LIFE IN DEATH: ADDRESSING THE CONSTITUTIONALITY OF BANNING THE REMOVAL OF LIFE SUPPORT FROM BRAIN-DEAD, PREGNANT PATIENTS

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INTRODUCTION

In November 2014, Marlise Munoz died from a blood clot in her lungs.[1] With no activity in her brain or brain stem, her doctors officially pronounced her dead.[2] After a long and exhausting struggle, her husband requested that Marlise be taken off life support.[3] The hospital in Texas that Marlise was staying at refused to take Marlise off life support.[4] This decision was motivated by the fact that when Marlise became brain dead, she was fourteen weeks pregnant.[5] If the hospital removed the life support, the fetus would die too.[6]

Section 166.949 of the Texas Health & Safety Code states that "a person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient."[7] This law motivated the hospital's decision to keep Marlise on life support.[8] The language in the statute seemed to leave open the possibility of protection for the fetus's life, although it was unclear.[9] Keeping Marlise on life support protected the hospital from liability.[10] Many have questioned and criticized the hospital's decision, especially in light of her husband's request.[11] Following the controversial situation, the media interviewed

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1. *See* Wade Goodwyn, *The Strange Case of Marlise Munoz and John Peter Smith Hospital*, NPR: HEALTH NEWS (Jan. 28, 2014), http://www.npr.org/blogs/health/2014/01/28/267759687/the-strange-case-of-marlise-munoz-and-john-peter-smith-hospital.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *See* Tom Dart, *Judge orders hospital to cut life support from brain-dead pregnant woman*, THE GUARDIAN (Jan. 24, 2014), http://www.theguardian.com/world/2014/jan/24/texas-judge-hospital-life-support-brain-dead-pregnant-woman.

7. TEX. HEALTH & SAFETY CODE ANN. § 166.949 (2012).

8. *See* Dart, *supra* note 6.

9. *See* Eddy R. Smith, *A Time to Be Born and a Time to Die: Pregnancy and End-of-Life Care*, 50 TENN. B.J., Apr. 2014, at 28, 28 n.3.

10. *See* Goodwyn, *supra* note 1.

11. *See generally* Catherine E. Shoichet, *Husband of Brain-Dead Texas Woman: 'I asked God to Take Me Instead'*, CNN (Jan. 30, 2014), http://www.cnn.com/2014/01/29/health/texas-pregnant-brain-dead-woman/; Katherine Taylor & Lynn Paltrow, *Marlise Munoz Case Shines Light on Dehumanizing 'Pregnancy Exclusion' Laws*, RH REALITY CHECK (Jan. 9, 2014), http://rhrealitycheck.org/article/2014/01/09/marlise-munoz-case-shines-light-on-dehumanizing-pregnancy-exclusion-laws/; *Texas Family Grieves After Brain-Dead Pregnant Woman Is Taken off Life Support*, CBS NEWS (Jan. 27, 2014) [hereinafter *Texas Family*],

the authors of the statute.[12] Some authors told reporters that "they never meant for their law to be used to keep a pregnant dead woman 'alive' until the hospital could deliver the baby."[13] The authors further stated that "they intended to keep a pregnant woman who was in a persistent vegetative state on a ventilator until she could deliver, but not a dead, pregnant woman."[14]

On January 24, 2014, a district court judge in Texas ordered the hospital to remove Marlise from life support.[15] The order was not longer than one page and simply stated: "The provisions of § 166.049 of the Texas Health and Safety Code do not apply to Marlise Munoz because, applying the standards used in determining death set forth in § 671.001 of the Texas Health and Safety Code, Mrs. Munoz is dead."[16] The order contained no other reasoning or explanation for removing life support and did not address the situation of life support being necessary to secure the life of the fetus.[17] At 11:30 AM on January 26, 2014, Marlise Munoz was taken off life support.[18] The fetus died moments afterward.[19]

This article examines the precarious situation of a patient who is brain dead but also pregnant. Part I discusses the existing state of the law regarding abortion. Part II addresses the legal and medical classification of brain death. Part III presents an analysis of who has rights and interests in this context. Finally, Part IV proposes a new framework examining the constitutionality of state laws that ban the removal of life support from brain-dead, pregnant patients. Specifically, it concludes that a state law banning the removal of life support from a brain-dead, pregnant patient is constitutional, albeit morally and ethically complex. Part IV also proposes that states like Texas ought to implement amendments to state statutes, thus reflecting the complexity of this issue. This article also examines and discusses practical and theoretical implications.

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http://www.cbsnews.com/news/texas-family-grieves-after-brain-dead-pregnant-woman-is-taken-off-life-support/.

12. *See* Goodwyn, *supra* note 1.

13. *Id.*

14. *Id.*

15. Munoz v. John Peter Smith Hospital, Judgment, No. 096-270080-14 (Tex. Dist. Ct. Jan. 24, 2014), http://thaddeuspope.com/images/MUNOZ_202053415-Judges-Order-on-Munoz-Matter.pdf.

16. *Id.*

17. *Id.*

18. *See* Manny Fernadez, *Texas Woman Is Taken Off Life Support After Order*, N.Y. TIMES (Jan. 26, 2014), http://www.nytimes.com/2014/01/27/us/texas-hospital-to-end-life-support-for-pregnant-brain-dead-woman.html?_r=0.

19. *See Texas Family*, *supra* note 11.

I. ABORTION JURISPRUDENCE

The removal of life-sustaining measures is an issue that is distinct from abortion.[20] Nevertheless, when one seeks to remove life support from a pregnant patient, abortion laws are implicated since the life of the fetus will die once life support is removed. Therefore, review of Supreme Court jurisprudence regarding abortion is necessary to determine who has rights or interests in this context.

