

VIEWPOINT

HEALTH AND THE 2024 US ELECTION

Early Pregnancy Loss in an Era of “Wrongful Embryonic Death”

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Legislators are scrambling to limit political damage from the Alabama Supreme Court’s 2024 decision on the claim of “wrongful death” of laboratory-conceived embryos. However, an even larger problem looms. Beyond the laboratory-conceived embryos at the center of this case, there are millions more naturally conceived embryos lost early in pregnancy; any might be claimed as a “wrongful death” under the Alabama Supreme Court’s interpretation of the law.

A wrongful death claim alleges that a defendant’s negligent act or omission caused the death of another. Generally, statutes authorize specified family members to sue, which can include parents, siblings, and extended family. Wrongful death acts are civil law, which requires a lower level of proof than criminal law. A criminal case requires evidence “beyond a reasonable doubt;” a civil case requires only “a preponderance of the evidence” that the defendant’s failure to use due care caused a death.

The Alabama court rested its decision on a 2022 amendment to the state constitution to “support the sanctity of unborn life and the rights of unborn children.” The court’s decision can be seen as the logical next step,

The expanding use of personhood in both civil and criminal law narrows life choices for pregnant people. The result could be legal constraints on ordinary behavior and social interactions of anyone who is pregnant. Imagine a celebratory dinner scenario for someone who has just tested positive for pregnancy. The server recommends an appetizer of Mexican soft cheese. None of them realize that such cheeses can carry *Listeria*, a bacteria harmful to pregnancy. Shortly afterward, the pregnant individual becomes ill and has a miscarriage. Under the Alabama Supreme Court’s interpretation of the law, the pregnant individual or any family member could file a wrongful death lawsuit against the waitstaff, the restaurant, and the cheesemaker.

This scenario is compounded by an aspect of human pregnancy that is seldom mentioned in discussions of personhood—the extremely high loss rate of naturally conceived embryos. As many as two-thirds of fertilized eggs die before the end of pregnancy.² Although much of this loss occurs before pregnancy can be detected, one-third of embryos that are detectable die during the course of the pregnancy.³ In the past, most of these losses occurred with little notice, often before there are any symptoms of pregnancy. This has changed. Today, over-the-counter pregnancy tests are cheap, readily available, and able to detect many pregnancies before the expected onset of next menses.⁴ Early detection in turn means increased recognition of pregnancy losses that would otherwise be mistaken for a late menses.

In the US, there are roughly 2 million detectable embryo deaths each year. Any one of these could be the subject of a wrongful death suit. The Alabama court used a statute written to address the death of minors and applied it to in vitro embryos. If laboratory-conceived frozen embryos stored miles from their parents qualify for protection as “persons,” certainly such protections would also apply to naturally conceived embryos in utero. In settings where the death of any embryo can raise questions of blame, the massive level of human embryonic mortality becomes a legal quagmire. High rates of embryonic death might make it difficult to prove causation in specific cases, but where the politics of personhood influence even state supreme courts, every pregnancy may be seen as a potential legal risk.

The rational response to legal risk is avoidance. Several Alabama fertility clinics abruptly suspended their in vitro fertilization services to avoid liability. In the restaurant scenario, waitstaff may decline to serve items that might cause miscarriage. The restaurant could require a waiver of liability or even refuse to seat someone who is unable to confirm they are not pregnant. Policies to

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after the US Supreme Court overturned *Roe v Wade*, to confer personhood status on all fertilized eggs, regardless of whether the fertilization occurs naturally or in a laboratory. Furthermore, the concept of embryo personhood appears to be acquiring momentum. Eleven states now have personhood laws that could justify the application of wrongful death statutes to fertilized eggs. Although 5 are unlikely to apply to in vitro embryos, all 11 apply to implanted embryos. More than a dozen additional states are actively considering such legislation.

Personhood language is already being used to prosecute pregnant individuals for use of controlled substances during pregnancy. Amanda Aguilar gave birth to a healthy neonate and still an Oklahoma county prosecutor charged her with felony child neglect when a test of the newborn’s meconium detected marijuana.¹ Aguilar had used medical marijuana under a license her physician issued to address severe morning sickness. A state court dismissed the case, but the prosecutor appealed. He argued, “While you have a license to smoke marijuana, you don’t have a license to give marijuana to a third person....This child is a third person.”

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avoid embryonic risk could make pregnant individuals ineligible for business, health, and other services.

In effect, law that defines embryos as persons empowers others to decide what pregnant individuals may or may not do. In some states, such law could lead to enforced behavioral boundaries. Although these scenarios may sound farfetched, 2 waiters in 1991 tried to shame a pregnant woman after she ordered an alcoholic drink with her meal.⁵ Ordinary social and economic life could become increasingly restricted for those who are pregnant. Service could be denied not only to pregnant individuals, but to anyone suspected of being pregnant.

The Alabama Supreme Court decision triggered an uproar over interference with in vitro fertilization services. The Alabama legislature quickly responded by enacting a legal exception to person-

hood for in vitro fertilization. However, crafting ad hoc exceptions to the personhood of laboratory-conceived embryos is likely to raise new questions about interpretation, including confusion about naturally conceived embryos and when a fertilized egg is considered a person and when it is not. Ad hoc approaches are a weak solution to the central problem—the complex and unintended consequences that flow from legalization of embryo personhood. What activities will pregnant persons be required to curtail to avoid potential harm to their embryo? Will anyone who is pregnant be confined to their homes during flu season? Will driving or participation in sports become too risky? The impact of such laws may well be to limit individuals' basic freedom in the name of protecting their fertilized eggs.

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