

¹⁹ *Shulhan Arukh, Hoshen Mishpat 163:6*.

²⁰ Vol.1, 158.

individually responsible for one particular task, each relies on the other, and from the resulting complacency, nothing gets accomplished.²¹

This is a different octave of the same concern expressed above regarding individuals: there are psychological barriers preventing rescue, and they must be removed. On an individual scale, we saw this in terms of the hesitation people feel regarding losing money. On a group scale, the crisis is large, and nervous complacency fosters inaction. Individuals generally do not take spontaneous, simultaneous action to save other people at their own expense; they require organization. We see this dynamic in our own day as people confront the modern news cycle: ambient dread couples with a sense of social disconnection to prevent meaningful action, even when that action has popular support. This means that if anything, the insight of Rema has grown only more relevant.

It is important here to remember that the sums of money involved in actually saving a life are not, perhaps, on the scale we are used to thinking of in terms of charitable contributions to worthy causes. They far exceed it. The debt that R. Shlomo Halberstam incurred was one that he spent the whole rest of his life attempting to pay off. He

²¹ See *Bava Batra* 24b; *Eiruvin* 3a.

²² Phone conversation with the great-grandson of R. Shlomo Halberstam, R. Chaim Boruch Halberstam, the son-in-law of the Ruv of Bobov-45, 8 Adar 5786. Special thanks to R. Avraham Kivelevitz for facilitating this connection.

The nature of R. Chaim Boruch Halberstam's description is slightly mysterious as according to halakhah, debts cannot

ended up bequeathing the remainder of that debt to his son.²² Both he and his son were Hasidic

rebbees with high profiles, meaning they had more extensive and dedicated support networks than the average Jew. And even R. Halberstam had acted under the belief that the Jewish community would be the ones to repay his expenses.

It is also important to reflect on how little time there is to respond effectively when life is on the line. When one of R. Halberstam's creditors later forgave his portion of the debt, he explained that the Nazis were washing over Hungary like an unstoppable wave. His comparison was to the case of *zuto shel yam* (sea tide) of *Bava Metzi'a* 21b, which causes such deep despair when it sweeps away a person's possessions that it extinguishes all further claim to those possessions, even should they miraculously wash up again. According to the creditor, there was "one small window of opportunity" to gather money and use it to hire smugglers. Those who tried to hold onto their money would simply have it stolen from them by the Nazis when they were deported to Auschwitz.²³ The creditor's point was that he felt he had no right to repayment, because the money would have been lost anyway; in doing so

be bequeathed. I speculate that R. Shlomo Halberstam's son took on the remainder of debt as a point of honor. The point remains that for ordinary persons, this level of financial damage is seismic in scale and certainly impacts the future of a family, in that an entire estate may be gravely impaired or exhausted.

²³ *Ibid.*

he was explaining his own personal reasons for *mehilah* (forgiving the debt). But what I notice, in addition, is how quickly decisions must be made in an emergency. Rav Moshe's *pesak* not only asks people to accept dramatic personal loss, but to do so more or less immediately.

So a question on which much of this debate hinges is: do we think many ordinary people will promptly cripple their own finances on a generational level in order to save strangers, even fellow Jews in a time of antisemitic violence? Alternately, do we see the billionaire class shouldering such burdens on behalf of the rest of us? If yes, that points us in the direction of Rav Moshe's *pesak*.

However, my impression is that this is not the world we live in. I showed Rav Moshe's *teshuvah* to friends and colleagues to hear their thoughts. I am blessed with friends and colleagues who are unusually intellectually gifted as well as unusually sweet of heart. But I was surprised to see how many could not help but suppress a smile when they read the description of Rav Halberstam's assertion that he is not obligated to repay. "He should be thankful he had the chance to do a *mitzvah*," was a common observation. I suspect there are very few persons of means who would be content to make such an intensive self-sacrifice (one which might impact their children, no less) for no other reward than spiritual self-satisfaction – not even perfunctory expressions of gratitude

¹ Thank you to my wife, Dr. Melissa R. Klapper, for many substantive suggestions on this article as well as her reviewing countless versions with her ever-vigilant red pen

and awe. The current philanthropic environment does not appear to me to rise to Rav Moshe's expectations.

If so, it makes the most sense to confront crisis as a community. It is perfectly described by the language of the *takkanah* – that if we do not help one another, no one else will come to save us. As the urgency of our situation intensifies, it is time to confront our own responsibility.

