UNLIMITED GOVERNMENT: WHEN CONSERVATIVE EFFORTS TO REGULATE WOMEN’S BODIES REACH BEYOND THE GRAVE

David R Quintanilla, London School of Economics and Political Science
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“We looked her in the eye and told her [we would let her go], and for the state of Texas, to not let us do that, was hard. You know, you want to keep your word to your loved one.”

-Erick Munoz

Marlise Munoz died on November 28, 2013. Her body was not allowed peace until over two months later. In the late evening hours of November 26th, Marlise’s husband, Erick, found her unconscious on the floor of their home. She had suffered a pulmonary embolism and had stopped breathing for hours. Erick and Marlise were both trained EMS technicians and thus Erick immediately tried to revive her. She was quickly taken to John Peter Smith (JPS) hospital where she was placed on a life support ventilator. The doctors were never able to revive her and she was officially pronounced dead on November 28th. Though her life had ceased, the tragedy of her story was just beginning.

Marlise was fourteen weeks pregnant when she died. The hospital refused to take her off of “life” support—even though she was dead—citing the Texas Advance Directives Act (TADA). The law contains a pregnancy exception that essentially holds advance directives do not apply to pregnant

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1 Brian Wiseman, NYT, Jan. 28, 2014.
3 Munoz v. JPS Hospital, Plaintiff’s First Amended Motion To Compel, Cause No. 96-270080-14, Jan. 23, 2014.
What unfolded after Marlise’s death was a sad reflection on the state of Texas and how little it respects women’s legal rights and their bodily integrity. Marlise’s story received international attention and had both legal and moral “experts” weighing in on the right course of action. A tumultuous legal battle ensued over whether or not the hospital should be allowed to discontinue the ventilator which kept oxygen flowing to her lungs. Marlise had communicated to her husband before her death that she would not want to be kept on life support in the event of a serious and irreversible injury. Erick instructed the hospital to cease medical attention to his wife’s body, but was told that her wishes would not be followed. In the end, Marlise was kept on a ventilator for over eight weeks before a judge finally ordered the hospital to end life support. The judge held that since Marlise was brain dead, per state law, she was legally dead. Consequently, the judge ruled that the law does not apply to the dead and that “life sustaining” measures should not be applied to Marlise any longer since she had died on November 28th.

The ruling ended a painful ordeal for the family, and a shameful period for Texas, but it revealed just how far some are willing to go to instill their beliefs on others, even the dead. Given the exceedingly uncommon existence of these types of cases, prior to Marlise’s tragic story, not much attention was been paid to the implications of TADA and its pregnancy exception; one study found only 30 similar cases reported in the US between 1982 and 2010. However, Marlise Munoz and her unborn fetus reinvigorated advocates on both sides of this issue. The firestorm of media coverage and political posturing ensured that the loudest voices were the ones that received the most attention. These individuals argued that Marlise should have been kept on life support (even, as we will see, knowing the extreme

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5 Supra note 1.
6 Munoz v. JPS Hospital, Judgment, Cause No. 96-270080-14, Jan. 24, 2014.
7 Id.
8 Esmaeilzadeh et al., One Life Ends, Another Begins, BMC Medicine 2010. I would argue that the key word above is “reported”. My belief is that unreported incidences are not as rare (but uncommon nonetheless) – there is no way of gathering hard data on that hypothesis.
deformities of the fetus!). They also claimed that the law should be “strengthened” so that in the future it will be clear to hospitals that they are refrained from ending life support even if the woman is brain dead.⁹

To be sure, lest anyone be unaware, Texas is a “conservative” state. The Republican Party has held a monopoly over state party offices for two decades and the party has only lurched further right with the growing influence of the Tea Party. The consequence has been a giant leap into social conservatism and an intrusion into peoples’ bedrooms, bodies, and life choices. Unsurprisingly, the policies enacted have affected women to a much larger extent than men. There is serious danger in allowing this course to continue. The Munoz family’s painful ordeal cannot be repeated.

In this article, I intend to display that the TADA is a misconceived and misguided law that treats woman as breeding machines and tissue incubators. Section I will offer a brief history of the TADA and its original aims. Section II will discuss the difference between brain death and a permanent vegetative state (PVS) as a tremendous amount of weight is given to the designation between the two. Section III will identify and discuss two of the numerous moral issues raised by Marlise’s story. Sections VI and V will lay out the legal case against the pregnancy exception of the TADA. I will argue that the law is unconstitutional as it violates the right to privacy and equal protection afforded under the Fourteenth Amendment. Moreover, I will show that the law attempts to overshadow clearly established legal intent under both federal and state laws.

I. The Texas Advance Directives Act

“A person may not withdraw or withhold life-sustaining treatment [] from a pregnant patient.”

-Texas Advance Directives Act, § 166.049

Advance directives are a relatively recent legal device. They essentially allow people to dictate certain decisions surrounding end-of-life care.¹⁰ A directive is a set of instructions given to specify what

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⁹ _Lieutenant Governor Candidates Say Muñoz Court Ruling Was Wrong_, FORT WORTH STAR TELEGRAM, Jan. 28, 2014.
actions should or should not be taken for one’s health if they become incapacitated or seriously ill and cannot make decisions for themselves. Most advance directives dictate an individual’s preference regarding whether or not they would choose to remain on life support in the event of a serious accident or disability—which is why directives are commonly referred to as “do not resuscitate” (DNR) documents.

