

## Are Unborn Children “Children”?

In February 2024, the United States witnessed a significant uproar sparked by the Supreme Court of Alabama’s ruling that frozen embryos are legally considered “children,” thus granting them the same legal rights as “unborn children”.<sup>1</sup> The ruling stemmed from an incident at the end of 2020 when a patient wandered into the “cryogenic nursery” of the Mobile Infirmary Medical Center through an unsecured door, removed several embryos from the freezer, and then dropped them (due to their subzero freezing temperature), thus destroying the embryos. In the aftermath, several couples sued the medical center for “negligence leading to the death of a minor”. The trial court dismissed the claims because frozen embryos do not meet the criteria of being a “person.”

However, the Supreme Court of Alabama overturned the ruling on appeal, citing religious principles and asserting that laws regarding death by negligence applied universally to “all unborn children,” including those outside of a womb at the time of the incident. (This decision, significantly influenced by Christian beliefs, sparked controversy among liberal circles.)

The immediate aftermath of this dramatic decision was the abrupt cessation of operations in many fertility laboratories. They needed time to reassess their responsibilities in cases of accidental or deliberate embryo damage or destruction, such as when couples decide against using their frozen embryos. Furthermore, they were uncertain if and how this ruling would impact the disposal of defective embryos detected during pre-implantation screening (PGD).

Halachic discourse on destroying embryos emerged a few years ago in response to the question of whether embryos may be destroyed for research purposes. Before we discuss the Halachic issues, a brief review of embryonic development is in order:

After fertilization, the zygote divides rapidly to form a solid ball of cells known as the morula which progresses to a blastocyst by about day 5. The blastocyst has two distinct layers, the outer trophoblast layer, which will form the placenta and placental membranes, and the inner cell mass comprising embryonic stem cells. These pluripotent stem cells can become either new stem cells (self-renewal) or become

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<sup>1</sup> See the full ruling here: <https://tinyurl.com/y8uvudam>

specialized cells (differentiation). Much research has been performed involving stem cells and their possible use in understanding disease processes and how healthy cells are generated to replace diseased ones. Embryonic stem cells come from embryos in the blastocyst stage before uterine implantation; removal of the cells from the blastocyst precludes the implantation of the embryo and its development into a fetus.

Although volunteer donors provide some eggs, and a smaller supply is produced through cloning, most stem cells come from surplus IVF embryos. The standard method of in vitro fertilization (IVF) involves the removal of several eggs from the woman and then fertilizing them in a laboratory. Some are then returned to the woman's uterus for implantation, and the others are frozen for future use. In many instances, such as where the woman successfully conceives, or if she dies or is divorced, the frozen embryos are never used.

May one use these unused embryos for the production of stem cells? As stated, the production of stem cells is an irreversible process that precludes the possibility of subsequent implantation and development into a fetus and might be considered feticide. Is doing so Halachically permissible, especially at such an early stage of development?<sup>2</sup>

In *Parshas Noach*, the Pasuk states:

*Whoever sheds the blood of man, by man shall his blood be shed; for man was formed in the image of God. (Bereishis 9:6)*

According to *R' Yishmael*, this Pasuk is the source for the *Issur* of abortion:

*It was said in the name of R' Yishmael that [a Ben Noach is put to death] even for [killing] fetuses. What is the reasoning of R' Yishmael? The Pasuk states, "Shofech Dam ha'Adam ba'Adam Damo Yishafeich" [literally, "whoever spills the blood of a person inside a person, his blood shall be shed"]. Which kind of person is "inside a person"? A fetus in its mother's uterus.*

We see that a fetus is classified as an "Adam" and that it is therefore forbidden to terminate a pregnancy, as the Pasuk states "*whoever spills the blood of person inside a person his blood shall be shed.*" Is there any *Issur* in killing a fetus when it is not "inside a person"? In other words, when it is outside of the uterus?

