

A Matter of Life “in” Death:

*Postmortem Cesarean Section
in Jewish Law*

Edward Reichman

Introduction

Today, the term cesarean section refers exclusively to a surgical procedure performed on living pregnant women either electively or emergently in order to deliver a living baby (henceforth referred to as living cesarean section). For the majority of human history, however, this was not the case. In fact, according to medical historians, until roughly 1500, cesarean sections were only performed exclusively postmortem (henceforth referred to as postmortem cesarean section). Cesarean sections on living women, with maternal survival, were unheard of until the Middle Ages. Despite its antiquity, postmortem cesarean section has been, and remains, one of the most infrequently performed procedures in the history of medicine. In a case report in the *Journal of the American Medical Society* in 1957, the authors write, “only 113 successful postmortem sections have been reported in the world literature of the last 250 years.”¹ As to how the procedure arrived at its unique name, there have been more than a few conjectures.²

The performance of the postmortem cesarean section has been documented since antiquity.³ The Catholic Church prescribed such cesarean sections primarily for the sake of baptizing the newborn child, though they did debate whether the baby or mother takes precedence if only one can be saved.⁴ When Henry VIII's third wife Jane Seymour was in labor and her life was at risk, he is purported to have proclaimed, "Save the child by all means, for it is easier to get wives than children."⁵ There is evidence in the 16th century that postmortem cesarean section was still a wellknown and widely accepted procedure, which may have been motivated by financial, legal or religious concerns, relating the dowry of the mother and the desire to baptize the progeny.⁶

Many historians record the first living cesarean section as having been performed in 1500 by Jakob Nufer, a Swiss pig-gelder, on his wife, who is reported to have survived to the age of 77 after bearing additional children thereafter. The first physician known to have recommended the performance of a living cesarean section was Francois Rousset (1535-1590), in his *Traite Nouveav de l'Hysterotomotokie ov Enfantement Caesarien*.

In this essay we will briefly address living cesarean section, in particular, the rabbinic sources that reflect its possible performance in antiquity. We then explore the history and halakha of postmortem cesarean section. Our research reveals four distinct stages in the rabbinic response to postmortem cesarean section throughout history.

Evidence of Living Cesarean Section from the Talmud

While the conventional literature of medical history records the first living cesarean section around 1500 C.E., there are some historians who have cited the Talmud as evidence of the practice over a millennium earlier, based on multiple passages in the Talmud and its commentaries that imply the performance of a living cesarean section. The discussions revolve around the interpretation of the phrase "*yotzeh dofen*," which is used in rabbinic literature to describe a form of non-natural birth whereby the fetus exits outside the birth canal. There are two distinct issues addressed by scholars- Does the phrase "*yotzeh dofen*" refer to a cesarean section or to some other surgical or obstetrical procedure? ; If indeed it refers

to cesarean section, is this a reflection of actual clinical practice or merely hypothetical legal analysis?⁷ I will not revisit the details here, but will add a few comments about and additions to the existing literature on this topic.

In his classic work *Ma'aseh Tuviah* (1708)⁸ Tobias Cohen, a graduate of the famed University of Padua Medical School, devotes a chapter to the procedure described in the Talmud as “*yotzeh dofen*.” He clearly assumes that it refers to living cesarean section and writes, “how strange this chapter must appear to the “modern” reader as the procedure is so exceedingly rare (*rechokah*), and is not performed on the daughters of Israel. However, since the rabbis discuss it in the Talmud, I will explain their words.” He gives detailed instructions how such a procedure should be performed.⁹

Abraham Hartog Israels¹⁰ was the first to seriously entertain the possibility that the Jews were performing living cesarean sections long before medical historians believed it was done. His medical school dissertation in 1845, upon graduation from Groningen, Netherlands, was on obstetrics and gynecology in the Talmud.¹¹ He devotes a lengthy chapter to cesarean section.¹²

In a letter to Dr. Simeon Abrams¹³ in 1857 about the permissibility of postmortem examinations, Rabbi Dr. Bernard Iloway writes that even the great operations in obstetrics were not unknown to the Talmudists. He enumerates cesarean section amongst them, but claims it was mainly performed on a corpse.¹⁴ Rabbi Yekutiel Kamelhar, in his work on scientific matters in the Talmud, likewise lauds the rabbis for their great knowledge of obstetrical procedures, including cesarean section, though he hedges as to whether the knowledge was theoretical or actual.¹⁵

Preuss, in his classic *Biblical and Talmudic Medicine* published in 1911 visits this issue as well, briefly addressing Israels and a few other scholars who had subsequently taken up the issue, and concludes:¹⁶

It is certain that the Talmud mentions a type of birth other than by way of the normal birth canal, with a happy outcome for both mother and child (i.e., both remain alive). It is likely that laparotomy for an abdominal pregnancy, and perhaps also cesarean section on a living woman, is what

the Talmud is referring to. There is no conclusive evidence however that either of these two operations was ever actually carried out during the time of the Talmud.

Jeffrey Boss picked up the issue again in the mid-20th century, adding to the core work of Israel.¹⁷ Boss's excellent article includes a more expansive analysis of rabbinic commentaries, but is perhaps more remarkable for his omission of the work of Preuss. He concludes that living cesarean section was indeed performed in Talmudic times, based on the assumption that halakhic discussions are always rooted in observed fact.

On internal evidence it appears very unlikely indeed that the operation existed only in Tannaitic imagination. Rabbinical teaching contained *halachah* and *haggadah*, the former being precepts of conduct and the latter including discussion of theology, ethical principles, history and other branches of learning; on *haggadah* speculation was common, but fantasy was never a feature of *halachah*, and the passages to be discussed in this paper are all halachic.¹⁸

Boss' statement, "fantasy was never a feature of *halachah*," is simply not true. In a number of cases the Talmud construes of imaginary or fantastical cases for the purposes of legal clarification.¹⁹ Even if it is agreed upon that the Talmudic passages indeed refer to living cesarean section, this, in and of itself, does not attest to the actual performance of this procedure. It is possible that these are merely hypotheticals to clarify the nuances of the law.

Unbeknownst to Boss, this same idea, that cesarean was performed then later forgotten, was espoused by none other than the *Chazon Ish*, in the context of a discussion about the superior knowledge of Chazal.²⁰ If indeed living cesarean section was performed in Talmudic times, as some would have us believe, we would then require an explanation as to why and when it fell into disuse, and why any trace of this practice was effectively erased from classic historical sources.

Furthermore, Boss invokes geopolitics to explain a debate between *Rashi* and *Rambam* about the performance on living cesarean section. *Rashi* clearly assumes that the Talmud refers to living cesarean section and he describes the procedure. *Rambam*, however,

is explicitly dismissive of the medical possibility of living cesarean section, even devising a creative scenario to explain the case of the *Mishnah*.²¹ Boss asserts that *Rambam*, living in an Islamic country, was averse to interpreting the Mishnaic texts as referring to a living cesarean section due to the Islamic approach to this procedure. According to Islamic tradition during that period, cesarean section was associated with the devil, and any child born of cesarean section was to be slain.²² Boss argues, “It would clearly have been dangerous for the Jews to have been known as the practitioners of such an unholy art, and the greatest centers of Jewish learning ... came under the rule of the Caliphate of Baghdad.” However, such an act of self-censorship, at the expense of the plain meaning of the text, would have been highly uncharacteristic of *Rambam*, whose allegiance to the rational explanation of rabbinic texts is unparalleled.

