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PROTECTING THE CONFIDENTIALITY OF BLOOD DONORS' IDENTITIES IN AIDS LITIGATION

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TABLE OF CONTENTS

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I. Introduction

A current issue in AIDS litigation is the extent to which the identities of volunteer blood donors can be protected from disclosure during discovery. As the volume of AIDS litigation involving hospitals and blood banks increases, this issue and the conflicts it raises become more acute.

Recognizing the importance of this issue, Congress has conducted extensive hearings on the confidentiality of blood donors' identities. Many experts who testified at those hearings recommended federal legislation to protect the identities of donors.[1] Pending such national legislation, however, the states have been left to grapple with this issue.

The donor confidentiality issue typically arises in a lawsuit against a blood bank or hospital which has allegedly distributed blood contaminated with the AIDS virus to the plaintiff. The theories of recovery in these cases include negligence, breach of warranty, and, in some cases, strict liability.[2]

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1. *See Protection of Confidentiality of Records of Research Subjects and Blood Donors, 1985: Hearings Before the Subcomm. on Health and the Environment of the House of Rep. Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 111-15, 124-32, 175-202 (1985) (testimony of Dr. Frank E. Young, Comm'r of Food and Drugs of the Dep't of Health and Human Services; Dr. Edward N. Brandt, Jr., former Ass't Secretary of Health; Dr. Joseph R. Bove, Prof. of Laboratory Medicine at Yale Univ.; Victor Schmitt, Vice-President of Medical Operations of the American Red Cross; and Robert W. Reilly, President of the American Blood Resources Ass'n) [hereinafter *Hearings*].

2. *See, e.g.*, Mason v. Regional Medical Center, 121 F.R.D. 300 (W.D. Ky. 1988) (negligence, strict liability, and breach of warranty); Krygier v. Airweld, Inc., 137 Misc. 2d 306, 520 N.Y.S.2d 475 (N.Y. Sup. Ct. 1987) (negligence); Taylor v. West Penn Hosp., No. GD87-00206, slip op. (Pa. Ct. Comm. Pleas Aug. 12, 1987) (negligence); Doe v. American Nat'l Red Cross, No. 88C-169, slip op. (Tenn. Cir. Ct. Aug. 8, 1988) (negligence and breach of warranty); Gulf

Under any of these theories, plaintiffs may seek to discover the identities of the donors of the blood they received.

Blood banks and hospitals uniformly oppose the disclosure of blood donors' identities, both because they have an obligation to protect donor privacy, and because they fear that public disclosure of donors' identities would discourage blood donations. If disclosure of donors' identities were allowed, people who would otherwise volunteer might not donate blood to avoid being publicly connected with AIDS.

The grounds relied on to protect donor identity vary, but the majority position to date is that the identities of blood donors should be protected from discovery in civil cases.[3] Only one state high court has dealt with the issue, but a federal district court in Kentucky and lower courts in New York, Pennsylvania, Tennessee, Texas, and Wisconsin have also addressed it.[4]

This article will describe, from the perspective of the hospital and the blood bank, the three principal theories which have been advanced to protect the identities of blood donors; the strengths and weaknesses of these theories; and the acceptance of these theories by the courts. Part II will discuss the statutory physician-patient privilege; Part III will discuss federal and state constitutional provisions; and Part IV will discuss state abuse-of-discovery rules.[5]

Coast Regional Blood Center v. Houston, 745 S.W.2d 557 (Tex. Ct. App. 1988) (negligence and strict liability); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. Ct. App. 1987) (negligence and implied warranty), *cert. denied*, 108 S. Ct. 1027 (1988).

Most states, however, limit the grounds under which a blood bank can be sued for having contaminated a transfusion recipient's blood with the AIDS virus. *See, e.g.*, ILL. REV. STAT. ch. 111½, ¶ 5101 (1987) (limiting liability of those engaged in the scientific procedure of transfusing blood or blood related products "to instances of negligence or willful misconduct"); 42 PA. CONS. STAT. ANN. § 8333 (Purdon 1983) (no recovery against institutions lawfully performing transfusions "by reason of any rule of strict liability or implied warranty").

3. *Compare* Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533 (Fla. 1987), *aff'd* 467 So. 2d 798 (Fla. Dist. Ct. App. 1985); Krygier v. Airweld, Inc., 137 Misc. 2d 306, 520 N.Y.S.2d 475 (N.Y. Sup. Ct. 1987); Taylor v. West Penn. Hosp., No. GD87-00206, slip op. (Pa. Ct. Comm. Pleas Aug. 12, 1987); Doe v. American Nat'l Red Cross, No. 88L-169, slip op. (Tenn. Cir. Ct. Aug. 8, 1988) (all disallowing discovery of donor identities) *with* Gulf Coast Regional Blood Center v. Houston, 745 S.W.2d 557 (Tex. Ct. App. 1988); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. Ct. App. 1987); Glessner v. Blood Center, No. 740451, slip op. (Wis. Cir. Ct. June 26, 1987) (memorandum decision) (all allowing such discovery). *See also* Mason v. Regional Medical Center, 121 F.R.D. 300 (W.D. Ky. 1988) (requiring that donor provide discovery but that his identity be kept confidential by ordering attorneys on each side to designate one attorney to conduct discovery but barring that attorney from divulging identity information to patients or others).

4. The Florida Supreme Court, in Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533 (Fla. 1987), is the only state high court to have addressed the issue. *See also* Mason v. Regional Medical Center, 121 F.R.D. 300 (W.D. Ky. 1988). *See also supra* note 3 (listing jurisdictions and courts which have addressed the issue).

5. It also has been stated that disclosure of blood donors' identities without affording them notice and the opportunity to be heard may violate their procedural due process rights.

II. The Physician-Patient Privilege as a Bar to Discovery

One theory which has been asserted to protect the identities of blood donors is the physician-patient privilege. State civil discovery rules generally provide that privileged information is protected from disclosure during discovery.[6] Although the physician-patient privilege does not exist at common law,[7] most states have created such a privilege by statute.[8] Use of this privilege, if available, is particularly desirable because it provides the court with a narrow, nondiscretionary ground on which to deny disclosure.

Two states have directly addressed the question whether their physician-patient privilege statutes protect the identities of blood donors. In *Krygier v. Airweld, Inc.*,[9] a New York trial court concluded that New York's statutory privilege was broad enough to protect the blood donors' identities. In that case, the plaintiff sued the defendant blood bank for wrongful death

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See Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 538 n.12 (Fla. 1987) (noting that, "without fully addressing the issue . . . because disclosure of the information requested threatens damage to the donors' reputation and other liberty interests, the donors' due process rights are also implicated"). Indeed, a person's reputation has been held to be a protected "liberty" interest under the due process clause of the fourteenth amendment. *See, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."). Only one court, however, has addressed the issue, and it dismissed the claim without any real discussion as not implicating a liberty interest. *See* Gulf Coast Regional Blood Center v. Houston, 745 S.W.2d 557, 561 (Tex. Ct. App. 1988) (stating that disclosure to plaintiff only was not *public* disclosure, which would implicate due process standards of hearing and notice). Because of the lack of precedent on this issue, and the fact that it is the weakest of the arguments given the Supreme Court's recent hesitancy in the area, this article will not address it further.

6. *See, e.g.*, Cal. Civ. Proc. Code § 2016 (West Supp. 1988) (providing that any party may obtain discovery regarding "any matter, *not privileged*, which is relevant to the subject matter involved in the pending action"); Del. Ct. Civ. P.R. 26(b)(1) (same operative language); Fla. Civ. P.R. 1.280(b)(1) (accord); Ill. Rev. Stat. ch. 110A, ¶ 201(b)(2) (1987) ("All matters that are privileged against disclosure on the trial . . . are privileged against disclosure through any discovery procedure."). *But see* Noble v. United Benefit Life Ins. Co., 230 Iowa 471, 475, 297 N.W. 881, 884 (1940) (dictum) (The Iowa privilege statute "does not prohibit a physician from disclosing any confidential communications. It prohibits him from giving testimony.").

7. *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977) ("The physician-patient evidentiary privilege is unknown to the common law.") (citations omitted); 8 J. Wigmore, Evidence § 2380, at 818 (McNaughton rev. ed. 1961) [hereinafter Wigmore on Evidence] ("It was early understood . . . as soon as the secrecy of private confidence in general was finally settled to be no justification for a legal privilege . . . that confidences given to a physician stand upon no better legal footing than others."). A small number of courts, however, recently have developed a physician-patient privilege under the common law. *See, e.g.*, Argonaut Ins. Co. v. Peralta, 358 So. 2d 232 (Fla. Dist. Ct. App. 1978) (extending common law physician-patient privilege to medical records of persons not involved in a lawsuit between an injured patient and a physician), *cert. denied*, 364 So. 2d 889 (Fla. 1978).

8. Wigmore states that "two thirds of the jurisdictions" presently have such statutes. 8 Wigmore on Evidence, *supra* note 7, § 2380, at 820.

9. Krygier v. Airweld, Inc., 137 Misc. 2d 306, 520 N.Y.S.2d 475 (N.Y. Sup. Ct. 1987).

when the plaintiff's husband died of AIDS after receiving blood provided by the defendant. During discovery the plaintiff requested the names and addresses of the donors of the blood the plaintiff's decedent had received. When the blood bank refused to comply, the plaintiff filed a motion to compel disclosure. The blood bank resisted the plaintiff's motion and moved for a protective order. The blood bank argued that the information came within New York's statutory physician-patient privilege.[10]

The New York statute provided:

> Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing or dentistry shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity . . . .[11]

The court stated the issue as whether the New York statute should be interpreted "to encompass in scope the relationship between the donor and the blood bank."[12] Concluding that it should, the court found significant an affidavit presented by the blood bank which stated that physicians and nurses were always present at some point during the blood donation process.[13] The court also relied on the statute's policy of fostering the free flow of information between physician and patient, and found that the policy was equally applicable to the relationship between the blood donor and the blood bank.[14] In holding the identities privileged, however, the court simply assumed that the information fell within the statute.[15]

In contrast, a Texas appellate court found that Texas' physician-patient privilege did not protect a blood bank from the obligation to disclose donors' identities. In *Tarrant County Hospital District v. Hughes*,[16] the plaintiff's daughter died of AIDS as a result of receiving a blood transfusion in a hospital. The plaintiff brought a wrongful death claim against the hospital, alleging medical malpractice and breach of implied warranty. During discovery the plaintiff requested documents containing the names and addresses of the hospital's blood donors. The hospital objected to the discovery request and moved for a protective order. The trial court denied the hospital's motion and ordered compliance with the plaintiff's discovery request. The hospital then petitioned the appellate court for a writ of mandamus, arguing, in part, that the information was protected by Texas' physician-patient

