

To what extent does the notion of the sanctity of life extend even to those who are as yet unborn? Under what circumstances, if any, may life be aborted so as to improve quality of life? In the following two essays a prominent physician and a distinguished Rabbinic scholar address themselves to these questions. Dr. Rosner, author of the first essay, is Assistant Director, Division of Hematology, Department of Medicine, Maimonides Medical Center.

THE JEWISH ATTITUDE TOWARD ABORTION

INTRODUCTION

Abortion is defined as the expulsion of a fetus from the uterus by premature termination of pregnancy. It can occur spontaneously or it can be induced; it may be therapeutic in nature, or criminal.

Tremendous interest in this subject is evidenced by the flood of books,¹ articles² and editorials³ in the medical literature as well as writings in the lay press.⁴ In addition, there is an abundance of papers and books in the legal, theological and social science literatures, enumeration of which is beyond the scope of this essay. One of the reasons for this flurry of interest in abortion is the changing moral and legal attitudes toward therapeutic abortion. Consequently, laws are revised to conform with these changing sets of values. Even the conservative American Medical Association has modernized its 1871 position on this matter and has published a new statement of policy⁵ spelling out the indications for therapeutic abortion.

Religious attitudes concerning abortion play a paramount role in shaping the thoughts, decrees and actions of various groups. The present article is an attempt to survey the Biblical, Talmudic, and Rabbinic literatures, and, from these sources, to describe in detail the Jewish attitude toward abortion. For comparative purposes, the Catholic and Protestant positions on abortion are briefly outlined.

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THE PROBLEM

Of the estimated 1,000,000 abortions that occur yearly in the United States,⁶ approximately two thirds are spontaneous, and at least 300,000 criminal.⁷ The latter figure, however, may be erroneously high.⁸ Therapeutic abortions are carried out at the rate of 18,000 per year.⁹ Indications for therapeutic abortions until recently have included various threats to the life of the mother such as psychiatric or organic medical disease. Medical illnesses in the mother necessitating premature termination of pregnancy are exemplified by cardiovascular disorders as rheumatic heart disease, renal diseases as pyelonephritis, gastrointestinal disturbances as severe ulcerative colitis, neoplastic diseases as carcinoma of the breast or uterus, infections as tuberculosis, allergic disorders as advanced asthma, endocrine and metabolic conditions as thyrotoxicosis and uncontrolled diabetes and diseases of the central nervous system as multiple sclerosis or epilepsy. Prior to the recently enacted abortion reform laws, socio-economic or fetal factors were not acceptable as reasons to perform therapeutic abortions. Thus, women exposed to drugs as thalidomide, or viruses as rubella, or radiation or Rh diseases were denied abortion of the potentially defective fetus.

LEGAL STATUS OF THERAPEUTIC ABORTION IN THE UNITED STATES

Until April 1967, abortion was a crime in all fifty states. In forty-six states and the District of Columbia, an abortion was permissible if it were necessary to save the life of the mother.¹⁰ The statutes, however, differed in regarding who is to perform the operation, who is to determine the necessity of the abortion and how many physicians must participate in such a decision.

The American Law Institute, in 1959, formulated a Model Penal Code (207-11) which states as follows: "A licensed physician is justified in terminating a pregnancy if:

- (a) he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with a grave physical or

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mental defect, or the pregnancy resulted from rape or from incest; and:

- (b) two physicians, one of whom may be the person performing the abortion, have certified in writing their belief in the justifying circumstances and have filed such certificates prior to the abortion in the licensed hospital where it is to be performed, or in such other place as may be designated by law."

It is upon this Model Penal Code that the abortion reform laws and the new American Medical Association therapeutic abortion policy statement are based.

A major impetus to change the abortion laws in the United States came in 1962 with the celebrated case of a Phoenix, Arizona housewife who took thalidomide tablets early in pregnancy. This drug is known to produce birth defects such as congenital partial or complete absence of one or more limbs. Unable to obtain a legal abortion in this country, she finally had the operation performed in Sweden where it was confirmed that her fetus was severely malformed.

The nationwide German measles (rubella) epidemic in 1963 and 1964 provided further impetus for abortion law reform. During these two tragic years, 20,000 stillbirths and 30,000 congenitally abnormal babies were born to women who had contracted rubella during the first trimester of pregnancy.

