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INTRODUCTION

On May 7, 2005, Susan Torres collapsed from a stroke owing to a cancerous tumor that had developed at the top of her spinal cord.[1] Soon after, doctors declared that she had suffered brain death.[2] In the forty-three other states that have adopted the Uniform Determination of Death Act, this meant that she was legally dead.[3] She was approximately seventeen weeks pregnant.[4] Her husband, Jason Torres, felt very strongly that his wife would

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1. Stephanie McCrummen, *Inside Stricken Mother, a Race Between Life and Death; Cancer That Felled Woman Now Threatens Fetus*, WASH. POST, June 17, 2005, at A1.

2. *Id.*

3. The Uniform Determination of Death Act was proposed by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, which followed the Harvard Medical School Ad Hoc Committee's recommendations in this matter and provided a model for legislating the brain-cessation criterion as legal death. PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MED. & BIOMED. & BEHAVIORAL RESEARCH, DEFINING DEATH: REPORT ON THE MEDICAL, LEGAL, AND ETHICAL ISSUES IN THE DETERMINATION OF DEATH 24, 53 (1981), http://www.bioethics.gov/reports/past_commissions/defining death.pdf. This model was endorsed by the American Medical Association and the American Bar Association, *id.* at 73, and has been adopted in various forms of legislation by forty-three states, NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM DETERMINATION OF DEATH ACT, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-udda.asp. Section 1 states that "[a]n individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead." UNIF. DETERMINATION OF DEATH ACT § 1, 12A U.L.A. 781 (1980).

4. Richard Willing & Wendy Koch, *'Devastating Loss': Baby Born to Brain-Dead Woman Dies*, USA TODAY, Sept. 12, 2005, at A1.

have wanted to be kept on life-sustaining treatment[5] to allow the fetus to reach at least twenty-five weeks, the earliest date doctors felt that a successful cesarean delivery would be possible.[6] In fact, the doctors maintained Susan Torres on life-sustaining treatment until the fetus reached twenty-seven weeks and was delivered, weighing one pound and thirteen ounces.[7] Tragically, the infant did not survive.[8] The Torres case is notable for its rarity: since 1979, English language medical literature contains only eleven cases of irreversibly brain-damaged women who have been maintained on life-sustaining treatment to benefit a developing fetus.[9] The Torres case is also notable for its lack of controversy.

Nineteen years earlier, Donna Piazzi was found in a public restroom, unconscious, not breathing, and sixteen weeks pregnant.[10] Eventually, doctors pronounced her brain dead.[11] Her husband asked that she be removed from life-sustaining treatment.[12] A second man, the undisputed biological father of the fetus, insisted that she be maintained on life-sustaining treatment.[13] The hospital sought a declaratory judgment in a Georgia Superior Court to continue treatment until the fetus reached viability and could be delivered via cesarean section.[14] The court granted the declaratory judgment.[15] Assuming Donna Piazzi did not have an advance directive expressing a contrary preference, and because the biological father was in favor of maintaining the mother on life-sustaining treatment, the result the court reached was likely the most appropriate.[16] The court's order, however, was not based on Donna Piazzi's or the

5. Richard Willing, *Woman Is Kept Alive to Save Unborn Baby*, USA TODAY, June 16, 2005, at A1. The Palliative Care and Ethics Committees at Froedtert Hospital in Milwaukee, Wisconsin define life-sustaining treatment as "[m]edical interventions used to prolong life," listing the following as examples: mechanical ventilation, kidney dialysis, artificial nutrition (feeding tubes, TPN), artificial hydration, medications for blood pressure support (pressors), antibiotics, blood products, and cardio-pulmonary resuscitation." PALLIATIVE CARE & ETHICS COMMS., MANAGING CONFLICTS CONCERNING REQUESTS TO WITHHOLD OR WITHDRAW LIFE-SUSTAINING MEDICAL TREATMENT 1, http://www.capc.org/tools-for-palliative-care-programs/clinical-tools/clinical-guidelines/withhold-conflict-mgmt.pdf.

6. Willing, *supra* note 5.

7. Stephanie McCrummen, *Brain-Dead Mother is Taken Off Life-Support*, WASH. POST, Aug. 4, 2005, at A1.

8. *Id.*

9. *Id.*

10. James M. Jordan, *Incubating for the State: The Precarious Autonomy of Persistently Vegetative and Brain-Dead Pregnant Women,* 22 GA. L. REV. 1103, 1108 (1988).

11. *Id.* at 1109.

12. *Id.*

13. Univ. Health Servs. Inc. v. Piazzi, No. CV86-RCCV-464 (Ga. Super. Ct. Aug. 4, 1986), *reprinted in* 2 ISSUES L. & MED. 415, 415 (1987).

14. *Id.* at 415-16.

15. *Id.*

16. *See id.* at 416.

biological father's preferences.[17] Rather, the court based its decision on the state's interest in preserving potential life.[18] The court held that Donna Piazzi's right of privacy was extinguished by brain death, that no one other than the pregnant woman can consent to the termination of pregnancy, and that the right to terminate life-sustaining treatment is suspended during pregnancy in accordance with the state's natural death statute.[19]

Thus, while the outcome may have been appropriate, the *Piazzi* court's legal conclusions effectively sanction the state to take possession of a brain dead pregnant woman's body for use as an incubator, regardless of whether her preferences or her family's preferences are to the contrary.[20] This article suggests a more appropriate methodology for courts to use in resolving conflicts over whether to maintain a post-mortem pregnant woman on life-sustaining treatment. Because of the rarity of post-mortem pregnancy and the consequent absence of case law on the matter, much of the proposed methodology results from analogy to related areas of the law.

Part I of this article endeavors to directly refute the *Piazzi* court's first holding by demonstrating that interests are not extinguished upon death; in fact, multiple legal premises rely on the legal fiction that the dead have interests deserving of posthumous protection. This Part concludes that the legal fiction extends to the interests of post-mortem pregnant women in refusing medical treatment. Part II proceeds by exploring two areas of the law in which the interests of pregnant women and the state are in tension: abortion and forced cesarean sections. This Part focuses on the rights and the temporal framework laid out in both the Supreme Court and lower courts' decisions and argues for their applicability in cases of post-mortem pregnancy. Part III articulates a proposed methodology courts should employ in cases of conflict over whether to remove a post-mortem pregnant woman from life-sustaining treatment, drawing on the abortion temporal framework and accounting for a post-mortem pregnant woman's interests, her family's interests, and the state's interests.

I. THE RIGHTS OF THE DEAD

For a dead man is popularly believed to be capable of experiencing both good and ill fortune – honor and dishonor and prosperity and the loss of it among his children and descendants generally – in exactly the same way as if he were alive but unaware or unobservant of what was happening.[21]

17. *See id.*
18. *Id.*
19. *Id.*
20. Jordan, *supra* note 10, at 1112.
21. DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES 16 (2008) (quoting Aristotle).

