

JEWISH RITUAL PRACTICE FOLLOWING A STILLBIRTH

Rabbi Stephanie Dickstein

This paper was approved on March 13, 1996, by a vote of twelve in favor and four abstentions (12-0-4). Voting in favor: Rabbis Kassel Abelson, Stephanie Dickstein, Elliot N. Dorff, Shoshana Gelfand, Myron S. Geller, Arnold M. Goodman, Susan Grossman, Judah Kagen, Vernon H. Kurtz, Aaron L. Mackler, Lionel E. Moses, and Gordon Tucker. Abstaining: Rabbis Ben Zion Bergman, Mayer Rabinowitz, Gerald Skolnik, and Elie Kaplan Spitz.

The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.

שאלה

What should Jewish ritual practice be following a stillbirth?

תשובה

Background

The body of halakhah associated with death and mourning is one of the richest and most admired areas of all Jewish law. Halakhah defines a wealth of ritual responses which teach us how to treat the body with respect, how the mourners should behave, and it specifies the critical role of the community. Until recently, however, those who face the loss of a pregnancy or a stillbirth, which is closely related to death, or the death of a newborn, have not had a Jewish way of actively responding to the tragedy which they confront. In fact, one of the books on mourning which is most used by laypeople states, “A life duration of more than thirty days establishes a human being as a viable person. If a child dies before that time, he is considered not to have lived at all. And no mourning practices are observed.”¹ In traditional practice, there is only the burial of the body in an unmarked grave in a special section of the cemetery. While this is, in fact, not the only response to the death of a newborn found in halakhic literature, the idea that Judaism says “nothing happened” is what all Jews “know” as Jewish law. Anonymous burial has also been the only ritual act in the case of a miscarriage after

¹ Maurice Lamm, *The Jewish Way in Death and Mourning* (New York: Jonathan David Publishers, 1969), p. 83.

the fifth month of pregnancy and in the case of a stillbirth, there has been no ritual response to an earlier miscarriage.

During the past two decades, there has been an increasing interest in developing Jewish rituals for dealing with pregnancy loss and infant death. This is most likely a result of changing expectations of and attitudes towards pregnancy, as well as one of the areas of Jewish life which has opened up as women have become more involved in the process of Jewish law. Traditional rituals are being applied to these losses, and new rituals are being created.

The Committee on Jewish Law and Standards has undertaken a process of developing the halakhah in this area. In 1991, the CJLS approved a *תשובה* by Rabbi Debra Reed Blank on a ritual response to miscarriage. That paper advocates considering a miscarriage in the category of illness, with both parents treated as we would someone who is ill, with some additional practices related directly to the loss of an incomplete pregnancy. In 1992, the CJLS accepted a *תשובה* by Rabbi Stephanie Dickstein, "Jewish Ritual Practice Following the Death of an Infant Who Lives Less Than Thirty-One Days." That paper obligated parents and the community for both a burial service and full mourning rituals.

Neither of those papers provides a satisfactory response to stillbirth. In 1987 the CJLS approved a *תשובה* by Rabbi Isidoro Aizenberg, "Treatment of the Loss of a Fetus through Miscarriage." Rabbi Aizenberg's paper restates the traditional halakhah which requires burial of a fetus after the fifth month of gestation. He advises rabbis to respond sensitively to the pain of the parents and permits the rabbi to accompany parents to the burial and to offer words of comfort. I believe that while Rabbi Aizenberg's *תשובה* was an important first step in the area of stillbirth, it is not a sufficient response, particularly because it lacks any communal component.

This paper presents an alternative halakhic response to stillbirth. It takes into account the experiences of rabbis and bereaved parents with whom I have shared this work since I became involved with it a decade ago. This paper should be read in the context of the *תשבות* referred to above, which contain full discussions of the halakhic material related to pregnancy loss and neo-natal death. For the purposes of this *תשובה*, stillbirth will be defined as the death of the fetus in utero after the point of viability, or during delivery before the emergence of the head or the majority of the body. The issue of viability will be discussed later in the paper.

