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COLLOQUIUM: GENDER, LAW AND HEALTH CARE: INCUBATOR OR INDIVIDUAL?: THE LEGAL AND POLICY DEFICIENCIES OF PREGNANCY CLAUSES IN LIVING WILL AND ADVANCE HEALTH CARE DIRECTIVE STATUTES

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SUMMARY:

... Part II argues that pregnancy clauses in prior directive statutes also violate constitutional rights of autonomy and privacy under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as violate Ninth and Thirteenth Amendment prohibitions on state power over the individual. ... Therefore, pregnancy clauses in statutes that do not allow the prior directive of an incompetent pregnant woman to be effectuated even before viability must be struck down as an unconstitutional violation of the right to privacy and bodily integrity, which is "broad enough to encompass a patient's decision to decline medical treatment," and which is an "ultimate exercise" of that constitutional right. a. ... Although this Comment is particularly concerned with the situation in which a prior directive exists, it is evident that a prior directive could be discounted when a fetus is involved because the interests of the state, the family, and friends are implicated. ... (E) Standards for Surrogate Decision-makers are as follows: (1) Any person authorized to make health care decisions for an incompetent pregnant woman under this section shall base those decisions on the wishes of the woman, recognizing that any prior directive executed by her shall be given great weight in the ultimate determination whether to withhold or withdraw life-sustaining treatment. (2) In determining the wishes of the incompetent pregnant woman, a surrogate shall also consider her: (a) current diagnosis and prognosis without the treatment at issue, i.e. what effects will such treatment have on the incompetent pregnant woman as well as the effects of such treatment on the fetus; (b) expressed preferences regarding the provision, withholding, or withdrawal of specific treatment at issue or of similar treatments; (c) relevant religious and moral beliefs and personal values; (d) behavior, attitudes, and past conduct with respect to the treatment at issue and medical treatment generally; (e) reactions to the provision, withholding, or withdrawal of a similar treatment for another individual; and, (f) expressed concerns about the effect on the family or intimate friends of the incompetent pregnant woman if a treatment were provided, withheld, or withdrawn.

TEXT:

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No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law... To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals...ⁿ¹

The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.ⁿ²

Introduction

The right of competent individuals to forego medical treatment as an expression of their right to bodily integrity and autonomy has been consistently recognized by the United States Supreme Court for the last one-hundred years.ⁿ³ Although the Court has often balanced the interests of the individual with the interests of the state to determine the extent of the right to forego medical treatment,ⁿ⁴ the basic [*529] underlying right of competent individuals to forego medical treatmentⁿ⁵ and to protect their right to bodily integrity and autonomy has not been questioned. State appellate courts have also upheld the right of a competent individual to forego medical treatment.ⁿ⁶

While upholding the rights of competent individuals to forego medical treatment in most circumstancesⁿ⁷ has been the easy case for federal and state courts, upholding the rights of incompetentⁿ⁸ individ- [*530] uals to forego medical treatment has been more difficult.ⁿ⁹ The seminal case involving the rights of incompetent patients to forego medical treatment was issued by the New Jersey Supreme Court in 1976. In *re* Quinlanⁿ¹⁰ held that an individual, whether competent or incompetent, had the right to forego medical treatment at common-law as well as under a state and federal constitutional right to privacy.ⁿ¹¹ Since Quinlan, several state appellate courts have also held that the right to forego medical treatment can be found in state and/or federal constitutional law, usually based on the right to privacy.ⁿ¹² This constitutional right to forego medical treatment has also been found to exist by several federal courts.ⁿ¹³ [*531]

Though Quinlan and its progeny of cases have recognized the right of an incompetent individual to forego medical treatment,ⁿ¹⁴ the cases have consistently turned on the question of how this right could be exercised and protected. While state appellate courts have come up with varying answers in case law, state legislatures originally reacted by enacting living will statutes.ⁿ¹⁵ Durable power of attorney for health care and advance health care directive statutes soon followed.ⁿ¹⁶ By enacting such prior directiveⁿ¹⁷ statutes, state legislatures aimed to codify the common-law right to forego medical treatment,ⁿ¹⁸ though not [*532] to limit or supersede it, and to recognize, as some courts already had, the constitutional right to forego life-sustaining treatment if one becomes incompetent.ⁿ¹⁹

As of this writing, all fifty states and the District of Columbia have enacted such statutes.ⁿ²⁰ Of these fifty-one jurisdictions, eighteen have [*533] only living will statutes,ⁿ²¹ four have only durable power of attorney for health care statutes,ⁿ²² eighteen have integratedⁿ²³ statutes,ⁿ²⁴ and [*534] eleven have separate living will and durable power of attorney for health care statutes.ⁿ²⁵

Of the eighteen jurisdictions with only living will statutes, eight forbid physicians to comply with the terms of a living will throughout the term of a patient's pregnancy,ⁿ²⁶ four forbid a physician from implementing the living will of a pregnant woman if the fetus could possibly be brought to the point of live birth with the continued use of life-sustaining treatment,ⁿ²⁷ one forbids a physician from implementing the living will of a pregnant woman if the fetus could be brought to the point of live birth and the mother would not be further harmed [*535] or made to suffer from being kept on life-support systems,ⁿ²⁸ and five do not have pregnancy clauses.ⁿ²⁹

Of the four jurisdictions with only durable power of attorney for health care statutes, one forbids a physician from implementing the terms of a durable power of attorney for health care throughout the term of a patient's pregnancy,ⁿ³⁰ one forbids a physician from implementing the durable power of attorney for health care of a pregnant woman if the fetus could possibly be brought to the point of live birth with the continued use of life-sustaining treatment,ⁿ³¹ and two do not have a pregnancy clause.ⁿ³²

Of the eighteen jurisdictions with integrated statutes, eight forbid physicians to comply with the terms of a prior directive throughout the term of a patient's pregnancy,ⁿ³³ three forbid a physician from implementing the terms of the prior directive of a pregnant woman if the fetus could possibly be brought to the point of live birth with the continued use of life-sustaining treatment,ⁿ³⁴ one forbids a physician [*536] from implementing the prior directive of a pregnant woman if the fetus could be brought to the point of live birth and the mother would not be further harmed or made to suffer from being kept on life-support systems,ⁿ³⁵ and six do not have a pregnancy clause.ⁿ³⁶

Of the eleven jurisdictions with separate living will and durable power of attorney for health care statutes, three forbid physicians to comply with the terms of a living will throughout the term of a patient's pregnancy.ⁿ³⁷ The durable power of attorney for health care statutes in these jurisdictions, however, vary in their treatment of an incompetent pregnant woman. While Mississippi's durable power of attorney for health care statute does not contain a pregnancy clause,ⁿ³⁸ New Hampshire's statute states that an incompetent pregnant woman must be maintained until live birth if, to a reasonable degree of medical certainty, the unborn child could be brought to term.ⁿ³⁹ Wisconsin's statute allows the surrogate to make whatever decisions the prior directive authorizes.ⁿ⁴⁰

