

Episode: *Health By Law: Embryonic Personhood in Alabama*

Guest: Rebecca Feinberg, JD

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[mellow theme music]

[00:00:04] TIM HOFF: Welcome to the new *Health By Law* series from the *American Medical Association Journal of Ethics*. I'm your host, Tim Hoff. A wrongful death suit rose to the Alabama Supreme Court, and the result was the establishment of a new precedent for embryonic personhood. This decision also generated exceptions and carveouts following panic among clinicians practicing IVF and Alabamians hoping to become parents through uterine implantation of IVF-generated embryos. Joining us to consider some of the evolving legal and ethical terrain at the beginning of life is Professor Rebecca Feinberg, the Distinguished Chair of Health Law, Bioethics and Policy, with her primary appointment as associate professor of law. She is cross-appointed as associate professor of public health and bioethics at New York Medical College. Professor Feinberg, thank you so much for being here. [music fades]

REBECCA FEINBERG: Thank you for having me, Tim. I do want to let your listeners know that I have no conflicts of interest and that we are recording today on Thursday, April 25th. This is a rapidly changing landscape, and I want to make sure that your listeners know the time stamp for this discussion, because by the time they listen, things may have changed. I think it's also important to note that as we talk about embryos and personhood for embryos, this is wrapped up in the abortion discussion, and any conversation I have about abortion comes from the perspective that abortion is health care. And lastly, I think the terminology is very important that we clarify the term "embryo," because colloquially, we often use the term "embryo" to mean just a clump of cells. But medically, you'll hear people use the term "embryo" to the ninth week of gestation in a pregnancy.

[00:01:53] HOFF: Yeah. Thanks for providing that important background for our listeners as a common place to start. For those who are unfamiliar with just the basic facts of the case, how about we start there? Can you lay out for us what happened?

FEINBERG: Sure. This was a fertility clinic that was inside of a university hospital. A patient unrelated to the fertility clinic managed to get into what is usually a secured area, meaning where the cryopreservation tanks are stored that hold embryos and reproductive material. This individual opened one of the cryopreservation tanks and managed to remove a couple of the containers that we call straws that were holding embryos. Because they're held in liquid nitrogen, or frozen in liquid nitrogen, which is at -196°C, the individual burnt their hand and dropped the straws on the floor, causing the loss of these embryos. It's important to note, as we talk about this, that there have been

no allegations that this individual opened the cryopreservation tank or damaged these embryos as part of a political act, and he had no political motivation.

[00:03:11] HOFF: And so, how did this case make its way through the Alabama court system to ultimately be heard by the Alabama Supreme Court?

FEINBERG: So, the case originally started in the lower courts with a number of different portions of the suit, including negligence and wantonness. But the portion of the case that we're going to focus on that made its way to the Supreme Court was the advancement of embryonic loss under the Wrongful Death of a Minor Act. The trial court specifically dismissed the wrongful death of a minor portion of this lawsuit because embryos are not people. But the case was appealed and went to the Supreme Court of Alabama. And the Supreme Court of Alabama agreed to hear this case, and they found differently than the trial court. The Supreme Court of Alabama specifically states that embryos are unborn children that are just not located in utero, giving personhood to these embryos. I also want to note for your listeners that they do so under the Wrongful Death of a Minor Act, which is an act from the year 1872, an era where we did not have the scientific or medical advancement of understanding or creating embryos outside the human body the way we have in the last 50 years of in vitro fertilization.

[00:04:42] HOFF: As noted briefly in the introduction for this podcast, there have been immediate and extensive consequences within Alabama for fertility clinics, clinicians who work in them, and people receiving care in the state. Can you describe some of those consequences for our listeners?

FEINBERG: So the initial response was a fair amount of panic. Most, not all, but most clinics put a pause on all IVF practice, meaning that women could not access or were stopped in the process of accessing their in vitro fertilization care. And this was based on fear of both civil and criminal prosecution. There is some natural attrition of embryos at every stage of the IVF process, and practitioners, from the physicians who are reproductive endocrinology and infertility experts to the embryologists who work in the laboratories, all had concerns that this natural attrition could lead to both civil and criminal prosecution. What it ultimately meant is that women in the state of Alabama had to cease, or were unable to access, in vitro fertilization care.

