

December 1996

A Commercialist Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul

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Recommended Citation

Richard A. Matasar, *A Commercialist Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul*, 48 Fla. L. Rev. 781 (1996).

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SEX, LIES, AND GENETIC TESTING: WHAT ARE YOUR RIGHTS TO PRIVACY IN FLORIDA?

*Jon Mills**

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I. INTRODUCTION

George Orwell was all wrong. Well, at least he was wrong about the year. His novel, *1984*, imagined a world where individuals had no privacy, were overseen, cloned and bred by an omnipresent government. Although we have yet to live in the world of *1984*, the culture of the information highway, global community, and genome mapping is upon us.

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Constitutions, the rule of law and social contracts have tried to protect citizens from their governments for hundreds of years. Is the law up to the challenge of protecting our privacy? Examples of destruction of human privacy are legion. From drug testing of welfare recipients to controlling our decisions about sex, birth and death, government has believed that it should tell us how to live and that it should be able to collect information about us.

Just how personal can this information get? President Clinton said, "I think it won't be too many years before parents will be able to go home from the hospital with their newborn babies with a genetic map in their hands that will tell them, here's what your child's future will be like."¹

American constitutional law has called privacy "the right to be let alone"² derived from "penumbras"³ of the Constitution. The Florida Constitution says it in the text: "Every natural person has *the right to be let alone* and free from governmental intrusion into his private life except as otherwise provided herein. . . ."⁴

The law of privacy has been forged in a caldron of issues like abortion and assisted suicide. The facts of these situations are so fundamental and personal that the law seems ill equipped to draw subtle lines.⁵ Yet, if the law does not, who or what will?

Past cultures have treated the individual's right to privacy in radically different way. The way a society treats an individual is based on factors ranging from physical environment to ideology, religion, and even the status or wealth of the individual.

For example, hunting conditions and weather conditions may dictate tribal considerations of privacy. Of course the threshold question of governance and control over individual decisions is elemental. When a larger public authority and issues concerning a larger public welfare emerge, the individual is instantly subject to the public authority's controls.

II. CULTURAL CONTEXT

While the courts have formulated tests for protecting the individual's right to privacy in this country, we should ask, what is the human basis

1. Alison Mitchell, *They See the Future and It Works for Them*, N.Y. TIMES, Oct. 10, 19, 96, at A26.

2. See, e.g., *Katz v. United States*, 389 U.S. 347, 350 (1967).

3. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

4. FLA. CONST. art. I, sec. 23 (emphasis added). The author sponsored the privacy amendment in the Florida Legislature.

5. See, e.g., *Katz*, 389 U.S. at 360-61 (Harlan, J., concurring).

for these tests? Ultimately, the right to privacy must be founded upon human "expectations of privacy." However, that which is a reasonable intrusion to one person may be inconceivable to another. A test may seek to be objective, but it is the subjective beliefs of the individuals within the community that define the "reasonable expectation" which will apply to each individual. Consequently, examining various cultural or national values and beliefs provides perspective on the development of the judicial quest for reasonable expectations of privacy.

Essentially, an individual's reasonable expectation of privacy is arrived at based on the individual's experiences and values derived from his or her own culture. The culture, in turn, is shaped by many factors—religion, climate, governmental structure, ideology, geography, history, and scientific advancement, to name but a few. Not only does culture influence the definition of individual rights, but the definition of individual rights ultimately influences the future of the culture. Thus, in smaller countries and homogenous cultures, the reasonable expectation of one may be very much the same as everyone else's. However, in large, heterogeneous countries like the United States, the factors play different roles from region to region, state to state, and community to community.

Finally, an individual's wealth also plays a role in determining a person's actual access to personal privacy. Whether it be the different expectations and privileges found among the classes in Ancient Greece or modern America, one's actual access to privacy is heavily influenced by one's ability to buy it. Those who can buy large homes surrounded by walls and who can pay to defend their rights in court can expect much more privacy than those who must live in crowded apartments in crowded cities.

It is important, then, not only to examine the effect one's culture has upon one's reasonable expectation of privacy but also to explore what happens when the right to privacy is defined on a level that stretches across many cultures. In other words, we must decide whether it is better to leave the definition of our right to privacy to the United States Supreme Court or to more local institutions like state legislatures or state supreme courts.

Reasonable expectations of privacy vary not only from person to person, but also across time and culture. Thus, by looking to anthropology and examining a variety of cultures and behavioral patterns, we can gain a more acute perspective as to what reasonable expectations of privacy others have formed and on what grounds these expectations rest. The expected level of privacy in a given society is substantially related to how the society defines the individual in relation to the public realm. Further, surrounding circumstances such as climate, religion, and

availability of food play a role in defining the expectation of privacy. Often, there is one factor that dominates the individual's rights and expectations. For example, the climate dominates the lives of the Arctic Eskimos, religion dominated the ancient Hebrew society, and ideology dominated Nazi Germany. In other cultures, all of the factors mesh to create a complex amalgam of influences upon an individual's rights and expectations.

Thus, as we examine other societies, we first must determine whether there is an organized public structure and, if so, just how influential and pervasive it is. Obviously, if there is no public, governing structure, there can be no state sanctioned invasion of privacy. Surely, one person may invade another's privacy by preventing that person from making a decision or by collecting information about that person, but we are concerned with the state's role in one's private life. The focus of this essay is the deprivation and protection of one's right to privacy and the process through which deprivation or protection is achieved, not whether all individuals have a sense of privacy. Even with no intruding government, there is still independent thought and action, and people will differ in how much they value their privacy.

The second task is to identify the major cultural factors at work within the society. Is the climate so extreme that most of the people's efforts are spent dealing with Mother Nature? Does one ideology, whether religious or otherwise, dominate the hearts and minds of the citizens so that there is little uncertainty as to how far the government may intrude into their lives? Does no one factor dominate or do the factors vary in importance across the society so that it becomes very difficult to determine objectively what is a "reasonable expectation of privacy" and what is not? The factors that define the culture and the structure of the public realm will determine the scope of an individual's right to privacy within that culture.

An anthropological look at undeveloped, non-literate societies with little or no public realm reveals that factors such as environment, economic cooperation, conflict, family, and religion all interact to establish the individual expectation of privacy, as well as the societies' standard of privacy. Moreover, whether these societies have a public realm at all also becomes quite relevant because without a public aspect to their daily lives, there cannot be a contrasting private realm. Studies of Arctic Eskimos, Siriono Indians, Mbuti Pygmies, and Jivaro Indians provide contrasting examples of how less-developed societies treat individual privacy.⁶

6. This essay only discusses the Eskimos. I currently am writing a book on the right to privacy which will delve into much greater detail comparing various societies.

