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Florida Constitutional Law: 1990 Survey of the State Bill of Rights*

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Abstract

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KEYWORDS: bill, rights, survey

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This is a comprehensive survey of the decisions of the Supreme Court of Florida that construed the bill of rights contained in article I of the state constitution during 1990. It supplements this Review's 1989 Survey of Florida Law, which examined the article I cases released by the court during the decade past.[1] Continuing the same format and case selection criteria,[2] the following

1. *See* Hawkins, *Florida Constitutional Law: A Ten-year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693 (1990). That project provides clear indications that the court is engaged in producing an active body of state constitutional jurisprudence. To briefly abstract its principal findings, the project concluded that: The court's decisions create a hierarchical order of rights in article I, with the order dependent solely upon the particular standard chosen by the court to measure the justification for the state's encroachment; article I rights are not absolute, despite rhetoric to the contrary; those rights eclipsed the protection against government interference afforded by their federal analogues on five occasions during the decade; litigants should exploit the textual differences between state and federal provisions, thereby promoting constitutional imperatives that are unique to Florida; and the court has promoted the independence of the state constitution on several occasions when it eschewed relevant federal precedent.

2. What follows is a section-by-section summary of the cases that addressed article I during 1990. This survey accepts the premise that each opinion citing to the state bill of rights, whether by principled analysis or passing reference, uniquely contributes to the development of the Florida Constitution. In profile, the opinion must confirm that the state constitution was relied upon by the court, addressed by a lower court, or advanced by a litigant in support of a claim. Conversely, an opinion that generically refers to equal protection, double jeopardy, and the like, cannot be said to directly add to the body of state constitutional law. Several recent cases support this position. In them, the court specifically declined to distinguish the nature of the state and federal protections, very likely because the claimants sought no particular relief under the

work marks, for the moment, the contours of Florida's evolving constitutional landscape.

A. INTRODUCTION

The bill of rights is the constitutional pedigree of personal freedoms. The integrity of the pedigree is only as sound as the barriers it establishes as protection from governmental excess. Conflict between the state sovereign and its constituents occurs inevitably when the state seeks to limit the exercise of personal freedom in the name of the common good, or wields its power in disregard of constitutional safeguards.

A challenging array of personal rights issues tested the limits of the state constitution this year. Among them are those that asked whether the state can:

- authorize a disinherited daughter to avoid her deceased mother's devise to charity;
- prohibit candidates for statewide offices from accepting campaign contributions during legislative sessions;
- tax the retail sales of magazines while exempting newspapers;
- enter judgment against a delinquent obligor of child support payments without allowing the obligor an opportunity to be heard in court;
- refuse with impunity for two years to comply with an order directing the state to restore wrongfully confiscated and withheld property to the owner;
- search the carry-on luggage of boarded bus passengers without a

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Florida Constitution. *See* White v. Pepsico, Inc., 568 So. 2d 886, 888 n.2 (Fla. 1990) (due process); Wemett v. State, 567 So. 2d 882, 884 n.2 (Fla. 1990) (due process); State v. Smith, 573 So. 2d 306, 316 n.5 (1990) (per curiam) (right to silence).

There is one exception to these case selection criteria. Occasionally, the court cites to a prior constitutional decision as precedent, without mentioning that the holding has constitutional significance. The line of cases beginning with State v. Neil, 457 So. 2d 481 (Fla. 1984), offers several illustrations. Cases of that ilk are included to the extent research successfully identified them.

The five district courts of appeal also contribute to the shaping of constitutional parameters, and their decisions oftentimes have statewide import. *See* Stanfill v. State, 384 So. 2d 141, 143 (Fla. 1980) (state constitutional decisions of the district courts "represent the law of Florida unless and until overruled by the supreme court"); Weiman v. McHaffie, 470 So. 2d 682, 684 (Fla. 1985) (absent conflicting precedent of its district court or the supreme court, a trial court is obliged to follow state constitutional decisions of other district courts). Time limits alone prevented review of district court cases in this survey.

whisper of suspicion of wrongdoing;
- execute roadside stops of law-abiding motorists merely because they satisfied an officer's self-styled drug courier profile;
- provide constitutionally effective legal representation when the defendant's state-paid assistant public defender is also a special deputy sheriff;
- relegate citrus growers, whose crops the state destroyed in a citrus canker eradication program, to an administrative rather than a judicial determination of damages;
- sanction the seller of allegedly obscene material that the buyer has a constitutionally protected right to possess; and
- deny a person the right to refuse unwanted medical intervention, without which death would certainly follow.

Article I cases occasionally spring from emotionally-charged societal disputes, which are fired by the cultural passions of a diverse citizenry. Once reduced to legal claims, those cases often produce fractured opinions that express doctrinal positions no less impassioned. The opinions in 1990 crystallized numerous driving principles at work behind the positions advocated by the court's membership. For instance, the justices on occasion displayed an ambitious aspiration to expand the scope of protection afforded by the constitutional imperatives of article I. Other times, a majority returned to the safe harbor of precedent and narrow construction to deny protection. Some opinions clearly attempted to reach a proper accommodation between the competing interests of the governed and those who govern. Others sought to acheive a just result, without regard to accommodation. Some turned deferentially upon the court's perception of its own role as a coordinate branch of government. Others cast the judiciary into the role of guardian of human dignity when another branch defaulted by failing to provide adequate protection. And there were cases that made apparent the ongoing tension between law, as a dynamic, evolutionary process, and law, as an interdiction comprised of prohibitory rules. To be sure, the holdings of the court's 1990 cases are of no greater interest and importance than the collegial and doctrinal forces that produced them.

B. Declaration of Rights

1. Political Power

All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair

others retained by the people. FLA. CONST. art. I, § 1.

No decisions construed this section during the survey period.

2. Basic Rights

Article I, section 2 makes three separate declarations. The first expresses the central constitutional concept that the state must deal with similar persons in a similar manner. The second declares that persons have inalienable rights, and specifically enumerates many of those rights. The third protects all basic rights of natural persons from deprivation, especially on account of race, religion, or physical handicap.

a. *Equal Protection Clause*

"All natural persons are equal before the law . . . ." FLA. CONST. art. I, § 2.

In *Shriners Hospitals for Crippled Children v. Zrillic*,[3] the court considered a will executed by Lorraine Romans that intentionally limited the inheritance of her daughter, Lorraine Zrillic, to several boxes of antique dishes and figurines, and left the remainder of the estate to Shriners Hospitals for Crippled Children. Romans died approximately two-and-one-half months after executing her will. Zrillic sought to avoid the devise to Shriners Hospitals in circuit court, relying upon Florida's version of a "mortmain" statute, a statute that essentially enabled a lineal descendent to avoid a charitable devise made within six months of the testator's death.[4] The circuit court declared the statute unconstitutional, and the district court reversed that decision.[5]

On review, the Supreme Court of Florida first decided that Zrillic had standing under the mortmain statute to avoid her mother's devise to Shriners Hospitals, and then measured the statute against two separate clauses within article I, section 2--the equal protection clause, and the inalienable rights clause. Regarding the first clause, five justices agreed that Florida Statutes section 732.803(1) violated state and fed-

3. 563 So. 2d 64 (Fla. 1990) (Barkett, J., author. Ehrlich, C.J., Shaw, and Kogan, JJ, concurred. Justice Grimes concurred in result. Justice McDonald concurred in result, and dissented in part, with an opinion in which Justice Overton concurred).

4. FLA. STAT. § 732.803 (1985).

5. Zrillic v. Estate of Romans, 535 So. 2d 294 (Fla. 5th Dist. Ct. App. 1988).

eral equal protection guarantees.[6] To survive equal protection analysis, the scheme "must appear to be based at a minimum on a rational distinction having a just and reasonable relation to a legitimate state objective."[7] The statutory scheme here created a class of testators who die within six months of executing a charitable devise. The court said that there exists no rational basis for considering differently devises executed six months or more before death, from those executed less than six months before death. Moreover, the class cannot be said to advance the statutory aim, for it may operate to uphold charitable devises made hastily, without adequate deliberation, albeit outside the six month limit, and may void those devises made without undue influence.[8]

Three other cases touched upon Florida's equal protection guarantee. The petitioners in the first case, *Amendments to Rules Regulating The Florida Bar—1-3.1(a) and Rules of Judicial Administration—2.065 (Legal Aid)*,[9] were fifty-eight members of The Florida Bar who requested the court to exercise its rule-making power to create a mandatory pro bono program for the state's practicing lawyers. The justices declined for the moment to take action on the rules proposed by the petitioners, pending receipt of a special committee's report on the subject, but did reach agreement on an interim statement of principle. Unanimously, the court held: "[E]very . . . member of The Florida Bar has an obligation to represent the poor when called upon by the courts . . . . Pro bono is a part of a lawyer's public responsibility as an officer of the court."[10]

Petitioners asserted that mandatory pro bono legal services were compelled by the state equal protection clause, as well as other article I sections.[11] The justices never reached the constitutional claims. Instead, the decision is clearly pegged upon the professional obligation undertaken in the lawyer's oath,[12] and imposed by common law anteced-

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6. FLA. STAT. § 732.803(1) (1985). On this point, Justice Grimes concurred with the four-member majority. *Shriners Hospitals*, 563 So. 2d at 71 (Grimes, J., concurring in result).

7. *Id.* at 69 (citations omitted).

8. *Id.* at 70-71.

9. 573 So. 2d 800 (1990) (unanimous) (Overton, J., author).

10. *Id.* at 806.

11. They also contended that mandatory pro bono legal services were required by article I, sections 9 (due process clause) and 21 (access to courts). *Id.*

12. The oath states, in part, that " 'I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed . . . .' " *Id.* at 803 (quoting Rules Relating to Ethics Governing Bench and Bar, 145 Fla. 763, 797 (1941) (em-

ents.[13] Thus, a lawyer's duty to provide pro bono legal services does not rest upon any express constitutional entitlement of the poor. The court's avoidance of the constitutional claims may be explained by the strong likelihood that it chose the more prudential course of resolving the cause on non-constitutional grounds.[14]

White v. Dugger[15] dealt with a habeas petitioner's equal protection claim that the state obtained the indictment against him in a fundamentally flawed manner. The stated basis for his argument was that the indictment against him was returned by a grand jury comprised of twenty-three jurors, and that the presence of persons during grand jury deliberations that exceeded the statutory limit of eighteen raised a constitutional violation. The court rejected the claim as meritless.[16]

Finally, *Department of Revenue v. Magazine Publishers of America, Inc.*[17] considered a statute that taxed the retail sales of magazines, while exempting from taxation the retail sales of newspapers.[18] Various magazine publishers charged that the statute violated the Speech and Press Clauses of the first amendment, the Equal Protection Clause of the fourteenth amendment, and the state constitutional counterparts. The court never reached the equal protection claim, but instead resolved the case in favor of the publishers on first amendment grounds, very likely because there existed clear first amendment precedent. *Magazine Publishers* is more fully discussed below, under article I, section 4.

b. *Inalienable Rights and Deprivation Clauses*

> *All natural persons . . . have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness,*

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phasis deleted)).

13. The opinion emphasized that " 'one who is allowed the privilege to practice law accepts a professional obligation to defend the poor.' " *Id.* at 804 (quoting In Interest of D.B., 385 So. 2d 83, 92 (Fla. 1980) (emphasis deleted)), and added that lawyers are essential to our common law adversarial system. *Id.*

14. *See* Fleeman v. Case, 342 So. 2d 815, 818 (Fla. 1976).

15. 565 So. 2d 700 (1990) (per curiam).

16. *Id.* at 703 (citing Thompson v. State, 565 So. 2d 1311, 1313 n.2 (1990)).

17. 565 So. 2d 1304 (Fla. 1990) (unanimous) (Ehrlich, C.J., author. Overton, Shaw, Barkett, Grimes, and Kogan, JJ., concurring. McDonald, J., did not participate.), *petition for cert. filed*, No. 90-904 (U.S. Dec. 10, 1990).

18. FLA. STAT. § 212.05(1)(i) (Supp. 1988) (imposing tax of six percent on retail magazine sales); FLA. STAT. § 212.08(7)(w) (Supp. 1988) (exempting newspapers).

> *to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.* FLA. CONST. art. I, § 2.

Shriners Hospitals, introduced in the preceding section, made two significant contributions to the state's constitutional jurisprudence. First, it elevated the right of persons to dispose of property by will from legislative creation to constitutional dimension. At issue was the scope of protection afforded by the inalienable rights clause, in light of the mortmain statute's restriction of certain devises to charity. The clause expressly protects the right of natural persons "to acquire, possess and protect property." To ascertain the meaning of that right, the majority of four justices turned to a principle of constitutional construction that requires a "common sense reading of the plain and ordinary meaning of the language."[19] Resorting to dictionary definitions, the justices interpreted the right to "possess" property as meaning "to have, hold, own, or control 'anything which may be the subject of property, for one's own use and enjoyment, either as owner or as the proprietor of a qualified right in it.' "[20] They determined that the right to "acquire, possess and protect property" necessarily includes the incidents of property ownership,[21] which, in turn, includes the " 'right to transmit' " property to others.[22] The mortmain statute directly restrained that right.

A second contribution is apparent from the court's reliance upon a principle of constitutional construction that permits it "to carry out the

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19. *Id.* at 67 (citation omitted). *Shriners Hospitals* is consistent with Florida's legal tradition of ascertaining intent of the legislature and constitutional adopters by resort to a plain meaning of the text. For other recent illustrations, see *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1137 (Fla. 1990); State v. Dodd, 556 So. 2d 1104, 1106 (Fla. 1990).

20. *Shriners Hospitals*, 563 So. 2d at 67 (quoting BLACK'S LAW DICTIONARY 1046-47 (5th ed. 1979)).

21. *Id.*

22. *Id.* (quoting BLACK'S LAW DICTIONARY 997 (5th ed. 1979) (emphasis omitted)). Article I, section 2 permits the legislature to regulate or prohibit property inheritance and possession by a narrowly limited class—aliens ineligible for citizenship. The court also reasoned that the framers must have intended that persons outside that class, including testators, ought to "be free from unreasonable legislative restraint." *Id.*

intent of the framers *as applied to the context of our times.*"[23] Historically, courts have distinguished property rights from testamentary rights. The former were grounded in natural law, and incorporated into the common law of England. The latter were foreign to the common law, and were creatures of statute, originally intended to retain for the monarchs the power of testamentary disposition in their struggle for power with the organized church.[24] The failure of modern-day courts to question the basis for the distinction only served to blindly perpetuate it. Finding that those "long-abandoned feudal notions of property" were now "inapplicable" in Florida, the majority reasoned that the adopters necessarily had rejected blind adherence to the old English distinction, and in its place elevated testamentary disposition to constitutional stature as an article I, section 2 property right.[25]

However, property rights are not absolute, and may yield to valid exercises of the state's police power. But here, the statutory limit on charitable devises was not "reasonably necessary" to accomplish the state's aim of protecting a decedent's spouse or lineal descendants from disinheritance. That protection formerly was said to avert undue influence by charitable organizations, or the peculiar susceptibility to influence by testators facing impending death.[26] Fatally, the mortmain statute enabled a lineal descendent having no contact with a testator to realize a windfall if a charitable devise were avoided, and enabled artful will drafters to deprive a spouse or lineal descendent of standing to contest the devise altogether.[27]

Three justices would have upheld the mortmain statute because its

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23. *Id.* (emphasis added). More recent case law indicates that a majority of the court is committed to viewing article I, section 2 property protections in light of prevailing social and economic conditions. *See* Harris v. Martin Regency, Ltd., 16 Fla. L. Weekly s98 (Fla. Jan. 17, 1991) (Barkett, J., author. McDonald, and Kogan, JJ., and Ehrlich, Senior Justice, concurred. Shaw, C.J., Overton, and Grimes, JJ., dissented.).

24. *Id.* at 67-68 (citations omitted).

25. *Id.* at 68. For another recent instance of the court's rejecting outmoded usage, see Warren v. State, 572 So. 2d 1376 (1991). *Warren* struck down on grounds of vagueness an anti-prostitution law that proscribed the keeping of a house of 'ill fame.' The court effectively receded from prior case law upholding the law, writing: "While the general population might have understood the meaning of 'ill fame' a century ago, the lack of definition in the statutes, jury instructions, and cases is fatal to its continued validity. Since the legislature first adopted the "ill-fame" statute, both our society and our language have changed." *Id.* at 1377.

26. *Shriners Hospitals*, 563 So. 2d at 69.

27. *Id.*

earlier version survived constitutional scrutiny.[28] Previously, the court rejected claims that the predecessor statute denied the testator and legatees the right to receive, enjoy, and dispose of property without due process, and denied them equal protection by unfairly limiting their right to acquire and dispose of property.[29] *Shriners Hospitals* illustrates the majority's willingness to favor article I rights over unjustified state regulation, even though it requires the court to expressly overturn a line of opposing case law.

One other case, *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, Altered VIN 243340M*,[30] has importance for personal property rights protected under article I, section 2. The justices held that the owners of a truck were entitled to seek damages for loss of use under the implied constitutional remedy of inverse condemnation. The owner's right arose when the state wrongfully seized the truck, and wrongfully detained it for a period of two years after the trial court ordered the state to restore the truck to the owner. This case is more fully discussed below, under article I, section 9.

3. Religious Freedom

> *There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.* FLA. CONST. art. I, § 3.

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28. *Id.* at 71 (Grimes, J., concurring in result); *id.* (McDonald, J , concurring in result, dissenting in part. Overton, J., concurring). Justice McDonald added that the legislature was well within its prerogatives when it sought to protect "the widow and children from improvident gifts made to their neglect by the testator." *Id.* at 72 (citation omitted). "Surely one would have to say that, had the testator, in her last few days, succumbed to a television evangelist's call to be with the Lord by delivering her property to his church and thus leave unprotected a physically handicapped child, a rational basis for the statute would exist." *Id.*

29. Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615, *appeal dismissed*, 323 U.S. 666 (1944).

30. 569 So. 2d 1274 (Fla. 1990) (per curiam) (the mandate did not issue until March 13, 1991, therefore this opinion was prematurely published. Check subsequent case history for the citation of the official opinion).

No decisions construed this section during the survey period.

4. Freedom of Speech and Press

Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated. FLA. CONST. art. I, § 4.

In *State v. Dodd*,[31] the court considered whether Florida's Campaign Financing Act[32] may constitutionally prohibit a candidate for the 1990 Republican nomination for state agriculture commissioner from accepting or soliciting campaign contributions during a regular or special legislative session. Candidate Dodd argued that the act violated his free speech and associational rights, and a clear majority of the court agreed.[33]

The plurality wrote that independent campaign expenditures in support of a political candidate are said to lie " 'at the core of our electoral process and the First Amendment freedoms,' "[34] in particular, those relating to speech and association. Governmental restrictions of those freedoms are "particularly grave"[35] when they prevent political candidates " 'from amassing the resources for effective advocacy.' "[36] Here, the act effectively cut off all campaign financing during any meeting of the legislature. That burden is particularly onerous because Florida law imposes no limit on the number of legislative sessions that might be convened.

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31. 561 So. 2d 263 (Fla. 1990) (plurality) (Kogan, J., author. Barkett and Grimes, JJ., concurred. Overton, J., concurred in a separate opinion. Ehrlich, C.J., concurred in result only in an opinion in which McDonald, J., concurred. McDonald, J., concurred in result with an opinion. Shaw, J., did not participate.).

32. FLA. STAT. § 106.08(8) (1989).

33. Adding to the three justices who signed onto the lead opinion, Justice Overton wrote separately that he "fully agree[d] with the majority . . . ." *Dodd*, 561 So. 2d at 267 (Overton, J., concurring).

34. *Id.* at 264 (quoting Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1396 (1990)).

35. *Id.* at 264.

36. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1976)).

Because the act implicated "weighty" free speech and associational rights protected under the state[37] and federal constitutions, with an intrusion said to be "particularly grave," the act's restrictions must meet the compelling state interest test.[38] The plurality said there is no doubt that the act promotes a compelling state interest,[39] however, the act failed to advance its goals through the least intrusive means. Indeed, the act was a "drastic, overbroad curtailment" of speech and associational rights.[40] For instance, the act applied without exception to all office-seekers, yet, an incumbent cabinet officer, a position sought by Dodd, only marginally affects the legislative process; and others, such as judges, have absolutely no role in that process. Moreover, corrupt campaign practices may occur as easily during the legislative session as during any other time.[41] The legislature's effort to remove the appearance of corruption from the campaign podium, though laudably motivated, simply went too far.[42]

In separate opinions, two justices wrote that the statute suffered from unconstitutional overbreadth,[43] and another would hold the statute facially unconstitutional because its sweeping application to *all* candidates was not the least restrictive means of achieving the state's interest.[44]

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37. In addition to the speech protections assured under article I, section 4, the court relied upon the equally availing associational rights protection under article I, section 5.

38. *Dodd*, 561 So. 2d at 264.

39. *Id.* at 265 (citing Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985)) (acknowledging that the "only legitimate and compelling governmental interests" are the prevention of corruption and the appearance of corruption) (emphasis omitted). The state argued that Florida politicians suffered a "crisis of confidence" with the voters, which the act was specifically targeted to improve. *Id.* at 266.

40. *Id.* at 267.

41. *Id.* at 265-66.

42. *Id.* at 267. The plurality elaborated:

> [F]ew rights are more basic to the American tradition than the ability of people to work for political reform through grassroots or personal campaigning. The raising of money from private sources is a crucial component of this right. In its commendable effort to stop the appearance of corruption caused by well-heeled special interests, the Campaign Financing Act imposes too heavy a hand on the innocent.

Id.

43. *Dodd*, 561 So. 2d at 268 (Overton, J., concurring); *id.* (McDonald, J., concurring in result).

