Seton Hall University

eRepository @ Seton Hall

Law School Student Scholarship | Seton Hall Law

2022

A Constitutional Standard for the Withdrawal of Life-Sustaining Treatment from an Incapacitated Pregnant Woman

Christine Clark

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Part of the Law Commons

A Constitutional Standard for the Withdrawal of Life-Sustaining Treatment from an Incapacitated Pregnant Woman

Christine Clark

INTRODUCTION 2
I. PREGNANCY AND CATASTOPHIC BRAIN INJURIES 3
A. Diagnosing Severe Brain Injuries 6
B. Success Rates 8
C. Medical Decision-Making Process for Incapacitated Patients 11
D. Advance-Care Planning and the "Pregnancy Exclusion" 12
II. CONSTITUTIONAL ANALYSIS 14
A. The Right to Terminate a Pregnancy 14
B. The Right to Choose to Withdraw Life-Sustaining Treatment 16
C. What is Autonomy? 17
D. University Health Services v. Piazzi 17
III. PROPOSED CONSTITUTIONAL STANDARD 18
A. Clear and Convincing Evidence 19
B. Substituted Judgment 20
C. Rights After Death 21
D. Viability 23
E. Success Rates 24
F. The Pregnancy Exclusion 25
G. Autonomy 26
CONCLUSION 26

INTRODUCTION

It is never an easy decision to take an individual who is left with little or no cognition off of life support. The decision becomes even more difficult when that individual is pregnant. The decision to take a pregnant woman who has suffered a catastrophic brain injury off of life support raises various medical, legal, and ethical issues and implications. If an issue like this were brought to the Supreme Court, there are simply no cases to help the Court reach a sound decision on the matter. None, that is unless the Court examines the constitutional privacy interests protected by the Fourteenth Amendment Due Process Clause.

There are two important decisions to be made when a pregnant woman becomes incapacitated: whether to withdraw life-sustaining treatment, and whether to terminate their fetus. Both of these issues have been adjudicated extensively by the Supreme Court. Moreover, both the right to withdraw life-sustaining treatment and the right to an abortion are privacy interests. Despite the fact that these rights are recognized separately, there is an overlap between the two rights, and this overlap makes it possible for the Supreme Court to create a standard by which a constitutional right to withdraw life-sustaining treatment from an incapacitated pregnant woman can be recognized.

This article examines the different concerns that need to considered before the Supreme Court can reach a conclusion regarding the right to withdraw life-sustaining treatment from an incapacitated pregnant woman. Part I discusses the scenario itself. It includes examples of this phenomenon, a discussion of the medical considerations at play, and an examination of the possibility of a successful pregnancy in pregnant women who are incapacitated. Part II involves a constitutional analysis of this scenario. This includes a brief outline of the Supreme Court's decisions regarding abortion and the right to withdraw life-sustaining treatment, a discussion concerning what autonomy means, and an example of one court's decisions when faced with an issue regarding the scenario at issue. Finally, Part III proposes a standard for the Supreme Court to use in order to properly acknowledge the right to withdraw life-sustaining treatment from an incapacitated pregnant woman. Part III further discusses the various concerns at play based on the proposed standard and discusses why the proposed standard is constitutional.

I. PREGNANCY AND CATASTOPHIC BRAIN INJURIES

When a pregnant woman suffers a catastrophic brain injury, her family and her doctors must decide whether to accept or withdraw life-sustaining treatment. These decision makers face

both the decision of whether to prolong the patient's life, and the decision of whether to end a pregnancy.[1] Although this situation is rare, the following instances are examples of this scenario, and they each demonstrate the complexities that come with the decision of whether to withdraw life-sustaining treatment from a pregnant woman.

In 2013, Marlise Munoz, a resident of Texas, was fourteen weeks pregnant when she suffered a sudden blood clot in her lungs which resulted in brain death.[2] Marlise's family told the hospital to stop treating her because Marlise had previously expressed that she never wanted to be kept on life support.[3] The hospital decided not to comply with the family's wishes, since a Texas law prohibited doctors from cutting off life support from a pregnant patient.[4] Marlise's family brought suit, and Marlise remained on life support until the Texas court reached a decision.[5] The court determined that the Texas state statute did not apply to Ms. Munoz since she was legally dead, and ordered the hospital to take her off life support.[6] The judge did not make a determination on the constitutionality of the law.[7]

In 2014, another woman suffered a catastrophic brain injury, but unlike Munoz, her family decided to keep the baby. Robyn Benson was twenty-two weeks pregnant when she was

[1] Feldman, *supra* note 11, at 710.

[2] Shea Flanagan, *Decisions in the Dark: Why "Pregnancy Exclusion" Statutes are Unconstitutional and Unethical*, Northwestern L. Rev., 2020, at 970.

[3] *Id.*

[4] Manny Fernandez and Erik Eckholm, *Pregnant, and Forced to Stay on Life Support*, The New York Times, Jan. 7, 2014, https://www.nytimes.com/2014/01/08/us/pregnant-and-forced-to-stay-on-life-support.html.

[5] Wade Goodwyn, *The Strange Case of Marlise Munoz and John Peter Smith Hospital*, NPR, January 28, 2014, https://www.npr.org/sections/health-shots/2014/01/28/267759687/the-strange-case-of-marlise-munoz-and-john-peter-smith-hospital.

