Nova Law Review

Volume 39, *Issue* 1 2014 *Article* 5

Nova Law Review Full Issue

NOVA LAW REVIEW

VOLUME 39 FALL 2014 NUMBER 1

FLORIDA ARTICLES AND SURVEYS

NOTES AND COMMENTS

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TELLI V. BROWARD COUNTY—A MISUNDERSTANDING OF COUNTY HOME RULE AND AN ABRIDGING OF THE STATUS OF THE CONSTITUTION'S COUNTY OFFICERS WHO ARE NOT THE CHARTER'S COUNTY OFFICERS

H. KENZA VANASSENDERP* & KAYLA M. SCARPONE**

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I. INTRODUCTION

When a state's court of last resort renders an opinion that abridges, ignores, and renders meaningless an express provision of that state's constitution, then that court shall have itself effectuated an amendment to its constitution erroneously and without the approval and longstanding support of the electors of that state.[1] This is what the Supreme Court of Florida did in 2012 in the case of *Telli v. Broward County*,[2] which held that counties should be allowed "to govern themselves, including [enacting] term limits [for] *their* officials, in accordance with their home rule authority."[3] It is being interpreted to opine that charter counties may impose term limits through their charters on any and all county officers—including the Constitution's County Officers enumerated in article VIII, section 1, subsection (d) of the Florida Constitution, which includes the office of the Tax Collector.[4] This recent Supreme Court of Florida opinion receded from—that is, determined that the Court would no longer abide by—its previous opinion in *Cook v. City of Jacksonville (Cook II)*,[5] issued ten years prior, which expressly and unambiguously held that charter counties could not limit the terms of the Constitution's five County Officers enumerated in article VIII, section 1, subsection (d) of the Florida Constitution.[6]

1. *See* Telli v. Broward Cnty., 94 So. 3d 504, 513 (Fla. 2012) (per curiam).
2. 94 So. 3d 504 (Fla. 2012) (per curiam).
3. *Id.* at 513 (emphasis added).
4. FLA. CONST. art. VIII, § 1(d); *Telli*, 94 So. 3d at 513.
5. 823 So. 2d 86, 86 (Fla. 2002).
6. *Telli*, 94 So. 3d at 505; *see also* FLA. CONST. art. VIII, § 1(d); Cook v. City of Jacksonville (*Cook II*), 823 So. 2d 86, 86 (Fla. 2002); City of Jacksonville v. Cook (*Cook I*), 765 So. 2d 289, 293 (Fla. 1st Dist. Ct. App. 2000) (per curiam), *reh'g granted*, Cook v. City of Jacksonville, 786 So. 2d 1184 (Fla. 2001), *overruled by Cook II*, 823 So. 2d 86 (Fla. 2002).

The decision in *Telli*, which is supported by scarce legal analysis, is in direct conflict with the Florida Constitution.[7] *Telli* represents a fundamental misunderstanding of charter counties' home rule power—as limited by the Florida Constitution—and also a misunderstanding of the status of the five County Officers created and established by article VIII, section 1, subsection (d) of the Florida Constitution.[8]

Another article has been published regarding this case in 2013 by Daniel S. Weinger, titled *Stare Decisis Takes Another Blow in* Telli v. Broward County.[9] We would like to note that we agree with Mr. Weinger's position regarding the past precedent leading up to *Telli*, and his discussion of stare decisis.[10] We do, however, respectfully disagree with his discussion of operative language of the Constitutional provisions pertaining to "County Officers" and "County Commissioners"—discussed more fully below.[11] Furthermore, we note that Mr. Weinger's article did not address several important issues with the case.[12]

Florida is divided into sixty-seven county political subdivisions, each served by one general purpose government entity—Board of County Commissioners—and five specific purpose one-officer entities, the Constitution's County Officers: Sheriff, Tax Collector, Property Appraiser, Supervisor of Elections, and Clerk of Circuit Court.[13] All county governments have home rule power under the Florida Constitution, regardless of whether they take form as a charter county government form of home rule, or non-charter county government form of home rule.[14] Home rule—ever since 1968—is vested inherently in each county.[15] However, the Constitution still provides limitations on county home rule.[16] There are two

7. FLA. CONST. art. VIII, § 1(d); *Telli*, 94 So. 3d at 506, 512–13; Daniel S. Weinger, *Stare Decisis Takes Another Blow in* Telli v. Broward County, 42 STETSON L. REV. 859, 859–60 (2013).

8. FLA. CONST. art. VIII, § 1(d); *Telli*, 94 So. 3d at 506, 512–13; Weinger, *supra* note 7, at 859, 868–69.

9. Weinger, *supra* note 7, at 859, 868–73.

10. *Id.* at 860–68.

11. *See infra* text accompanying note 119. Interestingly enough, Mr. Weinger served as co-appellate counsel for the Board of County Commissioners challenging the term limit provision in the *Telli* case. *Telli*, 94 So. 3d at 505–06; Weinger, *supra* note 7, at 859.

12. *See Telli*, 94 So. 3d at 505–13; Weinger, *supra* note 7, at 868–73.

13. FLA. CONST. art. VIII, § 1(a), (c)–(d), (f)–(g) (noting unless one or more offices in article VIII, section 1, subsection (d) is abolished under applicable constitutional authority). Although much of this article will focus on duties and provisions of the Tax Collector, the broader implications are applicable to all five of the Constitution's County Officers. *Id. See infra* Parts II.C., III.A.–B.

14. FLA. CONST. art. VIII, § 1(a), (f)–(g).

15. *See id.* § 1(a).

16. *See id.* § 1(f)–(g).

categories of such limitations, which include those limits on non-charter counties' home rule in article VIII, section 1, subsection (f), and those limits on charter counties' home rule in article VIII, section 1, subsection (g).[17]

The Constitution's five County Officers[18]—as created by and established under article VIII, section 1, subsection (d) of the Florida Constitution—have been imbued with sovereignty and maintain a status of independence from the county government, the Board of County Commissioners.[19] These officers maintain sovereign plenary power to carry out important state work assigned to them by general law to be performed and carried out at the county level and to exercise reasonable discretion in carrying out that work, not inconsistent with the express duties.[20] These officers *are not* subject to regulation or interference by the local county government—the Board of County Commissioners.[21] Therefore, any charter provisions pertaining to the Constitution's five County Officers will not be enforceable, save for a provision establishing a different manner for their selection—but being selected in a different manner does not change their status as the Constitution's County Officers.[22]

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17. *Id.*

18. *Id.* § 1(d). It is important to understand the terms that we have chosen to describe the five County Officers listed in, and created by, article VIII, section 1, subsection (d) of the Florida Constitution. FLA. CONST. art. VIII, § 1(d). Throughout this article, we refer to these officers as the "Constitution's County Officers." *Id.* This is because they are created by the Constitution. *Id.* Some cases have referred to them as "Constitutional County Officers," "Constitutionally-authorized County Officers," or some other related title. *See, e.g.*, Snipes v. Telli, 67 So. 3d 415, 418–19 (Fla. 4th Dist. Ct. App.), *reh'g granted sub nom.* Telli v. Broward Cnty., 74 So. 3d 1084 (Fla. 2011), *aff'd per curiam*, 94 So. 3d 504 (Fla. 2012). We believe referring to these officers as either "Constitutional" or "Constitutionally-authorized" is misleading. *See* FLA. CONST. art. VIII, § 1(d); *Snipes*, 67 So. 3d at 418–19. These titles have been used by the courts to distinguish the five article VIII, section 1, subsection (d), county officers from a charter-created officer to whom the duties of the article VIII, section 1, subsection (d) County Officer have been transferred, and which may retain the same name and responsibilities. FLA. CONST. art. VIII, § 1(d). For a more detailed discussion of the abolition of an article VIII, section 1, subsection (d) officer and the transfer of his or her duties, resulting in a *charter officer*, see *infra* Part II.C. However, if a charter county follows the correct procedures laid out in the Constitution under article VIII, section 1, subsection (d) to abolish a Constitution-created "County Office" and transfers its duties to a charter-created office, then the resulting charter office is also *constitutional*. FLA. CONST. art. VIII, § 1(d); *see infra* Part II.C. To avoid confusion, we refer to the article VIII, section 1, subsection (d) "County Officers," as created by the Constitution, as the "Constitution's County Officers" or "Constitution County Officer," and to any charter-created office carrying out the same duties after abolition and transfer as the "charter's county officer." FLA. CONST. art. VIII, § 1(d); *see infra* Parts II–V.

19. FLA. CONST. art. VIII, § 1(d)–(e).

20. *See id.* § 1(f).

21. *Id.*

22. *Id.* § 1(d).

A charter county *may* abolish one or more of the Constitution's five County Offices and transfer the duties performed by that office to a charter office—either charter-elected or charter-appointed.[23] For example, in the Miami-Dade, Broward, and Volusia county political subdivisions, the Constitution's County Tax Collector—even though it may be referred to by the same name under the charter—no longer exists.[24] The charter's appointed Tax Collector now exists in its place in these counties, and this charter office may be regulated to its fullest extent by the local government, not inconsistent with the state duties established under Chapter 197 of the Florida Statutes,[25] and other applicable general law.[26]

The recent Supreme Court of Florida decision in *Telli* is in direct contradiction with the above-summarized provisions of the Florida Constitution.[27] First, it fails to acknowledge the important limitations placed on counties' home rule power under the Constitution.[28] Second, it undermines completely the status of the Constitution's five County Officers by holding that charter counties may term limit any and all county officers through their charters—even the Constitution's County Officers—when those offices have not been first abolished under the county charter.[29]

Accordingly, the lower court decision from the Fourth District Court of Appeal in the case should have been affirmed, but on different grounds: (1) because charter counties have broad authority over their Board of County Commissioners and any of their charter-elected or charter-appointed officers under their charters, including the authority to set term limits on the charters' officers—including County Commissioners—and; (2) because counties do not have the authority to regulate or interfere with the Constitution's five County Officers and thus do not have the power to term limit any one of the Constitution's County Officers whose office has not been abolished and duties transferred to a charter-created office.[30] Regardless of what the

23. *Id.*

24. DADE COUNTY HOME RULE CHARTER art. IX, § 9.01(A) (2012); BROWARD COUNTY CHARTER art. III, § 3.06(a) (2010); VOLUSIA COUNTY CHARTER art.VI, § 601.1(1)(a) (2002); *see also* FLA. CONST. art. VIII, § 1(d).

25. FLA. STAT. § 197.332(2) (2014); *see also* DADE COUNTY HOME RULE CHARTER art. IX, § 9.01; BROWARD COUNTY CHARTER art. III, § 3.06; VOLUSIA COUNTY CHARTER art.VI, § 601.1.

26. Weinger, *supra* note 7, at 862–63.

27. *Compare* FLA. CONST. art. VIII, § 1(d)–(g), *with* Telli v. Broward Cnty., 94 So. 3d 504, 513 (Fla. 2012) (per curiam).

28. *Telli*, 94 So. 3d at 507; *see also* FLA. CONST. art. VIII, § 1(d)–(g).

29. *Telli*, 94 So. 3d at 513; *see also* FLA. CONST. art. VIII, § 1(d)–(g).

30. *See* FLA. CONST. art. VIII, § 1(d); *Telli*, 94 So. 3d at 512–13; Snipes v. Telli, 67 So. 3d 415, 419 (Fla. 4th Dist. Ct. App.), *reh'g granted sub nom.* Telli v. Broward Cnty., 74 So. 3d 1084 (Fla. 2011), *aff'd per curiam*, 94 So. 3d 504 (Fla. 2012).

Supreme Court of Florida held in the *Telli* opinion, county charter term limits are not effective as to the Constitution's County Officers.[31]

The following sections of this article will explore the preceding analysis in depth.[32] Part II will include important background on county governance under the Florida Constitution, including the development of the county home rule in Florida, the difference between charter and non-charter county governance, and the status that our Florida Constitution gives to the five Constitution County Officers enumerated in article VIII, section 1, subsection (d), as well as the relationship between charter and non-charter counties and the Constitution's County Officers in each of their respective counties.[33] Part III will include an in-depth analysis of the Supreme Court of Florida decision in *Telli*, and how that decision misinterprets county home rule and ignores the status of the Constitution's County Officers.[34] Part IV includes a discussion of some possible pathways of review.[35]

II. BACKGROUND ON COUNTY GOVERNANCE UNDER THE FLORIDA CONSTITUTION

The Florida Constitution provides that the state shall be divided into political subdivisions called counties.[36] The Constitution leaves it up to the Florida Legislature to determine the number and boundaries of such counties.[37] Currently, there are sixty-seven counties in Florida.[38]

The Constitution also establishes that there shall be one county government in each county political subdivision and provides that such county governments exercise home rule power, either in the form of a non-charter county government[39] or charter county government.[40] However, the Constitution also provides that there shall be six more distinct government entities that shall be integral to that county's political subdivision.[41] These include one collegial, general purpose entity in the form of the Board of

31. *Telli*, 94 So. 3d at 513; *see also* FLA. CONST. art. VIII, § 1(d).
32. *See infra* Parts II–IV.
33. *See* FLA. CONST. art. VIII, § 1(d); *infra* Part II.
34. *See* FLA. CONST. art. VIII, § 1(d); *Telli*, 94 So. 3d at 513; *infra* Part III.
35. *See infra* Part IV.
36. FLA. CONST. art. VIII, § 1(a) ("The state shall be divided by law into political subdivisions called counties.").
37. *Id.* ("Counties may be created, abolished or changed by law, with provision for payment or apportionment of the public debt.").
38. *See* FLA. STAT. ch. 7 (2014).
39. FLA. CONST. art. VIII, § 1(c), (f).
40. *Id.* § 1(g).
41. *Id.* § 1(d)–(e).

County Commissioners[42] and each of the five distinct one-officer, special purpose entities, which include: Sheriff, Tax Collector, Property Appraiser, Supervisor of Elections, and Clerk of Court.[43] These five, one-officer, special purpose entities are created by the Florida Constitution—labeled "County Officers"—and exist in every county political subdivision in Florida; even in counties that have adopted charters, unless any charter county has by charter provision abolished such an office and transferred its duties to either a charter-elected or charter-appointed office.[44]

A. *1968 Constitution and the Shift in Counties' Home Rule*

"Home rule" *generally* refers to the "allocati[on] [of] a measure of autonomy to a local government."[45] In other words, a local government that has home rule power governs its own local affairs and does not have to seek legislative authority for what it does.[46] Prior to the 1968 Constitution, counties in Florida derived home rule authority only as directly granted from the Florida Legislature "through [the] passage of local bills,"[47] and did not have any independent or inherent powers of self-government.[48] This previous form of home rule in Florida was commonly referred to as *Dillon's Rule*.[49] Based on the increasing population and growth needs of the people

42. *Id.* § 1(e).

43. *Id.* § 1(d).

44. FLA. CONST. art. VIII, § 1(d). There are certain limited ways, provided by the Constitution, in which a charter county government may alter or abolish one or more of these six county government entities, which will be discussed in Part II.C.1–3. *See* discussion *infra* Part II.C.1–3.

45. BLACK'S LAW DICTIONARY 850 (10th ed. 2014). The verbatim definition in Black's Law Dictionary is "[a] state legislative provision or action allocating a measure of autonomy to a local government, conditional on its acceptance of certain terms." *Id.* This definition is somewhat misleading because, as discussed *infra*, in Florida, home rule power is allocated under the State's constitution, and therefore, is not an allocation of power from the legislature, but an inherent power based on the consent of the people to be governed. *See* discussion *infra* Part III.A.

46. *See* FLA. CONST. art. VIII, § 1(f)–(g); BLACK'S LAW DICTIONARY, *supra* note 45, at 850.

47. C. Wayne Alford & John H. Wolf, Comment, *Constitutional Revision: County Home Rule in Florida—The Need for Expansion*, 19 U. FLA. L. REV. 282, 282–83 (1966).

48. Mark J. Wolff, *Home Rule in Florida: A Critical Appraisal*, 19 STETSON L. REV. 853, 859 (1990).

49. *See* Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 221 (1983) (discussing *Dillon's Rule*, under which "local government[s only] consisted of delegated or enumerated powers," and thus characterizing "local governments as creatures of the state legislature").

of Florida,[50] and the increasing demands that the passage of local bills were placing on the Legislature,[51] the people of Florida passed the 1968 Constitution which includes express provisions addressing the home rule power of county political subdivisions.[52] The fundamental force of these provisions of the 1968 Constitution meant that counties in Florida have inherent governing power and no longer have to request a specific law from the Florida Legislature to justify or authorize local county action.[53] Broad as this power may be, the Constitution still limits this inherent power with different limitations for non-charter home rule and charter county home rule.[54]

B. *The Difference Between Charter Counties and Non-Charter Counties Under the Florida Constitution*

All sixty-seven county political subdivisions in Florida possess home rule power inherently, regardless of whether they have a charter or not.[55] Under the 1968 Constitution, non-charter counties possess "such *power of self-government* as is provided by general[56] or special law[57] . . . [and] [t]he [B]oard of [C]ounty [C]ommissioners . . . may enact . . . county ordinances not inconsistent with general or special law."[58] Relatedly, charter county

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50. *See* Wolff, *supra* note 48, at 854 ("It is a practical response to persistent increases in demand for fundamental services such as water, sewage, transportation, zoning, and police and fire protection, precipitated by steadily increasing populations . . . .").

51. *See, e.g.*, Alford & Wolf, *supra* note 47, at 283 (stating that "[i]n 1965, the Florida Legislature passed 1186 special and local bills," dwarfing the number of general bills it passed, at a mere 586).

52. *See* FLA. CONST. art. VIII, § 1(f), (g).

53. *See* Wolff, *supra* note 48, at 861–62.

54. *Id.* at 881; *see also* FLA. CONST. art. VIII, § 1(f), (g).

55. Wolff, *supra* note 48, at 880.

56. Dep't of Bus. Regulation v. Classic Mile, Inc., 541 So. 2d 1155, 1157 (Fla. 1989). A *general law* is one that "operates universally throughout the state, uniformly upon subjects as they may exist throughout the state, or uniformly within a permissible classification." *Id.* (citing State *ex rel.* Landis v. Harris, 163 So. 237, 240 (Fla. 1934) (en banc)).

57. FLA. CONST. art. X, § 12(g). The Constitution defines a "special law" as a *special or local law*. *Id.*

> "[A] special law is one relating to, or designed to operate upon, particular persons or things, or one that purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal; a local law is one relating to, or designed to, operate only in a specifically indicated part of the State, or one that purports to operate within classified territory when classification is not permissible or the classification is illegal."

City of Miami v. McGrath, 824 So. 2d 143, 148 (Fla. 2002) (quoting *Landis*, 163 So. at 240 (emphasis omitted)).

58. FLA. CONST. art VIII, § 1(f).

governments possess "all *powers of local self-government* not inconsistent with general law, or with special law approved by vote of the electors," and the Board of County Commissioners "may enact county ordinances not inconsistent with general law."[59]

Fundamentally, all counties—whether charter or non-charter—possess inherent home rule power, and the only fundamental difference between the home rule power of charter counties and non-charter counties is the limitations placed upon them.[60] For all counties in Florida, home rule power is limited by both general law enactments of the Florida Legislature and the provisions of the Florida Constitution; but in non-charter counties, home rule is also limited further by special law enactments of the Florida Legislature.[61]

The Florida Legislature has provided broad powers of local self-governance to all counties through general law by enacting the provisions of chapter 125 of the Florida Statutes.[62] Essentially, chapter 125 of the Florida Statutes operates as a quasi-default charter for non-charter counties, but is used in practice by charter counties as well.[63] The provisions that exist for non-charter counties under chapter 125 are very broad and non-restrictive.[64]

In essence, under current law, there are several things that counties can accomplish under the charter county government structure that either cannot be accomplished, or can only be accomplished indirectly, under non-charter county government structure.[65] Examples include:

1) Citizen recall enabling voters of the county to vote to remove members of the Board of County Commissioners;[66]
2) Citizen initiatives to vote on proposed ordinances;[67]

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59. *Id.* § 1(g) (emphasis added). This distinction between powers of *self-government* and *local self-government* has not been defined. *See id.* However, we would argue that it means that non-charter home rule is limited to self-government, and charter home rule has a further limitation in that it is limited to *local self-government*. *Id.* Therefore, a charter cannot write anything that is not truly *local* in nature. *Id.*

60. FLA. CONST. art. VIII, § 1(f)–(g).

61. *Id.* § 1(g); BLACK'S LAW DICTIONARY, *supra* note 45, at 850; *see also* FLA. STAT. ch. 125 (2014). Those special law enactments passed by the Florida Legislature will only apply to charter counties if the voters in the county also pass it by referendum. FLA. CONST. art. III, § 10. "Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with *special law approved by vote of the electors*." FLA. CONST. art. VIII, § 1(g) (emphasis added).

62. *See* FLA. STAT. ch. 125.

63. *See id.*

64. *See id.*; 081-7 Fla. Op. Att'y Gen. 24 (1981).

65. *See* FLA. STAT. ch. 125.

66. *See id*. § 100.361(1).

67. *See id*. § 125.66(4)(b)(1).

3) Non-partisan elections of the Board of County Commissioners;[68]
4) Term limits for the Board of County Commissioners;[69]
5) Change in the length of terms for the Board of County Commissioners;[70]
6) Change in the districts represented by each County Commissioner, including at-large districts;[71]
7) County ordinances to prevail in the event of conflict with and over municipal ordinances on the same subject;[72]
8) Exclusive power in the county over community redevelopment authorities with tax increment financing;[73]
9) County authority to levy a municipal public service tax outside of a city in the county;[74]
10) Levy of a communication service tax at a higher rate;[75]
11) Abolish any of the State Constitution's County Officers—Sheriff, Tax Collector, Property Appraiser, Supervisor of Elections, and Clerk of Court—and then transfer the duties to a charter-created office in order to put them under the control of the Board of County Commissioners;[76] and/or

68. *See* 00-02 Fla. Op. Att'y Gen. 6 (2000).

69. Telli v. Broward Cnty., 94 So. 3d 504, 513 (Fla. 2012) (per curiam). This is in line with the holding of *Telli*, and an interpretation of article VIII, section 1, subsection (e) of the Florida Constitution. FLA. CONST. art. VIII, § 1(e); *Telli*, 94 So. 3d at 513. However, the holding of *Telli*, with respect to term limits of the Constitution's five County Officers enumerated in article VIII, section 1, subsection (d) of the Florida Constitution, is erroneous and in contradiction to the provisions and structure of the Florida Constitution. *See* FLA. CONST. art. VIII, § 1(d); *Telli*, 94 So. 3d at 513. For full discussion of this issue, *see infra* Part III.B.

70. *See* FLA. CONST. art. VIII, § 1(e) ("*Except when otherwise provided by county charter*, the governing body of each county shall be a board of county commissioners composed of five or seven members serving staggered terms of four years.") (emphasis added).

71. *See* FLA. STAT. § 124.01(4).

72. *See* FLA. CONST. art. VIII, § 1(f) (For non-charter county governments "an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict."); *id.* § 1(g) (For charter county governments: "The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.").

73. *See* FLA. STAT. § 163.410.

74. *See id.* § 166.231(1)(c).

75. *See id.* § 202.19(1).

76. *See* FLA. CONST. art. VIII, § 1(d); *infra* Part II.C.2.

12) Have special acts of the Legislature to be inapplicable within the county unless approved by referendum.[77]

C. *Status of the Constitution's "County Officers" (art. VIII, section 1, subsection (d))*

In *Amos v. Mathews*,[78] a Supreme Court of Florida decision rendered prior to the 1968 Constitution, the Court described the division of power and duties of state and local officers as such:

> It is fundamentally true that all local *powers* must have their origin in a grant by the state which is the fountain and source of authority. . . . [I]t is therefore the spirit of the Constitution, that the performance of state functions shall be confided to state officers; the performance of county functions of purely local concern shall be confided to county officers. Save as is otherwise clearly contemplated by the Constitution, there can be no compromise with that principle, the origin of which is more ancient than the Constitution itself.[79]

As noted above, prior to 1968, any and all county officers had the power to govern local affairs only to the extent that home rule power was granted to them by the Legislature.[80]

However, that power structure changed as a result of the 1968 Constitution, which vested in non-charter counties such powers of self-governing by general or special law, and in charter counties "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors."[81] In essence, this change "denotes a broad empowerment of local authorities to . . . rule[] in matters of *genuine local concern*," and "shift[ed] [to] locus of decision-making power back to those in the best position to assess *those needs*, freeing the state legislature to concentrate on the issues that have a *genuine statewide impact*."[82]

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77. *See* FLA. CONST. art. III, § 10; FLA. CONST. art. VIII, § 1(g) ("Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with *special law approved by vote of the electors*.") (emphasis added).

78. 126 So. 308 (Fla. 1930).

79. *Id.* at 320.

80. *See* FLA. CONST. of 1885, art. III, § 27; Louis C. Deal, *Constitutional Home Rule of Unchartered Counties—Fantasy or Fact?*, 56 FLA. B. J. 469, 469 (1982); Wolff, *supra* note 48, at 859–60.

81. *See* FLA. CONST. art. VIII, § 1(g).

82. Wolff, *supra* note 48, at 854 (emphasis added).

Thus, the division of state and local powers under the 1968 Constitution allows for local regulation of purely local officers, and state regulation of state officers.[83] The Constitution's County Officers listed in and created only by article VIII, section 1, subsection (d), hold an independent status in our state and Constitution.[84] They are not local officers with purely local duties as defined in *Amos*, but rather they are the state Constitution's sovereign County Officers with plenary power to implement important state duties under state law and state rule on the local level.[85]

Although the five officers listed in article VIII, section 1, subsection (d) are labeled County Officers, they are the Constitution's County Officers in and for each county political subdivision and they hold a constitutional sovereign status.[86] This sovereign status is of special consequence and benefit to Floridians because of the important state work that these Constitution County Officers perform on the county level, which is an overriding State interest and—notwithstanding dicta in court and Attorney General opinions—is not county business.[87] The sovereign status of these officers is well explained in *Demings v. Orange County Citizens Review Board*[88] as follows:

> [U]nder Florida's [C]onstitution, certain responsibilities of local governance are separately entrusted to *independent constitutional officers* who, at least in non-charter counties [who have not abolished the Constitution's County Officers], are not accountable to the county's governing board, but derive their power directly

83. *Amos*, 126 So. at 320; Deal, *supra* note 80, at 469; Wolff, *supra* note 48, at 859–60; *see also* FLA CONST. art. VIII, § 1(d).

84. FLA. CONST. art. VIII, § 1(d).

85. *See id.* § 1(g); Amos, 126 So. at 308, 320. The best example of state duties performed by the tax collectors is property tax collection. *See* FLA. STAT. § 197.603 (2014) ("The Legislature finds that the state has a strong interest in ensuring due process and public confidence in a uniform, fair, efficient, and accountable collection of property taxes by county tax collectors. . . . The Legislature intends that the property tax collection authorized by this chapter under [section] 9(a), [a]rt. VII of the State Constitution be *free from the influence or the appearance of influence of the local governments that levy property taxes and receive property tax revenues*." (emphasis added)). Other state duties include: Title, tag, and driver's license services, sale of hunting and fishing licenses, collection of other taxes on the local level, including those levied by state agencies. FLA. STAT. §§ 320.03, 322.135, 379.352(4).

86. Demings v. Orange Cnty. Citizens Review Bd., 15 So. 3d 604, 606 (Fla. 5th Dist. Ct. App. 2009); *see also* FLA. CONST. art. VIII, § 1(d).

87. Demings v. Orange Cnty. Citizens Review Bd., 15 So. 3d 604, 606 (Fla. 5th Dist. Ct. App. 2009); *see also* FLA. CONST. art. VIII, § 1(d).

88. 15 So. 3d 604 (Fla. 5th Dist. Ct. App. 2009).

> from the state. These officers are independently accountable to the electorate unless otherwise provided by law.[89]

In this context, the term *local governance* refers to the important state duties performed locally by the Constitution's County Officers elected in each county's political subdivision.[90] The sovereign independence of the Constitution's County Officers is important and is set up by our Constitution to eliminate even the appearance—much less the reality—of local influence on the important state work performed by these officers on the county level.[91] The independence and election of the Constitution's County Officers maintains service and accountability only to the electorate in the local county political subdivision and not to the interests of the local general purpose collegial governing body that would benefit from exercising undue influence and political control over these offices to the detriment of the people and to the detriment of the people's interest in due process, unfettered even, by the appearance of influence by those who tax and spend.[92]

The Constitution's five County Officers have been imbued with sovereignty.[93] Sovereignty refers to the supreme political authority of an independent state;[94] or, in other words, a state's "authority and . . . right to govern itself."[95] In the United States, the fifty individual states have retained all of their common law sovereign powers, save those that were relinquished to the federal government.[96] In Florida, state officers are imbued with a

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89. *Id.* at 606 (emphasis added) (citations omitted).

90. *See id.*

91. *See* FLA. STAT. § 197.603.

> The Legislature finds that the state has a strong interest in ensuring due process and public confidence in a uniform, fair, efficient, and accountable collection of property taxes by county tax collectors. Therefore, tax collections shall be supervised by the Department of Revenue pursuant to [section] 195.002(1). The Legislature intends that the property tax collection authorized by this chapter under [section] 9(a), [article] VII of the State Constitution be free from the influence or the appearance of influence of the local governments that levy property taxes and receive property tax revenues.

Id.

92. *See id.*; *Demings*, 15 So. 3d at 606; John B. Anderson et al., *Presidential Elections—The Right to Vote and Access to the Ballot*, 29 NOVA L. REV. 571, 580–81 (2005).

93. *See* FLA. CONST. art. VIII, § 1; *Demings*, 15 So. 3d at 610–11.

94. BLACK'S LAW DICTIONARY 1612 (10th ed. 2014) ("The supreme political authority of an independent state.").

95. *Sovereignty Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/sovereignty (last visited Dec. 26, 2014) ("[A] country's independent authority and the right to govern itself.").

96. THE FEDERALIST NO. 32, at 169 (Alexander Hamilton) (Am. Bar Ass'n, 2009) ("[T]he State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States."); Anderson et al., *supra* note 92, at 580–81.

portion of state sovereignty.[97] Similarly, the state Constitution's County Officers, including the County Tax Collectors, are also imbued with state sovereignty.[98] The Supreme Court of Florida has described the relationship between the state and its officers as such:

> "The term *office* implies a *delegation of a portion of the sovereign power* to, and possession of it by, the person filling the office; a public office being an agency for the state, and the person whose duty it is to perform the agency being a public officer. *The term embraces the idea of tenure, duration, emolument, and duties, and has respect to a permanent public trust to be exercised [on] behalf of government*, and not to a merely transient, occasional, or incidental employment. A person, in the service of the government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature, and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the regular administration of the government, the place and the duties remaining, though the incumbent dies or is changed, . . . is a public officer . . . every *office*, in the constitutional meaning of the term, impl[ies] an *authority to exercise some portion of the sovereign power*, either in making, executing, or administering the laws."[99]

Therefore, the Constitution's five County Officers have been imbued with the sovereign authority of the state and, as such, shall carry out their duties on behalf of the people of the State of Florida, free from local influence and interference.[100]

1. No Charter Regulation of, or Interference with, the Florida Constitution's Five Independent County Officers

Because of the sovereign independence of the Constitution's article VIII, section 1, subsection (d) County Officers, and the important public policy reasons for maintaining such independence, the general purpose collegial local county government—made up of the Board of County Commissioners—cannot regulate or interfere with a Constitution's County

97. State *ex rel.* Clyatt v. Hocker, 22 So. 721, 723 (Fla. 1897).

98. *See* FLA. CONST. art. VIII, § 1(d); *Clyatt*, 22 So. at 722. This state sovereignty is also abolished when the Constitution's County Office is abolished by a county charter. *See* FLA. CONST. art. VIII, § 1(d). For a more detailed discussion, see *infra* Part II.C.2.

99. *Clyatt*, 22 So. at 723 (emphasis added).

100. *See* FLA. CONST. art. VIII, § 1(d); *Clyatt*, 22 So. at 722.

