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AN ORAL HISTORY

CHARLENE L. SMITH, EILEEN SMITH-CAVROS, ANA ALVAREZ*

I. INTRODUCTION

Individual identity is a key concept in legal classifications. However, the concept of identity has an identity crisis of sorts. Some theorists embrace identity—feminist theorists—and other groups eschew it—queer theorists. Identity inhabits realms beyond the theoretical—its spectrum continues all the way to the individual. Identity can be construed as biological, personal, public, legal, political, historical, and fluid among many other sometimes complementary, but often conflicting classifications. Therefore, identities are more complex than mere singular categories. Kimberle Crenshaw was the first to specifically discuss the ideas of intersectionality and identity in a discussion of violence against women, noting, “experiences of women of color are frequently the product of
intersecting patterns of racism and sexism, and how these experiences tend not to be represented within the discourses of either feminism or antiracism."\(^1\)

Adding to Crenshaw’s observations about intersectionality, Patricia Hill Collins noted that:

> Gender, sexuality, race, and class hierarchies all require a favorable political climate. While U.S. nation-state policies regarding marriage and family reflect dominant moral codes, they also regulate property relations. Assumptions about marriage and, by implication, desired family forms remain supported by governmental policy, corporate policies, and the legal system. For example, denying slaves legal marriages, forbidding interracial marriages, using marital status to determine taxation policies and social welfare state entitlements, and refusing legal marriage to sexually stigmatized individuals all reflect nation-state interest in regulating an allegedly natural institution.\(^2\)

The study of intersectionality has continued to pose questions not only on how sex and race might interact, but also on how the following intersect: Social class, ethnicity, religion, age, sexual orientation, and multiple other ascribed or assigned statuses, characteristics, roles, and groups into which society and individuals are assigned or assign themselves. A

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female lawyer might have an experience different from a lesbian lawyer, or different from a gay male lawyer, or different from an African-American lesbian lawyer; a woman who is perceived as a lesbian lawyer might self-describe differently if asked her own identity. As a result, we chose to take an oral history approach to this project with the belief that although all interviewees shared the characteristics of being lesbians who were also lawyers, each woman’s unique circumstances shaped who she was, how she saw herself, and how she interacted with the law. Thus, each woman defined herself in terms of identity. This project also considered how the legal system, the workings within it, and the concept of justice itself might

3. See Interview with Lilas Ayandeh, Attorney at Law, The Law Office of Lilas Ayandeh, P.A., in Fort Lauderdale, Fla., 3 (June 27, 2012) (on file with Nova Southeastern University, Shepard Broad Law Center Library); Interview with Jennifer Travieso, Attorney at Law, Ins. Law Advocates, in Fort Lauderdale, Fla., 1 (June 28, 2012) (on file with Nova Southeastern University, Shepard Broad Law Center Library).

4. See Interview with Lilas Ayandeh, supra note 3, at 3; Interview with Robin L. Bodiford, Attorney at Law, Law Offices of Robin L. Bodiford, P.A., in Fort Lauderdale, Fla., 1–2 (July 17, 2012) [hereinafter Interview with Robin L. Bodiford (July 17, 2012)] (on file with Nova Southeastern University, Shepard Broad Law Center Library); Interview with Robin L. Bodiford, Attorney at Law, Law Offices of Robin L. Bodiford, P.A., in Fort Lauderdale, Fla., 1 (Aug. 3, 2012) [hereinafter Interview with Robin L. Bodiford (Aug. 3, 2012)] (on file with Nova Southeastern University, Shepard Broad Law Center Library); Interview with Seril L. Grossfeld, Attorney at Law, Seril L. Grossfeld Attorney at Law, P.A., in Fort Lauderdale, Fla., 1–2 (June 29, 2012) (on file with Nova Southeastern University, Shepard Broad Law Center Library); Interview with Linda F. Harrison, Assoc. Dean, Critical Skills Program & Assoc. Professor of Law, Nova Se. Univ., Shepard Broad Law Ctr., & Phyllis D. Kotey, Dir. of Cnty. Externship Programs & Clinical Assoc. Professor of Law, Fla. Int’l Univ. Coll. of Law, in Fort Lauderdale, Fla., 1 (Aug. 1, 2012) (on file with Nova Southeastern University, Shepard Broad Law Center Library); Interview with Lea P. Krauss, Attorney at Law, Lea P. Krauss Esquire, P.A., in Fort Lauderdale, Fla., 1 (July 17, 2012) (on file with Nova Southeastern University, Shepard Broad Law Center Library); Interview with Michelle M. Parker, Attorney at Law, Parker Law Firm, in Fort Lauderdale, Fla., 1 (June 30, 2012) (on file with Nova Southeastern University, Shepard Broad Law Center Library); Interview with Monica I. Salis, Attorney at Law, Monica I. Salis, P.A., in Fort Lauderdale, Fla., 1 (July 9, 2012) (on file with Nova Southeastern University, Shepard Broad Law Center Library); Interview with Jennifer Travieso, supra note 3, at 1. In 2012, the authors interviewed nine lesbian lawyers who practice in South Florida. These nine responded to an announcement about the oral history project on the Gay & Lesbian Legal Network (“GLLN”), which was sent to all members. Each of the lesbian lawyers granted an interview with the authors, which was videotaped, and is currently available on the Shepard Broad Law Center’s Library and Technology website at: http://nsulaw.nova.edu/library/. Videos were transcribed and those transcriptions are currently part of the Harris L. Kimball Memorial Digital Archive of Lesbian, Gay, Bisexual, Transgender, and Queer Florida Legal Oral History. The web link is: http://nsulaw.nova.edu/library/kimballarchive/. Each one of the participants granted the interviewers permission to use information from the interview. This article is a product of those interviews.

5. E.g., Interview with Lea P. Krauss, supra note 4, at 1.
interact with the lesbian status shared by all interviewees and the understanding that being a lesbian and being a lawyer might mean very different things to each woman. We wanted to examine differences between the women’s narratives as well as similarities that arose.

It is important to note that the group of lesbian lawyers we interviewed was accomplished through a snowball sample of women who were practicing law, teaching law, or had practiced law in South Florida. We acknowledge clearly that this was not a random sample and that South Florida—especially Broward County—is a unique place within the United States given its diverse population and international qualities. In addition—as noted in a National Public Radio (“NPR”) report on the 2010 Census—Florida recorded the second largest number of same-sex couples in the United States, in spite of having a “constitutional amendment[,] restricting marriage to a man and a woman.” With regard to the project, it does not completely include a full spectrum of minority lawyers—for example, no Hispanic-American lesbian lawyers or Asian-American lesbian lawyers were included in the study. This was not by design, but because none were reached through the snowball sample—an obvious limitation we were unable to address.

In relation to the lesbian lawyers, Newman notes that belonging to “advantaged . . . sexuality-based groups can serve as cultural capital . . . as

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6. E.g., Interview with Jennifer Travieso, supra note 3, at 17.
7. See infra Part II–III.
9. Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 1; Interview with Jennifer Travieso, supra note 3, at 1.
12. But see Interview with Lilas Ayandeh, supra note 3, at 19; Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 1.
13. See Survey Sampling Methods, supra note 8. However, the study did include Jewish, Persian, Catholic, Protestant, African-American and Caucasian participants. See infra Part III.
illustrated by the historical preference for white, male, heterosexual employees over women, people of color, and homosexual or transgendered individuals.14 If cultural capital “can determine a person’s social opportunities,” it follows then that in a society that is heterosexist, an identity other than heterosexual might be viewed as a liability in terms of cultural capital.15 If so, can it also have an effect on what we might call legal capital or opportunities within the legal system—from perspectives of career or client, of success or of justice?16

II. COMING OUT STORIES

Calhoun notes that the identities of lesbians (and gays) are usually considered from standpoints of sexuality.17 Her argument, however, is that lesbian identity is “best described as an identity that breaks heterosexual law.”18 While the authors of this paper do not ascribe to that as the single best description, there is within Calhoun’s claim an inherent and important truth.19 The identities of lesbian lawyers, their clients, and the greater lesbian community are closely intertwined with the law and legal decisions that affect them, directly or indirectly, or shape the way that society views lesbians and the way lesbians view society and the law.20 Thus, how lesbian lawyers see their own identities and those of their clients connects to how they identify the nature of law and justice as well as how they interact with the legal system.21

Some things have indeed changed in the twenty-first century for lesbian lawyers in terms of identity; other things have not.22 One area that remains challenging is the declaration and/or negotiation of identity.23 Some of the interviewees did not come out as lesbians until after graduating from law school or later.24 Several delayed coming out for family concerns.25

15. Id.
16. See id.
18. Id. at 1860.
19. See id.
20. E.g., Interview with Jennifer Travieso, supra note 3, at 8–11.
21. See, e.g., id.
23. Id.
24. E.g., Interview with Lilas Ayandeh, supra note 3, at 1. But see Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 5–6.
Some lesbians married men and lived contrasting public and private lives.26 Some had children, while others were never interested in children.27 Most interviewees minimized their coming out stories as they retold them to us initially. However, as they further described events and family relationships in relation to coming out, most had some degree of trauma associated with coming out.28 This ranged from angst over deciding if, when, and how to come out, to strains on relations with some family members, some of which were or are not completely resolved by coming out.29 This declaration of identity and its consequences in a heterosexist and homophobic society can be an ongoing source of personal stress and difficulty that heterosexual lawyers never face.30

A. Are Lesbian and Gay Male Issues Different?

A few of the interviewees discussed their coming out as especially difficult because they were lesbian and not gay men.31 For example, one noted that, in spite of holding progressive political beliefs, her father was accepting of her gay brother, but not of her being a lesbian.32 However, another interviewee felt that gay men actually had more challenges than lesbians, commenting: “I do think that many gay men find much more harsh discrimination and are treated differently than lesbian women.”33 Additionally, an interviewee noted that gay men she worked with on committees did not want to hear about feminism;34 however, another interviewee remarked that when men found out she was a lesbian, they treated her as one of the guys.35 A few interviewees noted that being a woman presented many challenges in itself; even before the challenges that

25. E.g., Interview with Lilas Ayandeh, supra note 3, at 1.
26. Interview with Robin L. Bodiford, (July 17, 2012), supra note 4, at 8; Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 2–3; Interview with Monica I. Salis, supra note 4, at 2–3.
27. Compare Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 1–3, with Interview with Seril L. Grossfeld, supra note 4, at 10.
28. See Interview with Lilas Ayandeh, supra note 3, at 18–19; Interview with Seril L. Grossfeld, supra note 4, at 10.
29. E.g., Interview with Lilas Ayandeh, supra note 3, at 19.
30. E.g., Interview with Jennifer Travieso, supra note 3, at 10–13.
32. Id.
33. Interview with Lea P. Krauss, supra note 4, at 2.
35. Interview with Lilas Ayandeh, supra note 3, at 9.
lesbianism might present. In general, however, there was a sense among most participants of shared issues between lesbians and gay men. Further, several of the interviewees represented multiple gay male clients, and a few described their legal victories for gay male clients as their proudest career moments.

