Death as Liberty

By Christina Q. Nguyen*

Marlise Muñoz was approximately fourteen weeks pregnant when she collapsed at her home in Texas on November 26, 2013,[1] and was declared brain dead at John Peter Smith Hospital on November 28, 2013.[2] Mrs. Muñoz, however, continued to receive post-mortem, life-sustaining medical treatment through January 26, 2014,[3] despite expressing to her husband and parents that she did not wish to remain on life support.[4] By virtue of being pregnant, Mrs. Muñoz' end-of-life decision was preempted by the Texas Advance Directives Act,[5] which otherwise recognizes a competent patient's decision to discontinue and withhold medical treatment.[6] Mrs. Muñoz was twenty-two weeks pregnant[7] when she was removed from life-support on January 26, 2014,[8] after a state trial court held that the Texas Advance Direc-

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1. Stipulation of Facts at 1, Muñoz v. John Peter Smith Hosp., No. 096-270080-14 (Tex. Dist. Ct. Jan. 24, 2014).

2. *Id. See* Tex. Health & Safety Code Ann. § 671.001(b) (West 2013) ("[T]he person is dead when, in the announced opinion of a physician, according to ordinary standards of medical practice, there is irreversible cessation of all spontaneous brain function.").

3. Matt Pearce, *Pregnant, Brain-dead Texas Woman Taken off Life Support*, L.A. Times (Jan. 26, 2014), http://articles.latimes.com/2014/jan/26/nation/la-na-nn-texas-pregnant-woman-20140126.

4. Affidavit of Erick Muñoz at 2, Muñoz v. John Peter Smith Hosp., No. 096-270080-14 (Tex. Dist. Ct. Jan. 23, 2014).

5. *See* Tex. Health & Safety Code Ann. § 166 (West 2013) (Advance Directives Act); *id.* § 166.049 ("A person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient."); *id.* § 166.098 ("A person may not withhold cardiopulmonary resuscitation or certain other life-sustaining treatment designated by the board under this subchapter from a person known by the responding health care professionals to be pregnant.").

6. §§ 166.031–033 (identifying competent adult's ability to execute directive regarding end-of-life decision-making and providing directive template).

7. Stipulation of Facts, *supra* note 1, at 1.

8. Pearce, *supra* note 3.

tives Act was inapplicable because Mrs. Muñoz was considered legally and medically dead.[9]

Jahi McMath, a thirteen-year-old eighth-grade girl, underwent a routine tonsillectomy at Children's Hospital Oakland in California on December 9, 2013,[10] and was later declared brain-dead on December 12, 2013, after suffering from a heart attack.[11] Ms. McMath's mother, Latasha Winkfield, requested that her daughter continue to receive life-sustaining medical treatment based on the family's religious belief that life ends when the heart stops beating.[12] Children's Hospital Oakland refused to comply with Ms. Winkfield's request[13] on the ground that Ms. McMath was legally and medically dead pursuant to California's Uniform Determination of Death Act[14] and that the hospital met its legal obligation by accommodating the family for a reasonably brief period so that they could gather by her bedside.[15] Yet, Ms. McMath presently remains on post-mortem, life-sustaining medical treatment[16] after her mother and Children's Hospital Oakland reached a stipulation[17] to remove Ms. McMath to another healthcare facility.[18] Pursu-

9. Judgment at 1, Muñoz v. John Peter Smith Hosp., No. 096-270080-14 (Tex. Dist. Ct. Jan. 24, 2014) [hereinafter Muñoz Judgment] (granting Plaintiff's Motion to Compel the hospital to remove Muñoz from life-sustaining treatment after finding the provisions of § 166.049 inapplicable because Mrs. Muñoz is deceased). *See* TEX. HEALTH & SAFETY CODE ANN. § 671.001 (West 2013) (defining death to include irreversible cessation of spontaneous brain function).

10. Complaint at 3, Winkfield v. Children's Hosp. Oakland, No. 4:13CV05993 (N.D. Cal. Dec. 3, 2013).

11. *Id.* at 4.

12. *Id.* at 3–4.

13. Memorandum of Points & Authorities in Opposition to Ex Parte Application for Temporary Restraining Order at 4, Winkfield v. Children's Hosp. of Oakland, No. RP13-707598 (Cal. Super. Ct. Dec. 30, 2013) [hereinafter Mem. of P. & A.].

14. *See* CAL. HEALTH & SAFETY CODE § 7180(a) (West 2007) ("An 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.").

15. *See id.* § 1254.4(a) ("A general acute care hospital shall adopt a policy for providing family or next of kin with a reasonably brief period of accommodation, . . . from the time that a patient is declared dead by reason of irreversible cessation of all functions of the entire brain, including the brain stem, in accordance with Section 7180, through discontinuation of cardiopulmonary support for the patient."); Mem. of P. & A., *supra* note 13, at 3.

16. Jason Wells, *Mother of Brain-dead Jahi McMath Says Daughter is "Still Sleeping,"* L.A. TIMES (Mar. 28, 2014), http://articles.latimes.com/2014/mar/28/local/la-me-ln-brain-dead-jahi-mcmath-mother-speaks-20140328.

17. Stipulation for Protocol for Possible Removal of Jahi McMath from Children's Hosp. at 1–2, Winkfield v. Children's Hosp. of Oakland, No. RP13-707598 (Cal. Super. Ct. Jan. 3, 2014) [hereinafter Stipulation for Protocol] (requiring that the Coroner formally

ant to the stipulation,[19] Children's Hospital Oakland released Ms. McMath to the Alameda County coroner's office, which issued a death certificate recording the date of death as December 12, 2013, the date Ms. McMath was declared brain-dead, before releasing Ms. McMath to her family.[20]

Mrs. Muñoz and Ms. McMath were both declared brain-dead, which Texas and California recognize as the irreversible cessation of all spontaneous brain function.[21] Additionally, both women were patients in states that permit healthcare providers to decline to comply with an individual's medical decision or instruction.[22] But that is where the similarities end. Mrs. Muñoz and Ms. McMath's families had opposite requests for relief: respectively, the right to refuse unwanted medical treatment, and the right to prolong life using available life-sustaining medical treatment, even when continued treatment may be futile.

This Comment explores whether Texas and California legislation,[23] giving healthcare providers discretion as to whether to effectuate a patient's end-of-life decision, implicates a patient's personal

accept the body from the hospital, and that Ms. Winkfield assume exclusive responsibility for Ms. McMath at the moment of transfer).

