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THE BEGINNING OF LIFE – JEWISH PERSPECTIVES

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PART I

Introduction

This article presents the Jewish approach toward the beginning of life based upon Jewish sources from the Bible to current responsa literature. It is, therefore, pertinent to summarize the fundamentals and the structure of Jewish Law:

Halakhah is the generic term for the whole legal system of Judaism, embracing all the laws, practices and observances. Orthodox Jews consider the *Halakhah*, in its traditional form, to be absolutely binding.

The source of *Halakhah* is Divine revelation. To the basic corpus of biblical law were added rabbinic enactments and decrees. The sources of authority in *Halakhah* are composed of two fundamental parts: (a) the Written Law, a composition of 613 positive and negative commandments of Sinaitic origin,

which are included in the five books of the Pentateuch; (b) the Oral Law, which includes the interpretation of the written law transmitted in its entirety with its details and minutiae at Sinai, as well as logical deductions, rabbinical decrees, customs, and positive and negative enactments.

The development of *Halakhah* may be divided into six periods:

- The earliest and most important source is the **Bible**.
- The **Tannaitic** period (1-220 CE): The major work of this period is the *Mishnah*, edited by Rabbi Judah *Ha'Nasi* ('the Prince') at the end of the 2nd century, in which were summarized all the legal debates and decisions of the Jewish leading scholars up to that era. The *Mishnah* includes early traditional understandings of the written law, original interpretations of the written law, ancient customs and regulations which are not mentioned in the Bible, and post-biblical decrees, customs and regulations. The *Mishnah* is composed of six major sections ('orders'), which cover all aspects of human life. Each order is subdivided into tractates, which are devoted to specific issues. There are about 60 tractates. This work became a sacred text second only to the Bible.
- The **Amoraic** period (220-470 CE): the *amoraim* were the interpreters of the *Mishnah*, and their work is termed *Gemara*, in which discussions and comments on the *Mishnah* constitute the major part; but also included are numerous new issues of legal importance, as well as folklore, history, astronomy, geography, botany, zoology, and medicine. The combination of *Mishnah* and *Gemara* is termed *Talmud*. With the closing of the *Talmud*, this work virtually became the infallible source of the *Halakhah*, and the history of post-Talmudic *Halakhah* is founded on recourse to the *Talmud* as the final and overriding authority. Rules for determining the actual decision in law from the labyrinth of legal debate in the *Talmud* have been formulated.
- The **Gaonic** period (7th century to mid-11th century): This period is marked by a significant expansion of the *Talmud* among Jews of the

world, further analysis and deeper comprehension of the *Talmud*, and the beginning of formal codification.

- The period of the **Rishonim** (mid-11th century to 16th century): The early rabbinic authorities (*Rishonim*) were divided into commentators, whose major activity consisted of exposition of the classical texts of the *Talmud* and other early rabbinical works, and decisors, whose major activity was to formulate and finalize legal conduct. The works of the decisors are divided into *responsa* and codification. The greatest interpreter of the Bible and the *Talmud* was Shlomo Yitzchaki [*Rashi*] (1040-1105). The greatest Jewish codifier was Moses Maimonides [*Rambam*] (1138-1205) who compiled his gigantic code, the *Mishneh Torah* (called after his death the *Yad Ha'chazakah*), in which he presented the final decisions in all matters of *Halakhah*, including those laws which were no longer applicable in his (and our) days. This magnum opus is composed of 14 books, which are subdivided into specific laws (*halakhot*). Each collection of laws is further subdivided into chapters and paragraphs. The other major work of codification of the Jewish law was done by Yoseph Karo (1488-1575) in his *Shulchan Aruch*. This work is divided into four major parts. The *Shulchan Aruch* marked a turning point in the history of *Halakhah*. Adherence to the *Shulchan Aruch* became the test of Jewish *Halakhic* fidelity.

Responsa is a rabbinic term denoting an exchange of letters of queries and replies in which one party consults another on a *halakhic* matter. The beginning of *responsa* literature as a literary and historical form of important dimensions took place in the middle of the *Gaonic* period, and has continued to this day. Since the publication of the *Shulchan Aruch*, most *responsa* are organized in accordance with the four subdivisions of the *Shulchan Aruch*. This form of *Halakhic* discourse has served as the major opus of normative Jewish legal formulation. It is estimated that there are about 400,000 *responsa* collected in over 3,000 books of *responsa*.

