



# NOVA LAW REVIEW

NOVA SOUTHEASTERN UNIVERSITY

## ARTICLES AND SURVEYS

STRATEGIC RESET: THE FLORIDA BAR FOUNDATION'S INVESTMENT  
IN A BETTER FUTURE FOR ACCESS TO JUSTICE AND THE RULE OF LAW

JULIETTE LIPPMAN

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STRATEGIC RESET: THE FLORIDA BAR FOUNDATION’S INVESTMENT IN A BETTER FUTURE FOR ACCESS TO JUSTICE AND THE RULE OF LAW .....	JULIETTE LIPPMAN	1
--	------------------	---

## NOTES AND COMMENTS

BANNING FAUX SANCTUARY JURISDICTIONS.....	LENA ABDIN	35
---	------------	----

WHAT ABOUT THE FLORIDA’S CHILDREN? ANALYZING THE IMPLICATIONS OF THE FAMILY FIRST PREVENTION SERVICES ACT OF 2018.....	ASHELEY PANKRATZ	63
---	------------------	----

A RISING FLORIDA EPIDEMIC: BIG BUSINESS CONTROLS FLORIDA’S RECOVERY RESIDENCE CRISIS.....	HUNTER SCHARF	91
---	---------------	----

LOWERING THE FLOOR: THE CONSEQUENCES OF COMPETITION-BASED EDUCATION REFORM FOR LOW-INCOME STUDENTS & FAMILIES .....	RICHARD SENA	117
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JULIETTE LIPPMAN \*

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I.	INTRODUCTION.....	2
II.	THE FLORIDA BAR FOUNDATION AND FLORIDA’S INTEREST ON TRUST ACCOUNTS (IOTA) PROGRAM .....	8
III.	THE GREAT RECESSION .....	10
IV.	PHILANTHROPY, LEGAL AID, AND RESOURCES: MENTAL MODELS AND METAPHORS .....	15
	A. <i>Catalytic Philanthropy and Strategic Grantmaking</i> .....	15
	B. <i>Traditional and New Legal Aid Delivery Models</i> .....	16
	C. <i>A Widened and Updated View of Available Resources</i> .....	19
	1. A Metaphor for the Traditional Model: D’Alemberte’s “Tributaries” .....	20
	2. A Metaphor for the New Model: Rawdon’s <i>Convergence</i> .....	21
V.	THE STRATEGIC RESET: A WORK IN PROGRESS .....	23
VI.	HISTORY OF STATE FUNDING FOR CIVIL LEGAL AID IN FLORIDA...	26
VII.	ACCESS TO JUSTICE AND THE RULE OF LAW .....	28
	A. <i>Access to Justice and the Rule of Law</i> .....	28
	B. <i>Technology</i> .....	29
VIII.	RESPONSIBILITIES OF THE PUBLIC AND PRIVATE SECTORS TO FUND CIVIL LEGAL AID .....	31
	A. <i>State Government</i> .....	31
	B. <i>The Business Community’s Stake in Expanding Access to         Justice</i> .....	33
IX.	CONCLUSION .....	34

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\* Ms. Lippman is a partner at Birnbaum, Lippman & Gregoire, PLLC in Ft. Lauderdale, Florida. She served as the 2018-2019 President of The Florida Bar Foundation. All opinions expressed in this Article are her own and not those of the Foundation. The Author is grateful to Jennifer Mee Arthur for her herculean efforts to ensure that this Article went from concept to reality and to Dominic “Donny” MacKenzie, the Foundation’s current Executive Director, who provided the wisdom for this Article and inspires the Author to do more. This Article is a tribute to the Author’s late mentors, Parker Thomson, Esq. and Hon. Marcia Beach, who worked with her early in her career to change the system for people with developmental disabilities. See *Cramer v. Chiles*, 33 F. Supp. 2d 1342 (S.D. Fla. 1999) and its progeny.

## I. INTRODUCTION

Scholars who study the human mind are increasingly interested in our capacity to imagine the future.<sup>1</sup> Some think that capacity defines us.<sup>2</sup> “What best distinguishes our species is an ability that scientists are just beginning to appreciate: We contemplate the future. Our singular foresight created civilization and sustains society.”<sup>3</sup> In other words, because we can conceptualize possible futures and take actions today that will bear fruit tomorrow, we change the world by changing how we think.<sup>4</sup>

We need mental models and metaphors to simplify, grasp, and express complex realities and ideas.<sup>5</sup> Our understanding is imperfect and the world changes; our thinking eventually becomes obsolete and our methods stop working; thus, we should regularly challenge our mental models, re- envision our objectives, and revise our strategies.<sup>6</sup> The Florida Bar Foundation (the “Foundation”) recently did just this when it undertook a

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1. Scott Cole, *A Timely Dose of Theory in Future Thinking Research*, 70 Q.J. EXPERIMENTAL PSYCH. 347, 347 (2017) (reviewing SEEING THE FUTURE: THEORETICAL PERSPECTIVES ON FUTURE-ORIENTED MENTAL TIME TRAVEL 1 (Kourken Michaelian et al. eds., 2016)); see also Adam Bulley, *The History and Future of Human Prospec tion*, EVOLUTIONARY STUD. IMAGINATIVE CULTURE, Spring 2018, at 75, 76 (reviewing SEEING THE FUTURE: THEORETICAL PERSPECTIVES ON FUTURE-ORIENTED MENTAL TIME TRAVEL *supra*; MARTIN E. P. SELIGMAN ET AL., HOMO PROSPECTUS (2016)). Cognitive scientists use a variety of terms to refer to this ability, including *prospec tion* and, delightfully, “[f]uture-oriented [m]ental [t]ime travel.” Cole, *supra*, at 347.

2. Martin E. P. Seligman & John Tierney, *We Aren’t Built to Live in the Moment*, N.Y. TIMES (May 19, 2017), <http://www.nytimes.com/2017/05/19/opinion/sunday/why-the-future-is-always-on-your-mind.html>.

3. *Id.*

4. *Id.*

5. See OLLE TORGNY, KUNGL TEKNISKA HÖGSKOLAN, ROYAL INST. TECH., METAPHOR - A WORKING CONCEPT 3 (1997); S.V. Kiseleva & N.A. Trofimova, *Metaphor as a Device for Understanding Cognitive Concepts*, 23 REVISTA DE LENGUAS PARA FINES ESPECÍFICOS 226, 227 (2017); Steve Rathje, *Metaphors Can Change Our Opinions in Ways We Don’t Realize*, QUARTZ (Mar. 31, 2018), <http://qz.com/1241030/metaphors-can-change-our-opinions-in-ways-we-dont-even-realize/>; P.N. Johnson-Laird, *Mental Models and Cognitive Change*, 25 J. COGNITIVE PSYCHOL. 131, 131 (2013); James Clear, *Mental Models: Learn How to Think Better and Gain a Mental Edge*, JAMES CLEAR, <http://www.jamesclear.com/mental-models> (last visited Dec. 21, 2019); James Clear, *Mental Models: How to Train Your Brain to Think in New Ways*, JAMES CLEAR, <http://www.jamesclear.com/feynman-mental-models> (last visited Dec. 21, 2019).

6. Kate Gerasimova, *How to Challenge Your Mental Models and Think Differently*, GOTHAM CULTURE (Mar. 23, 2017), <http://www.gothamculture.com/2017/03/23/challenge-mental-models-think-differently/>.

Strategic Reset.<sup>7</sup> In this Article, the Author explains the Foundation’s Strategic Reset and places it in context by discussing the circumstances that compelled it and the key ideas that shaped it.<sup>8</sup>

The Foundation is a 501(c)(3) charity with the mission of providing greater access to justice in Florida.<sup>9</sup> The Foundation’s principal source of revenue is the State’s Interest on Trust Accounts (“IOTA”) program, the nation’s first.<sup>10</sup> Lamentably, Florida is one of only three states<sup>11</sup> that currently do not provide legislative funding for civil legal aid.<sup>12</sup> In the past,

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7. STRATEGIC RESET COMM. OF THE BD. OF DIRS. OF THE FLA. BAR FOUND., THE FLORIDA BAR FOUNDATION STRATEGIC RESET 2, 6 (2017), <http://fbfcdn-lwncgfygomdk2qxt0e.stackpathdns.com/wp-content/uploads/2016/08/Strategic-Reset-and-Executive-Summary.pdf> [hereinafter STRATEGIC RESET REPORT]. The term *reset* is apt because it is a metaphor that comes from 21st century digital technology. See *Reset*, DICTIONARY.COM, <http://www.dictionary.com/browse/reset> (last visited Dec. 21, 2019). People *reset* things before the turn of the 21st century—e.g., bones, watches, clocks, odometers, passwords—but in the context of the Foundation’s *Strategic Reset*, the analogy is to resetting an electronic device: Clearing errors, restoring, refreshing, making a system work correctly again. See STRATEGIC RESET REPORT, *supra*, at 2–3.

8. See *id.* at 6; discussion *infra* Part V.

9. See 26 U.S.C. § 501(c)(3) (2018); *Leadership and Funding for Justice in Florida*, FLA. B. FOUND.: ABOUT, <http://thefloridabarfoundation.org/about/overview/> (last visited Dec. 21, 2019); *Mission*, FLA. B. FOUND.: ABOUT, <http://thefloridabarfoundation.org/about/mission/> (last visited Dec. 21, 2019).

10. *Leadership and Funding for Justice in Florida*, *supra* note 9.

11. James J. Sandman, *The Role of the Legal Services Corporation in Improving Access to Justice*, DAEDALUS, Winter 2019, at 113, 113; *State Legislative Funding for Civil Legal Aid*, A.B.A., [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/A\\_TJReports/l\\_s\\_sclaid\\_atj\\_legislative\\_funding.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/A_TJReports/l_s_sclaid_atj_legislative_funding.pdf) (last visited Dec. 21, 2019). The other two states are Alabama and Idaho. *State Legislative Funding for Civil Legal Aid*, *supra*; see also Phillip Ensler, *Civil Legal Aid Funding Is Not an Expense, It’s an Investment*, ALA. APPLESEED CTR. FOR L. & JUST. (June 22, 2018), <http://www.alabamaappleseed.org/author/ensler/civil-legal-aid-funding-is-not-an-expense-its-an-investment/>; *State Funding Initiative*, IDAHO LEGAL AID SERVICES, INC., <http://www.idaholegalaid.org/node/1064/state-funding-initiative> (last visited Dec. 21, 2019).

12. Sandman, *supra* note 11, at 113; *State Legislative Funding for Civil Legal Aid*, *supra* note 11. “Civil legal aid is a combination of services and resources that helps Americans of all backgrounds—including those who face the toughest legal challenges: Children, veterans, seniors, ill or disabled people, and victims of domestic violence—to effectively navigate the justice system.” *What Is Civil Legal Aid?*, VOICES FOR CIV. JUST., <http://www.voicesforciviljustice.org/for-journalists/civil-legal-aid-faq-media/> (last visited Dec. 21, 2019). The terms *legal services* or *civil legal assistance* are sometimes used interchangeably with *civil legal aid*. See ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 65 n.1 (4th ed. 2018). In this Article, the Author uses the term *civil legal aid* to refer broadly to all forms of free legal assistance. See discussion *infra* Part I–IX. On the history of civil legal aid in the United States, see HOUSEMAN & PERLE, *supra*, at 12, 22; FELICE BATLAN, WOMEN AND JUSTICE FOR THE POOR: A HISTORY OF LEGAL AID, 1863–1945, 3–9, 17 (2015); 2

the Foundation had the resources to fund a significant portion—up to a third—of the budgets of Florida’s civil legal aid providers.<sup>13</sup> Ten years of interest rate cuts in the wake of the Great Recession, however, decimated IOTA revenues and greatly reduced the Foundation’s ability to financially support the State’s civil legal aid organizations.<sup>14</sup>

There is a widening justice gap<sup>15</sup> in the United States: The need for civil legal aid greatly exceeds the supply.<sup>16</sup> The traditional legal aid delivery model has consisted primarily of representation by lawyers employed by legal aid organizations or private lawyers providing their services pro bono.<sup>17</sup> Most people receive no help for their urgent and pressing legal problems.<sup>18</sup> It is estimated that eighty percent or more of the civil legal needs of poor and low-income people go unmet, and that forty to sixty percent of the middle class now cannot afford to hire lawyers.<sup>19</sup> In other words, the civil justice system—our system for lawfully and peacefully adjudicating disputes and

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EARL JOHNSON JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 587–89 (2013).

13. John A. Noland, *The Florida Bar Foundation Celebrates the 30-Year Anniversary of IOTA*, FLA. B.J., July–Aug. 2011, at 24, 26.

14. See STRATEGIC RESET REPORT, *supra* note 7, at 3–4.

15. Sandman, *supra* note 11, at 114. *Justice gap* is a metaphor that describes the “shortfall between legal needs and available legal services” in civil matters. *Id.* Legal Services Corporation (“LSC”), the country’s single largest funder of civil legal aid, has measured the unmet need for civil legal aid in the United States in four Justice Gap reports published in 2005, 2007, 2009, and 2017. See LSC, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 3 (2005) [hereinafter JUSTICE GAP REPORT 2005]; LSC, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 4 (2d ed. 2007) [hereinafter JUSTICE GAP REPORT 2007]; LSC, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1–2 (2009) [hereinafter JUSTICE GAP REPORT 2009]; LSC, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017) [hereinafter JUSTICE GAP REPORT 2017].

16. Robert H. Frank, *How Rising Inequality Widens the Justice Gap*, N.Y. TIMES, Sept. 2, 2018, at BU3. The Federal Constitution does not provide an automatic right to counsel in civil cases. *Turner v. Rogers*, 564 U.S. 431, 438 (2011); see also U.S. CONST. amend. VI.

17. HOUSEMAN & PERLE, *supra* note 12, at 8.

18. JUSTICE GAP REPORT 2017, *supra* note 15, at 6; Frank, *supra* note 16.

19. JUSTICE GAP REPORT 2017, *supra* note 15, at 6; Leonard Wills, *Access to Justice: Mitigating the Justice Gap*, A.B.A. (Dec. 3, 2017), <http://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2017/access-to-justice-mitigating-justice-gap/>.

establishing legal rights—is mostly inaccessible to ordinary citizens.<sup>20</sup> This undermines the rule of law.<sup>21</sup>

The depletion of the Foundation’s financial resources, the widening justice gap, and the emergence of a nationwide shift in thinking about how the aspirational goal of full access to the civil justice system might be achieved led the Foundation’s leadership to conclude that the traditional legal aid model was not working—that there will never be enough lawyers or enough money to meet Floridians’ unmet civil legal needs—and that innovative solutions and dramatic changes in the State’s civil justice and legal aid systems would be required to fulfill the Foundation’s mission of providing greater access to justice.<sup>22</sup> So, therefore, on June 16, 2016, by unanimous vote, the Foundation’s Board of Directors passed the following resolution (“Strategic Reset Resolution”):

RESOLVED, The Florida Bar Foundation should execute a *strategic reset* and establish itself as not only a source of funds and expertise, but as a strategic leader and catalyst in the cause of increased access to justice for all. Its primary goal in the immediate future should be to serve as an agent of rapid, effective and high impact change.<sup>23</sup>

The Strategic Reset is a work in progress that will guide the Foundation’s investments of time, energy, and funds for five years (from fiscal years 2018–2019 through 2022–2023).<sup>24</sup> The Foundation’s mission of providing greater access to justice in Florida has not changed, and its goals and strategies remain consistent with the three purposes for which the Supreme Court of Florida originally authorized the use of IOTA funds (civil legal aid, improvements in the administration of justice, and law student programs).<sup>25</sup>

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20. See Frank, *supra* note 16.

21. See WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2017–2018 11 (2018); *Access to Justice*, UNITED NATIONS, <http://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (last visited Dec. 21, 2019).

22. See STRATEGIC RESET REPORT, *supra* note 7, at 6. The Strategic Reset Report was written by the Board’s Strategic Reset Committee and adopted by the Foundation’s Board on June 22, 2017. *Id.*; *Strategic Reset for the Florida Bar Foundation*, FLA. BAR FOUND., <http://www.floridabar.org/news/strategic-reset-for-the-florida-bar-foundation> (last visited Dec. 21, 2019).

23. STRATEGIC RESET REPORT, *supra* note 7, at 6.

24. *Id.* at 2.

25. See *In re Interest on Tr. Accounts (IOTA II)*, 372 So. 2d 67, 69 (Fla. 1979); *In re Interest on Tr. Accounts (IOTA I)*, 356 So. 2d 799, 805 (Fla. 1978); STRATEGIC RESET REPORT, *supra* note 7, at 9; *Leadership and Funding for Justice in Florida*, *supra* note 9; *Mission*, *supra* note 9.

A shift in thinking about how to increase access to justice in the United States is well underway.<sup>26</sup> In this Article, the Author refers to and touches on some of the emerging new ideas, but she does not attempt a thorough treatment of the entire subject—that would be too big of an undertaking.<sup>27</sup> The Author does aim to persuade readers to consider whether prevailing views of and approaches to civil legal aid have become obsolete and to open their minds to new ideas.<sup>28</sup> Florida is on the leading edge when it comes to creating a better future for access to justice and the rule of law in the State, but it trails behind when it comes to state funding for legal aid.<sup>29</sup> The Author also will argue that the State of Florida and the State’s business community should contribute substantial funding for civil legal aid.<sup>30</sup>

There is a growing consensus that access to justice is essential to a society governed by the rule of law and that civil legal aid benefits everyone, not just the poor.<sup>31</sup> Civil legal aid generates economic and social benefits far in excess of its cost.<sup>32</sup> All citizens, including corporate citizens, benefit from a well-functioning, fair, and accessible legal system.<sup>33</sup> As Nathan L. Hecht, Chief Justice of the Supreme Court of Texas, recently wrote: “Legal aid, like pro bono legal services, is not an entitlement. It’s not welfare. It’s simply good government. This is an American idea, not a liberal one or a conservative one.”<sup>34</sup>

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26. See NAT’L CTR. FOR ACCESS TO JUSTICE AT FORDHAM LAW SCHOOL, <http://www.ncforaj.org> (last visited Dec. 21, 2019). Information on recent developments in access to justice is available in many places. See *id.*; STRATEGIC RESET REPORT, *supra* note 7, at 15–21; *Resource Center for Access to Justice Initiatives*, A.B.A., [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/resource\\_center\\_for\\_access\\_to\\_justice/](http://www.americanbar.org/groups/legal_aid_indigent_defendants/resource_center_for_access_to_justice/) (last visited Dec. 21, 2019); *What Is Legal Aid*, LSC, <http://www.lsc.gov/what-legal-aid> (last visited Dec. 21, 2019).

27. See discussion *infra* Part IV.

28. See discussion *infra* Parts IV–VII.

29. See FLA. STAT. § 68.095 (2019); *State Legislative Funding for Civil Legal Aid*, *supra* note 11.

30. See THE FLA. BAR FOUND., *ECONOMIC IMPACTS OF CIVIL LEGAL AID ORGANIZATIONS IN FLORIDA* 1–2 (2016); Nancy Kinnally, *Summit Focuses on Legal Aid Solutions*, FLA. B.: NEWS, Jan. 1, 2016, at 21; discussion *infra* Part VIII.

31. See HOUSEMAN & PERLE, *supra* note 12, at 60.

32. See *Economic Impact Study*, FLA. B. FOUND., <http://www.thefloridabarfoundation.org/impact/> (last visited Dec. 21, 2019). This study found that every \$100,000 invested in civil legal aid in Florida creates an estimated \$719,000 in economic impacts. *Id.*

33. See *id.*

34. Nathan L. Hecht, *The Twilight Zone*, DAEDALUS, Winter 2019, at 190, 191; see also Alysia Santo, *How Conservatives Learned to Love Free Lawyers for the Poor*, POLITICO (Sept. 24, 2017), <http://www.politico.com/magazine/story/2017/09/24/how-conservatives-learned-to-love-free-lawyers-for-the-poor-215635>.

Part II of this Article describes the role of the Foundation and Florida's IOTA program in funding legal aid organizations and improvements in the administration of justice in Florida.<sup>35</sup>

Part III explains how the Great Recession affected the Foundation's finances between 2008 and the present.<sup>36</sup>

In Part IV, the Author discusses the key metaphors and mental models needed to understand the "rapid, effective and high-impact change" for which the Foundation seeks to be a strategic leader and catalyst.<sup>37</sup>

In Part V, the Author explains that the Strategic Reset is still very much a work in progress and outlines the new strategic directions that are beginning to take shape.<sup>38</sup>

Part VI contains a brief history of legislative funding for civil legal aid in Florida.<sup>39</sup>

In Part VII, the Author explains how access to justice relates to the rule of law and how it benefits every sector of society and supports social stability.<sup>40</sup>

In Part VIII, the Author argues that the State of Florida and Florida's business community should begin funding civil legal aid in meaningful ways.<sup>41</sup>

The Foundation's leadership is committed to doing today what will expand access to the State's civil justice system in the future.<sup>42</sup> As Foundation Board member Hon. Edwin A. Scales III of Florida's Third District Court of Appeal put it in his keynote speech at the Foundation's 2017 annual dinner: "It is my sincere hope that when we then [i.e., in the future] reflect on our Foundation's inventive, dynamic, bold experiment—the Strategic Reset Initiative—it will be bearing fruit, providing far more access to civil justice than merely divvying out depleting IOTA funds."<sup>43</sup>

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35. See discussion *infra* Part II.

36. See discussion *infra* Part III.

37. See STRATEGIC RESET REPORT, *supra* note 7, at 6; discussion *infra* Part IV.

38. See discussion *infra* Part V.

39. See discussion *infra* Part VI.

40. See discussion *infra* Part VII.

41. See Karen A. Lash, *Executive Branch Support for Civil Legal Aid*, DAEDALUS, Winter 2019, at 160, 160–61; *Economic Impact Study*, *supra* note 32; discussion *infra* Part VIII.

42. See *Florida Bar Foundation Continues to Play a Vital Role in Florida Commission on Access to Civil Justice*, FLA. B. FOUND. (Oct. 13, 2016), <http://www.thefloridabarfoundation.org/florida-bar-foundation-continues-play-vital-role-florida-commission-access-civil-justice/>.

43. *Foundation Poised for a Strategic Reset*, FLA. B. NEWS, Aug. 1, 2017, at 1.

## II. THE FLORIDA BAR FOUNDATION AND FLORIDA'S INTEREST ON TRUST ACCOUNTS (IOTA) PROGRAM

IOTA (or "IOLTA," as it is more widely known, for Interest on Lawyers' Trust Accounts) is a method of using the interest generated by pooled client funds in lawyers' trust accounts to raise money for law-related charitable purposes, primarily to fund civil legal aid for the poor.<sup>44</sup> Florida's IOTA program was the first in the United States.<sup>45</sup> It was established in 1981 after a decade of study and effort by forward-thinking Florida lawyers and judges.<sup>46</sup> The Supreme Court of Florida designated the Foundation, an existing nonprofit organization founded in 1956, to receive and administer the funds generated by the program.<sup>47</sup> This made the Foundation a major player in civil legal aid in Florida.<sup>48</sup> The Foundation became influential not

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44. Talbot D'Alemberte, *Tributaries of Justice: The Search for Full Access*, FLA. B.J., Apr. 1999, at 12, 16; *What Is IOLTA?*, A.B.A., [http://www.americanbar.org/groups/interest\\_lawyers\\_trust\\_accounts/overview/](http://www.americanbar.org/groups/interest_lawyers_trust_accounts/overview/) (last visited Dec. 21, 2019).

45. See *In re Interest on Tr. Accounts (IOTA I)*, 356 So. 2d 799, 804–05 (Fla. 1978).

46. See *id.* at 807 (establishing the program); *In re Interest on Tr. Accounts (IOTA III)*, 402 So. 2d 389, 393 (Fla. 1981) (adopting the program); *In re Interest on Tr. Accounts (IOTA II)*, 372 So. 2d 67, 69 (Fla. 1979) (amending the program); L. David Shear, *The Interest on Trust Accounts Program: The Quest Now Is Implementation*, 56 FLA. B.J. 104, 105 (1982); *Leadership and Funding for Justice in Florida*, *supra* note 9. The Honorable Arthur J. England, Jr. (1932–2013), who served as a Supreme Court of Florida justice from 1975–1981 and played a pivotal role in this effort, wrote: "We intended at the outset to create an IOTA model for other states, as well as to become the first in the country to adopt an IOTA program." *The Honorable Arthur J. England, Jr. to Receive the 16th Annual Russell E. Carlisle Advocacy Award Presented by Legal Aid Service of Broward County*, BROWARD COUNTY B. ASS'N BARRISTER, Sept. 2013, at 11. All fifty states and the District of Columbia now have IOLTA programs. *Directory of IOLTA Programs*, A.B.A., [http://www.americanbar.org/groups/interest\\_lawyers\\_trust\\_accounts/resources/directory\\_of\\_iolta\\_programs/](http://www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/directory_of_iolta_programs/) (last visited Dec. 21, 2019); *What Is IOLTA?*, *supra* note 44. For the history of IOTA/IOLTA. See *IOTA I*, 356 So. 2d at 800–02; Talbot "Sandy" D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 FLA. ST. U.L. REV. 631, 636–37 (1998); Arthur J. England & Russell E. Carlisle, *History of Interest on Trust Accounts Program*, 56 FLA. B.J. 101, 101–03 (1982); Gregory A. Hearing, Comment, *Funding Legal Services for the Poor: Florida's IOTA Program — Now Is the Time to Make It Mandatory*, 16 FLA. ST. U.L. REV. 337, 344–49 (1988); JOHNSON JR., *supra* note 12, at 586–89; NAT'L ASS'N OF IOLTA PROGRAMS, *History of IOLTA in North America*, YOUTUBE (Mar. 28, 2014), <http://www.youtube.com/watch?v=1KKHOXhDsOk>.

47. *IOTA I*, 356 So. 2d at 807; Herman J. Russomanno, *The Florida Bar Foundation: How Lawyers Help the Poor*, FLA. B.J., Feb. 2001, at 4, 4; Burton Young, *The Florida Bar Foundation: A History for a New Beginning*, FLA. B.J., 108, 108 (1982); *History*, FLA. B. FOUND.: ABOUT, <http://www.thefloridabarfoundation.org/history> (last visited Dec. 21, 2019).

48. Young, *supra* note 47, at 108, 112.



only because it distributed IOTA funds, but also because of the knowledge and engagement of its leadership and staff.<sup>49</sup> The Foundation, now a 501(c)(3) nonprofit, developed into Florida’s foremost source of information and expertise on access to justice issues.<sup>50</sup>

There are three approved uses for IOTA funds: Civil Legal Assistance for the poor (“LAP”), Improvements in the Administration of Justice (“AOJ”), and Law Student Assistance (“LSA”).<sup>51</sup> In the program’s first few years, when participation was optional, IOTA revenues hovered around \$3 million annually.<sup>52</sup> After 1989, when participation became mandatory, annual revenues of \$10 million or more were typical.<sup>53</sup> In 1990–1991, a year of unusually high revenue (\$19 million), the Foundation created

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49. *See id.*

50. *Id.* at 112; *see also* 26 U.S.C. § 501(c)(3) (2018); *Leadership and Funding for Justice in Florida*, *supra* note 9. Jane Curran, the Foundation’s first Executive Director, held that position for thirty-two years. *Jane Elizabeth Curran Distinguished Service Award*, FLA. B. FOUND., <http://thefloridabarfoundation.org/jane-curan-award-recipient> (last visited Dec. 21, 2019). She is said to have “spearhead[ed] virtually every innovation utilized in the IOTA/IOLTA movement throughout the United States until her retirement.” *Id.* The second Executive Director, Bruce Blackwell, a former Foundation President and former member of the Florida Bar’s Board of Governors, led the Foundation through the challenging years described in Part II. Gary Blankenship, *Florida Bar Foundation’s Blackwell Steps Down*, FLA. B. NEWS, May 15, 2018, at 8; *see also* discussion *infra* Part II. After a competitive national search led by the Author, the Foundation’s Board selected Dominic “Donny” MacKenzie as its third Executive Director. Max Marbut, *Donny MacKenzie to Lead the Florida Bar Foundation*, JACKSONVILLE DAILY REC. (July 2, 2018, 3:34 AM), <http://www.jaxdailyrecord.com/article/donny-mackenzie-to-lead-the-florida-bar-foundation>. An experienced litigator, MacKenzie, was Holland & Knight’s Jacksonville pro bono partner and had served on the Foundation’s Board for eight years, including as the Foundation’s 2015–2016 President and as the first Chair of the Foundation’s Strategic Reset Committee. *Id.* The Foundation’s current officers, directors, and staff are profiled on its website. *Our Leadership: Board of Directors*, FLA. B. FOUND.: ABOUT, <http://www.thefloridabarfoundation.org/about/board-of-directors> (last visited Dec. 21, 2019).

51. *IOTA II*, 372 So. 2d at 69; *IOTA I*, 356 So. 2d at 807; *Financial Stewardship*, FLA. B. FOUND., <http://www.thefloridabarfoundation.org/about/finances/> (last visited Dec. 21, 2019).

52. *See In re Interest on Tr. Accounts: A Petition to Amend Rules Regulating the Florida Bar*, 538 So. 2d 448, 450 (Fla. 1989). The Foundation’s financial information is publicly available and published on the Foundation’s website. *See Financial Stewardship*, *supra* note 51. The annual revenue information discussed in this Part is derived from a spreadsheet prepared for an August 8, 2019 telephonic meeting of the Foundation’s Spending and Reserve Committee. E-mail from Carlos Halley, Bd. Member, Fla. Bar Found., to Juliette Lippman et al., President, Fla. Bar Found. (Aug. 5, 2019, 2:32 PM) (on file with author); *see also Reports, Policies & Manuals*, FLA. B. FOUND., <http://www.thefloridabarfoundation.org/reports-policies-manuals/> (last visited Dec. 21, 2019); discussion *infra* Part II.

53. *See In re Interest on Tr. Accounts: A Petition to Amend Rules Regulating the Florida Bar*, 538 So. 2d at 453; D’Alemberte, *supra* note 46, at 636.

an endowment trust and began to set aside reserves.<sup>54</sup> The Foundation also developed other sources of revenue.<sup>55</sup> During the golden years of the 1990s and early 2000s, the Foundation provided approximately a third of the total funding for Florida's civil legal aid organizations.<sup>56</sup>

During this time, and through the inception of the Strategic Reset, the Foundation operated as a traditional grantmaking organization.<sup>57</sup> It distributed most of its funds toward making general support grants to fund the operations of the legal services organizations serving all parts of the State, as well as specific populations (e.g., children, the elderly, the disabled, and victims of domestic violence).<sup>58</sup> General support grants were based on the size of the eligible population.<sup>59</sup> Other grant programs awarded funds for specific purposes (e.g., special programs, extraordinary needs, disaster relief, and the like).<sup>60</sup>

### III. THE GREAT RECESSION

Interest rate cuts in the wake of the Great Recession had a profoundly negative effect on IOLTA revenue nationwide.<sup>61</sup> The Federal Reserve lowered interest rates to effectively zero in December 2008.<sup>62</sup> Rates remained at effectively zero through December 2015, reached two percent

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54. Jack Karp, *A Blank Check for Legal Aid Gets Harder to Cash*, LAW360 (Nov. 26, 2018), <http://www.law360.com/articles/1102027/a-blank-check-for-legal-aid-gets-harder-to-cash>; see also *The Florida Bar Foundation Endowment Trust*, FLA. B. FOUND., <http://www.thefloridabarfoundation.org/ways-to-give/endowment-trust/>; Email from Carlos Halley, *supra* note 52.

55. *Financial Stewardship*, *supra* note 51. The Foundation now has multiple revenue sources. *Id.*; *Reports, Policies & Manuals*, *supra* note 52.

56. Noland, *supra* note 13, at 26.

57. *Strategic Reset for the Florida Bar Foundation*, *supra* note 22.

58. See *id.*; THE FLA. BAR FOUND., ANNUAL OVERVIEW OF THE LEGAL ASSISTANCE FOR THE POOR GRANT PROGRAM 2015, 1–4 (2015).

59. See STRATEGIC RESET REPORT, *supra* note 7, at 3.

60. See *Grant Programs*, FLA. B. FOUND., <http://www.thefloridabarfoundation.org/what-we-do/grant-programs> (last visited Dec. 21, 2019); *Past Grants*, FLA. B. FOUND.: PROJECTS, <http://www.thefloridabarfoundation.org/project/past-grants/> (last visited Dec. 21, 2019). The description of the general support grant program and information on grants from 2006 to 2020 are available in the grant information. *Grant Programs*, *supra*; *Past Grants*, *supra*.

61. Robert J. Derocher, *The IOLTA Crash: Fallout for Foundations*, A.B.A. (June 15, 2017), [http://www.americanbar.org/groups/bar\\_services/publications/bar\\_leader/2012\\_13/september\\_october/iolta\\_crash\\_fallout\\_foundations/](http://www.americanbar.org/groups/bar_services/publications/bar_leader/2012_13/september_october/iolta_crash_fallout_foundations/).

62. See Kimberly Amadeo, *Fed Funds Rate History with Its Highs, Lows, and Charts*, BALANCE, <http://www.thebalance.com/fed-funds-rate-history-highs-lows-3306135> (last updated Oct. 31, 2019).

(the lowest rate considered normal) in mid-2018, and were lowered again in October 2019, to less than two percent.<sup>63</sup> Florida was in a better position than other states because the “Foundation [had prudently] ‘saved for the proverbial rainy day.’”<sup>64</sup> By 2007, just before the recession hit, the Foundation had \$88 million in reserves.<sup>65</sup>

Figures 1–3 illustrate the effect of prolonged interest rate cuts on the Foundation’s finances.<sup>66</sup> Figure 1 shows a precipitous drop in annual IOTA revenue.<sup>67</sup> It also shows that annual IOTA revenue remained flat at around five million dollars for about five years.<sup>68</sup> Figures 2–3 show that the Foundation dipped into its reserves to continue funding grants, initially at pre-recession levels, then steeply cut back its grantmaking.<sup>69</sup> Figure 3 shows the depletion of the Foundation’s reserves.<sup>70</sup>

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63. *Id.*

64. Karp, *supra* note 54.

65. THE FLA. BAR FOUND., ANNUAL REPORT 2013–14, 3 (2014) [hereinafter ANNUAL REPORT 2013–14]; Gary Blankenship, *Foundation Strives to Make Its Grants Count*, FLA. B. NEWS (Jan. 15, 2017), at 12.

66. THE FLA. BAR FOUND., ANNUAL REPORT 2017–18, 7 (2018) [hereinafter ANNUAL REPORT 2017–18]; THE FLA. BAR FOUND., ANNUAL REPORT 2016–17, 11 (2017) [hereinafter ANNUAL REPORT 2016–17]; THE FLA. BAR FOUND., ANNUAL REPORT 2015–16, 8 (2016) [hereinafter ANNUAL REPORT 2015–16]; THE FLA. BAR FOUND., ANNUAL REPORT 2014–15, 14 (2015) [hereinafter ANNUAL REPORT 2014–15]; ANNUAL REPORT 2013–14, *supra* note 65, at 3; THE FLA. BAR FOUND., ANNUAL REPORT 2012–13, 17 (2013) [hereinafter ANNUAL REPORT 2012–13]; THE FLA. BAR FOUND., ANNUAL REPORT 2011–12, 16 (2012) [hereinafter ANNUAL REPORT 2011–12]; THE FLA. BAR FOUND., ANNUAL REPORT 2010–11, 16 (2011) [hereinafter ANNUAL REPORT 2010–11]; THE FLA. BAR FOUND., ANNUAL REPORT 2009–10, 18 (2010) [hereinafter ANNUAL REPORT 2009–10]; THE FLA. BAR FOUND., ANNUAL REPORT 2006–08, 8–10 (2008) [hereinafter ANNUAL REPORT 2006–08]; *see also Financial Stewardship*, *supra* note 51.

67. ANNUAL REPORT 2017–18, *supra* note 66, at 7; ANNUAL REPORT 2016–17, *supra* note 66, at 11; ANNUAL REPORT 2015–16, *supra* note 66, at 8; ANNUAL REPORT 2014–15, *supra* note 66, at 14; ANNUAL REPORT 2013–14, *supra* note 65, at 3; ANNUAL REPORT 2012–13, *supra* note 66, at 17; ANNUAL REPORT 2011–12, *supra* note 66, at 16; ANNUAL REPORT 2010–11, *supra* note 66, at 16; ANNUAL REPORT 2009–10, *supra* note 66, at 18; ANNUAL REPORT 2006–08, *supra* note 66, at 8–10.

68. ANNUAL REPORT 2017–18, *supra* note 66, at 7; ANNUAL REPORT 2016–17, *supra* note 66, at 11; ANNUAL REPORT 2015–16, *supra* note 66, at 8; ANNUAL REPORT 2014–15, *supra* note 66, at 15; ANNUAL REPORT 2013–14, *supra* note 65, at 3; ANNUAL REPORT 2012–13, *supra* note 66, at 17; ANNUAL REPORT 2011–12, *supra* note 66, at 16; ANNUAL REPORT 2010–11, *supra* note 66, at 16; ANNUAL REPORT 2009–10, *supra* note 66, at 18; ANNUAL REPORT 2006–08, *supra* note 66, at 8–10.

69. ANNUAL REPORT 2017–18, *supra* note 66, at 7; ANNUAL REPORT 2016–17, *supra* note 66, at 11; ANNUAL REPORT 2015–16, *supra* note 66, at 8; ANNUAL REPORT 2014–15, *supra* note 66, at 14; ANNUAL REPORT 2013–14, *supra* note 65, at 5; ANNUAL REPORT 2012–13, *supra* note 66, at 17; ANNUAL REPORT 2011–12, *supra* note 66, at 16; ANNUAL REPORT 2010–11, *supra* note 66, at 16; ANNUAL REPORT 2009–10, *supra* note 66, at 18;

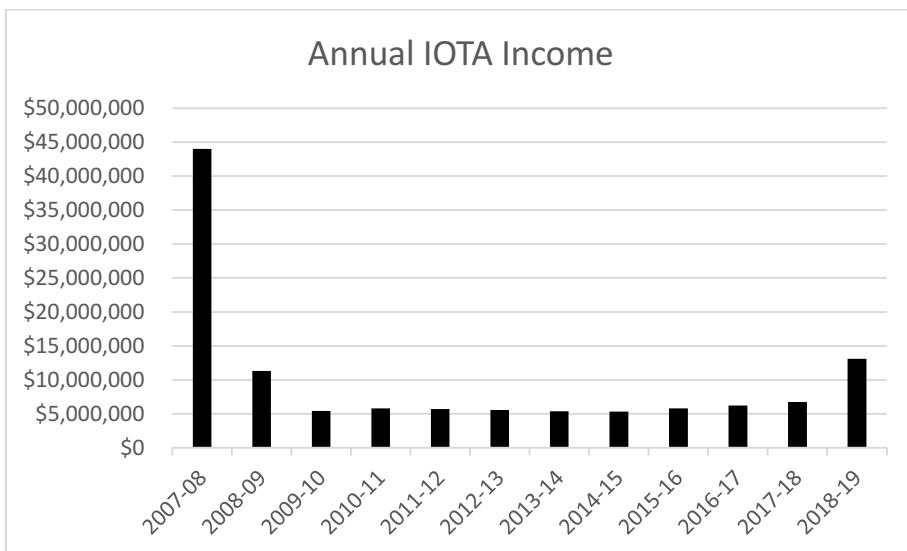


Figure 1. Florida Bar Foundation: Annual IOTA income, FY 2007–2008 through 2018–2019.<sup>71</sup>

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ANNUAL REPORT 2006–08, *supra* note 66, at 8–10; *see also Reports, Policies & Manuals, supra* note 52 (listing all annual reports from 2007–19).

70. ANNUAL REPORT 2017–18, *supra* note 66, at 7; ANNUAL REPORT 2016–17, *supra* note 66, at 11; ANNUAL REPORT 2015–16, *supra* note 66, at 8; ANNUAL REPORT 2014–15, *supra* note 66, at 14; ANNUAL REPORT 2013–14, *supra* note 65, at 3; ANNUAL REPORT 2012–13, *supra* note 66, at 17; ANNUAL REPORT 2011–12, *supra* note 66, at 16; ANNUAL REPORT 2010–11, *supra* note 66, at 16; ANNUAL REPORT 2009–10, *supra* note 66, at 18; ANNUAL REPORT 2006–08, *supra* note 66, at 8–10; *Reports, Policies & Manuals, supra* note 52 (listing all annual reports from 2007–19).

71. *Financial Stewardship, supra* note 51.

