

# *Nova Law Review*

---

*Volume 18, Issue 2*

1994

*Article 5*

---

## Constitutional Privacy in Florida: Between the Idea and the Reality Falls the Shadow

John Sanchez\*

\*

Copyright ©1994 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <http://nsuworks.nova.edu/nlr>

# Constitutional Privacy in Florida: Between the Idea and the Reality Falls the Shadow

**John Sanchez\***

---

## TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	775
II.	FLORIDA PRIVACY LAW . . . . .	779
	A. <i>Public Records</i> . . . . .	779
	B. <i>Medical Decisions</i> . . . . .	785
	C. <i>Blood Testing</i> . . . . .	788
	D. <i>Publication of Ads About Convicts</i> . . . . .	789
	E. <i>Marijuana Possession</i> . . . . .	789
	F. <i>Sexual Matters</i> . . . . .	790
	G. <i>Search and Seizure</i> . . . . .	791
	H. <i>Parents' Stake in Children's Lives</i> . . . . .	795
	I. <i>Victim Examinations</i> . . . . .	795
	J. <i>Victimless Crimes</i> . . . . .	796
	K. <i>Commercial Speech</i> . . . . .	797
	L. <i>Vagueness Doctrine</i> . . . . .	798
	M. <i>Cable Television</i> . . . . .	798
III.	PRIVACY STATUTES OR CONSTITUTIONAL PROVISIONS IN OTHER STATES . . . . .	799
IV.	CONCLUSION . . . . .	800

## I. INTRODUCTION

The law of privacy is a patchwork of disparate doctrines that resembles Dr. Johnson's definition of metaphysical poetry: "the most heterogeneous of ideas yoked by violence together." The right to be let alone, as coined by Judge Cooley, covers tort-based privacy, constitutional privacy embodying personal autonomy and search and seizure. The lines are blurred and each shades into the other. As a result, it is not surprising to find that the law has trouble keeping them straight.<sup>1</sup>

---

\* Professor of Law, Nova University Shepard Broad Law Center. Special thanks to Scott Solkoff's singular research skills.

1. See generally Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 *LAW & CONTEMP. PROBS.* 326 (1966); Milton R. Konvitz, *Privacy and the Law:*

Florida's Constitution first embraced a right to privacy in its search and seizure provision.<sup>2</sup> Article I, section 12 was amended in 1968 (by referendum), adding private communications to the interests protected by the clause.<sup>3</sup> In 1983, Florida's protection of privacy ebbed after voters amended section 12 to conform with United States Supreme Court interpretations of the Fourth Amendment to the Federal Constitution. In *Bernie v. State*,<sup>4</sup> the Florida Supreme Court ruled that the conformity amendment binds Florida courts to follow future decisions of the United States Supreme Court.<sup>5</sup> In this regard, Florida's conformity clause chilled individual liberties and placed federalism in a deep freeze.

In November of 1980, Florida voters adopted a freestanding constitutional amendment protecting privacy. Section 23 of the Florida Constitution provides: "Every natural person has the right to be let alone and free from governmental intrusion into his 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>6</sup> On the surface, section 23 seemed to offer the public more blanket privacy protection while artfully upholding Florida's strong presumption of access to public records. The amendment was hailed as a giant step forward in safeguarding individual privacy.<sup>7</sup>

From the distance of fourteen years, a key question is whether Florida's constitutional privacy protection has made a difference? Gathering countervailing forces have cast a shadow on section 23 and put privacy's promise on hold. In part, blame lies with the overabundance of caution by Florida courts which seem reluctant to take section 23's straightforward command at face value; however, blame also lies with the turning tide of the law, leaving privacy by the wayside. For example, the United States

*A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS. 272 (1966); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

2. FLA. CONST. art. I, § 12.

3. See FLA. CONST. art. I, § 12 (1968 revision).

4. 524 So. 2d 988 (Fla. 1988).

5. *Id.* at 991.

6. FLA. CONST. art. I, § 23 (added Nov. 4, 1980).

7. E.g., Gerald B. Cope, Jr., *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U. L. REV. 671, 673 (1978) [hereinafter Cope, *To Be Let Alone*] ("Ratification would place Florida among the national leaders in an emerging trend to protect individual privacy."). Cope's article traces proposals of the 1978 Constitutional Revision Commission, and weighs how constitutional privacy would reshape Florida privacy law. *Id.*; see also Gerald B. Cope, Jr. *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 631 (1977).

Supreme Court of the 1980's sharply pulled back on the use of privacy and scholars have noted how competing constitutional interests are strongly contesting privacy's turf.<sup>8</sup>

Hopes ran high when section 23 took effect, reflecting as it did a strong commitment to the right to be let alone. Unlike the unwritten and fragile federal privacy dimly perceived in the penumbras of the United States Constitution, Florida enshrined the principle that privacy is an interest in its own right, entitled to a prominent position in the state constitution. In sifting through section 23's legacy, performance should be measured by reach as well as by grasp.

If section 23 was more or less modeled along the lines of federal constitutional privacy, thus inheriting its metes and bounds, it would serve little purpose. However, the language of several leading section 23 cases claim that Florida's zone of privacy was designed to sweep wider than its federal counterpart. Yet, in the wake of fourteen years of scorekeeping, it's open to question whether section 23's salutary impact outweighs its shortcomings.

Enlarging the state zone of privacy might have meant that section 23 would fill in the blanks left by United States Supreme Court rulings. Measured by this principle, section 23 comes up empty. Another yardstick of its performance is to ask whether section 23's track record could have been achieved under alternative legal lines of reasoning. For example, Jehovah Witnesses are entitled to refuse blood transfusions in Florida, not by virtue of the right to privacy, but as a by-product of the free exercise of religion guaranteed under the federal charter.<sup>9</sup> Likewise, without invoking privacy, victimless crimes have been challenged under free speech and due process grounds and a gay parent's right to adopt children can be grounded on an equal protection footing.

Even when measured against the level of privacy protection prevailing when section 23 was adopted, the picture is mixed. For example, Florida's sodomy statute fell in 1971 before a First Amendment challenge.<sup>10</sup> With

---

8. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (striking down Florida's statutory ban on publication of name of rape victims in face of the First Amendment's guarantee of freedom of the press); Diane L. Zimmerman, *Requiem For A Heavyweight: A Farewell To Warren and Brandeis's Privacy Tort*, 68 CORN. L. REV. 291 (1983) (mapping out how the First Amendment defers to media definition of newsworthy and how this has eroded the privacy tort of disclosure of private facts).

9. See *In re Dubreuil*, 18 Fla. L. Weekly S575 (Fla. Nov. 4, 1993).

10. While section 800.01 was overturned, section 800.02 may still be read to bar private consensual sodomy. See *Mohammed v. State*, 561 So. 2d 384 (Fla. 1st Dist. Ct. App. 1990).

the possible exception of cases covering the right to die, Florida's privacy provision has made little dent in the state of the law.

If section 23 sweeps no wider than federal constitutional privacy, it serves little purpose save symbolism. The record of several states adopting constitutional privacy protection offers a window on section 23's untapped wealth. For example, California ensures bank depositors protection against subpoenas.<sup>11</sup> For a while, Alaskans could smoke pot at home under privacy's umbrella.<sup>12</sup> Some states outpace Florida even without tapping privacy. For example, Massachusetts and New Jersey relied on equal protection grounds to enable poor women to obtain free abortions.<sup>13</sup> While it's true that Congress' refusal to fund abortions was sustained in *Harris v. McRae*,<sup>14</sup> individual states are free to strike a different balance. This is one area where section 23 might have left its mark—a dramatic departure from federal law that would hammer home the fact that Florida's privacy protection is more than a prop, that it pays more than lip service to the right to be let alone.