Much of the halakhic material discussed below is in the category of *רשות* – permitted – rather than *חוoba* – required. The ritual response to stillbirth is still in the process of developing. The current status is the widespread belief among lay and professional Jews alike that there is no ritual response to stillbirth, and that, in fact, anything resembling mourning, or even the emotion of grieving, is forbidden by Jewish law. Therefore, the first purpose of this *תשובה* is to educate the community that there are Jewish rituals related to both the burial of a stillborn infant, and comforting the mourners and that the Jewish community should be involved. A second purpose is to suggest and recommend specific rituals. It is anticipated that this *תשובה* becomes more widely known, and rabbis engage families and their communities in these rituals, some or all of these rituals will become standard practice. At that time, we may reconsider the strength and flexibility of the legal language which is used in this *תשובה*.

From the point of view of Jewish law, a fetus or a stillbirth is a *נפל*, and is neither a baby nor an infant. Nevertheless, it is common practice to use the term "baby" in discussing the unborn fetus or the result of a stillbirth. As a legal paper, this *תשובה* will generally use the term "fetus" or "stillborn" when referring to the *נפל* both in utero and if it is stillborn. However, at times, when discussing the subjective experience of the family, the fetus will be referred to as a "baby."

The Need for a Specific Response to Stillbirth

Why does this loss, stillbirth, require a response which is different from either miscarriage or neo-natal death? From the vantage of traditional halakhah, a fetus is a **נְפָלָה**, not a human being, until its head or the majority of its body emerges from its mother's body. At the moment it is mostly emerged, it is considered a legal person. Prior to that moment, halakhah would make no distinction with regard to appropriate mourning practices between a fetus which dies after the onset of labor and an embryo. There are a very few halakhic distinctions among fetuses based on gestational age. The embryo that miscarries or is aborted less than forty days after conception has no halakhic consequences for the priestly status of any future children of its mother (**פרִיּוֹן הַבָּן**) would still be required for the firstborn son). A more mature fetus must be buried.

The halakhic reality of the “equality” of all fetuses is critical to our position on the permissibility of abortion. Until the moment that the baby emerges from its mother's body, its potential life never takes priority over the mother's life and health. Nothing in this paper should be read as challenging that position.² It is unlikely that in its halakhic development, the lack of mourning rituals in the event of a stillbirth had any relation to rabbinic concern for the permissibility of abortion. Today, however, this has become a serious issue. There is a concern that if we permit rituals resembling mourning for a stillborn fetus, we will be implying something about the human status of that fetus vis-à-vis the current American political debate on abortion. While we must be politically astute, we must also not allow our religious practice to be defined by those politics. A late term fetus is not considered by Jewish law to be a human being, yet it is a potential human being, with a degree of holiness associated with its human form and potentiality. At this late point in the pregnancy, Jewish law would only permit an abortion due to a serious threat to the mother, or a condition which dooms the fetus. When a mother has continued her pregnancy into the third trimester, and if the fetus must be aborted, there is a need for a ritual response. This issue will be discussed further at the end of the **תשובה**.

It is clear that contemporary rabbis and halakhic bodies cannot continue to treat a stillbirth as non-event, identical to the miscarriage of an embryo or a non-viable fetus. Rabbi Blank limits the applicability of her **תשובה** to twenty weeks, or some point shortly after that. Much of the medical/therapeutic literature dealing with pregnancy loss does not make a significant distinction between a stillbirth and the death of a newborn. In that literature, both losses are treated as the death of a baby. By the third trimester, the physical condition of the mother and the emotional state of the parents is similar in both cases. The mother whose infant is stillborn must still go through the exertion of labor and delivery. Afterwards, her body does not discern that the baby she delivered was not alive. She experiences the same hormonal changes and physical discomforts as her body returns to its non-pregnant state.

Psychologically, once a pregnancy reaches the third trimester, the parents assume that they will have a live baby. Even if the baby is born prematurely, and requires medical intervention, the expectation is that their child will come home. Today, medical technology enables the father and the mother to “see” their baby through ultrasound imagery (many carry around a “picture” of the fetus in utero), to hear the fetus' heart beat and to monitor its movements. Although the father's connection to the fetus is obviously quite different from the mother's, he, too, quite frequently “knows” and “interacts” with his baby.