Officer in any way, even in a charter county.[101] The Constitution does state one very limited way in which a county charter can regulate the Constitution's County Officers.[102] Under the Constitution, article VIII, section 1, subsection (d), Officers are to be "elected by the electors of each county;" in other words, this is the default manner in which Constitution County Officers are *chosen*.[103] Alternatively, the Constitution also states that "when provided by county charter or special law approved by vote of the electors of the county, any county officer *may be chosen in another manner* therein specified."[104] This limited exception would allow a charter county—under its charter or by special act approved by the voters in the county—to change the *manner* or method in which the Constitution's County Officers are *chosen*.[105] An example is that one or more of these five Constitution County Officers could be chosen by the majority of the local Board of County Commissioners.[106] However, this exception is limited expressly, in that, even if a charter county changes the *manner* in which the Constitution's County Officers are chosen, they still remain the Constitution's County Officers, with plenary power and sovereign authority, and therefore shall not be subject to the control of the county government.[107]

2. In Order to Have Charter Regulation and Control, the Constitution's County Office Must Be Abolished, and Its Duties Transferred to a Charter's County Office, Either Charter-Appointed or Charter-Elected

The Constitution also allows a charter county—through its charter, or through a special act approved by the charter county voters—to abolish completely one or more of the Constitution's article VIII, section 1, subsection (d) County Officers, and transfer the duties of that office to a charter-created office.[108] At that point, the Constitution's office, which was

101. *See* FLA. CONST. art. VIII, § 1(d); *Clyatt*, 22 So. at 722; 081-7 Fla. Op. Att'y Gen. 21 (1981) (stating that County Officers retain their status as constitutional County Officers unless abolished by charter).

102. FLA. CONST. art. VIII, § 1(d).

103. *Id.*

104. *Id.* (emphasis added).

105. *Id.*

106. *Id.*; *see also In re* Advisory Op. to Governor, 313 So. 2d 717, 721 (Fla. 1975).

107. *See* FLA. CONST. art. VIII, § 1(d); *In re* Advisory Op. to Governor, 313 So. 2d at 720–21.

108. FLA. CONST. art. VIII, § 1(d); *see also In re* Advisory Op. to Governor, 313 So. 2d. at 720 ("There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, [a property appraiser], a supervisor of elections, and a clerk of the circuit court; *except, when provided by county charter or special law approved by vote of the electors of the county*, any county officer may be chosen in another manner therein

abolished, is no longer the Constitution's County Office—even though the new county charter office may use the same name—and therefore no longer enjoys the same independence and plenary power of a sovereign office to carry out the important state duties delegated by the Legislature with insulation from influence of the local government.[109] The office is thus transformed into a non-sovereign *charter* county office—either elected or appointed—and is open to complete regulation and control by the county government.[110]

It is important to note though, that abolition of one or more of the Constitution's five County Offices and the transfer of each office's duties to a charter-created office are not by any means *mandatory* for counties that possess charters.[111] Rather, it is an option that can be exercised.[112] This concept was well explained by the Fifth District Court of Appeal in *Demings*, when it stated: "In charter counties, *the electorate has an option* of either maintaining these independent constitutional offices or abolishing them and transferring their responsibilities to the board of the charter county or to local offices created by the charter."[113] Thus, as long as the Constitution's County Office is maintained in a charter county and has not been abolished and its duties transferred—using express language of abolition and transfer—the county government is without the power to regulate the office, except to the

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specified, *or any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office*.") (emphasis added) (quoting FLA. CONST. art. VIII, § 1(d)).

109. *See* FLA. CONST. art. VIII, § 1(d); Demings v. Orange Cnty. Citizens Review Bd., 15 So. 3d 604, 606 (Fla. 5th Dist. Ct. App. 2009).

110. *See* FLA. CONST. art. VIII, § 1(d); Dade Cnty. v. Kelly, 153 So. 2d 822, 823–24 (Fla. 1963) (holding that "although it may be bad government," Dade County had the power to regulate its charter sheriff under the provisions of its county home rule charter); State *ex rel.* Glynn v. McNayr, 133 So. 2d 312, 316 (Fla. 1961) (stating that charter tax assessor retained all the same duties as a constitutional tax assessor under the charter, the only difference was that "his political life and death depend upon the county commissioners"); *Demings*, 15 So. 3d at 606. Additionally, section 125.63 of the Florida Statutes also indicates that before proposing a charter, a charter commission be formed which "shall conduct a comprehensive study of the operation of county government and of the ways in which the conduct of county government might be improved or reorganized." FLA. STAT. § 125.63 (2014). While there is no similar specific requirement for adoption of proposed charter amendments, this provision does indicate to us that charter governments should only make changes upon a finding that such changes will actually improve the conduct and operation of state and county government on the county level. *See id.*

111. *See* FLA. CONST. art. VIII, § 1(d).

112. *See id.*

113. *Demings*, 15 So. 3d at 606 (emphasis added); *see also* FLA. CONST. art. VIII, § 1(d).

limited extent of dictating the manner in which the Constitution's County Officer will be chosen.[114]

It is helpful to understand the terminology used in this discussion and related case law. The Constitution is the organic base jurisdictional authority created by the people.[115] Any officer created by it—for example, Governor, Legislator, or the Tax Collector—is the Constitution's officer.[116] It is a Constitution office, not a charter office.[117] If, in a county charter, the Constitution's County Office of Tax Collector, Sheriff, Property Appraiser, Supervisor of Elections, or Clerk of Court is abolished, and its duties transferred to a charter-elected or charter-appointed office, then the Constitution's office is gone and the replacement office is the charter's office.[118] If the Constitution's substantive procedural requirements are followed, then the charter's office was created *constitutionally*, but nonetheless is no longer the Constitution's County Officer—and thus, no longer enjoys the independence and plenary power of a state sovereign officer.[119]

3. Charter Counties Have Broader Power to Regulate Its County Commissioners

Unlike the provisions pertaining to the Constitution's five County Officers enumerated in article VIII, section 1, subsection (d), the provisions pertaining to County Commissioners in article VIII, section 1, subsection (e), are open to broader regulation through county charters.[120] Although the two provisions both contain the same operative language, "'[e]xcept when otherwise provided by county charter,'" the placement of that language is important.[121] In section 1, subsection (d), the operative language appears

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114. FLA. CONST. art. VIII, § 1(d); *see also Demings*, 15 So. 3d at 606.

115. *See* FLA. CONST. art. I, § 1.

116. FLA. CONST. art. VIII, § 1(d).

117. *See id.*; *Demings*, 15 So. 3d at 606.

118. FLA. CONST. art. VIII, § 1(d); *Demings*, 15 So. 3d at 606.

119. *See* FLA. CONST. art. VIII, § 1(d); *Demings*, 15 So. 3d at 606.

120. *Compare* FLA. CONST. art. VIII, § 1(d), *with* FLA. CONST. art. VIII, § 1(e).

> Commissioners. *Except when otherwise provided by county charter*, the governing body of each county shall be a board of county commissioners composed of five or seven members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected as provided by law.

FLA. CONST. art. VIII, § 1(e) (emphasis added).

121. FLA. CONST. art. VIII, § 1(d)–(e); Weinger, *supra* note 7, at 869 (quoting FLA. CONST. art. VII, § 1(d)–(e)). One author, in a recently published article, argued that there is no distinction between the levels of regulation by county charters of Constitution County Officers and County Commissioners because the two Florida constitutional provisions contain

after the language enumerating the Constitution's five different County Officers and their method of election and terms, and before the two specific alteration provisions, discussed above in subsections (a) and (b).[122] In section 1, subsection (e), the operative language is placed at the beginning of the entire provision, signaling a broader power to regulate, because any of the provisions that follow may be altered by a county charter.[123] This wording is in stark contrast to section 1, subsection (d), where the placement of the operative language indicates that only certain specific and limited alterations can be made by a county charter.[124]

III. LEGAL ANALYSIS OF *TELLI V. BROWARD COUNTY*

A. *County Home Rule*

The Supreme Court of Florida in *Telli* held that charter counties had the power to term limit—or *disqualify*—any and all county officers.[125] This holding was founded upon the Court's finding that its prior decision of *City of Jacksonville v. Cook (Cook I)*[126], "undermines the ability of counties to govern themselves as that broad authority has been granted to them by home rule power through the Florida Constitution."[127]

Many court opinions and law review articles repeatedly refer to counties' home rule power under the 1968 Constitution as a *grant* of power, but it is more properly characterized as an inherent, but limited power.[128] In *Hollywood, Inc. v. Broward County*,[129] the Fourth District described the origin of county home rule power.[130] First, the court stated that:

> [C]harter counties . . . derive their sovereign powers from the state through [a]rticle VIII, [s]ection 1(g) [which states]: "Counties operating under county charters shall have all powers of local self-

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the exact same language "'except[] when [otherwise] provided by county charter.'" Weinger, *supra* note 7, at 869. However, this argument is incomplete as it failed to analyze placement of the phrase. *See* Weinger, *supra* note 7, at 869–70.

122. FLA. CONST. art. VIII, § 1(a)–(b), (d).

123. *Id.* § 1(e).

124. *Id.* § 1(d).

125. Telli v. Broward Cnty., 94 So. 3d 504, 505 (Fla. 2012) (per curiam).

126. 765 So. 2d 289 (Fla. 1st Dist. Ct. App. 2000) (per curiam), *reh'g granted*, Cook v. City of Jacksonville, 786 So. 2d 1184 (Fla. 2001), *overruled by Cook II*, 823 So. 2d 86 (Fla. 2002).

127. *Telli*, 94 So. 3d at 505; *Cook I*, 765 So. 2d at 293.

128. *See* FLA. CONST. art. VIII, § 1(g); *e.g.*, Hollywood, Inc. v. Broward Cnty., 431 So. 2d 606, 609 (Fla. 4th Dist. Ct. App. 1983).

129. 431 So. 2d 606 (Fla. 4th Dist. Ct. App. 1983).

130. *Id.* at 609.

> government not inconsistent with general law, or with special law approved by the vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law."[131]

The Court then went on to state that "[t]hrough this provision, the people of Florida have vested broad home rule powers in charter counties such as Broward County," and that the counties possess all the powers of self-government unless preempted by state general law, and that the power is also limited by the Florida Constitution.[132] The Second District echoed these limitations on county home rule power in *Pinellas County v. City of Largo*.[133]

In one case predating the 1968 Constitution, the Supreme Court of Florida—in describing the power of the Legislature under the Florida Constitution—stated that "it should further be borne in mind that our State Constitution is *not a grant of power* to the Legislature, but is a *limitation voluntarily imposed* by the people themselves upon their inherent lawmaking power."[134] Prior to the 1968 Constitution, counties only derived home rule authority as directly granted from the Florida Legislature, and did not have any independent powers of government.[135] As such, the pre-1968 home rule power is more properly referred to as a *grant* of home rule power, while the post-1968 home rule is more properly referred to as an inherent power of self-governance, limited by the Florida Constitution and general law.[136]

Therefore, charter counties can exercise all the powers of local self-governance, as long as such exercises are not inconsistent with the Florida Constitution, or general law as passed by the Florida Legislature.[137]

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131. *Id.* (quoting FLA. CONST. art. VIII, § 1(g)).

132. *Id.*; *see also* FLA. CONST. art. VIII, § 1(g).

133. 964 So. 2d 847, 853–54 (Fla. 2d Dist. Ct. App. 2007).

134. Amos v. Mathews, 126 So. 308, 315 (Fla. 1930) (emphasis added).

135. Wolff, *supra* note 48, at 860; *see also* FLA. CONST. of 1885, art. VIII, § 27.

136. *Compare* FLA. CONST. of 1885, art. III § 27, *with* FLA. CONST. art. VIII, § 1(g). State constitutions themselves are seen as "limitations on the inherent sovereign power of states created by the people of that state." Mitchell W. Berger & Candice D. Tobin, *Election 2000: The Law of Tied Presidential Elections*, 26 NOVA L. REV. 647, 691 (2002). A constitutional scheme such as that which exists in Florida, under which there is "'a direct constitutional devolution of substantive home rule powers [to a county] dependent only upon the adoption of a home rule charter,'" is more properly characterized as a limitation upon inherent power, rather than a grant of power. Williams, *supra* note 49, at 222.

137. Snipes v. Telli, 67 So. 3d 415, 418 (Fla. 4th Dist. Ct. App.), *reh'g granted sub nom.* Telli v. Broward Cnty., 74 So. 3d 1084 (Fla. 2011), *aff'd per curiam*, 94 So. 3d 504 (Fla. 2012).

B. *Supreme Court of Florida Decision*

Oddly enough, the Supreme Court of Florida based its decision in *Telli* on the fact that it agreed with Justice Anstead's dissent in *Cook II*.[138] However, Justice Anstead's statement regarding county home rule power does not support the Court's conclusion:

> I cannot agree with the majority that the Florida Constitution prohibits charter counties from enacting term limits for county officers. To the contrary, the constitution explicitly grants broad authority to charter counties *over charter officers*, and, consistent with that grant, *imposes no restrictions on a county's authority to regulate those officers*.[139]

With the exception of calling county home rule power a *grant*, Justice Anstead's statement is correct.[140] Charter counties have full authority to regulate *charter officers*.[141] Several cases have held so.[142]

The Fourth District Court of Appeal in *Snipes v. Telli*[143]—the lower court decision preceding *Telli*—alluded to this conclusion in its well-reasoned distinction between the Constitution's County Officers, listed in article VIII, section 1, subsection (d), and County Commissioners, listed in article VIII, section 1, subsection (e).[144] However, the Supreme Court of Florida in *Telli* completely steamrolled this distinction, paying little attention or granting any lip service at all to the Fourth District Court of Appeal's analysis, simply noting that it was *unworkable* without much more discussion.[145] Accordingly, we must disagree firmly, but respectfully, with the Supreme Court's conclusion, as the distinction and holding of the Fourth District Court of Appeal in *Snipes*—which is well thought-out and supported—correctly reflects the status of the Constitution's County Officers, as opposed to a local charter's county officers, namely County

138. Telli v. Broward Cnty., 94 So. 3d 504, 512 (Fla. 2012) (per curiam); *see also Cook II*, 823 So. 2d 86, 95–96 (Fla. 2002) (Anstead, J., dissenting).

139. *Cook II*, 823 So. 2d at 95 (Anstead, J., dissenting) (emphasis added).

140. *See id.*

141. *See* Dade Cnty. v. Kelly, 153 So. 2d 822, 823–24 (Fla. 1963).

142. *See Cook II*, 823 So. 2d at 95; *Snipes*, 67 So. 3d at 418; Demings v. Orange Cnty. Citizens Review Bd., 15 So. 3d 604, 611 (Fla. 5th Dist. Ct. App. 2009).

143. 67 So. 3d 415 (Fla. 4th Dist. Ct. App.), *reh'g granted sub nom.* Telli v. Broward Cnty., 74 So. 3d 1084 (Fla. 2011), *aff'd per curiam*, 94 So. 3d 504 (Fla. 2012).

144. *Id.* at 417–19; *see also* FLA. CONST. art. VIII § 1(d)–(e).

145. Telli v. Broward Cnty., 94 So. 3d 504, 513 (Fla. 2012) (per curiam); *see also Snipes*, 67 So. 3d at 417–19; *Cook II*, 823 So. 2d at 94–96.

Commissioners, and logically aligns the procedural and substantive history leading up to the Court's previous decision in *Cook II*.[146]

1. The *Telli* Decision is in Direct Contradiction to the Provisions of Article VIII, Section 1, Subsection (d) of the Florida Constitution

As the constitutional provision currently stands, charter counties can take no action to interfere with any of the Constitution's County Officers under article VIII, section 1, subsection (d), except as discussed above that a county may choose a different *manner* in which such officers will be chosen.[147] This provision simply means that a charter county may use a different procedure for choosing the Constitution's County Officers.[148] However, the option exists whereby the electors of the county may—either by charter or special law—abolish the Constitution's County Office when all of the duties are transferred to another charter-created office, the charter's office.[149] The county could then regulate the charter-created office however it so pleases, as stated above by Justice Anstead because it is that charter's office, and not the Constitution's Office.[150] However, until such time as the Constitution's County Office is abolished and all of its duties transferred, a charter county cannot interfere with the Constitution's County Office and therefore, any provisions in the county charter pertaining to the Constitution's County Officer would be unenforceable.[151]

The *Cook II* and *Telli* opinions—and their predecessors—analyze and argue extensively over whether or not article VI, section 4, subsection (b)[152]—which establishes that certain offices under the Constitution are term

146. *See Cook II*, 823 So. 2d at 94–95; *Snipes*, 67 So. 3d at 417–19.
147. 081-7 Fla. Op. Att'y Gen. 21 (1981); *see also* discussion *supra* Part II.C.1.
148. *See* FLA. CONST. art. VIII, § 1(d).
149. *Id.*
150. *Cook II*, 823 So. 2d at 95–96 (Anstead, J., dissenting); *see also supra* Part III.B.
151. *See* FLA. CONST. art. VIII, § 1(d).
152. FLA. CONST. art. VI, § 4(b).

> Section 4. Disqualifications.—
> . . . .
> (b) No person may appear on the ballot for re-election to any of the following offices:
> (1) Florida representative,
> (2) Florida senator,
> (3) Florida Lieutenant governor,
> (4) any office of the Florida cabinet,
> (5) U.S. Representative from Florida, or
> (6) U.S. Senator from Florida
> if, by the end of the current term of office, the person will have served—or, but for resignation, would have served—in that office for eight consecutive years.

limited—expressly establishes that all other offices within the Constitution may not be term limited, by virtue of not being included in the article VI, section 4, subsection (b) list.[153] However, article VI, section 4, subsection (b) is actually a moot point on this issue.[154] Even assuming that this provision did not exist in the Florida Constitution, or assuming that its adverse implication does not apply to article VIII, section 1, subsection (d) officers, a term limit provision within a county charter could not be enforceable against any one of the Constitution's article VIII, section 1, subsection (d) County Officers if that office has not been abolished and its duties transferred to a charter office, simply based on the fact that county charters cannot regulate or interfere with the Constitution's County Officers.[155]

A contrary holding, such as that established in *Telli*, completely undermines the distinction in the Florida Constitution between the Constitution's County Officers and a charter-created officer—the charter's office—that performs the same duties previously carried out by the Constitution's County Officers.[156] The holding also completely undermines and breaks down the status of the Constitution's County Officers as officers who perform important state work locally, and, because imbued with sovereignty, are shielded from undue influence and control of the county, and only accountable to the electorate.[157]

Placing term limits on any of the five Constitution County Officers would be an interference with, and control over the Constitution's County Officer, in direct derogation of the Constitution.[158] Although the Second District Court of Appeal in *Pinellas County v. Eight is Enough in Pinellas*[159]—one of the lower court consolidated cases preceding *Cook II*—found that the charter term limit at issue in that case would not affect the *status, duties, or responsibilities* of the Constitution's County Officers,[160] a term limit would actually affect the status of the Constitution's County

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Id.

153. *Id.*; Telli v. Broward Cnty., 94 So. 3d 504, 512–513 (Fla 2012) (per curium); *Cook II*, 823 So. 2d at 90, 94–95; Snipes v. Telli, 67 So. 3d 415, 416–17 (Fla. 4th Dist. Ct. App.), *reh'g granted sub nom* Telli v. Broward Cnty., 74 So. 3d 1084 (Fla. 2011), *aff'd per curium*, 94 So. 3d 504 (Fla. 2012); *Cook I*, 765 So. 2d 289, 290, 293 (Fla. 1st Dist. Ct. App. 2000) (per curiam), *reh'g granted*, Cook v. City of Jacksonville, 786 So. 2d 1184 (Fla. 2001), *overruled by Cook II*, 823 So. 2d 86 (Fla. 2002).

154. *See* FLA. CONST. art. VI, § 4(b).

155. *See* FLA. CONST. art. VIII, § 1(d); *supra* Part II.C.2.

156. *See* FLA. CONST. art. VIII, § 1(d); *Telli*, 94 So. 3d at 512–13.

157. *See* FLA. CONST. art. VIII, § 1(d); *Telli*, 94 So. 3d at 512–13.

158. *Telli*, 94 So. 3d at 512.

159. 775 So. 2d 317 (Fla. 2d Dist. Ct. App.), *reh'g granted*, 786 So. 2d 1188 (Fla. 2001), *overruled by Cook II*, 823 So. 2d 86 (Fla. 2002).

160. *Id.* at 319; *see also Cook II*, 823 So. 2d 86, 90 (Fla. 2002).

Officers, who enjoy sovereign authority and plenary power, separate from the control of the county governing board.[161] Allowing charter counties to term limit the Constitution's County Officers, gives the charter county's governing board a source of leverage and control over the Constitution's County Officers.[162] For example, if a charter county's governing board does not agree with the actions of an incumbent Tax Collector, the charter county's governing board might attempt to pass a term limit provision in the county's charter, which would prohibit the incumbent Tax Collector from being able to run for reelection the following term and remain in office.[163] Additionally, the governing board might be able to maintain leverage over the Constitution's County Tax Collector by simply threatening to pass a charter term limit if the Constitution's County Tax Collector does not take actions in its favor.[164] This kind of interference and control is exactly what was intended to be avoided by having the Constitution's County Officers maintain an independence and sovereignty separate from any possible influence or control of the local county governing body.[165]

Furthermore, the holding in *Cook II* also renders the language in article VIII, section 1, subsection (d) that "'any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office,'" as mere surplusage.[166] If counties, under their charters, had full authority to regulate and control the Constitution's County Officers, there would be no need for the language regarding abolition and transfer.[167] Although charter counties have the power to impose term limits on county officers once they have become the charter's officers, and no longer the Constitution's sovereign County Officers, it is improper to conclude, as Justice Anstead did, that this procedure can be side-stepped:

> I can find no legal justification for concluding that charter counties should not be allowed to ask their citizens to vote on eligibility requirements of local elected officials, including term-limits, since they could abolish the offices completely or decide to select the officers in any manner of their choosing.[168]

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161. *See* FLA. CONST. art. VIII, § 1(d).
162. *See id.*
163. *See id.*
164. *See id.*
165. *See id.*
166. *Cook II*, 823 So. 2d 86, 90 (Fla. 2002) (quoting FLA. CONST. art. VIII, § 1(d)).
167. *See* FLA. CONST. art. VIII, § 1(d); *Cook II*, 823 So. 2d at 90.
168. *Cook II*, 823 So. 2d at 96 (Anstead, J., dissenting); *see also* FLA. CONST. art. VIII, § 1(d).

Allowing charter counties to term limit the Constitution's County Officers *before* their offices have been abolished and transferred to a charter's office is an illegal means of achieving a result that would be legal under different means, and allowing such regulation and control will upset the balance of power struck by the Constitution.[169] In a word, the *Telli* decision is alarming in ignoring base provisions of the Florida Constitution.[170]

a. *Additional Critiques of Reliance on Justice Anstead's Dissent in* Cook II

The Supreme Court of Florida in *Telli* based its holding on its agreement with Justice Anstead's dissent in *Cook II*.[171] Part of Justice Anstead's reason for finding that article VI, section 4, subsection (b) did not prohibit charter counties from implementing term limits on any and all of its county officers—the Constitution's County Officers and County Commissioners—was that the offices in that section for which term limits are listed expressly are offices of *statewide* importance.[172] As such, he concluded that the provision should have no bearing whatsoever on local officers.[173] However, this statement fails to acknowledge the distinction between the status of the Constitution's five County Officers listed in and created by article VIII, section 1, subsection (d), and that of other local officers who perform exclusively local duties—namely County Commissioners—and the fact that the work that the Constitution's five County Officers perform is in fact work of *statewide* importance implemented and carried out on the county level.[174]

Additionally, this distinction also undermines Justice Anstead's second reason for finding that article VI, section 4, subsection (b) cannot prohibit the implementation of term limits in charter counties for all county officers whether it be the Constitution's County Officers, the charter's

169. *Cook II*, 823 So. 2d at 94–95; *see also* FLA. CONST. art. VIII, § 1(d).

170. *See* FLA. CONST. art. VIII, § 1(d); Telli v. Broward Cnty., 94 So. 3d 504, 513 (Fla. 2012) (per curiam).

171. *See Telli*, 94 So. 3d at 512; *Cook II*, 823 So. 2d at 95–96 (Anstead, J., dissenting).

172. *Cook II*, 823 So. 2d at 96 (Anstead, J., dissenting); *see also* FLA. CONST. art. VI, § 4(b).

173. *Cook II*, 823 So. 2d at 96 (Anstead, J., dissenting); *see also* FLA. CONST. art. VI, § 4(b).

174. *See* FLA. CONST. art. VIII, § 1(d); Snipes v. Telli, 67 So. 3d 415, 418 (Fla. 4th Dist. Ct. App.), *reh'g granted sub nom.* Telli v. Broward Cnty., 74 So. 3d 1084 (Fla. 2011), *aff'd per curiam*, 94 So. 3d 504 (Fla. 2012).

county officers, or County Commissioners.[175] Justice Anstead noted that "there is no wording in article VI, section 4, [subsection] (b)—or anywhere else in the Florida Constitution or the Florida Statutes—that indicates that the named officers in article VI, section 4, [subsection] (b) are subject to term limits *to the exclusion of all other government officers, state or local*, in the State of Florida."[176] However, there is also no wording in article VI, section 4, subsection (b) to indicate that the specific disqualifications and election provisions should apply *exclusively* to those offices of specific *statewide* importance.[177] In fact, sections 6 and 7 of article VI contain wording indicating that the provisions in those sections expressly apply only to municipal or district elections and statewide elections, respectively.[178] This wording is evidence that the Constitution drafters know how to write provisions expressly applicable to only certain offices and or elections, and if they so intended for article VI, section 4, subsection (b) to apply only to *offices of statewide importance* as defined by Justice Anstead, they would have expressly noted that restriction.[179]

Furthermore, the Supreme Court of Florida's opinion in *Telli*, and its reliance on Justice Anstead's dissent in *Cook II*, fails to acknowledge and undermines the Constitution's specific distinction that exists between the Constitution's five County Officers listed in article VIII, section 1, subsection (d), and the County Commissioners listed in article VIII, section 1, subsection (e).[180] The Florida Fourth District Court of Appeal made a

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175. *Cook II*, 823 So. 2d at 96 (Anstead, J., dissenting); *see also* FLA. CONST. art. VI, § 4(b)(1)–(6); *Snipes*, 67 So. 3d at 418.

176. *Cook II*, 823 So. 2d at 96 (Anstead, J., dissenting); *see also* FLA. CONST. art. VI, § 4(b).

177. *See* FLA. CONST. art. VI, § 4(b); Telli v. Broward Cnty., 94 So. 3d 504, 512 (Fla. 2012) (per curiam); *Cook II*, 823 So. 2d at 96 (Anstead, J., dissenting).

178. *See* FLA. CONST. art. VI, §§ 6–7.

> Section 6. Municipal and district elections.—Registration and elections in *municipalities* shall, and in other governmental entities created by statute may, be provided by law.
>
> Section 7. Campaign spending limits and funding of campaigns for elective state-wide office.—It is the policy of this state to provide for *state-wide elections* in which all qualified candidates may compete effectively. A method of public financing for campaigns for *state-wide office* shall be established by law. Spending limits shall be established for such campaigns for candidates who use public funds in their campaigns. The legislature shall provide funding for this provision. General law implementing this paragraph shall be at least as protective of effective competition by a candidate who uses public funds as the general law in effect on January 1, 1998.

Id. (emphasis added).

179. *Cook II*, 823 So. 2d at 96 (Anstead, J., dissenting); *see also* FLA. CONST. art. VI, § 4(b)(1)–(6).

180. FLA. CONST. art. VIII, § 1(d)–(e); *Telli*, 94 So. 3d at 512–13; *Cook II*, 823 So. 2d at 95–96 (Anstead, J., dissenting).

detailed analysis of these two sets of offices in the lower court decision of *Snipes*.[181] First, the court noted that the structure of the two sets of offices is distinctly different under article VIII, section 1 of the Florida Constitution, specifically with regards to changes to be made by a county charter.[182] The court noted that "[t]he section 1, [subsection] (d) officers are established with precise language . . . . [The section] establishe[d] that a county government shall have certain named officers, and grants the county limited powers to change the manner of electing those officers, or to abolish an office altogether and transfer its duties to another county office."[183] In contrast, "the section 1, [subsection] (e) *commissioners* are described as a default option when a county charter does not provide otherwise."[184] Section 1, subsection (d) *requires* each county to have the five Constitution County Officers, and is followed by language that authorizes a limited way in which a county by charter may abolish the Constitution's County Office and transfer its duties to a charter-created office, the charter's office.[185] Conversely, section 1, subsection (e) does not require that the composition of the Board of County Commissioners be set up in the way enumerated in the Constitution; it is simply a default.[186] By beginning section 1, subsection (e) with the words "'*[e]xcept when otherwise provided by county charter*, ...' [t]he language of the Constitution expressly cedes power to a county charter when it comes to the creation of a county's collegial governing body."[187]

Additionally, the court went on to discuss the practicality of the Constitution preferring statewide uniformity for section 1, subsection (d) officers.[188] This *practicality* argument is further bolstered by the fact that the Constitution's five County Officers perform important statewide work on the county level, which is intended to be free of interference or influence of the

181. Snipes v. Telli, 67 So. 3d 415, 417–19 (Fla. 4th Dist. Ct. App.), *reh'g granted sub nom.* Telli v. Broward Cnty., 74 So. 3d 1084 (Fla. 2011), *aff'd per curiam*, 94 So. 3d 504 (Fla. 2012); *see also* FLA. CONST. art. VIII, § 1(d)–(e).

182. *Snipes*, 67 So. 3d at 417; *see also* FLA. CONST. art. VIII, § 1.

183. *Snipes*, 67 So. 3d at 417; *see also* FLA. CONST. art. VIII, § 1(d).

184. *Snipes*, 67 So. 3d at 417; *see also* FLA. CONST. art. VIII, § 1(e).

185. FLA. CONST. art. VIII, § 1(d); *Snipes*, 67 So. 3d at 417.

186. FLA. CONST. art. VIII, § 1(e); *see also Snipes*, 67 So. 3d at 417.

187. *Snipes*, 67 So. 3d at 417 (emphasis added) (quoting FLA. CONST. art. VIII, § 1(e)).

188. *Id.* at 418 ("Persons traveling and doing business between counties should deal with a common set of section 1, [subsection] (d) county officers, i.e., sheriff, tax collector, property appraiser, supervisor of elections, clerk of the circuit court, and should not be forced to navigate byzantine bureaucracies to accomplish similar tasks. Likewise, legislators seeking to regulate section 1, [subsection] (d) county officers should not be forced to take a variety of different titles and job descriptions into account in order to achieve a single legislative objective."); *see also* FLA. CONST. art. VIII, § 1(d).

local county governing board.[189] Conversely, the court notes that "these reasons for statewide uniformity are less applicable to the county's [collegial] governing body," whose duties "need not be kept uniform by the Constitution, but may rather be fashioned to suit the particular wants and needs of the voters of the county they serve."[190] The difference in status in the Florida Constitution between these two groups of officers "reflects the common sense conclusion that, as a matter of policy, the balance of state and local interests favors statewide uniformity for the [Constitution's five County Officers], and local flexibility for the [governing Board of County Commissioners]."[191]

The precise language in article VIII, section 1, subsection (e), "*[e]xcept when otherwise provided by county charter*," represents the shift in power and authority that resulted from the 1968 Constitution denoting broad county home rule powers.[192] Accordingly, prior to this change, even County Commissioners were considered *constitution officers*,[193] the election and qualifications of whom could not be changed.[194] However, this consideration is no longer true under the 1968 Constitution in charter counties that have established the form of its governing Board of County Commissioners under its charter, rather than utilizing the fallback option listed in article VIII, section 1, subsection (e).[195] Once a charter county decides to establish and to regulate its governing board under its charter, the County Commissioners are local charter county officers, who—as Justice Anstead pointed out in his dissent in *Cook II*—the charter county has the power and authority to regulate.[196] It is under this distinction and analysis that the Fourth District Court of Appeal in *Snipes* held that the holding of *Cook II* did not extend to County Commissioners, and that charter term limits for those offices are permissible under the Florida Constitution.[197]

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189. *See supra* Part II.C.

190. *Snipes*, 67 So. 3d at 418; *see also* FLA. CONST. art. VIII, § 1(d)–(e).

191. *Snipes*, 67 So. 3d at 418; *see also* FLA. CONST. art. VIII, § 1(d)–(e).

192. *Compare* FLA. CONST. art. VIII, § 1(e) (emphasis added), *with* FLA. CONST., art. VIII, § 1(e) (amended 1973).

193. State v. Walton Cnty., 112 So. 630, 632 (Fla. 1927) ("[T]he board of county commissioners of each county are constitutional officers, and under the terms of the Constitution their powers and duties shall be fixed and prescribed by the Legislature.").

194. *See* Wilson v. Newell, 223 So. 2d 734, 735 n.2 (Fla. 1969) (quoting FLA. CONST. of 1885, art. VIII, § 5 (1943)).

195. FLA. CONST. art. VIII, § 1(c), (e), (g).

196. *Cook II*, 823 So. 2d 86, 95–96 (Fla. 2002) (Anstead, J., dissenting); *see also* FLA. CONST. art. VIII, § 1(e), (g).

197. Snipes v. Telli, 67 So. 3d 415, 419 (Fla. 4th Dist. Ct. App.), *reh'g granted sub nom.* Telli v. Broward Cnty., 74 So. 3d 1084 (Fla. 2011), *aff'd per curiam*, 94 So. 3d 504 (Fla. 2012); *see also* FLA. CONST. art. VIII, § 1(c), (e); *Cook II*, 823 So. 2d at 94–95.

