DIE FREE OR LIVE: THE CONSTITUTIONALITY OF NEW HAMPSHIRE'S LIVING WILL PREGNANCY EXCEPTION

INTRODUCTION

On July 18, 1999, Tammy Martin was rushed to Memorial Hermann Northwest Hospital in Houston, Texas after suffering from an injury to her head.[1] The blow to her head ruptured a blood vessel in her brain.[2] Roughly one month before Ms. Martin slipped into a coma, the Governor of Texas, George W. Bush, signed into law Texas's Advance Directives Act.[3] This Act prohibits withholding medical treatment from pregnant women.[4] At the time of the accident, Ms. Martin was approximately fourteen weeks pregnant.[5]

Although Ms. Martin had not told anyone of her wishes in the event she was "being kept alive by artificial means,"[6] her mother, stepfather, and brother advocated tirelessly for the hospital to remove the life-support so that she and the fetus could die.[7] Scott Law, Ms. Martin's common law husband, fought Ms. Martin's family in order that she be "kept on life support at least until the fetus [was] old enough to be removed."[8] On July 23, 1999, state district court Judge Scott Link granted Mr. Law a temporary restraining order "preventing the hospital from withdrawing any life-support treatment until a further hearing Aug. 5" and mandating "the hospital do everything possible to keep [Ms.] Martin and the fetus alive."[9] On July 30, a probate judge granted Mr. Law temporary guardianship over Ms. Martin.[10] It was not until a week after court-appointed doctors declared Ms. Martin and her fetus "dead" that the same probate judge who issued the temporary guardianship then ordered life-support for the comatose woman and her seventeen-week-old fetus be removed.[11]

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1. Eric Hanson, *Pregnant Woman at Center of Legal Feud Allowed to Die*, HOUS. CHRON., Aug. 18, 1999, at 1A.

2. Ron Nissimov, *Life-Changing Decisions: Comatose Woman's Fetus Focus of Battle*, HOUS. CHRON., July 28, 1999, at 1A [hereinafter Nissimov, *Life Changing Decisions*].

3. Advance Directives Act § 1.02, TEX. HEALTH & SAFETY CODE ANN. §§ 166.001–.166 (Vernon 2001).

4. *Id.* § 166.049.

5. Ron Nissimov, *Woman in Coma Wanted to Abort, Brother Insists*, HOUS. CHRON., July 29, 1999, at 29A.

6. *Id.*

7. *Id.*

8. *Id.*

9. Nissimov, *Life Changing Decisions*, *supra* note 2; Ron Nissimov, *Care for Fetus Could End if Mom Ruled Brain-Dead*, HOUS. CHRON., July 31, 1999, at 1A.

10. Ron Nissimov, *Court-Appointed Doctors Declare Woman, Fetus Dead*, HOUS. CHRON., Aug. 14, 1999, at 33A.

11. Hanson, *supra* note 1.

Ms. Martin did not have a living will, but this tragic story would have been the same if she did. The Texas law forbidding medical treatment from being withheld from pregnant women also applies specifically to those pregnant women with living wills or other advance directives.[12] Texas is not the "lone star state" in prohibiting the living wills of pregnant women from having effect: the majority of states have similar pregnancy exceptions for women with living wills.[13]

Since 1976[14] every state, as well as the District of Columbia, has enacted a living will statute or an advance-health-care-directive statute that allows people to direct their health care in the event they become incompetent.[15] Twenty-nine of these states have exceptions in their statutes limiting the effectiveness of the living will or advance directive when the patient is a pregnant woman.[16] Eighteen states automatically void the

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12. *See* Advance Directives Act § 1.02, TEX. HEALTH & SAFETY CODE ANN. § 166.049 (Vernon 2001) (stating that life-support cannot be removed from a pregnant patient).

13. *See infra* note 16 (listing the states that have pregnancy exceptions to their living will statutes).

14. California was the first state to enact a living will statute when it enacted the Natural Death Act in 1976. Natural Death Act, ch. 1439, § 1, 1976 Cal. Stat. 6478 (repealed 1999); *see also* Gregory Gelfand, *Living Will Statutes: The First Decade*, 1987 WIS. L. REV. 737, 739 n.3 (setting forth the statutory citations for every living will statute in effect as of 1987 in order of enactment). Gelfand's article also gives an excellent review of the status of the living will statutes, and a comparison between them, a decade after the first one was penned.

15. *See* Bretton J. Horttor, *A Survey of Living Will and Advanced Health Care Directives*, 74 N.D. L. REV. 233, 239–92 (1998) (providing brief descriptions of every state's living will or advanced-health-care-directive statutes); *see also* Gelfand, *supra* note 14, at 739 n.3 (listing the statutes of the states in chronological order by date of enactment as of 1987).

16. *See* Natural Death Act § 4, ALA. CODE § 22-8A-4(e) (LexisNexis 1997 & Supp. 2004) (indicating that the advance-health-care directive of a pregnant patient does not have effect when the doctor knows the patient is pregnant); Health Care Decisions Act § 1, ALASKA STAT. § 13.52.055(b)(4) (2004) (prohibiting the living will of a pregnant woman from taking effect if "it is probable that the fetus could develop to the point of live birth if the life-sustaining procedures were provided"); Arkansas Rights of the Terminally Ill Act or Permanently Unconscious Act § 6(c), ARK. CODE ANN. § 20-17-206(c) (2000 & Supp. 2003) (prohibiting the living will of a pregnant patient to be given effect if "the fetus could develop to the point of live birth with continued application of life-sustaining treatment"); Colorado Medical Treatment Decision Act § 1, COLO. REV. STAT. § 15-18-104(2) (2004) (prohibiting a pregnant woman's living will from being given effect if a medical examination shows the fetus to be viable and, to a reasonable degree of certainty, capable of developing to live birth if the mother is given continued life support); An Act Concerning Death With Dignity § 5, CONN. GEN. STAT. ANN. § 19a-574 (West 2003) (making the protections of a living will inapplicable to pregnant women); Delaware Death with Dignity Act § 1, DEL. CODE ANN. tit. 16, § 2503(j) (2003) (prohibiting life-sustaining treatment from being withdrawn from a pregnant patient if "it is probable that the fetus will develop to be viable outside the uterus with the continued application of a life-sustaining procedure"); Natural Death and Medical Consent Act, ch. 45, 2005 Idaho Sess. Laws 380 (to be codified at IDAHO CODE ANN. § 39-4510) (providing a form that must be used when writing a living will that includes a provision that does not give effect to the directive if the declarant is pregnant, but also allowing for the use of an alternate form, as long as all of the elements of the form are included); Illinois Living Will Act § 3(c), 755 ILL. COMP. STAT. ANN. 35/3-3(c) (West 1992) (giving the living will of a pregnant woman no effect if the

physician determines "it is possible that the fetus could develop to the point of live birth with the continued application of death delaying procedures"); Living Wills and Life-Prolonging Procedures Act § 11(d), IND. CODE ANN. § 16-36-4-8(d) (LexisNexis 1993) (nullifying the effect of a living will declaration by a pregnant patient); Life-Sustaining Procedures Act § 7, IOWA CODE ANN. § 144A.6(2) (West 1997) (refusing to give effect to a living will if the patient is pregnant and "the fetus could develop to the point of live birth with continued application of life-sustaining procedures"); Natural Death Act § 3, KAN. STAT. ANN. § 65-28,103(a) (2002) (prohibiting the living will of a pregnant patient, as diagnosed by the attending physician, to be given effect); Kentucky Living Will Directive Act § 5, KY. REV. STAT. ANN. § 311.629(4) (LexisNexis 2001) (requiring a pregnant patient to remain on life support regardless of whether she had executed a living will "unless, to a reasonable degree of medical certainty," the attending physician and one other physician have certified that "the procedures will not maintain the woman in a way to permit the continuing development and live birth of the unborn child, will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication"); Adult Health Care Decisions Act (Minnesota Living Will Act) § 13 § 1, MINN. STAT. ANN. § 145B.13(3) (West 2005) (providing that a living will must not be given effect if the patient is pregnant and "the fetus could develop to the point of live birth with continued application of life-sustaining treatment"); MO. ANN. STAT. § 459.025 (West 1992) (stating that the declaration will have no effect if the patient is pregnant); Montana Rights of the Terminally Ill Act § 12, MONT. CODE ANN. § 50-9-106(6) (2004) (prohibiting life support from being removed from a pregnant patient "so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment"); Rights of the Terminally Ill Act § 8(3), NEB. REV. STAT. § 20-408(3) (1997) (requiring pregnant patients to remain on life support "so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment"); Uniform Act on Rights of the Terminally Ill § 9(4), NEV. REV. STAT. ANN. § 449.624(4) (LexisNexis 2005) (requiring pregnant patients to remain on life support if "it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment"); An Act Relative to Living Wills N.H. REV. STAT. ANN. § 137-H:14(I) (2005) (prohibiting a pregnant patient's living will from being given effect if the attending physician knows she is pregnant); Health Care Directives § 10, N.D. CENT. CODE § 23-06.5-09(5) (Supp. 2005) (prohibiting removal of life support from a pregnant woman unless "such health care will not maintain the principal in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful or unreasonably painful to the principal or will prolong severe pain that cannot be alleviated by medication"); Modified Uniform Rights of the Terminally Ill Act § 1, OHIO REV. CODE ANN. § 2133.06(B) (LexisNexis 2002) (requiring that life support not be withdrawn from a pregnant patient unless the attending physician, "to a reasonable degree of medical certainty", determines "the fetus would not be born alive"); Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act § 8(C), OKLA. STAT. ANN. tit. 63, § 3101.8(C) (West 2004) (stating that the advanced directive will not be operative if the patient is known to be pregnant); Advance Directive for Health Care Act § 5, 20 PA. CONS. STAT. ANN. § 5414(a) (West Supp. 2005) (voiding a pregnant woman's health care directive unless it can be determined "to a reasonable degree of medical certainty" that prolonged life-sustaining measures "(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"); Rights of the Terminally Ill Act § 1, R.I. GEN. LAWS § 23-4.11-6(c) (2001) (voiding the declaration of a pregnant patient if "it is probable that the fetus could develop to the point of live birth with continued application of life sustaining [sic] procedures"); Death with Dignity Act § 5(B), S.C. CODE ANN. § 44-77-70 (2002) (rendering ineffective a pregnant patient's declaration for the entire course of the patient's pregnancy); An Act to Provide for Living Wills § 10, S.D. CODIFIED LAWS § 34-12D-10 (2004) (requiring life sustaining treatment to continue for pregnant patients with directives unless, "to a reasonable degree of medical certainty," the attending physician and one other physician determine that "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"); Advance Directives Act § 1.02, TEX.

living will at any stage of the patient's pregnancy.[17] Of these eighteen states, five permit the living will to be given effect if the attending physician and one other physician determine "to a reasonable degree of medical certainty" that "the procedures will not maintain the woman in a way to permit the continuing development and live birth of the unborn child, will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication."[18] One state voids the living will only when the fetus is viable.[19] Ten states void the living will only when "it is probable that the fetus will develop to be viable outside the uterus with the continued application of a life-sustaining procedure."[20] In addition, there are five states that give the female declarant the option to

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HEALTH & SAFETY CODE ANN. § 166.049 (Vernon 2001) (stating that life support cannot be removed from a pregnant patient); Personal Choice and Living Will Act § 1, UTAH CODE ANN. § 75-2-1109 (1993) (voiding the directive of a pregnant patient to be removed from life-support); Natural Death Act § 4, WASH. REV. CODE ANN. § 70.122.030(1) (West 2002) (setting forth in the form suggested for living wills a provision that the directive will have no effect if the declarant's physician knows the declarant is pregnant); WIS. STAT. ANN. § 154.07(2) (West 1997 & Supp. 2004) (voiding the declaration of a pregnant patient). Prior to the Governor's signing of the Health Care Decisions Act, the Alaska Attorney General issued an opinion stating that section 18.2.040(c) "is constitutionally problematic," as it may interfere with a woman's right to choose during the first two trimesters of pregnancy. 1986 Alaska Op. Att'y Gen. 523, *available at* 1986 WL 81138 (citing Roe v. Wade, 410 U.S. 113, 164–65 (1973)).