A *Ben Noach* is liable to the death penalty for killing a fetus. However, this is not true of a Jewish person who is only fined for damages. The Torah (*Shemos 21*) states that if a person assaults a pregnant woman and she miscarries (but the woman

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<sup>2</sup> It is absolutely forbidden to destroy embryos that may potentially be used by a couple in fertility treatment. Furthermore, donating sperm for research is obviously and categorically forbidden. This would be considered *Hotza'as Zera l'Vatala* and destruction of sperm.

herself survives the attack) he must pay for the damages. This indicates that a Jewish person is not liable to the death penalty for killing an unborn fetus.<sup>3</sup>

This principle is also discussed by the *Sema*. The Halacha is that a *Rodef* (a person pursuing somebody to kill him) may be killed to save the pursued person. Therefore, if a woman is undergoing difficult labor and her life is in danger, it is permissible to dismember the fetus to save her life as it is considered a *Rodef* (*Shulchan Aruch, C.M. 425:2*). However, if the baby's head has already emerged, it is forbidden to kill it. The *Shulchan Aruch (ibid.)* explains, "*We do not set aside one soul on account of another soul, and this is the nature of the world.*"

This cryptic ruling is the source of great debate among the *Rishonim*. Why should there be any difference between an unborn fetus and one whose head has already emerged if both are endangering the mother? The *Sema (ibid. 8)* suggests the following approach:

*"This is the nature of the world" – [the Shulchan Aruch] needed to add this point, so that one should not argue that the baby is considered a Rodef and they should save its mother at its expense. The Shulchan Aruch therefore added that since "this is the nature of the world," the baby cannot be considered a Rodef.*

*Nevertheless, when it is still a fetus, it is permissible to kill it **though it is alive. This is because when a fetus has not yet emerged into the world it does not constitute a Nefesh.** The proof for this is that if a person assaults a pregnant woman and she miscarries, he only needs to pay for the fetus, and is not considered a murderer nor is he subject to the death penalty.*

According to the *Sema*, there is a fundamental Halachic distinction between a fetus and a baby that has been delivered. A fetus, though it is alive, is not considered a "*Nefesh*" and one is not liable to the death penalty for killing it. Once the baby is born, it is considered a *Nefesh* and one may not kill it even to save its mother. This is also the approach of *Rashi* and the *Yad Rama* in *Sanhedrin (72b)*.

This is the basis for much of the discussion by the *Gedolei haPoskim* regarding abortion. It should be noted that these sources do not directly discuss the state of development of a fetus that would prohibit abortion. However, it may be possible to derive that information from elsewhere. For instance, the Gemara in *Yevamos (69b)* asserts that within forty days of fertilization, an embryo is considered "*Maya b'Alma*" ("*mere water*"). For this reason, a woman who miscarries within forty days of conception does not contract *Tumas Leida* (the impurity of birth) (*Nidah 30a*). *Rashi (Menachos 99b)* explains that before forty days the embryo has not developed any form, thus it is "*Maya b'Alma*". An additional milestone is achieved when the fetus

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<sup>3</sup> As noted by the *Yad Rama Sanhedrin 57a*.

reaches three months after conception. The Gemara (*Nidah* 8a) explains that at this stage the fetus develops a noticeable human form. The Poskim discuss whether there is any basis for permitting abortion before either developmental milestone (either forty days or three months).<sup>4</sup>

An additional question is whether one may transgress any of the Mitzvos to save the life of a fetus. Generally, *Pikuach Nefesh* overrides all of the Mitzvos in the Torah, as the Torah says “*Asher Ya’aseh Osam haAdam va’Chai Bahem*” (*Vayikra* 18:5) – “*and you shall live through them [Mitzva performance]*” – implying that one is not expected to give up his life to fulfill a Mitzva. However, this only applies to an “*Adam*” – which would not include a fetus.

Nevertheless, the Gemara in *Arachin* (7a) rules that if a woman dies in childbirth on Shabbos, one may bring a knife (even through a *Reshus haRabim*) and cut through her abdominal wall to extract the fetus. The Gemara explains that doing so is permissible even though it desecrates Shabbos. Why may one override Shabbos if a fetus is not defined as an “*Adam*”?

The *Rishonim*<sup>5</sup> answer that although a fetus would not be included in “*va’Chai Bahem*”, there is another basis for overriding the Mitzvos of the Torah to save lives. The Gemara in *Yoma* (85b) quotes *R’ Shimon ben Menasia* – “*Chalel Alav Shabbos Achas...*” – “*desecrate one Shabbos on his behalf so that he will be able to fulfill many Shabbosos in the future.*” Since a fetus does have the potential to observe Shabbos after birth, one may desecrate Shabbos now to save its life despite it not yet being considered an “*Adam*”. The *Ramban* (*Toras haAdam, Sha’ar haMeichush, Inyan haSakana*) adds that this applies equally to an embryo that is fewer than forty days old as it too has the potential for future Mitzva observance although currently “*it has no life at all.*” This is cited by several *Acharonim* as well<sup>6</sup>. (However, the *Ramban* and *Ritva* in *Nidah* 44 both stress that this has no bearing on the question of killing a fetus which depends upon its current state and not its future potential.)

