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NOTE

POSTMORTEM GESTATIONAL DONATION: MEDICAL MIRACLE OR INTRUSION?

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Medical technologies continue to improve at a rapid pace, bringing us ever closer to working near magic; but balancing someone's rights to autonomous medical decision-making with fetal personhood is an open issue ripe for analysis. As seen in the ongoing story of Adriana Smith and baby Chance, families lack recourse when hospital decision-makers override both the surrogate judgment of the deceased person and the guidance of the state's Attorney General. This Note explores a novel application of the privacy tort—intrusion into seclusion—as a viable claim for the estate to bring on behalf of people subjected to postmortem gestational donation against their wishes.

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† J.D. Candidate, University of North Carolina School of Law, 2027. To my partner and my sister, thank you for your endless support so that I could embrace every opportunity law school had to offer. This Note would not exist but for you.

I. INTRODUCTION

Postmortem gestational donation ("PGD") is a new phenomenon inviting legal analysis. Advancements in life support technologies for people of all ages have made it physically possible to support the life of a fetus in utero after the death of the gestational carrier,[1] but the existence of this technology does not imply legal authority to use PGD regardless of the expressed preferences made by the adult prior to neurological death.[2]

A teaching hospital in Georgia utilized PGD in 2025 when Adriana Smith "died by neurological criteria [in February 2025,] when she was

1. Ondrej Hrdy, *Delivery of a Healthy Baby from a Brain-Dead Woman After 117 Days of Somatic Support: A Case Report*, 22 AM. J. CASE REPS. art. no. e:930926-1, at 1 (2021).

2. *See* Joan H. Krause, *Pregnancy Advance Directives*, 44 CARDOZO L. REV. 805, 806–07 (2023) (discussing the 1990 Supreme Court decision enumerating the implied "constitutionally protected liberty interest in refusing unwanted medical treatment" and pregnancy exclusions to advance directives in state statutes as insufficiently narrowly tailored) (internal citation omitted).

nine weeks pregnant."[3] Adriana had no advance directive, so the hospital should have consulted her family regarding Adriana's preferences.[4] Adriana's mother wanted the hospital "to stop" life support for Adriana,[5] but the hospital unilaterally chose the treatment plan according to its interpretation of Georgia's Living Infants Fairness and Equality ("LIFE") Act.[6] The hospital continued the use of life support for Adriana's body to facilitate the development of the then nine-week-old fetus until such time as the fetus could survive outside the womb.[7] According to a statement from Georgia's Attorney General's office in May 2025, "there's nothing in Georgia's abortion law that requires a woman be kept on life support after brain death . . . because removing life support is not an action done for the purpose of terminating a pregnancy."[8]

The unilateral choice by the hospital, disregarding input from Adriana's family, highlights the prioritization of the rights of the fetus above any preferences for end-of-life care or organ donation Adriana

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3. Sophie Schott, Faith E. Fletcher, Claire I. Horner & Virginia A. Brown, *Pregnancy, Brain Death, and the Right to Choose: Lessons from the Adriana Smith Case*, HASTINGS CTR. FOR BIOETHICS (June 3, 2025), https://www.thehastingscenter.org/pregnancy-brain-death-and-the-right-to-choose-lessons-from-the-adriana-smith-case/ [https://perma.cc/HKJ5-QZTP].

4. Ariane Lewis, Gwendolyn Quinn & Kimberly Mutcherson, *Ethical Controversies in the Adriana Smith Case in Georgia: Brain Death/Death by Neurologic Criteria in Pregnancy*, 26 AM. J. BIOETHICS 13, 14 (2026).

5. Raimundo Rojas, *While Grandma Demands "Justice," Baby Chance Still Fights for His Life*, NAT'L RIGHT TO LIFE (Feb. 20, 2026), https://nrlc.org/nrlnewstoday/2026/02/while-grandma-demands-justice-baby-chance-still-fights-for-his-life-2/ [https://perma.cc/MQ6Y-T38R].

6. Leila Fadel & Sam Gringlas, *Transcript of Sam Gringlas's Interview on Morning Edition*, NPR: MORNING EDITION (May 20, 2025, at 04:28 ET), https://www.npr.org/2025/05/20/nx-s1-5403809/a-brain-dead-pregnant-woman-is-being-kept-on-life-support-raising-legal-questions [https://perma.cc/MN5U-B3HZ].

7. Arthur Caplan, *The Adriana Smith Case Unfolding in Atlanta Raises Many Questions*, BIOETHICS TODAY (May 22, 2025), https://bioethicstoday.org/blog/the-adriana-smith-case-unfolding-in-atlanta-raises-many-questions/ [https://perma.cc/89KU-RWGS].

8. Fadel & Gringlas, *supra* note 6.

may have had.[9] One possible explanation for the hospital's choice to prioritize the fetus is the rise in popularity of fetal personhood.[10] Fetal personhood—a doctrine granting class status to fetuses[11]—is expanding since the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*.[12] If fetal personhood influenced the hospital's decision, then in Adriana's case the hospital chose to facilitate the rights of one class (fetuses) to usurp the rights of another (women).[13] Choosing one class over another is an interesting position for Georgia especially when considered in light of Georgia's utter detestation for privacy intrusions.[14]

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9. Jennifer Bellamy, *Infant of Georgia Woman Who Carried Baby While Brain Dead Still Fighting for His Life*, 11 ALIVE: LOCAL NEWS, https://www.11alive.com/article/news/local/adriana-smith-infant-update-hospital-care/85-77a8408f-18bd-4801-90b0-909514e4136 [https://perma.cc/8F54-LHLP] (last updated Aug. 26, 2025, at 23:04 ET).

10. Sarah Corning, *Recentering Pregnancy: A Response to Fetal Personhood*, 35 STAN. L. & POL'Y REV. 322, 323–24 (2024).

11. *See* Johanna Hussain, *The Legal Consequences of the Fetal Personhood Movement*, CORNELL J.L. PUB. POL'Y: BLOG (Mar. 4, 2025), https://publications.lawschool.cornell.edu/jlpp/2025/03/04/legal-consequences-of-the-fetal-personhood-movement/ [https://perma.cc/4Q5Z-N5EM]; *see, e.g.*, GA. CODE ANN. § 1-2-1(b) (defining an "unborn child" as a "[n]atural person") (internal quotations omitted).

12. Hussain, *supra* note 11.

13. This thought-provoking line of analysis is discussed at length in scholarship across the country. *See, e.g.*, Taylor Riley & Asha Hassan, *Fetal Personhood and Reproductive Criminalization—Implications for Patients, Clinicians, and Public Health*, 393 NEJM art. no. 16, at 1559 (2025); Wendy S. Heipt & Julia Littell, *Fetal Personhood Creep*, 28 IOWA J. GENDER, RACE & JUST. 283 (2025).

14. Georgia describes the right of publicity and the right of privacy as two sides of the same coin. Further, the Court states that an intrusion into either is akin to slavery. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 80–81 (Ga. 1905)

> The knowledge that one's features and form are being used for such a purpose [advertisements], brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him . . . that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts. or even of ordinary sensibilities, no

footnote continued on next page

What liability does the hospital face when enforcing fetal personhood against the expressed wishes of the family members of the deceased adult and the state's Attorney General? A deceased person maintains some rights over the handling of their corpse through pre-mortem contracts.[15] Both Adriana's preferences for the handling of her corpse and her premortem parenting preferences should have been considered. Noting the Supreme Court's reduction of constitutional privacy protections and shifting of medical decision-making for the female reproductive system to the states, state tort law may be an appropriate avenue for relief—specifically intrusion into seclusion. Georgia's intrusion of privacy tort refers to an "intrusion upon the plaintiff's seclusion or solitude, or into his private affairs."[16] Due to changes in how laws are applied to pregnant bodies, while not previously used in this context, intrusion may be a claim available for the families of deceased pregnant people.

This Note explores the application of intrusion in cases where a hospital acts against the expressed wishes of the deceased person, the deceased person's surrogate decision-makers, or the interpretation of the state's Attorney General. Part II outlines the technological advancement—life support—which made PGD possible, the interplay between life support and advance directives, and the federal

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> one can be more conscious of his enthrallment than he is. So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability . . . .

Id.

