Are Frozen Embryos "Children"?

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The recent ruling by the Alabama Supreme Court that human embryos frozen in test tubes are to be considered as children "has sent shock waves through the world of reproductive medicine." The process of in vitro fertilization (IVF) involves the harvesting and fertilization of ova. The embryos thus created are frozen until they can be implanted in the uterus. Multiple embryos are created to ensure a successful implantation, which requires the disposal of the "spare" embryos that are not needed once the woman has become pregnant. If embryos are "children," though, such disposal may be tantamount to homicide, meaning that fertility clinics would have to maintain them *ad infinitum*. This requirement would make the clinics' operation unfeasible – how much storage space and energy can they afford for this purpose? – thus threatening the availability of IVF in Alabama and in other jurisdictions whose courts adopt this reasoning.

However this issue plays out in the American legal system, the court's decision offers us an opportunity to consider how this question would be decided in Jewish law, or *halakhah*. It actually *has* been decided in a 1980 responsum by Rabbi Shmuel Halevy Wosner, an eminent *ḥareidi posek* who died in 2015.[1] In a previous *t'shuvah*,[2] Wosner had noted that the rule of *pikuaḥ nefesh* requires that we set aside the laws of Shabbat in order to save *all* human life, including that of a fetus. Although the fetus is not a *nefesh*, a legal person as defined by Jewish law, it is a *potential* person, and we therefore set aside the Shabbat prohibitions to save its life.[3] Wosner is now asked whether this rule applies to embryos that are not fetuses, specifically, are we required to set aside the laws of Shabbat in order to save the lives of "test-tube embryos" that have yet to be implanted in the uterus? He rules "no": we are *forbidden* to violate any of the Shabbat prohibitions in such a case. What is the halakhic difference between a fetus and an embryo? After all, neither is considered a *nefesh*. Wosner answers that the fetus enjoys a presumption of viability[4] while the embryos, most of which will never be implanted, do not qualify even as potential legal persons.

What is clear from this *p'sak* is that the frozen embryo is not a "child,"[5] for were *that* the case it would be included under the rubric of *pikuaḥ nefesh*. Based upon this reasoning, Jewish women and couples may utilize the services of fertility clinics that dispose of "spare" embryos without concern that in doing so those clinics are committing murder or some other class of homicide.

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[1] *Resp*. *Shevet Halevy* 5:47. We could, of course, cite many writings by progressive halakhists, but allowing Rabbi Wosner to act as our spokesperson guarantees that we're considering the most "right-wing" positions.
[2] *Resp*. *Shevet Halevy* 3:37.
[3] Based upon a *midrash* on Exodus 31:16: violate *this* Shabbat on its behalf so that it can survive to keep many Shabbatot (*B. Yoma* 85b). See Ramban, *Torat ha'adam* (ed. Chavel), p. 29.
[4] "The majority of fetuses are viable," so that it is likely that *this* fetus will indeed "keep many Shabbatot" if we save its life.
[5] Neither, for that matter is the fetus, which as we've noted is not a *nefesh*, a legal person. For this reason, the killing of a fetus, even in a case where Jewish law would not permit abortion, is *not* an act of murder. On the Jewish law of abortion, see here.

What is also clear is that the Alabama ruling, which may well have been motivated by religious[6] as well as strictly legal factors, is a dangerous one. It's bad enough that it threatens the availability of fertility services in the state, but it also would violate the religious liberty of Jewish women and couples who might possibly be denied access to services that *halakhah* permits to them.

[6] See the explicitly religious rhetoric of Chief Justice Tom Parker beginning on p. 26 of the court's ruling. While his is a separate concurring opinion, it may well shed light on the motivations behind the majority decision.