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SOLOMONIC DECISIONS IN FROZEN PREEMBRYO DISPOSITION: UNSCRAMLING THE HALAKHIC CONUNDRUM

The last quarter of a century has witnessed rapid scientific advancement in reproductive and fertility aid technologies. In particular, among childless couples, the process known as in vitro fertilization (IVF) has become increasingly popular, especially as its development coincided with a decline in the availability of adoptable infants. The offspring of this process may be biologically related to at least one, often both parents—an added aspect favored by most parents.

IVF treats infertility by bypassing the natural location of fertilization in the fallopian tube. The woman’s eggs are surgically removed from her ovaries prior to ovulation and fertilized in a laboratory with the sperm of her husband or donor. Doctors then implant most, but not necessarily all of the newly fertilized eggs into the woman’s uterus so that implantation can occur. If the procedure is successful, an embryo differentiates and develops into a fetus. Since implantation of too many fertilized eggs may cause multiple births, and since several attempts at implantation may be necessary to achieve a viable pregnancy, couples often consider cryopreservation, a procedure that freezes and stores newly retrieved eggs for possible future use.

Thus, with the advance of medical technology it is possible to observe the human “preembryo” fertilized, nourished, and even frozen outside a woman’s uterus. Adopted in 1986, the term preembryo, or extra corporeal embryo, refers to a fertilized egg that has not yet implanted itself into the uterine wall.

A host of rudimentary questions may be raised concerning the IVF process: What is the halakhic status of a preembryo? Is someone considered to be its owner? If so, then who? Should it be treated like a fetus?
Does one's position regarding abortion automatically determine one's view regarding the disposal of a preembryo?3

To lay the groundwork for the view I shall present, let us consider the following scenario: Both progenitors,4 a Jewish husband and Jewish wife, who are happily married, agree to participate in an IVF procedure through to implantation. Is participation in this program and the creation of preembryos alone to be taken as an irrevocable commitment to reproduction? Arguably, the parties intended to have children only as a couple. However, there is no record evidence that the parties gave much thought to the preembryos' disposition in case of eventualities other than pregnancy. The couple, now divorced, dispute who has authority over the preembryos. The woman desires implantation in the belief that the preembryo represents her last remaining opportunity for genetic motherhood—in talmudic parlance, “wanting a staff to lean on and a spade for burial”5—while the man, on the other hand, objects to preembryo placement in his former wife's uterus, arguing that the burden of unwanted fatherhood should not be imposed upon him without his consent.

How does halakha confront this new situation? As in numerous other instances, contemporary decisors resort to the use of analogical reasoning. Earlier halakhic sources are scrutinized to determine the relevant rules and these are then applied to the new situation. As the Hazon Ish observes,6 “one cannot make a distinction between explicit rules and those which are not explicit. Indeed, no rules are not explicit, for everything is explicit in our Torah.”

An analogical model suggested by Rabbi Shaul Yisraeli and others7 posits that marriage resembles a commercial partnership in which two individuals agree to pool their assets and abilities, and share the fruits of their “joint venture.” Marriage is “a partnership for life,” each spouse being a partner regardless of his or her monetary contribution to the relationship.8 Hence, argues Rabbi Yisraeli, spousal participation in an IVF program reflects a joint effort to achieve parenthood.9

The giving over of a sperm and an egg by our Jewish couple to an IVF program is thus seen as the vehicle for concretizing their joint intention to create a partnership. Whereas halakha usually recognizes the formation of a partnership (shutafut) either by placement of funds in a common purse (shutafut ha-kis), or verbal agreement between the parties, or commitment on the part of each partner to undertake the enterprise, or recognition of each partner as an agent or hireling of the
other,

in our situation, the partnership is created by “the commingling of sperm and egg.”