Professor Yehoshua Leibowitz, the great modern Jewish medical historian, summarizes the literature on cesarean section,²³ and Lurie contributes the most recent addition to the literature, though he appears to be unaware of the work of his predecessors.²⁴

Toldot Yeshu — Unexpected Reference to the Performance of Living Cesarean Section in Antiquity

As Preuss astutely points out, the Talmud never prefaces its discussions of cases of living cesarean section with a phrase such as, *ma’aseh she-haya* (“there was a specific case”). As there is no testimony of any actual case, there is therefore no conclusive evidence from the Talmud that living cesarean section was actually performed. There is, however, an interesting source which may support the theory of Israels, Boss and others that the Jews were indeed performing living cesarean section in antiquity and the Medieval period. The work *Toldot Yeshu* (The History of Jesus) is a Medieval parody of the Christian gospel. Its authorship and date are unknown, and scholars have dated it anywhere from the 6th to the 10th centuries.²⁵ There is one line in one of the earliest recensions of this work that bears on our discussion.²⁶

Yeshu claimed that he was the son of God and that he was able, through divine powers, to make a virgin pregnant in the absence

of a human male partner. The king challenged him to perform this feat with a woman in the kingdom. After nine months of sequestration, the woman had not yet borne a child. The king asked of Yeshu as to why she had not produced issue. Yeshu replied that sometimes the pregnancy can be prolonged. He then asked the king to allow him tear open the abdomen to remove the baby in order to prove the success of his endeavor, adding that “there are those amongst the Jews who do similar to this.” This seems to imply that Jews were performing cesarean sections on living woman in the Medieval period.²⁷

Potential Halakhic Ramification of Living Cesarean Section Debate

Aside from the interesting historical aspect of the above debate, there may be one halakhic implication. The Talmud in *Erchin* 7a discusses a case of postmortem cesarean section, a case we will discuss in detail presently. One halakhic issue of performing a postmortem cesarean section is the prohibition of desecration of the corpse, *nivul hamet*. Rabbi Yaakov Ettlinger (1798-1871) suggests one possibility as to why there would be no desecration in the performance of this specific procedure. A procedure that is performed on the living, such as cesarean section, he argues, would not constitute desecration when performed on the dead.²⁸ This proof is predicated on the discussion in the *Gemara* of “*yotzeh dofen*,” which he assumes are accounts of actual cases of living cesarean section. If, however, the Talmudic cases were purely hypothetical, and not accounts of actual cases, then this proof would be invalid.²⁹

Postmortem Cesarean Section to Rescue a Living Fetus

While the aforementioned discussion addresses living cesarean section, for the remainder of this article, I will focus on postmortem cesarean section, performed after the death of the mother for the purpose of rescuing a living fetus.³⁰ We will trace this procedure from antiquity to modern times with particular emphasis on its treatment in rabbinic literature.

Akin to the gestation of the fetus itself, the procedure of post-mortem cesarean section has undergone a number of developmental stages in rabbinic literature. However, quite apart from normal gestation, there have been significant periods of regression, as we will elaborate. Our discussion begins in the Talmudic period, with the literary and historical stage of infancy for post-mortem cesarean section.

Stage I- The Era of Certainty in the Performance of Postmortem Cesarean Section

Talmudic and Post-Talmudic Era

In the context of a discussion about capital punishment, the Talmud (*Erchin 7a*) addresses the case of a pregnant female criminal and the question of whether we delay execution till the birth of the child. Based on textual interpretation the Talmud concludes that we do not delay, and the fetus is executed along with its mother. Furthermore, prior to the execution, fetal demise is to be induced by striking the woman's abdomen. The purpose of this act is to prevent *nivul* or disgrace lest a living baby be delivered after execution.³¹ This concern assumes that the mother predeceases the baby, a fact which is contested by the Talmud.

This debate, about when and if the mother can predecease the baby is critical to our discussion about postmortem cesarean section and requires further clarification. The Talmud states as undisputed doctrine that the fetus predeceases the mother, and offers what appears to be a physiological explanation.

Since the vitality or viability of the unborn fetus is fragile, when the "poison" of the Angel of Death enters the woman, it will exert its fatal effect first on the fragile fetus. If true that the fetus always predeceases the mother, the Talmud queries, our concern that the fetus may survive the execution of its mother is unfounded. This contradiction is resolved by distinguishing between traumatic versus natural death. For a traumatic death, such as by execution, which occurs both rapidly, and through external, non-natural means, it is indeed possible for the fetus to survive after the mother's death, hence the concern for *nivul*. In a case of natural death, however, the fetus predeceases the mother.

The question remains, however, as to whether the statement that the fetus predeceases the mother in a case of natural death is absolute or not. This very issue is a matter of debate in the subsequent Talmudic passage, which bears directly on our discussion.

Rav Nachman said in the name of Shmuel. Regarding a pregnant woman who sat on the birth stool and died on Shabbat during childbirth, we bring a knife, incise her abdomen and remove the child.³²

This unambiguous reference to postmortem cesarean section is the *locus classicus* of our discussion. The Talmud elaborates upon this pronouncement and concludes that one can violate Biblical prohibitions of Shabbat, such as carrying a knife through a public domain, in order to perform the procedure.

How is this statement to be interpreted, in light of the unequivocal pronouncement mentioned above, that in the case of natural death the fetus predeceases the mother? If the fetus will not survive after the death of mother, what is the purpose of performing a postmortem cesarean section? *Rashi* maintains that this pronouncement is not absolute and merely describes the majority of cases. It is indeed possible, albeit in a minority of cases, for the fetus to outlive the mother in a case of natural death. In this case of *pikuach nefesh* (saving a life), we would perform the postmortem cesarean section for even a small possibility that the fetus survived. *Tosafot* however, are of the opinion that the Talmudic statement, that in the case of natural death the fetus predeceases the mother, is absolute and unexceptionable. What justifies the postmortem cesarean section in this case is the fact that the woman is on the birth stool, and the fetus has begun to separate from its mother. In this situation ONLY is it possible for the fetus to survive the mother's natural death.³³

An important distinction between these two opinions is whether one may perform a postmortem cesarean section if the woman is at an earlier stage of pregnancy. According to *Rashi*, it may indeed be permitted, as the fetus may be alive, whereas according to *Tosafot*, as there is no chance whatsoever for the fetus to survive prior to parturition, there would be no halakhic justification for performing a postmortem cesarean section at any pre-parturition stage.³⁴

The conclusion of the Talmud, that one can violate Biblical prohibitions to perform a postmortem cesarean section on a pregnant woman who dies on the birthing stool, remains without dissent.

The Period of the Geonim

In the period of the Geonim we find a number of passages that discuss the postmortem cesarean section. We will address three passages that appear to yield three different conclusions. Our first passage is clearly in synchrony with the Talmudic dictum.

If a woman dies on the birth stool and the fetus is moving within her, we cut open the abdomen on Shabbat, for in all cases of *pikuach nefesh* we violate Shabbat.³⁵

Furthermore, the agreement with the Talmudic dictum is evidenced by the fact that the reference above concludes with a quote directly from the relevant passage in Talmud *Erchin*.

Our second passage from the *Geonim* states:

If a woman dies pregnant there is no need to incise the abdomen as the fetus dies before her.³⁶

This appears to be contrary to the above statement of the *Geonim*, and to the Talmudic passage that explicitly requires a cesarean section for a deceased pregnant woman. However, closer analysis reveals a key difference in this statement. In this statement of the *Geonim*, the woman is pregnant upon death, but no mention is made of the stage of pregnancy. It could very well be an early stage of pregnancy. The Talmud's case, as well as that of the Geonic passage above, is specifically of a woman who dies on the birth stool. In this latter case all agree that a postmortem cesarean section should be performed, though they may disagree as to the reason. There is a debate between *Rashi* and *Tosafot* (according to some interpretations) as to whether the pronouncement allowing postmortem cesarean section is limited to a woman on the birthing stool (*Tosafot*) or whether the permissibility to perform the procedure applies to earlier stages of pregnancy as well (*Rashi*). It is possible that the Geonic author of this passage espouses the position of *Tosafot*.

It is our third passage from the *Geonim* which is the most remarkable:

Question: If a pregnant woman dies on the birthing stool and the fetus is noted to be moving within her abdomen, may we open the abdomen to extract the fetus or not?

Answer: We do not incise (the abdomen), rather we wait. We place a stone on the abdomen until the fetus dies, then we bury her.³⁷

Given the undisputed passage in the Talmud allowing for post-mortem cesarean section in this very circumstance, this excerpt from the *Geonim* seems especially enigmatic, especially since movement of the fetus is observed. Even the publisher of this passage could not refrain from noting the inconsistency and offering a possible solution. The blatant asynchrony led one modern scholar to declare, “This response does not appear to have been written by any sage of Israel, neither *Rishon* nor *Acharon*. I recall that some have written that these responsa require further investigation (as to their veracity).”³⁸

Rabbi Jacob Reischer suggests that perhaps at the time of the *Geonim* there was a concern for the misdiagnosis of the death of the pregnant woman. As such, one should not incise the abdomen lest this hasten or cause the death of the mother.³⁹ This concern, while inferred by Rabbi Reischer from the passage of the *Geonim*, is explicitly stated by *Rema* and will be explored presently. This assumption may explain why one should not perform a cesarean section, but it does not explain why one should actively cause fetal demise.⁴⁰

This Geonic directive to induce fetal demise may perhaps be the origin of the custom addressed by Rabbi David Ben Zimra in Egypt some centuries later, which is remarkably reminiscent of this case.⁴¹

I was asked to render my opinion on a common practice in Egypt that when pregnant women die in childbirth, and there is fetal movement within the abdomen, women strike the abdomen with a broom to hasten the death of the fetus. Is there a concern for the prohibition of murder (*netilat neshamah*), and if it occurs on Shabbos, is there also a violation of Shabbos?