17. ALA. CODE § 22-8A-4(e) (LexisNexis 1997 & Supp. 2004); CONN. GEN. STAT. ANN. § 19a-574 (West 2003); Natural Death and Medical Consent Act, ch. 45, 2005 Idaho Sess. Laws 380 (to be codified at IDAHO CODE ANN. § 39-4510); IND. CODE ANN. § 16-36-4-8(d) (LexisNexis 1993); KAN. STAT. ANN. § 65-28,103(a) (2002); KY. REV. STAT. ANN. § 311.629(4) (LexisNexis 2001); MO. ANN. STAT. § 459.025 (West 1992); N.H. REV. STAT. ANN. § 137-H:14(I) (2005); N.D. CENT. CODE § 23-06.5-09(5) (Supp. 2005); OHIO REV. CODE ANN. § 2133.06(B) (LexisNexis 2002); OKLA. STAT. ANN. tit. 63, § 3101.8(C) (West 2004); 20 PA. CONS. STAT. ANN. § 5414(a) (West Supp. 2005); S.C. CODE ANN. § 44-77-70 (2002); S.D. CODIFIED LAWS § 34-12D-10 (2004); TEX. HEALTH & SAFETY CODE ANN. § 166.049 (Vernon 2001); UTAH CODE ANN. § 75-2-1109 (1993); WASH. REV. CODE ANN. § 70.122.030(1) (West2002); WIS. STAT. ANN. § 154.07(2) (West 1997 & Supp. 2004).

18. KY. REV. STAT. ANN. § 311.629(4) (LexisNexis 2001); *accord* N.D. CENT. CODE § 23-06.4-07(3) (Supp. 2005); 20 PA. CONS. STAT. ANN. § 5414(a) (West Supp. 2005); S.D. CODIFIED LAWS § 34-12D-10 (2004); *see also* OHIO REV. CODE ANN. § 2133.06(B) (LexisNexis 2002) (permitting the living will to be given effect if "the fetus would not be born alive"). These five states have a general prohibition on giving effect to the living wills of pregnant patients. However, these states have attempted to soften their pregnancy exceptions, seemingly making the prohibition more humane to the mother by allowing the living will to be given effect if the fetus will not be born alive, or if keeping the mother alive will injure her, or result in prolonged pain that is not treatable with medication. This does not, however, alleviate the constitutional problems inherent in a general prohibition.

19. *See* COLO. REV. STAT. § 15-18-104(2) (2004) (deeming the living will void if a medical evaluation determines that "the fetus is viable and could with a reasonable degree of medical certainty develop to live birth with continued application of life-sustaining procedures").

20. DEL. CODE ANN. tit. 16, § 2503(j) (2003); *accord* ALASKA STAT. § 13.52.055(b)(4) (2004); ARK. CODE ANN. § 20-17-206(c) (2000); 755 ILL. COMP. STAT. ANN. 35/3(c) (West 1992); IOWA CODE ANN. § 144A.6(2) (West 1997); MINN. STAT. ANN. § 145B.13 (West 2005); MONT. CODE ANN. § 50-9-106(6) (2004); NEB. REV. STAT. § 20-408(3) (1997); NEV. REV. STAT. ANN. § 449.624(4) (LexisNexis 2005); R.I. GEN. LAWS § 23-4.11-6(c) (2001).

specify whether her directive should be followed in the event she is pregnant.[21]

New Hampshire is one of the states that expressly prohibits terminating the life-support of a pregnant woman regardless of the stage of pregnancy, even if she has a living will directing that exact action.[22] In so doing, New Hampshire and seventeen other states are essentially flouting the holdings of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which limit state regulation of abortion.[23] Despite the constitutional problems, due to biological reasons it is unlikely a plaintiff will ever have the standing necessary to pursue a challenge. It can be argued that this pregnant-woman exception cannot be challenged until such time as a pregnant woman with a properly executed living will or healthcare directive "is in a terminal condition or is permanently unconscious, without hope of recovery."[24] A challenge to the exception at any time before these three conditions are satisfied could result in the case being dismissed for lack of a justiciable issue due to lack of ripeness or standing.[25]

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21. *See* ARIZ. REV. STAT. ANN. § 36-3262 (2003) (providing an optional living will form allowing a woman to leave directions if she is found to be pregnant; this language is not mandatory and can be changed at the declarant's discretion); Health Care Advance Directives § 2, FLA. STAT. ANN. § 765.113(2) (West 2005) (requiring a court order or express delegation from the patient to the surrogate or proxy in order for removal of "life-prolonging procedures from a pregnant patient prior to viability"); GA. CODE ANN. § 31-32-8(a)(1) (2001) (requiring the living will to expressly provide for removal from life support if the patient is pregnant and that the fetus not be viable); Health Care Decision Act § 2, MD. CODE ANN., HEALTH-GEN. § 5-603 (LexisNexis 2005) (providing language in the sample forms that allows for specific instructions should the declarant be pregnant); New Jersey Advance Directives for Health Care Act § 4, N.J. STAT. ANN. § 26:2H-56 (West 1996) (permitting "[a] female declarant [to] include in an advance directive executed by her, information as to what effect the advance directive shall have if she is pregnant").

22. N.H. REV. STAT. ANN. § 137-H:14(I).

> Nothing in this chapter shall be construed to condone, authorize, or approve the withholding of life-sustaining procedures from or to permit any affirmative or deliberate act or omission to end the life of a pregnant woman by an attending physician when such physician has knowledge of the woman's pregnant condition.

Id. New Hampshire is not alone however. *See supra* note 17 (listing other states that automatically void the living will if the declarant is pregnant).

23. *See* Roe v. Wade, 410 U.S. 113, 164–65 (1973) (holding that states lack a sufficient interest to regulate abortion prior to the end of the first trimester); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860, 873 (1992) (rejecting the rigid *Roe* trimester framework, but adhering to the principle "that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions").

24. § 137-H:2(III).

25. *See* DiNino v. State *ex rel*. Gorton, 684 P.2d 1297, 1300–01 (Wash. 1984) (finding no justiciable issue because the plaintiff was neither pregnant nor in a terminal condition, therefore concluding "[t]his case presents a hypothetical, speculative controversy"); Gabrynowicz v. Heitkamp, 904 F. Supp. 1061, 1063 (D.N.D. 1995) (finding that since the female plaintiff was not pregnant, did not want to become pregnant, was in good health, and was not incompetent, there was "no 'realistic danger'

Conversely, however, it can be argued that because the pregnancy exception regulates the termination of pregnancy, the exception is really an abortion statute. If this argument is successful, then abortion providers would "have *jus tertii* standing to assert the rights of women whose access to abortion is restricted."[26] Furthermore, abortion providers generally have "standing to bring broad facial challenges to abortion statutes."[27] There might, therefore, be a way in which the statute can be challenged without having to wait until a pregnant woman with a living will becomes terminally ill or permanently unconscious.

New Hampshire is a state that traditionally values privacy; the courts have recognized a privacy right in the New Hampshire Constitution.[28] New Hampshire's right to privacy co-exists with the constitutional power of the legislature to place "reasonable and wholesome restrictions"[29] on its citizens and with the constitutional provision that "[w]hen men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is void."[30] Regardless of the constitutionality of the exception, by prohibiting the recognition of a woman's living will when she is pregnant, New Hampshire has both invaded the woman's privacy and placed an unreasonable restriction upon her. The result is a failure to live up to the words of General John Stark: "Live Free or Die."[31] Unfortunately the restrictions have made it impossible for a pregnant, terminally ill, or unconscious woman to choose death.

This Note will address both the constitutional issues and policy aspects of the pregnancy exception. Part I of this Note examines the provisions of the New Hampshire living will statute. Part II analyzes the current

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that the statutes [would] directly injure the plaintiff[]," and therefore the plaintiff did not have standing and the matter was not ripe for review).

26. Planned Parenthood of N. New England v. Heed, 390 F.3d 53, 56 n.2 (1st Cir. 2004) (citing Singleton v. Wulff, 428 U.S. 106, 117 (1976), *cert. granted sub nom.* Ayotte v. Planned Parenthood of N. New England, 125 S. Ct. 2294 (May 23, 2005) (No. 04-1144).

27. *Id.* (quoting Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 917 (9th Cir. 2004)).

28. *See In re* Caulk, 480 A.2d 93, 95 (N.H. 1984) (citing Comm'r of Corr. v. Myers, 399 N.E.2d 452, 455–56 (Mass. 1979)) (finding a constitutional right to privacy).

29. Opinion of the Justices, 509 A.2d 749, 751 (N.H. 1986) (quoting parenthetically Carter v. Craig, 90 A. 598, 600 (N.H. 1914)); *see* N.H. CONST. pt. II, art. 5 ("[F]ull power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state . . . .").

30. N.H. CONST. pt. I, art. 3.

31. "Live Free or Die," the New Hampshire state motto, was penned by General John Stark on July 31, 1809. N.H. REV. STAT. ANN. § 3:8 (2003).

framework for choice and presents three hypothetical cases to evaluate and analyze the constitutionality of the exception. Part III suggests modifying the statute to make the exception constitutional, as well as to bring the statute and the exception in accordance with traditional New Hampshire values.

I. BACKGROUND: THE NEW HAMPSHIRE LIVING WILL STATUTE

New Hampshire adopted its living will statute in 1985 and amended it in 1991.[32] The purpose of the statute is to ensure "that the rights of persons may be respected even after they are no longer able to participate actively in decisions about themselves, and to encourage communication between patients and their physicians."[33] New Hampshire was the thirty-third jurisdiction to enact a living will statute,[34] and the sixteenth state to include a pregnancy exception.[35] The enactment of this statute was in accordance with the New Hampshire Supreme Court's interpretation of Part I, Articles 2 and 3 of the New Hampshire Constitution, that there is "a *constitutional right of privacy*, arising from a high regard for human dignity and self-

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32. *Id.* § 137-H:1 to :16 (originally enacted as An Act Relative to Living Wills, ch. 137-h, 1985 N.H. Laws 319, *amended by* An Act Relative to Living Wills, ch. 239, 1991 N.H. Laws 312). The statute reads in part:

> 137-H:1 Purpose and Policy. The state of New Hampshire recognizes that a person has a right, founded in the autonomy and sanctity of the person, to control the decisions relating to the rendering of his own medical care. In order that the rights of persons may be respected even after they are no longer able to participate actively in decisions about themselves, and to encourage communication between patients and their physicians, the legislature hereby declares that the laws of this state shall recognize the right of a competent person to make a written declaration instructing his physician to provide, withhold, or withdraw life-sustaining procedures in the event such person is in a terminal condition or is permanently unconscious.
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> 137-H:14 Exceptions.
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> I. Nothing in this chapter shall be construed to condone, authorize, or approve the withholding of life-sustaining procedures from or to permit any affirmative or deliberate act or omission to end the life of a pregnant woman by an attending physician when such physician has knowledge of the woman's pregnant condition.

