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Jewish Ritual Practice Following the Death of an Infant Who Lives Less Than Thirty-One Days

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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 are the mourning practices and rituals when an infant dies before the thirty-first day of life?

תשובה

The laws and customs relating to mourning developed over thousands of years, yet it often seems as if they had been carefully constructed to meet both the responsibilities of כבוד המת and the complex psychological needs of the mourners. There are specific rules which instruct us how to treat a human body which no longer houses the soul, how to honor the memory of the departed, and how to support the mourners though the various stages of grief, anger, loss and adjustment. Halakhah requires that the community be a part of כבוד המת and comforting the mourners.

One group of mourners has traditionally been denied the comfort of Jewish ritual mourning. These are the parents whose infant lived less than thirty-one days after birth, or whose child is stillborn. In *The Jewish Way in Death and Mourning*, one of the most widely used books on mourning for laypeople, Rabbi Maurice Lamm states the current custom: "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, even though the child may have been normal, but was killed accidentally."[1] While

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

the practice described by Rabbi Lamm is not the only halakhic position accepted by the CJLS, nevertheless, it is widely considered by Conservative rabbis and laypeople to be the only halakhic position, and their practice is in accordance with this position (i.e., little or nothing is done).

The Death of an Infant Causes Grief

Our obligation to our community and to halakhah requires that we reevaluate this practice. In the past, infant death was much more common than it is today, although no less painful. In what seems to have been an attempt to be sensitive to the grieving parents, the custom which became accepted in our communities was not to require full mourning of the parents. This custom reflected the general attitude towards infant death. Even twenty years ago, it was common for doctors and others to underestimate the distress of parents whose newborn died. Today, it is no longer the accepted medical practice to ignore the death of an infant, whether it was born alive, or died in the womb. Hospitals have developed protocols to help families face the reality of their loss, and to enable them to mourn.[2] Parents are encouraged to see and touch their child. Pictures may be taken; mementos are preserved. Funerals are recommended, and the parents are encouraged to attend meetings of a support group. All of this is increasingly the established secular, medical procedure. Yet, when the parents approach their rabbi, perhaps to ask him or her to participate in the funeral, the rabbi may not be helpful. At best, he or she does not know what to do or say; at worst, he or she says, "There is no mourning for this נפל." Of course, Jewish tradition does not deny parents the right to grieve privately. However, the strength of Jewish mourning practice is the way in which it meet private grief with specific required rituals and communal involvement. Any death, especially that of an infant, is a theological crisis. Death is a time when religion and ritual can be most powerful, yet our current custom concerning infant death robs us of that power.

The Scope of This Teshuvah

This תשובה will begin by discussing some of the sources which support and contradict the current custom, as well as other sources on issues related to the discussion. It will then summarize the position of the CJLS on these issues. Finally, it will recommend and justify a halakhic position which is different from either custom, or the current position of the CJLS. The subject of this תשובה will be neo-natal death, the death of an infant born alive. However, it is important to note that stillbirth, the death of a potentially viable fetus in utero, is closely related in medical literature, and the parents' experience of that loss is often similar to neo-natal death. The consideration of a Jewish response to stillbirth will be the topic of a separate תשובה.

Past Precedents

Our present custom not to mourn a newborn (note: "mourning" here is used to mean the full range of rituals associated with death) is based on two major halakhic statements. The first is the Rambam in the Mishnah Torah Hilkhot Avel 1:6:

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[2] Some examples of the material which is available are: "Bereaved Parents Information Packet" from the Childbirth and Parent Education Association of Madison (1978); "Grieving: A Way to Heal" The American College of Obstetricians (1988); "Coping with Perinatal Death" Saheb Sahu, M.D., *Journal of Reproductive Medicine* (Mar. 1981). I would like to thank Dr. Harvey Friedman of Englewood, NJ for sharing these and other materials with me.

הנפלים אין מתאבלים עליהן וכל שלא שהה שלושים יום... אין מתאבלים עליו.

> We do not mourn for נפלים (fetuses), and a newborn which does not live for thirty days. . .we do not mourn for it.

The second is the Shulhan Arukh Yoreh De'ah 374:8:

תינוק כל שלושים יום ויום שלושים בכלל אין מתאבלים עליו.

> The infant, for thirty days, even including the full thirtieth day (if it dies), we do not mourn for it.

