

# [***Opinion: The twisted irony in Alabama's court decision on embryos***](https://advance.lexis.com/api/document?collection=news&id=urn:contentItem:6BCR-1R01-JBSS-S2W0-00000-00&context=1516831)

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**Body**

(CNN) &#8212; The Alabama Supreme Court's ruling on Friday will transform infertility care across the state, potentially setting the stage for a ruling that a fetus or even an embryo outside the womb holds constitutional [*rights*](https://publicportal-api.alappeals.gov/courts/68f021c4-6a44-4735-9a76-5360b2e8af13/cms/case/343D203A-B13D-463A-8176-C46E3AE4F695/docketentrydocuments/E3D95592-3CBE-4384-AFA6-063D4595AA1D).

The ruling is a reminder of how important [*fetal personhood*](https://time.com/6191886/fetal-personhood-laws-roe-abortion/) is becoming for both the antiabortion movement and the Republican Party - and of its potentially drastic consequences. In the United States today, recognizing the value of an embryo or fetus sets a precedent that no state can permit access to abortion - and that anyone who chooses abortion may be committing a crime.

The irony in the Alabama court's decision is that more Americans who want to be parents will be unable to achieve that dream. The ruling is extraordinary not only in declaring personhood before birth but also in applying the idea to embryos that haven't been implanted in the uterus. But the ruling is not just bizarre; its consequences may be profound.

If an embryo is a person, it can no longer be destroyed, donated for research or potentially even stored. Some abortion opponents argue that if embryos are persons, each one that is created must be implanted - and that would make even storing embryos for future use impermissible. If any of that comes to pass - and in Alabama, it likely will - that will transform how in vitro fertilization (IVF) works, and will mean a lower rate of success for Americans who already struggle to start a family.

The court's ruling could set a precedent for other conservative states that embrace the idea of personhood before birth, making it harder to pursue IVF across large swaths of the country. The decision will also bolster a broader antiabortion effort to recognize a fetus in the womb or even a frozen embryo as a person under federal constitutional law, helping abortion opponents make the case that if states already sometimes treat an embryo or fetus as a rights-holder, constitutional law should do the same.

The Alabama case began when three couples visited a fertility clinic in Mobile to pursue IVF: a treatment in which multiple eggs are harvested, fertilized and implanted to create a pregnancy. Across the US annually, about [*2% of births*](https://www.usatoday.com/story/news/nation/2024/02/20/alabama-supreme-court-frozen-embryos-ruling-ivf/72662533007/) involve IVF. The success rate of each IVF cycle can be low given the age and previous medical [*condition of the patient*](https://www.forbes.com/health/family/ivf-success-rates-by-age/).

Since many patients who turn to fertility clinics experience trouble getting pregnant, physicians routinely create and store excess embryos so that patients can try again if a first attempt fails. IVF is also expensive - an average cycle can cost anywhere between $12,000 and $30,000, even when patients can use [*embryos they've already created*](https://www.forbes.com/health/womens-health/how-much-does-ivf-cost/). This means that patients have more embryos than they implant in a given cycle, which they can choose to store, give to other patients or donate for research.

The three Alabama couples elected to store their excess embryos at the Mobile clinic from 2013 to 2016. In December 2020, however, a patient from an attached hospital entered the clinic, handled some of the embryos and injured their hand, given the subzero temperatures at which the embryos are stored. As a result, they dropped the embryos and accidentally [*destroyed them*](https://publicportal-api.alappeals.gov/courts/68f021c4-6a44-4735-9a76-5360b2e8af13/cms/case/343D203A-B13D-463A-8176-C46E3AE4F695/docketentrydocuments/E3D95592-3CBE-4384-AFA6-063D4595AA1D).

The plaintiffs sued, first alleging that the clinic was negligent in how it monitored the embryos, contending that the clinic breached the contract it [*signed with the couples*](https://publicportal-api.alappeals.gov/courts/68f021c4-6a44-4735-9a76-5360b2e8af13/cms/case/343D203A-B13D-463A-8176-C46E3AE4F695/docketentrydocuments/E3D95592-3CBE-4384-AFA6-063D4595AA1D). The couples also had a much more controversial claim: that their embryos counted as "children" or "persons" under the state's wrongful death of [*a minor law*](https://publicportal-api.alappeals.gov/courts/68f021c4-6a44-4735-9a76-5360b2e8af13/cms/case/343D203A-B13D-463A-8176-C46E3AE4F695/docketentrydocuments/E3D95592-3CBE-4384-AFA6-063D4595AA1D).

The Alabama Supreme Court agreed that the [*embryos were persons*](https://publicportal-api.alappeals.gov/courts/68f021c4-6a44-4735-9a76-5360b2e8af13/cms/case/343D203A-B13D-463A-8176-C46E3AE4F695/docketentrydocuments/E3D95592-3CBE-4384-AFA6-063D4595AA1D). The court pointed to a 2018 ballot measure that recognized fetuses [*as persons under state law*](https://ballotpedia.org/Alabama_Amendment_2,_State_Abortion_Policy_Amendment_(2018)). "The People of this State," the court explained, "have adopted a Constitutional amendment directly aimed at stopping courts from excluding 'unborn life' [*from legal protection."*](https://publicportal-api.alappeals.gov/courts/68f021c4-6a44-4735-9a76-5360b2e8af13/cms/case/343D203A-B13D-463A-8176-C46E3AE4F695/docketentrydocuments/E3D95592-3CBE-4384-AFA6-063D4595AA1D) It did not matter to the court that the embryos were frozen and not yet implanted in the uterus.