Id. §§ 137-H:1, :14.

33. *Id.* § 137-H:1.

34. *See* Gelfand, *supra* note 14, at 739 n.3 (listing the states with living will statutes, as of November 1987, in chronological order).

35. *Id.* at 778, 778–79 n.169 (listing, as of 1987, the states with outright pregnancy exceptions in chronological order by date of enactment). Note that several of the states listed in that footnote have since repealed the laws cited therein, or have revised the language. *See, e.g.*, Natural Death Act, ch. 1439, § 1, 1976 Cal. Stat. 6478, 6478 (repealed 1999).

determination, and that this right may be asserted to prevent unwanted infringements of bodily integrity . . . ."[36]

In New Hampshire, a living will is solely "a document which, when duly executed, contains the express direction that no life-sustaining procedures be taken when the person executing said document is in a terminal condition or is permanently unconscious, without hope of recovery from such condition and is unable to actively participate in the decision-making process."[37] Therefore, in New Hampshire, the use of a living will is confined to the direst of circumstances and is solely for the purpose of removing life support. Because the living will statute regulates the disposition of a person's life, the provisions are distinct from those in the testamentary-will statute. Some of those differences are outlined below.

For a living will to be valid, the document must conform with the requirements set forth in the statute. The declarant must be at least eighteen years old and "of sound mind."[38] The living will must be witnessed by at least two individuals, excluding "the person's spouse, heir at law, attending physician or person acting under the direction or control of the attending physician or any other person who has at the time of the witnessing thereof any claims against the estate of the person."[39] These requirements are meant "to ensure that reasonably neutral persons are present when the declarant makes such an important decision, because the declarant may feel freer to reconsider his decision away from the subtle pressures of interested parties."[40]

In addition, the living will must conform to the Uniform Acknowledgment Act or to the Uniform Recognition of Acknowledgments Act,[41] that is, the living will must be notarized.[42] Interestingly, while the

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36. *In re* Caulk, 480 A.2d 93, 95 (N.H. 1984) (emphasis added) (alteration in original) (quoting Comm'r of Corr. v. Myers, 399 N.E.2d 452, 455–56 (Mass. 1979)) (applying the holding of the Massachusetts Supreme Judicial Court to the New Hampshire Constitution to find a right to privacy); *see also* N.H. CONST. pt. I, art. 2 ("All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."); N.H. CONST. pt. I, art. 3 ("When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is void.").

37. N.H. REV. STAT. ANN. § 137-H:2(III) (2005).

38. *Id.* § 137-H:3.

39. *Id.* § 137-H:4.

40. Gelfand, *supra* note 14, at 758–59.

41. § 137-H:4 (requiring that the living will must be acknowledged pursuant to the Uniform Acknowledgement Act, N.H. REV. STAT. ANN §§ 456:1 to :15 (2004), or the Uniform Recognition of Acknowledgements Act, N.H. REV. STAT. ANN § 456-A:1 to :9 (2004)).

42. *See Id.* § 456:4 (2004) (including notary publics among those authorized to acknowledge an instrument in New Hampshire); *see also* § 456-A:1 (giving the requirements for recognizing notarial

competency requirement and the age requirement are the same for executing a living will and a testamentary will in New Hampshire,[43] the requirement that a living will be acknowledged under either the Uniform Acknowledgment Act or the Uniform Recognition of Acknowledgments Act is stricter than the witness requirements for properly executing a testamentary will.[44]

Second, the provisions for revoking a living will and those for revoking a testamentary will have noticeable differences. To revoke a living will, a person may: (1) physically destroy it; (2) tell two witnesses, other than her spouse or heir, that she wishes to revoke the living will; or (3) revoke the living will in writing, dated in the presence of two witnesses who are not her spouse or heir.[45] The revocation does not become effective until it is communicated to the attending physician.[46] Under the Statute of Wills, the revocation of a testamentary will may occur only if the testator: (1) executes another will or codicil; (2) physically destroys the will; or (3) is in the presence of some other person designated by the testator who destroys the will at the testator's direction.[47]

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acts performed outside of New Hampshire). On January 1, 2006, the Uniform Acknowledgement Act and the Uniform Recognition of Acknowledgements Act will be repealed and replaced by the Uniform Law on Notorial Acts. H.B. 672, 159th Leg., Reg. Sess. (N.H. 2005).

43. *Compare id.* § 551:1 (1997) ("Every person of the age of eighteen years and married persons under that age, of sane mind, may devise and dispose of their property, real and personal, and of any right or interest they may have in any property, by their last will in writing."), *with id.* § 137-H:3 (2005) ("A person of sound mind who is 18 years of age or older may execute at any time a document commonly known as a living will, directing that no life-sustaining procedures be used to prolong his life when he is in a terminal condition or is permanently unconscious.") The only difference in the requirement of who can be a testator and who can execute a living will is that persons who are married and under the age of eighteen are permitted to execute testamentary wills, but are not permitted to execute living wills. This indicates a level of inconsistency as to how New Hampshire regards the competency of minors: married minors are competent enough to execute a will disposing of their property at death, but they are not competent enough to execute living wills. For a discussion of the inconsistency in prohibiting minors from executing living wills, see generally Lisa Anne Hawkins, Note, *Living-Will Statutes: A Minor Oversight*, 78 VA. L. REV. 1581 (1992).

44. *Compare* § 551:2(IV) (1997) (requiring only that two or more witnesses attest, in the testator's presence, to the testator's signature), *with* N.H. REV. STAT. ANN. § 137-H:4 (2005) (requiring, in addition to subscription by at least two witnesses, acknowledgement pursuant to the Uniform Acknowledgement Act, N.H. REV. STAT. ANN §§ 456:1 to :15 (2004), or the Uniform Recognition of Acknowledgements Act, N.H. REV. STAT. ANN § 456-A:1 to :9 (2004)). The additional requirement under the living will statute may have a chilling effect on the execution of living wills in New Hampshire, since in order for one to be valid it must be acknowledged by "I. A judge of the supreme court, superior court, probate court or municipal court; II. A clerk or deputy clerk of a court having a seal; III. A commissioner or register of deeds; IV. A notary public; or V. A justice of the peace." *Id.* § 456:4. For persons who are unable to meet these requirements, their living wills will be invalid. *Id.* § 137-H:4 (2005).

45. *Id.* § 137-H:7.

46. *Id.*

47. *Id.* § 551:13 (1997).

The allowance for the liberal revocation of living wills is likely due to the fear that the more elaborate requirements for revoking a testamentary will would result in people not being able to revoke their living wills before disaster strikes.[48] Although the requirements may be more lenient when revoking a living will, New Hampshire's revocation requirements do have a relative degree of formality,[49] thus preventing casual conversation from resulting in accidental revocation of the living will.[50] Under the current structure of the living will statute, however, an incompetent person is capable of destroying her living will, but is not permitted to execute a new living will.[51]

Finally, the living will statute includes exceptions not found in the testamentary will statute.[52] First, removing life-support from a pregnant woman is expressly unauthorized by the living will statute.[53] Second, removing life-sustaining procedures from "mentally incompetent or developmentally disabled persons" is unauthorized by the statute.[54] These exceptions may override the intent of the patient if that patient has a living will. In addition, the exceptions are particularly repugnant given that a living will is valid only if made when competent.[55] Therefore, through these exceptions, New Hampshire is overriding the competent decision of the patient.

The remainder of this Note will focus on the first exception, prohibiting the living will of a pregnant woman from being given effect. The discussion will analyze the legal issues that are inherent when a single group, pregnant women, is prevented from exercising its rights in the same way as the rest of the population. It will also consider the policy questions that arise when states override the living wills of pregnant women by

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48. Gelfand, *supra* note 14, at 766.

49. *Compare* § 137-H:7 (2005) (setting forth the only three ways by which a living will may be revoked), *with* N.C. GEN. STAT. § 90-321(e) (2003) (providing that a person may revoke a living will "in any manner by which he is able to communicate his intent to revoke, without regard to his mental or physical condition").

50. *See* Gelfand, *supra* note 14, at 768 (explaining that some formality in revocation of living wills can prevent unintended revocation).

51. *See id.* at 766 ("[O]nce an incompetent has revoked a living will, he will be unable to reinstate it."). *Compare* N.H. REV. STAT. ANN. § 137-H:3 (2005) (stating that a person must be "of sound mind" in order to execute a living will), *with id.* § 137-H:7 (setting forth the circumstances under which a living will may be revoked, but not making any mention of the person's competence at the time of revocation).

52. *Compare* §§ 137-H:1 to :16 (living will statute), *with id.* §§ 551:1 to :16 (1997) (testamentary-will statute).

53. *Id.* § 137-H:14(I).

54. *Id.* § 137-H:14(II).

55. *Id.* § 137-H:3.

statute.

II. THE CURRENT CONSTITUTIONAL FRAMEWORK

As determined by the Court in the watershed case *Roe v. Wade*, a woman's right to an abortion is considered part of her fundamental right to privacy under the Due Process Clause of the Fourteenth Amendment;[56] this is unlike her right to direct her medical care, which the Court determined to be a liberty interest in *Cruzan v. Director, Missouri Department of Health*.[57] In *Roe*, the Supreme Court found that the right to privacy was a fundamental right, which encompassed the right of a woman to choose whether to carry a pregnancy to term or to have an abortion.[58] The Texas statute at issue, which criminalized abortions without regard to the stage of pregnancy, therefore violated the Due Process Clause.[59] Although the Supreme Court later rejected *Roe*'s rigid trimester framework in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court adhered to the general principle of *Roe* that the point of "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[60] Both *Roe* and *Casey* provide helpful guidance for analyzing the constitutionality of the pregnant-woman exception in the New Hampshire living will statute under a privacy analysis.

The pregnant-woman exception in the New Hampshire living will statute is similar to the Texas abortion statute struck down by the Supreme Court in *Roe*[61] in that it prohibits the living will, if there is one, from taking effect if the patient is a pregnant woman, without respect to the stage of pregnancy.[62] The Court in *Roe* held in part that if the woman is less than one trimester into her pregnancy, the State has no authority to interfere with her decision whether to continue with the pregnancy; that decision is "left to the medical judgment of the pregnant woman's attending physician."[63]

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56. Roe v. Wade, 410 U.S. 113, 152–53 (1973).

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

58. *Roe*, 410 U.S. at 152–53.

59. *Roe*, 410 U.S. at 164; *see also* U.S. CONST. amend XIV, § 1, cl. 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.").

60. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860, 873 (1992).

61. *See Roe*, 410 U.S. at 164 (referring to the Texas statute that criminalized abortion at any stage in pregnancy).

62. *See* N.H. REV. STAT. ANN. § 137-H:14(I) (2005) (nullifying a woman's living will when her attending physician knows she is pregnant).