A. Legal Fiction

A proposed methodology for courts to use in resolving conflicts over post-mortem pregnancy must weigh competing interests. The first and most important question that courts must address is whether the post-mortem pregnant woman has interests that can be infringed upon by surviving parties or the state.[22] Many scholars have answered no.[23] These scholars argue that upon death, patients cease to be people in the eyes of the law, and thus their right to determine what happens to their bodies no longer exists.[24] Similarly, the *Piazzi* court held that a mother's right of privacy is extinguished upon brain death.[25] This Part argues that while brain death ends a person's existence, the law promotes the fiction that the dead retain interests, which command both respect and protection.

1. Philosophical Underpinnings

The posthumous retention of interests has engendered vigorous debate among philosophers.[26] Two in particular, Joel Feinberg and Ernest Partridge, have academically sparred over the concept.[27] While Feinberg and Partridge fundamentally disagree over whether the dead have "interests" that can be "harmed," they both arrive at the conclusion that the wishes and commitments of the dead should be respected, albeit via different routes.[28]

Feinberg asserts that the dead have interests capable of being harmed.[29] He claims that while the deceased cannot experience subjective satisfaction from the fulfillment of their wants, each individual has objective interests that survive beyond his existence.[30] Posthumous interests exist in relation to

22. Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 935 (1997).

23. *See* Nicola S. Peart et al., *Maintaining a Pregnancy Following Loss of Capacity*, 8 MED. L. REV. 275, 291 (2000); Daniel Sperling, *Maternal Brain Death*, 30 AM. J.L. & MED. 453, 479 (2004) (citing David R. Field et al., *Maternal Brain Death During Pregnancy: Medical and Ethical Issues*, 260 JAMA 816, 821 (1988)); Norman Fost & Laura M. Purdy, *Case Study: The Baby in the Body*, 24 HASTINGS CTR. REP. 31, 32 (1994).

24. Peart et al., *supra* note 23, at 291.

25. Univ. Health Servs. Inc. v. Piazzi, No. CV86-RCCV-464 (Ga. Super. Ct. Aug. 4, 1986), *reprinted in* 2 ISSUES L. & MED. 415, 418 (1987).

26. *Compare* JOEL FEINBERG, HARM TO OTHERS, THE MORAL LIMITS OF THE CRIMINAL LAW 83 (1984), *with* Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243, 243-44 (1981), Joan C. Callahan, *On Harming the Dead*, 97 ETHICS 341, 341-42 (1987), *and* Barbara Baum Levenbook, *Harming Someone After His Death*, 94 ETHICS 407, 409 (1984).

27. Feinberg, *supra* note 26.

28. Schiff, *supra* note 22, at 937, 939.

29. Feinberg, *supra* note 26.

30. Joel Feinberg, *Harm and Self-Interest*, *in* LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 285, 304 (P.M.S. Hacker & J. Raz eds.,1977).

other people.[31] In the case of defamation, posthumous defamatory statements can harm a dead person's interest in maintaining a good reputation because his interests extend to future events.[32] That is, a person's interest in the way others regard him is harmed when he is posthumously defamed.[33] Feinberg argues further that a person, alive or dead, can be harmed even if he is unaware of the harm.[34] He claims that a defamatory statement harms a living person's reputational interest even if the statement is made in a remote location and the subject of the defamation is unaware of the statement.[35] If the living can be harmed by statements of which they are unaware, certainly the dead can be harmed as well.[36] According to Feinberg, the interests of the dead are violated through defamation, broken promises, or the abrogation of wills.[37]

Partridge rejects Feinberg's posthumous harm theories as well as the idea that the dead retain interests, stating that "objective conditions are 'interests' only insofar as they matter to someone."[38] Further, once a person no longer has the capacity to gain or lose personal fulfillment from a relationship, he can no longer be affected.[39] As such, any relational interest is extinguished upon death.[40] Finally, Partridge claims that a person, alive or dead, cannot be harmed if he is unaware of the harm.[41] Partridge does concede, however, that there are other reasons for honoring the wishes of the dead aside from avoiding harm to their interests.[42] He claims that the living have a personal interest in respecting the dead, which he admits is "self-regarding."[43] If wills are routinely violated simply because the dead cannot be harmed, no one can feel secure that his own posthumous wishes will be respected.[44] Thus, while Partridge does not agree with Feinberg's theory that posthumous interests exist and are capable of being harmed, he does maintain that the interests of the living are best preserved by "posthumous respect."[45]

Whether one agrees with Feinberg or Partridge on the issue of "harm" to

31. *Id.* at 305.
32. *Id.*
33. *Id.*
34. *Id.* at 306.
35. *Id.*
36. *Id.*
37. *Id.*
38. Partridge, *supra* note 26, at 247.
39. *Id.*
40. *Id.* at 249.
41. *Id.* at 251.
42. *Id.* at 261.
43. *Id.* at 262.
44. *Id.* at 260-61.
45. *Id.* at 264.

posthumous "interests," the result with respect to effectuating the wishes of the dead is the same: both philosophers agree that the commitments and expressed preferences of the dead should be honored. [46] Feinberg arrives at this conclusion by asserting that the dead have interests;[47] Partridge does so by asserting that the mental well-being of the living is promoted through upholding the wishes of the dead.[48] Both philosophers thus seem to endorse the idea that legal institutions should maintain the fiction that the dead have interests so that the wishes of the living are respected after death.[49] In fact, Feinberg explicitly states, "if the idea of an interest's surviving its possessor's death is a kind of fiction, it is a fiction that most living men have a real interest in preserving."[50] The American legal system does, in fact, promote this fiction in numerous areas of the law.[51]

2. The Law of Wills

The law of wills exemplifies the legal system's promulgation of the fiction that an individual's interests survive death.[52] Wills provide individuals with autonomy in controlling their possessions after death, as exhibited by the freedom of testation, which "refers to the liberty which an owner of property has to dispose of his or her property after death to the persons or institutions the decedent prefers."[53] Further, the law does not grant courts the authority to question the decedent's decisions about how to allocate his property so long as the disposition does not violate an overriding rule of law.[54] The law thus respects the wishes of the living testator as to the disposition of his property after death and affords latitude

46. Schiff, *supra* note 22, at 935-37.

47. *Id.* at 935.

48. *Id.* at 939.

49. *Id.*

50. *Id.* at 937 (citing Joel Feinberg, *The Rights of Animals and Unborn Generations*, *in* PHILOSOPHY AND ENVIRONMENTAL CRISIS 43, 57-60 (William T. Blackstone ed., 1974)); *see also* Callahan, *supra* note 26, at 351-52 ("As for maintaining these fictions in our legal institutions, Partridge and Feinberg have offered several good reasons for keeping them—reasons which appeal to the interests of the living—and I see no cause for not letting these benefits and ways of showing respect to the living justify maintaining these fictions in our legal system.").

