

Severing the Conjoined Twins: **In Re A in Jewish Law**

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Some preliminary general observations concerning the nature of Jewish Law:

Jewish Law is religious law in the sense that its principal concern is the primary question whether the proposed act accords with the Law and is therefore permitted – or perhaps even required – or violates the law and is therefore forbidden. The question whether performance of the act, if forbidden, will result in the imposition of penal sanctions is at best secondary. It is indeed possible, even likely in some instances, that a given act is forbidden but not punished, either because the particular offense is not punishable by the Law or because of some consideration special to the particular case such as the degree of the offender's intent and the nature of his motivation. Accordingly, the vast literature in Jewish Law dealing with issues of sacrificing an individual to save a group has always been cast in terms of the primary permissibility of the proposed act rather than whether it is to be punished.

Jewish Law is basically casuistic in its nature. Most assuredly, theoretical generalizations concerning the rationale and basis for rulings in particular circumstances are important and affect the understanding of later scholars and their interpretation of the cases recorded in the sources. But they are not determinative. In the final analysis, the rabbinic decisor will be concerned principally that his decision be consistent with those of the earlier authorities he regards as determinative rather than that it be supported by and consistent with some abstract theoretical generalization that appeals to his thinking about the subject. Such casuistry enables him to take into account any unique features of the given case that attract him. Any general rationalization of his decision will be just that, an after the fact attempt to show that it is not contrary to accepted sources and to provide some guidance – not a binding precedent - to later authorities.

As a system of religious law based on the belief in divine revelation and guidance, Jewish Law does not erase from its records earlier discussions and rulings of the rabbis. Once accepted, a position remains forever within the system and is a part of its sources for future use. This is not to say that Jewish Law always adheres to binding precedent. The very opposite is the case. Minority positions are recorded so that they may sometimes become the basis for a decision that deviates from the majority view. More to the point, earlier sources and decisions often are not rejected but are interpreted by later generations in the light of their understanding. These earlier sources and rulings may even be reinterpreted in terms that do not reflect the thoughts of the earlier rabbis. And the later interpretations, together with rulings based on them, may be the subject of still additional interpretations and reinterpretations. Jewish Law, then, builds layer upon layer of interpretations and rulings, constantly subject to the possibility of additional reworking and remodeling to suit each generation's understanding of its faith and itself.

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Decision in 1960s, Rabbi Moshe Feinstein

Same as Re A

All agree on the result

Different theories – self defense, necessity, lack of intent to kill

I. Self Defense –

Case # 1 - Mishna (2d century)

Rodef (pursuer)

One who pursues another to kill him is himself killed

Everyone may kill him, not only the pursued

More than permitted -

commanded

a virtuous act

a mitzvah

Paradigm case

The Rodef acts in violation of the law

Willfully, intending to kill

He is guilty of the offense

Or would be if not stopped

What about other cases?

Modern deliberations concerning innocent pursuer

Beginnings in the Talmud

Fully developed in Middle Ages (11-14 century), Casuistically

More philosophical speculation begins in late 19th century

Talmud, A child pursuer may be killed

Although not punished

Case # 2 - Mishna (2d century) Abortion case

Mother in travail

Destroy the fetus to save the mother

Her life takes precedence over his

But if the head has emerged

Do not touch the fetus

"One may not reject one life in favor of another"

One may not destroy one life to save another
The fetus is now a full human being

Talmud asks –

Why is the emerging fetus not a pursuer
You said a child pursuer may be killed

Answer –

This child (the fetus) is not the pursuer
Heaven is pursuing the mother

Apparently,

The child pursuer who may be killed in self defense
Need not be criminally liable, but must
Act knowingly, willfully
Perhaps also unlawfully?

The emerging fetus is not doing a humanly willed act
Or an unlawful act

It is an act of nature, heaven pursues the mother

The emerging fetus is at most an innocent aggressor
Probably not even an aggressor at all

Interim summary –

Self defense – RODEF - is not available to resolve the twins case

There is no willed and unlawful human act of the one twin that
endangers the other twin

Notwithstanding, Rabbi Feinstein's decision is based on Rodef

Criticized in the literature on the ground that –

The twins case is the same as the fetus case
Heaven is the pursuer, not the twin

All sounds simple and straightforward but Maimonides (12 century)
upsets the apple cart

He rules -

One may kill the fetus whose head has not emerged because
he is likened to a rodef, a pursuer

But once the head has emerged, he may not be killed

One does not destroy one life to save another and
This is the way of the world, the natural order

Difficulties –

The Talmud rejected the pursuer idea

Only an analogy for Maimonides?