To complicate matters, section 23's reach has been checked by voters. In the overlap where *Griswold* privacy shades into the Fourth Amendment's turf, the conformity amendment has placed a constitutional straitjacket on efforts to enlist privacy in the fight against undue searches and seizures. Simply put, Florida must ape United States Supreme Court Fourth Amendment rulings. Despite short-lived artful dodges by Florida courts to sneak section 23 in through the back door, search and seizure law stands undisturbed by section 23.

Privacy is left in limbo in light of other legal developments. All too often, the right to be let alone loses out to competing constitutional claims like the First Amendment. For example, the right of "John Does," uncharged of any crime, to preserve their anonymity in the Willets prostitution case was outweighed by the press' First Amendment right of access to "public records."<sup>15</sup> When Florida's Legislature tried, in the name of privacy, to bar the publication of the names of rape victims, the United States Supreme Court upended the statute under the banner of freedom of

---

11. See, e.g., *Burrows v. People*, 529 P.2d 590 (Cal. 1974).

12. See, e.g., *Ravin v. State*, 537 P.2d 494 (Alaska 1975); ALASKA CONST. art. 1, § 22.

13. See, e.g., *Jaffe v. Sharp*, 463 F. Supp. 222 (D. Mass. 1978); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982).

14. 448 U.S. 297 (1980).

15. *Post-Newsweek Stations, Fla. Inc., v. Doe*, 612 So. 2d 549 (Fla. 1992).

the press.<sup>16</sup> In *Atwell v. Sacred Heart Hospital*,<sup>17</sup> the natural mother's stake in preserving her anonymity had to give way to her child's right to know.<sup>18</sup>

Section 23 contains a built-in limitation that serves to blunt its impact. Unlike the broad reach of California's state constitutional privacy provision, section 23 governs only intrusions laid to the state.<sup>19</sup> While breaches of privacy are on the rise in private employment, remediable only under the largely orphaned tort of privacy, section 23 stands idly by. If the federal stance on narrowing state action is any guide, section 23 can be further weakened by rendering it harder to show state action. In doing so, worthy claims are discarded at the outset without reaching the merits. Finally, state action can serve as a double bind. By virtue of governing only public employment, section 23's privacy cases run the risk of being framed as search and seizure cases, thus lowering the iron curtain of the conformity amendment.

However, the picture is not altogether grim. Florida is probably as far-reaching as any state in empowering the dying with some measure of control over their fate. But one can conceive of a truly brilliant stroke: extending the right to die to authorizing doctor-assisted suicide.<sup>20</sup>

## II. FLORIDA PRIVACY LAW

### A. Public Records

Although Florida's public records law clings to the presumption of access to all governmental records,<sup>21</sup> there have always been exceptions

16. *The Fla. Star v. B.J.F.*, 491 U.S. 524 (1989)

17. 520 So. 2d 30 (Fla. 1988).

18. *Id.* at 31; see also FLA. STAT. § 395.017 (1991) (Florida's hospital record statute).

19. See FLA. CONST. art. I, § 23.

20. While many claim doctor-assisted suicide is a matter of policy best left to the Legislature, some cast the right to die as a constitutional right. For example, Dr. Kevorkian's lawyer argues that a constitutional right to physician-assisted suicide exists despite Michigan's February 1993 law banning assisted suicide. Michigan's law was enacted in response to nine suicides assisted by Kevorkian. See *Dr. Death Ordered to Stand Trial*, WASH. POST, Sept. 10, 1993, at A3. Michigan's ban on doctor-assisted suicides was deemed unconstitutional, but the appeals process has yet to run its course.

21. FLA. STAT. § 119.01 (1991). For a treatment of Florida's constitutional mandates on public records law, see Patricia A. Gleason & Joslyn Wilson, *The Florida Constitutional Open Government Amendments: Article 1, Section 24 and Article 3, Section 4(e), Florida Constitution, Let the Sunshine In*, 18 NOVA L. REV. 973 (1993).

designed to protect privacy rights that may otherwise be invaded.<sup>22</sup> The second sentence of article I, section 23 recites that “[t]his section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.” As case law on section 23 has developed, it has become evident that it is on a collision course with Florida’s Public Records Act.<sup>23</sup> How to read the two together has been drawn into question in a number of cases, including one of the key section 23 cases to date.

Privacy loomed as the key issue in *Winfield v. Division of Pari-Mutuel Wagering*,<sup>24</sup> where the Florida Supreme Court held that the subpoena of bank records without notice to the account holders does not sacrifice their privacy interests.<sup>25</sup> Of more enduring value than the sundry facts or holding of the case, however, was what the court had to say about the footing and reach of the infant privacy provision.

When it comes to bank records, in other words, the right to privacy does not command notice to a bank depositor so long as the subpoena serves a state interest of the highest order. The opinion comes to this conclusion after sounding a clear standard of judicial review and a ringing declaration that Florida’s right to privacy leaves its federal cousin in the dust.

Or does it? In *California Bankers Ass’n v. Shultz*<sup>26</sup> and *United States v. Miller*,<sup>27</sup> the United States Supreme Court held that a federal investigative agency may subpoena bank records without notifying the depositor.<sup>28</sup> In California, where the right of privacy looms larger than under the Federal Constitution,<sup>29</sup> the courts and Legislature have rejected the federal rule, thereby framing a procedure whereby a depositor may quash the subpoena.<sup>30</sup> Even though other states have also rejected the *California Bank-*

22. E.g., FLA. STAT. §§ 382.025 (birth records); 393.13 (retarded persons); 394.459 (clinical records of mental patients); 396.112 (alcohol treatment); 397.053, 397.096 (drug abuse); 400.321 (nursing home ombudsman committees); 827.07 (child abuse) (1979).

23. See Cope, *To Be Let Alone*, *supra* note 7, at 675.

24. 477 So. 2d 544 (Fla. 1985).

25. *Id.* at 548.

26. 416 U.S. 21 (1974).

27. 425 U.S. 435 (1976).

28. *Miller*, 425 U.S. at 455; *Shultz*, 416 U.S. at 68.

29. See PRIVACY PROTECTION STUDY COMMISSION, PRIVACY LAW IN THE STATES 9-11 (1977). The Commission was created by the Privacy Act of 1974, Pub. L. No. 93-579, § 5, 88 Stat. 1896, reproduced in comment to 5 U.S.C. § 552a (Supp. 1975).

30. CAL. GOV’T CODE § 7460 (Deering 1982); PRIVACY LAW IN THE STATES, *supra* note 29, at 12-13; cf. *Valley Bank v. Superior Court*, 542 P.2d 977 (Cal. 1975) (civil discovery).

ers/Miller rule,<sup>31</sup> Florida has not—despite section 23.

Among the earliest of “public records” cases is *Florida Board of Bar Examiners re: Applicant*.<sup>32</sup> In that case, a budding lawyer complained about questions posed by the Bar application calling for disclosure of psychiatric counseling—information which falls into the public domain. The court ruled that section 23 renders psychiatric counseling answers to bar application questions beyond the reach of public scrutiny.<sup>33</sup>

In *Miami Herald Publishing Co. v. Ferre*,<sup>34</sup> the court underscored that section 23 governs state and not private acts. In an abuse of process claim brought by a mayor against a private citizen who petitioned for disclosure of public records, the court ruled that absent state action, the mayor could not enlist the support of section 23. The court seemed to say that it was the party to the lawsuit who abused process, not the state which framed the law on which the underlying claim rested. Section 23 may be brought to bear only against governmental intrusions, not those undertaken by private parties.<sup>35</sup>

Section 23 may also yield at times to the public’s right of access to court records. In *Goldberg v. Johnson*,<sup>36</sup> the court let the light in on the terms of a settlement agreement and guardianship documents detailing the estate of Shepard Broad Law Center benefactor, Leo Goodwin, Sr.,

31. In Alaska, bank records are confidential and shall not be made public without notice to the depositor, unless disclosure is sought under a valid search warrant. ALASKA STAT. § 06.05.175 (1993). In California, a bank customer is entitled to ten days notice before a state investigator can obtain access to his or her depositor records. CAL. GOV’T CODE § 7460 (Deering 1982). In Maryland, the customer must be given twenty-one days notice prior to disclosure. MD. CODE ANN., § 225 (1990). There is a fourteen day notice requirement in Oklahoma. OKLA. STAT. tit. 6, §§ 2201-2206 (1984).

