Appendix B: Applying the Law of *Rodef* in Cases of Uncertainty

The גמרא יומא (Source 1a) sites sources from which to derive the rule that saving lives (נפש פיקוח) pushes aside the שבת (i.e., is דוחה שבת) even in cases of uncertain danger to life (ספק סכנת נפשות). The גמרא sites רבי ישמא־ל who derives this rule from the בא במחתרת case (the dispensation to kill a thief tunneling into one's home) where the imperative to save the homeowner's life pushes aside the prohibition to murder the thief, even though there is an uncertainty (ספק) whether the thief intends to murder the homeowner or only to steal. However, the גמרא subsequently states that this source is inconclusive since it only teaches us that we may push aside מצות in cases of ודאי סכנת נפשות (certain danger to life) since the בא במחתרת case is considered a case of ודאי סכנת נפשות (Source 1b, per רש"י's explanation in Source 1c) due to the presumption that the tunneling thief intends to kill the homeowner if confronted. רש"י in גמרא סנהדרין (Source 2b) comments that the tunneling thief is considered a רודף because of his intent to kill if confronted. It would therefore appear from the גמרא יומא that we may only apply the דין רודף to kill the thief because it is certain that he intends to kill if confronted. However, if there would be an uncertainty regarding his intentions to kill, presumably we could not apply the דין רודף to the thief.

Rav Moshe applies the same principle concerning application of the דין רודף to a fetus to permit abortion to save his mother whose life is potentially endangered due to complications of the pregnancy (apparently referring to a case where the mother suffers from an illness that is expected to intensify due to advancement of the pregnancy and/or childbirth, potentially with lethal results): *"For this reason, I have ruled that even if the physicians say there is a risk that a pregnant woman may die if the fetus is not aborted, even though usually a very minor risk level is sufficient to permit violating* שבת *and other prohibitions, we cannot permit feticide unless the physician assesses that the eventuality of the mother's death is nearly certain* (קרוב לודאי). *Since the dispensation for feticide is based on the fetus being a* רודף, *there must be a near certainty that he is a* רודף." (Source 3). (See also Source 4 in which *Rav Moshe* reiterates the same thought regarding a responsum of *Rav Chaim Ozer Grodzenski*). Perhaps one may extend *Rav Moshe's* logic to the case of multifetal pregnancy as follows: If *Rav Moshe* would permit MPR due to the fetuses being considered as רודפים against each other as *Rav Shlomo Zalman* does, perhaps *Rav Moshe* would require a near-certain prediction that all fetuses would die without intervention. Perhaps any prediction below a near-certainty level would not allow us to consider the fetuses as רודפים against each other just as *Rav Moshe* does not consider the fetus as a רודף against his ill mother without a near-certain prediction that she will die without intervention. In fact, when recording *Rav Shlomo Zalman's* opinion, the *Sefer Nishmat Avraham states "The Gaon, ZT"L explained me that in cases where the pregnancy is at high risk due to multiple fetuses, each of the fetuses has the* דין רודף." I do not know whether *Rav Shlomo Zalman's* terminology – "high risk" ("בסיכון גבוה") - is limited to a near-certain prediction of fetal loss or if a prediction at a somewhat lower certainty level would perhaps suffice to consider the fetuses as רודפים against each other.

However, perhaps we can explain both the גמרא יומא and *Rav Moshe's* פסק in the ill pregnant mother situation in a slightly modified manner which would, in turn, allow us to argue that in the multifetal pregnancy situation, a prediction of fetal loss below a near-certainty level would suffice to consider the fetuses as רודפים against each other. When the גמרא יומא says we can only derive that ודאי סכנת נפשות pushes aside מצות (is דוחה מצות)

