n6. See, e.g., Mack v. Mack, 329 Md. 188, 618 A.2d 744 (1993); DeGrella v. Elston, 858 S.W.2d 698 (Ky. 1993); In re Rosebush, 491 N.W.2d 633 (Mich. 1992); In re A.C., 573 A.2d 1235 (D.C. 1990); In re Estate of Longeway, 549 N.E.2d 292 (Ill. 1989); In re Jobes, 529 A.2d 434 (N.J. 1987); Rasmussen v. Fleming, 741 P.2d 674 (Ariz. 1987); Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626 (Mass. 1986); Corbett v. D'Alessandro, 487 So. 2d 368 (Fla. Dist. Ct. App. 1986); In re Torres, 357 N.W.2d 332 (Minn. 1984); In re Colyer, 660 P.2d 738 (Wash. 1983); Severns v. Wilmington Medical Ctr., Inc., 421 A.2d 1334 (Del. 1980).

n7. The cases uniformly recognize that the right of an individual to forego medical treatment is not absolute, and that it can be balanced against the countervailing interests of the state in its role as parens patriae. These interests are: (1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; and, (4) the maintenance of the ethical integrity of the medical profession. See, e.g., Brophy, 497 N.E.2d at 634; see also Cruzan, 497 U.S. at 279 ("Whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)); John D. Hodson, Annotation, Judicial Power to Order Discontinuance of Life-Sustaining Treatment, 48 A.L.R.4th 67 (1986) (analyzing state and federal cases pertaining to court orders to discontinue life support). For a good discussion of "protecting innocent third parties," which is the interest most frequently argued by states when intervening in the decision-making process of individuals to forego medical treatment, see In re Dubreuil, 629 So. 2d 819 (Fla. 1993), corrected, 18 Fla. L. Wkly., S 636 (Fla. 1993).

n8. What constitutes incompetency depends upon the statute in question. Generally, the term is used to describe a patient that is either brain-dead, in a persistent vegetative state, an end-stage condition or a terminal condition. It is the "lack of ability, legal qualification, or fitness to discharge a required duty. A relative term to show want of physical or intellectual or moral fitness." Irving J. Sloan, The Right To Die: Legal & Ethical Problems 142 (1988).

Brain-death refers to "whole brain death" where "all functions of the brain, including cortical, subcortical, and brainstem functions, are permanently lost." Fred Plum & Jerome B. Posner, The Diagnosis of Stupor & Coma 9 (3d ed. 1980). Persistent vegetative state "describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heart beat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner." In re Jobes, 529 A.2d at 438; see also President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment 174-75 (1983) (hereinafter President's Commission) ("Personality, memory, purposive action, social interaction, sentience, thought, and even emotional states are gone. Only vegetative functions and reflexes persist.").

End-stage condition is a statutory creation which appears in the Maryland Health Care Decisions Act of 1993. The Act defines an end-stage condition as "an advanced, progressive, irreversible condition caused by injury, disease, or illness: (1) That has caused severe and permanent deterioration indicated by incompetency and complete physical dependency; and (2) For which, to a reasonable degree of medical certainty, treatment of the irreversible condition would be medically ineffective." Md. Code Ann., Health-Gen. 5-601(i) (1994). A terminal condition is defined in Maryland as "an incurable condition caused by injury, disease, or illness which, to a reasonable degree of medical certainty, makes death imminent and from which, despite the application of life-sustaining procedures, there can be no recovery." Id. 5-601(q) (1994).

n9. For example, there are no United States Supreme Court cases directly on point which deal with the rights of an incompetent patient to refuse medical treatment; but see Cruzan, 497 U.S. at 278-80.

n10. 355 A.2d 647 (N.J.), cert. denied sub nom. Garger v. New Jersey, 429 U.S. 922 (1976).

n11. Id. at 663.

n12. See, e.g., Rasmussen v. Fleming, 741 P.2d 674 (Ariz. 1987) (federal and state); Bouvia v. Superior Court, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986) (federal and state); Foody v. Manchester Mem. Hosp., 482 A.2d 713 (Conn. 1984) (federal); Severns v. Wilmington Medical Ctr., Inc., 421 A.2d 1334 (Del. 1980) (federal); In re A.C., 573 A.2d 1235 (D.C. 1990) (federal); In re Guardianship of Browning, 543 So. 2d 258 (Fla. Dist. Ct. App. 1989), aff'd, 568 So. 2d 4 (Fla. 1990) (state); John F. Kennedy Mem. Hosp., Inc. v. Bludworth, 452 So. 2d 921 (Fla. 1984) (federal); In re L.H.R., 321 S.E.2d 716 (Ga. 1984) (federal); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977) (federal and state); In re Caulk, 480 A.2d 93 (N.H. 1984) (state); Quinlan, 355 A.2d at 647 (federal and state); Leach v. Akron Gen. Medical Ctr., 426 N.E.2d 809 (Ohio C.P. 1980) (federal); In re Colyer, 660 P.2d 738 (Wash. 1983) (federal and state); cf. Cruzan v. Harmon, 760 S.W.2d 408, 417-18 (Mo. 1988), aff'd sub nom. Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 278-79 (1990) (holding that neither right to refuse medical treatment nor right to privacy are absolute).

n13. See, e.g., United States v. Charters, 829 F.2d 479, 491 & nn.18-19 (4th Cir. 1987), cert. denied, 494 U.S. 1016 (1990) ("The right to be free of unwanted physical invasions" is protected by the Constitution); Bee v. Greaves, 744 F.2d 1387, 1392-93 (10th Cir. 1984) (same), cert. denied, 469 U.S. 1214 (1985); Gray v. Romeo, 697 F. Supp. 580 (D.R.I. 1988) (recognizing constitutional right to refuse life-sustaining treatment); Tune v. Walter Reed Army Medical Hosp., 602 F. Supp. 1452, 1456 (D.D.C. 1985) (holding that competent patient has the right to order removal of life-support).

n14. See, e.g., McConnell v. Beverly Enters.-Conn., 553 A.2d 596 (Conn. 1989); In re A.C., 573 A.2d 1235 (D.C. 1990); John F. Kennedy Mem. Hosp., Inc. v. Bludworth, 452 So. 2d 921 (Fla. 1984); DeGrella v. Elston, 858 S.W.2d 698 (Ky. 1993); Guardianship of Doe, 583 N.E.2d 1263 (Mass. Sup. Jud. Ct.), cert. denied, 112 S. Ct. 1512 (1992); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977); In re Peter, 529 A.2d 419 (N.J. 1987); Delio v. Westchester County Medical Ctr., 516 N.Y.S.2d 677 (N.Y. App. Div. 1987); State Dep't of Human Servs. v. Northern, 563 S.W.2d 197 (Tenn. Ct. App. 1978).

n15. In 1976, California became the first state to enact a "Natural Death Act." See Cal. Health & Safety Code 7185 et seq. (1976). Generally, living will statutes allow competent adults to prepare documents "authorizing or requiring the withholding or withdrawal of specified medical treatments" upon some triggering event (usually a terminal condition, a persistent vegetative state, an end-stage condition, or brain death) that has "rendered the declarant incompetent to make such a decision personally." Gregory Gelfand, Living Will Statutes: The First Decade, 1987 Wis. L. Rev. 737, 740. See supra note 8. "The Living Will is a means for the individual to manage his death by prospective guidelines and is premised on the informed consent of the person prior to an irreversible coma or a state of being disabled or maimed." Sloan, supra note 8, at 31.

n16. Durable power of attorney for health care statutes allow an individual (the principal) to appoint another individual (agent, surrogate, or proxy) to act as the principal's agent in the event that the principal becomes incompetent and is unable to make health care decisions. See, e.g., Massachusetts Health Care Proxies Act, Mass. Gen. Laws Ann. ch. 201D, 2 (West Supp. 1993).