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10. *Id.* at 308, 520 N.Y.S.2d at 476.
11. *Id.* (quoting N.Y. Civ. Prac. L. & R. 4504 (McKinney 1963 & Supp. 1988)).
12. *Id.*
13. *Id. See infra* note 28 and accompanying text (quoting the affidavit).
14. Krygier v. Airweld, Inc., 137 Misc. 2d at 308-09, 520 N.Y.S.2d at 476. *See infra* note 37 and accompanying text.
15. *See* Krygier v. Airweld, Inc., 137 Misc. 2d at 308-09, 520 N.Y.S.2d at 476-77.
16. Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. Ct. App. 1987), *cert. denied*, 108 S. Ct. 1027 (1988).

privilege.[17]

The appellate court rejected application of the privilege to protect the donors' identities. The relevant portion of the Texas statute provides: "Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided by this section."[18] The court noted that the statute required that a physician-patient relationship exist to be applicable. The court concluded that the requisite relationship had not been established because "[n]othing in the record reflect[ed] that the blood donors were seen by a physician or received medical care when they donated blood."[19]

The dissent in *Tarrant* shed further light on the majority's abbreviated privilege analysis. Although actually concurring in the result reached on the privilege issue, the dissent concluded that the holding was necessarily a limited one because there was no evidentiary record connecting blood donors with physicians.[20] According to the dissent, it was an open question whether the information would come within the scope of the privilege if such a record were provided.[21]

These decisions and the wording of the various physician-patient privilege statutes present three principal issues which must be dealt with in a blood bank's or hospital's attempt to assert a physician-patient privilege to protect its blood donors' identities: (1) whether a physician-patient or other statutory relationship exists; (2) whether the blood bank or hospital has standing to assert the patient's privilege, as a physician does in the usual case; and (3) whether the information itself and the form it is in, *i.e.*, the records containing the donor identities, are confidential and therefore privileged under the statute.

A. *Establishing the Statutory Relationship*

First, the wording of the statute may present an issue as to whether the requisite statutory relationship exists between the blood bank's or hospital's medical staff and the donors. Under most physician-patient privilege stat-

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17. *Id.* at 677.

18. TEX. REV. CIV. STAT. ANN. art. 4495b (Vernon Supp. 1988).

19. Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d at 677.

20. *Id.* at 681 (Keltner, J., dissenting). Judge Keltner stated in this regard:

> The record before us does not contain a statement of facts. Counsel for both the Hospital District and the respondent admit that an evidentiary hearing was not held on the Hospital District's motion for protective order. This failure to produce proof that a physician-patient relationship existed between the Hospital District and blood donors is necessarily fatal to the Hospital's attempt to avoid disclosing the names of the blood donors.

Id. (Keltner, J., dissenting).

21. *Id.* (Keltner, J., dissenting).

utes, only information given to a licensed physician is protected.[22] Under these statutes the hospital or blood bank attempting to assert the privilege must demonstrate the involvement of physicians in the donation process.[23] Although it is possible to extend the coverage of a solely physician-based statute to certain other medical personnel if they are employed by or acting under the direction of a physician,[24] absent such evidence, information given to non-physicians generally remains unprotected.[25] For example, the hospital asserting the Texas privilege in *Tarrant* failed to protect donor identities because of a lack of evidence of physician involvement in the blood donation process.[26]

Not all statutes, however, are limited to communications between physicians and patient. Some states expressly provide that information acquired by registered nurses in their professional capacities is privileged.[27] Such provisions make it easier to demonstrate the requisite professional-patient relationship since it is more likely that a nurse will be active in recording donor information, including names and addresses. This is exemplified by the court's application of the New York statute in *Krygier*. There, the defendant blood bank presented an affidavit stating that the person attending to the donor is "either a specially trained physician, registered nurse, licensed practical nurse or phlebatonist [sic]. In the United States, the health histo-

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22. *See, e.g.*, CAL. CIV. PROC. CODE § 994 (West 1966 & Supp. 1988) ("the patient, whether or not a party, has a privilege to refuse to disclose . . . a confidential communication between patient and physician . . ."); ILL. REV. STAT. ch. 110, ¶ 8-802 (1987) ("[n]o physician or surgeon shall be permitted to disclose any information he or she may have acquired in attending any patient . . . "); IND. CODE ANN. § 34-1-14-5 (Burns 1986) ("[p]hysicians [shall not be competent witnesses] as to matter communicated to them, as such, by patients, in the course of their professional business"); MICH. COMP. LAWS ANN. § 600.2157 (West 1986) ("[n]o person duly authorized to practice medicine or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character").

23. *See, e.g.*, State v. Staat, 291 Minn. 394, 398, 192 N.W.2d 192, 197 (1971) (stating that physician-patient relationship first must be established in order to assert the privilege under such a statute). The rationale for such a narrow reading is that physician-patient privilege statutes are in derogation of common law and, therefore, must be strictly construed. *E.g.*, General Accident, Fire & Life Assur. Co. v. Tibbs, 102 Ind. App. 262, 269, 2 N.E.2d 229, 232 (1936); State v. LaRoche, 122 N.H. 231, 233, 442 A.2d 602, 603 (1982).

24. *See, e.g.*, State v. Staat, 291 Minn. 394, ____, 192 N.W.2d 192, 197 (1971) (Minnesota physician-only statute "extends by implication to nurses or attendants who are employees or acting under the direction of the examining or treating physician") (citation omitted).

25. *See, e.g.*, General Accident, Fire & Life Assur. Co. v. Tibbs, 102 Ind. App. 262, 2 N.E.2d 229 (1936) (nurse's observation of victims in emergency room of hospital was not privileged under Indiana's statute because nurse was not a "physician" within the meaning of the statute); State v. LaRoche, 122 N.H. 231, 442 A.2d 602 (1982) (statements made to an emergency medical technician could not be privileged absent evidence he was working under the express direction of the attending physician).

26. *See supra* notes 16-21 and accompanying text.

27. *See, e.g.*, MINN. STAT. ANN. § 595.02(g) (West 1988) (registered nurse); N.Y. CIV. PRAC. L. & R. 4504(a) (McKinney 1963 & Supp. 1988) (registered professional and licensed practical nurses).

rian acts under the direct supervisor who is always a registered nurse. At Euroblood centers, a physician is present for the final clearance of all donors."[28] Because the statute covered patient communications with most of the medical personnel specified in the affidavit, the court concluded that the requisite statutory relationship existed. The court in *Krygier* then specifically extended coverage of the New York statute to include the relationship between a blood donor and a blood bank.[29] Thus, in the court's view, so long as statutory personnel were involved in blood donation, it did not matter who recorded the information or whether a statutory professional was present.

In summary, the applicability of the physician-patient privilege when asserted by a blood bank will hinge on the relevant statute. If the statute is limited to communications made to physicians, evidence of a physician's presence in the donation process must be presented. On the other hand, if the statute includes communications made to statutory medical personnel such as nurses, the requisite relationship is more easily established.

B. *Standing to Raise the Privilege*

Assuming the requisite statutory relationship has been established, an issue also may arise as to whether the party resisting disclosure has standing to assert the privilege. Generally, the statutes provide that the physician-patient privilege belongs to the patient. It is the patient who can preclude the physician or other professional from disclosing confidential information acquired in a professional capacity. If the patient is not a party to the litigation and privileged information is sought, the physician must assert the privilege on behalf of the patient.[30]

Where the information is sought from a blood bank, however, an issue can arise as to whether the blood bank has standing to assert the privilege on behalf of its donors. This standing issue remains unaddressed by the courts. The court in *Krygier* failed to address the standing issue because the court concluded that the physician-patient privilege encompasses the blood

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28. Krygier v. Airweld, Inc., 137 Misc. 2d 306, 308, 520 N.Y.S.2d 475, 476 (Sup. Ct. 1987).

29. *See id.* at 308-09, 520 N.Y.S.2d at 476. The court based its conclusion on policies supporting the privilege, such as the protection of patient privacy, the prevention of patient embarrassment, and the societal interest in fostering the free flow of information between physician and patient in order to ensure proper diagnosis and treatment. *Id.* The court continued: "This is particularly true when the blood donor, who altruistically donated his or her blood, is exposed to embarrassment and innuendo based upon a person acquiring AIDS from the pool of donations." *Id.* at 309, 520 N.Y.S.2d at 476-77.

30. In most states the privilege statute provides that the physician may not disclose the information in the absence of a waiver by the patient. *E.g.*, ILL. REV. STAT. ch. 110A, ¶ 8-802 (1987); MINN. STAT. ANN. §§ 595.02(d) & (g) (West 1988); TEX. REV. CIV. STAT. ANN. art. 4495b (Vernon Supp. 1988). Other states provide that the patient can prevent the physician from disclosing the information even if he is not a party to the litigation. *See, e.g.*, CAL. CIV. PROC. CODE § 994 (West 1966 & Supp. 1988).

bank-blood donor relationship.[31] In *Tarrant*, the court did not reach the standing issue because it found that the requisite statutory relationship had not been established.[32]

Courts have generally held that hospitals can assert their patients' privileges even though the hospital-patient relationship itself is not protected by the statute.[33] The basis of this conclusion is the fear that allowing the hospital to disclose the information simply because the patient and the physician are absent from the proceedings would undermine the statute's purpose.[34] Blood banks should argue that the hospital standing cases are analogous and require the same result. Thus, if the requisite statutory relationship is proven within the donation process, both blood banks and hospitals have standing to assert a donor's statutory rights to non-disclosure.

C. *Establishing That the Names and Addresses Are Protected Information*

An issue may arise as to whether the information itself, *i.e.*, the recorded identities of the blood donors, is confidential information protected by statute.[35] To establish that identity information is within the scope of the

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31. *See supra* note 29 and accompanying text.

32. *See supra* notes 16-21 and accompanying text.

33. *See, e.g.*, Board of Medical Quality Assur. v. Gherardini, 93 Cal. App. 3d 669, 156 Cal. Rptr. 55 (1979) (hospital, a third-party recipient of privileged matter, had standing to claim physician-patient privilege on behalf of non-consenting patients); St. Louis Little Rock Hosp. v. Gaertner, 682 S.W.2d 146 (Mo. Ct. App. 1984) (allowing defendant hospital to assert patients' privilege in a wrongful death action and protect hospital records documenting in-hospital suicide where plaintiff's decedent had committed suicide by drinking toilet-bowl cleanser while under the hospital's care). *See generally* Annotation, *Physician-Patient Privilege as Extending to Patient's Medical or Hospital Records*, 10 A.L.R.4th 552, 559-62 § 4 (1981) (summarizing precedents allowing hospitals to assert the privilege and finding no contrary authority).