The Sotah Ritual and Its Implications for Abortion

Noah Gradofsky received semikhah from Rabbi David Weiss Halivni of the Institute of Traditional Judaism and is Secretary of the Union for Traditional Judaism.

Numbers 5:11-31 presents the law of the *sotah*, a woman whose husband suspects her of infidelity.¹ The exact circumstances of this episode are unclear in the text. For instance, does the text contemplate specifically a woman who is pregnant, specifically a woman who is not pregnant, or could a woman be brought into the *sotah* ritual regardless of pregnancy status? Is the result for a woman who is guilty of adultery death, fetal loss, infertility, or something else?

The possibility that the *sotah* is pregnant during this ordeal, which I will explore further

in hand. Thank you as well to the Lehrhaus editors, particularly Rabbi David Fried, for their review and contributions to this article.

below, raises the possibility that, where the woman is guilty of adultery, the *sotah* ritual results in the death of the fetus. Generally, the classical rabbinic understanding of the *sotah* ritual is that if the accused woman is guilty, she will die.² To the extent that the accused woman is pregnant, this would mean the fetus also dies, unless we imagine that the woman's death is delayed until the fetus is born, a possibility that is not at all addressed in the biblical text.³ If the *sotah* ritual caused the

² Based on my review, remarkably few rabbinic sources explicitly reference the death of the accused woman. Further study may be warranted to explore whether there was consensus among the early rabbis that the woman found guilty by the *sotah* ritual dies.

Among the few explicit references to death I have found with regard to the *sotah* ritual are a statement of Rabbi Yehudah Ha-Nasi at the end of Mishnah Sotah 3:5, which appears in the Babylonian Talmud at [22b](#) and in [Yerushalmi Sotah 1:5](#), comparing the woman accused in a *sotah* ritual to a woman whose death is certain, and the story of one sister who drinks the *sotah* waters for another sister, found at [Bamidbar Rabbah 9:9](#) and parallels. Rashi presumes the death of the *sotah* at Sotah 9a s.v. [umah she-beyadah natlu heimenah](#) and his play on words at [Numbers 5:19 s.v. "ve-hishbi'a otah"](#) indicates the same. Rambam in [Mishneh Torah Sotah 3:16](#) explicitly references the death of the mother.

Although I could not identify any rabbinic texts that explicitly refer to a different consequence for a woman found guilty by the *sotah* ritual, those rabbinic opinions that appear to presuppose that the accused woman is pregnant, discussed below in footnote 4, may be based on an understanding that the biblical text indicates miscarriage as the result of the *sotah* ritual if the accused woman is guilty.

Interestingly, *Mishnah Sotah* 3:4, found in the Babylonian Talmud at [20a](#), says that once the *sotah* waters begin to take their ill effect, the woman is immediately removed from the Temple in order to avoid potential ritual impurity. The

death of a guilty pregnant woman, it would imply that the death of the fetus is an acceptable cost of the *sotah* ritual's investigation of the woman's guilt. There is also the possibility, as some modern scholarship suggests, that the death of the fetus is precisely the barometer by which the woman's guilt is evaluated. A review of this scholarship is warranted, as much of it tends to show that the biblical *sotah* is pregnant, which would make the *sotah* text relevant regarding the Torah's attitude

Talmud at [Sotah 20b](#) rejects the obvious possibility that the ritual impurity referenced is the impurity that would result from her death. In addition, arguably, the Talmud's words there, "*de-dilma meitah - lest she die*" suggests a lack of certainty that the woman feeling the ill effects of the *sotah* water will die. Although the phrase could refer to her dying before she is removed from the Temple, if the Talmud assumed that a woman found guilty by the *sotah* ritual woman would die, it might have proposed the reason for removing her with language such as "so that she not die before being removed."

Among the classical Torah commentators, as noted above Rashi on [Numbers 5:19 s.v. "ve-hishbi'a otah"](#) implies that the woman found guilty by the *sotah* ritual dies (but see Yisrael Isser Zvi Herczeg, *The Torah: With Rashi's Commentary Translated, Annotated, and Elucidated* (ArtScroll, 1998), 51, notes 8-9 regarding variant texts). [Ba'al Haturim on Numbers 5:31 s.v. "et avonah"](#) and Sforno on [Numbers 5:31 s.v. "ve-haisha hahi nisah et avonah"](#) explicitly mention death as the result if the woman is found guilty, while Hizkuni on [Numbers 5:21 s.v. "nofelet"](#) and [5:27 "ve-naflah yereikhah"](#) indicates the result is sexual dysfunction.