By the third trimester, the community is also involved in the pregnancy, and awaits the arrival of the new baby. This involvement ranges from the intimate connection of grand-

² Papers on abortion which have been approved by the CJLS are found in *PCJLS* 80-85, pp. 3-40.

parents, aunts and uncles and siblings, and the plans for a **ברית מילה** or **שמחת בת** made with the rabbi, to the concerned interest of friends and co-workers, to the comments of mail carriers and dry cleaners. If the fetus dies, no new baby enters this community. This is not a private or secret happening. This is a public loss, one which parents and the community need to confront.

Stillbirth Requires a Ritual Response Related to אבלות

Underlying both the **תשובה** approved by the CJLS requiring full mounting for a baby which dies within a month following birth, and this **תשובה** on stillbirth, is that there has been a change in the halakhic presumption of infant viability. The traditional **מקיל** (lenient) position, which does not require engaging in the obligations of **אבלות** (formal mourning) for an infant, is based on the presumption that a significant number of even full term infants will not survive their first month. **אבלות** is considered to be **דרבן**, (of Rabbinic authority). In cases of **ספק** (doubt) in matters which are **דרבן**, we are **מקיל**. Given the high incidence of infant mortality in the past, the viability of a baby was doubtful until it survived for one month. Therefore, it became the custom not to require the rituals of mourning for an infant who died before the thirty-first day of life. The rituals of **אבלות** are a serious imposition on the life of the mourners. It is likely that in not obligating the parents of a dead infant to engage in **אבלות**, the rabbis were being compassionate. In times of high infant mortality, parents might otherwise be excessively burdened by repeatedly becoming **אבלים**. In contrast, burial is considered to be **דאוריתתא** (of Biblical authority). In cases which are **דאוריתתא**, when we deal with a situation which is **ספק**, we take the **מחמיר** (strict) position. The body of a fetus has a human form and was a potential life. Therefore, burial has been required for the body of a dead newborn infant or for a stillbirth. Today, due to improvements in medical technology, our presumption is that the vast majority of full term infants and a significant majority of premature infants born alive are viable and will survive past their first month. Therefore, the viability of an infant born alive is not a **ספק**, and we cannot be **מקיל** when a baby dies. Given the rarity and shock of stillbirth, or infant death, today it is cruel, rather than compassionate, not to permit parents to behave as **אבלים**.

Part of the debate surrounding the 1992 **תשובה** requiring mourning in the event of neonatal death concerned the question of whether it was appropriately applied to all infants born alive, who survive even the shortest time, no matter how premature the baby was. In a Dissenting Concurrence to my **תשובה** on neo-natal death, Rabbi Avram Reisner suggests that a gestational age of thirty/thirty-one weeks which is a time of more certain viability should mark the time at which **חייב** **אבלות** becomes a **חייב** (obligatory).³

From a logical point of view, some would claim that a stillbirth is, by definition, not a viable fetus, and discussions of the duration of a pregnancy and viability seem irrelevant. However, it is also possible to argue that up until the moment of its death in utero, the third trimester fetus is potentially viable. Recently, the CJLS approved a **תשובה**, "Peri and Neo-Natology: The Matter of Limiting Treatment" by Rabbi Avram Reisner.⁴ If, for some reason, that third trimester fetus had been delivered prior to its death, we would be obligated to treat it as we would any other human being, in accordance with Rabbi Reisner's paper.

Significant and relevant to this discussion is the section of his **תשובה** on peri-natal treatment in which Rabbi Reisner states that, "surgical and medical treatment of the fetus in utero at this late date after 31-32 weeks) should be encouraged." While such sur-

³ Rabbi Avram Israel Reisner, "Kim Li: A Dissenting Concurrence," below, pp. 450-451.

⁴ Rabbi Avram Israel Reisner, "Peri- and Neo-Natology: The Matter of Limiting Treatment," above, pp. 347-356.

gery is not required, due to the even minimal risk to the mother, it is permitted, despite the possible risk to the mother. “This is not to say that a late term fetus has attained the status of a full life, but that greater concern for the potential life of a fetus is in order.” In his conclusion, Rabbi Reisner states that, “The claim of the potential life of the fetus to our ministrations is greater upon attaining viability, that is after seven months (31-32 weeks by obstetrical count).” The issue of the viability of a fetus is a legitimate one in the eyes of the CJLS.

