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THE RIGHT OF PRIVACY AND THE NEW YORK STATE CONSTITUTION: AN ANALYTICAL FRAMEWORK

INTRODUCTION

The Supreme Court, New York County, recently decided the case of *Hope v. Perales*,¹ which challenged the funding scheme of the state prenatal care assistance program for indigent mothers.² The funding scheme provided coverage for all medically necessary procedures except abortions without regard for the risk to the life of the mother in bringing the fetus to term.³ In the face of the United States Supreme Court's retreat from broadly defining the scope of the right of privacy,⁴ the plaintiffs brought suit to adjudicate the question of a right of

1. 150 Misc. 2d 985, 571 N.Y.S.2d 972 (Sup. Ct. New York County 1991).

2. *Id.* at 986, 571 N.Y.S.2d at 976.

3. *Id.* at 986-87, 571 N.Y.S.2d at 975.

4. See generally Eileen Kaufman, *Abortion Rights: The Supreme Court and Local Government Law 1989-90 Term*, 7 TOURO L. REV. 457 (1991) (discussing the Supreme Court's abortion decisions including *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), and the Court's retreat from *Roe v. Wade*, 410 U.S. 113 (1973)); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (discussing the Supreme Court's recent retreat from the protection of individual rights and the implications of state court activism).

privacy guaranteed by the New York State Constitution.⁵ The court held that the funding scheme violated the plaintiffs' fundamental rights of privacy⁶ as guaranteed by the New York State Constitution's due process clause⁷ because it impermissibly burdened those rights without a corresponding compelling state interest.⁸

The fundamental right of privacy incorporates more than the ability to procure an abortion. It implicates the autonomy of a person to decide: the course of his or her medical treatment; when medical treatment can be refused; when life sustaining treatment can be discontinued; the way to rear children; what acts consenting adults can perform in the sanctity of a bedroom; whether or not to utilize contraceptives; and the ability to engage in procreative choice.⁹ This right to be let alone to make one's own personal decisions free from interference from the state demonstrates the high regard for freedom, autonomy and life itself.¹⁰ A state recognizing this high regard can and must

5. Constance L. Hays, *Suit Seeks New Abortion Protection*, N.Y. TIMES, September 25, 1990, at B4.

6. *Hope*, 150 Misc. 2d at 991-92, 571 N.Y.S.2d at 976-77.

7. N.Y. CONST. art. I, § 6 (providing in pertinent part: "[n]o person shall be deprived of life, liberty or property without due process of law").

8. *Hope*, 150 Misc. 2d at 991-92, 571 N.Y.S.2d at 980.

9. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 446-55 (1972) (extending the right to sexual privacy recognized in *Griswold* to unmarried individuals); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (recognizing married couple's right to privacy in choosing to use contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535, 537 (1942) (the Court began to recognize a right to privacy in sexual and reproductive matters by overturning a statute requiring compulsory sterilization of persons convicted of felonies involving moral turpitude); *Pierce v. Society of Sisters*, 268 U.S. 510, 518-20 (1925) (affirming parental rights to employ private and parochial teachers through choice of private schools); *Meyer v. Nebraska*, 262 U.S. 390, 400-02 (1923) (restricting the teaching of foreign language infringes on the liberty interest of parents to engage teachers to instruct their children); *but see Bowers v. Hardwick*, 478 U.S. 186 (1986) (finding Georgia sodomy statute did not violate the fundamental rights of homosexuals).

10. Conversely, the state may argue that its interference is *justified* by its interest in preserving and protecting life. *See, e.g., Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (finding that the state may regulate or proscribe abortion to promote its interest in the preservation of human life); *Cruzan v. Harmon*,

recognize this fundamental right and give effect to it despite the contraction of its protection at the federal level.¹¹

This Comment asserts that a fundamental right of privacy is guaranteed by the New York State Constitution. This guarantee is independent of, as well as more expansive than, the federal right of privacy. Part I begins with an overview of the New York State constitutional standard used to evaluate the question of whether a fundamental right should be afforded a broader protection under the state constitution than that which arises under the Federal Constitution. Part I also includes an analysis of the approach taken by some other states faced with the right of privacy question, and their constitutional provisions that have been at issue. Part II contains an application of the New York State standard to the general question of whether there is a fundamental right of privacy under the New York State Constitution, analyzing its basis and scope. Part III outlines recent developments in federal law and concludes that the right of privacy has a separate basis under the New York State Constitution demanding more protection than that afforded at the federal level.

I. THE STANDARD OF REVIEW

A. Overview

In a constitutional inquiry, where an asserted right is protected under both the state and federal constitutions, New York State courts utilize the standard articulated by the United States

760 S.W.2d 408, 424 (Mo. 1988) (en banc) (in guardians' unsuccessful action to discontinue artificial hydration and nutrition for patient in vegetative state, the court noted "[t]he state's relevant interest is in life, both its preservation and its sanctity"), *aff'd sub nom.* *Cruzan v. Director, Missouri Dep't of Health*, 110 S. Ct. 2841 (1990).

11. *See, e.g.,* *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (stating that "general limitations on the powers of Government . . . do not forbid the United States or the states from meeting modern conditions or regulations") (emphasis added).

Supreme Court as the minimum level of protection.¹² With the federal protection as its base, the court utilizes similar provisions in the state constitution to expand upon those rights, especially where the asserted right is a matter of local concern.¹³

An interpretive and non-interpretive analysis of provisions of the New York State Constitution is undertaken to determine whether a fundamental right guaranteed by both the federal and state constitutions is to be afforded a broader scope of protection under the state provision.¹⁴ Courts utilizing this scheme to determine the scope of state protection afforded fundamental rights review the text of the provision granting the right and the underlying reasons for the presence of the provision within the state constitution.¹⁵ In some cases, a court will also consider practical considerations such as the need for uniformity between

12. *See, e.g.,* *People ex rel. Arcara v. Cloud Books, Inc.*, 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986). The Erie County District Attorney sought a court order to close a bookstore, which sold adult books and showed sexually explicit movies, claiming it was a public nuisance. *Id.* at 555, 503 N.E.2d at 493, 510 N.Y.S.2d at 845. The New York Court of Appeals found that in view of its long history of fostering freedom of expression, the minimal national standard established by the United States Supreme Court for first amendment rights could not be considered dispositive in determining New York State's constitutional guarantee of freedom of expression. *Id.* at 557-58, 503 N.E.2d at 494-95, 510 N.Y.S.2d at 846-47.

13. *See, e.g., id.* at 557, 503 N.E.2d at 494, 510 N.Y.S.2d at 846 (stating that "freedom of expression in books, movies and the arts . . . is a matter essentially governed by community standards").

14. *See, e.g.,* *People v. Alvarez*, 70 N.Y.2d 375, 378, 515 N.E.2d 898, 899, 521 N.Y.S.2d 212, 213 (1987) (stating that "regardless of whether there exists a federal constitutional provision parallel to a state provision, we must undertake a 'non-interpretive' analysis, proceeding from a 'judicial perception of sound policy, justice and fundamental fairness'" (quoting *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 303, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986), *cert. denied*, 479 U.S. 1091 (1987))).

15. *See, e.g.,* *People v. P. J. Video, Inc.*, 68 N.Y.2d 296, 302, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986) (stating that "[c]ourts and commentators have identified many considerations upon which a state court may rely when determining that its Constitution accords greater protection to individual liberties and rights than the protection guaranteed by the Federal Constitution") (citations omitted), *cert. denied*, 479 U.S. 1091 (1987).

federal and state provisions.¹⁶ These practical considerations, however, seem to be part of the non-interpretive leg of the analysis.¹⁷ In all cases, the court analyzes the question by employing both the interpretive and non-interpretive prongs of the test.¹⁸

B. Interpretive Analysis

1. New York State

Under the interpretive prong of the analysis, the court looks to the text of the specific passages giving rise to the right in question to determine whether the state right should be afforded a more expansive reading than its federal counterpart.¹⁹ This analysis requires the court to look at both the federal and state constitutions to determine which provisions guarantee the right and whether similar provisions are present in both the state and federal constitutions.²⁰ Focusing on the state provision, the court then considers "whether the language in the state [provision] is sufficiently unique to support a broader interpretation"²¹ than the comparable provision in the Federal Constitution; whether the history of the state provision demonstrates an intention to afford the same or broader protection than the federal provision; and whether the purpose and structure of the state constitution affirms the rights of the citizens rather than merely limiting state power.²² Essentially, the court looks for a textual difference in

16. See, e.g., *id.* at 304, 501 N.E.2d at 561, 508 N.Y.S.2d at 912 (stating that "the interest of federal-state uniformity . . . is one consideration to be balanced against other considerations that may argue for a different state rule").

17. See, e.g., *Alvarez*, 70 N.Y.2d at 379, 515 N.E.2d at 899-900, 521 N.Y.S.2d at 213-14 (recognition of practical consideration of federal-state uniformity appeared at the end of the 'non-interpretive' analysis).

