

Questions for the Record from Senator Charles Grassley
U.S. Senate Committee on the Judiciary
“The Continued Assault on Reproductive Freedoms in a Post-*Dobbs* America”
March 20, 2024

Questions for Professor O. Carter Snead:

- (1) Alabama enacted a law granting civil and criminal protections for in vitro fertilization (IVF) facilities and workers in response to an Alabama Supreme Court ruling, which held embryos are human beings and those who fail to protect or destroy embryos can be held liable for wrongful death.

Based on your research and experience, what remedies might remain for those who have had their embryos damaged or destroyed as a result of IVF clinic negligence in Alabama?

ANSWER: I am not an expert in Alabama law, but it certainly seems that the blanket civil and criminal immunity extended to IVF clinics by the new legislation is very broad indeed. Perhaps there might be some contractual grounds for recovery, depending entirely on the agreements signed by the patients and the clinics. But the short answer is that I am not aware of any avenue for legal redress.

- (2) Medical facilities of all sorts have security measures limiting who can access certain areas. For example, a hospital’s nursery has tight security measures to ensure the safety and security of the newborn infants in the hospital’s care. Similarly, operating rooms in medical facilities have safeguards to ensure patient safety and security during procedures.

Is there a minimum level of security IVF facilities should have to ensure the safety of embryos? If so, what security factors ought to be considered?

ANSWER: I am not an expert in such security measures, but it would certainly seem to me that IVF facilities should have very strong and reliable security measures sufficient to prevent the damage to or destruction of embryos, the violation of patient privacy, among other possible harms.

- (3) How do IVF safeguards and regulations in the United States compare to various countries in Europe?

ANSWER: The United States is unique in lacking meaningful regulation of the IVF industry. The United Kingdom has a regulatory agency – the HFEA – dedicated to providing oversight, issuing licenses, and the like. Germany has an “Embryo Protection Act” that provides standards that touch and concern IVF. The U.S. is unusual in this regard.

- (4) Based on your experience, does the IVF industry need better regulation to protect women, would-be mothers, and the embryos created? If so, what types of measures ought be considered by the Federal Government or by the states?

ANSWER: There is a pressing need for better regulation of IVF and assisted reproduction in the United States to provide for the health and well being of women, would-be-mothers, and embryonic human beings conceived by IVF – both those that are transferred to initiate a clinical pregnancy, as well as those that are not (many of which languish in cryostorage for years). I believe that the recommendations of the President’s Council on Bioethics (attached) almost exactly twenty years ago are still very much needed. In particular, I would draw the committee’s attention to the recommendations under Roman Numeral I (“Federal Studies, Data Collection, Reporting and Monitoring Regarding The Uses and Effects of These Technologies”). There, the Council recommended unanimously (despite members’ disagreements on abortion and the moral status of embryonic human life) that the federal government should sponsor longitudinal studies on the health effects of IVF and related techniques on women and children conceived with their aid. The Council further recommended strengthening of the mostly toothless Fertility Clinic Success Rate and Certification Act of 1992. I would also recommend a study to make a reliable assessment of the number of human embryos in cryostorage in the United States, and what their custodians have designated for their future disposition. (One such study was published by RAND in 2003- https://www.rand.org/pubs/research_briefs/RB9038.html).

To this I would add, following on the recommendations in Chapter 4 of my book *What It Means to be Human: The Case for the Body in Public Bioethics* (Harvard University Press 2020)(attached), that any legal regulation should strive to protect the welfare of every human being involved in this process – genetic parents, gestational parents, rearing parents, and most of all, children (at every stage of their biological development). None should be left outside the law’s concern. It is worth studying those jurisdictions (domestic and international) that have sought to achieve this comprehensive goal.

Rather than recapitulate the recommendations of the Council or the arguments in Chapter 4 my book, I am attaching both for the Committee’s benefit and for inclusion in the record.