32. 443 So. 2d 71 (Fla. 1983).

33. See Cope, *To Be Let Alone*, *supra* note 7, at 712 n.253, 713 n.254 (citing pre-section 23 Bar application question cases: Florida Bar v. Hefty, 213 So. 2d 422 (Fla. 1968) (questions about sex with a minor—opinion did not address privacy, but Ervin, J., did in dissent); Florida Board of Bar Examiners *re* Eimers, 358 So. 2d 7 (Fla. 1978) (Florida Supreme Court under rational basis analysis held being gay does not render one unfit for Bar) and cases addressing the standards for disbarment: Florida Bar v. Kay, 232 So. 2d 378 (Fla. 1970) (disbarment for public gay conduct—Ervin, J., claims this amounts to invasion of privacy)).

34. 636 F. Supp. 970 (S.D. Fla. 1985).

35. Compare California’s Constitutional privacy provision which, alone among the states, entails no state action requirement. In other words, the conduct of purely private actors falls within the reach of the privacy provision.

One way to limit the reach of section 23 would be to follow the much debated example set by the United States Supreme Court of narrowing the definition of state action.

36. 485 So. 2d 1386 (Fla. 4th Dist. Ct. App. 1986).



overriding claims of privacy.<sup>37</sup> Unlike *Goldberg*, the court in *Sentinel Communications Co. v. Smith*<sup>38</sup> enlisted privacy in the service of barring newspaper access to sealed court records in a domestic relations case.<sup>39</sup> While the husband-father in the case happened to be a judge, this public office did not turn this private litigant into a public figure thereby strengthening the case for media access. Invoking privacy found under the Federal Constitution as well as section 23, the court noted that "if the privacy rights of the litigants and third persons in this case are not recognized and respected, then no citizen has any right of privacy in private litigation."<sup>40</sup> The court records remained under lock and key.

In light of *Smith*, it seems the law balances the nature of the records under review with privacy. Such delicate balancing was at work in *Rasmussen v. South Florida Blood Service, Inc.*<sup>41</sup> where the privacy interests of blood donors outweighed an AIDS victim's claim to subpoena names and addresses of blood donors who may have contributed the tainted blood.<sup>42</sup>

In another leading case, *Florida Freedom Newspapers, Inc. v. Sirmons*,<sup>43</sup> the court found that section 23 does not foreclose the press from obtaining court records shedding light on a state senator's divorce.<sup>44</sup> The court ruled that section 23 does not create a right to private judicial proceedings, unlike the Fifth District Court of Appeal in *Sentinel Communications Co. v. Smith*.<sup>45</sup> In concurring, Justice Nimmons added that "[w]hile I agree with the majority's statement that Article I, section 23 does not create a right to private judicial proceedings, it seems to me that such Florida constitutional provision deserves to be weighed as a significant factor in civil cases, particularly those in which the public's interests are not

37. *Id.* at 1390.

38. 493 So. 2d 1048 (Fla. 5th Dist. Ct. App. 1986), *rev. denied*, 503 So. 2d 328 (Fla. 1987) and *disapproved* by *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988).

39. *Id.* at 1049.

40. *Id.*

41. 500 So. 2d 533 (Fla. 1987).

42. *Cf.* FLA. STAT. § 627.429 (1991) (insurance companies may inquire about positive HIV test results, but may not disclose the information.).

43. 508 So. 2d 462 (Fla. 1st Dist. Ct. App. 1987), *aff'd sub nom.* *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988).

44. *Id.* at 465.

45. 493 So. 2d 1048 (Fla. 5th Dist. Ct. App. 1986), *review denied*, 503 So. 2d 328 (Fla. 1987).

involved."<sup>46</sup> While confining its ruling to the underlying merits, the Florida Supreme Court affirmed in *Barron v. Florida Freedom Newspapers, Inc.*,<sup>47</sup> holding that "[a]ll trials, civil and criminal, are public events and there is a strong presumption of public access to these proceedings and their records, subject to certain narrowly defined exceptions."<sup>48</sup> The right to privacy, in other words, must yield in the face of a key tenet of our system of government: the presumption that all trials are public.

Echoing *Winfield*, the United States District Court for the Southern District of Florida held that Florida's right of privacy does not foreclose a foreign government from reaching the American bank records of persons suspected of crime.<sup>49</sup> In their efforts to trace funds allegedly embezzled from the Haitian government during the Duvalier regime, a subpoena, issued on behalf of the new Haitian government, directed an American bank to turn over records of a depositor who was a Duvalier ally. The court held that Florida's right of privacy did not stand in the way.<sup>50</sup>

In *Atwell v. Sacred Heart Hospital*,<sup>51</sup> the Supreme Court of Florida found itself in the thankless position of having to balance a child's right to know against the rights of his natural parents. The court held that the natural parent's stake in keeping their own medical records and, in turn, their identities, under wraps did not rule out their natural child, reared by foster parents, from prying the information out of its own medical records.<sup>52</sup>

In *Williams v. Minneola*,<sup>53</sup> police officers unthinkingly circulated photographs and a videotape of an autopsy. The decedent's mother and sister brought an array of tort claims against the police, who raised the Public Records Act as a shield of immunity.<sup>54</sup> Moreover, the defendants

46. *Sirmons*, 508 So. 2d at 465 (Nimmons, J., concurring).

47. 531 So. 2d 113 (Fla. 1988), *aff'g sub nom.* Florida Freedom Newspapers, Inc. v. *Sirmons*, 508 So. 2d 462 (Fla. 1st Dist. Ct. App. 1987).

48. *Id.* at 114.

49. *In re* Letter of Request for Judicial Assistance from Tribunal Civil de Port-Au-Prince, Republic of Haiti, 669 F. Supp. 403 (S.D. Fla. 1987).

50. For a discussion of pre-section 23 bank depositor's records cases, see Cope, *supra* note 7, at 691-693. Florida's law in this area reflects federal law while California offers depositors broader protection. *Id.*

51. 520 So. 2d 30 (Fla. 1988).

52. See Paul J. Tartanella, Note, *Sealed Adoption Records & the Constitutional Right of Privacy of the Natural Parent*, 34 RUTGERS L. REV. 451 (1982) (biological parents decision to bring the child to term and place the baby for adoption instead of having an abortion may rest on State's firm assurance that her identity will not be divulged).

53. 575 So. 2d 683 (Fla. 5th Dist. Ct. App. 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

54. FLA. STAT. §119 (1991).

enlisted section 23, attempting to stretch its last sentence to embody a grant of immunity for the disclosure of public records. The court took issue with this reading, ruling

that neither the Public Records Act nor the Florida Constitution grants a custodian protection against tort liability resulting from that person's intentionally communicating public records or their contents to someone outside the agency which is responsible for the records unless (1) the person inspecting the records has made a bona fide request to inspect them, in accordance with the Public Records Act, or (2) it is necessary to the agency's transaction of its official business to reveal the records to a person who has not requested to see them.<sup>55</sup>

In *Glatthar v. Hoequist*,<sup>56</sup> family members, thinking the aging testator wrote them out of his will, sought access to the document in the face of the testator's straightforward instructions preserving his will from their prying eyes while he lived.<sup>57</sup> When the trial court took custody of the will, the guardian of the now infirm testator sought to divulge the will's contents by asserting his ward's (the testator's) right to privacy. The court ruled that a mentally unfit person has not lost the right to privacy and that a guardian cannot defeat the ward's undeleagable stake in privacy.

