Termination of Pregnancy: Legal, Moral and Jewish Aspects

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I. Abortions in Israel: Statistical Background

Legal, Induced Abortions 1990-2003

(Statistics for illegal abortions are not available.)

Since the beginning of the 1990s, the abortion rate varied between 11.8 and 13.6 per 1000 women of childbearing age or between 139 and 150 for every 1000 live births. The highest rate occurred in the year 1990.

In the first half of the 1990s there was a decrease in the number of applications to Abortion Committees as well as the number of induced abortions performed with committee approval. Since the middle of the 1990s, the rate has been stable.

Data for 2003

In the year 2003 there were 21,226 applications to Abortion Committees functioning on the basis of the law with the approval of the Ministry of Health.

The Committees granted approval for 20,841 abortions leading to 20,015 actual abortions in the course of the year.

Around 50% of the abortions were approved in cases of extra-marital pregnancy, incest or rape.

Around 20% of the abortions were approved in cases of pregnancy likely to harm the mother either physically or emotionally.

And around 20% were approved in cases of congenital defects in the fetus.

Around 10% of the women who received approval for abortion were under the age of 17, which is the minimum age of marriage, or over 40.

Early abortion is performed by curettage under general anesthetic or by administering Mifegyne (mifepristone), which can be used to induce abortion through the seventh week. In 2003 Mifegyne was used 3,550 times, compared with a mere 2,165 times in 2000.

Late Abortion

188 abortions, around 1% of the total in the year 2003, were performed after the 23rd week of pregnancy. Unlike many other countries that completely prohibit abortions late in pregnancy, Israeli law allows abortion through the ninth month. In case of late abortions, a lethal substance is injected into the fetus's heart to kill it while it is still *in utero*. After the death of the fetus, the mother is given medication which induce labor. From the medical point of view, this is not just a termination of pregnancy. It is actually an act of feticide.

In Israel there are around 200 late abortions per year, most of them between the 26th and the 28th week.

83% of the official committee approvals for late abortion are in cases where there is concern of physical complications developing in the fetus; approvals based on the mother's age (9%); extra-marital pregnancy (5%); or danger to the mother's health (3%).

II. Definitions

Abortion is defined as termination of pregnancy before the fetus is viable. Accordingly, the maximum fetal age which can be included in

this definition varies with medical progress. If in the past a 27-week-old fetus was not considered viable, there are medical centers today where even 24- or 25-week-old fetuses are able to survive and develop.

An alternative definition of termination of pregnancy would include any activity that contributes either directly or indirectly to the death of a fetus in the womb or to death as a result of premature delivery, regardless of the stage of pregnancy.

III. Ethical Principles

The basic ethical approach towards termination of pregnancy is determined by the definition of the fetus legal status. If the fetus lacks an independent legal status, then from an ethical point of view there is no reason to force a woman to continue her pregnancy and give birth to a baby which, for whatever reason, she does not want. If, on the other hand, the fetus does have a legal status, such that its status turns the termination of its life into the killing of a helpless, innocent human being, then abortion assumes a most serious significance.

Theoretically, there are three possibilities for the legal status of a fetus:

1. The status of the fetus is equal to that of any of the mother's internal organs – *pars viscerum matris*, in the legal language of ancient Rome. According to this approach:
   a) The fetus is not a separate entity, but rather part of the mother's flesh;
   b) The fetus has no status or human rights of its own.

   This approach will henceforth be referred to as the *Roman approach*.
2. The fetus is a separate human being with full human rights. According to this approach:
   a) The fetus is a separate entity and not one of the mother's "internal organs";
   b) The fetus has its own status and full human rights. In other words, its status is equal to that of its mother.

   This approach will henceforth be referred to as the *Catholic approach*.
3. The third approach is the middle path, maintaining that the fetus is, indeed, a separate entity and is not simply one of its mother's "internal organs." Although it is a separate living being, its status is not identical to that of someone who has been born. Its status and rights arise from its *potential* to be born and to become a human being, and for this reason its status is defined as that of a separate entity with human potential, with only partial human rights. This approach will henceforth be referred to as the *middle approach*.