Upon formation of the partnership, no partner may terminate the agreement before the achievement of the common goals and prior to the agreed expiration date. Nonetheless, Rabbi Yisraeli argues, unavoidable circumstances beyond the partner’s control such as illness, disability, or tragedy (e.g. death of a relative) that force the partner to interrupt his performance will serve as legitimate grounds for terminating the partnership. Furthermore, Rabbi David Lau argues that this preembryo disposition agreement is predicated upon a continuing marriage. Divorce frustrates the agreement and is similar to the dissolution of a partnership agreement with the sudden demise of a partner. Analogously, in our scenario, the unforeseen event of divorce allows the husband to terminate the partnership agreement for procreation and thus preempt the possibility of implantation of the preembryo.

Accepting the partnership paradigm, Rabbi Yoezer Ariel argues that the resolution of our issue should be extrapolated from the halakhot of sales (mekhira) in general and the definition of duress (ones) in commercial dealings in particular. Once a sale has taken place and a defect occurs when the item is in the possession of the buyer, the buyer cannot rescind the sale. Analogously, in our situation, Rabbi Ariel contends, the unanticipated event of divorce does not negate consent and therefore is not grounds for setting aside the partnership agreement.

Is this conclusion correct? Generally, if an agreement is entered into for a specific reason, that reason must be expressed; generally, unexpressed conditions have no validity. If, however, the unstated reason to the agreement is obvious and understood by both parties, it becomes a material term of the agreement, and if the condition does not transpire, the agreement would be void. Halakha recognizes the power of umdena (loosely translated as an implied condition) in determining the intentions of parties in matters of gifts, marriage, sales, etc. In other words, we would imply a condition in a sales agreement even though the condition was not explicitly stated in the agreement. Would the buyer have consummated the transaction knowing that a defect would emerge shortly after his purchase? Is the sale to be construed as a conditional sale? Analogously, in our situation, is the unforeseen event of divorce (i.e. defect) viewed as an implied condition precluding subsequent implantation?

A sales transaction involves the agreement of parties, the seller and the buyer: “taluy be-da’at shenehem.” The voiding of a sale with the
appeal of a defect subsequent to purchase would be predicated upon two conditions:

1. The buyer would have not consummated the deal if he had realized that the item sold would be defective within a reasonable time.
2. The seller would negotiate the sale contingent upon the utility of the item being sold. In other words, the voiding of a sales transaction is dependent upon the existence of both the seller and buyer’s implied conditions.19

If we draw the analogy to our case, the unforeseen circumstance of divorce will not preclude future preembryo placement. Though the husband did not intend to continue with the IVF program in face of the divorce, the wife did not share his intention. Her desire to be a parent is accorded equal halakhic weight. Consequently, in the absence of an advance written directive addressing contingency situations such as divorce, the husband is precluded from opposing subsequent implantation.20

Upon divorce, R. Ariel allows the IVF process to continue without regard to the husband’s objections, while R. Yisraeli and R. Lau sanction the husband’s desire to discontinue the process without regard to the former wife’s wishes.21 Despite the competing positions concerning this issue, the conclusion that emerges most strikingly is that these decisors predicate their analysis upon the relevance of the partnership model. Relying upon R. Yisraeli’s position, R. Ariel observes:22

... the fertilized egg [i.e. preembryo] is defined like any other monetary asset, the two parents are the owners of the fertilized ova and exercise monetary partnership over it.

In short, according to all three decisors, the notion that there is a quasi-proprietary interest of the progenitors in their preembryo stands on firm halakhic ground. Thus, if a physician without consent takes some of a sperm sample submitted for infertility testing to sell or donate to others, or for similar purposes takes eggs that were removed in a surgical procedure, or absconds with frozen preembryos, he is liable for theft.23 Broadly speaking, it is a quasi-proprietary right involving “a bundle of rights” that may be exercised by the progenitors, within certain halakhic parameters to be sure, with respect to their preembryo: principally, the right to possess it, to exclude others from it, and to dis-
pose of it either by an overt act of destruction or by passive nonperformance (such as allowing it to thaw out in storage).  

At first blush, such a conclusion seems untenable. Fundamental to our Jewish worldview is that God created the world and owns everything in it—including our bodies. This belief is articulated in various verses of the Torah and resonates throughout the Oral Law. We have a duty to preserve our body. From the spirit of personal autonomy prevalent in the West, some infer a “right to our bodies,” but in classical Jewish thinking any such right is expressed as a duty to maintain our bodies—a covenantal duty, as it were. Still, during our lifetime, we are granted a degree of dispositional authority within the ambit set by halakha. Consequently, the disposal of the preembryo in the context of our scenario is categorized as “zera she-nifras,” or a discharge of seed.