51. Schiff, *supra* note 2322, at 937.

52. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is given effect to the maximum extent allowed by law."); Callahan, *supra* note 26, at 351-52 (concluding that our legal institutions are well justified in maintaining the fiction that the dead retain interests that can be harmed).

53. Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 976 n.24 (1999) (citing WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES § 3.1 (1988)).

54. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (2003).

in deciding how to transfer his property.[55]

Clearly, if the dead have interests, as Feinberg claims, these interests will extend to the manner in which private property is transferred.[56] Abrogation of a deceased's will constitutes a harm to the deceased's interest in controlling his proprietary legacy.[57] Even if the dead do not retain interests, as Partridge argues,[58] the law of wills' respect for the wishes of the dead supports the interests of the living who want their wishes respected after death as well.[59]

Aside from the existence of posthumous interests or the interests of living testators, there may be other rationales for respecting the wishes of the dead through the law of wills. Perhaps the transfer of property through a will is simply the least objectionable arrangement for dealing with property after its owner's death. Or maybe respecting the wishes of dead donors supports the interests of a different subset of the living: the donees. All are plausible rationales, and it is unnecessary to choose just one. The important point is that by enforcing the testator's stated preferences regarding the disposition of his private property, the law of wills promotes the fiction that the dead retain interests, no matter the underlying rationale.[60]

3. Organ Donation

The Uniform Anatomical Gift Act (UAGA), adopted by all fifty states and the District of Columbia in some form,[61] operates similarly to the law of wills in that it authorizes a living person to make a gift of all or part of his own body after death.[62] This gift is made through a will or the execution of a document signed by the donor in the presence of two witnesses.[63] In the absence of a will or other document manifesting the decedent's intent, the UAGA grants families the power to donate their loved one's body after

55. Hernandez, *supra* note 53, at 976-77.

56. *See* Feinberg, *supra* note 30, at 306 (discussing the harm to a decedent's heirs in the event that his will is overturned).

57. *See id.*

58. Partridge, *supra* note 26, at 244.

59. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003); Partridge, *supra* note 26, at 261.

60. Callahan, *supra* note 26, at 352.

61. *See* REVISED UNIF. ANATOMICAL GIFT ACT annots. (amended 2006), 8A U.L.A. 33 (Supp. 2009) (adopted by thirty-four states). The other seventeen states adopted either the 1968 or 1987 version of the Act. *See* UNIF. ANATOMICAL GIFT ACT annots. (amended 2006), 8A U.L.A. 3, 69 (2003).

62. REVISED UNIF. ANATOMICAL GIFT ACT § 5 (amended 2006), 8A U.L.A. 65 (Supp. 2009); *see also* Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 378 (2000) (discussing the right under the Uniform Anatomical Gift Act to donate body parts through a will).

63. REVISED UNIF. ANATOMICAL GIFT ACT § 5 at 65.

death, provided there is no actual notice that the decedent had contrary preferences.[64]

Thus, the UAGA grants living individuals the autonomy to decide what will become of their bodies after death.[65] The fact that the law (and hospitals) respects these autonomous decisions postmortem, at least in theory, furthers the fiction that the dead retain interests.[66] Granted, the well-documented primary purpose behind the passage of the UAGA was to increase the supply of available organs for transplant to the living.[67] However, if increasing the supply of organs was the sole consideration behind the composition of the UAGA, arguably there would be less emphasis placed on the intent of the deceased donor. Rather, the UAGA emphasizes the autonomy interest of the decedent by promoting the decedent's expressed wishes regarding organ donation over the wishes of any other party.[68]

Organ donation laws, while contributing to the supply of organs available for transplant, promote the legal fiction that posthumous interests deserve protection.[69] This may be because the dead actually retain interests or because there is a psychological benefit to people in knowing that society will honor their wishes about the use of their bodies after death.[70]

4. Attorney-Client Privilege

The legal fiction of posthumous interests is also manifested in case law supporting the position that the attorney-client privilege survives the client's death. In *Swidler & Berlin v. United States*, Supreme Court Justices espoused the views of both Partridge and Feinberg, and a majority of the Court held that lawyers may not be compelled to reveal communications with clients in a criminal proceeding, even after the death of the client.[71]

Chief Justice William Rehnquist, writing for the majority, held a view

64. *Id.* § 9 at 78 (identifying the individuals, in order of priority, who can donate the decedent's body).

65. *See* Rao, *supra* note 62, at 379.

66. Schiff, *supra* note 22, at 929. There is evidence that when the donor's wishes conflict with those of the surviving family members, health care professionals routinely favor the family's preferences despite the fact that, under the UAGA, preferences of surrogates should not be considered dispositive when a donor has made his or her preference clear; *see* Bethany Spielman, *Surrogates and Respect for Donors*, 3 AM. J. BIOETHICS 18, 18-19 (2003) (arguing that while surrogates should not be completely excluded from the decision-making process, they should be consulted only when the donor has no directive or when the directive is unclear).

67. Schiff, *supra* note 22, at 928.

68. *Id.* at 928-29.

69. *Id.*

70. Lori B. Andrews, *My Body, My Property*, 16 HASTINGS CTR. REP. 28, 30 (1986).

71. Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998).

consistent with Partridge's position.[72] Chief Justice Rehnquist did not claim that the dead have the same interests or privileges as the living.[73] However, Justice Rehnquist laid out an important consideration in favor of applying the attorney-client privilege posthumously: living clients will want to guard against posthumous disclosure during their lifetimes owing to concerns about "reputation, civil liability, or possible harm to family or friends."[74] If confidential communications do not remain so after death simply because the client is no longer alive, then living clients will have less incentive to disclose confidential information to their lawyers.[75]

Justice Sandra Day O'Connor, writing for the dissent, held a view consistent with Feinberg.[76] In arguing that the decedent's reputational interest should be weighed against the law enforcement's need for information, Justice O'Conner stated that a decedent has such an interest: "In my view, a criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may . . . override a client's *posthumous interest* in confidentiality."[77] By protecting a client's confidential communications even after death, the attorney-client privilege appears to support the legal system's fictitious attribution of interests to the dead.

5. Defamation Law

Interestingly, although Feinberg uses defamation to demonstrate that the dead have interests,[78] no cause of action exists for defamation of the dead at common law.[79] In adopting the common law approach, courts have articulated three rationales for rejecting laws that would provide compensation for defamation of the dead: (1) the cause of action for defamation rests on harm to personal reputation, which does not survive death, (2) the limits of this cause of action would be difficult to establish, or (3) a cause of action for defamation of the dead would "chill" historical

72. *See id.* at 407; Partridge, *supra* note 26, at 261 (stating that the living expect their wills to be honored after death).