Five of the eleven jurisdictions with separate living will and durable power of attorney for health care statutes forbid a physician from implementing the living will of a pregnant woman if the fetus could possibly be brought to the point of live birth with the continued use of life-sustaining treatment.ⁿ⁴¹ Yet, the durable power of attorney for health care statutes vary widely in their treatment of an incompetent pregnant woman. Georgia's statute allows a surrogate to make the same decisions that the principle could,ⁿ⁴² Illinois's statute states that a living will supersedes a durable power of attorney for health care,ⁿ⁴³ [*537] Iowa's statute does not have a pregnancy clause,ⁿ⁴⁴ Nevada's statute does not allow a surrogate to consent to abortion,ⁿ⁴⁵ and Rhode Island's statute does not allow a surrogate to consent to the withholding or withdrawal of life-sustaining treatment if the declarant is pregnant as long as it is probable that the fetus could be brought to the point of live birth.ⁿ⁴⁶

Of the eleven jurisdictions with separate living will and durable power of attorney for health care statutes, one forbids a physician from implementing the living will of a pregnant woman if the fetus could be brought to the point of live birth and the mother would not be further harmed or made to suffer from being kept on life-support systems.ⁿ⁴⁷ Under this particular durable power of attorney for health care statute, however, a surrogate may not consent to abortion.ⁿ⁴⁸ Two jurisdictions do not have pregnancy clauses in either statute.ⁿ⁴⁹

Thus, the majority of states in this country give a woman fewer constitutional and common-law rights if she is pregnant and incompetent than if she were either (a) competent and pregnant, (b) competent and chose to have an abortion before fetal viability, or (c) incompetent and without a prior directive.ⁿ⁵⁰ The diversity of statutes [*538] makes it unclear exactly what the rights of an incompetent pregnant woman are and whether she would be better off not having a prior directive and relying upon the common law and the Constitution to protect her right to bodily integrity and autonomy. This Comment will show that pregnancy clauses, as presently written, create legal and policy deficiencies that require the creation of a more caring paradigm to resolve the issue of protecting the individual rights of the incompetent pregnant woman.

Following this Introduction, Part I of this Comment argues that pregnancy clauses in prior directive statutes violate the common law. However, since legislatures can change the common law, this paper looks to the federal Constitution to defend the rights at issue from arbitrary state action. Part II argues that pregnancy clauses in prior directive statutes also violate constitutional rights of autonomy and privacy under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as violate Ninth and Thirteenth Amendment prohibitions on state power over the individual. Part III argues that pregnancy clauses in prior directive statutes are also deficient from a policy standpoint and that there is a more realistic and humane way to legislate. Part III concludes by proposing a legislative remedy that avoids constitutional, common law, and policy deficiencies in dealing with an incompetent pregnant woman with, or without,ⁿ⁵¹ a prior directive.

Finally, this Comment concludes that the best way to deal with the dilemma of whether life-sustaining treatment should be withdrawn or withheld from an incompetent pregnant woman with a viable fetus, or one who has a pre-viable fetus and has not made her wishes clear in a prior directive, is to defer to the family or friends of the individual and allow them to make the decision instead of allowing the state to simply ordain what should occur. This solution, a caring substituted judgment approach, will best effectuate the interests of the individual, the state, and family and friends, by recognizing that individual decisions are rarely made in a vacuum and that we often look to family and friends to resolve difficult moral and legal issues in our life and as death approaches. [*539]

I. The Common Law and Pregnancy Clauses

The common law has long recognized and upheld the right of a competent or incompetent individual to forego medical treatment.ⁿ⁵² This right to forego medical treatment under the common-law is based on the doctrine of informed consent,ⁿ⁵³ which "also encompasses a right to informed refusal."ⁿ⁵⁴ Many state courts that have addressed the issue of whether an individual has a right to forego medical treatment have avoided the constitutional issues involved and have decided these cases solely on common-law grounds.ⁿ⁵⁵ This has been the case whether the individual in question was competent to make such decisions or incompetent.ⁿ⁵⁶ **[*540]**

While most prior directive statutes do not alter the common law,ⁿ⁵⁷ state legislatures have the power to alter or change the common law, in conformity with constitutional restrictions on legislative power, and restrict those rights that now exist if they so desire.ⁿ⁵⁸ Thus, to defend the right to forego medical treatment, this Comment looks to the federal Constitution.ⁿ⁵⁹

II. The Constitution and Pregnancy Clauses

A. Fourteenth Amendment Analysis

1. Right to Bodily Integrity and Privacy. - Most analyses of the constitutional right to forego medical treatment rely on the right of autonomy,ⁿ⁶⁰ better known as the right to privacy. The Supreme Court first recognized this right in *Griswold v. Connecticut*.ⁿ⁶¹

In *Griswold* the Court stated that there are various zones of privacy that are protected by the "penumbras" of the Bill of Rights, and that without such zones of privacy those rights explicitly expressed could not be truly enjoyed.ⁿ⁶² The Court ruled that the state could not forbid married couples from using contraceptives because the marital relationship is a fundamental right protected by the Constitutionⁿ⁶³ under the Due Process Clause of the Fourteenth Amendment.ⁿ⁶⁴ The **[*541]** Court held that the Connecticut law at issue deprived married persons of the liberty protected by their fundamental right to be married and to make decisions about whether or not to use birth control.ⁿ⁶⁵

Thus, the court will protect certain fundamental rights despite the lack of specific language in the Constitution or Bill of Rights that defines those rights.ⁿ⁶⁶ States cannot infringe upon these fundamental rights that are protected by the penumbras of the Bill of Rightsⁿ⁶⁷ without a compelling reason to do so.ⁿ⁶⁸ Though there is no explicit basis in the Constitution for the decision in *Griswold*, the opinion of the Court was correct "in finding that the values of privacy, including freedom from government intrusion with private thoughts, association, and liberty, had long been a part of American legal philosophy."ⁿ⁶⁹

The genesis of the right to privacy in American jurisprudence began with an article written by Louis Brandeis and Samuel Warren in 1890.ⁿ⁷⁰ In that article, Brandeis and Warren posited that a general right existed to be free from the intrusions of society in private affairs, and, in particular, to be free from the intrusion of newspapers into the life of the individual.ⁿ⁷¹ From that article, the right to privacy has developed along four main branches of constitutional analysis. These four branches are: (1) the common law tort freedom from intrusion by others into the personal property of an individual and from disclosures of information about the individual's private affairs;ⁿ⁷² (2) Fourth Amendment privacy that protects the individual from unreasonable governmental searches and seizures;ⁿ⁷³ (3) First Amendment privacy in speech and association;ⁿ⁷⁴ and (4) privacy under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, which allows the individual to engage in certain highly personal activi- **[*542]** ties without undue governmental intrusion, i.e. fundamental decision-making privacy.ⁿ⁷⁵