³ See *Mishnah Sotah* 3:5, appearing in the Babylonian Talmud at [22b](#), and the Talmud thereon, for a discussion of the possibility of a delayed reaction to the *sotah* ritual, including R. Shimon recognizing significant problems with any possibility that the results of the *sotah* ritual might be delayed.

toward fetal death regardless of whether the mother dies along with the fetus.

In *An Adventure in Torah: A Fresh Look Through a Traditional Lens*, Hakham Isaac Sassoon,⁴ referencing some supportive texts in rabbinic literature, argues in favor of the understanding that the *sotah* is pregnant,⁵ a pregnancy which has aroused suspicion such that “Husband and society, and perhaps the woman herself, all needed their qualms to be allayed.”

Perhaps the strongest evidence Sassoon offers for this reading is that the result of the ordeal for the woman who is guilty of infidelity is “*venaflah yereikhah*” ([Numbers 5:27](#), c.f. [5:21](#) and [5:22](#)), literally “her thigh (*yerekh*) will fall,” which Sassoon notes is identified by scholars as a euphemism for miscarriage (although other

scholars suggest that it refers to other fertility issues). Sassoon notes that the rabbinic adage describing a fetus as a limb/part of its mother is formulated “*ubar yerekh imo* – a fetus is a thigh of its mother,”⁶ which (if the idiom reflects a longstanding convention) supports the possibility that *venaflah yereikhah* means that the fetus will be lost.

In their article “[The Kenite Origin of the Sotah Prescription \(Numbers 5.11-31\)](#),”⁷ Nissim Amzallag and Shamir Yona offer a number of other compelling pieces of evidence in favor of the negative outcome for the *sotah* being loss of a fetus, although they conclude that, at least in its Kenite origins, the *sotah* water is a pregnancy test rather than a test for marital infidelity (398-400).⁸ Among the evidence they provide for fetal loss being the negative outcome of the *sotah* ritual is

⁴ Thank you to my teacher, Hakham Isaac Sassoon, for reviewing earlier drafts of this article and providing many constructive comments.

⁵ Isaac Sassoon, [An Adventure in Torah: A Fresh Look Through a Traditional Lens](#). (Ktav Publishing House, 2012), 280-281. Hakham Sassoon notes that the Tanna at [Berakhot 31b](#) (with parallel at [Sotah 26a](#) which reverses the Tanna and his disputant) who understands that the biblical text promises an innocent accused woman an easy birth may indicate that the accused woman is pregnant. In addition, Sassoon notes that [Sifre Zuta 5:28](#) s.v. *ve-im lo nitme’ah* includes an opinion that the *sotah* ritual tests the legitimacy of the fetus. In “[The Pregnant Sotah: A Case Study in the Ethics of Abortion](#),” footnote 1, Yisroel Benporat notes that [Midrash Tanhuma, Buber edition, Naso 5](#) suggests the idea

that the *sotah* ritual is intended to determine the source of a pregnancy. Thank you to Rabbi Ezra Cohen for pointing me to that article. Thank you as well to Dr. Benporat for his many constructive suggestions about this article.

⁶ See e.g. [Yevamot 78a](#).

⁷ Nissim Amzallag and Shamir Yona, “The Kenite Origin of the Sotah Prescription (Numbers 5.11-31),” *Journal for the Study of the Old Testament* 41, no. 4 (2017): 383-412.

⁸ Thank you to Rabbanit Leah Sarna for pointing me toward this article. It may in fact have been a comment of hers based on this article that set me off on this train of thought.

the likely use of copper⁹ dust, an abortifacient, in the Kenite precursor to the biblical practice. They also understand *yerekh* as related to genitalia, citing [Gen 46:26](#), [Judges 8:30](#) and [Song of Songs 7:2](#), which suggests “that the 'cursing' effect of the potion addresses sexuality and/or reproduction,” potentially pointing toward either sterility or miscarriage (393). I would particularly note the phrase *yotz’ei yerekh* (“those who came out of the *yerekh*”) as a reference to progeny, as found in the first two of those verses. Amzallag and Yona also note that the term *nefel*, which derives from the same root as *venaflah*, refers to a stillborn (they use the term “aborted”) fetus (394).