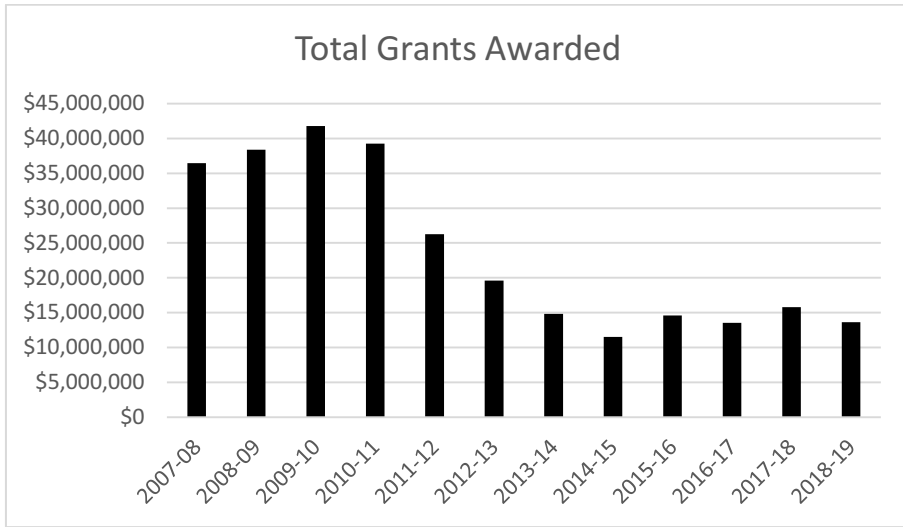


Figure 2. Florida Bar Foundation: Total grants awarded, FY 2007–2008 through 2018–2019.<sup>72</sup>

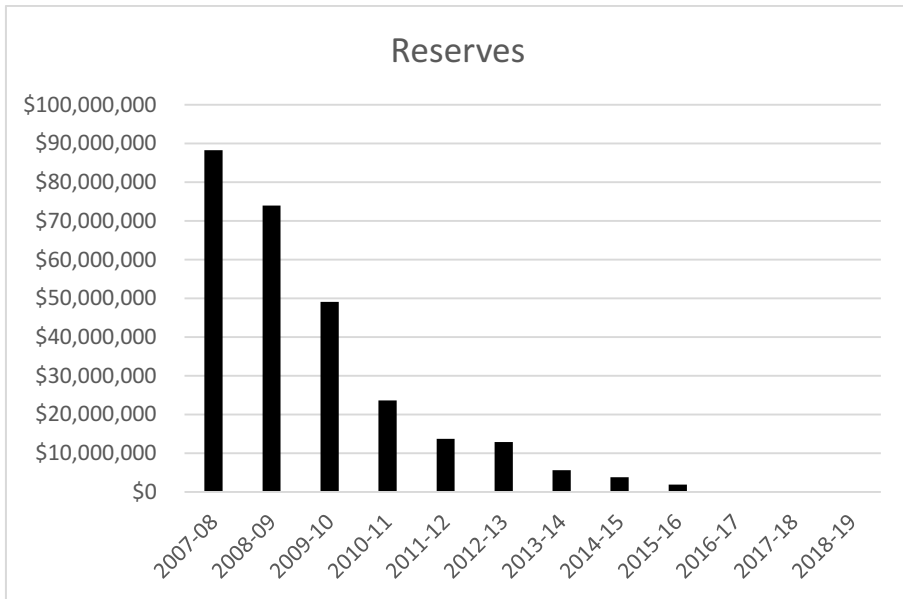


Figure 3. Florida Bar Foundation: Grant reserve balance, FY 2007–2008 to 2018–2019.<sup>73</sup>

72. Email from Carlos Halley, *supra* note 52.

73. ANNUAL REPORT 2017–18, *supra* note 66, at 7; ANNUAL REPORT 2016–17, *supra* note 66, at 11; ANNUAL REPORT 2015–16, *supra* note 66, at 8; ANNUAL REPORT 2014–

The Foundation's leadership could not have foreseen the interest rate cuts or predicted they would last so long.<sup>74</sup> The Foundation went into survival mode, using its reserves, then making cuts and seeking other funding sources, hoping for a return to normal that never came.<sup>75</sup> Grantee organizations and their clients suffered.<sup>76</sup>

The 2014–2015 fiscal year marked a turning point.<sup>77</sup> Income from the IOTA program fell to a historic low of \$5.3 million.<sup>78</sup> The Foundation's \$88 million reserve was depleted.<sup>79</sup> The Foundation was kept afloat by a loan from the Florida Bar and investment income from the Foundation's endowment.<sup>80</sup> In 2015, the Foundation could fund only a sliver—eight percent—of the budgets of Florida's legal aid organizations.<sup>81</sup> The need for a change in strategy was apparent and urgent.<sup>82</sup>

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15, *supra* note 66, at 14; ANNUAL REPORT 2013–14, *supra* note 65, at 6; ANNUAL REPORT 2012–13, *supra* note 66, at 17; ANNUAL REPORT 2011–12, *supra* note 66, at 16; ANNUAL REPORT 2010–11, *supra* note 66, at 16; ANNUAL REPORT 2009–10, *supra* note 66, at 18; ANNUAL REPORT 2006–08, *supra* note 66, at 8–10.

74. See Mark D. Killian, *Recession Takes a Heavy Toll on the Foundation's Finances*, FLA. B. NEWS, Sept. 1, 2011, at 1.

75. See *id.* In the 2011–2012 annual report, the Foundation's President reported that “[t]he Foundation's staff has shrunk already from [twenty-two] to [sixteen], and it's anticipated that Florida will lose as many as 100 legal aid attorneys over the next few years as the Foundation's reserves dwindle.” ANNUAL REPORT 2011–12, *supra* note 66, at 2. She expressed faith that things would return to normal, however: “Eventually IOTA revenue will go up, along with interest rates, but by the time it does, we will face a period of rebuilding.” *Id.* That year, the Foundation suspended its LSA grant programs, with the hope of reinstating them “once IOTA revenue has fully rebounded and legal aid funding has been substantially restored to pre-recession levels.” *Id.* at 13. In the following year's annual report, the Foundation's Executive Director, Jane Curran, also expressed a belief in an eventual return to normal, stating that “we hope our generous donors will continue to help bridge the gap until interest rates rise and IOTA revenue returns to a level that can better support Florida's legal aid organizations.” ANNUAL REPORT 2012–13, *supra* note 66, at 18.

76. See BRENNAN CTR. FOR JUSTICE, CIVIL LEGAL SERVICES: LOW-INCOME CLIENTS HAVE NOWHERE TO TURN AMID THE ECONOMIC CRISIS 1 (2010) (outlining the effect of the recession low-income clients with pressing civil needs); JOY MOSES, AND JUSTICE FOR ALL: PRIORITIZING FREE LEGAL ASSISTANCE DURING THE GREAT RECESSION 3 (2009); James A. Kowalski, Jr., *Foreword: A Public Emergency for Legal Aid Organizations on the Brink*, 17 FLA. COASTAL L. REV. 407, 409 (2016) (describing the effect of reduced funding on Jacksonville Area Legal Aid, Inc.).

77. See ANNUAL REPORT 2014–15, *supra* note 66, at 3.

78. *Id.* at 14.

79. *Id.* at 3.

80. *Id.*

81. Blankenship, *supra* note 65. In 2015, Florida legal services organizations received a total of \$82.95 million in funding. THE FLA. BAR FOUND., *supra* note 58, at 2. Of that, the Foundation supplied only 6.82 million, or 8.2%. *Id.* at 1; see also THE FLA. BAR

IV. PHILANTHROPY, LEGAL AID, AND RESOURCES:  
MENTAL MODELS AND METAPHORS

Here, it is necessary to discuss the key concepts that undergird the Strategic Reset.<sup>83</sup>

A. *Catalytic Philanthropy and Strategic Grantmaking*

The Strategic Reset Resolution declares that the Foundation intends to alter the status quo, to “serve as an agent of rapid, effective and high-impact change” and to become “a strategic leader and catalyst in the cause of increased access to justice for all.”<sup>84</sup> This idea—a charitable foundation’s becoming an agent, strategic leader, or catalyst for high impact change—comes from the world of philanthropy.<sup>85</sup>

*Catalytic philanthropy* is a term first used and described in 2009 by Mark Kramer, an influential thinker in the philanthropic world who focuses on helping funding organizations maximize the impact they make on complex social issues.<sup>86</sup> Catalytic philanthropy is “an approach practiced by innovative funders to create transformative change beyond writing the check.”<sup>87</sup> Catalytic philanthropy shifts responsibility for setting the agenda and accountability for results from the grantee to the grantor.<sup>88</sup> It allows charitable foundations to play much more important and impactful roles in addressing complex social challenges.<sup>89</sup> Organizations that practice catalytic philanthropy take an active leadership role in developing solutions to the issues they exist to address.<sup>90</sup> *Strategic grantmaking* is a similar concept.<sup>91</sup>

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FOUND., LEGAL AID FUNDING SOURCES FOR LSC-FUNDED ORGANIZATIONS IN FLORIDA IN 2015, 1 (2015).

82. See STRATEGIC RESET REPORT, *supra* note 7, at 3–5.

83. *Id.* at 1.

84. *Id.* at 6.

85. Mark R. Kramer, *Catalytic Philanthropy*, STAN. SOC. INNOVATION REV., Fall 2009, at 30, 32; Mark R. Kramer, HARV. BUS. SCH.: FAC. & RES., <http://www.hbs.edu/faculty/Pages/profile.aspx?facId=937405> (last visited Dec. 21, 2019).

86. See Kramer, *supra* note 85, at 32; Mark Kramer, FSG: ABOUT, <http://www.fsg.org/people/mark-kramer> (last visited Dec. 21, 2019); Mark R. Kramer, *supra* note 85.

87. *What Is Catalytic Philanthropy?*, FSG (Nov. 4, 2015), <http://www.fsg.org/blog/what-catalytic-philanthropy>.

88. See Mark Kramer, *Catalytic Philanthropy*, FSG, <http://www.fsg.org/publications/catalytic-philanthropy> (last visited Dec. 21, 2019).

89. See *id.*; Kramer, *supra* note 85, at 30, 32.

90. Kramer, *supra* note 85, at 32–33.

91. See COUNCIL ON FOUNDS., WHAT YOU NEED TO KNOW: COMPARING GRANTMAKING STRATEGIES 1 (2008).

Strategic grantmakers have a defined impact that they seek to make; they shape their grantmaking around the specific changes and outcomes they seek to produce.<sup>92</sup>

To reflect its transformation from traditional grantmaker to strategic grantmaker and catalytic philanthropist, the Foundation's website now contains the following description:

The Florida Bar Foundation is a 501(c)(3) nonprofit organization whose mission is to provide greater access to justice. Through strategic grantmaking, the Foundation funds local and statewide civil legal aid organizations and projects to improve the administration of justice and increase the effectiveness and efficiency of the legal aid delivery system. The Foundation engages in catalytic philanthropy by investing in training, technology, technical assistance, assessment and capacity-building for legal aid and works to develop and expand innovative pro bono initiatives.<sup>93</sup>

#### B. *Traditional and New Legal Aid Delivery Models*

As previously noted,<sup>94</sup> the traditional legal aid delivery model primarily consists of providing poor people with a free lawyer, either a staff attorney employed by legal aid organizations or a private attorney providing legal services without charge (*pro bono publico*) as part of their professional obligations.<sup>95</sup> Under this model, the solution to the access to justice problem appears to be comprised of more money and more lawyers,<sup>96</sup> and perhaps to expand the right to counsel from the criminal to the civil context.<sup>97</sup>

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92. *Id.*

93. *Leadership and Funding for Justice in Florida*, *supra* note 9; *see also* 26 U.S.C. § 501(c)(3) (2018).

94. *See* HOUSEMAN & PERLE, *supra* note 12, at 8; discussion *supra* Part I.

95. D'Alemberte, *supra* note 46, at 631–32; HOUSEMAN & PERLE, *supra* note 12, at 62 (referring to the access to justice movement's "range of initiatives beyond the core civil legal assistance system supplemented by pro bono"); Russell G. Pearce, *The Lawyer and Public Service*, 9 AM. U. J. GENDER SOC. POL'Y & L. 171, 175–76 (2001) (discussing lawyers' professional obligation to provide free legal services to the poor); Legal Services Corporation, *Glenn Rawdon's Speech at the White House forum on Increasing Access to Justice*, VIMEO (Apr. 21, 2014, 11:07 AM), <http://www.vimeo.com/925/7868>; LSC, *Glenn Rawdon's Speech, Everyone, Anytime, Anywhere, on How Technology Transforms Civil Legal Aid*, LSC (Apr. 14, 2014), <http://www.lsc.gov/media-center/blog/2014104114/glenn-rawdons-speech-everyone-anytime-anywhere-how-technology>.

96. BENJAMIN H. BARTON & STEPHANOS BIBAS, *REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF THE LAW* 11 (2017). In *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of the Law*, the authors, both law



In the past two decades, a new legal aid delivery model has begun to emerge out of a broad access to justice movement.<sup>98</sup> In 2011, lawyer and legal blogger Richard Zorza<sup>99</sup> wrote:

In the media there is often a fatalistic—if dramatic—attitude to the feasibility of solving the overall access to justice problem. Appalling statistics on access are combined with dramatic stories showing the dire consequences of lack of access and with news of new budget crises to paint a picture of an insoluble problem overwhelming heroic advocates. The story is all about the urgent need for more money, and all too rarely about the more comprehensive innovations that might transcend these dynamics.

But the good, and not often recognized, news is that there is now a broad emerging general operational consensus (used here in the sense of a ‘common basis for moving forward’) within the

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professors, argue that “giving each person a full-service lawyer for free” would not increase justice and call it the “*more lawyers, more justice* fallacy.” *Id.*; see also D’Alemberte, *supra* note 46, at 635–36.

97. BARTON & BIBAS, *supra* note 96, at 11. The movement to extend the right to counsel to civil cases is sometimes called *civil Gideon*, after *Gideon v. Wainwright*, the landmark case in which the Supreme Court of the United States ruled that states are required under the Sixth Amendment of the United States Constitution to provide attorneys to defendants in criminal cases if they cannot afford one. 372 U.S. 335, 348 (1963); see also U.S. CONST. amend. VI. The term *civil Gideon* may be misleading because the movement does not seek a free lawyer in every case for everyone who cannot afford one, as implied by Barton & Bibas in *Rebooting Justice: More Technology Fewer Lawyers, and the Future of the Law*, but rather, to advance the right to counsel for low-income people in civil cases involving basic human needs, such as housing, health, domestic violence, and child custody, or the potential for incarceration. See BARTON & BIBAS, *supra* note 96, at 11; HOUSEMAN & PERLE, *supra* note 12, at 46; *Backdrop: The Access to Justice Crisis*, NAT’L COALITION FOR CIV. RIGHT TO COUNS., <http://www.civilrighttocounsel.org/about/history> (last visited Dec. 21, 2019); *Better Access to Legal Representation Is Crucial — Even in Civil Cases*, L.A. TIMES: OPINION (Apr. 20, 2019, 3:05 AM), <http://www.latimes.com/opinion/editorials/la-ed-civil-gideon-20190420-story.html>.

98. HOUSEMAN & PERLE, *supra* note 12, at 40.

99. Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156, 156 (2011). Zorza died April 13, 2019, during the writing of this Article. See Bob Ambrogi, *In Memoriam: Richard Zorza, Impassioned Advocate and Blogger on A2J and Legal Tech*, LAW SITES (Apr. 27, 2019), <http://www.lawsitesblog.com/2019/04/in-memoriam-richard-zorza-impassioned-advocate-and-blogger-on-a2j-and-legal-tech.html>. A Harvard Law School graduate, Zorza was a public defender and legal services attorney early in his career and later was one of the founders and leaders of the Self-Represented Litigation Network, an organization dedicated to reforming the legal system to help meet the needs of self-represented litigants. *Id.*

relevant legal community—courts, bar, and legal aid—about the approaches needed for a comprehensive solution.<sup>100</sup>

The new model involves a range of initiatives beyond the traditional model.<sup>101</sup> Participants in the movement include state supreme courts, access to justice commissions, IOLTA funders such as the Foundation, other funders, bar associations, law schools, and civil legal aid programs.<sup>102</sup> “The aspirational goal of [the movement is one hundred] percent access to effective assistance.”<sup>103</sup> Achieving full access will require collaboration to develop a comprehensive, integrated access-to-justice system in each state.<sup>104</sup>

[T]he manner in which the civil legal services system develops in the future will no longer be determined solely by LSC and its grantees. Instead, the future of civil legal assistance increasingly will be in the hands of a much broader partnership of stakeholders who operate within the justice system in each state.<sup>105</sup>

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100. Zorza, *supra* note 99, at 156.

101. HOUSEMAN & PERLE, *supra* note 12, at 62. As noted in the Introduction, *supra* Part I, it is not possible to discuss in any depth the plethora of innovative initiatives that have come out of the access to justice movement in the past two decades. *See id.* at 40, 60; Wills, *supra* note 19; discussion *supra* Part I. In general, these initiatives and experiments involve both new technologies and new ideas. Zorza, *supra* note 99, at 157–60. Some are aimed at simplifying court operations and providing informational access services and other tools to make the courts easier to use for self-represented litigants. *Id.* at 157. Some promote the availability of more free and low-cost legal services, such as allowing lawyers to provide *unbundled* services (also known as *discrete task representation*) or to provide services through virtual online law practice (sometimes known as *eLawyering*), and making pro bono-friendly changes, such as mandatory reporting, insurance for pro bono participation, and emeritus practice. *Id.* at 157, 160–61. Some focus on using technology to expand access. *Technology Initiative Grant Program*, LSC: GRANTS & GRANTEE RESOURCES, <http://www.lsc.gov/grants-grantee-resources/our-grant-programs/tig> (last visited Dec. 21, 2019). “Since 2000, when Congress first appropriated special funds for [LSC’s] Technology Initiative Grant [“(TIG”)”] program, LSC has . . . awarded nearly [sixty-five] million [dollars] in grants for more than 700 projects” that use a broad range of technologies to help make the delivery of civil legal aid more efficient and effective. *Id.* These “technologies includ[e] mobile [applications], cloud computing, data analysis, and automated document assembly.” *Id.*

102. HOUSEMAN & PERLE, *supra* note 12, at 56.

103. *Id.* at 56 (quoting CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADM’RS, RESOLUTION 5: REAFFIRMING THE COMMITMENT TO MEANINGFUL ACCESS TO JUSTICE FOR ALL 1 (2015)). At their joint meeting in July 2015, the Conference of State Justices and the Conference of State Court Administrators adopted a resolution supporting “the aspirational goal of [one hundred] percent access to effective assistance for essential civil legal needs.” *Id.*

104. *See* HOUSEMAN & PERLE, *supra* note 12, at 56–57.

105. *Id.* at 43.

Beginning in the mid-1990s, the concept of state Access to Justice Commissions began spreading across the country.<sup>106</sup> Supreme Court of Florida Justice Jorge Labarga established the Florida Commission on Access to Civil Justice in 2014.<sup>107</sup> Its purpose is to study the “unmet civil legal needs of disadvantaged, low-income, and moderate-income Floridians” from the perspective of multiple constituencies and stakeholders, considering the State’s legal assistance delivery system as a whole.<sup>108</sup> The Commission’s formation focused the Supreme Court of Florida and the Florida Bar on the same mission as the Foundation: Expanding access to justice in the State.<sup>109</sup> The Foundation’s leadership has played vital roles on the Commission.<sup>110</sup> Like other state access to justice commissions, however, Florida’s Commission does not fund or deliver civil legal aid.<sup>111</sup>

### C. *A Widened and Updated View of Available Resources*

The traditional and new models of access to justice engender different views of what resources are available to achieve full access to justice.<sup>112</sup> In the traditional model, the resources are essentially thought to

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106. See NATHAN L. HECHT & THOMAS L. KILLBRIDE, ACCESS TO JUSTICE COMMISSIONS: LESSONS FROM TWO STATES 43 (Flango et al. eds., 2014).

107. *In re Fla. Comm’n on Access to Civil Justice*, No. AOSC14-65, 2014 Fla. LEXIS 3901, at \*3 (Fla. Nov. 24, 2014).

108. *Id.*; *In re Fla. Comm’n on Access to Civil Justice*, No. AOSC16-17, 2016 Fla. LEXIS 2717, at \*1 (Fla. Oct. 10, 2016).

109. See *In re Fla. Comm’n on Access to Civil Justice*, 2014 Fla. LEXIS 3901, at \*3.

110. *Florida Bar Foundation Continues to Play a Vital Role in Florida Commission on Access to Civil Justice*, *supra* note 42. Several past presidents of the Foundation serve or have served on the Commission. See *id.*; *In re Fla. Comm’n on Access to Civil Justice*, 2016 Fla. LEXIS 2717, at \*3; *In re Fla. Comm’n on Access to Civil Justice*, 2014 Fla. LEXIS 3901, at \*7; *Commission Members*, FLA. COMMISSION ON ACCESS TO CIV. JUSTICE, <http://atj.flcourts.org/commission-members/> (last visited Dec. 21, 2019); *Past Presidents 1971–2019*, FLA. B. FOUND.: ABOUT, <http://thefloridabarfoundation.org/about/board-of-directors/past-presidents> (last visited Dec. 21, 2019). These include the Hon. William A. Van Nortwick, Kathleen Schin McLeroy, John Patterson, Emerson R. Thompson, Jr., and Dominic MacKenzie, the Foundation’s Executive Director. See *In re Fla. Comm’n on Access to Civil Justice*, 2016 Fla. LEXIS 2717, at \*3; *In re Fla. Comm’n on Access to Civil Justice*, 2014 Fla. LEXIS 3901, at \*7; *Commission Members*, *supra*; *Florida Bar Foundation Continues to Play a Vital Role in Florida Commission on Access to Civil Justice*, *supra* note 42; *Past Presidents 1971–2019*, *supra*.

111. *Definition of an Access to Justice Commission*, ABA RESOURCE CTR. FOR ACCESS TO JUST. INITIATIVES (June 2014), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/l\\_sclaid\\_atj\\_definition\\_commission.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/l_sclaid_atj_definition_commission.authcheckdam.pdf); Karp, *supra* note 54.

112. See STRATEGIC RESET REPORT, *supra* note 7, at 6; *Foundation Poised for a Strategic Reset*, *supra* note 43, at 17.

consist of money and lawyers.<sup>113</sup> The new model has a much broader conception of available resources.<sup>114</sup> This Section discusses two metaphors that illustrate the two models, one as old as the Old Testament and one as new as the smartphone.<sup>115</sup>

### 1. A Metaphor for the Traditional Model: D’Alemberte’s “Tributaries”

Legendary Florida attorney Talbot “Sandy” D’Alemberte<sup>116</sup> created a powerful image of access to justice two decades ago in his 1998 law review article, *Tributaries of Justice: The Search for Full Access* (“Tributaries”).<sup>117</sup> D’Alemberte likened justice to a mighty river fed by multiple smaller rivers, or tributaries.<sup>118</sup> The image, he wrote, reminded him of a passage from the *Book of Amos*: “But let justice roll down like waters, and righteousness like an ever-flowing stream.”<sup>119</sup>

In D’Alemberte’s article, the mighty river was the justice system and the tributaries were resource streams: “Full access to the civil justice system can be achieved through free-flowing tributaries of resources that enable the impoverished to secure legal representation,” he wrote.<sup>120</sup> He believed that “[t]he exercise of identifying the tributaries that add to access can give us renewed faith that, by working on all of the elements of the system, full access is, indeed, possible.”<sup>121</sup>

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113. See BARTON & BIBAS, *supra* note 96, at 10; HOUSEMAN & PERLE, *supra* note 12, at 8.

114. See HOUSEMAN & PERLE, *supra* note 12, at 62.

115. See *id.*; discussion *infra* Sections IV.C.1–2.

116. Byron Dobson, *Sandy D’Alemberte, a Pillar of FSU with a Brilliant Legal Mind, Dies at 85*, TALLAHASSEE DEMOCRAT (May 21, 2019, 9:03 PM), <http://www.tallahassee.com/story/news/2019/05/20/sandy-dalemberte-pillar-fsu-brilliant-legal-mind-dies-85/3749117002/>. D’Alemberte died on May 20, 2019, during the writing of this article. *Id.* The universally beloved D’Alemberte served as Dean of Florida State University College of Law (1984–1989), President of the American Bar Association (1991–1992), and President of Florida State University (1993–2003). *Id.*; Bill Cotterell, *Fla. Has Had Some Great Leaders, but D’Alemberte Had a Rare Trait — He was Universally Beloved*, TALLAHASSEE DEMOCRAT, May 22, 2019, at A6.

117. See D’Alemberte, *supra* note 46, at 633–34. A shorter variant under the same name was published in the Florida Bar Journal in 1999. See D’Alemberte, *supra* note 44.

118. D’Alemberte, *supra* note 46, at 633–34.

119. *Id.* at 634 (quoting *Amos* 5:24). If the verse sounds familiar, it is because Martin Luther King, Jr. quoted the same verse in his *I Have a Dream* speech. Martin Luther King, Jr., *I Have a Dream*, Delivered on the Steps at the Lincoln Memorial in Wash. D.C. (Aug. 28, 1963) (transcript available at [http://avalon.law.yale.edu/20th\\_century/mlk01.asp](http://avalon.law.yale.edu/20th_century/mlk01.asp)).

120. D’Alemberte, *supra* note 46, at 634.

121. *Id.* at 649.

D’Alemberte identified eight potential resource tributaries.<sup>122</sup> Two were existing revenue sources: LSC’s federal funding and Florida’s IOTA program.<sup>123</sup> Four were ideas for new revenue sources: A state filing fee surcharge, a service tax on for-profit legal services, punitive damage awards and the residue of class action awards, and a fee-shifting statute for actions in which the poor successfully challenge government agencies to establish entitlement to benefits.<sup>124</sup> The other two were essentially human resources: Pro bono services by lawyers and local access to justice plans.<sup>125</sup>

## 2. A Metaphor for the New Model: Rawdon’s *Convergence*

*Convergence* is a brilliant technological metaphor for the new legal aid delivery model discussed above, the one that employs a range of initiatives beyond the traditional model.<sup>126</sup> Microsoft’s Bill Gates first used the term *convergence* in 1999 to refer to the integration of a number of disparate technologies or functions into a single system.<sup>127</sup> Glenn Rawdon,

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122. *Id.* at 634–48.

123. *Id.* at 634, 636.

124. *Id.* at 637–40.

125. D’Alemberte, *supra* note 46, at 641–49. Local access to justice plans contemplated “a system in which bar leaders, legal service providers, social agencies, and others are called together by the chief judge of each circuit to share information on the legal needs of the poor and to develop a local plan for access to justice.” *Id.* at 648. D’Alemberte’s references to a “comprehensive lawyer pro bono plan” and “local plans for access to justice” came from rulings on petitions seeking rule changes to address the civil needs of Florida’s poor that D’Alemberte had presented to the Supreme Court of Florida in the early 1990s on behalf of the Florida Bar and the Foundation. *Id.* at 641, 649; *see also In re Amendments to Rules Regulating the Fla. Bar — 1–3.-1(a) & Rules of Judicial Admin. — 2.065 (Legal Aid)*, 573 So. 2d 800, 806 (Fla. 1990) (holding that Florida lawyers have a public responsibility to provide legal services for the poor when appointed by a court and requiring each circuit to develop a plan addressing the legal needs of the poor in that community, but declining to adopt a proposed rule that would have made pro bono service mandatory); *Amendments to Rules Regulating the Fla. Bar — 1–3.1(a) & Rules of Judicial Admin. — 2.065 (Legal Aid)*, 630 So. 2d 501, 503 (Fla. 1993) (adopting a mandatory pro bono reporting requirement and the aspirational goal of a minimum of twenty hours of pro bono service per year for each member of the Florida Bar). Previously, in the early 1980s, the Supreme Court of Florida had declined to implement a mandatory pro bono service requirement. *See In re Emergency Delivery of Legal Servs. to the Poor*, 432 So. 2d 39, 41 (Fla. 1983). On the history of pro bono service in Florida, *see* Judge William A. Van Nortwick, Jr. et al., *Pro Bono Services in Florida*, 73 FLA. B.J., Apr. 1999, at 30, 30–36.

126. *See* HOUSEMAN & PERLE, *supra* note 12, at 58–61; discussion *supra* Section IV.B.

127. Glenn Rawdon, *Everyone, Anytime, Anywhere*, MGMT. INFO. EXCH. J., Fall 2014, at 13, 13; Legal Services Corporation, *supra* note 95; LSC, *supra* note 95. *See also* the following definitions. *Convergence*, TECHOPEDIA, <http://www.techopedia.com/definition/769/convergence> (last visited Dec. 21, 2019); Margaret

LSC's Program Counsel for Technology, borrowed the term from Gates and brilliantly applied it in a brief speech he delivered in April 2014 at the White House Forum on Increasing Access to Justice.<sup>128</sup>

Rawdon's speech was about LSC's Summit on the Use of Technology to Improve Access to Justice, which had taken place the previous December.<sup>129</sup> The goal of the Summit had been to develop a strategy to provide "some form of effective assistance to [one hundred percent] of persons otherwise unable to afford an attorney for dealing with essential civil legal needs."<sup>130</sup> Rawdon explained that "some form of effective assistance" did not mean providing a lawyer for everyone for every matter.<sup>131</sup> Rather, it meant "not turning anyone away with no assistance at all" by providing everyone with at least one of three different levels of assistance: Information, advice, and when needed, representation.<sup>132</sup> At the Summit, the participants designed a system with five components: (1) statewide legal portals for triage to determine the level of assistance needed; (2) automated document assembly; (3) mobile technologies; (4) expert systems and intelligent checklists; and (5) business process analysis.<sup>133</sup>

In a *constrained resource environment*, Rawdon emphasized, each component of the system should be built only once, by the member of the access to justice community best able to do so.<sup>134</sup> We shouldn't "each be out trying to build our own set of resources," he said.<sup>135</sup> *Convergence*, Rawdon said, was about "legal aid, the bench, the bar, law schools, libraries, and anyone else who cares about justice, coming together so all the pieces are there. No more each building our own systems, but a cooperative approach

Rouse, *Network Convergence*, SEARCHCONVERGEDIT.COM (Feb. 27, 2019), <http://searchconvergedinfrastructure.techtarget.com/definition/network-convergence>; *Technology Convergence*, SYSTEMS INNOVATION, <http://systemsinnovation.io/technology-convergence-articles/> (last visited Dec. 21, 2019).

128. Legal Services Corporation, *supra* note 95; LSC, *supra* note 95. *Convergence* inadvertently modernizes *Tributaries*: In D'Alemberte's article, the image is a natural one, of resources coming together like tributaries that feed a mighty river, whereas in Rawdon's speech, the image is a digital one, of resources coming together like technologies combine into an integrated system or platform. See D'Alemberte, *supra* note 44, at 12. The metaphor also carries the connotation of the destruction of walls around formerly isolated or *siloed* resources. See Alan J. Porter, *What Is Content Convergence?*, SIMPLE A: TREASURY, <http://www.simplea.com/articles/what-is-content-convergence> (last visited Dec. 21, 2019).

129. LSC, THE SUMMIT ON THE USE OF TECHNOLOGY TO EXPAND ACCESS TO JUSTICE 1 (2013); Legal Services Corporation, *supra* note 95; Rawdon, *supra* note 127, at 13; LSC, *supra* note 95.

130. LSC, *supra* note 129, at 1.

131. Rawdon, *supra* note 127, at 14.

132. *Id.*

133. *Id.*; LSC, *supra* note 129, at 4–10.

134. Legal Services Corporation, *supra* note 95; LSC, *supra* note 95.

135. Legal Services Corporation, *supra* note 95; LSC, *supra* note 95.

to provide the information, advice, and representation needed.”<sup>136</sup> Rawdon declared, “I believe that the Access to Justice Community is now at our point of convergence.”<sup>137</sup>

Rawdon’s speech was ostensibly about the role of technology in transforming civil legal aid, but it was about more than that.<sup>138</sup> The metaphor of convergence that Rawdon borrowed from Bill Gates provides a way to think about the coming together of disparate resources from all sectors of society to create a unified access to justice system—not just money and lawyers, but judges, government, academia, philanthropy, business, community service providers, medical providers, schools, libraries, and the like.<sup>139</sup> Richard Zorza wrote that Rawdon’s speech was also about “how technology offers the opportunity to help an organization or group re-think the potential reach of its own mission.”<sup>140</sup> *Convergence* is technology plus contribution by and cooperation among everyone with a stake in access to justice.<sup>141</sup>

## V. THE STRATEGIC RESET: A WORK IN PROGRESS

We now return to the Strategic Reset.<sup>142</sup> In Part III above, the Author described the salient developments of the years 2008–2014.<sup>143</sup> After the discussion in the previous Part, the reader should now be equipped to understand the process the Foundation has been going through from the turning point year of 2014–2015 through the present.<sup>144</sup>

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136. Rawdon, *supra* note 127, at 15.

137. LSC, *supra* note 95; Legal Services Corporation, *supra* note 95.

138. See Richard Zorza, *Glenn Rawdon’s Visionary White House Speech Is About 100% Access, and More, Not Just About Technology*, RICHARD ZORZA’S ACCESS TO JUST. BLOG (Apr. 13, 2014), <http://www.accesstojustice.net/2014/04/13/glenn-rawdons-visionary-white-house-speech-is-about-100-access-and-more-not-just-about-technology/>.

139. See *id.*

140. *Id.*

141. See *id.*

142. STRATEGIC RESET REPORT, *supra* note 7, at 6; *Foundation Poised for a Strategic Reset*, *supra* note 43, at 1.

143. See ANNUAL REPORT 2013–14, *supra* note 65, at 4–5; ANNUAL REPORT 2012–13, *supra* note 66, at 3–4, 6; ANNUAL REPORT 2011–12, *supra* note 66, at 3–4, 6; ANNUAL REPORT 2010–11, *supra* note 66, at 2, 16; ANNUAL REPORT 2009–10, *supra* note 66, at 2–3, 6, 10; ANNUAL REPORT 2006–08, *supra* note 66, at 10; discussion *supra* Part III.

144. See ANNUAL REPORT 2014–15, *supra* note 66, at 3; ANNUAL REPORT 2015–16, *supra* note 66, at 8; ANNUAL REPORT 2016–17, *supra* note 66, at 10; ANNUAL REPORT 2017–18, *supra* note 66, at 7; discussion *supra* Part III.

A *Research and Inquiry Project* commissioned by the Foundation,<sup>145</sup> as well as other studies of the justice gap,<sup>146</sup> showed that Florida's legal aid system was meeting only a small fraction of the legal needs of the poor even when IOTA revenue was at its peak.<sup>147</sup> The Foundation's pre-Strategic Reset strategy clearly was not working to achieve the Foundation's mission—which is to provide greater access to justice in Florida, not merely to distribute dwindling IOTA funds.<sup>148</sup> Clearly too, the golden years of high IOTA income were not coming back anytime soon.<sup>149</sup> So, how could the Foundation best make an impact on access to justice in Florida?<sup>150</sup>

The Foundation hosted a Legal Aid Summit in late 2015 that engaged legal aid and law school personnel to work in teams to design and test solutions to a handful of legal services problems.<sup>151</sup> The five challenge questions were as follows:

How do we tap new and varied resources to support our work?  
 How do we develop and retain a new generation of leaders? How  
 do we use data to enhance our resources, our work, and our  
 impact? How do we serve our communities in more client-  
 centered and strategic ways? How can we collaborate more inside  
 of our legal services network and beyond?<sup>152</sup>

LSC's President James Sandman participated in the Summit as a panelist and delivered the closing remarks.<sup>153</sup> Sandman called the Summit *just extraordinary*.<sup>154</sup> Referring to the goal of creating a statewide system that provides full access to justice, he said: "If there is any place where it can be done, I think it can be done in Florida."<sup>155</sup> "From the chief justice of the Supreme Court [of Florida] to the other justices of the Supreme Court [of Florida], to The Florida Bar, to The Florida Bar Foundation, to the legal

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145. BONNIE ALLEN, FLORIDA'S CIVIL LEGAL AID SYSTEM: STRENGTHS, CHALLENGES, OPPORTUNITIES, AND SUCCESS STORIES 9 (2015).

146. See FLA. COMM'N ON ACCESS TO CIV. JUST., INTERIM REPORT 2-4 (2015); JUSTICE GAP REPORT 2017, *supra* note 15, at 6; Steven Seidenberg, *Unequal Justice: U.S. Trails High-Income Nations in Serving Civil Legal Needs*, A.B.A. J., June 2012, at 56, 58.

147. STRATEGIC RESET REPORT, *supra* note 7, at 5.

148. *Id.* at 2.

149. *Id.* at 4.

150. *Id.* at 7.

151. See Kinnally, *supra* note 30.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*



services providers represented in this room, to the business community,” the necessary players were already collaborating.<sup>156</sup>

In early 2016, the Foundation’s Executive Team began to hold monthly strategy meetings.<sup>157</sup> At a leadership retreat in June 2016, after extensive study and discussion, the participants recommended that the Foundation undertake a strategic reset.<sup>158</sup> After the Board passed the Strategic Reset Resolution, the Foundation met and communicated with its grantees and posted Strategic Reset-related informational materials on its website.<sup>159</sup>

In mid-2017, approximately a year after the Board passed the Strategic Reset Resolution, the Foundation released the Strategic Reset Report.<sup>160</sup> The Report detailed the circumstances that had “demand[ed] a reconsideration of [the Foundation’s] traditional grant making role and business model” and set forth the strategic directions that would guide its “investments [of] time, energy, and funds for the next five years.”<sup>161</sup> The Strategic Reset Report articulated three primary strategic directions:

1. Maximize the impact and effectiveness of civil legal assistance provided to low and moderate-income individuals and communities in Florida.
2. Expand the role of The Florida Bar Foundation as an expert facilitator of effective civil legal assistance for low and moderate-income individuals and communities in Florida.

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156. Kinnally, *supra* note 30.

157. See Memorandum from Bruce B. Blackwell, CEO & Exec. Dir., Fla. Bar Found., on Strategic Direction to Exec. Dirs.: FBF AOJ & Children’s Legal Servs. Grantees (July 1, 2016) (on file with Fla. Bar Found.); STRATEGIC RESET REPORT, *supra* note 7, at 1.

158. See Memorandum from Bruce B. Blackwell to Exec. Dirs.: FBF AOJ & Children’s Legal Servs. Grantees, *supra* note 157. The attendees developed a consensus that included the following points: First, access to justice in Florida was insufficient and would be more strained in the future unless meaningful systemic changes were made. See *id.* at 2. Second, grantee legal aid organizations were serving only a small fraction of the population at risk of having unmet civil legal needs, a population that included not only the poor but also the working poor and middle class. See *id.* Third, information and guidance on how to navigate the justice system for self-represented persons were insufficient. STRATEGIC RESET REPORT, *supra* note 7, at 7. Fourth, the Foundation has limited resources and cannot meet the needs of the most at-risk populations (e.g., low income, working poor, children, elderly, and military veterans). See *id.* at 4. Fifth, the rule of law and social stability are threatened when eighty percent of people with civil legal problems do not seek or obtain legal help. *Id.* at 5, 15. Sixth, improving the justice system for everyone is in everyone’s interest. *Id.* at 13–14. Seventh, it strengthens the rule of law and is good for the economy. *Id.* at 13, 20. Money is not the only solution to the problem. STRATEGIC RESET REPORT, *supra* note 7, at 5.

159. See *id.* at 1.

160. *Id.*

161. *Id.* at 2, 6.

3. Serve as a catalyst for broad-based, systemic change and innovative solutions to reduce and eliminate the justice gap in Florida's civil justice system.<sup>162</sup>

In fiscal year 2018–2019, the Foundation suspended its general support grant program and began focusing on more project-specific grants and competitive grantmaking, seeking proposals that would make the greatest impact and further the specific strategies and goals of the Strategic Reset.<sup>163</sup> The Foundation now categorizes its grant programs in a new way.<sup>164</sup> In the past, there were three categories, corresponding to the three approved purposes for IOTA revenue: LAP, AOJ, and LSA.<sup>165</sup> There are now only two categories: Community Based Civil Legal Services (“CBCLS”),<sup>166</sup> which encompasses the former LAP and LSA categories,<sup>167</sup> and AOJ.<sup>168</sup>

The Foundation has developed metrics (quantifiable measures) to measure the impact of the Strategic Reset and to assess whether and to what extent the Reset's objectives are being accomplished.<sup>169</sup> The purpose of the metrics is not to measure the performance of grantees (which is done through other means), but rather, to measure the impact of the Reset itself.<sup>170</sup>

## VI. HISTORY OF STATE FUNDING FOR CIVIL LEGAL AID IN FLORIDA

As previously noted, Florida is one of only three states that currently do not fund civil legal aid.<sup>171</sup> However, Florida has actually had a statutory

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162. *Id.* at 2.

163. Interview with Kate York, Dir. of Grants Program, The Fla. Bar Found. (Feb. 6, 2019); *see also Grant Programs*, *supra* note 60; *Past Grants*, *supra* note 60.

164. Interview with Kate York, *supra* note 163; *2016–2017 General Support Grants*, FLA. B. FOUND., <http://www.thefloridabarfoundation.org/what-we-do/grant-programs/2016-17-general-support-grants/> (last updated Dec. 7, 2016); *Grant Programs*, *supra* note 60.

165. Interview with Kate York, *supra* note 163.

166. *Id.*; *Community Based Civil Legal Services*, FLA. B. FOUND., <http://www.thefloridabarfoundation.org/what-we-do/grant-programs/community-based-civil-legal-services/> (last visited Dec. 21, 2019).

167. *Community Based Civil Legal Services*, *supra* note 166. The LSA program was suspended in 2011–2012 due to lack of funds, but the Foundation has been able to revitalize some of the law student programs it had been forced to cut in the past. Interview with Kate York, *supra* note 163.

168. *Community Based Civil Legal Services*, *supra* note 166.

169. SPARK POLICY INST., STRATEGIC RESET METRICS 2–3 (2019).

170. *Id.*; Interview with Claud Nelson, Dir. of Pro Bono Program, The Fla. Bar Found. (Feb. 8, 2019).

171. Sandman, *supra* note 11, at 113; *State Legislative Funding for Civil Legal Aid*, *supra* note 11.

structure in place to fund civil legal aid since 2002.<sup>172</sup> The Florida Access to Civil Legal Assistance Act (“FACLA” or “Act”) was shepherded through the legislature by Republican legislators, passed with a bipartisan majority, and signed into law by former Republican Governor Jeb Bush in 2002.<sup>173</sup> The Act’s purpose is “to promote the availability of civil legal assistance to the poor and improve access to justice by establishing a streamlined method to utilize available state funds in furtherance of this goal.”<sup>174</sup> The Act authorizes Florida’s Department of Legal Affairs to “contract with a statewide not-for-profit organization that provides funding for civil legal assistance to the poor in this state [i.e., with the Foundation] to allocate funds to not-for-profit legal aid organizations.”<sup>175</sup> The Act stipulates what the funds may and may not be used for.<sup>176</sup>

FACLA began as a pilot in a few circuits in the 2002–2003 fiscal year with a \$2 million appropriation and expanded statewide a few years later, but with a smaller \$1 million appropriation.<sup>177</sup> Former Governor Bush vetoed the \$5 million appropriation in 2005, reportedly because he believed the increase was too large.<sup>178</sup> The legislature appropriated more modest amounts from 2006 through 2010.<sup>179</sup> Former Republican Governor Rick Scott, who was elected governor in 2010 and served two four-year terms, vetoed appropriations for civil legal aid under FACLA for four years in a row during his first term from 2011–2014.<sup>180</sup> After these four consecutive

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172. FLA. STAT. §§ 68.094–68.105 (2019) (first enacted 2002).

173. See FLA. STAT. § 68.094; Fla. H.B. 491, 2002 Leg., 104<sup>th</sup> Reg. Sess. (Fla. 2002); Jan Pudlow, *Civil Legal Assistance Act Funded: Vetoed a Year Ago, Program Is Once Again Back in Business*, FLA. B. NEWS, June 15, 2006, at 1.

174. FLA. STAT. § 68.095.

175. FLA. STAT. § 68.097.

176. FLA. STAT. § 68.105. Funds may not be used for lobbying, criminal or post-conviction proceedings, suing the state or any of its agencies or political subdivisions, suing colleges or universities, class actions, traffic or driver’s license infraction or enforcement proceedings, regulatory decisions, and initiating employment-related actions. *Id.* Funds may be used “for legal education or assistance in family law, juvenile law, entitlement to federal benefits, protection from domestic violence, elder abuse, child abuse, [and] immigration.” *Id.*

177. Gary Blankenship, *Civil Legal Assistance Act Vetoed: Foundation Plans to Fight on for Funding Next Year*, FLA. B. NEWS, June 15, 2005, at 1, 11; see also FLA. STAT. § 68.105.