[6] *Id.*

[7] Flanagan, *supra* note 2, at 971-72 ("However, the judge made no determination about whether this Texas law was constitutional as applied to pregnant patients in a persistent vegetative state who have previously communicated their end-of-life wishes to remove life support in this condition")

declared brain dead.[8] Her husband made the decision to keep her on a ventilator until the fetus could be delivered via Cesarean section.[9] Doctors hoped she could carry the fetus until her thirty-fourth week of pregnancy.[10] Instead, Robyn's body only persisted for six weeks, and a healthy baby was delivered on week twenty-eight of her pregnancy.[11] The baby was healthy but had to be kept in the neonatal intensive care unit.[12]

In 2015, Karla Perez was twenty-two weeks pregnant when she was declared brain dead.[13] Her family asked that she be kept alive as long as possible until the baby could be delivered.[14] The Methodist Health System in Nebraska was able to keep her alive for almost eight weeks, and her baby was delivered weighing only two pounds.[15] The doctors at this hospital had very little research to work from, since there were no documented cases of this phenomenon at their hospital.[16] In their research, the doctors only found thirty-three cases of incapacitated pregnant women since 1982.[17] Because of this lack of information, the doctors had to work off of their general knowledge of medicine and brain death in order to stabilize Perez.[18] The doctors had hoped to keep Perez alive until she reached thirty-two weeks, but her condition deteriorated at thirty weeks.[19] Her baby was stable at birth and was kept in a neonatal intensive care unit.[20]

---

[8] Brij Charan, *Brain-Dead Canadian Woman Dies After Giving Birth to Boy*, NBC News, Feb. 11, 2014, https://www.nbcnews.com/news/world/brain-dead-canadian-woman-dies-after-giving-birth-boy-n27741.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Elahe Izadi, *Woman Delivers Baby 54 Days After Being Declared Brain Dead*, The Washington Post, May 1, 2015, https://www.washingtonpost.com/news/morning-mix/wp/2015/05/01/a-brain-dead-woman-was-kept-alive-for-54-days-to-deliver-her-baby/.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

The previous examples involved brain dead mothers, but this dilemma also arises when mothers are in a persistent vegetative state. In 2018, a woman in Arizona had been in a persistent vegetative state for over ten years.[21] She was sexually assaulted while being cared for at Hacienda Healthcare in Phoenix, and became pregnant.[22] Since she was in a persistent vegetative state, her body could function, but cognitively all human qualities were gone.[23] She could not communicate to her family or her doctors that she was pregnant.[24] Therefore, the pregnancy could only be recognized through secondary changes on her body.[25] After one month, a doctor finally discovered the pregnancy.[26] The family was informed of the pregnancy, and despite the sexual assault, her parents decided not to terminate the pregnancy.[27] She gave birth to a premature yet healthy boy in 1996.[28]

A. *Diagnosing Severe Brain Injuries*

It is important to know how physicians diagnose and categorize severe brain injuries before discussing the implications of these injuries for pregnant women. A necessary diagnosis is whether a patient is considered to be brain dead or is in a vegetative state. Historically, the traditional standard for determining death was based on cardiopulmonary functions.[29] Physicians relied solely on a loss of circulatory and respiratory function in order to prove someone was dead.[30] When medical technology advanced and physicians used life support on their patients

[21] Elizabeth Chuck, *Pregnancy in Women in Vegetative States is Rare, but not Unprecedented*, NBC News, Jan 12, 2019, https://www.nbcnews.com/news/us-news/pregnancy-women-vegetative-states-rare-not-unprecedented-n957611.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *See* Ben Sarbey, *Definitions of Death: Brain Death and What Matters in a Person*, Journal of Law and the Biosciences, Nov. 20, 2016, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5570697/.
[30] *Id.*

more extensively, the definition of death changed to include both the cardiopulmonary approach and a new brain-based approach.[31] People could now be declared "dead" if they had no brain functioning at all, but continued to breathe and have a heartbeat.[32] In 1980, the Uniform Determination of Death Act ("UDDA") was published as the model statute for determining death.[33] The UDDA declared as dead an individual with either an "irreversible cessation of circulatory and respiratory functions" or an "irreversible cessation of all functions of the entire brain."[34] This brain-based standard under the UDDA for loss of cessation of the entire brain is known as "brain death."[35] Someone who is brain dead is considered legally and clinically dead with no chance of revival, and are only kept on life support for certain situations such as organ donation.[36]

Besides brain death, brain injuries can also place someone in a vegetative state, and these situations also lead to inquiries regarding whether to continue life support. There are a few important differences between brain death and a vegetative state, but both conditions have presented similar significant challenges in cases of maternal brain injuries during pregnancy.[37] First, brain death is legal death, but a vegetative state is not considered legal death because these patients maintain some cognitive functioning.[38] Unlike brain dead patients, patients in a vegetative state can regulate their breathing and heart rate without assistance.[39] Patients in a

---

[31] *Id.*
[32] *Id.*
[33] Uniform Determination of Death Act (UDDA). The UDDA does not discuss rules on maintaining life support beyond brain death in cases of pregnant women.
[34] UDDA § 1.
[35] UDDA.
[36] *Brain Death vs. Persistent Vegetative State: What's the Legal Difference?*, FindLaw, May 29, 2018, https://healthcare.findlaw.com/patient-rights/brain-death-vs-persistent-vegetative-state-what-is-the-legal-difference.html.
[37] Deborah M. Feldman, et al., *Irreversible Maternal Brain Injury during Pregnancy: A Case Report and Review of the Literature*, CME Review, 2000, at 708.
[38] *Brain Death vs. Persistent Vegetative State, supra* note 10.
[39] *Id.*

vegetative state have depressed consciousness, but are unaware and only exhibit some signs of wakefulness.[40] If a person is in a vegetative state for a significant period of time and it is "highly unlikely" they will live beyond the vegetative state, this patient is then diagnosed as being in a persistent vegetative state.[41] Many people often contend that a persistent vegetative state is a "state worse than death."[42] Physicians must make thorough evidence-based prognoses for brain-injured patients to ensure any clinical decisions about life support are well informed.[43]

B. *Success Rates*

Catastrophic brain injuries in pregnant women are uncommon, but when they occur, they create a complicated situation. A fetus can sometimes survive after keeping the mother on life support, but this success is not guaranteed and a decision to keep women on life support for their fetus involves numerous considerations.[44] General research on the topic, however limited, can aid in these decisions. Moreover, the general length of time doctors sustain patients on life-support can be indicative of how long a pregnancy in this state could be sustained. Finally, the survival rates of babies who are placed in the neonatal intensive care units should be considered, since, as seen in the examples above, the babies born from incapacitated mothers are often premature.

