Myth of Protection: Florida Courts Permitting Involuntary Medical Treatment of Pregnant Women

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INTRODUCTION

A pregnant woman enters a hospital after experiencing complications in the very beginning of her third trimester. She has two young children at home. The attending physician at the hospital is not her regular doctor. But, this attending physician decides that she cannot leave the hospital. The physician orders medication, supervision of her diet, restriction of her movement, and a cesarean section.[1]

The woman is sensitive to the risks to the fetus. But, she has two young children and her own doctor. She agrees to rest, but wants to go home and wants the opinion of another doctor. The attending physician informs her that she cannot leave. He initiates formal legal proceedings to confine her to his hospital and to perform a cesarean section.[2]

The hospital contacts the state attorney, who appoints the hospital's retained lawyer as counsel.[3] A judge and the hospital's attorney hold a special hearing over the phone to determine the woman's fate.[4] The hospital presents the doctor's expert opinion that the fetus is at a "substantial and unacceptable" risk of severe injury if the woman does not follow his exact orders.[5] The woman explains that she opposes forced supervised bed rest here and requests to change hospitals.[6] She wants to decide which doctor will help her deliver the child, where she will rest for possibly the next three months until the fetus is born, and who will care for her two young children at home. The State speaks through a medical doctor and attorney.[7] The pregnant woman must speak on her own behalf to explain that she wishes to have a say in how she brings a child into the world. The judge finds for the State.[8]

The court orders the woman to follow all of the physician's orders: "including but not limited to" bed rest, medication to postpone labor and prevent infection, and, when needed, a cesarean section.[9] This order has no expiration, even in the case of birth or loss of the fetus.[10] A few days later, the fetus is stillborn.[11] The judge does not terminate the order confining the woman in the hospital until a day after the fetus was

1. Kate Wevers, Recent Development, Burton v. Florida: *Maternal Fetal Conflicts and Medical Decision-Making During Pregnancy*, 38 J. L. MED. & ETHICS 436, 436–37 (2010).

2. *Id.*

3. *Id.* at 437.

4. *Id.*

5. Burton v. State, 49 So. 3d 263, 264 (Fla. Dist. Ct. App. 2010).

6. Wevers, *supra* note 1, at 436.

7. *Id.*

8. *Burton*, 49 So. 3d at 264.

9. *Id.*; Wevers, *supra* note 1, at 437 (The cesarean section occurred a few days after the woman had been confined in the hospital pursuant to the judicial order.).

10. Wevers, *supra* note 1, at 436.

11. *Id.* at 437.

stillborn.[12]

This judicial order compelling involuntary medical treatment that ultimately culminated in a stillborn fetus left many unanswered questions. Who would care for Ms. Burton's two other young children while she was forced to remain in the hospital? How great was the risk of severe injury to the fetus if Ms. Burton returned home? Was the fetus viable as to permit the State to intervene? Was the fetus likely to survive if the forced treatment was completed? Was survival nearly impossible regardless of additional actions taken? Did the judicial order leave Ms. Burton to the whims of an experienced obstetrician or a young emergency room physician?

Despite an explicit right to privacy in the Florida Constitution,[13] a right which the Supreme Court of Florida has interpreted to include the right to refuse medical treatment,[14] lower and reviewing courts in Florida continuously fail to protect a pregnant woman's right to refuse medical treatment. Lower courts use incorrect legal tests despite explicit precedent. Reviewing courts misapply doctrinal tests, ignore merits of individual cases, and attempt to use mootness to avoid addressing these cases. Further, the State appoints private attorneys specialized in medical litigation to represent it. In contrast, pregnant women are left without any representation.

Part I of this article describes the right to refuse medical treatment under the United States Constitution and the broader protection afforded by Florida's Constitution. Part II illustrates how the State can overcome a person's right to refuse medical treatment. Part III explains Florida courts' various failures to adequately protect the rights of pregnant women, including the doctrinal failure to apply strict scrutiny, the weak appellate review of these cases, and the failure to provide counsel despite an obligation to do so. Part IV discusses suggestions and recommendations to better protect the rights of pregnant women. Part V concludes that when it comes to pregnant women and medical decision-making, Florida courts ignore the law. The consequences of such a failure may extend well beyond a pregnant woman's right to refuse medical treatment.

12. *Id.* at 437.

13. FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life . . . .").

14. State v. Herbert (*In re* Browning), 568 So. 2d 4, 10 (Fla. 1990) ("Recognizing that one has the inherent right to make choices about medical treatment, we necessarily conclude that this right encompasses all medical choices.").

I. The Right to Refuse Medical Treatment

The federal and Florida constitutions both protect the right to privacy.[15] Binding interpretations of each recognize that the right to privacy includes the right to refuse medical treatment.[16]

A. *Federal Right to Refuse Medical Treatment*

The federal right to refuse medical treatment has its origins in the common law.[17] The United States Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to include a right to privacy which protects persons from interference with their reproductive choices and from unwanted medical treatment.[18]

1. Common Law Origins

The common law doctrine of informed consent[19] protects individuals from involuntary medical treatment.[20] Informed consent "encompasses a right to informed refusal."[21] Thus, a doctor who performs medical treatment without obtaining informed consent may be guilty of battery or liable for negligence.[22] The United States Supreme Court has recognized the importance of this common law right stating, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by

15. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) ("[T]he right to privacy which presses for recognition here is a legitimate one."); Roe v. Wade, 410 U.S. 113, 151 (1973) ("[T]he Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."); Fla. Const. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life . . . .").

16. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment . . . ."); State v. Herbert (*In re* Browning), 568 So. 2d 4, 11 (Fla. 1990) ("A competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health.").

17. Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1890).

18. *Roe*, 410 U.S. at 154; *Cruzan*, 497 U.S. at 278.

19. State v. Presidential Women's Ctr., 937 So. 2d 114, 115 (Fla. 2006) ("Under the doctrine of informed consent, a physician has an obligation to advise his or her patient of the material risks of undergoing a medical procedure."); Logan v. Greenwich Hosp. Ass'n., 191 Conn. 282, 289 (1983) ("[A] surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages.") (internal citations omitted).

20. *In re* A.C., 573 A.2d 1235, 1243 (D.C. Cir. 1990) (en banc) ("Under the doctrine of informed consent, a physician must inform the patient 'at a minimum' of 'the nature of the proposed treatment, any alternative treatment procedures, and the nature and degree of risks and benefits inherent in undergoing and in abstaining from the proposed treatment.'") (citing Crain v. Allison, 443 A.2d 558, 561–62 (D.C. 1982)).

21. *In re* Conroy, 486 A.2d 1209, 1222 (N.J. 1985).

22. *Id.*

clear and unquestionable authority of law."[23]

The common law also recognizes the right to refuse medical procedures that would benefit another.[24] This is akin to the common law recognition that there is no duty to rescue another person in most circumstances[25]:

> The common law has consistently held to a rule which provides that one human being is under no legal compulsion to give aid or to take action to save another human being or to rescue . . . . For our law to *compel* defendant to submit to an intrusion to 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.[26]

2. Substantive Due Process: Right to Privacy

Although the United States Constitution does not contain an explicit right to privacy, the Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment as guaranteeing a right to privacy dating back to 1890.[27]

In *Griswold v. Connecticut*, the Supreme Court recognized that a right to privacy exists specifically in a marital and reproductive setting and is protected under the Fourteenth Amendment.[28] In 1973, the Supreme Court held that prohibiting abortion, and thereby preventing women from exercising control of their own bodies, violated that right to privacy.[29] The Court noted, however, that it was not an absolute right and that the State could override a woman's right to privacy to protect a compelling state interest—namely, a viable third-trimester fetus.[30]

The Due Process Clause's right to privacy includes the right to refuse medical treatment.[31] In *Cruzan v. Director, Missouri Department of Health*, the Court addressed whether a person has the right to refuse food and care that will result in that person's death.[32] The Court reiterated the common law origin of the right, citing Justice Cardozo's statement that "[e]very human being of adult years and sound mind has a

23. *Union Pac. R.R. Co.*, 141 U.S. at 251.

24. *In re* A.C., 573 A.2d at 1243–44.

25. Erin P. Davenport, *Court Ordered Cesarean Sections: Why Courts Should Not Be Allowed to Use a Balancing Test*, 18 Duke J. Gender L. & Pol'y 79, 98 (2010).

26. McFall v. Shimp, 10 Pa. D. & C. 3d 90, 91 (Allegheny Cnty. Ct. 1978).

27. *Union Pac. R.R. Co.*, 141 U.S. at 251.