The privacy interests of minors has also been endorsed under section 23. In *A.J. v. Times Publishing Co.*,<sup>58</sup> thirty children and their school sought to enjoin the release of police records detailing neglect and abuse. The court concluded the privacy interests of the children and school outweighed unfettered access to public records. The court backed its general constitutional privacy protection by enlisting public policy reflected in the Public Records Act's exemption for child abuse records.<sup>59</sup>

The Florida Supreme Court, following a growing number of states, relied on privacy to strike down a state statute compelling minors seeking abortions to obtain either parental consent or court approval. In its sweeping opinion in *In re T.W.*,<sup>60</sup> the court confirmed that the right of privacy under the Florida Constitution was broader than federal privacy

55. *Williams*, 575 So. 2d at 687.

56. 600 So. 2d 1205 (Fla. 5th Dist. Ct. App. 1992).

57. *Id.* at 1207.

58. 605 So. 2d 160 (Fla. 2d Dist. Ct. App. 1992), *approved, cause remanded*, 626 So. 2d 1314 (Fla. 1993).

59. See FLA. STAT. §§ 119.07(3)(a), 415.51(1)(a), 39.411(4) (1991).

60. 551 So. 2d 1186 (Fla. 1989). *But see* State v. Avila, 44 Fla. Supp. 2d 131 (6th Cir. Ct. 1990).

protection. Given that a minor is deemed fit to consent to any other medical procedure tied to her pregnancy, the court assumed the girl could be entrusted with this decision as well.<sup>61</sup>

Florida is not alone in wielding its privacy law to combat restrictive anti-abortion-rights laws. In 1981, the California Supreme Court relied upon its privacy provision to strike down restrictions on state funded abortions.<sup>62</sup> States without written privacy protection have fallen back on equal protection.<sup>63</sup> It is unclear whether the court in *T.W.* would have reached the same outcome without section 23.

*Post-Newsweek Stations, Florida Inc. v. Doe*<sup>64</sup> arose after Sheriff Deputy Jeffrey Willets and his wife, Kathy, were charged with masterminding a prostitution ring. Among discovery materials were lists of clients who paid for Kathy Willets' sexual favors. These clients - "John Does" - sought to defeat the public disclosure of their names and addresses. The court weighed the public's statutory right of access to pretrial discovery information against the interests of these partners in crime to preserve their anonymity. Mindful of a media feeding frenzy, the Florida Supreme Court soberly ruled that the seal on identity must be lifted once a person is accused of a crime. In lone dissent, Justice Kogan chided the court for watering down privacy in the face of mere allegations of wrongdoing.

## B. *Medical Decisions*

Among the most high-profile of the privacy cases are those governing medical decision-making. An earlier case sets the stage. In *Satz v. Perlmutter*,<sup>65</sup> the Florida Supreme Court ruled that the right of privacy distilled from the United States Constitution affords competent, terminally ill adults the right to turn down or stop undue medical treatments if family members do not object.<sup>66</sup> The decision meshes with Florida's enlightened

---

61. Though not ruling them out altogether, the United States Supreme Court had already held certain parental/judicial consent statutes to be unconstitutional. See *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). *But see* *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983).

62. *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

63. *Right To Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *Moe v. Secretary of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981).

64. 612 So. 2d 549 (Fla. 1992).

65. 379 So. 2d 359 (Fla. 1980).

66. *Id.*

rule that even infirm persons may lay claim to privacy.<sup>67</sup> The harder question is whether a guardian can ever embody that same right and refuse treatment on behalf of the ward.

The issue came to the fore in *In re Barry*,<sup>68</sup> where a district court decided that the right of privacy, embodied in both federal and state constitutions, entitles a guardian of an encephalitic infant to put a stop to artificial life support. Florida's Supreme Court has since revisited this Gothic theme. In *In re T.A.C.P.*,<sup>69</sup> the court defined an anencephalic child as legally alive, despite the absence of any higher brain stem activity.<sup>70</sup> In light of this finding, the court cast grave doubts on the parent's harvesting of organs of their anencephalic baby while she still breathed. A Nova attorney representing the parents vainly claimed that Florida's right to privacy enables parents to make such decisions. The court ruled privacy played no role: "We also do not agree that a parental right of privacy is implicated here, because privacy does not give parents the right to donate the organs of a child born alive who is not yet legally dead."<sup>71</sup>

However, in *J.F.K. Memorial Hospital, Inc. v. Bludworth*,<sup>72</sup> the Fourth District Court of Appeal relied upon the patient's right of privacy in protecting the right to die. Yet, in its next breath the court conceded that the comatose patient *sub judice* had no stake in the matter. Recognizing that "a terminally ill comatose patient . . . has a right to refuse medical treatment,"<sup>73</sup> the court nonetheless reckoned that the direct beneficiaries of the patient's death, the family, had the only tangible stake—financial savings and ending the emotional drain.<sup>74</sup> While *Bludworth* purports to recognize a right to die, its dicta seems to question that very holding.

The pace of right to die cases picked up once the Second District Court of Appeal decided *Corbett v. D'Alessandro*.<sup>75</sup> Drawing into question both the Florida and federal rights of privacy, the court enabled guardians to put a stop to forced feedings of comatose wards, notwithstanding Florida law

67. See FLA. STAT. § 744.3215(1)(o) (1991); *Glatthar v. Hoequist*, 600 So. 2d 1205 (Fla. 5th Dist. Ct. App. 1992).

68. 445 So. 2d 365 (Fla. 2d Dist. Ct. App. 1984).

69. 609 So. 2d 588 (Fla. 1992).

70. *Id.*

71. *Id.* at 593 n.9.

72. 432 So. 2d 611 (Fla. 4th Dist. Ct. App. 1983), *certified question answered, quashed*, 452 So. 2d 921 (Fla. 1984).

73. *Id.* at 615.

74. *Id.* at 619.

75. 487 So. 2d 368 (Fla. 2d Dist. Ct. App.), *review denied*, 492 So. 2d 1331 (Fla. 1986).

that left no doubt that living wills cannot govern this form of life support.<sup>76</sup>

When the Supreme Court of Florida handed down its decision in *State v. Powell*,<sup>77</sup> supporters of privacy had good reason to fear that the court was scaling back privacy protection. *Powell* left intact state law<sup>78</sup> entitling coroners to preserve corneal tissue over objections lodged by decedent's family. Justice Shaw fired off a withering dissent, claiming that the offending law should yield before the legitimate privacy objection of decedent's kin.<sup>79</sup> Battle lines were forming.

If doubts were gathering about Florida's commitment to privacy, *In re Browning*<sup>80</sup> dispelled them. Estelle Browning, while competent, framed a living will detailing her objections to life supports if she were rendered unconscious.<sup>81</sup> Some time later, a stroke rendered her unable to talk, and, while not comatose, she endured Job-like afflictions. Unable to swallow, she was fed by a nasogastric tube. Upsetting the lower court's ruling that state law<sup>82</sup> vested control over feeding tubes beyond the reach of patients or their guardians,<sup>83</sup> the high court summoned up Florida's right of privacy, holding foresquare that section twenty-three embodies a "right of self-determination," enabling guardians to duly carry out a ward's instructions to terminate all forms of sustenance.<sup>84</sup> The court declared that the "right of privacy requires that we must safeguard an individual's right to chart his or her own medical course in the event of later incapacity."<sup>85</sup> In challenging a patient's right of self-determination, the State must show it has "a compelling interest great enough to override this constitutional right"<sup>86</sup>—no easy task.