63. *Roe*, 410 U.S. at 164; *cf. Casey*, 505 U.S. at 873 (holding that the state has an interest in the

Although *Casey* modified *Roe* to hold that a state has an interest in the woman's pregnancy from the point at which the woman becomes pregnant to ensure she makes an informed decision, the central holding of *Roe* still stands.[64] Under both *Roe* and *Casey*, a state's interest in the life of the fetus, and therefore the point at which a State can prohibit abortion, does not become compelling until the point of viability.[65] Thus, at any point prior to having a compelling interest, a State cannot "impose[] an undue burden on a woman's ability to make [the] decision" to terminate her pregnancy without violating Due Process.[66] While terminating the life-support of the mother is not in a legal sense an abortion,[67] it is logical to infer that cessation of the mother's life will result in *aborting* the fetus's growth and development.[68] Consequently, New Hampshire may only regulate that practice when the fetus has reached viability. The failure of the living will statute to provide for the different stages of the pregnancy therefore violates the central holding of *Roe*, as approved by *Casey*, as well as the right to privacy protected by the New Hampshire Constitution.[69]

Thus under both *Roe* and *Casey*, prior to the fetus's viability, a state cannot supersede the interests of the mother who has executed a valid living will. However, the state's interest post-viability under *Roe* is one of protecting "the potentiality of human life."[70] Therefore, a State arguably *can* prohibit a woman's living will from taking effect post-viability. *Roe*, however, has a caveat: abortion cannot be prohibited when the health of the

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fetus and can regulate so as to make sure the decision to abort is an informed one).

64. *Casey*, 505 U.S. at 873.

65. *Id.* at 860; *Roe*, 410 U.S. at 164–65.

66. *Casey*, 505 U.S. at 874.

67. *See* BLACK'S LAW DICTIONARY 6 (8th ed. 2004) (defining abortion as "[a]n artificially induced termination of a pregnancy for the purpose of destroying an embryo or [a] fetus").

68. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 6 (2d ed. 1950) (defining abortion as "[a]nything that fails to attain full development, or that ceases to progress before it is matured or perfect; a complete failure"). In *Roe*, the Supreme Court held that states must allow for abortion when the fetus is viable "for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 165. However, the Supreme Court's dictate in *Roe* does not support the argument that the "life" of the mother has already passed because she is terminally ill or permanently unconscious and that maintaining her artificially in "life" in order to promote the birth of the child will neither harm nor benefit the mother. This argument should not prevail because it perpetuates the belief that the mother's life is not as important as the life of the fetus. In addition, it raises an interesting issue of whether after child birth, when the patient is no longer pregnant, the previously nullified living will is given effect thus allowing the life-sustaining measures to cease.

69. *See* N.H. CONST. pt. I, art. 2 ("All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty . . . ."); *In re* Caulk, 480 A.2d 93, 95 (N.H. 1984) (finding a state constitutional right to privacy).

70. *Roe*, 410 U.S. at 164–65 (allowing a state to regulate or proscribe abortion when the fetus is viable).

mother is at stake.[71]

The pregnancy exception does not solely affect a woman's right to choose; it also implicates her decision to direct her medical care. Under the Supreme Court's decision in *Cruzan v. Director, Missouri Department of Health*, mentally competent people have "a constitutionally protected liberty interest in refusing unwanted medical treatment."[72] The Court further held that a state can require clear and convincing evidence showing that a patient, now incompetent, had a desire to be removed from life support.[73] In the case of pregnancy exceptions, it is necessary to analyze both the liberty interest and the privacy interest to determine if the State is infringing upon the patient's right to direct her medical care and her right to choose. Only after determining that the woman has a liberty interest in terminating her life-support can the issue of her right to choose to terminate the pregnancy be considered under a privacy analysis.

Another influential case in the development of the right to direct one's medical care is *In re Quinlan*, a New Jersey Supreme Court case.[74] In *Quinlan*, the court stated that the state's interest in "the preservation and sanctity of human life . . . 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."[75] The court in *Quinlan* decided that on its scale, the state's interest was dwarfed by the interests of Karen Quinlan, the patient, because her prognosis was dim: she would never regain cognitive function; "the bodily invasion [was] very great"; and she required around-the-clock intensive nursing, antibiotics, a respirator, a catheter, and a feeding tube.[76] This analysis is applicable to determine whether the state's interest in protecting the "potentiality of human life"[77] outweighs the wishes of the pregnant woman to have life-support terminated.

Although *Quinlan* analyzes the decision to remove a person from life-support within the privacy context,[78] in *Cruzan* the United States Supreme

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71. *Id.* at 165. The converse, of course, is that *Roe* also permits state regulation of abortion pre-viability to protect the health of the mother. *See id.* at 154 (noting that states may regulate to assert their interest in protecting health). It should be reiterated that the New Hampshire pregnant-woman exception does not provide for different stages of pregnancy; it treats all pregnant women alike. N.H. REV. STAT. ANN. § 137-H:14(I) (2005).

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

73. *Id.* at 284.

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

75. *Id.* at 663–64.

76. *Id.* at 664.

77. *Roe*, 410 U.S. at 164.

78. *Quinlan*, 355 A.2d at 664.

Court affirmatively held that the right to refuse medical treatment is a liberty interest guaranteed by the Constitution.[79] While the test developed in *Quinlan* may be applicable in this post-*Cruzan* world, it is imperative to analyze living will statutes in terms of the liberty interest and not in terms of privacy.

Currently, a pre-viability pregnant woman with a living will should be protected from governmental intrusion due to the Court's limitation on pre-viability-abortion regulation and the application of the "clear and convincing evidence" standard in cases of removal of life support. The Court has voiced its approval, however, of laws requiring informed decision making before an abortion can be performed, even if the fetus is pre-viability.[80] New Hampshire, however, does *not* have such a law. Abortion providers in New Hampshire are therefore not mandated to ensure that the woman make an informed decision regarding the abortion.[81]

III. APPLICATION OF THE FRAMEWORK TO THE NEW HAMPSHIRE PREGNANCY EXCEPTION

To date there has been no litigation in New Hampshire over the living will statute in general or the pregnancy exception in particular. However, there have been at least two cases challenging similar pregnancy exceptions in two different states.[82] The Washington Supreme Court in *DiNino v.*

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

80. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) (finding that a state is "free to enact laws to provide a reasonable framework for a woman to make a decision").

81. The New Hampshire Legislature has failed to pass informed-consent legislation three times since *Casey* was decided in 1992. S.B. 466, 152nd Leg., Reg. Sess. (N.H. 1992); H.B. 1587, 155th Leg., Reg. Sess. (N.H. 1998); H.B. 1340, 158th Leg., Reg. Sess. (N.H. 2004). Another bill was introduced in the New Hampshire House during the 2005 session regarding informed consent, H.B. 399, 159th Leg., Reg. Sess. (N.H. 2005). The majority house report deemed the bill inexpedient to legislate and a roll call was initiated. The status and the full text of all of the above bills can be found at http://www.gencourt.state.nh.us/ie/billstatus/quickbill.html. *But see* N.H. REV. STAT. ANN. 132:24–28 (2005) (setting forth an informed-consent requirement for minors seeking an abortion), *found unconstitutional by* Planned Parenthood of N. New England v. Heed, 296 F. Supp. 2d 59, 68 (D.N.H. 2003), *aff'd* 390 F.3d 53 (1st Cir. 2004), *cert. granted sub nom.* Ayotte v. Planned Parenthood of N. New England, 125 S. Ct. 2294 (May 23, 2005) (No. 04-1144).

82. *See, e.g.*, Gabrynowicz v. Heitkamp, 904 F. Supp. 1061, 1062–63 (D.N.D. 1995) (dismissing, on ripeness and standing grounds, a woman's claim that the North Dakota Living Will statute was unconstitutional because it prohibited medical treatment to be withdrawn from a pregnant woman with a terminal condition, unless the "medical treatment will not maintain the patient in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful or unreasonably painful to the patient or will prolong severe pain that cannot be alleviated by medication") (quoting Terminal Condition Treatment Option, ch. 309, § 7, 1989 N.D. Laws 858, 862); DiNino v. State *ex rel.* Gorton, 684 P.2d 1297, 1298–1300 (Wash. 1984) (dismissing, on ripeness grounds, a constitutional challenge to the Washington State provision requiring living wills to include the declaration "[i]f I have been diagnosed as pregnant and that diagnosis is known to my physician, this

State ex rel. Gorton and the United States District Court for North Dakota in *Gabrynowicz v. Heitkamp* have held that women challenging the pregnant-woman exception did not have justiciable claims.[83] The courts dismissed the cases for lack of ripeness and because the plaintiffs did not have standing since they were neither pregnant nor in a terminal condition.[84] So while there has been litigation in other states, the issue of the constitutionality of such pregnant-woman exceptions has not been decided.[85]

It appears from *Gabrynowicz* and *DiNino* that the only way for a court to find the pregnant-woman exception unconstitutional is if the patient has (1) properly executed a living will; (2) is pregnant; and (3) has a terminal condition. Apparently, these three conditions have not yet combined to create a controversy under the living will statute of New Hampshire, or any other state. If they do, then the right to die becomes a matter of the right to choose. And as stated above, a court could also hear a challenge brought by abortion providers if the argument is framed in the context of facially challenging the exception as an abortion statute.[86]

This Part intends to weigh various levels of women's rights against varying degrees of state intrusion. The first scenario will involve the refusal of medical treatment by a pregnant woman who does not have a living will. The second will involve a pregnant woman with a living will that has been modified to apply if she is pregnant. The third involves a pregnant woman with a living will that does not have a specific pregnancy

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directive shall have no force or effect during the course of my pregnancy") (quoting WASH. REV. CODE ANN. § 70.122.030(1) (West 2002)).

83. *Gabrynowicz*, 904 F. Supp. at 1063 (holding the plaintiffs' claim was not ripe and the plaintiffs had no standing because the woman was in good health, competent, not pregnant, nor did she wish to become pregnant, and "there is no 'realistic danger' that the statutes will directly injure the plaintiffs in the ways they assert"); *DiNino*, 684 P.2d at 1300–01 (finding that since the woman was neither pregnant nor terminally ill, there was no justiciable claim presented).

84. *Gabrynowicz*, 904 F. Supp. at 1063; *DiNino*, 684 P.2d at 1300–01.

85. *But see Gabrynowicz*, 904 F. Supp. at 1064 (indicating that a section of the living will statute could implicate some of the plaintiff's rights because it "appears to mandate medical treatment of a pregnant patient without distinguishing on the basis of fetal viability"). The pregnant-woman exception of the North Dakota code, N.D. CENT. CODE § 23-06.5-09(5) (Supp. 2005), is similar to the New Hampshire pregnant-woman exception, N.H. REV. STAT. ANN. § 137-H:14(I) (2005), except that the North Dakota statute contains a provision allowing for medical treatment to cease if the fetus will not be able to born alive or if the treatment is "harmful or unreasonably painful to the principal or will prolong severe pain that cannot be alleviated by medication." N.D. CENT. CODE § 23-06.5-09(5) (Supp. 2005).

86. *See Heed*, 390 F.3d at 56 n.2 (finding the plaintiffs had standing based in part on the fact that abortion providers "are routinely recognized as having standing to bring broad facial challenges to abortion statutes") (quoting Planned Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 917 (9th Cir. 2004)). The court also recognized that "providers routinely have *jus tertii* standing to assert the rights of women whose access to abortion is restricted." *Id.*

provision. Each of these scenarios proceeds as if the fetus is not yet viable. While an analysis of how a post-viability pregnancy is important, there is not the space to discuss it in this Note. As Part III proceeds, the constitutionality of the scenarios becomes murkier. The purpose of this Part is to tease out the constitutional limits of the New Hampshire exception and to determine whether the exception can be considered constitutional at all.