18. See, e.g., *id.* at 378, 515 N.E.2d at 899, 521 N.Y.S.2d at 213; *P.J. Video*, 68 N.Y.2d at 302-03, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

19. See, e.g., *P.J. Video*, 68 N.Y.2d at 302-03, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

20. *Id.*

21. *Id.*

22. *Id.* (The affirm/limitation element is not dealt with extensively in the

the provision providing for the asserted constitutional right. The court then considers the reasons for the textual differences, and whether those reasons are material to the question presented.²³

Materiality in differences relates to the basis for which the state provision was enacted.²⁴ For example, article 1, section 11 of the New York State Constitution provides:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination *in his civil rights by any other person or by any firm, corporation, or institution, or by the state, or [any] agency or subdivision of the state.*²⁵

Adopted during the Constitutional Convention of 1938, the provision was drafted to provide broader rights under the New York State Constitution than those provided under the Equal Protection Clause of the Fourteenth Amendment²⁶ of the Federal Constitution.²⁷ The members of the Constitutional Convention of 1938 who drafted the amendment were disturbed by federal decisional law that limited application of the Fourteenth Amendment to discrimination by the state, while not permitting its expansion

cases, but appears to implicate the circumstances of the creation of the constitutional provisions by the constitutional convention committee members.). *See also Doe v. Maher*, 515 A.2d 134, 148 (Conn. Super. Ct. 1986) (examining the setting which led to the state's first formal constitution to find the constitution "not only limited the power of government, but also guaranteed . . . fundamental rights").

23. *See, e.g., P.J. Video*, 68 N.Y.2d at 302-03, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

24. *See People v. Kohl*, 72 N.Y.2d 191, 197, 527 N.E.2d 1182, 1185, 532 N.Y.S.2d 45, 48 (1988). If the state provision differs from its federal counterpart provision, the court will examine the historical basis for the distinction. *Id.* If the rationale for the differing text is not material, the court looks further to find the presence of fundamental justice and fairness concerns which are left unaddressed by federal law, and are therefore warranted under the independent, broader state protection. *Id.*

25. N.Y. CONST. art. I, § 11 (emphasis added).

26. U.S. CONST. amend. XIV, § 1; *see infra* note 32.

27. NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE, VOL VI at 221, 223, 227 (1938) [hereinafter COMMITTEE REPORT].

to discrimination by individuals.²⁸ In order to protect against racial discrimination in all realms of life, including public and private establishments,²⁹ constitutional convention committee members specifically sought to make rights afforded under the Civil Rights Laws³⁰ constitutional rights.³¹ As such, the expanded equal protection provision was created to be more encompassing than the corresponding federal provision. Therefore, utilizing an interpretive analysis, New York courts would find that the rights afforded individuals who are subject to discrimination under the New York State Constitution's equal protection clause³² are much broader than Federal Fourteenth Amendment protection. The historical basis for textual differences is the legislative intent to expand equal protection principles to individuals and establishments without limitation to state actors.³³

The essence of an inquiry under the interpretive prong of the analysis integrates three questions. First, is there a textual difference?³⁴ Second, is the difference material to the analysis in ques-

28. REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, APRIL FIFTH TO AUGUST TWENTY-SIXTH 1938, VOL. II at 1065 (1938).

29. COMMITTEE REPORT, *supra* note 27, at 224-25 (inclusion of retail and wholesale places of business in equal accommodation section despite omission in the civil rights law makes civil rights provisions constitutional and expands protection to cover these establishments).

30. *Id.* at 221 (stating that "[a]ll existing provisions against discrimination of race, creed or color in New York State are contained in Civil Rights Law sections 5, 40, 40a, 41 and 42 . . ."); *see also* N.Y. CIV. RIGHTS LAW §§ 5, 40, 40(a), 42 (McKinney 1976).

31. COMMITTEE REPORT, *supra* note 27, at 221.

32. The United States Constitution provides: "[n]or shall any State . . . deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

The New York State Constitution provides: "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. CONST. art. I, § 11 (no state action required).

33. *See infra* notes 143-44 (discussing the state action requirement with respect to due process).

34. *See, e.g.,* *People v. Kohl*, 72 N.Y.2d 194, 197, 527 N.E.2d 1182, 1185, 532 N.Y.S.2d 45, 48 (1988) (noting that the textual difference between the federal due process provision requiring state action and the state due

tion, as determined by the basis underlying the adoption of the provision?³⁵ Finally, does the legislative intent, historical basis or affirmance of individual rights by the provision show a desire to broaden the scope of the right within the framework of the New York State Constitution?³⁶ If consideration of these questions indicates that the right is to be afforded greater scope and protection under the New York State Constitution, the courts will hold that the state constitution provides greater protection for the right than that provided by the Federal Constitution.³⁷

2. Interpretive Analysis in Other States

Connecticut courts have dealt with the question of whether the right of privacy arises independently under the Connecticut Constitution.³⁸ The plaintiffs in *Doe v. Maher*³⁹ sought to have the state's medicaid funding scheme declared unconstitutional.⁴⁰ In order for an abortion to be covered by the program, an additional requirement -- that the life of the mother be endangered by carrying the fetus to term -- must have been met.⁴¹ In the face of federal retreat defining the right of privacy,⁴² the Connecticut Superior Court utilized an interpretive

process provision was not material).

35. See, e.g., *id.* (finding federal rationale fully served New York State's interest in ensuring fundamental fairness).

36. See, e.g., *P.J. Video*, 68 N.Y.2d at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

37. See, e.g., *id.* at 302, 501 N.E.2d at 560, 508 N.Y.S.2d at 911 (stating "[o]ur decision, however, is also based on principles of federalism, and on New York's long tradition of interpreting our State Constitution to protect individual rights").

38. See, e.g., *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986) (class action brought on behalf of indigent women and physicians willing to perform medically necessary abortions).

39. *Id.*

40. *Id.* at 135 (regulation restricted funding of abortions under medicaid to those abortions "necessary because the life of the mother would be endangered if the fetus were carried to term").

41. *Id.*

42. Plaintiffs brought suit on state-based grounds because of the Supreme Court decision in *Harris v. McRae*, 448 U.S. 297 (1980), where the Court

analysis to determine that the Connecticut State Constitution independently provides its citizens a fundamental right of privacy.⁴³ The court held that the state medicaid funding scheme violated the plaintiff's right of privacy and procreative choice because the funding scheme violated the state's required neutrality towards the exercise of the fundamental right⁴⁴ without a corresponding compelling state interest.⁴⁵

The court noted that the rights guaranteed by the Connecticut State Constitution can be greater than those afforded under the Federal Constitution if the history of the Connecticut Constitution or Connecticut law indicates a reason for doing so.⁴⁶ The court first analyzed the preamble to the state constitution in determining the interpretive basis for this right. The Connecticut State Constitution's preamble states:

The People of Connecticut acknowledging with gratitude, the good providence of God, in having permitted them to enjoy a free government; do, in order more effectually to *define, secure and perpetuate the liberties, rights and privileges which they have derived from their ancestors*; hereby, after a careful consideration and revision, ordain and establish the following constitu-

upheld the federal government's denial of funding for medically necessary abortions for medicaid recipients. *Harris*, 448 U.S. at 317-18, 326. The Court found the funding scheme did not abridge the indigent woman's right of privacy because the funding scheme left her in a position no worse than she would have been had Congress not allocated funds for medical treatment. *Id.* at 316-17.

43. *Maier*, 515 A.2d at 148 (stating "the right of privacy is also implicitly guaranteed under our state charter of liberty").

44. *Id.* at 156 (excepting medically necessary abortions from the medicaid program constitutes an infringement of the right of privacy under the state constitution).

45. *Id.* (stating that "[s]ince the regulation impairs a fundamental right, its validity requires 'strict scrutiny to determine whether the regulation was compellingly justified and narrowly drafted'" (quoting *Campbell v. Board of Educ.*, 475 A.2d 289, 295 (Conn. 1984) (finding school board implementation of academic sanctions for nonattendance was not a violation of substantive or procedural due process or equal protection rights)).

46. *Id.* at 147 (stating "[i]t is clear, however, that the federal decisional law is not a lid on the protections guaranteed under our state constitution").

tion and form of civil government.⁴⁷

The court held that, through the preamble, the first constitution of 1818 "guaranteed to the people certain fundamental rights, both explicit and implicit, that could not be abridged absent a compelling state interest."⁴⁸ Because no provision in the Connecticut State Constitution refers to the right of privacy, this right is derived from an implicit guarantee found in the preamble.⁴⁹ In addition, the constitution in its entirety serves to affirm individual rights.⁵⁰ Finally, the preamble expressly refers to "liberties, *rights* and privileges . . . derived from . . . ancestors."⁵¹ These guaranteed rights were fundamental to the framers and based on their belief in natural rights.⁵² Natural rights, based in natural law, arise out of an individual's self determination to exercise power without restraint other than that which inures through nature or morality.⁵³

The court found that express reference to rights derived from ancestors in the preamble⁵⁴ indicated that the framers intended

47. CONN. CONST. pmbl. (emphasis added). The Preamble to the Federal Constitution reads:

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl.