Noting this perspective and Georgia's history with chattel slavery, the hospital's choice to force birth seems even more sinister. *See* Antia L. Allen, *Natural Law, Slavery, and the Right to Privacy Tort*, 81 FORDHAM L. REV. 1187, 1209 (2012).

15. Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 737, 776 (2009).

16. Troncalli v. Jones, 514 S.E.2d 478, 482 (Ga. App. 1999).

government's retreat from regulating female reproductive systems. Part III analyzes how intrusion's typical application presents a viable claim in the context of PGD and distinguishes PGD from postmortem sperm retrieval. Part IV describes the indefensible choice of the hospital to maintain Adriana's life support and addresses the consent defense. Part V concludes by acknowledging the strengths and weaknesses of intrusion in addressing this gap in the law.

II. Life Support: Empowering Patients' Right to Live and Right to Die

Supreme Court cases enumerate a "substantive-due-process right to make medical treatment choices" as within "autonomy rights."[17] Violating one's autonomy rights "consists of the nullification of the person's will as a free human being."[18] The right to autonomous medical decision-making includes both accepting and "refus[ing] life-sustaining treatment."[19] This right also includes "pre-mortem contracting" regarding organ donation and the final disposition of one's corpse.[20] In Section A, this Note describes the evolution of life support technology, empowering the right to live. Section B outlines one's right to contract premortem for certain posthumous preferences and to freely gift up to one's entire body, providing procedures around the right to die. Section C describes the shift removing federal government from being the force regulating medical decisions for pregnant people.

17. B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 Tex. L. Rev. 277, 329 (2006), *reprinted in* Case W. Rsre. U. Sch. L. Scholarly Commons: Fac. Publ'ns, https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1142&context=faculty_publications/1000 [https://perma.cc/LLL5-ZAL6]. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (implying a right to autonomous medical decision-making); Lawrence v. Texas, 539 U.S. 558 (2003) (enumerating a right to autonomy in personal decision-making).

18. Gideon Parchomovsky & Alex Stein, *Autonomy*, 71 U. Toro. L.J. 61, 74 (2021).

19. Megan S. Wright, *End of Life and Autonomy: The Case for Relational Nudges in End-of-Life Decision-Making Law and Policy*, 77 Md. L. Rev. 1062, 1065 (2018).

20. Smolensky, *supra* note 15.

A. *The Best Place to Start is at the End: Life Support Technology Revolutionized End-of-Life Care*

Life support technology today is often thought of as an all-inclusive process, but life support was developed in pieces to support individual organ systems through the nineteenth and twentieth centuries.[21] The respiratory system was the first organ system addressed by life support via a bellows used in 1776 to artificially breathe for people who had drowned.[22] From 1932–1940, artificial ventilation evolved for use on patients under anesthesia.[23] After the successes achieved when simulating respiration, the circulatory system became the next frontier. In 1901, life support for the circulatory system consisted of internal cardiac massage, during which a doctor would manually pump the heart of a chloroformed patient.[24] This evolved into internal defibrillation of the heart in 1947, followed by external defibrillation in 1956.[25] After respiration and circulation came other machines which could filter waste in 1923 (substituting for kidneys), complete intravenous nutrition and hydration supplementation in 1968 (substituting for the digestive tract), and in 1975 people began experimenting with artificial hepatic support (substituting for the liver).[26]

The motivation behind life support was to "develop[] methods of preventing death in patients considered 'too well to die.'"[27] Life support was infrequently used, but the rate of utilization has increased, possibly because the technological advancements facilitate shifts in consumers' attitudes regarding the value gained by using life

21. G.D. Phillips, *Life Support Systems in Intensive Care: A Review of History, Ethics, Cost, Benefit and Rational Use*, 5 ANAESTHESIA & INTENSIVE CARE 251, 251–52 (1977); *see* ALOK DABI & OMAR RAHMAN, TERMINATION OF LIFE SUPPORT, *in* STATPEARLS, https://www.ncbi.nlm.nih.gov/books/NBK564312/ [https://perma.cc/DM3B-FYZJ] (last updated Sep. 20, 2024).

22. Phillips, *supra* note 21, at 251.

23. *Id.* at 251–52.

24. *Id.* at 251.

25. *Id.*

26. *Id.* at 252.

27. *Id.* at 251–52.

support and avoiding death.[28] Beyond consumer preferences, doctors expanded life support to palliative care: Instead of functioning to usurp death, life support could reduce someone's suffering as they slipped away.[29] As an example, someone who was incapable of swallowing and digesting food because of stomach cancer could receive intravenous nutrition to reduce hunger pangs while the body's other organ systems continued to shut down.

Similarly, life support could be used to benefit the family members of the patient. If the patient's condition took a rapid turn for the worse, life support systems could be used to extend the patient's life until family members arrived at the hospital to say their goodbyes.[30] Additionally, if the patient's organ donor status is unknown, keeping the patient on life support preserves the organs for donation if approved by the family members.[31] It is this use of life support to essentially support the lives of people who are not the patient receiving life support that grounds PGD.

While life support use has changed the outcome of various medical emergencies, extended use of life support technologies puts the body at risk of certain complications.[32] Life support was created for temporary use to supplement organ systems that have stopped working due to critical illness only until the body either recovers

28. *See* John M. Luce & Gordon D. Rubenfeld, *Can Health Care Costs Be Reduced by Limiting Intensive Care at the End of Life?*, 165 CRITICAL CARE PERSP. 750, 750, 753 (2002) ("[A]ll critically ill patients should receive a therapeutic trial of intensive care."). For a comparison between the original intent of life support for the patients that were too well to die to today's more commonplace use which sees over half of patients dying despite life support use, compare this Note with Phillips, *supra* note 21.

29. Melahat Akdeniz, Bülent Yardimci & Ethem Kavukcu, *Ethical Considerations at the End-of-Life Care*, 9 SAGE OPEN MED. 1, 4 (2021).

30. *See* DABI & RAHMAN, *supra* note 21.

31. *See Deceased Donation*, UNOS, https://unos.org/transplant/deceased-donation/ [https://perma.cc/H89C-NQ4G] (last visited Mar. 17, 2026); Audiey Kao, *The Physician's Role in Discussing Organ Donation at the End of Life*, AMA J. ETHICS (2000), https://journalofethics.ama-assn.org/article/physicians-role-discussing-organ-donation-end-life/2000-12 [https://perma.cc/X2AE-U635].

32. *Ventilator/Ventilator Support: Risks of Being on a Ventilator*, NAT'L HEART, LUNG, & BLOOD INST., https://www.nhlbi.nih.gov/health/ventilator/risks [https://perma.cc/2T53-SBNT] (last updated Mar. 24, 2022).

enough to function without the life support technologies or fails.[33] Extended life support use has known side effects which detract from the intended outcome of PGD: a successful and healthy pregnancy.[34] Pregnancy requires the circulation of oxygen and nutrients to the fetus and removal of waste products.[35] Pregnancy itself carries risks such as preeclampsia, hyperemesis gravidarum, and a depressed immune system.[36] Mechanical ventilation carries risks that impact the availability of oxygen in the bloodstream, blood circulation, and increase the risk of illness.[37] Additionally, because the person on life support is dead, their corpse cannot participate in mitigating therapies to improve circulation for the benefit of the fetus.[38] The trade-off of using prolonged life support for PGD presents extensive risk to the fetus.

Life support technologies have gained a position in end-of-life care, but individual autonomy in medical decision-making is a protected right.[39] "In multiple decisions, the Supreme Court has recognized that the Due Process Clause subsumes a protected right to refuse medical care."[40] Someone's refusal to accept suggested medical care is only ignored when the state's interest in "public health, safety,

33. Robert C. McDermid & Sean M. Bagshaw, *Prolonging Life and Delaying Death: The Role of Physicians in the Context of Limited Intensive Care Resources*, 4 PHIL., ETHICS & HUMANS. MED., art. no. 3, at 1–2 (2009).

34. *Ventilator*, *supra* note 32.

35. Monika Sanghavi & John D. Rutherford, *Cardiovascular Physiology of Pregnancy*, 130 CIRCULATION 1003, 1003, 1007 (2014), https://www.ahajournals.org/doi/10.1161/circulationaha.114.009029 [https://perma.cc/9W68-A6FC] ("[M]aladaptation [to "heart and vasculature . . . remodeling"] has been associated with fetal morbidity.").

