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Immanuel Jakobvits

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# Jewish Views on Abortion

*Rabbi Dr. Immanuel Jakobovits*

*With the rise in illegal abortions, there is increasing pressure for a liberalization of the existing laws regulating abortion. In the middle of the clamor stand the religious institutions divided in their views. Rabbi Jakobovits discusses the Orthodox Jewish position in contrast to the more liberal Conservative and Reform views, stating that the traditional stand is somewhere between the more rigid Catholic view and the more permissive Protestant position. The author explains that Jewish law permits an abortion only when the mother's life is placed in danger, seemingly based on a theory of self-defense. Aside from this one situation, however, the Jewish law states that the individual's claim to life is controlling, even in cases of monster-births, illegitimate children, or rapes. Dr. Jakobovits expresses some concern that the present system might be changed thereby giving the life-and-death decisions on granting abortions to people not trained in moral issues.*

**W**ITH THE staggering rise in the rate of abortions — the overwhelming majority of them illegal according to most states' laws — and with the motives for such operations now including the fear of abnormal births as well as birth-control considerations, abortion has lately become the most widely debated medico-moral subject. What was previously either a therapeutic measure for the safety of the mother, or a plainly criminal act is now being widely advocated as a means to prevent the

THE AUTHOR (B.A., Ph.D., University of London, Rabbinical Diploma, Yeshiva Etz Chaim, London) is Rabbi of the Fifth Avenue Synagogue in New York City. Before assuming this post in 1958, Rabbi Dr. Jakobovits was Chief Rabbi of Ireland.

birth of possibly defective children, to curb the sordid indignities and hazards imposed on women resorting to clandestine operators, and simply to contain the population explosion. Under the mounting pressure of these new factors, combined with the widespread violation of the existing laws even by reputable practitioners, there is increasing agitation for a liberalization of these laws, particularly among physicians.<sup>1</sup> Many physicians, individually and as organized

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<sup>1</sup> The New York Academy of Medicine, in a report by its Committee on Public Health, has pleaded that "permissive medical practices based on *sound medical judgment* should be recognized, not forbidden by law . . ." and it recommended an amendment to the State Penal Law "to legalize therapeutic abortion when there is substantial risk that the continuance of the pregnancy would gravely impair the physical or mental health of the mother, or that the child would be born with grave physical or mental defects." The report argued that the present law "places the physician who performs the therapeutic abortion and the hospital where it is done in the position of *breaking*

groups, are pressing for legislative modifications which would give them far more discretionary power than they presently enjoy. They claim that, within some broad general guidelines, the decision whether or not legally to terminate a pregnancy should be left to their judgment. In part, this claim is already being asserted on a wide scale through the establishment at numerous hospitals of "abortion boards," composed solely of physicians, charged with the responsibility of sanctioning all such operations.

In the Jewish view, this line of argument cannot be upheld. The judgment that is here required, while it may be based on medical evidence, is clearly of a moral nature. The decision on whether, and under what circumstances, it is right to destroy a germinating human life, depends on the assessment and weighing of values, on determining the title to life in any given case. Such value judgments are entirely outside the province of medical science. No amount of training or experience in medicine can help in ascertaining the criteria necessary for reaching such capital verdicts, for making such life-and-death decisions. Such judgments pose essentially a moral, not a medical, problem. Hence they call for the judgment of moral, not medical, specialists.

Physicians, by demanding that as the practitioners in this field they should have the right to determine or adjudicate the laws governing their practice, are making an altogether unprecedented claim not advanced by any other profession. Lawyers do not argue that, because law is their speciality, the decision on what is legal should be left to their conscience. And teachers do not claim that, as the profession competent in education, the laws governing their work, such as on prayers at public schools, should be administered or defined at their discretion. Such claims are patently absurd, for they would demand jurisdiction on matters completely beyond their professional competence.

There is no more justice or logic in advancing similar claims for the medical profession. A physician, in performing an abortion or any other procedure involving moral considerations, such as artificial insemination or euthanasia, is merely a technical expert; but he is no more qualified than any other layman to pronounce on the

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*the law, even when they are adhering to what they believe to be sound medical practice.*" N.Y. Times, Dec. 14, 1964, p. 48, col. 5. (Emphasis added.) A subsequent report indicated that 87.6% of New York obstetricians answering a questionnaire favored the change in the law, and that the President of the Association for Humane Abortion, who called the existing law "inhumane and unrealistic," had admitted that "reputable physicians often perform therapeutic abortions, in respectable New York hospitals, which are not strictly legal." N.Y. Times, Jan. 31, 1965, p. 73, col. 5.

rights or legality of such acts, let alone to determine what these rights should be, relying merely on the whims or dictates of his conscience. The decision on whether a human life, once conceived, is to be or not to be, therefore, properly belongs to moral experts, or to legislatures guided by such experts.

## I. JEWISH LAW

### A. *The Claims of Judaism*

Every monotheistic religion embodies within its philosophy and legislation a system of ethics — a definition of moral values. None does so with greater precision and comprehensiveness than Judaism. It emphatically insists that the norms of moral conduct can be governed neither by the accepted notions of public opinion nor by the individual conscience. In the Jewish view, the human conscience is meant to enforce laws, not to make them. Right and wrong, good and evil, are absolute values which transcend the capricious variations of time, place, and environment, just as they defy definition by relation to human intuition or expediency. These values, Judaism teaches, derive their validity from the Divine revelation at Mount Sinai, as expounded and developed by sages faithful to, and authorized by, its writ.