A. *From* Roe *to* Gonzales

In 1973, the Supreme Court decided *Roe v. Wade*, which recognized the right to obtain an abortion as a fundamental privacy right safeguarded by the Fourteenth Amendment.[21] At that time, the Court also held that "persons" did not include the unborn under the Fourteenth Amendment.[22] Justice Blackmun wrote the majority opinion and analyzed the legality of abortion through a trimester framework.[23] During the first trimester, the state could not ban abortion at all; the decision was left up to the woman's attending physician.[24] After the first trimester, but before viability, the state could regulate abortion to protect the health of the mother.[25] Regulation during this period must satisfy strict scrutiny review.[26] After viability, the state could regulate abortion because the state's interest in protecting potential life has become compelling.[27] Nevertheless, the state still cannot prohibit an abortion that would be necessary to preserve the life or health of the mother.[28] In *Doe v. Bolton*, the Court broadly defined the health

20. The removal of life-sustaining measures is governed by *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 262 (1990) (holding that a competent person has a liberty interest pursuant to the Due Process Clause to refuse unwanted medical treatment). On the other hand, abortion cases are governed by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 875 (1992) (holding that the proper burden for pre-viability regulation of abortion is an undue-burden standard).

21. 410 U.S. 113, 155 (1973).

22. *Id.* at 158; *see also* U.S. CONST. amend. XIV, § 1 ("All *persons* born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws." (emphasis added)).

23. *See Roe*, 410 U.S. at 163.

24. *Id.*

25. *Id.* at 163–64.

26. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 944–51 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

27. *Id.* at 846.

28. *Id.*

of the mother to include "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[29] While this definition of "health" has been heavily criticized as being overbroad,[30] the Supreme Court has not amended this definition of health since the holding in *Bolton*.

In 1992, the Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey* which shifted the analysis from complete strict scrutiny considerations to considerations emphasizing whether an undue burden is being placed on the mother.[31] The Court defined "undue burden" as a regulation that has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.[32] The state is still forbidden from prohibiting any woman from making the ultimate decision regarding abortion before viability.[33] Similarly, the state's ability to regulate abortion after viability subject to health exceptions remains unchanged.[34]

In 2007, the Supreme Court decided *Gonzales v. Carhart*, in which the Court upheld a restriction on partial-birth abortions.[35] Since *Gonzales*, there have been no other court decisions on abortions causing significant alterations in the law.

B. *Moral and Legal Distinction Between Abortion and the Removal of Life Support from Pregnant Patients*

Understanding the moral and legal distinction between abortion and removal of life support for pregnant patients is difficult because it first requires an understanding of the moral and legal status of a fetus. The legal status of a fetus

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29. 410 U.S. 179, 192 (1973).

30. *See* Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of* Roe v. Wade*: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 152–53 (2005); Brian D. Wassom, Comment, *The Exception that Swallowed the Rule?* Women's Medical Professional Corporation v. Voinovich *and the Mental Health Exception to Post-Viability Abortion Bans*, 49 CASE W. RES. L. REV. 799, 799 (1999); *see also* Gail Glidewell, Note, *"Partial Birth" Abortion and the Health Exception: Protecting Maternal Health or Risking Abortion on Demand?*, 28 FORDHAM URB. L.J. 1089, 1145–46 (2001) ("Although a broad definition of health may protect against irrational distinctions between what is and is not a health risk, the extreme of allowing physicians to consider any and all health risks as serious enough to qualify under a health exception raises the concern that the exception will 'swallow up the rule.'").

31. 505 U.S. at 837.

32. *Id.*

33. *Id.*

34. *See* Jason C. Greaves, *Sex-Selective Abortion in the U.S.: Does* Roe v. Wade *Protect Arbitrary Gender Discrimination?*, 23 GEO. MASON U. C.R. L.J. 333, 347 (2013).

35. 550 U.S. 124, 168 (2007).

is unclear and tends to vary based on context and jurisdiction.[36] For example, while abortion has been legalized based on the understanding that the fetus was not a "person," fetuses have been considered "persons" for purposes of insurance coverage, wrongful-death suits, and homicide statutes.[37] The moral status of the fetus is just as complicated.[38] Most would agree that a fetus should be afforded special respect,[39] but the degree of this respect is up for significant debate.[40]

An abortion, compared to the removal of life support for pregnant patients, presents unique moral considerations. The Catholic Church maintains that abortion is gravely immoral,[41] even in situations of rape or incest, unless to save the life of the mother.[42] The Catholic Church does not, however, have the same view on removal of life support for pregnant patients. In the Catholic Church, there is no obligation to use extraordinary means to sustain a life.[43] A Catholic bishop in Ireland even criticized a law requiring a brain-dead, pregnant woman to remain on life support, saying that a woman "isn't simply an incubator."[44]

While both an abortion and the removal of life support from a pregnant patient result in the death of the fetus, the actions themselves are inherently

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36. *See* Kayhan Parsi, *Metaphorical Imagination: The Moral and Legal Status of Fetuses and Embryos*, 2 DEPAUL J. HEALTH CARE L. 703, 708 (1999); *see also* BONNIE STEINBOCK, LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES 5 (1992) (noting the different legal interests of the status of a fetus).

37. *See* STEINBOCK, *supra* note 36, at XIV; Parsi, *supra* note 36, at 708.

38. *See* Parsi, *supra* note 36, at 705–08.

39. *See* STEINBOCK, *supra* note 36, at 270 (discussing that the human embryo is entitled to respect, but that there are different views for what type of respect the human embryo deserves).

40. *Id.*

41. *See On the Importance and Priority of Defending Innocent Human Life*, U.S. CONF. CATH. BISHOPS, http://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/on-the-importance-and-priority-of-defending-innocent-human-life.cfm (last visited Feb. 8, 2016) ("Abortion, the direct killing of an innocent human being, is always gravely immoral . . . .").

42. *See* Mary McClusky, *Life Issues Forum: Support Life, However Conceived*, U.S. CONF. CATH. BISHOPS (Aug. 5, 2011), http://www.usccb.org/about/pro-life-activities/life-issues-forum/life-issues-forum-11-08-05.cfm.

43. *See A Catholic Guide to End-of-Life Decisions*, NAT'L CATH. BIOETHICS CTR., http://www.ncbcenter.org/page.aspx?pid=1204 (last visited Feb. 8, 2016) (discussing the distinction between what is morally optional and morally obligatory in end-of-life issues).