178. Blankenship, *supra* note 177.

179. See Wilson Sayre, *Study Shows Free Legal Services for the Poor Are Good for Business, Not Just to Feel Good*, WLRN (Feb. 9, 2017), <http://www.wlrn.org/post/study-shows-free-legal-services-poor-are-good-business-not-just-feel-good>.

180. See John Patterson, *Elections Matter and Justice Issues Should Count*, LONGBOAT KEY NEWS, Oct. 26, 2018, at 6; *Florida Governors*, FLA. DEP’T ST: FLA. FACTS, <http://dos.myflorida.com/florida-facts/florida-history/florida-governors/> (last visited Dec. 21,

line-item vetoes, the legislature gave up and stopped appropriating funds altogether during former Governor Scott's second term.<sup>181</sup>

As of this year, 2019, Florida has a new governor, Republican Ron DeSantis.<sup>182</sup> It remains to be seen whether the Florida Legislature will recommence FACLA appropriations and, if so, whether Governor DeSantis will or will not depart from former Governor Scott's practice of vetoing them.<sup>183</sup>

## VII. ACCESS TO JUSTICE AND THE RULE OF LAW

### A. *Access to Justice and the Rule of Law*

Access to the civil justice system is a fundamental aspect of the rule of law in the United States and around the world.<sup>184</sup> In its broadest sense, access to justice means the ability of ordinary people to understand the law and to use our legal system effectively.<sup>185</sup> The law "should be a body of norms promulgated as public knowledge so that people can study it, internalize it, figure out what it requires of them, and use it as a framework for their plans and expectations and for settling their disputes with others."<sup>186</sup> In addition, the civil legal system "should be available to ordinary people to uphold their rights, settle their disputes, and protect them against abuses of public and private power."<sup>187</sup>

The rule of law is an idea with a long history and no single definition.<sup>188</sup> One of its most important aspects is the idea that "people in positions of authority should exercise their power within a constraining framework of well-established public norms rather than in an arbitrary, ad hoc, or purely discretionary manner on the basis of their own preferences or

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2019); *Gov. Rick Scott Ignores Legal Aid for Floridians*, SUN SENTINEL: OPINION (Feb. 7, 2017, 3:50 PM), <http://www.sun-sentinel.com/opinion/editorials/fl-editorial-legal-assistance-20170206-story.html>.

181. Patterson, *supra* note 180.

182. *Florida Governors*, *supra* note 180.

183. See Jim Ash, *Board Adopts Legislative Positions*, FLA. B. NEWS, Jan. 10, 2019, at 6.

184. See WORLD JUSTICE PROJECT, *supra* note 21; *Access to Justice Commissions*, CTR. ON CT. ACCESS TO JUST. FOR ALL, <http://www.ncsc.org/microsites/access-to-justice/home/Topics/Access-to-Justice-Commissions.aspx> (last visited Dec. 21, 2019); *Access to Justice*, *supra* note 21.

185. Jeremy Waldron, *The Rule of Law*, STAN. ENCYCLOPEDIA PHIL. (June 22, 2016), <http://plato.stanford.edu/entries/rule-of-law/>.

186. *Id.*

187. *Id.*

188. See *id.*

ideology.”<sup>189</sup> In addition, the rule of law requires that “the law should be the same for everyone, so that no one is above the law, and everyone has access to the law’s protection.”<sup>190</sup>

The rule of law also requires that “citizens should respect and comply with legal norms, even when they disagree with them. When their interests conflict with others’ they should accept legal determinations of what their rights and duties are.”<sup>191</sup>

The World Justice Project (“WJP”), a United States based independent, multidisciplinary organization working to advance the rule of law worldwide, has developed a conceptual framework or model of the rule of law that it uses to measure the status of the rule of law around the world.<sup>192</sup> WJP notes:

The rule of law affects all of us in our everyday lives. Although we may not be aware of it, the rule of law is profoundly important—and not just for lawyers or judges. It is the foundation for a system of rules to keep us safe, resolve our disputes, and enable us to prosper. Every sector of society is a stakeholder in the rule of law.<sup>193</sup>

## B. *Technology*

We must be careful not to view technology as the answer to achieving full access to justice.<sup>194</sup> In the recent book *Rebooting Justice: More Technology, Fewer Lawyers, and the Future of Law*, the authors propose that technology and process simplification will fix the access-to-justice crisis by lessening the need for lawyers.<sup>195</sup> That may be true, but we will always need a public civil justice system for the fair and efficient resolution of non-criminal legal conflicts, and a civil justice system that is fair and works for everyone will always need lawyers.<sup>196</sup>

The landscape of civil litigation in state courts looks very different today than it used to.<sup>197</sup> Our civil justice system was designed with the

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189. *Id.*

190. Waldron, *supra* note 185.

191. *Id.*

192. WORLD JUSTICE PROJECT, *supra* note 21, at 5.

193. *Id.* at 11.

194. *See* BARTON & BIBAS, *supra* note 96, at 8.

195. *Id.* at 7–8.

196. *See* PAULA HANNAFORD-AGOR ET AL., NAT’L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS vi, 9 (2015).

197. *See id.* at iii, 21–22.

assumption that all parties to a dispute would be represented by counsel.<sup>198</sup> That is no longer the reality, if it ever was.<sup>199</sup> “The idealized picture of an adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion,” a 2015 study performed for the National Center for State Courts asserted.<sup>200</sup> The study’s findings offered “a dramatically changed picture of civil caseloads compared to . . . two decades ago and to perceptions held by many civil trial lawyers and judges.”<sup>201</sup> Among its key findings: Most cases are “low-value debt collection, landlord/tenant, and small claims cases; three-quarters of the judgments were \$5,200 or less”; there was a very low rate of dispositions involving formal adjudication (e.g., trial, summary judgment, binding arbitration); and in more than three-quarters of cases, at least one party was self-represented.<sup>202</sup>

The enormous asymmetry of representation in state courts, where more and more often people are going into court without representation to face opponents represented by lawyers, raises serious questions about the fairness of outcomes in civil legal matters.<sup>203</sup> Technological solutions cannot help people who cannot use technology or who cannot represent themselves in court—for example, children, the developmentally disabled, and others such as the elderly, the mentally ill, the institutionalized, the illiterate, and those who do not read and speak English fluently.<sup>204</sup> The most vulnerable will always need lawyers,<sup>205</sup> and lawyers will always be needed to litigate cases involving complex issues, matters of policy, and practices that affect entire populations.<sup>206</sup>

One thing technology will do is expand access to justice for those who earn too much to qualify for civil legal aid but who still cannot afford a lawyer.<sup>207</sup> The Foundation’s new strategic initiatives encompass moderate-income, as well as low-income Floridians.<sup>208</sup> This is not because the

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198. See Waldron, *supra* note 185.

199. See Frank, *supra* note 16.

200. HANNAFORD-AGOR ET AL., *supra* note 196, at vi.

201. PAULA HANNAFORD-AGOR, *NCSC Releases Report on The Landscape of Civil Litigation in State Courts*, NAT’L CTR. FOR ST. CTS. (Nov. 11, 2015), <http://www.ncsc.org/Newsroom/News-releases/2015/Civil-Justice-Initiative.aspx>.

202. PAULA HANNAFORD-AGOR ET AL., NAT’L CTR. FOR STATE COURTS, *Abstract to THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* (2015).

203. HANNAFORD-AGOR ET AL., *supra* note 196, at v–vi.

204. *Id.*; *What Is Civil Legal Aid?*, *supra* note 12; Zorza, *supra* note 138.

205. See Frank, *supra* note 16.

206. See *id.*; HANNAFORD-AGOR ET AL., *supra* note 196, at vi.

207. LSC, LSC 2007 ACTION PLAN FOR PRIVATE ATTORNEY INVOLVEMENT: HELP CLOSE THE JUSTICE GAP, UNLEASH POWER OF PRO BONO 1 (2007); *Foundation Poised for a Strategic Reset*, *supra* note 43, at 17.

208. *Foundation Poised for a Strategic Reset*, *supra* note 43, at 17.

Foundation is abandoning the poor, but because many access-to-justice technologies such as websites and mobile apps will be available to everyone.<sup>209</sup>

## VIII. RESPONSIBILITIES OF THE PUBLIC AND PRIVATE SECTORS TO FUND CIVIL LEGAL AID

### A. *State Government*

The public sector—government—is primarily responsible for ensuring that a state operates according to the rule of law.<sup>210</sup> This responsibility extends beyond the judicial branch to the executive and legislative branches.<sup>211</sup>

One of the fundamental purposes of government, mentioned in the Preamble to the United States Constitution, is to establish justice.<sup>212</sup> The framers of the United States Constitution “recognized that a well-functioning, accessible system of justice is essential to societal stability. It’s about the rule of law. You won’t long have a nation to defend, or worth defending, without it.”<sup>213</sup>

Section 21 of Article I of the Florida Constitution provides, “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.”<sup>214</sup>

Access to the civil justice system supports the other core purposes of government outlined in the United States and Florida Constitutions: Ensuring domestic tranquility, maintaining public order, guaranteeing equal civil and political rights to all, providing for the general welfare, and securing liberty.<sup>215</sup> Advocates for civil justice often focus their efforts on the legislative and judicial branches, but the executive branch is tremendously important, too: “Governors—and those who work with them—increasingly understand that incorporating civil legal help and partnering with legal-aid and self-help service providers support state and federal goals of fiscal responsibility and effective social services and produce better outcomes.”<sup>216</sup>

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209. *See id.*

210. *See* Waldron, *supra* note 185.

211. *See id.*

212. James J. Sandman, President, Legal Servs. Corp., Address Before the Hawaii Access to Justice Conference: Rethinking Access to Justice (June 20, 2014); *see also* U.S. CONST. pmbl.

213. Sandman, *supra* note 212.

214. FLA. CONST. art. I, § 21.

215. Lash, *supra* note 41, at 160–61; *see also* U.S. CONST. pmbl; FLA. CONST. pmbl.

216. Lash, *supra* note 41, at 161.

Federal funding for civil legal aid has been politically embattled since its inception.<sup>217</sup> State funding for civil legal aid should not be controversial; it historically has not been and now should not be a partisan issue in Florida.<sup>218</sup> Again, Nathan L. Hecht, Chief Justice of the Supreme Court of Texas wrote: “Legal aid, like pro bono legal services, is not an entitlement. It’s not welfare. It’s simply good government. This is an American idea, not a liberal one or a conservative one.”<sup>219</sup>

Funding legal aid is good government because, as shown by an economic impact study commissioned by the Foundation and published in 2016, it is cost-effective, good for the state’s economy, and saves taxpayer money.<sup>220</sup> The study found that every \$100,000 invested in civil legal aid in Florida creates an estimated \$719,000 in economic impacts.<sup>221</sup> Civil legal aid helps lower-income Florida residents obtain money to which they are entitled, including federal benefits (Social Security, Medicaid and Medicare, veterans’ benefits), unpaid child support, unpaid or disputed wages, and unemployment compensation, some of which comes from outside the State and most of which is spent in Florida.<sup>222</sup>

Civil legal aid also reduces the financial burden on government agencies.<sup>223</sup> When the Florida Legislature passed FACLA in 2002, it found “that the lack of adequate and equitable legal services available to the indigent population, particularly the children and elderly of this State, unnecessarily burdens existing social and human services programs.”<sup>224</sup>

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217. See *id.* at 163. In *IOTA III*, the opinion implementing Florida’s IOTA program, the Supreme Court of Florida noted that “continued funding for the Legal Services Corporation is a matter of intense debate in Washington, D. C.” *In re Interest on Tr. Accounts (IOTA III)*, 402 So. 2d 389, 396 (Fla. 1981). Then-President Ronald Reagan had begun urging Congress to abolish LSC and eliminate Federal legal aid financing. Stuart Taylor, *Legal Aid for the Poor: Reagan’s Longest Brawl*, N.Y. TIMES, June 8, 1984, at A16. “[F]or most of the last half century, legal aid for poor people has been a major political and ideological battleground.” 1 Earl JOHNSON JR., *TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES* x (2013). The battle continues into the present. See Katie Benner, *Justice Dept. Closes Unit That Offers Legal Aid: [National Desk]*, N.Y. TIMES, Feb. 2, 2018, at A14. The U.S. Department of Justice established the Office for Access to Justice (“ATJ”) in March 2010, during the Presidency of Barack Obama. *Id.* ATJ was quietly closed down in 2017, shortly after Jeff Sessions was sworn in as Attorney General under President Donald Trump. *Id.*

218. See Hecht, *supra* note 34, at 191.

219. *Id.*

220. *Economic Impact Study*, *supra* note 32.

221. *Id.*

222. *Id.*

223. See Lash, *supra* note 41, at 161.

224. FLA. STAT. § 68.095 (2019).



Funding civil legal aid helps ensure the effectiveness of state government programs intended to assist people in meeting their basic needs.<sup>225</sup>

Finally, funding civil legal aid is good government because access to justice promotes social stability and order.<sup>226</sup> When people lose faith in their ability to peaceably and effectively obtain redress in the legal system, they may take to the streets or resort to property damage and violence.<sup>227</sup> Ignoring the civil legal needs of the poor simply leads to bad results.<sup>228</sup> Any government that claims to care about the rule of law must fund civil legal aid.<sup>229</sup>

#### B. *The Business Community's Stake in Expanding Access to Justice*

Business and industry depend on the rule of law.<sup>230</sup> Supporting access to justice is not only consistent with good corporate citizenship; it is also aligned with corporate self-interest.<sup>231</sup> Companies cannot operate effectively if they cannot count on social stability and order—not merely the absence of civil unrest, but also the basic integrity and fairness of commercial transactions and the civil judicial system.<sup>232</sup> Unmet civil legal needs impose costs on businesses.<sup>233</sup> Employees may experience civil legal problems in any number of areas, such as personal finance, divorce, family violence, child custody, special needs education for children, or landlord-tenant disputes, for example.<sup>234</sup> Employees may not know how to address these issues or may lack access to the civil justice system to resolve them.<sup>235</sup> Such problems affect employees' work performance, causing employees to be absent from work, to be less productive on the job, or to leave their jobs altogether.<sup>236</sup> And, of course, the more people who slip into poverty as a result of civil legal problems, the less is spent on goods and services and the worse is the economy in general.<sup>237</sup>

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225. Lash, *supra* note 41, at 160–61.

226. *Id.* at 161.

227. See David Smiley, *McDuffie Riots: Revisiting, Retelling Story — 35 Years Later*, MIAMI HERALD (May 17, 2015, 3:37 PM), <http://www.miamiherald.com/news/local/community/miami-dade/article21178995.html>.

228. See Lash, *supra* note 41, at 161.

229. See Sandman, *supra* note 11, at 118–19.

230. *Economic Impact Study*, *supra* note 32.

231. *Id.*

232. See *id.*

233. *Id.*

234. See JUSTICE GAP REPORT 2017, *supra* note 15, at 31.

235. See *id.* at 31, 33.

236. See *id.* at 31.

237. *Id.*; see also *Economic Impact Study*, *supra* note 32.

## IX. CONCLUSION

The Foundation is uniquely qualified to point the way toward full access to justice in Florida and to foster the convergence of resources necessary to achieve it.<sup>238</sup> Since its founding in 1956, the Foundation has embodied the Florida Bar's professional and moral commitment to public service.<sup>239</sup> From the inception of Florida's IOTA program in 1981, the Supreme Court of Florida has entrusted the Foundation with a large part of the responsibility for determining how best to meet the civil legal needs of the state's poor.<sup>240</sup> The Foundation has a nearly forty-year history of providing funding for civil legal aid in the State.<sup>241</sup> With the Strategic Reset, the Foundation took on the role of leader of and catalyst for change in the State's civil legal aid delivery system and civil justice system.<sup>242</sup> The Foundation is situated in the nonprofit sector—i.e., largely outside the governmental and private sectors.<sup>243</sup> As such, the Foundation has a mostly independent, non-political view of both the civil justice system and the civil legal aid delivery system in this State.<sup>244</sup> Perhaps most importantly, the Foundation and its leadership have engaged in serious and meaningful study of how to make the greatest impact on access to justice with limited resources.<sup>245</sup>

The Author does not expect that the path to systemic change will be free of difficulty, but she is confident that the Foundation's new strategic directions will lead to a future expansion of civil justice in Florida and strengthen the rule of law.<sup>246</sup>

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238. See *Economic Impact Study*, *supra* note 32.

239. *Mission*, *supra* note 9.

240. *Leadership and Funding for Justice in Florida*, *supra* note 9.

241. See *id.*

242. See *id.*; *Foundation Poised for a Strategic Reset*, *supra* note 43, at 17.

243. See *Foundation poised for a Strategic Reset*, *supra* note 43, at 17; *Leadership and Funding for Justice in Florida*, *supra* note 9.

244. See *Community Based Civil Legal Services*, *supra* note 166.

245. *Id.*

246. See *Foundation Poised for a Strategic Reset*, *supra* note 43, at 1.

# BANNING FAUX SANCTUARY JURISDICTIONS

LENA ABDIN\*

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I.	INTRODUCTION .....	36
II.	HISTORY AND DEFINITIONS OF SANCTUARY CITIES .....	39
III.	TYPES OF SANCTUARY CITIES AND PERCEPTION .....	40
	A. <i>Types of Sanctuary Jurisdictions</i> .....	41
	B. <i>Perception of Sanctuary Jurisdictions</i> .....	42
IV.	SENATE BILL 168.....	45
	A. <i>Notable Sections in the Bill</i> .....	47
	1. Criminal Cases .....	47
	3. Victims or Witnesses.....	48
	4. Duties Related to Immigration Detainers.....	48
	5. Enforcement .....	48
	6. Basic Ordering Agreements and the 287(g) Program .....	49
V.	THE SITUATION IN FLORIDA.....	49
	A. <i>No Declared Sanctuary Jurisdictions</i> .....	49
	B. <i>Basic Ordering Agreements</i> .....	51
	C. <i>287(g) Program</i> .....	53
VI.	POTENTIAL IMPACT OF THE BILL IN FLORIDA.....	53
	A. <i>Crime</i> .....	54
	B. <i>Economy</i> .....	55
	C. <i>Trafficking</i> .....	57
	D. <i>Health</i> .....	58
	E. <i>ICE Mistakes</i> .....	59
VII.	PARTING THOUGHTS AND OTHER POTENTIAL CONSEQUENCES .....	60

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## I. INTRODUCTION

The current political climate has raised the topic of sanctuary policy as a point of contention between federal, state, and local government authorities.<sup>1</sup> On January 25, 2017, Executive Order 13,768, titled “Enhancing Public Safety in the Interior of the United States” was signed by President Donald Trump.<sup>2</sup> The order stated that sanctuary jurisdictions that refuse to comply with immigration enforcement measures would not be “eligible to receive federal grants, except as deemed necessary for law-enforcement purposes.”<sup>3</sup> The term *sanctuary jurisdictions* typically refers to a city, state, or county that will generally protect undocumented migrants and immigrants from deportation as well as welcome immigrants into the community, while limiting their cooperation with the federal government’s effort to enforce immigration laws.<sup>4</sup>

States that oppose bills banning sanctuary policies say that passing these bills undermines trust between local law enforcement agencies and local immigrant and migrant communities.<sup>5</sup> Further, they claim that sanctuary policies endanger the collaboration between immigrant communities and local law enforcement.<sup>6</sup> Conversely, supporters of bills banning sanctuary cities say that a relationship between local law enforcement and Immigration and Customs Enforcement (“ICE”) enables the deportation of potentially dangerous criminals who are in the country illegally.<sup>7</sup>

There are various methods sanctuary jurisdictions use to protect immigrants.<sup>8</sup> Scholars have looked into five different types of legal and policy stances sanctuary jurisdictions have imposed: “(1) barring

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1. Ann Morse et al., *Sanctuary Policy FAQ: What’s a Sanctuary Policy? FAQ on Federal, State and Local Action on Immigration Enforcement*, NCSL (June 20, 2019), <http://www.ncsl.org/research/immigration/sanctuary-policy-faq635991795.aspx>.

2. Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017); AM. IMMIGRATION COUNCIL, SUMMARY OF EXECUTIVE ORDER “ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES” 1 (2017).

3. AM. IMMIGRATION COUNCIL, *supra* note 2, at 3; *see also* Exec. Order No. 13,768, 82 Fed. Reg. at 8799.

4. Ann Deslandes, *Sanctuary Cities Are as Old as the Bible*, JSTOR DAILY (Mar. 22, 2017), <http://daily.jstor.org/sanctuary-cities-as-old-as-bible/>; Morse et al., *supra* note 1.

5. Morse et al., *supra* note 1.

6. *Id.*

7. *See Sanctuary Cities Undermine Law Enforcement and Endanger Our Communities*, WHITE HOUSE: IMMIGR. (Mar. 20, 2018), <http://www.whitehouse.gov/briefings-statements/sanctuary-cities-undermine-law-enforcement-endanger-communities/>.

8. *See* Christopher N. Lasch et al., *Understanding Sanctuary Cities*, 59 B.C. L. REV. 1703, 1704 (2018).

investigations into immigration violations; (2) limiting compliance with ICE detainers and administrative warrants; (3) limiting ICE's access to local jails; (4) limiting disclosure of sensitive information; and (5) declining to participate in joint operations."<sup>9</sup>

On May 2, 2019, Florida Senate Bill 168 (the "Bill") was passed, banning sanctuary cities in Florida.<sup>10</sup> Interestingly, however, "no city or county [in Florida] has [ever] officially declared itself a sanctuary jurisdiction."<sup>11</sup> Still, there are reports from Declined Detainer Outcome Reports ("DDOR") that indicate Florida has twenty-eight sanctuary cities and counties.<sup>12</sup> Most of the provisions of the Bill went into effect on July 1, 2019, except for one that became effective in October 2019.<sup>13</sup> The Bill requires all local authorities to honor requests from federal immigration authorities, including holding detainees, so they can be picked up by an agency like ICE and subjected to possible detainment or deportation.<sup>14</sup>

As previously noted, there are conflicting reports as to whether Florida even has sanctuary jurisdictions.<sup>15</sup> However, this has not stopped ICE or the legislature from trying to prevent any sort of sanctuary policy in the State.<sup>16</sup> Importantly, the Bill will essentially "transform every government agency, university, and law enforcement agency into [an arm of] federal immigration officers."<sup>17</sup> One strategy ICE is using in addition to the

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9. *Id.* at 1737.

10. FLA. STAT. § 908.103 (2019); Fla. CS for CS for CS for SB 168, at 1 (2019); Kate Sullivan, *Florida Legislature Passes Ban on Sanctuary Cities*, CNN: POL. (May 2, 2019, 9:57 PM), <http://www.cnn.com/2019/05/02/politics/florida-legislature-sanctuary-city-ban/index.html>.

11. Arian Campo-Flores, *Florida Gov. Ron DeSantis Signs Sanctuary-City Ban*, WALL STREET J. (June 14, 2019, 3:47 PM), <http://www.wsj.com/articles/florida-gov-ron-desantis-signs-sanctuary-city-ban-11560536897>.

12. Melissa S. Razdrih, *It's a Law: No More Sanctuary Cities as of July 1*, FLAPOL: HEADLINES (July 1, 2019), <http://floridapolitics.com/archives/300159-florida-says-goodbye-to-sanctuary-cities-and-counties-as-new-law-takes-effect-today>; see also Steve Salvi, *The Original List of Sanctuary Cities, USA*, OHIO JOBS & JUST. PAC (Aug. 29, 2019), <http://www.ojjpac.org/sanctuary.asp>.

13. FLA. STAT. §§ 908.101–09; Fla. CS for CS for CS for SB 168, at 6; Fla. S. Comm. on Rules, SB 168 (2019) Fiscal Note 1 (Apr. 18, 2019) available at <http://flsenate.gov/session/Bill/2019/168/Analyses/2019s00168.rc.PDF>.

14. Fla. CS for CS for CS for SB 168, at 1; Fla. S. Comm. on Rules, *supra* note 13, at 9–11.

15. Fla. S. Comm. on Rules, *supra* note 13, at 4; see also Elizabeth Koh, *Florida Bans Sanctuary Cities, but There Aren't Any in the State*, GOVERNING: PUB. SAFETY (June 17, 2019, 8:46 AM), <http://www.governing.com/topics/public-justice-safety/tns-florida-governor-signs-sanctuary-cities-ban.html>.

16. See Koh, *supra* note 15.

17. Samantha J. Gross, *Ban on Sanctuary Cities to Become Florida Law After Anguished Debate*, TAMPA BAY TIMES (May 2, 2019), <http://www.tampabay.com/florida>

Bill's ban on sanctuary jurisdictions to find and deport immigrants is implementing a Basic Ordering Agreement ("BOA") with local sheriffs' offices.<sup>18</sup> A BOA allows for a jail that is holding an immigrant on a detainer from ICE to be "reimbursed [fifty dollars] for up to [forty-eight] hours of detention."<sup>19</sup> Another strategy ICE is using in conjunction with the Bill is the 287(g) program.<sup>20</sup> Under the program, "local law enforcement agents are deputized to work as federal immigration officials, but the program is restricted to county jails."<sup>21</sup>

The impact of this Bill may be catastrophic to the Florida business community.<sup>22</sup> The State faces to potentially lose \$76.7 million in federal taxes, and \$44.7 million in state and local taxes if ten percent of the immigrant population leaves Florida.<sup>23</sup> This Bill could also play into the hands of human traffickers, as well as affect the health of immigrant communities.<sup>24</sup> For purposes of clarity, in this Comment, the term *sanctuary jurisdictions* will be used to denote sanctuary cities, counties, and states.\*

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politics/buzz/2019/05/02/sanctuary-cities-to-become-florida-law-after-anguished-debate/; see also FLA. STAT. §§ 908.104, 908.105; Fla. CS for CS for CS for SB 168, at 1.

18. *Fighting Basic Ordering Agreements: A Toolkit for Florida Advocates*, S. POVERTY L. CTR., <http://www.splcenter.org/basicorderingagreements> (last visited Dec. 21, 2019); see also FLA. STAT. §§ 908.104, 908.105; Fla. CS for CS for CS for SB 168, at 1.

19. *FAQs on ICE's New Enforcement Partnerships in Florida*, ACLU, <http://www.aclu.org/fact-sheet/faq-ices-new-enforcement-partnerships-florida> (last visited Dec. 21, 2019).

20. Ana Ceballos, *Senate Signs off on Sanctuary City Ban: Lawmakers Must Work Out Differences with House to Send Bill to Governor*, PALM BEACH POST, Apr. 27, 2019, at 6; see also FLA. STAT. § 908.106; Fla. CS for CS for CS for SB 168, at 3.

21. Dara Kam, *With DeSantis Urging Cooperation with ICE, Florida Sheriffs Are Looking at Options*, SUNSHINE ST. NEWS: POL. (Mar. 12, 2019, 8:15 AM), <http://www.sunshinestatenews.com/story/desantis-urging-cooperation-ice-florida-sheriffs-are-looking-options>.

22. *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida's Economy*, NEW AM. ECON. (Mar. 6, 2019), <http://research.newamericaneconomy.org/report/economic-cost-of-florida-senate-bill-168-and-house-bill-527/>; see also FLA. STAT. §§ 908.104, 908.107; Fla. CS for CS for CS for SB 168, at 1.

23. *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida's Economy*, *supra* note 22.

24. Paul DiMare, *SB 168 Is Anti-Business, Anti-Immigrant and Threatens the Safety of Floridians Statewide*, MIAMI HERALD, Mar. 5, 2019, at 13A; Marissa Raymond-Flesch, *The Negative Health Consequences of Anti-Immigration Policies*, 62 J. ADOLESCENT HEALTH 505, 505 (2018); see also FLA. STAT. §§ 908.104, 908.107; Fla. CS for CS for CS for SB 168, at 1.

## II. HISTORY AND DEFINITIONS OF SANCTUARY CITIES

*Sanctuary jurisdiction* ordinarily refers to a place that has declared itself as one that will typically protect undocumented migrants and immigrants from deportation and also limit their cooperation with the federal government's effort to enforce immigration laws.<sup>25</sup> It is similar to the concept referred to in the sanctuary movement of the 1980s, when religious institutions declared their territories to be safe havens for refugees and migrants escaping turmoil and persecution in Central America.<sup>26</sup> A common thread between the way different places operate as sanctuary jurisdictions is typically through an ordinance that allows local government law enforcement and institutions to refuse to give information about immigrants' residency statuses to federal immigration agents, when an immigrant resident has been arrested for a non-immigration-related offense.<sup>27</sup>

From a definitional point of view, the terms *sanctuary* and *sanctuary jurisdictions* mean those states and cities that receive federal funds from the Department of Justice ("DOJ") or the Department of Homeland Security ("DHS") and refuse to comply with 8 U.S.C. § 1373.<sup>28</sup> 8 U.S.C. § 1373 is a section in the Immigration and Nationality Act that provides that a federal, state, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.<sup>29</sup>

Another definition of *sanctuary jurisdiction* refers to areas which "do not honor civil detainer requests by ICE officials."<sup>30</sup> An ICE civil detainer request asks a local law enforcement agency to continue to keep an inmate who is in jail because of real or suspected violations of criminal laws for up to forty-eight hours after his or her scheduled release, so that ICE can determine if it wants to take that individual into custody.<sup>31</sup> ICE civil detainer

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25. SARAH HERMAN PECK, CONG. RESEARCH SERV., R44795, "SANCTUARY" JURISDICTIONS: FEDERAL, STATE, AND LOCAL POLICIES AND RELATED LITIGATION 4 n.18 (2019).

26. *Id.* at 3.

27. *Id.* at 3–4.

28. *Id.* at 16–17.

29. 8 U.S.C. § 1373 (2018), *declared unconstitutional by City and County of San Francisco v. Sessions*, 372 F. Supp. 3d 928 (N.D. Cal. 2018).

30. Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1220 (2019).

31. *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 510 (N.D. Cal. 2017).

requests are typically voluntary and local governments are not obligated to honor them.<sup>32</sup>

President Trump's administration considers areas that decline to honor detainer requests as sanctuary jurisdictions and has recognized them through the publication of lists of nonfederal jurisdictions that decline detainer requests.<sup>33</sup> Among the jurisdictions included in the list are those that require the federal government to obtain a warrant before they agree to hold a noncitizen in custody after the noncitizen should be released under state or local law.<sup>34</sup> Law enforcement definitions and connotations of sanctuary jurisdictions are generally portrayed as jurisdictions that violate laws and endanger communities.<sup>35</sup> On the other hand, immigrant advocates' definitions and connotations of sanctuary jurisdictions are portrayed as those jurisdictions that provide a safe-haven for undocumented immigrants and where "local law enforcement officers have the trust of the community."<sup>36</sup>

### III. TYPES OF SANCTUARY CITIES AND PERCEPTION

"There are various types of sanctuary [jurisdiction] policies."<sup>37</sup> Some are called sanctuary jurisdictions purely by symbolic means because they welcome immigrants, while "others are more proactive by their establishing protocols geared at the confidentiality of an individual's undocumented status and [to] ensure open communication between residents and public employees, especially law enforcement officers."<sup>38</sup> As previously noted, scholars have identified five principle types of legal and policy initiatives adopted by sanctuary jurisdictions: "(1) barring investigations into immigration violations; (2) limiting compliance with ICE detainers and administrative warrants; (3) limiting ICE's access to local jails; (4) limiting disclosure of sensitive information; and (5) declining to participate in joint operations."<sup>39</sup>

Public perception of sanctuary jurisdictions varies tremendously, especially when polled, depending on the wording of questions and

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32. *Id.*

33. Villazor & Gulasekaram, *supra* note 30, at 1221.

34. *Id.*

35. *Id.*; see also *Sanctuary Cities Undermine Law Enforcement and Endanger Our Communities*, *supra* note 7.

36. Villazor & Gulasekaram, *supra* note 30, at 1221–22.

37. *Id.* at 1236.

38. *Id.*

39. Lasch et al., *supra* note 8, at 1737.



specifically when poll takers consider what type of crime an immigrant commits.<sup>40</sup>

A. *Types of Sanctuary Jurisdictions*

A new, innovative way sanctuary jurisdictions “have legally resisted federal immigration enforcement is the establishment of policies that provide free legal assistance to undocumented immigrants and children in removal hearings.”<sup>41</sup> The federal government does not provide legal services for noncitizens and they must find and pay for their own lawyers, leading most immigrants to be underrepresented or unrepresented in removal hearings.<sup>42</sup>

Violations of federal immigration law may be criminal or civil in nature. Removal proceedings are civil, although some [behavior] that makes an [immigrant] alien removable may also [permit] criminal prosecution. For example, an [immigrant] alien who knowingly enters the United States without authorization is not only potentially removable, but could also be charged with the criminal offense of unlawful entry. Other violations of the [Immigration and Nationality Act] are exclusively criminal or civil in nature. Notably, an [immigrant] alien’s unauthorized immigration status makes him or her removable, but absent additional factors (e.g., having reentered the United States after being formally removed), unlawful presence on its own is not a criminal offense.<sup>43</sup>

Whereas localities have a range of policy options available to them to ensure that all individuals are treated equally regardless of their immigration status, a common thread that runs through sanctuary jurisdictions is their acknowledgement that detainers infringe on Fourth Amendment and due process rights. To be clear, such localities are not refusing to comply with the law. In fact, every single jurisdiction still shares fingerprint data upon arrest with the [Federal Bureau of Investigation], which in turn shares these data with the DHS for immigration status checks. Rather, in declining a detainer request, localities are choosing not to hold an individual beyond the point at which the person would otherwise be released from custody, which is generally the point at

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40. See Louis Jacobson, *Anatomy of a Statistic: Do 80 Percent of Americans Oppose Sanctuary Cities?*, POLITIFACT (Feb. 24, 2017, 2:50 PM), <http://www.politifact.com/truth-o-meter/article/2017/feb/24/anatomy-statistic-do-80-percent-americans-oppose-s/>.

41. Villazor & Gulasekaram, *supra* note 30, at 1240.

42. *Id.*

43. PECK, *supra* note 25, at 11.

which the legal authority to continue detaining the individual is over.<sup>44</sup>

In conclusion, “sanctuary [jurisdictions] today continue to provide safe havens to undocumented immigrants.”<sup>45</sup> The scope of protection has changed from barring law enforcement officers from communicating data about a person’s immigration status with federal immigration officers to wider “forms of protections, including refusing to honor detainer requests and providing free legal assistance to immigrants to directly challenge their removal from the United States.”<sup>46</sup>

### B. *Perception of Sanctuary Jurisdictions*

As previously noted, public perception of sanctuary jurisdictions varies tremendously when polled depending on the wording of questions.<sup>47</sup> Notably, in February 2017, the Harvard-Harris poll released findings which indicated that eighty percent of Americans were against sanctuary jurisdictions.<sup>48</sup> However, the wording of the poll question matters.<sup>49</sup> The question was phrased as: “Should cities that arrest illegal immigrants for crimes be required to turn them over to immigration authorities?”<sup>50</sup> In this case, the poll-takers were asked about crimes.<sup>51</sup> To many, that typically means “violent crimes, especially when placed with the term *arrest*.”<sup>52</sup>

Although there has not been much polling on the issue of sanctuary jurisdictions, there was a poll that appeared to support the idea behind the notion that the wording of a poll can greatly affect the results.<sup>53</sup> The aforementioned poll was conducted by Quinnipiac University and asked: “Thinking about people who have immigrated to the [United States] illegally, who do you think should be deported: Should no illegal immigrants be deported; only illegal immigrants that have committed serious crimes; only illegal immigrants that have committed any crime; or should all illegal immigrants be deported?”<sup>54</sup> In response to this question, only three-percent

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44. TOM K. WONG, CTR. FOR AM. PROGRESS, THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY 4 (2017).

45. Villazor & Gulasekaram, *supra* note 30, at 1242.

46. *Id.*

47. *See* Jacobson, *supra* note 40.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Jacobson, *supra* note 40.

53. *Id.*

54. *Id.*

said “no illegal immigrants should be deported, and [nineteen] percent said all illegal immigrants should be deported.”<sup>55</sup> Fifty-three percent of poll-takers said “deportations should only be done for *serious crimes*, compared to [twenty-two] percent for *any crime*.”<sup>56</sup> Many believe that sanctuary jurisdictions actually put immigrants at risk “who are not necessarily the primary targets of ICE . . . because ICE is forced to make more at-large arrests in immigrant communities—at workplaces, dwellings, and on the street, rather than in controlled jail or courthouse environments.”<sup>57</sup>

### C. *Pros and Cons of Sanctuary Policy*

Limited cooperation or sanctuary policies may bring about negative public safety outcomes in a couple of ways.<sup>58</sup> For example, “the adoption of limited cooperation policies could bring about *behavioral* changes in the local immigrant population by increasing the likelihood that individuals will engage in crime.”<sup>59</sup> As an example, perhaps certain immigrants may think that there is a lower risk of deportation in a sanctuary jurisdiction where local law enforcement limits its cooperation with ICE.<sup>60</sup> This is unlikely for two reasons.<sup>61</sup>

First, many immigrants “may not fully understand the nuances of limited cooperation policies, especially in contexts where the federal and local governments possess opposing policy orientations towards immigrants,” making this detrimental effect of sanctuary policy unlikely.<sup>62</sup> Second, and even more salient, even if immigrants have a pristine comprehension of sanctuary policies, local law enforcement often do not abide by sanctuary policy when it comes to violent and serious felony offenses.<sup>63</sup> Therefore, the most serious crimes will likely have the same risk of punishment associated despite any sanctuary policy in place.<sup>64</sup>

Another way sanctuary policies may bring about negative public safety outcomes, is that the existence of limited cooperation policies could

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55. *Id.*

56. *Id.*

57. Preston Huennekens, *Identifying the Super-Sanctuaries*, CTR. FOR IMMIGRATION STUDIES (Jan. 15, 2019), <http://www.cis.org/Huennekens/Identifying-SuperSanctuaries>.

58. Daniel E. Martínez et al., *Providing Sanctuary or Fostering Crime? A Review of the Research on Sanctuary Cities and Crime*, SOC. COMPASS, Nov. 8, 2017, at 1, 5.

59. *Id.*

60. *Id.*

61. *See id.*

62. *Id.*

63. Martínez et al., *supra* note 58, at 5.

64. *Id.*

attract immigrants that are more inclined to be convicted of crimes.<sup>65</sup> Thus, “[i]f the proportion of criminally-inclined noncitizens increased in a specific area, then we would expect crime rates to also increase. . . .”<sup>66</sup> Like in the previous example, this line of reasoning assumes that immigrants are aware of specific jurisdictions with sanctuary policies “but are not sufficiently informed to understand that such policies do not provide true *sanctuary*.”<sup>67</sup> Further, this reasoning also generally associates immigrants with criminality even though a “large body of research relying on both self-report surveys and official statistics reveals that immigrant adults and youths, relative to the general [United States] population, have lower levels of criminality and are consequently less likely to engage in criminal or delinquent behavior.”<sup>68</sup>

Lastly, a possible connection may exist between sanctuary policies, immigration, and crime from something called a *social disorganization framework*.<sup>69</sup> This framework provides that “dense community social and institutional network structures inhibit crime and delinquency by fostering informal social control mechanisms such as the supervision of adolescents.”<sup>70</sup> Community crime is more likely to increase under *social disorganization*, often linked to immigrant communities.<sup>71</sup> However, studies concluded that “the concentration of recent immigrants is negatively associated with homicide,” but there was no evidence of a relationship between immigrants and crime.<sup>72</sup>

On the other hand, sanctuary policies could bolster the relationship between the community and local law enforcement because immigrant community members will not feel at risk for deportation.<sup>73</sup> Thus, immigrant communities “may be more willing to seek assistance from law enforcement officials or cooperate with criminal investigations.”<sup>74</sup> Greater cooperation and coordination with local law enforcement “should facilitate the clearance of crimes by arrest, which has been shown to incapacitate and deter would-be criminals.”<sup>75</sup> Notwithstanding these dependable and persistent findings, many policymakers and lawmakers continue to question and ban sanctuary policies on the basis of public safety concerns.<sup>76</sup> One reason for this is that

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65. *Id.*

66. *Id.*

67. *Id.*

68. Martínez et al., *supra* note 58, at 1, 5.

69. *Id.* at 5.

70. *Id.*

71. *Id.*

72. *Id.*

73. Martínez et al., *supra* note 58, at 6; *see also* Morse et al., *supra* note 1.

74. Martínez et al., *supra* note 58, at 1, 6.

75. *Id.* at 6.

76. *Id.* at 1, 8.

the “discourse has less to do with crime and safety concerns and more with . . . public conceptualizations of what [it] means to be [a] *real American*.”<sup>77</sup> This implied *manifestation of racism* becomes a shadow in the sanctuary policy oppositions’ narrative that undocumented immigrants infringe on the *rule of law* and *law and order*.<sup>78</sup> This is likely why many policymakers and lawmakers “continue to recycle empirically inaccurate arguments that limited cooperation policies and noncitizens, more broadly, represent public safety concerns.”<sup>79</sup>

#### IV. SENATE BILL 168

One of President Trump’s most frequent promises during his campaign was: “Cities that refuse to cooperate with federal [immigration] authorities will not receive taxpayer dollars.”<sup>80</sup> Seeking to punish sanctuary jurisdictions that continued to defy 8 U.S.C. § 1373, President Trump issued Executive Order 13,768 to withdraw federal funds from those jurisdictions.<sup>81</sup> Shortly thereafter, there were multiple lawsuits filed contesting the provisions of the Executive Order.<sup>82</sup> Eventually, the court in the *County of Santa Clara v. Trump*<sup>83</sup> enjoined the enforcement of Executive Order 13768, finding it facially problematic because the Order was too broadly written.<sup>84</sup> Further, the United States Ninth Circuit Court of Appeals ruled that President Trump went beyond his authority with an executive order he signed and that the executive branch may not refuse to disperse the federal grants without the approval of Congress.<sup>85</sup>

As previously stated, in Florida, on May 2, 2019, the Bill was passed, banning sanctuary jurisdictions.<sup>86</sup> The Bill went into effect on July 1, 2019, except for one section that became effective in October 2019.<sup>87</sup> Specifically, the Bill requires all local authorities to honor requests from federal immigration authorities by holding detainees, so they can be picked

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77. *Id.* at 1, 9.

78. *Id.*

79. Martínez et al., *supra* note 58, at 9.

80. Lasch et al., *supra* note 8, at 1713; *Donald Trump Immigration Speech in Arizona*, POLITICO (Aug. 31, 2016, 10:54 PM), <http://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-227614>.