Advance health care directive statutes allow individuals to state, in advance, what type of medical care they would want if they should become incompetent at a future date, or to name a surrogate or proxy to make any decision regarding health care that the individuals would have been able to make if competent. See President's Commission, supra note 8, at 136. See also Gregory G. Sarno, Annotation, Living Wills: Validity, Construction, and Effect, 49 A.L.R.4th 812 (1992) (analyzing state and federal cases on the validity of living wills); James M. Jordan, Incubating for the State: The Precarious Autonomy of Persistently Vegetative and Brain-Dead Pregnant Women, 22 Ga. L. Rev. 1103, 1105 n.8 (1988) (discussing advance directives). Many advance health care directive statutes also set up surrogate decision-making mechanisms whereby an individual who has not been appointed, but who is within a hierarchy established by statute, can make health care decisions for one who has become incompetent and has made no prior directive. See, e.g., Md. Code Ann., Health-Gen. 5-605 (1994).

n17. This Comment will use "prior directive" as a shorthand method of referring to living wills, durable power of attorneys for health care, and advance health care directive statutes or documents.

n18. See infra note 57.

n19. See Gelfand, supra note 15, at 770; see also Janice MacAvoy-Snitzer, Pregnancy Clauses in Living Will Statutes, 87 Colum. L. Rev. 1280 (1987) ("Living will statutes provide legislatively defined mechanisms for exercising the constitutional right to bodily integrity, which encompasses the right of competent individuals to designate the course of their medical treatment.").

n20. Alabama Natural Death Act, Ala. Code 22-8A-1 to -10 (1990); Alaska Rights of the Terminally Ill Act, Alaska Stat. 18.12.010 to -.100 (1993); Arizona Living Wills & Health Care Directives Act, Ariz. Rev. Stat. Ann. 36-3201 to -3262 (Supp. 1993); Arkansas Rights of the Terminally or Permanently Unconscious Act, Ark. Code Ann. 20-17-201 to -218 (Michie Supp. 1989); California Natural Death Act, Cal. Health & Safety Code 7185-7195 (West Supp. 1993); Colorado Medical Treatment Decision Act, Colo. Rev. Stat. 15-18-101 to -109 (1989 & Supp. 1993); Connecticut Removal of Life Support Systems Act, Conn. Gen. Stat. 19a-570 to -580c (Supp. 1993); Delaware Death with Dignity Act; Del. Code Ann., tit. 16, 2501-2508 (1983); District Of Columbia Natural Death Act, D.C. Code Ann. 6-2421 to -2430 (1989); Florida Health Care Advance Directives Act, Fla. Stat. Ann. 765.101 to .401 (West 1986); Georgia Living Wills Act, Ga. Code Ann. 31-32-1 to -11 (Supp. 1994), and Durable Power of Attorney for Health Care Act, Ga. Code Ann. 31-36-1 to -13 (1991); Hawaii Medical Treatment Decisions Act, Haw. Rev. Stat. 327D-1 to -27 (1991 & Supp. 1993); Idaho Natural Death Act, Idaho Code 39-4501 to -4509 (1993); Illinois Living Will Act, Ill. Ann. Stat. ch. 755, para. 35/1 to 35/10 (Smith-Hurd 1993) and Health Care Surrogate Act, Ill. Ann. Stat. ch. 755, para. 40/1 to 40/55 (Smith-Hurd 1992); Indiana Living Wills & Life-Prolonging Procedures Act, Ind. Code Ann. 16-36-4-1 to -21 (Burns 1993 & Supp. 1994); Iowa Life-Sustaining Procedures Act, Iowa Code Ann. 144A.1 to A.12 (West 1989 & Supp. 1994), and Durable Power of Attorney For Health Care Act, Iowa Code Ann. 144B.1 to B.12 (Supp. 1994); Kansas Natural Death Act, Kan. Stat. Ann. 65-28,101 to 109 (1992); Kentucky Living Will Act, Ky. Rev. Stat. Ann. 311.622 to .644 (Baldwin 1993); Louisiana Natural Death Act, La. Rev. Stat. Ann. 40:1299.58.1 to .10 (West 1992); Maine Uniform Rights of the Terminally Ill Act, Me. Rev. Stat. Ann. tit. 18-A, 5-701 to -714 (West Supp. 1993); Maryland Health Care Decisions Act, Md. Code Ann., Health-Gen. 5-601 to -618 (1994); Massachusetts Health Care Proxies Act, Mass. Gen. Laws Ann. ch. 201D, 1-17 (West Supp. 1994); Michigan Uniform Durable Power of Attorney Act, Mich. Comp. Laws Ann. 700.495 to .497 (West 1980 & Supp. 1994); Minnesota Living Will Act, Minn. Stat. Ann. 145B.01 to .17 (West Supp. 1994); Mississippi Withdrawal of Life-Savings Mechanisms Act, Miss. Code Ann. 41-41-101 to -121 (1993), and Durable Power of Attorney for Health Care Act, Miss. Code Ann. 41-41-151 to -183 (1993); Missouri Uniform Rights of the Terminally Ill Act, Mo. Ann. Stat. 459.010 to .055 (Vernon 1992); Montana Rights of the Terminally Ill Act, Mont. Code Ann. 50-9-101 to -206 (1993); Nebraska Health Care Power of Attorney Act, Neb. Rev. Stat. 30-3404 to -3432 (Supp. 1993); Nevada Uniform Act on Rights of the Terminally Ill, Nev. Rev. Stat. 449.535 to .690 (1991), and Nevada Durable Power of Attorney for Health Care Act, Nev. Rev. Stat. 449.800 to .860 (1991); New Hampshire Living Wills Act, N.H. Rev. Stat. Ann. 137-H:1 to H:15 (Supp. 1993), and Durable Power of Attorney for Health Care Act, N.H. Rev. Stat. 137-J:1 to J:16 (Supp. 1993); New Jersey Advance Directives for Health Care Act, N.J. Stat. Ann. 26:2H-53 to -78 (West Supp. 1994); New Mexico Right to Die Act, N.M. Stat. Ann. 24-7-1 to -10 (Michie 1991); New York Health Care Agents & Proxies Act, N.Y. Pub. Health Law 2980-2994 (McKinney 1993); North Carolina Right to Natural Death Act, N.C. Gen. Stat. 90-320 to -323 (1993); North Dakota Uniform Rights of the Terminally Ill Act, N.D. Cent. Code 23-06.4-01 to -14 (1991 & Supp. 1993), and Durable Power of Attorney for Health Care Act, N.D. Cent. Code 23-06.5-02 to -18 (1991 & Supp. 1993); Ohio Modified Uniform Rights of the Terminally Ill Act, Ohio Rev. Code Ann. 2133.01 to .15 (Anderson 1994); Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act, Okla. Stat. Ann. tit. 63, 3101.1 to .16 (West Supp. 1994); Oregon Durable Power of Attorney for Health Care and Directive to Physicians Act, Or. Rev. Stat. 127.605 to .650 (1989 & Supp. 1994); Pennsylvania Advance Directive for Health Care Act, Pa. Cons. Stat. Ann. 5401-5416 (Supp. 1994); Rhode Island Rights of the Terminally Ill Act, R.I. Gen. Laws 23-4.11-1 to .11-14 (Supp. 1993), and Health Care Power of Attorney Act, R.I. Gen. Laws 23-4.10-1 to .10-12 (1989 & Supp. 1993); South Carolina Death with Dignity Act, S.C. Code Ann. 44-77-10 to -160 (Law. Co-op. Supp. 1993); South Dakota Living Wills Act, S.D. Codified Laws Ann. 34-12D-1 to -22 (1994); Tennessee Right to Natural Death Act, Tenn. Code Ann. 32-11-101 to -112 (Supp. 1994); Texas Natural Death Act, Tex. Health & Safety Code Ann. 672.001 to .021 (West 1992 & Supp. 1994); Utah Personal Choice and Living Will Act, Utah Code Ann. 75-2-1101 to -1118 (1993 & Supp. 1994); Vermont Terminal Care Document Act, Vt. Stat. Ann. tit. 18, 5251-5262 (1987), and Durable Power of Attorney for Health Care Act, Vt. Stat. Ann. tit. 14, 3451-3467 (1989 & Supp. 1993); Virginia Health Care Decisions Act, Va. Code Ann. 54.1-2981 to -2993 (Michie 1991 & Supp. 1994); Washington Natural Death Act, Wash. Rev. Code Ann. 70.122.010 to .920 (West 1992 & Supp. 1994); West Virginia Natural Death Act, W. Va. Code 16-30-2 to -13 (1991 Supp. & 1994), and Health Care Surrogate Act, W. Va. Code 16-30B-1 to -16 (Supp. 1994); Wisconsin Natural Death Act, Wis. Stat. Ann. 154.01 to .15 (West 1989 & Supp. 1993), and Power of Attorney for Health Care Act, Wis. Stat. Ann. 155.01 to .80 (West 1989 & Supp. 1993); Wyoming Living Will Act, Wyo. Stat. 35-22-101 to -109 (1994).

n21. Ala. Code 22-8A-1 to -10 (1990); Alaska Stat. 18.12.010 to .100 (1993); Ark. Code Ann. 20-17-201 to -218 (Michie Supp. 1989); D.C. Code Ann. 6-2421 to -2430 (1989); Haw. Rev. Stat. 327D-1 to -27 (1991 & Supp. 1993); Ind. Code Ann. 16-36-4-1 to -21 (Burns 1993 & Supp. 1994); Kan. Stat. Ann. 65-28,101 to 109 (1992); Ky. Rev. Stat. Ann. 311.622 to .644 (Baldwin 1993); La. Rev. Stat. Ann. 40:1299.58.1 to .10 (West 1992); Me. Rev. Stat. Ann. tit. 18-A, 5-701 to -714 (West Supp. 1993); Mo. Ann. Stat. 459.010 to .055 (Vernon 1992); Mont. Code Ann. 50-9-101 to -206 (1993); N.M. Stat. Ann. 24-7-1 to -10 (Michie 1991); Ohio Rev. Code Ann. 2133.01 to .15 (Anderson 1994); S.D. Codified Laws Ann. 34-12D-1 to -22 (1994); Tenn. Code Ann. 32-11-101 to -112 (Supp. 1994); Wash. Rev. Code Ann. 70.122.010 to .920 (West 1992 & Supp. 1994); Wyo. Stat. 35-22-101 to -109 (1994).