28. 381 U.S. 479, 485 (1965).

29. Roe v. Wade, 410 U.S. 113, 154 (1973).

30. *Id.* at 163–64.

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

32. *Id.* at 267–68.

right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault . . . ."[33] Although the right is not without its limits, the Court nonetheless held, "[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment . . . ."[34]

B. *Florida's Broader Right to Refuse Medical Treatment*

Unlike the United States Constitution, the Florida Constitution contains an explicit right to privacy.[35] Article 1, section 23 states, "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life . . . ."[36]

The Florida Supreme Court held that this explicit right to privacy is broader and "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution."[37] Like the United States Supreme Court, the Florida Supreme Court recognized that the right to privacy included an individual's right to refuse medical treatment.[38] Indeed, the Florida Supreme Court stated, "[r]ecognizing that one has the inherent right to make choices about medical treatment, we necessarily conclude that this right encompasses all medical choices."[39]

Florida's right to privacy also protects a woman's ability to make her own reproductive choices free from governmental intrusion.[40] While addressing the unconstitutionality of preventing minors from having abortions without parental knowledge or consent, the Florida Supreme Court explained the important and personal nature of reproductive choices and why the right to privacy protects them:

> Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions, first, whether, when, and how one's body is to become the vehicle for

33. *Id.* at 269 (citing Schloendorg v. Soc'y of N.Y. Hosp., 211 N.Y. 125, 129–30 (1914)).

34. *Id.* at 278.

35. FLA. CONST. art. I, § 23.

36. *Id.*

37. *In re* T.W., 551 So. 2d 1186, 1192 (Fla. 1989) (holding that although procedures for parental notification in the case of a minor seeking an abortion may be permissible under the United States Constitution, they were not necessarily permissible under Florida's constitution); N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 636 (Fla. 2003) ("In adopting the privacy amendment, Floridians deliberately opted for substantially more protection than the federal charter provides.").

38. State v. Herbert (*In re* Browning), 568 So. 2d 4, 11 (Fla. 1990) ("A competent person has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health."); *In re* Dubreuil, 629 So. 2d 819, 822 (Fla. 1993) (holding that the state has a duty to ensure that a person's desire to refuse medical treatment is honored).

39. *Browning*, 568 So. 2d at 10.

40. *T.W.*, 551 So. 2d at 1192.

> another human being's creation; second, when and how—this time there is no question of "whether"—one's body is to terminate its organic life.[41]

Although the decision to bring another human into the world is one of the most important choices a person can make, pregnancy and motherhood do not defeat an individual's right to control her own body.[42] The Florida Supreme Court has held that a woman does not forfeit her fundamental rights to liberty and privacy by becoming a mother.[43] In *In re Dubreuil*, the State argued that the mother and custodial parent of two young children could not refuse a life-saving blood transfusion because her children would be abandoned.[44] Finding for the woman, the Court concluded, "Parenthood, in and of itself, does not deprive one of living in accord with one's own beliefs. Society does not, for example, disparage or preclude one from performing an act of bravery resulting in the loss of that person's life simply because that person has parental responsibilities."[45]

II. Overriding the Right to Refuse Medical Treatment

As with all rights, the right to refuse medical treatment has its limits. Different jurisdictions employ different standards and legal tests to determine whether and how the State may force involuntary medical treatment on a pregnant woman. In some jurisdictions, a threat to the fetus will almost completely nullify the woman's right to refuse medical treatment.[46] For example, in Georgia the court actually allowed the State to obtain legal custody over the fetus while it was inside the mother's body.[47] Other jurisdictions will defer to the mother's decision in all but the most exigent and exceptional circumstances.[48] In theory, Florida

41. *Id.* (quoting Lawrence H. Tribe, American Constitutional Law 1337–38 (2d ed. 1988)).

42. *Dubreuil*, 629 So. 2d at 826.

43. *Id.*

44. The Court noted that this reasoning was severely flawed due to the fact that the children's father was alive and would be required by law to care for his children if their mother passed away. *Id.* at 826.

45. *Id.*

46. Application of Jamaica Hosp., 491 N.Y.S.2d 898, 900 (Sup. Ct. 1985) ("While I recognize that the fetus in this case is not yet viable, and that the state's interest in protecting its life would be less than 'compelling' . . . the state has a highly significant interest in protecting the life of a mid-term fetus, which outweighs the patient's right to refuse a blood transfusion on religious grounds."); New Jersey Div. of Youth & Family Servs. v. V.M., 974 A.2d 448, 449 (App. Div. 2009) (declining to decide whether a mother's refusal of a cesarean section was evidence of child abuse or neglect that could allow the state to terminate her parental rights).

47. Jefferson v. Griffin Spalding Cnty. Hosp. Auth., 274 S.E.2d 457, 459 (Ga. 1981).

48. *See In re* A.C., 573 A.2d 1235, 1252 (D.C. Cir. 1990) (en banc); *e.g.*, Davis v. Columbia Hosp. for Women Med. Ctr., Inc., No. 91-16305 (Super. Ct. D.C. June 24, 1996) (order denying plaintiff's motion in limine) (concluding that a doctor is not compelled to comply when a patient

applies the strict scrutiny test, in which the State can override a pregnant woman's right to refuse medical treatment only if it establishes a compelling interest and narrowly tailored means to serve that interest.[49]

A. *Jurisdictions Protecting the Fetus*

Some jurisdictions resolve the conflict between the woman and fetus in a manner that practically guarantees that the State can force medical treatment in order to protect the fetus. The Georgia Supreme Court considered a case where a pregnant woman declined a cesarean section and a blood transfusion on religious grounds.[50] The Georgia Supreme Court found that the woman and the fetus were so connected that the wellbeing of the fetus trumped the woman's right to bodily integrity.[51] The court reasoned that refusal of medical treatment was analogous to criminal conduct and child neglect.[52] The pregnant woman's parental rights were temporarily terminated and transferred to the Department of Family and Children Services.[53] The court actually permitted a state agency to take temporary custody of a fetus while it was inside its mother.[54] This temporary custody permitted the agency to make the woman's medical decisions until the child was born.[55]

B. *Jurisdictions Protecting Women*

Other jurisdictions will protect the woman's interest over that of the fetus.[56] In a particularly difficult case, the United States Court of

requested to terminate her high-risk pregnancy in the twenty-seventh week of pregnancy when there was a possibility that the fetus could be born alive).

49. State v. Herbert (*In re* Browning), 568 So. 2d 4, 14 (Fla. 1990).

50. Jefferson v. Griffin Spalding Cnty. Hosp. Auth., 274 S.E.2d 457, 458 (Ga. 1981).

51. *Id.* at 458.

52. *Id.* at 458–59 ("To abort this child would be a criminal offense in Georgia. A viable unborn child has the right under the U.S. Constitution to the protection of the State through such statutes prohibiting arbitrary termination of the life of an unborn fetus. . . . The Court concludes that this child is without the proper parental care and subsistence necessary for his or her physical life and health.").

53. *Id.* ("Temporary custody of the unborn child is hereby granted to the State of Georgia Department of Human Resources and the Butts County Department of Family and Children Services. The Department shall have full authority to make all decisions, including giving consent to the surgical delivery appertaining to the birth of this child. The temporary custody of the Department shall terminate when the child has been successfully brought from its mother's body into the world or until the child dies, whichever shall happen.").

54. *Id.*

55. *Id.* at 460.

56. *See In re* A.C., 573 A.2d 1235, 1252 (D.C. Cir. 1990) (en banc); *In re* Brown, 294 Ill. App. 3d 159, 171 (1997) ("We hold that the State may not override a pregnant woman's competent treatment decision, including refusal of recommended invasive medical procedures, to potentially save the life of the viable fetus . . . and find that a blood transfusion is an invasive medical procedure that interrupts a competent adult's bodily integrity.").