The basic ethical approach towards termination of pregnancy is determined by the definition of the fetus' legal status

The Roman Approach

The main factor supporting the Roman approach is the complete biological dependence of the fetus on its mother, its relatively immature biological state, and its lack of self-consciousness, thought, or freedom of choice.

The Roman approach would indicate that the mother has the full right to undergo an abortion at her own discretion, and she may allow scientific experiments to be conducted on the fetus while it is still in the womb just as she may allow such experiments to be conducted on the products of her abortion. According to this approach the mother may sell fetal tissue for scientific or commercial purposes in exactly the same way as she is entitled to sell a pint of her own blood.

The weak point of this argument is that it applies equally to infants who have already been born. These infants are also completely dependent on their parents, with no clear and unequivocal date when they become free of this dependence. Indeed, Philo of Alexandria[1] documents a fairly common Hellenistic belief that babies do not have

[1] Chayyei Moshe 1, 11.

human status until they start to eat regular food. Almost eight hundred years later (circa 800 C.E.), the Council of Metz did not impose any punishment for killing infants, and only after baptism was the child's life to be guarded.[2]

Another weak point in the Roman approach comes from the progress of scientific knowledge. Much is known today about the development of the fetus in its mother's womb. Genetically and immunoilogically the fetus is a separate organism from a short time after conception. Within three weeks, its heart starts beating. Within six (eight weeks from the last menstrual period) it takes on human form. It moves by itself and brain activity can be detected. The nervous system continues to develop during gestation as well as through the first few months after birth. The significance of these facts is clear: biologically, the fetus assumes the status of a living being at an early stage of pregnancy.

Catholic approach: There is no justification for abortion for maternal concerns – even if the mother's life is in danger

The Catholic Approach

Professor Yeshayahu Leibowitz[3] dealt with the question of fetal status from a biological or philosophical point of view. In his opinion, from these perspectives there is no difference between a fetus and a live infant. Human life develops in a continuous process beginning with conception, continuing through the pregnancy and after birth, at least until after the child reaches maturity. There is no clear line defining the boundary of life other than the date of conception or the date of death. Therefore, in his opinion a society that allows any deviation from the principle of preservation of life takes a fateful step.

Professor Leibowitz's philosophical approach, in our opinion, very closely resembles the Catholic approach.

The following conclusions are reached through the Catholic approach:

1. The fetus has rights of its own;
2. The mother's interests are irrelevant in decisions pertaining to the future of the fetus;
3. There is no justification for abortion for maternal concerns – even if the mother's life is in danger;
4. A maternal decision pertaining to the fetus has legal significance only insofar as she is the fetus' natural guardian and on condition that the good of the fetus is all that guides her considerations.

The Middle Approach

The middle approach rejects the first principle of the Roman approach and holds, in accordance with biological facts, that the fetus is a separate entity and not merely one of its mother's "internal organs." At the same time, it rejects the second principle of the Catholic approach, which maintains that the status of the fetus is identical to that of someone who has already been born. In other words, according to the middle approach the fetus does not have full human rights. The fetus is defined as a living being with human potential, but with only partial human rights. Great importance is attached to the welfare and well-being of the fetus and harm is not allowed to come to it without serious moral justification. On the other hand, if such good reason does in fact exist – such as danger to the mother's life or the need to reduce the number of embryos in a multiple pregnancy – then harm to the fetus is justified.

There is still room for ethical debate about when the fetus assumes its special status – at the time of conception, during implantation in the womb, or at some other stage of development. A detailed discussion of these points lies outside the scope of this article.

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[2] Lord Immanuel Jakobovits, *Medicine and Judaism: a Comparative and Historical Study* (1959, second edition – 1975, Bloch Publishing Company, NY, ISBN 0-8197-0097-5).

[3] Yeshayahu Leibowitz, "Medicine and the Value of Life," *Proceedings of the Chair of the History of Medicine at Tel Aviv University* (Tel Aviv: Tel Aviv University, 1977), 2-12.