---

76. FLA. STAT. § 765.03(3)(b) (1991).

77. 497 So. 2d 1188 (Fla. 1986), *cert. denied*, 481 U.S. 1059 (1987).

78. FLA. STAT. § 732.9185 (1991).

79. *Powell*, 497 So. 2d at 1194 (Shaw, J., dissenting).

80. 568 So. 2d 4 (Fla. 1990).

81. *Id.* at 8; *see also* FLA. STAT. § 765.05 (1991) (suggesting identical language).

82. Life-Prolonging Procedure Act of Florida, FLA. STAT. §§ 765.01-765.15 (1991).

83. The Act was amended prior to the *Browning* decision but after the cause of action arose to include the provision of sustenance in the definition of "life-prolonging procedure."

84. *Browning*, 568 So. 2d at 4.

85. *Id.* at 13.

86. *Id.* at 14.

### C. Blood Testing

*State v. Brewster*,<sup>87</sup> posed the question whether a sexually abused child could be forced to undergo AIDS testing. Balancing competing interests, the victim's privacy right to fend off governmental intrusion easily won out over the defendant's right to know, absent evidence of compelling need.<sup>88</sup> The case, meanwhile, leaves open the ripe question whether one may be pressed to undergo AIDS testing in the face of telltale signs that he or she carries the virus.

The Florida Supreme Court in *Fraternal Order of Police v. Miami*<sup>89</sup> approved drug testing<sup>90</sup> police officers in light of evidence of drug use, notwithstanding silence on the issue in the collective bargaining agreement. In concurring, Justice Kogan noted that the case "raises distinct problems" under section 23 and that those concerns will not go away.

The right to refuse a blood test is yet another by-product of section 23. *Department of Health & Rehabilitative Services v. Privette*<sup>91</sup> embodies the principle that a putative father may object to blood tests without weighing the child's best interest or the rights of the child's legal father.<sup>92</sup> Raising a privacy interest under section 23, the father called into question the best interests of the child. Therefore, whether the father has standing to raise the interests of the child is far from clear.<sup>93</sup> As stated by the court:

[A] compelling interest does not come into existence in the abstract but must be based on adequate factual allegations and a record establishing that the test itself is in the child's best interests. Absent that, the State's interest does not reach the threshold of being 'compelling': The blood test thus would be an improper intrusion into the putative father's privacy, if he has properly asserted this right. Art. 1, § 23, FLA. CONST. However, any such privacy claim is merely collateral to the overriding concern in the case: the child's best interests.<sup>94</sup>

---

87. 601 So. 2d 1289 (Fla. 5th Dist. Ct. App. 1992).

88. *Id.*

89. 609 So. 2d 31 (Fla. 1992).

90. See also Wm. Andrew Hamilton, Note, *Constitutional Law—Drug Testing of Florida's Public Employees: When May a Public Employer Require Urinalysis?—City of Palm Beach v. Bauman*, 15 FLA. ST. U. L. REV. 101 (1987); Stephen M. Fogel et al., *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553 (1988).

91. 617 So. 2d 305 (Fla. 1993).

92. *Id.*

93. *Id.* at 309.

94. *Id.*

In dissent, Justice Grimes observed that “[t]o suggest that Florida’s constitutional right to privacy permits a putative father to refuse a blood test in order to avoid the possibility of having to support his child offends ordinary principles of justice.”<sup>95</sup>

The religious-grounded refusal of a life-saving blood transfusion has been upheld by the Florida Supreme Court in *Public Health Trust v. Wons*.<sup>96</sup> Although the same outcome could be reached on privacy grounds, the court held that a Jehovah’s Witness was entitled to turn down a blood transfusion, even at the risk of leaving minor children motherless. This decision goes further than many states in striking the balance on the side of personal autonomy, despite the specter of minor children ending up as wards of the state.<sup>97</sup>

#### D. *Publication of Ads About Convicts*

In *Lindsay v. State*,<sup>98</sup> a court measured section 23 against a county’s policy of publishing drunk drivers’ mug shot, name and the caption “DUI--Convicted” in local newspapers. So long as the conditions of probation bear on the probationer’s past or future criminality or relate to the rehabilitative purposes of probation, the court reasoned, even constitutional rights can be trimmed, including the right of privacy.<sup>99</sup>

#### E. *Marijuana Possession*

Marijuana possession is one area where section 23 has not made a dent in the law. Unlike Alaska, which applied its state constitutional privacy provision to safeguard marijuana use in the home,<sup>100</sup> Florida courts have consistently ruled out any legal footing for marijuana use, twice before

95. *Id.* at 310 (Grimes, J., dissenting).

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

97. *See also* St. Mary’s Hosp. v. Ramsey, 465 So. 2d 666 (Fla. 4th Dist. Ct. App. 1985) (adults without dependents entitled to refuse medical treatment on religious grounds).

98. 606 So. 2d 652 (Fla. 4th Dist. Ct. App. 1992), *review denied*, 618 So. 2d 209 (Fla. 1993).

99. *Id.* at 356-57; *see* Scott Michael Solkoff, Note, *Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs*, 17 NOVA L. REV. 1441 (1993) (weighing the abridgment of Fifth Amendment rights in the service of rehabilitation).

100. *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (invalidated statute barring possession of marijuana in home; privacy in the home enjoyed constitutional status as part of the right of privacy in the Alaska Constitution).



section 23, in *Borras v. State*<sup>101</sup> and in *Laird v. State*.<sup>102</sup> At the time of its conception, conservative critics of the proposed section held up legalizing marijuana use as one of the parade of horrors the constitutional provision would unleash upon an unwary public. They needn't have worried. *Maisler v. State*<sup>103</sup> affirmed Florida's longstanding article of faith that the right of privacy does not sanction the personal possession of marijuana.

#### F. *Sexual Matters*

Privacy plays a supporting role in state obscenity prosecutions. In *Parnell v. St. Johns County*,<sup>104</sup> a dancer challenged the constitutionality of a county ban on nudity in public places or in any establishment serving alcohol.<sup>105</sup> The court did not reach the merits of the claim, dismissing the case on procedural grounds. However, the ruling left dicta indicating that privacy's protective shield covers only natural persons—it cannot be raised by one's corporate employer in a pending federal suit.<sup>106</sup>

In *Schmitt v. State*,<sup>107</sup> the district court found that section 23 does not stand in the way of prosecuting a father for snapping nude pictures of his daughter, videotaping his daughter and another teenage girl dancing topless, and other "lewd and lascivious" activities.<sup>108</sup>

Similarly, in *Stall v. State*,<sup>109</sup> the State enlisted Florida's RICO Act in charging individuals for violations of state obscenity laws, as reflected in the rental, sale, and showing of "obscene" videos and publications.<sup>110</sup> The trial court struck down the obscenity statute, citing section 23. The Second District Court of Appeal reversed, ruling that section 23 does not shield obscenity.<sup>111</sup> Affirming the Second District, the Florida Supreme Court

101. 229 So. 2d 244 (Fla. 1969), *cert. denied and appeal dismissed*, 400 U.S. 808 (1970).

102. 342 So. 2d 962 (Fla. 1977).

103. 425 So. 2d 107 (Fla. 1st Dist. Ct. App. 1982), *review denied*, 434 So. 2d 888 (Fla. 1983).

104. 603 So. 2d 56 (Fla. 5th Dist. Ct. App. 1992).

105. *Id.*

106. *Id.* at 57.

107. 563 So. 2d 1095 (Fla. 4th Dist. Ct. App. 1990), *approved in part and quashed in part*, 590 So. 2d 404 (Fla. 1991), *cert. denied*, 112 S. Ct. 1572 (1992).

108. *Id.* at 1100.

109. 570 So. 2d 257 (Fla. 1990), *cert. denied sub nom.* Long v. State, 111 S. Ct. 2888 (1991).

