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# It's Not Just Embryos. Even the Dead Have More Rights Than Women

By Tonja Jacobi

Column

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*Columnist Tonja Jacobi of Emory Law writes about the US Supreme Court and legal ethics. She says the Alabama IVF opinion's logic contradicts tort law's tenets, as it could require women to risk harm to save an embryo.*

The logical endpoint of the US Supreme Court's *Dobbs v. Jackson Women's Health Organization* decision overruling *Roe v. Wade* isn't simply that in vitro fertilization will become legally fraught and practically threatened.

It's that dead people have more rights than women who may get pregnant. There is a lot of focus at the moment on the desperate attempt by many Republicans to explain how they reconcile support for *Dobbs'* rejection of women's right to choose, and embrace of legally entrenching the notion of life beginning at conception, with support for IVF, which almost always necessitates destroying excess fertilized eggs.

Anti-abortion Republicans are victims of their own success in overturning *Roe v. Wade*. The logic that every embryo is a human life means IVF doctors either have to impregnate women with dozens of potentially viable embryos, or IVF has to come to a halt in any state that decides to define conception as the beginning of life—as happened in Alabama.

But while *Dobbs* is a genuine threat to IVF, that's just the first repercussion of the logic that women can't control their own bodies and destinies because the law recognizes embryos as humans, rather than as potential human life.

There are many other well-founded fears about the effect of *Dobbs*. One is that other previously fundamental rights will cease to exist at the whim of the Supreme Court, such as the right of women to access contraceptives—or men, for that matter. Another is that gay marriage will be undermined, or even interracial marriage.

But this only skims the surface of the logic of *Dobbs*.

Justice Samuel Alito began the majority opinion of *Dobbs* by setting up a dichotomy between those who believe women's rights over their bodies are fundamental—not that he put it in those terms—and those who believe that life begins at conception.

While it's true this is a key division of views, it completely fails to address whether states or the federal government can force women to experience pregnancy and birth against their will.

Answering whether life begins at conception doesn't address the more challenging question at the heart of the abortion debate: If life begins at conception, what do we do about that? Do we impose the responsibility of that life upon the woman, to their great potential risk and against their freedom of choice?

Only with abortion have courts recognized that the answer to that question could be yes. No court has ever held, outside the abortion context, that one person has the obligation to bear significant burdens—and even life-threatening health risk—to protect the life of another.

In the first week of law school, students are likely to be faced with the “trolley problem.” If a train is hurtling toward a catastrophic accident that will take many lives, is it justified to switch the tracks, forcing the train to change course so that it will kill a smaller number of other people? Can it ever be justified to risk killing one person to save others?

The trolley problem represents the conundrum arising from the fundamental legal distinction between an act and an omission. But the problem of *Dobbs* goes to an even more foundational question: Even within the category of an act—the easy side of the equation—we don't expect people to risk their lives to save others.

For instance, let's say you drive negligently and injure someone such that they will die unless they receive an immediate kidney transplant. Even though you are fully responsible for their impending death, the law won't force you to have one of your kidneys surgically removed, even though you can live perfectly well without it.

Even if you're responsible for another person's imminent death, you have no obligation to save them at any risk to yourself, or at any level of physical intrusion. But it goes beyond the fact that we don't have to risk our lives for others under the law.

Even after we are dead, we can refuse to give up our organs for transplant, even though it would save multiple lives and not risk any ill health to us. No court in the US would impose the indignity of forced organ transplantation, even though we're no longer there to experience that indignity.

In contrast, women can be forced to bear terrible health risks through enforced pregnancy. This is no longer theoretical: Multiple states have prevented women from seeking life-saving and health-saving pregnancy terminations. Those states deem fetuses to not only have rights, but to effectively have rights greater than any other human: The right to impose health risks and risks of death on another.

IVF treatment is just one of the most high-profile realms where the cruel logic of *Dobbs* is playing out, but it isn't the logical end. Thanks to *Dobbs*, dead people and embryos have more control over their bodies than the Supreme Court gives women of reproductive age in the US now. This is only the beginning.

The case is *LePage v. Ctr. for Reprod. Med., P.C., Ala., 2022-0515, 2/16/24, Ala., No. SC-2022-0515, 2/16/24.*

#### **Author Information**

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