

IVF and the Alabama Court Ruling

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In a first-in-the-nation decision, The Alabama Supreme Court recently issued a ruling declaring frozen embryos in that state to be “extrauterine children” for purposes of civil liability. This decision was the first of its kind in the United States. The case involved embryos destroyed at a hospital-based Alabama fertility clinic after an unrelated inpatient accessed the clinic storage tanks through an unsecured door, removed some vials containing embryos from a tank and then dropped them to the floor. As a result, embryos belonging to three patients were destroyed. In a lengthy opinion, Chief Justice Tom Parker and all but one of the other eight justices agreed that the couples can sue the clinic’s physicians and the hospital under Alabama’s wrongful death statute. Their opinion relied heavily on the justices’ religious beliefs. In justifying the ruling, Parker wrote “[H]uman life cannot be wrongfully destroyed without incurring the wrath of a holy God.” In attributing human life to fertilized eggs – sometimes one cell, sometimes a few hundred, but certainly not capable of sentient life – the court determined that they are deserving of all the protections afforded living persons.

The public reaction was quick and, one suspects, surprising (at least to the justices), because clinics providing IVF (in vitro fertilization) in Alabama stopped their services immediately following this decision. Their actions stemmed from the fear of being brought up on criminal charges if fertilized eggs – embryos in current parlance – were discarded. IVF involves fertilizing eggs with sperm in a laboratory and then transferring an embryo into the uterus of the woman wishing to conceive. Generally, only one embryo is transferred; the remaining embryos are then discarded if they are

deemed not to be viable or frozen for future use. Once the couple completes their family, they may choose to donate them to another couple but, understandably, many choose to discard them.

It was not only IVF that was threatened; it was virtually all Assisted Reproductive Technologies (ART). ART is the all-encompassing term that includes in vitro fertilization and its many spinoff technologies, including egg and embryo donation, surrogacy, preimplantation genetic testing and cryopreservation (freezing) of eggs, sperm and embryos. Since the first successful IVF baby was born in 1978, ART has been responsible for the birth of approximately twelve million persons. In the United States, where ART is thought to be *underutilized* due to its cost, nearly 100,000, or 2% of babies, are born from ART each year. In other countries, the utilization approaches 10%. Practitioners in the field – to include the host physicians, nurses, scientists and the myriad of professionals who daily devote themselves to building families – duly consider what they do to be the most pro-life and pro-family endeavors.

The Torah-observant community was threatened by this Alabama ruling. Not only was the ruling an unabashed and proudly announced decision to codify Christian interpretations of the Bible into secular law (something that we hope will eventually be declared unconstitutional), but ART is embraced by virtually all halakhists, this despite a conservative approach to abortion on demand without serious medical or psychological concerns. The embryo, to be sure, has some protected rights, but it reaches full human status only on delivery of its head.^[i] Embryos have no such rights. As the late Israeli Chief Rabbi Mordecai Eliyahu ruled, “The fertilized eggs that have been chosen for transfer to the womb should not be discarded but those that have not been chosen may be discarded. Regarding violation of Shabbat, the Halakha is that it is permissible to violate Shabbat to save a life, meaning one who has been born, but this has nothing to do with the type of [pre-implantation] embryos you are dealing with.”^[ii] Similarly, Rabbi Haim David Halevy, the late Chief Rabbi of Tel Aviv, ruled: “[All] the eggs that have been fertilized, while they are in the test tube, have no general or specific status as a fetus, and Shabbat laws are not violated on their behalf, and it is permissible to discard those that are not chosen for transfer [to the womb].”^[iii]

This is not controversial at all. “Thou shall not kill” applies only for full humans. The fetus is protected because of Genesis 9:6, “One who sheds the blood of a person – *shofekh dam ha’adam ba’adam* – is to be killed. “The word *ba’adam* seems to be superfluous; it is there to include an individual who is *ba’adam*, meaning in a person, i.e. a fetus.”^[iv] But that protection does not extend to an embryo that is not inside a person.^[v] Indeed, even the embryo following implantation *in vivo*, is considered “mere water” until the fortieth day.^[vi]

Of course there is a general obligation to avoid unnecessary *hashchatat zera*, destroying “seed” without purpose. It applies not only to embryos but also to sperm and unfertilized eggs. But it does not apply when these exist as part of a process to create life. Indeed, nature itself creates unused seed.^[vii] Biological research has discovered that, even in the youngest, most fertile women, the vast majority of fertilized eggs never implant and, of those that do, many will be lost to miscarriage. Although not perfect, nature is highly selective in letting only the minority of embryos to be born. Every embryo encounters checkpoints and hurdles that allow only the most fit to develop, which is why most babies that are born are healthy. It is an established fact, therefore, that most human embryos, whether fertilized *in vivo* or *in vitro*, will never be born. For better or worse, the complexity of human genetics is such that relatively few survive.

The nuanced view of Halakha is aligned with science and in contrast to Christian dogma. While the latter is quick to designate full personhood to a one cell fertilized egg, our sages do not mark that as the beginning of full human life. For us, human life begins only after implantation has occurred and the fetus takes form. Full human status is granted only after delivery.

It took a mere three weeks for the Alabama Legislature to pass a law that will protect IVF providers in from civil and criminal liability for embryo loss or damage during IVF treatments. But the bill is narrow in its scope. Although it reassures fertility specialists in that state that they are free from criminal prosecution, it does not reverse the damage done by the court’s decision to bestow personhood on every fertilized egg. Surely, we hope and pray that none of us finds ourselves personally involved in such situations. They are heartbreaking, no doubt. But, as Torah-observant Jews, these situations must not always lead to endless pain and suffering. To be pro-life halakhically means to support the use of IVF, when necessary, to build families, including lots of Jewish families. This is something that has taken on new urgency given the difficult times that are upon us.

^[i] Ohalot 7:6

[ii] Teshuva to Dr. Richard Grazi, Tehumin 11:272-274, 1991

[iii] Teshuva to Dr. Richard Grazi, Assia 47-48 (12:3-4), 1990

[iv] Sanhedrin 57b

[v] R. Gavriel Goldman and R. Menahem Bornstein, Sefer Puah, vol. 2, third edition, 5783 [2023], chapter 49, p. 355.

[vi] Yevamot 69b

[vii] The average seminal emission contains approximately 50-100 million sperm. Only one sperm cell is needed to fertilize an egg, and with most emissions none will get the chance. The average human female is born with approximately one million eggs (representing her entire lifetime supply) and 99.99% of those will never implant.

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