36. *What Are Some Common Complications of Pregnancy?*, NAT'L INST. HEALTH, https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/complications [https://perma.cc/5V62-CZMJ] (last updated May 29, 2024).

37. *Ventilator*, *supra* note 32.

38. Sadiya S. Khan, Natalie A. Cameron & Kathryn J. Lindley, *Pregnancy as an Early Cardiovascular Moment: Peripartum Cardiovascular Health*, 132 CIRCULATION RSCH. 1584, 1587–88 (2023).

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

40. *Amdt 14.S1.6.5.1 Right to Refuse Medical Treatment and Substantive Due Process*, CONST. ANNOTATED: ANALYSIS & INTERPRETATION U.S. CONST., https://constitution.congress.gov/browse/essay/amdt14-S1-6-5-1/ALDE_00000903/ [https://perma.cc/MQH5-YX2A] (last visited Sep. 22, 2025).

and human life" is found to outweigh the value of the refuser's constitutional right to autonomy and freedom of choice.[41] One's pre-mortem medical decisions are often laid out in an advance directive, discussed next.[42]

B. Advance Directives: Organ Donation and Decisions About the Handling of One's Body After Death

People have the right to freely contract[43] and freely gift,[44] including contracting and gifting around the posthumous handling of their body and its parts.[45] Advance directives and testamentary wills are methods for people to contract regarding the posthumous handling of their corpses.[46] Without express consent to donate one's organs and/or body,

41. *Id.*

42. Ira Bedzow, *Advance Directives: A Case of Changing Social Norms and Their Legal Implications*, 1 J. AGING, LONGEVITY, L. & POL'Y 96, 96–99 (2016).

43. *Freedom of Contract*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/freedom_of_contract [https://perma.cc/VE4D-XBBU] (last updated Jan. 2023); 42 U.S.C. § 1981(b) (2025); *see, e.g.*, Isabele M. Castle, *Unforeseen Implications of Assisted Reproductive Technology Post-*Dobbs, 50 UNIV. DAYTON L. REV. 437, 448–49 (2025) (discussing the implications freedom of contract has in contracts involving reproductive choices).

44. *Gift*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/gift [https://perma.cc/7W96-TLDR] (last updated Jan. 2023); *see* 42 U.S.C. § 1982 (2025) (enumerating the right to "convey real and personal property"); *see* Gruen v. Gruen, 488 N.Y.S.2d 401, 403–04 (1984) (discussing the right to gift as a common law property right).

45. *See* Bedzow, *supra* note 42, at 105; *U.S. Department of Health and Human Services Recommendations 19–28*, HEALTH RESS. & SERVS. ADMIN.: FED. ADVISORY COMMS., https://www.hrsa.gov/advisory-committees/organ-transplantation/recommendations/19-28 [https://perma.cc/X7TC-8S9D] (last updated June 2021) ("[A]ffirm[ing] the right of individuals to donate their organs and tissues at death").

46. *Before You Sign That Document! What You Need to Know About Advance Directives for Health Care*, OKLA. DEP'T HUM. SERVS. 1, https://soonersuccess.ouhsc.edu/Portals/1024/Legal%20Aid%20Combined%20Documents.pdf [https://perma.cc/VBN6-AFJN] (last updated Aug. 2016); *see* Smolensky, *supra* note 15.

actions consistent with organ donation or experimentation on a corpse would be mutilation and could result in damages.[47]

The Uniform Anatomical Gift Act ("UAGA") sets out a federal framework of statutory language, which all states have adopted "in some form," defining organ donation.[48] The UAGA balances the need for organ donation with an individual's right to refuse to donate while insulating hospitals from liability in the event that they harvest tissues or organs from someone who did not want to donate.[49] The organ donation system in the United States is an "opt-in" system, meaning that the assumption is for individuals to refuse to donate.[50] Registering one's "legally binding decision" to donate is one way to opt in, but when someone is not registered, the next-of-kin or legal agent will be contacted to offer surrogate judgment on behalf of the deceased person.[51]

However, many states, including Georgia, passed legislation known as pregnancy exclusion laws, voiding advance directives of pregnant people.[52] Those laws allow the state to assert a compelling interest in the life of the fetus justifying overriding the deceased's

47. Letter from Juliann Jenson, Research Analyst, to Interested Persons, Abuse of Corpse Crimes in Other States, (Feb. 20, 2020) (on file with Colo. Legis. Council Staff), https://leg.colorado.gov/sites/default/files/abuse_of_corpse_crimes-interestedperson_0.pdf [https://perma.cc/X4J3-8PFL] (listing corpse crimes from interference with a corpse to unauthorized dissection to treatment that would outrage familial sensibilities).

48. *Uniform Anatomical Gift Act*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/uniform_anatomical_gift_act [https://perma.cc/7YNB-E7LY] (last updated Feb. 2025).

49. *Id.* ("[T]he act states that any hospital that acts in good faith in accordance with the anatomical gift laws is not liable for damages in any civil or criminal liability.").

50. *Opt-In vs. Opt-Out Donation Systems*, 8 ALLIANCE SPOTLIGHT SERIES, art. no. 3, at 1 (2022).

51. *Id.*

52. Erin S. DeMartino et al., *US State Regulation of Decisions for Pregnant Women Without Decisional Capacity*, 321 JAMA 1629, 1629–31 (2019) (noting Georgia is one of nineteen states that statutorily restrict surrogate decision makers and one of three that require pregnancy testing prior to withdrawal of life support for all female patients of childbearing age).

preferences.[53] Accordingly, neither entity (deceased mother nor fetus) involved in PGD has an advance directive which will be respected by medical personnel if they are both silenced by the condition of pregnancy. PGD ultimately involves two entities whose medical providers cannot complete an analysis of their best interests in deciding appropriate treatment planning because of legislation tying the hands of the medical providers to the life support technologies.

Donating potential reproductive material, namely ova and spermatozoa cells,[54] is a well-established procedure for consenting adults, but postmortem donation largely requires written consent prior to the death of the individual.[55] The Uniform Law Commission comments that spermatozoa is a tissue, therefore eligible for postmortem donation.[56] Donating spermatozoa necessitates procedures beyond retrieval alone, as the cells must be preserved and maintained in specific, costly ways to remain viable.[57] These costs must be paid by the next-of-kin requesting PSR.[58] While the costs are unmanageable for low-income families, the greatest barrier to PSR is

53. *See id.* ("It is unclear whether the current legal framework achieves an ethical balance between the state's interest in preserving fetal life and the interests incapacitated women may have in forgoing life-sustaining treatments."); Krause, *supra* note 2, at 848.

54. Ova (or singularly ovum) are egg cells made in the female reproductive system. Spermatozoa (or singularly spermatozoon) are sperm cells made in the male reproductive system. These specialized cells are frequently donated through egg donation or sperm donation. Donees can use the donated reproductive cells as part of their fertility plan to conceive a child.

55. Samuel Hoy Brown VII, *Life After Death: How the Widespread Implementation of Postmortem Sperm Retrieval Can Redefine Procreative Liberty*, 83 LA. L. REV. 877, 888 (2023); *see* Caprice Knapp, Gwendolyn Quinn, Bethanne Bower, & Laurie Zoloth, *Posthumous Reproductive and Palliative Care*, 14 J. PALLIATIVE MED. 895, 896 (2011).