18. Ms. McMath's family and her attorney refused to disclose the location of the healthcare facility after the parties reached the stipulation. Norimitsu Onishi, *California: Girl Declared Dead is Transferred*, N.Y. Times, Jan. 7, 2014, at A13. On October 2, 2014, the attorney and family confirmed reports that Ms. McMath was receiving life-sustaining medical treatment in New Jersey. *See* Lee Romney, *Tests Show Jahi McMath has Brain Activity, Lawyer Says*, L.A. Times (Oct. 2, 2014), http://www.latimes.com/local/lanow/la-me-ln-medical-experts-jahi-mcmath-20141002-story.html.

19. *See* Stipulation for Protocol, *supra* note 17, at 1–2. On September 30, 2014, Ms. Winkfield, Ms. McMath's mother, filed a petition to overturn the brain death determination. Memorandum Regarding Court's Jurisdiction to Hear Petition for Determination that Jahi McMath Is Not Brain Dead at 1–2, 4, Winkfield v. Children's Hosp. of Oakland, No. RP13-707598 (Cal. Super. Ct. Sept. 30, 2014). A scheduled hearing was postponed and it is unclear when this petition will be heard. *See* Marisa Lagos, *Jahi McMath Hearing Postponed After Doctor's Determination*, S.F. Gate (Oct. 9, 2014), http://www.sfgate.com/bayarea/article/Jahi-McMath-hearing-postponed-after-doctor-s-5810707.php.

20. Onishi, *supra* note 18.

21. Tex. Health & Safety Code Ann. § 671.001(b) (West 2013); Cal. Health & Safety Code § 7180(a) (West 2007).

22. Tex. Health & Safety Code Ann. § 166.046 (West 2013) (setting forth procedures for ethics committee review applicable when physician refuses to honor patient's advance directive); Cal. Prob. Code §§ 4654, 4734–36 (West 2009) (permitting physician to decline to comply with advance directive due to conscience or medical ineffectiveness).

23. Health Care Decisions Law, Cal. Prob. Code § 4600 (West 2009); Advance Directives Act, Tex. Health & Safety Code § 166.

autonomy[24] sufficient to trigger the Due Process Clause of the Fourteenth Amendment.[25] Part I of this Comment examines the Fourteenth Amendment's substantive due process doctrine and the United States Supreme Court's reluctance to expand fundamental rights with respect to medical decisions. Part II of the Comment examines the Texas and California legislative schemes in response to the Court's recognition of the individual liberty interest to refuse unwanted medical treatment. Part III explores the impact on personal autonomy and equality. Specifically it examines the rights implicated in Mrs. Muñoz and Ms. McMath's situation, and uses these circumstances to demonstrate the perplexing and paradoxical interplay between medical death and personal autonomy that results from Texas and California's recognition of medical futility.

I. Substantive Due Process: the Court's Careful Evasion of Expanding Fundamental Rights

The Fourteenth Amendment Due Process Clause has both a procedural and substantive[26] component that protects personal autonomy by prohibiting the government from depriving "any person of life, liberty, or property, without due process of law."[27] In a substantive due process challenge, the Supreme Court usually applies a two-part test to determine whether the government has infringed a fundamental right or liberty interest.[28] First, the Court objectively examines whether the asserted fundamental right or liberty interest is both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[29] Second, the Court requires a "care-

24. *See generally* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990) (considering the constitutional implications of a third party's participation in end-of-life decision-making regarding an incompetent person).

25. U.S. CONST. amend. XIV, § 1.

26. Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997) ("The Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.") (citations omitted).

27. U.S. CONST. amend. XIV, § 1.

28. *Glucksberg*, 521 U.S. at 720–21.

29. *Id.* at 720–21 (citations omitted). *But see* Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (requiring asserted fundamental right or liberty interest to only be deeply rooted in this Nation's history and tradition); Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) (in the alternative, requiring asserted fundamental right or liberty interest to only be implicit in ordered liberty); Lawrence v. Texas, 539 U.S. 558, 562, 578 (2003) (invalidating the state's criminalization of same-sex sodomy, without reference to whether the per-

ful description" of the asserted fundamental right or liberty interest.[30] If the Court recognizes the existence of a fundamental right or liberty interest, any governmental infringement must be narrowly tailored to serve a compelling state interest.[31] If the Court refuses to recognize the asserted fundamental right or liberty interest, governmental infringement need only be rationally related to legitimate government interests.[32]

Where the government deprives a recognized fundamental right or liberty interest, the nature of the right determines the standard of review. The Court has applied strict scrutiny to marriage,[33] parental control of family upbringing,[34] procreation,[35] and contraception,[36] but different standards of review to abortion[37] and medical deci-

sonal autonomy that encompasses thought, expression, and certain intimate conduct was deeply rooted in history and tradition and implicit in ordered liberty).

30. *Glucksberg*, 521 U.S. at 720–21. *But see Lawrence*, 539 U.S. at 578 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

31. *Glucksberg*, 521 U.S. at 721 (citations omitted).

32. *Id.* at 728.

33. Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

34. Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923) (invalidating statute prohibiting educating children in a non-English language because it interferes with a parent's power to control his or her child's education); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (invalidating statute requiring children to attend public schools because it interfered with parental power); Troxel v. Granville, 530 U.S. 57, 72–73 (2000) ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made.").

35. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (invalidating sterilization statute applicable to armed robbers but not embezzlers based on Equal Protection Clause, while also recognizing the liberty interest to procreate); *id.* at 544 (Stone, J., concurring) ("And so I think the real question we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.").

36. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (invalidating statute that prohibited use of contraception by recognizing intrusion on right to marital privacy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Carey v. Population Services Int'l, 431 U.S. 678, 685, 693 (1977) (invalidating statute that prohibited sale of contraception to minors).

37. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992) ("First is a recognition of the right of the woman to choose to have an abortion

sions.[38] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court held that laws imposing an undue burden by substantially preventing a woman from getting an abortion are invalid, but that laws imposing incidental burdens that merely frustrate a woman's exercise of this right are permissible.[39] In *Cruzan v. Director, Missouri Dept. of Health*, the Court balanced a patient's liberty interest in refusing unwanted medical treatment against the government's interest in keeping the patient alive.[40]

When given the opportunity to expand the recognition of additional asserted fundamental rights or liberty interests, the Court has tended to exercise restraint.[41] This trend has become especially apparent when examining rights with respect to individual medical decisions.

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before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."); *id.* ("Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health."); *id.* at 847 ("It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."); *id.* at 851 ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

38. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

39. *Casey*, 505 U.S. at 874 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

40. *Cruzan*, 497 U.S. at 279 ("But determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.") (citations omitted).

41. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.") (citations omitted). *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 34–35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."). *But see* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating the state's criminalization of same-sex sodomy, though silent regarding level of scrutiny applied).

In *Cruzan,* the Court first addressed whether an individual possesses a right to die.[42] Nancy Cruzan was in a permanent, persistent vegetative state as a result of severe injuries she sustained in a car accident.[43] When it became clear that Ms. Cruzan had no chance of recovery, her parents requested that the hospital cease all life-sustaining treatment, but the hospital refused to do so without a court order.[44] The Missouri Supreme Court denied the parents' request because, in the absence of a patient's advance healthcare directive,[45] statutory law required clear and convincing evidence of the patient's end-of-life decision to withdraw life-sustaining medical treatment.[46]

In granting certiorari, the Court shifted away from deciding whether the constitution guarantees a broad right to die and, instead, narrowly addressed whether a patient in the same or similar circumstances would have a constitutional right to terminate life-sustaining medical treatment.[47] The Court inferred that competent individuals have a "constitutionally protected liberty interest in refusing unwanted medical treatment," but confined its inference to a "constitutionally protected right to refuse lifesaving hydration and nutrition."[48] In reaching this conclusion, the Court relied on the common law doctrine of informed consent and the right to be free of unwanted touching to preserve bodily integrity.[49] The Court further indicated that the "logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment."[50]

The Court balanced the individual's liberty interest in refusing unwanted lifesaving hydration and nutrition against the government's "interest in the protection and preservation of human life."[51] The

42. *Cruzan*, 497 U.S. at 277 ("This is the first case in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a 'right to die.'").

43. *Id.* at 266.

44. *Id.* at 267–68.

45. *See Advance Care Directives*, American Medical Association, http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/about-ethics-group/ethics-resource-center/end-of-life-care/advance-care-directives.page? (last visited Apr. 13, 2015) (describing advance care directives as tools that allow patients to take an active role in their own health care, and communicate their health and treatment wishes to physicians, proxies, and loved ones).

46. *Cruzan*, 497 U.S. at 265, 269.

47. *Id.* at 269.

48. *Id.* at 278–79.

49. *Id.* at 269–70, 277.

50. *Id.* at 270.

51. *Id.* at 280.

Court held that it was permissible for the government to require clear and convincing evidence of the individual's end-of-life decision prior to terminating treatment because any error "is not susceptible of correction," and the procedural requirement advanced the government's interest in life.[52] Furthermore, the Court indicated that the government may maintain an "unqualified interest" in the preservation of human life without considering the quality of that life.[53] The Court did not address whether an individual's surrogate decision-maker has either of these protected liberty interests.[54]

Seven years later in *Washington v. Glucksberg*, the Court declined to expand the liberty interest in refusing unwanted medical treatment beyond refusing lifesaving hydration and nutrition when Washington's assisted-suicide ban was challenged under the Fourteenth Amendment Due Process Clause.[55]

Instead of addressing the broadly asserted interests of an individual's "liberty to choose how to die"[56] and right to "control of one's final days,"[57] the Court narrowly and carefully characterized the asserted interest as the right to assisted suicide.[58] The Court held that assisted suicide was neither "deeply rooted in this Nation's history and tradition," nor "implicit in the concept of ordered liberty."[59] To the contrary, the Court explained that bans on assisted suicide were deeply rooted in our Nation's history.[60] Furthermore, the Court stated that the Due Process Clause does not broadly protect all decisions related to personal autonomy.[61]

The Court held that Washington's assisted-suicide ban was rationally related to several legitimate government interests.[62] Like *Cruzan*, the government had an "unqualified interest in the preservation of human life," without regard to the quality of that life, which was di-

52. *Id.* at 280–83.

53. *Id.* at 282.

54. *Id.* at 289 (O'Connor, J., concurring).

55. Washington v. Glucksberg, 521 U.S. 702, 725 (1997) ("The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection.").

56. *Id.* at 703, 722.

57. *Id.*

58. *Id.* at 703, 722, 724.

59. *Id.* at 710, 716, 728.

60. *Id.* at 710–16 (recounting history of criminalization of assisted suicide).

61. *Id.* at 727 ("That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.").

62. *Id.* at 728.

rectly advanced by the assisted-suicide ban.[63] Furthermore, the assisted-suicide ban reflected the government's interest in suicide prevention.[64] The government additionally had a legitimate interest in protecting vulnerable groups, preventing "voluntary and perhaps even involuntary euthanasia," and protecting the "integrity and ethics of the medical profession," specifically because "[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer."[65]

At the same time *Glucksberg* was decided, the Court in *Vacco v. Quill* held that New York's assisted-suicide ban did not violate the Fourteenth Amendment Equal Protection Clause because it "neither infringe[d] fundamental rights nor involve[d] suspect classifications."[66]

The Court held that the assisted-suicide ban and statutes permitting the refusal of unwanted medical treatment did not treat competent individuals unequally because "[*e*]*veryone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide."[67] Additionally, the Court stated that the refusal of unwanted medical treatment was not equivalent to physician-assisted suicide, and that distinctions are recognized by the medical profession, especially in connection with "fundamental legal principles of causation and intent."[68] The Court indicated that when a patient expresses the desire not to be subject to life-sustaining medical treatment, a healthcare provider terminates futile treatment that has no benefit with the intent to respect the patient's decision, whereas physician-assisted suicide requires a physician's intent that the patient die.[69] The Court stated that the distinctions were rationally related to all of the legitimate government ends that were identified in *Glucksberg*.[70]

Cruzan, *Glucksberg*, and *Quill* are a trilogy of cases that restricted, as opposed to expanded, the liberty to make end-of-life decisions.[71] In *Glucksberg* and *Quill*, the Court clearly drew a line between assisted

63. *Id.*; Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990).
64. *Glucksberg*, 521 U.S. at 728, 730.
65. *Id.* at 731–33 (citations omitted).
66. Vacco v. Quill, 521 U.S. 793, 799 (1997).
67. *Id.* at 800.
68. *Id.* at 800–01.
69. *Id.* at 801–02.
70. *Id.* at 808–09.
71. *Compare* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990), Washington v. Glucksberg, 521 U.S. 702 (1997), *and Quill*, 521 U.S. 793 (trilogy restricting liberty to make end-of-life decisions), *with* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965), Eisen-

suicide and *Cruzan*'s recognition of the liberty interest to refuse unwanted medical treatment.[72] But the line is less than clear between the right to refuse unwanted medical treatment and the corollary right to continue life-sustaining medical treatment, even where continued treatment may be futile. The perplexing question—whether there is a legitimate distinction—is left to the states.