73. *See Swidler & Berlin*, 524 U.S. at 405 (holding that the attorney-client privilege survives death but not discussing other interests or privileges).

74. *Id.* at 407.

75. *Id.*

76. *Id.* at 412 (holding that the deceased maintain personal, reputational, and economic interests); Feinberg, *supra* note 30, at 304-05 (stating that the deceased maintain an interest in having a good reputation or in having their loved ones flourish).

77. *Swidler & Berlin*, 524 U.S. at 411 (emphasis added).

78. Feinberg, *supra* note 30, at 305-08.

79. RESTATEMENT (SECOND) OF TORTS § 560 cmt. a (1977) ("The interest of the descendants or other relatives of a deceased person in his good name is not given legal protection by the common law.").

research.[80] The first rationale, in particular, appears to refute the contention that the dead have interests.

While as many as twenty-one states have criminal defamation statutes,[81] many which retain the offense of "blackening the memory of the dead," these laws are not aimed at protecting the interests of the dead nor the "self-regarding" interests of the living by ensuring that they will not be defamed upon death.[82] Rather, these laws were designed to maintain peace and order as defamatory statements tend to incite violence.[83] Accordingly, truth was not considered a defense when criminal defamation laws were first promulgated.[84] After all, true defamatory statements could cause as much violence as false ones.[85]

Many scholars have called for the creation of a private right of action for defamation of the dead.[86] Some state legislatures appear to be heeding their calls, at least regarding defamation suits filed before a plaintiff's death.[87] At least ten states have statutes allowing the survival of all causes of action.[88] In half of those states, judicial interpretations of these survival statutes have allowed defamation actions to survive the plaintiff's death.[89]

Despite the existence of criminal defamation of the dead laws and a call for civil defamation of the dead laws in academia, private parties still have no recourse when the dead are defamed. At first glance, this state of the law

80. Lisa Brown, Note, *Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525, 1530 (1989).

81. Raymond Iryami, Note, *Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1083, 1109 (1999).

82. *See, e.g.*, COLO. REV. STAT. ANN. § 18-13-105 (West 2009) (making it a felony to "knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead"); IDAHO CODE ANN. § 18-4801 (West 2009); NEV. REV. STAT. ANN. § 200.510 (West 2008); N.D. CENT. CODE ANN. § 12.1-15-01 (West 2008); OKLA. STAT. ANN. tit. 12, § 1441 (West 2009); TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 2009); UTAH CODE ANN. § 45-2-2 (West 2009).

83. Iryami, *supra* note 81 at 1105-06.

84. *Id.* at 1105.

85. *Id.* at 1106.

86. Brown, *supra* note 80, at 1567; Iryami, *supra* note 81, at 1124; Florence Frances Cameron, Note, *Defamation Survivability and the Demise of the Antiquated "Actio Personalis" Doctrine*, 85 COLUM. L. REV. 1833, 1852 (1985). Such reform would likely occur at the state legislative level, similar to the development of wrongful death statutes. The common law did not recognize a private right of action for wrongful death but today, every state has enacted a wrongful death statute that enables specific beneficiaries to recover damages for losses resulting from the victim's death. Mamta K. Shah, Note, *Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life*, 29 HOFSTRA L. REV. 931, 933-34 (2001).

87. Cameron, *supra* note 86, at 1836.

88. *Id.*

89. *Id.*

appears to contradict the contention that the legal system promotes the fiction that the dead retain interests. After all, if this fiction exists, would it not extend to protection of the reputational interests of the dead? While this is a valid criticism, the absence of a private right of action for defamation of the dead does not eviscerate the legal fiction theory, but rather, limits its scope.

A key distinction exists between defamation and the other areas of the law examined thus far that promote the legal fiction of posthumous interests. The law of wills, the UAGA, and the attorney-client privilege all arguably promote respect for the dead's wishes and confidential communications. The living are then encouraged to create wills, sign donor cards, and confide openly in their attorneys while feeling psychologically secure that upon death, these actions and confidences will be honored. This is the so-called "self-regarding" approach that Partridge articulated; individuals respect the wishes and communications of others after death to ensure that their own wishes and communications will receive the same treatment after their own deaths.[90]

This "self-regarding" approach is inapplicable in the defamation context because the defamed individual took no action prior to death deserving of posthumous respect and protection. Abrogation of a will, unauthorized removal of organs, or disclosure of confidential communications directly violates what the deceased, while alive, explicitly or implicitly preferred and understood was to become of her property, body, and communications after death. In contrast, defamation violates no such preference or understanding. Most people likely do not want their reputation posthumously marred. Yet there is no document or privilege protective of that desire, creating the expectation that this preference will be honored after death.

The absence of a private cause of action for defamation of the dead may stand for the legal system's rejection of Feinberg's posthumous rights theories. However, it does not invalidate the legal fiction concept, but rather limits it to posthumous protection of interests that a living individual expects will be honored after her death. This legal fiction, thus limited, has important implications for post-mortem pregnant women.[91]

90. Partridge, *supra* note 26, at 261.

91. This legal fiction will also have important implications for recently deceased men in the context of sperm retrieval. Currently, there are no legal restrictions on post-mortem sperm retrieval, which means that a man's living preferences regarding procreation could be disregarded after his death. *See* Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J. L. & MED. 455, 459 n.42 (1999) (citing Schiff, *supra* note 22, at 923). This Paper is concerned with post-mortem pregnant women and accordingly will not address the related issue of post-mortem sperm retrieval.

B. Interests of a Post-Mortem Pregnant Woman

If the American legal system promotes the fiction that interests will be protected after death, this fiction should extend to the right to refuse medical treatment, even for pregnant women. In *Cruzan v. Missouri Department of Health*, the Supreme Court faced the question of whether the Constitution grants individuals the "right to die."[92] The Court declared guardedly that "the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."[93] The Court's answer was qualified because, while it assumed that the Constitution grants individuals the right to refuse "lifesaving hydration and nutrition," it simultaneously upheld a Missouri statute preventing withdrawal of life-sustaining medical treatment unless the individual's intentions were proved by clear and convincing evidence, which in the instant case, they were not.[94]

After the Court declared that a liberty interest in refusing unwanted medical treatment existed, Congress promulgated the Uniform Health Care Decisions Act (UHCDA) in 1993.[95] Only nine states have adopted the UHCDA,[96] however all states now have legislation governing the requirements of advance directives.[97] In most states, this legislation is known as the "Natural Death Act" or the "Living Will Act."[98]

An advance directive is very similar to a will; in fact, advance directives are commonly known as "living wills."[99] An advance directive enables a competent individual to make decisions about medical treatment should the individual become incompetent. This format should seem familiar; an individual is able to make future decisions regarding her health and codify these decisions in a document, which she can expect will be respected by the law as clear and convincing evidence of her intentions. While advance directives typically apply to the living yet incompetent, they are arguably triggered by brain death as well.[100] However, even if advanced directives do not apply to situations of brain death by their terms, the legal fiction of

92. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277 (1989).