56. UNIF. ANATOMICAL GIFT ACT § 18 (UNIF. L. COMM'N 2009).

57. Brown, *supra* note 55, at 881–83, 890. The most common procedure used is Minimally Invasive Epididymal Sperm Aspiration ("MIESA") whereby healthy sperm can be retrieved during life and up to 36 hours after death. A surgeon microscopically incises the scrotum to locate the epididymis (sperm factory). The tubules within the epididymis are dilated and flushed to retrieve sperm cells. The cells then must be stored cryogenically to prevent deterioration until use. MIESA costs around $3,000. Cryogenic storage costs between $100 and $500 per year of storage. *Id.*

58. *Id.* at 890–91.

ambiguous consent: next-of-kin asserting surrogate judgment to consent to PSR without written consent from the deceased person.[59] As no state has passed legislation expressly addressing PSR, its implementation exclusively at the request of the deceased person's next-of-kin has mixed results.[60] Each hospital analyzes requests for PSR made by the deceased person's next-of-kin, absent the deceased person's written consent according to that hospital's protocol (or lack thereof) for addressing ambiguous consent.[61] Accordingly, explicit written consent forecloses any hospital's need to decide ambiguous consent.[62]

Premortem contracts elucidate decedents' preferences, and hospitals have policies in place for organ donation bounded by the state's codification of the UAGA.[63] While PSR is less common, some hospitals have performed this procedure by following their existing policies in alignment with the UAGA's comments clarifying that spermatozoa are donatable tissue.[64] Ova readily analogize to spermatozoa as a similarly donatable tissue, but postmortem gestational donation requires donation of multiple organ systems—up to one's entire body—for a period of potentially months instead of an acute procedure to harvest tissue.[65]

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59. *See id.* at 889 (deliberating about the evidentiary requirement needed to establish consent when the next-of-kin consents to harvest reproductive tissues without explicit written consent from the deceased); N.Y.C. BAR ASS'N, HUMAN ORGAN SUPPLY: REPORT ON ETHICAL CONSIDERATIONS AND BREACHES IN ORGAN HARVESTING PRACTICES 2 (2023) https://www.nycbar.org/wp-content/uploads/2023/05/20221145-OrganHarvestingEthics.pdf [https://perma.cc/L3BV-86G9] (placing ambiguous consent opposite from "forced organ harvesting from live victims" on the scale of ethically concerning organ donations).

60. Brown, *supra* note 55, at 884–85, 888.

61. *Id.*

62. *Id.*

63. *See generally* Kathleen S. Andersen & Daniel M. Fox, *The Impact of Routine Inquiry Laws on Organ Donation*, 7 HEALTH AFFS. 65 (1988), (discussing the influences the revision of the Uniform Anatomical Gift Act, federal legislation, and state legislation have on hospital policies for postmortem organ donation).

64. Brown, *supra* note 55, at 884–85, 888.

65. Elizabeth M. Gilbert, *Only Useful as a Uterus: How to Shape State and Personal Safeguards on the Implementation of Whole Body Gestational Donation to Protect the Value of Women as Whole Persons*, 25 GEO. J. GENDER & L. 1239, 1247 (2024).

While the right to die, premortem contracts, and medical standards of care are heavily influenced by the federal government and national standards,[66] the federal government bowed out from regulating medical decisions made by pregnant people. As discussed next, state governments have been empowered to regulate this space.

C. The Supreme Court Announces the States are the Rightful Caretakers of Female Reproductive Systems

Before reproductive healthcare and advances in life support technology increased survival rates of newborns staying in the Neonatal Intensive Care Unit ("NICU"), fetal personhood was impossible.[67] Personhood implies a person bearing legal rights, which historically have not attached to fetuses.[68] As technology improves, fetal personhood as a concept has gained traction in various states; but the federal government and the United States Supreme Court have not recognized this group as a protectable class of citizens.[69] Without a clear federal position, states are free to implement laws that facilitate fetal personhood.[70] Similarly, now that the federal government has

66. *See, e.g.*, *Amdt*, *supra* note 40; Anderson & Fox, *supra* note 63; and Susan A. Hughes, *Explainer: What is the Role of the Federal Government in Managing Health Care?*, HARV. KENNEDY SCH. (Sep. 22, 2025), https://www.hks.harvard.edu/faculty-research/policy-topics/health/explainer-what-role-federal-government-managing-health-care [https://perma.cc/N5P3-BD5M].

67. Ruthann Richter, *Premature Babies' Survival Rate is Climbing, Study Says*, STAN. MED. NEWS CTR. (Feb. 8, 2022), https://med.stanford.edu/news/insights/2022/02/premature-babies-survival-rate-is-climbing-study-says.html [https://perma.cc/FFY8-F4CT].

68. Dov Fox, *The Personhood Double Standard*, 59 U. SAN DIEGO SCH. L. 173, 173 (2025) (noting that recovery when embryos are unintentionally lost is frequently conceptualized through the lens of property damage or emotional harm to the owners of the embryos as opposed to death of a person).

69. *Compare* Roe v. Wade, 410 U.S. 113, 158 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn.") *with* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263 (2022) (overturning *Roe v. Wade* without relying on "any view about if and when prenatal life is entitled to any of the rights enjoyed after birth").

70. *See* New State Ice Co. v. Liebmann, 285 U.S. 269, 310–11 (1932) (Brandeis, J., dissenting) ("[A] single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

reverted authority over medical decision-making when a pregnant body is implicated to the states, states can explore the viability of privacy torts as an avenue for relief in this niche area.

Regulation for PGD must occur through the states, and the federal government can later announce a clarifying opinion if necessary.[71] The Supreme Court has stated and reversed the federal government's authority on reproductive health care choices when fetuses are involved.[72] Accordingly, the federal government is not currently equipped to address fetal personhood. The House of Representatives acknowledged this limitation in House Resolution 522.[73] This Resolution urges states to remove pregnancy exclusions from advance directives, decriminalize abortion, and clarify how medical personnel should interpret laws detailing restrictions on abortion, affirming that it is for the states to make and/or clarify laws regulating the female reproductive system.[74]

Looking more closely at Adriana Smith's case, there was a perfect storm of legislation and statutory interpretation that ended with Chance still in the NICU a year after Adriana died.[75] Georgia's LIFE Act passed in 2019, before the Supreme Court decided *Dobbs*.[76] The Northern District Court of Georgia found the LIFE Act to be unconstitutional as it forced limitations on medical decision-making, which were in opposition to *Roe v. Wade*[77] and *Planned Parenthood v.*

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71. *See, e.g.*, *A Brief History of Civil Rights in the United States:* Obergefell v. Hodges, HOWARD U. SCH. L.: VERNON E. JORDAN L. LIBR. (Jan. 15, 2026, at 11:55 ET), https://library.law.howard.edu/civilrightshistory/lgbtq/obergefell [https://perma.cc/E33D-CQ8Q] (showing the timeline of different states passing a variety of laws and then the Supreme Court announcing a clarifying opinion).

72. *See supra* text accompanying note 69.

73. H.R. Res. 522, 119th Cong. (2025).

74. *See id.*

75. *See* Rojas, *supra* note 5; Adriana was declared brain dead in February 2025. Chance graduated from the NICU (meaning that he was discharged and able to go home) on February 19, 2026. Madison Burgess, *Family of Brain Dead Woman Who Was Kept Alive to Deliver Son Give Huge Update on Baby*, TYLA, https://www.tyla.com/news/adriana-smith-brain-dead-delivered-baby-chance-update-199038-20260305 [https://perma.cc/AY5W-QKAC] (last updated Mar. 5, 2026).

76. H.B. 481, 155th Gen. Assemb., Reg. Sess. (Ga. 2019).

77. 410 U.S. 113, 158, 166 (1973).

Casey.[78] However, after *Dobbs*, Georgia's LIFE Act regained its constitutional status, becoming the law of Georgia once again.[79] With the LIFE Act in place at the time of Adriana's accident, choosing to abort a pregnancy after six weeks of gestation was illegal.[80] Georgia Code § 31-32-9(a)(1) enumerates Georgia's stance on withholding life support from a pregnant person as requiring "that the fetus is not viable" and the pregnant person's advance directive explicitly states that they want life support withheld even if they are pregnant.[81]

Between the LIFE Act and Georgia's pregnancy exclusion to honoring advance directives, the stage was set for fetal personhood doctrine to enter. Privacy is one space where personal liberty is protected, but fetal personhood may be curtailing how "merciless" intruding into private affairs is for pregnant people. Intrusion as applied to PGD may create an avenue for advocacy for pregnant people to push back on fetal personhood. The next Part of this Note discusses the contours of intrusion claims as applied to PGD.

III. On Intrusion and Defenses

Tort, as an elements-based body of law, invokes multi-step analyses.[82] Privacy torts are the same.[83] Section A introduces state privacy torts, specifically in Georgia and expanding beyond. Section B lays out the elements of intrusion. Section C explains the legal background for why the state intrusion tort is an appropriate claim.

78. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 898 (1992); SisterSong Women of Color Reprod. Just. Collective v. Kemp, 472 F.Supp.3d 1297, 1312 (N.D. Ga. 2020).

79. *SisterSong Women of Color Reprod. Just. Collective*, 40 F.4th at 1324.