110. *Id.* at 257.

111. State v. Long, 544 So. 2d 219 (Fla. 2d Dist. Ct. App. 1989), *approved sub nom.* Stall v. State, 570 So. 2d 257 (Fla. 1990), *cert. denied*, 111 S. Ct. 2888 (1991).

underscored that section 23 does not protect purveyors of sexually explicit products—there can be no reasonable expectation of privacy in the sale or purchase of such prurient products.<sup>112</sup> However, taking its cue from federal law, the court left little doubt, in dicta, that purely private possession of obscenity comes under section 23's protective umbrella.<sup>113</sup>

### G. Search and Seizure

In *Katz v. United States*,<sup>114</sup> the Supreme Court said that the Fourth Amendment protects people, not places.<sup>115</sup> Moreover, it warned against translating the Fourth Amendment into a general constitutional right of privacy.<sup>116</sup>

One way of setting search and seizure cases apart from *Griswold* privacy is to focus on the nature of the interest at stake in each. In the Fourth Amendment setting, privacy targets unfair and intrusive methods, processes, and procedures, while *Griswold* privacy entails substantive rights, like the right to an abortion.

A running theme in many criminal search and seizure cases in Florida is the weight due section 23 in light of section 12's "conformity amendment." Alone among the fifty states, Florida constitutionally commands its courts to count United States Supreme Court rulings as governing precedent when it comes to search and seizure. Since section 23 embodies wider protection of an individual's right to be let alone than does federal law, the privacy provision runs up against strict conformity with federal search and seizure law. Four Florida Supreme Court cases frame this theme.

In *Riley v. State*,<sup>117</sup> the Florida Supreme Court enlisted section 23 in striking down a warrantless helicopter search of a greenhouse. Sounding a bold note, Justice Barkett announced that "[o]ur own right to privacy amendment, article I, section 23, Florida Constitution, was meant to protect against governmental encroachments on privacy made possible by increasingly sophisticated investigative techniques."<sup>118</sup> By invoking section 23, the court widened the protections against search and seizure, perhaps in defiance of the conformity amendment. On appeal, the United States

112. *Stall v. State*, 570 So. 2d 257 (Fla. 1989), *cert. denied*, 111 S. Ct. 2888 (1991).

113. *Id.* at 261; *see Stanley v. Georgia*, 394 U.S. 557 (1969).

114. 389 U.S. 347 (1967).

115. *Id.* at 351.

116. *Id.* at 350.

117. 511 So. 2d 282 (Fla. 1987), *rev'd*, 488 U.S. 445 (1989).

118. *Id.* at 288.

Supreme Court, noting the waiver of federalism embodied in section 12's conformity amendment, reversed, holding that such warrantless searches do not tread on federal search and seizure law.<sup>119</sup> Some might say that *Riley* ironed out too many wrinkles.

This stinging rebuke has rendered Florida's Supreme Court's liberal wing slow to broaden search and seizure law in light of section 12 and *Riley*. In *State v. Wells*,<sup>120</sup> the court deemed inadmissible marijuana cigarettes left in an automobile's ashtray as well as a garbage bag of marijuana sealed inside a locked suitcase in the car's trunk. In that case, the DUI suspect consented only to a search of the trunk and the police fell short of legal grounds to open the telltale containers.

Without putting too fine a point on it, the court warily tapped section 23 to take exception to the "zone of privacy" framework. The same year as *Wells*, the court decided *Shaktman v. State*,<sup>121</sup> holding that although section 23 is triggered by the warrantless use of PEN registers, the compelling state interest test is met, thus putting to rest section 23 concerns.<sup>122</sup> When *Shaktman* is read alongside *Riley* and the conformity clause, it raises the specter that section 23 may still play a supporting role in Florida search and seizure cases, so long as the outcome squares with federal search and seizure law. *Shaktman* also sheds light on the history and footing of section 23. *State v. Jimeno*<sup>123</sup> underscores the tension between section 23 and section 12's conformity clause. Until then, the Florida Supreme Court had ruled that general consent to a car search did not cover the opening of a closed paper bag lying inside the vehicle. The United States Supreme Court reversed. Swallowing its pride, the Florida Supreme Court ruled section 12's conformity clause trumps section 23.<sup>124</sup> This uneasy "accommodation" of two clashing constitutional themes seems settled for the time being.

One interesting case recounts how Doreen Heller and her passenger were pulled over by police after a tag check matched the registration with

119. *State v. Riley*, 488 U.S. 445 (1989).

120. 539 So. 2d 464 (Fla. 1989), *aff'd*, 495 U.S. 1 (1990).

121. 553 So. 2d 148 (Fla. 1989).

122. *Id.* at 151; *see Baird v. State*, 553 So. 2d 187 (Fla. 1st Dist. Ct. App. 1989) (same facts), *quashed*, 572 So. 2d 904 (Fla. 1990); *Hastetter v. Behan*, 639 P.2d 510 (Mont. 1982) (toll records of telephone subscribers are protected by Montana's constitutional guaranty of privacy); *see also Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985) (setting up strict scrutiny analysis).

123. 588 So. 2d 233 (Fla. 1991).

124. *Madsen v. State*, 502 So. 2d 948 (Fla. 4th Dist. Ct. App. 1987), *aff'd*, 521 So. 2d 110 (Fla. 1988).

a different vehicle.<sup>125</sup> With license and registration in hand, it finally dawned on the officers that they had called in the wrong tag ID. Duly corrected, Heller was told she was free to go. Before pulling out, however, one officer noticed “track marks” on the passenger’s arms. Heller was instructed to leave the car for questioning. In due course, Heller confessed that illegal drugs were in the car. The ensuing search yielded the contraband.<sup>126</sup>

The Fifth District Court of Appeal, reversing the trial court’s admission of the drugs into evidence, grounded its ruling upon scant “founded suspicion” to warrant the second “Terry” stop.<sup>127</sup> Breaking new ground (or digging a ditch) in light of the conformity amendment, the court relied on section 23 to defeat the search and seizure.<sup>128</sup>

One case shedding light on the turf war waged by section 12 and section 23 is *Forrester v. State*,<sup>129</sup> in which the district court compared a section 12 analysis with a section 23 analysis.<sup>130</sup> The court did not rule on the merits of the section 23 claim since it was not raised below. The court did, however, map out a helpful comparison of the burdens of proof between section 23 and search and seizure law, hinting at the proper role section 23 might play.<sup>131</sup> In addressing the interplay between section 12 and 23, the court casts some role for section 23. But why lay out two competing tests of search and seizure law if one, section 12, governs?

125. *Heller v. State*, 576 So. 2d 398 (Fla. 5th Dist. Ct. App. 1991).

126. *Id.*

127. *Id.* at 399; see *Terry v. Ohio*, 392 U.S. 1 (1968).

128. *Heller*, 576 So. 2d at 400 (citing the Fourth Amendment of the United States Constitution and article I, sections 12 and 23 of the Florida Constitution).

129. 565 So. 2d 391 (Fla. 1st Dist. Ct. App. 1990).

130. *Id.*

131. The *Forrester* court stated:

In the search-and-seizure context, once a defendant has established that he or she had a reasonable expectation of privacy under the circumstances, and that a warrantless search and seizure occurred, the burden shifts to the state to demonstrate that the search was reasonable—that the state was not required to obtain a warrant under the circumstances . . . . In comparison, when a defendant raises a privacy challenge, the defendant must first show that the government has intruded into an area encompassed within the ‘zone of privacy’ protected by section 23. Only then does the burden shift to the state to demonstrate that the challenged intrusion “serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.” *Winfield*, 477 So. 2d at 547. The state’s burden in the search and seizure context is far less stringent than that under article 1, section 23.

*Forrester*, 565 So. 2d at 393 (some citations omitted).