Sassoon also argues that the result of the ordeal for the innocent woman, “*venizre’ah zara*” ([Numbers 5:28](#)), is best understood as suggesting successful delivery of an already gestating fetus rather than conception and subsequent birth. I would add that the notably graphic phrase in [Numbers 5:20](#), “*vayitein ish bakh et shikhvato mi-baladei isheikh*,” perhaps literally “[if] a man other than your husband placed his copulation in you,” may also suggest that the question is whether or not another man might have impregnated the *sotah*.¹⁰

⁹ Amzallag and Yona argue that the *afar* referenced at [Numbers 5:17](#) may refer to copper dust (389-391). Interestingly, *Mishnah Sotah* 2:2, appearing in the Babylonian Talmud at [15b](#), specifies that the water used in the *sotah* ritual comes from the *kiyor* (laver), which was made of copper. Cf Jacob Milgrom, *The JPS Torah Commentary: Numbers* (The Jewish Publication Society, 1990) on Numbers 5:17 s.v. “sacral water.”

In sum, according to Sassoon’s reading of the text, the *sotah* has become pregnant. If she has been faithful, she will deliver the fetus successfully, while otherwise the *sotah* ritual will cause her to miscarry, meaning, essentially, that it would cause an abortion.

If, indeed, the woman accused in the *sotah* ritual is pregnant, the text would be saying that causing the loss of a fetus, whether on its own or with the death of the mother, is an acceptable way of identifying the woman’s infidelity. It is also noteworthy that the fetus in question would be sufficiently gestated so that the pregnancy could be recognized and arouse suspicion in the husband. The text does not suggest any upper limitation as to when, within pregnancy, the trial by ordeal may occur. Note, however, that Amzallag and Yona suggest that the copper ore they argue was used in the Kenite precursor to the biblical *sotah* ritual would have been most effective early in pregnancy, which is part of why they see the ritual as a pregnancy test (396). In any event, the result of the pregnancy test is the loss of the fetus, which would still indicate abortion being an acceptable result under the relevant circumstances.

¹⁰ Hakham Sassoon agreed with this support when I mentioned it to him. However, Dr. Gabriel Wasserman noted the similarity of the phrase to [Leviticus 18:20](#) (“*ve-el eishet amitekha lo titein shekhavtekha letameah vah*”), which may suggest that the phrase is merely a pejorative reference to adultery. On the other hand, Hakham Sassoon noted to me that the preposition *bakh* in [Numbers 5:20](#) is fairly distinct from the *ve’el* introduction to [Leviticus 18:20](#).

It is not particularly surprising that the Torah might find fetal death to be acceptable in these circumstances. The traditional Jewish read of [Exodus 21:22-25](#) is that the loss of a fetus is not a capital offense (see e.g. *Mishna Bava Kamah* 5:4, found at [Babylonian Talmud 48b](#), [Mehilta Nezikin 8](#), s.v. "[ve-lo yihyeh ason](#)", [Rashi on Exodus. 21:22](#) and [my discussion here](#)). Similarly, Mishnah *Arakhin* 1:4, found in the [Babylonian Talmud at Arakhin 7a](#), teaches that a pregnant woman liable for execution is not allowed to carry the fetus to term but rather is executed immediately, with Samuel explaining in the Talmud that the court causes the fetus to die first. Also of note, *Mishnah Niddah* 5:3 (BT 43b-[44a](#)), states that killing a one-day-old child is a capital offense, strongly suggesting that killing a fetus is not a capital offense.¹¹ Even given this backdrop, it is notable that [Numbers 5:11-31](#) might be the only biblical text that in any way directly addresses abortion or otherwise intentionally causing fetal death, indicating that identifying infidelity is an acceptable justification for causing an abortion. Importantly, unless we allow for the possibility that the Torah would sanction executing a child who was the result of marital infidelity, this text would clearly indicate that the death of a fetus is substantially different from the death of a human being already delivered.

¹¹ Some Talmudic sources possibly indicating a radically different perspective toward fetal life are discussed below.

¹² Rambam [Laws of Murder 1:9](#) does not necessarily imply that Rambam sees abortion in general as murder, as his

In his Lehrhaus article "[The Pregnant Sotah: A Case Study in the Ethics of Abortion](#)," Dr. Yisroel Benporat engages in a similar analysis of commentaries on the *baraita* in [Sotah 26a](#), which states that certain pregnant women may drink the *sotah* waters. Benporat notes that, in line with what is probably the plain meaning of the *baraita*, [Rashi, s.v. "o shotot"](#) explicitly indicates that the text is not concerned for the potential result of fetal death. On the other hand, [Tosafot, s.v. "me-uberet atzmo o shotah"](#) says that the *sotah* ritual is delayed until after the birth.