However, the Supreme Court of Florida in its review of the Fourth District Court of Appeal's decision failed to even analyze this distinction.[198] In its decision, the Court simply recapped the two lower court consolidated decisions and its previous decision in *Cook II*, then simply noted that it no longer agreed with its previous decision, and would recede from it because it now agreed with Justice Anstead's dissent.[199] Rather than analyzing specifically why the distinction drawn by the Fourth District Court of Appeal was erroneous, the Court simply noted that it was unworkable and "would undermine the ability to predict what offices may be included within the scope of [*Cook II's*] prohibition on term-limits and would result in apparent inconsistencies between county officials."[200] However, we firmly and respectfully disagree with the Court's hasty, careless, unreasoned, and alarming conclusion about the Fourth District Court of Appeal's holding.[201] Based on the procedural and substantive history of the previous decisions involved in the *Cook II* case, the Fourth District Court of Appeal's holding is clear and logically aligns the past precedent.[202]

As correctly noted by the Fourth District Court of Appeal, the holding of *Cook II* only expressly applied to the Constitution's five County Officers enumerated in article VIII, section 1, subsection (d).[203] The first case that *Cook II* reviewed was *Cook I*.[204] This case was a challenge by the Clerk of Court for Duval County to a City of Jacksonville charter term limit provision.[205] The second case was *Eight is Enough in Pinellas*.[206] This case

198. *See* Telli v. Broward Cnty., 94 So. 3d 504, 512–13 (Fla. 2012) (per curiam); *Snipes*, 67 So. 3d at 419.

199. *Telli*, 94 So. 3d at 512–13; *see also Cook II*, 823 So. 2d at 95–96 (Arnstead, J., dissenting).

200. *Telli*, 94 So. 3d at 513; *see also Cook II*, 823 So. 2d at 94–95; *Snipes*, 67 So. 3d at 419.

201. *See Telli*, 94 So. 3d at 513; *Snipes*, 67 So. 3d at 419.

202. *See Cook II*, 823 So. 2d at 87–90; *Snipes*, 67 So. 3d at 416, 419.

203. *Snipes*, 67 So. 3d at 416; *see also* FLA. CONST. art. VIII, § 1(d); *Cook II*, 823 So. 2d at 94–95.

204. *Cook II*, 823 So. 2d at 87; *Snipes*, 67 So. 3d at 416; *see also Cook I*, 765 So. 2d 289, 289 (Fla. 1st Dist. Ct. App. 2000) (per curiam), *reh'g granted*, Cook v. City of Jacksonville, 786 So. 2d 1184 (Fla. 2001), *overruled by Cook II*, 823 So. 2d 86 (Fla. 2002).

205. *Cook II*, 823 So. 2d at 88; *Cook I*, 765 So. 2d at 290. The challenge was to the City of Jacksonville Charter, rather than a county charter because under the Florida Constitution, the City of Jacksonville currently operates "in the place of any or all county . . . government[]." FLA. CONST. art. VIII, § 6(e) n.1; *Cook II*, 823 So. 2d at 88. This section also contains a similar provision as article VIII, section 1, subsection (d), regarding abolition of the Constitution's County Officers, which states: "No county office shall be abolished or consolidated with another office without making provision for the performance of all state duties now or hereafter prescribed by law to be performed by such county officer." *Compare* FLA. CONST. art. VIII, § 6(e) n.1, *with* FLA. CONST. art. VIII, § 1(d). Contrary to the belief of many—Duval County is not a charter county. *See* FLA. CONST. art. VIII § 6 n. 1. There is no

began with a resident of the county seeking declaratory judgment that a charter provision implementing term limits for the Constitution's five County Officers as well as the County Commissioners was invalid.[207] The trial court found the provisions valid and, thereafter, the Constitution's five County Officers intervened as plaintiffs.[208] The trial court upheld the provision and the resident, the Constitution County Officers, and the county itself, appealed.[209] The Second District affirmed the trial court.[210] "The incumbent [C]lerk of . . . [C]ourt, [T]ax [C]ollector, and [S]heriff petitioned [the Supreme Court of Florida] for review, but the [B]oard of [C]ounty [C]ommissioners did not."[211] The Fourth District in *Snipes* correctly noted that the failure of the County Commissioners to petition for review of the Second District's decision was significant "because it had the effect of removing that office from the holding of [*Cook II*]."[212] Interestingly enough, the Supreme Court of Florida conveniently failed to include this fact in its opinion in *Telli*.[213]

Furthermore, the Supreme Court of Florida in *Cook II* could not have been more clear and express about the fact that it was only reviewing the validity of term limit provisions on the Constitution's five County Officers enumerated in article VIII, section 1, subsection (d).[214] The Court phrased the issue in the case as such from the very outset of the opinion.[215] Given the foregoing analysis, we would firmly and respectfully disagree with the careless and irresponsible conclusion of the Court in *Telli*, that unworkable

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Duval County government. *See id.* There is no consolidated government, and if and when the electors of Duval County vote in, or have an election to approve a county charter, the city of Jacksonville, by operation of law, will no longer act in operation and in place of the county government. *See id.*

206. Pinellas Cnty. v. Eight is Enough in Pinellas, 775 So. 2d 317, 317 (Fla. 2d Dist. Ct. App.), *reh'g granted*, 786 So. 2d 1188 (Fla. 2001), *overruled by Cook II*, 823 So. 2d 86 (Fla. 2002).

207. Telli v. Broward Cnty., 94 So. 3d 504, 510 (Fla. 2012) (per curiam).

208. *Id.* at 510–11; *Eight is Enough in Pinellas*, 775 So. 2d at 318.

209. *Telli*, 94 So. 3d at 510–11.

210. *Id.* at 511.

211. Snipes v. Telli, 67 So. 3d 415, 416 (Fla. 4th Dist. Ct. App.), *reh'g granted sub nom.* Telli v. Broward Cnty., 74 So. 3d 1084 (Fla. 2011), *aff'd per curiam*, 94 So. 3d 504 (Fla. 2012).

212. *Id.*; *see also Cook II*, 823 So. 2d 86, 94–95 (Fla. 2002).

213. *Telli*, 94 So. 3d at 506–13.

214. *Cook II*, 823 So. 2d at 90–91; *see also* FLA. CONST. art. VIII § 1(d).

215. *Cook II*, 823 So. 2d at 90.

> The issue we address in these consolidated cases is whether a charter county may in its charter impose a "term limit" provision upon those county officer positions which are authorized by article VIII, section 1, [subsection] (d), Florida Constitution, where the charter county through its charter has not abolished those county officer positions.

Id.

confusion will result as to which officers the *Cook II* decision would apply.[216]

This is not to say that even under *Cook II*, charter counties have no power whatsoever to term limit its officers.[217] Charter counties still have the ability to abolish any of the Constitution's five County Officers listed in article VIII, section 1, subsection (d), and transfer the duties to a separate charter-created office, which it could then term limit in the same manner that it can term limit its charter governing board and any other charter officers.[218] The officers would then be the *charter's* non-sovereign county officers, and no longer the Constitution's sovereign County Officers.[219] This distinction was also made in *Cook II*, as the issue posed specifically addressed the section 1, subsection (d), County Officers, "where the charter county through its charter *has not abolished* those county officer positions."[220] The Court in *Cook II* held that term limits could only be imposed on *constitutional*—that is, not-yet-abolished—County Officers through an amendment to the Constitution.[221]

IV. PATHWAYS TO REVIEW: WHERE CAN WE GO FROM HERE?[222]

While the pathway for review in attempting to correct the *Telli* decision is rather limited and bleak, there are some methods available by which one could attempt to get the decision revisited and hopefully overturned by the Supreme Court of Florida.[223] It is important to note that a state's supreme court is the final and ultimate arbiter on issues of state law.[224] Therefore, the Supreme Court of Florida is the final arbiter of the state constitutional law issues involved in *Telli*, and the trial courts and district courts of appeal are bound to follow the *Telli* decision until such time as it is overruled by a subsequent decision of the Supreme Court.[225] However, this does not mean that one could not argue a case on the same issue back up to the Supreme Court of Florida, on the premise that the *Telli* decision was

216. *Telli*, 94 So. 3d at 513; *see also Cook II*, 823 So. 2d at 94–95.
217. *See Cook II*, 823 So. 2d at 90.
218. FLA. CONST. art. VIII, § 1(d)–(e), (g); *Cook II*, 823 So. 2d at 90, 94–95.
219. *See Cook II*, 823 So. 2d at 94–95.
220. *Id.* at 90 (emphasis added).
221. *Id.* at 94–95.
222. This list of pathways to review is by no means all-inclusive.
223. *See* FLA. CONST. art. V, § 3(b); FLA. R. APP. P. 9.030(a); Telli v. Broward Cnty., 94 So. 3d 504, 513 (Fla. 2012) (per curiam).
224. *E.g.*, Blue Cross & Blue Shield of Ala., Inc. v. Nielsen, 116 F.3d 1406, 1413 (11th Cir. 1997).
225. *See Nielson*, 116 F.3d at 1413; *Telli*, 94 So. 3d at 513.

decided erroneously and in direct derogation of the Florida Constitution.[226] There are several different options for getting the issue back to the Supreme Court of Florida.[227]

A. *Constitutional Amendment*

One option would be for a constitutional amendment to be passed which would clarify the status of the Constitution's County Officers, and make it explicit that no actions could be taken to interfere with—including placing term limits on—the Constitution's County Officers, until and unless their offices have been abolished and duties transferred to a charter-created office.[228] The Florida Constitution sets out several different ways to propose and pass amendments to the Florida Constitution.[229] However, we believe that a constitutional amendment is unnecessary. The Florida Constitution does not need to be amended in this situation; its plain language simply needs to be followed.[230] We believe that the limited powers and authority of charter counties to regulate or control the Constitution's County Officers is clear from the plain language of the Florida Constitution as it stands.[231]

B. *Review of District Court of Appeal Decision*

The second option for getting back to the Supreme Court of Florida would be through review of a district court of appeal decision.[232] Under this option, one would have to bring a case in a Florida circuit court.[233] As noted above, the Florida circuit courts are bound by Supreme Court precedence, and so any circuit court would be bound to rule that charter term limits for any or all of the Constitution's County Officers are constitutionally permissible based on *Telli*.[234] However, an appeal could then be taken and heard by a district court of appeal.[235] The district court of appeal would also be bound to follow *Telli*, and therefore would affirm the trial court's

226. *See* Weinger, *supra* note 7, at 868–71; *see also Telli*, 94 So. 3d at 513.
227. *See* FLA. CONST. art. V, § 3(b)(3); FLA. R. APP. P. 9.030(a)(1)(A)(ii), (a)(2)(A)–(B).
228. *See* FLA. CONST. art. VIII, § 1(d), (g).
229. FLA. CONST. art. XI.
230. *See* FLA. CONST. art. VI, § 4(b); FLA. CONST. art. VIII, § 1(g).
231. *See* FLA. CONST. art. VIII, § 1(d).
232. FLA. CONST. art. V, § 3(b)(3).
233. *Id.* § 4(b)(3); FLA. R. APP. P. 9.030(b)(1)(A).
234. *See* FLA. CONST. art. V, § 3(b); Telli v. Broward Cnty., 94 So. 3d 504, 513 (Fla. 2012) (per curiam).
235. FLA. CONST. art. V, § 4(b)(1) ("District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts . . . .").

judgment.[236] The party could then petition the Supreme Court of Florida for review; however, the case would fall into the category of cases for which the Supreme Court of Florida only has discretionary review,[237] so there is no guarantee that the Court would hear the case.[238] It could just as easily decide not to, based on the fact that it has just recently issued the *Telli* opinion.[239]

Alternatively, the Supreme Court of Florida would have discretion to review the case if a district court of appeal certifies a question to be of great public importance that it has passed upon.[240] The Supreme Court of Florida could also immediately hear a review of the trial court judgment—of which appeal is pending—if a district court of appeal certifies the case "to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the [S]upreme [C]ourt."[241]

C. *Writ of Quo Warranto*

A writ of quo warranto is "used to test the right of a person either to hold an office . . . or to exercise some right or privilege."[242] Under the Florida Statutes, a person who claims the right to hold public office may bring a petition for writ of quo warranto if the Attorney General refuses to bring the petition.[243] The Supreme Court of Florida has jurisdiction to hear petitions for writs of quo warranto, challenging the right of a person to hold state office.[244] The Supreme Court of Florida has previously held that the title *state officer* under this provision "contemplates possession or use[] of a certain portion of sovereignty for the benefit of the people."[245] Because the Constitution's County Officers are sovereign officers, they are also subject to

236. *See id.*; *Telli*, 94 So. 3d at 513.

237. FLA. CONST. art. V, § 3(b)(3). Under this option, the Supreme Court of Florida could review the District Court's decision based on the fact that it "expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers." *Id.* Because of the constitutional issues involved in the case, conflict between more than one district is not necessary for discretionary Supreme Court review. *See id.*

238. *See id.*

239. *See Telli*, 94 So. 3d at 513.

240. FLA. CONST. art. V, § 3(b)(4).

241. *Id.* § 3(b)(5).

242. Tracy Raffles Gunn, *Original Proceedings in Florida's Appellate Courts*, 32 STETSON L. REV. 347, 354 (2003).

243. FLA. STAT. § 80.01 (2014).

244. FLA. CONST. art. V, § 3(b)(8) (The Supreme Court of Florida "[m]ay issue writs of mandamus and quo warranto to state officers and state agencies.").

245. *Ex parte* Smith, 118 So. 306, 307 (Fla. 1928).

a writ of quo warranto from the Supreme Court of Florida.[246] Therefore, this would be a viable method for getting this issue back to the Supreme Court of Florida directly, but one would have to wait for several things to occur before bringing such a petition.[247]

First, a charter county would have to pass a charter term limit applicable to one or more of the Constitution's County Officers.[248] Second, an incumbent Constitution County Officer would have to be denied the ability to run in the next election following the passage of the charter term limit.[249] Third, and related, a new Constitution County Officer would be elected and would take office.[250] At this point, the incumbent Constitution County Officer—who was denied the ability to run for office again—would have the right to petition the Supreme Court of Florida for a writ of quo warranto, challenging the newly-elected Constitution County Officer's right to hold that office.[251] The incumbent Constitution County Officer would have a claim to that office because had the charter term limit provision not been enacted—in derogation of the Florida Constitution—he or she would have been able to run again, and possibly would have been reelected.[252] However, the Supreme Court of Florida's jurisdiction for hearing a petition for a writ of quo warranto is discretionary as well, so again, there is no guarantee that the Court would hear the petition.[253]

Similarly, because a writ of quo warranto can also be used to challenge an exercise of authority derived from a public office,[254] the writ could also possibly be used to challenge the authority of a charter review committee to consider and propose charter term limits for the Constitution's County Officers.[255] However, the jurisdiction for this particular writ would fall in the circuit court,[256] the decision of which would then have to be appealed up to a Florida district court of appeal—just like any other case—and would not be guaranteed review by the Supreme Court of Florida.[257]

246. *See id.*
247. *See id.*
248. *See, e.g.*, Telli v. Broward Cnty., 94 So. 3d 504, 505–06 (Fla. 2012) (per curiam).
249. *Id.* at 506.
250. FLA. CONST. art. VIII, § 1(d); *Telli*, 74 So. 3d at 506.
251. FLA. CONST. art. V, § 3(b)(8); FLA. STAT. § 80.01 (2014); *see also Ex parte Smith*, 118 So. at 307.
252. *See Cook II*, 823 So. 2d 86, 96 (Fla. 2002) (Anstead, J., dissenting).
253. FLA. CONST. art. V, § 3(b)(8).
254. *See* Martinez v. Martinez, 545 So. 2d 1338, 1338–39 (Fla. 1989).
255. *See* Weinger, *supra* note 7, at 868.
256. *See* FLA. R. APP. P. 9.030(c)(3).
257. *See* FLA. CONST. art. V, §§ 3(b)(3), 4(b)(3); *supra* Parts II–IV.

V. CONCLUSION

For all of the foregoing reasons, the Fourth District Court of Appeal's decision and reasoning in *Snipes* should have been affirmed in *Telli*.[258] Under the Florida Constitution, charter counties have broad authority to regulate their County Commissioners fully, and therefore, the authority exists to set term limits for them within the county charter.[259] Conversely, there is only very limited and specific authority for counties to regulate the Constitution's five County Officers under their charters.[260] That is, specifically, a county may only establish a different manner in which these officers shall be *chosen* under the county charter; and as long as a charter county has not abolished the Constitution's County Office and transferred its duties to a charter-created office—the charter's office—it remains the Constitution's County Officer's, and charter counties possess no more power than non-charter counties to regulate them.[261] This point of law means that charter counties possess no more power than non-charter counties to set term limits for the Constitution's five County Officers.[262]

The Supreme Court of Florida's decision in *Telli* failed to take into account the status of the Constitution's five County Officers, completely abridging the distinction drawn by the Constitution between a Constitution's County Officer and a *charter's* county officer, and therefore, illegally and without authority or jurisdiction, has effectuated an amendment to the Florida Constitution, which it does not possess the power to effectuate.[263] Only the people of Florida can effectuate an amendment to the Florida Constitution through an amendment election vote.[264] The *Telli* opinion unconstitutionally abridges the rights of both incumbent holders of the Constitution's County Offices and of the voters who may wish to vote for those incumbent Constitution County Officers.[265] For this reason, the opinion is untenable, disconcerting, not judicially cognizant, devoid of constitutional integrity, and, if enforced, precipitates needlessly an

258. *See* Telli v. Broward Cnty., 94 So. 3d 504, 513 (Fla. 2012) (per curiam); Snipes v. Telli, 67 So. 3d 415, 419 (Fla. 4th Dist. Ct. App.), *reh'g granted sub nom.* Telli v. Broward Cnty., 74 So. 3d 1084 (Fla. 2011), *aff'd per curiam*, 94 So. 3d 504 (Fla. 2012); Weinger, *supra* note 7, at 860, 870.

259. *See* FLA. CONST. art. VIII, § 1(e), (g).

260. *Id.* § 1(g).

261. *See id.* § 1(e)–(g).

262. *See id.* § 1(f)–(g).

263. *See* FLA. CONST. art. I, § 1; *Telli*, 94 So. 3d at 512–13; Weinger, *supra* note 7, at 869–70.

264. FLA. CONST. art. XI, § 5(b), (e).

265. *See* FLA. CONST. art. I, § 1; *Telli*, 94 So. 3d at 512–13; Weinger, *supra* note 7, at 868–70.

unnervingly serious constitutional problem, which must be solved.[266] There is a dire need for the issue to make its way back to the Supreme Court of Florida for reconsideration of the constitutional implications of the *Telli* decision. If not revisited, there will soon be officers elected and sworn into sovereign state office in derogation of the Florida Constitution. If the issue does in fact make its way back to the discretionary jurisdiction of the Supreme Court of Florida, one would hope that the Court would exercise its discretion in favor of hearing the issue, if only to correct the dire constitutional issues placed before it; and then, also to correct a careless and unsupported opinion that is entirely inconsistent with the Court's well-earned respect as one of the best state supreme courts in the United States of America.

266. *See Telli*, 94 So. 3d at 512–13.

2014 SURVEY OF JUVENILE LAW

BY MICHAEL J. DALE*

I. INTRODUCTION

The Florida Legislature enacted a statute providing counsel to children in certain categories in dependency cases, and also passed a statute removing the nexus requirement to prove grounds for termination of parental rights.[1] Both laws are a substantial departure from prior practice and contain serious flaws, which are discussed in this survey.[2] The Supreme Court of Florida ruled on one case during the past year, interpreting Florida's speedy trial rule in juvenile delinquency cases.[3] Intermediate appellate courts remained active both in the delinquency area and in the dependency field.[4] This survey reviews and analyzes the new laws and the significant reported opinions in these areas.[5]

* Professor of Law, Nova Southeastern University Shepard Broad Law Center. This survey covers cases decided during the period from July 1, 2013 through June 30, 2014. The author thanks Law Review Subscriptions Editor, Richard Nelson, for his help in the preparation of this survey.

1. FLA. STAT. §§ 39.01305, .806(1)(f), (h) (2014); FLA. STAT. § 39.806(1)(f), (h) (2013).

2. *See* FLA. STAT. §§ 39.01305, .806(1)(f), (h) (2014); FLA. STAT. § 39.806 (2013); *infra* Part VII.

3. State v. S.A., 133 So. 3d 506, 507 (Fla. 2014) (per curiam).

4. *E.g.*, Weiand v. State, 129 So. 3d 434, 434 (Fla. 5th Dist. Ct. App. 2013).

5. *See infra* Parts I–V.

II. DEPENDENCY

Chapter 39 of the Florida Statutes and the Florida Juvenile Rules of Civil Procedure provide for notice and an opportunity to be heard at multiple points in the dependency proceeding, including sections of chapter 39 that provide that, unless parental rights have been terminated, parents must be notified of all proceedings and hearings involving the child.[6] Despite the clear language of chapter 39 and the Rules of Juvenile Procedure, the Second District Court of Appeal was obligated to reverse in *In re J.B. v. Department of Children & Family Services*[7] because the trial court failed to give the parents adequate notice and an opportunity to prepare for a permanency hearing.[8] The appeal involved a dependency proceeding in which the parents did not comply with the case plan, and a scheduled judicial review was set.[9] Before the hearing, the Department, according to the appellate court, "apparently abandoned the goal of reunification and decided to seek a permanent guardianship."[10] Because the hearing was noticed as a judicial review and not a permanency hearing, the parents knew nothing about the change in plans.[11] In fact, "[f]orty-three pages into the transcript—[according to the appellate court]—the Department first explained that it actually wanted an order at the conclusion of [the] hearing establishing a permanent guardianship and a termination of supervision."[12] Over the objections of the child's father's attorney, the trial court proceeded with the matter, apparently not seeming to understand the impact of its ruling.[13] The appellate court reversed.[14]

In dependency proceedings in Florida, by statute, the parties are: The parents, the Department of Children and Families, the Guardian Ad Litem ("GAL") Program or a representative of the GAL Program if appointed, the child, and the petitioner, whether the Department or someone else.[15] Chapter 39

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6. FLA. STAT. § 39.502(1) (2014); FLA. R. JUV. P. 8.045(h); FLA. R. JUV. P. 8.225(f)(1) (providing notice). When these rules do not require specific notice, all parties will be given reasonable notice of any hearings. FLA. STAT. § 39.502(1).

7. 130 So. 3d 753 (Fla. 2d Dist. Ct. App. 2014).

8. *In re J.B.*, 130 So. 3d at 754, 757; *see also* FLA. STAT. § 39.502(1); FLA. R. JUV. P. 8.225(f)(1).

9. *In re J.B.*, 130 So. 3d at 754.

10. *Id.*

11. *Id.* at 754–55.

12. *Id.* at 755.

13. *Id.* at 755–56.

14. *In re J.B.*, 130 So. 3d at 757.

15. FLA. STAT. § 39.01(51) (2014). For a discussion of the roles of the parties in Florida see Michael J. Dale & Louis M. Reidenberg, *Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated*, 35 NOVA L. REV. 305, 323–32 (2011).

also recognizes that in child welfare proceedings in Florida, a *participant* may also be involved in the case.[16] A participant is defined as a non-party who receives notice of hearing and "includ[es] the actual custodian of the child, the foster parents, . . . the legal custodian of the child, identified prospective parents, and any other person whose participation may be in the best interest of the child."[17] A mother of five children in *D.C. v. J.M.*[18] filed a writ of certiorari in the appellate court to quash a pre-trial order on the foster parent's motion to intervene.[19] The trial court's order provided that, in addition to the other parties, the foster parent's attorney would have the right to unfettered review of all court files in the case.[20] The mother, the GAL Program, and the attorney ad litem for one of the half siblings all objected and joined in the writ.[21] They claimed an invasion of privacy rights by the third party foster parent.[22] Recognizing that chapter 39 does not allow foster parents to receive every record in a confidential dependency case and that the order departed from an essential constitutional requirement, the appellate court granted the writ and quashed the trial court order.[23]

In any dependency proceeding, of course, the petitioner must prove the allegations contained in the petition by a preponderance of the evidence.[24] In *H.C. v. Department of Children & Family Services*,[25] a father appealed from an order adjudicating the children dependent based upon a finding of abuse, in that there were bruises on one of his children's left side as well as a purple loop mark.[26] The case arose when the children's mother, who was separated from the father, noticed the mark after the children returned from the father's care.[27] "The [court's] expert, . . . a nurse practitioner with the University of Miami's Child Protection [Unit],[28] testified that," in her opinion, the "injury 'represent[ed] child physical abuse.'"[29] The problem was that there was no

16. FLA. STAT. § 39.01(50).
17. *Id.*
18. 133 So. 3d 1080 (Fla. 3d Dist. Ct. App. 2014).
19. *Id.* at 1081.
20. *Id.*
21. *Id.*
22. *Id.*
23. FLA. STAT. § 39.0132(3) (2014); *D.C.*, 133 So. 3d at 1081–82.
24. FLA. STAT. § 39.507(1)(b).
25. 141 So. 3d 243 (Fla. 3d Dist. Ct. App. 2014).
26. *Id.* at 243.
27. *Id.* at 244.
28. *Id.*; *see also* FLA. STAT. § 39.303(1)(e). The Child Protection Units are operated by the State's Health Department to medically evaluate possible child abuse and neglect. *See* FLA. STAT. § 39.303(1).
29. *H.C.*, 141 So. 3d at 244.

evidence of who did it.[30] As the appellate court explained, "the record is completely devoid of any evidence that the [f]ather caused [the child's] injuries."[31] Thus, the court of appeals found that the petitioner, "the Department, failed to establish by a preponderance of the evidence that the [f]ather" probably was the person who inflicted the injuries, and, on that basis, it reversed.[32]

An issue which regularly arises in the dependency context in Florida is whether the neglect or abuse of one child is sufficient, in and of itself, to prove that a parent's other children are also dependent.[33] The case law, going back twenty years, requires that there must be a *nexus* between the injuries to one child, or other neglect of that child, and proof that the other children are dependent.[34] This was the issue in *W.R. v. Department of Children & Families*,[35] a case in which "[a] father appeal[ed] [from] an order [declaring] his . . . children dependent."[36] The appellate court affirmed as to one child, but reversed as to the other.[37] The finding by the trial court as to the second child was based upon "one incident where the father struck the child," but there was no evidence of harm.[38] There was not even a bruise.[39] Relying on the body of prior case law, the appellate court explained that, "[t]he trial court failed to make any finding [with] regard[] to the risk of imminent abuse," and failed to show there was "a nexus between the parent's abuse of the one child and the risk of abuse of [the other] child."[40] Significantly, the Florida Legislature statutorily removed the nexus requirement during the 2014 Legislative Session.[41] Whether the removal is constitutional is described in Part VII, Legislative Changes.[42]

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30. *Id.* at 245.
31. *Id.*
32. *Id.*
33. *E.g.*, R.F. v. Fla. Dep't of Children & Families (*In re* M.F.), 770 So. 2d 1189, 1193 (Fla. 2000) (per curiam).
34. Padgett v. Dep't of Health & Rehabilitative Servs., 577 So. 2d 565, 571 (Fla. 1991); W.R. v. Dep't of Children & Families, 137 So. 3d 1078, 1079 (Fla. 4th Dist. Ct. App. 2014); C.M. v. Dep't of Children & Family Servs. (*In re* S.M.), 997 So. 2d 513, 515 (Fla. 2d Dist. Ct. App. 2008).
35. 137 So. 3d 1078 (Fla. 4th Dist. Ct. App. 2014).
36. *Id.* at 1079.
37. *Id.*
38. *Id.*
39. *Id.*
40. *W.R.*, 137 So. 3d at 1079–80.
41. *Compare* FLA. STAT. § 39.806(1)(f) (2014), *with* FLA. STAT. § 39.806(1)(f) (2013).
42. *See infra* Part VII.

As noted earlier, foster parents can be participants in dependency proceedings.[43] As the recipients of children who are in the state-operated foster care system, foster parents are required to comply with licensing regulations.[44] In *Sanders v. Department of Children & Families*,[45] foster parents appealed from a decision of the Department of Children and Families revoking their foster care license on the basis of a hearing officer's recommendation.[46] The case arose from the foster parents' employment of corporal punishment on a foster child in their house.[47] Admitting that they struck the child, causing a bruise visible several days later, the foster parents on appeal claimed that the action of the Department interfered with their religious curriculum or teachings in violation of Florida law.[48] The appellate court affirmed the decision of the Department.[49] It held that Florida law does not deprive "the Department of the authority to prohibit corporal punishment," and that appellants' claim of invasion of their religious rights must fail because they should not have entered into the contract if they believed that the contract violated their constitutional rights.[50]

During the course of a dependency proceeding, often after adjudication and the disposition, a parent may make a motion for reunification.[51] When the parent does so, the court shall hold a hearing in which the "parent [is obligated to] demonstrate that the safety, [welfare], and physical, mental, and emotional health of the [parent's] child" will not suffer from endangerment by the change.[52] In a rather simple case on appeal, *A.M. v. Department of Children & Families*,[53] a mother appealed from a trial court's denial of a motion for reunification.[54] Apparently, there was no evidence in the record that the mother, through counsel, actually moved for reunification.[55] Nor was there an order

43. FLA. STAT. § 39.01(50) (2014); *see also supra* notes 15–17 and accompanying text.

44. Sanders v. Dep't Children & Families, 118 So. 3d 899, 901 (Fla. 1st Dist. Ct. App. 2013); *see also* FLA. STAT. § 409.175(1)(b).

45. 118 So. 3d 899 (Fla. 1st Dist. Ct. App. 2013).

46. *Id.* at 900.

47. *Id.*

48. *Id.*; *see also* FLA. STAT. § 409.175(1)(b).

49. *Sanders*, 118 So. 3d at 901; *see also* FLA. STAT. § 409.175(1)(b).

50. *Sanders*, 118 So. 3d at 901; *see also* FLA. STAT. § 409.175(1)(b).

51. FLA. STAT. § 39.621(9).

52. *Id.*

53. 118 So. 3d 998 (Fla. 1st Dist. Ct. App. 2013) (per curiam).

54. *Id.* at 998.