### B. *The Sources of Jewish Law*

For a definition of these values, one must look to the vast and complex corpus of Jewish law, the authentic expression of all Jewish religious and moral thought. The literary depositories of Jewish law extend over nearly four thousand years, from the Bible and the Talmud, serving as the immutable basis of the main principles, to the great medieval codes and the voluminous rabbinical *responsa* writings recording practical verdicts founded on these principles, right up to the present day.

These sources, to be detailed below, spell out a very distinct attitude on all aspects of the abortion problem. They clearly indicate that Judaism, while it does not share the rigid stand of the Roman Catholic Church which unconditionally proscribes any direct destruction of the fetus from the moment of conception, refuses to endorse the far more permissive views of many Protestant denominations. The traditional Jewish position is somewhere between these two extremes, corresponding roughly to the law as currently in force

in all but five American states, namely, recognizing only a grave hazard to the mother as a legitimate indication for therapeutic abortion.<sup>2</sup>

(1) *Abortion in the Bible.*—The legislation of the Bible makes only one reference to our subject, and this is by implication:

And if men strive together, and hurt a woman with child, so that her fruit depart, and yet no harm follow, he shall be surely fined, according as the woman's husband shall lay upon him; and he shall pay as the judges determine. But if any harm follow, then shalt thou give life for life. . . .<sup>3</sup>

(a) *The Jewish Interpretation.*—This crucial passage, by one of the most curious twists of literary fortunes, marks the parting of the ways between the Jewish and Christian rulings on abortion. According to the Jewish interpretation, if "no harm follow" the "hurt" to the woman resulting in the loss of her fruit refers to the survival of the woman following her miscarriage; in that case there is no capital guilt involved, and the attacker is merely liable to pay compensation for the loss of her fruit. "But if any harm follow," *i.e.*, if the woman is fatally injured, then the man responsible for her death has to "give life for life"; in that event the capital charge of murder exempts him from any monetary liability for the aborted fruit.<sup>4</sup>

This interpretation is also borne out by the rabbinical exegesis of the verse defining the law of murder: "He that smiteth a man, so that he dieth, shall surely be put to death . . ." which the Rabbis construed to mean "a man, but not a fetus."<sup>5</sup>

These passages clearly indicate that the killing of an unborn child is not considered as murder punishable by death in Jewish law.

(b) *The Christian Interpretation.*—The Christian tradition disputing this view goes back to a mistranslation in the *Septuagint*.

<sup>2</sup>The only states in which health risks, too, are recognized as a legal ground for abortion are Alabama, Colorado, Maryland, New Mexico, and Oregon. See ALA. CODE tit. 14 § 9 (1958); COLO. REV. STAT. ANN. § 40-2-23 (1963); MD. ANN. CODE art. 27, § 3 (1957); N.M. STAT. ANN. § 40A-5-3 (1953); ORE. REV. STAT. § 163.060 (1957).

<sup>3</sup>*Exodus* 21:22-23.

<sup>4</sup>*Mekhilta* and Rashi. For a translation of these sources, see 3 LAUTERBACH, *MEKHILTA* 66-67 (1935); ROSENBAUM & SILBERMAN, *PENTATEUCH AND RASHI'S COMMENTARY* 112-13 (1930).

<sup>5</sup>*Exodus* 21:12. (Emphasis added.)

<sup>6</sup>*Mekhilta* and Rashi. For a translation of these sources, see 3 LAUTERBACH, *op. cit. supra* note 4, at 32-33; ROSENBAUM & SILBERMAN, *op. cit. supra* note 4, at 110-10a.

There, the Hebrew for "no harm follow" was replaced by the Greek for "[her child be born] imperfectly formed."<sup>7</sup> This interpretation, distinguishing between an unformed and a formed fetus and branding the killing of the latter as murder, was accepted by Tertullian, who was ignorant of Hebrew, and by later church fathers. The distinction was subsequently embodied in canon law as well as in Justinian Law.<sup>8</sup> This position was further reinforced by the belief that the "animation" (entry of the soul) of a fetus occurred on the fortieth or eightieth day after conception for males and females respectively, an idea first expressed by Aristotle,<sup>9</sup> and by the doctrine, firmly enunciated by Saint Augustine and other early Christian authorities, that the unborn child was included among those condemned to eternal perdition if he died unbaptized.<sup>10</sup> Some even regarded the death or murder of an unborn child as a greater calamity than that of a baptized person.<sup>11</sup> Eventually the distinction between animate and inanimate fetuses was lost; and since 1588, the Catholic Church has considered as murder the killing of any human fruit from the moment of conception.<sup>12</sup>

This position is maintained to the present day.<sup>13</sup> It assumes that potential life, even in the earliest stages of gestation, enjoys the same value as any existing adult life. Hence, the Catholic Church never tolerates any direct abortion, even when, by allowing the pregnancy to continue, both mother and child will perish;<sup>14</sup> for "better two deaths than one murder."<sup>15</sup>

(2) *Abortion in the Talmud.*—Jewish law assumes that the full title to life arises only at birth. Accordingly, the Talmud rules:

If a woman is in hard travail [and her life cannot otherwise be

<sup>7</sup> The mistranslation, also followed in the Samaritan and Karaite versions, is evidently based on reading "zurah" or "surah" (meaning "form") for "ason" (meaning "harm" or "accident"). See KAUFMANN, *GEDENKSCHRIFT* 186 (1900).