While *Radbaz* does not mention the passage from the *Geonim*, he does vehemently reject this practice and reports that many times he urged these very women to perform a postmortem cesarean

section to save the child based on the explicit Talmudic passage in *Erchin*.⁴² This responsum is also clear evidence that the unambiguous decision of the Talmud, that a postmortem cesarean section should be performed, albeit limited to certain cases, was in force during this period, which coincides with the writing of the *Shulchan Arukh* and *Rema*.⁴³

This custom may have even lasted into the modern period, as evidenced by this passage discussing the custom of the Jews of Beirut:

When the corpse (of a woman who had died in pregnancy) has been washed and dressed in the shroud, the women who lay out corpses watch with eye and ear whether the young life in the dead woman stirs. If so, they rain blows on the abdomen of the corpse till all is still in it. For it would be a dishonor for the dead woman and her family if they ventured to open the corpse and it would be a sin to bury the living child alive.⁴⁴

The third of our passages from the *Geonim* appears to be a deviation from the Talmudic tradition, and is not consonant with the other two Geonic passages. The Talmudic tradition, permitting the performance of postmortem cesarean section, is clearly accepted in the mainstream halakhic literature and is codified into law by both *Rambam*⁴⁵ and *Shulchan Arukh*.⁴⁶

In concluding our discussion of stage one, it appears that the Talmudic permission to perform a postmortem cesarean section remained in force up to the 16th century, the inexplicable, lone third responsum of the *Geonim* notwithstanding. We have every reason to believe that the Talmudic statement allowing postmortem cesarean section was religiously followed as normative practice. The fact that we have no record of postmortem cesarean sections in rabbinic literature during this time period is likely more a reflection of the dearth or paucity of literature, combined with the rarity of the procedure, rather than of the lack of its performance.⁴⁷

Stage 2 — Rema and the Era of Doubt

It is the brief gloss of *Rema* on the *Shulchan Arukh* which introduces our next stage.

As to why we do not practice it (postmortem cesarean section) today, even during the weekdays, it is because we no longer have expertise in diagnosing the death of the mother within enough time for the fetus to still survive.⁴⁸

The *Magen Avraham*⁴⁹ explains this to mean that we may err in the determination of the death of the mother. By the time we wait to confirm the diagnosis, the fetus will clearly not have survived, and there will be no justification to perform a cesarean section.

If one reads the *Rema* carefully, it appears that he is placing a halakhic imprimatur on a preexisting practice of refraining from the performance of postmortem cesarean section rather than making a new halakhic pronouncement.⁵⁰

From the words of *Rema* we have no idea how long prior to this statement the practice of postmortem cesarean section had fallen in to disuse. It is theoretically possible that as early as the time of the *Geonim*, it was already not being performed, as Rabbi Reischer suggests, though we have no other sources to corroborate this theory. We do know, however, that moving forward from this point, given the imprimatur of the *Rema*, it became halakhically sanctioned to generally refrain from postmortem cesarean sections, as we shall see.

Consistency in the Cases of Postmortem Cesarean Section v. the Standard Determination of Death

It is noteworthy that while *Rema* is concerned with the misdiagnosis of death in the unique case of postmortem cesarean section, he did not voice the same concern in the section of *Shulchan Arukh* which deals directly with the diagnosis of death.⁵¹ Is *Rema* consistent in these two cases? It could be argued that in this case, as a procedure will be performed on the recently deceased, it is essential to delay until the confirmation of death, which presumably would be a relatively short period of time. In a standard case of declaration of death, there is anyway built in time for preparations for burial, which would preclude the necessity for adding additional delay.⁵²

The attempt to achieve halakhic consistency between the diagnosis of death in a standard case versus in the case of the pregnant woman is also relevant to the position of *Rambam*.⁵³ In this

case, however, while *Rambam* is concerned about hasty diagnosis of death in a standard case, and cautions against even closing the eyes in the peri-mortem period lest one accidentally hasten death, he raises no such concern in codifying the obligation to perform postmortem cesarean section. One would think that the time delay necessary for confirming the diagnosis of death would preclude the utility of the performance of a postmortem cesarean section, as the fetus would be dead, exactly as the *Magen Avraham* interpreted the *Rema*. The *Rambam*'s required delay, however, seems to be momentary, and perhaps not long enough for the fetus to demise. Rabbi Y. Fischer suggests another novel explanation. He limits the *Rambam*'s permission of postmortem cesarean section to a case of "sitting on the birth stool."⁵⁴ In this case, the baby has already "separated" from the mother and is somewhat independent. As such, the required delay to confirm death would not be harmful to the fetus and one could then comfortably proceed with the postmortem cesarean section.

Validation of Rema's Concern

That the *Rema*'s concern for the misdiagnosis of death with respect to postmortem cesarean section was well founded can be inferred from the following passage which, perhaps not coincidentally, is drawn from a work which would ultimately set the stage for one of the most remarkable and protracted debates in medical halakhic history- the halakhic definition of death.⁵⁵

Philip Peu, a successful surgeon and man-midwife in Paris, with a degree of candour no less uncommon than laudable, (in his *Prax. Obstetr. II. C. ii. 2.*) relates an unlucky accident which happened in his own hands; for being warmly solicited to perform a cesarean section on a pregnant woman, whom he thought perfectly dead because he perceived no pulsation in the sides of the breast, and because a mirror applied to her mouth was not tarnished by her breath, he did not hesitate to begin the operation. But he had hardly plunged the point of his instrument into the integuments, when the trepidation or trembling of the patient's body, the grinding of her teeth, and the motion of her legs, convinced him, though too late, of his rashness. This blunder

filled his mind with such terror, that he bound himself by an oath never for the future to attempt the same operation, till he was thoroughly satisfied with respect to the death of the pregnant woman.⁵⁶

The possibility of misdiagnosis of death was not restricted to cases of postmortem cesarean section. There is also an account of Vesalius, the father of modern anatomy and a contemporary of *Rema*, attempting a routine dissection only to realize that the woman was actually still alive.⁵⁷

Why the Regression?

The *Rema* is historically the first to introduce legal ambiguity into a practice long held to be on solid legal ground.⁵⁸ To what can we attribute this regression? It appears to be an early reflection of the belief that physicians were incapable of accurately diagnosing death. While the misdiagnosis of death is as old as death itself, the organized and public belief that it was a systemic problem requiring intervention evolved over a period of time, reaching its zenith with the publication, translation, annotation and dissemination of the book, *The Uncertainty of the Signs of Death*. The account above of Phillip Peu is found within the pages of this work.

With this book and others like it, a widespread fear was instilled within every individual that they might be buried alive. This ultimately led to legislation in many European countries requiring delay of burial after initial pronouncement of death until which time death could be confirmed with certainty, often a period of two to three days.

Given the halakhic requirement of immediate burial after pronouncement of death, this presented a serious challenge for contemporary rabbinic authorities. This so-called three-day burial controversy involved virtually every major rabbinic authority of that period and has received ample treatment in halakhic and academic literature. I do not revisit it here except to highlight some aspects of this historical chapter that bare relevance to our present discussion. Further research will surely bear our additional connections.

There is evidence that the legislators of the new laws requiring delay of burial specifically singled out the case of a pregnant woman. If the diagnosis of death was in doubt, this should clearly

impact the advisability of performing a cesarean section, lest we find a recurrence of the incident mentioned by Peu above. Despite this concern, some countries specifically legislated that a post-mortem cesarean section should be performed if a woman died in a state of advanced pregnancy.⁵⁹

According to one contemporary rabbinic scholar, the three-day burial controversy had an unexpected impact on a Jewish practice related to our discussion.⁶⁰ It was a custom to delay burial of a pregnant woman who died in order to facilitate the delivery or spontaneous passage of the fetus. It is possible that this practice was an outgrowth of the postmortem cesarean section, and while delayed burial was originally intended to deliver a living fetus, it evolved into the delivery of a deceased fetus.⁶¹ In light of the halakhic opposition to the delay of burial, at least one prominent rabbinic authority, Rabbi Isaiah Berlin, suspended this albeit unsubstantiated practice and required burial of all pregnant women without significant delay, similar to all deaths, lest one think that delay of burial would be permitted in other cases as well. Rabbi Yechiel Goldhaber asserts that Rabbi Berlin was responding to the recent dictates requiring delay of burial and specifically did not want the Jewish community to delay the burial of a pregnant woman, a common practice up to that point, lest it be misconstrued as a tacit approval of delay of burial in all cases, something to which Rabbi Berlin was clearly opposed.