II. Recognition of Medical Futility in the California and Texas Legislative Schemes

In California and Texas, when a patient or patient's family wishes to continue or discontinue life-sustaining medical treatment, healthcare providers have discretion to decline to comply with these medical instructions and may terminate treatment without consent.[73] Additionally, both California and Texas recognize that when a patient is declared brain-dead, healthcare providers have nearly unlimited discretion to withdraw all life-sustaining medical treatment upon satisfying procedural safeguards described below.[74] These legislative schemes attempt to balance a patient's personal autonomy with the integrity and ethics of the medical profession, but make clear that an asserted right to refuse medical treatment or prolong life using available life-sustaining medical treatment is not absolute.[75]

Pursuant to the Texas Advance Directives Act, a healthcare provider who refuses to submit to a patient's medical decision or instruction must inform the patient or patient's surrogate, and the healthcare provider's decision is reviewed by an ethics or medical committee.[76] The patient or patient's surrogate is informed of the committee review process, and is entitled to meet with the committee and receive a written decision.[77] Where the healthcare provider, patient, or surrogate disagrees with the committee's decision, the healthcare provider must make a "reasonable effort" to transfer the patient

stadt v. Baird, 405 U.S. 438, 453 (1972), *and* Carey v. Population Services Int'l, 431 U.S. 678, 685, 693 (1977) (trilogy expanding the right to contraception).

72. *Cruzan*, 497 U.S. at 278–79.

73. Tex. Health & Safety Code Ann. § 166.046 (West 2013); Cal. Prob. Code §§ 4654, 4734–36 (West 2009).

74. Tex. Health & Safety Code Ann. § 166.046(e)–(f); Cal. Health & Safety Code § 1254.4 (West Supp. 2015).

75. *Glucksberg*, 521 U.S. at 731–33.

76. Tex. Health & Safety Code Ann. § 166.046(a)–(b).

77. *Id.* § 166.046(b).

to a physician or healthcare facility that will comply with the patient's wishes.[78]

But where a committee agrees that a patient is brain-dead, a healthcare provider may stop life-sustaining medical treatment if the surrogate is unable to transfer the patient to another physician or healthcare facility within ten days of the committee's decision, unless an extension of time is granted pursuant to a court order.[79]

Despite these procedural safeguards, the Texas Advance Directives Act does not recognize a pregnant female patient's end-of-life decision.[80] By virtue of being pregnant, a female patient is wholly disqualified from refusing unwanted medical treatment, and a healthcare provider is compelled to continue life-sustaining medical treatment over a pregnant female patient's objection, even when continued treatment may be futile.[81] This disqualifying factor for pregnant female patients does not distinguish between fetal pre-viability and post-viability.[82] Additionally, even if a competent female patient contemplates circumstances such as a pregnancy and executes a written advance healthcare directive refusing life-sustaining medical treatment, this outcome is unavoidable because the directive explicitly acknowledges the following: "I understand that under Texas law this directive has no effect if I have been diagnosed as pregnant."[83]

California's Health Care Decisions Law is similar to the Texas Advance Directives Act, but does not include a disqualifying factor for pregnant female patients.[84] But unlike Texas, California does not re-

78. *Id.* § 166.046(d).
79. *Id.* § 166.046(e), (g).
80. *Id.* § 166.049.
81. *Id.* §§ 166.046, 166.049.
82. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 860 (1992) ("[V]iability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe* [*v. Wade*], at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact."). *See also* I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 J.L. MED. & ETHICS 235, 237 (2011) ("Working clinical definitions of viability involve human interpretation of statistical probabilities that are typically applied to a class of about-to-be-born fetuses. That is, they are not individual patient-specific, and as such, also likely (and in some cases subconsciously) represent a collective consensus about scarce resource allocation. As our chances of success diminish, it becomes less compelling to offer an intervention.").
83. TEX. HEALTH & SAFETY CODE ANN. § 166.033.
84. CAL. PROB. CODE § 4600 (West 2009).

quire that a healthcare provider's refusal to comply with a patient's medical decision or instruction be subject to review by an ethics or medical committee, unless the patient is declared brain-dead.[85] California healthcare providers may decline to comply on the ground that the requested treatment is "medically ineffective,"[86] "contrary to generally accepted health care standards,"[87] or for "reasons of conscience."[88]

Where a healthcare provider determines that a patient is brain-dead, California's Uniform Determination of Death Act requires an independent physician to confirm the prognosis.[89] Additionally, a physician has an obligation to accommodate the family for a "reasonably brief period" so that they can gather by the patient's bedside. The physician must also inform the patient's family of this policy in writing.[90] Furthermore, a physician must make "reasonable efforts" to accommodate asserted religious or cultural practices made by the patient or patient's family.[91] In determining what is reasonable, a healthcare facility is permitted to consider the scarcity of medical resources for current and incoming patients.[92]

Where a patient is brain-dead and upon satisfying procedural requirements, both Texas and California give healthcare providers broad authority to cease life-sustaining medical treatment without the patient or surrogate's consent.[93] This may be because healthcare providers widely characterize brain death as a clear example of medical futility.[94]

85. *Id.* § 4736; CAL. HEALTH & SAFETY CODE § 1254.4 (West Supp. 2015).

86. CAL. PROB. CODE § 4735 (West 2009) (Law Revision Commission Comments, 1999 Addition) ("Medically ineffective health care, as used in this section, means treatment which would not offer the patient any significant benefit.").

87. CAL. PROB. CODE § 4735.

88. *Id.* § 4734.

89. CAL. HEALTH & SAFETY CODE §§ 7180–81 (West 2007).

90. *Id.* § 1254(a)–(c).

91. *Id.* § 1254(c)(2).

92. *Id.* § 1254(d) ("For purposes of this section, in determining what is reasonable, a hospital shall consider the needs of other patients and prospective patients in urgent need of care.").

