Fred Rosner

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] articles[2] and editorials[3] 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 policy[5] 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.

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

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.

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 states[14] 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

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 abortion[18] 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

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

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]

JEWISH ATTITUDE TOWARD ABORTION

The question of intentional abortion is not raised directly in

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

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 explains[32] that the embryo is part of the mother's body and has no identity of its own since it is dependent for its

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 Talmud[33] and Rabbinic writings.[34] The Talmud continues[32]: "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 authorities[36] 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 uncleanliness must be observed for abortuses older than 40 days.[41] This period of uncleanliness 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 Judaeus[43] in the seventh century, Amatus Lusitanus[44] in the sixteenth century and Jacob Zahalon[45] 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 sources[46] and commentators on the *Talmud*[47] substitute the word "head" for "greater part" in the above *Mishnah*. Others[48] maintain the "greater part" verbatim. Maimonides[49] and Karo[50] 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 adjucating 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