

The Status of the Fetus and the Embryo: A Text Study

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How does *halakhah* define the status of the human organism in its prenatal stages, either as the fetus or as the embryo,¹ a fertilized egg living outside the womb? This question lies at the heart of a number of controversial issues. The first is abortion, the termination of pregnancy. The answer to the question “when is abortion permitted according to Jewish law?” will depend upon how the legal and moral status of the fetus, at a particular stage of its development, is measured against that of its mother. The use of human embryos in stem cell research generated much controversy in the early 21st century. Does Jewish law permit this sort of research, which can involve the killing of human embryos?² Finally, there is in vitro fertilization (IVF), a procedure requiring the creation of excess (“spare”) embryos that will not be implanted in a womb and which therefore will ultimately be discarded. A ruling by the Supreme Court of Alabama in 2024 (available [here](#)) has declared a frozen human embryo to be a “child,” thereby jeopardizing the availability of IVF in that state (along with others whose courts follow suit), and understandably so: if the fertilized human egg enjoys the status of a child, its destruction even for benign purposes could be defined as homicide. Is this standard coherent with Jewish law?

We have resources concerning [abortion](#) for [download](#) at our [website](#). This essay is intended as a brief text study to introduce the elements of the *halakhah* concerning the status of prenatal human life, the fetus and the embryo. We present the texts that figure prominently in the halakhic discussion, along with English translation and analysis. Our conclusion will summarize the points that we think are relevant in all these contemporary controversies.

Exodus 21:22-23

וְכִי־יִנָּצוּ אָנָשִׁים וְנָגְפוּ אִשָּׁה הָרָה וַיֵּצֵאוּ יָלְדָּהּ וְלֹא יְהִי אָסוֹן עָנֹשׁ יַעֲזֹשׁ בְּאִשֶּׁר יִשִּׁית
עָלֶיהָ בַּעַל הָאִשָּׁה וְנָתַן בְּפָלְלִים : וְאִם־אָסוֹן יְהִי וְנָתַתָּה נַפֶּשׁ תַּחַת נַפֶּשׁ :

When men fight, and one of them pushes a pregnant woman so that a miscarriage results, but no harm (*ason*) ensues, the one responsible shall be fined an amount to be exacted by the woman’s husband. But if harm (*ason*) occurs, the penalty shall be life for life (*nefesh taḥat nefesh*).

¹ Although “embryo” is often used to denote all prenatal life, we use it here specifically to refer to the fertilized egg outside the womb, to distinguish it from the fetus, which exists *in utero*.

² This is because human embryos were at the time the best source of pluripotent stem cells, those which can be developed into many different types of cells and tissues in the body. The extraction of embryonic stem cells leads to the death of the embryo. Hence the controversy, which appears to have subsided due to the development of induced pluripotent stem cells (iPSCs) that can be derived from adult stem cells, bypassing the need to extract embryonic stem cells. See [here](#) for the basic science.

Rashi

ולא יהיה אסון - באשה
ענוש יענש - לשלם דמי ולדות לבעל.
ואם אסון יהיה – באשה :

ונתתה נפש תחת נפש - רבותינו חולקין בדבר. יש אומרים נפש ממש, ויש אומרים
ממון, אבל לא נפש ממש, שהמתכוין להרוג את זה והרג את זה פטור ממיתה ומשלם
ליורשיו דמיו, כמו שהיה נמכר בשוק.

*But no harm – i.e., to the woman.*³

(The one responsible) shall be fined – to pay the valuation of the fetus to the woman's husband.

But if harm occurs – to the woman.

The penalty shall be life for life – the Rabbis dispute the matter. Some say that this refers to actual capital punishment, while others understand it to mean a monetary indemnity, for the one who intends to kill X but kills Y instead is exempt from execution but owes restitution to the family of Y.⁴

We learn from these verses that feticide – the killing of a fetus – is not considered homicide. The penalty for the killing of a fetus is a financial indemnity and not capital punishment, a relevant consideration only in the event that the woman is killed.

