DIFFICULT PROBLEMS CALL FOR NEW SOLUTIONS: ARE GUARDIANS PROPER FOR VIABLE FETUSES OF MENTALLY INCOMPETENT MOTHERS IN STATE CUSTODY?

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I. INTRODUCTION

A. The Case of J.D.S.

J.D.S. is a twenty-three-year-old woman with the mental capacity of a young child, living in Orlando, Florida.[1] She suffers from "severe mental retardation, cerebral palsy, autism, and [a] seizure disorder."[2] She cannot communicate and requires complete assistance in all her daily activities.[3] When J.D.S. was a child, her family abandoned her, and she has lived most of her life since that time in a state-licensed group home in southwest Orlando.[4]

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This Comment is dedicated to my friends and family, particularly my father, Dr. Kenneth Wozniak, my mother, Mrs. Susan Wozniak, my sister, Tricia, and my brother, Kevin, for their constant unconditional love and support during the writing of this Comment and throughout my life. I also thank Professor Robert Davis, Professor Thomas Marks, and Professor Bruce Jacob for their helpful input and guidance on this topic. Finally, I am grateful to the *Stetson Law Review* advisors, editors, and associates, especially Ms. Stephanie Redding and Associate Dean Theresa J. Pulley Radwan, for their help in drafting and editing this Comment, and Brandon Waas for his patience, dedication, and diligence in the editing of this Comment.

1. Anthony Colarossi, *Woman Asks to Speak for Fetus; Guardianship Request Could Set National Precedent, Observers Say*, Orlando Sentinel B1 (May 30, 2003).

2. *In re Guardianship of J.D.S.*, 864 So. 2d 534, 536 (Fla. 5th Dist. App. 2004).

3. *Id.* at 537 n. 3.

4. Pedro Ruz Gutierrez & Anthony Colarossi, *Suspect in Rape of J.D.S. Arrested; DNA Shows the Husband of a Group-Home Caretaker Fathered the Victim's Child, Police Said*, Orlando Sentinel A1 (Sept. 10, 2003). J.D.S. has been living in state-supervised facilities for over eighteen years. Dana Canedy, *Gov. Jeb Bush to Seek Guardian for Fetus of Rape Victim*, N.Y. Times A29 (May 15, 2003). However, there was a legal battle brewing because the woman's biological family stepped forward, requesting the right to handle J.D.S.'s legal affairs. Anthony Colarossi, *Court Fight Ahead over Who'll Speak for J.D.S.; The Disabled Woman's Appointed Guardian Challenged Bids by Her Mother and Aunt*,

In late November or early December 2002, the seventy-five-year-old husband of J.D.S.'s caretaker raped her,[5] and J.D.S. became pregnant with Baby Girl S.[6] J.D.S. could not comprehend what was happening to her body.[7] Therefore, no one knew of J.D.S.'s state until she was five months pregnant.[8] After J.D.S.'s caretaker discovered the pregnancy, Judge Lawrence Kirkwood of the Ninth Judicial Circuit in Orlando declared J.D.S. incompetent and appointed a guardian to make decisions on J.D.S.'s behalf, including her health and welfare.[9] Judge Kirkwood told the guardian to return to the court with medical evaluations and recommendations about J.D.S.'s future.[10] Initially, Florida's Department of Children and Families (DCF) wanted the court to appoint a guardian for J.D.S.'s baby upon its birth.[11] However, DCF later decided, after consulting with Florida Governor Jeb Bush, to request a guardian for the fetus *before* birth, believing that J.D.S.'s

Orlando Sentinel B4 (Jan. 21, 2004). This would have enabled J.D.S.'s biological family to sue for monetary damages on J.D.S.'s behalf. *Id.* But, in early April 2004, J.D.S.'s biological family dropped these court proceedings. Associated Press, *Disabled Woman's Family Drops Request to Control Legal Affairs*, The Miami Herald 1 (Apr. 1, 2004) (available at http://www.miami.com/mld/miamiherald/news/state/8328885.htm?template=contentModules/).

5. J.D.S. could not help authorities identify her rapist. *Id*. Authorities were able to match the rapist's DNA to J.D.S.'s baby, Baby Girl S, once the baby was born. Anthony Colarossi, *Man Competent to Stand Trial in Disabled Woman's Rape, Doctor Says*, Orlando Sentinel B4 (Oct. 14, 2003).

6. Canedy, *supra* n. 4. The man who raped J.D.S. was arrested and charged with "sexual battery of a physically helpless person." Colarossi, *supra* n. 5. However, he was later found incompetent to stand trial. Associated Press, *supra* n. 4. Hester Strong, J.D.S.'s caretaker, "is awaiting trial on a felony charge of negligence." *Florida Court Rules That Fetuses Can't Have Guardians*, Women's Health Weekly 65 (Feb. 12, 2004). This is because Hester Strong did not give J.D.S. prenatal care and should have recognized J.D.S.'s pregnancy earlier. Gutierrez & Colarossi, *supra* n. 4. Strong's group home subsequently lost its state license. Colarossi, *supra* n. 5.

7. Anthony Colarossi, *Disabled Woman Can Bear Child, Guardian Says; J.D.S., Fetus in Good Health*, Orlando Sentinel A1 (June 26, 2003).

8. Am. Civ. Liberties Union, *ACLU, Center for Reproductive Rights, and Florida NOW Say Appointing a Guardian for a Fetus Threatens the Health and Rights of Pregnant Women in Florida*, http://www.aclu.org/ReproductiveRights/ReproductiveRights.cfm?ID=13347&c=144 (Aug. 21, 2003).

9. Or. Setting Procs. to Authorize Guardian's Consent to the Termination of Parental Rights at 2, *In re Guardianship of J.D.S.*, 864 So. 2d 534 (Fla. 5th Dist. App. 2004) [hereinafter Or. Setting Procs.]; Am. Civ. Liberties Union, *supra* n. 8. Judge Kirkwood noted, in his order pertaining to the guardianship of J.D.S., that the Florida Department of Children and Families had failed to appoint a guardian for J.D.S. when she "reached the age of majority," which had harmed J.D.S. further. Or. Setting Procs. at 2.

10. Colarossi, *supra* n. 7.

11. *Id*.

situation was unique.[12] DCF's petition declared that J.D.S. could not comprehend her limitations, she could not take care of herself, and she was taking numerous prescription drugs that could be detrimental to her fetus.[13] Therefore, DCF stated that there was a conflict of interest between J.D.S.'s guardian and the fetus because J.D.S.'s "interests and needs were potentially adverse to those of the fetus."[14]

A woman named Jennifer Wixtrom[15] then stepped forward and petitioned the court to appoint her as guardian of J.D.S.'s fetus, with arguments similar to DCF's claims.[16] She argued that the appointment was necessary because J.D.S. lacked the requisite mental capacity to care for herself and for her fetus during her pregnancy.[17] Wixtrom was also concerned that J.D.S.'s guardian could pursue an abortion for J.D.S.[18] Wixtrom claimed that J.D.S.'s medical care could have adverse effects on J.D.S.'s fetus, and that there was no one to speak on behalf of the fetus until the birth occurred.[19] Judge Kirkwood denied Wixtrom's petition when J.D.S. was six months pregnant, stating that there was no Florida

12. Canedy, *supra* n. 4. Judge Kirkwood initially declined to consider issues involving the fetus. *Id.* This was because the State did not submit requests on behalf of the fetus before the status hearing, in which the judge ruled that J.D.S. would stay in Florida's adult-protective-services program. *Id.* Judge Kirkwood said at that hearing that he would consider motions on behalf of the fetus at a later date. *Id.*

13. *J.D.S.*, 864 So. 2d at 536. While J.D.S. was living in the Strongs' group home, she was taking three antipsychotic drugs that doctors had prescribed for her because they considered her hyperactive. Gutierrez & Colarossi, *supra* n. 4. Experts say that these types of drugs are normally used to treat certain conditions like schizophrenia, but they are inappropriately used to sedate the mentally disabled for long periods of time. *Id.* Between 2002 and 2003, despite her incapacity, J.D.S. had authorized her own medical treatment with "indecipherable scrawls" on her medical-release forms. *Id.* For a discussion of the types of drugs J.D.S. may have been taking for her mental and physical conditions, see *infra* n. 231 (discussing various drugs for seizures and their effects on the unborn).

14. *J.D.S.*, 864 So. 2d at 536.

15. Jennifer Wixtrom is an Orlando homemaker who believed in the "well-being, health and proper prenatal care for [J.D.S.'s] fetus." CNN, *Judge Rules Pregnant Disabled Woman Is Incapacitated*, http://www.cnn.com/2003/LAW/06/02/florida.fetus.guardian (posted June 2, 2003).

16. *J.D.S.*, 864 So. 2d at 536–537.

17. *Id*. at 536.

18. *Id.* at 539.

19. Colarossi, *supra* n. 7. Wixtrom's lawyer stated that the fetus should have a guardian to raise questions about medications J.D.S. might be taking or to defend the fetus if J.D.S.'s guardian later decided to abort the fetus. *Id.* J.D.S.'s medical report stated that the drugs' effects on J.D.S.'s fetus were unknown, and there were no plans to perform an amniocentesis to discover birth defects. *Id.*

statute or prior caselaw that entitled a fetus to a guardian.[20] He asserted that J.D.S.'s guardian could resolve any dilemmas between J.D.S.'s interests and her fetus's interests, with J.D.S.'s pregnancy being an important factor for her guardian to consider when making health care decisions.[21]

Doctors stated in reports filed in court that the continuation of J.D.S.'s pregnancy posed no more risk to J.D.S.'s mental and physical health than a pregnancy would pose to a normal woman.[22] Therefore, J.D.S.'s guardian decided it was in J.D.S.'s best interest to continue with the pregnancy.[23] Judge Kirkwood agreed with her decision.[24] J.D.S. gave birth to Baby Girl S on August 30, 2003.[25] The State of Florida took custody of Baby Girl S as soon as she was born.[26]

Florida's Fifth District Court of Appeal affirmed the lower court's decision to deny J.D.S.'s fetus a guardian, holding that it is improper to appoint a guardian for a fetus even if the fetus is past the point of viability.[27] The three-judge panel[28] held that, because Chapter 744 of the Florida Statutes[29] does not specifically address appointing guardians for fetuses, and because courts are not to interpret or construe unambiguous statutes, the guardianship

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20. Or. Denying Verified Pet. for Appointment of Guardian for Unborn Child at 2–3, *In re Guardianship of J.D.S.*, 864 So. 2d 534 (Fla. 5th Dist. App. 2004) [hereinafter Or. Denying Verified Pet.]; Associated Press, *Woman at Center of Fight on Fetal Rights Gives Birth*, N.Y. Times A10 (Sept. 1, 2003).

21. Or. Denying Verified Pet., *supra* n. 20, at 4–5.

22. Colarossi, *supra* n. 7. The fetus also appeared healthy after two sonograms. *Id.* The only concern was J.D.S.'s low pre-pregnancy weight of ninety-five pounds, given J.D.S.'s height of five feet, one inch. *Id*.

23. *Id.* Governor Jeb Bush praised the guardian's recommendation to continue with the pregnancy. *Id.*

24. *J.D.S.*, 864 So. 2d at 537.

25. *Id.* at 537 n. 5.

26. Associated Press, *supra* n. 20.

27. *J.D.S.*, 864 So. 2d at 539. J.D.S. gave birth to Baby Girl S after the oral argument of this case, and the appeals court "elected to decide th[e] case on the merits, notwithstanding its mootness, because [it] consider[ed] th[e] issue to be of great public importance and capable of recurring." *Id*. at 537 (citing *Enter. Leasing Co. v. Jones*, 789 So. 2d 964, 965–966 (Fla. 2001); *In re T.W.*, 551 So. 2d 1186, 1189–1190 (Fla. 1989); *Holly v. Auld*, 450 So. 2d 217, 218 (Fla. 1984); *In re Fey*, 624 So. 2d 770, 771 (Fla. 4th Dist. App. 1993)).

28. This panel consisted of Judge Emerson Thompson, who wrote the majority opinion, Judge Richard Orfinger, who concurred with an opinion, and Judge Robert Pleus, who dissented with an opinion. *J.D.S.*, 864 So. 2d at 535, 539.