With this background, Colorado, on April 25, 1967, became the first state to legalize abortion according to the guidelines set down by the Model Penal Code of the American Law Institute.

The Colorado statute authorizes an abortion whenever a pregnancy (a) results from rape or incest, (b) threatens the woman's physical or mental health or (c) is likely to produce a mentally deranged or physically deformed child. The Colorado law further specifies that the abortion must be approved by a panel of three physicians and the operation must be performed in an accredited hospital.

North Carolina enacted an abortion reform law a few weeks later, but excluded non-residents (less than four months). California followed with its abortion liberalization which was signed into law on June 15, 1967. The California bill does not, however, permit abortions where the child is likely to be deformed.

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Georgia, early in 1968, became the fourth state to reform its abortion statute. Its bill is more restrictive in that it requires three separate physicians to examine the woman requesting the abortion. Each physician must certify in writing that the abortion is necessary and specify the reasons. Maryland followed with its abortion reform law on July 1, 1968, which permits abortions where the mother's physical or mental health is endangered, where there is substantial risk that the baby would be seriously deformed or retarded and where the pregnancy results from rape.

In many other state legislatures, abortion reform bills were introduced—some ended in defeat, others tabled for further consideration. Nonetheless it appears that more states will adopt abortion reforms similar to those in Colorado, North Carolina and California.

The initial fear that the above states will become "abortion meccas"¹¹ has proved unfounded. In the first three months after the signing of Colorado's new liberalized abortion law, only 25 therapeutic abortions were performed.¹² During the first eight months under the new law, 120 carefully selected and supervised abortions were performed in Colorado hospitals, 29 of them on women from other states.¹³

LEGAL ATTITUDES TOWARD ABORTION IN OTHER COUNTRIES

In England, the Criminal Abortion (Offenses against Persons) Act of 1861 states¹⁴ that it is an offense to procure or attempt to procure abortion and any person, including the pregnant woman herself, who attempts to do so by any means whatsoever (by the administration of drugs or injections or surgical intervention) is guilty of a felony. Nearly seven decades later, the Infant Life (Preservation) Act was enacted into law in 1929.¹⁵ This statute specifies that the act of causing the death of the child (unborn fetus) must be done in good faith and only for preserving the life of the mother. A new law permitting abortion for social as well as medical reasons in England was recently passed by the House of Commons and became effective in April, 1968.

The new British law permits abortion when two physicians

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agree that continued pregnancy might threaten the mother's life or physical or mental health, or might result in the birth of a child with handicapping physical or mental abnormalities.

Another ground for abortion is the judgment that the child's birth might injure the physical or mental health of the woman's existing children. This so-called social clause, which goes far beyond the most liberal abortion laws in the United States, provoked bitter controversy in Parliament. It permits physicians to consider such factors as overcrowding, inadequate housing or the emotional tensions that might be produced by too large a family.

Leaders of the British Medical Association opposed this latter clause on the ground that it called for assessments beyond the physician's area of competence. Supporters of the clause maintained that the law does not require an unwilling physician to perform any abortion.¹⁵

In Hungary, since 1950, legal abortion is allowed before the twelfth week of pregnancy, virtually at the request of the patient.¹⁶

In Japan, because of the population explosion and high incidence of criminal abortion, therapeutic abortion was legalized in 1948 for health and social reasons.¹⁷

In Sweden, the liberalized abortion laws are based upon the thesis that adoption is not considered an acceptable alternative to abortion¹⁸ for care of unwanted children. The legal preconditions include danger to life or physical or mental health of the mother, the risk of giving birth to a defective or diseased child and pregnancies resulting from rape or incest. An additional provision in the Swedish law states that social circumstances shall be judged as part of the risk to the mother's health.

Liberalization of abortion laws for social reasons indicate the trend in Bulgaria, Poland, Czechoslovakia, Yugoslavia, and Hungary.¹⁹ These countries followed the example of the Soviet Union which was the first country to legalize abortion in 1920. Other writings on the legal status of abortions are available.²⁰

THE AMA POLICY ON THERAPEUTIC ABORTION

Following an emotion filled debate before Reference Committee G of the House of Delegates of the American Medical