Eskimo culture illustrates how a relatively harsh climate or environment may compel a low expectation of privacy. The bitter Arctic climate, coupled with the lack of modern technology, has produced a significant degree of interdependence in Eskimo society.⁷ During winters, members of Eskimo society need to congregate to survive in their frozen environment.⁸ They are forced to live with extended family and even neighbors in close quarters in small igloos.

Moreover, the "real family" of Eskimos, including both the nuclear and extended family, is the main social unit for both production and consumption.⁹ In addition to cooperating to stay warm, they live, work, travel, and share whatever they have with each other. A dangerous environment where food and supplies are scarce also requires sharing and responsiveness to the needs of one another. This closeness can intrude on privacy concerning excretion and sexual intercourse. The Eskimos are also very modest, so excretion takes place in a small can under the bedcovers, and the can is later taken outside to a larger drum.¹⁰ Furthermore, sexual arousal must be delicately controlled, and intercourse had to take place silently.¹¹

Although the forced intimacy of igloos removes privacy in one sense, the feeling of family closeness also generates a sense of privacy for the Eskimos' thoughts and feelings. They appreciate independent thought. In fact, there are no formal chiefs or institutions which have higher authority than that of the family. An anthropologist who lived with the Utku Eskimos commented that even after living with them for a long time and with a command of the language, she was unable to have close, intimate talks with them.¹² They were almost always polite towards her and made sure that her needs were met, but there remained a line that she could not cross.¹³ Thus, they had a sense of privacy and separation from outsiders but little sense of privacy among family. The family unit had an expectation of privacy for itself as a unit as compared with outsiders. As Barrington Moore describes it:

7. See BARRINGTON MOORE, JR., *PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY* 3-80 (1984). Much of Moore's discussion of Eskimo culture comes from a study of the Utkuhikhalingmiut (Utku) society done by an anthropology graduate student in 1963. See JEAN L. BRIGGS, *NEVER IN ANGER: PORTRAIT OF AN ESKIMO FAMILY* (1970).

8. MOORE, *supra* note 7, at 5.

9. *Id.* at 7.

10. *Id.* at 10.

11. *Id.*

12. *Id.* at 7.

13. *Id.*

[B]oth the capacity and desire to control feelings, especially hostile feelings, are part of a desire to maintain an atmosphere of social harmony. It would be misleading to label this air of smiling politeness and consideration for others as a facade, with the implication that it is a decoration without structural function. In a society with no formal institutions for the exercise of authority and with an individualistic or familistic economy, and where all members are exposed intermittently to risks of drowning, freezing, and running short of food or other supplies crucial for survival—not to mention comfort by Eskimo standards—it makes excellent adaptive sense to create and sustain an ethos of social harmony and considerateness alongside one of sturdy self-reliance.¹⁴

Unlike an individual in a large society, like America, where the distinction between public and private is easy to recognize, the distinction for Eskimos is quite subtle. There is no public institution to protect or take away privacy; there is only the family and custom. Thus, the anthropologist could only probe so far. The Utku must maintain a sense of civility among themselves in order to survive. This is seen in their sharing of resources when needed, always with a smile and without hesitation.

However, the smile often conceals all-too-human emotions and thoughts of resentment and hostility. The responsibility to share with others and make sure that everyone has enough can cut into an adult's time, and if one person or family is too often in need or reluctant to share, there will be resentment. In a sense, this need to share and look out for the whole invades an individual's private life. Survival requires them to take time away from themselves and give it to others.¹⁵ The Utku are without a public authority, governed instead largely by familial relations, yet they have developed very different views of the personal and how much of themselves they can keep from others. For our purposes, they serve to demonstrate the way cultural factors affect the human condition absent a set of enforceable rules and remind us that,

14. *Id.*

15. Western societies have less individual commitment to taking care of others in need. Further, even with governmental programs such as the New Deal and Great Society programs of this century, millions of Americans are in need of food, clothing, or shelter. At the same time, many Americans are openly hostile towards these programs. The Utku believe that fortune may turn on them quite quickly so they look out for one another. It is a form of insurance. In America, few people believe that they are one step away from famine or homelessness, so the need to establish a complete safety net does not seem so great.

no matter what form of public institution governs us, there are always underlying influences that affect the individual's expectation of privacy.

While the societies with little or no public realm do not have the same sense of an expectation of privacy as we do because of the lack of an organized state, there are societies that do have an organized state yet still lack the freedom to define their private realm. When one of the factors outlined above dominates the culture completely, that factor defines the expectation of privacy that individuals have within the society. One factor, like religion or ideology, can so entwine itself with the state that it becomes the decisionmaker for all privacy questions rather than the individual.

Nazi Germany, for example, was so dominated by ideology that the distinction between the public and private realm lost much of its meaning.¹⁶ Unlike the ancient Greek and Chinese societies as well as many modern cultures, the Nazis did not define their realm of privacy for themselves. Instead, it was decided for them. The dearth of protection afforded an individual's privacy interests in Nazi Germany was a function of the Nazi definition of the individual. The Nazis viewed the individual as prone to anxiety and alienated from the community until all aspects of the individual's life were integrated and channeled towards the advancement of the goals of the community.¹⁷ In accordance with this view, the Nazis sought to imbue all facets of the individual German's life with the objectives of Hitler's regime; thus, creating a society dominated by one ideology.¹⁸ In other words, of all the cultural factors that influence a society, here there was one that could and did override all the others. Hitler's ideology became the cultural trump card when it came time to define an individual's expectation of privacy. There was only one source for all the answers.

As George Mosse writes:

Hitler's aim was to construct an organic society in which every aspect of life would be integrated with its basic purpose. And in the terms in which this purpose was promulgated by the National Socialist Party, no one could be allowed to stand aside. Politics was not just one side of life, or one among many other sciences; it was instead the

16. See GEORGE L. MOSSE, *NAZI CULTURE: INTELLECTUAL, CULTURAL, AND SOCIAL LIFE IN THE THIRD REICH* xx (1966).

17. See *id.* at xxiv-xxv.

18. Of course, the Nazis also recreated the society by persecuting, jailing, and eventually killing those who did not fit the Nazi model of a German. The loss of liberty and life for Jews, homosexuals, and many others was, among other things, the ultimate stripping of individual privacy rights, but the focus here is on the State's role in the lives of its "favored" citizens.

concrete expression of the Nazi world view. This world view was held to be the very crux of what it meant to be a German, and therefore politics was the consciousness of race, blood, and soil, the essence of the Nazi definition of human nature.¹⁹

In light of this attempt to nationalize the masses, there was, quite simply, very little room for individualism in Nazi Germany. Individual concerns were to be yielded entirely to the perceived needs of the German people as a whole. For example, every village household had to take in people forced to evacuate their homes because of Allied bombings.²⁰ The State entered every house and determined how many people each house would have to accommodate.²¹ As one might expect, this very limited view of the individual had an adverse effect on personal privacy.