In a concurring opinion, Chief Justice Tom Parker suggested that divine law - which, he claimed, had been embraced by the people of Alabama - supported the court's conclusion. "Human life," he stressed, "cannot be wrongfully destroyed without incurring the [*wrath of a holy God."*](https://publicportal-api.alappeals.gov/courts/68f021c4-6a44-4735-9a76-5360b2e8af13/cms/case/343D203A-B13D-463A-8176-C46E3AE4F695/docketentrydocuments/E3D95592-3CBE-4384-AFA6-063D4595AA1D)

The Alabama ruling is a reminder of the importance of personhood ***politics*** on the American right - and a warning about how punitive they have become. Since the US Supreme Court overturned Roe v. Wade [*in 2022*](https://www.scotusblog.com/case-files/cases/dobbs-v-jackson-womens-health-organization/), the fight to establish that the word "person" in the 14th Amendment of the US Constitution applies to fetuses has escalated. At the one-year anniversary of the reversal of Roe, leading groups from the Alliance Defending Freedom to Students for Life called for [*personhood*](https://www.thenation.com/article/politics/anti-abortion-activists-dobbs/) for "preborn children."

States are considering bills recognizing the personhood of fetuses in contexts from [*wrongful*](https://floridaphoenix.com/2024/02/15/abortion-rights-advocates-slam-bill-establishing-personhood-at-conception-in-wrongful-death-suits/) death to [*tax deductions*](https://wisconsinexaminer.com/brief/tax-deduction-for-the-unborn-passes-senate-in-bill-destined-to-be-vetoed/). The goal is to slowly build the case that a fetus or even an embryo is a person for every purpose and circumstance. For the antiabortion movement, that would mean that no state could allow legal abortion. For some self-proclaimed antiabortion abolitionists, fetal personhood would mean that the criminal law would have to punish women who [*terminate their pregnancies*](https://www.nytimes.com/2022/07/01/us/abortion-abolitionists.html).

In theory, there should be a way for Americans like the couples in the Alabama case to protect themselves against medical negligence - or even to express their belief that frozen embryos or life in the womb have value - without setting a precedent for criminalizing abortion across the US. There are plenty of examples of people asserting that fetal life matters who are not angling to criminalize reproduction. A pregnant woman tried to drive [*in the HOV lane*](https://www.npr.org/2022/09/02/1120628973/pregnant-woman-dallas-fetus-hov-lane-passenger-ticket), arguing that her unborn child is a person. A prison employee in Texas sued on similar grounds when her child was stillborn after she was not allowed to [*leave her post*](https://www.cbsnews.com/texas/news/a-prison-guard-says-she-was-forced-to-stay-at-her-post-during-labor-pains-texas-is-fighting-compensation-for-her-stillbirth/#:~:text=%2D%20CBS%20Texas-,A%20prison%20guard%20says%20she%20was%20forced%20to%20stay%20at,fighting%20compensation%20for%20her%20stillbirth.&text=On%20a%20warm%20November%20night,she%20believed%20was%20a%20contraction.).

In the context of reproduction and the law, there are gaps in protections for Americans who experience stillbirth or miscarriage as a result of medical negligence, or who are otherwise [*denied wanted parenthood*](https://columbialawreview.org/wp-content/uploads/2017/01/149.pdf). Polls suggest that many Americans believe life in the womb has value while opposing criminal abortion bans: A 2022 Pew Forum poll found that even about a third of Americans who think abortion should be legal believe that "human life begins at conception, [*so a fetus is a person with rights."*](https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/)

That would not seem so strange if there was a way to recognize the value of embryonic or fetal life that does not inexorably lead to [*the punishment of physicians*](https://www.cnn.com/2022/10/12/health/abortion-doctors-talking/index.html) who perform abortions, others who [*aid abortion seekers*](https://www.poynter.org/fact-checking/2022/can-states-punish-women-for-traveling-out-of-state-to-get-an-abortion/) and even [*abortion seekers themselves*](https://www.cnn.com/2022/09/20/politics/abortion-bans-murder-charges-invs/index.html). It is not impossible to imagine how that would look - the Constitutional Court of South Korea took a position like this in recognizing constitutional protection [*for abortion rights*](https://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/south_korea_2019_constitutional_court_abortion.pdf) in 2019.

If embryonic or fetal life has value, the state shouldn't start with criminalization. Instead, the government may have a constitutional obligation to advance its interest in protecting that life in ways that don't limit reproductive liberty, by protecting pregnant workers, delivering better prenatal care or safe housing and reducing the [*rate of maternal mortality*](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3954&context=faculty_scholarship).

There is nothing inevitable about equating criminalization with valuing fetal or embryonic life, or providing a remedy for people who want to become parents and are unfairly denied the chance to do it.

The Alabama Supreme Court's ruling is just the start of the push for fetal personhood. And unless something changes, the more fetal personhood is recognized, the more kinds of reproductive decision-making will be a crime.

Opinion by Mary Ziegler

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