81. Villazor & Gulasekaram, *supra* note 30, at 1219.

82. Lasch et al., *supra* note 8, at 1717.

83. 250 F. Supp. 3d 497 (N.D. Cal. 2017).

84. *See id.* at 537.

85. *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018).

86. Fla. CS for CS for CS for SB 168, at 1 (2019); Sullivan, *supra* note 10.

87. Fla. CS for CS for CS for SB 168, at 6.

up by an agency like ICE and be subjected to detainment or deportation.<sup>88</sup> Minor offenses, like jaywalking or driving without a license, could be grounds for deportation for illegal immigrant aliens.<sup>89</sup> Florida Governor Ron DeSantis has supported the measure and signed the Bill into law on June 14, 2019.<sup>90</sup> The Bill creates Chapter 908 in the Florida Statutes entitled Federal Immigration Enforcement.<sup>91</sup>

The [B]ill seeks to ensure that state [as well as] local entities and law enforcement agencies cooperate with federal government officials to enforce, and not obstruct, immigration laws. In its most general and broad terms, the [B]ill prohibits sanctuary jurisdictions and requires state and local entities to comply with federal immigration detainers when they are supported by proper documentation.<sup>92</sup>

The Bill “requires every Florida county and municipality to expend maximum local resources to enforce federal immigration law and participate in civic liberties violations. Moreover, it does not provide any funding or reimbursement for its costly mandate.”<sup>93</sup> Specifically, the Bill ensures that no state agency, law enforcement agency, local government agency, or state university can adopt or have a sanctuary policy.<sup>94</sup> The Bill “ban[s] policies that limit local cooperation and information-sharing with federal authorities on immigration matters.”<sup>95</sup>

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88. *Id.* at 1, 2.

89. Xander Peters, *Florida’s New Anti-Sanctuary Cities Law Goes into Effect Today*, ORLANDO WKLY. (July 1, 2019, 11:32 AM), <http://www.orlandoweekly.com/Blogs/archives/2019/07/01/floridas-new-anti-sanctuary-cities-law-goes-into-effect-today>.

90. Fla. CS for CS for CS for SB 168, at 6.

91. *Id.* at 1.

92. Fla. S. Comm. on Rules, *supra* note 13, at 1.

93. Joe Gruters, *Senate Bill 168: Anti-Immigrant Attempts to Ban Sanctuary Policies and to Require Local Law Enforcement to Enforce ICE Detainer Requests*, ACLU FLA., <http://www.aclufll.org/en/legislation/senate-bill-168-anti-immigrant-attempts-ban-sanctuary-policies-and-require-local-law> (last visited Dec. 21, 2019).

94. *Id.*

95. *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida’s Economy*, *supra* note 22.

A. *Notable Sections in the Bill*

The Bill contains different sections, most notable of which are summarized and contextualized as follows by legislative history documents.<sup>96</sup>

1. Criminal Cases

Judges must determine and assign the defendant-immigrant to *a secure correctional facility*.<sup>97</sup> There, the facility must decide whether a reduction “by not more than [twelve] days” would aid in the handover of the defendant-immigrant to federal officers, granting the defendant-immigrant has an immigration detainer out for him/her.<sup>98</sup>

If a judge does not have this information at the time of sentencing, but a law enforcement agency receives the information after sentencing, the law enforcement agency must notify the judge and he or she must issue the order to the secure correctional facility as soon as the information becomes available.<sup>99</sup>

2. Transport

At the time a county correctional facility verifies with federal immigration authorities that there exists a possible situation where an arrested person may have an immigration detainer out for them, the federal authorities may then pick up the person and transfer them to a federal facility.<sup>100</sup> Nonetheless, it is prohibited for federal authorities to pick up the person and transfer them before the twelve-day period elapses.<sup>101</sup> Additionally, federal authorities who wish to transfer an immigrant alien in custody need to go through the process of securing an authorization from a judge before being allowed to move the person across state lines.<sup>102</sup>

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A. 96. See Fla. S. Comm. on Rules, *supra* note 13, at 1; discussion *infra* Section  
97. Fla. S. Comm. on Rules, *supra* note 13, at 10.  
98. *Id.*  
99. *Id.*  
100. *Id.*  
101. *Id.*  
102. Fla. S. Comm. on Rules, *supra* note 13, at 10.

### 3. Victims or Witnesses

Witnesses to or victims of crimes are exempt from this section, meaning that state or local law enforcement agencies are not required to give any information to federal authorities about these witnesses or victims.<sup>103</sup> However, this is so long as these witnesses or victims work with law enforcement in a good faith and timely manner in furtherance of an investigation or prosecution of a criminal offense.<sup>104</sup>

### 4. Duties Related to Immigration Detainers

There are certain duties related to immigration detainers that law enforcement personnel need to be aware of if they have someone in their custody that may have an immigration detainer out for him or her.<sup>105</sup> In the event that a law enforcement agency has someone that is subject to an immigration detainer, law enforcement personnel should notify a judge, all the while making sure to detail the immigration detainer's information in the person's file.<sup>106</sup> Further, law enforcement agencies need to abide by and comply with the immigration detainer and any requests it may note as long as the detainer is consistent with the requirements set forth in section 908.102, Florida Statutes.<sup>107</sup>

Interestingly, law enforcement personnel do not have to notify a judge, comply with detainer requests, or record the information in the person's file, if the person is coming from another law enforcement agency that already performed the above duties before transferring the person.<sup>108</sup> Further, judges who know that a person is subject to an immigration detainer are required to include the detainer information in the court record.<sup>109</sup>

### 5. Enforcement

The enforcement section, section 908.107, Florida Statutes, became effective in October 2019.<sup>110</sup> The Bill states that “[a]ny executive or administrative state, county, or municipal officer who violates his or her

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103. *Id.*

104. *Id.*

105. *Id.* at 10–11.

106. *Id.* at 10.

107. Fla. S. Comm. on Rules., *supra* note 13, at 10–11.

108. *Id.* at 11.

109. *Id.*

110. Fla. CS for CS for CS for SB 168, at 6 (2019); *see also* FLA. STAT. § 908.107 (2019).



duties under this chapter may be subject to action . . . under the State Constitution and state law.”<sup>111</sup> Moreover, the Bill establishes that “[i]f a local governmental entity or local law enforcement agency violates this chapter, the court must enjoin the unlawful sanctuary policy.”<sup>112</sup>

## 6. Basic Ordering Agreements and the 287(g) Program

The Bill provides that each county jail must enter into an agreement with ICE for temporary housing of immigrants that are subject to detainees.<sup>113</sup> In order to be compliant with this section of the Bill, the jail must enter into a BOA or an agreement authorized by section 287 of the Immigration and Nationality Act.<sup>114</sup>

## V. THE SITUATION IN FLORIDA

### A. *No Declared Sanctuary Jurisdictions*

To be clear,

[i]n Florida, no city or county has officially declared itself a sanctuary jurisdiction. [However], as an example of the type of policy that could be affected, the Alachua County Sheriff’s Office in central Florida has [long] declined requests by federal immigration authorities to hold immigrants beyond their release date, unless they had a court order or criminal warrant . . . .<sup>115</sup>

Alachua County is the only county listed on the Center for Immigration Studies Sanctuary Cities, Counties, and States List.<sup>116</sup> There are other reports from DDORs that indicate Florida has twenty-eight sanctuary cities and counties, including Hillsborough, Pinellas, Miami-Dade, and Orange counties, and cities Tampa, Miami, St. Petersburg, and Orlando.<sup>117</sup> DDORs report on state jurisdictions that refuse to “honor detainees issued by

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111. FLA. STAT. § 908.107.

112. *Id.*

113. Fla. CS for CS for CS for SB 168, at 5.

114. *Id.* at 6; Immigration and Nationality Act, Pub. L. No. 82-414, § 287, 66 Stat. 163, 233 (1952) (codified as amended at 8 U.S.C. § 1101).

115. Campo-Flores, *supra* note 11.

116. Bryan Griffith & Jessica M. Vaughan, *Maps: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIGR. STUD. (Apr. 16, 2019), <http://www.cis.org/Map-Sanctuary-Cities-Counties-and-States>.

117. Razdrih, *supra* note 12; Salvi, *supra* note 12.

ICE to that jurisdiction.”<sup>118</sup> Despite the existence of these reports, it still remains

difficult to determine how many sanctuary jurisdictions . . . exist in Florida because organizations use different criteria for making their determinations, and because the information necessary to make these determinations is not readily available. For [instance], the Federation for American Immigration Reform (“FAIR”) released a list of sanctuary jurisdictions in May 2018 which stated that, as of April 2018, [twelve] counties and [three] cities qualified as Florida sanctuary jurisdictions.<sup>119</sup>

Further, in October 2018, The Center for Immigration Studies provided a list of sanctuary jurisdictions, which included Florida counties Alachua and Clay, although Clay County is not currently listed there.<sup>120</sup> There was

[o]nly one Florida municipality, the City of West Palm Beach, [that] appeared on a compliance review list released by the DOJ, in January 2018. The city was required to submit documentation to the [DOJ] demonstrating whether its employees could communicate with DOJ, DHS, ICE, or their agents. The City of West Palm Beach now appears on the current [Florida Department of Law Enforcement] list of jurisdictions that have submitted certifications stating that it is in compliance with federal immigration laws.<sup>121</sup>

As of July 10, 2019, there may already be a legal challenge to the Bill.<sup>122</sup> The South Miami City Commission unanimously voted to hire a lawyer to challenge the Bill along with the Southern Poverty Law Center and the University of Miami.<sup>123</sup> South Miami was approached by the Southern Poverty Law Center, “which argues that the [B]ill is unconstitutional and in violation of the Fourth Amendment’s protection against . . . unreasonable

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118. See U.S. IMMIGRATION & CUSTOMS ENF<sup>3</sup>T, ENFORCEMENT AND REMOVAL OPERATIONS: WEEKLY DECLINED DETAINER OUTCOME REPORT 1 (2017).

119. Fla. S. Comm. on Rules, *supra* note 13, at 4.

120. *Id.*

121. *Id.* at 5.

122. See Fla. CS for CS for CS for SB 168, at 1 (2019); Jessica Lipscomb, *South Miami to File Lawsuit Challenging Florida’s New Ban on Sanctuary Cities*, MIAMI NEW TIMES (July 10, 2019, 8:00 AM), <http://www.miaminewtimes.com/news/south-miami-florida-and-southern-poverty-law-center-will-sue-over-states-sanctuary-city-ban-11215198>.

123. Lipscomb, *supra* note 122; see also Fla. CS for CS for CS for SB 168, at 1.

seizure.”<sup>124</sup> South Miami City Attorney, Thomas Pepe, stated that “state law conflicts with federal law about whether a city such as South Miami would be reimbursed for having its police [force act in tandem] with immigration agents [and that] the city could be sued for wrongfully detaining immigrants.”<sup>125</sup> Pepe also indicated that “seven nonprofit organizations will join the city as plaintiffs in the lawsuit.”<sup>126</sup>

#### B. *Basic Ordering Agreements*

As previously noted, another strategy ICE is using in conjunction with the legislature’s ban on sanctuary jurisdictions to find and deport immigrants, is by implementing a BOA.<sup>127</sup> Various “federal courts have ruled that it is unconstitutional for local law enforcement agencies to keep people detained in jail once their criminal cases have ended” under ICE detainers.<sup>128</sup> Those court holdings made many Florida sheriffs concerned that they would be sued because of the unlawful holds.<sup>129</sup> To get around this, Pinellas County Sheriff, Bob Gualtieri, along with the Florida Sheriffs Association, and ICE came up with the BOA.<sup>130</sup>

“A BOA is not an enforceable contract and does not [require] the jail to [act on a] detainer.”<sup>131</sup> Rather, it allows for a jail that does hold an immigrant for ICE to be reimbursed fifty dollars for up to forty-eight hours of detention.<sup>132</sup> Under a BOA, the jail agrees “to give ICE free access to their jails to interrogate inmates.”<sup>133</sup> Under a BOA, “[sheriffs] shall provide [ICE] with reasonable access to all detainees or inmates for purposes of interviewing such individuals for immigration enforcement related purposes.”<sup>134</sup> “[BOAs] aim to prevent the release of criminal aliens back

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124. Julia Ingram, *South Miami Says It Will Challenge Florida’s Ban on Sanctuary Cities in Court*, MIAMI HERALD, July 14, 2019, at 24SE; Lipscomb, *supra* note 122; *see also* Fla. CS for CS for CS for SB 168, at 1.

125. Lipscomb, *supra* note 122.

126. *Id.*

127. *See Fighting Basic Ordering Agreements: A Toolkit for Florida Advocates*, *supra* note 18.

128. *Id.*

129. *Id.*

130. *Id.*

131. *FAQs on ICE’s New Enforcement Partnerships in Florida*, *supra* note 19.

132. *Id.*

133. *Id.*

134. E-mail from Matt Dunagan, Deputy Exec. Dir. of Operations, Fla. Sheriffs Ass’n, to Sheriffs, Fla. Sheriffs Ass’n (June 17, 2019, 9:59 AM) (on file with author).

into the community.”<sup>135</sup> An ICE news release stated that “sheriffs will no longer have to choose between releasing criminal illegal [immigrant] aliens from their custody back into the community or exposing themselves to potential civil liability for violating the immigrant alien’s civil rights.”<sup>136</sup> The participating sheriffs in the agreements will receive reimbursement for complying with the detainers.<sup>137</sup>

On January 17, 2018, the ICE office issued a news release announcing that seventeen BOAs had been agreed to with sheriffs around the State.<sup>138</sup> By January 2019, sheriffs in ten additional counties signed BOAs: DeSoto, Flagler, Martin, Okeechobee, Palm Beach, St. Lucie, Seminole, Highlands, Nassau, and St. Johns counties.<sup>139</sup> As of early July 2019, forty-one out of sixty-seven counties in Florida had formally reached a BOA with ICE.<sup>140</sup> Counties that did not have formal agreements as of early July 2019 are: Miami-Dade, Broward, Duval, Baker, Bradford, Calhoun, Citrus, Clay, Collier, Dixie, Escambia, Gadsden, Gilchrist, Glades, Hamilton, Holmes, Jackson, Jefferson, Liberty, Okaloosa, Osceola, Osceola, Putnam, Sarasota, Sumter, Union, Volusia, and Wakulla counties.<sup>141</sup> Counties have ninety days to comply with the Bill’s provisions and either enter into a BOA or an intergovernmental service agreement.<sup>142</sup> “If not, officials can be sued or even face removal from the Governor or the Attorney General.”<sup>143</sup>

However, in some Florida counties, there are obstacles to compliance.<sup>144</sup> “In Citrus County, for example, the county’s detention facility is operated by Core Civic, a private for-profit company” which may result in “confusion between the Citrus County Sheriff’s Office and Core Civic about who should enter into the agreement.”<sup>145</sup> Alachua County, one of the only publicized sanctuary jurisdictions in Florida, has also signed an

135. ICE, *17 FL Sheriffs Announce New Enforcement Partnership*, U.S. IMMIGR. & CUSTOMS ENF’T NEWSROOM, (Jan. 17, 2018), <http://www.ice.gov/news/releases/ice-17-fl-sheriffs-announce-new-enforcement-partnership>.

136. Fla. S. Comm. on Rules, *supra* note 13, at 7.

137. *Id.*

138. *See ICE, 17 FL Sheriffs Announce New Enforcement Partnership*, *supra* note 135.

139. *See Fighting Basic Ordering Agreements: A Toolkit for Florida Advocates*, *supra* note 18.

140. Daniel Rivero, *Many Florida Counties Don’t Have ICE Agreements Required by New Law*, WLRN (July 3, 2019), <http://www.wlrn.org/post/many-florida-counties-dont-have-ice-agreements-required-new-law>.

141. *Id.*

142. *Id.*; *see also* Fla. CS for CS for CS for SB 168, at 1 (2019); E-mail from Matt Dunagan to Sheriffs, *supra* note 134.

143. Rivero, *supra* note 140.

144. *Id.*

145. *Id.*

agreement with ICE to start honoring the requests.<sup>146</sup> “The agreement states ICE will pay a fixed rate of [fifty dollars] for up to [forty-eight] hours of detention.”<sup>147</sup> It is unclear if the agreement includes fifty dollars a day or fifty dollars for the entire forty-eight hours.<sup>148</sup> It costs the Alachua Sheriff’s Office about \$185 a day to keep an inmate.<sup>149</sup>

### C. 287(g) Program

The 287(g) program is named after section 287 of the Immigration and Nationality Act and allows sheriff offices to “train and authorize personnel to identify and process undocumented immigrants.”<sup>150</sup> The program requires local law enforcement agents to complete two months of training from federal officials in South Carolina, according to the local sheriff.<sup>151</sup> Under the program, “local law enforcement agents are deputized to work as federal immigration officials, but the program is restricted to county jails.”<sup>152</sup> Currently, “there are five counties in Florida that participate in the program [and] the local law enforcement agency is in charge of covering the costs of out-of-state training, such as travel expenses.”<sup>153</sup> Members of civil rights organizations as well as advocates for immigration communities have regarded the 287(g) program as a tool for racial profiling and have indicated that the program even deters immigrants from reporting crimes and abuse.<sup>154</sup>

## VI. POTENTIAL IMPACT OF THE BILL IN FLORIDA

One outcome of the Bill will likely be hostility.<sup>155</sup> It may go so far as causing immigrants in Florida to leave the State entirely.<sup>156</sup> Further, it “could also result in significant economic losses for the [S]tate and would

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146. *Id.*; see also Griffith & Vaughan, *supra* note 116.

147. Cindy Swirko, *Sheriff Will Hold Inmates 48 Hours for ICE*, GAINESVILLE SUN, (June 18, 2019, 6:34 PM), <http://www.gainesville.com/news/20190618/sheriff-will-hold-inmates-48-hours-for-ice>.

148. *Id.*

149. *Id.*

150. Ceballos, *supra* note 20; see also Immigration and Nationality Act, Pub. L. No. 82-414, § 287, 66 Stat. 163, 233 (1952) (codified as amended at 8 U.S.C. § 1101).

151. Kam, *supra* note 21.

152. *Id.*

153. Ceballos, *supra* note 20.

154. See Kam, *supra* note 21.

155. *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida’s Economy*, *supra* note 22; see also Fla. CS for CS for CS for SB 168, at 1 (2019).

156. *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida’s Economy*, *supra* note 22; see also Fla. CS for CS for CS for SB 168, at 1.

also threaten key parts of Florida's workforce in industries like agriculture and construction."<sup>157</sup> Crime is statistically significantly lower in sanctuary jurisdictions compared to non-sanctuary jurisdictions, and economies are stronger in sanctuary jurisdictions.<sup>158</sup> There are "higher median household income, less poverty, and less reliance on public assistance, to higher labor force participation, higher employment-to-population ratios, and lower unemployment" in sanctuary jurisdictions.<sup>159</sup> The threat of deportation may also scare potential human trafficking victims into silence.<sup>160</sup> Lastly, there is a basis to believe that the Bill's goal is "to prohibit local law enforcement agencies from placing any limit on their compliance with detainers and would therefore amplify the consequences of ICE's mistakes," and may create negative health outcomes for immigrant families.<sup>161</sup>

#### A. *Crime*

"Crime is statistically significantly lower in sanctuary [jurisdictions] compared to non-sanctuary [jurisdictions]."<sup>162</sup> To put it in context, crime is described as the totality of violent crimes and property crimes per ten thousand people.<sup>163</sup> Murders, rapes, robberies, and assaults are examples of violent crimes, while burglary, larceny, motor vehicle theft, and arson are categorized as property crimes.<sup>164</sup> What we can see is that crime is actually much lower in sanctuary jurisdictions that constitute "large central metro counties, small metro counties, micropolitan counties, and noncore, rural counties."<sup>165</sup> The large central metro areas project just how pronounced the difference is between sanctuary and non-sanctuary jurisdictions.<sup>166</sup> The data shows that large central metro sanctuary jurisdictions have 65.4 fewer crimes per ten thousand people as compared to large central metro non-sanctuary jurisdictions, which may be surprising to some.<sup>167</sup>

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157. *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida's Economy*, *supra* note 22.

158. WONG, *supra* note 44, at 1.

159. *Id.*

160. DiMare, *supra* note 24.

161. ACLU FLA., *CITIZENS ON HOLD: A LOOK AT ICE'S FLAWED DETAINER SYSTEM IN MIAMI-DADE COUNTY 2* (2019); Raymond-Flesch, *supra* note 24, at 505; *see also* FLA. STAT. § 908.107 (2019); Fla. CS for CS for CS for SB 168, at 1.

162. WONG, *supra* note 44, at 1.

163. *Id.* at 6.

164. *Id.*

165. *Id.*

166. *Id.*

167. WONG, *supra* note 44, at 6.

The Major Cities Chiefs Association, which represents the [sixty-eight] largest [law enforcement agencies] in the United States, similarly concluded that commingling the work of local police with federal immigration enforcement efforts “would result in increased crime against immigrants and in the broader community, create a class of silent victims and eliminate the potential for assistance from immigrants in solving crimes or preventing future terroristic acts.”<sup>168</sup>

## B. *Economy*

Median household income is pointedly higher in sanctuary jurisdictions compared to non-sanctuary jurisdictions.<sup>169</sup> The “median household income is, on average, \$4,352.70 higher in sanctuary counties when statistically matching and then controlling for population characteristics.”<sup>170</sup> Not surprisingly, with higher median household income, poverty is significantly lower in sanctuary jurisdictions compared to non-sanctuary jurisdictions.<sup>171</sup> “[T]he percentage of people who live at or below the federal poverty line is, on average, 2.3[%] lower in sanctuary counties.”<sup>172</sup> Further, unemployment is significantly lower in sanctuary jurisdictions compared to non-sanctuary jurisdictions.<sup>173</sup> Demonstratively, sanctuary jurisdictions boast a 1.1% average unemployment rate lower than non-sanctuary jurisdictions.<sup>174</sup>

Florida could be following Arizona’s example.<sup>175</sup> In 2010, the Arizona Legislature enacted SB 1070.<sup>176</sup> This piece of legislation gave local law enforcement the authority to expend more resources on undocumented immigrants, giving them the potential to act as pseudo immigration officers.<sup>177</sup> Studies conducted after the passing of SB 1070 showed that the

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168. *Id.* at 3 (quoting CRAIG E. FERRELL, JR. ET AL., M.C.C. IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICY AGENCIES 6 (2006)).

169. *Id.* at 7.

170. *Id.*

171. *Id.*

172. WONG, *supra* note 44, at 8.

173. *Id.* at 10.

174. *Id.*

175. *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida’s Economy*, *supra* note 22; *see also* S.B 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

176. Ariz. S.B. 1070.

177. ARIZ. REV. STAT. § 11-1051 (2019); *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida’s Economy*, *supra* note 22; *see also* Ariz. S. B. 1070.

law may have caused a large decline in tax revenue.<sup>178</sup> This is largely attributed to some key industries in the state struggling to make ends meet after an estimated ten percent of Arizona's undocumented population left the state after the law was passed.<sup>179</sup> Unsurprisingly, vital industries such as construction and hospitality were largely affected because many of the immigrants that left the state worked in those industries.<sup>180</sup>

Like in Arizona, undocumented immigrants in Florida are very much employed.<sup>181</sup> Data shows that 85.8% of undocumented immigrants in Florida are of working age which ranges from ages sixteen to sixty-four.<sup>182</sup> "They pay \$1.7 billion each year in taxes, including more than \$543.2 million in state and local taxes, and hold \$13 billion a year in spending power to inject into the local economy."<sup>183</sup> Florida's economy may end up feeling the brunt of the effects should large portions of the immigrant population leave the State.<sup>184</sup>

New American Economy created a model to project the potential economic impact if ten percent, or even five percent of undocumented immigrants left Florida because of the Bill.<sup>185</sup> The results were shocking—"if [ten] percent of undocumented immigrants leave Florida, the [S]tate [may] lose \$76.7 million in federal taxes, and [up to] \$44.7 million in state and local taxes."<sup>186</sup>

As a whole, Florida may lose \$3.5 billion in Gross Domestic Product ("GDP").<sup>187</sup> \$38.4 million in federal taxes and \$22.4 million in state and local taxes may be lost if even five percent of undocumented immigrants leave the State as a result of feeling threatened.<sup>188</sup> Overall, Florida may lose \$1.8 billion in GDP.<sup>189</sup> In either scenario, the losses are staggering.<sup>190</sup>

The role undocumented immigrants play in the State labor market—including their crucial role in labor-intensive jobs—is vital and

178. ARIZ. REV. STAT. § 11-1051; *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida's Economy*, *supra* note 22; *see also* Ariz. S. B. 1070.

179. *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida's Economy*, *supra* note 22.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida's Economy*, *supra* note 22.

185. *Id.*; *see also* S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

186. *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida's Economy*, *supra* note 22.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*



irreplaceable.<sup>191</sup> Workers born in America that have different skill sets and professional interests, would not be able to fill the void immigrants would leave if they choose to leave the State.<sup>192</sup> The results of this void would force businesses to shut down totally because they will not be able to find the appropriate workforce to fill vacant positions.<sup>193</sup> Not surprisingly, this will ultimately lead to job losses for the United States citizen workers employed by those businesses and others.<sup>194</sup> Continuing the domino effect, economic activity will likely eventually stagnate across the board, impacting United States citizen workers too.<sup>195</sup> “Florida accounts for [fifty-six] percent of United States citrus production and ranks second in value of vegetable production.”<sup>196</sup> Laws like the Bill will drive away the agricultural labor force and leave Florida farmers without options to hire and harvest.<sup>197</sup>

### C. *Trafficking*

The Bill could “discourage immigrants from reporting crimes [for] fear of deportation.”<sup>198</sup> “Many of trafficking victims are lured into the system with the promise of legitimate jobs, while others are kidnapped or entrapped in a myriad of ways.”<sup>199</sup> It plays right into traffickers’ hands who use the fear of deportation to manipulate their immigrant alien victims.<sup>200</sup> “They ensure their victims are afraid to talk to the police, or even go to the hospital.”<sup>201</sup> Traffickers condition their victims to fear authority, specifically law enforcement, planting it in victims’ minds that if they were to report abuse, law enforcement would deport them and their families.<sup>202</sup> “Unfortunately, they are also at constant risk for engagement with law enforcement.”<sup>203</sup> It is important to note that reporting a crime is a problem in

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191. *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida’s Economy*, *supra* note 22.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. DiMare, *supra* note 24.

197. *Id.*; see also FLA. STAT. § 908.101 (2019); Fla. CS for CS for CS for SB 168, at 1 (2019).

198. DiMare, *supra* note 24; see also FLA. STAT. § 908.101; Fla. CS for CS for CS for SB 168, at 1.

199. Stephen Wood, *The Intersection of Human Trafficking and Immigration*, BILL HEALTH (June 27, 2018), <http://blog.petrieflom.law.harvard.edu/2018/06/27/the-intersection-of-human-trafficking-and-immigration/>.

200. DiMare, *supra* note 24.

201. *Id.*

202. *Id.*

203. Wood, *supra* note 199.

every state, “and is not confined to any one segment of the population.”<sup>204</sup> Most crimes are never reported, notwithstanding the victim’s immigration status or ethnicity.<sup>205</sup>

Whether the victims are subjected to prostitution or illegal drugs, these are people whose lifestyles are targeted by law enforcement agencies.<sup>206</sup> While most law enforcement goals are to protect trafficked people, these vulnerable individuals are still at a high risk for deportation if they are undocumented.<sup>207</sup> Even though “police and prosecutors try to afford protection and build their case, federal officers may take charge and initiate the process of deportation.”<sup>208</sup> The Bill, “no matter how nuanced the final product may be, gives traffickers another tool to terrorize and enslave their victims.”<sup>209</sup>

#### D. *Health*

The effects of racism and trauma have well-documented detrimental impacts on the long-term health of children, so it should be obvious that the current administration’s recent public policies and climate of racial tension is damaging the health of immigrant populations.<sup>210</sup> A study was conducted immediately following President Trump’s issuance of Executive Order rescinding Deferred Action for Childhood Arrivals from parents of Latino youth in one community.<sup>211</sup> This was in the midst of speculation about the fate of immigrant groups deportation statuses, and during pending court cases related to policies such as the Muslim ban, penalties for sanctuary cities, and the legality of the proposed border wall were being widely publicized.<sup>212</sup> It was not surprising that parents with more questionable immigration statuses “reported greater worry about family separation, negative impacts on their children, and concern about their children’s educational attainment.”<sup>213</sup>

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204. Jessica M. Vaughan, *The Effect of Sanctuary City Policies on the Ability to Combat the Opioid Epidemic*, CTR. FOR IMMIGR. STUD. (Feb. 15, 2018), <http://www.cis.org/Testimony/Effect-Sanctuary-City-Policies-Ability-Combat-Opioid-Epidemic>.

205. See Martínez et al., *supra* note 58, at 6.

206. Wood, *supra* note 199.

207. *Id.*

208. *Id.*

209. DiMare, *supra* note 24; see also Fla. CS for CS for CS for SB 168, at 1 (2019).

210. Raymond-Flesch, *supra* note 24, at 505.

211. *Id.*; see also Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017).

212. Raymond-Flesch, *supra* note 24, at 505.

213. *Id.*

Despite this, what appeared more chilling was “the isolation from support systems, including health care, that some parents are employing as a strategy for promoting their children’s safety in the current climate of fear.”<sup>214</sup> Further, policy changes “may further erode access to health care by limiting access to employer or state-based insurance for youth and families.”<sup>215</sup> This leaves immigrant parents at risk to incorrectly make choices regarding healthcare, especially when they have no mechanism to know for certain which healthcare providers are immigrant-friendly.<sup>216</sup> Lastly, a child’s immigration status has the “potential to compound a parent’s psychological stress and isolating behaviors.”<sup>217</sup> As an example, some parents may try to isolate children with tenuous or no immigration status or may experience stress because they have children with varying immigration statuses.<sup>218</sup>

#### E. *ICE Mistakes*

The City of Miami recently procured its detainer information “as part of a lawsuit brought by a [United States] citizen, named Garland Creedle, who Miami held on an ICE detainer in 2017.”<sup>219</sup> The data shows a very high number of detainers issued in a short period of time for people that were identified as United States citizens.<sup>220</sup> “Between February 2017 and February 2019—less than two years—ICE sent 420 detainers” for individuals identified as United States citizens.<sup>221</sup> That comes out to “nearly [four] detainers every single week, or [seventeen] per month.”<sup>222</sup> It is difficult to ascertain why ICE is making these errors when issuing detainers, but some potential reasons include: (1) ICE has “removed any limits on agents’ discretion when they issue detainers, and instead instructed agents to target as many people as possible”; (2) ICE’s databases are known to be unreliable; (3) ICE agents are sometimes “issuing administrative arrest warrants—which typically accompany detainers—without the supervisory review that is required by law.”<sup>223</sup> The aforementioned cycle is concerning for all those involved or otherwise because it sheds light on the fact that some states and localities are essentially being asked to arrest people for

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214. *Id.*

215. *Id.*

216. *Id.*

217. Raymond-Flesch, *supra* note 24, at 506.

218. *Id.*

219. ACLU FLA., *supra* note 161, at 4.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 6.

ICE.<sup>224</sup> This is especially true because the Bill prohibits “local law enforcement agencies from placing any limit on their compliance with detainers.”<sup>225</sup>

## VII. PARTING THOUGHTS AND OTHER POTENTIAL CONSEQUENCES

The Bill bans *sanctuary jurisdictions*, which refers to a place that has declared itself one that will typically protect undocumented migrants and immigrants from deportation and also limit their cooperation with the federal government’s effort to enforce immigration law.<sup>226</sup> The Bill will essentially destroy “the trust between local law enforcement and immigrant communities.”<sup>227</sup> The Bill requires “every Florida county and municipality to expend maximum local resources to enforce federal immigration law and participate in civic liberties violations.”<sup>228</sup>

Previously, states could prevent law enforcement agencies from communicating certain information about a person’s immigration status with federal authorities.<sup>229</sup> Now, there are broader forms of protections that states can and should participate in—refusing to honor detainer requests providing free legal assistance to immigrants, at the very least.<sup>230</sup> However, there are no cities or counties in Florida that have officially declared themselves a sanctuary jurisdiction, although there are reports from DDORs, the Center for Immigration Studies, and others that there may be more sanctuary jurisdictions in Florida.<sup>231</sup>

As previously stated, one strategy ICE is using in conjunction with the legislature’s ban on sanctuary jurisdiction to find and deport immigrants, is by implementing a BOA which allows for a jail to detain an immigrant for

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224. ACLU FLA., *supra* note 161, at 8; *see also* Fla. CS for CS for CS for SB 168, at 1 (2019).

225. ACLU FLA., *supra* note 161, at 2.; *see also* Fla. CS for CS for CS for SB 168, at 1.

226. FLA. STAT. § 908.103 (2019); Fla. CS for CS for CS for SB 168, at 1; DiMare, *supra* note 24; Deslandes, *supra* note 4.

227. DiMare, *supra* note 24; *see also* Fla. CS for CS for CS for SB 168, at 1; FLA. STAT. § 908.101.

228. Gruters, *supra* note 93; *see also* FLA. STAT. § 908.101; Fla. CS for CS for CS for SB 168, at 1.

229. Villazor & Gulasekaram, *supra* note 30, at 1242.

230. *Id.*

231. *See* U.S. IMMIGRATION & CUSTOMS ENF’T, *supra* note 118, at 4; Griffith & Vaughan, *supra* note 116.

ICE for up to forty-eight hours and be reimbursed fifty dollars for the detention.<sup>232</sup>

Advocates of the Bill say that the Bill will only impact people who have been charged with a crime and “ensure compliance with federal laws.”<sup>233</sup> Opponents of the Bill, on the other hand, believe it will “have unintended consequences [like] splitting immigrant families and hurting minority communities.”<sup>234</sup> Sanctuary policies could bolster the relationship between the community and local law enforcement because immigrant community members will not feel at risk for deportation.<sup>235</sup> Further, “when local law enforcement focuses on keeping communities safe, rather than becoming entangled in federal immigration enforcement efforts, communities are safer and community members stay more engaged in the local economy.”<sup>236</sup> This, then, derives benefits and incentives “to individual households, communities, counties, and the economy as a whole.”<sup>237</sup>

By keeping out of federal immigration enforcement, sanctuary [jurisdictions] are keeping families together—and when households remain intact and individuals can continue contributing, this strengthens local economies. These effects appear particularly pronounced in smaller counties, as removing one person from the economy of a small population has a larger effect than removing one person from the economy of a large population.<sup>238</sup>

The Bill will likely impact Florida businesses, economy, agriculture, human trafficking trends, crime rates, health of immigrant youth and their parents, and increase ICE mistakes.<sup>239</sup> Human traffickers take advantage of their victims’ isolation and inability to reach out to law enforcement for help.<sup>240</sup> Some believers in the Bill believe that limited cooperation or

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232. *Fighting Basic Ordering Agreements: A Toolkit for Florida Advocates*, *supra* note 18; *see also FAQs on ICE’s New Enforcement Partnerships in Florida*, *supra* note 19.

233. Koh, *supra* note 15; *see also* FLA. STAT. § 908.101; Fla. CS for CS for CS for SB 168, at 1.

234. Koh, *supra* note 15.

235. Martínez et al., *supra* note 58, at 6; Morse et al., *supra* note 1.

236. WONG, *supra* note 44, at 2.

237. *Id.*

238. *Id.* at 11.

239. ACLU FLA., *supra* note 161, at 2–6; Raymond-Flesch, *supra* note 24, at 505; DiMare, *supra* note 24; *How FL Senate Bill 168 & House Bill 527 Would Hurt Florida’s Economy*, *supra* note 22; *see also* FLA. STAT. § 908.101 (2019); Fla. CS for CS for CS for SB 168, at 1 (2019).

240. DiMare, *supra* note 24.

sanctuary policies may bring about negative public safety outcomes in a couple of ways by enabling criminal immigrants to commit crimes because they know sanctuary policies will protect them.<sup>241</sup> However, this is unlikely because these immigrants probably do not know the scope or legalities of sanctuary policies.<sup>242</sup> In conclusion, the Bill is likely to result in legal battles and litigation and have an overall negative impact on communities in Florida.<sup>243</sup>

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241. See FLA. STAT. § 908.101; Fla. CS for CS for CS for SB 168, at 1; Martínez et al., *supra* note 58, at 5.

242. See FLA. STAT. § 908.101; Fla. CS for CS for CS for SB 168, at 1; Martínez et al., *supra* note 58, at 5.

243. See FLA. STAT. § 908.101; Fla. CS for CS for CS for SB 168, at 6; ACLU FLA., *supra* note 161, at 3; DiMare, *supra* note 24.

# WHAT ABOUT FLORIDA’S CHILDREN? ANALYZING THE IMPLICATIONS OF THE FAMILY FIRST PREVENTION SERVICES ACT OF 2018

ASHELEY PANKRATZ\*

I.	INTRODUCTION .....	64
II.	OVERVIEW OF FEDERAL CHILD WELFARE FUNDING.....	66
	A. <i>Aid to Families with Dependent Children</i> .....	67
	B. <i>Title IV-E of the Social Security Act</i> .....	68
	C. <i>The Adoption and Safe Families Act</i> .....	69
	D. <i>Federal Funding for Prevention Services</i> .....	70
	1. Child Abuse Prevention and Treatment Act .....	70
	2. Promoting Safe and Stable Families .....	71
	3. Social Services Block Grant.....	72
III.	OVERVIEW OF THE FFPSA .....	72
	A. <i>Purpose of the FFPSA</i> .....	73
	B. <i>Eligibility</i> .....	73
	1. Candidates for Foster Care.....	73
	2. Child Welfare Plan .....	74
	C. <i>Support for Prevention Services</i> .....	75
	D. <i>Approved Placements to Receive Funding</i> .....	77
	1. Congregate Care and Group Homes.....	77
	2. Child Care Institutions .....	77
	3. QRTP.....	78
	4. Family Foster Homes .....	79
	5. Kinship Caregivers.....	79
	6. Adoption Assistance.....	79
IV.	THE FFPSA AND FLORIDA’S CHILD WELFARE SYSTEM.....	80
	A. <i>Community-Based Care Model</i> .....	80

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B.	<i>Guardianship Assistance Program</i> .....	82
C.	<i>Relative Caregiver Program</i> .....	83
V.	IMPLICATIONS OF FFPSA ON FLORIDA’S CHILD WELFARE SYSTEM	84
A.	<i>Time</i> .....	84
B.	<i>Money</i> .....	85
C.	<i>The Implications of the FFPSA on Florida’s Vulnerable Children</i> .....	86
1.	Lack of Support for Residential Group Homes.....	86
2.	Reliance on Relative Caregivers .....	87
VI.	CONCLUSION .....	88

“With open hearts, families and professionals across America work each day to give foster youth the resources, warmth, and care they need.”<sup>1</sup>

## I. INTRODUCTION

Children in foster care “are in the temporary custody of the state while their birth parents are given the opportunity to complete services that will allow the children to be returned to them if it is in the children’s best interest.”<sup>2</sup> The majority of the four hundred thousand children in care today were casualties of threatened or actual abuse, neglect, or abandonment by their guardians or parents.<sup>3</sup> More than half of the children who enter foster care are ultimately returned to their families.<sup>4</sup>

In 2017, over seven million children were the subject of Child Protective Service (“CPS”) investigations.<sup>5</sup> Following the investigations, approximately twenty percent of victims of maltreatment were placed in foster care.<sup>6</sup> Although the number of foster children in out-of-home care declined for over ten years—in 2012, the situation began to deteriorate.<sup>7</sup>

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1. Proclamation No. 9432, 81 Fed. Reg. 26,663 (Apr. 28, 2016).

2. *About Adoption from Foster Care*, ADOPTUSKIDS: ADOPTION & FOSTER CARE, <http://www.adoptuskids.org/adoption-and-foster-care/overview/adoption-from-foster-care> (last visited Dec. 21, 2019).

3. *Testimony from Jerry Milner on the Opioid Crisis: Implementation of the Family First Prevention Services Act (FFPSA) Before Comm. on Ways & Means, Subcomm. on Human Res.*, 115th Cong. (2018) (statement of Jerry Milner, Assoc. Comm’r, The Children’s Bureau, Admin. for Children & Families, U.S. Dep’t of Health & Human Servs.); see also Fla. H.R. Comm. on Health & Human Servs., HB 7099 (2019) Staff Analysis 2 (Apr. 2, 2019); U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2017 xii (2017).

4. *About Adoption from Foster Care*, *supra* note 2.

5. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 3, at xii.

6. *Id.* at 81.

7. Angie Schwartz & Sean Hughes, *On Child Welfare, an Insufficient Federal Response to the Opioid Epidemic*, CHRON. SOC. CHANGE (Apr. 24, 2018), <http://www.chronicleofsocialchange.org/opinion/child-welfare-insufficient-federal-opioid->



There was an almost three percent rise of victims, and a ten percent increase of CPS investigations from 2013 to 2017.<sup>8</sup> Nearly seventy-five percent of the children were neglected, and most of the other children were physically or sexually abused.<sup>9</sup> More than a quarter of the victims of maltreatment in 2017 were infants and toddlers.<sup>10</sup> Tragically, some children die at the hands of their parents or guardians before CPS can help them.<sup>11</sup> Which is what happened in 2017 to over sixteen hundred children who died from abuse and neglect.<sup>12</sup>

The ongoing opioid epidemic may be responsible for the escalation of CPS investigations and victimized children.<sup>13</sup> Especially because thirty-two percent of foster placements are caused by parent substance use.<sup>14</sup> In response to mounting foster care caseloads overwhelming social workers and service providers, President Donald Trump signed the Family First Prevention Services Act (“FFPSA”) on February 9, 2018.<sup>15</sup>

Anyone outside of child welfare services hardly recognized the FFPSA, which was “[t]ucked inside the \$1.3 trillion spending bill,”<sup>16</sup> the

epidemic/30551; see also *Implications of Passage of Families First Prevention Services Act*, ALLIANCE FOR CHILD. RTS. (Apr. 24, 2018), <http://www.kids-alliance.org/wp-content/uploads/2016/09/FFPSA-webinar-final.pdf>.

8. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 3, at ii. “[A] victim is defined as a child for whom the state determined at least once maltreatment is substantiated or indicated. This includes a child who died of child abuse and neglect.” *Id.* at 20.

9. *Id.* at 22.