The right of an incompetent pregnant woman to have her prior directive effectuated is based on the fundamental decision-making right to privacy found in the Constitution. This privacy right is controversial, however, because it has no explicit basis in the Constitution.ⁿ⁷⁶ *Griswold* was the first case to recognize a fundamental decision-making privacy right.ⁿ⁷⁷ The privacy right enunciated in *Griswold* was soon after reaffirmed in *Eisenstadt v. Baird*.ⁿ⁷⁸ In *Eisenstadt*, the Court held that unmarried couples, just as married couples, could not be barred from the use of contraceptives because to do so violated the equal protection clause of the Fourteenth Amendment.ⁿ⁷⁹

A year later, "in the single most noteworthy and (simultaneously) notorious decision of the twentieth century, the Court extended its privacy logic in ... Roe v. Wadeⁿ⁸⁰ and created a species of privacy unattached to specific guarantees of the Bill of Rights, now burrowed in the single word "liberty' appearing in the Fourteenth Amendment." ⁿ⁸¹ Roe held that a state could not completely forbid a woman from choosing to obtain an abortion because such state action violated the due process clause of the Fourteenth Amendment as well as the right to privacy. ⁿ⁸² As stated by Justice Blackmun, author of the majority opinion, the right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." ⁿ⁸³ [*543]

The Roe Court recognized that there was no explicit basis in the Constitution for the right of fundamental decision-making privacy, but the Court reiterated that it has consistently recognized a right of personal privacy and that personal rights that can be seen as "fundamental" or "implicit in the concept of ordered liberty" ⁿ⁸⁴ are included within the zone of privacy protected by the Constitution. ⁿ⁸⁵ The Court stated, however, that these fundamental privacy rights are not absolute. ⁿ⁸⁶ They will be balanced against relevant state interests ⁿ⁸⁷ which can override the individual interest if the state's interests are compelling and the statute in question is narrowly drawn to express the legitimate state interests. ⁿ⁸⁸ Roe has led to a long line of cases that have further refined the parameters of the right of privacy and bodily integrity while looking at the issue of abortion rights. These cases include Planned Parenthood v. Danforth, ⁿ⁸⁹ Carey v. Population Services International, ⁿ⁹⁰ Akron v. Akron Center for Reproductive Health, Inc., ⁿ⁹¹ Thornburgh v. American College of Obstetricians & Gynecologists, ⁿ⁹² Webster v. Reproductive Health Services, ⁿ⁹³ and Planned Parenthood v. Casey. ⁿ⁹⁴

Although these cases dealt mainly with abortion rights, the principle that the right to privacy includes a right to bodily autonomy and integrity was well established. ⁿ⁹⁵ As stated by the plurality in Casey I, "Roe ... may be seen not only as an exemplar of Griswold liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection." ⁿ⁹⁶ While it has been argued that the right to autonomy and privacy does [*544] not sustain the right to forego medical treatment, ⁿ⁹⁷ this view is in error. "It is settled now, as it was when the Court heard arguments in Roe v. Wade, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood ... as well as bodily integrity." ⁿ⁹⁸

Thus, the basic principles that can be gleaned from the Court's decisions in this area are that certain realms of personal decision-making fall under a right of privacy and bodily integrity which restricts the state from infringing upon those decisions unless there is a compelling state interest to do so and the statute is narrowly drawn to effectuate those compelling state interests. ⁿ⁹⁹ These protected areas include decisions regarding contraception, ⁿ¹⁰⁰ marriage, ⁿ¹⁰¹ procreation, ⁿ¹⁰² child rearing and education, ⁿ¹⁰³ family relationships, ⁿ¹⁰⁴ and bodily integrity. ⁿ¹⁰⁵

Under the Griswold-Roe line of cases, an incompetent pregnant woman's decision to forego life sustaining treatment may also be protected by the right of privacy and liberty. ⁿ¹⁰⁶ A woman's decision to execute a prior directive, and to have it effectuated, implicates her fundamental right to make decisions regarding procreation, family relationships, and bodily integrity. Because these matters involve "the most intimate and personal choices a person may make in a lifetime, [*545] choices central to personal dignity and autonomy," ⁿ¹⁰⁷ they are central to the "liberty" interest protected by the Fourteenth Amendment.

Further, an incompetent pregnant woman has the "right to define [her] own concept of existence, of meaning, of the universe, and of the mystery of human life," and those concepts should not be "formed under compulsion of the State." ⁿ¹⁰⁸ As this right extends to competent individuals, so it must extend to incompetent individuals in order to maintain and respect their constitutional rights. ⁿ¹⁰⁹

Although the interests of an incompetent pregnant woman are not absolute and must be balanced against the interests of the state, ⁿ¹¹⁰ those state interests do not become compelling until the fetus is viable. ⁿ¹¹¹ Therefore, pregnancy clauses in statutes that do not allow the prior directive of an incompetent pregnant woman to be effectuated even before viability must be struck down as an unconstitutional violation of the right to privacy and bodily integrity, which is "broad enough to encompass a patient's decision to decline medical treatment," ⁿ¹¹² and which is an "ultimate exercise" ⁿ¹¹³ of that constitutional right.

a. Pregnancy Clauses Before Fetal Viability. - Before the point of fetal viability, the state's interest in the fetal life or the health of the [*546] incompetent pregnant woman can never be compelling enough to override her privacy and bodily integrity interests.ⁿ¹¹⁴ Although the Casey I plurality has rejected the trimester framework established in Roe, the basic holding of Roe still stands.ⁿ¹¹⁵ As stated by the plurality in Casey I, "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."ⁿ¹¹⁶ By analogy, a state may not stop an incompetent pregnant woman from rejecting life-sustaining procedures before her fetus is viable.

There can be no doubt that, just as a prior directive statute with a pregnancy clause denying enforcement of a directive in the case of an incompetent woman with a pre-viable fetus is an "undue burden"ⁿ¹¹⁷ on her right to abortion, it is an "undue burden" on her right to forego medical treatment.ⁿ¹¹⁸

b. Pregnancy Clauses After Fetal Viability. - Although a state cannot interfere with an incompetent pregnant woman's decision to forego life-sustaining treatment before her fetus is viable, the state's interest in fetal life does become compelling at the point of fetal viability.ⁿ¹¹⁹ At that point, the state may forbid an abortion from occurringⁿ¹²⁰ unless the health of the mother is in danger.ⁿ¹²¹ However, in [*547] the case of an incompetent pregnant woman whose prior directive is at issue, this last point is moot because there is no health of the mother to protect. Thus, at the point of fetal viability, just as a state could forbid an abortion from occurring, it seems likely that a state would be allowed to forbid a prior directive from being carried out that would end the incompetent pregnant woman's life, and thus the life of the fetus.