48. *Maier*, 515 A.2d at 148 (fundamental rights explicitly stated in the declaration of rights, implicitly recognized in the preamble of the constitution, and all guaranteed by the due process clause).

49. *Id.* at 148-49. The Supreme Court of Connecticut of 1895 articulated that there are implicit fundamental rights protected by the state constitution. *Id.* at 148. Fundamental rights may arise from the preamble, declaration of rights and the due process clause. *Id.*

50. *Id.*

51. CONN. CONST. pmbl. (emphasis added); *see supra* text accompanying note 47 (setting forth text of Connecticut Constitution preamble).

52. *Maier*, 515 A.2d at 148-49.

53. *Id.* at 149.

54. CONN. CONST. pmbl. The court also utilized the preface to the declaration of rights, which states: "[T]he great and essential principles of liberty and free government may be recognized and established" *Maier*,

the rights of the citizens of Connecticut to be broad in conjunction with the natural rights theory and that all individual rights derived from these natural rights were not specifically enumerated in the text of the constitution.⁵⁵ The court also found that this provision in the preamble to the state constitution was older than the Bill of Rights⁵⁶ and was expansive enough to secure significant implicit rights for Connecticut citizens.⁵⁷ Thus, the state provision warranted broad interpretation due to its historical basis, the drafters' intent and its express affirmance of citizens' rights.

New Jersey courts have also utilized an interpretive analysis to hold that the New Jersey State Constitution affords a right of privacy separate and apart from the right of privacy as it exists in the Federal Constitution.⁵⁸ In *Right to Choose v. Byrne*,⁵⁹ the state supreme court held that the New Jersey state-based fundamental right of privacy is derived from the equal protection clause⁶⁰ of the state's constitution.⁶¹ The court began its interpretive analysis with the language of the New Jersey equal protection clause which states that "all persons are by nature free and independent, and have *certain natural and inalienable rights*, among which are those of enjoying and defending *life and liberty*, of acquiring, possessing, and protecting property and of *pursuing* and obtaining safety and *happiness*."⁶² The court noted the more expansive language of the provision as compared to the federal

515 A.2d at 148.

55. *Maher*, 515 A.2d at 148-49.

56. *Id.* at 150.

57. *Id.* at 149 (examining Connecticut case law that recognized implicit fundamental rights arising from the "purposely broad" language of the state constitution).

58. *Right to Choose v. Byrne*, 450 A.2d 925, 933 (N.J. 1982) (stating that "[b]y declaring the right to life, liberty and the pursuit of safety and happiness, Art. I, par. 1 protects the right of privacy, a right that was implicit in the 1844 Constitution").

59. 450 A.2d 925 (N.J. 1982).

60. N.J. CONST. art. I, § 1.

61. *Right to Choose*, 450 A.2d at 933.

62. N.J. CONST. art. I, § 1 (emphasis added).

guarantee⁶³ and further found “the right to life, liberty and the pursuit of happiness . . . protects the right of privacy, a right that was *implicit* in the 1844 Constitution.”⁶⁴ Thus, the textual difference between the state and federal provisions was materially related to the right in question.⁶⁵ The implicit guarantee of the 1844 constitution was broad with respect to individual rights⁶⁶ and the constitution was created to affirm those rights beyond the mere restraint of sovereign power.⁶⁷

Applying the interpretive prong of this analysis, these states have found that the textual differences in their constitutions resulted from a historic intent by their drafters to alter the scheme of protection afforded certain individual fundamental rights.⁶⁸ These rights were inalienable according to constitutional drafters, and were explicitly reserved to the citizens of the states.⁶⁹ Finding the textual differences to be material, and the general affirmation of individual rights within the constitutions, the courts held that there was a sufficient basis to provide for an independent state-based right of privacy.⁷⁰

63. *Right to Choose*, 450 A.2d at 933.

64. *Id.* (emphasis added).

65. *See supra* notes 23-24 and accompanying text (discussing “materiality” prong of the interpretive analysis).

66. *Right to Choose*, 450 A.2d at 933 (stating that the “state Bill of Rights . . . has been described as expressing ‘the social, political and economic ideals of the present day in a *broad*er way than ever before in American constitutional history’”) (citation omitted) (emphasis added). *See supra* notes 25-33 and accompanying text (discussing New York State constitutional legislative intent with respect to equal protection in the interpretive analysis).

67. *See supra* note 22 and accompanying text (discussing affirm/limitation prong of interpretive analysis).

68. *See Right to Choose*, 450 A.2d at 933 (noting implicit right of privacy in 1844 New Jersey Constitution); *Doe v. Maher*, 515 A.2d 134, 148-49 (Conn. Super. Ct. 1986) (noting the purposely broad 1818 Connecticut State constitutional preamble guarantees an implicit right of privacy); *see supra* notes 51-57 and accompanying text.

69. *See, e.g., Maher*, 515 A.2d at 148 (stating that the 1818 Connecticut Constitution “ensured our citizens that no branch of government . . . could encroach upon these fundamental rights except for the most compelling reasons”).

70. *See Right to Choose*, 450 A.2d at 933-34; *Maher*, 515 A.2d at 150.

B. Non-Interpretive Analysis

1. New York State

The second prong of the test, the non-interpretive analysis, does not focus on the text of the state constitution *per se*. Rather, it analyzes the asserted constitutional right to determine whether, under a scheme of fundamental fairness and sound judicial policy,⁷¹ the asserted right should be afforded greater protection under the state constitution than it receives under its federal counterpart.⁷² The court inquires as to whether, under the current federal protection scheme, there are any fundamental and fairness concerns of the state that are left unaddressed by the prevailing federal decisional law.⁷³ If any state concerns are left unaddressed or improperly protected, the court is warranted in expanding the state protection beyond its federal counterpart.⁷⁴ When utilizing a non-interpretive analysis, the court also reviews the prevailing state law to ascertain whether any existing state law, statutory or common, defines the scope of the individual right.⁷⁵ The court also examines the history and traditions of the state relating to the protection of the right.⁷⁶ Further, the court attempts to determine whether the right is one of local or national concern and seeks to identify any distinctive expectations the citizenry has toward the scope and protection scheme of the asserted right.⁷⁷ Finally, the court attempts to determine whether the body of state law regarding the right has developed as a result of a diminution of the right in the federal arena,⁷⁸ or as a result of the clouding of federal law by “muddied” Supreme Court

71. *People v. Alvarez*, 70 N.Y.2d 375, 378, 515 N.E.2d 898, 899, 521 N.Y.S.2d 212, 213 (1987).

72. *Id.*

73. *See, e.g., People v. Kohl*, 72 N.Y.2d 191, 197, 527 N.E.2d 1182, 1185, 532 N.Y.S.2d 45, 48 (1988).

74. *Id.*

75. *See, e.g., P.J. Video*, 68 N.Y.2d at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

76. *Id.*

77. *Id.*

78. *Id.* at 305, 501 N.E.2d at 562, 508 N.Y.S.2d at 913.

decisions that do not clearly delineate limitations on governmental power.⁷⁹ The New York Court of Appeals has stated that it will not hesitate to step in to delineate a specific "bright line" where state power ends and individual rights begin.⁸⁰

In *People v. P.J. Video, Inc.*,⁸¹ the defendants were charged with possession of, and intent to promote obscene material.⁸² The evidence against the defendants, video cassettes containing the allegedly obscene material, was seized pursuant to a warrant issued by a local magistrate.⁸³ The warrant was overturned by the court of appeals because its issuance was based solely on a police officer's affidavit that the videos contained obscene matter, only one of several elements required for a charge of obscenity.⁸⁴ The issuing magistrate did not personally view the tapes to make an independent determination of the obscenity allegation.⁸⁵ On certiorari, the United States Supreme Court upheld the warrant, concluding that it was based on probable cause as defined by federal precedent.⁸⁶ However, on remand to determine the state-based constitutional issue, the New York Court of Appeals found that the Supreme Court's decision was a dilution of the citizens' rights and protection against governmental power.⁸⁷ The court of appeals reasoned that the Supreme Court decision "muddied" the

79. *Id.*

80. *Id.* The court noted that "[w]e have sought to provide and maintain 'bright line' rules to guide the decisions of law enforcement and judicial personnel who must understand and implement our decisions" *Id.*

81. 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied*, 479 U.S. 1091 (1987).

82. *Id.* at 299, 501 N.E.2d at 557, 508 N.Y.S.2d at 909.

83. *Id.*

84. *Id.* at 299-300, 501 N.E.2d at 558, 508 N.Y.S.2d at 909. *See infra* note 90 (setting forth the statutory definition of obscene material).