---

[40] Douglas S. Diekema, et al., *Session 15. Brain Death, Permanent Vegetative State, and Medical Futility*, American Academy of Pediatrics, 2017, at 119, https://www.aap.org/en-us/Documents/Bioethics-BrainDeath.pdf.

[41] *Brain Death vs. Persistent Vegetative State, supra* note 10.

[42] James L. Bernat, *Ethical Issues in the Treatment of Severe Brain Injury: The Impact of New Technologies*, Disorders of Consciousness, 2009, at 121.

[43] *Id.* at 118-20 (In order to diagnose a brain injury, physicians perform numerous tests to "determine the extent of the injury. These tests include EEGs, CT and MRI scans, clinical examinations that are repeated over time in intervals, testing responses to stimuli. These texts can show if a patient is brain dead or in a vegetative state, as well as if a patient is transitioning out of a vegetative state.").

[44] Christopher M. Burkle, et al., *Medical, legal, and ethical challenges associated with pregnancy and catastrophic brain injury*, International Journal of Gynecology and Obstetrics, 2015.

The number of weeks a mother is pregnant can help establish whether a child has a realistic chance of survival.[45] A 2010 study conducted research about thirty cases of brain dead pregnant women from 1982 to 2010.[46] In this study, the mean age of the injured mother was 26.5 years, while the mean pregnancy was 22 weeks.[47] The mean week of delivery was 29.5 weeks.[48] A full-term pregnancy is normally forty weeks.[49] The study showed that only twelve viable neonates were born and survived past the neonatal period.[50] In a different study of forty-three cases from 1976 to 2015, however, there was one trial where the mother became incapacitated at six weeks, but the baby still managed to be delivered and progress to a healthy state.[51] There are currently no regulations to define at what week of pregnancy a mother should be kept on life support for the child to be delivered.[52]

Recall that when a person is brain dead they are legally dead. So, it is impossible to keep such a person "alive" with life support. Despite this truth, doctors have managed to successfully keep these people on life support for a significant period for certain purposes.[53] Among these purposes are organ donation and allowing the family of the deceased more time to say

---

[45] Iwona Pikto-Pietkiewicz, et al., *The Management of a Thirteen Weeks Pregnant Woman Rendered Brain-Dead Following a Ruptured Aneurysm*, The Journal of Critical Care Medicine, Aug. 9, 2019, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6698076/.
[46] *Id.*
[47] Burkle, *supra* note 19.
[48] *Id.*
[49] Jaime Rochelle Herndon, *How Long is a Full-Term Pregnancy*, About, Inc., Sept. 24, 2020, https://www.verywellfamily.com/what-does-it-mean-to-have-a-full-term-pregnancy-4174638.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] Rachael Rettner, *How Long Will A Brain-Dead Person's Body Keep Working?*, Huffpost, Jan. 3, 2014, https://www.huffpost.com/entry/brain-dead-body-alive_n_4537750?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAK1aKE23du_zf6AynCNOZTZUkXYqMTavnQumqbhRMXyNAcDhmKW7RAJ0BuNKRknnfmNgw16LthQQpy7XpToJfCdMIDhS7r1-8agnXW2jucSdkQhX7_Liv2yIeCbB-YCKAhVmEjJKzBgzU4ZYDvQm_3dqlNJleCR-CjvdOOHDEEyZ.

goodbye.[54] Another purpose, as denoted in the examples above, could be to keep a fetus incubated in the mother's body long enough for a successful delivery.[55] In the cases of brain death, successfully keeping a body on life support is feasible but not certain.[56] There are several factors to consider. Patients on life support no longer have a heartbeat, so a ventilator is needed to keep the heart beating.[57] Kidney and gastric functions can only continue for about a week with a ventilator, so a doctor must administer medication for these processes.[58] Normal blood pressure cannot be maintained, so medicine must be provided to maintain it.[59] Also, brain dead individuals cannot maintain their body temperature, so doctors must maintain this temperature through blankets, warm IVs, or by heating a room.[60] Although many treatments are necessary to keep a brain dead patient on life support, these treatments could theoretically keep a brain dead body functioning for a long time.[61] For example, as explained *supra*, brain dead mothers have been kept alive for weeks for their fetuses. In fact, in one fascinating example, a teenage girl, Jahi McMath, was kept on life support for almost five years.[62] This happened after the religious beliefs of her mother brought the matter to court, and the judge ruled to extend Jahi's life support.[63]

As noted above, people in a vegetative state are still partially "alive," and are not considered legally dead. This is because of medical differences between brain death and a vegetative state.

