

Survey of Recent Halakhic Periodical Literature

PREGNANCY REDUCTION

Women suffering from certain medical problems that prevent them from becoming pregnant because they do not experience normal ovulation can now be treated with fertility drugs that may result in the production of a multiple number of ova. Similarly, women who experience normal ovulation but fail to become pregnant because of other problems such as a blockage of the Fallopian tubes may be able to conceive and bear multiple fetuses by means of in vitro fertilization.¹ Since the statistical probability of successful implantation of any single ovum fertilized in this manner is relatively low, fertility specialists treat such women with drugs that cause production of multiple ova. As many as eight or nine ova may be produced in a single cycle, thus enabling the physician to implant a multiple number of fertilized ova and thereby increase the chances for a successful pregnancy. In some instances most or even all of the ova may become implanted in the uterus with the result that a woman who had heretofore been experiencing fertility problems may actually become pregnant with a multiple number of fetuses.

Simultaneous gestation of multiple fetuses may present a serious risk to the life of the mother. Beyond a certain number, there is virtually no likelihood that any of the fetuses will survive to term. Problems resulting in the mortality or morbidity of at least some of the fetuses, including premature birth and the problems attendant thereupon, may occur with as few as four, and perhaps even three, simultaneous pregnancies. To avoid such complications, gynecologists recommend reducing the number of fetuses in the uterus at a relatively early stage of pregnancy. The halakhic discussions of pregnancy reduction are limited to situations in which failure to intervene will result in the certain loss of all of the fetuses. That problem generally arises only in pregnancies involving six or perhaps five fetuses. That, of course, is a medical issue that must be determined upon assessment of all relevant factors.

When the presence of multiple fetuses will result in loss of the life of the mother the status of the fetus is that of a *rodef* or "pursuer" whose "aggression" must be blocked even at the cost of the life of the *rodef*. This is true even when, as in this case, there is no moral turpitude

insofar as the *rodef* is concerned since the *rodef* is acting in an entirely involuntary manner. However, a significant question of Jewish law arises in largely theoretical cases in which there is no threat to the life of the mother rising to the level that renders the law of *rodef* applicable but in which failure to intervene will result in the demise of all the fetuses. In such circumstances the question is whether it is permissible to destroy some fetuses in order to save others.

Were the question to be posed with regard to the sacrifice of an already born baby in order to save the life of another person—adult or infant—the answer would be fairly clear. The Mishnah, *Oholot* 7:6, declares that from the moment the major portion of a baby emerges from the birth canal it cannot be killed in order to save the mother. The Palestinian Talmud adds the explanatory comment that mother and child are, in effect, reciprocal *rodfim*, each one threatening the life of the other. In such situations, the proper course of action is passive non-intervention.

The sacrifice of a fetus in order to preserve the life of the mother is sanctioned on the premise that fetal life is inherently inferior to the life of a person already born coupled with the consideration that the fetus is a *rodef* with regard to the life of the mother.² That principle is not applicable in situations involving pregnancy reduction in which some fetuses are sacrificed to save others because the lives of the fetuses are, in terms of their halakhic status, equal in quality.³

The status of the halakhic prohibition with regard to feticide is a matter of some controversy. Many authorities regard the destruction of the fetus as a form of non-capital homicide while others regard it to be a forbidden form of "wounding," a form of "destruction of the seed" or as a prohibition merely rabbinic in nature.⁴ Rabbinic decisors who accept one of the latter positions have no difficulty sanctioning abortion for therapeutic reasons not involving a threat to the life of the mother.⁵ R. Chaim David ha-Levi, in a contribution to *Assia*, vol. 12, nos. 3-4 (Kislev 5750), relies upon those permissive views in permitting pregnancy reduction. Similarly, R. Eliczer Waldenberg, in his recently published *Ziv Eli'ezzer*, XX, no. 22, in a manner consistent with his highly controversial position regarding abortion of a Tay-Sachs fetus,⁶ cites those views in reaching an identical conclusion. The problem, however, is far more complex for the many authorities who regard feticide as a form of homicide and consequently refuse to sanction abortion other than for the purpose of preserving the life of the mother.⁷

The Mishnah, *Oholot* 7:6, is emphatic in its ruling prohibiting embryotomy once the major portion of the child has been delivered.

