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# Right to Be Let Alone - Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides for a State Right of Privacy, Resulted in Greater Privacy Protection for Florida Citizens

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**RIGHT TO BE LET ALONE?—HAS THE ADOPTION  
OF ARTICLE I, SECTION 23 IN THE FLORIDA  
CONSTITUTION, WHICH EXPLICITLY PROVIDES  
FOR A STATE RIGHT OF PRIVACY, RESULTED IN  
GREATER PRIVACY PROTECTION FOR  
FLORIDA CITIZENS?**

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& MICHAEL R. UFFERMAN\*\*\*

INTRODUCTION

In today's society, where individualism and personal liberties and freedoms are dominant cultural themes, the concepts of privacy and the "right to be let alone" play an integral role in citizens' day-to-day lives. With increasing frequency, individuals and public action groups are turning to the court system to protect the right of personal autonomy. Yet, contrary to public belief, there is no explicit right of privacy in the federal constitution. Although the United States Supreme Court has found an implicit right of privacy in certain contexts, this right has not been interpreted as broadly as many would like. As a result, some states have included explicit privacy provisions within their state constitutions in an effort to extend greater privacy protection to their citizens than is afforded under the Federal Constitution. In 1980, the citizens of Florida approved an amendment to Florida's Constitution, which grants Florida citizens an explicit right of privacy. But do Florida citizens have more privacy protection than citizens in states that do not have this explicit right? Over the last twenty years, several individuals and groups have relied on Florida's privacy provision to protect themselves from alleged governmental intrusions into their private lives. This article will

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examine some of these challenges and evaluate how the Florida Supreme Court has interpreted the specific privacy right found in the Florida Constitution. This article will then attempt to answer whether Floridians do in fact enjoy more privacy protection as a result of the enactment of Florida's privacy clause.

## I. ORIGINS OF RIGHT OF PRIVACY

In 1880, Thomas M. Cooley coined the phrase "the right to be let alone" in his treatise on the law of torts.<sup>1</sup> This concept was expanded upon by Samuel Warren and Louis Brandeis in an 1890 *Harvard Law Review* article, wherein the two suggested a "right of privacy."<sup>2</sup> Their article was in response to numerous attacks by the press on Warren's family.<sup>3</sup> This first notion of privacy later developed into the tort cause of action for invasion of privacy,<sup>4</sup> which is defined as "an unjustified exploitation of one's personality or intrusion into one's personal activity."<sup>5</sup> Years later, in his dissent in *Olmstead v. United States*,<sup>6</sup> Brandeis wrote:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect . . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.<sup>7</sup>

Thus Justice Brandeis laid the foundation for the development of the right of privacy that Americans enjoy today. Over the last half-century, this right has grown to encompass more than one's interest in preventing public disclosure of personal matters. Due in part to the willingness of the judicial branch to recognize and expand individual rights and liberties, the American citizen has come to expect the right to act and make decisions free from outside influence.

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1. See THOMAS M. COOLEY, *LAW OF TORTS* § 29 (1st ed. 1880); see also Honorable Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection From Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 31 (1997) (discussing the history of the privacy clause).

2. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see also Overton & Giddings, *supra* note 1, at 31.

3. See Overton & Giddings, *supra* note 1, at 31.

4. See *id.*

5. BLACK'S LAW DICTIONARY 829 (7th ed. 1999).

6. 277 U.S. 438 (1928).

7. *Id.* at 478 (Brandeis, J., dissenting).

### A. *The Federal Constitution*

It is not clear whether the founders of this country considered the concept of a right of privacy. While such a right may have been considered, it was not explicitly adopted by the founders, as there is no mention of the right of privacy in our federal constitution.<sup>8</sup> The closest the Federal Constitution comes to explicitly protecting privacy rights is in the Fourth Amendment, which states "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."<sup>9</sup> However, the protection offered by the Fourth Amendment generally has not extended beyond the restriction on improper governmental intrusion.

It was not until 1965, in the seminal opinion of *Griswold v. Connecticut*,<sup>10</sup> that the United States Supreme Court recognized an implicit right of privacy in the Constitution.<sup>11</sup> In *Griswold*, the Court held that a married couple has the right to use contraceptive devices, despite a state law which prohibited the use of birth control.<sup>12</sup> In an opinion authored by Justice Douglas, the Court stated:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and

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8. See *Roe v. Wade*, 410 U.S. 113, 152 (1973).

9. U.S. CONST. amend. IV.

10. 381 U.S. 479 (1965).

11. In *Roe*, the Court observed that as early as 1891, in the case of *Union Pacific R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891), "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe*, 410 U.S. at 152. Other cases also helped lay the groundwork for the right of decisional autonomy. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down a statute requiring all students to attend public schools rather than private schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a law which prohibited schools from teaching subjects in languages other than English). However, *Griswold* is generally recognized as the first case to clearly articulate that the Constitution contains a right of privacy. See 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.27 (3d ed. 1999).

12. See *Griswold*, 381 U.S. 479.

effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

. . . .

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>13</sup>

The Court concluded that the marriage relationship fell within a "zone of privacy" and therefore held the Connecticut statute to be unconstitutional.<sup>14</sup>

Over the next decade, the Court began to extend the "zone of privacy," both beyond the marital relationship and beyond the bedroom. In *Stanley v. Georgia*,<sup>15</sup> the Court held that a state could not prosecute an individual for possessing obscene material in the privacy of his or her home. The decision was based

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13. *Id.* at 484-86 (citations omitted).

14. *See id.*

15. 394 U.S. 557 (1969).

both on the First Amendment freedom of speech and press as well as the privacy protection announced in *Griswold*.<sup>16</sup> In *Eisenstadt v. Baird*,<sup>17</sup> the Court invalidated a state law prohibiting the distribution of contraceptives to persons who were not married. The Court reasoned:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>18</sup>

But it was not until *Roe v. Wade*<sup>19</sup> that the Court set out clear parameters for the "zones of privacy" concept announced in *Griswold*. In *Roe*, a pregnant woman brought an action challenging the Texas abortion statutes, which prohibited abortion at any stage of the pregnancy except to save the life of the mother.<sup>20</sup> In a majority opinion written by Justice Blackmun, the Court in *Roe* held that a woman's decision whether to terminate her pregnancy with an abortion was protected by the constitutional right of privacy. Contrary to *Griswold*, the Court concluded that the right of privacy was founded in "the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."<sup>21</sup> The Court stated that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."<sup>22</sup> The Court continued by listing five examples of personal rights: marriage, procreation, contraception, family relationships, and child rearing and education.<sup>23</sup> Although the Court found that the right of privacy encompasses a woman's right to have an abortion, the Court explained that this right was not absolute, and that the right must be weighed against important government interests in

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16. See *id.* at 564.

17. 405 U.S. 438 (1972).

18. *Id.* at 453 (citations omitted).

19. 410 U.S. 113 (1973).

20. See *id.* at 117-20.

21. *Id.* at 153.

22. *Id.* at 152.

23. See *id.* at 152-53.

regulation. Because the right was "fundamental," the Court stated that a "regulation limiting [this] right[ ] may be justified only by a 'compelling state interest'" and that "legislative enactments must be narrowly drawn to express only the legitimate state interest at stake."<sup>24</sup> After applying this test to the Texas abortion statutes, the Court concluded that the statutes were unconstitutional.<sup>25</sup>

The test established in *Roe* is the current test used by the Court in analyzing privacy clause claims under the Federal Constitution. First, the right of privacy only extends to fundamental rights such as marriage and procreation. If a party can establish that a fundamental right exists, then a state can only interfere with that right if the state's interests are compelling and the means employed are the least intrusive.

While there have been attempts during the twenty-five years since *Roe* to extend the right of privacy beyond the specific circumstances recited in that opinion, the Court has been hesitant to do so. For example, the Court has refused to extend the privacy umbrella to cover an individual's right to either engage in homosexual activity,<sup>26</sup> or limit the state from collecting their personal data.<sup>27</sup> However, some of these attempts have been successful. For instance, a plurality of the Court hinted that minors were entitled to privacy rights<sup>28</sup> and therefore a statute prohibiting the sale of contraceptives to minors was invalid.<sup>29</sup>

### B. *The Right of Privacy in State Constitutions*

Although the Supreme Court in *Griswold* found that the Federal Constitution only contained an implicit right of privacy, the Court stated two years later in *Katz v. United States*,<sup>30</sup> that the states, and not the federal government, are "the final guarantors of personal privacy."<sup>31</sup> "But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States."<sup>32</sup>

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24. *Id.* at 155 (citations omitted).

25. *See id.* at 164.

26. *See Bowers v. Hardwick*, 478 U.S. 186 (1986).

27. *See Whalen v. Roe*, 429 U.S. 589 (1977).

28. *See Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

29. For a complete discussion of United States Supreme Court cases dealing with the right of privacy, see ROTUNDA & NOWAK, *supra* note 11, §§ 18.26-30.

30. 389 U.S. 347 (1967).

31. *In re T.W.*, 551 So. 2d 1186, 1191 (Fla. 1989) (interpreting *Katz*).

32. *Katz*, 389 U.S. at 350-51.

Accordingly, some states followed suit and began to add explicit privacy clauses to their own state constitutions. Generally, this occurred between 1968 and 1980, the period when the Supreme Court was setting the boundaries for the federal right of privacy.<sup>33</sup> Today, Alaska,<sup>34</sup> California,<sup>35</sup> Florida,<sup>36</sup> Hawaii,<sup>37</sup> and Montana<sup>38</sup> have explicit privacy clauses in their state constitutions. In addition, Arizona,<sup>39</sup> Illinois,<sup>40</sup> Louisiana,<sup>41</sup> South Carolina,<sup>42</sup> and Washington<sup>43</sup> have a right of privacy within their constitutional provisions concerning search and seizure.

Subsequent to *Griswold*, many privacy right advocates were hopeful that the Supreme Court would be willing to interpret the privacy clause of the Federal Constitution broadly, which potentially would result in greater protection of individual rights and

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33. See Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 226 (1989). Silverstein points out that Washington (1889) and Arizona (1910) are exceptions. See *id.* n.106.

34. "The right of the people to privacy is recognized and shall not be infringed." ALASKA CONST. art. I, § 22 (adopted by amendment in 1972).

35. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1 (as reworded by constitutional amendment in 1974).

36. "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." FLA. CONST. art. I, § 23 (adopted by amendment in 1980).

37. "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." HAW. CONST. art. I, § 6 (adopted by amendment in 1978).

38. "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." MONT. CONST. art. II, § 10 (constitution ratified in 1972).

39. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." ARIZ. CONST. art. II, § 8 (constitution adopted in 1910).

40. "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means . . . ." ILL. CONST. art. I, § 6 (constitution adopted in 1970).

41. "Every person shall be secure in his person, property, communication, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy . . . ." LA. CONST. art. I, § 5 (constitution adopted in 1974).

42. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ." S.C. CONST. art. I, § 10 (adopted by amendment 1971).

43. "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7 (constitution adopted in 1889).



prevent governmental intrusion in such areas as gambling, drug use, and other victimless crimes.<sup>44</sup> However, these hopes were thwarted as a result of the restrictions placed on the right of privacy by the *Roe* court, which limited privacy protection to fundamental rights. Yet, as Justice William Brennan advised, "the decisions of the [Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."<sup>45</sup> Therefore, many individuals sought privacy protection in state courts. States were able to offer greater protection than federal courts due to the principle that "[i]n any given state, the federal Constitution [ ] represents the floor for basic freedoms; the state constitution, the ceiling."<sup>46</sup> Thus, an individual state can choose to grant its citizens more rights under its state constitution than are provided under the Federal Constitution.<sup>47</sup> When a party is unsuccessful in obtaining privacy protection in federal court under the Federal Constitution, that party can seek relief in state court and attempt to persuade the court that the state right of privacy is greater than the federal right. Justice Brennan labeled this movement toward state courts "the most important development in constitutional jurisprudence of our times."<sup>48</sup>

### C. Florida's Right of Privacy

As in other states, an effort was made in Florida in the late 1970s to add an explicit right of privacy to Florida's Constitution.

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44. See Silverstein, *supra* note 33, at 223-24.

45. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977). Justice Brennan further stated: State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.  
*Id.* at 491.

46. *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992) (citing Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 709 (1983)).

47. See *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980) ("Our reasoning . . . does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").

48. Special Supplement, NAT'L L.J., Sept. 29, 1986, at S1 ("Rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence of our times."); see also Silverstein, *supra* note 33, at 215 & n.2.

At the opening of the 1978 Constitution Revision Commission, then Chief Justice Ben F. Overton suggested that the Commission consider the adoption of a privacy clause.<sup>49</sup> The Commission subsequently approved a proposed privacy provision and it was placed on the ballot to be voted on by the citizens of Florida.<sup>50</sup> However, the measure was defeated by the people.<sup>51</sup>

Two years later, the Florida Supreme Court issued its opinion in *Shevin v. Harless, Schagger, Reid & Associates*,<sup>52</sup> wherein the court concluded that the Florida Constitution did not guarantee an individual's right of privacy. As a result, efforts were renewed to amend Florida's Constitution to include an explicit privacy clause. The same year the *Shevin* case was decided, the Legislature again passed a joint resolution to place a privacy amendment on the general election ballot.<sup>53</sup> The original version of the 1980 House proposal stated in relevant part that "[e]very natural person has the right to be let alone and free from unwarranted governmental intrusion into his private life."<sup>54</sup> After the word "unwarranted" was removed from the proposal, the bill was passed by the House and moved to the Senate.<sup>55</sup> Again, in the Senate, an attempt was made to qualify the scope of the proposal by limiting the privacy right to "unreasonable governmental intrusions."<sup>56</sup> After further debates, this attempt to qualify the bill's protection was also defeated, and the final version of the bill stated: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."<sup>57</sup> Upon being approved by both houses, the bill was placed on the ballot and passed by the voters.<sup>58</sup>

The legislative debate over article I, section 23 would prove to be insightful in later years when the Florida Supreme Court interpreted the reach of the protection provided under Florida's

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49. See Overton & Giddings, *supra* note 1, at 34.

50. See *id.* at 34-35.

51. See *id.* at 35.

52. 379 So. 2d 633 (Fla. 1980).

53. See Overton & Giddings, *supra* note 1, at 35.

54. Jon Mills, *Sex, Lies, and Genetic Testing: What Are Your Rights to Privacy in Florida?*, 48 FLA. L. REV. 813, 826 (1996).

55. See *id.* at 826-27.

56. *Id.* at 827.

57. *Id.* at 828-29; FLA. CONST. art. I, § 23.

58. See Overton & Giddings, *supra* note 1, at 35.

privacy right.<sup>59</sup> Five years after the privacy clause was adopted, the Florida Supreme Court stated:

The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.<sup>60</sup>

Subsequently, the court has consistently held that article I, section 23 was adopted in an effort to grant Floridians greater privacy protection than that available under the federal constitution.<sup>61</sup>

#### D. *Three Categories of Cases Interpreting Florida's Right of Privacy*

Since the inception of article I, section 23, the Florida Supreme Court has reviewed numerous cases in which the right of privacy was implicated. Those cases can be divided into three categories: (1) a person's interest in being secure from unreasonable governmental intrusion, (2) a person's interest in protecting against the disclosure of personal information, and (3) a person's interest in decisional autonomy.<sup>62</sup> The Florida Supreme Court has used different tests for analyzing the three types of claims.

The first category of privacy right cases involves an individual's interest in being free from unwarranted searches and seizures. At the federal level, the Fourth Amendment of the Constitution provides "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

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59. See Mills, *supra* note 54, at 828-29.

60. Winfield v. Division of Pari-Mutuel, 477 So. 2d 544, 548 (Fla. 1985).

61. See, e.g., Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998); *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989).

62. See Overton & Giddings, *supra* note 1, at 32.

searches and seizures . . . .”<sup>63</sup> Article I, section 12 of the Florida Constitution contains a similar provision:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.<sup>64</sup>

This version of article I, section 12 was approved by the citizens of Florida in November of 1982 and became effective January 3, 1983. Prior to that time, there was no specific requirement that search and seizure law in Florida be construed in conformity with the Fourth Amendment and the decisions of the United States Supreme Court.<sup>65</sup> In *Bernie v. State*,<sup>66</sup> the Florida Supreme Court upheld the provision in the 1983 amendment which required Florida courts to construe search and seizure cases in conformity with the United States Supreme Court. Consequently, although Florida courts were previously “free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution,”<sup>67</sup> this option was eliminated with the passage of the 1983 amendment.<sup>68</sup>

Nevertheless, individuals have still attempted to defend state criminal charges on the basis that a governmental search and seizure violated the right of privacy found in article I, section 23. Despite these attempts, the Florida Supreme Court has held that article I, section 12, and thus the Fourth Amendment as inter-

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63. U.S. CONST. amend. IV.

64. FLA. CONST. art. I, § 12.

65. See *State v. Hume*, 512 So. 2d 185, 187 n.2 (Fla. 1987).

66. 524 So. 2d 988, 990-91 (Fla. 1988).

67. *State v. Lavazzolli*, 434 So. 2d 321, 323 (Fla. 1983).