93. *Id.* at 278.

94. *Id.* at 285.

95. Bretton J. Horttor, *A Survey of Living Will and Advanced Health Care Directives*, 74 N.D. L. REV. 233, 233-34 (1998).

96. UNIF. HEALTH-CARE DECISIONS ACT annots., 9 Pt. IB U.L.A. 49 (Supp. 2009).

97. Horttor, *supra* note 95, at 233.

98. *See id.* at 239-92 (surveying state advance directives).

99. *See id.* at 233, 293.

100. Janice McAvoy-Snitzer, Note, *Pregnancy Clauses in Living Will Statutes*, 87 COLUM. L. REV. 1280, 1294 (1987); *see also* Archimandrite Makarios Griniezakis, *Legal and Ethical Issues Associated with Brain Death*, 23:2 ETHICS & MED. 113, 114 (2007) ("Advanced directives do offer insight into whether or not a [brain dead] person wants to donate his/her organs, and it may even prohibit the use of life support.").

posthumous interests applies: the patient, while competent, created an advance directive regarding the physical care she desired with the expectation that it would be respected once she was no longer able to articulate those desires herself. Individuals have the "self-regarding" incentive to respect the advance directives of others to ensure that their advance directive will be honored as well.

Accordingly, the interest in refusing unwanted medical treatment extends posthumously to the brain dead, who, while competent, created an advance directive. The usual restriction on who can create an advance directive is limited to eighteen-year-olds of sound mind.[101] Consequently, upon brain death, any individual of eighteen years or older, who created an advance directive while of sound mind, has a posthumous interest in refusing unwanted medical treatment. This fiction extends to pregnant women who meet these criteria and thus have a posthumous interest in refusing unwanted medical treatment. This interest, however, is not unlimited, and like all interests, it must be considered against competing interests.

II. BALANCING TESTS

Courts regularly balance competing interests. In both the abortion and forced cesarean contexts, courts have assessed and weighed the interests of pregnant women against the interests of the fetus and the interests of the state.[102]

A. Abortion Precedent

Any discussion of post-mortem pregnancy will necessarily be informed by the United States Supreme Court's abortion jurisprudence. The Court has adjudicated challenges to state restrictions on a woman's right to terminate her pregnancy.[103] In these decisions, the Court has articulated the competing interests implicated by these state restrictions and applied a temporal framework to determine when certain interests dominate others. The Court first formulated this approach in *Roe v. Wade*[104] and later refined it in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[105]

1. Roe v. Wade

Under the pseudonym of Jane Roe, an unmarried woman, who wished to

101. *See* Horttor, *supra* note 95, at 239-92 (demonstrating that, in most states, only individuals of eighteen years or older may sign an advance directive).

102. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) (abortion); *In re* A.C., 572 A.2d 1235, 1237, 1251 (D.C. 1990) (forced cesarean).

103. *See, e.g.*, *Casey*, 505 U.S. 833; Roe v. Wade, 410 U.S. 113 (1973).

104. *Roe*, 410 U.S. at 164-65.

105. *Casey*, 505 U.S. at 878-79.

terminate her pregnancy, sought a declaratory judgment that the Texas criminal abortion statutes, which prohibited procuring or attempting an abortion except for the purpose of saving the mother's life, were unconstitutional.[106] The United States District Court for the Northern District of Texas ruled in Roe's favor but denied her application for injunctive relief under the abstention doctrine.[107] On direct appeal, the Supreme Court affirmed the district court's holding that the Texas criminal abortion statutes were unconstitutional because the Fourteenth Amendment's Due Process Clause implies a "right of privacy . . . broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[108]

The Court, however, held that this right of privacy, though broad enough to include a woman's decision to obtain an abortion, is not absolute; at a certain point, the right to privacy must be weighed against state interests.[109] The Court identified two relevant state interests as integral to this analysis: (1) the interest in preserving and protecting the health of the pregnant woman, and (2) the interest in the potentiality of human life.[110] Importantly, the Court referred only to the state's interests and explicitly rejected the notion that the unborn have interests under the Fourteenth Amendment.[111]

Because the Court found the right of privacy to be fundamental, any legislation regulating this right could only be justified by a "compelling" state interest.[112] The dual state interests at stake in the abortion context, health of the mother and potentiality of human life, were found to grow in substantiality the closer the woman grows to term.[113] At a certain point during the pregnancy, the state's interests become "compelling."[114]

In order to determine when that point occurs, the Court created a trimester framework:

> For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably

106. *Roe*, 410 U.S. at 117, 118, 120.

107. *Id.* at 122. The district court abstained from granting injunctive relief due to the federal policy against interference with state criminal investigations except in cases where statutes are attacked for curbing free expression or for discouraging protected activities, neither of which were alleged in this case. Roe v. Wade, 314 F. Supp. 1217, 1224 (N.D. Tex. 1970) (citing Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965)).

108. *Roe*, 410 U.S. at 122, 153.

109. *Id.* at 154.

110. *Id.* at 164-65.

111. *Id.* at 158.

112. *Id.* at 155.

113. *Id.* at 162-63.

114. *Id.* at 163.

> related to maternal health. For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[115]

The Court's decision in *Roe* was highly controversial and politically significant; the ruling affected laws in forty-six states.[116] While the decision has been the subject of much criticism in the twenty-five years since it was handed down, the central holding has been upheld, most notably by the Court's decision in *Casey*.[117]

2. Planned Parenthood v. Casey

In *Casey*, five abortion clinics, one physician representing himself, and a class of physicians who provided abortion services brought suit seeking declaratory and injunctive relief on the basis that five provisions of the Pennsylvania Abortion Control Act were unconstitutional.[118] The provisions included an informed consent rule with a twenty-four-hour waiting requirement, a parental consent rule, a spousal notification rule, and reporting requirements for facilities that provide abortion services.[119]

The United States District Court for the Eastern District of Pennsylvania held that all five challenged provisions were unconstitutional and entered a permanent injunction against the state's enforcement of the provisions.[120] The Third Circuit affirmed in part and reversed in part, holding all the provisions constitutional except for the spousal notification rule.[121]

A divided Supreme Court affirmed in part and reversed in part, expressly maintaining the three-part holding of *Roe v. Wade*.[122] First, pre-viability, a woman has the right to choose to have an abortion without undue interference from the state because the state's interests are not strong enough to support either the prohibition of abortion or the imposition of a substantial obstacle to the woman's right to obtain an abortion.[123] Second, post-viability, the state has the power to restrict abortions so long as the restrictions contain exceptions for pregnancies that endanger the woman's

115. *Id.* at 164-65.