A key element for Hitler's indoctrination of the masses was to capture the youth. Control the minds of the young, and you solidify your hold on the future. The Nazis used the schools to institutionalize the Nazi ideology.²² Instead of the home, the school became the central source of rearing and training children.²³ "In the name of restoring tradition, the Nazi state did more than any other regime to break down parental autonomy and to make the family simply a vehicle of state policy."²⁴ Thus, the ideology was not found only in the laws of the state but also in the teachings of youth. The Nazis were able to strip away personal choices by taking away the opportunities to exercise or even recognize the option of differing choices. From the earliest of ages, the Nazi ideology took over as the source for all the answers.

Nazi interference with procreative and sexual autonomy is especially noteworthy. Nazi racism spurred a drive to increase the birthrate among the Aryans, and policies were implemented to effectuate this goal.²⁵ First, for Aryan women, abortion was punished with vigor, but among the "inferior" races, forced sterilization and limitations upon reproduc-

19. MOSSE, *supra* note 16, at xx.

20. RICHARD BESSEL, *LIFE IN THE THIRD REICH* 23 (1987).

21. *Id.*

22. See MOSSE, *supra* note 16, at xxxiii-xxxv, 263-318.

23. BESSEL, *supra* note 20, at 21-22.

24. Ingeborg Weber-Kellermann, *The German Family Between Private Life and Politics*, in *A HISTORY OF PRIVATE LIFE, V: RIDDLES OF IDENTITY IN MODERN TIMES* 517 (Arthur Goldhammer trans., Antoine Prost & Gérard Vincent eds., 1991) (article edited and translated by Mary Jo Maynes & Michelle Mouton). The author later writes, "Children born and raised under such a regime would absorb a concept of authority that permeated the entire political system." *Id.* at 520.

25. *Id.* at 517.

tion became common.²⁶ Second, the Nazis prohibited public employment to married women whose husbands were employed so that the women could focus solely on reproducing.²⁷ According to the Nazi ideology, when it came to Aryan women, motherhood defined women.²⁸ Third, homosexuals were vigorously persecuted in Nazi Germany. They “were arrested and often interred in concentration camps along with the Jews” and other “undesirables” because they did not contribute to the propagation of the Aryan race.²⁹

Thus, the low value the Nazis placed on the individual, coupled with their racist ideology, led to state intrusion into what we consider the most private aspects of life. Nazi ideology and the state became one. Of course, not every German believed in the ideology, but it was so pervasive that it was extraordinarily difficult to exercise any personal freedom that was not specifically approved by it. Personal beliefs were not supposed to be the source of one’s personal decisions, ideology was.

Another cultural factor that can override all others and become the sole source for defining an individual’s expectations of privacy is religion. Ironically, in societies where state and religion act as one, the state, acting with the good intentions of fostering the spiritual well-being of its citizens, intrudes quite far into the personal lives of individuals. Thus, religious states often subjugate prerogative for a “greater good.”

Ancient Hebrew society after the Exodus can best be defined as a theocracy; public and religious authorities were one in the same. Consequently, the Hebrew religion played the primary role in defining the individual with respect to society, and as such, it did not give the

26. *Id.* at 521-22.

27. *Id.* at 520. Interestingly, women who reproduced were honored with the “Mother’s Cross” in different degrees. *Id.* Mothers with eight or more children received a gold cross, those with six or seven received a silver cross, and those with four or five received a bronze cross. *Id.*

28. As Hitler put it:

If today a female jurist accomplishes ever so much and next door there lives a mother with five, six, seven children, who are all healthy and well-brought-up, then I would like to say: From the standpoint of the eternal value of our people the woman who has given birth to children and raised them and who thereby has given back our people life for the future has accomplished *more* and does *more*!

MOSSE, *supra* note 16, at 39 (alteration in original) (quoting Speech to the National Socialist women’s organization (Die Frauenschaft) published in the VÖLKISCHER BEOBACHTER, Sept. 13, 1936).

29. Weber-Kellermann, *supra* note 24, at 521. Of course, we too outlaw homosexual activity in most states, even if the laws are not enforced very rigorously. Many communities have been tackling the issue of discrimination against homosexuals recently, and the debate has been fierce.

individual a very expansive definition. The centerpieces of the Hebrew religion were the solidarity of the Hebrew community and the ever-watchful eye of the omniscient and omnipotent God. "The very notion of an area of social and individual life marked off as private and immune to divine interference would be an impossible absurdity from this standpoint."³⁰ Thus, even in larger or developing societies, one factor can still override all others in shaping the individual's expectation of privacy. Religion dominated in Hebrew society just as climate dominated the Eskimos.

Not surprisingly, the focus on the solidarity and well-being of the Hebrew community emphasized the larger concerns of the community more than individual needs. Moreover, sinfulness—disobedience with respect to the laws promulgated by God—undermined the well-being of the community, for the Hebrews believed that God visited his wrath upon the Hebrews whenever they strayed too far from his law. Because of the belief that individual sin adversely affected the community, very little within the realm of the totally private. As Moore writes, the Hebrew theocracy "confronted the individual in all the decisions of daily life. It was also a public from whom no secrets were hid and which left little or no autonomous area for private existence."³¹

The view of the Hebrew theocracy with respect to sexual autonomy exemplifies the lack of a significant private realm. There was a number of sexual crimes for which death was the punishment. These included adultery, incest, homosexuality, and bestiality.

It would be a mistake to say that absolutely no protection against governmental intrusion into an individual's life was recognized among the Hebrews. The Hebrew religion did prohibit the arbitrary use of power, for no leader was permitted to use power against a subject purely for his own personal gains. Despite this protection, however, the nature of the Hebrew theocracy, with its rules governing nearly all aspects of daily life, did not permit any substantial distinction between public and private behavior.

Other societies have been dominated by religious beliefs, but the religion was separated from the state. Victorian England and the early United States were heavily influenced by religious beliefs but took a different approach. Rather than making religious laws the state laws, these societies created a public realm that separated the individual's private life so that the individual could pursue his or her religious beliefs without interference from the state. Instead of assimilating the

30. MOORE, *supra* note 7, at 169.

31. *Id.* at 176.

religion into the state, a distinct separation was created so that, ideally, everyone could worship their god as they believed fit.