### B. Queer Theory/Feminist Jurisprudence: Relationship to Identity

One of the questions we wanted to consider was if the lesbian lawyers were influenced by any theoretical perspective that focused on either being a lesbian, a woman, or combinations of various approaches. For example, in the 1980s, Adrienne Rich observed that the framework of feminist jurisprudence was one where lesbians were perceived as either “abhorrent, or simply rendered invisible.” Rich was interested in why heterosexual feminists “crushed, invalidated, forced into hiding and disguise[d]” women who loved other women, and why feminist scholarship totally neglected the lesbian existence. Rich’s conclusion was that the “lesbian existence is potentially liberating for all women.” Further, Rich observed that there was a difference “between lesbian existence and the lesbian continuum.” Her observation was that lesbians generally led or lead double lives in order to fit into the heterosexual normative, where women are second-class citizens.

Fourteen years later, Elvia R. Arriola noted that she perceived “the law as a powerful instrument for cultural transformation.” Arriola was “call[ing] for [a] new perspective[] in discrimination analysis.” She notes,
as did Rich more than a decade before, that the feminist and other legal scholars failed to develop “adequate models of analysis in support of gay and lesbian victims of discrimination.” 46 Also, part of her article is openly critical of lesbian legal theory because it too “perpetuates the problematic idea that lesbian invisibility should be remedied by simply carving out theories around singular traits by which a person might self-identify.” 47 In her view, if lesbian legal theory embraces categorization into a single trait, it flounders because it fails to “capture a person’s full identity . . . to advance a meaningful principle of equality.” 48 The legal theory that follows the idea of a single trait results in group-based equality. 49 Arriola concludes that the courts instead should be looking at the total person, which might include “gender, sexuality, race, class, age, and ethnicity. Each trait is important to one’s moral worth, yet none provides justification for the denial of equal rights under the law.” 50

Traditionally, the law has been hostile toward lesbians. 51 Under anti-sodomy laws, claiming the identity itself of lesbian—and acting on that identity—was deemed illegal. 52 Even after lesbianism itself was no longer considered against the law, lesbians received unsatisfactory protection under the law from the perspectives of feminist and lesbian scholars. 53 Professor Nancy Polikoff noted in 1986, in relation to child custody disputes involving lesbian mothers, “[t]he courtroom is no place in which to affirm our pride in our lesbian sexuality, or to advocate alternative child-rearing designed to produce strong, independent women.” 54

Several decades later, how do lesbian lawyers view related issues? This will raise questions about how and if contemporary lesbian identities influence the law, and if and how law may influence lesbian identities. For example, do the interviewed lesbian lawyers believe the law treats lesbians and gays in a just manner? Why do they believe what they do, and does it affect their interpretation of law, their practice of it, their relationships with juries and opposing counsel, their political beliefs, and their day-to-day lives? However, examining the interviewees only in relation to the law is not

46. Id.; see also Rich, supra note 39, at 632–33.
47. Arriola, supra note 44, at 107.
48. Id.
49. See id at 106.
50. Id. at 143.
51. See Fla. Stat. §§ 798.02, 800.02 (2013).
52. See id.
54. Id.
enough.55 Related identity issues like generational, heritage, and family issues—when women came out, the decade in which they became lawyers and practiced law, and how their own families reacted—as well as other identities claimed by the interviewees like racial or ethnic identities, to cite just a few examples, are also likely to interact with their self and professional identities, and perhaps impact at least some of their choices.56

The theories would seem significant to lesbian lawyers.57 However, when the interviewees were asked about feminist jurisprudence, many responded that they knew very little about it.58 Regardless of not connecting feminist jurisprudence with being a feminist, most considered themselves to be feminists.59 For instance, Monica Salis believes that “if you stand up for women’s rights, [you are also] . . . standing up for lesbian rights.”60 Many of those we interviewed said the legal system gave them a chance to change the way in which people were treated.61 Monica said it was her observation that if you encountered a bigoted father with a daughter, then you argued: Would you want your daughter treated that way?62 She considered it her job to make sure that the courts were fair.63 Since there is “bias everywhere . . . [in] every case, [her] job is to make a perfect record.”64

While the lesbian lawyers may not have had a jurisprudential theory that they identified with, they reported stories of judges who would

55. See Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 20; Interview with Lea P. Krauss, supra note 4, at 4–5; Interview with Monica I. Salis, supra note 4, at 20–21.
56. Interview with Lilas Ayandeh, supra note 3, at 19; Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 4–5; Interview with Lea P. Krauss, supra note 4, at 4, at 6–7.
57. See Interview with Michelle M. Parker, supra note 4, at 1; Interview with Monica I. Salis, supra note 4, at 4.
58. E.g., Interview with Lilas Ayandeh, supra note 3, at 3. For instance, Lilas Ayandeh said that she would not do anything to promote feminism, but she was “pro-women, doing things and would . . . vote for Hilary Clinton.” Id. Michelle Parker viewed feminism as fighting discrimination. Interview with Michelle M. Parker, supra note 4, at 1. She wants to be treated the same as men. Id. Jennifer Travieso said she was probably more of a feminist while in college, but did not have time when in law school. Interview with Jennifer Travieso, supra note 3, at 1.
59. Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 17–18; Interview with Michelle M. Parker, supra note 4, at 1; Interview with Monica I. Salis, supra note 4, at 1; Interview with Jennifer Travieso, supra note 3, at 1.
60. Interview with Monica I. Salis, supra note 4, at 1.
61. E.g., id.
62. Id.
63. Id. at 9.
64. Id. (“call[ing] judges on their bad calls [and] proffer[ing] into the record” all that is needed to clarify the record).
constantly refer to the male lawyers as counsel, while the women lawyers would be referred to as miss.\textsuperscript{65} In fact, Lilas Ayandeh said that her female suitmate lawyer-friend got into an argument with a judge who kept calling her miss, and she said, “stop calling me miss, [I am] a lawyer too.”\textsuperscript{66} And the judge responded that he did not know what she was talking about.\textsuperscript{67} Lilas observed that maybe the judge was pompous, or he just did not know what her suitmate was talking about because the law is so geared toward men.\textsuperscript{68} Thus, while the principles of feminist jurisprudence may not have been known specifically, those interviewed certainly had first-hand experiences with the law and the effects of the law being sexist.\textsuperscript{69} Seril Grossfeld, for example, mentioned a case involving a divorce proceeding in which the judge said that “he [did not] think it was right . . . to throw a man out of his house.”\textsuperscript{70}

There were those who described themselves as activists, such as Lea Krauss.\textsuperscript{71} However, when asked if she considered herself a lesbian separatist, she said she did not do things to the extreme.\textsuperscript{72} Lea equated being a lesbian separatist activist with making judgments that might interfere with her desire to be accepting.\textsuperscript{73} Lea also said how a lesbian was treated was related to the way she looked.\textsuperscript{74} If a lesbian blended into society, then she would be treated the same as heterosexual women.\textsuperscript{75}

\textbf{III. HOW DID INTERVIEWEES SELF-IDENTIFY?}

Nearly all of our interviewees used the word lesbian as one of the first words with which they identified themselves.\textsuperscript{76} Robin Bodiford explained her choice of lesbian as a primary identifying word.\textsuperscript{77} She stated:

\begin{itemize}
\item[65.] Interview with Lilas Ayandeh, supra note 3, at 11.
\item[66.] Id. (emphasis added).
\item[67.] Id.
\item[68.] Id.
\item[69.] See, e.g., Interview with Seril L. Grossfeld, supra note 4, at 7–8.
\item[70.] Id. (emphasis added).
\item[71.] Interview with Lea P. Krauss, supra note 4, at 2. Lea is the current president of GLLN, the Gay and Lesbian Lawyers Network, which is active in Broward County. Id. at 9.
\item[72.] Id. at 2.
\item[73.] Id. She also observed that women were “still struggling to get equal pay.”
\item[74.] Interview with Lea P. Krauss, supra note 4, at 2.
\item[75.] Id.
\item[76.] Interview with Robin L. Bodiford (July 17, 2012), supra note 4, at 1; Interview with Linda F. Harrison & Phyllis D. Kote, supra note 4, at 1; Interview with Monica I. Salis, supra note 4, at 1; Interview with Jennifer Travieso, supra note 3, at 1.
\end{itemize}
I [am] a lesbian. . . . Because basically once you decide that you
[are] a lesbian, it pretty much defines your life. You wake up
every day and you [are] a lesbian and you have to deal with it and.
. . . [i]t does [not] go away. . . . You never get to forget about it
unless you may be, you know, absorbed in a book or a movie or .
. . something like that, but other than that, . . . it never goes away.78