If the fetus is (like) a pursuer while it is in the womb, why not also
after its head has emerged

More than 800 years of exegesis have not solved the problem

A tribute to Maimonides' standing that his position has influence

We'll return to Maimonides later

II. Necessity –

May one reject (or destroy) one life to save many lives?

Case # 1 – Abortion Mishna above

Once the head emerges one may not destroy the fetus to save the mother

The Mishna does not deal with the question,

Is it permitted to kill the one to save the many?

What is the law if both the fetus and the mother will die?

Not discussed in the Talmud

18th century Rabbi says kill the fetus, better that one die than both

He rejects the self defense approach because no willed or unlawful act, but accepts the necessity approach

Case # 3 – Duress, Talmud 3d-4th centuries

A orders B to kill C else A will kill B

Ruling – do not kill

Who says your blood is redder than his

Perhaps his blood is redder than yours

Equality of human life

Note – the source of this law is not a Biblical text or hallowed precedent

The source is human reasoning

Arguably, this reasoning does not apply to killing one to save the many

In the absence of some Biblical counter text or precedent, arguably human reasoning might yield the conclusion that you may kill the one to save the many

But we have no Talmudic source to support this conclusion

And we have a Talmudic source that may appear to reject this conclusion

Cases # 4 and 5 – Surrendering the one to save the many

Talmud (Tosefta and Jerusalem Talmud) 2d-3d centuries

Case # 4 - Heathens demand that women surrender one to be defiled or they will defile all the women

Ruling – Let them defile them all but do not surrender a single one

Case # 5 - Heathens demand that the group surrender one to be killed or they will kill them all

Ruling – Let them all be killed but do not surrender a single one

Both rulings are unanimous

Suppose the heathens specify the individual to be surrendered and killed

Now the Rabbis disagree

One says – turn him over to save the rest

The other says – only if he committed a capital crime
 (Note – No Talmudic source suggests you might surrender a designated woman to be defiled)

Maimonides adopts the stricter view

If not designated, may not surrender anyone to be killed

If designated, may surrender him **if** he committed a capital crime

Question raised by commentators –

Why not surrender the one to save the many, in either event?

Especially since the designated one will die anyway

Two possible explanations -

1. This case concerns the special situation how to deal with terrorist demands

Jewish Law says, do not pay exorbitant ransom to redeem captives

Note – Maimonides does not suggest you might surrender a designated woman to be defiled

That demand is outrageous in either event

Designation is irrelevant

But a demand to surrender one to be killed may be justified in the circumstances

E.g., if the designated one committed a capital crime the demand to surrender him is more like extradition

If he did not, the demand to surrender him under threat is an act of terror to be resisted

So, the reason forbidding surrender is because one must resist terror

Not because you may never kill one to save the many

See Jerome Hall, *General Principles of Criminal Law* (2d edition 1960) page 447

There are valid grounds in support of the above noted differences between the doctrines of necessity and coercion. In the former the pressure which influences the action is physical nature while in coercion it is immoral and illegal conduct of a human being that creates the problem. Certain major consequences result. In coercion the situation may be completely transformed in a split second by the malefactor's change of mind, and he is morally obliged to do that. There can hardly ever be any such very high probability that he will not change his mind as that no relief will come to alter imminent destructive physical forces.... Even if the execution of the coercer's threat were just as probable as the continuing impact of destructive, physical phenomena, there would frequently be a duty to resist the evil-doer.... In necessity, man bows to the inevitable; but in coercion there is no inevitability.

In Jewish Law, this principle is the duty to sanctify God's name

"kiddush hashem"

Which also happens to be the subject of that chapter in
Maimonides' Code

Distinguish Re A

That's more like Necessity

Nature causes the problem, not terrorist demands

Resistance to evil (terror) is not relevant

Recall the 18th century ruling that permits killing the fetus when
otherwise both it and the mother will die

2. Rabbi Feinstein –

There are two kinds of pursuers

One who acts wrongfully with guilt

One in which there is no guilt

but there is some other qualitative difference between the
pursuer and the pursued

In the case of the fetus that endangers its mother

The fetus is not to blame

But the second ground applies

The mother is a full life whereas the fetus is not

It's only a potential life

That difference plus the fact that the fetus is the cause of the danger
form the grounds (Maimonides as per R. Feinstein) to permit
the abortion

However, once the head has emerged, this difference disappears

Both the fetus and the mother are full lives

What remains is that the fetus is the source of the danger

There is no other difference between the fetus and the
mother

Both are equally not to blame

Both are equally full human beings

According to R. Feinstein, this also explains the lenient view that
the designated person may be surrendered

He will die in either event

His only prospect is "short-term" life

The others have a possibility of long-term life

True, he is not to blame

But he is the cause (the source) of the danger to them

So one may surrender his short-term prospects

to save the long-term prospects of the others

Re A – Both are equal full human beings, neither is to blame

The weaker sister has only short-term prospects.