Currently, all states allow some form of advance directive.\textsuperscript{11} Texas is one of about half the states that have some form of pregnancy exception.\textsuperscript{12} The Texas Advance Directives Act is contained in Chapter 166 of the Texas Health and Safety Code. The law reads in part, “a person may not withdraw or withhold life-sustaining treatment [...] from a pregnant patient.”\textsuperscript{13} The law also includes a standard form for creating a directive that includes the following disclaimer: “I understand that under Texas law this directive has no effect if I have been diagnosed as pregnant.”\textsuperscript{14}

One of the individuals tasked with helping to write the latest version of the TADA in 1999 stated that the law was modeled after the California Directives Act of 1977.\textsuperscript{15} Now a professor of Law at Southern Methodist University, Thomas Mayo, admitted that there was not much discussion surrounding the pregnancy exception and “that some academic commentary questioned the constitutionality of such provisions but that there was no general enthusiasm in favor of dropping the provision.”\textsuperscript{16} Essentially, it was understood that the pregnancy exception was necessary to mollify religious conservatives who were involved with the draft legislation. While the legislation appeased those groups most interested in its language, it failed to protect women’s liberty. What is clear however, is that the law was not intended to apply to corpses.

II. Brain Dead Versus Permanent Vegetative State

\textsuperscript{12} Id.
\textsuperscript{13} Texas Advance Directives Act, Health and Safety Code, § 166.049.
\textsuperscript{14} Id. at § 166.033.
\textsuperscript{15} Texas Law Didn’t Anticipate Muñoz Case, Drafters Say, FORT WORTH STAR TELEGRAM, Jan. 24 2014.
\textsuperscript{16} Id.
“The boundaries which divide Life from Death are at best shadowy and vague. Who shall say where the one ends, and where the other begins?”

-Edgar Alan Poe

Before evaluating the legal merits of TADA, it is important to draw a very clear distinction between brain death and what is known as a permanent vegetative state (PVS). Medical science has come a long way over the centuries, but we still lack a proper understanding of what exactly happens at death. Moreover, we have only recently begun to better understand when death occurs. What we do know is that there is a difference between what is commonly understood as brain death and PVS.

For millennia, death was usually determined by a cessation of breathing – if the person stopped breathing, they were dead. While a great deal has been learned about our biological processes over the past few centuries, a complete understanding of death may never be known – for obvious reasons. In the late 20th century however, efforts were made at having an established understanding and definition of brain death. One of the most well-known of these efforts was the 1968 Ad Hoc Committee of the Harvard Medical School to examine the definition of brain death. The committee aimed to lay out a protocol for which doctors and others in the medical professions could have consistent and accurate method for determining brain death. Their stated purpose was to “define irreversible coma as a new criteria for death.”

Over the years there has been a coalescence around much of the committees’ recommendations. It is now commonly accepted that brain death is “the irreversible loss of all functions of the brain, including the brainstem.” This is the ceasing of functions of both the higher and lower cortex. A person might still have spontaneous respiratory and circulatory functions, but no other brain functions, and still not qualify for brain death. The distinction is crucial when differentiating between brain death and PVS.

In Texas, the standard for determining legal death is found in § 671.001 of the Health and Safety Code. It states: “A person is dead when, according to ordinary standards of medical practice, there is

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18 See Goila and Perwar, The Diagnosis of Brain Death, Indian Journal of Critical Care Medicine, Jan 2009; see also, Calixto Machado, Diagnosis of Brain Death, Neurology International, Nov. 2010.
irreversible cessation of the person’s spontaneous respiratory and circulatory functions.” More specifically, for individuals placed on life support, the statute reads: “If artificial means of support preclude a determination that a person’s spontaneous respiratory and circulatory functions have ceased, the person is dead when...there is irreversible cessation of all spontaneous brain function.” This definition would not cover someone who is in a permanent vegetative state.

PVS is not brain death, but rather “complete unawareness.” The Multi-Society Task force on PVS described the condition as follows:

The vegetative state is a clinical condition of complete unawareness of the self and the environment.... In addition, patients in a vegetative state show no evidence of sustained, reproducible, purposeful, or voluntary behavioral responses to visual, auditory, tactile, or noxious stimuli; show no evidence of language comprehension or expression; have bowel and bladder incontinence; and have variably preserved cranial-nerve and spinal reflexes.

We define persistent vegetative state as a vegetative state present one month... or lasting for at least one month....

One way of understanding the difference between brain death and PVS is that with brain death the brain is not able to send any signals to other organs to continue functioning properly – if life support is turned off, the person will die quickly; whereas with PVS the brain might be able to send signals that allow organs to function, but there is no consciousness, feeling, or awareness whatsoever.

In Texas, “[d]eath must be pronounced before artificial means of supporting a person’s respiratory and circulatory functions are terminated.” We make several end of life legal and medical decisions based on the nuance contained between these two biological states – no doubt, as long as there

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20 Id.
22 Id.
is a pregnancy exception contained in the Texas Advance Directives Act the distinction is tremendously important. The judge in Marlise’s case correctly held that the law could not apply to a dead person, but it is unknown whether the same holding would have been reached if Marlise was completely and irreversibly unconscious, but not technically brain dead.

III. Moral Implications

“The notion that human life is sacred just because it is human life is medieval.”

-Peter Singer

The moral issues raised by the brain death or PVS for a pregnant patient are numerous and profound. Several dissertations could spring forward from pregnancy exceptions and the moral dilemmas that arise from them. Marlise’s story in particular could lead to a thoughtful discussion on abortion, euthanasia, gender equality, questions of when life begins, religious interpretation, and many others. Though this is a legal analysis of the TADA, I will very briefly discuss two moral issues I consider distinctly important.