44. *Id.* (Ehrlich, C.J., concurring in result only. McDonald, J., concurring).

Two other cases were decided on federal first amendment grounds, with passing reference to article I, section 4. In one, *Miami Herald Publishing Co. v. Morejon*,[45] the court determined that a news journalist enjoyed no qualified privilege under the federal first amendment to refuse to disclose information learned on a newsgathering mission as an eyewitness to a police arrest. The defendant issued a subpoena *duces tecum* to the reporter to appear for a discovery deposition. Asserting a reporter's qualified privilege against disclosing information or documents obtained in connection with newsgathering activities, the reporter moved the trial court to quash the subpoena. The trial court denied the motion and ordered the reporter to appear. That decision was affirmed by the district court and approved by the Supreme Court of Florida.[46]

Noting that the Florida Legislature had not enacted a "shield" law or statutory reporter's privilege, the court explained that any reporter's privilege must be based upon the first amendment and article I, section 4.[47] Turning to the leading first amendment decision in this area, *Branzburg v. Hayes*,[48] the court ruled that in Florida "there is no privilege, qualified, limited, or otherwise, which protects journalists from testifying as to their *eyewitness* observations of a relevant event in

45. 561 So. 2d 577 (Fla. 1990) (McDonald, J., author. Ehrlich, C.J., Overton, Shaw, Grimes, and Kogan, JJ., concurring. Barkett, J., concurring specially).

46. The rationale for the qualified journalist privilege under the first amendment has been broadly expressed as follows: " 'The concept of freedom of the press as guaranteed by the First Amendment is the keystone of our constitutional democracy and is broad enough to include virtually all activities for the press to fulfill its First Amendment functions.' " DiResta & Fee, *Unanswered Questions Regarding the Journalist's Privilege in Florida*, 64 FLA. BAR J. 26 (1990) (quoting Loadholtz v. Fields, 389 F. Supp. 1299, 1300 (M.D. Fla. 1975)). The district court explained that the underlying rationale for protecting confidential news sources does not apply to most non-confidential sources of information. "Unlike confidential news sources which are likely to dry up if disclosed, non-confidential news sources and like evidence seem, for the most part, unlikely to disappear if journalists are required to testify concerning the same in a subsequent court proceeding . . . ." Miami Herald Publishing Co. v. Morejon, 529 So. 2d 1204, 1207 (Fla. 3d Dist. Ct. App. 1988). Moreover, "the ability of the journalist to gather and report on the witnessed event is not substantially threatened . . . ." *Id.* at 1208.

47. *Morejon*, 561 So. 2d at 579 n.1.

48. 408 U.S. 665 (1972) (plurality) (acknowledging that the states were free to construe their own laws to recognize a reporters' privilege, whether qualified or absolute, the plurality decided that reporters have no qualified privilege under the first amendment to refuse to respond to subpoenas issued by grand juries, acting in good faith, in criminal investigations).

a subsequent court proceeding."[49] Because the journalist could point to no privilege, the court found it "unnecessary" to apply a balancing test.[50] Moreover, the court rejected the newspaper's claim that the first amendment privilege should apply unqualifiedly, and that compelling testimony might chill the newsgathering process.[51] *Morejon* treats the eyewitness news journalist like all other citizen eyewitnesses, although it left unanswered whether the journalist could successfully assert a privilege against disclosure of eyewitness information if the source of his or her eyewitness information is confidential.[52]

In another case, various magazine publishers challenged the constitutionality of a state statute that imposed a sales tax on the retail sale of magazines, while exempting the retail sale of newspapers.[53] Some publishers in *Department of Revenue v. Magazine Publishers of America, Inc.*[54] argued that the statute violated the Speech and Press Clauses of the first amendment, the Equal Protection Clause of the fourteenth amendment, and the state counterparts.

The court did not address the state constitutional claims, and decided the issue entirely on first amendment grounds. The first amendment poses no absolute bar against state regulation of the press. For instance, the state can legitimately subject the press to "generally applicable economic regulation[s]."[55] However, a scheme like Florida's sales tax on magazines singles out an individual press entity, which poses a danger of abuse by the state, thereby implicating first amendment protections.[56]

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49. *Morejon*, 561 So. 2d at 580 (emphasis added). Earlier decisions had upheld the right of a journalist to protect his or her *confidential* sources of information. Tribune Co. v. Huffstetler, 489 So. 2d 722 (Fla. 1986); Morgan v. State, 337 So. 2d 951 (Fla. 1976).

50. On that point, there is dispute among the justices. *See Morejon*, 561 So. 2d at 582 (Barkett, J., concurring specially) (arguing that decisions of the United States Supreme Court and Supreme Court of Florida consistently apply a balancing test when, as here, first amendment interests are implicated).

51. *Id.* at 580. The justices aligned Florida with other state courts that declined to adopt an absolute journalist privilege. *Id.* at 581 (citations omitted).

52. *See* DiResta & Fee, *supra* note 46, at 32.

53. FLA. STAT. § 212.05(1)(i) (Supp. 1988) (imposing tax of six percent on retail magazine sales); FLA. STAT. § 212.08(7)(w) (Supp. 1988) (exempting newspapers).

54. 565 So. 2d 1304 (Fla. 1990) (unanimous) (Ehrlich, C.J., author. Overton, Shaw, Barkett, Grimes, and Kogan, JJ., concurring), *petition for cert. filed*, No 90-904 (U.S. Dec. 10, 1990).

55. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987).

56. *Magazine Publishers*, 565 So. 2d at 1305-06 (citing *Arkansas Writers' Pro-*

To justify a differential tax that implicates the first amendment, the state must satisfy the strict scrutiny standard. Here, the tax assertedly advanced the public interest of promoting those publishers engaged in the dissemination of news while it was still new.[57] Concluding that the state's interest clearly was not compelling (and likely not even rational), the court determined that the state failed to meet its burden, and consequently the statutory scheme could not stand.[58] Having so concluded, the court struck the exemption granted to newspapers and allowed the statute to otherwise survive.[59]

Typical of the court's speech and press decisions *Dodd*, *Morejon*, and *Magazine Publishers* are firmly rooted in federal first amendment precedent. The occasional, if only passing, references to article I, section 4 suggest that the court is disinclined to craft a decision independent of federal case law based on the facts at issue in those cases or the arguments of counsel. Even passing references to the state constitution indicate, however, that litigants and jurists view the cases as representing equally important, but not necessarily identical, state constitutional markers.

5. Right to Assemble

> *The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances.* FLA. CONST. art. I, § 5.

State v. Dodd[60] was the only case to cite article I, section 5. *Dodd* was presented in the preceding section, and demonstrates a factual context where the freedom of speech and the freedom to associate are coextensive protections.

6. Right to Work

> *The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or*

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ject, 481 U.S. at 227).

57. *Id.* at 1308.

58. *Id.*

59. *Id.* at 1310-11.

60. 561 So. 2d 263 (Fla. 1990).

labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike. FLA. CONST. art. I, § 6.

No decisions construed this section during the survey period.

7. Military Power

The military power shall be subordinate to the civil. FLA. CONST. art. I, § 7.

No decisions construed this section during the survey period.

8. Right to Bear Arms

The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law. FLA. CONST. art. I, § 8.

No decisions construed this section during the survey period. Of note, the legislature proposed an amendment to article I, section 8, that imposed a three-day waiting period between the purchase and delivery of any handgun.[61] The voters adopted the legislative proposal during the general election of November, 1990.

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61. The amendment added three subsections to the existing section:
(b) There shall be a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph.
(c) The legislature shall enact legislation implementing subsection (b) of this section, effective no later than December 31, 1991, which shall provide that anyone violating the provisions of subsection (b) shall be guilty of a felony.
(d) This restriction shall not apply to a trade-in of another handgun.
FLA. S.J.R. 43 (1990).

9. Due Process

Florida's due process section combines three discrete categories of rights. The first category creates interests commonly understood to enjoy due process protections—the guarantees of life, liberty, and property. The due process section also lumps together two other categories that generally are regarded as protections independent of due process—the protection against double jeopardy, and the protection against self-incrimination.

a. *Life, Liberty, or Property*

> *No person shall be deprived of life, liberty or property without due process of law . . . .* FLA. CONST. art. I, § 9.

The article I, section 9 cases decided in 1990 addressed the safeguards afforded to persons whose liberty or property rights the state impinged, either by legislation or by action of its agents. Typically, challenges to state action arise in a variety of contexts, and the year's cases proved to be no exception. The court reviewed, on state due process grounds, state procedures that involved enforcement of child support judgments, administrative permitting procedures, use of evidentiary devices to facilitate the trial of defendants in criminal cases, and procedures of particular importance in the prosecution of and sentencing for capital crimes. Finally, the court considered a constitutional claim for damages by owners whose property the state wrongfully seized and confiscated. Those cases are treated in turn.

To sharpen the teeth of the state's child support enforcement laws, the Florida legislature declared in section 61.14(5)(a) and (b) that an unpaid support payment that became final after July 1, 1987, automatically became a final judgment *by operation of law* once the clerk of the circuit court notified the obligor.[62] Two district court panels interpreted the statute as directing the clerk to enter judgment without hearing, without an opportunity for the obligor to present defenses, and without opportunity for the trial court to alter unpaid installments when warranted. Each panel struck the statute as a violation of various provisions of the state constitution.[63] Those decisions were consolidated

62. FLA. STAT. § 61.14(5)(a), (b) (1987).

63. State *ex rel.* Pittman v. Stanjeski, 541 So. 2d 1214 (Fla. 2d Dist. Ct. App. 1989); and Attorney General v. D'Agosto, 541 So. 2d 167 (Fla. 4th Dist. Ct. App.

for review, and quashed in *State ex rel. Pittman v. Stanjeski*.[64]

The court couched the "critical question" as whether the law requires the clerk of court to enter judgment without opportunity for the obligor to present a defense before a judge.[65] To answer that question, the court relied upon guiding principles of statutory construction that required it " 'if reasonably possible . . . to adopt a reasonable interpretation . . . .' "[66] and to " 'avoid declaring a statute unconstitutional if such statute can be fairly construed in a constitutional manner.' "[67]

The court avoided declaring section 61.14(5)(a) and (b) unconstitutional by reading into it a requirement that the obligor was entitled to an opportunity to be heard. State and federal due process required that the section "should be interpreted" to allow a hearing before entry of a final judgment, provided the obligor timely responds to the clerk's notice. That notice should advise the obligor to respond by a date certain, failing which a default judgment will be entered. The hearing should be held by a judicial officer, before whom the obligor may present equitable defenses.[68] Several reasons support the judicial gloss: Child support enforcement is a major governmental concern which the statute advances; all branches of government have a shared interest in the maintenance and support of children; federal legislation requires states to follow certain procedures toward this end; and Florida has long supported effective child support collection procedures.[69]

In another setting, a unanimous court in *Ridgewood Properties, Inc. v. Department of Community Affairs*[70] held that the Secretary of the Department of Community Affairs may not testify at an administrative hearing as the sole witness to establish a material fact, and then pass upon his own evidence by reviewing the hearing officer's proposed findings and legal conclusions. Here, the Department notified Ridge-

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1989). In particular, the district courts determined that section 61.14(5) violated article I, sections 9 (due process) and 21 (access to courts), and article II, section 3 (separation of powers) of the state constitution.

64. 562 So. 2d 673 (Fla. 1990) (Overton, J., author. Ehrlich, C.J., McDonald, Shaw, Barkett, and Grimes, JJ., concurring. Kogan, J., concurred in result only.).

65. *Id.* at 674.

66. *Id.* at 677 (quoting Sandlin v. Criminal Justice Standards and Training Comm'n, 531 So. 2d 1344, 1346 (Fla. 1988)).

67. *Id.* (citation omitted).

68. *Id.* at 678-79.

69. *Stanjeski*, 562 So. 2d at 677-78.

70. 562 So. 2d 322 (Fla. 1990) (Grimes, J., author. Ehrlich, C.J., Overton, McDonald, Shaw, Barkett, and Kogan, JJ., concurring.).

wood that it was required to obtain approval for its office park development as a development of regional impact. Ridgewood contested that decision in an administrative hearing, at which the secretary testified as an expert that Ridgewood held no vested development rights under the Department's policy that would exempt it from compliance. The hearing officer so found, and the Department, over the secretary's signature, issued a final order against Ridgewood. The justices held, however, that the secretary violated Ridgewood's state and federal due process rights by acting as prosecutor at an administrative hearing, testifying as the Department's sole witness, and "[m]ost significantly" by passing on his own evidence.[71] The opinion does not distinguish the state and federal rights.

In criminal prosecutions, due process requires the state to prove every element of the offense beyond a reasonable doubt. It is axiomatic that this burden remains with the state, and may not be shifted onto the defendant. *State v. Cohen*[72] considered the limits of burden shifting in the context of a purported affirmative defense created in the witness tampering statute. The statute included a subsection that provided: "[I]t is an affirmative defense . . . that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully."[73]

The justices saw through the transparency of the statutory language. An affirmative defense "is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question."[74] In effect, an affirmative defense concedes the offense. This section, though labeled an affirmative defense, actually required the defendant to negate an element of the offense with proof that his or her conduct was lawful. Relying exclusively on article I, section 9, the court held that the legislature improperly shifted the burden of proving an element of the crime from the state to the defendant.[75]

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71. *Id.* at 323-24.

72. 568 So. 2d 49 (Fla. 1990) (Kogan, J., author; Shaw, C.J., Ehrlich, Barkett, and Grimes, JJ., concurring; Overton, J., dissented in an opinion joined by McDonald, J., who also dissented with an opinion).

73. FLA. STAT. § 914.22(3) (1985).

74. *Cohen*, 568 So. 2d at 51.

75. *Id.* at 52. The court also concluded that section 914.22(3) was illusory because it shifted to the defendant a burden of proof that is impossible to meet. FLA. STAT. § 914.22(3) (1985). That section requires the defendant to prove that "the con-

On vagueness grounds, *Cohen* struck down another subsection of the witness tampering statute, which proscribed conduct intended to "influence" a person's testimony in an official proceeding.[76] Because it was unclear whether the legislature intended to proscribe conduct designed to induce either false testimony, truthful testimony, or both, the section suffered from vagueness, and facially violated article I, section 9.[77]

Cohen departed from federal precedent by construing the state due process clause to provide a degree of protection greater than that afforded under the federal Due Process Clause. One federal district court upheld the federal analogue against constitutional attack, reasoning that the elements of the affirmative defense allow a defendant to avoid criminal liability upon proof by a preponderance of the evidence, and do not relieve the government of its burden of proving the elements of the crime beyond a reasonable doubt.[78]

Due process protections are also at work in criminal prosecutions when the state relies at trial upon evidentiary devices, such as presumptions and inferences. Construing the federal Due Process Clause, *State v. Rolle*[79] upheld Florida's drunk driving law,[80] which permitted the state to proceed upon the alternative theories of impairment, or unlawful blood alcohol level. The court said that the law did not impermissibly relieve the state of proving every element of the crime. The court also sustained the use of the related jury instruction which provided that evidence of unlawful blood alcohol level " '*would be sufficient by*

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duct consisted solely of lawful conduct." *Cohen*, 568 So. 2d at 52. Yet, section 914.22(1)(a) proscribes conduct intended "to influence the testimony of any person in an official proceeding." *Id.* It is impossible to prove the lawfulness of conduct, on the one hand, which the legislature declared unlawful, on the other.

76. FLA. STAT. § 914.22(1)(a) (1985).

77. *Cohen*, 568 So. 2d at 52-53. Two justices would have avoided declaring the statute unconstitutional. Both agreed that a "reasonable and proper" interpretation was that the legislature intended to criminalize conduct that intended to induce untruthful, not truthful, testimony. *Id.* at 53 (Overton, J., dissenting. McDonald, J., concurring.). Justice McDonald strictly interpreted the statute as intending to protect witnesses, victims, and informants from tampering, for whatever reason. *Id.* (McDonald, J., dissenting).

78. *Id.* at 53-54 (McDonald, J., dissenting) (citing United States v. Kalevas, 622 F. Supp. 1523 (S.D.N.Y. 1985)).

79. 560 So. 2d 1154 (Fla.) (Ehrlich, C.J., author. Overton, McDonald, Shaw, and Grimes, JJ., concurring. Barkett, J., concurred specially with an opinion in which Kogan, J., concurred.), *cert. denied*, 111 S. Ct. 181 (1990).

80. FLA. STAT. § 316.193(1) (1985).

itself" to establish impairment.[81]

The statute underlying the jury instruction provides that proof of unlawful blood alcohol "shall be prima facie evidence" of impairment.[82] The court let the statute stand because the phrase was commonly understood to create an inference that the jury was free to accept or reject, and thus, the jury was not bound unconstitutionally to find impairment from evidence of unlawful blood alcohol. Moreover, the court said, the legislature would have used the term "presumption," had it intended to create a presumption.[83] Justice Barkett's special concurrence made an important clarification of *Rolle* by noting that the effect of an evidentiary device, not its label, determines its validity under state and federal due process standards.[84]

Death-sentenced prisoners frequently assert due process protections on appeal. The court reached the merits in four such cases, and unanimously resolved the due process issues. In the first, *Randolph v. State*,[85] the trial court excused for cause a prospective juror who "guessed" that she could vote to impose the death penalty in an appropriate case. Randolph argued that the state and federal due process clauses prohibited the court from excusing a juror "'simply because [she] voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.'"[86] After evaluating the voir dire colloquy, the court was unable to hold that the trial

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81. *Rolle*, 560 So. 2d 1155 (emphasis in original) (quoting the jury instruction).

82. FLA. STAT. § 316.1934(2)(c) (1985).

83. *Rolle*, 560 So. 2d at 1157; *see also* Frazier v. State, 559 So. 2d 1121 (Fla. 1990) (applying *Rolle*).

84. *Id.* at 1161. (Barkett, J., specially concurring, Kogan, J., concurring). The special concurrence suggests that several of the court's previous decisions improperly concluded that the phrase "prima facie evidence" meant inference, rather than presumption. The opinion is significant for its principled analysis of the operation of inferences and presumptions, and pointedly demonstrates that the profusion of terms led to a confusing body of law.

Six months later, the court revisited section 316.1934(2)(c) in Wilhelm v. State, 568 So. 2d 1 (Fla. 1990), and held that a jury instruction virtually identical to that section violated federal due process by relieving the state of its burden of proof. Five of the seven justices agreed that "'[p]rima facie' is a technical term without common meaning for the lay person. Confronted with such a term in the jury instructions, and provided with no definition, a reasonable juror would be forced to guess at its meaning . . . ." *Id.* at 3. *Rolle* and *Wilhelm* are easily reconciled by noting that the instruction in *Rolle* contained no undefined terms, and avoided using "prima facie evidence." Consequently, *Rolle* never measured the term against due process standards.

85. 562 So. 2d 331 (Fla. 1990) (unanimous) (Barkett, J., author).

86. *Id.* at 334 (quoting Lockhart v. McCree, 476 U.S. 162, 176 (1986)).

court abused its discretion. Citing federal precedent to resolve the claim, the justices explained: "The trial court had the opportunity to evaluate the demeanor of the prospective juror, and given [the juror's] equivocal answers, we cannot say that the record evinces [her] clear ability to set aside her own beliefs 'in deference to the rule of law.' "[87]

In the second case, *Scull v. State*,[88] the trial court held a resentencing hearing on December 28, 1988, only three weeks after the state supreme court denied rehearing, but before the trial court received the mandate. Defense counsel returned from Christmas vacation on December 27, learned of the impending hearing, and asked the prosecutor to explain the sudden and hurried case activity. He responded that the trial judge was expected to soon leave his position and did not want to "dump" the case on his successor.[89] Realizing that he had no authority to conduct that hearing before receipt of the mandate, the trial judge held a second resentencing hearing on December 30, after receiving the mandate. On appeal of the judgment reimposing the death sentence, Scull claimed that the trial court's haste to resentence him violated his due process rights.[90] The justices unanimously agreed.

Article I, section 9, the court wrote, requires that "all proceedings affecting life, liberty, or property must be conducted according to due process."[91] In one sense, the term is incapable of precise definition, and "embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals."[92] In another sense, the term subsumes certain well-defined rights, among which are fair notice and reasonable opportunity to be heard.[93] The trial court's haste to conduct Scull's resentencing proceeding violated those basic rights, in part, because "[h]aste has no place in a proceeding in which a person may be sentenced to death."[94] Perhaps equally important to the decision, the justices agreed that the "appearance of irregularity so permeates these

87. *Id.* at 337 (quoting Buchanan v. Kentucky, 483 U.S. 402. 416 (1987)).

88. 569 So. 2d 1251 (Fla. 1990) (unanimous) (Kogan, J., author).

89. *Id.* at 1252.

90. *Id.*

91. *Id.*

92. *Id.* (citation omitted); *compare* Huff v. State, 569 So. 2d 1247, 1250 (Fla. 1990) (citing principle, and holding that trial court abused its discretion by striking motion for post-conviction relief filed by death-sentenced defendant, without first ruling on contemporaneously-filed motion to admit foreign attorney *pro hac vice*).

93. *Scull*, 569 So. 2d at 1252.

94. *Id.*

proceedings as to justify suspicion of unfairness."[95] The court vacated the sentence of death, and remanded for another sentencing hearing.

In the third capital appeal, *Nowitzke v. State*,[96] the court agreed with the defendant who charged that the trial court erred in refusing to order a competency hearing immediately before trial. On the Friday before the scheduled trial date, the prosecution offered a plea that included concurrent life sentences on two murder counts. Defense counsel conveyed the offer to Nowitzke, who rejected it, stating that he could not be executed. He explained that he would be "spiritually released on July 4, 1989 . . . because it was Independence Day and because of the number of letters in his three names."[97]

Defense counsel moved for a competency hearing. The trial court summarily denied counsel's request because Nowitzke had been pronounced competent to stand trial on his return from a state mental health facility three months earlier. A unanimous court reversed the convictions and remanded for another trial. Due process prohibits the prosecution of a person while he or she is incompetent.[98] Even though competency has once been established, the trial court has a continuing obligation to order a competency examination, and conduct a hearing when it " 'has reasonable ground to believe that the defendant is not mentally competent to proceed.' "[99] Here, the importance of a second competency hearing was indicated by Nowitzke's irrational reasons for rejecting the state's plea offer, which in turn cast doubt upon his ability to assist in his defense or understand the proceedings against him.[100]

White v. Dugger,[101] the fourth capital appeal, rejected as meritless the defendant's claim that a grand jury allegedly consisting of more than the statutory limit of eighteen violated state and federal due process.

In the remaining due process case, the owners of a truck that the state wrongfully confiscated sued to recover damages. *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, Altered VIN 243340M*[102] posed the following certified question: "Does a trial court have jurisdiction to order a payment of damages based on the failure of the state

95. *Id.*
96. 572 So. 2d 1346 (1990) (per curiam) (unanimous).
97. *Id.*
98. *Id.*
99. *Id.* (quoting FLA. R. CRIM. P. 3.210).
100. *Id.* at 646. *Nowitzke* also appears below, in article I, section 16.
101. 565 So. 2d 700 (Fla. 1990) (per curiam) (unanimous on this issue).
102. 569 So. 2d 1274 (Fla. 1990) (per curiam).

over a two-year period to honor that court's order returning confiscated property to its owner[?]"[103] Unanimous on the point, the justices answered the question affirmatively. The facts showed that the Florida Highway Patrol (FHP) seized a truck in 1983, and prevailed in a later forfeiture proceeding. The owners appealed that decision. During the pendency of the appeal, the FHP transferred the truck and title to the state Department of Transportation, which incurred costs for storage and improvements.

The owners succeeded in overturning the forfeiture,[104] after which the trial court entered an order on July 22, 1986, directing the state to return the truck to them. One year later, the trial court entered an amended order, granting the FHP's motion to add the Department as a necessary party. Thereafter, the owners filed a motion to determine damages, in which they sought to recover the value of the truck at the time of seizure, depreciation, loss of use during the period of confiscation, prejudgment interest, and attorney's fees.[105] On April 11, 1988, the trial court ordered the Department to return the truck within ten days. It entered a final order on May 12, 1988, which denied the damages claim, and again directed the Department to return the truck, although that was not accomplished until July, 1988, two years after the court entered its initial order.[106]

The trial court denied the owners' claim for damages, apparently concluding that their recourse was through an action separate from the claim to recover possession of the truck.[107] The district court reversed that decision, stating that the owners were entitled to include a damages claim in the supplemental proceedings incident to their claim for return of property. "It defies common sense," the panel explained, "to require [the owner] to initiate independent legal proceedings involving the same identical parties in order to secure relief that is predicated upon the failure to comply with the trial court's order directing return of the property."[108]

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103. *Id.* at 1275.

104. Hales v. State *ex rel.* Florida Highway Patrol, 487 So. 2d 100 (Fla. 4th Dist. Ct. App. 1986).

105. Motion To Determine Damages at 2, *In re Forfeiture*, 569 So. 2d at 1274.

106. *In re Forfeiture*, 569 So. 2d at 1275-76.

107. That course would have been fatal to the owners' cause because the second suit extended beyond the time permitted by the applicable statute of limitations. Answer Brief of Respondents at 3, *In re Forfeiture*, 569 So. 2d at 1274

108. *In re* Forfeiture of 1976 Kenworth Tractor Trailer Truck Altered VIN 243340M, 546 So. 2d 1083, 1084 (Fla. 4th Dist. Ct. App. 1989).

The justices declined to affirm the opinion of the district court, but approved the result. Turning to the jurisdictional issue, they creatively interpreted the rules governing civil pleading practice, so that the owners' motion to determine damages could be treated as a counterclaim by supplemental pleading. In that way, the trial court was empowered to exercise its jurisdiction to entertain the claim for damages in the original suit, although it arose after service of pleadings.[109]

Next, the justices rejected the state's argument that damages claim sounded exclusively in tort, which would have required dismissal because the doctrine of sovereign immunity shielded the state from tort liability. Instead, they characterized the suit as "nothing less than a [constitutional] claim of inverse condemnation,"[110] against which the statutory doctrine of sovereign immunity posed no bar.[111] Expressing uncustomary conviction, the justices wrote that "the Florida Constitution *dictates* that a remedy of this type must exist under the facts of the present case."[112] Those circumstances showed unmistakably that the state deprived the owners of the use of their truck for two years, in "outright refusal" to return it after the trial court ordered the state to do so.[113]

On remand, the truck owners were entitled to seek damages for inverse condemnation under article X, section 6(a) of the Florida Con-

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109. *In re Forfeiture*, 569 So. 2d at 1277 (citing FLA. R. CIV. P. 1.170(e)).

110. *Id.* (citation omitted).

111. *See, e.g.*, State Road Dep't v. Tharp, 1 So. 2d 868, 869 (Fla. 1941) ("neither will it be permitted as a plea to defeat the recovery of land or other property wrongfully taken by the State through its officers and held in the name of the State"); Schick v. Florida Dep't of Agriculture, 504 So. 2d 1318, 1322 (Fla. 1st Dist. Ct. App. 1987).

112. *In re Forfeiture*, 569 So. 2d at 1277 (emphasis added). Why the constitution "dictates" such a remedy is not explained in the court's opinion. Probably, the answer lies in the notion that the constitutional remedy of inverse condemnation is self-executing in character, *see* Department of Agriculture & Consumer Servs. v. Mid-Florida Growers, Inc., 521 So. 2d 101, 103 n.2 (Fla. 1988); United States v. Clarke, 445 U.S. 253, 257 (1980) (citation omitted) (construing fifth amendment counterpart), and that an owner of private property appropriated for public use may compel compensation via that remedy. Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663, 669 (Fla.), *cert. denied*, 444 U.S. 965 (1979).

113. *In re Forfeiture*, 569 So. 2d at 1276. The tone of the majority opinion suggests that a court might wield the constitutional remedy of inverse condemnation as if it were a sanction against a contemnor. With great charity to the state, however, Justice McDonald explained that the delay in restoring the truck to the owners was the result of the Department's efforts to protect its expenditures repairing and improving the vehicle. *Id.* at 1277 (McDonald, J., concurring. Overton, J., concurring).

stitution ("takings" clause).[114] Those damages include loss of use between the date of the initial order directing the return of the truck, and the date when the Department returned the truck. Also, they were entitled to prejudgment interest on that amount, and attorney's fees.[115]

In re Forfeiture effectively illustrates the interrelationship of several state constitutional sections that bond together to protect personal property rights—article I, section 2 (inalienable rights clause), article I, section 9 (due process clause), and article X, section 6(a). However, several aspects of the opinion counsel that its holding will be limited to the facts. First, the court on its own resorted to inverse condemnation as a means for affording the owners relief. Indeed, the two district court opinions that decided this case, and the record itself, are void of discussion about or pleading asserting a constitutional remedy.[116] The sole record reference that would give rise even to the barest allegation of constitutional infringement cannot be said to contemplate an action in inverse condemnation.[117] The decision is explained by the court's search for a fair result, no doubt at least partially motivated by its disdain for the state's contemptuous disregard of the trial court's order directing the state to restore the forfeited truck to the owners. For that reason alone, the circumstances should be viewed as "unique,"[118] and unlikely to recur.

Second, the majority attempted to distinguish *Wheeler v. Corbin*,[119] a case where the state deprived Gailyn Wheeler of the use of her car for 524 days after a wrongful forfeiture. The majority reasoned that the police had probable cause, and thus lawfully seized Wheeler's

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114. The section provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." FLA. CONST. art. X, § 6(a).

115. *Id.* at 1277 (McDonald, J., concurring).

116. The theory advanced by the owner was premised on inherent power, and not on inverse condemnation: "[A] court has the power to enforce its orders and judgments, including ordering the payment of incidental damages for the violation and long delay in complying with an order to return confiscated property." Answer Brief of Respondents at 4, *In re Forfeiture*, 569 So. 2d at 1274.

117. The owners charged that the Florida Highway Patrol violated a valid court order without lawful cause, and that its actions offended " 'due process' and the orderly process of the court." Answer Brief of Respondents at 6, *In re Forfeiture*, 569 So. 2d at 1274.

118. *In re Forfeiture*, 569 So. 2d at 1277 (McDonald, J., concurring).

119. 546 So. 2d 723 (Fla. 1989).

car, whereas the seizure of the truck here was unlawful.[120]

In re Forfeiture offers precedential value for private property rights that extends beyond the four corners of the majority opinion. The opinion plainly holds that the owner of private property may look to the remedy of inverse condemnation to vindicate *temporary*, rather than permanent, interferences by the state with the use of his or her property. Another of the court's recent opinions impliedly reached that result,[121] and the two decisions effectively overturned Florida's historical position that denied damage claims for mere temporary "takings."[122] The decisions have the salutary effect of firmly aligning Flor-

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120. The majority explained that Wheeler did not claim that the state failed to honor a court order directing the return of the confiscated car, "nor did Wheeler seek damages for any period of time *after* such an order was entered." *In re Forfeiture*, 569 So. 2d at 1276 (emphasis in original). But those reasons make Wheeler's cause no less compensable than the owners' claim in the instant case. In each case, there was no doubt that the property belonged to the challenging party. More to the point, the cases are easily distinguished by looking to the validity of the state's conduct in the first instance. The majority added that *Wheeler* does not control because it dealt with an impoundment based on probable cause, whereas the instant case relates to "an outright refusal of the state to return seized property to its lawful owner after ordered to do so by a court of competent jurisdiction." *Id.*

121. Joint Ventures, Inc., v. Department of Transp., 563 So. 2d 622 (Fla. 1990) (striking state statute under state and federal "takings" clauses because it allows the Department, without compensation, to impose a development moratorium up to ten years on vacant land located within area reserved for highway expansion). *Compare* Wheeler v. Corbin, 546 So. 2d 723, 724 n.2 (Fla. 1989) (declining to reach constitutional "taking" claim because it was not pled, and denying tort-based claim for loss of use of car during 524 days of impoundment).

122. *See, e.g.*, Morton v. Gardner, 513 So. 2d 725, 729 (Fla. 3d Dist. Ct. App. 1987) (rejecting claim for damages for loss of use by owner of commercial lobster fishing boat that the trial court ordered returned after 124-day period of confiscation, because "[i]n Florida, an action for inverse condemnation does not arise from a *temporary* 'taking' ") (emphasis in original; citation omitted); Hillsborough County v. Gutierrez, 433 So. 2d 1337 (Fla. 2d Dist. Ct. App. 1983) (flooding of plaintiffs' property occasioned by ineffective County-enforced plan for disposal of surface drainage water resulted in only temporary ouster); State, Dep't of Health and Rehabilitative Servs. v. Scott, 418 So. 2d 1032 (Fla. 2d Dist. Ct. App. 1982) (four month holdover by department beyond expiration of lease term did not permanently deprive landowner of use and enjoyment of his property); State Dep't of Transp. v. Donahoo, 412 So. 2d 400 (Fla. 1st Dist. Ct. App. 1982) (certain acts by the Department in connection with interstate road construction, including the mistaken placement of boundary markers, stacking of equipment, piling of dirt, and placement of drain curb in alleyway running alongside plaintiff's hotel, did not amount to a permanent invasion that would sustain a "taking" claim); Dudley v. Orange County, 137 So. 2d 859, 863 (Fla. 2d Dist. Ct. App. 1962) (the record failed to show that the county's dam caused "continuous flood-

ida with federal precedent.[123]

In conclusion, the court contributed significantly in 1990 to the development of a body of state constitutional law independent of federal standards. *Cohen*[124] struck down the witness tampering law because it impermissibly shifted the burden of proving the elements of the crime from the state to the defendant in violation of state due process, although a federal court had previously upheld the federal analogue. Two other cases relied exclusively on article I, section 9. *Scull*[125] vacated a death sentence and remanded for another sentencing hearing because the trial court's hastily conducted sentencing hearing created an impermissible appearance of irregularity and suspicion of unfairness. *In re Forfeiture*[126] held that state due process dictated that property owners were entitled to damages for inverse condemnation after the state wrongfully confiscated and withheld their property. The remaining cases resolved claims on both state and federal due process grounds, but drew no distinction between the nature of those independent sources.

b. *Double Jeopardy*

> *No person shall . . . be twice put in jeopardy for the same offense . . . .* FLA. CONST. art. I, § 9.

Most successive prosecution or punishment claims are waged generically as double jeopardy claims, and do not expressly rely on article I, section 9. Of the numerous double jeopardy claims raised in 1990, only two expressly addressed the state constitution. In one, *Fridovich v.*

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ing [of plaintiff's lands] for a long period of time"); Poe v. State Road Dep't, 127 So. 2d 898, 901 (Fla. 1st Dist. Ct. App. 1961) (diversion of surface water from its natural drainage onto plaintiff's property as the result of state highway reconstruction, held to be only a consequential damage where the drainage results in "recurrent but temporary flooding").

123. *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987) (" 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation"); United States v. Westinghouse Electric & Mfg. Co., 39 U.S. 261, 263-65 (1950); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

124. 568 So. 2d at 52.

125. 569 So. 2d at 1252.

126. 569 So. 2d at 1274.

State,[127] the state prosecuted Fridovich for first-degree murder and sought to retry him after the district court overturned the conviction for manslaughter. In a second trial, the state proceeded upon a "Refile Information for Manslaughter," and obtained a conviction for manslaughter.[128]

There was no doubt that state and federal double jeopardy clauses limit the state on retrial to prosecuting Fridovich for the lesser included offense of manslaughter. Fridovich argued, however, that the state had abandoned its prosecution because the refiled information bore a different case number than the one appearing on the original indictment. The court rejected his claim, noting that the new case number was the product of a clerical error, and that Fridovich was not prejudiced by a reprosecution of the identical offense for which he was convicted in the first trial.[129]

In the other case, *State v. Glenn*,[130] the defendant sought post-conviction relief following multiple convictions and sentences for trafficking in, and delivery of cocaine and heroin, all arising out of a single episode. He charged that *Carawan v. State*[131] prohibited the state from obtaining convictions on each offense under the state and federal double jeopardy clauses. That claim required the court to revisit *Carawan* to determine whether Glenn, who was convicted and sentenced at the time when *Carawan* became final, but who had not then challenged his conviction and sentence collaterally, could rely upon the decision as precedent.

Applying the rule of lenity in section 775.021(1), *Carawan* determined that the state could not sentence a defendant for both manslaughter and aggravated battery when it failed to adequately prove that those crimes arose from more than a single shotgun blast.[132] The

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127. 562 So. 2d 328 (Fla. 1990) (unanimous) (Overton, J., author).

128. *Id.* at 329.

129. *Id.* at 330.

130. 558 So. 2d 4 (Fla. 1990) (McDonald, J., author. Ehrlich, C.J., Overton, Shaw, Grimes, and Kogan, JJ., concurring. Barkett, J., concurred in result only.).

131. 515 So. 2d 161 (Fla. 1987).

132. *Carawan* was actually a statutory construction case, and never reached the constitutional concerns of the state double jeopardy clause. However, because the rule of lenity incorporated into that statute lies at the very heart of double jeopardy guarantees, *Carawan* and those cases adhering to it are reported here. *See* State v. Smith, 547 So. 2d 613, 621 (Fla. 1989) (Barkett, J., concurring in part, dissenting in part. Kogan, J., concurring).

legislature subsequently amended that statute effective July 1, 1988,[133] providing, in part, that offenses were to be viewed as separate if each required proof of an element not required by the other. In so doing, the legislature overruled the court's decision prospectively.[134] *Carawan*, however, has precedential value for pipeline cases, that is, cases with direct appeals pending at the time the decision became final.[135] *Glenn* asked whether *Carawan* was similarly available to persons whose direct appeals were final, but who had not yet resolved their collateral appeals.

The court held that Glenn was not entitled to rely upon *Carawan*.[136] It reasoned that *Carawan* was no revolutionary change in the law, but an evolutionary refinement that merely clarified past decisions.[137] The policy interest of decisional finality, coupled with the absence of any manifest injustice brought about by the court's refusal to revisit his case (post-*Carawan* laws would permit the state to convict Glenn separately for his crimes), argued against applying *Carawan* retroactively to collateral appeals.[138]

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133. Ch. 88-131, § 7, 1988 Fla. Laws 699, 709 (codified at Fla. Stat. § 775.021(4) (Supp. 1988)).

134. State v. Smith, 547 So. 2d 613, 617 (Fla. 1989) (acknowledging that the legislative amendment effectively overruled *Carawan*).

135. Rehearing was denied in *Carawan* on December 10, 1987. *Carawan*'s pipeline cases decided this year include: State v. Reddick, 568 So. 2d 902 (Fla. 1990) (separate convictions for homicide and shooting into an occupied dwelling have no common elements, address separate evils, and therefore may properly be imposed); Porterfield v. State, 567 So. 2d 429 (Fla. 1990) (remanding for resentencing where defendants were convicted and sentenced for sale or delivery of controlled substance and for possession of that substance); State v. McCray, 561 So. 2d 257 (Fla. 1990) (sale and delivery of a drug in a container are two crimes that address the same evil where the drug paraphernalia is used to facilitate the sale or delivery, and may not give rise to separate convictions or sentences); Skeens v. State, 556 So. 2d 1113 (Fla. 1990) (unanimous) (carrying a concealed firearm and possession of a firearm by a convicted felon are separate offenses and may arise out of a single act); Jones v. State, 569 So. 2d 1234 (Fla. 1990) (finding that *Carawan* imposed no impediment to sentencing defendant for two murders and for shooting into a vehicle occupied by the victims, when evidence showed that defendant fired three shots).

136. 558 So. 2d at 8.

137. *Id.*

138. *Id.* at 7-8. Numerous cases followed *Glenn* this year. *See* Love v. State, 559 So. 2d 198 (Fla. 1990); State v. Finney, 558 So. 2d 409 (Fla. 1990); State v. Jensen, 557 So. 2d 23 (Fla. 1990); State v. Spadaro, 556 So. 2d 1119 (Fla. 1990); State v. Etlinger, 556 So. 2d 1118 (Fla. 1990); State v. Pastor, 556 So. 2d 1112 (Fla. 1990); State v. Merckle, 556 So. 2d 1103 (Fla. 1990).

c. *Self-Incrimination*

No person shall . . . be compelled to be a witness against himself. FLA. CONST. art. I, § 9.

Only *Holton v. State*[139] addressed this section during the survey period. Holton appealed a sentence of death imposed after his conviction of first-degree murder. He argued that the trial court failed to consider the statutory mitigating circumstance of impaired capacity, which assertedly applied due to his longstanding drug addiction. The court disagreed and ruled that the trial court considered the matter, as evidenced in part by the sentencing order: "The defendant testified that he was addicted to drugs but still maintained his innocence of these offenses. This [circumstance] would not apply in view of that sworn testimony."[140]

The importance of the opinion for article I, section 9 lies with the court's recognition that a protestation of innocence, which due process generally prohibits the trial court from using against a defendant in either guilt phase or penalty phase of a capital trial, may be considered by the sentencer if it is relevant to mitigation.[141]

10. Prohibited Laws

No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed. FLA. CONST. art. I, § 10.

The court struck down two legislative enactments as violations of article I, section 10. One prohibited awarding attorney's fees under certain circumstances, and the other prohibited escalation clauses in recreational leases. The first, *Florida Patient's Compensation Fund v. Scherer*,[142] involved a medical malpractice action brought by Clara Scherer for injuries that occurred in June, 1979. She filed her claim on

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139. 573 So. 2d 284 (Fla. 1990) (per curiam) (unanimous). *Holton* is also discussed under article I, section 16, below.

140. *Id.* at 292.

141. *Id.*

142. 558 So. 2d 411 (Fla. 1990) (Kogan, J., author. Ehrlich, C.J., Overton, Shaw, and Grimes, JJ., concurring. McDonald, J., dissented in part, but concurred on the constitutional issue discussed here. Justice Barkett did not participate in the decision.).

September 20, 1982. Following the jury verdict awarding her damages, the trial court awarded her an attorney's fee under a law that entitled the prevailing party to an attorney's fee in medical malpractice actions.[143] That same law prohibited an attorney's fee for any action filed before July 1, 1980.[144] The district court affirmed the fee award, finding that Scherer's cause of action accrued when she discovered or should have discovered the existence of malpractice.[145]

The Supreme Court of Florida vacated the attorney's fee award and quashed the district court's opinion. It found that the cause of action under the attorney's fee statute accrued in June, 1979, when the negligent act itself occurred, and not when the negligence was discovered. "[D]amages and penalties, including an award of attorney's fees, for which a physician may be held liable cannot be constitutionally enlarged after the date of the alleged malpractice . . . [without violating] state and federal prohibitions against ex post facto laws."[146]

The prohibition against retrospective application of laws was also tested when the court allowed enforcement of a rent escalation clause in condominium recreational leases despite a later-enacted statute that voided such clauses. The dispute in *Association of Golden Glades Condominium Club, Inc. v. Security Management Corp.*[147] centered on two documents, a lease and a declaration of condominium. On March 14, 1970, the recreation corporation, as lessor, entered into a long term lease with the Association, as lessee, which included an escalation clause allowing for rental adjustments based upon the cost of living index. On the same date, the developer entered into a declaration of condominium with the Association, which bound the parties to the state's condominium act " 'as the same may be amended from time to

143. *Id.* at 413.

144. Fla. Stat. § 768.56 (1981). This section was repealed effective October 1, 1985, Ch. 85-175, § 43, 1985 Fla. Laws 1180, 1225, but continues in force for causes then pending.

145. Morales v. Scherer, 528 So. 2d 1, 2 (Fla. 4th Dist. Ct. App. 1988) (reasoning that the award of attorney's fees was controlled by the statute of limitation, rather than section 766.56, and concluding that the jury's determination that the cause of action accrued after September 20, 1980 should control).

146. *Scherer*, 558 So. 2d at 414 (agreeing with *Morales*, 528 So. 2d at 3 (Anstead, J., dissenting, in part)).

147. 557 So. 2d 1350 (Fla. 1990) (Overton, J., author. Ehrlich, C.J., Grimes, and Kogan, JJ., concurring. McDonald, J., concurred with a separate opinion. Barkett and Shaw, JJ., concurred in result only.).

time.' "[148] The recreation corporation was not a party on that document. On November 30, 1981, by way of merger, Security Management Corporation became the successor in interest to the corporation on the lease, and to the developer on the declaration of condominium. This litigation involved Security's suit for rent from the Association between July, 1980 and January, 1987.[149]

Between 1975 and 1989, the legislature enacted various laws that declared void all escalation clauses in residential condominium recreational leases.[150] Section 718.4015(2), Florida Statutes, in particular, provided that this policy did not apply "to contracts entered into prior to June 4, 1975, may not divest the parties of any benefits or obligations arising from the escalation of fees prior to October 1, 1988, but only prohibits further escalation of fees pursuant to the escalation clauses, on or after October 1, 1988."[151] The court decided that under the circumstances, Security Management Corporation was entitled to enforce a rent escalation clause in its lease with the Association.

Several reasons appear to support the court's decision. First, by its own terms, section 718.4015(2) had no effect on the enforceability of the contested rent escalation clause because the lease was entered into before June 4, 1975. Moreover, that section could not be applied retroactively, even if the legislature so intended, because to do so would violate article I, section 10, and the corresponding federal protection against ex post facto laws.[152] Second, the decision was controlled by precedent.[153] In summary, a subsequent merger binds the lessor to the

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148. *Id.* at 1352 (citation omitted).

149. *Id.* at 1351-52.

150. *Id.* at 1352-53 (recounting the history of this legislation).

151. FLA. STAT. § 718.4015(2) (Supp. 1988).

152. *Id.* at 1354 (citing Fleeman v. Case, 342 So. 2d 815 (Fla. 1976) (dictum)). Emphasizing the point, Justice McDonald wrote that "[n]o matter how hard the legislature may try, it cannot affect the terms of a contract" in existence before the enactment. *Id.* at 1355 (McDonald, J., concurring). *But see* Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1979) (reh'g denied) (looking to the "actual effect" of a statute on the contractual right, and applying balancing test to weigh the competing interests); United States Fidelity & Guarantee Co. v. Department of Insurance, 453 So. 2d 1355 (Fla. 1984) ("minimal" impairment outweighed by reasonable state action); Hawkins, *supra* note 1, at 767-71 (demonstrating that the protections of article I, section 10 are not absolute, and have yielded to acts of the legislature under certain circumstances).

153. *Association of Golden Glades*, 557 So. 2d at 1355 (citing Cove Club Investors, Ltd. v. Sandalfoot S. One, Inc., 438 So. 2d 354 (Fla. 1983)) (successor lessor under a recreational lease with an escalation clause, not a party on the declaration of

declaration of condominium[154] only when the lessor expressly agrees to be bound prospectively by amendments to the condominium act,[155] or the lessor and developer are a single entity.[156]

11. Imprisonment for Debt

No person shall be imprisoned for debt, except in cases of fraud. FLA. CONST. art. I, § 11.

In this survey period, the court considered whether article I, section 11 protects from imprisonment a parent found delinquent in child support payments. In *Gibson v. Bennett*,[157] an ex-wife sought to enforce a final judgment from a Virginia court, which awarded child support arrearages, in a Florida court by invoking its equitable powers, including contempt. The justices noted that Florida has long recognized the use of equitable remedies to enforce foreign support decrees.[158] Moreover, the legislature has authorized the use of contempt proceedings to enforce judgments for arrearage as a means of enhancing enforcement of family support obligations.[159]

Gibson argued, however, that enforcement of a "judgment for support" by contempt violates article I, section 11.[160] The court rejected

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condominium, held not bound by the declaration).

154. *Association of Golden Glades*, 557 So. 2d at 1354-55 (citing *Cove Club Investors, Inc.*, 438 So. 2d at 355); *see also* Condominium Ass'n of Plaza Towers N., Inc. v. Plaza Recreation Development Corp., 557 So. 2d 1356 (Fla 1990) (holding enforceable, escalation clause in recreation lease entered into before 1975 statute prohibiting such clauses).

155. *Association of Golden Glades*, 557 So. 2d at 1354 (citing Century Village, Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condominium Ass'n, 361 So. 2d 128 (Fla. 1978)).

156. *Id.* at 1355 n.2.

157. 561 So. 2d 565 (Fla. 1990) (Kogan, J., author. Ehrlich, C.J., Shaw, Barkett, and Grimes, JJ. Overton and McDonald, JJ., each concurred specially with separate opinions.).

158. *See, e.g.*, Haas v. Haas, 59 So. 2d 640 (Fla. 1952); McDuffie v. McDuffie, 155 Fla. 63, 19 So. 2d 511 (1944).

159. FLA. STAT. § 61.17(3) (1989) ("The entry of a judgment for arrearage for child support, alimony, or attorney's fees and costs does not preclude a subsequent contempt proceeding . . . for failure of the obligor to pay . . . .").

160. *Gibson*, 561 So. 2d at 570. More precisely stated, Gibson challenges his ex-wife's attempt to enforce a judgment of arrearage of child support, as distinct from a judgment or decree awarding support in the first instance.

Gibson's claim. The obligation to pay alimony or child support is not a debt, but rather a personal duty to the ex-spouse or child, as the case may be, and society.[161] Reducing a support decree to a money judgment does not destroy the decree as an obligation to pay support.[162] Nor is the character of the award altered when the obligor relocates to another state. The purpose remains the same—fulfillment of a continuing moral and legal obligation to support the former spouse or children.[163] So important are these obligations, that a judgment for support arrearage may be enforced by contempt even after a child reaches majority.[164]

Justices Overton and McDonald wrote separately[165] to argue that the decision required the court to recede from *Lamm v. Chapman*,[166] which held that "the acceptance of public assistance for the support of a dependent child vests in the [Florida Department of Health and Rehabilitative Services] the authority to proceed with *all* remedies available to the child's custodian."[167] In so holding, the court approved the use of contempt, as well as other remedies, to enforce judgments for support, and thereby rejected the claim that the obligation to pay child support or alimony is a debt for which a delinquent obligor cannot be imprisoned under article I, section 11. The two justices asserted that *Lamm* was premised upon the election of remedies doctrine, which obligates a party to adhere to a remedy, once chosen. In particular, *Lamm* stated that contempt would not be available to enforce a decree that awarded child support once arrearages were reduced to judgment.[168] That is, the aggrieved spouse may seek to secure a money judgment for the delinquent alimony in a court of law, or alternatively seek enforcement of the original decree in a court of equity,[169] but contempt is unavailable to enforce the latter. Although the distinction between a judgment of arrearage and a decree awarding child support is "technical," and "important in deciding whether contempt lies" under

161. *Id.*.
162. *Id.* at 572.
163. *Id.* at 569 (citations omitted).
164. *Id.* at 572.
165. *Gibson*, 561 So. 2d at 572 (Overton, J., concurring specially); *id.* at 573 (McDonald, J., concurring specially).
166. 413 So. 2d 749 (Fla. 1982).
167. *Id.* at 753 (emphasis in original).
168. *Id.*
169. *Gibson*, 561 So. 2d at 574 (McDonald, J., specially concurring) (citing Haas v. Haas, 59 So. 2d 640 (Fla. 1952)).

the election of remedies doctrine, Justice McDonald wrote that the doctrine has no further utility and should not impede enforcement in the child support and alimony context.[170]

12. Searches and Seizures

> *The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of the evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.* FLA. CONST. art. I, § 12.

Frequently referred to as the "conformity amendment," the current version of article I, section 12 took effect on January 1, 1983. Its principal aim is to assure that Florida courts construe that section identical to decisions of the United States Supreme Court that interpreted its fourth amendment counterpart.[171] The section makes two principle textual contributions beyond the protections secured by the federal version. It incorporates an exclusionary rule as a part of Florida's organic law, whereas the federal exclusionary rule is a product of judicial construction, and merely procedural in nature.[172] In addition to a great

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170. *Id.* at 573.

171. This was not always the case, for the court construed the pre-1983 article I, section 12 version independent of the fourth amendment. The body of decisional law developed under that version has continuing currency in many instances. *See* Hawkins, *supra* note 1, at 773-75 (identifying cases decided during the three-year period 1980-82, before the conformity amendment took effect).

172. The conformity requirement had two effects upon the exclusionary rule of article I, section 12: First, it stripped the rule of its constitutional stature, by relegating it to a judicial construct of the United States Supreme Court; and second, it laid vulnerable an entire body of state law interpreting that rule.

deal more descriptive language, the section also expressly affords protection "against the unreasonable interception of private communications," whereas the fourth amendment contains no such expression.

Twice in 1990, the court considered whether the conformity amendment protected persons who became the object of the state's war on drugs in two very commonplace settings—as passengers on commercial carriers, and as motorists on the open road. In each instance, the court determined that the state enterprise reached too far into the envelope of personal freedom, and held the line on unwarranted police practices.

In *Bostick v. State*,[173] a four-member majority struck down a Broward County Sheriff Department's drug interdiction practice, which consisted of plain-clothed narcotics officers, without a whisper of suspicion of wrongdoing, boarding busses and confronting passengers, requesting consent to search their carry-on luggage for contraband. The "crucial question" was whether "a reasonable person would have believed he was not free to leave," such that voluntary consent could be given under the circumstances.[174] In light of facts that the trial judge characterized as "very intimidating,"[175] the majority determined that Bostick was not free to leave, or " 'to disregard the [officers'] questions and walk away.' "[176] With the protections of article I, section 12 implicated, the state was required to justify its detention of Bostick. It could not do so. The majority wrote that "[t]here were no articulable facts and no rational inferences to support the police activity involved here."[177] Moreover, the state could not justify the ensuing luggage

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173. 554 So. 2d 1153 (Fla. 1989) (Barkett, J., author, Ehrlich, C.J., Shaw, and Kogan, JJ., concurring. Justices McDonald and Grimes each filed dissenting opinions in which the other, and Justice Overton concurred.), *cert. granted*, No. 89-1717 (U.S. Oct. 9, 1990). The court released *Bostick* on November 30, 1989, and the decision was addressed in Hawkins, *supra* note 1, at 781-83. Because the decision became final during the survey period, brief mention is made here. A series of bus cases that relied upon *Bostick* also became final this year. *See* McPherson v. State, 566 So. 2d 255 (Fla. 1990); Jones v. State, 559 So. 2d 1096 (Fla. 1990); Nazario v. State, 554 So. 2d 515 (Fla. 1990); McBride v. State, 554 So. 2d 1160 (Fla. 1989); Mendez v. State, 554 So. 2d 1161 (Fla. 1989); Shaw v. State, 555 So. 2d 351 (Fla. 1989); Avery v. State, 555 So. 2d 351 (Fla. 1989).

174. *Id.* at 1157 (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

175. *Id.*

176. *Id.* (quoting *Mendenhall*, 446 U.S. at 554).

177. *Id.* at 1158 (relying upon United States v. Sokolow, 490 U.S. 1 (1989); United States v. Cortez, 449 U.S. 411 (1981); United States v. Brignoni-Ponce, 442

search, for it failed to demonstrate by clear and convincing evidence that Bostick freely and voluntarily consented to that search.[178]

Then in *State v. Johnson*,[179] five justices concluded that a drug courier profile developed by Florida Highway Patrol Trooper Vogel to stop and detain passing motorists violated article I, section 12. Trooper Vogel stopped Paul Clive Johnson because he matched the self-styled profile:

> (1) the car was driving at 4:15 a.m.; (2) the driver was alone; (3) the driver was about thirty years of age; (4) the car had out-of-state tags; (5) the car was of a large model type; (6) the driver was male; (7) the driver was wearing casual clothes; (8) the driver was being "overly cautious" by driving at precisely the speed limit; and (9) the car was driving on a known drug corridor, Interstate 95.[180]

At roadside, Trooper Vogel searched the trunk of Johnson's car and discovered marijuana inside. The trooper arrested Johnson and seized the marijuana, which the trial court later suppressed. The district court affirmed the trial court's decision to suppress the evidence.[181]

On review by the Supreme Court of Florida, a five-member majority acknowledged that police officers may exercise discretion to stop an individual under circumstances indicating a likelihood of wrongdoing.[182] It said that a "profile" is permissible "precisely to the degree that it reasonably describes behavior likely to indicate a crime."[183] The fourth amendment, in an analogous context, requires a roving border patrol officer in search of illegal aliens to point to " 'specific articulable facts, together with rational inferences from those facts' " that warrant suspicion of criminal wrongdoing before the officer is justified in mak-

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U.S. 873 (1975)).

178. *Id.* at 1158-59.

179. 561 So. 2d 1139 (Fla. 1990) (Barkett, J., author. Overton, Shaw, Grimes, and Kogan, JJ., concurring. Ehrlich, C.J., dissented with an opinion, and McDonald, J., dissented with an opinion in which Ehrlich, C.J. concurred.).

180. *Id.* at 1140. Trooper Vogel testified that he developed the profile based upon elements common to thirty arrests he made during a thirteen month period before Johnson's arrest. That profile differed from the Patrol's own profile, which included the presence of air shocks on the car, window opaquing, and evidence that the car was loaded heavily. *Id.* at 1140-41.

181. State v. Johnson, 516 So. 2d 1015 (Fla. 5th Dist. Ct. App. 1987).

182. *Johnson*, 561 So. 2d at 1142.

183. *Id.*

ing a stop.[184] "*At the very least*," the justices reasoned, the same standard applies to "roving stops of state citizens by state police."[185]

Two justices disputed the majority's conclusion that Trooper Vogel lacked sufficient justification to conduct a stop. Chief Justice Ehrlich conceded that several factors relied upon by the trooper were inappropriate, but argued that other factors were sufficient to support reasonable suspicion. He viewed reasonable suspicion as " 'seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.' "[186] Justice McDonald argued that the trooper's accumulation of factors was "reasonable," and "reasonable profile stops of an automobile on a state highway should be contemplated by users of the highway," whose expectation of privacy is necessarily diminished due to the fight against Florida's "huge drug problem."[187]

The majority responded that an individual's "*unusual*" conduct, conduct that sets him or her apart from others, may justify a stop,[188] as illustrated by the United States Supreme Court's decision in *United States v. Sokolow*.[189] There, agents of the Drug Enforcement Administration became suspicious that Sokolow was engaged in drug trafficking, and stopped him at the Honolulu International Airport, where he had two day's earlier purchased two round-trip airplane tickets from Honolulu to Miami. In what it described as "a typical attempt to smuggle drugs" through an airport,[190] a seven-justice majority determined that the agents demonstrated sufficient justification to stop Sokolow. Important to that opinion, Sokolow's arrest was supported by several factors of probative significance such as: the agents' "reasonable ground to believe" that Sokolow used an alias when he purchased the tickets; and their knowledge that he paid $2,100 in cash for them.[191] That latter factor was "out of the ordinary," especially because Sokolow made payment from a roll of $20 bills containing nearly twice that amount of cash.[192] When taken together with other factors known to

184. *Id.* (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975)).
185. *Id.* (emphasis in original).
186. *Id.* at 1145 (Ehrlich, C.J., dissenting) (citation omitted).
187. *Id.* at 1146 (McDonald, J., dissenting. Ehrlich, C.J., concurring).
188. *Id.* at 1142 (emphasis in original).
189. 490 U.S. 1 (1989).
190. *Id.* at 4.
191. *Id.* at 8-9.
192. *Id.* at 8.

agents,[193] the government had a reasonable basis under the fourth amendment to suspect that Sokolow was transporting illegal drugs.

To satisfy an article I, section 12 infringement, the state must demonstrate that there exists "a strong and articulable link—a 'rational inference'—between the sequence of acts observed by the police and the concealed criminal conduct believed to exist, whether or not this sequence is described as a 'profile.' "[194] *Johnson*, unlike *Sokolow*, contained no record evidence that the defendant behaved unusually. Indeed, Johnson matched a profile that included an enormous class of law-abiding travelers. The court noted that the "sole basis" for Trooper Vogel's decision to stop Johnson was the coincidence of similarities between Johnson and the trooper's personal profile. Thus, his detention and arrest upon that basis alone were unjustified.

In an opinion released the same day as *Johnson*, *Creswell v. State*,[195] a realigned majority reached an opposite result. The majority of four justices held that factors in a drug courier profile, when viewed in light of the officer's experience, may provide an articulable or founded suspicion that will justify under fourth amendment standards a brief investigatory detention of a motorist after a legitimate traffic stop.[196] It distinguished the two cases by noting that *Johnson* considered whether a profile could justify a brief investigatory stop, whereas *Cresswell* concerned a brief investigatory detention following a lawful

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193. Sokolow's original destination was Miami, "a source city for illicit drugs; . . . he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; . . . he appeared nervous during his trip; and . . . he checked none of his luggage." *Id.* at 3.

194. *Johnson*, 561 So. 2d at 1143 (quoting *Brignoni-Ponce*, 422 U.S. at 884).

195. 564 So. 2d 480 (Fla. 1990) (Ehrlich, C.J., author. Overton, McDonald, and Grimes, JJ., concurring. Justices Shaw and Kogan dissented with separate opinions in which Justice Barkett joined).

196. Trooper Vogel stopped Cresswell for "following too closely," and justified the roadside detention in the following manner:

> Cresswell was very nervous, was driving along a known drug route in a vehicle with a large trunk, had a Massachusetts driver's license but was driving a car registered to someone else with Maine license plates and New York state insurance and inspection stickers, there was a CB radio in the car, the ignition key was separate from the other keys, and the back seat contained items normally found in the trunk.

Id. at 483. Trooper Vogel then detained Cresswell to await the arrival of a narcotics canine unit. The court wrote: " 'when viewed together by a trained law enforcement officer such facts . . . " 'can be combined with permissible deductions . . . to form a legitimate basis for suspicion of a particular person and for action on that suspicion.' " *Id.* (quoting United States v. Cortez, 449 U.S. 411, 419 (1981)).

traffic stop.[197] Moreover, it regarded the factors in *Cresswell* "at least as strong as those approved in *Sokolow*."[198]

Looking beyond the record facts, Justice Kogan argued in dissent that the experience of precedent disproved the constitutional validity of Trooper Vogel's profile. The earlier cases that had considered the trooper's profile showed that he had applied it "with such extreme inconsistency as to make it extremely unreliable."[199]

13. Habeas Corpus

The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety. FLA. CONST. art. I, § 13.

No decisions construed this section during the survey period.

14. Pretrial Release and Detention

Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained. FLA. CONST. art. I, § 14.

No decisions construed this section during the survey period.

15. Prosecution for Crime; Offenses Committed by Children

(a) No person shall be tried for capital crime without presentment

197. *Id.* at 482 n.2.

198. *Id.* at 483. Justice Shaw viewed the facts relied upon by the majority as vastly different from those in *Sokolow*, and concluded that the trooper lacked the justification for detaining Creswell. *Id.* (Shaw, J., dissenting, Barkett, J., concurring).

199. *Id.* (Kogan, J., dissenting, Barkett, J., concurring) (citations omitted).

> *or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.*
> *(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as a adult. A child found delinquent shall be disciplined as provided by law.* FLA. CONST. art. I, § 15.

A lone dissenting justice in *State v. Smith*[200] argued that article I, section 15 should be construed to permit prior inconsistent statements made by a declarant during a prosecutorial investigation to be introduced at trial. The court relied upon the controlling statute without reaching the constitutional position advanced by the dissent.

Evidence of an out-of-court prior inconsistent statement is generally regarded as unreliable, and inadmissible under the hearsay statutes. Florida Statutes section 90.801(2)(a) creates a narrow exception when the declarant testifies at trial, and has made the prior inconsistent statement at some "other proceeding."[201] The exception admits the statements as substantive evidence to prove the truth of the matter asserted. In *Smith*, the prosecutor interrogated a witness, in the presence of a deputy sheriff and court reporter, about her involvement in a homicide.[202] The court was asked to decide whether a prosecutor's investigation qualified as an "other proceeding" under section 90.801(2)(a).

The court in an earlier case said that the statute required formality, no less than a deposition, but no more than a hearing,[203] and that a police investigative interrogation, even though under oath, does not qualify as an "other proceeding."[204] In *Smith*, the court held that the section applied equally to a prosecutor's investigation, and ruled the witness's prior statements inadmissible because the investigation lacked the requisite " 'degree of formality, convention, structure, regularity

200. 573 So. 2d 306, 318 (Fla. 1990) (Overton, J., concurring in part, dissenting in part).

201. FLA. STAT. § 90.801 (2)(a) (1985).

202. *Smith*, 573 So. 2d at 313-14.

203. Delgado-Santos v. State, 471 So. 2d 74, 77 (Fla. 3d Dist. Ct. App. 1985), *adopted*, 497 So. 2d 1199 (Fla. 1986).

204. State v. Delgado-Santos, 497 So. 2d 1199 (Fla. 1986).

and replicability of the process in question.' "[205]

Relying in part on article I, section 15 to dispute the majority's decision, Justice Overton argued in dissent that the state constitution gives to an assistant state attorney virtually the same power to charge that it gives to the grand jury. Because grand jury proceedings have been held to satisfy the requirements of the statute, Justice Overton argued that the prosecutor should be no less entitled to rely upon its provisions.[206]

16. Rights of Accused and Victims

> *(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.*
> *(b) Victims of crimes or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.* FLA. CONST. art. I, § 16.

Article I, section 16(a) creates a cluster of rights designed to protect persons subject to criminal prosecution. Among those rights considered this year were the right to confront adverse witnesses, the right of representation, and the right to trial by an impartial jury.

a. *Confrontation*

The right "to confront at trial adverse witnesses" was one of sev-

205. *Smith*, 573 So. 2d at 314 (citation omitted).
206. *Id.* at 320.

eral constitutional rights abused by prosecutorial misconduct that resulted in the court's reversal of two murder convictions in *Nowitzke v. State*.[207] Through a psychiatrist, the defense established that Nowitzke was insane at the time of the offenses. On cross-examination, the prosecutor asked the psychiatrist whether he had been accused of being a "hired gun" by another psychiatrist, who was unconnected with the case. The prosecutor asked the question several more times and buttressed the accusation by emphasizing it during closing argument. The court wrote that the prosecutor's introduction of the opinion was irrelevant and misleading on the issue of the psychiatrist's credibility, was improper impeachment of an expert, and violated the defendant's right to confront the declarant under the state and federal constitutions.[208]

b. *Representation*

Indigent persons may qualify for the assistance of court-appointed counsel in both felony trial proceedings and any ensuing appeal. The appointment of counsel advances the right of the accused "to be heard . . . by counsel," assured under article I, section 16. *In re Order of the First District Court of Appeal Regarding Brief Filed in Forrester v. State*[209] addressed the nature and extent of appellate counsel's role in prosecuting the initial appeal on behalf of an indigent defendant.

Forrester is best understood against the backdrop of the sixth amendment's requirement that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense,"[210] and *Anders v. California*,[211] where the United States Supreme Court stated that counsel's "bare conclusion" that there was no merit to an appeal " '[could not] be an adequate substitute for the right to full appellate review available to all defendants' who may not be able to afford such an expense."[212] The Court in *Anders* continued:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an advo-

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207. 15 Fla. L. Weekly 645 (Fla. 1990) (per curiam) (unanimous). *Nowitzke* is also addressed above, in article I, section 9.

208. *Id.* at 647.

209. 556 So. 2d 1114 (Fla. 1990) (unanimous) (McDonald, J., author.).

210. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (deciding that the sixth amendment was obligatory on the states through the fourteenth amendment).

211. 386 U.S. 738 (1967).

212. *Id.* at 742-43 (citation omitted).

> cate in behalf of his client, as opposed to that of *amicus curiae* . . . . Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however be accompanied by a brief referring to anything in the record that might arguably support the appeal.[213]

Forrester pled nolo contendere to possession of cocaine and marijuana that were seized from his automobile without a warrant, and reserved the right to appeal the trial court's denial of his motion to suppress that evidence.[214] Forrester's appellate counsel filed an *Anders* brief, in which he concluded that an appeal would be frivolous and totally without merit.[215] Counsel stated that no good faith argument could be made in support of the suppression claim.[216]

The district court ordered counsel to file a supplemental brief on the suppression issue, and to advocate " 'whether, in the context of a non-consensual, warrantless search, a canine alert, without more, constitutes probable cause.' "[217] Counsel appealed that order to the Supreme Court of Florida, arguing that it violated article I, section 16 and its federal counterparts by shifting counsel's role from advocate for the client to *amicus curiae* for the court, which would infringe upon a defendant's right to effective assistance of counsel.

The court unanimously rejected that constitutional argument. Exercising its inherent power, "an appellate court can order supplemental briefs in any case before it, regardless of the type of brief originally filed."[218] *Anders* requires a "complete and careful review of the record" to support counsel's claim that an appeal would be wholly frivolous. In so doing, counsel serves the dual aims of effective client representation and assisting the court in its independent evaluation of the record.[219]

Harich v. State[220] also addressed the right to effective legal representation assured by article I, section 16. Harich argued in a collateral appeal of his conviction that his assistant public defender's appointment as a special deputy sheriff created a conflict of interest that vio-

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213. *Id.* at 744.
214. *Forrester*, 556 So. 2d at 1115.
215. *Id.*
216. *Id.* at 1115 n.2.
217. *Id.* at 1116 (citation omitted).
218. *Id.* at 1117.
219. *Id.*
220. 573 So. 2d 303 (Fla. 1990) (per curiam) (unanimous).

lated that section. At an evidentiary hearing on the claim, the trial court found that the sheriffs of three Florida counties issued "special" or "honorary" deputy sheriff cards to Harich's trial counsel,[221] but that counsel neither acted nor held himself out as a regular deputy. Not only did Harich fail to produce any evidence in support of his claim, but the evidence disproved it. The justices unanimously approved the findings of the trial court that counsel's status as a special deputy was widely known to members of the legal community, and easily discoverable through due diligence.[222] They also rejected Harich's arguments that counsel's appointment as a deputy sheriff amounted to an actual conflict, that prejudice must be presumed from that appointment, and that the allegation of these facts creates a per se constitutional violation.[223]

c. *Impartiality*

The right to "trial by impartial jury" is the most frequently litigated of the cluster of rights created under article I, section 16. Trial impartiality includes the assurance that a party will not exclude prospective jurors solely because of their membership in a discrete racial group. In 1984, *State v. Neil*[224] established the standard for determining whether a party's peremptory challenges were racially motivated, and thus violated article I, section 16. Briefly stated, the challenging party must make a timely objection, and demonstrate on the record, first, that the challenged prospective juror belongs to a distinct racial group, and second, that there exists a strong likelihood that the other party exercised a peremptory challenge to remove that juror solely on account of race.[225] If the trial court agrees with the movant, the burden shifts to the other party to show the existence of valid non-racial reasons for striking the juror.[226] *State v. Slappy*[227] later confirmed the court's commitment to "a vigorously impartial system of selecting

221. Those counties were Volusia County, located in the Seventh Judicial Circuit, the venue of the trial, and Marion and Lake Counties, located in the adjoining Fifth Judicial Circuit.

222. *Id.* at 305.

223. *Id.*

224. 457 So. 2d 481 (Fla. 1984).

225. *Id.* at 484.

226. *Id.* at 486-87.

227. 522 So. 2d 18 (Fla.), *cert. denied*, 487 U.S. 1219 (1988).

jurors."[228]

After *Neil*, the court declared that a defendant has standing to raise an article I, section 16 violation, even though he or she is not of the same race as the juror peremptorily challenged by the state. However, it acknowledged that such a defendant may have more difficulty in making a prima facie showing of racial bias than a defendant who is of a race different from the challenged juror.[229] *Reed v. State*[230] is the most recent illustration of the point. Reed, a white man charged with murdering a white victim, moved for mistrial following the prosecutor's use of eight of ten peremptory challenges to excuse blacks from the jury. The trial court found, virtually without any explanation by the state, that the challenges were not based purely on race. With due regard for the "inherent fairness and color blindness" of trial judges,[231] the Supreme Court of Florida agreed:

> Given the circumstances that both the defendant and the victim were white and that two black jurors were already seated, we cannot say that the trial judge abused his discretion in concluding that the defense had failed to make a prima facie showing that there was a strong likelihood that the jurors were challenged because of their race.[232]

Although *Reed* illustrates the court's deference to the role of the trial court in assuring trial impartiality under article I, section 16, the court is unlikely to address the merits of a *Neil* claim in the absence of record support. Only by adequately developing the record can trial attorneys protect a valid *Neil* claim, or defend against it, as the case may be. For example, in *Bryant v. State*,[233] the state proffered no reasons to justify its excusing five blacks during the course of its first seven peremptory challenges, yet the trial court summarily denied defense counsel's request for a *Neil* inquiry. Ultimately, six white and six black jurors were impanelled, but not until the state exercised seven of its

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228. *Id.* at 21. A four-justice majority in *Slappy* agreed that any doubt about whether the complaining party met the initial burden under *Neil* would be resolved in favor of that party. *Id.* at 22.

229. Kibler v. State, 546 So. 2d 710, 712 (Fla. 1989).

230. 560 So. 2d 203 (Fla.) (per curiam), *cert. denied*, 111 S. Ct. 230 (1990).

231. *Id.* at 206.

232. *Id.*

233. 565 So. 2d 1298 (Fla. 1990) (per curiam).

sixteen peremptories to strike blacks.[234] On appeal, the state argued that the reasons for the peremptories were race-neutral and not pretextual.[235] The majority acknowledged that some of the excused jurors' responses indicated valid basis for challenge, but found the responses of others impossible to evaluate. Without benefit of an independent evaluation of the state's reasons by the trial court, the supreme court declined to review the bare record.[236]

The absence of record clarity was also central to *Floyd v. State*.[237] Defense counsel timely objected to the prosecutor's attempt to peremptorily excuse the last of two black prospective jurors remaining on the panel. The prosecutor offered a factually erroneous, but race-neutral, explanation for the peremptory. He said that during voir dire, the juror had expressed the view that twenty-five years' imprisonment was enough for Floyd's crime, which suggested a predisposition against imposing the death penalty. The trial court denied defense counsel's objection, conceding that it did not recall the juror's response, but noting that it was " 'on the record.' "[238] In fact, however, the record confirmed that the excused juror never made such a response.[239]

A five-justice majority rejected Floyd's claim of error because defense counsel did not object to the prosecutor's erroneous explanation, and thereby failed to preserve the claim for appellate review.

> There is no question that the state's explanation was race-neutral, and if true, would have satisfied the test established in [*Neil* and *Slappy*]. It is uncontroverted, however, that the explanation was not true . . . . Thus, we must determine the parameters of the trial court's responsibility to ascertain if the state has satisfied its burden of producing a race-neutral reason for the challenge.[240]

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234. *Id.* at 1300.

235. *Id.* at 1301.

236. *Id.*. Justice McDonald dissented on the *Neil* issue, declaring that it was "manifest from the record" the state's exercise of peremptory challenges was not racially motivated. He believed that record proof of the state's race-neutrality was demonstrated by the ultimate composition of the jury, which included six black and six white jurors. *Id.* at 1303 (McDonald, J., concurring in part, and dissenting in part).

237. 569 So. 2d 1225 (Fla. 1990) (per curiam) (Shaw, C.J., Overton, Ehrlich, Grimes, and Kogan, JJ., concurred; McDonald, J., dissented with an opinion in which Barkett, J., concurred).

238. *Id.* at 1229 (footnote omitted).

239. *Id.*

240. *Id.*

The duty of the trial court is to establish record support for the state's reason, and it may assume the verity of any race-neutral reason if unchallenged by defense counsel. Had defense counsel disputed the prosecutor's reason, the trial court could have easily reviewed the record, discovered, and then corrected the error.[241]

Floyd accomplishes two ends. First, it reiterates the court's commitment to the *Neil-Slappy* formulation—defense counsel can preserve a claim for appellate review only by timely objecting when the state strikes a prospective juror who is a member of a distinct racial group, and by showing that there exists a strong likelihood of a racially improper motive. The court could have rejected Floyd's *Neil* claim because defense counsel failed to clearly satisfy the latter component of this standard.[242] By assuming that counsel satisfied the threshold, however, the court was able to address the more vexing problem posed by an unresolved record conflict. Second, *Floyd* imposes upon defense counsel the requirement to object when the state's explanation for its peremptory challenge lacks record support.

In stark contrast to the record uncertainty in *Bryant* and *Floyd*, the record "clearly support[ed]" the trial court's ruling to summarily deny defense counsel's *Neil* objection in *Holton v. State*.[243] The record showed that one prospective juror peremptorily excused by the prosecutor harbored reservations about capital punishment, and another was ambivalent toward recommending the death penalty. For those reasons, defense counsel was unable to demonstrate a "strong likelihood" that the state excused the two prospective jurors solely because they were black.[244]

When asked to explain his excuse of a third prospective black juror, the prosecutor stated his belief that the juror might be unsympathetic toward the murder victim, who was a female prostitute. The justices agreed that "*one could reasonably conclude* that the prospective juror could not be sympathetic toward a prostitute."[245] *Holton* is a straightforward application of *Slappy*,[246] and reconfirms that the state's peremptory challenge will be sustained on appeal if the record

241. *Id.* at 1229. Two justices took no issue with the majority's resolution of the *Neil* claim, but dissented, arguing that the facts of the murder made the death penalty inappropriate. *Id.* at 1233 (McDonald, J., dissenting; Barkett, J., concurring).

242. *Id.* at 1229 n.4.

243. 573 So. 2d 284 (per curiam) (unanimous).

244. *Id.* at 287.

245. *Id.* (emphasis added).

246. 522 So. 2d at 22.

demonstrates that its proffer is both race-neutral and reasonable.

Collateral claimants only unsuccessfully raised *Neil* issues this year. *Roberts v. State*[247] rejected an argument on collateral appeal that the trial court employed an improper *Neil* standard. The claim was procedurally barred because appellate counsel failed to raise it on direct appeal.[248] However, the court reached the merits of Roberts' claim for habeas relief, which charged that appellate counsel was ineffective for failing to challenge the trial court's reliance upon *Neil*, rather than the prevailing federal standard. The court held that counsel's failure to challenge the jury selection was not ineffective assistance because it amounted to neither defective performance, nor prejudiced the appeal.[249]

Lastly, *State v. Griffith*[250] may be fairly viewed as recognizing that the right of an accused to a trial by an impartial jury is a coordinate protection with article I, section 22, which provides that the qualifications and the number of jurors, no fewer than six, shall be fixed by law.

17. Excessive Punishments

Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. FLA. CONST. art. I, § 17.

Claims of excessive or disproportionate punishment are litigated

247. 568 So. 2d 1255 (Fla. 1990) (per curiam).

248. *Id.* at 1258; *see also* Hill v. Dugger, 556 So. 2d 1385, 1387-88 (Fla. 1990) (per curiam) (without approving or disapproving the claim that the state violated Hill's rights by peremptorily excusing black prospective jurors on account of race, the court simply noted that the trial court denied the latter as procedurally barred because appellate counsel failed to raise it on direct appeal).

249. *Roberts*, 568 So. 2d at 1262-68; *see also Hill*, 556 So. 2d 1385. *Hill* provides no glimpse into the allegedly offending colloquy, and it sheds little light onto the ineffective assistance claim:

> Given the state of the law on the *Neil* issue at the time of this appeal, as well as the record in this case on the inquiry and reasons given by the prosecution for the excusal of the prospective jurors, we find that appellate counsel was not ineffective under the *Strickland v. Washington*, 466 U.S. 668 (1984)] test.

Hill, 556 So. 2d at 1389.

250. 561 So. 2d 528, 530 n.3 (Fla. 1990). *Griffith* is discussed more fully under article I, section 22.

virtually entirely on federal eighth amendment grounds. It is indeed unusual to find mention of article I, section 17. For that reason, Judy Buenoano's last-minute collateral appeal to stay her impending electrocution, and in particular Justice Kogan's dissenting opinion, warrant special mention. In *Buenoano v. State*,[251] the court considered Buenoano's request for an evidentiary hearing on her claim that her execution would be "cruel and unusual"[252] because, she asserted, the electric chair used by the state prison system would malfunction. Her legal theory seized upon the macabre, grizzly circumstances of Jesse Tafero's electrocution, which occurred only weeks earlier. The evidence showed that smoke and twelve-inch flames spurted from Tafero's head immediately after he received the first jolt of electricity. Tafero was pronounced dead approximately seven minutes later and only after a third jolt of electricity was administered.[253] Relying upon the strength of an affidavit from her own expert, Buenoano argued on appeal that a " 'homemade' " electrode caused the chair to malfunction, a condition which she claimed the Florida Department of Corrections had failed to remedy.[254]

A four-justice majority reached the merits of Buenoano's constitutional claim, and found that the record as proffered failed to justify judicial interference with the Department's function. The majority deferred to the Department as the agency charged with executing condemned prisoners, and presumed that the Department properly performed that function. It noted that the Department's own investigation showed that the "irregularities in Tafero's execution" were the result of using a synthetic, rather than a natural sponge, which apparently did not affect the functioning of the electrode. "Death by electrocution," the majority concluded, "is not cruel and unusual punishment, and one malfunction is not sufficient to justify a judicial inquiry into the Department of Corrections' competence."[255]

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251. 565 So. 2d 309 (Fla. 1990) (per curiam) (Ehrlich, C.J., Overton, McDonald, and Grimes, JJ., concurring; Shaw, J., dissented with an opinion in which Barkett and Kogan, JJ., concurred; Barkett, J., dissented with an opinion in which Kogan, J., concurred; Kogan, J., dissented with an opinion).

252. *Id.* at 311.

253. *Id.* at 310-11.

254. *Id.* at 311. One expert attributed the malfunctioning to the Department's use of "only a single 'homemade' leg electrode[,] . . . haphazardly constructed from an old Army boot and other spare parts." *Id.* at 315 (Kogan, J., dissenting).

255. *Id.* at 311 (citing Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947)). This conclusion was hotly disputed. Justice Barkett charged that the majority,

Buenoano decided a federal question, as is evident by the majority's use of eighth amendment phraseology, "cruel *and* unusual," and by its reliance upon federal precedent. In marked contrast, article I, section 17 uses the disjunctive form, "cruel *or* unusual." Arguably, the adopters of article I, section 17 intended to create a protection against barbaric, arbitrary, non-individualized, and disproportionate punishment that is qualitatively different from the eighth amendment protection. Otherwise, the adopters would have replicated federal phraseology in this section, as they had in many other article I sections.[256] However, *Buenoano* took no occasion to consider the distinction.

Buenoano's importance for state constitutional law is not lost, for Justice Kogan's dissenting opinion provides a glimpse of the contours of this right from the viewpoint of one justice. Believing that article I, section 17 requires "swift and sure punishment," he argued the court should remand for an evidentiary hearing to establish whether "*any reasonable possibility*" existed that the flames observed during Tafero's execution were the result of faulty electrodes.[257] If so, the trial court should stay future executions until the state overhauls the electric chair, for "any electrical malfunction that results in needless charring of human flesh or an unnecessarily slow death" violates state and federal protections.[258]

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by denying Buenoano a hearing, "departs not only from any semblance of due process but from any process at all . . . [, and adds] a bizarre twist to death penalty jurisprudence." *Id.* at 312 (Barkett, J., dissenting). Two other justices would have remanded for an evidentiary hearing. *Id.* at 311 (Shaw, J., dissenting); *id.* at 313 (Kogan, J., dissenting) (adding that the Department failed to take "any meaningful step to investigate or correct the possible malfunctioning of the electric chair").

256. *Compare* People v. Anderson, 6 Cal.3d 628, 640, 493 P.2d 880, 883, 100 Cal. Rptr. 152, 155, *cert. denied*, 406 U.S. 958 (1972) (concluding that the use of the disjunctive form in article I, section 6 of the Constitution of California—"nor shall cruel or unusual punishments be inflicted"—was purposeful, and that capital punishment violates the section) (en banc); People v. Superior Court, 31 Cal.3d 797, 808, 647 P.2d 76, 82, 183 Cal. Rptr. 800, 806 (1982) (en banc) (noting that a popular initiative effectively cancelled the holding of *Anderson*, and restored the death penalty " 'to the extent permitted by the federal Constitution' ") (citation and emphasis omitted).

257. *Buenoano*, 565 So. 2d at 315 (Kogan, J., dissenting) (emphasis in original).

258. *Id.* Several other death row inmates collaterally challenged the Department's competence to carry out the death penalty. Relying upon *Buenoano*, five members of the court affirmed the trial courts' summary dismissals. *See* Hamblen v. State, 565 So. 2d 320 (Fla. 1990); White v. State, 565 So. 2d 322 (Fla. 1990) (per curiam); Squires v. State, 565 So. 2d 318 (Fla. 1990) (per curiam). Those opinions report that the United States District Court, Middle District of Florida, held a hearing and found that there was insufficient evidence to sustain the constitutional claim against the De-

On another subject, there is minority support for the view that conviction under Florida's RICO statutes,[259] and the predicate obscenity laws,[260] produces the potential of "draconian," unconstitutionally excessive penalties. That argument appeared in a dissent to *Stall v. State*,[261] and expresses the concern that the state could impose upon a defendant convicted of showing, selling, distributing, or renting obscene materials, the same severe maximum penalties intended for organized criminals, drug smugglers, and contract murders (life imprisonment, heavy fines, and likely forfeiture of assets).[262]

18. Administrative Penalties

No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law. FLA. CONST. art. I, § 18.

No decisions construed this section during the survey period.

19. Costs

No person charged with crime shall be compelled to pay costs before a judgment of conviction has become final. FLA. CONST. art. I, § 19.

No decisions construed this section during the survey period.

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partment, *id.* at 320 (citation omitted), and that there existed no substantial probability of recurrence of the problems that accompanied Tafero's execution. *Hamblen*, 565 So. 2d at 321 (citation omitted). Ultimately, the Department carried out subsequent executions without recurrence of those problems.

259. Florida RICO (Racketeer Influenced and Corrupt Organization) Act, codified at FLA. STAT. §§ 895.01-.06 (1985).

260. FLA. STAT. § 847.011 (1985).

261. 570 So. 2d 257, 274 (Fla. 1990) (Kogan, J., dissenting; Barkett, J., concurring).

262. *Id.* at 527-28; *see also* Comment, *RICO's Forfeiture Provision: A First Amendment Restraint on Adult Bookstores*, 43 U. MIAMI L. REV. 419, 446-47 (1988) (concluding that RICO's forfeiture provision amounts to a prior restraint on the distribution of non-obscene materials, which are entitled to first amendment protection, and suggesting that the government's goal of eradicating organized crime is not sufficiently compelling to justify total forfeiture of all assets of an adult bookstore).

20. Treason

Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort, and no person shall be convicted of treason except on the testimony of two witnesses to the same overt act or on confession in open court. FLA. CONST. art. I, § 20.

No decisions construed this section during the survey period.

21. Access to Courts

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. FLA. CONST. art. I, § 21.

Many litigants during the 1980s challenged statutes that sought to limit product liability claims by imposing time bars on recovery. One type of statute, a statute of repose, cuts off a right of action after a specified time, such as the completion of work or delivery of goods. It not only bars an accrued action, but also prevents accrual where the final element essential to the accrual occurs beyond the period established by the statute.[263] In 1980, *Battilla v. Allis Chalmers Manufacturing Co.*[264] held that the twelve-year statute of repose, which required that product liability actions must be commenced "within twelve (12) years after the date of delivery of the completed product to its original purchaser,"[265] violated article I, section 21 as applied. The court receded from *Battilla* in *Pullum v. Cincinnati, Inc.*,[266] and held that the statute of repose did not violate article I, section 21. The court reasoned that manufacturers should not be held perpetually accountable

263. *See* University of Miami v. Bogorff, No. 74,797 slip op. at 3-4 (Fla. Jan. 18, 1991); Bauld v. J.A. Jones Constr. Co., 357 So. 2d 401, 402 (Fla. 1978); Carr v. Broward County, 505 So. 2d 568, 570 (Fla. 4th Dist. Ct. App. 1987), *aff'd*, 541 So. 2d 92 (Fla. 1989). Those cases also explain that the statute of repose operates differently from another time bar to recovery, the statute of limitation. The latter establishes a time limit within which an action must be commenced, bars enforcement of an accrued cause of action, and runs from the date the cause of action accrues.

264. 392 So. 2d 874 (Fla. 1980).

265. FLA. STAT. § 95.11(3) (1975).

266. 476 So. 2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986).

for injuries caused by their products, and that the legislature could reasonably decide that the risk of liability should not extend beyond a twelve-year period beginning with the date of a product's sale.[267]

In 1990, *Frazier v. Baker Material Handling Corp.*[268] decided the fate of product liability claims that accrued in the window between *Battilla* and *Pullum*. Frazier was injured by a product delivered before the court issued *Battilla*. His injury occurred after *Battilla*, yet within the twelve-year statute of repose declared unconstitutional by that decision. Only the four-year statute of limitation posed a time bar to his claim, and Frazier filed suit within that period. Nonetheless, the trial court entered summary judgment against him, reasoning that *Pullum* reinstated the twelve-year statute of repose, which operated to cut off his claim. The district court affirmed the trial court.[269]

The Supreme Court of Florida expressed the general rule: " '[A] decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its application unless declared by the opinion to have prospective effect only.' "[270] Because *Pullum* was silent on the issue of retroactivity, the rule applied to reinstate the statute of repose, making it binding on Frazier. However, Frazier convinced four justices that his case fell within a well-established exception to the general rule, which provides that "[a] claimant with a viable cause of action is entitled to rely on the existing law which provides that claimant access to the court."[271] Thus, a claimant who relies upon a then-prevailing judicial interpretation of the controlling statute cannot be penalized by a later decision that leaves the claimant without relief.[272]

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267. *Id.* at 659 (adopting Battilla v. Allis Chalmers Mfg Co., 392 So. 2d 874, 874-75 (Fla. 1980) (McDonald, J., dissenting)).

268. 559 So. 2d 1091 (Fla. 1990) (Barkett, J., author; Shaw, Grimes, and Kogan, JJ., concurring; McDonald, J., dissented in an opinion concurred in by Ehrlich, C.J., and Overton, J.).

269. Frazier v. Baker Material Handling Corp., 540 So. 2d 205 (Fla. 3d Dist. Ct. App. 1989).

270. *Frazier*, 559 So. 2d at 1092 (quoting Melendez v. Dreis and Krump Mfg. Co., 515 So. 2d 735, 736 (Fla. 1987)).

271. *Id.* at 1093 (citing FLA. CONST. art. I, § 21).

272. *Id.* at 1092 (citations omitted). In dissent, Justice McDonald argued that the exception relied upon by the majority did not apply. He wrote that Frazier had no reason to rely on *Battilla* at the time he filed his claim, because that decision had no bearing on his case. *Battilla* simply held the statute of repose unconstitutional *as applied*, that is, as applied to suits initiated against a manufacturer more than twelve years after the date of sale. *Id.* at 1093 n.1 (McDonald, J., dissenting; Ehrlich, C.J.,

Turning to the subject of child support enforcement, the justices in *State ex rel. Pittman v. Stanjeski*[273] rejected the finding of two lower courts that section 61.14(5), Florida Statutes (1987), denied delinquent obligors access to courts. The statute provided that unpaid support payments became a final judgment by operation of law after notice by the clerk of court to the obligor. However, it omitted from its text any provision that would allow the obligor to challenge the facts upon which the judgment was based. The court salvaged the statute by "reasonably construe[ing]" it to require a hearing *before* any such judgment became final, provided that the obligor timely responded to the clerk's notice of arrearage.[274]

Another topic of constitutional significance emerged from the state's exercise of its police power in 1984, when it eradicated a blight on Florida's valuable citrus industry known as citrus canker. The eradication program spawned a series of cases by citrus growers who sued in inverse condemnation to recover damages for property destroyed by the state. In the first of those cases to reach the court, a five-member majority held in 1988 that the eradication program was a valid exercise of the state's police power, and that owners were entitled to full and just compensation for destroyed "healthy, but suspect" citrus plants.[275]

Among the cases that followed were three suits consolidated for relief in *Department of Agriculture & Consumer Services v. Bonanno*.[276] In circuit court, the Department moved to dismiss the suits, arguing that the act,[277] which established procedures for citrus canker claims, deprived the court of jurisdiction. The act created an administrative hearing process as the " 'sole and exclusive remedy' "

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and Overton, J., concurring). He added that the two cases were also distinguishable on their facts—Battilla was injured beyond the twelve-year cut-off, whereas, Frazier was injured within that period. Thus, the statute did not deny Frazier access to courts by barring his claim altogether, but merely shortened the time allotted for bringing suit. *Id.* at 1094.

273. 562 So. 2d 673 (Fla. 1990). This case is discussed more fully under article I, section 9.

274. *Id.* at 678-79.

275. Department of Agriculture & Consumer Servs. v. Mid-Florida Growers, Inc., 521 So. 2d 101, 102, 105 (Fla.), *cert. denied*, 488 U.S. 870 (1988).

276. 568 So. 2d 24 (Fla. 1990) (per curiam). The court released two other decisions that emerged from challenges to the state's eradication program. Both involved liability and damages issues. Department of Agriculture & Consumer Servs. v. Polk, 568 So. 2d 35 (Fla. 1990), and Department of Agriculture & Consumer Servs. v. Mid-Florida Growers, Inc., 570 So. 2d 892 (Fla. 1990).

277. Ch. 89-91, 1989 Fla. Laws 143.

for owners who opted to accept a schedule of compensation. That schedule prescribed presumptive values for categories of destroyed citrus plants, and presumed that those values represented full and fair compensation. The circuit court declared the act unconstitutional, and denied the Department's motion. The Department then petitioned the supreme court for a writ of prohibition to restrain the circuit court from exercising jurisdiction.[278]

The owners responded by arguing, in part, that the act unconstitutionally deprived them of their right of access to courts under article I, section 21.[279] A four-justice majority disagreed, and prohibited the circuit court from proceeding further with the suits.

> [T]o the extent that the statute could be said to place a limitation upon access, there is no violation of article I, section 21. In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), this Court held that the legislature may abolish a common law right of access to the courts if it provides a reasonable alternative to protect the rights of the people to redress for injuries.[280]

Clearly, the legislature abolished a right of access enjoyed at common law. By itself that action would have been fatal to the act. However, the majority concluded that the act survived constitutional scrutiny because the legislature put in its place a "reasonable alternative" remedy, by assuring the owners the opportunity for review of the administrative decision by the First District Court of Appeal.[281]

Three justices dissented on this point, arguing that the legislature impermissibly interfered with the exercise of constitutionally conferred judicial power.[282] In particular, the Administrative Procedures Act[283]

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278. *Bonanno*, 568 So. 2d at 27.

279. That theory is grounded in the notion that the trial judge, not an administrative agency, is the trier of all legal and factual issues in an inverse condemnation suit, except those relating to damages. *See Mid-Florida Growers, Inc.*, 521 So. 2d at 104.

280. *Bonanno*, 568 So. 2d at 30.

281. *Id.* (Shaw, C.J., Overton, McDonald, and Grimes, JJ., concurring). The majority added that the act also provided salutary advantages to affected owners. It conferred some benefits not available in circuit court, permitted the payment of claims barred by the statute of limitations, and eliminated the obligation that claimants invalidate releases they signed to obtain partial compensation under the act. *Id.*

282. *Id.* at 35 (Ehrlich, J., concurring in part and dissenting in part; Barkett and Kogan, JJ., concurring).

283. FLA. STAT. § 120.68(10) (1987).

insulates the agency from effective judicial review. A court reviewing an agency's decision under the canker eradication program may not reweigh the evidence, but may only decide whether there exists on the record sufficient evidentiary support for the final decision.

Another of *Bonanno*'s constitutional contributions is addressed in the following section.

22. Trial by Jury

> *The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.* FLA. CONST. art. I, § 22.

The first of two cases to consider this section focused upon the meaning of the guarantee that the right to a jury trial shall be secure and inviolate. *Department of Agriculture & Consumer Services v. Bonanno*,[284] introduced in the preceding section, considered a claim by nursery and grove owners that the canker eradication program deprived them of their right to litigate their inverse condemnation suits before a court and jury, and impermissibly relegated them to the administrative process. The majority rejected their claim.

Relying upon principles familiar to this section, the court determined that the right to jury trial is assured in those cases where the right was recognized " 'at the time Florida's first constitution became effective in 1845.' "[285] Because there then existed no right to jury trial in condemnation proceedings,[286] and the right to have a jury determine damages is a creature of modern statute, the legislature is free to change or take away that right. Thus, the citrus owners have no constitutionally protected right to prosecute inverse condemnation suits before a jury.

The second of the two cases focused upon this section's numeric requirement for jury size. By law, twelve persons are required to try capital cases, and six persons are required to try all other criminal

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284. 568 So. 2d 24 (Fla. 1990) (per curiam).

285. *Id.* at 28 (quoting *In re* Forfeiture of 1978 Chevrolet Van, 493 So. 2d 433, 435 (Fla. 1986)). Actually, Florida adopted its first constitution in 1838, although it did not become effective until Florida gained admission into the Union in 1845. Dudley v. Harrison, McCready & Co., 127 Fla. 687, 698, 173 So. 820, 825 (1937).

286. *Bonanno*, 568 So. 2d at 28 (citing Carter v. State Rd. Dep't, 189 So. 2d 793, 799 (Fla. 1966)).

cases.[287] In *State v. Griffith*,[288] the state waived the death penalty before jury selection in exchange for an agreement with Griffith's counsel to accept a six-person rather than a twelve-person jury. Describing the right to a jury trial as "indisputably one of the most basic rights guaranteed by our constitution,"[289] the court determined that the state's waiver of the death penalty in a capital case does not automatically entitle a defendant to trial by a six-person jury.[290] However, where the record indicates that defense counsel discussed the waiver of the twelve-person jury with the prosecutor and trial court, counsel's choice to proceed with a six-person jury will be viewed as tactical. Under those circumstances, there is no need that the record contain the defendant's personal waiver for the waiver to be effective.[291]

23. Right of Privacy

> *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.* FLA. CONST. art. I, § 23.

The right of privacy, or as it is more precisely phrased in the state constitutional context, "the right to be let alone," expresses the power of natural persons to define for themselves the boundary of their per-

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287. FLA. STAT. § 913.10 (1985); FLA. R. CRIM. P. 3.270.

288. 561 So. 2d 528 (Fla. 1990) (McDonald, J., author. Ehrlich, C.J., Shaw, Barkett, Grimes, and Kogan, JJ, concurring. Overton, J., concurred in result only).

289. *Id.* at 530.

290. The state claimed that its waiver of the death penalty in a first-degree murder case precluded a defendant from demanding a trial by twelve persons because death was no longer a possible punishment. One justice accepted this argument. *Id.* at 531 (Overton, J., concurring in result only). The other members of the court rejected the claim, agreeing instead that the legislature defines the crime, classifies the crime, sets the punishment, and prescribes the number of jurors required for trial. A prosecutor has no authority to unilaterally alter those parameters. *Id.* at 529.

291. *Id.* at 530; *see also,* State v. Enriquez, 572 So. 2d 515 (Fla. 1990) (no showing that defendant's waiver, as evinced by stipulation between defense counsel and prosecutor to trial by six-person jury, was invalid); State v. Rodriguez-Acosta, 561 So. 2d 531 (Fla. 1990); State v. Jones, 561 So. 2d 52 (Fla. 1990); State v. Mustelier, 561 So. 2d 533 (Fla. 1990). *Cf.* State v. Joseph, 561 So. 2d 534 (Fla. 1990) (unwilling to imply waiver from a silent record, the court approved the district court's reversal of defendant's murder conviction).

sonal lives, and imposes a correlative limit upon the state that prevents its encroachment into that boundary.[292] To assure that this "independent, freestanding, [and] fundamental" right[293] will remain "as strong as possible,"[294] the court measures state intrusions under the most exacting standard of review, the compelling state interest test.[295] Once the protections of the privacy amendment are implicated, the state may justify its interference with that right only by showing that interference was necessary to advance a compelling state interest, and that it accomplished the interference by the least intrusive means.

The "right to be let alone" is inherently subjective, and, in its absolute sense, respects a universe of personal choices. That partially accounts for the diversity of definitions found in much of the commentary on the subject. Grouping the court's privacy decisions into broad categories representing spheres of personal interest promotes our understanding of the concept, and suggests how an asserted interest will fare under article I, section 23 analysis by facilitating comparison with factually similar cases.

To accomplish those aims, the decade survey organized the court's article I, section 23 cases into three general categories of privacy interests:

> disclosural or informational privacy (how, when, and to what extent a person allows private information to be communicated to others); traditional search and seizure contexts (the privacy protected by article I, section 23 that is similarly protected by the

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292. The distinction between "right of privacy" and "right to be let alone" has significance beyond the obvious turn of the phrase. Stall v. State, 570 So. 2d 257, 264 (Fla. 1990) (Kogan, J., dissenting). For one, it respects the framers' intent to set apart Florida's express constitutional guarantee from the right to privacy implied in the federal constitution. *See* Dore, *Of Rights Lost and Gained*, 6 FLA. ST. U.L REV. 609, 652-53 n.268 (1978). Moreover, the "right to be let alone" borrows from an historical concept that reveres privacy as the most valued fundamental right. *See* Hawkins, *supra* note 1, at 827 n.674. Finally, it bears note that the text of a constitutional section, and not its title, determines its construction. FLA. CONST. art. X, § 12(h). For that reason, courts must look to the text itself, not the caption, to ascertain its meaning.

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

294. *Id.* at 544.

295. The court has uniformly applied this standard in civil cases. *See, e.g., In re* T.W., 551 So. 2d 1186 (Fla. 1989); Florida Bd. of Bar Examiners *Re:* Applicant, 443 So. 2d 71 (Fla. 1983); administrative cases, *see, e.g., Winfield*, 477 So. 2d at 548; and criminal contexts, *see, e.g., State v. Wells*, 539 So. 2d 464 (Fla.), *aff'd*, 110 S. Ct. 1632 (1989).

> warrant and reasonableness requirements of article I, section 12 and the fourth amendment); and decisional autonomy or self-determination (control over one's character, identity, and associations).[296]

This survey adheres to that model. Twice in 1990 the court construed article I, section 23. The two decisions, *In re Guardianship of Estelle M. Browning*[297] and *Stall v. State*,[298] addressed claims that the state unjustifiedly interfered with the freedom of personal choice assured under that section.

Personal dignity, individual autonomy, and the right to make for oneself decisions affecting matters of purely personal destiny lie at the heart of the right to be let alone, or as it is also described in this context, the right of self-determination. Persons make decisions of this sort daily, seldom with interference. Yet, some decisions, such as the difficult choice made by persons to refuse or discontinue life-sustaining medical intervention,[299] often run head-on into a "regulatory purgatory"[300] that effectively circumscribes personal choice. *Browning* poignantly illustrates the unfortunate consequences of misguided

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296. Hawkins, *supra* note 1, at 831. Functionally, these categories aid the definitional understanding of privacy by focusing on the varied qualities of individual life that persons seek to reserve for themselves, apart from outside scrutiny. *See* Stall v. State, 570 So. 2d 257, 264 (Fla. 1990) (Kogan, J., dissenting). Privacy interests derive from constitutional sources other than article I, section 23, including the search and seizure, substantive due process, and liberty clauses. *See, e.g.*, State v. Johnson, 561 So. 2d 1139, 1143 (Fla. 1990) (unjustified stops of motorists with similarity to drug courier profile intrude upon privacy rights protected under article I, section 12 of the Florida Constitution); Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533, 536 (Fla. 1987) (privacy interests are inherent in the concept of ordered liberty). *Compare* Roe v. Wade, 410 U.S. 113, 153 (1973) (the right to privacy is founded in the concept of personal liberty of the fourteenth amendment).

297. 568 So. 2d 4 (Fla. 1990) (Barkett, J., author; Shaw, C.J., Ehrlich, Grimes, and Kogan, JJ., concurring; McDonald, J., concurred with an opinion; Overton, J., concurred in part and dissented in part with an opinion).

298. 570 So. 2d 257 (Fla. 1990) (McDonald, J., author; Shaw, C.J., Overton, Ehrlich, and Grimes, JJ., concurring; Barkett, J. and Kogan, J., each dissented with an opinion in which the other concurred).

299. Often referred to as "death with dignity" or the "right to die," the term right of choice more precisely describes the particular decisions made under the rubric self-determination, whether the decision is either to choose or to refuse a particular course.

300. Tallahassee Democrat, Oct. 11, 1990, at 3B, col. 2.

regulation.[301]

Like many others, Mrs. Browning took care to execute a living will, an instrument that is essentially a directive to physicians and family expressing preferences about the medical course to be followed in the event she were to face incapacity. Her declaration provided:

> If at any time I should have a terminal condition and my attending physician has determined that there can be no recovery from such condition and my death is imminent, where the application of life-sustaining procedures would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.[302]

Mrs. Browning expressly added that she did not desire to be fed nutrition or hydration, either by gastric tube or intravenously.[303]

The year following her declaration, Mrs. Browning suffered a massive stroke that caused major, permanent, and irreversible damage to her brain, and left her totally unresponsive and unable to communicate. On the day of her accident, Mrs. Browning was hospitalized, and a gastrostomy tube was inserted into her stomach. Through it, she received food and liquid. The same month, she was transferred to a nursing home, where a nasogastric tube was inserted after her gastrostomy tube became dislodged and she encountered numerous unpleasant,

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301. Many reported decisions, *Browning* among them, confirm that patients often predecease the resolution of legal proceedings initiated on their behalf. *See Browning*, 568 So. 2d at 16 n.17.

302. *In re* Guardianship of Browning, 543 So. 2d 258, 275 (Fla. 2d Dist. Ct. App. 1989). That provision substantially comports with Florida's Life-Prolonging Procedure Act, Ch. 84-58, 1984 Fla. Laws 136 (codified at FLA. STAT. § 765.01.15 (Supp. 1984)).

303. The removal of nutrition or hydration was foreign to the Life-Prolonging Procedure Act. Although any competent adult could declare a written intent to withhold or withdraw "life-prolonging procedures" under specified circumstances, the act excluded the "provision of sustenance" (food and water) from its definition. FLA. STAT. § 765.03(3) (Supp. 1984). For that reason, the issue before the court did not involve the import of remedial protections afforded under the act, but Mrs. Browning's right of privacy under the state constitution. Meanwhile, the legislature amended the act to eliminate the exclusion, now including sustenance within the scope of "life-prolonging procedures." Ch. 90-223, § 1, 1990 Fla. Laws 1644.

chronic maladies.[304]

Several months after Mrs. Browning's relocation to the nursing home, the circuit court appointed a guardian. Some two years after the debilitating stroke, the guardian petitioned the circuit court to order that artificial feeding be discontinued. At a hearing on the guardian's petition, medical evidence showed that Mrs. Browning was non-comatose, and lived in a persistent vegetative state.[305] The circuit court found that Mrs. Browning's death was not imminent,[306] a prerequisite to the withdrawal of medical support under Florida's Life-Prolonging Procedure Act,[307] and denied the petition.

The district court affirmed the circuit court, finding, however, that even though Mrs. Browning had no remedy under the act, she did have a remedy under article I, section 23.[308] It declared that "a remedy must exist to fulfill Mrs. Browning's constitutional right of privacy,"[309] and in particular, her right to refuse medical treatment. The district court panel took the initiative, and proposed a thoughtfully crafted procedural scheme to give effect to that right.[310] It then certified the fol-

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304. *Browning*, 568 So. 2d at 8 n.3; *Browning*, 543 So. 2d at 261-62.

305. *Browning*, 568 So. 2d at 9; *Browning*, 543 So. 2d at 261.

