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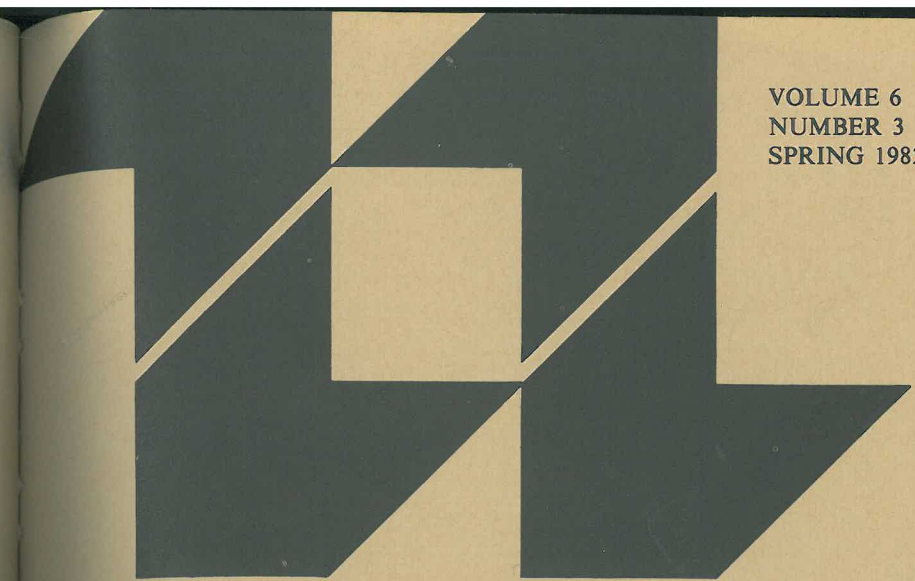
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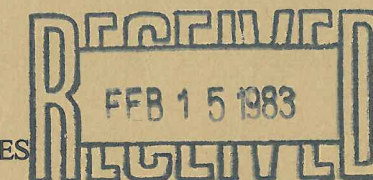
## Nova Law Review Full Issue

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**NOVA LAW JOURNAL**

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Civil Commitment System  
*Windsor C. Schmidt*

NOTES AND CASE COMMENTS

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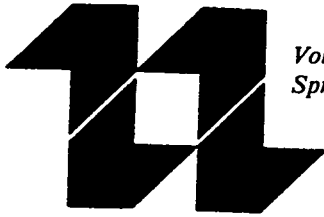
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## A Proposal for Changing Florida's Civil Commitment System

**Winsor C. Schmidt\***

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For purposes of this analysis, "civil commitment" is a form of non-criminal confinement for those who are legally found to be mentally ill.<sup>1</sup> With the minor exception of rare confinement for some communicable diseases, there is no analogue of involuntary commitment for physical illness.

Florida's civil commitment system, the "Baker Act,"<sup>2</sup> is in need of change because it has not kept pace with legal developments of recent years. To the extent developments in the law occur conservatively, and to the extent these developments could not have occurred without a consensus of professional and social opinion, it is also fair to say the Baker Act has not kept pace with developments in the mental health disciplines.

The changes in the Baker Act proposed here (see Appendix) are the product of comparison with a nationally circulated model act, the

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The author gratefully acknowledges the support of Tom Dye, former Director of the Policy Sciences Program; the research assistance of Robert Beitler, Steven Burwell and Clifford Nilson; the consultation of Robert Pass of Carlton, Fields, Ward, Emanuel, Smith & Cutler, Tampa, Florida; and the encouragement of Kent Miller.

1. See BLACK'S LAW DICTIONARY 222-23 (5th ed. 1979). See also T. SZASZ, LAW, LIBERTY AND PSYCHIATRY: AN INQUIRY INTO THE SOCIAL USES OF MENTAL HEALTH PRACTICES 39 (1963): "Commitment is compulsory or involuntary detention of a person in an institution designated as a mental hospital."

The civil liberties subfield of mental health policy analysis has certain areas of unexpected inattention: "for example, the problems posed by trying to 'treat' or 'help' people through the rehabilitative model (including problems of mental commitment, psychosurgery, and chemotherapy) appear not to have become grist for the scholarly mill (but see *The Civil Liberties Review*)." CIVIL LIBERTIES POLICY AND POLICY MAKING ix-x (S. Wasby ed. 1977).

2. FLA. STAT. §§ 394.451-.481 (1981).

Suggested Statute on Civil Commitment,<sup>3</sup> and consideration of such recommendations as the Report of the President's Commission on Mental Health.<sup>4</sup> The author's original intent was to draft a new mental health act as a substitute for the Baker Act, using the Suggested Statute on Civil Commitment. Upon analysis, however, the Suggested Statute is quite verbose and difficult to follow. In addition, the Baker Act already has several features of the Suggested Statute. Thus, the proposed changes to the Baker Act constitute improvements from the Suggested Statute added to the existing Florida civil commitment structure and language, without changing either the basic structure or words.

The comparison Suggested Statutes on Civil Commitment is part of a project suggested by the Mental Health Association involving the National Institute of Mental Health (NIMH) and the Mental Health Law project (the leading multidisciplinary, mental disability law, public interest firm in the country) to prepare analyses and suggested model statutes on such state mental health care issues as civil commitment.<sup>5</sup> During drafting, the Suggested Statute on Civil Commitment was reviewed and critiqued by a broadly representative, sixteen person, national interdisciplinary advisory panel, and by more than seventy other national mental health professionals, professional and consumer groups, lawyers, judges, and law professors.<sup>6</sup>

During the 1979 legislative session in Florida, the Suggested Statute on Civil Commitment was endorsed by such organizations as the Florida Mental Health Association, the National Association of Social Workers, the Florida Center for Children and Youth, and the District Two Human Rights Advocacy Committee for Florida State Hospital.<sup>7</sup>

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3. See *American Bar Association Commission on the Mentally Disabled*, 2 MENTAL DISABILITY L. REP. 57, 129-59 (1977). [hereinafter cited as MENTAL DISABILITY L. REP.].

4. REPORT OF THE TASK PANEL ON LEGAL AND ETHICAL ISSUES TO PRESIDENT'S COMMISSION ON MENTAL HEALTH, REPORT TO THE PRESIDENT, Vol. IV, App. (1978).

5. The other issues covered are: mental health advocacy service; mental health standards and human rights; zoning for community residences; therapeutic confidentiality (including electronic data processing); guardianship; mental health treatment for minors; right to education; state imposed disabilities; discrimination; incompetence to stand trial on criminal charges; insanity defense; and, mental health treatment for prisoners.

6. 2 MENTAL DISABILITY L. REP. at 61.

7. FLA. STAT. § 20.19(7) (1981), a third-party mechanism for protecting consti-

Despite widespread opinion that the Baker Act had not kept pace with national developments expressed in judicial decisions, legislative changes, and mental health care, the Florida legislature has not addressed the Suggested Statute on Civil Commitment, primarily because it is difficult to identify the differences between the Baker Act and the lengthy Suggested Statute. The Suggested Statute on Civil Commitment is twenty-eight pages long, including annotations; the introductory analysis is forty-nine pages long. In contrast, the Baker Act fills only eleven pages in the statute book, and includes issues addressed separately in the Suggested Statutes on Mental Health Standards and Human Rights (ten pages),<sup>8</sup> Procedures for Voluntary Treatment (four pages),<sup>9</sup> and Mental Health Treatment for Minors (ten pages).<sup>10</sup>

In late March 1981, changes to the Baker Act proposed here (Appendix A) were unanimously endorsed by both the Board of Governors for the Florida Bar and, in principle, by the Mental Health Association Board of Directors for the Florida Mental Health Association. These proposed changes to the Baker Act represent a distillation of an item by item comparison to the Suggested Statutes. The changes are not exhaustive; they cover those areas most needing amendment. The changes also attempt to be politically realistic. For example, the following proposals, however desirable, were omitted: jury trial;<sup>11</sup> protection from being a witness against oneself;<sup>12</sup> "beyond a reasonable doubt" or

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tutional and human rights of clients.

8. 2 MENTAL DISABILITY L. REP. at 291.

9. *Id.* at 329.

10. *Id.* at 459.

11. See, e.g., Note, *Confinement of Mabel Jones: Is There a Right to Jury Trial in Civil Commitment Proceedings?*, 6 FLA. ST. U.L. REV. 103 (1978). Seventeen jurisdictions (Alaska, Arkansas, California, Colorado, District of Columbia, Illinois, Kansas, Kentucky, Michigan, Montana, New Mexico, Oklahoma, Tennessee, Texas, Washington, Wisconsin, and Wyoming) have a right to a jury trial in civil commitment as of November, 1978. 3 MENTAL DISABILITY L. REP. 205, 206-14 (1979).

12. See, e.g., Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55 (1973); Fielding, *Compulsory Psychiatric Examination in Civil Commitment and the Privilege Against Self-Incrimination*, 9 GONZ. L. REV. 117 (1973); Wesson, *The Privilege Against Self-Incrimination in Civil Commitment Proceedings*, WIS. L. REV. 697, (1980); Comment, *Defective Delinquent Commitment Proceedings and the Constitution: The Privilege Against Self-Incrimination and the Right to Counsel at the Examination Stage*, 22 AM. U.L. REV. 619 (1973).

“clear, unequivocal and convincing evidence” as a standard of proof.<sup>13</sup>

*Cf. Estelle v. Smith*, 447 U.S. 934 (1981). (Prosecution’s use of psychiatric testimony at the sentencing phase of a capital murder trial to establish future dangerousness violated respondent’s constitutional rights to fifth amendment protection against self-incrimination and sixth amendment right to counsel, where respondent was not apprised of his rights and did not knowingly decide to waive them when faced while in custody with a court-ordered psychiatric inquiry, and where respondent was not given prior opportunity to consult with counsel to decide whether to submit to psychiatric examination).

13. Fifteen jurisdictions (California, District of Columbia, Hawaii, Idaho, Kansas, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, Oklahoma, Oregon, Utah, and Wisconsin) require proof “beyond a reasonable doubt” in civil commitment proceedings; two states (Oklahoma and Tennessee) require “clear, unequivocal, and convincing” evidence; and three states (North Carolina, Washington, and West Virginia) require “clear, cogent, and convincing” evidence. The other states, including Florida, merely require “clear and convincing” evidence for an individual to be involuntarily committed to a mental institution.

The standard of proof needed to involuntarily commit an individual to a state mental hospital for an indefinite period has been established by the United States Supreme Court to be at least “clear and convincing” evidence. *Addington v. Texas*, 441 U.S. 418 (1979). Whatever standard of proof is required under state law, if the standard does not “inform the factfinder that the proof must be greater than the preponderance of the evidence standard applicable to other categories of civil cases,” due process demands are not met. *Id.* at 433. If the required standard of proof is “beyond a reasonable doubt,” or an equivalent, such as “clear, unequivocal, and convincing” evidence, their is serious question that the state should be able to prove anyone to be both mentally ill and dangerous. See Greenberg, *Involuntary Psychiatric Commitments to Prevent Suicide*, 49 N.Y.U.L. Rev. 227, 266-67 (1974); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1291 (1968); Note, *Due Process and the Development of “Criminal” Safeguards in Civil Commitment Adjudications*, 42 FORDHAM L. REV. 611, 624 (1974).

Chief Justice Burger’s lack of consistency in mental disability law decisions emerges in *Addington* and has not gone unnoticed. See Shuman, *Warren Burger and the Civil Commitment Tetralogy*, 3 INT’L J.L. & PSYCHIATRY 155 (1980). In *Addington*, the Chief Justice introduced the idea that an individual’s interest in liberty includes not only physical liberty, but also mental freedom: a “free to be free” consideration for involuntary commitment. 441 U.S. at 429 (citing Chodoff, *The Case for Involuntary Hospitalization of the Mentally Ill*, 133 AM. J. PSYCHIATRY 496, 498 (1976); Schwartz, Myers & Astrachan, *Psychiatric Labeling and the Rehabilitation of the Mental Patient*, 31 ARCH. GEN. PSYCHIATRY 329, 335 (1974)). He used these references, provided by Joel Klein, counsel for the American Psychiatric Association, as *amicus curiae*, to reach the value judgment that unlike the criminal justice system, “[i]t cannot be said, therefore, that it is much better for a mentally ill person to ‘go

This article reviews the proposed changes in the Baker Act issue by issue. The justification for each proposed change will be presented with respect to legal developments and, where appropriate, developments in mental health disciplines.

### Definition of "Mentally Ill"

In Florida, the current definition of "mentally ill" is "having a mental, emotional, or behavioral disorder which substantially impairs the person's mental health."<sup>14</sup> Circular and tautological, this definition identifies mental illness as an absence of mental health, without defin-

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free' than for a mentally normal person to be committed." 441 U.S. at 429. See Brief for the American Psychiatric Association as *Amicus Curiae*, in P. FRIEDMAN, LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 297, 303 (1979). Ironically, Klein, former clerk to Justice Powell and former attorney with the Mental Health Law Project (the Project provided counsel for appellant Addington), is reported to have been involved with Justice Stewart's clerks in formulating the following response to Chief Justice Burger's statement in *O'Connor v. Donaldson*, 422 U.S. 563 (1965), ("There can be little doubt that in the exercise of its police power a state may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease." *Id.* at 582-83):

May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? . . . [T]he mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends. See *Shelton v. Tucker*, 364 U.S. 479, 488-490.

May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.

*Id.* at 575. See B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 370, 373-74, 376-77 (1979).

For a review of what, in civil commitment, must be proved by at least "clear and convincing" evidence, see A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 1980 SUPPLEMENT 127-28 (1980).

14. FLA. STAT. § 394.455(3) (1981). This definition was amended during the 1982 legislative session, while this article was in publication. See *infra* note 16.



ing mental health.

“Mentally ill” is a legal definition; it is one of the criteria for civil commitment. As a legal definition, it should give notice of those circumstances under which a person can be deprived of his freedom. The current definition of “mentally ill” has so far withstood constitutional challenge for vagueness because statutorily<sup>15</sup> it must be read in conjunction with the other criteria for commitment (e.g., likely to injure others, or likely to injure self).<sup>16</sup> Some courts, such as Pennsylvania’s,<sup>17</sup> have found even better definitions of mental illness<sup>18</sup> to be unconstitu-

15. FLA. STAT. § 394.463(2)(a) (1981).

16. See *In re Beverly*, 342 So. 2d 481 (Fla. 1977). The definition enacted in 1982 is:

an impairment of the emotional processes, of the ability to exercise conscious control of one’s actions, or of the ability to perceive reality or to understand, which impairment substantially interferes with a person’s ability to meet the ordinary demands of living, regardless of etiology, except that, for the purposes of this act, the term does not include retardation or developmental disability as defined in chapter 393, simple intoxication, or conditions manifested only by antisocial behavior or drug addiction.

FLA. STAT. § 394.455(3)(effective July 1, 1982). While this definition is substantially similar to the one here proposed, the 1982 changes in the Baker Act fell far short of those needed.

17. *Finken v. Roop*, 233 Pa. Super. 762, 339 A.2d 764 (1975), *cert. denied*, 424 U.S. 960 (1976). See *Gross v. Pomerleau*, 465 F. Supp. 1167 (D. Md. 1979) (medical concept of mental illness insufficient, legal definition should be relied upon in taking personal liberty); *Bell v. Wayne County Gen’l Hosp.*, 384 F. Supp. 1085 (E.D. Mich. 1974).

Compare, e.g., MICH. COMP. LAWS ANN. § 330.1400a (1980): “‘mental illness’ means a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life”; WIS. STAT. ANN. § 51.01(13)(b) (1981): “Mental illness, for purposes of involuntary commitment, means a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but does not include alcoholism.” These are examples of new legal definitions for mental illness accepted by state legislatures in response to successful litigation against older definitions. They are similar to the definition of mental illness for Florida proposed here.

18. The unconstitutionally vague Pennsylvania definition specified mental illness that “so lessens the capacity of a person to use his customary self-control; judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care.” 339 A.2d at 775 n.14 (quoting section 201 of the Pennsylvania Mental Health and Mental Retardation Act of 1966 codified in 50

tionally vague for failure to give fair warning of legally proscribed conduct, or to set a standard for restricting governmental discretion. The current Florida definition may be subject to more successful constitutional challenge in the future.

The proposed definition now substantially enacted, is as follows:

“Mentally ill” means a substantial impairment of emotional processes, ability to exercise conscious control of one’s actions or ability to perceive reality or to reason or understand, which impairment is manifested by instances of grossly disturbed behavior; it does not include retardation or developmental disability as defined in Chapter 393, brief periods of intoxication caused by substances such as alcohol or drugs, or dependence upon or addiction to any substance such as alcohol or drugs.

This definition limits legal involvement to situations of major mental impairment. The definition covers the three aspects of mental functioning (emotion, volition and cognition) in words understandable to lay persons, judges and attorneys, and mental health professionals.<sup>19</sup> It prevents mental health professionals from usurping judicial responsibility for determining the circumstances under which persons can be deprived of liberty. The definition excludes mental retardation, developmental disability, intoxication, and dependence or addiction to such substances as alcohol or drugs. These conditions are addressed by other statutes and programs in Florida.<sup>20</sup>

The definition is comparatively conservative. There is substantial psychiatric literature<sup>21</sup> supporting the position that mental illness is a

PA. CONS. STAT. § 4102 (1966)).

19. 2 MENTAL DISABILITY L. REP. at 89. See Keiter, *A Constitutional Analysis of Involuntary Civil Commitment in Wyoming*, 15 LAND & WATER L. REV. 141, 158 & 160 (1980) (statutory definitions of mental illness are frequently circular or ambiguous and fail to give the term any context; behavioral definition should be used); Note, *Involuntary Hospitalization of the Mentally Ill in Iowa: The Failure of the 1975 Legislation*, 64 IOWA L. REV. 1284, 1373, 1428 (1979) (Suggested Statute on Civil Commitment definition of mental illness is specifically recommended).

20. FLA. STAT. §§ 393.061-.20 (1981) deals with developmental disabilities; FLA. STAT. §§ 396.012-.171 (1981), alcoholism; FLA. STAT. §§ 397.011-.20 (1981) drug dependency.

21. See, e.g., D. COOPER, *PSYCHIATRY AND ANTI-PSYCHIATRY* (1967); R. GEERTSMA, *CLINICAL ASSESSMENT IN COUNSELING AND PSYCHOTHERAPY* 238 (1972);

theory for identifying behavior or thought processes which we do not

S. HALLECK, PSYCHIATRY AND THE DILEMMA OF CRIME 36, 219 (1967); L. HOHMAN, CURRENT APPROACHES TO PSYCHOANALYSIS (1960); K. MENNINGER, THE CRIME OF PUNISHMENT 117-18, 130 (1968); P. ROCHE, THE CRIMINAL MIND (1958); T. ROTHMAN, THE FUTURE OF PSYCHIATRY 247 (1962); T. SCHEFF, BEING MENTALLY ILL: A SOCIOLOGICAL THEORY (1966); THE MEDICAL MODEL OF MENTAL ILLNESS (S.L. Sharma ed. 1970); T. SZASZ, *supra* note 1; T. SZASZ, THE MYTH OF MENTAL ILLNESS: FOUNDATION OF A THEORY OF NORMAL CONDUCT (1961); Agnew & Bannister, *Psychiatric Diagnosis as a Pseudo-Specialist Language*, 46 BRIT. J. MED. PSYCH. 69 (1973); Albee, *Models, Myths, and Manpower*, 52 MENTAL HYGIENE 168 (Apr. 1968); Ausebel, *Relationships Between Psychology and Psychiatry: The Hidden Issues*, in CLINICAL PSYCHOLOGY IN TRANSITION (J. Braur ed. 1966); Baur, *Legal Responsibility and Mental Illness*, 57 NW. L. REV. 12, 14 (1962); Cavanagh, *A Psychiatrist Looks at the Durham Decision*, 5 CATH. U. L. REV. 25 (1955); Coles, *The Limits of Psychiatry*, 31 THE PROGRESSIVE 32 (May 1967); Davidson, *The Semantics of Psychotherapy*, 115 AM. J. PSYCHIATRY 410 (1958); Davidson, *Point of View*, 52 MENTAL HYGIENE 5 (1967); Eysenek, *The Outcome Problem in Psychotherapy*, THE INVESTIGATION OF PSYCHOTHERAPY (A. Goldstein ed. 1966); Furrow, *Defective Mental Treatment: A Proposal for the Application of Strict Liability to Psychiatric Services*, 58 B.U.L. REV. 391 (1978); Goldstein, *The Fitness Factory Part I: The Psychiatrist's Role in Determining Competency*, 130 AM. J. PSYCHIATRY 1144, 1147 (1973); Guiora & Harrison, *What is Psychiatry? A New Model of Service and Education*, 130 AM. J. PSYCHIATRY 1275, 1275 (1973); Halleck, *The Psychiatrist and the Legal Process*, 2 PSYCHIATRY TODAY 24 (1969); Jackson, 20 STAN. MED. BULL. 202 (1962); Kaschak, *Therapist and Client: Two Views of the Process and Outcome of Psychotherapy*, PROF. PSYCHOLOGY 271 (May 1978); Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968); Mariner, *A Critical Look at Professional Education in the Mental Health Field*, 22 AM. PSYCHOLOGIST 271 (1967); McReynolds, *DSM-III and the Future of Applied Social Science*, PROF. PSYCHOLOGY 123, 125 (Feb. 1979); Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978); Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist Views Durham and Brawner*, 1973 WASH. U.L.Q. 87, 104; Robitscher, *The New Face of Legal Psychiatry*, 129 AM. J. PSYCHIATRY 91 (1972); Roche, *Symposium on Criminal Responsibility and Mental Disease: Medical Aspects*, 25 TENN. L. REV. 221 (1959); Salzman, *Changing Styles in Psychiatric Syndromes: Historical Overview*, 130 AM. J. PSYCHIATRY 147 (1973); Sarbin & Mancuso, *Failure of a Moral Enterprise: Attitude of the Public Toward Mental Illness*, 35 J. CONSULTING & CLINICAL PSYCHOLOGY 159 (1970); Sarbin & Mancuso, *Paradigms and Moral Judgments: Improper Conduct is not Disease*, 39 J. CONSULTING & CLINICAL PSYCHOLOGY 6, 7 (1972); Shah, *Crime and Mental Illness: Some Problems in Defining and Labeling Deviant Behavior*, 53 MENTAL HYGIENE 21 (1969); Shepherd, *A Critical Appraisal of Contemporary Psychiatry*, 12 COMPREHENSIVE PSYCHIATRY 302, 304, 312 (1971); Strupp & Hadley, *A Tripartite Model of*

understand, rather than a disease susceptible to diagnosis and treatment in the same manner as physical illness. Indeed, the problems of defining and classifying these conditions remain an ongoing issue. The new Diagnostic and Statistical Manual of Mental Disorders (DSM-III)<sup>22</sup> favors the use of the general term "mental disorder" over "mental illness" or "mental disease." More specific classification of the disorder may vary with the individual making the classification. The results of field studies conducted to determine the reliability and correlation of classifications done by different individual raters under the new "multi-axial system" are given in the manual;<sup>23</sup> they show good

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*Mental Health and Therapeutic Outcomes with Special Reference to Negative Effects in Psychotherapy*, 32 AM. PSYCHOLOGIST 187 (1977); Tarrrier, *The Future of the Medical Model, a Reply to Guze, An Editorial*, 167 J. NERVOUS & MENTAL DISEASE 71 (1979); Taylor & Heiser, *Phenomenology: An Alternative Approach to Diagnosis of Mental Disease*, 12 COMPREHENSIVE PSYCHIATRY 480 (1972); Tuma, May, Yale & Forsythe, *Therapist's Experience, General Clinical Ability and Treatment Outcome in Schizophrenia*, 46 J. CONSULTING & CLINICAL PSYCHOLOGY 1120 (1978); Van Praag, *The Position of Biological Psychiatry Among the Psychiatric Disciplines*, 12 COMPREHENSIVE PSYCHIATRY 1 (1961); Wooten, *Academic Lecture: The Place of Psychiatry and Medical Concepts in the Treatment of Offenders*, 17 CAN. PSYCHIATRIC A.J. 365 (1972) "[I]t is time to admit that the sick and the wicked are not scientifically distinguishable. . . ." *Id.* at 371.

But see, e.g., M. SIEGLER & H. OSMOND, *MODELS OF MADNESS, MODELS OF MEDICINE* (1976); Ausubel, *Personality Disorder is Disease*, 16 AM. PSYCHOLOGIST 69 (1971); Guze, *The Future of Psychiatry: Medicine or Social Science? An Editorial*, 165 J. NERVOUS & MENTAL DISEASE, 225 (1977); Paris, *Diagnosis Before Treatment*, 20 CAN. PSYCHIATRIC J. 305 (1975); Reiss, *A Critique of Thomas S. Szasz' 'Myth of Mental Illness'*, 128 AM. J. PSYCHIATRY 1081 (1972); Shagrass, *Editorial Book Review*, 164 J. NERVOUS & MENTAL DISEASE 380 (1977).

See generally A. FLEW, *CRIME OR DISEASE?* (1974); Boorse, *On the Distinction Between Disease and Illness*, 5 PHILOS. & PUB. AFFAIRS 49 (1975); Coryell & Wetell, *Attitudes Towards Issues in Psychiatry Among Third Year Residents: A Brief Survey*, 135 AM. J. PSYCHIATRY 732 (1978); Houlgate, *Rights, Health and Mental Disease*, 22 WAYNE L. REV. 87 (1975); Kety, *From Rationalization to Reason*, 131 AM. J. PSYCHIATRY 957 (1974); Macklin, *Mental Health and Mental Illness: Some Problems of Definition and Concept Formation*, in *BIOMEDICAL ETHICS AND THE LAW* (J. Humber & R. Almeder eds. 1976); Moore, *Some Myths About "Mental Illness"*, 32 ARCH. GEN. PSYCHIATRY 1483 (1975); Shuman, *The Right to be Unhealthy*, 22 WAYNE L. REV. 61 (1975).

22. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. 1980).

23. *Id.* at Appendix F.

reliability. However, the extent to which this favorable reliability is dependent upon a statistic called the "kappa coefficient" renders the proffered reliability questionable.<sup>24</sup> Other criticisms cite additional substantive deficiencies in the manual.<sup>25</sup> This is only to suggest that DSM-III is no panacea to the problems of definition of the term "mentally

24. See, e.g., J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 138-41 (3d ed. 1981), (citing Cohen, *Weighted Kappa: Nominal Scale Agreement with Provision for Scaled Disagreement or Partial Credit*, 70 PSYCHOLOGICAL BULL. 213 (1968)); Fleiss, Spitzer, Endicott & Cohen, *Quantification of Agreement and Multiple Psychiatric Diagnosis*, 26 ARCHIVES OF GEN. PSYCHIATRY 168 (1972); Helzer, Robins, Taibleson, Woodruff, Reich & Wish, *Reliability of Psychiatric Diagnosis*, 34 ARCHIVES OF GEN. PSYCHIATRY 129 (1977); Janes, *Agreement Measurement and the Judgment Process*, 167 J. NERVOUS & MENTAL DISEASE 343 (1979); Spitzer, Cohen, Fleiss & Endicott, *Quantification of Agreement in Psychiatric Diagnosis*, 17 ARCHIVES OF GEN. PSYCHIATRY 83 (1967); Spitzer & Fleiss, *A Re-analysis of the Reliability of Psychiatric Diagnosis*, 125 BRIT. J. PSYCHIATRY 341 (1974).

25. E.g., McLemore & Benjamin, *Whatever Happened to Interpersonal Diagnosis? A Psycho-social Alternative to DSM-III*, 34 AM. PSYCHOLOGIST 17 (1979); McReynolds, *supra* note 21; Schacht & Nathan, *But Is It Good for the Psychologist? Appraisal and Status of DSM-III*, 32 AM. PSYCHOLOGIST 1017 (1977); Zubin, *But Is It Good for Science?*, 31 CLINICAL PSYCHOLOGIST 1 (1977-1978).

Newmark noted that preliminary drafts of DSM-III were besieged by criticism concerning lack of specificity in the definition of terms defining schizophrenia. Newmark, Konanc, Simpson, Boren & Prillaman, *Predictive Validity of the Rorschach Prognostic Rating Scale with Schizophrenic Patients*, 167 J. NERVOUS & MENTAL DISEASE 135 (1979). The ultimate value of DSM-III awaits use and tests for reliability in the various categories, but recent studies continued to note the difficulty of defining schizophrenia or determining appropriate diagnostic criteria. See, e.g., Newark, et al., *MMPI Criteria for Diagnosing Schizophrenia*, 42 J. PERSONALITY ASSESSMENT 366 (1978); Newark, et al., *The Discriminative Value of the Whitaker Index of Schizophrenic Thinking*, 42 J. PERSONALITY ASSESSMENT 636 (1978); Reade & Wertheimer, *A Bias in the Diagnosis of Schizophrenia*, 44 J. CONSULTING & CLINICAL PSYCHOLOGY 878 (1976). Similarly, critical recent studies of depression have been available. See, e.g., Endicott & Spitzer, *Use of the Research Diagnostic Criteria and the Schedule for Affective Disorders and Schizophrenia to Study Affective Disorders*, 136 AM. J. PSYCHIATRY 52 (1979); Hirschfield & Klerman, *Personality Attributes and Affective Disorders*, 136 AM. J. PSYCHIATRY 67 (1979); Klerman, Endicott, Spitzer, & Hirschfield, *Neurotic Depressions: A Systematic Analysis of Multiple Criteria and Meanings*, 136 AM. J. PSYCHIATRY 57 (1979); Owens & Maxmon, *Mood and Affect: A Semantic Confusion*, 136 AM. J. PSYCHIATRY 97 (1979); Winokur, Behar, Vanvalkenburg & Lowry, *Is a Familial Definition of Depression Both Feasible and Valid?*, 166 J. NERVOUS & MENTAL DISEASE 764 (1978).

ill.”

The proposed definition should reduce inappropriate use of the mental health system by emphasizing substantial mental impairments, while excluding civil commitment for conditions such as retardation, developmental disability, intoxication, substance dependence, and addiction. The civil commitment process will be more efficient once mental illness is more narrowly and appropriately defined.

### Definition of “Likely to Injure Himself”

Currently, there is no statutory definition in Florida for “likely to injure himself.” The Florida Supreme Court stated in *In re Beverly*: “In order to conclude that the person is likely to injure himself. . . , the judge must conclude that there is such a threat of harm as to comprehend the positive infliction of injury. . . .”<sup>26</sup>

The proposed definition is as follows:

“Likely to injure himself” means that it is more likely than not that in the near future the person will attempt to commit suicide or inflict serious bodily harm upon himself by violent or other actively self-destructive means, as evidenced by behavior causing or attempting the infliction of serious bodily harm upon himself within twenty days prior to the initiation of the proceeding.

This definition, another part of the criteria for involuntary commitment, incorporates provisions requiring a showing of recent, overt, self-injurious behavior.

With “likely to injure himself” now statutorily undefined in the Baker Act, mental health professionals are left with the uncomfortable and inappropriate discretion to do something, they *cannot* do: accurately and consistently predict dangerousness to self. Mental health professionals predict dangerousness to self much more frequently than self-injury actually occurs. One study indicated that psychiatric predictions of suicide would produce five erroneous commitments for every person who might actually commit suicide.<sup>27</sup> Another researcher con-

26. *In re Beverly*, 342 So. 2d at 487.

27. Greenland, *Evaluation of Violence and Dangerous Behavior Associated with Mental Illness*, 3 SEMINARS IN PSYCHIATRY 345, 354 (1971). See generally Under-

cluded that highly accurate predictive tools are not even available for such supposedly high risk populations as suicide attempters.<sup>28</sup>

The base rate for suicide is extremely low. Despite what one might think from the media's portrayal, only about one percent of people attempting suicide actually succeed in killing themselves within one year of the attempt.<sup>29</sup> Identifying and helping the truly suicidal present many problems. It has been proposed that a mental health professional who could correctly identify four out of five potential suicides would possibly erroneously hospitalize five individuals for every person who might actually kill himself.<sup>30</sup>

The inability to predict suicide, and especially the broader behavior of self-injuriousness, is further complicated by the following considerations. Suicide is not necessarily a mentally disordered act. Suicide may be an appropriate response to such circumstances as terminal illness, the loss of a loved one or extreme degradation. Thus, suicide can be the product of conscious, rational decision-making, and may even correlate with "mental health."<sup>31</sup> "Mental health professionals usually cannot judge the rationality of a suicide attempt on any medical or objective scale. They must rely, instead on their own subjective deter-

wood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408 (1979).

28. Murphy, *Clinical Identification of Suicidal Risk*, 27 ARCHIVES GENERAL PSYCHIATRY 356, 357 (1972).

29. Greenberg, *Involuntary Psychiatric Commitments to Prevent Suicide*, 49 N.Y.U.L. REV. 227, 239 (1974) and literature reviewed in *Id.* at 237-40.

30. *Id.* at 259-62 where Greenberg developed the following example. In a hypothetical medium sized city where 1,000 people survive a suicide attempt, ten will kill themselves within the following year. If mental health professionals were 80% efficient in predicting suicide (80% correctly identified as suicides and nonsuicides, 20% misidentified), eight of the ten suicides will have been accurately identified, and only two of the 794 [80% of (1000 minus eight)] predicted non-suicides will suicide. However, only eight of the 206 (1000 minus 794) predicted suicides will suicide (4% accuracy). This means that for every one person (4%) who will suicide committed as dangerous to self, 24 people will be erroneously committed; for every ten truly suicidal persons correctly committed, 240 persons who would not suicide will be committed. In order for all surviving suicide attempters to be appropriately at liberty, the prediction decisions of mental health professionals should be 99% efficient because only one percent of suicide attempters actually kill themselves within a year of the attempt.

31. *Id.* at 234-36 n.46; Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1227 n.141 (1974).

mination of normal and abnormal responses to events, a function for which they are not specially qualified by training or experience.”<sup>32</sup> Except for obvious cases like slashed wrists, distinguishing suicidal behavior from other potentially self-destructive behavior is difficult. Smoking cigarettes, racing cars or climbing mountains does not result in involuntary commitment, yet such behavior may be quite hazardous to self. Supreme Court Justice Robert Jackson was told in 1954 that a return to the Court following a heart attack would kill him. When he died five days after returning to the bench, his choice was praised.<sup>33</sup>

Unless Florida is prepared to engage in preventive detention for alleged suicides, which would further exacerbate at enormous cost Florida's already high per capita rate of confinement, the statutory definition for “likely to injure himself” should require recent, overt, self-injurious behavior. The reported suicide rate for the United States in 1974 was one out of every 8500 persons.<sup>34</sup> On the other hand, of those who attempt suicide, the death rate reported has varied from one in seventy to one in fifty.<sup>35</sup> The recent overt behavior requirement will at least reduce the extent to which the current civil commitment system inefficiently and unsuccessfully engages in pure speculation.

An argument can be made that the recent overt behavior requirement should not apply for continued involuntary commitments because of the alleged “masking” effect.<sup>36</sup> “Masking” is the artificial suppression of violence accomplished by a controlled institutional environment. A short time period, e.g., twenty days within which overt behavior must have occurred, enhances the validity of a dangerousness prediction; the shorter the time period, the more accurate the prediction, and the greater the reduction of erroneous and inappropriate commitments. This benefit should be weighed against the nominal impact of any so-called “masking effect.” In the California experience, by permitting no

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32. B. ENNIS & R. EMERY, *THE RIGHTS OF MENTAL PATIENTS* 51 (1978).

33. In Memoriam Mr. Justice Jackson, 349 U.S. XXVII, XXVIII-XXIX (1951).

34. 2 MENTAL DISABILITY L. REP. at 87.

35. Tuckman & Youngman, *Identifying Suicide Risk Groups Among Attempted Suicides*, 78 PUB. HEALTH REPS. 763 (1963).

36. See *People v. Lane*, 196 Colo. 42, 581 P.2d 719 (1978)(en banc); *Scopes v. Shah*, 59 A.D.2d 203, 398 N.Y.S.2d 911 (App. Div. 1977). These cases are critiqued in a letter from Robert Pass to Winsor Schmidt (Sept. 25, 1980).



more than two 14-day periods of involuntary commitment for suicidals, fewer than one percent over a two-year period required the second 14-day period, with none of them suiciding. This compares with a suicide rate of three percent within six months for those committed for longer periods under the previous statute.<sup>37</sup> If commitment of suicidals "masks" anything, it may mask the possible harm of commitment to suicidals.

The requirement of recent, overt, self-injurious behavior in the definition for "likely to injure himself" will effect statutorily what is already constitutionally required by many courts<sup>38</sup> and widely endorsed by commentators.<sup>39</sup> The proposed definition will also reduce inappropriate and potentially harmful commitments and should enhance the

37. See ENKI, A STUDY OF CALIFORNIA'S NEW MENTAL HEALTH LAW (1969-71) 152 (1972). Indeed, long periods of commitment may increase the rate of suicide rather than decrease it. See Greenberg, *supra* note 29, at 236, 250, 256-59; Light, *Treating Suicide: The Illusions of a Professional Movement*, 25 INT'L SOC. SCI. J. 475, 482-84 (1973); Pokorny, *Myths About Suicide*, SUICIDAL BEHAVIOR: DIAGNOSIS AND MANAGEMENT (H. Resnick ed. 1968).

38. See *Gross v. Pomerleau*, 465 F. Supp. 1167, 1173 (D. Md. 1979); *Benson v. Meredith*, 455 F. Supp. 662, 673 (D.D.C. 1978); *Suzuki v. Alba*, 438 F. Supp. 1106, 1110 (D. Hawaii 1977); *Stamus v. Leonhardt*, 414 F. Supp. 439 (S.D. Iowa 1976); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085 (E.D. Mich. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated*, 421 U.S. 957 (1975), *on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976); *Finken v. Roop*, 233 Pa. Super. 762, 339 A.2d 764 (1975), *cert. denied*, 424 U.S. 960 (1976).

*But see United States ex rel. Matthew v. Nelson*, 461 F. Supp. 707 (N.D. Ill. 1978); *People v. Sansone*, 18 Ill. App. 3d 515, 309 N.E. 733 (1974).

39. See, e.g., Elkins, *Legal Representation of the Mentally Ill*, 82 W. VA. L. REV. 157, 205 (1979) (even an overt act is not enough without further explanation and circumstances); Elliott, *Procedures for Involuntary Commitment on the Basis of Alleged Mental Illness*, 42 U. COLO. L. REV. 231 (1970); Griffith & Griffith, *Duty to Third Parties, Dangerousness, and the Right to Refuse Treatment: Problematic Concepts for Psychiatrist and Lawyer*, 14 CAL. W.L. REV. 241 (1978); Keiter, *supra* note 19, at 161-62; Note, *supra* note 19, at 1376, 1384, 1431 (because of inaccuracy in predicting dangerousness, the entire dangerousness standard from the Suggested Statute on Civil Commitment is recommended, including the requirement of a recent overt act within the past 20 days); Note, *Standards for Involuntary Civil Commitment in Pennsylvania*, 38 U. PITT. L. REV. 535 (1977). *But see, e.g., Tanay, Law and the Mentally Ill*, 22 WAYNE L. REV. 781 (1976).

treatment of persons who are likely to injure themselves.

### Definition of "Likely to Injure Others"

Florida's present statute does not define the term "likely to injure others." The Florida Supreme Court attempted to fill the gap in *In re Beverly*: "In order to conclude that the person is likely to injure . . . others, the judge must conclude that there is such a threat of harm as to comprehend the positive infliction of injury. . . ."40

The proposed definition is as follows:

"Likely to injure others" means that it is more likely than not that in the near future the person will inflict serious, unjustified bodily harm on another person, as evidenced by behavior causing, attempting or threatening such harm, including at least one incidence thereof within twenty days prior to the initiation of the proceeding.

This definition for the police power criterion in civil commitment incorporates provisions requiring a showing of recent, overt, dangerous behavior to others.

Just as mental health professionals are unable to accurately and consistently predict suicidal behavior, so too, are they unable to predict behavior that injures others. Psychiatrists overpredict violence; "for every correct psychiatric prediction of violence, there are numerous erroneous predictions."<sup>41</sup> Pressure from the legal system is perceived as too great for mental health professionals to do other than the "safe" thing, i.e., predict dangerousness.<sup>42</sup>

A dramatic illustration of the invalidity of predictions of violence occurred in the aftermath of the United States Supreme Court decision

40. *In re Beverly*, 342 So. 2d at 487. The Florida Supreme Court elaborates: "Ordinarily, this would refer to physical injury, but the judge may very well conclude that the person is likely to inflict emotional injury to another. The statute contemplates the latter as well as the former." *Id.*

41. Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife that Cuts Both Ways*, 2 *PSYCHIATRY TODAY* 43 (Feb. 1969)(reviews existing prediction studies).

42. Diamond, *The Psychiatric Prediction of Dangerousness*, 123 *U. PA. L. REV.* 439, 447 (1974).

in *Baxstrom v. Herold*,<sup>43</sup> regarding New York's maximum security forensic hospitals. The 969 allegedly "dangerous" mentally ill (criminally insane) persons, detained in forensic facilities after expiration of their prison terms, were ordered released or committed to civil facilities because the holdover detention was a constitutional violation. Despite the original psychiatric determinations that inmates were mentally ill and too dangerous to be released or even transferred to a civil hospital, one year after the Supreme Court's order, 702 were in civil hospitals posing no problems to the staff, 147 had been discharged into the community, and only seven had to be returned to the forensic facility.<sup>44</sup> Several years later, 27% were living in the community, two were convicted of felonies, seven of misdemeanors, and three percent were in maximum security institutions.<sup>45</sup>

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43. 383 U.S. 107 (1966).

44. Hunt & Wiley, *Operation Baxstrom After One Year*, 124 AM. J. PSYCHIATRY 974, 976 (1968). The balance consisted of deaths (24), transfers (10), convalescents (62), and miscellaneous (24).

45. Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970*, 129 AM. J. PSYCHIATRY 304, 309 (1972).

A very similar experience occurred in Pennsylvania. See *Dixon v. Attorney Gen.*, 325 F. Supp. 966 (M.D. Pa. 1971); T. THORNBERRY & J. JACOBY, *THE CRIMINALLY INSANE: A COMMUNITY FOLLOW-UP OF MENTALLY ILL OFFENDERS* (1977) (only fourteen percent of 438 released "mentally disordered offenders" engaged in injurious behaviors within four years of release). See also Coccozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976); Coccozza & Steadman, *Some Refinements in the Measurement and Prediction of Dangerous Behavior*, 131 AM. J. PSYCHIATRY 1012, 1013-14 (1976); Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQUENCY 371 (1972); Steadman, *A New Look at Recidivism among Patuxent Inmates*, 5 BULL. AM. ACAD. PSYCHIATRY & L. 200 (1977).

In reassessing their Baxstrom research, Coccozza and Steadman suggested the generalizability of their results to contemporary patient populations could be limited because of the high average age (47) and mean length of continuous institutionalization (almost 15 years) of the *Baxstrom* group, and because their retention in institutions for the criminally insane could have been the result of administrative inertia or discretion rather than dangerousness. Coccozza & Steadman, *supra* at 1093-94. However, Coccozza and Steadman concluded elsewhere that incorporating age variables yielded a false positive ratio of two to one and "if we were to attempt to use this information for statistically predicting dangerous behavior our best strategy would still be to predict that none of the patients would be dangerous." Coccozza & Steadman, *supra* at 1013-14.

In short, the psychiatrists “lacked the ability properly to diagnose dangerous mental illness and to determine the necessity for maximum security confinement.”<sup>46</sup> Mr. Chief Justice Burger concluded: “There can be little responsible debate regarding ‘the uncertainty of diagnosis in this field and the tentativeness of professional judgment.’”<sup>47</sup> Reliance upon mental health professional’s predictions of dangerousness results in commitment of several nondangerous persons for every truly harmful person,<sup>48</sup> a minimum overcommitment of several hundred percent.

Courts now hold that a better approach to the police power criterion for civil commitment is to require findings of specific violent behavior rather than to rely solely on a medical assessment of dangerousness.<sup>49</sup> Many state civil commitment statutes also require additional

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Monahan weathered the bureaucratic inertia suggestion by concluding: “It is not an acceptable retort to the research for psychiatrists and psychologists to say, after the fact, that they did not really believe the patients to be violent. If bureaucratic pressure influences prediction, then that pressure is part of the social reality that should be empirically studied.” J. MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 51 (1981). Following his extensive review of the dangerousness prediction literature, Monahan concluded: “It may be that short-term ‘emergency’ predictions in a person’s normal environment generate more accurate estimates of violent behavior.” *Id.* at 60. However, a “judicious assessment of the research to date is that *we know very little about how accurately violent behavior may be predicted under many circumstances.*” *Id.* at 15 (emphasis in original).

46. Morris, *Criminality and the Right to Treatment*, 36 U. CHI. L. REV. 784, 796 (1969).

47. *O'Connor v. Donaldson*, 422 U.S. 563, 584 (1975) (citing *Greenwood v. United States*, 350 U.S. at 375 and *Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 697-719 (1974)). See Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME AND DELINQUENCY 371, 390-91 (1972); Wenck, Robison & Smith, *Can Violence be Predicted?*, 18 CRIME & DELINQ. 393, 395-96 (1972).

48. A. STONE, *MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION* 27-33 (1975); Diamond, *supra* note 42; Laves, *The Prediction of Dangerousness as a Criterion for Involuntary Civil Commitment: Constitutional Considerations*, 3 J. PSYCHIATRY & L. 291 (1975); AMERICAN PSYCHIATRIC ASSOCIATION, *TASK FORCE REPORT 8: CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL* 23-28 (1975).

49. See *Gross v. Pomerleau*, 465 F. Supp. at 1173; *Bension v. Meredith*, 455 F. Supp. at 672; *Stamus v. Leonhardt*, 414 F. Supp. at 453; *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975); *Lynch v. Baxley*, 386 F. Supp. 378; *Finken v. Roop*, 233 Pa. Super. 762, 339 A.2d 764. (1975), *cert denied*, 424 U.S. 960 (1976).

factual information to reduce the unfairness and speculation in involuntary commitment for dangerousness.<sup>50</sup> The accuracy and imminence of predicted dangerousness is enhanced by requiring, as suggested in the proposed definition, evidence of recent behavior that causes, attempts, or threatens infliction of "serious, unjustified bodily harm on another person." As noted above,<sup>51</sup> the recent overt act requirement mirrors current legal trends.<sup>52</sup>

### Definition of "Lacks Sufficient Capacity to Make a Reasonable Application On His Own Behalf"

Before the Baker Act was amended in 1979, the criteria for involuntary hospitalization included mental illness and either 1) likelihood of injuring self or others, or 2) need for care or treatment and lack of sufficient capacity to make a responsible application for treatment.<sup>53</sup> The "need for care and treatment and lacking capacity" provision, challenged as unconstitutionally vague, was upheld by the Florida Supreme Court in *In re Beverly* by incorporating the following judicial criteria:

If the person is non-dangerous, the judge must conclude that he is in need of care and treatment and lacks sufficient capacity to make a responsible application on his own behalf. A mere conclusion that the person is "in need of care and treatment" is insufficient. The judge must further conclude that such person "lacks sufficient capacity to act for himself."

If the judge concludes that the mental illness manifests itself in neglect or refusal to care for himself, that such neglect or refusal poses a real and present threat of substantial harm to his well-being, *and that he is incompetent to determine for himself whether treatment for his mental illness would be desirable*, then the criteria of the statute have been met.

However, even though the other criteria are met, *a nondangerous individual who is capable of surviving safely in free-*

50. See 3 MENTAL DISABILITY L. REP. 206-14 (1978).

51. *Supra* note 38 and text accompanying notes 36-37.

52. *E.g.*, *Doremus v. Farrell*, 407 F. Supp. at 517; *Lynch v. Baxley*, 386 F. Supp. at 391; *Finken v. Roop*, 233 Pa. Super. 762, 339 A.2d 764.

53. FLA. STAT. §§ 394.467(1)(a)-(b) (1977).

*dom by himself or with the help of willing and responsible family members or friends should never be hospitalized involuntarily.*<sup>54</sup>

Most of the third paragraph is verbatim from the decision of the United States Supreme Court in *O'Connor v. Donaldson*.<sup>55</sup>

The 1979 amendments to the Baker Act removed the "lacks sufficient capacity" language from the statutory criteria, and replaced it with *some* of the language from *Beverly*: "In need of care and treatment which, if not provided, may result in neglect or refusal to care for himself, and such neglect or refusal poses a real and present threat of substantial harm to his well being."<sup>56</sup>

The problem with the 1979 revision is its failure to incorporate all of the criteria required by the Florida Supreme Court. There was no provision, for example, that the person be "incompetent to determine for himself whether treatment for his mental illness would be desirable."<sup>57</sup> The changes proposed here restore the "lacks sufficient capacity to make a reasonable application on his own behalf" language required by the Florida Supreme Court, and provide a statutory definition for this *parens patriae* commitment criterion. The suggested definition is as follows:

"Lacks sufficient capacity to make a reasonable application on his own behalf" means the person's inability, by reason of mental condition, to achieve a rudimentary understanding, after conscientious efforts at explanation, of the purpose, nature or possible significant benefits of treatment; provided that a person shall be deemed incapable of understanding the purpose of treatment if, due to impaired mental ability to perceive reality, he cannot realize that he has recently engaged in behavior likely to injure himself or others; and provided further that a person shall be deemed to lack sufficient capacity if his reason for refusing treatment is expressly

54. *In re Beverly*, 342 So. 2d at 487 (emphasis added).

55. *O'Connor v. Donaldson*, 422 U.S. at 576: "In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."

56. See FLA. STAT. § 394.463(2)(a)(2) and § 394.467(1)(b)(2) (1979) (emphasis added).

57. 342 So. 2d at 487.

based on either the belief that he is unworthy of treatment or the desire to destroy, harm or punish himself.

This definition specifies objective standards relating to an individual's mental functioning.<sup>58</sup> It appropriately focuses on the individual's ability to understand the purpose, nature and benefits of treatment.<sup>59</sup> The definition provides for a finding of incapacity when an individual believes himself unworthy of treatment, or expressly desires to be self-destructive.

As suggested by *Beverly*, a finding of incapacity should be a constitutional pre-condition for acceptable *parens patriae* commitments,<sup>60</sup> i.e., commitments based on the authority to protect individuals who cannot act for themselves.<sup>61</sup> Because civil commitment results in loss of individual liberty, "due process requires that the nature . . . of commitment bear some reasonable relation to the purpose for which the individual is committed."<sup>62</sup> The compelling state interest for *parens patriae* commitment is to provide mental health care for individuals who cannot address their own mental health needs. Because many mentally ill persons are as capable of making their own hospitalization decisions as physically ill persons,<sup>63</sup> due process requires a finding of individual incapacity or incompetence before a mentally ill person can be hospitalized involuntarily.

The individual's interest in freedom from inappropriate *parens patriae* commitment is bolstered by the constitutional right to privacy and

58. For a more specific explanation, see 2 MENTAL DISABILITY L. REP. AT 91-93.

59. Halleck, *Legal and Ethical Aspects of Behavior Control*, 131 AM. J. PSYCHIATRY 381 (1974).

60. See 2 MENTAL DISABILITY L. REP. at 90.

61. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972). See generally Coleman & Solomon, *Parens Patriae "Treatment": Legal Punishment in Disguise*, 3 HASTINGS CONST. L.Q. 345 (1976); Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895 (1976); Custer, *The Origins of the Doctrine of "Parens Patriae,"* 27 EMORY L.J. 195 (1978) (*parens patriae* jurisdiction, which came to be vested in courts of equity, is based on "a logical but incorrect restatement of a misprinted precedent"); Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215 (1975).

62. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

63. See, e.g., Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 88-89 (1968).

autonomy.<sup>64</sup> The Florida Constitution states: "Right of Privacy—every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. . . ." <sup>65</sup>

A number of courts have already recognized that the mentally ill person, like the physically ill person, must be allowed to decide whether to seek hospitalization, unless the state can show his inability to make such a decision because of the illness.<sup>66</sup> Other courts have relied on the reasoning and language of *O'Connor v. Donaldson*<sup>67</sup> to find unconstitutional state laws based only on the *parens patriae* authority.<sup>68</sup> Several courts have either eliminated *parens patriae* as a rationale for involuntary commitment or found the *parens patriae* standard so vague and unreviewable as to violate due process.<sup>69</sup>

The proposed definition for "lacks sufficient capacity" salvages the constitutionality of the *parens patriae* criterion for involuntary commitment and provides more objective standards for assessing such competency.<sup>70</sup>

64. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (right to terminate pregnancy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to contraception in the privacy of the home); *In re Quinlan*, 70 N.J. 10, 40, 355 A.2d 647, 663 (1976) (right to decline medical treatment under certain circumstances).

65. FLA. CONST. art. 1, § 23.

66. *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *Winters v. Miller*, 446 F.2d 65, 68 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971); *Colyar v. Third Judicial Dist. Court*, 469 F. Supp. 424 (D. Utah 1979); *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1978 (E.D. Wis. 1972).

67. 422 U.S. at 575-76.

68. E.g., *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976); *Stamus v. Leonard*, 414 F. Supp. 439 (S.D. Iowa 1976); *Finken v. Roop*, 233 Pa. Super. 762, 339 A.2d 764 (1975).

69. E.g., *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975); *Bell v. Wayne County Hosp.*, 384 F. Supp. 1085 (E.D. Mich. 1974); *Hawks v. Lazaro*, 157 W. Va. 417, 202 S.E.2d 109 (1974); *In re Levias*, 83 Wash. 2d 253, 517 P.2d 588 (1973); *In re Quesnell*, 83 Wash. 2d 224, 517 P.2d 568 (1973).

70. See Note, *supra* note 19, at 1429 (specifically recommending the adoption of this suggested incapacity standard).



## Payment for Care of Involuntary Patients

Florida currently allows the Department of Health and Rehabilitative Services to require involuntary patients, their spouses, parents of involuntarily committed children, and third party payors to participate in the cost of services or to pay fees for services, even if the services are unwanted.<sup>71</sup> This creates a financial incentive for public mental institutions to admit involuntary patients and to retain them longer than might otherwise be necessary. Requiring maintenance fees for involuntary patients places public mental institutions in a conflict of interests between expeditious treatment and discharge on one hand, and economic reward for holding involuntary patients on the other. The practice is a financial disincentive to high quality and low cost mental health care. Furthermore, facilities are thus discouraged from competing with each other.

The suggested amendment to section 394.457(7) is as follows:

(7) PAYMENT FOR CARE OF PATIENTS.—Fees and fee collections for patients in treatment facilities shall be according to s. 402.33, except that no person evaluated, detained, committed or treated involuntarily pursuant to the provisions of this part, or parents or spouse of the person, or third party payor, shall be required to participate in the costs or to pay fees incurred for their evaluation, treatment, care, maintenance or custody pursuant to this part; provided that if, upon the patient's request the patient is placed in any private facility, the patient shall bear the expense of the patient's care, maintenance and treatment at such facility.

This amendment codifies the right of involuntarily committed patients not to pay the costs of unwanted services through their families or third party payors. There is already some legal support for the proposition that involuntary patients should not be required to pay for unwanted services.<sup>72</sup> While, the state might argue that treatment of invol-

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71. FLA. STAT. § 394.457(7) & § 402.33 (1979).

72. See, e.g., *McAuliffe v. Carlson*, 377 F. Supp. 896 (D. Conn. 1974), 386 F. Supp. 1245 (D. Conn. 1974), *rev'd on other grounds*, 520 F.2d 1305 (2d Cir. 1975); *Department of Mental Hygiene v. Kirchner*, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964); *Department of Mental Hygiene v. Holey*, 59 Cal. 2d 247, 379 P.2d 22, 28 Cal. Rptr. 718 (1963); *Department of Mental Hygiene v. Bank of America*, 3

untary patients results in an implied contract with unjust enrichment of the involuntary patient; this theory is unlikely to succeed.<sup>73</sup> The double-taxation aspects of requiring involuntary patients to pay for state mandated treatment is a more viable argument against such payments.<sup>74</sup>

Policy objections to requiring involuntary patients to pay for care they do not request, include: maintenance fees extracted from involuntary patients are not always expended for purposes of their mental health; enforcement frequently requires those with very little to support those with even less (rather than a rich relative supporting a poor one); enforcement creates breaches and rifts in family relationships; and enforcement can deplete and exhaust resources that could finance discharge followed by a less restrictive alternative placement, thus perpetuating dependence and prolonged involuntary hospitalization.<sup>75</sup>

### Right to Treatment Plan

While a constitutional right to treatment has not been recognized by the United States Supreme Court,<sup>76</sup> Florida does provide a "statu-

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Cal. App. 3d 949, 83 Cal. Rptr. 559 (1969); *Miller v. State Dep't of Treasury (Revenue Div.)*, 385 Mich. 296, 188 N.W.2d 795 (1971); *Boldt v. State*, 98 Wis. 2d 445, 297 N.W.2d 29 (Wis. App. 1980) (state has no claim for support from social security benefits of a person held incompetent to stand trial in mental institution pursuant only to pending criminal charge); Comment, *Compulsory Contribution to Support of State Mental Patients Held Deprivation of Equal Protection*, 39 N.Y.U.L. REV. 858 (1964); Annot., 20 A.L.R.3d 363 (1968) (discusses attack theories of class legislation, double taxation, impairments of the obligations of contracts, taking of property without just compensation, undue delegation of legislative power to administrators, and defective title).

*But cf.* *Fayle v. Stapley*, 607 F.2d 858 (9th Cir. 1979) (not unreasonable to require contribution from criminally insane person); *Ivory v. Wainwright*, 393 So. 2d 542 (Fla. 1980) (upholding prisoner pay law); *In re Nelson*, 98 Wis. 2d 261, 296 N.W.2d 736 (1980) (payment for care upheld for acquittee by reason of mental disease); Op. Atty. Gen., 074-271 (Fla., Sept. 6, 1974) (patient may be involuntarily committed to private facility if the cost is born by the patient or guardian).

73. See B. ENNIS & R. EMERY, *supra* note 32, at 156-58.

74. See, e.g., *id.* at 158; Annot., *supra* note 72, at 378.

75. See A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 935 (1974).

76. See *O'Connor*, 422 U.S. at 573 ("there is not reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment

tory right to receive individual treatment.”<sup>77</sup> The scope of the required treatment is not clear, however. The current statute merely provides that no one shall have mental health treatment denied or delayed, that the least restrictive available treatment shall be utilized, and that a physical examination must be given within twenty-four hours of admission.<sup>78</sup>

The suggested amendment to section 394.459(2) is as follows:

(d) Not more than 5 days after the beginning of treatment, each patient shall have and receive an individualized treatment plan in writing that the patient has maximum opportunity to assist in preparing. Each plan shall contain at least:

1. A statement of the specific problems and specific needs of the patient;
2. A statement of intermediate and long-range objectives, with a projected timetable for their attainment;
3. A statement and rationale for the plan of treatment for achieving these objectives;
4. A statement of the least restrictive treatment conditions necessary to achieve the purposes of placement;
5. A specification of treatment staff responsibility and a

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upon compulsory confinement by the State”). *Id.* at 577-78 n.12 (*Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), finding a constitutional right to treatment, vacated; “deprives that court’s opinion of precedential effect, leaving this Court’s opinion and judgment as the sole law of the case”); *Pennhurst State School v. Halderman*, 451 U.S. 1, 16 n.12 (1981) (“this Court has never found that the involuntarily committed have a constitutional ‘right to treatment’. . .”); *Morales v. Turman*, 562 F.2d 933 (5th Cir. 1977).

*But cf.* *Burnham v. Department of Mental Health*, 349 F. Supp. 1335 (N.D. Ga. 1972) (no constitutional right to treatment), *rev’d*, 503 F.2d 1319 (5th Cir. 1974) (citing *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) and *Donaldson*, 493 F.2d 507). *See also* *Romeo v. Youngberg*, 644 F.2d 147 (3d Cir. 1980), *vacated*, 50 U.S.L.W. 4681 (June 18, 1982) (persons involuntarily committed to state institutions for the mentally retarded have due process rights to: conditions of reasonable care and safety, freedom from unreasonable bodily restraint, and “such training as an appropriate professional would consider reasonable to ensure [the patient’s] safety and to facilitate [the patient’s] ability to function free from bodily restraints.” *Id.* at 4683).

77. *O'Connor*, 422 U.S. at 566-67 n.2; FLA. STAT. § 394.459(2) (1981).

78. *See* *Wyatt v. Stickney*, 325 F. Supp. 781, *enforced* 334 F. Supp. 1341, 1343-44 (1971), *supplemented* *Wyatt v. Stickney*, 344 F. Supp. 373, 384 (M.D. Ala. 1972), *aff’d sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

description of proposed staff involvement with the patient in order to attain the objectives;

6. Criteria for release to less restrictive treatment conditions;

7. The additional disclosure information required in s. 394.459

(3)(a).

The requirement for individualized treatment plans and their elements are taken from federal court decisions in Alabama and the fifth circuit. Individualized treatment plans are one of the three fundamental conditions (along with a humane psychological and physical environment, and sufficient numbers of qualified staff) for minimally adequate treatment in public mental institutions. This does not involve legislative prescription of treatment, but rather identifies and specifies a condition without which treatment cannot possibly occur.

This amendment would not appear to be unnecessary since these elements are already prescribed by judicial decision. However, some institution staff do not know the elements of a treatment plan, or its significance; thus this amendment would facilitate *implementation* of each patient's statutory right to treatment for mental illness.<sup>79</sup>

### Definition of "Safety Justifying Emergency Treatment"

Regarding the right to express and informed consent, Florida's statute until recently provided that treatment "may" be rendered a patient, who refuses treatment and is not discharged, "on an emergency basis, upon the written order of a mental health professional when such mental health professional determines treatment is necessary for the safety of the patient or others."<sup>80</sup> Treatment without consent was only authorized when an emergency jeopardized the safety of the patient or others. This section was recently held to be unconstitutional.<sup>81</sup>

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79. See also W. SCHMIDT, *THE RIGHT TO TREATMENT IN MENTAL HEALTH LAW* (Nat'l A. of Att'y Gen. 1976); Spece, *Justifying Invigorated Scrutiny and the Least Restrictive Alternative As a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study*, 21 ARIZ. L. REV. 1049 (1979); Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1 (1978).

80. FLA. STAT. § 394.459(3)(a) (1981).

81. FLA. STAT. § 394.459(3)(a) and § 394.467(4)(h) have been declared uncon-

The suggested amendment would add the following language:

“Safety is jeopardized only by a situation threatening death or serious bodily harm.”

It is elementary tort law, according to Prosser quoting Mr. Justice Holmes, that “[t]he absence of lawful consent is part of the definition of an assault.”<sup>82</sup> Consent can be implied “in an emergency which threatens death or serious bodily harm, [but] the mere desirability of treatment cannot justify. . .going ahead without the consent of the patient, or at least that of a near relative.”<sup>83</sup> Furthermore, “[i]f the plaintiff is known to be incapable of giving consent because of. . .mental incompetence, his failure to object, or even his active manifestation of consent will not protect the defendant.”<sup>84</sup>

The Department of Health and Rehabilitative Services nevertheless changed the presumably clear legislative intent regarding the right to consent by defining “safety” as “the physical and emotional well being of an individual separate and apart from threat or violence, either physical or verbal.”<sup>85</sup> There is little direct authority to justify “emotional well being” as a definition for “safety.” The most recent substantial definition of that word consists of a remand by the United

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stitutional because they allowed hearing examiners to make the judicial decision regarding competence to consent to treatment during recommitment hearings in violation of FLA. CONST. art. 5, § 20(c)(3). *Bentley v. State ex rel. Rogers*, 398 So. 2d 992 (Fla. 4th Dist. Ct. App. 1981). Section 20(c)(3) gives the circuit courts jurisdiction over proceedings relating to “guardianship, involuntary hospitalization, the determination of incompetency.” (By similar reasoning, the provisions allowing hearing examiner jurisdiction over continued involuntary hospitalization should also be unconstitutional).

The 1982 legislature addressed the problem identified by *Bentley* through passage of CS/HB 665 which changed “hearing examiner” to “court” in section 394.459(3)(a), and provided that the hearing examiner may issue a recommended order to the court regarding incompetence to consent to treatment in section 394.467(4)(h).

The decision in *Bentley* and the legislative activity occurred while this article was being written. The proposal here regarding the definition of “safety justifying emergency treatment” is otherwise viable.

82. W. PROSSER, LAW OF TORTS 102 (3d ed. 1964).

83. *Id.* at 104.

84. *Id.* at 103-04. See also Furrow, *Defective Mental Treatment: A Proposal for the Application of Strict Liability to Psychiatric Services*, 58 B.U.L. REV. 391 (1978).

85. FLA. ADMIN. CODE ch. 10E-5.09(10) (1977).

States Court of Appeals for the First Circuit “for consideration of alternative means for making incompetency determinations in [*parens patriae*] situations where any delay [in administration of antipsychotic drugs] could result in significant deterioration of the patient’s mental health.”<sup>86</sup> Even this decision held, for the police power situation, that first there must be procedures for ensuring that patient interests, such as side effects in refusing antipsychotics, are taken into consideration by a qualified physician; second, that forcible administration of antipsychotics does not occur absent findings that patient interests are outweighed by a need to prevent violence; and third, that less restrictive alternatives are unavailable.<sup>87</sup>

Other courts have defined “emergency” as a situation in which a physician certifies there has been “a sudden, significant change in the patient’s condition which creates danger to the patient himself or to others in the hospital,”<sup>88</sup> or “where a patient presents a danger to himself or other members of society” (or is judicially declared incompetent).<sup>89</sup> An administrative bulletin of the New Jersey Division of Mental Health and Hospitals allowed emergency administration of medication “if a physician certifies that it is essential to administer psychotropic medication in order to prevent death or serious consequences to a patient.”<sup>90</sup> The prior Florida law that was tracked in drafting 394.459(3)(a) provided for emergency surgical treatment only where it is deemed lifesaving, or following a mandatory adversarial hearing to determine the appropriateness of surgery.<sup>91</sup>

Notwithstanding some questions regarding procedures for implementing the right to consent,<sup>92</sup> the mental patient’s constitutional right

86. *Rogers v. Okin*, 634 F.2d 650, 660 (1st Cir. 1980), *vacated*, 50 U.S.L.W. 4676 (U.S. June 18, 1982) (for consideration in light of *In re Roe*, 421 N.E.2d 40 (Mass. 1981)). *But see* note 40 *supra*.

87. *Rogers*, 634 F.2d at 657.

88. *Rennie v. Klein*, 476 F. Supp. 1294, 1313 (D.N.J. 1979).

89. *In re K.K.B.*, 609 P.2d 747, 750 (Okla. 1980).

90. *See Rennie v. Klein*, 462 F. Supp. 1131, 1149 (D.N.J. 1978).

91. FLA. STAT. § 394.459(3)(b) and (c) (1979).

92. *See Bentley v. State ex rel. Rogers*, 398 So. 2d 992 (Fla. 4th Dist. Ct. App. 1981). (FLA. STAT. § 394.459(3)(a) and § 394.467(4)(h) violate article 5, section 20(c)(3) of the Florida Constitution regarding circuit court jurisdiction over guardianship, involuntary hospitalization, the determination of incompetency.) By similar reasoning, the provisions allowing hearing examiner jurisdiction over continued involun-

to refuse intrusive treatment, such as the administration of psychotropic (antipsychotic) medication, is becoming recognized in Florida.<sup>93</sup> There are many legal bases for the right to consent to, and refuse, treatment: privacy and personal autonomy (including the ninth amendment);<sup>94</sup> first amendment protection of thought processes or religious beliefs; eighth amendment cruel and unusual punishment protection prohibiting use of drugs for control or aversive conditioning; procedural and substantive due process; equal protection; and using the least restrictive alternative.<sup>95</sup>

As noted by the Oklahoma Supreme Court: "There is no support in common law for the proposition that treatment, medical or psychiatric, constitutes a legally nonreversible medical decision. . . . In a society ruled by laws [rather than by individuals], social actions that infringe or control individual freedoms must be judged by legal

tary hospitalization should also be unconstitutional.

93. *In re Rewis*, Case No. 80-2011B (Division of Administrative Hearings, Feb. 20, 1981) (citing *Scott v. Plante*, 532 F.2d 939, 946 (3rd Cir. 1976)); *Davis v. Hubbard*, 506 F. Supp. 915 (W.D. Ohio 1980); *Rogers v. Okin*, 478 F. Supp. 1342, 1360 (D. Mass. 1979), *rev'd in part on other grounds*, 634 F.2d 650 (1st Cir. 1980), *cert. granted*, 451 U.S. 906 (1981); *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978), *enforced*, 476 F. Supp. 1294 (D.N.J. 1979), *refusing stay*, 481 F. Supp. 552 (D.N.J. 1979) (appeal pending in the Third Circuit); *In re K.K.B.*, 609 P.2d 747 (Okla. 1980); *Geodecke v. Department of Insts.*, 198 Colo. 407, 603 P.2d 123 (1979) (en banc) (decided on basis of state law); *Souder v. McGuire*, 423 F. Supp. 830 (M.D. Pa. 1976); *Price v. Sheppard*, 307 Minn. 250, 239 N.W.2d 905 (1976); *Kaimowitz v. Department of Mental Health*, 1 MENTAL DISABILITY L. REP. 147, Case No. 73-18434-AW (Mich. Wayne Co. Cir. Ct. filed July 10, 1973).

94. *See, e.g.*, FLA. CONST. art. 1, § 23: "Right of Privacy—every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."

95. *See generally* Dubose, *Of the Parens Patriae Commitment Power and Drug Treatment of Schizophrenia: Do the Benefits to the Patient Justify Involuntary Treatment?*, 60 MINN. L. REV. 1149 (1976); Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. L. REV. 461 (1977); Schwarz, *In the Name of Treatment: Autonomy, Civil Commitment, and the Right to Refuse Treatment*, 50 NOTRE DAME LAW. 808 (1975); Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 WIS. L. REV. 497; Comment, *Advances in Mental Health: A Case for the Right to Refuse Treatment*, 48 TEMP. L.Q. 354 (1975). *See also* Comment, *Brave New World Revisited: Fifteen Years of Chemical Sacraments*, 1980 WIS. L. REV. 879 (1980).

standards."<sup>96</sup> The American Psychiatric Association has thus recognized the individual's right to refuse treatment:

Except in emergencies, if a patient who is competent to participate in treatment decisions declines to accept treatment recommended by staff, we accept the patient's right to refuse. If the physician believes the patient is not competent to participate in treatment decisions, he should ask a court to rule on the patient's competency. If the patient is found not competent, an impartial third party, designated by the court, should be given the authority of consent.<sup>97</sup>

Many psychiatrists consider forced treatment to be unethical.<sup>98</sup>

The rule<sup>99</sup> promulgated by the Florida Department of Health and Rehabilitative Services flies in the face of this consensus, and the clear legislative intent.<sup>100</sup> The rule, if honored, makes the statutorily mandated right to express and informed consent meaningless. The rule requires treatment to occur with the label of "emergency treatment order" whenever there is refusal to consent by a patient, or refusal by the guardian or guardian advocate of an incompetent patient, or failure to discharge the refusing patient. The rule does not allow the refusal of treatment to be honored under any circumstances.

The suggested definition of "emergency" would further clarify legislative intent, and conform Florida's law to recent legal developments.

96. *In re K.K.B.*, 609 P.2d at 751.

97. *Id.* (citing AMERICAN PSYCHIATRIC ASSOCIATION, TASK FORCE ON THE RIGHT TO TREATMENT, THE RIGHT TO ADEQUATE CARE AND TREATMENT FOR THE MENTALLY ILL AND MENTALLY RETARDED 12 (Final Draft, May 8, 1975)). *But see In re Roe*, 421 N.E.2d 40 (Mass. Supp. Jud. Ct. 1981) (a court, not a third party, must determine what an incompetent patient living in the community would have preferred when competent before allowing the state to administer antipsychotic drugs; also, only the least restrictive of either involuntary confinement, or compulsory medication, may be used—not both).

98. Address by Lewis H. Gaughan, *The Right of a Mental Patient to Refuse Antipsychotic Drugs in an Institution*, *Univ. of Richmond Law School* (March 6, 1978). *See Gaughan & LaRue, The Right of a Mental Patient to Refuse Antipsychotic Drugs in an Institution*, 4 L. & PSYCHOLOGY REV. 43 (1978).

99. FLA. ADMIN. CODE ch. 10E-5.11(3)(b) (1977).

100. *Compare* FLA. STAT. § 394.459(3)(a) (declared unconstitutional, *see* note 81 *supra*).



Treating without consent an individual whose "emotional well being" is jeopardized is neither constitutionally nor therapeutically appropriate. "[I]t is universally recognized as fundamental to effective therapy that the patient acknowledge his illness and cooperate with those attempting to give treatment."<sup>101</sup> Forcibly drugging patients without consent is unacceptable in a society ruled by law.

### Clinical Record: Confidentiality

The proposed amendment for Florida Statutes section 394.459(9) is underlined below:

**(9) CLINICAL RECORD: CONFIDENTIALITY. -**

A clinical record for each patient shall be maintained. The record shall include data pertaining to admission and such other information as may be required under rules of the department. Unless waived by express and informed consent by the patient or his guardian or attorney, the privileged and confidential status of the clinical record shall not be lost by either authorized or unauthorized disclosure to any person, organization, or agency. Notwithstanding s. 90.503(4)(b), no communication made by a patient to a mental health professional, including but not limited to a psychotherapist, may be used for any purpose other than a proceeding under this chapter. The clinical record shall not be a public record and no part of it shall be released, except: . . .

Section 90.503(4)(b) is one of the exceptions to the psychotherapist-patient privilege. The exception provides that there is no psychotherapist-patient privilege for communications made during a court-ordered examination of a patient's mental condition.

The proposed amendment preserves the confidentiality and fifth amendment right of a person examined for his mental condition, including a court-ordered examination, not to be compelled to give evidence against himself in a criminal prosecution. With this amendment, disclosures to a mental health professional could only be used in proceedings under chapter 394.

A strong case can be made for generally affording the right to

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101. *O'Connor*, 422 U.S. at 584.

remain silent to individuals in the civil commitment process.<sup>102</sup> An exception to the right can be made when refusal precludes the presentation of evidence regarding treatability and capacity to make informed decisions concerning treatment. Some courts disagree,<sup>103</sup> but other courts apply the privilege against self-incrimination to involuntary civil commitment proceedings.<sup>104</sup>

The Florida Supreme Court decided that the psychotherapist-patient privilege provision<sup>105</sup> of the old evidence code did *not* apply to testimony of the examining physician where the patient was previously warned that communications would *not* be privileged.<sup>106</sup> Florida's new

102. 2 MENTAL DISABILITY L. REP. at 101-04 (applicability of the fifth amendment to civil commitment proceedings and the right to remain silent as a due process requirement); sources in note 12 *supra*.

A person in the custody of the police is warned that he or she has a right to remain silent because of the probability of indirect or subtle coercion to make a statement. Hospital custody in civil commitment is at least as coercive as police custody because: (1) involuntary mental patients are deprived of liberty and segregated from friends and family; (2) the person is in an unfamiliar hospital environment at a time of greatest depression or agitation; (3) patients do *not* have a right to bail and are dependent upon hospital staff discretion for discharge; (4) patients do *not* get an attorney within a matter of hours; (5) patients may *not* be as mentally capable of protecting their interests as persons accused of crime; (6) patients receive treatments that can lessen their ability to remain silent or resist coercive confinement measures; (7) mental health professionals act as both therapist and agent of the state, whereas police have a clear adversarial role to persons in custody; and (8) mental health professionals are probably more experienced and adept at eliciting information than police officers. B. ENNIS & R. EMERY, *supra* note 32, at 75. *Cf. Estelle v. Smith*, 450 U.S. 929 (1981) (prosecution use, during sentencing phase of capital murder trial, of unwarned statements, without assistance of counsel, to psychiatrist violates fifth amendment privilege against self-incrimination and sixth amendment right to counsel).

103. *See Suzuki v. Yuen*, 617 F.2d 173, 177-78 (9th Cir. 1980); *French v. Blackburn*, 428 F. Supp. 1351, 1359 (M.D.N.C. 1977), *aff'd*, 443 U.S. 901 (1979); *People ex rel. Keith v. Keith*, 38 Ill. 2d 405, 231 N.E.2d 387 (1967); *McGuffin v. State*, 571 S.W.2d 56 (Tex. Civ. App. 1978); *Ramsay v. Santa Rose Medical Center*, 498 S.W.2d 741 (Tex. Civ. App. 1973).

104. *See Lessard v. Schmidt*, 349 F. Supp. at 1102; *Finken v. Roop*, 339 A.2d 764 (Pa. Super. Ct. 1975); *State ex rel. Memmel v. Mundy*, Case No. 441-417 (Cir. Ct. Milw. Wis. filed Aug. 18, 1976), *on appeal* 249 N.W.2d 573 (Wis. 1977).

105. FLA. STAT. § 90.242(3)(a) (1973).

106. *In re Beverly*, 342 So. 2d at 489. In addition to the appropriateness of a warning, the best practice would be to have an attorney present during any psychiatric interview for civil commitment. *See Finken v. Roop*, 339 A.2d at 764. *See also Lee v.*

evidence code<sup>107</sup> fails to require such a warning, thus increasing the importance of one commentator's suggestion that the extent of any self-incrimination protection should be clearly set out in the Florida commitment statutes.<sup>108</sup>

The amendment proposed here is a compromise position. The position was recognized in a recent California Supreme Court decision holding the privilege against self-incrimination only protects mentally disabled individuals from giving evidence that would tend to implicate them in criminal activity or subject them to potential criminal prosecution.<sup>109</sup> The amendment would clarify the extent of self-incrimination protection enjoyed by persons subject to civil commitment in Florida.

### Rights of Mental Health Professionals

The suggested amendments to Florida Statutes section 394.460 relating to the rights of mental health professionals are as follows:

(2) Mental health professionals testifying at hearings conducted pursuant to this part may, if appropriately qualified, give expert testimony:

(a) Describing the present mental functioning of a person whom the witness has personally examined;

(b) Stating an opinion as to what the prospects are that proposed and available treatment will improve the person's mental condition;

(c) Stating an opinion whether the person has a mental illness, as defined in s. 394.455(3); provided that any witness so testifying shall provide a detailed explanation as to how any such descriptions and opinions were reached and a specification of all behaviors and other factual information on which such descriptions and opinions are based.

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County Court, 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705 (1971), *cert. denied*, 404 U.S. 823 (1971) (defendant in criminal proceeding has a right to counsel at pretrial mental examination).

107. FLA. STAT. § 90.242(3)(a) (1976).

108. Note, *Involuntary Hospitalization of the Mentally Ill Under Florida's Baker Act: Procedural Due Process and the Role of the Attorney*, 26 U. FLA. L. REV. 508 (1974).

109. *Cramer v. Tyars*, 23 Cal. 3d 131, 588 P.2d 783, 151 Cal. Rptr. 653 (1979).

(3) Mental health professionals testifying at such hearings shall not be permitted to give opinion testimony:

(a) Stating the diagnostic category applicable to a person, unless the person raises the issue through cross-examination or the presentation of evidence, or

(b) Notwithstanding s. 90.703, stating a conclusion that a person is likely to injure himself or others, or that a person's neglect or refusal to care for himself poses a real and present threat of substantial harm to his well being.

Much has been written about the rights of mental patients, but comparatively little is said about the rights of the mental health professionals charged with the care, treatment and honoring of the rights of mental patients. Mental health professionals complain about spending an inordinate amount of time in court, in a role they are neither trained nor qualified to exercise and in an inappropriate adversarial relationship to their patient.<sup>110</sup> The suggested amendments delineate the testimony that mental health professionals may offer, limiting it to that which they are qualified to give.

The amendments excuse mental health professionals from invoking inconsistent, unreliable and invalid diagnostic labels often established by vote (e.g., homosexuality voted in and out as a disease) rather than by scientific verification. Diagnostic labels in the courtroom frequently communicate impressions of disturbed or incapacitated conditions without providing information useful to the commitment process.<sup>111</sup>

Also specific psychiatric diagnoses are extremely unreliable and often contradictory.

Civil commitment proceedings call for detailed information about the individual's mental and emotional functioning. Descriptive information can be supplied by psychiatric and psychological witnesses without any reference to diagnostic conclusions which are often of questionable utility to professionals and meaningless or

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110. See generally LAW AND THE MENTAL HEALTH PROFESSIONS: FRICTION AT THE INTERFACE (W. Barton & C. Sanborn eds. 1978); Galie, *An Essay on the Civil Commitment Lawyer: Or How I Learned to Hate the Adversary System*, 6 J. PSYCHIATRY & L. 71 (1978); Slovenko, *Criminal Justice Procedures in Civil Commitment*, 24 WAYNE L. REV. 1 (1977).

111. Ennis & Litwack, *supra* note 47, at 741.

misleading to laymen.<sup>112</sup>

The amendments also relieve mental health professionals of the uncomfortable responsibility of deciding the legal criteria for commitment. The responsibility of determining whether an individual meets the legal criteria for commitment lies with the judge or hearing examiner, based on the evidence presented, not with a psychiatrist. A neutral judge is particularly important in view of the considerable evidence that psychiatric diagnosis is strongly influenced by the socio-economic histories of both patient and clinician, with a lower patient socio-economic history biasing the diagnosis toward greater illness and poorer prognosis than is actually presented by the clinical picture.<sup>113</sup> This ef-

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112. 2 MENTAL DISABILITY L. REP. at 105 (citing V. NORRIS, MENTAL ILLNESS IN LONDON 42-53 (Maudsley monograph No. 6, 1959)) (60% are of agreement on diagnosis of 6,253 patients when second diagnostician knew the original diagnosis). A 1962 research project illustrates this point: Beck, Ward, Mock, & Erbaugh, *Reliability of Psychiatric Diagnoses: 2. A Study of Consistency of Clinical Judgments and Ratings*, 119 AM. J. PSYCHIATRY 351, 356 (1962) (average rate of agreement for specific diagnoses under controlled conditions was only 54%). See generally J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 123-45 (1970); Ash, *The Reliability of Psychiatric Diagnoses*, 44 J. ABN. & SOC. PSYCH. 272 (1949) (three psychiatrists all agreed on specific diagnoses in only 20% of the cases and all three disagreed 31% of the time). Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitments*, 117 U. PA. L. REV. 75, 80 (1968) ("The diagnostician has the ability to shoehorn into the mentally diseased class almost any person he wishes. . . ."); Schmidt & Fonda, *The Reliability of Psychiatric Diagnosis: A New Look*, 52 J. ABN. & SOC. PSYCHOLOGY 262 (1956) (47% agreement as to classification of non-organic psychoses).

See *supra* notes 22-25. DSM-III probably constitutes an improvement over DSM-II, but whether reliability and validity are sufficiently high for legal use remain to be thoroughly researched. J. ZISKIN, *supra* note 24 and numerous sources cited therein.

In addition to endorsement by the Florida Bar, the suggested provisions regarding rights of mental health professionals have been specifically and unanimously endorsed by the Board of Directors for the Florida Mental Health Association. FLORIDA MENTAL HEALTH ASSOCIATION, BAKER ACT REVIEW TASK FORCE FINAL REPORT (Oct. 1981).

113. See Lee & Temerlin, *Social Class, Diagnosis, and Prognosis for Psychotherapy*, 7 PSYCHOTHERAPY: THEORY, RESEARCH & PRAC. 181 (1970) and sources cited in Ennis & Litwack, *supra* note 47, at 724 n.108.

See also Roth & Lerner, *Sex-Based Discrimination in the Mental Institutionalization of Women*, 62 CAL. L. REV. 789 (1974) (Psychiatric bias based on sex makes it easier for a woman to be committed than a man under the same circumstances, results

fect combines with the extremely deficient predictions of assaultive and suicidal behavior discussed earlier. A review of the literature and research<sup>114</sup> necessarily leads to the conclusion that psychiatric predictions of dangerousness to self and others, and predictions of the need for care and treatment, are invalid; that psychiatric judgments are not sufficiently reliable or valid to justify their admissibility under traditional rules of evidence; and that psychiatric judgments do not convey meaningful or otherwise unavailable information about the issues relevant in a civil commitment proceeding.

Whether the suggested amendment to the statutory section titled "Rights of mental health professionals" actually increases or abridges the rights of mental health professionals probably depends upon the perception of the individual professional. Some would say the suggested amendments abridge their right to speak freely, the right to use specialized terminology and expertise to provide greater justice and humanity for their patients. Others would say the suggested amendments promote efficiency in their court appearances, lessen their adversarial approach to their patients and free them of judgmental roles.

### Admission for Court-Ordered Evaluation, Involuntary Placement, and Continued Involuntary Placement

The suggested amendments in the last sections of the proposed bill (Appendix) do the following things:

- (1) provide that the "need of care or treatment" criterion for court-ordered evaluation and involuntary placement be manifest rather than predicted;
- (2) restore the "lacks sufficient capacity to make a reasonable ap-

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in different treatment for women—such as more use of electro-convulsive therapy and psycho-surgery—and makes it more difficult for women to be released. Women are often hospitalized for exhibiting traits which would not lead to hospitalization for a man, such as aggressiveness, running away, or sexual promiscuity.)

114. Ennis & Litwack, *supra* note 47. The uncertainty, tentativeness, fallibility, and subjectivity of psychiatric diagnosis and judgment have been recognized by the United States Supreme Court. *Addington*, 441 U.S. 418 (1979); *O'Connor*, 422 U.S. at 584.

See generally Albers, Pasewark & Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception*, 6 CAP. U.L. REV. 11 (1976).

plication in his own behalf” criterion to court-ordered evaluation and involuntary placement, as required by the Florida Supreme Court to maintain constitutionality;

(3) change the maximum period of initial involuntary placement from six months to three months if likely to injure others, or in need of care or treatment, and from six months to two weeks if likely to injure self;

(4) allow one continued involuntary placement;

(5) require substantial probability that treatment will significantly improve the patient’s mental condition before continued involuntary placement can occur.

Many of the justifications for these suggestions have been discussed above. Requiring manifest evidence of need for care or treatment, rather than prediction of need, is consistent with the legal trend toward requiring recent overt acts; this minimizes the extent to which commitment becomes preventive detention, and recognizes the inability of any witness to accurately predict another’s future behavior.

Restoring the “lacks sufficient capacity to make a reasonable application on his own behalf” criterion to court-ordered evaluation and involuntary placement assures the constitutionality of the commitment criteria as required by the Florida Supreme Court in *Beverly*.<sup>115</sup> A finding of incompetence seems to be a constitutional pre-condition to commitment against one’s wishes.

The suggested amendments also shorten the maximum period of initial involuntary placement and allow one continued involuntary placement. Prolonged hospitalization is antitherapeutic and harmful to patients. One review of earlier studies concluded: “The major thrust of the evidence is that living in an institution has harmful physical and psychological effects . . . regardless of the particular characteristics of the population or the unique qualities of the total institution.”<sup>116</sup> The

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115. *In re Beverly*, 342 So. 2d at 487.

116. Prock, *Effects of Institutionalization: A Comparison of Community, Waiting List and Institutionalized Aged Persons*, 59 AM. J. PUB. HEALTH 1837 (1969). See BARTON, *INSTITUTIONAL NEUROSIS* (1966); WING & BROWN, *INSTITUTIONALIZATION AND SCHIZOPHRENIA* (1970); Gruenberg, *From Practice to Theory: Community Mental Health Service and the Practice of Neurosis*, 1969 THE LANCET 721; Myerson, *Can Institutionalization Be Prevented?*, MASS. J. MENTAL HEALTH 17 (Summer 1972).

negative effects of prolonged institutionalization so outweigh any benefits of continued confinement that staff ultimately expend more energy treating the negative secondary effects than they do treating the original condition.<sup>117</sup> The issue then becomes the appropriate maximum period of involuntary commitment. The broadest proposal for amending civil commitment standards presented by the President's Commission on Mental Health limits the original commitment to six weeks, with one possible six week extension.<sup>118</sup> The initial commitment period in Michigan has been sixty days,<sup>119</sup> ninety days in California<sup>120</sup> and Washington,<sup>121</sup> and four months in Maine.<sup>122</sup> There is statistical support for an involuntary commitment period of no more than ninety days.<sup>123</sup> The American Psychological Association, the American Orthopsychiatric Association and leading commentators agree with the amendments proposed here: no one should be involuntarily committed to a mental institution for more than a total of six months.<sup>124</sup>

California has had different commitment periods for persons presenting different problems. For example, when a patient demonstrates at least an imminent threat of substantial physical harm to others (likely to injure others), the commitment period is limited to ninety days. Persons presenting at least an imminent threat of taking

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*See also* Kiesler, *Mental Hospitals and Alternative Care: Noninstitutionalization as Potential Public Policy for Mental Patients*, 37 AM. PSYCHOLOGIST 349 (1982) (reviewed ten studies randomly assigning treatment modes of seriously ill psychiatric patients and found no case where hospitalization was more beneficial than alternative treatment).

117. LEGAL RIGHTS OF THE MENTALLY HANDICAPPED, 437-50, 514-20, 749-55 (B. Ennis & P. Friedman eds. 1973). *See also* O'Connor, 422 U.S. at 574-75.

118. TASK PANEL ON LEGAL AND ETHICAL ISSUES, THE PRESIDENT'S COMMISSION ON MENTAL HEALTH, MENTAL HEALTH AND HUMAN RIGHTS: REPORT OF THE TASK PANEL ON LEGAL AND ETHICAL ISSUES, *reprinted in* 20 ARIZ. L. REV. 49, 117-22 (1978). [hereinafter cited as TASK PANEL ON LEGAL AND ETHICAL ISSUES].

119. MICH. COMP. LAWS § 330.1472 (1980).

120. CAL. WELF. & INST. CODE §§ 5300-5304 (Deering 1979)(the Code provides for 14 days of intensive treatment plus further treatment not to exceed 90 days.

121. WASH. REV. CODE § 71.05.320 (1975).

122. ME. REV. STAT. ANN. tit. 34, § 2334 (Supp. 1978).

123. *See* Shah, *Some Interactions of Law and Mental Health in the Handling of Social Deviance*, 23 CATH. U.L. REV. 674 (1974).

124. *See* B. ENNIS & R. EMERY, *supra* note 32, at 130; B. Ennis & P. Friedman, *supra* note 117, at 437.



their own life (likely to injure self) are subject to two fourteen-day commitment periods.<sup>125</sup> This different policy for suicidals is consistent with the *lack* of substantial evidence that mental health services successfully prevent suicides.<sup>126</sup> In fact, there is some evidence that involuntary treatment may increase the rate of suicide.<sup>127</sup> The President's Commission on Mental Health suggests a forty-eight hour commitment for suicide attempters.<sup>128</sup> Greenberg recommends physical and medical interference for twenty-four hours maximum.<sup>129</sup>

One evaluation of California's overall experience with limited term commitments came to the following conclusions:

- “patient discharge was affected by time periods at which staff decisions were forced by non-therapeutic requirements;”
- “the 14-day certification time period for involuntary patients conforms closely to the optimum time periods utilized by professional staff without any legally imposed limitations;”
- “having the patient committed until medically ready for discharge did not result in any better prognosis than when the patient was mandatorily released;”
- “results indicate little correlation between prognosis and keeping individuals hospitalized until medically ready for discharge;”
- prior to the statutory limitations, “involuntary patients were hospitalized longer than voluntary,” while as a result of the limitations, “the trend reversed;”
- the study “supports the contention by some professionals that there is little correlation between treatment duration and later outcomes;”
- the results “negate the prediction that mandatory discharge at a specified time would result in a significant detriment to treat-

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125. CAL. WELF. & INST. CODE §§ 5150-5152, 5200-5213, 5250-5268 (Deering Supp. 1979). There is also a provision for a 72-hour evaluation.

126. See Greenberg, *supra* note 29, at 256 (the few controlled studies on the effectiveness of treatment for suicidals are inconsistent or negative); Light, *Treating Suicide: The Illusions of a Professional Movement*, 25 INT'L SOC. SCI. J. 475, 482-84 (1973).

127. Greenberg, *supra* note 29, at 236, 250, 256-59.

128. TASK PANEL ON LEGAL AND ETHICAL ISSUES, *supra* note 118.

129. Greenberg, *supra* note 29, at 243.

ment and functional level of the discharged patient."<sup>130</sup>

Several United States Supreme Court decisions support limited periods for involuntary commitment. The Court held in *Jackson v. Indiana* that persons incompetent to stand trial can be confined only for a limited period of time: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."<sup>131</sup> In *McNeil v. Director*, the Court held that "just as the [*Jackson*] principle limits the permissible length of a commitment on account of incompetence to stand trial, so it also limits the permissible length of a commitment 'for ob-

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130. A. Urmer, *A Study of California's New Mental Health Law (1969-1970)*, ENKI Research Institute, 1242-51.

131. 406 U.S. at 738. In *Jackson*, a mentally defective deaf mute was found incompetent to stand trial in cases involving two separate robberies of four and five dollars respectively, and was committed indefinitely for treatment until competence could be restored. At the time of the appeal, the petitioner had been confined for three and one-half years; the record indicated it was unlikely he would ever be able to fully participate in his trial. The Court indicated there must be progress toward that degree of competence, the goal of his confinement. If it was not likely that goal would be achieved, then the State must either release him or initiate the customary civil commitment proceeding. The Court set no specific time limits, but noted his three and one-half year confinement to date and cited New York legislation providing that a misdemeanor defendant could be committed for no more than ninety days nor a felony defendant committed for more than two-thirds of the maximum sentence permissible if convicted. N.Y. CODE CRIM. PROC. §§ 730.50(1), (3) (1971).

*Jackson* is an incompetence-to-stand-trial commitment case, rather than a civil commitment case, but it illustrates the duration of commitment must relate to the purpose of confinement.

*Cf.* *Flicker v. Florida*, 352 So. 2d 165 (Fla. 1st Dist. Ct. App. 1977) (concern expressed about six months detention in jail after discharge from hospital as competent to stand trial); Williams & Miller, *The Processing and Disposition of Incompetent Mentally Ill Offenders*, 5 LAW & HUMAN BEHAV. 245 (1981) (Florida mentally ill offenders spend unnecessarily long periods of time in jail and hospital awaiting court processing).

*See generally, e.g.* Comment, *Substantive Due Process Limits on the Duration of Civil Commitment for the Treatment of Mental Illness*, 16 HARV. C.R.-C.L. L. REV. 205 (1981) (proposed a quantitative declining-marginal-benefit criterion for civil commitment based upon a net benefit principle legally grounded in *Jackson v. Indiana*). The declining-marginal-benefit criterion appears more technical than may be legislatively or judicially feasible at this time.

servation.'"<sup>132</sup> In *O'Connor v. Donaldson*, the Court cited these two cases for the proposition that involuntary commitment cannot "constitutionally continue" after the basis for commitment ceases.<sup>133</sup>

Extended involuntary commitments in Florida are an inappropriate use of limited resources. Commitment periods seem to correspond to the length of time that government reimbursement is available rather than to patient needs. Involuntary commitment periods should be limited to a maximum of two three-month periods for those who are likely to injure others or are in need of care or treatment. A maximum of two two-week periods should be given to those likely to injure themselves. Persons who are so dangerous that they commit crimes should be prosecuted in the criminal justice system. Persons with chronic disabilities should be processed pursuant to guardianship law.

Finally, the amendments provide that the additional involuntary commitment period can occur only if there is substantial probability that treatment during the additional period will significantly improve the patient's mental condition. The two concepts encompassed by this treatability criterion are:

First, the individual's condition should be susceptible to improvement or cure through techniques that may properly be administered involuntarily. A second and equally important aspect of treatability is that the resources needed to achieve improvement or cure are available and will be applied.<sup>134</sup>

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132. *McNeil v. Director*, 407 U.S. 245, 248-50 (1972). In *McNeil*, a person convicted of two assaults in 1966 and sentenced to five years imprisonment was referred to Patuxent Institution for examination to determine the appropriateness of indefinite commitment to Patuxent under Maryland's Defective Delinquency Law, MD. CODE ANN. art. 31B (1971). The prisoner allegedly refused to cooperate with the examination. No determination was made, the sentence expired, and confinement in Patuxent continued. Citing *Jackson*, the Court in *McNeil* held it was a denial of due process to hold someone for observation indefinitely, without sufficiently safeguarding his rights, where there is no reason to anticipate the person will be easier to examine in the future.

*McNeil* involved commitment of a convicted person for observation and evaluation, rather than civil commitment; but it illustrates when the purpose of confinement no longer exists, confinement for that purpose must cease. Thus, confinement of the mentally ill cannot constitutionally continue if the basis for commitment (e.g., treatment for dangerousness to others, treatment for dangerousness to self) no longer exists.

133. *O'Connor*, 422 U.S. at 575.

134. 2 MENTAL DISABILITY L. REP. at 93.

The treatability criterion is a corollary and rough equivalent of Judge Johnson's ruling in *Wyatt v. Stickney* that persons who are involuntarily committed to a mental institution have a "right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition."<sup>135</sup> Unless an involuntarily committed person is treatable, "the hospital is transformed into a penitentiary where one could be held indefinitely for no convicted offense."<sup>136</sup> In short, "[t]o deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate resources violates the very fundamentals of due process."<sup>137</sup>

Deliberations about limiting the duration of commitments and requiring treatability should address the consequences of such changes. The anticipated results include reduced commitment of the many people predicted to be dangerous who do not actually inflict harm; "criminalization" of some frightening or annoying behavior; increased diversion of persons from the criminal justice system to mental health treatment program participation agreements; effective intervention in suicide attempts similar to the successful British program "Samaritans"; increased voluntary mental health services; increased utilization of guardianship; increased demand for and provision of non-mental hospital custodial care for the elderly poor; less harm to people in public mental hospitals; and more appropriate use of limited resources.<sup>138</sup>

### Conclusion

The Florida Mental Health Act (Baker Act) does *not* reflect recent developments in mental disability law. Despite its intended design,

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135. *Wyatt*, 325 F. Supp. at 784. For a recent exhaustive and sophisticated rehabilitation of the right to treatment, relying upon the constitutional principle of the least restrictive alternative, see Spece, *supra* note 79.

136. *Wyatt*, 325 F. Supp. at 784 (citing *Ragsdale v. Overholser*, 281 F.2d 943, 950 (1960)).

137. *Wyatt*, 325 F. Supp. at 785.

138. See 2 MENTAL DISABILITY L. REP. at 94-96.

*Cf.* MD. CODE ANN. art. 31B (1977) (abolishing indeterminate sentence; making program participation optional with eligible offenders; establishing mandatory twenty-five year sentence for third-time violent offenders, without parole except through Patuxent).

to encourage voluntary admissions for mental health care, an excessively high proportion of admissions are involuntary. Commitment hearings in much of Florida are embarrassingly short, especially considering that the consequences (lifelong stigma, prolonged institutionalization) can be worse than conviction for a crime. There are hundreds of persons in Florida's unaccredited public mental institutions who have received institutional care for dozens of years, even though institutionalization is neither the most appropriate nor least restrictive placement. The result is that their primary problem is the institutionalization syndrome itself. Many have the anomolous and illegal classification of being "voluntary," though incompetent, and without a guardian.

Many of these problems result from a lack of less restrictive alternatives. However, they are also the product of any bureaucracy's tendency to follow the path of least resistance. It is still comparatively easy to have a person involuntarily committed, and recommitted, in Florida.

The suggested amendments to Florida's Baker Act reviewed here, reflect recent legal developments. They are consistent with the recommendations of the President's Commission on Mental Health, the national Suggested Statute on Civil Commitment, and the experiences in other states and countries. Based on the following conclusions of a recent survey of psychiatrists, it is also fair and accurate to say: "Most psychiatrists *are* generally in favor of extending civil rights to their patients"<sup>139</sup> and "psychiatrists would be better characterized as supporting the increased concern over [legal] rights than as opposing it."<sup>140</sup>

—Psychiatrists do not favor involuntary civil commitment for individuals who are mentally ill but not dangerous.

—Psychiatrists favor a restrictive definition of *dangerous to others* which is based on recent behavioral evidence and the imminent likelihood of a future occurrence.

—Psychiatrists hold that "commitment hearings should be mandatory."

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139. 2 MENTAL DISABILITY L. REP. at 677 (1978).

140. Kahle & Sales, *Due Process of Law and the Attitudes of Professionals Toward Involuntary Civil Commitment*; LISPETT & SALES, *NEW DIRECTIONS IN PSYCHOLOGICAL RESEARCH* (1978).

—Psychiatrists favor extending a number of rights to the subject of a commitment petition during the process of involuntary civil commitment proceedings.

—Psychiatrists favor extending a number of rights to individuals who have been involuntarily committed.

—There is little in the way of major “differences between the philosophy of psychiatrists and the philosophy of lawyers” which should influence the wording of involuntary civil commitment laws. . . . [T]he philosophical rivalry appears to be between the American Psychiatric Association leadership and membership. While the leadership prefers to ignore past psychiatric abuses and to defend the “right” to be “unencumbered by complicated legal procedures,” the membership prefers to protect against future abuses through legislation.<sup>141</sup>

Rather than reflect a so-called “criminalization” of civil commitment, the suggested amendments change the present situation whereby persons accused of crime are accorded more rights and protections than persons committed to a mental institution against their will. Legal protections are particularly important for persons subject to involuntary commitment, who are least able to protect themselves, or get someone else to protect them.

The suggested amendments orient Florida's Baker Act toward a health care model,<sup>142</sup> and away from a preventive detention social control model. The amendments will reduce cost by minimizing inappropriate use of expensive mental health facilities and resources.

The manner in which a society deals with its less fortunate and disadvantaged is often said to be the measure of a civilization. More immediately the question should be asked: what protections would I want for myself, my family, or a friend, if we were subject to involuntary civil commitment in Florida?

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141. 2 MENTAL DISABILITY L. REP. at 677-78.

142. See Cumming & Gover, *Therapeutic Consequences of the Involuntary Commitment Process*, 2 AM. J. FORENSIC PSYCHIATRY 37 (1979) (commitment process has therapeutic value for patients; adversary process presents role model for rational approach to problem solving).

## Appendix

### A bill to be entitled

An act relating to mental health; amending s. 394.455(3), Florida Statutes, and adding subsection (23), (24), (25) to said section; providing definitions; amending s. 394.457(7), Florida Statutes; providing an exception to payment for care; amending s. 394.459(3)(a), (9), Florida Statutes, and adding subsection (2)(d) to said section; specifying when safety is jeopardized; providing for confidentiality; providing for individualized treatment plan; amending s. 394.460, Florida Statutes, adding subsections (2), (3) to said section; prescribing testimony of mental health professionals; amending s. 394.463(2)(a), Florida Statutes; providing additional criterion; amending s. 394.467 (1)(b), (2)(d), (3)(a), (4)(f), Florida Statutes; providing additional criteria; establishing time limitations.

Be It Enacted By the Legislature of the State of Florida

Section 1. Subsection (3) of section 394.455, Florida Statutes, is amended and subsections (23), (24), and (25) are added to said section to read:

394.455 Definitions. - As used in this part, unless the context clearly requires otherwise.

(3) “Mentally ill” means a substantial impairment of emotional processes, ability to perceive reality or to reason or understand, which impairment is manifested by instances of grossly disturbed behavior; it does not include retardation or developmental disability as defined in Chapter 393, brief periods of intoxication caused by substances such as alcohol or drugs, or dependence upon or addiction to any substances such as alcohol or drugs.

(23) “Likely to injure himself” means that it is more likely than not that in the near future the person will attempt to commit suicide or inflict serious bodily harm upon himself by violent or other actively self-destructive means, as evidenced by behavior causing or attempting the infliction of serious bodily harm upon himself within twenty days prior to initiation of the proceeding.

(24) “Likely to injure others” means that it is more likely than not that in the near future the person will inflict serious, unjustified bodily harm on another person, as evidenced by behavior causing, attempting or threatening such harm, including at least one incident thereof within twenty days prior to initiation of the proceeding, which behavior gives rise to reasonable fear of such harm from said person.

(25) “Lacks sufficient capacity to make a reasonable application on his behalf” means the person’s inability, by reason of mental condition, to achieve a rudimentary understanding, after conscientious efforts at explanation of the purpose, nature or possible significant benefits of treatment; provided that a person shall be deemed incapable of understanding the purpose of treatment if, due to impaired mental ability to perceive reality, he cannot realize that he has recently engaged in behavior likely to injure himself or others; and provided further than a person shall be deemed to lack sufficient capacity if his reason for refusing treatment is expressly based on either the belief that he is unworthy of treatment or the desire to destroy, harm or punish himself.

Section 2. Subsection (7) of section 394.457, Florida Statutes, is amended to read:

394.457 Operation and administration.-

(7) PAYMENT FOR CARE OF PATIENTS. - Fees and fee collections for patients in treatment facilities shall be according to s. 402.33, except that no person evaluated, detained, committed or treated involuntarily pursuant to the provisions of this part, or parents or spouse of the person, or third party payor, shall be required to participate in the costs of pay fees incurred for their evaluation, treatment, care, maintenance or custody pursuant to this part; provided that if, upon the patient’s request the patient is placed in any private facility, the patient shall bear the expense of the patient’s care, maintenance and treatment at such facility.

Section 3. Subsections (3)(a) and (9) of section 394.459, Florida Statutes, are amended and subsection (2)(d) is added to said section to read:

394.459 Rights of patients. -

(2) RIGHT TO TREATMENT. -

(d) Not more than 5 days after the beginning of treatment, each patient shall have and receive an individualized treatment plan in writ-



ing that the patient has maximum opportunity to assist in preparing. Each plan shall contain at least:

1. A statement of the specific problems and specific needs of the patient;

2. A statement of intermediate and long-range objectives, with a projected timetable for their attainment;

3. A statement and rationale for the plan of treatment for achieving these objectives;

4. A statement of the least restrictive treatment conditions necessary to achieve the purposes of placement.

5. A specification of treatment staff responsibility and a description of proposed staff involvement with the patient in order to attain the objectives;

6. Criteria for release to less restrictive treatment conditions;

7. The additional disclosure information required in s.394.459(3)(a).

**(3) RIGHT TO EXPRESS AND INFORMED PATIENT CONSENT. -**

(a) All persons entering a facility shall be asked to give express and informed consent for treatment after disclosure to the patient if he is competent, or his guardian if he is a minor or is incompetent, of the purpose of the treatment to be provided, the common side effects thereof, alternative treatment modalities, the approximate length of care, and that consent given by a patient may be revoked orally or in writing prior to or during the treatment period by the patient or his guardian. If a voluntary patient refuses to consent to or revokes consent for treatment, such patient shall be discharged within 3 days or in the event the patient meets the criteria for involuntary placement, such proceedings shall be instituted within 3 days. If any patient refuses treatment and is not discharged as a result, treatment may be rendered such patient in the least restrictive manner on an emergency basis, upon the written order of a mental health professional when such mental health professional determines treatment is necessary for the safety of the patient or others. Safety is jeopardized only by a situation threatening death or serious bodily harm. If any patient refuses consented to treatment or revokes consent previously provided, and if, in the opinion of the patient's mental health professional, the treatment not consented to is essential to appropriate care for such patient hereunder, then the administrator shall immediately petition the hearing

examiner for a hearing to determine the competency of the patient to consent to treatment. If the hearing examiner finds that the patient is incompetent to consent to treatment, he shall appoint a guardian advocate, who shall act on the patient's behalf relating to provisions of express and informed consent to treatment. A guardian advocate appointed pursuant to the provisions of this act shall meet the qualifications of a guardian contained in part IV of chapter 744, except that no mental health professional, department employee, or facility administrator shall be appointed.

**(9) CLINICAL RECORD: CONFIDENTIALITY. -**

A clinical record for each patient shall be maintained. The record shall include data pertaining to admission and such other information as may be required under rules of the department. Unless waived by express and informed consent by the patient or his guardian or attorney, the privileged and confidential status of the clinical record shall not be lost by either authorized or unauthorized disclosure to any person, organization, or agency. Notwithstanding s. 90.503(4)(b), no communication made by an individual to a mental health professional, including but not limited to a psychotherapist, may be used for any purpose other than a proceeding under this act. The clinical record shall not be a public record and no part of it shall be released, except: . . .

Section 4. Section 394.460, Florida Statutes, is amended and subsection (2) and (3) are added to said section to read:

**394.460 Rights of mental health professionals. -**

(1) No mental health professional shall be required to accept patients for treatment of mental, emotional, or behavioral disorders. Such participation shall be voluntary.

(2) Mental health professionals testifying at hearings conducted pursuant to this part may, if appropriately qualified, give expert testimony:

(a) Describing the present mental functioning of a person whom the witness has personally examined;

(b) Stating an opinion as to what the prospects are that proposed and available treatment will improve the person's mental condition;

(c) Stating an opinion whether the person has a mental illness, as defined in s. 394.455(3); provided that any witness so testifying shall provide a detailed explanation as to how any such descriptions and

opinions are reached and a specification of all behaviors and other factual information on which such descriptions and opinions were based.

(3) Mental health professionals testifying at such hearings shall not be permitted to give opinion testimony:

(a) Stating the diagnostic category applicable to a person, unless the person raises the issue through cross-examination or the presentation of evidence, or

(b) Notwithstanding s. 90.703, stating a conclusion that a person is likely to injure himself or others, or that a person's neglect or refusal to care for himself poses a real and present threat of substantial harm to his well being.

Subsection 5. Subsection (2)(a) of section 394.463, Florida Statutes, is amended to read:

304.463 Admission for emergency or evaluation. -

(2) COURT-ORDERED EVALUATION. -

(a) Criteria. - A person may be admitted to, or retained in, a receiving facility for evaluation if there is reason to believe that he is mentally ill and because of his illness is:

1. Likely to injure himself or others if allowed to remain at liberty;  
or

2. In need of care or treatment that manifests itself in neglect or refusal to care for himself, that such neglect or refusal poses a real and present threat of substantial harm to his well being, and that he lacks sufficient capacity to make a reasonable application on his own behalf.

Section 6. Subsections (1)(b), (2)(d), (3)(a), and (4)(f) of section 394.467, Florida Statutes, are amended to read:

394.467 Involuntary placement. -

(1) CRITERIA. -

(b) Any other person may be involuntarily placed if he is mentally ill and, because of his illness, is:

1. Likely to injure himself or others if allowed to remain at liberty;  
or

2. In need of care or treatment that manifests itself in neglect or refusal to care for himself, that such neglect or refusal poses a real and present threat of substantial harm to his well being, and that he lacks sufficient capacity to make a reasonable application on his own behalf.

(2) ADMISSION TO A TREATMENT FACILITY. -

(d) A written notice that the patient or his guardian or representa-

tive may apply immediately to the court to have an attorney appointed if the patient cannot afford one.

The petition may be filed in the county in which the patient is involuntarily placed at any time within 6 months of the date of the certificate. The hearing shall be held in the same county, and one of the patient's physicians at the facility shall appear as a witness at the hearing. If the hearing is waived, the court shall order the patient to be transferred to the least restrictive type of treatment facility based on the individual needs of the patient, or, if he is at a treatment facility, that he be retained there. However, the patient can be immediately transferred to the treatment facility by waiving his hearing without awaiting the court order. The involuntary placement certificate shall serve as authorization for the patient to be transferred to a treatment facility and as authorization for the treatment facility to admit the patient. The treatment facility may retain a patient for a period not to exceed 6 months from the date of admission if the patient is likely to injure others or is in need of care or treatment and lacks sufficient capacity to make a reasonable application on his own behalf, or for a period not to exceed 2 weeks from the date of admission if the patient is likely to injure himself. If continued involuntary placement is necessary at the end of that period, the administrator shall apply to the hearing examiner for an order authorizing not more than one continued involuntary placement.

### (3) PROCEDURE FOR HEARING ON INVOLUNTARY PLACEMENT. -

(a) If the patient does not waive a hearing or if the patient, his guardian, or a representative, files a petition for a hearing after having waived it, the judge shall serve notice on the administrator of the facility in which the patient is placed and on the patient. The notice of hearing must specify the date, time, and place of hearing; the basis for detention; and the names of examining mental health professionals and other persons testifying in support of continued detention and the substance of their proposed testimony. The judge may serve notice on the state attorney of the judicial circuit of the county in which the patient is placed, who shall represent the state. The court shall hold the hearing within 5 days unless a continuance is granted. The patient, his guardian or representative, or the administrator may apply for a change of venue for the convenience of parties or witnesses or because of the condition of the patient. Venue may be ordered changed within

the discretion of the court. The patient and his guardian or representative shall be informed of the right to counsel by the court. If the patient cannot afford an attorney, the court shall appoint one. The patient's counsel shall have access to facility records and to facility personnel in defending the patient. One of the mental health professionals who executed the involuntary placement certificates shall be a witness. The patient and his guardian or representative shall be informed by the judge of the right to an independent expert examination by a mental health professional. If the patient cannot afford a mental health professional, the judge shall appoint one. If the court concludes that the patient meets the criteria for involuntary placement, the judge shall order that the patient be transferred to a treatment facility or, if the patient is at a treatment facility, that he be retained there or that he be treated at any other appropriate facility or service on an involuntary basis. The judge shall consider testimony and evidence regarding the patient's competence to consent to treatment. If the judge finds that the patient is incompetent to consent to treatment, he shall appoint a guardian advocate who shall act on the patient's behalf relating to the provision of express and informed consent to treatment. The order shall adequately document the nature and extent of a patient's mental illness. The judge may adjudicate a person incompetent pursuant to the provisions of this act at the hearing on involuntary placement. The treatment facility may accept and retain a patient admitted involuntarily for a period not to exceed 3 months if the patient is likely to injure others or is in need of care or treatment and lacks sufficient capacity to make a reasonable application on his own behalf, or for a period not to exceed 2 weeks if the patient is likely to injure himself, whenever the patient is accompanied by a court order and adequate documentation of the patient's mental illness. Such documentation shall include a psychiatric evaluation and any psychological and social work evaluations of the patient. If further involuntary placement is necessary at the end of that period, the administrator shall apply to the hearing examiner for an order authorizing not more than one continued involuntary placement.

**(4) PROCEDURE FOR CONTINUED INVOLUNTARY PLACEMENT. -**

**(f) If the patient by express and informed consent waives his hearing or if at a hearing it is shown that the patient continues to meet the criteria for involuntary placement, and that there is a substantial probability that treatment will significantly improve the patient's**

mental condition, the hearing officer shall sign the order for continued involuntary placement. The treatment facility shall be authorized to retain the patient for a period not to exceed 3 months if the patient is likely to injure others or is in need of care or treatment and lacks sufficient capacity to make a reasonable application on his own behalf, or for a period not to exceed 2 weeks if the patient is likely to injure himself. There shall be no more than one continued involuntary placement period.

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## Speedy Trial Rights For Florida's Juveniles: A Survey of Recent Interpretations by Florida Courts

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"Delay of justice is injustice."<sup>1</sup> This maxim is embodied in the Bill of Rights<sup>2</sup> and in Florida's Constitution:<sup>3</sup> it is implemented by the federal government's Speedy Trial Act of 1974<sup>4</sup> and by Florida's Rules of Criminal and Juvenile Procedure.<sup>5</sup> The right to a speedy trial is incorporated into the statutory provisions or court rules of the fifty states and the District of Columbia.<sup>6</sup>

This note provides a practical interpretive guide to Florida's understanding of juvenile rights to a speedy determination when a juvenile is accused of a delinquent act.<sup>7</sup> It compares and contrasts pertinent provisions of Florida's Juvenile Justice Act<sup>8</sup> with state court rules to show 1) how the act's language has been interpreted; 2) the results reached through these interpretations; and 3) how differing fact patterns and rapidly changing law can produce ambiguous precedent.<sup>9</sup> In order to facilitate understanding the importance of juvenile rights in the context of speedy resolution of pending charges, a brief background

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1. Walter Savage Landor (1775-1864), an English poet, essayist and novelist.

2. U.S. CONST. amend. VI.

3. FLA. CONST. art. I, § 16.

4. 18 U.S.C. § 3161-74 (1976).

5. FLA. R. CRIM. P. 3.191 (1981) and FLA. R. JUV. P. 8.180 (1981).

6. See Poulos & Coleman, *Speedy Trial, Slow Implementation: The ABA Standard in Search of a Statehouse*, 28 HASTINGS L.J. 353, 376 n.53 (1976).

7. In 1950, the Florida Constitution was amended to define violations of law by children as "acts of delinquency" rather than as crimes. FLA. CONST. art. 1, § 15. The new constitution adopted in 1968 preserved this juvenile court concept and philosophy. *Id.*

8. The short title of chapter 39 of the Florida Statutes covering proceedings relating to juveniles, FLA. STAT. § 39.05, the speedy trial right, was amended in 1981. FLA. R. JUV. P. 8.180, as amended, became effective Jan. 1, 1981.

9. The diligent practitioner must be alert to the subtle and frequent changes in the language of the juvenile statutes and rules which could render relatively current decisions inapplicable because they were based on language in effect at the time of the offense.

of the historic speedy trial guarantee to all criminally accused will be given.<sup>10</sup>

The United States Supreme Court recognized the diverse functions served by speedy trials. Speedy trials are an important safeguard against oppressive pre-trial incarceration and an effective means for minimizing anxiety accompanying public accusation. Speedy trials limit impairment of an accused's defenses to the extent impairment results from lost witnesses or fading memories.<sup>11</sup> The Court has also stressed societal interests at stake in securing an accused's speedy trial; preventing overwhelming case backlogs which enable defendants to negotiate pleas to lesser offenses and curtailing the accused's opportunity to commit other crimes if free on bond while awaiting trial.<sup>12</sup>

The United States Supreme Court in its landmark decision *Barker v. Wingo*,<sup>13</sup> established a framework for guidelines to assist courts in determining when trial delay violated a defendant's constitutional right to speedy trial.<sup>14</sup> The Court declined to set precise limits, believing this function more appropriate for legislatures. In Florida, both the legislature and supreme court delineated these speedy trial limits for juveniles.<sup>15</sup>

The language of Florida's juvenile rules appears unambiguous. Uncertainty develops when the language of the rules and the language of their legislative counterpart conflict,<sup>16</sup> or when situations not expressly resolved by the language of either arise. These circumstances necessitate consideration of persuasive authority, most often found in

10. Juveniles in Florida were not granted the speedy trial right until 1973 when chapter 39 was revised to reflect the procedural mandates of *In re Gault*, 387 U.S. 1 (1967). The creation of shorter time limits than due process required was based on the theory that the juvenile justice system should operate swiftly. See generally CONTINUING LEGAL EDUCATION COMMITTEE, THE FLA. BAR, FLA. JUV. L. & PRAC. (1979) for history and development of the juvenile system in Florida.

11. *United States v. Ewell*, 383 U.S. 116 (1966).

12. *Barker v. Wingo*, 407 U.S. 514 (1972).

13. *Id.*

14. Relevant factors include the length of delay, the reason for delay, assertion of defendant's right, and prejudice to the defendant. *Id.* at 530.

15. FLA. STAT. § 39.05(7)(a) (1981) and FLA. R. JUV. P. 8.180(a) (1981).

16. Compare FLA. R. JUV. P. 8.180(e) (1981) with FLA. STAT. § 39.05(6) (1981). For discussion of this conflict, see *infra* notes 51 and 52 and accompanying text.



the language and interpretation of analogous criminal procedure rules used in adult court.<sup>17</sup> This need for logical persuasive case law is problematic since Florida courts traditionally adhere to the philosophy that "juveniles constitute a special and distinct class of citizens with particularized needs to be afforded unique treatment by the state."<sup>18</sup> If juveniles are in fact deserving of "unique treatment" it is arguable that decisions and procedures adopted in adult criminal cases are inapplicable and inappropriate for juvenile delinquency cases despite factual similarities.<sup>19</sup>

During its 1981 session the legislature substantially revised Florida's Juvenile Justice Act.<sup>20</sup> These revisions, the most significant since the Act's major overhaul in 1978,<sup>21</sup> call for harsher treatment of juvenile offenders. They are the legislature's response to public alarm over rise in juvenile crime. They may also pretend serious erosion of the enhanced procedural benefits currently afforded juveniles. The avowed purpose of the Act is to assure all children "the care, guidance, and control, preferably in each child's own home, which will best serve the moral, emotional, mental, and physical welfare of the child and the best interests of the state."<sup>22</sup> The delicate balance between the interests of the state and the interests of the child is threatened now that one interest is gaining preeminence. Earlier provisions, now more severe, permit serious and repeat offenders to be removed from the juvenile system and treated as adults in all respects.<sup>23</sup> Florida courts must re-

17. FLA. R. CRIM. P. 3.191 (1981).

18. *A.D.T. v. State*, 318 So. 2d 478 (Fla. 1st Dist. Ct. App. 1975).

19. *See L.G. v. State*, 405 So. 2d 252, 253 n.3 (Fla. 3d Dist. Ct. App. 1981) (availability requirement of adult criminal rule not pertinent to juvenile rule); *In re D.B.*, 385 So. 2d 83, 90 (Fla. 1980) (delinquency proceedings exist to remove children from the adult criminal justice system and punish them in a manner suitable and appropriate for children); *G.A. v. State*, 391 So. 2d 720, 722 (Fla. 1st Dist. Ct. App. 1980) (expressed state policy of treating juvenile offenders differently from adult offenders).

20. *See Evans, Juvenile Justice: The Legislature Revisits Chapter 39*, 55 FLA. B.J. 697 (1981).

21. Ch. 78-414, 1978 Fla. Laws 1318-66.

22. FLA. STAT. § 39.001(2)(b) (1981).

23. *See* FLA. STAT. § 39.04(2)(c)(3) (1981) and FLA. R. JUV. P. 8.150(b) (1981) (providing for waiver to adult court of a child fourteen or older under certain circumstances); FLA. STAT. § 39.04(2)(e)(4) (1981) (granting authority and discretion

main alert to jealously safeguard the distinctive rights of those minors who remain within the juvenile system. Otherwise, the longstanding objectives of juvenile court—rehabilitation and restitution rather than punishment and retribution<sup>24</sup>—could be sacrificed to appease public anger with the juvenile system.

Supporting the view that the unique aspects of juvenile courts should be preserved, the remainder of this note will examine the unsettled “speedy rights”<sup>25</sup> guaranteed juveniles and suggest possible avenues for resolving existing conflicts.

### When the Speedy Right Attaches

Florida Rule of Juvenile Procedure 8.180(a)<sup>26</sup> Time. Every case in which a petition has been filed alleging a child to be delinquent or dependent shall be brought to an adjudicatory hearing without demand within ninety (90) days or the earlie(r) of the following dates:

- (1) The date the child was taken into custody.
- (2) The date the petition was filed.<sup>27</sup>

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to the prosecutor to file a charge directly in the adult criminal division if the child is sixteen or seventeen and public interest requires adult sanctions be considered); FLA. STAT. § 39.02(5)(c) (1981) (providing for grand jury indictment of a child, regardless of age, if the crime is punishable by death or life imprisonment).

24. *G.A.*, 391 So. 2d at 722 (citing *Kent v. United States*, 383 U.S. 541 (1966)) and FLA. STAT. § 39.001(2) (Supp. 1978).

25. The term “speedy rights” will hereinafter be used since a corresponding right to a timely-filed instrument of accusation, unique to juveniles, will also be discussed. Provisions of FLA. R. JUV. P. 8.180 (1981) not dealt with in this note are the effect of a mistrial or order of a new trial (8.180(e)) and the exemption from the rule for permanent commitments of children for adoption or placement in a licensed agency (8.180(f)). These subsections have remained unchanged and virtually unchallenged since they provide few grounds for controversy.

26. The corresponding FLA. STAT. § 39.05(7)(a) (1981) reads: “If a petition has been filed alleging that a child has committed a delinquent act, the adjudicatory hearing on the petition shall be commenced within 90 days of the earlier of the following dates: . . .” (The remainder is identical to the rule).

27. A petition is the accusatory instrument equivalent to the adult information and is filed in the same fashion by the state attorney. *See* FLA. R. CRIM. P. 140(b) which reads: “The indictment or information upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.” The distinctive vocabulary used for juveniles further symbol-

Unlike the corresponding adult criminal speedy trial rule, the juvenile speedy trial rule does not distinguish between misdemeanors and felonies in setting time limits.<sup>28</sup> Nor is the juvenile rule invoked by defendant's demand.<sup>29</sup>

There are several reasons why swift resolution of pending charges are especially important to this age group. Adolescents are in the midst of rapid developmental changes.<sup>30</sup> Any enforced delay during a critical stage of their learning process can have serious deleterious consequences on their ability to mature into responsible adults.<sup>31</sup> It is well established that the efficacy of discipline is a function of its timing.<sup>32</sup> Another forceful argument against unnecessarily prolonged exposure to the adjudicatory process is the strong influence that peers have on a child's behavior and the possibility of corruption due to association with delinquents in the system.<sup>33</sup> Where an *innocent* child is mistakenly held accountable for the delinquent act of another, the stigmatizing effect can be devastating unless corrected with all possible speed. Where a

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izes the intent that they should not be treated as criminals nor dealt with by the process used for criminals. Other changes include: summons instead of warrant, finding of involvement or adjudication instead of conviction, disposition instead of sentence, community control instead of probation.

28. FLA. R. CRIM. P. 3.191(a)(1) (1981) provides a 90-day limit for misdemeanors and 180 days for felonies.

29. FLA. R. CRIM. P. 3.191(a)(2) (1981) requires a trial within 60 days upon motion by a defendant demanding it. This aspect of the juvenile rule is disadvantageous to those juveniles who have previously waived their speedy trial rights and now wish to proceed swiftly but have no procedural mechanism to reactivate them.

30. L. Kohlberg & R.B. Kramer, *Continuities and Discontinuities in Childhood and Adult Moral Development*, HUMAN DEVELOPMENT 12, 93-120 (1969).

31. *Id.*

32. R. Walters, R. Park & V. Cane, *Timing of Punishment and the Observation of Consequences to Others as Determinants of Response Inhibition*, J. EXPERIMENTAL CHILD PSYCHOLOGY, 2, 10-30 (1965).

33. In 1966, a study of peer influence was conducted by the behavioral research team of Costanzo and Shaw. They asked children to compare the lengths of a pair of lines, one line obviously longer than the other. All but one of the children were confederates of the investigators and were told to choose the incorrect line. The child who was not a confederate altered his own judgment, denying evidence of his senses, and agreed with the obvious incorrect judgment of the group to conform with his peers. P. Costanzo & M. Shaw, *Conformity as a Function of Age Level*, CHILD DEVELOPMENT 37, 967-975 (1966).

*guilty* child is appropriately held accountable for his own delinquent act, he is equally disserved by learning that justice may be thwarted by dilatory tactics.

The time in which the adjudicatory hearing must be held begins to run at the earlier of two events: when the child is taken into custody or when a petition is filed by the state attorney.<sup>34</sup> What constitutes "taken into custody" has been a source of confusion to prosecutors, defense lawyers and trial judges in determining the moment the speedy trial right is triggered. The Juvenile Justice Statute defines the phrase "taken into custody" as "the status of a child immediately when temporary physical control over the child is attained by a person authorized by law, pending the child's release, detention, placement, or other disposition as authorized by law."<sup>35</sup> Notwithstanding the "plain" language of the statute, three district courts of appeal have reached disparate results when asked to determine when custody begins.

In *D.L.M. v. State*,<sup>36</sup> a nine-year-old child was seen emerging from a house that was burglarized. He was apprehended by the police, taken back to the house where he was identified by a witness, and then released to his parents. He was not formally arrested until thirty days later. The Third District Court of Appeal held that these facts did not constitute custody within the meaning of the rule.<sup>37</sup> Instead of using the definition set out by the juvenile statute, which might have led logically to the conclusion that the child had been in temporary physical control of one authorized by law, the court sought guidance from the committee note tracing the history of the Florida Rule of Juvenile Procedure pertaining to speedy trial. Finding that the present rule "evolved from the criminal speedy trial Rule 3.191, and looking to interpretations under that rule,"<sup>38</sup> the court determined that the actions of the police officers did not constitute "custody", since the criminal standard is defined as "arrest".<sup>39</sup>

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34. This occurs most frequently when a child was not apprehended at the time of the offense but a complaint was filed against him at a later date.

35. FLA. STAT. § 39.01(32) (1981).

36. 397 So. 2d 439 (Fla. 3d Dist. Ct. App. 1981).

37. *Id.* at 440.

38. *Id.*

39. FLA. R. CRIM. P. 3.191(a)(4) (1981) has an explicit provision defining custody as *arrest* or summons. Juvenile rules, however, differ in purpose and intent. See

The Fourth District Court of Appeal reached the same result using a different analysis in *State v. C.B.*<sup>40</sup> This was a consolidated appeal by the state seeking reversal of three juvenile dismissals where the juveniles were taken into custody but released the same day.<sup>41</sup> Although the court looked first to the statutory definition of custody found in Chapter 39, it based its finding on a subsection of the statute in effect at that time which said, "the person taking the child into custody and detaining the child shall, within 3 days, make a written report to the appropriate intake officer, . . ." <sup>42</sup> From this language the court surmised that the legislature intended to limit speedy time application to cases where a juvenile was actually detained for a period of time rather than being released immediately after being taken into custody. That analysis is no longer valid in light of the legislature's deletion of those words in its 1981 revision of Chapter 39.<sup>43</sup>

In *G.A. v. State*,<sup>44</sup> a juvenile shot and killed his mother. The First District Court of Appeal ordered the boy discharged, finding his custody effected by law enforcement officers who exercised temporary physical control by detaining him for questioning before he was released to a family member.<sup>45</sup> Instead of filing a delinquency petition the state attorney immediately sought, without success, a grand jury indictment for murder.<sup>46</sup> When the delinquency petition finally was filed, it was 26 days beyond the statutory custody limit which, as the appellate court ultimately found, attached at the time G.A. was first questioned.<sup>47</sup>

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FLA. R. JUV. P. 8.010 (1981) which mandates that the juvenile rules are to be used under the Florida Juvenile Justice Act (chapter 39).

40. 401 So. 2d 919 (Fla. 4th Dist. Ct. App. 1981).

41. *Id.* at 920.

42. FLA. STAT. § 39.03(2) (1979).

43. Effective July 1, 1981.

44. 391 So. 2d 720 (Fla. 1st Dist. Ct. App. 1980).

45. *Id.* at 723. The officer testified that G.A. would not have been allowed to leave the premises had he attempted to do so before the questioning was completed.

46. FLA. STAT. § 39.02(5)(c) (1981). An indictment can be returned against a child of any age who commits an offense punishable by death or by life imprisonment. The child is then tried and handled in all respects as if he were an adult. If the grand jury returns a no true bill or fails to act within 21 days, the juvenile court retains jurisdiction and may proceed as it would in any other case.

47. 391 So. 2d at 724.

The precise meaning to be given "custody" has not been illuminated by these cases; rather they illustrate the term's elusive nature. These diverse results suggest a case by case approach is necessary in determining the custody question, since investigatory questioning by police officers should not always be viewed as equivalent to custody. Nevertheless, the anxiety accompanying accusation by an authority figure and the unique vulnerability of minor children require strict interpretation of the definition set out by the legislature in Chapter 39 to assure that, in those instances where a child is under physical control of a law enforcement officer and is *not free* to leave at any time, the speedy provisions of the statutes and rules are activated.

### The Juvenile Right to a Speedy Accusation

On a question certified to the Florida Supreme Court in *S.R. v. State*,<sup>48</sup> the court expressly ruled that timely filing of the charging instrument is a substantive right guaranteed juveniles by statute.<sup>49</sup> Commonly called the 45-day rule, this uniquely juvenile right,<sup>50</sup> closely re-

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48. 346 So. 2d 1018 (Fla. 1977).

49. *Id.* at 1019. The tangential issue of substantive versus procedural rights has significant impact on decisions reached when the statutes and the rules conflict. However, a discussion of this is beyond the scope of this note. See *M.G. v. State*, 404 So. 2d 420 (Fla. 1st Dist. Ct. App. 1980), *State v. L.H.*, 392 So. 2d 294 (Fla. 2d Dist. Ct. App. 1980), *S.M. v. State*, 398 So. 2d 496 (Fla. 3d Dist. Ct. App. 1980), *State v. G.B.P.*, 399 So. 2d 1123 (Fla. 4th Dist. Ct. App. 1981) and *P.L.H. v. Brownlee*, 389 So. 2d 649 (Fla. 5th Dist. Ct. App. 1980) for the diverse treatment given this question by the five district courts of appeal.

50. FLA. STAT. § 39.05(1)-(7) (1981) and FLA. R. JUV. P. 8.110(a)(1)-(3) (1981). There is no adult rule or statutory counterpart, nor is there a constitutional equivalent. The United States Supreme Court has held that the sixth amendment speedy trial right is inapplicable to the period prior to arrest or filing of formal charges, but that due process may still require dismissal if delay was purposeful and caused substantial prejudice to the defense. *United States v. Marion*, 404 U.S. 307 (1971). There are also some statutes of limitations on pre-arrest or pre-filing delays, e.g., 18 U.S.C. § 3282 providing a five year limit on the filing of federal charges. See also *U.S. v. MacDonald*, \_\_\_ U.S. \_\_\_, 102 S. Ct. 1497 (1982) reversing the Fourth Circuit Court of Appeals' dismissal based on violation of MacDonald's speedy trial rights under the sixth amendment (*MacDonald v. U.S.*, 632 F.2d 258 (1980)). This celebrated murder case involved an army doctor accused of killing his wife and two daughters. He was arrested but the charges were dismissed. Five years later the grand jury

lated to the speedy trial right, mandates dismissal with prejudice if a petition is not filed within 45 days of a specified event. Potential conflict exists since the *statute* triggers the timeclock's start when the child is "taken into custody";<sup>51</sup> the juvenile *rules* require filing a petition within 45 days from the date the complaint is referred to the "intake office".<sup>52</sup> The intake office is the Department of Health and Rehabilitative Services (HRS). HRS personnel are responsible for interviewing the juvenile with his parents or guardian and recommending appropriate disposition of the charge (i.e., judicial or non-judicial treatment) to the state attorney.

Conflict could be avoided if, as suggested before, the statutory "custody" provision is triggered once control over the child is effected by a law enforcement officer, despite immediate release of the child to his parent or guardian. This would logically resolve any remaining inconsistency since the *rule* would apply only to those clearly *non-custodial* situations. Both the rule and the statute permit a fifteen day extension upon motion by the state attorney.<sup>53</sup>

Whether the 45-day rule applies to those 16 or 17-year-old juveniles charged by information directly in the criminal division of the circuit court remains unclear.<sup>54</sup> In *State v. Puckett*<sup>55</sup> the Second District Court of Appeal held that the 45-day rule did not apply to an information filed against a juvenile who was to be prosecuted as an adult. Puckett sought and won dismissal in the trial court, arguing that Florida Statute § 39.05(6), which requires timely filing of a juvenile petition, existed prior to Statute § 39.04(2)(e) which permits the state

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indicted him; he was tried and convicted. Chief Justice Burger wrote that once charges are dismissed, the speedy trial guarantee is no longer applicable.

51. FLA. STAT. § 39.05(6) (1981).

52. FLA. R. JUV. P. 8.110(e) (1981).

53. FLA. STAT. § 39.05(6), as amended in 1981, substituted "for good cause shown" for the original wording "when in the opinion of the court additional time is justified because of exceptional circumstances." FLA. R. JUV. P. 8.110(e) (1981) retains the statute's original language.

54. FLA. STAT. § 39.04(2)(e)(4) (1981) gives the state attorney authority to file an information if in his judgment the public interest requires that adult sanctions be considered or imposed. For a discussion of this provision, see Comment, *Prosecutorial Waiver of Juveniles Into Adult Criminal Court: The Ends of Justice . . . Or the End of Justice? State v. Cain*, 5 NOVA L.J. 487 (1981).

55. 384 So. 2d 660 (Fla. 2d Dist. Ct. App. 1980).

attorney to file an adult information.<sup>56</sup> In reversing and reinstating the information, the appellate court reasoned by negative inference that since both statutes were amended in the same session,<sup>57</sup> if the legislature meant to include the filing of informations within the 45-day period it would have so specified.<sup>58</sup>

In contrast to *Puckett*, the First District Court of Appeal in *I.H. v. State*<sup>59</sup> equated an information with a petition for purposes of the 45-day rule where a sixteen-year-old burglary suspect had successfully transferred his case from the criminal division back to juvenile court.<sup>60</sup> The juvenile appealed on the ground that no petition had been filed in the juvenile division within 45 days as required by statute and therefore, the court was without jurisdiction to hear the matter. The appellate court pointed out that "the information filed in adult court was authorized by statute and gave the adult court jurisdiction over the cause. By the same token, the transfer to juvenile court was authorized by the same statute and gave the juvenile court jurisdiction."<sup>61</sup> The court held that while a juvenile has a substantive right to have the charge dismissed if it is *untimely filed*, the information could serve as the petition, though better practice would call for a petition to be substituted for the information.<sup>62</sup> Since the information was filed against I.H. within a week after he was taken into custody, timeliness posed no problem, but it can be inferred that had it not been filed within the 45 days, the appellate court would have granted the dismissal.

56. *Id.*

57. Ch. 78-414, 1978 Fla. Laws 1334 amended FLA. STAT. § 39.05(6) to allow 45 days rather than the previous 30 days.

58. 384 So. 2d at 661.

59. 405 So. 2d 450 (Fla. 1st Dist. Ct. App. 1981).

60. On motion of a child, if he can show he has not previously been convicted of two delinquent acts, one of which is a felony, he must be returned to the juvenile court for prosecution. FLA. STAT. § 39.04(2)(e)(4) (1979). The 1981 revision of this subsection permits return to juvenile court only for those sixteen or seventeen-year-olds who are charged with a *misdemeanor* and do not have the prior record.

61. 405 So. 2d at 452.

62. *Id.* at 453. As this note went to press the Fourth District Court of Appeal decided *State v. D.C.W.*, No. 81-1699 (filed Sept. 1, 1982). The court held that the 45-day rule is not activated until the accused is transferred to the juvenile division. *Id.* *D.C.W.* involved a juvenile originally indicted on an offense that was later reduced making him eligible for juvenile court treatment.



The 45-day rule was not raised in *State v. Perez*,<sup>63</sup> where two juveniles were being held as adults on other charges but were re-arrested for the commission of a sexual assault at the Dade County jail. The information on this new charge was not filed until 90 days had lapsed. They moved for a discharge on the ground that as juveniles they had the right to be brought to trial within ninety days of their arrest.<sup>64</sup> The Third District Court of Appeal affirmed the discharge holding that the juvenile's speedy trial rights had vested, "and until such time as the State notifies a juvenile that he is to be considered as an adult as to certain charges, the juvenile has the right to rely on the statutes and the rules that protect him in the status of a juvenile."<sup>65</sup> Implicitly, the 45-day rule is one of those protections.

In view of *S.R. v. State*<sup>66</sup> it can be argued that until the juvenile court is divested of its jurisdiction over a juvenile, the state must not deny any juvenile substantive rights to which he is entitled. If this argument is accepted, the state must file an information on any juvenile to be prosecuted in adult court within 45 days of arrest or risk dismissal.

### The Dismissal Sanction

The language in Chapter 39 and the Juvenile Rule pertaining to dismissal for violation of the speedy trial right are identical. Both provide:

If the adjudicatory hearing is not begun within ninety days or an extension thereof as hereinafter provided, the petition shall be dismissed with prejudice.<sup>67</sup>

Neither the statute nor the rule require a motion by the defendant to activate this provision.<sup>68</sup> Thus, it appears not only to be mandatory, but

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63. 400 So. 2d 91 (Fla. 3d Dist. Ct. App. 1981).

64. *Id.* at 94. They had not yet been found guilty of their other crimes which would activate section 39.02(5)(d) (stating that once a child is found guilty of a crime as an adult he shall thereafter be handled as an adult for subsequent crimes).

65. *Id.*

66. 346 So. 2d 1018 (Fla. 1977).

67. FLA. STAT. § 39.05(7)(b) (1981); FLA. R. JUV. P. 8.180(b) (1981).

68. Compare with the 45-day rule. Both FLA. R. JUV. P. 8.110(e) (1981) and

automatic. Once the outer limit has expired a juvenile court has no choice but to discharge the defendant.<sup>69</sup>

When the United States Supreme Court in *Barker v. Wingo*<sup>70</sup> set forth the four elements that are to be balanced against each other on a case by case basis in order to determine a defendant's constitutional right to speedy trial, it also lamented "the unsatisfactorily severe remedy of dismissal" when that right had been deprived.<sup>71</sup> The Court went on to say: "This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free."<sup>72</sup> In *Barker* the Court found that there had been no denial of speedy trial even though the delay had been well over five years.

Certainly the mandated dismissal in consequence of exceeding much stricter statutory or rule-determined limits for juveniles must trouble lower courts even more so. Nevertheless, the dismissal sanction, whether procedural or constitutional, serves the goal speedy trial is designed to effectuate—a system disposing of cases with reasonable dispatch. Although sometimes both prosecutors and defendants perceive speed as antagonistic to their interest,<sup>73</sup> there is the public's interest in maximizing the deterrent effect of prosecution<sup>74</sup> and in minimizing the considerable costs of lengthy pretrial detention.<sup>75</sup> Delay of justice also diminishes victims' respect for the judicial system, especially if victims perceive the slow process as concern for only the defendant. Victims

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FLA. STAT. § 39.05(6) (1981) start with the words "On motions by or in behalf of a child. . . ."

69. Compare with FLA. R. CRIM. P. 3.191(d)(1) (1981) for adults which specifically provide for a motion for discharge. Moreover, subsection (d)(3) requires the trial court to make a complete inquiry of possible reasons to deny discharge.

70. 407 U.S. 514 (1972). See *State v. Bonamy*, 1982 Fla. Law Weekly 421 (5th Dist. Ct. App. Feb. 10, 1982) for Florida's application of the *Barker* guidelines.

71. *Id.* at 522.

72. *Id.*

73. This is often the situation where a defendant wants to wait and see the outcome of a co-defendant's separate trial, hoping for an acquittal so he may not be tried. *Barker* was such a case.

74. Footnote 8 in *Barker* referred to a 1968 estimate that over 70% of those arrested in Washington D.C. for robbery and released prior to trial were rearrested while on bail.

75. Overcrowded conditions and spiraling costs of running detention centers and holding facilities are nationwide problems.

and witnesses are further angered and inconvenienced when required to make repeated trips to court due to continuances and other delaying devices.

### Waiver of Speedy Trial Rights

Presumably the harsh realities of the dismissal sanction have manifested in a liberalizing trend regarding exceptions to the speedy right. This is evident on both national<sup>76</sup> and state levels.<sup>77</sup> Generous interpretations of waiver, extension and exclusion provisions make the speedy countdown appear a flexible restraint. The exceptions are ambiguous in some situations, creating traps for the unwary. One potential pitfall in Florida's juvenile rules is misuse of its new waiver provision, which states simply: "In a delinquency proceeding the child may voluntarily waive his right to a speedy trial."<sup>78</sup>

The waiver provision became effective January 1, 1981, and no appellate decisions have yet construed the rule. The only statutory reference to waiver of speedy trial is in the section of the Act entitled Hearings, which says in part: "The right to a speedy trial shall be governed by the provisions of § 39.05(7), but such right may be *voluntarily waived* by the child in accordance with the Florida Rules of Juvenile Procedure."<sup>79</sup> (Emphasis supplied). There is no corresponding provision in the rules of criminal procedure.<sup>80</sup>

On its face the new provision would favor the conclusion that an affirmative act by the child is necessary to effectuate a waiver. The inclusion of the word *voluntary* should preclude any automatic or un-

76. See Speedy Trial Act Amendments Act of 1979, Pub. L. No. 96-43, 93 Stat. 327. For commentary on these amendments, see Misner, *The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process*, 32 HASTINGS L.J. 635 (1981).

77. See Poulos & Coleman, *supra* note 6, at 378-79.

78. FLA. R. JUV. P. 8.180(c) (1981).

79. FLA. STAT. § 39.09(1)(a) (1981).

80. FLA. R. CRIM. P. 3.191(d)(2) (1981) and 1980 committee note 1 declare that the terms waiver, tolling, or suspensions have no meaning within the context of the section as amended. The section addresses extensions for a specified period of time. The juvenile rules retain the term "tolling" in one subsection only — when a child intends to plead insanity as a defense. FLA. R. JUV. P. 8.170(b)(2) (1981) provides that when a continuance is granted for the purpose of an examination it will "toll the speedy time rule."

knowing waiver of speedy time without the child's express acquiescence.<sup>81</sup> It has been determined that silence or inaction by an adult defendant does not constitute waiver.<sup>82</sup>

The accused (whether adult or juvenile) has no duty to bring on his own trial.<sup>83</sup> Nevertheless, the Fourth District Court of Appeal in *A.F. v. Nourse*<sup>84</sup> reluctantly discharged the juvenile when defense counsel stood by without objection to the setting of the adjudicatory hearing beyond the ninety-day limit. The court held it was bound by *Stuart v. State*<sup>85</sup> inasmuch as the Florida Supreme Court refused to equate waiver with defense's failure to point out that the trial date exceeded speedy limits.<sup>86</sup> Moreover, Judge Hersey, though concurring with the result reached by the majority in *A.F.*, expressed dismay: "Defense counsel, after all remains an officer of the court. . . . Counsel should not be encouraged to invite error . . . or acquiesce in error. Society, as well as an individual accused, has rights which merit our attention."<sup>87</sup> The new waiver provision may be more liberally applied in future decisions if Judge Hersey's displeasure with such defense tactics is shared among the judiciary.

The ramifications of waiver in the context of the defense motion for continuance are also unresolved. The Florida Supreme Court in *Butterworth v. Fluellen*<sup>88</sup> allowed an adult defendant's motion for continuance to be treated as a waiver of the speedy trial rule. The *Fluellen* court held that once the motion was granted, the limitation set out by the criminal rule was no longer applicable and only federal and Florida constitutional guarantees remained.<sup>89</sup> This ruling seems inappropriate for juveniles, however, since adults retain the right to demand trial within sixty days, a right unavailable to juveniles. The better practice would be for the trial court to cite a defense continuance as one reason

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81. It cannot be presumed that the Florida Supreme Court would include the word without intending that it be given full force and effect.

82. *State v. Ansley*, 349 So. 2d 837 (Fla. 1st Dist. Ct. App. 1977).

83. *Dickey v. Fla.*, 398 U.S. 30 (1970).

84. 383 So. 2d 757 (Fla. 4th Dist. Ct. App. 1980).

85. 360 So. 2d 406 (Fla. 1978).

86. *Id.*

87. 383 So. 2d at 759.

88. 389 So. 2d 968 (Fla. 1980).

89. *Id.* at 970.

for extension of the time for speedy trial rather than as an automatic "voluntary" waiver by the juvenile.

The waiver provision is most appropriate when non-judicial actions, such as diversionary programs,<sup>90</sup> are employed to resolve minor infractions best settled out of court. If the infraction cannot be resolved in this matter the juvenile's charge should not be dismissed for lack of time to prosecute. Once the juvenile voluntarily waives speedy trial, the question arises as to whether a new ninety-day period starts to run<sup>91</sup> or whether, under the *Fluellen* rationale, only the defendant's constitutional rights remain.

### Extension of Speedy Time

Florida's juvenile rule and its juvenile statute substantially agree in their provisions for extending time:

The court may extend the period of time . . . on motion of any party, after hearing, on a finding that the interest of justice will be served by such extension. The order will recite the reasons for such extension. The general congestion of the court's docket, lack of diligent preparation, or failure to obtain available witnesses or other avoidable or foreseeable delays shall not constitute grounds for such extension.<sup>92</sup>

These sections, ostensibly specific and straightforward in their mandatory language, have been the crux of numerous appeals.<sup>93</sup>

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90. See, e.g., FLA. STAT. § 39.0333 (1981) authorizing community arbitration as an alternative to judicial action.

91. This issue was settled for criminal defendants by the *Fluellen* court, but as stated earlier, adults retain their right under the Rules of Criminal Procedure to demand a trial within 60 days.

92. FLA. R. JUV. P. 8.180(d) (1981). FLA. STAT. § 39.05(7)(c) (1981) differs only in requiring a finding of good cause or that the interest of the child will be served.

93. See *C.S. v. State*, 390 So. 2d 457 (Fla. 3d Dist. Ct. App. 1980) (oral continuance does not extend speedy time. The court must have a finding with reasons cited and an order); *M.M. v. State*, 407 So. 2d 262 (Fla. 3d Dist. Ct. App. 1981) (lack of written order cannot be cured after time expires); *J.R.S. v. Hastings*, 374 So. 2d 559 (Fla. 4th Dist. Ct. App. 1979) (must enter order and cite reasons for extension); *R.L.P. v. Korda*, 380 So. 2d 1329 (Fla. 4th Dist. Ct. App. 1980) (oral continuance on the court's own motion does not extend speedy time); *M.B. v. Lee*, 318 So. 2d 1364 (Fla.

In clear, unequivocal language three actions are required of the trial judge: 1) that he conduct a hearing,<sup>94</sup> 2) that he make a finding of cause, and 3) that he issue an order reciting the reasons for extension. The language precludes justifying extensions for the normally avoidable reasons. By the specific language of both the rule and statute, extensions must be in the "interest of justice" or "the interest of the child."<sup>95</sup>

Florida's Fifth District Court of Appeal appeared to reach the same conclusion in *M.B. v. Lee*.<sup>96</sup> In this case it was unclear whether the juvenile had made an oral motion for continuance, but the court stated that even if he had, he was still entitled to dismissal since the trial judge failed to enter an order reciting the reasons for extension.<sup>97</sup>

As discussed earlier<sup>98</sup> it is an unsettled question whether the criminal or the juvenile procedural clock applies when juveniles are certified to be tried as adults. In *State v. Benton*<sup>99</sup> the Florida Supreme Court held that the criminal speedy time limitation of 180 days begins to run from the time a juvenile is taken into custody, regardless of when certification occurs or the juvenile court is divested of its jurisdiction.<sup>100</sup> The court has not determined the proper time limits for speedy trial in instances where juveniles successfully transfer cases from adult to juvenile court pursuant to Florida Statute § 39.04(2)(e)(4).<sup>101</sup> At least three of Florida's five district courts of appeal have held that pendency in adult court should not be considered in determining the expiration of the ninety-day period.<sup>102</sup>

5th Dist. Ct. App. 1980) (must enter a written order of extension and cite reasons even if it is a continuance by defendants).

94. See FLA. R. JUV. P. 8.220 on General Provisions for Hearings, particularly subsection (a) which requires the presence of a child, with two exceptions, and subsection (g) concerning reasonable notice. This rule would appear to prevent *ex parte* motions by the state for extending time.

95. See *supra* note 92.

96. 383 So. 2d 1364 (Fla. 5th Dist. Ct. App. 1980).

97. *Id.* at 1365.

98. See *supra* note 23 and accompanying text.

99. 337 So. 2d 797 (Fla. 1976).

100. *Id.* at 798.

101. As of July 1, 1981, this is possible only where the child is charged with a *misdemeanor* and can show he has not previously been found to have committed two delinquent acts, one of which is a felony.

102. *W.M. v. Tye*, 337 So. 2d 225 (Fla. 4th Dist. Ct. App. 1979); *State ex rel.*

The Fourth District Court of Appeal justified this exclusion of time by suggesting that without it, a juvenile defendant, aware that he did not meet the statutory requirement of certification as an adult, could sit back and wait until the ninety days neared expiration before moving the case back to juvenile court, resulting in inadequate time for the state to bring him to trial.<sup>103</sup> Notwithstanding the remote possibility defendants would choose this tactic, and concurring with the court's opinion that the legislature did not intend such procedural "game playing",<sup>104</sup> it is nevertheless unfair to exempt the portion of a juvenile's speedy rights the state consumes with paper-shuffling. It is unlikely that the juvenile could successfully return to juvenile court unless the state had originally filed an information erroneously.<sup>105</sup> An extension could be granted the state if the defendant is shown to be engaging in the procedural gamesmanship the Fourth District Court envisioned. The interest of justice would thus be served. This alternative comports with a literal reading of the statute and rules which dictate the appropriate procedure for extensions but do not provide for *exclusions* of time. The public interest in a speedy trial need not be overlooked by either prosecution or defense. Where counsel uses delay techniques purely for tactical advantage, the court's contempt power may be brought to bear upon the offending attorney.

### Conclusion

Difficult and complex "speedy" dilemmas are too often left to trial court decision making on issues not adequately addressed by juvenile rules or statutes. Nowhere is there guidance as to what actions by juveniles constitute unexcused delay.<sup>106</sup> Nor is there a test of "continu-

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Ortez v. Brosseau, 403 So. 2d 540 (Fla. 2d Dist. Ct. App. 1981); I.H. v. State, 405 So. 2d 450 (Fla. 1st Dist. Ct. App. 1981).

103. 337 So. 2d at 226.

104. *Id.*

105. *See supra* note 101. After all, the state is the record-keeper and should know if the juvenile's prior record meets the statutory requirement.

106. This possibility often arises when a juvenile fails to show for a hearing. But is any extension of time permitted without the presence of the defendant or defense counsel in light of the express provisions requiring his presence? *See supra* note 94.

ous availability" applicable to juveniles as there is for adults.<sup>107</sup> May the trial court discount speedy time lost to the state when a minor uses a false name or invalid address to evade service of summons?<sup>108</sup> A myriad of other questions remain unanswered.

Some courts justify applying adult criteria used in the criminal division where juvenile standards are nonexistent. As the Second District Court of Appeal stated in *State v. L.H.*,<sup>109</sup> "absent legislation, a juvenile's rights are ordinarily similar to those of an adult."<sup>110</sup> In contrast, other courts steadfastly maintain the position that juveniles are a "distinct class of citizens"<sup>111</sup> requiring unique treatment.

Since the legislature has provided a statutory mechanism for certain classes of recidivistic juveniles considered appropriate candidates for adult treatment,<sup>112</sup> it seems inappropriate that courts arbitrarily substitute adult standards for *all* juveniles whenever explicit case or statutory authority is lacking.<sup>113</sup> The children remaining within juvenile jurisdiction should not suffer the spillover effect resulting from public hysteria over a supposed teenage crime wave. Statistics do not justify it<sup>114</sup> nor does essential justice permit it. A comprehensive statutory and

107. See *supra* note 19.

108. See *McKenzie v. State*, 378 So. 2d 1244, 1246 n.5 (Fla. 2d Dist. Ct. App. 1979) (inference that circumstances such as these would be viewed unfavorably to the defendant despite lapse of speedy time).

109. 392 So. 2d 294 (Fla. 2d Dist. Ct. App. 1980).

110. *Id.* at 296 (citing *Johnson v. State*, 314 So. 2d 573 (Fla. 1975)).

111. See *supra* note 18.

112. See *supra* note 23.

113. The Fifth District Court of Appeal held that the state had no appellate rights with respect to a dismissal on speedy trial grounds since there was no statutory authority for it. *W.A.M. v. State*, 1982 Fla. Law Weekly 186 (Fla. 5th Dist. Ct. App., Jan. 13, 1982). Significant in this holding is the court's strict adherence to the principle of allowing the legislature to enact the laws and the courts to interpret them. Nevertheless, for much of the juvenile court's day-to-day decisionmaking there is a woeful lack of legislative directives.

114. The Uniform Crime Reports accumulated by the United States Department of Justice from law enforcement agencies across the nation recently released these figures for the five-year period from 1976 through 1980: Murder arrests for persons over age 18 increased by 5%; murder arrests for persons under 18 increased by less than 1%; burglary arrests for adults rose by 15%; burglary arrests for juveniles went down by 11%; theft/larceny by adults jumped by 18%; theft/larceny by juveniles dropped 6%; arson by adults was up 34%; arson by juveniles was down 7%; motor



rule mechanism is needed. Until then, vigilance by the courts in maintaining a separation of adult and juvenile standards is the only way to prevent the further erosion of juvenile rights.

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vehicle theft by adults were up 12%; motor vehicle theft by juveniles went down 15%; overall property crime by adults increased 17%; overall property crime by juveniles decreased 8%. United States Department of Justice, Uniform Crime Reports 13, 21, 24, 196 (1980). (Gov't Class. No. J 1.14/7:980).

# The Spousal Notice and Consultation Requirement: A New Approach to State Regulation of Abortion

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## Introduction

Historically, state government has regulated certain aspects of the marital relationship in order to further its interest in maintaining a stable and well-functioning society.<sup>1</sup> Regulation of marriage and divorce, and of marital duties and obligations, has always been considered within the purview of state powers.<sup>2</sup> In some circumstances the reach of state power impacts on the private decision-making processes of families. However, state intrusion in child bearing, contraception and abortion decisions has not been condoned.<sup>3</sup> The United States Constitution demands that state administration of family law in this area respect the individual's right of privacy as well as the zone of privacy protecting the family relationship.<sup>4</sup> This note examines the history of the state's role in regulating the abortion decision beginning with *Roe v. Wade*<sup>5</sup> and concluding with *Scheinberg v. Smith*,<sup>6</sup> which addressed the constitutionality of a spousal notice and consultation provision as a condition to abortion.

## Historical Overview

*Roe v. Wade*<sup>7</sup> established that the right of privacy, "founded in the

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1. See *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *Estin v. Estin*, 334 U.S. 541, 546 (1948).

2. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

3. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Poe v. Gerstein*, 517 F.2d 787, 795 (5th Cir. 1975).

4. *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967). See also Note, *Developments In The Law-The Constitution And The Family*, 93 HARV. L. REV. 1156 (1980).

5. 410 U.S. 113.

6. *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981); *Jones v. Smith*, 474 F. Supp. 1160 (S.D. Fla. 1979).

7. 410 U.S. 113 (1973).

Fourteenth Amendment concept of personal liberty and restriction upon state action,"<sup>8</sup> encompasses a woman's decision to terminate her pregnancy. The Court cautioned that "this right is not unqualified and must be considered against important state interests in regulation."<sup>9</sup> Any interference with this right requires a showing of "compelling state interests"<sup>10</sup> and narrowly drawn legislative enactments expressing "only the legitimate state interests at stake."<sup>11</sup> Consonant with this standard of review, the Court in *Roe* concluded that the state's interests in the health of the mother and in the protection of the potential human life of the fetus were not sufficiently compelling in the first trimester of pregnancy to justify interference with an abortion decision made by a physician and his patient.<sup>12</sup>

### *Focus on Medical Procedures*

Since *Roe*,<sup>13</sup> state legislatures have promoted state interests in mothers' health and in potential human lives by regulating medical procedures associated with abortion. Courts have carefully reviewed regulation of medical procedures to determine whether those legislated measures constituted justifiable state interference with a woman's constitutional right to elect to terminate her pregnancy during the first trimester.<sup>14</sup>

One such regulatory measure was shown to be an undue invasion of privacy and was held unconstitutional by the United States Supreme Court in *Doe v. Bolton*.<sup>15</sup> The *Bolton* Court construed a Georgia law requiring both hospital committee approval of an abortion candidate

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8. *Id.* at 153.

9. *Id.* at 154.

10. *Id.* at 155.

11. *Id.*

12. The Court in *Roe* noted that in light of present medical knowledge, state interests in safeguarding the health of the mother assume "compelling" stature approximately at the end of the first trimester. The point at which the state's interest in potential life becomes "compelling" is at viability, because this is when the fetus has the "capability of meaningful life outside the mother's womb." *Id.* at 154.

13. 410 U.S. 113 (1973).

14. See Note, *supra* note 4, at 1304.

15. *Doe v. Bolton*, 410 U.S. 179 (1973).

and her physician's decision to terminate the pregnancy.<sup>16</sup> Because committee review after the physician's approval would be review "once removed from diagnosis"<sup>17</sup> and "basically redundant,"<sup>18</sup> the Court could not find any "constitutionally justifiable pertinence"<sup>19</sup> for that requirement. Additionally, the Court invalidated a provision of the law which required that the abortion procedure be performed in an accredited hospital. It contended that the state failed to prove "that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, [satisfied the] health interests."<sup>20</sup>

Seven years later, Illinois was unable to show any compelling interest furthered by a statutory requirement that doctors inform abortion candidates of possible fetal pain caused by particular abortion methods.<sup>21</sup> The statute also mandated candidates wait twenty-four hours between the consultation and operation. The Court referred to the Supreme Court decision in *Planned Parenthood of Central Missouri v. Danforth*,<sup>22</sup> which cautioned that reading more meaning into the term "informed consent"<sup>23</sup> than "the giving of information to the patient as to just what would be done and as to its consequences . . . might well confine the attending physician in an undesired and uncomfortable strait-jacket in the practice of his profession."<sup>24</sup> In *Colautti v. Franklin*<sup>25</sup> the Court struck a Pennsylvania law which defined fetal viability vaguely and ambiguously, and subjected physicians to criminal liability for failure to follow prescribed standards of care for viable fetuses. This exercise of state power unreasonably burdened the medical profession. Moreover, this exercise unjustifiably hindered a woman's choice to terminate first trimester pregnancy, in contravention of *Roe*.<sup>26</sup>

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16. *Id.*

17. *Id.* at 197.

18. *Id.*

19. *Id.*

20. *Id.* at 195.

21. *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980).

22. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1976).

23. 627 F.2d 772, 782.

24. *Id.*

25. 439 U.S. 379 (1979).

26. 410 U.S. 113.

### *Focus on the Marital Relationship*

Early abortion legislation, which focused on regulating medical procedures, was predicated on state interests in protecting mothers' health and potential human life. Later enactments demonstrate a shift in focus as legislatures premise new statutes on the state's traditional and more widely accepted role of regulating the marital relationship. In support of a statute requiring a husband's written consent to his wife's first trimester abortion, Missouri referred to its authority to impose joint-consent requirements as conditions to child adoption and artificial insemination.<sup>27</sup> Despite Missouri's efforts to defend the statute as an incident of its power to regulate the marital relationship, the United States Supreme Court in *Planned Parenthood of Central Missouri v. Danforth* found the statute violative of standards enunciated in *Roe*.<sup>28</sup>

[T]he State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.' Clearly, since the state cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.<sup>29</sup>

Florida's statute,<sup>30</sup> considered in *Poe v. Gerstein*,<sup>31</sup> also effected a husband's unilateral veto power over his wife's abortion decision. Like Missouri, Florida urged that this statute was a valid exercise of its general authority to promote society's interest in the marriage relationship. The fifth circuit acknowledged the state has power to regulate certain aspects of marriage or the marital relationship, but concluded that this

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27. 428 U.S. 52, 68 (1976).

28. 410 U.S. 113 (citations omitted).

29. 428 U.S. at 69 (citations omitted).

30. Fla. Stat. § 458.22(3) (1975) states:

(3) WRITINGS REQUIRED - One of the following shall be obtained by the physician prior to terminating a pregnancy:

(a) The written request of the pregnant woman and, if she is married, the written consent of her husband, unless the husband is voluntarily living apart from the wife, . . .

31. 517 F.2d 787 (5th Cir. 1975).

intrusion into intra-familial decision-making processes concerning childbearing could not be sanctioned<sup>32</sup> in light of the Supreme Court's holding in *Griswold v. Connecticut*.<sup>33</sup> Moreover, said the fifth circuit, *Eisenstadt v. Baird*<sup>34</sup> determined that the individual's right of privacy included the right to be free from state interference with the child-bearing decision.<sup>35</sup>

In *Poe*, the State of Florida's primary contention was that the consent statute was necessary to protect the rights of a husband whose wife desires an abortion. This proposition was first examined in light of a husband's interest in paternity of the fetus. The court criticized this argument and referred to the common law's refusal to compensate fathers for tortious or criminal injury to the fetus.<sup>36</sup> Furthermore, because the Florida statute did not require that the husband sire the fetus, nor even that the woman be married at time of conception to the same man whose consent was later required for the abortion, the court found a husband's interest in paternity of the fetus inapplicable.

The state proposed a second source for a husband's interest in his wife's abortion decision — protection of procreative potential. Legislating against procreation outside marriage made a husband completely dependent on his wife for legitimate offspring. Florida asserted its need to legislate safeguards for a husband's procreative potential within the confines of marriage.<sup>37</sup> Noting that procreation of offspring is one of the primary purposes of marriage,<sup>38</sup> Florida postulated that a wife's repeated abortions could deny her husband the opportunity to have children. This result would impede the "right to have offspring" enunciated by the Court in *Skinner v. Oklahoma*.<sup>39</sup> The court in *Poe*<sup>40</sup> re-

32. *Id.* at 795.

33. 381 U.S. 479, 482 (1965).

34. 405 U.S. 438 (1972).

35. *Poe v. Gerstein*, 517 F.2d 787, 795 (5th Cir. 1975).

36. *See, e.g., Stidham v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 10 (1959).

For a discussion of the father's right, see Note, *Abortion: The Father's Rights*, 42 CINN. L. REV. 441, 442-44 (1973).

37. 517 F.2d at 796.

38. *See, e.g., Kreyling v. Kreyling*, 20 N.J. Misc. 52, 23 A.2d 800 (1942).

39. In *Skinner*, the Oklahoma Supreme Court overturned a statute providing for the sterilization by vasectomy or salpingectomy of habitual criminals on the grounds that the statute "deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring." 316 U.S. 535, 536 (1942).

sponded to this argument, explaining that *Skinner*<sup>41</sup> did not guarantee the individual a procreative opportunity, but merely safeguarded his procreative potential from state infringement. "As a consequence we do not read *Skinner* to permit state infringement upon the woman's fundamental right to abortion."<sup>42</sup>

### The New Breed of Abortion Regulation

The constitutionality of governmental regulation of the marital decision-making process concerning abortion is currently defined by the holdings in *Poe*<sup>43</sup> and *Danforth*.<sup>44</sup> Thus, a statute granting a husband absolute veto power over his wife's decision to terminate pregnancy will be found unconstitutional notwithstanding the state's societal interests in the marital relationship nor the husband's interest in the procreative potential of the marriage. "However, neither *Danforth* nor *Poe* considered whether less intrusive measures designed to insure a husband's participation in the abortion decision could, within constitutional contours, be predicated on these interests."<sup>45</sup>

*Scheinberg v. Smith*<sup>46</sup> considered a challenge to the validity of a Florida statute requiring a wife to give her husband notice of the proposed abortion and an opportunity to consult with her concerning the procedure. The statute pertains only to a wife neither separated nor estranged from her husband. The notice and consultation provision requires as a condition to securing the abortion, that the wife provide her physician with either 1) a written statement that notice and opportunity have been given or 2) her husband's written consent.<sup>47</sup> The Act provides that "[a]ny person who willfully performs or participates in the termination of a pregnancy in violation of the requirements of this section is guilty of a felony."<sup>48</sup>

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40. 517 F.2d 787.

41. 316 U.S. 535 (1942).

42. 517 F.2d at 797.

43. 517 F.2d 787.

44. 482 U.S. 52 (1976).

45. *Scheinberg v. Smith*, 482 F. Supp. 529, 539 (S.D. Fla. 1979).

46. *Id.*

47. FLA. STAT. § 390.001(4)(b) (1981).

48. *Id.*

### *Scheinberg v. Smith*

In 1979, the Florida Legislature enacted the Medical Practice Act, which contained the following provision governing abortions sought by married women:

If the woman is married, the husband shall be given notice of the proposed termination of pregnancy and an opportunity to consult with his wife concerning the procedure. The physician may rely on a written statement of the wife that such notice and opportunity was given, or he may rely on the written consent of the husband to the proposed termination of the pregnancy. If the husband and wife are separated or estranged, the provisions of this paragraph for notice or consent shall not be required. The physician may rely upon a written statement from the wife that the husband is voluntarily living apart or estranged from her.<sup>49</sup>

Dr. Mark Scheinberg,<sup>50</sup> a licensed physician who performs abortions in Florida, filed a class action suit against state enforcement officials on behalf of all married pregnant women wishing to terminate their pregnancies. He sought injunctive and declaratory relief on the ground this provision unconstitutionally abridged married women's rights to privacy in the abortion decision.

In July, 1979, the District Court denied Dr. Scheinberg's request to preliminarily enjoin enforcement of the spousal notice provision because it felt he had not demonstrated a substantial likelihood of success for proving the provision violated the equal protection clause of the fourteenth amendment. On final hearing two months later, the District Court did, in fact, declare the provision unconstitutional, finding it to be an overly inclusive means to promote marital harmony. State officers appealed the decision, and in October 1981, the United States Court of Appeals for the Fifth Circuit considered the case. The appellate court held state interests in furthering the institutional integrity of the marital relationship were compelling, and were sufficient justification for enacting the spousal notice and consultation provision. In the context of this state interest the court considered also the relation of paternal in-

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49. FLA. STAT. § 390.001(10) (1981).

50. Formerly using the pseudonym John Jones, M.D. in *Jones v. Smith*, 474 F. Supp. 1160 (S.D. Fla. 1979).



terest in marital procreative potential. The case was remanded for factual determination of whether proper abortion procedures posed a greater than *de minimis* risk to future childbearing capabilities.

The court of appeals examined the burden the notice and consultation provision imposed upon a woman's constitutionally protected right to have an abortion. In order to trigger the strict scrutiny standard of review the district court had required plaintiffs to show the provision met the direct interference test of *Charles v. Carey*,<sup>51</sup> or constituted a new obstacle "in the path of a woman's exercise of her freedom of choice."<sup>52</sup> In *Charles*, the seventh circuit declared unconstitutional a provision of the Illinois abortion statute which required the physician performing an abortion to conduct a consent consultation with his patient at least twenty-four hours prior to the operation. Based upon the *Charles*<sup>53</sup> court's reasoning, both the district and appellate courts in *Scheinberg* required a showing that the burden imposed by the statute was "not *de minimis*".<sup>54</sup> State regulation not directly interfering with a woman's abortion decision is *not* strictly scrutinized and thus does not call for a compelling state interest. The court of appeals, while recognizing that the notice and consultation provision of Florida's statute left a married woman "with something less than the completely untrammelled freedom of choice,"<sup>55</sup> compared that burden with the burden imposed by Missouri's statute stricken in *Danforth*.<sup>56</sup> The statute in *Danforth* required husband consent as a *prerequisite* to abortion. The *Scheinberg* court concluded "the intrusion into a woman's ability to exercise freedom of choice is thus much less here than in *Danforth*."<sup>57</sup>

It is ironic that while citing *Charles*, the fifth circuit engaged in that weighing process explicitly cautioned against in *Charles*. The *Charles* decision proposed that "undue" defines the ultimate constitu-

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51. 627 F.2d 772 (7th Cir. 1980).

52. *Harris v. McRae* proposed this as an alternative indication for strict scrutiny review. 448 U.S. 297, 316 (1980).

53. 627 F.2d 772.

54. *Id.* at 777.

55. 659 F.2d at 486.

56. 428 U.S. 52 (1976).

57. 659 F.2d at 485. The court noted here that since the statute requires notice and not consent, the intrusion into a woman's ability to exercise her freedom of choice is therefore less here than in *Danforth*.

tional issue, not merely the threshold requirement for imposing strict scrutiny.<sup>58</sup> Further, the court in *Charles* found the defendant's proposed statutory interpretation — that the burden imposed must be undue in order to invoke strict scrutiny — contained no guidelines for defining "undue" and would virtually preclude the application of strict scrutiny to any state interference with the abortion decision.<sup>59</sup> The *Charles* court recognized the dangers of deferring to state legislative wisdom and therefore proscribed the permissible reach of state power into the abortion decision. This reasoning led the *Charles*<sup>60</sup> court to conclude the Illinois abortion statute, requiring a twenty-four hour mandatory waiting period between consultation and operation, constituted a burden unjustified by state interests in a woman's first trimester abortion decision. Similarly, the court of appeals in *Scheinberg*, after acknowledging the provision's burden on a woman's freedom to terminate pregnancy during the first trimester, and recognizing the Court's recent reaffirmation of *Roe's*<sup>61</sup> mandate, could have invalidated the statute. A recent sixth circuit case illustrates this point:

Since the State has no compelling interest during the first trimester of pregnancy, no balancing [of State interests] is required. If a regulation results in a legally significant impact or consequence on a first trimester abortion decision, it is invalid.<sup>62</sup>

Instead of ending its inquiry at this point, the *Scheinberg* court considered the state's claim of compelling interests in maintaining and promoting the marital relationship and in protecting the husband's interest in the procreative potential of marriage. It stated:

[T]hese interests, weighed together and, for purposes of analysis, telescoped into a state interest in furthering the integrity of state-created and regulated institutions of marriage and the family, are 'sufficiently weighty,' *Poe*, to justify the burden on a woman's abor-

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58. 627 F.2d at 777.

59. *Id.*

60. 627 F.2d 772.

61. 410 U.S. 113.

62. *Akron Center for Reproductive Health v. City of Akron*, 651 F.2d 1198, 1204 (6th Cir. 1981).

tion decision imposed by the spousal notification requirement.<sup>63</sup>

The *Scheinberg* court manipulated Supreme Court precedents, *Zablocki v. Redhail*<sup>64</sup> and *Griswold v. Connecticut*,<sup>65</sup> to support its conclusion that the institution of marriage, the cornerstone of civilized society, is deserving of heightened protection under the constitution. In *Zablocki*,<sup>66</sup> the Court invalidated a Wisconsin law prohibiting remarriage of non-custodial parents under support orders absent court approval. Justice Stewart's concurring opinion identified "[t]he problem in this case [as] not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected freedom."<sup>67</sup> The statute found unconstitutional in *Griswold*<sup>68</sup> operated directly on an intimate relation between husband and wife, as well as their physician's role in one aspect of that relation.<sup>69</sup> The Court viewed the relationship as "lying within the zone of privacy created by several fundamental constitutional guarantees."<sup>70</sup>

Furthermore, the court's decision in *Poe*<sup>71</sup> specifically rejected the notion that state intrusion into intra-familial decision-making processes concerning childbearing could be justified by state interests in promoting the marital relationship. The fifth circuit read *Zablocki*,<sup>72</sup> *Griswold*<sup>73</sup> and *Poe*<sup>74</sup> to support state regulation of the marriage relationship. Somehow the circuit court avoided the stress those decisions placed on the importance of marriage as an area of privacy deserving of respect and protection from government interference. Thus, the logical extension of the principles denoted in *Zablocki*, *Griswold*, and *Poe* is that the notice and consultation provision unconstitutionally impinges upon a husband's and wife's individual right to be free from govern-

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63. 659 F.2d at 483 (citations omitted).

64. 434 U.S. 374 (1978).

65. 381 U.S. 479 (1965).

66. 434 U.S. 374.

67. *Id.* at 391-92 (J. Stewart's concurring opinion).

68. 381 U.S. 479.

69. *Id.* at 503 (J. White's concurring opinion).

70. *Id.* at 485 (J. Douglas, opinion for the majority).

71. 517 F.2d 787.

72. 434 U.S. 374.

73. 381 U.S. 479.

74. 517 F.2d 787.

ment intrusion into their personal relationship.

The *Scheinberg* court urged that the notice and consultation requirement has the effect of furthering "the integrity of marital, and hence familial, life."<sup>75</sup> This conclusion was adduced from expert testimony on record from the district court. The experts, a professional array of communication encouragers, included gynecologists, obstetricians, psychiatrists and psychologists.<sup>76</sup> No matter how persuasive the appellate court found that testimony, the court failed to draw a distinction between a qualified professional's *recommendation* that his married patients communicate and a state's *mandate* that its married citizens communicate.

Because "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up,"<sup>77</sup> the decision to terminate a pregnancy is not always the product of mutual agreement. Differences in individual moral and religious convictions might account for a deadlock between mates in the abortion decision. Additionally, in situations where a woman has become pregnant by someone other than her husband, either voluntarily or as the consequence of rape, and fears physical or emotional abuse, communication of her intention to terminate the pregnancy could have a deleterious effect on the future of the marriage.<sup>78</sup> The experts indicated that *forced* communication does not necessarily enhance the quality of a marriage and might in many instances produce anxiety and stress, causing the wife to self-abort or to procure an illegal abortion.<sup>79</sup> It is ironic that under these circumstances, the notice and consultation provision could contribute to the destruction of the same state interest the legislation was designed to protect, namely the "authenticity"<sup>80</sup> of marriage. The state's stated

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75. 659 F.2d at 484.

76. The precise nature of this testimony and the qualifications of the experts are explained in *Scheinberg v. Smith*, 482 F. Supp. at 538.

77. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

78. 482 F. Supp. at 538.

79. *Id.*

80. "By authenticity we mean a marital relationship characterized by institutional integrity . . . the concept we wish to convey is that the state has an interest in attempting to ensure that the institution of marriage maintains its identity with its conceptual essence." 659 F.2d at 484.

goal — *preserving* the integrity of the marital relationship — could be better achieved by refraining from involvement in private marital communications concerning childbearing. Certainly, this result would be consistent with the *Zablocki*,<sup>81</sup> *Griswold*,<sup>82</sup> and *Poe*<sup>83</sup> decisions.

The court of appeals remanded *Scheinberg* for factual findings necessary to determine whether the provision could withstand constitutional attack despite its failure to limit the notice and consultation requirements to jointly-conceived children.<sup>84</sup> The court also directed the district court to inquire whether abortion procedures detrimentally affect future childbearing capabilities,<sup>85</sup> which in turn might hamper the procreative potential of the marriage.

The fifth circuit, by remanding to learn whether abortion has more than a “*de minimis*” effect on a woman’s fertility, may be indicating that a husband’s procreative potential can constitute a compelling state interest—a status not acknowledged in previous decisions. The Supreme Court in *Danforth*<sup>86</sup> expressed an awareness of the “deep and proper concern and interest that a devoted and protective husband has in his wife’s pregnancy.”<sup>87</sup> Yet in balancing a husband’s concern against his wife’s freedom of choice in undergoing abortion, the Court in *Danforth* concluded: “it is the woman who physically bears the child and who is more directly and immediately affected by the pregnancy [;therefore,] as between the two, the balance weighs in her favor.”<sup>88</sup> The propriety of a husband’s concern in his wife’s pregnancy was also recognized in *Griswold*.<sup>89</sup> From *Danforth* and *Griswold* one may deduce a husband has a proper concern and interest in his wife’s pregnancy. But *Griswold*<sup>90</sup> and *Danforth*<sup>91</sup> cannot be read to suggest that

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81. 434 U.S. 374.

82. 321 U.S. 479 (1965).

83. 517 F.2d 787.

84. 659 F.2d at 486.

85. The authors concluded “that induced abortion has no or little, if any, effect on risk of ectopic pregnancy in subsequent reproduction under a generally favorable condition.” C.S. Chung, M. Mi, R.G. Smith, P.G. Steinhoff, *Induced Abortion and Ectopic Pregnancy in Subsequent Pregnancies* (Rev. man. at 12) (19\_\_\_).

86. 428 U.S. 52 (1976).

87. *Id.* at 69.

88. *Id.* at 71.

89. 321 U.S. 479 (1965).

90. *Id.*

the husband's interest in the procreative potential of the marriage should be considered a compelling state interest justifying legislation which burdens a woman's fundamental right to a first trimester abortion.

Nevertheless, the court of appeals in *Scheinberg*, relying upon the authority of *Skinner*,<sup>92</sup> found the husband's ability to procreate entitled to constitutional protection. As a corollary to this proposition, the court acknowledged that the state has a "compelling interest in requiring a wife to inform her husband when she is contemplating termination of a pregnancy."<sup>93</sup> In *Skinner*,<sup>94</sup> the Supreme Court protected an individual from sterilization by the State of Oklahoma. The rights established in that case were intended to protect an individual from unjustified governmental intrusion in matters of procreation. As noted earlier, the court in *Poe*<sup>95</sup> explained, "*Skinner* did not guarantee the individual a procreative opportunity; it merely safeguarded his procreative potential from state infringement."<sup>96</sup> Consequently, *Poe*<sup>97</sup> did not interpret *Skinner*<sup>98</sup> to permit state infringement upon a woman's fundamental right to an abortion. As noted in appellee's petition for rehearing in *Scheinberg*, "the court has misapprehended the decision in *Poe* as it interprets the rights established in *Skinner*, . . . [which] were intended as a shield against governmental interference with individual rights. The decision was not intended to be a sword which could be used to enhance a State's power over its citizens."<sup>99</sup> Rehearing was denied.

### Constitutional Objections

The notice and consultation provision in the Florida Medical Practice Act is prone to attack as an infringement upon first amendment freedom of speech guarantees. Because this provision requires a wife to

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91. 428 U.S. 52.

92. 316 U.S. 535 (1942).

93. 659 F.2d at 485.

94. 316 U.S. 535 (1942).

95. 517 F.2d 787.

96. *Id.* at 797.

97. 517 F.2d 787.

98. 316 U.S. 535.

99. Appellee's Petition for Rehearing, Case No. 80-5023 at 3-4.

notify and consult with her husband on the abortion decision, it necessarily compels speech in the marital relationship. The court in *Scheinberg*<sup>100</sup> failed to address the issue, though the argument was clearly preserved and the request for a rehearing of the case rested on it. A statute having the potential to impair an individual's freedom of speech is deserving of careful consideration.

Historically, first amendment freedom of speech and thought has received special protection as a fundamental liberty serving as the "indispensable condition, of nearly every other form of freedom."<sup>101</sup> Judicial and philosophical justification for free speech emphasizes the importance of individual self-expression and its forwarding impact on the goals of representative democracy and self-government.<sup>102</sup> In past cases, first amendment issues have typically focused upon the permissibility of an individual's *exercise* of free speech in the *public forum*. Government interference with this right, in the form of state regulation, has been upheld where the speech is directed to producing or inciting imminent lawless action,<sup>103</sup> encouraging subversive activities during wartime<sup>104</sup> or interfering with public order and tranquility.<sup>105</sup>

The Florida statute represents a significant and novel departure from first amendment issues considered in the past. A distinguishing characteristic of the statute is that it attempts to compel speech, rather than inhibit its free exercise. Additionally, the statute seeks to regulate purely *private* speech in the context of the marital relationship, in contrast to previous instances of permissible state regulation of speech in the public forum. There is no case law precedent permitting a state to compel purely private speech, though several court decisions have interpreted the nature of this first amendment right.

*Wooley v. Maynard*<sup>106</sup> establishes that the right of freedom of thought, protected against state action by the first and fourteenth amendments, includes both the right to speak freely and the right to refrain from speaking at all. Both are "complementary components of

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100. 659 F.2d 476.

101. *Id.* at 327.

102. G. GUNTHER, CONSTITUTIONAL LAW 1108 (10th ed. 1980).

103. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

104. *Schenk v. United States*, 249 U.S. 444 (1969).

105. *Cox v. New Hampshire*, 312 U.S. 569 (1941).

106. *Wooley v. Maynard*, 430 U.S. 705 (1977).

the broader concept of individual freedom of mind."<sup>107</sup> Freedom of speech and association are not, however, absolute.<sup>108</sup> "They are susceptible of [state] restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."<sup>109</sup> Accordingly, state restrictions on free exercise of speech in the public forum have been justified by state concerns for public welfare. However, the right to remain silent enjoys an even greater protection than the right to speak freely. Involuntary speech may be "commanded only on even more immediate and urgent grounds"<sup>110</sup> than those for which the state can prohibit speech. Following this analysis, a court should determine whether the notice and consultation requirement prevents an immediate threat to the husband's procreative ability and whether this threat, like speech

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107. *Id.* at 714.

108. *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

109. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

110. *Id.* at 633. The classic right to silence cases have arisen in the context of state interests in controlling subversive activities. In *Gibson v. Florida Legislative Investigation Comm.*, the Court reversed a contempt conviction arising from a witness' refusal to disclose to a state legislative committee names of local NAACP chapter members. The committee sought this information in connection with its investigation of local Communist activities. Though this was considered a valid legislative interest, the Court nevertheless required a showing that this interest outweigh the individual's constitutionally protected right of privacy in his views or associations. Further, in order to establish an overriding legislative interest, the Court required that a "substantial connection" between the information sought and the subject matter of the inquiry be shown. Because no nexus was proved between the local NAACP and Communist activities, the Court refused to compel disclosure. 372 U.S. 539 (1963). *Cf. Uphaus v. Wyman*, 360 U.S. 72 (1959). Thus, in *Scheinberg*, the state must not only prove that its interest in the procreative potential of a marriage is a valid legislative concern, but must also show that this interest outweighs or subordinates the married woman's right to privacy in her communications. Further, the state must show that a nexus exists between the information sought to be compelled and its interest in the procreative potential of the marriage. 659 F.2d 476 (5th Cir. 1981).

Additionally, the requirement that legislation infringing upon protected speech be precisely drawn to express only the legitimate state interests at stake emerged in cases involving disclosures of organizational membership where an individual sought public employment or office. *Garner v. Board of Pub. Works*, 341 U.S. 716 (1951). The Court in this case held that a governmental employer could not condition employment upon an oath that the employee has not or will not engage in protected speech activities. *Id.* Similarly, the court in *Scheinberg* should not condition a married woman's access to an abortion upon consultation with her husband.



inciting riot, is a lawful subject for state regulation. Since infringements on the right to remain silent must be justified by more urgent state interests than those interests justifying restrictions on the right to speak freely, it is imperative to compare the nature of the state's interests in both situations. By way of illustration, where dangers of subversive activity and hostile demonstrations are exacerbated by an individual's exercise of free speech in a public place, the state has the duty to protect its citizens. When a wife desires an abortion, is it proper for the state to intrude into the private realm of marital communication by requiring her to voice such an intention as a means of protecting the husband's procreative potential?<sup>111</sup> The nature of the individual rights involved in this question render it worthy of a judicial response.

### *The Right of Privacy*

Certain aspects of an individual's right of privacy are infringed by state limitations on first amendment guarantees of freedom of thought and speech. Privacy, in the abortion context, involves both an individual's interest in avoiding disclosure of personal matters and independence in making important decisions.<sup>112</sup> The Florida statute attempts to compel a woman to speak on a private matter about which she might choose to remain silent. Further, if a woman is forced to notify and consult her husband, she loses that feature of privacy which protects one's independence in decision-making. These characteristics of the statute are antithetical to fundamental notions of privacy.

### *The Equal Protection Argument*

In addition to first amendment and privacy attacks on the statute, perhaps the most severe criticism is based upon equal protection grounds. Where fundamental rights are involved the equal protection

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111. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

112. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). (But note the Court in *Whalen* permitted the state to keep computerized records of the names of persons who obtain certain drugs by prescription owing to its effective security system to prevent unauthorized disclosure.)

inquiry must consider whether the notice and consultation provision is necessary and effective in furthering state interests and whether the legislation is narrowly drawn to express only the legitimate state interests at stake.<sup>113</sup>

The district court in *Scheinberg* found the statute inadequately drawn because it was both over and underinclusive. It was held overinclusive because it made "no exception for a married woman carrying the child of someone other than her husband."<sup>114</sup> As the statute is written, the husband's interest in the fetus arises from his marriage, not his paternity. Despite the district court's analysis, the court of appeals side-stepped this anomaly, focusing instead on whether the abortion procedure had more than a "*de minimis*" effect on his wife's child-bearing capabilities.<sup>115</sup> The district court found the statute underinclusive because "it does not require a woman to notify and consult with her husband about an impending hysterectomy or tubal ligation,"<sup>116</sup> and these surgical procedures altogether foreclose marital procreative potential. It concluded that these failings in the statute rendered it unconstitutional. It should also be noted that a husband does not have to consult with his wife if he desires a vasectomy. The court of appeals acknowledged that the statute *was* indeed underinclusive. Nevertheless, it reversed the lower court's ruling finding that court's analysis unpersuasive; Florida's legislature may properly choose abortion as singularly deserving of special legislation.

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113. 410 U.S. 113. For a discussion of the necessary relationship between classifications and legislative objectives for equal protection purposes, see Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). The Constitution's demand for equal protection of the laws requires that those who are similarly situated be similarly treated. The success of a classification is determined by the measure of its ability to treat similarly those similarly situated with respect to furthering a valid state interest. Where fundamental rights are involved, the legislative means must bear a "tight fit" to the legislative ends sought. G. GUNTHER, *supra* note 102.

114. 482 F. Supp. at 540.

115. "The state interest sought to be furthered by this legislation encompasses more than merely the husband's interest in a particular fetus. . . . It encompasses furthering the institutional integrity of the marital relationship, and of the family." 659 F.2d at 486. *Cf.* 518 F.2d 787.

116. 659 F.2d at 486.

## Conclusion

The spousal notice and consultation provision should have been declared unconstitutional once the court of appeals determined it constituted an obstacle to a married woman's first trimester abortion choice. By purporting to balance an individual's actual constitutional guarantee of privacy against a state's compelling interest in marital procreative potential, the appellate panel invited a novel —albeit ill-advised— approach to the abortion question. Certainly, opponents of abortion may take advantage of this new potential weapon and structure restrictive statutes under the pretext of procreative potential. One must wonder whether procreative potential would command equal attention if a woman sought to regulate or restrict her husband's vasectomy decision. Finally, one must not ignore the personal protections afforded by *Roe* and wonder whether procreative potential will succeed to ultimately erode what progress *Roe* has intelligently effected.

*Bambi G. Blum*

## *Scheinberg v. Smith*: Toward Recognition of Minors' Constitutional Right to Privacy in Abortion Decisions

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On October 1, 1981, the United States Court of Appeals for the Fifth Circuit affirmed the decision of the district court in *Scheinberg v. Smith*,<sup>1</sup> that the parental consent provisions of the *Florida Medical Practice Act*<sup>2</sup> regarding abortion, unconstitutionally invaded a woman's right to privacy.<sup>3</sup> The judicial precedent leading the court to recognize this right to privacy for minors was first enunciated by the fifth circuit in *Poe v. Gerstein*.<sup>4</sup> The *Scheinberg* majority found unconstitutional the *Florida Therapeutic Abortion Act's*<sup>5</sup> requirement that parental consent must be given children seeking abortion. The requirement violated young women's fundamental right to privacy in contravention of the United States Supreme Court's clear pronouncements in *Griswold v. Connecticut*<sup>6</sup> and *Roe v. Wade*.<sup>7</sup>

The parental notice and consent cases which led the court to reject the contested statutory provisions in *Scheinberg* are the subject of this comment. Additionally, this comment will briefly examine the history of privacy afforded children in relation to parental control. The interplay of children's abortion rights with the various waiting period provisions of abortion statutes will also be discussed.

### I. Children as Chattels

The emerging field of children's rights litigation is a direct result

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1. 482 F. Supp. 529 (S.D. Fla. 1979).

2. FLA. STAT. § 390.001 (4)(a) (1981).

3. *Scheinberg v. Smith*, 659 F.2d 476, (5th Cir. 1981).

4. 517 F.2d 787 (5th Cir. 1975).

5. The applicable part of Florida's Statutes section 458.22(3) (1976) reads: "If the pregnant woman is under eighteen years of age and unmarried, in addition to her request, the written consent of her parents, custodian, or legal guardian must be obtained."

6. 381 U.S. 479 (1965).

7. 410 U.S. 113 (1973).

of, and in sharp contrast to, the iniquities to which children were subjected through the centuries. Historically, the law treated minors as chattels, unable to legally act for themselves.<sup>8</sup> In biblical times, as in the days of the Roman Empire, parental control of an unmarried female included complete determination of her future. A father had the right both to sell his daughter in marriage, and to annul her marriage vows if he chose.<sup>9</sup> Though it is true that children's status improved with the centuries, minors remained charges of their parents.<sup>10</sup> There was no distinction made between the rights or treatment of small children and of teenagers on the brink of legal or emotional maturity. All were considered the property of their parents.<sup>11</sup>

## II. Setting the Stage for *Scheinberg*

The historical treatment of minors would seem to suggest that the state, in deference to parents' traditional powers, may condition a pregnant minor's right to abortion on parental consent. However, in light of *Roe*, which established a woman's right to privacy in her abortion decision, the fifth circuit in *Poe v. Gerstein* concluded that these privacy rights must also apply to an unwed, pregnant Florida teenager.

In *Roe*, the Court held the decision to terminate a pregnancy is encompassed both in the fourteenth amendment's concept of personal liberty and the ninth amendment's reservation of rights to the people.<sup>12</sup> Thus the right to a "zone of privacy"<sup>13</sup> was found to be constitutionally guaranteed. In *Gerstein* the appellate court extended *Roe's* analysis and held the "fundamental right to an abortion applies to minors as well as to adults."<sup>14</sup> The appellate court reasoned that the criteria enunciated in *Roe* applied even more forcefully to the pregnant teenager, who could suffer physical and emotional infirmities as a result of an unwanted pregnancy. Additionally, the pregnant teenager may be subjected to social condemnation resulting from the abrupt termination

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8. In re Gault, 387 U.S. 1 (1967).

9. 6 ENCYCLOPEDIA JUDAICA 1167 (1973).

10. 387 U.S. 1.

11. 517 F.2d at 789.

12. 410 U.S. at 153.

13. *Id.* at 152.

14. 517 F.2d at 791.

of her education.<sup>15</sup>

Because a fundamental right was involved in *Gerstein*, the fifth circuit panel strictly scrutinized the Florida statute in order to ascertain whether a compelling state interest justified requiring parental consent to the minor's abortion. The court found four interests that could be invoked in defense of the statute: "(a) preventing illicit sexual conduct among minors; (b) protecting minors from their own improvidence; (c) fostering parental control; (d) supporting the family as a social unit."<sup>16</sup> None of these interests however, were found sufficiently compelling to overcome the minor's fundamental right to an abortion.

In *Carey v. Population Services International*,<sup>17</sup> the Supreme Court asserted "it would be plainly unreasonable to assume that [the state] has prescribed pregnancy and the birth of an unwanted child . . . as punishment for fornication."<sup>18</sup> The *Gerstein* court observed that parents do not always act in their child's best interests, and may sometimes act nonsensically or punitively when they learn of their daughter's pregnancy.<sup>19</sup> Ironically, while the statute considered in *Gerstein* authorized parents to make the critical decision in permitting or denying their daughter's abortion, the *Gerstein* court made clear that it was the minor daughter alone who would bear financial and legal responsibility for the coming child.<sup>20</sup>

The fifth circuit pointed out in *Gerstein* that the statute requiring a minor to notify her parents of her pregnancy, effectively impeded the teenager from procuring an abortion. Certainly the potential for trauma arises when an unwed teenager must face her parents and tell them she is pregnant. This can be physically and emotionally detrimental.<sup>21</sup>

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15. *Id.*

16. *Id.* at 792.

17. 431 U.S. 678 (1977).

18. *Id.* at 695 (citing *Eisenstat v. Baird*, 405 U.S. 438, 448 (1972)).

19. *See e.g.*, *Baird v. Bellotti*, 393 F. Supp. 847 (D.C. Mass. 1975) (In order to punish their daughter for her pregnancy, the court found that some parents would not allow the abortion); *In re Rotkowitz*, 175 Misc. 948, 949, 25 N.Y.S.D.2d 624, 626 (Dom. Rel. Ct. 1941) stating: "There are parents . . . who will by act do that which is harmful to the child and sometimes will fail to do that which is necessary to permit a child to . . . lead a normal life in the community." *Id.*

20. 517 F.2d at 793. *See* FLA. STAT. §§ 744.13 & 827.06 (1976).

21. 517 F.2d at 793 n.11.

One year after the fifth circuit decided *Gerstein*, the United States Supreme Court in *Planned Parenthood of Missouri v. Danforth*<sup>22</sup> invalidated a state requirement that unmarried minors obtain parental approval before terminating pregnancies. Relying upon its decision in *Roe v. Wade*, the Court held a state cannot proscribe abortion during the first trimester of pregnancy.<sup>23</sup> The Court reasoned that the state could not endow a third party with the “absolute and possibly arbitrary power to prohibit an abortion.”<sup>24</sup> Nor could the state “delegate . . . a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.”<sup>25</sup> The abortion decision is so important that not only adults, but unmarried pregnant minors as well, are protected by the constitution against state intrusion.<sup>26</sup>

Supreme Court precedent has established that from the start of the second trimester of pregnancy, through its duration, the state has a compelling interest in both the mother’s safety and the potentiality of human life.<sup>27</sup> States may, therefore, limit the availability of abortions in the later trimesters and impose place, time and other conditions on abortion procedures and availability.<sup>28</sup> However, abortions performed within the first trimester fall outside this significant state interest, even though “power of the state to control the conduct of children reaches beyond the scope of its authority over adults.”<sup>29</sup> Minors are different from adults, but are not so different that their most fundamental rights may be unduly impinged upon. The state’s interest in prohibiting minor’s first trimester right to abortion is not compelling enough to with-

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22. 428 U.S. 52 (1976).

23. 410 U.S. at 163.

24. 428 U.S. 52.

25. *Id.* at 74.

26. Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980). *But see* Miami Herald, Jan. 31, 1982, at 4A, col. 1 which states that a thirteen year old who “fought her parents all the way to the State Supreme Court for the right to have an abortion, had changed her mind. Her announcement came after the Alabama Supreme Court temporarily blocked the operation. . . . The girl’s decision made the case moot and left unanswered the legal question of whether a minor can have an abortion without parental approval in Alabama.”

27. 410 U.S. 113.

28. 410 U.S. 113.

29. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

stand strict scrutiny when balanced against the interference this state prohibition exerts on a minor's fundamental privacy right. Moreover, while parents' power over their children is great, it is not absolute. "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children."<sup>30</sup>

### III. Notification Provisions in Abortion Control Statutes

In addition to parental consent requirements, parental notification requirements have been subjected to constitutional challenges. In *Wynn v. Carey*<sup>31</sup> the Seventh Circuit Court of Appeals found provisions of the Illinois Abortion Parental Consent Act of 1977<sup>32</sup> unconstitutional. The statute required that an unmarried minor under the age of eighteen attempt to obtain consent from both her parents prior to obtaining an abortion. If one or both parents refused consent, the minor was required to petition for court authorization of the abortion. In addition, upon the minor's application for judicial relief the court was required to notify her parents. Thus, whenever a pregnant teenager sought an abortion, her parents were *always* notified.<sup>33</sup>

The seventh circuit struck these consent and notification provisions as both over and underinclusive. The act was underinclusive because married minors who remained married, or who were divorced or widowed were not included. These minors were not required to consult with or obtain the consent of their parents. Since the ostensible purpose of the act was to afford *minors* some measure of parental guidance in the decision to undergo abortion, there was no apparent reason for distinguishing between single minors and minors who were, or had been, married.<sup>34</sup> The act was overinclusive because there was no statutory exception for single minors who were emancipated or mature enough to make the decision for themselves.

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30. *Id.* at 170.

31. 582 F.2d 1375 (7th Cir. 1978).

32. ILL. REV. STAT. ch. 38 § 81-23(4): "If . . . consent is refused . . . [it] may be obtained by order of a judge of the circuit court . . . after such hearing as the judge deems necessary. . . . Notice of such a hearing shall be sent to the parents."

33. *Id.*

34. 582 F.2d at 1387.



The appellate court also found the act constitutionally deficient in failing to provide for minors who did *not* understand what an abortion entails and what its physical or psychological consequences may be.<sup>35</sup> If the parents of an immature, unknowledgeable girl were notified by the court that their daughter was attempting to circumvent, by judicial intervention, their refusal to allow her abortion, the parents' negative decision would prevail under the statute despite the best interests of the child. Since the statute did not allow judicial inquiry beyond whether the girl understood the consequences of an abortion, if the girl was unable to understand, then the court's hands were tied because it was not authorized under the statute to take any further action. The immature minor's fate was back in the hands of both of her parents. Even if *one* parent consented to the abortion, and the court agreed it would be best to terminate the pregnancy, the abortion would still be barred by the other parent's veto.<sup>36</sup> For these reasons the statute failed to meet the minimum standards set by the United States Supreme Court in *Bellotti v. Baird*,<sup>37</sup> "that the statute must be 'speedy,' 'nonburdensome' and preserve the minor's anonymity when she seeks judicial authorization for an abortion."<sup>38</sup> It is well recognized that the "abortion decision is one that simply cannot be postponed, or it will be made by default with far reaching consequences."<sup>39</sup>

While in some familial relationships parental notification can result in the minor's psychological sustenance and produce beneficial advice, where poor intra-familial relations exist the results of notification can be devastating. Two recent federal district court decisions have held that an unqualified statutory requirement of parental notification is an unconstitutionally weighty burden on the fundamental right of a minor to have an abortion.<sup>40</sup>

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35. *Id.* at 1390. While not enumerated by the court, some consequences, in addition to the death of the fetus, may be physical discomfort to the mother, grief or guilt.

36. *Id.*

37. 428 U.S. 132 (1976).

38. *Id.* at 144-45.

39. 443 U.S. at 643.

40. Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172, 1202 (N.D. Ohio 1979); Women's Community Health Center Inc. v. Cohen, 477 F. Supp. 542, 546-48 (D. Me. 1979). See also Planned Parenthood Assoc. of Kansas City, Missouri Inc. v. Ashcroft, 655 F.2d 848 (8th Cir. 1981) which held unconstitu-

A parent infuriated by the illicit pregnancy may abuse the minor daughter. Additionally, physical harm caused the minor by parental footdragging and delay is foreseeable, especially in the abortion context which mandates time is of the essence. Some of those possibilities were described by the mother of a girl waiting for an abortion in a Minnesota abortion clinic.<sup>41</sup> The Minnesota abortion law requires that a minor under 18 years 1) notify both her parents; 2) offer the clinic *proof* that both parents have been notified, and 3) wait for a 48 hour waiting period before the abortion can be performed. The necessity of securing a waiver of parental notification is a chilling and frustrating experience.

[F]or many, the abortion itself is preceded by a harrowing day in court trying to secure a waiver from a judge against having to tell parents. Not uncommonly, mother and daughter are thrown into a conspiracy against a wrathful father who they fear will never be able to understand how his daughter came to such a sorry pass. Legal maneuvering can delay the abortion, sometimes dangerously. One mother nods toward her teenage daughter, now 20 weeks pregnant: 'Her boyfriend is black,' says the woman who joined with her daughter in the fight for the waiver. 'My husband told her if he ever saw her with a black man, he'd kill her.'<sup>42</sup>

The United States Supreme Court in *H. L. v. Matheson*<sup>43</sup> did not agree that parental notification as a prerequisite unduly burdens a minor's right to an abortion. The minor in question there was unmarried, 15 years of age; living at home and supported by her parents. She became pregnant and, after consulting with a social worker and a physician, decided to obtain an abortion. The physician, however, recognized he would be subject to criminal penalties for noncompliance,<sup>44</sup> and would not perform the abortion without notifying his patient's parents.

The pertinent part of the Utah statute considered in *H. L.* provides: "To enable a physician to exercise his best *medical judgement*

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tional a statute requiring notice to parents of *all* minors seeking abortions because it required notice to parents of mature minors and those for whom it was not in their best interests to give notice.

41. *Abortion: Women Speak Out*, Life, Nov. 1978, at 45-54.

42. *Id.* at 48, cols. 1 & 2.

43. 450 U.S. 398 (1981).

44. *Id.* §§ 76-7-314(3), 76-3-204 & 76-3-301(3) (1953).

[in considering whether to perform an abortion] he shall: . . . (2) Notify if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor. . . .”<sup>45</sup> While it was urged that *Bellotti*, decided prior to *H. L.*, had settled the question of parental consent, Chief Justice Burger’s majority decision in *H. L.* contrasted the classes of plaintiffs. In *Bellotti* the principal class consisted of “unmarried [pregnant] minors in Massachusetts who have adequate capacity to give a valid and informed consent [to abortion], and who do not wish to involve their parents.”<sup>46</sup> In *H. L.* the class was comprised of *unemancipated* minor girls who were living at home, supported by their parents; they made no claim of maturity. The *H. L.* majority concluded the appellant lacked standing to enlarge its challenge to encompass the statute’s effects on all unmarried minor girls, which included those mature and emancipated. The Court decided the issue within narrow parameters, holding that a statute delineating a “mere requirement of parental notice”<sup>47</sup> does not violate the constitutional rights of an immature, dependent minor living at home. The statute in question did not grant parental or judicial power to *totally* proscribe the abortion procedure. It did necessitate that the physician notify parents, if possible, if an abortion was to be performed. The Chief Justice opined the statute promoted family unity and served a “significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician.”<sup>48</sup> However, parents were not statutorily obligated to fill out medical forms.

In his dissenting opinion, Justice Marshall thought it clear that the parental notice requirement “burdens the minor’s privacy right.”<sup>49</sup> Although earlier decisions had safeguarded family privacy from invasive governmental interference, Justice Marshall felt the majority distorted those decisions to achieve an opposite result, thereby excusing an inexcusable incursion into the privacy of families. He noted it was unlikely the state’s statutory notice prerequisite would “resurrect parental authority that the parents themselves [were] unable to preserve.”<sup>50</sup> Be-

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45. UTAH CODE ANN. § 76-7-304(2) (1974). (emphasis added).

46. 450 U.S. at 406 n.12, (citing 443 U.S. at 626) (emphasis added).

47. 450 U.S. at 409.

48. *Id.* at 411.

49. *Id.* at 441.

50. *Id.* at 448.

sides attempting to alter familial interaction, the statute may also be too great an intrusion into the family since it mandates lines of communication which are not there.<sup>51</sup> Justice Marshall accurately pointed out that “[r]ather than respecting the private realm of family life, the statute invokes the criminal machinery of the state in an attempt to influence the interactions within the family.”<sup>52</sup> When lines of family communication break down, it should be outside the scope of state interest to *force* speech among family members. This result is consistent with *Wooley v. Maynard*<sup>53</sup> where the Court suggested the first and fourteenth amendments protect the individual’s freedom of thought, which includes the right to *refrain* from speaking. The Utah statute in *H. L.* required physicians subject to state regulation and licensing to notify their minor patients’ parents. The state has the right to mandate a doctor comply with its notification requirement; this does not infringe upon the doctor’s constitutional rights. However, in Justice Marshall’s view, the constitution protects a child — as a *private* person — from being forced to communicate to her parents something she believes will be detrimental to her well being.

The Utah statute was found constitutional because it was narrowly drawn and required notification only to parents of an *immature, dependent* minor. It would seem that states wishing to structure a constitutional notification provision could do so by following the narrow parameters of the Utah statute.

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51. See also Miami Herald, Jan. 27, 1982, at 15A, cols. 4-6: “If the draft of the regulation (now in committee) is finalized HHS [Department of Health and Human Services] will be able to force any family planning clinic to send a notice to the parents of a minor seeking prescription birth control. In effect parents would be getting a report . . . that their children are sexually active. [W]ould the threat of clinic-as-informer result in more teenage pregnancies? Teenagers who don’t talk with their parents can either avoid the clinic or lie about their identity. [Parents] . . . want to be advised [but] whatever our anxieties, the Federal Government cannot mandate family communication.” *Id.*

52. 450 U.S. at 454.

53. 430 U.S. 705, 714 (1977). See also, Note, *The Spousal Notice and Consultation Requirement: A New Approach to State Regulation of Abortion*, 6 NOVA L.J. 457 (1982).

#### IV. How Long Do Ladies in Waiting Have to Wait?

The question of waiting periods as constituting an undue burden on the right to an abortion, for both adults and minors, has left the courts divided. In a recent case, *Planned Parenthood of Kansas City v. Ashcroft*,<sup>54</sup> the United States Court of Appeals for the Eighth Circuit found a forty-eight hour waiting period unconstitutionally long. The court based its decision on the fact that the waiting period necessitated two separate visits to the clinic or physician with concomitant additional time and expense. In addition, the court stated waiting periods increase "delay, and delay increases the risk to the woman."<sup>55</sup>

In contrast, in *Akron Center for Reproductive Health v. City of Akron*,<sup>56</sup> the district court found that even though a twenty-four hour waiting period made the abortion decision more expensive, the increased cost was not so great that it would burden a woman's *decision* to have an abortion. As a result, the court did not invoke strict scrutiny, nor require a compelling state interest. The waiting period requirement in *Akron*, for example, heavily burdens those girls who cannot afford two trips to a physician or to a clinic which may be far from home, and who can ill afford to lose time from school or their job. Additionally, there is a burdensome physical and emotional cost to the patient who must wait those twenty-four hours after consulting with her physician.<sup>57</sup> Other courts have suggested that these burdens do require strict scrutiny.<sup>58</sup>

#### V. *Scheinberg v. Smith*

The effect of many of these precedential decisions was weighed

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54. 655 F.2d 848 (8th Cir. 1981).

55. *Id.* at 866. *See also* *Women's Medical Center of Providence Inc. v. Robert*, 50 U.S.L.W. 2483 (Jan. 15, 1982). (Twenty-four hour waiting period held invalid).

56. 479 F. Supp. 1172 (N.D. Ohio 1979).

57. 627 F.2d 785.

58. *See also* *Wolfe v. Schroering*, 541 F.2d 523, 526 (6th Cir. 1976). Similar waiting periods occurred in *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980), wherein the court stated that "these women will be subject to . . . inconvenience, expense, and additional anguish attending this rigid requirement." *Id.* at 785. As a result, the twenty-four hour waiting period was stricken.

heavily in the fifth circuit's construction of the *Medical Practice Act*,<sup>59</sup> as enacted by the Florida legislature in 1979. The act included several subsections regulating abortion conditions for both married and unmarried women. Subsection (4)(a) delineated state requirements for notification to and consent of parents of minors who wished to obtain abortions.<sup>60</sup> The statute provided that in order for an unmarried minor to be permitted an abortion, she must have "either the written informed consent of a parent, custodian, or legal guardian or an order from the Circuit Court."<sup>61</sup> Failure to comply with these provisions exposed physicians performing abortions to state criminal penalties: "any person who willfully performs, or participates in, the termination of a pregnancy in violation of the requirements of this section is guilty of a felony. . . ."<sup>62</sup>

Although the constitutionality of notice and consent requirements had been addressed by the United States Supreme Court in *Bellotti v. Baird*,<sup>63</sup> the Florida court had not addressed the constitutionality of its statute until subsection (4)(a) was challenged by Dr. Mark D.

59. FLA. STAT. § 390.001(4) (1981).

60. *Id.* This section reads:

(4) Prior to terminating a pregnancy, the physician shall obtain the written informed consent of the pregnant woman or, in the case of a mental incompetent, the written consent of her court-appointed guardian.

(a) If the pregnant woman is under 18 years of age and unmarried, in addition to her written request, the physician shall obtain the written informed consent of a parent, custodian, or legal guardian of such unmarried minor, or the physician may rely on an order of the circuit court, on petition of the pregnant unmarried minor or another person on her behalf, authorizing, for good cause shown, such termination of pregnancy without the written consent of her parent, custodian, or legal guardian. The cause may be based on a showing that the minor is sufficiently mature to give an informed consent to the procedure, or based on the fact that a parent unreasonably withheld consent by her parent, custodian, or legal guardian, or based on the minor's fear of physical or emotional abuse if her parent, custodian, or legal guardian were requested to consent, or based upon any other good cause shown. At its discretion, the court may enter its order ex parte. The court shall determine the best interest of the minor and enter its order in accordance with such determination.

61. 482 F. Supp. at 532.

62. FLA. STAT. § 390.001(10) (1981).

63. 443 U.S. 622.

Scheinberg in a class action suit on behalf of “all unmarried minor pregnant women desiring to terminate their pregnancies,”<sup>64</sup> and on behalf of their physicians. The United States District Court for the Southern District of Florida found that subsection (4)(a) unconstitutionally infringed upon a minor’s right to privacy in her abortion decision.<sup>65</sup>

The Fifth Circuit Court of Appeals affirmed the district court in striking down subsection (4)(a). The appellate court found the issue had been resolved by *Bellotti* and held that although judicial authorization or parental consent *may be required* by a state before it permits an unmarried minor to obtain an abortion, a judge *must* allow the abortion if the minor “satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own.”<sup>66</sup> Even if the minor fails to demonstrate this maturity, the court *must* permit the abortion if it decides this measure would be in the best interests of the minor.<sup>67</sup> The appellate court found subsection (4)(a) “mandates that a Florida court base its authorization of a minor’s abortion on what it finds to be the best interests of the minor, without regard to the minor’s maturity. Thus the provision runs directly afoul of *Bellotti*. . . .”<sup>68</sup> The unconstitutional section, which placed the entire decision upon the judge where parental consent was not obtained, ignored the emancipation, intelligence or ability of the minor to understand and cope with the consequences of her situation. Because the language of the subsection was deemed mandatory (“the court *shall* determine the best interest of the minor and enter its order in accordance with such determination”)<sup>69</sup> the subsection failed. Had the statute required judicial determination of the minor’s best interests only in cases of immature, unemancipated minors, the statute may have escaped the fatal flaw of being overinclusive.

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64. 482 F. Supp. at 532 n.7.

65. *Id.* at 540.

66. 443 U.S. at 647.

67. *Id.* at 647-48.

68. 482 F. Supp. at 532.

69. FLA. STAT. § 390.001(4)(a) (1981).

## Conclusion

The abortion cases demonstrate the still evolving constitutionally recognized right of privacy. The middle line drawn by courts protects certain values considered basic to constitutional rights. Within this framework, judicial decisions have recognized that unwanted teenage pregnancies threaten family and social stability.

Since the decision to have an abortion is primarily one of medical concern<sup>70</sup> and personal morality, the courts and legislatures should refrain from imposing moral judgments on, and impediments to, the exercise of this private, personal decision. The state's deference to familial privacy is a consideration weighty enough to overcome any interest the state might have in trying to enforce a parental veto over the minor's abortion decision. Minors, as well as adults, should have the right to control the reproductive processes of their own bodies. If a minor, in consultation with a physician, makes the decision to abort within the "safe" first trimester, the state should not interfere.

*Judith L. Weinstein*

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70. *Colautti v. Franklin*, 439 U.S. 379, 387 (1979).



## The Florida Land Trust: An Overview

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In 1963 the Florida legislature, in an effort to stimulate the productivity, growth, and development of Florida real estate, sanctioned use of the land trust and enacted chapter 63-468, Laws of Florida, now section 689.071.<sup>1</sup> The essential purpose of a land trust is to facilitate

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1. 1963 Fla. Laws 998; FLA. STAT. § 689.071 (1981) states:

Section 1. Every conveyance, deed, mortgage, lease, assignment or other instrument heretofore or hereafter made, hereinafter referred to as the "recorded instrument," transferring any interests in real property in this State including but not limited to leasehold and mortgage interests to any person, corporation, bank, or trust company, qualified to act as fiduciary in this State, in which said recorded instrument said person, corporation, bank, or trust company is designated "Trustee," or, "As Trustee," without therein naming the beneficiaries of such trust, whether or not reference is made in said recorded instrument to any separate collateral unrecorded declarations or agreements, shall be effective to vest and is hereby declared to have vested in such trustee full rights of ownership over said real property or interest therein, with full power and authority as granted and provided in said recorded instrument to deal in and with said property or interest therein or any part thereof provided, said recorded instrument shall confer on the trustee the power and authority either to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the real property described in said recorded instrument.

Section 2. Any grantee, mortgagee, lessee, transferee, assignee, or person obtaining satisfactions, releases, or otherwise in any way dealing with the trustees with respect to said real properties held in trust under said recorded instrument, as hereinabove provided for, shall not be obligated to inquire into the identification of status of any named or unnamed beneficiaries, or their heirs or assigns to whom a trustee may be accountable under the terms of said recorded instrument, or under any unrecorded separate declarations or agreements collateral to said recorded instrument whether or not such declarations or agreements are referred to therein, nor to inquire into or ascertain the authority of such trustee to act within and exercise the powers granted under said recorded instrument, nor to inquire into the adequacy or disposition of any consideration, if any is paid or delivered to such trustee in connection with any interest so acquired from such trustee, nor to inquire into any of the provisions of any said unrecorded declarations or agreements.

and provide a flexible and practical method for the acquisition, financing, and disposition of real estate.

Illinois appears to have been the first state to have recognized and developed the land trust.<sup>2</sup> By statute they have defined a land trust as:

[A]ny arrangement under which the title, both legal and equitable, to real property, is held by a trustee and the interest of the beneficiary is personal property and under which the beneficiary, or any person designated in writing by the beneficiary, has the exclusive power to direct or control the trustee in dealing with the title and the exclusive control of the management, operation, renting and selling of the trust property together with the exclusive right to the earnings, avails and proceeds of said property is in the beneficiary of the trust.<sup>3</sup>

Simply stated, a land trust is an arrangement under which both legal and equitable title is held by a trustee. At the same time, all of

Section 3. All persons dealing with the trustee under said recorded instrument as hereinabove provided shall take any interest transferred by the trustee thereunder within the power and authority as granted and provided therein, free and clear of the claims of all the named or unnamed beneficiaries of such trust, and of any unrecorded declarations or agreements collateral thereto whether referred to in said recorded instrument or not, and of anyone claiming by, through or under said beneficiaries, including and without limiting the foregoing to any claim arising out of any dower or curtesy interest of the spouse of any beneficiary thereof; provided, nothing herein contained shall prevent a beneficiary of any said unrecorded collateral declarations or agreements from enforcing the terms thereof against the trustee.

Section 4. In all cases where said recorded instrument, as hereinabove provided, contains a provision defining and declaring the interests of beneficiaries thereunder to be personal property only, such provision shall be controlling for all purposes where such determination shall become an issue under the laws or in the courts of this State.

Section 5. This act is remedial in nature and shall be given a liberal interpretation to effectuate the intent and purposes hereinabove expressed, and shall take effect immediately upon becoming a law.

Section 6. This act shall not apply to any deed, mortgage or other instrument to which section 689.07 Florida Statutes, applies.

2. W.B. GARRETT, LAND TRUSTS (1971).
3. ILL. REV. STAT. ch. 29, § 8.31 (1969).

the rights, interests, powers and conveniences of fee ownership are retained and exercised by the beneficiary. The beneficiary retains a personal property interest.<sup>4</sup> Thus, even with both legal and equitable title vested in the trustee, most of the usual and necessary attributes of real estate fee ownership are retained by the beneficiary under the trust agreement. The only attribute generally ascribed to the trustee is "that relating to title, upon which third parties may rely in transactions where title to the real estate is of primary importance."<sup>5</sup>

The land trust is a modified form of the conventional trust agreement. However, the Florida Land Trust Statute section 689.071<sup>6</sup> should not be confused with section 689.07, Florida Statutes, which allows recording of deeds of real estate conveyances in the name of a trustee. Section 689.07 provides that grantors will be deemed to grant a fee simple estate to a grantee, if the words "trustee"/"as trustee" are added to the name of the grantee, provided no named beneficiaries or apparent trust purposes are set forth in the instrument of conveyance.<sup>7</sup> The section attempts to simplify conveyances of real property made to a trustee as grantee, as if no trustee reference was used.<sup>8</sup> Sections 689.07 and 689.071 are mutually exclusive provisions. Subsection 6 of section 689.071 expressly provides that the Land Trust Act does not apply to any transactions to which section 689.07 applies.<sup>9</sup>

As stated, the land trust is a modified form of the conventional trust agreement. It does differ, however, from the typical trust arrangement. In a land trust, the res is limited to "an arrangement where the trustee holds title to the property and all active managerial and administrative powers are reserved to the beneficiaries. The trustee's *only duty* is to deal with the trust when and as directed by the beneficiaries, and to convey the property . . . when the trust terminates."<sup>10</sup>

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4. *Duncanson v. Lill*, 322 Ill. 528, 153 N.E. 618 (1926), *Ferraro v. Parker*, 229 So. 2d 621 (Fla. 2d Dist. Ct. App. 1969); *Goldman v. Mandell*, 403 So. 2d 511 (Fla. 5th Dist. Ct. App. 1981).

5. *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 488, 389 N.E.2d 540, 543 (1979).

6. FLA. STAT. § 689.071 (1981).

7. *Id.* § 689.07 (1981).

8. *Id.*

9. *Id.* § 689.071(6) (1981).

10. H.W. KENOE, *KENOE ON LAND TRUSTS* 1-5 (1978) (emphasis added).

A trust of this nature must, in Florida, meet the same substantive legal requirements that a conventional trust arrangement must satisfy.<sup>11</sup> "The fact that a trust has a corpus consisting of land does not change the necessary elements requisite to a valid trust."<sup>12</sup>

Under the Florida Land Trust Act, the trustee is vested with the power to deal with all facets of property ownership.<sup>13</sup> It is to be noted the Act *only* applies if the recorded instrument, transferring any title and interest to the trustee, specifically grants "the power and authority either to protect, conserve and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the real property described in the recorded instrument."<sup>14</sup>

In the states which have recognized and authorized the use of land trusts<sup>15</sup> the device's popularity has been based upon its practical application for those dealing in real estate. This note provides an overview of the basic advantages and attributes that may be realized through the use of a Florida land trust.

### Comment on the Statute of Uses

It is apparent that the validity of the land trust depends upon the effect and construction given the Statute of Uses. Under Florida law this statute will execute an inactive, or passive, trust of real property, placing both legal and equitable title in the beneficiary.<sup>16</sup> A passive trust is one in which the trustee has no active duties to perform.<sup>17</sup> Commentators have questioned whether classification of a trust as passive, or a determination that Florida's Statute of Uses applies to *personalty*, could invalidate the design of the land trust and extinguish the trustee's

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11. FLA. STAT. § 737.101 (1981).

12. D.R. LOWELL, FLORIDA LAW OF TRUSTS 266 (2d ed. 1976).

13. FLA. STAT. § 689.071 (1981).

14. *Id.*

15. Other states which have expressly recognized and/or adopted similar land trust statutes are: Hawaii, HAWAII REV. STAT. ch. 558 (Supp. 1979); Indiana, IND. CODE ANN. § 30-4-2-13 (Burns 1971); North Dakota, N.D. CENT. CODE § 59-03-02 (1967); and Virginia, VA. CODE ANN. § 55-17.1 (Supp. 1964).

16. FLA. STAT. § 689.09 (1981). McKillop, *The Illinois Land Trust in Florida*, 13 U. FLA. L. REV. 173 (1960).

17. *Elvins v. Seestedt*, 141 Fla. 266, 193 So. 54 (1940).

title.<sup>18</sup> To avoid this result, duties and powers of the trustee must be sufficiently active to prevent the operation of the Statute of Uses. Both Professor Scott<sup>19</sup> and the Restatement of Trusts, Second,<sup>20</sup> express the view that “where a trust is created by the terms of which the trustee is directed to convey the land to the beneficiary and no other active duties are imposed upon him . . . the weight of authority is . . . that the direction to convey is sufficient to make it an active trust.”<sup>21</sup>

In considering the Florida Land Trust Statute, Florida’s courts have not yet clearly articulated whether the Statute of Uses will apply both to trusts of land and trusts of personal property. Commentators, such as Professor Boyer, suggest that the Florida Land Trust Act “circumvents the statute”<sup>22</sup> by permitting the trust instrument to declare that a beneficiary’s interests are personal property.<sup>23</sup> It has been asserted that since historically the Statute of Uses was never applied to personalty, and since Florida has no statute subjecting personalty to the statute, trusts in personalty should not be affected by the statute.<sup>24</sup>

The Illinois courts have held the Statute of Uses inapplicable to land trusts due to the active duties imposed upon the trustee and the fact that beneficiaries’ interest is personalty.<sup>25</sup> The leading Florida case on this issue is *Ferraro v. Parker*.<sup>26</sup> In *Ferraro*, the Second District Court of Appeal indicated that Florida would apparently follow Illinois<sup>27</sup> in finding and construing such trusts to be active rather than passive.

18. McKillop, *supra* note 16.

19. A. SCOTT, THE LAW OF TRUSTS § 69.1 (3d ed. 1967).

20. RESTATEMENT (SECOND) OF TRUSTS § 69 (1959).

21. *Id.*

22. R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS 178 (1980).

23. FLA. STAT. § 689.071(4) (1981).

24. D.H. REDFERN, *Wills* § 14.15 (4th ed. 1973). For an excellent overview on the history of the Statute of Uses in Florida, see Wilson, *The Florida Statute of Uses*, 21 FLA. L.J. 131 (1947).

25. *Chicago Title & Trust Co. v. Mercantile Bank*, 300 Ill. App. 329, 20 N.E.2d 992 (1st Dist. 1939); *Breen v. Breen*, 411 Ill. 206, 103 N.E.2d 625 (1952).

26. *Ferraro v. Parker*, 229 So. 2d 621 (Fla. 2d Dist. Ct. App. 1969); *Goldman v. Mandell*, 403 So. 2d 511 (Fla. 5th Dist. Ct. App. 1981).

27. McKillop, *supra* note 16.

## Advantages and Attributes of Land Trusts

The single most important aspect of the use of a land trust is that it converts the beneficiaries' interest from one in real estate to one of personal property in the possession, control, rents, issues and proceeds, etc. of the real estate,<sup>28</sup> which are attributes of personal property. It now seems Florida recognizes, as long as the instrument of conveyance to the trustee so declares, that the beneficiaries' interests are personalty.<sup>29</sup> This division of the incidents of ownership of real estate is the quint-essential factor contributing to the ability of a land trust to offer advantages not available in other devices or arrangements suitable for the holding of title to real estate.

### *Nondisclosure or Privacy of Ownership*

Under the Florida Land Trust Act, the conveyance of property to the trustee is effective to place in that named trustee full rights of ownership. The recorded trust deed need only disclose the name of the trustee and not beneficiaries' names, nor the names of those having actual authority or power of direction over the property's management and control. The trustee may disclose beneficiaries' identities when authorized to do so by the beneficiaries or by legal process.<sup>30</sup>

There are many reasons why owners desire anonymity from the public record.<sup>31</sup> Developers' secretly assembling large parcels of acreage for development are a good example. The protection that privacy affords in some circumstances eases developers' negotiating processes during acquisition thus minimizing unreasonable or unrealistic demands sellers might otherwise make. In addition, "[the] land owner may simply not wish to disclose his ownership for the wholly proper reason that he wants his real estate ownership to be private . . ."<sup>32</sup> just as his holdings in other investment portfolios are private.

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28. O. CAPLAN, *THE LAW OF LAND TRUSTS* 14 (3d ed. 1960).

29. FLA. STAT. § 689.071(4); *Ferraro v. Parker*, 229 So. 2d 621 (Fla. 2d Dist. Ct. App. 1969).

30. See Tominberg, *Land Trust Secrecy—Perhaps A Secret No More*, 23 DEPAUL L. REV. 509 (1973).

31. G. Bogert, *THE LAW OF TRUSTS AND TRUSTEES* § 250 (Rev. 2d ed. 1977).

32. W.B. GARRETT, *supra* note 2, at 6.

### *Judgments and Creditors Rights*

A judgment against the beneficiary of a land trust does not create a lien against the property held in a land trust.<sup>33</sup> It is essential to the utility and effective administration of the land trust that this be the result. Otherwise, a judgment against one of a number of beneficiaries could restrict and impede the operation of a trust property and frustrate its objectives.<sup>34</sup>

In Florida, a court judgment awarding money damages to an unsecured creditor must be enforced by an execution.<sup>35</sup> Such judgments however become a lien only on real property<sup>36</sup> and such other property upon which there may be a levy of execution.<sup>37</sup> By statute this property is limited to "lands and tenements, goods and chattels, equities of redemption in real and personal property. . . ."<sup>38</sup> Since a beneficiary in a land trust has no legal or equitable interest in the trust property, but only an interest declared as personalty, his interest would not be subject to either a judgment lien<sup>39</sup> or an execution lien.<sup>40</sup> The beneficial

33. *Favata v. Favata*, 74 Ill. App. 3d 979, 394 N.E.2d 443 (1979); *Chicago Title & Trust Co. v. Mercantile Trust & Savings Bank*, 300 Ill. App. 329, 20 N.E.2d 992 (1939).

34. H.W. KENOE, *supra* note 10, § 3.2.

35. H. TRAWICK, *TRAWICK'S FLORIDA PRACTICE AND PROCEDURE* 415 (1980); CONTINUING LEGAL EDUCATION COMMITTEE, THE FLA. BAR, *CREDITORS' AND DEBTORS' RIGHTS IN FLORIDA* 210 (1979).

36. FLA. STAT. § 55.10(1) (1981); *Smith v. Venus Condominium Ass'n Inc.*, 352 So. 2d 1169 (Fla. 1977).

37. "A levy of execution has been defined as an absolute appropriation in law of the property levied onto the payment of a judgment debt." 24 FLA. JUR. 2d *Creditors' Rights* § 54 (1981) (citing *Early & Daniel Co. v. Brown*, 22 Fla. Supp. 155 (1961)). "In practice, levy usually involves physical seizure of designated property by the sheriff, inventory and storage of that property and notice culminating in its sale for the benefit of creditors." CONTINUING LEGAL EDUCATION COMMITTEE, THE FLA. BAR, *supra* note 34, at 212. *Evens v. Gainesville Nat'l Bank*, 80 Fla. 84, 85 So. 659 (1920); *Willard v. Petruska*, 402 F.2d 756 (5th Cir. 1968).

38. FLA. STAT. § 56.061 (1981).

39. *Id.* § 55.10 (1981).

40. *Id.* § 56.061 (1981). As to tangible personal property, Florida Statutes section 56.061 may not be considered all inclusive:

Florida courts have created and enforced liens on personal property of judgment debtors when a writ of execution is delivered for docketing to the sheriff of the county in which the personal property is located. As a

interest in a land trust, is more in the nature of an intangible interest or chose in action;<sup>41</sup> these trusts, are therefore "not proper subjects of levy and sale under execution unless made so by statute. . . ."<sup>42</sup>

The fact that a beneficial interest in a Florida land trust is not subject to levy and sale under writ of execution does not suggest that a beneficiary's interest is completely protected from creditors and third parties. Since the interest of a beneficiary in a land trust cannot be reached by execution at law, it may be possible to bring a creditor's bill in chancery.<sup>43</sup> A creditor's bill is an action brought by a creditor who sues in equity for the purpose of reaching property that cannot be reached by execution at law.<sup>44</sup> Whether the interest of a beneficiary in a land trust may be reached by a creditor's suit has not yet been answered in Florida. The Illinois courts though have clearly made available to a judgment creditor the remedy of a creditor's bill.<sup>45</sup>

Another equitable remedy potentially available to a judgment creditor is a proceedings supplementary<sup>46</sup> which is also based on a valid unsatisfied execution. A judgment granting equitable relief to a creditor, through either a creditor's suit or proceedings supplementary, may order the sale of the beneficiaries' property interest with proceeds distributed to satisfy execution of the judgment or utilize any other equi-

result, the lien is created and perfected upon delivery of the writ of execution to the sheriff. The lien attaches to all personal property of the judgment debtor in the county in which the unit is docketed. . . .

*In re Cone*, 11 Bankr. 925, 927 (1981), *In re Vero Cooling & Heating, Inc.*, 11 Bankr. 359 (1981); *Love v. Williams*, 4 Fla. 126 (1850); *Flagship State Bank of Jacksonville v. Carantzas*, 352 So. 2d 1259 (Fla. Dist. Ct. App. 1978).

41. FLA. STAT. § 679.10 (1981); *Levine v. Pascal*, 94 Ill. App. 2d 43, 236 N.E.2d 425 (1968).

42. 24 FLA. JUR. 2d *Creditors' Rights* § 14 (1981); *Peninsula State Bank v. United States*, 211 So. 2d 3 (Fla. 1968).

43. FLA. STAT. § 68.05 (1981).

44. *B.L.E. Realty Corp. v. Mary Williams Co.*, 100 Fla. 254, 134 So. 47 (1931); 13 FLA. JUR. 2d *Creditors' Rights* § 281 (1979), H. TRAWICK, *supra* note 34, § 27-10.

45. ILL. REV. STAT. ch. 22, § 49 (1980); *Levine v. Pascal*, 94 Ill. App. 2d 43, 236 N.E.2d 425 (1968); *Chicago Federal Savings & Loan Ass'n v. Cacciatore*, 25 Ill. 2d 535, 185 N.E.2d 670 (1962); *Garvey v. Parrosh*, 84 Ill. App. 3d 578, 405 N.E.2d 1105 (1980).

46. FLA. STAT. § 56.29 (1981); H. TRAWICK, *supra* note 34, § 27-9; FLA. R. SUMM. P. 7.220.



table remedies available to enforce its judgment.<sup>47</sup>

Just exactly what equitable remedy or relief will be afforded a judgment creditor against a Florida land trust beneficiary remains unclear. The Illinois statute on supplementary proceedings<sup>48</sup> provides:

(2) When assets . . . of the judgment debtor . . . are discovered, the court may, by appropriate order, judgment or decree:

(e) Compel any person cited to execute an assignment of any chose in action or a conveyance of title to real or personal property, in the same manner and to the same extent as a court of chancery could do in any proceeding by a judgment creditor to enforce payment of a judgment or in aid of execution.<sup>49</sup>

This section clearly authorizes institution of proceedings which may result in a court order directing sale of the beneficiary's interest in the land trust with application of proceeds to the satisfaction of the judgment in the same manner as the relief afforded under a creditor's bill.

The Florida courts have not yet spoken to the issue of whether proceedings supplementary, with its concomitant remedies, are applicable to a creditor's judgment against a land trust beneficiary. Certainly, the courts may follow Illinois in holding such remedy available. Following Illinois provisions in this area, the Florida legislature could enact or amend existing law to provide for the execution by proceedings supplementary of a chose in action, title to personal property, or specifically the beneficial interest in a Florida land trust.

### *Elective Share and Spousal Rights*

In Florida there is no longer dower or curtesy estates afforded the surviving spouse in the decedent's real or personal property.<sup>50</sup> The new Florida Probate Code affords the surviving spouse of a decedent domi-

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47. H. TRAWICK, *supra* note 34, § 27-10 (1980).

48. ILL. REV. STAT. ch. 110, § 73 (1980).

49. *Id.* § 73(2)(e).

50. 1973 Fla. Laws ch. 73-107 abolished the right of dower in property transferred prior to death; Florida Statutes section 732.111 abolished dower and curtesy in Florida.

ciled in Florida, an elective share<sup>51</sup> equal to thirty percent<sup>52</sup> of the value of “*all property* of the decedent.”<sup>53</sup> This includes both the real and personal property subject to administration; real estate located outside Florida is not included.<sup>54</sup> The percentage of elective allowance is computed by the court after deducting from the estate assets valid claims paid or payable from the estate and “all mortgages, liens, or security interests thereon.”<sup>55</sup> Since the property subject to the elective share provisions<sup>56</sup> includes personal property<sup>57</sup> two important issues concerning land trusts emerge. The first question is whether a spouse must concur in transactions involving land trust property in order to release any inchoate dower or elective share rights to which the trust property may be subject. The second question is whether a surviving spouse may be defrauded or deprived an elective share when property, otherwise includable in the probate estate, is placed in a land trust.

The Florida Land Trust Act,<sup>58</sup> provides that:

All persons dealing with the trustee . . . shall take any interest transferred by the trustee . . . free and clear of the claims of all the named beneficiaries . . . or . . . of anyone claiming by, through or under said beneficiaries . . . including . . . any claim arising out of any dower or curtesy interest of the spouse of any beneficiary. . . .<sup>59</sup>

As a result of this provision, “beneficial interests in land trusts may be

51. FLA. STAT. § 732.201-.213 (1981).

52. FLA. STAT. § 732.207 (1981).

53. *Id.* § 732.205 (1981).

54. *Id.*

55. *Id.* § 732.207 (1981).

56. *Id.* § 732.206 (1981).

57. *Farington v. Richardson*, 153 Fla. 907, 16 So. 2d 158 (1944); FLA. STAT. § 732.206 (1981); *Libberton v. Libberton*, 240 So. 2d 336 (Fla. 4th Dist. Ct. App. 1970).

58. FLA. STAT. § 689.071(3) (1981).

59. Florida abolished dower and curtesy rights with the adoption of the new Florida Probate Code, effective January 1, 1976 which implemented the elective share provisions in its place. Since the Florida Land Trust Act was adopted in 1963, prior to the adoption of the new probate code, references in the text of the statute should equally apply to claims arising out of a surviving spouse's elective share rights. If in fact this is the intent of the legislature, it is suggested that the text of the Land Trust Act be amended accordingly.

freely transferred and dealt with without the concurrence of the spouse of the beneficiary."<sup>60</sup> This aspect will clearly aid the efficient and "unimpeded transactional arrangements of real estate interests particularly by those who are dealing actively in such properties."<sup>61</sup>

With Florida's elimination of dower and curtesy came elimination too of those inchoate characteristics regarding elective share provisions.<sup>62</sup> Since a surviving spouse of a post-January 1, 1976 decedent, no longer has any inchoate interest in the deceased spouse's real and personal estate, only the beneficiary is required for transactions involving his interests. Thus, the surviving spouse need not concur in the release of the beneficiary's personal property interests in the Florida land trust.

Another advantage is that the settler of a land trust who retains the beneficial interest in the property may provide for the interest's devolution on his death. This may be done in a variety of ways, e.g., to designated parties as joint tenants with right of survivorship, as life estates with remainders over, etc. Thus, the beneficial interest passes *directly* to the named party or remainderman by operation of the trust agreement and is not subject to probate.

Where the trust agreement does not so provide, or the beneficial interest has not been properly designated under appropriate testamentary disposition, the beneficial interest is subject to administration as part of the probate estate. In that case the beneficial interest, passing according to the decedent's testamentary plan, is subject to inclusion in computation of the elective share.<sup>63</sup> But, where the beneficial interest passes by operation of the trust agreement, the interest will not be included in computation of elective share property.<sup>64</sup> This raises the question of whether in such instances spousal rights can be completely disregarded or whether the land trust can be used to defraud a surviving spouse of her elective share rights.

In *Stoxen v. Stoxen*,<sup>65</sup> the Illinois Appellate Court held that dower rights do not extend to the beneficiary's personal property interest in a

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60. H.W. KENOE, *supra* note 10, at 3-8.

61. *Id.*

62. FLA. STAT. § 732.201-.213 (1981).

63. FLA. STAT. § 732.206 (1981).

64. *Id.*, CONTINUING LEGAL EDUCATION COMMITTEE, THE FLA. BAR, BASIC PRACTICE UNDER FLORIDA PROBATE CODE 263 (2d ed. 1981).

65. 6 Ill. App. 3d 445, 285 N.E.2d 198 (1972).

land trust. Nevertheless, in *Dubin v. Wise*,<sup>66</sup> a beneficiary's conveyance of his interest in a land trust to his son for the purpose of depleting his estate in violation of a prenuptial agreement, was set aside.

Florida's courts have not yet specifically answered this question. As discussed, there is no longer an inchoate right of dower, but rather an elective share in property "that is subject to administration."<sup>67</sup> It would seem, therefore, that if a bona fide land trust is created a spouse may be able to dispose of his property in almost any manner he chooses. An Illinois case is illustrative. In *Matter of Estate of Nemecek*<sup>68</sup> both the surviving wife and administrator of the decedent's estate brought an action to recover property (her marital home) which had been conveyed by the decedent into an Illinois land trust. The trust instrument provided that upon the decedent's death the trustee was to sell the property and distribute the proceeds to the decedent's nephew and sister-in-law. The surviving wife contended the conveyance constituted an invalid testamentary disposition, was illusory, and amounted to a fraud on her marital rights. The Illinois Appellate Court affirmed the lower court grant of the defendant trustee's motion to dismiss. The appellate panel stated that, under Illinois law:

[A] property owner has an absolute right to dispose of his property during his lifetime in any manner he sees fit. He may convey his property to another even though the transfer may be for the sole purpose of minimizing or defeating the statutory marital interest of his spouse . . . . This type of conveyance is not subject to defeasance by the surviving spouse *unless* it is a sham and is colorable or illusory and tantamount to a fraud.<sup>69</sup>

In stating this position the *Nemecek* court relied on *Johnson v. La Grange State Bank*.<sup>70</sup> In *Johnson*, the decedent had placed the majority of her assets in an inter vivos revocable trust. She made herself trustee and named a bank as successor trustee. Upon her death distribution of the trust res was to be made to her mother, sister, niece, and

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66. 41 Ill. App. 3d 132, 354 N.E.2d 403 (1976).

67. FLA. STAT. § 732.206 (1981).

68. *In re Estate of Nemecek*, 85 Ill. App. 3d 881, 407 N.E.2d 655 (1980).

69. *Id.* at 656.

70. *Johnson v. La Grange State Bank*, 73 Ill. 2d 342, 383 N.E.2d 185 (1978).

various charities. Mr. Johnson, the surviving spouse whose net worth was in excess of \$2,000,000, brought an action to set aside the trust contending he, as surviving spouse, was deprived of his marital rights in the trust property. At issue was whether the assets of such an inter vivos trust could be "insulated" from the testator's probate estate"<sup>71</sup> insofar as the surviving spouse was concerned. The Illinois Supreme Court concluded that:

"[A]n inter vivos transfer of property is valid as against the marital rights of the surviving spouse unless the transaction is tantamount to a fraud as manifested by the absence of donative intent to make a conveyance of a present interest in the property conveyed. Without such intent the transfer would simply be a sham or illusory transfer. . . ."<sup>72</sup>

In *Bee Branch Cattle Company v. Koon*,<sup>73</sup> the settlor established inter vivos trusts for the financial well-being of his niece and nephews. The trust res consisted of shares of stock in a corporation in which the settlor had been the primary shareholder. After establishing the trusts, the settlor became incompetent. His spouse, appointed guardian and curator of his estate, brought an action to cancel the trusts arguing the trusts constituted a fraud upon her inchoate dower rights in the property. The Florida Supreme Court, referring to their decision in *Williams v. Collier*,<sup>74</sup> sustained the trusts and noted that the spouse would be amply provided for by her dower share in other property of the settlor at his death. The court contrasted their decision to the opposite result reached in *Smith v. Hines*<sup>75</sup> where it appeared "that the husband had designed by subterfuge to deprive his wife of her dower rights when she was not properly provided for from his property."<sup>76</sup>

In *In re the Estate of Herron*,<sup>77</sup> a surviving spouse elected to as-

71. *Id.* at 190.

72. *Id.* at 194.

73. 44 So. 2d 684 (Fla. 1950).

74. 120 Fla. 248, 158 So. 815 (1935). See also *Lane v. Palmer First Nat'l Bank & Trust*, 213 So. 2d 301 (Fla. 2d Dist. Ct. App. 1968). Annot. 39 A.L.R. 3d 14 (1971).

75. *Smith v. Hines*, 10 Fla. 258 (1863).

76. 44 So. 2d at 690.

77. 236 So. 2d 563 (Fla. 4th Dist. Ct. App. 1970).

sert dower rights in the proceeds of certain life insurance policies. The policies constituted the res of an inter vivos trust created by the decedent during his life. The surviving spouse contended that the trust was illusory or testamentary and therefore invalid. The Fourth District Court of Appeal held the trust proceeds were not subject to the spouse's right of dower. In *Herron*, the court noted that the testator's intention to create a trust was clearly expressed and under such circumstances "the manifest intention of the settlor should control as against a contention that the trust is illusory."<sup>78</sup>

As articulated in *Herron*, concern in illusory transfer cases focuses on the sufficiency, or bona fides, of the *settlor's intention* to create a trust. Absent illusory<sup>79</sup> or fraudulent transfers,<sup>80</sup> or where conveyance of property was intended merely as a sham scheme to retain settlor's ownership, a spouse may dispose of his personal property as he sees fit. In the absence of fraud, then an inter vivos or land trust may be used to legitimately defeat a surviving spouse of dower or elective share rights in the property conveyed.<sup>81</sup>

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78. *Id.* at 567.

79. An illusory trust is a trust arrangement which takes the form of a trust, but because of the powers retained, has no real substance and in reality is not a completed trust. *In re Estate of Herron*, 237 So. 2d at 566.

80. The Illinois cases on this point indicate that the intent to defraud the surviving spouse does not involve the traditional meaning of fraud. Their interpretation of the phrase is to be construed in connection with the words illusory and colorable. Where the settlor has no real intent to convey any present interest in the property, but, in fact, intends to retain complete ownership and control, there is no present donative intent and therefore amounts to a fraud on the spouse's marital rights. *In re Estate of Nemecek*, 85 Ill. App. 3d at 883, 407 N.E.2d at 656; *Johnson v. La Grange State Bank*, 73 Ill. 2d at 359, 383 N.E.2d at 193.

Another factor considered in determining whether an intent to defraud is present may be ascertained from "transfers of a disproportionate and unreasonable amount of assets in relationship to the balance of the promisor's property." *Dubin v. Wise*, 41 Ill. App. 3d 132, 354 N.E.2d 403, 409 (1976). In *Dubin*, a conveyance by the settlor of a land trust which eliminated a fractional interest which was to have gone to the surviving spouse upon his death, was set aside on the basis of fraud and an intent to subvert an antenuptial agreement. *Id.*

81. *Lesnick v. Estate of Lesnick*, 82 Ill. App. 3d 1102, 403 N.E.2d 683 (1980); *Estate of Tomaso v. Tomaso*, 82 Ill. App. 3d 286, 402 N.E.2d 702 (1980); Annot. 39 A.L.R.3d 14 (1971); *Payne v. River Forest State Bank & Trust Co.*, 81 Ill. App. 3d 1128, 401 N.E.2d 1229 (1980).

### *Multiple Title Holders*

Where title to real estate is vested in a number of parties, complexities in conveyancing may arise. Generally, upon any conveyance or transfer of interest in real property, the signatures of all involved parties must be obtained. In Florida, absentee or non-resident ownership is very common. The burdens and problems inherent in this ownership situation can be avoided by the use of a land trust. In land trusts the power to convey real estate is vested in the trustee who alone executes instruments dealing with title. In addition, shares owned by beneficiaries may be transferred through assignment of these beneficial trust interests.

### *Transferability of Interest*

The land trust beneficiary has a personal property interest<sup>82</sup> which can be transferred easily by any form of assignment adequate to transfer an interest in intangible personal property. In Florida an assignment of beneficial interest need not comply with Florida Statute § 680.06; thus the two party witness requirement is obviated and only the signature of the assignor is required to assign a beneficiary's interest.<sup>83</sup> Fractional interests may be handled with a minimum of documentation. "The assignment becomes effective when lodged with the trustee and its acceptance is indicated on a copy of the assignment."<sup>84</sup> A sale or transfer of the ownership may also be made without title examination under some circumstances. This is because the subject matter of the transfer is the beneficial personal property interest transferred independently of the legal and equitable title which remain in the trustee.<sup>85</sup>

This assignment of beneficial interest is distinguishable from a conveyance or transfer of trust property itself. Florida's Act empowers the trustee to deal completely with the property, as provided by the trust agreement itself. Third parties may rely on the trustee's exercise of those powers without notice or knowledge of the trust beneficiaries

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82. This interest could be restricted by agreement of the parties as evidenced in the trust agreement.

83. FLA. STAT. § 680.06 (1981); *Goldman v. Mandell*, 403 So. 2d 511 (Fla. 5th Dist. Ct. App. 1981).

84. H.W. KENOE, *supra* note 10, at 3-15.

85. G. BOGERT, *supra* note 31.

or of limitations placed on the trustee.

### *Partition*

A land trust also provides a convenient vehicle for multiple ownership of property. One of the most useful functions of the trust—preventing problems and difficulties between multiple beneficiaries of property—would be negated if partition proceedings could be brought by any dissident beneficiary. While the Florida courts have not yet addressed the issue of whether land trust beneficiaries may bring an action for partition, both Wisconsin and Illinois have clearly held that partition will not lie against property held in a land trust while the trust is still in effect.<sup>86</sup>

In Florida, partition is not permitted in “a tenancy in partnership so long as the partnership is not destroyed,”<sup>87</sup> and a partner’s interest is considered by statute to be personal property.<sup>88</sup> However, Florida Statutes section 64.091 does provide<sup>89</sup> that partition will lie against personal property as far as the nature of the property permits. Though the effect of this statute on partition of land trust interests is yet to be decided, it is foreseeable that given the legislative intent and nature of the Land Trust Act, Florida will follow the Illinois and Wisconsin courts. Currently the trust agreement or deed in trust should prohibit beneficiaries from bringing an action to partition the trust property.

### Transfer of Beneficial Interest Upon Death

Land trusts can be particularly effective in estate planning. At the time the trust is established, or by amendment at any time thereafter, the *beneficiary* may provide for the devolution of his interest on his death.

Many property owners hold title to real estate as joint tenants in order to pass full ownership to the survivor. The joint tenant necessarily acquires an immediate interest in this type relationship which may not

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86. *Kinser v. Bidwell*, 55 Wis. 2d 749, 201 N.W.2d 9 (1972); *Breen v. Breen*, 411 Ill. 206, 103 N.E.2d 625 (1952).

87. R. BOYER, *supra* note 22, § 20.04.

88. FLA. STAT. § 620.685 (1981).

89. FLA. STAT. § 64.091 (1981).



reflect the desire of the original owners. The intended result may more accurately be accomplished with a land trust. The trust agreement may provide the trust settlor will retain sole possession, control, or management, etc. over the property for some stated period or until the settlor's death. The agreement can provide that upon the beneficiary's death the beneficial interest shall vest in another effecting joint tenancies, life estates, contingent interests or remainders in named successor beneficiaries. Provisions for transfers of beneficial interests upon the settlor's or primary beneficiary's death should be carefully drafted. Such remainder interests are present interests which do not circumvent the Statute of Wills.<sup>90</sup> The interests designated for beneficiary remainderman must involve only beneficial *interests*. Since in a land trust legal and equitable *title* is vested solely in the trustee, a testamentary remainder anticipating transference of the trust property's legal or equitable *title* will be void.<sup>91</sup>

In an Illinois case, *Favata v. Favata*<sup>92</sup> the settlor made two amendments to his land trust. The first amendment provided the existing trust interest vested in his daughter at his death. However a subsequent amendment provided that title to real estate held in the land trust was to pass to his son in the event of the settlor's death. Certain other property was to be held in trust for his daughter. The Illinois Appellate Court held that under the terms of the first amendment the daughter received a present remainder interest the moment the trust was created. As a result, this amendment was valid and did not constitute a void testamentary disposition. However, the second amendment was held invalid because the "settlor apparently attempted to transfer legal and equitable title"<sup>93</sup> to his children.

### *Estate Planning, Ancillary Administration*

Because land trusts have the basic characteristics of conventional trust agreements, they may be utilized as effective estate planning devices. As discussed above, upon the beneficiary's death, the beneficial

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90. *Favata v. Favata*, 74 Ill. App. 3d 979, 394 N.E.2d 443 (1979).

91. *Id.*

92. *Id. Cf. In re Estate of Nemecek*, 80 Ill. App. 3d 881, 408 N.E.2d 655 (1980).

93. *Favata*, 74 Ill. App. 3d at 982, 394 N.E.2d at 447.

interest can be automatically conveyed to successor beneficiaries or transmitted by the deceased beneficiary's will. By placing title to real estate in a land trust, the grantor retains a measure of control over the beneficiaries and the manner in which they hold and maintain the property. By appropriate language in the trust agreement, the power of direction may be conferred upon someone other than the beneficiary, while the income and other benefits of property ownership will still flow to the beneficiary.

A land trust may also avoid problems of ancillary administration. "[I]t is uniformly recognized that such beneficial interest is transmitted by probate administration in the domicile of the beneficiary."<sup>94</sup> Therefore, a New York or California resident owning Florida real estate can place title to the property in a Florida land trust. Upon the settlor's death the beneficial interest will automatically transfer to his successor, as named in the trust agreement or by the settlor's will, etc., and ancillary probate administration in Florida will not be required.<sup>95</sup> The land trust may also provide for a local agent or representative through which the property management may be channeled.

### Tort Liability for Negligence in Connection with Real Estate Held in Trust

In general, beneficiaries are deemed liable for injury to persons or property incurred on real estate held in trust.<sup>96</sup> Certainly, the land trust arrangement could not function if tort liability were imposed on the trustee.

Liability in negligence arises primarily out of a duty and a breach of duty. Such duty arises out of possession, control or management of the property. Since the land trust trustee generally has no right in respect of possession, maintenance, control or repair of the property, he obviously lacks a duty to third parties regarding these attributes.<sup>97</sup> Therefore, under the typical land trust arrangement, the trustee should not be held personally liable for injuries occurring on the trust

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94. H.W. KENOE, *supra* note 10, § 7.39 (1978).

95. FLA. STAT. § 734.02; FLORIDA PROBATE PRACTICE, § 20.1 (1973).

96. W.B. GARRETT, *supra* note 2, at 11.

97. *Brazowski v. Chicago Title & Trust Co.*, 280 Ill. App. 293 (1935).

property.<sup>98</sup>

### *Trustee Liability to Third Parties*

The essential function of a land trust trustee is to act as a vehicle for holding title to real estate. As discussed earlier, both legal and equitable title is vested in the trustee for this purpose.<sup>99</sup> "In reality the transfer to the trustee is a formality involving a shifting of legal documents."<sup>100</sup> Under the typical land trust arrangement, the "trustee has no duties in respect to the management or control of the property or to pay taxes, insurance, or to be responsible for litigation."<sup>101</sup> The duties, rights and responsibilities attendant upon real property owners continue to reside in the beneficiaries. While typically these duties are retained, they may be delegated to third parties or to the land trust trustee.

As a practical matter, the only duties specifically imposed upon the trustee are to convey and deal with matters concerning *title* to the trust property. Under the typical land trust agreement, the trustee may engage in these matters only upon the written direction of the beneficiaries or the person named in the trust agreement as having the power of direction.<sup>102</sup> Land trust trustees are empowered by statute and usually by agreement to execute various types of agreements and documents. As a result of this authority to contract with third parties, questions arise concerning land trust trustee liability. Under traditional rules of trustee liability "[i]f a trustee makes a contract in the administration of the trust, he is personally liable unless the contract provides otherwise."<sup>103</sup> If the land trust trustee wishes to avoid personal liability

98. *Fields v. 6125 Indiana Ave. Apts.*, 47 Ill. App. 2d 55, 196 N.E.2d 485 (1964).

99. See *supra* cases cited in note 4.

100. *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 492, 389 N.E.2d 540, 545 (1979).

101. *Robinson v. Chicago Nat'l Bank*, 32 Ill. App. 2d 55, 58, 176 N.E.2d 659, 661 (1961).

102. *Spachman v. Overton*, 16 Ill. App. 3d 385, 306 N.E.2d 743 (1979).

103. G.T. & G.G. BOGERT, *LAW OF TRUSTS* 454 (5th ed. 1973). RESTATEMENT (SECOND) OF TRUSTS §§ 262, 266-271A, 275 (1959). The trustee is of course entitled to indemnification from the trust if the obligation was properly incurred in the administration of the trust. A. SCOTT, *THE LAW OF TRUSTS* § 262 (3d ed. 1967).

This position of the trustee warranted by the nature of the land trust

he should include an exculpatory provision in the contract instrument. Failure to do so may render him personally liable on the agreement to the same extent as if he held the property free of the trust.<sup>104</sup>

Florida's common law rules governing trustee liability to third persons were changed in 1975 by legislative enactment. Florida Statutes section 737.306 provides:

(1) Unless otherwise provided in the contract, a trustee is not personally liable on contracts, except contracts for attorneys' fees, properly entered into his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.

(2) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.

(3) Claims based on contracts, except contracts for attorneys' fees, entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trustee in his fiduciary capacity, whether or not the trustee is personally liable.

(4) Issues of liability between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge, or indemnification, or in any other appropriate proceeding.<sup>105</sup>

The protection afforded by this statute has been held inapplicable to land trust trustees. In *Taylor v. Richmond's New Approach*

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. . . should be recognized by those dealing with the beneficial interest and in preparing instruments which are to be presented to the trustee for signature. Any contract of sale, mortgage, or other security document, lease or contract, which provides for the payment of money or the performance of any representation or warranty should be so drafted that these obligations are not those of the trustee. When presented with such an instrument the trustee will refuse to execute it or will modify it so that the obligations are those of the beneficiaries alone.

H.W. KENOE, *supra* note 10, at 4-38.

104. RESTATEMENT (SECOND) OF TRUSTS § 261 (1959).

105. FLA. STAT. § 737.306 (1979).

*Ass'n*,<sup>106</sup> a land development corporation conveyed title to property, upon which they had developed a condominium, to the president and secretary of the corporation as trustees pursuant to the Florida Land Trust Act. After the developer's control of the association passed to unit owners, the condominium association attempted to hold the trustees liable for assessment against unsold apartments as well as for some contractual obligations. Having lost the assets of the trust through a mortgage foreclosure, the trustees were held *personally* liable for the obligations. On appeal, the second district held that absent any contractual provision indicating the trustees sought to limit their liability in dealing with third parties traditional rules of trustee liability would apply. The provisions of Florida's statute section 737.306 were found inapplicable to land trust trustees. "In the absence of a more specific pronouncement, we do not believe the legislature intended to extend this protection to Florida land developers operating under an Illinois land trust."<sup>107</sup> The protections afforded by this section, the court said, were intended to apply only to trustees acting under classical inter vivos or testamentary trust arrangements. "Moreover, [the land trust] statute prescribes that the trustee is vested with full rights of ownership over the real property."<sup>108</sup>

If the trustee of an Illinois land trust can deal with the trust property as if it were his own, we believe it logical that he be subject to personal liability for obligations which he has incurred to third persons in his administration of the trust.<sup>109</sup>

Looking at the facts in *Taylor* the court's result appears correct. But perhaps the legislature should consider whether Florida's statute section 737.036 should apply to land trusts as well as inter vivos or testamentary trusts. It is submitted that the protections afforded by this statute *should* extend to land trust trustees.

As pointed out in *Taylor*, the Florida Land Trust Statute vests the trustee with full rights of ownership over the real estate.<sup>110</sup> But as a

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106. 351 So. 2d 1084 (Fla. 2d Dist. Ct. App. 1977).

107. *Id.* at 1096.

108. *Id.*

109. *Id.*

110. *Id.*

practical matter, while the land trust trustee is statutorily vested with "power" to deal with property title, under the typical trust agreement he lacks this right absent the beneficiary's direction. In contrast the trustee of a typical inter vivos or testamentary trust, is vested not only with the power to deal with the trust property but also with other discretionary powers prescribed by the trust agreement. Since the land trust trustee's power (e.g., to sell, lease, encumber, manage and deal with all matters affecting title to the real estate) are effected only upon specific direction of the beneficiary (unless the trust agreement vests the trustee with discretionary authority and power to act in such matters) the land trust trustee's ability to act in a representative capacity is clearly more limited than the trustee of a conventional inter vivos or testamentary trust. The trustee in a land trust is merely a conduit through which passes the intent and the direction of the true owners—the holders of the beneficial interests or those having the power of direction.

"The land trust is, in fact a fiction which has become entrenched in the law of this state and accepted as a useful instrument in the handling of real estate transactions. Outside of relationships based on legal title, the trustee's title has little significance."<sup>111</sup> Under these circumstances should not the protections afforded by Florida's statute section 737.036 more equitably apply to land trust trustees than to trustees of an inter vivos or testamentary trust? If the legislature or judiciary recognize this limitation on liability, third parties dealing with land trust trustees would certainly be more prudent. All third parties would recognize that, with respect to *any* obligations undertaken by the parties, recourse would be limited to the trust res. If further assurances or guarantees were deemed necessary to protect third parties, the beneficiaries or the party with the power of direction could sign the agreement as guarantor.

In situations, such as *Taylor*, where the trustee and beneficiary or trustee and settlor are substantially similar in identity, a better approach for imposing liability would be to follow equitable principles analogous to piercing of the corporate veil. If a land trust has been used to intentionally defraud third parties and the trustee is personally

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111. *People v. Chicago Title & Trust Co.*, 75 Ill. 2d 479, 492, 389 N.E.2d 540, 545 (1979).

at fault for obligations arising from his *actual control or management* of the property, then the trustee should be held personally liable for his actions.

If section 737.036 did apply, and the trustee treated the property as if it were his own, or failed to reveal he was acting in a representative capacity, or acted without regard to the beneficiaries' directions then, absent any attempt to exonerate himself from liability, personal liability would attach against the trustee. In regard to issues of this nature, the courts and legislature should look to the realities of control rather than the refinements of title. Liability should lie against those parties who control the trust property, as well as those who enjoy the benefits of ownership. Logic and equity, tempered by the realities of the trustee-beneficiary relationship dictate that provisions of section 737.306 apply to land trust trustees.

## Tax Aspects

### *Federal Taxation*

Under the Florida Land Trust Act at least two documents are required: (1) a deed in trust conveying the property to the trustee and (2) a trust agreement, setting forth the agreement between the trustee and the beneficiaries. If there are multiple beneficiaries, it is recommended that a third document be drawn, setting forth the relationships of the beneficiaries among themselves.<sup>112</sup>

The beneficiary of a land trust may be an individual, sole proprietor, partnership or corporation and will be taxed accordingly. However, in the event the relationship between the beneficiaries is not carefully structured, it is possible beneficiaries will be treated as a corporation for income tax purposes. The result is double taxation on the trust income.<sup>113</sup>

### *Homestead*

Under the Florida Constitution, the homestead exemption is

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112. See Weider, *Florida Land Trust Tax Planning and Problems*, 49 FLA. B.J. 308 (1975); Peckron, *Tax Consequences of Land Trusts*, 16 HAWAII B.J. 3 (1981).

113. *Id.*

granted to "every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner. . . ." <sup>114</sup> Since the land trust beneficiary has neither legal nor equitable title, he is not afforded homestead protection. <sup>115</sup>

As made apparent by Florida's Constitution, when a land trust attempts to hold title to residential property beneficiaries are deprived of the substantial protection against creditor's claims as well as the benefit of potential ad valorem tax exemptions. This result should be carefully considered when the land trust is used solely to hold title to property utilized as the beneficiary's principal residence.

### Contracts for The Sale of Trust Property

Though Florida has not yet ruled on whether a beneficiary may validly execute a contract for the sale of the trust real estate, the Illinois courts have concluded a *sole* beneficiary may execute such a contract, provided he discloses the property is held in a land trust, and that he is the beneficiary thereof. <sup>116</sup> This may be true even if the beneficiary does not disclose that the property is held in a land trust. <sup>117</sup>

### Financing

As a practical matter commercial, personal or conventional mortgage loans may be secured by property held in a land trust. In the typical mortgage context the trustee's legal and equitable title is used as security for the loan. In such cases the trustee will be designated mortgagor and must therefore execute all documents necessary to consummate the transaction. However the trustee's authority and power to encumber both legal and equitable title to the trust property must be expressed in the trust deed. As the Florida Land Trust Act, subsection 1 provides:

[E]very conveyance . . . [is] effective to vest in the trustee full rights of ownership . . . with full power and authority . . . as

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114. FLA. CONST. art. VII, § 6; *See also* FLA. STAT. § 196.031 (1981).

115. 074-313 Op. Att'y Gen. 111 (1974).

116. *Madigan v. Buehr*, 125 Ill. App. 2d 8, 12, 260 N.E.2d 431, 435 (1970).

117. *Lampinen v. Hicks*, 73 Ill. App. 2d 376, 378, 391 N.E.2d 1105, 1107 (1979).



granted in the instrument . . . provided the instrument confers on the trustee the power to . . . encumber . . . the property.<sup>118</sup>

The trust deed should, therefore, contain an express provision empowering the trustee to mortgage, pledge, or otherwise encumber the property held in trust for the trust's benefit. Mortgagees dealing with the trustee and trust property<sup>119</sup> are protected under the Act; they are not obligated to look beyond the four corners of the recorded trust deed to determine the interests or rights of the beneficiaries, nor are they liable for any unrecorded collateral declarations or agreements.<sup>120</sup>

The trustee's mortgage obligation is secured by a lien on the trust property. The mortgage terms, e.g., amount of debt, interest rate, amortization period, etc., should be stated in the promissory note. In order to limit the security to the trust res the promissory note should limit the rights and remedies of the lender to foreclosure of the mortgaged property securing the debt. Unless other guarantees or collateralization have been agreed to, the lender should acknowledge in the note and mortgage document that no personal liability will be asserted against the trustee or any beneficiary in the event of deficiency arising from a foreclosure action. Beneficiaries may guarantee their personal liability at the lender's insistence, and this may be included in the promissory note or as a separate instrument.

A promissory note executed by a land trustee, which is payable *only* out of the land trust property with no personal liability, qualifies as a negotiable instrument under the Uniform Commercial Code.<sup>121</sup> But when mortgage terms are incorporated in the note the note becomes non-negotiable. If the promissory note merely refers to the fact that it is secured by mortgage on the trust res, this alone does not eliminate the negotiability of the note.<sup>122</sup> The question of whether the promissory note should embody any of the essential terms of the mortgage instrument, other than the repayment terms and parties, will be

118. FLA. STAT. § 689.081(1) (1981).

119. *Id.*

120. FLA. STAT. § 689.081(2)(3) (1981).

121. *Kitzer v. Kitzer*, 20 Ill. App. 3d 54, 56, 312 N.E.2d 699, 701 (1974); ILL. REV. STAT. ch. 26, § 3-105(1)(H) (1980); FLA. STAT. § 673.3-105 (1981).

122. *Holly Hill Acres Ltd. v. Charter Bank of Gainesville*, 314 So. 2d 209, 211 (Fla. 2d Dist. Ct. App. 1975).

based upon the lender's preference as to the negotiability of the instrument and whether an assignment of the note and mortgage to a third party is contemplated.

The beneficial personal property interest in a land trust<sup>123</sup> may be assigned by the beneficiary as collateral for a loan, just as any other form of personalty (e.g. stock certificates, bonds, certificates of deposit, etc.) may be assigned. Lenders unfamiliar with the land trust concept and assignment of beneficial interest transactions, may be hesitant about accepting such assignments as loan collateral. Nonetheless, this technique does have certain advantages for both lender and borrower. First, it avoids the necessity of that complex documentation usually associated with use of real property as security for debt, such as mortgage documentation, recording, releases and application procedures. Second, a collateral assignment of beneficial interest as security for a debt may avoid the assignor's right of redemption<sup>124</sup> eliminating lender concerns over rights on foreclosure of the debt.<sup>125</sup> Third, a pledge of personal property becomes security for the loan, and therefore assignments of beneficial interest in a land trust fall within the purview of Article 9 of the Uniform Commercial Code.<sup>126</sup> Foreclosure of a security interest in personalty under Article 9 is less costly and less time consuming than foreclosure of a typical real estate mortgage.

This form of financing transaction is well suited to unamortized commercial or personal loans made on a demand or short term basis. Transactions of this nature must be carefully documented. It has been suggested that such transactions should involve trusts that were created prior to the negotiation of the loan,<sup>127</sup> otherwise such a loan may be characterized as a mortgage requiring<sup>128</sup> legal foreclosure and full recognition of any rights and defenses a defaulting mortgagee may have.

Litigation resulting from this procedure has been based upon claims that such assignment transactions were devices used to avoid both mortgage foreclosure proceedings and borrower's rights of re-

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123. FLA. STAT. § 689.071(4) (1981).

124. 229 So. 2d at 624.

125. See ILL. REV. STAT. ch. 77, § 18b. (1980).

126. FLA. STAT. § 679.101 (1981).

127. H.W. KENOE, *supra* note 10, at § 5.34.

128. FLA. STAT. § 697.01 (1981).

demption on loans secured by real estate.<sup>129</sup> In *Quinn v. Pullman Trust and Savings Bank*,<sup>130</sup> the Illinois appellate court summarized and set forth guidelines as to when an assignment of beneficial interest transaction would constitute a mortgage:

A land trust may not be used as a device to circumvent the right of redemption where the transaction of creation of the land trust and borrowing of funds with the simultaneous pledging and assignment of the beneficial interest are one transaction. However where, as here, the trust contains no provision for the sale of the real estate subject-matter on default in a debt, where it is set up for purposes other than a security for debt, where the pledge of the beneficial interest is subsequent to the creation of the trust, and where the pledged security transaction is of the trust beneficial interest only, the transaction is valid and will not be construed to be a real estate mortgage.

In later Illinois cases, *Kortenhof v. Messick*<sup>131</sup> *Shefner v. University National Bank*,<sup>132</sup> the courts upheld the validity of the assignment of beneficial interest transaction and refused to require the trust beneficiary-creditor to follow statutory mortgage foreclosure proceedings. In both cases the loan transactions adhered to *Quinn's* articulated guidelines.

In *Ferraro v. Parker*,<sup>133</sup> a land trust agreement was entered into for the purchase and development of certain real estate. Ferraro, who was both trustee and beneficiary, executed a demand note to the other two trust beneficiaries for \$18,572.10 and at the same time signed a loan agreement putting up his 31 percent interest in the trust as collateral security for the loan. Failing to satisfy the debt on time, his interest, evidenced by a trust participation certificate, was deemed forfeited and was sold to a third party. Ferraro thereafter sought a declaratory

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129. *DeVoigne v. Chicago Title & Trust Co.*, 304 Ill. 177, 189, 136 N.E. 498 (1922); *See also Horney v. Hayes*, 11 Ill. 2d 178, 142 N.E.2d 94 (1957).

130. *Quinn v. Pullman Trust & Savings Bank*, 98 Ill. App. 2d 402, 404, 240 N.E.2d 791, 793 (1968).

131. *Kortenhof v. Messick*, 18 Ill. App. 3d 15, 309 N.E.2d 368, 372 (1974).

132. *Shefner v. University Nat'l Bank*, 40 Ill. App. 3d 978, 980-81, 353 N.E.2d 126, 128-29 (1976).

133. 229 So. 2d at 624.

judgment declaring the loan agreement be deemed a mortgage on his equitable interest in the trust. Ferraro also argued the defendants should have foreclosed on the mortgage before depriving him of his equity of redemption. In their motion to dismiss the defendants contended that Ferraro, who failed to pay the note for more than one year after it was due, had failed to redeem any equity he might have had. In addition, defendants argued the loan agreement and assignment of Ferraro's trust participation certificate was not intended as a mortgage.

The trial court dismissed the complaint. On appeal, Florida's Second District Court of Appeal affirmed stating "the interest [of Ferraro] was not an interest in real estate nor would a pledge of that interest be rendered a mortgage. . . ." <sup>134</sup> Responding to Ferraro's claim that his pledged trust participation certificate was merely security for his loan (constituting a mortgage) and that this required legal foreclosure, the court found the loan agreement conveyed legal title to the certificate and did not constitute a lien. The agreement was an absolute assignment of Ferraro's interest and neither the loan agreement nor assignment indicated an intention to secure payment of the obligation.

The essential result of these cases, where *Quinn's* guidelines are met, is that an assignment of a land trust's beneficial interest for the purpose of securing a loan does not convert the transaction into a real estate mortgage requiring legal foreclosure proceedings and recognition of debtor's redemptive rights.

A beneficial interest in a land trust is a "general intangible" under section 9-106 of the Uniform Commercial Code.<sup>135</sup> Pursuant to the code, the security interest in a general intangible must be perfected by filing a financial statement.<sup>136</sup> The Illinois legislature, through an amendment to their code provision, specifically exempted "a security interest created by an assignment of a beneficial interest in a trust or a decedent's estate"<sup>137</sup> from filing requirements. In Illinois, therefore, a security interest in a land trust can now be perfected without filing a financial statement.<sup>138</sup> In contrast, Florida's code states a financing

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134. *Id.* at 624.

135. FLA. STAT. § 679.106 (1981); *Levine v. Pascal*, 94 Ill. App. 2d 43, 49, 236 N.E.2d 425, 431 (1968).

136. FLA. STAT. § 679.302 (1981).

137. ILL. REV. STAT. ch. 26, § 9-302(1)(c) (1981).

138. *First Federal Savings & Loan Ass'n of Chicago v. Pogue*, 72 Ill. App. 3d

statement will not be required to perfect "a security interest created by an assignment of a beneficial interest in a decedent's estate."<sup>139</sup> The text of this section clearly differs from the U.C.C. and Illinois code which exempts the beneficial interests created both "in a trust or a decedent's estate."<sup>140</sup>

A literal reading of Florida Statutes section 679.302 requires Florida practitioners to file a financing statement to perfect the security interest. Ironically the sponsors' notes to subsection (1)(c) indicate the intent of this provision is to:

*Overcome a growing body of case law requiring perfection by filing of a security interest created by an assignment of a beneficial interest in a trust or a decedent's estate. Most of these cases involved trusts or estates which had as their corpus real property. In a substantial percentage of these cases, the courts concluded that the security party's interest was in personalty, i.e., any rights in the real property were inchoate. These cases represent a dramatic departure from traditional principles of real property. In Florida, the most recent judicial authority in this regard conforms with the revisions. . . .*<sup>141</sup>

The inconsistency between statutory text and legislative intent has not yet been reconciled by judicial construction or legislative amendment. Therefore, as a matter of sound practice the careful practitioner must continue to process and file financing statements in the course of transactions involving collateral assignments of beneficial interests.

### Conclusion

Both the legislature and courts of this state have come to recognize that the so called "Illinois" land trust could become useful in the growth and development of Florida real estate. Although used in Illinois throughout this century, Florida lawyers, banks and trust institutions have appeared cautious in their promotion and use of land trusts.

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54, 58, 389 N.E.2d 652, 656 (1979).

139. FLA. STAT. § 679.302(1)(c) (1981).

140. ILL. REV. STAT. ch. 26, § 9-302(1)(c) (1981).

141. FLA. STAT. § 679.9-302(1)(c) (1981) (emphasis added); *But see In re Cowser*, 14 Bankr. 335 (1981).

Perhaps this reluctance derives from what was traditionally perceived as the greatest obstacle to utilization of land trusts in Florida—the impact of the Statute of Uses on such trusts. But in recent years this obstacle has been overcome by legislation and judicial decision. Perhaps attorneys' and institutions' lack of familiarity with the practical and beneficial aspects of such trusts has contributed to this result.

Florida case law concerning land trusts is still in its infancy. Nonetheless, there remains sufficient legal foundation of which members of the bar may take note. There are numerous unanswered questions concerning application of the land trust to various situations. By starting with a firm foundation and understanding of the basic advantages and attributes of the Florida land trust we can resolve unanswered issues and explore new areas of application.

*Mitchell A. Sherman*

## PRIVATE HOMOSEXUAL ACTIVITY AND FITNESS TO PRACTICE LAW: Florida Board of Bar Examiners, In re N.R.S.

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### Introduction

Homosexual conduct has existed for many years, but it has become a politically and morally controversial topic in today's society. Debates rage over the unnaturalness of sexually deviant behavior and one's right to enjoy freedom of sexual choice and expression.

Laws imposing criminal sanctions on consenting adults who engage in private homosexual behavior are historically longstanding<sup>1</sup> and most have withstood constitutional attack.<sup>2</sup> Despite the constitutionality of statutes prohibiting this conduct, courts have recognized the counter-vailing right of privacy which, although not *explicitly* provided for in the United States Constitution, is considered an implicit and substantive right.<sup>3</sup>

In this emotionally charged, and often misunderstood area, courts reluctantly confront and resolve the legal issues. First, this comment considers the legal issues presented when noncommercial homosexual acts occur privately between consenting adults. Second, this comment focuses particularly on the legitimacy of the Florida Board of Bar Examiners' inquiry into the private sexual behavior of a bar applicant as part of the process in which his fitness to practice law in Florida is

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1. *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199, 1202-03 (E.D. Va. 1975). In *Doe*, the court observed the Virginia statute has its ancestry in Judaic and Christian law, and is immediately traceable to the Code of Virginia of 1792. *Id.* at 1202-03.

2. *Id.* at 1203. *See also* *Witherspoon v. State*, 278 So. 2d 611 (Fla. 1973). *See generally* 81 C.J.S. *Sodomy* § 3 (1977).

3. An in-depth discussion of the right of privacy and the recognition of privacy as a fundamental right under the United States Constitution is beyond the scope of this comment. *But see* Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974).

determined.

### Background of *In re: N.R.S.*

The Florida Supreme Court's power and authority to regulate admission of persons to the practice of law in Florida is derived from the Florida Constitution.<sup>4</sup> The Florida Board of Bar Examiners (Board), serving as an administrative arm of Florida's Supreme Court performs regulatory and supervisory functions over Florida's practicing attorneys. The Board is answerable solely to the Florida Supreme Court,<sup>5</sup> and its authority may neither usurp nor exceed the court's power under the Florida Constitution.<sup>6</sup>

As part of its duty to regulate admission of persons to the Florida bar, the Board is empowered to schedule informal hearings in order to question the applicant's qualifications. Thus, the Board insures that all applicants fully comply with the Florida Supreme Court's qualification criteria before being admitted to practice law in Florida.<sup>7</sup>

Recently, the Florida Supreme Court, in *Florida Board of Bar Examiners, In re N.R.S.*,<sup>8</sup> explicitly denied the Board authority to question an applicant regarding his proclivity towards private homosexual conduct. N.R.S., a member of the New York State Bar, had completed all parts of the Florida Bar examination successfully. His application for admission to the Bar revealed he had been classified 4-F by the military "either because of a physical problem or because of his homosexuality."<sup>9</sup> The Board conducted an informal hearing at which N.R.S. refused to answer questions about his past sexual conduct. He admitted a "continuing sexual preference for men but . . . indicated that he had no present intention regarding future homosexual acts."<sup>10</sup>

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4. FLA. CONST. art V, § 15: "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

5. *In re Fla. Bd. of Bar Examiners*, 353 So. 2d 98 (Fla. 1977).

6. *Id.*

7. FLA. SUP. CT. R. RELATING TO ADMISSIONS TO THE BAR, Art. II, § 12 (1977).

8. 403 So. 2d 1315.

9. *Id.* at 1316.

10. *Id.*



He further stated he would obey all the laws of Florida.<sup>11</sup>

Following a review of N.R.S.'s testimony, the Board requested he return for further questioning. This, he refused to do. Ultimately, the Board refused to certify his admission to the Florida Bar, conceding "that, except for the issue of sexual conduct, it (the Board) has no adverse information concerning petitioner's fitness."<sup>12</sup> N.R.S. subsequently petitioned the Florida Supreme Court seeking its order that the Board certify his admission to practice.

The issue presented by the case was whether questioning a Florida Bar applicant about private homosexual activity was rationally related to proving fitness to practice law.<sup>13</sup> The issue is a delicate one,<sup>14</sup> and one recently addressed by other jurisdictions in the context of other employment areas.<sup>15</sup> After reconciling the competing arguments, the Florida Supreme Court refused to sanction the Board's inquiry into the applicant's private sexual conduct, even though the applicant admitted a continuing sexual preference for men.<sup>16</sup>

### N.R.S.'s Constitutional Arguments

Florida Statute § 800.02 prohibits "unnatural and lascivious acts,"<sup>17</sup> and has been construed to include homosexual acts between

11. *Id.*

12. *Id.*

13. *Id.* at 1317.

14. *Id.* at 1316.

15. *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969)(discharge of homosexual employed by the National Aeronautics and Space Administration for immoral conduct and possession of unsuitable personality traits held violative of substantive due process); *Morrison v. State Bd. of Educ.*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969)(male teacher who engaged in non-criminal relationship with another male cannot be subject to disciplinary proceedings absent showing behavior indicated unfitness to teach). *But see Gaylord v. Tacoma School Dist. No. 10*, 88 Wisc. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977) (public knowledge of male teacher's homosexuality impaired his academic efficiency thus constituting sufficient cause for discharge).

16. 403 So. 2d at 1315. The court did sanction further inquiry by the Board, if the Board in good faith, felt the conduct was other than private, noncommercial and consensual.

17. FLA. STAT. § 800.02 (1981) reads in part: "Unnatural and lascivious act. Whoever commits any unnatural and lascivious act with another person shall be guilty of a misdemeanor of the second degree. . . ."

consenting adults.<sup>18</sup> In the instant case, N.R.S. alleged the statute could not be constitutionally applied to private consensual activity between adults,<sup>19</sup> but in a footnote the court declined to answer this assertion, stating the statute had previously withstood constitutional attack.<sup>20</sup>

In *Witherspoon v. State*,<sup>21</sup> applicants challenged the constitutional validity of section 800.02, contending the words “unnatural and lascivious” contained within the statute were “so vague as to make an ordinary person guess at their meaning, and so broad as to invade the right to privacy and the constitutional rights of individuals guaranteed by the First and Fourteenth Amendments to the United States Constitution and Declaration of Rights of the State of Florida.”<sup>22</sup> Florida’s Supreme Court answered that the words “unnatural and lascivious” were not vague, but rather were “of such a character that an ordinary citizen can easily determine what character of act is intended, and are thus secure from constitutional attack.”<sup>23</sup> Similar statutes in other states have also withstood constitutional attack.<sup>24</sup>

Florida statutes set forth guidelines as to who may not practice law in Florida. The category of excludable applicants includes those persons “not of good moral character.”<sup>25</sup> Florida courts have struggled with the interpretation of the words “good moral character,”<sup>26</sup> as has the United States Supreme Court.<sup>27</sup>

In *Konigsberg v. State Bar of California*,<sup>28</sup> an applicant was denied admission to the California Bar because he had failed to show he was a person of good moral character. There was some evidence appli-

18. 278 So. 2d 611.

19. See *infra* notes 41-53 and accompanying text.

20. 403 So. 2d 1315.

21. 278 So. 2d 611.

22. *Id.* at 612.

23. *Id.*

24. See generally 81 C.J.S. *Sodomy* § 3 (1977).

25. Florida statutes provide that “[n]o sheriff or clerk of any county or deputy of either, shall practice [law] in this state, nor shall any person not of good moral character . . . be entitled to practice.” FLA. STAT. § 454.18 (1981) (emphasis added).

26. Florida Bd. of Bar Examiners Re: G.W.L., 364 So. 2d 454 (Fla. 1978); State *ex rel.* Tullidge v. Hollingsworth, 146 So. 66 (Fla. 1933).

27. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957).

28. *Id.*

cant had once been connected with the Communist Party, but the applicant refused on First Amendment grounds to answer questions about his political associations and beliefs. The United States Supreme Court sustained the denial of admission,<sup>29</sup> but described the term *good moral character* as *unusually ambiguous*.<sup>30</sup> The Court warned that such ambiguity could “be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.”<sup>31</sup> In order to prevent arbitrary denial of applicants’ admission to the Bar, the United States Supreme Court held that the standards imposed by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution must be met.<sup>32</sup>

Petitioner in *In re N.R.S.* advanced the argument that he had been denied due process and equal protection of the law.<sup>33</sup> Under the Fourteenth Amendment of the United States Constitution, government cannot take away a person’s life, liberty, or property without due process of law.<sup>34</sup> There are two aspects of the due process guarantee: procedural and substantive. Procedural due process involves an individual’s right to a fair decision-making process, including notice.<sup>35</sup> N.R.S. argued he had been denied procedural due process of law because Florida Bar forms did not give notice that homosexual persons applying for admission to practice would be subject to questioning about their private sex lives.<sup>36</sup>

Petitioner also asserted that he had not been afforded equal pro-

29. *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961).

30. *Id.* at 263.

31. *Id.*

32. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); U.S. CONST. amend. XIV, § 1.

33. See Brief for Petitioner at 18, 23; 403 So. 2d 1315.

34. U.S. CONST. amend. XIV, § 1. A discussion on the Court’s interpretation of the phrase “life, liberty, and property” is beyond the scope of this comment. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 383, 478 (1978) [hereinafter cited as NOWAK].

35. NOWAK, *supra* note 34 at 383, 499.

36. See Brief for Petitioner at 18; 403 So. 2d 1315. Substantive due process is “[t]he right to be free from irrational and capricious government conduct resulting in deprivation of life, liberty or property.” J. Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation*, 64 IOWA L. REV. 527, 533 (1979).

tection of the laws.<sup>37</sup> The equal protection clause of the Fourteenth Amendment<sup>38</sup> guarantees that similarly situated individuals will be afforded equal treatment by the government.<sup>39</sup> N.R.S. argued that “similarly situated individuals” described all applicants to the Florida Bar, whether heterosexual or homosexual. Since the Florida statute proscribing “unnatural and lascivious acts”<sup>40</sup> had been applied to heterosexuals as well as homosexuals,<sup>41</sup> N.R.S. asserted that equal protection prohibited the Board from inquiring into his private sexual behavior since the Board did not delve into the private sex lives of heterosexuals.<sup>42</sup>

In addition to the procedural due process and equal protection constitutional challenges, petitioner asserted that inquiry into his private sexual behavior violated his right to privacy under the United States Constitution.<sup>43</sup> Commentators recognized a right of privacy as early as 1890, when Samuel Warren and Louis D. Brandeis wrote a person’s privacy should be protected from intrusion by newspapers.<sup>44</sup> Articulating what would later become a foundation for today’s right of privacy, Brandeis dissented in 1928 from the majority’s view and wrote that a person should be prohibited from government intrusion into his private life.<sup>45</sup>

While the United States Constitution does not *explicitly* guarantee the right of privacy, the Supreme Court has recognized a right of privacy implicit in the express guarantees of the Constitution.<sup>46</sup> The right of privacy has been viewed by the Court as an element of “liberty”

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37. See Brief for Petitioner at 23; 402 So. 2d 1315; U.S. CONST. amend. XIV, § 1.

38. U.S. CONST. amend. XIV, § 1.

39. NOWAK, *supra* note 32, at 519.

40. FLA. STAT. § 800.02 (1981).

41. Thomas v. State, 326 So. 2d 413 (Fla. 1975).

42. See Brief for Petitioner at 22-23; 403 So. 2d 1315.

43. *Id.* at 16.

44. S. Warren and L. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890).

45. Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

46. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (right of women during some stages of pregnancy to have an abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right of unmarried individuals to obtain contraceptives).

guaranteed by the Fourteenth Amendment.<sup>47</sup> In the landmark decision, *Griswold v. Connecticut*, the Court found that the “specific guarantees in the Bill of Rights have penumbras . . . various guarantees create zones of privacy.”<sup>48</sup> *Griswold’s* “zones of privacy” emerged from such fundamental constitutional guarantees as the First Amendment, limiting forced disclosure of speech and association; the Third Amendment, protecting a person from forced quartering of a soldier during peacetime; the Fourth and Fifth Amendments limiting the extent to which the government may demand information from a person; and the Ninth Amendment, which guarantees that enumerated constitutional rights shall not be construed as limiting other rights of the people.<sup>49</sup> Thus, by interpreting the specific constitutional guarantees as creating zones of privacy, the extrapolated right of privacy was recognized as a fundamental right.<sup>50</sup>

It is interesting to note that on November 4, 1980, Floridians voted to amend the state Constitution,<sup>51</sup> adding Article I, section 23, which provides that every person has “[t]he right to be let alone and free from government intrusion into his private life.”<sup>52</sup> Had petitioner brought his cause of action after the general election, he could have asserted an explicit right of privacy under the Florida Constitution, and that the Board’s investigation constituted an unreasonable intrusion into his private life. This argument was not raised in petitioner’s brief, presumably because the brief was filed prior to passage of the privacy amendment. The court’s opinion followed the amendment. While it cannot be conclusively determined from the language of the N.R.S. opinion, it is possible that the court foresaw the impact of Florida’s new section 23 and on that ground determined petitioner’s right of privacy

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47. *Meyer v. Nebraska*, 262 U.S. 39 (1923) (“liberty” includes right to marry, establish a home, bring up children, and in general, enjoy those privileges essential to an orderly pursuit of happiness); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (recognizing “liberty” includes parents’ right to direct their children’s upbringing and education).

48. 381 U.S. 479, 484.

49. *Id.*

50. *Id.*

51. G. Cope, *A Quick Look At Florida’s New Right of Privacy*, 55 FLA. B.J. 12 (1981).

52. FLA. CONST. art. I, § 23.

warranted protection from intrusion by the Florida Board of Bar Examiners. By resting its decision on the grounds that private noncommercial sexual acts between consenting adults are not relevant to fitness to practice law, the court apparently protected petitioner's right of privacy as explicitly written in the new Florida Constitution.

The constitutional arguments asserted by petitioner are not new. It has been suggested by other courts that prohibition of homosexual behavior, even private homosexual behavior, may infringe on the right of privacy,<sup>53</sup> deny equal protection,<sup>54</sup> and impair due process requirements regarding liberty.<sup>55</sup> The Florida Supreme Court did not, however, address petitioner's arguments asserted on these constitutional grounds. Apparently, the court avoided the constitutional issues in keeping with its rule<sup>56</sup> to dispose of cases, where possible, without adjudication of constitutional issues.<sup>57</sup>

### Fitness to Practice Law

In addition to constitutional arguments, N.R.S. claimed the Board's inquiry into his private consensual sexual behavior was not rationally related to prove fitness to practice law.<sup>58</sup> Traditionally, states grant bar examiners wide powers to regulate bar admission, but these powers are not without restriction.<sup>59</sup>

As early as 1889, courts recognized that where an attorney's conduct did not affect his professional integrity, a board of bar examiners could not suspend an attorney, even though that conduct might be "irregular."<sup>60</sup> Similarly, "if the act does not disclose moral turpitude in the perpetrator rendering him unfit to be entrusted with the confidences

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53. *Acanfora v. Board of Educ. of Montgomery County*, 259 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974); 417 F.2d 1161.

54. 359 F. Supp. 843 (D. Md. 1973).

55. *Id.*

56. *Florida Bar v. Rayman*, 238 So. 2d 594 (Fla. 1970).

57. *Id.*

58. *See* Brief for Petitioner at 6; 403 So. 2d 1315.

59. 353 U.S. 232.

60. *State v. McClaugherty*, 33 W. Va. 25, 28, 10 S.E. 408, 410 (1889) (conduct of attorney who published false and libelous charge against judge in newspaper held insufficient misconduct to disbar).

and duties of the profession, it cannot appropriately be made the basis of disbarment."<sup>61</sup>

According to the United States Supreme Court in *Schware v. Board of Bar Examiners*<sup>62</sup> "[a] State can require . . . good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness . . . to practice law."<sup>63</sup> In *N.R.S.*, petitioner asserted that homosexual activity was "hardly dishonorable conduct relevant to the legal profession,"<sup>64</sup> and that such conduct cast no doubt on his integrity, honesty, and fairness.<sup>65</sup>

### The Florida Board of Bar Examiners' Position

The Board defended its inquiry into possible homosexual conduct as an appropriate means of protecting the public and of maintaining the integrity of the legal profession. The Board noted that it is an attorney's sworn duty to uphold the laws of the state in which he practices, including sodomy statutes and laws proscribing homosexual conduct. Florida, along with twenty-two other states, has a criminal statute prohibiting homosexual conduct.<sup>66</sup>

The Board argued that questioning the applicant about his private sexual conduct was relevant to determine "whether the applicant intends to disobey the laws of Florida which he seeks to be sworn to uphold."<sup>67</sup> The Board suggested "that an applicant's past homosexual acts are relevant to determine whether past conduct will prevent him from achieving the social acceptance necessary to enable him to discharge his professional responsibilities."<sup>68</sup>

In response to petitioner's privacy argument, the Board asserted that the Florida Supreme Court had followed the United States Su-

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61. *Bartos v. United States Dist. Court*, 19 F.2d 722, 726 (8th Cir. 1927).

62. 353 U.S. 232.

63. *Id.* at 239.

64. *See* Brief for Petitioner at 5-6; 403 So. 2d 1315.

65. *Id.* at 6.

66. FLA. STAT. § 800.02 (1981). *See generally* K. Lasson, *Homosexual Rights: The Law in Flux and Conflict*, 9 BALT. L. REV. 47 (1979).

67. 403 So. 2d 1315.

68. *Id.* at 1317.

preme Court in limiting the right to privacy<sup>69</sup> and that the right did not extend to homosexuals.<sup>70</sup>

### The Court's Disposition

The Florida Supreme Court in *In re N.R.S.* stated: "Private non-commercial sex acts between adults are not relevant to prove fitness to practice law,"<sup>71</sup> but did not specifically address the constitutional issues raised by petitioner. However, the court used constitutional due process language in reaching its decision. Holding that unless the Board demonstrated, in good faith, a need to question further the petitioner about other sexual conduct (i.e., conduct that was commercial, public or nonconsensual), inquiries were to be limited to those "bear[ing] a rational relationship to an applicant's fitness to practice law."<sup>72</sup>

The words, "rational relationship" are trademarks of the oft-quoted minimal scrutiny test employed by the courts in assessing whether due process and equal protection of the law have been violated.<sup>73</sup> The means chosen under this test must be reasonably correlated to the ends sought, and *in N.R.S.*, the court concluded the Board's inquiry failed to meet even this standard. Presumably then, no reason existed for applying the "strict scrutiny" standard which is invoked only when a suspect class or fundamental right is involved.<sup>74</sup>

The argument could be made, however, that because the right of privacy was, at least to some extent, involved in *In re N.R.S.*, and because the right of privacy has been recognized as a fundamental right, that is, a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"<sup>75</sup> the stricter standard

69. See Brief for Respondent at 3; 403 So. 2d 1315. See also *Doe*, 403 F. Supp. 1199; *Laird v. State*, 342 So. 2d 962 (Fla. 1977).

70. See Brief for Respondent at 3; 403 So. 2d 1315.

71. 403 So. 2d at 1317.

72. *Id.*

73. *United States v. Carolene Prods.*, 304 U.S. 144 (1938); *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (Harlan, J., concurring). For a discussion of the minimal scrutiny test employed by the Court, see generally NOWAK, *supra* note 34; Friedman *supra* note 36.

74. *Griswold*, 381 U.S. 479. For a discussion of the strict scrutiny test employed by the Court, see generally NOWAK *supra* note 34; Friedman, *supra* note 36.

75. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (footnotes omitted).



of review<sup>76</sup> should have been invoked. Petitioner did not advance this argument, nor did the court apply the stricter test, choosing instead to hold implicitly the inquiry by the board failed to meet the rational relationship test, the lowest standard of review.

The court's opinion gives very little basis for its decision other than the lack of a rational relationship between the Board's inquiry and attorney's fitness to practice law. The court considered the issue carefully, obviously recognizing its delicacy.<sup>77</sup> In the words of the court: "A lawyer should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession."<sup>78</sup> The court stressed the importance of lawyers leading law abiding lives in order to maintain the dignity associated with the legal profession and in keeping with the attorney's sworn duty to uphold the law.

The Board's concern is that the applicant for bar admission be morally, as well as legally, responsible. Thus, good moral character must be demonstrated before an applicant is admitted to the bar.<sup>79</sup> The definition given the term "good moral character" is considered unusually ambiguous, and the United States Supreme Court has warned against its arbitrary use.<sup>80</sup>

Included in the Florida Supreme Court's definition of *good moral character* are "conduct or acts which historically [do not] constitute an act of moral turpitude."<sup>81</sup> "Moral turpitude involves the idea of inherent baseness or depravity in the private social relations or duties owed by man to man or by man to society. . . ."<sup>82</sup> "The sole purpose of these requirements is to protect the public."<sup>83</sup> Additionally, "[t]he layman must have confidence that he has employed an attorney who will represent his interests . . . [and] if an applicant has committed certain illegal acts in the past, he may represent a future peril to society which

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76. 381 U.S. 479.

77. 403 So. 2d 1315.

78. FLA. CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1978).

79. Florida Bd. of Bar Examiners, Re: G.W.L., 364 So. 2d 454 (Fla. 1978).

80. 353 U.S. 252.

81. 364 So. 2d 454.

82. *Id.* at 458.

83. *Id.*

would justify denying the applicant admission."<sup>84</sup>

All attorneys are not of impeccable background, nor are they infallible. Recognizing this, the Board has admitted persons to practice who have violated laws,<sup>85</sup> or engaged in unethical conduct<sup>86</sup> at some point in their lives. Similarly, attorneys who have been suspended from practice for illegal conduct have subsequently been re-admitted to practice.<sup>87</sup> Thus, conduct that may be unethical or illegal may not involve an offense of moral turpitude for which a person should be excluded from the practice of law.

In a 1978 advisory opinion requested by the Florida Board of Bar Examiners, *Florida Board of Bar Examiners v. Eimers*,<sup>88</sup> the Florida Supreme Court considered the relationship between homosexuality and fitness to practice law. In *Eimers*, the applicant for admission had passed all parts of the Florida Bar Examination, but had admitted his preference for homosexuality during questioning at a hearing before the Board. The applicant was not asked about any specific acts he may have engaged in nor was there any evidence proving the applicant had acted or planned to act on his sexual preference. The court stated that in order to determine the reasonableness of the relationship between homosexual orientation and fitness to practice law, consideration must be given the purpose for ostracizing the morally unfit.<sup>89</sup> The court stated that an attorney's mere preference for homosexuality did not constitute a threat to the Board's objective of protecting the public

84. Florida Bd. of Bar Examiners, *In re Eimers*, 358 So. 2d 7, 9 (Fla. 1978).

85. Florida Bd. of Bar Examiners, *re Groot*, 365 So. 2d 164 (Fla. 1978) (debts incurred later discharged by bankruptcy are not basis for denial of admission to Bar where not incurred with reckless disregard for payment); *In re Florida Bd. of Bar Examiners*, 183 So. 2d 688 (Fla. 1966) (conviction of petty larceny does not deprive individual of right to be admitted to the practice of law, if otherwise qualified).

86. 365 So. 2d 164; 183 So. 2d 688.

87. *The Fla. Bar v. Davis*, 361 So. 2d 159 (Fla. 1978) (issuance of worthless checks constitutes unethical conduct by an attorney warranting suspension for twelve months); *The Fla. Bar v. Blalock*, 325 So. 2d 401 (Fla. 1976) (attorney suspended for misappropriating funds will be reinstated when restitution made); *In re Hill*, 298 So. 2d 161 (Fla. 1974) (one year suspension for issuance of worthless checks and alcohol problems).

88. 358 So. 2d 7, 9.

89. *Id.*

from those morally unfit to practice law,<sup>90</sup> and further, that homosexual behavior among consenting adults did not render a person unable to “live up to and perform . . . professional duties and responsibilities assigned to members of The Bar.”<sup>91</sup>

In addition, the *Eimers*' court found the record devoid of evidence which suggested a preference for homosexual behavior among consenting adults was “indicative of character baseness.”<sup>92</sup> Implicit in this statement is the message that homosexual conduct, while proscribed by Florida's criminal law is moral turpitude of the degree which renders a person unfit to practice law. Since under *Eimers*, private consensual homosexual conduct was not deemed an offense of moral turpitude for which a person should be denied admission to the bar, it follows that *inquiry* into such conduct is not rationally related to fitness to practice law.

Two strong dissents in *N.R.S.* present the competing arguments.<sup>93</sup> As stated by Justice Boyd, “[h]omosexual acts are prohibited by the criminal law.”<sup>94</sup> The state legislature is not prohibited “by any constitutional principle of due process, equal protection, or privacy”<sup>95</sup> from enacting laws intended to “protect the public health, welfare, safety, and morals.”<sup>96</sup>

Since the issue in *N.R.S.* was not whether the Board can deny admission to someone who *admits* an orientation towards homosexual lifestyle, but rather whether the Board can *question* the applicant as to his private sexual activity, Justice Boyd stated that “[e]ven without evidence of actual conduct, I am opposed to the admission of any person whose admitted ‘orientation’ indicates a lifestyle likely to involve routine violation of a criminal statute.”<sup>97</sup> Although the mere “likelihood” of routine violation of the law is arguably weak grounds for denying an applicant admission to the bar, Justice Boyd felt further inquiry into petitioner's past and planned conduct would have been useful and

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90. *Id.*

91. *Id.* at 10.

92. *Id.*

93. 403 So. 2d 1315.

94. *Id.* at 1317.

95. *Id.*

96. *Id.*

97. *Id.* at 1318.

proper. Justice Boyd also stated that he would deny admission to anyone whose lifestyle involved routine violation of legislatively defined standards of moral conduct,<sup>98</sup> and believed the court had invaded the province of the legislature.<sup>99</sup>

The majority made no attempt to reconcile this viewpoint with their decision. Ignoring the competing argument, the court held that inquiry into an applicant's "orientation" to private consensual homosexual conduct was beyond the Board's purview, even though, as Justice Boyd stated, such conduct is violative of a criminal statute.<sup>100</sup> The majority denied the Board authority to determine through further questioning, whether petitioner's past conduct involved violation of a criminal statute.<sup>101</sup> Instead, the court seemed to rely on petitioner's assertion that he would obey the laws of Florida and that he had no present intention regarding future homosexual conduct. Thus, the possibility exists that an applicant who *may* have violated a Florida criminal law will be admitted to practice in Florida, *without further determination* of the frequency or seriousness of the past behavior.

Justice Alderman's separate dissent in *N.R.S.* addressed the danger of admitting to the bar persons who may have violated the law. He stated that further inquiry was relevant in the area of homosexual conduct just as it would be into any other area of illegal or immoral conduct.<sup>102</sup> Without further inquiry into petitioner's private homosexual conduct, Alderman argued the Board would be unable to determine with certainty the applicant's moral fitness. Further investigation by the Board may well have revealed the nature and extent of petitioner's past and planned conduct. However, since in the majority's view orientation or proclivity towards a homosexual lifestyle is not grounds for denial of admission to the Bar, any inquiry with regard to such private consensual homosexual behavior is not rationally related to fitness to practice law.

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98. *Id.*

99. *Id.*

100. FLA. STAT. § 800.02 (1981).

101. *Id.*

102. 403 So. 2d 1315.

## Implications

The Florida Supreme Court has refused to sanction questioning of a Florida Bar applicant regarding his or her private, noncommercial sexual conduct even though their behavior may be in violation of Florida law.<sup>103</sup> Such private conduct, the court held, is not rationally related to fitness to practice law in Florida.

The court's refusal to grant the Board authority to further inquire into petitioner's private sexual behavior is apparently grounded in the belief that orientation or mere preference for a homosexual lifestyle is not an offense of moral turpitude or behavior which renders a person unable to meet the standard of good moral character.

Arguably, some conduct which is illegal is not conduct demonstrating moral turpitude. Current Florida law deems cohabitation to be a violation of the law.<sup>104</sup> Despite this status of the law, no applicant has been denied admission to the Florida Bar in recent years because of cohabitation. Apparently, although this conduct is illegal in Florida, it is not conduct involving moral turpitude nor conduct which fails to meet the standard of good moral character, and thus, not grounds for denial of admission to the bar.

The dissenters' opinions are grounded in Florida's criminal law. The dissenters were concerned about past and possible future violations of the criminal statute by petitioner. While at first blush the reasoning of the dissent appears practical, a closer examination reveals the impracticality of the position. The dissenters apparently would have the definition of *good moral character* narrowed to *law abiding*. Such reasoning in effect would allow admission to the bar only to those individuals who could evidence a strict compliance with Florida's criminal statutes. Anyone who had violated *any* law in Florida would be subject to Board inquiry and investigation regardless of whether the offense met with the Board's definition of conduct involving moral turpitude. However, since moral turpitude is the standard which the Board applies in screening candidates for admission, inquiry into an area for which admission cannot be denied would be irrelevant and not rationally related to fitness to practice law.

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103. FLA. STAT. § 800.02 (1981).

104. FLA. STAT. § 798.02 (1981).

## Conclusion

The court in *N.R.S.* apparently felt the petitioner's preference for a homosexual lifestyle was not conduct demonstrating moral turpitude such that it warranted denying his admission to the bar. Consequently, the court concluded any inquiry into his private sexual behavior would be irrelevant. However, since no clear rationale for its conclusion is stated, one must surmise and draw inferences regarding the reasoning and logic underlying the result. The majority opinion denied the Board authority to further question *N.R.S.* about his private homosexual behavior since this was not rationally related to his fitness to practice law, but the opinion fails to explain why such inquiry is not rationally related.

While the dissenters' view appears legally sound in that homosexual behavior is violative of Florida's criminal law, their approach is fraught with impracticalities because their inquiry would extend into areas for which an applicant cannot be denied admission. The majority's opinion takes the more practical approach but leaves unanswered the assertion that such inquiry violates due process, equal protection, and the right to privacy. Without elaborating why private homosexual behavior is unrelated to fitness to practice law, the court denied the Board authority to inquire into this area.

*Leslie J. Roberts*

## Liability of Commercial Premises Owners to Injured Invitees: Estate of Starling v. Fisherman's Pier

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### Introduction

In the early morning hours of December 24, 1978, John Starling, inebriated to the point of unconsciousness, rolled off a commercial fishing pier into the surrounding waters and drowned. His estate sued the pier for negligence because the pier employee failed to provide for John's safety after knowing of his drunken condition. This case comment explores the issues raised by *Estate of Starling v. Fisherman's Pier*<sup>1</sup> as they pertain to the duty owed by owners of commercial premises to invitees who become incapacitated and then injured. This comment also examines Florida courts' position in the area of premises liability<sup>2</sup> and analyzes traditional classifications of visitors with the concurrent duties and immunities these classifications confer upon premises owners and occupiers.

While not emphasizing the distinctions, *Estate of Starling* exemplifies the outmoded distinctions between certain classes of visitor plaintiffs. Plaintiff classification is often the critical element in determining landowner liability; thus this comment considers the different results courts can reach depending on plaintiff classification. Finally, since classification is frequently unjust and anachronistic in contemporary society, this comment advocates its replacement with a single duty of reasonable care in view of foreseeability of injuries to others.

### *Estate of Starling*

On December 24, 1978, John Starling decided to walk out onto

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1. *Estate of Starling v. Fisherman's Pier, Inc.*, 401 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1981), *cert. denied*, 411 So. 2d 381 (Fla. 1981).