From the perspective of dinei mamonot (monetary matters) the conclusion is understandable. However, in terms of “issura” (prohibition), is the destruction of surplus preembryos included under the rubric of abortion? The foregoing conclusion of the permissibility of preembryo disposal within the context of an IVF process can be understood from two different perspectives. One approach is to apply one’s views about the fetus and abortion automatically to the status of the preembryo. Consequently, those who allow for abortion of a pre-40-day embryo would similarly permit preembryo destruction in our case. Alternatively, there is the view that the preembryo, an extracorporeal body, is to be halakhically distinguished from an embryo (ubur) that is positioned on the uterine wall. Whereas an embryo during the first forty days of gestation may acquire property and inherit, a preembryo is bereft of this legal capacity. Moreover, given its extracorporeal status, the destruction of a preembryo does not constitute an act of homicide. Hence, under certain conditions, the disposal of surplus preembryos will be permitted.

John Locke, the seventeenth century English philosopher, notes that the earth was given to mankind in common. . . . Men . . . come to have a property in several parts of that which God gave to mankind in common.

Moreover, The Earth and all that is therein, is given to Men for the Support and Comfort of their being.
For Locke, the idea that the natural resources of the earth are the subject of an original grant from God to man seemingly resonates in our biblical verses: "The earth is God's and the fullness thereof," and "the earth He has given to the children of man."

Upon closer analysis, the Jewish tradition offers a wholly different perspective. As the Talmud states:

Rabbi Levi raised the question: In one place it is written: "the earth is God's and the fullness thereof," and in another place it is written: "The heavens are the heavens of God but the earth He has given to the children of man." The answer is that the former verse applies to its status prior to pronouncing the benediction, the latter verse applies after one pronounces the benediction.

Though Locke readily admits that God gave property to man, nevertheless man's personal identity is defined by his ability to "mix his labor" and appropriate the produce of the earth. Clearly, Locke does not sanction wasteful or negligent destruction. However, ultimately man rather than God is the measure of all things. "Every man has a property in his own person. This nobody has right to but himself."

We have been taught by the Jewish tradition that all of creation belongs to God. God, so to speak, has inherent rights in everyone and everything. "Ki li kol ha-areti"—"the whole earth is Mine." Jews have rights—including quasi-proprietary rights in human reproductive material—but all within the framework of, and by the authority of, our covenant with God. Consequently, prior to enjoying God's creation, a Jew must fulfill a duty—a recitation of a blessing acknowledging God's ownership of the world. Invoking this obligation allows man to exercise his God-given right: "The earth He has given to the children of man."

NOTES

3. Our discussion is predicated upon the assumption that the majority of decisors recognize the IVF process as a halakhically permissible procedure subject to certain prescribed guidelines. See R. J. David Bleich, Contemporary Halakhic Problems (1977, 1995) vol. 1, p. 108 and vol. 4, p. 238; J.
4. Our premise is that the locus of authority for resolving this issue is within the authority of the progenitors—the gamete providers—whose egg and sperm formed the preembryo. Though according to most poskim a child born of IVF (where the father is the sperm donor and the biological and gestational mother are identical) has a halakhic mother and halakhic father for the purposes of lineage and inheritance (see R. Ovadia Yosef, *Nishmat Avraham, Even ha-Ezer* 1: note 5:3; and R. Yitzchok Breitowitz, *Tradition* 31 (1996), p. 64, notes 15 & 16. Compare R. Sternbuch, op. cit. and *Tsits Eliezer*, op. cit.) nevertheless, prior to embryo transfer and uterine implantation, a preembryo has neither a halakhic mother nor a halakhic father. See *Teshuvot Devar Yehoshua* 2:108, R. Akiva Eger, Novellae on *Shulhan Arukh Torah De'a* 87:6; R. Yosef Engel, *Bet ha-Osar, Erekh Av*, kelal 4; R. Zalman N. Goldberg, *Tehumin* 5 (5744), p. 248 and R. Breitowitz, op. cit., p. 70; R. Menachem Kasher, *Noam* 1 (5717), p. 125; R. Kasher, *Torah Shelema* vol. 17, p. 142; and R. Yehoshua Ben-Meir, *Emek Halakha* 2 (5749), p. 141, notes 49-50. Consequently, throughout our presentation, the term “progenitor” rather than mother and father will be utilized to identify the decisional authority regarding preembryo disposition.