44. *Archbishop of Dublin: A Woman 'Isn't Simply an Incubator'*, BREAKING NEWS (Dec. 23, 2014), http://www.breakingnews.ie/ireland/archbishop-of-dublin-a-woman-isnt-simply-an-incubator-655665.html.

different.[45] An abortion is a willful act destroying the life of a fetus.[46] The removal of life support is ceasing to take measures to sustain a life.[47] In the context of a brain-dead patient, the patient has no life to sustain;[48] only the life of the fetus is being sustained.[49] Life support only gives the appearance of life to a brain-dead, pregnant patient by filtering oxygen and nutrition into the body, but the patient is still dead.[50] Therefore, life support for a brain-dead, pregnant patient would only sustain the life of the fetus—the legal status of which remains uncertain.[51]

II. LEGAL AND MEDICAL CLASSIFICATIONS OF BRAIN DEATH

Many states have adopted the Uniform Determination of Death Act ("UDDA") which was proposed for adoption in the United States by the American Medical Association.[52] The UDDA defined death as "either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem."[53] Brain death is considered death from both a medical and legal

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45. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 281 (1990) (From a legal standpoint, the removal of life-sustaining measures implicates due process rights to refuse unwanted medical treatment.); *cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 851 (1992) (On the other hand, pre-viability abortion cases implicate privacy rights and the undue-burden standard identified in *Casey*.).

46. *See* U.S. CONF. CATH. BISHOPS, *supra* note 41 (defining abortion as the "direct killing" of an innocent human); *see also Abortion*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/abortion (defining abortion as "a medical procedure used to end a pregnancy and *cause the death of the fetus*" (emphasis added)).

47. *See* Kathleen M. Stacy, *Withdrawal of Life-Sustaining Measures: A Case Study*, 32 CRITICAL CARE NURSE, June 2012, at 18, http://www.aacn.org/wd/Cetests/media/C1232.pdf.

48. *See* Elizabeth Landau, *When 'Life Support' Is Really 'Death Support'*, CNN (Dec. 29, 2013), http://www.cnn.com/2013/12/28/health/life-support-ethics/ ("The term 'life support' exacerbates the problem, too, because those who are brain dead do not have a life to sustain, said Arthur Caplan, director of the Division of Medical Ethics at NYU Langone Medical Center.").

49. *Id.*

50. *See* Liz Szabo, *The Ethics of Being Brain Dead: Doctors and Bioethicists Discuss Jahi McMath and Marlise Munoz*, HUFFINGTON POST (Jan. 10, 2014), http://www.huffingtonpost.com/2014/01/10/ethics-brain-dead_n_4577116.html.

51. *See supra* notes 15, 18, 19, and accompanying text.

52. *See* Marina Martino, Note, *Deciding for Others: New York Law and the Rights of Incompetent Persons to Withhold or Withdraw Life-Sustaining Medical Treatment*, 41 N.Y.L. SCH. L. REV. 285, 287 n.20 (1996).

53. *Id.* (emphasis added).

perspective.[54] Once someone is brain dead, his or her organs can be harvested for donation.[55]

Brain death is distinguishable from a coma or a persistent vegetative state. Coma patients are alive but in a state of depressed consciousness.[56] A comatose patient will demonstrate brain stem responses.[57] When all brain activity ceases in the comatose patient, the patient is declared brain dead.[58] Similarly, a patient in a persistent vegetative state is "unaware of themselves or their environment" and is "noncognitive, nonsentient, and incapable of conscious experience."[59] A persistent vegetative state has often been described as a "death-in-life."[60] Vital organs may continue to function, but the brain has stopped functioning on almost all levels.[61] When in this state, a patient is unlikely to ever recover consciousness.[62] Nonetheless, a patient in this condition could be kept "alive" for long periods of time through technological means.[63] Unlike being in a coma or a persistent vegetative state, once a person is brain dead, they are no longer alive, and all activity in both the brain and brain stem has ceased.[64]

III. WHOSE RIGHT IS IT ANYWAY?

A. *No Rights After Death*

After death, someone is no longer considered a "person," so they have no constitutional rights of which they may be deprived.[65] While some property

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54. *See generally id.*

55. *See* Maxine M. Harrington, *The Thin Flat Line: Redefining Who Is Legally Dead in Organ Donation After Cardiac Death*, 25 ISSUES L. & MED. 95, 97 (2009).

56. *Id.* at 136 (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 266 (1990)).

57. *See* Szabo, *supra* note 50.

58. *Id.*

59. *See* The Multi-Society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State (First of Two Parts)*, 330 NEW ENG. J. MED. 1499, 1501 (1994); *see also Cruzan*, 497 U.S. at 266 (defining persistent vegetative state as "a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function").

60. *See* Ann MacLean Massie, *Withdrawal of Treatment for Minors in a Persistent Vegetative State: Parents Should Decide*, 35 ARIZ. L. REV. 173, 174 (1993).

61. *Id.*

62. *See* The Multi-Society Task Force on PVS, *supra* note 59.

63. *See* Massie, *supra* note 60, at 174.

64. *See* Szabo, *supra* note 50.

65. *See* Mich. Cent. R.R. Co. v. Vreeland, 227 U.S. 59, 67 (1913) ("Nothing is better settled than that, at common law, the right of action for an injury to the person is extinguished by the death of the party injured."); Ford v. Moore, 237 F.3d 156, 165 (2d Cir. 2001) ("Even if there were a viable claim against Moore for conduct after Ford's death, the death would have extinguished any claim of Ford's."); Judge v. City of Lowell, 160 F.3d 67, 76 n.15 (1st

rights are descendible,[66] the estate, not the decedent, has the right.[67] Right-to-die issues often arise in the context of a patient in a persistent or permanent vegetative state. The first decision on whether there is a constitutional right to die arose in 1990 when the Supreme Court decided *Cruzan v. Director, Missouri Department of Health*.[68] The Supreme Court recognized that a competent person has a liberty interest pursuant to the Due Process Clause in refusing unwanted medical treatment.[69] Nevertheless, those liberty interests must be balanced against relevant state interests.[70] An incompetent person does not possess the same right as a competent person in this fashion since he is unable to make an informed and voluntary choice.[71] The Supreme Court held that Missouri's law