306. That finding was premised upon medical opinion testimony that Mrs. Browning could continue to live for an "indeterminate" time with the feeding tube left in place. *Browning*, 568 So. 2d at 9. To the mind of the district court panel, and at least one commentator, this distinction, like others in the act, warrants rethinking. *See Browning*, 543 So. 2d at 265 (defining imminent death under conditions where medical treatment is continued, effectively renders the statute "useless"); Morgan, *Florida Law and Feeding Tubes—The Right of Removal*, 17 STETSON, L. REV. 109 (1987) (such a construction effectively disenfranchises persons whose condition, though not terminal, is irreversible). As will be seen, the state supreme court rejected the trial court's method of determining "imminence" for constitutional purposes. *See infra* at note 338.

307. Ch. 84-58, 1984 Fla. Laws 136.

308. *Browning*, 543 So. 2d at 261. The district court observed that the case was presented to the trial court almost exclusively under the Florida Statutes, and that both the guardian's attorney and the trial court were understandably confused about the distinction between the procedural requirements for a statutory, versus a constitutional claim. *Id.* at 262.

309. *Id.* at 266.

310. The district court outlined procedures that took into account the selection of the surrogate (either a guardian or the circuit court in exceptional cases), *id.* at 270; the need for an informal forum, preferably without judicial review, *id.* at 270-71; evidence essential to the decision to forego treatment, including physicians' certificates to establish the patient's current medical condition, evidence that the patient will not regain competency, evidence that the patient, if competent, would have selected the course chosen by the surrogate, and proof that the state's interests are not paramount,

lowing question to the state supreme court as having great public importance:

> Whether the guardian of a patient who is incompetent but not in a permanent vegetative state and who suffers from an incurable, but not terminal condition, may exercise the patient's right of self-determination to forego sustenance provided artificially by a nasogastric tube?[311]

The court answered affirmatively with qualification. In this, only the second self-determination case to expressly construe article I, section 23,[312] the justices began with a broadly-stated premise—"everyone has a fundamental right to the sole control of his or her person."[313] An "integral component" of self-determination is the inherent right to make personal medical treatment decisions, which necessarily encompasses "*all* medical choices."[314] Competent persons have the right to refuse medical intervention,[315] regardless of the denomination of the procedure at issue,[316] and regardless of the subjectivity of the choice.

Indeed, mainstream judicial thought has often honored the subjective medical decisions of patients. For instance, courts have enforced the wishes of competent adults to forego medical intervention when

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id. at 271-73; the requirement that the surrogate support a decision to forego treatment by clear and convincing evidence, *id.* at 273; and the scope of judicial review, when required, *id.* at 273-74.

311. *Id.* at 274.

312. Only *In re* T.W., 551 So. 2d 1186 (Fla. 1989), clearly decided a self-determination claim under article I, section 23. That decision struck down Florida's parental consent law because it impermissibly interfered with the right of an unmarried, fifteen-year-old pregnant female to decide for herself whether to terminate her pregnancy during the first trimester. It bears repeating, however, that the court's privacy cases that construed common law and the federal constitution may strongly suggest principles incorporated into article I, section 23.

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

314. *Id.* (emphasis added).

315. *Id.* (citing Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989); Cruzan *ex rel.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2852 (1990)). *Cf. id.* at 2851-52 (regarding the right of a competent person to refuse unwanted medical treatment, including lifesaving hydration and nutrition, as a liberty interest that derives from the fourteenth amendment).

316. *Browning*, 568 So. 2d at 11 n.6 (regarding as legally indistinguishable, medical procedure denominated as "major or minor, ordinary or extraordinary, life-prolonging, life-maintaining, life-sustaining, or otherwise").

premised on tenets of religious faith,[317] on the desire to avoid a diminished quality of life,[318] and on the refusal to endure prolonged and insufferable pain.[319] Notably, the court has yet to insist that a claimant first demonstrate an objective manifestation of reasonableness as a precondition to the threshold finding that personal medical choice deserves protection.[320]

The inviolability of the personal right to decide a medical course does not turn on whether the person is competent or incompetent. The

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317. *See, e.g.*, Public Health Trust v. Wons, 541 So. 2d 96 (Fla. 1989) (competent adult, who is also a practicing Jehovah's Witness, has a lawful right to refuse a blood transfusion, without which she may well die).

318. *See, e.g.*, Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1142, 225 Cal. Rptr. 297, 304 (Ct. App. 1986) (patient in a public hospital, whose life has been diminished to the point of "hopelessness, uselessness, unenjoyability and frustration," has the right to forego life-support); Drabick v. Drabick, 200 Cal. App 3d 185, 196, 245 Cal. Rptr. 840, 846 (Ct. App. 1988) ("Whether the benefits of treatment outweigh its detriments is a decision that engages on personal and medical values, including ideas about the quality of life. It is not a decision that courts are constituted or especially well-qualified to make."); Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 434, 497 N.E.2d 626, 635 (1986) (recognizing a right "to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity") (citation omitted); *In re* Gardner, 534 A.2d 947, 955 (Me. 1987) ("Gardner has himself done the balancing of his own values and their bearing on the question of whether to be kept alive in a persistent vegetative state by artificial means. That personal weighing of values is the essence of self-determination . . . . [W]e judges do not ourselves engage in an independent assessment of the value of his life."); *In re* Torres, 357 N.W.2d 332, 340 (Minn. 1984) (a terminally ill patient might choose to avoid " '[t]he ultimate horror . . . of being maintained in limbo, in a sterile room, by machines controlled by strangers' ") (citation omitted); *In re* Quinlan, 70 N.J. 10, 26, 355 A.2d 647, 663 ("We have no hesitancy in deciding . . . that no external compelling interest of the State could compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life"), *cert. denied*, 429 U.S. 922 (1976). *Cf. Cruzan*, 110 S. Ct. at 2853 (states may decline to make judgments about a particular person's "quality" of life, and simply assert "an unqualified interest in the preservation of human life").

319. *See, e.g.*, Satz v. Perlmutter, 362 So. 2d 160, 161 (Fla. 4th Dist. Ct. App. 1978) (terminally ill adult, who testified at bedside hearing to being "miserable" with use of a respirator, has a right to remove it, even though death would follow within one hour), *approved*, 379 So. 2d 359 (Fla. 1980); *In re* Guardianship of Grant, 109 Wash. 2d 545, 555, 747 P.2d 445, 450-51 (1987) (en banc) (the amount of pain endured by a terminally ill, noncomatose person is a significant factor, although not the only factor, to be considered in deciding whether to withhold life sustaining treatment).

320. In contrast, the court has imposed an objectivity requirement in disclosural privacy cases, and cases decided in traditional search and seizure contexts.

justices agreed that there was no constitutional basis for distinguishing the protections inuring to competent persons, and those whose non-cognitive condition prevented the personal exercise of their choice.[321]

Having decided that competent and incompetent persons alike enjoy a constitutional right to make decisions involving their personal medical care, the justices addressed three remaining questions—who may exercise the right for an incompetent person, under what circumstances may the state regulate this area, and what procedures give force to the right. Concerning the first question, precedent established that a close family member, or a court-appointed guardian, may exercise the right for an irreversibly comatose patient, whose essentially vegetative existence was sustained by a mechanical respirator.[322] *Browning* extended the class of persons capable of exercising the patient's right to include proxies,[323] and surrogates, such as close family members and friends.[324] The role of those decision makers is a narrow one:

> We emphasize and caution that when the patient has left instructions regarding life-sustaining treatment, the surrogate must make the medical choice that the patient, if competent, would have made, and not one that the surrogate might make for himself or

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321. *Browning*, 568 So. 2d at 12 (citing John F. Kennedy Memorial Hosp., Inc. v. Bludworth, 452 So. 2d 921, 924 (Fla. 1984)).

322. *Id.* at 13 (citing *Bludworth*, 452 So. 2d at 926).

323. Persons to whom the patient delegated full responsibility for future medical decision making. *Id.* at 15.

324. *Id.* (footnote omitted). *Browning* is a logical and warranted extension of *Bludworth*. It makes little sense to limit the class of surrogate decision makers in this context to court-appointed guardians and "close" family members. Friends, for instance, may be well-suited to exercise the patient's charted medical course. Moreover, the patient may prefer to designate a friend, rather than a family member, or there may be no family that could be said to be "close," whether by consanguinity or familiarity. Indeed, delegations of friends by patients are commonplace. *Cruzan*, 110 S. Ct. at 2857 (O'Connor, J., concurring).

The durable family power of attorney is another device used in this setting. The legislature authorizes a principle to create a durable family power of attorney by designating his or her "spouse, brother, sister, niece, nephew, or a person related to the principal by lineal consanguinity" FLA. STAT. § 709.08(1) (Supp. 1990). *But see* Waters, *Florida Durable Power of Attorney Law: The Need For Reform*, 17 FLA. ST. U.L. REV. 519 (1990). Mr. Waters argues that the durable power as presently enacted "affords only a limited and frequently unhelpful alternative to guardianship," *id* at 521, by illogically restricting the class of attorneys-in-fact to a narrow group of relatives, and failing to provide procedural safeguards for exercise of the power. *Id.* at 546.

herself, or that the surrogate might think is in the patient's best interests.[325]

Regarding the second question, the state must first show a compelling state interest before it regulates the exercise of personal medical care choices protected under article I, section 23. Often repeated as the state's interests in cases involving a person's refusal of unwanted medical treatment are a non-exclusive list of factors that include preserving life, protecting innocent third parties, preventing suicide, and helping to maintain the ethical integrity of the medical profession.[326]

Browning makes a significant contribution to state constitutional doctrine by recognizing that among the state's interests is its overarching responsibility to safeguard the inalienable rights of its citizens. The court wrote with great clarity that "[t]he state has a *duty* to assure that a person's wishes regarding medical treatment are respected."[327] Continuing, it said that: "obligation serves to protect the rights of the individual from intrusion by the state unless the state has a compelling interest great enough to override this constitutional right."[328] On balance, the state's interests failed to outweigh Mrs. Browning's right to self-determine her medical course.[329] Moreover, there is no state inter-

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325. *Browning*, 568 So. 2d at 13. The opinion does not suggest the parameters of the constitutional right of privacy when the patient left no instructions regarding future medical care.

326. Courts have recognized other state interests in this context. *See Browning*, 568 So. 2d at 14 n.13 (protecting incompetents from erroneous decisions, avoiding unwanted medical care, and assuring that the person's wishes are faithfully executed); Public Health Trust v. Wons, 541 So. 2d 96, 98 (Fla. 1989) (holding that the state's interest in maintaining a home with two parents for two minor children is insufficient to override one parent's choice to forego lifesaving blood transfusion on religious and privacy grounds); *Cruzan*, 110 S. Ct. at 2853 (states are entitled to guard against potential abuse, and to establish procedures that guarantee accurate fact-finding).

327. *Browning*, 568 So. 2d at 13 (emphasis added). The notion that the state has a duty to secure the inalienable rights of all persons was a truth self-evident to the signers on the nation's Declaration of Independence. The court noted Justice Stevens's recent observation of the principle in the context of the federal constitution: " 'Our Constitution is born of the proposition that all legitimate governments must secure the equal right of every person to 'Life, Liberty, and the pursuit of Happiness.' " *Id.* at 13 n.12 (quoting *Cruzan*, 110 S. Ct. at 2878-79 (Stevens, J., dissenting) (footnote omitted) (quoting Declaration of Independence). *Browning* makes a novel addition to the court's constitutional jurisprudence by declaring that the Florida Constitution embraces those same ideals.

328. *Browning*, 568 So. 2d at 13-14.

329. *Id.* at 14. Because the state failed to demonstrate a compelling state interest

est that overrides the interest of the state in protecting its people.

Finally, the court addressed the procedures designed to protect the patient's chosen medical course. The court declared that the decision maker need not obtain prior judicial approval to carry out the wishes of the patient, *provided* the patient specifically expressed those wishes orally or in writing in the event of later incapacity.[330] If a patient delegates decision making power to a proxy, the designation must be in writing. Because the proxy by nature has full decision making responsibility, the patient need not express any instructions. However, when a patient provides instructions, the patient need not designate a decision maker. In that event, a close family member or friend may carry out the patient's wishes, and a designation, if made, may be oral or written.[331]

Browning charges the decision maker with two responsibilities. First, the decision maker must take "great care" in exercising a patient's medical choice.[332] Second, the decision maker must support a decision with clear and convincing evidence.[333] If the particular decision is to forego medical treatment of an incompetent patient, the decision maker must satisfy three conditions by clear and convincing evidence:

> 1. . . . that the patient executed any document knowingly, willingly, and without undue influence, and that the evidence of the patient's oral declarations is reliable;
> 2. . . . that the patient does not have a reasonable probability of recovering competency so that the right could be exercised directly by the patient; and

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that would justify its regulation of a person's decision to forego life-sustaining medical intervention, there was no need to consider whether the means to carry out the state's interest was "narrowly tailored in the least intrusive manner possible." *Id.*

330. *Id.* at 15. This was not the first time the court opted for a nonjudicial procedure that facilitated an individual's choice. *See* John F. Kennedy Hosp., Inc. v. Bludworth, 452 So. 2d 921, 925 (Fla. 1984) (rejecting the need to obtain prior court approval as "too burdensome" under the circumstances).

331. *Browning*, 568 So. 2d at 15.

332. *Id.* The requirement of "great care" does not insist upon bright lines. The case sheds no light on what facts might satisfy the requirement, and its true meaning remains to be charted by future cases. Its usage, however, suggests that it is a standard entirely independent of the second requirement imposed upon the decision maker.

333. *Id. Accord Cruzan*, 110 S. Ct. at 2852 (holding that the United States Constitution does not forbid a state from requiring clear and convincing evidence of an incompetent's wishes to withdraw treatment).

> 3. . . . that any limitations or conditions expressed either orally or in the written declaration have been carefully considered and satisfied.[334]

The third condition does not apply to proxies, nor does the provision for oral declarations contained in the first condition.[335]

Trial courts are available to proxies or surrogates who seek a declaration of their powers, and to interested parties who challenge the decision of a proxy or surrogate. If questioned or challenged in court, a written declaration or designation of proxy, in the absence of contrary evidence of intent, establishes a rebuttable presumption that constitutes clear and convincing evidence of the patient's wishes. The decision maker may rely upon physicians' certificates to establish a rebuttable presumption that the medical condition described in the declaration has been satisfied.[336] Oral statements by the patient to forego treatment, if made while competent, are admissible on the issue of intent, but standing alone, are not presumptively clear and convincing.[337]

Turning to the record facts, the court found that the conditions Mrs. Browning established in her declaration were satisfied. There was no question concerning the validity of the declaration, or that she suffered from a terminal condition. Only the question of imminence remained to be decided. Medical evidence established that death would occur within four-to-nine days were the nasogastric tube removed. Thus, there was clear and convincing evidence on the record that satisfied the condition of imminence, and the surrogate could confidently instruct Mrs. Browning's health care providers to discontinue

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334. *Browning*, 568 So. 2d at 15.

335. *Id.* at 15-16.

336. The decision maker "must obtain, and may rely upon" certificates (affidavits, sworn statements, or depositions) from at least three physicians, including the primary treating physician and two others who are specialists. *Id.* at 16 (adhering to *Bludworth*, 452 So. 2d at 926).

337. *Browning*, 568 So. 2d at 16. Justice Overton's objection to the majority opinion was limited to its authorization of oral statements as proof of the patient's intent. He argued that judicial involvement was "appropriate" to assure the validity of the statements, and to avoid conflicts of interest between patient and surrogate, for instance, when the surrogate stands to financially benefit from the premature termination of the patient's life support. *Id.* at 18 (Overton, J., concurring in part, and dissenting in part.). The majority addressed these concerns by stating: "We cannot ignore the possibility that a surrogate might act contrary to the wishes of the patient. Yet, we are loath to impose a cumbersome legal proceeding at such a delicate time in those many cases where the patient neither needs nor desires additional protection." *Id.* at 15.

feeding.[338]

With unmistakable clarity, *Browning* advances the core concept that article I, section 23 makes inviolable certain personal freedoms. The case holds that persons have a constitutionally protected right to make all personal medical decisions, without prior judicial approval, and that they may freely delegate to others the power to make those decisions on their behalf in the event of incapacity.[339] If a person loses competence after making a declaration that charts a future medical course, the decision maker may exercise the medical choice that the patient would have wanted, provided that the patient's intent is supported by clear and convincing evidence. Several features in the opinion underscore the significance of that holding including: the unanimity of the justices on the turning principles of the opinion; the repeated rejection of factors traditionally thought to justify state intervention into this area; the recognition of a constitutional right not asserted by a claimant, and previously undefined by the court's case law; and the seldom-seen crafting of rules to safeguard the exercise of the constitutional right.

Browning's importance extends beyond the four corners of the opinion, for it signals that the Florida Constitution's right of privacy may eclipse the privacy protections of the United States Constitution in the area of self-determination. Only months before *Browning*, the United States Supreme Court decided *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*,[340] and acknowledged for the first time that a person's choice to discontinue life-sustaining medical treatment is a liberty interest protected by the fourteenth amendment. The justices stood noticeably silent on the question logically presented by the case, whether the choice deserved protection under the implied federal right to privacy. To some, it matters not whether the right of self-determination derives from liberty, privacy, or some other fundamental guarantee.[341] Prudence cautions, however, that the textual basis of an

338. *Id.* at 17. A declaration that instructs the decision maker to remove life-support in the event of "imminent" death, will be satisfied constitutionally by looking to the length of time a patient will survive after removal of life-support, not to the length of time the patient will survive if life-support measures are introduced, or maintained.

339. *Browning*, 568 So. 2d at 17.

340. *Id.*

341. Indeed, *Browning* acknowledges that "privacy" encompasses a concept of freedom that has been interchangeably used with the commonly understood notion of "liberty," both of which imply a fundamental right of self-determination. *Browning*,

asserted right cannot be lightly considered.[342] *Cruzan*'s silence about whether federal privacy protects the right to make personal medical decisions leaves federal constitutional privacy law unsettled, and raises the possibility that the Court no longer views privacy as a fundamental right.[343] Alternatively, the decision may signal that the Court has no desire to nationalize privacy law in this context, and for the moment leaves the states free to fashion federal privacy protections.

When read together, *In re T.W.*[344] and *Browning* in one year's time seemingly demonstrate a commitment of the court to hold that the exercise of personal choice within the realm of self-determination ought to remain largely unimpeded by state regulation. The release of *Stall* one month after *Browning*, however, cast into doubt the court's true resolve to vigorously defend expressions of personal freedom classified under that rubric. Review of *Stall* follows.

The state charged Stall and others with violating Florida's RICO act,[345] and the predicate offenses under the obscenity statute,[346] for allegedly showing, selling, distributing, or renting obscene material. The trial court dismissed the information, finding in part that the obscenity statute violated article I, section 23. On appeal to the district court, Stall maintained that he had standing to vicariously assert the privacy rights of his customers. Relying upon *Stanley v. Georgia*,[347] which declared that the first and fourteenth amendments prohibited states from

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568 So. 2d at 9-10; *see also Cruzan*, 110 S. Ct. at 2856 (O'Connor, J., concurring) (the notion of liberty is "inextricably entwined with our idea of physical freedom and self-determination").

342. Pegging an asserted interest to a particular constitutional text offers a degree of analytical certainty. For one, the textual basis of a right may indicate its relative strength. Some sections afford a greater standard of protection than other sections. *Compare* FLA. CONST. art. I, § 23 (measuring state infringement of the express right of privacy according to the compelling state interest test) with FLA. CONST. art. I, § 12 (measuring state infringement of privacy right by standards of reasonableness and legitimacy). For another, rights expressly conferred, rather than implied, provide the clearest evidence of their existence and importance. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 790 (1986) (White, J., dissenting).

343. Allen, *Court Disables Disputed Legacy of Privacy Right, Supreme Court Review*, NAT'L L.J., Aug. 13, 1990, at 8 (criticizing *Cruzan* for its failure to endorse the privacy analyses it acknowledged).

344. 551 So. 2d 1186 (Fla. 1989).

345. Florida RICO (Racketeer Influenced and Corrupt Organization) Act, FLA. STAT. §§ 895.01-.06 (1985).

346. FLA. STAT. §§ 847.011 (1985 & Supp. 1986).

347. 394 U.S. 557 (1969).

proscribing the mere possession of obscene material,[348] Stall argued that the right to possess would be meaningless unless sellers and distributors of obscene material were similarly able to seek protection from governmental intrusion.

Citing two federal decisions, *Griswold v. Connecticut*[349] and *Eisenstadt v. Baird*,[350] the district court panel expressly found that Stall was entitled to assert the privacy right of his customers to possess obscene material.[351] It reasoned that Stall's customers had no effective means of protecting their right of possession in a prosecution for distribution, unless Stall had standing to raise the claim on their behalf.

On review, a majority of five justices found the two federal cases easily distinguishable. *Griswold* rested on different facts. The State of Connecticut prosecuted as accessories the executive director of the state planned parenthood league, and a licensed physician because they prescribed contraceptives to married persons in violation of a statute that forbade the use of contraceptives. Ultimately, the *Griswold* defendants were allowed to champion the fundamental right of marital privacy held by the patients with whom they had a professional relationship. Otherwise, their patients' right would have had no voice against the infringement occasioned by Connecticut's contraceptive ban. The majority in *Stall* relied upon *Paris Adult Theater I v. Slaton*,[352] where the United States Supreme Court had disapproved the

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348. In *Stanley*, state and federal officers gained entry into Stanley's home upon the strength of a search warrant, which entitled them to seize illegal bookmaking equipment, records, and materials. While looking through a desk drawer in an upstairs bedroom, they discovered three eight-millimeter reels of film. After viewing the films on a projector, the officers determined that the films were obscene and seized them. The state prosecuted Stanley under a Georgia obscenity law, which among other things, proscribed the "possession . . . of obscene matter," *id.* at 558 n.1, and obtained a conviction. The Court overturned that conviction with its familiar holding:

> [T]he First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime . . . . [T]he States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.