68. See *Bernie*, 524 So. 2d at 990-91.

preted by the Supreme Court, still controls these types of cases.<sup>69</sup> The court justified this by the fact that article I, section 23 was adopted prior to the amendment to article I, section 12.<sup>70</sup> As a result, the Florida Constitution does not offer greater privacy protection in these types of cases.

The second category of privacy right cases involves situations where an individual is attempting to shield information from the public. In most instances, the Florida Supreme Court has relied on article I, section 23 when analyzing cases from this category. The Florida Supreme Court articulated the test for deciding claims under article I, section 23 in *Winfield v. Division of Pari-Mutuel Wagering*.<sup>71</sup> In that case, the Florida Department of Business Regulation and the Division of Pari-Mutuel Wagering issued subpoenas duces tecum to several banking institutions to obtain banking records of the accounts of Nigel and Malcolm Winfield.<sup>72</sup> The Winfields asserted that such action violated their state constitutional right to privacy.<sup>73</sup> Writing for the majority, Justice Adkins established the standard of review for privacy right cases. First, an individual must demonstrate that a reasonable expectation of privacy exists.<sup>74</sup> If this burden can be satisfied, then the burden shifts to the state.<sup>75</sup> The court concluded that the right of privacy is a fundamental right, and therefore demands the compelling state interest standard.<sup>76</sup> That is, the state must prove that the challenged state action serves a compelling state interest.<sup>77</sup> In addition, the state can only accomplish this goal through the least intrusive means.<sup>78</sup> The court reasoned that "the state's interest in conducting effective investigations in the pari-mutuel industry is a compelling state interest and that the least intrusive means was employed to achieve that interest" and therefore held that the government's action was permissible.<sup>79</sup> The *Winfield* test has been repeatedly cited by the Florida Supreme Court as the test for deciding claims brought pursuant to article I, section 23.<sup>80</sup>

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69. See *Hume*, 512 So. 2d at 188.

70. See *id.*

71. 477 So. 2d 544, 547 (Fla. 1985).

72. See *id.* at 546.

73. See *id.*

74. See *id.* at 547.

75. See *id.*

76. See *id.*

77. See *id.*

78. See *id.*

79. *Id.* at 548.

80. See, e.g., *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989).

Despite the heavy burden that the state must meet in order to justify an intrusion, the Florida Supreme Court has been reluctant to provide protection for cases involving the disclosure of personal information.<sup>81</sup> One obstacle has been Florida's policy on public records and its "law in the sunshine" statutes.<sup>82</sup> In fact, article I, section 23 specifically provides, "This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."<sup>83</sup> Even in cases where the public records law was not applicable, the Florida Supreme Court has still been hesitant to find that a party has met the first prong of the *Winfield* test. For example, in *City of Miami v. Kurtz*,<sup>84</sup> the court held that a job applicant did not have a legitimate expectation of privacy regarding whether or not she was a smoker. Also, in *Florida Board of Bar Examiners re Applicant*,<sup>85</sup> the court concluded that the state has a compelling interest in requesting applicants of the state bar to reveal psychiatric treatment history. Moreover, in some instances, the court has refused to apply the *Winfield*/strict scrutiny test. In *Rasmussen v. South Florida Blood Service, Inc.*,<sup>86</sup> a case involving a victim who contracted AIDS as a result of a blood transfusion, the court relied on a balancing test to find that the privacy interests of blood donors as well as society's interest in maintaining a blood donation system outweighed a victim's interest in disclosure.

In the coming years, a strong possibility exists that many more claims will arise out of this second category of cases. As the Information Age progresses and the Internet community grows, personal data is becoming easier to obtain.<sup>87</sup> The notion of the so-called "private life" is becoming extinct and aspects of people's lives that were once off-limits are now apparently fair game. Phone numbers, addresses, and other background information

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81. See Overton & Giddings, *supra* note 1, at 39. Of the 11 informational privacy claims considered by Florida appellate courts between 1989 and 1998, only four decisions resulted in privacy protection. In comparison, of the 18 behavioral privacy claims considered by Florida appellate courts in the same span, 10 decisions resulted in privacy protection. See Daniel R. Gordon, *Upside Down Intentions: Weakening the State Constitutional Right to Privacy, a Florida Story of Intrigue and a Lack of Historical Integrity*, 71 TEMP. L. REV. 579, 595-96 (1998).

82. See FLA. STAT. ANN. ch. 119 (West 1996) (public records law).

83. FLA. CONST. art. I, § 23.

84. 653 So. 2d 1025 (Fla. 1995).

85. 443 So. 2d 71 (Fla. 1983).

86. 500 So. 2d 533 (Fla. 1987).

87. See Gordon, *supra* note 81, at 588 (Florida Supreme Court Justice Overton asked, "who, ten years ago, really understood that personal and financial data on a substantial part of our population could be collected by government or business and held for easy distribution by computer operations?") (citing CONST. REVISION COMM'N 3267, 3271 (Jan. 9, 1997)).

are increasingly being accessed and shared between companies or other organizations.<sup>88</sup> Undoubtedly, individuals in the next millennium are sure to encounter increasing difficulty in shielding personal information from others in the public arena.

Finally, this article will focus on the third category of privacy right cases—cases involving a person's interest in decisional autonomy. In this category of cases, a conflict exists between an individual's right to make his or her own decisions concerning personal conduct and the state's interest in regulating such conduct. In *Planned Parenthood v. Casey*,<sup>89</sup> the United States Supreme Court characterized this third category as involving an individual's "intimate personal choices" concerning "the right to define one's own concept of existence, of meaning, of universe, and of the mystery of human life."<sup>90</sup>

As pointed out earlier in this article, over the last thirty years, individuals both in Florida and nationwide have been seeking privacy protection for a wide range of personal decisions, including whether to terminate a pregnancy, whether to refuse medical treatment, and whether to permit a third party to have contact with one's children. As in the second category of cases, the Florida Supreme Court has applied the *Winfield*/strict scrutiny test to personal autonomy cases.<sup>91</sup> Since 1980, the bulk of the privacy right cases considered by the Florida appellate courts have come from this third category of cases.<sup>92</sup> The next section of this article will analyze some of these cases and explain their results.

## II. GREATER PRIVACY PROTECTION IN FLORIDA?

As indicated above, article I, section 23 was adopted with the intention of giving Florida citizens greater privacy protection than that afforded by the Federal Constitution. Over the last twenty years, several individuals and groups have tested this notion by challenging particular state action or conduct as being in violation of article I, section 23. Many of these challenges have culminated at the Florida Supreme Court, leaving the task

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88. See Silverstein, *supra* note 33, at 225 ("Commentators recount the threats to personal privacy posed by computers, data banks, and government agencies' thirst for information.").

89. 505 U.S. 833 (1992).

90. *Id.* at 851.

91. See *infra* Pt. II and discussion of cases therein.

92. Of the 29 privacy right cases that Florida appellate courts considered between 1989 and 1998, 18 involved issues relating to behavioral privacy (cases regarding an individual's personal decisions). See Gordon, *supra* note 81, at 595.

of setting the parameters of Florida's right of privacy to the judicial branch. So do Florida citizens enjoy greater privacy protection as a result of article I, section 23? This article will examine four different scenarios where the Florida Supreme Court was asked to interpret Florida's right of privacy. The disputes all stem from the third category of privacy right cases—those cases involving an individual's right to make personal decisions free from state interference. In two of the scenarios, the Florida Supreme Court recognized greater privacy protection for Floridians as a result of article I, section 23. In contrast, in the other two cases, the Florida Supreme Court refused to grant protection under the state right of privacy.

A. *Two Examples Where Floridians Enjoy Greater Privacy Protection*

1. Parental Consent or Notification Requirements For Abortion

Probably no other privacy right issue has created more controversy in American society during the last three decades than the issue of a woman's right to choose whether to continue her pregnancy. As is often the case with controversial social topics, this issue has also been prevalent in American jurisprudence. Most notable is the United States Supreme Court's landmark decision in *Roe v. Wade*, the principal case in United States abortion law.

In *Roe*, the Supreme Court established that a woman's right to choose to have an abortion was part of the constitutional right of privacy implicit in the Fourteenth Amendment.<sup>93</sup> As Justice Blackmun wrote in the majority opinion, the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>94</sup> After establishing this fundamental constitutional principle, the majority in *Roe* ruled that state regulation of abortion practices could be upheld only if they were narrowly drawn to serve a compelling state interest.<sup>95</sup> The *Roe* Court recognized two state interests which might support some limitations on the right to an abortion—the interest in protecting the health of the mother and the life of the fetus.<sup>96</sup> Therefore, there exists a "compelling interest" in the mother's life where restriction on the right to an abortion is needed to protect her life or safety. Likewise, there is a "compelling inter-

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93. See *Roe v. Wade*, 410 U.S. 113, 153 (1973).

94. *Id.*

95. See *id.* at 156.

96. See *id.* at 163.



est" in the fetus when the state can show a viable life which it has an interest to protect.

The *Roe* majority has often been portrayed as establishing a rigid "trimester" analysis in determining what types of government regulations of abortion would pass constitutional muster. However, this rigid "trimester" analysis seems to have been abandoned by the Supreme Court within a few years of the *Roe* decision. By the 1980s, the Court appears to have adopted a reasonableness test to determine the constitutionality of abortion regulations.<sup>97</sup> Under this test, the Court will uphold a regulation if it appears that it is a reasonable means of protecting the woman's life; however, the Court will invalidate any such regulation if the Court finds the law was intended not to protect the health of the woman, but merely to deter abortions.<sup>98</sup> In *Webster v. Reproductive Health Services*,<sup>99</sup> while they did not do so in a majority opinion, it appears that a majority of the justices rejected the trimester analysis. Although a new test has never been formally adopted by the Court, it seems that the post-*Roe* cases stand for the following principle for analyzing abortion regulations:

The Supreme Court will only uphold abortion regulations that are supported by a compelling state interest; that states have compelling interests in protecting the health of the woman and protecting a viable fetus. A state regulation of an abortion that is to be performed prior to the time the fetus is viable must be judicially determined to be narrowly tailored to protect the health of the woman. A state law that is designed to protect a viable fetus will be upheld if it is narrowly tailored to the promotion of that interest. A law designed to protect a possible viable fetus must allow an exception for a woman who needs an abortion to protect her life or health. Some special restrictions will be upheld on abortions for minors, due to the societal state interest in the protection of minors. A state may refuse to fund abortions, because the right to privacy includes only a right to choose to have an abortion without governmental interference and not a right to have abortion services provided by the government.<sup>100</sup>

A regulation that states have attempted to impose in recent years is parent notification or consent requirements for minors

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97. See ROTUNDA & NOWAK, *supra* note 11, at 589-90.

98. See *id.* at 590.

99. 492 U.S. 490 (1989).

100. ROTUNDA & NOWAK, *supra* note 11, at 590-91.

seeking an abortion. The Supreme Court first confronted parental consent requirements in *Planned Parenthood of Central Missouri v. Danforth*.<sup>101</sup> In this case, the Court considered a statute which gave a minor female's parent absolute veto power over her decision to have an abortion. Writing for the majority, Justice Blackmun found the absolute veto power unconstitutional because "any independent interest the parents [might] have in the termination of the minor daughter's pregnancy [was] no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."<sup>102</sup> However, the majority did concede that the state had a greater interest in regulating abortion procedures for juveniles than it had when it regulated abortions for adults.<sup>103</sup> Justices Stewart and Powell, who joined the majority opinion, wrote separately to indicate that the constitutional flaw in the statute was the absolute veto given to the minor's parents. As Justice Stewart stated in his concurring opinion:

I think it clear that [the parental consent requirement's] primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti v. Baird* suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.<sup>104</sup>

In *Bellotti v. Baird (Bellotti I)*,<sup>105</sup> the Supreme Court determined that a state parental consent statute was ambiguous as to both the authority of parents to veto their minor child's decision to have an abortion, as well as the availability of a judicial bypass procedure, and therefore, the Court remanded the case to the lower courts.<sup>106</sup> The Supreme Court considered the statute

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101. 428 U.S. 52 (1976).

102. *Id.* at 75.

103. *Id.* at 72.

104. *Id.* at 90-91 (citation & footnote omitted).

105. 428 U.S. 132 (1976).

106. *See id.*

again in *Bellotti v. Baird*, (*Bellotti II*).<sup>107</sup> The statute at issue in *Bellotti II* required a minor to receive the consent of her parents or, alternatively, receive judicial approval for an abortion in a proceeding in which a court determined whether the abortion was in the best interest of the minor.<sup>108</sup> However, the statute made no provision for a determination of whether the minor was sufficiently mature to make an informed decision regarding abortion; consequently, without a majority opinion, the Supreme Court invalidated the statute.<sup>109</sup> Justice Powell's plurality opinion observed that the state could restrict a minor's ability to have an abortion by requiring notification or consent from a parent if the state established a procedure whereby the female could bypass the consent or notification requirement.<sup>110</sup> The Powell plurality opinion also recognized three reasons for concluding that the constitutional rights of children cannot be equated with those of adults: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."<sup>111</sup>

In addition, the Powell plurality opinion crafted guidelines for a judicial bypass procedure that would promote these interests. Addressing these guidelines, the Powell plurality stated:

A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician independently of her parent's wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.<sup>112</sup>

In *Bellotti II*, the state law failed to meet these guidelines because it did not require the judge to determine whether the minor was sufficiently mature to make her own decision, nor did it require the judge to honor her decision if she were. It has become clear that, even absent a majority opinion, the Powell plurality in *Bellotti II* has become the de facto constitutional standard for parental consent and notification laws.

The year 1983 marked the first time in which the Court upheld a parental consent requirement. In *Planned Parenthood*

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107. 443 U.S. 622 (1979).

108. *See id.*

109. *See id.*

110. Justice Powell's plurality opinion was joined by Chief Justice Burger and Justices Stewart and Rehnquist.

111. *Bellotti*, 443 U.S. at 633.

112. *Id.* at 643-44.

*Association of Kansas City, Missouri, Inc. v. Ashcroft*,<sup>113</sup> the Court upheld a state law requiring a minor to receive the consent of one of her parents or, alternatively, to obtain consent from the juvenile court judge. While Justice Powell only wrote for himself and Chief Justice Burger in *Ashcroft*, the standards he promulgated in that opinion, which echoed those he articulated in *Bel-lotti II*, would provide the guidelines in future opinions for determining which types of parental consent or notification requirements would be upheld by the Court.<sup>114</sup> Justice Powell found that the interests in the protection of minors and the promotion of family decision making justified a parental consent statute.<sup>115</sup> However, he indicated that the statute must contain a judicial bypass procedure which (1) allows the minor to bypass the consent or notification requirement through a process that does not unduly burden her ability to have a safe abortion; (2) allows the minor to receive permission for the abortion if (a) the minor demonstrates sufficient maturity to make her own decision, or (b) the trial judge finds the abortion is in the minor's best interest; and (3) protects the anonymity of the minor.<sup>116</sup>

In 1990, the United States Supreme Court in *Ohio v. Akron Center for Reproductive Health*<sup>117</sup> upheld a parental notification statute which required one parent, or in certain circumstances another relative, to be notified. Justice Kennedy, writing for the majority, explained the criteria for a constitutional bypass procedure and found that the state "may require a heightened standard of proof"<sup>118</sup> when, as here, the bypass procedure contemplates an *ex parte* proceeding at which no one opposes the minor's testimony.<sup>119</sup> Thus, it is clear that under federal law, a state may require the consent of, or notification to, one or

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113. 462 U.S. 476 (1983).

114. See ROTUNDA & NOWAK, *supra* note 11, at 633. See also *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990).

115. See *Akron Ctr.*, 497 U.S. at 502.

116. See *Ashcroft*, 462 U.S. at 491 & n.16.

117. See *Akron Ctr.*, 497 U.S. at 502 (upholding statute which required doctor to give notice to one parent, or in certain circumstances to a relative of the minor before performing abortion, but allowed for doctor and the minor to avoid requirement through judicial bypass procedure); see also *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (invalidating statute that required notification of both minor's parents).

118. "Clear and convincing" evidence that the minor is mature enough or the abortion is in her best interest.

119. *Akron Ctr.*, 497 U.S. at 502. The majority also found that the minor was given a fair hearing, even though she did not have state funded counsel and was required to make a showing of maturity by "clear and convincing" evidence. See *id.* at 516.

both of a minor's parents if a judicial bypass procedure that meets the requirements of *Akron* is provided.<sup>120</sup>

Against this federal backdrop, several states have attempted to implement parental consent or notification laws. While several have succeeded, a few, including Florida, have failed. The distinguishing factor between Florida and states that have successfully enacted notification requirements appears to be Florida's privacy amendment.

In 1989, in *In re T.W.*,<sup>121</sup> the Florida Supreme Court considered section 390.001(4)(a) of the Florida Statutes,<sup>122</sup> Florida's parental consent statute. This statute required that, prior to having an abortion, a minor must obtain parental consent, or alternatively, convince a court that (1) she is sufficiently mature to make the decision or (2) the abortion is in her best interest.<sup>123</sup>

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120. See ROTUNDA & NOWAK, *supra* note 11, at 639.