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Cir. 1998) ("[A]ll of the actions that form the basis of Judge's claims occurred subsequent to Weems's death. At that time, Weems had no rights of which he could be deprived."); Silkwood v. Kerr-McGee Corp., 637 F.2d 743, 749 (10th Cir. 1980) ("[T]he civil rights of a person cannot be violated once that person has died."); Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979) ("[T]he Civil Rights Act, 42 U.S.C. §§ 1983 and 1985, does not provide a cause of action on behalf of a deceased based upon alleged violation of the deceased's civil rights which occurred after his death."); Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979) ("After death, one is no longer a *person* within our constitutional and statutory framework, and has no rights of which he may be deprived." (emphasis added)); Infante v. Dignan, 782 F. Supp. 2d 32, 37–38 (W.D.N.Y. 2011) ("Here, the alleged constitutional injury to Ms. Infante occurred after her death, and it appears well settled that a deceased person has no constitutional rights."); Estate of Conner v. Ambrose, 990 F. Supp. 606, 618 (N.D. Ind. 1997) ("A person's civil rights may only be violated while that person is alive. After death, one is no longer a 'person' within our constitutional and statutory framework and has no rights of which he may be deprived."); *see also* Estate of Cartwright v. City of Concord, 618 F. Supp. 722, 730 (N.D. Cal. 1985), *aff'd*, 856 F.2d 1437 (9th Cir. 1988) ("Those authorities are persuasive that the civil rights of a person cannot be violated after death, and therefore the scope of an investigation after death is not actionable."); *accord* Means v. City of Chicago, 535 F. Supp. 455, 464 (N.D. Ill. 1982). *But see* Swidler & Berlin v. United States, 524 U.S. 399 (1998) (holding that attorney-client privilege survives the death of the client).

66. *See* Yingling v. Smith, 255 A.2d 64, 66 (Md. 1969) ("A majority of states hold that the right to contest a will is a property right, assignable and descendible."); Elvis Presley Int'l Mem'l Found. v. Crowell, 733 S.W.2d 89, 97–98 (Tenn. Ct. App. 1987) ("[T]he right of publicity is descendible . . . . If a celebrity's right of publicity is treated as an intangible property right in life, it is no less a property right at death."); City of Wheeling v. Zane, 173 S.E.2d 158, 165 (W. Va. 1970) ("A right of re-entry retained in a conveyance of land, though not an estate, is a future interest which descends to the heir of the grantor at the time of his death.").

67. *See generally* Stanley Rothenberg & Eric P. Bergner, *Candle in the Wind: Would Elton John's Publicity Rights Extinguish with His Death?*, 46 J. COPYRIGHT SOC'Y U.S.A. 75 (1998).

68. 497 U.S. 261 (1990).

69. *Id.* at 278.

70. *Id.* at 281.

71. *Id.* at 280.

requiring clear and convincing evidence of the incompetent patient's wishes before removing life support was constitutional.[72] Justice Stevens's dissented in *Cruzan*, noting that "Nancy Cruzan's interest in life, no less than that of any other person, includes an interest in how she will be thought of after her death . . . . How she dies will affect how that life is remembered."[73] Even if one accepts Justice Stevens's dissent as correct, this would be a right that Nancy Cruzan had *during life*, not *after death*.

B. *Advanced Directives and Living Wills*

Advanced directives and living wills are written legal documents that specify medical care and end-of-life decisions should patients become unable to make these decisions.[74] Living wills discuss organ donation and medical treatments that the patient would or would not want to be used to sustain life.[75] In advanced directives, the patient selects a healthcare agent and gives him instructions, indicating the choices the patient would want if he was in a coma, terminally ill, or near the end of life.[76] Advanced directives become especially complicated in the rare circumstance where the patient is pregnant.

State statutes widely vary regarding the validity of an advanced directive for a pregnant patient.[77] Many states void advanced directives if the patient is pregnant.[78] For some states, the validity of an advanced directive depends on the viability of the fetus.[79] Other states will not enforce the advanced directive until after the fetus is carried to term.[80] Some have questioned the constitutionality of

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72. *Id.* at 282.
73. *Id.* at 344 (Stevens, J., dissenting).
74. *See* Catherine J. Jones, *Decisionmaking at the End of Life*, 63 AM. JUR. TRIALS 1, § 27 (1997).
75. *Id.*
76. *Id.*
77. *Id.* § 36.
78. *Id.*
79. *Id.*
80. *Id.*

such statutes,[81] but the Supreme Court has never ruled that these kinds of restrictions on advanced directives constitute an undue burden.[82]

State regulations prohibiting the removal of life support from pregnant patients in a coma or a persistent vegetative state before the fetus reaches viability might be considered unconstitutional under *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[83] since the restrictions could create an undue burden on the woman's right to choose to terminate the pregnancy.[84] Nevertheless, if the fetus is past the point of viability and the pregnancy would endanger the patient's health or life, the state is still prohibited from restricting an abortion of a pregnant patient.[85] While this might be true for pregnant patients in a coma or a persistent vegetative state, these concerns are not present when a patient is brain dead. The brain-dead, pregnant patient is no longer alive; therefore, the life and health of the patient is no longer a concern.[86] Furthermore,

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81. *See* Kristeena L. Johnson, Note, *Forcing Life on the Dead: Why the Pregnancy Exemption Clause of the Kentucky Living Will Directive Act Is Unconstitutional*, 100 KY. L.J. 209, 232 (2011) (arguing that pregnancy exemption clauses in living-will statutes, like the one found in Kentucky's statute, is unconstitutional); Janice MacAvoy-Smitzer, Note, *Pregnancy Clauses in Living Will Statutes*, 87 COLUM. L. REV. 1280 (1987) (arguing that pregnancy clauses in living will statutes are unconstitutional); *cf.* Molly C. Dyke, Note, *A Matter of Life and Death: Pregnancy Clauses in Living Will Statutes*, 70 B.U. L. REV. 867 (1990) (concluding that the Supreme Court in 1990 would not consider pregnancy clauses unconstitutional).