80. Ga. Code Ann. § 16-12-141(b) (2025).

81. Ga. Code Ann. § 32-31-9(a)(1) (2025).

82. Ketan Remakrishnan, *What is a Tort?*, 139 Harv. L. Rev. 1011, 1027 (2026).

83. Robert M. Connallon, *An Integrative Alternative for America's Privacy Torts*, 38 Golden Gate U. L. Rev. 71, 78–81 (2007). As an important note, an individual's right to privacy after death must be established statutorily. Restatement (Second) of Torts § 652I cmt. b (Am. L. Inst. 1977). Because postmortem gestational donation arises where states have statutorily provided rights for fetuses, this Note assumes privacy after death has similarly been statutorily provided.

A. The Birth of Intrusion and Georgia's Stance on Privacy

In the United States, the right to privacy began when courts recognized the common law "right to be let alone" as a tort warranting recovery.[84] States took varied approaches on elements of privacy torts.[85] The Restatement (Second) of Torts outlined four unique torts which related to one's right to privacy.[86] For purposes of this Note, only intrusion into seclusion will be discussed.[87] As outlined in the Restatement: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[88] Generally, this tort comprises three elements: (1) intentional intrusion; (2) upon the seclusion/solitude or private affairs of an individual; (3) which an ordinary person would find highly offensive.[89]

In 1905, the Georgia Supreme Court described a right to privacy in *Pavesich v. New England Life Insurance Company*, noting the commentaries on common law and holding privacy as the equal opposite of one's right to publicity.[90] The court analogized having one's "liberty taken away" to being "held to service by a merciless master . . . ."[91] While this case was specifically about a different privacy tort (right to publicity), the court's description of privacy as deeply

84. *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68, 78 (Ga. 1905).

85. Connallon, *supra* note 83.

86. *Pavesich*, 50 S.E. at 72.

87. The four privacy torts are: (1) intrusion into seclusion; (2) public disclosure; (3) defamation; and (4) right to publicity. To paint with a broad brush, the three privacy torts which are not discussed in this Note describe tensions between privacy and nonconsensual dissemination of otherwise private matters. *See* RESTATEMENT (SECOND) OF TORTS § 652A cmt. d (AM. L. INST. 1977). Any harms from postmortem gestational donation arise from medical decision-making, not from the dissemination of medical decisions without consent.

88. *Id.* § 652B.

89. Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 206 (2012).

90. *See Pavesich*, 50 S.E. at 70.

91. *Id.* at 80.

personal and rooted in natural law informed how Georgia developed privacy law.[92]

B. There is no Need to Typecast Intrusion

Intrusion is typically thought of as limited to information and communications,[93] but the language of the tort is not limited in this way. Intrusion protects against "mental distress," essentially "fill[ing] the gaps left by trespass, nuisance, [and] the intentional infliction of emotional distress."[94] Intrusion is an intentional tort, meaning that the actor, whose breach of duty caused damage, must have either subjectively "believe[d], or is substantially certain" that damage would be caused by their actions.[95] After plaintiffs establish the threshold question of intent, opening the door for intentional torts, plaintiffs must then prove the remaining elements.[96] The elements of intrusion may, at first glance, appear to present a cyclical argument in which the first two elements depend on the existence of one to establish the other.[97] The next Subsections will evaluate the boundaries of the elements of intrusion individually and analyze how they would apply in Adriana's case.

1. Element One: Intentional Intrusion

"Intentional intrusion" involves two concepts: intent and intrusion. As mentioned previously, intent can be established subjectively or by substantial certainty.[98] This optionality allows for a

92. *See id.* at 73 ("[S]ome matters of private concern are not to be made public, even with the consent of those interested.").

93. *See* Benjamin Zhu, *A Traditional Tort for a Modern Threat: Applying Intrusion Upon Seclusion to Dataveillance Observations*, 89 N.Y.U. L. REV. 2381, 2394–95 (2014) (expanding the traditional applications of intrusion to modern technologies).

94. Rankin, E., *Case Comment: Assessing Damages for the Public Disclosure of Private Facts: The Case of* Jane Doe 464533 v. ND, 42 QUEEN'S L.J. 135, 140–41 (2017).

95. McMullen v. McHughes Law Firm, 454 S.W.3d 200, 209 (Ark. 2015).

96. *See Intentional Tort*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/intentional_tort [https://perma.cc/G3SV-D39W] (last updated Mar. 2023).

97. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (AM. L. INST. 1977). A defendant can only intrude if there is privacy, but reasonable privacy is determined by the context of the purported privacy and the intrusion.

98. *Id.*

wider net. Intent can be shown directly or circumstantially.[99] The hospital likely did not intend to damage Adriana's privacy interest in her corpse, but the hospital was likely substantially certain that the intrusion would happen since Georgia's Attorney General spoke out against the hospital's reasoning for keeping Adriana on life support.[100]

Intrusion also casts a wide net. Intrusion "consists solely of an intentional interference" into one's seclusion, "either as to his person" or "private affairs."[101] "The invasion may be by physical intrusion" such as "insist[ing] over the plaintiff's objection in entering his home."[102] A physical intrusion can be carried out by the actor themselves or through technology.[103] A consistent thread running through when something was an intrusion is when the actor "penetrated some zone of physical or sensory privacy . . . in violation of the law or social norms."[104] That is to say, element two is a necessary condition for element one.

Georgia holds that behavior qualifies as intrusion where there is a physical intrusion analogous to trespass.[105] The line between trespass and intrusion is whether the physical intrusion was to property or to one's person.[106] For Adriana, various technologies to forcibly maintain the functioning of her organ systems were attached and inserted into

99. David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059, 1071 (2010).

100. Joyce Lupiani, *'Handmaid's Tale' in Real Life? Georgia AG Says Heartbeat Law Not to Blame*, FOX 5: ATLANTA (May 19, 2025, at 16:39 ET), https://www.fox5atlanta.com/news/handmaids-tale-real-life-georgia-ag-says-heartbeat-law-not-blame [https://perma.cc/9LVA-SC7Y] (noting that Georgia's Attorney General "issued a clarification in response" to the national outcry after the hospital's choice continuing life support for Adriana's corpse).

101. Howard v. Aspen Way Enter., Inc., 406 P.3d 1271, 1274 (Wyo. 2017).

102. *Id.*

103. *Intrusion on Seclusion*, CORNELL. L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/intrusion_on_seclusion [https://perma.cc/PFS8-58ZL] (last updated July 2024).

104. 62A AM. JUR. 2D *Privacy* § 36 (2024).

105. Justice v. SCI Ga. Funeral Servs. 329 Ga. App. 635, 638 (2014).

106. Desnick v. Am. Broad. Co., 44 F.3d 1345, 1352 (7th Cir. 1995) ("The one protects the inviolability of the person, the other the inviolability of the person's property.").

her body.[107] The decision of the hospital resulted in a physical intrusion into Adriana's body.

2. Element Two: Into the Seclusion or Private Affairs of an Individual

This element requires nuance. "[P]rivacy . . . is not a binary, all-or-nothing characteristic . . . . [T]he fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law."[108] What one person may consider private, another may have no interest in maintaining seclusion in that matter.[109] Generally, the more intimate a matter, the more likely there was a reasonable expectation of privacy.[110]

Like the first element, this element also concerns two separate pieces: seclusion and private affairs. Seclusion can be objective, such as when someone is home alone.[111] Seclusion can also be subjective if the person took reasonable steps to assert a veil of seclusion around themself.[112] Asserting a veil of seclusion can look like having an intimate conversation in a restaurant, but speaking in a low volume and pausing the conversation when the waiter approaches the table.[113]

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107. *See* Minyvonne Burke, *Georgia Mother Says She is Being Forced to Keep Brain-Dead Pregnant Daughter Alive Under Abortion Ban Law*, NBC NEWS (May 15, 2025, at 20:48 ET), https://www.nbcnews.com/news/us-news/family-forced-keep-brain-dead-pregnant-woman-alive-rcna207002 [https://perma.cc/34BB-7J8J].

108. Sanders v. Am. Broad. Co., 20 Cal. 4th 907, 915–16 (1999).

109. Frederick Davis, *What do We Mean by "Right to Privacy"?*, 4 S.D. L. REV. 1, 6 (1959); *see* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (describing that a person's "actual (subjective) expectation of privacy" may not be shared by all of society).