29. Chapter 744 of the Florida Statutes governs guardianships in the State of Florida. *Id.* at 538.

statutes do not allow for fetuses to have guardians.[30] The court also noted that, under Florida's guardianship statutes, a court can appoint a guardian only for a ward, and a ward is defined as a person.[31] The court reasoned that there is no Florida statute or case law defining a fetus as a person.[32] Therefore, a fetus cannot have a guardian.[33] Addressing Wixtrom's concerns about J.D.S.'s guardian seeking an abortion, the court stated that a guardian cannot consent to an abortion regarding a ward unless the court grants this authority after finding, by clear and convincing evidence, that the abortion is in the ward's best interest.[34]

Judge Richard Orfinger, in his concurrence, invited the Legislature to confront J.D.S.'s situation; he stated the following:

> The Legislature is the appropriate forum to debate the proper balance between the State's compelling interest in protecting the unborn and the mother's constitutional right to privacy and personal bodily integrity, assuming that such a balance can be achieved.[35]

In his dissent, Judge Robert Pleus asserted that appointing a guardian for a fetus is "not an undue burden and is the only means to ensure that the [s]tate's compelling interest in the health, welfare and life of an unborn child is protected."[36] He fur-

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30. *Id.* In oral arguments for the *J.D.S.* case, Judge Thompson, who wrote the majority opinion, said, "You're asking us to become a super-Legislature. . . . You're asking us to create law." Anthony Colarossi, *Court Hears Debate on Rights of Fetuses; An Orlando Rape Victim's Case May Determine Whether the Unborn Should Have Guardians*, Orlando Sentinel A1 (Aug. 22, 2003). The court noted that other statutes specifically provide protection for fetuses, such as the Florida vehicular homicide statute, § 782.071, which extends to a viable fetus, and § 782.09, which states that the "willful killing of an unborn child by injury to mother shall be deemed manslaughter." *J.D.S.*, 864 So. 2d at 538.

31. *Id.* at 538–539. An interesting point to note is that, prior to 1989, Florida's guardianship statutes defined a ward as "an *incompetent* for whom a guardian has been appointed." Fla. Stat. Ann. § 744.102(19) hist. n. 8 (West 2003) (emphasis added). The Florida Legislature changed this definition in 1989 to "a *person* for whom a guardian has been appointed." *Id.* at § 744.102(19) (emphasis added). If the definition prior to 1989 was still in force, the majority opinion in *J.D.S.* could not have asserted that a fetus cannot have a guardian because a fetus is not a person. *J.D.S.*, 864 So. 2d at 538–539 (holding that because a fetus is not a person, a fetus is not entitled to a guardian).

32. *Id*. at 538.

33. *Id.*

34. *Id.* at 539.

35. *Id.* at 540 (Orfinger, J., concurring).

36. *Id.* at 545–546 (Pleus, J., dissenting). Judge Pleus was also concerned with the fiduciary relationship between J.D.S. and her guardian:

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ther stated that appointing a guardian for a *totally incapacitated ward's fetus* is not an undue burden.[37]

J.D.S.'s widely publicized story causes many people, from the newspaper reader to the legal scholar, to wonder how her horrific situation could have occurred. But J.D.S. is not alone in her circumstances.

B. J.D.S.'s Situation Is Not an Isolated Case

J.D.S.'s case is not the only recent widely known case involving the rape of a mentally incompetent woman in Florida.[38] At least six mentally disabled women were raped and impregnated while in Florida care facilities between 2000 and 2003.[39] A caregiver in a care facility for the mentally disabled raped Kirsten Hubbard, a woman with cerebral palsy and the mental abilities of an infant; Hubbard gave birth in 2002.[40] The caregiver sexually abused Hubbard for two years before she became pregnant.[41] It took the facility five months to discover Hubbard's pregnancy, even though her medical records noted that she had been sexually assaulted.[42]

> The guardian of the mother owes a complete non-compromising fiduciary relationship to the mother and the guardian is prohibited from compromising his or her duties owed to the ward by taking actions on behalf of the unborn child. This means the court-appointed guardian is placed in a "dilemma" when issues of the ward conflict with the welfare or health of the unborn child. Without a guardian for the baby, the court places the baby at the mercy of the decisions made by the court-appointed guardian.

Id. at 547 (Pleus, J., dissenting).

37. *Id.* at 546 (Pleus, J., dissenting).

38. *See infra* nn. 39–51 and accompanying text (noting additional cases involving rape of mentally incompetent women).

39. Sandra Mathers, *Orlando Facility Let Patient Be Raped, Suit Says; The Suit Was Filed By the Disabled Victim's Mother, Who Is Raising the Child She Bore*, Orlando Sentinel B7 (Sept. 19, 2003). These are the cases that have received publicity. It is probable that no one will ever know the exact number of mentally disabled rape victims in state custody because they often cannot speak for themselves, and when they can, their caregivers often do not believe them. Anthony Colarossi, *Dorothy's Story; When Dorothy Was 15, The Mentally Retarded Girl Was Raped and Impregnated While Living in a Group Home. Her Case Shows How Vulnerable the Developmentally Disabled Can Be in State Care, Advocates Said*, Orlando Sentinel A1 (Aug. 3, 2003).

40. Mathers, *supra* n. 39.

41. *Id.*

42. *Id.* Hubbard's records also noted that she had not menstruated for those five months and that her abdomen was swelling. *Id.* Caregivers had been giving Hubbard Provera before they discovered her pregnancy. *Id.* Doctors prescribe this drug for abnormal uterine bleeding, "secondary amenorrhea, endometrial cancer, metastatic renal cancer,"

In another case, fifteen-year-old Dorothy's caregiver repeatedly raped her in a state-licensed group home, resulting in impregnancy.[43] The caregiver told Dorothy he loved her, but then told her to lie about his identity; she gave birth, and the father went to jail.[44] The state took custody of Dorothy's child after Dorothy lived with the child for eight months in a supervised setting.[45]

In May 2003, a Miami-Dade County judge ordered an abortion for a twenty-eight-year-old rape victim, known as Z.M.H., who had "the cognitive skills of a [four]-year-old."[46] Police believed the victim was raped more than once, and doctors said giving birth would have threatened her life.[47] The mentally disabled rape victim told the judge her wishes by saying, "My baby no more."[48] When Z.M.H.'s court-appointed guardian sought authorization for an abortion, the Liberty Counsel[49] asked the court to appoint a guardian *ad litem* for Z.M.H.'s fetus.[50] The judge denied this request.[51]

The Z.M.H. case and this sampling of other known cases demonstrate the potential for a situation like J.D.S.'s to happen again. This is why the Florida Legislature must take action to prevent the confusion that occurred during J.D.S.'s pregnancy, and to ensure that the fetus's interests are adequately represented, along with the mother's interests.[52] There must be specific

and also as a contraceptive. Tommy W. Gage & Frieda Atherton Pickett, *Mosby's Dental Drug Reference* 431 (6th ed., Mosby 2003). This drug can cause spontaneous abortion as one of its side effects. *Id.* Staffers also increased the nutrients Hubbard received through her feeding tube right before she gave birth, which caused her to develop aspiration pneumonia. Mathers, *supra* n. 39.

43. Colarossi, *supra* n. 39.

44. *Id.*

45. *Id.* Dorothy left the child in a bathtub unattended, and DCF concluded that she was therefore not capable of taking care of the child. *Id.*

46. Associated Press, *Retarded Rape Victim's Fetus Is Aborted Despite Challenge*, N.Y. Times A11 (May 31, 2003); Colarossi, *supra* n. 1.

47. Associated Press, *supra* n. 46.

48. *Id.*

49. The Liberty Counsel is a nonprofit organization, established in 1989, whose goal is to advance "religious freedom, the sanctity of human life and the traditional family." Liberty Counsel, *About Us: Restoring the Culture One Case at a Time by Advancing Religious Freedom, the Sanctity of Human Life and the Traditional Family*, http://www.lc.org/aboutus.html (accessed July 2, 2004).

50. *J.D.S.*, 864 So. 2d at 544.

51. *Id.*

52. J.D.S.'s situation has sparked other governmental action as well. Florida Governor Jeb Bush appointed a governmental panel to recommend methods of ensuring that devel-

guidelines in Florida's guardianship statutes to address these unfortunate, relatively unique situations.

C. Scope

This Comment will not discuss the causes or ramifications of the growing problem of rape in state-licensed group homes. It will focus only on whether appointing a guardian for a viable fetus is constitutional, under federal and Florida law, in situations similar to J.D.S.'s: those in which courts appoint guardians for mentally incompetent pregnant women. The differing opinions in the Florida Fifth District Court of Appeal's *J.D.S.* decision represent some of the thoughts and powerful emotions that the J.D.S. situation has created.[53] The majority opinion in *J.D.S.* focused narrowly on the direct wording of the Florida guardianship statutes, using what little guidance these statutes could give in J.D.S.'s

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opmentally disabled individuals in Florida are guaranteed legal guardians, should they need them, to look out for their best interests. Gutierrez & Colarossi, *supra* n. 4.

53. J.D.S.'s case is not the only situation sparking debates about fetal rights recently. The Laci Peterson case has thrust fetal rights into many people's minds because her husband, Scott Peterson, was convicted and sentenced to death in California for two murders, one for Laci and one for their unborn son, Conner. Fred Barnes, *Worth Protecting*, 9 The Weekly Standard 24 (Mar. 1, 2004); Harriet Ryan, *Jury Recommends Death for Scott Peterson*, http://www.courttv.com/trials/peterson/121304_verdict_ctv.html (last updated Feb. 4, 2005). This is because California law states that "murder is the unlawful killing of a human being, *or a fetus*, with malice aforethought." Barnes, 9 The Weekly Standard at 24. (emphasis added). Twenty-eight states have laws such as this one. *Id*. Florida is not one of these states; Florida's murder statute, § 782.04, does not include a fetus. However, Florida's vehicular homicide statute, § 782.071, includes a viable fetus. Fourteen states' fetal homicide laws cover fetuses "from the moment an embryo is implanted in a woman's uterus." Debra Rosenberg et al., *The War over Fetal Rights*, Newsweek U.S. Ed. 40 (June 9, 2003). The killing of an unborn child is covered under Florida law, which states that the killing of an unborn quick child by injury to the mother is deemed manslaughter. Fla. Stat. § 782.09.

Another new development in the area of fetal rights is Congress passing the Unborn Victims of Violence Act, which creates a federal law similar to the state laws covering fetuses in their definition of murder. Pub. L. No. 108-212, § 2, 118 Stat. 568, 568 (2004). This law creates a "separate offense for anyone harming or killing the fetus while committing federal crimes against a pregnant woman." Anthony Colarossi, *'Fetal Rights' Renews Old Feud; Some Worry That the Fight over a Guardian for a Fetus Will Erode Abortion Rights*, Orlando Sentinel A1 (June 9, 2003). The United States House of Representatives passed the measure in late February 2004, with a vote of 245 to 163, and the United States Senate passed it on March 25, 2004, with a vote of 61 to 38. James Gerstenzang, *The Nation; Bush Signs Anti-Violence Law That Extends into the Womb*, L.A. Times A20 (Apr. 2, 2004). President Bush signed the bill into law on April 1, 2004. *Id.* For an in-depth discussion of recent controversies over fetal rights, see Rosenberg et al., Newsweek U.S. Ed. at 40.

situation.[54] The dissenting opinion did not focus enough, calling for the Legislature to declare a fetus a person.[55] The concurring opinion was correct to invite the Florida Legislature to address J.D.S.'s situation and clarify the issue, recognizing all the unique interests involved.[56]

The purpose of this Comment is to cut through the politics and passion behind these differing opinions[57] and suggest that, when a scenario like J.D.S.'s occurs, it would be constitutional under federal and Florida privacy law for Florida's DCF to appoint a guardian after the fetus has passed the viability point using a court proceeding[58] to determine whether the fetus in fact needs a guardian. The Florida Legislature should recognize this analysis and implement a "J.D.S. provision" into the Florida guardianship statutes. A novel approach to protecting the potential life of the fetus is necessary in a J.D.S.-type scenario, and the Florida Legislature must provide clear guidelines for courts to follow in these unfortunate situations.

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54. *J.D.S.*, 864 So. 2d at 535–539.

55. *Id*. at 539–542.

56. *Id*. at 542–549.