82. *See* Johnson, *supra* note 81, at 232 (noting that the Supreme Court has never ruled on this issue, but the D.C. Court of Appeals has done so).

83. *See id.* While the Supreme Court has not explicitly ruled on this, many state statutes regarding advanced directives follow this approach. For example, see Elizabeth Andreoli, *Consent to Medical Treatment: The Right to Have Peace of Mind*, 35 ARK. LAW. 24 (2000).

> In 1987, Arkansas enacted the Rights of the Terminally Ill or Permanently Unconscious Act ("ARTIPUA"). This Act replaced the "Death with Dignity" statute, enacted ten years earlier. ARTIPUA provides that adults may execute advance directives governing the withholding or withdrawal of life-sustaining treatment should they become terminally ill or permanently unconscious. If the patient is pregnant, however, her right to forgo life-sustaining treatment is abridged to the extent that her fetus could develop to the point of live birth with continued life-sustaining treatment. Whereas only "qualified patients" are covered by ARTIPUA, those patients who are not "qualified" may still refuse medical treatment under common-law and statutory informed consent law.

Id. at 26. Regardless, state regulations prohibiting the removal of life support from pregnant patients in a coma or a persistent vegetative state before the fetus reaches viability might be constitutional. Such discussion is outside the scope of this article.

84. *See* Jones, *supra* note 74, § 27.

85. *Id.*

86. *Cf.* Univ. Health Servs., Inc. v. Piazzi, No. CV86-RCCV-464, 1986 WL 1167470 (Ga. Super. Ct. Aug. 4, 1986) (granting a hospital's petition to continue life-support

after death, the pregnant patient no longer has any rights to assert.[87] The focus then turns to whether there are any other parties who have rights or interests in this context.

C. *Interests of the State, Father, and Fetus*

The Supreme Court has established and affirmed for many decades that the state has a compelling interest in protecting potential life[88]—at least potential life past the point of viability.[89] The Supreme Court, however, has never opined on any potential rights of the father in the abortion context. In *Roe v. Wade*, the Supreme Court only discussed the matter briefly in a footnote, stating:

> Neither in this opinion nor in *Doe v. Bolton* do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision . . . . We are aware that some statutes recognize the father under certain circumstances . . . . We need not now decide whether provisions of this kind are constitutional.[90]

Years later, the Supreme Court held in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[91] that a provision in the state statute requiring a woman to notify her husband of her intent to receive an abortion constituted an undue burden and was therefore invalid.[92] The Court went on to say that "it cannot be claimed that the father's *interest* in the fetus' welfare is equal to the mother's protected liberty."[93] The Court justified its conclusion of unequal interest in the fetus by asserting that "it is an inescapable biological fact that state regulation with respect to the fetus will have a far greater impact on the pregnant woman's bodily integrity than it will on the husband."[94] The discussion was framed around interests, not rights.[95]

This suggests that the father has minimal rights, if any, in the life of the fetus. Since the state can regulate abortion in some circumstances (past the point of

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procedures on a brain-dead, pregnant woman since the woman had no protectable privacy interest after death, according to Georgia law).

87. *See supra* Section III.A.

88. *See* Gonzales v. Carhart, 550 U.S. 124 (2007); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113, 162–63 (1973).

89. *See Gonzales*, 550 U.S. 124; *Casey*, 505 U.S. 833; *Roe*, 410 U.S. at 162–63.

90. 410 U.S. at 165 & n.67.

91. 505 U.S. at 837.

92. *Id.* at 837.

93. *Id.* at 838 (emphasis added).

94. *Id.*

95. *See id.*

viability)[96]—but the father never has any control in preventing an abortion[97]—the Court is also implicitly finding the state's interest to be greater and more compelling than the father's interest. Thus, when faced with the precarious situation of a brain-dead, pregnant patient, it appears that the state can control whether to keep the patient on life support, regardless of the father's wishes.

This conclusion is supported by the fact that the Supreme Court has only recognized the interests of the state and the mother in the abortion context.[98] Therefore, when the mother's rights are extinguished at death, only the state's interests remain. While arguments that the father should have rights in this context are legitimate,[99] it is not logical for the death of the mother to suddenly create rights for the father where he would otherwise have none. A strong argument can be made with respect to the rights and interests of the father, but the Supreme Court currently does not recognize controlling rights nor compelling interests of the father. Such a discussion is outside the scope of this article but is encouraged for further research.

Similar to the lack of fathers' rights in the abortion context, the rights of the fetus have never been recognized by the Supreme Court. The Court has stated that a "person," as it is used in the context of the Fourteenth Amendment,[100] does not include the unborn.[101] Nevertheless, just because the fetus does not have a constitutional "right," that does not preclude the possibility that the fetus has an interest.

Texas has recently proposed a new law, inspired by the Munoz case, that assigns an attorney to represent the interests of the fetus in the case of a brain-

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96. *See Gonzales*, 550 U.S. 124; *Casey*, 505 U.S. 833; *Roe*, 410 U.S. at 162–63.

97. *See Casey*, 505 U.S. at 887–88 (finding that even a "spousal notification" constitutes an "undue burden").

98. *See generally Gonzales*, 550 U.S. 124; *Casey*, 505 U.S. 833; *Roe*, 410 U.S. at 162–63.

99. *See generally* Kevin M. Apollo, Comment, *The Biological Father's Right to Require a Pregnant Woman to Undergo Medical Treatment Necessary to Sustain Fetal Life*, 94 DICK. L. REV. 199 (1989); Maria F. Walters, Note, *Who Decides? The Next Abortion Issue: A Discussion of Fathers' Rights*, 91 W. VA. L. REV. 165 (1988).

100. *See* U.S. CONST. amend. XIV, § 1 ("All *persons* born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws." (emphasis added)).