The argument can be made that the potential fetal life should not be allowed to override the interests of the mother in bodily integrity and personal autonomy, and such an argument apparently has support in the language of certain state court appellate decisions. Specifically, the New Jersey Supreme Court stated in *In re Quinlan*ⁿ¹²² that "the State's interest contra weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest."ⁿ¹²³

There is little doubt that keeping an incompetent woman alive against her will is an invasive procedure when her prognosis is dim. In such a case, it is likely that a court would uphold her right to forego medical treatment. Where a viable fetal life is involved,ⁿ¹²⁴ however, the individual rights of the mother will likely be seen as not overcoming the state interest in the fetal life. *Quinlan* did not address a situation in which an incompetent woman was pregnant, so it is unlikely that the case could be used to significantly bolster an argument that fetal rights should not be able to overcome the right of the mother to have her prior directive effectuated in light of *Casey I*ⁿ¹²⁵ and its predecessors.ⁿ¹²⁶

In re A.C.,ⁿ¹²⁷ however, did address a situation in which the incompetent woman was pregnant. The court stated that

in virtually all cases the decision of the patient, albeit discerned through the mechanism of substituted judgment, will control. We do not quite foreclose the possibility that a conflicting state interest may be so compelling that the patient's wishes must yield, but we anticipate that such cases will be extremely rare and truly exceptional.ⁿ¹²⁸ [*548]

The court held that the ordering of a cesarean section against the wishes of the mother was improper, even though such a procedure seemed necessary to save the life of the fetus.ⁿ¹²⁹ The court failed to explain "in what circumstances ... the state's interests can ever prevail over the interests of a pregnant patient."ⁿ¹³⁰ This is a strong statement in support of the woman's interest in protecting her right to bodily integrity either directly or through the doctrine of substituted judgment.ⁿ¹³¹ However, as pointed out by the partially dissenting opinion, the statements of the majority are dictum and seem to go further than what is seen under present federal case law.ⁿ¹³² "The state's interest in preserving human life and the viable unborn child's interest in survival are entitled, I think, to more weight than I find them assigned by the majority when it states that "in virtually all cases the decision of the patient ... will control.""ⁿ¹³³ Federal case law has made it clear that "the state's interest in potential human life becomes compelling at the point of viability"ⁿ¹³⁴ and that even before viability there is "an important and legitimate state interest in protecting the potentiality of human life."ⁿ¹³⁵

Some courts have recognized that a viable fetus born live may have a cause of action for prenatal injury.ⁿ¹³⁶ From this principle, many state courts have applied a balancing test in cases of "maternal-fetal conflict"ⁿ¹³⁷ involving a viable fetus. This test weighs the interests of the fetus and the state against the mother's interest in bodily integrity and autonomy.ⁿ¹³⁸ In such circumstances, though rare, most courts have found that the state's interest in protecting the unborn **[*549]** child is compelling and should prevail over the interests of the mother.ⁿ¹³⁹

Thus, while the argument exists that the fetal (and state) interest in life should not override the maternal interest in individual liberty and bodily integrity, it appears that after viability the state's interest in the fetal life will generally be seen as compelling and that the state interest will be recognized by most federal and state courts and enforced over the wishes of the mother in protecting her individual rights.ⁿ¹⁴⁰ This legal principle does not mean, however, that the right **[*550]** to privacy of the individual and her right to bodily integrity may be trampled in order to serve the state's interest. Simply allowing the state at the point of fetal viability to dictate what shall be done with an incompetent pregnant woman's body is violative of basic societal, moral, and philosophical beliefs and would equate an incompetent pregnant woman with an incubator or reproductive vessel.ⁿ¹⁴¹ **[*551]**

2. Equal Protection Analysis. - Under the equal protection clause of the Fourteenth Amendment, similarly situated people must be treated similarly and any sex-based classification "must serve important governmental objectives and be substantially related to those objectives to pass scrutiny by constitutional measures."ⁿ¹⁴² Pregnancy clauses in prior directive statutes do not meet this standard before the incompetent woman's fetus is viable. Before viability - before the state's interest in fetal life becomes compellingⁿ¹⁴³ - pregnancy clauses create classifications which on their face are not necessary to the achievement of an important state interestⁿ¹⁴⁴ and they do not treat similarly situated people similarly.ⁿ¹⁴⁵

Pregnancy clauses in prior directive statutes violate the equal protection clause because they classify women on the basis of whether they are pregnant and competent, or incompetent. Conversely, they classify women based upon whether they are incompetent and pregnant, or not pregnant. If a woman is competent and pregnant, she may choose to have life support withdrawn or to have an abortion with little restriction on her rights, as set forth by the Court in its abortion rights cases.ⁿ¹⁴⁶ However, if the woman is incompetent and pregnant, her rights are stripped away by pregnancy clauses because they do not allow her to end her life-sustaining treatment. The Equal Protection Clause is violated because there is no legitimate state interest in denying an incompetent pregnant woman the same rights that it allows competent pregnant women to exercise, i.e., the right to natural death. When a prior directive document is executed, the woman is competent; thus, competent women are also treated differently based upon whether they are pregnant. Such "outright refusal to administer the right of natural death to a pregnant woman because she is incompetent amounts to impounding her body and using it as an incubator."ⁿ¹⁴⁷

A variation of the first classification arises from pregnancy clauses in prior directive statutes that distinguish between whether an incompetent woman is pregnant or not. If a woman is not pregnant and incompetent, her prior directive will be effectuated in most states; but, once it is determined that an incompetent woman is pregnant, her **[*552]** right to have a prior directive effectuated disappears in most states.ⁿ¹⁴⁸ Again, there is no compelling state reason for such a statutory provision before the point of fetal viability. While the Supreme Court has held that a state may classify on the basis of whether or not an individual is pregnant, a state may not do so unless the classification is rationally related to a legitimate state interest.ⁿ¹⁴⁹ Such is not the case here because before fetal viability the state can have neither a legitimate nor a compelling interest in fetal life that overrides the individual's right to bodily integrity.ⁿ¹⁵⁰ Before the point of fetal viability occurs, pregnancy clauses in prior directive statutes violate the Equal Protection Clause of the Fourteenth Amendment because they "deny women the equal right of choice to act as equal participants in all of life's activities,"ⁿ¹⁵¹ either between men and women or among women themselves.