121. 551 So. 2d 1186 (Fla. 1989).

122. FLA. STAT. ANN. §390.001(4)(a) (Supp. 1988), provided:

1. If the pregnant woman is under 18 years of age and unmarried, in addition to her written request, the physician shall obtain the written informed consent of a parent, custodian, or legal guardian of such unmarried minor, or the physician may rely on an order of the circuit court, on petition of the pregnant unmarried minor or another person on her behalf, authorizing, for good cause shown, such termination of pregnancy without the written consent of her parent, custodian, or legal guardian. The cause may be based on: a showing that the minor is sufficiently mature to give an informed consent to the procedure; the fact that a parent, custodian, or legal guardian unreasonably withheld consent; the minor's fear of physical or emotional abuse if her parent, custodian, or legal guardian were requested to consent; or any other good cause shown. At its discretion, the court may enter its order *ex parte*. If the court determines that the minor is sufficiently mature to give an informed consent to the procedure, the court shall issue an order authorizing the procedure without the consent of her parent, custodian, or legal guardian. If the court determines that the minor is not sufficiently mature, the court shall determine the best interest of the minor and enter its order in accordance with such determination.

2. The court shall ensure that a minor who files a petition pursuant to this paragraph will remain anonymous. The minor may participate in proceedings in the court on her own or through another person on her behalf. Court proceedings brought pursuant to this paragraph are confidential and shall be given the priority necessary for the court to reach a decision promptly. The court shall rule within 48 hours after the petition is filed; but the 48-hour limitation may be extended at the request of the minor. An expedited anonymous appeal shall be made available to a minor who files a petition pursuant to this paragraph.

3. The Supreme Court may promulgate any rules it considers necessary to ensure that proceedings brought pursuant to this paragraph are handled expeditiously and are kept confidential.

123. See *T.W.*, 551 So. 2d at 1188-89.

Pursuant to this procedure, T.W., a pregnant, unmarried minor, petitioned for waiver of parental consent under the judicial bypass provision and argued on alternative grounds that: (1) she was sufficiently mature to give informed consent to the abortion; (2) if she was required to obtain consent from her parents, she had a justified fear of physical or emotional abuse from them; and (3) because her mother was seriously ill, informing her of the pregnancy would be an added burden.<sup>124</sup>

In addition to T.W.'s claim, the guardian ad litem argued that the judicial bypass provision of the statute was unconstitutionally vague and that, therefore, parental consent must be required when a minor seeks an abortion.<sup>125</sup> The trial court agreed and found the judicial bypass procedure to be unconstitutional on the basis that it (1) lacked a sufficient provision for challenges to its validity, (2) was vague, and (3) did not provide for testimony to controvert the minor's testimony.<sup>126</sup>

On appeal, the district court ruled the judicial bypass provision was unconstitutionally vague in that it permitted arbitrary denial of a petition. The district court also identified several other defects in the statute, claiming that it (1) failed to provide for a record hearing, (2) lacked guidelines as to admissible evidence, (3) merely provided for a brief forty-eight-hour time limit, and (4) failed to provide for appointed counsel for indigent minors.<sup>127</sup> Subsequent to the district court's ruling and prior to the Florida Supreme Court's granting certiorari, T.W. lawfully ended her pregnancy, thus making the issues raised moot.<sup>128</sup> However, the Florida Supreme Court found that the questions presented were of great public importance and were likely to recur; therefore, they accepted the case pursuant to its review powers under article V, section 3(b)(1) of the Florida Constitution.

Justice Shaw, writing for the majority, acknowledged the federal law in this area and explained that the statute must pass muster under both the federal and state constitutions.<sup>129</sup> Noting Florida's unique express privacy provision, the court chose first to examine the statute under the Florida Constitution, since a finding that it was invalid under the Florida Constitution would

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124. *See id.* at 1189.

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.* at 1190.

eliminate the need for any further review under the Federal Constitution.<sup>130</sup>

The *T.W.* court analyzed the history of Florida's right of privacy and explained that the privacy clause is evidence of a clear intent on the part of Florida's citizenry to provide more protection from governmental intrusion into one's private life than that provided by the federal constitution. Therefore, because *T.W.* claimed relief pursuant to article I, section 23, the Court relied on the strict scrutiny test announced in *Winfield*. In applying this test, the court indicated that it had to first determine whether a fundamental right is implicated in a woman's decision to have an abortion.<sup>131</sup> The Court concluded that "[t]he Florida Constitution embodies the principle that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental."<sup>132</sup>

Based on the amendment's clear language that the right of privacy extends to "every natural person," the Court further observed that this right clearly extends to minors.<sup>133</sup> However, the Court recognized that minors' rights are not absolute and that the state can overcome these constitutional rights by demonstrating that the statute furthers a compelling state interest through the use of the least intrusive means.<sup>134</sup>

Noting the state interests acknowledged by the *Roe* Court—the health of the mother and the potentiality of life in the fetus—the *T.W.* court considered the question of when these interests become compelling under Florida law. The court adopted the end of the first trimester as the time when the state's interest in maternal health becomes compelling.<sup>135</sup> The court stated that prior to this point no interest in maternal health could be served by significantly restricting how abortions can be performed by qualified doctors, while after this point the matter becomes one of genuine concern.<sup>136</sup> Therefore, "prior to the end of the first trimester, the abortion decision must be left to the woman and may not be significantly restricted by the

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130. *See id.*

131. *See id.*

132. *Id.* (quoting *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986)).

133. *Id.* at 1193 (emphasis added).

134. *See id.*

135. *See id.*

136. *See id.*

state."<sup>137</sup> After this point, however, the state may impose *significant* restrictions only if done through the use of the least intrusive means "designed to safeguard the health of the mother."<sup>138</sup>

In regard to the state's interest in the health of the unborn child, the court concluded that under Florida law this interest becomes compelling upon "viability," since at this point "society becomes capable of sustaining the fetus," and its interest in preserving its potential for life thus becomes compelling.<sup>139</sup> The court indicated that this point typically occurs upon completion of the second trimester.<sup>140</sup>

In conclusion, the court held that the statute failed with respect to these state interests because "it intruded upon the privacy of the pregnant minor from conception to birth . . . [and] [s]uch a substantial invasion of a pregnant female's privacy by the state for the full term of the pregnancy is not necessary for the preservation of maternal health or the potentiality of life."<sup>141</sup> The court acknowledged, however, that where parental rights over a minor are concerned, it needs to address additional state interests.<sup>142</sup> The court cited *Bellotti II* to detail the interests involved when a minor seeks an abortion: "[t]he peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."<sup>143</sup> But, the court explained, while the federal courts applied a relaxed standard in assessing the validity of parental consent statutes,<sup>144</sup> Florida's explicit privacy provision requires that the compelling state interest standard be applied: "We agree that the state's interests in protecting minors and in preserving family unity are worthy objectives. Unlike the federal Constitution, however, which allows intrusion based on a 'signifi-

137. *Id.*

138. *Id.* The court also noted that *insignificant* burdens during either stage need only further *important* state interests. *See id.*

139. *Id.*; *see also* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (Blackmun, J., concurring & dissenting).

140. *See T.W.*, 551 So. 2d at 1194.

141. *Id.*

142. *See id.*

143. *Id.* (quoting *Bellotti v. Baird*, 443 U.S. 622, 634 (1979)).

144. *See* Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 414, 427 n.10 (1983) ("[T]he Court has repeatedly recognized that, in view of the unique status of children under the law, the States have a '*significant*' interest in certain abortion regulations aimed at protecting children 'that is not present in the case of an adult.'" (emphasis added); *H. L. v. Matheson*, 450 U.S. 398, 441 n.32 (1981) (Marshall, J., dissenting) ("Although it may seem that the minor's privacy right is somehow less fundamental because it may be overcome by a '*significant* state interest,' the more sensible view is that state interests inapplicable to adults may justify burdening the minor's right.") (emphasis added).



cant' state interest, the Florida Constitution requires a 'compelling' state interest in all cases where the right to privacy is implicated."<sup>145</sup>

Because Florida had not recognized these interests as being sufficiently compelling to justify parental consent for other procedures involving minors,<sup>146</sup> the court was unable to find a compelling state interest to justify a parental consent requirement only where abortion is concerned: "Although the state does have an interest in protecting minors, 'the selective approach employed by the legislature evidences the limited nature of the . . . interest being furthered by these provisions.'"<sup>147</sup>

The court further noted that the statute also failed the second prong of the *Winfield* standard as it did not employ the least intrusive means in furthering the state interest.<sup>148</sup> The court explained that an "inquiry under this prong must consider procedural safeguards relative to the intrusion,"<sup>149</sup> and pointed out that the judicial bypass provision neither provided legal representation for the minor nor required a record of the hearing.<sup>150</sup> The court found that "[i]n proceedings wherein a minor can be wholly deprived of authority to exercise her fundamental right to privacy, counsel is required under our state constitution."<sup>151</sup> Additionally, the court pointed out that the statute failed to provide for a record hearing, stating that "[w]ithout a record hearing to memorialize a trial judge's reasons for denying a petition for waiver of parental consent, appellate review is meaning-

145. *T.W.*, 551 So. 2d at 1195 (citing *Winfield v. Division of Pari-Mutuel*, 477 So. 2d 544, 548 (Fla. 1985)).

146. *See* FLA. STAT. ANN. § 743.065 (1987) (allowing an unwed minor to consent, without parental approval, to any medical procedure involving her pregnancy or her existing child, except abortion, regardless of the possible consequences involved); FLA. STAT. ANN. ch. 63 (1987) (permitting minor to put child up for adoption without parental consent).

147. *T.W.*, 551 So. 2d at 1195 (quoting *Ivey v. Bacardi Imports Co.*, 541 So. 2d 1129, 1139 (Fla.1989)).

148. *See id.*

149. *Id.* at 1196.

150. *See id.*

151. *Id.* *See also* *Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1138 (7th Cir. 1983) (finding that requiring an indigent minor to handle her case all alone is to risk deterring many minors from pursuing their rights because they are unable to understand how to navigate the complicated court system on their own or because they are too intimidated by the seeming complexity to try); *In re D.B. & D.S.*, 385 So. 2d 83 (Fla. 1980) (recognizing that individual's interest in preserving the family unit and raising children is fundamental; therefore, counsel for the affected party is constitutionally required in any proceeding involving permanent termination of fundamental rights).

less.”<sup>152</sup> Finally, the Court pointed to the fact that the statute failed to make any exception for “emergency or therapeutic” abortions as another reason to conclude that the statute failed to provide adequate procedural safeguards and, therefore, did not employ the least intrusive means.<sup>153</sup>

Thus, it is apparent that in the area of abortion regulation, Florida’s privacy amendment provides greater privacy protection for Florida citizens than does the Federal Constitution; but, how does Florida compare with other states that have constitutions which implicitly, as opposed to explicitly, provide for a right of privacy? *Pro-Choice Mississippi v. Fordice*<sup>154</sup> provides a good comparison.

Subsequent to the Florida Supreme Court’s decision in *T.W.*, the Supreme Court of Mississippi examined a similar parental consent statute in *Fordice*. The statute at issue in *Fordice* required minors, with limited exceptions, to obtain consent of both parents prior to having an abortion.<sup>155</sup> After failing facial constitutional challenges in federal courts, a coalition of pro-choice advocates challenged this statute, as well as other abortion

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152. *T.W.*, 551 So. 2d at 1196.

153. *Id.*

154. 716 So. 2d 645 (Miss. 1998).

155. See MISS. CODE ANN. §§ 41-41-51 to 63 (1993). Subject to significant exceptions, Mississippi requires an unemancipated minor to obtain consent of both parents or the approval of the court before obtaining an abortion; in instances where the minor’s parents are divorced, unmarried, or separated, then consent of the parent with primary custody of the minor is sufficient. See § 41-41-53(2)(a). If the minor’s parents are married, but one of the parents is not available within a reasonable time and manner, then written consent of the available parent is sufficient. See § 41-41-53(2)(b). If the pregnancy is the result of sexual intercourse between the minor and her natural father, adoptive father, or stepfather, then written consent of the minor’s mother is sufficient. See § 41-41-53(2)(c). Abortions without written parental consent are permitted in cases of medical emergency. See § 41-41-57. The parental consent statutes allow for a judicial bypass through which the court may waive parental consent. See § 41-41-53(3). The minor may represent herself, but the court shall advise her of her right to counsel if she is not already represented. See § 41-41-55(2). The proceeding must be confidential and anonymous, and criminal penalties exist to prevent disclosure of the proceedings. See §§ 41-41-55(3), 41-41-61. The chancery court must rule upon the application for waiver within 72 hours, or the parental consent requirement is waived. See § 41-41-55(3). Parental consent is waived if the court finds (1) the minor is sufficiently mature to make the abortion decision on her own, or (2) obtaining the abortion would be in the best interests of the minor. See § 41-41-55(4). The minor has the right to an expedited, confidential, and anonymous appeal if the court denies the waiver. See § 41-41-55(6). No filing fee is required under the statute. See § 41-41-55(7).

provisions within the act,<sup>156</sup> claiming that these provisions violated the Mississippi Constitution.

The Mississippi Supreme Court first addressed the issue of whether the Mississippi Constitution provides for a right to an abortion. As the court pointed out, the Federal Constitution's failure to state an explicit right to an abortion did not prevent the United States Supreme Court from finding certain "penumbras" from which a protection of privacy is derived.<sup>157</sup> Likewise, the Mississippi court acknowledged that in *In re Brown*,<sup>158</sup> they had previously held that while the state constitution does not explicitly deny or grant the right to an abortion, the constitution does provide for a right to privacy and the right to make choices concerning one's body.<sup>159</sup> Therefore, since "autonomous bodily integrity is protected under the right of privacy," then "[p]rotected within the right of autonomous bodily integrity is an *implicit* right to have an abortion."<sup>160</sup> Therefore, the court

156. The parties also challenged the constitutionality of § 41-41-31 (1993) (requiring a 24-hour waiting period after state mandated consultation on information pertaining to abortion and pregnancy before a woman may have an abortion); and Rules and Regulations for the Operation of Ambulatory Surgical Facilities and Abortion Facilities § 102.19 (requiring a physician to have completed an American Medical Association approved residency in obstetrics and gynecology before performing abortions at a licensed abortion clinic). For purposes of this article, only the Mississippi Supreme Court's analysis of the parental consent statute will be analyzed.

157. See *Fordice*, 716 So. 2d at 653.

158. 478 So. 2d 1033 (Miss. 1985).

159. See *Fordice*, 716 So. 2d at 653. The court notes that article 3, section 32 of the Mississippi Constitution states that "[t]he enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people." *Id.* As the court explains, this language mirrors the Ninth Amendment of the United States Constitution and, therefore, should be interpreted similarly.

160. *Id.* (emphasis added); see also *American Academy of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997) (holding that state constitution protects right of woman to choose to have an abortion); *In re T.W.*, 551 So. 2d 1186, 1190-93 (Fla. 1989) (right to an abortion included under explicit state constitutional right to privacy); *Mahaffey v. Attorney General*, No. 94-406793 AZ, 1994 WL 394970, at \*7 (Mich. Cir. Ct. July 15, 1994) (stating that "State Constitution encompasses a right of privacy, which in turn includes the right to an abortion"); *Doe v. Gomez*, 542 N.W.2d 17, 26-27 (Minn. 1995) (finding right to abortion is included in right to autonomous bodily integrity protected under state constitutional right to privacy); *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976) (likening the right to refuse medical treatment to the right to an abortion); *Hope v. Perales*, 634 N.E.2d 183, 186 (N.Y. 1994) (holding right to privacy protected under due process clause of New York Constitution involves right to reproductive choice, including right to an abortion); *State v. Koome*, 530 P.2d 260, 263 (Wash. 1975) (holding that state constitution protects right to an abortion under right to privacy).

concluded that “[j]ust as the United States Supreme Court has recognized that the federal constitutional right to privacy protects a woman’s right to terminate her pregnancy, we find that the state constitutional right to privacy includes an implied right to choose whether or not to have an abortion.”<sup>161</sup>

Next, consistent with the Florida Supreme Court’s reasoning in *T.W.*, the *Fordice* court acknowledged that minors, like adults, possess constitutional rights, and that included within these rights is the right to an abortion.<sup>162</sup> However, the Mississippi Supreme Court cautioned that these rights are not absolute as minors are not afforded constitutional protection equal to that of adults.<sup>163</sup> As in *T.W.*, the court relied upon the United States Supreme Court’s decision in *Bellotti II* to support its conclusion that minors’ rights are not equal to those of adults.<sup>164</sup>

The *Fordice* court next discussed which standard it should apply to this constitutional challenge. The Plaintiffs argued that *T.W.* and *American Academy of Pediatrics v. Lungren (Lungren I)*<sup>165</sup> demonstrate that a strict standard of review is required,<sup>166</sup> and while the court noted that it has previously required a compelling state interest standard when assessing governmental intrusion into one’s personal life,<sup>167</sup> it chose not to do so in this case.<sup>168</sup> Because the Mississippi Supreme Court rarely addressed the issue of the appropriate standard for reviewing the constitutionality of an abortion statute, it called upon United States Supreme Court precedent for guidance—in particular *Casey v. Planned Parenthood of Southeastern Pennsylvania*.<sup>169</sup>

In *Casey*, the United States Supreme Court balanced a woman’s right to terminate her pregnancy before viability with the state’s “important and legitimate interest in protecting the

161. *Fordice*, 716 So. 2d at 653-54.