101. *See Roe*, 410 U.S. at 158.

dead, pregnant patient.[102] This proposal is not without controversy.[103] Rebecca Robertson, the Legal and Policy Director of Texas's ACLU, said that "[t]he minute you become pregnant, you no longer have the right to decide for yourself."[104] Rebecca Robertson is mistaken about what event extinguishes rights: it is not pregnancy that extinguishes rights—rather, it is death.

Texas's proposal is not the first instance of state officials advocating on behalf of unborn children.[105] Some fetal-protection laws allow states to prosecute pregnant woman for using drugs.[106] Some attorneys argue that appointing counsel to represent the unborn is necessary for the state's interest in protecting fetal life.[107] Many consider these measures to be extreme and irrational. Nevertheless, the Supreme Court has not suggested that this would constitute an undue burden, especially when the mother is dead.

IV. CONSTITUTIONALITY OF BANNING THE REMOVAL OF LIFE SUPPORT FROM BRAIN-DEAD, PREGNANT PATIENTS

A. *Banning the Removal of Life Support from Brain-Dead, Pregnant Patients Is Constitutional*

In Munoz's case, the district judge ordered that the hospital remove Marlise Munoz from life support.[108] The judge reasoned that the statute did not apply to her since she was already dead.[109] Therefore, the court did not need to answer the question of the constitutionality of such a provision.[110] This article attempts to answer the question that the Texas district court left open: whether a state statute banning the removal of life support from a brain-dead, pregnant patient is constitutional.

This article proposes that banning the removal of life support from brain-dead, pregnant patients is constitutional. The moment someone dies, her rights are extinguished. Currently, the Supreme Court has not recognized rights of the

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102. *See* Maxwell Tani, *Texas Lawmaker Proposes Giving Lawyers to Some Fetuses*, HUFFINGTON POST: HUFFPOST POL. (Feb. 26, 2015), http://www.huffingtonpost.com/2015/02/26/texas-fetus-lawyer_n_6764412.html?utm_hp_ref=politics.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Munoz v. John Peter Smith Hospital, Judgment, No. 096-270080-14 (Tex. Dist. Ct. Jan. 24, 2014), http://thaddeuspope.com/images/MUNOZ_202053415-Judges-Order-on-Munoz-Matter.pdf.

109. *Id.*

110. *Id.*

father in the abortion context. As such, under existing precedent, the state is the only party that can assert a legitimately compelling interest after the death of the mother.[111]

Most arguments against banning the removal of life support from brain-dead, pregnant patients focus on autonomy.[112] The growth of assisted reproductive technology led to recognizing reproductive autonomy after death,[113] but new

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111. Dyke, *supra* note 81, at 868–70. At least one state court has already arrived at this conclusion:

> In *University Health Services v. Piazzi*, the Georgia Superior Court implied that it would follow the state's pregnancy clause, notwithstanding the objections of a patient's family. The court granted a hospital's petition to continue life-support procedures on a brain-dead, pregnant woman. No living will was involved in the case and the woman's wishes were unknown. The patient's husband and family, however, requested that the life-maintenance systems be removed. The court held that, according to Georgia law, the woman was dead and, therefore, had no protectable privacy interest. The court also held that, because the legislature had already determined that a living will would be ineffective during the course of pregnancy, the woman's wishes regarding the maintenance systems were irrelevant. While the constitutionality of the pregnancy provision was not before the Georgia court, the court's reliance upon the living will statute indicates that it might reject a claim that the pregnancy clause is unconstitutional.

Id. at 871. Some state statutes, including one in Arkansas, allow for similar exceptions, even while the mother is alive. *See* Andreoli, *supra* note 83, at 26 ("Arkansas identified some compelling state interests when it legislated that courts may override a refusal of consent by a person empowered to do so. The Consent to Treatment Statute provides that when an emergency exists, the courts may override an authorized person's refusal of consent if the patient is (a) a pregnant woman in the last trimester of pregnancy; (b) a 'person of insufficient age or mental capacity to understand and appreciate the nature of the proposed . . . treatment and the probable consequences of refusal of the treatment;' or (c) a parent of a minor child when the court finds the 'life or health of the parent is essential to the child's financial support or physical or emotional well-being.'"); *see also In re* A.C., 573 A.2d 1235 (D.C. 1990) (vacating an order that a terminally-ill mother undergo a cesarean delivery of her fetus holding that a pregnant, terminally-ill patient with a viable fetus may decide whether or not to have a cesarean delivery, unless incompetent). The court went on to say:

> We do not quite foreclose the possibility that a conflicting state interest may be so compelling that the patient's wishes must yield, but we anticipate that such cases will be extremely rare and truly exceptional. This is not such a case. Having said that, we go no further. We need not decide whether, or in what circumstances, the state's interests can ever prevail over the interests of a pregnant patient. We emphasize, nevertheless, that it would be an extraordinary case indeed in which a court might ever be justified in overriding the patient's wishes and authorizing a major surgical procedure such as a caesarean section.

Id. at 1252.

112. *See* Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 785–88 (2009).

113. *Id.* at 788.

technology cannot create new rights. Technology can, perhaps, amplify interests.[114] The fact that an interest may survive death does not mean that the law is required to recognize this interest as an after-death right.[115]

Some argue that reproductive decisions are so "deeply personal" that procreative autonomy should survive death.[116] This belief is at odds with the legal assumption underlying many jurisdictions regarding pregnant, brain-dead patients.[117] Many states void an advanced directive if the woman is pregnant.[118] Under these circumstances, the state assumes that the woman would have chosen to be kept alive.[119] This assumption, however, varies from state to state. With that being said, states should be able to choose whether to ban the removal of life support from brain-dead, pregnant patients, depending on whether the state deems its interests in protecting life sufficient enough for such legislation. Furthermore, this article recommends that states balance their interests with that of the fathers', if they choose to recognize the fathers' interests at all.