Benporat concludes that Rashi does not consider abortion murder and therefore allows the *sotah* ritual to continue forthwith, while Tosafot sees abortion as murder and therefore requires delaying the *sotah* ritual. Benporat notes as well that [Meiri, s.v. "kana le'ishto"](#) and Rambam in [Mishneh Torah Sotah 2:7](#) also indicate that the *sotah* ritual is not delayed for a pregnant woman until she gives birth, which, although Benporat does not explicitly mention this, may imply that Rambam and Meiri do not consider abortion murder.¹² Clearly, Rashi, Meiri, and Rambam are less concerned about the loss of the fetus than Tosafot. However, it seems to me that the conclusion that Tosafot views causing fetal death to be murder is overstated. In fact, Tosafot

analysis there may only apply after the onset of labor. See footnote 17 below and [Mishpetei Uziel Part 4 Hoshen Mishpat 46 section 2](#).

suggests delaying the *sotah* ritual because the fetus is *mamona de-ba'al*, literally the husband's property, as suggested in [Babylonian Talmud Arakhin 7a](#).¹³

How literally to take the phrase *mamona de-ba'al*, either as used on *Arakhin 7a* or as used here by Tosafot, is an interesting question. As it relates to this comment in Tosafot, one might wonder why Tosafot does not consider the possibility of carrying out the *sotah* ritual during pregnancy at least with the couple's consent, an issue contemplated by [Mishneh Le-Melekh Hilkhos Sotah 2:7](#) and [Netziv in Meromei Sadeh](#) commenting on the comment of Tosafot we have been discussing. These considerations may advocate for a more abstract understanding of the term *mamona de-ba'al*, which could in turn suggest some moral objection on Tosafot's part as to terminating the fetus. The sense of this objection may also be suggested in Tosafot's

¹³ In an email conversation, Dr. Benporat agreed that the conclusion based on this text that Tosafot see abortion as murder might be overstated, but he also pushed back on understanding the phrase *mamona de-ba'al* too literally with points I integrate here and in the below discussion of Rabbah and Rav Hisdah on [Bava Kamma 49a](#).

¹⁴ To the extent that Tosafot is expressing some moral concern, I might argue that that concern could fall under the rubric of *tza'ar ba'alei hayyim* (the suffering of living creatures). I am not aware of any discussion of *tza'ar ba'alei hayyim* as a factor in regards to a fetus, but it seems to me that if we presume that the fetus is not treated as a human being, it might well be deserving of protection as a living creature capable of suffering. Whether *tza'ar ba'alei hayyim* provides a reasonable framework for analyzing issues of fetal life may be worth further exploration.

words "*ve-taymah, amay it lan le'miktalei* - it is surprising, why should we kill it?"¹⁴

The use of the phrase *mamona de-ba'al* regarding a fetus is introduced on [Arakhin 7a](#). There, commenting on the Mishnah's ruling that a condemned pregnant woman is executed immediately rather than allowing her to first bring the fetus to term, the Talmud first proposes that this ruling is obvious, saying that the fetus is merely a part of the mother's body (*gufah hi*). The Talmud proposes that one might instead understand the fetus as *mamona de-ba'al*, property of the husband. Whether this conceptualization is adopted or rejected by the Talmud is ambiguous. The Talmud's subsequent language *ve-lo lifsedeih mineih* ("and don't cause him financial loss") tends to indicate that the Talmud quite literally means to suggest considering the fetus as a financial interest of the husband. However, it is possible that Tosafot uses

Note that famously, R. Moshe Feinstein, in [Iggerot Moshe Hoshen Mishpat 2:69](#), argues based on [Tosafot Sanhedrin 59a s.v. "leikah mida'am de-leyisrael sharei be-davar"](#) that Tosafot see abortion as murder. Tosafot's reference here to *mamona de-ba'al* with regard to the pregnant *sotah* tends to suggest that a fetus is not a *nefesh* (soul) whose willful killing could be considered murder, which would at least suggest a lack of unanimity among the Tosafists on this point. In addition, *Tosafot HaRosh* parallel to the aforementioned *Tosafot* in *Sanhedrin 59a* explicitly states that a fetus is not a *nefesh* (soul) until it emerges, which, to the extent *Tosafot HaRosh* represents a less-edited version of the *Tosafot*, tends to undermine R. Feinstein's thesis. This point was raised in a conversation not related to this article by my teacher Rabbi Leonard Levy.