In *State v. Kerwick*,<sup>132</sup> the court enlisted section 23 in finding that police overstepped the bounds of Fourth Amendment propriety. The case arose after officers cornered Kerwick's car, flashed their badges, and then "asked" if they could pick through her luggage as she awaited a bus. Feeling trapped, Kerwick consented to a search. Officers found a locked container inside her suitcase and sliced it open with a knife, revealing a bag of cocaine.<sup>133</sup> While paying lip service to the Fourth Amendment, the court embraced section 23 to find that Kerwick did not knowingly and voluntarily consent to the search.<sup>134</sup>

On the other hand, *Madsen v. State*<sup>135</sup> brings home the limited role section 23 plays in search and seizure cases. Federal opinions premised on section 12's conformity clause, have sustained the admissibility of an unauthorized tape recording capturing Madsen's complicity in drug trafficking. The court noted that absent the conformity amendment, the tape could not be tapped, but that now they were duty-bound to leave intact the trial judge's ruling of admissibility.<sup>136</sup> Madsen weighed in that the recording tread on his right of privacy as embodied in section 23. The court rejected the claim, lamenting, "[i]f we were to apply the right to privacy in the manner proposed by appellant, we would effectively nullify the constitutional amendment to section 12, and this is obviously not an appropriate judicial prerogative."<sup>137</sup> It is helpful to contrast the *Madsen* case with that of *State v. Calhoun*<sup>138</sup> in which the same court upheld a similar suppression order on grounds of section 12 and 23 violations.<sup>139</sup> In *Calhoun*, law enforcement intercepted jailhouse conversations between the suspect and his brother after assurances that their talks were private. The court cast aside governing case law owing that "none of those controlling decisions discussed the Article 1, sections 12 and 23, protections of the Florida Constitution cited above, but were decided on Fourth and Fifth Amendment principles."<sup>140</sup> To be sure, the two decisions clash over the footing of section 23 on search and seizure matters. The only way to meld the two opinions may be that, over time, the clout of section 23 has

132. 512 So. 2d 347 (Fla. 4th Dist. Ct. App. 1987).

133. *Id.*

134. *Id.* at 348; *see also* *Maulden v. State*, 617 So. 2d 298 (Fla. 1993).

135. 502 So. 2d 948 (Fla. 4th Dist. Ct. App. 1987), *aff'd*, 521 So. 2d 110 (Fla. 1988).

136. *Madsen*, 502 So. 2d at 950.

137. *Id.* at 950; *see also* *State v. Jimeno*, 588 So. 2d 233 (Fla. 1991); *State v. Hume*, 512 So. 2d 185, 188 (Fla. 1987).

138. 479 So. 2d 241 (Fla. 4th Dist. Ct. App. 1985).

139. *Id.* at 245.

140. *Id.* at 244.

gathered force, though, of course, both opinions were rendered well before *Riley*.<sup>141</sup>

#### H. *Parents' Stake in Children's Lives*

Can grandparents win visitation rights over the objections of the child's parents? In *Sketo v. Brown*,<sup>142</sup> the appellate court brushed aside privacy claims raised by the parents, and instead adopted the "best interest of the child" test.<sup>143</sup> This standard measures the clashing interests between parents and grandparents, including the state's freestanding stake in the welfare of children.<sup>144</sup>

Whenever one person makes decisions for another person, a shift of privacy rights takes place. In the field of parental rights, the children's right to privacy is often subordinated to the parents or to the State.<sup>145</sup> For example, the privacy rights of "immature" minors may give way to the power of the parent or the State.<sup>146</sup> Similarly, a child's right to self-determination yields to the State's power to compel education.<sup>147</sup>

#### I. *Victim Examinations*

In *State v. Drab*,<sup>148</sup> the district court would not order a second gynecological examination of an eight-year-old child allegedly abused by her father, unless the test was necessary to insure that the due process rights of the accused were not violated.<sup>149</sup> In framing the issue in these terms, the court sidestepped the privacy issue.<sup>150</sup> The court does not say why the privacy rights of the child or complaining witness do not figure into the legal equation. Perhaps because the compelling state interest test of

141. See also *Adams v. State*, 436 So. 2d 1132 (Fla. 5th Dist. Ct. App. 1983) (audio and video recordings of a storefront "sting operation" did not violate defendant's right of privacy).

142. 559 So. 2d 381 (Fla. 1st Dist. Ct. App. 1990).

143. *Id.* at 382.

144. *Id.*

145. See generally *Privacy in Family and Home*, in 3 PRIVACY LAW AND PRACTICE ¶ 22 (George B. Trubow, ed., 1991).

146. *Bellotti v. Baird*, 443 U.S. 622 (1979).

147. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

148. 546 So. 2d 54 (Fla. 4th Dist. Ct. App.), *review denied*, 553 So. 2d 1164 (Fla. 1989).

149. *Id.* at 55.

150. *Id.*

*Winfield* yields the same outcome.<sup>151</sup>

In *State v. Brewster*,<sup>152</sup> a sexually abused child was free to forgo AIDS testing.<sup>153</sup> The appellate court reasoned that the victim's right to be let alone far outweighed the defendant's poorly articulated need for the information.<sup>154</sup>

## J. *Victimless Crimes*

To some there is no such animal as a victimless crime. Even those crimes which have no "direct" victim often leave indirect victims in their wake. This does not, however, put to rest the rather convincing argument that government should not police an individual's action when that act falls short of harming others. Section 23 may serve as a useful vehicle for those challenging governmental control over their private affairs.<sup>155</sup> To date, however, the Amendment has been rendered toothless. Case in point is the handling of the personal possession laws. In *Maisler v. State*,<sup>156</sup> the district court held its ground that Florida's right of privacy may not serve to strike down laws criminalizing the personal possession of marijuana.<sup>157</sup>

In *State v. Phillips*,<sup>158</sup> Phillips and Williams were charged with statutory rape. The trial judge struck down, as unconstitutional, the governing statute that barred consent as a defense.<sup>159</sup> The trial court held that the statute "violated the minor's right of privacy guaranteed by Article 1, Section 23 of the Florida Constitution. . . ."<sup>160</sup> The Fourth District Court of Appeal reversed, finding that Phillips and Williams lacked standing to assert the "victim's" right of privacy.<sup>161</sup> The appellate court did not tip its hand, however, regarding how a minor might ever challenge the statute's constitutionality, thus enabling a third party to assert the claim.<sup>162</sup>

151. See also *State v. Diamond*, 553 So. 2d 1185 (Fla. 1st Dist. Ct. App. 1988).

152. 601 So. 2d 1289 (Fla. 5th Dist. Ct. App. 1992).

153. *Id.*

154. *Id.* at 1291.

155. FLA. CONST. art. I, § 23.

156. 425 So. 2d 107 (Fla. 1st Dist. Ct. App. 1982), *review denied*, 434 So. 2d 888 (Fla. 1983).

157. *Id.*

158. 575 So. 2d 1313 (Fla. 4th Dist. Ct. App.), *review denied*, 589 So. 2d 292 (Fla. 1991).

159. *Id.* at 1314.