Neglect allegations are usually the easiest to substantiate, but other forms of abuse are often also present in the same families. Moreover, neglect involving a dangerous lack of supervision or failure to provide the basic necessities of life often indicates the presence of drug abuse and/or mental health issues in a home. Chronic neglect has devastating impacts on brain development, and as a predictor of child fatalities neglect is just as dangerous for children as abuse.

*Implications of Passage of Families First Prevention Services Act*, *supra* note 7.

10. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 3, at 19.

11. *Id.* at ii.

12. *Id.*

13. Schwartz & Hughes, *supra* note 7; Kalena Thomave, *Family First Act Brings Major Changes One Year After Passage*, SPOTLIGHT ON POVERTY & OPPORTUNITY (Feb. 27, 2019), <http://www.spotlightonpoverty.org/spotlight-exclusives/family-first-act-brings-major-changes-one-year-after-passage/>.

14. Lorna Collier, *Young Victims of the Opioid Crisis*, AM. PSYCHOL. ASS’N, Jan. 2018, at 18.

15. Family First Prevention Services Act of 2017, H.R. 253, 115th Cong. § 1 (2017) (enacted); Schwartz & Hughes, *supra* note 7; *Family First Prevention Services Act*, NAT’L CONF. ST. LEGISLATURES (Aug. 16, 2019), <http://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx>.

16. Mattie Quinn, *Fostering Change: Inside the Federal Government’s Big, Bold — and Potentially Messy — Plan for Overhauling How States Manage Child Welfare*, GOVERNING, Mar. 2019, at 32, 34.

Bipartisan Budget Act of 2018.<sup>17</sup> The new law significantly restructures federal child welfare financing from the established format of 1980 Title IV-E of the Social Security Act (“Title IV-E”).<sup>18</sup> After an overview of how child welfare services are funded, this Article will assess the effects the FFPSA may have on Florida’s child welfare system.<sup>19</sup>

## II. OVERVIEW OF FEDERAL CHILD WELFARE FUNDING

The child welfare system identifies families whose children are in danger of suffering or have suffered abuse, abandonment, or neglect, and works with those families to address the problems that are endangering children, if possible. If the problems cannot be addressed, the child welfare system finds safe out-of-home placements for these children.<sup>20</sup>

In 2016, about twenty-seven percent of the estimated thirty billion dollars spent by states on child welfare was funded by the federal government.<sup>21</sup> Most of federal funding is authorized by programs under the Temporary Assistance for Needy Families (“TANF”), Title IV-E, the Child Abuse Prevention and Treatment Act (“CAPTA”), Promoting Safe and Stable Families (“PPSF”), and the Social Services Block Grant (“SSBG”).<sup>22</sup>

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17. *Family First Prevention Services Act*, CHILD. DEF. FUND: POLICIES, <http://www.childrensdefense.org/policy/policy-priorities/child-welfare/family-first/> (last visited Dec. 21, 2019); *see also* H.R. 253 § 1.

18. John Kelly, *CliffsNotes on Family First Act, Part Two: Limiting Support for Congregate Foster Care*, CHRON. SOC. CHANGE (Feb. 14, 2018), <http://www.chronicleofsocialchange.org/finance-reform/cliffsnotes-family-first-act-part-one-services-prevent-foster-care/29896>; *Title IV-E: Federal Payments for Foster Care and Adoption Assistance*, CHILD. & FAM. SERVICES REVIEWS, <http://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/2994> (last visited Dec. 21, 2019).

19. *See* THE FLA. LEGISLATURE’S OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, COSTS ASSOCIATED WITH DELAYED IMPLEMENTATION OF THE FAMILY FIRST PREVENTION SERVICES ACT OF 2018 1 (2018); EMILIE STOLTZFUS, CONG. RESEARCH SERV., IF10590, CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING 1 (2019); discussion *infra* Parts II–III.

20. Fla. H.R. Comm. on Health & Human Servs., *supra* note 3, at 2.

21. STOLTZFUS, *supra* note 19, at 1.

22. *See id.*; Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101–5116 (2018); CHILDREN’S BUREAU, PROMOTING SAFE AND STABLE FAMILIES 1 (2019); FLA. DEP’T OF CHILDREN & FAMILIES, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): AN OVERVIEW OF PROGRAM REQUIREMENTS 2 (2016); *Title IV-E: Federal Payments for Foster Care and Adoption Assistance*, *supra* note 18; KAREN LYNCH, CONG. RESEARCH SERV., 94-953, SOCIAL SERVICES BLOCK GRANT: BACKGROUND AND FUNDING 3 (2016).

A. *Aid to Families with Dependent Children*

Before the FFPSA, funding for foster children was part of the Aid to Dependent Children Program (“ADC”).<sup>23</sup> Under the Flemming Rule, states were required to “pay families ADC while making efforts to improve home conditions, or place children in foster care.”<sup>24</sup> After states protested the Flemming Rule, the Aid to Families with Dependent Children (“AFDC”) of 1935 established federal funding for children from unsafe households.<sup>25</sup> Essentially, grants were given to states to “provide cash welfare payments for needy children who had been deprived of parental support or care because their [parent] was absent from the home, incapacitated, deceased, or unemployed.”<sup>26</sup> The AFDC allowed states to determine who needed support based on income limitations, but required them “to provide aid to all persons who were in classes eligible under federal law and whose income and resources were within state-set limits.”<sup>27</sup>

AFDC federal welfare funding was ultimately abolished in 1996 by the cash welfare block grant, TANF.<sup>28</sup> A block grant is a fixed amount of money that is given to the states to provide necessary services.<sup>29</sup> Under this structure, TANF eliminated AFDC as an *individual entitlement*.<sup>30</sup> Instead,

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23. U.S. DEP’T OF HEALTH & HUMAN SERVS., FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD 3 (2005).

At first [ADC] functioned mainly to provide federal grants to help the states maintain their mothers’ aid laws that had been passed in [forty] states between 1910 and 1920. With the federal government providing [a third] of costs, the program offered aid to poor parents, imagined at that time to be always female, caring for children without a husband.

Linda Gordon & Felice Batlan, *Aid to Dependent Children: The Legal History*, VA. COMMONWEALTH U. (Feb. 26, 2018), <http://socialwelfare.library.vcu.edu/public-welfare/aid-to-dependent-children-the-legal-history/>.

24. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 23, at 3.

25. *Id.*; see also *Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF) — Overview*, U.S. DEP’T HEALTH & HUM. SERVICES (Nov. 30, 2009), <http://www.aspe.hhs.gov/aid-families-dependent-children-afdc-and-temporary-assistance-needy-families-tanf-overview-0>.

26. *Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF) — Overview*, *supra* note 25.

27. *Id.*

28. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 23, at 3; see also *Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF) — Overview*, *supra* note 25.

29. *The Problems with Block-Granting Entitlement Programs*, CTR. ON BUDGET & POL’Y PRIORITIES, <http://www.cbpp.org/the-problems-with-block-granting-entitlement-programs> (last visited Dec. 21, 2019).

30. *Timeline of Major Child Welfare Legislation*, CHILD WELFARE LEAGUE AM., <http://www.cwla.org/wp->

grants from TANF are considered *entitlements* of the state and “[a]ssistance is often, but not exclusively, in the form of a cash benefit.”<sup>31</sup> The statutory goals of TANF are to help “needy families so that children can be cared for at home; to end the dependence of needy parents on government benefits by promoting job preparation, work and marriage; to prevent and reduce the incidence of out-of-wedlock pregnancies; and to encourage the formation and maintenance of two-parent families.”<sup>32</sup>

#### B. *Title IV-E of the Social Security Act*

In 1980, Title IV-E allowed states to be reimbursed for foster care costs.<sup>33</sup> There were some requirements—safeguards had to be established and children needed to be “eligible for the pre-welfare reform AFDC program.”<sup>34</sup> But, one of the most appealing aspects of Title IV-E was there were no limits on reimbursements for approved services.<sup>35</sup> All approved services included efforts to provide a stable and safe environment for each child, at least until a permanent placement option was available.<sup>36</sup>

Title IV-E authorized federal and state governments to share costs for services to provide mistreated and vulnerable children safe *out-of-home care*.<sup>37</sup> Some shared costs included monthly maintenance payments for daily care, the cost of training staff and foster care parents, administrative expenses, recruitment of foster and adoptive parents, and guardianship and adoption assistance.<sup>38</sup> In 2018, over six-hundred thousand children were supported by Title IV-E funding.<sup>39</sup>

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content/uploads/2014/05/TimelineOfMajorChildWelfareLegislation.pdf (last visited Dec. 21, 2019).

31. GENE FALK, CONG. RESEARCH SERV., RL32748, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A PRIMER ON TANF FINANCING AND FEDERAL REQUIREMENTS 2 (2017).

32. *Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF) — Overview*, *supra* note 25. TANF still required states to use former AFDC requirements to determine eligibility of Title IV-E Foster Care and Adoption Assistance funding. U.S. DEP’T HEALTH & HUMAN SERVS., *supra* note 23, at 3.

33. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 23, at 3.

34. *Id.*

35. *Id.* at 1.

36. *Title IV-E: Federal Payments for Foster Care and Adoption Assistance*, *supra* note 18.

37. *Id.*

38. *Id.*; see also *Family First Prevention Services Act*, *supra* note 17.

39. STOLTZFUS, *supra* note 19, at 2.

C. *The Adoption and Safe Families Act*

Title IV-E remained mostly untouched until the Adoption and Safe Families Act (“ASFA”).<sup>40</sup> The ASFA was established in 1997 and initiated the first significant change to Title IV-E and child welfare funding since 1980.<sup>41</sup> The new law “responded to concerns that children were too often left in unsafe situations while excessive and inappropriate rehabilitative efforts were made with the family.”<sup>42</sup> To remedy these issues, the ASFA declared that a child’s safety is the most important concern in every decision made for the child.<sup>43</sup>

The new law established timelines to help place children in permanent homes and continues to reward states for adoptions of foster children.<sup>44</sup> The ASFA requires states to terminate parental rights (“TPR”) for children in care for fifteen months and states may do so sooner for children in severe harm.<sup>45</sup> The states must prefer qualified relative caregivers over nonrelative caregivers and need to conduct criminal background checks on foster and adoptive parents.<sup>46</sup> The law also authorizes *concurrent planning*, which permits states to search for other placement options for the child while simultaneously attempting to reunify them with their parents.<sup>47</sup>

Overall, the ASFA has been a successful program.<sup>48</sup> The incentives helped thousands of foster children.<sup>49</sup> In 1998, there were thirty-eight thousand adoptions of foster care children.<sup>50</sup> In 2017, sixty thousand children were adopted out of care.<sup>51</sup> The time that children remained in care

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40. Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, § 101, 111 Stat. 2115, 2116 (1997) (codified as amended at 42 U.S.C. § 1305); U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 23, at 3.

41. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 23, at 3.

42. *Id.* “It also addressed what was at least a perceived reluctance on the part of child welfare agencies and judges to seek terminations of parental rights and adoption in a timely fashion when reunification efforts were unsuccessful.” *Id.*

43. *Adoption and Safe Families Act (ASFA)*, CHILD. & FAM. SERVICES REVIEWS, <http://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/2999> (last visited Dec. 21, 2019).

44. *Timeline of Major Child Welfare Legislation*, *supra* note 30.

45. *Adoption and Safe Families Act (ASFA)*, *supra* note 43.

46. *Id.*

47. *Id.*

48. See Kim Phagan-Hansel, *One Million Adoptions Later: Adoption and Safe Families Act at 20*, CHRON. SOC. CHANGE (Nov. 28, 2018), <http://chronicleofsocialchange.org/adoption/one-million-adoptions-later-adoption-safe-families-act-at-20/32582>.

49. *Id.*

50. *Id.*

51. *Id.*

decreased as well.<sup>52</sup> In 1999, approximately fifteen percent of foster children remained in care for three to four years.<sup>53</sup> That number decreased to just nine percent by 2017.<sup>54</sup>

#### D. *Federal Funding for Prevention Services*

Even before the FFPSA, states could receive federal funding for many prevention services.<sup>55</sup> Prevention services “are designed to improve child-rearing competencies of the parents and other caregivers via education on the developmental stages of childhood and provision of other types of assistance.”<sup>56</sup> Most states receive federal funding for these services through grants.<sup>57</sup>

##### 1. Child Abuse Prevention and Treatment Act

Under Title I of CAPTA, grants fund investigations, risk and safety assessments, training of CPS staff, and services for severely vulnerable infants.<sup>58</sup> Two categories of funding are authorized under CAPTA—discretionary grants and community-based prevention grants.<sup>59</sup> Title II of CAPTA introduced the Community-Based Child Abuse Prevention Program (“CBCAP”).<sup>60</sup> CBCAP allows states to receive grants to fund a governor designated lead agency.<sup>61</sup> Once designated, the lead agency is permitted “to develop, operate, expand, and enhance community-based, prevention-

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52. *Id.*

53. Phagan-Hansel, *supra* note 48.

54. *Id.*

55. *See* U.S. DEP’T HEALTH & HUMAN SERVS., *supra* note 3, at 78.

56. *Id.*

57. *See id.* at 78–79.

58. *Id.* at 78; Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106a (2018).

59. 42 U.S.C. §§ 5106a(a)–(b); *Timeline of Major Child Welfare Legislation*, *supra* note 30.

60. U.S. DEP’T HEALTH & HUMAN SERVS., *supra* note 3, at 79.

CAPTA was most recently amended by the Victims of Child Abuse Act Reauthorization Act of 2018 (P.L. 115-424, 1/7/2019). The law amends section 106(b)(2)(B)(vii) of CAPTA to provide immunity from civil and criminal liability (it previously provided immunity from only prosecution) for people who make good-faith child abuse or neglect reports or who provide information or assistance, including medical evaluations or consultations, in connection with a report, investigation, or legal intervention pursuant to a good-faith report of child abuse or neglect.

CHILD WELFARE INFO. GATEWAY, ABOUT CAPTA: A LEGISLATIVE HISTORY 3 (2019); *see also* 42 U.S.C. § 5106b; Victims of Child Abuse Act of 1990, H.R. 5955, 115th Cong. § 2 (2018) (enacted).

61. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 3, at 79.

focused programs and activities designated to strengthen and support families to prevent child abuse and neglect.”<sup>62</sup>

“CAPTA [also] . . . required a Guardian Ad Litem or Court Appointed Special Advocate . . . to be appointed for each child . . .”<sup>63</sup> Over four-hundred-thousand children received services through CBCAP in 2017.<sup>64</sup> “[CBCAP] grants provide critical support for locally-driven services that are essential to building healthy and thriving communities, including voluntary evidence-based home visiting programs, parental skills-building, self-help programs, mental health and substance use services, and other family support services.”<sup>65</sup>

## 2. Promoting Safe and Stable Families

Grants are also available to states through PPSF of the Title IV-B of the Social Security Act.<sup>66</sup> PPSF replaced “the Family Preservation and Family Support program.”<sup>67</sup> Funds were expanded by PPSF to include reunification and adoption services.<sup>68</sup> Funding is accessible by states “on a discretionary and a capped mandatory basis for PSSF.”<sup>69</sup> Essentially, states must fund one dollar for every three dollars they receive from the federal government.<sup>70</sup>

PPSF grants fund services to prevent children from being removed from their homes, alternative placement services, and reunification costs.<sup>71</sup>

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62. *Id.* “[CAPTA] [r]equires states to have policies and procedures for hospitals to notify Child Protective Services (CPS) of all children born who are affected by illegal substance use or withdrawal symptoms resulting from prenatal drug exposure or indications of Fetal Alcohol Syndrome Disorder.” *New Mexico Family First Prevention Services Act Subcommittee: Federal Substance Use Disorder Services Grants and Potential for State FFPSA Implementation*, NAT’L CONF. ST. LEGISLATURES (Nov. 27, 2018), <http://www.nmlegis.gov/handouts/FFPAS%20112718%20Item%205%20NCSL%20Family%20First%20Prevention%20Services%20Act%20Subcommittee%20Meeting%20Presentation.pdf>.

63. James Payne, *Reasonable Efforts — It’s Time to Review and Reconsider*, PUB. CONSULTING GROUP (June 24, 2019), <http://www.publicconsultinggroup.com/news-perspectives/reasonable-efforts-it-s-time-to-review-and-reconsider/>.

64. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 3, at 85.

65. PREVENT CHILD ABUSE AM., 2019 FEDERAL PUBLIC POLICY AGENDA 2 (2019).

66. 42 U.S.C. § 629i (2018); STOLTZFUS, *supra* note 19, at 1; U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 3, at 102.

67. *Timeline of Major Child Welfare Legislation*, *supra* note 30.

68. *Id.*

69. STOLTZFUS, *supra* note 19, at 2.

70. *Id.*

71. CHILDREN’S BUREAU, *supra* note 22, at 1; U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 3, at 79.

The grants also funds foster youth education vouchers and mentoring for children of incarcerated parents.<sup>72</sup> No federal criteria must be met to be eligible for PPSF.<sup>73</sup> So, children in foster care or living at home may receive PPSF funded services.<sup>74</sup> This may be why PPSF was the most used funding source in 2017<sup>75</sup> and approximately five-hundred-thousand children received services funded through this grant.<sup>76</sup>

### 3. Social Services Block Grant

As stated above, most states receive funding through the CBCAP and PSSF grants.<sup>77</sup> However, the SSBG may also be used by states to fund prevention services.<sup>78</sup> These services include, “child daycare, child protective services, information and referral, counseling, and foster care, as well as other services that meet the goal of preventing or remedying neglect, abuse, or exploitation of children.”<sup>79</sup>

## III. OVERVIEW OF THE FFPSA

Although productive, some argue that the ASFA program did not help reunite families or keep them together.<sup>80</sup> ASFA was blamed for quickly separating children from their parents and for not tending to the parents’ needs to prevent foster care and adoptions.<sup>81</sup> Critics of CAPTA contended that “CAPTA . . . is primarily focused on intervention-based child welfare strategies that are implemented after crisis occurs, rather than on the prevention of crisis through family strengthening and support.”<sup>82</sup> These issues led to a demand for more prevention services to help parents remain with their children and to avoid foster care altogether.<sup>83</sup>

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72. *Timeline of Major Child Welfare Legislation*, *supra* note 30; *see also* CHILDREN’S BUREAU, *supra* note 22, at 1.

73. STOLTZFUS, *supra* note 19, at 2.

74. *Id.*

75. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 3, at 79.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Phagan-Hansel, *supra* note 48. Almost two million children received grant-funded prevention services in 2017. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 3, at 79.

81. Phagan-Hansel, *supra* note 48.

82. PREVENT CHILD ABUSE AM., *supra* note 65, at 2.

83. *See* Phagan-Hansel, *supra* note 48.



A. *Purpose of the FFPSA*

The FFPSA provides supportive services and programs to prevent placing children in foster care.<sup>84</sup> The new law has two ambitious goals.<sup>85</sup> The first, is to allow states to fund prevention services to enable parents or kin caregivers to continue to live with their children.<sup>86</sup> The second, is to limit the use of congregate or group home placements of children.<sup>87</sup>

B. *Eligibility*

In 2020, federal funding will be available for twelve-month's worth of approved prevention services for all eligible cases.<sup>88</sup> Regardless of whether they meet AFDC eligibility requirements, all eligible participants may receive prevention services.<sup>89</sup> Authorized prevention service recipients are *candidates for foster care*, foster care children who are expectant mothers or are already parents, or "parents or kin caregivers of candidates for foster care."<sup>90</sup>

1. Candidates for Foster Care

A child is considered a *candidate for foster care* when "they are identified in a prevention plan as being at imminent risk of entering care but can safely remain at home or in a kinship placement if provided services that prevent entry into foster care."<sup>91</sup> Even if the child has an adoption or guardianship arrangement in place, they may still be considered a *candidate for foster care*, as long as there is a "risk of disruption or dissolution that would result in entry into foster care."<sup>92</sup> Basically, funding is provided if it is necessary to prevent foster care or "directly relate[d] to the child's safety, permanence, or well-being."<sup>93</sup>

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84. CHILDREN'S DEF. FUND, THE FAMILY FIRST PREVENTION SERVICES ACT 1 (2018); *see also* Family First Prevention Services Act of 2017, H.R. 253, 115th Cong. § 101 (2017) (enacted); Schwartz & Hughes, *supra* note 7; *Family First Prevention Services Act*, *supra* note 15.

85. *See Family First Prevention Services Act*, *supra* note 15.

86. *Id.*

87. *Id.*

88. EMILIE STOLTZFUS, CONG. RESEARCH SERV., IN10858, FAMILY FIRST PREVENTION SERVICES ACT (FFPSA) 1 (2018).

89. CHILDREN'S DEF. FUND, *supra* note 84, at 1.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

What does *imminent risk* mean?<sup>94</sup> CAPTA's definition of *child abuse and neglect* must be used by the states.<sup>95</sup> *Child abuse and neglect* is defined by CAPTA as "any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation, [and] an act or failure to act which presents imminent risk of serious harm."<sup>96</sup> The definitions refer only to parents and caregivers.<sup>97</sup> However, states define the terms—*child abuse and neglect* and *imminent risk* in many ways and usually with much more detail.<sup>98</sup> So, it will be the state's responsibility to define *candidate for foster care* and *imminent risk* based on their own definitions of abuse and neglect in their *child welfare plan*.<sup>99</sup>

## 2. Child Welfare Plan

States must have a *child welfare plan* to use Title IV-E prevention services.<sup>100</sup> The plan must detail how states will assess child safety.<sup>101</sup> States are also required to conduct "risk assessments for each child," to describe and qualify intended services and programs, to explain how the state will monitor and evaluate the services, improve practices, and train staff.<sup>102</sup> States are not eligible to receive Title IV-E funding until the plan is approved by United States Department of Health and Human Services ("HHS") and it must be updated every five years.<sup>103</sup>

States may only "receive federal funding equal to at least [fifty percent] of their cost, as long as the services and programs [meet] certain

94. CTR. FOR THE STUDY OF SOC. POLICY, RESPONSIBLY DEFINING CANDIDACY WITHIN THE CONTEXT OF FFPSA: FIVE PRINCIPLES TO CONSIDER (2019).

95. *Id.*

96. *Id.* "In 2015, the [f]ederal definitions of *child abuse and neglect* and *sexual abuse* were expanded . . . to include a child who is identified as a victim of sex trafficking or severe forms of trafficking in persons." CHILD WELFARE INFO. GATEWAY, *supra* note 60, at 1.

97. *What Is Child Abuse or Neglect? What Is the Definition of Child Abuse and Neglect?*, U.S. DEP'T HEALTH & HUM. SERVICES (Feb. 12, 2014), <http://www.hhs.gov/answers/programs-for-families-and-children/what-is-child-abuse/index.html>.

98. CTR. FOR THE STUDY OF SOC. POLICY, *supra* note 94.

99. *Id.*; see also CHILDREN'S DEF. FUND, *supra* note 84, at 2.

100. CHILDREN'S DEF. FUND, *supra* note 84, at 2.

101. *Id.* "State plans must include steps to track and prevent child maltreatment fatalities. This plan must address strategies to engage the courts and other partners." PUBLIC KNOWLEDGE, SUMMARY OF FAMILY FIRST PREVENTION SERVICES ACT FOR JUDGES AND ATTORNEYS 1 (2018).

102. CHILDREN'S DEF. FUND, *supra* note 84, at 2.

103. *Id.*; 42 U.S.C. § 629 (2018).

evidence-based standards, and the spending [is] above the *state's maintenance of effort* (MOE) level.”<sup>104</sup> The MOE requirement mandates states to spend as much as they did in 2014 for *foster care prevention expenditures*.<sup>105</sup> The purpose of the MOE requirement is to prevent states from “substituting their current state/local prevention dollars with the new Title IV-E funds.”<sup>106</sup>

### C. *Support for Prevention Services*

If a state elects the Title IV-E prevention program under the FFPSA, the state will be afforded funding for twelve months of prevention services for eligible recipients.<sup>107</sup> FFPSA prevention services include “mental health and substance abuse prevention and treatment services provided by qualified clinicians, and in-home parent skill-based programs that include parenting skills training, parent education, and individual and family counseling that have been rated and approved.”<sup>108</sup>

Any services under Title IV-E “must be rated as promising, supported, or well-supported,” and must be approved by HHS.<sup>109</sup> *Promising* prevention services are “[c]reated from an independently reviewed study that uses a control group and shows statistically significant results.”<sup>110</sup> A program is *supported* if it “[u]ses a random-controlled trial or rigorous quasi-experimental design [and] [m]ust have sustained success for at least six months after the end of treatment.”<sup>111</sup> A treatment is *well-supported* if it “[s]hows success beyond a year after treatment.”<sup>112</sup>

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104. STOLTZFUS, *supra* note 88, at 1.

105. CHILDREN’S DEF. FUND, *supra* note 84, at 3.

106. *Id.*

107. See U.S. DEP’T OF HEALTH & HUMAN SERVS., PROGRAM INSTRUCTION: STATE REQUIREMENTS FOR ELECTING TITLE IV-E PREVENTION AND FAMILY SERVICES AND PROGRAMS 3–4 (2018); Family First Prevention Services Act of 2017, H.R. 253, 115th Cong. § 1 (2017) (enacted).

108. U.S. DEP’T HEALTH & HUMAN SERVS., *supra* note 107, at 3. “[The] Opioid package, authorize[d] [twenty] million [dollars] in funding for HHS to award to states to develop, enhance, or evaluate family-focused treatment programs to increase the number of evidence-based programs that will later qualify for funding under [FFPSA].” *New Mexico Family First Prevention Services Act Subcommittee: Federal Substance Use Disorder Services Grants and Potential for State FFPSA Implementation*, *supra* note 62; see also H.R. 253 § 1.

109. U.S. DEP’T HEALTH & HUMAN SERVS., *supra* note 107, at 3.

110. *Family First Prevention Services Act*, *supra* note 15.

111. *Id.*

112. *Id.*

Eligible services must be beneficial, have a manual, and be included in a state's plan.<sup>113</sup> The services must also align with a trauma-informed approach explained by HHS instructions:

[P]revention services must be provided under an organizational structure and treatment framework that involves understanding, recognizing, and responding to the effects of all types of trauma and in accordance with recognized principles of a trauma-informed approach and trauma-specific interventions to address trauma's consequences and facilitate healing. [HHS is] not further defining what a trauma-informed approach to service delivery means.<sup>114</sup>

If a child is eventually placed in foster care because the parents or relatives cannot care for them, the parents are no longer "eligible for substance abuse treatment through IV-E."<sup>115</sup> A family that is eligible for services may only receive Title IV-E funded prevention services for twelve-months.<sup>116</sup> The twelve-months begins when the child is considered a candidate for foster care or is a pregnant or parenting youth.<sup>117</sup> The only exception to the twelve-month limitation is if the family is eligible again at another time.<sup>118</sup> In addition, the prevention services must be evidence-based and will be backed as an *entitlement*, much like Medicaid.<sup>119</sup>

To receive prevention services, the eligible candidate for foster care or pregnant or parenting youth must have a written prevention plan.<sup>120</sup> A prevention plan for a candidate for foster care must include trauma-informed services or programs, a plan to keep the child "safely out of foster care, and the list of services or programs needed for the child or on behalf of the child."<sup>121</sup> For a pregnant or parenting youth, the prevention plan must have "their case plan, list of services or programs needed to ensure that a youth is prepared or able to be a parent, and a foster care prevention strategy for any child born to that youth."<sup>122</sup>

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113. *Id.*

114. U.S. DEP'T. OF HEALTH & HUMAN SERVS., *supra* note 107, at 3.

115. Schwartz & Hughes, *supra* note 7.

116. CHILDREN'S DEF. FUND, *supra* note 84, at 1.

117. *Id.*

118. *Id.*

119. Teresa Wiltz, *This New Federal Law Will Change Foster Care as We Know It*, PEW (May 2, 2018), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/05/02/this-new-federal-law-will-change-foster-care-as-we-know-it>.

120. CHILDREN'S DEF. FUND, *supra* note 84, at 2.

121. *Id.*

122. *Id.*

D. *Approved Placements to Receive Funding*

1. Congregate Care and Group Homes

Before the FFPSA, there were no limits on federal funding for group homes or congregate care.<sup>123</sup> Title IV-E now limits reimbursements for congregate or group home care and adoption assistance.<sup>124</sup> Under the FFPSA, states will only be reimbursed for two weeks of a child's stay in congregate care and group housing settings.<sup>125</sup> By the third week of a child entering foster care, states are only reimbursed for children in *foster family homes* ("FFH") or *child care institutions* ("CCI").<sup>126</sup> So, if a child is placed into a group home or into congregate care, no Title IV-E funding is available after fourteen days, unless it is a FFH or a specific CCI.<sup>127</sup>

The only other exception to the fourteen-day restriction is for funding administrative costs.<sup>128</sup> Only administrative expenses for a child's case for a child in a group or congregate home may be paid after fourteen days.<sup>129</sup> Administrative costs "include activities to develop necessary processes and procedures to establish and implement the provision of prevention services for eligible individuals, policy development, program management, and data collection and reporting."<sup>130</sup>

2. Child Care Institutions

A CCI is "defined as a licensed private or public child-care institution with no more than [twenty-five] children . . . ."<sup>131</sup> The FFPSA allows states to seek reimbursements for only specific CCIs.<sup>132</sup> CCIs under the FFPSA are: (1) Qualified residential treatment programs ("QRTP"), (2) settings for prenatal and parenting support, (3) eighteen and older supervised

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123. Wiltz, *supra* note 119.

124. John Kelly, *CliffsNotes on Family First Act, Part Three: Adoption, Foster Home Recruitment, Reunification and More*, CHRON. SOC. CHANGE (Feb. 15, 2018), <http://chronicleofsocialchange.org/finance-reform/cliffsnotes-family-first-act-part-three-adoption-foster-home-recruitment-reunification/29897>; *see also* Family First Prevention Services Act of 2017, H.R. 253, 115th Cong. § 101 (2017) (enacted); Kelly, *supra* note 18; Wiltz, *supra* note 119.

125. Wiltz, *supra* note 119; *see also* H.R. 253 § 101.

126. CHILDREN'S DEF. FUND, *supra* note 84, at 7–8; Wiltz, *supra* note 119.

127. Kelly, *supra* note 18; Wiltz, *supra* note 119.

128. CHILDREN'S DEF. FUND, *supra* note 84, at 8; Kelly, *supra* note 18; Wiltz, *supra* note 119.

129. CHILDREN'S DEF. FUND, *supra* note 84, at 7–8; Kelly, *supra* note 18.

130. U.S. DEP'T HEALTH & HUMAN SERVS., *supra* note 107, at 8.

131. CHILDREN'S DEF. FUND, *supra* note 84, at 7.

132. *See id.* at 7–8.

independent living settings, (4) high-quality residential care and support facilities for children and youth at-risk of sex trafficking, and (5) residential licensed substance abuse treatment facilities where the child is placed with the parent for up to twelve months.<sup>133</sup> CCIs are not “detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children determined to be delinquent.”<sup>134</sup>

### 3. QRTP

QRTP programs must have a *trauma-informed treatment model*, on call nursing and clinical staff, and “discharge planning and family-based aftercare supports available for at least [six] months post-discharge.”<sup>135</sup> The programs must also aid and document family outreach, which includes “maintain[ing] contact information for any known biological family and fictive kin of the child.”<sup>136</sup> In addition, programs must facilitate and record family participation during and after discharge, if in the best interest of the child.<sup>137</sup> The efforts used to preserve sibling relationships must also be documented by a QRTP program.<sup>138</sup> All QRTPs must be accredited, which “generally takes [twelve] to [eighteen] months.”<sup>139</sup> The standard to evaluate whether a QRTP program is appropriate for a child is as follows:

Within [thirty] days of a child being placed in a QRTP setting, a qualified individual must assess the child’s strength and needs using an age-appropriate, evidence-based, validated, functional assessment tool to determine if the child’s needs can be met with family members or in a foster family home, or in one of the other approved settings . . . consistent with the short- and long-term goals of the child and their permanency plan.<sup>140</sup>

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133. *Id.* at 7–8.

134. *Id.* at 8.

135. *Id.*

136. CHILDREN’S DEF. FUND, *supra* note 84, at 8.

137. *Id.*

138. *Id.*

139. *Therapeutic Group Homes: Needed Programs in Danger from Family First Act*, CHILD WELFARE MONITOR (Mar. 4, 2019), <http://www.childwelfaremonitor.org/2019/03/04/therapeutic-group-homes-needed-programs-in-danger-from-family-first-act/>. A court must decide whether a prospective QRTP is approved within sixty days. CHILDREN’S DEF. FUND, *supra* note 84, at 9.

140. CHILDREN’S DEF. FUND, *supra* note 84, at 8.

#### 4. Family Foster Homes

An FFH is defined as an establishment with less than seven children.<sup>141</sup> They must be approved by the state or licensed to care for children.<sup>142</sup> They also need to have constant care for children separated from their family.<sup>143</sup> Exceptions to these requirements may be made for foster youth who are expectant mothers, to keep family relationships maintained, and to help disabled children.<sup>144</sup>

#### 5. Kinship Caregivers

The ASFA required kinship caregivers and relative caregivers “to meet the same licensing standards as foster parents.”<sup>145</sup> The FFPSA provides kinship caregivers, or relatives of a child to “take primary responsibility for the care of children who are in need of a safe and stable placement.”<sup>146</sup> Through a *kinship navigator program* (“KNP”), Title IV-E funds may be used to assist kinship caregivers “in learning about, finding, and using programs and services to meet the needs of the children they are raising and their own needs, and to promote effective partnerships among public and private agencies to ensure kinship caregiver families are served.”<sup>147</sup> One concern with the KNP is that there is no funding under Title IV-E prevention programs for children already in foster care because they are not considered candidates for foster care.<sup>148</sup> Yet, foster care is defined as placement of children “in a licensed or unlicensed kinship” home by the state.<sup>149</sup>

#### 6. Adoption Assistance

Prior to the FFPSA, all children were eligible for federal adoption assistance.<sup>150</sup> However, the FFPSA stopped federal adoption assistance for

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141. Kelly, *supra* note 18.

142. CHILDREN’S DEF. FUND, *supra* note 84, at 7.

143. *Id.*

144. *Id.*

145. *New Mexico Family First Prevention Services Act Subcommittee: Federal Substance Use Disorder Services Grants and Potential for State FFPSA Implementation*, *supra* note 62.

146. U.S. DEP’T OF HEALTH & HUMAN SERVS., PROGRAM INSTRUCTION: FISCAL YEAR 2018 FUNDING AVAILABLE FOR DEVELOPING, ENHANCING OR EVALUATING KINSHIP NAVIGATOR PROGRAMS 2 (2018).

147. *Id.* at 3.

148. U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 107, at 7.

149. *Id.*

150. *Id.*

“children adopted before their [second] birthday,” until June 30, 2024.<sup>151</sup> Also, any child with *special needs* is not eligible for adoption assistance until July 1, 2024.<sup>152</sup> “Each state sets its own special needs definition, which may include the child’s ethnic background; age; sibling group status; medical condition; or physical, mental, or emotional disabilities.”<sup>153</sup> Therefore, “[a] child with special needs should not be confused with a child who requires special education.”<sup>154</sup>

Supporters of the FFPSA have claimed that the new law protects children from the trauma of being removed from their home and separated from family.<sup>155</sup> Nearly three hundred child welfare organizations praised the law as, “landmark bipartisan legislation [that] will strengthen families so more children can remain safely with their parents and kinship caregivers and avoid unnecessary placement in foster care.”<sup>156</sup>

#### IV. THE FFPSA AND FLORIDA’S CHILD WELFARE SYSTEM

The FFPSA may demand significant changes to Florida’s child welfare system model and federal revenue.<sup>157</sup>

##### A. *Community-Based Care Model*

In 1998, Florida began using a *community-based care model* to unite local communities and resources for vulnerable children.<sup>158</sup> The model requires child welfare services to be outsourced to *community-based care organizations* (“CBCs”), which are also known as *lead agencies*.<sup>159</sup>

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151. STOLTZFUS, *supra* note 88, at 3; *see also* Family First Prevention Services Act of 2017, H.R. 253, 115th Cong. § 101 (2017) (enacted).

152. CHILDREN’S DEF. FUND, *supra* note 84, at 13; *see also* H.R. 253, § 111.

153. *Eligibility and Benefits for Federal (Title IV-E) Adoption Assistance*, N. AM. COUNCIL ON ADOPTABLE CHILD. (Feb. 9, 2017), <http://www.nacac.org/resource/eligibility-benefits-federal-assistance/>; *see also* H.R. 253 § 101.

154. *About the Children*, ADOPTUSKIDS: MEET THE CHILDREN, <http://www.adoptuskids.org/meet-the-children/children-in-foster-care/about-the-children> (last visited Dec. 21, 2019); *see also* H.R. 253 § 101.

155. H.R. 253 § 101; *Family First Prevention Services Act*, *supra* note 17.

156. Letter from Abriendo Puertas/Opening Doors et al., Nat’l Orgs., to Mitch McConnell et al., Majority Leader, U.S. Senate (May 15, 2018) (on file with Ass’n of Univ. Ctrs. on Disabilities).

157. Fla. H.R. Comm. on Health & Human Servs., *supra* note 3, at 4; *see also* H.R. 253 § 101; Quinn, *supra* note 16, at 35.

158. Quinn, *supra* note 16, at 35.

159. Fla. H.R. Comm. on Health & Human Servs., *supra* note 3, at 2.



CBCs are responsible for providing foster care and related services. These services include, but are not limited to, counseling, domestic violence services, substance abuse services, family preservation, emergency shelter, and adoption. The CBC must give priority to services that are evidence-based and trauma informed. CBCs contract with a number of subcontractors for case management and direct care services to children and their families. There are [seventeen] CBCs statewide, which together serve the state's [twenty] judicial circuits.<sup>160</sup>

Under the model, the Department of Children and Families (“DCF”) oversees legal services for cases involving the welfare of children and handles contracts and funding for CBCs.<sup>161</sup> DCF must work to keep children safely at home with their families.<sup>162</sup> “When possible, child protective investigators and CBC case managers place children with relatives or responsible adults whom they know and with whom they have a relationship.”<sup>163</sup> However, when it is impossible to keep children with their families, they may be placed in temporary out-of-home care.<sup>164</sup> Which is where more than twenty thousand Florida foster children are placed today.<sup>165</sup> More than half of those children are in non-relative placements such as, group homes, licensed foster care, residential treatment centers, or some other housing situation.<sup>166</sup> Ultimately, the goal of foster care is to find children permanent homes.<sup>167</sup> Which includes reunifying the children with their parents or facilitating adoptions.<sup>168</sup>

“Florida uses funds from a variety of sources for child welfare services, such as the federal [SSBG], the federal [TANF] block grant, federal Title XIX Medicaid administration, federal Title IV-B, federal Title IV-E, various other child welfare grants, and state general revenue.”<sup>169</sup>

Many states are understandably worried about losing federal funds if they fail to comply with [the FFPSA] and are scrambling to implement changes. Florida has already spent a lot of time and

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160. *Id.*

161. *Id.*

162. *Id.* at 6.

163. *Id.* at 7.

164. Fla. H.R. Comm. on Health & Human Servs., *supra* note 3, at 2.

165. *See Children in Out-of-Home Care: Statewide*, FLA. DEP'T OF CHILD. & FAMILIES, <http://www.myflfamilies.com/programs/childwelfare/dashboard/c-in-ooH.shtml> (last visited Dec. 21, 2019).

166. *Id.*; *see also* Fla. H.R. Comm. on Health & Human Servs., *supra* note 3, at 7, 9.

167. Fla. H.R. Comm. on Health & Human Servs., *supra* note 3, at 7.

168. *Id.*

169. *Id.* at 2.

money setting up a plan called Path Forward to deal with implications of the legislation. But with a child welfare system that is among the largest and most diverse in the country, serving more than [twenty-three thousand] children from the Panhandle to South Florida, we cannot expect a federal bill to solve the system's shortcomings.<sup>170</sup>

One of the most concerning issues with the new funding structure under the FFPSA happens when a child is placed with relative caregivers because Florida may be “forced to deny relatives the funding they need to support the daily care of a child.”<sup>171</sup> Essentially, the State must determine if Title IV-E funds should be used to help the parents or to support the relative caring for the child.<sup>172</sup> This is problematic for relative caregivers and the children placed in their care.<sup>173</sup> “[R]ecent research suggests that children placed with relatives . . . have a higher risk of poverty, which is likely linked to the fact that relatives are less likely to receive foster care payments and other income supports.”<sup>174</sup> Prevention services are funded under the FFPSA for parents of children not in foster care, so there is “little incentive to use the model standards in order to license kin and get them the financial aid they so desperately need.”<sup>175</sup>

#### B. *Guardianship Assistance Program*

In 2018, the Guardianship Assistance Program (“GAP”) was established in Florida.<sup>176</sup> GAP “provide[s] guardianship assistance payments for the care of children by relatives who have assumed legal guardianship of children for whom they previously cared for as foster parents.”<sup>177</sup> The GAP program began in Florida on July 1, 2019.<sup>178</sup>

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170. Bill Frye, *The Future of Child Welfare in Florida*, TAMPA BAY TIMES: OPINION (Feb. 1, 2019), <http://www.tampabay.com/opinion/columns/column-the-future-of-child-welfare-in-florida-20190201/>; see also Family First Prevention Services Act of 2017, H.R. 253, 115th Congress § 1 (2017) (enacted).

171. Schwartz & Hughes, *supra* note 7; see also H.R. 253 § 1.

172. Schwartz & Hughes, *supra* note 7.

173. See *id.*

174. *Id.*

175. *Id.*; see also H.R. 253 § 1.

176. THE FLA. LEGISLATURE'S OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, *supra* note 19, at 5.

177. *Id.*

178. Fla. H.R. Comm. on Health & Human Servs., *supra* note 3, at 11.

Establishment of the GAP framework allows the State to receive other Title IV-E funds to support guardians, which could mitigate the aggregate loss of the Title IV-E funds because of the expiration of the waiver. Florida's GAP also allows DCF to provide caregivers who establish legal guardianship with a larger monthly stipend relative to existing State programs.<sup>179</sup>

DCF cannot request reimbursements for children without documented information to prove that the child is still being supported by the guardian.<sup>180</sup> "However, once the guardian begins receiving GAP payments, the child's case is closed because permanency has been achieved."<sup>181</sup> Because the court does not supervise the case plan after a child is in permanent placement, a child's case plan may not be updated with required information for GAP.<sup>182</sup> Since there is no law in Florida that terminates payments based on whether the child is still being supported by the guardian, "Florida's GAP will provide stipends to children and guardians . . . regardless of whether they qualify for federal Title IV-E reimbursement."<sup>183</sup>

### C. *Relative Caregiver Program*

There are four funding types for children placed with relatives or fictive kin.<sup>184</sup> The options "vary in the amount of funding, funding source, and the relationship of the caregiver with the child."<sup>185</sup> Two of the four options are under the Relative Caregiver Program ("RCP").<sup>186</sup> RCP was created in 1998 and expanded in 2014.<sup>187</sup> Through the RCP, two groups may receive financial support based on the child's age—fictive kin or relatives.<sup>188</sup> The RCP is funded by TANF and state money.<sup>189</sup> Other caregivers not eligible for RCP may receive funding from Florida's Temporary Cash Assistance.<sup>190</sup> A child may also be placed in permanent guardianship without funding.<sup>191</sup> "The RCP and GAP programs will run concurrently

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179. *Id.*

180. *Id.* at 13.