55. *Id.*

deciding the motion for reunification in the record.[56] For these simple reasons, the appellate court upheld the decision below.[57]

III. TERMINATION OF PARENTAL RIGHTS

The issue of the failure of parents to appear at termination of parental rights proceedings has come up in appellate court on numerous occasions in Florida.[58] Under Florida law, it is possible for a court to enter a consent to the termination of parental rights.[59] However, while the Florida statute governing the failure to appear may be grounds for termination of parental rights,[60] the question remains as to the circumstances underlying the failure to appear, including the possibility that the parent appeared on one of several days in the proceeding.[61] In *C.S. v. Department of Children & Families*,[62] the mother and father appealed from a judgment terminating their parental rights on the basis of the entry of a consent when they failed to appear.[63] The appellate court affirmed, finding that the court did not rule solely on the basis of the failure to appear, but also on the facts of the case.[64] The appellate court also noted that "[t]he trial court found the mother's excuse for [not appearing] not to be credible."[65] However, there was a very strong dissent by Judge Warner.[66] Apparently, "the parents appeared on the first two days of the adjudicatory hearing and failed to appear on the third day, [which was] scheduled three months later."[67] Relying on case law holding that a consent should not be entered where a parent does not appear at part of the hearing, Judge Warner would have granted the appeal on that ground.[68]

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56. *Id.*
57. *Id.* at 998–99.
58. *See* J.M. v. Dep't of Children & Families, 9 So. 3d 34, 35 (Fla. 4th Dist. Ct. App. 2009); Michael J. Dale, *2013 Survey of Juvenile Law*, 38 NOVA L. REV. 81, 86–87 (2013) [hereinafter Dale, *2013 Survey of Juvenile Law*]; Michael J. Dale, *2012 Survey of Juvenile Law*, 37 NOVA L. REV. 333, 342–46 (2013) [hereinafter Dale, *2012 Survey of Juvenile Law*].
59. FLA. STAT. § 39.801(3)(d) (2014); *see also J.M.*, 9 So. 3d at 36.
60. FLA. STAT. § 39.801(3)(d).
61. *See* Nickerson v. Dep't of Children & Families, 718 So. 2d 373, 373–74 (Fla. 3d Dist. Ct. App. 1998).
62. 124 So. 3d 978 (Fla. 4th Dist. Ct. App. 2013) (per curiam), *review denied*, 135 So. 3d 286 (Fla. 2014).
63. *Id.* at 979.
64. *Id.*
65. *Id.* at 980.
66. *Id.* (Warner, J., dissenting).
67. *C.S.*, 124 So. 3d at 980 (Warner, J., dissenting).
68. *Id.*

Florida provides for termination of parental rights on numerous grounds—abuse, neglect, and abandonment.[69] Abandonment, as defined in the Florida Statutes, is a situation where the parent "has made no significant contribution to the child's care and maintenance."[70] It includes a lack of frequent contact with the child where marginal efforts or token visits are not enough.[71] In *S.L. v. Department of Children and Families*,[72] a mother appealed from an adjudication terminating her parental rights on grounds of continuing abuse, neglect, or abandonment.[73] The appellate court affirmed in part and reversed in part, finding that the trial court erred in basing the termination on abandonment.[74] Looking at the facts, the appellate court held that the mother had at least twenty-six visits over a one-year period with her children, and that record contained "testimony indicat[ing] there may have been other visits . . . not memorialized in . . . Department records."[75] There was also evidence of telephone communications and provision of clothing, shoes, snacks, food, and other gifts.[76] In a second case, *J.E. v. Department of Children and Families*,[77] the appellate court affirmed a finding of abandonment by the father by clear and convincing evidence.[78] The court found that he failed to demonstrate financial ability to support the children or the capacity to do so, having last paid support three months prior to the trial.[79] In addition, his visitation was infrequent and irregular, causing the child not to see her father as a parent.[80] Finally, the court affirmed because the parent failed to substantially comply with the case plan, a separate ground for termination of parental rights.[81] The problem with the Florida Statute, as evidenced by the two cases described above, is that the language in the law is imprecise, containing no timeframes or other specific elements in the test of abandonment.[82]

Termination of parental rights in Florida, as in other jurisdictions, requires first, a finding by clear and convincing evidence that the grounds for

69. FLA. STAT. § 39.806(1)(e)(1) (2014).
70. *Id.* § 39.01(1).
71. *Id.*
72. 120 So. 3d 75 (Fla. 4th Dist. Ct. App. 2013) (per curiam).
73. *Id.* at 76.
74. *Id.* at 77.
75. *Id.*
76. *Id.*
77. 126 So. 3d 424 (Fla. 4th Dist. Ct. App. 2013).
78. *Id.* at 428.
79. *Id.*
80. *Id.*
81. *Id.* at 430; *see also* FLA. STAT. § 39.806(1)(e)(1) (2014).
82. *See* FLA. STAT. § 39.806(1)(e); S.L. v. Dep't of Children & Families, 120 So. 3d 75, 77 (Fla. 4th Dist. Ct. App. 2013) (per curiam); *J.E.*, 126 So. 3d at 428.

termination exist[83] and second, that termination is in the manifest best interests of the child.[84] Third, in Florida, termination must be the least restrictive alternative.[85] In the case *K.D. v. Department of Children & Family Services (In re Z.C. II)*,[86] parents appealed a final judgment terminating parental rights to twin sons.[87] The case had previously been on appeal.[88] In the first decision, the appellate court held that since the trial court elected not to terminate parental rights, it could not immediately place the children in a permanent guardianship.[89] Thus, the case went back to the trial court on questions of the least alternative means and manifest best interest.[90] What brought the case back to the appellate court was the question of whether the trial court was obligated to consider new circumstances in determining whether termination was in the best interest of the children.[91] Reviewing the facts of the case, the appellate court reversed and remanded again, finding that it could not say for certain that the trial court would not have decided that the circumstances warranted an adjudication of dependency instead of termination of parental rights as a matter of best interests of the child.[92]

Finally, in *A.J. v. Department of Children & Families*,[93] the appellate court reversed as to the failure of the trial court to make proper findings as to the grounds for termination of parental rights.[94] Specifically, the appellate court found that there was no substantial evidence of significant harm to the sons, and was further "troubled by the court's finding[] that the parents could not provide the children with necessities, [as] [t]here was no testimony establishing the parents' financial situation and . . . no evidence that [they] could not . . . provide for their children."[95] In fact, the trial court denied the mother's attorney the right to shed light on another issue—the children's referral to therapy by their mother—on grounds that the question was irrelevant.[96] The trial court further

83. FLA. STAT. § 39.809(1); *see, e.g.*, 750 ILL. COMP. STAT. 50/1(1)(D)(f) (2014).

84. FLA. STAT. § 39.810; *see, e.g.*, 750 ILL. COMP. STAT. 50/1(1)(D)(m-1).

85. Padgett v. Dep't of Health & Rehabilitative Servs., 577 So. 2d 565, 571 (Fla. 1991); K.D. v. Dep't of Children & Family Servs. (*In re* Z.C. II), 132 So. 3d 877, 879 (Fla. 2d Dist. Ct. App. 2014); *see also* FLA. STAT. § 39.6012(3)(d).

86. 132 So. 3d 877 (Fla. 2d Dist. Ct. App. 2014).

87. *Id.* at 878.

88. Dep't of Children & Family Servs. v. K.D. (*In re* Z.C. I), 88 So. 3d 977, 979 (Fla. 2d Dist. Ct. App. 2012) (en banc).

89. *Id.* at 988–89.

90. *Id.* at 989.

91. *In re Z.C. II*, 132 So. 3d at 879.

92. *Id.* at 879–80.

93. 126 So. 3d 1212 (Fla. 4th Dist. Ct. App. 2012) (per curiam). This was a 2012 case that was reported in 2013.

94. *Id.* at 1215.

95. *Id.*

96. *Id.* at 1214.

compounded its errors by relying on "hearsay accounts regarding one of the young[] boys and one of the father's daughters acting out sexually."[97]

IV. STATUS OFFENSES—CHILDREN IN NEED OF SERVICES

Chapter 984, entitled "Children and Families in Need of Services," deals with status offenders.[98] A "child in need of services" concerns children who have committed an act, which if committed by an adult would not be a crime.[99] Under Florida law, this includes children who persistently run away, are "habitually truant from school," and who "persistently disobey[] the reasonable and lawful demands of [their] parents."[100] This statute begins with the following statement of purpose:

> To provide judicial and other procedures to assure due process through which children and other interested parties are assured fair hearings by a respectful and respected court or other tribunal[s] and the recognition, protection, and enforcement of their constitutional and other legal rights, while ensuring that public safety interests and the authority and dignity of the courts are adequately protected.[101]

It appears clear from the Second District Court of Appeal ruling in *Moyers v. State*[102] that the trial court failed to comply with the enabling language of the statute.[103] In that case, a father "appeal[ed] two orders finding him in indirect criminal contempt for failing to comply with truancy orders" that obligated him to ensure that his daughter attended school.[104] According to the appellate court, there was no evidence presented at the first of two hearings regarding an order to show cause, and that the evidence presented at the second hearing showed only that the father's daughter had been absent or departed from school on several days.[105] In fact, according to the appellate court, what the evidence did show was that the child's medical condition caused her not to attend school for several days.[106] There was no evidence of the father's willful

97. *Id.*
98. *See* FLA. STAT. § 984.01 (2014).
99. *See id.* § 984.03(9).
100. *Id.* § 984.03(9)(a)–(c).
101. *Id.* § 984.01(1)(a).
102. 127 So. 3d 827 (Fla. 2d Dist. Ct. App. 2013).
103. *Id.* at 828; *see also* FLA. STAT. § 984.01(1)(a).
104. *Moyers*, 127 So. 3d at 827–28.
105. *Id.* at 828.
106. *Id.*

failure to assure the child's attendance.[107] Rather, according to the appellate court, "[t]he truancy . . . judge improperly acted as the judge and the prosecutor, and the evidence was insufficient to establish Mr. Moyers' willful noncompliance with the truancy court's order[]."[108] Seeing "the truancy judge's improper role in the proceedings as prosecut[or], and because" there was no evidence to support the finding, the appellate court reversed.[109] In so doing, it recognized that it had previously ruled in exactly the same fashion in a prior case involving the same trial judge.[110]

An important question of the proximity of the status offense to a delinquency offense arose recently in *M.J. v. State*.[111] In that case, a juvenile appealed from an adjudication of delinquency.[112] The claim was that the trial court had denied the juvenile's "motion to suppress his confession . . . from what [was] claim[ed] [to be] an illegal detention for loitering and prowling."[113] Under the facts of the case, the court determined that the motion should have been suppressed because the reasonable stop of the juvenile by the police was for truancy, and thus, there was no "probable cause to arrest the juvenile for loitering and prowling."[114] According to the appellate court, during mid-day hours, a deputy sheriff noticed a juvenile "in front of a house in a high crime area."[115] The officer knew from prior dealings that the juvenile should have been in school.[116] When the officer made a U-turn in his vehicle, the juvenile ran away, and the officer subsequently found the juvenile "lying along the concrete wall inside the porch" of the house.[117] The officer then read the juvenile his *Miranda* rights and subsequently the juvenile confessed to a burglary.[118] The appeals court found that the police officer saw the juvenile and "suspected him of being a truant, not . . . committing a crime."[119] Thus, there was no probable cause for the arrest for loitering and prowling.[120]

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107. *Id.*
108. *Id.*
109. *Moyers*, 127 So. 3d at 828.
110. *Id.* (referencing Sockwell v. State, 123 So. 3d 585, 592 (Fla. 2d Dist. Ct. App. 2012)).
111. 121 So. 3d 1151, 1153 (Fla. 4th Dist. Ct. App. 2013), *review denied*, 133 So. 3d 528 (Fla. 2014).
112. *Id.* at 1153.
113. *Id.*
114. *Id.*
115. *Id.*
116. *M.J.*, 121 So. 3d at 1153.
117. *Id.*
118. *Id.*
119. *Id.* at 1155.
120. *Id.*

V. JUVENILE DELINQUENCY

The issue before the Supreme Court of Florida during this survey year was the question of proper interpretation of the speedy trial rule in delinquency cases.[121] The specific issue in *State v. S.A.*[122] was how to compute what is referred to as the speedy trial rule's *recapture window*.[123] The issue arose from a conflict in two of the district courts of appeal.[124] In *S.A.*, the appellate issue arose when the juvenile "filed a notice of expiration of speedy trial and a motion seeking discharge under the speedy trial rule."[125] The motion required application of the trial rule's *recapture window* found in the Florida Rules of Juvenile Procedure.[126] The recapture rule says that "[n]o later than [five] days from the date of the filing of [the] motion for discharge, the court [is obligated to] hold a hearing on the motion."[127] Then, "unless the court finds that one of the reasons set forth in subdivision (d) [of the rule] exists . . . the respondent [must] be brought to trial within [ten] days" and if not, and "through no fault of the respondent, the respondent [is] . . . discharged."[128] The specific technical question was whether the rule provides for one fifteen-day time period based upon the five- and ten-day provisions, or whether the calculation of the recapture window is based upon two separate, but interrelated time periods of five and ten days.[129] Analyzing the legislative history—and over a dissent and two concurrences—the plurality ruling was "that the recapture window is comprised of two separate time periods."[130]

The Supreme Court of the United States' rulings in *Miller v. Alabama*[131] and *Graham v. Florida*[132] have generated a growing body of interpretive case law in Florida and in other jurisdictions.[133] In *Mason v. State*,[134] the specific question the appellate court dealt with was if the application of *Miller*, which

121. *See* State v. S.A., 133 So. 3d 506, 507 (Fla. 2014) (per curiam).
122. 133 So. 3d 506 (Fla. 2014) (per curiam).
123. *Id.* at 507.
124. *Id.*; *see also* State v. S.A., 96 So. 3d 1133, 1135 (Fla. 4th Dist. Ct. App. 2012), *reh'g granted*, 2013 Fla. Lexis 881 (Fla. 2013), *quashed*, 133 So. 3d 506 (Fla. 2014); State v. McFarland, 747 So. 2d 481, 483 (Fla. 5th Dist. Ct. App. 2000).
125. *S.A.*, 133 So. 3d at 507.
126. FLA. R. JUV. P. 8.090(m)(3); *S.A.*, 133 So. 3d at 507–08.
127. FLA. R. JUV. P. 8.090(m)(3); *S.A.*, 133 So. 3d at 508.
128. FLA. R. JUV. P. 8.090(m)(3).
129. *S.A.*, 133 So. 3d at 509.
130. *Id.*
131. No. 10-9646, slip op. (U.S. June 25, 2012).
132. 560 U.S. 48 (2010).
133. *See Miller*, No. 10-9646, slip op. at 2; *Graham*, 560 U.S. at 82; 1 MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT ¶ 5.03(13)(e)(iii) (2014).
134. 134 So. 3d 499 (Fla. 4th Dist. Ct. App. 2014) (per curiam).

had held that a sentencing law "requir[ing] a mandatory sentence of life in prison without . . . parole for a juvenile, [was violative of] the Eighth Amendment prohibition against cruel and unusual punishment."[135] In the *Mason* case, the juvenile "negotiated [a] plea to second-degree murder . . . and received life in prison with a fifteen-year mandatory minimum as a [violent habitual] felony offender."[136] Because the statute under which the juvenile was punished did not contain a requirement of mandatory life in prison without parole, *Miller* did not apply, according to the appellate court.[137] Although the court employed discretion at the trial level to impose a higher sentence than it could have, nothing indicated that the court did not take Mason's youth into account when determining the sentence.[138] The appellate court thus affirmed.[139]

In *Weiand v. State*,[140] the juvenile appealed an order denying his motion for post-conviction relief.[141] Based upon the defendant's pro se appeal, the intermediate appellate court held that the sentence of life in prison without parole on kidnapping and robbery convictions was illegal under *Graham v. State*.[142] Applying *Graham*, the appellate court held that "the Supreme Court [of the United States] created a *bright-line rule* . . . that a defendant . . . under eighteen, when" he or she commits a "non-homicide offense [could not] be sentenced to life without parole."[143]

Lack of probable cause for an arrest of a juvenile for loitering, described in the *M.J.* case above, has arisen on several occasions in the appellate courts.[144] Thus, in *C.C. v. State*,[145] a juvenile "was adjudicated delinquent on charge[s] of loitering and prowling," appealed the adjudication, and the appellate court reversed, finding there was a failure to establish a completed offense of loitering and prowling.[146] The case arose when police officers in the City of Hollywood at about ten o'clock in the morning noticed a

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135. *Id.* at 500; *see also Miller*, No. 10-9646, slip op. at 2; DALE ET AL., *supra* note 133, at ¶ 5.03(13)(e)(iii).

136. *See Mason*, 134 So. 3d at 500.

137. *Id.*; *see also Miller*, No. 10-9646, slip op. at 2.

138. *See Mason*, 134 So. 3d at 501.

139. *Id.*

140. 129 So. 3d 434 (Fla. 5th Dist. Ct. App. 2013).

141. *Id.* at 434.

142. *Id.* at 435; *see also* Graham v. Florida, 560 U.S. 48, 82 (2010).

143. *Weiand*, 129 So. 3d at 435 (emphasis added); *see also Graham*, 560 U.S. at 82.

144. *See* C.C. v. State, 137 So. 3d 466, 467 (Fla. 4th Dist. Ct. App.), *review denied*, No. SC14-960, 2014 WL 4291798 (Fla. Aug. 29, 2014); M.J. v. State, 121 So. 3d 1151, 1153 (Fla. 4th Dist. Ct. App. 2013), *review denied*, 133 So. 3d 528 (Fla. 2014); *supra* text accompanying notes 111–20.

145. 137 So. 3d 466 (Fla. 4th Dist. Ct. App.), *review denied*, No. SC14-960, 2014 WL 4291798 (Fla. Aug. 29, 2014).

146. *Id.* at 467.

juvenile who the officers believed should have been in school.[147] "When the officers stopped their patrol car [the respondent] and two other[s] . . . dropped their backpacks in a bush and [tried to hide] behind a truck."[148] The officers arrested the respondent, searched his backpack, and found a four-way lug wrench and other tools.[149] At trial, respondent moved to dismiss, which was denied, and the defense then rested.[150] The appellate court held "that the items found . . . after [the] arrest should not have been admitted [as evidence] or considered by the trial court because the offense of loitering and prowling [was not] completed."[151] In fact, the appellate court held that, under the law, it must be found that the respondent was loitering and prowling at a place and in a manner not usual for law-abiding citizens, that loitering was under circumstances that warranted alarm or concern for the safety of others, and that these elements were completed prior to the arrest.[152] Significantly, the appellate court held that it was unable to distinguish the *C.C.* case from *M.J.*[153] Recognizing the nearly identical facts, the court held that the State had failed to prove that the elements of the offense occurred in the officers' presence.[154] It thus reversed.[155]

In a third similar case, *G.T. v. State*,[156] the juvenile appealed from a conviction "for resisting an officer without violence when she refused to [provide] the arresting officer [with] her name and personal information after [she was] detained [on] suspicion of underage drinking and disorderly intoxication."[157] In order to detain someone, the "officer must have reasonable suspicion of criminal activity by" that individual.[158] In this case, the State was unable to demonstrate the facts that connected the child to an empty liquor bottle or to show that the police officer "had more than an inchoate hunch that this group of juveniles was the one [that] he had been dispatched to investigate."[159] The only information that the officer had was that the juveniles appeared to have "red [and] glossy eyes and slurred speech, [suggesting] to the

147. *Id.*
148. *Id.*
149. *Id.*
150. *C.C.*, 137 So. 3d at 467.
151. *Id.*
152. *Id.* at 468–69 (quoting E.F. v. State, 110 So. 3d 101, 104 (Fla. 4th Dist. Ct. App.), *review denied*, 121 So. 3d 1038 (Fla. 2013)).
153. *Id.* at 468; *see also* M.J. v. State, 121 So. 3d 1151, 1153 (Fla. 4th Dist. Ct. App. 2013), *review denied*, 133 So. 3d 528 (Fla. 2014).
154. *C.C.*, 137 So. 3d at 469.
155. *Id.* at 469–70.
156. 120 So. 3d 141 (Fla. 4th Dist. Ct. App. 2013) (per curiam).
157. *Id.* at 142.
158. *Id.* at 143.
159. *Id.*

officer that they were intoxicated."[160] However, the officer observed this after he detained the juvenile.[161] The court thus reversed.[162]

The fourth lack of reasonable suspicion case is *A.R. v. State*.[163] In this case, the act of delinquency alleged was resisting an officer without violence.[164] "Boynton Beach police were 'investigating a . . . crime that [may have] taken place' in a public park."[165] When officers arrived, the appellant turned away and started to run.[166] The officer yelled at the individual to stop a number of times, and the youth ultimately gave up and surrendered.[167] The juvenile's argument on appeal was that the police investigation of the crime could not be the basis to legally detain a person where there was no reasonable suspicion of probable cause as to that individual.[168] Running away—the court held based on prior case law—"is not sufficient to establish [a] reasonable suspicion where there is no evidence to demonstrate that the flight took place in a high crime area."[169] Further, there was no showing that the flight obstructed the officers in the lawful execution of their duties.[170] The court thus reversed.[171]

Issues of detention, ranging from home detention through secure detention, appear regularly in the appellate case law.[172] The issue in *H.D. v. Shore*[173] was whether a child could be held in secure detention based upon a prior arrest for burglary of a dwelling and grand theft offenses, which by themselves did not score sufficiently on Florida's Risk Assessment Instrument ("RAI") for secure detention, but when the juvenile failed to go to school, the father reported the violation and the court then ordered secure detention.[174] The appellate court ruled that Florida's juvenile detention statute does not provide a court with the authority to order secure detention solely on the basis of a violation of a pre-adjudication home detention.[175] The appellate court then explained that the remedy for such a violation was indirect contempt.[176]

160. *Id.*
161. *G.T.*, 120 So. 3d at 143.
162. *Id.* at 143–44.
163. 127 So. 3d 650, 652 (Fla. 4th Dist. Ct. App. 2013).
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 652–53.
168. *A.R.*, 127 So. 3d at 653.
169. *Id.* at 654.
170. *Id.*
171. *Id.* at 655.
172. Dale, *2013 Survey of Juvenile Law*, *supra* note 58, at 93; *see, e.g.*, H.D. v. Shore, 134 So. 3d 1062, 1062 (Fla. 4th Dist. Ct. App. 2013) (per curiam).
173. 134 So. 3d 1062 (Fla. 4th Dist. Ct. App. 2013) (per curiam).
174. *Id.* at 1062–63.
175. *Id.* at 1063; *see also* FLA. STAT. § 985.255 (2014).
176. *H.D.*, 134 So. 3d at 1063.

Therefore, the appellate court held that as the child did not score enough points under Florida's RAI for secure detention, and there were no findings to depart from the RAI, secure detention was improper.[177] The court thus granted the writ of habeas corpus.[178] It should be noted that the court in *H.D.* disagreed with the court in *K.T.E. v. Lofthiem*,[179] that section 985.265(1) of the Florida Statutes "provides an independent basis for ordering secure detention" under the facts in the *H.D.* case.[180]

Evidentiary issues are not usually part of this juvenile survey as they are generic to any variety of litigation settings.[181] However, a recent Fourth District Court of Appeal case, *T.D.W. v. State*[182] is worthy of discussion as it deals with best evidence.[183] The issue before the court was "whether [the] appellant was [properly] identified as one of the three boys who burgl[arized] a home."[184] His "identification was based in part on the [detective's] testimony."[185] The detective testified that "she saw [the appellant] on a surveillance videotape [that] she [had] viewed outside the courtroom."[186] However, the "identification did not appear on the copy of the surveillance video offered into evidence at trial."[187] Florida Rule of Evidence 90.952 provides in relevant part that "[e]xcept as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph."[188] Known as the Best Evidence Rule, unless an exception may be shown, "'the testimony of [the] witness . . . [regarding] the contents of the original is inadmissible.'"[189] Finding that the error was not harmless, citing similar case law, the appellate court reversed.[190]

The issue of whether Second Amendment constitutional rights apply to juveniles was before the Fourth District Court of Appeal in *L.S. v. State*.[191] A

177. *Id.* at 1064.
178. *Id.* at 1062, 1064.
179. 915 So. 2d 767 (Fla. 2d Dist. Ct. App. 2005).
180. *H.D.*, 134 So. 3d. at 1063–64; *see also* FLA. STAT. § 985.265(1); *K.T.E.*, 915 So. 2d at 769–70.
181. *See* Dale, *2013 Survey of Juvenile Law*, *supra* note 58, at 84.
182. 137 So. 3d 574 (Fla. 4th Dist. Ct. App. 2014).
183. *Id.* at 575.
184. *Id.*
185. *Id.*
186. *Id.*
187. *T.D.W.*, 137 So. 3d at 575.
188. FLA. STAT. § 90.952 (2014).
189. *T.D.W.*, 137 So. 3d at 576; *see also* FLA. STAT. § 90.952.
190. *T.D.W.*, 137 So. 3d at 577–78; *see also* McKeehan v. State, 838 So. 2d 1257, 1261 (Fla. 5th Dist. Ct. App. 2003).
191. 120 So. 3d 55, 58 (Fla. 4th Dist. Ct. App. 2013).

juvenile was adjudicated delinquent based upon "carrying a concealed firearm, grand theft of a firearm, improper exhibition of a firearm, [and] resisting arrest without violence [as well as] possession of a firearm by a minor."[192] The appellate court reversed as to all adjudications with the exception of carrying a concealed firearm.[193] As to that adjudication, the minor argued that he had a right under the Second Amendment to the United States Constitution to carry the firearm as there is no juvenile exception in the Amendment.[194] The appellate court held that the constitutional rights of children are not equated with those of adults on the basis of the juvenile's "inability to make decisions in an informed and mature manner."[195] Citing basic United States Constitutional law, the court held that while the Second Amendment does not mention juveniles, the Supreme Court of the United States has recognized limitations on the right to bear arms.[196] The court also commented that the constitutional rights of children under the Florida Constitution are not the same as adults, as well as under the laws of other states.[197] The court therefore affirmed the adjudication of possession of firearms by a minor.[198]

Florida provides that incompetency may be grounds under which a proceeding to determine delinquency may not proceed and that ultimately the charges under certain circumstances may be dismissed.[199] The basis for incompetence may be age, immaturity, a mental illness, intellectual disability, or autism.[200] The question before the Fourth District Court of Appeal in *D.B. v. State*,[201] was whether dismissal of a delinquency petition was mandated as the juvenile had been declared incompetent more than three years earlier and remained incompetent.[202] Under the Florida Statutes, and pursuant to due process principles, a juvenile may not be tried while incompetent.[203] The statutes also provide a jurisdictional limit on how long the court may retain jurisdiction.[204] Here, under the statute and as conceded by the State, dismissal was warranted.[205]

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192. *Id.* at 56.
193. *Id.* at 59.
194. *Id.* at 58; *see also* U.S. CONST. amend. II.
195. *L.S.*, 120 So. 3d at 58.
196. U.S. CONST. amend. II.; *but see In re* T.W., 551 So. 2d 1186, 1193 (Fla.), *withdrawn*, 1989 Lexis 1226 (Fla. 1989).
197. *L.S.*, 120 So. 3d at 59.
198. *Id.*
199. FLA. STAT. § 985.19(1), (5)(c) (2014).
200. *See id.* § 985.19(2), (3)(a).
201. 120 So. 3d 71 (Fla. 4th Dist. Ct. App. 2013).
202. *Id.* at 72.
203. *Id.* at 73; *see also* FLA. STAT. § 985.19(1).
204. FLA. STAT. § 985.19(5)(c).
205. *D.B.*, 120 So. 3d at 72.

The issue of waiver of *Miranda* rights by juveniles is a very common issue that arises in the appellate courts all over the country.[206] That issue was before the appellate court in *J.X. v. State*.[207] In that case, a juvenile appealed the denial of his motion to suppress statements he provided to the police after being given his *Miranda* warnings, which he then waived.[208] The juvenile was seventeen and was summoned to the police station with his mother.[209] There was a suspicion that he had been involved in burglaries.[210] As soon as he was advised that he had been asked to come to the police station because of the two residential burglaries, he unequivocally invoked his right to counsel.[211] The police officer "closed his case file and terminated the interview."[212] However, after the detective said he was going to speak to the juvenile's brother, the mother encouraged the appellant to cooperate.[213] After the juvenile reinitiated contact with the officer, the officer advised the juvenile again of his *Miranda* rights, giving him the form containing the full recitation and orally advising him.[214] The juvenile then confessed.[215] The appellate court held that when the juvenile reinstituted contact with the police—where there was no threat of coercion and where the juvenile did not ask for a lawyer—the waiver was free, voluntary, and knowing.[216] It then affirmed the denial of the motion to suppress.[217]

Florida's delinquency statute provides a number of dispositional alternatives including probation, restitution, community service, revocation of driver's licenses, and attendance at school.[218] Restitution issues often come up before the appellate courts on proper application of the Florida Statute.[219] In *T.J.J. v. State*,[220] a juvenile appealed an order of disposition—including restitution—after he admitted to a burglary of a dwelling.[221] The issue was that the restitution order included a payment for "items not listed in the original

206. *E.g.*, J.X. v. State, 125 So. 3d 364, 365 (Fla. 3d Dist. Ct. App. 2013); *see also* DALE ET AL., *supra* note 133, at ¶ 5.03(7).
207. 125 So. 3d 364, 365 (Fla. 3d Dist. Ct. App. 2013).
208. *Id.* at 365.
209. *Id.*
210. *Id.*
211. *Id.*
212. *J.X.*, 125 So. 3d at 365.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 367.
217. *J.X.*, 125 So. 3d at 367.
218. FLA. STAT. § 985.455(1)–(2) (2014).
219. Dale, *2013 Survey of Juvenile Law*, *supra* note 58, at 94.
220. 121 So. 3d 635 (Fla. 4th Dist. Ct. App. 2013).
221. *Id.* at 637.

charging document."[222] The amount of restitution was "$2718, or more than twice what the charging document," set forth.[223] The appeals court reversed for failure to comply with the statute, which provides that restitution is based upon the charging document.[224]

In *V.A.C. v. State*,[225] the issue involving an order of restitution dealt with a jurisdictional problem.[226] In that case, the juvenile turned nineteen, and a notice of hearing to establish restitution was filed after the juvenile's nineteenth birthday.[227] As a result, the juvenile court lacked jurisdiction.[228] Having reserved jurisdiction on the issue of restitution prior to the juvenile's nineteenth birthday, the trial court could have dealt with the matter.[229] However, the "court erred in ordering restitution after it lost jurisdiction."[230]

If there is an allegation that a juvenile has violated probation, under Florida law, the state may file a petition for violation of probation.[231] In *S.M. v. State*,[232] the juvenile appealed the dispositional order which found her guilty of violation of probation on the grounds that the juvenile had been ordered to leave the courtroom to privately speak to her grandmother, and because the State presented only hearsay evidence by the juvenile's probation officer to support the allegation.[233] The appellate court held that "[w]hile '[h]earsay is admissible in a revocation hearing,'" it cannot be the sole basis for the finding; in the case at bar that was all the evidence.[234] Thus, "there was insufficient evidence to revoke the . . . probation on the two allegations contained [in] the petition."[235] Furthermore, "juveniles have a constitutional right to be present at all critical stages of the proceeding[]," unless waived by the child himself or herself.[236] Because "the juvenile did not personally waive her right to be present" and because events took place while the juvenile was out of the courtroom—only to be back to hear the disposition—the court also reversed.[237]

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222. *Id.*
223. *Id.*
224. *Id.*
225. 136 So. 3d 612 (Fla. 2d Dist. Ct. App. 2013).
226. *Id.* at 613.
227. *Id.*
228. *Id.*
229. *Id.*
230. *V.A.C.*, 136 So. 3d at 614.
231. FLA. STAT. § 985.439(1)(b) (2014).
232. 138 So. 3d 1156 (Fla. 4th Dist. Ct. App. 2014).
233. *Id.* at 1157, 1159.
234. *Id.* at 1159 (quoting McNealy v. State, 479 So. 2d 138, 139 (Fla. 2d Dist. Ct. App. 1985)).
235. *Id.*
236. *Id.* at 1159–60 (quoting J.R. v. State, 953 So. 2d 690, 691 (Fla. 1st Dist. Ct. App. 2007) (per curiam)).
237. *S.M.*, 138 So. 3d at 1160.

Another dispositional issue that comes up on occasion is the question of the specifics of special conditions of juvenile probation.[238] In *T.J.J.*, in addition to ordering "restitution for items not [contained] in the . . . charging document, [t]he [trial] court also imposed [as] a special condition of . . . probation that the [respondent] not associate with persons under supervision, members of gangs, or whose contact [was] prohibited by the juvenile's probation officer, parent or guardian."[239] The appellate court reversed as to this condition of probation finding that nothing in the Florida Statutes or the Rules of Juvenile Procedure contained a "blanket prohibition of willful contact" with certain individuals.[240] The rules' "special condition [dealt with] prohibiting contact with the victim[s]."[241] Furthermore, the appellate court held that "the condition must be related to the crime committed."[242] Finally, the appellate court held that "the condition [was] invalid for vagueness and overbreadth."[243]

Another example of police interaction with a juvenile during school hours and their handling of them is *R.A.S. v. State*.[244] In that case, a juvenile appealed from a delinquency adjudication for "possession of marijuana and drug paraphernalia" having unsuccessfully sought to suppress the evidence.[245] A police officer was driving through the respondent's neighborhood trying to find him because the youngster had been reported absent from school.[246] When "[t]he deputy located [the student] and asked him to come over to talk to him," the student said he was on his way to school.[247] The deputy offered to give the student a ride to school, which the student accepted.[248] The deputy then told the youngster to empty his pockets, indicating that he was doing a weapons pat-down.[249] In so doing, the officer—realizing the student failed to entirely empty his pockets—felt an item, which turned out to be a plastic bag of marijuana.[250] The appellate court held that ordering someone to empty his pockets under these circumstances was an unauthorized full search.[251] "The deputy did not have . . .

