A Jewish physician and a rabbi discuss prevailing Jewish and Catholic beliefs which affect decisions about prenatal diagnosis as well as abortion.

Rome Decrees Abortion
VATICAN CITY — The Roman Catholic Church condemned the abortion of unborn babies showing malformation and deficiencies as pseudo-humanistic and a breach of medical ethics. "Science and medicine have allowed us today to discover in the fetus some defects which could give rise to future malformations and deficiencies. The impossibility at present of providing a remedy for them by medical means has led some to propose and even practice the suppression of the fetus. This conduct springs from an attitude of pseudo-humanism which compromises the ethical order and objective values and must be rejected by upright consciences," the Vatican said in a document for the International Year of Disabled Persons. This document reflecting Pope John Paul's views about the sanctity of human life, said the quality of a society and civilization would be measured by the respect shown to the weakest of its members.

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Recent advances in prenatal diagnosis have generated a moral crisis for many people. Important technological applications have created options which only a few decades ago would have been regarded as science fiction. While physicians now have the ability to diagnose and exercise in utero control over some diseases, unfortunately they are unable to treat all severe birth defects which can be diagnosed prenatally at this time. Scientists, humanists, and lay persons are becoming increasingly aware of the religious, ethical, and moral issues which have arisen from medicine's enhanced ability to control life processes or, in some cases, terminate pregnancies.

A significant body of literature reflecting Jewish scholarship in the field of bioethics has been published.

Since Judaism is not homogeneous, various approaches and interpretations of Jewish law (halakhah) have developed. We will attempt to include here views of the two liberal positions, including Reform Judaism which does not accept the binding authority of the halakhah, and Conservative Judaism which accepts the authority of the halakhah but views it as the product of a dynamic evolutionary process; ie, Conservative Judaism tends toward a liberal construction of the law. We shall also discuss the views of Orthodox Judaism which incline toward a literal and strictly constructionist approach. In so doing we hope to convey a conspectus of Jewish attitudes towards prenatal diagnosis and selective abortion of defective fetuses. Before discussing these topics we will provide some background material concerning Jewish law, Jewish beliefs concerning ensoulment (entry of the soul into the fetus), and therapeutic abortion. In several instances comparison with prevailing Catholic attitudes will be made.

Background
The basis of Jewish law is the Torah, or "teaching." This is best understood as having two parts. The first is the written Torah which consists of the five Books of Moses or Pentateuch—the first five books of the Bible. The second part of the Torah is the oral Torah which consists of the accompanying expositions and interpretations of the written Torah which are contained in the Talmud and later rabbinic literature. The Talmud, compiled and edited by the fifth century A.D., remains the basic source of all legal decisions affecting a Jew's existence. Traditionists accept the view that the Talmud was communicated to Moses verbally as a supplement to the written Torah. Liberal interpreters view the Talmud as the product of the post-Biblical experience of rabbinic exposition in applying the principles of the written Torah to a changing community.

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In a sense, the written Torah can be compared to the Constitution of the United States. It is the skeleton of the body of Jewish law as the Constitution is the skeleton of the body of American civil law. And, just as the huge number of decisions of the United States courts (case law) puts flesh on the skeleton of the Constitution, so do Talmudic and later rabbinic law put flesh on the skeleton of the written Torah.

In Jewish law the fetus is considered to be part of its mother rather than an independent entity, but this designation says nothing about the right of abortion. Somewhat more relevant is the factor of “doubtful viability” associated with the embryo. The fetus is not considered to be a viable, living human being until 30 days after its birth, unless a full-term pregnancy is definitely known to have been completed. Germane as this information is to the question of abortion, it is hardly sufficient to determine the morality of such action. It merely defines the legal status of the fetus and tells us that according to Jewish (and Roman) law, the fetus has no legal rights of its own.