Most interviewees also mentioned several other identifying words
together; from woman to mother to daughter to attorney or lawyer—used by
most interviewees—to black, rather than a single identity.79 This is
exemplified by Linda Harrison, who described herself as “[f]emale first,
African American second, lesbian third, and mother on top of all those.”80
Lea Krauss said, “I would say I identify as a gay woman, as an attorney, as a
friend, a cousin. I [am] pretty family and friend oriented.”81

Several expressed discomfort at the general idea of categorizing
identities.82 Michelle Parker, for example, commented, “I tell other people
to not put themselves [in] a category to limit themselves. I do limit [my]self, I
consider myself a lesbian but I know that [is] kind of hypocritical . . . that I
tell other people to not limit themselves or to categorize themselves but then
I do [it] myself . . . .”83 Only one interviewee volunteered the term feminist
when we asked if the interviewees considered themselves feminists.84
Interestingly, most were somewhat hesitant to fully qualify themselves as
feminists for various reasons.85 A few equated feminism with activism, and
were not activists, therefore reluctant to call themselves feminists.86 For
example, Jennifer Travieso explained, “I [am] a lesbian. I would qualify
myself as a feminist. . . . I think in college I was definitely a feminist. I think
now I [am] maybe not as strong or as active in—under the title of feminist as

77. Interview with Robin L. Bodiford (July 17, 2012), supra note 4, at 1.
78. Id.
79. Interview with Linda F. Harrison & Phyllis D. Kotev, supra note 4, at 1;
    Interview with Lea P. Krauss, supra note 4, at 1; Interview with Monica I. Salis, supra note 4,
    at 1.
80. Interview with Linda F. Harrison & Phyllis D. Kotev, supra note 4, at 1.
81. Interview with Lea P. Krauss, supra note 4, at 1.
82. E.g., Interview with Linda F. Harrison & Phyllis D. Kotev, supra note 4, at 1.
83. Interview with Michelle M. Parker, supra note 4, at 1.
84. Id.
85. E.g., Interview with Linda F. Harrison & Phyllis D. Kotev, supra note 4,
    at 17–18.
86. E.g., Interview with Jennifer Travieso, supra note 3, at 1.
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I used to be.” 87 Several others clarified areas where they felt like they differed from some feminist thinking. 88 Phyllis Kotey noted:

The only reason I [am] bothered by [the feminist label] is I [am] bothered by the phrase and all the baggage that it brings with it. But for me, even with all of the baggage that it brings to bear, I still must say that I believe that in issues with gender, issues of race, that we have to be advocates and make sure that people are treated fairly. And that [is] what I see being, you know, a feminist [is] all about. It [is] not about whether I wear makeup or not, or whether I shave my legs or not, no more than being black is all about whether I raise my black power fist.

But I certainly think that it [is] important that I am always sensitive to issues of gender and I always try to be. And when I—people tell me, oh, it does [not] matter. I [am] like, well, if it did [not] matter, then we would have more women in place—in positions of power. 89

Most of our interviewees were white and did not mention race or ethnicity in terms of their identities. 90 Two of our interviewees were African-American, one was Persian-American/Iranian-American, and three were Jewish. 91 These interviewees all discussed ways in which race or ethnicity impacted their identities and/or legal careers. 92 Both African American interviewees mentioned the critical importance of class within the legal system and one discussed being the recipient of racial bias in the courtroom in the 1990s. 93 Linda Harrison explained that when she was a prosecutor, “[t]he judge wanted someone else appointed to try the case” because he was just concerned about keeping his record intact of never

87. Id.
88. E.g., Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 17–18.
89. Id.
90. See, e.g., Interview with Robin L. Bodiford (July 17, 2012), supra note 4, at 1.
91. Interview with Lilas Ayandeh, supra note 3, at 1; Interview with Seril L. Grossfeld, supra note 4, at 5; Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 1; Interview with Lea P. Krauss, supra note 4, at 14; Interview with Monica I. Salis, supra note 4, at 13.
92. Interview with Lilas Ayandeh, supra note 3, at 1–2; Interview with Seril L. Grossfeld, supra note 4, at 5; Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 4–5; Interview with Lea P. Krauss, supra note 4, at 14; Interview with Monica I. Salis, supra note 4, at 13–14.
having a black person prosecute a case in his court. Seril Grossfeld described looking for a first job after law school:

[T]he first job was difficult because I was a Jewish woman from New York in Northern Florida looking for a job. So there was [not] much opportunity and I usually got appointments for interviews . . . they could [not] tell from my name, and when I walked in, they said, “Oh, we just filled the job.”

Persian-American interviewee Lilas Ayandeh discussed the challenges of revealing and maintaining her identity within her ethnic community and family:

[T]he [Persian] culture is so strong and rich . . . and even in Iran you hear the president say we do [not] have gay people. I mean that [is] ridiculous, what [do] you mean you do [not] have gay people, of course you do; but it [is] not something that [is] accepted . . . there is [sic] jokes about gay people from back in the day, so it [is] something that [is] just engrained in the culture that it [is] not real and the people that are there look at that as lower than dirt kind of thing. So yes it was definitely hard to come out to them [family]—they are accepting now.

A. Law School Experience

The law school experience for a lesbian can be traumatic and/or enlightening. She can be tolerated but ignored, or validated as someone bringing insight into the law. Sometimes, all of these approaches are her experience. To illustrate the traumatic, it has not been uncommon for lesbian, gay, bisexual, transgender, and intersex (“LGBTI”) bulletin boards to be vandalized.

94. Id. at 25.
95. Interview with Seril L. Grossfeld, supra note 4, at 5.
96. Interview with Lilas Ayandeh, supra note 3, at 19–20.
98. Id.
99. See id.
100. Id. at 568. The University of Michigan Gay, Lesbian, and Bisexual group was forced to put Plexiglas over its bulletin board. Id. at 568 n.73. In 1988, Lynn Miller, a contributing editor to the Student Lawyer, noted that when she asked a lesbian who was Chair of the Lesbian, Gay, and Bisexual Caucus about being out, her response was that “students do [not] want to be isolated—or harassed.” Lynn Miller, The Legal Closet, 16 STUDENT LAW., Feb. 1988, at 12, 14. Further, the lesbian leader noted that at the University of Oregon Law
Recently, the atmosphere in most law schools is one of toleration. However, even by 1994, any classroom discussion that focused on LGBTI issues was frequently confined to the legal arguments, according to Scott Ihrig, who studied the issue as a student at the University of Minnesota.

Rarely were the facts of such cases discussed. The impact was to silence the voice of the LGBTI community. For instance, Ihrig observed that any time sexual orientation was the legal question of the constitutional law case being discussed in class, if he volunteered observations, he was told by his professor to “‘divorce your personal politics from your constitutional law.’”

For lesbians, the problem is compounded. Lesbian sexuality is almost totally absent in any discussion, based on court cases. Ruthann Robson also noted that in her experience as a law professor—even if such discussion took place—it was not uncommon for the lesbian students to censor their comments and never make them personal. Of course, there are exceptions. For instance, Monica Salis, who went to the University of Miami Law School in the late 1970s, said she took classes related to discrimination and she always tried to turn the focus to gay rights. Monica also observed that she was perceived to be very outspoken. For a variety of reasons, many of those interviewed were not out while in law school. As has been noted, many of the interviewed lesbian attorneys waited until

School, some “‘students were getting hate mail.’” Id. The Dean did respond by sending a message to the entire student body that such mail was unacceptable. Id.

101. Ihrig, supra note 97, at 566.
102. See id. at 555, 557–58.
103. Id. at 572. Monica Salis noted that in no class that she took at the University of Miami Law School in the late 1970s, was there any discussion of sexual orientation, not even when Bowers v. Hardwick was assigned. Interview with Monica I. Salis, supra note 4, at 4.
104. Ihrig, supra note 97, at 566.
105. Id. at 558.
106. See RUTHANN ROBSON, SAPPHO GOES TO LAW SCHOOL 221 (1998).
107. Id.
108. Id. It was noted by a law student in the Student Lawyer (1988), “[t]here are times in class when I want to bring up gay-related issues, but I can’t raise my hand, because I know [that] everyone in the class will immediately wheel around in their chairs to see who said that.” Miller, supra note 100, at 14.
109. See Interview with Monica I. Salis, supra note 4, at 4.
110. Id. at 2, 4.
111. Id. at 4. Monica admits that even her high school transcript said that she had forced the closure of the school due to demonstrations, which she orchestrated. Id.
112. See Interview with Lilas Ayandeh, supra note 3, at 1; Interview with Seril L. Grossfeld, supra note 4, at 3; Interview with Lea P. Krauss, supra note 4, at 8.
after graduating from law school to make their identity known. Further, their recollections were that sexual orientation was not discussed in the law classes. Even in those law classes where the expectation that a discussion might take place—such as Constitutional Law, Family Law, or Wills and Trusts—they did not remember any mention of sexual orientation issues. Lea Krauss validates what the studies have shown. Lea graduated in 1999 and she does not recall any classes where sexual orientation was the focus of the legal discussion.