116. William Mears & Bob Franken, *30 Years After Ruling, Ambiguity, Anxiety Surround Abortion Debate*, CNN, Jan. 22, 2003, http://www.cnn.com/2003/LAW/01/21/roevwade.overview/ ("In all, the Roe and Doe rulings impacted laws in 46 states.").

117. *Id.*

118. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844-45 (1992).

119. *Id.* at 844.

120. *Id.* at 844-45.

121. *Id.* at 845.

122. *Id.*

123. *Id.*

health or life.[124] Third, from the outset of the pregnancy, the state has legitimate interests in both protecting the health of the woman and the potentiality of life.[125]

The plurality reaffirmed the fundamental right of privacy, which "protects citizens against governmental intrusion in such intimate family matters as procreation, childrearing, marriage, and contraceptive choice"[126] and held that these principles were properly applied in *Roe* to encompass a woman's right to an abortion.[127] The Court went on to overturn the trimester framework laid out in *Roe* and in its place, created a temporal framework that draws a line at viability.[128] The result of the Court's decision is that pre-viability, a woman has the right to terminate her pregnancy.[129] However, the state has the concurrent right to protect its interest in the potentiality of life through measures designed to ensure that the woman's choice is informed, so long as these measures do not pose an undue burden on her right.[130] Post-viability, the state may promote its interest in the potentiality of life by regulating and even prescribing abortion except where the procedure is necessary to preserve the health or life of the mother.[131]

Applying this framework to the challenged Pennsylvania provisions, the plurality stated that the spousal notification provision violated the Due Process Clause of the Fourteenth Amendment by imposing an undue burden on a woman's right to terminate her pregnancy.[132] However, a majority of the Justices found that the remaining provisions did not present due process violations and upheld them.[133]

Roe's undisturbed identification of a woman's right to privacy, which includes the decision to obtain an abortion as well as the state's compelling interests in both the life of the mother and the potentiality of life, sets up a tension between individual and state interests almost identical to that which can arise in the situations of post-mortem pregnancy.[134] Importantly, the pre- and post-viability line elaborated in *Casey* provides an important framework that courts should apply in the post-mortem pregnancy

124. *Id.*
125. *Id.*
126. *Id.* at 926-97.
127. *Id.* at 927.
128. *Id.* at 870, 873.
129. *Id.* at 870.
130. *Id.* at 878.
131. *Id.* at 879 (citing Roe v. Wade, 410 U.S. 113, 164-65 (1973)).
132. The Supreme Court stated that due process is guaranteed by the Fourteenth Amendment. *Id.* at 869-70. The Court held that spousal consent is an undue burden, *id.* at 895, and that a state violates the Due Process Clause when it imposes an undue burden on a woman's ability to have an abortion, *id.* at 895.
133. *Id.* at 900.
134. Roe v. Wade, 410 U.S. 113, 154 (1973).

context.[135]

B. Forced Cesareans

Another line of cases with important implications for conflicts over post-mortem pregnancy deals with forced cesarean sections. Although rare, in these cases a pregnant woman will go against her physician's recommendation that she undergo a necessary cesarean section in order to protect the health of the fetus, the mother, or both.[136] The physician then turns to the courts to resolve the dilemma in what must inevitably be a hastily conducted proceeding.[137] In earlier cases, courts authorized the cesarean sections over the mother's objections in order to save the life of the fetus.[138] More recent cases, however, place a greater emphasis on the pregnant mother's right of privacy, including the right to refuse medical treatment.[139]

1. In re A.C.

A.C., a twenty-seven year old pregnant woman, was in the twenty-fifth week of a high-risk pregnancy when doctors discovered a malignant tumor in her lung.[140] As A.C.'s condition rapidly deteriorated, she agreed to palliative care including intubation and heavy sedation, which prevented her from communicating her preferences concerning her fetus.[141] The hospital requested the trial court to order a cesarean section.[142] The trial court ordered the cesarean, and the District of Columbia Court of Appeals denied a motion to stay the trial court order.[143] The cesarean section was performed, and tragically, both mother and child died shortly thereafter.[144]

The court of appeals ordered a rehearing en banc and vacated the trial court's order, holding that in almost all cases, the mother's decision whether to consent to a cesarean section should be respected.[145] The court

135. *Casey*, 505 U.S. at 870.

136. Eric M. Levine, *The Constitutionality of Court-Ordered Cesarean Surgery: A Threshold Question*, 4 ALB. L.J. SCI. & TECH. 229, 231 (1994).

137. *Id.* at 232.

138. *See, e.g.*, *In re* Jefferson v. Griffin Spalding City Hosp., 274 S.E.2d 457, 460 (Ga. 1981) (per curiam) (affirming a court order compelling cesarean section); *In re* Madyun, 114 Daily Wash. L. Rptr. 2233 (D.C. Super. Ct. 1986), *reprinted in In re* A.C., 572 A.2d 1235, 1259, 1264 (D.C. 1990) (requiring cesarean surgery to be performed for the benefit of the fetus).

139. *See, e.g.*, *In re* Baby Boy Doe, 632 N.E.2d 326, 332 (Ill. App. Ct. 1994).

140. *In re* A.C., 573 A.2d 1235, 1238 (D.C. 1990).

141. *Id.* at 1238-39.

142. *Id.* at 1238.

143. *Id.* at 1241.

144. *Id.*

145. *Id.* at 1237.

extended this holding to incompetent patients, reasoning that incompetents "have just as much right as competent patients to have their decisions made while competent respected."[146] Where a woman lacks decision-making capacity and her wishes are unknown, her decision should be ascertained through substituted judgment.[147] The court explicitly rejected a balancing test between the mother's interests and the fetus' interests and heavily emphasized the mother's right to forego medical treatment.[148] However, the court did concede that there may be certain rare instances in which the state's interests are so compelling that they force the mother's interests to yield: "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."[149]

2. In re Doe

The Illinois Appellate Court similarly refused to balance the mother's right to refuse medical treatment against the interests of her fetus.[150] In this case, Mother Doe, later identified as Tabita Bricci, refused to undergo a cesarean section when her doctors informed her that her fetus was receiving an inadequate supply of oxygen.[151] According to Mrs. Bricci's religious beliefs, it was wrong to terminate a pregnancy before term, even by cesarean section.[152] The circuit court refused to compel the cesarean and the Illinois Appellate Court unanimously upheld this refusal.[153] Mrs. Bricci fortunately delivered a healthy baby without the cesarean section.[154]

In this case, the Illinois Appellate Court held "that a woman's competent choice in refusing medical treatment as invasive as a cesarean section during her pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus."[155] The court based its decision on the common law right to refuse medical treatment as well as the constitutionally protected state right of privacy that extends to reproductive autonomy and bodily integrity.[156] The court referenced the exception from *In re A.C.* that in rare instances the state's interest may be so compelling as