- The period of the **Acharonim** (16th century to present time): The later rabbinic authorities (*Acharonim*) are similarly subdivided between

commentators, codifiers and responders. Most rulings of modern times are based upon these authorities.

The Torah and its precepts are continually interpreted and expanded by the rabbinic Sages of each generation who rule on matters as they come up, add protective rules and regulations and provide legal, ethical and personal guidance to the Jewish people.

General Jewish ethical approaches

A fundamental difference exists between Judaism and secular philosophical ethics in many facets of life. The basis, validity and source of Jewish ethics is rooted in the belief in God and His Torah, whereas the basis of secular ethics is primarily humanism and rational intellect.

Jewish ethics and law are derived from the written and oral law, described above, which were Divinely given to Moses on Mount Sinai. The Jewish rules of law and principles of ethics include commandments governing the relationship between man and God, as well as precepts governing man's relationship to his fellowman.

The following are some basic principles of Jewish ethics as viewed by Orthodox Judaism:

- In Judaism, there is no basic difference between laws and regulations and morals and ethics because both are integral parts of the Torah and their validity flows from the power of the Torah and the Divine revelation. Therefore, basic principles, discussions and debates on Jewish ethical issues do not differ from those of Jewish legal issues. This view is contrary to the social and secular systems of law and ethics.
- Jewish ethics includes the guidelines for proper conduct for man in relation to his fellow man as well as in man's relation to God. Therefore, there is no difference in the binding nature of the law

between the laws prohibiting stealing, killing, falsehood, revenge, carrying a grudge and the like, and the laws prohibiting idol worship, Sabbath desecration, eating on the Day of Atonement, and the like. So, too, there is no difference between the obligations of giving charity, visiting the sick, burying the dead, caring for orphans and widows and their like, and the observance of dietary laws, eating unleavened bread (*matzah*) on Passover, and the like. This view is contrary to the humanistic approach in which only relations among human beings are dealt with.

- According to the Torah and Jewish law, one is obligated not only to refrain from doing bad but one must do good by being compassionate and charitable with one's fellow human beings as it is written, *turn from evil and do good*.¹ These are two equal parts of the Jewish ethical obligation. Therefore, not only are harmful acts such as stealing, wounding and killing prohibited but there exist positive commandments: to give charity, to visit the sick, to be hospitable, to return lost objects, and the like. This view is contrary to the legal approach which is primarily concerned with the avoidance of harm to others but does not require doing good to others.
- The Jewish principles require not only proper acts but also proper thoughts and intentions. The Torah forbids hatred, covetousness, revenge, carrying a grudge, and the like, and requires one to love God, to love one's fellow man, to love one's parents, to love a stranger, and the like, in spite of the obvious difficulties in controlling one's thoughts.
- One of the important Jewish ethical principles is to sanctify the profane and to raise every day human endeavor to a level of holiness. Some ethical and religious systems praise those who abstain from normal life's activities, who are celibate, and who practice asceticism in various ways. This is not the normative Jewish view. Judaism does not demand the uprooting of one's natural inclinations but an even more difficult task, that is the conquering and appropriate channeling of one's natural instincts. To fight one's evil inclination does not mean to withdraw from the world but to overcome the inclination while living in

the world. This requirement is more difficult because it compels one to conduct oneself ethically during daily living which is full of ethical traps and obstacles.

The Bible and Talmud are replete with references to proper conduct, both between man and man, and man and God. These references and teachings are especially numerous in the books of the early and late prophets, Ecclesiastics, Proverbs, Ethics of the Fathers, and the *Aggadic* portions of the Talmud.

The Torah itself presents two types of teachings in regard to ethical conduct:

- The precepts and laws including specific obligations.
- The stories about the ethical conduct of the Patriarchs and Matriarchs which should be emulated.

The Book of Genesis, for instance, only includes three of the 613 commandments but is full of stories illustrating ethical characteristics of the Patriarchs and the Matriarchs.

According to the rabbinic Sages, the attributes and “conduct” of God should also be emulated by man, in the performance of what is good and just.