One more key factor influencing a society's attitude toward individual privacy is the way it allocates and protects property rights. Personal privacy is not something protected only by the state. In many cultures, privacy can be bought. In the United States, for example, the level of privacy that a homeless person can expect is much less than that of the wealthy person who can purchase a large estate surrounded by ten foot walls. We have the right to be free from governmental intrusion into our homes absent a compelling state interest, but this right means little to the people living in shelters or on the streets. The poor often must divulge highly personal information to the government or a charitable organization in order to receive aid. If the state were to ask the same questions of its wealthy citizens, there is little question that we would consider such questioning an intrusion upon their reasonable expectations of privacy. Courts have avoided an outright declaration that the poor have less of a right to privacy than the rich by finding that there is no reasonable expectation of privacy involved when an individual seeks help from the state.³²

Thus, an individual's reasonable expectation of privacy within a society is dictated by many factors—from those beyond human control, like climate, to those shaped by cultural mores, like religion and property rights. In some cases, one factor may so dominate that it controls the society's concept of individual privacy, while in others, multiple factors combine to shape it.

III. THE LEGAL TEST

The legal test today symbolizes the struggle between the individual and the collection of individuals we call government. We teach that the test is as follows:

1. Does the individual have a reasonable expectation of privacy?

32. *Cf., e.g., City of North Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995) (holding that an applicant for a state job did not have a legitimate expectation of privacy concerning her status as a smoker because "individuals must reveal whether they smoke in almost every aspect of life in today's society"). The theory behind this is that the government does not require the individual to divulge anything because the individual has "voluntarily" sought governmental aid or employment. *Cf. id.* Thus, the individual can avoid the probing questions of the government by deciding not to seek its aid. Of course, while it is quite easy for a wealthy person to survive without government aid, the same is not true for an indigent or jobless person.

2. If so, then the individual qualifies for a fundamental right which we only can be breached by a compelling state interest.
3. Is there a compelling state interest to impair the individuals privacy? This is the component where society weighs in with its needs, such as public safety or health.
4. Is the intrusion done in the least intrusive way? If society is going to intrude, the goal is to only do so much as is necessary to meet the public purpose.³³

The application of the test makes several points obvious. First, the right to privacy is not absolute. Intrusions are acceptable where there is a sufficiently strong state interest. Second, the test of "reasonable expectation of privacy" is as ethereal as the ordinary or reasonably prudent person. What is a reasonable expectation of privacy in America in 1997? Is it different from a reasonable expectation in America in 1845? Is it different in Alaska than it is in New York City? What would be a reasonable expectation of privacy in Nazi Germany in 1941?

A. *Who Is Reasonable?*

The conundrum of the test is that the threshold definition of an important right is based on the expectations of a society with widely varying expectations. What then is reasonable? It should not necessarily be what most people feel. As a fundamental human right, privacy should not be defined by social norms or majority acceptance, and by the same token, privacy cannot be defined as what one person thinks. These questions are easier in the abstract than when applied to a practice of prohibiting a public hospital from treating the sick child of a Christian Scientist.

B. *What Is Compelling?*

At this point the plot becomes even more complex. We, the law, have identified a privacy right that is reasonable for an individual to expect. How do we determine whether a governmental interest will override that reasonable expectation?

First, analysts correctly will suggest that many courts at the state and federal level do not employ the compelling interest standard. They employ the lower balancing standard. The result is that it is even easier to override the privacy interest of an individual.

How courts choose which standard to apply is difficult to intuit. They may choose based on the type of question presented. For example,

33. See *id.* at 1027-28 (describing the test as applied under the Florida Constitution).

courts appear to use the balancing test on privacy issues dealing with personal information as opposed to personal decisions. For example, in *Florida v. Rolling*,³⁴ the circuit court judge applied a balancing test to determine whether the families of victims of violent crimes had a privacy interest in preventing the release of crime scene photographs that outweighed the public's "right to information."³⁵ However, in *Beagle v. Beagle*,³⁶ where the question was whether the state could grant visitation rights to grandparents over a parent's objections, the Supreme Court of Florida utilized strict scrutiny review.³⁷

IV. THE DIFFERENCE IN THE STATE RIGHT TO PRIVACY: THE FLORIDA EXAMPLE

Based on fundamental constitutional principles, states can exceed federal constitutional rights in the protection of individual liberties. In fact, some consider it a duty of the states.³⁸ Florida and ten other states have textual constitutional rights of privacy.³⁹

In a 1977 landmark decision, *Shevin v. Harless, Schaffer, Reid & Associates, Inc.*,⁴⁰ the Supreme Court of Florida determined that the Florida Constitution did not guarantee an individual's right of privacy,⁴¹ thereby sparking widespread interest in the protection of privacy in political and public settings. The 1978 Florida Constitutional Revision Commission debated and adopted a privacy provision to be submitted to the public. The entire revision was defeated. I introduced a similar privacy provision⁴² in 1980, which ultimately passed after an extensive legislative process and lively public debate.

From the start, the intent was to depoliticize, in a partisan sense, consideration of the amendment. My cosponsors included Republicans and Democrats, liberals and conservatives. The issue was framed both as a civil liberties issue, as a response to big government and, as a

34. 22 Media L. Rep. (BNA) 2264 (Fla. 8th Jud. Cir., July 27, 1994).

35. *Id.* at 2268.

36. 678 So. 2d 1271 (Fla. 1996).

37. *Id.* at 1272.

38. See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

39. Of the 11 states, only California's right to privacy covers both public and private actors.

40. 379 So. 2d 633 (Fla. 1980).

41. *Id.* at 639.

42. I introduced the privacy amendment with the intention of providing a basis for protecting both decisional and informational privacy rights. I used the background information prepared by Professor Pat Dore and staff analysis from the House Government Operations Committee to analyze the resolution.

response to growing invasions of informational privacy spurred by ever-expanding technical and computer capabilities.⁴³ The amendment was accepted by the membership in that context. Ultimately the bill passed overwhelmingly, largely because it had such widely divergent sponsors and ideologically broad-based arguments.

The bill, as originally drafted, read: "Every natural person has the right to be let alone and free from unwarranted governmental intrusion into his private life." The major difference between this provision and the Constitutional Revision Commission's provision rejected by the voters just two years earlier was the addition of the word "unwarranted." This word created volatile debate during the Commission meetings because opponents of including the qualifying word, "unwarranted," before "governmental intrusion" argued that the word "unwarranted" suggested that the fundamental privacy right was not as important as other fundamental rights. Proponents of including the term had equally strong convictions regarding the benefits of its inclusion. The proponents insisted that the word "unwarranted" would provide the flexibility which is traditionally necessary in a constitution, allowing the courts to balance the competing governmental and private interests in any given fact scenario.