The inferred presumption is that the sacrifice of one life will assuredly save the other. There is, however, no specific statement of halakhic determination dealing with cases in which non-interference would lead to the loss of both mother and child. Halakhic grounds that may justify an embryotomy under such conditions even subsequent to the commencement of parturition are set forth by R. Israel Lipschutz, the author of *Tiferet Yisra'el*, in his commentary on this Mishnah. One of the issues⁸ hinges upon the applicability of a law recorded by Rambam, *Hilkhot Yesodei ha-Torah* 5:5 "... if the heathen said to them, 'Give us one of your company and we shall kill him; if not we will kill all of you,' let them all be killed but let them not deliver to [the heathens] a single Jewish soul. But if they specified [the victim] to them and said, 'Give us so and so or we shall kill all of you,' if he had incurred the death penalty as Sheba the son of Bichri, they may deliver him to them . . . but if he had not incurred the death penalty let them all be killed, but let them not deliver a single Jewish soul."

Rambam's ruling is based upon the explication of the narrative of II Samuel 20:4-22 found in the Palestinian Talmud, *Terumot* 8:12. Joab, commander of King David's troops, had pursued Sheba the son of Bichri and besieged him in the town of Abel and demanded that he be delivered to the king's forces. Otherwise Joab threatened to destroy the entire city. From the verse "Sheba the son of Bichri has lifted up his hand against the king, against David" (II Samuel 20:21), Resh Lakish infers that acquiescence with this demand can be sanctioned only in instances in which the victim's life is lawfully forfeit, as was the case with regard to Sheba the son of Bichri who is described as being guilty of *lese majesté*; in instances in which the victim is innocent, all must suffer death rather than become accomplices to murder. R. Yohanan maintains that the question of guilt is irrelevant, but that the crucial element is the singling out of a specific individual. Members of a group have no right to select one of their number arbitrarily and deliver him to death in order to save themselves since the life of each individual is of inestimable value. However, once a specific person has been marked for death in any event, either alone if surrendered by his companions or together with the entire group if they refuse to comply, those who deliver him are not accounted as accessories. Rambam's ruling is in accordance with the opinion of Resh Lakish.⁹

In a medical context, when confronted by the imminent loss of both mother and child, those authorities who require merely that the victim be "specified" would advocate dismemberment of a partially delivered child having no possibility of survival in order to save the

mother since they do not require that he necessarily be guilty of a capital offense. However, according to Rambam, the intended victim must be culpable as well. Since a newly-born child is certainly guilty of no crime it may not be sacrificed in order to preserve the life of the mother. Furthermore, this line of reasoning does not apply to the many cases where either the mother or child may be saved through the sacrifice of the other; in such situations the crucial element of "specification" is totally absent.¹⁰

Teshuvot Panim Me'iro't, II, no. 8, discusses the selfsame problems but does not conclude with a definitive ruling. *Panim Me'iro't's* comments are cited by *Tosefot R. Akiva Eger, Oholot* 6:17, no. 17. *Panim Me'iro't's* arguments for permitting the destruction of the child in order to save the mother seem to be predicated upon the consideration that sacrifice of the child will save the mother whereas the child is doomed in any event. Since the death of the child can save the mother but the death of the mother cannot save the child, the child is to be regarded as "specified" for death as was Sheba ben Bichri. Similar views are also advanced in other contexts by *Yad Ramah, Sanhedrin* 72a, and *Maharam Hal'avah, Pesahim* 25b.

In an article published in *Assia*, vol. 12, nos. 1-2 (Tevet 5749), Rabbi Yitzchak Zilberstein finds tentative support in the comments of *Panim Me'iro't* for resolution of the classic lifeboat dilemma as well as for the problem of pregnancy reduction. An overloaded boat will sink and drown all its passengers. If one or more passengers are thrown overboard the remainder will be rescued. May some of the passengers, who will in any event die if no one intervenes, be cast from the boat in order to save at least one of the passengers? May some of the fetuses be eliminated in order that the others develop to term? Citation of *Panim Me'iro't* in this context does not at all seem to be apropos. In addressing the parturition situation, *Panim Me'iro't* seems to be tracking the reasoning advanced by *Tiferet Yisra'el*, i.e., the child has been "specified" for death whereas the mother has not. That is manifestly not the case with regard to either the lifeboat passengers or the woman pregnant with multiple fetuses. The situation is entirely analogous to the paradigm case, *viz.*, "Give us one of your company and we shall kill him; if not we will kill all of you." *Haazon Ish, Sanhedrin*, no. 25, as well as R. Shlomo Zalman Auerbach, as cited by the editor of *Assia* in a footnote appended to Rabbi Zilberstein's article, explicitly rule that it is forbidden to sacrifice one member of an endangered group in order to save the rest.