57. Many pro-life and pro-choice commentators have remarked on this case. For example, Sherry Colb wrote, "Unlike a normal, functioning adult woman, J.D.S. is impaired enough to tempt the governor of her state to try to elevate her fetus'[s] interests over her own. For this, our president's brother should be ashamed." Sherry Colb, *Conflicts Arise over Rights of Pregnant Retarded Woman and Fetus*, www.CNN.com/2003/LAW/08/29/findlaw.analysis.colb.fetus/index.html (Aug. 29, 2003). Howard Simon, the executive director of the American Civil Liberties Union of Florida, has said, "The governor's personal agenda and political aspirations are getting in the way of providing for this woman's health and well-being." Canedy, *supra* n. 4. Critics of Governor Jeb Bush have also said that the governor's intentions were to keep J.D.S.'s case in the court system until J.D.S. was in her third trimester of pregnancy because she would not be able to obtain an abortion without her health or life being in danger at that point. *Id.* A pro-life writer stated,

> [W]hat we have in this case is a classic example of precisely why the practice of appointing guardians was developed in the first place. The law always recognized the need for appointment of guardians for those unable to speak for themselves. Who is less able to speak for him/herself than an unborn [five]-month-old?

Ken Connor, *Governor Acts Properly on Behalf of Disabled Woman's Unborn Child*, Tampa Tribune, Nation/World 13 (May 21, 2003). A representative of the American Family Association's Center for Law and Policy said, "The governor has the constitutional duty to uphold the right to life." Canedy, *supra* n. 4. For his part, Jeb Bush declared, "While others may interpret this case in light of their own positions, we see it as the singular tragedy it is, and remain focused on serving the best interests of this particular victim and her unborn child." *Id.*

58. This is the method Florida uses to determine whether an individual needs a guardian. Fla. Stat. § 744.331 (2003).

Parts II and III of this Comment will explore competing interests involved in this type of situation, including the mother's right to privacy under federal and Florida law against state intervention during her pregnancy, and the state's compelling interest in the potential life of the fetus after the point of viability.[59] Next, in Part IV, this Comment will address Florida's guardianship laws.[60] Part V of this Comment will discuss scenarios in which states, including Florida, have appointed guardians for fetuses in the past.[61] These situations include those of minors desiring to obtain abortions without parental consent through a judicial bypass option,[62] court-ordered medical care for mothers to protect the potential life of the fetus,[63] and cases involving substance abuse during pregnancy.[64] Finally, in Part VI, this Comment will show that the Florida Legislature should accept the Fifth District Court of Appeal's invitation to create a new "J.D.S. provision" in its guardianship statutes.[65]

II. A HISTORICAL PERSPECTIVE OF A PREGNANT MOTHER'S RIGHT TO PRIVACY AGAINST STATE INTERVENTION UNDER FEDERAL LAW

The conflicting constitutional issues involved in a situation like J.D.S.'s (in fact, all maternal/fetal rights cases) are the mother's right to privacy versus the state's interest in the fetus's potential life.[66] Because the constitutional rights of liberty and privacy dominate subjects like procreation, courts have judged governmental actions that interfere with decisions in procreation cases under a strict-scrutiny analysis.[67] However, the United

59. *Infra* nn. 66–130 and accompanying text (discussing cases that weigh the mother's privacy versus the state's interest in the potential life of a fetus). Part II analyzes the issue under federal law, and Part III analyzes the issue from a local perspective. *Id*.

60. *Infra* nn. 131–153 and accompanying text (discussing Florida's guardianship laws).

61. *Infra* nn. 154–211, 215–218 and accompanying text (discussing scenarios where states have appointed guardians for fetuses in the past).

62. *Infra* nn. 185–190 and accompanying text (discussing the judicial bypass option).

63. *Infra* nn. 169–175, 191–197 and accompanying text (discussing court-ordered medical care).

64. *Infra* nn. 176–184 and accompanying text (discussing a substance abuse case).

65. *Infra* nn. 225–261 and accompanying text (discussing this Author's recommendation for a new "J.D.S. provision").

66. *Roe*, 410 U.S. at 162.

67. Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing*

States Supreme Court later refined its analysis to adopt an "undue burden" standard in these situations.[68]

In *Griswold v. Connecticut*,[69] the United States Supreme Court declared that, while there is no specific right to privacy in the United States Constitution, certain guarantees in the Bill of Rights have penumbras "formed by emanations from those guarantees that help give them life and substance."[70] The lower court in *Griswold* found healthcare professionals guilty of giving information about contraception to married people, in violation of a Connecticut statute that outlawed both obtaining contraception and assisting in obtaining contraception.[71] The United States Supreme Court overturned the conviction, declaring that Connecticut's law violated the zone of privacy that the penumbras created and that it had a "maximum destructive impact" on the marital relationship.[72] *Griswold* involved married individuals' right to use birth control, but its holding extended more widely to declare that various constitutional "guarantees create zones of privacy."[73]

In *Eisenstadt v. Baird*,[74] the United States Supreme Court extended to unmarried individuals *Griswold*'s right to use contraceptives.[75] The Massachusetts Superior Court convicted a man for both exhibiting contraceptives while delivering a lecture at Boston University and giving a woman vaginal foam at the end of the lecture.[76] The trial court stated that the individual violated a

Guardians Ad Litem for Fetuses and Embryos, 66 Wash. L. Rev. 503, 518–519 (1991). This means that the governmental intrusion must serve a compelling state interest and, for the state action to be constitutional, the intrusion must be narrowly tailored. *Id*. at 519.

68. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000); *Casey*, 505 U.S. at 876.

69. 381 U.S. 479 (1965).

70. *Id.* at 484.

71. *Id.* at 480.

72. *Id.* at 485.

73. *Id.* at 484. The Court stated that the First, Third, Fourth, Fifth, and Ninth Amendments have the penumbras that create the right to privacy. *Id. Griswold* was not the first case discussing a right to privacy; Justice Brandeis's dissenting opinion in *Olmstead v. U.S.*, argued for a general constitutional right to privacy, stating that the Constitution's framers recognized "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *see also* Margaret J. Farrell, *Revisiting* Roe v. Wade*: Substance and Process in the Abortion Debate*, 68 Ind. L.J. 269, 301–302 (1993) (noting that Justice Brennan's majority opinion in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), was partially based on Justice Brandeis's dissent in *Olmstead*).

74. 405 U.S. 438.

75. *Id.* at 454–455.

76. *Id.* at 440.

Massachusetts law that allowed dispensing contraceptives to married couples only.[77] The Massachusetts Supreme Judicial Court set aside the conviction, asserting that the conviction violated the defendant's First Amendment rights with regards to exhibiting the contraceptives, but the Court upheld the conviction with regard to his distributing the vaginal foam.[78] The United States Supreme Court held that the Massachusetts statute violated the Equal Protection Clause of the Fourteenth Amendment because it treated single individuals differently from married individuals.[79] Writing for the majority, Justice William Brennan declared, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[80]

In *Roe v. Wade*,[81] the United States Supreme Court asserted that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[82] In *Roe*, a single, pregnant woman sought a declaratory judgment that Texas's criminal abortion statutes were unconstitutional because they violated a woman's right to choose to end her preg-

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77. *Id.* at 440–441.

78. *Id.* at 440.

79. *Id.* at 454.

80. *Id.* at 453. The Court held that under the Equal Protection Clause of the Fourteenth Amendment, "all persons similarly circumstanced shall be treated alike." *Id.* at 447 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). This means that married and unmarried individuals who are similarly situated must be treated similarly with regards to privacy. *Id.* at 454–455.

81. 410 U.S. 113. While this case and its reaffirmation, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (discussed *infra* at notes 88–94 and the accompanying text), involve abortion, which was not a direct factor in J.D.S.'s situation, the cases are still relevant to this Comment because they discuss a mother's right to privacy in a broader context than simply a mother's particular right to choose an abortion. *See e.g. Roe*, 410 U.S. at 153 (noting that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"). Also, J.D.S.'s guardian could have petitioned the court to allow J.D.S. to have an abortion if she felt that J.D.S.'s health or life was endangered. ***J.D.S.***, 864 So. 2d at 539 (citing Fla. Stat. §§ 390.0111(1), (3) (2003); 744.3215(4)(e) (2003)).

82. *Roe*, 410 U.S. at 153. The Court discussed the strict scrutiny test, stating that if there is a fundamental right involved, like privacy, a regulation limiting that right can be constitutional only if it serves a "compelling state interest." *Id.* at 155. In addition to serving a compelling state interest, "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* (citing *Eisenstadt*, 405 U.S. at 463–464 (White, J., concurring); *Griswold*, 381 U.S. at 485; *Aptheker v. Sec. of St.*, 378 U.S. 500, 508 (1964); *Cantwell v. Ct.*, 310 U.S. 296, 307–308 (1940)).

nancy.[83] The United States Supreme Court held that a woman's right to privacy includes the right to choose an abortion because of the financial, psychological, and possible physical harm an unwanted pregnancy would force on a woman.[84] The Court also stated, however, that this right is not absolute—instead, at a certain point, the state's interest in the potentiality of human life becomes compelling.[85] To emphasize this point, the Court stated that, "The pregnant woman cannot be isolated in her privacy."[86] The Court declared that a fetus is not a person in terms of the Fourteenth Amendment because the use of the word "person" in other sections of the Constitution is used only post-natally; there are no prenatal references.[87]

Planned Parenthood of Southeastern Pennsylvania v. Casey[88] reaffirmed *Roe*.[89] The United States Supreme Court asserted that

83. *Id.* at 120, 129.

84. *Id.* at 153. The Court also noted that, at common law and during much of the nineteenth century, society viewed abortion with less disapproval than most state statutes did at the time *Roe* was decided. *Id.* at 140.

85. *Id.* at 153–154.

86. *Id.* at 159. The state has a compelling interest in protecting pregnant women, and it has another compelling interest in the fetus's potential life. *Id.* at 162. The *Roe* court held that the state's interest in the mother's health becomes compelling at the end of the first trimester, and after this point, the state can regulate abortion as long as it "reasonably relates" to the mother's health. *Id.* at 163. The plurality opinion in *Casey* later rejected this trimester framework as being too rigid and not correctly valuing the state's interest in the health of the mother and in the potential life of the fetus. *Casey*, 505 U.S. at 872. The compelling point for the state's interest in the potential life of the fetus is at the point of viability. *Roe*, 410 U.S. at 163. After the point of viability, the state can prohibit abortion, except "to preserve the life or health of the mother." *Id.* at 163–164. For a relatively early, in-depth proposal for complete fetal rights at the point of viability, see Patricia A. King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 Mich. L. Rev. 1647 (1979).

87. *Roe*, 410 U.S. at 157–158. For example, the Fourteenth Amendment mentions the word "person" in defining a citizen; the word also appears in the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 157. Some legal scholars have criticized this finding, noting that Justice Blackmun simply "looked to the express terms of the text of the Constitution and found that the Constitution does not include protection for the unborn, maintaining that if [the unborn] were so protected, their right to life would be specifically guaranteed by the Fourteenth Amendment." Farrell, *supra* n. 73, at 304. Margaret Farrell criticizes this as being an "absolutist vision of the Amendment's guarantees," which she argues is not correct because the Fourteenth Amendment only literally guarantees the right to due process if the government takes away an individual's life. *Id.* at 304, 304 n. 142. Thus, she asserts that there could be no right to privacy at all if courts viewed the Constitution in this way. *Id.*

88. 505 U.S. 833.

89. *Id.* at 857. The Court in *Casey* noted that the decision of whether to have an abortion is related to the decision of whether to use contraception, which was the issue in

the state has a legitimate interest in protecting the health of the woman and the potential life of the fetus from the outset of pregnancy.[90] The state's interest in the fetus's potential life becomes compelling at the point of viability, where "there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman."[91] Just because a law that serves a valid purpose has an additional effect of making it more difficult for a mother to obtain an abortion, does not by itself invalidate the law.[92] The Court used the undue burden test as the threshold in determining whether the state regulation "reach[ed] into the heart of the liberty protected by the Due Process Clause."[93] A state may express a "profound respect for the life of the unborn" through a regulation, as long as it is not an undue burden on the mother.[94]

Griswold and *Eisenstadt*. *Id.* at 852. *Roe* was an extension of the right to privacy that the United States Supreme Court recognized in these two cases. *Id.* at 853.