A. What if the Woman Is Conscious, Competent, and Pregnant but Refuses Further Medical Treatment?

Consider again Tammy Martin's situation.[87] Assume that instead of living in Texas, Tammy is a resident of New Hampshire. She is pregnant, conscious, and competent after her head injury, but she has been given a terminal diagnosis and is dependent on life-support and wishes it to be removed.

In this scenario, the question is whether New Hampshire can interfere with Tammy's right to remove herself from life-support, thus preventing her from also ending the life of her fetus, regardless of the stage of pregnancy. In *In re Caulk*, a prisoner, Joel Caulk, made a competent decision to stop eating solid food.[88] He insisted he was not committing suicide, he was instead "allowing himself to die."[89] The New Hampshire Supreme Court held that the right of Mr. Caulk to allow himself to die, when he was not "facing death from a terminal illness," was superceded by "the State's interest in preserving life and preventing suicide," and "maintaining an effective criminal justice system."[90] Furthermore, in an *Opinion of the Justices* from 1983, the New Hampshire Supreme Court reiterated that "our State Constitution provides . . . all . . . individuals[] with certain fundamental liberty interests."[91] The court then held that the right of mentally ill patients "to refuse medical treatment is a liberty interest which is protected by our State Constitution."[92] So the question is, if the

87. *Supra* notes 1–11 and accompanying text.

88. *In re* Caulk, 480 A.2d 93, 94 (N.H. 1984).

89. *Id.*

90. *Id.* at 97.

91. Opinion of the Justices, 465 A.2d 484, 488 (N.H. 1983).

92. *Id.* at 489. The New Hampshire Supreme Court allowed two legitimate state interests to override the mentally ill's right to refuse medical treatment: (1) "the State's interest in protecting the individual and others from harm," and (2) "the State's interest, as *parens patriae*, in caring for persons who are unable to care for themselves." *Id.* Neither of these state interests would affect a competent pregnant woman in a terminal state from exercising her right to refuse treatment, since she is not under the State's guardianship and arguably more harm is being done to her by staying alive than if she were permitted to have life-support removed.

State can interfere in a non-terminally ill, competent prisoner's decision to "allow[] himself to die"[93] in order to preserve the maintenance of the criminal justice system and "preserv[e] life and prevent[] suicide,"[94] but it cannot force medical treatment onto mentally ill or incompetent patients, can it then interfere to preserve the life of the fetus of a terminally ill but competent woman?

The answer is likely no. Although decided long before the United States Supreme Court's decision in *Cruzan*, *Caulk* and the *Opinion of the Justices* are consistent with the *Cruzan* decision and can be reconciled with this scenario.[95] On the one hand, the State has an interest in preserving life when the patient is not facing a terminal illness.[96] This interest is not applicable to Tammy because she is terminally ill. However, the State also has the responsibility of complying with a patient's right to direct her health-care decisions when there is clear and convincing evidence of her desires.[97] Since Tammy has made it clear that she wishes to be removed from life-support, the State must honor her decision.

Furthermore, when there is no indication as to the stage of pregnancy to which the pregnant-woman exception applies, it is even more likely that the state does not have a compelling interest. The Supreme Court has allowed that at most New Hampshire's interest in Tammy's pregnancy pre-viability is to insure she makes an informed decision[98] and to protect her health.[99] However, the *Casey* limitation does not apply in New Hampshire because the State has not implemented legislation to this effect; therefore the State has no regulatory authority pre-viability to interfere with Tammy's decision to terminate her pregnancy other than to promote Tammy's health.

Although the New Hampshire Legislature has not yet exercised its power to regulate abortion pre-viability through the enactment of an informed-consent law, it could. The informed-consent law would likely be accompanied by a waiting-period provision. The Court in *Casey* found that

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93. *Caulk*, 480 A.2d at 94.

94. *Id.* at 97.

95. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990) (citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982)) (weighing the State's interest against the individual's circumstances); *Caulk*, 480 A.2d 93, 97 (same); *Opinion of the Justices*, 465 A.2d 484, 488 (same).

96. *Caulk*, 480 A.2d at 97.

97. *Cruzan* concluded that states may apply a clear and convincing standard of proof when a guardian seeks to have a patient in a terminal vegetative state removed from life support. *Cruzan*, 497 U.S. at 284. That standard would be met easily by the decision of the patient herself, as in this situation.

98. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) (allowing states to pass laws providing "a reasonable framework" that requires women to give their informed consent before having an abortion).

99. *See* Roe v. Wade, 410 U.S. 113, 164–65 (1973) (allowing state regulation of abortion to promote the health of the mother).

a twenty-four-hour waiting period, intended to ensure the woman was adequately informed of her choices, did not constitute an undue burden.[100] Assuming, arguendo, that the Legislature chose to enact an informed-consent law, in this scenario, the State would be able to prevent the removal of Tammy's life-support up to the limits of the waiting period. The Supreme Court has not yet reanalyzed the validity of waiting-period laws, so it is unknown if a waiting period of greater than twenty-four hours would be found to be an undue burden. However, if the Legislature enacted a twenty-four-hour waiting period, this would certainly not result in an undue burden and would be constitutional.[101]

In addition, the New Hampshire Supreme Court has found a specific right to privacy in the New Hampshire Constitution.[102] Since choice issues are decided under a privacy analysis, it is clear that the State's interference would be unconstitutional. Consequently, New Hampshire cannot supersede Tammy's right to choose to remove herself from life-support given that the statute is silent as to which stage of pregnancy the pregnant-woman exception applies, and that Tammy's fetus is not yet viable.

B. What if a Competent Woman Executes a Living Will with an Express Provision for Effectiveness Should She Be Pregnant When She Becomes Terminally Ill or Permanently Unconscious?

If Tammy has a duly-executed living will explicitly providing that it is to be effective regardless of whether she is pregnant and she is now in a terminal or permanently unconscious state, then that living will should be given effect. The conditions under which she made the decision are analogous to those in the scenario where Tammy is competent and pregnant but in a terminal state.[103] The State's interest, therefore, does not override Tammy's right to refuse medical treatment.

The right to refuse medical treatment by way of a living will is expressly permitted by statute in New Hampshire.[104] In addition, the New Hampshire Supreme Court has implied that when a person is "facing death

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100. *Casey*, 505 U.S. at 887.

101. *Id.*

102. *Caulk*, 480 A.2d at 95.

103. *See supra* Part III.A (analyzing the state's interest in the fetus when a competent, conscious, pregnant woman has made the decision to remove herself from life-support).

104. N.H. REV. STAT. ANN. §§ 137-H:1 to :16 (2005). *Cruzan v. Director, Missouri Department of Health* held that a state may require clear and convincing evidence of the patient's desire to have life-support removed before a guardian can remove the life-support. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 284–85 (1990). It seems logical that a patient's living will would provide such "clear and convincing" evidence of the patient's desires.

from a terminal illness," the State does not have an overriding interest in "preserving life."[105] Thus, where Tammy has executed a living will and is now in a terminal state, "the State's interest in preserving life" does not "dominate[]."[106]

Her living will must also be valid. For the living will to be valid, Tammy must have been at least eighteen years old and "of sound mind" when she executed the living will.[107] The living will must have been witnessed in accordance with either the Uniform Acknowledgment Act or the Uniform Recognition of Acknowledgments Act.[108] Because Tammy's living will meets these requirements, the court should further Tammy's express, conscious decision to terminate her life if she were ever in a terminal or permanently unconscious state.[109] This is the same decision the competent, conscious Tammy made in the preceding scenario.

Finally, because the Supreme Court in *Cruzan* held that states may impose a clear and convincing evidence standard when determining whether the person wished to be removed from life-support, Tammy's living will must at least meet this standard to ensure her directive is followed. The Court in *Cruzan* "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."[110] It made this assumption based on the liberty interest recognized in cases dealing with refusal of medical treatment, such as *Washington v. Harper* and *Vitek v. Jones*.[111] The Court then went on to reiterate that the mere existence of a liberty interest does not preclude state action; the state's interest must be balanced against the liberty interest.[112] The Court recognized that states have an interest in protecting and preserving human life, in ensuring that the decision to remove life-support is not fraught with abuse, and that the "unqualified interest in the preservation of human life [can] be weighed against the constitutionally protected interests of the individual."[113]

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105. *See Caulk*, 480 A.2d at 97 (finding the state's interest in preserving life "dominates" over the person's right to die when a person not dying from a terminal illness chooses to "set the death-producing agent in motion").

106. *Id.*

107. N.H. REV. STAT. ANN. § 137-H:3 (2005).

108. *Id.* § 137-H:4.

109. *See id.* § 137-H:2(III) (defining a living will).

110. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990).

111. Washington v. Harper, 494 U.S. 210, 221–22 (1990) (finding that the Due Process Clause conferred "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs" upon respondent); Vitek v. Jones, 445 U.S. 480, 488 (1980) (noting that state statutes may create liberty interests protected by the Fourteenth Amendment's Due Process Clause).

112. *Cruzan*, 497 U.S. at 279 (citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

113. *Id.* at 280–82.

It was against these state interests that the Court held that when a State seeks to determine whether a now-incompetent person wanted to be removed from life-support, "a State may apply a clear and convincing evidence standard."[114] This burden of proof is high enough to guard against "[a]n erroneous decision to withdraw life-sustaining treatment" that "is not susceptible of correction."[115] It follows that if the patient's wish to be removed from life support is established by clear and convincing evidence, then the risk of erroneous termination has been overcome and the state's interest in the matter has been outweighed by the patient's liberty interest. The Court found that the Missouri Supreme Court did not err when it found the evidence in *Cruzan* failed to satisfy the clear and convincing standard.[116] It found this in part because the statements Nancy Cruzan's guardians relied upon in arguing that Nancy wished to be removed from life support were statements she had made to her roommate "that she would not want to live should she face life as a 'vegetable,' and other observations to the same effect."[117] The Court found that these "observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition."[118] Implicitly, the Court seemed to require that for there to be clear and convincing evidence demonstrating the patient wished to be removed from life-support, the evidence must include specific reference to the termination of medical treatment and/or nutrition and hydration.

It would appear that for Tammy's intent to be given effect, her intent would need to be included in the living will itself.[119] Because she made a special provision contemplating the potential of pregnancy, it can be presumed she wanted the living will to be effective in the event of pregnancy. In this scenario, Tammy obviously had made a decision about what she wanted to happen in the unique circumstance that she may become

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114. *Id.* at 284.

115. *Id.* at 283.

116. *Id.* at 285.

117. *Id.*

118. *Id.*

119. Some state statutes specifically require the declarant to put in the living will itself her intent to be removed from life support even if she is pregnant. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3262 (2003) (providing the declarant with the option of making specific decisions if she is pregnant); FLA. STAT. ANN. § 765.113(2) (West 2005) (requiring express language in the directive or a court order to remove a pregnant woman from life support); GA. CODE ANN. § 31-32-8(a)(1) (2001) (requiring the living will to make an express provision to remove the declarant from life support); *see also* MD. CODE ANN., HEALTH-GEN. § 5-603 (LexisNexis 2005) (providing language in the sample forms that allow for specific instructions should the declarant be pregnant). *But see* DiNino v. State *ex rel.* Gorton, 684 P.2d 1297, 1298–99 (Wash. 1984) (refusing to give effect to changed language to the model living will that would have allowed for the plaintiff to be removed from life support if she were pregnant).

terminally ill or permanently unconscious and pregnant at the same time. In addition, her intent is made clear on the face of the living will that she intended life-support to be removed even if she were pregnant. This is clear and convincing evidence that courts should accept in giving effect to her living will.