<sup>8</sup> See WESTERMARCK, *CHRISTIANITY AND MORALS* 243 (1939).

<sup>9</sup> ARISTOTLE, *DE ANIM. HIST.*, vii. 3; see 1 *CATHOLIC ENCYCLOPEDIA* 46-48 (1907).

<sup>10</sup> See 1 PLOSS & BARTELS, *WOMAN* 483 (1935); 2 *CATHOLIC ENCYCLOPEDIA* 266-67 (1907).

<sup>11</sup> See 2 LECKY, *HISTORY OF EUROPEAN MORALS* 23-24 (3d ed. 1891).

<sup>12</sup> See 1 PLOSS & BARTELS, *op. cit. supra* note 10, at 484; BONNAR, *THE CATHOLIC DOCTOR* 78 (1948).

<sup>13</sup> See *e.g.*, *CATHOLIC HOSPITAL ASSOCIATION OF THE UNITED STATES AND CANADA, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HOSPITALS* 4 (1949).

<sup>14</sup> See BONNAR, *op. cit. supra* note 12, at 84.

<sup>15</sup> Tiberghien, *Principles et Conscience Morale*, *CAHIERS LAENNAC*, Oct. 1946, p. 13.

saved], one cuts up the child within her womb and extracts it member by member, because her life comes before that of [the child]. But if the greater part [or the head] was delivered, one may not touch it, for one may not set aside one person's life for the sake of another.<sup>16</sup>

This ruling, sanctioning embryotomy to save the mother in her mortal conflict with her unborn child, is also the sole reference to abortion in the principal codes of Jewish law.<sup>17</sup> They add only the further argument that such a child, being in "pursuit" of the mother's life, may be destroyed as an "aggressor" following the general principle of self-defense.<sup>18</sup>

This formulation of the attitude toward abortion in the classic sources of Jewish law implies (1) that the only indication considered for abortion is a hazard to the mother's life, and (2) that, otherwise, the destruction of an unborn child is a grave offense, although not murder.

(3) *Abortion in Rabbinical Writings.*—Some of these conclusions, and their ramifications, are more fully discussed in later rabbinical writings, notably the prolific *responsa* literature. Before detailing a few of these writings, it should be pointed out that criminal abortion, as distinct from therapeutic abortion, is scarcely mentioned in Jewish sources at all. This omission seems all the more glaring in view of the extraordinary attention given to the subject in Christian literature and other legislation in ancient, medieval, and modern times. Criminal abortion was, with few exceptions, simply nonexistent in Jewish society. Consequently, the legal and moral problems involved were rarely submitted to rabbinical judgment, and their consideration thus did not enter into the *responsa*, at least not until comparatively recent times.<sup>19</sup>

Elaborating on the law as defined in the Talmud and the codes, the *responsa* add several significant rulings. While the status of a child conceived by rape is not discussed, several opinions are expressed on the legality of aborting a product of incest or adultery, both capital offenses in Biblical law. One eighteenth century authority considered the case of an adulteress different insofar as

<sup>16</sup> TALMUD, TOHOROTH II *Oboloth* 7:6.

<sup>17</sup> MAIMONIDES, HIL. ROTZE'ACH, 1:9; SHULCHAN ARUKH, *Choshen Mishpat* 425:2.

<sup>18</sup> This is based on a discussion of the Mishnah, TALMUD, *Sanhedrin* 72b. See generally JAKOBOVITS, *JEWISH MEDICAL ETHICS* 184-91 (1962).

<sup>19</sup> See JAKOBOVITS, *op. cit. supra* note 18, at 181.

her capital guilt would also forfeit the life of the fruit she carried.<sup>20</sup> But others maintained that there could be no distinction between a bastard and a legitimate fetus in this respect, and that any sanction to destroy such a product would open the floodgates to immorality and debauchery.<sup>21</sup> A later *responsum* also prohibited such an operation.<sup>22</sup>

Since the Talmud permits the sacrifice of the child to save the mother only prior to the emergence of its head or the greater part of its body from the birth canal,<sup>23</sup> a widely discussed question concerns the right to dismember the fetus even during the final stage of parturition if it is feared that otherwise both mother and child may die. As the danger to the mother usually is likely to occur before that stage is reached, this is mainly a hypothetical question, but it may be of some practical significance in the case of a breech-birth if the child's head cannot be extracted following the delivery of the rest of the body. Notwithstanding the rule that the child in principle assumes full and equal human rights once the major part is born, and that consequently one may not thereafter save one life (the mother's) at the cost of another (the child's), this particular case may be an exception because (1) the child is liable to die in any event, whether the operation is carried out or not, while the mother can be rescued at the expense of the child, and (2) in the Jewish view the viability of a child is not fully established until it has passed the thirtieth day of its life, so that of the two lives here at stake the one is certain and established, while the other is still in some doubt. This slight inequality in value is too insignificant to warrant the deliberate sacrifice of the child for the sake of the mother if, without such sacrifice, the child would survive; but it is a sufficient factor to tip the scales in favor of the mother if the alternative is the eventual loss of both lives. Hence, with one exception,<sup>24</sup> rabbinical verdicts are inclined to countenance the intervention, provided the physician is confident of the success of the operation.<sup>25</sup>

<sup>20</sup> EMDEN, RESPONSA SHE'ILATH YA'AVETZ, pt. 1, no. 43. Cf. note 53 *infra*.

