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Right to Life Means No Right to Death with Dignity

Pamela M. White¹

The seeds of the anti-abortion success realised by *Dobbs v Jackson Women's Health Organization*² were planted decades ago by earlier judgments designed to limit access to legal terminations³ and by state legislatures inserting foetal personhood rights into laws and regulations not directly related to abortion. Adoption by 36 US states of 'pregnancy exclusion clauses' in advance directives is one such example where a pregnant person's agency and advance decision-making can be overruled to ensure the development of a gestating foetus.⁴

The 1981 *Uniform Determination of Death Act (UDDA)* and adoption of state Advance Directive legislation⁵ during in the mid-1980s, triggered a two-pronged campaign by the Pro-Life lobby to challenge legislation that might obstruct life-support treatments for braindead individuals, especially pregnant women.⁶ One prong argues for a religious-based definition of death: cessation of pulmonary-cardiac function.⁷ It challenges the legal neurological definition of death including administration of the apnoea test, considered by clinicians as the definitive assessment of brain-death.⁸ The apnoea test has come under increased scrutiny in

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² *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. ____ (2022)

³ Use of state trigger laws. See Guttmacher.org State legislation tracker. <https://www.guttmacher.org/state-policy>

⁴ ES DeMartino, BP Sperry & CK Doyle "US State Regulations of Decisions for Pregnant Women Without Decisional Capacity" *JAMA* 2019 321(16) 1629-1631 at 1630. See Flanagan at n6 for an update on figures.

⁵ 1985 *Uniform Rights of the Terminally Ill Act (URTIA)*.

⁶ Shea Flanagan, 'Decisions in the Dark: Why Pregnancy Exclusion Statutes are unconstitutional and unethical' *Northwestern University Law Review*. 2020 114:969

⁷ New Jersey has legalised religious definitions of death.

⁸ Ariane Lewis, David Greer. 'Medicolegal Complications of Apnoea Testing for the Determination of Brain Death. *Bioethical Inquiry*. 2018. 15. 417-428.

US,⁹ Canadian,¹⁰ and UK¹¹ courts. Opposition to the neurological determination of death not only frustrates organ donation, but also enables ongoing life-support until organ death occurs. Without a definitive brain-death determination, administration of life-support cannot be defined as futile treatment and will therefore carry on until organ death occurs.¹²

The second prong of the campaign encouraged state legislatures to include pregnancy exclusion clauses in advance directive legislation, thereby circumventing *Roe v Wade*.¹³ By 2020, just 14 states permitted physicians to honour a pregnant woman's advance medical directive. Foetal 'viability' legally (not medically) set at 14 weeks gestational age¹⁴ overrides an advance directive in 12 states, with another 5 states making life-support dependent on treatment benefits accruing to the foetus. In the remaining 19 states, maternal life-sustaining therapies must be provided regardless of foetal viability or existence of an advance directive. Prior to *Dodds*, over 70% of US states had legislated 'right-to-life' for the gestating foetus and mandated ongoing life-support for pregnant women in PVS, braindead, or persistent coma conditions until the baby can be safely delivered usually by caesarian section or dies *in utero*.¹⁵

⁹ See: (Israel Stinson v Children's Hospital Los Angeles [2016] BS164387; Re Guardianship of Hailu [2015] 361 P.3d 5; McMath v California [2015] No. 3:15-06042 N.D. Cal.; Re Allen Callaway [2016]; Re Miranda Grace Lawson [2016]; Brett and Yvonne Shively v Wesley Medical Center and Lindall Smith [2006]; Alex Pierce v Loma Linda University Medical Center [2016]); Brett and Yvonne Shively v Wesley Medical Center [2006], Court of Appeals of the State of Kansas); Re Allen Callaway [2016] DG-16-08); Re Miranda Grace Lawson [2016] CL16-2358; Alex Pierce, thirteen-years-old (In Alex Pierce v. Loma Linda University Medical Center [2016]; Durbin K. Monroe Co parents proposing "Bobby's Law" in honor of son taken off life support. The Blade. Published 2019. Accessed December 9, 2019.