---

[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] Kat Chow, *Jahi McMath, Teen At Center Of Medical And Religious Debate On Brain Death, Has Died*, NPR, June 29, 2018, https://www.npr.org/2018/06/29/624641317/jahi-mcmath-teen-at-center-of-medical-and-religious-debate-on-brain-death-has-di.
[63] *Id.*

Unlike brain death, those who are in a vegetative state can still maintain certain functions on their own, and sometimes have a chance at revival. These patients can often regulate their breathing and heart rate without assistance.[64] So, successfully keeping these people alive involves more standard supportive care, such as providing adequate nutrition through a feeding tube, administering physical therapy, and preventing disease or infection.[65]

Additionally, the survival rate of babies in the neonatal intensive care unit is an important consideration since babies born to mothers on life support are often premature. Based on the American Academy of Pediatrics 2017 study, the one-year survival rate for babies admitted to the neonatal intensive care unit was seventy-four percent.[66] The survival rate increased with each week of pregnancy, with only eighteen percent success at twenty-two weeks, twenty-nine percent at twenty-three weeks, fifty-six percent at twenty-four weeks, eighty-four percent at twenty-five weeks, and ninety percent success at twenty-six weeks.[67] Thus, based on these statistics, the baby is only more likely to survive than die starting at the twenty-fourth week of pregnancy.[68]

C. *Medical Decision-Making Process for Incapacitated Patients*

Since incapacitated patients lose the ability to make health-care decisions for themselves, a designated decision maker must work with doctors to make any medical decisions on the

[64] Nicoletta Lanese, *Not Brain Dead: Patient Trapped in Vegetative State by Unethical Doctors*, Live Science, Oct. 08, 2019, https://www.livescience.com/man-kept-in-vegetative-state-for-year.html.
[65] *Id.*
[66] Hans Jorgen Stensvold, MD, et al., *Neonatal Morbidity and 1-Year Survival of Extremely Preterm Infants*, American Academy of Pediatrics, March 2017, https://pediatrics.aappublications.org/content/pediatrics/early/2017/02/20/peds.2016-1821.full.pdf.
[67] *Id.*
[68] *Id.*

patient's behalf.[69] These decision makers are called "surrogates," and physicians have a duty to obtain consent for all treatment or testing for which they would have needed the original patient's consent if they had capacity.[70] Surrogates require adequate information, or information that a reasonable person would need to make a clinical decision.[71] Surrogates can be appointed formally by the patient themselves when they still have capacity, by statute where a lawful surrogate is chosen from a list of family members, or informally through the designation of a physician.[72] Surrogates often make decisions based on the actual patient's autonomy.[73] In doing so, the surrogates apply the patient's perspectives and values to reproduce the decision the patient would have made, which can be anticipated from general knowledge about the patient or specific conversations.[74]

D. *Advance-Care Planning and the "Pregnancy Exclusion"*

Sometimes, a patient may provide guidelines before they lose capacity through advance care planning.[75] Examples of guidelines that are used in advance care planning are advance directives, or "living wills. [76] These are often written documents that designate a patient's treatment preferences based on a their understanding of their diagnosis, the burden of each treatment, and any possible outcomes of each treatment.[77] Advance directives and living wills

---

[69] Bernat, *supra* note 17, at 122 (Noting that medical decisions require informed consent, and that a brain-injured patient does not lose the right to informed consent. The surrogate of the patient is transferred this right of informed consent, and becomes the decision maker for the patient. "The informed-consent doctrine requires three conditions to make a patient's consent valid: (1) the patient has the capacity of make and communicate health-care decisions; (2) the patient is given and understands the information that is necessary to make an informed and rational decision; and (3) the patient is not coerced by people or agencies, and thereby can make the decision freely.").

[70] *Id.* at 122-23.

[71] *Id.* at 123; *see also* Feldman, supra note 11, at 710 ("Extensive counseling and education regarding the patient should be given to the family so they can make an informed decision about life support.").

[72] Bernat, *supra* note 17, at 123.

[73] *Id.*

[74] *Id.*

[75] Bernat, *supra* note 17, at 126.

[76] *Id.*

[77] *Id.*

are created when a patient is ill and the patient expects they may need further treatment.[78] For example, some patients who create advance directives for themselves expect they may eventually become incapacitated.

There are some present legal obstacles that limit the use of a surrogate or an advance directive in the case of pregnant and incapacitated patients.[79] Although surrogates and advance directives help make decisions for incapacitated patients, they cannot be used unless the statutory criteria are met.[80] One legal obstacle for pregnant women is that some states exclude pregnant women from using advance directives or living wills, and this is often called the "pregnancy exclusion.[81]" The rationale behind this could likely be that when women draft these documents, they are not thinking about how their preferences would change if they became pregnant.[82] Also, these statutes often are in place to protect the rights of incapacitated pregnant women.[83] This is because a woman may have used these documents to direct doctors not to use life-sustaining treatment, but the women may not have considered how this preference would change if they became pregnant.[84] Currently, thirty-six states have statutes that either prohibit or restrict physicians from honoring a patient's advance health care directives to refuse life-sustaining treatment if they become pregnant.[85]

---

[78] *Id.*
[79] Katie Rinkus, *The Pregnancy Exclusion in Advance Directives: Are Women's Constitutional Rights Being Violated?*, Loyola Pub. Interest L. Reporter, October 6, 2014, at 97.
[80] *Id.* at 96.
[81] Elizabeth Villareal, *Pregnancy and Living Wills: A Behavioral Economic Analysis*, The Yale Law Journal, Apr 8, 2019, https://www.yalelawjournal.org/forum/pregnancy-and-living-wills.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] Flanagan, *supra* note 2, at 971-72

II. CONSTITUTIONAL ANALYSIS

As can be seen in the cases of Marlise Munoz, Robyn Benson, and Karla Perez, and as noted earlier in this paper, there are two difficult decisions to be made when a pregnant woman is on life support: the decision of whether to remove life-sustaining treatment, and the decision of whether to terminate a fetus. These decisions represent a collision between two heavily adjudicated constitutional rights of the mother. The first recognized right is the constitutionally protected right to refuse medical treatment.[86] This includes the right to choose to withdraw life-sustaining treatment for incapacitated patients.[87] The second recognized right is the constitutional right to choose an abortion.[88] Interestingly, both of these rights have been recognized by the Supreme Court as privacy rights safeguarded by the Fourteenth Amendment's Due Process Clause. Further, these rights are currently grounded in the belief that there are certain constitutional rights central to preserving individual autonomy.[89]