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Association at its meeting in Atlantic City in June 1967, a new policy statement on therapeutic abortion emerged to rescind the previous policy that stood immobile since 1871. The Committee on Human Reproduction had prepared the policy statement and unanimously recommended it to the Board of Trustees which in turn unanimously recommended it to the AMA membership. The latter adopted the new policy which no longer opposes therapeutic abortion if continued pregnancy threatened the health or life of the mother, if the child might be physically deformed or mentally deficient or if conception had resulted from rape or incest.²¹

CATHOLIC ATTITUDE TOWARD THERAPEUTIC ABORTION

The Catholic Church's attitude toward therapeutic abortion is that any direct attack on the fetus is considered murder, even if it is carried out with the best intentions. Neither man nor the state has the authority to destroy the life of an innocent person, and both criminal and therapeutic abortion involve a direct and deliberate destruction of an innocent life. The emphasis is on the word "innocent." The unborn child, from conception onward is considered a human being with all the rights of any other human person. Therefore, although a direct abortion would preserve the mother's life or health, it is not morally permissible.

On October 29, 1951, Pope Pius XII delivered an address on morality in marriage in which he stated:²²

"Every human being, even the infant in the mother's womb, has the right to life immediately from God, not from the parents or from any human society or authority. Therefore, there is no man, no human authority, no science, no medical, eugenic, social, economic or moral indication, that can show or give a valid juridical title for direct deliberate disposition concerning an innocent life . . . Thus, for example, to save the life of the mother is a most noble end, but the direct killing of the child as a means to this end is not licit . . ."

Further reasons for Catholic opposition to abortion include the teaching that all unbaptized fetuses and infants are forever excluded from participation in God's divinity and in the Beatific Vision reserved for those who have been baptized. No one has

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the right to exclude an unborn infant from such participation.²³

The penalty for performing an abortion is stated in Canon 2350 of the Church's Code of Canon Law: "Persons who procure abortion, the mother not excepted, automatically incur excommunication." The same penalty is incurred by all those who assist in procuring the abortion.

From the standpoint of the Catholic Church, there seem to be neither psychiatric nor medical indications for terminating a pregnancy.

PROTESTANT ATTITUDES TOWARDS THERAPEUTIC ABORTION

The Baptists consider abortion to be primarily "a medical problem and that the theological implications can be trusted to our Omniscient Heavenly Father."²⁴ Similarly, the Methodist Church considers abortion a scientific, medical matter on which only competent medical opinion has any value.

The attitude of the Lutheran Church is very similar to that of the Catholics in that "the use of abortifacients and of medicines designed to produce sterility is condemned."²⁵ The American Lutheran Conference, however, at its biennial meeting in 1952 pronounced a statement part of which reads as follows: "Abortion must be regarded as the destruction of a living being, and, except as a medical measure to save the mother's life, will not be used by a Christian to avoid an unwanted birth. . . ."

The Presbyterian Church believes the life of the mother would receive first consideration. Ministers and members are allowed to follow "enlightened conscience with regard to this matter."²⁶ The Episcopalians also permit individual clergymen to make the decision.

The Unitarian Church states that "judgment regarding therapeutic abortions rests upon the principle of preserving and extending human life and that this decision must be the patient's and the physician's—not the Church's or any other institution's."²⁷

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The question of intentional abortion is not raised directly in

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the Bible. We deduce the status of the fetus from the following relevant passages.

An unborn fetus in Jewish law is not considered a person (Hebrew: *nefesh*, meaning soul) until it has been born. The fetus is regarded as a part of the mother's body and not a separate being until it begins to egress from the womb during parturition. In fact, until forty days after conception, the fertilized egg is considered as "mere fluid." These facts form the basis for the present day Jewish legal views on abortion. Biblical, Talmudic and Rabbinic support for these statements will now be presented.

In Exodus (21:22-23) we find the following: "When men fight and one of them pushes a pregnant woman and a miscarriage results, but no other misfortune ensues, the one responsible shall be fined as the woman's husband may exact from him, the payment to be based on judges' reckoning. But if other misfortune ensues, the penalty shall be life for life. . . ."

Rashi quotes the *Mechilta* which interprets "no other misfortune" to mean no fatal injury to the woman following her miscarriage. In that case, the attacker pays only compensation for the loss of the fetus. Most other Jewish Bible commentators including Ramban, Ibn Ezra, Malbim, Torah Temimah, Hirsch, and Hertz agree with Rashi's interpretation. We thus see that when the mother is unharmed following trauma to her abdomen and only the fetus is aborted, our major, if not only, concern is to have the one responsible pay damages to the husband since the fetus is his property. No prohibition is evident from this Scriptural passage against destroying the unborn child.