Cases of Postmortem Cesarean Section in the Post-Rema Era

As opposed to the historical period preceding the *Rema*, for which we have no recorded actual cases in rabbinic literature of postmortem cesarean section, in the ensuing centuries we find a number of such cases. Through these reports we can see the impact of the *Rema*'s pronouncement on the subsequent halakhic landscape. Was the *Rema*'s concern universally accepted or was postmortem cesarean section still performed? As mentioned above, *Radbaz*, a rough contemporary of *Rema*, advocated for the performance of postmortem cesarean section, and makes no mention of the concern for the misdiagnosis of death. It is unclear, however, if he would have known of *Rema*'s position. We focus on later responsa, after the dissemination of the *Shulchan Arukh*

with the *Rema*'s glosses. Perhaps the most oft-quoted responsum on postmortem cesarean section is that of tragic case presented to Rabbi Yaakov Reischer (1661-1773).⁶² His response not only reflects the acceptance of the comments of *Rema*, it also gives insight into its application.

Regarding a case, which should never occur again in Israel, of a pregnant woman who was decapitated with a sword on Shabbat, and her fetus was observed to be moving. A man incised the abdomen to save the fetus and after the procedure found that the fetus had died. He asked if he needs penitance (*kapparah*) for the accidental violation of Shabbat.

In Rabbi Reischer's response, he clearly follows the position of *Rema* that we do not perform a postmortem cesarean section "today," as we are no longer experts in determining death. He limits this to cases of natural death. However, in this case, as it is a traumatic death, and furthermore, decapitation renders the diagnosis irrefutable, the concern of the *Rema* is irrelevant, and it is clearly permissible to perform the postmortem cesarean section. We may infer that if it would have been a case of natural death, the position of *Rema* would have been in force and Rabbi Reischer would have prohibited a postmortem cesarean section. Of note, Rabbi Reischer is of the opinion that *Rashi* and *Tosafot* do not argue regarding the accepted fact that in a natural death the fetus *always* dies first. As such, according to Rabbi Reischer, in the case of a natural death, all authorities agree that one is only permitted to perform a cesarean section if the woman is on the birth stool.

The acceptance of the decision of *Rema* is reflected in a responsum of another prominent rabbinic authority, Rabbi Moshe Teitelbaum (1759-1841), progenitor of the Satmar chassidic dynasty. In dealing with a related issue about the burial of a pregnant woman with her fetus, and whether a cesarean section should be performed to remove the deceased fetus in order to provide a separate burial,⁶³ he states that there are rabbinic discussions about postmortem cesarean section to save a living fetus, "something that is not possible in our time, as explained in *Rema*..."⁶⁴

While the tragic case presented to Rabbi Reischer above was straight forward from a legal perspective,⁶⁵ the case presented to Rabbi Avrohom Chaim Oppenheim (?1796- ?1894) was not.

Regarding an incident that occurred in a nearby village. A pregnant woman died, and according to her previous testimony, at the day of her death she was exactly 8 months and 1 day pregnant. In her village there is a physician who is expert in the determination of death, and no villager is buried until he confirms the diagnosis of death. When this physician examined the woman, he declared that she was definitively dead, and that her fetus was still alive.

Is one permitted to desecrate the body and remove the fetus from her? The reason we are not accustomed to incise the abdomen and remove the fetus is because we are not expert in determining death, and perhaps the woman merely fainted. The fetus would die first (if we wait for the definitive diagnosis), as it states in *Shulchan Arukh* ... Such is not the case here where the physician, who is an acclaimed expert, affirms that both the fetus is still alive and that the mother is definitely dead. Do we say that the permission to remove the fetus is only if the baby is completely formed, as in the Talmudic passage where the woman is on the birth stool, and that if not (as in this case) it is better not to desecrate unnecessarily?⁶⁶

There are two variables here that require analysis. The first is the accuracy of the medical diagnosis for both the mother and fetus. If this were the only issue, the decision would likely be clear. *Rema* was concerned about the misdiagnosis of death, once this factor is corrected for, as in this case, we can invoke the Talmudic permission to perform a cesarean section.

The other variable is the gestational age of the fetus. Above we discussed the debate between *Rashi* and *Tosafot* as to whether the postmortem cesarean section can be performed only for a woman on the birth stool, or whose fetus is fully developed, or even at an earlier gestational age.

In his halakhic analysis, Rabbi Oppenheim initially leans against performing the cesarean section because of the early gestational age.⁶⁷ In this case, he argues, the fetus would predecease the mother (agrees with *Tosafot*). As to the observation of the physician regarding fetal movement, he likens it to the Talmudic comment that it is like the movement of the tail of a lizard (i.e., the

movement is reflex, or perhaps artifact, and not an indication of the presence of life). He ultimately allows the procedure based on an analysis of the laws of desecration of the dead (*nivul*).

His final comment and conclusion however are of particular interest regarding the interface of the history of postmortem cesarean section and the three-day burial controversy.

I am inclined to allow the desecration (*nivul*) in this case ... for as explained in your question, it appears that the deceased will not be buried immediately (in any case) due to the decree of the government. If so, even if you do not desecrate now (to perform the postmortem cesarean section) there will ultimately be desecration when the fetus exits after death, as *Rashi* interprets in Gemara *Erchin*...

We see how the decree regarding delaying burial could potentially have halakhic impact on our case of postmortem cesarean section.

The young Rabbi Oppenheim forwarded his response to the prominent rabbinic authority, Rabbi Moshe Kunitz (1774-1834), for validation.⁶⁸ Of note, he omitted the final comment regarding delayed burial in his letter. While Rabbi Kunitz took the young rabbi to task for some of his misguided analyses, he ultimately concurred that it would be appropriate to perform the postmortem cesarean section. Rabbi Kunitz does not specifically address the fear of *Rema* regarding the misdiagnosis of death, assumedly being satisfied with the oversight of the expert physician. This decision of Rabbi Kunitz, allowing postmortem cesarean section if a physician pronounced the death, was incorporated into other legal texts.⁶⁹

What is clear from these cases is that they interpreted *Rema*'s statement as situational, and if circumstances reveal a clear diagnosis of death, whether through decapitation or by expert physician examination, the original Talmudic permission to perform a postmortem cesarean section would remain in force.

In his Holocaust responsa, Rabbi Ephraim Oshry describes a profoundly tragic case of postmortem Cesarean section.⁷⁰ On May 7, 1942, the Germans decreed that any Jewish woman found to be pregnant would be shot on sight. That very day an innocent woman, not knowing of the decree, was walking in the street. When

a Nazi soldier noticed her, he immediately shot her in the chest. The woman was brought to the local hospital where she was pronounced dead, and the physicians thought they could possibly save the fetus. Rabbi Oshry himself witnessed the event and was consulted by a Jewish physician as to the permissibility of performing a postmortem cesarean section. The physician raised the issue of *nivul hamet*, desecration of the dead, as well as the possibility that the woman was still alive.

Rabbi Oshry ruled at the bedside that the procedure was permitted. In his later published discussion, he based his analysis on the passage in *Erchin*, addressing the debate between *Rashi* and *Tosafot*, as well as the position of *Rema*. He also invokes the similar case of traumatic death in pregnancy discussed by Rabbi Reischer above. The procedure was technically a success, and the baby was delivered alive.⁷¹

In conclusion of our analysis of stage two, the rabbinic authorities in the post *Rema* era appear to have accepted *Rema's* ruling as normative,⁷² and postmortem cesarean sections were generally not performed. There are a number of specific cases of postmortem cesarean section recorded during this period, all of which are justified by the rabbinic authorities as being consistent with the position of *Rema*, as the death of pregnant mother was ascertained with certainty.

Stage 3 — The Return of Certainty and Restoration of the Talmudic Ruling

While the likelihood of a definitive diagnosis of death was less likely in the pre-modern era, in the modern era, this is no longer the case, and it is far easier to definitively diagnose both the death of the mother, as well as the remaining life of the fetus. The advances in modern medicine led to the revisiting of the question of postmortem Cesarean section by both medical and rabbinic authors.

Dr. Yaakov Levy, writing in *ha-Ma'ayan* in 1971, interprets the statement of *Rema* similar to his predecessors, Rabbis Reischer and Kunitz, though he updates the medical reality for his time.⁷³ He advocates, given the advances in medicine, for the restoration of the original ruling of the

Talmud and codified by the *Shulchan Arukh*. Rabbi Shlomoh Schneider, writing in the journal *haMaor* in 1974, in essence makes the same argument, though he buttresses it with other halakhic analyses.⁷⁴ R' Shmuel Vozner echoes the same sentiment that today, given our enhanced ability to both diagnose the death of the mother and the life of the fetus, we should restore the practice of postmortem cesarean section.⁷⁵ It was also brought to his attention that R' Isser Zalman Meltzer was of the same opinion. Rav Vozner hastens to add, however, that one should not rely on his decision until there is concurrence from other Torah sages.