a. Sanctity Of Life Versus Quality Of Life

The idea that all life is precious and thus has equal value is both shortsighted and naïve. I think most people would agree with the first part of the statement, that all life is precious, but what does that really mean? We value life, and we should as it is a precious thing. But if you take the idea that all life is equal to its logical conclusion, things are not so simple. Is the 10-year-old boy equal to the 85-year-old dying man? Is the healthy young woman equal to the elder lady dying a slow, painful death from emphysema? More specifically, is an individual with no lucidity, awareness, or personality equal to an individual who is fully conscious? Is a newborn with anencephaly (missing a major portion of the brain) equal to a healthy newborn child? The discomfort to these questions arises from the need to compare one life against another. But what is it to compare “life”? 
As mentioned above, with brain death there is no brain activity and the person is deceased. With PVS, there is no consciousness, feeling, or awareness. This begs the question, is the person really alive if they have no consciousness or feeling and they will never awake? This issue has been the focus of many philosophical, legal, and medical works. Peter Singer, in his insightful book, Rethinking Life and Death, challenges the traditional “sanctity of life” approach that permeates our cultural norms. He asks, for example, why we allow certain measures to be taken by a brain dead individual who is irreversibly unconscious but not for someone with PVS who is just as irreversibly unconscious. It is not a subtle point. Though a complete and thorough philosophical discussion of that question is beyond the purview of this paper, a guiding principle for the legal analysis that follows is that a person is not truly alive if they are in a permanent vegetative state.

b. Neonatal Euthanasia

In a similar vein, there is a disconnect between ideology and reality with the notion that all life is to be protected beginning at conception. Pregnancies are complicated. They do not all result in healthy babies after nine months. Many pregnancies end in a miscarriage, nature’s way of terminating a pregnancy. Sometimes babies are born severely deformed or handicapped and do not live but for a few days or even hours. The problem is that we possess a need to draw a clear distinction about what is life and what is not, so as to feel confident in protecting life where we believe it begins. For many it is at conception, for others it is at birth. But these designations have undesirable consequences when played out.

If a medical test identifies a thirty week fetus as severely deformed with medical conditions that are both painful and fatal to the fetus, many people, even some “pro-life” people, would agree that terminating the pregnancy is acceptable and possibly even the morally correct thing to do. However,

24 There have been cases where a person in a PVS has “awoken”, but it is exceedingly rare and for our purposes, the issue is whether a person in that state should have the ability to choose whether or not they should have any medical support, regardless of whether or not they might awake.

many of those same people might disagree that it is acceptable to euthanize a baby born severely deformed, in writhing pain, who only has a life expectancy of two to three weeks. The problem again is that we place arbitrary boundaries on what is acceptable and what is not. For the sanctity of life adherents, the belief is that life begins at conception, regardless of what science and medical research teaches us about biology, brain activity, and personality. They cannot prove that human life begins at conception based on any scientific foundation, but to many this is beside the point. For others, abortion is justifiable as a woman’s right to choice, but infanticide is never acceptable. Here the line is drawn at birth. But even this mindset reveals a shortsighted approach. Is it moral to terminate a perfectly healthy fetus, but not to euthanize a severely deformed newborn that is in perpetual pain? A mother who asked that medical assistance not be used to keep her newborn alive, but was rejected by the hospital, stated this situation thusly: “A woman can terminate a perfectly healthy pregnancy by abortion at 24 ½ weeks and that is legal. Nature can terminate a problem pregnancy by miscarriage at 24 ½ weeks and the baby can be saved at all costs; anything else is illegal and immoral.”26 One author discussing these issues stated it this way: “it is [] hoped that one might [] clearly appreciate that not allowing neonatal euthanasia in cases of babies who are born ‘severely retarded or damaged, mentally or physically’ is not necessarily the most humane thing to do, but certainly quite arbitrary, inconsistent and, perhaps, morally unforgivable.”27

With regards to the pregnancy exception contained in the TADA, the issue I hope to have illuminated with this section is that protecting life at all costs is both overly simplistic and, at times, morally unjustified. Though the remainder of this paper will review the TADA through a legal framework, the underlying moral foundation stated here permeates the discussion.

IV. Legal Implications

“If the machine of government is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law.”

26 Id. at 83–84, quoting Peggy Stinson.
The pregnancy exception contained in the Texas Advance Directives Act is a direct attack on women’s rights. Even granting that the life of an unborn child demands certain protections, this law obliterates proper ethical standards that are protected by the U.S. and Texas Constitutions as well as state and federal laws. The pregnancy exception is a violation of both a woman’s constitutional right to privacy and her right to equal protection. Moreover, the exception runs counter to abortion statutes as well as certain portions of the TADA itself. First however, it is tremendously important to evaluate the claims made by JPS and others throughout the tragic ordeal of the Munoz family.

a. The TADA Does Apply to Dead Person

It is incontrovertible that Marlise died on November 28, 2014. After the doctors at John Peter Smith (JPS) Hospital pronounced her brain dead, Marlise was no longer alive, medically or legally. Even ardent supporters of JPS’s decision not to cease life support admitted that there was tension created by the TADA and the legal requirements for death written into law. State Senator Dan Patrick, a professed Tea Party social conservative stated, “I think we have to change the law… we have conflicting statutes.”

In reality, there was no conflict of law, but rather a brazen attempt to force a square peg into a round hole. The law was never meant to apply to the dead.

JPS, represented by the district attorney, admitted that Marlise was in fact dead, but that the law should still apply given the intent of the language. Their primary claim was that the law was “enacted to protect the unborn child against the wishes of a decision maker who would terminate the child’s life along with the mother’s.” Basically, they claimed that the law should apply to the baby, not the mother. Though it is clear on its face that that the pregnancy exception was intended for the unborn, the law was not written specifically for them. The law was written to provide guidance and restrictions on creating

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28 Lieutenant Governor Candidates Say Muñoz Court Ruling Was Wrong, FORT WORTH STAR TELEGRAM, Jan. 28, 2014.
29 Defendant’s Brief in Response to Plaintiff’s Motion to Compel, Munoz v. JPS Hospital, Cause No. 96-270080-14, Jan. 23, 2014.
30 Id.
advance directives (as well as liability protection for doctors and hospitals), not to circumvent established legal and ethical standards of medical care. The TADA specifically states in § 166.032 that only a competent adult may create an advance directive.\textsuperscript{31} Moreover, the exception applies to “pregnant patients” not corpses. Mr. Mayo, who helped draft the law recently stated, “there is not a problem with the statute; there is a problem with the application of the law to a patient that is no longer alive.”\textsuperscript{32}