90. *Id.* at 871 (O'Connor, Kennedy & Souter, JJ., plurality). The plurality rejected *Roe*'s trimester approach, saying that this approach is unnecessary in ascertaining that a mother's right to choose an abortion would not take a back-seat to the state's interest in the fetus's potential life. *Id*. at 872. The plurality said that the trimester framework "undervalues the [s]tate's interest in potential life," and that the only errors in *Roe* were "misconceiv[ing] the . . . pregnant woman's interest," and undervaluing the state's compelling interest in fetal protection. *Id*. at 858 (opinion of the Court), 873 (plurality). The *Casey* Court found the holding in *Roe*, that there can be no state regulation in the first trimester, to be problematic. *Id.* at 872–873, 876 (plurality). This is why the *Casey* Court adopted the "undue burden" test instead, which allows regulations "[e]ven in the earliest stages of pregnancy" to make sure a woman's choice of abortion "is thoughtful and informed." *Id.* at 872, 876 (joint opinion).

91. *Id.* at 870. The plurality said that viability is the most workable line to draw, and that "[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the [s]tate's intervention on behalf of the developing child." *Id.*

92. *Id.* at 874.

93. *Id.* The undue burden test means that, if a state regulation puts a substantial obstacle in the way of a woman wanting to obtain an abortion of a nonviable fetus, the law is unconstitutional. *Id.* at 877.

94. *Id.* The Court went on to determine that Pennsylvania's provisions mandating a mother's informed consent prior to an abortion, a mother's receipt of abortion information twenty-four hours before the procedure, parental consent for a minor's abortion with a judicial bypass option, and reporting requirements for abortion facilities were not undue burdens, and the provisions were therefore constitutional. *Id*. at 844 (opinion of the Court), 887 (plurality), 899 (plurality), 900–901 (plurality). A provision requiring a married woman to notify her husband of her plans to get an abortion was an undue burden and was therefore unconstitutional. *Id.* at 893–894 (opinion of the Court).

One of the most recent United States Supreme Court cases to confront the right to privacy is *Lawrence v. Texas*,[95] in which two homosexual men appealed their convictions under a Texas homosexual sodomy statute, arguing that the statute violated the Equal Protection Clause of the Fourteenth Amendment.[96] The Court declared the Texas law unconstitutional because it violated the Due Process Clause of the Fourteenth Amendment.[97] The majority pronounced that adults can have a homosexual relationship "in the confines of their homes and . . . private lives and still retain their dignity as free persons."[98] The Court quoted *Casey* by saying, "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[99] The Court also noted in *Lawrence* that *Griswold* and *Eisenstadt* helped draw the background for its 1973 decision in *Roe*.[100]

The right to privacy is an expanding doctrine, as the United States Supreme Court cases described above demonstrate.[101]

95. 539 U.S. 558 (2003).

96. *Id.* at 563–564.

97. *Id.* at 578. The Court did not hold the statute invalid under the Equal Protection Clause of the Fourteenth Amendment because an Equal Protection analysis may have led people to question whether an analogous statute that applied to *homosexuals and heterosexuals alike* would be valid. *Id.* at 574–575.

98. *Id.* at 567. The Court also mentioned *Carey v. Population Services International*, 431 U.S. 678 (1977), which invalidated a law restricting the sale of contraception to minors under the age of sixteen. *Id*. at 566.

99. *Id.* at 578 (quoting *Casey*, 505 U.S. at 847). It is important to note that *Lawrence*'s majority consisted of five Justices, including Justice O'Connor's concurring opinion declaring the Texas law violated the Equal Protection Clause because it applied only to homosexuals, not heterosexuals. *Id*. (O'Connor, J., concurring). In *Lawrence*, Justice O'Connor did not join the Court in overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Supreme Court declared a sodomy law constitutional. *Id*. Justice O'Connor was in the majority in *Bowers*. 478 U.S. at 187. Justice Scalia, in his *Lawrence* dissent, noted that *Roe* and *Casey* have been eroded by other Supreme Court holdings such as *Washington v. Glucksberg*, 521 U.S. 702 (1997), which stated that only those fundamental rights that are "deeply rooted in this Nation's history and tradition" meet the criteria for any test other than the rational basis test under "substantive due process." *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting) (quoting *Glucksberg*, 521 U.S. at 721). Because Justice Scalia wrote the dissenting opinion in *Lawrence*, this Comment will address a J.D.S. law under the undue burden test from *Casey* for federal law and under strict scrutiny for Florida law; Florida has not adopted the undue burden standard from *Casey. See N. Fla. Women's Health & Counseling Servs., Inc. v. Fla.*, 866 So. 2d 612, 626 (Fla. 2003) (stating that a compelling state interest is necessary in *all* cases involving the right to privacy, and strict scrutiny is the proper analysis to use in these cases).

100. *Lawrence*, 539 U.S. at 566 (noting that facets of both *Griswold* and *Eisenstadt* were found in *Roe*).

101. *Supra* nn. 69–100 and accompanying text (describing United States Supreme

These cases provide the framework for analyzing guardianships for fetuses under federal laws. However, because guardianship statutes are matters of state law and not federal law, it is necessary to discuss the evolution of Florida's right to privacy, which is stricter than the federal right to privacy.[102]

III. FLORIDA'S PRIVACY LAWS

Florida is fairly unique because the Florida Constitution includes a Right of Privacy Clause.[103] Few states have this type of provision in their Constitutions.[104] The Florida Supreme Court has noted that lawmakers intentionally drafted the provision in strict terms and that it is therefore "much broader in scope than that of the Federal Constitution."[105] Florida courts have pointed to the Right of Privacy Clause in a number of situations, including grandparents' visitation rights,[106] assisted suicide,[107] the right to refuse blood transfusions,[108] and the removal of a feeding tube from an adult in a persistent vegetative state.[109]

In *Winfield v. Division of Pari-Mutuel Wagering*, [110] the Florida Supreme Court first ruled that state intrusion on the right to privacy requires a compelling state interest to be constitutional

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Court cases in the evolution of the right to privacy).

102. *See infra* pt. III (noting the differences between federal and Florida privacy law).

103. Fla. Const. art. I, § 23. Florida's right of privacy reads, "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." *Id.* The Florida Constitution begins with a Declaration of Rights, which is a list of rights protecting Floridians from unjust governmental infringement. *N. Fla. Women's Health & Counseling Servs.,* 866 So. 2d at 618. Citizens of Florida voted in 1980 to amend the Declaration of Rights portion of the Florida Constitution to include this Right of Privacy Clause as a separate, express right. *Id.* at 619. This action was in response to the United States Supreme Court's giving a great deal of responsibility to individual states to ensure the right to privacy. *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 547–548 (Fla. 1985).

104. *T.W.*, 551 So. 2d at 1190. Other states that have an express privacy provision include Alaska, California, and Montana. *Id.*

105. *Id*. at 1191–1192 (quoting *Winfield*, 477 So. 2d at 548). Lawmakers considered and rejected placing "the use of the words 'unreasonable' or 'unwarranted' before the phrase 'governmental intrusion' in order to make the privacy right as strong as possible." *Winfield*, 477 So. 2d at 548.

106. *E.g. Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998).

107. *E.g. Krischer v. McIver*, 697 So. 2d 97, 100 (Fla. 1997).

108. *E.g. In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1994).

109. *E.g. Corbett v. D'Alessandro*, 487 So. 2d 368, 370 (Fla. 2d Dist. App. 1986).

110. 477 So. 2d 544.

under the Florida Constitution.[111] Therefore, any state intrusion in Florida must meet the federal standards as well as the stricter Florida standards regarding privacy.[112] However, before a court considers whether the State infringed on an individual's right to privacy, "a reasonable expectation of privacy must exist."[113] Overall, the Florida privacy standard is rigorous, as is "emphasized by the fact that no government intrusion in . . . personal decision[-]making cases . . . has survived."[114]

A case involving a law that did not pass Florida constitutional privacy muster is *In re T.W.*,[115] in which the Florida Supreme Court held that a statute[116] requiring a pregnant minor to obtain a parent's consent before getting an abortion[117] was unconstitutional because there was no compelling state interest and because the statute was not the least intrusive means of accomplishing the State's interest.[118] The trial court appointed counsel for a minor wanting an abortion and counsel as a guardian *ad litem* for the fetus;[119] the trial court then denied T.W.'s request for a waiver.[120] Florida's Fifth District Court of Appeal found the entire statute unconstitutional and quashed the trial court's decision to require parental consent.[121] The guardian for the fetus appealed,[122] and the Florida Supreme Court declared that, "the appointment of a guardian *ad litem* for the fetus [at the trial court level] was clearly improper" and that only the attorney general

111. *Id*. at 547. The burden then shifts to the state to justify the intrusion on privacy. *Id.* The state can meet this burden by showing that the law promotes a compelling state interest and uses the least intrusive means to accomplish this goal. *Id.*

112. *Id*. at 548.

113. *Id*.

114. *T.W.*, 551 So. 2d at 1192; *but see Renee B. v. Fla. Agency for Health Care Administration*, 790 So. 2d 1036, 1041 (Fla. 2001) (noting an instance in which government intrusion survives).

115. 551 So. 2d 1186.

116. Fla. Stat. § 390.001(4)(a) (Supp. 1988) (repealed 1991) (cited in *T.W.*, 551 So. 2d at 1188, 1188 n. 1).

117. The law also provided a judicial alternative to a minor having to obtain her parents' consent; under this alternative, the minor was required to convince a court that she was mature enough to make such a decision without the help of her parents, or if she was immature, that the abortion was still in her best interest. *T.W.*, 551 So. 2d at 1188–1189.

118. *Id*. at 1195.

119. *Id.* at 1189.

120. *Id.*

121. *Id.*

122. *Id.*

could bring the appeal.[123] The Court then quashed the statute because it infringed on a pregnant minor's privacy at every point in the pregnancy, and this type of invasion "is not necessary for the preservation of maternal health or the potentiality of life."[124]

The Florida Supreme Court noted that, under the Florida Constitution, the State's interest in "the potentiality of life in the fetus" is compelling at the point of viability, when "society becomes capable of sustaining the fetus."[125] The Court also pointed out that, although the State's interests of protecting minors from their immaturity and the preservation of the family are important, the Florida Constitution would not allow these interests to override a minor's right to privacy.[126] The Court differentiated federal law from Florida law in this area because under federal law, a "significant state interest" can justify intrusion, while only a "compelling state interest" can do so in Florida.[127]

Consequently, Florida courts continue to apply strict scrutiny under *Roe*, while the United States Supreme Court receded from strict scrutiny and instead adopted the undue burden test in *Casey*.[128] In 2003, the Florida Supreme Court cited *T.W.* heavily in

123. *Id.* at 1190.

124. *Id.* at 1194.

125. *Id.* at 1193–1194. Florida has laws that further the State's interest in the fetus's potential life. *Id*. at 1194. These include Florida Statutes § 390.0111, which prohibits abortion during the third trimester unless "termination of [the] pregnancy is necessary to save the life or preserve the health of the pregnant woman." Fla. Stat. § 390.0111(1) (2003). Florida does not allow partial-birth abortions, except when the mother's life is endangered and there is no other medical procedure that can solve the problem. *Id*. at § 390.0111(5). Florida also requires voluntary, written consent from a pregnant woman for a physician to perform an abortion. *Id*. at § 390.0111(3). Consent means that the physician must notify the woman of risks and the gestational age of the fetus, and must provide the woman with other printed materials informing her of abortion alternatives and a description of the fetus, if she wants to view these materials. *Id*. at § 390.0111(3)(a). Another Florida law showing respect for the potential life of a viable fetus is Florida Statutes § 782.09, which declares that "[t]he willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter, a felony of the second degree."

126. *T.W.*, 551 So. 2d at 1194.

127. *Id.* at 1195. Under *Casey*, the United States Supreme Court upheld a Pennsylvania parental-consent statute very similar to the Florida statute in *T.W.* 505 U.S. at 899 (plurality). This exemplifies the difference between federal and Florida law in this area.