238. T.J.J. v. State, 121 So. 3d 635, 637 (Fla. 4th Dist. Ct. App. 2013); *see also* FLA. STAT. § 985.435 (2014).
239. *T.J.J.*, 121 So. 3d at 637.
240. *Id.* at 638–39; *see also* FLA. STAT. § 985.435; FLA. R. JUV. P. Form 8.947.
241. *T.J.J.*, 121 So. 3d at 638; *see also* FLA. R. JUV. P. Form 8.947.
242. *T.J.J.*, 121 So. 3d at 638 (citing Biller v. State, 618 So. 2d 734, 734–35 (Fla. 1993)).
243. *Id.*
244. 141 So. 3d 687, 689 (Fla. 2d Dist. Ct. App. 2014).
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *R.A.S.*, 141 So. 3d at 689.
250. *Id.*
251. *Id.*

reason to [believe] that [the youngster] was carrying a weapon or contraband. Thus, the initial search had no legal basis."[252] The court recognized that the police officer did have the right to conduct the pat-down for weapons.[253] But when an officer takes a truant into custody, as here, "the only concern is for officer safety," which means the concern is about a weapon.[254] Thus, the appellate court reversed.[255]

Florida law provides a form of amnesty or immunity for school students who divulge information related to the supplying of controlled substances if the events giving rise to the incident "occurred on property other than public school property."[256] In *State v. E.M.*,[257] the State appealed the trial court's granting of the respondent juvenile's motion in limine to preclude statements to school officials.[258] The case arose out of an internal suspension resulting from a violation of the school dress code.[259] The student told the school security officials that he was out of dress code because "his uniform shirt was 'messed up.'"[260] When the security officer asked the youngster to show the officer the shirt and when the juvenile "opened his backpack to take out [his] shirt, [the] [s]ecurity [officials] smelled the odor of marijuana."[261] As a result, the juvenile admitted that he had the marijuana, which the security officer found in the backpack.[262] The State alleged two counts—possession of marijuana with intent to deliver at the nearest school and marijuana subsequently found in the juvenile's home.[263] As a matter of statutory interpretation, the appellate court held that the immunity statute did not apply because the student did not fall within the category of one who "divulges information leading to the arrest and conviction of the person who supplied the controlled substance to him."[264] Rather, the student fell into the second category which did not receive the same protection—which is to say inadmissibly of incriminating statements—as in the first category.[265] The appellate court therefore reversed.[266]

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252. *Id.*
253. *Id.* at 690.
254. *R.A.S.*, 141 So. 3d at 690.
255. *Id.*
256. FLA. STAT. § 1006.09(2)(a) (2014).
257. 141 So. 3d 682 (Fla. 4th Dist. Ct. App. 2014).
258. *Id.* at 683.
259. *Id.*
260. *Id.*
261. *Id.*
262. *E.M.*, 141 So. 3d at 683.
263. *Id.*
264. *Id.* at 685 (citing FLA. STAT. § 1006.09(2)(a)(2014)).
265. *Id.*
266. *Id.* at 686.

VI. OTHER MATTERS

The role of Florida's well-funded GAL Program has been discussed in this law review on several occasions.[267] In *Turnier v. Stockman*,[268] the issue of whether a guardian ad litem could be appointed arose in the context of a chapter 61 custody matter commenced as a paternity proceeding.[269] The case transferred from St. Johns County to Miami-Dade County, involved with whom a deaf minor child should live, where both of the parents were deaf.[270] The trial court considered appointing a GAL, but ultimately did not.[271] The mother appealed, arguing that it was reversible error for the trial court to fail to appoint a GAL for the child.[272] The appellate court held that there was no requirement to appoint a guardian in the proceeding below because the Florida Legislature in, chapter 61, did not make the appointment mandatory, but rather discretionary.[273]

The question of liability of what are known in Florida as the lead agencies—the organizations to which the Department of Children and Families outsource the provision of foster care and related services—was before the First District Court of Appeal.[274] The case—a wrongful death action arising out of the death of a child in foster care—was brought against Partnership for Strong Families, the community-based provider in several counties in the state.[275] The appellate court affirmed summary judgment for the provider, finding it owed no duty to the child because the trial court had terminated *protective supervision*, and thus the "negligence could not be the proximate cause of" the child's death.[276] The death had occurred as a result of the action of the child's father to whom the child had been returned.[277] Finding that the alleged negligence was also unforeseeable, the appellate court affirmed the grant of the motion for summary judgment.[278] Thus, *Castello v. Partnership for Strong Families,*

267. *See, e.g.*, Dale & Reidenberg, *supra* note 15, at 323–32.
268. 139 So. 3d 397 (Fla. 3d Dist. Ct. App. 2014),.
269. *Id.* at 398–400; *see also* FLA. STAT. § 61.401 (2014).
270. *Turnier*, 139 So. 3d at 398.
271. *Id.* at 399.
272. *Id.* at 400.
273. *Id.*; *see also* FLA. STAT. § 61.401.
274. Castello v. P'ship for Strong Families, Inc., 117 So. 3d 62, 63–64 (Fla. 1st Dist. Ct. App. 2013) (per curiam), *review denied*, 139 So. 3d 884 (Fla. 2014); *see also* FLA. STAT. § 39.0016(1)(b).
275. *Castello*, 117 So. 3d at 63.
276. *Id.* at 63–64.
277. *Id.* at 63.
278. *Id.* at 63–64.

Inc.[279] mirrors the Supreme Court of the United States ruling in *DeShaney v. Winnebago County Department of Social Services*.[280]

Domestic violence matters unrelated to dependency proceedings can also involve juveniles.[281] *Cannon v. Thomas*[282] is such a case.[283] A student appealed from a trial court order "granting a permanent injunction for protection against repeat violence" arising out of the appellant child's attack upon the appellee child.[284] The injunction was granted based upon a factual determination that the appellant "brutally battered [a]ppellee's daughter, slamming her head against a concrete wall" near a convenience store.[285] The problem, according to the appellate court, is that the Florida statute requires two incidents of violence in order to protect the minor child.[286] Thus, while recognizing the severity of the attack, as a matter of statutory construction, the appellate court was obligated to vacate the injunction for protection against the violence.[287]

VII. LEGISLATIVE CHANGES

This year's legislative changes in juvenile law demonstrate a new emphasis on prevention and intervention,[288] a commitment to utilizing trauma informed care,[289] and revised standards for detention centers.[290] The Legislature also increased protections for juvenile offenders by adding criminal penalties for willful neglect on the part of Department of Juvenile Justice ("DJJ") employees.[291] In dependency, the Legislature addressed a longstanding issue relating to termination of parental rights for prospective child abuse, reversing twenty years of case law that required a nexus between prior abuse and current risk.[292] The Legislature has also created a right to counsel for special needs children in dependency actions.[293] Other changes include new provisions for

279. 117 So. 3d 62 (Fla. 1st Dist. Ct. App. 2013) (per curiam), *review denied*, 139 So. 3d 884 (Fla. 2014).
280. 489 U.S. 189, 203 (1989); *Castello*, 117 So. 3d at 64.
281. *See* FLA. STAT. § 784.046(2)(a) (2014).
282. 133 So. 3d 634 (Fla. 1st Dist. Ct. App. 2014).
283. *Id.* at 635.
284. *Id.*
285. *Id.*
286. FLA. STAT. § 784.046(1)(b); *Cannon*, 133 So. 3d at 635, 640.
287. *Cannon*, 133 So. 3d at 635, 640.
288. FLA. STAT. § 985.01(1)(a).
289. *Id.* §§ 985.02(8), .03(52).
290. *Id.* §§ 985.02(5), .03(44).
291. *Id.* § 985.702(2)(a).
292. *See id*. § 39.806(1)(f); Padgett v. Dep't of Health & Rehabilitative Servs., 577 So. 2d 565, 571 (Fla. 1991).
293. FLA. STAT. § 39.01305(3).

addressing cases of medical neglect,[294] and new provisions for reporting and addressing deaths of children in department care.[295] The Legislature also extended the scope of the relative caregiver program to include non-relative caregivers.[296] On a lighter note, the Legislature has mandated a program to help children in department care obtain their driver's licenses.[297]

A. *Juvenile Delinquency Statutory Changes*

This year, the Legislature has introduced a shift in the declared purpose of the juvenile justice system by emphasizing the role of prevention, intervention, treatment, and the importance of children's families and community support systems.[298] To this end, the Legislature added section 985.17 of the Florida Statutes, describing the need for prevention services to "decrease recidivism by addressing the needs of at-risk youth and their families."[299] The new statute directs the DJJ to "develop the capacity for local communities to serve their youth [through] engag[ing] faith and community based organizations to provide" various volunteer services such as "chaplaincy services, crisis intervention counseling, mentoring, and tutoring."[300] The statute directs the DJJ to provide services such as literacy and recreation programs targeted specifically at certain at-risk youth.[301]

The Legislature has also added an emphasis on *trauma informed care* recognizing the role that trauma, such as "violence, physical or sexual abuse, neglect, [and] medical difficulties," plays in the child's life.[302] The DJJ is directed to provide services to "be more supportive and avoid retraumatization, [through] trauma-specific interventions that are designed . . . to facilitate healing."[303]

The shift toward prevention through family and community involvement is also apparent in new guidelines for detention facilities.[304] Facilities are to be placed close to the home communities of children they serve to encourage family involvement.[305] Further evidencing the transition to more

294. *Id.* § 39.3068.
295. *Id.* § 39.201(3).
296. *Id.* § 39.5085(1)(a), (2)(a)(3).
297. *Id.* § 409.1454(1)–(2).
298. *See* FLA. STAT. § 985.01(1)(a), (e).
299. *Id.* § 985.17(1).
300. *Id.* § 985.17(2)–(2)(a).
301. *Id.* § 985.17(3)(a).
302. *Id.* § 985.03(52); *see also* FLA. STAT. §§ 985.02(8), .601(3)(a).
303. FLA. STAT. § 985.02(8).
304. *Id.* § 985.02(5).
305. *Id.* § 985.02(5)(c).

individualized services is the reduction of the maximum number of beds allowed in facilities from 165 to 90.[306]

Lastly, the Legislature has filled a significant gap in protection of juvenile offenders from harm at the hands of DJJ employees, volunteers, and interns.[307] Although the Florida Statutes provided criminal penalties for sexual abuse of children within the juvenile justice system, there was no such provision for employees alleged to have neglected a youth in the department's custody.[308] Although such incidences are uncommon, one recent highly publicized event illustrated the need for legislative change.[309] In 2011, an eighteen-year-old in the department's custody died of a brain hemorrhage after "guards refused to call 911 for more than six hours" because they thought the young person was faking.[310] Unfortunately, the guards could not be charged with child neglect because the person was eighteen and no longer legally a child.[311] To address instances such as this, the Legislature amended section 985.701 of the Florida Statutes to define '"[j]uvenile offender' [as a] person of any age . . . detained . . . or committed to the custody of the department," and created section 985.702 which makes "[w]illful and malicious neglect of a juvenile offender" a felony offense.[312] In addition, violation of these provisions is grounds for dismissal and permanent disqualification from employment in the juvenile justice system.[313] Section 985.702 also imposes a duty on DJJ employees to report instances of neglect and makes failure to do so a first-degree misdemeanor.[314]

B. *Dependency Statutory Changes*

Perhaps the most significant practical change in substantive dependency law was the legislative abrogation of the nexus test established by the Supreme Court of Florida in *Padgett v. Department of Health & Rehabilitative Services*[315] in 1991.[316] The *Padgett* nexus test—which has been applied for over

306. FLA. H.R., FINAL BILL ANALYSIS, CS/HB 7055, Reg. Leg. Sess., at 3 (Fla. 2014); *see also* FLA. STAT. § 985.02(5)(c).

307. FINAL BILL ANALYSIS, CS/HB 7055, at 17–18, *see also* FLA. STAT. § 985.702.

308. FINAL BILL ANALYSIS, CS/HB 7055, at 17.

309. *Id.*; Ana M. Valdes, *Parents of Teen Who Died in Detention to Sue State*, PALM BEACH POST, Mar. 14, 2012, at B1.

310. Lisa Rab, *DJJ Supervisor Thought Eric Perez Was "Faking" As He Died in Juvie Lockup, Officer Testifies*, THE PULP (Mar. 9, 2012, 12:42 PM), http://blogs.browardpalmbeach.com/pulp/2012/03/djj_eric_perez_death_grand_jury_report.php; *see also* Valdes, *supra* note 309.

311. Rab, *supra* note 310; *see also* FINAL BILL ANALYSIS, CS/HB 7055, at 17.

312. FLA. STAT. §§ 985.701(1)(a)(1)(c), .702(2)(a)–(b).

313. *Id.* § 985.702(2)(c).

314. *Id.* § 985.702(3), (4)(a)–(b).

315. 577 So. 2d 565 (Fla. 1991).

two decades[317]— mandated that termination of parental rights ("TPR") based upon the abuse of sibling or another child in the family must be predicated upon a showing of a nexus between the harm to the other child, and imminent risk of harm to the current child.[318] The Legislature has eliminated this nexus requirement in part, amending section 39.806 of the Florida Statutes to specify that no proof of a nexus between prior conduct and potential harm to a sibling is required in cases of prior egregious conduct, or those related to homicide of a child or the other parent.[319] Similarly, conviction of crime "that requires [a] parent to register as a sexual predator" has been added as a grounds for TPR.[320]

Although several organizations provide attorney representation to dependent children in some parts of the state on a limited basis, the Legislature has recognized that children with special needs have a particular need for legal representation.[321] For this reason, the Legislature has extended a right to legal representation for dependent children with certain special needs.[322] Specifically, an attorney shall be provided for a child who is subject to any proceeding under chapter 39 who resides or is being considered for placement in a skilled nursing home or residential treatment center, is prescribed but declines assent to psychotropic medication, has a developmental disability, or is a victim of human trafficking.[323]

There is a series of serious infirmities in the new statute.[324] First, it leaves unrepresented many children with equally serious needs, as well as the vast majority of the over twenty-eight thousand children who are before the dependency court.[325] There are several constitutional reasons why all these other children are entitled to counsel.[326] The fact that they are treated

316. *Id.* at 57; *see also* FLA. STAT. § 39.806(1)(f); Fla. Prof'l Staff of the Comm. On Appropriations, Bill Analysis and Fiscal Impact Statement, S. 1666, Reg. Sess., at 19 (2014).

317. Dale, *2013 Survey of Juvenile Law*, *supra* note 58, at 85.

318. *Padgett*, 577 So. 2d at 571; Dale, *2013 Survey of Juvenile Law*, *supra* note 58, at 85.

319. FLA. STAT. § 39.806(1)(f), (h).

320. *Id.* § 39.806(1)(n). Research discloses no legislative history for these changes. FLA. STAT. § 39.806 (2013).

321. FLA. STAT. § 39.01305(1)(a)(2). The legislation is a response to a 2012 warning issued by the United States Department of Justice threatening a law suit against the State of Florida regarding Americans with Disabilities Act violations concerning severely disabled children housed in nursing homes throughout the state. FLA. H.R., FINAL BILL ANALYSIS, CS/HB 561, Reg. Leg. Sess., at 3 (2014).

322. FLA. STAT. § 39.01305(3).

323. *Id.*

324. *See id.* § 39.01305(1)–(9).

325. *See* Dale & Reidenberg, *supra* note 15, at 311, 353; *DCF Quick Facts*, FLA. DEP'T OF CHILDREN AND FAMILIES, http://www.dcfstate.fl.us/general-information/quick-facts/cw (last visited Nov. 9, 2014).

326. Dale & Reidenberg, *supra* note 15, at 350–53.

differently than those provided with lawyers raises a question of equal protection.[327] The failure to provide counsel at all to most children in Florida in these cases may also be a denial of procedural due process.[328]

Second, the new law appropriates five million dollars to pay for lawyers to represent the children.[329] However, it says that, first, efforts must be made to find volunteer lawyers.[330] This itself is a problem because volunteer lawyers have never been able to represent even a significant fraction of the children before the dependency court.[331] The decision to provide lawyers for children is first made by the attorneys for the Department of Children and Families.[332] The law thus creates an ethical issue for department lawyers.[333] Pursuant to the Florida Rules of Professional Responsibility, the decision of whether a party should be entitled to counsel is being made by a lawyer for another party.[334] Moreover, the system for locating and training lawyers to represent children is left to the GAL Program.[335] This creates a similar ethical problem.[336] Thus, one party is training and choosing those lawyers who will represent another party.[337]

Third, the legislature never explained why the excess of thirty million dollars that it has expended to fund the GAL Program every year is not adequate to represent these children.[338] Of course—as discussed in two articles by this author in the *Nova Law Review*[339]—the first part of the answer may be that the

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327. *Id.*

328. *Id.* at 311, 353.

329. FLA. H.R., FINAL BILL ANALYSIS, CS/HB 561, Reg. Leg. Sess., at 4 (2014).

330. FLA. STAT. § 39.01305(4)(a) (2014).

331. *See* U. FLA. LEVIN COLL. LAW CTR. ON CHILDREN & FAMILIES & FLA'S CHILDREN FIRST, LEGAL REPRESENTATION OF DEPENDENT CHILDREN 6 (2012). The failure to fund volunteer lawyers to represent children is compounded by the influx of approximately 53,000 undocumented children into the United States and the efforts of bar associations to fund lawyers for them. Melvin Felix & Mike Clary, *Deutsch Vows to Fight for Undocumented Kids*, SUN SENTINEL (Dec. 18, 2014, 8:42 PM), http://www.sun-sentinel.com/news/politics/fl-undocumented-minors-folo-20141218-story.html; Mara Gay, *As Child Immigrants Await Fate, a Race for Counsel*, WALL ST. J., Oct. 1, 2014, at A19; Jan Pudlow, *Florida Lawyers Stand with Unaccompanied Minors*, FLA. B. NEWS, Oct. 1, 2014, at 1. Legal Aid Societies are overwhelmed by need for pro bono lawyers to meet need of unaccompanied immigrant children. Gay, *supra* note 331.

332. FLA. STAT. § 39.01305(6); Dale & Reidenberg, *supra* note 15, at 308 n.10.

333. Dale & Reidenberg, *supra* note 15, at 308 n.10, 352–53.

334. R. REGULATING FLA. BAR 4-1.14(b); *see also* Dale & Reidenberg, *supra* note 15, at 311, 353.

335. Dale & Reidenberg, *supra* note 15, at 323.

336. *See id.* at 308 n.10, 323.

337. *See id.*

338. *Id.* at 362. The complete budget from all sources is actually higher. *See* Michael Dale & Louis M. Reidenberg, *The Kids Aren't Alright: Every Child Should Have an Attorney in Child Welfare Proceedings in Florida*, 36 NOVA. L. REV. 345, 356, (2012).

339. *See* Dale, *2012 Survey of Juvenile Law*, *supra* note 58, at 338–39; Dale &

GAL Program in Florida does not represent the legal interests of children in dependency and termination of parental rights cases.[340] The GAL Program is not the child's lawyer.[341] Rather, the GAL Program, a party to dependency and TPR cases in Florida, only represents the child's best interests.[342] The child, of course, is a separate party in Florida.[343] So the GAL Program's lawyers cannot ethically represent another party—the child.[344] The second part of the answer may be that, while the GAL Program describes itself as *guardian angels*, it tries to be the child's friend, has 145 lawyers on staff, and actually only represents the best interests of half the children before the court; it is legally, ethically, and structurally incapable of solving the complex legal problems of the children before the dependency court.[345]

Until this year, chapter 39 did not contain any special provisions for dealing with cases of medical neglect or those involving children with complex medical needs.[346] Because of this, "parents [could] be found . . . neglectful or abusive [where the] observed problems [were] related to insufficient services or a natural change in medical conditions."[347] To correct these shortcomings and to ensure children are maintained in a minimally restrictive and nurturing environment, provisions were added to ensure that reports of medical neglect will be investigated by persons with specialized training,[348] and a child protective team investigating such a case must consult with a physician with experience treating children with the same condition.[349] The goal of these changes is to use a family-centered approach to allow children to remain at home where the parents are willing and able to meet the child's medical needs with services.[350]

Although this survey can only address a limited number of statutory changes, there are several additional provisions that require mention.[351] First, the legislature has created multiple procedures and protocols related to the

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Reidenberg, *supra* note 15, at 311.

340. Dale & Reidenberg, *supra* note 15, at 311; *see also* FLA. GUARDIAN AD LITEM PROGRAM, FLA. GUARDIAN AD LITEM 2009 ANNUAL REPORT 2, 5 (2009), *available at* http://www.guardianadlitem.org/documents/GAL-2009AnnualReport.pdf.

341. *See* Dale & Reidenberg, *supra* note 15, at 310–11, 327.

342. *Id.* at 311, 327.

343. *See id.* at 311.

344. R. REGULATING FLA. BAR 4-1.7(a)(2); *see also* FLA. STAT. § 39.01(51) (2014).

345. *See* Dale & Reidenberg, *supra* note 15, at 327, 330, 353.

346. FLA. STAT. § 39.01(41)–(43); Fla. Prof'l Staff of the Comm. on Appropriation, Bill Analysis and Fiscal Impact Statement, S. 1666, Reg. Sess., at 12 (2014).

347. Fla. Bill Analysis and Fiscal Impact Statement, S. 1666 at 12.

348. *See* FLA. STAT. § 39.3068(1).

349. *See id.* § 39.303(1).

350. *Id.* § 39.3068(2).

351. *See supra* Part V.

investigation and reporting of deaths and other incidents, involving children either in the care of, or who have been investigated by, the department.[352] The relative caregiver program—which provides financial assistance to family members willing to care for a dependent child—was extended to assist persons who are not related to the child by blood or marriage.[353] A three-year pilot program was established to pay for the costs associated with obtaining a driver's license—including insurance—for children in foster care.[354] Finally, multiple provisions were added to increase the overall competence of child welfare personnel, with an emphasis on increasing the number of employees with bachelor's and master's degrees in social work.[355]

VIII. CONCLUSION

The Legislature made substantial changes in the juvenile delinquency and child welfare law.[356] In the latter area, several of the changes contain major constitutional infirmities.[357] The Supreme Court of Florida heard only one juvenile law case involving a statutory analysis of the speedy trial rule.[358] And finally, the intermediate appellate courts contained their long-standing approach to significant oversight of trial court rulings in both delinquency and child welfare areas.[359]

352. *See, e.g.*, FLA. STAT. § 39.2015 (1).
353. *Id.* § 39.5085(2)(a)(3).
354. *Id.* § 409.1454(2).
355. *Id.* § 402.403(1)–(6).
356. *See supra* Part I.
357. *See supra* Part V.
358. State v. S.A., 133 So. 3d 506, 507 (Fla. 2014) (per curiam).
359. *See, e.g.*, S.L. v. Dep't of Children & Families, 120 So. 3d 75, 77 (Fla. 4th Dist. Ct. App. 2013) (per curiam).

BANNING REVENGE PORNOGRAPHY: FLORIDA

AYSEGUL HARIKA*

I. INTRODUCTION

As the use of technology and social media websites rise every day, so do the number of people who fall victim to revenge pornography.[1] Social media websites, like Instagram, which as of December 2013 had seventy-five million daily users and as of March 2014 approximately sixty million photos uploaded a day, can easily be used as a platform to post explicit photos of ex-

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1. Casey Martinez, *An Argument for States to Outlaw 'Revenge Porn' and for Congress to Amend 47 U.S.C. § 230: How Our Current Laws Do Little to Protect Victims*, 14 PITT. J. TECH. L. & POL'Y 236, 237–38 (2014).

lovers.[2] Even more troubling, is the startup of websites such as IsAnyoneUp, which allow people to submit explicit images, sometimes accompanied by the victim's name, phone number, address, and links to their social media profiles.[3] Some of these websites even charge the individuals fees in order to remove their images from the website.[4] Twenty-seven-year-old Kevin Christopher Bollaert started the website UGotPosted, which facilitated more than ten thousand explicit images of individuals without their consent, and charged each individual as much as three hundred and fifty dollars to remove the explicit content.[5] State legislatures are slowly beginning to realize the need to outlaw the posting of explicit images on social media sites, as the resulting harm to victims can include years of harassment and shame.[6]

Revenge pornography—which is also known as non-consensual pornography—is the "distribution of sexually graphic images of individuals without their consent."[7] Specifically, revenge pornography refers to "images originally obtained with consent . . . within the context of a private or confidential relationship, . . . [such as between] intimate partner[s], [which are] later distribute[d] . . . without consent."[8] "As of July 18, 2014, thirteen states—New Jersey, Alaska, Texas, California, Idaho, Utah, Wisconsin, Virginia, Georgia, Arizona, Maryland, Colorado, and Hawaii—have passed laws that treat nonconsensual pornography as a crime in itself . . . ."[9] This Comment aims to persuade readers that the Florida Legislature needs to

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2. Craig Smith, *By the Numbers: 100+ Interesting Instagram Statistics*, DIGITAL MARKETING RAMBLINGS, http://expandedramblings.com/index.php/important-instagram-stats/#.VBH8-vldWdR (last updated Dec. 14, 2014).

3. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350–51 (2014); Martinez, *supra* note 1, at 238; Amanda Levendowski, Note, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 423–24 (2014); Lindsey Bever, *Fighting Back Against 'Revenge Porn,'* WASH. POST, (April 28, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/04/28/fighting-back-against-revenge-porn. IsAnyoneUp's creator earned himself the title of "'the most hated man on the Internet.'" Bever, *supra* note 3; *see also* Levendowski *supra* note 3, at 423.

4. *California Attorney General Announces Arrest of Revenge Porn Operator*, COMPUTER & INTERNET LAW, Mar. 2014, at 22, 22.

5. *Id.* at 22–23.

6. *See* Martinez, *supra* note 1, at 239–244; Mary Anne Franks, *Criminalizing Revenge Porn: Frequently Asked Questions*, SOC. SCI. RES. NETWORK 3 (unpublished working paper, Oct. 9, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337998.

7. Citron & Franks, *supra* note 3, at 346.

8. *Id.* Revenge pornography also includes images retrieved without consent, such as by hacking an individual's phone or recording sexual acts by hidden cameras; but this Comment will only focus on images obtained with consent as it is the most prevalent type of revenge pornography. *See id.*; *infra* Parts II–III.

9. Franks, *supra* note 6, at 3.

follow the progression of the laws in these states, and enact its own laws to ban revenge pornography.10

Part II of this Comment will discuss the rising trend of revenge pornography and the increase in use of the platforms it is found on today.[11] Part III of this Comment will examine what being a victim means for the lives of those who fall victim to the posting of their intimate photographs.[12] Part IV of this Comment will discuss the issues faced when proposing revenge porn legislation, and will then examine the text of three states which have enacted revenge porn statutes—New Jersey, California, and Maryland.[13] Part V of this Comment will compare the language of the failed Florida bills—House Bill 475 and Senate Bill 532—to determine what could be changed in order to help enact statutes that will ban the posting of revenge porn in the state of Florida.[14]

II. REVENGE PORNOGRAPHY: A RISING TREND

Revenge pornography has become more popular with the increased use of social media sites, new photo sharing applications for smart phones, and sexting.[15] This Part of the Comment will be split into two parts.[16] The first part will discuss the role that social media websites—such as Facebook and Instagram, and new photo and video applications for smartphones, like Snapchat—play in the popularity of revenge pornography.[17] The second part discusses the popular trend among teens and young adults—sexting—which many times leads to the posting of revenge pornography.[18]

A. *Social Media Websites*

Adding to the sixty million photos uploaded onto Instagram everyday, Facebook users are uploading approximately three hundred million

10. *See infra* Part V.
11. *See infra* Part II.
12. *See infra* Part III.
13. CAL. PENAL CODE § 647(j)(4) (West 2014); H.D. 43, 2014 Leg., Reg. Sess. (Md. 2014); N.J. STAT. ANN. § 2C:14–9 (West 2014); *see also infra* Part IV.
14. H.R. 475, 2014 Leg., Reg. Sess. (Fla. 2014); S. 532, 2014 Leg., Reg. Sess. (Fla. 2014); *see also infra* Part V.
15. Martinez, *supra* note 1, at 237; Nicole A. Poltash, Comment, *Snapchat and Sexting: A Snapshot of Baring Your Bare Essentials*, 19 RICH. J.L. & TECH., no. 4, 2013, at 1, 4–5, 11.
16. *See infra* Part II.A–B.
17. *See infra* II.A.
18. *See infra* II.B.

photos to Facebook each day.[19] Facebook alone has over 1.35 billion users.[20] With hundreds of millions of photos being uploaded every day, the potential for misuse heightens, and it becomes more and more unrealistic to expect website administrators to catch the inappropriate images being posted.[21] Lawmakers have recently suggested that social media websites—like Facebook and Instagram—need to begin "establish[ing] the identity of people opening accounts to prevent . . . revenge porn[ography]."[22] Although verifying the identity of each user on a social media website might not be the ultimate answer to ending the posting of non-consensual pornography, it is a step in the right direction.[23] It is less likely that individuals will engage in unacceptable behavior if their identity is revealed, especially if they can be traced to the information posted, unlike if an individual posted anonymously.[24] If allowed to post anonymously, individuals are less likely to feel guilt, and might have a false sense of security that they might not get into any trouble.[25]

In addition to the common use of these social media sites comes Snapchat, "a mobile phone application that sends self-destructing messages."[26] Snapchat allows users to send photos and videos, which are deleted within seconds of the recipient viewing them.[27] According to the company, "'[t]he data is completely deleted and could not be recalled even if law enforcement came looking for [it].'"[28] This description misguides users though, as further investigation into the company's privacy policy reveals: "Although we attempt to delete image data as soon as possible after the message is received and opened by the recipient . . . we cannot guarantee that the message contents will be deleted in every case. . . . Messages, therefore, are sent at the risk of the user."[29]

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19. Poltash, *supra* note 15, at 2; Smith, *supra* note 2.

20. Craig Smith, *By the Numbers: 200+ Amazing Facebook User & Demographic Statistics*, DIGITAL MARKETING RAMBLINGS, http://expandedramblings.com/index.php/by-the-numbers-17-amazing-facebook-stats/ (last updated Dec. 20, 2014).

21. *See* Poltash, *supra* note 15, at 2; Julie Kay, *"Revenge Porn" a Criminal Act? Yes, If Groups Get Their Way*, DAILY BUS. REV. (Aug. 6, 2014), https://www.dailybusinessreview.com/id=1202666010714/Revenge-Porn-A-Criminal-Act-Yes-If-Groups-Get-Their-Way?SLreturn=20140811130411; Andrew Whitaker, *Revenge Porn Sites Must End Anonymity*, THE SCOTSMAN, July 30, 2014, at 15.

22. Whitaker, *supra* note 21.

23. *See id.*

24. *See id.*

25. *See id.*

26. Poltash, *supra* note 15, at 2.

27. *Id.* at 2–3, 7.

28. *Id.* at 3 (alteration in original).

29. *Id.* at 8–9 (alteration in original).

The loopholes do not end there.[30] There is still a chance that the recipient may take a screenshot of the image—a photo of the image seen on the screen of a cellphone, which saves the received photo to their photo album.[31] Even though the application will notify the sender that the screenshot has been taken, once the photo is copied, the sender has little control over what the recipient will do with the image.[32] "In 2012 alone, more than five billion messages were sent through Snapchat," and its popularity has increased since then, making it "'the second-most popular free photo and video app for the iPhone . . . just behind YouTube and ahead of Instagram'" in February 2013.[33] This increased popularity of the application and the false sense of security that the images will disappear forever, make Snapchat "'the greatest tool for sexting since the front-facing camera.'"[34] Snapchat's use for sexting was apparent at its inception—"the application is rated for users twelve years of age and older due, in part, to 'suggestive themes' and 'mild sexual content or nudity,'" but the start-up of websites such as Snapchat Sluts—"a website featuring photos of naked women that were taken using Snapchat"—has provided even more proof.[35]

B. *Sexting*

Minors and young adults are also exploring their sexuality in a more dangerous way by leaving permanent traces of the "fruits of their exploration" through sexting.[36] Sexting is defined as "'[t]he practice of sending or posting sexually suggestive text messages and images, including nude or semi-nude photographs, via cellular phones . . . or over the Internet.'"[37] Most commonly, "a person takes a digital photo of himself or herself and sends it via mobile phone as a text message."[38] "'[A]ccording to . . . the Cyber Civil Rights Initiative, up to [eighty percent] of revenge porn victims belong to this category,'" meaning they initially sent their explicit images willingly.[39] Recent surveys have shown that "'[s]ending and posting

30. *Id.* at 9.
31. *See* Poltash, *supra* note 15, at 9.
32. *See id.*
33. *Id.* at 9–10 (alteration in original).
34. *Id.* at 8–9, 11.
35. *Id.* at 11–12.
36. Elizabeth M. Ryan, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 363 (2010).
37. Poltash, *supra* note 15, at 4 (quoting Verified Complaint at 5, Miller v. Skumanick, 605 F. Supp. 2d 634 (M.D. Pa. 2009)) (alteration in original).
38. *Id.*
39. Martinez, *supra* note 1, at 242.

nude or semi-nude photos or videos starts at a young age and becomes even more frequent as teens become young adults.'"[40] In a "2012 survey of over six hundred . . . high school students, . . . twenty percent . . . had sent a sext [from their] cell phone," and almost forty percent had received a sext.[41] "More than a quarter had forwarded a sext that they had received to others."[42] Of the participants who had sent a sext, one third had sent the sext "'despite believing that there could be serious consequences.'"[43] The real consequence though, that teens and young adults need to keep in mind and remember before they engage in the new trend of sexting, is the fact that "once an individual transmits an image via cell phone or over the Internet, it is virtually impossible to remove it."[44]

Pictures received from sexting are the main source of explicit images posted on social media websites or revenge pornography websites.[45] Many revenge porn websites were started to post these sext messages for the entertainment of others.[46] In February 2013, the students at Cypress Bay High School in Weston, Florida, learned firsthand the dangers of teenage sexting.[47] An anonymous web page filled with more than a dozen nude pictures—apparently received through sexting—appeared online.[48] Students at Cypress Bay High identified many of the females as classmates, and some of the pictures even listed the females' names.[49] The photos went viral after the link was quickly shared through Twitter, with over four thousand students viewing the website while still in school.[50] It is believed that the website was created by current Cypress Bay classmates.[51]

Mentioned earlier in this Comment, the revenge pornography website, IsAnyoneUp, was one of the most successful—if not the most successful—of the hundreds of sketchy sites before it shut down in 2013.[52]

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40. Poltash, *supra* note 15, at 5 (alteration in original).
41. *Id.*
42. *Id.*
43. *Id.*
44. Ryan, *supra* note 36, at 363.
45. *See* Poltash, *supra* note 15, at 14.
46. *See id.* at 12; *California Attorney General Announces Arrest of Revenge Porn Operator*, *supra* note 4, at 22.
47. *See* Michael Vasquez, *Photos of Nude Teen Girls Linked to Cypress Bay High School*, MIAMI HERALD (Feb. 27, 2013, 7:17 AM), http://www.miamiherald.com/incoming/article1947560.html.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. Kelly Goff, *Mother Vows to Make Revenge Pornography a Federal Crime*, INLAND VALLEY DAILY BULLETIN (Feb. 6, 2014), www.dailybulletin.com/general-news/20140203/mother-vows-to-make-revenge-pornography-a-federal-crime.