162. *See id.* at 658.

163. *See id.*

164. *See id.* (citing *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (finding that constitutional rights of children are not equal with those of adults because of “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing”)).

165. 32 Cal. Rptr. 2d 546 (Cal. Ct. App. 1994).

166. *See Fordice*, 716 So. 2d at 658.

167. *See Mississippi Empl. Sec. Comm’n v. McGlothlin*, 556 So. 2d 324 (Miss. 1990) (applying compelling state interest test); *In re Brown*, 478 So. 2d 1033, 1039 (Miss. 1985) (applying a strict scrutiny analysis under which the right to privacy may only be infringed upon in compelling cases of great and imminent public danger).

168. *See Fordice*, 716 So. 2d at 654.

169. 505 U.S. 833 (1992).

potentiality of life,"<sup>170</sup> and concluded that "only where state regulation imposes an *undue burden* on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."<sup>171</sup> Based upon the reasoning in *Casey*, the Mississippi Supreme Court concluded that the undue burden standard is the appropriate means of balancing the state's interest with the woman's constitutionally protected liberty:

We find this reasoning to be sound. While we have previously analyzed cases involving the state constitutional right to privacy under a strict scrutiny standard requiring the State to prove a compelling interest, we are not bound to apply that standard in all privacy cases. The abortion issue is much more complex than most cases involving privacy rights. We are placed in the precarious position of both protecting a woman's right to terminate her pregnancy before viability and protecting unborn life. In an attempt to create a workable framework out of these diametrically opposed positions, we adopt the well reasoned decision in *Casey*, applying the undue burden standard to analyze laws restricting abortion. We do not limit any future application of the strict scrutiny standard for evaluating infringement on a person's right to privacy in other areas.<sup>172</sup>

The court acknowledged that this standard is less stringent than that employed by other states deciding this issue,<sup>173</sup> and differentiated those decisions by the fact that those states' constitutions provide for an *explicit* right to privacy, while the Mississippi Constitution has only an *inferred* right to privacy.<sup>174</sup>

Thus, having applied this less stringent standard, the court held that the parent consent statute was not too restrictive:

The State has a legitimate interest in protecting the health of its minors, and in ensuring that their decisions regarding abortion are well informed and carefully considered. These interests are promulgated by Mississippi's parental consent statutes. Mandatory parental consent does not place an undue burden upon a minor's right to obtain an

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170. *Id.* at 871 (quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

171. *Id.* at 874 (emphasis added).

172. *Fordice*, 716 So. 2d at 655.

173. See *American Academy of Pediatrics v. Lungren (Lungren III)*, 940 P.2d 797 (Cal. 1997) (applying the compelling state interest test, the court found that California's parental consent law significantly intruded upon fundamental autonomy interest protected by California's explicit privacy clause); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).

174. See *Fordice*, 716 So. 2d at 654.

abortion, particularly in light of the judicial bypass. Those minors who lack the requisite maturity to make the long-impacting decision to have an abortion need their parents' guidance, and those who are able to make a fully informed choice alone have the option of obtaining a waiver of parental consent through the judicial bypass proceeding.<sup>175</sup>

The court, therefore, determined that the parental consent statute passed the undue burden test, and was thus constitutional.<sup>176</sup>

Thus, a comparison of the Florida and Mississippi Supreme Courts' opinions demonstrates that in the area of abortion rights the explicit right to privacy in Florida's constitution provides greater privacy protection for its citizens than those states with no, or merely an implicit, right to privacy.

## 2. Grandparental Visitation

The issue of grandparental visitation rights also has become a controversial topic in recent years. At common law, there was no right to grandparental visitation if the parents of the child objected to the visitation.<sup>177</sup> Today, however, statutes in all fifty states provide for grandparental visitation in some form.<sup>178</sup>

175. *Id.* at 660.

176. *See id.* In reaching this conclusion, the court noted that the procedural safeguards employed in the statute helped to ensure that the statute did not constitute an undue burden. *See id.*

177. *See* Theresa H. Sykora, *Grandparent Visitation Statutes: Are the Best Interests of the Grandparent Being Met Before Those of the Child?*, 30 *FAM. L.Q.* 753, 758 (1996) (citing *Olds v. Olds*, 356 N.W.2d 571, 572-73 (Iowa 1984)).

178. *See* ALA. CODE § 30-3-4 (1989 & Supp. 1994); ALASKA STAT. § 25.24.150 (Michie 1991); ARIZ. REV. STAT. ANN. § 25-337.01 (West Supp. 1994); ARK. CODE ANN. § 9-13-103 (Michie 1993); CAL. FAM. CODE § 3102 (West 1994); COLO. REV. STAT. § 19-1-117 (1990); CONN. GEN. STAT. ANN. § 46b-59 (West 1995) (general visitation statute—prior to 1983, the statute specifically provided for grandparental visitation); DEL. CODE ANN. tit. 10, § 1031 (Michie Supp. 1994); FLA. STAT. ANN. § 752.01; Ga. Code Ann. § 19-7-3 (Supp. 1994); HAW. REV. STAT. ANN. § 571-46.39 (Michie Supp. 1994); IDAHO CODE § 32-719 (1995); 750 Ill. Comp. Stat. § 5/607 (West Supp. 1994); IND. CODE ANN. § 31-1-11.7-2 (Michie Supp. 1994); IOWA CODE ANN. § 598.35 (West Supp. 1994); KAN. STAT. ANN. § 38-129 (1993); KY. REV. STAT. ANN. § 405.021 (Banks-Baldwin 1995); LA. REV. STAT. ANN. § 9:344 (West Supp. 1995); ME. REV. STAT. ANN. tit. 19, § 1003 (West Supp. 1994); MD. CODE ANN., FAM. LAW § 9-102 (1995); MASS. GEN. LAWS ANN. ch. 119, § 39D (1994); MICH. COMP. LAWS ANN. § 722.27b (West 1993); MINN. STAT. ANN. § 257.022 (West 1992); MISS. CODE ANN. § 93-16-3 (Law. Co-op. 1994); MO. ANN. STAT. § 452/402 (West Supp. 1994); MONT. CODE ANN. § 40-9-102 (1995); NEB. REV. STAT. § 43-1802 (1993); NEV. REV. STAT. ANN. § 125A.330 (Michie 1993); N.H. REV. STAT. ANN. § 458:17-d (1992); N.J. REV. STAT. ANN. § 9:2-7.1 (West Supp. 1994); N.M. STAT. ANN. § 40-9-2 (Michie 1994); N.Y. DOM. REL. LAW § 72 (McKinney 1999); N.C. GEN. STAT.

Although there are a number of variations of the issue, essentially the conflict develops when one or both of a child's parents refuse to allow one or more of the grandparents to have contact with the child. The state becomes involved when the grandparent files a petition in court in an attempt to acquire court-ordered visitation. Florida section 752.01 of the Florida Statutes, which permits grandparental visitation, is the vehicle for state action:

- (1) The court shall, upon petition filed by a grandparent of a minor child, award reasonable rights of visitation to the grandparent with respect to the child when it is in the best interest of the minor child if:
  - (a) One or both parents of the child are deceased;
  - (b) The marriage of the parents of the child has been dissolved;
  - (c) A parent of the child has deserted the child;
  - (d) The minor child was born out of wedlock and not later determined to be a child born within wedlock as provided in s. 742.091; or
  - (e) The minor is living with both natural parents who are still married to each other whether or not there is a broken relationship between either or both parents of the minor child and the grandparents, and either or both parents have used their parental authority to prohibit a relationship between the minor child and the grandparents.
- (2) In determining the best interest of the minor child, the court shall consider:
  - (a) The willingness of the grandparent or grandparents to encourage a close relationship between the child and the parent or parents.
  - (b) The length and quality of the prior relationship between the child and the grandparent or grandparents.

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§ 50-13.2 (Supp. 1998); N.D. CENT. CODE § 14-09-05.1 (1995); OHIO REV. CODE ANN. § 3109.051 (Anderson Supp. 1994); OKLA. STAT. tit. 10, § 5 (West 1998); OR. REV. STAT. § 109.123 (1999); 23 PA. CONS. STAT. ANN. § 5311 (West 1991); R.I. GEN. LAWS § 15-5-24.1 (Michie Supp. 1994); S.C. CODE ANN. § 20-7-420(33) (Law Co-op 1995); S.D. CODIFIED LAWS ANN. § 24-5-54 (1993); TENN. CODE ANN. § 36-6-302 (1998); TEX. FAM. CODE ANN. § 14.03 (West 1986 & Supp. 1995); UTAH CODE ANN. § 30-5-2(1) (1999); VT. STAT. ANN. tit. 15, § 1012 (1989); VA. CODE ANN. § 20-124.2 (Michie 1999) (general statute regarding visitation); WASH. REV. CODE § 26.09.240 (1999); W. VA. CODE § 48-2B-4 (Supp. 1994); WIS. STAT. ANN. § 880.155 (West 1991); WYO. STAT. ANN. § 20-7-101 (Michie 1994).

- (c) The preference of the child if the child is determined to be of sufficient maturity to express a preference.
- (d) The mental and physical health of the child.
- (e) The mental and physical health of the grandparent or grandparents.
- (f) Such other factors as are necessary in the particular circumstances.<sup>179</sup>

Over the past decade, this statute has been challenged as being in violation of a parent's right of privacy. The United States Supreme Court recently granted certiorari in a case out of the state of Washington.<sup>180</sup> The issue before the Supreme Court is whether the Washington grandparent visitation statute violates a parent's right of privacy under the Federal Constitution.<sup>181</sup> However, a number of states have already ruled on the issue, with varying results.

The first grandparental visitation case considered by the Florida Supreme Court was *Beagle v. Beagle*.<sup>182</sup> In *Beagle*, Roy and Sharron Beagle filed a petition in the trial court for visitation rights with their granddaughter, Amber Beagle.<sup>183</sup> The child's parents, Dewey and Melissa Beagle, challenged the petition and moved to dismiss the action.<sup>184</sup> At the time of the proceeding, the Beagles were "living together with the child as an intact family."<sup>185</sup>

The trial court dismissed the petition, finding that Florida's grandparental visitation statute violated the parents' right of privacy under article I, section 23 of the Florida Constitution.<sup>186</sup> On appeal, the district court reversed, relying on its previous decision in *Sketo v. Brown*.<sup>187</sup> In *Sketo*, the district court upheld the award of grandparental visitation in a case where one of the parents was deceased.<sup>188</sup> Building on its reasoning in *Sketo*, the district court in *Beagle* stated:

When we consider that the justification for Florida's grandparent visitation statute is the best interest of the child, it

179. FLA. STAT. ANN. § 752.01 (1999).

180. See *Troxel v. Granville*, 120 S.Ct. 11 (1999). At the time this article was written, the Court had not yet rendered an opinion in *Troxel*.

181. See *Custody of Smith v. Stillwell*, 969 P.2d 21 (Wash. 1998).

182. 678 So. 2d 1271 (Fla. 1996).

183. See *id.* at 1273.

184. See *id.*

185. *Id.*

186. See *id.* at 1273-74.

187. 559 So. 2d 381 (Fla. Dist. Ct. App. 1990).

188. See *id.* at 382.



seems to us that it matters little whether the child whose interest is to be protected lives in a loving, nurturing home with both parents, a loving home headed by a working mother whose erstwhile husband has deserted the family or with a loving father devastated by a divorce not of his asking. Article I, Section 23 protects the privacy rights of each of these family units in precisely the same way. None of these loving parents is more or less equal than any other and none is entitled to more or less privacy protection than are the others. None of the children whose best interest is protected by section 752.01 is the child of a lesser parent because he or she belongs to the family unit defined by a loving father and mother or father or mother.<sup>189</sup>

Recognizing the importance of this issue, the district court certified the following question as being one of great public importance: "Is section 752.01(1)(e), Florida Statutes (1993), facially unconstitutional because it constitutes impermissible state interference with parental rights protected by either article I, section 23 of the Florida Constitution or the due process clause of the Fourteenth Amendment to the United States Constitution?"<sup>190</sup> The supreme court accepted the case pursuant to its discretionary review powers.

In a unanimous opinion written by Justice Overton, the Florida Supreme Court struck down the provision of the statute that was in question. The court began its analysis by recounting the history of the grandparental visitation statute. The concept of grandparental visitation was first introduced by the Florida Legislature in 1978.<sup>191</sup> In 1984, the Legislature amended the grandparental visitation statute and *permitted* court-ordered visitation in the following situations: (1) where one or both of the parents of the child are deceased; (2) where the marriage of the child's parents has been dissolved; or (3) where a parent of the child has deserted the child.<sup>192</sup> The Legislature again amended the statute in 1990 to *require* grandparental visitation when it is in the best interest of the child.<sup>193</sup> Finally, in 1993, the Legislature added subsection (1)(e) to section 752.01, which opened the door for

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189. *Beagle v. Beagle*, 654 So. 2d 1260, 1263 (Fla. Dist. Ct. App. 1995).

190. *Id.*

191. *Beagle*, 678 So. 2d at 1272-73; *see also* FLA. STAT. ANN. § 61.13(2)(b) (Supp. 1978); FLA. STAT. ANN. § 68.08 (Supp. 1978).

192. *See Beagle*, 678 So. 2d at 1273; *see also* FLA. STAT. ANN. § 752.01 (Supp. 1984) (providing that the court *may* order visitation).

193. *See Beagle*, 678 So. 2d at 1273; *see also* § 752.01 (providing that the court *shall* order visitation when in the best interest of the child).

grandparental visitation in situations where the child was still living with both natural parents who were still married to each other.<sup>194</sup> This final amendment was the provision that was challenged in *Beagle*.

The Florida Supreme Court concluded that the issue of whether the state can interfere with family relationships implicates a parent's right of privacy.<sup>195</sup> Therefore, the court applied the strict scrutiny test announced in *Winfield*.<sup>196</sup> The court determined that the state did not have a compelling interest in imposing grandparental visitation rights over the objection of at least one of the parents.<sup>197</sup> In making this determination, the court looked at other cases involving parental privacy rights. The court observed that the statute in *In re T.W.* that required parental consent prior to an abortion did not satisfy the compelling state interest.<sup>198</sup> On the other hand, the court cited its previous decisions in *Padgett v. Department of Health and Rehabilitative Services*<sup>199</sup> and *Schmitt v. State*,<sup>200</sup> wherein the court recognized that the state has a compelling state interest when it is acting to prevent demonstrable harm to a child. In *Padgett*, the court concluded that the state had a compelling interest in terminating parental rights based on evidence of abuse or neglect.<sup>201</sup> In *Schmitt*, the court found that the state had a compelling interest in protecting a child from sexual exploitation by a parent.<sup>202</sup>

Based on this precedent, the court in *Beagle* held that "the State may not intrude upon the parents' fundamental right to raise their children except in cases where the child is threatened with harm."<sup>203</sup> The court seemed to dismiss the "best interest of the child" standard contained within the statute:

However, even assuming grandparent visitation promotes the health and welfare of the child, the state may only impose that visitation over the parents' objections on a showing that failing to do so would be harmful to the child. It is irrelevant, to this constitutional analysis, that it might

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194. See *Beagle*, 678 So. 2d at 1273; see also § 752.01(1)(e) (authorizing the award of grandparental visitation rights in situations where the child lives within an intact family).

195. See *Beagle*, 678 So. 2d at 1275-76.

196. See *id.* at 1276.

197. See *id.*

198. See *id.*

199. 577 So. 2d 565 (Fla. 1991).

200. 590 So. 2d 404 (Fla. 1991).

201. See *Padgett*, 577 So. 2d at 571.

202. See *Schmitt*, 590 So. 2d at 410-11.

203. *Beagle*, 678 So. 2d at 1276.

in many instances be "better" or "desirable" for a child to maintain contact with a grandparent.<sup>204</sup>

Accordingly, the Florida Supreme Court held that section 752.01(1)(e) was unconstitutional to the extent that it permitted grandparental visitation without an explicit finding of harm to the child. The court limited its holding to situations where the state has attempted to impose grandparental visitation upon "an intact family."<sup>205</sup> The court closed by stating, "it is not our judicial role to comment on the general wisdom of maintaining intergenerational relationships. We must refrain from expressing our personal thoughts as either grandparents or future grandparents."<sup>206</sup>

Two years later, the Florida Supreme Court accepted another case dealing with this issue. In *Von Eiff v Azicri*,<sup>207</sup> the court was asked whether subsection (1)(a) of section 752.01 violated a parent's right of privacy under Florida's Constitution. Subsection (1)(a) required grandparental visitation when it was in the best interest of the child if one or both parents of the child were deceased.<sup>208</sup>

Luisa and Philip Von Eiff were married in 1990 and their daughter Kelly was born in 1991.<sup>209</sup> Luisa died of cancer in 1993.<sup>210</sup> The following year, Philip remarried, and his new wife Cheryl adopted Kelly.<sup>211</sup> Kelly's maternal grandparents, the Azicris, filed a petition for visitation in the trial court at the end of 1994 after the Von Eiffs refused unconditional visitation.<sup>212</sup> In response, the Von Eiffs argued that subsection (1)(a) violated their right of privacy.<sup>213</sup>

The case proceeded to a nonjury trial.<sup>214</sup> The testimony revealed the Azicris were very involved in Kelly's life prior to Luisa's death.<sup>215</sup> While the Von Eiffs permitted the Azicris to visit Kelly after Philip remarried, the Von Eiffs required that a third person be present during the visits.<sup>216</sup> The Azicris

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204. *Id.* at 1276-77 (quoting *Brooks v. Parkerson*, 454 S.E.2d 769, 773-74 (Ga. 1995)).

