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FLORIDA FAMILY LAW BOUNDS OF ADVOCACY: A MANDATE FOR COLLABORATIVE PRACTICE

JOSHUA AARON JONES*

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I. INTRODUCTION

In the quest for a highly professional and ethical society of attorneys, the well-intentioned Florida Bar and sister state bar associations have created various committees, reports, recommendations, and law professionalism guidelines.1 Yet, despite these ongoing efforts, scholars tell us that professionalism—an apparently elusive, aspirational state of legal work—has

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continued to decline. Rather than create one streamlined source of guidance or proactive solutions that look toward the problems of evolving technologies, good intentions have only resulted in more and more committees, reports, recommendations, and law professionalism guidelines, sometimes the same material under a different name. The Henry Latimer Center for Professionalism (“HLCP”) is the hub in a wheel of Florida attorney professionalism resources, with many spokes. The mass of materials give the impression that Florida attorneys are over-regulated.

To be sure, HLCP is an important, award-winning, and highly regarded project. However, it still remains that attorneys must wade through a web of professionalism regulatory sources, including: (1) Oath of Admission to the Florida Bar; (2) the Florida Bar Creed of Professionalism; (3) the Florida Bar Professionalism Expectations; (4) the Rules Regulating the Florida Bar; and (5) the decisions of the Florida Supreme Court. If those were not enough, a Florida attorney would be foolish to ignore the Guidelines for Professional Conduct, the Standards for Imposing Lawyer Sanctions, or the Professionalism Handbook. These offer great insight into the methods and the levels of attorney discipline that arise from breaches of the various guidelines. Who comes up with it all? Technical

3. See Rizzardi, supra note 1, at 694–97, 706.
6. See Rizzardi, supra note 1, at 694–95.
7. About the Center for Professionalism, supra note 4; see also Florida Bar v. Norkin, 132 So. 3d 77, 89 (Fla. 2013) (per curiam).
9. Id.
10. Id. at vi–xiv. The earliest version of this set of standards was published in 1989, and the most recent revision was 2015. Id. at xiv.
12. See Fla. Sup. Court Comm’n on Professionalism et al., supra note 8, at xviii, xxiv.
13. See id. at xv–xviii.
15. Fla. Sup. Court Comm’n on Professionalism et al., supra note 8, at vi.
16. Id. at xx; Fla. Bar, supra note 14, at 2, 4.
administrative processes aside, the Florida Bar maintains a Standing Committee on Professionalism that works closely with the Committee on Student Education & Admissions to the Bar, while the Florida Supreme Court has a Commission on Professionalism and Civility. 18

And then, there is family law. 19 Family management attorneys commit to an even higher level of professionalism with yet another set of rules—the Florida Family Law Bounds of Advocacy (“BoA”). 20 Are family lawyers so lacking in moral and interpersonal skills that they need an additional guide for professionalism designed just for them? 21 Though some who have personally experienced a family or marital legal crisis might say that family lawyers do need extra rules, 22 the BoA Preliminary Statement explains that:

The purpose of the Bounds is to guide Florida family lawyers through the quagmire of professional and ethical dilemmas that are unique to the practice of family law. The intent is to suggest a higher level of practice than the minimum baseline of conduct required by the Rules Regulating [t]he Florida Bar. Many family lawyers encounter situations where the rules provide insufficient guidance. 23

Thus, the point of the BoA is not to add a layer of prohibitory conduct for a practice area allegedly run amok, but rather, it is to help attorneys navigate this very challenging field of law unique from all others. 24 To date, there has not been a Florida ethics opinion that considers the BoA. 25 However, proceed with caution. 26 If the Florida Bar views other

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17.  See Fla. Supreme Court Comm’n on Professionalism et al., supra note 8, at xiv.
20.  See id. at 1–2.
21.  See id. at 2. To be sure, the spirit behind the BoA is to contextualize professionalism issues within the unique circumstances of inter-family relations. Stephen Sessums et al., Bounds of Advocacy: Goals for Family Lawyers in Florida 5 (2004).
22.  See West et al., supra note 19, at 2.
23.  Id.; see also R. Regulating Fla. Bar 4.
24.  See West et al., supra note 19, at 2.
proficiency guidance as mandatory, why shouldn’t the profession see the BoA as mandatory in the context of family law?27 Going a step further, given the parallels between collaborative process philosophy and the spirit and points of the BoA, it is reasonable to suggest that there is now a mandate for family law practitioners to offer collaborative dispute resolution as the default option for family legal matters.28 I suggest family attorneys accept “a higher level of practice than the minimum baseline.”29

This discussion offers an overview of the BoA, collaborative dispute resolution, and an argument that all Florida family law attorneys are now required to offer collaborative process as the default standard method of dispute resolution, or at the very least, all family attorneys should be trained so that they are knowledgeable of the collaborative process and are able to fully inform their clients of all options.30

II. THE BOA

Florida adopted the BoA in 200431 following the American Academy of Matrimonial Lawyers Model Bounds of Advocacy.32 That step forward was in the wake of Florida’s creation of a unified family court system.33 In creating the unified family court, the Florida Supreme Court explained that families need “a system that provide[s] non-adversarial alternatives and flexibility of alternatives; a system that preserve[s] rather than destroy[s] family relationships; . . . and a system that facilitate[s] the process chosen by the parties.”34 The unified family law concept and BoA are important foundations to Florida’s growing philosophy of therapeutic justice,35 and the

26.  West et al., supra note 19, at 2; see also Fla. Supreme Court Comm’n on Professionalism et al., supra note 8, at vi.
27.  West et al., supra note 19, at 2; see also Fla. Supreme Court Comm’n on Professionalism et al., supra note 8, at vi.
29.  West et al., supra note 19, at 2.
30.  See discussion infra Sections II, III, IV.B, V.A, V.C.
31.  West et al., supra note 19, at 1.
32.  Id.
33.  See In re Report of the Family Court Steering Comm., 794 So. 2d 518, 523 (Fla. 2001).
34.  Id.
35.  Id. at 522; William W. Booth, History and Philosophy of the Juvenile Court, in Florida Juvenile Law and Practice 1-38 (15th ed. 2018); Family Court Steering Comm., Proposed Model Family Court Plan, Fla. B. News, Sept. 1, 2000, at 4 (explaining the concept of therapeutic justice); see also West et al., supra note 19, at 7; About the ISTJ.
official recognition of collaborative practice is another maneuver towards prioritizing peaceful dispute resolution.  

Recently, members of the Florida Bar Family Law Section received a beautiful, printed version of the revised BoA. The Florida Family Law BoA is divided into six broad topics which are further subdivided into narrower issues that are often encountered by family law attorneys:

1. Professional Cooperation and the Administration of Justice;  
2. Competence and Advice;  
3. Client Relationship and Decision-Making;  
4. Conflict of Interest;  
5. Fees; and  
6. Children.

Each of the sub-issues in these categories is complimentary to the collaborative pillars: Competency, confidentiality, good faith negotiation, and informed consent.

Given recent ethics opinions, such as Florida Bar v. Norkin and In re Code for Resolving Professionalism Complaints, extra professionalism
guides should be viewed as mandatory, not merely aspirational.47 Yet, the revised BoA’s Preliminary Statement implies that the BoA is only aspirational.48 In re Code for Resolving Professionalism Complaints does not mention the BoA,49 however, its omission from the cadre of integrated mandatory professional standards should not imply that the Court muted the BoA.50 The Court’s underlying public policy assertion is clear: Guidance produces stronger professionalism, thereby protecting legal consumers and the profession, and such resources should be followed.51 The various professionalism guides are not mere façades of attorneys’ commitments to professionalism.52 The BoA should be a guiding star of professionalism mandates, at least as to family law attorneys.53

If the legal community is to view the BoA as mandatory for family lawyers, how do we define family lawyer?54 Anyone who has called themselves a family lawyer has certainly been met with a response along the lines of: So, like, divorces?* Do you do custody cases?* Or adoptions?* Do you do wills?* Okay, let me ask you something.* Exactly which lawyers is the BoA meant to guide?55

The current BoA lacks a definition for family law or family lawyer.56 What, then, is a family law case?* Neither the statutes, the professional rules, or various works of professional guidance provide a precise definition of family law.57 Perhaps board certification is the fine line, but board

47. See Sessums et al., supra note 21, at Preliminary Statement. Note that the recent BoA revision does not use the term aspirational or even aspire; whereas, the prior BoA and its predecessors included the language, “[b]ecause the goals aspire to a level of practice above the minimum established in the FRPC, it is inappropriate to use them to define the level of conduct required of lawyers for purposes of malpractice liability or discipline.” Id.

48. See West et al., supra note 19, at 2.


50. See West et al., supra note 19, at 2.

51. Id. at 1–2.

52. See Fla. Supreme Court Comm’n on Professionalism et al., supra note 8, at xv.

53. West et al., supra note 19, at 1–2.

54. Sessums et al., supra note 21, at 5.

55. See id.

56. See West et al., supra note 19, at 2. Though the previous version of the BoA attempted to define the practice area, it only offered a circular definition of family lawyer: A family lawyer is defined to mean one who handles a family law matter. Sessums et al., supra note 21, at 5.

certification is optional.\textsuperscript{58} Further, there are family law issues that overlap many board certification areas, such as adoption, education law, elder law, immigration and naturalization, juvenile law, marital and family law, real estate, and wills and trusts.\textsuperscript{59} Each of these has a significant impact on families.\textsuperscript{60} Is a probate attorney a family lawyer?\textsuperscript{61} Education lawyer?\textsuperscript{62} Estate planner?\textsuperscript{63} Real estate advisor?\textsuperscript{64} What about the criminal attorney whose client also needs a divorce?\textsuperscript{65} Not even the Florida Bar Family Law Section Bylaws define family law.\textsuperscript{66} One can gather hints from the Family Law Section committees in the bylaws, but those clues are also vague—for example, children’s issues.\textsuperscript{67} However, lack of a committee for a particular issue should not be indicative of a practice area’s exclusion from the concept of family law.\textsuperscript{68} Perhaps, the BoA enshrouds a much larger portion of the Florida Bar than even family lawyers, whoever they may be, realize.\textsuperscript{69}


\textbf{Marital and family law} is the practice of law dealing with legal problems arising from the family relationship of husband and wife and parent and child, including civil controversies arising from those relationships. In addition to actual pretrial and trial process, \textit{marital and family law} includes evaluating, handling, and resolving such controversies prior to and during the institution of suit and post judgment proceedings.

\textbf{Marital & Family Law Certification, supra.}

\textsuperscript{59} See \textit{WEST ET AL., supra} note 19, at 25.

\textsuperscript{60} See \textit{id.}


\textsuperscript{66} See Fla. Bar Fam. L. Sec. By-Laws, art. I.

\textsuperscript{67} See \textit{id.} art. VII.

\textsuperscript{68} See \textit{id.}

\textsuperscript{69} See \textit{WEST ET AL., supra} note 19, at 2.
III. WHAT IS COLLABORATIVE FAMILY LAW?

Collaborative family law is a type of therapeutic justice focused on dispute resolution outside of court, with the help of an interdisciplinary team of professionals. Collaborative process can also be useful in proactive legal planning, such as contract negotiations and premarital agreements. Through interest-based negotiations, families reach a rational conclusion via respectful negotiations. The parties improve communication and problem-solving skills, a necessity for co-parenting success. In theory, those new skills will produce a positive impact on those individuals and, in turn, their communities. Collaborative process also offers positive mental health benefits for the professionals. The broader goal among the collaborative movement is to create collaborative cultures, whether disputes are between children, neighbors, businesses, customers or families. The most ardent collaborative professionals hope to evolve their professions and communities so that fellow citizens are empowered to problem-solve together, instead of resorting to the war of litigation.

As a matter of professionalism, collaborative philosophy rests on four pillars, each reliant on informational transparency: Competency, confidentiality/non-confidentiality, good faith negotiation, and informed consent. Attorneys and their clients work with a neutral facilitator, usually a licensed mental health professional, a financial professional, and/or any other expert that the family’s situation may require, such as a real estate appraiser. There are several models within the collaborative concept,

70. See 23 STEVEN SCOTT STEPHENS, FLORIDA FAMILY LAW § 15:1 (2018 ed.).
71. Id. § 15:7.
72. See id. § 15:1.
73. See id. § 15:22.
75. See STEPHENS, supra note 70, § 15:15; Michael J. Higer, Recognizing We Have a Problem: The Mental Health and Wellness of Lawyers, FLA. B.J., Jan. 2018, at 4, 4. Given that the Florida Bar has found it necessary to create an entire division—the Mental Health and Wellness Center—it goes without saying that the status quo of litigation is not healthy for attorneys. Higer, supra, at 4.
76. See STEPHENS, supra note 70, § 15:1.
79. STEPHENS, supra note 70, § 15:1.
reiterating the method’s flexibility to suit the needs of each family or business.\textsuperscript{80}

Except for the attorneys, all of the experts are neutral—the experts cannot be hired for future litigation.\textsuperscript{81} The attorneys cannot be hired for future litigation between the same family members.\textsuperscript{82} If the collaborative process fails, all professionals, including the attorneys, must withdraw from the case.\textsuperscript{83} Thus, the protocols create great incentive to minimize adversarial conflict and to find a solution.\textsuperscript{84} Though the withdrawal fail-safe may seem like a harsh consequence, it prevents disgruntled spouses from using courts for vengeance or attorneys from using courts for grand-standing.\textsuperscript{85} The parties are not allowed to use the threat of litigation to force an agreement in the collaborative process.\textsuperscript{86}

Many attorneys reject collaborative philosophy for fear of losing the lucrative revenue stream that litigation brings—assuming the bill is paid.\textsuperscript{87} Offering collaborative dispute resolution does not require one to give up a litigation practice; it is merely another service.\textsuperscript{88} There are very few Florida attorneys who exclusively practice collaborative family law.\textsuperscript{89} Some cases may not be appropriate for collaborative process, such as families with...

\begin{footnotes}
\item[80.] Id.
\item[81.] Id. app. 15A.
\item[82.] See Sessums et al., supra note 21, at 25.
\item[83.] Stephens, supra note 70, § 15:1.
\item[85.] R. Regulating Fla. Bar 4; Merlin, supra note 84, at 53, 56; Stephens, supra note 70, § 15:1.
\item[86.] Merlin, supra note 84, at 53.
\end{footnotes}
ongoing domestic violence.\(^90\) There will always be a need for family law
litigators.\(^91\)

Plus, a focus on revenue loss ignores the BoA’s requirement to resolve family disputes in an efficient manner, while minimizing costs and conflict.\(^92\) Resistant minds fail to recognize that the efficiency of the collaborative process frees up staff time and allows for a higher volume of cases completed in only a few months, rather than a few years.\(^93\) And the method works.\(^94\) According to research from the Florida Academy of Collaborative Professionals, ninety-two percent of family law cases that utilized the collaborative process reached a full settlement on all issues, including child time-sharing.\(^95\)

The Collaborative Process Act became effective in 2016, along with Florida Bar Rule 4-1.19 in 2017.\(^96\) Of particular interest in this discussion is that, though those who practice collaborative family law must obtain informed consent from a client, acknowledging that the attorney disclosed all possible methods to resolve the case,\(^97\) there is not a corresponding mandate for litigators.\(^98\) Rule differentiation between practice methods, in the same legal subject matter, does little to advance professionalism.\(^99\)

IV. PARALLELS BETWEEN COLLABORATIVE STANDARDS AND ETHICS AND THE BOA

A. Parallels

The collaborative philosophy and protocols reflect the BoA and vice versa.\(^100\) Many of the BoA points consider issues already governed by other

\(^91\) See Kane, supra note 61.
\(^92\) See West et al., supra note 19, at 2; Danois, supra note 87.
\(^93\) See Sheridan & Markus, supra note 88.
\(^94\) See id.
\(^95\) Statistics on Collaborative Divorce in Florida (1/31/2018 Update), supra note 89.
\(^97\) See Int’l Acad. of Collaborative Prof’ls, supra note 44, at 8–9; Merlin, supra note 90, at 38–39.
\(^98\) Rizzardi, supra note 1, at 706–07; Mary T. Robinson, Mandating Civility: Wisdom or Folly?, 22 PROF. LAW., no. 2, 2014, at 16, 17, 22.
\(^99\) See R. Regulating Fla. Bar 4; Rizzardi, supra note 1, at 695.
\(^100\) West et al., supra note 19, at 23; What Is Collaborative Divorce?, supra note 36.
rules, such as attorney fees, but the following are on point for the success of a collaborative family law case, and failure to observe the BoA would probably cause a collaborative process to collapse.101

1.1 A lawyer must strive to lower the emotional level of family disputes by treating everyone with respect . . . .

1.8 A lawyer must cooperate in the exchange of discovery . . . .

1.9 A lawyer must not use discovery for delay, harassment, or obstruction . . . .

1.17 A lawyer must avoid disparaging personal remarks or acrimony toward the opposing party, opposing counsel, third parties, or the court . . . .

2.1 A lawyer should advise the client of the emotional and economic impacts of altering the family structure, and explore all options including reconciliation . . . .

2.2 A lawyer should advise the client of the potential effect of the client’s conduct in disputes involving children . . . .

2.3 A lawyer must advise the client about alternative dispute resolution . . . .

2.5 A lawyer should attempt to resolve family disputes by agreement and should consider all appropriate means of achieving resolution . . . .

2.8 A lawyer should endeavor to achieve the client’s lawful objectives as economically and expeditiously as possible . . . .

3.5 A lawyer should share decision-making responsibility with the client, and counsel the client about the propriety of the objectives sought and the means employed to achieve them . . . .

6.1 A lawyer representing a parent should consider the welfare of the minor children and seek to minimize the adverse impact of the family law litigation on them . . . .

101. See West et al., supra note 19, at 44–45; Merlin, supra note 90, at 39–40.
6.2 A lawyer should not communicate with minor children regarding issues in the litigation.

6.3 A lawyer must counsel a client not to use children’s issues for leverage in the litigation.

6.4 A lawyer must consider any impact on a child of bringing that child to court. This should be done in full discussion with the client and other professionals involved.

6.5 A lawyer must reveal information to the extent the lawyer reasonably believes necessary to prevent a client from committing a crime or to prevent a death or substantial bodily harm to another.

The guidance on children is of paramount importance to the collaborative process. However, the most important takeaway for this discussion is 2.3: “A lawyer must advise the client about alternative dispute resolution.” If a family lawyer is not trained in collaborative practice, that lawyer cannot fully inform a client about all of the alternative dispute resolution options and, thus, if the Florida Bar is to take the BoA as mandatory, rather than aspirational, the attorney would be lacking in professional responsibility if the attorney excludes collaborative process from their intake meetings.

Before passage of the Collaborative Process Act and Rule of Professional Regulation 4-1.19, there was room to argue that collaborative law training was unnecessary. However, now, even if a litigation-motivated family lawyer has no interest in ever working with the collaborative method, the BoA requires that attorney to inform clients about alternative dispute resolution. The comment to BoA 2.3 explains:

102. WEST ET AL., supra note 19, at 3–6.
104. WEST ET AL., supra note 19, at 23.
105. See id. at 7, 23, 53.
107. WEST ET AL., supra note 19, at 23; see also Abney, supra note 106, at 3–4.
A lawyer should advise clients of various methods of alternative dispute resolution, including collaborative law, mediation, arbitration, private judging, and parent coordination, among others. Family lawyers must have sufficient knowledge about alternative dispute resolution to understand the advantages and disadvantages for a particular client and to counsel the client appropriately about the particular dispute resolution method selected.  

Litigators need to understand the collaborative process in case a client consults the litigator after a collaborative process failed. Attorneys must know the boundaries within which the litigation may proceed out of the collaborative process—for example, disqualification of prior experts and confidentiality of prior discussions. Given the statute, bar rule, revised BoA, and more than a decade of collaborative practice in Florida, it is perplexing that the Marital and Family Law Certification Exam Review course does not offer a session on collaborative practice and that the Board Certification Exam does not cover collaborative family law.

B. Collaborative Process as a BoA Mandate

In *Florida Bar v. Norkin*, the court expanded the breadth of materials to be consulted in Bar disciplinary matters. Mr. Norkin had a problem with his temperament in court and toward opposing counsel, including such shenanigans as raising his voice, using an angry tone, constantly interrupting others, harassing judges with frivolous questions, accusing judges of favoring opposing counsel, and continuing to practice after he was suspended.
To be clear, “Mr. Norkin’s transgressions were on the extreme end of a behavioral spectrum, but it is the Court’s analysis that should draw attention.”115 “The Court . . . went beyond the Florida Rules of Professional Conduct [("FRPC")] and held Norkin to the aspirational standards of the Guidelines for Professional Conduct.”116 In his offenses to the Guidelines, the Court found that Norkin breached FRPC rules.117 If the Court relies on the Guidelines to find violations of the FRPC, the same should be true of the BoA.118

With these directives, it is difficult to understand any family attorney’s disregard for or refusal to become trained in the collaborative family law process.119 The BoA should be interpreted as a mandate “that family attorneys fully support collaborative family law process, in almost every case . . . as the first-line option.”120 Given the Court’s approach to its analysis of the Rules Regulating Professional Conduct, a family law attorney must, at a minimum, be aware of and explain collaborative practice as an option.121

With themes centered on rational problem-solving, efficiency, and preservation of dignity, lawyers in other practice areas may also find value in the BoA.122 The interpersonal communication points in the BoA are helpful to any profession.123 A review of the BoA certainly won’t harm one’s practice.124 Collaborative process should be seen as a valuable tool in any attorney’s toolbox.125

116. Id.; FLA. SUPREME COURT COMM’N ON PROFESSIONALISM ET AL., supra note 8, at xv–xvii.
117. Norkin, 132 So. 3d at 90–91; FLA. SUPREME COURT COMM’N ON PROFESSIONALISM ET AL., supra note 8, at xv–xvii.
118. See Norkin, 132 So. 3d at 90–91; WEST ET AL., supra note 19, at 2; Jones, supra note 28.
119. See Abney, supra note 106, at 1; WEST ET AL., supra note 19, at 23.
120. Jones, supra note 28.
121. See R. Regulating Fla. Bar 4; WEST ET AL., supra note 19, at 23.
122. See SESSUMS ET AL., supra note 21, at 5; WEST ET AL., supra note 19, at 2.
125. See Abney, supra note 106, at 3.
V. PUBLIC POLICY PROPOSALS

A. Prioritize Collaborative Process over Litigation

The practice of family law generally—however one may define family law and the practice of law—is in a state of identity crisis. Once, the industry was a mysterious, retainer-and-hourly-billing structure hidden in dark, wood-paneled offices with Dictaphones. Now, law practice is technology-driven, unbundled offers and flat fee services, is practiced in shared work spaces, and caters to sophisticated clients. Families and businesses need to move faster than our courts can keep up and faster than the old way of adversarial law. Meanwhile, the Internet and other computational law platforms are devouring potential business. The growth of technology has led to a transfer of information from the elite and highly educated to the masses. Attorneys need to view their clients as partners in problem-solving, rather than uninformed followers. How long do we ignore the call for change?

