

## VIEWPOINT

# A Troubling Court Decision for Reproductive Rights

## Legal Recognition of Fetal Standing to Sue

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**Abortion** remains one of the most divisive controversies in the United States, and few states restrict the practice more than Alabama. In 2018, Alabama voters passed an amendment to the state's constitution that "recognize[s] and support[s] the sanctity of unborn life and the rights of unborn children."<sup>1</sup> Kansas, Missouri, and Louisiana have enacted similar language into their constitutions. These clauses variously classify fertilized eggs, zygotes, embryos, and fetuses as "persons" entitled to unspecified legal protections from the moment of conception.<sup>2</sup> They have the potential for sweeping consequences. It is unclear whether and how these measures would lead to criminal penalties against pregnant women for activities like drug use that risk harming the fetus, as well as prohibitions on in vitro fertilization (IVF), stem cell research, or other practices that involve the destruction of human embryos.

In May 2019, Alabama enacted a related law that criminalizes abortion of any "woman known to be pregnant." This near-total abortion ban—scheduled to take effect in 6 months—exempts only "serious health risk" to the woman or "lethal anomaly" in the "unborn child." It includes no exception for rape or incest. In all other cases, physicians face possible criminal sanction and second-guessing of any determination of medical emergency warranting termination of pregnancy.<sup>3</sup> The governor of Alabama has conceded that the new

recognized the legal personhood rights of the (aborted) fetus, and allowed the man, Ryan Magers, to name the fetus as a co-plaintiff in his "wrongful death" suit. Magers, who is 19 years old, stated in court filings that his 16-year-old girlfriend underwent an abortion after he had repeatedly "pleaded" with her to carry the pregnancy to term and give birth.<sup>5</sup>

Judge Barger's decision to let the fetus bring suit alongside Magers has far-reaching implications for reproductive rights. A recent analogue to the Alabama case is an Ohio lawsuit in which a couple brought a "wrongful death" claim against a Cleveland fertility clinic after failure of a storage freezer in 2018 destroyed their last 3 IVF-generated embryos. An appellate court rejected the couple's petition to have their embryos afforded a similar kind of personhood status that Judge Barger's decision does for fetuses. Such claims would do more than allow couples to sue for the negligent demise of their embryos or deter a woman from ending a pregnancy that she is unprepared to carry. By elevating the legal status of the fetus, the Alabama judgment provides at least indirect support for all manner of restrictions on women's interests and reproductive freedom, for example, to limit embryo creation, mandate "adoption" of unused IVF embryos, and require female patients who do not get pregnant after the first IVF cycle to undergo additional rounds of painful egg retrieval.<sup>6</sup>

Magers' suit reflects a troubling trend in the dozen states that let fetal interests supersede that of women. Unborn homicide and abuse statutes have subjected pregnant women to charges of homicide, child abuse, and the loss of parental rights for taking prescription drugs or for declining cesarean delivery when indicated. These arrests and prosecutions have persisted in ways that most

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abortion law is unenforceable because it contradicts existing Supreme Court precedent, starting with *Roe v Wade*, which sets forth a federal constitutional right that trumps state law.<sup>4</sup> The main target of these legislative changes is abortion.

But a recent case in Alabama presents a challenge to reproductive rights that is perhaps even more threatening than either of the 2018 or 2019 legislative initiatives because it does not necessarily require overruling *Roe v Wade*. In that case, a man and an aborted fetus are suing the manufacturer of an abortion pill and the clinic that provided it to his then-girlfriend, who used the pill to end her pregnancy at 6 weeks. In a decision, Madison County Probate Judge Frank Barger

affect women of color and limited means. The legal recognition of fetal rights in the Alabama case sets a precedent that may challenge the basic health and liberty interests of women, who may have any number of reasons for deciding that they cannot, or do not want to, carry or raise a child. The *Magers* decision could allow lawsuits by fetuses against physicians. Already, the new abortion law makes physicians who perform most abortions Class A felons and subjects them to unspecified civil suits.<sup>3</sup> These legal developments will have clinical implications as well. Most critically, the risk of criminal culpability and civil liability is likely to further chill the limited number of physicians willing to provide abortions in a conservative state like Alabama.

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The claim by the other party in the case, Ryan Magers, also gives cause for concern and directly contravenes judicial precedent. In the 1976 case of *Planned Parenthood v Danforth*, the Supreme Court affirmed a woman's right to have an abortion over her partner's objection, explaining that, as the one "who physically bears the child," she "is the more directly and immediately affected by the pregnancy."<sup>7</sup> Abortion regulations "have a far greater effect on the mother's liberty than on the father's" because they touch "upon the very bodily integrity of the pregnant woman." A plurality of justices reaffirmed in their 1992 *Planned Parenthood v Casey* opinion that what prioritizes a woman's decision over her partner's opposition is that a woman alone "bears the child."<sup>8</sup> That is why, "when the wife and the husband disagree" about having an abortion, the woman has the final decision. Her constitutional priority in abortion conflicts means that the husband is legally powerless to decide whether or not the woman is to keep a pregnancy. But, as the Supreme Court recognized, this conclusion does not negate the husband's "deep and proper concern and interest...in his wife's pregnancy and in the growth and development of the fetus she is carrying." Men have important reproductive interests too. But the woman makes the final decision about abortion.<sup>8</sup>

For cases in which gestation is not involved, by contrast, some courts have held that a man's interest in not being a genetic parent can win out. The most common such context to date is disputes between former couples about whether to implant or destroy the frozen embryos that they created during an earlier (and apparently happier) time in their relationship. Understood against this background, denying Magers' lawsuit will not mean that men lack any reproductive rights. These liberty interests remain clear and strong when it comes to birth control and embryo disposition. Those rights are not decisive, however, when they are different than a women's interests related to the control of their own bodies, when the stakes involve gestating or refusing to gestate a fetus.<sup>9</sup>

Magers' lawsuit does not deserve the solicitude that Judge Barger afforded it. But it is optimistic to expect swift reversal upon further consideration. Recent changes to the composition of the US Supreme Court and other federal appellate courts have tilted them in a direction increasingly skeptical of abortion rights. Within this dynamic context, this case threatens to open up a new fault line in US struggles over abortion.

#### ARTICLE INFORMATION

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