the phrase *mamona de-ba'al*, and perhaps understands the Talmud to use the phrase *mamona de-ba'al*, more abstractly to refer to any interest that goes beyond that of the mother. We will see below as well that a discussion of Rabbah and Rav Hisdah on [Bava Kamma 49a](#) may advocate for understanding the father's property rights in a less than classical sense. On the other hand, neither the Talmud in *Arakhin* nor Tosafot on *Sotah* 26a suggest that their reference to the father's property rights is less than literal. Further, the argument from silence is deafening, and Tosafot simply may not have thought of or cared to address the possibility that the husband and wife involved in the *sotah* ritual would choose to move forward with the ritual immediately if given the opportunity. Additionally, Tosafot may not take for granted that the immediate resolution of the *sotah* issue would be sufficient cause to permit the mother or father to choose, especially in this charged environment, to risk what might alternatively be considered loss of a limb to the mother or financial loss to the father.¹⁵ Therefore, it seems to me a fairly literal understanding of *mamona de-ba'al* is still quite possibly supported. In any event, it seems clear that Tosafot's mention of *mamona de-ba'al* suggests a concern for something other than murder.

Benporat also notes that some more recent perspectives might undercut the above

understanding of Rashi (and possibly Meiri and Rambam) regarding the status of fetal life. While these perspectives offer some reason for pause, I don't think they gravely undercut the analysis.

Some writers posit that the *sotah* ritual represents divine punishment. One may argue, therefore, that humans are not responsible for the outcome of the ritual and therefore we may not speculate about the *sotah* ritual nor extrapolate anything from it to other situations. Other perspectives mentioned by Benporat include arguments that it is significant that the result of the *sotah* ritual is uncertain. Some even argue that it is near certain that the ritual will result in acquittal and therefore there is no real danger to the fetus, because only an innocent woman would actually go through with drinking the *sotah* waters. To the sources cited by Benporat, I would add the commentary of R. Yoseph Kapach on *Mishneh Torah* (note 13 on *Sotah* 2:7), where he explains Rambam's holding by arguing (a) that in the case of capital punishment in [Babylonian Talmud Arakhin 7a](#) the court directly causes the death of the woman and the fetus; (b) that this fact necessitates the scriptural support provided by the Talmud in that case; whereas (c) in the case of the *sotah*, the woman testifies as to her innocence and chooses to drink the *sotah* waters. He also notes that based on the positive outcome for the innocent woman in [Numbers 5:28](#) and

¹⁵ Regarding whether and when one is permitted to cause oneself bodily or financial damage, see e.g. [m. Bava Kama 8:6](#) (at [B.T. 90b](#)), [Bava Kama 91a-b](#), [t. Bava Kama 9:31](#) (and

R. Lieberman's comments thereon in *Tosefta Kifshutah*), Tosafot [Bava Kama 91b](#), s.v. "[Ela Hay](#)", and [Yam Shel Shelomo Bava Kama 8:59](#).

expanded upon at [Berakhot 31b](#) and [Sifrei Zutah 5:28](#), the woman even likely believes that drinking the waters will assist her in giving birth.

The existence of these different understandings perhaps should give us some pause in extrapolating from the *sotah* ritual to other cases of terminating a fetus. Nonetheless, even if the fetal death is due to the choices of the mother and ultimately divine judgment, and even if it is a side effect of the woman's death, however this case is analyzed, the fact remains that ultimately, the ritual, with its risk to the fetus, is endorsed. Further, the ritual could only move forward with the participation of the priest and, as understood by the Talmud, with the participation of the rabbinic court. Therefore, there seems to be strong indication that in the Torah text as understood by Hakham Sassoon, and in [Babylonian Talmud Sotah 26a](#) as understood by Rashi, Meiri and Rambam, that the death of a fetus was an acceptable price to pay to suss out a mother's guilt. Further, the assumption that no guilty woman would drink the *sotah* waters seems fanciful. At least in the rabbinic conception, the *sotah* is first warned by her husband and then secludes herself with the man with whom she is suspected of acting inappropriately. It seems reasonable to assume that at least some women who did this might also "take their chances" with the *sotah* waters. In addition, there is the possibility of a woman having self-destructive impulses which lead her to participate in the

ostensibly dangerous ritual.¹⁶ It is also clear that neither the Torah, Rashi, Meiri, nor Tosafot consider acquittal to be the foregone conclusion to the ritual. It seems to me, therefore, that analysis of the *sotah* ritual potentially sheds significant light on the Torah and Talmud's perspectives on the significance of fetal death.