34. *E.g.*, Tucson Medical Center v. Rowles, 21 Ariz. App. 424, ____, 520 P.2d 518, 523 (1974). The court stated in what has become a leading case:

> We have neither discovered nor have we been cited to authority holding directly that a hospital cannot assert the privilege as to records containing confidential material when both the physician and the patient are absent from the proceedings. Despite the fact that [Arizona's statute] provides only that a physician or surgeon shall not be examined as to privileged information, our decision . . . that hospital records are covered by the physician-patient privilege mandates that the hospital assert this privilege when neither the patient nor his physician are parties to the proceeding. To hold otherwise would deprive a patient of the confidentiality granted him [by the statute] simply because neither he nor his physician have any interest in the outcome of the proceedings.
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> . . . .
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> It would be absurd to hold that our legislature intended that one unable to assert the privilege because of his absence from the proceedings has a lesser right to confidentiality under [the statute] than one who is a party to the proceedings.

Id. at ____, 520 P.2d at 523. *Accord* Parkson v. Central DuPage Hosp., 105 Ill. App. 3d 850, 853-54, 435 N.E.2d 140, 142 (1982).

35. The privilege statutes almost uniformly protect only information acquired by a physi-

privilege, a blood bank or hospital must show (1) that the donors' records are protected, and (2) that the donors' identities are protected. Neither *Krygier* nor *Tarrant* addressed this issue,[36] although New York precedent to the effect that non-party patients' identities are privileged probably explains the court's lack of analysis in *Krygier* of this point.[37]

The fact that donors' identities are recorded and filed should not destroy their confidentiality. Courts which have addressed the issue have concluded that information that was privileged when disclosed to the physician remains privileged when transcribed into hospital records.[38] It would defeat the purpose of the physician-patient privilege to conclude that the privilege is destroyed when a physician simply copies the information he acquires

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cian from his patient in confidence and in the context of a physician-patient relationship. *See, e.g.*, CAL. CIV. PROC. CODE § 992 (West 1966 & Supp. 1988) ("confidential communication between patient and physician means information including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence"); ILL. REV. STAT. ch. 110, ¶ 8-802 (1987) (information given to a physician is protected only if it was information the physician "acquired in attending any patient in a professional character, necessary to enable him or her to serve such a patient").

36. In *Krygier*, the court simply assumed that the information and the form it was in were protected by the New York statute. *See supra* notes 14-15 and accompanying text. In *Tarrant*, the court never reached the issue, having held the Texas statute inapplicable on other grounds. *See supra* notes 16-21 and accompanying text.

37. *See* Stahl v. Rhee, 136 A.D.2d 539, 540, 523 N.Y.S.2d 159, 161 (1988) ("The identity of a stranger to this lawsuit in connection with a disease or side effect of the medication at issue is a confidential communication covered by the privilege.") (citing Matter of Hyman v. Jewish Chronic Disease Hosp., 15 N.Y.2d 317, 322, 206 N.E.2d 338, 339, 258 N.Y.S.2d 397, 399 (1965) (dictum); Gourdine v. Phelps Mem. Hosp., 40 A.D.2d 694, 336 N.Y.S.2d 316 (1972) (holding such identities privileged)).

38. *See, e.g.*, Tucson Medical Center v. Rowles, 21 Ariz. App. 424, 520 P.2d 518 (1974) (evidence otherwise privileged under Arizona's physician-patient statute does not become non-privileged simply because it is contained in hospital records); People v. Lapsley, 26 Mich. App. 424, 182 N.W.2d 601 (1970) (holding Michigan physician-patient privilege extends to medical records of a public medical institution, and excluding under the rule hospital records tending to show that prosecution's witnesses, who implicated defendant in beating of a 14-year-old patient, were mentally incompetent and thus ineligible to testify). *See generally* 8 WIGMORE ON EVIDENCE, *supra* note 7, at § 2382 ("The privilege is universally agreed to include the physician's entries in medical records of a hospital."). Some jurisdictions, however, closely examine the person to whom the patient initially gave the information; if that person is not covered by the statute, the information in the record is not privileged. *See, e.g.*, Prudential Ins. Co. v. Kozlowski, 226 Wis. 641, 276 N.W. 300 (1937) (holding records and notes made by nurse at time of patient's admission to hospital not within scope of privilege, but also relying on the fact that the treatment received was not for a "vicious" or "embarrassing" disease). Further, some jurisdictions closely examine the way in which the information was obtained before allowing the privilege to protect a medical record. *See, e.g., In re* "B", 482 Pa. 471, 394 A.2d 419 (1978) (records of patient's hospitalization in psychiatric facility were not shielded from disclosure under physician-patient privilege statute because there was no evidence that such records included "communications" between the physician and the patient). Thus, special care should be taken in jurisdictions which apply the general rule strictly.

into a hospital record.[39] This rule is applicable to a blood bank's records of information given in confidence by its donors to medical personnel. If the initial information is protected, its transcription into record form should not affect its privileged status.

A blood bank or hospital must also demonstrate that the substantive information sought—the donors' names and addresses—is confidential information protected by the relevant statute. A minority of courts have held that disclosure of the identities of non-party patients *per se* violates the physician-patient privilege regardless of the context in which disclosure is sought.[40] The majority rule is that, although patients' names are not privileged because they are not diagnostic in nature, they are privileged if disclosure would occur in a context which would embarrass or humiliate the patient.[41] This is the "context" rule. It has also been held that a protective

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39. For example, in State *ex rel.* Benoit v. Randall, 431 S.W.2d 107 (Mo. 1968), the Supreme Court of Missouri reasoned as follows:

> This is undoubtedly the rule as announced by all the authorities, and, that being so, it seems that it must follow as a natural sequence that when the physician subsequently copies that privileged communication upon the record of the hospital, it still remains privileged. If that is not true, then the law which prevents the hospital physician from testifying to such matters could be violated both in letter and spirit, and the statute nullified, by the physician copying into the record all the information acquired by him from his patient, and then offer or permit the record to be offered into evidence containing the diagnosis, and thereby accomplish by indirection, that which is expressly prohibited in a direct manner.

Id. at 109. *Accord* Tucson Medical Center v. Rowles, 21 Ariz. App. 424, ____, 520 P.2d 518, 521 (1974); Parkson v. Central DuPage Hosp., 105 Ill. App. 3d 850, 855, 435 N.E.2d 140, 142 (1982); Unick v. Kessler Mem. Hosp., 107 N.J. Super. 121, 126, 257 A.2d 134, 136 (Super. Ct. Law Div. 1969); Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 37-38, 125 S.E.2d 326, 330 (1962).

40. *See, e.g.*, Dierickx v. Cottage Hosp. Corp., 152 Mich. App. 162, 393 N.W.2d 564 (1986) (Michigan's privilege statute prohibits physicians from disclosing even names of patients who are not involved in the litigation). Some statutes, furthermore, expressly protect patient identity. *See, e.g.*, TEX. REV. STAT. ANN. art. 4495b (Vernon Supp. 1988).

41. *See generally* Geisberger v. Willuhn, 72 Ill. App. 3d 435, 390 N.E.2d 945 (1979) (applying the general rule and citing authorities from other jurisdictions). Thus under the rule, if the privilege claimant cannot establish a relationship between the names desired and a medical procedure, the names alone are discoverable. *See, e.g.*, Ascherman v. Superior Court, 254 Cal. App. 2d 506, 515-16, 62 Cal. Rptr. 547, 553 (1967); Wolf v. People, 117 Colo. 279, 281-82, 187 P.2d 926, 927 (1947); Geisberger v. Willuhn, 72 Ill. App. 3d at 437-38, 390 N.E.2d at 946-47. Where, however, such a relationship is either proven or evident from circumstances, the identities are protected. *See, e.g.*, Marcus v. Superior Court, 18 Cal. App. 3d 22, 95 Cal. Rptr. 545 (1971) (trial court violated California's physician-patient privilege statute by requiring doctor and hospital, in malpractice action, to disclose names and addresses of patients who had received same type of tests as plaintiff). In *Marcus*, the court reasoned as follows:

> We recognize that the disclosure of a patient's name does not necessarily violate the privilege . . . . In the case at bench it is not merely the disclosure of the name and address, but the joining of the information with the limitation in question that these were patients who had received the specified tests.

Id. at 25, 95 Cal. Rptr. at 547. The California Supreme Court, in *Rudnick v. Superior Court*, 11 Cal. 3d 924, 523 P.2d 643, 114 Cal. Rptr. 603 (1974), summarized the operation of the general

order prohibiting dissemination of the information beyond the party seeking it is not sufficient to avoid a violation of the privilege.[42]

Under either the *per se* or the context rule, blood donors' names and addresses generally are entitled to protection under the various physician-patient privilege statutes. Under the *per se* rule, disclosure of the names would itself violate the privilege. Even under the majority "context" rule, the nature of AIDS litigation arguably links the donors' names to the disease—a context which could embarrass or humiliate the donor—and would bring the names within the protection of the privilege.

To summarize, although the physician-patient privilege statutes vary in language, general principles can be extracted and used to predict the applicability of the privilege to names and addresses of non-party blood donors. The key issue is whether the requisite statutory relationship exists between the blood donor and the individuals involved in the blood collection process. The difficulty in establishing this relationship will vary according to the breadth of the applicable statute. If this statutory relationship can be demonstrated, however, the standing and content issues should not pose a problem in most jurisdictions.

III. Challenging a Potential Court Order Compelling Discovery of Blood Donors' Identities as an Unconstitutional Infringement of Their Right to Privacy

Another argument that has been made to protect donor identity is that an order compelling the disclosure of donors' names and addresses would be an infringement of the donors' constitutional right to privacy. Although the principal ground for this position is the penumbral right to privacy in the U.S. Constitution, certain state constitutions explicitly provide protection for the right of privacy. However, before a federal or a state constitutional

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rule as follows:

> The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. Therefore, if the disclosure of the patient's name reveals nothing of any communication concerning the patient's ailments, disclosure of the patient's name does not violate the privilege. If however, disclosure of the patient's name inevitably in the context of such disclosure reveals the confidential information, namely the ailments, then such disclosure violates the privilege. Conversely, if the disclosure reveals the ailments but not the patient's identity, then such disclosure would appear not to violate the privilege.

Id. at 933 n.13, 523 P.2d at 650 n.13, 114 Cal. Rptr. at 610 n.13. *But see* Payne v. Howard, 75 F.R.D. 465 (D.D.C. 1977) (names of patients should be turned over so discovering party could seek waivers of their privileges); King v. O'Connor, 103 Misc. 2d 607, 426 N.Y.S.2d 415 (Sup. Ct. 1980) (allowing discovery of name of non-party patient who shared hospital room with plaintiff and was alleged source of plaintiff's postoperative infection despite physician-patient privilege because the patient was viewed as a first-hand witness under the circumstances).