A. *The Right to Terminate a Pregnancy*

The Supreme Court has recognized the right to an abortion as a fundamental privacy right protected by the Fourteenth Amendment, which is rooted in the protection of individual autonomy. *Roe v. Wade* was the first pivotal case for abortion rights. This case was brought to the Court as a challenge to a Texas law that prohibited abortions, and the claim was that the law violated the Due Process Clause of the Fourteenth Amendment..[90] In examining this challenge, the Court stated that any rights protected under the Fourteenth Amendment's zone of privacy

---

[86] *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990).

[87] *Id.*

[88] *See Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[89] *Compassion in Dying v. Washington*, 79 F.3d 790, 800 (9th Cir. 1996) ("In examining whether a liberty interest exists in determining the time and manner of one's death, we begin with the compelling similarities between right-to-die cases and abortion cases.").

[90] *Roe*, 410 U.S. at 119.

were those rights that are deemed "fundamental."[91] The court determined the right to choose to have an abortion was "fundamental," and therefore is included in the guarantee of personal privacy from the Due Process Clause of the Fourteenth Amendment.[92]

Roe was eventually reaffirmed by the Supreme Court's holding in *Planned Parenthood v. Casey*. In Justice O'Connor's plurality opinion, the Court held that it reaffirmed *Roe*'s "essential holding."[93] The Court acknowledged the zone of privacy and recognized that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood. . . ."[94] The Court in *Casey* referred to the right to choose as a "liberty" guaranteed by the Due Process Clause. The Court described this right to choose as central to the preservation of individual autonomy.[95] The Court reasoned that a mother's right to an abortion should not be interfered with, since women possess a constitutionally protected liberty interest in controlling their "reproductive lives," which included the intimate and personal decision to terminate a pregnancy.[96] The Court also introduced an undue burden standard when balancing the government's interests at stake against the mother's right to choose.[97] Under this standard, a state's regulation was improper if it placed an "undue burden" on a woman's right to choose an abortion.[98] In other words, the regulation is improper if it "has the purpose or effect of

---

[91] *Id.* at 153.
[92] *Id.* at 152.
[93] *Casey*, 505 U.S. at 846.
[94] *Id.* at 849; *see also Obergefell*, 576 U.S. at 663 ("The fundamental liberties protected by [the Due Process Clause] include most of the rights enumerated in the Bill of Rights . . . In addition, these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.").
[95] *Casey*, 505 U.S. at 857.
[96] *Id.* at 851 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").
[97] *Id.* at 874.
[98] *Id.* at 877.

placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[99] As established by abortion jurisprudence, there are some choices that are central to a person's autonomy, which are protected under the Due Process Clause of the Fourteenth Amendment.[100]

B. *The Right to Choose to Withdraw Life-Sustaining Treatment*

Cruzan v. Director, Missouri Department of Health established the right to withdraw life-sustaining treatment in incapacitated patients as a privacy interest covered by the Fourteenth Amendment Due Process Clause. *Cruzan* came to the court because the parents of Nancy Cruzan, a young woman in a persistent vegetative state, wished to withdraw her life support, which the Missouri hospital refused to do without a court order.[101] Cruzan was incompetent, and Missouri required "clear and convincing evidence" of a patient's prior wishes that they would have wanted the life support be withdrawn.[102] In determining the rights of Cruzan, the Court referred to the right to refuse medical treatment as a privacy interest protected by the Fourteenth Amendment, which, as in *Casey*, is based on the notion of individual autonomy.[103] Prior case law had held that competent individuals had a constitutional right to refuse unwanted medical treatment, and now this refusal extended to incapacitated individuals.[104] Any regulation of this right to refuse medical treatment would only be upheld if the regulation, when balanced against the patient's interest, served an important state interest.[105] The Court found that Missouri had a valid and compelling interest in preserving human life, and therefore upheld Missouri's "clear

---

[99] *Id.* at 877.
[100] *Id.* at 844. (Noting that two general rights under which abortion rights are justified are the right to make family decisions and the right to physical autonomy.)
[101] *Cruzan*, 497 U.S. at 266-68.
[102] *Id.* at 269.
[103] *Id.* at 279; *see also Id.* n.7 (citing *Bowers* v. *Hardwick*, 478 U.S. 186, 194-195 (1986).) ("Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.").
[104] *Id.* at 271.
[105] *Id.* at 279.

and convincing evidence" standard because the standard acted to further that interest.[106] The court held that hospitals must only defer to the patient's wishes in order to maintain individual autonomy in connection with the zone of privacy.[107]

C. *What is Autonomy?*

As mentioned above, certain rights guaranteed by the Fourteenth Amendment's Due Process Clause are central to the preservation of individual autonomy. The current conceptualization of autonomy is that autonomy helps to establish a zone of privacy and noninterference with the decisions of individuals.[108] The general principle of autonomy means that each person has control over his or her body and life.[109] It basically establishes that we should let people do what they want to do, including any choice to refuse medical treatment.[110] For competent adults, autonomy usually prevails.[111] For incompetent individuals, however, the effect of autonomy is less clear, because it would seem that decision-making autonomy requires awareness on the part of the particular individual. But, as established in *Cruzan*, autonomy usually prevails even for incompetent individuals unless there is a substantial enough countervailing state interest.[112]