n22. Mass. Gen. Laws Ann. ch. 201D, 1-17 (West Supp. 1994); Mich. Comp. Laws Ann. 700.495 to .497 (West 1980 & Supp. 1994); Neb. Rev. Stat. 30-3404 to -3432 (Supp. 1993); N.Y. Pub. Health Law Ann. 2980-2994 (McKinney 1993).

n23. An integrated statute provides for both a living will and a durable power of attorney for health care. Such a statute generally allows an individual to execute one or both such prior directives, and it also generally provides for what is to occur when no prior directive exists and the patient is incompetent to make decisions regarding health care.

n24. Ariz. Rev. Stat. Ann. 36-3201 to -3262 (Supp. 1993); Cal. Health & Safety Code 7185-7195 (West Supp. 1994); Colo. Rev. Stat. 15-18-101 to -109 (1989 & Supp. 1993); Conn. Gen. Stat. 19a-570 to -580c (Supp. 1993); Del. Code Ann. tit. 16, 2501-2508 (1983); Fla. Stat. Ann. 765.101 to .401 (West 1987); Idaho Code 39-4501 to -4509 (1993); Md. Code Ann., Health Gen. 5-601 to -618 (1994); Minn. Stat. Ann., 145B.01 to .17 (West Supp. 1994); N.J. Stat. Ann. 26:2H-53 to -78 (West Supp. 1994); N.C. Gen. Stat. 90-320 to -323 (1993); Okla. Stat. Ann. tit. 63, 3101.1 to .16 (West Supp. 1994); Or. Rev. Stat. 127.605 to .650 (1989 & Supp. 1994); Pa. Cons. Stat. Ann. 5401-5416 (1989 & Supp. 1994); S.C. Code Ann. 44-77-10 to -160 (Law. Co-op. Supp. 1993); Tex. Health & Safety Code Ann. 672.001 to .021 (West 1992 & Supp. 1994); Utah Code Ann. 75-2-1101 to -1118 (1993 & Supp. 1994); Va. Code Ann. 54.1-2981 to -2993 (Michie 1991 & Supp. 1994).

n25. Ga. Code Ann. 31-32-1 to -11 (1991 & Supp. 1994) and Ga. Code Ann. 31-36-1 to -13 (1991); Ill. Ann. Stat. ch. 755, para. 35/1 to 35/10 (Smith-Hurd 1993) and Ill. Ann. Stat. ch. 755, para. 40/1 to 40/55 (Smith-Hurd 1992); Iowa Code Ann. 144A.1 to .12 (West 1989 & Supp. 1994) and Iowa Code Ann. 144B.1 to .12 (Supp. 1994); Miss. Code Ann. 41-41-101 to -121 (1993) and Miss. Code Ann. 41-41-151 to -183 (1993); Nev. Rev. Stat. 449.535 to .690 (1991) and Nev. Rev. Stat. 449.800 to .860 (1991); N.H. Rev. Stat. Ann. 137-H:1 to H:15 (Supp. 1993) and N.H. Rev. Stat. 137-J:1 to J:16 (Supp. 1993); N.D. Cent. Code 23-06.4-01 to .4-14 (1991 & Supp. 1993) and N.D. Cent. Code 23-06.5-01 to .5-18 (1991 & Supp. 1993); R.I. Gen. Laws 23-4.11-1 to .11-14 (1989 Supp. & 1993) and R.I. Gen. Laws 23-4.10-1 to .10-12 (1989 & Supp. 1993); Vt. Stat. Ann. tit. 18, 5251-5262 (1987) and Vt. Stat. Ann. tit. 14, 3451-3467 (1989 & Supp. 1993); W. Va. Code 16-30-2 to -13 (1991 & Supp. 1994) and W. Va. Code 16-30B-1 to -16 (Supp. 1994); Wis. Stat. Ann. 154.01 to .15 (West 1989 & Supp. 1993) and Wis. Stat. Ann. 155.01 to .80 (West 1989 & Supp. 1993).

n26. Ala. Code 22-8A-4(a)(4) (1990); Haw. Rev. Stat. 327D-6 (1991 & Supp. 1993); Ind. Code Ann. 16-36-4-8(d) (Burns 1993 & Supp. 1994); Kan. Stat. Ann. 65-28,103(a)(4) (1992); KY. Rev. Stat. Ann. 311.626(2) (Baldwin 1993); Mo. Ann. Stat. 459.025 (Vernon 1992); Wash. Rev. Code Ann. 70.122.030(1)(c) (West 1992 & Supp. 1994); Wyo. Stat. 35-22-102(b) (1994).

See, e.g., Wash. Rev. Code Ann. 70.122.030(1)(c) (West 1992 & Supp. 1994) ("If I have been diagnosed as pregnant and that diagnosis is known to my physician, this directive shall have no force or effect during the course of my pregnancy.").

n27. Alaska Stat. 18.12.040(c) (1993); Ark. Code Ann. 20-17-206(c) (Michie Supp. 1989); Mont. Code Ann. 50-9-202(3) (1993); Ohio Rev. Code Ann. 2133.06(B) (Anderson 1994).

See, e.g., Ark. Code Ann. 20-17-206(c) (Michie Supp. 1989) ("The declaration of a qualified patient known to the attending physician to be pregnant must not be given effect as long as it is possible that the fetus could develop to the point of live birth with continued application of life-sustaining treatment.").

n28. S.D. Codified Laws Ann. 34-12D-10 (1994) ("Notwithstanding a declaration made pursuant to this chapter, life-sustaining treatment and artificial nutrition and hydration shall be provided to a pregnant woman unless, to a reasonable degree of medical certainty,..., such procedures will not maintain the woman in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication.").

n29. D.C. Code Ann. 6-2421 to -2430 (1989); La. Rev. Stat. Ann. 40:1299.58.1 to .10 (1992); Me. Rev. Stat. Ann. tit. 18-A, 5-701 to -714 (West Supp. 1993); N.M. Stat. Ann. 24-7-1 to -10 (Michie 1991); Tenn. Code Ann. 32-11-101 to -112 (Supp. 1994).

n30. Mich. Comp. Laws Ann. 700.496(7)(c) (Supp. 1994) ("This designation cannot be used to make a medical treatment decision to withhold or withdraw treatment from a patient who is pregnant that would result in the pregnant patient's death.").

n31. Neb. Rev. Stat. 30-3417(1)(b) (Supp. 1993) ("Attorney in fact shall not have authority ... to make any decision when the principal is known to be pregnant that will result in the death of the principal's unborn child and it is probable that the unborn child will develop to the point of live birth with the application of health care.").

n32. Mass. Gen. Laws Ann. ch. 201D, 1-17 (West Supp. 1994); N.Y. Pub. Health Law Ann. 2980-2994 (McKinney 1993).

n33. Cal. Health & Safety Code 7189.5(c) (West Supp. 1994); Conn. Gen. Stat. 19a-574 (Supp. 1993); Del. Code Ann. tit. 16, 2503(d) (1983); Idaho Code 39-4504(4) (1993); Okla. Stat. Ann. tit. 63, 3101.4(B)(IV)(a) (West Supp. 1994); S.C. Code Ann. 44-77-70 (Law. Co-op. Supp. 1993); Tex. Health & Safety Code Ann. 672.019 (West 1992 & Supp. 1994); Utah Code Ann. 75-2-1109 (1993).

See, e.g., Cal. Health & Safety Code 7189.5(c) (West Supp. 1994) ("The declaration of a qualified patient known to the attending physician to be pregnant shall not be given effect as long as the patient is pregnant.").

n34. Colo. Rev. Stat. 15-18-104(2) (1989); Fla. Stat. Ann. 765.113(2) (West 1986); Minn. Stat. Ann. 145B.13(3) (Supp. 1993). See, e.g., Minn. Stat. Ann. 145B.13(3) (West Supp. 1994) ("In the case of a living will of a patient that the attending physician knows is pregnant, the living will must not be given effect as long as it is possible that the fetus could develop to the point of live birth with continued application of life-sustaining treatment.").

n35. Pa. Cons. Stat. Ann. 5414(a) (Supp. 1993) ("Notwithstanding the existence of a declaration or direction to the contrary, life-sustaining treatment, nutrition and hydration must be provided to a pregnant woman ... unless, to a reasonable degree of medical certainty ... life-sustaining treatment, nutrition and hydration: (1) will not maintain the pregnant woman in such a way as to permit the continuing development and live birth of the unborn child; (2) will be physically harmful to the pregnant woman; or, (3) would cause pain to the pregnant woman which cannot

be alleviated by medication.").