5. *Tevamos* 65b. Parenthetically, childlessness is a halakhically recognized cause of action for a wife to demand a divorce. See *Shulhan Arukh Even ha-Ezer* 154:6. Whether there is a requisite ten year period of cohabitation between husband and wife prior to establishing a wife’s cause of action, see *Shulhan Arukh Even ha-Ezer* ibid; *Piskei Din shel Batei ha-Din ha-Rabbaniyim* 4:355 and *Piskei Din shel Batei ha-Din ha-Rabbaniyim* 12:320 and 336. Furthermore, whether a wife’s cause of action is recognized in cases where a husband objects to siring a child through artificial means such as IVF, see R. Shelomo Z. Urbach, *Noam* 1 (5717), pp. 145 and 158; *Teshuvot Havot Binyamin* 3:108, 2; and R. Shabtai Rappaport, *Assia* 67-68 (5761), pp. 126-128.


8. For the application of this paradigm in other marital contexts, see *Teshuvot Maharashdam Hosen Mishpat* No. 206; *Piskei Din shel Batei ha-Din ha-Rabbaniyim* 11:116. Compare *Piskei Din shel Batei ha-Din ha-Rabbaniyim* 3:188, 192. Clearly, the description of marriage as a partnership is indicative of only one of the many dimensions of the matrimonial relationship. Thus, for example, the halakhic concept of “sh’ebud” (servitude) within the realm of conjugal relations is another integral aspect of this relation-
TREAVAMOT 65b; Nedarim 81b; Ketubot 71b; Rashba, Gittin 75a and Nedarim 15b; Shulhan Arukh Even ha-Ezer 154:6 and Piskei Din shel Batei ha-Din ha-Rabbaniyim 1:5.

9. Whether the mitsva of procreation (peru u-revu) or the mitsva of populating the world (la-shevet yetsara) is fulfilled through IVF is a matter of controversy. See R. Breitowitz, op. cit., pp. 64 and 66, notes 7, 9 & 16.


11. For its analogue in commercial partnership, see Rambam, Hilkhut Shulhun ve-Shufatinf 8:1; Shulhan Arukh Hoshen Mishpat 176:2; Sema, Shulhan Arukh Hoshen Mishpat 176:7; and Sefer Hazon Ish, Hoshen Mishpat, Bava Batra 4:11.


13. The partner, similar to a day-laborer ("po'el"), is accorded certain retraction rights. For a po'el's retraction privileges, see Bava Metzia 77b; Shulhan Arukh Hoshen Mishpat 333:5; Rema, ad. loc.; Shakh, Shulhan Arukh Hoshen Mishpat 333:14; Teshuvot Shevet Ya'akov 1:6 and 2:184; and Teshuvot Maharsham 2:29. See note 21 for a fuller discussion.


16. See Kiddushin 49b and Shulhan Arukh Hoshen Mishpat 207:4. For exceptions in monetary matters see Darkei Moshe, Hoshen Mishpat 207:4; Rema, Shulhan Arukh Hoshen Mishpat 207:4; Sema, Shulhan Arukh Hoshen Mishpat 207:10; and Pithei Hoshen, Dinei Kinyanim 20:34.

17. For explicit and implicit uses of umdena in the Talmud, see Ketubot 46a, 78b; Kiddushin 65b; Bava Kamma 108a; Bava Metzia 22b; Bava Batra 68a, 92b-93a; Makkot 7a and Shevut 33b.