Based upon this Biblical statement Maimonides in his code asserts as follows: "If one assaults a woman, even unintentionally, and her child is born prematurely, he must pay the value of the child to the husband and the compensation for injury and pain to the woman."²⁸ Maimonides continues with statements regarding how these compensations are computed. A similar declaration is found in Karo's *Shulkhan Arukh*.²⁹ No concern is expressed by either Maimonides or Karo regarding the status of the miscarried fetus. It is part of the mother and belongs jointly to her and her husband and thus damages must be paid for its premature death. However, the one who was responsible is not culpable for murder

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since the unborn fetus is not considered a person.

Murder in Jewish law is based upon Exodus 21:12 where it is written: "He that smiteth a man so that he dieth shall surely be put to death." The word "man" is interpreted by the Sages to mean a man but not a fetus.³⁰ Thus, the destruction of an unborn fetus is not considered murder.

Another pertinent Scriptural passage is Leviticus 24:17 where it states: "And he that smiteth any person mortally shall surely be put to death." However, an unborn fetus is not considered a person or *nefesh* and, therefore, its destruction does not incur the death penalty.

Turning to Talmudic sources, the *Mishnah* in *Tractate Oholoth* 7:6 asserts the following: "If a woman is having difficulty in giving birth (and her life is in danger), one cuts up the fetus within her womb and extracts it limb by limb, because her life takes precedence over that of the fetus. But if the greater part was already born, one may not touch it, for one may not set aside one person's life for that of another."

Tosafot Yom Tov, in his commentary on this *Mishnah*, explains that the fetus is not considered a *nefesh* until it has egressed into the air of the world and, therefore, one is permitted to destroy it to save the mother's life. Similar reasoning is found in Rashi's commentary on the Talmudic discussion of this *Mishnah* where Rashi states that as long as the child did not come out into the world, it is not called a living being, *i.e.* *nefesh*.³¹ Once the head of the child has come out, the child may not be harmed because it is considered as fully born, and one life may not be taken to save another.

The *Mishnah* in *Tractate Arachin* 1:4 states: "If a pregnant woman is taken out to be executed, one does not wait for her to give birth; but if her pains of parturition had already begun, (literally: she had already sat on the birth stool), one waits for her until she gives birth..." One may conclude from this *Mishnah* that one does not delay the execution of the mother in order to save the life of the fetus because we wish to avoid causing grief to the mother.

The Talmud explains³² that the embryo is part of the mother's body and has no identity of its own since it is dependent for its

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life upon the body of the woman. However, as soon as it starts to move from the womb, it is considered an autonomous being (*nefesh*) and thus unaffected by the mother's state. This concept of the embryo being considered part of the mother and not a separate being recurs throughout the Talmud³³ and Rabbinic writings.³⁴ The Talmud continues³²: "Rab Judah said in the name of Samuel: If a (pregnant) woman is about to be executed, one strikes her against her womb so that the child may die first, to avoid her being disgraced." Rashi explains that if the child escaped death and came forth after the mother's execution, it would cause vaginal bleeding and disgrace the executed mother. Thus we have evidence that an unborn fetus does not have the status of a living being and destroying it to save the mother embarrassment is permissible if it is going to die anyway.

A very difficult and bizarre *Tosefot* states that "it is permissible to kill an unborn fetus."³⁵ Some authorities³⁶ consider these words of *Tosefot* verbatim whereas others are of the opinion that *Tosefot* should not be interpreted literally.³⁷ Yet others state that these words of *Tosefot* are erroneous.³⁸

Prior to forty days after conception, a fertilized egg is considered nothing more than "mere fluid"³⁹ and one "need not take into consideration the possibility of a valid childbirth."⁴⁰ However, after 40 days have elapsed, fashioning or formation of the fetus is deemed to have occurred. Laws of ritual uncleanness must be observed for abortuses older than 40 days.⁴¹ This period of uncleanness is similar to that prescribed following the birth of a child and is not the same as that for a menstruant woman. Furthermore, a woman who aborts after the 40th day following conception is required to bring an offering just as if she had given birth to a live child.⁴² These laws of ritual impurity and offerings apply even where the abortus "resembles cattle, a wild beast or a bird" or a "shapeless piece of flesh." These facts imply that the unborn fetus, although not considered a living person (*nefesh*), still has some status. Nowhere, however, does it state that killing this fetus by premature artificial termination of pregnancy is prohibited.