from the בא במחתרת case because of the presumption that a person does not hold himself back from defending his property ("חזקה אין אדם מעמיד עצמו על ממונו"), the following explanation is suggested: Originally, רבי ישמאל proposed that the בא במחתרת case serves as a source that ספק סכנת נפשות is דוחה מצות because he understood that the tunneling thief is– "ספק על ממון בא ספק על נפשות בא" *("about whom it is uncertain whether he only comes to take money or if he come to take lives")* – and thus, the בא במחתרת is a legitimate ספק סכנת נפשות case, from which we can derive that all similar cases are דוחה מצות. However, the גמרא subsequently recalibrated its position, i.e., due to the "חזקה אין אדם מעמיד עצמו על ממונו", and thus, the בא במחתרת is no longer considered a ספק סכנת נפשות case, but rather a ודאי סכנת נפשות case. This חזקה is needed since normally a burglary is not presumed to be a life-threatening situation and, thus, as long as we are uncertain about the thief's intent, we have no basis to call the thief a רודף without further empirical evidence that he threatens lives. The "חזקה אין אדם מעמיד עצמו על ממונו" provides us the evidence that enables us to conclude that he certainly is engaged in a life-threatening activity – i.e., the required evidence that transforms the "ordinary" thief into the status of a רודף. Once a person is deemed a רודף, it is immaterial if we are able to predict with certainty that the outcome of his actions will be a fatality or if our predictions of a fatal outcome are less than certain. The very fact that he is, with certainty, engaged in life-threatening activity renders him a רודף and therefore, subject to the דין רודף - i.e., we save the life of his victim by taking the רודף's life.

We see this notion as self-evident as follows: Even in the classic רודף situation, we would never require a near-certain prediction that the assailant's murder attempt would be successful in order to consider him a legal רודף. It is obvious that the mere attempt on another life even with an uncertain outcome, renders a person a רודף and therefore his life may be preemptively taken if no other avenue is available to stop him. Therefore, we see that the operative issue to consider is only whether the individual is considered a certain רודף in the first place and ***not*** whether the ***outcome*** of the רדיפה will be a certain death.

This approach can perhaps help us understand *Rav Moshe's* ruling regarding the ill pregnant mother – i.e., whether potential complications expected to arise from the pregnancy can enable us to consider the fetus a רודף to permit abortion to save the mother. In the case of the responsum of *Rav Chaim Ozer* which *Rav Moshe* refers to (see Source 4), the pregnant mother's current condition was presumably not yet life-threatening; the threat would potentially arise later as a result of the childbirth complicating her existing lung disease. Since pregnancy itself inherently is not considered a life-threatening condition and her life would only become threatened due to future complications not yet extant, there is no basis to call the fetus a רודף based only on a potential for future developments, unless these potential dangerous developments are predicted on the level of a near-certainty. Perhaps only under these dire, near-certain circumstances, we can deem the pregnancy itself as a life-threatening condition and therefore, a רדיפה situation, in which case we may sacrifice the fetus to save his mother. (Even though the near-certain danger will only occur in the future, *Rav Chaim Ozer* writes that to classify a danger as a רדיפה situation, it is immaterial if the danger looms immediately or if it only looms some time later; as long as the danger is considered certain, we apply the דין רודף).

However, in the case of multifetal pregnancy, the very pregnancy itself is a life-threatening condition since the nature of this complex pregnancy is likely incompatible with fetal life. Therefore, even if a lethal outcome is less

than nearly-certain, we may perhaps still consider the pregnancy itself as a רדיפה situation since the multitude of fetuses threatens each other's lives. We do not require any additional evidence or new development to render the pregnancy as a life-threatening condition and therefore, a רדיפה situation. Therefore, perhaps a near-certainty of a lethal outcome (in the absence of MPR) is not needed to permit reducing the fetuses. This contrasts with the pregnant mother with lung disease where a near-certainty of a lethal outcome is needed to permit aborting the fetus since a new development must occur to create the life-threatening condition. Thus, it is possible that when *Rav Shlomo Zalman* stated "*that in cases where the pregnancy is at high risk due to multiple fetuses, each of the fetuses has the* דין רודף", his definition of "high risk" ("בסיכון גבוה") may possibly be lower than a near-certainty that all fetuses would perish without intervention. Furthermore, if *Rav Moshe* would agree with *Rav Shlomo Zalman* that the דין רודף may be applied to permit MPR, perhaps *Rav Moshe* would not require a near-certain prediction of a fatal outcome, as he may distinguish between the multiple pregnancy situation and the case of a pregnancy complicated by a serious life-threatening illness of the mother.