The issue of the presumption of viability is one which is critical to the discussion of stillbirth and neo-natal death. The other is the emotional connection of the parents to their child. The halakhic statement underlying my *תשובה* on neo-natal death is that of Mishnah Niddah 5:3.

תינוק בן יומ אחד, הרי הוא לאביו ולאמו כחתן שלם.

A one-day-old infant, if it dies, is considered to its father and mother like a full bridegroom.

The Talmud Yerushalmi in Kiddushin 4:11 extends this to the infant who dies after its head and the majority of its body emerges, and includes the relatives other than the parents among those who grieve. These statements recognize the emotional connection of the family with even the newest of newborns and the appropriateness of applying the strictures of **אבלות** to the family of a newborn who dies.

The case for a ritual response modeled on **אבלות** when parents and community are confronted with a stillbirth is a strong one. It is based on three considerations: (1) the recognition of the emotional connection that exists even with a fetus or very short-lived baby; (2) the appreciation of a fetus as a potential life (as it has always been in Jewish law); and, (3) the assumption of viability of the third trimester fetus due to current medical technology.

The Point at Which We Invoke Rituals to Mourn a Stillbirth

We have a halakhic system which prefers absolute to approximate times in deciding whether or not a particular halakhic obligation applies. The exact duration of a pregnancy which would define viability in relation to the rituals of mourning for a stillbirth remains problematic. Viability may depend as much on the technology available in a particular hospital as on the size or objective health of a particular baby or its mother’s health during pregnancy or delivery. Rabbi Reisner argues strongly, both in his *תשובה* on the limits of peri-natal and neo-natal treatment, and in his concurring dissent to the neo-natal mourning *תשובה*, that after thirty-one weeks by obstetrical count, we are dealing with more certain viability. In fact, as we had anticipated, the time of more certain viability has been moving earlier. Currently, there is an eighty-five percent survival rate for babies delivered at twenty-eight weeks gestation.⁵ However, there are still eight to ten weeks between the limits of Rabbi Blank’s *תשובה* on miscarriage and the thirty-one weeks Rabbi Reisner suggests or the most current expectations of viability. As much as I recognize the halakhic discomfort with leaving the decision of how to treat the loss of a fetus after twenty weeks but before 28-31 weeks up to an individual rabbi and family, I do not see a reasonable alternative. Both the responses to miscarriage and to stillbirth should be available during this gray area. Some families will want to avail themselves of the

⁵ Letter from Charles Paley, M.D., who is a Neonatologist and Attending Physician at St. Luke’s-Roosevelt Medical Center and on the faculty at Columbia University. 6 Sept. 1995. Dr. Paley informs me that in the medical literature, the term “viability” is used to indicate the time at which survival is first possible, currently at twenty-three weeks.

more public, mourning-like rituals for stillbirth. Others will prefer the model with more private ritual and with ביקור חולמים as the communal response. Rabbis and the community must respond to the particular situation of each family. Certainly in the later period of this gray area, burial is required, whichever ritual model the parents choose.

Ritual Responses to Stillbirth

It is the loss of a potential human life and the significant effect on the parents and their community which makes stillbirth a religious issue and requires a religious response. How can Judaism respond in a way which is sensitive and halakhically appropriate? We can find appropriate ways of responding to a stillbirth by applying rituals from the treatment of the חולה (a sick person), the treatment of a dead body, the treatment of an אבל (person mourning one of seven immediate relatives), and by using liturgy creatively and sensitively.