85. *P.J. Video*, 68 N.Y.2d at 299-300, 501 N.E.2d at 558, 508 N.Y.S.2d at 909. The court did not require the magistrate to personally view the tapes. *Id.* However, in the event that he or she did not view the tapes, the affidavits must satisfy the probable cause requirement. *Id.* at 300, 501 N.E.2d at 558, 508 N.Y.S.2d at 910.

86. *New York v. P.J. Video, Inc.*, 475 U.S. 868, 876-77 (1986).

87. *P.J. Video*, 68 N.Y.2d at 305, 501 N.E.2d at 562, 508 N.Y.S.2d at 913.

waters of search and seizure law and, as a result, permitted government encroachment on individual rights by means of eliminating a clear delineation between the government's power and individuals' rights.⁸⁸ Therefore, the warrant was issued without probable cause, in violation of the New York State Constitution article I, section 12,⁸⁹ because obscenity is a crime defined by a local standard.⁹⁰ The warrant was based solely on the police officer's conclusive statements that the material was sexually explicit and no mention was made as to whether the material as a whole was obscene.⁹¹

In *P.J. Video*, the court of appeals specifically expanded Supreme Court decisional law on search and seizure because federal law defined probable cause in a significantly limited way.⁹² The court of appeals interpreted Federal Fourth Amendment protection to mean that police were only required to show probable cause as to one element of an alleged offense in order to obtain a valid warrant.⁹³ The court of appeals found this to be a limitation

88. *Id.*

89. *Id.* at 309, 501 N.E.2d at 564-65, 508 N.Y.S.2d at 916.

90. *Id.* at 300, 501 N.E.2d at 559, 508 N.Y.S.2d at 910. New York Penal Law § 235.00(1) defines obscene as follows:

"Obscene." Any material or performance is "obscene" if (a) the average person, *applying contemporary community standards*, would find that considered as a whole, its predominant appeal is to the prurient interest in sex, and (b) it depicts or describes in a potentially offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and (c) considered as a whole, lacks serious literary, artistic, political, and scientific value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material . . . to be designed for children

N.Y. PENAL LAW § 235.00(1) (McKinney 1980) (emphasis added). This statutory definition conforms to the standards enunciated by the Supreme Court. *See Miller v. California*, 413 U.S. 15, 24-25 (1973); *see also P.J. Video*, 68 N.Y.2d at 300 n.3, 501 N.E.2d at 559 n.3, 508 N.Y.S.2d at 910 n.3.

91. *P.J. Video*, 68 N.Y.2d at 298-99, 501 N.E.2d at 559, 508 N.Y.S.2d at 910.

92. *Id.* at 304, 501 N.E.2d at 562, 508 N.Y.S.2d at 913 (the limited definition refers to the individual rights perspective).

93. *Id.*

on prior Supreme Court law concerning the subject.⁹⁴ Therefore, state constitutional protection was warranted to delineate a boundary beyond which the state government could not cross.⁹⁵ The elements of justice and fundamental fairness warranted a specific "bright line"⁹⁶ drawn by the state courts when federal decisional law did not delineate a sufficiently clear boundary beyond which the state could not cross.⁹⁷

The court in *P.J. Video* also noted that practical considerations played a role in non-interpretive analysis.⁹⁸ While weighing the necessity or desirability of protecting an asserted individual right beyond the protection guaranteed by the Federal Constitution, the court inquired as to whether the right in question is one that calls for uniformity between federal and state constitutional schemes.⁹⁹ The court has stated that uniformity is a factor that will be balanced against the state-based right when that asserted right is broader than its federal counterpart.¹⁰⁰ However, uniformity is not usually a critical factor in the determination of whether to expand the asserted right.¹⁰¹ This is especially true where federal protection for this right is in flux and the right has not been fully delineated in federal decisional law.¹⁰² Thus, when the United States Supreme Court is making fundamental changes, limiting the scope of protection afforded an individual right under the Bill of Rights, the New York Court of Appeals has held that it is

94. *Id.*

95. *Id.* The court did not indicate if state individual protection would be expanded automatically when the United States Supreme Court retreats from a previous definition of the individual right's scope. It seems that this is a significant factor utilized within the non-interpretive test, but is not completely dispositive.

96. *See supra* notes 78-80 and accompanying text.

97. *P.J. Video*, 68 N.Y.2d at 305, 501 N.E.2d at 562, 508 N.Y.S.2d at 913.

98. *Id.* at 304, 501 N.E.2d at 561, 508 N.Y.S.2d at 912.

99. *See, e.g.,* *People v. Alvarez*, 70 N.Y.2d 375, 379, 515 N.E.2d 898, 521 N.Y.S.2d 212, 213 (1987).

100. *P.J. Video*, 68 N.Y.2d at 304, 501 N.E.2d at 561, 508 N.Y.S.2d at 912.

101. *Id.*

102. *Id.* at 305, 501 N.E.2d at 562, 508 N.Y.S.2d at 913; *see supra* note 78; *see infra* note 107 and accompanying text.

incumbent upon New York State courts to protect the right by defining its scope under their state constitution.¹⁰³ If the Supreme Court fails to draw a definitive line delineating the scope of governmental power, the state courts have an obligation to define the boundary as it arises under the state constitution so that reasonable citizen expectations may be maintained.¹⁰⁴ In such an instance, the need for uniformity is outweighed by the need for protection from governmental encroachment.¹⁰⁵ Further, the need for uniformity is of very limited consideration when a state, such as New York, has a tradition of protecting individual rights,¹⁰⁶ and the scope of the federal right is not well delineated or is in a state of contraction.¹⁰⁷ However, when Supreme Court decisional law covers the concerns of fundamental fairness and justice, and the state provision does not materially differ from the federal provision, the state based right will have the same scope as defined in the federal decisional law. This is due, in part, to practical considerations.¹⁰⁸

The issue in the non-interpretive prong of the analysis is cor-

103. *P.J. Video*, 68 N.Y.2d at 304, 501 N.E.2d at 561, 508 N.Y.S.2d at 912.

104. *Id.* at 305, 501 N.E.2d at 562, 508 N.Y.S.2d at 913 (court discussed its movement in the fourth amendment area to maintain "bright line" rules where the Supreme Court has allowed the rules governing police conduct to be "muddied").

105. *Id.* at 304, 501 N.E.2d at 561, 508 N.Y.S.2d at 912-13.

106. *Id.* at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 912 (stating "[o]ur decision [is based on] New York's long tradition of interpreting our State Constitution to protect individual rights").

107. *Id.* at 304, 501 N.E.2d at 561, 508 N.Y.S.2d at 912-13 (noting that "notwithstanding an interest in conforming our State Constitution's restrictions . . . to those of the Federal Constitution where desirable, this court has adopted independent [state constitutional] standards [to] promote 'predictability and precision in judicial review'").

108. *People v. Kohl*, 72 N.Y.2d 191, 197, 527 N.E.2d 1182, 1185, 532 N.Y.S.2d 45, 48 (1988). The defendant challenged as violative of due process the state's requirement that defendant prove insanity as an affirmative defense by a preponderance of the evidence. *Id.* The court of appeals upheld the defense because it did not relieve the prosecution from proving beyond a reasonable doubt the *mens rea* of the defendant. *Id.* at 199, 527 N.E.2d at 1186, 532 N.Y.S.2d at 49.

nered in *specific* line drawing.¹⁰⁹ If the federal line is in flux, or non-existent such that citizens cannot formulate reasonable expectations of protection, then the court will utilize the state constitutional provisions to draw a line above the falling federal line.¹¹⁰ If the state court finds that the line the federal courts have drawn is explicit, but does not take state related concerns into account, then the court will redraw the line at a higher point affording greater rights under the state constitution.¹¹¹ As a result, when the line is explicit at the federal level and is drawn so as to take into account state related concerns, then state protection will match federal protection.¹¹²

Such an analysis, as well as an expanded individual rights outcome, is clearly warranted when the scope of protection afforded individual rights under the Federal Constitution is being altered by a conservative Supreme Court. Based on prior decisional law, the citizens of a state can expect a wide range of personal freedoms and responsibilities. As the scope of the protection afforded at the federal level changes, these expectations will not be accommodated by the federal courts and the line beyond which the state cannot cross will gradually impede upon these expectations as it becomes blurred. Creating the "bright line" at the state level preserves reasonable expectations of both the state and the individual.¹¹³

As the court noted in *P.J. Video*, Supreme Court decisions that muddy already protected rights "heighten[] the danger that our citizens' rights against unreasonable . . . intrusions might be violated."¹¹⁴ State court adherence to a right once found within the federal scope of protection, but which is now being eroded

109. See *supra* note 80 and accompanying text.

110. See *supra* notes 78-79 and accompanying text.

111. See *supra* notes 74-76 and accompanying text.

112. See, e.g., *Doe v. Maher*, 515 A.2d 134, 147 (Conn. Super. Ct. 1986) (noting that "[j]ust as it is wrong to assume that state constitutions are mere mirror images of the federal constitution, so it is wrong to assume that independent state constitutions share no principles with their federal counterpart") (citation omitted).