Collaborative practice offers an efficient process focused on the end goal of solutions. The past several decades of family law have created a status quo for a my-side versus your-side mentality. That perception is pointless because

131. Bargate, supra note 128.
132. See STEPHENS, supra note 70, § 15:1.
133. See Baer, supra note 129; Walker, supra note 126.
134. See Abney, supra note 106, at 1.
135. Id. at 4.
there are no winners in family law. If a family is before a court, for any other reason than a marriage or an adoption, no one walks away the champion. The family has already lost more than either side could ever be awarded by a court.

The adversarial legal philosophy never made sense in the family arena. Family law emerged over centuries of social equality progress in the context of adversarial justice systems. It goes without saying that a judicial system evolved for businesses, property, and criminal justice is ill-suited for the task of family management. The same is obvious given that family court dockets are backlogged for months and families end up bankrupt because of divorce.

B. Consolidate Professionalism Resources

The Florida Bar should consolidate the universe of professional guidelines and rules into one simplified body of rules, sufficient with commentary to encompass the guidance. With the BoA in mind, Florida attorneys need not differentiate ethical standards by practice area or scatter guidance among many different sources and committees. Technology offers limitless options to maximize the consolidation of these materials. The new LegalFuel initiative could be an excellent venue to house such a consolidation, along with cross-referencing and hyperlinking to ethics opinions and historical materials. Simplification of the sources will also

136. Id.
137. See id.
138. See id.; Baer, supra note 129.
139. Baer, supra note 129.
141. See Joslin, supra note 140, at 2–3; Lee & Smith, supra note 140, at 53–64.
143. See Rizzardi, supra note 1, at 722. Perhaps we could also consolidate the Florida Rules of Civil Procedure, Florida Probate Rules, Florida Family Rules, Florida Juvenile Department Rules, Florida Criminal Procedure Rules, Florida Rules of Judicial Administration, etc. See id.
144. See WEST ET AL., supra note 19, at 1–2.
145. See Bargate, supra note 128.
benefit consumers. The layman cannot understand his rights or role in the attorney-client relationship if even attorneys are on a breadcrumb trail to sort out the ethical/professionalism standards.

C. Modernize Law School Pedagogy

Law school education pedagogy should change tones. Most classes present a theoretical perspective aimed at future litigators. Practical courses focus on writing or litigation. Even clinics have stalled at mediation as an offering of alternative dispute resolution training. Only in advanced coursework, by which time a young attorney’s practice philosophy has already been indoctrinated for adversarial work, does an aspiring lawyer learn about mediation, arbitration, and negotiation. Classes that focus on proactive client/business management and solutions are almost unheard of. Why aren’t we teaching young attorneys to first look for solutions rather than first filing a case in court? Problem-solving should be the priority; litigation should be a last resort. Until our law schools focus on peaceful problem solving as a priority, courts will remain overburdened—thereby exhausting tax coffers, leaving attorneys

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147. See West et al., supra note 19, at 33; Rizzardi, supra note 1, at 722–23.
148. See Rizzardi, supra note 1, at 692, 722.
151. Id.
154. See Segal, supra note 152; Cohen, supra note 149.
156. Id. at 181.
157. See Judy Gutman, Litigation as a Measure of Last Resort: Opportunities and Challenges for Legal Practitioners with the Rise of ADR, 14 LEGAL ETHICS 1, 17 (2011).
miserable, and keeping clients unhappy about billing and the longevity of their cases.

D. Collaborative Process for Board Certification

The Florida Family Law Section must add collaborative process to the board certification review course and exam. With a specific statute, a specific rule, and more than a decade of successful collaborative practice in Florida, it is disingenuous for a board certified family and matrimonial law attorney—untrained in the collaborative method—to call themselves an expert in family law. This dispute resolution method is no longer a goal of a handful of attorneys in South Florida. It is a statewide, statutory, and professional responsibility reality. A Florida family law attorney cannot comply fully with the BoA if the attorney is untrained in collaborative process and refuses to discuss the option with clients. If fully committed to the spirit of the BoA, the Florida Family Law Section should prioritize collaborative practice, include it in the Family and Matrimonial Law Board Certification review course and exam, and support all efforts to train attorneys in the practice method.

VI. CONCLUSION

Florida courts have never shied from therapeutic jurisprudence. Collaborative practice offers a philosophy that can have positive impacts on professionals, court resources, and, most importantly, families. That

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161. See Merlin, supra note 84, at 53; Marital and Family Law Certification Examination Specifications, supra note 58, at 1.

162. See FLA. STAT. § 61.55 (2018); Merlin, supra note 90, at 38; Marital & Family Law Certification, supra note 58, at 1.

163. See FLA. STAT. § 61.55; Merlin, supra note 90, at 40.

164. FLA. STAT. § 61.55; Merlin, supra note 90, at 40.

165. See WEST ET AL., supra note 19, at 34, 53.

166. See Abney, supra note 106, at 4; Joslin, supra note 140, at 24; Marital and Family Law Certification Examination Specifications, supra note 58, at 1; About the ISTJ, supra note 35.


168. See Abney, supra note 106, at 1, 3; Merlin, supra note 90, at 38, 40.
translates to a healthier society. A divorce, paternity, time-sharing, alimony, or modification case need not ruin a family’s financial and emotional well-being, and the BoA forbids family law attorneys to work in a way that leaves a family in a worse position—emotionally or financially. The collaborative family law method satisfies attorney ethical obligations and has the potential to change lives and communities—the point of therapeutic justice. So, then, why do so few family attorneys know about collaborative process; and worse, why do so many lawyers refuse to recognize it as one of the options that should be offered to every client? Collaborative process can reduce or eliminate the negative and unavoidable outgrowths of family law litigation. The BoA should be viewed as a mandate for collaborative family law process.

169. See Merlin, supra note 90, at 41.
170. See WEST ET AL., supra note 19, at 34.
171. See Family Court Steering Comm., supra note 35, at 4; see also WEST ET AL., supra note 19, at 7.
172. See Abney, supra note 106, at 1.
173. Id. at 3–4.
174. See id. at 4; Jones, supra note 28.
SUPREME COURT MAKES IT EASIER FOR PEOPLE TO WIN BIG

ALEXANDRA EICHNER*

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I. INTRODUCTION

Enacted in 1992, the Professional and Amateur Sports Protection Act ("PASPA") barred all but a small handful of states from legalizing sports betting.¹ Sports betting had come to be so disfavored by so many members of the public, and of the federal government, that Congress took matters into

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their own hands with this federal legislation. PASPA stood as federal law until May 14, 2018, which is when the Supreme Court of the United States declared it unconstitutional in its entirety due to the commandeering effect it had on the states. The reasoning behind this Supreme Court opinion stands to not only affect legalized sports betting, but also subjects not related to gambling at all. Debates on sanctuary cities, gun control, and marijuana possession will likely feel the repercussions of this Supreme Court decision.

While many people and organizations are in opposition to legalized sports betting—including a number of critical athletes, the National Collegiate Athletic Association (“NCAA”), and other sports leagues—many benefits are likely to follow sports gambling legalization efforts of the states. Sports gambling is a multi-billion dollar industry in the United States today, and the recent Supreme Court decision to allow states to decide for themselves if they will allow sports betting will benefit both state and national economies by greatly increasing tax revenues. And that is not the only benefit. A safer market will be created for sports bettors, jobs will be created, a bigger economic impact will be felt, the integrity of sporting events will be better protected, people with a gambling addiction may receive treatment faster, and the games will be more exciting for the leagues and viewers.

Many state legislatures are quickly reacting to this decision and are beginning to discuss possible legalization in their own states. A small handful have already enacted full-scale sports gambling, while another handful have recently passed bills. Fifteen others have introduced sports

3. See Murphy, 138 S. Ct. at 1461, 1485.
7. Smiley, supra note 6.
8. See id.
9. Id.
11. See id.
gambling bills that are awaiting passage. Almost half of the states have reacted to this news in some way and are engaged in efforts to move their state towards legalized sports gambling. The State of Florida, specifically, has laws that prohibit sports gambling. These “laws would need to be repealed or amended before . . . sports [betting] would be [legal in the state].” These actions have not been taken by the Florida Legislature yet. But that is not to say that Florida will not legalize sports gambling in the future. However, if Florida does, those legalization efforts may prove to be more challenging in that state than in some of the other states. For one, there are seven Indian-owned and operated casinos in Florida. This throws a third party—one not too keen on adding sports gambling to the casinos—into the mix of negotiators for legalization. Second, a ballot initiative stood as an obstacle. Florida had an amendment on the ballot in November of 2018 that passed requiring voter approval to expand casino gambling. It is no longer left to the Legislature. So, the future of legal sports gambling in Florida is still an open question.

II. HISTORY OF PASPA

A. Legislative Objectives

As set out in the 1991 Senate Report, the intent of PASPA is clear: “[T]o prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity.”

Those who testified in favor of the legislation, including commissioners of the major sporting leagues and professional athletes, argued that gambling posed a threat to the character of team sports. They maintained that legalized sports gambling takes healthy, clean competition, and a great symbol of teamwork, and turns it into something that represents a fast buck and “the desire to get something [from] nothing.” They believed that legal sports gambling would change the sports games that “stand for success through preparation and honest effort” for the worse. Those who testified were also concerned with the effect that legalized sports gambling would have on the teenagers in America. The newly developed technologies—designed to make gambling more convenient for adults—would make it easier for children to gamble, and many believed that “[g]overnments should not be in the business of encouraging people, especially young people, to gamble.”

Paralleled with the above concerns from those who work in the sports world were the federal government’s own concerns. It is clear from the Senate Report that the government itself believed this bill served the important public purpose of stopping the spread of “sports gambling and to maintain the integrity of our national pastime.” Congress feared that “[s]ports gambling threaten[ed] to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling.” Congress additionally believed that legal sports gambling would encourage gambling among young people and further, would undermine the public’s confidence in the character of sports, both amateur and professional. The government determined that if states controlled their own legalization of sports betting, the effects of state legalization would be felt throughout the country, as it

28. Id. at 4–5.
29. Id. at 5.
30. Id.
31. See id. at 6.
33. Id.
34. Id. at 4–5.
would be “difficult for other States to resist the lure.” Furthermore, the conclusion was drawn that illegal entrepreneurs who ran illegal gambling markets would always aim to beat their legal counterpart, meaning that legal sports gambling would surely increase illegal sports gambling.

To combat the public’s and Congress’s many concerns regarding this national problem of sports betting, the Federal Government chose to enact federal legislation that made it unlawful for state governments to “sponsor, operate, advertise, promote, license, or authorize by law” any type of wagering or betting scheme on games in which amateur or professional athletes are participating in, or on the performances of the athletes themselves.

This bill received not only support from the Federal Government, as evidenced by its birth as federal law, but also overwhelming national support. The National Football League (“NFL”), National Basketball Association (“NBA”), Major League Baseball (“MLB”), NCAA, as well as at least eight other major groups and many individuals supported this legislation. And on January 1, 1993, PASPA became federal law.

B. Cultural Roots

A study into the history of gambling in the United States, and how it came to have such a negative stigma surrounding it, helps to reveal a more complete motivation behind the passing of PASPA.

Gambling in America started in the 1600s. “All [thirteen] original colonies [had] established lotteries . . . [in order] to raise revenue.” Playing the lottery became so embedded into society and played such an important role in raising revenue, that gambling was regarded as a civic duty. Revenue generated from lotteries was “used to build churches and libraries,”

35. *Id.*
36. *Id.* at 7.
38. *Id.* at 8.
39. *Id.*
41. ROGER DUNSTAN, GAMBLING IN CALIFORNIA II-1 (1997); see also Professional and Amateur Sports Protection Act, § 3704, 106 Stat. at 4228.
42. DUNSTAN, supra note 41, at II-1.
43. *Id.* at II-2.
44. *Id.*
and even established the country’s oldest and most prestigious universities.\textsuperscript{45} Lotteries were so accepted that, in 1823, a private lottery was passed by Congress to raise money “for the beautification of Washington, D.C.”\textsuperscript{46}

During the 1800s, “[l]otteries were not the only form of gambling.”\textsuperscript{47} Because gambling was so popular and customary, betting on “horse racing [became] a popular form of gambling.”\textsuperscript{48} Additionally, casinos began their rise in popularity.\textsuperscript{49} Gambling continued to spread as the country began to grow and expand westward.\textsuperscript{50}

However, exploitation of the system was inevitable.\textsuperscript{51} Just one illustration of the abuse was the outcome of the 1823 lottery approved by Congress “for the beautification of Washington, D.C.”\textsuperscript{52} Those who organized that lottery escaped “with the proceeds and the winner [of the lottery] was never paid.”\textsuperscript{53} Opposition to lotteries and gambling started to increase.\textsuperscript{54} “[T]he prevalence of scandal[] and the belief that the poor were being targeted” was just one source of opposition that was starting to surround gambling.\textsuperscript{55} This opposition grew with religious disapproval and also a large social climate reform.\textsuperscript{56} Thus, gambling legislation became more complicated with the countervailing interests of raising revenue for the newly developing country, and the public’s newfound perception and understanding of the “[i]ncreasing evidence of fraud and dishonesty” associated with gambling.\textsuperscript{57} What once was an acceptable and encouraged practice in the early 1800s became prohibited by most states in the 1840s.\textsuperscript{58}

But after the Great Depression, [t]he antigambling mood changed tremendously.\textsuperscript{59} Legalized gambling was once again looked at as a way to raise much needed revenue for the economy that was in need of major stimulation.\textsuperscript{60} Massachusetts decriminalized bingo, and “[h]orse racing . . . wagering began to make a comeback.”\textsuperscript{61} “During the 1930s, [twenty-one]
states brought back [horse] racetracks” that had been outlawed and brought back with them “[n]ew laws and automated systems” to combat the dishonesty that came with them in the 1800s. Along with the reemergence of legal gambling was an attack on the illegal gambling that had run so rampant during the prohibition. Since then, states have been progressively legalizing forms of gambling once again, and today, almost every state allows some form of legal gambling. However, the negative stigma surrounding gambling never disappeared.

C. Precursors to the Law

While the cultural roots noted above are regarding gambling in the form of lotteries, racetracks, and the famously known casino atmosphere, sports gambling has specifically received its own negative criticism. Sports gambling was also popular in the 1800s, at the same time that “professional baseball began to gain popularity.” As baseball gained popularity, so did betting on it. As noted above, the fraud, dishonesty, and crookedness that came to be associated with gambling by some people in the 1800s, also attached to gambling on sports. The negative stigma that surrounded gambling in general during this time was worsened by the Black Sox Scandal in the 1919 World Series. “Some players from the favored [team], Chicago White Sox, were found to have fixed games at the request of gamblers,” causing their team to lose the World Series. This scandal was heard around the nation and gave the public the impression that sports bettors were criminals “trying to ruin the sanctity of the game for their own monetary [investment]”. While gambling was technically illegal at this time, many people considered illegal sports gambling to be victimless before the news of this scandal broke. Illegal sports gambling continued to grow through the

62. DUNSTAN, supra 41, at II-7.
63. Id.
67. Id.
68. Id.
69. DUNSTAN, supra note 41, at II-4; Martin, supra note 66.
70. Martin, supra note 66.
71. Id.
72. Id.
73. Id.
1920s, the *Golden Era of [S]ports.* College football, college basketball, and boxing were all gaining huge popularity among gamblers, “and baseball was [just] as . . . liked as ever.”

The growing illegal sports gambling marketplace—a “problem that simply would not go away”—warranted governmental intervention. Congress enacted a series of anti-racketeering laws to help combat the illegal underground gambling that was so prevalent. In 1950, the “Johnson Act prohibit[ed] interstate transportation of gambling devices.” Then in 1961, the Wire Act was passed. It prohibits interstate transmission of gaming information via wire communications facilities. This law “sought to target the mob’s most profitable racket” by prohibiting gambling on the nation’s communication systems. This law helped regulate interstate gambling activity, but did not specifically regulate intrastate activity—which would change later in 1992 with the enacting of PASPA. Also, in 1961, 18 U.S.C. § 1953 “limit[ed] interstate transportation of betting slips and paraphernalia,” 18 U.S.C. § 1952 prohibited “interstate travel or transportation in furtherance of racketeering,” and the Johnson Act was strengthened. Next, the Bribery in Sports Contests Act of 1964 was passed. This related to sports gambling indirectly. “It [made] it a crime to bribe or attempt to bribe an individual . . . to influence the outcome of a sporting event.” This law is important in understanding the backdrop of regulating sports gambling because a scheme to influence a sporting contest many times involves money and “bets placed on the outcome of [the game].” Subsequently, in 1970, “[the] Organized Crime Control Act enacts or modifies 18 U.S.C. §§ 1511, 1512, and 1513.”

74. *Id.*
75. Martin, *supra* note 66.
77. *Id.* at 230.
80. *Id.*
86. *Id.; see also* Act of June 6, 1964, § 224, 78 Stat. at 203.
1955, 1961, and 2516, [which] prohibit[s] an illegal gambling business, make[s] obstruction of state law enforcement” by one or more person involved in an illegal gambling business “unlawful, include[s] syndicated gambling as a racketeering activity, and permit[s] wiretapping for suspected syndicated gambling.”

In March of 1989, another scandal was heard around the world which further exacerbated the negative stigma surrounding those who gambled on sports. The MLB announced that famous athlete and then Cincinnati Reds’ manager, Pete Rose, was being investigated for serious allegations. It was revealed the next day, by Sports Illustrated, that the investigation into Rose had to do with ties he had to sports betting. John Dowd, as Special Counsel to Commissioner A. Bartlett Giamatti, led the investigation into Rose’s sports betting allegations and produced the Dowd Report, which detailed the findings of Rose’s betting on baseball games. In August 1989, Commissioner Giamatti concluded that Rose bet on baseball and was banned from baseball for life for gambling.

Just two months after Rose was banned from baseball, the government tried to intervene once again to help combat betting in the country, this time as an amendment to the Lanham Trademark Act, which was proposed with the aim of prohibiting state sanctioned lotteries. In 1990, another amendment was proposed, this time to the Comprehensive Crime Control Act, with the aim of prohibiting states from operating sports-related lotteries. The federal government was unsuccessful with both additional interventions into the gambling world as neither bill became law.

91. Glynn, supra note 89.
93. Pete Rose Chronology, supra note 90.
All of these precursors led up to February 1991 when the Senate Bill that would eventually become PASPA was introduced. Through this law, Congress stepped into the realm of intrastate sports gambling regulation, something it had not done before. It became illegal for states to authorize any type of sports gambling, with the exception of four states which were grandfathered in.

III. General Impacts of the Supreme Court Decision

A. No More Commandeering

Most Americans know that federal law is the “supreme law of the land.” They believe that no one can refuse its directives or question its dictates. After all, the Constitution says this. But, that is not entirely true. Federal laws passed pursuant to “the Constitution do stand as . . . supreme law.” But that does not mean that the federal government rules over everyone and everything in the country.