It is worth noting that the *sotah* ritual differs from other abortion scenarios in that in most cases an abortion's perceived benefits flow to the mother and family, whereas, at least arguably, the *sotah* ritual provides benefits not only to the particular family involved but also to others who might participate in the ritual at other times. Society at large also benefits by confirming and responding to the woman's alleged misdeeds. For example, one can argue that the positive effects of the death of the fetus lie in not only identifying the particular woman's guilt but also in providing reliable evidence of the innocence of other women who undergo the *sotah* ritual without ill effects. Nonetheless, the fact that fetal loss might be an acceptable price to pay for these benefits is still remarkable and demonstrates a distinction between a fetus and a born child, unless we imagine that the death of a born child would be an acceptable price to pay for these benefits.

Another argument against extrapolation from the *sotah* is that participating in the Torah laws of *sotah* is a mitzvah in and of itself that might

¹⁶ Thank you to Dr. Benporat for raising this important possibility.

justify the fetal loss. This analysis is to be rejected, since (a) it would still beg the question of *why* the Torah prescribes the ritual together with its potential effect on the fetus; and (b) the Torah's prescribed response to an inherently negative circumstance should logically be viewed as a necessary evil as opposed to a good in and of itself.

Of course, any conclusions drawn based on these texts will have to take into account the various possible interpretations of these texts as well as consider other texts which may have different implications.¹⁷ While I have followed Hakham Sasson's interpretation of the text in Numbers, which he supports with several rabbinic sources, other rabbinic sources offer different interpretations. Rabban Gamliel at [Sifrei Zuta 5:28](#) argues that the Torah prohibits a pregnant woman from drinking the *sotah* waters (seemingly disagreeing with [Sotah 26a](#)). Strikingly, Rabban Gamliel's reference to the pregnant woman as an עוברת rather than the more common term מעוברת may suggest that Rabban Gamliel intends

to emphasize the Torah's concern for protecting fetal life.¹⁸

I have mentioned the Mishnah at [Arakhin 7a](#), which requires immediate execution of a condemned pregnant woman, and the Talmud thereon, which suggests that the fetus is a part of the mother's body and/or a financial interest of the husband. I have also noted the Mishnah at [Niddah 5:3 \(43b-44a\)](#) which seems to preclude capital punishment for feticide. Other rabbinic sources may suggest a different perspective toward fetal life and understanding of fetal death. For instance, R. Yishmael's opinion at [Sanhedrin 57b](#) that abortion is a capital crime, at least for Noahides, may associate any abortion with murder.¹⁹ On the other hand, on its face, [Sanhedrin 57b](#) refers to abortive activity by Noahides. It is possible that the text treats Noahides differently from Jews either as it relates to the permissibility of feticide or as it relates to the severity of the punishment.²⁰ Additionally, since the term *shefikhut damim* used at [Sanhedrin](#)

¹⁷ I omit from this analysis Mishnah Oholot 7:6 which deals a woman who is in mortal danger during labor, since Mishnah Arakhin 1:4, found in the Babylonian Talmud at Arakhin 7a, indicates that a fetus has a different status after the onset of labor (and hence the execution of a woman in labor is delayed until after the birth). Similarly, Rav Nahman's ruling in the name of Samuel at Arakhin 7a seems to suggest that the Sabbath is only violated in order to save a fetus after the onset of labor.

¹⁸ Thank you to Dr. Benporat for providing the reference to this text and for providing the tantalizing suggestion as to the significance of the choice of words.

¹⁹ As Hakham Sasson noted to me, this would then constitute a different perspective from the Mishnah in [Niddah](#).

²⁰ In a conversation not related to this article, R. Leonard Levy noted that at [Sanhedrin 57a](#), Rav Huna, Rabbi Yehudah, and all students of Rav assert that a Noahide is executed for violation of any of the seven commandments applicable to Noahides, including stealing. As Rabbi Levy noted, if Rabbi Yishmael agreed with this notion, then his application of the death penalty for a Noahide who kills a fetus would be consistent with those Talmudic texts we have discussed above which suggest that a fetus is the property of the husband.

57b is generally associated with the unjustified taking of a life, one could argue that the reference to abortion in *Sanhedrin* 57b applies only where Jewish law would not otherwise permit an abortion.