D. *University Health Services v. Piazzi*

Piazzi is an example of a case that assessed the constitutionality of the withdrawal of life-sustaining treatment from an incapacitated pregnant woman. In this case, the hospital sought to

---

[106] *Id.* at 283.
[107] *Id.* at 287.
[108] Susan Adler Channick, *The Myth of Autonomy at the End-Of-Life: Questioning the Paradigm of Rights*, Villanova L. Rev., 1999, at 586.
[109] Robert L. Schwartz, Eu*thanasia and the Right to Die: Nancy Cruzan and New Mexico*, New Mexico L. Rev., 1990, at 679-80.
[110] *Id.*
[111] *Id.*
[112] *Id.*

keep Donna Piazzi on life support to preserve the life of her unborn child.[113] Donna Piazzi was brain dead, and her husband requested that the hospital withhold the life-sustaining treatment.[114] Her husband was not the biological father of the child, however, and the biological father requested the hospital maintain life support for Piazzi.[115] Piazzi was twenty weeks pregnant, and it was shown that there was a reasonable possibility that the body could remain functioning until a viable fetus could be delivered.[116] The court ultimately held that the constitutional privacy rights Piazzi possessed were extinguished by her death, including the right to abort a fetus.[117]

III. PROPOSED CONSTITUTIONAL STANDARD

As noted, both the right to choose an abortion and the right to choose to withdraw life-sustaining treatment have been recognized by the Supreme Court as privacy rights safeguarded by the Fourteenth Amendment's Due Process Clause. This constitutional overlap is heightened by the fact that both of these rights are currently grounded in the belief that there are certain constitutional rights central to preserving individual autonomy. Based on this overlap, it is possible that there is also a constitutionally protected privacy right to accept or withdraw life-sustaining treatment from an incapacitated pregnant woman.

A proposed standard, which could be adopted by the Supreme Court for these scenarios, is to recognize that an incapacitated pregnant woman still has privacy interests at stake. Under such a standard, the surrogate decision-maker must defer to the pregnant woman's wishes on whether to withdraw life-sustaining treatment while pregnant. This decision requires the surrogate to prove

---

[113] Wendy Adele Humphrey, *But I'm Brain-Dead and Pregnant: Advance Directive Pregnancy Exclusions and End-of-Life Wishes,* William and Mary L. Rev., May 2015, at 690-91.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*

by clear and convincing evidence exists that the decision they make is consistent with the incapacitated woman's prior wishes regarding the administration of life-sustaining treatment while she is carrying a fetus. There are various considerations at play, however, in order for this standard to pass constitutional muster, and these will be discussed below.

A. *Clear and Convincing Evidence*

In order to adopt a constitutional standard for the withdrawal of life-sustaining treatment from an incapacitated pregnant woman, clear and convincing evidence of the patient's prior wishes must exist. Recall that the Court in *Cruzan* upheld Missouri's standard that clear and convincing evidence of a patient's prior wishes was necessary in order to take an incompetent patient off of life support. The Court did not hold that this standard must be used, however, and left it to the states to determine what standard they would use to prove that a patient would have decided to refuse the treatment.[118] States can choose from three potential standards of evidence to prove that a patient would have refused medical treatment: (1) preponderance of the evidence; (2) clear and convincing evidence; or (3) beyond a reasonable doubt.[119] The typical standard of proof in civil cases is the preponderance of the evidence standard, which simply means "more likely than not."[120] When applied to the withdrawal of life-sustaining treatment, this standard would require that it is more likely than not that the incompetent patient would have decided to accept or withdraw treatment based upon the available evidence.[121] The beyond a reasonable doubt standard is the highest standard of proof, and so is usually used in criminal cases.[122] The clear and convincing evidence standard is the intermediate standard of proof, falling somewhere

[118] *Cruzan*, 497 U.S. at 283.
[119] Jon b. Eisenberg, et al., *Legal Implications of the Wendland Case for End-of-Life Decision Making*, West J. Med., March 2002, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1071696/.
[120] *Id.*
[121] *Id.*
[122] *Id.*

between preponderance of the evidence standard and beyond a reasonable doubt.[123] Clear and convincing evidence is usually used in cases involving rights that are more substantial, both on an individual and societal level.[124] The predominant standard courts use to address withdrawal of life-sustaining treatment is the clear and convincing evidence standard.[125] This standard is appropriate here since the Supreme Court has recognized the right to withdraw life-sustaining treatment and the right to end a pregnancy as more substantial rights worthy of greater consideration.

B. *Substituted Judgment*

Under the proposed standard, surrogates cannot use substituted judgment to make a decision regarding life-sustaining treatment for an incapacitated pregnant woman, and therefore must rely solely on clear and convincing evidence of the patient's prior wishes. Surrogate decision-makers are often allowed to use substituted judgment to make healthcare decisions on behalf of an incompetent patient.[126] This standard directs the decision-maker to act on behalf of the incapacitated patient based on their understanding of what the patient might have chosen.[127] Although this seems similar to what is being achieved by the clear and convincing evidence standard in *Cruzan*, the Court in *Cruzan* rejected the use of substituted judgment in cases involving the withdrawal of life-sustaining treatment because it deferred to what the patients themselves would've wanted.[128] This was because the court did not think that, constitutionally, decisions regarding a privacy right protected under the Due Process Clause should be made by

---

[123] *Id.*
[124] *Cruzan*, 497 U.S. at 283.
[125] *Martin v. Martin (In re Martin)*, 538 N.W.2d 399, 409 (1995); *see also Conservatorship of Wendland*, 28 P.3d 151, 169 (2001).
[126] Jean Kephart Cipriani, *The Limits of the Autonomy Principle: Refusal of Life-Sustaining Medical Treatment for Incompetent Persons*, Hofstra L. Rev., 1994, at 720-21.
[127] *Id.*
[128] *Cruzan*, 497 U.S. at 275.