Some argue that a state regulation banning the removal of life support is a violation of a patient's right to die.[120] These arguments miss the crucial and determining factors in this unique context: the patient is already dead, no longer has rights, and cannot claim an infringement of these nonexistent rights. A dead, pregnant patient cannot claim a violation of her right to die when the state keeps her on life support, because she is already dead and thus has no legal rights.[121] "Life support" is somewhat of a misnomer here, because the pregnant patient is not being kept alive; rather, it merely gives the appearance of life to the patient while sustaining the life of the fetus.[122] The arguments regarding a right to die are better suited for the context of a living patient in a coma or persistent

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114. *Id.* at 789.

115. *Id.* at 772; *see also* Matthew H. Kramer, *Do Animals and Dead People Have Legal Rights?*, 14 CAN. J.L. & JURIS. 29, 47 (2001) ("They continue year after year to be subjects for whom legal protections are established and retained, rather than objects in relation to which the protections are established solely for the gratification of the living.").

116. *See* Hilary Young, *Presuming Consent to Posthumous Reproduction*, 27 J.L. & HEALTH 68, 69 (2014).

117. *See* Smolensky, *supra* note 112, at 786.

118. *Id.*

119. *Id.*

120. *See* Sherry F. Colb, *Excluding Pregnant Women from the Right to Terminate Life Support*, VERDICT (Jan. 22, 2014), https://verdict.justia.com/2014/01/22/excluding-pregnant-women-right-terminate-life-support.

121. *See supra* Part III.A; *see also* Fitzsimmons v. Olinger Mortuary Ass'n, 17 P.2d 535, 536 (Colo. 1932) ("[I]nsult and indignity, can, of course, inflict no injury on the dead."). *But see* DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES 69 (2008) (arguing that a nonliving person can have legal rights).

122. *See* Szabo, *supra* note 50.

vegetative state. This article does not address the concern with banning removal of life support from a pregnant patient who is alive in a coma or a persistent vegetative state. Although banning the removal of life support from a brain-dead, pregnant patient may be permissible, it is not necessarily ethically or practically ideal.

B. *Practical and Ethical Implications*

The idea of keeping a dead woman on life support for the sole purpose of sustaining the life of a fetus seems bizarre, unnatural, and intrusive.[123] Such concerns seem especially egregious when the family objects to sustaining life support.[124] These objections are anticipated since the family, not the state, will likely assume responsibility over the child, even though the state may mandate sustaining life support. As such, allowing the father a right to decide whether to sustain life support is justified. This is not constitutionally mandated, but it may be a reasonable solution for states to consider when drafting legislation. States should also consider this option in conjunction with advanced directive statutes. Allowing the father to decide whether to keep the patient and fetus on life support will place a great deal of stress and pressure on him. Nevertheless, this pressure will not be any greater than what is currently imposed on women in the abortion context.

Another concern with the state banning removal of life support from pregnant patients is whether this procedure violates medical ethics. Physicians have a duty to respect corpses.[125] After a patient dies, "physicians have an ethical obligation to treat the patient's remains in accordance with patient or family wishes."[126] Legally, if the family has any rights, the rights will be limited to property rights in the corpse.[127] The family's legal remedies in this context will be dependent on the specific state jurisdiction. Because the need for medical

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123. *See supra* notes 9–11.

124. *See* Lawrence O. Gostin, *Legal and Ethical Responsibilities Following Brain Death: The McMath and Muñoz Cases*, JAMA ONLINE (Jan. 24, 2014), http://jama.jamanetwork.com/article.aspx?articleid=1818922.

125. *See* Jeffrey T. Berger et al., *Ethics of Practicing Medical Procedures on Newly Dead and Nearly Dead Patients*, 17 J. GEN. INTERNAL MED. 774, 774–78 (2002); *see also id.* at 775 ("Respect for the corpse is a duty of physicians found in common practice, and described in bioethical discourse and in numerous professional policies and position statements.").

126. *Id.* at 776.

127. *Id.*; *see also* D.W. MEYERS, THE HUMAN BODY AND THE LAW 183–84 (2d ed., Stanford Univ. Press 1990).

treatment ceases upon a patient's death,[128] a state statute requiring a physician to treat a dead patient could be seen as ethically unsound.[129] Some have argued that this is an infringement of the corpse's right to a burial.[130] However, the right to a burial, if there even is one, typically belongs to the next of kin, not the decedent.[131]

The problem here is that there could be a conflict between what is legally permissible and what is ethically obligatory, depending on how one defines "respectful" treatment of a corpse. As this article proposes, states are free to ban the removal of life support from brain-dead, pregnant patients. The ethical concern for the medical profession in this context is a dilemma that states should seriously consider before legally mandating arguably unethical behavior. Requiring physicians to treat brain-dead patients may undermine the public's respect for the medical profession.[132] On the other hand, some ethicists maintain that "[t]here are no ethical issues in the care of someone who is brain dead, because the patient is now a corpse."[133] It is possible that requiring physicians to treat brain-dead patients for the purpose of saving an unborn life may promote respect and value to human life in the community. The ethical obligations of a physician for dead patients will be the turning point for this dilemma. A physician's treatment of brain-dead patients should not be unethical, if such treatment is for the purpose of saving an unborn life.

Ethical obligations of physicians are often determined by public attitudes surrounding the medical behavior in question.[134] Some ethical obligations are

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128. *See* Robert N. Brown, *Medical Decision-Making at the End of Life*, 67 MICH. B.J. 1106, 1108 (1988).

129. *See* Gostin, *supra* note 124.

130. *Id.*

131. *See* Robert A. Brazener, *Liability in Damages for Withholding Corpse From Relatives*, 48 A.L.R. 3d 240 § 3 (1973) ("Although most jurisdictions do not recognize the existence of property rights in dead bodies, the common law generally does recognize that the surviving spouse, if there is one, or the next of kin has the right to custody of the body of the deceased, in the condition in which it was left by death, and that such person has the right to bury the body without any interference.").

132. *Cf.* Brown, *supra* note 128, at 1108 (discussing a court's conclusion that it was not unethical for a medical professional to withdraw life support since no third-party interests were in conflict and the state's interest in preventing suicide was not present).