Stage 4 — The Era of Brain Death and the Return of Doubt

In the late 20th century there evolved a new and alternate diagnosis of death that has reintroduced ambiguity into the procedure of postmortem cesarean section. In 1968 a Harvard committee published an article defining a clinical condition called irreversible coma.⁷⁶ This ultimately became known as brain death and was eventually accepted by the Western world as an alternate definition of death. The status of brain death in *halakha* has become one of the most complex chapters in modern medical halakhic history and we shall address it here only inasmuch as it interfaces with our topic.

The Impact of the Case of Postmortem Cesarean Section on the Halakhic Literature on the Definition of Death

The case of postmortem cesarean section, and the Talmudic passage of *Erchin* above, plays a critical role in the halakhic analysis of the legal status of the brain dead patient. While a number of rabbinic authorities invoke the case of postmortem cesarean section in their analyses of the case of brain death, we will focus specifically on the position of Rabbi Shlomo Zalman Auerbach, for whom this case played a central role in his discussions.

As a major rabbinic authority in the late 20th century, Rabbi Auerbach was asked to render his opinion as to whether brain death is considered halakhic death. Apparently, he was seriously considering acceptance of brain death when he was made aware

of cases where pregnant women were diagnosed with brain death, yet able to deliver healthy babies via cesarean section.⁷⁷

The key aspect of this case for Rabbi Auerbach was the medical fact that the fetus was able to survive despite the fact that the mother was brain dead. According to the *Gemara Erchin*, in the case of a natural death, unless the woman is on the birth stool, the fetus always predeceases the mother.⁷⁸ If indeed brain death is halakhic death, it should simply not be possible for the fetus to outlive the mother. It must therefore be, he reasoned, that brain death cannot be halakhic death.

The counter argument, advanced by Rabbi Dr. Steinberg, among others, was that modern science has created a new reality and that the artificial delivery of oxygen to the body via a respirator, and the preservation of blood flow and blood pressure supplying all the required sustenance for the fetus, can allow a corpse to serve as an incubator despite the legal and halakhic death of the brain dead patient. To demonstrate this point, the following animal experiment was proposed. A pregnant sheep would be decapitated and then sustained through artificial means long enough to deliver the fetus. If this were possible it would lead to the following conclusion. All would agree that a decapitated sheep is legally dead, based upon the *Mishnah* in *Ohalot* (1:6). It is only through modern interventions that the fetus can still be delivered even after the legal status of death. It is therefore possible that brain death is halakhic death, yet it is still possible, through modern technology, to deliver a living baby after its determination. This experiment was performed on 17 *Shevat*, 5752.⁷⁹

While the experiment may have led to a reinterpretation of the Talmudic passage by Rabbi

Auerbach, it did not completely assuage his concerns about accepting brain death as halakhic death.

Of historical interest, contrary to popular belief, this is not the first time this type of experiment was performed. In fact, in 1627, William Harvey, who first described the circulation of the blood, decapitated a rooster and preserved the circulation and respiration with a bellows. It could be argued that that was the first case of “brain death” to be maintained on a “respirator.”⁸⁰

Impact of Brain Death on the Performance of Postmortem Cesarean Section

In the modern era, since the acceptance of the brain death criteria, there have been a number of cases of pregnant women diagnosed with brain death. In some of these cases attempts were made, with varying success, to sustain the mother in order to deliver the fetus.⁸¹ The halakhic approach to this unique case is linked to the position one maintains about brain death.

If one considers the brain dead patient to be alive, then this is no longer a discussion about postmortem cesarean section, but of living cesarean section.⁸² According to this position, as the mother is halakhically alive, one is clearly obligated to sustain her life, and by extension, the fetus' as well. The issue now becomes the assessment of danger and risk to the pregnant mother. There is debate as to whether a brain dead patient has the status of a *gosses* (moribund) or *safek gosses* (possibly moribund). This status carries halakhic ramifications, such as the prohibition of even moving a *gosses*, lest it hasten death. While it may be theoretically possible to deliver a child from a brain dead patient naturally, with external abdominal compression, given the lack of consciousness of the woman, this would be challenging. Would the performance of a cesarean section to deliver the fetus be considered a violation of the prohibition of moving the *gosses*? What if the health status of the brain dead patient were compromised by the pregnancy? Would we perform an abortion to prolong the life of the brain dead patient, or would it be preferable to deliver the fetus, which is a potential life? It is quite possible that the performance of cesarean section on a brain dead woman would cause undue physiological stress and possibly hasten her death. Ironically, while it would be obligatory to sustain the pregnant mother, who is halakhically alive according to this position, it may possibly be prohibited to deliver the baby through cesarean section, lest it hasten the mother's death.

If one considers the brain dead patient as halakhically dead, we can then invoke our discussion about postmortem cesarean section. Would the Talmudic pronouncement codified by the *Shulchan Arukh* allowing for postmortem cesarean section apply here? Or, would the *Rema's* doubt about the diagnosis of death apply? In

either case, the unique status of the brain dead pregnant patient creates a scenario that was simply unimaginable previously in the history of medicine- a clinically dead woman with a living child in utero who can be sustained for weeks to months. All the previous halakhic discussions relate to sustaining the woman for minutes, perhaps a few days at most, in order to possibly deliver the child. What if the woman is only a few weeks pregnant? Will we sustain the body as a human incubator for months, or is this halakhically untenable?

The case of the Talmud and codes clearly refers to the performance of a cesarean section immediately upon determination of death, without delay. For this case there is some discussion of desecration of the corpse, *nivul hamet*, for the procedure. In the brain death case, however, in addition to the issue of *nivul ha-met*, there is also the concern for *halanat ha-met*, abrogation of the *mitzvah* of timely burial, as burial would be delayed until the delivery of the baby, which could be months. One could compare this to a situation of organ donation from a brain dead patient, which is permitted by a number of rabbinic authorities who accept the brain death criteria as halakhically valid. In this case, burial is delayed sometimes for days until organ harvest occurs, and is permitted based on the *pikuach nefesh* for the organ recipient. Would we apply the same logic to delaying burial of the deceased woman for *pikuach nefesh* for the fetus? Does the fetus have the same status as a living person in the eyes of *halakhah* with respect to *pikuach nefesh*? We do allow violation of Shabbat in order to save the life of a fetus. Does it matter that the delay could be months instead of days? These issues clearly merit a more expansive halakhic analysis, which is beyond the scope of this article.⁸³

Conclusion

This essay discusses one of the rarest performed surgical procedures in the history of medicine, the postmortem cesarean section, from historical and halakhic perspectives. The halakhic approach to this procedure has evolved since antiquity and has undergone

a number of distinct stages. In the initial stage, the medical determination of death was unquestioned and rabbinic authorities universally advocated the performance of the postmortem Cesarean section. In the second stage, the accuracy of the medical determination of death was called into question, and the rabbinic authorities generally withheld consent for the procedure, with some notable exceptions. In the third stage, the medical diagnosis of death was again restored to a state of accepted accuracy, and the rabbinic authorities again advocated for the performance of the procedure. In the final and present stage, the medical community has adopted a new, and alternative determination of death, so-called "brain death." While the medical accuracy of this diagnosis is accepted, it is now the halakhic status of this diagnosis that is in question and that has generated renewed halakhic ambiguity in the performance of the postmortem Cesarean section. This essay illustrates the complex relationship between medical history and medical halakhah, and the responsiveness of rabbinic authorities throughout the centuries to contemporary medical developments.

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1. H. DeKruif, et. al., "Postmortem Cesarean Section with Survival of Infant," *Journal of the American Medical Society* 163:11(March 16, 1957), 938-939.
 2. Pliny the Elder suggests that the name Caesar comes from the word *caesum*, 'cut out,' because the first Caesar was cut from his mother's womb. Many illustrations throughout the centuries depict this supposed birth of Caesar. However, according to most historians, Julius Caesar himself could not have been so delivered, because this dangerous operation was normally done only upon a dead woman, and his mother Aurelia was known to have lived for many years after his birth. There is a tradition that Caesar's mother indeed did not survive the operation. This version is found in *Tosafot (Avodah Zara 10b s. v., "kol")*, who cites Yosippon as the source of this tradition. Some suggest that the term derives from the fact that during the time of the Caesars (not a specific Caesar) the law, *Lex Regis* (or *Lex Caesaria*) of Numa Pompilia (715-672 B.C.E), forbade the burial of a pregnant woman before the fetus had been excised. Who does otherwise, the law stated, clearly causes the promise of life to perish with the mother. For a lengthy discussion on the etymology of the term, see "Creative Etymology: 'Caesarean Section' from Pliny to Rousset," in R. Blumenfeld-Kosinski, *Not of Woman Born: Representations of Caesarean Birth in Medieval and Renaissance Culture* (Cornell University Press: Ithaca, 1990), 143-153. This work also discusses artistic depictions of cesarean section, as well as the general history of this topic. See also T. N. Raju, "The Birth of Caesar and the Cesarean Misnomer," *American Journal of Perinatology* 24:10(November, 2007), 567-568.