42. *See* Parkson v. Central DuPage Hosp., 105 Ill. App. 3d 850, 855 n.3, 435 N.E.2d 140, 144 n.3 (1982) (citing State *ex rel.* Benoit v. Randall, 431 S.W.2d 107 (Mo. 1968) (screening of patient's records by plaintiff alone would violate the physician-patient privilege)).

argument can be advanced, certain constitutional prerequisites must be met.

A. *State Action and Third-Party Standing: Prerequisites in Either a Federal or State Constitutional Challenge*

1. *Discovery Order as State Action*

In either a federal or a state constitutional challenge, it first must be established that a court order compelling discovery would constitute state action to subject the order to constitutional scrutiny.[43] This requirement should not pose a significant obstacle.

In *Seattle Times Co. v. Rhinehart*,[44] the Supreme Court subjected analogous judicial action to constitutional scrutiny. In that case, the defendant newspaper initiated extensive discovery in a defamation and invasion of privacy suit and subsequently moved for an order compelling discovery. The trial court granted the motion to compel, but also issued a protective order prohibiting the newspaper from using certain private information for any purpose other than preparation for trial. The newspaper challenged the trial court's protective order as an unconstitutional infringement of the right of free speech guaranteed by the first amendment.[45] The Supreme Court subjected the protective order to first amendment scrutiny without questioning the existence of sufficient state action.[46]

State courts which have addressed the question in the blood donor con-

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43. Under the United States Constitution, the right of privacy derives from the penumbrae of various amendments which comprise the Bill of Rights. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965). *But see, e.g., id.* at 488-93 (Goldberg, J., concurring) (expressing the minority view that the federal privacy right derives from the ninth amendment). The duty to honor this federal right is imposed on the states by the due process clause of the fourteenth amendment which, to date, has been held to incorporate the first eight amendments. *See id.* at 488 (Goldberg, J., concurring). *See also, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982) ("Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.' ").

Similarly, in the state constitutions, the usual rule is that due process provisions apply only to actions taken by the state. *See, e.g.*, USA I Lehndorff Vermoegensverwaltung GmbH & Cie v. Cousins Club, Inc., 64 Ill. 2d 11, 20-21, 348 N.E.2d 831, 835 (1976) (finding a state action requirement in Illinois due process clause despite absence of actual language to that effect).

44. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

45. The Washington Supreme Court subjected the protective order to first amendment scrutiny but found any burden on free speech "justified." *See* Rhinehart v. Seattle Times Co., 98 Wash. 2d 226, 256, 654 P.2d 673, 690 (1982).

46. Seattle Times Co. v. Rhinehart, 467 U.S. at 30-33. For a brief overview of the different levels of constitutional scrutiny, see *infra* note 69.

Given the special place of discovery rules in the resolution of disputes and the low risk of governmental censorship, the Court in *Seattle Times* found heightened scrutiny more appropriate. *Id.* at 34. Under this standard the Court held that the state's substantial interest in preserving the trial judge's discretion in discovery matters justified the small impact on any litigant's exercise of free speech. *Id.* at 35-37.

text have found sufficient state action to warrant constitutional scrutiny.[47] The Florida District Court of Appeals in *South Florida Blood Services, Inc. v. Rasmussen* cited *Seattle Times* for the proposition that all court orders which compel, restrict, or prohibit discovery constitute state action subject to constitutional limitations.[48] The Texas court in *Tarrant County Hospital District* cited *Seattle Times* for the same proposition.[49] The application of *Seattle Times* in these blood donor cases would strongly support a finding of state action under similar circumstances.[50]

2. *Establishing Standing to Raise the Constitutional Rights of Donors*

In addition to meeting the state action requirement, a blood bank or hospital must demonstrate standing to assert the constitutional rights of blood donors before the merits of the constitutional challenge can be reached. Although one ordinarily cannot assert the constitutional rights of another,[51] the doctrine of third-party standing provides an exception to this general rule and a potential means for blood banks to assert the privacy rights of blood donors.

In *Singleton v. Wulff*,[52] the Supreme Court set forth the criteria by which the applicability of third-party standing should be determined. In that case, two doctors challenged the constitutionality of a Missouri statute limiting the types of abortions that the state would fund under the Medicaid program. The doctors asserted constitutional privacy rights of their patients in their attack on the statute. The Court held that two elements must be present to justify third-party standing: (1) the relationship of the litigant and the third party must be inextricably bound up with the activity the litigant seeks to pursue; and (2) there must be some obstacle to the third party asserting his or her own right.[53] Under this test the Court concluded

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47. South Fla. Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 803 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So. 2d 533 (Fla. 1987) (the supreme court decision, however, did not discuss state action); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 679 n.3 (Tex. Ct. App. 1987), *cert. denied*, 108 S. Ct. 1027 (1988).

48. South Fla. Blood Serv., Inc. v. Rasmussen, 467 So. 2d at 803.

49. Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d at 679 n.3.

50. The only potential contrary authority lies in occasional state court decisions holding that courts' discovery orders in civil actions between private parties do not constitute sufficient state action to implicate the search and seizure clause of the fourth amendment. *E.g.*, Union Oil Co. v. Hertel, 89 Ill. App. 3d 383, 386, 411 N.E.2d 1006, 1008 (1980). Such decisions are inapposite, however. State action sufficient to trigger general constitutional scrutiny is a far different matter from state action which constitutes a governmental search or seizure. The latter inquiry by definition is much narrower and, therefore, should not govern the answer to the first.

51. *See, e.g.*, Barrows v. Jackson, 346 U.S. 249, 255 (1953) (restating the general rule).

52. Singleton v. Wulff, 428 U.S. 106 (1976).

53. *See id.* at 114-16. In explaining the meaning of the first element, the Court pointed out that the required relationship between the litigant and the third party always will be satisfied where a confidential relationship, as in the physician-patient context, is present. *Id.* at 115 (citing Griswold v. Connecticut, 381 U.S. 479, 481 (1965)).

that the doctors could raise their patients' privacy rights because of the confidential physician-patient relationship involved, and because the patients probably would not come forward to assert their rights for fear of publicity.[54]

The *Singleton* test provides a framework for blood banks and hospitals to establish standing. Under the first prong of the test, the close relationship between a blood bank or a hospital and its donors is very similar to the doctor-patient relationships which were found sufficient in *Singleton*. Moreover, the impact on donors' anonymity—the asserted right—would be fatal if donors' interests could not be raised by the blood banks or hospitals. This close relationship would make a blood bank or hospital "uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against," its donors' privacy.[55] Thus, the first prong of the *Singleton* test is satisfied.

Blood banks or hospitals should also be able to satisfy the "genuine obstacle" prong of the test. The most obvious obstacle to blood donors exercising their rights to privacy is that they are not parties to the action, and are, therefore, unable to seek a protective order. Even if the donors had a vehicle by which they could assert their rights, the Supreme Court stated that "to require that a right to anonymity be claimed by the [holders of the right] themselves would result in nullification of the right at the very moment of its assertion."[56] Thus, under the Supreme Court's standards, blood donors' constitutional rights to anonymity never could be raised effectively in these cases unless the blood banks or hospitals were allowed to raise them. The hindrance to blood donors' assertion of their rights to privacy is much greater and more direct than the "fear" of publicity found sufficient in *Singleton*, and should easily fulfill the second prong of the *Singleton* test.[57]

There also is support for the assertion of third-party standing in state court decisions which have addressed this issue. For example, in *Taylor v. West Penn Hospital*,[58] the Pennsylvania trial court recognized a blood bank's standing to raise its donors' constitutional privacy claims.[59] The

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54. *Id.* at 117.

55. *Id.*

56. NAACP v. Alabama, 357 U.S. 449 (1958). The Court held that the National Association for the Advancement of Colored People, in resisting a court order that it divulge the names of its members, could assert the members' constitutional privacy rights.

57. In fact, it also would seem to fulfill the "practical impossibility" standard preferred by Justice Powell in his dissent in *Singleton*. In summarizing his view of prior third-party standing cases, Justice Powell stated: "On their facts [the prior cases] indicate that . . . an assertion [of third-party standing] is proper, not when there is merely some 'obstacle' to the rightholder's own litigation, but when such litigation is in all practicable terms impossible." Singleton v. Wulff, 428 U.S. at 126 (Powell, J., dissenting).

58. Taylor v. West Penn Hosp., No. GD87-00206, slip op. (Pa. Ct. Comm. Pleas Aug. 12, 1987) (granting protective order).

59. *Id.*, slip op. at 5.

court reasoned that third-party standing was necessary because the blood donors' rights "would not otherwise be protected."[60] In *Tarrant County Hospital District v. Hughes*,[61] the Texas Court of Appeals reached the merits of an identical constitutional privacy claim without addressing the third-party standing issue,[62] and must not have viewed the hospital's assertion of its donors' rights as problematic.

In sum, if the grounds for a blood bank's or hospital's assertion of its donors' constitutional rights are clearly articulated, third-party standing should not prove difficult to establish.

B. *The Federal Constitutional Analysis*

1. *Establishing an Infringement of the Federal Privacy Right*

Once state action and standing have been established, the next step is to demonstrate that disclosure of donors' identities would infringe upon their fundamental rights to privacy under the U.S. Constitution.[63] The federal right to privacy has two main aspects: (1) the individual has a right to make certain kinds of important decisions without governmental interference; and (2) the individual has a right to be free of governmental disclosure of personal matters.[64] Although the decision-making aspect is not implicated by disclosure of blood donors' identities,[65] the non-disclosure aspect is highly relevant. Under lower courts' interpretations of the two principal Supreme Court cases explicating the right of non-disclosure, it is likely that court-ordered disclosure of blood donors' identities would be held to infringe the right to privacy and trigger heightened scrutiny analysis.

The Supreme Court first addressed the non-disclosure right in *Whalen v. Roe*.[66] That case involved a constitutional challenge to a New York statute which sought to control the dissemination of dangerous prescription drugs. Under the statute the most dangerous category of prescription drugs could be prescribed only on an official form. The form required identification of the patient, drug, prescribing physician, pharmacy, and dosage. One copy of the form was sent to the state health department to be entered into a computer system. The reporting procedure was intended to prevent the

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60. *Id.*

61. Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. Ct. App. 1987).

62. *Id.* at 679-80.

63. For a brief description of the source of the unwritten federal right to privacy and how it has been imposed on the states through the substantive use of the due process clause of the fourteenth amendment see *supra* note 43.

64. Whalen v. Roe, 429 U.S. 589, 599-601 (1977).

65. The decision-making aspect of the right is narrow in scope, having been strictly limited to highly personal matters such as procreation, marriage, and contraception. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (procreation); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception).