n36. Ariz. Rev. Stat. Ann. 36-3201 to -3262 (Supp. 1993); Md. Code Ann., Health-Gen. 5-601 to -618 (1994); N.J. Stat. Ann. 26:2H-53 to -78 (West Supp. 1994); N.C. Gen. Stat. 90-320 to -323 (1993); Or. Rev. Stat. 127.605 to .650 (1989 & Supp. 1994); Va. Code Ann. 54.1-2981 to -2993 (Michie 1991 & Supp. 1994).

n37. Miss. Code Ann. 41-41-107(1) (1993); N.H. Rev. Stat. Ann. 137-H:14(I) (Supp. 1992); Wis. Stat. Ann. 154.07(2) (West 1989 & Supp. 1992).

n38. See generally Miss. Code Ann. 41-41-151 et seq. (1992).

n39. N.H. Rev. Stat. Ann. 137-J:2(V)(c) (Supp. 1992).

n40. Wis. Stat. Ann. 155.20(6) (Supp. 1993).

n41. Ga. Code Ann. 31-32-8(1) (1991 & Supp. 1994); Ill. Ann. Stat. ch. 755, para. 35/39(c) (Smith-Hurd 1993); Iowa Code Ann. 144A.6(2) (West 1989); Nev. Rev. Stat. 449.624(4) (1991); R.I. Gen. Laws 23-4.11-6(c) (Supp. 1993).

n42. Ga. Code Ann. 31-36-4 (1991).

n43. Ill. Ann. Stat. ch. 755, para. 40/15 (Smith-Hurd 1992).

n44. See generally Iowa Code Ann. 144A.1 et seq. (West 1989 & Supp. 1994).

n45. Nev. Rev. Stat. 449.850 (1991).

n46. R.I. Gen. Laws 23-4.10-5(c) (Supp. 1993).

n47. N.D. Cent. Code 23.06.4-07 (1991 & Supp. 1993).

n48. N.D. Cent. Code 23.06.5-03(5) (1991 & Supp. 1993).

n49. Vt. Stat. Ann. tit. 18, 5251 et seq. (1987 & Supp. 1993), and Vt. Stat. Ann. tit. 14, 3451 et seq. (1989 & Supp. 1993); W. Va. Code 16-30-2 et seq. (1991 & Supp. 1994), and W. Va. Code 16-30B-1 et seq. (Supp. 1994).

n50. It should be noted that the Attorney General of Alaska has issued an informal opinion questioning the constitutional validity of that state's pregnancy clause in light of the Supreme Court's Griswold-Roe jurisprudence in privacy right cases. See Op. (Inf.) Att'y Gen. Alaska 523 (1986). The Attorney General of Wisconsin has also issued an opinion questioning the constitutionality of the pregnancy clause in Wisconsin's living will statute. See Letter from Bronson C. La Follette, Wisconsin Attorney General, to Walter Kunicki, Chairperson, Special Comm'n on Bio-Ethics Legislative Council (Jan. 14, 1985).

No state or federal court has yet addressed the issue of whether pregnancy clauses can withstand constitutional scrutiny. While the Supreme Court of Washington was directly confronted with this issue in DiNino v. State, 684 P.2d 1297 (Wash. 1984), it chose not to address it. In that case, Ms. DiNino had prepared a living will stating that it was to be given effect even if she was pregnant. Ms. DiNino requested that the court resolve the constitutionality of the pregnancy clause in the statute so that she and her doctor could know what their rights and liabilities were under the Washington Natural Death Act. Id. at 1300. However, the court refused to address the issue, ruling that a non-justiciable controversy was presented. Id. Ms. DiNino was neither pregnant at the time she brought suit nor was she suffering from a terminal condition. Thus, because the court thought that it would be issuing an advisory opinion, it declined to address the issue raised. Id.

This result is unfortunate. As the dissent argued, the majority opinion "underrates the public importance of this issue," and this is a "matter of "continuing and substantial public interest' that warrants an authoritative determination for future guidance." Id. at 1301 (Dimmick, J., dissenting) (citations omitted). Since pregnancy only lasts nine months and a terminally ill individual may not survive the pregnancy, or potential legal proceedings, the court should have resolved this important issue, because it is "capable of repetition, yet evading review." Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 515 (1911).

n51. While this Comment mainly addresses the situation where a prior directive has been executed by an incompetent pregnant woman, the legislative proposal discussed infra also addresses the situation where a prior directive does not exist.

n52. See, e.g., Schloendorf v. Society of New York Hosp., 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body") (Cardozo, J.), overruled on other grounds, Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957); Pratt v. Davis, 118 Ill. App. 161, 166 (1905), aff'd, 79 N.E. 562 (Ill. 1906) ("Under a free government, at least, the free citizen's first and greatest right, which underlies all others - the right of inviolability of his person; in other words the right to himself - is the subject of universal acquiescence"); Slater v. Baker & Stapleton, 95 Eng. Rep. 860 (K.B. 1767) (holding surgeon liable for damages for not obtaining the consent of his patient before operating); see also supra notes 3, 6 & 14.

n53. The doctrine of informed consent "follows logically from the universally recognized rule that a physician, treating a mentally competent adult under non-emergency circumstances, cannot properly undertake to perform surgery or administer other therapy without the prior consent

of his patient." Sard v. Hardy, 281 Md. 432, 438-39, 379 A.2d 1014, 1019 (1977). "The fountainhead of the doctrine ... is the patient's right to exercise control over his own body,..., by deciding for himself whether or not to submit to the particular therapy." Id. at 439, 379 A.2d at 1019.

In effect, the doctrine of informed consent protects two interests: "the interest in being free from nonconsensual bodily invasion and the interest in decisionmaking autonomy." Martha A. Matthews, Suicidal Competence and the Patient's Right to Refuse Lifesaving Treatment, 75 Cal. L. Rev. 707, 721 (1987). See also Edward A. Lyon, The Right to Die: An Exercise of Informed Consent, Not an Extension of the Constitutional Right to Privacy, 58 U. Cin. L. Rev. 1367 (1990).

n54. In re Conroy, 486 A.2d 1209, 1222 (N.J. 1985). See also Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 277 (1990) ("The common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment."); In re Rosebush, 491 N.W.2d 633, 635 (Mich. 1992) ("The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, the right to refuse medical treatment and procedures").

n55. See, e.g., Barber v. Superior Court, 195 Cal. Rptr. 484 (Cal. Ct. App. 1983); In re Estate of Longeway, 549 N.E.2d 292 (Ill. 1989); DeGrella v. Elston, 858 S.W.2d 698 (Ky. 1993); Mack v. Mack, 329 Md. 188, 618 A.2d 744 (1993); In re Gardner, 534 A.2d 947 (Me. 1987); In re Rosebush, 491 N.W.2d at 635; In re Peter, 529 A.2d 419 (N.J. 1987); In re Storar, 420 N.E.2d 64 (N.Y.), cert. denied, 454 U.S. 858 (1981). It is interesting to note that soon after the issuance of the Mack decision by the Maryland Court of Appeals, the Maryland General Assembly stated in the Preamble to the Maryland Health Care Decisions Act of 1993 that the "constitutional law of this nation recognizes an individual's right to personal health care decisionmaking, complementing the common-law doctrine of informed consent." 1993 Md. Laws 372.

n56. See, e.g., supra notes 6 & 14.

n57. See, e.g., Ky. Rev. Stat. Ann. 311.984(5) (Baldwin 1991) (The Kentucky Living Will and Health Care Directive Acts "shall not impair or supersede any common law or statutory right that an adult has to effect the withholding or withdrawing medical care"); 1993 Md. Laws 372 (common-law rights not superseded by statute); Thomas W. Mayo, Constitutionalizing the "Right to Die", 49 Md. L. Rev. 103, 136-37 (1990) ("Natural Death Acts and "living will' statutes generally are regarded as having added rights to those that existed at common law, not being in derogation of those pre-existing rights."); see also Jordan, supra note 16, at 1152 ("The right to die was independently developed by the common law courts, and the statutes generally contain a disclaimer that they are not intended to impair or supersede any previously existing rights.").

n58. See, e.g., Counselman v. Hitchcock, 142 U.S. 547, 570 (1892) ("It is, of course, competent for the legislature to change any doctrine of the common law"); United States v. Thomas, 82 U.S. (15 Wall.) 337, 344 (1872) ("But the legislature can undoubtedly, at its pleasure, change the common-law.").

n59. This Comment recognizes that several state appellate courts have found a state-based constitutional right to forego medical treatment. See supra note 12 and accompanying text. However, this Comment looks to federal constitutional law to defend the right to forego medical treatment, recognizing that states are free to find greater rights than exist under the federal Constitution, but that the federal Constitution protects the minimum of rights that all Americans will be entitled to exercise, regardless of what their particular state constitution protects.

n60. See, e.g., supra notes 12-13, 53, 57; infra notes 81, 97, 127.

n61. 381 U.S. 479 (1965).

n62. 381 U.S. at 484.

n63. Id. at 486.

n64. The Fourteenth Amendment states in relevant part that: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, 1.