Many of the Poskim conclude that before forty days of gestation, one still cannot permit abortion unless the mother’s life (or other fetuses’ lives in the case of a complicated multiple gestation) lives are in danger. The *Chavos Yair* (31) explains:

*If in so doing there is a destruction of a Nefesh – namely by harming a fetus and causing its death and a miscarriage – one might have made the question dependent on several considerations: [Firstly,] whether forty days have passed*

<sup>4</sup> See the *Chavos Yair* (31), *Toras Chesed* (E.H. 42), *Tzitz Eliezer* (7:48), *Igros Moshe* (C.M. 2:69), and *Yabia Omer* (4, E.H. 1) for further discussion that is beyond the scope of this essay.

<sup>5</sup> The *Ran* (*Yoma* 3b *miDapei haRif*) and others.

<sup>6</sup> See the *Sha’ar haTzion* 617:1. However, the *Shevet haLevi* (7:80) and *Tzitz Eliezer* (11:43) dispute this ruling.

*since conception or not, for before this it is considered to be Maya b'Alma, as explained in the Gemaros in Nidah and Krisos. [Secondly,] whether three months have passed or not (which is the stage that the fetus becomes recognizable as a human and when the pregnancy is externally apparent). [Thirdly,] whether the mother has felt the fetus move in her uterus or not which usually takes place a little after three months into the pregnancy... Nevertheless, it is not our intention to rule based on inclinations or from "Sevaros haKeres" (unfounded logic<sup>7</sup>) – [we] only [issue rulings] based on Torah law.*

In short, the *Chavos Yair* does not countenance permitting abortion based on the stage of fetal development. However, other Poskim<sup>8</sup> held that such distinctions could be drawn and ruled that a *Ben Noach* was not liable for performing abortions before forty days of gestation.

Returning to the question of destroying embryos before implantation, there are several relevant distinctions from the issue of termination of pregnancy. For instance, Professor Avraham Steinberg notes that these embryos are incapable of further development unless implanted into a maternal host. Perhaps, in their current state, they would not have the status of a fetus even according to those who do not permit abortion at any stage.

Additionally, and perhaps more fundamentally, an embryo pre-implantation would not be included in the *Drasha* of "**whoever spills the blood of a person inside a person, his blood shall be shed**" as it is not yet "*inside a person.*" Therefore, there would not appear to be an *Issur* to destroy it.

However, it is reasonable that this would still depend upon the stage of embryonic development. If it were possible for an embryo or even a fetus to develop significantly outside of the womb, it would surely have the same status as a regular fetus and it would be forbidden to abort it even if it could not be said to be "*a person inside a person*".

In fact, in our essay for Parshas Tazria 5779, we discussed the possibility of fetal development outside of the actual womb. In 2017, physician-scientists at the Children's Hospital of Philadelphia succeeded in developing an artificial womb that was tested in fetal lambs. The fetus was placed into a clear plastic sac filled with synthetic amniotic fluid and the umbilical cord was then connected to a machine outside of the sac that removed carbon dioxide from the blood and provided oxygen and nutrition much like the placenta does. When this technique is possible with

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<sup>7</sup> Literally, "belly opinions" or "*boich sevaros*" in Yiddish.

<sup>8</sup> See the sources cited in footnote 2 and the *Achiezer* (3:65), who discuss this matter at length.

human fetuses (e.g. in extremely premature deliveries), it will be possible for a fetus to continue developing outside of the mother's womb.

In that essay, we debated whether the removal of the fetus from its mother's uterus (when it is transferred to an artificial womb) would be considered "*Leida*" (Halachic birth). If so, there would certainly be no question that subsequent "abortion" would be forbidden. However, if it would not be considered *Leida*, then perhaps it would still be considered a fetus which is subject to the prohibition of abortion, although is not technically "a person inside a person", as discussed above.