To be sure, other interpretations exist. Such ancient sources as the Septuagint, Philo, and the Didache apply the word אסון (“harm”) to the fetus, so that the penalty for causing a miscarriage is “life for life.”⁵ But as we see from Rashi's comment, the Rabbinic tradition understands the “harm” to refer to the death of the woman. Thus, a basic distinction in legal status exists between a fetus and its mother: while the killing of the mother is classified as murder, the killing of the fetus is not. This distinction is critically important for determining the *halakhah* of abortion, as we now see.

M. Ohalot 7:6

האשה שהיא מקשה לילד מחתכין את הולד במעיה ומוציאין אותו אברים אברים מפני שחיה קודמין לחייו יצא רובו אין נוגעין בו שאין דוחין נפש מפני נפש.

When a woman experiences a dangerous childbirth, the fetus may be dissected and extracted limb by limb from her womb, **because her life takes precedence over its life.**

Once the major part of [the fetus; other versions: “its head”] has emerged, it may not be harmed, **because one nefesh is not sacrificed on behalf of another nefesh.**

³ His source is the *M'khilta* to Exodus 21:22.

⁴ See *B. Sanhedrim* 74a.

⁵ This requires a different translation for the phrase ויצאו ילדיה in verse 22, which literally means “so that the fetus emerges.” Rather than “miscarriage,” it would mean “cause a premature birth.”

This text assumes the difference in status established in the Biblical passage. In a difficult birth, when either the mother or the fetus can survive, abortion is required to save the mother at the expense of the fetus. Her life “takes precedence”⁶ so long as the fetus has not “emerged into the atmosphere.”⁷ Upon emergence, however, her advantage disappears, for “one *nefesh* is not sacrificed on behalf of another *nefesh*.” The word *nefesh* here does not mean “soul” in any spiritual sense of that word but rather “person”: at emergence, the moment of birth, the fetus becomes a *nefesh*, a legal person, a status that it did not enjoy while in utero. Given this equality in status, there are no grounds on which to favor either of these persons (נפשות; *n'fashot*) over the other.

It would seem, then, that abortion is permitted – and indeed mandated – in this situation of mortal danger to the mother precisely because the fetus is not yet a legal person. But the following text challenges this assumption.

B. Sanhedrin 72b

אמר רב הונא : קטן הרודף ניתן להצילו בנפשו.
קסבר : רודף אינו צריך התראה, לא שנא גדול ולא שנא קטן.
איתיביה רב חסדא לרב הונא : יצא ראשו - אין נוגעין בו, לפי שאין דוחין נפש מפני נפש. ואמאי? רודף הוא!
שאני התם, דמשמיה קא רדפי לה.

Rav Huna said: A minor who pursues [another person] with intent to kill may be stopped at the cost of his life.

He reasons: a *rodef* [pursuer] does not require forewarning,⁸ whether he is an adult or a child.

Rav H̥isda raises an objection to Rav Huna’s position: “Once the major part of it has emerged it may not be harmed, because one *nefesh* is not sacrificed on behalf of another *nefesh*” [*M. Ohalot* 7:6]. But why not? Is the fetus not a pursuer? [The Talmud responds, defending Rav Huna] That case is different, because the mother is being “pursued” from Heaven.

Rav H̥isda cites *M. Ohalot* 7:6 (Text No. 2) as a difficulty against Rav Huna’s ruling: if, as Rav Huna believes, we are entitled to kill a minor who is pursuing with intent to kill, why does that *mishnah* forbid us from harming the child – who is “pursuing” the mother and endangering her life - once it emerges from the womb? After all, we are permitted to abort the fetus *prior* to emergence, presumably because it is a *rodef*; does it not continue to be a “pursuer” once it has emerged? The Talmud defends Rav Huna by declaring that the “pursuit” in this case – i.e., the

⁶ The word קודמין could be translated as “comes before” – i.e., the mother existed prior to the fetus, which might be the reason why we say her life “takes precedence.” See *Tiferet Yisrael, Yakhin* to the *mishnah*.