However, after further thought, I believe that the above logic is incorrect since there is a fundamental difference between the conventional רודף (who attempts to kill, in which category we will include the בא במחתרת) and the fetuses in a multifetal pregnancy. In his ספר אבי עזרי (Source 5), *Rav Shach* writes there are two aspects included in the דין רודף: (1) A חיוב that devolves on the רודף (i.e., the legal consequence of his act of attempted murder), which authorizes us to kill the רודף if needed to save the victim (נרדף); and (2) Even if the pursuer is not engaged in attempted murder (as in the case of an unintentional רודף), the general imperative of פיקוח נפש (saving a life at risk) dictates that if the נרדף's life became endangered because of the pursuer, the pursuer has a דין רודף – to the extent that the פיקוח נפש imperative of the נרדף overrides the פיקוח נפש imperative of the רודף. Based on *Rav Shach's* explanation, it is understood that with respect to the "legal consequence" (חיוב)-aspect of the דין רודף, if the רודף has criminal intent, then we do not require a certainty of a lethal outcome since the very attempt to commit murder creates the חיוב which authorizes killing the רודף. Thus, the assignment of the status of רודף to an *intentional* רודף can be described as process-related and not necessarily outcome-dependent (i.e., the process is the attempt to kill another). However, if there is no criminal intent, then the only aspect of the דין רודף that can be invoked is the פיקוח נפש imperative. Thus, the assignment of the status of רודף to an *unintentional* רודף is necessarily outcome-dependent. Consequently, our ability to assign the status of רודף is only as good as our confidence about the outcome. Accordingly, in the case of an *unintentional* רודף, if we lack certainty of a lethal outcome, perhaps we cannot assign of the status of רודף. Therefore, it may be quite possible that *Rav Moshe* would rule that a fetus in a multifetal pregnancy cannot be assigned the status of a רודף unless there is a near-certainty of a lethal outcome to all the fetuses just as he required a near-certain lethal outcome for the mother in order to permit aborting her fetus.

Appendix B: Applying the Law of *Rodef* in Cases of Uncertainty

Sources

1) תלמוד בבלי יומא, דף פה', ע"א - ע"ב:

1a) גמרא, דף פה' ע"א:

וכבר היה ר' ישמעאל ורבי עקיבא ורבי אלעזר בן עזריה מהלכין בדרך ולוי הסדר ורבי ישמעאל בנו של רבי אלעזר בן עזריה מהלכין אחריהן נשאלה שאלה זו בפניהם מניין לפקוח נפש שדוחה את השבת נענה ר' ישמעאל ואמר אם במחתרת ימצא הגנב ומה זה שספק על ממון בא ספק על נפשות בא ושפיכות דמים מטמא את הארץ וגורם לשכינה שתסתלק מישראל ניתן להצילו בנפשו ק"ו לפקוח נפש שדוחה את השבת.

Rebbi Yishmael, Rebbi Akiva and Rebbi Elazar ben Azaryah were walking on the road, with *Levi Hasadar* (the arranger or embroiderer) and *Rebbi Yishmael* the son of *Rebbi Elazar ben Azaryah* walking behind them. The following question was asked before them: From where do we know that saving lives pushes aside (the observance of) שבת? *Rebbi Yismael* responded and said (the תורה says in שמות כב: א): *"If a thief is discovered while tunneling in, and he is struck and dies, he has no blood".* If this thief, about whom it is uncertain if he (only) comes to take money or if he come to take lives, and furthermore, bloodshed defiles the land and causes the Divine presence to become removed from Israel, and yet it is permitted to save the homeowner by taking the thief's life, then certainly saving lives pushes aside the שבת.

1b) גמרא, דף פה' ע"ב:

אמר שמואל אי הואי התם הוה אמינא דידי עדיפא מדידהו וחי בהם ולא שימות בהם אמר רבא לכולהו אית להו פירכא בר מדשמואל דלית ליה פירכא דר' ישמעאל דילמא כדרבא דאמר רבא מאי טעמא דמחתרת חזקה אין אדם מעמיד עצמו על ממונו והאי מידע ידע דקאי לאפיה ואמר אי קאי לאפאי קטילנא ליה והתורה אמרה בא להרגך השכם להרגו ואשכחן ודאי, ספק מנלן? ... וכולהו אשכחן ודאי ספק מנא לן ודשמואל ודאי לית ליה פירכא.