110. Y.G. v. Jewish Hospital, 795 S.W.2d 488, 500 (Mo. App. 1990) ("[T]he right of privacy has been held to apply particularly to sexual matters or matters of procreation."); *see* Katz, 389 U.S. at 361 (Harlan, J., concurring) ("Thus a man's home is, for most purposes, a place where he expects privacy . . . ."). *But see id.* (Harlan, J., concurring) (explaining there can be no protection of privacy interests where the person "exhibited . . . no intention to keep them to himself").

111. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

112. *See* 62A AM. JUR. 2D *Privacy* § 36 (2024); Safari Club International v. Rudolph, 862 F.3d 1113, 1124 (9th Cir. 2017) (analyzing "deliberate effort to maintain confidentiality").

113. *Safari Club*, 862 F.3d at 1124.

Whether someone has a reasonable expectation of seclusion is fact specific.[114]

Similarly, what qualifies as a private affair is also fact specific.[115] As an example, some people do not like to share their middle name. While that may not be a matter in which all people have a privacy interest, it does not defeat all possibilities of having a privacy interest in middle names. Affairs which occur exclusively in private spaces are generally private.[116] Affairs that may occur in public but happened in private at the time of the intrusion may still have been a private affair.[117] As an example of the nuance in privacy analyses, Y.G. was a person who participated in in vitro fertilization ("IVF") and conceived triplets.[118] When Y.G. went to a public reception celebrating a hospital's IVF success stories, Y.G.'s efforts to avoid cameras and interviewers combined with the intimacy of Y.G.'s procreation required a jury trial to determine if Y.G.'s expectation of privacy was reasonable.[119]

Further, privacy is grounded in autonomy.[120] Autonomy requires acknowledgment of the self as a separate entity.[121] Separation from others requires some degree of seclusion.[122] Seclusion is protectable as a privacy interest.[123] Following that chain, affairs which are grounded in autonomy require some degree of seclusion, implicating privacy interests. Medical decisions and parenting decisions both require

114. *See* 62A Am. Jur. 2d *Privacy* § 36 (2024) ("[T]here are degrees and nuances to the societal recognition of expectations of privacy, and the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law.").

115. *See id.*

116. *But see* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining that even within one's home, if they are visible to the public, there is no reasonable expectation of privacy).

117. *See id.* at 351.

118. *Y.G.*, 795 S.W.2d at 492.

119. *Id.* at 501–03.

120. Dorota Mokrosinska, *Privacy and Autonomy: On Some Misconceptions Concerning the Political Dimensions of Privacy*, 37 L. Phil. 117, 117 (2018).

121. Edward S. Dove, *Beyond Individualism: Is There a Place for Relational Autonomy in Clinical Practice and Research?*, 12 Clinical Ethics 150, 150 (2017); *see* Mokrosinska, *supra* note 120, at 117–18.

122. Mokrosinska, *supra* note 120, at 120.

123. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890).

autonomy for the person to make a choice that will comport with their preferences and render the set of consequences they are willing to accept.[124] Those choices are unique and can be deeply personal. Because of the autonomy and intimacy involved, medical and family affairs are often considered private.[125] Whether in whole or in part, any aspect of medical or parenting decisions where the person made a reasonable effort to assert a veil of seclusion can be protected by intrusion.[126]

Looking at Adriana's case, the affair in question was about the use of life support technology to facilitate whole body organ donation for the purpose of gestating a fetus.[127] Comparing to Y.G., where Y.G.'s participation in IVF was considered possibly private because it involved medical procedures and procreation, requiring a person on life support to gestate a fetus for up to thirty weeks is also likely private. This is largely a medical procedure with some aspects of parenting and medical decision-making on behalf of the fetus. Adriana would have a reasonable expectation of privacy in her medical care and posthumous handling of her corpse.[128]

3. Element Three: Which Would be Highly Offensive to the Reasonable Person

Intrusion does not allow for eggshell plaintiffs,[129] so this element is crucial when assessing liability. This element is essentially a balancing

124. Danielle Hahn Chaet, *AMA* Code of Medical Ethics' *Opinions on Patient Decision-Making Capacity and Competence and Surrogate Decision Making*, 19 JAMA ETHICS 675, 675 (2017); Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY 1071, 1078–79 (2003).

125. *See* Y.G. v. Jewish Hospital, 795 S.W.2d 488, 500 (Mo. App. 1990)

126. *See id.*; Safari Club International v. Rudolph, 862 F.3d 1113, 1124 (9th Cir. 2017).

127. Caplan, *supra* note 7.

128. *See Y.G.*, 795 S.W.2d at 500; *Safari Club*, 862 F.3d at 1124.

129. *See, e.g.*, *Eggshell Skull Rule*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/eggshell_skull_rule [https://perma.cc/25A4-GZJ8] (last updated July 2025). The eggshell plaintiff doctrine requires civil defendants to take plaintiffs as they are even with unknown extra susceptibility to damages. Because intrusion requires the intrusion to have been highly offensive to the reasonable person, there is no space in intrusion claims for subjective eggshell plaintiffs.

test.[130] The reasonable efforts the person took to assert a veil of seclusion around their person or private affairs are balanced against the severity of the intrusion.[131] At the same time, all elements must be present to establish the tort—having a surplus of one element cannot make up for the lack of the other.[132] The actor using the most expensive technology to intrude into the person's rock collection is irrelevant since a rock collection is not a private affair. Conversely, when a person has made every reasonable effort to maintain confidentiality around the name of their baby, they cannot claim intrusion when the actor discovers the name by accidentally opening the wrong Christmas gift.

In Adriana's case, the hospital's actions were highly offensive to reasonable people across the country.[133] Georgia's Attorney General, the media, and the United States House of Representatives have all spoken out against the hospital maintaining Adriana on life support.[134] With all three elements established, the analysis continues.

C. *On the Other Hand . . .*

Establishing intent and the tortious act is not enough to recover; there must also be causation, damages, and no defense.[135] Causation requires that the tortious act and the damage be clearly linked.[136] In Adriana's case, life support would not have been maintained but for the hospital's choice to override the surrogate judgment of Adriana's

130. *See, e.g.*, *Balancing Test*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/balancing_test [https://perma.cc/AF5X-TJ89] (last updated Mar. 2025).

131. *See* Adam J. Tutaj, *Intrusion Upon Seclusion: Bringing an "Otherwise" Valid Cause of Action into the 21st Century*, 82 MARQUETTE L. REV. 665, 666 (1999), https://scholarship.law.marquette.edu/cgi/viewcontent.cgi [https://perma.cc/FZH3-3WN5].

132. *See* Robert Rafii, *Invasion of Privacy: Intrusion*, FINDLAW (Aug. 7, 2025), https://www.findlaw.com/injury/torts-and-personal-injuries/invasion-of-privacy-intrusion.html [https://perma.cc/ZTJ4-HF3X].

133. *See* Caplan, *supra* note 7.

134. *See supra* note 4 and text accompanying note 69.

135. Rafii, *supra* note 132.

136. *Causation*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/causation [https://perma.cc/AE8P-9XBY] (last visited Mar. 20, 2026).

family members and intrude into Adriana's body.[137] The damage is also evident as Adriana was kept on life support for four months, incurring dignitary harm, nonconsensual deferment of the final disposition of her corpse, and economic harm in the form of the associated medical bills.[138]

But after proving intent, all three elements of intrusion, causation, and damage, there may still be a defense that insulates the actor from liability.[139] Consent would be a complete defense if Adriana had consented to being an organ donor for this purpose, but that was not what happened.[140] Instead, the hospital's strongest defense is that the state has a compelling interest in the life of the fetus that outweighs Adriana's interest in privacy.[141] As seen in the right-to-die line of cases, the state will only intrude into someone's autonomous medical decision when the state has a compelling interest in protecting human life that outweighs the person's autonomy and right to privacy in their medical treatment decisions.[142] The compelling interest test is a balancing test.[143]

For the state, the LIFE Act codified Georgia's interest in the fetus as a human life.[144] The LIFE Act sets out that fetuses with beating hearts are natural persons entitled to legal protections.[145] That statute

137. *See* Rojas, *supra* note 5.