128. *State v. Pres. Women's Ctr.*, 707 So. 2d 1145, 1149 (Fla. 4th Dist. App. 1998). Florida also continues to use the rigid trimester framework from *Roe* instead of the viability standard the United States Supreme Court articulated in *Casey*. *See* Fla. Stat. § 390.0111(1) (declaring that it is illegal for a woman to have an abortion during the third trimester of pregnancy unless her life or health is in danger).

declaring that a parental *notification* statute (as opposed to the parental *consent* statute in *T.W.*) violated a minor's right to privacy.[129]

These cases demonstrate that Florida's right to privacy is stricter than the federal right to privacy. Because Florida's right to privacy is more difficult to supersede than the federal right to privacy, a state law addressing guardians for fetuses may be constitutional under federal law but unconstitutional under Florida law. As shown later in this Comment, this is not the case in a J.D.S.-type situation, in which a court appoints a guardian for a mentally incompetent woman during her pregnancy.[130]

IV. INTRODUCTION TO GUARDIANS: WHO ARE THEY? WHAT DO THEY DO?

The "*parens patriae* power" allows states to act in order to protect people who cannot care for themselves.[131] Promoting guardians is one way the state can exercise this power.[132] A guardianship is a trust relationship that is very sacred because the guardian acts for another individual—the ward—after the state determines that the ward is incapable of taking care of himself or herself.[133] Florida Statutes § 744.102(8) defines a guardian as "a person who has been appointed by the court to act on behalf of a ward's person or property, or both." The two types of guardians relevant to this Comment are guardians *ad litem* and plenary guardians. A guardian *ad litem* is an individual who is appointed

129. *N. Fla. Women's Health & Counseling Servs.*, 866 So. 2d at 622–623. For an example of a law that does not violate Florida's right to privacy, see *Renee B.*, 790 So. 2d 1036. *Renee B.* involved the rules of the Agency for Health Care Administration, which excluded Medicaid coverage for medically necessary abortions, except "where the pregnancy endangers the life of the mother or is the result of rape or incest." *Id.* at 1037–1038. The Florida Supreme Court stated that, while the privacy provision of the Florida Constitution provides for a woman's right to choose, this right does not include an entitlement to public money to pay for the abortion. *Id.* at 1041. The Court reasoned that putting restrictions on funds to pay for abortions does not put a "restriction on access to abortions that was not already present." *Id.*

130. *See* pt. VI (arguing that the circumstances in a situation like J.D.S.'s are unique and require special action that may be unconstitutional in a situation involving a woman with normal abilities).

131. Page McGuire Linden, *Drug Addiction during Pregnancy: A Call for Increased Social Responsibility*, 4 Am. U. J. Gender & L. 105, 122 (1995).

132. Goldberg, *supra* n. 67, at 507.

133. 28 Fla. Jur. 2d *Guardian and Ward* § 1 (1998).

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by a court having jurisdiction over the guardianship to represent a ward in a certain legal proceeding.[134] A plenary guardian has wider authority; a court appoints this type of guardian "after the court has found that the ward lacks capacity" to care for himself or herself, and the plenary guardian has control over "all delegable legal rights and powers of the ward."[135]

J.D.S. could have obtained a guardian under Florida Statutes § 744.331[136] after a court determined that she was incapacitated.[137] This statute lists steps necessary to obtain a guardian for an incapacitated person,[138] but currently there are no provisions to appoint a guardian for a viable fetus.[139]

There is an important trust relationship between a guardian and a ward.[140] In fact, it is one of the few types of relationships in which confidence and good faith are truly essential because the guardian actually represents the government, "the supreme guardian."[141] Florida statutes mandate matters between a guardian and a ward; there are no federal laws that do so.[142]

A court can appoint any person to be a guardian, as long as that individual is qualified.[143] It does not matter whether the

134. Fla. Stat. § 744.102(9) (2003).

135. *Id*. at § 744.102(8)(b).

136. *See generally id*. at § 744.331(6) (outlining the procedure required for a court to appoint a guardian).

137. The trial court held a hearing to determine whether J.D.S.'s potential guardian was competent and appointed J.D.S.'s guardian on June 2, 2003. Br. of Pet. at 12–13, *J.D.S.*, 864 So. 2d 534 (Fla. 5th Dist. App. 2004) (copy on file with the *Stetson Law Review*).

138. Fla. Stat. § 744.331. The steps include the following: (1) giving notice to the alleged incapacitated person; (2) appointing an attorney to represent the alleged incapacitated person in cases involving a petition for adjudication of incapacity; (3) appointing a committee consisting of three members, one being a psychiatrist or other type of physician, and the other two being some type of health care practitioners who are able to render an expert opinion to the court; (4) having each member of the committee examine the alleged incapacitated person and file a written report to the court; (5) holding an adjudicatory hearing; and (6) rendering an order determining incapacity. *Id*. at § 744.331(1)–(6).

139. *J.D.S.*, 864 So. 2d at 538.

140. 28 Fla. Jur. 2d *Guardian and Ward* § 4.

141. *Id.*

142. *Id*. at § 5. Chapter 744 of Florida's Statutes regulates the appointment of guardians. *See* Fla. Stat. § 744.1012 (stating the purpose of Fla. Stat. § 744). "[B]oth the court of the county in which the incompetent [individual] resides and in the court in the county in which the incompetent [individual] may be found" have jurisdiction to appoint a guardian for the incompetent individual, as long as the incompetent resides in the State of Florida. 28 Fla. Jur. 2d *Guardian and Ward* § 25.

143. Fla. Stat. § 744.309(1)(a). "A professional guardian must register with the State-

guardian "is related to the ward or not."[144] But, no matter who the guardian is, the guardian must take an oath before exercising any authority.[145] This oath declares that the guardian "will faithfully perform his or her duties as guardian."[146] A guardian is also under the jurisdictional court's control, such that a guardian can resign from his or her position only if he or she gets permission from the court.[147]

The most important provision related to a J.D.S.-type situation is Florida Statutes § 744.446(1), which mandates that a guardian must be "independent and impartial;"[148] there is essentially a fiduciary relationship "between the guardian and the ward."[149] The guardian is not allowed to take on any obligation that would conflict with the guardian's ability to perform his or her duties.[150]

Courts usually appoint guardians *ad litem* to represent individuals' interests when those individuals cannot represent themselves in court or in other legal proceedings.[151] Courts often appoint guardians *ad litem* to represent children, "incompetents in medical treatment cases, and the rights of incompetents, minors,"

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wide Public Guardianship Office." *Id*. at § 744.1083(1). Every professional guardian must undergo a minimum of forty hours of training, as well as sixteen hours of continuing education every two years. *Id*. at § 744.1085(3). There is also a background-check requirement. *Id.* at § 744.1085(5).

144. *Id*. at § 744.309(1)(a).

145. *Id*. at § 744.347.

146. *Id*.

147. 28 Fla. Jur. 2d *Guardian and Ward* § 67; *see also James v. James*, 64 So. 2d 534 (Fla. 1953) (holding that a court's jurisdiction regarding guardians and wards is broad and plenary).

148. Fla. Stat. § 744.446(1).

149. *Id*.

150. *Id.* This provision is important because, in J.D.S.'s case, J.D.S.'s guardian could consider only the best interests of J.D.S., not of the fetus. *Id.* Considering the best interests of the fetus would have violated the guardian's duty towards J.D.S., especially if these interests conflict with J.D.S.'s interests. *J.D.S.*, 864 So. 2d at 547 (Pleus, J. dissenting). An example of a consideration that could violate this fiduciary duty would be the drugs J.D.S. was taking that could have harmed her fetus. *Id.*; *see also infra* n. 231 (discussing drugs J.D.S. could be taking to control her seizures). For J.D.S.'s guardian to thoroughly consider the ramifications of J.D.S.'s drugs on her fetus, J.D.S.'s guardian would have to compromise her duty to J.D.S. *J.D.S.*, 864 So. 2d at 547 (Pleus, J., dissenting). But, if J.D.S.'s fetus had a separate guardian who could speak on its behalf, J.D.S.'s guardian would be able to avoid compromising the duty she owes to J.D.S. *Id*. at 547–548.

151. Goldberg, *supra* n. 67, at 505.

and the unborn in trust and estate proceedings.[152] Courts have also appointed guardians for fetuses on occasion.[153]

V. APPOINTMENTS OF GUARDIANS FOR FETUSES

According to Susan Goldberg, a professor of reproductive rights, there are three types of cases in which courts appoint guardians for fetuses: "abortion cases, forced medical treatment cases[,] and cases involving allegations of substance abuse during pregnancy."[154] As the following cases will demonstrate, state courts have been fairly inconsistent in their views on appointing guardians for fetuses.

A. Guardians for Fetuses in Florida

Unlike the record in states such as Alabama and New York, there are few cases in Florida in which guardians have represented fetuses.[155] This may be because of the Florida Supreme Court case *T.W.*,[156] which declared that appointing a guardian *ad litem*[157] for a fetus was clearly improper in a case in which a mi-

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152. *Id.* at 505–506. "The state . . . has an obligation to protect the welfare of children," and this can supercede parental authority at times. *Id.* at 507. In "trust, estate[,] and probate proceedings," the guardian's appointment is only for the current litigation. *Id.* at 508–509.

153. *See id.* at 521–526 (discussing cases in which courts have appointed guardians *ad litem* for fetuses, including abortion, medical treatment cases, and cases in which the mother is allegedly using drugs and endangering the health of her fetus); *see generally* Helena Silverstein, *In the Matter of Anonymous, a Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 Cornell J.L. & Pub. Policy 69 (2001) (addressing the issue of judges in Alabama appointing guardians *ad litem* for fetuses when a pregnant minor is attempting to obtain a judicial waiver of parental consent to obtain an abortion).

154. Goldberg, *supra* n. 67, at 521.

155. *Infra* nn. 162–166 and accompanying text (discussing a Florida case in which the court appointed a guardian *ad litem* for a fetus when the hospital wanted to perform an abortion on a woman with severe psychosis). For examples of Alabama caselaw, see *infra* nn. 185–190 (referencing *In re Anonymous*). For examples of New York caselaw, see *infra* nn. 192–201 (referencing *In re Jamaica Hosp.* and *In re Nancy Klein*).

156. For additional facts on this case see *supra* notes 115–127 and accompanying text (discussing *T.W.* in the context of Florida's right to privacy).

157. A guardian *ad litem* is a person, usually a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent party. Fla. Stat. § 744.102(9). In J.D.S.'s situation, Florida's DCF sought to appoint a plenary guardian, plenary meaning complete or entire. *Id*. at § 744.102(8)(b). Therefore, the fetus's guardian in J.D.S.'s case would have more authority than simply representing the fetus in court.

nor wanted to have an abortion without parental consent.[158] In *T.W.*, the trial court appointed counsel for the pregnant mother and a guardian *ad litem* for the fetus in its first trimester.[159] After the trial court found that the parental consent statute was unconstitutional, the guardian *ad litem* for the fetus appealed to the Florida Supreme Court and filed motions to stop the abortion, which were unsuccessful.[160] The Florida Supreme Court held that appointing a guardian for the fetus was "clearly improper," and that only the Florida Attorney General could pursue the appeal.[161]

In *Lefebvre v. North Broward Children's Hospital*,[162] the trial court appointed an attorney *ad litem* (guardian *ad litem*) to represent a fetus during a situation in which the mother was nine-and-one-half weeks pregnant and suffered from severe psychosis.[163] The hospital wanted to perform an abortion, and the fetus's guardian favored this because he felt "it would be in the best interests of both [the mother] and the fetus."[164] The court allowed the abortion.[165] The trial court did not follow *T.W.*, and the appel-

158. *T.W.*, 551 So. 2d at 1190. The Florida Supreme Court declared a parental notification statute to be unconstitutional because it infringed on the minor's right to privacy, under the Florida Constitutional right to privacy. *Id.* at 1194. The Florida Supreme Court decided this case prior to *Casey*, so it contains a great deal of trimester analysis that was valid in federal law under *Roe*, but not *Casey*. *See id*. (stating that a fetus is viable at the end of the second trimester). However, Florida still follows the trimester framework analysis from *Roe. See supra* n. 128 (discussing a Florida statute espousing the trimester framework).

159. 551 So. 2d at 1189.

160. *Id.*

161. *Id.* at 1190.

162. 566 So. 2d 568 (Fla. 4th Dist. App. 1990).

163. *Id.* at 569. The trial court "heard testimony from several [h]ospital employees, who confirmed that [the mother] had refused to eat, threw food around her room, bit, scratched[,] and spit at hospital employees, escaped from her restraints, busted through a wall[,] and attempted to place pieces of plaster in her vagina and to eat her feces." *Id.* at 569–570.