IsAnyoneUp would have three hundred fifty thousand page views a day.[53] Hunter Moore, the website's creator, would "post[] names, addresses, and work information about the victims and urged followers—strangers to the person posing—to taunt them."[54] "Moore netted more than [thirteen thousand dollars] a month in advertising revenue" through IsAnyoneUp.[55] Hunter Moore decided to opt out of the website in 2013, after he learned that the FBI was investigating him.[56] It took two years to investigate Moore and the website before any action was taken.[57]

With the popularity of IsAnyoneUp, more and more revenge pornography websites began popping up.[58] One of these websites was UGotPosted, which was created in December 2012.[59] This new revenge pornography website not only suggested, but "*required* that the poster include the subject's full name, location, age, and Facebook profile link" next to their explicit image.[60] Even worse, the website's creator, Kevin Christopher Bollaert, would charge the victims "a fee ranging from $299.99 to $350" to get their explicit images or videos removed from the site.[61] Bollaert created another website—ChangeMyReputation—to collect these fees.[62] When a revenge porn victim would contact UGotPosted with a request for their content to be removed, Bollaert would reply with a ChangeMyReputation email address, offer to remove them for a fee, and then the victim could pay using a PayPal account.[63] Court documents obtained from Bollaert's ChangeMyReputation PayPal account showed that he earned tens of thousands of dollars from the fees he charged the victims.[64] Like Hunter Moore, Bollaert also made a significant amount of money from advertisers on his revenge porn site—nine hundred dollars a month to be exact.[65]

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53. *Id.*
54. *Id.*
55. Levendowski, *supra* note 3, at 423.
56. Goff, *supra* note 52.
57. *See id.*
58. *See California Attorney General Announces Arrest of Revenge Porn Operator*, *supra* note 4, at 23; Goff, *supra* note 52.
59. *California Attorney General Announces Arrest of Revenge Porn Operator*, *supra* note 4, at 23.
60. *Id.* (emphasis added).
61. *Id.*
62. *Id.*
63. *Id.*
64. *California Attorney General Announces Arrest of Revenge Porn Operator*, *supra* note 4, at 23.
65. *Id.*; *see also* Levendowski, *supra* note 3 at 423.

III. REVENGE PORNOGRAPHY: THE HARM

Once an image is shared without consent, the victim becomes sexual entertainment for complete strangers.[66] According to a survey from 2013, which "included 1182 online interviews amongst American adults ages [eighteen through fifty-four]," "one in ten former partners threaten to post sexually explicit images of their exes online."[67] About sixty percent of those scorned lovers follow through.[68] If uploaded to the Internet, the explicit photograph can be viewed by thousands of people, continued to be shared on multiple other websites, or even emailed to the victim's family, employers, or friends to further embarrass the victim.[69] In some instances, the explicit "image[s] can dominate the first several pages of *hits* on the victim's name in a search engine," which has the potential to "destroy victims' intimate relationships, as well as their educational and employment opportunities."[70] In a "recent study, . . . colleges and universities [revealed that they] use social-networking websites—a medium that commonly features primary- and secondary-sexting images—to help evaluate applicants."[71] Explicit images can be just as detrimental to "careers and future job prospects."[72] "'According to a recent survey by Microsoft, [seventy-five] percent of U.S. recruiters and human-resource professionals report that their companies require them to do online research about candidates, and many use a range of sites when scrutinizing applicants, including . . . photo- and video-sharing sites.'"[73] More importantly, "'[s]eventy percent of U.S. recruiters report that they have rejected candidates because of information found online,'"[74] a sad reality for the victims who have images posted online without their consent or knowledge; especially because it is unrealistic to expect employers to "contact victims to see if they posted the nude photos of themselves or if someone else did in violation of their trust."[75] "The 'simple but regrettable truth is that after consulting search results, employers [do not] call revenge porn victims to schedule' interviews or to extend offers."[76]

66. Franks, *supra* note 6, at 1.
67. Levendowski, *supra* note 3, at 424, 424 n.7.
68. *Id.* at 424.
69. Franks, *supra* note 6, at 1.
70. *Id.*
71. Ryan, *supra* note 36, at 364.
72. Poltash, *supra* note 15, at 16.
73. *Id.* at 16–17 (alteration in original).
74. *Id.* at 17 (alteration in original).
75. Citron & Franks, *supra* note 3, at 352.
76. *Id.*

For other revenge porn victims, the consequences are much worse.[77] Some victims endure stalking, harassment, bullying, psychological problems, and in dire cases, suicide.[78] "According to a study conducted by the Cyber Civil Rights Initiative, over [eighty percent] of revenge porn victims experience severe emotional distress and anxiety."[79] Much of this anxiety comes from the fact that the victims' explicit images are more often than not accompanied by their personal information when posted on revenge porn websites.[80] "In a study of 1244 individuals, over [fifty percent] of victims reported that their naked photos appeared next to their full name and social network profile . . . ."[81] Furthermore, "over [twenty percent] of [the] victims reported that their e-mail addresses and telephone numbers appeared next to their naked photos," instilling a fear that strangers may confront the victims offline, especially since some of the online interactions include sexual demands.[82]

For teenagers and young adults who are victims of revenge pornography, the consequences are more severe and tragic.[83] From the onset, the moment an explicit image is shared with those who are not meant to see it, the continued existence of the idea of a *permanent record* of the image will haunt young teens or adults for years to come.[84] "'[I]t is the fear of exposure and the tension of keeping the act secret that seems to have the most profound emotional repercussions.'"[85] Other times, the harassment and bullying once the image is shared is too much for teens and young adults to handle.[86] Hope Witsell was only thirteen years old when she took a topless photograph of herself and sent it to a boy she liked.[87] The boy then sent the photograph to others, who then also forwarded the picture to further recipients.[88] This included students at her school and a nearby high school, who began bullying her in person and over the Internet.[89] To deal with the harassment, Witsell began cutting herself.[90] In a heart-breaking turn of

77. *See* Franks, *supra* note 6, at 1.
78. *Id.*; Citron & Franks, *supra* note 3 at 347; Ryan, *supra* note 36, at 359.
79. Citron & Franks, *supra* note 3, at 351.
80. Levendowski, *supra* note 3, at 424.
81. Citron & Franks, *supra* note 3, at 350.
82. *Id.* at 350–51.
83. *See* Ryan, *supra* note 36, at 359.
84. Poltash, *supra* note 15, at 19.
85. *Id.*
86. *See* Ryan, *supra* note 36, at 359.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

events, Hope Witsell took her own life.[91] Eighteen-year-old Jessica Logan's life also ended too soon when she took her own life after falling into depression over her shared nude image.[92] Jessica sent her boyfriend a nude photograph of herself when she was on vacation with her friends.[93] When their relationship ended, Jessica's boyfriend shared her explicit photograph with others, and the photo was distributed among "students at four different high schools."[94] "Students at the four schools incessantly harassed Logan about the photo, calling her a *slut*, *whore*, and other names in person, over the phone, and over the Internet."[95]

IV. THE START OF BANNING REVENGE PORNOGRAPHY: RECENT LEGISLATION

The fourth part of this Comment will be split into two separate sections.[96] The first section will explore the challenges faced when trying to enact revenge porn legislation, while the second section will review the fairly new revenge porn legislation passed in thirteen states.[97] While thirteen states—New Jersey, Alaska, Texas, California, Idaho, Utah, Wisconsin, Virginia, Georgia, Arizona, Maryland, Colorado, and Hawaii—have passed legislation, the public's lack of empathy for revenge pornography victims might be the reason why enacting legislation in many other states, including Florida, has not been as successful.[98]

A. *Issues With Enacting Legislation*

The main issue faced when trying to enact legislation to ban revenge pornography, is the matter of consent.[99] The public's perception of the issue seems to be one of the "victims 'brought it upon themselves.'"[100] This unfortunate lack of empathy towards revenge porn victims has been illustrated in both scholarly commentary and in comment sections of any

91. Ryan, *supra* note 36, at 359.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *See infra* Part IV.A–B.
97. *Id.*
98. Franks, *supra* note 6, at 3; *see also* Martinez, *supra* note 1, at 250–51; *infra* Part V.
99. *See* Citron & Franks, *supra* note 3, at 354; Martinez, *supra* note 1, at 251.
100. Martinez, *supra* note 1, at 250; *see also* Citron & Franks, *supra* note 3, at 354.

article or post on the topic.[101] When online news articles on revenge porn are posted—or when bloggers post about and discuss the topic—the comments section will most likely include derogatory comments towards the victims.[102] It is not uncommon to see comments stating that the victims are *stupid* or *slutty*.[103] The biggest reason for this response from the public is the fact that the victims chose to take these photos and then willingly shared them with other individuals.[104]

> This disregard for harms undermining women's autonomy is closely tied to idiosyncratic, dangerous views about consent with regard to sex. Some argue that a woman's consensual sharing of sexually explicit photos with a trusted confidant should be taken as wide-ranging permission to share them with the public. Said another way, a victim's consent in one context is taken as consent for other contexts. . . . While most people today would rightly recoil at the suggestion that a woman's consent to sleep with one man can be taken as consent to sleep with all of his friends, this is the very logic of revenge porn apologists.[105]

Unfortunately, the lack of public sympathy is mostly harming young girls.[106] A recent study conducted by the Cyber Civil Rights Initiative found that "[ninety percent] of [the individuals] victimized by revenge porn[ography] were female."[107] The rise in popularity of sexting, has led to the peer pressuring of young women—by friends or boyfriends—encouraging them to take and send these explicit images.[108] Other young women believe that they need to participate in the trend to be *cool*.[109] No matter the public's opinion, one minor mistake—especially at an age where teenagers and young adults might not know any better—should not be a justification for the years of harassment that these individuals will be forced to endure.[110]

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101. Martinez, *supra* note 1, at 250.
102. *Id.* at 250–51.
103. *Id.*
104. Citron & Franks, *supra* note 3, at 354; Martinez, *supra* note 1, at 251.
105. Citron & Franks, *supra* note 3, at 348.
106. Martinez, *supra* note 1, at 251.
107. Citron & Franks, *supra* note 3, at 353.
108. *See* Martinez, *supra* note 1, at 251.
109. *See id.*
110. *See id.*

B. *Current Legislation*

"'People [do not] know where to start when they are a victim of revenge porn . . . .'"[111] Since the trend of sexting is fairly new, many victims do not know whether they have any rights or any available remedies when the recipient of their image or video shares it with others, or posts it online.[112] "'Having legislation that defines *sexually explicit images* and repercussions of posting images without permission and not removing them on request empowers the victim and hopefully leads to quick resolution in many of these cases.'"[113] Sexting and the recent advances in technology—which have made the startup of revenge pornography websites to post explicit content received through sexting incredibly simple for anybody who owns a computer—has brought on new challenges which our generation is only now beginning to tackle.[114]

> Revenge porn victims have only recently come forward to describe the grave harms they have suffered, including stalking, loss of professional and educational opportunities, and psychological damage. As with domestic violence and sexual assault, victims of revenge porn suffer negative consequences for speaking out, including the risk of increased harm. We are only now beginning to get a sense of how large the problem of revenge porn is now that brave, outspoken victims have opened a space for others to tell their stories. The fact that nonconsensual porn so often involves the Internet and social media, the public, law enforcement, and the judiciary sometimes struggle to understand the mechanics of the conduct and the devastation it can cause.[115]

In an effort to end the lifelong damaging outcomes suffered by the victims of revenge pornography, state legislatures are beginning to take innovative steps toward criminalizing the act.[116] Currently, thirteen states—New Jersey, Alaska, Texas, California, Idaho, Utah, Wisconsin, Virginia, Georgia, Arizona, Maryland, Colorado, and Hawaii—have passed laws that

111. *Revision Legal to Testify May 6 Before Michigan Senate Judiciary Committee on Issues, Recommendations for "Revenge Porn" Legislation*, P.R. NEWSWIRE, (May 5, 2014), http://www.prnewswire.com/news-releases/revision-legal-to-testify-may-6-before-michigan-senate-judiciary-committee-on-issues-recommendations-for-revenge-porn-legislation-258001681.html.

112. *See id.*

113. *Id.* (emphasis in original).

114. *See* Franks, *supra* note 6, at 1.

115. Citron & Franks, *supra* note 3, at 347.

116. *See* Franks, *supra* note 6, at 3.

criminalize revenge pornography.[117] Although experts in the field of cyber harassment admit that the laws may be flawed and may not provide enough protection—stating that "many of these laws suffer from narrow applicability and/or constitutional infirmities"—they are still groundbreaking and an improvement for victims who may not be able to receive any protection at all.[118]

Revenge pornography is likely to violate state statutes for harassment or invasion of privacy in many states, but police officers will usually not act unless the explicit content posted involves a minor.[119] When the image involves a minor, child pornography laws come into play, which are normally treated with more seriousness and urgency.[120] Police tend to turn away many revenge pornography victims who are young adults or adults, because they cannot provide any evidence of physical harm.[121] Sometimes police officers embarrass or harass the victims themselves.[122] It is imperative that all revenge pornography victims receive protection because the harm of harassment, "lost jobs, lost relationships, lost friendships, and in extreme cases, physical harm," is very real.[123] The thirteen states that have passed legislation banning the posting of nonconsensual pornography have begun a groundbreaking movement that may take years to complete.[124]

1. New Jersey

New Jersey Code 2C:14-9 was passed in New Jersey in 2003.[125] The statute "makes 'it a felony to disclose a person's nude or partially nude image without that person's consent.'"[126] Subsection (c) of the statute specifically refers to the type of revenge pornography this Comment discusses—instances in which an individual willingly shares the content with one person they trust, but the content is then further distributed without their

117. *Id.*

118. *Id.* at 1, 3; *see also* Martinez, *supra* note 1, at 240–41.

119. Martinez, *supra* note 1, at 239.

120. *See* Poltash, *supra* note 15, at 13.

121. *See* Martinez, *supra* note 1, at 236–37 (illustrating the story of Annmarie Chiarini, whose boyfriend coerced her to take explicit photographs of herself). After the relationship ended, Chiarini's boyfriend distributed her explicit photographs to strangers, her friends, and her family. *Id.* She contacted the police, who "told her that no crime was committed and there was nothing [that] they could do." *Id.* at 236. The second time she contacted the police, they "laughed [at her] and essentially blamed her for the incident." *Id.* at 237.

122. *Id.* at 237, 239.

123. Martinez, *supra* note 1, at 251.

124. Franks, *supra* note 6, at 3; *see also* Martinez, *supra* note 1, at 239–44.

125. N.J. STAT. ANN. § 2C:14-9 (West 2014).

126. Martinez, *supra* note 1, at 239; *see also* N.J. STAT. ANN. § 2C:14-9.

consent—whereas the other sections of the statute describe instances where the individual engaging in the act is photographed or recorded without permission.[127] The section specifically reads:

> c. An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he discloses any photograph, film, videotape, recording or any other reproduction of the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, unless that person has consented to such disclosure. For purposes of this subsection, *disclose* means sell, manufacture, give, provide, lend, trade, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, advertise or offer. Notwithstanding the provisions of subsection b of [New Jersey Statute] 2C:43-3, a fine not to exceed $30,000 may be imposed for a violation of this subsection.[128]

Subsection (d)(1) of the statute makes it "an affirmative defense to a crime under this section that: [T]he actor posted or otherwise provided prior notice to the person of the actor's intent to engage in the conduct specified in subsection a., b., or c."[129] Experts and lawmakers alike praise the "'specific definitions and affirmative defenses'" outlined in the statute, as they "'guard the statute against First Amendment overbreadth.'"[130] The law has also been complimented for treating the conduct seriously even though it was enacted "well ahead of its time" and "years before any of the debate that surrounds such laws today" began.[131] Making the posting of revenge pornography a felony also serves as a good deterrent for those who may not think that the act is a serious offense.[132] "New Jersey 'gave the law enough teeth to serve as a deterrent, threatening those convicted of posting lewd images or video of someone without license or privilege with a third-degree crime, punishable with a prison sentence of [three] to [five] years.'"[133] The lack of this deterrent effect in many of the other states that have proposed legislation may lead to the opinion that the legislation might not be effective, and therefore, the proposed bill may ultimately fail to pass as law.[134]

127. N.J. STAT. ANN. § 2C:14-9(1)(a)–(c).
128. *Id.* § 2C:14-9(1)(c).
129. *Id.* § 2C:14-9(1)(d)(1).
130. Martinez, *supra* note 1, at 240–41.
131. *Id.* at 241.
132. *Id.*
133. *Id.*
134. *See id.*

2. California

California's Senate Bill 255, which is now codified as section 647(j)(4) of the California Penal Code, became effective on October 1, 2013.[135] The law "makes it a misdemeanor to 'publish images of another person without their consent "with the intent[] to cause . . . emotional distress."'"[136] The California law finds someone guilty of disorderly conduct if:

> Any person who photographs or records by any means the image of the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the image taken, with the intent to cause serious emotional distress, and the depicted person suffers serious emotional distress.[137]

The initial issue with the California revenge pornography statute was that it did not protect victims who had taken the images themselves and then shared them with someone they trusted, who then shared them with third party recipients without the victims' consent.[138] As stated earlier in this Comment, "up to [eighty percent] of revenge porn[ography] victims belong to this category," which is why it is the main focus of this Comment.[139] The law, therefore, did not punish anybody except the person who made the recording.[140] This meant that operators of revenge pornography websites and third party redistributors of the image—who many times encourage the posting of these images or engage in egging on viewers to harass the victims—could not be charged under the law.[141] On February 21, 2014, the California Assembly Commission enrolled Bill 2643, which will expand the Civil Code by prohibiting a person from posting explicit images of another identifiable person that were intended to remain private.[142] This new addition to the law

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135. CAL. PENAL CODE § 647(j)(4) (West 2014); Martinez, *supra* note 1, at 241.

136. Martinez *supra* note 1, at 241–42; *see also* CAL. PENAL CODE § 647(j)(4)(A).

137. CAL. PENAL CODE § 647(j)(4)(A).

138. Martinez, *supra* note 1, at 242–43; *see also* CAL. PENAL CODE § 647(j)(4)(A).

139. Martinez, *supra* note 1, at 242; *see also supra* Parts I–II.

140. Martinez, *supra* note 1, at 243.

141. *Id.*

142. Assemb. 2643, 2013–14 Leg., Reg. Sess. (Cal. 2014).

> would create a private right of action against a person who intentionally distributes a photograph or recorded image of another that exposes the intimate body parts, as defined, of that person or him or her engaged in specified sexual acts, without his or her consent, knowing that the other person had a reasonable expectation that the material would remain private, if specified conditions are met.[143]

Another major issue with California law still remains though; the criminal law requires that the defendant intended to cause the victim serious emotional distress.[144] This creates a problem for prosecutors who then need to collect evidence to prove that victims have suffered emotional distress.[145] The sexual nature involved with sexting and becoming a victim of revenge pornography already makes victims reluctant to share their stories.[146] Many victims are too humiliated or afraid to speak out and would rather just have the whole episode disappear, or at the very least remain anonymous.[147] The California criminal statute is also quite tame in its punishment compared to other revenge porn statutes, which has a negative effect on its deterrent factor.[148]

3. Maryland

Scholars with an expertise in online cyber bullying and harassment—and have extensive knowledge of revenge pornography—were very excited about the proposed legislation aimed at criminalizing revenge pornography in Maryland.[149] Proposed House Bill 43 originally intended to "bar[] the disclosure of a person's sexually explicit or nude images 'knowing that the other person has not consented to the disclosure.'"[150] The original

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143. *Id.*

144. CAL. PENAL CODE § 647(j)(4)(A) (West 2014); Citron & Franks, *supra* note 3, at 374.

145. *See* CAL. PENAL CODE § 647(j)(4)(A); Martinez, *supra* note 1, at 243.

146. Citron & Franks, *supra* note 3, at 358.

147. *See id.*

148. CAL. PENAL CODE § 647(k)–(l); Citron & Franks, *supra* note 3, at 374. The statute makes nonconsensual pornography a misdemeanor "punishable by up to six months in prison and a [one thousand dollar] fine, up to one year in prison and a [two thousand dollar] fine for a second offense," whereas New Jersey's revenge pornography statute—and many other newly proposed statutes—makes the act punishable as a felony imposed with greater jail time and heftier fines. Citron & Franks, *supra* note 3, at 374; Martinez, *supra* note 1, at 239–41.

149. *See Groundbreaking Revenge Porn Bill*, THE ELM (Nov. 4, 2013), https://elm.umaryland.edu/groundbreaking-internet-safety-bill/.

150. Citron and Franks, *supra* note 3, at 372 (quoting H.D. 43, 2014 Leg., Reg. Sess. (Md. 2014)).

legislative text of the bill was similar to New Jersey's praised revenge pornography statute due to its specific definitions, broad scope, and its effective deterrent status in making the act of revenge pornography a felony.[151] It was a positive move towards more states enacting *effective* legislation to criminalize revenge pornography.[152] Unfortunately, before it was enacted on May 12, 2014, the legislative text of the bill was dramatically changed.[153] The enacted law—effective October 1, 2014—now reads:

> (B)(1) This section does not apply to: (I) lawful and common practices of law enforcement, the reporting of unlawful conduct, or legal proceedings; or (II) situations involving voluntary exposure in public or commercial settings. An interactive computer service, as defined in 47 U.S.C. § 230(f)(2), is not liable under this section for content provided by another person.
>
> (C) A person may not *intentionally cause serious emotional distress to another* by intentionally placing on the Internet a photograph, film, videotape, recording, or any other reproduction of the image of the other person that reveals the identity of the other person with his or her intimate parts exposed or while engaged in an act of sexual contact: (1) knowing that the other person did not consent to the placement of the image on the Internet, and (2) under circumstances in which the other person had a reasonable expectation that the image would be kept private.
>
> (D) A person who violates this section is guilty of a *misdemeanor* and on conviction is subject to imprisonment not exceeding [two] years or a fine not exceeding [five thousand dollars] or both.[154]

The enacted bill now requires the intent of causing emotional distress to the victim—similar to the California revenge pornography

151. *See* Md. H.D. 43; Citron & Franks, *supra* note 3, at 372–74.

152. *See* Citron & Franks, *supra* note 3 at 372–74.

153. Md. H.D. 43; MD. DEP'T OF LEGIS. SERVS., FISCAL & POLICY NOTE, H.D. 43, Reg. Sess., at 5 (2014).

154. Md. H.D. 43. The original legislative attempt to pass Maryland revenge pornography legislation read:

> For the purpose of prohibiting a person from intentionally disclosing a certain sexually explicit image of a certain other person, knowing that the other person has not consented to the disclosure; providing penalties for a violation of this Act; providing for the scope of this Act; providing that this Act does not affect any legal or equitable right or remedy otherwise provided by law; defining certain terms; and generally relating to the intentional disclosure of sexually explicit images.

H.D. 64, 434th Gen. Assemb., Reg. Sess. (Md. 2014).

statute.[155] The original attempt to pass revenge porn legislation only required that a person *intentionally* disclose an image, "knowing that the other person has not consented."[156] The enacted law has also lowered the severity of the crime.[157] The original attempt to pass revenge porn legislation would have made the disclosure of sexually explicit images, without consent, a felony with a punishment of up to five years of jail time and a significant fine.[158] The enacted law lowered the degree of the crime to a misdemeanor.[159] With the law being classified as a lower degree crime, it means that the punishable time of an offender must also be lowered.[160] The Maryland law currently allows up to two years of jail time and, in the most serious offenses, up to a five thousand dollar maximum fine.[161]

There is still reason for lawmakers, and the public alike, to be pleased with Maryland's enacted revenge pornography statute. [162] Lawmakers have commended the second section of the bill, which lists various exemptions of scenarios where the bill does not apply.[163] Luckily for them, the second section of the statute stayed intact with only relatively minor changes.[164] The statute provides that in certain scenarios—such as in any situation that involves "lawful and common practices of law enforcement, the reporting of unlawful conduct, or legal proceedings"—the statute does not apply and the act engaged in cannot be considered a criminal act.[165] Scholars have argued that it is important for lawmakers to include clear exemptions like these so that the proposed statutes can avoid First Amendment overbreadth issues.[166]

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155. Md. H.D. 43; *see also* CAL. PENAL CODE § 647(j)(4)(A) (West 2014).

156. Md. H.D. 64.

157. *Compare* Md. H.D. 64, *with* Md. H.D. 43.

158. Md. H.D. 64.

159. Md. H.D. 43.

160. *See* Md. H.D. 43; Citron & Franks, *supra* note 3, at 373–74 (discussing the different laws in states who have passed laws criminalizing revenge porn and the amount punishable under each statute).

161. Md. H.D. 43.

162. *See id.*; Pat Warren, *Bill Signed Into Law Making Revenge Porn a Misdemeanor*, CBS BALTIMORE LOCAL (May 15, 2014, 6:52 PM), http://Baltimore.cbslocal.com/2014/05/15/bill-signed-into-law-making-revenge-porn-a-misdemeanor/.

163. Md. H.D. 43; *see also* Warren, *supra* note 162.

164. Md. H.D. 43.

165. *Id.*

166. Citron & Franks, *supra* note 3, at 388.

> Revenge porn bills should include exemptions that guard against the criminalization of disclosures concerning matters of public interest, such as the Maryland, New York, and Wisconsin bills do. They should make clear that it is a crime to distribute someone's sexually explicit images *if and only if* those images do not concern matters of public importance. . . . Such an exception would help reflect the state of First Amendment doctrine; it would not alleviate overbreadth problems.

V. BANNING REVENGE PORNOGRAPHY: FLORIDA

The fifth section of this Comment will specifically focus on the current state of revenge pornography legislation in Florida, and aim at convincing readers that revenge pornography should be criminalized in the state of Florida.[167] Recently, both Florida House Bill 475 and Florida Senate Bill 532 failed to pass as law.[168] The proposed legislation aimed at "prohibiting an individual from disclosing a sexually explicit image of an identifiable person."[169] The first part of this section will outline both the Florida House Bill 475 and Florida Senate Bill 532.[170] The second part of this section will discuss the suggestions of scholars who specialize in revenge pornography, as applied to Florida's proposed legislation, to help legislative bodies draft new bills so the state can continue to move forward in its efforts to criminalize revenge pornography.[171]

A. *Proposed Legislation*

Legislation was proposed both in the Florida House of Representatives and the Florida Senate to criminalize revenge pornography in Florida.[172] Unfortunately, both efforts failed.[173] One issue—which will be discussed in the second section of this part of the Comment—is that both proposed bills required a showing of *intent to harass* the victim by posting the explicit images.[174] The statutes do have significant differences though, which can be seen in the legislative text of the bills.[175] Florida House Bill 475—which died in the Criminal Justice Subcommittee on May 2, 2014—reads:

> An act relating to the disclosure of sexually explicit images . . . prohibiting an individual from disclosing a sexually

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Id. (footnote omitted).

167. *See infra* Part V.A–B.

168. *See* H.R. 475, 2014 Leg., Reg. Sess. (Fla. 2014); S. 532, 2014 Leg., Reg. Sess. (Fla. 2014); *CS/CS/SB 532: Disclosure of Sexually Explicit Images*, FLORIDA SENATE, http://www.flsenate.gov/Session/Bill/2014/0532 (last visited Jan. 2, 2015); *HB 475: Disclosure of Sexually Explicit Images*, FLORIDA SENATE, http://www.flsenate.gov/Session/Bill/2014/0475 (last visited Jan. 2, 2015).

169. Fla. H.R. 475; Fla. S. 532.

170. *See infra* Part V.A.

171. *See infra* Part V.B.

172. *See* Fla. H.R. 475; Fla. S. 532.

173. Fla. H.R. 475; Fla. S. 532; *CS/CS/SB 532: Disclosure of Sexually Explicit Images*, *supra* note 168; *HB 475: Disclosure of Sexually Explicit Images*, *supra* note 168.

174. Fla. H.R. 475; Fla. S. 532; *see infra* Part V.B.

175. *See* Fla. H.R. 475; Fla. S. 532.

> explicit image of an identifiable person with the intent to harass such person if the individual knows or should have known such person did not consent to the disclosure.
> . . . .
> (2) An individual may not intentionally and knowingly disclose . . . sexually explicit image of an identifiable person or that contains descriptive information in a form that conveys the personal identification information . . . of the person to a social networking service or a website, or by means of any other electronic medium, *with the intent to harass such person*, if the individual knows or should have known that the person depicted in . . . sexually explicit image did not consent to such disclosure.
> (3)(a) Except as provided in paragraph (b), an individual who violates this section commits a *felony of the third degree* . . . .
> (b) An individual who is [eighteen] years of age or older at the time he or she violates this section commits a *felony of the second degree* . . . if the violation involves a sexually explicit image of an individual who was younger than [sixteen] years of age at the time the sexually explicit image was created.
> . . . .
> (5) This section does not apply to the disclosure of a sexually explicit image for:
> (a) The reporting, investigation, and prosecution of an alleged crime for law enforcement purposes.
> (b) Voluntary and consensual purposes in public or commercial settings.[176]

Section (1) of the bill, which was omitted from the recopying of the statute into this Comment provided above, provides specific and detailed definitions for the terms used within the proposed statute, such as *disclose*, *harass*, *identifiable person*, and *sexually explicit image*.[177] As stated in the text, the Florida House Bill makes the violation of the revenge pornography statute a felony.[178]

Unlike the Florida House Bill, the Florida Senate Bill makes the offense of disclosing sexually explicit images a misdemeanor.[179] Florida Senate Bill 532 reads:

> An act relating to the disclosure of sexually explicit images . . . prohibiting an individual from *disclosing a sexually explicit image of an identifiable person with the intent to harass*

176. Fla. H.R. 475 (emphasis added).
177. *Id.* § 1(1)(a)–(d).
178. *Id.* § 1(3)(a).
179. *Compare id.*, *with* Fla. S. 532 § 1(3)(a).

> *such person* if the individual knows or should have known such person did not consent to the disclosure; providing criminal penalties . . . requiring a court to order that a person convicted of such offense be prohibited from having contact with the victim; providing criminal penalties for a violation of such order; providing that criminal penalties for certain offenses run consecutively with a sentence imposed for a violation of [specific provisions].
>
> . . . .
>
> (3)(a) Except as provided in paragraph (b), an individual who violates this section commits a *second degree misdemeanor* . . . .
>
> (b) An individual who is older than [eighteen] years of age at the time he or she violates this section commits a *first degree misdemeanor* . . . if the violation involves a sexually explicit image of an individual who was younger than [sixteen] years of age at the time the sexually explicit image was created.[180]

The Senate-proposed bill provides specific definitions for the terms *disclose*, *harass*, *identifiable person*, and *sexually explicit image* as well.[181] Section 1 of the proposed legislation—intentionally left out of the recopying of the statute above—also specifically mentions, as the House Bill does, that "[a]n individual may not intentionally and knowingly disclose a sexually explicit image of an identifiable person to a social networking service or a website, or by means of any electronic medium."[182] This illustrates that both of the proposed statutes are trying to specifically target the rising trend of revenge pornography as it relates to posting these images on the Internet.[183] Unlike House of Representatives Bill 475, which placed a heftier punishment for violators of the statute, Senate Bill 532 provided that a violation of the statute would amount to a misdemeanor.[184] In Florida, a misdemeanor of the first degree is punishable "by a definite term of imprisonment not exceeding [one] year."[185] "A misdemeanor of the second degree [is punishable] by a definite term of imprisonment not exceeding [sixty] days."[186] For a felony in the second degree under House of Representatives Bill 475, one who committed the act of sharing an explicit image involving a minor without consent could have been punished "by a term of imprisonment not exceeding [fifteen] years."[187] Young adults and adults who fall in the category of

180. Fla. S. 532 (emphasis added).
181. *Id.* § 1(1).
182. *Id.* § 1(2); *see also* Fla. H.R. 475 § 1(2).
183. *See* Fla. H.R. 475; Fla. S. 532.
184. *See* Fla. H.R. 475 § 1(3); Fla. S. 532 § 1(3).
185. FLA. STAT. § 775.082(4)(a) (2014).
186. *Id.* § 775.082(4)(b).
187. *Id.* § 775.082(3)(d); Fla. H.R. 475 § 1(3)(b).

violating a felony in the third degree, could have been punished "by a term of imprisonment not exceeding [five] years."[188] The fines that could have been imposed range from five thousand dollars to ten thousand dollars for the felonies, and five hundred dollars to one thousand dollars for the misdemeanors.[189]

B. *Scholar Suggestions*

Reviewing proposed legislation and analyzing the legislative text against expert advice might help legislative bodies determine why the law might have failed to pass.[190] At the very least, reading and analyzing scholars' advice may help lawmakers draft more applicable legislation that has greater chances of being enacted into law, which is the ultimate goal.[191] The main problem with House of Representatives Bill 475 and Senate Bill 532 was the malicious motive requirement.[192] Both proposed bills required a showing of *intent to harass* the victim by posting the explicit images.[193] When evaluating the California revenge pornography statute—which also requires proof of a malicious motive that the defendants intended to inflict serious emotional distress upon the victim—scholars and lawmakers alike believed that it went too far:[194]

> Such requirements misunderstand the gravamen of the wrong—the disclosure of someone's naked photographs without the person's consent and in violation of their expectation that the image be kept private. Whether the person making the disclosure is motivated by a desire to harm a particular person, as opposed to a desire to entertain or generate profit, should be irrelevant. Malicious motive requirements are not demanded by the First Amendment and, in fact, create an unprincipled and indefensible hierarchy of perpetrators. What is essential is a statute's goal of protecting privacy, autonomy, and the fostering of private expression, which the Court has recognized as legitimate grounds for regulation.[195]

188. FLA. STAT. § 775.082(3)(e), (9)(3)(d).
189. *Id.* § 775.083(1)(b)–(e).
190. *See* Citron & Franks, *supra* note 3, at 386–90.
191. *See id.* at 386.
192. *See* Fla. H.R. 475; S. 532, 2014 Leg., Reg. Sess. (Fla. 2014); Citron & Franks, *supra* note 3, at 387.
193. Fla. H.R. 475; Fla. S. 532.
194. CAL. PENAL CODE § 647(4)(A) (West 2014); *see also* Citron & Franks, *supra* note 3, at 387.
195. Citron & Franks, *supra* note 3, at 387.

Malicious motive requirements also make the case harder for prosecutors who must charge the offenders.[196] As shown throughout this Comment—and through many other scholarly articles that reiterate the stories of victims—many are too ashamed to talk and are afraid to come forward with their story.[197] Victims want to hide from the shame posts found online, not attribute their name further to the content.[198]

The requirement of *intent to harass* the victim may also discourage law enforcement officers from acting when a revenge pornography victim comes forward.[199] The issue of what constitutes *harassment* and when the violator passes the threshold to qualify the act as *intending to harass*, begins again.[200] The definition of *harass*—provided in both House Bill 475 and Senate Bill 532—provides little help.[201] According to the proposed legislation, "'harass' means to engage in conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose."[202] "Revenge porn statutes might have a better chance of withstanding overbreadth challenges if they require the state to prove that the victims suffered harm."[203] Although it might help the statute escape overbreadth challenges, the requirement of showing harm further frustrates the issue of having revenge porn victims come forward and speak out.[204] Many victims are also afraid of what the person they are reporting might forward to others, and openly speak about what they have been through, as well as the harm that the offender has inflicted on them.[205] It is scary for victims to come forward and openly speak about what they have been through as well as the harm that the offender has inflicted on them.[206] The proposed legislation did a good job of providing clear and specific definitions of key terms, though.[207] Along with the important definitions of *harass* and *sexually explicit image*, Florida legislators also included a definition for the term *disclose*, which is very important in regards to revenge

196. *Id.* at 369–70; *see also* Martinez, *supra* note 1, at 243.
197. *See* Citron & Franks, *supra* note 3, at 347, 358.
198. *See id.* at 358.
199. Martinez, *supra* note 1, at 237; *see also* H.R. 475, 2014 Leg., Reg. Sess. (Fla. 2014); S. 532, 2014 Leg., Reg. Sess. (Fla. 2014).
200. *See* Fla. H.R. 475; Fla. S. 532.
201. *See* Fla. H.R. 475; Fla. S. 532.
202. Fla. H.R. 475; Fla. S. 532.
203. Citron & Franks, *supra* note 3, at 388.
204. *See id.* at 347.
205. *See id.*; Martinez, *supra* note 1, at 236–37.
206. Martinez, *supra* note 1, 236–37; *see also* Citron & Franks, *supra* note 3, at 367.
207. *See* Fla. H.R. 475; Fla. S. 532.

pornography statutes.[208] The legislative text defines *disclose* as "to publish, post, distribute, exhibit, advertise, offer, or transfer, or cause to be published, posted, distributed, exhibited, advertised, offered, or transferred."[209] This definition is excellent as it covers a wide range of scenarios that can constitute revenge pornography and does not limit the act to a specific transfer from one person to the other; it protects victims on a much larger scale.[210] The proposed legislation also contained an exemption section, similar to the praised section in Maryland's revenge porn statute.[211] Again, lawmakers favor this type of clear exemption section because it helps avoid First Amendment overbreadth issues.[212]

Another issue the proposed legislation in Florida most likely faced is the extent of the penalty imposed upon violators.[213]

> The ideal penalty for nonconsensual pornography is another contested issue. If the conduct is categorized as a mere misdemeanor, it risks sending the message that the harm caused to victims is not that severe. Such categorization also decreases incentives for law enforcement to dedicate the resources necessary to adequately investigate such conduct. At the same time, criminal laws that are more punitive will face stricter examination and possible public resistance. Although California's categorization of revenge porn as a misdemeanor sends a weak message to would-be perpetrators and will be a less effective deterrent than a law like New Jersey's, [which categorizes revenge porn as a felony], it may have aided the law's passage.[214]

Lawmakers need to find a median point in categorizing legislation.[215] The felony categorization of revenge pornography, with a penalty of anywhere between five to fifteen years of jail time—although a good deterrent—seems too extreme, and it casts a shadow of doubt that anybody would actually be charged under the statute.[216] On the other hand, under the

208. Fla. H.R. 475; Fla. S. 532; Citron & Franks, *supra* note 3, at 388.
209. Fla. H.R. 475; Fla. S. 532.
210. *See* Fla. H.R. 475; Fla. S. 532; Citron & Franks, *supra* note 3, at 388–89.
211. Fla. H.R. 475; Fla. S. 532; Citron & Franks, *supra* note 3, at 372–73; *see also* MD. CODE ANN. Criminal Law § 3-809 (West 2014).
212. *See* Citron & Franks, *supra* note 3, at 388.
213. *See* Fla. H.R. 475; Fla. S. 532.
214. Citron & Franks, *supra* note 3, at 389.
215. *See id.*
216. *See id.* at 389–90 (discussing the importance of penalty categorization of statutes, which can either make a proposed legislation successful, or be responsible for its death); Martinez, *supra* note 1, at 241.

proposed Senate Bill, it is possible for violators to get a sentence of up to one year in jail, which seems like a slap on the wrist compared to revenge porn statutes in other states.[217] It is possible that legislators wondered if this law would even be worth passing, as it is not likely to deter actors, especially since police officers will probably not be willing to spend the needed time to investigate the act for such a small offense.[218] Although Florida's proposed legislation was a good starting point, it is clear that both bills were flawed.[219]

VI. CONCLUSION

Revenge pornography is a rising trend that today's generation needs to face.[220] Technological innovations have made it easier for individuals to share private information with others with a simple click of a button.[221] For revenge porn victims, this private information is of the most sensitive kind—sexually explicit images or videos of the individual.[222] With the dramatic increase of the popularity of sexting, teenagers, and young adults are the main victims of revenge pornography.[223] These young adults are haunted at a young age because of one mistake that will likely "result[] in lost jobs, lost relationships, lost friendships, and [possibly] physical harm."[224] Thirteen states have enacted revenge porn legislation and many have proposed bills in review.[225] The efforts of Florida Legislators to enact revenge pornography have sadly failed, but lawmakers cannot stop trying.[226] This Comment has proven the rise in the number of acts leading to revenge pornography, has shown the harms of revenge pornography faced by victims, and has analyzed legislation in other states which may be of help preparing the next set of proposed legislation.[227] The Florida Legislature's attempts at enacting revenge pornography were commendable, and the state continues to move forward during this groundbreaking era in an effort to join other states in

217. Fla. S. 532; *see also* FLA. STAT. § 775.082(4)(a) (2014); Citron & Franks, *supra* note 3, at 389.

218. *See* Fla. S. 532; Citron & Franks, *supra* note 3, at 361, 389.

219. *See* H.R. 475, 2014 Leg., Reg. Sess. (Fla. 2014); Fla. S. 532; Citron & Franks, *supra* note 3, at 387–91.

220. *See* Martinez, *supra* note 1, at 237; Poltash, *supra* note 15, at 5–6, 19.

221. *See* Martinez, *supra* note 1, at 237–38, 245.

222. *Id.* at 245.

223. *Id.* at 251.

224. *Id.*

225. Franks, *supra* note 6, at 3; *see also* Citron & Franks, *supra* note 3, at 371.

226. *See* H.R. 475, 2014 Leg., Reg. Sess. (Fla. 2014); S. 532, 2014 Leg., Reg. Sess. (Fla. 2014); Kay, *supra* note 21.

227. *See supra* Parts II–V.

criminalizing this disgraceful act.[228] "On July 30, 2014, the Miami Beach Commission unanimously voted to pass a resolution urging the Florida [L]egislature to enact legislation criminalizing . . . revenge porn[ography]."[229] The resolution was passed with the aid of Miami-Dade Florida Association for Women Lawyers, whose main "mission [includes] mak[ing] Florida the next state on [the] list" of the thirteen states that have already passed revenge porn legislation.[230] It is impossible to draft the *perfect* statute, but legislators could take the advice of experts and scholars in the field of cyber harassment to help enact better revenge pornography statutes that will provide victims with more protection, and will succeed at becoming law.[231]

228. Kay, *supra* note 21; *see also* Fla. H.R. 475; Fla. S. 532; Citron & Franks, *supra* note 3, at 371.

229. Press Release, Fla. Ass'n for Women Lawyers Miami-Dade Chapter, With the Help of Miami-Dade FAWL, Miami Beach Comm'n Unanimously Votes to Pass Resolution Urging Fla. Legislature to Criminalize "Revenge Porn" (July 30, 2014), *available at* http://mdfawl.org/miami-beach-revenge-porn-resolution/; *see also* Kay, *supra* note 21.

230. Press Release, Fla. Ass'n for Women Lawyers Miami-Dade Chapter, *supra* note 229.

231. *See* Citron & Franks, *supra* note 3, at 386, 390–91.

SOCIAL MEDIA IS PERMANENT, YOU ARE NOT: EVALUATING THE DIGITAL PROPERTY DILEMMA IN FLORIDA PROBATE

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I. INTRODUCTION

The *digital after life*[1] has quickly become the brave new world of probate law and estate planning.[2] The reason for this is because as recently as 2010, reports show that "[seventy-seven percent] of Americans use e-mail or the [I]nternet, at least occasionally."[3] Yet, a similar study now reveals that number has increased to show that eighty-seven percent of American adults are now using the Internet.[4] More significantly, while nearly nine out of ten Americans from the ages of eighteen through forty-five use the Internet,[5] ninety-seven percent of young adults ages eighteen through twenty-nine are regularly using the Internet.[6] The Internet has become so prevalent in society that fifty-nine percent of young adults ages eighteen through twenty-nine cite the Internet as their primary source for news, both nationally and internationally.[7] Furthermore, research shows that nearly eight out of ten young adults ages eighteen through twenty-four "have created their own social networking profile."[8] With this expanding popularity, words like *selfie* and *social media* have now been deeply ingrained in our language,[9] and it seems like social networking, e-mail, and microblogging are here to stay;[10] unfortunately, we are not.[11] Therefore, this

1. Dana Parks, *Digital After Life—Social Media and the Deceased*, SAN DIEGO BURIAL AT SEA (Apr. 18, 2013), http://www.sandiegoburialatsea.com/digital-after-life/.

2. *See* Caitlin Dewey, *What Happens to Your Facebook When You Die?*, WASH. POST (May 7, 2014, 5:20 PM), http://www.washingtonpost.com/news/the-intersect/wp/2014/05/07/what-happens-to-your-facebook-when-you-die/.

3. PEW RES. CTR., MILLENNIALS: CONFIDENT. CONNECTED. OPEN TO CHANGE., 27 (Paul Taylor & Scott Keeter eds., 2010), *available at* http://www.pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf.

4. PEW RES. CTR., THE WEB AT 25 IN THE U.S.: THE OVERALL VERDICT: THE INTERNET HAS BEEN A PLUS FOR SOCIETY AND AN ESPECIALLY GOOD THING FOR INDIVIDUAL USERS 5 (2014), *available at* http://www.pewinternet.org/2014/02/27/the-web-at-25-in-the-u-s/.

5. *See* PEW RES. CTR., *supra* note 3, at 19, 27.

6. PEW RES.CTR., *supra* note 4, at 5.

7. *See* PEW RES. CTR., *supra* note 3, at 35.

8. *Id.* at 29.

9. *Selfie Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/selfie (last visited Dec. 26, 2014) (selfie was first used in 2002 and emphasizes the recent impact social networking has had on our culture); *Social Media Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/socialmedia (last visited Dec. 26, 2014).

10. *See* Dan Newman, *6 Reasons Social Media Is Your Secret Weapon in Customer Service*, ENTREPRENEUR (May 5, 2014), http://www.entrepreneur.com/article/233612.

11. *See Estate Planning: Protecting Your Digital Assets*, ALLY BANK (May 9, 2014, 9:00 AM), http://community.ally.com/straight-talk/estate-planning-your-digital-assets/.

continually debated legal question still exists: What happens to our digital assets when we die?[12]

There is already an excellent foundation of legal discussion developed around how digital property should be managed,[13] what should happen to an owner's social media account when they die,[14] as well as how a Uniform Act may help state legislatures address the disposition of digital property.[15] This Comment will expand on this discussion by exploring how some states, the Uniform Act, and other legal scholars have attempted to address this legal issue in order to provide the groundwork for how the Florida Legislature can effectively and fairly govern digital estate planning, while staying ahead of the ever-increasing role that technology and social media plays in our lives.[16] Part II of this Comment will provide a general overview of the types of digital assets and the problems that may arise when digital assets become things of value.[17] Part III will outline the existing state legislative solutions and consider to what extent the Uniform Act provides for digital estate planning, and examine the possible issues that follow.[18] Part IV will discuss traditional estate planning in Florida and its silence in addressing the fiduciaries' responsibilities to maintain and administer the decedent's digital estate.[19] Lastly, this Comment will conclude with recommendations on how the Florida Legislature can improve on the current legislative solutions and develop a sound foundation, keeping pace with the ever changing technological world, and the legal issues arising out of digital estate planning.[20]

12. *Id.*

13. *See* James D. Lamm et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. MIAMI L. REV. 385, 391–396 (2014).

14. Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. REV. 1643, 1644 (2012); Damien McCallig, Note, *Facebook After Death: An Evolving Policy in a Social Network*, 22 INT'L. J.L. & INFO. TECH. 107, 108 (2014); Kristina Sherry, Comment, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185, 186 (2012).

15. Samantha D. Haworth, Note, *Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act*, 68 U. MIAMI L. REV. 535, 542 (2014).

16. *See* discussion *infra* Parts III–IV.

17. *See* discussion *infra* Part II.

18. *See* discussion *infra* Part III.

19. *See* discussion *infra* Part IV.

20. *See* discussion *infra* Part V.

II. HOW SOCIAL MEDIA BECOMES A DIGITAL ASSET

Seeing how the use of social media, online banking, e-mail, gaming, and blogging accounts are growing at an astounding rate,[21] there should not be any surprise in the contemporaneous rise in legal questions.[22] Some reports estimate that by 2018, social networking accounts will increase from 3.6 billion to over 5.2 billion.[23] One of the first social media platforms that turned online sharing into a big business for its creative users and its advertisers was YouTube.[24] Some of YouTube's most popular user accounts boast upwards of one million dollars in revenue a year and over a billion views worldwide.[25]

While the popularity of these sites and accounts rise, so does its value to their users.[26] One such social media platform, Vine, is also a social media website that allows "millions of people [to] post [six]-second clips and share them with the community."[27] Although Vine is only a year old, the platform has generated enormous popularity with teens, young adults, and advertisers.[28] There are several *Vine Stars*[29] that have gained millions of followers.[30] These social media celebrities use their pages as substantial sources of income and in some cases can make upwards of two thousand

21. *Computer & Internet Trends in America*, U.S. Census Bureau (Feb. 3, 2014), http://www.census.gov/library/infographics/computer_2014.html; *Internet Usage and Population Growth*, INTERNET WORLD STATS, http://www.internetworldstats.com/am/us.htm (last visited Dec. 26, 2014); *e.g.*, *Facebook Reports Second Quarter 2014 Results*, FACEBOOK (July 23, 2014), http://investor.fb.com/releasedetail.cfm?ReleaseID=861599. Facebook reported over 1.32 billion monthly active users, "an increase of [fourteen percent] year-over-year." *Id.*

22. Lamm et al., *supra* note 13, at 387; Sherry, *supra* note 14, at 187.

23. THE RADICATI GRP., INC., EMAIL STATISTICS REPORT, 2014–2018 4 (Sara Radicati ed., 2014).

24. *See About YouTube*, YOUTUBE, http://www.youtube.com/yt/about/ (last visited Dec. 26, 2014).

25. Harrison Jacobs, *We Ranked YouTube's Biggest Stars by How Much Money They Make*, BUS. INSIDER (Mar. 10, 2014, 9:22 PM), http://www.businessinsider.com/richest-youtube-stars-2014-3?op=1.

26. *See* Alyson Shontell, *Meet the Stars of Vine: These Kids Have Millions of Followers and Make Eye-Popping Amounts of Money*, BUS. INSIDER (Mar. 8, 2014, 11:48 AM), http://www.businessinsider.com/vine-stars-2014-3.

27. *Id.*

28. *See id.*

29. *Id.*

30. Jeff Beer, *Vine Star Logan Paul Brings His Six-Second Creativity to New Hanes Campaign*, FAST COMPANY (July 20, 2014, 8:14 PM), http://www.fastcocreate.com/3033265/vine-star-logan-paul-brings-his-six-second-creativity-to-new-hanes-campaign; Shontell, *supra* note 26.

dollars per re-Vine.[31] Therefore, social media accounts can become so popular that they generate businesses within themselves, drive revenue, and become digital assets of their own.[32]

Surprisingly, on average, an everyday individual's digital assets are worth thirty-five thousand dollars to fifty-five thousand dollars.[33] There is no doubt that a digital asset can have real value.[34] There are several examples where digital assets can hold intellectual property rights, earn revenue from advertisers, and even put a price on digital avatars in video games.[35] World of Warcraft is a gaming platform that has users purchase online weapons, virtual resorts, and gaming currency through the digital realm with real money.[36] Several of World of Warcraft users have accounts with avatars that are part of an online gaming community and worth thousands of dollars.[37]

Furthermore, no one will deny the sentimental value that certain digital media can have.[38] Photos, e-mails, instant messages, and other personal information could be some of the most important assets a family will have after their loved one passes.[39] This is becoming increasingly noteworthy because more and more memorabilia are uploaded to a computer or digital archive rather than physically placed in a photobook.[40] Thus, digital property can be important to protect and plan for, even if there is no financial value.[41]

Undoubtedly, the first step would require us to properly define digital assets and their characteristics.[42]

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31. Shontell, *supra* note 26. A re-Vine is where a user shares a sponsor's video simply by pressing the re-Vine button, and the user would be compensated for sharing that video with his or her followers. *See id.*

32. *See* Lamm et al., *supra* note 13, at 389–90; Shontell, *supra* note 26.

33. Ashley Watkins, Comment, *Digital Properties and Death: What Will Your Heirs Have Access to After You Die?*, 62 BUFF. L. REV. 193, 195, (2014); Evan Carroll, *How Much Are Your Digital Assets Worth? About $35,000*, DIGITAL BEYOND (July 24, 2014), http://www.thedigitalbeyond.com/2014/07/how-much-are-your-digital-assets-worth-about-35000/.

34. *See* Watkins, *supra* note 33, at 194–95.

35. Lamm et al., *supra* note 13, at 389–90.

36. *See id.* at 390.

37. *See id.*; Watkins, *supra* note 33, at 195.

38. Lamm et al., *supra* note 13, at 390–91.

39. *Id.*

40. *Id.* at 391.

41. *Id.*

42. *See* John Romano, *A Working Definition of Digital Assets*, DIGITAL BEYOND (Sept. 1, 2011, 12:24 PM), http://www.thedigitalbeyond.com/2011/09/a-working-definition-of-digital-assets/.

> [While] [t]he phrase digital asset is being used . . . we have yet to come to a legally-accepted definition. A simple definition is that a digital asset is content owned by an individual that is stored in digital form. But this may not be broad enough to encompass all the digital elements of an estate that have value. An expanded definition includes online accounts.
>
> So a more inclusive definition is that *a digital asset is digitally stored content or an online account owned by an individual*.[43]

Thus, when considering whether the account or its content is a digital asset, we have to determine its "value . . . in the connections to other online accounts or the money making potential."[44] The digital content, which could be categorized as a digital asset, includes "images, photos, videos, and text files."[45] Digital assets could be stored locally on the individual's computer or can be accessed through the cloud.[46] Furthermore, "[s]ome online accounts can be considered assets in and of themselves and have value to [the] estate;" these include the aforementioned social media profiles and e-mail accounts.[47] While there are several different types of digital files, each may be considered "intangible, personal property, as long as they stay digital."[48]

Generally, property can be separated into two categories: Real property and personal property.[49] The significance of whether or not they stay digital can be an important distinction, because once a digital file such as a photo is printed, it becomes tangible personal property.[50] Interestingly, over ninety-three percent of Americans are misinformed about what will happen to their digital assets when they die.[51] For this reason, it would be helpful to briefly discuss the different types of digital assets.[52]

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. Romano, *supra* note 42.
48. *Id.*
49. Nathan J. Dosch & Joseph W. Boucher, *E-Legacy: Who Inherits Your Digital Assets?*, WIS. LAW., Dec. 2010, *available at* http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=83&issue=12&articleid=1907.
50. *See* Romano, *supra* note 42.
51. Evan Carroll, *93 Percent of Americans Unaware or Misinformed About Digital Assets*, DIGITAL BEYOND (Apr. 29, 2014, 7:54 PM), http://www.thedigitalbeyond.com/2014/04/93-percent-of-americans-unaware-or-misinformed-about-digital-assets/.
52. Sherry, *supra* note 14, at 193–96; *see also* discussion *infra* Part II.A.

A. *Pick Your Poison: The Types of Digital Assets and Digital Accounts*

The reason for categorizing digital assets and digital accounts is because each shares—at least on some level—an interconnectedness that is unparalleled in respect to other types of property.[53] It is important, however, to note that there are differences between digital assets and digital accounts, because the overlaps between the two often cause them to be used interchangeably.[54] Although the two blend together in discussion, they may be treated differently under the law.[55] Most, if not all, social media accounts require an e-mail account to act as a backup for password changes and direct communication to the user.[56] Thus, e-mail is a fundamental piece to this digital asset issue, as most users access most of their other accounts through this service as well.[57]

Evan Carroll, co-founder of the Digital Beyond Blog—which heavily influences this article and is a leading online resource for legal discussion dealing with one's digital estate—identifies "at least five *types* of digital assets."[58] While this Comment will include the five digital assets defined by Carroll, there are some other types of assets that would be helpful if briefly discussed as well.[59] The first is devices and data, which is the decedent's actual computer as well as what can be stored on it.[60] The second is e-mail, which includes continued access to the account and the messages stored within them.[61] Digital media accounts are third, and are an important distinction from e-mail accounts because these are an expanding field of digital assets, which include music, eBooks, apps, movies, and other forms of digital media.[62] The fourth type is cloud storage accounts, which are online databases that store digital assets online.[63] The fifth type, financial

53. *See* Sherry, *supra* note 14, at 193–94.

54. Watkins, *supra* note 33, at 198–99. This Comment also uses the term *digital asset* interchangeably with *digital account* for the purpose of simplicity, but does recognize the importance of distinguishing between the two. *Id.* at 199.

55. *Id.* at 199.

56. Sherry, *supra* note 14, at 196.

57. *See id.*

58. *Id.* at 194 (emphasis in original); *see also* Evan E. Carroll et al., *Helping Clients Reach Their Great Digital Beyond*, WEALTHMANAGEMENT.COM (Sept. 1, 2011), http://www.wealthmanagement.com/estate-planning/helping-clients-reach-their-great-digital-beyond-0.

59. Sherry, *supra* note 14, at 194–96; *see also* Watkins, *supra* note 33, at 198–200; *infra* Parts A.1–7.

60. Sherry, *supra* note 14, at 194–95.

61. *Id.* at 195.

62. Watkins, *supra* note 33, at 206.

63. *Id.* at 211.

accounts, includes online banking, retirement, and insurance policies.[64] Another to consider are business accounts.[65] While these assets are a type of online account, some personal businesses are run through accounts, like eBay, and present separate difficulties of their own.[66] Lastly, the final type of accounts to be discussed are social media accounts and, while they are a type of online account, they are a central focus to this Comment and require a more in-depth analysis.[67]

1. Devices and Data

Devices are easily recognized as the physical computer or other tangible property—such as an external hard drive or flash drive—where several digital files can be stored.[68] These devices can and are normally "'distributed as part of the estate.'"[69] Therefore, what separates digital assets from the devices and data discussion is that e-mail, social media, business, and financial accounts are "stored beyond [the] individual's personal devices."[70]

2. E-mail

E-mail has been referred to as the "crossover between local and cloud-based storage" systems.[71] The service is used for a variety of reasons including business and personal communication with people all over the world.[72] Oftentimes, important aspects of the decedent's life can be found in his or her e-mail—including bills and other personal information—which stresses the importance of having continued access to these accounts.[73] Although content in e-mail ranges from personal photos and financial records to intimate private conversations, it represents a real value and deserves to be protected and managed like any other property.[74]

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64. *Id.* at 200.
65. *Id.* at 212–13.
66. *Id.*
67. *See* Sherry, *supra* note 14, at 198; *infra* Part II.A.7.
68. Sherry, *supra* note 14, at 197.
69. *Id.*
70. *Id.*
71. *Id.*
72. *See* Watkins, *supra* note 33, at 202.
73. *See* Justin Atwater, *Who Owns E-Mail? Do You Have the Right to Decide the Disposition of Your Private Digital Life?*, 2006 UTAH L. REV. 397, 399.
74. *See id.* at 399–401.

3. Digital Media

A decedent's digital media collection can include a wide variety of things.[75] A common example would be a decedent's iTunes account or Amazon Kindle.[76] Worth noting, however, iTunes only provides the user a license for its product and is generally nontransferable.[77] The *first sale doctrine* in copyright law permits a lawful owner of a CD or book to sell this material item.[78] While this applies for a material copy, the digital copies of those same songs or books may not be so easily disposed of.[79] Even with this restriction, there are other examples of digital media accounts—like ReDigi—that allow digital songs and media to be *sold* or transferred on their marketplace.[80] There has recently been a movement by larger companies to follow suit and join the selling and transfer of digital media, including iTunes and Amazon.[81] This area of digital assets is growing, and with the transition from license to a digital media market, the future of these accounts becomes more uncertain.[82]

4. Cloud Storage Accounts

There are several new online accounts that offer storage in the *cloud*.[83] The appeal to storing media, documents, and other files in the *cloud* is because these files can be accessed by several different devices, as long as there is an internet connection.[84] More popular examples of these types of accounts include, "DropBox, SkyDrive, iCloud, or the Amazon Cloud Drive."[85] Cloud storage accounts create similar problems as other digital accounts for fiduciaries, including their ability to find these accounts and these accounts limiting the accounts' access and transferability in their terms of service ("TOS").[86] As one scholar notes, "iCloud actually addresses death specifically with a 'No Right of Survivorship' clause. This clause states that '[y]ou agree that your [a]ccount is non-transferable . . . . Upon receipt of a

75. Watkins, *supra* note 33, at 206.
76. *See* Jim Lamm, *What Happens to Your Apple iTunes Music, Videos, and eBooks When You Die?*, DIGITAL PASSING (Sept. 4, 2012), http://www.digitalpassing.com/2012/09/04/apple-itunes-music-videos-ebooks-die/.
77. *Id.* at 207; *see also* Watkins, *supra* note 33, at 207.
78. Lamm, *supra* note 76.
79. *See* Watkins, *supra* note 33, at 206–07.
80. *Id.* at 208.
81. *See id.* at 209.
82. *Id.* at 210.
83. *See id.* at 211.
84. *See* Watkins, *supra* note 33, at 211.
85. *Id.*
86. *Id.*

copy of a death certificate your [a]ccount may be terminated and all [c]ontent within your [a]ccount deleted.'"[87] Depending on the account, it seems like these storage accounts—which may hold very important data such as unpublished works, or personal communications—may not be able to be accessed by the fiduciary or passed on to the decedent's heirs.[88]

5. Financial Accounts

Seemingly more familiar types of accounts are banking and retirement accounts, which fall under the umbrella of financial accounts.[89] Historically, these did not pose much of a problem because being able to identify and access these accounts would mean waiting for the decedent's mail to come: 1) showing that the account exists and where to find it; and 2) making it less difficult to get a court order to access the account.[90] However, recently more and more banking has gone paperless and the new age of online banking makes managing expenses more convenient for the user, but can cause a major problem for their heirs.[91] Aside from being able to locate these accounts, accessing them can be near impossible without having the passwords or identification numbers.[92] One benefit to a financial banking account is that it is governed by the state law where the decedent lived, and legislation may help with accessing the account from the bank or business, which maintains the account.[93]

6. Business Accounts

Certain accounts, such as eBay, PayPal, Amazon, and many of the previously mentioned digital accounts, can be part of a decedent's business.[94] Some individuals may have developed and established a trusted eBay account.[95] Some lawyers may even keep client files in a Dropbox-type service for their ease of sharing with partners.[96] Even a domain name may

87. *Id.*; *iCloud Terms and Conditions*, APPLE, http://www.apple.com/legal/icloud/en/terms.html (last updated Oct. 20, 2014).
88. *See* Watkins, *supra* note 33, at 211.
89. *Id.* at 200.
90. *See id.* at 200–01.
91. *Id.*
92. *Id.* at 201.
93. Watkins, *supra* note 33, at 201–02.
94. *See id.* at 213.
95. Naomi Cahn, *Postmortem Life On-line*, PROBATE & PROPERTY, July–Aug. 2011, at 36, 37.
96. *Id.*

be considered a business account that would qualify as a digital asset.[97] While the same problems could potentially arise if a decedent used these accounts for personal use, the fact that it is a business account creates a different set of possible issues for the decedent's heirs and fiduciary.[98] For example, under Florida law, it is the personal representative's fiduciary responsibility to maintain and efficiently manage the decedent's estate.[99] Therefore, the fiduciary would have to ensure that the business is maintained, and the only way this would be possible is if the personal representative of the estate knew about the business account and was able to access it.[100]

7. Social Media Accounts

The popularity of social media accounts is uncontested.[101] Billions of people are utilizing websites, like Facebook, Instagram, Twitter, Myspace, Pinterest, and countless others, to post the most intimate details of their personal lives on the internet.[102] These websites allow users to create accounts and develop personal profiles tailored just for them.[103] The ability to then share these profiles with friends, family, and your fifth grade science teacher gives social media a defining feature.[104] Social media has become so popular that a recent study has shown that ninety-two percent of children in the United States have an online presence by the age of two.[105] On average, a social media user at age thirty already has a digital fingerprint that can span back fifteen years.[106] One of the most important aspects of social media is that it is increasingly popular amongst teens and young adults.[107] This is a considerable fact because most young adults may not draft a will in time to properly plan for their estate.[108] The fact that so many young adults are

97. *Id.*
98. Watkins, *supra* note 33, at 212–13.
99. FLA. STAT. § 733.602(1) (2014).
100. *See* Watkins, *supra* note 33, at 212–13.
101. *See* Sherry, *supra* note 14, at 199–200; Watkins, *supra* note 33, at 203.
102. Watkins, *supra* note 33, at 203–04.
103. *See* Sherry, *supra* note 14, at 199–200.
104. *See* Watkins, *supra* note 33, at 204.
105. Jeff Bertolucci, *Nine of Ten U.S. Kids Have Online Presence by Age Two, Study Says*, PC WORLD (Oct. 7, 2010, 2:45 PM), http://www.pcworld.com/article/207225/nine_of_ten_us_kids_have_online_presence_by_age_two_study.html.
106. *Id.* ("[T]he vast majority of children today will have online presence by the time they are two-years-old—a presence that will continue to build throughout their whole lives.").
107. *See* PEW RES. CTR., *supra* note 3, at 29.
108. *See* Assoc. Press, *Dealing with the Digital Afterlife*, RICHMOND TIMES-DISPATCH (July 17, 2014, 8:25AM), http://www.timesdispatch.com/business/dealing-with-the-digital-afterlife/article_773fa594-0dad-11e4-af88-001a4bcf6878.html.

accumulating vast digital estates and are not properly planning for their future is what creates so much confusion for their heirs, their fiduciary, and the law once they die.[109]

As it may already be apparent, and although this Comment will later discuss the subject, the distinction between personal and intangible property can make a substantial difference because, "[d]epending upon the law in your jurisdiction, this distinction . . . may have significant implications on how clients grant executors access to these assets, what control the executor has over these assets, and over the probate process itself."[110] As briefly mentioned earlier, a major problem to consider is the need for the fiduciary to identify, locate, and access assets that are only available through digital means such as e-mail or other online servers.[111] Other potential obstacles to consider mentioned earlier—although slightly outside the scope of this Comment—are copyright concerns.[112] More importantly, if a fiduciary is successful in accessing a particular digital asset, the fiduciary could come across a host of other legal problems attempting to transfer the digital asset.[113]

B. *Terms of Service: The Social Media Contract*

The access and transferability of a digital asset incorporates different aspects of property, contract, and probate law.[114] An agreement between online services and their users is "almost always governed by a contract of adhesion."[115] The issues derive from the contractual agreement between the user and the Internet service provider ("ISP").[116] Normally, for the user to acquire a license for the service provided by the ISP, the user must adhere to

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109. *See* Jessica Hopper, *Digital Afterlife: What Happens to Your Online Accounts When You Die?*, NBC NEWS (June 1, 2012, 7:53 AM), http://rockcenter.nbcnews.com/_news/2012/06/01/11995859-digital-afterlife-what-happens-to-your-online-accounts-when-you-die?lite. Cahn explains:

> 'When somebody dies, the person who is responsible for taking care of the individual's asset is supposed to be complying with what the individual wanted and protecting the individual,' Cahn said. 'Because so many people have not thought about this, we don't know what the person actually wanted . . . we can all imagine what's in internet accounts. There may certainly be cases where the person who died would not have wanted anyone to get anywhere near the person's account.'

Id. (alteration in original).

110. Romano, *supra* note 42; *see also infra* Part III.

111. Romano, *supra* note 42; *see also supra* Part II.A.6.

112. Dosch & Boucher, *supra* note 49; *see also supra* Part II.A.3.

113. Dosch & Boucher, *supra* note 49.

114. *Id.*

115. Sherry, *supra* note 14, at 204.

116. Dosch & Boucher, *supra* note 49.

the TOS.[117] In many instances, the TOS do not specify what will happen to the account upon the user's death.[118] Additionally, TOS often include language that makes it very difficult, if not impossible, to allow the user to transfer their account to someone else, or even allow another person to access their account.[119] Therefore, the TOS may prevent a fiduciary from being able to transfer or access the account.[120] Herein lies the primary question surrounding how a fiduciary can access a legitimate digital asset of a decedent when the contract that the decedent originally agreed to did not grant fiduciary access.[121]

More often than not, the user typically scans through "several screens worth of legalese, and then registers by clicking [on] a box and agreeing to the terms therein."[122] These terms—although they qualify as a contract of adhesion—are routinely held up by the courts and are enforceable.[123] The TOS often dictate the law that is binding to the agreement, but the question of which law would supersede the other is unclear.[124]

While there is opportunity throughout social media, some platforms have recently come across controversy in regard to who owns the rights to the videos and pictures users post.[125] The language in the TOS agreement on Instagram raised many questions in regard to what license Instagram had with its users' pictures.[126] The platform updated its TOS the very next

117. *Id.*; *see also Statement of Rights and Responsibilities*, FACEBOOK, http://www.facebook.com/legal/terms (last updated Nov. 15, 2013).

118. Sherry, *supra* note 14, at 204.

119. Dosch & Boucher, *supra* note 49; *see also Statement of Rights and Responsibilities*, *supra* note 117.

120. Dosch & Boucher, *supra* note 49; *see also Statement of Rights and Responsibilities*, *supra* note 117.

121. Dosch & Boucher, *supra* note 49; *see also Statement of Rights and Responsibilities*, *supra* note 117.

122. Sherry, *supra* note 14, at 204–05.

123. *Id.* at 205.

124. *See id.* ("Given that not all users are situated in California, then, '[i]t's questionable whether the estate laws of a decedent's resident state would supersede the contractual agreements with the various online services,' irrespective of legislation specifically addressing social-media assets."); *Statement of Rights and Responsibilities*, *supra* note 117.

125. *See* Declan McCullagh, *Instagram Says It Now Has the Right to Sell Your Photos*, CNET (Dec. 17, 2012, 9:54 PM), http://www.cnet.com/news/instagram-says-it-now-has-the-right-to-sell-your-photos/.

126. *See Terms of Use*, INSTAGRAM, http://instagram.com/about/legal/terms/before–January-14-2013 (last visited Dec. 30, 2014). The TOS which caused the controversy state:

> Instagram does *not* claim *any* ownership rights in the text, files, images, photos, video, sounds, musical works, works of authorship, applications, or any other materials—collectively, *Content*—that you post on or through the Instagram

day.[127] The new TOS give Instagram the license to use a user's content "[s]ubject to your profile and privacy settings, [therefore], any User Content that you make public [and] searchable by [another] User[] [is] subject to use under . . . Instagram API."[128] Instagram's TOS also "reserve the right to refuse access to the [s]ervice to anyone for any reason at any time,"[129] leading to a host of other potential legal questions.[130]

Facebook purchased Instagram for a cool one billion dollars in 2012.[131] Facebook is by far the most popular social media platform on the Internet, boasting an average of over 829 million daily active users.[132] Even with such a position, Facebook is another social media platform that has shared in some controversy over their TOS.[133] One recent feature, in particular, that has aroused some serious questions is how an individual's account will be managed, if at all, after death.[134] This feature, called memorializing, is supposed to lock a deceased person's account and keep anyone from logging into it.[135] Although Facebook maintains this is to

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> Services. By displaying or publishing—*posting*—any Content on or through the Instagram Services, you hereby grant to Instagram a non-exclusive, fully paid and royalty-free, worldwide, limited license to use, modify, delete from, add to, publicly perform, publicly display, reproduce and translate such Content, including without limitation distributing part or all of the Site in any media formats through any media channels, except Content not shared publicly—*private*—will not be distributed outside the Instagram Services.

Id.

127. *See* McCullagh, *supra* note 125; Alia Papageorgiou, *Instagram Will Own Your Photos Starting Jan. 16 2013*, NEW EUROPE (Dec. 19, 2012, 18:16), http://www.neurope.eu/article/instagram-will-own-your-photos-starting-jan-16-2013; Kevin Systrom, *Updated Terms of Service Based on Your Feedback*, INSTAGRAM, http://blog.instagram.com/post/38421250999/updated-terms-of-service-based-on-your-feedback (last visited Dec. 30, 2014).

128. *Privacy Policy*, INSTAGRAM, http://instagram.com/about/legal/privacy/ (last visited Dec. 30, 2014).

129. *Terms of Use*, INSTAGRAM, http://instagram.com/about/legal/terms/ (last visited Dec. 30, 2014).

130. *See* Lamm et. al., *supra* note 13, at 386–87.

131. Evelyn M. Rusli, *Facebook Buys Instagram for $1 Billion*, N.Y. TIMES (Apr. 9, 2012, 2:02 PM), http://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/?_php=true&_type=blogs&_r=0.

132. *Facebook Reports Second Quarter 2014 Results*, *supra* note 21.

133. Sherry, *supra* note 14, at 204–05.

134. *See* Hopper, *supra* note 109; *How Do I Report a Deceased Person or an Account That Needs to be Memorialized?*, FACEBOOK, https://www.facebook.com/help/150486848354038 (last visited Dec. 30, 2014).

135. *How Do I Report a Deceased Person or an Account that Needs to be Memorialized?*, *supra* note 134.

protect the privacy of the deceased and their family and friends, there have been some setbacks.[136]

Facebook has also been involved in litigation as a result of its TOS.[137] After the suicide of Benjamin, Helen and Jay Stassen, the parents of the departed, began intense litigation to gain access to their son's Facebook and e-mail accounts.[138] Because of its policy, Facebook maintains that it will not allow access by giving out the password to a dead person's account.[139] Although a local judge ordered Facebook to allow the parents of the decedent access to his account, Facebook currently has not complied and legally can appeal the decision.[140] Facebook's TOS restricts its users from sharing their password with anyone else.[141] Facebook's TOS also restricts the user from transferring their account to anyone without explicitly getting permission in writing.[142] If there is any violation of "the letter or spirit of this [s]tatement, . . . we can stop providing all or part of Facebook to you."[143]

One of the biggest concerns facing the loved ones left behind is often trying to figure out what the deceased wanted to do with their social media accounts.[144] In most cases, "people [do not even] think about what will happen to their online accounts when they die."[145] Internet companies also take the position that users have a certain expectation of privacy and craft their TOS to represent this.[146] Unlike other online banking accounts that users expect to be passed on when they die, social media accounts are expected to be memorialized or deleted.[147]

While social media is in the midst of growing pains that are posing their own set of problems, other types of online assets have had a chance to grow out of their infancy.[148] Google provides an e-mail service called Gmail, whose TOS states that it will, in certain circumstances, release

136. *See* Evan Carroll, *Deceased Man Returns on Facebook*, DIGITAL BEYOND (July 21, 2014), http://www.thedigitalbeyond.com/2014/07/deceased-man-returns-on-facebook/; Hopper, *supra* note 109; *How Do I Report a Deceased Person or an Account that Needs to be Memorialized?*, *supra* note 134.

137. Hopper, *supra* note 109.

138. *Id.*

139. *See id.*

140. *Id.*

141. *Statement of Rights and Responsibilities*, *supra* note 117.

142. *Id.*

143. *Id.*

144. Hopper, *supra* note 109.

145. *Id.*

146. *Id.*

147. *Id.*

148. *See id.* ("According to Google's web site [sic], in rare cases, they may provide the content of a deceased person's account to an authorized representative of the person.").

information through the "legal process or enforceable governmental request."[149] Yahoo, on the other hand, has recently changed its policy to align similarly with other e-mail service providers due to one of the most discussed and often cited cases of digital assets and ownership rights.[150]

Justin Ellsworth, a trained demolition expert for the United States Marines, was killed in Al Anbar, Iraq while inspecting a roadside bomb.[151] Justin utilized e-mail as a primary means to communicate with his friends and family.[152] However, Justin died intestate with no spouse or child, leaving his parents as next of kin.[153] Justin's father, John, then attempted to retrieve Justin's e-mails from Yahoo, but the ISP initially refused to comply with his request.[154] At the time, Yahoo's TOS did not allow the company to provide "e-mail passwords to anyone [except] for the account holder."[155] John argued under the theory that e-mail accounts are personal property and should pass just like other property through intestacy laws.[156] Yahoo would eventually concede, but not before conditioning their compliance with a court order that would require them to provide Justin's father with the e-mails.[157] Yahoo delivered the contents of Justin's e-mail to his father John in a CD despite the fact that Yahoo refused to change its policy prohibiting the ISP from disclosing their users' e-mails.[158]

This case highlights the difficulty and uncertainty surrounding digital assets of the deceased and the TOS of the service providers.[159] Some experts suggest that the real legal battle will be between the "[TOS] declaring that users have no right of survivorship, and newly enacted state laws like Oklahoma's, declaring that social-media accounts may pass like tangible property to beneficiaries and heirs."[160] This conflict, as previously discussed, touches on several issues with state laws and the TOS which

149. *Privacy Policy*, GOOGLE, http://static.googleusercontent.com/media/www.google.com/en/us/intl/en/policies/privacy/google_privacy_policy_en.pdf (last updated Dec. 19, 2014).

150. Sherry, *supra* note 14, at 198; *see also Privacy Policy*, YAHOO, https://info.yahoo.com/privacy/us/yahoo/ (last updated Sept. 25, 2014).

151. Sherry, *supra* note 14, at 214.

152. *Id.*

153. *Id.*

154. *Id.*; Stefanie Olsen, *Yahoo Releases E-mail of Deceased Marine*, CNET (Apr. 21, 2005, 12:39 PM), http://news.cnet.com/yahoo-releases-e-mail-of-deceased-marine/2100-1038_3-5680025.html.

155. Olsen, *supra* note 154.

156. Sherry, *supra* note 14, at 214.

157. *Id.*

158. Olsen, *supra* note 154.

159. *See id.*

160. Sherry, *supra* note 14, at 215 (referencing a February 1, 2012 telephone interview with Evan Carroll, Co-founder of The Digital Beyond blog).

dictate what law governs their terms.[161] Couple this with the fact that there is little to no case law to help structure these new legislative attempts to remedy the digital asset uncertainty creates more questions than answers for the decedents' families.[162]

III. HITS AND MISSES: HOW SOME LEGISLATURES FELL BEHIND THE TECHNOLOGY

There are currently seven states that have enacted laws specifically designed to help fiduciaries manage online accounts.[163] Several other states, including Florida, are currently in the process of introducing legislation that will consider and address fiduciary access to digital access.[164] While these are the first attempts at state legislatures creating answers for the digital asset uncertainty, experts believe that several states' digital asset "laws are too limited in scope."[165] On July 16, 2014, the Uniform Law Commission ("ULC") passed the Uniform Fiduciary Access to Digital Assets Act ("UFADAA").[166] This was the result of an ongoing effort to help guide fiduciaries and provide access to digital assets so that they can properly administer the decedent's estate "while respecting the privacy and intent of the account holder."[167] The following discussion of the current state laws governing fiduciary access will include: Connecticut,[168] Idaho,[169] Indiana,[170] Nevada,[171] Oklahoma,[172] Rhode Island,[173] and Virginia.[174]

161. *Id.* at 215–16.
162. *See id.*
163. Jim Lamm, *August 2013 List of State Laws and Proposals Regarding Fiduciary Access to Digital Property During Incapacity or After Death*, DIGITAL PASSING (Aug. 30, 2013), http://www.digitalpassing.com/2013/08/30/august-2013-list-state-laws-proposals-fiduciary-access-digital-property-incapacity-death/.
164. *Id.*
165. *See id.*
166. Jim Lamm, *Uniform Fiduciary Access to Digital Assets Act (UFADAA)*, DIGITAL PASSING (July 16, 2014), http://www.digitalpassing.com/2014/07/16/uniform-fiduciary-access-digital-assets-act-ufadaa/.
167. *Id.*
168. CONN. GEN. STAT. § 45a-334a (2014).
169. IDAHO CODE ANN. § 15-3-715 (2014).
170. IND. CODE § 29-1-13-1.1 (2014).
171. NEV. REV. STAT. § 143.188 (2014).
172. OKLA. STAT. tit. 58, § 269 (2014).
173. R.I. GEN. LAWS § 33-27-3 (2014).
174. VA. CODE ANN. § 64.2-110 (2014).

A. *The States*

As previously mentioned, several states have created legislation that is intended to help fiduciaries and their heirs deal with digital assets.[175] While state legislatures draft and implement these new laws, they must take into account several factors "including: (1) passwords; (2) encryption; (3) federal and state criminal laws that penalize *unauthorized access* to computers and data—including the Computer Fraud and Abuse Act—and; (4) federal and state data privacy laws, including the Stored Communications Act."[176]

1. Connecticut

Connecticut's statute begins by defining an e-mail service provider as any person who is an intermediary between the sending and receiving of e-mail between users.[177] The statute further defines an e-mail account as all electronic information that is recorded and stored as it relates to the user and the service provider.[178] Connecticut then requires the e-mail service provider to provide copies of the content in the deceased user's e-mail account so long as the executor of the estate can provide: A written request for copies of the e-mail content, a death certificate, and "a certified copy of the certificate of appointment as executor or administrator;" or an order from the court of probate ruling that the court has jurisdiction over the estate of the deceased.[179] The statute ends with a catch–all stating that this section will not require an ISP to disclose information that would conflict with applicable federal law.[180] The most obvious restriction to this statute is that it only applies to e-mail and gives the fiduciary no control or instruction in regard to social media accounts or other types of digital assets.[181] The statute is too limited in scope, and would need to be expanded to include assets, including social media.[182]

175. Lamm, *supra* note 163.
176. *Id.*; *see also* 18 U.S.C. §§ 1030, 2701 (2012).
177. CONN. GEN. STAT. § 45a-334a(a)(1) (2014).
178. *Id.* § 45a-334a(a)(2).
179. *Id.* § 45a-334a(b).
180. *Id.* § 45a-334a(c).
181. *See id.* § 45a-344a(a)–(c).
182. *See* CONN. GEN. STAT. § 45a-334a(a)–(c); Lamm, *supra* note 163.

2. Idaho

Idaho was one of the earliest states to enact legislation that grants a personal representative authority over digital assets.[183] The Idaho statute is titled "Transactions Authorized for Personal Representatives: Exceptions", and the only relevant language to digital assets states that the personal representative may "[t]ake control of, conduct, continue or terminate any accounts of the decedent on any social networking website, any microblogging or short message service website or any e-mail service website."[184] The statute uses clear and concise language to include several types of digital assets, but grants the personal representative the right to *continue* a decedent's social networking website, which may be in direct conflict with certain social media accounts' TOS.[185]

3. Indiana

Under the Indiana statute, titled "Electronically Stored Documents of Deceased",[186] the custodian, or individual that stores electronic documents of another, shall provide any information or copies of any documents upon written request or a certified order of the court.[187] More interestingly, the statute also prohibits the custodian from disposing of the stored documents for two years after receiving the written request.[188] This subsection of the statute may also directly conflict with the TOS of the decedent's service providers.[189] While the Indiana statute attempts to give broad power to the fiduciary's control over the decedent's e-mail, it does not mention social media or other digital assets.[190]

4. Nevada

Nevada's statute is one of the newer legislative attempts to reign in the digital asset dilemma.[191] Interestingly, this piece of legislation does not

183. *See* IDAHO CODE ANN. § 15-3-715 (2014); Sherry, *supra* note 14, at 216–17.
184. IDAHO CODE ANN. § 15-3-715(28).
185. *See id.*; *e.g.*, *iCloud Terms and Conditions*, *supra* note 87.
186. IND. CODE § 29-1-13-1.1 (2014).
187. *Id.* § 29-1-13-1.1(b)(1)–(2).
188. *Id.* § 29-1-13-1.1(c).
189. *See id.*; *e.g.*, *iCloud Terms and Conditions*, *supra* note 87.
190. *See* IND. CODE § 29-1-13-1.1.
191. *See* NEV. REV. STAT. § 143.188 (2014); Lamm, *supra* note 163.

attempt to grant the personal representative access to the digital asset.[192] The statute states the following:

> [A] personal representative has the power to direct the termination of any account of the decedent, including, without limitation: (a) [a]n account on any: (1) [s]ocial networking Internet website; (2) [w]eb log service Internet website; (3) [m]icroblog service Internet website; [or] (4) [s]hort message service Internet website; or (5) [e]lectronic mail service Internet website; or (b) [a]ny similar electronic or digital asset of the decedent.[193]

The statute, however, does not grant the personal representative authority to terminate a bank account.[194] Lastly, the final subsection to the statute declares that the personal representative's termination of the digital assets does not violate the TOS or contractual obligations of the decedent and the ISP.[195]

5. Oklahoma

Oklahoma was the first state to enact any legislation that was specifically designed to handle social media and the decedent's digital assets in regard to estate planning and probate.[196] The statute currently reads, "[t]he executor or administrator of an estate shall have the power, where otherwise authorized, to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites."[197] While this has been in effect since 2010, there have not been any cases that would require the court to interpret the statute.[198]

6. Rhode Island

Rhode Island's statute is very similar to Connecticut's in that it only requires the ISP to provide copies of the digitally stored documents.[199] While Rhode Island's language allows the personal representative to possibly

192. *See* NEV. REV. STAT. § 143.188.
193. *Id.* § 143.188(1).
194. *Id.* § 143.188(2).
195. *Id.* § 143.188(3).
196. *See* Sherry, *supra* note 14, at 216.
197. OKLA. STAT. tit. 58, § 269 (2014).
198. Sherry, *supra* note 14, at 216.
199. *See* Watkins, *supra* note 33, at 221. *Compare* R.I. GEN. LAWS § 33-27-3 (2014), *with* CONN. GEN. STAT. § 45a-334a (2014).

gain access to the decedent's e-mail, it as well is too limited in scope because it does not incorporate social media or any other type of digital asset.[200]

7. Virginia

Currently, Virginia's statute has the most unique take on addressing the digital estate of the decedent because this statute only grants the "personal representative of a deceased minor[]" power to control the TOS of an online account.[201] The Virginia statute never mentions an adult decedent, which will lead the court to conclude the legislative intent was only to address a minor's digital estate.[202] While the statute grants the personal representative "the power to assume the minor's [TOS] agreement for an online account," it is solely for the purpose of disclosing the contents of the minor's communication pursuant to 18 U.S.C. § 2702.[203]

B. *The Answer? The Uniform Fiduciary Access To Digital Assets Act*

Fiduciaries play a vital, often unglamorous, role in probate, acting on behalf of deceased individuals.[204] In most instances, "[f]iduciaries generally have the same power over assets that an absolute owner would have," essentially stepping in the shoes of the decedent, even when dealing with his or her digital assets.[205] The UFADAA is the ULC's attempt to address several of the obstacles that arise for the fiduciary regarding digital assets; it addresses four major types of fiduciaries, and provides these fiduciaries the power to overcome obstacles that arise with digital estates.[206] The Uniform Act, although complete, will need to be refined before states can begin considering incorporating it into their legislation.[207] The question soon becomes: What exactly would states be considering with this Act?[208]

The Uniform Act is intended to provide a "consistent . . . framework to resolve conflict[] with state criminal laws, as well as supplementing federal criminal and civil laws."[209] The first step of the UFADAA was

200. *See* R.I. GEN. LAWS § 33-27-3.
201. VA. CODE ANN. § 64.2-110(A) (2014); Lamm, *supra* note 163.
202. *See* VA. CODE ANN. § 64.2-110.
203. Lamm, *supra* note 163; *see also* 18 U.S.C. § 2702 (2012); VA. CODE ANN. § 64.2-110.
204. *See* Lamm, *supra* note 166.
205. *Id.*
206. *See id.*
207. *See id.*
208. *See id.*
209. Lamm et al., *supra* note 13, at 414.

simply defining a digital asset as a record that is electronic.[210] This broad definition is intended to include anything that can be stored digitally.[211] Section 4 of the Act, titled "Access by Personal Representative to Digital Assets of Decedent," lays out the groundwork for the personal representative to have authority to access the stored electronic communication of the decedent; it also grants the personal representative access to "any other digital asset in which at death the decedent had a right or interest."[212] Therefore, the Act is intending to permit the personal representative access to all of the digital assets of the decedent, unless it would be prohibited by applicable law.[213]

In the following sections, sections 5 through 7, the UFADAA provides agents, conservators, and trustees the authority to manage and access their principal's, protected person's, or successor's digital assets.[214] Section 5 is intended to establish that so long as the conservator is authorized by the court, he may access the protected person's digital assets.[215] Section 5 is similar to section 4, as it also addresses the concerns of the ISP and is structured so that it could incorporate all forms of digital assets.[216] Section 6 establishes that unless otherwise explicitly stated in the power of attorney, the agent has authority over all of the principal's digital assets.[217] Following basic agency principles, there should not be any question as to the authority granted by the principal to the agent.[218] Section 7 of the UFADAA deals with inter vivos transfers of digital assets, as well as testamentary transfers of digital assets, and grants authority to the trustee to access and manage the successor's digital assets.[219]

Section 8 is potentially the most important provision in the UFADAA because it provides specific authority to the fiduciary.[220] In fact, section 8(b) nullifies several of the issues previously brought up in this comment regarding TOS.[221] The language of section 8(b) reads:

> (b) Unless an account holder, after [the effective date of this [act]], agrees to a provision in a terms-of-service agreement

210. UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 2(9) (2014).
211. *See id.*
212. *Id.* § 4(1), (3).
213. *See id.* § 4.
214. *Id.* §§ 5–7.
215. UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 5.
216. *See id.* §§ 4–5.
217. *Id.* § 6(b)(2).
218. *See id.* § 6.
219. *Id.* § 7.
220. UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8.
221. *See id.* § 8(b).

> limits a fiduciary's access to a digital asset of the account holder by an affirmative act separate from the account holder's assent to other provisions of the agreement:
> (1) the provision is void as against the strong public policy of this state.[222]

As this reads, the statute would trump any TOS agreements in light of the strong public policy behind enforcing the statute.[223] Section 8 has another provision, which may be interesting if an ISP decides to enforce their agreed upon TOS.[224] Section 8(c) provides that the "choice-of-law provision in a [TOS] agreement is unenforceable against a fiduciary acting under this [act]."[225] This portion of the UFADAA is intended to follow basic probate law by recognizing the personal representative or other fiduciary stepping into the shoes of the decedent and thus, would have the "same authority as the account holder if the account holder were the one exercising the authority."[226] Although section 8 is intended to authorize fiduciary authority, it is carefully drafted so that it would not be in conflict with applicable law, such as the Computer Fraud and Abuse Act.[227]

Section 9 of the UFADAA enumerates how the fiduciary must properly request access to the digital assets and that compliance is necessary for access to digital property.[228] It is important to note that section 9 is reinforcing the premise that the personal representative's power is limited to what the original account holder would have if he still accessed the account.[229] Section 10 absolves the potential civil liability put on ISP for complying with this Act; thus, section 10 provides immunity for them.[230]

Ultimately, this Act, if uniformly adopted, could clear up some of the legal issues revolving around ISPs and their TOS.[231] This Act can potentially relieve ISP's need to protect themselves through their TOS by removing the risk involved with disclosing personal information through lawful requests by fiduciaries.[232] Furthermore, this Act could help secure

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222. *Id.* (a*lteration in original)*.
223. 18 U.S.C. § 1030 (2012); *see also* UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8(b).
224. *See* UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8(c).
225. *Id.* (second alteration in original).
226. *Id.* § 8 cmt.
227. *See* 18 U.S.C. § 1030; UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8 cmt.
228. UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 9.
229. *Id*. § 9 cmt.
230. *Id.* § 10.
231. Lamm et al., *supra* note 13, at 416.
232. *See id.*

fiduciaries' access to decedent's personal information, while ensuring that the decedent's privacy and final wishes are protected.[233]

IV. BRIDGING THE GAP: WHY FLORIDA NEEDS TO ADDRESS THE DIGITAL ASSET QUESTION

The current Florida Probate Code grows from a legacy of legal debate and discussion that has been ongoing since its inception.[234] Florida probate proceedings are entirely governed by statute, and the administration of estates is governed by chapter 733, beginning with the venue for probate proceedings[235] and ending with the closing of estates.[236] Under chapter 733, Florida requires that a personal representative be appointed to administer the decedent's estate.[237] Furthermore, the personal representative typically must be a Florida resident, unless they are a lineal descendant or spouse.[238] The personal representative must not have been convicted of a felony, cannot be under eighteen years of age, and must be mentally capable of performing their duties.[239]

The personal representative in Florida is considered a fiduciary and held to a certain standard of care.[240] "A personal representative [must] settle and [administer] the estate . . . accord[ing] [to] the terms of the decedent[]" and must use the authority granted to him "for the best interests of interested persons."[241] To help ensure the personal representative is acting in the best interest of the parties, as long as the actions of the personal representative are in accordance with administering the estate properly, he or she will not be liable for those acts.[242]

Thus, the Florida Probate Code grants certain powers to the personal representative,[243] so they can adequately and efficiently administer the estate, including the fiduciary duty to maintain the assets of the estate.[244] The first issue regarding digital assets can be found in the language of Florida Probate Code chapter 733, which states:

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233. *See* UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, Prefatory Note.
234. *See* Henry A. Fenn & Edward F. Koren, *The 1974 Florida Probate Code—A Marriage of Convenience*, 27 U. FLA. L. REV. 615, 616–18 (1975).
235. FLA. STAT. § 733.101 (2014).
236. *See id.* § 733.903.
237. *Id.* § 733.301(1)(a)(1).
238. *Id.* § 733.304(2)–(3).
239. *Id.* § 733.303(1)(a)–(c).
240. FLA. STAT. § 733.602(1).
241. *Id.*
242. *Id.* § 733.602(2).
243. *Id.* § 733.608.
244. *Id.* §§ 733.608, .609(1).

> (1) All real and personal property of the decedent, except the protected homestead, within [the] state and the rents, income, issues, and profits from it shall be assets in the hands of the personal representative:
>
> (a) [f]or the payment of devises, family allowance, elective share, estate and inheritance taxes, claims, charges, and expenses of the administration and obligations of the decedent's estate;
>
> (b) [t]o enforce contribution and equalize advancement; [and]
>
> (c) [f]or distribution.[245]

The language of the code does not mention intangible property.[246] Furthermore, there is not a single mention of a digital asset.[247] The silence in the statute represents some of the problems that arise between a fiduciary's attempt to gain access and control of digital assets that would clearly violate an ISP, such as Facebook's TOS.[248] The bulk of the previous discussion regarding digital assets and the problems that arise in states with fiduciaries—and how some states have attempted to address this issue—shed light on the fact that the Florida Probate Code provides no protection to a decedent's digital estate, because through the language of the statute, digital assets do not exist.[249] Furthermore, the Florida Probate Code does not currently authorize the fiduciary to access or control e-mail or other forms of electronic communication.[250] Having shown that digital property can hold extraordinary sentimental value, and in some cases substantial financial value,[251] there is clearly a need for the Florida Probate Code to recognize digital assets and provide a consistent framework for fiduciaries to access these accounts and administer them accordingly.[252]

V. CONCLUSION

It takes some time for legislatures to hammer out a permanent solution to the issues that arise with digital estate planning and fiduciary

245. FLA. STAT. § 733.608(1).
246. *See id.*
247. *See id.*
248. *See id.*; *supra* notes 114–21 and accompanying text.
249. *See* FLA. STAT. § 733.608; Dosch & Boucher, *supra* note 49; discussion *supra* Part III.
250. *See* FLA. STAT. § 733.608.
251. Lamm et al., *supra* note 13, at 390–91.
252. *See supra* Part IV.

management.[253] Legal scholars have presented several suggestions on how to properly plan for a digital estate, including taking an inventory of all accounts and listing all relevant user names and passwords.[254] Other suggestions include regularly backing up and expressly authorizing ISP to disclose their information to their fiduciaries.[255] This is, of course, when an account holder has planned out his digital estate; however, when no plan exists, a fiduciary should consult an attorney and so long as there is not a criminal investigation, request and create copies of the content of the digital property.[256]

While these suggestions are currently necessary in Florida, they would not be if Florida would enact the UFADAA, at least in part.[257] Florida should establish a digital assets statute that gives direct access to the decedents' or incapacitated individuals' guardian to electronic e-mail communications, as well as any and all other digital assets, including social media accounts.[258] To help ensure there is not subsequent litigation, Florida should adopt section 9 of the UFADAA, to ensure ISPs do not fear subsequent civil litigation.[259] Furthermore, Florida legislators should take note of the prior states' attempt at addressing the digital assets issues and refrain from making theirs too limited in scope.[260] Incorporating all digital assets, including social media, would help ensure they do not end up with the same latent ambiguity as Rhode Island, Virginia, and Connecticut.[261] Lastly, Florida legislators should strongly consider section 8 of the UFADAA.[262] This section develops strong fiduciary authority while maintaining the necessary responsibilities to ensure the decedent's privacy is maintained and their final wishes are respected.[263]

253. *See* Lamm et al., *supra* note 13, at 416.
254. *Id.* at 416–18.
255. *Id.*
256. *Id.*
257. *See* UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, Prefatory Note (2014).
258. *See id.* § 4 (2014).
259. *See id.* § 9.
260. *See id.* Prefatory Note.
261. CONN. GEN. STAT. § 45a-334a (2014); R.I. GEN. LAWS § 33-27-3 (2014); VA. CODE ANN. § 64.2-110 (2014); UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT, Prefatory Note.
262. *See* UNIF. FIDUCIARY ACCESS TO DIGITAL ASSETS ACT § 8.
263. *See id.* § 8(b).