Since stillbirth is related to miscarriage, many of the recommendations from Rabbi Blank's paper apply here as well. The mother is a חולה in body and soul and the father is חולה in soul. A מירבך for their recovery should be recited. At some point, when the mother has recovered physically from the pregnancy and delivery, and possibly surgery, she should recite ברכת הגומל (thanksgiving for deliverance from danger). As tragic as the loss of the baby is, she must still acknowledge that she faced physical danger and survived. The community must respond by fulfilling its obligation for ביקור חולמים (visiting the sick), as described in Rabbi Blank's paper. The family should be visited by close friends, meals can be provided and other services offered by the broader community. In addition, at the proper time, a visit to the מקורה is recommended as Rabbi Blank comments, "In a case where the couple is not accustomed to observing הלוות טהרה המשפחה . . . the rabbi can take special care in describing the symbolic merits of such a visit." Some beautiful have been written for the occasion.⁶

The above recommendations from Rabbi Blank's apply to miscarriages. However, a stillbirth is an event which is significantly different from the much more common early miscarriage. Despite the fact that in Jewish law, the fetus never lived as a human being, our language refers to it in words of life, stillbirth and its death in utero. There is a need to mark and mourn this potential life that came so close to being, and to respond to the loss and grief of the expectant parents and their community. As discussed above, the issue of the viability of the third trimester fetus is a significant factor. For a full response to stillbirth, we turn to the rituals associated with burial and mourning.

Burial/Funeral Service

In fact, traditional halakhah does already note the quasi-human status of this potential life. It does so by requiring burial of the body of a formed fetus from the end of the fifth month on. The body should be wrapped in a clean white sheet and placed in a kosher coffin. Some authorities require circumcision while others do not mention it. Circumcision need not be done, but it may be done during the preparation of the body if it would be of comfort to the parents. No ברכה is recited. טהרה need not be done. Burial should be in a Jewish cemetery. Often, cemeteries have a special section for the graves of stillborns and infants. The stillborn may also be buried in a family plot. Many funeral homes and cemeteries reduce or do not charge a fee to bury a stillborn.

Traditional halakhah does not require any special liturgy or service. It is, however around the burial of the body that we have the opportunity to provide an important ritual

⁶ Rabbi Diane Cohen, "Smikhat Horim: Providing Support for Parents Suffering a Miscarriage," unpublished paper.

response in the face of a tragedy and a way to begin the healing. If at all possible, parents and other relatives and friends should attend the burial. In conversations with women of all ages who had had a stillbirth, I found that there was a universal sense of distress that they had not been a participant in the burial of their child, and they regretted not knowing the exact spot of the grave. It has been the experience of rabbis who have done funerals for stillborns that attendance at the burial is larger than expected. This indicates that family and friends want to respond to the loss in a Jewish way and that attending a funeral is a natural way of confronting tragedy and a first step in comforting the parents.

The funeral should be held as soon as possible. However, to enable the mother to attend, the burial may certainly be delayed until she recovers enough physical strength to be present at the cemetery. The service would consist of prayers, psalms and other readings. A liturgy for the funeral of a stillborn, or infant of any age, is in the proposed new Rabbinical Assembly Rabbi's Manual. In addition, there are moving liturgies in many of the new books which contain sections on Jewish women's life cycle.⁷ The burial service for a stillborn should not include צידוק הדין. There will be no eulogy. But the rabbi should speak words of comfort to the family. קרייה may be done, as is the usual custom, either on a piece of clothing or the black ribbon.

Kaddish may or may not be recited, at the discretion of the rabbi. Some rabbis prefer to limit kaddish to very specific situations related to those who are obligated to recite it. That does not include this family, since there was no death of a living person. Other rabbis permit the recitation of kaddish in many situations and feel that this loss is close enough to death to make kaddish an appropriate part of the funeral liturgy.

The baby should be given a Hebrew name and that name should be included in the service. The name might be the one which the parents had intended to use for their child. Alternatively, they might choose a name like Menachem or Nechama, indicating a desire for comfort. Jewish folk tradition recommends giving the child a name so that the parents will be able to find their child when they arrive in גן עדן. Contemporary therapeutic thought is that giving the stillborn a name aids the parents in the healing process and helps to distinguish that child from any other children of that couple.

At the conclusion of the service, the parents should walk between two lines of comforters, and the traditional statement of comfort should be said to them.

At some later time the grave should be marked with a stone that includes the name chosen by the parents for their child.

Mourning Practices Following the Burial

A meal of concern should be provided by the community on the return of the family from the cemetery. The family might also light a 24-hour yahrzeit candle or even a Shabbat candle. When contrasted with the traditional seven day candle, this more quickly extinguished candle symbolizes that the potential life of the baby did not come to fruition.