93. TEX. HEALTH & SAFETY CODE ANN. § 166.046(d)–(f) (West 2013). The effect of the broad authority granted in sections (e)–(f) is limited by section (d), which requires healthcare providers to undertake reasonable efforts to transfer the patient to a facility willing to comply with the directive. *Id.* CAL. HEALTH & SAFETY CODE § 1254.4(a) (West Supp. 2015). The effect of the broad authority granted in section (a) is limited by section (b)(2), which requires healthcare providers to undertake reasonable efforts to accommodate a decision-maker's religious and cultural practices. *Id.*

94. James L. Bernat, *Medical Futility Definition, Determination, and Disputes in Critical Care*, 2 NEUROCRITICAL CARE 198, 200 (2005) ("Brain death is a clear case where the quanti-

"[M]edical futility refers to a physician's prognostic pronouncement that as a consequence of irretrievable illness or injury, further therapy will not improve the patient's condition and, therefore, should not be attempted."[95] Medical futility has a quantitative component that measures the probability that the treatment will succeed, and a qualitative component that measures the probability that the treatment will provide a benefit to the patient.[96] Further medical treatment is considered futile if there is zero probability the treatment will neither succeed nor provide a benefit to the patient, but also if the desired outcome, although possible, is overwhelmingly improbable.[97]

Brain death is the irreversible cessation of all spontaneous brain function,[98] and there is zero probability that further medical treatment will restore the patient's life.[99] Indeed, continuing treatment under these circumstances is incompatible with the physician's role as healer and undermines the integrity and ethics of the medical profession.[100]

But in the absence of brain death, a healthcare provider's discretion to decline to continue life-sustaining medical treatment has broad implications on patients' rights when there is a lack of consensus among healthcare providers regarding whether further medical treatment will succeed or provide a benefit to the patient.[101] There are further implications when there is a lack of consensus regarding

tative component of futility is met, because no treatment can help save the patient's life."). *See also* Thaddeus Mason Pope, *Medical Futility Statutes: No Safe Harbor to Unilaterally Refuse Life-sustaining Treatment*, 75 TENN. L. REV. 3, 27 (2007) ("Perhaps the clearest case of medically inappropriate care is LSMT [life-sustaining medical treatment] requested for a brain dead patient.").

95. Bernat, *supra* note 94, at 198.

96. *Id.* at 199; Pope, *supra* note 94, at 26.

97. Bernat, *supra* note 94, at 199.

98. TEX. HEALTH & SAFETY CODE ANN. § 671.001(b) (West 2013); CAL. HEALTH & SAFETY CODE § 7180(a) (West 2007).

99. Bernat, *supra* note 94, at 200.

100. *See* Washington v. Glucksberg, 521 U.S. 702, 731–33 (1997) (reasoning that physician-assisted suicide, generally, threatens medical ethics by blurring the line between harming and healing, and erodes trust in a physician's complete dedication to the patient's best interests); Pope, *supra* note 94, at 17 ("Health care providers want to shorten and ease patient suffering; they do not want to cause or prolong it.").

101. Denise Grady, *PET Scans Offer Clues on Vegetative States*, N.Y. TIMES, April 15, 2014, at A9.

whether treatment should be declared medically futile even if there is a slim success rate as opposed to a zero percent success rate.[102]

III. Impact on Personal Autonomy and Equality.

The impact of a healthcare provider's broad authority to override a patient's personal autonomy in making medical decisions largely depends on whether a patient asserts the right to refuse unwanted medical treatment, or the right to prolong life using available life-sustaining medical treatment even where continued treatment may be futile.

A. Right to Refuse Unwanted Medical Treatment

In *Cruzan*, the Supreme Court recognized that the right to refuse unwanted medical treatment is a liberty interest,[103] but that the interest must be balanced against the government's interests.[104] Both California and Texas recognize a competent patient's decision to discontinue and withhold medical treatment,[105] while also recognizing that healthcare providers have discretion to decline to comply with these decisions.[106]

1. The Texas Advance Directives Act Violates Equal Protection

The Texas Advance Directives Act, however, goes further by only recognizing a patient's decision to discontinue and withhold medical treatment so long as the patient is not a pregnant female.[107] Unlike *Quill*, a patient's decision to discontinue and withhold medical treatment is not treated equally regardless of physical condition because the statute does not protect pregnant female patients who express this desire.[108] This is arguably a sex-based classification that violates Equal Protection principles.

102. Bernat, *supra* note 94, at 199 ("[S]ome physicians do not declare a therapy futile unless the success rate is 0%, whereas others consider it futile even with a success rate as high as 13%.").

103. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990).

104. *Id.* at 279 ("But determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.") (citations omitted).

105. TEX. HEALTH & SAFETY CODE ANN. § 166.032 (West 2013); CAL. PROB. CODE § 4650 (West 2009).

106. TEX. HEALTH & SAFETY CODE ANN. § 166.046; CAL. PROB. CODE §§ 4654, 4734–36.

107. TEX. HEALTH & SAFETY CODE ANN. § 166.049.

108. Vacco v. Quill, 521 U.S. 793, 800 (1997); TEX. HEALTH & SAFETY CODE ANN. § 166.049.

The Court in *Geduldig v. Aiello,* with respect to California's disability insurance system that excluded pregnancy-related disabilities, but included disabilities that only affected men, indicated that "[w]hile it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification."[109] The Texas Advance Directives Act is distinguishable because it unequally suppresses the personal autonomy to refuse life-sustaining medical treatment, and strips the liberty interest to choose an end-of-life decision on the basis of sex. In Texas, persons may execute a written advance healthcare directive and elect whether to refuse unwanted medical treatment, or prolong life using all available life-sustaining medical treatment.[110] However, the Texas Advance Directives Act neither respects a pregnant female patient's decision to refuse unwanted medical treatment, nor a non-pregnant female's preference to terminate life-sustaining medical treatment under all circumstances.[111]

Where a female patient contemplates the possibility of a pregnancy and consciously chooses to discontinue unwanted medical treatment despite a pregnancy, Texas categorically forces all female patients to explicitly acknowledge that the written advance healthcare directive is not effective if the female patient is pregnant.[112] Female patients are effectively excluded from discontinuing and withholding unwanted medical treatment, meaning that the only real choice female patients have is to prolong their life using all available life-sustaining medical treatment, whereas male patients retain the liberty to choose between refusing or electing life-sustaining medical treatment.[113] The Texas Advance Directives Act, therefore, unequally infringes the autonomy to refuse unwanted medical treatment in violation of *Cruzan* on the basis of sex.[114]

2. The Texas Advance Directives Act Violates Substantive Due Process

The Texas Advance Directives Act also violates substantive due process because the disqualifying factor for pregnant female patients does not distinguish between fetal pre-viability and post-viability,[115]

109. Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).
110. Tex. Health & Safety Code Ann. § 166.033.
111. *Id.*
112. *Id.*
113. *Id.*
114. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990).
115. Tex. Health & Safety Code Ann. §§ 166.033, 166.049.

and therefore does not accommodate pregnant female patients' interest in exercising their fundamental right to an abortion.[116] While the government's "unqualified interest"[117] in keeping the pregnant female patient alive to preserve the potential life of the fetus may justify stripping a pregnant female patient's liberty interest to refuse life-sustaining medical treatment,[118] the Texas Advance Directives Act imposes an undue burden on the patient's personal autonomy to seek an abortion before the fetus attains viability.[119] *Casey* has made clear that such burdens are constitutionally impermissible.[120]