n65. John E. Nowak et al., Constitutional Law 14.27, at 686 (3 ed. 1988).

n66. Griswold, 381 U.S. at 486 (Goldberg, J., concurring).

n67. 381 U.S. at 484; see also Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting).

n68. 381 U.S. at 497 (Goldberg, J., concurring).

n69. Nowak et al., supra note 65, at 687.

n70. Samuel Warren & Louis Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890); see also Ken Gormley, One-Hundred Years of Privacy, 1992 Wis. L. Rev. 1335.

n71. Gormley, supra note 70, at 1348-51.

n72. Warren & Brandeis, supra note 70; Gormley, supra note 70, at 1345 ("The "right to be let alone,' which Warren and Brandeis went on to introduce to American jurisprudence, was a basic tort notion.").

n73. Katz v. United States, 389 U.S. 347 (1967).

n74. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Schneider v. State, 308 U.S. 147 (1939).

n75. Griswold v. Connecticut, 381 U.S. 479 (1965); see also Roe v. Wade, 410 U.S. 113 (1973); Gormley, supra note 70, at 1406 ("Certainly, Griswold, Roe and subsequent cases involving fundamental decision making privacy do share a common theme relating to a repulsion from governmental intrusion. That is, privacy protects the individual from an ever "normalizing' state ... by preventing the government from imposing certain fundamental decisions upon the individual.").

n76. Gormley, supra note 70, at 1391-92. Although a majority of the justices in Griswold agreed that there is a fundamental right of privacy under the Constitution, the Court was divided on the specific source. Id.

n77. See supra note 65 and accompanying text.

n78. 405 U.S. 438, 455 (1972).

n79. Id. at 446-55.

n80. 410 U.S. 113 (1973).

n81. Gormley, supra note 70, at 1392; see also Roe, 410 U.S. at 153 (The right to privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."); Anita L. Allen, Feminist Moral, Social, and Legal Theory: Taking Liberties: Privacy, Private Choice, and Social Contract Theory, 56 U. Cin. L. Rev. 461, 465 (1987) ("Privacy refers to an aspect of liberty. It refers to freedom from governmental or other outside interference with decisionmaking and conduct, especially respecting appropriate private affairs.").

n82. 410 U.S. at 164.

n83. Id. at 153.

n84. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

n85. Roe, 410 U.S at 152.

n86. Id. at 154; see also Maher v. Roe, 432 U.S. 464, 473 (1977) ("Roe did not declare an unqualified "constitutional right to an abortion.'").

n87. Roe, 410 U.S. at 154.

n88. Id. at 155.

n89. 428 U.S. 52 (1976).

n90. 431 U.S. 678 (1977).

n91. 497 U.S. 502 (1990) (Akron II); 462 U.S. 416 (1983) (Akron I).

n92. 476 U.S. 747 (1986).

n93. 492 U.S. 490 (1989).

n94. Casey I, 112 S. Ct. 2791 (1992).

n95. See Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J., concurring) (A fundamental aspect of privacy is the "freedom to care for one's health and person, [free] from bodily restraint or compulsion"); see also Allen, supra note 81, at 474 ("Post-Roe cases have illuminated the Court's understanding that the right of privacy is really an aspect of constitutionally protected liberty.").

n96. 112 S. Ct. at 2810.

n97. See, e.g., James Bopp, Jr. & Daniel Avila, The Due Process "Right To Life" in Cruzan and its Impact on "Right-To-Die" Law, 53 U. Pitt. L. Rev. 193 (1991); Mayo, supra note 57; Lyon, supra note 53.

n98. Casey I, 112 S. Ct. at 2806.

n99. See supra note 68 and accompanying text.

n100. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

n101. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967).

n102. See, e.g., Casey I, 112 S. Ct. 2791; Roe, 410 U.S. 113; Skinner v. Oklahoma, 316 U.S. 535 (1942).

n103. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

n104. See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944).

n105. See, e.g., Casey I, 112 S. Ct. 2791; Cruzan, 497 U.S. 261. In Cruzan, the Court did not address whether a person could refuse medical treatment based on a right to privacy because the Court assumed that the Constitution included a "liberty" interest sufficient to do so. Id. at

278-79 n.7. Further, "the concept of privacy embodies the moral fact that a person belongs to himself and not others nor society as a whole." Thornburgh, 476 U.S. at 777-78 (Stevens, J., concurring).

n106. See generally Janice MacAvoy-Snitzer, Pregnancy Clauses in Living Will Statutes, 87 Colum. L. Rev. 1280, 1287 (1987) ("Although Roe and its progeny have examined the right of privacy in terminating pregnancy in the context of anti-abortion legislation, it does not follow that Roe protects a woman's right of privacy only when she seeks to have an abortion. Roe addressed a broad right of privacy.").

n107. Casey I, 112 S. Ct. at 2807.

n108. Id. at 2807. The reasoning of Casey I has most recently been relied upon to support the right of a mentally competent, terminally ill patient to commit physician-assisted suicide. Compassion In Dying v. Washington, 850 F. Supp. 1454, 5831 (W.D. Wa. 1994). In that case, the district court judge concluded "that the suffering of a terminally ill person cannot be deemed any less intimate or personal, or any less deserving of protection from unwarranted governmental interference, than that of a pregnant woman." Id. at 1460. It is a short logical step to conclude that an incompetent pregnant woman should have the right to have her prior directive, which was created when she was competent, carried out. As the court went on to note, "the liberty interest protected by the Fourteenth Amendment is the freedom to make choices according to one's individual conscience about those matters which are essential to personal autonomy and basic human dignity." Id. at 1459.

n109. See Saikewicz, 370 N.E.2d at 428 ("To protect the incompetent person within its power, the State must recognize the dignity and worth of such a person and afford that person the same panoply of rights and choices it recognizes in competent persons."); see also In re Eichner, 426 N.Y.S.2d 517, 542-43 (N.Y. App. Div. 1980), modified, In re Storar, 420 N.E.2d 64 (N.Y.), cert. denied, 454 U.S. 858 (1981).

n110. See supra notes 7, 86-88 and accompanying text.

n111. " Viability means that the fetus's condition is such that it can survive after birth with help from neonatal intensive care resources." Mary Mahowald, Beyond Abortion: Refusal of Cesarean Section, 3 Bioethics 106, 110 (1989). The point of fetal viability is generally thought to be 28 weeks of gestation. Roe, 410 U.S. at 160. While it is recognized that viability may occur as early as 24 weeks of gestation, id. at 160 n.60, it is assumed for argument that 28 weeks is the point of viability.

n112. In re Quinlan, 355 A.2d 647, 663 (N.J. 1976).

n113. Bouvia v. Superior Court, 225 Cal. Rptr. 297, 306 (Cal. Ct. App. 1986).

n114. See Roe, 410 U.S. at 162-64.

n115. 112 S. Ct. at 2818, 2821.

n116. Id. at 2821.

n117. See id. at 2820 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid ... An undue burden is an unconstitutional burden."). For the developing interpretation of what an "undue burden' encompasses, see, e.g., Planned Parenthood v. Casey, 114 S. Ct. 909, 910-11 (1994) (Casey II) (Souter, J.) (noting that the Third Circuit's construction of the Supreme Court's decision in Casey I, 112 S. Ct. 2791 (1992), as only requiring a plaintiff to show that an abortion regulation would be an "undue burden' "in a large fraction of the cases" as correct); Fargo Women's Health Org. v. Schafer, 113 S. Ct. 1668, 1669 (1993) (O'Connor, J.) (noting that laws restricting abortion are an "undue burden' if, "in a large fraction of the cases in which [the law] is relevant, [they] will operate as a substantial obstacle to a woman's choice to undergo an abortion.").

n118. See generally Casey I, 112 S. Ct. at 2820-21. The genesis and development of the "undue burden" test can be seen by reviewing Hodgson v. Minnesota, 497 U.S. 417, 458-59 (1990) (O'Connor, J., concurring in part & concurring in judgment in part); Akron II, 497 U.S. 502 (1990); Webster, 492 U.S. at 530 (O'Connor, J., concurring in part & concurring in judgment); Thornburgh, 476 U.S. at 828 (O'Connor, J., dissenting); Simopoulos v. Virginia, 462 U.S. 506, 520 (1983) (O'Connor, J., concurring in part & concurring in judgment); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in judgment in part & dissenting in part); Akron I, 462 U.S. at 464 (O'Connor, J., dissenting); Bellotti v. Baird, 428 U.S. 132, 147 (1976) (Bellotti I); Doe v. Bolton, 410 U.S. 179, 198 (1973).

n119. Roe, 410 U.S. at 163. See also Casey I, 112 S. Ct. at 2821.

n120. Roe, 410 U.S. at 163-64; see also Colautti v. Franklin, 439 U.S. 379, 386 (1979).

n121. Casey I, 112 S. Ct. at 2821; Roe, 410 U.S. at 164-65.

n122. 355 A.2d 647 (1976).

n123. Id. at 663 (emphasis in original).