The strict position on burial – requiring burial and the strong recommendation of a funeral service – does not extend to all other practices of אבלות following burial. In particular, this paper does not recommend shivah. It is clear that in the case of a stillbirth, in contrast to a neo-natal death, we do not have a halakhic mandate for shivah. In

⁷ See, for example, liturgies by Rabbi Sandy Eisenberg Sasso and Rabbi Amy Eilberg in *Life Cycles: Jewish Women on Life Passages and Personal Milestones*, ed. Rabbi Debra Orenstein (Woodstock, Vt.: Jewish Lights Publishing, 1994), pp. 45-46, 48-51.

addition, rabbis who have adapted the **תשובה** on neo-natal death to deal with stillbirths have told me that parents of stillbirths prefer a “one-day shivah.”

In recognition of the fact that we are dealing with a loss that is not identical with, but is close to, death, we recommend a one day **יום ניחום**, a Day of Comfort, to be observed by both the parents and the community. The parents should remain at home. The community should be present and should offer comfort. The **יום ניחום** could include a minyan at the parents’ home the evening following the funeral. The parents may recite kaddish or some other prayer or psalm. The rabbi should speak words acknowledging the loss of the expected baby and instructing the community in how to treat the parents.⁸

After this one day **יום ניחום**, the community obligation would revert to the **ביקור חולים** model. However, the unique nature of the illness/loss would have been publicly acknowledged. The parents should not be prohibited from observing some of the private practices associated with shivah during the remainder of the week following burial, or from reciting kaddish in a minyan. Despite the fact that we are not obligating or even calling the mourning time shivah, there is a connection between the seven days of shivah and the seven days following birth, after which the **שמחה בת ברית מילה** would have been held.

The usefulness of the model based on **אבלות** as a response to stillbirth is especially important for the father. Husbands and wives do have different experiences of pregnancy and will experience the loss of the expected baby in different ways. However, the father’s loss is no less real than the mother’s for all that its manifestations may be less physical or obvious. When the father is treated as an **אבל** equal to the mother, he is relieved of the burden of “being strong.” He has a specific set of ritual tasks to do and a specific role, through which he can confront his loss. In addition, family and friends have a responsibility to be present and to care for him as well as for the mother. Pregnancy loss and infant death is associated with an increased risk of divorce. This is often related to the inability of the parents to share their grief with each other or with others. Through these rituals, Judaism provides a structure for the parents to be supported and protected from the isolation associated with stillbirth.

Although the stillborn’s grandparents will not have the status of **אבלים**, the public nature of these funeral and **יום ניחום** rituals is also very important for them. They, too, need permission to grieve, as well as specific rituals through which they can help their bereaved children.

As with any death/loss, it is important to remember that the family is not healed and does not recover after one day or a week or a month. The family has been irrevocably changed. The community needs to continue to express its concern and offer support, as it should for all mourners.

Yahrzeit

The final recommendation is that parents may observe the yahrzeit of their lost baby. Some have expressed discomfort with marking the loss, which was not exactly a death, with the rituals associated with death. Nevertheless, this anniversary will be noted in any event (most often by a minor depression or some other type of crisis).⁹ Reciting kaddish, giving

⁸ There are an increasing number of books and pamphlets about dealing with pregnancy loss which will be useful to families, friends and rabbis. A particularly helpful book, which is based on work with families in a pregnancy loss support group sponsored by the National Council of Jewish Women, is Ingrid Kohn and Perry Lynn Moffitt, *A Silent Sorrow* (New York: Delta/Dell/Bantum, 1992).

⁹ Sandra Blakeslee, “New Groups Aim to Help Parents Face Grief when a Newborn Dies,” *New York Times*, 8 Sept. 1988, p. B13.

חֶדְקָה and/or lighting a yahrzeit or Shabbat candle provides a ritual outlet for remembering a tragic event in the family's past.

When would the yahrzeit of a stillbirth be observed? In most cases, the exact time of the fetus' death is unknown, and delivery will be at a later time. When the exact date of death is unknown, one custom is to observe the date of the funeral as the yahrzeit. Another option, when it is impossible to determine the date of death, is for the relative to choose a day on which to observe the yahrzeit.¹⁰ This seems to be the most reasonable solution. Some parents might choose to observe the day when they learned that the fetus would be stillborn; others might choose the day when the body was delivered; still others might choose the day of burial.