To be sure, application of the rule "Be killed but do not trans-

gress" to situations in which even the person delivered to death will perish in any event is fraught with conceptual difficulty. The Gemara, *Pesahim* 25b, states that the principle "Be killed but do not transgress" as applied to an act of homicide is an *a priori* principle based upon reason alone, i.e., upon the principle "Why do you think that your blood is sweeter than the blood of your fellow?" If so, questions *Kesef Mishneh, Hilkhot Yesodei ha-Torah* 5:5, what is the basis for the extension of the ruling "Be killed but do not transgress" to a situation in which the victim is singled out and the entire group warned that, if the specified individual is not delivered, all will perish. In such cases the dictates of reason would indicate that it is preferable by far to sacrifice a single life rather than to suffer the loss of the entire group. *Kesef Mishneh* concludes that the Sages possessed a tradition extending this principle even to cases in which the *a priori* reason advanced does not apply.¹¹

The most authoritative, although somewhat tentative, pronouncement with regard to pregnancy reduction that has appeared thus far is that of R. Shlomo Zalman Auerbach. Rabbi Auerbach is quoted by Dr. Abraham S. Abraham, *Nishmat Avraham, Foshen Mishpat* 425:2, sec. 22, as having stated that he "is inclined to permit" (*da'asi noteh le-hattir*) pregnancy reduction in appropriate circumstances. Dr. Abraham cites Rabbi Auerbach as having expressed that opinion with regard to "multiple fetuses, e.g., a sextuplet." Unfortunately, further details of Rabbi Auerbach's reasoning are not provided. A similar ruling by R. Mordecai Elyahu is published in *Tehumin*, XI (5720), 272-274. Again, a detailed discussion of the considerations involved is unfortunately lacking.

A similar conclusion is reached by Rabbi Zilberstein in his earlier cited article in *Assia* and by Rabbi Joshua Ze'ev Zand in an article appearing in a journal published by the Hebrew Theological College, *Or Shmu'el* (Skokie, 5752).¹² Rabbi Zand carefully cautions that, unless the mother's life is endangered, the procedure can be sanctioned only in situations in which none of the fetuses can otherwise survive, but that the procedure cannot be sanctioned if any of the fetuses can survive even though the surviving fetus is likely to suffer some defect or abnormality. A more detailed discussion was subsequently published by Rabbi Zand in his *Birkat Banim* (Jerusalem, 5744), chap. 12, sec. 41.

Both writers explain that the procedure is permissible because a non-viable fetus, i.e., a fetus that cannot survive for a period of at least thirty days subsequent to birth, is not considered to be a "live" creature for purposes of Jewish law and hence the prohibition against feticide does not apply. Indeed, the Gemara, *Shabbat* 135a. *Yomam* 32a and

Baba Batra 20a, compares a non-viable neonate, i.e., a baby that cannot survive for a period of thirty days, to a stone and declares that it cannot be moved on *Shabbat*.¹³

There is yet another conceptual problem that must be confronted in analyzing the basis of a permissive ruling with regard to pregnancy reduction. If feticide is a form of homicide it must be because the fetus has the status of a human being even during gestation. If a neonate that cannot survive does not also enjoy that status it must be because although only a viable fetus enjoys the status of a human being it nevertheless enjoys that status either from conception or from an early period of gestation. Conversely, a non-viable neonate does not enjoy that status in utero. The crucial point is that, although the status of the fetus may not be known until it either survives or perishes, its objective status is determined from the very beginning of its existence.

This gives rise to a dilemma in the contemplation of pregnancy reduction. It is certainly the case that at the moment of intervention all of the fetuses are doomed. Which fetus shall be selected for reduction and which fetus shall be allowed to develop to term depends upon the act of the physician. Assuming there is no prohibition in eliminating a non-viable fetus, choosing between non-viable fetuses presents no halakhic problem. Pregnancy reduction, however, is advocated precisely in order to assure that some fetuses will survive to term. After intervention, the remaining fetuses *are* viable. It is clear that in performing a medical procedure a physician does not generate life but simply preserves a life already in existence. Accordingly, when pregnancy reduction is an option, each of the fetuses is potentially viable. The physician merely selects which fetus shall live and which shall perish. Assuredly, the surviving fetuses had the status of viable fetuses from the earliest stage of gestation. Choosing between viable fetuses does present a problem in the form of "on what account do you think the blood of one is sweeter than the blood of another? (*mai hazit*)." In the act of intervention it becomes determined that the surviving fetus was viable from the moment of conception. Does the principle of *mai hazit* operate in precluding a selection of that nature? It is that principle that is codified by Rambam, *Hilkhot Rozeah* 1:9, in the words "for one dare not set aside one life for [another] life."