Appeals for the District of Columbia determined that the woman's decision would almost always prevail.[57] In *In re A.C.*, the State obtained a judicial order to perform a cesarean section on a pregnant woman with terminal cancer without her consent.[58] Despite the fact that a cesarean section would aggravate her cancer and likely shorten her life, the judge ordered that the woman submit to the surgery.[59] The judge decided between a terminally ill woman's inevitable death and a fetus that might survive via cesarean section delivery.[60] Ultimately, the doctor performed the cesarean section.[61] The baby died a few hours after the delivery.[62] The woman died two days later.[63]

The District of Columbia Circuit found that the trial court erred in ordering the forced cesarean section.[64] After evaluating the common law and federal constitutional protections of the right to refuse medical treatment, the District of Columbia Circuit held that "every person has the right, under the common law and constitution, to accept or refuse medical treatment."[65] This right exists regardless of that person's illness, and even if her death is imminent.[66] "To protect that right against intrusion by others—family members, doctors, hospitals, or anyone else, however well intentioned, we hold that a court must determine the patient's wishes by any means available, and must abide by those wishes unless there are truly extraordinary or compelling reasons to override them."[67]

C. *Florida's Strict Scrutiny Test*

Florida uses a more stringent standard that favors neither the woman nor the fetus.[68] In theory, Florida employs a strict scrutiny test to determine whether or not the State can, and how it can, override a woman's right to refuse medical treatment.[69] The State cannot override a

57. *A.C.*, 573 A.2d at 1252 ("What a trial court must do in a case such as this [where the mother has not consented to treatment for the benefit of the fetus] is to determine, if possible, whether the patient is capable of making an informed decision about the course of her medical treatment. If she is, and if she makes such a decision, her wishes will control in virtually all cases.").

58. *Id.* at 1238.

59. *Id.* at 1240.

60. *Id.*

61. *Id.* at 1241.

62. *Id.*

63. *Id.*

64. *Id.* at 1251.

65. *Id.* at 1247.

66. *Id.* ("Further, it matters not what the quality of a patient's life may be; the right of bodily integrity is not extinguished simply because someone is ill, or even at death's door.").

67. *Id.*

68. State v. Herbert (*In re* Browning), 568 So. 2d 4, 14 (Fla. 1990); Burton v. State, 49 So. 3d. 263, 265 (Fla. Dist. Ct. App. 2010).

69. *Browning*, 568 So. 2d 4 at 14; *Burton*, 49 So. 3d. at 265.

pregnant woman's decision to refuse medical treatment unless it demonstrates a compelling interest and narrowly tailored means to protect that interest.[70]

Florida has identified potential compelling state interests, including (1) preservation of life, (2) protection of innocent third parties, (3) prevention of suicide,[71] and (4) maintaining the ethical integrity of the medical profession.[72] But the existence of any of these concerns does not automatically guarantee that the State can impose involuntary medical treatment upon an individual.[73]

> [Courts have advised that] these state interests . . . 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 when a compelling state interest may override the basic constitutional right of privacy . . . .[74]

Because the existence of a compelling state interest is not sufficient, the State must also establish narrowly tailored means to accomplish this state interest.[75] As the Supreme Court of Florida has held, "[t]he 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."[76]

In addition to relying on strict scrutiny as the doctrinal standard, the Florida Supreme Court has devised a specific procedure to use when an individual's refusal of medical treatment may compromise a compelling state interest.[77] The healthcare provider contacts the State Attorney, who

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70. *Browning*, 568 So. 2d at 14 ("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.").

71. The refusal of medical treatment that would result in death is permitted, *id.* at 10, the Florida Supreme Court has included this as a factor that would allow the State to override the right to refuse medical treatment. The Florida Supreme Court has used this factor to find that there is no right to assisted suicide. Krischer v. McIver, 697 So. 2d 97, 100 (Fla. 1997).

72. *Browning*, 568 So. 2d at 14 ("Cases decided by this Court have identified state interests in the preservation of life, the protection of innocent third parties, the prevention of suicide, and maintenance of the ethical integrity of the medical profession, and have balanced them against an individual's right to refuse medical treatment.").

73. *Id.*

74. Singletarry v. Costello, 665 So. 2d 1099, 1105 (Fla. Dist. Ct. App. 1996).

75. *Browning*, 568 So. 2d at 14.

76. *Id.* (emphasis added).

77. *In re* Dubreuil, 629 So. 2d 819, 824 (Fla. 1993) ("Accordingly, a health care provider wishing to override a patient's decision to refuse medical treatment must immediately provide notice to the State Attorney presiding in the circuit where the controversy arises, and to interested third parties known to the health care provider. The extent to which the State Attorney chooses to engage in a legal action, if any, is discretionary based on the law and facts of each case. This procedure should eliminate needless litigation by health care providers while honoring the

decides whether or not to pursue the judicial order.[78] The State Attorney may appoint the hospital's retained attorney as special counsel.[79] A judge will hold a hearing and determine if a compelling state interest exists and if narrowly tailored means can be used to achieve it.[80] If the judge finds a compelling state interest, he may order narrowly tailored involuntary medical treatment to protect that compelling state interest.[81]

In short, Florida requires that the State demonstrate a compelling interest—a risk of harm to the viable fetus—and use narrowly tailored means to protect the fetus before a court will compel involuntary medical treatment of a pregnant woman.[82]

III. Failure to Adequately Protect a Pregnant Woman's Right to Refuse Medical Treatment

Despite the demanding requirements of the strict scrutiny test, Florida courts continually fail to protect a pregnant woman's right to refuse medical treatment. First, many courts do not actually apply the strict scrutiny test. Second, reviewing courts often perform a limited and substandard review of cases involving pregnant women when compared with the searching and thorough appellate review of other cases of involuntary medical treatment. Third, although judicial proceedings to impose compulsory medical treatment endanger a woman's physical liberty, the State fails to provide needed legal counsel despite an obligation to do so.

A. *Doctrinal Failure to Apply Strict Scrutiny*

Florida courts have consistently failed to apply the strict scrutiny test. A court has ordered compulsory medical treatment without even determining that the fetus is viable[83]—when viability is the threshold requirement for the State's compelling interest in the fetus.[84] Judges have also compelled involuntary treatment without finding particular risks posed to the fetus.[85] Indeed, where the reviewing court did explain the risks posed to the fetus, the court insisted that the State had a compelling interest even when there was only a two to six percent chance of

patient's wishes and giving other interested parties the right to intervene if there is a good faith reason to do so.").

78. *Id.*

79. Wevers, *supra* note 1, at 436.

80. *Dubreuil*, 629 So. 2d at 824.

81. *Id.*

82. Singletarry v. Costello, 665 So. 2d 1099, 1105 (Fla. Dist. Ct. App. 1996).

83. Burton v. State, 49 So. 3d 263, 265 (Fla. Dist. Ct. App. 2010).

84. *Id.*; Roe v. Wade, 410 U.S. 113, 163 (1973).

85. *Burton*, 49 So. 3d at 265.

fatal injury to the fetus.[86]

1. Courts Have Not Required a Compelling State Interest

Florida courts have not applied strict scrutiny to cases of compelling forced medical treatment of pregnant women because the judicial orders and reviewing decisions fail to establish the viability of the fetus, specific danger to the fetus, or substantial risk of injury, without which the State cannot claim to have a compelling interest.

In *Burton v. State*, the trial judge failed to establish a compelling state interest because he made no finding that the fetus was even viable.[87] Florida defines viability as the point at which a fetus could survive outside of the mother's womb with artificial support.[88] In Florida, there is no presumption that a third trimester fetus is viable.[89] The judicial order compelling Ms. Burton to do everything the doctor told her did not state that the fetus was viable.[90] Thus, the court did not even determine if an innocent third party (i.e., a viable fetus) entitled to legal protection existed.[91] The appellate court found that the trial court's failure to determine fetal viability was error.[92]

The trial court in *Burton* also failed to explain how the mother's behavior placed the fetus at risk.[93] The court merely stated that the mother's failure to follow medical instructions placed the fetus in "'substantial and unacceptable risk' of severe injury or death."[94] The lower court provided no indication of what risks were posed to the fetus or how the mother's behavior exacerbated those risks.[95] The judge failed to make any finding that explained how the mother's behavior placed the fetus at risk and resulted in a compelling need for the State to protect the fetus.[96] Essentially, the trial court allowed a conclusory statement to satisfy strict scrutiny.

86. Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247, 1253 (1999).

87. *Burton*, 49 So. 3d at 265.

88. Fla. Stat. § 390.011(4) (2006) ("'Viability' means that stage of fetal development when the life of the unborn child may with a reasonable degree of medical probability be continued indefinitely outside the womb.").

89. *Id.*; *Burton*, 49 So. 3d at 265 (holding that a compelling interest in a fetus does not exist until there is a finding that the fetus is viable and Florida does not recognize any presumption that a fetus is viable).

90. *Burton*, 49 So. 3d at 265.

91. *Id.* (holding that a compelling interest in a fetus does not exist until there is a finding that the fetus is viable and Florida does not recognize any presumption that a fetus is viable); Roe v. Wade, 410 U.S. 113, 163 (1989) (noting that the State has a compelling interest in a viable fetus).

92. *Burton*, 49 So. 3d at 265.

93. *Id.* at 264.

94. *Id.*

95. *Id.*

96. *Id.* at 265.