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The Tenth Amendment coupled with judicial interpretation of the Constitution has produced the conclusion that it is unconstitutional for the federal government to commandeer the state governments or to encroach upon their autonomy. In the recent case of Murphy v. NCAA, it was argued that PASPA violated this anti-commandeering principle by

100. Id.; U.S. CONST. art. VI.
102. U.S. CONST. art. VI.
103. Maharrey, supra note 101.
104. Id.
105. Id.
106. U.S. CONST. amend. X.
107. See id.; Mike Maharrey, Supreme Court’s Sports Gambling Opinion Is a Rare and Major Win for the Tenth Amendment, TENTH AMEND. CTR. (May 14, 2018), http://www.tenthamendmentcenter.com/2018/05/14/supreme-courts-sports-gambling-opinion-is-a-rare-and-major-win-for-the-tenth-amendment/.
When PASPA was enacted in 1992, an exception was carved out specifically for the state of New Jersey. New Jersey was given one year to set up sports betting schemes in the state’s casinos. At the time, New Jersey did not act upon that exception and they fell under the general ban. Nearly two decades later, the state changed their mind. The Legislature conducted hearings discussing the possibility of legalizing sports betting in an effort to help the state’s struggling casinos and racetracks. In 2011, the New Jersey Legislature asked voters via referendum whether sports gambling should be permitted. The results of the referendum showed that sixty-four percent of New Jersey voters voted in favor of an amendment to the New Jersey Constitution that would allow sports gambling. The New Jersey Legislature enacted a law that authorized certain kinds of sports wagering in New Jersey casinos and racetracks. The NCAA, NBA, NFL, MLB, and National Hockey League (“NHL”) sued the state of New Jersey under PASPA to enjoin the state law. New Jersey’s argument was that PASPA was unconstitutional because it violated the anti-commandeering principle by preventing New Jersey from being autonomous and amending its own laws. Conversely, the sports leagues argued that PASPA did not commandeer the states because no affirmative action on the states’ part was
required.\textsuperscript{120} The states only had to leave the existing law in place—in other words, sit back and do nothing.\textsuperscript{121}

The lower courts rejected New Jersey’s argument, siding with the sports leagues that the concept of anti-commandeering was not applicable in that instance because the states were not required to affirmatively do anything.\textsuperscript{122} “The Supreme Court [rejected] review of that decision.”\textsuperscript{123}

While the line between what constitutes commandeering and not commandeering can be thin, the Supreme Court of the United States has offered some guidance in the past.\textsuperscript{124} First, laws that are of general applicability—not directed at the states specifically—must be followed by the states.\textsuperscript{125} Second, incentives given to states for doing what the federal government wants are acceptable.\textsuperscript{126} And third, cooperative federalism—the “you do it or I will” approach—is acceptable.\textsuperscript{127} What is not allowed is telling the states or the state officials what they must do and invading their autonomy.\textsuperscript{128} The federal government has no power to force states into cooperating or implementing its own acts.\textsuperscript{129}

In 2014, New Jersey tried to help their casinos and racetracks again.\textsuperscript{130} This time, the state did not affirmatively legalize any kind of sports betting.\textsuperscript{131} Instead, it merely repealed the state prohibitions that existed regarding sports betting.\textsuperscript{132} The state \textit{artfully couched} the legalizing sports gambling law simply as a \textit{repealer}, even though the statute nonetheless made sports gambling in the state’s casinos and racetracks legal.\textsuperscript{133} Once again, the NCAA, NFL, NBA, MLB, and NHL challenged New Jersey’s actions in federal court.\textsuperscript{134} And the lower courts once again ruled in favor of the sports

\begin{thebibliography}{134}
\bibitem{footnote} Murphy, 138 S. Ct. at 1471; Howe, \textit{supra} note 1; \textit{see also} Professional and Amateur Sports Protection Act, \S 2, 106 Stat. at 4227.
\bibitem{footnote} See Howe, \textit{supra} note 1.
\bibitem{footnote} Id.
\bibitem{footnote} Id.
\bibitem{footnote} Id.
\bibitem{footnote} See New York, 505 U.S. at 177.
\bibitem{footnote} Id. at 185.
\bibitem{footnote} See id. at 173--74.
\bibitem{footnote} See id. at 175.
\bibitem{footnote} Maharrey, \textit{supra} note 101.
\bibitem{footnote} See Howe, \textit{supra} note 1.
\bibitem{footnote} Id.
\bibitem{footnote} Id.
\bibitem{footnote} Id.
\bibitem{footnote} Id.
\bibitem{footnote} Id.
\bibitem{footnote} Id.
\end{thebibliography}
leagues. However, this time, the Supreme Court granted review of the decision. New Jersey made the same argument in front of the Supreme Court that it had made before: PASPA unconstitutionally commandeers states by preventing them from repealing or amending their own state laws. The sports leagues also made the same argument that it was not commandeering because no affirmative action by the state was required.

On May 14, 2018, the Supreme Court agreed with New Jersey’s argument and struck down the federal law that infringed upon the reserved powers of the states. It was held that PASPA unconstitutionally “directs . . . state legislatures by telling them [that] they cannot repeal . . . state law.” Justice Alito, delivering the opinion of the Court, acknowledged that the legalization of sports gambling is a controversial issue. Important policy choices must be made regarding sports gambling, but the Court believed that they were not the proper people to make the decision. The federal government is free to regulate sports gambling directly if it wishes, but if it does not, then the decision is to be left to the individual states. The Supreme Court opinion states that PASPA regulates state government regulation, it does not regulate sports gambling directly. Thus, “each state is free to act on its own” regarding legalizing sports gambling because the Constitution “gives Congress no such power” to regulate state regulation. “[F]or the first time, the Court . . . included a constitutional basis for the anti-commandeering doctrine in [its] opinion” by stating that the anti-commandeering doctrine is:

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\text{[T]he expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the [s]tates . . . [c]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the}
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135. Howe, supra note 1.
136. Id.
138. Id. at 1471.
139. Id. at 1461, 1484–85.
140. See id. at 1481; Maharrey, supra note 107.
141. Murphy, 138 S. Ct. at 1468, 1484.
142. Id. at 1484.
143. Id. at 1484–85.
144. Id. at 1485 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).
145. Id. at 1484–85.
[s]tates. The anti-commandeering doctrine simply represents the recognition of this limit on congressional authority. 146

PASPA unconstitutionally commandeers states regarding regulation of legal sports gambling. 147

The Supreme Court went even further than deeply cementing this anti-commandeering doctrine further into law. 148 They expanded it. 149 “[T]he [Supreme] Court went on to invalidate all of PASPA, even [after only finding that] part of the law [was] unconstitutional.”150 By acknowledging that the other provisions cannot be severed from the unconstitutional ban on authorization of sports betting, the Supreme Court is further reinforcing this state sovereignty principle into law that will make it harder in the future “for the federal government to coerce states to bend to its will.”151

1. Obvious Effect on States

The most obvious result of this victory for federalism is that now states are free to decide for themselves if they will legalize sports gambling or not. 152 Nevada, Delaware, and New Jersey have already legalized full scale sports betting, with the latter two states having legalized it after the Supreme Court struck down PASPA in May. 153 Recent bills have passed in four other states and at least twelve states have introduced bills that are awaiting passage. 154 With almost half of the states moving forward so quickly after the Supreme Court decision, it is clear that the political environment regarding sports gambling is changing dramatically and quickly. 155

The other half of the states appear to have no activity regarding sports betting legalization efforts—yet. 156 It is possible that those states will make moves to amend or repeal existing laws they have in the future. 157 The only state in which legalized sports betting is classified as highly unlikely is

146. Maharrey, supra note 107; see also Murphy, 138 S. Ct. at 1475–76.
147. Murphy, 138 S. Ct. at 1485.
149. Id.
151. Maharrey, supra note 107; see also Murphy, 138 S. Ct. at 1484.
152. See Murphy, 138 S. Ct. at 1484–85.
154. Id.
155. See id.
156. Id.
157. See id.
Utah. This is because Utah has an anti-gambling provision written into its state constitution. A change to the state’s decades long opposition to gambling is likely too big of a departure from existing state policy for legalized sports gambling to be included in their future.

2. Broader Implications

A not-so-obvious result of this anti-commandeering decision is the impact it may have in the realm of other highly debated topics today—those not related to sports gambling at all.

One widely debated topic currently is the subject of sanctuary cities. Section 1373 of the United States Code is a federal statute that prohibits a government entity from restricting any other government entity or official from communicating with the Immigration and Naturalization Service regarding the lawful or unlawful immigration status of an individual. This statute “is at the heart of the . . . federal effort to . . . penalize” these areas that limit cooperation with federal immigration officers in order to protect illegal immigrants. Most sanctuary policies are instructions by state and local governments to not turn over information about immigrants. The Justice Department argues that these orders violate the statute. But after the recent anti-commandeering court decision, it is clear that the federal government cannot tell the states what to do. This includes telling the states that they cannot not follow federal tune either, i.e., they cannot not follow 8 U.S.C. § 1373. Now that the anti-commandeering principle has been further cemented into law, it is clear that the federal government will have a more challenging time claiming that sanctuary city policies should be enjoined.

Numerous cities have sanctuary policies, including New York, Seattle, Los Angeles, Chicago, and others with large immigrant
populations. President Trump has made it clear that he intends to defund these sanctuary cities in order to break their resistance to deportation of illegal immigrants. If this recent anti-commandeering decision begins to impact the topic of sanctuary cities, another constitutional issue may rise to the surface in regards to sanctuary cities—a taxing and spending issue. The Supreme Court has made it clear that, in order for Congress to impose a condition on their spending, the condition must be unambiguous so that states are fully informed of the consequences of accepting the federal funding. If a condition on federal funding meets the requirements, it is okay for the federal government to revoke the funding to the state and local governments if they do not comply with the condition that they agreed to upon accepting the money. What this means for Trump’s plan to defund the sanctuary cities is that his administration cannot cut off funding to sanctuary cities, unless they can show that the funding was specifically conditioned on cooperating with the federal government in efforts to deport illegal immigrants. If they are successful in showing that funding was conditional, then it is within the federal government’s power to take back the funding. However, this may pose a challenge to the Trump Administration because “[f]ew, if any, federal grants to state and local governments are conditioned on cooperation with federal deportation efforts.”

Additionally, this recent decision may be significant for state laws that wish to legalize “possession of some types of firearms” that the federal government may oppose. The federal government may no longer be able to block such legalization efforts “by passing laws that require states to continue to” ban firearm possession activities under their own laws. Moreover, this recent decision may “give[] states the green light to legalize marijuana under state law.” “If a state is constitutionally [allowed] to repeal its . . . ban on sports gambling,” then the same logic can

170. Somin, supra note 5.
171. Id.
172. See id.
175. Somin, supra note 5.
176. Waters, supra note 174.
177. Somin, supra note 5.
178. Somin, supra note 4.
179. Id.
180. Mikosra, supra note 150.
be applied to marijuana laws—the state is constitutionally allowed to repeal its ban on possession, manufacturing, or distributing marijuana. Attorney General Jeff Sessions wrote a one page memo instructing United States Attorneys to disregard the Obama-era direction that “resources should be limited in criminal prosecution[s] of marijuana users” in states that have legalized marijuana usage. Currently, “[t]en states and Washington D.C. have legalized marijuana for recreational use,” even though it is still considered illegal under federal law. The conflict between state and federal law, in theory, results in state laws being preempted by federal law by way of the Constitution’s Supremacy Clause, which reads: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land.” One question raised by the revocation of the 2013 memo is the availability of resources the federal government has access to in order “to conduct direct enforcement of marijuana laws.” Any large widespread federal attempt to enforce federal marijuana laws would likely need the assistance of local law enforcement officers. This raises a Tenth Amendment anti-commandeering issue. The Supreme Court made it clear in _Printz v. United States_ that the federal government cannot command state officers to administer or enforce a federal program. Thus, it is unclear how this Supreme Court decision will thwart the Justice Department’s efforts to control marijuana under the Controlled Substances Act.

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181. _Id._
183. _Id._
185. U.S. CONST. art. VI; _see also_ Bomboy, _supra_ note 182.
186. Bomboy, _supra_ note 182.
187. _Id._
188. _Id._
190. _Id._ at 935.
In many cases, the federal government would have the power to ban things that it opposes—like “possession of some types of firearms” or marijuana—“by making them directly illegal under federal law.”

However, this could be very expensive and difficult. Unless the federal government bars activities it opposes directly under their own laws, it can no longer rely on state assistance in cooperating and supporting the enforcement of federal law through the state’s own laws. If a state wants to deny the federal government assistance in opposing certain activities by amending its own laws, it appears now that it can.

B. Legalized Sports Betting Benefits

A number of athletes with prominent names in sports—including NFL Commissioner Roger Goodell—and sports leagues across the country are opposed to the nationwide efforts being made to legalize sports gambling. They fear the integrity of sports games will be undermined. Additionally, they have expressed concern that increased legalized sports betting will “turn fans away from their sports [due to] fear[ ] of fixed games.” However, this concern is misguided. “[P]eople are already legally betting on . . . sports in Nevada, and [there has been] no known evidence [of negative] impact[s] on the games.” Additionally, it is beneficial to those in opposition that “the Supreme Court’s decision [came] so late in the Court’s calendar” when many state legislatures are out of session for the summer. This puts the leagues “in an ideal position to work with . . . individual state legislation when they return for the [next] session” to ensure that the leagues help address their concerns by helping develop the new sports gambling laws.

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192. Somin, supra note 4.
193. Id.
194. Id.
195. Id.
197. Wolohan, supra note 196.
198. Id.
199. Id.
200. Id.
201. Id.
202. Wolohan, supra note 196.
The legalization of sports gambling appears to not only hold benefits for individuals, but also for the nation as a whole.203 “From the 1940s to the 1960s, the mafia . . . took control of the [illegal] sports betting market” and pushed it offshore.204 “Organized crime is [not] known for its customer service or propriety.”205 But still, millions of Americans continue to gamble illegally in this completely unregulated market.206 Americans were left with little or no recourse in these markets that were subject to the rules of other countries.207 States have no way to regulate online gambling sites and thus are unable to “ensure the fairness of the games, conduct background checks on company employees, or audit the financial records of the company.”208 That is just one problem associated with illegal gambling.209 Additionally, there is the risk and fear of credit card and other fraud due to online gambling popularity.210 Local bookies engage in shady operations because they function without rules and regulations.211 Billionaire and Dallas Mavericks owner Mark Cuban publicly acknowledged that everyone has been gambling on sports for a long time.212 If Americans have illegally gambled on sports, and will continue to gamble illegally on sports, legal sports gambling markets in the United States would provide much needed protection to those bettors.213 In-state operated sports gambling environments would provide the much needed “rules and regulations [that] can ensure honest, secure, and safe transactions.”214

Another benefit legalized sports gambling would provide is increased tax revenue.215 There are “casinos in over [forty] U.S. states [that provide 2] million jobs [and] generat[e] approximately $38 billion in tax revenue” each year.216 While those statistics of legal gambling are

203. Smiley, supra note 6.
204. Id.
205. Id.
206. Id.
207. Id.
208. PUB. SECTOR GAMING STUDY COMM’N, FINAL REPORT 25 (1999), http://www.nclgs.org/PDFS/Public_Sector_Gaming_Study.pdf; see also Smiley, supra note 6.
209. See Smiley, supra note 6.
210. Id.
211. Id.
213. See Lauletta, supra note 212; Smiley, supra note 6.
214. Smiley, supra note 6.
215. Id.
216. Id.
impressive, the statistics for illegal gambling are even more so.217 “Americans illegally [bet] roughly $148 to $500 billion on sports.”218 State government taxing on that money would create a huge new influx of money into the country from a source not currently being taxed at all.219 “That can close a lot of budget deficits and support scores of schools, health clinics, bridges, tunnels, and so on.”220

Not only will tax revenue increase with legalized sports betting, but the number of jobs supported would increase also.221 “State-licensed sports books [would] generate more job[s] . . . at the existing casinos” through the need of more “oddsmakers, analysts, security, cashiers, etc.”222 And also, depending on how the states would implement their own regulating laws, it may even create new free standing sports betting locations which would need to be staffed.223 Additionally, increased traffic into casinos and around possible free standing sports betting locations from those bettors engaging in sports wagering, would lead to “more revenue for [the] restaurants, retail shops and other businesses [nearby].”224 This ancillary effect could have a broad and beneficial economic impact.225

A regulated environment would likely have a positive impact on the games themselves that people are wagering on.226 Even NBA Commissioner, Adam Silver, agrees.227 In countries “[o]utside of the United States, sports betting” is legal, popular, and highly regulated.228 Adopting a framework that allows state governments to authorize and strictly regulate betting on sports has proven to be effective in other markets, like what has been done in Australia.229 The Australian state of Victoria created a sports betting regulatory regime that “contains a number of features critical to ensuring that sports gambling is channeled in appropriate ways and that

217. See id.
218. Id.
220. Id.
221. Id.
222. Id.
223. Id.
224. Smiley, supra note 6.
225. Id.
226. Id.
229. See Ross & Anderson, supra note 228; Silver, supra note 227.
threats to sporting integrity can be promptly identified.\textsuperscript{230} One critical feature is \textit{special regulations} that allow for the sharing of information among “bookmakers, law enforcement, and . . . sports leagues,” even in situations where the information would ordinarily be confidential.\textsuperscript{231} “Access to . . . betting records is crucial” in order to track down any “match-fixing [or] abuse of inside information.”\textsuperscript{232} It also provides a means to make sure the athletes are not wagering on themselves.\textsuperscript{233} Access to betting records, like those available in Australia, are nonexistent “in the illegal [sports] betting market.”\textsuperscript{234} This means that they are unavailable to the sports leagues who would greatly benefit from the devices that could locate \textit{unusual activity} that threatens the integrity of sporting events.\textsuperscript{235}

Another benefit of legalized sports gambling is detection of individuals who have a gambling problem.\textsuperscript{236} It is reported that almost ten million Americans have a gambling addiction.\textsuperscript{237} Detection of addict-like behavior can help guide people towards treatment.\textsuperscript{238} Moreover, many illegal gambling sites do not have limits on the amount of money people can wager.\textsuperscript{239} Lack of a wagering limit can get people into major trouble, but if state-regulated legalized sports gambling was available, Americans’ interests would be protected.\textsuperscript{240}

An additional benefit of legalized sports betting includes a “more exciting game[] for viewers.”\textsuperscript{241} Millions of people turn on sports games, some watching because they enjoy it, but most watching because they have money on the game and want to see if they will win or lose their bets.\textsuperscript{242} If more people start legally betting on sports, more people will tune into the games they have wagers on, and the viewers will be more interested and engaged in every game.\textsuperscript{243}

\begin{thebibliography}{246}
\bibitem{230} Ross \& Anderson, \textit{supra} note 228.
\bibitem{231} Id.
\bibitem{232} Id.
\bibitem{233} Id.
\bibitem{234} Smiley, \textit{supra} note 6.
\bibitem{235} See id.; Ross \& Anderson, \textit{supra} note 228.
\bibitem{236} Smiley, \textit{supra} note 6.
\bibitem{238} Smiley, \textit{supra} note 6.
\bibitem{239} \textit{Pub. Sector Gaming Study Comm’N}, \textit{supra} note 208, at 25.
\bibitem{240} Smiley, \textit{supra} note 6.
\bibitem{241} Id.
\bibitem{242} Id.
\bibitem{243} See id.
\end{thebibliography}
“Finally, there has always been a relationship between professional sports and gambling.” All while battling sports betting legalization attempts, the sports leagues are actually clearly accepting and promoting sports betting.

[O]ver the past [twenty] years, . . . sports teams have willingly accepted money from state lotteries for the use of logos, accepted money for in-stadium casino signage, invested in Daily Fantasy Sports companies like FanDuel and Draft Kings, played games in casinos, and have even allowed franchises to move to Las Vegas.

Legalization of sports betting would end the blatant hypocrisy by the sports leagues. They should embrace another taboo about keeping gambling out of their games “to reengage their fans and help create a new fan experience.”

IV. SPECIFIC IMPACTS OF SUPREME COURT DECISION IN FLORIDA

A. The Polls May Play a Role

Florida law does not currently permit any form of sports betting. But with this recent Supreme Court decision and a number of states already quickly moving to legalize sports betting in their states, the pressure is up for Florida lawmakers.

Florida lawmakers have been trying to agree if and how to update and expand gambling laws in the state—a topic of debate in Tallahassee even before the recent Supreme Court decision regarding sports betting. After weeks of negotiations, the legislative leaders could not come to an agreement.

The leaders were trying to agree upon a way to update the state’s gaming laws before the November 2018 election, where voters had “a

244. Wolohan, supra note 196.
245. Smiley, supra note 6.
246. Wolohan, supra note 196.
247. Smiley, supra note 6.
248. Wolohan, supra note 196.
250. Id.
252. Klas, supra note 251.
chance to complicate the Legislature’s role with a constitutional amendment [that was] on the . . . ballot.”253 But, the decision was in the hands of the voters.254 Amendment 3, Voter Approval of Casino Gambling Initiative, required voter approval to authorize casino gambling in the state.255 While “[t]he amendment specify[d] only the expansion of casino card games, slot-like games and anything classified as a Class 3 game under federal law,” it is assumed by many that sports gambling will now fall under this category.256

The anti-casino amendment has received overwhelming support, particularly by Disney Worldwide Services—donating $9.655 million to the support campaign—and the Seminole Tribe of Florida, which has contributed $6.775 million to the support campaign.257 Disney has long opposed expanding casino gambling in Florida.258 And the Seminole Tribe, while operating casinos of its own, oppose expansion of gambling that could allow bettors to visit gambling sites other than those owned and operated by the tribe.259 The amendment was approved by sixty percent of voters, thereby changing the Florida Constitution and giving voters “the exclusive right to decide whether to authorize casino gambling by requiring that in order for casino gambling to be authorized under Florida law, it must be approved by Florida voters.”260 According to a recent poll, it is likely that seventy-six percent of Florida voters supported this amendment.261 According to one law professor, including sports gambling in the category with other gambling that is on Amendment 3 would hurt the amendment.262 It is clear that many Floridians oppose expanding gambling, and want to be the ones to make that decision.263 But “even if [many] people are against

253. Id.
254. Id.
256. Davis & Rohrer, supra note 18.
258. Id.
259. See id.
260. Florida Amendment 3, Voter Approval of Casino Gambling Initiative (2018), supra note 255 (quoting FLA. CONST. art. X, § 29 (proposed)).
262. Davis & Rohrer, supra note 18.
263. See Poll: 76% of Likely Florida Voters Support Amendment 3, supra note 261.
casino gambling, most people are OK with sports betting.”

So many people are used to betting in office pools on sporting events like the Super Bowl and March Madness. “If they think Amendment 3 would stop sports betting after the [Supreme Court of the United States] has approved it, . . . they’re going to think twice about voting for Amendment 3.”

B. **A Third Negotiator in the Mix**

The State of Florida has a compact with the Seminole Tribe that gives the tribe a monopoly to offer card games—like blackjack—at its casinos and operate slot machines outside of the Miami-Dade and Broward counties. In exchange for this exclusivity, the Seminole Tribe pays a portion of its casino money to the state. An agreement like this has been in place between the Tribe and the State since 2010. With the anti-gambling amendment in the hands of voters, and the Seminole Tribe being a large contributor to support the campaign, the future of sports betting in Florida is still an open question. If sports gambling is included in the category of gambling in the November amendment, as noted above, then it is likely that sports betting will not come to Florida quickly—if at all.