⁷ The language of Rashi in *B. Sanhedrin* 72b; see below.

⁸ *Hatra'ah*, the warning given to a potential sinner that the act he is about to commit is forbidden and carries with it a specific punishment. Such forewarning is a formal requirement in Jewish law in order to exact certain corporal or capital punishment upon the transgressor. This requirement is waived in the case of the *rodef*, when the victim’s life is in clear and present danger.

threat to the mother's life – is an “act of God,” an exceptional circumstance that is not covered by the law of the *rodef*. As Rashi further explains:

Rashi to B. Sanhedrin 72b, s.v. yatza rosho

יצא ראשו - באשה המקשה לילד ומסוכנת, וקתני רישא : החיה פושטת ידה וחותרתו ומוציאתו לאברים, דכל זמן שלא יצא לאויר העולם לאו נפש הוא וניתן להורגו ולהציל את אמו, אבל יצא ראשו - אין נוגעים בו להורגו, דהוה ליה כילוד ואין דוחין נפש מפני נפש.

Once its head has emerged – this refers to the case of the woman experiencing a dangerous childbirth. The first part of that *mishnah* states that the woman may dissect [the fetus] and extract it limb by limb, **for so long as it has not emerged from the womb it is not a nefesh**, and it is therefore permissible to kill it to save its mother. But once its head has emerged – it may not be harmed, for it is like a born child (*yilud*), and one *nefesh* is not sacrificed on behalf of another *nefesh*.

Rashi does not use the concept of *rodef* to explain the warrant for abortion in *M. Ohalot* 7:6. He justifies that abortion in the *mishnah*'s own language: the fetus becomes a *nefesh*, a legal person, at birth. Prior to birth, the mother's superior legal status allows her life to take precedence.

This distinction between a fetus and a legal person (*nefesh*) is sharply delineated in the *halakhah*'s discussion of the status of the *tonok ben yomo*, the day-old infant.

M. Niddah 5:3

תנוק בן יום אחד מיטמא בזיבה ומיטמא בנגעים ומיטמא בטמא מת וזוקק ליבום ופוטר מן היבום ומאכיל בתרומה ופוסל מן התרומה ונוחל ומנחיל וההורגו חייב.

A one-day-old boy is subject to [the laws of ritual impurity], to the laws of levirate marriage, to the laws of *t'rumah*, and to the laws of inheritance. One who kills him is culpable for death.

B. Nidah 44b

וההורגו חייב. דכתיב : ואיש כי יכה כל נפש - מ"מ.

“One who kills him is culpable for death.” As it is written (Leviticus 24:17): “One who kills any *nefesh* [will surely be put to death]” – that is, a person of any age.

The newborn child is included within the prohibition of murder precisely because the Torah proscribes the murder of any *nefesh*. This designation, applied here to the *tinok ben yomo*, is never applied to the fetus.

To say that the fetus is not a *nefesh* is *not* to say that it enjoys no status whatsoever. The very fact that the *halakhah* requires a warrant (sufficient cause) to justify abortion⁹ implies that in the absence of such a warrant the fetus enjoys our protection. Moreover, the fetus is covered under the rubric of *pikuah nefesh*, the obligation to save human life: we are required to violate the prohibitions of *m'lakhah* on Shabbat if necessary to save the life of an endangered fetus, just as we are required to do so for any human person. But how can this be if the fetus is not a *nefesh*, a full legal person? Why does its life take precedence over the Shabbat prohibitions, which as we know are taken with the utmost seriousness in Jewish law?

We find an answer in the Geonic work *Halakhot G'dolot*, as quoted by Ramban (R. Moshe b. Nachman) in his *Torat Ha'adam, Inyan Hasakanah*. The passage begins with an excerpt from the Talmud.