<sup>21</sup> BACHARACH, RESPONSA CHAVATH YA'IR no. 31.

<sup>22</sup> HALEVI, RESPONSA LECHEM HAPANIM, KUNTERES ACHARON no. 19.

<sup>23</sup> See text accompanying notes 16-18 *supra*.

<sup>24</sup> SOPHER, RESPONSA MACHANEH CHAYIM *Choshen Mishpat*, pt. 2, no. 50. Some authorities left the question unresolved, see EGER, OHOLOTH 7:6; MEIR OF EISENSTADT, RESPONSA PANIM ME'IROTH, pt. 2, no. 8.

<sup>25</sup> SCHICK, RESPONSA MAHARAM SHIK, *Yoreh De'ab* no. 155; HOFFMANN, RESPONSA MELAMED LEHO'IL, *Yoreh De'ab* no. 69.



(4) *Deformed Children in Rabbinical Writings.*—More recently the tragic problem of abortions indicated by suspected fetal defects has occupied considerable space in rabbinical writings. The recognition of this problem only dates from 1941, when an Australian medical journal first drew attention to the incidence of abnormalities resulting from rubella<sup>26</sup> in the mother during her early pregnancy. Since then, the legal, moral, and religious issues involved have been widely but still inconclusively debated in medical as well as non-medical circles. They aroused much public controversy when it was established that the birth of thousands of deformed babies could be traced to drugs, notably thalidomide, taken by pregnant mothers and when many such mothers sought to have their pregnancies terminated for fear that they would deliver malformed children.

All the authorities of Jewish law are agreed that physical or mental abnormalities do not in themselves compromise the title to life, whether before or after birth. Cripples and idiots, however incapacitated, enjoy the same human rights (though not necessarily legal competence) as normal persons.<sup>27</sup> Human life being infinite in value, its sanctity is bound to be entirely unaffected by the absence of any or all mental faculties or by any bodily defects: any fraction of infinity still remains infinite.

(5) *Monster-Births in Rabbinical Writings.*—The absolute inviolability of any human being, however deformed, was affirmed in the first *responsum* on the status of monster-births. Early in the nineteenth century, a famous rabbinical scholar advised a questioner that it was forbidden to destroy a grotesquely misshapen child; he ruled that to kill, or even starve to death, any being born of a human mother was unlawful as homicide.<sup>28</sup> Indeed, in a somewhat less legal context, a twelfth century moralistic work referred to a ruling against terminating the life of a child born with teeth and a tail like an animal, counseling instead the removal of these features.<sup>29</sup>

<sup>26</sup> German measles. See Gregg, *Congenital Cataract Following German Measles in Mother*, 3 TRANSACTIONS OF THE OPHTHALMOLOGICAL SOC'Y OF AUSTRALIA 35-46 (1941); see also Swan, Tostevin, Mayo & Black, *Congenital Defects in Infants Following Infectious Diseases During Pregnancy*, 2 MEDICAL J. OF AUSTRALIA 201-10 (1943).

<sup>27</sup> See MISHNAH BERURAH, BI'UR HALAKHAH, ON ORACH CHAYIM 329:4. An idiot can even sue for injuries inflicted on him. TALMUD, *Baba Kamma* 8:4. Again, the killing of even a dying person is culpable as murder. MAIMONIDES, HIL. ROTZACH 2:7.

<sup>28</sup> ELEZAR FLECKELES, RESPONSA TESHUVAH ME'AHAVA, pt. 1, no. 53. See ZIMMELS, MAGICIANS, THEOLOGIANS AND DOCTORS 72 (1952).

<sup>29</sup> SEPHER CHASIDIM no. 186 (Zitomir ed. 1879).

### C. Arguments Against the Destruction of Defectives

Based on these principles and precedents, present-day rabbis are unanimous in condemning abortion, feticide, or infanticide to eliminate a crippled being, before or after birth, as an unconscionable attack on the sanctity of life. Further considerations leading to this conclusion include the arguments that, conversely, the saving of an unborn child's life justifies the violation of the Sabbath (permitted only when human life is at stake);<sup>30</sup> that such a child is not in "pursuit" of the mother, thus excluding an important condition for the right to perform a therapeutic abortion;<sup>31</sup> that the interruption of a pregnancy is not without hazards to the mother, particularly the danger of rendering her sterile and the increase in maternal mortality resulting from abortions, as attested by physicians;<sup>32</sup> and that the killing of an embryo, while technically not murder due to a "scriptural decree," yet constitutes "an appurtenance of murder" because "in matters affecting human life we also consider that which is going to be [a human being] without any further action, following the laws of nature."<sup>33</sup>