113. See *supra* note 104 and accompanying text.

114. *P.J. Video*, 68 N.Y.2d 296, 306, 501 N.E.2d 556, 562, 508 N.Y.S.2d 907, 913 (1986), *cert. denied*, 479 U.S. 1091 (1987).

and blurred by the Supreme Court, represents responsible individual protection as well as specific historical delineation of the metes and bounds of individual freedoms and governmental power.

2. Non-Interpretive Analysis in Other States

Other states have also addressed the question of whether their constitutions provide greater protection for individual rights that are mutual to the state and federal constitutions and have applied something akin to the non-interpretive analysis. For example, Connecticut has also utilized non-interpretive analysis to delineate the extent of state power in areas of privacy.¹¹⁵ As was discussed in the interpretive section,¹¹⁶ the Connecticut Supreme Court, in *Doe v. Maher*,¹¹⁷ afforded broader protection to the individual right of privacy utilizing the state constitution.¹¹⁸

The court looked to the traditions and conscience of the people to determine if the right of procreative choice, as a component of the right to privacy, was so deeply rooted as to become fundamental.¹¹⁹ The court utilized Connecticut decisional law¹²⁰

115. *Id.*

116. *See supra* notes 20-70 and accompanying text.

117. 515 A.2d 134 (Conn. Super. Ct. 1986).

118. *Id.* at 147.

119. *Id.*

120. *Id.* at 150. The court specifically cited *State v. Butkus*, 424 A.2d 659 (Conn. Super. Ct. 1980), where the defendant, convicted of prostitution, appealed, contending that the statute violated her constitutional right of privacy arising under both the state and federal constitutions. *Butkus*, 424 A.2d at 660. The court held that the state-based right of privacy does not extend to a conversation of a prostitute in the street. *Id.* (citing *State v. Allen*, 424 A.2d 651 (Conn. Super. Ct. 1988)). *See also* *Ochs v. Borelli*, 445 A.2d 883 (Conn. 1982) (in suit against doctor for negligent sterilization process and wrongful birth of their child, defendants' appeal based on sexual contact as proximate cause was rejected by the court as an impingement of the right of privacy); *State v. Allen*, 424 A.2d 651, 655 (Conn. Super. Ct. 1988) (court declined to extend the right of privacy to prostitutes "plying their trade . . ."); *Foody v. Manchester Memorial Hosp.*, 482 A.2d 713, 718 (Conn. Super. Ct. 1984) (the right of privacy includes the patient's or his substitute decision maker's right to decline life sustaining treatment).

to delineate the scope of the Connecticut constitutional right of privacy and found that it was deeply rooted and therefore fundamental.¹²¹ Specifically, the court reasoned that the right of procreative choice is an integral part of the right of privacy, as is the right to make self affecting medical decisions and the right to maintain the confidentiality of the doctor-patient relationship.¹²²

In *Right to Choose v. Byrne*,¹²³ the New Jersey Supreme Court also utilized a non-interpretive analysis. In *Byrne*, the court looked to the body of state decisional law to define the scope of the privacy right.¹²⁴ The court determined that the right of privacy as guaranteed by the New Jersey State Constitution includes the right to refuse medical treatment,¹²⁵ the right to procreative choice¹²⁶ and the right to decide with whom to have sexual relations.¹²⁷ Generally, the court has found that the right of privacy is one of personalty whereby the state's police power is curbed significantly with regard to decisions about private personal behavior.¹²⁸

121. *Maier*, 515 A.2d at 149-50.

122. *Id.* at 152-53.

123. 450 A.2d 925 (N.J. 1982).

124. *Id.* at 933 (the court utilized the interpretive prong to find a right of privacy under the state constitution and non-interpretive prong to define its scope).

125. *Id.* The court discussed the fact that the state has an interest in this area and the fundamental right is *balanced* against the state's asserted right. *Id.* In somewhat less than compelling interest language the court noted that "under some circumstances, an individual's . . . right to [refuse medical treatment] . . . overrides the State's interest in preserving life." *Id.* (citing *In re Grady*, 426 A.2d 467, 474 (N.J. 1981) (where parents sought tubal ligation for daughter afflicted with Down's Syndrome)). See *In re Grady*, 426 A.2d at 474 (where the court also noted that an intrusion into the right of privacy might require a "more persuasive showing of a public interest under our . . . constitution" than that which is required under the federal counterpart).

126. *Right to Choose*, 450 A.D.2d at 933-34 (discussing body of New Jersey law acknowledging a woman's right to choose whether to abort or carry a fetus to full term).

127. *Id.* at 933 (acknowledging right to privacy findings by New Jersey courts as including sexual conduct between consenting adults).

128. *State v. Saunders*, 381 A.2d 333, 339 (N.J. 1977) (finding state statute which prohibited sexual relations between men and unmarried women infringed upon the right of privacy despite state's interests in preventing

In contrast, the Supreme Judicial Court of Massachusetts has held that the right of privacy is not protected under the state constitution,¹²⁹ despite the availability of a constitutional provision¹³⁰ similar to the provision utilized to guarantee the right of privacy in New Jersey.¹³¹ In *Moe v. Secretary of Administration and Finance*,¹³² the court held that the Massachusetts State Constitution's due process clause provides for expanded protection of the right of privacy *arising out of the federal body of case law*.¹³³ The court relied on *Roe v. Wade*,¹³⁴ *Griswold v. Connecticut*,¹³⁵ and their progeny¹³⁶ to define the fundamental constitutional right of privacy, while looking to state law for a state defined "strong interest"¹³⁷ in non-consensual bodily invasion of an individual.¹³⁸ Utilizing the *federal* right of

venereal disease, preventing increase in number of illegitimate children and in protecting the marital relationship and public morality).

129. See *supra* note 58.

130. The Massachusetts Constitution states:

All people are born free and equal and have certain *natural, essential and unalienable rights*; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

MASS. CONST. pt. I, art. 1 (emphasis added).

131. The New Jersey State Constitution states: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, par. 1.

132. 417 N.E.2d 387 (Mass. 1981).

133. *Id.* at 400 (emphasis added).

134. 410 U.S. 113 (1973).

135. 381 U.S. 479 (1965).

136. See *Moe*, 417 N.E.2d at 397-98 (citing *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52 (1976)).

137. *Moe*, 417 N.E.2d at 399 (the "strong interest" seems to rise to the level of a liberty interest); see also *Superintendent of Belchertown v. Saikewicz*, 370 N.E.2d 417, 424 (Mass. 1977) (the interest arises in common law as a derivative of the doctrine of informed consent).

138. *Moe*, 417 N.E.2d at 398-99 (the court was not required to utilize state grounds for the right of privacy because adequate federal interpretation finding

privacy, in conjunction with an expanded state-based due process interpretation, the court struck down the funding scheme on the grounds that the due process clause required neutrality in the funding of medicaid once it was implemented.¹³⁹

II. THE RIGHT OF PRIVACY AND THE NEW YORK STATE CONSTITUTION

A. Introduction

In *Hope v. Perales*,¹⁴⁰ the trial court relied on the due process clause of the New York State Constitution¹⁴¹ to hold that a state based fundamental right of privacy existed.¹⁴² Utilizing an interpretive analysis, the court found there are minimal textual differences between the federal and state clauses.¹⁴³ The Fifth and Fourteenth Amendments to the Federal Constitution have virtually the same language as article I, section 6 of the New York State Constitution.¹⁴⁴ Further, no legislative intent or

a fundamental right of privacy exists).

139. *Id.* at 400-01.

140. 150 Misc. 2d 985, 571 N.Y.S.2d 972 (Sup. Ct. New York County 1991).

141. N.Y. CONST. art. I, § 6; *see supra* note 7.

142. *Hope*, 150 Misc. 2d at 991, 571 N.Y.S.2d at 976-77. The court referred to the "constitutional right to privacy guaranteed by the due process clause of the New York State Constitution." *Id.*

143. *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 160, 379 N.E.2d 1169, 1173, 408 N.Y.S.2d 39, 44 (1978). The only difference between the state due process clause and the federal due process clause of the fourteenth amendment is the absence of a state action requirement in the New York State constitutional clause. *Id.* In *Sharrock*, this omission was used by the New York Court of Appeals to relax state action requirements imposed by federal decisional law. *Id.* (citing *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978), and noting similarities with the case before the court). Although *Flagg Bros.* involved the rejection by the Supreme Court of a warehouseman's lien and *Sharrock* was a private sale authorized by lien law, both focused on whether each sale constituted state action. *See Sharrock*, 45 N.Y.2d at 149 n.2, 379 N.E.2d at 1173 n.2, 408 N.Y.S.2d at 43 n.2.

