VIEWPOINT

The Law and Ethics of Fetal Burial Requirements for Reproductive Health Care

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On May 28, 2019, the Supreme Court of the United States decided the constitutionality of a far-reaching new abortion law.[1] The 7 to 2 ruling in *Box v Planned Parenthood* upheld an Indiana provision that mandates any clinician or facility providing abortion to bury or cremate fetal remains, no different than the requirements for cadavers. The Court declined to review a separate provision that bars any abortion that is sought on the basis of sex, race, or genetic disability.[1] This Viewpoint examines the practical implications of the Court's decision for physicians and their patients.

Indiana is one of 8 states that has passed laws requiring that fetal remains be interred or cremated, rather than disposed of as medical material under the rules set forth by the state's environment and health departments. That mandate is an example of what abortion rights advocates call a targeted restriction on abortion providers (TRAP law).[2] These are laws that appear to impose neutral requirements on medical professionals who perform abortion, for example, by insisting that they maintain admitting privileges at a nearby hospital and have hallways in their facilities that are as wide as an ambulatory surgical center. These were the TRAP laws in Texas that the US Supreme Court struck down in its last major abortion ruling in 2016, explaining that the laws reduced access to abortion by making it too expensive for any clinician or facility that provides the procedure to operate in the state.[3] In its latest case, however, the Court affirmed the Indiana TRAP law requiring the costly disposal of fetal remains from any surgical abortion.[1]

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Proponents of the law argued that it expresses respect for unborn life by mandating dignified funeral rites for fetal remains.[4] Opponents countered that the requirement unduly burdens women seeking abortion, not least by making it much costlier for facilities to perform the procedure—prohibitively more expensive for those clinics that have already been forced to shut down because of the additional expenses and administrative burdens that the law imposes. Independent economists estimate that fetal cremations cost approximately $500 each and more than twice that amount per burial. Lower courts acknowledge the evidence showing that the administrative costs associated with these arrangements "pose significant logistical challenges for healthcare providers in terms of sorting procedure, storage, transportation, and ultimate disposal."[5] Individual clincians or medical facilities must absorb these expenditures or pass them along to the families, who are in turn forced into making unwanted funerary arrangements for their aborted fetuses, without any countervailing medical benefit.[5]

This is not the first time the US Supreme Court has considered restrictions on the disposition of fetal remains. In a 1983 case out of Ohio, the Court invalidated the city of Akron's criminal penalties for nonhumane fetal disposal. But the Court did not address the reasons states might be permitted to impose civil fines for failure to dispose of fetal remains in the way ordinarily reserved for born persons.[6] The Court took up that issue a decade later in the 1992 case from which the 2-part undue burden standard continues to govern US abortion law today. In *Planned Parenthood v Casey*, the Court held that for any abortion restriction to stand as constitutional, it must (1) serve a real and legitimate purpose, such as promoting women's health or expressing respect for unborn life; and (2) leave abortion sufficiently accessible to women. A law cannot, for example, make it impractical for any medical clinic in the state to offer the procedure.[7] That was the standard set forth in the 1992 *Planned Parenthood v Casey* case about an abortion law in Pennsylvania. But the Court's 2019 approval of civil fines for nonburial of fetal remains in the *Box v Planned Parenthood* decision does not necessarily place such laws on sure constitutional footing.

This is because the Court's recent ruling did not actually decide whether the Indiana law creates an "undue burden on a woman's right to obtain an abortion."[1] The party challenging the postabortion mandate litigated this case on the assumption that the provision did not even serve a legitimate interest, or that there was no rational connection between its stated goals and the methods that it uses to achieve them. The only way that a law would not survive under this deferential standard, the Court emphasized, is if the challengers are able to prove there is no "conceivable basis"[1] to support it. The majority of justices explained that it is not irrational, however, to think that fetal burial requirements serve the state interest in expressing respect for unborn life, an interest the Court has previously ruled is legitimate.[1] This holding still enables future parties to challenge fetal

burial requirements in Indiana or any other state for unduly burdening abortion access, a litigation strategy that, if successful, would trigger the less deferential standard of review under *Planned Parenthood v Casey*. Forcing clinics to dispose of fetal remains in the same way as deceased children may rationally serve a legitimate interest, and yet at the same time, restrict the right to abortion in a way that requires more demanding constitutional scrutiny.

Beyond the burdens that fetal disposition laws place on clinicians and women seeking abortion, these laws bear clinical and cultural consequences by implying that aborted fetuses should be treated no differently than born persons who are buried or cremated after they die. In defending the Indiana provision, lawmakers argued that the moral mandate "expands on long-established legal and cultural traditions of recognizing the dignity and humanity of the fetus."[1] For most women, the decision to have an abortion is a deeply personal and difficult one. Laws like Indiana's are not just about the status of unborn life and whether medical clinics, individual physicians, and female patients are forced to treat fetal remains more like children who have died than as medical tissue. The Supreme Court's decision in *Box v Planned Parenthood* is really about the future of abortion access. Will it remain what Justice Ruth Bader Ginsburg affirmed as a "constitutionally protected right," or will it be demoted to what Justice Clarence Thomas called a "supposed" right that will be no longer?[1]

Justice Thomas made this debate clear in a separate, 20-page opinion he authored for himself alone, admonishing his colleagues to uphold selective abortion bans that would ban abortion, even at the very earliest stages of pregnancy, if it is sought for any reasons the state forbids, including severe disability. Justice Thomas argued that "today's prenatal screening tests" make abortion a "disturbingly effective tool" to "eliminate children with unwanted characteristics." His repeated appeal to eugenics is misguided—it overlooks that every one of these states leave prospective parents free to pick and choose among offspring traits in other ways, from discarding embryos that test positive for disease to setting aside sperm and egg donors whose ethnicity does not match that of the parent. If this law and other laws like it really reflected the fears Justice Thomas cites about "controlling the population and improving its quality," why would states limit these restrictions to abortion and allow every other means of the very same targets of selection? For now, at any rate, the Court declined to review the selective abortion provision in the *Box v Planned Parenthood* case, leaving in place the lower court opinion striking down that part of the Indiana law. The Court left open the possibility that it could still, in the future, strike down similar selective abortion bans already in place in 7 other states.[1]

ARTICLE INFORMATION

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