66. Whalen v. Roe, 429 U.S. 589 (1977).

diversion of dangerous prescription drugs for illegal purposes. Physicians and patients sued in federal court, claiming that the statute was unconstitutional.

The patients in *Whalen* argued, in part, that their right to privacy was unconstitutionally infringed because the information in the official forms might leak out to the public and destroy the plaintiffs' reputations. The Supreme Court recognized that the plaintiffs had a constitutional right to keep undisclosed personal information stored in state records,[67] but held that the right was not sufficiently infringed to warrant constitutional scrutiny. The Court found that the danger of public disclosure through "leaks" was quite remote because the statute itself specifically prohibited any disclosure and provided criminal sanctions for violations.[68] Because the *Whalen* Court found no infringement of the privacy right, it never reached the issue of the level of scrutiny which should be applied if that right were infringed.[69]

Later in the same term, in *Nixon v. Administrator of General Services*,[70] the Court not only reaffirmed the non-disclosure right, but also found it implicated. That case involved former President Nixon's constitutional challenge to the Presidential Recordings and Materials Preservation Act. The Act directed the Administrator of General Services to screen Nixon's presidential papers and tapes. After the screening, Nixon's personal and private papers were to be returned to him. However, the balance of his papers were to be retained in the public domain. Nixon claimed that the Act violated his constitutional right of privacy.

As in *Whalen*, the Court affirmed the existence of the non-disclosure aspect of the privacy right.[71] Moreover, the Court found that Nixon had a privacy interest in some of his presidential papers.[72] Unlike *Whalen*, how-

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67. *Id.* at 598-99. The Court stated: "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* (footnotes omitted).

68. *Id.* at 603.

69. *Id.* at 604-06. The level of judicial scrutiny is simply the degree of justification the government must have to infringe upon a constitutional right. For example, the various economic liberties like freedom of contract are clearly constitutionally protected by the fourteenth amendment. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). Under current doctrine a state can justify infringement upon economic liberties merely by a showing that the means chosen (the state action) reasonably serve a legitimate state interest (usually its police power or its interest in health and safety). *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963). This particular degree of judicial scrutiny is often called the minimum rationality test. It is the test most favorable to a finding of constitutionality. Fundamental liberties, however, can justifiably be infringed only where the state is serving a compelling governmental interest by the least restrictive means. *E.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973). This analysis is referred to as strict scrutiny.

70. Nixon v. Administrator of Gen. Services., 433 U.S. 425 (1977).

71. *Id.* at 457.

72. *Id.* at 457-58. The Court reasoned:

We may agree with appellant that, at least when Government intervention is at stake,

ever, the Court in *Nixon* assumed that the privacy right was infringed to some extent because disclosure of some personal information was likely to occur.[73] Although, as detailed below, the Court ultimately found the government's potential intrusion on Nixon's privacy justified,[74] *Nixon* remains the only case in which the Supreme Court has found the non-disclosure right infringed.

Lower courts' interpretations of *Whalen* and *Nixon* have confirmed that the non-disclosure aspect is implicated when the government discloses highly personal information.[75] More to the point, lower federal courts generally have held that the essential core of this second zone of privacy is the right to prevent disclosure of identity in a damaging context.[76] Thus, the right is essentially one of confidentiality, which is at the heart of the blood donor disclosure issue.

In all of the cases which have discussed the constitutionality of blood donor identity disclosure through court ordered discovery, the courts have found sufficient infringement of privacy to employ constitutional scrutiny.[77] These courts have reasoned that blood donors' identities are protected because of the damage to a donor's reputation which would occur once he became associated with AIDS litigation and it was revealed that he was a potential source of contamination.[78] Thus, the consensus seems to be that the disclosure of blood donors' identities through a court's discovery powers implicates the federal privacy right.

> public officials, including the President, are not without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity. Presidents who have established Presidential libraries have usually withheld matters concerned with family or personal finances, or have deposited such materials with restrictions on their screening. We may assume . . . for the purposes of this case that this pattern of *de facto* Presidential control and Congressional acquiescence gives rise to appellant's legitimate expectation of privacy in such materials.

Id. (footnotes and citations omitted).

73. *See id.* at 458.

74. *See infra* notes 80-82 and accompanying text.

75. *See, e.g.*, South Fla. Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 803 (Fla. Dist. Ct. App. 1985) (citing Whalen v. Roe, 429 U.S. 580 (1977) and Florida Bd. of Bar Examiners *re*: Applicant, 443 So. 2d 71, 76 (Fla. 1983)).

76. *See, e.g.*, Lora v. Board of Educ., 74 F.R.D. 565, 580 (E.D.N.Y. 1977) (privacy encompasses the right "to prevent disclosure of . . . identity in a damaging context"); Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 536 (Fla. 1987) (citing Lora v. Board of Educ., 74 F.R.D. at 572-74).

77. *See* Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 536 (Fla. 1987), *aff'd*, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985); Taylor v. West Penn Hosp., No. GD87-00206, slip op. at 10 (Pa. Ct. Comm. Pleas Aug. 12, 1987) (granting protective order); Doe v. American Nat'l Red Cross, No. 88C-169, slip op. (Tenn. Cir. Ct. Aug. 8, 1988); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 679 (Tex. Ct. App. 1987), *cert. denied*, 108 S. Ct. 1027 (1988). *See also* Gulf Coast Regional Blood Center v. Houston, 745 S.W.2d 557, 559-60 (Tex. Ct. App. 1988) (following *Tarrant*).

78. *See supra* note 77 (citing authorities).

Under these precedents and principles, a blood bank or hospital should be able successfully to assert the non-disclosure right. Under *Whalen* and *Nixon*, it can be argued that identity, when connected with AIDS contamination, is a highly personal matter. And where *Whalen* involved disclosure to a government official in a context in which disclosure to the public was legally prohibited, disclosure in AIDS litigation will necessarily be made to a member of the public—the plaintiff.

2. *The Appropriate Level of Judicial Scrutiny If the Non-Disclosure Right Is Infringed*

a. *The* Nixon *Balancing Test.* If the non-disclosure aspect of the right to privacy is infringed, the state has the burden of justifying its actions. The difficulty of bearing this burden can vary greatly, depending upon the level of judicial scrutiny that the infringement invokes.[79] In the non-disclosure area, the leading case on the level of judicial scrutiny is *Nixon*.

As previously stated, the Court in *Nixon* found that the constitutional right to non-disclosure was infringed by the Presidential Recordings and Materials Preservation Act. The Court, however, also found that the infringement of the right had to be weighed against the public interest served by the Act.[80]

Applying this balancing approach, the Court concluded that the Act's elaborate regulatory safeguards made any infringement on privacy quite small, and that any infringement was outweighed by the public interest in the non-personal archival material. For example, the Court reasoned that the Act itself would protect Nixon's privacy interests much as the New York statute and its regulations protected the plaintiffs in *Whalen*.[81] Thus, the infringement was held to be minimal. On the other hand, as part of its first amendment analysis, the Court found a compelling public interest in the archival information, and also found that the Act served this interest in the least restrictive way available.[82]

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79. *See supra* note 69 (generally discussing judicial scrutiny and the justification of infringements on constitutional rights).

80. Nixon v. Administrator of Gen. Services, 433 U.S. at 458. The Court reasoned as follows:

> [T]he merit of [Nixon's] claim of invasion of his privacy cannot be considered in the abstract; rather, the claim must be considered in light of the specific provisions of the Act, and any intrusion must be weighed against the public interest in subjecting the Presidential materials of [Nixon's] administration to archival screening.

Id.

81. *Id.* In this regard the Court found it significant that the Act provided for the immediate return of any personal documents to Nixon, while in *Whalen* the prescription reports were to be retained by the state health department for a period of five years. *Id.*

82. *Id.* at 467. The Court, however, did not actually balance this compelling public interest against the privacy interest. Presumably it found the privacy infringement too insignificant to warrant a careful assessment of the state interest at that point in the opinion.

Thus, the Court in *Nixon* did not apply the strict scrutiny approach.[83] Instead, the Court applied a balancing test, weighing the individual interest in privacy against the public interest in the information. It was unclear, however, whether this balancing test was to be applied in all disclosure cases or only in those cases in which the infringement on the right was too small to warrant strict scrutiny.

After *Nixon*, lower courts have uniformly applied a balancing-of-interests test to all cases in which the non-disclosure right has been infringed. Interpreting *Nixon* as a *per se* rejection of strict scrutiny in disclosure cases, lower courts have found that the state may compel the disclosure of constitutionally protected information when state interest in the information outweighs the individual interest in non-disclosure.[84] To help focus the inquiry, some courts have articulated factors which must be considered in evaluating the weight of these competing interests. These factors include: (1) the type of information which would or might be disclosed, (2) the potential for harm in any subsequent non-consensual disclosure, (3) the injury which disclosure would cause to the relationship in which the record was generated, (4) the adequacy of safeguards to prevent unauthorized disclosure, (5) the degree of need for access, and (6) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating in favor of access.[85]

b. *The Constitutional Balancing Test Applied to Blood Donor Identities in AIDS Litigation.* All blood donor disclosure cases which have discussed the constitutional privacy issue have agreed that the balancing-of-interests test is the appropriate means to determine the constitutionality of an order mandating disclosure.[86] Only two of these cases, however, actually

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83. Nixon v. Administrator of Gen. Services, 433 U.S. 425 (1977). *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (citations omitted).

84. The leading case on this point is Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979). *See generally* Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976) (establishing the procedural due process balancing test). Under this test the court in *Plante* found that the public's need for complete information concerning its elected officials' financial interests outweighed the senators' interest in keeping the records undisclosed. Plante v. Gonzalez, 575 F.2d at 1134-36.

85. *See, e.g.*, United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3rd Cir. 1980) (using these factors to conclude that a minimal intrusion into the privacy surrounding some employees' medical records was outweighed by the strong public interest in facilitating research and investigations of the National Institute for Occupational Safety and Health).

86. *See* Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 537 (Fla. 1987) (affirming the same holding in 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985)); Taylor v. West Penn Hosp., No. GD87-00206, slip op. at 10 (Pa. Ct. Comm. Pleas Aug. 12, 1987) (granting protective order); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 679 (Tex. Ct. App. 1987).

applied the test and ruled on the constitutionality of such an order.

In *Tarrant County Hospital District v. Hughes*,[87] the appellate court reached the merits of the constitutional claim after it found the narrower ground articulated by the hospital inapplicable.[88] The trial court had rejected the constitutional claim and compelled disclosure. However, to provide some protection to the donors, the trial court ordered that the plaintiff not contact the donors without seeking a further order allowing such contact.