More relevant to our discussion concerning the morality of abortion is the Jewish legal attitude to feticide as compared to homicide or infanticide. The law of homicide in the Torah, in one of its several formulations (Exodus 21:12) reads, “He who smites a man...” According to the Talmud citing another text (Lev. 24:17), the passage from Exodus includes any human person including a one-day-old-child (with the presumption in favor of a full-term pregnancy); but is taken to exclude the fetus because the fetus is not a person until it is born.

Exodus 21:22 provides another scriptural text for denying capital crime status to feticide in Jewish law:

If men strive (fight), and wound a pregnant woman so that her fruit be expelled, but no harm befall (her), then shall he be fined as her husband shall assess, and the matter placed before judges. But if harm befall (her, i.e., she is killed), then shalt thou give life for life. While all rabbis, past and present, treat abortion in a most serious manner, the halakhah tells us that according to Jewish and Roman law, the fetus has no legal rights of its own.

The prevailing rabbinic outlook states that the time of ensoulment and the nature of that soul belong to those “secrets of God.” They have no bearing on the practical legal issues of feticide versus homicide. Clearly, some kind of “life” other than human personhood is presupposed for the fetus. The teaching of the Pythagorean Greeks that the soul enters the body at conception prevailed in Christianity by way of the third century Church Father Tertullian, and was confirmed by St. Gregory of Nyssa in the fourth century. In the fifth century Augustine introduced the distinction, based on the Septuagint, whereby only the killing of a “formed” fetus is homicide and, consequently, that only such a fetus can be said to have a soul.

Although St. Basil (d. 329) had condemned abortion at any stage, the Justinian Code in the sixth century exempted abortions before 40 days from penalty. Gratian’s Decretum of 1140, a ruling by Pope Innocent III (c. 1216), and the Decretalia of Pope Gregory IX (c. 1241) all reaffirmed the difference between “animated” (ensouled) fetuses and those younger than that. The bull Effraenatum of Pope Sixtus V in 1588 did away with the 40-day-rule and declared abortion murder at any stage on penalty of excommunication, even for those who counseled it. His decree was rescinded less than three years later by Pope Gregory XIV. The relaxation of penalties lasted until 1869, when Pope Pius IX re instituted the doctrine and the sanctions of Sixtus V. This decree of 1869, further affirmed in the current code of Canon Law which came into force in 1918, is now the reigning doctrine of Catholicism. The original Pythagorean view and the teaching of Effraenatum have thus prevailed.

More important than the time of ensoulment is another belief, namely that the soul is in need of baptism for its salvation, which follows, in turn, from the doctrine of original sin. In his esteemed treatise, De Fide, written in the sixth century, St. Fulgentius says:

It is to be believed beyond doubt that not only men who are come to the use of reason, but infants whether they die in their mother’s womb, or after they are born, without baptism in the name of the Father, Son, and Holy Ghost, are punished with everlasting punishment in eternal fire, because though they have no actual sin of their own, yet they carry along with them the condemnation of original sin from their first conception and birth.

Augustine had likewise taught that the embryo is included among those whose souls were condemned to eternal perdition if they died unbaptized. Aquinas later suggested the possibility of salvation for an infant who did not survive until birth, but the original teaching continued its hold. The result was that abortion came to be considered worse than murder. The death of a baptized mother is only the beginning of an eternity of salvation, while the death of an unbaptized infant is the beginning of an eternity of perdition.

All of this represents a serious concern for the immortality of the soul of the fetus. Granted its entry at any given time, the concern now is not only that it not be deprived of life in this world but that it not be denied eternal salvation in the next. While it must be said that Catholicism’s position on abortion has contributed to
the moral consciousness of western civilization in this regard and has succeeded in sensitizing humanity to a greater reverence for life, it is undoubtedly true that the Catholic position on the issue is the product of the acceptance of theological postulates which Judaism cannot share, including the dogma of original sin and the need to be baptized to achieve eternal salvation.