n124. See Casey I, 112 S. Ct. at 2821; Roe, 410 U.S. at 163.

n125. 112 S. Ct. 2791 (1992).

n126. See, e.g., supra notes 80, 89-93.

n127. 573 A.2d 1235 (D.C. 1990).

n128. Id. at 1252 (citations omitted).

n129. Id.

n130. Id.

n131. See infra note 217 and accompanying text.

n132. In re A.C., 573 A.2d at 1254 (Belson, J., concurring in part and dissenting in part).

n133. Id.

n134. Id.; see also supra notes 119-121 and accompanying text.

n135. Roe, 410 U.S. at 162. See also Casey I, 112 S. Ct. at 2849 ("As the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling.") (Blackmun, J., concurring in part and dissenting in part).

n136. See, e.g., Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946) (holding that a viable fetus, later born, may have a cause of action for injuries sustained while in the womb); see also Patricia King, The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn, 77 Mich. L. Rev. 1647, 1657-59 (1979) ("The live birth criterion [is] important not as a sign of physical separation, which could occur at any time during the gestational period, but as verification of a capacity for continued life.").

n137. This term is not altogether accurate, as often the conflict is between the wishes of the woman and the wishes of the health care provider and/or state as to what course of medical treatment should be followed.

n138. See, e.g., Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981). In Jefferson, the court weighed the interest of the mother in protecting her individual right to practice her religious beliefs against the interest of the unborn child's right to life and found in favor of the child's right to life. Id. at 460.

n139. See Dawn E. Johnsen, Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty, 43 Hastings L.J. 569, 571 (1992) ("Courts in eleven states have ordered pregnant women to submit to cesarean sections against their will. In at least one such case, the compelled surgery required physically tying the woman to the operating table.") (citations omitted); William J. Curren, Court-Ordered Cesarean Sections Receive Judicial Defeat, 323 New Eng. J. Med. 489 (1990) ("In a quiet, often unnoticed, but consistent manner, a number of trial-court judges in at least 11 states across the country have ordered that a pregnant woman must submit to a cesarean section to deliver a viable fetus against the known and clearly expressed will of the woman."); Veronica E.B. Kolder et al., Court-Ordered Obstetrical Interventions, 316 New Eng. J. Med. 1192, 1193 (1987) (Judges granted petitions to order cesarean sections in 13 out of 15 cases).

n140. See, e.g., In re Jamaica Hosp., 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985) (ordering a blood transfusion over the religious objections of the mother to protect the life of a mid-term fetus); Crouse Irving Mem. Hosp. v. Paddock, 485 N.Y.S.2d 443 (N.Y. Sup. Ct. 1985); Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981) (court-ordered cesarean section over wishes of mother); In re Yetter, 62 Pa. D. & C.2d 619, 623 (1973) ("right of privacy includes a right to die with which the State should not interfere where there are no minor or unborn children ...."). Nevertheless, it must be noted that In re A.C., supra notes 127-135 and accompanying text, and the recent case of Mother Doe, supra, may signal a new trend by the courts to recognize and uphold the rights of the individual pregnant woman to personal autonomy and bodily integrity over the interest of the State in potential fetal life.

Mother Doe, later identified as Tabita Bricci, a 22-year-old Chicago woman, was 37 weeks pregnant and suffered from a medical condition in which the placenta was "not delivering sufficient oxygen to the viable unborn fetus." Emergency Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District, Baby Boy Doe v. Mother Doe (No. A-502) (hereinafter "Emergency Petition"), at 3-4, cert. denied, 114 S. Ct. 652 (1993). On December 9, 1993, the State filed a Petition for Adjudication of Wardship in the Cook County Juvenile Court, alleging that the unborn fetus was neglected because Ms. Bricci refused to submit to a cesarean section. Id. The juvenile court declined to rule, holding that it lacked jurisdiction under the Illinois Juvenile Court Act. Id.

On December 10, 1993, an emergency hearing was held before the Illinois Appellate Court, Third Division. Id. at 5. The court ruled that the juvenile court lacked jurisdiction to rule on the original Petition, but that the case could go forward in the circuit court under its equity powers. Id. On that same date, the State filed a new petition in the circuit court requesting that "the court ... approve a temporary custodian solely to consent to the performance of a cesarean section." Id. At the hearing before the circuit court, a doctor "testified that if a cesarean section [was] not performed, the unborn fetus [had] a close to zero percent chance of surviving the natural birth process through the vaginal canal." Id. The doctor testified that he believed that brain damage had already occurred. Id. at 6.

Judge Brownfield, in his ruling on December 11, 1993, found that Ms. Bricci refused to submit to a cesarean section based on her religious beliefs and that failure to have the cesarean section posed serious risks to the unborn child. Id. at 6. Nevertheless, he refused to grant the State's request for a temporary custodian to consent to the cesarian section. Id. On December 14, 1993, the Illinois Appellate Court, Second Division, unanimously affirmed the lower court ruling without written opinion. Id. On December 16, 1993, the Illinois Supreme Court denied the Public Guardian's Emergency Petition for Leave to Appeal. Id. at 7. On December 18, 1993, the United States Supreme Court denied the

Public Guardian's Emergency Petition for a Writ of Certiorari. Baby Boy Doe v. Mother Doe, 114 S. Ct. 652 (1993).

The Public Guardian argued in its Emergency Petition to the Supreme Court that the State had a compelling interest in protecting the life of a viable unborn fetus and that the case should be remanded back to the lower courts to weigh that State interest against the interest of the mother to practice her religion freely and to make decisions concerning her medical care. Emergency Petition at 13. As already stated, the Court declined to hear the case.

However, on April 5, 1994, the Illinois Appellate Court issued a written opinion in this case "cognizant of the seriousness of the question presented, and believing that the [] courts of Illinois require some guidance in this area ...." Baby Boy Doe v. Mother Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994). The court held that "a woman's competent choice in refusing a medical treatment as invasive as a cesarean section during her pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus." Id. at 330.

Relying on federal and state court precedent, the court found that the right of a competent pregnant woman to forego such medical treatment arose from "her rights to privacy, bodily integrity, and religious liberty ...." Id. at 332. The court went on to state that "the potential impact upon the fetus is not legally relevant; to the contrary, [the Illinois Supreme Court] explicitly rejected the view that the woman's rights can be subordinated to fetal rights." Id. (citing 531 N.E.2d at 355). Thus, when such an invasive procedure as a cesarean section is at issue, the state cannot trump the rights of the pregnant woman and cannot compel her "to do or not do anything merely for the benefit of the unborn child." Id.

Baby Boy Doe was delivered by a successful natural birth in December 1993. Tracy Shryer, Woman at Center of Dispute Gives Birth, L.A. Times, Dec. 31, 1993, at A24. Physicians said it would be six months before they would be able to determine if he suffered any brain damage while in utero. Id.

n141. See Dawn E. Johnsen, The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection, 95 Yale L.J. 599, 613 (1986) ("By substituting its judgment for that of the woman, the state deprives women of their right to control their lives during pregnancy - a right to liberty and privacy protected by the Constitution. Furthermore, by regulating women as if their lives were defined solely by their reproductive capacity, the state perpetuates a system of sex discrimination that is based on the biological difference between the sexes, thus depriving women of their constitutional right to equal protection of the laws.").

n142. Andrea M. Sharrin, Potential Fathers and Abortion: A Woman's Womb is Not a Man's Castle, 55 Brooklyn L. Rev. 1359, 1398 (1990); see also Craig v. Boren, 429 U.S. 190, 204 (1976).

n143. See supra notes 116, 119 and accompanying text.

n144. Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

n145. Sharrin, supra note 142.

n146. See supra notes 80, 89-94.

n147. Jordan, supra note 16, at 1159.

n148. See supra notes 26-28, 30-31, 33-35, 37, 39, 41, 46-47 and accompanying text.

n149. Geduldig v. Aiello, 417 U.S. 484 (1974). Geduldig involved a California statute that did not pay benefits to women for normal pregnancy-related conditions as a disability covered by the statute, although it did cover certain male-specific conditions such as prostatectomies, circumcision, hemophilia and gout. Id. at 501 (Brennan, J., dissenting). In Geduldig, the Court stated "that pregnancy-related restrictions are not first-order sex-based equal protection problems because they are based on a real physical difference between men and women." Ruth Colker, An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class, 1991 Duke L.J. 324, 358. Such pregnancy clauses, however, do more than discriminate upon a sex-based, real physical difference; they also discriminate between women based upon whether or not they are competent.

n150. See supra notes 114-116 and accompanying text.

n151. Sharrin, supra note 142, at 1402.

n152. The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

n153. Sol Wachtler, Judging the Ninth Amendment, 59 Fordham L. Rev. 597 (1991). For a good overview of Ninth Amendment scholarship, see Symposium on Interpreting the Ninth Amendment, 64 Chi.-Kent L. Rev. 37 (1988).

n154. 381 U.S. 479 (1965).

n155. Id. at 496.

n156. Id. at 497.