When it comes to ethical issues it is quite difficult to achieve a general consensus in a pluralistic, Western society. However, we may say that the middle path is currently attracting many adherents in the medical world.

IV. Historical Background[4]

A familiarity with the historical background may help us to understand the battles and processes around the world concerning abortion. History often repeats itself, and fluctuations in the social world view are not unusual.

Ancient Times

Even in ancient times primitive methods were used to bring about abortion. These methods were of two main types:

(1) Piercing the fetus via the vagina (generally without concern for sterility);

(2) Use of pharmacological means to bring about a cessation of pregnancy and expulsion of the contents of the womb.

Echoes of these methods are heard in the Hippocratic Oath,[5] which completely forbids any assistance in ending a pregnancy – "I shall never give a woman a drug or instrument for the purposes of abortion" – and in the poet Ovid's[6] criticism of "those women who puncture and pierce with instruments or give deadly potions to their unborn children." Ancient literature describes other methods used to terminate pregnancies, including external warming, physical activity, and extreme self-imposed starvation.

Despite fairly widespread use of abortion techniques, most legislators of the ancient cultures – both religious and secular – regarded termination of pregnancy as a forbidden act. Moral repugnance at harming a living fetus and interfering with the natural process of pregnancy found expression in different ways. Until the second half of the twentieth century there were hardly any examples of a complete absence of moral objection to the killing of a fetus. Nevertheless, moral opposition in theory was not always accompanied by legal enforcement.

Eastern cultures were always more firm in their opposition to abortion than the Western nations. Buddhism forbade termination of pregnancy for religious reasons and was harsh in its punishment of those who performed abortions because of the environmental danger involved. This danger arose from the belief that the souls of the aborted children were evil and dangerous. The ancient Indian legal codes, the Aryas and the Manava Dharma-Sastra, regarded abortion as murder, and it was therefore prohibited for Hindus.

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In ancient Persia, the Avesta religion forbade abortion. The Assyrian Code prescribed the death penalty for women who had abortions; even after the death sentence was carried out such women were not permitted to be buried.

In ancient Egypt abortion was considered a serious crime, but the severity of the punishment set for it is unclear, particularly in light of the fact that infanticide was openly tolerated in Egypt. Pharaoh's royal decree that "every male that is born shall be cast into the river"[7] was not a deviation from the norm.

A study of ancient Greek literature reveals an ambivalent attitude towards termination of pregnancy. Ovid, Seneca, Favorinus, Plutarch, and Juvenal all spoke of abortion as "a crime against which no one protests" on one hand, but as a generally accepted phenomenon on the other.

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4 Lord Immanuel Jakobovits, ibid.; Abraham Steinberg, *Encyclopedia of Jewish Medical Ethics* (Second edition, Jerusalem: Schlesinger Institute, 2006), vol. 2, pp. 717-817 ('abortion'); Daniel Sinclair, "The Legal Basis for the Prohibition against Abortion in Hebrew Law As Compared with Other Legal Systems," *Annual Journal of Hebrew Law* (1978): 177-207.

5 Fourth century B.C.E.

6 43 B.C.E.-17 C.E.

7 Exodus 1:22.

Abortions were performed in great numbers not only because of social difficulties but also owing to the women's desire to protect their figures from the changes associated with pregnancy and giving birth.

The Pythagorean philosophers understood that from the moment pregnancy begins the fetus is to be considered a living being and for this reason it is forbidden to harm it. This view was prevalent during the fourth century B.C.E. and some see it as the source for the well-known clause of the Hippocratic Oath quoted above.

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In contrast to the Pythagoreans, the Platonic and Stoic philosophers believed that the fetus is given "life" only at the moment of birth, and therefore they expressed no opposition to termination of pregnancy at any stage. Plato was in favor of making abortion compulsory for any woman above the age of forty. Aristotle, on the other hand, took an intermediate stance, maintaining that "life" begins when the mother feels fetal movement. Accordingly, he recommended abortions for social reasons (i.e., families with many children) on the condition that they were performed before "the fetus first kick."