181. *Id.*

182. *Id.*

183. Fla. H.R. Comm. on Health & Human Servs., *supra* note 3, at 13.

184. *Id.* at 10.

185. *Id.* "A fictive kin is a person who is unrelated to the child but has such a close emotional relationship with the child that he or she may be considered family." *Id.* at 7.

186. *Id.* at 10.

187. Fla. H.R. Comm. on Health & Human Servs., *supra* note 3, at 10.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 11.

starting July 1, 2019, and relative and nonrelative caregivers can choose to apply for either program.”<sup>192</sup>

## V. IMPLICATIONS OF FFPSA ON FLORIDA’S CHILD WELFARE SYSTEM

Complying with the FFPSA’s strict standards may be an expensive and time-consuming process.<sup>193</sup>

### A. *Time*

It is unclear whether Florida can comply with the FFPSA timelines.<sup>194</sup> Instituting *trauma-informed* and evidence-based services is not only costly, but also time consuming.<sup>195</sup> For instance, each service and program requires assessments, manuals, curriculum, training of all staff, and evaluations.<sup>196</sup> Accrediting QRTPs may also be “a long and arduous process.”<sup>197</sup> It will also be a particularly expensive and demanding process for smaller homes.<sup>198</sup> So, some high-quality group homes and congregate care facilities may not become accredited before the FFPSA is effective in Florida.<sup>199</sup> Not only will accreditation be difficult for the homes, but the State may have a very difficult time finding enough qualified professionals to conduct the assessments, especially because qualified professionals cannot be State employees.<sup>200</sup> It is essential that the State has a sufficient amount of approved group homes for children, because without them “many children will experience a string of failed foster home placements, with each one leading to further damage to the child.”<sup>201</sup>

In addition to finding professionals for assessments, DCF and *lead agency staff* will need to be retrained to follow FFPSA requirements for

192. Fla. H.R. Comm. on Health & Hum. Servs., *supra* note 3, at 13.

193. See Family First Prevention Services Act of 2017, H.R. 253, 115th Cong. § 111 (2017) (enacted); THE FLA. LEGISLATURE’S OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, *supra* note 19, at 3, 9.

194. See H.R. 253 § 111; THE FLA. LEGISLATURE’S OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, *supra* note 19, at 9.

195. THE FLA. LEGISLATURE’S OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, *supra* note 19, at 9.

196. *Id.*

197. *Therapeutic Group Homes: Needed Programs in Danger from Family First Act*, *supra* note 139.

198. See *id.*

199. See H.R. 253 § 111; *Therapeutic Group Homes: Needed Programs in Danger from Family First Act*, *supra* note 139.

200. See *Therapeutic Group Homes: Needed Programs in Danger from Family First Act*, *supra* note 139.

201. *Id.*

claims and tracking costs.<sup>202</sup> Currently, the State uses the *Florida Safe Families Network* (“FSFN”) to manage child welfare cases.<sup>203</sup> FSFN “contains [thirty] years of child welfare data and includes information on more than [eight] million people.”<sup>204</sup> DCF must update FSFN to comply with the FFPSA, which will undoubtedly be a tiresome process due to the large amount of information already compiled and narrow guidelines set by the new law.<sup>205</sup>

## B. *Money*

Besides time, money is a potential problem.<sup>206</sup> Beginning in 1994, states could waive provisions of Title IV-E to develop child welfare projects with HSS approval.<sup>207</sup> In 2006, Florida’s Title IV-E demonstration waiver was effective, and a project was established and approved.<sup>208</sup> The waiver allowed funds to be allocated to CBCs, to children ineligible for Title IV-E funding, and for other services for children not in *out-of-home care*.<sup>209</sup> The FFPSA will affect Florida’s waiver which expired in September 2019.<sup>210</sup>

When the waiver expires, [Florida] will be required to revert to a traditional Title IV-E service model, which will both eliminate federal support for many current services and create a significant funding deficit for the State. DCF estimates that expiration of the waiver will lead to an operating deficit of roughly [seventy to ninety] million [dollars] per year over the next five fiscal years.<sup>211</sup>

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202. THE FLA. LEGISLATURE’S OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, *supra* note 19, at 8; *see also* H.R. 253 § 111.

203. THE FLA. LEGISLATURES OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, *supra* note 19, at 8.

204. *Id.*

205. *Id.*; *see also* H.R. 253 § 1.

206. *See* THE FLA. LEGISLATURES OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, *supra* note 19, at 11; Bill Frye, *We Need Flexibility to Get Child Welfare Right in Florida*, TAMPA BAY TIMES: OPINION (July 5, 2019), <http://www.tampabay.com/opinion/columns/we-need-flexibility-to-get-child-welfare-right-in-florida-column-20190705/>.

207. Fla. H.R. Comm. on Health & Human. Servs., *supra* note 3, at 1.

208. *Id.* at 4; *see also* FLA. LEGISLATOR’S OFFICE PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, *supra* note 20, at 1.

209. Fla. H.R. Comm. on Health & Human. Servs., *supra* note 3, at 4.

210. *Id.*

211. *Id.*

Under traditional Title IV-E, Florida could be reimbursed for fifty to seventy-five percent of specific trainings.<sup>212</sup> Now, Florida will share more costs of trainings since the FFPSA reimburses only fifty percent of the costs.<sup>213</sup> Because of this, it will be difficult for the State to provide the same amount and level of training it did in 2017–2018.<sup>214</sup> To do so, Florida will “need to double the existing match to \$6.8 million or reduce IV-E.”<sup>215</sup>

Moreover, FSN must also be updated for GAP, which is estimated to cost over fourteen million dollars and is not funded through FFPSA.<sup>216</sup> To avoid the costs of children in group care or CCIs for more than the fourteen days allotted under the FFPSA, “DCF would need to either reduce the number of children in out-of-home care or recruit additional foster parents.”<sup>217</sup> Based on data from 2017–2018, Florida could expect unreimbursed group homes and congregate care costs of about fifty-five to sixty million dollars per year.<sup>218</sup>

### C. *The Implications of the FFPSA on Florida’s Vulnerable Children*

#### 1. Lack of Support for Residential Group Homes

Is the FFPSA best for Florida’s vulnerable children?<sup>219</sup> Florida already has a painful history with trying to find vulnerable children homes.<sup>220</sup> Thankfully, residential group homes have been an option for children with nowhere else to go.<sup>221</sup> Residential group homes keep children with their siblings and “[i]n many cases, parents or guardians voluntarily bring their child to a family style group home.”<sup>222</sup> Residential group homes in Florida, “like the Florida Sheriffs Youth Ranches, United Methodist Children’s Home, Boys Town, St. Augustine Youth Services, and other high-quality homes . . . take care of thousands of children.”<sup>223</sup>

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212. THE FLA. LEGISLATURE’S OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, *supra* note 19, at 9.

213. *Id.* at 9–10.

214. *See id.*

215. *Id.*

216. *Id.* at 8.

217. THE FLA. LEGISLATURE’S OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, *supra* note 19, at 11; *see also* Family First Prevention Services Act of 2017, H.R. 253, 115th Cong. § 1 (2017) (enacted).

218. THE FLA. LEGISLATURE’S OFFICE OF PROGRAM POLICY ANALYSIS & GOV’T ACCOUNTABILITY, *supra* note 19, at 11.

219. *See* Frye, *supra* note 170.

220. *Id.*

221. *See id.*

222. Frye, *supra* note 206.

223. Frye, *supra* note 170.

Sometimes residential group homes are better options for children.<sup>224</sup> Especially if the one placement can help them avoid the trauma of multiple placements.<sup>225</sup> Yet, under the FFPSA, Florida may lose federal funding by placing children in resident family-style and residential group homes, which could severely limit placement options for children.<sup>226</sup>

## 2. Reliance on Relative Caregivers

Rather than placing children in congregate care or group homes, the FFPSA endorses placing children with relative caregivers—“a practice often called *diversion*.”<sup>227</sup> Diversion can be a major issue.<sup>228</sup> Mainly because FFPSA services “are authorized only once conditions in a home have deteriorated to the point where a child is at imminent risk of removal.”<sup>229</sup> Since these services are delayed until there is a risk that the child will have to be placed into foster care, “the law increases the likelihood that the children of addicted parents entering treatment will have to be moved, at least temporarily, to another home—often, and preferably, the home of a relative.”<sup>230</sup> Placing a child with a relative may not alleviate all, or even most of the danger to the child.<sup>231</sup> It can even be detrimental to children since there is usually “generational cycles of abuse and neglect within families, and placing a child with a relative allows the abuse to continue.”<sup>232</sup>

Furthermore, many children who go into foster care because of parental substance abuse, are also affected by other family issues.<sup>233</sup> This includes, “domestic violence, mental illness, and long histories of traumatic experiences.”<sup>234</sup> Considering how severe opioid addiction can be, and the other issues that may affect the families, the twelve-month limit to receive prevention services may not be enough to help families long-term.<sup>235</sup> In fact, “[a] 2010 study of 109 opiate-dependent patients released from residential

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224. *Id.*

225. *See Therapeutic Group Homes: Needed Programs in Danger from Family First Act*, *supra* note 139.

226. *See* Family First Prevention Services Act of 2017, H.R. 253, 115th Cong. § 101 (2017) (enacted); Frye, *supra* note 170.

227. Schwartz & Hughes, *supra* note 7; H.R. 253 § 101.

228. *See* Frye, *supra* note 170; Schwartz & Hughes, *supra* note 7.

229. Schwartz & Hughes, *supra* note 7; *see also* H.R. 253 § 111.

230. Schwartz & Hughes, *supra* note 7.

231. *See* Frye, *supra* note 170.

232. Frye, *supra* note 170; *see also* Schwartz & Hughes, *supra* note 7.

233. Frye, *supra* note 170; Schwartz & Hughes, *supra* note 7.

234. Schwartz & Hughes, *supra* note 7.

235. *Id.* “Some child welfare advocates . . . worry that [twelve] months of preventive care isn’t enough for parents struggling with opioid addiction. People with opioid addictions often relapse multiple times on the road to recovery.” Wiltz, *supra* note 119.

treatment found that [ninety-one] percent of [patients] relapsed.”<sup>236</sup> The FFPSA twelve-month limitation could also cause “limited availability of services, wait lists, and other barriers,” and families may receive less than twelve months of reimbursable prevention services based on these problems.<sup>237</sup>

Overall, the prevention services and programs offered under the FFPSA may not be enough to help children:

Due to the complex interrelated issues occurring in the homes . . . families require a broad range of services for both the children and the parents, including “family therapy, programs building parenting skills, child development services, and interventions addressing domestic violence.” Of these, only parenting skills programs are supported through [the FFPSA], and only those that meet evidence-based criteria yet to be developed by HHS.<sup>238</sup>

## VI. CONCLUSION

The opioid epidemic has destroyed families across the United States and continues to threaten the lives of children.<sup>239</sup> It is clear that the FFPSA is a remarkable step in the right direction towards helping families.<sup>240</sup> Offering states the ability to be reimbursed for prevention services and programs creates a pathway that avoids unnecessary foster care placements.<sup>241</sup>

Prevention is certainly key<sup>242</sup> and basic values should direct all child welfare legislation—“all parents and families could become vulnerable with a twist of fate . . . all families are worthy and deserve respect . . . all children love their parents, and everyone needs a little help at times in overcoming

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236. Schwartz & Hughes, *supra* note 7.

237. *Testimony from Jerry Milner on the Opioid Crisis: Implementation of the Family First Prevention Services Act (FFPSA) Before Comm. on Ways & Means, Subcomm. on Human Res.*, *supra* note 3; Family First Prevention Services Act of 2017, H.R. 253, 115th Cong. § 111 (2017) (enacted).

238. Schwartz & Hughes, *supra* note 7; *see also* H.R. 253 § 111.

239. *See* Wiltz, *supra* note 119.

240. Jerry Milner, *Trump’s Top Child Welfare Official: Family First a Good First Step, but True Prevention Is Key*, CHRON. SOC. CHANGE (Feb. 14, 2018), <http://www.chronicleofsocialchange.org/featured/trumps-top-child-welfare-official-family-first-good-first-step-true-prevention-key/29901>; *see also* H.R. 253 § 111.

241. *See Testimony from Jerry Milner on the Opioid Crisis: Implementation of the Family First Prevention Services Act (FFPSA) Before Comm. on Ways & Means, Subcomm. on Human Res.*, *supra* note 3.

242. Milner, *supra* note 240.



life's challenges."<sup>243</sup> Unfortunately, "[p]revention, in the context of federal reform often refers to prevention of foster care entry, not prevention of maltreatment,"<sup>244</sup> and the main goal of prevention services should always be to prevent maltreatment of children.<sup>245</sup>

With the [FFPSA], we have reached one more step in the continuum of services to children and families in the United States. We now have prevention of foster care placement for those children brought to the attention of child welfare agencies, a limited population, but a critical one in the continuum. That adds to the existing array of child welfare services that includes foster care and reunification support services, adoption services, and emancipation and transitional living services for youth exiting from foster care.

What remains missing is the ability to use substantial federal funds to strengthen families before maltreatment creates lasting, usually life-long trauma to children. We also lack the ability to provide strong community-based, universal family support services to families. Absent such services and support, many of those families will inevitably knock on the doors of public child welfare and cost us infinitely more in federal foster care dollars and in remediation efforts, that could so clearly be avoided.

Failure to redefine the system to stem the tide of children entering care and keep families strong comes at great expense to everyone. Those costs are financial and societal. It's an expense that is paid in inter-generational cycles of trauma that affect all sectors of our society. The family is the foundation of American society; we must treat it as such.<sup>246</sup>

Florida and the nation can expect to face many obstacles while introducing the new law and the requirements.<sup>247</sup> However, as long as Florida ensures all vulnerable children are protected and supported, the

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243. *Testimony from Jerry Milner on the Opioid Crisis: Implementation of the Family First Prevention Services Act (FFPSA) Before Comm. on Ways & Means, Subcomm. on Human Res., supra* note 3.

244. *Implications of Passage of Families First Prevention Services Act, supra* note 7.

245. *See Testimony from Jerry Milner on the Opioid Crisis: Implementation of the Family First Prevention Services Act (FFPSA) Before Comm. on Ways & Means, Subcomm. on Human Res., supra* note 3.

246. Milner, *supra* note 240.

247. *See Quinn, supra* note 16, at 35.

State's child welfare system could certainly improve with help from the FFPSA.<sup>248</sup>

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248. See Frye, *supra* note 170.

# A RISING FLORIDA EPIDEMIC: BIG BUSINESS CONTROLS FLORIDA’S RECOVERY RESIDENCE CRISIS

HUNTER SCHARF\*

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I.	INTRODUCTION.....	91
II.	THE OPIOID EPIDEMIC: THE ROOT OF THE SOBER HOME CRISIS....	93
	A. <i>The Three Waves of the Opioid Epidemic</i> .....	95
	1.    The First Wave.....	95
	2.    The Second Wave .....	96
	3.    The Third Wave .....	96
III.	RECOVERY RESIDENCES .....	98
	A. <i>Problems in the Recovery Residence Community</i> .....	99
	1.    Unethical Practices .....	99
	2.    The Reality of an Addict.....	101
	THE PRESSING ISSUES IN FLORIDA.....	102
	A. <i>How Florida Is Addressing the Problem</i> .....	104
	1.    Current Legislation .....	105
	2.    Recently Proposed Legislation .....	107
	B. <i>Why Stronger Regulation Is Necessary</i> .....	108
	1.    Problems with the Current Regulations in Florida	108
V.	ROADBLOCKS TO REGULATION .....	110
	A. <i>Federal Roadblocks</i> .....	111
VI.	HOW BIG BUSINESS CONTROLS SOBER HOME REGULATION .....	113
VII.	CONCLUSION.....	115

## I. INTRODUCTION

“On October 26, 2017, President Donald Trump declared [America’s] opioid crisis a public health emergency.”<sup>1</sup> This nationwide

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declaration was in response to a 540% increase in fentanyl related deaths over the past three years.<sup>2</sup> Correspondingly, the rapid rise of opioid abuse has led to numerous treatment and recovery facilities opening their doors across the nation.<sup>3</sup> With the marketability of sunny beaches and a relaxed lifestyle, addiction treatment has become a big business in South Florida.<sup>4</sup> However, with Florida's weak legislative regulation over recovery residences, fraud and corruption have taken over the recovery industry, thus allowing addicts to become *cash cows* for the personal gain of unscrupulous treatment and recovery residence providers.<sup>5</sup> With paramedics and firefighters responding to roughly "twenty overdose calls in a day," in what is deemed to be the nation's recovery capital, it is clear that Florida needs to take greater action.<sup>6</sup> However, with addiction treatments having the potential to generate fast money, those involved in Florida's one-billion-dollar market may not want government entities monitoring their actions.<sup>7</sup>

This Comment takes the position that stronger government oversight is needed to combat the ongoing recovery residences crisis in Florida.<sup>8</sup> This Comment also proposes a possible reasoning as to why greater legislative action has not been taken to combat this issue, pointing out the financial incentives of minimal regulation over the industry.<sup>9</sup> Part II of this Comment discusses the opioid epidemic and maps out what has led this country into the current public health emergency it finds itself in today.<sup>10</sup> Part III highlights the problems in the recovery residence industry that has left countless addicts in the hands of unscrupulous treatment and recovery residence owners.<sup>11</sup> Part IV examines how the Sunshine State has retained its reputation of fraud and corruption, as well as discusses the recent legislative regulations enacted

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1. Danielle L. Liberman, *Not Too Sunny in the Sunshine State: The Need to Improve Florida's Opioid Abuse Treatment Centers to Combat the National Public Health Crisis*, 31 GEO. J. LEGAL ETHICS 723, 731 (2018).

2. *Id.*

3. Heather Stratman & Dave Aronberg, *Sober Living Homes and the Regulation They Need*, GOVERNING (May 14, 2018, 6:15 AM), <http://www.governing.com/gov-institute/voices/col-regulation-sober-living-homes-recovery-residences-need.html>.

4. Liberman, *supra* note 1, at 733–34.

5. *Id.* at 734.

6. *Id.* at 736.

7. See Lisa Riordan Seville et al., *Florida's Billion-Dollar Drug Treatment Industry is Plagued by Overdoses, Fraud*, NBC NEWS (June 25, 2017, 11:46 PM), <http://www.nbcnews.com/feature/megyn-kelly/florida-s-billion-dollar-drug-treatment-industry-plagued-overdoses-fraud-n773376>.

8. See *infra* Section IV.B.

9. See *infra* Part VI.

10. See *infra* Part II.A.

11. See *infra* Part III.A.

to combat the currently corrupt industry.<sup>12</sup> Part IV also highlights a recently proposed bill to strengthen regulation that died in committee action and examines the problems with the current regulations in Florida.<sup>13</sup> Part V discusses federal regulations that pose as a roadblock to strong government oversight at the state and local level.<sup>14</sup> Part VI addresses the financial incentives for dual operators of treatment centers and sober homes to oppose strong government oversight, and presents the notion that these large operators indirectly lobby against regulation by using federal law as roadblocks to more stringent regulation.<sup>15</sup>

## II. THE OPIOID EPIDEMIC: THE ROOT OF THE SOBER HOME CRISIS

As drug overdose deaths continue to increase in the United States, the opioid epidemic continues to be one of the largest medical epidemics the country has yet to face in recent decades.<sup>16</sup> Since the beginning of the epidemic, over half a million Americans have died as a result of drug overdose.<sup>17</sup> “Annual deaths due to drug overdoses [have] now exceed[ed] deaths due to car accidents, gun violence, and even HIV at the height of the 1990s HIV epidemic.”<sup>18</sup> “The current leading cause of drug [overdose] is . . . a family of chemicals called opioids.”<sup>19</sup> With two out of three drug overdose deaths involving an opioid, the CDC reported 47,000 opioid overdose-related deaths across the nation in 2017.<sup>20</sup> Opioids are a class of drugs that include illegal substances such as heroin and fentanyl as well as legally obtained prescription pain relievers such as oxycodone (OxyCotin), hydrocodone (Vicodin), codeine, and morphine.<sup>21</sup> The pain relieving effect opioids have on the body occurs when the drug binds to and activates opioid receptors on the cells located in the brain, spinal cord, and other organs in the body that

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12. See *infra* Part IV.

13. See *infra* Part IV.

14. See *infra* Part V.A.

15. See *infra* Part VI.

16. Liberman, *supra* note 1, at 725; *Data Overview*, CTR. FOR DISEASE CONTROL & PREVENTION (Dec. 19, 2018), <http://www.cdc.gov/drugoverdose/data/index.html>.

17. *The Triple Wave Epidemic: Opioids, Heroin and Fentanyl: Supply Issues and Public Health Consequences: Hearing on Tackling Fentanyl: The China Connection Before the Subcomm. on Afr., Glob. Health, Glob. Human Rights, & Int’l Org. of the Comm. on Foreign Affairs*, (2018) [hereinafter *Hearings*] (testimony of Daniel Ciccarone, M.D., M.P.H., Professor, Department of Family and Community Medicine, University of California San Francisco).

18. *Id.*

19. *Id.*

20. *Data Overview*, *supra* note 16.

21. *Opioids*, NAT’L INST. ON DRUG ABUSE: DRUGS OF ABUSE, <http://www.drugabuse.gov/drugs-abuse/opioids> (last visited Dec. 21, 2019).

are involved with the feelings of pain and pleasure.<sup>22</sup> When the opioids attach to these receptors located in various places throughout the body, they block pain signals sent from the brain and release large amounts of dopamine which creates a *high*-like effect, causing the user to want to repeat the experience.<sup>23</sup>

As millions of Americans suffer from pain across the nation, opioids are often prescribed to treat their conditions.<sup>24</sup> While prescription opioids are generally safe when taken for a short period, misuse in combination with overprescribing by physicians can have deadly effects on the user.<sup>25</sup> According to the United States Department of Health and Human Services, the estimated number of Americans who misuse prescription opioids is a staggering 11.4 million.<sup>26</sup> Misuse of prescription opioids can occur by taking the medicine in a way other than prescribed, taking someone else's prescription, and taking the medicine for its *high*-like effect.<sup>27</sup> With legal prescription opioids such as hydrocodone, oxycodone, and morphine eliciting similar effects to illegal opioid substances such as heroin and fentanyl when taken incorrectly, such misuse can lead to future heroin use.<sup>28</sup> Because of their highly addictive quality, after just five days of prescription opioid use, the likelihood that a user will develop a long-term dependency on the drug rises steeply thus increases the risk of eventual addiction and overdose.<sup>29</sup> Consequently, in a 2016 study, "half of heroin users reported using prescription opioids before [beginning to use] heroin."<sup>30</sup>

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22. *Prescription Opioids*, NAT'L INST. ON DRUG ABUSE: PUBLICATIONS, (June 2019), <http://www.drugabuse.gov/publications/drugfacts/prescription-opioids>.

23. *Id.*

24. *Overview*, CTR. FOR DISEASE CONTROL & PREVENTION (Aug. 13, 2019, 12:00 AM), <http://www.cdc.gov/drugoverdose/data/prescribing.html>.

25. *See Prescription Opioids*, *supra* note 22; *see also* Liberman, *supra* note 1, at 728.

26. *What Is the U.S. Opioid Epidemic?*, U.S. DEP'T HEALTH & HUMAN SERVICES (Sept. 4, 2019), <http://www.hhs.gov/opioids/about-the-epidemic/index.html>.

27. *Prescription Opioids*, *supra* note 22.

28. Shelby Leheny, *The Connection Between Prescription Opioids and Heroin*, PHARMACY TIMES (Sept. 12, 2016), <http://www.pharmacytimes.com/contributor/shelby-leheny-pharmd-candidate-2017/2016/09/the-connection-between-prescription-opioids-and-heroin>.

29. Mayo Clinic Staff, *How to Use Opioids Safely*, MAYO CLINIC: PATIENT CARE & HEALTH INFO (Apr. 24, 2019), <http://www.mayoclinic.org/diseases-conditions/prescription-drug-abuse/in-depth/how-to-use-opioids-safely/art-20360373>.

30. Leheny, *supra* note 28.

### A. *The Three Waves of the Opioid Epidemic*

The rise in opioid abuse is outlined in three distinct waves that correlates directly to the progression of “three [separate] classes of opioids: [P]rescription pills . . . heroin, and [synthetically] manufactured fentanyl.”<sup>31</sup> With countless people falling victim to the misrepresentation given by various pharmaceutical companies, abuse and addiction of opioids skyrocketed, thus creating a pressing supply and demand issue which ultimately led to each wave of the epidemic becoming more and more dangerous.<sup>32</sup>

#### 1. The First Wave

“The first wave began in 1991” as a result of a sharp increase in prescribing opioid-based medications.<sup>33</sup> The increase in prescriptions written by providers was influenced by reassurance from “pharmaceutical companies and medical societies [that claimed] the risk of addiction to prescription opioids was [extremely] low.”<sup>34</sup> As a result, areas where opioids were “readily available and prescribed liberally” were the first to experience an increase in opioid abuse and illegal diversion of prescription pills that occurs when the original person prescribed the medication transfers it to others who do not have a prescription.<sup>35</sup>

As this new found epidemic swept the nation, Florida found itself as the *pill mill* capital of the country.<sup>36</sup> Pain clinics proliferated throughout the State.<sup>37</sup> “Doctors in Florida prescribed [ten] times more [opioid-based pain killers] than every other state in the country combined.”<sup>38</sup> The reason for such proliferation was the result of the lack of prescription drug monitoring.<sup>39</sup> Unlike most states across the country, Florida did not have a prescription drug database.<sup>40</sup> Such databases prevent *doctor shopping* that

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31. *Hearings, supra* note 17.

32. *See What Is the U.S. Opioid Epidemic?, supra* note 26; *Hearings, supra* note 17.

33. Lindsay Liu et al., *History of the Opioid Epidemic: How Did We Get Here?*, POISON CONTROL: POISON & PREVENTION INFO, <http://www.poison.org/articles/opioid-epidemic-history-and-prescribing-patterns-182> (last visited Dec 21, 5, 2019).

34. *Id.*

35. *Id.*

36. *See* Greg Allen, *The Oxy Express: Florida’s Drug Abuse Epidemic*, NPR (Mar. 2, 2011, 12:01 AM), <http://www.npr.org/2011/03/02/134143813/the-oxy-express-floridas-drug-abuse-epidemic>.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

allows “people [to] travel from one clinic to another, [to purchase] hundreds of doses of prescription drugs” undetected.<sup>41</sup> However, Florida did not take immediate action to combat the issue.<sup>42</sup> It took “years of lobbying by law enforcement [before] the state [l]egislature passed a bill” to create a monitoring program that would combat the problem.<sup>43</sup>

## 2. The Second Wave

The second wave started in 2010, as a result of pressing efforts to decrease opioid prescribing; thus making prescription pills harder to obtain.<sup>44</sup> Without a means to support their addiction due to the lack of accessibility of prescription pills, the focus changed to the “cheap, widely available, and potent illegal opioid,” heroin.<sup>45</sup> Thus, an unintended consequence of restrictions on opioid pill prescribing led to a drastic increase in heroin use across the nation.<sup>46</sup> From 2002–2013, heroin related overdose deaths increased by 286%.<sup>47</sup> Furthermore, roughly “80% of heroin users admitted to misusing prescription opioids before turning to heroin” to feed their addiction.<sup>48</sup>

The rapid rise of heroin use has also led to different health concerns.<sup>49</sup> As heroin is commonly injected into the body, “users [are] at risk for injection-related diseases [such as], HIV/AIDS, hepatitis B and C, skin infections, bloodstream infections, and infections of the heart.”<sup>50</sup> According to the National Institute on Drug Abuse, “one-quarter of AIDS cases stem from intravenous drug use.”<sup>51</sup>

## 3. The Third Wave

The third and most current wave of opioid abuse started in 2013 as an increase in opioid related deaths were linked synthetic opioids such as

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41. Allen, *supra* note 36.

42. *See id.*

43. *Id.*

44. Liu et al., *supra* note 33.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *See* Liu et al., *supra* note 33.

50. *Id.*

51. *How Does Drug Abuse Affect the HIV Epidemic?*, NAT’L INST. ON DRUG ABUSE: PUBLICATIONS (July 2012), <http://www.drugabuse.gov/publications/research-reports/hiv/ids/how-does-drug-abuse-affect-hiv-epidemic>.



fentanyl.<sup>52</sup> “Fentanyl is a highly potent drug, about 80-100 times [stronger than] morphine by weight, which makes it 30-40 times stronger than heroin by weight.”<sup>53</sup> “Fentanyl is a well-regarded pharmaceutical used in surgery to control severe pain,” however, the fentanyl that has flourished due to the epidemic has been *illicitly manufactured*.<sup>54</sup> Fentanyl has “integrated into the illicit drug supply [by being] sold as heroin in powder form, or as counterfeit opioids.”<sup>55</sup> The increase in fentanyl being mixed with other drugs sold on the streets is the result of its high potency.<sup>56</sup> “[B]ecause it takes very little to produce a high with fentanyl,” it is cheaper to produce.<sup>57</sup> Thus, creating a higher profit for the manufacturers and distributors.<sup>58</sup> “Fentanyl is the main chemical in a growing family of chemicals” that pose a threat to the nation.<sup>59</sup> In addition to its dangerous potency, rapid changes in purity have profound effects on overdose rates in each location these changes occur.<sup>60</sup> Because of its much stronger potency, synthetic opioid related overdoses and deaths occur as a result of users ingesting heroin, or opioid pills purchased on the streets, without knowledge that fentanyl has been mixed in as an unexpected contaminant.<sup>61</sup>

Carfentanil is another form of “opioid that is used by veterinarians for very large animals [such as] elephants.”<sup>62</sup> As opposed to fentanyl, it has never been approved for human use and “is approximately [one hundred] times more toxic than fentanyl and ten thousand times more toxic than morphine.”<sup>63</sup> Like fentanyl, “carfentanil is being cut into other illicit drugs like heroin and counterfeit pills made to look like [regular] prescription opioids.”<sup>64</sup> With chemical compounds that can be altered and no way of knowing the potency of the opioids being sold on the streets, the third wave of this ongoing epidemic has become the most dangerous.<sup>65</sup>

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52. Liu et al., *supra* note 33.

53. *Hearings, supra* note 17.

54. *Id.*

55. *Id.*

56. *Fentanyl*, NAT’L INST. ON DRUG ABUSE: PUBLICATIONS (Feb. 2019), <http://www.drugabuse.gov/publications/drugfacts/fentanyl>.

57. *Id.*

58. *See id.*

59. *Hearings, supra* note 17.

60. *Id.*

61. *Id.*

62. *Fentanyl and Carfentanil*, OTTAWA PUB. HEALTH, <http://www.ottawapublichealth.ca/en/public-health-topics/fentanyl-and-carfentanil.aspx> (last visited Dec. 21, 2019).

63. *Id.*

64. *Id.*

65. *See Hearings, supra* note 17.

### III. RECOVERY RESIDENCES

As unintended consequences of strict prescription opioid regulation worsen the epidemic, secondary measures such as recovery residences, also known as sober homes, have proliferated throughout the country to help combat the ongoing issue.<sup>66</sup> Because access to stable living is fundamental to a person's health and well-being, safe and properly regulated recovery residences are vital in the recovery process.<sup>67</sup> A recovery residence, as opposed to a treatment facility, does not provide drug abuse rehabilitation treatment.<sup>68</sup> However, the purpose of a recovery residence is to provide a safe and supportive environment for those who are still vulnerable to mainstream society in the early stages of their recovery.<sup>69</sup> With rehabilitation in treatment facilities typically lasting for a twenty-eight-day period due to the standard cap set by many insurance companies, most patients move to recovery residences to continue the recovery and integration process into mainstream society.<sup>70</sup> This type of model is known as the *Florida Model*, as it advocates a slow integration back into the everyday stresses of life.<sup>71</sup> Under this model of rehabilitation, “[r]ecovery residences serve as a bridge between the twenty-four-hour highly supervised treatment” and care provided at treatment facilities and the full return to independent living.<sup>72</sup> “The National Institute on Drug Abuse suggests that recovering [addicts] should spend ninety days in some form of recovery housing,” however, many individuals in recovery stay as long as several months to even years in these types of residences.<sup>73</sup> Because relapse rates are high for individuals who do not live in supportive recovery environments during the early stages of the recovery process, “the progress they make while attending [these facilities] can be lost or compromised” at the hands of poorly run sober living houses.<sup>74</sup>

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66. *Id.*; see also Beth Ann Middlebrook & Pat Taylor, *Addressing the Opioid Crisis Through Quality Recovery Housing*, HEALTH LAW., Dec. 2018, at 24, 24.

67. Middlebrook & Taylor, *supra* note 66, at 24.

68. *Sober Living Vs Rehab Centers*, DIST. RECOVERY CMTY. (Jan. 12, 2018), <http://www.thedistrictrecovery.com/blog/sober-living-vs-rehab>.

69. *See id.*

70. Liberman, *supra* note 1, at 735.

71. *Id.*

72. Middlebrook & Taylor, *supra* note 66, at 24.

73. *Id.*

74. Middlebrook & Taylor, *supra* note 66, at 24.

A. *Problems in the Recovery Residence Community*

In another attempt to combat the opioid epidemic, the Affordable Care Act and the Mental Health Parity and Addiction Equity Act, require insurers to cover addiction treatment for substance abuse users.<sup>75</sup> This legislation also makes it easier for people to obtain insurance to cover their substance abuse treatment by giving everyone access to private insurance, “which is legally bound to pay for rehabilitation.”<sup>76</sup> However, while these laws have provided substantial amounts of coverage for addicts to seek treatment, they have also led to these same addicts becoming targets for fraud and corruption.<sup>77</sup> While there are many treatment centers and recovery residences that truly wish to aid those in recovery by following strict codes of ethics, many unscrupulous actors have opened their doors with the sole purpose to commit fraudulent practices and entice payments from insurance companies to gain personal access into the now billion-dollar industry.<sup>78</sup> Such corruptive practices can be seen in activities such as patient brokering, bed flipping, intentional drug exposure, human trafficking, prostitution, fraudulent medical billing, unnecessary medical testing, and overbilling for urinalysis exams.<sup>79</sup>

1. Unethical Practices

Treatment facilities and recovery residences often work together by means of patient brokering, kickbacks, bed flipping, insurance fraud and expensive urine testing to profit off one another at the addict’s expense.<sup>80</sup> “Patient brokering is the act of trading a patient [of] a treatment” facility to a recovery residence in exchange for a financial kickback.<sup>81</sup> Patient brokering can also be conducted by third party marketers who look for vulnerable addicts on the streets with hefty insurance policies to bring to facilities and sober homes for a fee.<sup>82</sup> Once the patient is traded off to the participating recovery residence, the owners then prey on their newly acquired vulnerable tenants by insisting on several months’ rent up front with full intentions of

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75. Liberman, *supra* note 1, at 732; *see also* Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2018); Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, H.R. 6938, 110th Cong. § 1 (unenacted).

76. Liberman, *supra* note 1, at 732.

77. *Id.*

78. *See id.* at 734.

79. *Id.* at 736.

80. *See* Liberman, *supra* note 1, at 734; Mike Vogel, *Addicted to Rehab*, FLA. TREND, May 2017, at 80.

81. Liberman, *supra* note 1, at 734.

82. *Id.* at 734–35.

bed flipping.<sup>83</sup> Bed flipping can occur in different forms.<sup>84</sup> One way bed flipping occurs is when recovery residence owners evict their tenants for simple rule violations and/or intentionally allow drugs onto the property with hopes of an overdose to start the process all over again.<sup>85</sup> By keeping their residents on a continuous cycle of relapsing and/or taking their money up front and kicking them out to create space for another person to be taken advantage of, the sober homes and treatment facilities make a substantially larger amount of money at a faster rate.<sup>86</sup> The second way bed flipping can occur is by exploiting insurers until the addict's insurance is exhausted.<sup>87</sup> At that point, addicts are shown the door and often times become homeless and subject to *body snatchers*, also known as third party marketers, who look for struggling or relapsed addicts to start the cycle all over again.<sup>88</sup> Unfortunately, the exploitation does not stop there.<sup>89</sup> Numerous recovery residences subject their tenants to unsafe conditions such as overcrowding, theft, rape, human trafficking, and prostitution on top of the elaborate insurance fraud schemes.<sup>90</sup>

Furthermore, urine tests supply a great deal of revenue to the billion-dollar industry.<sup>91</sup> Unscrupulous doctors, labs, treatment centers, and sober homes work together in the elaborate kickback schemes by issuing numerous and unnecessary drug tests to check if the addicts are staying clean, thus allowing the treatment facilities to *soak insurers* with extensive billing.<sup>92</sup> The facilities bill insurers \$150 to \$200 for one standard urine test that costs roughly \$10 to conduct.<sup>93</sup> The facilities then send the urine samples to labs for *confirmatory* testing that can range anywhere from \$1,500 to \$2,000 for one sample.<sup>94</sup> In more egregious cases, clinic employees will provide their own urine to be tested so that the insurers can continue to be billed even after the patient has left the facility.<sup>95</sup> In 2017, “the grand jury found one well

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83. *Id.* at 735–36.

84. *See id.*

85. *See* Liberman, *supra* note 1, at 735–36.

86. *See id.*

87. *See* Vogel, *supra* note 80, at 84.

88. *Id.*

89. *See* Liberman, *supra* note 1, at 736.

90. *Id.*

91. Vogel, *supra* note 80, at 83.

92. *See id.*; Arthur Mondale, *Palm Beach County State Attorney Announces Arrests in Major Drug Treatment Fraud Case*, WPTV: NEWS (Apr. 2, 2019, 6:47 PM), <http://www.wptv.com/news/region-c-palm-beach-county/palm-beach-county-sober-homes-task-force-to-announce-arrests-in-major-fraud-case>.

93. Vogel, *supra* note 80, at 83.

94. *Id.*

95. *Id.*

known [facility] that billed [an insurer] \$600,000” in urine analysis testing for a single patient over a seven month period.<sup>96</sup>

## 2. The Reality of an Addict

In 2017, Kenneth Chatman, a sober home and drug treatment center operator in Florida, was sentenced to twenty-seven years in federal prison.<sup>97</sup> Chatman plead guilty to conspiracy to “commit health care fraud, money laundering and sex trafficking.”<sup>98</sup> Between 2013 and 2016, Chatman and his associates “defrauded insurance companies of an estimated \$24 million.”<sup>99</sup> However, “the toll on sober home residents was even worse than the financial crime.”<sup>100</sup> Under Chatman’s care, many of the two thousand residents who lived in his facilities died of drug overdoses.<sup>101</sup> “Instead of helping his patients to achieve sobriety, Chatman exploited the vulnerable victims to satisfy his personal greed.”<sup>102</sup> He also “provided drugs to addicts, solicited and accepted kickbacks and bribes, and used his position of power to sexually exploit his patients.”<sup>103</sup> Chatman would force “women into prostitution, giv[e] the addicted women drugs and then withhold[] those drugs if they would not comply. He [also] told the women the prostitution would pay their *rent*.”<sup>104</sup>

Throughout his trial, both families of victims lost due to overdose under Chatman’s care and victims that made it out alive shared their stories.<sup>105</sup> “One was a [twenty-two] year old woman who testified that she was forced to have sex with [roughly one hundred and fifty] men in less than a month while staying at a sober home [owned by Chatman].”<sup>106</sup> She further testified that she was brought to one of Chatman’s sober homes when she

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96. *Id.*

97. Paula McMahon, *Sober Homes Fraudster Who Gave Drugs to Addicts Sentenced to 27 ½ Years in Prison*, SUN SENTINEL (May 17, 2017, 6:30 PM), <http://www.sun-sentinel.com/news/crime/fl-reg-kenneth-chatman-sentenced-sober-homes-20170516-story.html>.

98. *Id.*

99. *Sober Home and Drug Treatment Center Owner Sentenced*, FBI: NEWS (Feb. 21, 2018), <http://www.fbi.gov/news/stories/florida-sober-home-owner-sentenced>.

100. *Id.*

101. *Id.*

102. *Drug Treatment Center Operator Gets 27 Years in Prison for Fraud, Sex Trafficking: United States v. Chatman*, WESTLAW J. HEALTH CARE FRAUD, June 9, 2017, at 2, 2017 WL 2505013.

103. *Id.*

104. *Sober Home and Drug Treatment Center Owner Sentenced*, *supra* note 99.

105. McMahon, *supra* note 97.

106. *Id.*

was nineteen years old by men who had worked for him.<sup>107</sup> Upon entering the home, she was physically assaulted causing her to lose consciousness.<sup>108</sup> Upon waking, she found herself tied to a bed post with restraints on her wrists and ankles.<sup>109</sup> They had taken all of her belongings and clothes and proceeded to drug her with an unknown sedative that allowed men to enter the room in which she was tied and continuously rape her.<sup>110</sup>

“Chatman [would also conspire] with other sober home owners to refer patients to his facilities in return for [financial] kickbacks.”<sup>111</sup> According to his indictment, “[the] kickbacks came in the form of checks with memo lines indicating they were for *commissions, case management fees, and consulting fees.*”<sup>112</sup> Chatman would also allow “patients to continue using illegal drugs while he billed their health insurers for nonexistent, ineffective or medically unnecessary medical treatment and testing . . . .”<sup>113</sup> To keep the cycle moving, “when a patient’s insurance benefits were close to running out, Chatman would provide illicit substances so the patient would test positive for drugs. He would then convince the insurance company that the patient had *relapsed* and required additional treatment, allowing him to continue billing for the fraudulent services.”<sup>114</sup>

#### IV. THE PRESSING ISSUES IN FLORIDA

With an atmosphere that emanates a relaxed lifestyle, it is no wonder that Florida has become an epicenter for recovery residences.<sup>115</sup> The palm trees and sunny beaches grasp the attention of families looking for places to send their loved ones for substance abuse treatment and recovery.<sup>116</sup> Because of this, out-of-state addicts are the primary driver of revenue for the Florida industry.<sup>117</sup> In a recent study conducted by a Minnesota based health care company, it was found that seventy-five percent of people treated in Florida for substance abuse were from out of state.<sup>118</sup> However, Florida is

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107. *Id.*

108. *Id.*

109. *Id.*

110. McMahan, *supra* note 97.

111. *Drug Treatment Center Operator Gets 27 Years in Prison for Fraud, Sex Trafficking*, *supra* note 102, at 1.