18. See Teshuvot Sho'el u-Meshiv, Mahadura Kamma, 1:145, 197, 199; Teshuvot Noda bi-Yehuda, Mahadura Kamma, Toreh De'a No. 69; Mahadura Tanina, Even ha-Ezer No. 130; and Teshuvot Maharsham 3:82, and 5:5.

19. Tosafot, Bava Kamma 110b; Tosafot ha-Rosh, Ketubot 47b; and Netivot ha-Mishpat, Shulhan Arukh Hoshen Mishpat 230:1. For the scope of Tosafot's ruling, see the ensuing discussion in Mishne le-Melekh, Hilkhot Zeihyya u-Mattana 6:1.

20. For the effectiveness of an advance written directive addressing "ones" situations in contractual relations see Sema, Shulhan Arukh Hoshen Mishpat 310:12 and Shakh, Hoshen Mishpat 334:1. For its relevance to our issue, see Ariel, op. cit., p. 105. Alternatively, one may argue that the parties intended to have a child as a married couple. Hence, the act of divorce impairs the entire preembryo disposition agreement. In fact, in the context
of a sales transaction one finds that halakha takes judicial notice of a strong presumption or implied condition ("umdena gedola") advanced by the buyer that can void the sale. See Tosafot Ketubot 47b and Teshuvot Noda bi-Yehuda, op. cit., Yoreh De'a 69. This conclusion should equally apply to our scenario. Though R. Lau does not explicitly invoke the "umdena" rationale, his line of reasoning clearly reflects this approach. See R. Lau, op. cit., p. 151.

21. Though the decisors do not elucidate the underlying premise of their positions, it is clear that the controversy hinges on differing conceptions of the nature of a partnership agreement. According to R. Yisraeli, a partner is viewed as a laborer who performs a personal service on behalf of the employer. For antecedents for this approach, see Teshuvot Rabi no. 219; Nimmukei Yosef, Bava Metzia 105a; Tur Hoshen Mishpat 176:4; and Shakh, Shulhan Arukh Hoshen Mishpat 176:8. Hence, a preembryo partnership agreement, similar to the labor contract, is legally consummated by a kinyan (a formal act) via the commencement of work (i.e. the commingling of the sperm and egg)(see Bava Metzia 76b, 83a and Rema, Shulhan Arukh Hoshen Mishpat 333:2) and a privilege is conferred upon the worker to withdraw from a labor contract at any time. (Exceptions to this privilege are beyond the scope of this presentation.) However, R. Ariel contends that a partnership agreement is akin to two individuals who undertake a monetary obligation. See Taz, Shulhan Arukh Hoshen Mishpat 176:1; Sema, Shulhan Arukh Hoshen Mishpat 176:4, 44; Levush, Shulhan Arukh Hoshen Mishpat 176:1; and Pithei Hoshen, Dinei Shutafut 1:2. Consequently, neither partner enjoys retraction privileges unless the conditions are fulfilled as outlined in the text accompanying note 19. Interestingly, R. Lau construes a partnership as a bilateral agreement of mutual obligations; nevertheless, retraction is possible. See R. Lau, op. cit., p. 151. For a discussion of varying conceptions of partnership, see R. Isaac Herzog, The Main Institutions of Jewish Law (1967), vol. 2, pp.155-159.


Furthermore, the explicit premise of applying the halakha of "demi veladot" presupposes the existence of a mother and father. Prior to preembryo transfer to the uterus, however, we have progenitors rather than a halakhic father and mother. See note 4; R. Yisraeli, op. cit, 3:108:12; and R. Breitowitz, op. cit., p. 72. Compare R. Bleich, op. cit., p. 243, note 12; and R. Goldberg, op. cit., p. 274. Despite the inapplicability of imposing
liability based on "demei veladot," restitution would be mandated based upon the rule of yored le-nikhsei havero—"one who appropriates his neighbor's property." See R. Goldberg, op. cit., p. 273.