There were exceptions to being silent. Michelle Parker, who graduated in 2011, recalls that sexual orientation issues were talked about openly in some of her law classes. Perhaps this might be related to the fact that the law school had many openly gay and lesbian law professors and even a dean. Michelle observed that the professors knew she was a lesbian, and in her classes she felt that the professors explained things in more detail that were related to sexual orientation issues. On the other hand, Seril Grossfeld—who attended law school in the 1970s—says that there were no open LGBTI law professors. In fact, Seril noted that there were very few

113. See Interview with Lilas Ayandeh, supra note 3, at 1, 4; Interview with Seril L. Grossfeld, supra note 4, at 3–4; Interview with Lea P. Krauss, supra note 4, at 4, 6, 8.
114. Interview with Robin L. Bodiford (July 17, 2012), supra note 4, at 11; Interview with Seril L. Grossfeld, supra note 4, at 5; Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 7; Interview with Lea P. Krauss, supra note 4, at 8; Interview with Monica I. Salis, supra note 4, at 4.
115. Interview with Robin L. Bodiford (July 17, 2012), supra note 4, at 11; Interview with Seril L. Grossfeld, supra note 4, at 5; Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 7; Interview with Lea P. Krauss, supra note 4, at 8; Interview with Monica I. Salis, supra note 4, at 4.
116. See Interview with Lea P. Krauss, supra note 4, at 8.
117. Id. Lea says that she took Constitutional Law her last year in law school and they talked about Bowers v. Hardwick. Id.
118. See Interview with Michelle M. Parker, supra note 4, at 7.
119. Id.
120. Interview with Lilas Ayandeh, supra note 3, at 10; Interview with Michelle M. Parker, supra note 4, at 7. Michelle attended the Shepard Broad Law Center, Nova Southeastern University. Interview with Michelle M. Parker, supra note 4, at 7.
121. Id. Michelle recalls that in a Civil Procedure class where the professor knew she was a lesbian, that professor “spent ten extra minutes on it just for [her] benefit.” Id. Lilas Ayandeh was not out while in law school and she does not remember any discussion at the same law school—Shepard Broad Law Center, Nova Southeastern University—where there was any discussion that related to sexual orientation. Interview with Lilas Ayandeh, supra note 3, at 1, 7. Further, Lilas did not know that there were several out professors at the law school and was surprised when told who they were. Id. at 9–10.
122. See Interview with Seril L. Grossfeld, supra note 4, at 2, 4.
women law professors. In some instances, there were openly gay professors at the law school but their presence seemed subdued. For instance, Jennifer Travieso remembers that she took a course in sexual identity with about six or seven other students. It was a paper course and she thought that what she learned was very interesting.

For the few who acknowledged their sexual orientation while in their teens or twenties, it was common to become activists in their undergraduate years. Identity recognition prompted being active in law school too. There were exceptions even to this general observation. Monica Salis went to New York University for her undergraduate education and was involved with women’s organizations on campus where half the members were lesbians. But, when she got to University of Miami Law School in 1979, there were no identifiable lesbians.

In contrast, Jennifer Travieso joined an underground LGBTI club at a Catholic university law school. She decided to run the club in a much more active way. She approached the Assistant Dean for funding, something all groups at the law school did. The Assistant Dean flat out denied the request and Jennifer was explicitly told that the group would not be welcome. Jennifer sought help from her favorite professor and he

123.  Id. at 5.  Monica Salis said there were no out professors at the University of Miami Law School in the late 1970s. Interview with Monica I. Salis, supra note 4, at 3.
124.  See Interview with Jennifer Travieso, supra note 3, at 7.
125.  Id. at 6.
126.  Id. at 6–7.
127.  See, e.g., id. at 1.
128.  See, e.g., id. at 3.  Many of those interviewed are very active in the LGBTI community currently. See Interview with Monica I. Salis, supra note 4, at 14–15; Interview with Jennifer Travieso, supra note 3, at 14. For instance, Lea Krauss is President of GLLN, which is a very active group. Interview with Lea P. Krauss, supra note 4, at 9. She is also very active in The Pride Center as a board member. Id. One of the reasons they asked Lea to be on the board was to have a “younger perspective and a female perspective.” Id. at 10. She is largely responsible for assembling a women’s resource center that addresses issues with regard to health, networking, and also provides a social center where women feel safe. Id. Until she got this established, The Pride Center was largely a boys’ club. Id.
129.  See, e.g., Interview with Monica I. Salis, supra note 4, at 3.
130.  Id.
131.  Id. at 2–3.  “[All her] friends in law school were gay men.” Id. at 3. “They were easy to identify and it was very comfortable. . . . We studied for the Bar, shared a hotel room up in Tampa, and took the Bar together.” Id.
132.  Interview with Jennifer Travieso, supra note 3, at 3.
133.  Id. at 3–5.
134.  Id. at 3.
135.  Id. at 3–4.
suggested contacting the American Civil Liberties Union (“ACLU”). By the end of the year, the group won an award for being the most active at the law school. Interestingly, the faculty sponsor of the group was not the out professor at the school, but rather her favorite law professor, the one who had suggested she consult the ACLU.

Jennifer’s experiences were somewhat mirrored by Michelle Parker, who became the President of Lambda United, the law school LGBTI club at Shepard Broad Law Center, Nova Southeastern University, and made it into one of the most active groups at the law school. She took on the task because, in her words, “equal right[s] [are] so important to me . . . [and] raising awareness is . . . important.” In fact, Michelle said that so much of her time in law school was taken up by the group, that her grades suffered. Fortunately, at her law school, the group had existed for some time and they were given funds without hesitation. Under Michelle’s leadership, Lambda sponsored fundraisers with the money going to organizations such as the Broward House that helps people with HIV/AIDS. They also joined other student groups to present a Gay Adoption Symposium. Michelle also observed that “[s]he [was] making the same grades as [her] first year [friends who] all graduated with honors, except for [her].”

136. Id. at 4.
137. Interview with Jennifer Travieso, supra note 3, at 4.
138. Id. at 4–5. Some of the students at the law school were not in favor of the club, so Jennifer and her group decided to “poke fun at ourselves” and offered a free breakfast consisting of Fruit Loops. Id. at 5. Jennifer also indicated that she really felt empowered by being the founder of the law school group. Id. at 11. Fighting for people’s rights was an amazing experience for her. Id.
139. Interview with Jennifer Travieso, supra note 3, at 7.
140. Compare id. at 4–5, with Interview with Michelle M. Parker, supra note 4, at 1, 6. When nobody wants to lead, the law school club becomes almost underground. See Interview with Michelle M. Parker, supra note 4, at 6.
141. Id.
142. Id. According to Michelle, “[s]he was making the same grades as [her] first year [friends who] all graduated with honors, except for [her].” Id.
143. See id.
144. Interview with Michelle M. Parker, supra note 4, at 6. They also had Rock Out Loud with a band and hamburgers. Id. Lambda gave half of what it made to Fight Out Loud, which helps people who “have been victims of discrimination based on their sexual orientation and sexual identity.” Id.
146. Interview with Michelle M. Parker, supra note 4, at 7.
As far as helping the lesbian lawyers secure legal positions after graduating, the various law schools did not seem to be aware of any potential problems associated with getting jobs and being a lesbian.\footnote{147} Whether those interviewed were out to their future employers related to several factors.\footnote{148} For those who graduated in the 1980s and waited until after law school to come out, sexual orientation was not of concern.\footnote{149} In contrast, those who had been active and out in law school, interviewed as out lesbians.\footnote{150} Michelle Parker, for instance, observed that she

would rather [the firm] know that I am gay before I . . . step foot in your office because if you [are] going to have a problem with it I would rather you know now and I do [not] want to be terminated in two months because you found out that I was gay.\footnote{151}

Fortunately for Michelle, her firm is fine with gay folks.\footnote{152} Jennifer noted that “now some firms are marketing directly to the gay community.”\footnote{153} The gay attorney can identify with the gay community and it is actually positive.\footnote{154} In South Florida, there may even be an advantage to being identified as a lesbian according to Lea Krauss, the current president of the Gay and Lesbian Lawyers Network (“GLLN”).\footnote{155} It is a method by which to

\footnotesize
\begin{itemize}
  \item \footnote{147} See id. at 7–8. In 1988, an article in Student Lawyer noted that “[g]ay students feel they have to remain closeted to get a job and establish a reputation . . . .” Miller, \textit{supra} note 100, at 14. Activists are caught between a rock and a hard place. “If they include membership in any gay organizations on their resumes, [it is] an automatic warning. If they leave them off . . . [the students] ‘look like . . . boring pe[ople] with no leadership skills.’” \textit{Id.}
  \item \footnote{148} See Miller, \textit{supra} note 100, at 17.
  \item \footnote{149} See id.
  \item \footnote{150} See, e.g., Interview with Michelle M. Parker, \textit{supra} note 4, at 8. There were those in-between years where those who were out were very afraid to be when they started their job searches. \textit{See} Miller, \textit{supra} note 100, at 14. They believed they would not get the position, and if they did, and it became known they were lesbians, they would be fired. \textit{See id.} at 15. Their experience at the time was that they did not fit in. \textit{Id.} They could not take their partners to any social function. \textit{Id.} They had to be very careful about what they talked about that was personal. \textit{Id.} Then, the result was that the lesbian/gay attorney was perceived to be removed and cold. Miller, \textit{supra} note 100, at 15. Law professors at that time counseled gay students to do research about the firms to see which ones contributed to gay causes. \textit{Id.} That way, they were more likely to fit in. \textit{Id.}
  \item \footnote{151} Interview with Michelle M. Parker, \textit{supra} note 4, at 8. Further, Michelle said she wanted to be free to take her girlfriend to the Christmas party. \textit{Id.} And she wanted to know if the firm was anti-gay before working for them. \textit{Id.}
  \item \footnote{152} \textit{Id.} The firm’s secretary is a lesbian and her uncle, who is gay, is the person in charge of all the firm’s scheduling. \textit{Id.}
  \item \footnote{153} Interview with Jennifer Travieso, \textit{supra} note 3, at 11.
  \item \footnote{154} \textit{Id.}
  \item \footnote{155} Interview with Lea P. Krauss, \textit{supra} note 4, at 3, 9.
\end{itemize}
get business and, further, the LGBTI community “feel[s] comfortable dealing with a lesbian [attorney].”\textsuperscript{156} “[P]rofessionally, you can use that to your advantage.”\textsuperscript{157}