The subcommittee ultimately passed an amendment on March 11, 1980 striking the term "unwarranted" from the bill. After this decision, the resolution took on a more absolute tone in the amendatory process.

The existence of *Roe v. Wade*⁴⁴ muted debate on issues like abortion and gay rights.⁴⁵ Proponents suggested the resolution had no effect on current law since the federal right was assured under the United States Supreme Court's decision.

Concern over the potential for a conflict between the right to privacy and the public records law was the focus of the debate as the full Governmental Operations Committee began its deliberations on April 9, 1980. These concerns were quieted by the addition of the following amendment: "This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." The committee passed the amendment unanimously, and the bill passed without objection as Committee Substitute for HJR 387.

The bill with the addition of the public records provision was read for the first time on the House floor May 5, 1980. Introducing the bill

43. Arguments for the amendment evoked images of George Orwell's *1984* and concern over the ability of big government to snoop into one's private life and control personal decisionmaking.

44. 410 U.S. 113 (1973).

45. Some anti-gay sentiments surfaced more visibly during the public consideration after the resolution had passed the legislature.

to the full House, I cited a recent Harris Poll which indicated that sixty-five percent of the people polled believed the right of privacy should be a fundamental right along with "life, liberty and the pursuit of happiness."⁴⁶ The bill gave legislators the opportunity to act against the big government of the day and gave the public the opportunity to vote privacy into the realm of protected "fundamental" rights. The bill passed by the required three-fifths constitutional voice vote, was read for the third time the next day, May 6, and passed with 98 Yeas to only 4 Nays.

*A. The Consideration and Adoption of HJR 387
as SJR 935 by the Florida Senate*

The House bill then moved to the Senate and was referred to the Rules and Calendar Committee. Again, there was concern over whether forbidden governmental intrusion should somehow be limited. Senator Dunn, one of the bill's primary opponents, attempted to qualify the phrase "governmental intrusion" by limiting the right of privacy to protect citizens from "any unreasonable" government intrusion. The bill was reported favorably out of the Rules Committee.

The debate on the Senate floor followed the next week. Senator Dunn offered the same amendment he offered in the Rules Committee. Senator Dunn expressed concern that the "absolute" privacy right then reflected in the bill would not permit wiretapping, would affect the state's taxing authority and lobbying disclosure requirements, would allow marijuana possession in the home, would legalize sexual activities of any sort between consenting adults, would limit search and seizure activities, and would prohibit the investigation of state employees.⁴⁷ Senator Dunn also argued that there would be a "glut of cases every time our government attempts to do anything vis-à-vis the private citizen and his home life."⁴⁸ Senator Dunn's amendment failed on a voice vote.

During debate on the bill, Senator Dunn also raised the issue of the bill's potential impact on abortion and right to life issues. Senator Gordon, one of the bill's co-sponsors, argued that privacy rights within

46. Jon Mills, Personal Notes of House and Senate Floor Debates (May 1980) (on file with author).

47. *Id.*

48. *Id.*

the family were protected under the Federal Constitution.⁴⁹ The final vote in the Senate was 34 Yeas and 2 Nays.

Much of the debate by the legislature surrounding the privacy amendment revolved around whether or not to include the term "unwarranted" to modify the amount of governmental intrusion which would be tolerated under the privacy amendment. Without a standard by which to judge a possible infringement of the new constitutional right to privacy, the amendment suffered from vague language.⁵⁰ The Senate Staff recommendation included the suggestion that the amendment include the desired standard of judicial review.⁵¹ The recommendation, based on other states with similar constitutional provisions, was one of "compelling state interest."⁵² Under this standard, the intrusion would be allowed only if first authorized by the Constitution and only if there was a compelling state need for the intrusion.⁵³ This standard would shift the burden to the state to justify the reason and need for the intrusion.⁵⁴

The Staff recommended revising the amendment to read: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as necessitated by a compelling state interest."⁵⁵ Professor Pat Dore testified regarding the necessity of inserting this limitation. She recommended against including the specific compelling governmental interest balancing test which would likely be used by the courts based on the bill's language. The bill was reported favorably out of the Rules Committee.

The Senate Rules Committee rejected the Staff's recommendation and the Senate and House joined in passing the Amendment without any qualifying language. The duty of defining the boundaries of the right to privacy protected by the new amendment would then fall to the Florida courts.

B. *Significance of the Legislative Debate*

The legislative debate would prove significant as the Supreme Court of Florida began to define the right of privacy. The seminal decision

49. Now, we are finding that this is not necessarily true and that the privacy amendment's most significant function may ultimately be protection of rights of the family if *Roe v. Wade* disappears.

50. Senate Staff Analysis (May 6, 1980) (on file with author).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

interpreting the right to privacy, *Winfield v. Division of Pari-Mutuel Wagering*,⁵⁶ came five years after the amendment became effective. The *Winfield* court recognized that the amendment was intentionally phrased in strong terms. The court said: "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."⁵⁷

Winfield established the standard for analysis under Florida's privacy amendment. As the amendment's legislative proponents had hoped, the court said the government may infringe on the right of privacy only to achieve a compelling state interest and only if government pursues its goal in the least intrusive manner.⁵⁸

C. Florida's Examples

Because of the textual right, Florida has had a more complete experience in analyzing the wide range of circumstances that generate privacy litigation than many other jurisdictions. Analyzing privacy cases, writers frequently have divided cases into those regarding personal decision (decisional privacy) and those regarding personal information (personal privacy). This division is imperfect and frustrated by circumstances which seem to involve both issues. Of note is the indication that courts seem to adhere to the fundamental rights test more closely and place a higher regard on controversies involving personal decisions like abortion. The following are a series examples from Florida showing the vagaries of protecting privacy even in a state that claims it is a protector of private rights.

1. Employment

What kind of information can be asked when you are seeking a job? How about a job in government? The threshold reasonable expectation question appears to be affected by the fact that an individual is seeking something from government—a job. Consequently, there is a potential diminution in an individual's reasonable expectation because of the

56. 477 So. 2d 544 (Fla. 1985).

57. *Id.* at 548.