133. Liz Szabo, *Ethicists Criticize Treatment of Brain-Dead Patients,* NAT'L CATH. REP. (Jan. 10, 2014), http://ncronline.org/news/people/ethicists-criticize-treatment-brain-dead-patients.

134. *See* Berger et al., *supra* note 125, at 774 ("The essential ethical dilemma is how to weigh the moral goods . . . against the need to respect persons, to minimize patient harm, and to maintain *public trust*.") (emphasis added).

standard in the field, such as the Hippocratic Oath[135] or maintaining patient confidentiality after death.[136] Nevertheless, many ethical questions remain uncertain. When medical conduct occurs in this uncertain and ambiguous context, public receptivity to the conduct in question is often critical in determining a physician's ethical obligations.[137] For instance, an ambiguous ethical question that physicians face is how much consent is needed in order to use a patient's corpse for training purposes.[138] Physicians are obliged to respect the patient and his family by obtaining informed consent.[139] These obligations are not "absolute" and may yield "to larger societal needs."[140] In the example of training, ethical obligations regarding the degree of informed consent necessary are balanced by the societal good that occurs from training competent physicians.[141]

If obtaining a high degree of informed consent could be overridden by the societal good of ensuring competent physicians, then obtaining a high degree of informed consent from the family in the context of a deceased, pregnant patient could also be overridden by the societal good of protecting potential human life. Again, it is crucial to emphasize that this conclusion results after balancing the harm to the deceased patient's corpse versus the good to society in protecting potential human life.[142] The public's reaction to relaxing this type of consent

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135. *See* Tanya J. Dobash, Note, *Physician-Patient Sexual Contact: The Battle Between the State and the Medical Profession*, 50 WASH. & LEE L. REV. 1725 (1993) (citing Hippocrates, *Physician's Oath*, *in* STEDMAN'S MEDICAL DICTIONARY 579 (3d lawyers' ed. 1972)).

136. *See* Bernard Friedland, *Physician-Patient Confidentiality: Time to Re-Examine a Venerable Concept in Light of Contemporary Society and Advances in Medicine*, 15 J. LEGAL MED. 249 (1994); *see also* Dobash, *supra* note 135 (discussing a physician's ethical obligations regarding sexual contact with patients).

137. *See* Berger et al., *supra* note 125.

138. *Id.*

139. *Id.*

140. *Id.* at 777 ("These imperatives are not absolute and may be subjugated to larger societal needs if physician training is sufficiently compromised by greater informed consent requirements.").

141. *Id.*

142. *Cf. id.* In discussing physician ethical obligations regarding informed consent, a medical ethicist noted:

> In consequentialist constructs, where some individual interests are subjugated to larger interests, the use of corpses for training purposes without explicit consent can be justified. Here, possible burdens to the deceased person or family are accepted for the societal good. The use of corpses minimizes harm to living patients who otherwise would bear the burden of being training subjects. In this system, practical concerns regarding harm to living persons override concerns about damage to corpses, or the harms from offending individuals' notions of death and dying. Our

when the deceased patient is pregnant should be further explored to assess social implications more accurately. Specifically, empirical research should assess whether the state law that requires doctors to keep brain-dead, pregnant patients on life support to protect unborn life will diminish or promote the public's respect for physicians when balanced against the societal good of valuing life. States should be mindful of the results of that research before enacting legislation banning the removal of life support from brain-dead, pregnant patients.

C. *Proposed Statutory Amendments to Texas's and Other States' Law*

The district judge in Munoz's case ordered the removal of life support because the statute did not apply to Munoz[143] since she was already dead.[144] The provision at issue was section 166.049 of the Texas Health and Safety Code, which states "[a] person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient."[145] The Texas Health and Safety Code defines "life-sustaining treatment" as "treatment that, based on reasonable medical judgment, *sustains the life of a patient and without which the patient will die*."[146]

Whether the life of the fetus is protected under the statute depends primarily on: (1) the definition of life-sustaining measures, and (2) the definition of "patient." If Texas wants to ban the removal of life-sustaining treatment from brain-dead, pregnant patients, the state needs to amend the definition of "life-sustaining treatment" to include treatment sustaining the life of the patient *or the fetus, if the patient is pregnant*. In the alternative, the state should amend the statute to redefine "patient" to include a fetus when the patient is pregnant. Defining "patient" to include the mother as well as the fetus is consistent with modern medical practice; when a patient is pregnant, the physician owes a duty of care to the patient and to the fetus.[147] This article does not explicitly recommend that states adopt this change—such decisions are for individual state legislatures to decide. The article does, however, explicitly conclude that such state action would be constitutional. If states wish to provide this protection for

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> Western societal norms more closely reflect an individualistic ethic than a communitarian ethic.

Id.

143. Munoz v. John Peter Smith Hospital, Judgment, No. 096-270080-14 (Tex. Dist. Ct. Jan. 24, 2014) http://thaddeuspope.com/images/MUNOZ_202053415-Judges-Order-on-Munoz-Matter.pdf.

144. *Id.*

145. TEX. HEALTH & SAFETY CODE ANN. § 166.949 (2012).

146. *Id.* § 166.002(10) (emphasis added).

147. *See, e.g.*, Walker v. Rinck, 604 N.E.2d 591 (Ind. 1992); Broadnax v. Gonzalez, 809 N.E.2d 645 (N.Y. 2004).

the unborn, they need to make sure the statutory language is clear. Otherwise, hospitals and doctors are left with unclear guidelines when addressing these situations.

CONCLUSION

As this article has demonstrated, a state regulation banning the removal of life support from brain-dead, pregnant patients is constitutional. When a woman dies, her rights are extinguished. Since the Supreme Court has only recognized the interests of the state and rights of the mother in the abortion context, state interests are predominant after the woman dies. While some argue that states should recognize the interests of the father in this context, current Supreme Court precedent does not support that claim. The interests of the father, the interests of the state, and the ethical implications discussed in this article are policy concerns that states should consider before enacting this kind of legislation. This article does not attempt to resolve all the ambiguities surrounding whether a father potentially has rights in the abortion context. As such, further research and dialogue into this possibility are encouraged to resolve those ambiguities.