anyone but the patient themselves.[129] So, although surrogates become the decision-makers, they are not entitled to exercise the will of the patient.[130] They are only entitled a rebuttable presumption that they are the preferred decision-maker, but their decision must be based on clear and convincing evidence that a the patient would have chosen to exercise their right to accept or refuse life-sustaining treatment.[131]

C. *Rights After Death*

The court in *Piazzi* was incorrect in holding that constitutional privacy rights were extinguished by death, including the right to abort a fetus. The court in *Piazzi* ruled this way because the pregnant patient in that case was brain dead. The Court in *Cruzan* did not rule this way, since the patient in that case was in a vegetative state. Still, however, the holding in *Piazzi* does not seem consistent with the precedent set by *Cruzan*. This is because even though the patients were in these different states, they both lacked the cognitive functionality to decide things for themselves, and a standard based on clear and convincing evidence would be applicable to both.

Some argue that the holding of *Piazzi* is true, and constitutional rights are diminished once someone is incapacitated.[132] But, as in *Cruzan*, courts have held that certain rights exist after death, acknowledging that the dead can have interests that survive death.[133] For example, the attorney-client privilege survives death, a celebrities' right of publicity can survive death, and reproductive autonomy in cases of frozen sperm or embryos survive death.[134] In the cases of

---

[129] *Id. at 286.*
[130] Cipriani, *supra* note 127, at 720-21.
[131] *Id.*
[132] Seema K. Shah, *Piercing the Veil: The Limits of Brain Death as a Legal Fiction*, University of Michigan Journal of L. Reform, 2015, at 335.
[133] Kirsten Rabe Smolensky, *Rights of the Dead*, Hofstra L. Rev., 2009, at 774.
[134] Shah, *supra* note 133, at 336.

frozen sperm and embryos, courts have held that a decedent has an autonomy interest in how the sperm or embryo will be used. Similarly, there is likely an autonomy interest in the right to an abortion which can also survive death. Reproductive rights are "deeply personal," and should survive death.[135] Also, pregnant women who are incapacitated have an almost "symbolic existence," meaning they are arguably more than just a corpse due to the life growing inside them.[136] Therefore, their rights might hold more value than someone who is also incapacitated yet not pregnant.

Besides this, a court should honor the mother's right to choose since courts have acknowledged that the purpose of allowing this right to choose was to allow women to control their own destinies. Justice Ruth Bader Ginsburg had said that abortion should be legal so women can control their own destiny, "and participate equally in the ethical and social life of the nation."[137] This argument is very compelling, but in the case of incapacitated pregnant mothers, there is no longer a destiny for them. Even though the mother is incapacitated, however, requiring clear and convincing evidence of her prior wishes still allows her to have control over her destiny. This is because this evidence depends on what she would have chosen for herself.[138] The decision-makers for the incapacitated person have to defer to that person's wishes, and the incapacitated woman is therefore still in control of her own destiny.

---

[135] Krista M. Pikus, *Life in Death: Addressing the Constitutionality of Banning the Removal of Life Support from Brain-Dead Pregnant Patients*, Gonzaga L. Rev, 2015, at 432; *see also Cruzan*, 497 U.S. at 344 (Stevens, J., dissenting) ("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.").

[136] Daniel Sperling, *Should a Patient Who Is Pregnant and Brain Dead Receive Life Support, Despite Objection From Her Appointed Surrogate?*, AMA Journal of Ethics, 2020, https://journalofethics.ama-assn.org/article/should-patient-who-pregnant-and-brain-dead-receive-life-support-despite-objection-her-appointed/2020-12.

[137] Robert A. Sedler, *Abortion, Physician-Assisted Suicide and the Constitution: The View from Without and Within*, 12 Notre Dame J. L. Ethics & Pub. Pol'y 529, 540.

[138] *Cruzan*, 497 U.S. at 283.

D. *Viability*

In the proposed standard, the viability of the fetus is not taken into account, but this does not make the standard unconstitutional. *Casey* held that a state could not enact regulation that results in an "undue burden," or a substantial obstacle in the path of the woman seeking an abortion before the fetus attain viability. Based on this framework, it would seem that an incapacitated woman's prior wishes should only be respected if the fetus has not yet attained viability. For example, some commentators have argued that the right to withdraw life-sustaining treatment from an incapacitated pregnant woman should be based on the following schema: (1) pre-viability, the woman's right to choose should be respected; and (2) post-viability, the government's interest in preserving the life of the fetus trumps any interest the mother would have had, and the woman's right to choose does not necessarily have to be respected.[139] This standard made sense in the abortion cases when the mother was still alive, but it does not make sense when a woman is incapacitated for a variety of reasons.

Casey established that it was constitutional to outlaw abortions after the point at which a fetus becomes "viable." This was discussed in a framework where a mother was alive, and the fetus was growing in a natural way. In contrast, If the mother is incapacitated, the right to withdraw life-sustaining treatment trumps viability concerns. The right to withdraw treatment is a constitutional right, making it more substantial to the consideration than viability, which was a secondary facet of the jurisprudence of abortion. This is partially because if not for life support, the fetus would have died along with the mother. The mother is simply serving as an incubator for the fetus inside her while on life-support.[140] Also, as previously established, the rights of the

[139] Shah, *supra* note 133, at 338.