Based upon these Talmudic sources as well as the Scriptural passages cited earlier, one may again ask why do most Rabbinic

authorities prohibit abortion, except in certain situations, as a serious moral offense even though it is not considered murder? Distinguished Jewish physicians of ancient and more recent times also admonished against abortion. Denunciations of the practice of abortion are recorded in the medical oaths and prayers of Asaf Judaeus⁴³ in the seventh century, Amatus Lusitanus⁴⁴ in the sixteenth century and Jacob Zahalon⁴⁵ in the seventeenth century. What are the objections to abortion in the opinion of these Jewish physicians in view of the fact that an unborn fetus does not have the status of a person (*nefesh*) by Jewish law? If abortion is not considered murder, on what legal basis is it prohibited?

This question will be answered by establishing the time that a fetus becomes equal to an adult human being. We have referred to the *Mishnah* in Tractate *Oholoth* 7:6 upon which the Jewish legal attitudes toward therapeutic abortion is based. The *Mishnah* states in part that if the “greater part was already born, one may not touch it, for one may not set aside one person’s life for that of another.” Thus the act of birth changes the status of the fetus from a non person to a person (*nefesh*). Killing the newborn after this point is infanticide. Many Talmudic sources⁴⁶ and commentators on the *Talmud*⁴⁷ substitute the word “head” for “greater part” in the above *Mishnah*. Others⁴⁸ maintain the “greater part” verbatim. Maimonides⁴⁹ and Karo⁵⁰ also consider the extrusion of the head to indicate birth. They both further state that by Rabbinic decree, even if only one limb of the fetus was extruded and then retracted, childbirth is considered to have occurred.⁵¹

Not only is the precise time of the birth of paramount importance in adjudicating whether aborting the fetus is permissible to save the mother’s life, but the viability of the fetus must also be taken into account. The newborn child is not considered fully viable until it has survived thirty days following birth as it is stated in the *Talmud*⁵²: “Rabban Simeon ben Gamliel said: Any human being who lives thirty days is not a *nephel* (abortus) because it is stated (Num 18:16): ‘And those that are to be redeemed of them from a month old shalt thou redeem,’ since prior to 30 days it is not certain that he will survive.” Further support for the necessity of a 30 day *post partum* viability period

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for adjudicating various Jewish legal matters pertaining to the newborn comes from Maimonides who asserts⁵³: "Whether one kills an adult or a day-old child, a male or a female, he must be put to death if he kills deliberately . . . provided that the child is born after a full term pregnancy. But, if it is born before the end of nine months, it is regarded as an abortion until it has lived for 30 days, and if one kills it during these 30 days, one is not put to death on its account."

Thus, although the newborn infant reaches the status of a person or *nefesh* which it didn't have prior to birth, it still does not enjoy all the legal rights of an adult until it has survived for 30 days *post partum*. One is not liable for the death penalty if one kills such a child until it has established its viability but it is certainly prohibited because "one may not set aside one person's life for that of another."⁵⁴

The permissibility to kill the unborn fetus to save the mother's life rests upon the fact that such an embryo is not considered a person (*nefesh*) until it is born. Maimonides⁵⁵ and Karo⁵⁶ present a second reason for allowing abortion or embryotomy prior to birth where the mother's life is endangered and that is the argument of "pursuit" whereby the fetus is "pursuing" the mother. The argument of pursuit is based upon two passages in the Pentateuch:

- (1) Deut. 25:11-12 "When men strive together one with another, and the wife of one draws near to save her husband from the hand of the one that smiteth him, and she puts her hand and taketh hold of his genitals, then you shall cut off her hand, your eye shalt have no pity."
- (2) Leviticus 19:16 "Thou shalt not stand idly by the blood of thy neighbor."

In the former case, the woman is pursuing the man by maiming him and she should be stopped. The latter case is interpreted by Rashi and most other commentators to mean that one should not stand idly by without attempting to rescue one's fellow man whose life is threatened by robbers, drowning or wild beasts. Based upon these Biblical passages, the *Mishnah* states⁵⁷: "These may be delivered at the cost of their lives he that pursues after his fellow man to kill him. . . ." The *Talmud*⁵⁸ follows with a

lengthy discussion asserting that it is one's duty to disable or even take the life of the assailant to protect the life of one's fellow man.