In effect, multiple pregnancies of such nature give rise to a paradox: If there is no intervention, the fetuses are all foredoomed and no prohibition attends upon their destruction. The very act of reduction renders some of the fetuses viable and hence would appear to trigger

the rule "one dare not set aside one life for [another] life." Hence it would seem that that act of intervention serves to render such intervention illicit.

The predicament is analogous to the classical paradox presented by Epimenides the Cretan who declared that all Cretans were liars and that all other statements made by Cretans were certainly lies.¹⁴ Accordingly, if the statement "All Cretans are liars," when uttered by a Cretan, is also understood as meaning that Cretans always lie,¹⁵ the following propositions follow from that statement: All Cretans are liars. I am a Cretan. Therefore, I am a liar. But if I am a liar then "All Cretans are liars" is a lie. If that is a lie, then I am telling the truth. If I am telling the truth, then it is true that all Cretans are liars and that I am telling a lie. . . .¹⁶

It would appear to this writer that, methodologically, proper resolution of the paradox is akin to the methodology employed in resolution of the philosophical paradox presented by the seemingly contradictory principles of divine omniscience and human freedom. The various resolutions of that problem propounded by medieval philosophers all serve to confirm both principles in insisting that human will is indeed free but that the Deity has foreknowledge of the choice that men will make. Similarly, it may be argued that the surviving fetuses were created as viable fetuses from the onset of conception. The physician may indeed randomly choose fetuses for elimination but his choice, albeit not preordained, is nevertheless foreknown. Hence, those fetuses that are eliminated were *ab initio* not endowed with viability with the result that their elimination is not prohibited.

This situation is not analogous to that of a physician who aborts a perfectly viable fetus. Such a fetus is perfectly viable save for the act of the abortionist. Divine omniscience is a significant factor only in determining that the fetus was never viable and hence its destruction does not constitute an illicit act. Assuming that feticide is a form of homicide, the elimination of a viable fetus is comparable to the sacrifice of one human being for the preservation of another. Prior knowledge on the part of the Deity is neither a defense nor a justification for engaging in such an act, just as divine omniscience does not serve to exculpate an act of homicide. Pregnancy reduction, on the contrary, is comparable to a situation in which a fetus would perish if not for medical intervention. When rescued, the fetus is regarded as having been viable from conception since such rescue was foreknown to the Deity. When, absent pregnancy reduction, no fetuses can survive, none of the fetuses is viable other than upon an act of rescue. Accordingly, the act of rescue, involv-

ing, to be sure, the destruction of other nonviable fetuses, serves to determine that only the preserved fetuses were viable from the moment of conception.¹⁷

This line of reasoning serves to sanction pregnancy reduction only when it is a virtual certainty that no fetuses will otherwise survive and serves to sanction the elimination of only the minimum number of fetuses necessary in order to make it possible for some fetuses to survive.