B. Ninth Amendment Analysis

The Ninth Amendmentⁿ¹⁵² was largely ignored by the Court in its protection of individual rights for the first two-hundred years of its existence.ⁿ¹⁵³ This changed, however, with the concurring opinion of Justice Goldberg in *Griswold v. Connecticut*.ⁿ¹⁵⁴ In his concurrence, Justice Goldberg argued that the right to privacy in marriage was a fundamental right

protected from state infringement under the Ninth Amendment.ⁿ¹⁵⁵ Without a compelling state interest as well as a narrowly drawn statute to effectuate that interest, such fundamental rights may not be infringed.ⁿ¹⁵⁶ [*553]

A Ninth Amendment analysis of pregnancy clauses in prior directive statutes would conclude that they violate an incompetent pregnant woman's right to forego medical treatment because they forbid her from exercising a liberty that is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."ⁿ¹⁵⁷ Before 1950, people generally died in the home and the state played little, if any, role in decisions to forego medical treatment.ⁿ¹⁵⁸ Thus, the tradition of our nation is that people died at home where they made their own decisions whether to undergo medical treatment.ⁿ¹⁵⁹ With the recent advent of medical technology and the ubiquitous rise of hospitals the focus of decision-making has changed.ⁿ¹⁶⁰ There is, however, no reason to ignore the individual's traditional right to decide whether to forego medical treatment.

Although the right to forego medical treatment is not explicitly stated in the Constitution, "the language and history of the Ninth Amendment reveal that the framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments."ⁿ¹⁶¹ The founding fathers believed that fundamental rights that exist outside those specifically mentioned in the Bill of Rights should not be deemed unprotected simply because they are not enumerated.ⁿ¹⁶²

Just as marriage is a fundamental right protected by the Ninth Amendment,ⁿ¹⁶³ so too is the fundamental right to privacy and bodily integrity and the right to forego medical treatment.ⁿ¹⁶⁴ These rights [*554] cannot be infringed upon without a compelling state interest to do so.ⁿ¹⁶⁵

Dying at home without interference from the state is "deeply rooted" in our society.ⁿ¹⁶⁶ Our founding fathers "recognized the significance of man's spiritual nature, of his feelings and of his intellect," and protected individuals by enacting the Ninth Amendment, which confers upon them, "as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men."ⁿ¹⁶⁷

As marital relations fall within the "private realm of family life,"ⁿ¹⁶⁸ so does the personal decision to forego medical treatment. As this right is fundamental, as it is protected by the Ninth Amendment,ⁿ¹⁶⁹ it cannot be abridged except for a compelling state interest, which cannot arise before the point of fetal viability.ⁿ¹⁷⁰

C. Thirteenth Amendment Analysis

Pregnancy clauses in prior directive statutes are also unconstitutional under the Thirteenth Amendmentⁿ¹⁷¹ because they reduce an incompetent pregnant woman to a state of slavery and involuntary servitude. An incompetent pregnant woman who is kept alive without her consent by attachment to life-support systems becomes nothing more than a machine - an incubator or reproductive vessel for the potential life that she is carrying - in order to serve the state.

It is clear, however, that the Thirteenth Amendment is an "absolute declaration that slavery or involuntary servitude shall not exist" in the United States.ⁿ¹⁷² By turning an incompetent pregnant woman [*555] into an unwilling incubator or reproductive vessel, she is reduced to slavery in order to serve the state. Her body is completely controlled by the state and she is not allowed to carry out her individual choice as to what should be done with, or to, her body. This recalls aspects of slavery as they existed when the Thirteenth Amendment was enacted. Just as the African American woman's body was controlled by her master in all respects including reproduction, so is the body of an incompetent pregnant woman controlled by its new master - the state. This nation's "leading Thirteenth Amendment cases" make it clear "that no person may be compelled to serve another."ⁿ¹⁷³

Such reproductive slavery is especially offensive in light of the Supreme Court's consistent holding that under the Thirteenth Amendment states and individuals cannot require another individual to labor for them in order to discharge their debts.ⁿ¹⁷⁴ If peonage is considered a form of involuntary servitude prohibited by the Thirteenth Amendment, then a state order to remain attached to medical machines and produce a child must also be considered a form of involuntary servitude prohibited by the Thirteenth Amendment.

"The phrase 'involuntary servitude' was intended to extend to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."ⁿ¹⁷⁵ And while it is easier to understand the "general spirit" of the phrase involuntary servitude than to exactly define the phrase,ⁿ¹⁷⁶ it is clear that impounding the body of an incompetent pregnant woman would fit within the prohibitions of the Thirteenth Amendment. Forced labor through physical or legal coercion has always been barred by the Thirteenth Amendment.ⁿ¹⁷⁷ That prohibition has been reenforced by recent courts' examination and condemnation of forced labor camps and forced confinement.ⁿ¹⁷⁸ "The critical factor in every case finding involuntary servitude is that the victim's only choice is between performing the labor on the one hand and physical and/or legal sanctions on the other."ⁿ¹⁷⁹

The logic of these cases extends to the situation where an incompetent pregnant woman is being forced to "labor"ⁿ¹⁸⁰ for the state against her will. She has no choice because the state has pre-ordained that choice for her through legal sanctions and the physical appropriation of her body. Although the government "may require individuals to perform certain well-established 'civic duties,' such as military service and jury duty,"ⁿ¹⁸¹ such is not the case here. It can hardly be argued that procreating for the state is a well established civic duty in light of Roe and its progeny. Further, "the nation does not seem to be in danger of becoming depopulated unless women are compelled to bear children."ⁿ¹⁸²

Treatment of an incompetent pregnant woman so that she becomes nothing more than an incubator or reproductive vessel is antithetical to our Constitution,ⁿ¹⁸³ "akin to African slavery,"ⁿ¹⁸⁴ and cannot [*557] be sanctioned by society. The legislative proposal below precludes such an undesirable result.

III. Policy Deficiencies of Pregnancy Clauses in Prior Directive Statutes and a Legislative Proposal

As discussed in Parts I and II above, pregnancy clauses in prior directive statutes violate both common law and constitutional rights of an incompetent pregnant woman, especially before the fetus is viable.ⁿ¹⁸⁵ Even after fetal viability, however, there are some serious questions as to whether it is wise to allow the state to command what will be done with an incompetent pregnant woman's body. Arguments about individual autonomy or state interests are not enough in this situation, and in fact serve an injustice to those involved. This Comment will propose a more humane approach to this problem after first addressing the policy deficiencies of pregnancy clauses in prior directive statutes as they are currently written.