These opinions, in turn, are based on a statement by Rabbi Shimon ben Gamaliel in B. Shabbat 135b:

תניא רבן שמעון בן גמליאל אומר כל ששהה שלושים יום באדם אינו נפל.

> It was taught: "Rabbi Shimon ben Gamaliel said: Anyone who lives thirty days is not considered a נפל."

What accounts for the significance of thirty days in considering whether or not an infant is a נפל, and therefore not mourned? R. Shimon b. Gamaliel uses as his proof text Num. 18:16, ופדויו מבן חדש תפדה "and he shall be redeemed from one month." Since thirty days is the age at which we are commanded to redeem the firstborn, this is a reasonable way to define at what age the infant changes status from נפל to human being.

B. Bekhorot 49a has an extended discussion about what happens to the redemption money if a father pays the kohen prior to thirty days, and then the son dies within thirty days of his birth. Tosafot there say that the kohen must return the money, since the Torah commanded the father to pay only from the thirtieth day onward. However, Rashi offers another reason for why the kohen may not keep the money. This issue is not the father's obligation, but that the child was not considered viable since he was less than thirty days old. Therefore, the kohen was not entitled to the money in the first place.

The significance of the viability of the infant is pointed out by both the Kesef Mishnah and the Radbaz on the Rambam referred to above. They comment that up until thirty days, there is doubt (ספק) about whether or not the child will survive. Obligating someone for the full rituals of אבלות is considered to be putting a burden on them. It is a principle of halakhah that in case of ספק in אבלות, we follow the more lenient position. Since up until thirty days is considered to be a ספק whether or not the child will survive, if it does not survive, we are lenient, and do not require the parents to mourn.

Alternative Halakhic Positions

The sources above are the primary statements on which the current custom not to mourn is based. However, this is not the only position found in halakhic literature. There is an opinion that a child which is born alive is mourned even if it dies in the first day of life. This position is first stated in Mishnah Niddah 5:3:

תינוק בן יום אחד הרי הוא לאביו ולאמו ולכל קרוביו כחתן שלם.

> A one-day-old infant, if he dies, is considered to his father and mother and all relatives like a full bridegroom.

This opinion is expanded in Talmud Yerushalmi Kiddushin 4:11 where we learn that if a newborn was alive when its head, and the majority of its body emerged from its mother, it is mourned:

> תנאי בן יומו שמת הרי הוא לאביו ולאמו ולכל קרוביו כחתן שלם לא אף דבר בן יומו חי אלה אפילו יוצא ראשו ורבו בחיים.
>
> It was taught: a one-day-old, which dies, it is to its father, and mother, and all its relatives like a full bridegroom, and not only if it lives a day, but even if it was alive when its head and the majority of its body emerged.

We find this statement again in Semakhot 3:1. Since the latter two sources are of Palestinian origin, it is possible that in Israel it was customary to mourn for newborn infants, while in Bavel it was not.

However, even in Bavel we find examples of fathers who observed mourning for their newborns. In B. Shabbat 136a we learn that the son of Rav Dimi and Rav Cahana mourned for their newborns who died. In a source from the Middle Ages, *Ma'ase HaGeonim*, we learn that it was a custom in some German communities to mourn for newborns.[3]

Even the Rambam (Hilkhot Avel 1:7) indicates that he also follows the opinion that a newborn who dies prior to the thirty-first day of life, is mourned, if we knew for certain that the infant was carried full-term.

> ואם נודע בודאי שנולד לתשעה חדשים גמורים אפילו מת ביום שנולד מתאבלים עליו.
>
> If a man knows for certain that the child was born after a full nine months, even if it dies on the day it is born, we mourn it.

The Shulhan Arukh (Y.D. 374:8) concurs. However, Rashi and others are very strict in defining the meaning of "full-term." We must know for sure that the mother had not had marital relations with her husband for the nine months after the child was conceived. Otherwise, we assume that the child was not full-term. In fact, both of the fathers mentioned in B. Shabbat 136a justify their mourning on the basis of the fact that they knew that their child had been full-term. (Although it is not necessarily by Rashi's criteria קים לי ביה שכלו לו חדשיו).