n157. Id. at 487 (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1923)).

n158. Henry R. Glick, The Right to Die: Policy Innovation and its Consequences 13 (1992).

n159. Id.

n160. President's Commission, supra note 8, at 17-18; see also Linda C. Fentiman, Privacy & Personhood Revisited: A New Framework for Substitute Decisionmaking for the Incompetent, Incurably Ill Adult, 57 Geo. Wash. L. Rev. 801, 802-04 (1989) (noting that more than 80% of Americans over the age of 65 die in an institutional setting).

n161. Griswold, 381 U.S. at 488 (Goldberg, J., concurring).

n162. Wachtler, supra note 153, at 599 ("The founders believed that the people were the source of all legitimate political authority and possessed fundamental personal liberties that had their origin in the laws of nature."); see also Gormley, supra note 70, at 1411 (entering into the social contract did not "obliterate the liberty and personal autonomy of the individual").

n163. Griswold, 381 U.S. at 485.

n164. See supra notes 12-14 and accompanying text.

n165. Griswold, 381 U.S. at 491 (Goldberg, J., concurring).

n166. Snyder, 291 U.S. at 105.

n167. Griswold, 381 U.S. at 494 (Goldberg, J., concurring); see also Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (arguing that every unjustified intrusion upon the privacy of an individual by the government violates the Constitution).

n168. Griswold, 381 U.S. at 495 (Goldberg, J., concurring).

n169. Although it is recognized that there is much debate over the Ninth Amendment and the scope of its power and usage by the judiciary, it cannot be ignored or considered surplusage to the Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803). "To treat the Ninth Amendment as an historical anomaly that adds nothing to serious constitutional jurisprudence ... not only violates the mandate that unenumerated rights be neither denied nor disparaged, but also ignores the framer's intent that the Constitution be read broadly to protect fundamental rights." Wachtler, supra note 153, at 609.

n170. See supra notes 114-116, 150 and accompanying text.

n171. The Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, 1.

n172. Civil Rights Cases, 109 U.S. 3, 20 (1883).

n173. Andrew Koppelman, Legal Theory: Forced Labor: A Thirteenth Amendment Defense of Abortion, 84 Nw. U. L. Rev. 480, 485 (1990).

n174. See, e.g., Toibb v. Radloff, 501 U.S. 157, 166 (1991) (expressing concern over the possibility that a bankruptcy debtor would be forced to work for creditors in violation of the Thirteenth Amendment); Pollock v. Williams, 322 U.S. 4 (1944) (stating that the Thirteenth Amendment's purpose was not only to end slavery, but to ensure a system of free and voluntary labor); Taylor v. Georgia, 315 U.S. 25, 29 (1942) (noting that coerced labor is a form of involuntary servitude within the meaning of the Thirteenth Amendment); United States v. Reynolds, 235 U.S. 133, 146 (1914) ("compulsion of such service by constant fear of imprisonment under the criminal laws" violates the Thirteenth Amendment); Bailey v. Alabama, 219 U.S. 219 (1911); Clyatt v. United States, 197 U.S. 207, 215 (1905) (holding that peonage, coercing the victim by threat of legal sanction to work off debt to a master, is involuntary servitude).

n175. Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 998 (3d Cir.), cert. denied, 114 S. Ct. 85 (1993) (citing United States v. Kozminski, 487 U.S. 931, 942 (1988)); see also Butler v. Perry, 240 U.S. 328, 332 (1916). Although the Thirteenth Amendment was enacted in reaction to the enslavement of African Americans, it is not limited simply on the basis of race. The Amendment prohibits all slavery or involuntary servitude except that concerning criminal punishment. Slaughter House Cases, 83 U.S. (16 Wall.) 36, 72 (1873).

n176. Kozminski, 487 U.S. at 942.

n177. Id. at 943; see also supra note 174 and accompanying text.

n178. See, e.g., United States v. Kozminski, 487 U.S. 931, 939-53 (1988) (holding that involuntary servitude exists when victim is forced to work under threat of physical restraint or physical injury or by use of legal threats); United States v. King, 840 F.2d 1280-82 (6th Cir.), cert. denied, 488 U.S. 894 (1988) (holding that defendant's repeated use of threats to use physical force to make victims perform labor constitutes involuntary servitude and violates the Thirteenth Amendment); United States v. Booker, 655 F.2d 562, 564 (4th Cir. 1981) (concluding that the Thirteenth Amendment was intended to end not only formal slavery as it had existed in the South prior to the Civil War, but all types of involuntary servitude); Jobson v. Henne, 355 F.2d 129, 131 (2d Cir. 1966) (noting the purpose of the Thirteenth Amendment was to proscribe conditions of enforced compulsory service of one to another).

n179. Steirer, 987 F.2d at 999; see also Kozminski, 487 U.S. at 943 (finding involuntary servitude existed because victim had no choice but to work or face legal sanction).

n180. " The pun on the word "labor' should not distract attention from the fact that when a woman is forced against her will to carry a child to term, control over her body and its (re)productive capacities is seized from her and directed to a purpose not her own." Koppelman, supra note 173, at 489.

n181. Steirer, 987 F.2d at 999; see also Selective Draft Cases, 245 U.S. 366, 368-73 (1918) (holding that a military draft does not violate the Thirteenth Amendment).

n182. Koppelman, supra note 173, at 519.

n183. Marcus Brown Bldg. Co. v. Feldman, 256 U.S. 170, 199 (1921) ("The traditions of our law are opposed to compelling a man to perform strictly personal services against his will.").

n184. Kozminski, 487 U.S. at 942.

n185. See supra notes 114-121 and accompanying text.

n186. See supra note 19 and accompanying text.

n187. See supra notes 26-28, 30-31, 33-35, 37, 39, 41, 46-47.

n188. 42 U.S.C. 1395-1396 (Supp. 1991).

n189. 497 U.S. 261 (1990).

n190. Fred Cate, Implementing the Education Mandate of the Patient Self-Determination Act, 7 Health Law. 11 (Fall 1993). For a discussion of the legislative process and intent leading to enactment of the PSDA, see Elizabeth McClosky, Between Isolation and Intrusion: The Patient Self-Determination Act, 19 Law, Med. & Health Care 80 (1991).

n191. Cate, supra note 190, at 11; see also 57 Fed. Reg. 8194 (1992) (amending 42 C.F.R. pts. 417, 431, 434, 483, 484, 489 and 498).

n192. See supra notes 26-28, 30-31, 33-35, 37, 39, 41, 46, 47 and accompanying text.

n193. See, e.g., Mildred Solomon et al., Decision Near the End of Life: Professional Views on Life-Sustaining Treatments, 83 Am. J. Pub. Health 14 (1993); Lawrence Schneiderman, Effects of Offering Advance Directives on Medical Treatments and Costs, 117 Ann. Intern. Med. 599 (1992); Marion Danis et al., A Prospective Study of Advance Directives for Life-Sustaining Care, 324 N. Eng. J. Med. 882 (1991).

n194. See supra note 192.

n195. See Cate, supra note 190, at 13 (noting the PSDA's focus on "opening discourse" about a patient's right to choose medical treatment).

n196. See supra notes 21-50 and accompanying text.

n197. See supra notes 26-36 and accompanying text.

n198. See supra notes 37-49 and accompanying text. The question also arises whether prior directive statutes limit the rights of those without prior directives. See, e.g., Cruzan, 760 S.W.2d at 420 (declining to rule on the question of whether the common law right to refuse medical treatment was broader than the rights given under the Missouri Living Will Act). This question, though relevant, exceeds the scope of this Comment.

n199. Even in states without pregnancy clauses, prior directive statutes generally provide no guidance to health care providers or individuals as to what should occur if the patient is pregnant and incompetent. It is unclear whether the health care provider should follow the patient's prior directive, the provider's own moral belief, or the request of the patient's family. The incompetent pregnant woman's directive may be ignored because of the provider's fear of civil or criminal liability. The proposal below avoids ambiguity and gives guidance to health care providers, individuals, and practitioners of law as to what should occur in the situation where there is an incompetent pregnant woman both with, and without, a prior directive.

n200. Roe, 410 U.S. at 153.

n201. See Elizabeth Benton, The Constitutionality of Pregnancy Clauses in Living Will Statutes, 43 Vand. L. Rev. 1821, 1826 (1990) (noting that the "risk of psychological harm to the woman's partner and family must be considered when a pregnant woman's body is maintained against her express wishes").

n202. See generally Benton, supra note 201, at 1826-27 (discussing the financial burdens imposed on the woman's family when the state forces the birth of a child).

n203. Roe, 410 U.S. at 153.

n204. As stated earlier, supra note 51, this proposal will also help protect the interests of an incompetent pregnant woman who has not executed a prior directive, because it will clarify the roles of the patient, health care provider, and surrogate decision-maker.

n205. Susan Sherwin, No Longer Patient: Feminist Ethics & Health Care 137 (1992) (describing the struggle "as a clash between the basic moral principles of autonomy and beneficence").