What's also important to note is that the companies that ship embryos, meaning they pick them up and transfer them between clinics in state, out of state, all paused their practice within the state of Alabama as well. Meaning that not only could women not receive in vitro fertilization in the state of Alabama, but they also could not transfer their embryos out of state to continue their medical care elsewhere. This put an entire stop on in vitro fertilization for these women. It took approximately two weeks before we saw legislative response. The legislators proposed a bill, and Governor Kay Ivey signed it into law, giving immunity from both civil and criminal prosecution for those involved in the practice of IVF.

[00:06:51] HOFF: I'm glad you mentioned the implications for women seeking care outside of the state of Alabama. This is obviously a state case, but there are

implications at the federal level and for other states. So, could you please canvass some of the most important ones for our listeners and explain why they're important?

FEINBERG: Absolutely. It's important to note that we're looking at a different legal landscape now that the United States Supreme Court has heard the Dobbs case, rather than during the Roe versus Wade era that we previously had because the Dobbs case returned control over a portion of reproductive care, specifically abortive care or termination, to the individual state decisions. And as a result, we see a range of different practices in different states in the Union. At the moment, there are 11 states that have legislative personhood laws. Four states, one of which is Alabama, have actually prosecuted women for child endangerment and neglect based upon personhood laws and the treatment of their early pregnancies. We see this reaching into lots of other areas of reproductive care legislatively. For example, Kentucky is now allowing women to sue for child support during their pregnancy. Georgia already had a law on the books that allows you to deduct \$3,000 for an unborn child with a heartbeat from your taxes. In other words, many different states are taking different legislative approaches to the idea of personhood and how this could affect and inhibit the full range of reproductive care for women in their individual states.

[00:08:43] One of the areas we're looking at from an academic perspective that I think is going to be particularly interesting for IVF providers with the idea of personhood is preimplantation genetic testing. This is testing that occurs in more than half of the IVF cycles that occur in this country, and that deems embryos to be either euploid or aneuploid, meaning to have the right or the wrong number of chromosomes or to be guessed as mosaic somewhere within that range. And those embryos are, at least the embryos that are determined to be aneuploid, meaning to have the wrong number of chromosomes, are typically not used for attempts at reproduction. And if those embryos still have personhood, it will raise the question of what can happen with them. We see this already as a tremendous problem in the state of Louisiana that, under Francophonian law, has always referred to embryos as juridical persons, and therefore does not allow the destruction of embryos in that state.

[00:10:00] HOFF: Many have pointed to the explicitly religious language in the Alabama Supreme Court's majority opinion. What do you see as some of the possible legal consequences of using this kind of language as a basis for legal decisions?

FEINBERG: So it's important to note, as an ethicist, that religious language in judicial decision making—and judicial decision making is one way of making law—is incredibly problematic because it imposes a religious moral perspective on law that affects people who may not subscribe to that moral ethos. I do want to back up for your listeners who've not had the opportunity to read the decision in the LePage case and specifically the concurrence written by the Supreme Court justice, the chief justice. I'll read two quotes that give some sense of where religion plays into this. So, one of them, the Supreme Court justice states, "We believe that each human being from the moment of conception is made in the image of God, created by him to reflect his likeness. It is as if the people of Alabama took what was spoken of the prophet Jeremiah and applied it to every unborn person in the state." Another quote from the chief justice in the Supreme

Court of Alabama states, “Carving out an exception for the people in this case, small as they were, would be unacceptable to the people of this state who have required us to treat every human being in accordance with the fear of a holy God who made them in His image.” This language is religious and not legislative, yet what the chief justice is writing has become law, and he is the chief justice of the state Supreme Court. I again want to remind your listeners that the age of this precedent is an age where we did not know or understand or have the scientific concept of an embryo external to the human body. The Wrongful Death of a Minor Act, again, is from 1872.

[00:12:24] I’d also like to take just a moment to point out to your listeners, because anything involving an embryo, whether it’s in vitro fertilization or natural conception, has a correlation to abortion because abortion is discussing embryos and fetuses. And Alabama has a law from 2019—so before the Dobbs decision—that is now enacted that essentially bans abortion in the state, but specifically says “in utero.” And the intention, according to one of the senators in Alabama, was to protect IVF. So there’s a clear conflict here between legislation that was already passed and legislation that, or law that is made in the judicial practice by the Supreme Court here. The conflict is that abortion, which intends to end a pregnancy, and IVF, which intends to initiate a pregnancy, are both brought into question when you give embryos personhood.