This "bundle of rights" is not a free-standing personal right of the progenitors. Halakha is primarily a system of duties owed rather than rights possessed. See Ketubot 86a; Bava Batra 174a; Arakhin 22a; and R. Herzog, op. cit., vol. 1, pp. 381-386. Moreover, in halakha, rights are derivative of duties. As Prof. Moshe Zilberg writes, "in the case of a person who refuses to pay his debt, we force him to fulfill the commandment and repay the debt. The court, in other words, is not primarily concerned with the indebtedness to the claimant, but with the obligation of the debtor, with his religio-moral obligation . . . and it only as though in a side effect, as a secondary result of the process, does the claimant receive his money" (Talmudic Law & the Modern State (1973), p. 68.)

Thus, our primary focus is on the borrower, the individual who has the obligation to repay the loan. Essentially, it is the borrower's duty, rather than the lender's right, that generates the latter's legal claim. See further my Dinei Israel 17 (1993-1994), p. 44. Similarly, in our case, the progenitor's rights vis-à-vis his preembryo are dependent upon the fulfillment of certain duties, namely the proscriptions against murder and theft. With the non-applicability of the prohibition of murder and the applicability of the prohibition of theft (see text accompanying this note and notes 23 & 29-32), a right is generated, namely, a progenitor's right of non-interference, pursuant to halakhic guidelines.

R. Yoezer Ariel's as well as R. L.Y. Halperin's (op. cit., p. 30) language seems to indicate that a preembryo is to be treated like property. Alternatively, it may be argued that their utilization of language of "ownership" and "property" does not necessarily signify that the preembryo may be treated like property. Rather, these terms merely designate who has the authority to decide whether halakhically available options with preembryos will occur such as creation, storage discard and placement in the uterus. Furthermore, the halakhot of partnership and sale, creating in personam obligations, are utilized to ascertain the couple's gemirat da'at (i.e. intent) regarding preembryo disposition rather than indicating proprietary rights

An analogy exists in a related context that can serve to illustrate this point. We often say children are “our’s” and that they “belong” to us. Yet halakha does not recognize children as the property of their parents, but rather confers upon parents a degree of authority over, and responsibility for, their children. See *Teshuvot Mishpetei Uziel Even ha-Ezer* No. 91; *Ma’aseh Hoshev* 4:38, p. 318; and my *Israel Law Review* 14 (1979), p. 480. Though the nature and scope of a progenitor’s authority may differ from the parameters of parental authority, we find similar approaches for resolving “oneJ” situations. For example, see *Piskei Din shel Batei ha-Din ha-Rabbaniyim* 2:330-331, 3:172 regarding the treatment of “oneJ” issues in child adoption.


There is an array of mitsvot, manifested through the performance of the positive obligation of “ve-nishmartem me’od le-nafshoteikhem” (Deuteronomy 4:15) and the negative obligations of “protecting yourself” (Deuteronomy 4:9) and “bal tashhiti” (wasteful destruction), which mandate the reasonable care of God’s creation, namely our human body. (For viewing the obligation to protect one’s body within the parameters of *bal tashhit*, see *Shabbat* 129b, 140b; *Bava Kamma* 91b; *Rif*: *Shabbat* 139b; *Piskei ha-Rosh*, *Shabbat* 18:5; *Yam shel Shelomo*, *Bava Kamma* 8:59; and *Amud ha-Yemin*, Nos. 16:19 & 32.) In talmudic parlance, “hamira sakanta me-issura”—endangering oneself is more stringently prohibited than the prohibitions of halakha—see *Hullin* 10a; *Shulhan Arukh Orah Hayim* 173:2; and *Rema*, *Shulhan Arukh Torah De’a* 116:5.

On numerous occasions, contemporary decisors have suggested the employment of *dinei shomrim* (bailment) as a halakhic-juridical framework for defining man’s relationship with God. In other words, while exercising his rights as a *shomer*, the Jew also assumes the responsibility of preserving the bailment (his body) entrusted to him by God, the bailor (*mafkid*). See *Teshuvot Binyan Av* 3:53; R. Bleich, *Bioethical Dilemmas: A Jewish Perspective*, op. cit., pp. 65 and 68; R. Simcha Kook, *Torah She-ba-al Peh* 18 (5736), p. 82; and *Amud ha-Yemin* 16:19.