A. Policy Deficiencies of Pregnancy Clauses in Prior Directive Statutes

The first major policy deficiency of pregnancy clauses in prior directive statutes is that they ignore the circumstances or wishes of the incompetent pregnant woman. As stated in Part I, one goal of legislatures in enacting prior directive statutes was to allow individuals to be able to exercise their right to forego medical treatment and to avoid being indefinitely hooked up to a machine against their will.ⁿ¹⁸⁶ This concern evaporates, however, if the patient is incompetent and pregnant under most statutes as written because wishes and desires expressed in a prior directive will be ignored.ⁿ¹⁸⁷

The second policy deficiency of pregnancy clauses in prior directive statutes is that they undermine the goals of the Patient Self-Determination Act (hereinafter PSDA).ⁿ¹⁸⁸ The PSDA was signed into law approximately five months after the Supreme Court issued its decision in Cruzanⁿ¹⁸⁹ and "reflected an effort to ensure that the new constitutionally protected right to 'self-determination in health care decisions' be given force by ensuring that individuals were given an opportunity to indicate their wishes with clear and convincing evidence."ⁿ¹⁹⁰ [*558]

In effect, the PSDA requires hospitals that receive Medicare or Medicaid funding to maintain written policies and procedures which guarantee that every adult receiving care will be given written information concerning patient involvement in treatment decision-making. Hospitals must inform patients about the prior directive laws of the state as well as the institution's policies respecting such documents.ⁿ¹⁹¹

While the PSDA's intention to educate society and to foster communication between physician and patient is laudable, its effectiveness for the pregnant woman entering a maternity ward is questionable. Essentially, a pregnant woman will be informed that she has the right to create a prior directive, even though at least thirty-five jurisdictions prohibit physicians from following this directive.ⁿ¹⁹² The medical literature itself makes it clear, moreover, that a prior

directive executed by the pregnant woman would likely be ignored by her health care providers.ⁿ¹⁹³ Because of state law or health care provider reluctance to abide by an executed prior directive,ⁿ¹⁹⁴ pregnancy clauses undermine the PSDA's public policy goals of fostering the communication between patient and physician that allows the patient to control what occurs to her body.ⁿ¹⁹⁵

A third deficiency with pregnancy clauses in prior directive statutes concerns conflicting requirements in the statutesⁿ¹⁹⁶ that make it unclear exactly what rights an incompetent pregnant woman retains. In states with integrated statutes, or a single statute, it is clear that a pregnancy clause would control if there was a prior directive.ⁿ¹⁹⁷ In states with separate statutes, however, the conflicting provisions lead to unclear law. A woman may be better off not having a prior directive at all in order to rely more effectively on her common-law and [*559] constitutional rights.ⁿ¹⁹⁸ Again, such an outcome contradicts the stated legislative policy goals for enacting such statutes.ⁿ¹⁹⁹

A fourth policy deficiency exists in prior directive statutes with pregnancy clauses because they completely ignore the "detriment that the state would impose upon the pregnant woman" and her family "by denying this choice altogether."ⁿ²⁰⁰ Just as a woman may face many hardships if denied the option to obtain an abortion and forced to undergo an unwanted pregnancy, so too might she suffer if denied the right to forego medical treatment. The incompetent pregnant woman may not wish to leave behind a motherless child, nor make her family suffer the hardship of witnessing her helpless incubation of the fetus and of facing the child who will always remind them that the mother was kept alive against her, and perhaps the family's, wishes.ⁿ²⁰¹ The incompetent pregnant woman may also not want the family to bear the financial and emotional burden of raising the child without her participation.ⁿ²⁰² "There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."ⁿ²⁰³

These likely concerns of the incompetent pregnant woman are totally ignored by the blind application of pregnancy clauses in prior directive statutes. Again, these concerns have been ignored by the legislatures, though their stated goal is to protect individual rights and [*560] to promote individual and family decisionmaking. Pregnancy clauses as presently written expressly thwart these goals.

As a society we must recognize and work to change laws that indiscriminately deny half our population individual rights long protected by common-law and the Constitution. This Comment proposes a remedy to end such discrimination by incorporating the idea of the feminist ethic of care with the legally recognized doctrine of substituted judgment to create a pregnancy clause that recognizes and addresses the interests of those parties responsible for an incompetent pregnant woman with a prior directive.ⁿ²⁰⁴

B. Feminist Ethic of Care

The struggle between the right of patient autonomy and bodily integrity and the physician's (or the State's) paternal duty to help the patient achieve the best outcome is well documented in bioethics literature.ⁿ²⁰⁵ This simple dichotomy, however, is inadequate to analyze the real life circumstances and concerns of most individuals in our society. Rarely does one make a decision without considering its effect upon family and friends. Seeing events as polar opposites, viewing the world in dichotomies, sets up a false dualism that lead us, as a society, "to an either/or, self/other analysis instead of a plural, multiple, variant, and contextualized analysis."ⁿ²⁰⁶

Feminist ethicsⁿ²⁰⁷ looks beyond this narrow framework, and false dualism, to consider how autonomy arises and flourishes in a larger social context. An ethic of caring enhances autonomy.ⁿ²⁰⁸ The law must recognize that life decisions are made within a broad personal context and that we cannot truly understand an individual's choices [*561] without understanding the larger circumstances of a person's life.ⁿ²⁰⁹ The argument of individual autonomy or compelling state interest is the argument of a general rule applied to a particular situation - an ethic of justice - that often fails to look at the situation in context and proceed to an equitable resolution within an ethic of care.ⁿ²¹⁰ An ethic of justice looks either to what the state must win in the situation or what the individual must win and ignores not only the family, but more importantly, the individual.

By not acknowledging or adopting an ethic of care, we not only ignore the autonomy of the individual, but also the context of the individual's life. "A care-based ethic arises out of perceptions of human beings as relational, interdependent, and supportive as opposed to our current rights-based ethic in which people are separate, autonomous, and equally empowered actors." ⁿ²¹¹ An ethic of care recognizes that emotions and familial interaction play a large role in our everyday life and in our decision-making. ⁿ²¹² The ethic of care questions, at the time of death, the attempt to separate individuals from those who have been part of their lives and who have been a part of their decision-making throughout life. Just as a model of friendship and amicalism should be supported and fostered between patient and physician, so too should it be promoted between patient and the state. "Under amicalism, the intention would be to enlist friends and family, who both understand and care personally and specifically for a patient, in the task of medical decision-making, rather than treating medical choice as a contest between [an] isolated patient and [the] physician" ⁿ²¹³ or state.

In the situation of an incompetent pregnant woman, it is not simply enough to advocate strict autonomy or compelling state interest, **[*562]** there is another interest at stake: that of family and friends in protecting the rights of an individual from being trampled by the state. The interest of family and friends should be recognized and considered before making the decision to attach or remove life-sustaining treatment from an incompetent pregnant woman.

