

Dead Fetuses Are Not “Remains”

The insidiousness of state laws intended to require the burial or cremation of miscarried or aborted fetuses.

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Anti-abortion demonstrators outside Whole Woman's Health of McAllen, Texas, on Feb. 27, 2016. Ilana Panich-Linsman for the Washington Post

In 2016, the Indiana Legislature passed HB 1337, which then-Gov. Mike Pence signed into law. Among other things, HB 1337 said that “a miscarried or aborted fetus must be interred or cremated,” with several specifications to make sure that that would actually happen and could be verified. The law specifies that the miscarried or aborted fetus does not have to be given a name by the mother, the process can be kept anonymous, and more than one fetus can be cremated at a time.

The bill made its way through appeals courts before reaching the Supreme Court, which on May 28 rejected a number of its passages. Yet the Supreme Court upheld the part about disposal of fetal remains. That part of the legislation remains in force, and it has far-reaching consequences.

If the material is understood as remains, then it must be remains of something. For proponents of such laws, that something was previously a person. For many others, it was not. Fetal remains bills therefore strike at the heart of personhood discussions. The Supreme Court's allowance of the Indiana fetal burial or cremation law in effect supports the highly problematic assumption that fetuses must be treated as persons. As [many commentators](#) have [noted](#), this decision involves a serious attack on abortion rights in ways that seek to impose the political and moral views of some people on everybody. Much of the response, including [Justice Ruth Bader Ginsburg's opinion](#), has focused on other parts of the Indiana law. Yet requirements about disposal of fetuses pose undue emotional and

practical burdens on women. Women who have just suffered a miscarriage or gone through an abortion must make additional decisions about what happens to the dead fetus, even when they consider it just a dead fetus and not deserving of any special treatment. And medical facilities will be required to find ways to carry out expensive burials and cremations as well as places to accept the material, and then presumably pass all those costs on to patients.

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Indiana is not the first or only state to use protection of fetal remains to place restrictions on women experiencing miscarriages or choosing to have abortions. A similar law in Texas received a permanent injunction from U.S. District Judge David A. Ezra in 2018. That law reached further than Indiana's by including "embryos" as well as "fetuses." (Embryos are the earliest stages of development, typically up to eight weeks, at which point the developing organism is called a fetus.) It was also worded to apply to any medical facility. Therefore, as Ezra noted, the Texas law would require that if a pregnant woman went to a dentist and then had a miscarriage in the dental office, the dentist would be responsible for handling the remains. He clearly thought that was unworkable.

I served as an expert witness in the case, which lasted for a week. Some witnesses were patients who explained that such a law would make them feel that they were being forced to regard the embryo or fetus as a person. They did not believe that the tissue at early developmental stages was a person, and they did not want to be forced to treat it as such. One woman discussed her experiences at a medical clinic where she had gone for emergency treatment when her pregnancy was failing. She was treated for a miscarriage, and the facility required a burial or cremation for what they called her "baby." She said that she would never have gone to that hospital if she had known what would happen.

Other witnesses said that they did not think of the dead embryo or fetus as "remains" of anything. Its being buried or cremated for later burial gave the dead tissue a status they did not feel it deserved. Some medical providers reported on their experiences with patients with diverse views. My role as a historian and philosopher of developmental biology was to establish that society has had a long-standing divergence of opinion about how we value developing humans. For at least a significant percentage of the population, embryos are bunches of unformed cells, and fetuses exhibit gradually emerging form and function over time. For many, the fetus becomes a person when it is born. For others, the ill-defined point of viability might also count. And for some, personhood begins at "conception." Yet we know that a single fertilized egg can produce an embryo that splits into two (or more) through twinning. We also know that two separately fertilized embryos (following two different "conceptions") can merge together into one [chimera](#). The simplistic idea that life and personhood begin with conception is problematic in numerous ways.

In the Texas case, witnesses in favor of the law spoke to the need to respect life and provide "dignity," along with other standard arguments. But the judge pointed to the burden placed by the law on women seeking to exercise their right to abortion. For practical, financial, and emotional reasons, he determined that the law violated the due process clause of the 14th Amendment. It also violated the equal protection clause because it treated some facilities, namely in vitro fertilization clinics, differently from other health care facilities. In his [summation](#), he concluded:

the clear weight of the evidence shows that the waste disposal options required by the challenged laws would cause many, if not most, doctors and healthcare facilities providing pregnancy-related care to women to be overwhelmed with embryonic and fetal tissue remains with no acceptable method of disposal. Indeed, those few state officials tasked with attempting to insure implementation of the challenged laws were relegated to asking private cemeteries, funeral homes, and crematoriums for help. With the exception of a non-contractually binding offer from the Catholic Church in Texas

that it would do what it could, little else was forthcoming. ... [M]any issues ... make this offer, although well intended, problematic and presently unworkable in light of the numerous unresolved logistical problems.

That Texas trial and ruling made clear that at least a large number of women, and perhaps a majority, regard dead embryonic or fetal material as medical waste. They expect it to be treated as such. Yet the Indiana law demanded that fetal material not be treated as “infectious or pathological waste,” and the Texas law stated it must be disposed of as “human remains” and “may not be placed in a landfill.”

Women’s reproductive rights and constraints are increasingly moving under the control of state governments, with the resulting patchwork of conflicting decisions and underlying values. The dead fetuses that some consider medical waste, others consider human remains. While women with access to information and resources are likely to find ways to make the decisions they find appropriate about abortions, they will still face obstacles in states like Indiana, where they are forced to treat dead fetuses in ways they may not agree with.

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