Had the November 2018 amendment not passed, the Florida Legislature would have held the future of sports gambling in their hands, and the large presence of Indian owned and operated casinos in the State—eight to be exact—could have posed a challenge to legalization of sports betting efforts that many other states are not facing. Because there is no legalization activity in the State yet, it is unclear how Florida would decide to implement a regulated sports betting environment—such as, sports books in the casinos themselves or stand-alone sports betting locations. But if legalization efforts begin, the Indian tribes—as another negotiator in the mix—insert some added difficulty to the negotiations.

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264. Davis & Rohrer, supra note 18.
265. Id.
266. Id.
267. Saunders & Kam, supra note 18.
268. Id.
269. Id.
270. Davis & Rohrer, supra note 18.
271. See id.
272. See id.; Green, supra note 20; Florida Casinos, supra note 19.
273. See Klas, supra note 251; Saunders & Kam, supra note 18.
274. Davis & Rohrer, supra note 18; Green, supra note 20.
C. Why It Should Be Legal in Florida

As noted above, an array of benefits follow from the legalization of sports betting. Some of the most notable are increased tax revenue, increased jobs, and broad economic support. Sports gambling could be especially beneficial to “destination states like Florida and could result in a significant boo[m] for the [S]tate’s tourism economy.” Because the margins from sports betting wagers are narrower than other forms of gaming, it is the ancillary spending from gamblers who flock to hotels and gaming venues where the money is made . . . . As the State’s number one industry, tourism would be greatly benefited from legalized sports gambling, which would only be more beneficial for the citizens of the State.

Additional benefits include financial support for “dog tracks and casinos that have struggled to retain younger [customers],” and increased attendance and participation in some of Florida’s sports leagues who are not “considered among the upper echelon of franchises”—like the Tampa Bay Rays.

According to the Florida Council on Compulsive Gambling, it is estimated that around “181,000 Florida residents have [a] gambling problem[,] and another 770,000 are at-risk” for developing a gambling problem. While those opposed to legalized sports gambling in the state argue that those numbers will only increase if legal sports betting came to Florida, they are overlooking a huge hidden benefit to regulated sports gambling. People have been illegally gambling on sports for so long, and they will continue to do so even if Florida does not legalize it. Unregulated gambling is what will cause the gambling problem to increase—not regulated sports gambling. As noted above, a state-sanctioned, regulated gambling environment could impose limits on wagering amounts

275. See Smiley, supra note 6.
276. Id.
277. Klas, supra note 249.
278. Id.
280. Green, supra note 20.
282. See id.; Smiley, supra note 6.
283. Davis & Rohrer, supra note 18; Lauletta, supra note 212.
284. See Smiley, supra note 6.
and even screen users for signs of problem gambling.\textsuperscript{285} If state-operated sports books extended to online, pop-ups could appear to help direct people towards resources to get help, or even inform others who know someone in need of help of resources available.\textsuperscript{286} State-regulated sports gambling would not increase problem gambling like many fear—it would help.\textsuperscript{287}

V. CONCLUSION

The recent Supreme Court decision to rule PASPA unconstitutional was a major victory for federalism.\textsuperscript{288} By strengthening the support behind the anti-commandeering doctrine rooted in the Tenth Amendment, the Supreme Court has not only affected sports betting, but has likely also produced an ancillary effect that will impact a plethora of topics, including gun control, marijuana laws, and sanctuary cities.\textsuperscript{289}

Although many are in opposition to legal sports betting, many benefits stand to come from state regulated sports gambling.\textsuperscript{290} Those include: A safer market for people already illegally betting on sports; increased tax revenue; job creation and positive economic impact; protection of sports games integrity; detection of people with problem gaming; an “[e]nd [to] sports leagues’ blatant hypocrisy,” and more exciting games for the fans.\textsuperscript{291} People have been gambling on sports in Nevada for years, and there has been no known evidence of it affecting the integrity of games—a concern of so many.\textsuperscript{292} The states that have not taken steps towards legalization should follow the lead of almost half of the country that have taken steps quickly forward to legalize sports betting, including Florida.\textsuperscript{293}

Florida has no movement in legalizing sports betting yet, and while it is possible in the future that the legislature would want to legalize sports betting, it may be harder than in other states.\textsuperscript{294} For one, the legislature may not be the one to make the decision for Florida.\textsuperscript{295} The decision may be up to

\textsuperscript{285} Id.
\textsuperscript{286} Id.
\textsuperscript{287} See id.
\textsuperscript{289} Somin, supra note 4; see also U.S. CONST. amend. X.
\textsuperscript{290} Smiley, supra note 6.
\textsuperscript{291} Id.
\textsuperscript{292} Wolohan, supra note 196.
\textsuperscript{293} See Rodenberg, supra note 10.
\textsuperscript{294} See id.; Davis & Rohrer, supra note 18.
\textsuperscript{295} Davis & Rohrer, supra note 18.
The decision to expand gambling is left to the citizens and it is likely that sports gambling will fall into the category of gambling that the citizens will now have control over. There was wide support for passage of this Amendment, known as the anti-casino amendment, because so many people were opposed to expanding gambling in the state. It is likely that sports gambling will not be legal in Florida quickly, if at all.

This amendment was not the only obstacle in legalizing sports betting in Florida. Had the anti-gambling amendment not passed in November, the decision would have been left to the Legislature. They would have had to deal with the Native American Tribes in Florida, who own and operate their own casinos and who are against legalizing sports gambling, which would affect the crowds that go to their casinos to gamble.

In the end, sports gambling should be legal in all states, including Florida. A number of benefits flow from the legalization of sports gambling, benefits that help those individuals gambling and the public as a whole. As Mark Cuban and so many others have acknowledged, sports gambling has been going on for years and people will continue to do it whether it is legal or not. States should take action to help protect their citizens while they gamble on sports and make some money that will benefit the public in the process.

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296. Klas, supra note 251.
297. Davis & Rohrer, supra note 18.
298. Id.; see also Disney, Seminoles Sink $10m into Gambling Issue, supra note 257.
299. See Davis & Rohrer, supra note 18; Klas, supra note 249.
300. See Davis & Rohrer, supra note 18; Disney, Seminoles Sink $10m into Gambling Issue, supra note 257; Florida Amendment 3, Voter Approval of Casino Gambling Initiative (2018), supra note 255; Klas, supra note 251.
301. See Florida Amendment 3, Voter Approval of Casino Gambling Initiative (2018), supra note 255.
302. See Davis & Rohrer, supra note 18; Disney, Seminoles Sink $10m into Gambling Issue, supra note 257.
303. See Davis & Rohrer, supra note 18; Disney, Seminoles Sink $10m into Gambling Issue, supra note 257.
304. See Smiley, supra note 6.
305. See id.
306. Lauletta, supra note 212; see also Silver, supra note 227.
IS THE END TO THE OPIOID EPIDEMIC NEAR? FLORIDA AND OTHER STATES ATTEMPT TO ADDRESS THE CRISIS BY PASSING NEW LIMITS ON OPIOID PRESCRIPTIONS

DANNAKHAWAM*

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I. INTRODUCTION

The amount of opioids that are “prescribed in the [United States] each year [can] keep every man, woman, and child in the country medicated around the clock for one month.”1 Consequently, “over [two] million Americans over the age of [eleven] struggled with an opioid . . . abuse disorder in 2014.”2 Drug abuse and addiction have also cost Americans two hundred billion dollars in healthcare, the criminal justice system, lost workplace production, and child care in 2007.3 The Department of Health and Human Services found that states were dealing with a greater amount of children in foster care.4 The Centers for Disease Control and Prevention (“CDC”) also stated that there was an “increase in the number of babies born with Neonatal Abstinence Syndrome,” which “is a drug withdrawal syndrome that occurs” when mothers abuse opioids while pregnant.5 Research also indicates that the increase in opioid prescriptions accounts for the 20% decline in the men’s labor force.6

Opioids cause a majority of the overdoses in the United States, with these deaths being five times higher in 2016 than in 1999.7 Statistics show that “[r]oughly 21 to 29 [%] of patients prescribed opioids . . . misuse them.”8 “[P]eople addicted to prescription drugs are [forty] times more likely to [become] addicted to heroin . . . .”9 In 2017, over seventy-two

crisis/.
3. Id.; see also Hoban, supra note 1.
5. Id.
6. Id.
thousand Americans died from a drug overdose. Every day, almost one hundred fifteen people die from overdosing on opioids. In Florida alone, sixteen people per day are lost to an opioid overdose.

The abuse of prescription painkillers and heroin has become a national health crisis. Federal agencies have attempted to solve what is now known as the opioid epidemic; however, drug overdose remains the leading cause of death for Americans under the age of fifty. The CDC has drafted guidelines for prescribing opioids, and the United States Food and Drug Administration (“FDA”) has issued warning labels to accompany prescription painkillers.

In March 2018, then-Governor Rick Scott signed House Bill 21 to combat the opioid epidemic. The Governor’s goal in passing this legislation was to limit the occurrence of drug addiction, reduce the availability of opioids, and help those who are vulnerable or in need of assistance.

Research has shown that many addicts received and consumed their first opioid following a medical procedure. Therefore, this legislation provides for tougher limits on prescription painkillers and more money for treatment programs. The bill reduces opioid prescriptions for acute pain patients. For a patient suffering from chronic pain, the prescription must include specific indications regarding its need and use. Doctors who do not

11. See Understanding the Epidemic, supra note 7.
16. Act effective July 1, 2018, ch. 2018-13, § 21, 2018 Fla. Laws 1, 106 (codified in scattered sections of FLA. STAT.); Jim Saunders, Scott Signs High-Profile Opioid Bill into Law, ORLANDO SENTINEL: LOC. & ST., Mar. 20, 2018, at 1B.
17. See Saunders, supra note 16.
19. Saunders, supra note 16; De Leon, supra note 18.
21. Id. § 3(3)(a), 2018 Fla. Laws at 5.
prescribe within these guidelines will be penalized.\textsuperscript{22} The law also sets aside about fifty-three million dollars from the budget in order to enhance opioid treatment and make it easier for law enforcement to respond to drug abuse and overdoses.\textsuperscript{23} Section 456.0301 of the Florida Statutes, which became effective on July 1, 2018, requires those who are “authorized to prescribe controlled substances . . . to complete a board-approved [two]-hour continuing education course on prescribing controlled substances offered by a statewide professional association of physicians” within Florida.\textsuperscript{24} House Bill 21 also requires the physician to “discuss the risks and benefits of the use of controlled substances.”\textsuperscript{25} Acute pain treatment, according to the additions made to the statute, will be more heavily regulated.\textsuperscript{26} Specifically, House Bill 21 indicates that a prescription for an opioid drug “may not exceed a [three]-day supply.”\textsuperscript{27} There are exceptions where a seven-day supply may be prescribed.\textsuperscript{28}

This article will first analyze the history and rise of the opioid epidemic nationally.\textsuperscript{29} It will also discuss pharmaceutical companies’ marketing tactics and how they misrepresented their products.\textsuperscript{30} Following the discussion on misrepresentation, class action lawsuits brought against pharmaceutical companies and/or doctors will be examined.\textsuperscript{31} The main focus of this article, however, after providing important background information, will be on this newly passed bill in Florida and how the bill will impact the crisis.\textsuperscript{32} This will be analyzed by comparing former Governor Scott’s approach in Florida to what is being done in other states.\textsuperscript{33} Similarly, an analysis of other solutions, including how France handled a similar crisis, will be compared to how the United States is handling the opioid epidemic as a whole.\textsuperscript{34}
II. HISTORY OF OPIOID MISUSE

A. Worldwide History

Opium was first found in ancient Mesopotamia around 3000 B.C. 35 The Sumerians called it the *plant of joy.* 36 Opium then spread to the Assyrians, the Egyptians, and then the Greeks. 37 “Around the same time, Alexander the Great [brought] opium to India” and used it during war. 38 “Around the fourth century A.D., opium [became available in] China through Arab traders . . . .” 39 A renowned Chinese surgeon would give his patients opium before surgery. 40

“In 1527, Paracelsus, a Swiss-German alchemist . . . created opium pills and prescribed them as painkillers.” 41 His compound of opium, which was meant to reduce pain, was called laudanum. 42

Similarly, opium was one of the products traded along the Silk Road. 43 Western countries exported opium grown in India to China. 44 Europeans used the profits from selling opium to purchase other Chinese luxury products. 45 With its addictive nature beginning to show, opium smoking became very popular in China, and *opium importations grew rapidly.* 46 By 1729, it became a serious problem and the sale and smoking of opium became prohibited in China. 47 Then, opium *importation and cultivation* became outlawed in China. 48 “[H]owever, the opium trade continued to flourish.” 49

36. *Id.* at 886.
37. *Id.*
38. *Id.*
39. *Id.* at 887.
41. *Id.*
42. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Opium Trade, supra* note 43.
49. *Id.*
Chinese immigration and the California Gold Rush brought opium to America. \(^{50}\) Improvements in the field of medicine gave rise to increased opioid usage in the nineteenth century. \(^{51}\) In 1806, morphine was isolated from opium. \(^{52}\) “After its introduction into [United States] medicine, morphine [was used to treat] chronic pain . . . .” \(^{53}\)

Today, reports indicate “a global increase in the production, transportation, and consumption of opioids, mainly heroin.” \(^{54}\) “The worldwide production of heroin has more than doubled . . . since 1985.” \(^{55}\) “Globally, it is estimated that [over thirteen] million people take opioids, including [roughly nine] million who use heroin.” \(^{56}\)

B. American History Beginning in the 1900s

The soldier’s disease began when Civil War veterans were given morphine and became dependent on it. \(^{57}\) In 1898, the Bayer Company produced heroin. \(^{58}\) It became a wonder drug as addicts realized that its effects were amplified when it was injected into the bloodstream. \(^{59}\) “In 1909, Congress passed the Opium Exclusion Act, [which] bar[red] opium imports for smoking purposes.” \(^{60}\) However, this Act “did not apply to medicinal uses of opium.” \(^{61}\) In 1914, Congress subsequently passed the Harrison Narcotics Tax Act. \(^{62}\) “The original interpretation of the Act . . . required physicians and pharmacists to approve the distribution of opioids . . . .” \(^{63}\) The Supreme Court of the United States expanded the Act to bar physicians from


\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) Id.

\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) Id.

\(^{62}\) Id.

\(^{63}\)Id.; Trickey, supra note 50; see also Act of Dec. 7, 1914, Pub. L. No. 63-223, 38 Stat. 785 (1914).
supplying addicts the opioids needed to maintain their addiction.\textsuperscript{64} Therefore, addicts were forced to turn to the black market to find drugs.\textsuperscript{65} Narcotics clinics, which supplied drugs to addicts, were established, but struck down due to the recent Supreme Court ruling.\textsuperscript{66} Heroin became illegal in 1924.\textsuperscript{67} Later, in 1938, Congress created the FDA “to oversee the safety of [prescription] drugs before they were sold.”\textsuperscript{68}

C. \textit{1970s–90s}

Drug use in the United States continued to escalate in the 1970s as Percocet and Vicodin were added to the market.\textsuperscript{69} A letter was printed in the New England Journal of Medicine in January 1980 stating that addiction is rare amongst those being treated with narcotics.\textsuperscript{70} A paper written by pain-management specialist, Dr. Russell Portenoy, asserted that out of thirty-eight patients who were being treated with opioids, only two of them had issues with addiction.\textsuperscript{71} Therefore, during this time, opioid therapy was considered safe and helpful.\textsuperscript{72}

In 1970, Congress passed the “Controlled Substances Act, which placed all prescription narcotics and opioids into five . . . schedules.”\textsuperscript{73} “The opioids placed in Schedule I were considered [extremely] dangerous” and were banned from being prescribed.\textsuperscript{74} “By the mid-1970s, President Nixon had created the Drug Enforcement Agency (“DEA”) and . . . declared the War on Drugs.”\textsuperscript{75} During the 1980s, physicians were afraid to prescribe opioids, even to patients who were terminally ill.\textsuperscript{76}

\begin{flushleft}
\textsuperscript{64.} \textit{Id.} at 889.  \\
\textsuperscript{65.} \textit{Id.}  \\
\textsuperscript{66.} \textit{Id.}  \\
\textsuperscript{67.} Moghe, supra note 13.  \\
\textsuperscript{68.} Waldrop, supra note 35, at 890.  \\
\textsuperscript{69.} Moghe, supra note 13.  \\
\textsuperscript{70.} \textit{Id.}  \\
\textsuperscript{71.} \textit{Id.}  \\
\textsuperscript{72.} See \textit{id.}  \\
\textsuperscript{74.} Waldrop, supra note 35, at 890.  \\
\textsuperscript{75.} \textit{Id.}  \\
\textsuperscript{76.} \textit{Id.} at 891. A physician’s fear of prescribing opioids was known as \textit{opiophobia}. \textit{Id.}
\end{flushleft}
In 1996, Purdue Pharma released OxyContin as a long-term painkiller. Purdue Pharma created a video called “I Got My Life Back” in order to promote the painkiller. The video followed six people with chronic pain that were treated with OxyContin. The video was distributed to physicians to put in their waiting rooms. Doctors in the video raved about the drug, ensuring users that it would not have any side effects. Following the video, the number of painkiller prescriptions that were filled increased by eleven million. Purdue Pharma also placed advertisements of OxyContin in journals across the nation. The company conducted more than forty national pain management conferences in Florida, Arizona, and California. Physicians, pharmacists, and nurses were recruited and trained with all expenses paid for. Seven years later, the company was charged with misrepresenting the drug and its addictive nature.

In 2001, pain management became a priority. There was still no evidence that addiction would be an issue for those who were being prescribed opioids to treat their pain. According to a published book that was sponsored by Purdue Pharma, “doctors’ concerns about addiction side effects [were] inaccurate and exaggerated.” As prescribing pain medication continued to increase, so did the rates of opioid abuse, which doubled between 1998 and 2008.

During the early 2000s, the George Bush Administration did not support indictments of Purdue Pharma’s executives and, instead, settled a
case against them in 2007.\textsuperscript{91} The company “plead[ed] guilty to a felony charge of [misrepresenting] OxyContin.”\textsuperscript{92} Three executives each pleaded guilty to a misdemeanor that “did not accuse them of any wrongdoing.”\textsuperscript{93} “The company and the executives paid a combined $634.5 million in fines and the men were required to perform community service.”\textsuperscript{94} However, the fines were only considered a slap on the wrist for this multi-billion-dollar company.\textsuperscript{95}

F. 2010

In 2010, an abuse deterrent form of OxyContin was created to “make it more difficult to . . . abuse [the drug] by snorting or injecting it.”\textsuperscript{96} Before this new version of the drug was released, “35.6\% of [patients] questioned admitted [to] abusing the drug;” however, two years after the deterrent was released, only about 12.8\% reported drug abuse.\textsuperscript{97} Of those, 24\% of them still found a way to work around the deterrent feature of the medicine.\textsuperscript{98}

G. 2016–Today

In 2016, overdose deaths were “[five] times higher than in 1999.”\textsuperscript{99} Under the Obama administration, drug overdose became the leading cause of death for Americans under fifty-years-old.\textsuperscript{100} Therefore, the FDA and CDC began addressing the opioid crisis.\textsuperscript{101}

\begin{itemize}
  \item \textsuperscript{91} Barry Meier, Opioid’s Maker Hid Knowledge of Wide Abuse, N.Y. TIMES, May 29, 2018, at A1.
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} Id.
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} See Ameet Sarpatwari et al., The Opioid Epidemic: Fixing a Broken Pharmaceutical Market, 11 HARV. L. & POL’Y REV. 463, 473 (2017); Meier, supra note 91.
  \item \textsuperscript{96} Moghe, supra note 13.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} Id.
  \item \textsuperscript{99} Understanding the Epidemic, supra note 7. There have been three waves of opioid overdose deaths. \textit{Id.} The first began in the 1990s, as opioid prescriptions increased. \textit{Id.} The second wave was in 2010, which specifically involved heroin. \textit{Id.} The third wave began in 2013, as synthetic opioids, particularly manufactured fentanyl, were added to the market. \textit{Id.}
  \item \textsuperscript{100} Josh Katz, U.S. Drug Deaths Climbing Faster Than Ever, N.Y. TIMES, June 6, 2017, at A1; Opioid Lawsuits, supra note 14; see also Waldrop, supra note 35, at 892–93.
  \item \textsuperscript{101} Moghe, supra note 13.
\end{itemize}
President Donald Trump declared a public health emergency in October. 102 “His plan . . . includes harsher penalties for drug traffickers and lowering the amount of drugs needed to trigger mandatory minimum sentences for dealers.”103 President Trump wants the death penalty to be considered as punishment for drug traffickers.104 He also plans to increase research through “public-private partnerships between the . . . National Institutes of Health and pharmaceutical companies.”105 Trump’s goals include an awareness campaign with commercials to scare children from using drugs.106 “[He] wants to see the number of opioid prescriptions cut by one-third within three years.”107 President Trump also seeks to provide better treatment centers and recovery outlooks.108

III. PHARMACEUTICAL MARKETING & MISREPRESENTATION

A. Purdue Pharma

“Purdue Pharma introduced OxyContin in 1996 . . . [and] aggressively marketed” the product immediately.109 “Sales grew from [forty-eight] million in 1996 to [over one] billion in 2000.”110 Eight years after it was first introduced into the market, “OxyContin . . . became a leading drug of abuse in the United States.”111

Purdue’s marketing plan focused on influencing physicians to prescribe their product.112 The pharmaceutical company looked into each physician’s prescribing habits in order to determine how each physician would respond to its marketing.113 In other words, the company was able to predetermine whether each physician would be an easy-sale or a hard-sale prior to meeting with each one of them.114 After collecting its data, Purdue identified which physicians prescribed more often compared to which

103. Id.
104. Id.
105. Id.
106. Id.
107. Schallhorn, supra note 102.
108. Id.
109. Van Zee, supra note 84, at 221.
110. Id.
111. Id.
112. Id. at 222.
113. Id.
114. Van Zee, supra note 84, at 222.
physicians did not prescribe at all. OxyContin was meant to target those who prescribed more frequently and significantly.