When a pregnant female patient requests to cease life-sustaining medical treatment, the incidental result is an abortion. But by barring pregnant female patients from electing to refuse unwanted medical treatment irrespective of viability, the Texas Advance Directives Act takes the fundamental right to abortion completely off the table.[121] Furthermore, the Texas Advance Directives Act is not calculated to persuade a woman to evaluate her options when making an end-of-life decision, but instead disqualifies and deprives her of the ability to make an informed decision because the government has already decided for her.[122] The disqualifying factor for pregnant female patients is a mechanism to prevent pre-viability abortions, and imposes an undue burden by wholly prohibiting a pregnant female patient from terminating her pregnancy by refusing unwanted, life-sustaining medical treatment.[123]

116. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 878–79 (1992) ("An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. . . . Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.").

117. Washington v. Glucksberg, 521 U.S. 702, 728 (1997) ("Washington has an unqualified interest in the preservation of human life."); *Cruzan*, 497 U.S. at 280–82.

118. *See Cruzan*, 497 U.S. at 278–79 ("[D]etermining that a person has a liberty interest under the Due Process Clause does not end the inquiry; whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.").

119. *Casey*, 505 U.S. at 846, 878–79.

120. *Id.*

121. *Id.* ("[A] state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.").

122. *Id.* ("To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.").

123. *Id.*

The circumstances of Mrs. Muñoz' case presents a bizarre dichotomy in the Texas Advance Directives Act. The Texas trial court held that the Texas Advance Directives Act was inapplicable because Mrs. Muñoz was brain-dead, and thus legally and medically dead.[124] The court did not rule on the constitutional challenges to the disqualifying factor for pregnant female patients,[125] and therefore did not balance the government's interest in the preservation of human life, by subjecting Mrs. Muñoz to eight weeks of post-mortem, life-sustaining medical treatment,[126] against Mrs. Muñoz' personal autonomy to refuse unwanted medical treatment[127] and to seek an abortion before the fetus attains viability.[128] The court also did not indicate whether the disqualifying factor permissibly protected a woman's health, or impermissibly posed an undue burden on a woman's right to an abortion.[129] Nor did the court address whether the fact that the fetus was not viable even at twenty-two weeks, at the time of the hearing, had any bearing on the court's holding.[130]

The court's ruling suggests that when a pregnant female patient is declared brain-dead, healthcare providers should recognize the patient's personal autonomy to discontinue medical treatment[131] because the Texas Advance Directives Act's disqualifying factor is inapplicable under these circumstances, regardless of fetal viability.[132] This also suggests that because there is zero probability that further medical treatment will restore a brain-dead patient's life, continued post-mortem treatment is futile,[133] incompatible with the physician's

124. Muñoz Judgment, *supra* note 9, at 1; TEX. HEALTH & SAFETY CODE ANN. § 671.001 (West 2013).

125. Muñoz Judgment, *supra* note 9, at 1; TEX. HEALTH & SAFETY CODE ANN. §§ 166.033, 166.049.

126. Stipulation of Facts, *supra* note 1, at 1.

127. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990).

128. *Casey*, 505 U.S. at 846, 878–79.

129. *Id.* at 878 ("As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.").

130. Stipulation of Facts, *supra* note 1, at 2.

131. *Cruzan*, 497 U.S. at 278–79 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

132. Muñoz Judgment, *supra* note 9, at 1; TEX. HEALTH & SAFETY CODE ANN. § 671.001 (West 2013).

133. Bernat, *supra* note 94, at 199 ("Medical futility generates two criteria that comprise independent variables: so-called quantitative and qualitative futility assessments. The quantitative component is the numerical probability that an act will produce the desired physiological effect. The qualitative component is the numerical probability that the

role as a healer, and undermines the integrity and ethics of the medical profession.[134] Yet, fetal viability may arguably justify the infringement of a brain-dead pregnant female patient's personal autonomy to both refuse unwanted medical treatment[135] and to terminate her pregnancy.[136] Additionally, where a pregnant female patient is brain-dead, the government arguably does not need to consider risks to the patient's health because she is legally and medically dead.[137] As such, the government may easily advance its interest in preserving the potential life of the fetus with post-viability abortion restrictions.[138]

The court's ruling also suggests that a pregnant female patient, who is in an irreversible persistent vegetative state, and who will not benefit from further medical treatment,[139] may be stripped of the personal autonomy to refuse life-sustaining medical treatment.[140] This leads to a perplexing result because when a patient is brain-dead or in an irreversible persistent vegetative state, continued treatment under either circumstance is futile[141] and incompatible with the physician's role as healer.[142] Though death distinguishes an irreversible persistent vegetative state from brain death, the quantitative component that measures the probability that the treatment will succeed and the qualitative component that measures the probability that the treatment will provide a benefit to the patient is the same if both conditions are truly irreversible.[143] The court's ruling seems to suggest that where there is

physiological effect will benefit the patient. A futility calculation is the product of the quantitative and qualitative components. As either component approaches zero, the product approaches zero, and the act becomes futile.").

134. Washington v. Glucksberg, 521 U.S. 702, 731–33 (1997) (recognizing the ethical dilemma that arises for physicians when the line between healing and harming is blurred); Pope, *supra* note 94, at 15–16.

135. *Cruzan*, 497 U.S. at 278–79.

136. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992) ("[T]he state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.").

137. *Id.*

138. *Id.*

139. *See generally* Bernat, *supra* note 94, at 198–99 (addressing the concept of medical futility, which is the consequence of irreversible illness or injury that future therapy cannot improve).

140. *See, e.g.*, *Cruzan*, 497 U.S. at 278–79.

141. Bernat, *supra* note 94, at 198–99.

142. TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013); Bernat, *supra* note 94, at 198–99 ("The determination of medical futility has an immediate ethical implication: because further therapy in this situation is futile and cannot help the patient, physicians have no ethical obligation to provide it, even when the therapy in question is requested or even demanded by the patient's family. Some scholars have further asserted that based on concepts of justice, physicians have an ethical duty not to prescribe futile therapy.").