146. *Id.* at 1246.
147. *Id.* at 1249.
148. *Id.* at 1247.
149. *Id.* at 1252.
150. *In re* Baby Boy Doe, 632 N.E.2d 326, 326 (Ill. App. Ct. 1994).
151. *Id.* at 327; Don Terry, *Newborn Settles Caesarian Fight a Mother's Way*, N.Y. TIMES, Dec. 31, 1993, at A12.
152. *In re Doe*, 632 N.E.2d at 327.
153. *Id.* at 328, 335.
154. *Id.* at 329.
155. *Id.* at 330.
156. *Id.* at 330-331.

to justify a cesarean section against the mother's will.[157] The Illinois Appellate Court did not find the instant case so extraordinary as to afford the state's interest such great weight.[158]

Notably, *In re Doe* involved a fully competent woman who repeatedly made her preferences known regarding the cesarean section procedure. The court did not have the opportunity to decide the arguably more difficult situation presented by a post-mortem pregnant woman. Nevertheless, the D.C. and Illinois forced cesarean decisions inform the methodology that courts should employ in these arguably more difficult situations.

III. PROPOSED METHODOLOGY FOR POST-MORTEM PREGNANCY

The foregoing sections stand for the propositions that: (1) the law creates a fiction of posthumous protection of those interests that a living individual expects to be honored after her death; (2) this legal fiction protects a post-mortem pregnant woman's interests in refusing medical treatment; and (3) this interest is not absolute—a court must weigh it against competing interests much as the courts do in abortion and forced cesarean cases. Because the Supreme Court has determined that viability establishes the point at which the competing interests scale tips in favor of a state's interest in the potentiality of life,[159] the methodology in this article advocates for resolving conflicts over post-mortem pregnancy within the pre/post viability framework.

A. Pre-Viability

A pregnant woman who suffers brain death before her fetus reaches the point of viability[160] deserves to have her interest in refusing medical treatment respected, provided that she articulates this interest while she is competent. The first Subsection will discuss the manner in which the courts should weigh the competing interests of the state with the interests of the mother when the mother has clearly stated her preferences regarding the refusal of medical treatment while pregnant in an advance directive. The

157. *Id.* at 332.

158. *Id.* at 334.

159. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878-79 (1992); Roe v. Wade, 410 U.S. 113, 164-65 (1973).

160. "Viability is defined as the ability of fetuses to survive in the extrauterine environment." Keith L. Moore & T.V.N. Persaud, The Developing Human: Clinically Oriented Embryology 103 (7th ed. 2003). "There is no sharp limit of development, age, or weight at which a fetus automatically becomes viable or beyond which survival is assured, but experience has shown that it is rare for a baby to survive whose weight is less than 500 gm or whose fertilization age is less than 22 weeks. Even fetuses born between 26 and 28 weeks have difficulty surviving, mainly because the respiratory system and the central nervous system are not completely differentiated." *Id.*

second Subsection will discuss the manner in which courts should weigh the competing interests of the state with the interests of the mother in the more likely scenario: when the mother has not created an advance directive, or has created one but without specifically addressing her pregnancy.

1. Preferences of the Mother Clearly Stated

When a pregnant woman includes a provision in her advance directive stating whether she wants to be maintained on life-sustaining treatment in the event of incompetency or brain death during her pregnancy, the court should uphold the mother's wishes, even if the consequence is the death of both mother and fetus. The mother's interest in refusing medical treatment deserves respect by both hospitals and courts. Although the mother is brain dead, she specifically provided for this situation in her advance directive and has an interest that the American legal system should protect. Concededly, the state also has an interest in the potentiality of life,[161] but because the fetus has not reached the point of viability, that interest is not yet compelling and does not trump the woman's interest in refusing medical treatment.

This outcome is inconsistent with the Natural Death Statutes of most states. Most Natural Death Statutes include a pregnancy clause, which states that an advance directive has no effect during pregnancy.[162] Indeed, only three states reference something similar to the point of viability in their pregnancy clauses.[163] In those three states, pregnancy nullifies the advance directive, but only if it is possible that the fetus could develop to the point of live birth with the continued application of life-sustaining treatment.[164] However, in light of the Supreme Court's decision in *Casey* regarding the State's weakened interests in the potentiality of life pre-viability, a substantive due process challenge to a Natural Death Statute's pregnancy clause that does not account for viability would likely be successful, as a pregnancy clause unduly burdens a woman's right to terminate her pregnancy through refusal of medical treatment.[165] Pre-viability, the state's interest in keeping a brain dead woman on life-sustaining treatment against her will is not compelling.[166] Accordingly, when a woman has explicitly made her preferences known regarding pregnancy in an advance directive,

161. *Casey*, 505 U.S. at 878-79.

162. Horttor, supra note 95, at 293.

163. *Id.* at 238, 257, 269. Those states are Arkansas, ARK. CODE ANN. § 20-17-206 (West 2009); Iowa, IOWA CODE ANN. § 144A (West 2009); and Nebraska, NEB. REV. STAT. ANN.§ 20-403 (West 2009).

164. *See, e.g.*, ARK. CODE ANN. § 20-17-206 (West 2009); Horttor, *supra* note 97, at 238, 257, 269 (setting forth Arkansas', Iowa's, and Nebraska's point of viability clauses).

165. Jordan, *supra* note10, at 1154.

166. *See id.* at 1154-55.

this preference should control.

2. Preference of the Mother Unknown

While doctors have attempted to increase the use of advance directives in recent years, only a small percentage of the population has prepared them.[167] Accordingly, it is unlikely that a post-mortem pregnant woman will have prepared an advance directive and even more unlikely that it will address what she wishes to happen in the event of pregnancy. Notably, neither Susan Torres nor Donna Piazzi had advance directives.[168] A treating physician should not assume that a woman who drafted an advance directive with no mention of pregnancy intended for it to control during pregnancy. It is unreasonable to hold that a woman necessarily considered the situation of brain death during pregnancy at the time of drafting her advance directive.

Likewise, neither should a physician assume that because a woman was pregnant at the time of brain death, she necessarily would have wanted the pregnancy continued after her death. The fact that a woman did not have an abortion prior to brain death does not mean she would have chosen to continue the pregnancy. The woman may not have wished to produce a motherless child and burden her grieving partner with the care of an infant. She may not even have a partner. Additionally, she may not have wanted to extend the grieving process for her family and friends who would witness her on life-sustaining treatment for weeks or months.[169]

This dilemma can best be resolved in much the same way that similar dilemmas are resolved in other end-of-life cases: through substituted judgment. The substituted judgment standard allows a surrogate to make the decision the surrogate believes the patient would have wanted.[170] This standard requires "that the surrogate's decisions correspond to what the incompetent patient would have preferred in advance of losing decision-making capacity had he or she given thought to the matter. Put most simply, the substituted judgment standard seeks to determine the now-incompetent patient's *probable* wishes concerning treatment."[171] Should the biological father be married to the post-mortem pregnant woman, he will likely play a key role in determining her probable wishes regarding her pregnancy as the surrogate.