Ancient Roman law stands out in the absolute rights which it awarded the father with regard to his family, going so far as defining the fetus as *pars viscerum matris* – part of the mother's body – and not as a separate living being. For this reason, until the second century C.E. killing a fetus was legal according to Roman law. Throughout the Roman empire there was no legal prohibition against performing abortions and they were quite common. However, many instances of abortion ended in infection and death. Ovid condemned "those women who pierce and puncture with instruments or give deadly potions to their unborn children" – something which even wild animals do not do. He claimed that nature punishes these women: the punishment occurs when "She herself dies and is dragged to the pyre with her hair revealed, and then all who see declare, 'This is her punishment.'"

The Christian Approach

Christianity has dealt extensively with the issue of abortion, and termination of pregnancy has become the most widely discussed subject in twentieth-century Christian literature. The Christian approach has undergone significant changes over the centuries but the general trend was always opposition to termination of pregnancy, with considerable fluctuations with regard to details – for example, the distinctions drawn between abortions at different stages of pregnancy. In 305 C.E. the Council of Elvira established heavy canonical punishments for those who performed abortions; nine years later the Council of Angora (Ancyra) eased the severity of these prohibitions. Over the course of the years a compromise approach was formed, distinguishing between abortions at earlier and later stages of pregnancy.

In the wake of the Samaritan version of the Torah, the Septuagint, and Philo's commentary, there were those who differentiated between abortion at a very early stage and abortions at later ones. Many believed that the formation of a male fetus soul is completed on the fortieth day following conception with the completion of his (external) human form. Some maintained that with females the process is completed later, on the eightieth day. The determination of a date of the creation of the soul produced the dividing line between abortions performed at earlier and later stages.

In the thirteenth century, Thomas Aquinas believed that consciousness and movement are the characteristics of a living being and – like Aristotle – supported the approach that regarded the mother's feeling the fetus first kick as the beginning of life. There were Christian theologians who agreed completely with Aristotle's view of the soul's development, according to which the soul develops in three stages (the soul of the "powers of growing" at the time of conception; the soul of a lower living

system at a later stage; and finally, a full human soul). Aquinas, following Aristotle's lead, held that only fetal movements that are felt represent the first stage of the development of a full human soul. This approach was supported by Popes Innocent III and Gregory IX in the thirteenth century. But in 1588 Pope Sixtus V reinstated the original punishments for termination of pregnancy regardless of fetal age. Since then all termination of pregnancy has been considered murder. This principle was further confirmed in the penal code published by Pope Pius IX in 1862, and in the last canonical law, which took effect in 1918.

In fact, the approach of the Church is completely opposed to the Roman approach. In principle, the Catholic Church sees the fetus as a living being with full human rights, beginning at the moment of conception. For this reason Catholic doctors (even in the twentieth century) were instructed to refrain from terminating pregnancies, even when the mother's life was endangered, because "two deaths are preferable to one murder."[8] A similar consideration would forbid fetal reduction even when the chances of survival for a multiple pregnancy are very low otherwise because according to the Christian approach, fetal reduction is equivalent to throwing some people off a sinking ship in order to save the others.

The French Revolution and Feminism

The French Revolution had a marked effect on the values of Western society. In the wake of its influence, and especially in light of the opposition of leading legal and medical figures to the granting of full human rights to fetuses, there have been changes in civil legislation. In most Western countries most of the more serious medieval clauses of the anti-abortion legislation were removed. In Prussia, for instance, by the year 1837 the death sentence was no longer prescribed as the penalty for abortion.

Despite the relaxing of criminal punishment, the prohibition against abortion has remained intact, almost world-wide, for many years. It was only in the second half of the twentieth century that the feminist approach spread in the Western world, supporting the woman's absolute freedom to choose abortion. This approach sees the fetus as an integral part of the woman's body, and since she is assumed to be in charge of her own body, she is likewise permitted to terminate a pregnancy.