205. *Id.* at 1277.

206. *Id.*

207. 720 So. 2d 510 (Fla. 1998).

208. *See* FLA. STAT. ANN § 752.01(1)(a) (1993).

209. *See Von Eiff*, 720 So. 2d at 511.

210. *See id.*

211. *See id.*

212. *See id.* at 512.

213. *See id.*

214. *See id.*

215. *See id.*

216. *See id.*

expressed their dissatisfaction with such an arrangement and testified that visiting the home of their deceased daughter, where Philip now lived with his new wife, brought back painful memories.<sup>217</sup> At the conclusion of the trial, the court ordered unsupervised visitation, finding that it was in the best interest of the child to have the relationship with her maternal grandparents restored.<sup>218</sup>

On appeal, the district court affirmed the trial court's order.<sup>219</sup> The district court found that "the state has a compelling interest in protecting children after a parent has died by preserving grandparent visitation that is in the child's best interests."<sup>220</sup> The district court also concluded that subsection (1)(a) is "narrowly tailored" to promote this compelling interest.<sup>221</sup> The district court distinguished *Beagle* because the family in *Beagle* was intact, whereas the Von Eiffs were no longer intact as a result of Luisa's death.<sup>222</sup> As in *Beagle*, the district court in *Von Eiff* certified the question to the Florida Supreme Court, which accepted the case.<sup>223</sup>

Again in a unanimous opinion, this time written by Justice Pariente, the Florida Supreme Court struck down the challenged provision as violating the Von Eiffs' right of privacy.<sup>224</sup> The court applied the compelling state interest test and concluded that the state failed to satisfy its burden.<sup>225</sup> The court stated that subsection (1)(a) suffers from the same infirmity as subsection (1)(e), in that it does not require proof of demonstrable harm to the child.<sup>226</sup> The court reasoned that requiring proof of harm to the child as a prerequisite "ensures that the focus will not be on the perceived benefits of a grandparent-grandchild relationship before the need for government intervention is assessed."<sup>227</sup>

The Azicris argued that when one or more of a child's parents is killed, the child will suffer harm if the state does not preserve the familial bond between grandparents and grandchildren.<sup>228</sup> The court dismissed this argument, asserting

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217. *See id.*

218. *See id.*

219. *See Von Eiff v. Azicri*, 699 So. 2d 772 (Fla. Dist. Ct. App. 1997).

220. *Id.* at 773.

221. *Id.*

222. *See id.* at 775.

223. *See id.* at 778.

224. *See Von Eiff v. Azicri*, 720 So. 2d 510, 517 (Fla. 1998).

225. *See id.* at 514.

226. *See id.*

227. *Id.* at 515.

228. *See id.*

that the death of a child's parent is not the type of harm which has traditionally warranted government intrusion.<sup>229</sup>

The court also addressed the district court's argument that *Beagle* was distinguishable because it involved an intact family:

Under *Beagle*, the State could not force grandparent visitation against the "express wishes" of Philip Von Eiff before the death of the biological mother, "in the absence of demonstrated harm to the child." We find nothing in the unfortunate circumstance of one biological parent's death that would affect the surviving parent's right of privacy in a parenting decision concerning the child's contact with her maternal grandparents. Philip Von Eiff, whom the trial court found to be a "loving, nurturing and fit" parent, continues to enjoy a right of privacy in his parenting decisions, despite the death of the child's biological mother. As succinctly stated by the Fifth District, under operatively identical facts in finding subsection (1)(a) unconstitutional: "We are unable to discern any difference between the fundamental rights of privacy of a natural parent in an intact family and the fundamental rights of privacy of a widowed parent."

In addition, Philip Von Eiff has remarried and his new wife, Cheryl Von Eiff, adopted the child, thereby together forming a new "intact" family. While our result does not depend upon this factual scenario, the fact that a new intact family was formed illustrates the difficulty in allowing government intervention into family decision-making based on whether the family is "intact." Moreover, the adoption of the child by Cheryl Von Eiff creates the same "relationship . . . for all purposes" between the adopted child and the adoptive parent "that would have existed if the adopted [child] were [the adoptive parent's] blood descendant."<sup>230</sup>

Finally, the court again disapproved the "best interest of the child" standard that is found in section 752.01:

It permits the State to substitute its own views regarding how a child should be raised for those of the parent. It involves the judiciary in second-guessing parental decisions. It allows a court to impose "its own notion of the children's best interests over the shared opinion of these

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229. *See id.*

230. *Id.* at 515-16 (citations omitted).

parents, stripping them of their right to control in parenting decisions."<sup>231</sup>

The court closed by stating:

We recognize that it must hurt deeply for the grandparents to have lost a daughter and then be denied time alone with their granddaughter. We are not insensitive to their plight. However, familial privacy is grounded on the right of parents to rear their children without unwarranted governmental interference.

The Von Eiffs possess a constitutional right of privacy in their decision to limit the grandparents' visitation with their child. The Von Eiffs are loving, nurturing and fit parents, whose parenting decisions do not constitute a substantial threat of demonstrable harm to the child's health or welfare. . . .

There may be many beneficial relationships for a child, but it is not for the government to decide with whom the child builds these relationships. This concept implicates the very core of our constitutional freedoms and embodies the essence of Florida's constitutional right of privacy.<sup>232</sup>

Finally, in *Saul v. Brunetti*,<sup>233</sup> the Florida Supreme Court was again asked to rule on Florida's grandparent visitation statute. The issue in *Saul* was whether subsection (1)(d) of section 752.01 violated article I, section 23. Subsection (1)(d) required grandparent visitation when it was in the best interest of the child if the child was born out of wedlock.<sup>234</sup>

Dominick Brunetti and Beth Saul had an out-of-wedlock child named Tyler.<sup>235</sup> Tyler lived with the mother and her parents, David and Diane Saul.<sup>236</sup> Nearly two years after the child was born, the mother was killed in automobile accident.<sup>237</sup> Shortly after the mother died, Tyler moved in with his father.<sup>238</sup> The Sauls filed suit seeking visitation pursuant to section 752.01.<sup>239</sup> Although the father objected, the trial court awarded the Sauls weekly visits.<sup>240</sup> The trial court found that continued

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231. *Id.* at 516 (citation omitted).

232. *Id.*

233. 25 Fla. L. Weekly. S52 (Fla. Jan. 27, 2000)

234. See FLA. STAT. ANN. § 752.01(1)(d) (1995).

235. See *Saul*, 25 Fla. L. Weekly at S52.

236. See *id.*

237. See *id.*

238. See *id.*

239. See *id.*

240. See *id.*

visitation with the Sauls was in the child's best interest.<sup>241</sup> There was no evidence in the record that the child would suffer any harm if visitation were denied.<sup>242</sup>

On appeal, the district court declared subsection (1)(d) unconstitutional.<sup>243</sup> The Florida Supreme Court accepted the case and affirmed the district court's decision.<sup>244</sup> In a per curiam opinion, the court held that subsection (1)(d) suffers the same infirmity as the provisions in *Beagle* and *Von Eiff*.<sup>245</sup> The court stated that "the fact that the parents of the child in *Brunetti* were never married should not change this Court's analysis of the constitutionality of the statute."<sup>246</sup>

Pursuant to *Beagle*, *Saul*, and *Von Eiff*, it is clear that article I, section 23 played a significant role in striking down two provisions of Florida's grandparental visitation statute. But does this mean that Florida parents have greater privacy rights in this area of the law than do parents in other states?

Of the state courts that have considered the constitutional status of grandparent visitation statutes, a majority has upheld them.<sup>247</sup> Generally, in those cases in which the statute was upheld, the particular statute permitted grandparental visitation when it was in the best interest of the child,<sup>248</sup> the same standard

241. *See id.*

242. *See id.*

243. *See Brunetti v. Saul*, 724 So. 2d 142 (Fla. Dist. Ct. App. 1998).

244. *See Saul*, 25 Fla. L. Weekly at S52.

245. *See id.*

246. *Id.*

247. *See In re Graville*, 985 P.2d 604, 611 (Ariz. Ct. App. 1999) ("In so holding, we are in agreement with the majority of the courts in the nation that have upheld similar grandparent visitation statutes"); *Ridenour v. Ridenour*, 901 P.2d 770, 774 (N.M. Ct. App. 1995) ("A majority of courts which have considered this issue have rejected similar or related constitutional challenges."). Courts in the following states have upheld grandparental visitation statutes in the face of constitutional challenges: *Cockrell v. Sittason*, 500 So. 2d 1119, 1121 (Ala. Civ. App. 1986); *Graville*, 985 P.2d at 611; *Sanchez v. Parker*, No. 93-09822, 1995 WL 489146 (Del. Fam. Ct. July 1, 1995); *West v. West*, 689 N.E.2d 1215, 1221 (Ill. App. Ct. 1998); *Sightes v. Barker*, 684 N.E.2d 224 (Ind. Ct. App. 1997); *Spradling v. Harris*, 778 P.2d 365, 368 (Kan. Ct. App. 1989); *King v. King*, 828 S.W.2d 630 (Ky. 1992); *Martin v. Coop*, 693 So. 2d 912, 915 (Miss. 1997); *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993); *Roberts v. Ward*, 493 A.2d 478, 481 (N.H. 1985); *R.T. v. J.E.*, 650 A.2d 13 (N.J. Super. Ct. Ch. Div. 1994); *Ridenour*, 901 P.2d at 774; *Sibley v. Sheppard*, 429 N.E.2d at 1049, 1052 (N.Y. 1981); *Hedrick v. Hedrick*, 368 S.E.2d 14, 18-19 (N.C. Ct. App. 1988); *Hollingsworth v. Hollingsworth*, 516 N.E.2d 1250, 1253 (Ohio Ct. App. 1986); *Deweese v. Crawford*, 520 S.W.2d 522, 526 (Tex. App. Ct. 1975); *Campbell v. Campbell*, 896 P.2d 635 (Utah Ct. App. 1995); *Michael v. Hertzler*, 900 P.2d 1144 (Wyo. 1995).

248. *See Silverstein*, *supra* note 33.

the Florida Supreme Court disapproved. Many of the courts that have upheld grandparental visitation statutes have recognized that the state has an interest, in its capacity as *parens patriae*, to promote the best interest of the child.<sup>249</sup> In *King v. King*, the Kentucky Supreme Court reasoned:

In an era in which society has seen a general disintegration of the family, it is not unreasonable for the General Assembly to attempt to strengthen familial bonds. As this Court observed . . . "the grandparents' visitation statute was an appropriate response to the change in the demographics of domestic relations, mirrored by the dramatic increase in the divorce rate and in the number of children born to unmarried parents, and the increasing independence and alienation within the extended family inherent in a mobile society." . . . There is no reason that a petty dispute between a father and son should be allowed to deprive a grandparent and grandchild of the unique relationship that ordinarily exists between those individuals. One of the main purposes of the statute is to prevent a family quarrel of little significance to disrupt a relationship which should be encouraged rather than destroyed.<sup>250</sup>

An appellate court in Utah has also stated:

Modern society has witnessed a general trend toward disintegration of the nuclear family. Changes in the demographics of domestic relations, the rise in the divorce rate, and the increasing numbers of children born to single parents are but a few of the factors contributing to the destabilization of the traditional nuclear family. Given such circumstances, it is not unreasonable for our legislature to attempt to strengthen intergenerational ties as an alternative or supplementary source of family support for children.<sup>251</sup>

Rather than relying on the strict scrutiny test, courts in Kentucky, Missouri, New Jersey, and Utah have relied on the lesser rational relation test when analyzing grandparental visitation statutes.<sup>252</sup> Even when strict scrutiny was applied, courts in Indiana and Wyoming still found that the state's interest in protecting the child justified an award of visitation if a judge found such an

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249. See, e.g., *Michael*, 900 P.2d at 1150.

250. *King*, 828 S.W.2d at 632.

251. *Campbell*, 896 P.2d at 643.

252. See *King*, 828 S.W.2d at 632; *Herndon*, 857 S.W.2d at 210; *R.T.*, 650 A.2d at 16; *Campbell*, 896 P.2d at 644.



award to be in the best interest of the child.<sup>253</sup> Contrary to Florida, none of these courts required that demonstrable harm to the child be established in order for a grandparent to receive an award of visitation.<sup>254</sup>

However, Florida is not alone in its stance on grandparental visitation statutes, as courts in other states have required a showing of demonstrable harm to the child as a prerequisite to grandparental visitation.<sup>255</sup> In fact, most of these courts have come to this conclusion despite the fact that the particular state did not have an explicit right of privacy within its state constitution. For example, in *Hawk v. Hawk*,<sup>256</sup> the Tennessee Supreme Court reversed an award of grandparental visitation in the absence of a specific finding of harm to the child. The court based its decision on the implicit right of privacy found in article I, section 8 of the Tennessee Constitution.<sup>257</sup> In *Brooks v. Parkerson*<sup>258</sup> and *In re Herbst*,<sup>259</sup> the Georgia and Oklahoma Supreme Courts respectively made similar rulings. Both courts based their decisions not only on implicit rights of privacy in their state constitutions but also on the Fourteenth Amendment of the federal constitution.<sup>260</sup> Finally, in *Williams v. Williams*,<sup>261</sup> the Virginia Supreme Court reversed an award of grandparental visitation absent a finding of harm to the child. A plurality of the court based its decision on the federal right of privacy found in the Fourteenth Amendment, rather than relying on state constitutional grounds.<sup>262</sup> In sum, when compared to other jurisdictions, it is apparent that parents in Florida have been afforded greater pri-

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253. See *Sightes v. Barker*, 684 N.E.2d 224 (Ind. Ct. App. 1997); *Michael*, 900 P.2d at 1147.

254. See *supra* notes 223-27 and accompanying text.

255. See, e.g., *Custody of Smith v. Stillwell*, 969 P.2d 21 (Wash. 1998), cert. granted, 120 S.Ct. 11 (1999). Although Washington has an explicit right of privacy within the state constitution's provision concerning search and seizure, the court in *Stillwell* seemed to invalidate the challenged grandparental visitation statute on federal constitutional grounds. See *id.*

256. 855 S.W.2d 573 (Tenn. 1993).

257. See *id.* at 579. The Tennessee Constitution provides that "no man shall . . . deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." TENN. CONST. art. I, § 8.

258. 454 S.E.2d 769 (Ga. 1995).

259. 971 P.2d 395 (Okla. 1998).

260. See *Brooks*, 454 S.E.2d at 771-74; *Herbst*, 971 P.2d at 399. Article 1, paragraph 1, section 1 of the Georgia Constitution states that "no person shall be deprived of life, liberty or property except by due process of the law." The court in *Herbst* did not cite to the particular provision of the Oklahoma Constitution where the implicit right of privacy is found.

261. 501 S.E.2d 417 (Va. 1998).

262. See *id.* at 417-18.

vacy rights then parents in other states when it comes to making decisions regarding child rearing.

B. *Two Examples Where Floridians Were Not Afforded Greater Privacy Protection*

1. Physician-Assisted Suicide

Next, consider the issue of physician-assisted suicide. Ninth Circuit Judge Stephen Reinhardt has expressed that the controversy regarding assisted suicide “may touch more people more profoundly than any other issue the courts will face in the foreseeable future.”<sup>263</sup> The issue presents an interesting struggle between the traditional taboo against suicide and state-sanctioned murder on the one hand, and on the other hand, the recognition that some diseases are so debilitating that although a person may still be alive in a medical sense, for all intents and purposes, the quality of life has been severely diminished. The recent medical breakthroughs of the past half-century have allowed doctors to prolong a patient’s life through the use of respirators, life-support machines, and other similar instruments. Therefore, proponents of assisted suicide argue that death with dignity is the next logical step; that is, medicine and science should intervene and end a terminally ill patient’s life when such a procedure is requested by the patient.