The question of whether a pregnancy was full-term or not is one of great concern to all of our authorities. Of particular interest is the assumption that a child born after eight months is by definition not viable, although one born after seven months is viable.[4] The classic Talmudic statement of this is B. Shabbat 135a. "An eighth-month child is not handled on Shabbat: the mother bends down to nurse for her own comfort, not for the sake of the child." There is also a discussion about whether an otherwise healthy infant born after eight months can be circumcised on Shabbat. Most of our sources state that we do not mourn for an infant carried only eight months, unless it had been alive for thirty days before dying. B. Niddah 44b claims that Rashbag's statement that we do not mourn an infant who dies before thirty days is made only with regard to an infant who was born after eight months; even Rashbag believes that for a full-term infant, we mourn from the first day of life. It is only when the infant was not known to be full-term that we do not mourn unless the infant survived more than thirty days.

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[3] *Ma'ase HaGeonim* edited by Avraham Epstein (Israel: M'kitze Nirdamim, 5760), p. 49.

[4] See the gloss on S.A. Yoreh De'ah Hilkhot Avelut 374:8. If a divorced woman marries prior to three months, and we do not know which husband is the father of her dead infant, both husbands have obligations to the child. The first is obligated because it might have been full-term, and the second because the baby might have been born after seven months.

Up until this point, the halakhot we have examined deal only with the gestational and post-natal age of the infant. Does the actual condition or developmental stage of that particular infant affect its status in regard to its parents' obligation to mourn? Does the halakhah make a distinction in mourning between an infant who was born healthy and died as a result of an accident, and one whose hold on life was precarious from the beginning? The Radbaz on the Rambam Avel 1:6 states that even if the infant was eaten by a lion on the thirtieth day, it was, by definition, not considered viable, and we do not mourn it. The Shulhan Arukh (374:8) states that the length of gestation is what determines mourning, and that it does not matter whether or not that particular infant was fully developed.

We have seen that the sources which deal with mourning for an infant who dies on the thirtieth day of life, or prior to that, offer a number of different answers on the question of whether the parents, and other relatives, mourn for that child. Some do not require mourning for any such infant; others do, if the child was know to have been carried full-term, or was potentially viable (i.e., not eighth-month).

Burial Practices

Before we begin to consider our halakhic position, we must examine one other area: burial. The obligation to bury is taken by most scholars to be דאורייתא, and thus in a different category from most other mourning rituals, which are דרבנן. Therefore, while even those who consider the death of the infant to be an issue of ספק, so that with regard to mourning, we are lenient, and do not require it, with regard to burial, we are strict and require burial.[5]

Thus, burial is required for a newborn infant, a stillbirth, and for a fetus miscarried after the fifth month (when it has human form). We find the burial of a newborn described in Talmud Yerushalmi Kiddushin 4:11 and again in Semakhot 3:2:

> יוצא בחיק נקבר באשה אחת ובשני אנשים... אין אומדים עליו בשורה ואין אומרים בברכת אבלים עד שיהה בן שלושים יום.
>
> It is taken out in arms and buried by one woman and two men. . . we do not stand in rows, and do not say ברכת אבלים unless it died after thirty days.

There is no requirement that those burying the child be relatives, although the Yerushalmi describes the infant being carried by its maternal grandmother. The Rambam Avel 12:10 describes the same type of burial.[6] These, then, are the primary halakhic sources are used as the basis for establishing the halakhah for our community.

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[5] Isidoro Aizenberg, "Treatment of the Loss of a Fetus through Miscarriage," *PCJLS 86-90*, pp. 255-256.

[6] In the literature on funeral services for children, there is a progression of requirements which depend on the age of the child, as well as his or her social status and intelligence. According to the Rambam (Hilkhot Avel 12:11), the public has no obligation to manifest grief until the child is twelve months old, at which point it is carried on a bier. Semakhot 3:3 says that a child is not carried on a beir until it is three years old. Both the Rambam and the Shulhan Arukh go on to say that whether the public is obligated to attend the funeral depends on whether or not they saw the child go out in public.

According to the Rambam 12:1, the eulogy is intended to honor the dead. However, the criteria which he and the other sources use to define at what age the funeral service is held, and a eulogy spoken, seems to indicate that its purpose is also to comfort the parents. Although the sources disagree about whether that age is three, four, five, six or even thirteen years, they all agree that there is a difference in the funeral depending on whether the parents are poor or rich, young or old. The assumption is that poor or old parents suffer more from the loss of a child than do rich or young parents. Neither Isaac Klein nor Maurice Lamm describe any practical difference in the funeral service for a younger or older child, from that of an adult.