144. The fifth amendment of the United States Constitution provides, in pertinent part: "[n]o person shall be . . . deprived of life, liberty, or property

historical basis for the 1821 enactment is available. As such, an interpretive analysis of the due process basis of the right is not enlightening.

B. Non-Interpretive Analysis

Analysis under the non-interpretive prong operates within the individual rights framework of the New York State Constitution. Specifically, as noted by the New York Court of Appeals, the New York State Constitution has "long safeguarded any threat to individual liberties, irrespective of from what quarter that peril arose."¹⁴⁵ The nature of the constitution serves to affirm individual rights against encroachment.¹⁴⁶ In addition, notions of fundamental fairness and state law concerns necessarily warrant a broad degree of protection for individual rights arising under the state constitution.¹⁴⁷

1. Familial Relationships

In *Cooper v. Morin*,¹⁴⁸ for example, the court of appeals held that pretrial detainees must be provided an opportunity for visits with family members where they could maintain physical contact.¹⁴⁹ The plaintiffs in *Cooper* were pretrial detainees being

without due process of law" U.S. CONST. amend. V. The fourteenth amendment of the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The New York State Constitution provides, in pertinent part, "[n]o person shall be deprived of life, liberty or property without due process of law." N.Y. CONST. art. I, § 6.

145. *Sharrock*, 45 N.Y.2d at 160, 379 N.E.2d at 1174, 408 N.Y.S.2d at 44.

146. *Id.* at 161, 379 N.E.2d at 1174, 408 N.Y.S.2d at 44.

147. *People v. P.J. Video, Inc.*, 68 N.Y.2d 297, 303, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911-12 (1986), *cert. denied*, 479 U.S. 1091 (1987).

148. 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979), *cert. denied*, 446 U.S. 984 (1980).

149. *Id.* at 73, 399 N.E.2d at 1190, 424 N.Y.S.2d at 170-71 (holding "pretrial detainees are entitled to contact visits of reasonable duration as a matter of State, though not of Federal, constitutional right . . .").

held at the Monroe County correctional facility in Rochester.¹⁵⁰ As a result of "temporary" conditions,¹⁵¹ the women at the facility were limited to ten to fifteen minute non-contact visits with family and friends.¹⁵² The plaintiffs contested the denial of physical contact visitation.¹⁵³ The New York Court of Appeals found the state could not, merely for budgetary reasons,¹⁵⁴ abridge the detainee's "fundamental right to marriage[,] family life . . . and to bear and rear children"¹⁵⁵ because the detainees were held only to ensure their appearance at trial and were not yet convicted of any crime.

During the interval of time between the decision in *Cooper* in the appellate division¹⁵⁶ and its review by the court of appeals,¹⁵⁷ the United States Supreme Court decided *Bell v.*

150. *Id.* at 73, 399 N.E.2d at 1190, 424 N.Y.S.2d at 171. The action was granted class action status specifically including "all women inmates of the Monroe County jail" *Id.* The named plaintiffs were three pretrial detainees and three convicted and sentenced inmates. *Id.* at 74, 399 N.E.2d at 1190, 424 N.Y.S.2d at 171.

151. *Id.* at 74, 399 N.E.2d at 1191, 424 N.Y.S.2d at 171. The use of existing "lockup facilities" was approved on a temporary basis by the state commission of correction due to a lack of room for female inmates. *Id.* The "temporary" conditions that supported the use of non-conforming facilities for pretrial detention existed for over five years at the time of trial. *Id.*

152. *Id.*

153. *Id.* at 73, 399 N.E.2d at 1190, 424 N.Y.S.2d at 170.

154. *Id.* at 81-82, 399 N.E.2d at 1195, 424 N.Y.S.2d at 176 (the court noted that "'to exalt economic considerations over the rights of our citizens is nothing more than abdication of this court's constitutional responsibility'" (citations omitted)).

155. *Id.* at 80, 399 N.E.2d at 1194, 424 N.Y.S.2d at 175. The court balanced the fundamental rights of detainees against the state's interest in the maintenance of security. *Id.* at 80-81, 399 N.E.2d at 1194-95, 424 N.Y.S.2d at 175-76. The court dismissed additional expenditures for rearrangement finding that the state failed to satisfy a "strong showing of necessity." *Id.* at 81, 399 N.E.2d at 1195, 424 N.Y.S.2d at 176.

156. The fourth department decided this case on September 15, 1978. *See Cooper v. Lombard*, 64 A.D.2d 130, 409 N.Y.S.2d 30 (4th Dep't 1978), *modified sub nom. Cooper v. Morin*, 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979) (court considered state constitutional grounds, though trial court and appellate division did not).

157. The court of appeals decided this case on December 19, 1979. *See Cooper v. Morin*, 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168

Wolfish.¹⁵⁸ This case was analogous to *Cooper* in that the plaintiffs were a group of pretrial detainees held at the Metropolitan Correctional Center in Manhattan.¹⁵⁹ The plaintiffs challenged a number of the conditions at the facility including "double bunking,"¹⁶⁰ the "publisher-only" rule¹⁶¹ and strip searches performed after contact visits.¹⁶² The United States Supreme Court, in overturning a lower court ruling requiring a compelling necessity to continue the challenged practices,¹⁶³ held that absent an intent to punish the detainees, a practice will be sustained so long as it is reasonably related to a legitimate governmental interest.¹⁶⁴ An example of such a legitimate interest is the government's need to maintain security at the facility.¹⁶⁵ In addition, the Court noted that in determining whether a practice is reasonably related to such an objective, courts should extend great deference to the prison officials who understand the nature of the task of prison administration.¹⁶⁶ The

(1979), *cert. denied*, 446 U.S. 984 (1980).

158. 441 U.S. 520 (1979) (decided on May 14, 1979).

159. *Id.* at 523.

160. *Id.* at 525-26. In order to provide sleeping space, single bunks were replaced with double bunks. *Id.* Of the 389 residential rooms, 121 were designated for double-bunking. *Id.* at 526 n.4. However, the number of rooms actually housing two inmates never exceeded 73, and of these, only 35 rooms housed double-bunked pre-trial detainees. *Id.*

161. *Id.* at 548-49 (permitted inmates to receive books and magazines only if they were mailed directly from the publisher or book club).

162. *Id.* at 558 (requiring inmates to expose their body cavities for visual inspection after each contact visit).

163. *Id.* at 563. The Supreme Court noted that their "fundamental disagreement with the Court of Appeals [was] that [it] failed to find a source in the Constitution for its compelling-necessity standard." *Id.* at 532; *see Wolfish v. Levi*, 573 F.2d 118, 124 (2d Cir. 1978) (stating that "this standard of compelling necessity is neither rhetoric nor dicta"), *rev'd sub nom. Bell v. Wolfish*, 441 U.S. 520 (1979).

164. *Bell*, 441 U.S. at 539 (stating that "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment'").

165. *Id.* at 540. The Court further stated that such security measures "may directly serve the Government's interest in ensuring the detainee's presence at trial." *Id.* at 540 n.22.

166. *Id.* at 539. The court warned that inquiries with respect to legitimacy

Court clearly intended to admonish courts for interfering with any internal administration of prisons stating that “[s]uch considerations are peculiarly within the . . . professional expertise of corrections officials.”¹⁶⁷ In such a case, the restriction will be sustained so long as it is not completely irrational even where the challenged restriction impinges on a detainee’s fundamental constitutional rights.

In *Bell*, the challenged practices included strip searches that were alleged to be unreasonable and therefore in violation of the Fourth Amendment.¹⁶⁸ The Court sustained the practice for detainees who had engaged in contact visits as legitimate and reasonably calculated to maintain prison security.¹⁶⁹ While mentioning the elimination of contact visits as an alternative which would obviate the need for body cavity searches, the Court failed to decide whether such elimination would be unconstitutional.¹⁷⁰

In *Cooper*, however, the New York Court of Appeals held otherwise.¹⁷¹ The court stated that had this case come before the United States Supreme Court based upon challenging the interference with the fundamental right of familial relationships, it was certain that the Court would have relied on *Bell*.¹⁷² Therefore,

of restrictions must “spring from constitutional requirements and that judicial answers to them must reflect that fact *rather than a court’s idea of how best to operate a detention facility*.” *Id.* (emphasis added).

167. *Id.* at 540 n.23 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

168. *Id.* at 558. Although the court admitted that the body cavity searches “instinctively gives us the most pause,” they failed to find them unreasonable under the fourth amendment. *Id.*

169. *Id.* at 560 (stating that “[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that” the institution can engage in body cavity searches).

170. *Id.* at 560 n.40. Although the Court referred to the holding below that pretrial detainees have a constitutional right to contact visits, it stated that since the ruling was not challenged, they would “express no opinion.” *Id.* (citing *Wolfish v. Levi*, 573 F.2d 118, 126 n.16 (2d Cir. 1978), *rev’d sub nom.* *Bell v. Wolfish*, 441 U.S. 520 (1979)).