The *Burton* trial court also failed to address the basic question of whether the forced medical treatment had any chance of success. The court provided no explanation of the risks and benefits of the proposed medical treatment.[97] For example, does a fetus usually survive a cesarean section at this stage in a high-risk pregnancy? Is there a high likelihood that the fetus will survive but will also suffer severe brain damage? Or rather, was the fetus likely to be stillborn regardless of the delivery method? The trial court left all of these questions unanswered.[98] Even after complying with monitored bed rest, enduring a forced cesarean section, and following all of the doctor's orders, the mother gave birth to a stillborn fetus.[99] Further, the reviewing appellate court did not mention these crucial missing elements.[100] This perhaps indicates that a determination of viability will satisfy strict scrutiny and permit the involuntary treatment of a pregnant woman, in complete contradiction of the Supreme Court of Florida.[101]

In contrast to the limited information in the *Burton* case, *Pemberton v. Tallahassee Memorial Regional Medical Center* demonstrates that a specific finding of risk or danger to the fetus should not necessarily warrant forced medical treatment.[102] In *Pemberton*, the court concluded that an involuntary cesarean section was necessary to protect the fetus because the risk of death to the fetus was, considering all facts in the light most favorable to the State, six percent.[103] Ms. Pemberton had previously undergone a cesarean section with a vertical incision, a method, which apparently leads to a greater risk of uterine rupture, which could result in the fetus's death.[104] The court, however, inadvertently called its own finding into question when it specifically noted that "[a]fter a cesarean section of the type Ms. Pemberton previously had undergone . . . it is possible for a woman to deliver vaginally without uterine rup-

97. *Id.* This could be due, in part, to the sparse record from the lower court, which left many questions unanswered. *Id.* at 268 n. 2.

98. *Id.* at 265.

99. *Id.*

100. *Id.* at 264–65.

101. The Supreme Court of Florida explained that the existence of concerns regarding (1) preservation of life, (2) prevention of suicide, (3) protection of innocent third parties, and (4) maintaining the ethical integrity of the medical profession, may indicate the existence of a compelling state interest, but that any one of these concerns in and of itself is insufficient to establish a compelling state interest. Singletarry v. Costello, 665 So. 2d 1099, 1105 (Fla. Dist. Ct. App. 1996) ("These state interests . . . 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 when a compelling state interest may override the basic constitutional right of privacy . . . .").

102. Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247, 1253 (N.D. Fla. 1999).

103. *Id.*

104. *Id.* at 1249.

ture or other complications."[105] Thus, the court recognized that it was possible for Ms. Pemberton to vaginally deliver a healthy child without any complications. Indeed, the court's statistics game indicated that there was at least a ninety-four percent probability that a vaginal birth would not cause any injury to the fetus.[106]

The *Pemberton* court justified involuntary medical treatment based on the premise that no one would participate in an activity that presents a four-to-six percent risk of death.[107] The State's most favorable evidence was expert medical testimony, which stated that the risk of uterine rupture and therefore death of the fetus was four to six percent.[108] The court concluded that the risk of injury to the fetus was unreasonable because "if an airline told prospective passengers there was a four to six percent chance of a fatal crash, *nobody* would board the plane."[109] The court rejected Ms. Pemberton's expert who placed the risk of uterine rupture at 2% to 2.2%, with a 50% chance of death to the fetus.[110] Continuing its airplane analogy, the court reasoned that the involuntary cesarean section was permissible because "[p]resumably there would still be no passengers on a plane if the risk of a crash was only two percent, and if, in any crash, only half of the passengers would die."[111]

Ironically, the court reasoned that no one would fly if there were a two percent risk of death involved in flying, but, then ordered inpatient medical treatment, where there is a two percent chance of death by infection.[112] Because the court reasoned that no one would participate in an activity with a two percent risk of death, but then ordered the plaintiff to remain in a hospital where she faced a two percent risk of contracting a deadly infection, the court's reasoning was—and remains—flawed.

Any medical procedure has its risks and possible complications.[113] Although the court briefly alluded to these risks in a footnote, the footnote stated merely that there are risks associated with all medical procedures and that the risks accompanying cesarean sections are less than the risks accompanying vaginal delivery.[114] The court did not provide further details on the risks associated with cesarean sections.[115] Rather, the

105. *Id.* at 1252–53.
106. *Id.*
107. *Id.* at 1253.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. Tara Parker Pope, *How Scared Should We Be?*, N.Y. TIMES (Oct. 31, 2007) http://well.blogs.nytimes.com/2007/10/31/how-scared-should-we-be/.
113. *Pemberton*, 66 F. Supp. 2d at 1254 n. 18.
114. *Id.*
115. *Id.*

court insisted that society pay no attention to the forced invasive surgery behind the curtain.[116] A conclusory statement as to the relative risks incidental to cesarean section and vaginal birth does not satisfactorily explain the court's determination that a mother should face the risks inevitably associated with involuntary surgery rather than the risks associated with traditional vaginal birth.

In point of fact, there are serious specific risks associated with cesarean sections. Depending on the circumstances, the risk to the mother's life can be four to five times greater than it is through vaginal birth.[117] The mother faces immediate risks from the surgical process, including anesthesia complications, excessive blood loss, bladder injury, and infection.[118] This medical procedure may also cause long-term latent injury including uterine scarring from the uterus rupturing during subsequent pregnancy, which can result in death or serious injury to the woman.[119]

The reasoning in *Pemberton* is also flawed because the *mother* did not face a two-to-six percent chance of death; rather, purportedly, the *fetus* did.[120] Where can courts defensibly draw the line and decide that a woman's decision is trumped by the risk posed to the fetus? May a court conclude that a pregnant woman cannot participate in any activity that poses a two to six percent risk of death to the fetus? The risk of death posed by the flu is about two percent;[121] should a woman not be allowed to leave her home during flu season because it presents a risk of death to the fetus? Suppose a woman wants to go on a church mission to a developing country with a substandard healthcare system; could the court say she cannot do that because it heightens the risk of injury to the fetus? May a court determine that a woman cannot care for her other young children because they are so rambunctious that she could injure the fetus while attempting to play with them? Could a court go as far as to say that she cannot climb or descend stairs? Finding the compelling interest requirement satisfied based solely on a small risk to the fetus greatly increases the range of behavior that courts could potentially curtail.

2. Courts Have Not Required Narrowly Tailored Means

Even assuming the risk to the fetus is high enough to create a com-

116. *Id.*

117. Eric M. Levine, Comment, *The Constitutionality of Court-Ordered Cesarean Surgery: A Threshold Question,* 4 Alb. L.J. Sci. & Tech. 229, 238–40 (1994).

118. *Id.*

119. *Id.*

120. Pemberton v. Tallahassee Mem'l Reg'l Med'l Ctr., Inc., 66 F. Supp. 2d 1247, 1250 (N.D. Fla. 1999).

121. Pope, *supra* note 112.

pelling state interest, the means that courts have permitted are not narrowly tailored enough. In other words, the courts have also failed to apply the strict scrutiny test by compelling women to do whatever their doctors say, issuing orders without any expiration date, deciding arbitrarily which type of involuntary bodily invasion a woman would prefer, and using a woman's desire to have a child to justify compulsory medical treatment.

In *Burton*, the lower court's order was the opposite of narrowly tailored.[122] Rather, the judicial order required Ms. Burton to comply with the physician's orders, "including *but not limited to* bed rest, medication to postpone labor and prevent or treat infection, and eventual performance of a cesarean section delivery."[123] The court ordered the woman to do everything the doctor ordered.[124] The only limit to the doctor's control was that his orders must promote the wellbeing of the fetus.[125] The appellate court did not address the specifics of Ms. Burton's case at all.[126] Instead, the appellate court stated the generic rule that the means must be narrowly tailored to accomplish the state's compelling interest, but failed to address the lower court's egregious failure to require narrowly tailored means.[127] The judicial order literally required Ms. Burton to follow all the doctor's orders.[128] Requiring one person to do whatever another person says cannot constitute narrowly tailored means. The appellate court, however, failed to mention this glaring error in its opinion.

Furthermore, the *Burton* order did not have an expiration:[129] The child could have been born and Ms. Burton would still have been required to follow the doctor's orders. In the *Burton* case, the fetus was stillborn but was still delivered by cesarean section.[130] There is no indication that the judicial order would not apply if it became extremely unlikely that the fetus would survive.[131] In fact, the judicial order was not actually rescinded until one day after the fetus was delivered stillborn.[132] The appellate court should have addressed the nearly nonexis-

122. Burton v. State, 49 So. 3d 263, 264 (2010).

123. *Id.* at 264 (emphasis added).