112. *Id.*

113. *Id.*

114. *Id.* at 1–2.

115. Liberman, *supra* note 1, at 733–34.

116. *Id.*

117. *Id.*

118. Vogel, *supra* note 80, at 82.

not the “recovery oasis” it is marketed to be.<sup>119</sup> Deception has been an ongoing issue for those who continue to send their loved ones into the poorly regulated State.<sup>120</sup> While many recovery residence facilities market a ninety percent success rate, seventy percent of overdoses occur within a quarter mile of a sober home in Delray Beach, Florida.<sup>121</sup>

“Delray Beach, Florida has become the *recovery capital of America*” as it is currently home to the largest recovery community in the country.<sup>122</sup> For a city that is sixteen square miles, Delray Beach is estimated to have more than eight hundred treatment facilities.<sup>123</sup> However, with Florida’s current regulation over the recovery community, combined with the unscrupulous actors who engage in bad practices, there is no real way to know how many sober homes exist within the city limits.<sup>124</sup>

In 2016, first responders went out on fourteen hundred overdose calls in Delray Beach, equating to roughly four a day.<sup>125</sup> Of the fourteen hundred emergency calls, ninety-five percent were out-of-state occupants of sober homes and treatment centers.<sup>126</sup> With the cost of a 911 call averaging \$2,500, the city is forced to spend thousands of dollars and divert responders away from serving regular residents of the city.<sup>127</sup>

Furthermore, with the rising rate of opioid overdoses sweeping the State, Florida has been forced to spend hundreds of thousands of dollars on Narcan, an overdose antidote.<sup>128</sup> Naloxone, known as “Narcan,” is a drug that “kicks opioid molecules off receptors in the brain, reviving overdose victims and allowing them to start breathing again.”<sup>129</sup> As the drug is not new, being discovered in the 1960s, “it has cost less than \$5 per dose” for decades.<sup>130</sup> However, being that it is the only drug that can reverse an opioid overdose fast enough to save a victims life, in combination with the escalating number of overdoses due to the epidemic, the price of Narcan has

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119. *Id.* at 80.

120. *Id.* at 82.

121. Liberman, *supra* note 1, at 733; Patricia Liverpool, *Regulating Sober Living Homes*, REG. REV. (Aug. 20, 2018), <http://www.theregreview.org/2018/08/20/liverpool-regulating-sober-living-homes/>.

122. Liberman, *supra* note 1, at 733 (quoting Jane Gross, *On Florida Coast, Addicts Find Home in an Oasis of Sobriety*, N.Y. TIMES, Nov. 16, 2007, at A1).

123. Liberman, *supra* note 1, at 733.

124. *Id.* at 735.

125. Vogel, *supra* note 80, at 84.

126. *Id.*

127. *Id.* at 85.

128. *Id.*

129. Peter Haden, *We Can’t Do Without It: First Responders Pay Soaring Price for Overdose Antidote Naloxone*, WLRN (Mar. 11, 2018), <http://www.wlrn.org/post/we-can-t-do-without-it-first-responders-pay-soaring-price-overdose-antidote-naloxone>.

130. *Id.*

skyrocketed.<sup>131</sup> “Delray Beach Fire Rescue used to spend \$2,100 on naloxone.”<sup>132</sup> However, as a result of the increased price due to supply and demand issues, Delray Beach Fire Rescue, spends fourteen times that amount.<sup>133</sup> Additionally, “Palm Beach County’s Fire Rescue’s naloxone bill went from \$18,000 to \$205,000—an increase of more than 1,100[%].”<sup>134</sup> In response to these numbers, former Delray Beach Mayor, Cary Glickstein, was quoted saying, “[Florida is] now subsidizing the care and treatment of this industry that is reaping millions of dollars in insurance proceeds.”<sup>135</sup>

Insurance companies have even taken a stand against the unregulated rehabilitation industry in Florida.<sup>136</sup> In 2016, Southwest Floridians who purchased Cigna insurance were forced to switch providers as the insurance company decided to pull out of the Florida health marketplace.<sup>137</sup> The company withdrew from Florida in an attempt to avoid fraudulent billing from substance abuse treatment centers.<sup>138</sup> In support of their decision, Cigna claimed that certain outpatient facilities were taking advantage of plans that offer out-of-network benefits for addicts that flocked to South Florida for substance abuse treatment.<sup>139</sup> The company also stated that the abuse included “kickbacks to doctors and excessive, high-cost drug testing.”<sup>140</sup>

#### A. *How Florida Is Addressing the Problem*

In an attempt to combat the pressing issues sober homes have posed to the State, the Florida Legislature has passed several laws in the recent years.<sup>141</sup> Delray Beach created the Delray Beach Drug Task Force, which served as a “non-profit consortium of law enforcement agencies, treatment providers, and other people involved in addiction industry that run educational and health initiatives, and meets regularly to discuss better solutions.”<sup>142</sup> Additionally, in 2014, “the FBI partnered with Florida ‘on a

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131. *Id.*

132. *Id.*

133. *Id.*

134. Haden, *supra* note 129.

135. Vogel, *supra* note 80, at 85.

136. *See* Liberman, *supra* note 1, at 737.

137. Frank Gluck, *Cigna Pulling Out of FL Health Marketplace in 2016*, NEWS-PRESS: NEWS (Oct. 22, 2015, 11:53 AM), <http://www.news-press.com/story/news/local/2015/10/22/cigna-pulling-out-fl-health-obamacare-marketplace-2016/74344980/>.

138. *Id.*

139. *Id.*

140. *Id.*

141. Liberman, *supra* note 1, at 738.

142. *Id.*



task force investigating fraud’ in the recovery industry.”<sup>143</sup> However, despite these efforts, problems in the recovery community continued to flourish, thus requiring more action.<sup>144</sup>

### 1. Current Legislation

In 2015, House Bill No. 21 passed, currently known as Florida Statute Section 397.487, which required the Florida Department of Children and Families (“DCF”) to create a voluntary certification program for recovery residences.<sup>145</sup> While certification does not equate to licensure, it does require adherence to industry sanctioned best practice standards.<sup>146</sup> As a result of this legislation, treatment facilities are legally only allowed to refer participants of their programs to certified recovery residences.<sup>147</sup> Per designation by the DCF, to become certified, recovery residence providers must obtain a certificate of compliance from the Florida Association of Recovery Residences (“FARR”).<sup>148</sup> FARR is the Florida affiliate to the National Association of Recovery Residences (“NARR”) and is responsible with certifying compliance to the standard of recovery residences set by NARR.<sup>149</sup>

The NARR Standard does not instruct providers how to specifically operate their recovery residence. Instead, thirty-eight standards organized under six domains provide a measurement platform upon which certification may be achieved. By way of example: Standard 1.08 states: “Recovery Residences provide drug and alcohol free environments.” Applicants for certification submit a policy and procedure for implementation of this particular standard. If FARR Certification staff are satisfied, this policy and procedure achieves the objective, then nothing further is required to meet the standard. Conversely, if staff have concerns regarding the efficacy of the providers policy and procedure, they then

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143. *Id.* (quoting Cat Ferguson, *In Florida Rehabs, Addicts Are Bought and Sold*, BUZZFEED NEWS: SCI (Mar. 19, 2016, 9:14 AM), <http://www.buzzfeednews.com/article/catferguson/addiction-marketplace>).

144. *See id.*

145. *Id.*; *see also* FLA. STAT. § 397.487 (2019); H.R. 21, 2015 Leg., 108th Reg. Sess. (Fla. 2019).

146. *See* FLA. ASS’N OF RECOVERY RESIDENCES, FLORIDA ASSOCIATION OF RECOVERY RESIDENCES (FARR) CERTIFICATION REQUIREMENTS, (2017).

147. Liberman, *supra* note 1, at 738.

148. FLA. ASS’N OF RECOVERY RESIDENCES, *supra* note 146.

149. *Id.*

consult with the provider to arrive at an alternative path by which the applicant might achieve compliance.<sup>150</sup>

While exact policies and procedures are not specifically mandated under the certification process, recovery residences seeking certification are still bound by the standards set by FARR as the standards must be met before a certificate of compliance can be issued.<sup>151</sup> Such standards include: Organizational standards, fiscal management standards, operation standards, recovery support standards, property standards, and good neighbor standards.<sup>152</sup> However, there is no requirement under Florida law that recovery residences have to obtain certification.<sup>153</sup> Therefore, sober homes are legally allowed to operate in Florida without being certified.<sup>154</sup>

In 2016, “Florida’s lawmakers funded a Sober Home Task Force.”<sup>155</sup> The task force was spearheaded by State Attorney Dave Aronberg and is comprised of state and federal police agencies, as well as civilians.<sup>156</sup> The agencies investigate, arrest, and prosecute unscrupulous operators for a variety of legal violations, while civilian experts and concerned citizens recommend changes to the State laws.<sup>157</sup> The task force was created with the goal to shut down insurance fraud and patient brokering that controls the recovery community.<sup>158</sup>

In 2017, Florida enacted Statute Section 817.505, the Florida Patient Brokering Act, “a criminal statute that makes it ‘a crime for any person, including health care providers and facilities, to offer or receive kickbacks, bonuses, commission or rebates, or engage in any split-fee arrangement in return for referral of patients or patronage to or from a healthcare provider/facility.’”<sup>159</sup> The statute also makes it a third-degree felony, that is punishable up to five years in state prison, to receive financial incentives, also known as kickbacks, to entice facilities to use their services.<sup>160</sup>

House Bill No. 807, Practices of Substance Abuse Service Providers Act, which was promoted by the Sober Home Task Force, was also signed

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150. *Id.*

151. *Id.*

152. *Id.*

153. Liberman, *supra* note 1, at 738.

154. *See id.*

155. Middlebrook & Taylor, *supra* note 66, at 26–27.

156. Caroline Bell, *Task Force Seeks to Clean Up Florida’s Drug Treatment Industry*, MEDIUM (Apr. 15, 2019), <http://www.medium.com/the-sunshine-report/sober-home-task-force-seeks-to-clean-up-drug-treatment-industry-5da0b0fb0dfd>.

157. *Id.*

158. *Id.*

159. Liberman, *supra* note 1, at 739; *see also* FLA. STAT. § 817.505 (2019).

160. Liberman, *supra* note 1, at 739; *see also* FLA. STAT. § 817.505.

into action in 2017.<sup>161</sup> The bill added “tougher penalties for patient brokering, increased protection against deceptive marketing practices, and [made] it easier for law enforcement to investigate the abuse occurring in treatment centers.”<sup>162</sup>

Most recently, during the 2019 legislative session, the Florida Senate passed and adopted Florida House Bill 369, Substance Abuse Services.<sup>163</sup> The bill was drafted, once again, upon recommendation from State Attorney Aronberg’s Sober Home Task Force and became effective on July 1, 2019.<sup>164</sup> The new piece of legislature allows non-violent drug offenders to qualify to provide peer support services by certifying them with the State.<sup>165</sup> “Peer support services allow individuals with similar life circumstances to work with those struggling with addiction to overcome it.”<sup>166</sup> Prior to the legislation, individuals in positions of ownership or employment in recovery residences were subject to level two background screenings under Florida law.<sup>167</sup> However, the bill amends this law and exempts prior drug offenders who qualify to become peer specialists.<sup>168</sup>

## 2. Recently Proposed Legislation

House Bill No. 369 was not the only proposed piece of legislation set out to strengthen Florida’s sober home regulation during the 2019 legislative session.<sup>169</sup> House Bill No. 103 and corresponding Senate Bill No. 102 sought to amend Florida Statute Section 397.487, Voluntary Certification of Recovery Residences.<sup>170</sup> The amendment proposed to remove the voluntary aspect of the recovery residence statute, thus requiring that all residences be

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161. Liberman, *supra* note 1, at 739; *see also* Fla. CS for CS for HB 807 (2017) (Practices of Substance Abuse Service Providers Act).

162. Liberman, *supra* note 1, at 739; *see also* Fla. CS for CS for HB 807 (2017).

163. Jeffrey Lynne, *Breaking News — Florida Legislature Passes Latest Sober Homes Task Force SUD Treatment and Recovery Residence Legislation*, SOBER LAW NEWS (May 3, 2019), <http://www.soberlawnews.com/breaking-news-florida-legislature-passes-latest-sober-homes-task-force-sud-treatment-and-recovery-residence-legislation/>; *see also* Fla. CS for CS HB 1 (2019) (Substance Abuse Services).

164. Lynne, *supra* note 163.

165. Janelle Irwin Taylor, *Substance Abuse Peer Mentoring Bill Clears the Florida House*, FLA. POL. (Apr. 24, 2019), <http://www.floridapolitics.com/archives/294671-substance-abuse-peer-mentoring>; *see also* Fla. CS for CS for HB 369.

166. *Id.*

167. Lynne, *supra* note 163.

168. Taylor, *supra* note 165.

169. *See* H.R. 103, 2019 Leg., 121st Reg. Sess. (Fla. 2019); S. 102, 2019 Leg., 121st Reg. Sess. (Fla. 2019).

170. Fla. H.R. 103; Fla. S. 102.

certified.<sup>171</sup> Under this legislation, all sober homes would be subject to the same FARR standards required under the current voluntary certification program.<sup>172</sup> Additionally, the law would further impose criminal penalties for persons who operate a recovery residence without a certificate of compliance.<sup>173</sup> However, the bills died in committee action, never making it to either floor for a vote.<sup>174</sup>

## B. *Why Stronger Regulation Is Necessary*

Florida has an ongoing history of waiting until it is too late to take action.<sup>175</sup> From the pill mill epidemic that left Florida with its current reputation to the sober home crisis that is leaving thousands of addicts in worse conditions than before entering the State for help, it is clear that Florida does not like to take drastic proactive measures.<sup>176</sup> While the Florida legislature has made an attempt to combat the ongoing sober home crisis with its recent legislative action, the recently proposed bill to mandate the certification process makes it clear that it is not enough.<sup>177</sup> Some state legislatures want stronger regulation.<sup>178</sup>

### 1. Problems with the Current Regulations in Florida

With cities in Florida, such as Delray Beach, being nicknamed the *relapse capital* of the country, it is the Florida Legislature's responsibility to set the tone for sober home regulation.<sup>179</sup> While the voluntary certification method may be the solution for states such as Pennsylvania and Massachusetts, who have both enacted voluntary certification laws, it is not enough for Florida.<sup>180</sup>

Pennsylvania's Sober Home Task Force made the recommendation for voluntary certification of recovery residences in 2017.<sup>181</sup> The proposal

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171. Fla. H.R. 103; Fla. S. 102.

172. See Fla. H.R. 103; Fla. S. 102.

173. Fla. H.R. 103; Fla. S. 102.

174. H.B. 103: Recovery Residences, FLA. SENATE, <http://www.flsenate.gov/session/bill/2019/103> (last visited Dec. 21, 2019).

175. See Liberman, *supra* note 1, at 736; Greg Allen, *Beach Town Tries to Reverse Runaway Growth of Sober Home*, NPR (Aug. 10, 2017, 7:25 AM), <http://www.npr.org/sections/health-shots/2017/08/10/537882989/beach-town-tries-to-reverse-runaway-growth-ok-sober-homes>.

176. See Liberman, *supra* note 1, at 736; Allen, *supra* note 175.

177. See Liberman, *supra* note 1, at 737; H.R. 103; Fla. S. 102.

178. See H.R. 103; Fla. S. 102.

179. Liberman, *supra* note 1, at 736.

180. See Middlebrook & Taylor, *supra* note 66, at 26, 28.

181. *Id.* at 26.

was in response “to [seventeen] medical dispatch calls for overdoses at recovery houses” that occurred in 2016, which resulted in two deaths.<sup>182</sup> To compare state numbers, Delray Beach alone suffered 412 overdoses in just the first half of 2016.<sup>183</sup> Additionally, thirty-seven of those overdoses resulted in death.<sup>184</sup> With such a staggering difference in numbers, it is clear that Florida and Pennsylvania should not have similar regulation over sober homes.<sup>185</sup>

Furthermore, back in 2015 when the legislation began, only thirteen of Florida’s thousands of recovery residences qualified for certification.<sup>186</sup> With the voluntary certification legislation being in place for almost four years now, only eighty-seven recovery residence companies currently meet the standard required for a certificate of compliance.<sup>187</sup> With such a low number of certifiable facilities in comparison to the thousands that are not currently participating nor meet the standard for the voluntary certification process, greater regulatory action needs to be taken.<sup>188</sup>

Despite the Florida Legislature’s efforts, the voluntary certification program for recovery residences is just that—voluntary.<sup>189</sup> As a result, unscrupulous actors can still legally own and operate sober homes without adhering to the standards set by NARR.<sup>190</sup> The standard molded by NARR was constructed atop the Social Model of Recovery Philosophy (“SMRP”), which takes the position that peer support is integral to an addict’s recovery.<sup>191</sup> As numerous studies have found as such, NARR has compiled the most effective evidence based practices and molded an overarching standard that recovery residences can implement to provide the most effective recovery practices for their residence.<sup>192</sup> By only implementing a voluntary certification program, there is no way to enforce the NARR Standard to all operating sober homes across the State.<sup>193</sup>

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182. *Id.*

183. Ifran Uraizee & Ryan Van Velzer, *Drug Overdoses Rampant in Delray’s Sober Home Neighborhoods*, SUN SENTINEL (July 14, 2017, 5:15 PM), <http://www.sun-sentinel.com/local/palm-beach/fl-pn-delray-overdoses-20170706-story.html>.

184. *Id.*

185. See Middlebrook & Taylor, *supra* note 66, at 26; Uraizee & Van Velzer, *supra* note 183.

186. Liberman, *supra* note 1, at 738–39.

187. *Id.* at 739.

188. See *id.*

189. *Id.* at 738.

190. *Id.*

191. FLA. ASS’N OF RECOVERY RESIDENCES, *supra* note 148.

192. *Id.*

193. Liberman, *supra* note 1, at 738.

Furthermore, while Florida's voluntary certification program has made it illegal for treatment facilities to refer participants of their programs to uncertified recovery residences, bad actors in the recovery business can still find ways to retain a healthy flow of business without such referrals.<sup>194</sup> Deceptive marketing scams use the State's resort-like atmosphere to target out-of-state addicts looking for supportive environments as they continue their journey into recovery.<sup>195</sup> Therefore allowing unscrupulous sober home owners to retain business without the process of referrals from treatment centers.<sup>196</sup>

The fact that recovery residences can legally operate in anonymity also poses a problem for the State.<sup>197</sup> Without a requirement for certification or another means to know where these homes are located, there is no way to monitor and oversee how the residents are being treated.<sup>198</sup> Without some form of mandatory oversight, unscrupulous actors can continue to prey on addicts in recovery by legally opening recovery facilities to lure and manipulate the already vulnerable as a money-making scheme.<sup>199</sup> While tougher patient brokering laws have been put in place to deter some unethical behavior, there have been no laws enacted that criminalize bad actors from just opening their doors.<sup>200</sup> Furthermore, as there is an apparent link between addicts in recovery and overdoses, absent certification, government agencies, law enforcement officials, and health departments cannot take the proactive measures needed to adequately distribute necessary resources that can prevent the overdose death toll from rising.<sup>201</sup>

## V. ROADBLOCKS TO REGULATION

With the recent proposition during the 2019 legislative session to mandate certification of all sober homes across the State, it is clear that some Florida lawmakers believe stronger governmental oversight is necessary to combat the sober home crisis.<sup>202</sup> Being that both corresponding bills (House Bill 103 and Senate Bill 102) died in committee action, the question is

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194. *See id.* at 739.

195. Allen, *supra* note 36; Liberman, *supra* note 1, at 733–34.

196. Allen, *supra* note 36.

197. *See* Lisa Kashinsky, *Sober Homes Spark Legal Battles, Calls for More Oversight*, BOS. HERALD.COM: NEWS (Apr. 24, 2019, 12:58 PM), <http://www.bostonherald.com/2019/04/23/sober-homes-spark-legal-battles-calls-for-more-oversight/>.

198. *Id.*

199. *See* Allen, *supra* note 36.

200. *See* Liberman, *supra* note 1, at 739.

201. *See* Liverpool, *supra* note 121.

202. *See* Fla. H.R. 108; H.R. 103; *see* Fla. S. 102.

why.<sup>203</sup> Regulation over the recovery industry has been and continues to be a controversial topic.<sup>204</sup> Supporters of regulation claim stronger governmental oversight is still needed to combat the problems that exist in the recovery community in order to fully protect those seeking sobriety.<sup>205</sup> However, critics of stronger oversight use federal regulations such the Fair Housing Act (“FHA”) and the Americans with Disabilities Act (“ADA”) to contend that increased regulations imposed on sober homes would violate federal law.<sup>206</sup>

#### A. *Federal Roadblocks*

The FHA and ADA are two federal laws that prevent discriminatory housing practices against individuals with disabilities.<sup>207</sup> The FHA was originally enacted in 1968 to eliminate housing discrimination on the basis of race, color, national origin, and religion.<sup>208</sup> However, in 1988, “Congress passed the Fair Housing Amendments Act (“FHAA”), which extended fair housing protection[s] to prohibit housing discrimination against individuals suffering from a handicap.”<sup>209</sup> The amendment to the FHA defines handicap as “(1) a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.”<sup>210</sup> Due to the language of the statute, courts have recognized that recovering alcoholics and drug addicts qualify as handicapped and thus require protection from discrimination.<sup>211</sup> Because of this classification, “state and local governments are prohibited from enacting or enforcing land use or zoning laws that discriminate against” addicts in recovery.<sup>212</sup> Additionally, “the ADA prohibits discrimination against individuals with disabilities in all areas of public life, including public accommodations.”<sup>213</sup> Because the ADA definition of *disability* is almost identical to the FHAA’s definition of

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203. *HB 103: Recovery Residences*, *supra* note 176; Fla. H.R. 103; Fla. S. 102.

204. *See* Liverpool, *supra* note 121.

205. *Id.*

206. *Id.*; Lillie Werner Singh, *Federal Law and State Sober Living Regulations Intersect*, BEHAV. HEALTHCARE EXECUTIVE (June 19, 2018), <http://www.behavioral.net/article/policy/federal-law-and-state-sober-living-regulations-intersect>; *see also* 42 U.S.C. § 3602 (2017); 42 U.S.C. § 12101 (2017).

207. Singh, *supra* note 206.

208. Dana K. Maine & Connor M. Bateman, *Regulation of Sober Living Facilities Under Federal Fair Housing Legislation*, FOR DEF., June 2018, at 46, 47.

209. *Id.*

210. 42 U.S.C. § 3602 (2017).

211. Maine & Bateman, *supra* note 208, at 48.

212. Singh, *supra* note 206.

213. *Id.*

*handicap*, addicts in recovery are also considered a protected class under the ADA.<sup>214</sup>

As a result of these protections, sober living facilities are also protected under these regulations.<sup>215</sup> Therefore, laws and regulations imposed on sober homes may not have a discriminatory impact on its residents to interfere with their equal opportunity to live in a dwelling.<sup>216</sup> Because of these protections, state and local governments feel limited in how they can regulate individuals with substance use disorders that reside in sober homes.<sup>217</sup> However, in a joint statement by the U.S. Department of Housing and Urban Development (“HUD”) and the U.S. Department of Justice (“DOJ”):

Operators of group homes for persons with disabilities are subject to applicable state and local regulations addressing health and safety concerns unless those regulations are inconsistent with the Fair Housing Act or other federal law. Licensing and other regulatory requirements that may apply to some group homes must also be consistent with the Fair Housing Act. Such regulations must not be based on stereotypes about persons with disabilities or specific types of disabilities. State or local zoning and land use ordinances may not, consistent with the Fair Housing Act, require individuals with disabilities to receive medical, support, or other services or supervision that they do not need or want as a condition for allowing a group home to operate. State and local governments’ enforcement of neutral requirements regarding safety, licensing, and other regulatory requirements governing group homes do not violate the Fair Housing Act so long as the ordinances are enforced in a neutral manner, they do not specifically target group homes, and they do not have an unjustified discriminatory effect on persons with disabilities who wish to reside in group homes.<sup>218</sup>

Furthermore, “courts have held that laws may treat a protected class differently if the restriction is intended to benefit the protected group or responds to legitimate safety concerns raised by affected individuals.”<sup>219</sup>

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214. Maine & Bateman, *supra* note 208, at 47–48.

215. See Singh, *supra* note 206.

216. *Id.*

217. *Id.*

218. U.S. DEP’T JUSTICE, JOINT STATEMENT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND THE DEPARTMENT OF JUSTICE: STATE AND LOCAL LAND USE LAWS AND PRACTICES AND THE APPLICATION OF THE FAIR HOUSING ACT 13 (2016).

219. Singh, *supra* note 206.



In the recently proposed bill to mandate certification of all sober homes in Florida, that bill stated that,

The Legislature finds that a person suffering from addiction has a higher success rate of achieving long-lasting sobriety when given the opportunity to build a stronger foundation by living in a recovery residence after completing treatment. The Legislature further finds that this state and its subdivisions have a legitimate state interest in protecting these persons, who represent a vulnerable consumer population in need of adequate housing. It is the intent of the Legislature to protect persons who reside in a recovery residence.<sup>220</sup>

According to the language in this bill, “[i]t is the intent of the Legislature to protect persons who reside in a recovery residences,” not to discriminate against them.<sup>221</sup> Thousands of out-of-state addicts flock to Florida looking for a safe environment to receive treatment and recover from addiction.<sup>222</sup> However, with the fraud and corruption that has flourished in the recovery community, families send their loved ones into the State only to return in *body bags*.<sup>223</sup> Addicts and families alike have spoken out about the issues that arise from lack of regulation over sober homes in Florida; however, critics of regulation continue to use federal roadblocks such as the FHA and ADA to fight strong government oversight in the billion-dollar industry.<sup>224</sup>

## VI. HOW BIG BUSINESS CONTROLS SOBER HOME REGULATION

With the Florida market for addiction treatment reaching one billion dollars, more people have entered the business than ever before.<sup>225</sup> As the *Florida Model* advocates for outpatient rehabilitation to continue in the form of sober home living, those involved in the business often own both treatment facilities and sober homes.<sup>226</sup> “Treatment costs about \$9,000 [per] month”; however, once the addicts in recovery complete the standard inpatient rehabilitation, they then move on to sober home living where the cost lowers to roughly \$400 per month.<sup>227</sup> As treatment centers and sober

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220. Fla. H.R. 103.

221. *Id.*

222. Liberman, *supra* note 1, at 724.

223. *Id.*

224. See Seville et al., *supra* note 7.

225. Seville et al., *supra* note 7; David Segal, *City of Addict Entrepreneurs*, N.Y. TIMES, Dec. 28, 2017, at F8.

226. See Segal, *supra* note 225; Seville et al., *supra* note 7.

227. Segal, *supra* note 225.

homes have proliferated due to the opioid epidemic sweeping the nation, easy money has become an end in itself for those involved in the billion-dollar-business.<sup>228</sup> In an interview conducted for the New York Times in 2017, sober home owner Daniel Sullivan discussed his experience with those in the business of addiction, claiming that, “[t]here was a time last year when a lot of the guys who owned clinics and sober living homes were driving a Cadillac Escalade, or a Mercedes-Benz.”<sup>229</sup> Sullivan also claims he “heard a few of them talking about how they were just \$50,000 away from joining the high-roller program at the MGM in Vegas.”<sup>230</sup>

Dual owners of treatment centers and sober homes can still make large profits without engaging in mass insurance fraud schemes.<sup>231</sup> While many unscrupulous actors have taken advantage of common practices such as urinalysis, it is still a key component to drug treatment.<sup>232</sup> According to the Center for Substance Abuse Treatment, “urine testing is the best developed and most commonly used monitoring technique in substance abuse treatment programs.”<sup>233</sup> Additionally, the Substance Abuse and Mental Health Services Administration claims that urine analysis “should occur not less than once a week or more frequently than every [three] days in the first weeks of treatment.”<sup>234</sup> With the use of more sophisticated urine analysis testing, an addict tested three times a week can amount to charges of \$36,000 a month.<sup>235</sup> As a result, a sober home with six residents on the same testing regimen could bring in roughly \$2.5 million a year.<sup>236</sup>

With the combination of less frequent testing and moderately priced urine analysis, operators of treatment centers and sober homes can fly under the radar and still yield a significant profit without violating any state or federal laws.<sup>237</sup> Without some form of complete regulation, it is almost impossible to detect if these under-the-radar scams are occurring within these larger business operations.<sup>238</sup> With such profits to be made in the South Florida market, it can be assumed that those involved in the more sophisticated money-making operations would be opposed to stricter

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228. *See id.*

229. *Id.*

230. *Id.*

231. *See* Pat Beall & Christine Stapleton, *Behind the Bonanza: How Urine Tests Make Millions*, PALM BEACH POST, Aug. 2, 2015 at 1A.

232. *See id.*; ROBERT F. FORMAN & PAUL D. NAGY, SUBSTANCE ABUSE: CLINICAL ISSUES IN INTENSIVE OUTPATIENT TREATMENT 237 (2006).

233. FORMAN & NAGY, *supra* note 232, at 237.

234. *Id.*

235. Beall & Stapleton, *supra* note 231.

236. *Id.*

237. *See id.*

238. Vogel, *supra* note 80, at 83.

regulation and government oversight.<sup>239</sup> If stringent regulations were to be enacted in Florida, it can be assumed that stricter policies would be implemented to oversee testing such as urinalysis.<sup>240</sup> As urine testing is only one example of the under-the-radar money-making devices implemented by large business operators in the recovery industry, it can be presumed that those involved in the billion-dollar-market lobby against stronger regulation.<sup>241</sup>

Indirect lobbying tactics occur when opposers to regulation claim that doing so would violate federal regulations such as the ADA and FHA.<sup>242</sup> While these federal laws have been perceived as roadblocks to regulation in the recovery industry, joint statements made by the DOJ and HUD have implied that discriminatory impact is justified when health concerns involving the disabled occur.<sup>243</sup> By using well-intended federal law to lobby against state run regulation, large business operators in the recovery industry continue to take advantage of the addicted in an under-the-radar fashion.<sup>244</sup>

## VII. CONCLUSION

As the United States finds itself in the middle of the worst opioid mortality rate in our nation's history, Florida needs to realize that it is the State that needs to take the most significant action.<sup>245</sup> Thousands of addicts from across the nation flock to Florida in seek of recovery.<sup>246</sup> While some find it, others fall victim to the hands of *unscrupulous* actors whose only wish is to make a profit off of their vulnerability.<sup>247</sup> While the Legislature has taken steps in the right direction with the implementation of new regulatory measures, it is not enough.<sup>248</sup> Drug overdose deaths in Florida are over twice the national average, and as unethical practices *in sober homes* create a direct *pipeline to relapse*, there is an evident nexus between the two.<sup>249</sup>

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239. See Seville et al., *supra* note 7; Singh, *supra* note 206.

240. See Beall & Stapleton, *supra* note 231; Seville et al., *supra* note 7; Vogel, *supra* note 80, at 83.

241. See Beall & Stapleton, *supra* note 231; Singh, *supra* note 206; Vogel, *supra* note 80, at 83.

242. See Seville et al., *supra* note 7; Singh, *supra* note 206.

243. See Singh, *supra* note 206; U.S. DEP'T JUSTICE, *supra* note 220, at 9.

244. See Vogel, *supra* note 80, at 82.

245. Liberman, *supra* note 1, at 745.

246. Seville et al., *supra* note 7.

247. *Id.*; Liberman, *supra* note 1, at 734.

248. See Liberman, *supra* note 1, at 738.

249. Lizette Alvarez, *Haven for Recovering Addicts Now Profit from Their Relapses*, N.Y. TIMES (June 20, 2017), <http://www.nytimes.com/2017/06/20/us/delray-beach->

The voluntary certification process is merely a band-aid on the sober home issues that can be seen in Florida's recovery industry.<sup>250</sup> Whether the answer lies in the form of mandatory certification or not, stronger government oversight is needed in the recovery community to combat the ongoing crisis.<sup>251</sup> As opposers to regulation fight their battle by using well intended federal regulations as roadblocks, supporters of statewide regulations and those affected by a lack thereof must fight back by showing the Florida Legislature that these roadblocks can be overcome by the health and safety needs of those in substance abuse treatment and recovery.<sup>252</sup> This analysis serves as a narrow introductory talking point into the various alternative possibilities as to why real change has not occurred in Florida's recovery industry.<sup>253</sup> As those in the throes of recovery continue to suffer as a result of lax regulation, we can only hope that real change will occur soon.<sup>254</sup>

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addiction.html; *Drug Abuse Treatment in Florida: Statistics, Success, and More*, COMFORT RECOVERY, <http://www.comfortrecovery.com/florida/> (last visited Dec. 21, 2019).

250. Liberman, *supra* note 1, at 740.

251. See Kashinsky, *supra* note 197.

252. See Singh, *supra* note 206.

253. See Taylor, *supra* note 167; Liberman, *supra* note 1, at 736.

254. See Alvarez, *supra* note 249.

# LOWERING THE FLOOR: THE CONSEQUENCES OF COMPETITION-BASED EDUCATION REFORM FOR LOW- INCOME STUDENTS & FAMILIES

RICHARD SENA \*

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I.	INTRODUCTION .....	118
II.	DEVELOPMENT OF COMPETITIVE EDUCATION POLICY .....	120
	A. <i>From Brown to Rodriguez: The Court’s Migration from Progressive to Competition-Based Education Policy</i> .....	120
	B. <i>Neoliberalization of American Education Policy</i> .....	122
III.	DEFINING PRIVATIZED SCHOOL CHOICE PROGRAMS.....	124
	A. <i>Charter Schools</i> .....	124
	B. <i>School Choice Vouchers</i> .....	125
IV.	SCHOOL CHOICE AND EFFECTS OF LOW-INCOME COMMUNITIES..	126
	A. <i>Consequences of Charter School Choice</i> .....	126
	1. Charter School Closures.....	127
	2. High Teacher Turnover Rate.....	128
	3. For-Profit Charters .....	129
	4. The Argument for Charters .....	129
	B. <i>Consequences of School Choice Vouchers</i> .....	131
	1. Vouchers Further Stratify Educational Opportunities .....	131
	2. Research Does Not Support the Effectiveness of Vouchers.....	132
	3. The Argument for Vouchers .....	133
V.	THE EFFECTS OF STATEWIDE SCHOOL CHOICE IN FLORIDA.....	133
	A. <i>Florida Constitution and Challenges Against School Choice Vouchers</i> .....	134

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1.	<i>Bush v. Holmes</i> I & II.....	134
2.	Florida's Neo-Voucher Program.....	135
3.	Governor DeSantis' Doubling-Down on Vouchers.....	136
B.	<i>Florida's Charter Schools</i> .....	137
1.	Negative Results of Charters Schools in Florida .	137
2.	Constitutional Challenges against Schools of Hope .....	138
VI.	ALTERNATIVES TO COMPETITION-BASED EDUCATION REFORM...	139
VII.	CONCLUSION .....	140

## I. INTRODUCTION

In the closing pages of F. Scott Fitzgerald's introspective novel, *This Side of Paradise*, a self-reflective Amory Blaine preaches the importance of high-quality broadly accessible public education:

Every child . . . should have an equal start. If his father can endow him with a good physique and his mother with some common sense in his early education, that should be his heritage . . . . He shouldn't be artificially bolstered up with money, sent to these horrible tutoring schools, dragged through college . . . . Every boy ought to have an equal start.<sup>1</sup>

Amory's musings over education mirror the plight of today's inequality over educational opportunities.<sup>2</sup> Because of America's regressive education funding policy, which derives a large part of school funding from property values, low-income, and minority students continue to find themselves in woefully underfunded schools.<sup>3</sup> Not only are low-income students subject to worse education, but the student population, as a whole, is becoming further stratified both racially and educationally.<sup>4</sup> It is because of

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1. F. SCOTT FITZGERALD, *THIS SIDE OF PARADISE* 252 (James L.W. West III ed. 1995).

2. Rachel R. Ostrander, *School Funding: Inequality in District Funding and the Disparate Impact on Urban and Migrant School Children*, 2015 BYU EDUC. & L.J. 271, 271 (2015).

3. See *id.* at 272–73, 283. Local sources, such as property taxes, account for approximately forty-five percent of school district funding. Nikhil Goyal, *Save Our Schools: Bernie's Education Platform Deserves an A+*, NATION, June 17, 2019, at 4, 4. This results in affluent, often white students, being educated in far superior schools than low-income, often minority students, attending woefully underfunded schools. *Id.*

4. Ostrander, *supra* note 2, at 272.

this stratification that schools today are more segregated than at any time since segregation was formally abolished.<sup>5</sup>

Though the plight of low-income students is palpable, dissatisfaction with public education throughout the rest of the population has been the true harbinger of contemporary education reform in the United States.<sup>6</sup> When President Reagan's administration published its damning report on the state of American public schools titled *A Nation at Risk: The Imperative for Education Reform* in 1983, the public became primed for meaningful and radical proposals for education reform.<sup>7</sup>

Instead of tailoring a bottom-up system which increased the floor of education quality for the most vulnerable students at the bottom of the socioeconomic ladder, contemporary education reform has manifested from American market economics—namely, competition.<sup>8</sup> This competition-based approach to education reform increases the range of outcomes for low-income students, including further increasing negative outcomes.<sup>9</sup>

This Comment will consider how competition-based education reform has lowered the quality floor for low-income families and students.<sup>10</sup> First, this Comment will explain the development of competition-based education reform as it has evolved through the judiciary, federal legislation, and through the states.<sup>11</sup> Second, this Comment will define the two main types of competition-based school choice reform most stringently supported by President Trump's administration: Charter schools and school choice vouchers.<sup>12</sup> Third, this Comment will consider how charter schools and vouchers create new negative outcomes for low-income students.<sup>13</sup> Fourth, this Comment will analyze how these school choice programs have manifested as a statewide initiative in Florida.<sup>14</sup> Lastly, this Comment will

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5. *Id.*

6. DAVID P. GARDNER ET AL., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATION REFORM*, 1 (1983).

7. See Zachary Jason, *The Battle Over Charter Schools*, HARV. EDUC. MAG., Summer 2017, at 22, 26.

8. Chris Gilbert, *Creating Educational Destruction: A Critical Exploration of Central Neoliberal Concepts and Their Transformative Effects on Public Education*, 83 EDUC. F. 60, 61 (2019).

9. *Id.*

10. *Id.* at 63; see also discussion *infra* Part IV.

11. Olander, *supra* note 2, at 289–90; see also discussion *infra* Part II.

12. Gilbert, *supra* note 8, at 61; see also discussion *infra* Part III.

13. Patrick J. Wolf et al., *Taking Stock of Private-School Choice*, EDUC. NEXT, Spring 2018, at 46, 47; see also discussion *infra* Part IV.

14. Wolf et al., *supra* note 13, at 47; see also discussion *infra* Part V.

consider alternatives to raising the floor of outcomes in education quality for low-income students.<sup>15</sup>

## II. DEVELOPMENT OF COMPETITIVE EDUCATION POLICY

The development of American education policy is a cocktail of federal, state, and community legislation intermingled with aspects of taxation, economics, and the judiciary.<sup>16</sup> Unlike freedom of speech, gun rights, and other fundamental rights afforded strict Constitutional protection, the right to public education exists beyond the nucleus or penumbra of the text.<sup>17</sup> Instead, the right to public education and the need for its existence comes from public sentiment declaring its necessity.<sup>18</sup> As such, the battle for access and equality in public education has been historically rooted in civil rights.<sup>19</sup>

### A. *From Brown to Rodriguez: The Court's Migration from Progressive to Competition-Based Education Policy*

Like all contests for equality, educational equality has been a hard-fought and hard-won issue.<sup>20</sup> The United States Supreme Court's ruling in *Brown v. Board of Education*<sup>21</sup> signals the role of education in modern American society.<sup>22</sup> In *Brown*, the Court overruled its previous ruling in *Plessy v. Ferguson*<sup>23</sup> and effectively struck Jim Crow era school segregation laws, determining even if segregated schools were in all other respects equal, segregation had too much of a deleterious impact on children for it to be just.<sup>24</sup>

Central to the Court's determination in *Brown* was its outlining of the essential nature and importance of education in modern society.<sup>25</sup> Chief Justice Warren, delivering the opinion of the Court, cited compulsory school

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15. Goyal, *supra* note 3, at 4; *see also* discussion *infra* Part VI.

16. *See* Ostrander, *supra* note 2, at 289–90.

17. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973); Ostrander, *supra* note 2, at 283–84.

18. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

19. *See* Ostrander, *supra* note 2, at 290.

20. *See id.* at 295.

21. 347 U.S. 483 (1954).

22. *See* Ostrander, *supra* note 2, at 273.

23. *Plessy v. Ferguson*, 163 U.S. 537, 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

24. *Brown*, 347 U.S. at 494–95.

25. *Id.* at 493.



attendance laws and society's investment in public education as a "recognition of the importance of education to our democratic society."<sup>26</sup> Further, the Court added education as being "required in the performance of our basic public responsibilities," and "perhaps the most important function of the state and local governments."<sup>27</sup> With respect to the state's responsibilities in education, the Court provided where the state has undertaken the burden of providing public education to its citizens, it is obligated to do so on equal terms.<sup>28</sup>

Since *Brown*, the Court has backed away from a collectivist ideal in public education.<sup>29</sup> In *San Antonio Independent School District v. Rodriguez*,<sup>30</sup> the Court expressly excluded education as a fundamental right, despite agreeing with the opinion in *Brown* about its importance to society.<sup>31</sup> *Rodriguez* involved a Texas state funding system which resulted in extremely disparate funding between high-income and low-income school districts.<sup>32</sup> As a result of the unequal funding system—predominantly a product of property taxes factoring heavily into school funding—the state's lowest-income school district populated by largely minority students saw significantly less funding than the state's most affluent district.<sup>33</sup> The Court ultimately found that state-funded educational quality is not Constitutionally insured as long as students have access to *basic education*.<sup>34</sup>

The Court's rationale in *Rodriguez* was a precursor to market-theory-based school initiatives of today.<sup>35</sup> The Court in *Rodriguez* provided that Texas' school financing scheme promotion of pluralism, or the local sharing of the responsibility, encouraged "experimentation, innovation, and a healthy competition for education excellence."<sup>36</sup> Thus, the Court in *Rodriguez* placed virtues of local control, participation, decentralization, and competition in education policy ahead of the virtues of equality enshrined in *Brown*.<sup>37</sup>

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26. *Id.*

27. *Id.*

28. *Id.*

29. *See Ostrander, supra* note 2, at 283.