164. *Id.* at 570. It may seem odd that a guardian for a fetus would advocate for an abortion, but in a situation in which the mother is uncontrollable and taking drugs that could harm the fetus, a guardian may feel that it is in the best interest of the fetus not to have to endure the ramifications of the mother's health problems. *See id*. at 569 (describing the mother's health problems). Also, the mother in this case was a little over two months pregnant, so the fetus would not have been viable outside of the womb. *Id*.

165. *Id.* at 570. The Fourth District Court of Appeal reversed the trial court's decision to allow the abortion because, under § 744.3725 of the Florida guardianship statutes, "the court must . . . '[p]ersonally meet with the incapacitated person to obtain its own impression of the person's capacity, so as to afford the incapacitated person the full opportunity to

late court did not address the issue;[166] therefore, this case suggests that the *T.W.* holding, indicating that guardians for fetuses are improper, may be very narrow in Florida law.

B. Other States' Uses of Guardians for Fetuses

Some states appoint guardians for fetuses; these states include Alabama, Georgia, Massachusetts, New York, and Wisconsin.[167] Other states, such as Illinois, do not favor guardians for fetuses in any situation.[168]

In *Jefferson v. Griffin Spalding City Hospital Authority*,[169] the Juvenile Court of Butts County, Georgia, appointed counsel for a fetus (calling the fetus "a child") and granted temporary custody of the fetus to the State "to make all decisions, including giving consent to the surgical delivery" of the child.[170] A mother in her thirty-ninth week of pregnancy refused to deliver her baby by surgery and also refused to accept a blood transfusion because of religious beliefs.[171] Doctors stated that they were ninety-nine percent certain that the baby would not survive a natural childbirth, and that the chances of the mother's survival were fifty percent.[172] Her examining doctor felt that, if the woman had the baby by cesarean section, there was almost a one-hundred-percent chance of both the baby and the woman surviving.[173] The Georgia Supreme

express his personal views or desires with respect to the judicial proceeding and issue before the court.'" *Id.* at 570–571 (quoting the Florida statute). The appellate court did not address the issue of the guardian *ad litem* for the fetus. *See generally id*. at 570–571 (stating the court's opinion).

166. *Id*. at 569–570 (mentioning the trial court's appointing the fetus's guardian only in the facts of the case at the trial level, and not in the appellate court's analysis).

167. *See generally In re Anonymous*, 805 So. 2d 726, 727 (Ala. Civ. App. 2001) (noting the trial court considered the testimony of "the Guardian *ad litem* [for the fetus]"); *Jefferson v. Griffin Spalding County Hosp. Auth.*, 247 S.E.2d 457, 459 (Ga. 1981) (noting that an attorney was appointed to "represent[ ] the interests of the unborn child"); *Commonwealth v. Rocha*, 784 N.E.2d 651, 654 (Mass. App. 2003) (stating that guardians *ad litem* were appointed "for the victim and the fetus"); *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 900 (N.Y. App. Div. Special Term Dept. 1985) (appointing a physician as the "guardian of the unborn child"); *St. ex rel. Angela M.W. v. Kruzicki*, 541 N.W.2d 482, 486 (Wis. App. 1995) (referring to "the fetus'[s] guardian *ad litem*"), *rev'd*, 561 N.W.2d 729, 731 (Wis. 1997).

168. *E.g. In re Fetus Brown*, 689 N.E.2d 397, 406 (Ill. App. 1st. Dist. 1997) (holding that the trial court "erred in appointing . . . [a] guardian *ad litem* for [the fetus]").

169. 274 S.E.2d 457.

170. *Id.* at 459.

171. *Id.* at 458.

172. *Id*.

173. *Id.*

Court found that "the State has an interest in the life of this unborn, living human being,"[174] and that the State's compelling interest in the viable baby's life outweighed the intrusion to the mother because the lives of the mother and the baby were inseparable at that time.[175]

Wisconsin is another state in which a state court has appointed a guardian for a fetus.[176] In *State ex rel. Angela M.W. v. Kruzicki*,[177] a Wisconsin court of appeals held that a juvenile court could "issue a protective custody order for a viable fetus in order to protect the fetus from the effects of its mother's drug use."[178] The mother was five months pregnant when her doctor suspected drug use.[179] Her doctor urged her to enter voluntary drug treatment, which she did not do; when she was absent from scheduled doctor's appointments towards the end of her pregnancy, her doctor notified county authorities.[180] The Waukesha County Department of Health and Human Services asked the juvenile court to take the fetus into custody under Wisconsin's Child Welfare Statute.[181] After hearing oral arguments from various parties, including a guardian *ad litem* for the fetus, the court reasoned that the fetus was a neglected child for purposes of Wisconsin's Child Welfare Statute.[182] The juvenile court therefore could "detain the fetus's mother against her will."[183] The Wisconsin Supreme Court

174. *Id*. at 460.

175. *Id.* at 458. For an in-depth analysis of a mother's rights versus her fetus's rights regarding compelled cesarean sections, see Joel Jay Finer, *Toward Guidelines for Compelling Cesarean Surgery: Of Rights, Responsibility, and Decisional Authenticity*, 76 Minn. L. Rev. 239 (1991).

176. *See Angela M.W.*, 541 N.W.2d at 486 (referring to the fetus's guardian *ad litem*'s response to Angela M.W.'s petition).

177. *Id*. at 482.

178. *Id*. at 485; A. Michael Lee, Student Author, State Ex Rel. Angela M.W. v. Kruzicki*: The Wisconsin Court of Appeals Introduces a Dangerous New Weapon in the Battle over "Fetal Rights"*, 30 Ga. L. Rev. 1183, 1185 (1996). For an in-depth discussion advocating against the criminalization of women's reckless conduct during pregnancy, see Student Author, *Maternal Rights and Fetal Wrongs: The Case against the Criminalization of 'Fetal Abuse'*, 101 Harv. L. Rev. 994 (1988).

179. *Angela M.W.*, 541 N.W.2d at 485; Lee, *supra* n. 178, at 1186.

180. *Angela M.W.*, 541 N.W.2d at 485; Lee, *supra* n. 178, at 1186.

181. Wis. Stat. § 48.19(1)(c) (2003); *Angela M.W.*, 541 N.W.2d at 485; Lee, *supra* n. 178, at 1186.

182. *Angela M.W.*, 541 N.W.2d at 485; Lee, *supra* n. 178, at 1188.

183. *Angela M.W.*, 541 N.W.2d at 485; Lee, *supra* n. 178, at 1185. The juvenile court order declared that the fetus was to be held at a hospital for inpatient treatment and protection. Lee, *supra* n. 178, at 1186. The juvenile court later amended its order to keep the

reversed this decision, finding that a fetus is not a child for purposes of Wisconsin's Child Welfare Statute, but the Court did not address the issue of the lower court's appointing a guardian for the fetus.[184]

In Alabama, trial court judges have the option of routinely appointing guardians for fetuses during situations in which an unemancipated minor desires to obtain an abortion without parental consent.[185] For example, in 2001, in *In re Anonymous*,[186] a sixteen-year-old high-school student sought an abortion and "filed a petition seeking a waiver of parental consent."[187] The trial court appointed a guardian *ad litem* to argue on behalf of the fetus.[188] In another such case in 1998, *In re Anonymous*,[189] "the trial court judge appointed a guardian *ad litem* to represent the interests of the unborn fetus and permitted the guardian to cross-examine the minor [the mother of the fetus] at the waiver hearing."[190]

In New York, some courts have appointed guardians for fetuses in certain situations, such as when a pregnant mother refuses a blood transfusion.[191] In *In re Jamaica Hospital*,[192] a judge appointed a guardian for a fetus when the mother was eighteen weeks pregnant and refused a blood transfusion.[193] The woman's

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fetus at a drug treatment center that the mother had voluntarily entered. *Id.* at 1187.

184. *Angela M.W.*, 561 N.W.2d at 731.

185. Silverstein, *supra* n. 153, at 70. In Alabama, there are some parental involvement laws that call for the appointment of guardians *ad litem* for minors who seek abortions, but not for their fetuses. *Id.* at 77 (noting Ala. Code § 26-21-3; 4). Nevertheless, some judges regularly appoint guardians to speak on behalf of the fetuses in court. *Id.*

186. 805 So. 2d 726.

187. *Id.* at 726.

188. *See id*. at 727 (stating that the trial court considered the oral motion of the guardian *ad litem*).

189. 720 So. 2d 497 (Ala. Civ. App. 1998), *aff'd*, 720 So. 2d 497 (Ala. 1998).

190. Silverstein, *supra* n. 153, at 70. The guardian asked the girl whether she was acquainted with the Bible and whether she knew that, if she had the abortion, she would be killing her own child. *Id.* Because the guardian represents the fetus, this situation is essentially one of the fetus questioning its mother while the mother is on the stand. *Id*. The judge also permitted the guardian to put pro-life witnesses on the stand "to testify on behalf of the fetus. The hearing lasted nearly four hours." *Id.* Most waiver hearings take under thirty minutes. *Id.* at 83. Interestingly, although the judge did not feel that a waiver of parental consent was in the best interest of the minor or the fetus, the judge stated that his findings in that regard were not determinative, so he granted the waiver. *Id*.

191. *Jamaica Hosp.*, 491 N.Y.S.2d 898.

192. 491 N.Y.S.2d 898.

193. *Id.* at 899–900. The trial judge appointed one of the mother's doctors "as special guardian of the unborn child and ordered him to exercise his discretion to do all that in his medical judgment was necessary to save [the fetus's] life, including the transfusion of

doctor believed that the mother and the fetus were in mortal danger because of the situation.[194] Because the judge considered the fetus to be potentially viable, he held a bedside hearing.[195] The judge recognized that, because the fetus was not definitely viable, the State's interest in protecting the fetus's life "would be less than 'compelling' in the context of the abortion cases."[196] However, because the case did not involve an abortion, "the state ha[d] a highly significant interest in protecting the life of a mid-term fetus, which outweighs the patient's right to refuse a blood transfusion."[197]

In contrast, in *In re Klein*,[198] a New York appellate court held that the trial court was correct in denying a petition for a legal guardian of a nonviable fetus.[199] The court stated that it is improper for a nonviable fetus to have a guardian because a nonviable fetus is not a "person;"[200] therefore, the state has no compelling interest in the potential life of a nonviable fetus.[201]

In Massachusetts, a man was convicted of raping and impregnating his severely mentally disabled twenty-one-year-old sister.[202] A Probate and Family Court judge appointed guardians *ad litem* for the young woman and her unborn child after the rape, but the court ordered an abortion.[203] The Massachusetts Appeals Court did not address the issue of the guardian for the fetus in its opinion affirming the defendant's conviction.[204]

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blood into the mother." *Id.* at 900.

194. *Id.* at 899.

195. *Id.*

196. *Id.* at 900.

197. *Id.*

198. 538 N.Y.S.2d 274 (N.Y. App. Div. 2d Dept. 1989).

199. *Id*. at 275. A nonviable fetus is one that is less than twenty-four weeks old, according to this New York appellate court. *Id*.

200. *Id*. The court cited *Roe* for this proposition, stating that "[t]he State has no compelling interest in the protection of the fetus prior to viability, since the mother's constitutional right to privacy, which includes the right to terminate her pregnancy, is paramount at that stage." *Id*. (noting that *Roe* held that a non-viable fetus is not legally recognized as a person).

201. *Id.*

202. *Rocha*, 784 N.E.2d at 653.

203. *Id.* at 654.