<https://www.toledoblade.com/local/suburbs/2019/12/02/bobbys-law-bobby-reyes-monroecounty-taken-off-life-support-university-ofmichigan/stories/20191202150>

¹⁰ *Morlani et al v Haddari* 2021 ONSC 7288.

¹¹ Re M (Declaration of Death of Child) (CA) [2020] 4 WLR 52; *Barts Health NHS Trust v Dance & Ors* [2022] EWHC 1435 (Fam) at 75-76 and 99; *Barts Health NHS Trust v Dance & Ors* [2022] [2022] EWFC 80, 2022 WL 02792515 at 2 and 17.

¹² G Yanke, MY Rady, J Verheijde and J. McGregor. 'Apnoea testing Is Medical Treatment Requiring Informed Consent' *The American Journal of Bioethics* 2020 20(6) 22-24. AR Joffe, 'the Apnoea test: Requiring Consent for a Test that is a Self-Fulfilling Prophecy, Not fit for Purpose and Always Confound?' *The American Journal of Bioethics* 2022 20(6) 42-44.

¹³ E Villarreal, *Pregnancy and Living Wills: A Behavioral Economic Analysis*, 2019 128 YALE L.J. F. 1052.

¹⁴ The notion of viability at 14 weeks gestation does not align with medical understandings of foetal viability commonly thought to be 22-28 weeks gestation and defined as when the The limit of viability is the [gestational age](#) at which a [prematurely born fetus/infant](#) has a 50% chance of long-term survival outside its mother's womb. See: Breborowicz GH (January 2001). "Limits of fetal viability and its enhancement". *Early Pregnancy*. 5 (1): 49-50.

¹⁵ ES DeMartino, BP Sperry & CK Doyle "US State Regulations of Decisions for Pregnant Women Without Decisional Capacity" *JAMA* 321(16) 1629-1631 at 1630.

Legislative removal of a pregnant patient's medical decision-making autonomy has not gone unchallenged. The 2013 Muñoz case exposed a disturbing situation of a neurologically braindead pregnant Texas resident being kept artificially 'alive' for two months against the wishes of her husband.¹⁶ Yet, the US is not alone in overruling family wishes of a peaceful passing for their pregnant braindead family member. Natasha Petrie, a pregnant Irish resident was pronounced neurologically dead in December 2014.¹⁷ Concerns about the legal implications of Ireland's Eighth Amendment establishing equal rights for the 'unborn child' and the pregnant woman contributed to the decision to sustain Natasha's body on life-support for a month against her family's wishes.¹⁸

Truog observes it is women who are being kept biologically alive contrary to their own or family members' directives or even standard medical practice so to enable the delivery of a viable child.¹⁹ A 2021 study of 35 cases worldwide reveals that most cadaveric pregnancies are sustained for about 7 weeks though 120 days is not unknown.²⁰ Yet, survival is low for foetuses under 14 weeks and barely reaches 55% for those between 14 and 19 gestational weeks. Higher survival rates have been reported for foetuses at 20-23 weeks of gestation (92%) with most born alive when maternal life-support is initiated at 24 gestational weeks and over. To date, little research has been undertaken to assess longer term health of these children.²¹

While some may conclude that cadaveric pregnancies are becoming technologically possible, healthy live births tend to be over-reported.²² Moreover, life-support cases involve considerable maternal medical intervention and constant foetal monitoring. The 2021 study revealed extensive serious multiple maternal complications including pneumonia, sepsis and urinary tract infections, circulatory instability, hypothalamic dysfunctions, thermal variability, and pituitary hormonal imbalances.²³ Families, care staff, and clinicians find the

¹⁶ *Muñoz v John Peter Smith Hospital* Cause No 096270080-14. [2014] Tarrant County District Court, 96th Judicial District, State of Texas.

¹⁷ *PP v Health Service Executive* [2014] IEHC 622.

¹⁸ C Hurley, 'PP v Health Service Executive' (2015) 18 *Trinity CL Rev* 205 at 209.