These considerations would be valid even if it were known for certain that the expected child would be born deformed. The almost invariable doubts about such a contingency only strengthen the objections to abortion in these circumstances, especially in view of the Talmudic maxim that in matters of life and death the usual majority rule does not operate; any chance, however slim, that a life may be saved must always be given the benefit of the doubt.<sup>34</sup>

A similar attitude was adopted in a recent rabbinical article<sup>35</sup> on the celebrated trial in Liege (Belgium) in which a mother and others were acquitted of guilt for the confessed killing of a thalidomide baby. The author denounces abortion for such a purpose as well as the Liege verdict. "The sole legitimate grounds for killing a fetus are the urgent needs of the mother and her healing, whereas in these circumstances the mother's efforts to have the child aborted

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<sup>30</sup> See BACHARACH, *op. cit. supra* note 21. But there is some rabbinical dispute on this opinion. See JAKOBOVITS, *op. cit. supra* note 18, at 279 n.38.

<sup>31</sup> See text accompanying notes 16-18 *supra*.

<sup>32</sup> UNTERMAN, 6 NO'AM (Jerusalem) 1 (1963). Unterman, Chief Rabbi of Israel, refers to medical evidence given him by Professor Asherman, Director of the Maternity Department of the Municipal Hadassah Hospital in Tel Aviv. See also note 43 *infra*.

<sup>33</sup> *Ibid.*

<sup>34</sup> TALMUD, YOMA 84; SHULCHAN ARUKH, *Orach Chayim*, 329:2. See also note 45 *infra*.

<sup>35</sup> ZWEIG, 7 NO'AM (Jerusalem) 36 (1964).

are based on self-love and plain egotism, wrapped in a cloak of compassion for this unfortunate creature, and this cannot be called a necessity for the mother at all."<sup>36</sup>

#### D. *Psychological Considerations*

On the other hand, Jewish law would consider a grave psychological hazard to the mother as no less weighty a reason for an abortion than a physical threat. On these grounds a seventeenth century *responsum* permitted an abortion in a case where it was feared the mother would otherwise suffer an attack of hysteria imperiling her life.<sup>37</sup> If it is genuinely feared that a continued pregnancy and eventual birth under these conditions might have such debilitating effects on the mother as to present a danger to her own life or the life of another by suicidal or violent tendencies, however remote this danger may be, a therapeutic abortion may be indicated with the same justification as for other medical reasons. But this fear would have to be very real, attested to by the most competent psychiatric opinion, and based on previous experiences of mental imbalance.<sup>38</sup>

## II. MORAL AND SOCIAL CONSIDERATIONS

The legalistic structure of these conclusions must be viewed in the context of Judaism's moral philosophy and against the background of contemporary social conditions.

### A. *The "Cruelty" of the Abortion Laws*

At the outset, it is essential, in order to arrive at an objective judgment, to disabuse one's mind of the often one-sided, if not grossly partisan, arguments in the popular (and sometimes medical) presentations of the issues involved. A hue and cry is raised about the "cruelty" of the present abortion laws.<sup>39</sup> Harrowing scenes are depicted, in the most lurid colors, of girls and married women selling their honor and their fortunes, exposing themselves to mayhem and death at the hands of some greedy and ill-qualified abortionist in a dark, unhygienic back-alley, and facing the prospect of being

<sup>36</sup> *Ibid.*

<sup>37</sup> MIZRACHI, RESPONSA P'RI HA'ARETZ, *Yoreh De'ab* no. 21.

<sup>38</sup> UNTERMAN, HATORAH VEHAMEDINAH 25, 29 (4th ser. 1952); FRIEDMAN, RESPONSA NETZER MATA'AI pt. 1, no. 8; FEINSTEIN, RESPONSA IGROTH MOSHEH *Orach Chayim* pt. 4, no. 88. These authorities permit the violation of the Sabbath for the sake of psychiatric patients.

<sup>39</sup> See editorial in N.Y. Times, April 7, 1965, p. 42, col. 2, commenting on CBS TV program of April 5, 1965; See also editorial in N.Y. Times, Feb. 13, 1965, p. 20, col. 2.

hunted and haunted like criminals for the rest of their lives — all because safe, honorable, and reasonably priced methods to achieve the same ends are barred from hospitals and licensed physicians' offices by our "barbaric" statutes. Equally distressing are the accounts and pictures of pitifully deformed children born because our "antiquated" abortion laws did not permit us to forestall their and their parents' misfortune. And then there are, of course, always heart-strings or sympathy to be pulled by the sight of "unwanted" children taxing the patience and resources of parents already "burdened" with too large a brood.

There is, inevitably, some element of cruelty in most laws. For a person who has spent his last cent before the tax-bill arrives, the income tax laws are unquestionably "cruel"; and to a man passionately in love with a married woman the adultery laws must appear "barbaric." Even more universally "harsh" are the military draft regulations which expose young men to acute danger and their families to great anguish and hardship.

### *B. Moral Standards in Society*

All these resultant "cruelties" are surely no valid reason for changing those laws. No civilized society could survive without laws which occasionally spell some suffering for individuals. Nor can any public moral standards be maintained without strictly enforced regulations calling for extreme restraints and sacrifices in some cases. If the criterion for the legitimacy of laws were to be the complete absence of "cruel" effects, we should abolish or drastically liberalize not only our abortion laws, but our statutes on marriage, narcotics, homosexuality, suicide, euthanasia, and numerous other laws which inevitably result in personal anguish from time to time.