However, the application of the *shomer* model for understanding the God-man relationship is problematic. Firstly, though in the bailor-bailee relationship, the bailee has certain claims against the bailor, man has no such enforceable rights in his relationship with God. Furthermore, accord-
ing to this paradigm, both man’s rights and his obligations stem from his status as a hireling (“sokher”) or a borrower (“sho’el”). Yet this description of bailment in effect reflects a minority view. This approach emerges from the reconciliation of seemingly contradictory talmudic passages in Bava Metsia 79a & 103a. See Ritva, Bava Metsia 79a and Sefer Hazon Ish, Hoshen Mishpat, Bava Kamma 23:10.

However, most authorities view a sokher or a sho’el as exercising either personal rights or personal obligations. See Rambam, Hilkhot Sekhirut 6:1; Hilkhot She’eila ve-Pikadon 1:5; Rash mi-Sens, Teshuvot Maimuniyyot Sefer Mishpatim, 27; Teshuvot ha-Rashba 2:328; Tosafot, Bava Metsia 56b; Shakh, Shulhan Arukh Hoshen Mishpat 66:73 and 334:2; and Netivot ha-Mishpat, Shulhan Arukh Hoshen Mishpat 316:1 & 3. See Herzog, op. cit., vol. 1, pp. 329-338; and Michael Wigoda, Sekhirut ve-Shteilah (5758), pp. 7-24 and 546-550.

Finally, under certain conditions, many contemporary posekim (see note 24) allow a progenitor to destroy or thaw out unwanted preembryos. Clearly, neither a sokher nor a sho’el enjoys the right to dispose of his bailment. Whether the bailee has an obligation to return it upon the conclusion of the bailment period, or, alternatively, the bailor has the right to take it back is a matter of some dispute (see Ketsot ha-Hoshen, Hoshen Mishpat 84:4 and Netivot ha-Mishpat, Hoshen Mishpat 86:1), but conversion by the bailee is certainly not an option. Hence, placement of the God-man relationship under the rubric of the mafkid-shomer paradigm is questionable. For differing rationales, see Amud ha-Yemini 16:20 and Teshuvot Tsits Eliezer 4:5: Ramat Rachel No. 29.

27. For a similar conclusion regarding the parameters of individual autonomy in Jewish medical decision-making, see David Shatz, The Jewish Law Annual 12 (1997), p. 3. In fact, according to certain posekim, this decision-making authority extends beyond an individual’s lifetime. Thus, a person, while alive, can give a post-mortem anatomical gift for institutions involved in medical research. See Teshuvot Binyan Tsiyyon Nos. 170 and 171; Teshuvot Mahne Hayyim 2; Yoreh De’a No. 60; and Teshuvot Imrei Shefer No. 82. Compare Teshuvot Hatam Sofer, Yoreh De’a No. 336; Teshuvot Maharam Schick, Yoreh De’a Nos. 347-348; Teshuvot Avnei Nezer, Even ha-Ezer No. 83; Teshuvot Helkat Ta’akov 4:39; Teshuvot Yaskil Avdi 6, Yoreh De’a No. 19; and Igerot Moshe, Yoreh De’a 3:140.

Secondly, the exercise of this authority in various contexts reflects a “right” given by God to man rather than man’s intrinsic right, in the sense that, ultimately, it is not his “possession.” For example, “hovel be-reshut”—the permissibility of a voluntary assumption--a risk of becoming a victim to an assault reflects this perspective. See Turei Even, Megilla 27a and Minhat Hinnukh No. 48.