160. *Id.*

161. *Id.*

162. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In *Wyche v. Florida*,<sup>163</sup> the court construed a Tampa ordinance prohibiting loitering. The statute prohibited loitering

while a pedestrian or in a motor vehicle, in or near any thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting, or procuring another to commit an act of prostitution, sodomy, fellatio, cunnilingus, masturbation for hire, pandering, or other lewd or indecent act. Among the circumstances which may be considered in determining whether this purpose is manifested are: that such person . . . repeatedly beckons to, stops or attempts to stop, or engages passers-by in conversation, or repeatedly stops, or attempts to stop motor vehicle operators by hailing, waving of arms or any bodily gesture. . . .<sup>164</sup>

The Florida Supreme Court struck the ordinance down as unconstitutionally vague, among other grounds.<sup>165</sup> In dicta, the court noted that “many of the activities implicated by the ordinance fall into the realm of personal autonomy that is protected by article I, section 23 of the Florida Constitution.”<sup>166</sup>

### K. *Commercial Speech*

Another hotbed of privacy litigation on a national scale is the permissible bounds of commercial speech. Florida’s privacy right has come into play only once in this area. In *State v. Rampell*,<sup>167</sup> the court measured the First Amendment against the right of privacy in upholding the constitutionality of a state statute.<sup>168</sup> The statute barred uninvited, in-person, direct solicitation of clients by certified public accountants.<sup>169</sup> The court found the minimal right of free commercial speech to be outweighed by the right of the citizenry to be let alone.<sup>170</sup>

---

163. 619 So. 2d 231 (Fla. 1993).

164. *Id.* at 233 (quoting TAMPA, FLA. CODE § 24-61A10 (1987)).

165. *Id.* at 234.

166. *Id.* at 235 n.5 (citing *In re Browning*, 568 So. 2d 4, 9-10 (Fla. 1990)).

167. 589 So. 2d 1352 (Fla. 4th Dist. Ct. App. 1991), *approved in part and quashed in part*, 621 So. 2d 426 (Fla. 1993).

168. *Id.* at 1353.

169. *Id.*

170. *Id.* at 1360.



### L. *Vagueness Doctrine*

The Florida Supreme Court's decision in *Wyche v. Florida*,<sup>171</sup> holds promise for privacy in its dicta.<sup>172</sup> The case concerned a City of Tampa ordinance prohibiting loitering.<sup>173</sup> The Florida Supreme Court ruled the ordinance unconstitutional on vagueness and other grounds.<sup>174</sup> In dicta, the court noted that "many of the activities implicated by the ordinance fall into the realm of personal autonomy that is protected by article I, section 23 of the Florida Constitution."<sup>175</sup> In time, this decision may prove a potent weapon to test the constitutionality of arguably over-broad statutes.<sup>176</sup>

### M. *Cable Television*

Florida privacy law has never addressed privacy concerns attending cable television. California, by contrast, makes it illegal for a cable television provider to use any electronic device to record, transmit, or observe any events inside a subscriber's premises.<sup>177</sup> In the District of Columbia, a cable franchisee must exercise "the highest possible standard of care" in not disseminating its subscriber's viewing selections, financial transactions, and/or the utilization of other cable-related interactive services.<sup>178</sup> This information may not be released even upon a valid subpoena or search warrant.<sup>179</sup> Connecticut, Illinois, New Jersey, and Wisconsin have similar laws.<sup>180</sup>

171. 619 So. 2d 231 (Fla. 1993).

172. See also discussion *supra* part II.J.

173. See *id.*

174. *Id.* at 234.

175. *Id.* at 235 (citing *In re Browning*, 568 So. 2d at 9-10).

176. See Nan Feyler, Note, *The Use of the State Constitutional Right of Privacy to Defeat State Sodomy Laws*, 14 N.Y.U. REV. L. & SOC. CHANGE 973 (1986); Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986) (federal and state cases). A few states have relied on state constitutional privacy provisions to strike down their sodomy statutes. *E.g.*, *Michigan Organization for Human Rights v. Kelley*, No. 88-815820CZ (Mich. Cir. Ct., Wayne County 1990) (covering both heterosexual and homosexual sodomy), *Kentucky v. Wasson*, No. 86-X-48 (Ky. Cir. Ct., Fayette County, 1990) (covering only homosexual sodomy).

177. CAL. PENAL CODE § 637.5 (West 1993).

178. D.C. CODE ANN. § 43-1845 (1992).

179. *Id.*

180. CONN. GEN. STAT. ANN. § 16-333 (West 1992); ILL. ANN. STAT., ch. 38, § 87-2 (Smith-Hurd 1993); N.J. REV. STAT. § 48:5A-1 (1992); WISC. STAT. ANN. § 134.43, 968.27(1) (West 1992).

### III. PRIVACY STATUTES OR CONSTITUTIONAL PROVISIONS IN OTHER STATES

Florida aside, other states have raised privacy to the level of constitutional codification, though with uneven results. In Alaska, as of 1972, “[t]he right of the people to privacy is recognized and shall not be infringed.”<sup>181</sup> In Arizona, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>182</sup> In California, “[a]ll people are by their nature free and independent,” and among their inalienable rights are “pursuing and obtaining safety, happiness, and privacy.”<sup>183</sup> Hawaii’s search and seizure law adds some interesting language to the familiar formula: “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated. . . .”<sup>184</sup> Article one, section twelve of the Illinois Constitution provides that there shall be “prompt” and “certain” relief for “injuries and wrongs” to one’s privacy.<sup>185</sup> Like Hawaii, Louisiana explicitly adds the right of privacy to its search and seizure provision.<sup>186</sup> In Montana, it is recognized that “[t]he 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.”<sup>187</sup> In New York, the states’ search and seizure provision is identical to its federal counterpart, except that the state adds language strengthening the sanctity of private communications.<sup>188</sup>

Other states, while not elevating their concerns to constitutional dimensions, have made provisions by legislative enactment. In Delaware, for example, violation of privacy is a Class A misdemeanor.<sup>189</sup> In Georgia and Louisiana, it is illegal to invade one’s privacy or to be a “peeping Tom.”<sup>190</sup> In Maine, a person is guilty of invasion of privacy if, under certain circumstances, he or she trespasses with the intent to eavesdrop or installs or uses any device that can transmit or record sounds or images.<sup>191</sup>

---

181. ALASKA CONST. art. I, § 22.

182. ARIZ. CONST. art. II, § 8.

183. CAL. CONST. art. I, § 1.

184. HAW. CONST. art. I, § 5 (emphasis added).

185. ILL. CONST. art. I, § 12.

186. LA. CONST. art. I, § 5.

187. MONT. CONST. art. II, § 10.

188. See N.Y. CIV. RIGHTS LAW § 50 (McKinney 1993).

189. DEL. CODE ANN. tit. 11, § 1335 (1992).

190. GA. CODE ANN. § 26-3002 (1993); LA. REV. STAT. ANN. § 14:284 (West 1992).

191. ME. REV. STAT. ANN. tit. 17-A, § 511 (West 1992).

In Massachusetts, "a person shall have a right against unreasonable, substantial or serious interference with his privacy."<sup>192</sup> Rhode Island enumerates Prosser's four traditional categories of tort privacy after its declaration that "It is the policy of this state that every person in this state shall have a right to privacy. . . ."<sup>193</sup> Utah's privacy protections are specifically strengthened in the area of eavesdropping and the misuse of listening or recording devices.<sup>194</sup>

In the area of tort privacy, most states recognize the traditional torts at common law, with the apparent exception of Minnesota, Nevada, North Dakota, and Wyoming.<sup>195</sup> It should also be understood that those states which have constitutionalized their right to privacy, often pass more specific legislation.<sup>196</sup>

#### IV. CONCLUSION

Thirteen years of parsing section 23 have taken the luster off privacy's promise. So far, hopes outrun reality. The cases bring sharply into focus that all too often privacy plays second banana to competing interests.

---

192. MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1989).

193. R.I. GEN. LAWS § 9-1-28.1 (1992).

194. UTAH CODE ANN. § 76-9-401 (1993).

195. ROBERT ELLIS SMITH, COMPILATION OF STATE AND FEDERAL PRIVACY LAWS (1992).

196. *E.g.*, FLA. STAT. §§ 455.241 (Supp. 1992) (disclosure of medical records); 559.72 (Supp. 1992) (release of credit information); 659.062 (protection of social security numbers) (1991); MONT. CODE ANN. § 39.2-304 (1992) (polygraphs).