Her stronger sister has a possibility of long-term life
 The weaker sister is the cause (or source) of the danger
 So, the surgery is permitted

Difficulties in Rabbi Feinstein's approach –

a. It offers an explanation of the lenient rabbinic position

Designation is enough to warrant surrender

But it does not explain the stricter view that more is needed

Surrender only if he committed a capital offense

Maimonides ruled according to the stricter view

b. It limits the permission to kill one to save the many to situations
 in which the one to be killed is the cause (or source) of the
 danger

It limits the permission to kill to cases in which A and B are locked
 together in a struggle which only one of them can survive.

Perhaps this is a heuristic designed to keep such permission within
 narrow bounds

Limit the anarchic tendency inherent in Necessity

Still, it rings somewhat arbitrary

Suppose there is no medical basis to choose which should die and
 which should live?

Who owns the single heart?

Case # 6 – The baby in the bunker case

S.S. roundup of Jews to be sent to extermination camps

Some are hiding in an underground bunker

A newborn infant cries, endangers the group

They smothered him with a pillow to stifle his cries. He suffocated

After the war, the survivors asked if they did wrong

Not punishment, should they do penance

Ruling – the infant was an innocent aggressor but it was permitted
 to kill him and save the group since he would have died
 anyway

III. Lack of Intent to Kill

Case # 7 – The Trolley Problem

Professor Judith Thomson, "The Trolley Problem", 94 Yale
 Law Journal 1394 (1985)

The trolley problem arose in Jewish Law in the 1950s

Rabbi Isaiah Karelitz

The driver lost control of a car on a steep hill

Headed toward a group of persons

Steered the car away from them and killed one person
who was not otherwise in danger

The question arose after the fact, penance not punishment

Rabbi Karelitz considered the various possibilities

Distinguished the case of the heathens demanding surrender

Here the immediate act is an act of saving

It deflects (diverts) the danger away from the group

It happens that there is a person on the other side

There, surrendering the one puts him at the mercy of those
who demand his surrender

In and of itself, the immediate act of surrendering him
does not save anyone

Here the driver does not intend to kill anyone

His immediate intent is to save the endangered group

There, the intent to save is a more remote consequence

More like motive than intent

Dependent on the demanders

Since the driver's act saves many; only one person is killed

Whereas doing nothing allows the many to die

Perhaps it was OK

Compare the third judge in Re A

But R. Karelitz didn't give a final ruling on the problem

Note – Subtle differences concerning intent may deserve special
weight when the issue is religious penance

Case # 8 –

Tyre, Lebanon

Terrorists blew up a building with many Israeli soldiers

Mealtime, most were in the dining room at the bottom of the rubble

A few were trapped higher up

The question –

May one use heavy machinery – huge bulldozers – to clear
away the upper level debris to accelerate access to the
many trapped at the bottom?

This will likely kill some trapped at the higher level but still
alive, but it might save the many trapped in the debris

Rabbi Yisraeli – No

Why – This is a direct killing

Perhaps the prospect of saving the others was too remote

Killing is virtually certain whereas saving is unknown

Summarise the cases –

In the abortion case, in which both will die, and

In the conjoined twins case

The very act that kills the one saves the other

Killing and saving are inseparably intertwined

The actor's immediate intent is to save life

The one killed and the one saved are locked in
struggle together

This is similar to double effect theory

Direct vs. indirect intent

Though I know of no earlier source that used such
reasoning in this context

In the Trolley problem

The very act that kills the one saves the others

The immediate intent is to save life

BUT, the one killed and the ones saved are struggling

The one killed is outside the zone of danger

That may explain R. Karelitz's hesitation

In the Tyre case,

The two acts – killing and saving - are separate
distinct

The initial act (bulldozing the rubble) causes death

In and of itself it doesn't save anyone

It only speeds up the process of removing the
debris

Saving the others requires separate later acts
which may or may not be effectual

Note - The differences in the psychology of the acts (actors) may
be a critical consideration in a religious system

Professor Thomson's problem

How does one distinguish the trolley problem from the case of the
surgeon who can harvest one person's body parts for 5
implantations?

She posits -

Intuitively, one is permitted to divert the trolley

Intuitively, one may not kill someone to harvest his organs

What explains the difference?

In Jewish law, the surgeon case is the Tyre case, # 8

First you kill the one to harvest his organs

Afterwards, you transplant his organs to save the others

The killing is direct

It does not in itself save anyone

It merely provides a foundation for the later transplants,
that may or may not save others