This discussion prompted Maimonides to state: . . . "Consequently, the Sages have ruled that if a pregnant woman is having difficulty in giving birth, the child inside her may be excised, either by drugs or manually (i.e. surgery) because it is regarded as pursuing her in order to kill her. But, if it's head has been born, it must not be touched for one may not set aside one human life for that of another, and this happening is the course of nature" (i.e. an act of God, that is, the mother is pursued by Heaven, not the fetus). An identical statement is found in Karo's Code.

Many Rabbinic authorities⁵⁹ pose the following question to Maimonides. How can the argument of pursuit be invoked here since, if it were applicable, then killing the fetus even after the head or greater part is born should be permissible? *Tifereth Israel*⁶⁰ states that the argument of pursuit is totally inappropriate because the child endangering the mother's life is an act of God. The child does not intend to kill the mother. It is a case of Heavenly pursuit. This concept of Heavenly pursuit is discussed in the *Talmud* and mentioned by both Maimonides and Karo. Jakobovits⁶¹ amplifies the problem. He states that a contradictory ruling seems to be emerging. On the one hand, we invoke the argument of pursuit to allow therapeutic abortion and on the other hand, the validity of this argument is dismissed because nature and not the child pursues the mother.

The problem is resolved by several Rabbis (36, 37, 59, 60) whose separate Responsa state that the non-person status of the fetus prior to birth is not sufficient to warrant the embryo's destruction since this would still constitute a serious moral offense, even if it is not a penal crime. Thus one must invoke the additional argument of pursuit. After the baby's head has emerged, however, the fetus attains the status of a *nefesh*, even prior to proved 30 day *post partum* viability and the "weak" argument of pursuit no longer justifies killing the child even if the mother's life is threatened since it is a case of Heavenly pursuit. However, even after egress of the head, if *both* lives are threatened one may kill the fetus to save the mother. The reason is that the mother's life is a certainty without the fetal threat whereas the viability of the fetus

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is in doubt until 30 days have elapsed following birth. This viewpoint is also subscribed to by Rabbi Moses Schick⁶² and Rabbi David Hoffman.⁶³ Others⁶⁴ dispute this ruling.

We now return to the original question. If the unborn child is not considered a *nefesh*, why should its destruction not be allowed under all circumstances? Why is only a threat to the mother's life or health an acceptable reason for therapeutic abortion?

One answer is given by Rabbi Ya'ir Bacharach who, contrary to the *Mishnah* in Tractate *Arachin* 1:4, states that one waits for a condemned pregnant woman to give birth because a potential human being can arise from each drop of human seed (sperm). Interference with this pregnancy would constitute expulsion of semen for naught, an act akin to coitus interruptus as practiced originally by Er and Onan⁶⁵ and strictly prohibited by Jewish law. This reason for prohibiting therapeutic abortion upon demand is also subscribed to by others.⁶⁶

A second reason for not allowing abortion without specific indication is that the unborn fetus, although not a person, does have some status. This is evident from the laws regarding ritual impurity and offerings that a woman who aborts after 40 days of conception must adhere to. These requirements are similar to those prescribed following the live birth of a child. Thus the fetus may be considered as a "partial person."⁶⁷

A third reason for prohibiting abortion on demand is that one is not permitted to wound oneself⁶⁸ and thus a woman undergoing vaginal abortion by manipulative means is considered as intentionally wounding herself. At least two Rabbinic authorities adhere to this viewpoint.⁶⁹

A fourth reason for prohibiting abortion without maternal danger, is asserted by at least one Rabbi⁷⁰ who states that the operative intervention entails danger. One is prohibited by Jewish law from placing oneself in danger based upon Deuteronomy 4:15: "Take ye therefore good heed unto yourselves . . ."

Another reason for prohibiting therapeutic abortion in cases where no threat to the mother exists is stated by the present Chief Rabbi of Israel, Issur Yehuda Unterman. He states that one may desecrate the Sabbath to save the life or preserve the health of an unborn fetus in order that the child may observe many Sabbaths

later.⁷¹ As a result, destroying the fetus, although not legally murder, is nevertheless forbidden because of an appurtenance to murder. Rabbi Bacharach, who permits abortion prior to 40 days of pregnancy because the fetus has no status at all but is considered mere fluid, is taken to task by Rabbi Unterman who states that even prior to 40 days there is an appurtenance to murder.