NOTES

- For a discussion of in vitro fertilization from the perspective of Jewish law see J. David Bleich, *Judaism and Healing* (New York, 1981), pp. 92-95.
- A detailed analysis of this involved concept is presented in J. David Bleich, *Contemporary Halakhic Problems*, I (New York, 1977), pp. 347-354.
- It is indeed the case that in situations in which the fetuses are not viable solely because there are too many fetuses in a single uterus each fetus is a "pursuer" with regard to each of the other fetuses and hence it might appear that the "law of the pursuer" would permit, and even require, elimination of the "pursuer" in order to preserve a potential victim. However, as is evident from the deliberations of the Palestinian Talmud, *Avodah Zarah* 2:2 and *Sanhedrin* 8:9, in situations in which two individuals are mutual aggressors the acts of aggression, in effect, cancel each other, and the law of pursuit does not apply. See *Teshuvot Divrei Yisakhar*, no. 168 and *Iggerot Mosheh, Hoshen Mishpat*, II, no. 59. Cf., R. Joshua Ze'ev Zand, *Birkat Banim* (Jerusalem, 5754), p. 376.
- For an analysis and discussion of these various positions see *Contemporary Halakhic Problems*, I, 325-371.
- See sources cited in *Contemporary Halakhic Problems*, I, 109-115 and 354-356.
- See the vigorous rebuttal of R. Moses Feinstein, *Iggerot Mosheh, Hoshen Mishpat*, II, no. 69. See also *Contemporary Halakhic Problems*, I, 112-115.
- Teshuvot Abi'ezer*, III, no. 72, contends that references to feticide as a form of homicide apply only to a fetus that has "torn itself loose" from the uterus, i.e., during the final stages of labor. According to that view, the fetus is regarded as a separate entity only after the process of parturition has begun whereas in earlier periods of gestation the fetus is regarded as but an organic limb of the mother's body with the result that pregnancy reduction in order to preserve other fetuses presents no halakhic problem. *Teshuvot Torat Heseh, Even ha-Ezer*, no. 42, sec. 4, also explains Rambam's ruling in *Hilkhot Rose'ah* 1:9 in a similar manner. This is apparently the position adopted by R. Aaron Soloveichik as reported by Yitzchak Mehlman, "Multi-Fetal Reduction," *Journal of Halacha and Contemporary Society*, no. XXVII (Spring, 1994), pp. 59-62.
- Other issues discussed by *Tiferet Yisra'el* are analyzed in *Contemporary Halakhic Problems*, I, 359-360.
- Rosh and Ran, however, both rule in accordance with the opinion of R. Yohanan; Rema, *Yoreh De'ah* 157:1, cites both views without offering a definitive ruling.
- See, however, R. Chaim Sofer, *Teshuvot Mahaneh Hayyim, Hoshen Mishpat*, no. 50, who advances a number of considerations that serve to distinguish the "specification" of Sheba ben Bichri from the danger posed by a child in the course of delivery. These considerations are discussed in *Contemporary Halakhic Problems*, I, 358.
- For an elucidation of the basis of that tradition see *Teshuvot Abi'ezer*, II, no. 16, sec. 5.
- The various halakhic authorities who permit reduction of multiple embryos are cited by Richard V. Grazi and Joel B. Wolowelsky, "Multiple Pregnancy Reduction and Disposal of Untransplanted Embryos in Contemporary Jewish Law and Ethics," *American Journal of Obstetrics and Gynecology*, vol. 165, no. 5 (November, 1991), pp. 1268-71, and by Richard V. Grazi, Joel B. Wolowelsky and Raphael Jewelewicz, "Assisted Reproduction in Contemporary Jewish Law and Ethics," *Gynecologic and Obstetric Investigation*, vol. 37, no. 4 (May, 1994), pp. 217-225.
- It must however be noted that despite these statements of the Gemara, R. Eleazar Fleckles, a disciple of the *Noda bi-Yehudah*, in a cryptic statement appearing in his *Teshuvah me-Ahavah*, I, no. 43, states that one who causes the death of a non-viable neonate incurs the penalty of "death at the hands of heaven." That statement has neither been analyzed nor cited by contemporary scholars.
- For a discussion of this paradox see Bertrand Russell, *Logic and Knowledge*, Richard C. Marsh, ed. (London, 1956), pp. 59-83, reprinted in Irving M. Copi and James A. Gould, *Contemporary Readings in Logical Theory* (New York, 1969), pp. 135-153. For references to this paradox in classical sources see Theodore K. Scott, *James Buridan: Sophisms on Meaning and Truth* (New York, 1966), pp. 49-60 and p. 49, note 89.
- Expressed more generally, the identical paradox is presented by the statement, "This sentence is false." If it is false, then it must be true that "This sentence is true." But if it is true, then the sentence is false. Thus the truth of the sentence implies that it is false, which in turn implies that it is true, which in turn . . .
- Russell's Theory of Types designed to resolve paradoxes of this nature is of no avail with regard to the dilemma posed by pregnancy reduction. Russell argued that a proposition concerning a class of propositions is not itself a member of that class. Thus the proposition "All Cretans are liars" is not itself a member of the class of lies ascribed to Cretans. Similarly, the self-referential proposition "This sentence is not true" is not really a member of the class of propositions. However, as expressed by Hans Reichenbach, "Bertrand Russell's Logic," *The Philosophy of Bertrand Russell*, Paul A. Schilpp, ed. (New York, 1963), I, 38, Russell's Theory of Types is merely "an instrument to make language consistent," i.e., a linguistic rule designed to interpret the manner in which language is employed. As such, it offers no solution to a paradox that is ontological in nature.
- This argument is developed at some length and in a somewhat different form in *Birkat Banim*, pp. 366-372.