¹⁹ RD Truog 'Defining Death: Lessons from the Case of Jahi McMath'. *Pediatrics* 2020; 146(s1): S75–S80 at S77.

²⁰ MG Dodaro, A. Seiderari, IR Marina, V Bergella and F Bellussi. 'Brain death in pregnancy: A systematic review focusing on perinatal outcomes'. *American Journal of Obstetrics and Gynecology*. 2021 245(2) 445-469.

²¹ *Ibid* n18. Apgar scores for 24 week+ babies was in the normal range.

²² *Ibid* n18

²³ See Tables 2 and 3 at n18.

significant deterioration of the maternal body disturbing, with reports of nurses experiencing not insignificant levels of emotional distress.²⁴

When families contest state-ordered maternal life-support, success has been patchy. In 2019, the Petrie family received an apology and a financial settlement from Ireland for the lack of consent for their daughter's medical treatment. The victory in Muñoz was achieved on the court's acceptance of Mrs Muñoz being declared legally dead and that foetal death had occurred *in utero*. In April 2021, four pregnant women²⁵ successfully contested Idaho's override of their advance directives (*Almerico et al. v. State of Idaho et al*)²⁶ though it rests on constitutional rights found in the First, Fourteen and Fifteen Amendments and case law²⁷ subsequently challenged and struck down by *Dodds*.

With the reversal of *Roe v Wade*,²⁸ the constitutionality of *Almerico et al. v. State of Idaho et al.* enabling pregnant women to make healthcare decisions stands in jeopardy. Moreover, the ability of US states to dictate medical treatment now extends to all persons with a uterus, regardless of their pregnancy status. *Dodds* is broadly drafted such that in many US states, women with autoimmune diseases or cancer risk being refused medications and treatments designed to address their illnesses as the prescribed drugs and chemotherapy might damage a developing foetus or result in a miscarriage.²⁹

Not only does *Dodds* remove autonomous medical decision-making from over half of the US population, uterus-containing bodies are simultaneously transformed into non-autonomous pregnant and potentially pregnant beings. For pregnant US women, the prospect of cadaveric gestation has become a reality regardless of potential for foetal viability and irrespective of advance directives, family wishes, or surrogacy contracts that may have been completed.

²⁴ L Staff, M Nash, 'Brain death during pregnancy and prolonged corporeal support of the body: A critical discussion' *Women and Birth*. 30 (2017) 354–360. L Winborg, 'Sheila's Death Created Many' *Nursing*. 1993: 45-49.

²⁵ *Almerico et al. v. State of Idaho et al* Case No.1:18-cl-00239 BLW.

²⁶ Case No.1:18-cl-00239 BLW.

²⁷ *Planned Parenthood of Southeastern Pa. v. Casey* (91-744), 505 U.S. 833 (1992); *Cruzan v. Director, Missouri Department of Health*, (88-1503), 497 U.S. 261 (1990)

²⁸ 410 US 113 (1973)

²⁹ M Whyte, "Viably Fertile" Patients Are Denied Essential Medicine Because of *Roe v. Wade*' *LA Times* 18.07.2022; <https://www.msnbc.com/opinion/msnbc-opinion/post-roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>

The implications of past legislative initiatives now affirmed by *Dodds* will lead to significant challenges to the definition of death for women, girls, and persons with uteruses. Foetuses have a ‘right-to-life’, but their gestating mother who has no corresponding ‘right-to-death’ or ‘end-of-life care with dignity’ is called upon to make the ultimate sacrifice. Un-wanted cadaveric pregnancies will be a reality, not an exception.

Nations not recognising foetal legal personhood need to be mindful of attempts taken to weaken autonomous decision-making and of utilitarian arguments advocating for foetal preservation based on a limited number of successful maternal life-support studies. The fact that a braindead, PVS or comatose pregnant woman has no conscious awareness does not give clinicians, or anyone else, licence to perform unwanted medical procedures irrespective of supposed treatment benefits accruing to a foetus. To do so undermines the very foundation of ethical health care.