Another argument of Rabbi Unterman is that a fetus, even less than 40 days after conception, is considered a potential (literally: questionable) human being which, by nature alone, without interference, will become an actual human being. Thus a potential person (*sofek nefesh*) has enough status to prohibit its own destruction.

A final argument of Rabbi Unterman comes from the interpretation of R. Ishmael for the Scriptural verse⁷²: "Whoso Sheddeth man's blood, by man shall his blood be shed, for in the image of God did He make man." This can be translated "whoso sheddeth the blood of man in man, his blood shall be shed. . . ." The "man in man" is interpreted to mean a fetus.⁷³ This Noachidic prohibition of killing a fetus applies also to Israelites even though the Jewish legal consequences might differ.

A final reason for prohibiting abortion on demand in Jewish law is suggested by the present Chief Rabbi of the British Commonwealth, Immanuel Jakobovits⁷⁴ and Belgian Rabbi Moshe Yonah Zweig, among others. They point to the *Mishnah* in *Tractate Oholoth* 7:6 which permits abortion prior to birth of the child only when the mother's life is endangered. The implication is that when the mother's life is not at stake, it would be prohibited to kill the unborn fetus.

SUMMARY OF RABBINIC OPINION REGARDING THERAPEUTIC ABORTION

A small minority of Rabbinic Responsa are of the opinion that prior to forty days after conception, the fetus has no status at all and is not a *nefesh* and abortion at this stage might be permissible for the slightest reason. According to these few Rabbis, such a reason might be the fear that a deformed child may be born, due to exposure of the mother early in pregnancy to German measles or a teratogenic drug such as thalidomide or pos-

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sibly even for socio-economic reasons or family planning. Such rulings are vigorously denounced by others who prohibit therapeutic abortion both in the case where the mother was exposed to German measles⁷⁵ or where the mother ingested thalidomide early in pregnancy.⁷⁶ Most Rabbinic authorities permit therapeutic abortion where the health or life of the mother is threatened. Some are more stringent and require the mother's life to be in danger, however remote such danger⁷⁷ whereas other authorities permit abortion for a threat to the mother's health.⁷⁸ Such dangers to maternal health may include deafness,⁷⁹ cancer, pain or psychiatric disease.⁸⁰ Psychiatric indication for abortion would be acceptable only if some grave danger to the mother is in fact anticipated to result from her fears or nervous condition, as certified by competent medical opinion, and only on the basis of previous experiences of mental strain by the mother.⁸¹

Some authorities extend the permissibility to perform therapeutic abortion to any maternal need.⁸² This would include cases of incest or rape⁸³ where shame or embarrassment to the mother in the continuance of the pregnancy are considered threats to the mother's health. This, however, is a minority viewpoint. Only a very small group of Rabbinic Responsa regard the possibility of a deformed child being born to prey so much on the mother's mind as to constitute impairment of her health. This "maternal" indication is not acceptable to most Rabbinic opinions.

If the mother becomes pregnant while nursing a child and the pregnancy changes her milk so that the suckling's life is endangered, then considerable Rabbinic opinion would permit abortion in this case.⁸⁴

MALFORMED BABIES AND MONSTER BIRTHS

The Talmud⁸⁵ contains the following quotation: "In the case of a birth given to a creature which possesses a double back or a double spine, Rab said: If it was a woman (who miscarried), it is not regarded as an offspring. . . .", that is, the laws concerning a birth are not observed. However, this creature, once it has been born, has the status of a person and killing it would be considered infanticide which is prohibited.

The thirteenth century *Sefer Chasidim*⁸⁶ describes the case of a child born with teeth and a tail. It was said that the end will be

that people will eat him, therefore it is better to kill him. The reply by the author was that one should remove the teeth in the front and tail from below so that the infant will be like a human body and he will not be able to do any harm. Thus we see that the killing of monster births is prohibited.

An early Rabbinic responsum relating to a malformed child is that of Rabbi Elazar Fleckeles in the nineteenth century⁸⁷. His ruling is that once a child is born of a human mother and survives, it is a living human being in all respects and may not be destroyed. Starving it to death is considered homicide.