[140] Chedid Faris, et al., *A Brain-Dead Pregnant Woman with Prolonged Somatic Support and Successful Neonatal Outcome: A Grand Rounds Case with a Detailed Review of Literature and Ethical Considerations*, International Journal of Critic Illness and Injury Science, Jul. 2013, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3883204/.

incapacitated mother are the only rights a court must consider when deciding whether to remove life-sustaining treatment. The fetus has no rights, since the right of a fetus have never been recognized by the Supreme Court.[141] In fact, the Court has stated that for purposes of the Fourteenth Amendment, the definition of "person" does not encompass fetuses.[142] The fetus's death would merely be an adverse result of withdrawing life support, which is much different from the explicit choice to terminate the child in abortion cases while the mother is still alive.[143]

E. *Success Rates*

Another reason why requiring clear and convincing evidence of the mother's prior wishes is a constitutional standard is because, even if the government has an interest in the preservation of the fetus, it is not definite that the fetus would have a good chance at survival. As established in the Part I of this paper, there is little known about the chances of survival for a fetus born from an incapacitated pregnant woman as too few cases of the phenomenon exist. Also, the potential to keep someone's body functioning on life support is possible but not definitive. There are a tremendous number of treatments that need to be administered to brain dead patients to keep their bodies functioning, and quite a few for patients in a vegetative state as well.[144] Also, as mentioned in the Part I, babies born to incapacitated mothers are often premature and are placed in the neonatal intensive care unit. The survival rates of these babies is only greater than fifty percent after reaching the twenty-fourth week of pregnancy.[145] At twenty-four weeks, a fetus is considered "viable.[146]" So, if a mother suffers a catastrophic brain injury in the second week of her pregnancy that results in brain death, she will need to be kept on life-support for twenty-two

[141] Pikus, *supra* note 136, at 428.
[142] *Id.*
[143] Shah, *supra* note 133, at 338.
[144] Sperling, *supra* note 137.
[145] Stensvold, *supra* note 67.
[146] *Id.*

weeks or more for her baby to have a greater chance at survival than death. This is risky, comes with tremendous costs, and could potentially result in birth defects or abnormalities even if the pregnancy is successful.[147] In the examples from Part I, Karla Perez persisted for almost eight weeks, Robyn Benson persisted for almost six weeks, and the girl at Hacienda Healthcare in Phoenix lasted for several months. Still, their babies were all born prematurely.

F. *The Pregnancy Exclusion*

One potential result of the proposed constitutional standard is that it would overcome the hurdles pregnant women face due to "pregnancy exclusion" statutes. As mentioned in Part I, pregnancy exclusion statutes exclude pregnant women from using advance directives or living wills.[148] Often, these exclusions are in place to protect the rights of incapacitated pregnant women, and currently thirty-six states have statutes that either prohibit or restrict physicians from honoring a patient's advance health care directives to refuse life-sustaining treatment if they become pregnant.[149] The proposed standard recognizes a privacy interest in the right of incapacitated pregnant women to withdraw life-sustaining treatment.[150] In doing so, this standard could render "pregnancy exclusion" statutes unconstitutional. Advance directives or living wills could then serve as partial evidence of a woman's prior wishes regarding life-support. Also, the proposed standard could influence doctors and hospitals to include decisions regarding pregnancy in templates for advance directives or living wills, allowing women to have greater decision-making power should they become incapacitated.

---

[147] Flanagan, *supra* note 2, at 973.
[148] Villareal, *supra* note 82.
[149] Flanagan, *supra* note 2, at 971-72
[150] Jamie Hwang, *4 women challenge Idaho's 'pregnancy exclusion' for living wills*, ABA Journal, June 5, 2018, https://www.abajournal.com/news/article/four_women_challenge_idahos_pregnancy_exclusion_for_living_wills ("Pregnancy doesn't equal loss of your civil and constitutional rights").

G. *Autonomy*

Part II recognizes that the right to an abortion and the right to withdraw life-sustaining treatment are constitutional privacy interests, and that these interests exist because they are central to the preservation of individual autonomy. Autonomy helps to establish the zone of privacy that encompasses these rights. Moreover, the Supreme Court's recognition of autonomy shows it is often a determinative factor in whether something can be a constitutionally protected privacy interest. The proposed standard for the withdrawal of life-sustaining treatment is central to the preservation of individual autonomy for a couple of reasons. First, as mentioned in Part II, autonomy means that a person should be able to make their own choices.[151] Here, deferring to the prior wishes of the incapacitated patient based on clear and convincing evidence of those wishes preserves the right of this patient to have control over their body, despite losing the capacity to choose. Second, the principle of autonomy means that each person should have control over their own body.[152] By allowing clear and convincing evidence of a patient's wishes regarding the fetus to trump any government interest in preserving the life of the fetus, autonomy will have prevailed, and the patients will still able to have control over their bodies even after a loss of cognition.

CONCLUSION

In this analysis, I have attempted to define and discuss the medical practices surrounding situations where pregnant women suffer catastrophic brain injuries and are rendered either brain dead or in a persistent vegetative state. I have also discussed the related privacy interests protected by the Fourteenth Amendment's Due Process Clause, and have noted how the right to

[151] Channick, *supra* note 109, at 586.
[152] Schwartz, *supra* note 110, at 679-80.

an abortion and the right to withdraw life sustaining treatment are both constitutionally protected rights. Finally, I have offered the conclusion that because of the overlap between these two rights, there is a potential standard for the Supreme Court to adopt in cases where pregnant women are rendered incapacitated that is constitutional and defers to the interests of the patients themselves. The proposed standard recognizes the privacy interests of the incapacitated women and requires surrogate decision-makers to make decisions based on clear and convincing evidence of a woman's prior wishes regarding the acceptance or withdrawal of life-sustaining treatment with the knowledge that she is carrying a fetus. Mercifully, it is a standard that will not likely find application in a large number of cases, but for those cases in which such a standard is needed it will provide a measure of clarity and justice for which we might all be thankful.