Jewish ethical teaching involves general concepts and principles on the one hand, and specific rules and regulations on the other. The Bible cites a number of basic principles about the proper relationship between man and man, such as:

- *Love your fellow man as yourself*² – “this is a major principle in the Torah”³; “what is hateful to you, do not do to your neighbor, that is the whole Torah, while the rest is commentary, go and learn it”.⁴
- *Do not profane the name of your God*,⁵ namely do not conduct yourself in a way that profanes the name of God.⁶
- *You shall do what is righteous and good in the eyes of the Lord.*⁷
- *Observe Justice and perform righteousness.*⁸
- *Despise evil and love good, and establish justice by the gate.*⁹
- *Do justice, love kindness, and walk humbly with your God.*¹⁰

- *The righteous lives through his faith.*¹¹
- *That you may walk in the way of the good, and keep the paths of the righteous.*¹²
- *Its ways are ways of pleasantness, and all its pathways are peace,*¹³
etc.

However, the Jewish ethical system, like the *halakhic* system, is not satisfied with general theoretical rules alone but is filled with practical and individual guidelines. The Torah requires every human being to strive for perfection in one's conduct *vis-a-vis* another person, in actions, in speech and in thought, and not just abstract general good behavior.

In addition to the aforescribed biblical ethical system, the rabbinic sages in the Talmud and thereafter also decreed and implemented ethical guidelines for moral conduct, both on a societal and on an individual level. Many ethical discussions are scattered throughout rabbinic literature including the Talmud and *Midrashim*. These discussions provide the foundation for the organized ethical theories and views in the Middle Ages and in more recent times.

Jewish medical ethics

Discussions of medical ethical dilemmas from a Jewish-*halakhic* viewpoint go back to antiquity. The basic principles are already enunciated in the Bible and the Talmud and the rabbinic literature of all eras.

In recent years, many discussions of medical ethics and Jewish law have been published.

Jewish medical ethics, in terms of the application of *halakhic* and Jewish ethical principles to the solution of problems, differs from secular medical ethics on four planes:

- The range of discussions and attitudes.
- The methods of analysis and discussion.
- The final conclusions.

- and the basic principles.¹⁴

1) *The range of discussions and attitudes*

Halakhah addresses all the medical ethical questions which secular medical ethics raises, whether old or new. *Halakhah* also addresses specific medical issues that affect only Jews who observe the precepts of the Torah. The basic Jewish approach is the same for questions relating to the terminally ill, abortion, organ transplantation and questions relating to the treatment of patients on the Sabbath, the laws of seclusion or the laws of a menstruant woman.

2) *Methods of analysis and discussion*

Jewish medical ethics analyzes medical ethical questions with the same methods and *halakhic* principles used for any *halakhic* analysis using basic principles and sources enunciated in the Talmud, Codes of Jewish law, and the responsa literature of all generations. The scientific or medical data are presented and the relevant *halakhic* sources are then applied to the data. It is not always easy to arrive at a *halakhic* conclusion regarding a medical question. A far reaching knowledge of *halakhah* as well as an expert and precise understanding of the relevant scientific facts is required in order to arrive at the proper *halakhic* conclusion.

3) *Final conclusions*

Halakhah attempts to give final and operative decisions to questions posed to the rabbinic decisor. This is in contrast to secular medical ethics which views its function as defining the relevant ethical dilemma, sharpening the focus of the various views and not necessarily arriving at final and practical conclusions. Since time immemorial, however, Rabbis have differed in their opinions and not always is the final decision unanimous. This situation is no different than any other normative legal matter. Mechanisms exist in *halakhah* to decide among the various opinions. In this respect, there is no

difference between a medical question and any other question in any area of Judaic practice or belief.

The *halakhic* construct in resolving a medical ethical question is a tripartite one involving the patient and/or family, the physician, and the rabbinic decisor. The patient is obligated to seek the best possible medical care. He has the autonomous right to choose his physician and his rabbinic decisor and has the right to make his personal wishes known. The physician is obligated to treat the patient and must use the best diagnostic and therapeutic interventions according to his knowledge and judgment. The rabbinic decisor is obligated to understand all the facts of the medical questions, to consider the views presented by the patient and the physician, and then to decide according to halakhic principles how to proceed in any given situation. His decision is binding on both patient and physician.