For an individual’s decisional rights regarding his own regenerative organs and tissues such as blood and hair, see Terushalmi Shabbat 6:1; Mishne Nedarim 9:5; Nedarim 65b; Bava Kamma 3b; Rashi, ad. loc.; Bava Kamma 43a; Mishne Arachin 1:4; Arachin 7b; Igerot Moshe, Hoshen Mishpat 1:103; R. S.Z. Urbach, Nishmat Avrahom, Yoreh De’a 349:3; Ma’aseh Hoshav, op. cit.; Yaakov Ariel, Shut be-Ohala shel Torah, (5758),...
pp. 483-485; and R. Mordechai Halperin, *Oraita* 17 (5753), p. 159. There are, however, strong reasons to assume that the disposition of hair, for example, does not serve as an illustration of the scope of an individual’s decisional authority regarding his body parts. Specifically, upon closer examination, we find decisors who do not view hair as part of the human body. See *Nekudot ha-Kessef Yoreh De’a* 349:2 & *Pithei Teshuva, Yoreh De’a* 349:4. Compare *Shulhan Arukh Yoreh De’a* 349:2.

Furthermore, regarding our relations with other individuals, the permissibility of privileged battery (such as a *bet din* meting out corporeal punishment—see *Tosefta*, *Gittin* 3:8; *Tosefta*, *Bava Kamma* 6:17 and 9:11; Rambam, *Hilkhot Rotse’ah u-Shemiras ha-Nefesh* 4:5-6; *Teshuvot Tashbetz* 3:82; *Shulhan Arukh Yoreh De’a* 336:1; Rema, *Shulhan Arukh Hoshen Mishpat* 421:13; *Teshuvot Helkat Ya’akov* 3:11; *Teshuvot Shevut Ya’akov* 3:140; and Igerot Moshe, *Yoreh De’a* 1:140 and 4:30) reflects an individual’s authorization to fulfill God’s right, so to speak (i.e. the performance of a particular *mitzva*). See *Amud ha-Yemini*, No. 16:19.

29. For a listing of posekim who permit aborting a fetus during the first 40 days of gestation, see A. Steinberg, *Encyclopedia Hilkhotit Refu’it* (1991), vol. 2, p. 95, note 254. For a differing interpretation of some of the cited *teshuvot*, see R. Bleich, *Contemporary Halakhic Problems* (1977), vol. 1, pp. 339-347. See *Ma’aseh Hoshev*, op. cit. Conversely, those posekim who prohibit the abortion of a 40 day fetus would equally proscribe disposal of surplus preembryos. Though the fetus is underdeveloped, the potential for human viability still exists. See *Shevet me-Yehuda*, vol. 1, p. 9. For an extensive analysis, see R. Y. Breitowitz, “The Preembryo in Halakha,” j.law.com, 3-10.
30. *Me’iri, Bet ha-Behira*, *Bava Batra* 141a; Rambam, *Hilkhot Mekhira* 22:10; *Tur Hoshen Mishpat* 210; *Shulhan Arukh Hoshen Mishpat* 210:1; and *Sema, Hoshen Mishpat* 210:2. Compare *Rashba* and *Nimmukei Tosef, Bava Batra* 66a; and *Shakh, Shulhan Arukh Hoshen Mishpat* 210:2.
31. For the utilization of this argument as a basis for allowing destruction of unwanted preembryos, see R. L.Y. Halperin, op. cit., p. 30.
34. Locke, ibid. section 26.
36. Locke, op. cit. sections 27 and 32.
37. Locke, op. cit. sections 31, 38 and 46.
39. See notes 24 and 27. The scope of a progenitor’s authority regarding his reproductive tissue extends well beyond the locus of our discussion. For the role of a couple’s authority in cases of halakhically permissible forms of

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contraception, see Tosafot ha-Rosh Ketubot 39a; Teshuvot Hatam Sofer, Torah De'a No. 172 and Even ha-Ezer No. 20; Teshuvot Divrei Malki'el 1:70; Teshuvot Avraham No. 20; Tosafot ha-Rosh, Yevamot 12b; Teshuvot Torat Hessed, Even ha-Ezer 44:21; Teshuvot Shevet Sofer, Even ha-Ezer No. 1 and Sefer Hazon Ish, Even ha-Ezer 36:2-3. For the allowance to destroy “seed which does not procreate,” see Teshuvot Imrei Eish, Yoreh De'a No. 69; Teshuvot Pri Hasadeh 1:77; and Teshuvot Maharsham 3:168. Compare Teshuvot Binyan Tsiyyon, Even ha-Ezer No. 137.