124. *Id.*

125. *Id.*

126. *Id.* at 265.

127. *Id.*

128. *Id.* ("The court ordered Samantha Burton to comply with the physician's orders 'including, but not limited to' bed rest, medication to postpone labor and prevent or treat infection, and eventual performance of a cesarean section delivery.").

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

tent likelihood that this never-ending judicial order to follow the doctor's orders *ad infinitum* could qualify as narrowly tailored and thus be constitutional.

The court relied on a disturbing rationale in *Pemberton* to provide a reason why a forced cesarean section is narrowly tailored: specifically, a woman's desire to have a child.[133] The court justified an involuntary cesarean section on the presumption that requiring a woman to have a wanted child by cesarean section is less of a burden on the woman than requiring a woman to have an unwanted child.[134]

> The balance tips far more strongly in favor of the state in the case at bar, because here the full-term baby's birth was imminent, and more importantly, here the mother sought only to avoid a particular procedure for giving birth, not to avoid giving birth altogether. *Bearing an unwanted child is surely a greater intrusion on the mother's constitutional interests than undergoing a cesarean section to deliver a child that the mother affirmatively desires to deliver.*[135]

The court is in no position to determine if bearing an unwanted child is a greater burden than undergoing an involuntary cesarean section. A cesarean section is a serious surgery that cuts through multiple layers of tissues, physically removes a fetus from a person's body, and usually leaves a permanent scar.[136] There are some women who have an unexpected pregnancy but do not want an abortion. A woman may choose against abortion because of religious beliefs, personal reasons, etc. Some of these women, however, often because of religious beliefs, do not want surgery.[137] The court is in no position to make a bright-line determination that an unwanted pregnancy is a greater burden than involuntary surgery.

The court's reasoning in *Pemberton* is also flawed because it seems to be based on the assumption that the woman had a choice whether or not to have the child. It did not matter after the point of viability if Ms. Pemberton had not wanted the child.[138] This case exists because the State of Florida sought to ensure that the viable fetus would be born healthy.[139] Because Ms. Pemberton's desire to have or not have the child

133. Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr, Inc., 66 F. Supp. 2d 1247, 1251 (N.D. Fla. 1999).

134. *Id.*

135. *Id.* (emphasis added).

136. Levine, *supra* note 117, at 236.

137. April L. Cherry, *The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment*, 69 TENN. L. REV. 563, 564 (2002).

138. FLA. STATE § 390.0111(1) (2006) ("No termination of pregnancy shall be performed on any human being in the third trimester of pregnancy [unless necessary to save the pregnant woman's life.").

139. *Pemberton*, 66 F. Supp. 2d at 1251.

is irrelevant, it is inappropriate to justify unwanted medical treatment on that basis.

Most concerning is that the *Pemberton* court used a woman's desire to have her child against her as means to justify violating her bodily integrity. Ms. Pemberton had taken her pregnancy and childbirth seriously.[140] She did not want a cesarean section, and because doctors would not comply with that wish, she hired a qualified midwife to assist with a homebirth.[141] Thus, the court used her manifest desire to have a successful childbirth against her to force her to bear a child using a procedure contrary to her wishes.[142] If the court's reasoning is followed to its logical conclusion, a woman who had an unexpected pregnancy and did not seriously desire to have the child, e.g., did not go to the doctor regularly, drank excessive amounts of alcohol, etc., would be in a better position to assert her right to bodily integrity. The inevitable result of that reasoning is that of two women, who would both ultimately be required to have the child, assuming the fetus is viable and birth is imminent, the one who has done more to ensure the wellbeing of the fetus loses her right to bodily integrity.

By ordering a pregnant woman to do everything she was told, the lower and appellate courts in *Burton* blatantly ignored the narrowly tailored means requirement.[143] Although the *Pemberton* court attempted to explain the narrowly tailored means requirement, its deeply flawed reasoning ultimately resulted in the court deciding that the method of birth is an unimportant concern for pregnant women[144] and that a woman's desire to have a child can constitute grounds for the permissible violation of her bodily integrity.

B. *Substandard Appellate Review*

In most cases involving involuntary medical treatment, reviewing courts perform in-depth and searching review.[145] However, in cases involving pregnant women, not only have the courts failed to apply the standard doctrinal test, but appellate courts have limited their review to

140. *Id.* at 1248 (noting that Ms. Pemberton hired a midwife and took steps to prepare for an at-home vaginal delivery).

141. *Id.*

142. *Id.* at 1251.

143. Burton v. State, 49 So. 3d 263, 264 (2012).

144. If this statement were true, then this case would not have been before the court.

145. *See* State v. Herbert (*In re* Browning), 568 So. 2d 4, 9 (Fla. 1990) (examining medical evidence, causation, and likelihood of successful treatment); *In re* Barry, 445 So. 2d 365, 372 (Fla. Dist. Ct. App. 1984) (permitting parents to remove the feeding tube of their permanently brain dead infant based on medical testimony from multiple doctors confirming that the condition is incurable).

broad procedural issues.[146] Indeed, appellate judges have indicated that they may use the mootness doctrine to avoid hearing cases involving the involuntary medical treatment of pregnant women.[147]

In *M.N. v. Southern Baptist Hospital*, the appellate court remanded an order of compelled chemotherapy to be administered to an eight-month-old child on the basis that the trial court failed to consider the nature of the treatment, the likelihood of success, and the parents' interest.[148] The parents opposed the treatment because of religious beliefs and due to a concern that the treatment would cause the child undue suffering.[149] The appellate court held that the child's welfare and parents' interest in the child extended beyond compulsory futile treatment:

> There is a substantial distinction in the State's insistence that a human life be saved where the affliction is curable, as opposed to the State's interest where . . . the issue is not whether, but when, for how long, and at what cost to the individual . . . life may be briefly extended.[150]

The appellate court in *M.N.* remanded with instructions that the lower court complete an in-depth review of individual circumstances.[151] Specifically, the lower court was ordered to consider the parents' interest, the State's interest, and the child's interest in light of the severity of the illness, the likelihood of success, and the invasiveness of the treatment.[152] In the court's own words:

> This necessitates consideration of the appellants' interest in making fundamental decisions regarding the care of their minor child, the state's interest in preserving human life, and the child's own welfare and best interests, in light of the severity of the child's illness, the likelihood as to whether the proposed treatment will be effective, the child's chances of survival with and without such treatment, and the invasiveness and nature of the treatment with regard to its effect on the child.[153]

In contrast, appellate review of the involuntary medical treatment

146. *See* Burton v. State, 49 So. 3d 263, 264–66 (Fla. Dist. Ct. App. 2012) (ignoring the trial court's failure to use narrowly tailored means).

147. *Id.* at 267–68 (Berger, J., dissenting) ("[S]ince the principles of law to be applied in this case are not new and the case is now moot, I would dismiss the appeal.").

148. 648 So. 2d 769, 771 (Fla. Dist. Ct. App. 1994).

149. *Id.* at 770.

150. *Id.* at 771.

151. *Id.*

152. *Id.*

153. *Id.* For additional examples of more searching review, see *In re* Barry, 445 So. 2d 365, 372 (Fla. Dist. Ct. App. 1984) (holding that the State's asserted interest in preserving life does not trump the parents' interest in refusing medical treatment of a comatose infant lacking 90% of his brain functioning and with less than two years to live).

of pregnant women has often not addressed the merits of the case.[154] Rather, the review is limited to general procedural issues.[155] In *Burton*, the appellate court addressed only the fact that the lower court applied the wrong standard.[156] It did not address the lower court's order to follow all of the doctor's orders.[157] The appellate court also failed to point out the lower court's failure to evaluate the likelihood of the treatment's success or any potential injury to the mother or fetus.[158] Because the fetus was stillborn despite the forced medical treatment,[159] it may have been extremely unlikely that the fetus would have survived cesarean section or vaginal delivery. Similarly, in *Harrell v. St. Mary's Hospital*, the court held that a hospital does not have standing to request a judicial order to compel a pregnant woman to accept a blood transfusion.[160] It did not address whether it was permissible to order an involuntary blood transfusion that conflicted with the pregnant woman's religious beliefs.[161]

Most concerning, the *Burton* case indicated that Florida appellate courts might refuse to hear the merits of cases involving the involuntary medical treatment of pregnant women.[162] In *Burton*, the court explained that review was granted because it was a case of first impression.[163] Thus, at least one Florida appellate court has indicated that it may not hear other cases of involuntary medical treatment of pregnant women.[164] If its justification for hearing Ms. Burton's case were extended, this appellate court would decline to hear any future case in which the lower court nominally applied the strict scrutiny test[165] and ordered involuntary medical treatment of a pregnant woman. Because of the immediacy with which the judicial treatment orders are followed, nearly all of these cases would be rendered moot before the mother could seek appellate

154. Burton v. State, 49 So. 3d 263, 264–66 (Fla. Dist. Ct. App. 2012).

155. *Id.*; In *Pemberton*, the trial court did an acceptably detailed review of the facts, but its reasoning and its application of strict scrutiny were still questionable. *See supra* text accompanying notes 102–121.