4) Basic Principles

The basic principles of Jewish medical ethics compared to secular medical ethics are the following:

Jewish ethics is based on duties, obligations, commandments, and reciprocal responsibility. The acceptance upon oneself of this yoke is the ultimate purpose of Jews on this world and provides spiritual fulfillment. The word “right” in its modern sense meaning “I am entitled to it” does not exist in biblical or talmudic literature. By contrast, **secular medical ethics** is based heavily on the concept of rights and autonomy. This is a minimalistic view and justifies human decisions which cannot be criticized as long as they do no harm to others. Judaism, however, requires self-fulfillment based on obligatory and binding moral requirements which are beyond the personal, temporal feeling of individuals but rather founded on values mutually beneficial to society.

Judaism in general prefers the casuistic approach to resolve *halakhic* questions. This means that one must examine each situation according to the

individual circumstances and develop the response according to the specific details and characteristics of that situation using many of the basic *halakhic* rules and regulations and principles. This is the methodology of the rabbinic responsa literature and is ideally suited for medical questions where the circumstances differ from patient to patient. By contrast, the current approach of **Western secular medical ethics** uses a limited number of ethical principles and applies them to all situations involving medical ethical questions.

Judaism recognizes absolutism only with respect to the Divine source of authority of Jewish law, the supreme authority of the prophets who speak the words of God and the eternity of Torah. Judaism does not, in general, subscribe to a set of principles and values as absolute imperative categories but rather favors a middle of the road approach, the “path of the golden mean”, which is a proper balance between different values or laws in any specific case. The ethical imperative for the average person is to conduct oneself properly with the appropriate balance between opposing values and to avoid extreme positions. There are, however, unusual circumstances or for specific pious individuals where it might be justified or even desired to act “over and above” what is required and with special holiness and sanctity. This is the exception, however, and not the rule. Hence, for Judaism there is no definitive value which is absolute so that it takes precedence in every case or situation. Various values have different moral weight and there is a system for ascribing priorities in specific situations where conflicting values exist. This view is based on the principle that “the Torah was not given to ministering angels”¹⁵ but to ordinary human beings who, by definition, are not perfect. Man’s obligation is “to be strong as a lion to arise in the morning to the service of one’s Creator”, namely one must seek and strive to reach Divine understanding and perfection in Torah. One’s reward is the effort in striving for perfection although the latter is unattainable, as stated by King Solomon, *There is no righteous man on earth who only does good and does not sin.*¹⁶

The physician-patient relationship in **Judaism** is not a voluntary-contractual arrangement but a Divine commandment and obligation. The patient is

commanded to seek healing from the physician and to prevent illness if possible. The physician is obligated to heal and is considered to be the messenger of God in the care of patients. The patient is not free to decide autonomously to refuse treatment which might be beneficial or save his life. He is prohibited from relying on miracles, but must do whatever is necessary to heal himself according to standard medical practice.

PART II

The sanctity of life

In **Judaism**, the value of human life is supreme; therefore, to save a life, nearly all biblical laws are waived. This is certainly true concerning killing or hastening death. This approach is in contrast to the **secular ethical** view which considers human life to be one of many values and often gives greater weight to “the quality of life”. However, even in **Judaism**, the value of human life is not absolute and in certain rare and well-defined circumstances other values may supercede it. Nonetheless, this does not in any way diminish the supreme value of human life in Judaism.

The obligation to save life is one of the cardinal principles of Judaism because he who destroys a life is as if he destroyed a whole world and he who saves a life is as if he saved a whole world.¹⁷ Almost all biblical and rabbinic commandments (except three: idolatry, murder, and forbidden sexual relations) are suspended in order to save a life. Thus, a dangerously ill patient must desecrate the Sabbath or eat on the Day of Atonement or violate any other prohibition, if necessary, to save his life. Even if someone is coerced to violate biblical laws or be killed, he is obligated to violate them if one can do so in private, even if it means violating religious tenets.