For lawyers, education is never finished.\textsuperscript{158} In fact, Continuing Legal Education (“CLE”) is a requirement.\textsuperscript{159} With the influence of such groups as the GLLN,\textsuperscript{160} the Florida Bar presented a CLE program geared to LGBTI issues.\textsuperscript{161} The presentation covered such issues as death of partners and how the remaining partners might not have any rights.\textsuperscript{162} As Jennifer noted, “[i]f you do [not] have the proper documents in place and . . . [the] partner’s family does [not] agree with you, they come in . . . [and] take the body.”\textsuperscript{163} Jennifer expressed her dismay, “it [is] completely legal for them to do that. It [is] heart wrenching.”\textsuperscript{164}

B. LGBTI Client’s and Court Experience

Various judicial councils and bar associations have been concerned about fairness in courts for the LGBTI community.\textsuperscript{165} For instance, the Arizona report found that “[t]hirteen percent (13%) of judges and attorneys have observed negative treatment by judges in open court toward those perceived to be gay or lesbian.”\textsuperscript{166} Further, if sexual orientation was part of the legal issue, “[thirty-nine] percent believed their sexual orientation was used to devalue their credibility.”\textsuperscript{167}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{156} Id. at 3.
\item \textsuperscript{157} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} See Interview with Lea P. Krauss, supra note 4, at 12; Interview with Jennifer Travieso, supra note 3, at 9. Lea P. Krauss is currently the president of the GLLN. Interview with Lea P. Krauss, supra note 4, at 9.
\item \textsuperscript{161} See Interview with Jennifer Travieso, supra note 3, at 9–10.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id. at 10.
\item \textsuperscript{164} Id.
\item \textsuperscript{166} GAY & LESBIAN TASK FORCE, STATE BAR OF ARIZ., supra note 165, at 20.
\item \textsuperscript{167} Todd Brower, Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in the California Courts, 11 AM. U. J. GENDER SOC. POL’Y & L. 39, 45 (2003) [hereinafter Brower, Obstacle Courts].
\end{enumerate}
\end{footnotesize}
It has been observed that once the client’s sexual orientation becomes part of the legal proceeding, the entire proceeding is overshadowed by the trait. When juror polls are taken, jurors are more likely to say that “they cannot be fair . . . [to] gay litigants,” compared to any other group. Given this knowledge, it would appear that some lawyers use this animosity to plant negative seeds in prospective jurors’ minds. For instance, when an attorney asks whether the prospective juror would “accept unbiased testimony from [a] gay witness[ ],” the implication is that the gay witness is unreliable. Further, if the LGBTI lawyer represents activists in the LGBTI community, a conflict may arise. This fact may be important because, as Professor Nancy D. Polikoff noted, if the activist client wanted, for example, to shout out in a courtroom, she as the lawyer was conflicted between identifying with her client’s need to be heard, and her desire to abide by her respect of the judicial system. With one exception, none of those interviewed represented gay activists. Only a few of those interviewed actually had clients who even identified as LGBTI. Lilas Ayandeh, being the accidental exception by representing a client who had a civil rights claim, said that she advertised in Girl Magazine, which is well known in the South Florida lesbian community. From that advertisement, Lilas was approached by a client who wanted to be represented by her because she wanted a lesbian lawyer. Lilas sought out civil rights attorneys for their


169. Id. at 611. The jurors are more likely to be less fair to gay or lesbians than “African-Americans, Asians, Hispanics, or Whites.” Id.


171. Id.


173. Id. at 449–50.

174. Compare Interview with Seril L. Grossfeld, supra note 4, at 16, with Interview with Lilas Ayandeh, supra note 3, at 4–5, Interview with Robin L. Bodiford (Aug. 3, 2012), supra note 4, at 2, Interview with Linda F. Harrison & Phyllis D. Kotev, supra note 4, at 12–13, Interview with Lea P. Krauss, supra note 4, at 17, Interview with Michelle M. Parker, supra note 4, at 8, Interview with Monica I. Salis, supra note 4, at 6, and Interview with Seril L. Grossfeld, supra note 4, at 10; Interview with Linda F. Harrison & Phyllis D. Kotev, supra note 4, at 12–13; Interview with Michelle M. Parker, supra note 4, at 8; Interview with Monica I. Salis, supra note 4, at 6; Interview with Jennifer Travieso, supra note 3, at 7.

175. See Interview with Lilas Ayandeh, supra note 3, at 4; Interview with Seril L. Grossfeld, supra note 4, at 10; Interview with Linda F. Harrison & Phyllis D. Kotev, supra note 4, at 12–13; Interview with Michelle M. Parker, supra note 4, at 8; Interview with Monica I. Salis, supra note 4, at 6; Interview with Jennifer Travieso, supra note 3, at 7.

176. Interview with Lilas Ayandeh, supra note 3, at 4.

177. Id.
advice as to whether the case had merit. The case ended as other civil rights attorneys said it would. The client lost due to the weakness of the facts in her case.

Generally, the court system in Broward County was seen as fair toward the LGBTI community. While Michelle M. Parker has many LGBTI clients, the issues are usually not gay related. The reason that her firm has so many gay clients is due to the manner in which they advertise on the GLLN website. GLLN is a very active legal network. Thus, many in the community decide on which lawyer they will retain based on finding them on the network. Michelle noted that they handle Title VII cases, but based on gender, not sexual orientation. Thus, Michelle noted that while their clients had been fired because they were lesbian, the focus of the case was sex discrimination because the client did not fit the female stereotype.

IV. FLORIDA LAW AS IT RELATES TO THE LGBTI COMMUNITY

Florida’s LGBTI population is one of the highest in the United States, and the figure is continually rising. In the past decade, the number of same-sex households alone has greatly increased in Florida. One would infer from such statistics that the LGBTI community is attracted to Florida

178. Id. at 5.
179. Id.
180. See id. Some part of the loss was due to the fact that the client had been "pulled over for a DUI [and in doing so] almost hit th[e] Deputy on the side of the road." Interview with Lilas Ayandeh, supra note 3, at 5. However, the client was convinced that the whole episode was due to her sexual orientation. Id. at 6. The client arrived at this conclusion because when she was stopped, the deputy asked if she was gay. Id. He probably arrived at this conclusion because she had short hair and her partner, who was also in the car, was very feminine. Id.
181. Id. at 6; see also Interview with Lea P. Krauss, supra note 4, at 17.
182. See Interview with Michelle M. Parker, supra note 4, at 8.
183. See id.
184. See Interview with Lea P. Krauss, supra note 4, at 9.
185. See id. at 13; Interview with Michelle M. Parker, supra note 4, at 8.
187. Interview with Michelle M. Parker, supra note 4, at 8; see also Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (discussing sex stereotyping).
due to its favoring laws and liberal constituency; however, that is not the
case. Florida’s laws towards members of the LGBTI community have
been described as hostile and even draconian. Historically, the treatment
towards the LGBTI persons in Florida exemplifies an overall societal
animosity. There have been “‘witch hunts’ for lesbian and gay teachers,
political attacks through voter initiatives, [and] overtly discriminatory
laws.”

Florida’s legislation and judiciary make a clear distinction between
the LGBTI individual and the heterosexual individual. In Florida, the
LGBTI individual’s rights and protections are limited in comparison to those
of a heterosexual individual. Although the LGBTI community, at a local
level, might enjoy some added protections that the State of Florida fails to
provide, “the scope of [such] protections is limited and . . . do[es] not
globally encompass a large percentage of Florida’s LGBT[I]
population.” Florida’s LGBTI community faces much discrimination in
various aspects of the law due to their sexual orientation.

A. Right to Marry

On September 21, 1996, Congress effectuated the Defense of
Marriage Act (“DOMA”), which grants states the right to decline recognition
of same-sex marriages sanctioned in another state. DOMA was motivated

190. Matthew T. Moore, Long-Term Plans for LGBT Floridians: Special
Concerns and Suggestions to Avoid Legal and Family Interference, 34 NOVA L. REV. 255, 256
(2009); see also GATES, supra note 188, at 6 tbl.3, app. 1; Kunerth, supra note 189.
191. See Moore, supra note 190, at 256.
192. See id.
193. William E. Adams, Jr., A Look at Lesbian and Gay Rights in Florida
Today: Confronting the Lingering Effects of Legal Animus, 24 NOVA L. REV. 751, 751
(2000).
194. See id. at 754.
195. CARLTON FIELDS & EQUAL, FLA. INST., A LEGAL HANDBOOK FOR LGBT
196. See Kunerth, supra note 189. For example, “Orlando and Orange County
both offer domestic-partnership benefits to same-sex couples—something they [did not] do
[tene] years ago.” Id.
197. Moore, supra note 190, at 259.
also Nanci Schanerman, Note, Comity: Another Nail in the Coffin of Institutional
No State, territory, or possession of the United States, or Indian tribe,
shall be required to give effect to any public act, record, or judicial proceeding of
by the likely prospect that same-sex marriages would soon be recognized in Hawaii.199 “[T]he federal government was worried that [Hawaii] was dangerously close to granting same-sex marriages, and the implications of the Full Faith and Credit Clause would mandate recognition of marriages performed in Hawaii in every state around the country.”200 By enacting DOMA, the federal government’s purpose was to leave the decision of recognizing same-sex marriage up to each state, rather than having it mandated upon all states on the basis of federal principles.201

The Florida Legislature took prompt action with regard to the Federal DOMA and, by June 1997, the DOMA law was accepted and codified into the Florida Statutes.202 In the process of enacting the Florida DOMA, many supporters of such law made their hostility toward the LGBTI community known.203 Take, for example, the words of Senator Grant, an advocate for Florida’s DOMA, “’God created Adam and Eve, not Adam and Steve,’” or how he expressed that it was “‘[g]reat that [the Act] [took] effect on June 4, right smack dab in the middle of Gay Pride Week.’”204

Although Florida’s DOMA makes clear that same-sex marriages are not recognized within the state, the issue did not stop there.205 In 2003, when the Supreme Court of Massachusetts overturned its state law banning same-sex marriage,206 Florida’s opponents to same-sex marriage were quick to realize that Florida’s DOMA was also at risk of being overturned.207 For that

any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Defense of Marriage Act of 1996 § 2(a).