B. Arakhin 7a-b

א"ר נחמן אמר שמואל : האשה שישבה על המשבר ומתה בשבת, מביאין סכין ומקרעים את כריסה ומוציאין את הוולד.
פשיטא, מאי עביד? מחתך בבשר הוא!
אמר רבה : לא נצרכה, להביא סכין דרך רשות הרבים. ומאי קמשמע לן? דמספיקא מחללינן שבתא.

Rav Nachman said in the name of Shmuel: when a woman in labor dies on Shabbat, a knife is brought to cut open her womb and extract the fetus.

[The Talmud objects] Isn't that obvious? What objection can there be to this action? It's simply the cutting of flesh!

Rabah answers the objection: Shmuel needed to state this in order to rule that a knife may be carried through the public domain on Shabbat for this purpose. And what halakhic point is he making? That we set aside the laws of Shabbat to save life even in cases of doubt.

But the Talmud objects again: we already know this! The Mishnah (Yoma 8:7), which addresses the case of individuals buried under a collapsed wall, has already decreed that we set aside the laws of Shabbat to save human life even in cases where it is doubtful that our actions can fulfill that *mitzvah*. So why is Shmuel repeating something that is common knowledge? And the Talmud answers its objection:

מהו דתימא : התם הוא דהוה ליה חזקה דחיותא, אבל הכא דלא הוה ליה חזקה דחיותא מעיקרא אימא לא, קמ"ל.

[Shmuel makes his ruling] because you otherwise might have thought that the Mishnah is referring to cases where those in danger were at least known to be alive previously. But in this case, where the fetus did not already have an existing presumption of life, one might think that the rule does not apply. So Shmuel tells us that we set aside the laws of Shabbat to save the fetus.

⁹ This can involve reasons ranging from danger to the mother's life to concerns for the mother's physical and emotional health and wellbeing. See our text study "[On Abortion](#)."

Shmuel's ruling, says *Halakhot G'dolot*, is a significant *hidush*, a new or daring halakhic idea, because it would have us treat the fetus *as though it were a nefesh*, violating the laws of Shabbat in order to save its life. And this flies in the face of three halakhic texts that we have already read in this essay:

1. *M. Ohalot* 7:6, which mandates abortion in a life-threatening childbirth. The fetus is sacrificed for the mother because מעיקרא לית ביה משום הצלת נפשות, i.e., we are not obligated to save the life of the fetus because, so long as it is in utero, it is not a *nefesh*.
2. *M. Nisah* 5:3 and *B. Nidah* 44b, which teach that ודוקא בן יום אחד ועובר לא ההורגו חייב, "one who kills a day-old baby is culpable for murder," i.e., a day-old baby but not a fetus.
3. Exodus 21:22-23, from which we learn that one who kills a fetus is not culpable for murder but must simply provide financial compensation (דמי ולדות).

Nonetheless, concludes *Halakhot G'dolot*, Shmuel declares that:

אפילו הכי לענין שמירת מצות מחללין עליה, אמרה תורה חלל עליו שבת אחת שמא ישמור שבתות הרבה.

Even so, for the purpose of enabling [the fetus] to survive and to observe the *mitzvot* we violate Shabbat to save its life. The Torah says: violate one Shabbat on his behalf so that he may observe many Shabbatot.

The passage highlighted in bold font deserves emphasis. It appears in two places in the Talmud. In the first, *B. Yoma* 85b, it serves as one of the prooftexts for the rule פקוח נפש דוחה את השבת, saving human life takes precedence over the Shabbat prohibitions. In the second, it comes to delineate the halakhic line between life and death.

B. Shabbat 151b

תניא, רבן שמעון בן גמליאל אומר: תינוק בן יומו חי - מחללין עליו את השבת, דוד מלך ישראל מת - אין מחללין עליו את השבת.
תינוק בן יומו חי מחללין עליו את השבת. אמרה תורה: חלל עליו שבת אחד, כדי שישמור שבתות הרבה. דוד מלך ישראל מת - אין מחללין עליו - כיון שמת אדם, בטל מן המצות.