[00:13:36] HOFF: It’s worth noting at this point that there are competing legal, clinical, and ethical definitions of personhood. So, for our listeners, could you canvass some of those alternative definitions?

FEINBERG: Some, like the chief Supreme Court justice in Alabama, believe that life begins, or personhood initiates, at fertilization, meaning when two haploid cells, a sperm and an egg, are combined to create one diploid cell, the embryo itself. Others believe that personhood does not begin until you reach the blastocyst stage of embryonic development. That’s roughly five days. But what’s important is at that stage, you can differentiate two different parts of the embryo: the trophoctoderm that will become the placenta and the inner cell mass that will become the fetus. For others, the beginning of personhood starts at transfer, meaning when that embryo is placed inside of the uterus. And for yet others, it’s when that transfer actually implants, meaning when the embryo embeds into the uterine wall. We see in many states that personhood begins at the most nascent stages of cardiac activity, roughly six weeks, which is when we see heartbeat laws coming into play in the abortion discussion. For those who follow the logic of the Roe versus Wade case, personhood begins at different stages of the trimester system, typically between the first and second trimester. For those who follow the logic of the Casey court, they believe that personhood begins at viability, roughly 20 to 24 weeks of gestation. And for yet others, personhood begins at birth, meaning when the fetus emerges, and a baby takes its first breath of its own accord or independently.

[00:15:41] And it’s interesting to note from an ethical perspective that there are cultures in this world where infant mortality is so high that personhood is not denoted during the first year of life. The infant is not even given a name until the first birthday, when likelihood of survival markedly increases. So, there is this very wide range from

fertilization through the first year of life, of when different people, different cultures, different religions all find personhood.

[00:16:15] HOFF: And so, how will the definition of personhood advanced specifically by the Alabama Supreme Court conflict with these other definitions, and what consequences might that have?

FEINBERG: So I think it's very interesting to look at the conflict between the different forms of law we just saw come out in the state of Alabama, meaning the judicial law that was put into place by the holding from the Supreme Court of Alabama, and the legislative law that was put into place in response to attempt to protect IVF. The legislation absolves IVF practitioners of any civil or criminal liability. This is the antithesis of what the judicial law was trying to do, which was to hold the clinic accountable for the loss of embryos by not properly securing the tank and allowing an outside person to come in and damage these embryos. The state legislators have stripped the courts of the ability to hold bad actors within clinics accountable, and instead have come full circle to creating no responsibility for these embryos. We see this dichotomy in the state legislation that is attempting to protect IVF. But in fact, really allowing the practice of IVF to occur without responsibility is completely the opposite of what the judicial ruling attempted to do by giving personhood to these embryos and attempting to create a greater responsibility to protect embryos in the course of IVF.

[00:18:04] It is interesting that the judicial ruling does not differentiate embryos at all. All embryos are encompassed in this level of personhood, whether they are cryopreserved in liquid nitrogen or whether they exist inside of a woman's body in her uterus. Whereas the legislative decisions signed into law by the governor differentiate between embryos that are being used for IVF and embryos that are being used for other purposes. This fundamental conflict between the judicial made law and the legislative made law in the state of Alabama sets up such an interesting precedent that I believe we're going to see repeated and examined in other states. I ultimately predict something will likely rise to the level of the United States Supreme Court before we see more resolution to this issue. I do expect to see more states attempting to legislatively advance personhood as a means of controlling reproductive autonomy. Your listeners should stay tuned as we see multiple cases wending through the systems in multiple states that are directly addressing this issue, and to stay tuned specifically to the issue of embryonic personhood as it plays a role in the greater conversation of reproductive justice and reproductive freedom for women in this country. [theme music returns]

[00:19:50] HOFF: Professor Feinberg, thank you so much for being on the podcast and for sharing your expertise with us.

FEINBERG: Thank you so much for having me. It's been a pleasure to talk with you today.

HOFF: That's all for this episode. Thanks to Professor Feinberg for joining us. Music was by the Blue Dot Sessions. For more podcasts, articles, art, and continuing

education, all for free, visit our site, journalofethics.org. We'll be back soon with more *Health Law* from the American Medical Association Journal of Ethics.