200. Schanerman, supra note 198, at 150.

201. Id. at 150–51.


203. Kanotz, supra note 202, at 446.

204. Id. at 445–46 (second alteration in original).

205. Id.


207. See Vote Yes on Amendment 2, CHRISTIAN FAM. COALITION, http://cfcfoilition.com/full_article.php?article_no=94 (last visited Nov. 10, 2013). The coalitions advertised various reasons why an amendment to the Florida Constitution was necessary. Id.
very reason the process to amend Florida’s Constitution began. In 2005, “[a] coalition of groups joined . . . and agreed on the language [for] the Florida Marriage Protection Amendment . . . .” The proposed language stated, “marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.” The Supreme Court of Florida approved the language of the Amendment by a unanimous vote. By 2008, the decision to determine whether the proposed Amendment was to become part of the Florida Constitution was left in the hands of Florida’s constituents.

There were ugly campaign tactics favoring the passage of the Amendment; one campaign advertisement particularly encouraged voters to vote in favor of the Amendment by threatening that activist judges could ignore the will of the people and legalize same-sex marriage if the Amendment was not passed. Furthermore, advertisements emphasized hostile societal views against the LGBTI community by stating that the Amendment would “protect[] . . . children from being taught [by] public schools that same-sex marriage is the same as natural marriage,” and it would “give[] children the best chance for both a mom and a dad.” The results were surprising to the LGBTI community since opinion polls “never showed the [Amendment] getting any more than [fifty-nine] percent

208. See id.
213. FLA. FAMILY POLICY COUNCIL, YES ON 2: FACT SHEET 1 (2008), available at http://ccpcfl.org/Voter-Guides/2008/2008MarriageAmend2.pdf. Massachusetts . . . activist judges ha[d] re-written marriage laws and ignored the will of the people by legalizing same-sex marriages. There is a national movement to do this all over the country, which is why [twenty-seven] states have passed state constitutional amendment [sic] to protect marriage. . . . Amendment 2 protects the definition of marriage from activist judges.
214. Id. (emphasis added).
support.” Yet the Amendment passed by a supermajority; “[a]pproximately 4.6 million voters supported [the] Amendment, . . . while about 2.8 million opposed it.” Passage of this Amendment “demonstrates that neither legislative nor societal hostility in Florida is likely to end soon.”

For now, an LGBTI individual in a long-term, non-marital relationship will continue to be viewed as an individual under the laws of Florida. Since the LGBTI community is denied of the right to marry, they are also denied the “legal status and certain benefits derived therein.”

Marriage bestows upon couples a litany of legal rights and benefits, including but not limited to: Filing joint state and federal income tax returns, social security survivor benefits, immigration benefits, bereavement leave, immunity from testifying against your spouse in court, wrongful death and loss of consortium relief, sick leave to care for a partner, assumption of a spouse’s pension, automatic inheritance rights, child custody, burial determination, hospital visitation rights, divorce protections, and domestic violence protection.

Acknowledging that change is necessary, the Supreme Court of the United States found section three of DOMA unconstitutional. Even so, LGBTI individuals must undertake “costly and time consuming litigation under Florida law” to make sure that his or her loved one does not become a legal stranger upon the occurrence of an unexpected event.

216. Id.; Florida Voters Approve Marriage Protection Amendment, supra note 209.
217. Moore, supra note 190, at 256.
218. Id. at 257.
220. Id.
221. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013) (reasoning that, “[t]he federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity”).
B. What the Future May Hold?

Even when the LGBTI individual takes legal measures to protect his or her partner and provide him or her with rights to prevent them from becoming legal strangers upon the occurrence of an unexpected event, there still remains the frightening possibility that such legal documents will be ignored because the gay and lesbian “relationship is so thoroughly invisible and disrespected.”223 Take for example the 2008 case of Clay Greene and Harold Scull, partners of twenty years, whose legal measures to “name[ ] each other [as] beneficiaries of their respective estates and agents for medical decisions” were completely ignored.224 “By the time [Scull] died, county officials had [already] sold all of the couple’s possessions, confiscated their cats, and assumed control over their finances.”225 Scull died without seeing his partner Greene, since Greene was confined to a nursing home and prohibited from visiting him.226

Although the legal measures taken by an LGBTI individual might be ignored or contested,227 such measures are still the best option an LGBTI individual has to provide rights and protect his or her life partner. In Florida, the LGBTI individual must plan ahead in the event sickness or death strikes.228 This is especially true since “Florida [is] hostile to same-sex relationships and consider[s] same-sex partners to be legal strangers.”229


226. Id. at 164; NCLR Launches Campaign on Behalf of Clay & Harold, supra note 224.


228. See CARLTON FIELDS & EQUAL FLA. INST., supra note 195, at 14.

229. Knauer, supra note 225, at 188.
1. Transfer of Property

In Florida, a LGBTI individual must utilize legal tools and documents to make sure that his or her life partner has access to him or her and to his or her property upon death or incapacity.\(^{230}\)

\[\text{There are a wide variety of legal documents available and recognized under Florida law that can be used to facilitate the orderly transfer of various types of property upon death, in the event of incapacity, or to otherwise avoid the default disposition of those assets upon death under existing law.}\(^{231}\)

So in Florida, if a LGBTI individual wishes for his or her life partner to be granted any of his or her property upon death, he or she must have valid legal documents specifying such wishes because failure to do so can leave the surviving life partner empty handed.\(^{232}\)

Although some states have facilitated matters for their LGBTI community in this regard by granting legal recognition and protection to the same-sex relationship, Florida is not one of those states.\(^{233}\) Florida’s legislature has failed various times to pass laws that would “recognize the long-term relationships of same-sex couples”; until such occurrence, Florida’s same-sex partners will continue to be “forced . . . to fit themselves into existing legal categories.”\(^{234}\)

Same-sex partners can “fit themselves into existing legal categories”\(^{235}\) through estate planning.\(^{236}\) “[E]state-planning documents enable[] same-sex partners to give each other some measure of legal standing and protection.”\(^{237}\) For example, through a valid will, same-sex partners can devise their property to their partners—devisees—rather than allowing


\(^{231}\) Id.

\(^{232}\) Id. at 14–15.

\(^{233}\) See Aimee Bouchard & Kim Zadworny, Growing Old Together: Estate Planning Concerns for the Aging Same-Sex Couple, 30 W. New Eng. L. Rev. 713, 749 (2008). “The Hawaii [L]egislature passed the Hawaii Reciprocal Beneficiaries Act, which granted some of the legal rights of marriage to couples who registered as reciprocal beneficiaries.” Id. at 717. “When Vermont extended the status of a civil union to same-sex couples, it granted them all the same legal rights as provided by marriage within the state . . . .” Id. “The California Domestic Partner Rights and Responsibilities Act states that same-sex domestic partners will be treated like heterosexual married partners in the event of the death of one spouse.” Id. at 720.

\(^{234}\) Adams, supra note 193, at 761 & n.74, 762.

\(^{235}\) Id. at 762.

\(^{236}\) Knauer, supra note 225, at 167.

\(^{237}\) Id.
Florida’s intestacy laws to govern the distribution of their property. If the probate method is not preferred, the LGBTI individual has other options, such as “trusts, joint ownership, and transfer on death designations.” Unlike heterosexual couples, if same-sex partners fail to take legal action to provide their long-term partners with rights, their partners will be legal strangers in the eyes of Florida law.

2. Visitation Rights and End of Life Decisions

Some of the most unconscionable are laws that stand in the way of LGBT[I] people taking care of those they love, in life and in death. . . . LGBT[I] people could be excluded from medical decision-making for a partner. . . . [U]pon the death of a partner, LGBT[I] people are often denied making end-of-life decisions about last rites, funerals, and disposition of remains.

Unlike heterosexual couples, same-sex couples have to provide the hospitals with legal documents “before being allowed to take part in [their] partner’s care” or to even be allowed to see their partner. This is why LGBTI individuals are advised to have legal documents that verify their relationship and grant their partners the right to make medical and end-of-life decisions.

A recent Florida case that gained much national attention, Langbehn v. Public Health Trust of Miami-Dade County, exemplifies the difficulties same-sex partners face in obtaining access to their hospitalized partner and in being permitted to make medical decisions on behalf of their partner. Janice Langbehn was not allowed access to Lisa Pond, her partner of eighteen years, during the critical hours of Pond’s hospitalization when she

238. Id. at 189–90, 192.
In the vast majority of states where the decedent is not survived by a spouse, the rules of intestate succession distribute the decedent’s property to the closest relatives in the following priority: Children, parents, siblings, nieces and nephews, grandparents. . . . If a decedent is not survived by any relatives within the prescribed degrees of relationship, all property will escheat to the state.