The judge hearing the case made no comment except to say the pregnancy provisions of the TADA “do not apply to Marlise Munoz because, applying the standards…of the Texas Health and Safety Code, Mrs. Munoz is dead.”\textsuperscript{33} He did not determine whether or not the law could withstand constitutional challenges. I believe that the text of the U.S. and Texas Constitutions, as well as established case law show that it could not.

b. Unconstitutional Infringement of Privacy Rights

The Fourteenth Amendment of the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”\textsuperscript{34} The Texas Constitution states in Article 1, Section 19 that “No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law.”\textsuperscript{35} The U.S. Supreme Court in a litany of cases, spanning centuries, has held that a fundamental right to privacy is protected under the “penumbras” of the Fourteenth Amendment.\textsuperscript{36} The court has also determined that a right to privacy is protected at common law. The Court held in \textit{Union Pacific Railroad Co. v. Botsford} that “[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of

\textsuperscript{31} Texas Advance Directives Act, Health and Safety Code, § 166.032 (1999).
\textsuperscript{32} \textit{Texas Law Didn’t Anticipate Muñoz Case, Drafters Say}, FORT WORTH STAR TELEGRAM, Jan. 24 2014.
\textsuperscript{33} \textit{Munoz v. JPS Hospital}, Final Order, Jan. 24, 2014.
\textsuperscript{34} US CONST. AMEND. XIV.
\textsuperscript{35} TEX. CONST. ART. I, § 19.
every individual to the possession and control of his own person, free from all restraint or interference of others.”\(^{37}\)

i. A Woman’s Privacy Rights Balanced Against The Protection of Unborn Life

In Roe v. Wade, the seminal abortion case in the U.S., the Supreme Court held that the right to privacy is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”\(^{38}\) The court struck down the Texas law restricting abortion as too extreme.\(^{39}\) It declared that the right to privacy was not absolute, but that it must be balanced against “compelling” state interests. Two interests were specified: 1) “preserving and protecting the health of the pregnant woman” and 2) “protecting the potentiality of human life.”\(^{40}\) It was clear that there was a tension in protecting the fundamental right to privacy as well as potential life. The court stipulated a rigid trimester scheme to delineate when the right to privacy would effectively trump the protection of potential life.

In Casey v. Planned Parenthood of Pennsylvania, the court eliminated the trimester scheme and established an undue burden test utilizing “viability” as the marker for allowing greater state restrictions. The protection of unborn life after viability could allow a state to eliminate a woman’s right to choose an abortion (with certain exceptions, i.e. health of the mother, rape, incest, or fetal deformity). Prior to viability, measures to protect a fetus could only be sought so long as it did not pose an undue burden on a woman’s right to privacy. The court was sure to reemphasize that individuals have a fundamental right to medical autonomy, which is the ultimate exercise of one’s right to privacy.\(^{41}\)

As to the legal status of unborn life, the court has clearly stipulated that there is a state interest in the protecting a fetus, however, the interest does not rise to the same level as protecting a living person. In Roe, the court held that the word “person” as used in the Fourteenth Amendment does not include the

\(^{39}\) Id.
\(^{40}\) Id.
unborn. In other words, whether viable or not, a fetus is not afforded the same protections as a living person. Irrespective of any compelling state interest in protecting potential life, this differentiation is crucial to an analysis of whether or not pregnancy exceptions in advanced directives pass constitutional muster. The differing legal statuses become increasingly important when we consider the rights afforded to people to refuse unwanted medical treatment.

In several cases in the U.S., courts have upheld a woman’s right to privacy and medical autonomy, even when doing so might endanger a fetus. In *In re Fetus Brown* the Illinois Appellate Court held that “the state may not override a pregnant woman’s competent treatment decision, including refusal of recommended invasive medical procedures, to save the life of a viable fetus.” These cases, along with the protections afforded to woman from *Roe* and *Casey*, and the legal status of the unborn, display that the pregnancy exception contained in TADA abridges the right to privacy guaranteed to all, including woman.

ii. The Ability To Refuse Life Sustaining Treatment

In 1976 the New Jersey Supreme Court held that individuals may decline medical treatment, even with substituted judgment. As other state courts followed suit the U.S. Supreme Court finally waded into the discussion in the pivotal case *Cruzan v. Director, Missouri Department of Health*. The case involved a woman, Nancy Cruzan, who was involved in a car accident and severely injured. It was determined that she was in a permanent vegetative state with no hope of ever recovering consciousness. Her family fought to have her taken off life support as they claimed she would not have wanted to remain in such a state if she could choose. The court held that an incompetent person may be removed from life-sustaining treatment if a court could determine that it would have been the person’s wishes prior to

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becoming incapacitated. The court reinforced that competent individuals have a “constitutionally protected liberty interest in refusing unwanted medical treatment” and if, by clear and convincing evidence, a trial court could establish that the individual would not want to remain on life support, then their wishes should be followed.

Though some advocates of personal liberty were discouraged by the *Cruzan* ruling, arguing that the “clear and convincing standard” was misconceived, the lasting effect of the ruling was to solidify legal approval of substituted judgment for incapacitated persons. In 1982, an influential presidential report, commissioned by then President Regan also helped to pave the way for allowing certain classes of people to make medical decisions, even those affecting end of life care, for incompetent patients. The report stated, “the authority of competent informed patients to decide about their health care encompasses the decision to forego treatment and allow death to occur…. When patients are incompetent to make their own decisions, others must act on their behalf.” Most advanced directive statutes now incorporate language allowing the use of a proxy should the patient not have a written directive.