138. *See* Kandiss Edwards, *Family of Brain-Dead Georgia Woman Seeks Support to Meet GoFundMe Goal for Baby's Medical Costs*, BLACK ENTER. (Dec. 3, 2025), https://www.blackenterprise.com/infant-adriana-smith-gofundme-goal-brain-dead/ [https://perma.cc/5EWQ-B9F2] (sharing that Adriana's family set up a GoFundMe to raise $600,000 for medical expenses).

139. *See* Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L. REV. 1320, 1344 (2017), https://yalelawjournal.org/article/tort-law-inside-out [https://perma.cc/B892-P9VA] (allowing tort "liability outside strict tort categories" when conduct is unjustifiable or unconsented).

140. *See* Rojas, *supra* note 5. Considering the facts around her family's outrage and silence about Adriana's status as an organ donor, it seems likely that Adriana did not tell her family that she wanted to be kept on life support to incubate a fetus if she happened to become brain-dead while pregnant.

141. *See Amdt*, *supra* note 40.

142. *Id.*

143. *See* Amanda Dorman, *The Enumeration Conflagration: Originalist Interest-Balancing Tests After* Bruen, 60 HOU. L. REV. 1143, 1162 (2023).

144. GA. CODE ANN. § 16-12-141(b) (2024).

145. *Id.*

informed the hospital's position that removing Adriana's life support would be an illegal abortion, ending the life of the fetus.[146] Further, the state can intervene on behalf of children when their parents make medical decisions that go against the medical standard of care.[147] Most commonly, the state grants hospitals authority to intervene to administer life-saving medical treatments.[148] However, the state's interest does not outweigh Adriana's.

D. Adriana's Interests are Weighty

Adriana's interest in her private affairs regarding the posthumous handling of her corpse and respect for her medical decisions outweigh the State's interest in the fetus for three reasons. *First*, no matter how dire the need, organ donation cannot be compelled.[149] As mentioned above, the UAGA requires that gifts of one's organs or body be for specific purposes, none of which align with PGD.[150] Life support is an incredible tool for facilitating organ donation, but organ donation must be a gift.[151] When someone is in desperate need of a kidney or a liver lobe, potential donors cannot be forced to undergo the procedure because their right to autonomy is greater than the potential donee's interest in human life.[152]

Similarly, dead bodies cannot be harvested for their organs without consent.[153] Rights in one's body and its parts are grounded in autonomy.[154] Autonomy allows for someone to make premortem

146. Lewis, Quinn & Mutcherson, *supra* note 4, at 13.

147. Lee Black, *Limiting Parents' Rights in Medical Decision Making*, 8 AMA J. ETHICS 676, 679 (2006), https://journalofethics.ama-assn.org/article/limiting-parents-rights-medical-decision-making/2006-10 [https://perma.cc/L5Y4-SSYP].

148. *Id.*

149. Louis M. Solomon, Rebekka C. Noll & David S. Mordkoff, *Compelled organ donation*, 6 GENDER MED. 516, 516 (2009), https://pubmed.ncbi.nlm.nih.gov/20114003/ [https://perma.cc/929K-8VVS].

150. UNIF. ANATOMICAL GIFT ACT § 18 (UNIF. L. COMM'N 2009).

151. *Id.*

152. *See* Solomon, Noll & Mordkoff, *supra* note 149.

153. NAT'L ACADS., ORGAN DONATION: OPPORTUNITIES FOR ACTION 205 (2006), https://www.nationalacademies.org/read/11643/chapter/9 [https://perma.cc/QHF5-8EFX].

154. Hill, *supra* note 17.

decisions about the handling of their body with the reasonable expectation that those choices will be honored even after the person is unable to enforce their preferences.[155] This right to one's body is so powerful that even dead bodies are allowed to keep their organs, even as the transplant list continues to grow.[156] People die without the organs they need, but there is nothing that can be done to harvest organs from a corpse on life support if the person never consented to donate when they were alive.

Respect for autonomy cannot unravel in the face of pregnancy. If a person cannot be compelled to donate their organs either through procedures during their lifetime or after they have lost their ability to use their organs postmortem, making the recipient—or rather, beneficiary—of the organs a fetus as opposed to a child or adult is not enough to change the outcome. After all, Georgia asserts that fetuses are the same class of natural person as children and adults.[157]

Second, building on the first reason, using life support for PGD is not the standard of care.[158] As much as states can intervene to authorize life-saving medical treatments for children over the refusal of their parents, this is only for life-saving treatments which align with the standard of care.[159] There is a difference between authorizing life-saving treatments and authorizing an experimental procedure where experimental procedures cannot overcome a parent's autonomous medical decisions for the child.[160]

While Georgia may want to shift the standard of care to include life support for brain-dead pregnant people, the Attorney General

155. Bedzow, *supra* note 42.

156. *See* NAT'L ACADS., *supra* note 153.

157. GA. CODE ANN. § 1-2-1(b) (2025).

158. *See* Gilbert, *supra* note 65, at 1244 (noting "prolonged somatic support" is "the rare exception").

159. *See* Black, *supra* note 147, at 679–80; David Archard, Emma Cave & Joe Brierley, *How Should We Decide How to Treat the Child: Harm Versus Best Interests in Cases of Disagreement*, 32 MED. L. REV. 158, 174 (2024).

160. *See* Back, *supra* note 147; Archard, Cave & Brierley, *supra* note 159. Arguably, using experimental medical procedures to artificially induce the status of "alive" for the fetus secondhand through life support applied to a dead body is not the same as using an evidence-based life-saving treatment.

interpreted the LIFE Act to require the opposite result.[161] The state cannot authorize life-saving treatments that have such a low probability of success that they are not standard.[162] Without the treatment plan qualifying as the standard of care justifying the state's intervention into the medical decision for the fetus, the state's interest in overriding the parents' decision is not compelling.

Third, when a similar case happened in Texas in 2013, the Texas District Court ruled against the hospital.[163] Marlise Munoz shared many similarities with Adriana Smith.[164] Marlise was fourteen-weeks pregnant when she was declared brain-dead.[165] The hospital chose to override Marlise's desire to refuse life support asserting a compelling interest in maintaining life support exclusively for the benefit of the fetus.[166] Marlise's husband filed suit against the hospital in January 2014 asking for the court to clarify whether Marlise or the fetus's interests should be prioritized.[167] The Texas court held that the statute could not apply to Marlise since she was already dead without asserting an interest in the life of the fetus.[168]

Taken together, Georgia's interest in the fetus cannot be so compelling as to outweigh Adriana's privacy interest. Without a sufficiently compelling interest, the hospital has no defense against intrusion. To address this, concerned parties could lobby for changes

161. *Transcript*, *supra* note 6.

162. *See* Black, *supra* note 147; Archard, Cave & Brierley, *supra* note 159.

163. Krause, *supra* note 2, at 814.

164. *See id.*; Nadia N. Sawicki, *Media Matters: Fetal Abnormalities in the Munoz Case*, PETRIE-FLOM CTR. (Jan. 27, 2014), https://petrieflom.law.harvard.edu/2014/01/27/media-matters-fetal-abnormalities-in-the-munoz-case/ [https://perma.cc/75U4-LWC3]; Caplan, *supra* note 7.

165. Krause, *supra* note 2, at 814.

166. Plaintiffs Original Petition for Declaratory Judgment and Application for Unopposed Expedited Relief at 3, Munoz v. John Peter Smith Hosp., No. 096-270080-14 (D. Tex. Jan. 14, 2014), 2014 WL 285060; Debra Cassens Weiss, *Hospital Refuses to Take Patient Off Life Support, Despite Family Wishes, Because She is Pregnant*, A.B.A. J. (Jan. 8, 2014, at 13:44 CT), https://www.abajournal.com/news/article/hospital_refuses_to_take_patient_off_life_support_despite_familys_wishes_be [https://perma.cc/9JLV-TPSL].

167. Munoz, *supra* note 166, at 1.

168. *See* Krause, *supra* note 2, at 814.

in the organ donation policy to create an opt-in for postmortem gestational donation, creating a complete defense of consent for hospitals facing liability for intrusion. Looking back at how hospitals already address atypical postmortem donation requests, the next Section distinguishes PGD from postmortem sperm retrieval.