156. *Burton*, 49 So. 3d at 264 (noting that the trial court required only that the welfare of the child outweigh the mother's interest and did not apply the strict scrutiny test).

157. *Id.*

158. *Id.*

159. *Id.*

160. Harrell v. St. Mary's Hosp., Inc., 678 So. 2d 455, 456 (Fla. Dist. Ct. App. 1996).

161. *Id.*

162. *Burton*, 49 So. 3d at 264.

163. *Id.*. *But see id.* at 268 (Berger, J., dissenting) (contending that this was not a case of first impression) (citing Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr, Inc., 66 F. Supp. 2d 1247 (N.D. Fla. 1999)).

164. *Id.*

165. Due to the failure to apply strict scrutiny as previously discussed, exactly what will qualify as passing the strict scrutiny test is unclear. *See supra* text accompanying notes 87–143.

review.[166] Thus, if the appellate court refused to hear later cases similar to the one presented by Ms. Burton simply because they were not cases of first impression, no other case concerning the involuntary medical treatment of pregnant women would be heard.

Furthermore, the dissent in *Burton* presents an even more disturbing proposition: Where the record is insufficient, the appellate court must presume that the lower court made the correct decision.[167] The dissent states that "[d]ue to the lack of an adequate record, we must presume there was sufficient evidence to support the trial judge's decision, e.g., that viability was determined."[168] Given that these cases are often fast-paced and characterized by inadequate counsel and judicial error, this would result in horribly-reasoned cases never being subjected to meaningful review. For example, the *Burton* case involved a judge who did not find that the fetus was viable, did not explain what risks were posed to the mother, applied the wrong legal test, and ordered a woman to do anything the doctor told her to do.[169] According to the dissent, an appellate court should not review these blatant errors.[170] By the dissent's logic, a judge who keeps an inadequate record and does not explain his reasoning shields himself from appellate review.

C. *Failure to Provide Counsel in Forced Medical Treatment Proceedings*

The faulty reasoning and inadequate protection mechanisms in these cases may be explained by the fact that the pregnant women are often unrepresented by counsel. While the State appoints experienced attorneys who then offer the testimony of medical expert witnesses, the woman often represents herself without the assistance of counsel. Thus, the judicial proceeding features a trained lawyer and doctor against a woman with no formal legal or medical knowledge. Under federal and Florida law, however, the State should provide counsel in these types of cases.[171]

166. Wevers, *supra* note 1 at 436 (cesarean section was performed two days after the judicial order was granted); *Pemberton*, 66 F. Supp. 2d at 1250 (cesarean section was performed immediately after the judicial order was granted).

167. *Burton*, 49 So. 3d at 267–68 (Berger, J., dissenting).

168. *Id.* at 268 n. 2.

169. *Id.* at 265–66 (majority opinion).

170. *Id.* at 268 (Berger, J., dissenting) ("Because I disagree with the majority view that this is a case capable of repetition yet evading review, I would dismiss the appeal as moot.").

171. Alabama v. Shelton, 535 U.S. 654, 658 (2002) (concluding that deprivation of physical liberty may trigger the right to counsel); Vitek v. Jones, 445 U.S. 480, 493 (1980) (plurality opinion) (holding that involuntary psychiatric treatment is a massive curtailment of liberty for a non-incarcerated citizen); Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (considering disproportionate levels of representation to determine if the defendant is entitled to counsel); *In re*

Pregnant women have a right to counsel under the federal Constitution because involuntary medical treatment results in a deprivation of physical liberty.[172] The United States Supreme Court has also identified involuntary medical treatment as a constitutional violation that in and of itself warrants the right to counsel.[173] Furthermore, the state of Florida requires that those facing commitment to a mental healthcare facility have a right to counsel.[174] Because pregnant women in these proceedings face deprivation of physical liberty and forced medical treatment, both federal and Florida law provide that these women have a right to counsel in these judicial proceedings.

1. Federal Law Requires Counsel in Proceedings Where an Individual May Be Deprived of Her Physical Liberty

The United States Constitution requires that the government appoint counsel to represent indigent defendants facing criminal imprisonment.[175] The Supreme Court has held that there is a right to appointed counsel in any proceeding that "may end up in the actual deprivation of a person's liberty."[176] The Court recognized that the right to counsel "exist[s] only where the litigant may lose his physical liberty if he loses the litigation."[177] But this is not limited to criminal charges:[178]

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which *may result in commitment to an institution in which the juvenile's freedom is curtailed*, the child and his parents must be notified

Beverly, 342 So. 2d 481, 489 (Fla. 1977) (holding that an individual facing involuntary commitment has a right to counsel at all significant stages of the proceeding); *Burton*, 49 So. 3d at 266 ("[G]iven the deprivation of her physical liberty and violation of her privacy interests, the proceeding below violated Samantha Burton's constitutional right to appointed counsel in this case. Accordingly, I would reverse on these constitutional grounds as well." (Van Nortwick, J., concurring).

172. *Shelton*, 535 U.S. at 658.

173. *Vitek*, 445 U.S. at 493.

174. *Beverly*, 342 So. 2d at 489.

175. U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

176. Shelton, 535 U.S. at 658.

177. Lassiter v. Dep't of Soc. Servs. of Durham Cnty. N.C., 452 U.S. 18, 25 (1981).

178. *In re* Gault, 387 U.S. 1, 41 (1967) (emphasis added). The Court's decision was designed to give juveniles the same protections afforded to adult suspects. *Id.* at 28–29 ("Under our Constitution, the condition of being a boy does not justify a kangaroo court. . . . The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case.").

> of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[179]

Because the State's attempt to override a pregnant woman's right to refuse medical treatment may result in a deprivation of physical liberty, these women have the right to counsel. The risk that an individual will be deprived of her physical liberty triggers the right to counsel.[180] In *Pemberton*, Ms. Pemberton was deprived of her physical liberty when police arrived at her home and brought her to the hospital to receive an involuntary cesarean section.[181] In *Burton*, Ms. Burton was ordered to remain in the hospital, submit to supervised bed rest, and follow any other orders of the physicians.[182] Ms. Burton was deprived of her physical liberty because she was forced to remain in a hospital, and even within the hospital, she was forced to remain in her bed.[183] She was also forced to endure a cesarean section.[184] Additionally, the order's requirement that she follow all the doctor's instructions further diminished her physical liberty.[185] Because in both cases the State deprived the women of their physical liberty, these women had a right to counsel in the judicial proceeding which authorized the State to curtail their physical freedom.

2. Federal Law Requires Counsel in Proceedings Where an Individual May Be Subject to Involuntary Medical Treatment

In addition to deprivation of physical liberty, the involuntary medical treatment also justifies the woman's right to counsel. In *Vitek v. Jones*, the United States Supreme Court found in a plurality opinion that involuntary medical treatment intruded upon a prisoner's retained right to refuse medical psychiatric treatment,[186] even in light of the fact that prisoners have limited constitutional rights.[187] The Court explained, "[w]e have recognized that for the ordinary citizen, commitment to a mental hospital produces 'a massive curtailment of liberty.'"[188] The prisoner in *Vitek* was to be incarcerated in a prison or mental institution:

179. *Id.* at 41.

180. Lassiter v. Dep't of Soc. Servs. of Durham Cnty. N. C., 452 U.S. 18, 25 (1981).

181. Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247, 1250 (N.D. Fla. 1999).

182. Burton v. State, 49 So. 3d 263, 265 (Fla. Dist. Ct. App. 2010).

183. *Id.*

184. *Id.*

185. *Id.*

186. Vitek v. Jones, 445 U.S. 480, 493 (1980) (plurality opinion).

187. *Id.*

188. *Id.* at 491 (quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972)).

either way his physical liberty would be deprived.[189] The plurality still found, however, that subjecting someone to the risk of involuntary psychiatric treatment without the benefit of counsel was impermissible.[190] Essentially, in addition to the deprivation of physical liberty, involuntary medical treatment further intrudes upon an individual's rights. Thus, that individual has the right to counsel.[191]

Similarly, in addition to the deprivation of their physical liberty, the women in both *Burton* and *Pemberton* were forced to endure an involuntary medical procedure.[192] The respective courts ordered the medical procedure despite the fact that the women did not have the assistance of counsel.[193] Also, neither of these women was incarcerated; if a prisoner has a right to counsel before involuntary medical treatment, a free woman should as well.[194] To conclude otherwise is to suggest that pregnancy deprives women of more rights than does incarceration.