The feminist movement gained huge support worldwide; in its wake legislation in many countries was changed and some of the criminal prohibitions against abortion were canceled. The countries in which the law was changed, in the last two generations, include the United States, Holland, and Israel.

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In recent years a reactionary movement has begun to appear. The pendulum is swinging back towards the Catholic approach, and the anti-abortion lobby is gaining strength. Confrontations between "right to choose" and "right to life" organizations at times become quite violent.

V. Social and Legal Aspects

The dominant social stratum in Israel adopted a liberal ideology even before the establishment of the State. Echoes of this ideology can be seen as far back as the arguments over the decision by the Haganah to enlist women in the British army during World War II. Following the establishment of the State, this permissiveness gave rise to large numbers of unplanned pregnancies and termination of pregnancy seemed a simple way of solving the social problem of the young mother.

Later, the Israeli legislature faced a complex problem. On one hand, a considerable number of these pregnancies involved girls below the legal age of majority. On the other hand, until the 1970's the law forbade abortion. The legal solution was an

[8] A. Bonnar, *The Catholic Doctor*, 1948.

unusual one: it was decided that the law forbidding abortions would not be enforced, and thus hundreds of thousands of illegal abortions were performed while those charged with law enforcement deliberately turned a blind eye.

The Penal Act of 1977 permitted abortion even for social reasons; the prevailing social ideology had finally attained a legal framework. However, the theoretical license was insufficient to lend abortion legal legitimacy and an interesting legal exception was required: by law, the agreement of a parent or legal guardian is needed before the performance of any invasive procedure on a minor. According to this principle it would be necessary to obtain the agreement of the parents or guardian before terminating her pregnancy, an act which involves a certain degree of danger to the future of the girl and her fertility. But the requirement of parental consent went against the trend of liberation from the religious ethical system of the parents' generation and was likely to run counter to the aims of the law: the requirement of parental consent would reduce the number of abortions performed and would increase the number of unwanted births. Therefore, contrary to the generally accepted practice in other areas of law, according to which the consent of a minor is of no relevance, when it comes to abortion it is enough for there to be informed consent on the part of the pregnant minor. The law does not apply any restriction in terms of the girl's age and does not require the consent of a guardian or family member, despite the known dangers to the health and fertility of a minor who undergoes surgical abortion.[9] These exceptions are an indication and reflection of the values of the dominant societal sector. If society saw the preservation of the life of the fetus and prevention of abortion as important values, the law would be worded quite differently.

The number of legal abortions in Israel has been fairly stable since the 1980's, remaining between 16,000 and 20,000 annually

Amendment to the Abortion Act

During the 1980's the Abortion Act was amended once again. The new amendment canceled the license to perform abortions for social reasons while retaining the other indications for abortion: danger to the health of the mother or the fetus, the mother's age (below 17 or over 40), and pregnancy as a result of forbidden relations (adultery or premarital sex).

The reality once again reflected the influence of the dominant forces in the law enforcement system: the number of legal abortions did not change at all. The social clause was no longer applied but there was an immediate rise in the number of pregnancies terminated for other reasons, such as "danger to the life of the mother." In a wide-ranging study conducted by the Israeli Ministry of Health it turned out that the law was not being strictly enforced.[10] At least one major public hospital openly kept double records of reasons for abortion. One list, maintained for the purposes of the Abortion Act, included all those women whose abortions were approved according to subsection 4a of section 316 (danger to the health of the mother), while the second list, indicating the source of funding for the abortion (the sick funds or welfare services), divided these women into two subsections: women with a genuine medical indication, in which case the abortion was covered by the health plan, and women with social difficulties, in which case funding came from the welfare services. The ratio between the two groups was 5% medical indications to 95% social reasons.

The number of legal abortions in Israel has been fairly stable since the 1980's, remaining between 16,000 and 20,000 annually. It is known that, in addition, thousands more abortions are performed illegally, but there is ongoing controversy as to the extent of this phenomenon. Estimates vary between 10,000 and 50,000 illegal abortions annually.