E. Postmortem Gestational Donation versus Postmortem Sperm Retrieval: The Good, the Bad, and the Ugly

Comparing PGD to PSR, there are similarities in the legal concerns but differences in the outcome.[169] The UAGA announces organ donation as a gift.[170] Donations should be for "transplantation, therapy, research, or education."[171] PSR clearly fits as a transplantation of spermatozoa to be combined with ova and placed in a host uterus.[172] However, PGD fits none of the four criteria.[173]

As similar as the two procedures seem on their face, the rights that are being asserted by the deceased person in PSR versus the hospital in PGD are fundamentally different. As mentioned above, PSR involves a person exercising their choice to donate tissue for transplantation.[174] PGD entails a hospital using life support to initiate whole body donation outside the scope of the allowed reasons under the UAGA.[175] Further, nonconsensual organ donation is illegal, which is why hospitals are wary of performing PSR without the written consent of the deceased person.[176] Protecting individuals' rights to autonomous medical decision-making, including posthumous preferences, is tantamount in PSR cases.[177]

169. *See* Brown, *supra* note 55; *see* Gilbert, *supra* note 65, at 1241

170. *Uniform Anatomical Gift Act*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/uniform_anatomical_gift_act [https://perma.cc/LY9D-UBWC] (last updated Feb. 2025).

171. UNIF. ANATOMICAL GIFT ACT § 2(3) (UNIF. L. COMM'N 2009).

172. *Sperm Donation*, DOGUS IVF CTR., https://ivfnorthcyprus.com/services/sperm-donation [https://perma.cc/UV83-MC2J] (last visited Mar. 19, 2026).

173. Gilbert, *supra* note 65, at 1247.

174. *See Sperm Donation*, *supra* note 172.

175. *See* UNIF. ANATOMICAL GIFT ACT (UNIF. L. COMM'N 2009).

176. *See id.*; *see* Brown, *supra* note 55.

177. *See* Brown, *supra* note 55.

Conversely, PGD cases arise where there is a clear absence of consent, and the states' laws require hospitals to void the advance directives of people who happen to be pregnant.[178] A notable difference between PSR and PGD processes is that PSR only involves the deceased person and their reproductive materials, whereas PGD involves the deceased person and a fetus.[179] Yet the desired result is the same: a healthy child, beginning a host of legal and financial obligations (often magnitudes greater than other methods of procreation) which someone else—not the deceased person being exploited for the creation of a child—must assume.[180] This key difference can be squared when remembering the state's compelling interest in the life of the fetus which is not present in sperm (or states which do not recognize fetal personhood).[181] Acting without consent and in direct opposition to the expressed wishes of the surrogate decision-makers may expose the hospital performing PGD to tort liability.

IV. Fetal Personhood or State Privacy: To Be or Not to Be

Intrusion into seclusion may not be a perfect solution, but it is a workable approach to assessing liability when hospitals choose to override the preferences of a patient to breach the standard of care. The reasons why this tort could be applied to PGD have been explored at length in Part III. This Part addresses tensions in the application of the intrusion claim. Section A elaborates the weaknesses of the hospital's misapplication of life support. Section B expands on the role consent could have to prevent hospital liability.

A. The Hospital Failed Adriana

There is tension between the language of the LIFE Act and withholding life support, as noted by Georgia's Attorney General.[182]

178. *See* Krause *supra* note 2.

179. Brown, *supra* note 55; Gilbert, *supra* note 65.

180. Brown, *supra* note 55; Gilbert, *supra* note 65.

181. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 262, 282 (1990) ("States simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."); s*ee* Krause, *supra* note 2, at 845.

182. *Transcript*, *supra* note 6; Lupiani, *supra* note 100.

Withholding life support is not an action taken for the purpose of terminating a pregnancy.[183] The hospital withholding Adriana's life support was not a choice encompassing a cost-benefit analysis of the risks of extended life support against a slim chance of recovery: She was completely brain-dead with no chance of recovery.[184] Continued life support held no benefit for her. Yet because she was pregnant, the hospital made a different decision: to expose the fetus and Adriana's body to the risks of extended life support despite the risks associated with extended life support use and nonexistent benefit to Adriana.[185]

Not only was it unclear if Adriana had an advanced directive, but it is also unclear if she was a registered organ donor.[186] This cuts two ways. Either Adriana was uninterested in donating any of her organs and her entire body was donated for the purpose of saving a life, or Adriana was interested in organ donation but was unable to donate her organs as they were all used to save one life instead of as many as her remaining healthy organs could save.

Stepping back from Adriana, people who are registered organ donors or intentionally choose not to register, people with advance directives, and people with other premortem contracts expressing their preferences for the handling of their bodies lose their right to freely contract if they happen to die pregnant in a state with legislation like Georgia's.[187] While contract law fails these people, tort may be the path forward.

B. Consent is King—Let the People Choose Their Medical Fates

The relationship between tort and consent is meaningful for postmortem gestational donation. Consent is a complete defense to tort liability[188] and would be a defense available for the hospital against

183. *Transcript*, *supra* note 6.

184. Schott et al., *supra* note 3; *Brain Death*, CLEVELAND CLINIC, https://my.clevelandclinic.org/health/diseases/brain-death [https://perma.cc/H3CR-XUU7] (last updated June 25, 2024).

185. *See Transcript*, *supra* note 6.

186. *See* Rojas, *supra* note 5; *supra* note 140 and accompanying text.

187. DeMartino, *supra* note 52.

188. *Complete Defense*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/complete_defense [https://perma.cc/ACP7-MF96] (last updated July 2022).

an intrusion claim.[189] Where there is no clear consent, like in postmortem sperm retrieval cases, family members can provide surrogate judgment to establish consent to PGD on behalf of the deceased person.[190] But PGD involves sequestering extensive medical resources for the deceased person's life support, cesarean section, and then any potential treatments needed for the likely premature fetus.[191] After the fetus is born, someone must take custody of the child. Clear consent to the full array of consequences would be stronger protection for the hospital.[192]

Adding a specialized "opt-in" for this niche type of organ donation could be readily added to existing procedures to opt in to organ donation generally. The specialized opt-in would allow both for clear consent to protect the hospital from liability and an opportunity for counseling on the obligations incurred by using PGD. The costs associated may not be front of mind when opting in involves simply checking a box (like deciding to be an organ donor when renewing one's driver's license). PGD is unlike other postmortem organ donations since PGD may involve life support, potential NICU expenses, potential required therapies (physical, occupational, psychological, speech) for the future child, and establishing a parenting plan for the custody, care, and maintenance of the future child. With due consideration, this specialized opt-in would establish clear consent to PGD.

V. Conclusion

For Adriana, advancements in end-of-life care and reproductive healthcare decided her treatment plan. The hospital decided that the financial cost to save the fetus and deny Adriana and her family any

189. Eric P. Robinson, *Intrusion*, Free Speech Center, https://firstamendment.mtsu.edu/article/intrusion/ [https://perma.cc/T5B4-68HS] (last updated July 2024); *see* Edward L. Raab, *The Parameters of Informed Consent*, 102 Transactions Am. Ophthalmological Soc'y 225, 225–26 (2004) (emphasizing effective and provable informed consent as a defense for claims against providers).

190. *See* Benjamin H. Levi et al., *What Counts as a Surrogate Decision?*, 41 Am. J. Hospice & Palliative Med. 125, 125 (2024).

191. *See* Gilbert, *supra* note 65, at 1243.

192. *See* Raab, *supra* note 189.

autonomy in the medical decision-making process was correct, to the dismay of her family. While Georgia was empowered by the LIFE Act to assert a compelling interest to protect the fetus, overriding the refusal of Adriana's family, the state's interest was hardly compelling enough to outweigh Adriana's interest in her private affairs. Adriana and Chance were both patients deserving of care according to Georgia's standards, instead of nonconsensual experimentation debauching the UAGA.

Intrusion into seclusion may be able to provide a means of addressing the harm Adriana had no way to escape. Postmortem gestational donation without consent is a misapplication of life support technologies, opening hospitals to tort liability through intrusion of privacy actions. PGD costs dignity, emotional turmoil, lack of finality, one parent from a child (if the fetus survives), and immense hospital resources. Ultimately, intrusion is only available after the hospital has intruded, and the novelty of the approach reduces its deterring effect. Even so, intrusion provides an avenue for families to seek relief from the consequences of the hospital's choice.