In 2001, “Purdue paid [forty] million [dollars] in sales incentive bonuses to its sales representatives.” Purdue also increased its number of representatives by more than double, from 318 to 671. Because sales representatives were encouraged to sell more through a bonus system, the sales representatives also focused on physicians that they knew were already prescribing in order to make more bonus money.

Primary care physicians were heavily pursued by these sales representatives. As they comprised nearly half of all OxyContin prescribers by 2003, problems arose because “primary care physicians were not [adequately] trained in pain management,” nor did they understand the effects of the long-term use of painkillers. “The non-cancer-related pain market constituted 86% of the total opioid market in 1999.” OxyContin prescriptions for non-cancer-related pain increased from about six hundred and seventy thousand in 1997 to approximately 6.2 million in 2002. Since the launch of the extended-release oxycodone, Purdue has earned about thirty-one billion dollars in total revenue.

As opioids began to be used liberally to treat non-cancer-related pain, the availability of all opioids increased. “Nationwide, from 1997 to 2002, there was a 226%, 73%, and 402% increase in fentanyl, morphine, and oxycodone prescribing, respectively . . . .” At the same time, the Drug Abuse Warning Network reported that emergency room patients were more insistent on receiving fentanyl, morphine, and oxycodone. Over two million people stated that a prescription opioid was the “first drug they had tried.” Most people who are abusing prescription opioids get their drugs from a doctor’s prescription or from their family’s or friend’s doctor’s prescription.

115. Id.
116. Id.
117. Id.
118. Id.
119. Van Zee, supra note 84, at 222.
120. Id.
121. Id.
122. Id. at 223.
123. Id.
124. Sarpatwari et al., supra note 95, at 473.
125. Van Zee, supra note 84, at 224.
126. Id.
127. Id.
128. Id.
129. Id.
When Purdue came out with OxyContin, it released commercials that advertised the risk of addiction as less than one percent.\textsuperscript{130} “Purdue [also] trained its sales representatives” to market the drug with a low risk of addiction.\textsuperscript{131} The company used unreliable studies to support its statement; one indicated that only 4 out of 11,882 patients using opioids suffered from addiction and the other found no addiction amongst a ten thousand-person burn victim sample.\textsuperscript{132}

During an interview with a former sales representative who started with Purdue Pharma in 2008 and quit in 2013, Carol Panara stated that the company misrepresented the drug to the public and to their sales representatives.\textsuperscript{133} She also stated that she was told to sell as much as she could to make money.\textsuperscript{134} “[T]he company taught her to tell doctors that . . . patients [may] only appear to be addicted.”\textsuperscript{135} The term was advertised as pseudoaddiction.\textsuperscript{136} There was no empirical evidence to support pseudoaddiction.\textsuperscript{137} With this term being used, sales tripled to an all-time high.\textsuperscript{138}

Purdue Pharma claimed that it did not know about the side effects of OxyContin and the risks of its abuse.\textsuperscript{139} The New York Times reported that a copy of a confidential Justice Department report indicates that Purdue Pharma knew of the abuse of OxyContin immediately after the drug was introduced, but hid that information.\textsuperscript{140} The company had reports that “the pills were being crushed and snorted, stolen,” and improperly prescribed.\textsuperscript{141} The one hundred and twenty page report included emails to the owners of the pharmaceutical company of data showing its misuse.\textsuperscript{142}

\begin{flushright}
\begin{multicols}{2}
\textsuperscript{130.} Van Zee, supra note 84, at 223 (quoting Barry Meier, Pain Killer: A Wonder Drug’s Trail of Addiction and Death 99 (2003)).
\textsuperscript{131.} Id.
\textsuperscript{132.} Id.
\textsuperscript{134.} Id.
\textsuperscript{135.} Id.
\textsuperscript{136.} Id.
\textsuperscript{137.} Id.
\textsuperscript{138.} Purdue Pharma Misrepresented Impact of OxyContin, Former Sales Rep Says, supra note 133.
\textsuperscript{139.} See Meier, supra note 91.
\textsuperscript{140.} Id.
\textsuperscript{141.} Id.
\textsuperscript{142.} Id.
\end{multicols}
\end{flushright}
B. **FDA’s Response**

Under the Food, Drug, and Cosmetics Act, the FDA regulates the advertising and marketing of prescription drugs to ensure that the promotions are truthful and properly communicated.\(^{143}\) The FDA’s resources are limited in that they do not have enough staff members to monitor all promotional materials.\(^{144}\) “In 2002, [only thirty-nine] FDA staff members were responsible for reviewing roughly [thirty-four thousand] pieces of promotional materials.”\(^{145}\) “In 1998, Purdue distributed [fifteen thousand] copies of an OxyContin video to physicians [prior to] submitting it to the FDA for review . . . .”\(^{146}\) “In 2001, Purdue submitted to the FDA a second version of the video, [but] the FDA did not review [it] until October 2002 . . . .”\(^{147}\) After its review, the FDA determined that the video misrepresented the product and minimized the risks.\(^{148}\)

OxyContin was approved by the FDA in 1996.\(^{149}\) When the FDA approved OxyContin, it allowed the pharmaceutical company to state that its long-acting formulation was believed to lessen the appeal to drug abusers.\(^{150}\) The original label stated that addiction was *very rare* if opioids were used properly to manage pain.\(^{151}\) In 2001, the label was modified to state that there was no scientific data available that analyzed the risk of addiction in chronic-pain patients.\(^{152}\) Today, “[o]ne of the highest priorities of the FDA is . . . to address the crisis” that has affected many families nationwide.\(^{153}\)

### IV. Lawsuits

Between 2004 and 2017, there have been multiple class action lawsuits against opioid companies.\(^{154}\) The most common argument against

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144. *See* Van Zee, *supra* note 84, at 224.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. Van Zee, *supra* note 84, at 224.
151. Van Zee, *supra* note 84, at 224.
152. *Id.*
opioid makers is that the pharmaceutical companies knew or should have known that their products could lead to addiction and misrepresented that risk.\textsuperscript{155} Suing pharmaceutical companies that downplayed the addictive nature of these drugs is based on precedent.\textsuperscript{156} In 1998, state attorneys general sued tobacco companies to hold them responsible for tobacco-related diseases.\textsuperscript{157} Thereafter, the tobacco companies agreed to make annual payments to the states to help fund anti-tobacco programs and campaigns.\textsuperscript{158}

There have been private and government lawsuits filed against pharmaceutical companies.\textsuperscript{159} Individuals and families have filed thousands of lawsuits against doctors and corporations, holding them responsible for the loss of a family member.\textsuperscript{160} Their claims are that drug companies underplayed the risks of addiction, that doctors prescribed too much and did not recognize the signs of addiction, and that pharmacies did not monitor the over-distribution of the drugs.\textsuperscript{161} In many cases, the plaintiffs allege that their addiction or their family member’s addiction started with prescription opioids, but led to heroin.\textsuperscript{162}

Counties, cities, states, and the federal government have also been involved in lawsuits against pharmaceutical companies.\textsuperscript{163} “President Donald Trump . . . declared the opioid crisis a Nationwide Public Health Emergency.”\textsuperscript{164} “[The Department of Justice] officials announced that they would share data related to prescription painkiller sales with state and local governments to facilitate opioid lawsuits against drug companies.”\textsuperscript{165}

State entities have been more successful than individuals at suing pharmaceutical companies because they cannot be accused of misusing the drug.\textsuperscript{166} In other words, they are not contributorily negligent because states have suffered financial consequences while never ingesting the drug.\textsuperscript{167} The state government lawsuits included arguments that the companies created

\textsuperscript{156} Semuels, supra note 154.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Opioid Lawsuits, supra note 14.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Opioid Lawsuits, supra note 14.
\textsuperscript{165} Id.
\textsuperscript{166} Semuels, supra note 154.
\textsuperscript{167} Id.
great financial costs for the states as they fought against addiction. In June 2018, Purdue Pharma laid off its entire sales team, as twenty-four states sued the company.

Because “Ohio leads the nation in overdose deaths,” in 2017, the Attorney General of Ohio sued Purdue Pharma, Teva Pharmaceuticals, and Johnson & Johnson. Ohio sued for restitution for consumers and compensation for the Department of Medicaid, which paid for opioid prescriptions. Other similar lawsuits were filed in Illinois, Mississippi, four counties in New York, and two counties in California.

Within the last couple of months, Palm Beach County, in Florida, filed a lawsuit against over two dozen individuals and companies—including CVS, Walmart, and Walgreens—"alleging that their negligence and deceptive trade practices contributed to the . . . opioid crisis." The complaint represents Palm Beach County’s effort to be reimbursed for all the money it spent fighting the epidemic that has taken the lives of many nationwide. “Palm Beach County [had] the highest number of opioid overdose[s] . . . in . . . 2015 and 2016.” It holds the drug companies responsible for misleading consumers and causing deaths, substance abuse disorders, and homelessness.

As lawsuits continue to be filed, states have also enacted legislation to try to limit prescription painkillers and prevent new addiction.
V. FLORIDA’S NEW BILL

A. House Bill 21

House Bill 21 is an act related to controlled substances.\(^{178}\) It mandates practitioners, as a part of their license renewal, to complete a continuing education course in order to prescribe controlled substances.\(^{179}\) It also requires certain boards to put forth rules that control prescribing habits for acute pain.\(^{180}\) House Bill 21 amends the law in Florida in order to better regulate and train prescribers.\(^{181}\)

The two-hour training course—which is now required by House Bill 21—must include information on the current standards for prescribing opiates.\(^{182}\) The course must also demonstrate that there are alternatives to treating pain, including natural remedies.\(^{183}\) The physicians will be taught the risks of opioid addiction when dealing with acute pain.\(^{184}\)

Acute pain is defined as the “normal, predicted, physiological, and time-limited response to an adverse chemical, thermal, or mechanical stimulus associated with surgery, trauma, or acute illness.”\(^{185}\) Acute pain does not include pain resulting from cancer, a terminal condition, palliative care for incurable illness or injury, or “[a] traumatic injury with an Injury Severity Score of [nine] or greater.”\(^{186}\)

House Bill 21 sets forth guidelines for prescribing controlled substances for acute pain.\(^{187}\) The physician must conduct an evaluation of the patient, create a treatment plan, obtain consent, consistently review the treatment plan and medical records, and comply with the law.\(^{188}\) “Failure of a prescriber to follow [these] guidelines constitutes grounds for disciplinary action.”\(^{189}\)

There are five classes of controlled substances.\(^{190}\) Schedule I and II have “a high potential for abuse.”\(^{191}\) Schedule I, however, is not accepted as

\(^{178}\) Ch. 2018-13, § 1, 2018 Fla. Laws at 3.
\(^{179}\) Id.
\(^{180}\) Id.
\(^{181}\) See id.
\(^{182}\) Id.
\(^{183}\) See Ch. 2018-13, § 1(a), 2018 Fla. Laws at 3.
\(^{184}\) Id.
\(^{185}\) Id. § 3(1)(a), 2018 Fla. Law at 4.
\(^{186}\) Id. at 4–5.
\(^{187}\) Id.
\(^{188}\) Ch. 2018-13, § 3, 2018 Fla. Laws at 4–5.
\(^{189}\) Id. at 7–8.
\(^{191}\) Id. § 812(b)(1)–(2).
treatment in the United States, while Schedule II is.\textsuperscript{192} Schedule III “has a potential for abuse,” but it is less likely compared to the drugs in Schedules I and II.\textsuperscript{193} Schedule IV and V have “a low potential for abuse”, and the abuse of the drugs in those schedules only “lead to limited physical dependence.”\textsuperscript{194}

House Bill 21 also adds and reschedules substances to the various schedules of controlled substances.\textsuperscript{195}

Acute pain treatment with Schedule II controlled substances, according to the additions made to the statute, will be more heavily regulated.\textsuperscript{196} Specifically, a prescription for an opioid may not exceed a three-day supply.\textsuperscript{197} There are exceptions where a seven-day supply may be prescribed.\textsuperscript{198} The bill states that:

For the treatment of acute pain, a prescription for an opioid drug . . . as a Schedule II controlled substance . . . may not exceed a [three]-day supply, except that up to a [seven]-day supply may be prescribed if: [t]he prescriber, in his or her professional judgment, believes that more than a [three]-day supply of such an opioid is medically necessary to treat the patient’s pain as an acute medical condition; the prescriber indicates [acute pain exception] on the prescription; and [t]he prescriber adequately documents in the patient’s medical records the acute medical condition and lack of alternative treatment options that justify deviation from the [three]-day supply limit established in this subsection.\textsuperscript{199}

House Bill 21 will add Schedule V drugs to the list of drugs that are required to be reported to the Prescription Drug Monitoring Program (“PDMP”).\textsuperscript{200} Other additions to the PDMP include: Requiring physicians to refer to the PDMP before distributing prescriptions, providing the Department of Health with the ability to give other states access to Florida’s PDMP, and allowing physicians with Veterans Affairs, the military, the

\textsuperscript{192} \textit{Id.} § 812(b)(3).
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.} § 812(b)(4)–(5).
\textsuperscript{195} \textit{See Act} effective July 1, 2018, ch. 2018-13, § 8, 2018 Fla. Laws 1, 17. (codified in scattered sections of Fla. STAT.).
\textsuperscript{196} \textit{See id.;} 21 U.S.C. § 812.
\textsuperscript{197} Ch. 2018-13, § 3, 2018 Fla. Laws at 8.
\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{Id.}
Indian Health Services, and Florida medical examiners to look at and add to the data found within the PDMP.\footnote{201} House Bill 21 also includes guidelines for pharmacists.\footnote{202} Specifically, pharmacists must verify the patient’s identity before giving him or her a controlled substance while using the PDMP.\footnote{203}

The appropriations for 2018–2019 include “[f]und[s] to the Department of Children and Families for expenditure[s]” related to the opioid crisis, funds to the Department of Health to provide emergency opioid antagonists to first responders, including police officers and EMTs, funds for the criminal justice system, and funds to improve the PDMP.\footnote{204}

Under House Bill 21, a patient or practitioner who knowingly receives or prescribes a controlled substance that is not medically necessary will now be subject to a second-degree felony.\footnote{205} House Bill 21 became effective on July 1, 2018.\footnote{206}

B. Community Response

Before House Bill 21 was signed by the Governor, some physicians objected to the proposed limits.\footnote{207} Since physicians can no longer prescribe thirty days’ worth of painkillers, House Bill 21 seems to be inconvenient to patients and physicians, who will have to spend more time meeting with one another.\footnote{208} Although it may seem inconvenient, it is an inconvenience that can save thousands of lives nationwide.\footnote{209}

Another part of the bill requires physicians and pharmacists to monitor the statewide database before prescribing opioids to a patient.\footnote{210} The purpose of the database is to inhibit an addict’s means of receiving drugs

\begin{footnotes}

\footnote{201} Ch. 2018-13, § 10, 2018 Fla. Laws at 57, 58, 60; Scott, \textit{supra} note 200.


\footnote{203} Ch. 2018-13, § 6(2)(a), 2018 Fla. Laws at 14.

\footnote{204} \textit{Id.} § 20, 2018 Fla. Laws at 105–06.

\footnote{205} \textit{Id.} § 2, 2018 Fla. Laws at 1–2, 4.

\footnote{206} \textit{Id.} § 21, 2018 Fla. Laws at 106; Scott, \textit{supra} note 200.


\footnote{208} News Service of Florida, \textit{supra} note 207; \textit{see also} Ch. 2018-13, § 2, 2018 Fla. Laws at 4.

\footnote{209} News Service of Florida, \textit{supra} note 207.

\footnote{210} \textit{Id.}; \textit{see also} Ch. 2018-13, § 10(1)–(2)(a), 2018 Fla. Laws at 56.

\end{footnotes}
from multiple doctors. Therefore, failing to check the database will result in a citation, which may escalate to a misdemeanor. Physicians and pharmacists have never had to use this database before. The main concern amongst pharmacists is how the new law and citations will be enforced. Pharmacists are also concerned with how the database will “affect the practice of pharmacy.”

There was also an attempt to remove the two-hour continuing education requirement that must be administered by a statewide professional association of physicians in Florida. There are only four groups that offer this course: “The Florida Medical Association, the Florida Osteopathic Medical Association, the Florida Academy of Family Physicians, and the Florida Psychiatric Society.” These associations charge for the continuing education course. There was an argument that the associations will receive a lot of revenue from this requirement, which is why they support it heavily. These associations are not the only groups that can offer the course, however, as any group can take steps to become certified.

VI. WHAT ARE OTHER STATES DOING?

A. Generally

Setting a seven-day supply limit for initial opioid prescriptions, Massachusetts passed the first opioid-limiting law in the nation. At the end of 2016, seven states had created laws that minimized opioid prescribing; this movement continued in 2017. Over thirty states

211. News Service of Florida, supra note 207.
215. Id.
217. Id.
219. Id.
220. Wilson, supra note 216.
222. Id.
contemplated laws that had to do with controlled substance prescriptions in 2016 and 2017.\textsuperscript{223} By 2018, twenty-eight states had created laws that had limits on prescribing opioids.\textsuperscript{224} Seven days is the most common limit on first-time opioid prescriptions.\textsuperscript{225} Some states have a three-day, five-day, or fourteen-day limit; however, in a few states, there are also dosage limits.\textsuperscript{226} About half of the states that have imposed prescribing limits indicate that they apply to acute pain treatment and set exceptions for the treatment of chronic pain.\textsuperscript{227} Another exception within these limiting laws is cancer treatment; in order to apply, the exception must be included on the prescription and kept in the patient’s medical record.\textsuperscript{228}

Most states focus on general opioid prescribing, but a few states, including Alaska, Connecticut, Indiana, Louisiana, Massachusetts, Nebraska, Pennsylvania, and West Virginia, also set limits that pertain specifically to minors.\textsuperscript{229} These laws control opioid prescriptions to minors, as compared to only initial opioid prescriptions for adults.\textsuperscript{230} Some also require discussions regarding risks of addiction with the minor and his or her parents.\textsuperscript{231}

Rather than limits by statute, a few state laws in New Hampshire, Ohio, Oregon, Vermont, Virginia, Washington, and Wisconsin authorize other entities to set forth prescribing guidelines.\textsuperscript{232} These entities may be the state’s department of health or a provider regulatory board.\textsuperscript{233} Rhode Island and Utah have limits that are indicated by statute and also “allow other entities to adopt prescribing policies.”\textsuperscript{234}

Some state laws guide prescribers in order to limit opioid overuse.\textsuperscript{235} In Maryland, physicians can only prescribe the lowest dose needed to treat the pain for the amount of time the pain is supposed to last.\textsuperscript{236} Utah gives “commercial insurers, the state Medicaid program, workers’ compensation insurers, and public employee insurers” the ability to put forth policies

\begin{itemize}
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Id.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Blackman, \textit{supra} note 221.
\item \textsuperscript{227} Id.
\item \textsuperscript{228} Id.
\item \textsuperscript{229} Id.
\item \textsuperscript{230} Id.
\item \textsuperscript{231} Blackman, \textit{supra} note 221.
\item \textsuperscript{232} Id.
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Id.
\item \textsuperscript{235} See id.
\item \textsuperscript{236} Blackman, \textit{supra} note 221.
\end{itemize}
regarding controlled substance prescribing.\textsuperscript{237} The policies must guide physicians to engage in proper prescribing techniques.\textsuperscript{238}

States are also tackling the epidemic by enacting “laws related to [PDMPs], access to naloxone, pain clinic regulation, [and] provider education and training.”\textsuperscript{239} PDMPs help physicians understand a patient’s prescription history in order to protect vulnerable patients.\textsuperscript{240} Recently, states, including Florida, have passed bills to require providers to register with the PDMP.\textsuperscript{241}

Naloxone is used to undo the effects of opioids while a person is overdosing.\textsuperscript{242} Some states have allowed pharmacists to give out naloxone even if the patient does not have a prescription.\textsuperscript{243} Similarly, family members, school employees, police officers, and first responders are now able to keep naloxone readily available to use when necessary.\textsuperscript{244}

States are also scrutinizing pain clinics that treat chronic pain.\textsuperscript{245} These laws attempt to limit prescriptions in pain clinics.\textsuperscript{246} This is needed because there are some pain clinics that distribute medication in order to make money, rather than because the patient needs them; this leads to excess prescriptions and drug misuse.\textsuperscript{247} These laws are successful in the parts of the country where pain clinics are acting unethically.\textsuperscript{248}

In summary, state legislators are fighting the opioid epidemic in different ways.\textsuperscript{249} It is challenging to treat pain and prevent drug misuse at the same time.\textsuperscript{250} In the past few years, state leaders in twenty-eight states adopted guidelines or limits on prescribing opioids.\textsuperscript{251} The states that have lost the most lives to the opioid crisis are listed below, along with their specific policies and goals for combating the epidemic.\textsuperscript{252}

\begin{thebibliography}{9}
\bibitem{237} Id.
\bibitem{238} Id.
\bibitem{239} Id.
\bibitem{240} See id.
\bibitem{241} Scott, supra note 200.
\bibitem{242} Blackman, supra note 221.
\bibitem{243} Id.
\bibitem{244} Id.
\bibitem{245} See id.
\bibitem{246} See id.
\bibitem{247} Blackman, supra note 221.
\bibitem{248} Id.
\bibitem{249} Id.
\bibitem{250} Id.
\bibitem{251} Id.

