

1. Maimonides's rulings here seem to be self-contradictory. On the one hand, he writes that therapeutic abortion is permitted as a consequence of the law of pursuit. On the other hand, he writes that therapeutic infanticide is forbidden because childbirth is a natural process, and thus the emerging infant cannot be killed as a pursuer. In terms of the law of pursuit, what distinguishes the fetus from the infant? Both are behaving identically in identical circumstances!
2. As noted in Sourcesheet #1, Maimonides' introduction of this category is not rooted in the Mishnah, which seems to distinguish the case on the ground that the fetus is not legally human and make no reference to the law of pursuit.
3. The Jerusalem Talmud tentatively introduces the law of pursuit into the infant case, but rejects it on the grounds that it seems to be a case of mutual pursuit. (Tangent: Perhaps mutual pursuit should allow bystanders to kill either?) There is no explicit suggestion that pursuit explains the outcome in the fetus case.
4. The Babylonian Talmud also tentatively introduces the law of pursuit into the infant case, and rejects it on the slightly different ground that there is actually no human pursuit here, presumably because the infant is not acting volitionally. Here too there is no suggestion that pursuit explains the outcome in the fetus case.
5. Rav Schach begins asserting the conclusion of Sourcesheet#1, namely that Maimonides diverged from the straightforward reading of the Mishnah because

One) he considered abortion murder and

Two) believed that lifesaving through murder is prohibited even when rationally justifiable, even though

Three) the principle that lifesaving doesn't allow murder is derived by the Talmud from the rational argument "who says your blood is redder?"

(Note: I assume throughout these sourcesheets that this argument can be extended to forbid choosing among other human lives, i.e. that the argument "who says A's blood is redder than B's is equivalent. So far as I can tell, this assumption is unquestioned in halakhic history despite some obvious Talmudic basis for distinguishing)

In the case R. Schach cites as evidence, the lifesaving murder does not involve a choice between lives, as the murder victim will die anyway.

To resolve the contradiction within Maimonides, Rav Shach posits that the law of pursuit applies only to pursuers committing killings for which they could later be judicially executed. The formalization of this is that only people the killing of whom is a crime whose punishment is judicial execution can be considered "pursued".

As a result – in the infant case, as both mother and infant are considered "pursued", both are also considered "pursuers". In the fetus case, however, the infant cannot be considered "pursued", and thus only the infant and not the mother is considered a "pursuer", and one may kill the infant to save the mother.

I have two objections to R. Schach's solution:

One) he suggests that Maimonides' formulation "this is the nature of the world" comes from the Jerusalem Talmud's "you don't know who is pursuing whom", whereas it seems to me much more likely to be a philosophic paraphrase of the Babylonian Talmud's "Heaven is pursuing her".

Two) He does not provide a rationale for the execution of an infant as "pursuer". Maimonides does permit the execution of children. Children at least have intent, however, if not (generally) legal responsibility. Infants, and especially infants in the birth process, are nonvolitional. How can they be considered "pursuers"?

6. R. Chayyim provides a formal rationale by distinguishing, as is his wont, between the "status" and the "implications" of being a pursuer. His argument is very complicated, and we will explain it step.

One) He argues that the rule that one may not kill a pursuer unnecessarily demonstrates that the law is centered on saving the pursued rather than on punishing the pursuer.

Two) Accordingly the "status" of pursuer is solely dependent on the existence of a "pursued".

Three) However, the "implications" of that status, in particular the right of third parties to kill the pursuer when necessary to save the pursued, are generally dependent on the guilt of the pursuer.

Four) Nonetheless, the "status" carries with it some implications that are independent of the guilt or innocence of the pursuer.

Five) Specifically, one must realize that the law of pursuit stands in stark contradiction to the general principle "who says your blood is redder than mine", which forbids saving a life through murder.

Six) The law of pursuit works formally by creating a new obligation to save life, which, unlike the general commandment "and live by them" does override the prohibition against killing.

- Seven) That it functions technically by creating a new obligation, rather than by applying the general commandment is evidenced by its applicability to non-Jews, who are not subject to the command/exception “and live by them”.
- Eight) It ordinarily does so only when the pursued is guilty. In other words, the law of pursuit generally allows one to decide that the guilt of the pursuer makes his blood “less red” than that of the pursued.
- Nine) However, since the law of pursuit works formally by suspending the principle “who says your blood is choosing redder than his”, it also allows for criteria other than guilt to be used when choosing between pursued and pursuer. In other words, it allows one to decide whose blood is redder.
- Ten) Since the fetus is not legally human, the mother’s blood is redder.
- Eleven) Therefore, since the fetus has the “status” of pursuer, it may be killed even though it is guiltless.
7. (objection to g) R. Chayyim claims that non-Jews do not have the exception “and live by them”, and that accordingly the fact that the law of pursuit applies to non-Jews proves that pursuit is more than just a special case of “and live by them”. It’s not clear how he know that the command/exception doesn’t apply to non-Jews, as there isn’t any other circumstance in which it would. For Jews, it is used to allow transgression under threat of death, but in Maimonides’ formulation, non-Jews are in any case never obligated to transgress under threat of death! This is because Maimonides believes that the obligation under certain circumstances to die rather than transgress stems from the commandment to sanctify G-d’s Name, which does not apply to non-Jews.
 8. (objection to c) R. Chayyim suggests that the implications of the status of pursuer are generally dependent on the status of pursuer. But Maimonides ruled that children may be executed as pursuers! And the Talmud makes clear that the transgressions of minors are considered accidental. Is R. Chayyim suggesting that the law of pursuit, in his formulation, would allow one to kill an accidental pursuer?
 9. (Objection to a) Maimonides in 9 suggests that killing the pursuer is legitimate only if that killing is necessary to save the pursued. Seemingly, as per R. Chayyim, the permission is generated solely by a commandment to save the pursued. Why, then, is one who kills a pursuer unnecessarily not executed? That seems to suggest that there are independent grounds for killing the pursuer!
 10. (Further objection to a) To make things worse, Maimonides fails to mention this limitation when discussing the law of the furtive trespasser. Perhaps he relies on his full discussion in Laws of Murder, but it seems to me more likely that the furtive trespasser may be killed even if injuring him would have been sufficient. The distinction between ordinary pursuers and furtive trespassers is difficult to support if one views the law of pursuit as based solely on a commandment to save the pursued.
 11. (Objection to i-k) R. Chayyim concludes that the principle “who says your blood is redder” is suspended in the legal universe of pursuit to the point that criteria other than guilt are admitted. What criteria would he admit? Gender? Tribe? Social utility? General moral worth? Of course not – but on what basis does he exclude them?
Furthermore, R. Chayyim’s explanation puts a lot of weight on the “therefore “ in Rambam. Essentially, one is required to deduce his thesis from the mere fact of the law of pursuit. It seems to me that a theory so complex and far-reaching would have been given more exposition. .