171. *Cooper v. Morin*, 49 N.Y.2d 69, 81-82, 399 N.E.2d 1188, 1195-96, 424 N.Y.S.2d 168, 176 (1979), *cert. denied*, 446 U.S. 984 (1980).

172. *Id.* at 77-78, 399 N.E.2d at 1192-93, 424 N.Y.S.2d at 172-73.

focusing on state constitutional grounds instead,¹⁷³ the court of appeals found that a heightened scrutiny “balancing . . . the harm to the individual . . . against the benefit sought by the government”¹⁷⁴ was the proper level of inquiry.¹⁷⁵ Noting that the Supreme Court test utilized a “one-sided concept of due process,”¹⁷⁶ the court weighed the state-based fundamental right to marriage, procreation and bearing and rearing children against the governmental security interests.¹⁷⁷ It found the state practices did not rise to the level of a strong showing of necessity necessary to abridge the individual’s fundamental right.¹⁷⁸

The familial aspect of the right of privacy was further highlighted in another court of appeals case, *In re Marie B.*,¹⁷⁹ which challenged the constitutionality of Family Court Act section 1039(e).¹⁸⁰ Marie B.’s mother violated an adjournment in con-

173. *Id.* at 78, 399 N.E.2d at 1193, 424 N.Y.S.2d at 173. The court concluded that “contact visitation [was] not required by either the due process or equal protection clause of the Fourteenth Amendment to the Federal Constitution.” *Id.* at 75-76, 399 N.E.2d at 1191-92, 424 N.Y.S.2d at 172. However, the court found “contact visitation of reasonable duration is required by the due process clause of the State Constitution.” *Id.* at 76, 399 N.E.2d at 1191-92, 424 N.Y.S.2d at 172.

174. *Id.* at 79, 399 N.E.2d at 1194, 424 N.Y.S.2d at 174-75.

175. *Id.*

176. *Id.* The court disagreed with the prior Supreme Court holding in *Bell* which required only a legitimate state purpose to justify punishment of pretrial detainees. *Id.* It concluded that “[s]o one-sided a concept of due process we regard as unacceptable.” *Id.*

177. *Id.* at 80-81, 399 N.E.2d at 1194-95, 424 N.Y.S.2d at 175-76. The state’s purpose for pretrial detention was characterized as ensuring the detainee would be present at trial. *Id.* at 81, 399 N.E.2d at 1195, 424 N.Y.S.2d at 176. Therefore, the court concluded “[t]o this end the State may adopt security measures intended to frustrate possible attempts at escape or the passage of contraband from a visitor to a detainee” *Id.*

178. *Id.* at 81-82, 399 N.E.2d at 1195-96, 424 N.Y.S.2d at 176.

179. 62 N.Y.2d 352, 465 N.E.2d 807, 477 N.Y.S.2d 87 (1984).

180. *Id.* at 357-58, 465 N.E.2d at 809, 477 N.Y.S.2d at 89. The court quoted the New York Family Court Act section 1039(e) as it existed before 1985, stating:

Upon application of the petitioner or the child’s attorney or law guardian, or upon the court’s own motion, made at any time during the duration of the order, the court may restore the matter to the calendar, if

templation of dismissal order and, under the terms of section 1039(e), the Oneida County Department of Social Services petitioned to have the child removed from the mother's custody without a fact-finding hearing.¹⁸¹ The court of appeals held that the statutory scheme for presuming neglect or abuse in the event of a violation of the order was unconstitutional.¹⁸² In order to remove the child in contravention of the fundamental right of privacy of the parent in rearing the child, the government must show an "overriding necessity."¹⁸³ The court reasoned that "legislation which authorizes the removal of a child from the parent without the requisite showing of . . . *extraordinary circumstances* constitutes an impermissible abridgement of fundamental parental rights."¹⁸⁴ Thus, under the New York State Constitution the right to be free from interference in familial relationships is fundamental and can only be abridged when the state can show by clear and convincing evidence a compelling state interest.

However, the familial right of privacy is not absolute. In *People v. Liberta*,¹⁸⁵ the court of appeals reasoned that a man's right of privacy is not violated when he is prosecuted for raping

the court finds after a hearing that the respondent has failed substantially to observe the terms and conditions of the order or to cooperate with the supervising child protective agency. *In such event, circumstances of neglect shall be deemed to exist, and the court may thereupon proceed to a dispositional hearing under this article and may, at the conclusion of such hearing, enter an order of disposition authorized pursuant to section one thousand fifty-two with the same force and effect as if a fact-finding hearing had been held and the child had been found to be an abused child or a neglected child.*

Id. (quoting Act of Aug. 9, 1975, ch. 707, § 1039(e), 1975 N.Y. Laws 1121 (McKinney)).

Based on the court's finding, the New York Family Court Act was subsequently amended to delete the last sentence of § 1039(e). Act of Nov. 25, 1985, ch. 601, § 1039(e), 1985 N.Y. Laws 1501 (McKinney).

181. *Marie B.*, 62 N.Y.2d at 355-56, 465 N.E.2d at 808-09, 477 N.Y.S.2d at 88-89.

182. *Id.* at 358, 465 N.E.2d at 810, 477 N.Y.S.2d at 90.

183. *Id.*

184. *Id.* (emphasis added).

185. 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984).

his wife.¹⁸⁶ The court held the right of privacy extends only to consensual acts, even in the marital context.¹⁸⁷

2. Bodily Integrity and Medical Matters

In *Rivers v. Katz*,¹⁸⁸ the court of appeals held that involuntarily committed mental patients have the right to refuse antipsychotic medication.¹⁸⁹ The plaintiffs were patients who were involuntarily committed to a state psychiatric facility and forced to be medicated with antipsychotic drugs.¹⁹⁰ The plaintiffs brought suit to enjoin the administration of these drugs “and to obtain a declaration of their common-law and constitutional right to refuse medication.”¹⁹¹ The court of appeals held that the due process clause of the state constitution affords involuntarily committed mental patients a fundamental right to refuse antipsychotic medication.¹⁹²

The court stated that the common law of New York afforded “every individual of adult years and sound mind . . . ‘a right to determine what shall be done with his own body’” and the right to control his medical treatment.¹⁹³ In addition, the court rejected the argument that the plaintiffs’ states of mental illness decreased their “*fundamental liberty interest* to reject”¹⁹⁴ medical treatment. In order to override the patient’s wishes, the state must

186. *Id.* at 165, 474 N.E.2d at 574, 485 N.Y.S.2d at 214 (husband “cannot justifiably rape his wife under the guise of right to privacy”).

187. *Id.*

188. 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986).

189. *Id.* at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78.

190. *Id.* at 490-91, 495 N.E.2d at 339-40, 504 N.Y.S.2d at 77.

191. *Id.* at 491, 495 N.E.2d at 340, 504 N.Y.S.2d at 77.

192. *Id.* at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78.

193. *Id.* (quoting *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914), *overruled by* *Bing v. Thunig*, 2 N.Y.2d 656, 163 N.Y.S.2d 3, 143 N.E.2d 3 (1957)).

194. *Id.* at 495, 495 N.E.2d at 342, 504 N.Y.S.2d at 79-80 (emphasis added). Earlier the court noted that “it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires.” *Id.* at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78.

show a compelling interest.¹⁹⁵ Compelling state interests include situations where the patient represents a danger to himself or others within society,¹⁹⁶ or where the treatment implicates the police power of the state.¹⁹⁷ The state must prove this compelling interest by clear and convincing evidence and the treatment must be narrowly tailored to give as much effect as possible under the circumstances to the patient's wishes.¹⁹⁸

State compelling interests in this area, while including the right to protect the health of the citizenry, do not include preventing the natural death of the patient.¹⁹⁹ Further, the patient's wishes will be recognized even after the patient has become incompetent when they are made known by means of a living will or other clear and convincing proof.²⁰⁰

New York statutory law also contributes to the fundamental fairness argument. New York Penal Law section 125.05(3), enacted three years before the United States Supreme Court decision in *Roe v. Wade*,²⁰¹ provides for access to abortion services within twenty-four weeks of the beginning of a pregnancy.²⁰² Thus, the right of procreative choice is inherent in the statutory framework of New York law without regard to Supreme Court

195. *Id.* at 495-96, 495 N.E.2d at 343, 504 N.Y.S.2d at 80.

196. *Id.* at 496, 495 N.E.2d at 343, 504 N.Y.S.2d at 80.

197. *Id.* at 497-98, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

198. *Id.* at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

199. *See, e.g., In re Storar*, 52 N.Y.2d 363, 377, 420 N.E.2d 64, 71, 438 N.Y.S.2d 266, 273 (1988) (stating that a "patient's right to determine the course of his own medical treatment [is] paramount to what might otherwise be the doctor's obligation to provide needed medical care").