In Texas the TADA specifies that a proxy may be allowed to make decisions on behalf of an incompetent patient. The statute reads:

If an adult qualified patient has not executed or issued a directive and is incompetent or otherwise mentally or physically incapable of communication, the attending physician and the patient’s legal guardian or an agent under a medical power of attorney may make a treatment decision that may include a decision to withhold or withdraw life-sustaining treatment from the patient.

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46 *Id.*
48 *Texas Advance Directives Act, Health and Safety Code, § 166.039.*
The statute goes on to say that a spouse or other close relative could also make decisions on behalf of the patient. Importantly, the statute also specifies that lacking a written directive does not create a presumption that the person would have desired to continue life support indefinitely.\textsuperscript{49} In other words, lacking a directive should not have any bearing on whether a proxy may make decisions for the patient, or whether a treating hospital should refrain from ending life support.

The language of the U.S. and Texas Constitutions guarantee a right to privacy. The Supreme Court has held 1) that a woman has a fundamental right to privacy that restricts an undue burden on her decision to have an abortion prior to viability \textit{(Roe, Casey)}\textsuperscript{1}; 2) that individuals have a sacred right to control their own bodies and to be free “from restraint or interference of others” \textit{(Union Pacific)}\textsuperscript{2}; and 3) that individuals hold a protected right to refuse unwanted treatment \textit{(Cruzan)}. Additionally, the language of the Texas Advance Directives Act makes plain that the intent is to allow people the right to make prospective decisions regarding their medical treatment.

When placing these protections against the pregnancy exception in the TADA, the exception simply cannot withstand legal scrutiny. First, the exception infringes on a woman’s right to bodily integrity. If the state forces unwanted medical procedures and invades the body of a woman against her (and/or her properly designated loved one’s) wishes, how can that not be an invasion of something sacred? Call it privacy, call it personhood, call it whatever you like, it is an invasion by the state over a woman’s body. Even granting that a woman might in some situations have a moral obligation to accept certain medical treatments for the benefit of her fetus, it is imperative to understand that the issue here is what the state may allow or forbid with regards to a woman’s body. As one author correctly and powerfully stated it:

\begin{quote}
[Though a moral duty might exist for the woman] it is another thing altogether [] for the state to transform a woman’s complex moral obligations into an absolute legal duty to
\end{quote}

\textsuperscript{49} \textit{id.}
keep [a] fetus alive by undergoing life-prolonging medical intervention. To do so destroys the pregnant woman’s most basic constitutional liberty to avoid state-compelled bodily invasions that might cause her physical and emotional pain and suffering.\textsuperscript{50}

c. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment commands that no state may “deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{51} The Equal Protection Clause has long been employed to protect against gender discrimination. In a nation where women continue to make only $0.77 for every dollar earned by a male counterpart for doing the same work,\textsuperscript{52} a gap continues to exist across many spectrums for men and women. Nowhere is this gap more poignant, or dangerous, than in statutes such as the Texas Advance Directives Act – which refuse to cede control of a woman’s body to the woman herself.

There are three primary equal protection issues raised with pregnancy exceptions like those contained in the TADA. First, the statute clearly defines two classes of persons – those who are, or could become, pregnant and those who cannot become pregnant. In other words, the statute separates men from women in determining who may have a fully enforced directive. Second, the pregnancy exception offers certain protections to the unborn that do not exist for living individuals. Third, as we will see, the law discriminates between competent and incompetent woman.

i. Gender Discrimination

Equal protection under the law ensures that the state itself does not discriminate against its citizens without proper basis.\textsuperscript{53} The TADA clearly treats men and women differently. The U.S. Supreme Court has determined that equal protection claims involving gender discrimination are to be decided utilizing “intermediate” scrutiny. Intermediate scrutiny demands that the state government must prove its

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\textsuperscript{51} \textit{US Const. Amend. XIV.}
\textsuperscript{53} \textit{US Const. Amend. XIV.}
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classification (discrimination) is substantially related to an important government interest.\textsuperscript{54} In \textit{U.A.W. v. Johnson Controls Inc.}, the Supreme Court held that “the pregnancy distinction classify[s] on the basis of gender and childbearing capacity.” Though intermediate scrutiny would appear a high bar for pregnancy exceptions to overcome, in application, equal protection afforded to women under the Fourteenth Amendment have been much less powerful than the protections given to racial minorities and illegal aliens.

Unfortunately, equal protection is not always applied… equally. Many courtrooms continue what can only be construed as a discriminatory application to gender claims. A pending case in Tennessee shows how tremendously unequal certain courts treat women. A federal judge is considering a longer sentence for a woman because of the fact that she was pregnant while involved in meth distribution ring. She currently faces up to 12 years in prison because of her involvement, however, a U.S. district judge is considering increasing her sentence to 24 years – because she endangered her fetus.\textsuperscript{55} Her male counterparts are completely spared this possibility. “Between 1973 and 2005, there have been 413 documented cases in which a woman’s pregnancy was a necessary factor in criminal charges brought against her by the state.”\textsuperscript{56} In addition to the legal conundrums that face women solely because of their (possible) pregnancy, equal protection challenges based purely on gender do not appear to be on a firm footing. However, there still exists a serious, valid argument based on gender discrimination.