The problem of malformed babies usually born without one or more limbs or with seal-like limbs to mothers who ingested the teratogenic drug thalidomide early in pregnancy is discussed by two recent Rabbinic responsa. Rabbi Moshe Jonah Halevi Zweig of Antwerp, Belgium writing in a Hebrew periodical⁵⁹ condemns the killing of the thalidomide deformed baby which resulted in the famous Liège, Belgium trial involving parents, relatives and a physician charged with the murder of this drug-damaged child.⁸⁸ Rabbi Zweig's lengthy dissertation, however, deals primarily with abortion (i.e. antenatal) and not infanticide (i.e. postnatal).

Rabbi Immanuel Jakobovits, writing in a London journal⁸⁹ concludes as follows: a physically or mentally abnormal child has the same claim to life as a normal child because it is considered a person (*nefesh*). Furthermore, while only the killing of a born and viable child constitutes murder in Jewish law, the destruction of the fetus, too, is a moral offense and cannot be justified except out of consideration for the mother's life or health. Consequently, the fear that a child may or will be deformed is not in itself a legitimate indication for its abortion, particularly since there is usually a chance that the child might turn out to be quite normal. Killing a cripple is similarly prohibited.

Once a malformed child has been born, one cannot use the argument of euthanasia or mercy killing to sanction its destruction. This act is positively prohibited by Jewish law as nothing less than murder (infanticide). The Jewish attitude toward euthanasia in general is discussed at length elsewhere.⁹⁰

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CONCLUSION

Prior to forty days following conception, the fertilized egg is considered by some Rabbinic authorities as nothing more than "mere fluid." From forty days until birth, the fetus is not considered a living person (*nefesh*) but is regarded as part of the mother's flesh and aborting it might not be legally considered murder. However, the destruction of an unborn fetus without sufficiently strong indication is still condemned for a variety of reasons. Abortion is permitted by most Rabbinic authorities where a medical or psychiatric threat to the mother's life exists. Many authorities permit abortion not only if her life is in danger but even if her health may deteriorate by continuation of the pregnancy. A small minority of Rabbinic opinion allow therapeutic abortion for reasons such as incest, rape and fear that a malformed child may be born. Justification for this position rests on the grounds of concern for the mother, i.e. that such a birth would adversely affect her mental or physical health by causing her anguish, shame or embarrassment. This latter viewpoint is not subscribed to by most Rabbinic authorities, however.

After the head or greater part of the body of the infant is born, only a threat to BOTH lives would allow sacrifice of the child to save the mother because the mother's life is a certainty without the fetal threat, whereas the fetus has not proved its viability until thirty days *post partum* have elapsed. After thirty days of life, every human being, whether deformed, crippled or otherwise deficient has rights equal to every other adult human being.

Since many important legal and moral considerations which cannot be spelled out in the presentation of general principles may weigh upon the verdict in any given case, it seems advisable to submit every individual case to Rabbinic judgment in the light of the prevailing medical and other circumstances.

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"Under these special circumstances, it is consistent with the policy of the American Medical Association for a licensed physician, in a hospital accredited by the Joint Commission on Accreditation of Hospitals, and in consultation with two other physicians chosen because of their recognized professional competence who have examined the patient and have concurred in writing, to be permitted to prescribe and administer treatment for his patient commensurate with sound medical judgment and currently established scientific knowledge. Prior to the institution of a therapeutic abortion, the patient and her family should be fully advised of the medical implications and the possible untoward emotional and physical sequelae of the procedure.

"In view of the above, and recognizing that there are many physicians who on moral or religious grounds oppose therapeutic abortion under any circumstances, the American Medical Association is opposed to induced abortion except when:

- (1) There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother, or
- (2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency, or
- (3) There is documented medical evidence that continuance of a pregnancy, resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient;
- (4) Two other physicians chosen because of their recognized professional competence have examined the patient and have concurred in writing; and
- (5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.

It is to be considered consistent with the principles of ethics of the American Medical Association for physicians to provide medical information to State Legislatures in their consideration of revision and/or the development of new legislation regarding therapeutic abortion."

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Addendum: While this paper was in press, a book entitled *Birth Control in Jewish Law* by Rabbi David M. Feldman was published. (New York Univ. Press, 1968, 322 pp). One entire section of this book is devoted to an extensive study of the relevant principles found in the classic texts of Jewish Law concerning abortion.