Shmuel said if I had been there (during the above discussion), I would have said my source is superior to their sources: The תורה states: *"You shall guard My decrees and My laws that man shall carry out and by which he shall live"* (ויקרא יח: ה'). (This implies that) man shall live by Hashem's laws and not die by them. *Rava* stated: For all the *Tanaic* sources (that lifesaving pushes aside שבת), there is a refutation, but for *Shmuel's* source, there is no refutation. The source of *Rebbi Yishmael* (i.e., the tunneling thief case, may be refuted) as *Rava* said: What is the משנה's reasoning (in *Sanhedrin 72a*) that someone tunneling into a house (may be killed)? There is a presumption that a person does not hold himself back from defending his property, and this thief, knowing that homeowner will confront him, says "If he will confront me, I will kill him" and the תורה says if someone comes to kill you, anticipate him and kill him first. Therefore, we only find (from the tunneling thief case, a source that we may push aside מצות to save a person whose life is in) certain danger, but from where do we know (that we may push aside מצות to save a person whose life is in) possible danger? … For all the *Tanaic* sources (the same refutation applies): we only find (from their source, that we may push aside מצות for) certain danger, but from where do we know (that we may push aside מצות to for) possible danger? However, for *Shmuel*'s source, there certainly is no refutation *(explanation adapted from Artscroll publications).*

1c) רש"י, דף פה׳ ע"ב, ד"ה "אין אדם מעמיד את עצמו":

מלהציל את ממונו מיד גנב והאי גנב דאתי במחתרת מידע ידע דקאי בעל הבית באפיה ואדעתא דהכי אתא דמימר אמר כי קאי לאפאי קטילנא ליה ואין זה ספק נפשות אלא ודאי נפשות והתורה אמרה לו כאן אחרי שבא להורגך השכם להורגו.

(A person does not hold himself back) from defending his property from the thief. And this thief who enters via tunneling in knows that the homeowner will confront him, and with this foreknowledge, the thief comes, saying "if he confronts me, I will kill him." (Therefore) this is not a situation of uncertain danger to life but rather, a situation of certain danger to life and the תורה here says to him: "since he comes to kill you, anticipate him and kill him first."

1d) רש"י, דף פה׳ ע"ב, ד"ה "דשמואל לית ליה פירכא":

אשר יעשה האדם המצות שיחיה בהם ודאי ולא שיבא בעשייתה לידי ספק מיתה. אלמא מחללין על הספק.

When the תורה states "*that man shall carry out",* implying that man shall live by the מצות – the תורה means that a man should live by the מצות with certainty - indicating that a person should not enter (even) into a potential (ספק) eventuality of death by performing מצות. Therefore, we see that we may desecrate the שבת (even) for a potential (threat to a person's life).

2) תלמוד בבלי סנהדרין, דף עב, ע"ב:

2a) גמרא:

תניא אידך מחתרת אין לי אלא מחתרת גגו חצירו וקרפיפו מנין תלמוד לומר ימצא הגנב מ"מ א"כ מה תלמוד לומר מחתרת מחתרתו זו היא התראתו.

It was taught in another ברייתא: Scripture states *"If the thief is found <u>while tunneling in</u> ..."* (שמות כב׳: א׳). This only teaches us (that we may kill the thief who gained entry through) tunneling. From where do we know (that we may kill the thief who gained entry to) the homeowner's roof, yard or field (via a ladder or open door)? Scripture states *"If the thief is found"* - which indicates in any manner (i.e., even if the thief gained entry to the roof, yard or field, he may be killed). If so, why does Scripture state "tunneling"? The תורה comes to teach us that his act of tunneling is in place of his warning *(explanation adapted from Artscroll publications).*

2b) רש"י, ד"ה "זו היא התראתו":

שא"צ התראה אחרת אלא הורגו מיד דכיון דטרח ומסר נפשיה לחתור אדעתא דהכי אתא דאי קאי לאפאי קטילנא ליה ואמרה תורה כיון דרודף הוא א"צ התראה אלא מצילין אותו בנפשו.

(The explanation is) that he thief does not require any additional warning (to warrant his death), but rather the homeowner may kill him immediately (upon sighting him). Since the thief expends the effort and sacrifices himself to tunnel in, he does so with the intent to kill the homeowner if he confronts him. And the תורה states since the thief is a רודף, he does not require any warning (to warrant his death). Rather, we save the homeowner by taking the life of the thief.

אבל נכנס לחצרו וגגו דרך הפתח אינו הורגו עד שיתרו בו בעדים חזי דקאימנא באפך וקטילנא לך וזה יקבל עליו התראה ויאמר יודע אני ועל מנת כן אני עושה שאם תעמוד לנגדי אהרוג אותך אבל בלא התראה לא דדילמא לאו אדעתא דנפשות קא אתי אלא דאשכח פתחא להדיא ועל אדעתא דאי קאי באפאי ליפוק.