Past CJLS Positions and Discussions

During the past decade, the CJLS has devoted a significant amount of time to the discussion of this issue. In 1987 a תשובה by Rabbi Isidoro Aizenberg on the treatment of loss of a fetus though miscarriage was passed by a vote of 11-0 with one abstention.[7] The תשובה calls for the burial of the fetus after the fifth month, and suggests, if the rabbi deems it desirable, he or she may accompany the parents to the cemetery and can read Psalms and speak words of comfort. A stone with the family name may be put up, but אנינות and אבלות are not observed.

A later paper by Rabbi Aizenberg on infant death distinguishes three different practices.[8] (1) When a full term infant dies within thirty days, there is אנינות, קריעה, burial, shivah and sheloshim; no eulogy is delivered, and the burial is performed by immediate family members. The parents may, if they wish, recite kaddish for thirty days; (2) if the baby was born prematurely, the above customs are followed only if it died more than thirty days after birth; or, (3) if the baby was born prematurely, and died prior to thirty days, it is treated as a fetus. In the case of (2) and (3), the parents may recite kaddish. I do not believe that Rabbi Aizenberg's תשובה is sufficient. Nevertheless, it is far better than the custom, and its lack of widespread dissemination among rabbis and congregants alike is tragic.

A second תשובה, dealing with the entire spectrum of miscarriage, pregnancy loss and infant death, was submitted by Rabbi Amy Eilberg in 1986. She recommended that a flexible range of options, from meditations to full אבלות, should be available to the rabbi to offer the family, based on his or her evaluation of the family's needs. Rabbi Eilberg withdrew the תשובה after it was discussed by the CJLS in 1990.[9]

Rabbi Debra Reed Blank wrote a תשובה, which was adopted in 1991, on the treatment of miscarriage.[10] Her model is primarily one of treating the father and mother under categories related to ביקור חולים, with some additional practices, such as the mother going to the mikveh, and a gathering of family and/or friends for prayers. While this תשובה is an important step, I feel that it is not sufficient in the case of pregnancy loss beyond the point of viability, where the halakhah already requires burial.

I submitted a תשובה on mourning practice following infant death and stillbirth in 1989. That תשובה, in conjunction with Rabbi Eilberg's and Rabbi Blank's תשובות, has been the subject of serious and lengthy discussion by the CJLS. My original תשובה, which, in essence, would have required full mourning for all infants born alive after a certain gestational age, with only some technical differences in the case of a stillbirth, contained elements which troubled many members of the committee. Acting on some of those concerns, I have made some revisions in my original תשובה, including separating neo-natal death from stillbirth.

Mourning Practices in the Case of the Death of a Full Term Infant

I began with the assumption, which is already clearly an option within rabbinic literature, and a position of the CJLS, that in the case of a full-term pregnancy, when any infant dies for any reason, at anytime after birth, its parents and other family members should be obligated for full אנינות, and אבלות just as for any other child. The parents should recite kaddish for thirty days, and should observe the yahrzeit. Since it is likely that most sib-

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[7] See above, n. 5.

[8] Isidoro Aizenberg, "Mourning for a Newborn," *PCJLS 86-90*, pp. 251-254.

[9] See Amy Eilberg, "Response to Miscarriage: A Dissent," above, pp. 364-366.

[10] Debra Reed Blank, "Response to Miscarriage," above, pp. 357-363.

lings will be very young minors, they have no obligations for kaddish or other mourning rites. Post-bar or bat mitzvah siblings, who will have awareness and feelings about the infant, should be encouraged to use the traditional rituals to work through the many (mixed) feeling they have.

Burial and Funeral Service

The body should be buried in accordance with Jewish practice. The service should contain all elements which are included in our usual burial services. A true eulogy cannot be given, but in its place, the rabbi should speak words of comfort. A selection of prayers and other readings, which would be appropriate for the burial of an infant of any age, has been submitted to the Publications Committee for consideration in the new Rabbi's Manual. The parents should be encouraged to attend the burial of their child. If one or both of the parents feel incapable of attending, then they should be advised to ask another relative or close friend to attend. Grandparents, aunts and uncles and other family and close friends should also be encouraged to attend.

Traditionally, the burial of a נפל could be delayed for any reason. Any other funeral should not be delayed except under exceptional circumstances. One of those circumstances is when the primary mourner cannot get to the cemetery immediately, but could be there within a few days. The funeral of a newborn who dies should be done as soon as possible, but if the mother wants to attend, burial may be delayed until she recovers enough physical strength following the delivery to attend. In conversations with Jewish women of all ages whose infants had died, I found a universal sense of loss that they had not been able to bury their child, and that they had never been told, and did not know they could ask, where exactly the grave was. Attending a funeral is difficult, but it is an essential element in honoring life, acknowledging death, and finding comfort. Rabbis do a kindness to no one when we accept the full responsibility for burying an infant.

Naming

If the infant was not named prior to death, it is usually given a name at the grave. Ways to do this are included in the burial liturgy. The name may be the one the parents intended to use for their child, or they might choose a name like Menachem, or Nechama, indicating a desire for comfort. Jewish folk tradition recommends giving a name so that the parents will be able to later find their child in Gan Eden. Contemporary therapeutic thought is that giving the dead infant a name aids the parents in the healing process, and helps to distinguish that child from any other children of that couple.

Circumcision

Should an uncircumcised boy be circumcised before burial? There is no obligation to do so, since the mitzvot are only obligatory on the living. While the mitzvah of ברית מילה at eight days is the father's, the ברית is between God and the child, who is no longer alive. If מילה is done, either during טהרה or at the grave, there is no ברכה recited, and it need not be done by a *mohel*. Neither the Rambam nor Rabbi Isaac Klein in his *Guide to Jewish Religious Practice* mention the custom at all. The Shulhan Arukh 353:6 says that the infant is circumcised at its grave. Rabbi Lamm states that the cus-

tom is to do the circumcision during the טהרה. This is not a custom which we need to perpetuate. However, it the parents request a circumcision, and would be comforted by it, it should be done during or prior to the טהרה.[11]

Autopsy

Jewish law generally opposes autopsies, unless they are required by the law of the land, or would directly save another life. In the case of the death of an infant we should allow, and even encourage, an autopsy if it might be crucial in determining the advisability of future pregnancies for that couple. If an autopsy is done, it should be completed as soon as possible, and with the same restrictions which we put on adult autopsies.

Shivah

My discussion of the area of the community's responsibility to the mourners, primarily in the form of communal responsibilities for shivah, was one which troubled many members of the CJLS. I originally argued for full seven day shivah in all cases. Many members of the committee felt that this was an unreasonable burden on the family and/or the community. They recommended a one or three day shivah, or שבעה בצנעה (private observances, as on Shabbat). Some commented that "we have enough trouble getting a minyan and getting full shivah when an adult has died, how can we expect this for a newborn?" While we cannot put a requirement on the community which it will not observe, that does not, in this case, seem to me to be a relevant argument for not requiring shivah. The reality is that as rabbis, we do our best to be sure that a family has a minyan when they want it, and there is no reason why we should feel an obligation to do more in this case. After all, we are not, please God, talking about a frequent occurrence, so that it would overly burden even a large congregation.

On the contrary, of all of the recommendations in this תשובה, I believe that communal participation in shivah is one of the most important elements. Denial of real loss and isolation are usually two of the most serious impediments to healthy grieving, and eventual resolution. Requiring shivah, with its obligation of communal participation during the shivah period, makes a clear statement that the loss of a human life was real, that the parents and the extended family should be grieving (and not [only] grateful for this blessing in disguise) and that the parents must not be left alone at this time. Family and friends may have already spent time with the baby, and if it was sick, they would have prayed for it. In any event, if things had been different, the community would have been there visiting the new baby and welcoming it with Jewish rituals (in a time frame of one week for a boy). One of the strengths of Judaism is that it requires community for both שמחה and for sorrow. The family whose newborn dies should not also be denied its community.

It is likely that the community will be uncomfortable, and will not know what to say.

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[11] What is the origin of the custom of circumcising a dead male infant? In B. Sanhedrin 110b, the question is asked, "At what age do infants enter the world to come?" A variety of answers are offered ranging from conception, through birth, through the time that the child can speak, or answer "Amen." R. Nathan b. Isaac says it is from the time of ברית מילה. Since the circumcision is a sign which is always on the body, the boy will be recognized as a Jew, will not be allowed into *Gehinom*, will be reunited with his family and will be resurrected. Saul Lieberman has an interesting discussion of this issue in "Afterlife in Early Rabbinic Literature," (*Harry Austryn Wolfson Jubilee Volume* [AAJR, 1965]). He suggests that although claims are made that this is an ancient rabbinic practice, it may not be that old, or rabbinically sanctioned. Lieberman feels that it is a folk custom which was performed by midwives and others in order to comfort the parents.