By adopting an ethic of care, we do not delegitimize or ignore the autonomy and bodily integrity of the incompetent pregnant woman, but rather strengthen it and give it added meaning. As Professor Bender explains:

Autonomy, the power of an individual to control her own life and death, is as much a cornerstone of a care-based ethic as it is of modern medical ethics and legal practice. The differences are in the sources or meanings of autonomy. In a care-based ethic, individual autonomy is a process nurtured in webs of relationships and responsibilities instead of a static condition pre-existing them. Whereas the ideological basis of a rights-based ethic rests on an assumption of equally empowered, independent people, an ethic of care recognizes that many relationships contain dependencies between differently empowered people... The autonomy of an ethic of care can be melded with the autonomy concerns in a rights-based medical ethic, if it is understood to mean self-governing moral agency, rather than independent or self-contained decisionmaking. Self-governing in an ethic of care does not mean governing alone by abstract reasoning and distant observations, but means choosing options with respect to responsibilities, relationships, conversations, and dialogues with others. ⁿ²¹⁴

By recognizing an ethic of care in decision-making, we further illuminate the right of autonomy and recognize that the context of the situation is important to any decision. An ethic of care further effectuates the autonomy and dignity of the individual, ⁿ²¹⁵ in this case the incompetent pregnant woman. This ethic is easily adapted to the legal system and dovetails nicely with the doctrine of substituted judgment which allows family and friends to take part in the decision about whether medical treatment should be withheld or withdrawn from an incompetent pregnant woman. ⁿ²¹⁶ **[*563]**

C. Substituted Judgment

The substituted judgment doctrine arose under the common law to provide a means by which the courts could deal with the incompetent individual without a prior directive. As explained by the New Jersey Supreme Court:

under the substituted judgment doctrine, where an incompetent's wishes are not clearly expressed, a surrogate decisionmaker considers the patient's personal value system for guidance. The surrogate considers the patient's prior statements about and reactions to medical issues, and all facets of the patient's personality that the surrogate is familiar with - with, of course, particular reference to his or her relevant philosophical, theological, and ethical values - in order to extrapolate what course of medical treatment the patient would choose. ⁿ²¹⁷

Although this Comment is particularly concerned with the situation in which a prior directive exists, it is evident that a prior directive could be discounted when a fetus is involved because the interests of the state, the family, and friends are implicated.ⁿ²¹⁸ The choices expressed in a prior directive are obviously precedent,ⁿ²¹⁹ and it is difficult to [*564] know whether the incompetent pregnant woman foresaw the event occurring.

In such a situation it should be evident that a court or health care provider may be reluctant to carry out a prior directive under the belief that the incompetent pregnant woman's wishes are truly not known in this situation. Moreover, "many physicians are refusing to discontinue life-sustaining medical treatment without judicial authorization, due either to their own sense of professional ethics or to the fear of civil or criminal liability."ⁿ²²⁰ Under an ethic of care, family and friends should decide the course of action in this difficult situation rather than let the state step in and dictate what should occur. "Almost invariably the patient's family has an intimate understanding of the patient's medical attitudes and general world view and therefore is in the best position to know the motives and considerations that would control the patient's medical decisions."ⁿ²²¹ While there is always the possibility that a woman may be left without either a family or partner, this is an unlikely prospect. If it occurs, then close friends should be given the same role that a family member or partner would carry out in this situation.ⁿ²²² As stated by the New Jersey Supreme Court, "our common human experience teaches us that family members and close friends care most and best for a patient. They offer love and support and concern, and have the best interest of the patient at heart. The importance of the family in medical treatment decisions is axiomatic."ⁿ²²³ Further, it is family and friends that treat a "patient as a person, rather than a symbol of a cause."ⁿ²²⁴

By combining the feminist ethic of care with the legally recognized doctrine of substituted judgment (a "caring substituted judgment" approach), a better solution emerges to deal with the incompetent pregnant woman who has executed a prior directive. While a simple or decisive answer is difficult to achieve, the following proposal, which incorporates a caring substituted-judgment approach, [*565] should enable society to deal more humanely, compassionately, and openly with the wishes of a dying incompetent pregnant woman.

D. Legislative Proposal

This Comment proposes that prior directive statutes be re-written so that they take into account not only the common-law and constitutional rights of the individual woman, but also the rights of family and friends. Consideration of these rights will provide clearer guidance as to what should occur if there is an incompetent pregnant woman with (or without) a prior directive.

Pregnancy clauses in prior directive statutes must first address the situation where the fetus is not yet viable. In that situation, the wishes of the pregnant woman, as set forth in her prior directive, must be effectuated if they are clearly stated. Until the point of viability, there is simply no state interest that can overcome the interest of the incompetent pregnant woman to exercise her common-law and constitutional rights to privacy and bodily integrity.ⁿ²²⁵ In order to determine what the wishes of the woman are, statutes should require that women clearly state in their prior directive what is to occur if they become incompetent while they are pregnant.ⁿ²²⁶ If the woman does so, then her wishes must be effectuated before the fetus is viable. If she does not make her wishes clearly known, then the decision whether to withdraw or withhold life-sustaining treatment from an incompetent pregnant woman should go to family and friends, instead of to the health care provider or the state.

Once fetal viability occurs, a look at strict individual autonomy versus state interest reveals that most courts will likely rule that a state has a compelling interest in fetal life and could prohibit life-sustaining procedures from being withheld or withdrawn.ⁿ²²⁷ The state should not, however, be allowed to mandate the outcome of this decision because the state will usually not suffer the consequences of its act. Family and friends of the incompetent pregnant woman will suffer the consequences and should be allowed to make the decision as to what [*566] should occur. Where there is no family, then close friends of the individual should be consulted.ⁿ²²⁸

This proposal would be similar to the Maryland Health Care Decisions Act of 1993.ⁿ²²⁹ Like the Maryland Act, it would designate surrogate decision-makers for an individual if they have not executed a prior directive.ⁿ²³⁰ All prior directive statutes should contain a section worded substantially as follows:

Effect Of Directive During Pregnancy(A) Before the fetus of an incompetent pregnant woman is viable, ⁿ²³¹ as defined in the definitional section of this Act, a directive executed in accordance with this Act shall be given effect if the woman has clearly stated her intent as to what should be done in the event that she is pregnant at the time of her incompetency ⁿ²³² and the fetus is not yet viable.

(1) If the woman has failed to indicate her intent as to what should be done in the event that her fetus is not viable and she is incompetent, then the mechanism set out in subsection (B) shall be followed. ⁿ²³³ **[*567]**

(B) Once the fetus of an incompetent pregnant woman is viable, as defined in the definitional section of this Act, the health care providers should turn to the husband or partner, family or close friends of the incompetent pregnant woman, in order of priority established in subsection (C), to determine whether or not life-sustaining procedures should be maintained or withheld or withdrawn. The decision of the surrogate shall be given effect unless there is a conflict as discussed in subsection (D).

(C) The following priority for surrogate decision-making is established:

1. Guardian, if one has been appointed;
2. Surrogate or Proxy; ⁿ²³⁴
3. The patient's husband or partner; ⁿ²³⁵
4. An adult child of the patient;
5. A parent of the patient;
6. An adult brother or sister of the patient;

7. A friend or relative of the patient who is competent and presents an affidavit stating that the person is a relative or close friend of the patient and that they are familiar with the patient's activities, health, and personal beliefs.