Assisted suicide has been a judicial “hot topic” over the past decade, in part due to the efforts of Dr. Jack Kevorkian. In 1990, Dr. Kevorkian assisted Janet Adkins in committing suicide near Grovelands, Michigan.<sup>264</sup> Adkins was suffering from the early stages of Alzheimer’s disease.<sup>265</sup> Although Dr. Kevorkian was initially charged with murder, the charge was later dismissed.<sup>266</sup> Before 1999, Dr. Kevorkian had a handful of similar charges brought against him, all resulting in dismissals or acquittals.<sup>267</sup> The number of assisted deaths attributed to Dr. Kevorkian ranges from forty-five to seventy.<sup>268</sup> Recently, however, Dr. Kevorkian was found guilty in a Michigan court of second-degree

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263. *Compassion in Dying v. Washington*, 79 F.3d 790, 793 (9th Cir. 1996).

264. See Scott A. Fisk, *The Last Best Place to Die: Physician-Assisted Suicide and Montana’s Constitutional Right to Personal Autonomy Privacy*, 59 MONT. L. REV. 301, 303 (1998).

265. See *id.*

266. See *id.*

267. See *Key Dates in Kevorkian’s Crusade*, DETROIT FREE PRESS, Mar. 27, 1999, <<http://www.freep.com/news/extra2/qkchron27.htm>>.

268. See Fisk, *supra* note 264, at 304 n.18.

murder for the death of Thomas Youlk.<sup>269</sup> Prior to his death, Youlk suffered from Lou Gehrig's disease.<sup>270</sup> In September of 1998, Dr. Kevorkian assisted Youlk in taking his life, and later that year, 60 Minutes aired a portion of the suicide procedure as part of a Mike Wallace interview with Dr. Kevorkian.<sup>271</sup> In March of 1999, Kevorkian was found guilty by a jury,<sup>272</sup> and later sentenced to ten to twenty-five years in prison.<sup>273</sup> An appeal of the case is still pending.<sup>274</sup>

As a result of the nationwide attention that individuals such as Dr. Kevorkian have received, assisted suicide has often been the subject of many legislative debates and courtroom battles. Several efforts have been made to legalize assisted suicide. Some groups have attempted to legalize such conduct through state legislative bills or state constitutional amendments. Although many of these efforts have failed,<sup>275</sup> the citizens of Oregon have twice approved the "Death With Dignity Act," which legalizes assisted suicide.<sup>276</sup>

Other groups have sought protection of the right of assisted suicide from the judicial branch. In 1990, the United States Supreme Court decided *Cruzan v. Director, Missouri Department of Health*,<sup>277</sup> a case concerning whether a patient has a fundamental right to refuse medical care. The case involved a woman who was severely injured in a car accident. As a result of her injuries, the woman ended up in a vegetative condition.<sup>278</sup> The woman's par-

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269. See Brian Murphy, *Kevorkian Backs Off His Threat to Starve*, DETROIT FREE PRESS, Apr. 16, 1999, <<http://www.freep.com/news/extra2/qkevo16x.htm>>.

270. See Dawson Bell, *Kevorkian Seeks New Trial on Appeal*, Nov. 16, 1999 <[http://www.freep.com/news/extra2/kevo16\\_19991116.htm](http://www.freep.com/news/extra2/kevo16_19991116.htm)>.

271. See Murphy, *supra* note 269.

272. See *Kevorkian Found Guilty*, K-NEWS, Mar. 26, 1999, <[http://www.channel6000.com/knews/news/national/news\\_nat-990326-163024.html](http://www.channel6000.com/knews/news/national/news_nat-990326-163024.html)>.

273. See Murphy, *supra* note 269.

274. See Bell, *supra* note 270.

275. In *Washington v. Glucksberg*, 521 U.S. 702, 717-18 (1997), the Supreme Court stated that with the exception of Oregon, "many proposals to legalize assisted-suicide have been and continue to be introduced in the States' legislatures, but none has been enacted." *Id.* at 718 n.15 (referring to numerous failed proposals to legalize assisted suicide). The Court did note that although many other countries have rejected proposals to legalize assisted suicide, Columbia's Constitutional Court has legalized voluntary euthanasia for terminally ill patients. See *id.* at 718 n.16 (citing to Sentencia No. C-239/97 (Corte Constitucional, Mayo 20, 1997); *Colombia's Top Court Legalizes Euthanasia*, ORLANDO SENTINEL, May 22, 1997 at A18).

276. See John A. Brennan, *A State Based Right to Physician Assisted Suicide*, 79 B.U. L. REV. 231, 241-42 (1999).

277. 497 U.S. 261 (1990).

278. See *id.* at 266.

ents requested the hospital to remove the life-sustaining machines.<sup>279</sup> The Missouri Supreme Court held that state law required the hospital to continue the treatment unless (1) a competent patient chooses to discontinue treatment or (2) the guardian of an incompetent patient could establish by "clear and convincing evidence" that the incompetent patient would have rejected the treatment.<sup>280</sup> The Missouri Supreme Court found that the woman's parents failed to meet this second prong.<sup>281</sup>

Upon review, the United States Supreme Court concluded that the Federal Constitution did not forbid the state of Missouri from requiring "clear and convincing evidence" of the incompetent patient's wishes prior to removing the machines.<sup>282</sup> However, the case was very important, because although the Court did not explicitly hold that such a right exists, the Court did state that "for the purposes of this case, we assume the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."<sup>283</sup> Many supporters of assisted suicide looked to *Cruzan* as the springboard to a federal constitutional right to die.

But in 1997, in the case of *Washington v. Glucksberg*,<sup>284</sup> the United States Supreme Court rejected the notion that the right to privacy protected assisted suicide. In *Washington*, the Court upheld a Washington statute that prohibited assisted suicide.<sup>285</sup> The Respondents, who consisted of Washington physicians and terminally ill patients, asserted that assisted suicide was protected by the principle of "self-sovereignty" and therefore sheltered by the Fourteenth Amendment.<sup>286</sup> The Court, however, concluded that the right of assisted suicide was not a fundamental right.<sup>287</sup>

In an opinion authored by Chief Justice Rehnquist, the Court began its analysis by looking at the legal history of the ban on suicide and assisted suicide. The Court stated that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisted suicide."<sup>288</sup> Suicide was punished as a crime at English common

279. *See id.* at 267.

280. *Cruzan v. Harmon*, 760 S.W.2d 408, 415 (Mo. 1988).

281. *See id.* at 426.

282. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 280-81 (1990).

283. *Id.* at 279.

284. 521 U.S. 702 (1997).

285. *See id.* at 735.

286. *See id.* at 708.

287. *See id.* at 728.

288. *Id.* at 711.

law, and Sir William Blackstone, author of the Commentaries on the Laws of England, described suicide as “self-murder” and stated that the law ranked suicide among the highest crimes.<sup>289</sup> Suicide continued to be looked down upon by the American colonies, although some of the harsh sanctions that were previously required at common-law were abolished, such as forfeiture of all remaining items in the estate.<sup>290</sup> In the nineteenth century, many states began to enact statutes prohibiting assisted suicide, the earliest being New York in 1828, and by the time the Fourteenth Amendment was ratified, most states outlawed assisted suicide.<sup>291</sup>

After looking at the history of suicide, the Court then proceeded to distinguish its earlier decision in *Cruzan*. The Court stated:

The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation’s history and constitutional traditions. The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed, the two acts are widely and reasonably regarded as quite distinct. In *Cruzan* itself, we recognized that most States outlawed assisted suicide—and even more do today—and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide.<sup>292</sup>

Thus, after concluding that the right to die was not “fundamental,” the Court examined Washington’s law using the rational basis test and found that the law was rationally related to a legitimate governmental interest.<sup>293</sup> The Court found that Washington had a legitimate interest in: (1) preserving human life; (2) preventing suicide as a public health concern; (3) precluding under-diagnosis of pain and suffering; (4) protecting the integrity and ethics of the medical profession; (5) protecting dis-

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289. *Id.* at 712 (quoting 4 W. BLACKSTONE, COMMENTARIES 189).

290. *See id.* at 713-14.

291. *See id.* at 715.

292. *Id.* at 725-26 (citations omitted).

293. *See id.* at 728.

abled and terminally ill patients from prejudice, abuse, neglect, and mistakes; and (6) avoiding the slippery slope to voluntary and perhaps involuntary euthanasia.<sup>294</sup> Therefore, the Washington law was upheld.

The same day *Glucksberg* was decided, the Court issued its opinion in *Vacco v. Quill*,<sup>295</sup> another case involving assisted suicide. The case involved a challenge to a group of New York laws which *permitted* patients to refuse medical treatment but *prohibited* physicians from assisting in suicide.<sup>296</sup> Again, in an opinion written by Chief Justice Rehnquist, the Court upheld the assisted suicide law and rejected the argument that New York law violated the Equal Protection Clause of the Fourteenth Amendment.<sup>297</sup>

The Respondents in *Vacco* consisted of New York doctors who sued the state's Attorney General. The doctors argued, and the Court of Appeals for the Second Circuit agreed, that "New York law does not treat equally all competent persons who are in the final stages of fatal illness and wish to hasten their deaths," because "those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs."<sup>298</sup>

The Supreme Court, however, determined that the New York assisted suicide laws "neither infringe fundamental rights nor involve suspect classifications."<sup>299</sup> As a result, the Court stated that the laws will be upheld if they "bear [ ] a rational relation to some legitimate end."<sup>300</sup> The Court concluded:

On their faces, neither New York's ban on assisting suicide nor its statutes permitting patients to refuse medical treatment treat anyone differently than anyone else or draw any distinctions between persons. *Everyone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide. Generally speaking, laws that apply evenhandedly to all "unquestionably comply" with the Equal Protection Clause.<sup>301</sup>

294. *See id.* at 728-33.

295. 521 U.S. 793 (1997).

296. *See id.* at 797.

297. *See id.* at 808.

298. *Quill v. Vacco*, 80 F.3d 716, 727, 729 (2d Cir. 1996).

299. *Vacco*, 521 U.S. at 799.

300. *Id.*

301. *Id.* at 800 (citations omitted).

Finally, as it did in *Glucksberg*, the Court distinguished assisting suicide from withdrawing medical treatment.<sup>302</sup> After examining the same state interests that were discussed in *Glucksberg*, the Court held that New York's laws were rationally related to a legitimate end, and therefore the assisted suicide ban was not unconstitutional.<sup>303</sup>

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302. See *id.* at 800-08. The Court stated:

[W]e think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical; it is certainly rational. The distinction comports with fundamental legal principles of causation and intent. First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication. Furthermore, a physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and "to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them." The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, "must, necessarily and indubitably, intend primarily that the patient be made dead." Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not.

The law has long used actors' intent or purpose to distinguish between two acts that may have the same result. Put differently, the law distinguishes actions taken "because of" a given end from actions taken "in spite of" their unintended but foreseen consequences.

. . . [New York] has neither endorsed a general right to "hasten death" nor approved physician-assisted suicide. Quite the opposite: The State has reaffirmed the line between "killing" and "letting die."

. . . *Cruzan* therefore provides no support for the notion that refusing life-sustaining medical treatment is "nothing more nor less than suicide."

For all these reasons, we disagree with respondents' claim that the distinction between refusing lifesaving medical treatment and assisted suicide is "arbitrary" and "irrational." Granted, in some cases, the line between the two may not be clear, but certainty is not required, even were it possible. Logic and contemporary practice support New York's judgment that the two acts are different, and New York may therefore, consistent with the Constitution, treat them differently. By permitting everyone to refuse unwanted medical treatment while prohibiting anyone from assisting a suicide, New York law follows a longstanding and rational distinction.

*Id.* (citations and footnotes omitted).

303. See *id.* at 808.

Pursuant to *Glucksberg* and *Vacco*, it was apparent that the proponents of assisted suicide would not find any protection in the Federal Constitution. This caused some groups to turn their efforts toward state courts. In California, however, this effort failed.

In *Donaldson v. Lungren*,<sup>304</sup> a California Court of Appeal considered whether the California Constitution protected a patient's right to assisted suicide. Donaldson, a terminally ill patient, argued that there is no difference between a doctor who disconnects a life-support machine or fails to provide treatment and a doctor who assists a patient in committing suicide.<sup>305</sup> Donaldson argued that in both situations, the doctor is actively participating in the patient's life, because "[n]ot doing anything is doing something."<sup>306</sup> The California appellate court rejected this argument, pointing out that the doctor who sustains a patient's life by the use of a life-support machine essentially postpones an immediate encounter with death, whereas the doctor that assists suicide hastens death.<sup>307</sup> The court did recognize that Donaldson had the right to take his own life, stating that "[n]o state interest is compromised by allowing Donaldson to experience a dignified death rather than an excruciatingly painful life."<sup>308</sup> But the court concluded that Donaldson's state right of privacy did not protect the right to assisted suicide.<sup>309</sup> Four years later, in *Kevoorkian v. Arnett*,<sup>310</sup> a federal district court also concluded that the right of privacy in California's constitution did not protect the right to assisted suicide.<sup>311</sup>

Against this backdrop, the Florida Supreme Court considered whether the Florida Constitution's right of privacy protected the right to assisted suicide in the 1997 case of *Krischer v. McIver*.<sup>312</sup> Charles E. Hall, a thirty-five-year-old man suffering from AIDS, sought permission in a Florida trial court for his doctor, Cecil McIver, M.D., to assist in his death.<sup>313</sup> Hall contracted AIDS from a blood transfusion.<sup>314</sup> Hall claimed that section

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304. 4 Cal. Rptr. 2d 59 (Cal. Ct. App. 1992).

305. *See id.* at 63.

306. *Id.*

307. *See id.*

308. *Id.*

309. *See id.* at 63-64.

310. 939 F. Supp. 725 (C.D. Cal. 1996).

311. *See id.* at 732.

312. 697 So. 2d 97 (Fla. 1997).

313. *See id.* at 99.

314. *See id.*



782.08, which prohibited assisted suicide, violated his right of privacy under article I, section 23 of the Florida Constitution.<sup>315</sup>

At the time of the case, Hall's health was deteriorating and it was apparent that he was suffering.<sup>316</sup> After finding that Hall was mentally competent, the trial court enjoined the state attorney from enforcing section 782.08 against Dr. McIver should he assist Hall in committing suicide.<sup>317</sup> The trial court also established guidelines for the procedure. The court held that "the lethal medication must be self-administered only after consultation and determination by both physician and patient that Mr. Hall is (1) competent, (2) imminently dying, and (3) prepared to die."<sup>318</sup> The trial court held that the second and third factors are to be subjectively determined by Hall, and that Dr. McIver must conclude that Hall's belief is "objectively reasonable at the time."<sup>319</sup> The state attorney appealed the trial court's ruling and the district court certified the question to the Florida Supreme Court.<sup>320</sup> The supreme court accepted the case.

In his brief to the supreme court, McIver relied on previous cases of the Florida Supreme Court recognizing a patient's right to refuse medical treatment. The first right to refuse treatment case considered by the court was the 1980 case of *Satz v. Perlmutter*,<sup>321</sup> a case that arose before article I, section 23 was in effect. Apparently relying on the Federal Constitution's right of privacy, the Florida Supreme Court adopted the decision of the district court, which granted a terminally-ill patient the right to discontinue the use of an artificial respirator.<sup>322</sup> The district court stated that the right of an individual to refuse treatment should be balanced against the state's interest in (1) the preservation of life, (2) the protection of innocent third parties, (3) the prevention of suicide, and (4) the maintenance of the ethical integrity of medical practice.<sup>323</sup> The district court concluded that none of the four state interests surmounted the individual's right to die.

Nine years later, in *Public Health Trust v. Wons*,<sup>324</sup> the Florida Supreme Court expanded on its decision in *Perlmutter* and held that an individual has the right to refuse a blood transfusion.

315. *See id.*

316. *See id.*

317. *See id.*

318. *Id.* at 100.

319. *Id.*

320. *See id.* at 99-100.

321. 379 So. 2d 359 (Fla. 1980).

322. *See id.* at 360.

323. *See State v. Perlmutter*, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978).

324. 541 So. 2d 96 (Fla. 1989).

The following year, in *In re Guardianship of Browning*,<sup>325</sup> the court specifically determined that the right of privacy found in article I, section 23 of the Florida Constitution protects a person's right to refuse medical treatment. The court stated, "[E]veryone has a fundamental right to the sole control of his or her person."<sup>326</sup>

Finally, in *In re Dubreuil*,<sup>327</sup> the supreme court again held, as it did in *Wons*, that an individual has a state constitutional right to refuse a blood transfusion. Patricia Dubreuil was in an advanced stage of pregnancy and admitted to a hospital for the delivery of the baby.<sup>328</sup> Shortly thereafter, it became apparent that a Caesarean section delivery was necessary.<sup>329</sup> Patricia signed a routine consent form for the procedure but withheld consent for a blood transfusion on the basis of beliefs as a Jehovah's Witness.<sup>330</sup> After the delivery, it became apparent that a blood transfusion was required to save Patricia's life.<sup>331</sup> When Patricia continued to refuse the blood transfusion, hospital authorities were able to contact Luc Dubreuil, Patricia's estranged husband.<sup>332</sup> Luc gave his consent for the transfusion.<sup>333</sup> After the initial transfusion, the physicians believed that additional transfusions would be needed and the hospital petitioned the court for an emergency declaratory judgement to determine the hospital's duty.<sup>334</sup> The trial court ruled in favor of the hospital, thereby allowing the hospital to administer further blood transfusions.<sup>335</sup> The trial court tried to distinguish *Perlmutter*, a case involving an adult patient with no minor dependents, by pointing out that Patricia Dubreuil was the mother of four minor children and no alternative method of care had been established for the four children.<sup>336</sup> The trial court found that the state's compelling interest under the second prong of the *Perlmutter* test—the protection of innocent third parties—out-

325. 568 So. 2d 4 (Fla. 1990).