In a somewhat ambiguous opinion, the appellate court also rejected the constitutional claim. The court in *Tarrant* appeared to ground its conclusion on the balancing test.[89] Evaluating the state's interest as personified by the plaintiff seeking discovery, the court found that her interest in discovering relevant evidence was certainly legitimate and even crucial. The court noted that without the information, the plaintiff probably would not be able to continue with her suit.[90] On the other side of the equation, the court found the infringement of the donors' privacy to be minimal because of the trial court's use restrictions. The restrictions precluded the plaintiff from contacting the donors without court approval.[91] The court concluded that the record did not support the "contention that the blood donors possess a need of anonymity greater than the plaintiff's need."[92]

Other language in the decision, however, seems to belie an application of the balancing test. Later in the opinion, when discussing the abuse-of-discovery rule, the court again referred to the trial court's use restrictions, but this time expressly found that their presence avoided *any* invasion of the constitutional privacy right.[93] Thus, the court made questionable its earlier reference to the balancing test.

The other opinion to address the constitutionality issue is *Doe v. American Red Cross*.[94] In that case, the trial judge concluded: "I am of the opinion that there is a right of privacy in blood donors that is constitutionally

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87. Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. Ct. App. 1987). For a more complete discussion of the facts in *Tarrant*, see *supra* notes 16-17 and accompanying text.

88. *See* Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d at 677, 680 (rejecting hospital's assertions that disclosure was prohibited by physician-patient privilege and abuse-of-discovery rule).

89. In fact, the court began its constitutional analysis by stating: "In reaching this decision, we have applied a balancing test comparing the interest served by the State action with the donors' interest in privacy." *Id.* at 679.

90. *Id.* at 679.

91. *Id.*

92. *Id.*

93. *Id.* at 680 (citing Whalen v. Roe, 429 U.S. 589, 606-07 (1977)). The court stated: "Because the trial court's order evidences a proper concern with protection of the individual's right of privacy, *we hold that the record does not establish an invasion of any constitutionally protected right for liberty of the blood donors.*" *Id.* (emphasis added).

94. Doe v. American Nat'l Red Cross, No. 88C-169, slip op. (Tenn. Cir. Ct. Aug. 8, 1988).

protected on both the federal and state level. I am further of the opinion that this right in this case is substantial and exceeds plaintiff's interest in attempting to win a lawsuit."[95]

Despite the favorable results in *Doe*, there are substantial difficulties associated with arguing that a court order compelling discovery is unconstitutional under the *Nixon* balancing test. First, as will be discussed further in Part IV, all states have a discovery rule allowing a court to prevent abuses of discovery.[96] These rules generally allow for balancing competing interests on a more favorable basis than the constitutional balancing test.[97] Thus, given the rule that constitutional issues should be reached only if no narrower grounds are available to reach the same result, the discovery rule would probably be preferred.

Second, the *Nixon* balancing test does not yield the type of clear imbalance in favor of the privacy interest that is necessary to convince a court that discovery of donor identities is unconstitutional. Using the six factors the courts have provided to guide the inquiry, the result is by no means clear. The first three factors generally indicate a high privacy interest. First, the type of information—identity—is very damaging to donors in view of the current AIDS epidemic and the issue of contagiousness. Second, the potential for harm caused by an unauthorized disclosure to the general public is enormous. Third, the injury which disclosure would cause to the relationship in which the record was generated—the relationship between the blood donor and the blood bank or hospital—would also be great.

On the other hand, the remaining three factors point to a significant state interest. First, the adequacy of the safeguards to prevent unauthorized disclosure can be greatly strengthened by a carefully worded protective order, backed by sanctions, prohibiting such disclosure. Second, the degree of need for the information is significant where potentially relevant evidence is concerned, and the need can grow to great proportions in those situations in which the viability of the plaintiff's lawsuit depends upon questioning the donors. Third, the express public policy of the various states militates in favor of access if the information is relevant. Following the lead of the Federal Rules of Civil Procedure, state discovery rules have adopted a policy favoring broad discovery of all relevant information.

Nonetheless, the constitutional privacy argument is significant and should be made in spite of its difficulties. As will be discussed in Part IV, demonstrating that a constitutionally protected right is implicated will strengthen any balancing-of-interests argument made under state discovery rules. Additionally, a strong constitutional argument may have a subliminal effect on the reviewing court, causing it to view with greater receptiveness

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95. *Id.*, slip op. at ____.
96. *See infra* notes 114-18 and accompanying text.
97. *See infra* notes 114-16 and accompanying text.

the narrower grounds which have been articulated.[98]

C. *The State Constitutional Analysis*

As a general rule, state courts have not extended the protections provided by their own constitutions' due process clauses beyond the U.S. Constitution. Focusing as it does on the protection and expansion of individual rights, the U.S. Constitution often has proven to be the high-water mark, with the states doing no more, and often less.[99] Thus, under most state constitutions, no more protection will be found for the privacy of blood donors than that which is found in the Due Process Clause of the fourteenth amendment.

A minority of state constitutions, however, now expressly protect privacy with varying levels of emphasis. These state provisions fall into two groups: six states specifically mention a substantive right to privacy within their search and seizure provisions,[100] and four states provide a free-standing right to privacy as a separate section of their constitutions.[101] Thus, unlike the U.S. Constitution, in which the right to privacy is implicitly derived from the Bill of Rights, these state constitutions contain an explicit reference to the right. Moreover, state courts' interpretations of these provisions, on occasion, have gone beyond the protection provided by the federal privacy right.[102]

The most promising way for a blood bank or hospital to invoke a state privacy provision is to argue that, even if the implicit federal right to privacy is not sufficiently infringed by disclosure, the explicit state right is infringed. A state court which reads the federal right narrowly because it is

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98. For example, in Krygier v. Airweld, Inc., 137 Misc. 2d 306, 520 N.Y.S.2d 475 (Sup. Ct. 1987), the New York trial court actually based its protective order banning discovery of blood donors' identities on New York's statutory physician-patient privilege and its abuse-of-discovery rule. But throughout its opinion, the court referred to the "persuasive and cogent" constitutional arguments of the defendant blood bank. *Id.* at 308-09, 520 N.Y.S.2d at 476-77.

99. *See generally* Burns, *Due Process of Law: After 1890 Anything; Today Everything—A Bicentennial Proposal to Restore Its Original Meaning*, 35 DE PAUL L. REV. 773 (1986) (taking the position that the doctrines of substantive due process and selective incorporation have retarded the growth of parallel state constitutional provisions).

100. *See* ARIZ. CONST. art. II, § 8; HAWAII CONST. art. I, § 5; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; S.C. CONST. art. 1, § 10; WASH. CONST. art. I, § 7.

101. ALASKA CONST. art. I, § 22; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; MONT. CONST. art. II, § 10.

102. *See, e.g.*, Tollet v. State, 272 So. 2d 490 (Fla. 1973) (tape recordings of conversations between informer and defendant held inadmissible under precursor of Section 23 of the Florida Constitution, even though under United States v. White, 405 F.2d 838 (7th Cir. 1969), *rev'd*, 401 U.S. 745, *reh'g denied*, 402 U.S. 990 (1971), *cert. denied*, 406 U.S. 962 (1972), the recordings were admissible under the U.S. Constitution); People v. Jackson, 116 Ill. App. 3d 430, 452 N.E.2d 85 (1983) (holding that article I, § 6 of the Illinois Constitution of 1970 protected bank records, even though under United States v. Miller, 425 U.S. 435 (1976), there was no right of privacy in bank records under the U.S. Constitution).

not textually based might be persuaded to find the explicit state right implicated.

In *Rasmussen v. South Florida Blood Services, Inc.*,[103] the Florida Supreme Court used the explicit privacy provision in Florida's Constitution[104] as further support for finding an infringement of a constitutional right.[105] The court found that "a principal aim of the constitutional provision is to afford individuals some protection against the increasing collection, retention, and use of information relating to all facets of an individual's life."[106] The court in *Rasmussen*, however, did not apply constitutional scrutiny to the infringement of the state right because discovery was prohibited under Florida's abuse-of-discovery rule.[107]

A second argument which might alter the constitutional analysis would be that the enumerated state privacy right warrants stricter scrutiny, *i.e.*, a heightened burden of state justification, than the balance-of-interests test available under the U.S. Constitution.

This argument, however, may be doomed to failure in states without free-standing sections containing the privacy right. By placing the privacy right within search and seizure provisions, these states prohibit only *unreasonable* invasions of privacy.[108] Accordingly, these states will use a balancing test similar to that applied in *Nixon* or will merely require minimum rationality in order to justify the intrusion.[109]

In the four states with free-standing sections protecting privacy, however, judicial invocation of strict scrutiny is more likely. Although Alaska has rejected the use of strict scrutiny,[110] Montana constitutionally provides

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103. Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533 (Fla. 1987).

104. FLA. CONST. art. I, § 23.

105. Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d at 536. The court reasoned as follows:

> [In addition to the federal right of privacy], in Florida, a citizen's right to privacy is independently protected by our state constitution. In 1980, the voters of Florida amended our state constitution to include an express right of privacy. In approving the amendment, Florida became the fourth state to adopt a strong, freestanding right of privacy as a separate section of its state constitution, thus providing an explicit textual foundation for those privacy interests inherent in the concept of liberty which may not otherwise be protected by specific constitutional provisions.

Id. (citations and footnotes omitted).

106. *Id.*

107. *See infra* notes 120-25 and accompanying text.

108. *See, e.g.*, Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 630 (1977).

109. *Id.* at 713-30. (stating generally that the prohibition against only unreasonable invasions of privacy has anchored such sections "firmly to the rational basis test").

110. *See* Ravin v. State, 537 P.2d 494, 498 (Alaska 1975) (rejecting Alaska's use of the strict scrutiny test). Recognizing "considerable dissatisfaction with the fundamental right—compelling state interest test," the court in *Ravin*, adopted a new approach requiring less state justification than strict scrutiny but more than minimum rationality. *Id.* The court articulated its test as

for its use,[111] California has adopted strict scrutiny at least when reviewing the disclosure of medical records,[112] and Florida has generally adopted the strict scrutiny standard.[113]

> [w]hether there is a proper governmental interest in imposing restrictions on marijuana use and whether the means chosen bear a substantial relationship to the legislative purpose. If governmental restrictions interfere with the individual's right to privacy, we will require that the relationship between means and ends be not merely reasonable but close and substantial.

Id.

Although the test certainly is phrased differently than the *Nixon* balancing test, the end result probably is quite similar. The Alaska approach, however, does seem to provide a more focused and, overall, more principled approach than the vague *Nixon* balancing test.