It is our responsibility to teach them how to speak with sensitivity to all mourners, these included. But this education will be more likely to take place when we are clearer about what the community is required to do.

Other colleagues have expressed a concern that in requiring full shivah we are placing a burden on a family, and the mother in particular, whose health is delicate. Again, this is not a reason to avoid shivah. Since the funeral of a newborn would have been postponed, or the infant would have lived more than a few days, shivah would most likely not take place until the mother has recovered some physical strength. In most of our communities, the "prime time" of shivah is limited to an hour or so in the evening, and perhaps thirty minutes in the morning, for minyan. Only close friends come by at other times. The first few weeks after coming home without the baby is a time when the house is painfully empty. The presence of comforters in the home will not fill the emptiness, but will "provide a container for it," enabling the parents to begin integrating the emptiness. Additionally, shivah is not only the burden of having visitors, but the חיוב and the permission to do nothing else but mourn. This aspect is particularly important for the father, since it essentially asks him not to return to his employment for a period of time so that he, too, can engage in the work of mourning.

Taking into account these considerations, as well as the inadvisability of advocating anything less than full shivah to our community, we will obligate both the parents and the community for full shivah.

Both Parents as אבלים

Throughout this discussion I have treated the father and mother equally as primary mourners, rather than the mother as a primary mourner, and the father as somewhat outside of that status. Husbands and wives do have different experiences of pregnancy, childbirth, parenthood, and if, God forbid, their infant dies, they do respond differently to that loss. However, the father's loss is no less real than the mother's, for all that its manifestations may be less physical or obvious. Neo-natal death can lead to the isolation of the partners, not only from their community, but also from each other. There is a high rate of marital dissolution associated with such a loss. I strongly believe that requiring halakhic mourning, in which both parents are "equal" mourners, is critical. When the father is treated as a mourner, he is relieved of the burden of "being strong" for his wife. He has a specific set of ritual tasks to do and a specific role, through which he is encouraged to confront the magnitude of his loss in all its dimensions from sadness to rage to helplessness. In addition, family and friends have a responsibility to be present for him, and to care for him as well as for the mother.

Premature Infants

The above is all in the case of a full-term infant who dies after birth. Given our relative medical sophistication, can we continue to make a distinction between an infant who was carried full-term, and one who was not, and should that distinction determine our mourning practices, or lack thereof? It is clear that there is no scientific basis for giving a seventh month newborn more chance of survival that an eighth month infant. On the contrary, it is known that every additional day of pregnancy and every added ounce of weight increases the infant's survival rate. At twenty-seven weeks (the end of the sixth month) a premature child given expert care already has a sixty-six percent chance of survival. By the end of the seventh month (thirty-one weeks) survival rates are at least eighty-five percent. At the end of the eighth month (35-36 weeks) more than ninety-seven percent of

infants born alive will live.[12] Since a majority of the infants born alive after twenty-seven weeks of gestation can be expected to survive, we are no longer dealing with the same situation as our predecessors did. For them, premature birth meant that the infant's chance of survival beyond the first few days of life was doubtful. The intention of the halakhah in taking advantage of the principal of leniency in a case of ספק, so that it distinguished between the death of a premature infant, and one who was full term, was to avoid burdening parents repeatedly with the regulations periods of mourning.

Today, we have a different reality. רוב תינוקות, a majority of the infants born alive, even after a gestational period of only twenty-seven weeks, can be expected to survive. By that point in the pregnancy, most parents expect to bring a baby home from the hospital, even if it requires technical assistance at the beginning of its life. When we do not require mourning for an infant who dies after that time, we are not being sensitive to the parents. Our insensitivity contrasts with the sensitivity which we assume on the part of the Rabbis when, confronted by high rates of infant mortality, they sought to avoid burdening the parents. Under present medical conditions, we can no longer justify the leniency of not requiring the parents of a premature infant who dies to observe the rites of mourning as already described above.