326. *Id.* at 10. The court reiterated its previous statement in *In re T.W.*, wherein the court stated, "We can conceive of few more personal or private decisions concerning one's body that one can make in the course of a lifetime . . . [than] the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment." *Id.* (quoting *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989)).

327. 629 So. 2d 819 (Fla. 1993).

328. *See id.* at 820

329. *See id.*

330. *See id.*

331. *See id.* at 821.

332. *See id.*

333. *See id.*

334. *See id.*

335. *See id.*

336. *See id.*

weighed the mother's right to refuse the transfusion.<sup>337</sup> The district court of appeal affirmed the trial court's order.<sup>338</sup>

Patricia Dubreuil was subsequently released from the hospital.<sup>339</sup> Although the case was moot, the Florida Supreme Court accepted the case because the issue was capable of repetition.<sup>340</sup> In quashing the district court's decision, the supreme court pointed out that the children's father was still alive, and although he was separated from his wife, he would become the natural guardian under Florida law if the mother should die.<sup>341</sup> The court concluded that the state failed to introduce any evidence that the father would not assume responsibility for the children, and therefore held that the state's interest did not outweigh the mother's right to refuse the transfusion.<sup>342</sup> The court left open the question as to whether the state's interest in protecting innocent third parties could ever outweigh an individual's interest in refusing treatment.<sup>343</sup>

In *Krischer*, McIver argued to the Florida Supreme Court that there was no meaningful distinction between refusing medical treatment and assisting suicide.<sup>344</sup> However, in an opinion authored by Justice Grimes, the Supreme Court rejected this conclusion.

The court began its analysis by pointing out that although there is no state law criminalizing suicide, Florida has punished assisted suicide since 1868.<sup>345</sup> In fact, as of 1994, thirty-four jurisdictions nationwide had statutes which criminalized such conduct.<sup>346</sup> The court also considered several reports from various agencies and groups that opposed physician-assisted suicide.<sup>347</sup>

The court then proceeded to conduct the traditional *Winfield*/strict scrutiny privacy clause analysis. After concluding that Mr. Hall did have a right of privacy regarding personal medical decisions, the court analyzed whether the State had a compelling

337. See *id.*

338. See *In re Dubreuil*, 603 So. 2d 538 (Fla. Dist. Ct. App. 1992).

339. See *Dubreuil*, 629 So. 2d at 822.

340. See *id.*

341. See *id.* at 821, 827.

342. See *id.* at 828.

343. See *id.* at 827.

344. See *Krischer v. McIver*, 697 So. 2d 97, 102 (Fla. 1997).

345. See *id.* at 100.

346. See *id.* (citing to *People v. Kevorkian*, 527 N.W. 2d 714 (Mich. 1994)).

In *Kevorkian*, the Supreme Court of Michigan catalogued the states that specifically prohibit assisted suicide. See *Kevorkian*, 527 N.W.2d at 732 n.51.

347. See *Krischer*, 697 So. 2d at 101-04 (considering *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* vi-vii (May 1994), (Supp. Apr. 1997); AMA Council on Ethical and Judicial Affairs, Report I-93-8.

interest to justify intruding into Mr. Hall's privacy right.<sup>348</sup> The court began by distinguishing its earlier decisions recognizing the right to refuse medical treatment. The court concluded that "there is a significant difference" between the right to refuse medical treatment and the right to physician assisted suicide.<sup>349</sup> The court cited to the following reasoning from the American Medical Association:

When a life-sustaining treatment is declined, the patient dies primarily because of an underlying disease. The illness is simply allowed to take its natural course. With assisted suicide, however, death is hastened by the taking of a lethal drug or other agent. Although a physician cannot force a patient to accept a treatment against the patient's will, even if the treatment is life-sustaining, it does not follow that a physician ought to provide a lethal agent to the patient. The inability of physicians to prevent death does not imply that physicians are free to help cause death.<sup>350</sup>

The court went on to analyze whether the state's interests in preventing assisted suicide outweighed McIver's right to assisted suicide. The court used the same four interests relied on by the court in *Perlmutter*: (1) the preservation of life, (2) the protection of innocent third parties, (3) the prevention of suicide, and (4) the maintenance of the ethical integrity of medical practice.<sup>351</sup> The court concluded that three of the four interests "are so compelling as to clearly outweigh Mr. Hall's desire for assistance in committing suicide."<sup>352</sup>

First, the court found that the state has an unqualified interest in the preservation of life.<sup>353</sup> In doing so, the court distinguished the present case from *Perlmutter*, where suicide was not at issue because the discontinuation of life support would "merely result in [the patient's] death, if at all, from natural causes."<sup>354</sup> The court explained that disconnecting a respirator that would

348. *See id.* at 102.

349. *Id.* at 103.

350. *Id.* at 102-03 (quoting AMA Council on Ethical and Judicial Affairs, Report I-93-8, at 2).

351. *See id.* at 103-04.

352. *Id.* at 103. The court did not address the second interest articulated in *Perlmutter*—the protection of innocent third parties. The court stated in a footnote that there was no evidence introduced to demonstrate the effect of Mr. Hall's suicide on innocent third parties. *See id.* at 103 n.4.

353. *See id.* at 103.

354. *Id.* (quoting *Satz v. Perlmutter*, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978)).

result in death by natural causes was in contrast to “an unnatural death by means of a ‘death producing agent.’”<sup>355</sup> The court held that the state has a compelling interest in preventing the “affirmative, destructive” act of assisted suicide.<sup>356</sup>

Second, the court held that the state has a compelling interest in preventing suicide. To support this, the court cited to the United States Supreme Court’s analysis in *Glucksberg* on this point:

Those who attempt suicide—terminally ill or not—often suffer from depression or other mental disorders. Research indicates, however, that many people who request physician-assisted suicide withdraw that request if their depression and pain are treated. The New York Task Force, however, expressed its concern that, because depression is difficult to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients’ needs. Thus, legal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses.<sup>357</sup>

Finally, the court held that the state has a compelling state interest in maintaining the integrity of the medical profession.<sup>358</sup> The court stated that numerous medical groups opposed assisted suicide, including: the American Medical Association, the Florida Medical Association, the Florida Society of Internal Medicine, the Florida Society of Thoracic and Cardiovascular Surgeons, the Florida Osteopathic Medical Association, the Florida Hospices, Inc., and the Florida Nurses Association.<sup>359</sup>

Accordingly, the court held that the Florida statute banning assisted suicide did not violate article I, section 23 of the Florida Constitution.<sup>360</sup> The court made clear that this holding did not mean that a carefully crafted statute authorizing assisted suicide would be unconstitutional, but pointed out that the Legislature, and not the court, was the appropriate branch of government to make this decision.<sup>361</sup>

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355. *Id.* (quoting *Perlmutter*, 362 So. 2d at 162).

356. *Id.*

357. *See id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702 (1997)) (citations omitted).

358. *See id.* at 103-04.

359. *See id.*

360. *See id.* at 104.

361. *See id.*

Of the six justices who voted on the case, five concurred with the majority.<sup>362</sup> Justice Kogan wrote a dissenting opinion expressing his disagreement. In his dissent, Justice Kogan explained that the notion of “dying of natural causes” and the traditional concept of suicide are no longer readily distinguishable from one another: “Medicine now has pulled the aperture separating life and death far enough apart to expose a limbo unthinkable fifty years ago, for which the law has no easy description.”<sup>363</sup> Justice Kogan argued that Florida’s right of privacy should protect a patient’s right to die:

To my mind, the right of privacy attaches with unusual force at the death bed. This conclusion arises in part from the privacy our society traditionally has afforded the death bed, but also from the very core of the right of privacy—the right of self-determination even in the face of majoritarian disapproval. What possible interest does society have in saving life when there is nothing of life to save but a final convulsion of agony? The state has no business in this arena. Terminal illness is not a portrait in blacks and whites, but unending shades of gray, involving the most profound of personal, moral, and religious questions. Many people can and do disagree over these questions, but the fact remains that it is the dying person who must resolve them in the particular case. And while we certainly cannot ignore the slippery-slope problem, we previously have established fully adequate standards to police the exercise of privacy rights in this context to ensure against abuse.<sup>364</sup>

Finally, Justice Kogan concluded that the state’s interest in preserving the life of a terminally ill patient failed to meet the compelling state interest test:

I cannot in good conscience say that the state’s interest is compelling, given the fact that Mr. Hall’s life no longer can be saved. Here, the state is vouchsafing nothing but indignity and suffering—hardly “compelling” interests. I further believe that the rule established by the majority is not merely unworkable but rests on concerns of an era that, however much we may regret it, no longer exists. A sharp dividing line once separated life from death. Today there stretches a chasm of ambiguities. Because the confrontation of these ambiguities is inherently a personal

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362. Justice Anstead was recused from the case.

363. *Id.* at 109 (Kogan, J., dissenting).

364. *Id.* at 111 (citation omitted).

decision, I am unwilling to remove from Mr. Hall's control the way in which he confronts his own personal fate.<sup>365</sup>

At the end of the day, however, the majority of the court was unwilling to recognize a patient's right to die in Florida's Constitution. Thus, although Floridians enjoy greater privacy protection in some areas, this protection does not cover the right to assisted suicide. The inherent problems with recognizing this right, such as the uncertainty in how it might be applied and the obvious potential for abuse, were unavoidable stumbling blocks for a majority of the court. The Florida Supreme Court was hesitant to extend the umbrella of privacy to cover assisted suicide, choosing instead to rely on the legislature to recognize such a right.

## 2. Right to Purchase Obscene Materials

Finally, consider the issue of an individual's right to obtain obscene material. In the three decades since the regulation of obscenity has come to occupy judicial minds, the Supreme Court has reached a dead end on the map of First Amendment jurisprudence. While obscenity law may be stagnant in the federal courts, it is far from resolved. The Supreme Court has yet to clearly define the appropriate reach of obscenity regulation, or announce a cogent standard for such judicial determination.<sup>366</sup> As Justice Brennan stated: "No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such a disharmony of views, and remained so resistant to the formulation of stable and manageable standards."<sup>367</sup>

A brief overview of the history of obscenity law demonstrates that the Supreme Court has been reluctant to uncover new terrain by applying a constitutional privacy analysis to this area of the law. Therefore, obscenity jurisprudence remains mired in the First Amendment, which has resulted in limited protections for individuals under federal law.

In 1957, the Supreme Court in *Roth v. United States*<sup>368</sup> determined that the First Amendment does not protect obscenity. *Roth* involved a conviction under federal law for sending obscene material through the U.S. mail. Upholding the conviction, the

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365. *Id.* at 115.

366. See Claudia Tuchman, *Does Privacy Have Four Walls? Salvaging Stanley v. Georgia*, 94 Colum. L. Rev. 2267, 2267 (1994).

367. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

368. 354 U.S. 476 (1957).

majority found that "it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance,"<sup>369</sup> and observed that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."<sup>370</sup> In reaching its conclusion, the Court announced the following bifurcated procedure for analyzing obscenity regulation: If "the average person, applying contemporary community standards, [finds] the dominant theme of the material taken as a whole [to] appeal [ ] to prurient interest," the material can be classified as obscene and regulated accordingly.<sup>371</sup> However, if the material survives the test, it is not deemed "obscene" and thus merits full First Amendment protection.<sup>372</sup>

In the years following *Roth*, the Court modified the test for determining what constitutes obscenity, and announced in *Miller v. California*<sup>373</sup> the test which is used today. In *Miller*, the Court established a three-prong test that identified obscenity based on whether the material (1) has a dominant theme that appeals to the prurient interest in sex; (2) is patently offensive in affronting community standards regarding the description of sexual matters, and (3) taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>374</sup>

Over a decade after the *Roth* decision, in *Stanley v. Georgia*,<sup>375</sup> the Court departed from *Roth*'s blanket approach by introducing into the analysis the right of privacy as an additional constitutional consideration. *Stanley* involved a warrant search of Robert Stanley's home for evidence of alleged bookmaking activities. During the search, police officers discovered reels of film that they determined to be obscene. Subsequently, Stanley was arrested pursuant to a Georgia statute which prohibits the possession, sale, and distribution of obscene material.<sup>376</sup>

Writing for the majority, Justice Marshall recognized that both privacy and First Amendment principles were implicated. Specifically, the Court considered the privacy aspects of individual thought and the sanctity of the home, and explained that:

Th[e] right to receive information and ideas, regardless of their social worth, is fundamental to our free society.

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369. *Id.* at 483.

370. *Id.* at 484.

371. *Id.* at 489.

372. *See id.*

373. 413 U.S. 15 (1973).

374. *See id.* at 24.

375. 394 U.S. 557 (1969).

376. *See* GA. CODE. ANN. § 26-630(1) (Supp. 1968).



Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.<sup>377</sup>

Thus, despite their authority to regulate certain forms of public obscenity, states may not cross the threshold of the home and attempt to control "the contents of . . . [one's] library."<sup>378</sup> The *Stanley* Court concluded that obscenity commands constitutional protection under certain circumstances; therefore, a state cannot constitutionally criminalize the private possession of obscene material.<sup>379</sup>

While the Court's opinion was a breakthrough in obscenity law, *Stanley's* reach proved limited. In the post-*Stanley* era, the Court has interpreted the privacy protection afforded in *Stanley* as merely applying to the physical home, as opposed to individual thought processes, and has returned to a *Roth/Miller* obscenity analysis for all instances of non-home-based possession.<sup>380</sup> Additionally, in a move which has further minimized the holding in *Stanley*, the Court has also created exceptions to the privacy-of-the-home rationale for cases involving child pornography.<sup>381</sup>

In light of the Supreme Court's reluctance to expand their holding in *Stanley*, individuals have begun challenging obscenity regulations under state law in an effort to legalize the sale and distribution of obscene material based on the greater privacy protections afforded by their state's constitution. The Florida Supreme Court and the Hawaii Supreme Court are two courts

377. *Stanley*, 394 U.S. at 564.

378. *Id.* at 565.

379. *See id.* at 566.

380. *See* United States v. Twelve 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 127 (1973) (dismissing all claims of a general right of privacy based on the "explicitly narrow and precisely delineated privacy right on which *Stanley* rests" and the "line of demarcation" that starts only at the threshold of the home); United States v. Orito, 413 U.S. 139, 141-42 (1973) (holding that there is no "zone of constitutionally protected privacy [that] follows such [obscene] material when it is moved outside the home protected by *Stanley*"); and Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (concluding that a state may constitutionally regulate the public viewing of obscene films in a theater restricted to paying adults); United States v. Reidel, 402 U.S. 351, 356 (1971) (limiting *Stanley* to the geographical locus of the home).

381. *See* Osborne v. Ohio, 495 U.S. 103, 111 (1990) (stating that the governmental interest in protecting the physical and psychological well-being of minors is sufficiently compelling to permit regulating possession of child pornography in the home).

that have addressed this issue, but as will be shown, the courts reached differing conclusions.

In 1990, the Florida Supreme Court examined the constitutionality of section 847.011 of the Florida Statutes, Florida's obscenity statute, in *Stall v. State*.<sup>382</sup> In *Stall*, Stall and several other persons were charged with violating the Florida Racketeer Influenced and Corrupt Organization (RICO) Act,<sup>383</sup> predicated on forty-eight violations of Florida's obscenity statute.<sup>384</sup> The complaint alleged that violations "occurred through the showing, sale, distribution, and rental of allegedly obscene writings and tapes, and objects allegedly intended for obscene purposes."<sup>385</sup>

The trial court dismissed the state's pretrial motion and held that the statute violated Florida's privacy amendment.<sup>386</sup> On appeal, the district court reversed, finding that Florida's right to privacy provision does not shield individuals from criminal prosecution.<sup>387</sup> Petitioners appealed the district court ruling to the Florida Supreme Court and argued that Florida's privacy amendment should be interpreted to protect sellers and distributors of obscene material because, without this interpretation, an individual's right to possess such material is meaningless.<sup>388</sup> The supreme court accepted the case pursuant to its discretionary review powers.

Prior to addressing the constitutional challenges, Justice McDonald, writing for the majority, implicitly acknowledged that the Petitioners (the sellers of the obscene material) had standing to bring this cause of action by citing to the district court's ruling on this issue.<sup>389</sup>

Next, the court began its analysis by recognizing previous cases where it had found Florida's obscenity statute to be constitutional.<sup>390</sup> The court noted specifically its previous decision in

382. 570 So. 2d 257 (Fla. 1990).

383. FLA. STAT. § 895.01-06 (1985).

384. See *Stall*, 570 So. 2d at 257.

385. *Id.* at 258.

