

## Displaced Persons: Are Unimplanted Embryos People?—Part I

Adapted from the writings of Dayan Yitzhak Grossman

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AP News reports:

The Alabama Supreme Court has ruled that frozen embryos can be considered children under state law, a decision critics said could have sweeping implications for fertility treatment in the state.

The decision was issued in a pair of wrongful death cases brought by three couples who had frozen embryos destroyed in an accident at a fertility clinic. Justices, citing anti-abortion language in the Alabama Constitution, ruled that an 1872 state law allowing parents to sue over the death of a minor child “applies to all unborn children, regardless of their location.”

“Unborn children are ‘children’...without exception based on developmental stage, physical location, or any other ancillary characteristics,” Justice Jay Mitchell wrote in Friday’s majority ruling by the all-Republican court.

Mitchell said the court had previously ruled that fetuses killed while a woman is pregnant are covered under Alabama’s Wrongful Death of a Minor Act and nothing excludes “extrauterine children from the Act’s coverage.”

The ruling brought a rush of warnings about the potential impact on fertility treatments and the freezing of embryos, which had previously been considered property by the courts...

Chief Justice Tom Parker issued a concurring opinion in which he quoted the Bible in discussing the meaning of the phrase “the sanctity of unborn life” in the Alabama Constitution.

“Even before birth, all human beings bear the image of G-d, and their lives cannot be destroyed without effacing his glory,” Parker said.[1]

In this article and a follow-up, we consider the Torah’s perspective on the status of “extrauterine children.”

As we have previously noted,

There is a unanimous consensus that the Torah generally forbids abortion, and that “abortion on demand” is prohibited.[2]

There is, however, considerable disagreement among halachic authorities over whether this prohibition extends to “extrauterine children.” R’ Moshe Sternbuch reports that he has heard that “some” prohibit the destruction of extrauterine embryos as a form of murder and abortion, but he himself rejects this view:

It would seem that the prohibition against abortion applies [to embryos] that are in a woman’s uterus, that will develop and mature on their own in her uterus, and one destroys them. Here, however, they are outside the uterus, and an operation is still required to implant them in a woman’s uterus, and without this they will not reach maturity on their own, so in my humble opinion, it is obvious that this is not called abortion, and there is likewise no murder here

at all...[3]

R' Chaim Jachter reports that R' Zalman Nechemia Goldberg expressed a very similar view to that of Rav Sternbuch:

He told me that he believes a fertilized egg does not have the status of a human life. He explained that an act must occur (transfer into a woman's womb) in order for the fertilized egg to develop, so its status differs from fertilized ova in the mother's womb, which develop independently.[4]

This is also the view of R' Chaim Dovid Halevi:

All the eggs that were fertilized at the time they were in the test tube do not have the status of embryos at all, and we do not desecrate Shabbos for them, and it is permitted to throw them away if they were not chosen for implantation, because there is no halacha prohibiting abortion other than from a woman's uterus. This is the halacha regarding Jews, and it applies to non-Jews as well...[5]

R' Mordechai Eliyahu also maintains that:

All fertilized eggs which are destined to be implanted in the mother's womb should not be destroyed, as a live fetus will yet develop from them. But those eggs which have not been chosen for implantation may be discarded.[6]

R' Avraham Steinberg reports that R' Yosef Shalom Elyashiv also allowed the destruction of extrauterine embryos, at least in the context of the technique of pre-implantation genetic diagnosis (PGD) to prevent the birth of a child with a severe disease such as Tay-Sachs. In this process, multiple embryos are created and screened for the gene that causes the disease; those without the gene are implanted in the womb, and those with it are destroyed:

According to Rav Elyashiv, [PGD] is permissible, and the destruction of the eggs in which the gene for the disease is present is permitted. What are possible rationales for this ruling? 1. An egg fertilized in vitro is not considered a human being, and indeed has no potential to develop into a full-fledged human being unless the egg is implanted in the woman's womb. 2. A fertilized egg is at the stage of development that is halachically considered "within the first forty days of gestation." According to our Sages, at such an early stage of development, the fetus is defined as mere fluid and is not considered a person with a soul.

Rav Elyashiv's ruling would also permit stem cell experimentation using cells of fertilized eggs for the purpose of curing severe diseases. The fundamental principles justifying such experimentation are identical to those identified above: An egg fertilized outside the womb, and especially within the first forty days of development, is not considered a full-fledged human being; therefore, its destruction constitutes neither abortion nor murder.[7]

Rav Elyashiv's son-in-law R' Yitzchak Zilberstein also permits PGD and the concomitant destruction of the problematic embryos:

Those eggs that are vulnerable to the disease, it is permitted to not

implant them and it is even permitted to destroy them, and there is no prohibition in this. These fertilized eggs that are found outside the uterus do not have the status of a *nefesh*, and one who destroys them is not in the category of “a destroyer of a *nefesh*”...[8]

[1]Kim Chandler. Warnings of the impact of fertility treatments in Alabama rush in after frozen embryo ruling. AP News.

<https://apnews.com/article/alabama-supreme-court-from-embryos-161390f0758b04a7638e2ddea20df7ca>.

[2]A Supreme Leak: Abortion Rights (and Wrongs). Bais HaVaad Halacha Journal. May 12, 2022. (And see the sequel to that article, A Supreme Leak: Abortion Rights (and Wrongs), Part II. May 20, 2022.)

[3]Bishvilei Harefuah *choveres* 8 (Kislev 5747) p. 29. Rav Sternbuch proceeds nevertheless to prohibit the practice of IVF for Jews on other grounds, but the halachic consensus does not accept his view.

Cf. R' Yehuda Dovid Bleich, Survey of Recent Halakhic Periodical Literature: In Vitro Fertilization: Questions of Maternal Identity and Conversion, Tradition Issue 25.4 (Summer 1991) p. 97.

[4]Gray Matter Volume 2 pp. 111-12. Rav Jachter goes on to report that “R' Gidon Weitzman...similarly reported that many *poskim* permit discarding unused frozen embryos.”

[5]Shu”t Mayim Chaim (Halevi) p. 247 (see here).

[6]R' Mordechai Eliyahu, *Hashmadas Beitziyos Mufaros Vedilul Ubarim*, Techumin 11. The responsa of both Rav Halevi and Rav Eliyahu were apparently addressed to Dr. Richard Grazi, who reports their positions in Richard V. Grazi, MD and Joel B. Wolowelsky, PhD, Multifetal Pregnancy Reduction and Disposal of Untransplanted Embryos in Contemporary Jewish Law and Ethics, American Journal of Obstetrics and Gynecology 65:5, November 1991 (the quote of Rav Eliyahu in the text is from that article). R' Yossi Sprung (a disciple of R' Asher Weiss and *rav* of Shaare Zedek Medical Center), in a lightly sourced article titled Destroying Embryos for Research, No'ach 5781, flatly asserts that “It is also absolutely forbidden to destroy embryos that may potentially be used by a couple in fertility treatment,” but he unfortunately provides no source or background for this contention. In any event, even he merely forbids the destruction of embryos “that may potentially be used by a couple in fertility treatment, and he may agree that this does not extend to embryos that a couple has chosen not to implant, as per the distinction made by Rav Eliyahu.

[7]Embryos, Designer Babies: Are They Kosher? OU.

[8]Assia 51-52 (Iyar 5752) p. 56.