2. The Starling court did not elaborate on the distinctions between classifications of persons who come upon property. John Starling was classified as an invitee without any discussion. This case comment will expand the court's analysis and illustrate how different results may follow depending on the initial classification.

the fishing pier located off the City of Lauderdale-by-the-Sea. Perhaps John wanted to see whether the fish were biting or perhaps he wanted to "toast in" Christmas eve while out on the pier as he carried a bottle of liquor with him through the entrance pay booth. The pier employee and operator of the bait shop, August Poehler, apparently also wanted to join in the celebration. John and August partook in the drinking of the holiday spirits while in the bait shop.<sup>3</sup> John, however, proceeded to get thoroughly drunk and stumbled back out onto the pier where he subsequently passed out near the pier's edge.

August failed to take any precautions to safeguard his unconscious customer. Later, John Starling rolled off the fishing pier into the surrounding ocean waters and drowned.<sup>4</sup> His estate sued the pier owner and August Poehler because as pier employee, August failed to take precautionary steps to provide for John's safety after seeing John in a drunken condition.

### The Lower Court

Starling's estate claimed the pier was negligent in failing to remove Starling from a position of known danger when he could have been easily removed by the pier employee without any danger to that employee.

In defense, the pier relied principally on *Reed v. Black Caesar's Forge Gourmet Restaurant, Inc.*,<sup>5</sup> which involved an intoxicated restaurant patron who recovered his keys from the valet parking attendant and proceeded to drive his car into Biscayne Bay where he drowned. Florida's Third District Court of Appeal found no restaurant liability because the proximate cause of Reed's death was his own negligence in driving while intoxicated. Thus, the owners of the fishing pier in *Starling* argued the proximate cause of decedent's death was his own negligence in becoming intoxicated.

To bolster its defense, the fishing pier proprietors in *Starling* argued that the liquor the deceased consumed was not sold or supplied by the pier.<sup>6</sup> Since Florida does not have a Dram Shop Act, a bar is under

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3. Brief for Appellants at 2.

4. *Id.*

5. 165 So. 2d 787 (Fla. 3d Dist. Ct. App. 1964).

6. Brief for Appellee at 5-6. The plaintiff in *Starling* cited a case in which a



no duty to protect an intoxicated person from injury to himself.<sup>7</sup> Therefore, defendant contended, a fishing pier that did not serve alcoholic beverages would be under even less of a duty than a bar that supplied its patrons with intoxicating liquors.<sup>8</sup> Additionally, argued the pier, neither the condition of the premises presented a danger nor did any act of the pier operator place Starling in a perilous situation.<sup>9</sup> Had defendant not kept the premises in a safe condition, or failed to warn plaintiff of a hidden peril which defendant knew or should have known about, the breach of duty would have been clear.<sup>10</sup>

The only duty the pier recognized was the duty of a business establishment to protect its patrons from harm by other patrons or employees, when *notice* of a *specified* danger was apparent.<sup>11</sup> This duty arguably does not extend to a duty to protect a guest from himself. Generally, there is no duty "to come to the assistance of a person who is so ill or intoxicated as to be unable to look out for himself."<sup>12</sup> The Broward County Circuit Court, persuaded by the defendants' argument and reliance on *Reed*, dismissed the Starling estate complaint with prejudice for failure to state a cause of action.<sup>13</sup>

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plaintiff was struck by an automobile after being ejected from a bar because he was intoxicated. One basis for liability was the violation of a statute prohibiting a bar from serving or selling liquor to an intoxicated person. *Pence v. Ketchum*, 326 So. 2d 831 (La. 1976).

7. Florida, along with more than half the states, does not have a Dram Shop Act. 4D PERSONAL INJURY ACTIONS, DEFENSES, DAMAGES § 1.02 (L. Frummer & M. Friedman eds. 1971). Such statutes impose liability on one who dispenses liquor to an already intoxicated person and are designed to protect, not the intoxicated person, but innocent bystanders who are injured by him. The primary purpose of the act is to protect the "economic, social and moral well-being and the safety of the state and all its people," *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 143 P.2d 952 (3d Dist. Ct. App. 1943).

8. Brief for Appellee at 6.

9. *Id.* at 4. The defendant relied on the fact the open horizontal railing, in and of itself, presented no danger. He ignored the fact that it was this condition that became dangerous by being insufficient to prevent the victim from rolling off the pier.

10. 65 C.J.S. *Negligence* § 63 (1966).

11. Brief for Appellee at 2 (citing *Warner v. Florida Jai Alai, Inc.*, 221 So. 2d 777 (Fla. 4th Dist. Ct. App. 1969)).

12. Brief for Appellee at 203 (citing 57 AM. JUR. 2d *Negligence* § 41 at 389 (1971)).

13. Brief for Appellants at 3 (citing to the record at 33).

## The Appellate Decision

Florida's Fourth District Court of Appeal reversed the Broward County Circuit Court's dismissal of Starling estate's complaint. The appellate court recognized the general rule that a chance bystander has no duty to come to the aid of an intoxicated person. However, the *business* relationship existing between the pier and the invited patron provided the necessary relationship in order to impose an ordinary duty of care.<sup>14</sup> Accordingly, if the facts of *Reed* were altered, the Third District Court of Appeal probably would have held the restaurant liable. The Fourth District hypothesized that, if in *Reed* the restaurant had knowledge that an unconscious patron was left unattended in the restaurant parking lot and injury resulted, restaurant liability probably would lie. In other words, the *Starling* court implicitly recognized that both knowledge of the patron's incapacity coupled with control over the patron's actions are the requisite elements to find premise owner liability for injuries sustained by the patron.

A case factually similar to *Starling* aided the Fourth District Court of Appeal in the duty of care analysis, and the court looked to the West Virginia's Supreme Court of Appeals decision in *Hovermale v. Berkeley Springs Moose Lodge No. 1483*.<sup>15</sup> In *Hovermale*, a Moose Lodge member was found dead in his car after drinking at the lodge bar the previous night. Whether the victim was ill or drunk was disputed at the trial. The evidence did show after a few drinks Hovermale collapsed at the bar and was taken to his car at the direction of the bartender in order to "sleep it off."<sup>16</sup> When the lodge closed for the night no one checked the condition of the victim "asleep" in his car. When the lodge re-opened the next morning, Hovermale was found dead. He had suffered a heart attack within hours after being placed in his automobile.

The West Virginia court, relying on the Restatement (Second) of Torts, found the lodge owed Hovermale an ordinary duty of care:

[A] possessor of lands open to the public is under a duty to those members of the public who enter in response to its invitation to

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14. 401 So. 2d. 1136.

15. 271 S.E.2d 335 (W. Va. 1980).

16. *Id.* at 337.

give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.<sup>17</sup>

Thus the supreme court considered whether under the circumstances defendant complied with its duty to render aid to an invitee known to be ill or injured and whether this factual question had been improperly taken from the jury. Finding that it had, the supreme court of appeals reversed the Morgan County Circuit Court and awarded a new trial.<sup>18</sup>

*Starling* and *Hovermale* may be distinguished to the extent that the plaintiffs' incapacities resulted from different causes.<sup>19</sup> The *Starling* court said, however, that regardless of the initial reason for the disability, the end result — total incapacity — was the same. Liability to the business depends on the proprietor's knowledge of the victim's condition, the foreseeability of danger, and the ability to render aid to the intoxicated patron.

A proprietor simply cannot ignore and step over an unconscious customer lying in a dangerous place upon his premises and he must take some minimal steps to safeguard any customer upon his premises from extreme danger, even though the customer has allowed himself to be exposed to that danger in the first place.<sup>20</sup>

### Intoxication Issue

In *Starling*,<sup>21</sup> Chief Judge Letts stated that gross misconduct on the part of the decedent might affect the case's outcome: "[W]e would expect that a jury would find the drowned man comparatively negligent

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17. *Id.* at 338 (citing RESTATEMENT (SECOND) OF TORTS § 314A (1965)).

18. *Id.*

19. *See supra* text accompanying note 16.

20. 401 So. 2d 1136. On appeal to the Florida Supreme Court, Fisherman's Pier alleged a conflict between the *Reed* and *Starling* decisions. In *Reed*, a commercial establishment was under no duty to protect an intoxicated person from harm to himself, while in *Starling*, an affirmative duty was imposed. Brief for Petitioner at 2. The Florida Supreme Court denied certiorari based on jurisdictional grounds. *Starling*, 411 So. 2d 381 (Fla. 1981).

21. 401 So. 2d 1136.

in large or even total measure. . . ."<sup>22</sup> However, the Chief Judge also stated the issue of comparative negligence was not the test of whether a cause of action was stated.<sup>23</sup>

Prior to 1973, Florida followed the common law rule that any contribution by a plaintiff to his own injury, would totally bar the plaintiff from recovery, even though the defendant was clearly more at fault. However, with *Hoffman v. Jones*,<sup>24</sup> Florida adopted the law of comparative negligence which does not completely bar the negligent plaintiff's recovery but rather reduces it in proportion to the plaintiff's own contributory negligence. Florida's abrogation of the contributory negligence doctrine caused considerable modification in the assumption of risk defense as well. "Assumption of the risk in certain instances merges with comparative negligence . . . [and] the fact finder is entitled to consider all facts and circumstances in order to determine the extent to which the plaintiff may be at fault."<sup>25</sup> Still the standard of care for intoxicated plaintiffs is the same: that of sober individuals.<sup>26</sup> Therefore, because comparative negligence is not a total bar to recovery, a cause of action could exist for Starling's estate.

The issue of plaintiff's intoxication at the time of injury is properly a matter for the jury's consideration.<sup>27</sup> A jury might well deny recovery; however, plaintiff's *incapacity* precipitates a duty of care upon the defendant proprietor. "The evidence of intoxication goes to the jury question of whether [the defendant] should have known, in the exercise of reasonable care, that the deceased was in need of attention."<sup>28</sup>

*Total incapacity* of a plaintiff renders a duty on the proprietor to take precautions to guard the plaintiff's safety.<sup>29</sup> Despite the fact that the plaintiff was initially negligent in becoming drunk, once he is in a

22. *Id.*

23. *Id.*

24. 280 So. 2d 431 (Fla. 1973).

25. *Hall v. Holton*, 330 So. 2d 81 (Fla. 2d Dist. Ct. App. 1976) *quoted in* *Heath v. First Baptist Church*, 341 So. 2d 265, 267 (Fla. 2d Dist. Ct. App. 1977).

26. *See generally* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 32 (4th ed. 1971); *RESTATEMENT (SECOND) OF TORTS* § 283, comment d (1965).

27. *Chicago, Rock Island & Pac. Ry. Co. v. Houston*, 209 Ark. 217, 189 S.W.2d 904 (1945); *Mills v. Silbernagel & Co.*, 204 Ark. 734, 164 S.W.2d 893 (1942); *Sanders v. Brown*, 73 Ariz. 116, 238 P.2d 941 (1952).

28. 140 So. 2d 702 (La. Ct. App. 1962).

29. *Small v. Boston & Me. R.R.*, 85 N.H. 330, 159 A. 298 (1932).

drunken stupor the law recognizes the impossibility of requiring sober conduct.<sup>30</sup> Therefore, the question for the jury to decide was whether a breach of duty occurred under the circumstances. While it is true that a proprietor "is not an insurer and as such should not be held responsible for events over which he has no control and could not reasonably foresee,"<sup>31</sup> in a particular situation a jury might well decide what actions a reasonable person would be expected to take.<sup>32</sup> For instance, the pier proprietor in *Starling* knew the victim had passed out and was situated in a dangerous position. How far one must go to protect a person from injury depends on the foreseeability of injury, the plaintiff's capacity to watch out for his own safety, and what a reasonable person would do under the circumstances.

There are other special situations in which a higher duty of care may be imposed. For example, one charged with the custody of another, such as a police officer in a police-prisoner situation,<sup>33</sup> or a common carrier in service of a passenger,<sup>34</sup> has been held to a higher than ordinary duty of care.<sup>35</sup> Thus where an intoxicated prisoner was injured after a fall from his bunk bed, the jailer was found liable for failing to secure the plaintiff to prevent a foreseeable injury.<sup>36</sup> Putting a passenger off a train in the middle of the night when the passenger was so

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30. *Id.*

31. 271 S.E.2d at 339.

32. The *Hovermale* court cited a case where a train conductor failed to render aid to a passenger suffering from a stroke, assuming that the man was drunk, and stated:

[t]he case turns, not on what the conductor assumed or thought, but on what he should, in the exercise of reasonable prudence, have done in light of the facts which were brought to his notice. . . . The fault of the conductor was not in making the wrong diagnosis, but in rashly assuming that he was competent to make any diagnosis at all.

*Middle v. Whitridge*, 213 N.Y. 499 at —, 108 N.E. 192 at 197 (1915) quoted in *Hovermale*, 271 S.E.2d at 339.

33. *Barlow v. City of New Orleans*, 228 So. 2d 47 (La. Ct. App. 1969); *Shuff v. Zurich-Am. Ins. Co.*, 173 So. 2d 392 (La. Ct. App. 1965); *Wilson v. City of Kotzebue*, 627 P.2d 623 (Alaska 1981).

34. *Swilley v. Economy Cab Co. of Jacksonville*, 46 So. 2d 173 (Fla. 1950).

35. *Barlow v. City of New Orleans*, 228 So. 2d 47 (La. Ct. App. 1969); *Swilley v. Economy Cab Co. of Jacksonville*, 46 So. 2d 173 (Fla. 1950); *Bourgeois v. Toyé Bros. Yellow Cab Co.*, 192 So. 379 (La. Ct. App. 1939).

36. *Shuff v. Zurich-Am. Ins. Co.*, 173 So. 2d 392 (La. Ct. App. 1965).

intoxicated as to be totally unaware of any danger was found to be a breach of duty owed by the train to its passenger.<sup>37</sup> One "whose mental and physical facilities are so impaired, that he is incapable of exercising due care for himself, where he is in the custody of another who is charged with the duty of caring for his safety,"<sup>38</sup> should not be subjected to rules of contributory or comparative negligence. Alternatively, where a plaintiff-prisoner was found not so drunk to be unable to protect himself, the burden on the defendant was correspondingly lighter and no breach of duty was found.<sup>39</sup>

The degree of plaintiff's incapacity determines whether a higher degree of care will be imposed in a custodial relationship. The "degree of vigilance and caution which is necessary . . . may vary according to the capacity of the person with respect to whom the duty to exercise care exists."<sup>40</sup> Total incapacity, as in the *Starling* case, logically would require more care than that required toward one who was only slightly drunk. When the defendant knows of the plaintiff's incapacity and then allows the plaintiff to expose himself to great peril, the defendant has committed a culpable act.<sup>41</sup>

Intoxication of a person does not relieve others of the obligation to exercise care to avoid injuring him, but may, on the contrary, impose a duty of exercising greater care than would otherwise be sufficient, where his appearance and actions indicate such a degree of

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37. *Johnson v. Louisville & Nashville R.R.*, 104 Ala. 241, —, 16 So. 75, 77 (1894). In that case, the conductor ejected a drunk passenger in the middle of the tracks for not having the fare. *See also Pence*, 326 So. 2d 831. An additional basis for recovery in *Pence* was founded on the defendant's duty to avoid affirmative acts which increase the peril to an intoxicated patron. The *Pence* court stated:

If it should be conceded that [plaintiff] contributed to his death by drinking until he became drunk and unconscious, it would not follow that the plaintiff would not be entitled to recover. If a person lies down upon a railroad track in a state of helpless intoxication, the company will not be justified in running a train over him, if it can be avoided in the exercise of reasonable care, after the person is discovered in his exposed condition.

*Id.* at 837 (quoting *Weymire v. Wolfe*, 52 Iowa 533, 3 N.W. 541, 542 (1879)).

38. *Wilson*, 627 P.2d at 631.

39. *Manuel v. United States Fire Ins. Co.*, 140 So. 2d 702 (La. Ct. App. 1962).

40. 65 C.J.S. *Negligence* § 12 at 587 (1956). *See generally* 58 AM. JUR. 2d *Negligence* § 39 (1971).

41. *Johnson v. Louisville & Nashville R.R.*, 104 Ala. 241, 16 So. 2d 75 (1894).

intoxication as affects his capacity to care for his own safety.<sup>42</sup>

### Liability to Trespassers, Licensees and Invitees

In his often-quoted concurring opinion from *Heaven v. Pender*,<sup>43</sup> Master of the Rolls Brett stated the basic negligence principle:

[W]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.<sup>44</sup>

Premises liability, which departs in some respects from this principle, deals with the liability of owners or occupiers of real property to injured visitors or guests.<sup>45</sup>

The status of the injured person, as invitee, licensee or trespasser, "affects to some degree the liability of the owner . . . since it may determine the extent of the obligation which the duty of due care imposes upon the possessor."<sup>46</sup> It is this status factor which distinguishes such cases from other negligence actions.

The special rules of premise liability are frequently said to be attributed to the special place in which land has historically "been held in English and American thought, the dominance and prestige of the landowning class in England during the formative period of the rules governing the possessor's liability, and the heritage of feudalism."<sup>47</sup>

Traditionally, persons entering the premises of another have been

42. 65 C.J.S. *Negligence* § 12 at 587 (1966) (footnotes omitted).

43. 11 Q.B.D. 503, 509 (1883).

44. *Id.* as quoted in *Rowland v. Christian*, 69 Cal. 2d 180, 183, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

45. 62 AM. JUR. 2d *Premises Liability* § 215 at 226 (1971).

46. *Id.*

47. 69 Cal. 2d 180, 184, 443 P.2d 561, 565, 70 Cal. Rptr. 97, 101 (1968). The *Rowland* court refers to 2 HARPER AND JAMES, *THE LAW OF TORTS* at 1432 (1956). For discussion of the origins and history of premises liability, see W. L. PROSSER, *Business Visitors and Invitees*, 26 MINN. L. REV. 573 (1942). See also Comment, *The Outmoded Distinction Between Licensees and Invitees*, 22 MO. L. REV. 186 (1957).

divided into three categories: trespassers, licensees, and invitees. Each has commanded a different degree of care due from the owner or person in control of the premises. For example, a landowner owes the least duty to a trespasser. The landowner must warn of known dangers once he knows of the trespasser's presence, and must refrain from wantonly injuring the trespasser. A landowner owes the greatest duty to invitees. He must inspect the premises for unsafe conditions and repair any defects which are known or should be known,<sup>48</sup> "and . . . give timely notice of latent or concealed perils . . . not known to the [invitee]."<sup>49</sup> The duty owed to a licensee, one on the property for social purposes, falls somewhere between the duties owed to invitee and trespasser.

At times difficulties in classifying persons on others' property has led to confusion where premises owner liability has been at issue. Trespassers enter the land without the landowner's permission, licensees are tolerated, and invitees are desired or even asked to enter the premises for business purposes.<sup>50</sup> However, licensees may be designated as gratuitous, bare, or "mere" licensees.<sup>51</sup> In an increasing tendency to find liability where none might otherwise exist, the courts have sometimes strained to include certain visitors<sup>52</sup> in one category rather than another.

Typical of the difficulties in this classification system is the conflict of opinion over the definition of "invitee." One basis for invitee status rests upon an economic benefit theory.<sup>53</sup> The price for the economic

48. PROSSER, *supra* note 26, at 357.

49. *Waterman v. Graham*, 228 So. 2d 925 (Fla. 2d Dist. Ct. App. 1969) *quoted in* *Heath v. First Baptist Church*, 341 So. 2d 265, 267 (Fla. 2d Dist. Ct. App. 1977).

50. Annot., 95 A.L.R.2d 996 (1964).

51. 62 AM. JUR. 2d *Premises Liability* § 74 at 328. For further discussion of Florida's treatment of classifications of visitors upon the premises, see text at pp. 545-47 *infra*.

52. "While it has been said often enough that 'mutuality of interest' may be indirect and remote from the object of the particular visit, there is at least ground for suspecting that in some of these cases, at least, it has been dredged up for the occasion." PROSSER, *supra* note 22, at 388. *See, e.g., Cameron v. Abatiell*, 127 Vt. 111, 241 A.2d 310 (1968), holding a policeman on duty to be an invitee, rather than a licensee, and thus allowing recovery.

53. One authority discusses nineteenth century English contract law as one of the origins of premises liability. Comment, *supra* note 47, at 188. Other areas of the law which have been drawn upon and at times confounded by the then newly emerging



benefit derived from the visitor's presence is the landowner's duty to make the premises safe.<sup>54</sup> When there is no benefit to the landowner, generally, he is under no duty. Exactly what constitutes an economic benefit can also become a complex determination. Professor Prosser stated that economic benefit may take the form of good will, like merely making a public restroom available.<sup>55</sup> Other courts have found economic benefit as the possibility of future sales to an accompanying friend of a patron.<sup>56</sup> Some cases have applied merely a public invitation test.<sup>57</sup> There is an implied representation that one who holds his premises open to the public is presumed to have made them safe,<sup>58</sup> whether an economic benefit is involved or not.

Without much discussion Florida's Fourth District Court of Appeal in *Starling* classified Starling as an invitee. Presumably defendants could have argued that because Starling used the premises for drinking, a purpose not held out to the public, Starling lost his invitee status. Moreover, the pier could also have argued that by drinking Starling violated a local ordinance and therefore lost his invitee status.<sup>59</sup> Then the question would be whether Starling was a licensee or a trespasser and what effect this would have on the duty of the pier operator. Conceivably, defendant's duty might be diminished if Starling was classified a trespasser.

In Florida prior to 1972, a licensee was one who entered the premises for *his own* benefit, with the permission of the landowner. In *Post v. Lunney*,<sup>60</sup> Florida's mutual benefit test or economic benefit test for determining invitee status was replaced with the broader invitation test

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principles of negligence include: the law of nuisance on the highway, the law of fraud, and the distinction between acts of omission and commission.

54. PROSSER, *supra* note 26 at 386, (citing FIRST RESTATEMENT OF TORTS §§ 332, 343, Comment a (1938)).

55. PROSSER, *supra* note 26, at 388.

56. *Id.*

57. Annot., 95 A.L.R.2d 996 (1964).

58. PROSSER, *supra* note 26 at 388.

59. The Chief Judge noted, but did not specifically address, the fact that the consumption of alcoholic beverages on the pier was in violation of a municipal ordinance. He also observed in a footnote that the pier operator had consumed alcoholic beverages with the drowned man. 401 So. 2d 1136.

60. 261 So. 2d 146 (Fla. 1972).

found in the Restatement (Second) of Torts § 332.<sup>61</sup> This test qualified business invitees, public invitees, and social guests for the same degree of care from the landowner. The unjust results of the mutual benefit test were clearly illustrated by *Post v. Lunney* where Mrs. Lunney while on a garden club tour tripped on a piece of transparent vinyl protecting an oriental rug and sustained injury. Mrs. Lunney sued Mrs. Post, the owner of the home, who had offered her home to the tour for charitable purposes. Mrs. Post received no compensation for allowing the tour of her estate, though Mrs. Lunney had paid to go on the tour. Mrs. Lunney was in the home with Mrs. Post's permission but there was no business relationship between them and thus no invitee status. The trial court denied recovery but the Florida Fourth District Court of Appeal reversed holding the instruction to the jury, that plaintiff was a licensee, was incorrect. She was an invitee and should be allowed to recover. The plaintiff could have reasonably assumed she was an invitee and would be under the Restatement test.<sup>62</sup> Public invitees and business invitees were found preferable to the exclusive use of the mutual benefit test formerly stated in *McNulty v. Hurley*.<sup>63</sup>

Even though the class of business invitees was enlarged to include public invitees without the requirement of an economic benefit, in *Wood v. Camp*<sup>64</sup> the Florida Supreme Court confirmed its commitment to retain different degrees of care depending on the status of the plaintiff. The *Wood* case involved a father's action against a landowner for his child's death when a bomb shelter which the child had entered exploded. The child was an invited guest. At issue was the inclusiveness of the class of invitees and the appropriate standard of care. By revolving the distinction around the invitation, whether express or implied,

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61. *Id.* at 148.

62. The RESTATEMENT (SECOND) OF TORTS § 332 defines invitee:

- (1) An invitee is either a public invitee or a business visitor.
- (2) A public invitee is a person who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public.
- (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealing with the possessor of land.

*Id.* at 176.

63. 97 So. 2d 185 (Fla. 1957).

64. 284 So. 2d 691 (Fla. 1973).

the supreme court expanded the group of invitees to include licensees and social guests applying to both a single standard of responsible care under the circumstances. But the Florida Supreme Court specifically retained the class of uninvited licensee and trespasser, although it admitted there is only a fine distinction between these latter two categories.<sup>65</sup> *Wood* then overruled *Cochran v. Abercrombie*<sup>66</sup> which had disallowed recovery for a licensee to whom there was only a duty not to purposely injure.<sup>67</sup>

### Argument for Elimination of Categories

While a person's status may be relevant in predicting the foreseeability of his presence, once his presence is known reasonable burdens upon the landowner vary with the circumstances.

Thus, although the foreseeability of harm to an invitee would ordinarily seem greater than the foreseeability of harm to a trespasser, in a particular case the opposite may be true. The same may be said of the issue of certainty of injury. The burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach may often be greater with respect to the trespassers than with respect to invitees, but it by no means follows that this is true in every case. In many situations, the burden will be the same, i.e. the conduct necessary upon the defendant's part to meet the burden of exercising due care as to invitees will also meet his burden with respect to licensees and trespassers.<sup>68</sup>

The *Wood* court's main criticisms of abolishing the distinction are that once abolished, no guidelines can be offered to a jury, and the landowner would be subjected to too great a burden, making him an insurer of those who come upon his premises.<sup>69</sup> But a reasonable guide-

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65. *Id.* at 695.

66. 118 So. 2d 636 (Fla. 2d Dist. Ct. App. 1960).

67. In *Cochran*, a case with facts strikingly similar to the *Wood* case, plaintiff was looking at the car motor upon defendant's request. When defendant started the car, which had been left in gear, plaintiff was injured. 118 So. 2d 636.

68. 69 Cal. 2d 180, 186, 443 P.2d 561, 567, 70 Cal. Rptr. 97, 103 (1968).

69. 284 So. 2d 691 (Fla. 1973).

line for a jury is that a defendant will only be held liable in those situations where a "reasonable [person] would have realized plaintiff's grave danger, and lack of danger to himself, and where reasonably effective means of rescue were easily accessible as defendant knew or should have known. . . ."70 If this reasoning were applied to the *Starling* case, regardless of how the decedent was classified, *liability would lie*. But if the status distinctions were retained and *Starling* had been *classified a trespasser*, perhaps because he went beyond the scope of his invitation, then *liability might not lie*, even though all other factors have remained constant.

A major problem with retaining different degrees of care is that at times an individual's status might change during the course of a single visit. That is, an invitee might become a licensee or trespasser because of changes in the reason for his visit, the scope of this invitation,<sup>71</sup> the particular location of the premises where the injury occurred, or even the length of his stay.<sup>72</sup> A good example of this status inconsistency is illustrated by the following fact pattern:

A canvasser who comes on your premises without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him, it seems rather strange that your duty toward him should be different when he comes to your door from what it is when he goes away. Does he change his color in the middle of the conversation? What is the position when you discuss business with him and it comes to nothing? No confident answer can be given to these questions. Such is the morass into which the law has floundered in trying to distinguish between licensees and invitees.<sup>73</sup>

In *Starling*, even though the plaintiff was not specifically invited to the pier to drink, and even if he stayed on the pier after closing hours,

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70. Fowler V. Harper and Fleming James, Jr., 2 THE LAW OF TORTS, § 18.6 at 1046 (1956), (citing J. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112-13 (1908)).

71. Robillard v. Tillotson, 118 Vt. 295, 108 A.2d 524 (1954).

72. Hickman v. First Nat'l Bank of Great Falls, 112 Mont. 398, 117 P.2d 275 (1941).

73. Comment, *supra* note 47, at 193-94 n.31 (citing Dunster v. Abbott, 2 All E.R. 1572 (1953)).

the defendant knew of Starling's drunken condition and could foresee the likelihood of injury resulting. The pier operator was clearly in the better position to safeguard Starling without danger to himself. Whether Starling was originally an invitee who became an uninvited licensee or even a trespasser, is a purely academic question under these circumstances since the same duty of care should be imposed upon the pier and its operator.

*Prigden v. Boston Housing Authority*<sup>74</sup> presented the question of the duty owed a trespasser<sup>75</sup> known to be in a position of peril. After initially trespassing onto the premises, the child plaintiff was injured because the property owner failed to take safety precautions even after the condition of peril was known; the child fell down the elevator shaft of an apartment building. The agent of the premises owner knew of the child's position and refused to turn off the power to the elevator. A third person put the elevator into operation and serious injury resulted to the child. The court found inapplicable any rule which exempted a property owner who did not act when he was in a position to act where he could prevent injury or further injury. The Massachusetts Supreme Court therefore extended the duty of exercising reasonable care to prevent injury to include the *duty to take affirmative action* to protect a trespasser in a known position of peril. *Prigden* clearly exemplifies the reason to eliminate different duties of care owed to individuals on another's property. If the Massachusetts court had applied the traditional common law duty owed to a trespasser, that child would probably have been barred from recovery.

In 1963, the Massachusetts Supreme Judicial Court upheld a common duty to all lawful visitors,<sup>76</sup> but would not go as far as California

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74. *Prigden v. Boston Housing Auth.*, 364 Mass. 696, 308 N.E.2d 467 (1974).

75. Another example of the duty owed to a trespasser who was intoxicated and allowed to remain in a place where injury was foreseeable is illustrated in the following case. An intoxicated passenger of another railroad company was aroused from a drunken stupor and placed on a depot platform. Shortly thereafter, he was observed by employees of the defendant company sleeping between the tracks. It was found that the employees had a duty to either see him safely out of the railroad yard or watch out for him as the engine moved. The employees did neither and the company was found liable, even though plaintiff was a trespasser. *Cincinnati, New Orleans & Tex. Pac. Ry. v. Marris' Adm'x.*, 27 Ky. 388, 85 S.W. 188 (1905).

76. *Prigden v. Boston Housing Auth.*, 364 Mass. 696, 697, 308 N.E. 2d 467, 477 (1974).

had in *Rowland v. Christian*<sup>77</sup> which placed a trespasser in the same category as licensee and invitee. While the California decision made status a factor in determining liability, status was not the dispositive factor.

In *Rowland v. Christian*, the California Supreme Court advocated a single duty of reasonable care in all circumstances<sup>78</sup> to replace the difficult and often arbitrary application of the common law's anachronistic distinctions.<sup>79</sup>

Whatever may have been the historical justifications for the common law distinctions, it is clear that these distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to the difficulty in applying the original common law rules—they are all too easy to apply in their original formulation—but is due to the attempts to apply just rules in our modern society within the ancient terminology.<sup>80</sup>

The factors that should be weighed in determining liability or immunity may or may not have anything to do with the original classifica-

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77. 69 Cal. 2d 180, 184, 443 P.2d 561, 566, 70 Cal. Rptr. 98, 102 (1968).

78. *Id.*

79. *Id.*

80. *Id.* In refusing to adopt the rules relating to the liability of a possessor of land for the law of admiralty, the United States Supreme Court stated:

The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all circumstances."

*Id.* (footnotes omitted in original). Note also that England has rejected the common law distinctions in the Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, ch. 31.

tions.<sup>81</sup> “[T]o focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values.”<sup>82</sup> Plaintiff’s status is relevant insofar as it bears on the determination of what constitutes reasonable care.<sup>83</sup>

Whether Starling was an invitee, a licensee, or a trespasser, the pier operator knew of his condition and the likelihood of injury. These are the gauges which should be used to measure degree of care. The jury should be asked if “an ordinary reasonable and prudent person under the same or similar circumstances, stand[ing] in the shoes of the defendant, could foresee a risk of some harm to the particular plaintiff?”<sup>84</sup>

While Florida has not gone as far as California, and in fact has expressly repudiated the reasoning that favors discontinuing the classifications, the *Starling* case demonstrates that the duty owed by an occupier of premises should be expanded. A jury might well find no liability on the part of the pier operator depending upon the jury instructions given regarding the duty owed to invitees or licensees. If there was a single duty of care, the status of the injured person would be only a factor in determining whether the pier operator owed the plaintiff a duty of ordinary care. It would not only simplify the law, it would make it manifestly more just.

### Conclusion

By finding that a cause of action had been stated, *Estate of Starling* demonstrated the Florida Fourth District Court of Appeal’s willingness to expand the liability of premises owners to those who lawfully come upon the premises.

The facts of this case illustrate the inadequacy of variously classifying persons for purposes of defining premise owners’ duty. Neither the victim’s classification nor the voluntariness of his condition should be the basis of liability. Once a presence is known, if the foreseeable

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81. 69 Cal. 2d at 187, 443 P.2d at 568, 70 Cal. Rptr. at 105.

82. *Id.*

83. Comment, *supra* note 47 at 199.

84. *Id.*

**danger is great, while the risk of preventing injury is small, the pier operator should be under a duty to act.**

***Roberta Kushner***



Courts: A Comparative and Political Analysis. By Martin Shapiro. Chicago: University of Chicago Press. 1981. Pp. ix + 245. \$20.00.

*Reviewed by Arthur S. Miller\**

Martin Shapiro, a political scientist who is a member of the law faculty of the University of California at Berkeley, has done more than anyone to illumine the political nature of law. His *Law and Politics in the Supreme Court*<sup>1</sup> is a minor classic, even though it is largely ignored by those who edit the coursebooks used in law-school constitutional law classes.<sup>2</sup> His latest entry into the field of "political jurisprudence" is *Courts*, a slim volume that should be required reading for all law students. In it, Shapiro forces one to think beyond the sterile turgidities of appellate opinions that are the usual fodder of legal education, and to consider both the political and the sociological functions of judiciaries.

This he does by showing, in his opening chapter, that "courts are much less independent and adversarial" than the conventional model suggests; and "much less prone to follow pre-existing legal rules."<sup>3</sup> Shapiro, moreover, believes that appeal, rather than being a means of vindicating individual rights, is in fact a way by which central governing authorities extend and solidify control over the hinterlands. The remainder of the volume is devoted to testing those conclusions by analyzing the judiciaries of England, civil law systems, China, and traditional Islam. *Courts*, then, is a wide-ranging analysis of the politics of judiciaries. Tightly written, with prose more prosaic than limpid, it demands close attention to what Shapiro is saying.

What one gains is worth the effort. Professor Shapiro suggests how "uncourtlike" courts often are, "uncourtlike" in the sense that the actual judicial process often deviates from the orthodox model of what he calls a triadic structure—an independent judge applying preexisting norms in an adversary proceeding with a winner-take-all judgment. In fact, Shapiro argues, courts are not really independent but rather are

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1. M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* (1964)

2. E.g., W. LOCKHARD, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS* (5th ed. 1980) has no mention of Shapiro's book.

3. SHAPIRO, *supra* note 1, at *viii*.

part of the political regime, often creating their own legal rules and mixing mediation with litigation to produce compromises. Let me illustrate by quoting some passages, some of which are truistic but nonetheless ignored by the professoriate (and even by practitioners).

1. "Most courts make some law as they go along, and when they do it is usually with the assistance of the parties."<sup>4</sup> That situation is one of today's commonplaces, to be sure. Since the Legal Realists showed that judges make, not find, law, it is agreed that courts are mini-legislatures—and not just for the parties before the bar of a court. Courts, particularly the Supreme Court of the United States, make law for generations yet unborn; they promulgate general norms—legislative norms—the law of the land rather than the law of the case.<sup>5</sup> But even though a truism, this reality has not yet percolated very far into the minds of those who edit coursebooks in any area of law study. Law students, therefore, are persuaded (directly or indirectly) to believe that law preexists, and that the task of courts is to find the one rule that will fit the particular factual situation at bar. Why there is such a widespread failure to concede in teaching materials what most legal educators readily acknowledge in conversation is an unexplained mystery. I am unaware, for example, of any constitutional law book that proceeds, as it should, from Chief Justice Earl Warren's candid valedictory;<sup>6</sup> from Justice Byron White's equally candid observation in his dissenting opinion in *Miranda v. Arizona*;<sup>7</sup> from Justice William Brennan's concurring opinion in *Richmond Newspapers, Inc. v. Virginia*,<sup>8</sup> or from Justice William O. Douglas' assertion in *The Court Years*, his autobiography.<sup>9</sup> Shapiro cites none of these statements, but each buttresses

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4. *Id.* at 13.

5. See Miller, *Constitutional Decisions as De Facto Class Actions: A Commentary on Cooper v. Aaron*, 58 U. DET. J. URBAN L. 573 (1981).

6. Retirement of Mr. Chief Justice Warren, 395 U.S. vii, xi (1969) (Justices bound only by the Constitution and "our own consciences"). The Constitution, of course, does not answer questions; it merely provides a point of departure for judicial lawmaking.

7. 384 U.S. 436, 531 (1966) (White, J., dissenting) (admitting that the Court always has and always will create constitutional law).

8. 448 U.S. 555, 595 (1980): "judges are not mere umpires, but . . . lawmakers—a coordinate branch of *government*".

9. W. DOUGLAS, *THE COURT YEARS* 8 (1980) (quoting Hughes, C.J., to the effect that ninety percent of the Justices' decisions are made on emotion with the other

his conclusion quoted above. If judges are willing to tell us that they make up the law as they go along, why shouldn't law professors be as willing to accept and act upon such a conclusion?

I do not propose to delve into the psychology of legal educators. No doubt there are reasons for professorial acceptance and defense of the orthodox model of the judiciary. Shapiro, alluding to some of them, stated: "More of the resources of legal scholarship and argumentation are spent on building up the ideology of judicial independence than on any other part of the prototype precisely because the court's basic social logic as triadic conflict resolvers rests on this element."<sup>10</sup> That observation, however, does not tell us why legal scholars accept the "basic social logic" of courts—why, that is, scholars do not probe deeply into the judicial apparatus and analyze its sociological functions. It is as if the Legal Realists, who forever and conclusively smashed the orthodoxy concerning judges and courts, had never existed.

2. If judges are in fact lawmakers, what does that do to the notions of "independence, preexisting legal rules, adversary proceedings, and dichotomous solutions?" Says Shapiro:<sup>11</sup>

[L]awmaking and judicial independence are fundamentally incompatible. *No regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints.* To the extent that courts make law, judges will be incorporated into the governing coalition, the ruling elite, the responsible representatives of the people, or however else the political regime may be expressed.

There can be little doubt that Shapiro is correct. Although this is neither the time nor the place to expand on that statement, two bits of evidence—one a scholarly study and the other a recent Supreme Court decision—are in order. In *The Politics of the Judiciary* (for some inexplicable reason not cited by Shapiro), Professor J. A. G. Griffith concludes: "The judiciary in any modern industrial society, however composed, under whatever economic system, is an essential part of the system of government and . . . its function may be described as under-

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ten percent supplying reasons for supporting predelections).

10. SHAPIRO, *supra* note 1, at 19.

11. *Id.* at 34.

pinning the stability of that system and as protecting that system from attack by resisting attempts to change it."<sup>12</sup> Griffith wrote principally about the British experience, but his observations have wider relevance. He effectively shows that a legal system cannot be regarded as operating in a political vacuum. Both Griffith and Shapiro conclusively demonstrate that the State and the legal system, including the judiciary, are closely intertwined. That, again, is a sociological truism admitted by all who think about it but not purveyed to law students—no doubt because of the prevailing ideology of "legalism."

The other example is *Dames & Moore v. Regan*,<sup>13</sup> the Iranian hostage case decided in July 1981 by the Supreme Court. There the Court, speaking through Justice William Rehnquist, upheld President Carter's hurried agreements with Iran to obtain release of the fifty two hostages. Although crafted in familiar lawyers' language, Rehnquist's opinion reeks with the odor of compromise forced by necessity. Principle, as usual, gave way to *realpolitik*. The Justices, in the last analysis, had no choice save to sustain the validity of the executive agreements. The Court, quite obviously, was in fact (though not in theory) an arm of the political branches of government. To paraphrase one of Machiavelli's principles ("A republic or a prince should ostensibly do out of generosity what necessity constrains them to do"),<sup>14</sup> a republic—the United States—should purport to do under the law what political necessity requires that it do. Said even more bluntly, *Dames & Moore* is a pure example of a political Hobson's choice: the Justices not only had to take the first horse in Mr. Hobson's livery stable, it was the only horse there.

Furthermore, to speak of judicial independence and impartiality is to forget, once again, the teaching of Mr. Oliver Wendell Holmes who in 1873 wrote forcefully and persuasively about the nonneutrality of law and of courts: the notion, he said, that law was neutral, impartially imposed by judges, "presupposes an identity of interests between the

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12. J. GRIFFITH, THE POLITICS OF THE JUDICIARY 213 (paperback ed. 1977). See Miller, *The Politics of the American Judiciary*, 49 POL. Q. 200 (1978).

13. 453 U.S. 654 (1981). For discussion, see Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 U.C.L.A. REV. — (1982).

14. N. MACHIAVELLI, THE DISCOURSES 325 (Walker trans. 1950). (This was originally published in 1531).

different parts of a community which does not exist in fact.”<sup>15</sup> We may hope, he went on to say, that compassion will temper self-interest, but “all that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the de facto supreme power in the community.”<sup>16</sup> If Holmes was correct, as surely he was (and is), then the liberal theory of the rule of law is thoroughly discredited. As Holmes said, law is “a means by which a body, having the power, puts burdens which are disagreeable to them on the shoulders of somebody else.”<sup>17</sup>

Shapiro does not mention Holmes, nor does he inquire into the question of who the “de facto supreme power” in a given community might be. This is not to fault him; rather, it is merely to say that he has opened the door to more comprehensive analyses of the politics and sociology of courts. One hopes that others will pick up from where he ends, and go on to produce a complete sociology—a political sociology—of how courts, in the United States and elsewhere, operate—and who benefits from their decisions.

3. Despite the common belief to the contrary, the civil law system does not differ in any marked respect from the common law. “Far from being a complete set of preexisting legal rules, civil law nations like common law nations, depend on their courts to legislate many of their legal rules as they conduct litigation.”<sup>18</sup> On reflection, it is readily seen that things could scarcely be otherwise. There is no possible way for a code, however detailed, to anticipate all the many disparate factual situations concerning disputes among litigants. This conclusion, it is worth noting, makes nonsense out of the insistence in Louisiana that since it is governed by the Code Napoleon it differs from the other states. It can call itself a civil law state, but that does not mean that either its law or its legal system is not basically the same as, say, the systems in force in Texas or South Dakota.

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15. Holmes, Comment: *The Gas-Stokers' Strike*, 7 AM. L. REV. 582 (1873). For discussion, see Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. (1979).

16. *Id.*

17. *Id.*

18. SHAPIRO, *supra* note 1, at 155.

## II.

I do not suggest that this is all Professor Shapiro has to say in *Courts*. There is much more. In my judgment, he makes a persuasive case for his model of the judicial process. If he is accurate, as surely he is, then the traditional model—what he calls the prototype—must not only be completely reexamined, it must be replaced by a model more in accord with political and sociological facts. *Courts* presents a challenge to all law and political science professors; one that must be met if ever there is to be an adequate conception of law and of judging. I am not at all sanguine on that score: Speaking generally, law schools are reverting to what they were before the Legal Realists.<sup>19</sup> As such, and again speaking generally, they are not even very good trade schools. *Courts* does not give all the answers or even pose all the questions, but it is a solid first step toward a greater understanding. The prose tends to be muddy, and there are too many typographical errors, but those small faults are unimportant compared to the very real service Shapiro has accomplished.

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19. Cf. Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981); Miller, *Reductionism in the Law Schools*, 16 SAN DIEGO L. REV. 891 (1979).