143. Bernat, *supra* note 94, at 199; Pope, *supra* note 94, at 26.

brain death, the government's interest in life is outweighed by the integrity and ethics of the medical profession, which would be undermined if healthcare providers were compelled to provide futile postmortem treatment.[144] However, in the absence of brain death, the integrity and ethics of the medical profession hold less weight because there is a lack of consensus among healthcare providers regarding whether further medical treatment will succeed or provide a benefit to the patient.[145]

Thus a pregnant female patient's ability to exercise both her personal autonomy to refuse unwanted medical treatment and to terminate her pregnancy turns on the determination of legal death. This effectively implies that the government's interest in keeping the pregnant female patient alive to preserve the potential life of the fetus dissolves upon the patient's death, without respect to fetal viability, and yields to the patient's fundamental rights and liberty interests and the integrity and ethics of the medical profession. Ultimately, in order to retain autonomy to exercise established liberty interests in refusing medical care and terminating pregnancy, a female patient must be declared legally dead. Given that the entire premise of electing to cease life-sustaining medical treatment is to permit a patient to die, the current scheme is paradoxical.

B. Right to Prolong Life Using Available Life-Sustaining Medical Treatment, Even Where Continued Treatment May Be Futile

The United States Supreme Court has not addressed the question of whether there is a fundamental right or liberty interest to prolong life using available life-sustaining medical treatment, which is the corollary of the liberty interest recognized in *Cruzan* to discontinue and withhold medical treatment.[146] If, and when, the Court does address

144. Washington v. Glucksberg, 521 U.S. 702, 731–33 (1997) (recognizing the state's interest in protecting the integrity and ethics of the medical profession while holding constitutional a Washington law permitting competent, terminally ill patients to hasten death with prescribed medication); Pope, *supra* note 94, at 15–16 ("The medical profession is a self-governing one with its own standards of professional practice. . . . In particular, many health care providers do not consider the practice of medicine to include measures aimed solely at maintaining corporeal and biological functioning.").

145. Grady, *supra* note 101 (discussing recent findings based on PET and MRI scans that identify a significant number of individuals labeled vegetative who demonstrate signs of consciousness and possess some potential to improve).

146. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.").

this question, history suggests the Court will likely exercise restraint[147] when applying the two-part test to determine whether the government has infringed a fundamental right or liberty interest.[148]

Like Texas,[149] California permits persons to execute written advance healthcare directives and elect whether to refuse unwanted medical treatment, or prolong life using available, life-sustaining medical treatment "within the limits of generally accepted health care standards."[150]

To advance its interest in protecting personal autonomy,[151] California seeks to limit artificially prolonging life where continued treatment is medically futile[152] because that treatment "may violate patient dignity and cause unnecessary pain and suffering."[153] Irrespective of brain death, California healthcare providers may decline to comply with a patient's medical decision or instruction on the ground that the requested treatment is "medically ineffective,"[154] "contrary to generally accepted health care standards,"[155] or for "reasons of conscience."[156]

In contrast with Texas,[157] California does not require that a healthcare provider's refusal to comply with a patient's medical decision or instruction be subject to review by an ethics or medical committee.[158] Though, both California and Texas recognize that healthcare providers have nearly unlimited discretion to withdraw all life-sustaining medical treatment upon satisfying procedural safeguards when a patient is declared brain-dead.[159]

147. *Glucksberg*, 521 U.S. at 720.

148. *Id.* at 720–21.

149. TEX. HEALTH & SAFETY CODE ANN. § 166.033 (West 2013).

150. CAL. PROB. CODE § 4701 (West 2009).

151. *Id.* § 4650(b).

152. *See* Bernat, *supra* note 94, at 204 (discussing findings that advance directive legislation has increased ethics consultations, decreased time spent making futility decisions, and improved physician-surrogate communication); *see also* Pope, *supra* note 94, at 25–26 (recounting statistics of hospitals' unilateral decision to terminate life-sustaining care, and predicting such occurrences to increase).

153. CAL. PROB. CODE § 4650(b).

154. *Id.* § 4735.

155. *Id.*

156. *Id.* § 4734.

157. TEX. HEALTH & SAFETY CODE ANN. § 166.046 (West 2013).

158. CAL. PROB. CODE § 4736.

159. TEX. HEALTH & SAFETY CODE ANN. § 166.046(e)–(f); CAL. HEALTH & SAFETY CODE § 1254.4 (West Supp. 2015).

The circumstances of Ms. McMath's case[160] erode a healthcare provider's discretion to terminate futile medical treatment to brain-dead patients, despite satisfying procedural safeguards. When treating physicians determined that Ms. McMath was brain-dead, at least three physicians confirmed the prognosis.[161] The hospital also met its obligation in accommodating Ms. McMath's family for a reasonably brief period so that they could gather by her bedside.[162] However, irrespective of the healthcare provider's medical conclusion that further treatment would be futile, a healthcare provider must also make "reasonable efforts" to accommodate asserted religious or cultural practices made by the patient or patient's family.[163] The hospital initially refused to comply with Ms. Winkfield's request that her daughter continue to receive life-sustaining medical treatment,[164] which was based on the family's religious beliefs that life ends when the heart stops beating.[165] Ms. Winkfield and the hospital eventually reached a stipulation[166] to remove Ms. McMath to another healthcare facility,[167]

160. Winkfield v. Children's Hosp. of Oakland, No. RP13-707598 (Cal. Super. Ct. 2013).

161. CAL. HEALTH & SAFETY CODE §§ 7180–81 (West 2007); Physician Declaration of Robin Shanahan at 1, Winkfield v. Children's Hosp. of Oakland, No. RP13-707598 (Cal. Super. Ct. Dec. 30, 2013); Physician Declaration of Robert Heidersbach at 1, Winkfield v. Children's Hosp. of Oakland, No. RP13-707598 (Cal. Super. Ct. Dec. 30, 2013); Lee Romney, *Clock Ticks in Jahi McMath Case; Experts Say Court Clash Went Too Far*, L.A. TIMES (Dec. 30, 2013), http://articles.latimes.com/2013/dec/30/local/la-me-ln-jahi-mcmath-brain-dead-case-20131230.

162. CAL. HEALTH & SAFETY CODE § 1254.4(a); Mem. of P. & A., *supra* note 13, at 3–4 (detailing numerous measures undertaken by the hospital to provide access and support to Ms. McMath's family in the days after her death).

163. CAL. HEALTH & SAFETY CODE § 1254.4(c)(2) ("If the patient's legally recognized health care decisionmaker, family, or next of kin voices any special religious or cultural practices and concerns of the patient or the patient's family surrounding the issue of death by reason of irreversible cessation of all functions of the entire brain of the patient, the hospital shall make reasonable efforts to accommodate those religious and cultural practices and concerns.").