One soul is dearer to God than the observance of all the Torah precepts, thus testifying to the extreme importance of saving a life. This is the meaning of

the phrase “*and thou shalt live by them*” (i.e., the commandments) but not die by them. From this interpretation we learn that “the laws of the Torah are not vengeful but merciful and compassionate to bring peace to the world. About heretics who claim that it is prohibited to desecrate the Sabbath even to save a life it is written, ‘*Wherefore I gave them also statutes that were not good, and ordinances whereby they should not live*’¹⁸

The individual’s permission is not required in order to save his life. Even if the person in danger cries out “Do not save me”, one disregards his wishes and saves him.

According to *halakhic* rulings, he who desecrates the Sabbath to save a life does not transgress; rather he fulfills a biblical commandment. Even if his rescue attempts are unsuccessful and even if someone else has already effected the rescue, he has still done the right thing and will be rewarded by God. Even if he erred and thought the person was in danger and acted accordingly, he is exempt from any spiritual liability.

Even only a doubtful or possible but not definite danger to life requires the waiving of all Torah precepts.¹⁹ The rule of the majority is, therefore, not invoked when it comes to saving lives because the Torah says that “*you shall live by its [precepts]*”. This means that no one should die because of the observance of its precepts.

One may not sacrifice one life to save another life. Therefore, during the birth of a baby, if the head has emerged from the birth canal but the baby is endangering the mother’s life, one may not destroy it to save the mother.²⁰

A number of sources form the basis of the obligation to save lives.

The main source is the negative precept “*Thou shalt not stand idly by the blood of thy fellow man*”.²¹ If one sees one’s fellowman drowning or being attacked by wild animals or by robbers, one is obligated to try to save him. The Torah warns against negligence in the saving of even a single life if one is able to do so.

One is obligated to save a life not only if the rescue is assured. Even if it is not sure that it will be successful one must attempt it, thereby fulfilling the biblical precept. One must attempt in any way possible, to prevent loss of a human being even if the chances of success are poor.

Additional principles regarding the saving of life are as follows:

- The commandment of returning a lost object²² also includes the restoration of one's "lost" health..²³
- The precepts "*and he shall live with thee*"²⁴ and "*that thy brother may live with thee*"²⁵ also include the saving of life.

Nonetheless, although Jewish law requires that Torah and rabbinic laws be set aside in the face of danger to life, there are a few exceptions:

- With regard to the three cardinal sins, idolatry, murder, and forbidden sexual relations, a person should rather be martyred and not transgress them..²⁶

The Rabbis also discuss situations other than the cardinal three precepts where Torah laws are not waived even for saving life:

- If the violation of any Torah law must be done in public and involves a desecration of God's name one should rather suffer death than transgress..²⁷
- During times of persecution, if a ruler decrees that the Jews must abandon their religion or nullify a Torah precept, they should suffer death rather than transgress..²⁸
- In times of war, the danger to each individual is not as important as the welfare of the entire population at war. Therefore, soldiers must obey commands to go to war in spite of personal danger and the principle of individual danger of life is waived.

The principle of autonomy which is dominant in **Western secular medical ethics** is modified in Judaism. **Judaism** asserts that man was created in the image of God ²⁹ and that all people are, therefore, considered special and equal. Thus, Judaism requires that people must respect and help one another. Judaism also accepts a degree of patient autonomy in the physician-patient relationship. However, in certain situations in which autonomy conflicts with other fundamental principles of Judaism, such as the obligations to preserve one's health and life, to avoid harming others and to do good for others, the *halakhah* may be in direct conflict with autonomy.

In **Judaism**, man is said to have free will and choice. This does not mean that he is permitted to choose to live immorally or to violate Torah laws. A person is commanded to live within *halakhah* and thus his autonomy and free choice are restricted. Decision-making in areas which do not involve *halakhah* can be totally autonomous. However, in every life situation in which there is a clear *halakhic* position any Jew, be he physician or patient, must always act within the parameters of *halakhah* and not on one's own inclinations and desires.

PART III

The moral status of an embryo

From time immemorial, scientists and philosophers have argued about when life begins. From a pure scientific viewpoint it is impossible to answer this query. In fact, it is impossible to define scientifically the very term "life". Indeed, the definition of life and of the beginning of life involves religious, ethical, legal and social considerations.