[9] Penal Act 1977, sections 312-321 (Hebrew).

[10] Memoranda from the director of the Ministry of Health: memorandum no. 64/90, 15 June 1990; memorandum no. 23/93, 14 November 1993.

Whatever the true number may be, to date no doctor has ever been brought to justice for performing an abortion contrary to the law. (Only in cases where women whose pregnancies were terminated died as a result of the surgical procedure have doctors been brought to court.)

Ignoring Violations of the Abortion Law

Whatever the actual statistics might be, no physician has yet been charged with the precise crime of inducing an illegal abortion. This policy is echoed by the decision of the court (State *vs*. N. Elayyev 36864/97; unpublished).[11]

In that case two physicians were charged with performing illegal abortions. One of the abortions ended with the mother's death, but no proximate cause was demonstrated. In the court's decision, the claim of the defendant's attorney was mentioned: For we know on the basis of prior experience that the recommendation of Legal Counsel to the Ministry of Health[12] is not to sue physicians in cases of illegal abortion unless the illegal abortion ends in death.

in the framework of Jewish law there is a clear distinction between the status of a fetus and that of a newborn

In light of counsel's claim, according to whom no one had yet been sued for the offense of illegal abortion, the judge decided to refrain from conviction. He only sentenced the accused to public service.

"This policy, as far as it exists, reveals a severe defect in application of the law. **Law is enacted in order to be fulfilled**." Further: "The welfare of the public demands precision in applying any law calling for penal sanctions," as phrased by E. Rubinstein and B. Medina in their book *Ha-Mishpat ha-Konstitutsionali shel Medinat Yisrael* (5th ed.; 5757; 1:228).

Enforcing the law in this case is particularly important in view of the fact that health and life are involved for the whole purpose of the law is to guarantee the woman's well-being and her health and to guarantee that the woman not receive an ill-considered decision that might harm her. (See H. Grossman, Chairman of the Public Services Committee in Divrei Kenesset 79 (5737, 1229.)[13]

VI. Jewish Aspects[14]

Jewish law accepts the biological fact that the fetus is a living being. The fetal heart beats as early as the fourth week after conception. Organogenesis (the stage of organ formation) is complete, from an external perspective, at the end of the sixth week (the eighth week according to the accepted gynecological practice of counting the date of conception as two weeks from the beginning of the last menstrual period). Biological considerations make it impossible to determine a clear line between a fetus which is considered alive and one that is not.[15] The only absolute dividing line is the moment of conception. After that moment, the fetus is a living body from the perspective of the life sciences. Therefore it is clear that abortion must undoubtedly constitute harm to a living creature. According to Jewish law the complete dependence of the fetus on its mother does not in any way justify permitting its destruction, just as the complete dependence of a day-old baby does not permit us to kill it, even if consideration of the mother's convenience would seem to point in this direction. Theoretically, this leads us to regard abortion in much the same way as we would regard murder. Indeed, there are those who maintain that "a gentile is killed for [murder of] fetuses," that is,

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11 Quoted in Prof. E. Shochtman, "*Al Drishat ha-Haskama ha-Mudda'at be-Hafsakat Herayon, Mishpatim* 29 (3), pp. 737-777, note 70 (p. 763).

12 This apparently refers to an old directive of the Legal Counsel to the **Government**, which is responsible for enforcing criminal law in this matter, not the Legal Counsel to the Ministry of Health.

13 E. Shochtman, *ibid*.

14 Abraham S. Abraham, *Nishmat Avraham* (Second edition, Jerusalem: Schlesinger Institute 5767), vol. 4, *Choshen Mishpat* 425:1; A. Steinberg, ibid.; Mordechai Halperin, "Modern Medicine in View of Halacha: Monthly Review" (1987) 6:34, 33-44.