111. MONT. CONST. art. II, § 10 provides: "The right of individual privacy . . . shall not be infringed without the showing of a compelling state interest." No cases interpreting this provision have yet involved a state release of private information to a member of the general public. The Montana Supreme Court, however, has held that state collection of employee records with a prohibition on public disclosure implicates the right and requires a compelling state interest which is narrowly served in order to justify the infringement. *See* Montana Human Rights Div. v. Billings, 199 Mont. 434, 649 P.2d 1283 (1982). For more background on the Montana Constitution's privacy right, *see* Gorman, *Rights in Collision: The Individual Right of Privacy and the Public Right to Know*, 39 MONT. L. REV. 249 (1978).

112. The California Constitution does not mention the standard of review for infringements of privacy. At first the California Supreme Court, in cases involving governmental seizure of academic information and governmental disclosure of personal financial information to the public, held that the state action must serve a compelling state purpose and must be drafted with narrow specificity. *See, e.g.*, Valley Bank v. Superior Court, 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975) (establishing disclosure rules for banks when they are requested in discovery to disclose protected financial information of customers); White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (complaint alleging that police officers had posed as university students, compiled intelligence reports about class discussions, and turned the reports over to the police department stated a prima facie violation of the right of privacy, and intrusions on the right could be justified only by a compelling interest).

The court in Wood v. Superior Court, 166 Cal. App. 3d 1138, 212 Cal. Rptr. 811 (1985), applied strict scrutiny to state medical board subpoenas requiring physicians to turn over to the board the complete medical records of named patients in order to determine whether the physician was over-prescribing dangerous drugs. *Id.* at 1147-48, 212 Cal. Rptr. at 819-20. Under this standard the court struck down the subpoenas as written because, while the control of the drugs was a compelling interest, *id.* at 1147-48, 212 Cal. Rptr. at 820, there were ways to check on the doctors which intruded far less upon patient privacy. *Id.* at 1148-50, 212 Cal. Rptr. at 820-21.

113. In Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985), the Florida Supreme Court adopted a strict scrutiny standard in reviewing infringements on the state constitutional right to privacy. *Id.* at 547. The court in *Winfield* stated:

> The right of privacy is a fundamental right which we believe demands the compelling interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

Id. The court reaffirmed its use of strict scrutiny in *Rasmussen* when it stated that its opinion in that case "in no way changes or dilutes the compelling state interest standard appropriate to a review of state action that infringes privacy rights under article I, section 23 of the Florida

In sum, the state constitutional privacy provisions offer additional support for establishing the right to non-disclosure. In a few states these provisions may be the source of a higher degree of judicial scrutiny than federal law currently provides. Nonetheless, in states other than Montana, California, and Florida, it is questionable whether the availability of one of these constitutional provisions would significantly affect the constitutional analysis discussed in Part III-B.

IV. Using State Abuse-of-Discovery Rules to Argue for a Protective Order Prohibiting the Disclosure of Blood Donors' Identities

As a general rule, state discovery rules follow the modern trend and allow broad-based discovery directed at any information which will lead to admissible evidence.[114] The rules temper this broad license by conferring discretionary power on trial courts to limit or prohibit discovery which would cause unreasonable expense or intrusion.[115] In exercising its discretion under abuse-of-discovery rules, the court must balance the competing interests of the respective parties.[116]

Constitution as established in *Winfield* . . . . " Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d at 535.

114. *See, e.g.*, Cal. Civ. Proc. § 2017 (West Supp. 1988) (providing that any party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending action); Del. Ct. R. Civ. P. 26(b)(1) (providing virtually the same language); Mich. R. Civ. P. 2.302(B)(1) (accord); Minn. Stat. Ann. ch. 48 § 2602(1) (West 1979) (accord).

115. *See, e.g.*, Cal. Civ. Proc. § 2017(C) (West Supp. 1988) ("The court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery outweighs the likelihood that the information sought will lead to the discovery of admissible evidence."); Ill. Rev. Stat. ch. 110A, ¶ 201(c)(1) (1987) ("The court may at any time . . . make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression."); Minn. R. Civ. P. 26.03 (1979) ("for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (1) that the discovery not be had"); Wis. Stat. Ann. § 804.01(3) (West 1977) (same language as Minnesota rule).

116. A good description of the court's discretionary inquiry under such a rule is found in Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533 (Fla. 1987):

> In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting discovery or by denying it. Thus, the discovery rules provide a framework for judicial analysis of challenges to discovery on the basis that the discovery will result in undue invasion of privacy. This framework allows for broad discovery in order to advance the state's important interest in the fair and efficient resolution of disputes while at the same time providing measures to minimize the impact of discovery on competing privacy interests.
>
> Accordingly, we must assess all of the interests that would be served by the granting or denying of discovery—the importance of each and the extent to which the action serves each interest.

Id. at 535 (citations omitted). *See also* Sarver v. Barnett Ace Hardware, 63 Ill. 2d 454, 457, 349 N.E.2d 28, 30 (1976) (articulating the court's duty under Illinois' abuse-of-discovery rule care-

Abuse-of-discovery rules provide a useful mechanism for precluding the discovery of blood donors' identities in civil litigation against blood banks and hospitals. The inquiry is quite similar to the constitutional balancing test discussed in Part III-B above, with one important difference. Instead of pitting the privacy interest against the state interest as under the *Nixon* balancing approach, abuse-of-discovery balancing takes *all* factors into account. Significantly, courts which have applied abuse-of-discovery rules in blood donor identity cases have concluded that any injury which disclosure causes to the public interest in an adequate volunteer blood supply weighs against allowing discovery.[117] Abuse-of-discovery rules also have the advantage of being a narrower ground on which to prohibit disclosure than constitutional principles. Moreover, cases prohibiting discovery under abuse-of-discovery rules provide persuasive authority in other jurisdictions because these rules are based on the equivalent federal rule and are virtually identical in language.[118]

State courts in Florida, Pennsylvania, and New York have prohibited discovery of blood donor identities under their abuse-of-discovery rules.[119] The principal case is *Rasmussen v. South Florida Blood Services, Inc.*[120] In that case, the plaintiff was struck by a car and taken to a hospital where he received fifty-one units of blood. He subsequently contracted AIDS. The plaintiff sued the driver of the car and, in an attempt to win consequential damages, alleged that the source of his AIDS was the blood given to him by the hospital as part of his medical treatment. Hoping to prove that he contracted AIDS from the transfusion, the plaintiff served the blood bank which had provided the blood with a subpoena *duces tecum* requesting the names and addresses of the donors of the fifty-one units of blood he had received. The trial court ordered compliance with the request, but the ap-

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fully to balance the needs of truth and the possibility of excessive burden to the litigants). Courts, moreover, have held that these rules provide affirmative protection to privacy interests. *See, e.g.*, May Centers, Inc. v. S.G. Adams Printing, 153 Ill. App. 3d 1018, 1023, 503 N.E.2d 691, 695 (1987); Krygier v. Airweld, Inc., 137 Misc. 2d 306, 309, 520 N.Y.S.2d 475, 477 (Sup. Ct. 1987).

117. It has been argued that the National Blood Policy, which supports a voluntary donor system, and the societal interest in an adequate blood supply, also should weigh on the privacy side of the constitutional balancing test. *See* Memorandum in Support of Petition for Cert. at 10-12, Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. Ct. App. 1987), *cert. denied*, 108 S. Ct. 1027 (1988) (No. 87-1082). The Texas state court in *Tarrant* considered these interests in its discovery rule analysis but not in its constitutional analysis. The hospital district, in its petition for certiorari, claimed that this constituted constitutional error. *Id.* The issue remains generally unaddressed.

118. *See* FED. R. CIV. P. 26(c) (same language as that of Minnesota and Wisconsin quoted *supra* note 115).

119. *See also* Doe v. American Nat'l Red Cross, No. 88C-169, slip. op. (Tenn. Cir. Ct. Aug. 8, 1988). The court referred to Tennessee's abuse-of-discovery rule, but decided the case on the constitutional right of privacy. *See supra* notes 94-95 and accompanying text.

120. Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533 (Fla. 1987).

pellate court reversed, finding that a protective order was justified.[121]

The Florida Supreme Court affirmed. The court balanced all of the competing interests under Florida's abuse-of-discovery rule and concluded that the donors' identities were protected from disclosure. The first factor the court considered was the donors' privacy interests, which were found to reach constitutional proportions under federal and state law.[122] The court next considered the societal interest in having an adequate supply of blood, and found it in the public interest to prevent any serious disincentive to blood donations.[123] Assessing the danger of such disincentives, the court concluded that disclosure would deter future blood donors from volunteering because persons infected with AIDS through transfusions would investigate the backgrounds and private lives of donors to obtain admissible evidence.[124] Although the court recognized that the plaintiff had a legitimate interest in obtaining full recovery through the Florida judicial system, it concluded that this interest was far outweighed by the privacy and societal interests involved.[125]

Similarly, in *Taylor v. West Penn Hospital*,[126] a Pennsylvania trial court used state discovery rules to prohibit the disclosure of a blood donor's identity. There, the plaintiff had received a blood transfusion during a routine operation. When a donor whose blood had been used during the operation subsequently donated blood again, the blood bank, using the newly available test for the AIDS virus, discovered that the donor had been exposed to AIDS. The blood bank notified the plaintiff who, after testing positive for the AIDS virus, sued the hospital in which the operation was performed and the blood bank. The plaintiff attempted to discover the identity of the donor from the blood bank. The blood bank refused to comply with the discovery request and moved for a protective order prohibiting discovery on constitutional and abuse-of-discovery grounds.

While the court in *Taylor* found that the constitutional right to privacy was implicated, it chose to base its holding on Pennsylvania's abuse-of-discovery rule instead. The court first assessed the weight of the privacy interest. The court found that the intrusion, where only one name was sought and it already was established that this was the person who infected the

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121. South Fla. Blood Serv., Inc. v. Rasmussen, 467 So. 2d at 803-04 (relying on Florida's abuse-of-discovery rule).

122. Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d at 535-37. *See also supra* notes 103-07 and accompanying text (elaborating on the court's state constitutional analysis).

123. Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d at 538.

124. *Id.*

125. *Id.* The court also reasoned that the need for the information was low: "[W]e find that the discovery order requested here would do little to advance [the state's interest in ensuring full compensation for victims of negligence]. The probative value of the discovery sought by Rasmussen is dubious at best." *Id.*

126. Taylor v. West Penn Hosp., No. GD87-00206, slip op. (Pa. Ct. Comm. Pleas Aug. 12, 1987).

plaintiff, would be less than in *Rasmussen*, where the plaintiff sought the names and addresses of fifty-one donors, the majority of whom could not have had anything to do with his contracting AIDS.[127] The court thus concluded that a privacy interest existed, but was not the decisive factor.