3. Federal Law Indicates a Right to Counsel Exists in These Proceedings Because of the Nature of the Interests at Stake and Risk of Erroneous Decision

In addition to the presumption that deprivation of liberty confers a right to counsel, the court considers other factors to determine if counsel is required.[195] In *Lassiter v. Department of Social Services of Durham County North Carolina*, the United States Supreme Court enumerated three factors to consider when determining if the right to counsel exists in non-criminal proceedings: (1) the private interests at stake, (2) the government's interest, and (3) the risk that procedures will lead to an erroneous decision.[196] The court also noted that the test should be applied with the presumption that the right to counsel generally only confers when there is a risk of deprivation to physical liberty.

All the factors identified in *Lassiter* indicate that the woman should have counsel appointed to her. First, there are several private interests at

189. *Id.* at 484.

190. *Id.* at 494.

191. *Id.*

192. Burton v. State, 49 So. 3d 263, 265 (Fla. Dist. Ct. App. 2010) (ordering forced cesarean section and any other necessary medical treatment to protect the fetus); Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247, 1250 (1999) (ordering forced cesarean section).

193. *Burton*, 49 So. 3d at 266 (Van Nortwick, J., concurring); *Pemberton*, 66 F. Supp. 2d at 1247 (stating that Ms. Pemberton was not even present during the hearing).

194. *Burton*, 49 So. 3d at 264 (Van Nortwick, J., concurring); *Pemberton*, 66 F. Supp. 2d at 1247; *cf. Vitek*, 445 U.S. at 491 ("We have recognized that for the ordinary citizen, commitment to a mental hospital produces a 'massive curtailment of liberty.' ") (quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972)).

195. Lassiter v. Dep't of Soc. Servs. of Durham Cnty. N.C., 452 U.S. 18, 27 (1981).

196. *Id.*

stake: the woman's physical liberty is at stake, her interest in deciding how she will bring a life into the world, her right to refuse an invasive surgery, and her right to avoid the risks associated with surgery. Second, the government's interest is limited to ensuring the safety of a viable fetus. Because counsel could be appointed quickly, appointing counsel does not adversely affect this interest. Third, the risk of an erroneous decision is high because the issue involves complex medical evidence and legal rules that have been repeatedly misapplied.[197] Because much of the decision is based on the doctor's medical testimony, the woman should be at least entitled to counsel that has experience questioning expert witnesses and can indicate where the testimony and conclusions reached are dubious. Because of demonstrated legal errors committed by the lower courts, such as applying the wrong legal standard, pregnant women need attorneys who can ensure that the correct legal standard guides the decision-maker.

Although counsel is not always required in civil proceedings, disproportionate levels of representation may require a right to counsel.[198] For example, in *Turner v. Rogers*, the Supreme Court held that counsel is not always required in child support proceedings where the non-custodial parent's failure to pay may result in imprisonment of up to one year.[199] The court noted, however, that appointing counsel was inappropriate because the custodial parent seeking child support frequently represents herself *pro se*.[200]

Pregnant women refusing medical treatment face disproportionate levels of representation.[201] In forced medical treatment cases, the state attorney will usually appoint the healthcare provider's retained counsel to handle the case.[202] Thus, an attorney who frequently handles medical cases represents the State.[203] In *Burton*, *Pemberton*, and nearly all other cases involving the involuntary medical treatment of pregnant women, the pregnant woman is without counsel and fighting pro se against the hospital's attorney.[204] Thus, unlike *Turner*, it is not one unrepresented

197. *See Burton*, 49 So. 3d at 264; Harrell v. St. Mary's Hosp., Inc., 678 So. 2d 455, 456 (Fla. Dist. Ct. App. 1996).

198. Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011).

199. *Id.* at 2518.

200. *Id.* at 2520.

201. Wevers, *supra* note 1, at 436 (noting that Ms. Burton did not have legal representation but the State was represented by the hospital's retained attorney).

202. *Id.*; *Pemberton*, 66 F. Supp. 2d at 1247.

203. This arrangement also presents a potential conflict of interest. The hospital's attorney is likely to place greater trust in the doctors and is sensitive to potential medical malpractice suits, which may affect his representation. Wevers, *supra* note 1, at 437.

204. *Id.*

party against another unrepresented party.[205] Because the State's legal counsel presents a problem of disproportionate levels of representation, *Turner* would not prevent the requirement that the woman receive counsel as well.

Because forced medical treatment of pregnant women encompasses an important private interest in bodily integrity, a government interest limited to protecting a viable fetus, and a high risk of an erroneous decision, pregnant women in these circumstances need the assistance of counsel. Additionally, the disproportionate level of representation in these cases exacerbates the above-mentioned interests. Finally, the actual deprivations of physical liberty seen in these cases furthers urges the right to counsel.

4. Florida Law Requires Counsel in Proceedings to Override a Woman's Right to Refuse Medical Treatment

Additionally, Florida courts have recognized the right to counsel in broader circumstances than has the United States Supreme Court.[206] Under Florida law, an individual is entitled to due process protection and counsel in proceedings that could result in involuntary commitment to a mental health facility.[207] In Florida, "[t]he subject of an involuntary civil commitment proceeding has the right to the effective assistance of counsel at all significant stages of the commitment process."[208]

Because these cases involve involuntary confinement to a healthcare facility, the women have a right to counsel under Florida law. Both the concurrence in *Burton* and other Florida cases indicate that an individual facing involuntary commitment to a healthcare facility has a right to counsel in all determinative proceedings, i.e. proceedings in which the commitment decision is made.[209] This Florida caselaw is reinforced by the United States Supreme Court's decision in *Vitek v. Jones*, which

205. Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (noting that the mother seeking child support was also unrepresented by counsel).

206. Pullen v. State, 802 So. 2d 1113, 1116 (Fla. 2001); Fla. Const. art I, § 9 ("No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.").

207. *Pullen*, 802 So. 2d at 1116 ("Clearly, an individual who faces involuntary commitment to a mental health facility has a liberty interest at stake."); *see* Jones v. State, 611 So. 2d 577, 579 (Fla. Dist. Ct. App. 1992) ("At a minimum, this due process contemplates reasonable notice, a hearing, and the right to effective assistance of counsel at all significant stages of the proceedings . . . .").

208. *In re* Beverly, 342 So. 2d 481, 489 (Fla. 1977) ("By significant stages we mean all judicial proceedings and any other official proceeding at which a decision is, or can be, made which may result in a detrimental change to the conditions of the subject's liberty."); *e.g.*, Ivey v. Dep't of Children & Family Servs., 974 So. 2d 480, 483 (Fla. Dist. Ct. App. 2008).

209. Burton v. State, 49 So. 3d 263, 266 (Fla. Dist. Ct. App. 2010).

identifies a right to counsel in proceedings involving involuntary psychiatric treatment.[210] In the cases discussed in this article, pregnant women are involuntarily kept in a hospital and forced to receive involuntary surgery, medication, and treatment.[211] Because people in Florida have a right to counsel before involuntary commitment to a healthcare facility, pregnant women have a right to counsel before enduring forced medical treatment in a hospital.

IV. SUGGESTIONS

A. *Florida Should Defer to the Woman's Decision Instead of Performing the Strict Scrutiny Test*

The use of a strict scrutiny analysis in the case of pregnant women undermines the protections of Florida's constitutional right to privacy. There are many situations in which a person's refusal of medical treatment or procedures would result in a risk of injury to innocent third parties.[212] This risk is not limited to pregnant women. For example, if a child has a very rare blood type and the parent is the only available person with that blood type, can the court order the parent to donate blood even if that is against his or her religious beliefs? After all, a court could reason, blood donations are relatively easy and routine and the court is ordering only a blood donation on this one occasion, so the order is narrowly tailored. If one's child needs a kidney and the parent is a match, could the court order the parent to donate his kidney? After all, a court could find, the State has a compelling interest in the child's life and without the kidney the child will die; people live relatively normal lives with only one kidney and because the child needs only one kidney, the order is narrowly tailored.

Because the strict scrutiny analysis could lead to disastrous results even when applied correctly and could undermine the constitutional right to privacy, courts should instead defer to the mother's wishes when it comes to these extremely personal bodily decisions.