164. Mem. of P. & A., *supra* note 13, at 3–4 ("A full week after death, Children's has determined that the time has come to stop providing mechanical support to Ms. McMath's body. Accordingly, on December 19, 2013 Children's advised Ms. McMath's family/next of kin of their intent to discontinue all mechanical ventilation and any other medical intervention soon.").

165. Complaint, *supra* note 10, at 4 ("Plaintiffs are Christians with firm religious beliefs that as long as the heart is beating, Jahi is alive. . . . These religious beliefs involve providing all treatment, care, and nutrition to a body that is living, treating it with respect and seeking to encourage its healing."). Religious accommodations and exemptions have also been asserted in other contexts. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (recognizing religious exemption to the Affordable Care Act's contraception coverage mandate).

166. *See* Stipulation for Protocol, *supra* note 17, at 1 (outlining procedure and parties' roles for transfer from Children's Hospital).

where she presently receives post-mortem medical treatment that is artificially prolonging her life.[168] The hospital essentially made "reasonable efforts" to accommodate Ms. Winkfield's asserted religious beliefs by stipulating to transfer Ms. McMath to another healthcare facility.[169]

In accommodating the family's asserted religious beliefs, the hospital facilitated post-mortem medical treatment to a brain-dead patient, even though there was zero probability that further medical treatment would restore Ms. McMath's life.[170] The hospital yielded to the family's interest in artificially prolonging Ms. McMath's life, which outweighed the integrity and ethics of the medical profession, even though the requested post-mortem treatment is "medically ineffective,"[171] "contrary to generally accepted health care standards,"[172] and incompatible with the physician's role as healer.[173] Alternatively, the hospital yielded to the family's interest because any error was "not susceptible of correction."[174]

This is perplexing because where a patient has an otherwise irreversible condition, the balance often tips in favor of the integrity and ethics of the medical profession because healthcare providers may decline to prolong a patient's life on the ground that the requested treatment is "medically ineffective,"[175] "contrary to generally accepted health care standards,"[176] or for "reasons of conscience."[177] A healthcare provider's refusal to comply with a patient's medical decision or instruction to prolong life is not always subject to review by an ethics or medical committee,[178] even though there is a lack of consensus among healthcare providers regarding whether further medical treat-

167. Onishi, *supra* note 18; Romney, *supra* note 18 (reporting that Ms. McMath remains on a ventilator and under care at a home in New Jersey).

168. Wells, *supra* note 16.

169. CAL. HEALTH & SAFETY CODE § 1254.4(c)(2) (West Supp. 2015).

170. *See* Bernat, *supra* note 94, at 200 (discussing physician's legal and moral obligations in the context of medical futility case study).

171. CAL. PROB. CODE § 4735 (West 2009).

172. *Id.*

173. Washington v. Glucksberg, 521 U.S. 702, 731–33 (1997); Pope, *supra* note 94, at 15–16.

174. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 283 (1990).

175. CAL. PROB. CODE § 4735.

176. *Id.*

177. *Id.* § 4734.

178. *Id.* § 4736; *but see* TEX. HEALTH & SAFETY CODE ANN. § 166.046 (West 2013) (requiring review of a healthcare provider's decision not to comply with a patient's medical directive by ethics or medical committee).

ment is medically futile.[179] Additionally, in the absence of brain-death, a healthcare provider who refuses a request to prolong life is not required to make "reasonable efforts" to accommodate asserted religious or cultural practices made by the patient or patient's family.[180]

The outcome in Ms. McMath's case does not advance California's interest in protecting patient dignity and preventing unnecessary pain and suffering,[181] and suggests that there may be some liberty interest to prolong life using available life-sustaining medical treatment, even where continued treatment may be futile. But in following that logic, a patient suffering from an irreversible condition who seeks to prolong life using available life-sustaining medical treatment is treated differently from a brain-dead patient with the same desire. This results in the unequal suppression of the personal autonomy to prolong life using available life-sustaining medical treatment. Ultimately, in order to retain the personal autonomy to prolong life, a patient suffering from an irreversible condition must be declared brain-dead, and therefore legally and medically dead. Given that the entire premise of prolonging life is to evade death, the current scheme is paradoxical.

Conclusion

When given the opportunity to expand the recognition of additional asserted fundamental rights or liberty interests, the United States Supreme Court usually tends to exercise restraint.[182] Though the Court has recognized the liberty interest in refusing life-sustaining medical treatment,[183] it has not addressed the question of whether there is a fundamental right or liberty interest to prolong life using available life-sustaining medical treatment.[184]

179. Bernat, *supra* note 94, at 199 ("[T]here is no consensus regarding the numerical threshold for an act to be labeled futile. . . . Realistically, there is a continuum of outcome probabilities for every clinical intervention. The point on the outcome probability continuum at which futility occurs is inherently arbitrary and is determined differently among physicians and patients.").

180. CAL. HEALTH & SAFETY CODE § 1254.4(c)(2) (West Supp. 2015).

181. CAL. PROB. CODE § 4650(b) ("Modern medical technology has made possible the artificial prolongation of human life beyond natural limits. In the interest of protecting individual autonomy, this prolongation of the process of dying for a person for whom continued health care does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person.").

182. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

183. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990).

184. *Id.*

California and Texas' recognition of medical futility and healthcare providers' nearly unlimited discretion to withdraw all life-sustaining medical treatment upon satisfying procedural safeguards has raised more issues than resolutions. The Texas Advance Directives Act's disqualifying factor for pregnant female patients is arguably a sex-based classification that violates Equal Protection principles and substantive due process because it does not distinguish between fetal pre-viability and post-viability,[185] and therefore does not accommodate a pregnant female patient's personal autonomy to both refuse unwanted medical treatment[186] and to terminate her pregnancy.[187] Additionally, a California healthcare provider's discretion to terminate medical treatment to brain-dead patients may be limited if the provider must make "reasonable efforts" to accommodate asserted religious or cultural practices made by the patient or patient's family.[188] This results in the unequal suppression of the personal autonomy to prolong life using available life-sustaining medical treatment. The circumstances in Mrs. Muñoz and Ms. McMath's cases clearly demonstrate the perplexing outcomes that result from Texas and California's recognition of medical futility, specifically where patients must die to retain any personal autonomy.

185. TEX. HEALTH & SAFETY CODE ANN. § 166.033 (West 2013) ("[U]nder Texas law this directive has no effect if I have been diagnosed as pregnant."); *id.* § 166.049 ("A person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient.").

186. *Cruzan*, 497 U.S. at 278–79.

187. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

188. CAL. HEALTH & SAFETY CODE § 1254.4(c)(2) (West Supp. 2015).