New Hampshire does not permit any exception to the blanket proscription from the termination of life-support for any pregnant patient, not even for explicitly stated orders in her living will.[120] Because there has been no litigation, it is unclear if altering the suggested living will form provided in New Hampshire Revised Statutes Annotated (RSA) section 137-H:3 to include a provision allowing for the living will to be effective if the woman is pregnant would comply with the "form and substance" of the sample living will.[121] It is likely that it would be valid as there is no statement in the sample form indicating that if the declarant were pregnant the living will would be void.[122] In addition, the statute plainly states that the living will "may be, *but need not be*, in form and substance substantially" the same as the sample form provided in the statute.[123] Thus, the plain language of the living will statute does not prohibit the declarant from including a provision that would permit the termination of life-support when the declarant is pregnant.

This differs from *Gabrynowicz* in that the North Dakota statute required the pregnancy clause to be present in the directive.[124] Because the plaintiffs in *Gabrynowicz* removed the clause, the State argued that the directive differed "'substantially' in the statutory form, and thus [was] not entitled to presumptive evidence of the patient's intent."[125] The court in *Gabrynowicz* recognized the potential for an altered version of the required statutory form that "directly contradicted the required pregnancy clause" to

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120. N.H. REV. STAT. ANN. § 137-H:14 (2005). Unlike New Hampshire, some states do have exceptions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3262 (2003) (providing an optional living will form allowing a woman to leave directions if she is found to be pregnant; this language is not mandatory and can be changed at the declarant's discretion); FLA. STAT. ANN. § 765.113(2) (West 2005) (requiring a court order or express delegation to the surrogate or proxy of the patient from the patient in order for removal of "life-prolonging procedures from a pregnant patient prior to viability"); GA. CODE ANN. § 31-32-8(a)(1) (2001) (requiring the living will to provide expressly for removal from life support if the patient is pregnant and a finding by the attending physician that the fetus is not viable).

121. N.H. REV. STAT. ANN. § 137-H:3 (2005).

122. *See id.* (providing that the sample living will "may be, but need not be" followed "in form and substance").

123. *Id.* (emphasis added).

124. Terminal Illness Declarations, ch. 251, § 2, 1993 N.D. Laws 868, 870 (codified as amended at N.D. CENT. CODE § 23-06.5-09(5) (Supp. 2005)); *See* Gabrynowicz v. Heitkamp, 904 F. Supp. 1061, 1062 (D.N.D. 1995) (interpreting the former version of the North Dakota statute, which included a clause in the health-care-directive form that nullified the directive if the declarant is pregnant).

125. *Gabrynowicz*, 904 F. Supp. at 1064.

be found invalid but did not decide the issue since there was no standing or ripeness.[126] The New Hampshire Supreme Court would have no similar dilemma because New Hampshire does not have a mandatory living will form. The living will and its provision allowing it to be given effect when the declarant is pregnant would therefore be "presumptive evidence of the patient's intent" and thus should be followed.[127]

New Hampshire currently has no informed-consent legislation;[128] therefore the State does not have an interest in the fetus pre-viability beyond protecting the health of the mother.[129] It follows, then, that New Hampshire cannot regulate Tammy's right to choose to have her life-support terminated and, necessarily, the fetus's life, if the fetus is pre-viability. Both Tammy's right to direct her medical care, when elucidated in a living will to meet a clear and convincing evidentiary standard, and her right to choose, trump the interest of the State in preserving potential life.

In the event New Hampshire does enact informed consent legislation, would the requirements for a valid living will satisfy the informed-consent requirements? Not likely. If the statute requires the woman, in drafting her living will, to be fully informed of the alternatives and submit to a waiting period before including a pregnancy clause in her living will, then it depends on the circumstances. As the United States Supreme Court has ruled, waiting periods imposed to ensure informed decision-making do not impose an undue burden.[130] If it is not an undue burden when the woman is seeking an abortion, then it is not an undue burden to require a woman to submit to a twenty-four-hour waiting period in order that she read literature on the subject when the woman is drafting a living will. To ensure that her wishes will be given effect and not thwarted based on lack of informed consent, it would be prudent for the woman and the lawyer drafting her living will to include a provision stating that all laws have been complied with in the drafting of the living will, including the informed consent law.

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126. *Id.*

127. *Id.*

128. *See supra* note 81 (discussing the New Hampshire Legislature's three failed attempts at passing an informed-consent law and providing a resource for accessing the latest proposed bill).

129. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) (deciding that it is permissible for states "to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning").

130. *Id.* at 887.

C. What if the Woman Is Incompetent and Has a Living Will Without a Specific Provision if She Is Pregnant?

In this scenario Tammy chose, while she was competent, to have life-support removed if she ever became terminally ill or permanently unconscious. If New Hampshire's interest in the pregnancy of the woman cannot extend to force a woman who is conscious and competent to remain on life-support without violating her right to privacy, the State's interest should also be overridden when a woman is incompetent, has a living will, and is pregnant. Tammy's decision to remove life-support is valid given that she made the decision before she knew of the unique circumstance of her pregnancy. If the Constitution protects the rights of women to remove themselves voluntarily from life support when they are conscious and competent, then that same Constitution protects women who have properly executed living wills and have not made a specific provision for the unique situation of pregnancy. Here all three requirements for challenging the statute on its merits are met: (1) the woman is pregnant; (2) she has a properly executed living will; and (3) she is in "a terminal condition . . . without hope of recovery."[131]

Does the State's interest in the potential life of the fetus override Tammy's right to determine the outcome of her medical treatment when no provision has been made altering her living will to apply if she is pregnant? No. The State's interest does not override the woman's right to decide her medical care if that decision is made in a way that meets the "clear and convincing" evidentiary standard. Because Tammy's living will was executed while she was competent, there is "clear and convincing" evidence of her intent to be removed from life support in the event she ever became permanently unconscious or terminally ill. While her living will did not provide that it was to be *effective* if she was pregnant, it also did not provide that it was to be *ineffective* if she was pregnant. Living wills in New Hampshire need not follow the substance or the form of the sample living will.[132] Given how the exception is phrased, however, there should be a rebuttable presumption that Tammy intended to comply with the statute. By permitting the admission of evidence to establish Tammy's intent that her living will apply even if pregnant, a court would be complying with the purpose of the statute, which recognizes the autonomy of persons to control their medical care.[133] Furthermore, New Hampshire's interest in the

131. N.H. REV. STAT. ANN. § 137-H:2(III) (2005); *see supra* Part III (discussing the requirements necessary to challenge the New Hampshire statute).

132. § 137-H:3.

133. *Id.* § 137-H:1.

pregnancy prior to viability is only in protecting the health of the mother.[134] Because Tammy's health is extremely poor, as evidenced by her reliance on life-support and her terminal state, New Hampshire's interest in protecting her health is not compelling and thus may not supersede Tammy's right to make her own medical decisions. Although New Hampshire has no informed-consent law, as stated previously, *Casey* makes it clear that New Hampshire could regulate Tammy's choice pre-viability to ensure she makes an informed decision.[135]

Is Tammy's choice to have her life-support terminated valid given that she did not know of her impending pregnancy when she executed the document? Yes. Under *Cruzan*, a state can "apply a clear and convincing evidence standard" when a guardian seeks to remove a patient from life-support.[136] New Hampshire could apply the clear and convincing standard to counter the argument that Tammy intended to have her life-support terminated even if she was pregnant. For example, in *In re Westchester County Medical Center*, the New York Court of Appeals, while applying a clear and convincing standard, held that the existence of a writing made while the patient was still competent established the patient's intent.[137] The court noted that a person who took the time to execute a writing would be more likely to express a change of heart either in a new writing or orally, but that "a requirement of a written expression in every case would be unrealistic."[138]

The United States Supreme Court has held that "[*e*]*veryone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment."[139] Because Tammy executed a living will while competent, she has the right to refuse medical treatment. New Hampshire would have a valid argument, however, that since she did not change the living will when she found out she was pregnant, and since she made her living will with full knowledge that under New Hampshire law it

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134. Roe v. Wade, 410 U.S. 113, 163 (1973).

135. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887 (1992).

136. *Cruzan*, 497 U.S. at 284. The Court noted that clear and convincing evidence had been defined by the New York Court of Appeals as "proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented," *id.* at 285 n.11 (quoting *In re* Westchester County Med. Ctr. *ex rel.* O'Connor, 531 N.E.2d 607, 613 (N.Y. 1988)), and by the New Jersey Supreme Court "as evidence which 'produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" *Id.* (alteration in original) (quoting *In re* Jobes, 529 A.2d 434, 441 (N.J. 1987)).

137. *In re Westchester County Med. Ctr.*, 531 N.E.2d at 613.

138. *Id.* at 614.

139. Vacco v. Quill, 521 U.S. 793, 800 (1997).

would be ineffective if she became pregnant, her intent was that she wanted to remain on life-support if she were pregnant.

It could even be argued that a woman intended to remain pregnant if she had not aborted before she became terminally ill or permanently unconscious.[140] Regardless of the validity, this argument is flawed. It is possible that Tammy was in an early stage of pregnancy when disaster struck and did not have time to change her living will or abort the fetus. It is also possible that Tammy had just received confirmation of her pregnancy and was driving to her lawyer to change her living will when she was in the accident that left her permanently unconscious. In this situation she had contemplated the possibilities and was about to modify her living will to comport with her desire to be removed from life-support regardless of her pregnancy. She might also have been on her way to an abortion appointment. In this case she had chosen to abort, but there was an intervening circumstance preventing her from doing so. Her right to choose should not be overridden by the State in such circumstances. Her right to refuse medical treatment is therefore valid if surrounding circumstances provide clear and convincing evidence supporting her decision to be removed from life-support even in the instance where she is pregnant.

Whether the competing interests of the State (in regulating pre-viability abortions) and the mother (her right to choose and her right to direct her medical care) can be reconciled is another matter. The State can regulate pre-viability abortions unless the regulation places an undue burden on the women seeking abortions.[141] As stated above, States can require that women seeking abortions be fully informed of the alternatives and the process.[142] This interest in preserving human life is the same interest that was implicated in *Cruzan*, to which the United States Supreme Court allowed the Missouri Supreme Court to apply a clear and convincing evidence standard.[143] While her right to choose and her right to direct her own medical care are perfectly valid in this circumstance, the state's interest in preventing the erroneous termination of life is also strong. One of the rationales presented by the Court in *Cruzan* was that termination of life is permanent and cannot be reversed.[144] If clear and convincing evidence can be presented to show that the woman wished life-sustaining medical treatment be withdrawn, then the state's interest in preserving the life of the

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140. *See* Gelfand, *supra* note 14, at 780 (stating that a mother in a terminal condition "wanted the child to be born (or she would have already aborted)").

141. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

142. *Id.* at 887.

143. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 280, 284 (1990).