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B. New Hampshire

The New Hampshire Board of Medicine adopted opioid prescribing rules, which became effective in January 2017. Pursuant to New Hampshire Code of Administrative Rules Med 502, providers must conduct a physical examination on the patient and document his or her medical history. They must also “consider the patient’s risk for opioid . . . abuse,” keep track of opioid prescriptions, provide the patient with information regarding side effects and dangers, and “[u]tilize a written informed consent [form] that explains the . . . risks associated with opioids.” Providers may “[n]ot prescribe more than the minimum amount of opioids medically necessary to treat the patient’s medical condition.” In most cases, an opioid prescription of [three] or fewer days is sufficient,” however, in an emergency department, a prescription for more than seven days is not permitted.

C. Ohio

“The opioid epidemic has [impacted] nearly every aspect of life in Vinton County, [Ohio].” The expenses involved in caring for drug abusers eats up 25% of the county’s annual budget. In response to the epidemic, effective August 31, 2017, the governor of Ohio added new limits on opioid prescriptions for acute pain. The limits include:

(1) No more than seven days of opioids can be prescribed for adults.
(2) No more than five days of opioids can be prescribed for minors and only after the written consent of the parent or guardian is obtained . . .
(3) Health care providers may prescribe opioids in excess of the day supply limits only if they provide a specific reason in the patient’s medical record.

255. Id. 502.04(b), (h).
256. Id. 502.04(i)(1).
257. Id.
258. Katie Zezima, Epic Opioid Battle Moves to an Ohio Courtroom, WASH. POST, Apr. 8, 2018, at A12.
259. Id.
260. Grzelewski, supra note 252.
These limits indicate Ohio’s goals in reducing the number of opioids prescribed. With these new limits, it is estimated that the state will reduce opioid doses by 109 million. With the reduction of prescriptions, there will be less cases of misuse and abuse.

D. Pennsylvania

Pennsylvania has experienced an alarming rise in drug overdose deaths in recent years. In 2016, 4642 individuals were reported to have died from a drug overdose in the state; 85% of those were specifically as a result of prescription or illicit opioids. In Pennsylvania, there are guidelines for all different kinds of providers: Dentists, gynecologists, pediatricians, emergency room physicians, etc. The guidelines set forth for acute pain in emergency room settings are as follows. First, patients suffering from acute pain will be subject to a physical examination. When a patient is discharged from the hospital, his or her prescription should typically not exceed seven days.

Non-opioid medicines should be considered as alternatives or concurrent treatment with opioids. “When opioids are [needed], the provider should choose the lowest potency opioid necessary to relieve the patient’s pain.” “Emergency providers should not prescribe long-acting opioid agents . . .” Multiple providers should not

262. Grzelewski, supra note 252.
263. Id.
264. See id.
266. Id.
268. Emergency Department (ED) Pain Treatment Guidelines, supra note 252.
269. Id.
270. Id.
271. Id.
272. Id.
273. Emergency Department (ED) Pain Treatment Guidelines, supra note 252.
be prescribing pain medication at the same time.274 “Emergency [room] providers should [also] not fill prescriptions for patients who run out of pain medication[] . . . .”275 Lastly, in Pennsylvania, patients who show signs of “addiction should be encouraged to seek detoxification” and will be assisted in the process by the provider.276

E. West Virginia

West Virginia suffered the greatest loss in the nation to the opioid epidemic with a drug death rate of fifty-two per hundred thousand people.277 The Management of Pain Act is a statutory provision governing prescription pain medication in West Virginia.278 A prescriber is subject to disciplinary action if he or she fails to maintain documentation of the physical examination and medical history of the patient, writes a fake prescription for a controlled substance, or is involved in [a]normal or unusual prescribing.279 A licensing board may conduct an investigation if the board believes the prescriber has engaged in such acts.280

F. Conclusion

A study was conducted to determine the effect of state laws on overdose deaths and treatment.281 The findings indicated that both “pain management clinic law[s] . . . [and] doctor shopping law[s] reduce[] prescription opioid overdose deaths.”282 The implementation of pain management clinic laws reduces the amount of opioid-related overdoses by 9.6%.283 Similarly, doctor shopping laws “reduce[] prescription opioid

274. Id.
275. Id.
276. Id.
279. W. VA. CODE § 30-3A-3(a)(1), (2), (5).
280. See id.
281. Ioana Popovici et al., The Effect of State Laws Designed to Prevent Nonmedical Prescription Opioid Use on Overdose Deaths and Treatment, 27 HEALTH ECON. 294, 295 (2018). “Several studies suggest that PDMPs have the potential to reduce nonmedical use of prescription opioids . . . [along with] treatment admissions.” Id. Nonetheless, “state PDMPs do not seem effective in reducing prescription opioid overdose mortality.” Id. Other solutions, therefore, need to be analyzed. See id.
282. Id. at 301.
283. Popovici et al., supra note 281, at 301.
overdose deaths by 8.5%.“284 Therefore, state action has helped control the opioid epidemic and has begun to save lives.285

VII. OTHER POSSIBLE PROBLEMS & PROPOSED SOLUTIONS

A. France vs. United States

France was consumed by a heroin epidemic in the 1980s and 1990s.286 In 1995, France passed a law giving all doctors the ability to prescribe buprenorphine.287 Buprenorphine, a non-addictive drug that is used to treat opioid addicts, minimizes an addict’s yearnings for opioids.288 The doctors who were prescribing buprenorphine in France were mainly primary-care doctors.289 After this drug was implemented into doctors’ treatment plans, half of all addicts were led to recovery.290 Four years later, overdoses decreased by 79%.291

Compared to France, the laws in the United States require doctors to take an eight-hour class in order to be able to use buprenorphine.292 The law does not require a doctor to take a class in order to prescribe opioids, however.293 The classes that are required to be able to prescribe buprenorphine are expensive and time-consuming.294 Along with the class requirement, doctors may not take more than a certain number of buprenorphine patients—although “Congress is considering waiving this limit.”295 In a study, the results indicated that 10% of doctors do not know how to obtain the waiver required to be able to prescribe buprenorphine.296 According to a psychiatrist specializing in addiction at Brandeis University, many primary-care doctors do not even like the idea of working with addicts.297

284. Id.
285. See id.
287. Id.
288. Id.
289. Id.
290. Id.
291. Khazan, supra note 286.
292. Id.
293. Id.
294. Id.
295. Id.
296. Khazan, supra note 286.
297. Id.
The American healthcare system has other issues that make using France’s solution difficult. Even though Medicaid pays for a large amount of all drug-abuse treatment, state programs have limits on buprenorphine. Similarly, doctors are aware that if they begin to prescribe buprenorphine, most of their patients will be addicts, and there will not be room for others. A solution to this problem is to require those who prescribe painkillers to also prescribe buprenorphine.

In Parkersburg, West Virginia, a state with the greatest number of overdose deaths in the country, only ten doctors who prescribe buprenorphine were found in a fifty-mile radius. Of those ten, three did not take insurance and cost hundreds of dollars, one had a waiting list, and one could not be reached. Only one doctor “accept[ed] new buprenorphine patients and . . . insurance.” Since the cost of treatment is more expensive than the cost of heroin in the United States, most addicts cannot find the means to recover from addiction.

B. Other Issues & Solutions

There are other solutions that have been proposed but not yet implemented. There have been recommendations made to Congress to fund increased resources to emergency rooms. Emergency departments should have opioid dependence screening tools, “training . . . on how to address . . . opioid dependent individuals,” and “referral sources for outpatient addiction . . . clinics,” especially for those who do not have insurance.

Physicians depend on PDMPs to identify improper opioid prescribing history. These systems, however, are separate in each state and therefore, create blind spots for abuse. Also, in many states, data is

298. Id.
299. Id.
300. Id.
301. Khazan, supra note 286.
302. Id.
303. Id.
304. Id.
305. See id.
308. Id.
309. White & Stember, supra note 306.
310. Id.
not available immediately and does not include fill attempts, which would indicate pharmacy shopping. PDMP information is not a part of doctors’ or pharmacists’ systems for the most part. This forces them to take time out of being with the patient to go on a separate system to check the patient’s opioid history. A study regarding PDMPs in Massachusetts indicated that the “process took over four minutes and [fifty-three]... clicks” to conduct. That being said, a Pew study indicated that “the median rate of PDMP usage among prescribers [is about 32%].” Doctors know they cannot see everything regarding the patient’s opioid history and choose to forgo the process. Now, the process in many states, including Florida, is required.

As a more effective mechanism than PDMPs:

Walgreens, Oracle, Centerstone, the National Alliance on Mental Illness, the Brain Injury Association of America, MedStar Health... Health IT Now and the National Council for Prescription Drug Programs (NCPDP) [are using] a nationwide... and real-time drug monitoring program to stop fraudulent prescriptions before they reach the patient’s hands.

...[This] alert system... instantly captures data each time a physician sends an electronic prescription for a controlled substance and each time a pharmacist seeks to fill an opioid prescription.

The White House has become aware of the need for this kind of system and is calling for “States [to] transition to a nationally interoperable [PDMP] network.” When prescribers and pharmacists do not have a full view of a patient’s history with opiates, they can fuel addiction. If they are

311. Id.
312. Id.
313. Id.
314. White & Stember, supra note 306.
315. Id.
316. Id.
317. Act Effective July 1, 2018, ch. 2018-13, § 10(2)(a), 2018 Fla. Laws 1, 56 (codified in scattered sections of fla. stat.); see also White & Stember, supra note 306.
318. White & Stember, supra note 306.
320. See White & Stember, supra note 306.
given the information at the right time, they can help put an end to an
drugs habit and save his or her life.\textsuperscript{321}

VIII. CONCLUSION: WILL FLORIDA’S BILL BE EFFECTIVE?

The fact that young people are more prone to drug abuse is a

\textit{common misconception}.\textsuperscript{322} On the contrary, forty-five to sixty-four-year-olds

“account for 40\% of all drug overdose deaths.”\textsuperscript{323} A majority of those people

were prescribed opioids from their doctors for pain.\textsuperscript{324}

Considering that fact, the purpose of House Bill 21 is to limit the

chance of drug addiction in its infancy.\textsuperscript{325} Although the bill also provides for

additional treatment opportunities and recovery support services, its focus is

the three-day prescribing limit.\textsuperscript{326} With the limit on prescription painkillers,

the sources of the problem may be eliminated; however, it is difficult to

tackle the issue of those who are currently in the grips of addiction.\textsuperscript{327}

Therefore, considering France’s attack on its heroin epidemic, implementing

cheaper treatment options could help those who are already struggling with

addiction.\textsuperscript{328}

On the other hand, since House Bill 477 was passed in October

2017, which charges drug dealers selling fentanyl with murder and

trafficking, there has been a decline in drug overdoses.\textsuperscript{329} Looking at a

microcosm effect of the bill in Florida, “[t]he Manatee County Sheriff’s

Office has investigated 47 . . . overdoses in the first two months of 2018,

compared to 172 . . . overdoses in the first two months of last year.”\textsuperscript{330}

Similarly, only 6 fatal overdoses occurred in the beginning of 2018

compared to 21 that occurred in the first two months of 2017.\textsuperscript{331} Therefore,

with the passage of these two bills—House Bill 21 and 477—the hope is that

addiction and overdoses will continue to decline in Florida.\textsuperscript{332} A history

professor at the University of North Florida stated that the solution to the

\textsuperscript{321} Id.
\textsuperscript{322} Hoban, supra note 1.
\textsuperscript{323} Id.
\textsuperscript{324} Id.
\textsuperscript{325} De Leon, supra note 18.
\textsuperscript{326} Id.
\textsuperscript{327} Id.
\textsuperscript{328} See Khazan, supra note 286.
\textsuperscript{329} See Act effective Oct. 1, 2017, ch. 2017-107, § 19, 2017 Fla. Laws 1, 1,
85; De Leon, supra note 18.
\textsuperscript{330} De Leon, supra note 18.
\textsuperscript{331} Id.
\textsuperscript{332} See id.; Act effective July 1, 2018, ch. 2018-13, § 1, 2018 Fla. Laws 1
.codified in scattered sections of F LA. S TAT.); Ch. 2017-107, § 19, 2017 Fla. Laws at 1, 85.
opiod epidemic is to “make it more difficult and expensive to get supply . . . [and] make treatment on demand available to people.” 333 As the government becomes more involved and aware of the opioid epidemic, tangible measures are being taken to intervene and unravel this national health crisis that has affected the lives of millions. 334

333. Trickey, supra note 50.

334. See President Donald J. Trump’s Initiative to Stop Opioid Abuse and Reduce Drug Supply and Demand, supra note 319; Trickey, supra note 50.
AN EYE FOR AN EYE WILL MAKE THE WHOLE WORLD BLIND: HOW RESTORATIVE JUSTICE WILL HELP FLORIDA SEE AGAIN

AMBER MASSEY*

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I. INTRODUCTION

Restorative justice is a theory that emphasizes restoring victims.¹ Restorative justice is victim-centered and involves those most directly affected by the crime—the victim, the offender, their family members, and

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members of the community. Through the restorative justice process, these individuals are directly involved in addressing the harm caused and coming to a solution. Retributive justice views crimes committed by an offender as a crime against the state and asks the questions: What law was broken, who broke it, and what should the punishment be? Restorative justice instead focuses on the crime against the victim and asks the questions: “Who was harmed, what are the needs and responsibilities of all affected, and how do the parties together address those needs and repair the harm?”

Restorative justice is a relatively new process and only emerged in the United States around the 1970s as an alternative to the criminal justice system we know today. Nationally, there are “[t]hirty-five states [that] have adopted legislation encouraging the use of restorative justice for [both] children and adults.” However, for many years, local non-profits have been relied upon to provide these restorative justice programs.

With regard to Florida, there are quite a few administrative codes that deal with restorative justice in the education system and only one statute when it comes to the criminal system. Florida Statute section 985.155 allows for any state attorney to establish a Neighborhood Restorative Justice Center in areas throughout the county for first-time, non-violent juvenile offenders. The statute defines a first-time, non-violent juvenile offender as:

[A] minor who allegedly has committed a delinquent act or violation of law that would not be a crime of violence providing grounds for detention or incarceration and who does not have a

4. Mulligan, supra note 1, at 140.
5. Nusrat, supra note 3.
6. Mulligan, supra note 1, at 141.
10. Id.
11. See About RJ, supra note 7.
previous record of being found to have committed a criminal or
delinquent act or other violation of law.\footnote{13}

Of the twenty judicial circuits in Florida, only four judicial circuits
offer a form of restorative justice programs for juveniles: The Fourth
Judicial Circuit, which includes Clay, Duval, and Nassau counties; the Ninth
Judicial Circuit, which includes Orange and Osceola counties; the Twentieth
Judicial Circuit, which includes Charlotte, Collier, Glades, Hendry, and Lee
counties; and the Seventeenth Judicial Circuit, which includes Broward County.\footnote{14} While the purpose behind Florida Statute section 985.155 is to
allow for alternatives to the traditional juvenile system route, very few
counties are taking advantage of these alternatives.\footnote{15} Rather than giving state
attorneys the option to enact a Neighborhood Restorative Justice Center, it
should be mandatory that all judicial circuits have restorative justice as an
alternative avenue for first-time, non-violent offenders, especially with
regard to juveniles.\footnote{16}

Section II of this note will provide a brief overview of the history of
restorative justice, as well as explain the most common types of restorative
justice programs.\footnote{17} Section III examines studies in both the United States
and worldwide on how employing restorative justice practices can reduce
recidivism among juveniles and adults.\footnote{18} Section IV examines whether there
is a cost benefit to using restorative justice over the traditional justice
system.\footnote{19} Section V examines the different types of laws Florida has in
effect pertaining to restorative justice.\footnote{20} Section VI examines how
restorative justice has been used in Florida case law.\footnote{21} Section VII looks
specifically at Broward County, Florida—how the county uses restorative
justice practices and whether those programs are state funded or privately
funded.\footnote{22} Section VIII looks at other states’ use of restorative justice
practices and programs, and how they relate to Florida’s use.\footnote{23} Section IX

\footnotesize{13. \textit{Id.} § 985.155(1)(c).}
15. See FLA. STAT. § 985.155; About RJ, supra note 7.
16. See FLA. STAT. § 985.155; About RJ, supra note 7.
17. See infra Section II.
18. See infra Section III.
19. See infra Section IV.
20. See infra Section V.
21. See infra Section VI.
22. See infra Section VII.
23. See infra Section VIII.
examines the limitations surrounding restorative justice. Lastly, section X will offer a conclusion on why Florida needs to implement more restorative justice practices and make restorative justice the route for first-time, non-violent juvenile offenders.

II. OVERVIEW OF RESTORATIVE JUSTICE

When a crime is committed, often as a society we believe “the punishment must fit the crime.” Within the westernized legal system, having justice done is most often synonymous with administering punishment. While the current criminal justice system in the United States has its strengths, there are also weaknesses, such as, being overworked and overwhelmed with the number of cases. As a result of being overwhelmed, the offender and victim might not get the attention needed due to lack of time. The restorative justice model is better suited to meet an individual’s needs because there is a personalized sense to it—from the face-to-face direct communication to working together to reach a solution.

The restorative justice model started out in the 1890s based on the tradition of oral justice of the New Zealand Maori and the native people of North America. However, the movement did not begin to gain momentum until the 1960s when a variety of approaches to restorative justice started to emerge in many countries throughout the world. Canada, being one of

24. See infra Section IX.
25. See infra Section X.
27. Id.
29. Id.
30. Nusrat, supra note 3.

Navajo of North America explain that their version of restorative justice was not designed to punish individuals, rather to “teach them how to live a better life. It is a healing process that either restores good relationships among people or, if they do not have good relations to begin with, fosters and nourishes a healthy environment.”

Id. at 79 (quoting Michael L. Hadley, Spiritual Foundations of Restorative Justice, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 174, 179 (Dennis Sullivan & Larry Tifft eds., 2006)).
32. Id. at 78–79.
these countries, is considered to be the pioneer behind the restorative justice movement because they began using victim offender mediation (“VOM”) in 1974 as a result of an incident in Elmira, Ontario. There, a probation officer— who wanted to make offenders accountable for their actions—took two men door-to-door to the owners of the properties they vandalized. This action had such positive reactions from all parties involved that it served as a springboard for victim-offender mediation programs. While restorative justice was around in the 1970s, the movement really began to take off in 1989 when New Zealand made restorative justice the hub of its entire juvenile justice system. Since then, restorative justice can be seen throughout the world in countries such as Australia, Canada, Hong Kong, Israel, New Zealand, South Africa, and much of Western Europe. Even international organizations such as the United Nations have policies promoting the use of restorative justice.

In the United States, restorative justice programs have been around sporadically since the 1970s and 1980s. However, the majority of growth in restorative justice began in the 1990s with the implementation of the Balanced and Restorative Justice Project (“BARJ”) in 1992. “BARJ was developed through a funding initiative of the Office of Juvenile Justice and Delinquency Prevention of the [United States] Department of Justice.” “A number of states are currently implementing . . . restorative justice principles [into] their juvenile justice systems [such as:] Arizona, California, Colorado, Illinois, Iowa, Minnesota, New York, Ohio, Oregon, Pennsylvania, Texas, Vermont, and Wisconsin.” While restorative justice originally began as a way of dealing with property crimes such as burglary, today restorative justice is being used for even the most severe forms of crimes, including murder. Restorative justice is not only used throughout the criminal justice system, but is also used in schools, communities, businesses, and foster care

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33. Id. at 77; T. Bennett Bur kemper, Jr. et al., Restorative Justice in Missouri’s Juvenile System, 63 J. Mo. B. 128, 130 (2007).
35. Duel et al., supra note 31, at 77.
37. Bur kemper, Jr. et al., supra note 33, at 130.
38. Id.
39. Id.
40. Id.
41. Id.
42. Bur kemper, Jr. et al., supra note 33, at 130.
43. See Mahajan, supra note 34, at 125.
and group homes. There are three main models of restorative justice used in the criminal justice system: “(1) victim offender mediation, (2) family group conferencing, and (3) circles.”

A. Victim-Offender Mediation

“The Elmira Case is . . . credited with the birth of . . . VOM.” “VOM is the most developed and widespread” form of restorative justice; it is also one of the broadest forms of restorative justice. There are typically four phases in VOM: “(1) intake, (2) preparation, (3) mediation, and (4) follow-up.”

In the first phase, a mediator looks at a potential case to make sure the case is appropriate for VOM. In the second phase, “the mediator meets with all parties involved” with the case to see if they are willing to participate in good faith. If any party is not willing to participate, then VOM cannot occur. If all parties agree to participate, they are expected to be honest and candid in expressing how they recount the events and their feelings surrounding it. Throughout these discussions, “victims and offenders work together to create” a plan for restitution that appropriately addresses the crime. In VOM, victims have the chance to be heard and explain how they were directly impacted by the crime and offenders take full accountability for what they have done and attempt to make amends with the victim. When VOM originated, it only included the victim and the offender, but now it can also include “parents, family members, or other supporters.” Then, in the follow-up phase, the case is reviewed for success; if VOM was not successful, then the case is returned back to the courts.

There are many benefits to VOM. First, the victim benefits because he or she is able to directly confront the offender and explain the

44. About RJ, supra note 7.
45. Duel et al., supra note 31, at 79.
46. Id. (emphasis in original).
47. Id.
48. Mahajan, supra note 34, at 125.
49. Duel et al., supra note 31, at 79.
50. Id.
51. Id.
52. Id.
53. Id.
54. Duel et al., supra note 31, at 79.
55. Id. at 79–80.
56. Id. at 80.
57. Id.
58. See id.
impacts without the stresses of a court room setting. Second, the offender benefits through taking responsibility for his or her actions and dealing with the ramifications associated with those actions. And third, society benefits because the offender can directly approach the harmed community and make amends for his or her wrongdoing, resulting in decreased recidivism.