Between Premature and Not Gestationally Viable

How premature is too premature, too uncertain, for us to require mourning? This is one point on which I feel that both the CJLS as a Movement-wide halakhic authority, and individual rabbis, must retain some flexibility. The boundaries of medicine's ability to save the lives of tiny infants is constantly being pushed back. Certainly, our limit should not go back beyond the five months at which we begin to require burial. However, between that point, and until about thirty weeks, it seems that a decision concerning mourning, could be made by the rabbi and the parents. There the actual length of the infant's life might become more of a factor than gestational age. In any event, burial is required, and that could serve as a focus of Jewish ritual.

At the moment, this issue of "how premature" remains unresolved. In its discussion, the CJLS apparently approved the opinion that any infant born alive no matter how premature, who remains alive for even the shortest amount of time, is treated כחתן שלם, as a full human being. In a dissenting concurrence, Rabbi Avram Reisner argues that following my primary halakhic reasoning of ספק viability, we should retain the requirement of a certain gestational age (thirty weeks) before implementing full mourning practices as described in this תשובה. A premature infant born prior to that time, who dies before the end of thirty days, would continue to be treated as a נפל.[13]

The Need for Guidance

I will conclude with a comment and a recommendation. The chaos caused by transitional moments requires clear guidance. One function of halakhah is to provide that guidance: "This is what Jews do, this is what they do not do." In practice, we may be flexible within

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[12] Alan Guttmacher, *Pregnancy, Birth and Family Planning*, revised by Irwin Kaiser (New York: New American Library, 1986), pp. 59-60.

[13] Rabbi Avram Israel Reisner, "Kim Li: A Dissenting Concurrence," below, pp. 450-451. While I agree in essence with Rabbi Reisner, I would prefer the limit to be a few weeks earlier than the 30 weeks gestational age that he recommends. Alternatively, or in addition, thirty days of life seems to me to be too long a period of time to determine whether full mourning should be required. I would be more comfortable with a shorter required time of life. My final position on this may depend on the final decision concerning the ritual response to stillbirth.

certain boundaries, and we recognize that our congregants will do what they want in areas where we rabbis are not the main actors. Nevertheless, there are halakhic positions which govern our actions and advice. I believe that if we are to be helpful as rabbis, with the full force of the power of Judaism, to families who have lost a baby, we must have clear halakhic guidelines. It is not for the rabbi to decide whether each particular family has a חיוב to mourn or not. And yet, as I have listened to rabbinic colleagues, I keep hearing a need for flexibility in addition to halakhic, or even only pastoral, guidelines. While I believe that there will always be a need for some flexibility (and some of those places are mentioned above), I also feel that much of the perceived need for so much flexibility come precisely from our lack of a position.

First, given the well known, although incorrect, statement that there is no mourning for infants, our congregants do not expect a response from us, and may not even call us.

Second, for the same reason, we as rabbis do not seek out these parents, and we do not speak with the authority that makes people do more or less what we say at other life cycle events.

Third, again for the same reasons, the extended families and community, which usually know their roles in Jewish life cycle rituals, do not know their roles here. We are afraid that we cannot count of this essential component of the mourning rituals.

Fourth, we live in a society which is still working out new responses to neo-natal loss. While many hospitals have protocols for dealing with neo-natal death, once the family leaves the hospital, there is still a tendency to ignore and downplay the loss.

Fifth, even experienced colleagues have faced this situation only a few times. So each of us makes our judgment based on the particular needs of the few families we have encountered, as well as on our own ability to deal with this tragedy. For all of these reasons, I believe that if we develop a halakhically supported, and pastorally helpful response, to neo-natal death, (and to stillbirth,) then the perceived need for halakhic flexibility, as opposed to rabbinic sensitivity, will be lessened.

Finally, in our classes on life cycle rituals, and in our conversations with expectant parents, we must discuss the fact that there is a Jewish response to miscarriage, stillbirth and infant death, and we must assure parents that neither we as rabbis, nor the Jewish community, will abandon them if everything does not turn out as they pray that it will.

Conclusion

It is an official position of the CJLS that in the case of neo-natal death – the death of a full-term or premature infant, prior to the completion of the thirtieth day of life – the death is treated in the same manner as we treat the death of someone who lived more than thirty days. That is: the body is treated and prepared as any Jewish body, there is burial and a funeral service (with readings and comments which are sensitive to the situation). The parents, and non-minor siblings, have the obligations of קריעה, אנינות, אבלות, shivah, recite kaddish for thirty days, and observe yahrzeit. The community has all of its obligations for נחום אבלים, including preparing the סעודת הבראה and providing a minyan for shivah and beyond.