144. *Id.* at 283.

pre-viability fetus must give way despite the lack of an express provision in her living will regarding her pregnancy. If there is clear and convincing evidence, the woman's right to terminate her medical treatment should prevail even if the State asserts that the decision was not informed under the applicable informed-consent law. Unlike the additional costs of having to make multiple trips to an abortion provider, the costs to sustain the mother's life in order to preserve the life of the fetus would be an undue burden to many people.

An example of how much it costs to maintain life in order to deliver a fetus is provided by the case of Susan Torres, a twenty-six-year-old pregnant woman who entered into a coma on May 7, 2005, after losing consciousness because of aggressive cancer.[145] Her family opted to keep her on life-support to give the fetus an opportunity to develop.[146] It is unclear from the media reports if Ms. Torres had a living will. On August 2, 2005, a one pound, thirteen-ounce girl was born.[147] It was reported by the *Washington Post* that the medical bills for Ms. Torres's three-month stay in the hospital "ha[d] already exceeded $1 million."[148] For the State to require a woman and her family to potentially bankrupt themselves, against the clear and convincing wishes of the woman, would be an undue burden. The state's interest, therefore, would not prevail over the right of the woman to direct her medical care and terminate her pregnancy in this case.

IV. POLICY IMPLICATIONS OF THE PREGNANCY EXCEPTION

Regardless of the constitutionality of pregnancy exceptions, state legislatures should endeavor to repeal them or refuse to enact them because of their policy impacts. Of particular concern are the policy considerations based on New Hampshire's tradition of autonomy and privacy, the impact to the woman, and the impact to the woman's family.

When the Supreme Court penned *Roe*, it emphasized that there were important policy considerations involved.[149] Those policy concerns included a distressful life for the mother, psychological harm, mental and physical health issues, the distress of having an unwanted child, and

145. Stephanie McCrummen, *Brain-Dead Va. Woman Gives Birth; Baby Appears Healthy After 3-Month Ordeal*, WASH. POST, Aug. 3, 2005, at A01.

146. *Id.*

147. *Id.*

148. *Id.*

149. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (suggesting that the physical, psychological, and social harms that can result from forcing a woman to carry a fetus to term can be addressed by preserving the woman's right to choose in consultation with her physician).

bringing a child into a family psychologically unable to care for it.[150] Contrary to the views expressed by other commentators, all of these considerations are issues in the pregnancy-exception context.[151] It is clear that in many circumstances, the pregnancy exception would impinge upon the lives of a woman and her family by imposing upon them a child that may cause psychological, financial, and emotional distress.

A. Live Free or Die: New Hampshire Policies

The New Hampshire Constitution requires citizens to relinquish certain "natural rights to . . . society"[152] in order to ensure that society functions. It also gives the legislature broad constitutional authority to enact "wholesome and reasonable . . . laws."[153] However, the New Hampshire Supreme Court has reined in this broad authority, and the legislature may only make such laws that impose "reasonable and wholesome restrictions" on its citizens.[154] On the abortion-regulation front, these constitutional provisions and their interpretations have resulted in New Hampshire being analyzed as a strongly pro-choice state.[155] While there is a statute requiring parental notification for minors,[156] it has been deemed unconstitutional by both the New Hampshire Federal District Court and the First Circuit Court of Appeals, and the parties presented oral arguments to the United States Supreme Court on November 30, 2005.[157] In addition, there is no statute requiring women to be fully informed before having an abortion.[158] It is therefore a deviation from New Hampshire's strong pro-choice status to have a pregnancy exception in the living will statute.

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150. *Id.*

151. *See, e.g.*, Elizabeth Carlin Benton, Note, *The Constitutionality of Pregnancy Clauses in Living Will Statutes*, 43 VAND. L. REV. 1821, 1826 (1990) (asserting that some concerns present in the abortion context, such as medical harm to the woman or infliction of a difficult future, are not concerns in the living will context).

152. N.H. CONST. pt. I, art. 3.

153. *Id.* pt. II, art. 5.

154. Opinion of the Justices, 509 A.2d 749, 751 (N.H. 1986) (quoting parenthetically Carter v. Craig, 90 A. 598, 600 (N.H. 1914)).

155. JEAN REITH SCHROEDEL, IS THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES 150–51 tbl.5.5. (2000).

156. N.H. REV. STAT. ANN. § 132:24 to :28 (2005).

157. *See* Planned Parenthood of N. New England v. Heed, 296 F. Supp. 2d. 59, 65, 68 (D.N.H. 2003) (finding unconstitutional the parental notification law for lack of an exception to the law for protecting the minor's health and imposing a permanent injunction against enforcement of the law), *aff'd*, 390 F.3d 53 (1st Cir. 2004), *cert. granted sub nom.*, Ayotte v. Planned Parenthood of N. New England, 125 S. Ct. 2294 (May 23, 2005) (No. 04-1144).

158. *See supra* note 81 (providing citations for the four failed bills that proposed an informed decision-making law, including the citation to the most recently proposed bill in the 2005 legislative session).

The Legislator who co-wrote the New Hampshire living will statute, Susan McLane, was well-known for "her tireless advocacy of women's rights."[159] Despite her advocacy, the pregnancy exception made it into the law. It has been posited by Rachel Roth that the "Catholic and right-to-life forces [were] persistent and effective in influencing most of [the living will] legislation throughout the country," but many interest groups, like those representing the elderly, were not involved in lobbying.[160] Unfortunately, Roth continues, "[f]eminist advocates presumably were less effective" in preventing the inclusion of these exceptions.[161] This is perhaps why a bill sponsored by a legislator committed to women's rights ended up with an exception that limits and restricts the rights of the women she sought to protect.

The pregnancy exception to the New Hampshire living will statute likely exists, therefore, because of the persistence of anti-abortion special interests. It does not comport with the general policies of New Hampshire, or arguably, even with the principles of the bill's co-sponsor. There is no reason that New Hampshire, recognized for its strong pro-choice reputation, should bow to the pressures of anti-abortion activists and limit the rights of women and their status in society in order to further the rights of the fetus.

B. Policies Affecting the Dying Mother

Several commentators have looked at pregnancy exceptions through the feminist lens and have concluded that these exceptions, in essence, subject women to legislatively endorsed subordination.[162] Katherine A. Taylor has said that "pregnancy restrictions, which limit women's control over their reproductive fate and over their own bodies during pregnancy, are integrally and insidiously tied with women's ongoing subordination in our

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159. Amanda Parry, *Remembering the Example She Set*, CONCORD MONITOR (N.H.), Feb. 15, 2005, at A-1.

160. RACHEL ROTH, MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS 124 (2000) (citation omitted).

161. *Id.*

162. *See, e.g.*, April L. Cherry, Roe*'s Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST. L. 723, 740–50 (2004) (considering the effect of pregnancy exceptions on the subordination of women and their status as second-class citizens); Katherine A. Taylor, *Compelling Pregnancy at Death's Door*, 7 COLUM. J. GENDER & L. 85, 138–64 (1997) (taking a macroscopic view of how pregnancy exceptions infringe upon a woman's status in society); Timothy J. Burch, Note, *Incubator or Individual?*: *The Legal and Policy Deficiencies of Pregnancy Clauses in Living Will and Advance Health Care Directive Statutes*, 54 MD. L. REV. 528, 560 (1995) (identifying the need as a society "to change laws that indiscriminately deny half our population individual rights long protected by common-law and the Constitution").

society."[163] Taylor and other commentators argue the restrictions imposed by pregnancy exceptions in living will statutes limit women's citizenship[164] and encourage "technological objectification" of pregnant women as the women's bodies "literally [are] used, possibly for months, as . . . fetal incubator[s] without [their] permission, in the complete absence of [their] human agency and control. . . . [This] transform[s] [the women] into passive machines that simply require medical fine-tuning to stay alive."[165]

Mandatory medical treatment of pregnant women, such as that required by the New Hampshire living will statute, requires women to sacrifice themselves[166] for the benefit of their unborn fetuses in order "to conform to the social norm of the altruistic mother."[167] This is a particularly disturbing concept considering the New Hampshire living will statute does not even allow the removal of life-support if the woman is suffering serious physical pain. This state-mandated sacrifice fails to conform with *Roe*'s requirement that state regulation of abortion pre-viability be limited to protecting the health of the mother.[168] A statute mandating the suffering of the mother certainly does not protect her health. These restrictions, of which there is no analogous living will restriction applicable to men, thereby "diminish[] women's citizenship vis-a-vis men; consigning women to something less than full citizenship, which is forbidden by our current constitutional norms."[169] Taylor discusses how the advances in medical technology have played a role in subordinating women through "technological objectification."[170] Through this technological objectification, women are compelled to remain pregnant, thus "degrading women's role in pregnancy."[171] The pregnancy exception thus reduces the role a woman plays in her own pregnancy and increases the role that the "outsider" state plays.[172] Again, since there is no analogous restriction placed on men who find themselves similarly situated in a permanently unconscious state, the State is subordinating women to men and limiting women's role in society.

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163. Taylor, *supra* note 162, at 138–39.

164. Cherry, *supra* note 162, at 750 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 928–29 (1992) (Blackmun, J., concurring in part and dissenting in part); *see also* Taylor, *supra* note 162, at 163 ("The pregnancy restrictions similarly enforce a double standard for the citizenship status of men and women.").

165. Taylor, *supra* note 162, at 149–50 (internal quotation marks omitted).

166. *Id.* at 159.

167. Cherry, *supra* note 162, at 742.

168. Roe v. Wade, 410 U.S. 113, 163 (1973).

169. Cherry, *supra* note 162, at 742.

170. Taylor, *supra* note 162, at 149–51 (internal quotation marks omitted).

171. *Id.* at 152–53.

172. *Id.* at 155.

Although in most situations the mother will be permanently unconscious, it is also possible for her to be on life-support and in a terminal state but be conscious. In those situations, maintaining the life-support will make what little life she has left distressful. She will be saddled with the knowledge that she is being kept alive solely for the purpose of incubating the fetus.[173] Furthermore, the impact on the child in later life, upon realization that its mother was kept alive against her wishes only to give birth, must be fully considered.

C. Policies Affecting Her Surviving Family

In addition, the knowledge that the living will's effect is merely being postponed until the woman gives birth can result in serious psychological harm to the surviving parent and the extended family. While it is possible that the birth of the child will bring some joy to the surviving family and "give some meaning to [the patient's] existence,"[174] it is also possible that the birth of the child and then the subsequent death of the mother will be severely, psychologically damaging to the woman's partner and her family.[175] The United States Supreme Court in *Roe* made it clear that it is not only the effect on the woman that is to be considered, but also the effect on "all concerned."[176]

Moreover, the physical and mental health of all concerned in caring for the child once born must too be considered. The problem of single parenthood is implicated, as it was in *Roe*,[177] since the surviving parent will have the added burdens of raising a child as a single parent. The Court recognized that being a single parent is not only taxing mentally and physically but also financially.[178]

Finally, the surviving spouse and family may be psychologically unable to care for the newborn child because of the anguish over the death of the mother and the surrounding circumstances that accompanied the child's birth.[179] The Court in *Roe* made it clear that "the problem of bringing a child into a family already unable, psychologically and

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173. *See* Kristin A. Mulholland, Note, *A Time to Be Born and a Time to Die: A Pregnant Woman's Right to Die with Dignity*, 20 IND. L. REV. 859, 873 (1987) ("Once delivery is completed, the mother may be allowed to die naturally.").