- For general works on the history of cesarean section, see, for example, J. H. Young, *Caesarean Section: The History and Development of the Operation from Early Times* (H. K. Lewis and Company: London, 1944); R. M. Pierce and E. M. Rucker, "A Librarian Looks at Cesarean Section," *Bulletin of the History of Medicine* 25(March, 1951), 132-148; H. A. Gabert, "History and Development of Cesarean Section," *Obstetrics and Gynecology Clinics of North America* 15:4(1988), 591-605. A very recent contribution appeared in the Hebrew medical literature, A. Zilberlicht, et. al., "The Incredible Story About the Cesarean Section From Ancient Times Till Nowadays," (Hebrew) *Harefuah* 153:8(August, 2014), 471-474 and 497.
3. G. M. Gould and W. L. Pyle, *Anomalies and Curiosities of Medicine* (W. B. Saunders, 1896), 134-137. E. M. Hillan, "Caesarean Section: Historical Background," *Scottish Medical Journal* 36:5(October, 1991), 150-154; Q. Warraich and U. Esen, "Perimortem Cesarean Section," *Journal of Obstetrics and Gynaecology* 29:8(November, 2009), 690-693. M. do Sameiro Barroso, "Post-Mortem Cesarean Section and Embryotomy: Myth, Medicine and Gender in Greco-Roman Culture," *Acta Medico-historica Adriatica* 11:1(2013), 75-88. ⁴ R. Blumenfeld-Kosinski, *op. cit.*, 26-27.
 4. *ibid.* 27.
 5. See K. Park, "The Death of Isabella Della Volpe: Four Eyewitness Accounts of a Postmortem Cesarean Section in 1545," *Bulletin of the History of Medicine* 82(2008), 169-187.
 6. See *Arukh HaShalem*, s. v., "dofen." The *Arukh* assumes *yotzeh dofen* refers to postmortem only. *Tashbetz* 1:110 accepts the possibility of living cesarean section and disagrees with the interpretation of the *Arukh*, struggling to reinterpret him as referring to a case of a deathly ill woman, although still alive. Alexander Kohut, in his explanatory notes on the *Arukh*, likewise finds difficulty with the latter's position that cesarean section is only performed on a deceased woman.
 7. Section *Gan Na'ul*, Chapter 18. On Cohen and his work, see D. Ruderman, "On the Diffusion of Scientific Knowledge Within the Jewish Community: The Medical Textbook of Tobias Cohen," in his *Jewish Thought and Scientific Discovery in Early Modern Europe* (Yale University Press: New Haven, 1995); *Koroth* 20(2009-2010), where five articles are devoted to Tobias Cohen and his work *Ma'aseh Tuvia*.
 8. Though living cesarean section was first recommended by a physician in the 16th century, it took many years, in fact centuries in many places, for it to become part of accepted medical practice. Cohen's citation of an interpretation in the name of a Rav Heschel, linking cesarean section with the requirement for a woman to bring a postpartum sacrifice, is worth recording. The students of R' Shimon bar Yochai asked why a woman has to bring a sacrifice after childbirth. According to the Talmud, when a woman is in the throes of labor, she takes an oath not to cohabit again with her husband, lest it lead to another painful labor. For this inappropriate oath, she brings a sacrifice. Rav Heschel explained it in the following way: According to the Talmud, if a woman undergoes a living cesarean section, she

will not be able to give birth again. When a woman is in labor, she does not yet know whether she will deliver naturally or through cesarean section, but the pain leads her to take an oath not to cohabit again with her husband. If she delivers via cesarean section, she would not have had to take an oath, as in any case she would not be able to have another child. She therefore brings the sacrifice because she could have prevented a false oath by waiting. While clearly a novel interpretation, it is based on the fact that if a woman delivers by cesarean section, she cannot bear children subsequently. It is unclear to me how R' Heschel infers this from the Talmud, when in fact it appears quite the opposite, that the Talmud discusses the legal ramifications of a second child born to a woman whose firstborn was delivered by cesarean section. (“*yotzeh dofen vi-haba acharav*”)

9. On Israels, see H. S. Hes-Swartenberg, “Abraham Hartog Israels, M.D., 1822-1883: Netherlands’ First Professor in the History of Medicine,” *New York State Journal of Medicine* 79:9(August, 1979), 1445-1447; *idem.*, *Jewish Physicians in the Netherlands 1600-1940*(Van Gorcum: Assen, 1980), 80-81.
10. *Dissertatio Historico-Medica Inauguralis Exhibens Collectanea Gynaecologica ex Talmude Babylonico*, defended in Groningen, March 15, 1845.
11. See full text at <http://babel.hathitrust.org/cgi/pt?id=nnc1.cu58942270;view=2up;seq=104>, pp. 160-184. ¹³ On Dr. Abrahams, see Y. Levine, “Dr. Simeon Abrahams: More than a Footnote,” *Jewish Press* (September 28, 2010).
12. <http://www.jewish-history.com/lloway/letter11.html> (accessed November 9, 2014). Ilowy cites *Tosafot, Avodah Zara* 10a, who mention the story of Caesar’s death. He mistakenly attributes the source of *Tosafot* to Josephus, instead of Yosippon, which was a work of different authorship often confused with Josephus. In addition to this letter, Ilowy addressed issues of science and Jewish law in a remarkable letter entitled “The Science of the Talmudists,” *The Occident* 14(1857), available at <http://www.jewishhistory.com/lloway/letter03.html>.
13. *Ha-Talmud U-Mada’ei Ha-Tevel* (Lvov, 1928), 51.
14. F. Rosner, trans., J. Preuss, *Biblical and Talmudic Medicine* (Hebrew Publishing Co.: New York, 1978), 421-426, esp. 426. In addition to translating the classic work of Preuss, and making it accessible to the English speaking world, Dr. Rosner also penned a brief biography of Preuss which appeared in *Medical History* 19:4(October, 1975), 376-388. For recent additions to the biography of Preuss, see S. Carlebach, *Ish Yehudi- The Life and Legacy of a Torah Great: Rav Joseph Tzvi Carlebach* (Shearith Joseph Publications, 2008), 53-60; M. Gillis-Carlebach, “Biblical and Talmudic Medicine- Contributions to the History of Medicine and Culture by my Grandfather, Dr. Julius Preuss (1861-1913),” (German) in *Der Jüdische Arzt in Kunst und Kultur*. Heidelberg, Caris-Petra (Hrsg.). Frankfurt a.M.: Mabuse-Verlag, 2012.
15. J. Boss, “The Antiquity of Caesarean Section with Maternal Survival: The Jewish Tradition,” *Medical History* 5(1961), 117-131.
16. *ibid.*, 120.
17. See for example the many cases discussed in *Chullin* 70a. *Tosafot, Ketubot*

4b, s. v., “*ad*,” explicitly states that we find a number of purely hypothetical cases in the Talmud that never did or could occur. It is possible, as Preuss notes, that there is a distinction between Mishnaic and Talmudic cases and that the *Mishnah*, a guide to practical halakhah, does not venture into the hypothetical. If we accept this distinction, then we must per force conclude that postmortem cesarean section (if identified with “*yotzeh dofen*”), which is described in the *Mishnah*, is indeed describing an actual case.