15 Leibowitz, *ibid*.

according to the Noahide laws which apply to gentiles, abortion of a helpless fetus is considered equivalent to murder. The source of the prohibition is found in Rabbi Yishmael's commentary on the book of Genesis:[16] "'He who spills the blood of a human person [lit: 'a person within a person'] – his blood will be spilled.' Who is a 'person within a person'? This refers to a fetus inside his mother's womb."[17]

Despite the above, according to Jewish law the abortion of a fetus is not identical to murder. As explained in the Mishna[18] the killing of a fetus is not seen in the same light as the killing of a newborn baby. The source for this distinction is found in the Torah, based on the punishment meted out to someone who causes a woman to miscarry in the course of a dispute: "And if men strive with one another and strike a pregnant woman and she miscarries…"[19] Here the Torah differentiates between two possible outcomes: when the blow kills the woman as well (as the fetus), the person who struck her is held accountable for manslaughter, but if "there is no disaster"[20] and the blow harms only the fetus he is not accused of murder and is required to pay damages only.

The guiding principle here is unequivocal: in contrast to the Noahide laws, in the framework of Jewish law there is a clear distinction between the status of a fetus and that of a newborn. Abortion is not identical to murder.

How Serious is the Prohibition?

In light of the above, there is heated controversy among the *poskim* as to how seriously the transgression of killing a fetus is regarded in Jewish law. There are those who maintain that this falls squarely under the category of pure murder, as explained above in the framework of the Noahide laws. The only difference between abortion of a gentile fetus and abortion of a Jewish fetus is reflected in the seriousness of the penalty: under Noahide law the killing of a fetus is punishable by death, while according to Jewish law the perpetrator is "only" punished with death brought about by the Divine hand.

In contrast, other *poskim* maintain that there is no biblical prohibition against the performance of abortion; there is only a rabbinical prohibition based on a decree of the Sages. According to this view, in cases of great suffering where the Sages' decree does not apply it is permissible to act according to biblical law and to permit an abortion.

Tay-Sachs Disease and Down's Syndrome

The halachic debate is pertinent to the issue of Tay-Sachs disease (GM2 gangliosidosis). In this genetic disease the infant lacks a certain enzyme and as a result an adipose matrix builds up, particularly in the tissues of the nervous system. At birth the infant appears completely normal but within a few months, with the accumulation of this substance in the tissues, his development begins to decline, there is psychomotor retardation, and then a continual deterioration leading invariably to death within a few years. It is difficult to describe the suffering of family members who know that the infant is bound to die. The disease is most prevalent among Ashkenazi Jews, where one in 625 couples is likely to bear a Tay-Sachs child. With the help of an amniocentesis the disease can be detected in a fetus (or, more precisely, the possibility can be ruled out) during the early months of pregnancy, and if the fetus is found to have the disease the pregnancy can be terminated. There is no doubt that termination of pregnancy under such circumstances can save the family tremendous suffering. The halachic question here is whether the life of a living fetus can be taken in order to spare the family much suffering.

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[16] 9:6.
[17] *Beraita* in *Sanhedrin* 57b (Babylonian Talmud).
[18] *Niddah* 5:3.
[19] Exodus 21:22-23.
[20] Ibid.

The great American halachic authority of the last generation, Rabbi Moshe Feinstein, of blessed memory, prohibited this. In his view the killing of a Tay-Sachs fetus is biblically prohibited because it falls under the category of murder and, therefore, even terrible suffering cannot justify it.

In contrast, the famous authority Rabbi Eliezer Waldenberg of Jerusalem permited the abortion of a Tay-Sachs fetus. He believed that here we may rely here on those authorities who maintain that the prohibition against abortion in Jewish law is of rabbinic origin, and therefore in a case of severe suffering the Sages' decree would not apply.

This debate involves other considerations, too. We should not forget that we are speaking of a fetus which is not viable (i.e., it is going to die regardless), and therefore, although its life expectancy may be longer than thirty days, there is room for halachic debate as to whether its status can be considered similar to that of a *nefel*, a term used in Jewish law to refer to a newborn suffering from a defect such that it cannot survive longer than a few days. The legal status of a *nefel* is not the same as that of a viable infant.