58. *Id.* The court held that the privacy amendment did not prevent the Division of Pari-Mutuel Wagering from subpoenaing Winfield's bank records as part of an investigation. *Id.* The threshold question, according to the court, was "whether the law recognize[d] an individual's legitimate expectation of privacy in financial institution records." *Id.* at 547. The court was willing to find that the law recognized this legitimate expectation of privacy, but the court held that there was a compelling state interest in investigating the pari-mutuel industry and that the Division of Pari-Mutuel Wagering least intrusive means to achieve that interest. *Id.* at 548.

person's status as a job seeker. Whether this diminution is justified is a different question.

In 1984, the Supreme Court of Florida concluded that The Florida Bar was entitled to ask its applicants, "Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder?"⁵⁹ The court concluded that despite the fact that an applicant has a reasonable expectation of privacy concerning a record of mental health treatment, there is a compelling interest for the Bar to examine such information because of the need of the state to regulate the legal profession.⁶⁰ The court further found that the bar had used the least intrusive means to implement this public purpose of assuring fitness of members of the Bar.⁶¹ The Court also added that practicing law was a "privilege" and that there is no "constitutional right to be admitted to the Bar."⁶² Although the court appeared to review the privacy right of the applicant under the same standard as any other privacy assertion, one must question whether the fact that the court found that the plaintiff sought a privilege from government lessened the state's burden to show a compelling interest.

In dissent, Justice Adkins conceded that while "it is difficult to conceive of information in which an individual has a greater legitimate expectation of privacy than medical records containing communications and other information between an applicant and a psychiatrist, psychologist, or counselor," it is also true that the state had a compelling interest.⁶³ He parted ways with the majority as to whether the process was the least intrusive.⁶⁴ This area of the test provides the opportunity for the courts to suggest compromise between compelling interests and individual rights. In fact, current Bar standards are more limited regarding mental health than this 1984 questionnaire.⁶⁵

A more recent case concerning employment presents a prime example of the legal test being far less important than the articulation of the nature of the privacy right. In that case, the Third District Court of Appeal described the privacy right at issue to be the right to decide whether one can engage in the legal activity of smoking tobacco in

59. Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71, 73, 77 (Fla. 1983).

60. *Id.* at 75.

61. *Id.*

62. *Id.* at 74.

63. *Id.* at 77 (Adkins, J., dissenting).

64. *Id.* (Adkins, J., dissenting).

65. See Florida Board of Bar Examiners, Application for Admission to The Florida Bar 10 (Revised 10/94) (on file with author) (asking applicants to list serious mental disorders they have suffered from in the previous ten years and any current disorders which could impair or limit their ability to practice law).

one's own home. However, the supreme court, in a decision finding no violation of the constitutional right to privacy, found that the relevant right was the *information* that the individual had smoked tobacco.

In *City of North Miami v. Kurtz*, the supreme court determined that the City of North Miami could require a job applicant to sign an affidavit stating that she had not used tobacco in the preceding year as a condition for considering her for employment.⁶⁶ The court found that the applicant had no reasonable expectation of privacy.⁶⁷ Moreover, the court accepted statistics produced by the city to show the costs of smokers to the city as proof of a compelling interest.⁶⁸ However, since the court found no reasonable expectation of privacy, there was no need for a showing of a compelling interest.⁶⁹

The Third District Court of Appeal had found privacy rights implicated when the "City requires her to refrain from smoking for a year prior to being considered for employment."⁷⁰ The supreme court characterized the issue as involving a job applicant and an issue that in terms of expectations where "[i]n today's society, smokers are constantly required to reveal whether they smoke."⁷¹ Thus, the supreme court reached the conclusion that there was no expectation of privacy in the *information* that a person smokes while the Third District Court of Appeal said there was a reasonable expectation that the government could not prevent an applicant from smoking. Perhaps each answers the question it asks.

2. Abortion

Perhaps the most telling case on the extent of Florida's privacy right is *In re TW*.⁷² While earlier cases articulated the test to be used, this case dealt with the controversial issue of abortion and concluded that Florida's privacy right was intended to protect abortion rights and was more extensive than the federal right.⁷³ The issue was parental consent for abortion.⁷⁴ The court concluded that the parental consent statute was unconstitutional.⁷⁵ Citing *Winfield*, the court noted that

66. 653 So. 2d 1025, 1026 (Fla. 1995).

67. *Id.* at 1028.

68. *Id.* at 1028-29.

69. *See id.* at 1028.

70. *Id.* at 1027.

71. *Id.* at 1028.

72. 551 So. 2d 1186 (Fla. 1989).

73. *Id.* at 1191-92.

74. *Id.* at 1188-89. In *TW*, the abortion had already occurred but because of the major public concern, the Attorney General sought an advisory opinion. *Id.* at 1189-90.

75. *Id.* at 1196. The measure was passed as part of an abortion clinic bill. *See* FLA. STAT.

[s]ince 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.⁷⁶

The court concluded that this expanded right “embraces more privacy interests, and extends more protection to the individual in those interests, than does the Federal Constitution.”⁷⁷ With this reasoning it seems obvious that the Florida abortion rights are more extensive than those that existed under the United States Constitution at the time of the passage of the Florida amendment in 1980.⁷⁸

The court proceeded to analyze both abortion cases and cases dealing with the control of government over minors.⁷⁹ It concluded that “[t]he challenged statute fails because it intrudes upon the privacy of the pregnant minor from contraception to birth.”⁸⁰ While federal courts evaluating parental consent statutes required the state to show a “significant” interest rather than a “compelling” interest, the *TW* court concluded that the Florida standard required a showing of a compelling state interest.⁸¹ And, based on that standard, the court concluded that the state had not shown a compelling interest to overcome the minor’s privacy rights.⁸²

The court also concluded that, even if the state could show a compelling interest, the statute did not employ the least intrusive means of furthering the state’s interest.⁸³ Thereby, the statute also failed the second prong of the Florida privacy test.⁸⁴ This conclusion is important

§ 390.001(4)(e) (Supp. 1988).

76. *TW*, 551 So. 2d at 1191-92 (quoting *Winfield*, 477 So. 2d at 548).

77. *Id.* at 1192.

78. *But see id.* at 1202 (Grimes, J., concurring in part and dissenting in part).

However, this did not mean that Florida voters had elected to create more privacy rights concerning abortion than those already guaranteed by the United States Supreme Court. By 1980, abortion rights were well established under the federal [sic] Constitution, and I believe the privacy amendment had the practical effect of guaranteeing these same rights under the Florida Constitution.

Id. (Grimes, J., concurring in part and dissenting in part).

79. *See id.* at 1192-96.

80. *Id.* at 1194.

81. *Id.* at 1195.

82. *Id.*

83. *Id.*

84. *Id.*

because other members of the court were willing to find a compelling interest in parental consent.⁸⁵ Given a compelling interest, the state could then attempt to craft a different statute to meet the “least intrusive” test.