Another text worthy of consideration regarding rabbinic attitudes toward the loss of a fetus is [Bava Kama 49a](#).²¹ There, Rabbah and Rav Hisda argue over the payment due to a husband when a person in a fight causes the loss of a fetus (*demei veladot*, see [Exodus 21:22](#)). Rabbah states that if the husband passed away without heirs before the loss of the fetus, the mother collects the *demei veladot*. Rav Hisda vehemently disagrees. Taken from different perspectives, the statements of either Rabbah, Rav Hisda, or both may suggest special consideration for the value of a fetus. Arguably, if the fetus were considered literally the property of the husband, upon the husband's passing without heirs, the fetus might be considered ownerless, in which case no *demei veladot* would be due. Notably, the Mishnah (appearing at the top of [49a](#)) simply indicates that where the husband died without heirs, no *demei veladot* are due, and Rabbah introduces the case where the husband predeceased the fetus as an exception to the Mishnah. Rabbah's declaration that the mother collects *demei veladot* may thus be a remarkable expansion of the law and an insistence that somebody be compensated for the loss of the fetus as long as any theoretical claimant

²¹ As noted above, this text was suggested to me by Dr. Benporat, although we have some differences in how we interpret this text.

can be identified. On the other hand, it is possible that upon the passing of the husband, property rights in the fetus simply transfer to the mother. In that case, Rabbah's statement would be a simple application of the basic laws of property. In turn, Rav Hisda may be objecting to such a mechanical application of property law to the *demei veladot*. Rav Hisda's statement, "*marei dikhi atu veladot tzerarei ninhu vezakhya behu ... Master of this ruling! Are veladot bundles of money which she acquires?*" seems to express moral outrage at Rabbah's conception of the fetus, especially if the term *veladot* in Rav Hisda's statement refers to fetuses, as it appears to (Soncino translates "Are embryos packets of money," ArtScroll translates "**Are offspring bundles of money,**" as compared to the William Davidson Talmud which translates "**Is that to say that compensation for the offspring is like bundles of money**"). Even assuming R. Hisda's use of the term *veladot* refers to the *demei veladot*, his language would still seem to suggest some moral consternation.

The above analysis may have halakhic implications. Practically all of the rabbinic texts discussed above are from halakhic discussions in the Talmud and halakhic midrashim which generally have direct impact on halakhic decision making.²² Clearly, the significance ascribed to a fetus and fetal loss is relevant to the analysis of when and whether an abortion is permitted. Compare, for example, R. Moshe Feinstein, in

²² Which is not to suggest that homiletical sources do not have any bearing on that process. See e.g. [Law and Theology in Judaism](#) (Ktav Publishing House, 1974) by my teacher Rabbi David Novak, particularly the first chapter.

[Iggerot Moshe Hoshen Mishpat 2:69](#), who sees abortion as murder and therefore restricts abortion to situations of direct threat to the mother's life, to Hakham Benzion Uziel in [Mishpetei Uziel Part 4 Hoshen Mishpat 46](#), who argues that a fetus is not a *nefesh* (life) and concludes that abortion is permitted even for "tzorekh kalush – a slight need."

Our understanding of biblical texts generally does not significantly impact our halakhic analysis. Rather, we analyze how our sages understood and applied the biblical texts halakhically. Therefore, determining the meaning of [Numbers 5:11-31](#) and whether it contemplates fetal loss would not significantly affect halakhic analysis of abortion. However, our understanding of the biblical text may well impact how we understand our sages' application of that text or the values underlying our sages' rulings. In any event, understanding the biblical *Sotah* ritual to involve fetal death is an admittedly speculative understanding. Still, the rabbinic understandings that we have seen to imply that fetal death either is or is not an acceptable result of the *sotah* ritual, as well as the other rabbinical texts we have examined with regard to rabbinic perspectives on fetal death, are worthy of consideration when determining the *halakhah* with regard to abortion, taking into account all of the caveats I have introduced in the above analysis.

I emphasize that my analysis is not primarily halakhic, and this article is not intended to imply, let alone state, any conclusion regarding the permissibility of abortion. Rather, my purpose

has been to recognize the biblical *Sotah* text as possibly the one and only Torah text that in any way addresses abortion and to examine several rabbinic texts which discuss fetal life for similar implications. The *Sotah* text in the Torah is ambiguous but quite possibly implies that fetal death is an acceptable price to pay in order to prove a pregnant woman's lack of marital fidelity. The rabbinic texts we examined more clearly address fetal life. The implications of those texts are at times unclear and suggest conflicting rabbinical perspectives. In the end, there may be no singular Jewish outlook on fetal life and abortion. However, close analysis of the relevant texts may yield some understanding of which perspectives were more or less prevalent, as well as define the outer limits of Jewish thought on these matters.

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