



Personhood Amendment Will Not Change Legal Safeguards for Physicians Providing Necessary Treatment to Pregnant Patients

The Mississippi Center for Public Policy has received many questions about the legal implications of Ballot Initiative 26 – The Personhood Amendment. One question that stands out is whether the amendment would subject medical professionals to prosecution for performing life-saving procedures, such as treating a woman for cancer or terminating an ectopic pregnancy. This memo provides both a legal and ethical response to this and related questions.

The legal analysis concludes the following:

- Mississippi law permits abortion in order to save the life of the mother. Our statutes already exempt physicians from being prosecuted for terminating an ectopic pregnancy. **Passage of the Personhood Amendment would not change these statutes.**
- Mississippi law protects medical professionals from criminal liability for the accidental homicide of an unborn person. **Under the Personhood Amendment, there will continue to be no criminal liability for medical professionals** who prescribe a medication fatal to an unborn baby to treat a female patient whose pregnancy was unknown and was not reasonably discoverable.

The ethical analysis likewise concludes:

- The principle of double effect provides an ethical explanation as to why the Personhood Amendment DOES NOT provide a legitimate basis to prosecute a physician who terminates an ectopic pregnancy or who performs any other medical procedure with the essential aim of preserving life.

Legal Analysis

Ballot Initiative 26 would amend Mississippi’s constitution “to define the word ‘person’ or ‘persons’, as those terms are used in Article III of the state constitution, to include every human being from the moment of fertilization, cloning, or the functional equivalent thereof.” Because the amendment recognizes that life begins at the moment of fertilization, some observers have wondered whether its passage could result in the criminal prosecution of a physician who prescribes medication that injures an unborn child or who terminates an ectopic pregnancy. **As explained below, there is currently no criminal liability for such actions. Likewise, the Personhood Amendment provides no basis for criminalizing these treatments.**

Accidental Death Excused

A Mississippi statute (Section 97-3-17) insulates medical professionals from criminal liability for the accidental death of an unborn person. Subsection (a) explains that causing the death of another human being is excusable “when committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.” Miss. Code §97-3-17(a).

Accordingly, when a physician renders lawful medical services, without any unlawful intent and exercising the usual and ordinary caution (for example, in prescribing chemotherapy to treat cancer in a woman whose pregnancy was unknown and was not reasonably discoverable), and the treatment accidentally takes the life of an unborn person in the process, the taking of that life is excusable.

Even if Roe v. Wade Were Reversed, Such Protections Would Remain

Even if *Roe v. Wade* were reversed today, Mississippi’s criminal statutes would still allow removal of an ectopic fetus and all other treatments to save the life of the mother even if it is known that the treatment would cause the death of the child. Three statutes already on the books eliminate the guesswork as to what consequences the Personhood Amendment would have on doctors providing treatment necessary to save the life of a pregnant woman. Each law states it shall not be a crime to terminate a pregnancy to save the life of the mother.

The first statute would automatically go into effect if the U.S. Supreme Court were to overturn *Roe v. Wade*. This law (§41-41-45) would prohibit abortion, with an exception to save the mother’s life and an exception for rape. The law reads as follows:

[From and after ten days following the date of publication by the Attorney General of Mississippi that the Attorney General has determined that the United States Supreme Court has overruled the decision of Roe v. Wade, and that it is reasonably probable that this section would be upheld by the Court as constitutional, this section will read as follows:]

- (1) As used in this section, the term "abortion" means the use or prescription of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth or to remove a dead fetus.
- (2) No abortion shall be performed or induced in the State of Mississippi, except in the case where necessary for the preservation of the mother's life or where the pregnancy was caused by rape.
- (3) For the purposes of this section, rape shall be an exception to the prohibition for an abortion only if a formal charge of rape has been filed with an appropriate law enforcement official.
- (4) Any person, except the pregnant woman, who purposefully, knowingly or recklessly performs or attempts to perform or induce an abortion in the State of Mississippi, except in the case where necessary for the preservation of the mother's life or where the pregnancy was caused by rape, upon conviction, shall be punished by imprisonment in the custody of the Department of Corrections for not less than one (1) year nor more than ten (10) years.

The law clearly allows an exception to be made when abortion is necessary to save the life of the mother.

Similarly, a second statute prohibits partial-birth abortion except when there is no other way to save the baby's mother from dying. Section 41-41-73 reads:

(1) Any physician who knowingly performs a partial-birth abortion and thereby kills a human fetus shall be guilty of a felony and, upon conviction thereof, shall be fined not more than Twenty-five Thousand Dollars (\$ 25,000.00) or imprisoned in the State Penitentiary for not more than two (2) years, or both. This subsection shall not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury if no other medical procedure would suffice for that purpose.

The third law, defining abortion as a crime, was on the books long before the case of Roe v. Wade. Even though enforcement of this law was suspended by the U. S. Supreme Court's decision in Roe, the legislature has retained the law on the books, and they amended it as recently as 1997. The law exempts licensed physicians from prosecution when they terminate a pregnancy to save the mother's life, as long as two other physicians share the opinion that the abortion is medically necessary. Section 97-3-3 provides:

(1) Any person wilfully and knowingly causing, by means of any instrument, medicine, drug or other means whatever, any woman pregnant with child to abort or miscarry, or attempts to procure or produce an abortion or miscarriage shall be guilty of a felony unless the same were done by a duly licensed, practicing physician:

(a) Where necessary for the preservation of the mother's life;

...