204. *Id*. This is typical of many cases involving guardians for fetuses. *See supra* nn. 169–197 (mentioning cases in which courts have appointed fetal guardians). The issue at hand is usually not the appointment of a guardian for the fetus, so if the appellate court mentions the issue at all, it is only in passing. *Id.*

Another Massachusetts case involved court-appointed counsel for a fetus. In *In re Jane A.*,[205] a probate court judge had to determine whether a mentally disabled pregnant woman would have consented to an abortion if she were competent.[206] The judge appointed various individuals to examine the situation from different points of view, including

> a temporary guardian with authority concerning medical issues; counsel for [the mentally disabled woman]; a guardian *ad litem* "to investigate and report on the substituted judgment question with respect to the abortion;" a guardian *ad litem* "to oppose a determination that the ward, if competent, would choose to have an abortion;" and counsel to represent the fetus.[207]

The individuals advocating for the ward expressed an opinion that the pregnancy should be terminated, but the probate judge decided otherwise.[208] The judge reasoned that the mentally disabled woman would suffer the same psychological harm regardless of whether she continued with the pregnancy or not.[209]

The Massachusetts Appeals Court reversed the probate judge's decision after mentioning that the probate judge "was conscientious in appointing persons who would examine the question from various points of view," including the guardian for the fetus.[210] The court reasoned that the judge must take the ward as the judge finds her, and it would be impossible for the ward, in her mental state, to continue with the pregnancy without causing herself irreparable harm.[211]

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205. 629 N.E.2d 1337 (Mass. App. 1994).

206. *Id.* at 1338.

207. *Id*. at 1338 n. 1 (quoting the probate court judge's decision) . The woman's condition involved "agitated and assaultive behavior," including kicking, biting, and ripping her clothes off. *Id.* at 1339. She did not understand what pregnancy meant because sometimes she would acknowledge that there was a baby inside her, and other times, she would deny it. *Id.* The trial court judge found it "fruitless" to determine what the woman wanted regarding the pregnancy because sometimes she would say she wanted to keep the baby inside her, and other times, she would say she wanted to have the "baby stop growing inside my belly." *Id.*

208. *Id*. at 1339.

209. *Id.* at 1339–1340.

210. *Id.* at 1338 n. 1.

211. *Id.* at 1340.

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Some states are cautious or downright hostile toward the idea of appointing guardians for fetuses.[212] In *In re Fetus Brown*,[213] an Illinois appellate court struck down the trial court's appointment of a "temporary custodian" for a viable fetus when its mother refused to consent to a blood transfusion, even though the mother and the fetus only had a five-percent chance of survival without the transfusion.[214]

Over a decade earlier, however, in *In re Estate of D.W.*,[215] an Illinois trial court appointed a guardian *ad litem* for a nonviable fetus when a mother wanted to obtain an abortion for her eighteen-year-old, severely mentally disabled daughter whom the mother discovered was pregnant.[216] Doctors testified that the pregnancy would pose serious risks to the daughter, and the guardian *ad litem* for the fetus presented no evidence to the contrary.[217] The trial court held that medical necessity must be present before a guardian (the woman's mother) could consent to an abortion for the ward, but the Illinois Appellate Court reversed this judgment and allowed the guardian to consent to the abortion.[218]

New Jersey has also addressed the issue of a guardian for a nonviable fetus. In *In re D.K.*,[219] a Superior Court in New Jersey declared that the appointment of a guardian for a nonviable fetus of eight to ten weeks was improper.[220] *D.K.* is similar to J.D.S.'s

212. Illinois is one of these states. *See Fetus Brown*, 689 N.E.2d at 399, 406 (holding that the state cannot override a mother's refusal of blood transfusions even though she is eight-and-a-half months pregnant, and the appointment of a guardian for a fetus in this situation is improper).

213. *Id*. at 397.

214. *Id.* at 399, 405. The court relied on *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. 1st Dist. 1994), which held that the state could not override a mother's refusal of a cesarean section even though she was thirty-five weeks pregnant and the viable fetus would most likely die without the surgery. *Fetus Brown*, 689 N.E.2d at 405 (citing *Baby Boy Doe*, 632 N.E.2d at 326–327). The trial court in *Baby Boy Doe* appointed a guardian *ad litem* for the fetus. 632 N.E.2d at 328. The *Fetus Brown* court also relied on *Stallman v. Youngquist*, 531 N.E.2d 355 (Ill. 1988), which declared that "in Illinois, a fetus cannot have rights superior to those of its mother . . . thus . . . a pregnant woman owes no legally cognizable duty to her developing fetus." *Fetus Brown,* 689 N.E.2d at 401 (quoting *Stallman*, 531 N.E.2d at 361).

215. 481 N.E.2d 355 (Ill. App. 1st Dist. 1985).

216. *Id.* at 355–356.

217. *Id.* at 356.

218. *Id.* at 357.

219. 497 A.2d 1298 (N.J. Super. Ch. Div. 1985).

220. *Id.* at 1301–1302.

case because the mother in *D.K.* suffered from schizophrenia, and the guardian that the trial court appointed for the fetus sought to restrain a hospital from treating the mother with any medication that could be harmful to the fetus.[221] The New Jersey court held that "[t]he appointment of a guardian for the fetus, prior to its viability, is . . . improper."[222]

This assortment of cases from various states demonstrates the disparity between courts when appointing guardians for fetuses in various situations. The guardian issue was also not the main issue of these cases on appeal.[223] Because of this inconsistency, the Florida Legislature should provide specific statutory guidelines for Florida courts to follow if a situation like J.D.S.'s comes before them again.[224]

VI. CAN COURTS APPOINT GUARDIANS FOR VIABLE FETUSES IN THE LIMITED CIRCUMSTANCES OF A SITUATION LIKE J.D.S.'S?

This Part of the Comment will show that the state has a compelling interest in the potential life of the fetus after the point of viability.[225] Because of this compelling interest, Florida courts should be able to appoint a guardian for a viable fetus when the mother is mentally incompetent, completely unable to make deci-

221. *Id.* at 1300. The court was determining whether the woman should abort the fetus. *Id*.

222. *Id.* at 1302. An appointment of a guardian prior to viability "permits a third person to control the fetus, contrary to *Roe v. Wade.*" *Id.* The court also noted that an additional problem with the appointment of a guardian for a fetus is that there is no provision for an appointment in New Jersey law. *Id*. This is similar to the court's holding in *J.D.S.*, in which the court heavily relied on the legislature's role in creating a guardianship law such as one that would cover J.D.S.'s fetus. 864 So. 2d at 538.

223. *E.g. Rocha*, 784 N.E.2d at 656–658 (stating that the main issue in the case was whether DNA evidence establishing paternity was unduly prejudicial); *Jamaica Hosp.*, 491 N.Y.S.2d at 899–900 (finding the main issue to be whether a mother's refusal of a blood transfusion would be valid when her unviable fetus's life was in danger).

224. Florida courts may be able to appoint guardians for fetuses now without a statute from the Florida Legislature granting them this authority. *E.g. Lefebvre*, 566 So. 2d at 569. But the trial courts run the risk of an appellate court overturning these decisions, such as the *Fetus Brown* case. 689 N.E.2d at 400. Therefore, courts must confront sensitive, emotional issues like in J.D.S.'s situation with consistency.

225. *See Casey*, 505 U.S. at 870 (finding that the state's interest in potential life is compelling after viability, when there is a possibility of life outside the womb); *Roe*, 410 U.S. at 163 (recognizing that the state's interest in potential fetal life becomes compelling after the point of viability).

sions for herself, and in state custody. First, this Section will address the state's compelling interest in the potential life of the fetus. Second, it will discuss the "least intrusive means" requirement of the privacy doctrine.

A. Compelling Interest

The state has a compelling interest in protecting the potential life of a viable fetus.[226] In most situations, a competent mother can make decisions for herself, considering her own best interests as well as the best interests of the fetus.[227] This is not the case when the state appoints a guardian for a mentally incompetent, pregnant woman.[228] There is a conflict of interest present because the state appoints a guardian for the mother, but grants the viable fetus, who will most likely enter state custody upon birth, no voice.[229]

1. Conflict of Interest

There is a fiduciary relationship between a ward and a guardian.[230] Because of this, a guardian can consider only what is best for the ward's welfare, and not the fetus's welfare in a scenario like J.D.S.'s. This situation can present problems if the guardian is in the position of having to choose between the best interests of the ward and the best interests of the fetus. For example, J.D.S. was taking drugs that were potentially harmful to her fetus.[231] A

226. *Casey*, 505 U.S. at 846.

227. *See In re Unborn Child*, 683 N.Y.S.2d 366, 369 (N.Y. Fam. 1998) (noting that a pregnant mother generally wishes to ensure her fetus's health, but that a fetus may be harmed by a pregnant woman's decisions that may not have adverse effects on the mother herself).

228. This is because of the fiduciary relationship that is present between a guardian and a ward. Fla. Stat. § 744.446(1).

229. *J.D.S.*, 864 So. 2d at 547 (Pleus, J., dissenting).

230. Fla. Stat. § 744.446(1). A fiduciary relationship is defined as a duty "in that the guardian is required to act in good faith and with due regard to the needs of the vulnerable adult." *J.D.S.*, 864 So. 2d at 542 (Pleus, J., dissenting).

231. J.D.S. suffered from severe seizures. *Id*. at 536. A leading physician's text advises that "pregnant women with epilepsy should be given phenytoin, carbamazepine, or phenobarbital in the smallest effective dose and should be closely monitored." Mark H. Beers & Robert Berkow, *The Merck Manual of Diagnosis and Therapy* 2024 (17th ed., Merck Research Laboratories 1999). This is because seizures during pregnancy can cause birth complications. *Id*. The manual goes on to state, "[c]left palate; cardiac, craniofacial, or visceral abnormalities; nail and digit hypoplasia; and mental retardation have been increasingly reported in children of epileptic women taking anticonvulsants." *Id*. The Food

guardian for the fetus would be better able to inform an independent decision-maker, such as a court, of the harmful consequences these drugs could have on the fetus, as opposed to a guardian for the mother, who must consider only the mother's best interests.

There are other decisions that the guardian for a mother like J.D.S. must make as well, such as whether the mother should take certain drugs during childbirth, where the mother should give birth, whether doctors need to perform certain procedures during pregnancy because of the mother's mental condition, and other considerations that could have an effect on the fetus. Without a guardian to research and report facts on behalf of the viable fetus, the State is allowing a guardian, who can speak only on behalf of the mother, to decide what is best for both the mother *and* the fetus. The State is, in effect, cheating the incompetent mother out of a completely zealous advocate who will consider only the mother's best interests when making important health decisions.[232] Therefore, a separate guardian advocating the interests of the fetus is necessary to abate both a conflict of interest and an outright lack of representation for the fetus.

2. Public Policy

J.D.S.'s caretaker's husband invaded J.D.S.'s privacy in one of the worst ways imaginable—he raped her in her own home.[233] To further exacerbate this tragedy, her caretakers failed to discover her pregnancy until the fetus was almost viable.[234] If caregivers

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and Drug Administration separates drugs into five categories: A, B, C, D, and X. WebMD Health, *Bad Medicines for Expectant Moms*, http://my.webmd.com/content/pages/2/3608_1029.htm (accessed May 30, 2004). Drugs in Categories A, B, and C are generally safe if taken during pregnancy. *Id.* Drugs in Category D can have potential adverse effects on a fetus, but occasionally the drug's benefit will outweigh the risk to the fetus. *Id.* In such cases, "maternal condition and treatment needs . . . should be considered, weighing the benefit to the mother with the risk to the fetus." *Id.* Category X drugs cause malformations in fetuses, and there is no benefit to taking these drugs during pregnancy. *Id.* Examples of Category X drugs are thalidomide and alcohol. *Id*.

232. This would be the case if Judge Kirkwood's suggestion, "[t]he pregnancy necessarily will be a very important factor to the guardian to be considered in determining [the mother's] overall health care needs," is followed by pregnant incompetent women's guardians. Or. Denying Verified Pet., *supra* n. 20, at 5.

233. Canedy, *supra* n. 4.

234. *J.D.S.*, 864 So. 2d at 536, 537 n. 5. For additional facts concerning J.D.S., see text accompanying *supra* notes 7–8.

had noticed J.D.S.'s condition before her fetus was almost at the point of viability, perhaps she could have obtained an abortion without the State's compelling interest in the life of the fetus being a dominant factor.[235]

J.D.S. is not alone; a situation like J.D.S.'s may happen again, and the State should start ensuring at the point of viability that a fetus resulting from the rape of an incompetent woman in state custody will have a chance at a better life than the mother has had. This situation may involve hearings to determine whether the mother's healthcare is harming the fetus, and whether alternatives are available that could be mutually beneficial to the mother and the fetus. If such a situation exists, the independent decision-maker should hear from representatives of the mother *and* the fetus to best determine what action to take.