200. *See, e.g., In re O'Connor*, 72 N.Y.2d 517, 530, 531 N.E.2d 607, 613, 534 N.Y.S.2d 886, 892 (1988) (stating that "no one should be denied essential medical care unless the evidence clearly and convincingly shows that the patient intended to decline the treatment . . .").

201. 410 U.S. 113 (1973).

202. N.Y. PENAL LAW § 125.05(3) (McKinney 1987). This section provides in pertinent part: "Justifiable abortion act." An abortion act is justifiable when committed upon a female with her consent by a duly licensed physician acting (a) under a reasonable belief that such is necessary to preserve her life, or (b) within 24 weeks from the commencement of her pregnancy.
Id.

decisional law.²⁰³

The New York citizenry, therefore, has a reasonable expectation of fundamental privacy in matters of marriage, child rearing, bodily integrity and procreative choice.²⁰⁴ Notions of fundamental fairness warrant the broad interpretation of this right within the New York constitutional framework in order to meet the reasonable expectations of the citizenry in accordance with New York statutory and common law.²⁰⁵

III. RECENT DEVELOPMENTS OF THE FEDERAL RIGHT OF PRIVACY

In addition to notions of fundamental fairness, a finding that the New York State Constitution independently provides for a fundamental right of privacy is warranted given the court of appeals' "bright line" philosophy.²⁰⁶ The state of the right of privacy at the federal level is problematic. The Supreme Court is currently limiting the scope of the federally defined right of privacy, especially in the area of procreative choice.²⁰⁷

In *Webster v. Reproductive Health Services, Inc.*,²⁰⁸ the Court

203. New York Penal Law § 125.05 was amended in 1970 to include the twenty-four week provision described in subsection (3)(b) (set forth at *supra* note 201). Act of July 1, 1970, ch. 127, § 3, 1970 N.Y. Laws 170 (McKinney). This amendment occurred three years before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973).

204. See *supra* notes 104, 110, 113 and accompanying text (describing placement of citizen's expectations in non-interpretive leg of analysis).

205. See *People v. P.J. Video, Inc.*, 68 N.Y.2d 297, 303, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911-12 (1986) (describing notions of fundamental fairness in the context of the non-interpretive prong of analysis for expanded state protection), *cert. denied*, 479 U.S. 1091 (1986).

206. For a discussion of the "bright line" philosophy, see *supra* note 79 and accompanying text.

207. See generally *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); see also Walter Dellinger and Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PA. L. REV. 83, 84 (1989).

208. 492 U.S. 490 (1989) (finding that a state has a *continuing* interest in protecting potential human life whose strength varies depending on the trimester of pregnancy).

held that the framework for the protection of the fundamental right to procure an abortion was unworkable and unsound.²⁰⁹ It held, in contrast to *Roe v. Wade*,²¹⁰ that the state's interest in potential life arises when the fetus is viable.²¹¹ Thus, the "liberty interest" of the woman to procure an abortion²¹² can be regulated provided the state does so reasonably and with a legitimate state interest, such as the protection of potential life.²¹³ The Court retreated from holding that a fundamental right to procure an abortion existed, as established in *Roe*, and addressed the issue of whether a legitimate state interest in potential life exists *before* viability.²¹⁴ The Court retreated from previous decisional law that resulted in a muddying of the scope of the right. Will an outright ban on abortions be upheld? Does the interest in potential human life rise above potentially life threatening health conditions in the mother such as those discussed in *Doe v. Maher*?²¹⁵ Before *Webster*, these questions would have all been answered in the negative.

In addition to limiting rights in the procreative choice aspect of

209. *Id.* at 518 (stating that "*Roe* trimester framework falls into category of construction that is unsound in principle and unworkable in practice").

210. 410 U.S. 113 (1973).

211. *Webster*, 492 U.S. at 519. The Court held valid the state's requirement for viability testing prior to abortion reasoning that the state's choice of viability as the point where potential human rights must be safeguarded permissibly furthered the state interest. *Id.* at 519-20.

212. *Id.* at 520 ("a liberty interest protected by the Due Process Clause" and not a fundamental right).

213. *Id.*

214. *Id.* at 504. The preamble of the Missouri act in question stated that "[t]he life of each human being begins at conception." *Id.* The Court refused to pass on the constitutionality of the preamble because it had not yet been used to restrict or regulate abortion. *Id.* at 513. The Court found that the requirement of these tests permissibly furthers the state's interest in protecting potential human life because the state in this case has chosen viability as the point at which its interest in potential life must be safeguarded. *Id.* at 519-20. See also *Dellinger*, *supra* note 207, at 84 (stating "the *Webster* plurality rejected a decision recognizing a fundamental constitutional right without explaining what, if anything, was wrong with the decision").

215. *Doe v. Maher*, 515 A.2d 134, 135 (Conn. Super. Ct. 1986) (the regulation in question restricted funding to those abortions "necessary because the life of the mother would be endangered if the fetus were carried to term").

the right of privacy, the Court has also limited the rights of medical patients to refuse life sustaining treatment. In *Cruzan v. Director, Missouri Department of Health*,²¹⁶ the Court found that the right to refuse medical treatment was not fundamental, but a liberty interest.²¹⁷ The case involved the level of proof required to show that an incompetent would have refused life sustaining medical treatment.²¹⁸

Mary Beth Cruzan was a patient in a persistent vegetative state who, according to her family, had previously made her wishes known that should she ever be severely injured with no hope of recovery, she would not have wanted to continue life sustaining treatment.²¹⁹ The Supreme Court of Missouri, however, found that the level of proof required in the case, clear and convincing evidence, had not been produced.²²⁰ Therefore, the state court held that life sustaining treatment could not be removed.²²¹

The United States Supreme Court, finding that the state law requiring clear and convincing evidence only implicated a liberty interest, upheld the evidentiary requirement.²²² Conversely, the dissent noted that because the right to refuse medical treatment was a fundamental right, the evidentiary requirement impinging on that right must be examined under strict scrutiny.²²³ The majority, however, limited the aspect of the right of privacy implicating the right to refuse medical treatment by allowing the regulation of that right to be tested under a rational basis test.²²⁴

216. 110 S. Ct. 2841 (1990).

217. *Id.* at 2851. In *Cruzan*, the parents of a patient in a persistent vegetative state brought an action to terminate artificial hydration and nutrition. *Id.* at 2842. While finding a "liberty interest" under the due process clause, the Court still required substantial proof that the guardians' views reflected those of the patient. *Id.* at 2851-52.

218. *Id.* at 2845.

219. *Id.* at 2846.

220. *Cruzan v. Harmon*, 760 S.W.2d 408, 426 (Mo. 1988) (en banc), *aff'd sub nom. Cruzan v. Director, Missouri Dep't of Health*, 110 S. Ct. 2841 (1990).

221. *Id.*

222. *Cruzan*, 110 S. Ct. at 2846.

223. *Id.* at 2864 (Brennan, J., dissenting).

224. *Id.* at 2853 (the Court stated "Missouri may legitimately seek to

The right of privacy in medical decision making is therefore not fundamental at the federal level, but merely a liberty interest protected by the rational basis test.

Thus, the Court continues to blur the metes and bounds of the right of privacy at the federal level. The Court is continuing to limit the overall scope of the right, permitting greater governmental encroachment on the fundamental right of privacy by "chipping" off pieces and "protecting" the separated parts under the low level liberty interest protection of the Due Process Clause.²²⁵

CONCLUSION

The New York State Constitution provides an independent and broader basis of a fundamental right of privacy.²²⁶ This fundamental right arises out of the non-interpretive prong of the constitutional analysis called for by the New York Court of Appeals.²²⁷ The common and statutory law of New York provides for, *inter alia*, a right of privacy in medical decision making, familial relationships, and the exercise of procreative choice.²²⁸ Further, the United States Supreme Court has begun to decide cases in this area that muddy previous decisional law in an attempt to restrict the right.²²⁹ The protection at the federal level is retracting and the citizens of the state have a legitimate and reasonable expectation that their right of privacy will not be violated by governmental encroachment. Current federal protection schemes will not prevent the diminution of reasonable expectations in this area. Therefore, it is incumbent upon New York

safeguard the personal element of this choice through imposition of heightened evidentiary requirements") (emphasis added).

225. See generally *Cruzan v. Director, Missouri Dep't of Health*, 110 S. Ct. 2841 (1990); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

226. See *supra* notes 1-8 and accompanying text.

227. See *supra* notes 71-80 and accompanying text.

228. See *supra* notes 148-205 and accompanying text (discussing New York law in this area).

229. See *supra* notes 207-224 and accompanying text.

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State courts to delineate a broadly defined fundamental right of privacy arising under the due process clause of the state constitution. Such a delineation is necessary in order to preserve all expectations, define the scope of individual rights and clearly mark the limits of governmental power.

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