B. *Actually Apply Strict Scrutiny*

Trial courts need to *actually* apply strict scrutiny instead of using it in name only. First, the lower courts must explicitly state that the fetus is viable and explain how it arrived at this conclusion. Second, the courts

210. Vitek v. Jones, 445 U.S. 480, 493 (1980) (plurality opinion).

211. *Burton*, 49 So. 3d at 265; Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc., 66 F. Supp. 2d 1247, 1250 (1999).

212. *See In re* Dubreuil, 629 So. 2d 819, 827 (Fla. 1993) (noting that the State may be able in some circumstances to force a parent to accept life-saving medical treatment in order to prevent abandonment of her children).

must indicate that the fetus is at risk of severe injury or death because of the mother's behavior. Third, the court should explain how the proposed forced treatment would protect the viable fetus and why that protection is necessary—in other words, how the proposed treatment is narrowly tailored. The court's order should also give explicit, specific, and limited directives. It should not use any limitless language, such as "including but not limited to."[213] Finally, the court order must automatically expire at the time of the fetus's birth or when the fetus is no longer viable.

For example, a model judicial order would be:

> This court finds that the fetus in Ms. Doe is viable because the obstetrician testified that the fetus is healthy, the expected due-date is in one week, this is the thirtieth week of the pregnancy, and the obstetrician stated that medical research suggests that a fetus in this condition is viable outside the mother's womb.
>
> This court finds that Ms. Doe's refusal to receive a cesarean section places the viable fetus at risk of severe injury or death because (1) the obstetrician has testified that the fetus' position in the womb will likely make it difficult for the fetus to receive air, (2) medical research indicates that this risk will increase the longer the child is in the womb, (3) there is a 75% chance that the fetus will not be able to breathe, and (4) there is 99% likelihood that the fetus will die if the complications manifest.
>
> This court finds that an emergency cesarean section is narrowly tailored to protect the fetus from serious injury or death because (1) immediate removal from the womb would end the risk of loss of air to the fetus, and (2) the fetus would be removed from the womb immediately.
>
> This court orders that an emergency cesarean section be performed in the next twelve hours. This order automatically terminates upon completion of the cesarean section, birth of the child, or loss of the fetus.

C. *Give Pregnant Women Notice of Potential Conflict Between Woman and Fetus*

Doctors should notify their pregnant patients that their medical treatment decisions might be judicially overridden if these decisions conflict with the wellbeing of the fetus. Such notice would foster trust and communication between the patient and her doctor. If the woman is alerted to the potential conflict early on, the doctor and patient can discuss the risk at an early stage without the doctor worrying that the longer he takes to explain why medical treatment is necessary, the greater the likelihood of injury to the fetus. Such communication also allows the

213. *Burton*, 49 So. 3d at 265.

woman to explain her concerns to the doctor before the need for emergency medical treatment arises. This could result in a woman's better understanding of the severity of the risk to the fetus so that she may eventually agree to a cesarean section or other course of treatment if it is later deemed necessary. Alternatively, if a doctor learns that a woman does not want a medical procedure because of her deeply held religious beliefs, the doctor may choose not to seek an order compelling involuntary medical treatment. Ideally, notice could prevent conflict and litigation between the pregnant woman and the State.

Furthermore, even if a pregnant woman and her doctor could not reach an understanding, prior notice would allow the woman to better protect her right to bodily integrity. Notice alerts a woman to a potential conflict of interest with her doctor. Because doctors may differ in opinion, notice would allow the woman to choose a doctor who does not believe a certain medical treatment is necessary or at least a doctor with whom the woman feels more comfortable. It would also allow the woman an opportunity to properly litigate the issue if a conflict is anticipated. A woman could get her own attorney and experts and ensure that if an order were granted it would be limited to what is absolutely necessary.

D. *Appoint Counsel for Pregnant Women Facing Involuntary Medical Treatment*

The States should appoint counsel for women in these proceedings. As previously mentioned, there are various doctrinal failures during these proceedings. These errors could be easily addressed by appointing counsel for pregnant women who face involuntary medical treatment. Because these cases are somewhat rare, the expense involved in appointing an attorney would be relatively low.

E. *Require Lower Courts to Create an Adequate Record*

Lower courts should be required to give detailed explanations of their findings so that appellate courts can perform a thorough and adequate review.[214] A complete record will enable the reviewing court to understand the reasoning that led to an invasion of the woman's bodily integrity. The reviewing court could then provide better instruction and guidance to the lower courts. Additionally, requiring the lower court to

214. *See* M.N. v. S. Baptist Hosp. of Fla., Inc., 648 So. 2d 769, 771 (Fla. Dist. Ct. App. 1994) (requiring additional evidence of likelihood of success of proposed treatment, invasiveness of the treatment, and chances of survival without proposed treatment before deciding that the State could prevent the parents of a terminally ill child from discontinuing life support).

compile an adequate record would also force the court to thoroughly examine the evidence before compelling medical treatment.

At the very least, an inadequate record should not result in unwarranted deference to the trial court.[215] Reviewing courts should note this failure by trial courts in order to discourage incomplete records and unfounded decisions in the future. Due to the hasty nature of these proceedings, it is unfair to assume correctness based on the trial court's failure to compile an adequate record. Reviewing courts should not reward the trial court for this failure.

F. *Perform Adequate Appellate Review*

The reviewing courts must look beyond general procedural issues and actually examine the application of strict scrutiny in these cases. As discussed previously, other cases involving involuntary medical treatment go into great detail and individualized review. Because the same strict scrutiny test applies to pregnant women and all other persons facing forced medical treatment, pregnant women should receive the same level of review.[216] The ideal appellate review would explain and confirm the existence of a compelling state interest and of narrowly tailored means.

Additionally, reviewing courts should note any failures by the lower courts, even if these failures qualify as harmless error, in order to instruct lower courts in future cases. Because these cases are usually moot by the time they reach the appellate level, appellate opinions concerning involuntary medical treatment of pregnant women are most useful as guides for future cases. A failure to provide an expiration to the order compelling treatment may not be a crucial issue in a case where a cesarean section was performed immediately. But in a case where a woman is involuntarily confined in a hospital for over a week, the lack of an expiration date could play an important role in determining if the order constituted narrowly tailored means. By addressing all significant errors in a lower court's handling of a case the reviewing court can prevent future erroneous decisions and practices in the lower courts.

215. Burton v. State, 49 So. 3d 263, 267–68 (Fla. Dist. Ct. App. 2012) (Berger, J., dissenting).

216. *Id.* at 266 ("The test to overcome a woman's right to refuse medical intervention in her pregnancy is whether the state's compelling state interest is sufficient to override the pregnant woman's constitutional right to the control of her person, including her right to refuse medical treatment. . . . [T]he state must then show that the method for pursuing that compelling state interest is 'narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual.'") (quoting State v. Herbert (*In re* Browning), 568 So. 2d 4, 14 (Fla. 1990)).

V. CONCLUSION

Despite a clearly and repeatedly articulated standard to determine the limited legality of involuntary medical treatment, Florida courts have deviated from this standard seemingly only in cases involving pregnant women. Where the interests of pregnant women and the fetus may conflict, Florida courts permit involuntary medical treatment without a finding that the fetus faces substantial risk, without specified narrowly tailored means to protect the fetus, and without meaningful review of these decisions. These flawed judicial orders are likely the result of an unequal playing field: a pregnant woman without counsel versus the State's appointed attorney specialized in medical litigation.

These judicial failures can lead to ramifications limiting the rights of pregnant women and other persons. For pregnant women, these decisions signal that a limited or vague risk to the fetus can be used to limit a woman's behavior, perhaps even beyond medical treatment decisions. For the rest of society, these decisions undermine the strict scrutiny analysis requiring a compelling state interest and narrowly tailored means that courts must use to compel medical treatment in all manner of cases. Specifically, these decisions provide justifications for involuntary medical treatment of one person for the benefit of another. These cases may ultimately water down the strict scrutiny standard, a result that could affect any area of Florida law that uses the strict scrutiny analysis.

The Florida courts have failed to apply the law equally to all citizens.[217] Although the strict scrutiny test is questionable in this context, the failure to apply this test leaves pregnant women without any protection of their rights to refuse medical treatment. While the law of some jurisdictions leaves pregnant women with curtailed rights, Florida courts have chosen to simply ignore the law when it comes to pregnant women.

217. Rostker v. Goldberg, 453 U.S. 57, 79 (1981) (holding that the Equal Protection Clause of the United States Constitution requires that the government treat similarly situated people alike).