

KIM LI: A DISSENTING CONCURRENCE

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This paper was submitted as a response to “Jewish Ritual Practice Following the Death of an Infant Who Lives Less Than Thirty-One Days,” by Rabbi Stephanie Dickstein. Dissenting and concurring opinions are not official positions of the Committee on Jewish Law and Standards.

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.

The Committee on Jewish Law and Standards passed Rabbi Stephanie Dickstein’s paper, “Jewish Ritual Practice Following the Death of an Infant Who Lives Less Than Thirty-One Days,” at its meeting on June 3, 1992, by a substantial margin, thus bringing to a conclusion an on-again-off-again debate over the past five years. At issue was the tradition not to require mourning practices for an infant that does not live thirty days.

Rabbi Dickstein pointed out again, as had been noted before, that that tradition substantially misstated the precedents and the early law. Indeed, the Talmud reports that certain Amoraim mourned their infants lost prior to thirty days of age, where they felt them to have been born at full term, and that is the codified law. Nevertheless, over the years there were voices on the Committee who were uncertain whether the old halakhah should be reinstated in the face of an overruling custom. I am pleased that the overwhelming majority of the Committee saw fit to do so. Given modern medicine and hygiene, there is little reason to treat a full-term infant as other than a complete human being.

Rabbi Dickstein went further and argued that, given the state of medical information and technology, it is desirable to treat viable pre-term newborns in the same way we treat full-term infants. In her paper as presented before the CJLS, she was unwilling to determine precisely the point of viability. Effectively, she found thirty weeks to be a point of viability *לכל הדעות*, requiring *אבלות* at that point, but, uncertain about ever-shifting and debated medical determinations, she left it to “the rabbi and the parents” to determine if mourning would be applied before then, from five months (twenty-three weeks) until “around thirty weeks.”

I strongly support Rabbi Dickstein’s view, proposed before her by Rabbi Eilberg, that viability by today’s medical standards should affect our understanding of the Amoraic claim, *קים לי דכלו לו חדשיו*. I challenged in committee, however, the flexible standard. I do not believe halakhah abides flexible standards. Flexible judgment about arriving at the standard, of course, but the rabbinic dictum of *לא פלוג* argues against such an amorphous ruling. I asked Rabbi Dickstein for a date certain. She was unwilling, on one foot, to offer

such and, in what I took to be undue haste, the Committee opted to delete any specific age. To wit, a child, born alive, even much smaller and younger than any reasonable viability standard, is the proper subject of אבילות by this decision. In that one stroke, I believe, the Committee went further than it should have and further, I suspect, than Rabbi Dickstein or most of its members intended.

It was argued, in those last frantic moments before the vote, that the text in Mishnah Niddah (5:3) which refers to a day-old infant as חתן שלם justifies such a ruling. I do not believe that it does. That a fourteen-week fetus barely of human form, born alive but living only a few minutes, should be considered by some sources fully human while others remain unconvinced even of full-term infants until thirty days had elapsed seems to me much broader than the likely Tannaitic debate. Rather, the debate is to be understood, I believe, concerning a fully formed baby (whatever that means precisely – I shall return to this in a moment). Is said infant שלם חתן at birth or only at thirty days? An unformed infant is clearly not שלם.

As I write I wonder whether I should rather have dissented than concurred, but having argued in favor of the major premises of Rabbi Dickstein's paper I felt constrained to concur. Nevertheless, I believe strongly that viability may serve as the equivalent of the claim of קים לי, but simple live birth may not.

How then to determine viability rabbinically? The Report of the Committee on Fetal Extrauterine Survivability of the New York State Task Force on Life and the Law determined in January 1988 "that an anatomic threshold of development occurs around 23-24 weeks of gestation (500 grams). Before this time the fetal organs. . .are not sufficiently developed to permit extrauterine survival," and that that threshold will stand for "the foreseeable future." This is, however, a threshold of potential survivability. At that gestational age an infant will likely succumb, but intervention is warranted since there is at least some chance the child will survive. This is a valuable measure to determine neonatal care, but it has only a very weak claim on the rather certain rabbinic category of קים לי. Similarly, the 26-27 week threshold that many have considered relates to crossing the fifty percent barrier. At that point it is somewhat likelier that the infant will survive (50-60 percent) than that it will not. But again I ask, what is the meaning of ספק if not the 50-50 chance? Why, at all, the wait until thirty days – certainly infant mortality even then was not so high that a preponderant majority of infants did not survive? The measure which our sources attest is one of virtual certainty, קים לי.

I propose that that measure is attained in our day at 31-32 weeks, that is, the end of the seventh month of gestation when survival rates are greater than eighty-five percent according to Rabbi Dickstein's source (1986!), and certainly eighty percent according to the New York State Task Force report. At that point, it seems possible to say קים לי with conviction. Furthermore, this coincides with a rabbinic model. The Rabbis claimed that בן שבע חי, בן שמונה מת. This refers, of course, to the end of the respective months, with בן תשע a full-term infant. I do not know what science stood behind that rabbinic finding or whether it was simply a justification of why some infants live and some die. No matter. Present-day science finds no such correlation. Every passing day enhances a fetus' chance to survive. Yet it is those last two months which are in question, not more. While we perforce abandon בן שמונה מת, we can affirm בן שבע חי.

Let the completion of seven months, rather than the former nine, serve as the grounds for the claim of קים לי. Before that level of development let the old law stand that the child needs to prove viability by living thirty days to be considered a full legal person. That is what I believe we should rule. And that, in any case, is how I propose to follow this ruling. I recommend that others do the same.