Since there is no *חַיּוֹב* associated with this yahrzeit observance, the parents, and even siblings who were alive and old enough at the time of the stillbirth, may mark the anniversary for only the first year, or for as many years as it is meaningful to them. It is not morbidity or an inability to close a sad chapter which suggests continuing to mark yahrzeit after the first year, but rather a ritualized acknowledgement of a fact in the history of that family.

Death of a Premature or Compromised Infant

Following the adoption of the *תשובה* on neonatal death, Rabbi Reisner wrote "Kim Li: A Dissenting Concurrence," referred to above, expressing his difficulty with requiring full mourning for an infant born alive prior to the thirty-first week; that is prior to a point of more certain viability. Also noted above, twenty-eight weeks is now the time of 85% survival. I feel that the practices I have recommended in this *תשובה* for a stillbirth would also be an appropriate alternative halakhic response, as well as one which is psychologically sound, in dealing with the death of a premature infant born alive prior to twenty-eight weeks, who survives only minutes or hours.

In addition, the practices recommended in this *תשובה* on stillbirth could also apply in the case of a severely deformed and compromised newborn classified as dying in Rabbi Reisner's *תשובה* on limiting treatment for peri- and neo-natology. The presumption that this baby would die might make the full mourning normally recommended for a baby born alive a less compassionate response. On the other hand, it is likely that the parents and family would still have developed a relationship with such a baby in the days or weeks before its death and would want to engage in full mourning.

Third Trimester Abortion

These rituals should also be available to parents in the tragic and rare situation in which an almost full-term pregnancy must be terminated due to danger to the life or health of the mother, or to her mental inability to carry to term a non-viable fetus. Our understanding of the halakhah would still require burial of the body in this event, based on fetal age. In most cases today, medical practice at this late point in the pregnancy when the mother's life is in danger, is to attempt to deliver and then treat a viable, albeit premature, baby.¹¹ Such a late-term abortion is more likely in a situation where tests indicate that the fetus is already doomed. Some suggest that treating the aborted fetus as almost human would increase the parents' guilt over the abortion. However, I believe that it is possible to acknowledge and mourn the loss of the potential life while still

¹⁰ Rabbi Aaron Felder, *Yesodei Smochos* (New York, 1976), p. 134.

¹¹ Dr. Charles Paley, op. cit.

asserting that the mother's life and health took priority. These rituals can provide an important opportunity to mourn and to comfort parents whose isolation from God and from their community is extreme.

Theology

A particular concern of many bereaved parents is what happens to the soul of their never-to-be-born baby. The question of ensoulment (when a soul enters a particular body) is not an area of set dogma in Jewish theology. There are numerous sources suggesting a variety of different entry times for the soul, from conception, to birth to even later. I would suggest that the rabbi be extremely sensitive to the parents' need to know that God has not abandoned them or their never-to-be-born baby. Whatever the rabbi's personal theology on ensoulment, this is a time to share with the parents that there is a Jewish view that the fetus had a unique soul and that God is caring for it.¹²

Conclusion

In the event of a stillbirth, burial at a Jewish cemetery is required. We strongly recommend a funeral service at the time of burial attended by family and others. The stillborn may be named and circumcision can, but need not, be done. The grave should later be marked.

Following the burial, we recommend a one day *יום ניחום* (Day of Comfort) which may include a minyan at which the parents may recite kaddish or some other prayer. After the first day, the parents may observe the practices associated with *שבועה ב贊ניות* (private observances which do not involve the community). After the second day, *יום ניחום חולים*, the community should treat the parents as if they were in the category of *חולים* (those who are ill), visiting them if it is desired and providing for their physical needs. The parents may observe yahrzeit.

¹² For a collection of some Talmudic material in English on the issue of the soul, see A. Cohen, *Everyman's Talmud* (New York: Schocken Books, 1949/1975), pp. 76-78. Note in particular the discussion between Rabbi Judah and Antoninus in Sanhedrin 91b.