Similarly, from time immemorial scientists and philosophers have debated the status of the embryo/fetus. There has been, and continues to be a great dispute as to whether or not an embryo has an independent claim for life and/or whether or not he possesses a status of an independent person.

a) Some scholars have opined positively to this query but they differ as to the stage of the fetal development at which the fetus has its own rights and personhood:

- The moment of conception
- The time of implantation of the fertilized egg in the uterine wall
- The time that the fetal shape or human form is recognizable
- The time that the brain develops
- The time of fetal movement
- The time of viability of the fetus outside the uterus, which differs according to the scientific ability to sustain extra-uterine life.

b) Some scholars believe that the fetus is never considered as an independent human being, and he has no independent claim for life.

c) Yet other scholars opine that the fetus does not possess self and independent moral rights but it has a relative claim for life and for rights based upon its eventual personhood in that it is a potential human being while in utero. According to this view, the closer to birth the fetus is, the closer to personhood it can be considered and the greater justification it has to be accorded rights.³⁰

Hence, three views pertain to fetal rights:

- The fetus has no independent rights and is merely an integral part of the mother
- The fetus has full rights, identical to a born, fully formed and independent human being
- The fetus has some rights but less than a person has after birth.

The philosophical argument about when “personhood” endows someone with rights is, thus, an unresolvable issue. It varies according to one’s religious, cultural and social beliefs.³¹

Another moral issue pertains to the question whether or not there is a moral distinction between an embryo that is already implanted and developing in utero compared with a pre-embryo in a test tube after an in-vitro fertilization is performed.

Yet another moral issue concerns the status of a fetus as a patient. The advancement of medical technology and knowledge have stimulated the notion that the fetus should be considered a separate patient with its own rights and needs for protection.³² Hence, a variety of ethical questions pertain to the moral aspects of intra-uterine treatment:

- The mother's right to autonomy and the need for her informed consent for any fetal treatment which requires invasion of her body, versus the right of the fetus to receive effective therapy and to be protected from harm.
- The uncertainty of the outcome of fetal therapy.
- The proper allocation of limited resources – is it proper to utilize enormous resources for an unborn fetus rather than for urgent care of living people?
- Can the parents and/or physician be sued by the newborn for malpractice for not treating an unborn fetus?
- Can the mother request abortion if the fetus is defective, at least during the first stage of pregnancy (in countries where abortion is legal), or is the fetus a separate entity from the mother?.³³

Jewish perspectives

The fundamental Jewish position toward the status of an embryo/fetus is based upon the assumption of a **progressive acquisition of a human status**. The gametes, the zygote, the blastocyst, the early organogenesis, and the progressive physical development and viability of the pre-embryo/ embryo/ fetus all indicate and express a progressively growing potential for human life

and existence. The biological progression of the fetal development also reflects a moral and legal progression of rights and dignity. Hence, these various stages of biological development merit a progressively growing respect, dignity and rights. The changing moral status of the developing embryo/fetus can be, and in fact should be, balanced and weighted against other moral values and rights. Full, complete and unrestricted rights as a human being are achieved only after childbirth.

Moreover, Judaism sharply distinguishes and differentiates between pre-implanted embryos and those who are already implanted in-utero, as shall be discussed below.

Ensoulment

The Talmudic Sages, as well as some subsequent Jewish scholars, have debated the theological and meta-physical question whether or not a fetus acquires a soul, and if he does – at what stage of its development does this occur. The Talmud quotes the following dispute:

Antoninus said to Rabbi Judah the Prince: "when is the soul placed in man, as soon as it is decreed that it shall be male or female or when the fetus is actually formed?" He replied: "from the moment of formation". He objected: "can a piece of meat be unsalted for three days without becoming putrid? But it must be from the moment that God decrees its destiny". Rabbi Judah the Prince said: "This thing Antoninus taught me and Scripture supports him".³⁴

Nonetheless, most Rabbis exclude a fetus from the Biblical term *nefesh*, meaning soul or person.³⁵ Other Rabbis call a fetus *a safek nefesh*, meaning a partial or a potential person.³⁶ Maimonides' position on this matter is questionable and debatable.

The theological question of the timing of ensoulment has not, and cannot be resolved by Jewish practical, legal mechanisms; this question is beyond human ability to solve.