18. *Emunah U-Bitachon*, Chapter 5.
19. See his commentary to *Mishnah Bekhorot* 8:2.
20. See H. E. Fadel, “Postmortem and Perimortem Cesarean Section: Historical, Religious and Ethical Considerations,” *Journal of the Islamic Medical Association of North America* 43:3(December, 2011), 194-200. While Fadel does not address the Islamic approach to cesarean section in the times of *Rambam*, he does contend that postmortem cesarean section is fully consonant with Islamic law and teachings.
21. See Y. Leibowitz, “*Mavo Histori Refui le-Seder Taharot*,” *Torah She-Ba’al Peh* (5724), 33-39. See also his “*LeToldot ha-Refuah bi-Yisrael*,” in *Yavneh* 3:7-12(5709), 184-200, esp. 187-189. Leibowitz mentions Theophile Reynaud’s 1637 work as the first medical treatise on cesarean section. This was in fact preceded by the work of Francois Rousset in 1581.
22. See S. Lurie, “Vaginal Delivery after Caesarean Delivery in the Days of the Talmud (2nd Century BCE — 6th Century CE),” *Vesalius* 12:1(2006), 23-24. There is no mention of the expansive analyses of Israels, Preuss or Boss, and the rabbinic citations are scant. As opposed to Boss, he realizes that “it is possible that these passages are of theoretical nature, due to the known tendency of the Jewish writings to provide commentaries for even the most unlikely cases.” He argues, however, that the terminology used is of a “concrete category,” reflecting that these were actual cases. He cites no specifics, and it is unclear to me how one would infer from the language whether these cases were real or imagined.
23. J. Dan, “*Toldot Yeshu*,” in M. Berenbaum and F. Skolnik, eds., *Encyclopaedia Judaica* 20(Gale Virtual Reference Library: Detroit, 2006), 28–29.
24. See Y. Deutch, “An Ancient Version of *Toldot Yeshu*,” (Hebrew) *Tarbitz* 69:2(5760), 177-197, esp. 190-191. I thank my dear friend Jay Zachter for drawing my attention to this source.
25. The other versions of *Toldot Yeshu* either do not contain this section or cannot be read this way, and while they preserve the phrase “there are those amongst the Jews who do similar to this,” it is used in a different context. See Deutch, *op. cit.* Upon completion of this essay, I fortuitously discovered an article that identifies and elaborates upon the passage in *Toldot Yeshu* as a possible reference to living Cesarean section. See M. Meerson, “Yeshu the Physician and the Child of Stone: A Glimpse of Progressive Medicine in Jewish-Christian Polemics,” *Jewish Studies Quarterly* 20:4(December, 2013), 297-314.
26. *Binyan Tzion*, 171.
27. Regarding the criterion of Rabbi Ettlinger with respect to *nivul ha-met*, see

- R' J. David Bleich, "Nivul HaMet," communication in *Tradition* 37:3(Fall 2003).
28. The topic of postmortem cesarean section in rabbinic literature has received brief treatment in the works of Preuss, Zimmels, and Jakobovits.
 29. The exact nature of the *nivul* is a matter of debate. See Y. Mitnick, *Avodah Berurah, Erchin* 7a (Brooklyn, 5764), 136. He mentions other opinions including postmortem bleeding, and the public observance of the event. Some suggest that the *nivul* would result from the birth of a dead fetus.
 30. *Erchin* 7a.
 31. This interpretation of the debate between *Rashi* and *Tosafot* is as per *Rema* in his responsa (n. 40) and many others. According to Rabbi Yaakov Reischer, in his *Shvut Yaakov*, for example, *Rashi* concurs with *Tosafot* that the baby predeceases the mother in a case of natural death unless she is on the birth stool. For further discussion of the *Rashi-Tosafot* debate, see R' E. Oshry, *Sh'ailot U-Teshuvot Mi-Ma'amakim* 2:10; S. Schneider, "Is It Permitted to Operate on a Pregnant Woman Who Died in Order to Save the Fetus?" (Hebrew) *Ha-Ma'or* 222(Kislev-Tevet, 5735), 10-12, republished in his *Divrei Shlomo* 3:362 with additions. According to the *Kaf Ha-Chaim*, *Rambam* would agree with *Rashi* that one always performs a postmortem cesarean section, even if not in labor and is a natural death. The *Livyat Chen* cites the *Shitah Mekubetzet* who found a manuscript version of *Rashi* that seems to be more in line with the position of *Tosafot*. For discussion of these sources, see S. Magnus, *Adnei Shlomo O. C.*, v. 6, *siman* 330, n. 32. *Ba'al Halakhot Gedolot (Shabbat, Chapter 18)* appears to follow *Tosafot* and simply states as a matter of fact, without dissent, that when a pregnant woman dies of natural causes her child predeceases her, while if the death is traumatic the child may survive. See T. H. Zablodover, *Beit Shmuel* v. 1, n. 5(5697), 20-24, who provides a novel interpretation of the position of the Vilna Gaon on this Talmudic passage. He addresses the issue of whether a pregnant woman who dies during childbirth, on the birth stool, is considered as a natural death, or as a murder/traumatic death. If the latter, this would lead to a different understanding of *Rashi*. Rabbi Zablodover proudly writes that he discussed his interpretation of the Vilna Gaon with Rabbi Chaim Ozer Grodzinsky, who accepted his analysis. Rabbi Shlomoh Zalman Auerbach appears to have agreed with this position. See Y. Gefen, *Deliyat ha-Kerem* 1(5767), 240.
 32. There are some who expand of *Tosafot's* permission to perform postmortem cesarean section to include not only the case of sitting on the birth stool, but also a case where the fetus is completely developed (*kalu lo chadashav*), as in this case as well the fetus is independent. See for example, Y. Kohen, *Zera Emet* 2:50.
 33. S. Asaph, *Teshuvot ha-Geonim (Mekitzei Nirdamim: Jerusalem, 5702)*, 85, n. 76.
 34. A. A. Harkavy, *Zichron le-Rishonim ve-gam le-Acharonim (Teshuvot ha-Geonim)* (Berlin, 5647), n. 508, p.339.³⁷ T. Moscovitz, ed., *Sh'ailot U-Teshuvot Ha-Geonim* (Jerusalem, 5720), p. 74, n. 248. As per the editor,

- this paragraph was censored in the Vilna edition and restored in this work based on the Mantua edition.
35. See Rabbi David Avitan's notes to his edition of *Birkei Yosef*, O. C., 330. See also, *Kneset HaGedolah* on O. C., 330. For an alternative interpretation of the *Geonim*, see *Sh"ut Zera Emet* 2:50.
 36. *Shvut Yaakov* 1:13. See Y. Fischer, *Sh'ailot U-Teshuvot Even Yisrael* 8:33, who questions this interpretation based on the position of *Shitah Mekubetzet* in *Erchin*
 37. 7a. For another explanation of this passage, see Y. Weinberg, *Seridei Aish* 1, p. 316.
 38. The editor of the Mantua edition cited by Moscowitz, *op. cit.*, suggests that the rock was placed on the abdomen of the pregnant woman to prevent dehiscence of bodily contents, and not to hasten the death of the fetus.
 39. *Radbaz* 2:695.
 40. *Radbaz* adds that a postmortem cesarean section would only be allowed if the woman was on the birth stool (i.e. died during childbirth), as only in this case, and for traumatic death, would the fetus still survive. It appears *Radbaz* held like *Tosafot*.
 41. This may be an indication that there were differences in the Ashkenzic and Sefardic practices. *Rema* as we shall see was not in favor of the practice of postmortem cesarean section. *Radbaz* may have followed the tradition of R' Yosef Karo. Some contend, however, that *Rema* is not arguing on the *Shulchan Arukh*, but rather elaborating upon his statement.
 42. H. H. Ploss, M. Bartels and P. Bartels, *Woman: An Historical, Gynecological and Anthropological Compendium* (William Heinemann Ltd.: London, 1935), 412. H. J. Zimmels, in his *Magicians, Theologians and Doctors* (Edward Goldston and Sons: London, 1952), 90, quoting the same source, mentions this as a custom among non-Jews. I was unable to find the original source from Ludwig Frankel.
 43. *Hilchot Shabbat* 2:15.
 44. O. C. 330:5.
 45. See K. Park, "The Death of Isabella Della Volpe: Four Eyewitness Accounts of a Postmortem Caesarean Section in 1545," *Bulletin of the History of Medicine* 82:1(Spring 2008), 169-187.
 46. *Shulchan Aruch*, O. C. 330:5. *Rema's* comment is based on an earlier source, the *Issur v'Hetter* (59:11) by Rabbi Yonah Kalman Babad HaAshkenazi (1470-1550), but this source only slightly predates *Rema*. H. J. Zimmels lists this statement of *Rema* among a number of examples of lost knowledge or expertise discussed in rabbinic literature. See his, "The Significance of the Statement 'we are not acquainted any more' as Echoed in Rabbinic Literature," *Leo Jung Jubilee Volume* (1962), 223-235.
 47. *ad. loc.*
 48. R' E. Posek, *Koret HaBrit*, O. C. 310, n. 15 ascertains from the fact that *Rema* does not use a more legalistic formulation (such as, "and there are those who say it is prohibited to cut, and so is our practice") that he is