n206. Bender, supra note 5, at 530.

n207. Feminist ethics and feminism are "varied and multiple." Bender, supra note 5, at 519. This Comment recognizes that feminism is a label which encompasses more than a "political struggle for woman's rights." Id. The Comment examines feminist theories which emphasize "the need to value and focus on care, compassion, responsiveness, responsibility, conversation, and communication, as well as learning to listen closely to others and to pay attention to others' needs, regardless of their differences from our own." Id. See also Nel Noddings, Caring: A Feminine Approach to Ethics and Moral Education 24 (1984) ("Caring involves stepping out of one's own personal frame of reference into the other's. When we care, we consider the other's point of view.").

n208. See infra notes 214-215 and accompanying text.

n209. Feminist ethics generally "reject[] the notion of an ethics founded on general principles in favour of a context specific analysis." Helen B. Holmes & Laura M. Purdy, Feminist Perspectives in Medical Ethics 24 (1992).

n210. Holmes & Purdy, supra note 209, at 18; see also Leslie Bender, Teaching Feminist Perspectives on Health Care Ethics and Law: A Review Essay, 61 U. Cin. L. Rev. 1251, 1259 (1993) (noting that an ethic of justice is generally seen as a rights-based model "in which problems are analyzed using abstract principles organized in hierarchies by autonomous decisionmakers," while an ethic of care, by comparison, is seen as "being more particularized, contextual, relational, and interdependent, and rooted in values of caring and responsibility").

n211. Bender, supra note 5, at 535.

n212. See generally An Ethic of Care: Feminist & Interdisciplinary Perspectives 71 (Mary Jeanne Larrabee ed., 1993) ("The justice orientation organizes moral perception by highlighting issues of fairness, right, and obligation... The care orientation meanwhile focuses on other saliencies: on the interconnections among the parties involved, on their particular personalities, and on their weal and woe.").

n213. Sherwin, supra note 205, at 157.

n214. Bender, supra note 5, at 536-37.

n215. Id. at 539.

n216. See Fentiman, supra note 160, at 805 ("Substitute decision-making for an incompetent adult should seek to respect and promote that individual's right to autonomy and privacy, both by seeking to effectuate his medical treatment choice, to the extent that it can be determined once he is no longer competent, and by providing a sphere for private decisionmaking by that individual, his family, and his physician, into which the state cannot intrude.") (emphasis added).

n217. In re Jobes, 529 A.2d 434, 444 (N.J. 1987); see also Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 431 (Mass. 1977). The doctrine of substituted judgment evolved from English estate law which called upon the court to "don the mental cap' of the person who was incompetent to look after an estate. See Ex Parte Whitbread in re Hinde, a Lunatic, 35 Eng. Rep. 878 (1816).

n218. The argument can be made that if a prior directive exists and the fetus is not viable, the directive should be effectuated under all circumstances. While this may be an attractive argument initially in protecting the individual interest, reality counsels otherwise. It is naive to think that a health care provider will effectuate a prior directive if an incompetent woman is pregnant without discussing such action with the woman's family and friends. The proposal below recognizes and attempts to address this reality.

n219. One can argue that because the incompetent pregnant woman can not make a contemporaneous choice whether or not to remain on life-sustaining treatment until the fetus's birth, her precedent wishes, as evidenced by a prior directive, should not be followed. This is especially true if the prior directive is unclear and does not address the situation where a woman is incompetent and pregnant. The argument suggests that an unclear prior directive could violate the present wishes of an incompetent pregnant woman. The morally correct action in this situation is to look to family and close friends to make such a decision. See, e.g., Sanford H. Kadish, Letting Patients Die: Legal & Moral Reflections, 80 Calif. L. Rev. 857, 888 (1992) (arguing that "an advance choice has force, but not the conclusive moral force of a contemporary choice").

It must be understood that upon completion of a prior directive, no one can reasonably contemplate all the possible situations in which it might be effectuated. Legislatures generally do not expect such a level of specificity when a prior directive is executed because the purpose of having such statutes would be undermined. Again, however, the situation where a woman is incompetent and pregnant is unusual because the fetus must be considered. In order to insure that her wishes are respected, a woman would have to specify in her prior directive what actions should take place if she is pregnant and incompetent. The proposal addresses this concern.

n220. Fentiman, supra note 160, at 807.

n221. In re Jobes, 529 A.2d at 445.

n222. There is no legitimate reason to cut off the individual from friends and family when the individual is most in need of their assistance. Excluding family and friends from medical decision-making should be the rare exception, not the rule. See In re Jobes, 529 A.2d at 445 (noting that "family members are best qualified to make substitute judgments for incompetent patients").

n223. In re Farrell, 529 A.2d 404, 414 (N.J. 1987).

n224. In re Jobes, 529 A.2d at 445.

n225. See supra notes 114-116 and accompanying text.

n226. Several states' prior directive forms contain pregnancy clauses. Such forms require that women initial them, cross them out, or specify what should be done if incompetent and pregnant. See, e.g., Md. Code Ann., Health-Gen. 5-603 (1994) ("If I am pregnant, my decision

concerning life-sustaining procedures shall be modified as follows ....").

n227. See supra notes 119-121 and accompanying text.

n228. This legislative proposal contains a priority system, which would ensure that even if there are no family members available, or if the woman has not designated a surrogate decision-maker, close friends would be consulted.

n229. Md. Code Ann., Health-Gen. 5-601 et seq. (1994).

n230. Id. 5-605.

n231. As discussed earlier, viability is generally thought to occur at 28 weeks of gestation, though it can occur as early as 23 or 24 weeks. Supra note 111. In this instance, the statute should adopt bright-lines in order to be effective and give guidance to health care providers. In recognition of the fact that a legislature may not want to adopt such a bright-line rule, the statute may allow the attending physicians to determine the point of viability. This, too, could prove problematic. Concerns over possible liability on their part may cause a health care provider to delay making a determination of viability long enough to ensure fetal viability. In order to ensure uniformity in the Act's operation, it would be more prudent for the legislature to establish 28 weeks as the point of viability.

n232. Incompetency should be defined by the Act as it is presently done in prior directive statutes, as discussed supra note 8.

n233. This subsection recognizes that when a woman executes her prior directive she may not be able to decide what she would like done in a situation where she is incompetent and pregnant. It also recognizes that a woman may want her family to make this decision. In addition, it is noted that health care providers are unlikely to follow an ambiguous prior directive, particularly if the patient is incompetent and pregnant.

The argument could be made that this subsection incorrectly presumes that no choice is made when a woman chooses not to say anything in her prior directive. In other words, by not saying anything in the prior directive, the woman perhaps has made a choice that her directive is not to be affected by the pregnancy and that it should be carried out. In this situation where a woman is incompetent and pregnant, the better course is to require her to make an explicit statement as to what she wants to occur. If a woman truly wants her wishes to be effectuated, she needs to clearly state what they are. This requirement is minimal in light of the fact that the alternative is that the state will make the decision for her.

n234. In most circumstances, it is likely that a family member would be named by the individual as their guardian, or a surrogate or proxy. This, however, is not always the case. Generally, the individual has the right, in a prior directive, to name a guardian, or a surrogate or proxy. If an individual is named, that person is given priority in this subsection. However, if there is only a living will, a surrogate will not have been named. This hierarchy would make it possible that family members or friends, instead of the state, would be the individuals who would make the decision as to what should occur.

n235. Use of the term partner recognizes that an incompetent pregnant woman may not be married, or that she may be involved in a same-sex relationship.

n236. A patient care advisory committee would try to resolve any dispute that develops between co-equal surrogates. A physician acting in accordance with the recommendation of the committee would be immune from liability. See, e.g., Md. Code Ann., Health-Gen. 5-605(b) (1994) (providing that if surrogates disagree, the physician will refer the case to the patient care advisory committee). For a complete discussion of patient care advisory committees, see Symposium: Hospital Ethics Committees and the Law, 50 Md. L. Rev. 742 (1991). For an example of a statute establishing patient care advisory committees and requiring their use by health care facilities, see the Maryland Patient Care Advisory Committee Act. Md. Code Ann., Health-Gen. 19-370 to -1705 (1990 & Supp. 1994).

n237. The existence of a prior directive is "persuasive evidence of [the] incompetent [pregnant woman's] intention and it should be given great weight by the person or persons who substitute their judgment on [her] behalf." John F. Kennedy Mem. Hosp., Inc. v. Bludworth, 452 So. 2d 921, 926 (Fla. 1984).

n238. This subsection recognizes that many types of life-sustaining treatment may be harmful to fetal development and allows the surrogate to consider this in their decision-making. See, e.g., T.W. Sadler, Langman's Medical Embryology 113-15 (5th ed. 1985) (examining the harmful effect of chemical agents and pharmaceutical drugs on the fetus).

n239. See supra notes 80, 89-94.

n240. See supra notes 127, 138-140.

n241. See supra note 119.

n242. See supra note 237 and accompanying text.

n243. Fentiman, supra note 160, at 846.