Borrowing partially from a previously written hypothetical,\textsuperscript{57} I offer the following scenario: Suppose that a man has a young son who has been diagnosed with leukemia. The son will die within a few weeks if he does not receive a bone marrow transplant. The father is the only match available to the son and thus is the only person who can save his life. Suppose also that the father, because of religious reasons, chooses not to go through with the transplant, believing that God will heal his son. Even though

\textsuperscript{54} Craig v. Boren, 429 U.S. 190 (1976)
\textsuperscript{56} Id.
\textsuperscript{57} Joan Mahoney, \textit{Death with Dignity: Is There an Exception for Pregnant Women?}, 57 UMKC L. Rev. 221, 223 (1989).
the man might have a moral obligation to consent to the transplant, no court could or would force him to undergo the procedure. The man has left an advance directive making it known that he does not wish to be kept on life support in the event of a serious, non-reversible medical condition. Tragically, the man has a pulmonary embolism and has entered a permanent vegetative state. His wife, seeking to carry out his wishes instructs the doctors to remove the man from life support. Suppose, against the wishes of the wife, the hospital seeks a court order to keep the man on life support so that they can prepare his body for a transplant. No court would allow the order. Moreover, even if there was no advance directive, and even given that there seems to be a clear moral obligation on the part of both parents to allow the operation, a hospital would not be able to overrule the instructions of the man’s wife. The result, either with or without a directive, would be to allow the man, and by extension the boy, to die.

For Marlise, who was fourteen weeks pregnant at the time of her death, a completely different process unfolded. Even though she was dead on November 28th, the hospital was able to continue “life-sustaining” ventilation for another eight weeks until a court ruled against it. This would not have happened with a man in the condition outlined above. He would have been taken off life support immediately after review of his directive or after consultation with the wife if there was no directive. Moreover, if Marlise would have been in a permanent vegetative state, applying the pregnancy exception in the TADA would have possibly allowed the hospital to keep Marlise on life support indefinitely – until the baby naturally miscarried or was born. Does this appear to be equal protection under the laws? It clearly does not. The TADA as written infringes on women’s equal rights which are explicitly protected by the U.S. and Texas Constitutions.

ii. Denying Equality To The Living

In addition to the equal protection claims against the TADA based on gender discrimination, there is also a claim based on unequal treatment of two separate classes of persons – the unborn and the living. By including the pregnancy exception, the law allows for certain protections to be made on behalf of the unborn that are not made for living individuals – even “innocent” children. The constitution
ensures that all people are given equal protection under the law. However, the TADA creates the strange condition of failing to give equal protection to “persons” in favor of “non-persons.”

The basis for the pregnancy exception, and of course restrictions on abortion, are often rooted in the idea that all life should be protected, even the unborn. It seems strange that the freedom loving social conservatives who typically shout the loudest when it comes to these issues, promote on the one hand, a “live-free-or-die” approach to governance, yet on the other hand also advocate for ridiculous intrusions upon a woman’s body. Working to create laws that protect unborn life (which affect only woman) while shunning state action that would force similar intrusions to protect the living (affecting women and men) is ludicrous.\(^{58}\) I do not intend to argue that the state should begin forcing individuals (even parents) to undergo possibly painful or harmful procedures for the benefit of another, but rather that we should not be forcing woman to sacrifice their bodily integrity on behalf of a non-person. Of course the response to this is simply to claim that a fetus is a person, plain and simple – which it is not.

Advocates of the “sanctity of life” belief have been effective at supporting their position through legal action. Several courts across the country have found certain tortious and criminal actions arising from harm to a fetus. For instance, the Texas Penal Code Ann. § 1.07 defines an individual as “a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.” Accordingly, if a person harms or murders a pregnant woman the perpetrator will be liable for both the harm to the mother and to the unborn child. However, criminal and tort laws considering the unborn as human for the purposes of liability, do not result in constitutional fetal protection. Katherine Taylor, in her excellent critique of pregnancy exceptions succinctly laid out the following problems with trying to make a correlation between certain laws that consider life beginning at conception and constitutional protections:

\(^{58}\) This is similar to the shockingly contradictory positions of social conservatives who are willing to go to almost any end to protect the unborn – even advocating terribly invasive policies – but are tremendously quick to rail against many of the welfare protections that assist those very children once they are born.
Tort and criminal actions based on fetal injury do not prevent constitutionally protected, arguably justified actions in advance that might harm the fetus, but apply only to unjustified, harmful actions already completed. In addition, criminal or civil sanctions for fetal injury were initially intended to protect the interests of the mother, or parents, in the health of their child. Third party actors stand in a different relationship to the fetus than a pregnant woman, who, again, has at stake her critical liberty interest in bodily integrity.⁵⁹

Most importantly, however, the fact remains that to the U.S. Supreme Court has ruled that a fetus does not constitute a person as intended by the Constitution. Ultimately, if a court can determine that protecting unborn life is an important governmental interest and that the pregnancy exception is sufficiently related to this interest, but does not find that protecting a living child rises to the level of forcing a man to remain on life support or to experience physical or emotional pain to protect his living child – then judicial scrutiny be damned.

iii. Competent Versus Incompetent Women

As discussed above, a woman’s right to privacy ensures that, at least prior to viability, she may choose to undergo an abortion. Even after viability certain protections are guaranteed to women for their own health and wellbeing so that an abortion is possible throughout the pregnancy. Additionally, all individuals have the right to refuse medical assistance, even life sustaining assistance if they so choose. These protections should not be eradicated simply because one has become incapacitated.

Pregnancy exceptions create an additional classification based on competency that conflicts with the equal protection clause.⁶⁰ If a pregnant woman is severely injured and in need of serious medical attention to save her life, but is also competent and able to refuse treatment, her wishes shall be respected. Even if her requests were met with resistance because of her pregnancy, for health reasons she could

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demand an abortion, then subsequently deny medical assistance. However, a pregnant woman whose injuries result in her becoming incompetent because of a lack of consciousness or awareness, may not demand the same result, even if she has a written directive stating she would not want life sustaining measures. This individual would be forced to remain on life support, against her wishes and those of her family’s because of the pregnancy exception. The result is that the state allows competent women the right to die, while not allowing the same right to incompetent women. This classification is not likely to withstand intermediate scrutiny as the state has no important interest in denying incompetent women the same rights as competent women. On the contrary, the state has an important if not compelling interest in protecting the rights of incompetent individuals in an equal manner to competent individuals.