239. Id. at 189–90.

240. See Knauer, supra note 225, at 188.

241. Movement Advancement Project et al., supra note 227.


243. Id.

244. 661 F. Supp. 2d 1326 (S.D. Fla. 2009).

245. Id. at 1331–33.
remained semi-conscious. Although Janice had a power of attorney, which authorized her to make medical decisions on behalf of her partner in the case of incapacity, no one in the hospital “acknowledged the legal effect of the document.” Instead, Janice was informed by a social worker that because Florida was an anti-gay state, she was not going to be allowed to see Pond or know about her medical condition. It was not until Pond’s sister arrived at the hospital that Janice was allowed access to Pond, but at that point, Pond was already unconscious and died soon thereafter.

Although Janice unsuccessfully sued the hospital and hospital staff for the emotional distress she was forced to endure, her case was not overlooked by the President of the United States. President Barack Obama noted,

[LGBTI] Americans are “uniquely affected” by relatives-only policies at hospitals . . . [and] “are often barred from the bedsides of the partners with whom they may have spent decades of their lives—unable to be there for the person they love, and unable to act as a legal surrogate if their partner is incapacitated.”

Therefore, in 2010, President Obama issued a memorandum requiring hospitals that accept Medicare or Medicaid funds to adopt policies that would provide visitation rights to same-sex couples. Further, the memorandum directed hospitals to respect “all patients’ advance directives, such as durable powers of attorney and health care proxies.”

Since hospitals must abide by the President’s executive order to continue obtaining funding from the government, it is not surprising that Florida hospitals have changed their policies to include same-sex partners as
part of their “family member” definitions and have adopted a non-discrimination policy that encompasses sexual orientation, gender identity, and gender expression.²⁵⁵ Although such policy changes are occurring throughout Florida hospitals, they are not a result of any state action.²⁵⁶

President Obama’s memorandum did not cover end-of-life decisions that arise when dealing with funeral decisions and disposition of remains.²⁵⁷ However, this issue also causes problems for the same-sex partners, specifically when “[f]amilies [are] unfamiliar with or intolerant of a same-sex relationship [and they] may make after-death arrangements contrary to a couple’s wishes.”²⁵⁸ In Florida, “any person may carry out written instructions of the decedent relating to the decedent’s body and funeral and burial arrangements.”²⁵⁹ Therefore, it is advised that same-sex partners provide directives on how they wish their remains to be disposed.²⁶⁰ If such measures are not taken, the same-sex partner will have no say in such decision regarding the area of burial and cemetery arrangements, since the state law has traditionally vested decision-making authority in the next of kin.²⁶¹

3. Living Facilities

About eighty percent of senior care is provided by family, but since LGBTI elders typically do not have the traditional family support system, many end up relying on nursing homes or other institutions for long-term care.²⁶² The thought of going to a nursing home or a living facility raises many fears for the LGBTI elders.²⁶³ Unfortunately, their fears are validly

²⁵⁶ See President Barack Obama, supra note 254; see also, e.g., JACKSON HEALTH SYS., supra note 255.
²⁵⁷ See President Barack Obama, supra note 254.
²⁵⁸ Bouchard & Zadworny, supra note 233, at 748.
²⁶⁰ Bouchard & Zadworny, supra note 233, at 748.
rooted, especially when elders “face a heightened risk of abuse . . . regardless of other identity factors.”

Being part of a minority group makes the LGBTI elders more susceptible to being subjected to emotional and physical hostility and to being the first target of abuse in living facilities. For such reasons, many LGBTI elders who end up in long-term care institutions feel forced to closet their sexual orientation.

Although the Nursing Home Reform Act (“NHRA”) was designed to protect LGBTI elders from discrimination, abuse, and neglect in federally certified nursing homes, this does not mean that such conduct does not continue to occur. Regardless of the federal protections, the LGBTI elders are correct in believing that in such institutions “[l]they can[not] be guaranteed an environment . . . where they will be treated equally.”

A national survey indicated that forty-three percent of 770 LGBTI elders living in a nursing home “reported some type of mistreatment by staff or fellow patients” and “about [twenty] percent of LGBT[I] patients were abruptly discharged from their facility—a far higher rate than their straight counterparts.”

Also, since the NHRA protections do not cover living facilities or nursing homes that are not federally funded, it is up to the states

265. Id.
266. Diane C. Lade, Nursing Home as Closet—‘Gen Silent’ Film on Gay Seniors Exposes Prejudice, Fear, SUN-SENTINEL, Aug. 7, 2012, at 1A (‘More than three-fourths of the LGBT[I] survey respondents said gay seniors would hide their sexual orientation if they ended up in institutional care.’); see also Daniel Redman, They Stood Up for Us: Advocating for LGBT Elders in Long-Term Care, 21 TEMP. POL. & CIV. RTS. L. REV. 443, 452–53 (2012).

Vera and Zayda were together for fifty-eight years. When Vera’s Alzheimer’s became too much for Zayda to deal with, they went into an assisted living facility. Despite the fact that they had been partners for nearly six decades, they were afraid to be out in this facility, and they presented themselves as sisters instead. Once Vera passed away, Zayda did not feel like she could speak about their relationship. She did not put up any pictures or any indications of the fact that she had lived this life with this person whom she loved, and with whom she had built a family.

Redman, supra note 266, at 453.
269. Lade, supra note 266.
270. Freeman, supra note 263.
to set those protections.271 Sadly, Florida has not been at the forefront in enforcing laws protecting the elders in long-term care facilities, let alone creating laws that would protect the LGBTI elders in long-term care facilities.272 Instead, “[r]eports have criticized [Florida] nursing homes and assisted living facilities for not meeting the specialized health and welfare needs of elderly homosexuals.”273 Until proactive measures are taken by Florida to hold the long-term care institutions accountable for unfair treatment towards the LGBTI elders, the LGBTI elders feel forced to hide their identity in order to diminish the likelihood of abuse, discrimination, and neglect.274

C. Adoption

Until recently, Florida had a total ban on homosexual adoption.275 “In 1977, Florida became the first state to enact a [blanket exclusion] on adoption[] by gay[ ]s or lesbian[ ]s . . . .”276 The statute plainly stated “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.”277 The legislation clearly singled out the LGBTI community from adopting on the basis that the group was dangerous to children.278 Even though there was a “lack of empirical studies or legislative fact-finding regarding the harms of adoption by gay or lesbian adults, the legislature[ʼs]” hostility was enough to enact the ban on all homosexual adoptions.279

271. NATʼL SENIOR CITIZENS LAW CTR. ET AL., supra note 267, at 21–25.
274. Freeman, supra note 263; Lade, supra note 266.
277. FLA. STAT. § 63.042(3) (1977) (current version at FLA. STAT. § 63.042 (2013)) (emphasis added).
278. Lee, supra note 276, at 154; FLA. STAT. § 63.042 (1977) (current version at FLA. STAT. § 63.042 (2013)).
279. Lee, supra note 276, at 155.
one senator pointed out, the statute “had nothing to do with adoption and everything to do with discrimination against homosexuals.”

In Florida, the right to adopt has been incessantly fought for by the LGBTI community for thirty-six years. In many cases like *Lofton v. Kearney,* homosexual foster parents challenged the constitutionality of Florida’s adoption ban. The courts constantly upheld the adoption ban, mainly on the reasoning that the best interest of the child was a legitimate basis for the ban. However, it has been clear to many that “the best interest of the child standard, that was offered as the *legitimate purpose* behind the *per se* denial of homosexual adoption, [was] merely a guise for discrimination.”

After previous failed legal challenges to the adoption ban, a Third District Court of Appeal decision has changed the *playing field* in favor of the LGBTI community. In 2010, the Third District Court of Appeal deemed the law banning homosexuals from adopting unconstitutional. The court held that “the best interests of children are not preserved by prohibiting homosexual adoption,” and “the [law] violated . . . equal protection rights of the children [and their prospective parents].” For now, the prohibited adoption by gays and lesbians is no longer in effect.

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280. *Id.* Oddly enough, members of the LGBTI community could become foster parents, but could not adopt those foster children until the legal challenge was initiated by a gay foster father. See *In re Adoption of Doe,* 2008 WL 5006172, at *1 (Fla. 11th Cir. Ct. Nov. 25, 2008), aff’d sub nom. Fla. Dep’t of Children & Families v. Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. 3d Dist. Ct. App. 2010). The Florida Circuit Court of the Eleventh Judicial Circuit found the prohibition against adoption unconstitutional. *Id.* at *29.


283. *Id.* at 1374.

284. See, e.g., *id.* at 1383–84.


288. *Adoption of X.X.G. & N.R.G.,* 45 So. 3d at 87, 91.

fight is far from over; a backlash against gay and lesbian adoption continues to ensue. The remains the lingering possibility of another Florida appellate court ruling differently on the matter, which would take it to the Supreme Court of Florida to make the final ruling.

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**D. Child Custody**

In Florida, a LGBTI parent might face child custody and visitation issues in two main factual contexts: 1) “[A] person who enters into a heterosexual marriage and has children, [but] later divorce[s] after discovering that he or she is gay, lesbian, bisexual, or transgender,” or 2) “[a] same-sex couple[] . . . rais[es] a child or children together [and later] separate[s].” In the first scenario, the legal issues for the LGBTI parent arise due to his or her sexual orientation and/or gender identity. While in the second scenario, the legal issues for the LGBTI parents typically arise because only one of the LGBTI parents is the legal parent of the child. Under Florida law, there is a lot more guidance on how to deal with child custody or visitation issues if the LGBTI parent had the child from a prior heterosexual relationship.