A *baraita*: Rabban Shimeon ben Gamliel says: we violate the laws of Shabbat on behalf of a day-old child [i.e., to save their life], but we do not violate the laws of Shabbat for David, king of Israel, once he has died.

"We violate the laws of Shabbat on behalf of a day-old child" - The Torah says: violate one Shabbat on his behalf so that he may observe many Shabbatot.

"But we do not violate the laws of Shabbat for David, king of Israel, once he has died" – for when one has died, one is exempt from observing *mitzvot*.

The Talmud instructs us to violate the Shabbat prohibitions to save the life of a day-old infant because of that infant's potential to grow and someday to observe *mitzvot*. Shmuel, according to *Halakhot G'dolot*, extends this logic to the fetus: we violate *this* Shabbat on its behalf so that it may survive to observe many Sabbaths in the future. The fetus therefore enjoys a degree of status

under the *halakhah* and has a claim to our protection.¹⁰ Although it is not yet a legal person, a *nefesh*, we violate Shabbat to save its life (something we do for legal persons) because of its *potential* to become a *nefesh*, a member of the community.

The next logical question is whether a similar degree of status and claim to protection extends to the embryo, the fertilized human egg living outside the womb. Since the technology that makes this possible has been developed only in recent times, it's understandable that the Talmud and the medieval halakhic sources do not address the question explicitly. But it *has* been addressed in a 1980 responsum¹¹ by Rabbi Shmuel Halevy Vosner, [an eminent hareidi posek](#) who died in 2015. Halevy was asked concerning the “test-tube baby” (תינוק המבחנה), at the time a fairly recent phenomenon. Inasmuch as the IVF procedure requires the creation of human embryos that must be stored prior to implantation, Vosner's correspondent asks:

אם בתנאים מוקדמים אלה יש צורך לחלל שבת כדי להמשיך התפתחותם אם מותר
והספק בזה אם גם בכה"ג אמר הבה"ג דמחללין על העוברין, ומטעם שישמור שבתות
הרבה?

Suppose that in this preliminary stage it becomes necessary to violate the laws of Shabbat to insure the continued development of the embryos. Is that permissible? The question is whether the *Halakhot G'dolot* would extend his ruling from the fetus to the embryo on the same grounds, namely “so that he may grow to observe many Shabbatot”?

Wosner rejects this reasoning. If *Halakhot G'dolot*, based upon Shmuel's ruling in *B. Arakhin* 7a-b, allows us to violate Shabbat to save the life of a fetus, this is because of the majority principle: רוב ולדות בני קיימא הם, “most fetuses will survive.” It is permissible to violate Shabbat to save the fetus “so that he will observe many Shabbatot” because it is likely that the fetus will in fact become obligated to uphold the obligations of a full legal person. But, Wosner continues, משא"כ זרע זה שבתוך המבחנה שאינו נכלל כלל ברוב זה דרוב העוברין בני קיימא הם, “this is not the case with an embryo preserved in a test tube, which is not included in this majority principle.” That is, most of the embryos created in the IVF procedure are “spare” or “excess” embryos: they will not be implanted within a womb and will necessarily be discarded. Therefore, we do not violate Shabbat in order to save the frozen embryo or the embryo living in a test tube.

Summary. The foregoing, we hope, is sufficient to support the following points.

1. Under Jewish law the fetus is not a *nefesh*, a legal person or a “child.”
2. The fetus nonetheless enjoys a degree of status and protection (subject to maternal considerations that warrant abortion) because it is a potential *nefesh*.
3. The embryo, the fertilized egg preserved outside the womb, does not enjoy the status of potential *nefesh* and is not entitled to protection under the rubric *pikuah nefesh*. In vitro fertilization is fully permissible, even though the procedure necessarily involves the discarding of “spare” or “excess” embryos.”

¹⁰ That claim, we emphasize, is overridden in cases where abortion is permissible under *halakhah*. See the previous note.

¹¹ *Resp. Shevet Halevy* 5:47.