The TADA explicitly calls for protecting the wishes of an incompetent person. It authorizes a proxy to act on behalf of the patient in conjunction with the patient’s physician. Texas clearly intended this structure to ensure that competent as well as incompetent individuals were given the same protections in the event of a severe injury or illness. The pregnancy exception contained in the TADA renders this protection moot for incompetent pregnant women. This is both unconstitutional and against the overarching intent of the statute.

d. The Pregnancy Exception Outruns Legal Intent

i. The Pregnancy Exception Outruns State and Federal Abortion Laws

Examining the potential consequences of the pregnancy exception begs the question, how can a woman legally choose to terminate her pregnancy while living, but be forced to bring a pregnancy to term while dying, or even if she is already dead? The state of Texas has one of the strictest abortion laws in the nation. The current law, passed in 2013, gained national headlines when State Senator Wendy Davis stood for over eleven hours in a successful filibuster attempt. Weeks later, the Republican Governor of the State, Rick “Oops” Perry, called a special session to pass the bill, known as HB2, with a strong Republican majority. The bill passed in the special session and immediately women’s access to safe and

affordable family planning services was made tremendously insecure. The last word on the bill is yet to be heard as it currently being reviewed by the U.S. 5th Circuit Appellate Court. But for now, HB2 stands as the law of the land in Texas.

With regards to the pregnancy exception contained in the TADA, the most important restriction contained in HB2 is the twenty week abortion ban. In Texas, a woman may no longer have an abortion after the twentieth week of her pregnancy unless the health of the mother is at risk.\textsuperscript{62} Currently, twelve states including Texas have a twenty week ban.\textsuperscript{63} It is unclear whether or not the twenty week bans will ultimately withstand legal challenges. Several states that have enacted the twenty week ban have had them struck down as an undue burden prior to viability (which is general held to be at twenty-four weeks).\textsuperscript{64} The issue will no doubt come before the Supreme Court at some point. However, even if the twenty week ban is upheld, the bottom line is that Texas allows women to choose to terminate their pregnancy for approximately the first half of the pregnancy. The exception in the TADA completely contradicts HB2 as it does not allow for an incompetent women to declare that she would choose to discontinue life support which in effect would end both her life and the life of the unborn fetus. A woman in Texas has a protected right to have an abortion which is grounded in both the constitutional right to privacy and the HB2. Obviously, supporters of both the HB2 and the pregnancy exception would prefer to eliminate a woman’s right to choose at fertilization, but the law is what it is. These are the same individuals that take any opportunity to remind anyone listening that we are a nation of laws and those laws must be followed. I agree, but consistency is imperative for a nation of laws.

Undeniable tension exists between the pregnancy exception and current abortion laws. If we take the numerous constitutional holdings and federal and state statutes to their possible (and logical) conclusions we see that Texas allows a woman to freely choose a pregnancy up until week twenty, and if competent, have an abortion for health reasons at any time, but denies an incompetent woman the right to

\textsuperscript{63} Abortion Bans at 20 Weeks: A Dangerous Restriction for Women, NARAL, Jan. 2014.
\textsuperscript{64} Federal Court Strikes Down Arizona's 20-week Abortion Ban, FOX NEWS, May 20, 2013.
have an abortion, or to refuse unwanted medical attention if she is only ten weeks pregnant—or even only three weeks pregnant! The exception clearly outruns the legal intent of federal and state law and should be eliminated from the TADA.

ii. Who Is This Benefiting?

Section 166.035 of the TADA states: The following persons may execute a directive on behalf of a qualified patient who is younger than 18 years of age:

(1) the patient’s spouse, if the spouse is an adult;

(2) the patient’s parents; or

(3) the patient’s legal guardian

This means that a parent can decide to draft a directive for their living child. More importantly, a parent can determine to refuse life support for their living child. This seems understandable. Severe brain injuries are certainly possible for minors just as they are for adults. Merely because they are below the age of majority should not deny them the constitutional protections discussed above. Having a parent speak on behalf of their child, either through a written directive, or through communication with the treating physicians, makes sense. However, this does not mesh with the pregnancy exception that restricts a parent’s ability to act on behalf of their unborn child. If a parent can make end of life decisions for their living child, should they not be able to make the same decisions for their unborn children? More directly, if a parent has a seriously ill or injured child and would choose not to have life sustaining measures taken because they believed it was in the best interests of their child whom they love dearly – they can and should be able to make that decision. They should also be able to make that decision for their unborn child!

The stark reality is that if a pregnant woman arrives at a hospital with severe brain injuries resulting in brain death or PVS, there is a strong chance that the fetus has sustained serious injuries as well. In a 2010 study of maternal brain death, when the mother was pronounced brain dead at thirteen to
fifteen weeks pregnant, only one in five of the babies that were eventually delivered survived.\textsuperscript{65} A lack of oxygen to a fetus, even if only for a short period of time, can have serious and life threatening consequences including brain, heart, limb, and/or lung defects.\textsuperscript{66} All of these problems appeared to present in the unborn child of Marlise Munoz.

After her embolism Marlise Munoz was unconscious for a matter of hours and had a lack of oxygen to her brain for at least an hour.\textsuperscript{67} This directly and undeniably affected the fetus in her body. The result was a fetus with serious abnormalities and medical problems. “The fetus ha[d] hydrocephalus, or water on the brain, a possible heart condition, and ‘lower extremities that [are] deformed to the extent that the gender [could not] be determined.’”