The implication of *TW* for abortion rights in Florida is clear. Irrespective of federal changes, Florida citizens have at least the same abortion rights conferred by the United States Constitution as of 1980 and probably more.

3. Right to Die

Right to die and assisted suicide cases are the most recent and now among the most controversial privacy cases. Allowing a patient to die without heroic or intrusive measures is a far different issue than allowing a third party to administer a lethal dose of morphine at the request of a terminally ill patient. The law is much more concerned about affirmative acts and third party actions than permitting natural causes to take effect.

Florida was willing to take a paternal interest in the life of its citizens even before the right to privacy amendment was passed in 1980. For example, mandatory use of motorcycle helmets was upheld in 1969 in a case in which Judge Robert Mann quoted John Donne’s statement that “[a]ny man’s death diminishes me.”⁸⁶ Without a separate textual right of privacy the state did not have to meet a compelling interest standard.⁸⁷ Thus, the court performed a balancing test and found the statute requiring helmets constitutional.⁸⁸

While the issue of physician-assisted death has been a topic of public debate for many years, especially after Dr. Kervorkian entered the scene, the issue did not reach the Supreme Court until 1997.⁸⁹ Just weeks after arguments were heard before the Court, the same issue reached the Supreme Court of Florida in *McIver v. Krischer*.⁹⁰ Even though the Supreme Court held that there was no right to physician-assisted death

85. See *id.* at 1203 (Grimes, J., concurring in part and dissenting in part) (finding that the statute “reflects a legitimate state concern over the welfare of children and impinges upon the minor’s right to privacy in the least intrusive manner”); *cf. id.* at 1205 (McDonald, J., dissenting) (“For many purposes, minors are treated differently. I does not offend me in the slightest that their ability to consent to an abortion is different from adults and is an issue appropriately left with the legislature.”).

86. *State v. Eitel*, 227 So. 2d 489, 490 (Fla. 1969).

87. *Shevin*, 379 So. 2d at 639.

88. *Fitel*, 227 So. 2d at 490-91.

89. *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

90. 697 So. 2d 97 (Fla. 1997).

implicit in the Federal Constitution,⁹¹ the Florida case still was important. The Supreme Court let Washington's ban on assisted-suicide stand, but it did not rule that the states were prohibited from passing laws that allow physician-assisted death.⁹² The Court also strengthened its holding in *Cruzan v. Director, Missouri Department of Health*⁹³ affirming a patient's right to have any artificial means of life support discontinued.⁹⁴ Thus, there is a federal right to die when the patient is being kept alive through artificial means. However, there is a distinction, according to the Court, between discontinuing life support and prescribing drugs to bring about death.⁹⁵ The end result of the two actions is the same, but the Court drew a line between them.

Thus, *McIver* became all the more important. The Supreme Court of Florida has held on many occasions that the explicit guarantee of privacy in the Florida Constitution affords more protection than the implicit federal right.⁹⁶ Here, the federal right was defined, and the Supreme Court of Florida has to decide just how much stronger the State's right is. Had the Supreme Court ruled that the Federal Constitution did guarantee a right to physician-assisted death, the Supreme Court of Florida would not have had to deal with the enormous political pressures accompanying the case.

McIver directly brings the question of the state's interest in an individual's life. The plaintiffs, Dr. Cecil McIver and three terminally ill persons, sued the State's Attorney for Palm Beach County seeking a declaratory judgment that would declare Florida's assisted self-murder statute unconstitutional.⁹⁷ The three terminally ill patients sued to have the option of receiving the aid of Dr. McIver in hastening their deaths.⁹⁸

Central to the plaintiff's case in *McIver* is the reasoning behind *In re Guardianship of Browning*,⁹⁹ in which the Supreme Court of Florida decided whether the guardian of an incompetent, non-terminally ill person could exercise the person's right of self-determination by removing a feeding tube.¹⁰⁰ The *Browning* court answered the question

91. *Glucksberg*, 117 S. Ct. at 2272.

92. *See id.* at 2261-75.

93. 497 U.S. 261, 278 (1990) ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment. . .").

94. *Glucksberg*, 117 S. Ct. at 2267 (citing *Cruzan*, 497 U.S. at 278-79).

95. *Id.* at 2270.

96. *See, e.g., TW*, 551 So. 2d at 1192.

97. *McIver*, 697 So. 2d at 99 (citing FLA. STAT. § 782.08 (1995)).

98. *Id.*

99. 568 So. 2d 4 (Fla. 1990).

100. *Id.* at 7-8.

affirmatively and used the privacy amendment as the basis of its reasoning.¹⁰¹ The court held that “everyone has a fundamental right to the sole control of his or her person” and that this includes making all medical choices.¹⁰² Thus, the right of a competent person to choose or refuse medical treatment is constitutionally protected in Florida.¹⁰³ Finally, the court said that it could find no reason to qualify that right by distinguishing between procedures as “major or minor, ordinary or extraordinary, life-prolonging, life-maintaining, life-sustaining or otherwise.”¹⁰⁴

4. Disclosure of Crime Scene Photographs

The definition of the right to privacy becomes even more difficult when the individual’s right competes with a public constitutional right. Such was the case when the Eighth Circuit Court considered the disposition of crime scene photographs in the Danny Rolling multiple murder trial.¹⁰⁵ The relatives of the victims sought to prevent publication of the gruesome pictures of their families.¹⁰⁶ The court confronted several major legal challenges. For one, the privacy right was claimed by *relatives* of the victims for publication of images of the victims.¹⁰⁷ In other words, the victims were not and could not assert their own privacy right. Second, there was the conflicting notion that legal and constitutional obligations exist for public disclosure of court documents.¹⁰⁸

The judge concluded that the relatives had their own privacy right which they could assert.¹⁰⁹ The court cited instances in other jurisdictions where family members could assert a privacy right to protect disclosure of information regarding their relatives, including most prominently the case involving the families of the crew of the Challenger.¹¹⁰

101. *Id.* at 8, 17.

102. *Id.* at 10.

103. *Id.* at 11.

104. *Id.* at 11 n.6.

105. *Florida v. Rolling*, 22 Med. L. Rep. 2264 (Fla. 8th Cir. Ct. 1994). The author represented the families as a Special Assistant State Attorney on this issue. *Id.* at 2265.

106. *Id.*

107. *See id.* at 2267-68.

108. *See id.* at 2270.

109. *Id.* at 2267-68.

110. *Id.* (citing *N.Y. Times v. NASA*, 782 F. Supp. 628 (D.C. 1991); *Williams v. City of Mineola*, 575 So. 2d 683 (Fla. 5th DCA 1991)).