- not disagreeing with R' Karo, but rather commenting based on the present medical reality. See also *Tzitz Eliezer* 10:25 Chap. 6.
49. O. C., 329. In *Rema's* gloss to E. H. 145:9 he also comments that "*ein anu beki'in bi-zman ha-zeh*" (we are not experts today) with regards to medical diagnoses and the cause of death, but this does not refer to the actual determination of death.
 50. *Rema* also addresses the issue of postmortem cesarean section in his responsa, n. 40.
 51. See Y. Weiss, *Minchat Yitzchak* 5:7 and Y. Fischer, *Sh'ailot U-Teshuvot Even Yisrael* 8:33.
 52. This assumes that *Rambam* holds like *Tosafot*. See Y. Fischer, *Sh'ailot U-Teshuvot Even Yisrael* 8:33.
 53. For a discussion of this topic in Jewish sources, see. M. Samet, "*Halanat Ha-Met*," *Asupot* 3(5749), 413-465; S. Kottek, "The Controversy Concerning Early Burial," *Assia: Jewish Medical Ethics* 1:1(May, 1988), 31-33; F. Wiesemann, "Jewish Burials in Germany- Between Tradition, the Enlightenment and the Authorities," *Leo Baeck Institute Yearbook* 37(1992) 17-31; J. M. Efron, "Images of the Jewish Body: Three Medical Views from the Jewish Enlightenment," *Bulletin of the History of Medicine* 69(1995) 349-66; S. Goldberg, *Crossing the Jabbok: Illness and Death in Ashkenazi Judaism in Sixteenth through Nineteenth Century Prague* (University of California Press: Berkeley and Los Angeles, California, 1996), 195-200. An excellent recent addition to the literature on the rabbinic response to the delayed burial controversy has been written by Rabbi Yechiel Goldhaber and is as yet unpublished. For discussion of this topic in the general historical literature, see J. Bondeson, *Buried Alive* (W. W. Norton: New York, 2001); G. K. Behlmer, "Grave Doubts: Victorian Medicine, Moral Panic, and the Signs of Death," *Journal of British Studies* 42:2(April, 2003), 206-235. For a superb discussion on the evolution of the definition of death throughout history, including the early burial controversy, see M. S. Pernick, "Back from the Grave: Recurring Controversies over the Defining and Diagnosing Death in History," in R. M.
 54. Zaner, ed., *Death" Beyond Whole-Brain Criteria* (Kluwer Academic Publishers: Dordrecht, 1988), 17-74.
 55. J. J. Bruhier D'Ablaincourt, *The Uncertainty of the Signs of Death* (1746), 5.
 56. J. Snart, *Thesaurus of Horror* (1817), 79.
 57. According to Rabbi Reischer above, the ambiguity may have begun earlier, in the Geonic period.⁵⁹ See, for example, the article in Belgian law which states that, "When a woman has died in a state of advanced pregnancy, they shall direct the artificial extraction of the infant, supposed to be yet living ; and, in the lack of an attending doctor, shall perform it themselves when necessary." See W. Tebb and E. P. Vollum, *Premature Burial and How It Can Be Prevented* (Swan Sonnenschein: London, 1905), 295.
 58. What follows derives from personal correspondence with Rabbi Yechiel Goldhaber.

59. I hope to address the possible reasons for this custom, which was not without its militant detractors, and the evolution of its practice, in a forthcoming article.
60. *Shvut Yaakov* 1:13. A. Buczacz (1770-1840), in his glosses *Eshel Avraham* to *Shulchan Aruch*, O. C. 330, briefly cites virtually the identical case. *Sha'arei Teshuva* O.C. 330:5 asserts that he is referring to the very case of Rabbi Reischer.
61. The custom of attempting to extract or deliver a deceased fetus after the death of its mother was widespread in Jewish communities in Europe in the Middle Ages.
62. *Heishiv Moshe*, O. C., 13.
63. Rabbi Akiva Eiger, in his glosses on the *Shulchan Arukh*, states that if the woman is decapitated, it is obvious that the statement of *Rema* does not apply. He cites the *Shvut Yaakov*.
64. *Har Evel*, p. 20. This case is usually quoted from the responsa of Rabbi Moshe Kunitz, who received the question from Rabbi Oppenheim, but the latter's analysis is important for our discussion as well. ⁶⁷ Rabbi Oppenheim also discusses the legal status of the fetus at different gestational ages, and the prohibition of murder, as they impact on this case.
65. *Sefer ha-Metzareif*, n. 101. Rabbi Kunitz explicitly comments that he thought the question so significant that he includes it verbatim in his work.
66. See, for example, Avraham ben Nachman HaKohen, *Taharat ha-Mayim* p. 36b, n. 45; *Bikur Cholim Landshuta* (5626).
67. *She'ailot u-Teshuvot Mi-Ma'amakim* 2:10.
68. Rabbi Oshry records the even more tragic postscript at the end of his responsum.
69. For another source on the acceptance of *Rema's* position in postmortem cesarean section see, *Minchat Elazar* 4:28.
70. 11:4(*Tammuz*, 5731), 218-225. See the review of Levy's essay by R' J. D. Bleich in his *Contemporary Halakhic Problems* 1(Ktav Publishing: New York, 1977), 123-125.
71. S. Schneider, "Is It Permitted to Operate on a Pregnant Woman who Died in Order to Save the Fetus?" (Hebrew) *Ha-Ma'or* 222(*Kislev-Tevet*, 5735), 10-12, republished in his *Divrei Shlomo* 3:362 with additions; A version was also published in *Kobetz Ohel Moshe* 7(5755), 71-74.
72. *Shevet Levi* 6:27. See also 8:89.
73. "A Definition of Irreversible Coma," *JAMA* 205:6(August, 1968).
74. A specific tragic case transpired in Israel of a young pregnant woman who was diagnosed with brain death. According to physicians, the fetus was still viable and there were discussions with the family and legal experts as to whether the fetus should be delivered. This case, and its halakhic ramifications, is discussed in a lengthy monograph by R' Y. Shafran, "A Lack of Authority: On the Borders of Life and Death," (Jerusalem, 5753); *idem.*, "Saving a Fetus from the Mother Postmortem: Halakhic Analysis," (Hebrew)

- Sefer Assia* 9(5764), 274300, including a letter exchange with Rabbi Yaa-kov Ovia. Rabbi Shafran also created a short film based on this case.
75. Rabbi Auerbach apparently held like *Tosafot*. Regarding his interpretation of *Rashi*, see *Beit Shmuel*, *op. cit.* and Y. Gefen, *Deliyat ha-Kerem* 1(5767), 240.
 76. On the sheep experiment, see A. Steinberg and M. Hersch, "Decapitation of a Pregnant Sheep: A Contribution to the Brain Death Controversy," *Transplantation Proceedings* 27:2(April, 1995), 1886-1887; A. Steinberg, "Keviat Rega ha-Mavet," *Assia* 53-54(August, 1994), 5-16; *Minchat Shlomoh* 83, chapter 12; A. S. Abraham, *Nishmat Avraham* (2nd ed.) Y. D. 339, p. 465. For a detailed discussion of the impact of the sheep experiment on the positions on brain death of Rabbis Auerbach and Elyashiv, see M. Halperin, *Refuah, Metzuit v-Halakhah* (Schlesinger Institute: Jerusalem, 2011), 143-151. Y. Gefen has a lengthy and detailed section in his *Deliyat ha-Kerem* 1(5767), 238ff. See also Dr. Steinberg's discussion of this experiment in his article in this volume.
 77. See Pernick, *op. cit.*, who mentions the case of Harvey, as well as others who performed similar experiments in 18th and 19th centuries.
 78. M. Esmailzadeh, *et. al.*, "One Life Ends, Another Begins: Management of a Brain Dead Pregnant Mother- A Systematic Review," *Biomed Central* 8:74(2010). They report 30 cases found in the medical literature from 1982-2010. These cases involve other variables and ethical issues, such as the wishes of the husband and family, and the health status of the fetus.
 79. For a discussion of how the rabbinic authorities who do not accept brain death address this case, see Shafran, *op. cit.* The position of Rabbi Eliezer Waldenberg (*Tzitz Eliezer* 18:31) in this case is somewhat enigmatic. On his position, see Y. Sasson, *Ruach Yaakov*(Jerusalem, 5770), 64-65.
 80. Regarding delay of burial for a pregnant woman, there is a corollary chapter to the topic of postmortem cesarean section which may possibly be assimilated to this issue. There is extensive discussion in halakhic literature about whether the burial of a pregnant woman should be delayed in order to allow efforts, either through physical or spiritual means, to induce the delivery of the fetus before burial. See, for example, M. Teitelbaum, *Heishiv Moshe* O. C. 13. This practice was common in the pre-modern era, and burial of the pregnant woman specifically was often delayed for days. The possible impetus for this practice has been debated and has included- the spiritual harm to the mother or child, the requirement for a separate burial for mother and fetus, and, most relevant here, the possibility that the fetus may survive. In any case, we have some potential halakhic precedent about delayed burial in the case of a pregnant woman, which might be applied here.