(2) No act prohibited in subsection (1) of this section shall be considered exempt under the provisions of subparagraph (a) thereof unless performed upon the prior advice in writing, of two (2) reputable licensed physicians.

This medical exception in the criminal code expresses a longstanding belief that physicians are not to be prosecuted for medically necessary abortions. Finding this exception in all three abortion statutes makes it safe to predict that the Personhood Amendment would not lead to criminal prosecution of doctors for removing ectopic (tubal) pregnancies, for administering chemotherapy to treat an expectant mother's cancer, or for prescribing medication to treat other life-threatening conditions. **The three statutes indicate legislative intent and the public policy of this State to not punish abortions performed to save the life of the mother, and to not punish a fetal death caused while saving the mother's life. A Personhood Amendment would not alter this policy.**

That said, the law does not forbid a mother from foregoing chemotherapy or other life-saving treatments in order to preserve and give birth to the second life she carries within her. But ectopic pregnancies do not present a mother with an occasion whereby she can preserve the life of her child by sacrificing her own life.

Finally, it is worth adding that it is unlikely the Personhood Amendment could be used to justify a ban on in vitro fertilization (IVF). Initiative 26 recognizes the personhood of a fertilized egg – otherwise known as an “embryo.” IVF assists in reproducing a human life. By contrast, abortion necessarily involves killing a human life. IVF procedures can be performed without destroying human embryos, and therefore would still be permissible under Initiative 26. As is currently being done in many cases, any excess embryos not implanted in the womb could be frozen and implanted later or adopted out to other parents.

The Personhood Amendment, however, could be used to justify a ban on the outright destruction of embryos. This is because the amendment confirms that personhood extends to an embryo, regardless of the conditions under which that embryo is created. Indeed, the Personhood Amendment guarantees the right to life under every situation (including IVF) under which human life may come into existence.

In summary, it is inconceivable that a reasonable understanding of Mississippi law, even subsequent to passage of the Personhood Amendment, could lead to the prosecution of a doctor who terminated an ectopic pregnancy or otherwise treated a pregnant patient with the primary intention of preserving the mother’s life. Doing so would be analogous to prosecuting a homeowner for arson because his house burned down after a spark escaped from a fire in his fireplace. In other words, it would be a frivolous case based on a complete ignorance of the context surrounding the action in question.

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The Principle of Double Effect

The above analysis demonstrates there is no legal basis for prosecuting a physician who terminates an ectopic pregnancy or who otherwise causes the death of an unborn child in the course of providing life-saving treatment to the mother. The constitutional protection for life provided by the Personhood Amendment would in no way change these protections. In confirmation of the analysis provided above, we want to take this argument one step further by showing that the statutes cited here are not based on legislative whim, but on a longstanding ethical concept known as the “principle of double effect.”

The principle of double effect was first articulated by ethicists as a means of better understanding what could be meant by the Biblical command: “Thou shalt not kill.” Does the command always prohibit the killing of another person? What about cases of self-defense?

The common sense understanding of the Biblical command is that killing another person out of self-defense is not the same as murder. But why is the common sense view correct? The principle of double effect clarifies that an act may have two effects – one intended; one unintended or not essential to the act itself. The act of self-defense is essentially aimed at saving life. If in trying to save life, a person must kill a would-be murderer, this killing is not ethically defined as murder.

In layman's terms, application of the principle of double effect is the application of common sense to the law. To better understand how the principle works in practice we might look to another right enshrined in Mississippi's constitution.

The constitution refers to freedom of speech and of the press as a "sacred right." But does this mean that all speech is protected by law? To use the classic example, falsely yelling "Fire!" in a crowded theater is not protected as free speech. Libel is also not protected free speech, but is punishable under both civil and criminal law. This is because the principal aim of libel is to harm another person and so its aim is not speech, as such.

The principle of double effect undergirds existing Mississippi law and counsels against criminally prosecuting a physician who unavoidably causes the death of an unborn person. As demonstrated above, these safeguards would in no way change upon passage of the Personhood Amendment.

When confronted by life-threatening pregnancies such as an ectopic pregnancy, the woman's right to life is not forfeited by the unborn child's right to life. **The mother may, in self-defense, use a medical intervention to save her own life if a remedy that saves both lives is not available.** Further, the physician who intervenes to save the mother's life at the cost of the child's life is justified when both lives cannot be saved. As long as the physician's intent is to save the mother's life, he is not culpable for the unborn child's death, be it ectopic or otherwise.

In conclusion, if an unborn child's death is accidental or necessary to save his mother's life, there is no justifiable legal or ethical ground for prosecuting a physician who terminates an ectopic pregnancy or who prescribes medication injurious to an unborn child – either under current law, or under a state constitution that recognizes the basic fact that life begins at fertilization.

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