The Talmudic Sages and subsequent authoritative Jewish scholars have been engaged in another interesting legal-moral debate concerning the status of a fetus. Some Rabbis consider the fetus to be an appendage of the mother, whereas others disagree.³⁷ Such discussions are common in the Talmud, either directly or applied indirectly. This question may be dependent on the issue of when the soul enters the body. There is, however, a difference of opinion among Jewish scholars whether or not this statement has any legal ramifications.

Nonetheless, these theological and legal debates have an insignificant impact on the application of Jewish law concerning the rights appropriated to the different stages of fetal development. Whether or not ensoulment occurs at fertilization, conception or formation of the fetus, and whether or not the fetus is or is not an appendage of the mother is irrelevant to the issue of rights and claim for life for the following considerations:

On the one hand, the developing human being from the gamet to the newborn deserves respect and dignity and should not be emitted and/or destroyed for naught. On the other hand, in face of conflicting values and rights the decisions will shift for or against the rights of the fetus depending on the fetal stage of development and on the moral-legal weight of the opposing values and rights, as will be shown below.

Jewish-legal position regarding stages of embryonic development

Several stages of the human fetal development have particular significance in Jewish law and philosophy. These are: semen, pre-embryo (i.e., a pre-implanted fertilized ovum), embryo in-utero up to 40 days, embryo/fetus in-utero from 41 days on, and a newborn.

SEMEN

Jewish theology attributes respect to semen as a human part and as a potential for future life, but does not regard it as life. The Jewish legal consequence of this position is a clear and unqualified prohibition of improper emission of semen, including masturbation.

Expending semen for naught is considered a very serious offense in Judaism.³⁸ According to *Kabbalah*, it is the most stringent of all transgressions in the Torah. He who expends semen for naught is as if he shed blood by destroying a soul,³⁹ because every drop is capable of producing human beings.

Since the prohibition of destroying semen is not explicitly stated in the Torah, there is disagreement among the rabbinic decisors as to the biblical source for this prohibition. Some Rabbis write that the source for this is the verse *thou shalt keep thee from every evil thing*⁴⁰ which is interpreted to mean that a man should not indulge in erotic thoughts by day that may lead him to uncleanness by night.⁴¹ Some Rabbis state that the prohibition of destroying semen is derived from the law of wounding and destroying; just as it is prohibited to intentionally wound one's body, so too it is prohibited to destroy one's semen.⁴² Some Rabbis derive the prohibition from the acts of Er and Onan.⁴³

PRE-IMPLANTATION EMBRYO

This entity deserves dignity and respect as a human part and as a potential for future life, but it is not considered as life. The potential for future life of this entity is still very low and very remote. It also requires further unnatural human intervention in order to continue its existence and to enable it to become a human being. Hence, this entity has no humanhood status.

One of the basic sources for the Jewish position designating an inherent different legal and moral status to a pre-implanted embryo as compared with an in-utero embryo is the following:

The Bible states "*One who spills the blood of a human, in a human, his blood shall be spilled*".⁴⁴ This verse teaches us that the prohibition of murder applies exclusively to a human formed within another human, i.e., a fetus within its mother's womb.⁴⁵ Hence, a pre-implanted fertilized ovum does not have the status of a human being regarding the prohibition of murder.

Pre-implanted zygotes or blastocytes, as such, are entitled to full protection and dignity. However, when these rights come into conflict with other values one ought to weigh the relevant merits and rights and balance between them.

One of the consequences of such a balance is the permission to perform a pre-implantation genetic diagnosis and to discard defective pre-embryos. The potential damage of giving birth to a seriously defective child overrides the minimal dignity that the zygote deserves and the remote potential of life of a pre-implanted fertilized egg.

Another consequence of current importance is the permission to derive stem cells from superfluous frozen fertilized eggs in order to advance potential cures for many people with chronic, debilitating, fatal, degenerative disorders. The ethical dilemmas concerning stem cell research are currently intensely and passionately debated in all western countries, and it is beyond the scope of this article to discuss all its ramifications in depth from a Jewish point of view. Suffice it to say that the balance between the enormous potential benefit of life-saving derived from stem cells outweighs the responsibility of dignity towards the fertilized egg.⁴⁶

EMBRYO IN-UTERO – FIRST 40 DAYS

According to the Talmud, until forty days post conception, the fetus is "mere fluid".⁴⁷ Current obstetrical calculation of the gestational period

starts from the first day of the last menstrual period. Since the Talmudic Sages calculated the gestational period from conception, this "forty day" stage is at the end of the seventh week of pregnancy according to current obstetrical terminology.