If the mother's life is in danger and the only way of saving her life requires destruction of the fetus, the fetus may be killed

This last consideration does not apply in the case of a Down syndrome diagnosis during pregnancy. Despite the differences between a Tay-Sachs fetus and one with Down syndrome, Rabbi Waldenberg finds real grounds for possible abortion of the latter as well. He did not issue a universal license, however, and leaves the decision in each case to a halachically competent rabbi who is familiar with the couple concerned.

Here there is great importance attached to the character of the parents, their level of faith, and their ability to deal with stress. There are families capable of raising a Down syndrome child with great love and self-sacrifice, with a strengthening of family bonds and causing values (such as respect for human life, altruism, and scrupulous observance of Jewish law) to be internalized in the other family members. In less strong families, this type of situation can cause tremendous harm. As is the case in many other areas, the halachic decision is a function of both the medical situation and the internal strength of the parents, and the rabbi most closely involved with the family should decide.

Danger to the Mother's Life

There is one situation where there is unanimous agreement. If the mother's life is in danger and the only way of saving her life requires destruction of the fetus, the fetus may be killed. This situation was more common in the past, before the age of Cesarean sections. A narrow pelvis, a transverse presentation, and some of the breech positions formerly required that the fetus be cut and removed from the womb in order to preserve the mother's life. This license is limited to the process of birth up until the moment when the baby's head emerges. From that moment the regular principle that "no one life takes precedence over another life" applies, and as explained in the Mishna:[21] "If a woman is having a difficult labor, the fetus in her womb is cut up and is removed limb by limb because her life takes precedence over his life. Once he is mostly outside [of her body] he is not to be touched [harmed], for no one life takes precedence over another life."

This law is discussed in several places in the Talmud and the responsa. The complex issues involved in abortion are known to represent one of the most fascinating areas of Jewish law. A detailed discussion of the subject would include the fine legal distinctions that make abortions at an early stage of pregnancy, as well as the use of indirect methods, preferable; for example, performing abortion before the forty-first day after conception is preferable to any later stage, and a pharmacological abortion is preferable to a surgical one. Such a discussion lies outside the scope of this article.[22]

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[21] *Ohalot* 7:6.

[22] See the references in note no. 14 above.

Embryo Reduction

Embryo reduction is recommended today for medical reasons in multiple pregnancies; for example, in the cases of quadruplets, quintuplets, or sextuplets, which mainly occur following fertility treatments. In such instances the chances of the fetuses being born and surviving are very small unless their numbers are reduced to two or three, while the chances of survival for the remaining fetuses are raised quite considerably. The responsa at hand are united in their approval of embryo reduction in such cases.[23]

In Summary

In light of the halachic sources, it would seem that the approach adopted by Jewish law is very similar to the middle approach presented in the ethical discussion. In practice, the following guiding principles apply:

1. Under Jewish law abortion is not identical to murder.
2. Abortion is forbidden in the absence of serious justification.
3. Performance of an abortion prior to the fortieth day after conception is less serious than performance of an abortion thereafter.
4. In a multiple pregnancy, in which the chances of fetal survival are extremely small without embryo reduction, it is permissible to decrease their number in order to increase the chances of survival for the remaining fetuses.

There is no complete agreement among the authorities as to what constitutes the serious justification required for the termination of pregnancy under normal circumstances. Most modern authorities permit termination of pregnancy only if there is reason to believe that the pregnancy may endanger the mother's life.

In contrast, there are some outstanding authorities who permit the termination of pregnancy in any situation where the continuation of the pregnancy may cause severe physical or emotional suffering.

In practice, when there is a medical recommendation to consider termination of pregnancy, observant women generally consult the rabbi who usually answers their halachic questions and act according to his advice. Some of the halachic considerations affecting the decision are mentioned above, while the footnotes allow for further study on this topic.

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[23] Rabbi Yitzhak Silberstein and Dr. Pinhas M. Osher, "Thinning of Embryos," *ASSIA* Book 8, pp. 7-13 (1995); A. S. Abraham, *Nishmat Avraham*, Second edition, vol. 4, *Choshen Mishpat* 425:1 (21).