So far our reasoning, which could be supported by any number of references to Jewish tradition, has merely sought to demolish the "cruelty" factor as a valid argument per se by which to judge the justice or injustice of any law. It still has to be demonstrated that the restrictions on abortion are morally sound enough and sufficiently important to the public welfare to outweigh the consequential hardships in individual cases.

### *C. The Hidden Side of the Problem*

What the fuming editorials and harrowing documentaries on the abortion problem do not show are pictures of radiant mothers

fondling perfectly healthy children who would never have been alive if their parents had been permitted to resort to abortion in moments of despair. There are no statistics on the contributions to society of outstanding men and women who would never have been born had the abortion laws been more liberal. Nor is it known how many "unwanted" children eventually turn out to be the sunshine of their families.

A Jewish moralistic work of the twelfth century relates the following deeply significant story:

A person constantly said that, having already a son and a daughter, he was anxious lest his wife become pregnant again. For he was not rich and asked how would he find sufficient sustenance. Said a sage to him: "When a child is born, the Holy One, blessed be He, provides the milk beforehand in the mother's breast; therefore, do not worry." But he did not accept the wise man's words, and he continued to fret. Then a son was born to him. After a while, the child became ill, and the father turned to the sage: "Pray for my son that he shall live." Exclaimed the sage: "To you applies the biblical verse: 'Suffer not thy mouth to bring thy flesh into guilt.'"<sup>40</sup>

Some children may be born unwanted, but there are no unwanted children aged five or ten years.

#### D. *Abortion Statistics*

There are, then — even from the purely utilitarian viewpoint of "cruelty" *versus* "happiness" or "usefulness" — two sides to this problem, and not just one as pretended by those agitating for reform. There are the admittedly tragic cases of maternal indignities and deaths as well as of congenital deformities resulting from our restrictive abortion laws. But, on the other hand, there are the countless happy children and useful citizens whose births equally result from these laws. What is the ratio between these two categories?

If one considers that even with the existing, rigid laws there are well over one million abortions performed annually in the United States (most of them by reputable physicians), it stands to reason that a relaxation of these laws would raise the abortion rate by many millions. In Hungary, for instance, where abortions were legalized in 1956, state physicians have terminated about two million pregnancies since then (in a population of ten million), amounting to three abortions for every live birth.<sup>41</sup> Even allowing

<sup>40</sup> SEPHER CHASIDIM, *op. cit. supra* note 29, no. 520.

<sup>41</sup> See N.Y. Times, Oct. 28, 1965, p. 14, col. 3.

for the more widespread recourse to birth control and for some stricter controls in the proposed abortion laws in this country, there can be little doubt that the American abortion rate would soar to at least two or three times the present number (probably a gross underestimate) if the proposed changes were adopted.

Out of the three million pregnancies that would probably be terminated every year, no more than 30,000<sup>42</sup> would have resulted in deformed births, while the remaining 99 per cent would have been healthy children, had their mothers been allowed or forced to carry them to term. Subtract from this latter figure the number of mothers whose hazards would be minimized if they did not feel compelled to resort to clandestine operations, and one would still have only a relatively minute proportion of abortions that would be fully justified for the reasons advanced by the advocates of liberalization. Well over 95 per cent, if not 98 per cent, of all abortions would eliminate normal children of healthy mothers. In fact, as for the mothers, the increased recourse to abortion (even if performed by qualified physicians), far from reducing hazards, would increase them, since such operations leave at least five per cent of the women sterile,<sup>43</sup> not to mention the rise in the resultant mortality rate. One can certainly ask if the extremely limited reduction in the number of malformed children and maternal mortality risks really justify the annual wholesale destruction of three million germinating, healthy lives, most of them potentially happy and useful citizens, especially in a country as under-populated as America (compared to Europe, for instance, which commands far fewer natural resources).

### *E. The Individual's Claim to Life*

These numerical facts alone make nonsense of the argument for more and easier abortions. But moral norms cannot be determined by numbers. In the Jewish view, "he who saves one life is as if he

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<sup>42</sup> This is the number of defective births resulting from German measles anticipated for 1965 in the United States. To this number may have to be added anticipated abnormalities for other reasons, but from it would have to be subtracted the considerably larger number of cases in which affected mothers would not resort to abortion, either because of their opposition to abortion or because the condition is undetected during pregnancy. The total of abortions fully justified by actual (not suspected) fetal defects due to factors that could be recognized during pregnancy could thus scarcely exceed 30,000.

<sup>43</sup> See N.Y. Times report, note 41 *supra*.

saved an entire world";<sup>44</sup> one human life is as precious as a million lives, for each is infinite in value. Hence, even if the ratio were reversed, and there was only a one per cent chance that the child to be aborted would be normal — in fact the chances invariably exceed 50 per cent in any given case<sup>45</sup> — the consideration for that one child in favor of life would outweigh any counter-indication for the other 99 per cent.