386. See *id.*

387. See *State v. Long*, 544 So. 2d 219, 222 (Fla. Dist. Ct. App. 1989).

388. See *Stall*, 570 So. 2d at 260.

389. See *id.* at 258. See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Long*, 544 So. 2d at 221-22 (holding that the sellers have standing to bring claim since (1) § 847.011(1)(a) prohibits distribution of obscene materials; and (2) the customers, whose privacy rights will be violated by the statute, are not subject to prosecution and will, therefore, have no effective avenue of preserving their rights).

390. See *Sardiello v. State*, 394 So. 2d 1016 (Fla. 1981) (upholding obscenity statute where defendants had been charged with possession of obscene

*State v. Kraham*.<sup>391</sup> In that case, Kraham was charged with selling obscene motion pictures. The trial court dismissed the charges, relying on *Stanley v. Georgia*,<sup>392</sup> and found that “[a] regulation that criminally punishes one for providing that citizen with material he has a Constitutional right to possess is illogical and arbitrary.”<sup>393</sup> As the *Stall* court noted, *Kraham* reversed the lower court’s ruling based on *Johnson*.<sup>394</sup>

While the *Stall* court acknowledged that *Stanley* stands for the proposition that an individual’s private possession of obscene material is protected, the court distinguished this interest from the protection of those who deal commercially in obscenity.<sup>395</sup> The court noted that the United States Supreme Court has consistently held that states have a legitimate interest in deterring the sale of obscene material.<sup>396</sup> Moreover, as the *Stall* court pointed out, the United States Supreme Court has specifically refused to extend *Stanley* to the sale and distribution of obscene material, finding that “the protected right to possess obscene material in the privacy of one’s home does not give rise to a correlative right to have someone sell or give it to others.”<sup>397</sup>

The *Stall* court recognized that Florida’s privacy amendment affords greater protection to its citizens than does the Federal Constitution, and that this right encompasses the right to possess obscene materials in the privacy of one’s home.<sup>398</sup> Thus, the court observed that an assessment of governmental intrusion into an individual’s privacy rights requires the application of the *Win-*

material with intent to sell); *Johnson v. State*, 351 So. 2d 10 (Fla. 1977) (upholding a conviction for selling obscene magazines).

391. 360 So. 2d 393 (Fla. 1978).

392. 394 U.S. 557 (1969).

393. *Kraham*, 360 So. 2d at 394.

394. While the Court appeared to find this case law persuasive, it must be noted that with the exception of *Sardiello*, each of these cases were decided prior to the enactment of Florida’s privacy amendment, and were decided exclusively on the grounds that the statute was not overbroad or vague. While *Sardiello* was decided subsequent to the adoption of Florida’s privacy amendment, a right of privacy violation was not raised, and it too was decided on the overbroad/vagueness issue.

395. See *Stall*, 570 So. 2d at 259.

396. See, e.g., *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 58 (1989).

397. *Stall*, 570 So. 2d at 260 (quoting *United States v. Twelve 200-Foot Reels of Super 8 mm. Film*, 413 U.S. 123, 128 (1973)). However, note that some of the United States Supreme Court cases cited by the court can be distinguished. See *Osborne v. Ohio*, 495 U.S. 103 (1990) (finding a compelling state interest in the deterrence of child pornography, as the health and welfare of children are at stake); *Miller v. California*, 413 U.S. 15 (1973) (holding based partially upon the fact that defendant was convicted of mailing *unsolicited* sexually explicit material).

398. See *Stall*, 570 So. 2d at 260.

*field/strict scrutiny standard*<sup>399</sup> if a reasonable expectation of privacy exists.<sup>400</sup> However, the *Stall* court found that a reasonable expectation of privacy was not present in this case:

Although one may possess obscene material in one's home, there is no legitimate reasonable expectation of privacy in being able to patronize retail establishments for the purpose of purchasing such material. *Also, it does not appear that the defense in the instant case presented private individuals whose right to possess obscene materials at home had been violated by the instant state action.*<sup>401</sup>

In support of its conclusion, the court quoted the United States Supreme Court's decision in *Paris Adult Theatre I v. Slaton*:<sup>402</sup>

Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.

. . . .

Moreover, we have declined to equate the privacy of the home relied on in *Stanley* with a "zone" of "privacy" that follows a distributor or a consumer of obscene materials wherever he goes. The idea of a "privacy" right and a place of public accommodation are, in this context, mutually exclusive.<sup>403</sup>

Thus, the court found that "the right to possess privately does not equate to the right to sell publicly."<sup>404</sup> In reaching this conclusion, the court adopted the lower courts reasoning:

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399. *See id.* (citing *Winfield v. Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985)).

400. *See id.* (citing *Winfield*).

401. *Id.* (emphasis added). The last sentence of this quote begs the question: had a private individual's right to possess obscene materials been violated, would the court's holding in this case have been different?

402. 413 U.S. 49, 65-67 (1973).

403. *Id.* (citations omitted).

404. 570 So. 2d at 262. Note that the court uses the concepts of *selling* and *purchasing* interchangeably. While these concepts are clearly interrelated, the court's failure to differentiate the two is crucial to its final holding, as *selling* denotes the rights of a *vendor*, who has no established privacy interest, while

It is clear that Florida's right to privacy is broader than the federal right. However, it is not so broad that a person can take it with him to the store in order to purchase obscene material—even though he has the right to possess such material in the privacy of his home.<sup>405</sup>

Having determined that no privacy interest existed, the obscenity statute did not have to undergo an analysis under the *Winfield*/strict scrutiny standard, but was merely required to be rationally related to a legitimate state interest. Having determined that this lesser standard applied, the *Stall* court relied upon the precedence of federal case law, where the United States Supreme Court has consistently held that the state has a legitimate state interest "in stemming the tide of commercial obscenity."<sup>406</sup> Consequently, the court held that the privacy provision of the Florida constitution does not apply to vendors of obscene material; and therefore, the statute was not unconstitutional.<sup>407</sup> Thus, in the area of obscenity regulation, Florida citizens do not enjoy greater privacy protections under Florida's constitution than they do under the Federal Constitution.

This poses the question of whether other states provide greater privacy protections in the area of obscenity regulation. Because the Hawaii Constitution also contains an explicit privacy right clause, *State v. Kam*<sup>408</sup> will provide a helpful comparison between Florida and other states that have similar privacy provisions.

In reaching its conclusion, the *Stall* court acknowledged that the Hawaii Supreme Court in *Kam* had addressed the same issue and found that Hawaii's explicit privacy provision does protect a seller's right to distribute pornographic material. However, the *Stall* court disagreed with the Hawaii court's rationalization that because *Eisenstadt v. Baird*<sup>409</sup> allowed a vendor to raise a purchaser's Fourteenth Amendment claim, a vendor of obscene material can claim and have the same rights as a private citizen enjoys.<sup>410</sup> An analysis of the *Kam* decision will demonstrate that while that court did rely upon the *Eisenstadt* decision, it was not for the proposition stated by the *Stall* court.

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*purchasing* denotes the rights of a *buyer*, who has an undisputed right to possess. See *State v. Kam*, 748 P.2d 372 (Haw. 1988).

405. *Stall*, 570 So. 2d at 262 (quoting *State v. Long*, 544 So. 2d 219, 223 (Fla. Dist. Ct. App. 1989)).

406. *Id.* at 260 (citation omitted).

407. See *id.* at 263.

408. 748 P.2d 372 (Haw. 1988).

409. 405 U.S. 438 (1972).

410. See *Stall*, 570 So. 2d at 262.

In *Kam*, the Hawaii Supreme Court considered whether Hawaii's pornography statute,<sup>411</sup> violated the state constitution's right to privacy clause.<sup>412</sup> In *Kam*, two bookstore clerks were arrested for selling adult magazines to undercover policemen. The issues presented to the Hawaii Supreme Court were: (1) whether the statute was unconstitutionally overbroad and/or vague; (2) whether the clerks possess the standing to assert the privacy rights of their customers to purchase sexually explicit adult materials; and (3) whether the statute infringes on the right of privacy.

On the first issue, the court ruled that since the statute's definition of obscenity followed the requirements of *Miller v. California*,<sup>413</sup> it was therefore not unconstitutionally overbroad or vague.<sup>414</sup>

As to the second issue, the court pointed out that prior to addressing the merits of the right to privacy violation claim, it was first necessary to determine whether the clerks, as sellers of pornographic material, "possess the standing to assert the privacy rights of those persons who wish to buy those items to read or view in the privacy of the home."<sup>415</sup> This analysis is the key distinction between the *Kam* and *Stall* decisions. While the decision in *Stall* rested on whether sellers hold a fundamental privacy right to sell pornographic material,<sup>416</sup> the *Kam* court focused the question on the buyer's right to purchase those items, which he or she has a constitutional right to possess. In deciding this issue, the Hawaii

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411. See HAW. REV. STAT. § 712-1214 (1999) (providing in part: "(1) A person commits the offense of promoting pornography if, knowing its content and character, the person: (a) Disseminates for monetary consideration any pornographic material . . .").

412. See HAW. CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right").

413. 413 U.S. 15 (1973).

414. See *Kam*, 748 P.2d at 375.

415. *Id.*

416. There is some uncertainty with the actual focus of the *Stall* opinion. While the court clearly stated that it did not need to "determine whether the obscenity statute embodies a compelling state interest because the privacy amendment does not apply to vendors of obscene material," *Stall*, 570 So. 2d at 260 (emphasis added), it went on to state that "there is no legitimate reasonable expectation of privacy in being able to patronize retail establishments for the purpose of purchasing [obscene] material." *Id.* (emphasis added). However, the court went on to state that "it does not appear that the defense . . . presented private individuals whose right to possess obscene materials at home had been violated by the instant state action." *Id.* (emphasis added). This statement begs the question—had those individuals been presented, would the court's holding have been different?

court relied on the United States Supreme Court's decision in *Eisenstadt*, and this was crucial to the court's ultimate holding.

In *Eisenstadt*, the United States Supreme Court found that a distributor of contraceptives had standing to assert the rights of unmarried persons who had been denied access to contraceptives.<sup>417</sup> Based on *Eisenstadt*, the Hawaii Supreme Court concluded that Appellants did in fact have "standing to assert the constitutional privacy rights of the buyers of pornographic material."<sup>418</sup> As the court pointed out, enforcing the statute "against the sellers of pornography severely reduces the ability of persons to read or view pornographic material in the privacy of the home," and since the persons seeking to buy pornographic material were not subject to prosecution under the law, they would have no forum to challenge the law.<sup>419</sup>

As noted above, *Stall* determined that *sellers* of obscene material do not hold a reasonable expectation of privacy in selling obscene material; therefore, Florida's statute did not have to survive the scrutiny of the compelling state interest test.<sup>420</sup> In contrast, the *Kam* court concluded that it was the *buyer's* rights that were at issue. Since there was no question that buyers do have a legitimate expectation of privacy in being able to possess obscene material, the *Kam* court concluded that the compelling state interest standard was appropriate.<sup>421</sup>

Having established Appellants' standing, the *Kam* court addressed the fundamental issue: "Is an individual's fundamental privacy right to own and view pornographic material violated when he or she is effectively denied the right to obtain such material (since generally, pornography is bought for private use at home)?"<sup>422</sup> The court acknowledged that the United States Supreme Court has consistently ruled that the right to possess obscene material in the privacy of one's home does not give rise to a right to sell or give it to others.<sup>423</sup> However, the court observed that this view has spawned considerable controversy

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417. See *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972).

418. *Kam*, 748 P.2d at 376.

419. *Id.* (citing *Eisenstadt*, 405 U.S. at 446).

420. It is interesting to note that while the *Stall* court did not expound on the standing issue in the opinion, the court did cite to the district court's analysis of this issue (in *State v. Long*) when it implicitly found that the Appellants (sellers) did have standing, and this analysis is very similar to that found in the *Kam* opinion.

421. See *Kam*, 748 P.2d at 380.

422. *Id.* at 376.

423. See *id.* See also *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973); *United States v. Orito*, 413 U.S. 139, 143-44 (1973) (holding that Congress has authority to regulate the commerce of obscene material

and numerous dissents, and endorsed Justice Stevens' dissenting opinion in *Pope v. Illinois*<sup>424</sup> by concluding that since the government cannot constitutionally criminalize the possession or sale of obscene literature, without some connection to minors or blatant exposure to unconsenting adults, the government cannot prosecute the sellers of pornography:<sup>425</sup>

The [United States Supreme] Court has adopted a restrictive reading of *Stanley*, opining that it has no implications to the criminalization of the sale or distribution of obscenity. But such a crabbed approach offends the overarching First Amendment principles discussed in *Stanley*, almost as much as it insults the citizenry by declaring its right to read and possess material which it may not legally obtain. In *Stanley*, the Court recognized that there are legitimate reasons for the state to regulate obscenity: protecting children and protecting the sensibilities of unwilling viewers. But surely a broad criminal prohibition on all sale of obscene material cannot survive simply because the state may constitutionally restrict public display or prohibit sale of the material to minors.<sup>426</sup>

The *Kam* court next explained that since article I, section 6 of the Hawaii Constitution affords greater privacy rights than does the Federal Constitution, the court was not bound by the United States Supreme Court precedents.<sup>427</sup> The court observed that the Hawaii privacy amendment specifically requires "that it can be infringed upon only by the showing of a compelling state interest," and only through the use of the least restrictive means.<sup>428</sup> Relying on the United States Supreme Court's decision in *Carey v. Population Services International*,<sup>429</sup> the court concluded that because the enforcement of Hawaii's pornography statute had a detrimental impact on an individual's privacy right

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based on the risk of ultimate exposure to juveniles or to the general public); *United States v. Reidel*, 402 U.S. 351 (1971).

424. 481 U.S. 497 (1987).

425. See *Kam*, 748 P.2d 377 (citing *Pope*, 481 U.S. at 512 (Stevens, J., dissenting, joined by Marshall, J., and Brennan, J., in part)).

426. *Id.* (quoting *Pope*, 481 U.S. at 518 (Stevens, J., dissenting) (citations and footnote omitted)).

427. See *id.*

428. *Id.* at 378.

429. 431 U.S. 678 (1977) (invalidating a state law which restricted the sale of contraceptives to licensed pharmacists and impermissibly infringed on an individual's privacy right to decide about family planning by making contraceptives less accessible to the public).



to possess such material, without a showing of a compelling government interest, the statute must fail.<sup>430</sup>

The court stated that while the State supported its argument that there was a *legitimate* state interest in regulating the commerce of obscene material, the decisions relied upon by the State were distinguishable because they used the "rational basis" standard.<sup>431</sup> Therefore, the court concluded: "Since a person has the right to view pornographic items at home, there necessarily follows a correlative right to purchase such materials for this personal use, or the underlying privacy right becomes meaningless."<sup>432</sup>

Consequently, in this instance, Florida citizens have less privacy protections than do the citizens of Hawaii, even though both states have express privacy provisions. The distinction appears to be in the focus of the two state supreme court decisions. While *Kam* considered the statute's infringement on an individual's clear right to possess pornographic material, *Stall* focused on whether a seller has a right to distribute such material, and was unwilling to establish a legitimate expectation of privacy in this activity.

#### CONCLUSION

After examining the manner in which the Florida Supreme Court has handled these issues as compared to courts from other jurisdictions, one can see a possible trend in the outcomes of the Florida cases. Of course, the makeup of the Florida Supreme Court is always changing, and thus no one can predict how the court might decide certain issues in the future. However, it would at least appear that prior decisions have allowed the state right of privacy to prevail where the conduct has not been criminally proscribed. In contrast, the court has given less consideration to awarding a state right of privacy where the conduct has been criminally sanctioned. For example, pursuant to the United States Supreme Court's decision in *Roe*, it is undisputed that obtaining an abortion is not criminally prohibited.<sup>433</sup> In

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430. See *Kam*, 748 P.2d at 380.

431. See *id.* at 379.

432. *Id.* at 380.

433. While FLA. STAT. § 390.001(4)(a)(10) (1988) imposed criminal sanctions for violations of that statute, based on Florida's common law it appears that only the doctor performing an abortion in violation of that provision would be charged, and not the minor receiving the abortion. Therefore, the conduct of the minor, whose right of privacy is at issue, would not be criminally prohibited. See *State v. Ashley*, 701 So. 2d 338 (Fla. 1997) (holding that the state could not prosecute a teenage woman who shot herself in the abdomen

contrast, the act of selling or purchasing pornographic material is clearly criminally sanctioned.<sup>434</sup>

In conclusion, this article demonstrates that Floridians have been afforded more privacy protection than citizens in states where no explicit right of privacy exists. At least in some instances, article I, section 23 has proven to be the deciding factor in curbing unreasonable state interference into Florida citizens' day-to-day lives.

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during third trimester of pregnancy causing death of fetus since at common law, while a third party can be held criminally liable for causing injury or death of fetus, a pregnant woman can not be).

434. Moreover, the *Stall* court appeared to suggest that had evidence been presented that the statute infringed upon an individual's right to possess pornographic material, the holding in that case may have been different. See *Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990).