B. **Family Group Conferencing**

Family Group Conferencing (“FGC”) originated in 1989 in New Zealand under the Children’s and Young People’s Well-Being Act. FGC can be seen in one of its various forms throughout the world. There are two main models when it comes to FGC: The New Zealand model and the Australian model. FGC is manifested differently between New Zealand and Australia. In New Zealand, the FGC model focuses on using social service workers to organize conferences and help families decide who is most appropriate to participate in the process. The New Zealand model does not use a script to steer the direction of the dialogue. Further, the offender, or his or her family, offers a proposal to the victim and his or her family in order to provide a cure for the harm caused. To the contrary, the Australian model uses an authoritative figure, such as a police officer, to mediate the conference. Further, the Australian model uses a scripted dialogue to steer the direction of the conversation.

In the United States, where the FGC has been adopted, the Australian model is followed. A case is usually referred for FGC by judges or probation officers; however, police officers and schools can refer as well. FGC in the United States uses neutral facilitators, which can consist of law enforcement officers, human services personnel, county staff, clergy,

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60. *Id.*
61. *Id.*
62. *Id.; see also* Children’s and Young People’s Well-Being Act 1989, pt. 2, cl. 20 (N.Z.).
64. *Id.* at 81.
65. *Id.*
66. *Id.*
67. *Id.*
68. Duel et al., *supra* note 31, at 81.
69. *Id.*
70. *Id.; Reimund, supra* note 2, at 677.
or community-based volunteers. These facilitators assist the victims, offenders, and their families in engaging in an open dialogue. In the FGC, the number of supporters present can range from six to ten or to only a couple of individuals. “FGC has been primarily used in cases involving juveniles” in order to help “facilitate cooperation between families of victims and families of offenders” in resolving the conflict. However, FGC use for adults has been steadily increasing. A 2001 estimate “showed ninety-four active FGC programs in the United States.” When looking at FGC and VOM, the main difference between the two is that family members take a primary role in FGC, while in VOM they take a secondary role and are not mandatory participants.

C. Circles

In restorative justice, circles refer to a community-based decision-making approach that is derived from traditions of aboriginal people of North America. These circles were used as a way to strike a balance between the individuals and the community and to restore harmony. “The use of circles in the United States began . . . with a pilot [program] in Minnesota” in 1995. Circle sentencing—which is also referred to as “community circles, peace[] circles, or healing circles”—has been evolving “since the early 1990s as an effective” means to uncover “the root of the problems” leading to an offender’s actions.

Unlike in VOM, where only the victim and offender are focused on, in circles, the healing process is expanded by including the entire community in the process. Circles often can include attorneys, mediators, and “families of [the] victims and offenders.” In order to effectively include the community in the circle, a talking piece is used and “passed clockwise

73. Id.
74. Id.; Umbreit et al., supra note 36, at 269.
75. Umbreit et al., supra note 36, at 269.
76. Duel et al., supra note 31, at 81.
77. Id.
78. Reimund, supra note 2, at 677.
79. Duel et al., supra note 31, at 81–82.
80. Id. at 82.
82. Reimund, supra note 2, at 677.
83. Sapir, supra note 81, at 208.
84. Id. at 210; see also Mahajan, supra note 34, at 125.
85. Mahajan, supra note 34, at 129.
Whoever is in possession of the talking piece has uninterrupted time to convey his or her thoughts and wishes on a particular event, usually the crime. The use of the talking piece is to “emphasize respect, valuing what each participant has to say.” It also helps the participants to speak from the heart because the person with the talking piece cannot be interrupted. Since the community is invited to these circles, the discussion is typically focused on how the community as a whole can prevent future “harm to the community[, provide care and support for [the] victim[ ], and appropriately receive community offenders.”

III. RESTORATIVE JUSTICE AND RECIDIVISM

A. In Other Countries

There are multiple studies that show the benefit of switching to a restorative justice system. A meta-analysis that examined thirty-five victim and offender programs found that programs using restorative justice were far more effective than programs using traditional criminal justice. Further, a 2007 study found that restorative justice practices were more effective at reducing more serious crimes than less serious crimes, such as property crimes. The study—including close to eight hundred cases—found that restorative justice reduces the frequency of reoffending by an average of twenty-seven percent. A handful of other studies have found that restorative justice has this positive effect. The Ministry of Justice—in a report on re-offending following a restorative justice program—found that

86. Duel et al., supra note 31, at 82.
87. Id.
88. Reimund, supra note 2, at 678.
89. Id. at 677–78; see also Duel et al., supra note 31, at 82.
90. Duel et al., supra note 31, at 82.
93. SHERMAN & STRANG, supra note 91, at 8.
95. See SHERMAN & STRANG, supra note 91, at 22.
those who participated in a restorative justice program had a fourteen percent lower re-offending rate than those who did not participate.96

B. The United States

The United States Department of Justice supported research in 2017 on the effectiveness of restorative justice programs.97 The objective of the research was to incorporate highly quantitative studies to analyze the effectiveness of various restorative justice programs.98 This research looked at “results related to delinquency, non-delinquency, and victim outcomes” for offender and victim participants in the restorative justice programs.99 Analysis of these programs “showed a moderate reduction in future delinquent behavior” as compared to a more traditional juvenile court proceeding.100 However, victim-participants in these restorative justice programs “appear to experience a number of benefits and are more satisfied” with the restorative justice programs than the traditional approach of the justice system.101 When looking at the different types of restorative justice programs, research found encouraging results in terms of delinquency outcomes for the offenders.102 Overall, the findings suggest that certain restorative justice programs could reduce future youth delinquency while increasing victim satisfaction with the outcome.103

However, the Department of Justice will likely continue to do additional evaluations to substantiate the promising effects identified.104

A “meta-analysis . . . found that restorative justice conferences cause a ‘modest, but highly cost-effective, reduction in the frequency of repeat offending by the consenting [incarcerated/formerly incarcerated individuals] randomly assigned to participate in such a conference.’”105 Another “meta-

98. See id. at 2.
99. Id.
100. Id.
101. Id. at 3.
102. See WILSON ET AL., supra note 97, at 2. These outcomes were seen in “victim-offender conferencing, [FGC], arbitration/mediation programs and circles.” Id.
103. Id. at 2–3.
104. See id. at 3, 39.
105. KATHERINE BECKETT & MARTINA KARTMAN, UNIV. OF WASH., VIOLENCE, MASS INCARCERATION AND RESTORATIVE JUSTICE: PROMISING POSSIBILITIES 7 (2016),
analysis of a sample of 11,950 juveniles found that restorative justice programs [had] a [thirty-four] percent reduction in recidivism.”\textsuperscript{106} Studies have also found that even “when former participants did re-offend, [the] crimes [that they committed] were less serious than those committed by others who had not [participated in a] restorative justice process[].”\textsuperscript{107} Further, while less is known about the effect of diversionary programs— which are programs that use restorative justice practices to divert defendants from incarceration—evaluations have found that recidivism rates were significantly lower for program participants than for comparison groups.\textsuperscript{108}

C. Analysis

It is clear that the United States needs to conduct more research to determine the full range of the effectiveness of implementing restorative justice programs and the decrease in recidivism associated with it.\textsuperscript{109} It appears that, with time and further research, the United States—like the United Kingdom and the rest of Western Europe—will see a substantial decrease in the amount of recidivism in its juvenile and adult offenders.\textsuperscript{110} It is apparent though, based on the studies done in other countries, that there is a link between restorative programs and a decrease in recidivism; the United States should use these studies as further proof that restorative justice practices are a smart move for itself and society as a whole.\textsuperscript{111} It also appears that, while one benefit of switching restorative justice practices is a

\textsuperscript{106} Id. at 7.
\textsuperscript{107} Id.
\textsuperscript{108} See Umbreit et al., supra note 36, at 281–82, 284.
\textsuperscript{109} See Wilson et al., supra note 97, at 3.
\textsuperscript{111} See Beckett & Kartman, supra note 105, at 7; Restorative Justice Council, supra note 96, at 3; Sherman & Strang, supra note 91, at 4; Wilson et al., supra note 97, at 3; Kershen, supra note 94.
lower re-offending rate, there also appears to be a cost benefit to switching as well.\textsuperscript{112}

IV. COST BENEFITS OF RESTORATIVE JUSTICE

The costs of using restorative justice are significantly lower than the traditional justice system.\textsuperscript{113} Many have concluded that these programs are significantly lower due to the following reasons: “Volunteers typically mediate sessions; [most] cases can . . . be dealt with in a few hours; and . . . offenders [often] do not require legal representation . . . .”\textsuperscript{114}

For example, “Genesse County in New York has been [using] restorative justice program[s] since 1981.”\textsuperscript{115} “Based on data [collected] by the end of December 2004, the County estimates it saved over four million dollars by [sending] offenders to community service sentencing versus placing them in jail.”\textsuperscript{116}

In a cost-benefit study of an adult felony . . . court, researchers found that though the cost of probation for . . . participants [in drug court] was about $1,400 more than those who were not, there [were] net savings and other financial benefits to the community that far outweighed the costs.\textsuperscript{117}

Another study done by Indiana and Ohio compared consequences for seventy-three youths and adults going through VOM programs against those in a traditional process.\textsuperscript{118} The VOM “offenders spent less time incarcerated and when they were incarcerated,” they spent time in county jail rather than state prison, which resulted in substantial cost savings.\textsuperscript{119} Even on a worldwide scale, restorative justice has been shown to be cheaper than

\begin{quote}
\textsuperscript{113} Id. at 14.
\textsuperscript{114} Marc-Antoine Carreira da Cruz, A Potential Use of Crime Statistics — Measuring Cost Effectiveness of Restorative Justice Programmes: A Cross Eye on the British and Canadian Debate, EFFECTIVS NEWSL. (Effectivs, Brussels, Belg.), Nov. 2010, at 1, 3.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\end{quote}
traditional justice.\textsuperscript{120} A report by the United Kingdom’s Ministry of Justice found, “that face-to-face [restorative justice] conferences both reduce crime and provide a cost saving to [the] government.”\textsuperscript{121} Further, the report found that there were “[n]ine pounds saved for every one pound spent,” which in United States currency would be for every $11.36 saved, $1.26 was spent.\textsuperscript{122}

Unlike the research done on recidivism, there is very little in the realm of whether restorative justice is more cost-effective than the traditional justice system.\textsuperscript{123} However, the research that has been conducted shows a promising potential for monetary benefits in addition to the societal benefits.\textsuperscript{124} If countries like the United Kingdom are seeing a substantial saving in cost by using restorative justice practices, then there is no reason that—with time and effort—the United States will not see the same results.\textsuperscript{125} Even if the cost savings turn out to be not as substantial as originally hoped, the societal benefits should still be considered when looking at whether to employ restorative justices practices.\textsuperscript{126}

V. FLORIDA STATUTES ON RESTORATIVE JUSTICE

There is only one criminal statute in Florida relating to a restorative justice program for juveniles, which is Section 985.155 of the Florida Statutes.\textsuperscript{127} Florida Statute section 985.155 allows for the state attorney in each judicial district to establish at least one Neighborhood Restorative Justice Center in each county\textsuperscript{128} for “the purposes of operating a deferred prosecution program for first time, nonviolent, juvenile offenders.”\textsuperscript{129} Out of

\begin{itemize}
\item \textsuperscript{120} See Latimer & Kleinknecht, supra note 112, at 14; Wachtel, supra note 110.
\item \textsuperscript{121} Wachtel, supra note 110.
\item \textsuperscript{122} Id.; see also Exchange Calculator from Dollar to British Pound, CURRENCY-CALC.COM, http://www.currency-calc.com/USD GBP (last visited Dec. 17, 2018).
\item \textsuperscript{123} See Benefits of Restorative Justice to Victims, Offender, Communities, supra note 115.
\item \textsuperscript{124} See id.
\item \textsuperscript{125} See Latimer & Kleinknecht, supra note 112, at 14; Wachtel, supra note 110.
\item \textsuperscript{126} See Carreira da Cruz, supra note 114, at 3; Beitsch, supra note 9; Benefits of Restorative Justice to Victims, Offender, Communities, supra note 115.
\item \textsuperscript{127} Fla. Stat. § 985.155(1)(c) (2018); see also About RJ, supra note 7.
\item \textsuperscript{128} Id. § (2)(a).
\item First-time, non-violent juvenile offender means a minor who allegedly has committed a delinquent act or violation of law that would not be a crime of violence providing grounds for detention or incarceration and who does not have a previous record of being found to have committed a criminal or delinquent act or other violation of law.
\end{itemize}
the twenty judicial circuits, only four offer some form of alternate restorative justice program: The Ninth Judicial Circuit, which includes Orange and Osceola Counties; the Twentieth Judicial Circuit, which includes Charlotte, Collier, Glades, Hendry and Lee Counties; the Fourth Judicial Circuit, which includes Clay, Duval, and Nassau Counties; and the Seventeenth Judicial Circuit, which covers Broward County. Under Florida Statute section 1006.13 subsection 1, which falls under the Education Code and allows for, but does not require, “alternatives to expulsion or referral to law enforcement agencies to address disruptive behavior through restitution, civil citation, teen court, neighborhood restorative justice, or similar programs.”

There are, however, Florida Administrative Codes that cover the topic of restorative justice. Florida Administrative Code Rule 63H-2.006 requires the Department of Juvenile Justice (“DJJ”) non-residential staff to be trained in restorative justice, while Rule 63H-2.007 requires the DJJ detention staff to be trained in restorative justice. Even more encouragingly, Florida is on the right path in implementing more of a restorative justice system for juveniles; Rule 63E-7.016, requires that “residential commitment program’s mission statement . . . be consistent with the [DJJ’s] mission and principles of . . . restorative justice philosophy.”

VI. FLORIDA RESTORATIVE JUSTICE CASE LAW

In the case of State v. VanBebber, a Florida Supreme Court case—a defendant, convicted of several felony counts of driving under the influence, was given a downward departure sentence due to mitigating circumstances. In the concurring opinion by Justice Pariente, she talked about how sentencing the defendant to a lengthy prison term would only complete the goal of retribution, but by using a restorative justice approach instead, the harm between the defendant and his child would be healed.

130. About RJ, supra note 7; Judicial Circuits Map, supra note 14.
132. See Diversion Programs, supra note 14.
135. FLA. ADMIN. CODE ANN. r. 63H-2.006.
137. FLA. ADMIN. CODE ANN. r. 63E-7.016.
138. 848 So. 2d 1046(Fla. 2003).
139. Id. at 1047–48.
140. Id. at 1053–54.

In this case, a lengthy prison term would satisfy only the goal of retribution. On the other hand, a balanced and restorative justice approach views crime as “more than a violation of . . . criminal law” but also as a disruption “in a
Additionally, in the case of Department of Revenue v. Jackson—another Florida Supreme Court case—a defendant was incarcerated and filed a petition for modification of his child support obligation until his release from prison. The Fifth District Court of Appeal affirmed the [petition] ... and certified conflict with a case from the Fourth District Court of Appeal. The Florida Supreme Court held that the trial court could hold the incarcerated parent’s petition for modification in inactivity pending release. While the case itself is fairly unimportant to restorative justice, what was notable about this case was the opinion of Justice Pariente, concurring in part and dissenting in part. In her concurring/dissenting opinion, Justice Pariente stated:

Alternatives to incarceration could embrace a balanced and restorative approach to criminal justice. This approach requires the offender to be held accountable for his or her criminal actions by recognizing the harm done, including indirectly to his or her child, and by imposing a solution that would enable the offender to seek to repair the harm resulting from his or her criminal behavior, including the continued payment of child support.

Even more impressive is the case of nineteen-year-old Conor McBride, which is the only criminal case in Florida to use restorative justice. On March 28, 2010, Conor McBride walked into the Tallahassee Police Department and told the officer on duty that he shot his fiancé in the head. About an hour before McBride walked into the department, he had shot his girlfriend of three years, Ann. The shooting occurred after, what
was essentially, thirty-eight hours of continuous fighting.¹⁵⁰ The State Attorney for Leon County charged McBride with first-degree murder, which “carries a mandatory life sentence, or potentially, the death penalty.”¹⁵¹ Ann’s parents forgave Conor and, through research, found out about restorative justice and restorative justice expert, Sujatha Baliga.¹⁵² After a conference call among all parties and their attorneys, they were convinced the situation was suitable for a restorative justice program.¹⁵³ After doing his own research, the prosecutor agreed to the mediation, and on June 22, 2011, the restorative circle took place.¹⁵⁴

This restorative circle was in a similar format as seen in VOM, “except [for] the fact that the attorneys were . . . present with the parties.”¹⁵⁵ Each party, including Conor, his parents, and Ann’s parents, spoke about the crime and how it affected them.¹⁵⁶ After the circle was over, Ann’s parents were asked what they wanted as restitution; this would be in addition to the punitive sentence.¹⁵⁷ They asked that Conor do enough good work for society for two people “because Ann was not there to do her share”; they suggested a sentence of ten to fifteen years in prison for his crime.¹⁵⁸ The State Attorney said he would take their suggestions into consideration, but he still needed to consult other individuals before offering a plea deal.¹⁵⁹ “Three weeks later, [the State Attorney] gave Conor a choice between [twenty-five] years . . . imprisonment [or] [twenty years] imprisonment plus [ten] years of probation.”¹⁶⁰ Conor chose the twenty years plus ten years of probation.¹⁶¹ Restorative justice expert, Sujatha Baliga stated:

[T]hat the retributive system rarely sees the importance and need of including the victims in deciding what happens to the people who have done unimaginable damage to their lives. Likewise, the retributive system does not recognize redemption or allowing the offender the opportunity to repair the irreparable before entering the doors of the courthouse.¹⁶²

¹⁵⁰. Id.
¹⁵¹. Id. at 31.
¹⁵². Mahajan, supra note 34, at 139–40.
¹⁵³. Id. at 140.
¹⁵⁴. Id. at 140–41.
¹⁵⁵. Id. at 141.
¹⁵⁶. Id.
¹⁵⁷. Mahajan, supra note 34, at 142.
¹⁵⁸. Id.
¹⁵⁹. Id. at 142–43; see also Tullis, supra note 147, at 31.
¹⁶⁰. Mahajan, supra note 34, at 142.
¹⁶¹. Id.
¹⁶². Id. at 143–44.
Two important questions were asked after looking at this case: (1) “has the restorative circle . . . worked?” and (2) “[o]n a larger scale, [has] it met the ends of community justice?” In order to answer these questions, you have to look at “comparing the outcome[s] of [the] case with the goals of a VOM model.” Based on the outcomes of this case, it is clear that all the objectives of VOM had been met. “The offender was held accountable, the victim[s] parents] received closure, and the ways of restitution were agreed upon.” Even more impressive, is that “the punitive sentence was also decided through [this] restorative circle.”

There is not much case law using restorative justice practices in Florida. It is worth noting that the cases that have mentioned the benefits of using restorative justice practices have been Florida Supreme Court cases; further, the one case where restorative justice was used throughout the entire process was a first-degree murder case. The fact that the Florida Supreme Court justices and even some attorneys are starting to see how beneficial using restorative justice practices can be is a big step in what the future can hold for Florida. Over the last ten years or so, restorative justice can be seen more and more in Florida and even specifically in Broward County. There are a handful of programs offered within Broward that are helping to bring the community, victims, and offenders together to repair harm.

VII. USE OF RESTORATIVE JUSTICE IN BROWARD COUNTY

In Broward County, “[i]f a minor child has committed a first or second non-violent offense, the State Attorney’s Office (“SAO”) may choose to offer the minor [the option of] a diversionary program.” The SAO

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163. Id. at 144.
164. Id.
165. Mahajan, supra note 34, at 144.
166. Id.
167. Id.
168. Id.
169. See Dep’t of Revenue v. Jackson, 846 So. 2d 486, 500 (Fla. 2003); State v. VanBeber, 848 So. 2d 1046, 1052 (Fla. 2003); Tullis, supra note 147, at 32.
170. See Jackson, 846 So. 2d at 500; VanBeber, 848 So. 2d at 1054; Tullis, supra note 147, at 31.
171. See Jackson, 846 So. 2d at 500; VanBeber, 848 So. 2d at 1054; Tullis, supra note 147, at 32.
offers several different diversionary programs, not only for minors, but for adults as well, which include: Truancy diversion, misdemeanor diversion, felony pre-trial intervention, domestic violence misdemeanor diversion, driving while license suspended diversion program, and alternative to formal processing of juvenile cases.\(^{175}\)

The Broward County Sheriff’s Office has a program called the Community Justice Program (“CJP”).\(^{176}\) “[This] is a voluntary program established to provide Civil Citation (pre-arrest) and diversion (post-arrest) options for juvenile offenders who reside in Broward County.”\(^{177}\) The CJP is offered to youths—ages seven to seventeen—who are referred for criminal offenses committed within the county.\(^{178}\) Youths can enter the program either by a civil citation referral by law enforcement officers or via a post arrest diversion referral from the SAO.\(^{179}\) This program also focuses on the needs of victims of crimes that are associated with the juveniles’ cases and the community “through the implementation of restorative justice principles.”\(^{180}\) The goal of CJP is to “[reduce] recidivism; [r]educer youth risk factors; [p]rovide and link youth to appropriate community services to meet their social, educational, and health needs; . . . [a]ddress victim needs for counseling, reparation, and restitution;” etc.\(^{181}\) Since 2012, when the CJP program was put in place, over four thousand youths have been served.\(^{182}\) Of those youths, ninety percent achieved successful completion rates and ninety-eight percent of the youths did not recidivate within the twelve-month period following the program.\(^{183}\) Further, the use of the CJP program “saved an estimated $13.6 million in arrest processing costs.”\(^{184}\)

“As of [the 2016 Fiscal Year], Broward County is ranked [third] in . . . Florida for civil citation utilization.”\(^{185}\) The 2016 report found that seventy-two percent of youths that were eligible to receive a civil citation received one, up two percent from the previous year.\(^{186}\) The report also

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175. Diversion Programs, supra note 14.
177. Id.
178. Id.
179. Id.
180. Id.
181. Juvenile Assessment Center, supra note 176.
183. BROWARD CTY. HUMAN SERVS. DEP’T, supra note 172, at 5.
184. Hollinger, supra note 182.
185. BROWARD CTY. HUMAN SERVS. DEP’T, supra note 172, at 5.
186. Id.
looked at missed opportunities where a civil citation could have been issued, but arrests were made instead. “In Broward County in [2016], there were 365 missed opportunities, which accounted for [twenty-eight] percent of [youths] eligible [for] civil citations.”