30. 411 U.S. 1 (1973).

31. *Id.* at 30, 35.

32. *Id.* at 4–5.

33. *See id.* at 46–47.

34. *Id.* at 2.

35. *Rodriguez*, 411 U.S. at 35; Gilbert, *supra* note 8, at 64; Ostrander, *supra* note 2, at 283.

36. *Rodriguez*, 411 U.S. at 50.

37. *See id.* at 2; Ostrander, *supra* note 2, at 284–85.

## B. *Neoliberalization of American Education Policy*

Since *Rodriguez*, policy-making and political support involving competition in education has reached a fever pitch.<sup>38</sup> And, the expansion of neoliberal ideals in American policy-making has played a strong part in the advancement of competition-based education policy virtues found in *Rodriguez*.<sup>39</sup> Neoliberalism, plainly, is the idea that societal advancement is best achieved not through progressive cooperation, but through freedom, individualism, and competition.<sup>40</sup>

With respect to education, neoliberalism has manifested into federal legislation over the past three presidential administrations.<sup>41</sup> Prompted by a nationwide dissatisfaction with the performance of American schools, the administration of George W. Bush proposed the No Child Left Behind Act in 2001, which was federal legislation to “close the achievement gap with accountability, flexibility, and choice.”<sup>42</sup> Although No Child Left Behind is more readily known for the increase in standardized testing, Title V of The Bill explicitly promoted *parental choice* and the funding of *innovated programs*, such as charter schools.<sup>43</sup>

Similarly, the Obama administration’s *Race to the Top* grant, which provided over \$4 billion for school funding, asked states and school districts to compete by submitting *robust plans* to reform their education systems and, in effect, further endorsed and enabled the proliferation of school choice.<sup>44</sup> Former chief of staff to Obama era Secretary of Education, Arne Duncan, credited the grant for accelerating competition-based education reforms such as public school choice.<sup>45</sup> Among the policies pursued by the winning states were school choice initiatives such as charter schools, which saw quicker growth in states receiving grant money than in those which did not.<sup>46</sup>

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38. Gilbert, *supra* note 8, at 61.

39. *Id.*

40. *Id.* at 62.

41. *Id.* at 63.

42. *Id.*; No Child Left Behind Act of 2001, Pub. L. No. 107–110, § 1, 115 Stat. 1425, 1425 (2002) (codified as amended at 20 U.S.C. § 6301).

43. No Child Left Behind Act of 2001 § 101; *see also* Jason, *supra* note 7, at 28.

44. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111–5, § 5, 123 Stat. 115, 181 (2009) (codified as amended in scattered sections of 16 U.S.C. and 42 U.S.C.); *see also* Gilbert, *supra* note 8, at 63; *Race to the Top*, WHITE HOUSE PRESIDENT BARACK OBAMA, <http://obamawhitehouse.archives.gov/issues/education/k-12/race-to-the-top> (last visited Dec. 21, 2018).

45. Joanne Weiss & Frederick M. Hess, *What Did Race to the Top Accomplish?*, EDUC. NEXT, Fall 2015, at 50, 51.

46. *Id.* at 52.

Most recently, President Donald Trump's 2019 budget proposal allots \$1 billion to spur school choice policies.<sup>47</sup> At the same time, the budget looks to cut over ten billion in funding for programs for low-income parents, Native Americans, arts programs, and other progressive education policies.<sup>48</sup> President Trump's affinity for school choice initiatives is headlined by his administration's appointing of pro-school choice activist Betsy DeVos as Secretary of Education.<sup>49</sup>

Prior to being appointed as Secretary of Education, DeVos had championed school choice initiatives in her home state of Michigan and nationwide.<sup>50</sup> Unlike past efforts of universally raising the floor of education quality across the board, DeVos establishes the party line that a parent's ability to choose where his or her child goes to school, above all, should be prioritized.<sup>51</sup> During her confirmation, DeVos spoke for what she believed was the will of parents, arguing "parents no longer believe that a one-size-fits-all model of learning meets the need of every child."<sup>52</sup>

Public sentiment is also behind school choice policy despite little data showing definitive positive outcomes for students.<sup>53</sup> Neoliberal policy-making, though, finds value not necessarily in outcomes, but achievement of its ideals.<sup>54</sup> Neoliberalism assumes humans are selfish actors and given the opportunity will strive for their own individual benefit.<sup>55</sup> In education, neoliberal policy eschews the collectivist benchmark that all stakeholders—students, families, teachers, administrators, and society at large—can work for a common goal of uniform high-quality education.<sup>56</sup> Instead, neoliberalism advocates for an individualist ideal that if the stakeholders compete against each other—students against students, teachers against

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47. Philissa Cramer, *Report: Trump Education Budget Would Create a Race to the Top for School Choice*, CHALKBEAT (May 17, 2017), <http://www.chalkbeat.org/posts/us/2017/05/17/report-trump-education-budget-would-create-a-race-to-the-top-for-school-choice/>.

48. *Id.*

49. See Jason, *supra* note 7, at 27.

50. Joel R. Malin et al., *Educational Neoliberalization: The Mediatization of Ethical Assertions in the Voucher Debate*, 40 DISCOURSE: STUD. CULTURAL POL. EDUC. 217, 223 (2019); see also Jason, *supra* note 7, at 27–28.

51. Malin et al., *supra* note 50, at 225.

52. *Id.*

53. See Tamara Wilder Linkow, *Disconnected Reform: The Proliferation of School Choice Options in U.S. School Districts*, 5 J. SCH. CHOICE 414, 420, 426 (2011).

54. See Gilbert, *supra* note 8, at 62; Wolf et al., *supra* note 13, at 47, 54.

55. Gilbert, *supra* note 8, at 63.

56. See *id.*

teachers, district against district, and state against state—the entire system will benefit.<sup>57</sup>

### III. DEFINING PRIVATIZED SCHOOL CHOICE PROGRAMS

School choice, broadly, represents several competition-based public and private school initiatives where parents are given a degree of autonomy in selecting where their child attends.<sup>58</sup> In conjunction, school choice initiatives are theoretically meant to improve a myriad of systematic issues, such as racial integration, as well as improve the test scores of those who do and don't participate by fostering competitive values.<sup>59</sup> The focus of this Comment is on the school choice policies which divert funds from traditional public schools, namely: Charter schools and voucher programs.<sup>60</sup>

#### A. *Charter Schools*

Charter schools are public schools, often run by corporations, receiving public funds but are otherwise divorced from school district rules and regulations where they reside.<sup>61</sup> Instead, charter schools are said to benefit students and parents through their institutional autonomy and their direct accountability to families, as opposed to districts.<sup>62</sup> Today, charter schools are represented in forty-three states, educating approximately three million students.<sup>63</sup>

Because students are not assigned to any particular charter school, their public funding and operational authorization is directly correlated to fulfilling their charter—a contract usually consisting of upholding academic, financial, and organizational competence—and maintaining enrollment numbers.<sup>64</sup> Thus, charters face an increased risk of closure as they are not ensured funding or authorization.<sup>65</sup> Since the 2010 school year, the charter school closure rate has hovered between just over six percent to as high as

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57. *See id.* at 64.

58. Linkow, *supra* note 53, at 417.

59. Wolf et al., *supra* note 13, at 50–51.

60. *Id.* at 52; *see also* discussion *infra* Part III.A–B.

61. Ed Grabianowski, *How Charter Schools Work*, HOWSTUFFWORKS: CULTURE, <http://people.howstuffworks.com/charter-school.htm> (last visited Dec. 21, 2019); Linkow, *supra* note 53, at 417.

62. Linkow, *supra* note 53, at 417.

63. Jason, *supra* note 7, at 24.

64. *Id.*; Grabianowski, *supra* note 61.

65. ALISON CONSOLETTI, THE STATE OF CHARTER SCHOOLS: WHAT WE KNOW — AND WHAT WE DO NOT — ABOUT PERFORMANCE AND ACCOUNTABILITY 8 (2011).

nearly thirteen percent.<sup>66</sup> Reasons for closures largely correlate with financial and management issues.<sup>67</sup>

Unlike private schools, which receive their funding primarily from tuition and other non-public means, charters siphon money, both directly and indirectly, from public schools.<sup>68</sup> In charter systems where the *money follows the child*, traditional public schools are directly affected when a child transfers into a charter school.<sup>69</sup> In other systems, charter funds are set aside in the state's budget funds which could have presumably been allotted to traditional public schools in a non-parallel school system.<sup>70</sup>

### B. *School Choice Vouchers*

School choice vouchers are state supplemental grants for families wishing to enroll their children in private schools, or *high performing public schools*.<sup>71</sup> The competitive logic of vouchers is they allow parents increased autonomy to pull their children from underperforming public schools by opening more doors to private school education.<sup>72</sup> Voucher programs are often targeted and acute in their implantation and are typically limited, at least initially, to low-income students and students with disabilities.<sup>73</sup>

Because private schools are not mandated to accept voucher-receiving students, the effectiveness of voucher programs often turns on the regulatory nature of a state's laws.<sup>74</sup> Top-performing private schools often do not participate in voucher programs because of fear of reputation dilution.<sup>75</sup> Instead, voucher-participating private schools are often occupied by religious institutions.<sup>76</sup>

Florida, Indiana, Louisiana, and Ohio are the only states offering statewide voucher programs, and twenty-five states and the District of

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66. *Inside Charter School Closings: Inside Charter School Growth*, NAT'L ASS'N CHARTER SCH. AUTHORIZERS, <http://www.qualitycharters.org/policy-research/inside-charter-school-growth/closings/> (last visited Dec. 21, 2019).

67. CONSOLETTI, *supra* note 65, at 8.

68. *See* Grabianowski, *supra* note 61.

69. Jason, *supra* note 7, at 26.

70. *See* Grabianowski, *supra* note 61.

71. Linkow, *supra* note 53, at 418.

72. Wolf et al., *supra* note 13, at 51. "Stringent regulations appear to dissuade some schools from opting in" to voucher programs. *Id.* at 48.

73. *Id.*

74. *Id.* at 53.

75. *Id.* at 52.

76. Wolf et al., *supra* note 13, at 52.

Columbia offer a more abridged type of voucher program.<sup>77</sup> Partly due to the relative newness of these statewide programs, the differences in their implementation, and the ever-moving target of what determines a program's success, there are no tangible conclusions on the effectiveness of broadly applied voucher programs.<sup>78</sup> But, because school choice programs are rooted in the neoliberal ideal of freedom, the mere fact parents are given more choice is success for choice advocates, regardless of outcomes.<sup>79</sup>

#### IV. SCHOOL CHOICE AND EFFECTS OF LOW-INCOME COMMUNITIES

Because school choice is rooted in neoliberalism and competition-based reform, the system necessarily creates disparities between winners and losers.<sup>80</sup> Thus, a top-down system is created in which the winners compel the losers to improve, or else the losers cease to exist.<sup>81</sup> This system proves ideal in the spectrum of market economics, where producers compete to make the best or most desirable products at competitive costs.<sup>82</sup> Consumers are tasked in making value propositions—weighing costs and benefits—and typically are not faced with the prospect of life-long consequences for his or her choices.<sup>83</sup> However, those on the losing end of education are often further set back when their local traditional public school loses funding, their charter school closes, or they are enrolled in a charter or private school with high teacher turnover or overall lowered academic performance.<sup>84</sup>

##### A. *Consequences of Charter School Choice*

Charter schools around the country are especially targeted toward low-income, urban, and minority students.<sup>85</sup> Because these communities often receive the lowest funding per student, traditional public schools in these communities face similar difficulties to their neighboring charters, but

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77. *Id.* at 47. Florida's voucher program is more accurately described as a "tax-credit-funded scholarship initiative." *Id.*

78. *Id.* at 50.

79. Malin et al., *supra* note 50, at 217–18.

80. Gilbert, *supra* note 8, at 62–63.

81. *See id.* at 63.

82. *See id.* at 62.

83. Malin et al., *supra* note 50, at 228.

84. Jason, *supra* note 7, at 27; Peter Greene, *The Promises Charter Schools Don't Make*, FORBES (Sept. 28, 2019, 11:37 AM), <http://www.forbes.com/sites/petergreene/2018/09/28/the-promises-charter-schools-dont-make>.

85. Jason, *supra* note 7, at 27.

charters increasingly expose students to more institutional instability.<sup>86</sup> The prospect of closures, higher teacher turnover, and the nefarious nature in low performance of charter schools run by for-profit organizations subject students to lower outcomes than traditional public schools.<sup>87</sup>

### 1. Charter School Closures

Instead of diverting public funds to improving low-performing public schools in low-income communities, charters often subject students to an increased range of negative outcomes.<sup>88</sup> Unlike their traditional public-school counterparts, charter schools are mandated to fulfill their charter and enrollment numbers or else face closure—in some cases occurring after two consecutive years of non-compliance with their charter.<sup>89</sup> But charter schools more often fail because of their mismanagement.<sup>90</sup> According to a 2011 report, 65.7% of all charter schools closed either because of either financial problems stemming from low student enrollment or mismanagement issues.<sup>91</sup> And 18.6% of closures were the product of failing to meet academic standards.<sup>92</sup> Mismanagement issues typically were ethical failings, such as dishonest audits and school administration appropriating school funds for personal use.<sup>93</sup>

Unexpected closure of charter schools, unsurprisingly, have a negative effect on students—particularly when schools close in the middle of the year and, in rare cases, in the middle of a school day.<sup>94</sup> The mid-year closure rate has decreased between 2010–2016, from as high as 3.2% to 2.1%, but mid-year school closures are not an issue students might experience while at traditional public schools.<sup>95</sup> Additionally, because mid-year school closures have such a negative effect on students, a school district

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86. See Greene, *supra* note 84.

87. Jason, *supra* note 7, at 27.

88. See *id.* at 26–27.

89. CONSOLETTI, *supra* note 65, at 14; Lloyd Dunkelberger, *Florida Charter School Closures Average 20 Per Year, Report Shows*, SUN SENTINEL (Sept. 18, 2018, 9:55 AM), <http://www.sun-sentinel.com/news/education/fl-ne-charter-schools-report-20180918-story.html>.

90. CONSOLETTI, *supra* note 65, at 8.

91. See *id.*

92. See *id.*

93. *Id.* at 10.

94. Jason, *supra* note 7, at 24.

95. See *Inside Charter Closings: Inside Charter School Growth*, *supra* note

may take it upon itself to take control of the failed charter and finish out the year before formally closing the facility.<sup>96</sup>

Charter advocates argue the mercurial nature of charters allow them to be more accountable to parents and traditional public schools should also face the prospect of closure.<sup>97</sup> But, as stated, charter closures are more often related to financial mismanagement than a failure to meet academic standards.<sup>98</sup> Further, if public schools faced a similar burden, students—particularly those in the lower socioeconomic rungs—would face even more educational uncertainty on top of attending a poorly funded school.<sup>99</sup>

## 2. High Teacher Turnover Rate

Traditional public schools currently face challenges of high teacher turnover, and that problem is exacerbated among charter schools.<sup>100</sup> Turnover at charter schools tends to be a product of two factors.<sup>101</sup> First, charters can subject teachers to longer hours and less pay than traditional public schools due to their aversion to teachers' unions and flexibility in school policies governing work limits.<sup>102</sup> Second, successful charters which franchise will often transfer teachers between facilities.<sup>103</sup>

Students are ultimately at the short end of the stick when it comes to the inability of charters to stifle teacher turnover rate.<sup>104</sup> Among the most important factors determining academic success is both teacher and student engagement.<sup>105</sup> Students having to face constant unfamiliarity in the classroom and hallways will be less engaged.<sup>106</sup> Similarly, teachers who have to work longer hours for sub-par pay will also be less engaged.<sup>107</sup> Although not all charter schools pay teachers a lower rate for more work, the

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96. CONSOLETTI, *supra* note 65, at 10.

97. *Id.* at 5.

98. *Id.* at 8.

99. Greene, *supra* note 84.

100. Jason, *supra* note 7, at 27.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Bruce Beairsto, *Teacher Engagement Is the Key to Student Engagement*, EDUCAN NETWORK (Mar. 3, 2012), <http://www.edcan.ca/articles/teacher-engagement-is-the-key-to-student-engagement/>.

106. *See id.*

107. *Id.*



charter school system provides a lower floor for teacher work quality, which gets passed along to students.<sup>108</sup>

### 3. For-Profit Charters

Both high closure rates and teacher turnover are often products of low-performing charter schools.<sup>109</sup> And, the vast majority of low performing charter schools are run by for-profit corporations—such as the one formerly run by the current Secretary of Education, Betsy DeVos.<sup>110</sup> While advocating charters in Michigan, DeVos helped fund a system which performed no better, and more often worse, than Michigan’s already teetering public school system.<sup>111</sup> Further, Michigan’s charter system is run predominantly by for-profit companies, which are known for placing profiteering over improving education outcomes.<sup>112</sup> Under the performance standard of the No Child Left Behind Act, for-profit charters performed fifteen percentage points lower than their traditional public school counterparts.<sup>113</sup> And, the role of for-profit charters in the charter school system is not insignificant, considering for-profit charters represent fourteen percent of all charter schools nationwide.<sup>114</sup>

### 4. The Argument for Charters

Notwithstanding the harrowing bottom end of the charter school barrel, charters have received much-publicized success.<sup>115</sup> Despite only educating six percent of the nation’s student population, charters occupy approximately a fourth of U.S. News and World Report’s top 100 high schools.<sup>116</sup> In states with stringent charter school laws, ample oversight, and active non-profit charter organizations, charters not only thrive, but work in

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108. See Christopher Redding, *Teacher Turnover Is a Problem — Here’s How to Fix It*, CONVERSATION: EDUC. (Sept. 7, 2018, 6:43 AM), <http://theconversation.com/teacher-turnover-is-a-problem-heres-how-to-fix-it-101584>.

109. See Jason, *supra* note 7, at 27.

110. *Id.* at 27–28.

111. *Id.*

112. *Id.* at 28.

113. *Id.*

114. Jason, *supra* note 7, at 28.

115. See *id.* at 24.

116. *Id.*; see also *Best U.S. High Schools*, U.S. NEWS & WORLD REP., <http://www.usnews.com/education/best-high-schools/search?ranked=true> (last visited Dec. 21, 2019).

harmony with traditional public schools.<sup>117</sup> Successful charters, like any successful school, do not necessarily thrive because of competition, but because they are well-funded, and implement known policies and features facilitating student engagement.<sup>118</sup>

Thus, the argument for charters is less an argument that competitive-based school choice initiatives work, but that well-funded and well-run schools work—regardless of whether the school is a charter, or traditional public school.<sup>119</sup> In 2018, one of the top players in the National Basketball Association and Akron, Ohio, native, LeBron James, opened the *I Promise School* which operates within a troubled school district in his hometown of Akron.<sup>120</sup> The school serves a largely minority population, including a sizeable non-native English speaking and special needs population.<sup>121</sup> Along with the school's two million district funded budget, LeBron James' foundation supplies an additional \$600,000 to support the teaching staff.<sup>122</sup> Further, James' foundation supports parents by supplying adult education programs, along with health and legal services.<sup>123</sup>

Early results have been promising for James' investment.<sup>124</sup> The *I Promise School's* results, as measured by the nationally recognized Measure of Academic Progress assessment, saw exponential growth in academic achievement for the school's third and fourth grade student body.<sup>125</sup> "Ninety percent met or exceeded individual growth goals in reading and math, outpacing their peers across the district."<sup>126</sup> A significant distinction James' school has with other celebrity endeavors in education is the school operates within Ohio's public school district as a traditional public school, and not under the state's charter program.<sup>127</sup>

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117. See Jason, *supra* note 7, at 27–28.

118. See *id.* at 28.

119. See Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC: BUS. (Aug. 25, 2016), <http://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/>.

120. Erica L. Green, *Reigniting Dreams: An N.B.A. Star's School Is Gaining Ground*, N.Y. TIMES, Apr. 13, 2019, at A1.

121. See *id.*

122. *Id.*

123. *Id.*

124. See *id.*

125. Green, *supra* note 120.

126. *Id.*

127. *Id.*

## B. *Consequences of School Choice Vouchers*

Unlike charter school policies, school choice vouchers give parents the option of pulling their children from low-performing public schools and enrolling them into competing private schools.<sup>128</sup> Charters, in theory, are an expansion of public education, while vouchers are an indirect repudiation of it.<sup>129</sup> Also, unlike charter schools, school choice vouchers supply public funds to schools which are not subject to public oversight.<sup>130</sup>

### 1. Vouchers Further Stratify Educational Opportunities

Traditionally, the prospect of attending private schools is reserved for middle and upper-class families.<sup>131</sup> The combination of high tuition, and academic and disciplinary requirements, is regularly a bar on low-income and minority students whose families would like to open the door to high-performing private institutions.<sup>132</sup> Further, “research shows that white or affluent parents often avoid schools that have high concentrations of minority and low-income students.”<sup>133</sup>

Although voucher programs often prohibit participating schools from instituting practices which exclude low-income students with less-than-ideal academic and behavioral records, oversight over such prohibitions is unsatisfactory.<sup>134</sup> Thus, access to the very schools that students seek to leverage vouchers, which voucher laws purport to want to help, are not compelled to help these students.<sup>135</sup> Instead, voucher laws are more concerned with upholding exclusivity and serving their primary stakeholders, which typically are not low-income and minority families.<sup>136</sup>

Within low-income communities, likely only those families who have both the education and means to leverage vouchers will use them at participating schools.<sup>137</sup> Parents of children who are more educated are better equipped to leverage market-based initiatives, like charters and vouchers.<sup>138</sup> Additionally, parents who can’t physically transport their

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128. Wolf et al., *supra* note 13, at 47.

129. Jason, *supra* note 7, at 26.

130. Wolf et al., *supra* note 13, at 52.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Wolf et al., *supra* note 13, at 48, 52.

136. *Id.* at 52.

137. *Id.*

138. *Id.*

children to their chosen private school are inherently excluded from the program.<sup>139</sup> Thus, vouchers are at least partially incompatible with the community which they are intended to help.<sup>140</sup>

## 2. Research Does Not Support the Effectiveness of Vouchers

Earlier this Comment discussed that although low outcomes exist with respect to charter schools, they still did provide a sizeable upside where charter schools were well run and well-funded.<sup>141</sup> Conversely, no such upside exists where school choice vouchers are involved.<sup>142</sup> Rigorous academic studies have found that voucher systems have a negligible-to-negative effect on student achievement in the short and long term.<sup>143</sup> In the District of Columbia and Louisiana, year-to-year results in math showed a precipitous decline—there was as much as a sixteen-percentile rank drop in math for elementary students in Louisiana for students who had switched to a private school under the voucher program.<sup>144</sup> In Ohio, researchers similarly found a sharp decline in math performance.<sup>145</sup>

Voucher proponents will point to other factors besides achievement, such as educational attainment, as a worthwhile component to voucher policy.<sup>146</sup> Educational attainment speaks to a student's future prospect in furthering his or her education.<sup>147</sup> Attainment is often directly correlated with quality of life, such as health and earnings.<sup>148</sup> Studies have found that students participating in voucher programs showed a higher rate of attainment when compared to those not participating.<sup>149</sup> But, as stated in the section above, parents of children participating in voucher programs are also more likely to be more educated, which is inextricably linked to student attainment.<sup>150</sup>

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139. *Id.*

140. Wolf et al., *supra* note 13, at 48, 52.

141. Jason, *supra* note 7, at 24; *see also* discussion *supra* Part IV.

142. *See id.*, at 29; Malin et al., *supra* note 50, at 217.

143. Wolf et al., *supra* note 13, at 53.

144. Malin et al., *supra* note 50, at 219.

145. *Id.*

146. Wolf et al., *supra* note 13, at 49–50.

147. *Id.* at 49.

148. *Id.*

149. *Id.*

150. Ronald Brownstein, *Are College Degrees Inherited?*, NAT'L J., Apr. 12, 2014, at 3.

### 3. The Argument for Vouchers

Along with arguments for student attainment, voucher proponents preach that they improve the performance of neighboring public schools through competition.<sup>151</sup> But, it is more likely that public schools—including charter schools—have simply improved independently of vouchers on their own.<sup>152</sup> Significantly, when voucher participants are compared to charter participants, the latter still shows improvement over the former—signifying that vouchers, simply, are a net negative for their participants.<sup>153</sup>

Apart from any results-based legitimacy, voucher proponents simply argue for the neoliberal values explained earlier in this Comment—that parental choice is both the ends and means of any school choice program.<sup>154</sup> It is undisputed that parents leveraging school choice initiatives like charters and vouchers are more satisfied than those not participating in those programs, but their—particularly low-income parents’—satisfaction is more often correlated with perceived *convenience and safety* than whether their student is achieving academically.<sup>155</sup> Additionally, as stated, vouchers are more readily available to parents with the skills, time, and transportation means to use them.<sup>156</sup>

## V. THE EFFECTS OF STATEWIDE SCHOOL CHOICE IN FLORIDA

The Florida education system hosts five of the nation’s top ten largest school districts.<sup>157</sup> It educates approximately 2.8 million students across its sixty-seven counties.<sup>158</sup> Like many other large education systems, Florida has fully bought into the school choice trend by implanting one of four statewide voucher programs and has instituted one of the nation’s most

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151. Gilbert, *supra* note 8, at 61.

152. See Bill Honig, *Why Conventional School Reforms Have Failed: Charter Schools Are Not the Key to Improving Public Education*, BUILDING BETTER SCHOOLS (April 26, 2016), <http://www.buildingbetterschools.com/charter-schools-are-not-the-key-to-improving-public-education/>.

153. *Id.*

154. Wolf et al., *supra* note 13, at 54.

155. Jason, *supra* note 7, at 27.

156. *Id.*

157. *Top 10 Largest School Districts by Enrollment and Per Pupil Current Spending*, U.S. CENSUS BUREAU (May 21, 2019), <http://www.census.gov/library/visualizations/2019/comm/largest-school-districts.html>.

158. Dunkelberger, *supra* note 89; Emily L. Mahoney, *House Bill to Expand Schools of Hope Program, Adds to Charter School Debate*, MIAMI HERALD (Mar. 20, 2019, 9:25 AM), <http://www.miamiherald.com/news/local/education/article228166494.html>.

robust charter school systems.<sup>159</sup> But Florida’s school choice initiatives have been wrought with many of the tell-tale issues discussed in this Comment.<sup>160</sup>

#### A. *Florida Constitution and Challenges Against School Choice Vouchers*

Unlike the Federal Constitution and judiciary, many states, including Florida, have adopted state constitutional mandates enacting many of the tenets discussed by the Court in *Brown*.<sup>161</sup> In section I of article IX of the Florida Constitution, education is protected on a level congruent with its place in the social fabric: “Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality of education . . . .”<sup>162</sup>

##### 1. *Bush v. Holmes I & II*

Florida’s courts have had a storied history in protecting the State’s public schools from competition-based reforms.<sup>163</sup> In 2004’s *Bush v. Holmes*,<sup>164</sup> the Florida Supreme Court overturned a statewide voucher program providing state funds to *sectarian*, or religious, private schools pursuant to the state constitution’s *no-aid provision*—prohibiting the use of state funds benefitting, directly or indirectly, any sectarian institution.<sup>165</sup> In 2006’s *Bush v. Holmes*,<sup>166</sup> the court again struck down another voucher program, but this time under the aforementioned article IX, section I of the Florida Constitution.<sup>167</sup> Justice Pariente, writing for the majority, wrote that the state constitution barred the transfer of funds “earmarked for public education to private schools.”<sup>168</sup> Significantly, Justice Pariente found that voucher programs inherently undermine the mandate of *high quality* education provided by the constitution:

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159. Wolf et al., *supra* note 13, at 47.

160. See Dunkelberger, *supra* note 89.

161. FLA. CONST. art. IX, § 1; see also *Brown v. Bd. of Educ.*, 347 U.S. at 483, 493 (1954).

162. FLA. CONST. art. IX, § 1.

163. See John Kennedy, *School Choice Expands in Florida with 5th Voucher Program*, GOVERNING: EDUC. (May 13, 2019, 8:15 AM), <http://www.governing.com/topics/education/tns-school-choice-expands-in-florida.html>.

164. 886 So. 2d 340 (Fla. 1st Dist. Ct. App. 2004) (en banc).

165. *Id.* at 366.

166. 919 So. 2d 392 (Fla. 2006).

167. *Id.* at 412–13.

168. *Id.* at 408.

The [voucher program] by its very nature undermines the system of *high quality* free public schools that are the sole authorized means of fulfilling the constitutional mandate to provide the education of all children residing in Florida. The systematic diversion of public funds to private schools on either a small or large scale is incompatible with article IX, section 1(a).<sup>169</sup>

Despite challenges in the judiciary, Florida is one of the biggest players in statewide school choice initiatives.<sup>170</sup> Florida and other states which have constitutional bars on choice voucher programs have found a work-around by diverting funds directly to parents through tax credits or education savings accounts.<sup>171</sup> Today Florida, along with three other states, Indiana, Louisiana, and Ohio, have spearheaded sweeping statewide school choice programs.<sup>172</sup>

## 2. Florida's Neo-Voucher Program

Florida's Tax Credit scholarship program ("FTC") was established in 2001 with the intended goal of helping low-income families gain access to private schools.<sup>173</sup> As it stands, political forces have decidedly turned the FTC from a low-income targeted initiative to targeting decidedly middle-class families.<sup>174</sup> As of the 2016–2017 school year, the FTC allows families not exceeding 260% of the federal poverty level, \$25,750 for a household of four, to qualify for the program.<sup>175</sup> For further context, a family of four grossing six thousand per month qualifies for a program purported to help low-income families gain access to better education and would be squarely considered middle class according to the U.S. Census Bureau.<sup>176</sup>

Despite none of the statewide voucher programs showing any meaningful academic achievement results, the FTC has shown a supposed

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169. *Id.* at 409.

170. Wolf et al., *supra* note 13, at 47.

171. Malin et al., *supra* note 50, at 218.

172. Wolf et al., *supra* note 13, at 47.

173. *Florida Tax Credit Scholarship FAQs*, FLA. DEP'T EDUC., <http://www.fldoe.org/schools/school-choice/k-12-scholarship-programs/ftc/ftc-faqs.shtml> (last visited Dec. 21, 2019).

174. Wolf et al., *supra* note 13, at 51–52.

175. *Florida Tax Credit Scholarship FAQs*, *supra* note 173; Kimberly Amadeo, *What Is Considered Middle Class Income?*, BALANCE (June 18, 2019), <http://www.thebalance.com/definition-of-middle-class-income-4126870>.

176. Amadeo, *supra* note 175; *Florida Tax Credit Scholarship FAQs*, *supra* note 173.

glimmer of hope for school choice advocates.<sup>177</sup> In a non-rigorous study, researchers found that the FTC “had a *statistically significant positive effect* on reading . . . for students close to the program’s . . . eligibility cutoff.<sup>178</sup> However, even without considering the veracity of the research, those students near the cutoff are decidedly not within any definition of low-income.<sup>179</sup>

Further, studies showing the success of the FTC aren’t able to compare the pre and post transfer test scores of participants because the program’s design eludes such evaluation.<sup>180</sup> Lastly, studies that do suggest the FTC’s success in increasing student attainment are further watered down by their lack of scientific rigor.<sup>181</sup>

### 3. Governor DeSantis’ Doubling-Down on Vouchers

Florida Governor Ron DeSantis recently signed bold new voucher legislation, the *Family Empowerment Scholarship*, which diverts \$136 million of public funds to private schools.<sup>182</sup> The bill harkens back to the failed push of former governor Jeb Bush, who was present on the floor as it passed the state senate, and allows state tax dollars to be funneled directly to private schools as opposed to the current tax-credit scheme in place.<sup>183</sup> The legislation is expected to face constitutional challenges, but since *Holmes*, three of the majority opinion’s justices have retired, and Governor DeSantis has appointed three conservative justices, himself.<sup>184</sup>

The new scholarship predictably threatens the sustainability of existing Florida public schools.<sup>185</sup> Despite proponents conservatively suggesting the scholarship will pull a relatively low \$136 million from the state’s \$22.2 billion public education budget, long-term effects of the scholarship range up to \$1 billion in total diverted funds.<sup>186</sup> As a result, the state’s public schools will face increased overcrowding, decreased

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177. See Wolf et al., *supra* note 13, at 53.

178. *Id.* at 48.

179. Amadeo, *supra* note 175.

180. Wolf et al., *supra* note 13, at 53.

181. *Id.*

182. Kennedy, *supra* note 163.

183. Bill Cotterell, *Jeb Bush’s Education Plan Comes Full Circle*, PENSACOLA NEWS J., May 5, 2019, at F8.

184. Kennedy, *supra* note 163.

185. Kevin Robinson, *Union Says School Choice Law Will Hurt Districts: Escambia and Santa Rosa Could Take Combine Hit of \$20 Million*, PENSACOLA NEWS J., May 21, 2019, at A5.

186. Kennedy, *supra* note 163; Robinson, *supra* note 185.



investment in the arts, and crumbling infrastructure and transportation services.<sup>187</sup> Further, the scholarship is even further divorced from assisting low-income families as families of four earning as much as \$77,250, or not exceeding three-hundred percent of the poverty line, are eligible for voucher assistance.<sup>188</sup>

## B. *Florida's Charter Schools*

Along with a robust voucher program, Florida has also instituted a vast network of charter schools.<sup>189</sup> Of Florida's 2.8 million pre-kindergarten through high school students, 284,000 are enrolled in the state's 654 charter schools.<sup>190</sup> Currently, charters are prohibited from opening near a traditional public school in Florida unless the school had received a "D" or "F" grade by the school board for three consecutive years.<sup>191</sup> But a proposed bill expanding Florida's charter school program, named *Schools of Hope*, seeks to liberalize charter schools' access to *opportunity zones*—or economically poor areas.<sup>192</sup>

### 1. Negative Results of Charters Schools in Florida

Despite the Florida legislature's enthusiastic attitude in expanding charter schools, Florida has seen less-than-stellar results in their implementation.<sup>193</sup> Between 2012 and 2017, 160 charter schools failed because of typical reasons related to financial and organizational mismanagement.<sup>194</sup> Further, forty-five percent of Florida's charter schools are run by for-profit organizations despite evidence showing for-profit charters earn the worst results for student achievement.<sup>195</sup> The combination of lax regulation of charters and profiteering from education has caused a failure rate of almost twenty percent a year, costing Florida taxpayers \$70 million.<sup>196</sup>

Charter school proponents in Florida argue—as is the national refrain for charter advocates—that charter schools outperform traditional

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187. Robinson, *supra* note 185.

188. Kennedy, *supra* note 163.

189. Dunkelberger, *supra* note 88.

190. *Id.*

191. Mahoney, *supra* note 158.

192. *Id.*

193. Dunkelberger, *supra* note 89.

194. *Id.*

195. *Id.*; see also Jason, *supra* note 7, at 27–28.

196. Honig, *supra* note 151; see also Dunkelberger, *supra* note 89.

public schools in the high-end range.<sup>197</sup> The latest grade report found that charter schools outperformed traditional public schools sixty-five percent to fifty-five percent where it came to earning an “A” or “B” grade from the school board.<sup>198</sup> Conversely, charter schools outpaced traditional public schools in the low end, where they beat out traditional public schools three percent to one percent where it came to earning “F” grades.<sup>199</sup> Additionally, a general nation-wide study found that where students, instead of schools, are compared, traditional public schools actually outperformed charters.<sup>200</sup>

## 2. Constitutional Challenges against Schools of Hope

Schools of Hope, like Florida’s newly signed voucher law, is set to be reviewed by Florida’s courts based on state constitutional challenges.<sup>201</sup> Florida’s school boards have launched an offensive against Schools of Hope, and argue, in part, that the law violates the Florida Constitution’s provision governing local control of schools.<sup>202</sup> But legal challenges against the law will likely face an uphill battle as the state’s courts have ruled on similar issues of state and local control in previous rulings.<sup>203</sup>

For example, the Florida appellate division has already ruled on a similar operational control matter in *School Board of Palm Beach County v. Florida Charter Education Foundation, Inc.*<sup>204</sup> In *Florida Charter*, the Palm Beach County School Board appealed the constitutionality of Florida’s charter school law, allowing the state board to reverse its denial of a charter school opening in the district.<sup>205</sup> The county school board argued that the charter law’s appeals process allowed the state board to overrule the county’s constitutional power to “operate, control and supervise all free public schools within the school district.”<sup>206</sup> The court found that the Florida Constitution

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197. Dunkelberger, *supra* note 89.

198. *Id.*

199. *Id.*

200. Honig, *supra* note 151.

201. Tom Urban & Jim Saunders, *Appeals Court Weighs 2017 Florida Law That Seeks to Boost Charter Schools*, ORLANDO WEEKLY (June 12, 2019, 2:22 PM), <http://www.orlandoweekly.com/Blogs/archives/2019/06/12/appeals-court-weighs-2017-florida-law-that-seeks-to-boost-charter-schools>.

202. *Id.*

203. *See id.*

204. *Sch. Bd. of Palm Beach Cty. v. Fla. Charter Educ. Found., Inc.*, 213 So. 3d 356, 359 (Fla. 4th Dist. Ct. App. 2017).

205. *Id.* at 361.

206. *Id.* at 359.

gave the state board superior power than the school district to supervise the system of free public education in the state.<sup>207</sup>

The current case challenging Schools of Hope came under review at the First District Court of Appeal.<sup>208</sup> During oral arguments, the panel appeared to question the school board's argument, particularly whether standing existed to challenge the law.<sup>209</sup> Ultimately, the latest constitutional challenge of Florida's charter program will likely be for naught.<sup>210</sup>

## VI. ALTERNATIVES TO COMPETITION-BASED EDUCATION REFORM

Repeat presidential candidate Bernie Sanders has been among the loudest voices against competition-based education policies and has advocated for a more bottom-up and progressive system of reform.<sup>211</sup> Paying homage to former Supreme Court Justice and the petitioner's counsel in *Brown*, Sanders' proposal is aptly named "A Thurgood Marshall Plan for Public Education."<sup>212</sup> The plan calls for an adoption of education as a *public good* rather than a *private commodity* as it has evolved into under school choice.<sup>213</sup>

In effect, the plan seeks to raise the floor of public education by raising teacher salaries, investing in adult education after school and summer programs, making school meals free, and perhaps most significant of all, providing federal investment to reverse the inequalities of funding between low and high-income communities.<sup>214</sup> In effect, Sanders' plan is not dissimilar to what LeBron James' I Promise School in Akron, Ohio sought and in the short-term succeeded in achieving.<sup>215</sup>

Significantly, Sanders' plan specifically provides for a *per-pupil spending floor*.<sup>216</sup> There exists some symmetry between a spending floor per student and voucher and charter school programs allowing funding to follow the student.<sup>217</sup> But, unlike charters and vouchers, Sanders' plan increases the level of the funding to ensure positive results for the pupil instead of

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207. *Id.* at 360.

208. Urban & Saunders, *supra* note 201.

209. *Id.*

210. *Id.*

211. Goyal, *supra* note 3, at 4.

212. *Id.*

213. *Id.*

214. *Id.*

215. Green, *supra* note 120.

216. Goyal, *supra* note 3, at 4.

217. Grabianowski, *supra* note 61.

allowing the funding to move from school to school in hopes the pupil is benefitted.<sup>218</sup>

Despite the mercurial nature of charters and vouchers, the former has unquestionably offered positive results for many low-income and minority students and even school choice opponents are hesitant to call for an outright ban on charter schools.<sup>219</sup> In states with sma conservative implementation of charters to ensure proper oversight, accountable authorizers of charters, and charters run by non-profit organizations, charter schools can thrive and benefit students alongside traditional public schools.<sup>220</sup> But, like the I Promise School, effective public schools serving low-income and minority students are not exclusive to the charter system and instead are a result of proper funding and implementation.<sup>221</sup> While the Department of Education has funneled over \$4 billion into charter schools—hundreds of millions of that money into failed charters—the formula for effectively serving low-income and minority students has already been proven.<sup>222</sup> Schools funded according to the needs of its community rather than property values or student achievement are better fit to ensure the Court’s mandate in *Brown*—that every student have a quality and equal education.<sup>223</sup>

## VII. CONCLUSION

The start of reversing the lowering floor of public education is not through competition, but through the acceptance that every child has the right to a quality education.<sup>224</sup> It has been established that low-income students face more problems with respect to teacher turnover, segregation, safety, and other detractors that take away from their engagement.<sup>225</sup> While competition has provided a wider range of outcomes for low-income students, it does not provide them with the security of a quality education.<sup>226</sup> Both charter schools and school choice vouchers offer net negative effects to low-income student populations, despite the former offering a handful of high performing schools.<sup>227</sup>

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218. Goyal, *supra* note 3, at 4.

219. *See id.* at 8.

220. *See* CONSOLETTI, *supra* note 65, at 15; Jason, *supra* note 7, at 24.

221. Green, *supra* note 120.

222. Goyal, *supra* note 3, at 8.

223. *See* Olander, *supra* note 2, at 272–73.

224. *Id.* at 271.

225. *See id.*

226. Jason, *supra* note 7, at 27.

227. Gilbert, *supra* note 8, at 64; Jason, *supra* note 7, at 27.

Instead, public policy should favor a view on education closer to Chief Justice Warren's view in *Brown* and acknowledge that schools are too interwoven into the fabric of modern society to allow the range of negative outcomes to be so perilous as they've become.<sup>228</sup> Considering the staggering popularity of school choice initiatives among parents and political proponents spanning both sides of the aisle, competition-based reform will be a hard habit for the United States to kick.<sup>229</sup> But, as school choice initiatives mature and research studies continue to show the negligible and negative effects of school choice programs on low-income students, public support for plans like Bernie Sanders' "A Thurgood Marshall Plan for Public Education" will likely gain more traction in the public sphere.<sup>230</sup>

As a despondent Amory Blaine exclaimed in the closing pages of *This Side of Paradise*, "[r]eform won't catch up to the needs of civilization unless it's made to. A laissez-faire policy is like spoiling a child by saying he'll turn out all right in the end."<sup>231</sup> Leaving education to the devices of neoliberal policy is too much a price to pay for those toiling at the bottom.<sup>232</sup>

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228. See Ostrander, *supra* note 2, at 273.

229. See Gilbert, *supra* note 8, at 64.

230. Goyal, *supra* note 3, at 4.

231. FITZGERALD, *supra* note 1, at 256.

232. See Wolf et al., *supra* note 13, at 54.









# NON-MAJORITY REVENUE SOURCES IN THE 2010s