After concluding the right existed, the judge identified the public right as the right to know.¹¹¹ Since the right to know is a constitutional right in Florida, the judge was confronted with two competing constitutional rights. His solution was to balance the two rights and prohibit publication of the photographs but allow limited public access.¹¹² This analysis is, of course, not the analysis generally articulated for the privacy right. Perhaps the judge actually articulated an analytical process which could have been used subliminally to reach the same result using the existing privacy test. For example, the judge could have found that the family had a right to privacy in the non-disclosure of the photographs. The state had a compelling interest in some disclosure based on constitutional and statutory rights to information. And, finally, the least intrusive means to exercise that right would be through limited access and no publication.

The result created a new privacy right in Florida (perhaps unique in state jurisdictions)—the right of family members against certain disclosures concerning their relatives. Of course, the nature of the disclosure in the *Rolling* case was extreme.

5. Blood Test Information

In *Rasmussen v. South Florida Blood Service, Inc.*,¹¹³ the Supreme Court of Florida decided that blood donors' privacy interests and society's interest in a strong volunteer blood system outweigh a plaintiff's interest in discovering the names and addresses of blood donors in order to find evidence that he contracted AIDS from blood supplied by the blood service.¹¹⁴ The plaintiff was struck by a car and received fifty-one units of blood in surgeries following the accident.¹¹⁵ One year after the accident, he found out that he had AIDS.¹¹⁶ In his suit against the driver of the automobile, he served the blood bank with a subpoena duces tecum that requested the names and addresses of its blood donors.¹¹⁷ The blood bank refused to provide the requested information.¹¹⁸

111. *Id.* at 2267.

112. *Id.* at 2269-70.

113. 500 So. 2d 533 (Fla. 1987).

114. *Id.* at 534.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

The *Rasmussen* court held that a balancing test must be applied when deciding whether to issue a protective order in discovery disputes.¹¹⁹ The court recognized that “[t]he potential for invasion of privacy is inherent in the litigation process” and that Florida discovery rules give courts the authority to protect the privacy of individuals.¹²⁰ In discussing the competing interests, the court emphasized Florida’s privacy amendment, stating that “there can be no doubt that [it] was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others.”¹²¹ Rasmussen’s interest in discovering the names to see whether any of the blood donors were known AIDS carriers or convicted drug users could not overcome the blood donors’ interests.¹²²

Unlimited access to the names and addresses would allow Rasmussen to conduct a thorough check into the lives of each blood donor without any donor’s knowledge.¹²³ Friends, family, co-workers, and employers could be questioned about the lives of the donors, and once AIDS and the donor were mentioned in the same sentence to these people, the donors would be subject to all of the discrimination AIDS patients face. Also, many people would avoid donating blood in the future, if they believed that their names and addresses would be available to others without their permission. The court found that there had to be a way to verify the blood service’s report that none of the fifty-one blood donors was known to have AIDS without compromising the anonymity of the donors.¹²⁴

Thus, the Supreme Court of Florida applied a mixed test in deciding this privacy issue. While recognizing the high value we have for personal privacy and its constitutional protections—both federal and state—it did not use strict scrutiny language.¹²⁵ Instead, it applied a balancing test.¹²⁶ However, implicit in the language used in balancing the competing interests were elements of strict scrutiny review. In citing several federal privacy right cases and Florida’s privacy amendment, the court essentially called the blood donor’s privacy interests a fundamental right.¹²⁷ And, the language stating that some other method of verifying

119. *Id.* at 535.

120. *Id.*

121. *Id.* at 536.

122. *Id.* at 538.

123. *Id.* at 537.

124. *Id.*

125. *See id.* at 534-38.

126. *Id.* at 535.

127. *Id.* at 535-37.

the accuracy of the blood service's report had to be available very easily could have been pulled from a strict scrutiny analysis.

The missing element was whether or not the state's interest in having broad discovery rules was compelling. Even though this informational privacy interest was considered to be of the utmost importance,¹²⁸ it still did not receive the strict scrutiny review applied to decisional privacy interests.¹²⁹

V. THE FUTURE OF THE PRIVACY RIGHT IN FLORIDA

Florida courts have been consistent in articulating the constitutional test for privacy in Florida. Also, Florida courts interpreting article I, section 23, consistently have said that Florida's right exceeds the federal right of privacy.¹³⁰ However, the outcomes and application of the test have been far less predictable as the above cases indicate.

As more politically charged privacy issues come to the Supreme Court of Florida, the Privacy Amendment becomes more and more controversial. Abortion opponents, for example, may seek to modify privacy rights, relating to abortions or parental consent for abortions, so that the current legislature can pass restrictions on abortions. Finally, the right could be expanded to include private actors. This would give individuals protection from the release of information by their employers, banks, utilities, and more.¹³¹

The Florida Constitution Revision Commission began meeting in June 1997. The privacy right has been one of the most, if not the most, controversial provision. There is little doubt that this commission will address the issue over the next year. Whether any changes come from it remains to be seen.

VI. CONCLUSION

Individual and human rights in this country have evolved from national movements and national standards. The Fourteenth Amendment's application of rights to the states was a landmark in human rights, guaranteeing all citizens, no matter their state of

128. Compare *Kurtz*, 653 So. 2d at 1025 (giving less weight to the privacy interest in not having to disclose whether or not a job applicant had used tobacco within the previous 12 months).

129. See, e.g., *TW*, 551 So. 2d at 1195.

130. See, e.g., *Kurtz*, 653 So. 2d at 1027.

131. See 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, 26-27 (1997).

residence, a baseline of protection. The Federal Constitution was the protector—"states' rights" was the code phrase for discrimination.

But in the American crucible of cultural diversity a national standard for "community" may result in the lowest common denominator or a definition based on averaging. Would it not be better when the most individual of rights, privacy, is implicated to define that right within a more localized community—the state?

This proposition does not suggest abandoning the federal level of protection. Some issues involving personal information and privacy have implications in interstate commerce in the new information society. Indeed, we cannot constitutionally lower the standard, but since privacy rights are so ill defined and that broader protection so limited, should not the states raise the level of protection for their citizens? The ten states that have individual textual standards are doing so with various degrees of daring. Florida has developed a broad jurisprudence of privacy in seventeen years, which provides the basis for future enhancement of individual protections. Florida citizens have put the words in the constitution and the Supreme Court has told us that the right is fundamental, extensive and far exceeds federal standards. If the constitution revision commission, the legislature, and others refrain from tampering, Florida has the chance to be a laboratory and a haven for one of the most threatened of rights in today's society.