But, in truth, such a counter-indication, too, is founded on fallacious premises. Assuming one were 100 per cent certain (perhaps by radiological evidence) that a child would be born deformed, could this affect its claim to life? Any line to be drawn between normal and abnormal beings determining their right to live would have to be altogether arbitrary. Would grave defect in one limb or in two limbs, or an anticipated sub-normal intelligence quotient of seventy-five or fifty make the capital difference between one who is entitled to live and one who is not? And if the absence of two limbs deprives a person of his claim to life, what about one who loses two limbs in an accident? By what moral reasoning can such a defect be a lesser cause for denying the right to live than a similar congenital abnormality? Surely life-and-death verdicts cannot be based on such tenuous distinctions.

#### F. *The Obligations of Society*

The birth of a physically or mentally maldeveloped child may be an immense tragedy in a family, just as a crippling accident or a lingering illness striking a family member later in life may be. But one cannot purchase the relief from such misfortunes at the cost of life itself. So long as the sanctity of life is recognized as inviolable, the cure to suffering cannot be abortion before birth, any more than murder (whether in the form of euthanasia or of suicide) after birth. The only legitimate relief in such cases is for society to assume the burdens which the individual family can no longer bear. Since society is the main beneficiary of restrictive

<sup>44</sup> TALMUD, *Sanhedrin* 4:5. For this reason, Jewish law forbids the surrender of a single life even if any number of other lives may thereby be saved. MAIMONIDES, *HIL. YESODEI HATORAH* 5:5.

<sup>45</sup> Estimates of the rate of abnormalities resulting from German measles have varied widely, but none of them approaches 50%. The rate among live-born babies was recently found to be under 10%, and "one can conclude [from various studies] that the incidences of congenital malformations reported by early workers are fantastically high and incorrect. The recommendation of therapeutic abortion based on those rates is not medically justified." Greenberg, Pellitteri & Barton, *Frequency of Defects in Infants Whose Mothers Had Rubella During Pregnancy*, 165 *A.M.A.J.* 675, 678 (1957). Cf. note 26 *supra*.

public laws on abortion (or homicide), it must in turn also pay the price sometimes exacted by these laws in the isolated cases demanding such a price.

Just as the state holds itself responsible for the support of families bereaved by the death of soldiers fallen in the defense of their country, it ought to provide for incapacitated people born and kept alive in the defense of public moral standards. The community is morally bound to relieve affected families of any financial or emotional stress they cannot reasonably bear, either by accepting the complete care of defective children in public institutions, or by supplying medical and educational subsidies to ensure that such families do not suffer any unfair economic disadvantages from their misfortune.

### G. *Illegitimate Children*

Similar considerations apply to children conceived by rape. The circumstances of such a conception cannot have any bearing on the child's title to life, and in the absence of any well-grounded challenge to this title there cannot be any moral justification for an abortion. Once again, the burden rests with society to relieve an innocent mother (if she so desires) from the consequences of an unprovoked assault upon her virtue if the assailant cannot be found and forced to discharge this responsibility to his child.

In the case of pregnancies resulting from incestuous, adulterous, or otherwise illegitimate relations (which the mother did not resist), there are additional considerations militating against any sanction of abortion. Jewish law not only puts an extreme penalty on incest and adultery, but also imposes fearful disabilities on the products of such unions. It brands these relations as capital crimes,<sup>46</sup> and it debars children born under these conditions from marriage with anyone except their like.<sup>47</sup>

(1) *The Deterrent Effect.*—Why exact such a price from innocent children for the sins of their parents? The answer is simple: to serve as a powerful deterrent to such hideous crimes. The would-be partners to any such illicit sexual relations are to be taught that their momentary pleasure would be fraught with the most disastrous consequences for any children they might conceive. Through this knowledge they are to recoil from the very thought of incest or adul-

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<sup>46</sup> See *Leviticus* 20:10-20.

<sup>47</sup> See *Deuteronomy* 23:3, and Jewish commentaries.



tery with the same horror as they would from contemplating murder as a means to enjoyment or personal benefit. Murder is comparatively rare in civilized society for the very reason that the dreadful consequences have evoked this horror of the crime in the public conscience. Incest and adultery, in the Jewish view, are no lesser crimes,<sup>48</sup> and they require the same horror as an effective deterrent.

(2) *Parental Responsibility*.—Why create this deterrent by visiting the sins of the parents on their innocent children? First, because there is no other way to expose an offense committed in private and usually beyond the chance of detection. But, above all, this responsibility of parents for the fate of their children is an inexorable necessity in the generation of human life; it is dictated by the law of nature no less than by the moral law. If a careless mother drops her baby and thereby causes a permanent brain injury to the child, or if a syphilitic father irresponsibly transmits his disease to his offspring before birth, or if parents are negligent in the education of their children, all these children may innocently suffer and for the rest of their lives expiate the sins of their parents. This is what must be if parental responsibility is to be taken seriously. The fear that such catastrophic consequences ensue from a surrender to temptation or from carelessness will help prevent the conception of grossly disadvantaged children or their physical or mental mutilation after birth.