The court did find decisive the societal interest in an adequate blood supply, concluding that a court ordered disclosure would have a chilling effect on future donors' inclinations to volunteer. In determining that the weight of this interest was great, the court articulated six rationales. First, the blood bank's policy of non-disclosure was consistent with long-standing blood bank policy nation-wide, thus implying its necessity.[128] Second, the blood bank depended completely on volunteers and, in order to induce voluntarism, expressly promised its donors that all information concerning them would remain confidential.[129] Third, witnesses in hearings before the Subcommittee on Health and the Environment in the House of Representatives had uniformly testified that disclosure of donor information in ordinary civil discovery would jeopardize an already restricted blood supply.[130] Fourth, because the National Blood Policy supported an all-volunteer source of blood, protecting voluntarism was crucial.[131] Fifth, in addition to deterring people from donating, disclosure would deter people who did donate from giving candid medical histories and actually increase the danger not only of AIDS, but also of hepatitis and syphilis.[132] Sixth, court-ordered disclosure in AIDS litigation would conflict with the broader strategy of encouraging people to come forward voluntarily to be tested for AIDS.[133]

The court then assessed the nature of the plaintiff's interest in discovery and found it to be minimal. The main reason the plaintiff sought the donor's identity was to bring an action against him. The court found this

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127. *Id.*, slip op. at 9.

128. *Id.*, slip op. at 12-13.

129. *Id.*, slip op. at 12. *See also* Doe v. American Nat'l Red Cross, No. 88C-169, slip op. at ___ (Tenn. Cir. Ct. Aug. 8, 1988) ("plaintiff's interest in the identity of the donor is to disclose all facts of the donor's intimate life that the employees of Defendant might have discovered and to paint his private life in the ugliest of colors. A faint possibility that a future donor could face such a public attempt is enough to turn him away no matter how innocent his life may be.").

130. Taylor v. West Penn Hosp., No. GD87-00206, slip op. at 13 (citing *Hearings*, *supra* note 1, at 111-202 (testimony of Dr. Frank E. Young, Dr. Edward N. Brandt, Jr., Dr. Joseph R. Bove, Victor Schmitt, and Robert W. Reilly)).

131. *Id.* at 14 (citing 39 Fed. Reg. 32,702 (1974)). *See also* Doe v. American Nat'l Red Cross, No. 88C-169, slip op. at ___ (Tenn. Cir. Ct. Aug. 8, 1978) ("The effect upon the public interest must also be considered. The availability of human blood is an important matter to society and is entitled to protection.").

132. Taylor v. West Penn Hosp., No. GD87-00206, slip op. at 16. Because federal regulations require that blood banks use medical histories to screen out suspect donors, the court found that disclosure would create conflict with federal regulatory law. *Id.* (citing 21 C.F.R. §§ 40.3(b) & (c) (1987)).

133. *Id.*, slip op. at 17. The court stated that any discovery order, even if narrowly drafted, would be viewed by the general public as eroding the guarantee of confidentiality. *Id.*

interest to be quite limited because of the likelihood that any judgment obtained against him could not be collected.[134] Further, the blood bank had already given the plaintiff information sufficient to show causation, so the donor's testimony could only be relevant to proving a breach of duty.[135] The court stated that such testimony would be of very limited value to the negligence issue.[136] Thus, the court concluded that, although the plaintiff had a legitimate interest in discovering the identity of the donor, this interest was outweighed by the donor's privacy interest and the societal interest in an adequate blood supply.[137]

Finally, in *Krygier v. Airweld, Inc.*,[138] a New York trial court based a protective order barring release of blood donors' identities, in part, on that state's abuse-of-discovery rule.[139] The court found that the rule protected the blood donors' interest in anonymity without discussing whether the interest was constitutionally based. The court also noted society's interest in maintaining an adequate supply of blood. On the other side of the equation, the court found the plaintiff's need for the donors' identities to be minimal because the identities could be relevant, as was the case in *Taylor*, only to proving a breach of duty.[140] Thus, the court concluded that the plaintiff's interest in discovering all evidence material to her suit was "far outweigh[ed]" by privacy and societal interests.[141]

A contrary result was reached in *Tarrant County Hospital District v. Hughes*.[142] The Texas appellate court found the discovery balance weighed

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134. *Id.*

135. *Id.*, slip op. at 17-18.

136. *Id.*, slip op. at 18-19. The court noted that the jury would be instructed that the donor's identity was legally protected so as not to prejudice the plaintiff. *Id.*, slip op. at 18. The court further stated:

> The jury will be permitted to find that the donor knew he was in a high risk category when he donated the blood in question through expert testimony which will establish that over 90% of the adults who had contracted AIDS in 1985 were in a high risk category. In determining whether the blood bank followed its procedures, the jury may consider that a person in a high risk category would not be likely to donate blood if properly informed of the risks.

Id.

137. *See id.*, slip op. at 19.

138. Krygier v. Airweld, Inc., 137 Misc. 2d 306, 520 N.Y.S.2d 475 (Sup. Ct. 1987).

139. Although, as discussed in Part II of this article, the court primarily relied on New York's physician-patient privilege statute to deny discovery, *see supra* notes 9-15 and accompanying text, it alternatively relied on its discretion under the state's abuse-of-discovery rule. Krygier v. Airweld, Inc., 137 Misc. 2d at 309, 520 N.Y.S.2d at 477.

140. Krygier v. Airweld, Inc., at 309, 520 N.Y.S.2d at 477. Without mentioning causation, the court stated "that at all times relevant to this suit a test for the AIDS antibody was unavailable. Therefore, liability of [the blood bank] would be premised on their screening and investigative procedures under common law principles of reasonable care." *Id.*

141. *Id.*

142. Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. Ct. App. 1987), *cert. denied*, 108 S. Ct. 1027 (1988).

in favor of the plaintiff and affirmed the trial court's orders to disclose. Assessing the blood donors' rights to privacy, as discussed in Part III-B, the court found that no constitutional infringement occurred because of the restrictions on the plaintiff's use of the names and addresses after they were disclosed.[143] The court also found that while the societal interest in an adequate blood supply was great, any injury to that interest was speculative.[144] Conversely, the court found the plaintiff's need for the identities to be critical, because the suit probably could not be continued without the information.[145] Finally, one of the court's reasons for refusing a protective order was the standard of review: the court was testing for an abuse of discretion, not balancing *de novo*.[146] This reliance on the standard of review was reaffirmed and emphasized by the same court in *Gulf Coast Regional Blood Center v. Houston*.[147]

Some important lessons can be gleaned from these cases. First, as *Rasmussen* and *Tarrant* demonstrate, the privacy interest should be tied to the state constitution in order to gain the maximum legal effect from that interest. Second, as *Tarrant* demonstrates, more than a mention of the societal interest in an adequate volunteer blood supply is necessary. Danger to that interest must be shown. It would be much better to focus the blood supply argument on specific factors, as was done in *Taylor*, and thereby demonstrate how a societal interest will be injured by disclosure. Third, as *Taylor*, *Krygier*, and *Tarrant* demonstrate, the plaintiff's need for the donors' identities must be minimized. The blood banks in *Taylor* and *Krygier* accomplished this by turning over enough information to prove the key element of causation, thereby leaving the questioning of the donors relevant only to proving a breach of duty, where it was helpful but unnecessary. In *Tarrant*, however, the court made a conclusory finding of necessity without explanation because the hospital provided no evidence of causation.

The abuse-of-discovery provisions thus provide a uniformly strong argument for precluding discovery of blood donor identities. Unlike physician-patient privilege statutes, these provisions exist in all jurisdictions and contain equivalent language. In addition, they provide a much narrower and less controversial theory than the constitutional grounds on which to preclude discovery.

Abuse-of-discovery arguments, however, are not without disadvantages. The rules provide the trial court with much discretion, which can lead to unpredictability. *Stare decisis*, even within the jurisdiction, will be less con-

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143. *Id.* at 680. *See supra* note 93 and accompanying text.

144. Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d at 680.

145. *Id.* at 679. *See supra* note 90 and accompanying text.

146. *See* Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d at 680.

147. Gulf Coast Regional Blood Center v. Houston, 745 S.W.2d 557, 560 (Tex. Ct. App. 1988) ("The scope of discovery rests largely with the discretion of the trial court.").

clusive because of the inherently flexible nature of each decision. Therefore, arguments made under these provisions must be made with great specificity and an even greater than usual emphasis on the equities of the case.

V. Conclusion

Current law unfortunately provides no certainty with regard to the protection of blood donors' identities from discovery in civil litigation. However, three arguments can be asserted in support of such protection until Congress or the state legislatures act to correct the problem.

Under the first approach, involving a state's physician-patient privilege statute, the key issue will be whether the requisite statutory relationship exists between the blood donor and the individuals involved in the blood collection process. If this statutory relationship is established, it will not be difficult for the hospital or blood bank to establish that it has standing to assert the privilege, and that the donors' names and addresses are protected information within the meaning of the statutory privilege. In those cases in which it is available, the use of a privilege statute will be especially desirable because it provides the court with a narrow, non-discretionary ground on which to provide protection.

Under the second approach, challenging a court order compelling discovery of blood donors' identities as an unconstitutional infringement of the right to privacy, the hospital or blood bank first must establish that the court order compelling discovery constitutes state action. The hospital or blood bank must also establish third-party standing to assert the rights of blood donors who are not parties to the litigation. Both prerequisites should be clearly articulated and are not difficult to establish.

Under the federal constitutional analysis, the hospital or blood bank should argue that the penumbral right to privacy includes the right to be free of governmental disclosure of personal matters, and that this right is implicated by disclosure of blood donors' identities in AIDS litigation. Where a non-disclosure right is infringed, lower courts have uniformly rejected the application of strict scrutiny in favor of a balancing-of-interests test—compelling the disclosure of constitutionally protected information where the state's interest in the information outweighs the individual's interest in non-disclosure.

Under most state constitutions, no more protection will be found for the privacy of blood donors than that which is found under the U.S. Constitution. However, those states with explicit, free-standing constitutional provisions protecting the right to privacy may require a higher degree of state justification than the federal balancing-of-interests test requires.

The third approach, using state abuse-of-discovery rules to argue for a protective order prohibiting disclosure of blood donors' identities, may be the most promising for the hospital or blood bank resisting disclosure. The court's inquiry under this approach involves a balancing test similar to that

under the federal constitutional approach, but with the distinct advantage that *all* factors must be taken into account. Courts have concluded that injury to the public interest in an adequate blood supply caused by disclosure of donors' identities weighs in favor of prohibiting discovery. Unlike the physician-patient privilege statutes, essentially identical abuse-of-discovery rules exist in all jurisdictions. Moreover, abuse-of-discovery rules provide the court with a narrower, less controversial ground than constitutional arguments.