In the short term, this part of the story was not largely covered. Most people seemed to assume that the issue was a basic question of keeping a woman on life support against her wishes in order to save a life. To most, the story was taken at face value, but it was in fact much more excruciating and sorrowful for Marlise’s family. In addition to being denied a respite from the ordeal based on Marlise wishes, they also knew that the fetus was not likely to survive and even if it did, it would likely have serious health problems. The family knew there was no good outcome in continuing the life support. What happened next was both shameful and horrific.

The hospital continued to try to press their case for continuing “life support” on Marlise’s lifeless body. They received public support from religious organizations and social conservatives who claimed that all life is to be protected and that someone must fight to protect the fetus in Marlise’s body. After details began to emerge publicly regarding the fetus’ health, some voices began to ask the basic question, should we be trying to “save” this baby’s life?\textsuperscript{68} The supporters of JPS only continued their outcry of life at all costs.

\textsuperscript{65} Esmaeilzadeh et al., One life ends, another begins, BMC Medicine 2010.
\textsuperscript{67} Wade Goodwyn, \textit{The Strange Case Of Marlise Munoz And John Peter Smith Hospital}, NPR, Jan. 28, 2014.
\textsuperscript{68} See eg., Frank Bruni, \textit{The Cruelest Pregnancy}, NYT, Jan. 18, 2014.
Stepping away from legal analysis momentarily, one must consider the ramifications of what JPS and its supporters were seeking. They intended to keep Marlise on life support in order to protect life yet even JPS had admitted that there were serious fetal abnormalities. Many people no doubt continued their ardent support of JPS because of the sheer fact that they had not bothered to learn the details of the situation. While it is both ridiculous and sad these people believed it was right that the state should dictate the care of Marlise’s body, they can at least be forgiven for not knowing the full extent of the ordeal—this group often yells first, informs themselves second. However, for those that knew the medical condition of the fetus, one must ask, who the hell were they trying to benefit? Their position was disturbing, cruel, and ludicrous.

Shortly before the case went before the final arbiter, Federal Judge R.H. Wallace, the hospital revealed that they knew of the serious brain deformities as well as the heart and limb problems. They continued to press their case claiming that these conditions might have been due to a genetic defect and not the result of an extended lack of oxygen. Consider that for a moment. They actually sought to keep Marlise’s body attached to a machine in order to continue the development of a severely deformed fetus. Marlise’s father, called his daughter’s body “a host” and her husband, Erick, said her smell had been replaced by the “smell of death.”

Yet the hospital and its supporters, including many office holders, sought greater support for their cause knowing the condition of the fetus.

The cruelest and most devastating blow came during the hearing on the matter before Judge Wallace. The hospital actually admitted for the first time publicly, the fetus was not viable. “The hospital also agreed her fetus wasn’t viable; like its mother, it had been deprived of oxygen for at least an hour.” To repeat, the fetus was not viable. Legally, the pregnancy exception denies a parent the ability to act on behalf of their unborn child, whether the mother is brain dead or in a PVS. This is a direct contradiction to the language regarding parents and their minor children. Not only is it unconstitutional, contradictory, and downright cruel, it can lead to disastrous and shameful outcomes. Outcomes that

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69 Fort Worth Hospital Ends Life Support for Marlise Muñoz, WFAA, Jan 29, 2014.
70 Wade Goodwyn, The Strange Case Of Marlise Munoz And John Peter Smith Hospital, NPR, Jan. 28, 2014.
benefit no person, and possibly no non-person. You have to be a sick individual to advocate for the continued life support of a dead corpse only to prolong the quasi-life of a brain damaged fetus. How extreme and ignorant can these people be?

V. Conclusion

“It remains for the doctor, and especially the anesthesiologist, to give a clear and precise definition of ‘death’ and the ‘moment of death’ of a patient who passes away in a state of unconsciousness…. In case of insoluble doubt, one can resort to presumptions of law and of fact.”

-Pope Pius XII, Address to an International Congress of Anesthesiologists, 1957

The Munoz family should not have been forced to endure such agony. No other family should be forced to endure the same. To properly protect women’s constitutional guarantees, the pregnancy exceptions should be eliminated from the Texas Advance Directives Act. Moreover, though brain death and PVS are different states of being, with different bodily functions, I argue that the evidence above displays that when it comes to end-of-life decisions, they should be treated the same. Basically, if a woman is brain dead she is no longer living and thus, as in the case of Marlise Munoz, this law should not apply to the corpse that remains. However, a woman in a permanent vegetative state should also be allowed to utilize an advance medical directive or the decision of her next of kin to decide whether or not to continue life sustaining measures. The pregnancy exception is a gross infringement on women’s constitutional rights. The Texas Advance Directive Act itself contains language that is in direct opposition to the exception. On the one hand, these constitutional protections guarantee certain rights for all individuals, among them the right to terminate a pregnancy and refuse medical attention. PVS patients should not forfeit these guarantees simply because of their incompetency. It defies logic and legal standing to allow non-pregnant women the choice to cease life support, and for Texas to legally allow abortion up to the twentieth week, but NOT to allow pregnant women the same rights.

On the other hand, putting legal issues aside, there are clear policy reasons for modifying laws that lead to monstrous outcomes. Why should the state deny a person their constitutional rights and extend the pain and misery of family members only to “benefit” a futile cause? Is the state completely
immune to the notion of a life worth living? Either way, if there is no viable life to account for, should people not simply ask for the humane and natural thing and allow a dead body to rest in peace?

Women’s health issues should be important to everyone; they affect everyone. As a father of two daughters, these issues are tremendously important to me. I want to know that, merely because of biology, my daughters will not be treated differently from my son. The unfortunate story of Marlise and Erick Munoz displayed the startling results of an ambiguous law and the shocking, extremist positions held by JPS, conservative organizations, and lawmakers. Additionally, where there is no clarity of law one might also find a void of common sense and common decency. The repercussions of the pregnancy exception are frighteningly profound. Texas deserves better, Marlise deserved better.