#### *H. Public Standards v. Individual Aberration*

In line with this reasoning, Jewish law never condones the relaxation of public moral standards for the sake of saving recalcitrant individuals from even mortal offenses. A celebrated Jewish sage and philosopher of the fifteenth century, in connection with a question submitted to his judgment, averred that it was always wrong for a community to acquiesce in the slightest evil, however much it was hoped thereby to prevent far worse excesses by individuals. The problem he faced arose out of a suggestion that brothels for single people be tolerated as long as such publicly controlled institutions would reduce or eliminate the capital crime of marital faithlessness then rampant. His unequivocal answer was: It is surely far better that individuals should commit the worst offenses and expose themselves

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<sup>48</sup> Compare the juxtaposition of murder and adultery in the Ten Commandments. *Exodus* 20:13.

to the gravest penalties than publicly to promote the slightest compromise with the moral law.<sup>49</sup>

Rigid abortion laws, ruling out the *post facto* "correction" of rash acts, compel people to think twice *before* they recklessly embark on illicit or irresponsible adventures liable to inflict lifelong suffering or infamy on their progeny. To eliminate the scourge of illegitimate children more self-discipline to prevent their conception is required, not more freedom to destroy them in the womb. For each illegitimate child born because the abortion laws are strict, there may be ten or more such children *not* conceived because these laws are strict.

The exercise of man's procreative faculties, making him (in the phrase of the Talmud) "a partner with God in creation," is man's greatest privilege and gravest responsibility. The rights and obligations implicit in the generation of human life must be evenly balanced if man is not to degenerate into an addict of lust and a moral parasite infesting the moral organism of society. Liberal abortion laws would upset that balance by facilitating sexual indulgences without insisting on corresponding responsibilities.

### I. *Therapeutic Abortions*

This leaves only the concern for the mother's safety as a valid argument in favor of abortions. In the view of Judaism, all human rights, and their priorities, derive solely from their conferment upon man by his Creator. By this criterion, as defined in the Bible, the rights of the mother and her unborn child are distinctly unequal, since the capital guilt of murder takes effect only if the victim was a born and viable person. This recognition does not imply that the destruction of a fetus is not a very grave offense against the sanctity of human life, but only that it is not technically murder. Jewish law makes a similar distinction in regard to the killing of inviable adults. While the killing of a person who already suffered from a fatal injury (from other than natural causes) is not actionable as murder,<sup>50</sup> the killer is morally guilty of a mortal offense.<sup>51</sup>

This inequality, then, is weighty enough only to warrant the sacrifice of the unborn child if the pregnancy otherwise poses a threat to the mother's life. Indeed, the Jewish concern for the

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<sup>49</sup> ARAMA, AKEDATH YITZCHAK ch. 20, at 41 (b) (ed. Frankfurt a/o 1785).

<sup>50</sup> TALMUD, *Sanhedrin* 78a.

<sup>51</sup> Maimonides acquits such a murderer only before "a human court." HIL. ROTZ'ACH 2:7-8. Cf. note 4 *supra*.

mother is so great that a gravid woman sentenced to death<sup>52</sup> must not be subjected to the ordeal of suspense to await the delivery of her child.<sup>53</sup> (Jewish sources brand any delay in the execution, once it is finally decreed, as "the perversion of justice" *par excellence*,<sup>54</sup> since the criminal is sentenced to die, not to suffer.)

Such a threat to the mother need not be either immediate or absolutely certain. Even a remote risk of life invokes all the life-saving concessions of Jewish law,<sup>55</sup> provided the fear of such a risk is genuine and confirmed by the most competent medical opinions. Hence, Jewish law would regard it as an indefensible desecration of human life to allow a mother to perish in order to save her unborn child.

#### IV. CONCLUSION

This review may be fittingly concluded with a reference to the very first Jewish statement on deliberate abortion. Commenting on the *Septuagint* version of the above-quoted *Exodus* passage,<sup>56</sup> the Alexandrian-Jewish philosopher, Philo, at the beginning of the Current Era declared that the attacker must die if the fruit he caused to be lost was already "shaped and all the limbs had their proper qualities, for that which answers to this description is a human being . . . like a statue lying in a studio requiring nothing more than to be conveyed outside."<sup>57</sup> The legal conclusion of this statement, reflecting Hellenistic rather than Jewish influence, may vary from the letter of Jewish law; but its reasoning certainly echoes the spirit of Jewish law. The analogy may be more meaningful than Philo could have intended or foreseen. A classic statue by a supreme master is no less priceless for being made defective, even with an arm or a leg missing. The destruction of such a treasure can be warranted only by the superior worth of preserving a living human being.

<sup>52</sup> In practice Jewish law virtually abolished capital punishment thousands of years ago, as it insisted on numerous conditions whose fulfillment was almost impossible (such as the presence of, and prior warning by, two eye-witnesses).

<sup>53</sup> TALMUD, *Eraḥbin* 1:4; TALMUD, TOSAPHOTH, *Eraḥbin* 7a.

<sup>54</sup> ETHICS OF THE FATHERS 5:8.

<sup>55</sup> SHULCHAN ARUKH, *Orach Chayim* 329:2-4.

<sup>56</sup> See text accompanying note 3 *supra*.

<sup>57</sup> DE SPEC. LEGIBUS 3:108-10, 117-18; DE VIRTUT. 138. But in the latter two passages, Philo himself qualified his statement by calling only a person who killed a child already born "indubitably a murderer."