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167. Glenn Cohen, *Negotiating Death: ADR and End of Life Decision-making*, 9 HARV. NEGOT. L. REV. 253, 283 (2004).

168. McCrummen, *supra* note 1, at A1; Jordan, *supra* note 10, at 1109.

169. D. GARETH JONES, SPEAKING FOR THE DEAD: CADAVERS IN BIOLOGY AND MEDICINE 98 (2000).

170. Alan Meisel, *Suppose the Schindlers Had Won the Schiavo Case*, 61 U. MIAMI L. REV. 733, 744-45 (2007).

171. *Id.*

Ideally, the physician, the biological father, and the post-mortem mother's other family members can reach a consensus regarding the post-mortem mother's probable wishes and the best course of action with regard to maintenance of, or removal from, life-sustaining treatment. Such was the case with Susan Torres, and thus there was no need to involve the courts. However, a trickier situation arises, as in the Donna Piazzi scenario, when such a consensus is not reached and the courts are consulted to resolve the dispute.[172]

In the *Piazzi* case, the biological father wanted the post-mortem mother to be maintained on life-sustaining treatment until the fetus could develop and be delivered by cesarean section.[173] The mother's husband wanted her removed from life-sustaining treatment.[174] Biological fathers cannot override a competent woman's autonomous decisions regarding whether to continue or terminate her pregnancy.[175] Additionally, the law disregards the biological father when it comes to cesarean sections and blood transfusions during pregnancy.[176] Accordingly, some scholars have argued that in cases of post-mortem pregnancy, the biological father's role should be limited to informing the inquiry as to what the mother would have wanted; he should not make the final determination.[177] When the post-mortem mother's wishes can be discerned and her judgment properly substituted without controversy or conflict, this approach is consistent with respect for her post-mortem interests regarding refusal of medical treatment.

However, when the post-mortem mother's wishes are in dispute or simply cannot be determined, as in the *Piazzi* case,[178] the biological father's interests and role are deserving of greater weight. When the mother is competent and making autonomous decisions regarding her pregnancy, or even when her wishes can be discerned through substituted judgment, her interests are known and deserve protection over the interests of the biological father.[179] However, when the mother's wishes are unknown and cannot be determined, her judgment cannot be substituted and her interests cannot be protected over the interests of the biological father. At that point, courts should defer to the judgment of the biological father, giving his

172. Jordan, *supra* note 10, at 1198.

173. Univ. Health Servs. Inc. v. Piazzi, No. CV86-RCCV-464 (Ga. Super. Ct. Aug. 4, 1986), *reprinted in* 2 ISSUES L. & MED. 415, 416 (1987).

174. *Id.*

175. Sperling, *supra* note23, at 491.

176. *Id.*

177. *Id.* ("The biological father should only be allowed to contribute to a full understanding of [the woman's wishes and ideology regarding the pregnancy] and should be allowed to *reflect* on these, *not determine* this understanding.").

178. *See Piazzi*, No. CV86-RCCV-464, *reprinted in* 2 Issues L. & Med. 415 (1987).

179. Sperling, *supra* note 21, at 491.

preference priority. If the biological father is not involved or chooses not to make the decision, it will fall to other family members. Such an approach would function similarly to the UAGA,[180] allowing family members to make end-of-life decisions for their loved ones in the absence of contrary preferences.

B. Post-Viability

A pregnant woman who suffers brain death after her fetus reaches the point of viability retains an interest in refusing medical treatment. However, at the point of viability, the state's interest in the potentiality of life, in accordance with *Roe* and *Casey*, becomes compelling and should be accorded more weight than the post-mortem mother's interest in refusing treatment. The framework provided by the *Casey* court mandates that post-viability, the state's interest in the potentiality of life must yield only if the continued pregnancy poses a danger to the health or life of the mother.[181] Obviously, in a situation involving a post-mortem pregnant woman, concern for the health or life of the mother is no longer a factor.

Should a conflict arise over whether to maintain a post-mortem pregnant woman on life-sustaining treatment post-viability, a court should resolve the conflict in favor of the state's interest in potential life and order that the woman be maintained on life-sustaining treatment until the fetus can be safely delivered. Such a resolution is consistent with the Supreme Court's abortion jurisprudence. Yet this resolution is not completely consistent with the case law surrounding forced cesareans. The court in *In re A.C.* found that it would be rare for a court to justifiably override a patient's wishes and authorize a major medical procedure.[182] Granted, in the majority of post-mortem pregnancies, the wishes of the mother will not have been stated in an advance directive and will have to be gleaned through substituted judgment. Even if the post-mortem pregnant woman provided for this contingency in an advance directive, however, the court should find that with post-viability, the scale tips in favor of the state's interest in potential life. This outcome appears to be mandated by the Supreme Court's decisions in *Roe* and *Casey*. Perhaps this is the type of rare instance the *In re A.C.* court envisioned when it stated that the state might be justified in overriding the patient's wishes, or perhaps not. Either way, the controlling decision handed down by the Supreme Court states that post-viability, the state has a compelling interest in the potentiality of life.[183] Such a

180. REVISED UNIF. ANATOMICAL GIFT ACT § 9 (amended 2006), 8A U.L.A. 78 (Supp. 2009).

181. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

182. *In re* A.C., 573 A.2d 1235, 1252 (D.C. 1990).

183. *Casey*, 505 U.S. at 846.

compelling interest trumps a post-mortem pregnant woman's interest in refusing medical treatment.

IV. CONCLUSION

On the rare occasions when courts are confronted with a conflict over whether to maintain a brain dead pregnant woman on life-sustaining treatment, they should employ a consistent methodology in resolving the conflict and avoid decisions based on rationales like the *Piazzi* court's, which essentially ignored both the wishes of the post-mortem mother and her family. Pre-viability, courts should respect the wishes of the pregnant woman, who retains interests after death in accordance with the fiction promulgated by the American legal system. These wishes may be manifested in an advance directive, but it is more likely than not that physicians will have to ascertain the post-mortem mother's wishes through the use of substituted judgment. In the event that no consensus is reached regarding her wishes, the decision of whether to maintain the mother on life-sustaining treatment should fall first to the biological father and then to the rest of her family. Post-viability, the post-mortem pregnant woman continues to retain an interest in refusing medical treatment; the state's interest in the potentiality of life becomes compelling at this point in the pregnancy, however, and will ultimately override her wishes to the contrary. Situations of post-mortem pregnancy, like those confronted by Susan Torres, Donna Piazzi, and their respective families, are tragic and thankfully uncommon. When they do occur, however, courts should be prepared to respect the rights of post-mortem pregnant women and their families. This article proposes a methodology for doing so.