(D) If persons with equal decision-making priority under subsection (C) of this section disagree as to what should be decided as to life-sustaining procedures for the incompetent pregnant woman, the case shall be referred to the institution's patient care advisory committee. ⁿ²³⁶

(E) Standards for Surrogate Decision-makers are as follows:

(1) Any person authorized to make health care decisions for an incompetent pregnant woman under this section **[*568]** shall base those decisions on the wishes of the woman, recognizing that any prior directive executed by her shall be given great weight in the ultimate determination whether to withhold or withdraw life-sustaining treatment. ⁿ²³⁷

(2) In determining the wishes of the incompetent pregnant woman, a surrogate shall also consider her:

(a) current diagnosis and prognosis without the treatment at issue, i.e. what effects will such treatment have on the incompetent pregnant woman as well as the effects of such treatment on the fetus; ⁿ²³⁸

(b) expressed preferences regarding the provision, withholding, or withdrawal of specific treatment at issue or of similar treatments;

(c) relevant religious and moral beliefs and personal values;

(d) behavior, attitudes, and past conduct with respect to the treatment at issue and medical treatment generally;

(e) reactions to the provision, withholding, or withdrawal of a similar treatment for another individual; and,

(f) expressed concerns about the effect on the family or intimate friends of the incompetent pregnant woman if a treatment were provided, withheld, or withdrawn.

A policy such as that set out above will best effectuate all the interests involved in what is, admittedly, a difficult situation. Before fetal viability, the interests of the individual woman are paramount unless she has failed to clearly state in a prior directive what should occur if she becomes incompetent. After fetal viability, the state is still not allowed to interfere in the decision as to what should occur. Nor may the state ordain what should occur. The interests of the state are assuaged by the fact that there can be no doubt that family and friends are also interested in the fetal life as well as in the life and wishes of the incompetent pregnant woman.

The obvious criticisms of this proposal may center around the viability distinction in this context and how a woman's prior directive may be brought into question if she has clearly stated her wishes. In [*569] an ideal world such distinctions would never have to be made and whatever the woman desired as expressed in her prior directive would govern in all circumstances. Such an ideal world does not exist, however, and it must be recognized that the state can, and will, likely step in when the fetus of a woman is viable, if not before that point. This is clearly seen in the abortion rights casesⁿ²³⁹ and the forced cesarean section cases.ⁿ²⁴⁰ States have consistently intervened in the situation where a woman is pregnant and she has attempted to exercise her rights in contradiction to what her health care providers or the state believe to be in the best interest of the unborn fetus. This proposal recognizes that fact and attempts to cope with this reality.

The distinction between pre and post viability is recognized and incorporated into this proposal because the United States Supreme Court has made this distinction a part of the law of abortion.ⁿ²⁴¹ The Court would likely look to this law if it were to recognize the right to forego medical treatment as a constitutionally protected privacy right and apply it to the situation where a woman is pregnant and incompetent. It is important to note that this proposal does not call into question the wishes of an incompetent woman as expressed in her prior directive. The proposal recognizes these wishes and requires that family or friends take those wishes into account when making their decision as to what should be done.ⁿ²⁴² In light of current federal and state law, the wishes of a woman that are clearly expressed in a prior directive, whether the fetus is pre or post viable, are far more likely to be carried out by family or friends than by a health care provider or the state acting alone. This is especially true if the fetus is viable. By recognizing this fact and by dealing with it directly, the first step is taken toward moving the law to a better place.

By allowing family and friends to make the decision of whether to forego life-sustaining treatment where a woman is incompetent and pregnant with a viable fetus (or before viability, if her choice is not clearly enunciated in her prior directive), we arrive at a method that can best fit everyone's needs. Family and friends have the best interests of the woman, the fetus (and, consequently, the interest of the state) in mind and know best the beliefs and desires of the woman at the moment of incompetency. Throughout our lives we rely on family and friends to protect our autonomy, to do what is best for us, and to help us arrive at our decisions. This fact of life should not change at [*570] the end of life when we are most in need of the ones that have supported us throughout life.

By adopting a caring, substituted judgment standard, which is a "shared decision-making process:"

individual participants are able to view each other not as adversaries, but as partners in reaching the resolution of a difficult problem. Then, after a decision is made, there is not enmity, but connection. This paves the way for future relations of mutual respect, rather than malpractice litigation, or rifts within the family. Accordingly, just as is the case with alternative dispute resolution, the process of conversation, of structuring a decisionmaking model on the basis of human connection rather than on a hierarchy of rights and rules, enhances both the quality of the decision made and the participants' acceptance of it.ⁿ²⁴³

Such is the import of this proposal. It may not be perfect, but it is workable, clear, and best addresses the various

competing interests in such a manner that the state will not dictate its decisions to the individuals involved.

Conclusion

It is clear that pregnancy clauses in prior directive statutes must be changed. As currently written, they violate common-law and constitutional rights of women, as well as leave the state of the law unclear and ambiguous. This is especially true before the fetus reaches viability.

Once the fetus is viable, however, the state's interest becomes compelling. That should not, however, override the autonomy of the incompetent pregnant woman as expressed and exercised through her family and friends in consideration of her prior directive and by their personal knowledge of the woman. Through a "caring substituted judgement" model, we can best effectuate the interests of all in an admittedly difficult circumstance.

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust Law Powers of Attorney Durable Powers Estate, Gift & Trust Law Powers of Attorney Living Wills Healthcare Law Treatment End-of-Life Decisions Advance Directives

FOOTNOTES:

n1. *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251-52 (1891).

n2. *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 278 (1990).

n3. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (Casey I) (holding that Constitution limits a state's authority to interfere with an individual's basic decisions regarding bodily integrity); *Cruzan*, 497 U.S. at 278 (recognizing a right to refuse medical treatment); *Washington v. Harper*, 494 U.S. 210 (1990) (holding that forcible injection of medication into a nonconsenting individual infringes a liberty interest); *Winston v. Lee*, 470 U.S. 753 (1985) (invalidating surgical removal of bullet from murder suspect as unreasonable under the Fourth Amendment); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (recognizing right to be free from unreasonable bodily restraints); *Rochin v. California*, 342 U.S. 165 (1952) (holding that involuntary stomach-pumping violates due process); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (recognizing liberty interest of individual with regard to undergoing unwanted treatment); *Camden & Suburban Ry. v. Stetson*, 177 U.S. 172 (1900) (holding that court has no common-law power to order an individual to undergo surgical procedures).

n4. See, e.g., *Cruzan*, 497 U.S. at 261 (holding that individual's liberty interest must be balanced against competing state interests); *Washington v. Harper*, 494 U.S. 210 (1990) (holding that state's interest in administering antipsychotic drugs to violent, mentally-ill inmate outweighed the inmate's liberty interest); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (recognizing that reasonable state regulations may override individual's liberty interest).

n5. This Comment recognizes, as do most feminist theories, that the framing and naming of an issue is a political act. As such, this Comment does not use the morally laden terms "right-to-die," "euthanasia," or "suicide." To do so would detract from the true issue involved: the right of individuals to choose what medical treatment, if any, is to be performed upon their bodies. See Leslie Bender, *A Feminist Analysis of Physician-Assisted Dying and Voluntary Active Euthanasia*, 59 *Tenn. L. Rev.* 519, 527 (1992).