B. The Appointment of a Guardian for a Viable Fetus Is Not an Undue Burden on the Mother under Federal Law; It Is Also the Least Intrusive Means to Recognize the State's Compelling Interest in Protecting a Viable Life under Florida Law.

A state may take any action it deems necessary to protect the potential life[236] of a fetus, as long as the restriction it causes on the mother is not an undue burden.[237] While the appointment of a guardian for the fetus of a normal, competent mother would definitely be an undue burden, the situation is different in a J.D.S.-type situation. A normal, competent mother can make decisions for herself and for her fetus, taking both her own best interests and the fetus's best interests into account.[238] This Comment has noted certain cases in which authorities have intervened when the fetus's best interests were in danger, even when the mother was fully competent.[239] The United States Supreme Court held in

235. *Casey*, 505 U.S. at 870.

236. While one could argue that *Casey* applies only in abortion situations, the state's compelling interest in the potential life of a fetus could also mean protecting a viable fetus from harmful drugs or other practices that could possibly cause the fetus's death. *See Jamaica Hosp.*, 491 N.Y.S.2d at 899–900 (addressing a pregnant mother's refusal of a blood transfusion when that decision endangered her fetus).

237. *Casey*, 505 U.S. at 876–877.

238. *See Unborn Child*, 683 N.Y.S.2d at 369 (noting that while a mother usually tries to ensure the health of her unborn child, many times, mothers take actions that adversely affect the child, but are harmless to the mother).

239. *See supra* nn. 155–222 and accompanying text (describing cases from numerous

Casey that the state has a legitimate interest from the beginning of a pregnancy to protect the health of the mother and the life of the fetus.[240] The United States Supreme Court and the Florida Supreme Court have noted that the state's interest in the fetus's potential life becomes compelling at the point of viability.[241] J.D.S.'s fetus was viable at the time at which a potential guardian filed a petition to become the fetus's guardian.[242] The law that this Comment proposes would allow courts to appoint guardians for viable fetuses only in a situation like J.D.S.'s—in which the State appoints a guardian for both the mother because of mental incapacity, and the fetus, and in which the fetus would enter state custody upon birth.[243]

To avoid undue infringement of the mother's right to privacy, viability is the logical point at which a court should appoint a guardian for a fetus in a situation like J.D.S.'s.[244] One could argue that the state has a compelling interest in the fetus's health before viability because *Roe* and *Casey* discuss only the state's compelling interest in fetal *life*; there is no mention of fetal *health*.[245] Therefore, it would be allowable for a court to appoint a guardian for a fetus as soon as the mother's pregnancy is apparent, even if this is before viability, to ensure the fetus's health.[246] However, there may be problems with this analysis under Florida privacy law because, prior to viability,[247] there is no requirement of a threat to a mother's life or health in order for a mother to have an abortion.[248] In a court proceeding, prior to viability, to determine

states in which authorities intervened on behalf of fetuses).

240. *Casey,* 505 U.S. at 846.

241. *Id.*; *T.W.*, 551 So. 2d at 1193–1194.

242. Colarossi, *supra* n. 7.

243. The Court in *Casey* noted that, "[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." 505 U.S. at 870.

244. Viability is a flexible line to draw that can bend as technology makes the viability point earlier and earlier in a pregnancy. *Id*. at 872–873.

245. Ltr. from Thomas C. Marks, Jr., Prof., Stetson U. College of L., to Carrie Ann Wozniak, Author, *Comment at the L. Rev. Dinner*, 1–2 (Mar. 18, 2004) (on file with the *Stetson Law Review*).

246. *Id*. at 2.

247. Florida still espouses the trimester framework, which *Casey* abandoned, but this has not been the subject of litigation yet. *See* Fla. Stat. § 390.0111(1) (prohibiting abortion during the third trimester unless "termination of [the] pregnancy is necessary to save the life or preserve the health of the pregnant woman"); *Casey*, 505 U.S. at 872–873.

248. *See* Fla. Stat. § 390.0111(1) (mentioning the life-or-health-of-the-mother exception

if it is in the mother's best interest to have an abortion,[249] the presence of a fetal-guardian advocate may infringe on the mother's right to privacy more than Florida's strict right to privacy allows.[250] To avoid this constitutional problem, the Florida Legislature should allow an appointment of a guardian only after the fetus reaches viability.

The proposed statute must also allow for the mother's health to prevail over the State's interest in the fetus's life if necessary, in accordance with *Roe* and *Casey*.[251] The question in a scenario like J.D.S.'s is whether an abortion is truly necessary.[252] If the court is convinced that the mother's health is in danger and the mother needs to abort the pregnancy, this would be permissible under the proposed statute, in accordance with prior caselaw.[253] But after the point of viability, the fetus's guardian should be able to advocate the fetus's best interests in front of the court, with the mother's guardian presenting the mother's best interests. This

when outlawing abortion in the third trimester, but not before then).

249. Florida Statutes § 744.3215(4)(b)(2)(e) requires this type of proceeding when the mother is mentally incompetent.

250. *See supra* n. 103 (recognizing Florida's privacy right as inherently stringent).

251. These cases held that there must be an exception for the health of the mother when the state attempts to proscribe an abortion after viability. *Casey*, 505 U.S. at 879 (citing *Roe*, 410 U.S. at 164–165, and holding that states can proscribe abortion except "where it is necessary . . . for the preservation of the life or health of the mother"). This is partially why the United States Supreme Court, in *Stenberg v. Carhart*, declared a Nebraska statute outlawing partial-birth abortion unconstitutional. 530 U.S. 914, 929–930 (2000). The statute addressed only the life of the mother and not her health in its exception to the ban. *Id*. at 921–922.

252. *See id*. (stating that "doctors often differ in their estimation of comparative health risks and appropriate treatment"). There may also be a dilemma in which the mother's medication is not completely necessary to her health, but only increases her quality of life; but, at the same time, the medication has the potential to harm the viable fetus. Courts would have to decide on a case-by-case basis whether the mother should continue taking the medication after hearing from guardians for the mother and the fetus. The Author envisions a spectrum with the mother's interests on one side and the fetus's on the other, with the court deciding where on the spectrum the medication falls and whether the medication is appropriate during the pregnancy.

253. According to Florida Statutes § 744.3215(4), a guardian cannot consent to an abortion procedure for the ward without first getting permission from a court. When the guardian for the mother appears in court to gain this permission after the viability point in the pregnancy, the court would be able to hear from the guardian of the fetus as well, which would aid the court in determining whether an abortion really is necessary to protect the mother's health. *See* Fla. Stat. § 744.3725 (requiring the court to hear evidence from experts, to personally meet with the ward to gain a personal impression of the ward's desires, and to determine by clear and convincing evidence that the abortion is in the ward's best interests).

will aid the court in determining whether there is clear and convincing evidence that an abortion is necessary to protect the life or health of the mother.[254] Other than for the health or life of the mother, the State's interest in the fetus's potential life can outweigh the rights of the mother after the point of viability.[255]

A guardian for the viable fetus is the only nonburdensome means for the state to protect the fetus's interests. Without such a guardian, the State of Florida would let the mother's guardian, someone who can advocate only for the mother's interests, make decisions with which the fetus will have to live (or potentially die). J.D.S. had many health problems, and doctors may have been treating her with powerful drugs that could have been harmful to her fetus.[256] The fact that Baby Girl S was born normal does not make this point moot because other fetuses may not be as fortunate.[257] Drugs for the mentally incompetent can be harmful to a fetus, and the fetus could be at an increased risk of developing unnecessary abnormalities if it has no one to speak on its behalf.[258] What if a fetus is born with preventable abnormalities because another drug was available that the mother could have taken without the risk to the fetus? These are real concerns that the notion of privacy may be disguising under current law.

Appointing a guardian for a fetus is not an undue burden because the guardian would have a role similar to that of the mother's guardian.[259] In *J.D.S.*, Jennifer Wixtrom, who petitioned the court to be appointed as the fetus's guardian, proposed that "[t]he guardian will conduct her own analysis and review the ex-

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254. Florida Statutes § 744.3725 requires clear and convincing evidence to determine whether an abortion is necessary.

255. *Casey*, 505 U.S. at 877. In *Casey*, the United States Supreme Court held that

> [r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.

Id. Allowing a guardian to speak about consequences to the fetus's well-being would simply be a structural mechanism of this type.

256. *See supra* n. 231 (discussing drugs that a woman like J.D.S. may be taking to remedy her health problems but that could be detrimental to the health of her fetus).

257. *Id.*

258. *Id*.

259. Appellant's Initial Br. at 22, *In re Guardianship of J.D.S.*, 864 So. 2d 534 (noting the assertion that "the appointment of a guardian for the unborn child will do [nothing] more than create a 'structural mechanism' by which the state can express 'its profound respect for the life of the unborn'") (copy on file with the *Stetson Law Review*).

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pert[s'] analysis as to the proper care for the unborn child, which will then be presented to the trial court at the same time J.D.S.['s] guardian offers her report."[260] This would not cause the mother any additional harm. In fact, the fetus's guardian may assist the court in making the right decision by presenting succinct arguments to the court instead of having the court speculate as to how certain decisions would affect the fetus. The guardian would be no more than a "'structural mechanism' by which the state can express 'its profound respect for the life of the unborn.'"[261]

C. Is This a Slippery Slope towards More Rights for All Viable Fetuses?

Many people are concerned that, if a guardian is appointed for a fetus in a J.D.S.-type scenario, this would create a "slippery slope" that would lead to rights for all fetuses, even those of healthy, responsible mothers.[262] But a J.D.S.-type situation is self-limited because the State already has custody of the mother and will have custody of the fetus once it is born. This is not the case with normal pregnancies of mentally competent mothers. Special circumstances call for special action.

D. Recommendation

Because Florida has recently had difficulty in protecting mentally incompetent women who are in state custody,[263] the

260. *Id.*

261. *Id.* (quoting *Casey*, 505 U.S. at 877).

262. Many writers have written editorials on this case, referring to the infringement on abortion and privacy rights this case would cause if courts could appoint guardians in a *J.D.S.*-like situation. *See* Colb, *supra* n. 57 (stating that Governor Bush's actions amount to an assault on the ideals of our country); Jenelle Wilson, *Fetal Rights Undermine Privacy of Women*, The Battalion 2 (Texas A&M University) (Jun. 16, 2003) (opining that Jeb Bush vowed to force J.D.S. to continue her pregnancy "with complete disregard for what is best for her"); Feminist Majority Foundation Online, *Anti-Abortionists Target Mentally Retarded Rape Victims*, http://www.feminist.org/news/newsbyte/uswirestory.asp?id=7817 (May 29, 2003) (stating that "anti-abortion extremists" drew J.D.S. into the center of an abortion rights debate). Other pro-life writers have written editorials praising Governor Jeb Bush's actions as a step in the right direction towards fetal rights. *See* Connor, *supra* n. 57 (declaring that Jeb Bush acted in the most compassionate way possible in a "heart-wrenching situation").

263. *See supra* nn. 39–51 and accompanying text (describing situations in which mentally incompetent women in state custody were raped and impregnated).

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Florida Legislature should take certain measures to ensure that a mentally incompetent woman's fetus's best interests are considered after the fetus has reached the viability point in a pregnancy. The Legislature should add a provision to its guardianship statutes that allows a court to appoint a guardian for a viable fetus of a mentally incompetent woman in state custody. However, for the provision to be constitutional, there must be a statutory provision requiring the health and life of the mother to be the dominant factors to consider. Appointing a guardian for the fetus will allow a court to properly weigh both the mother's best interests and the fetus's best interests in determining such issues as the proper drugs the mother should be taking and whether it is in the best interest of the mother's health or life to obtain an abortion.

VII. CONCLUSION

The issue of fetal rights is a growing contemporary controversy that will not disappear in the near future because of increasing advances in technology.[264] While many people argue that any measure to protect a fetus chips away at the holding of *Roe*, there are situations that demand that a fetus's defenseless voice be heard, as J.D.S.'s story demonstrates. States, including Florida, have allowed for the appointment of guardians to speak on behalf of fetuses in various situations, and J.D.S.'s case qualifies in the same way. While a guardian for a fetus may infringe on the mother's right to privacy, a guardianship of this kind is the only way to further the State of Florida's compelling interest in the future life of the fetus in a situation like J.D.S.'s.

264. Rosenberg et al., *supra* n. 53, at 40.