Broward County also has the PROMISE program, which stands for Preventing Recidivism through Opportunities, Mentoring, Interventions, Support, and Education. This was put into effect by the Broward County public school system to address student issues that would normally lead to juvenile delinquency arrest and result in entry to the juvenile justice system. The PROMISE program uses restorative justice principles to help “address socially unacceptable or illegal behaviors” of children in public schools. The Urban League of Broward County offers another program called Project EMBRACE. “Project EMBRACE is a three-to-six month [long] diversion program for first time juvenile offenders [that] provides alternatives to [the] traditional criminal justice processes.”

Broward County has a good variety of restorative justice programs in effect and a majority of them are run by a local government, such as the Broward County Sheriff’s Department or Broward County public schools. While there are still a few programs that are run through private or non-profit funding, it is a positive sign to see the county taking a role in applying these restorative justice practices to its juvenile offenders. There will always be a need for non-profit-type organizations to step in to help the local government, but instead of working independently of the local government, there should be a switch to working together to form one single, unified community; working towards using restorative justice practices is a step in

187. Id.
188. Id. at 5–6.
190. See id.
191. Id.
193. Id.
194. Id.
195. See Juvenile Assessment Center, supra note 176; PROMISE Program, supra note 189.
196. See Juvenile Assessment Center, supra note 176.
the right direction to having restorative justice be an everyday part of the traditional justice system.\textsuperscript{197}

VIII. OTHER STATES’ USE OF RESTORATIVE JUSTICE

A. Colorado

Colorado is leading “the [n]ation in [p]ioneering [r]estorative [j]ustice laws,”\textsuperscript{198} and “in legal support for restorative justice.”\textsuperscript{199} Colorado Revised Statute section 19-1-103(94.1)\textsuperscript{200} defines restorative justice.\textsuperscript{201} Colorado has statutes in the state criminal code and children’s code that promote the use of restorative justice not only in the school disciplinary setting, but also in criminal and juvenile court and the Department of Corrections.\textsuperscript{202} In 2007, upon signature of the governor, the Colorado Restorative Justice Coordinating Council was created pursuant to HB-07-1129.\textsuperscript{203} In 2013, Colorado expanded restorative justice through HB-13-1254,\textsuperscript{204} which initiated pilot programs for four districts—Pueblo, Alameda, Boulder, and Weld—to screen for cases that were eligible for restorative justice practices as the first line of response to many juvenile crimes.\textsuperscript{205} “In 2015, HB-15-1094 further expanded the [Restorative Justice Coordinating] Council membership to include a public defender, judge, and law

\textsuperscript{197} See Allen, supra note 28; Diversion Programs, supra note 14; Juvenile Delinquency, supra note 173.


\textsuperscript{199} Id.

\textsuperscript{200} COLO. REV. STAT. § 19-1-103(94.1) (2018).

\textit{Restorative justice} means those practices that emphasize repairing the harm to the victim and the community caused by criminal acts. Restorative justice practices may include victim-offender conferences attended voluntarily by the victim, a victim advocate, the offender, community members, and supporters of the victim or the offender that provide an opportunity for the offender to accept responsibility for the harm caused to those affected by the crime and to participate in setting consequences to repair the harm. Consequences recommended by the participants may include, but need not be limited to, apologies, community service, restoration, and counseling. The selected consequences are incorporated into an agreement that sets time limits for completion of the consequences and is signed by all participants.

\textit{Id.}

\textsuperscript{201} Id.

\textsuperscript{202} Witzel, supra note 198; see also COLO. REV. STAT. § 19-1-103.


\textsuperscript{205} Id.; Witzel, supra note 198.
206. HB-15-1094 also allowed for the expansion of eligible cases “to include petty offenses, misdemeanors, and felony 3–6 level offenses.” During the pilot program period of July 1, 2014 and June 30, 2016, 574 youths were found to be suitable and began participation in a restorative justice program. During this two year period, 474 youths out of the 574 participated in the restorative justice program and reached an agreement, while “433 youths had successfully completed their restorative justice contracts.” All 433 cases were referred to the pilot program.

When looking at the recidivism in these pilot programs, at the time the data was collected, 283 of the 574 had completed participation in the restorative justice program. Of those 283 youths, “17.7% (50) had been out of the restorative justice program for a full year, 45.9% (130) had been out of restorative justice at least six months, but less than a full year, and 36.4% (103) had been out of restorative justice for less than six months.” The data looked at the youth who had been out of the program for an entire year, and of those fifty youths, eight percent recidivated in the year following their restorative justice program. This is a significant decrease when compared to the local and national average of sixty to seventy percent recidivism for those not using restorative justice programs.

Even more impressive, is that Colorado has a High Risk/Impact Victim Offender Dialogue (“HRVOD”). This is a unique system “that serves survivors [or] victims of high impact crimes.” Participation in HRVOD is voluntary and can include, but is not limited to, the following violent crimes: All forms of murder, vehicular homicide, assaults,
kidnapping, aggravated robbery, and child abuse.\textsuperscript{217} HRVOD has been used since 2011 and works “in conjunction with or within the criminal justice system.”\textsuperscript{218} Often “restorative justice . . . in HRVOD cases occurs after sentencing [or] much later in the punishment phase.”\textsuperscript{219} It is easy to see why Colorado is leading the way for restorative justice in the United States; not only does the state as a whole implement restorative justice, individual counties also have some form of restorative justice program—for example, the Boulder County Sheriff’s Office Restorative Justice (“BCSORJ”) program, which was founded in 2000.\textsuperscript{220} There are also numerous other restorative justice programs throughout the state—approximately sixty-three.\textsuperscript{221} These programs are made up of judicial districts, school boards, private companies, and police departments.\textsuperscript{222}

One example of how Colorado’s pilot restorative justice program is helping to heal victims of crimes is evidenced in the case of Sharletta Evans, whose three-year-old son was killed in a 1995 drive by shooting by Raymond Johnson.\textsuperscript{223} At the time of the crime, Johnson was sixteen years old.\textsuperscript{224} When Sharletta Evans learned of Colorado’s new restorative justice pilot programs, she wanted to be one of the first to use it.\textsuperscript{225} Johnson was now thirty-two.\textsuperscript{226} On May 23, 2012, Evans and her other son, Calvin, sat down with her son’s killer and had an honest conversation about the crime from each of their own points of view.\textsuperscript{227} Sharletta and Calvin Evans left that day with a \textit{mission accomplished}.\textsuperscript{228} Calvin said he left with his anger behind him and confirmation that Johnson was truly remorseful for what had transpired.\textsuperscript{229} Sharletta says, “[t]he experience strengthened her belief in

\begin{itemize}
\item \textsuperscript{217} Id.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} \textit{See High Risk/Impact Victim Offender Dialogue — (HRVOD), supra note 215; Who We Are, BOULDER COUNTY, http://www.bouldercounty.org/safety/victim/restorative-justice/who-are-we/ (last visited Dec. 17, 2018).}
\item \textsuperscript{221} \textit{Restorative Justice Programs, RESTORATIVE JUST. COLO., http://www.rjcolorado.org/restorative-justice-programs/index.html (last visited Dec. 17, 2018).}
\item \textsuperscript{222} Id.
\item \textsuperscript{224} Id.
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Id.
\item \textsuperscript{228} Simpson, supra note 223.
\item \textsuperscript{229} Id.
\end{itemize}
restorative justice;” she is “not at peace with [Johnson] spending the rest of his life in prison,” and would like to see him receive a second chance at life. 230

B. Minnesota

Minnesota, like Colorado, is seen as pioneering the way for restorative justice practices. 231 Minnesota continuously employs restorative justice practices, especially within its Department of Corrections (“DOC”). 232 The DOC has integrated restorative justice practices into its correctional system, such as through its apology letter program and its victim-offender dialogue. 233 Both of these programs are only possible if the victim wants it to happen, as the goal of restorative justice is to make the victim feel better about a crime committed against them. 234 Another program that makes Minnesota stand out is the University of Minnesota, School of Social Work’s Center for Restorative Justice and Peacemaking (“CRJP”). 235 It is the home base for many of the state’s restorative justice initiatives. 236 CRJP also has a multitude of resources to provide training and education to the community. 237 Minnesota, like Colorado, is special because it has legislative authority for the use of restorative justice programs to “assign an appropriate sanction to [an] offender.” 238 And one of Minnesota’s restorative justice statutes, section 611A.775, 239 has already withstood a challenge brought before the

230. Id.
232. Id. at 259–60.
235. See Umbreit & Fercello, supra note 72, at 15.
236. See id.
237. Id.
238. Reimund, supra note 2, at 678 (quoting Minn. Stat. Ann. § 611A.775 (West 2018)).

A community-based organization, in collaboration with a local governmental unit, may establish a restorative justice program. A restorative justice program is a program that provides forums where certain individuals charged with or petitioned for having committed an offense meet with the victim, if appropriate; the victim’s family members or other supportive persons, if appropriate; the offender’s family members or other supportive persons, if
Minnesota Supreme Court in the case of *State v. Pearson.*

Minnesota currently has approximately four statutes that implement the use of restorative justice practices or techniques dealing with both children and adults. For example, section 609.125 allows for the performance of work in a restorative justice program as an option for sentencing in misdemeanors or gross misdemeanors. Minnesota also requires that, for first time juvenile petty offenders, the prosecutor refer the juvenile offender to a restorative justice program or provider.

C. **Analysis**

Both Colorado and Minnesota have impressive restorative justice programs and legislation in place that other states, including Florida, should use as a guide on how to begin or better implement restorative justice programs. While Florida has some counties that implement restorative justice practices through the use of diversionary programs, they are not mandatory for first time non-violent juvenile offenders; rather, it is left open to the discretion of the State Attorney whether they even want to offer a type of diversionary program. It is clear why these two states are leading the nation in restorative justice practices—the fact that both Colorado and

appropriate; a law enforcement official or prosecutor when appropriate; other criminal justice system professionals when appropriate; and members of the community, in order to: (1) discuss the impact of the offense on the victim and the community; (2) provide support to the victim and methods for reintegrating the victim into community life; (3) assign an appropriate sanction to the offender; and (4) provide methods for reintegrating the offender into community life.

Id. at 847. The court further noted that the State’s lack of participation in the circle does not negate the sentencing circle recommendation and that the statute does not make attendance by the prosecutor mandatory. Further, if the prosecutor wanted a particular sentencing result, he should have participated in the circle and the state is bound by the results. Id.

240. 637 N.W. 2d 845 (Minn. 2002). The Court found that “[o]n a more concrete level, the statute explicitly gives restorative justice programs the authority to assign appropriate sanctions to [the] offender,” but ruled that the courts still have the sentencing authority. Id. at 847–48. The court further noted that the State’s lack of participation in the circle does not negate the sentencing circle recommendation and that the statute does not make attendance by the prosecutor mandatory. Id. at 848. Further, if the prosecutor wanted a particular sentencing result, he should have participated in the circle and the state is bound by the results.


242. MINN. STAT. § 609.125 (2017). “Upon conviction of a misdemeanor or gross misdemeanor the court, if sentence is imposed, may, to the extent authorized by law, sentence the defendant . . . to perform work service in a restorative justice program in addition to any other sentence imposed by the court.” Id. § (a)(6).

243. Id. § 609.092(b).

244. See id. § 609.125; Focht-Perlberg, *supra* note 231, at 259; Witzel, *supra* note 198.

Minnesota have restorative justice written into legislation as a means other than the traditional court system allows more victims and offenders a way of healing that is less stressful than the traditional system. If Florida were to write restorative justice programs as a means for first time juvenile offenders into legislation rather than as an option, it would likely see similar results as in Colorado and Minnesota, and result in a much lower rate of recidivism among its juvenile and adult offenders.

IX. LIMITATIONS OF RESTORATIVE JUSTICE

While there are a number of limitations that restorative justice programs have, many of them are remedial. “The first [limitation] has to do with the limited access to restorative justice that results when programs entail dialogue between crime survivors and the specific person who harmed them.” Participation for victims in restorative justice practices is solely voluntary and is often initiated by the victim. Because of this, the many benefits that restorative justice programs have to offer may be unavailable to a larger amount of offender parties. Furthermore, the entire restorative justice process relies on the offender’s willingness to take full accountability for their actions, and to engage in candid dialogue without further revictimizing the victim. Additionally, a lot of crimes never result in an arrest or a conviction, and in those situations, the victim cannot benefit from a restorative justice program because there is no offender to have an open dialogue with. Even though it is not always an option in many cases, when it is an option, the dialogue between victim and offender can be quite powerful.

Secondly, while “participation in some restorative justice programs may serve as a substitute for, or part of, a defendant’s court sentence, most restorative justice programs are not designed as an alternative to traditional court sentence.” These programs are also typically “not designed to reduce the number of defendants” that are currently incarcerated or about to

246. See Focht-Perlberg, supra note 231, at 259–60; Witzel, supra note 198.
247. See Fla. Stat. §985.155(2)(b); Focht-Perlberg, supra note 231, at 258–60; Witzel, supra note 198.
248. Beckett & Kartman, supra note 105, at 8.
249. Id. (emphasis in original).
250. Id.
251. Id.
252. Id.
253. Beckett & Kartman, supra note 105, at 8.
254. Id.
255. Id.
be incarcerated; however, there has been a shift in this to try to combat the issue of mass incarceration.\footnote{Id. at 8–9.}

Lastly, “many restorative justice programs, particularly those offering an alternative to traditional court processes and incarceration, are available only to juveniles or to adults charged with low level offenses.”\footnote{Id. at 9 (citation omitted).} While application of restorative justice approaches to those charged with serious criminal offenses has been more controversial, there has been growing support in the application of it.\footnote{Beckett & Kartman, supra note 105, at 9.} The deficiency of restorative justice programs that include serious violence is unfortunate; evidence has found that restorative justice outcomes are the greatest when used with serious violent crimes.\footnote{Id.}

\section*{X. Conclusion}

There are many reasons why Florida should have restorative justice programs written into legislation in a non-discretionary manner; for one, restorative justice has been found to lower the rate of reoffending among those who participate in restorative justice programs.\footnote{See id. at 7.} A study from Sam Houston State University found that restorative justice interventions, even if minimally involved with the criminal proceedings, reduces recidivism of juvenile offenders.\footnote{Sam Houston State Univ., Research Reveals Restorative Justice Reduces Recidivism, Forensic Mag.: Crime Scene (July 28, 2017, 12:17 PM), http://www.forensicmag.com/news/2016/07/research-reveals-restorative-justice-reduces-recidivism.} By focusing on limiting the amount of recidivism among juvenile offenders—especially on those that have been convicted of their first offense—Florida would also be reducing the number of adult offenders it sees in the criminal justice system.\footnote{See David Newton, Restorative Justice and Youthful Offenders, FBI L. Enforcement Bull. (Oct. 6, 2016), http://leb.fbi.gov/articles/featured-articles/restorative-justice-and-youthful-offenders.}

Not only would Florida be able to directly reduce the number of reoffending juvenile offenders, and indirectly reduce the number of reoffending adults, but the state would also likely be able to save costs while doing so.\footnote{See id.; Wachtel, supra note 110.} As studies from the United States and other countries around the world have shown, there is a cost benefit to implementing restorative justice
programs into the justice system. While studies regarding this area of restorative justice are limited, the research that has been done shows promising results. The United Kingdom Ministry of Justice’s report is a prime example of this. Even if the cost of implementing restorative justice programs are more expensive than the traditional route, it can still have cost saving benefits such as the study shown by Indiana and Ohio, which found that those in VOD programs spent less time incarcerated and those that were incarcerated spent time in county jail rather than state prison which saved a substantial amount. While in that situation, it does cost more to implement restorative justice, but money was still saved in the long run due to the decrease in recidivism—which as a result saved money because less people were being incarcerated, leading to a decrease in costs.

Additionally, by implementing mandatory restorative justice programs, Florida would be helping all of its citizens come together and heal from crimes. Restorative justice, unlike the traditional justice system, involves only those directly impacted by the crime and their supporters. By having this intimate setting, victims are able to directly convey their thoughts and emotions without the barrier of the formalities of the court, and the same goes for the offender. Allowing this kind of open, frank conversation and questioning helps victims heal and allows the offender to really come to terms with why they committed the crime. This type of deep reflective conversation is also likely one of the reasons that recidivism is lower for restorative justice programs, because the offender really gets the full force of the effects of their actions.

An example of how restorative justice could have changed the outcome of a child’s life is the case of Graham v. Florida. In 2003, at the age of sixteen, Terrance Graham was arrested for attempted robbery of a barbeque restaurant. The prosecutor in Graham’s case charged him as an adult with a first-degree felony for armed burglary with assault and a second-

264. Benefits of Restorative Justice to Victims, Offender, Communities, supra note 115; Wachtel, supra note 110.
265. See Wachtel, supra note 110.
266. Id.
268. Id.
269. See id.
270. Reimund, supra note 2, at 668.
271. See Umbreit et al., supra note 36, at 266, 269.
272. Sapir, supra note 81, at 208.
273. Id. at 212–13; Tullis, supra note 147, at 32.
275. Id. at 53.
degree felony for attempted armed robbery. However, the judge withheld adjudication and sentenced Graham to three years of probation. Six months later, Graham was arrested again after allegedly forcefully entering a home and ransacking it. Graham’s attorney requested a five-year sentence, the Florida Department of Corrections recommended four years, and the State asked for “[thirty] years on the armed burglary count and [fifteen] years on the attempted armed robbery count.” The trial court found Graham guilty and sentenced him to “life imprisonment for the armed burglary and [fifteen] years for the attempted armed robbery.” Graham challenged this sentence under the Eighth Amendment. The First District Court of Appeal affirmed his sentence as it did not find it grossly disproportionate to his crimes. Further, the First District Court of Appeal of Florida found that Graham was not capable of rehabilitation. The Florida Supreme Court denied review, but the Supreme Court of the United States granted certiorari. The Supreme Court of the United States held that it is “grossly disproportionate and hence unconstitutional for any judge or jury to impose a sentence of life without parole of an offender [under the age of eighteen], unless [they have] committed a homicide.”

While it is nice to know that the law prohibits the sentencing of juveniles to life for non-homicide offenses, it still allows for juveniles to be sentenced to several years in prison with a possibility of parole. If this

276. Id. at 53–54. Under Florida law, the prosecutor has discretion whether to charge sixteen and seventeen-year-olds as adults for most felony crimes. Id. at 53.
277. Id. at 54.
278. Graham, 560 U.S. at 54.
279. Id. at 56.
280. Id. at 57. In the trial court’s explanation for the sentences, the judge explained:

So then it becomes a focus, if I can’t do anything to help you, if I can’t do anything to get you back on the right path, then I have to start focusing on the community and trying to protect the community from your actions. And, unfortunately, that is where we are today is I don’t see where I can do anything to help you any further. You’ve evidently decided this is the direction you’re going to take in life, and it’s unfortunate that you made that choice.

I have reviewed the statute. I don’t see where any further juvenile sanctions would be appropriate. I don’t see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions.

Id.

281. Id. at 58; see also U.S. CONST. amend. VIII.
283. Id.
284. Id.
285. Id. at 97 (Thomas, J., dissenting).
286. See id. at 82.
case had used restorative justice practices, the outcome might have been different for Terrance because restorative justice helps get to the root of why an offender is committing crimes.287 Terrance Graham had a rough start to life. Graham’s parents were addicted to crack cocaine throughout his early years of life.288 “Graham was [also] diagnosed with attention deficit hyperactivity disorder in elementary school” and “began drinking alcohol and using tobacco at age [nine] and smoked marijuana at age [thirteen].”289 While this is not an excuse to commit violent acts against other people, this upbringing could have shaped his reality of the world and how to interact with it.290 Like in the case of Conor McBride, where restorative justice was used for a murder case, this case could have had a similar outcome had those practices been used.291 There is no question that Terrance Graham still needed to face punishment for his actions, but had restorative justice been implemented in addition to his punishment, the second crime might have never occurred.292 If Terrance had been given the ability to sit down with the restaurant owner and have an open conversation about how the crime affected the owner and why Terrance did it, something might have clicked, and he may have realized the severity of his actions.293 Even if Terrance could not have had a conversation with the actual victim, there are other restorative justice programs where he could have talked to victims of other crimes about how their lives have been changed because of the crimes.294 This is a perfect example of why restorative justice needs to be mandatory for juvenile offenders, regardless of whether they are violent or non-violent offenders.295 It is clear that restorative justice is gaining momentum throughout the United States and is on its way to repairing the harm inflicted against victims by offenders and bringing people together in the process; however, there is still progress to be made.296

287. See Sapir, supra note 81, at 208.
289. Id.
290. See id. at 53, 56–57.
291. See Tullis, supra note 147, at 31, 36.
292. See id.; Sam Houston State Univ., supra note 261.
293. See Graham, 560 U.S. at 53–56; Tullis, supra note 147, at 31–32. During the first robbery, an accomplice with Graham “struck the restaurant manager in the back of the head with a metal bar.” Graham, 560 U.S. at 53. The manager needed stitches for the injury to his head. Id.
295. See Graham, 560 U.S. at 53, 70, 72; Duel et al., supra note 31, at 71.
296. See Burkemper Jr. et al., supra note 33, at 130, 134; Duel et al., supra note 31, at 80; Beitsch, supra note 9.