174. *Id.*

175. Benton, *supra* note 151, at 1826–27.

176. Roe v. Wade, 410 U.S. 113, 153 (1973).

177. *Id.*

178. *Id.*; Benton, *supra* note 151, at 1827 (stating that the woman's survivors would be burdened with "the financial and emotional problems of caring for a motherless child").

179. Benton, *supra* note 151, at 1826–27.

otherwise, to care for it" is a "detriment that the State would impose upon the pregnant woman by denying this choice."[180] For the State to knowingly impose this burden under the guise of the living will statute is contrary to the policy set forth in *Roe*.

V. LEGISLATIVE SOLUTIONS

The New Hampshire Legislature can preemptively resolve the constitutional issues of the pregnancy exception. Although the majority of states have a pregnancy exception to their living will statutes, twenty-one states plus the District of Columbia do not.[181] In addition, several states have provisions in their pregnancy clauses making the living will ineffective if (1) the fetus is viable,[182] (2) the living will does not expressly provide for life-support to be removed if the declarant is pregnant,[183] or (3) the fetus could not be born alive, or the mother would have to endure pain not able to be relieved by medication.[184] By implementing any one of these

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180. *Roe*, 410 U.S. at 153.

181. *See supra* note 16 (naming the twenty-nine states that have pregnancy exceptions to their living will statutes).

182. *E.g.*, Colorado Medical Treatment Decision Act § 1, COLO. REV. STAT. § 15-18-104(2) (2004) (prohibiting a pregnant woman's living will from being given effect if a medical examination shows the fetus to be viable).

183. *E.g.*, ARIZ. REV. STAT. ANN. § 36-3262 (2003) (providing an optional living will form allowing a woman to leave directions if she is found to be pregnant; this language is not mandatory and can be changed at the declarant's discretion); Health Care Advance Directives § 2, FLA. STAT. ANN. § 765.113(2) (West 2005) (requiring a court order or express delegation from the patient to the surrogate or proxy in order for removal of "life-prolonging procedures from a pregnant patient prior to viability"); GA. CODE ANN. § 31-32-8(a)(1) (2001) (requiring the living will to expressly provide for removal from life support if the patient is pregnant and that the fetus not be viable); Health Care Decision Act § 2, MD. CODE ANN., HEALTH-GEN. § 5-603 (LexisNexis 2005) (providing language in the sample forms that allows for specific instructions should the declarant be pregnant); New Jersey Advance Directives for Health Care Act § 4, N.J. STAT. ANN. § 26:2H-56 (West 1996) (permitting "[a] female declarant [to] include in an advance directive executed by her, information as to what effect the advance directive shall have if she is pregnant").

184. *E.g.*, Kentucky Living Will Directive Act § 5, KY. REV. STAT. ANN. § 311.629(4) (LexisNexis 2001) (requiring a pregnant patient to remain on life support regardless of whether she had executed a living will "unless, to a reasonable degree of medical certainty" the attending physician and one other physician have certified that "the procedures will not maintain the woman in a way to permit the continuing development and live birth of the unborn child, will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication"); Health Care Directives § 10, N.D. CENT. CODE § 23-06.5-09(5) (Supp. 2005) (prohibiting removal of life support from a pregnant woman unless "such health care will not maintain the principal in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful or unreasonably painful to the principal or will prolong severe pain that cannot be alleviated by medication"); Modified Uniform Rights of the Terminally Ill Act § 1, OHIO REV. CODE ANN. § 2133.06(B) (LexisNexis 2002) (requiring that life support not be withdrawn from a pregnant patient unless the attending physician, "to a reasonable degree of medical certainty", determines "the fetus would not be born alive"); Advance

three conditions, the New Hampshire Legislature could avoid a potentially nasty legal battle.

The best way to solve the constitutionality problem would be legislation to remove the pregnancy exception altogether. If this is not done, then amending the pregnancy exception to apply only in cases where the fetus is viable is the best way for New Hampshire to maintain the pregnancy exception but to do so in a constitutional manner. Since the State's interest is dominant post-viability, the State would have the easiest time enforcing and justifying a provision of this nature.

Another possibility that would give extensive decision-making responsibility to women would be to specifically allow for women to make their intent clear within the living will that they want life-support removed even if they are pregnant.[185] This would allow women to contemplate the possibilities and would clearly set forth their intent removing all ambiguity.

The most subjective and superficial way to overcome the constitutionality issue would be to allow the living will to be given effect if prolonging the life-support would not result in a live birth or would prolong severe pain not able to be alleviated by medication.[186] In this situation doctors can make only "reasonable" medical judgments.[187] In addition, this subjective language presumes a live birth and no prolonged pain to the mother, rebuttable only by two physicians' reasonable opinions.[188] Aside from the current language in the New Hampshire statute, this is the option most likely to make the mother an incubator for the development of the fetus.

Directive for Health Care Act § 5, 20 PA. CONS. STAT. ANN. § 5414(a) (West Supp. 2005) (voiding a pregnant woman's health care directive unless it can be determined "to a reasonable degree of medical certainty" that prolonged life-sustaining measures "(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"); An Act to Provide for Living Wills § 10, S.D. CODIFIED LAWS § 34-12D-10 (2004) (requiring life sustaining treatment to continue for pregnant patients with directives unless, "to a reasonable degree of medical certainty," the attending physician and one other physician determine that "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").

185. *See supra* notes 21, 119 and accompanying text (providing the citations of state statutes that allow declarants to include provisions in their living will that will give effect to their living will if they are pregnant).

186. *See supra* note 18 and accompanying text (setting forth the citations of state statutes that allow the declarant's living will to be given effect if life-support would not result in a live birth or would prolong severe pain not able to be alleviated by medication).

187. *See, e.g.*, S.D. CODIFIED LAWS § 34-12D-10 (2004) (invalidating the living will of a pregnant woman unless two physicians determine to a "reasonable degree of medical certainty" that the woman's pain will be unalleviated by medication or that the fetus will not be born alive).

188. *E.g.*, *id.*

On January 6, 2005, New Hampshire Senator Andre Martel introduced a bill that would repeal the current living will statute and replace it with a reenacted version of section 137-J.[189] This bill would change the express prohibition on removing pregnant women from life-support with language that would permit life-support to be removed if:

> to a reasonable degree of medical certainty, as certified on the principal's medical record by the attending physician or ARNP [advanced registered nurse practitioner] and an obstetrician who has examined the principal, such treatment or procedures will not maintain the principal in such a way as to permit the continuing development and live birth of the fetus or will be physically harmful to the principal or prolong severe pain which cannot be alleviated by medication.[190]

On March 31, 2005, Senator Robert E. Clegg Jr. moved to have this bill laid on the table.[191] The motion was approved through a voice vote.[192] The bill therefore did not make it out of committee. Although the Martel bill is a step in the right direction, it hardly alleviates the constitutional issues. Requiring a woman to remain on life-support in order to incubate a fetus without regard to her right to choose or her right to make her own medical decisions is still constitutionally suspect.

In any case, if the legislature refuses to alter the current language to make it constitutional, there are two possible ways in which the courts can read the statute to save it. One possibility is that the courts read into the statute a *rebuttable* presumption of adherence to RSA section 137-H:14. By allowing the exception to be a rebuttable presumption, family or guardians can still proffer evidence that maintaining life-support through pregnancy would be contrary to the woman's intent. If the court accepts the evidence, then the intent of the woman can be given effect, despite the prohibition on terminating life-support for pregnant women.

The second possibility is for the courts to limit the scope of the statute to apply only to post-viability fetuses despite the plain language. Although it is standard practice for the New Hampshire Supreme Court to first examine the plain language and "apply the statute as written" if the

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189. S.B. 134, 159th Leg., Reg. Sess. (N.H. 2005).

190. *Id.*; *see also* H.B. 656, 159th Leg., Reg. Sess. (N.H. 2005). The House Bill was introduced on January 26, 2005.

191. 12 STATE OF NEW HAMPSHIRE, SENATE JOURNAL 251, 265–66 (2005), *available at* http://www.gencourt.state.nh.us/scaljourns/Journals/2005/SJ%2012.pdf.

192. *Id.*

language is unambiguous,[193] there is precedent for limiting the scope of a statute despite its plain language. In *State v. Chaplinsky*, Walter Chaplinsky was charged with violating Public Law chapter 378, section 2, which stated "'[n]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place,'"[194] for saying to the Rochester City Marshall, "'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.'"[195] In affirming Mr. Chaplinsky's conviction, the New Hampshire Supreme Court limited the scope of the statute by finding that an objective test applied in determining whether particular words were offensive. Despite the absence of the language in the statute, the New Hampshire Supreme Court held that offensive words are only those words that "men of common intelligence would understand would be words likely to cause an average addressee to fight."[196] The United States Supreme Court affirmed the New Hampshire Supreme Court and found that the limited construction of the statute does not "contravene[] the Constitutional right of free expression."[197] It is therefore possible for the courts to read the statute to apply only post-viability in order to save it from being unconstitutional.

CONCLUSION

The pregnancy exception to the New Hampshire living will statute does not comport with current constitutional precedent nor with the principles and ideals that make New Hampshire such a unique place. It is imperative to remember that *Roe* gave birth to a woman's constitutional right to choose,[198] and *Cruzan* safeguarded the constitutional right to refuse medical treatment.[199] The pregnancy exception is mutually exclusive of these two rights, and is therefore patently unconstitutional. Although the statute may never be challenged judicially because the likelihood of the three required circumstances—(1) the pregnancy of the patient (2) in a terminal or permanently unconscious state with (3) a duly executed living will—converging are slim, the statute should not be left as it is. The New

193. Planned Parenthood of N. New England v. Heed, 390 F.3d 53, 61 (1st Cir. 2004).

194. State v. Chaplinsky, 18 A.2d 754, 757 (N.H. 1941).

195. *Id.*

196. *Id.* at 762.

197. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

198. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right to privacy is large enough to encompass a woman's right to terminate her pregnancy).

199. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 281 (1990) (finding a Due Process right to refuse "life-sustaining medical treatment").

Hampshire Legislature can proactively change the exception so that it comports with federal and state constitutional law by allowing women to have the right to choose and also refuse medical treatment.

The Legislature can take one of four routes: (1) remove the pregnancy exception altogether; (2) allow for women to explicitly state that they would like to have life-support removed regardless of their pregnancy; (3) require life-support to be required only when the fetus is viable; or (4) allow for a subjective determination by two physicians to determine whether the fetus will be born alive or if the mother is in severe pain not able to be alleviated by medication. Any one of these alterations would mitigate the harshness and unconstitutionality of the current exception.

Finally, the Legislature should modify the exception simply because the current construction is offensive to public policy.[200] Even if the exception is constitutional, it violates the policy considerations the New Hampshire Legislature must make in regulating choice. New Hampshire should not force the birth of a child when it is explicitly against the will of the mother. The fact that the mother is incapacitated and unable to assert her decision is all the more reason for living wills not to be subject to an exception for pregnancy. New Hampshire cannot and should not force its nose into a situation where it does not belong.

While "[t]here are too many variables to create one single standard"[201] and each state must independently legislate living wills, constitutional principles and rights may not be discarded. The pregnancy exception to the New Hampshire living will statute is an instance where the Legislature must reconcile constitutional rights and not be satisfied with the status quo.

Emma Sisti

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200. *See supra* Part IV (considering various policy rationales for the pregnancy exception of the New Hampshire living will statute).

201. Mulholland, *supra* note 173, at 878.