Id. at 568 (footnote omitted).

349. 381 U.S. 479 (1965).

350. 405 U.S. 438 (1972).

351. State v. Long, 544 So. 2d 219, 221-22 (Fla. 2d Dist. Ct. App. 1989), *approved sub nom.* Stall v. State, 570 So. 2d 257 (Fla. 1990). Ultimately, the district court held that article I, section 23 did not shield Stall from criminal prosecution under the obscenity statute, *id.* at 222, and that the statute did not impermissibly interfere with the constitutional right of privacy. *Id.* at 223.

352. 413 U.S. 49 (1973).

analogy by saying that " 'it is unavailing to compare a theater, open to the public for a fee, with the private home of Stanley v. Georgia, and the marital bedroom of Griswold v. Connecticut.' "[353]

Eisenstadt was also unavailing. There, the defendant who distributed vaginal foam to an unmarried adult woman in violation of Massachusetts law was entitled to assert the rights of unmarried persons who were denied access to contraceptives under that law. The majority distinguished *Eisenstadt* upon the stated basis that it clearly was premised on the statute's unequal treatment of married and unmarried persons in violation of the fourteenth amendment's Equal Protection Clause. The two cases were easily contrasted:

> There is no such distinction between adults who may have access to obscene materials. Moreover, private users and commercial sellers are separate and distinct classes and may be treated differently. *Eisenstadt* provides a vehicle, as do other cases, to raise the constitutionality of a statute by holding that persons or entities in different positions have the same rights and must be treated the same. It certainly does not sustain the rationale that, because one has a right to view obscene material in one's home, statutes forbidding the sale and commercial distribution of such material are invalid.[354]

Stall's *Stanley* argument was equally unpersuasive to the majority because the United States Supreme Court has consistently limited *Stanley* to its facts. In particular, *United States v. 12 200-Foot Reels of Super 8mm. Film*[355] directly stated: " '[T]he protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others.' "[356]

Having distinguished *Griswold* and *Eisenstadt*, and limited *Stanley* to its facts, the majority implicitly rejected the district court's find-

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353. *Stall*, 570 So. 2d at 261 (quoting *Paris Adult Theater I*, 413 U.S. at 65).

354. *Stall*, 570 So. 2d at 262-63. A fiery dissent charged that the majority grossly misrepresented federal law by concluding that *Eisenstadt* is simply an equal protection case, thus implying that no privacy concerns were implicated. "[T]he holding of *Eisenstadt* is unintelligible unless it is premised upon a privacy right involved in the purchase and sale of contraceptives." *Id.* at 273 (Kogan, J., dissenting; Barkett, J., concurring) (footnote omitted). Also, *Eisenstadt* clearly relied on *Griswold*, which addressed the right of privacy in the marital relationship. *Id.* at 273 n.21.

355. 413 U.S. 123 (1973).

356. *Stall*, 570 So. 2d at 260 (quoting United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 128 (1973)).

ing that Stall had standing to assert the constitutionally protected right of privacy enjoyed by his customers.[357] Gratuitously, the majority added that the privacy amendment does not apply to vendors of obscenity either.[358] Normally, a claimant's failure to assert successfully a protected interest disposes the issue. Once Stall failed to meet that threshold, he could advance no constitutional privacy claim, and the inquiry into the merits was unnecessary. Perhaps it was to more fully establish its position on obscenity regulation that the majority continued.

The five-member majority reached the merits of Stall's privacy claim by engaging in the following hypothetical: "Assuming that [those who show, sell, distribute, or rent allegedly obscene material] have vicarious standing to raise their customers' privacy interest, we agree with the district court that their customers' right of privacy does not extend to [them]."[359]

As a threshold matter, the right of privacy in the context of obscenity regulations attaches only when a claimant demonstrates a "reasonable" expectation of privacy.[360] Borrowing from *Paris Adult Theater I*,[361] the majority wrote: " 'The idea of a 'privacy' right and a place

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357. The majority's disagreement with the district court on the standing issue may explain why the majority approved the *decision* of the district court, *see Stall*, 570 So. 2d at 258, 262, and did not approve the *opinion*.

358. *Id.* (relying upon *12 200-Foot Reels*, 413 U.S. at 128). The only question posed by *Stall* asks whether the right of the vendor's *customers* to privately possess obscene material extends to the point of sale, and if so, whether the vendor can take advantage of that protection in a criminal prosecution for unlawful distribution. Whether Stall himself, as a *distributor*, has a personal privacy interest is a concern not directly presented by the case as framed by the four corners of the opinion.

359. *Stall*, 570 So. 2d at 258 (citation omitted).

360. The reasonableness of one's expectation of privacy takes into account all the circumstances, and in particular, the objective manifestations of that expectation. *Id.* at 260 (citations omitted). Requiring a claimant to show objective reasonableness is a standard that is characteristic of disclosural privacy, and search and seizure cases. Before *Stall*, the court had not yet imposed that requirement on matters of personal choice grouped under the rubric of self-determination.

361. *Paris Adult Theater I*, 413 U.S. at 49. That opinion involved the civil prosecution of two Atlanta movie theaters, together with their owners and managers, under the Georgia Code, for the exhibition of allegedly obscene films to the public for paid admission. The Court reaffirmed the principle that obscene material enjoys no first amendment protection, and held: "[T]he States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called 'adult' theaters from which minors are excluded." *Id.* at 69.

of public accommodation are, in this context, mutually exclusive.' "[362] The justices summarily declared that a customer has no "legitimate reasonable" expectation of privacy to patronize a retail establishment in order to purchase obscene material.[363] *Stall* is the first instance where the court declined to find even the bare existence of an asserted privacy interest under article I, section 23.[364]

The majority declared that the state has a "*legitimate* interest 'in stemming the tide of commercialized obscenity.' "[365] To accomplish that aim, the state is empowered to make " 'morally neutral' " judgments that commercialized obscenity injures the community as a whole.[366] Unless those choices " 'clearly transgress private rights,' "[367]

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362. *Stall*, 570 So. 2d at 261 (quoting *Paris Adult Theater I*, 413 U.S. at 66-67).

363. *Stall*, 570 So. 2d at 257. The majority implied in dicta that Stall could not succeed on his claim because he failed to present persons whose constitutionally protected right to possess obscene material was affected by the state action. *Id.* However, the court had already concluded that there exists no constitutionally protected right to purchase such material. Thus, it would be futile for Stall to produce persons who were entitled to privately possess that material. That dicta raises speculation whether the court would have been less reticent to seriously explore the limits of article I, section 23, were the right asserted by such individuals personally. Stall's close link to the commercial enterprise, which was the focus of the legislative policy, made him an unlikely candidate to champion the right vicariously in a case of first impression.

364. In a few pre-article I, section 23 cases, the court was unwilling to find an implied right of privacy in the Florida Constitution. *See, e.g.*, Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc., 379 So. 2d 633, 639 (Fla. 1980); *In re* Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 779 (Fla. 1979); Laird v. State, 342 So. 2d 962, 965 (Fla. 1977).

365. *Stall*, 570 So. 2d at 260 (quoting *Paris Adult Theater I*, 413 U.S. at 57) (emphasis added). Federal constitutional analysis accepts as the state's interests in this context, "the interest of the public in the quality of life and the total community development, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Paris Adult Theater I*, 413 U.S. at 58.

366. *Stall*, 570 So. 2d at 261 (quoting *Paris Adult Theater I*, 413 U.S. at 69). Unwilling to accept the notion that obscene materials are inherently harmful, the dissent looked to the record for evidence that would show actual injury to one or more persons. Having found "no shred of evidence" to support the state's regulation, Justice Kogan wrote, "I do not believe that abstract, unproven harm is a sufficient reason to invade the right to be let alone." *Id.* at 270. He would hold that the article I, section 2 prohibits governmental intrusion into the noninjurious aspects of one's personal life, including the acquisition of "noninjurious reading materials and entertainment for discrete personal use." *Id.* at 269. *Accord* Bostick v. State, 554 So. 2d 1153, 1155 (Fla. 1989) (construing privacy in the context of article I, section 12, the court's majority wrote that the "right of personal autonomy or privacy . . . is forfeited when an individual acts to harm another").

it is the role of the judicial branch to defer to a coordinate branch. There is no breach of private rights when the state regulates obscene works that " 'depict or describe sexual conduct.' "[368]

The anti-obscenity statute at issue proscribes the distribution and exhibition of " 'obscene' " material, as well as " 'lewd, lascivious, filthy, indecent, sadistic, or masochistic' material."[369] The majority reasoned that those statutes are "sufficiently limited, both by their terms and by common sense"[370] to pass constitutional scrutiny. Conceding that the terms have different shades of meaning, the majority accepted that the federal analogue to Florida's obscenity statute, which uses the identical terms, " 'has always been taken as aimed at obnoxiously debasing portrayals of sex.' "[371]

That analysis provoked Justice Kogan and Justice Barkett to charge that the majority's mode of statutory interpretation was "legally indefensible." The fundamental legal obstacle posed by the anti-obscenity law, they argued, is that the term "obscenity" itself defies a legally comprehensible definition. Consequently, a handful of people "define" the crime after-the-fact, and thereby impose their personal views of morality on others.[372] Such unbridled censorship impermissibly restricts individual autonomy, and offends the very spirit of the privacy amendment.[373]

The majority also reasoned that the weight of state court prece-

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367. *Stall*, 570 So. 2d at 261 (quoting *In re T.W.*, 551 So. 2d at 1204 (Grimes, J., concurring in part, dissenting in part)).

368. *Stall*, 570 So. 2d at 259 (quoting Miller v. California, 413 U.S. 15, 24 (1973)). *Miller* set standards for state regulation of obscenity, which were incorporated in Florida law. *See* FLA. STAT. § 847.001(7), (11) (Supp. 1986).

369. *Stall*, 570 So. 2d at 259 (citations omitted).

370. *Id.*

371. *Id.* (quoting Manual Enters., Inc. v. Day, 370 U.S. 478, 482-83 (1962) (footnotes omitted)). *But cf.* Warren v. State, 572 So. 2d 1376 (Fla. 1991) (striking on vagueness grounds a statute that proscribes the keeping of house of "ill fame:" even though "the general population might have understood the meaning of 'ill fame' a century ago, the lack of definition in the statutes, jury instruction, and cases is fatal to its continued validity") (unanimous on point); Hicks v. State, 572 So. 2d 1378 (Fla. 1991) (following *Warren*) (unanimous); Palmieri v. State, 572 So. 2d 1378 (Fla. 1991) (following *Warren*) (unanimous).

372. *Stall*, 570 So. 2d at 263 (Barkett, J., dissenting; Kogan, J., concurring.); *id.* at 263 (Kogan, J., dissenting; Barkett, J., concurring). History records with irony the numerous, short-lived attempts by the censorship police to suppress literary works, now regarded as masterpieces. *Don Juan*, *An American Tragedy*, *Lady Chatterly's Lover*, *God's Little Acre*, and *Ulysses* are among them. *Id.* (citations omitted).

373. *Id.*

dent opposes Stall. It claimed that the court had several years ago "addressed" Stall's *Stanley* claim in *State v. Kraham*,[374] which specifically rejected the argument that it was illogical and arbitrary to sanction one person for providing material to another who was entitled to possess that material.[375]

To say that the court had before "addressed" the issue now raised by Stall is imprecise. *Kraham* considered whether the 1975 version of the obscenity statute, which proscribed the sale of obscene material, was unconstitutional in light of one's right to possess such material under *Stanley*. However, the voters approved article I, section 23 in November 1980, over two years after *Kraham*. Thus, the court never even considered whether a person could vicariously assert the protections of the state privacy amendment. This criticism of the majority's opinion is all the more valid in light of its repeated reliance in earlier privacy cases upon the teachings of *Winfield v. Division of Pari-Mutuel Wagering*,[376] which firmly established Florida's general privacy right as affording greater protections than those implied in the federal Bill of Rights.

Finally, *Stall* makes an intriguing contribution to the principles of constitutional construction. Said the majority:

> There is no indication that the drafters of article I, section 23 meant to broaden the right of privacy [beyond then-existing state or federal protections] as it relates to obscene materials or that the validity of [the anti-obscenity statute] is affected by the privacy provision. Indeed, had the public been aware of such an application, we seriously doubt that the amendment would have been adopted.[377]

But this is not a case where the court must divine the adopters' intent. Unlike many personal rights with ancient origins and no recorded historical materials to aid constitutional interpretation, Florida's right of privacy is a recent addition to the organic law, with much available material to its credit. The majority's use of unwarranted, unsupported

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374. 360 So. 2d 393 (Fla. 1978), *appeal dismissed*, 440 U.S. 941 (1979).

375. *Stall*, 570 So. 2d at 258.

376. 477 So. 2d 544 (Fla. 1985); *see also In re T.W.*, 551 So. 2d at 1191; Public Health Trust v. Wons, 541 So. 2d 96, 102 (Fla. 1989) (Ehrlich, C.J., concurring specially); Cope, *To Be Let Alone: Florida's Proposed Right of Privacy*, 6 FLA. ST. U.L. REV. 671, 740 (1978).

377. *Stall*, 570 So. 2d at 262 (footnote omitted).

speculation implicitly discredits precedent. First, past privacy cases were guided by the knowledge that the adopters intended to assure a level of protection beyond the level afforded by federal law. Second, there can be no doubt that Florida's privacy amendment imported state and federal cases in existence at the time of its adoption.[378] Among them are several cases that recognized the right of persons to possess obscene materials in their homes.[379] These cases are necessarily woven into the state constitutional fabric.

Third, *Stall* is out of sync with the court's two most recent article I, section 23 cases, *Browning* and *In re T.W.* Unlike *Stall*, both cases addressed the constitutional claims head-on, and broke new ground by extending constitutional horizons beyond the perimeter of precedent. And unlike *Stall*, neither case speculated about the adopters' intent. No doubt the court could have avoided reaching the heart of those claims by engaging in the selfsame speculation: "had the public been aware" that the amendment would one day be interpreted to protect the decision of a person to terminate his or her life by refusing medical intervention,[380] or to protect the decision of a minor female to terminate her pregnancy without her parents' consent,[381] "we seriously doubt that the amendment would have been adopted."[382]

But it did not. Instead, *Browning* began boldly with the premise that "everyone has a fundamental right to the sole control of his or her person."[383] And *In re T.W.* observed initially that " '[t]he citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23' " than that required by federal law.[384] Only one year before the court released *Stall*, Chief Justice Ehrlich acknowledged the central importance of precedent in constru-

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378. *Id.* at 264 (citing Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980); *see also* Lieberman v. Marshall, 236 So. 2d 120, 127 (Fla. 1970) (adopting cases that construed predecessor version of article I, section 4).

379. *Id.* (citing *Stanley*, 394 U.S. at 557; State v. Keaton, 371 So. 2d 86 (Fla. 1979)).

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

381. *In re T.W.*, 551 So. 2d at 1186.

382. Indeed, the court could have avoided a substantial portion of the political controversy spurred by *In re T.W.* had it declined to face the issue head-on. *See* Anderson, *Judicial Politics*, 77 A.B.A. J. 34 (Jan. 1991) (reporting that this case threatened the very composition of the court by "caus[ing] such a ruckus among abortion-rights opponents" as to cast into doubt the outcome of the retention campaign of the opinion's author).

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

384. *In re T.W.*, 551 So. 2d at 1191-92 (quoting *Winfield*, 477 So. 2d at 548).

ing article I, section 23—the certain knowledge that Floridians chose a greater degree of privacy than provided under federal law "*alone* could justify broadening the scope of [precedent]."[385] Rather than engage in unsupported speculation about what the adopters might have intended, the majority should have ascertained the adopters' intent in light of historically known fact and relevant precedent.[386]

Stall is a decisional oddity that leaves much to ponder. One might argue that the majority actually decided *Stall* by applying the doctrine of standing. Clearly, the court concluded that Stall could not vicariously assert the privacy rights of his customers. Under that interpretation, the majority had no need to reach the merits of the underlying privacy claim. However, much of the majority opinion addresses the very nature of the substantive right of privacy, and indeed declares that Stall failed to satisfy the threshold for asserting a privacy right. Consequently, one might alternatively argue that the majority effectively mooted the standing issue, rendering its discussion of the standing doctrine mere dicta, and reached the merits. In the final analysis, the standing theory advances the narrower of the two alternative holdings and therefore presents the stronger argument.

Several factors argue that *Stall* is an aberrational distortion on the landscape of article I, section 23. Among them are its lack of analytical clarity, disregard of constitutionally relevant precedent, and casting upon the claimant a requirement of objectivity when the court in numerous other instances has honored purely subjective wishes of persons to self-determine matters of personal choice. These factors caution that the decision lacks precedential importance outside the circumstances presented.

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385. *Wons*, 541 So. 2d at 102 (Ehrlich, C.J., concurring specially) (emphasis added).

386. *Compare* Shriners Hosps. for Crippled Children v. Zrillic, 563 So. 2d 64 (Fla. 1990). In *Shriners Hospitals*, released only four months before *Stall*, a four-member majority struck down the centuries-old mortmain statute as the result of a "common sense reading of the plain and ordinary meaning" of the text of article I, section 2. *Id.* at 67. It is beyond dispute that a like reading of the personal "right to be let alone," especially when taken together with extant privacy case law, would have amply supported the conclusion that, as a threshold matter, article I, section 23 embraced a person's right to procure or view obscene material, free from state interference. Whether that right could survive state regulation, however, is altogether another matter.

C. CONCLUSION

The single most noteworthy conclusion to be drawn from the court's state constitutional jurisprudence of 1990 is that the court has accepted major responsibility for protecting personal rights from governmental excess. The court convincingly asserted its role as guardian of article I rights when it twice reached outside the record pleadings, and imposed a constitutional remedy to achieve a just result.[387] In matters of personal medical health care choices, a decisive majority of the membership showed its commitment to reshaping the constitutional landscape by pushing the frontiers of protection beyond the perimeter of precedent. Moreover, the majority added a component to compelling state interest analysis by declaring that the state has an overarching responsibility to safeguard the inalienable rights of its citizens.[388]

On three occasions, the court also assumed a role for the judiciary that deferred to the policy choices and functions of coordinate branches of government. A majority declined to interfere with the legislature's efforts to regulate commercialized obscenity without any record evidence that justified the state's action;[389] accepted the legislature's exclusive procedures to compensate owners whose property the state destroyed in a citrus canker eradication program, as a "reasonable alternative" to the time-honored common law remedy of inverse condemnation;[390] and presumed that the Department of Corrections properly performed its function of executing condemned prisoners in the face of macabre evidence of a malfunctioning electric chair.[391]

The opinions teach that the selection of a particular principle of constitutional interpretation greatly influences the court's constitutional logic. Although it is impossible to predict with precision which principle the justices will rely upon in any given case, two cases this year deserve particular attention, because they illustrate the importance of principle selection on the outcome.[392]

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387. *See supra* notes 116 and 308 and accompanying text.

388. *See supra* notes 327-28 and accompanying text.

389. *See supra* note 366 and accompanying text.

390. *See supra* note 280 and accompanying text.

391. *See supra* notes 253-55 and accompanying text.

392. In any analytical scheme, the point of departure is of vital importance. As Justice Frankfurter noted years ago: in law, as in history, "the place you reach depends upon the direction you are taking[, and] where one comes out on a case depends on where one goes in." United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

Courts often glean the meaning of constitutional text from the original intent of the adopters, and there are a variety of theories used to ascertain that intent. One theory proved to be critical to the analysis of *Shriners Hospitals*,[393] where a clear majority of four justices made a "common sense reading of the plain and ordinary meaning" of the text of article I, section 2. It decided that the adopters must have intended that the ability to transmit property to others is included within the grasp of that section's right "to acquire, possess and protect property," and then tossed out Florida's mortmain statute because it allowed certain persons to avoid charitable devises.

Another theory of construction emerged in *Stall*,[394] where a five-member majority relied upon an intriguing, common sense-like interpretation of article I, section 23 to reject a claim that argued essentially, because the section entitles persons to possess obscene materials privately, free from state regulation, then it must necessarily entitle persons to acquire such materials. Said the court: "[H]ad the public been aware of such an application, we seriously doubt that the amendment would have been adopted." *Stall*, unlike *Shriners Hospitals*, never considered the black letter text of article I, section 23. It never asked whether the express textual protection afforded to the "right to be let alone" entitled persons to acquire such materials for private use. Had the majority applied *Shriners Hospitals*, it very likely would have begun with the analytical premise that the text raises the potential of such an entitlement, rather than reject the claim at the outset by the unwarranted use of unsupported speculation.

Shriners Hospitals is instructive for its use of another approach to constitutional interpretation, one unconcerned with original intent of the adopters. The majority struck down the centuries-old mortmain statute because its feudal rationale had no constitutional relevance in "the context of our times." *Shriners Hospitals* aptly supports the principles that the constitution must be viewed as a dynamic, "living" document, and that courts must interpret the state's organic law free of anachronistic strain upon its order.

The court's state constitutional labors concentrate on the personal rights created in article I. In all, the court framed 102 state constitutional issues in 80 cases. Of those, 73 issues and 62 cases directly pertained to article I. The decade survey of the 1980s identified five instances where a state constitutional right eclipsed the corresponding

393. *See supra* notes 19-22 and accompanying text.

394. *See supra* note 377 and accompanying text.

federal right.[395] Already this decade, two cases, *Browning*[396] and *Cohen*,[397] clearly illustrate circumstances where the state constitution provides a degree of protection of personal rights greater than the federal constitutional minimum.

395. Hawkins, *supra* note 1, at 857-58.
396. *See supra* notes 297-344 and accompanying text.
397. *See supra* notes 72-78 and accompanying text.