A Jewish Perspective

All Jews are admonished not to treat abortion lightly. Abortion is a heavy responsibility for the one who asks for it and the individual who is asked. Except when extremating circumstances exist, abortion is prohibited by Jewish law despite the fact that feticide is neither murder nor a capital offense. There are certain maternal or fetal circumstances, however, permitting termination of pregnancy. Jewish legal authorities differ on the nature of those indications.

The main Talmudic source for this question is as follows:

If a woman is having difficulty giving birth, it is permitted to dismember the child inside her womb and take it out limb by limb because her life takes precedence. If the greater part of the child has come out it must not be touched, because one life must not be taken to save another. (Ahalot 7:6)

Rashi, a renowned Hebrew sage of the Middle Ages, comments on the above passage:

For as long as it did not come out into the world it is not called a living thing and it is permissible to take its life in order to save another. Once the head has come forth it may not be harmed because it is considered born, and one life may not be taken to save another.

Thus, according to Rashi, the reason that it is permitted to take the life of the unborn child is that the fetus is not considered a living thing and, hence, taking its life cannot be called murder.

From Moses Maimonides it appears that the reason the "life" of the unborn child may be taken when it endangers the life of the mother is based on the law of the "pursuer." In his code, Maimonides says:

This is, moreover, a negative commandment, that we have no pity on the life of a pursuer. Consequently the sages have ruled that if a woman with child is having difficulties in giving birth, the child inside her may be taken out, either by drugs or surgery, because it is regarded as one pursuing her and trying to kill her. But once its head has appeared, it must not be touched, for we may not set aside one human life to save another human life, and what is happening is the course of nature. (Code of Maimonides, "Murder and the Preservation of Life," 1:9)

There is, then, a clear distinction between the reasoning of Rashi and that of Maimonides. According to Rashi, the embryo is not considered a living being and therefore the life of the mother takes precedence. According to Maimonides, the life of the mother takes precedence because the fetus is in the position of "pursuer." From this difference in interpretation, different legal decisions have arisen. According to Maimonides, we should permit abortion only where there is clear danger to the life of the mother. According to Rashi, there might be other adequate reasons besides a threat to the mother's life.

When there is clear, life-threatening danger posed to the mother by continuation of the pregnancy, Jewish law is clear and unequivocal in stating that a therapeutic abortion not only may be performed but must be performed. The Talmud requires a therapeutic abortion to save the mother's life because she is considered to be a person while the fetus, up until the time of the birth, is not. In circumstances where the pregnancy is detrimental to the mother's health, although not life threatening, many halakhic authorities argue that there is justification for permitting termination of the pregnancy. Such circumstances include mental health problems since these have been definitely equated with physical health risk; thus a woman who is in danger of losing her mental health unless the pregnancy is interrupted would qualify according to this view.

Most Reform and Conservative rabbis and some Orthodox rabbis would agree to this. [Bleich, 1968; Rosner, 1968; Klein, 1979]. If there is a substantial risk that the fetus would be born with a deformity that would cause it to suffer severely, some authorities have said that it is permitted to terminate the pregnancy within the first 3 months [Klein, 1979]. According to this view, in circumstances where it has been proven conclusively (by prenatal diagnosis or amnioncentesis) that the fetus will be afflicted with a disorder such as Tay-Sachs disease, it is permitted to perform an abortion up to the 24th week of pregnancy [Rosner, 1976; Steinberg, 1980].

It should be noted that the opinions expressed here are controversial. We think that the majority of Reform and Conservative rabbis and many Orthodox rabbis in the United States would support the position for prenatal testing and abortion of defective fetuses depending on the degree of affliction in the fetus and the mother's physical and mental health. In Jewish families, therefore, we think that such decisions should be made by the woman and her husband with input from her rabbi and physician.

We realize that abortion of defective fetuses is an unfortunate but necessary option for some families. The ultimate goal of much research in birth defects is primary prevention which will obviate the need for selective abortion. Until the time, however, when all severe birth defect syndromes can be prevented, such options must be made available to Jewish families who want them.

References
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