However, if the thief enters the homeowner's yard or roof via the doorway, the homeowner may not kill him unless he warns him in the presence of witnesses (as follows): "Beware! I am confronting you and I will kill you". The thief must accept upon himself the warning and say: "I acknowledge (your warning) and in spite of it, I will carry out (my crime with the admonition that) if you confront me, I will kill you". However, in the absence (of an explicit warning, the thief who gained entry to the yard or roof) may not be killed since perhaps he does not come with the intent to take a life. Rather, (perhaps) he found an open door (and entered) with the intent to exit (i.e., to flee immediately) if the homeowner confronts him.

3) <u>אגרות משה, חושן משפט ח"ב, סימן סט' אות ד'</u>

בשביל שום צורך דהאם שזה אסור בפשיטות. ומטעם זה הוריתי שאף שהרופאים אומרים שיש חשש שמא תמות האם כשלא יהרגו את העובר, אף שלענין חלול שבת וכל האיסורין היו מחללין והיו עוברין במדת חשש שאמרו דהא גם בשביל ספק קטן וס"ס מחללין, מ"מ להרוג את העובר יהיה אסור עד שתהיה האומדנא להרופאים גדולה קרוב לודאי שתמות האם דמאחר דהוא מצד שנחשב רודף צריך שיהיה כעין ודאי שהוא רודף, וגם פשוט שאין חלוק לפ"ז בין הולדות, דאף

For this reason, I have ruled that even if the physicians say there is a risk that a pregnant woman may die if the fetus is not aborted, even though usually a very minor risk level is sufficient to permit violating שבת and other prohibitions, we cannot permit feticide unless the physician assesses that the eventuality of the mother's death is nearly certain (קרוב לודאי). Since the dispensation for feticide is based on the fetus being a רודף, there must be a near certainty that he is a רודף.

4) <u>אגרות משה, חושן משפט ח"ב, סימן סט' אות ד'</u>

ובענין השאלה שבא לפני הגרח"ע שהאשה היתה חולה גדולה שהרופא אמר שודאי תסתכן בלידתה יש להתיר גם מטעם רודף כדכתב בעצמו באם הרופא אומר שהוא ודאי שתמות, ולמה שבארתי ע"פ הירושלמי שהרדיפה הוא מחמת שנפשה ושניהם לא יוכלו לחיות ודאי הוא בחשיבות רודף מחמת שמקשה ללד, ואם הרופאים אין אומרים שהוא ודאי אלא רק חששות בעלמא יהיה אסור עד שיראו הרופאים בשעת הלידה.

Regarding the question that came before the *Gaon, Rav Chaim Ozer* (אחיעזר, חלק ג', סימן עב), where the (pregnant) woman was very ill and the physician stated that she would certainly become endangered through childbirth: (In such a situation), one should permit (aborting the fetus) on the basis of רודף as *Rav Chaim Ozer* himself wrote regarding a situation where the doctor stated that the mother will certainly die. … And if the physicians do not state that it is a certainty (? - that the mother's life will become endangered as a result of childbirth complications), but rather they merely have concerns (that the mother may become endangered), then it is forbidden (to kill the fetus) until the physicians see (the mother's condition) at the time of childbirth.

It appears that two aspects are included in the דין רודף:

1) The specific rule that applies to a רודף, i.e., that it is permitted to save the נרדף (victim) at the expense of the רודף's life. This is independent of the דין פיקוח נפש (general rule of saving the life) of the נרדף. This aspect of דין רודף applies when the pursuit (רדיפה) entails an act of attempted murder (מעשה רציחה); it is a legal consequence (חיוב) that devolves on the רודף (as a result of his criminal activity);
2) The general rule of פיקוח נפש (saving a life at risk): Even if the pursuer is not engaged in attempted murder (רציחה); nonetheless, if the פיקוח נפש situation facing the נרדף came about because of the pursuer (even without criminal intent), he has a דין רודף – which means that the פיקוח נפש imperative of the נרדף sets aside (overrides) the פיקוח נפש imperative of the רודף. This works through the principle of דחייה - pushing aside - just as the prohibitions of the entire תורה are pushed aside by פיקוח נפש, similarly the פיקוח נפש of the רודף is pushed aside by the פיקוח נפש needs of the נרדף.

5) אבי עזרי על הרמב"ם, הל' רוצח, פ"א ה"ט: