DA. 5-4-93 047

Case No. 80, 311

In the

Supreme Court of the State of Florida

In re: Matter of Patricia Dubreuil,

Petitioner,

vs.

South Broward Hospital District,

Respondent.

On Discretionary Review
of the District Court of Appeal,
Fourth District — No. 90-1295

INITIAL BRIEF FOR PETITIONER

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Statement of the Case and of the Facts

1. Statement of the case

On April 6, 1990, Respondent South Broward Hospital District (hereafter the Hospital) petitioned the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County for a declaration of the Hospital's duty to administer blood transfusions to Petitioner Patricia Dubreuil (hereafter Mrs. Dubreuil) against her will. (App. 1-7)[1] That same day, the Circuit Court authorized the transfusions. The Circuit Court issued its written order several days later on April 11, 1990. (App. 8-18)

On April 12, 1990, Mrs. Dubreuil filed a motion for rehearing. (App. 19-25) Her motion was denied without hearing that same day. (App. 26) Notice of appeal of the Circuit Court's order was filed on May 10, 1990. On July 8, 1992, the District Court of Appeal of Florida, Fourth District, affirmed the Circuit Court's order in a 2-1 decision. (App. 27-49); see *In re Dubreuil*, 603 So. 2d 538 (Fla. 4th DCA 1992). On August 5, 1992, Mrs. Dubreuil petitioned this Court to accept discretionary jurisdiction to review the District Court's decision. Discretionary jurisdiction was accepted on January 25, 1993.

2. Statement of the facts

Around midnight of Thursday, April 5, 1990, Mrs. Dubreuil was admitted to the Hospital through the Hospital's emergency room in an advanced stage of pregnancy. Mrs. Dubreuil did not have a private obstetrician. (App. 9) By the early morning hours of Friday, April 6, it was determined that Mrs. Dubreuil was ready to give birth and that a Caesarean section

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[1] References are to the Appendix filed with *Petitioner's Brief on Jurisdiction*.

delivery was indicated. (App. 2-3, 9) Mrs. Dubreuil consented to the Caesarean section but withheld consent to the use of blood on the basis of her values and convictions as one of Jehovah's Witnesses.[2] (App. 4, 11, 27-28) The child was subsequently delivered by Caesarean section. (App. 3, 9)

After the delivery of the child, Mrs. Dubreuil experienced significant loss of blood and, in the opinion of her attending physicians, required blood transfusions to save her life. (App. 3-4, 10-11) Mrs. Dubreuil still refused to consent to the use of blood. (App. 11) Mrs. Dubreuil's mother, who also was one of Jehovah's Witnesses, supported her daughter's refusal. (App. 3-4, 10) Mrs. Dubreuil's husband, from whom she was separated, and Mrs. Dubreuil's two brothers did not support her refusal. (App. 4, 10-11) Neither her husband nor her brothers were Jehovah's Witnesses. In addition, Mrs. Dubreuil and her husband were the natural parents of three other minor children, all of whom lived with her. The children's names and ages were Cary, age 12; Tina, age 6; Tracy, age 4; and Michael, the newborn. (App. 3, 9-10)

Unsure of its rights, obligations and responsibilities under these circumstances, the Hospital petitioned the Circuit Court for an emergency declaration of the Hospital's authority or duty to administer blood transfusions to Mrs. Dubreuil despite her competent refusal. (App. 1-7) The hearing was held at approximately 3:00 p.m. on Friday, April 6. (App. 8) Counsel for both the Hospital and Mrs. Dubreuil were present but no formal testimony was

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[2] Upon admission, Mrs. Dubreuil executed various hospital forms including a general consent form which evidently included a consent to blood transfusions. However, when Hospital personnel indicated a desire to transfuse Mrs. Dubreuil, she expressed her religion-based refusal of blood.

taken as there was no substantial dispute over the underlying facts.[3] After hearing the arguments and representations of counsel, the Circuit Court, at approximately 3:30 p.m., ordered that Mrs. Dubreuil could be transfused as deemed necessary in the opinion of her attending physicians. (App. 16-18)

On April 11, 1990, the Circuit Court issued a written order reflecting its findings of fact and conclusions of law. (App. 8-18) On April 12, 1990, Mrs. Dubreuil filed a motion for rehearing asking the Circuit Court to set aside its April 6 order authorizing the transfusions. (App. 19-21) Mrs. Dubreuil's motion papers indicated that her extended family and friends would care for her children in the event of her demise. Mrs. Dubreuil also filed an affidavit in support of her motion repeating her unqualified refusal of blood and requesting nonblood management of her medical problems. (App. 22-25) The Circuit Court denied the motion for rehearing on April 12, 1990. (App. 26) Mrs. Dubreuil was subsequently discharged from the Hospital on April 18, 1990.

[3] During the hearing, counsel for the Hospital received a phone call from the Hospital indicating that Mrs. Dubreuil had again stated her firm refusal of blood. (App. 11-12, 29)

Summary of Argument

Patricia Dubreuil's refusal of blood was protected by her state constitutional rights of personal privacy and religious freedom and by her federal constitutional rights of bodily self-determination and religious freedom. The state's alleged interest in innocent third parties is nowhere expressed in the positive law of this state, has never been asserted by the state itself, and therefore did not override Mrs. Dubreuil's fundamental constitutional rights. The state's allegedly overriding interest in innocent third parties is the product of repeated dicta that finds its origin in the *Georgetown* case. The dangers inherent in the undisciplined, ad hoc exercise of the sovereign's *parens patriae* power exemplified by *Georgetown* show that the subordination of express constitutional rights is a matter best left to the legislative process. Until the legislature has fully considered the ramifications of such subordination, the constitutional rights of all citizens, including Mrs. Dubreuil, should be respected.

If Mrs. Dubreuil's fundamental state and federal constitutional rights were overridden by concerns about her minor children, the forcible administration of religiously abhorrent medical treatment was not the least intrusive means of protecting her children. The presence of Mrs. Dubreuil's husband, mother and brothers showed that there were less intrusive means available to protect her children.

And finally, if Mrs. Dubreuil's fundamental state and federal constitutional rights were overridden by concerns about her minor children, and if the forcible administration of religiously abhorrent medical treatment was the least intrusive means of protecting her children, the Hospital still did not carry its heavy burden of proof that Mrs. Dubreuil's children would be 'abandoned.' The District Court created a presumption of abandonment that unconstitutionally relieved the Hospital of its heavy burden of proof.

ARGUMENT

1. A single adult's refusal of allegedly life-saving medical treatment does not constitute abandonment of her dependents under Florida law

The substantive question at the heart of this appeal is whether a single adult's constitutional and common law right to control what is done to her body abates because she has minor children. Stated more broadly, do single adults with dependents have lesser rights of personal privacy, bodily self-determination and religious freedom than all other Florida citizens? The District Court ruled that because of Mrs. Dubreuil's status as a separated parent with minor children, her refusal of allegedly life-saving blood transfusions was tantamount to an abandonment of her children. Thus, according to the District Court, Mrs. Dubreuil's constitutional rights of personal privacy, bodily self-determination and religious freedom were subordinated to 'the state's' interest in her children and she was forced to submit to medical treatment against her will.[4] Petitioner submits that her right to refuse medical treatment was protected by her state and federal constitutional rights and that no interest of 'the state' in the protection of innocent third parties nor any interest of the Hospital was compelling enough to override her rights.

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[4] As more fully discussed at pages 10 to 12 of this brief, the State of Florida has never appeared in nor asserted any interest in this case. Thus, discussion of 'the state's' interest must be qualified in view of this reality.

a. Mrs. Dubreuil's fundamental state and federal constitutional rights protected her refusal of treatment

i. Florida's constitutional guarantee of personal privacy

In construing Florida's constitutional guarantee of personal privacy, art. I, § 23, Fla. Const., this Court has said that "a competent person has the constitutional right to choose or refuse medical treatment and the right extends to all relevant decisions concerning one's health." *In re Guardianship of Browning*, 568 So. 2d 4, 11 (Fla. 1990). Thus, Mrs. Dubreuil's competent refusal of blood was protected by her state constitutional right of personal privacy.

ii. Florida's constitutional guarantee of religious free exercise

When a person's religious convictions provide the motivation or basis for her refusal of medical treatment, the Florida Constitution's guarantee of religious free exercise, art. I, § 3, Fla. Const., also protects that refusal of treatment. *Public Health Trust v. Wons*, 541 So. 2d 96 (Fla. 1989). Thus, Mrs. Dubreuil's refusal of blood was protected by her state constitutional right of religious freedom.

iii. Fourteenth Amendment liberty interest in bodily self-determination

In *Cruzan v. Missouri Department of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990), the United States Supreme Court said it was indisputable that "the Due Process Clause [of the Fourteenth Amendment] protects an interest in life as well as an interest in refusing life-sustaining medical treatment." *Id.* at 281, 110 S. Ct. at 2853, 111 L. Ed. 2d at 243; *see also id.* at 278, 110 S. Ct. at 2851, 111 L. Ed. 2d at 241 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical

treatment may be inferred from our prior decisions.") In *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990), the Supreme Court said that prison inmates suffering from mental disorders possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Id.* at 221-22, 110 S. Ct. at 1036, 108 L. Ed. 2d at 198. The Supreme Court also observed that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Id.* at 229, 110 S. Ct. at 1041, 108 L. Ed. 2d at 203.[5] Mrs. Dubreuil submits that her refusal of blood was protected by her Fourteenth Amendment liberty interest in controlling what is done to her own body.

iv. First Amendment right of religious free exercise

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. This injunction applies to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1218 (1940). It applies to state judicial as well as state legislative action. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463, 78 S. Ct. 1163, 1172, 2 L. Ed. 2d 1488, 1500 (1958).[6] Although religious practices do not enjoy the

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[5] *See also* Youngberg v. Romeo, 457 U.S. 307, 315, 102 S. Ct. 2452, 2458, 73 L. Ed. 2d 28, 37 (1982) ("the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause"); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045 (1923) (liberty guaranteed by Fourteenth Amendment includes "freedom from bodily restraint").

[6] *Cf.* Shelley v. Kraemer, 334 U.S. 1, 15, 20, 68 S. Ct. 836, 843, 845, 92 L. Ed. 1161, 1181, 1184 (1948) ("judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment . . . [and] is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy").

same absolute protection as religious beliefs, *Braunfeld v. Brown*, 366 U.S. 599, 603, 81 S. Ct. 1144, 1146, 6 L. Ed. 2d 563, 566-67 (1961), only those religious practices which pose some "substantial threat to public safety, peace or order" are without the protection afforded by the First Amendment. *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S. Ct. 1790, 1793, 10 L. Ed. 2d 965, 970 (1963).

An important aspect of Mrs. Dubreuil's religion-motivated refusal of blood is that her refusal is really a non-act or refusal to act rather than an affirmative act. The distinction between nonfeasance and misfeasance, or omission and commission, is important. Whereas states have exercised their police power to limit or prohibit individual action motivated by religion to prevent harm to public health, safety or welfare, *see, e.g., Reynolds v. United States*, 98 U.S. 145, 167, 25 L. Ed. 244, 250-51 (1878) (prohibition of the "positive act" of polygamy); *Harden v. State*, 216 S.W.2d 708 (Tenn. 1948) (prohibition of religious snake handling), there is no precedent for prohibiting an individual's religion-motivated inaction when there is no grave and pressingly imminent danger to the public. *See* Note, *The Refused Blood Transfusion: An Ultimate Challenge for Law and Morals*, 10 Nat. L.F. 202, 207-09 (1965); Comment, *The Right to Die—A Comment on the* Application of the President and Directors of Georgetown College, 9 Utah L. Rev. 161, 163-68 (1964).

"Where the religiously grounded 'action' is a refusal to act rather than affirmative, overt conduct, the State's authority to interfere is virtually non-existent except only in the instance of the grave and immediate public danger." *In re Brown*, 478 So. 2d 1033, 1037 (Miss. 1985). "[W]e must not confuse the issue of governmental power to regulate or prohib-

it conduct *motivated by religious beliefs* with the quite different problem of governmental authority to compel behavior *offensive to religious principles*." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 250, 83 S. Ct. 1560, 1586, 10 L. Ed. 2d 844, 874 (1963) (Brennan, J., concurring).

> [T]he common law has always been hesitant to impose liability for inaction as opposed to action. And one detects in constitutional decisions in a variety of contexts a sense of uneasiness, an intuition, that a compulsion to act contrary to individual judgment is undesirable when there is no external, compelling state interest to be served and no conflicting private right to be protected.

Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 Fordham L. Rev. 1, 9 (1975).

Mrs. Dubreuil submits that her refusal of blood was protected by her First Amendment right of religious free exercise. *See In re Estate of Brooks*, 205 N.E.2d 435 (Ill. 1965); *In re Milton*, 505 N.E.2d 255 (Ohio 1987).

v. Respect for fundamental constitutional rights

Mrs. Dubreuil's state and federal constitutional rights of personal privacy, bodily self-determination and religious freedom were fundamental and therefore deserving of zealous protection. As a matter of both state and federal constitutional law, fundamental constitutional rights may be burdened only upon a showing by the state that it has a "compelling" interest that can be protected or accomplished by no less intrusive means. *See, e.g., Browning*, 568 So. 2d at 13-14; *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141, 107 S. Ct. 1046, 1049, 94 L. Ed. 2d 190, 197-98 (1987). But before considering whether any law established 'the state's' allegedly compelling interest in Mrs. Dubreuil's children and, if so, wheth-

er the forcible administration of unwanted medical treatment was the least intrusive means of protecting that 'state' interest, the absence of the State of Florida as a party to this litigation must be addressed.

b. The State of Florida has never appeared in or asserted any interest in this case

As the District Court noted below, the "state" is not and has never been a party to this litigation. *Dubreuil*, 603 So. 2d at 541. Although this fact apparently did not trouble the District Court, Petitioner submits that it is of profound importance. This whole case turns on the alleged existence of an overriding state interest that the State of Florida has never articulated nor asserted in any case, including this one. Rather, it is the Hospital (whose interests can hardly be said to be identical to the state's) that has urged the allegedly overriding 'state' interest in innocent third parties. Although it seems trite to say so, the Hospital is not the state. Unlike the state, hospitals have no *parens patriae* interest in anyone, including the dependents of their patients. Agencies of the state and county commissioned to look out for and protect the interests of minor children and other dependents pursuant to comprehensive statutory schemes have such a *parens patriae* interest but hospitals do not. By what authority does a hospital take upon itself the sovereign's *parens patriae* responsibilities and seek non-statutory court orders to compel the nonconsensual treatment of competent adults?

Hospitals have "at best only a tangential interest in the outcome of [such] litigation and can have no legitimate individual stake in the institution . . . of the medical procedure." *In re Storar*, 420 N.E.2d 64, 77 (N.Y. 1981) (Jones, J., dissenting). A hospital has

> no legally protected interest in administering the transfusions. If there [is] a conflict of legal interests, it [is] not between those of the patient and those of the

> hospital but between the individual liberty of the patient and the interests of society, or between the interests of the patient as she [sees] them and the interests of the patient as the state . . . [sees] them. It would seem that the hospital [stands] not in the position of a party in interest in an adversary proceeding but in the position of one who is bringing a situation to the attention of the sovereign.

Comment, *The Right to Die—A Comment on the* Application of the President and Directors of Georgetown College, 9 Utah L. Rev. 161, 163 (1964).

If a single adult's refusal of treatment really amounts to the abandonment of her child, it should be the state and county child protection authorities and not some hospital that asserts the state's statutorily-defined *parens patriae* interests. Although hospitals are required to report cases of abuse, neglect or abandonment to local child protection authorities, *see* 14B Fla. Stat. Ann. § 415.504(1)(a), (b) (West 1986), hospitals have their own peculiar interests to worry about, chief among which are their liability concerns (especially in specialties as liability-conscious as obstetrics). *See, e.g.*, Rock, *Malpractice Premiums and Primary Cesarean Section Rates in New York and Illinois*, 103 Pub. Health Rep. 459 (1988); Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 Cal. L. Rev. 1951, 2021 (1986); *see also Families Often Prevail Over Patients' Advance Directives*, Medical Ethics Advisor, Jan. 1993, at 5, 6 ("The most obvious reason for the physicians' inclination to go along with the family's wishes [contrary to the patient's instructions] is that they are afraid of a lawsuit by the survivors.").

By presuming to act upon the sovereign's interests, hospitals can mask their true motives and use court orders to forcibly administer medical treatment as an "anticipatory defensive strategy with respect to possible future claims for malpractice." *In re Storar*, 420

N.E.2d at 77 (Jones, J., dissenting). "When decisions are made based on fear of liability, the focus of the decision shifts from a medical and ethical inquiry about the patient's interests to a strictly legal assessment of the provider's concerns." N.Y. State Task Force on Life and the Law, *Life-Sustaining Treatment* 9 (1988). When the state itself, through its statutory child protection schemes and resources, acts upon its *parens patriae* interests, hospitals avoid putting themselves in situations that create serious conflicts of interest. The State of Florida's absence from this case is a most troubling fact which, Petitioner submits, undermines the Hospital's assertion of 'the state's' allegedly compelling interest in the protection of innocent third parties.

c. No positive Florida law supported the Circuit Court's order

The combination of the individual's constitutional rights of personal privacy, bodily self-determination and religious freedom creates a formidable barrier to any state-authorized interference. *See Wons*, 541 So. 2d at 102 (Ehrlich, C.J., concurring specially). To surmount this barrier, the Hospital must point to some long-standing, clearly articulated law that establishes the state's compelling interest in overriding these fundamental constitutional rights. "[N]o showing merely of a rational relationship to some colorable state interest [will] suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S. Ct. 1790, 1795, 10 L. Ed. 2d 965, 972 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530, 65 S. Ct. 315, 323, 89 L. Ed. 430, 440 (1945)).

In the case of *In re Brown*, 478 So. 2d 1033 (Miss. 1985), the Mississippi Supreme Court considered whether or not a competent adult who was one of Jehovah's Witnesses had the right to refuse treatment. The patient had sustained a serious gunshot injury and was refusing blood transfusions that allegedly would be necessary to keep her alive. The state argued that its interest in prosecuting the attempted homicide and in keeping the patient alive as its only eyewitness overrode the patient's state constitutional rights of personal privacy and religious freedom. In considering these competing interests, the Mississippi high court analyzed the case as follows:

> We are presented [the patient's] claim of two rights—a right to the free exercise of her religious beliefs and a right of privacy. If those rights be held to include the right, as a competent adult, to refuse a blood transfusion, the matter is at an end, unless the State can point to some competing right vested in it by some valid rule which is a part of our positive law. Rights are subject to compromise only when they collide with conflicting rights vested in others.

Id. at 1036. The court ruled that the state's interests did not override the patient's personal privacy and religious freedom rights under the Mississippi Constitution.

A similar analysis was applied in the case of *Fosmire v. Nicoleau*, 551 N.E.2d 77 (N.Y. 1990), another case involving a competent refusal of treatment by one of Jehovah's Witnesses. In *Fosmire*, a hospital argued that a Witness mother's refusal of allegedly life-saving blood transfusions would result in the abandonment of her newborn son. Although the patient in *Fosmire* was married and therefore not a single, separated or divorced parent, the New York Court of Appeals, after determining that the prospective 'abandonment' alleged by the hospital was not based on New York's child abandonment statute, looked for any other positive New

York law establishing the superiority of 'the state's' alleged interest in preventing such non-statutory 'abandonment.' Finding no such law, the New York high court explained:

> [T]he hospital can point to no law or regulation which requires a parent to submit to medical treatment to preserve the parent's life for the benefit of a minor child or other dependent. If, as the hospital urges, the State has an interest in intervening under these circumstances, it has never expressed it.

Id. at 83. Petitioner submits that the same thing could be said about the law of this state.

i. Florida statutory law did not support the Circuit Court's order

In Florida, abandonment of a child is defined as:

> a situation in which the parent . . . of a child . . ., while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. If the efforts of such parent . . . to support and communicate with the child are, in the opinion of the court, only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned.

1A Fla. Stat. Ann. § 39.01(1) (West 1988).

In this case, no evidence was adduced that Mrs. Dubreuil had ever failed to provide for her children's support or communicate with them. The most that could be said in this regard is that the Hospital and Circuit Court were concerned that Mrs. Dubreuil's possible death would prevent her from supporting or communicating with her children. However, even if Mrs. Dubreuil would have died as a result of her refusal of blood, it cannot be said that she was "able" to avoid this eventuality or that she was 'willfully rejecting' her parental obligations. Because of her study of the Bible and her deeply held religious convictions, it would have been a grave sin for her to accept a blood transfusion.

As the dissenting judge pointed out below, if a parent does not 'abandon' or neglect her children when, motivated by religious belief, she refuses to consent to medical care allegedly necessary for her children, then a parent who, motivated by religious belief, refuses care for herself certainly cannot be said to have 'abandoned' her children. *In re Dubreuil*, 603 So. 2d at 545 (Warner, J., dissenting) (discussing *In re J.V.*, 516 So. 2d 1133 (Fla. 1st DCA 1987)); *see* Note, *Compulsory Medical Treatment: The State's Interest Re-Evaluated*, 51 Minn. L. Rev. 293, 301 (1966) ("The purpose of *parens patriae* is to provide a vehicle for the court to physically protect the child and not to protect a parent so he can in turn provide for his child.").

In addition, in view of the extreme 'remedy' fashioned by the Circuit Court, *i.e.*, the forcible invasion of Mrs. Dubreuil's body, there can be little question that this is not a case founded on Florida's child abandonment statutes. *See, e.g.*, 1A Fla. Stat. Ann. §§ 39.41(1)(a)(1), (a)(2), (a)(3); 39.41(3) (West Supp. 1993) (abandoned children are to be placed in the home of a relative or licensed child-care agency). As one writer pointed out, "the 'ultimate sanction' for child abandonment is court-ordered termination of parental rights. In refusing treatment, the parent is simply applying this ultimate sanction against himself or herself." Note, *The Refusal of Life-Saving Medical Treatment vs. The State's Interest in Preservation of Life: A Clarification of the Interests at Stake*, 58 Wash. U. L.Q. 85, 102 (1980). Petitioner submits that the proceedings below were utterly dehors Florida's comprehensive statutory scheme to protect children from abandonment, abuse, and neglect and that the 'remedy' of invading a parent's body goes way beyond anything expressly provided for or even contemplated by Florida's child protection statute.

ii. Florida decisional law did not support the Circuit Court's order

In the absence of any statutory basis for the nonconsensual violation of Mrs. Dubreuil's body, where, in the positive law of the State of Florida, did the courts below find authority to order Mrs. Dubreuil to submit to medical treatment against her will? Where did the Hospital, the Circuit Court, and the District Court come up with law establishing a state interest sufficient to override Mrs. Dubreuil's fundamental constitutional rights? The District Court and the Circuit Court relied on one of the four standard criteria that have been repeated numerous times in refusal-of-treatment cases. These four standard factors are: 1) preservation of life; 2) protection of innocent third parties; 3) prevention of suicide, and 4) maintenance of the ethical integrity of the medical profession. *See, e.g., Wons*, 541 So. 2d at 97.

These factors were originally enunciated by this Court in 1980 when it adopted the reasoning of the Fourth District Court of Appeal in *Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980), *aff'g* 362 So. 2d 160 (Fla. 4th DCA 1978). In the instant appeal, it is the second factor—the protection of innocent third parties—that the Hospital and Circuit Court relied on in part and that the District Court relied on in whole in overriding Mrs. Dubreuil's fundamental rights.[7] Before analyzing the origin of 'the state's' interest in innocent or dependent third parties, it is good to remember this Court's caution about these four standard factors in *Wons*:

> It is important to note that these factors are by no means a bright-line test, capable of resolving every dispute regarding the refusal of medical treatment. Rather, they are intended merely as factors to be considered while reaching the difficult decision of

[7] The Hospital and the Circuit Court also relied on the fact that Mrs. Dubreuil's husband did not agree with her refusal of blood. (App. 3-4, 17) The District Court majority discounted this factor as a basis for either its or the Circuit Court's decision. See 603 So. 2d at 541. The dissent below completely rejected this factor. See 603 So. 2d at 542 (Warner, J., dissenting).

> when a compelling state interest may override the basic constitutional rights of privacy and religious freedom.

541 So. 2d at 97; *accord In re Guardianship of Browning*, 568 So. 2d at 14.

As indicated above, the first expression of Florida's interest in protecting innocent third parties was dicta in the 1978 case of *Satz v. Perlmutter*.[8] The Fourth District Court in *Satz v. Perlmutter* credited its enumeration of the four standard state interests to the 'exhaustive discussion,' 362 So. 2d at 162, of this subject found in the Massachusetts case of *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977).

Just as dicta in *Satz v. Perlmutter* contained the first expression of Florida's interest in protecting innocent third parties, so too did dicta in *Saikewicz* contain the first expression of Massachusetts' interest in protecting innocent third parties.[9] In *Saikewicz*, Massachusetts' Supreme Judicial Court pointed to what it described as the "leading case" of *In re President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (Wright, J., in camera), *reh'g denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964), as the basis for its identification of the state's "parens patriae interest in protecting the patient's minor children from 'abandonment' by their parent." *Saikewicz*, 370 N.E.2d at 425.[10]

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[8] There were no innocent third parties in *Satz v. Perlmutter*.

[9] The profoundly retarded patient in *Saikewicz* had been institutionalized for over 50 years and had no third party dependents.

[10] Besides the protection of innocent third parties, the Massachusetts high court in *Saikewicz* also pointed to the *Georgetown* case as the source of two other of the four standard state interests in refusal of treatment cases, namely the prevention of suicide and the protection of the medical profession's integrity. These latter two interests are not at issue in this case and have generally been dismissed as unfounded in every case in which they have been asserted. *See, e.g.*, Wons, 541 So. 2d at 100 (Ehrlich, C.J., concurring specially) (prevention of suicide not implicated where patient has no desire

Thus, the very first expression of 'the state's' *parens patriae* interest in protecting minor children from 'abandonment' occasioned by their parents' refusal of medical treatment apparently is found in the *Georgetown* case.[11] Petitioner submits that this Court's dicta in *Satz v. Perlmutter* was not sufficient to establish the State of Florida's overriding interest in innocent third parties and that the centrality of the *Georgetown* case to the entire 'abandonment'/protection-of-innocent-third-parties rationale requires this Court's thorough and careful review of the *Georgetown* case as the source of this alleged 'state' interest.

iii. The Georgetown *case*

In *Georgetown*, hospital counsel orally petitioned a federal district court judge ex parte for an order authorizing the hospital to administer blood transfusions to an adult patient who evidently was *in extremis*. The district court judge denied the petition. Later that same afternoon, the same hospital counsel orally petitioned a single federal court of appeals judge, J. Skelly Wright, for the same relief. Acting alone in a *nisi prius* as opposed to an appellate capacity, Judge Wright went to the hospital and visited the patient and her husband, both of whom were Jehovah's Witnesses. Although Judge Wright found the patient "not in a mental condition to make a decision" and "hardly *compos mentis* at the time in question," 331 F.2d

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to die and death would come as result of natural as opposed to self-inflicted causes); Norwood Hosp. v. Munoz, 564 N.E.2d 1017, 1022 (Mass. 1991) (same); Fosmire v. Nicoleau, 551 N.E.2d 77, 82 (N.Y. 1990) (same); In re Conroy, 486 A.2d 1209, 1224 (N.J. 1985) (same); Browning, 568 So. 2d at 14 (ethical integrity of medical profession is least significant of four standard state interests and alone could never override patient's fundamental constitutional rights); Wons, 541 So. 2d at 100-01 (Ehrlich, C.J., concurring specially) (same).

[11] Unlike the patients in both *Satz v. Perlmutter* and *Saikewicz*, the patient in *Georgetown* did in fact have a minor child.

at 1007, 1008, he nevertheless ascertained that the patient viewed transfusions as being against her will. Since the patient was the mother of a minor child and either could not or would not consent to what Judge Wright had been told was life-saving treatment, Judge Wright granted an order allowing the transfusions.

Some five months later, Judge Wright issued an opinion explaining his actions. Although Judge Wright discussed a number of factors he believed supported his order, it is evident that it was the patient's status as the mother of a minor child that was the determining factor. On this point Judge Wright reasoned that the patient's refusal of blood was tantamount to the voluntary abandonment of her child. Citing no District of Columbia statute (or case law) as authority for his actions, Judge Wright opined that "the people" (presumably of the District of Columbia) would not allow such an abandonment. 331 F.2d at 1008.

As the denial of the *Georgetown* patient's petition for rehearing en banc shows, a majority of the judges on the United States Court of Appeals for the District of Columbia Circuit would have affirmed the federal district court's denial of the hospital's petition.[12] *See* 331 F.2d at 1010-18. The opinions in the denial of the petition for rehearing, especially those of Judge Miller and then-future Chief Justice Warren Burger, highlight the procedural peculiarity and dubious merits of Judge Wright's actions. 331 F.2d 1015. Case law and

[12] Nine of the 10 federal court judges who considered the *Georgetown* case would have denied the order. Only Judge Wright would have granted it.

commentary on both the procedural and substantive aspects of Skelly Wright's actions in the *Georgetown* case have been very harsh.[13]

The *Georgetown* case illustrates not only the wayward course a single judge may take when he is without the benefit of a full evidentiary hearing but also the need for judicial restraint and thorough, non-emotional examination of the interests at play. However understandable Judge Wright's actions may have been under the circumstances he let himself be pulled into, more must inform decisions to override fundamental, time-honored rights than a court's sincere but highly subjective views about what is right. "The humanitarian considerations of the court, of course, must be given high respect, but courts should decide cases on rules of law, not of conscience." 16 S.C. L. Rev. 552, 558 (1964).

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessary of order in the social life." Wide enough in all conscience is the field of discretion that remains.

B. Cardozo, *The Nature of the Judicial Process* 141 (1921) (footnote omitted).

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[13] See, e.g., Wons, 541 So. 2d at 99 n.1 (Ehrlich, C.J., concurring specially); Dubreuil, 603 So. 2d at 543-44 (Warner, J., dissenting); Fosmire v. Nicoleau, 551 N.E.2d at 83; In re Estate of Brooks, 205 N.E.2d 435, 439-40 (Ill. 1965); Rhoden, *Litigating Life and Death*, 102 Harv. L. Rev. 375, 381-82 & nn. 28-30 (1988); Jonsen, *Blood Transfusions and Jehovah's Witnesses*, 2 Critical Care Clinics 91, 97-99 (1986); Note, *Compulsory Medical Treatment: The State's Interest Re-evaluated*, 51 Minn. L. Rev. 293 (1966); Note, *The Refused Blood Transfusion: An Ultimate Challenge for Law and Morals*, 10 Nat. L.F. 202 (1965); 45 B.U. L. Rev. 125 (1965); 77 Harv. L. Rev. 1539 (1964); 26 Mont. L. Rev. 95 (1964); 16 S.C. L. Rev. 552 (1964); 39 Tul. L. Rev. 125 (1964); 113 U. Pa. L. Rev. 290 (1964); 18 Vand. L. Rev. 772 (1965); 41 Wash. L. Rev. 124 (1966). *See generally* Clarke, *The Choice to Refuse or Withhold Medical Treatment: The Emerging Technology and Medical-Ethical Consensus*, 13 Creighton L. Rev. 795, 816-17 (1980).

Although Judge Wright's example in *Georgetown* may afford courts the sense of security and 'precedent' they want in emergency proceedings of constitutional proportion, his actions were too unrestrained to be anywhere within the bounds of judicial discretion. Judge Wright's original lack of restraint and rigorous analysis should not be perpetuated on the basis of repeated dicta.

d. Florida's parens patriae *interest*

In all candor, *Georgetown* must be viewed as an extremely infirm foundation for 'the state's' supposedly overriding interest in innocent third parties. And to the extent that subsequent cases have directly or indirectly relied on the underlying authority of *Georgetown*, those cases too must be questioned. But regardless of the precedential value of *Georgetown* and its progeny, and regardless of the lack of any Florida statutes or decisional law on this point, does Florida's general *parens patriae* interest in the welfare of minor children or other dependents override a competent adult's fundamental constitutional rights of personal privacy, bodily self-determination and religious freedom? Put another way, does the state's 'raw' *parens patriae* power, 'unrefined' or 'untempered' by any legislative process or statutory scheme, displace express constitutional guarantees?

Former Chief Justice Warren Burger described the nature of the state's *parens patriae* authority as follows: "[T]he States are vested with the historic *parens patriae* power, including the duty to protect 'persons under legal disabilities to act for themselves.' The classic example of this role is when a State undertakes to act as '"the general guardian of all infants, idiots, and lunatics."'" *O'Connor v. Donaldson*, 422 U.S. 563, 583, 95 S. Ct. 2486, 2497,

45 L. Ed. 2d 396, 411 (1975) (Burger, C.J., concurring) (citations omitted). Similarly, this Court *In re Beverly*, 342 So. 2d 481 (Fla. 1977), explained that "[t]he *parens patriae* doctrine is used **as a basis for state laws** which protect the interests of minors, establish guardianships and provide for the involuntary commitment of the mentally ill." 342 So. 2d at 485 (emphasis added).

In *G.S. v. State*, 190 So. 2d 603 (Fla. 2d DCA 1966), a case in which the state itself was actually a party, the District Court reversed an order permanently committing three minor children to a child placement agency. Although the state and the trial court unquestionably were acting on the basis of the state's *parens patriae* power, they did not act "in strict conformity with legislative direction." *Id.* at 604. The District Court explained:

> The state, in its capacity as parens patriae, may direct the conditions or exigencies by which it can assume control of infants. These conditions, however, can be set by the legislature only. . . . [A] valid order . . . must be in strict conformance with legislative direction.
>
> The courts must follow the positive and unambiguous provisions of the statute.

Id. Thus, neither the state nor the trial court was free to innovate when acting on the basis of the sovereign's *parens patriae* authority.

Also instructive in this regard is the case of *AMI Anclote Manor Hospital v. State*, 553 So. 2d 199 (Fla. 2d DCA 1989). In this case, the state and county sought to protect hospitalized mentally ill patients who allegedly were being mistreated. Although the state and county claimed to be acting pursuant to the Florida Mental Health Act, they in fact had no statutory basis to act in the manner that they had notwithstanding their benevolent motives. The state and county nevertheless argued that regardless of the statute's provisions, they were "empow-

ered" to act "pursuant to the *parens patriae* doctrine." *Id.* at 200. The District Court was not persuaded. "The respondents' attempted use of this doctrine to bring this action has no foundation. When the legislature, acting pursuant to the state's *parens patriae* power, adopted Part I of the Florida Mental Health Act, it did not accord respondents power to bring this action." *Id.* (citations omitted). Again, non-statutory, ad hoc exercise of the state's *parens patriae* power by the state itself was not countenanced.

Petitioner submits that this Florida case law shows that exercise of the state's *parens patriae* power is not left to the broad discretion of the state or, much less, individual trial judges. Moreover, in each of the above cases, the state itself was actually party to the litigation and was at least purporting to act pursuant to a statutory scheme premised on the state's *parens patriae* interests. In the instant appeal, the state is not and has never been a party and no one, neither the Hospital or the Circuit Court, has claimed to be acting pursuant to any statutory scheme premised on the state's *parens patriae* interests. Indeed, such unrestrained exercise of state power is what the legislative process (and, Petitioner would submit, the judicial process) is designed to avoid.

The issuance of non-statutory '*parens patriae*' orders to protect innocent third parties essentially amounts to a non-legislative enlargement of Florida's child abandonment statute. Petitioner submits that if anyone were to propose amendments to Florida's child abandonment statute to include instances of parental refusal of medical treatment within the definition of abandonment and to include the forcible administration of that treatment as a remedy thereto, such a proposal would never survive the legislative process. But a single judge on a promi-

nent court, acting under the pressure of an emergent situation almost thirty years ago, has accomplished as much. This Court should not enshrine that judge's well-meaning but legally flawed actions as the law of this state.

e. Protecting innocent third parties

Despite the lack of any statutory, case law, or general '*parens patriae*' authority for the Circuit Court's order, is the protection of innocent third parties by means of nonconsensual violations of their providers' bodies sound and manageable as a matter of public policy? What are the implications of such a policy if it were to be consistently and evenly applied? Petitioner submits that when fully considered, the policy advanced by the Hospital and adopted by the courts below is inherently unsound and dangerous.

Any discussion of a plan to forcibly administer medical treatment to competent adults against their will must "begin with the premise that everyone has a fundamental right to the sole control of his or her person. . . . An integral component of self-determination is the right to make choices pertaining to one's health, including the right to refuse unwanted medical treatment." *In re Guardianship of Browning*, 568 So. 2d 4, 11 (Fla. 1990). Accordingly, the notion that a person's body may be invaded for the benefit of another person is "jarringly alien to the Anglo-American legal tradition." Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights?*, 10 Harv. Women's L.J. 9, 23 (1987). As the court said in *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (1978), a case in which a man suffering from aplastic anemia sought injunctive relief against his cousin, the only available donor of compatible bone marrow that allegedly was necessary to save the man's life:

> For our law to **compel** defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn.

10 Pa. D. & C.3d at 91 (emphasis in original).

Similar concerns were expressed by the District of Columbia Court of Appeals *In re A.C.*, 573 A.2d 1235 (D.C. 1990), a case in which a hospital, acting to protect an allegedly viable fetus, sought and obtained a court order to perform a Caesarean section upon a woman who had refused to submit to the procedure. In overturning the trial court's order, the appellate court observed:

> There are also practical consequences to consider. What if [the patient] had refused to comply with court order that she submit to a caesarean? Under the circumstances, she obviously could not have been held in civil contempt and imprisoned or required to pay a daily fine until compliance. Enforcement could be accomplished only through physical force or its equivalent. [The patient] would have to be fastened with restraints . . ., or perhaps involuntarily rendered unconscious by forcibly injecting her with an anesthetic, and then subjected to unwanted major surgery. Such actions would surely give one pause in a civilized society, especially when [the patient] had done no wrong.

Id. at 1244 n.8 (citations omitted).

Although Caesarean sections are different from blood transfusions, as a matter of principle there is no difference. There is "no reason to qualify [the right to refuse treatment] on the basis of the denomination of a medical procedure as major or minor, ordinary or extraordinary," or whatever. *Browning*, 568 So. 2d at 11 n.6.

> There is no such thing as a "trivial interference" with personal sovereignty; nor is it simply another value to be weighed in a cost-benefit comparison. In this respect, if not others, a trivial interference with sovereignty is like a minor invasion of virginity: the logic of each concept is such that a value is respected in its entirety or not at all.

Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 Notre Dame L. Rev. 445, 492 (1983).

> As one leading ethicist wrote about the *A.C.* decision:
>
> > It is almost impossible to think of any case where a competent pregnant woman's decision might be appropriately overruled by a judge that would be consistent with the *A.C.* opinion that "force" should never be used to physically restrain a competent woman. Not only surgery, but blood transfusions, injections, and even forcing a pill down a woman's throat, are to be prohibited.
> >
> > The conclusion thus seems inescapable: the use of the judiciary to force women to undergo medical treatments against their will is not only counterproductive, unprincipled, sexist, and repressive, it is also lawless.

Annas, *Foreclosing the Use of Force:* A.C. *Reversed*, Hastings Center Rep. July-Aug. 1990, at 27, 29.

Our law's and our culture's respect for bodily integrity also is seen in the fact that decedents' bodies cannot be invaded for purposes of harvesting potentially life-saving organs or tissue for the benefit of minor children or other dependents. If the decedent, for religious or any other personal reasons, indicated that she did not want to make such a donation, the needs of innocent third parties do not prevail. 20B Fla. Stat. Ann. § 732.912(2), (3) (West Supp. 1993). There is no good reason single adults with dependents should be treated with less respect than corpses. *Cf.* Nelson & Milliken, *Compelled Treatment of Pregnant Women*, 259 J. A.M.A. 1060, 1065 (1988).

Despite the absence of any positive Florida law, if 'the state' does indeed have a compelling, overriding interest in the protection of innocent third parties, one would expect 'the state' to vigorously protect such innocents in all situations in which they are threatened. In

this regard it must be acknowledged that many persons other than parents have dependents. Thus, it is not only minor children who might be affected by a parent's refusal of treatment but any dependent of a patient refusing treatment. For example, a single adult caring for her elderly parent or grandparent or a single parent caring for her retarded adult child would have her personal privacy, bodily self-determination and religious liberty subordinated to 'the state's' interest in her dependent. In these latter situations, the provider's fundamental constitutional rights presumably would remain subordinated until her dependent dies (assuming the parent survives the retarded adult child).

In addition, if 'the state's' interest in ensuring support for innocent third parties is so compelling, 'the state's' prophylactic intervention could not be limited to refusals of blood by Jehovah's Witnesses. Why shouldn't a fifty-five-year-old man caring for his elderly mother or retarded son be forced to submit to coronary bypass surgery to ensure his continuing ability to provide for these innocent third parties? Consistent application of the innocent-third-party rule would require intervention whenever any single adult's ability to provide support for dependents is threatened. Petitioner submits this is not, has never been, and will never be the law. *See* Clarke, *The Choice to Refuse or Withhold Medical Treatment: The Emerging Technology and Medical-Ethical Consensus*, 13 Creighton L. Rev. 795, 817 (1980) ("To be consistently applied, the 'welfare of minors' rule should be available to compel elective surgery on parents if it would improve their ability to provide support and maintenance for their children, although it has never been extended that far and such an extension seems unlikely.").

And even if the innocent-third-party rule could somehow be rationally and nondiscriminatorily limited to religion-motivated refusals of allegedly life-saving treatment, would any court (or legislature) ever compel a single Catholic woman to submit to an abortion for the sake of minor children she already has? If her obstetrician advises her (within her first trimester) that she will suffer serious, possibly debilitating injury or death if she takes her pregnancy to term, would anyone force her to abort her pregnancy so as to ensure her continuing ability to care for her existing children? If not, there has to be a better reason than that 'the state' respects her personal privacy, bodily self-determination and her religious convictions. Medically, the abortion is the safer procedure; legally, the embryo is not a person. Either 'the state's' interest in the support and welfare of innocent third parties overrides individual privacy, bodily self-determination and religious freedom or it does not. There cannot be one standard for members of mainstream religions and another for members of minority religions.

Despite the emotional appeal of protecting innocent third parties (especially minor children), the reality is that the law has never singled out single parents or other single adults with dependents for such special 'protection' in circumstances that threaten their ability to provide support. Indeed, if 'the state's' interest in ensuring support for dependents is compelling enough to override a provider's fundamental constitutional rights, then a dependent's interest in such support must be legally superior to the provider's rights. But is this the case? If a dependent's interests are not legally superior to the provider's fundamental rights, then the dependent's interests certainly do not achieve such superiority simply because a hospital or even the state seeks to protect them.

Out of recognition of this allegedly compelling interest in innocent third parties, does the law, by constitutional guarantee, statutory privilege, or common law tradition, give dependents the authority to restrain their providers from otherwise lawful conduct? For the sake of his or her dependents, could a person be prohibited from lawful employment or recreation that is considered unreasonably dangerous or life-threatening?[14]

> [P]arents take all sorts of health risks, from sky diving, to abusing drugs or alcohol, to joining the United States Army, that are not subject to state intervention. It is puzzling that parenthood should vitiate the right to refuse treatment when it leaves intact the freedom to act in other ways equally detrimental to a child.

Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 Cal. L. Rev. 1951, 1975 (1986). The innocent-third-party rule is not being, has never been, and will never be consistently applied. Any attempt to do so would not be tolerated. Only because of its sudden and unpredictable application to minorities has the rule been able to survive thus far. The time has now come to extirpate such rank discrimination from the law of this state.

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[14] According to the National Safety Council, white collar workers have a drastically lower incidence of accidental death and occupational injury than do firefighters, coal miners, or those who work in steel foundries. National Safety Council, *Accident Facts* 34-35, 44-45 (1988). Should single adults with dependents be prohibited from employment in those latter jobs? *See* Note, *The Refusal of Life-Saving Medical Treatment vs. The State's Interest in Preservation of Life: A Clarification of the Interests at Stake*, 58 Wash. U. L.Q. 85, 105 n.110 (1980).

f. Summary of 'abandonment'/innocent-third-party rationale

No positive Florida law elevates 'the state's' interest in innocent third parties over the individual's express constitutional rights of personal privacy, bodily self-determination and religious freedom. The state's laws on adoption, 5 Fla. Stat. Ann. § ch. 63 (West 1985 & Supp. 1993), and punishment of criminals, *see Delancy v. Booth*, 400 So. 2d 1268 (Fla. 5th DCA 1981) (incarceration precludes parental custody of minor child), show that support of dependent children by their natural parents is not the overriding interest the courts below construed it to be. As the court said in *Fosmire v. Nicoleau*:

> There is no question that the State has an interest in protecting the welfare of children. However, at common law the patient's right to decide the course of his or her own medical treatment was not conditioned on the patient being without children or dependents. . . . The State's interest in promoting the freedom of its citizens generally applies to parents.

551 N.E.2d at 83, 84. Petitioner submits that Florida's express constitutional guarantee of personal privacy provides no less protection to competent patients than does the common law right of bodily self-determination.

It should not be forgotten that "the primary function of the State [is] to preserve and promote liberty and the personal autonomy of the individual." *Fosmire v. Nicoleau*, 551 N.E.2d at 82. "The notion that the individual exists for the good of the state is, of course, quite antithetical to our fundamental thesis that the role of the state is to ensure a maximum of individual freedom of choice and conduct." *In re Osborne*, 294 A.2d 372, 375 n.5 (D.C. 1972). A nonconsensual physical violation in the form of forcibly administered medical treatment is repugnant to the fundamental principles of individual liberty that are basic to our scheme.

> Through the ages, a multitude of noble causes, religious and secular, have been regarded as worthy of self-sacrifice. . . . Nations still insist on the prerogative to engage in mass killing for furtherance of the "national interest," "wars of liberation," or the "defense of democracy." Bodily control, self-determination, and religious freedom are beneficial both to the individual and to the society whose atmosphere and tone are determined by the human values which it respects.

Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 Rutgers L. Rev. 228, 244-45 (1973).

The nonconsensual violation of competent adults' bodies cannot be justified by repeating dicta about 'the state's' alleged interest in innocent third parties. The public policy implications of this appeal are profound and far-reaching. Where there is no guidance from any positive law, where the people through their elected representatives have not considered the ramifications of a policy that would override expressly guaranteed constitutional freedoms, a court should be loathe to act. "[A] sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, . . . should be left with the people and to the political processes the people have devised to govern their affairs." *Doe v. Bolton*, 410 U.S. 179, 222, 93 S. Ct. 739, 763, 35 L. Ed. 2d 201, 196 (1973) (White, J., dissenting).

The state's undoubted interest in the welfare of minors and other dependents does not suffice to override fundamental rights expressly guaranteed to all persons by the Florida and United States Constitutions. Until the people of this state or nation, through the fact-finding resources at the disposal of their elected representatives, have carefully examined all of the social, ethical and legal consequences that will flow from the subordination of personal privacy, bodily self-determination and religious freedom to concerns about the welfare of dependents, the courts should prudently stay their hand. "The greatest dangers to liberty lurk in

insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479, 48 S. Ct. 564, 579, 72 L. Ed. 944, 957 (1928) (Brandeis, J., dissenting).

2. The forcible administration of medical treatment to competent adults contrary to their express wishes is not the least intrusive means of protecting innocent third parties

Assuming 'the state's' interest in the protection of innocent third parties is compelling enough to override an individual's fundamental constitutional rights of personal privacy, bodily self-determination and religious freedom, is the forcible administration of medical treatment the least intrusive, most narrowly tailored means of protecting 'the state's' interest? In *Browning*, this Court explained:

> The state has a duty to assure that a person's wishes regarding medical treatment are respected. That obligation serves to protect the rights of the individual from intrusion by the state unless the state has a compelling interest great enough to override this constitutional right. **The means to carry out any such compelling state interest must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual.**

568 So. 2d at 13-14 (emphasis added); *see also In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985).

Certainly, the violation of a person's body must be viewed as one of the most intrusive invasions of individual liberty the state could possibly accomplish. Such a drastic and extreme measure should be resorted to only as the last possible alternative to accomplish or protect 'the state' interest in question. In this case, the known presence of a father with a statutorily mandated duty to provide for his children's care was an obvious less intrusive alternative. 21A Fla. Stat. Ann. § 744.301 (West Supp. 1993). Moreover, the presence of

Mrs. Dubreuil's mother and adult brothers also made it evident that there may have been other means much less intrusive than forcibly invading her body that could have protected 'the state's' interest in the welfare of her children. The forcible violation of Mrs. Dubreuil's body was not the least intrusive means of protecting her children.

3. The Hospital failed to carry its "heavy" burden of proof when it sought to override Mrs. Dubreuil's constitutional rights of personal privacy, bodily self-determination and religious freedom

Assuming 'the state's' interest in protecting innocent third parties is compelling enough to override an individual's constitutional rights of personal privacy, bodily self-determination and religious freedom, and assuming that the nonconsensual violation of a person's body is the least intrusive means of protecting the innocent third parties, did the Hospital carry its "heavy" burden of proof in showing that Mrs. Dubreuil's children would not be cared for if she were to die as a result of her refusal of blood? In *Wons*, this Court stated that "it will be necessary for hospitals that wish to contest a patient's refusal of treatment to . . . sustain the heavy burden of proof that the state's interest outweighs the patient's constitutional rights." 541 So. 2d at 98. Despite this heavy burden of proof placed squarely on the Hospital, the District Court acknowledged that "the trial court had no indication at the time of the crucial decision concerning what would happen to the children if their mother died." *Dubreuil*, 603 So. 2d at 541. Clearly, the Hospital did not sustain its heavy burden of proof.

How, then, did the Circuit Court and the District Court conclude that Mrs. Dubreuil's constitutional rights were overborne by 'the state's' interest in her minor children? Simply on the basis of her status as a single parent. As the dissenting judge below explained, the Dis-

trict Court created a presumption that the dependents of any single adult will be abandoned whenever the adult refuses allegedly life-saving medical treatment. *See Dubreuil*, 603 So. 2d 546-47 (Warner, J., dissenting). Thus, in the emergency situations in which these cases typically arise, hospitals will not have to carry their burden of proof. Rather, it will be the patient, the responding party, who must come forward with evidence to get out from underneath the presumption that her children will be 'abandoned.'

As the dissent below points out, this presumption of abandonment runs headfirst into this Court's statements in both *Browning* and *Wons* that 'the state's' interest in innocent third parties is "by no means a bright-line test, capable of resolving every dispute regarding the refusal of medical treatment." *Browning*, 568 So. 2d at 14; *Wons*, 541 So. 2d at 97. The District Court, by means of its presumption, has essentially created such a bright-line test. The effective result of this presumption is that single adults with dependents no longer have the right to refuse allegedly life-saving treatment in Florida. As the New York Court of Appeals said in *Fosmire v. Nicoleau*, under the innocent-third-party rule, "a competent adult could never refuse life-saving treatment if he or she were a parent of [or provider for] a minor child [or other dependent]." 551 N.E.2d at 83.

Petitioner adds only this to the observations of the dissenting judge about this constitutionally dubious presumption: Burdens of proof and other procedural requirements reflect our law's (and therefore our society's) respect for the individual rights or liberties at stake. As Felix Frankfurter once said, "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347, 73 S.

Ct. 608, 616, 87 L. Ed. 819, 827-28 (1943). Few liberty interests are more fundamental and therefore more deserving of procedural protection than the individual's rights to personal privacy, bodily self-determination and religious freedom. As the Third District Court said in *Wons*:

> Surely nothing, in the last analysis, is more private or more sacred than one's religion or view of life. . . . [T]he individual's right to make decisions vitally affecting his private life according to his own conscience . . . is difficult to overstate . . . because it is, without exaggeration, the very bedrock on which this country was founded.

Wons v. Public Health Trust, 500 So. 2d 679, 687 (Fla. 3d DCA 1987). The decisions below minimize if not eliminate the Hospital's burden of proof and thus minimize if not eliminate the law's protection of these fundamental rights.

Respect for the individual liberties guaranteed in the Florida and United States Constitutions and for the procedural rules that this Court and the United States Supreme Court has formulated to protect those liberties requires much more than the 'bright-line' presumption of proof adopted below.

Conclusion

The nonconsensual violation of a person's body should awaken every ounce of caution our legal system has to offer. Patricia Dubreuil's refusal of blood was protected by her state and federal constitutional rights of personal privacy, bodily self-determination and religious freedom. No state interest established in the Florida Constitution, articulated in state statute, or defined in this state's decisional law overrode Mrs. Dubreuil's express constitutional rights. The state's general *parens patriae* interest in the welfare of dependents does not suffice. The state itself has never asserted this interest in this case. Rather, it has been the Hospital, an entity whose interests differ significantly from the state's, that has urged this 'state' interest. In a principled system of law, where rules and standards are to be applied evenly to all citizens, more must be required to override an individual's fundamental constitutional rights. The decisions of the District Court of Appeal and of the Circuit Court should be reversed.

Dated: February 17, 1993
Brooklyn, New York

Respectfully submitted,

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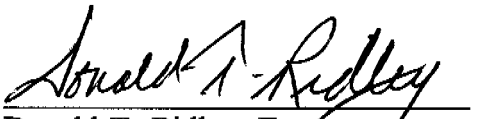

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