This stage *per se* does not yet constitute a status of a human being. Hence, all Rabbinic authorities agree that if a woman miscarried within forty days of conception, the laws of uncleanness of childbirth do not apply to her, because the aborted embryo at that stage is not considered a human being.⁴⁸

However, since the embryo at this stage is already implanted in the womb its potential for becoming a human being is a natural process.

Nonetheless, this is still a remote possibility. These two sides of the coin have generated a debate amongst the Rabbinic authorities concerning a deliberate cessation of the embryo's existence. Some Rabbis assert that up to forty days one can be very lenient in regard to abortion and it is not forbidden to abort a fetus at that stage, or at least it is an additional reason to permit the abortion when other reasons exist.⁴⁹ Other Rabbis, however, state that it is biblically prohibited to abort any fetus, even prior to forty days, just like it is prohibited after forty days.⁵⁰

EMBRYO IN-UTERO – AFTER 40 DAYS

At this stage, the potential of becoming a full and complete human being is getting greater and closer. Hence, a negative attitude toward abortion is expressed unanimously among the rabbinic decisors and commentators. Nearly all agree that some type of prohibition is involved in the performance of an abortion. However, there are differing views as to the nature of the prohibition, its seriousness, the reason for the prohibition, and the conditions under which abortion may be considered. It is beyond the scope of this article to discuss in-depth all the aspects of abortion according to Jewish law.

Many of the current authoritative Rabbis consider abortion as a moral and theological form of murder, though all agree that the fetus still has no full claim

for life at this stage. Hence, on the one hand, it is strictly forbidden to abort a fetus, but on the other hand, the life of the mother takes precedence over the life of the fetus, so that if the mother's life or health is seriously threatened by the continuation of the pregnancy than abortion is not only permissible but actually required. Also, no capital punishment is administered upon the transgressor, as would have been the case if one murders an existing human being out of the womb.

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5. Leviticus 18:21.
6. Babylonian Talmud, Tractate Yoma 86a.
7. Deuteronomy 6:18.
8. Isaiah 56:1.
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13. Proverbs 3:17.
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17. Babylonian Talmud, Tractate Sanhedrin 37a.
18. Maimonides' *Mishneh Torah, Shabbat* 2:3.
19. Babylonian Talmud, Tractate Yoma 83a-84b.

20. Babylonian Talmud, Tractate Sanhedrin 72b; Maimonides' *Mishneh Torah Rotzeach* 1:9; Joseph Karo's *Shulchan Aruch, Choshen Mishpat* 425:2.
21. Leviticus 19:16.
22. Deuteronomy 22:2.
23. Babylonian Talmud, Tractate Sanhedrin 73a.
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25. Leviticus 25:36.
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38. Maimonides' *Mishneh Torah, Issurei Biyah* 21:18; Joseph Karo's *Shulchan Aruch, Even Haezer* 23:2.
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40. Deuteronomy 23:10.
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42. Responsa *Binyan Tzion* #137.
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44. Genesis 9:6.
45. Babylonian Talmud, Tractate Sanhedrin 67b.
46. See the testimony of Rabbi M.D. Tendler before the American National Bioethics Advisory Commission, Vol 3, p. H-1ff, 2000.
47. Babylonian Talmud, Tractate Yebamot 69b; Maimonides, *Mishneh Torah, Terumot* 8:3 and *Issurei Biyah* 10:1.
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49. Responsa *Chavat Yair* #31; Responsa *Seridei Aish*, Part 3 #127; Responsa *Tzitz Eliezer*, Part 7 #48:1:8. See also *Achiezer*, Part 3, end of #65; Rabbi S.Z. Auerbach, cited in *Nishmat Abraham* Part 5 *Choshen Mishpat* 425:2; Rabbi Y.H. Henkin, *Assia* #59-60, 5757 (1997), pp. 133ff.
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