In a custody decision, it is the court that decides which parent is better fit to retain custody over his or her child. A “family court judge applying a ‘best interest of the child’ test, has broad discretion in defining which family members or forms are deviant and which are normal and healthy.” In Florida, the problem for the LGBTI parent lies in the broad discretion that the judges have. Many court decisions show that judges decide child custody matters based on the social stigma of homosexuality, rather than what is truly in the best interest of the child. Take, for

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290. See id.
291. Id.
294. Id., supra note 292, at 1–2.
297. Woodhouse & Reese, supra note 296, at 19 (emphasis added).
298. See Packard v. Packard, 697 So. 2d 1292, 1293 (Fla. 1st Dist. Ct. App. 1997) (per curiam); Maradie, 680 So. 2d at 543.
299. Packard, 697 So. 2d at 1293; Maradie, 680 So. 2d at 540.
example, *Maradie v. Maradie*, 680 So. 2d 538 (Fla. 1st Dist. Ct. App. 1996) (per curiam), where the trial court below removed child custody rights from a lesbian-mother on the basis that the ""homosexual environment is not a traditional home environment and can adversely affect a child,"" or *Packard v. Packard*, 697 So. 2d 1292 (Fla. 1st Dist. Ct. App. 1997) (per curiam) where the trial court below reasoned that due to the mother’s sexual orientation, the father would "provide a more traditional family environment for the children." Even though the Florida appellate courts have clarified that sexual orientation of an LGBTI parent should only be considered in determining custody matters if it has a direct bearing on the "welfare of the child," these types of rulings exemplify how social stereotypes disfavor the LGBTI parent in Florida. 304

Unlike LGBTI parents from prior heterosexual relationships, ""[s]ame-sex parents in Florida . . . face unique legal issues"" because, typically, ""both partners in a same-sex couple cannot establish a legally recognized parental relationship to the couple’s child." Since same-sex couples in Florida cannot gain parental rights on the basis of marriage, there are very few avenues available for a LGBTI non-legal parent to form legal ties with his or her child. 306 A recent avenue that has become available to Florida’s LGBTI non-legal parents is second-parent adoption. 307 ""Second-parent adoption in Florida is when an unmarried parent adopts her partner’s biological or adoptive child. This adoption generally gives the second parent full legal parental rights, legal and custodial." This adoption option only recently became available to Florida’s LGBTI community as a result of Florida’s lift on the ban of homosexual adoption. 309 Although the second-parent adoption option might be available, it remains a new and unsettled law in Florida. 310

If a LGBTI non-legal parent is unable to establish legal ties to the child, Florida case law precedent does not favor his or her fight in obtaining

301. Id. at 540.
302. 697 So. 2d 1292 (Fla. 1st Dist. Ct. App. 1997) (per curiam).
303. Id. at 1293.
304. See id. (quoting Maradie, 680 So. 2d at 542); see also Jacoby v. Jacoby, 763 So. 2d 410, 413 (Fla. 2d Dist. Ct. App. 2000).
305. NAT’L CTR. FOR LESBIAN RIGHTS, supra note 292, at 7 (emphasis added).
306. See supra Part IV.A.
308. Id.
309. See supra Part IV.C; Second Parent Adoption, supra note 307.
child custody or visitation rights.\footnote{311} “Florida’s appellate courts have consistently held that parental rights cannot be extended or established based upon the emotional or psychological bond that develops over time when one treats a child as his or her own, even with the legal parents’ knowledge and consent.”\footnote{312} The Florida judiciary is continually unwilling to apply the legal theories that could grant the LGBTI non-legal parent custodial rights to the child.\footnote{313} More often than not, Florida courts treat the LGBTI non-legal parent as a legal stranger to the child.\footnote{314} In \textit{Wakeman v. Dixon},\footnote{315} the court rejected the former domestic partner’s claim of parental rights as a \textit{de facto} or \textit{psychological} parent as there is “no right to claim court-ordered visitation as a \textit{psychological parent}, and the court lacks the inherent authority to award it.”\footnote{316} Florida’s Judiciary justifies its reluctance to extend theories of \textit{de facto parent} or \textit{psychological parent} with the argument that those “‘rights are, with regard to a non-parent, statutory, and the court has no inherent authority to award’” them.\footnote{317} Not surprisingly, the Florida Legislature has taken no action in granting the court such authority.\footnote{318} Quite obviously, the inaction of Florida’s Judiciary and Legislature in this matter stems from legal animus towards the LGBTI community.\footnote{319}


312. \textit{T.M.H.}, 79 So. 3d at 807 (Lawson, J., dissenting).


314. \textit{See id.} This is a growing issue especially when “[a]n increasing number of same-sex couples are choosing to have children. . . . Reproductive options for same-sex couples who desire to parent include adoption, foster care, embryo adoption, surrogacy, donor sperm insemination (“DI”), donor oocyte with gestational carrier (“GC”), and shared maternity.” Deborah Smith, \textit{What are the Reproductive Options When a Same-Sex Couple Wants a Family?}, \textit{SEXUALITY, REPROD. & MENOPAUSE}, Aug. 2011, at 30, 30–31.


316. \textit{Id.} at 672–73 (citing Swain v. Swain, 567 So. 2d 1058, 1058 (Fla. 5th Dist. Ct. App. 1990)).


318. \textit{See Wakeman}, 921 So. 2d at 672.

E. Employment Discrimination

“[T]he Florida Civil Rights Act does not cover employment discrimination on the basis of sexual orientation or gender identity.” It has been clearly documented that, in Florida, LGBTI individuals experience employment discrimination at a high rate. Yet, the Florida Legislature has failed to take action to prevent such injustices from continuing. To this day, Florida does not have a “statute prohibiting employment discrimination based on sexual orientation or gender identity.”

In 2008, the Florida Legislature made attempts to add sexual orientation and gender identity as impermissible grounds for discrimination, but since animus towards the LGBTI community is prevalent within the legislature, no protection has passed. Take, for example, Florida House Representative D. Alan Hays, who believes that LGBTI individuals “need psychological treatment.” Until such animosity towards LGBTI individuals is extinguished, it is unlikely that LGBTI individuals will have a legal remedy in matters of employment discrimination. Until then, cases like that of Steven Stanton—who was employed for seventeen years as a city manager but fired once he announced plans of getting a gender change—will continue to occur.

V. What the Lesbian Lawyers Observed About the Legal System

Lesbian lawyers have multiple challenges relating to the legal system. The first is that the law itself was written by males and to advantage males. Women were a later addition. Deborah L. Rhode gives due credit to contemporary changes in regard to sex and the law, noting

320. Id. at 1.
321. See id. at 1–8, 17–30.
322. Id. at 9–11.
323. Id. at 1.
325. Id. at 10.
327. See Howard, supra note 326.
330. See id. at 219 tbl.12.1. Less than 5% of the lawyers were women in the 1960s and fewer than 2% were law professors. Id. at 4 tbl.I.1, 219–20 tbl.12.1.
that “[t]oday, the legal landscape has been transformed.” But she contends that even with more women in law and the abiding belief that “the woman problem has been solved,” inequities remain a serious problem from salaries to mentoring to promotions. Rhode believes that these and other areas remain—and often continue—to present obstacles and challenges to lesbian lawyers and their clients.

All of our interviewees described a changing legal system and a changing world for lesbian lawyers, although they described different degrees of systemic change. Most felt the law was more or less equal in its treatment of lesbian and gay clients and lawyers and seemed to feel that “for the most part, [they thought] judges just care about the law. They [are] not—they [are] not [sic] going to necessarily care about is he gay or straight.” Jennifer Travieso expressed mixed feelings—that if a jury knows, it may, but it would probably not affect a judge because they mostly just use the law. On the other hand, Robin Bodiford stated flatly that there is “[n]o such thing as someone not bringing biases to [the] bench.” And Michelle Parker, when asked to describe her angriest moment—as all interviewees were—answered, “[m]y angriest moment is that there is bias everywhere. You [are] not always going to get a fair deal, like life is [not] fair . . . .” Monica Salis affirms, “[m]y job is to make the court be fair. . . . There [is] bias everywhere. Every case. Every case.” Interestingly, even most of those who described the legal system as primarily fair, later went on to describe incidents of unfairness within the system or in

331. Rhode, supra note 328, at 1001.
332. Id.
333. Id. at 1001–04.
334. See id. at 1003–06.
335. Interview with Robin L. Bodiford (Aug. 3, 2012), supra note 4, at 5; Interview with Seril L. Grossfeld, supra note 4, at 18; Interview with Linda F. Harrison & Phyllis D. Kotev, supra note 4, at 22; Interview with Lea P. Krauss, supra note 4, at 5; Interview with Jennifer Travieso, supra note 3, at 17; see Interview with Lilas Ayandeh, supra note 3, at 18; Interview with Michelle M. Parker, supra note 4, at 11–12; Interview with Monica I. Salis, supra note 4, at 19–20.
336. See Interview with Robin L. Bodiford (Aug. 3, 2012), supra note 4, at 4–5; Interview with Seril L. Grossfeld, supra note 4, at 18; Interview with Monica I. Salis, supra note 4, at 19.
337. Interview with Jennifer Travieso, supra note 3, at 8.
338. Id.; see also Interview with Lea P. Krauss, supra note 4, at 17; Interview with Michelle M. Parker, supra note 4, at 9; Interview with Monica I. Salis, supra note 4, at 9.
340. Interview with Michelle M. Parker, supra note 4, at 12.
341. Interview with Monica I. Salis, supra note 4, at 9.
individuals within the system; for example, how heterosexual women lawyers found more success, how men still outnumber women in many courtrooms, how juries might deal unfairly with LGBTI individuals, how opposing lawyers might use a person’s sexual orientation as an issue, how some judges demonstrated biased language or behavior, and the difference in perspectives between urban courts compared to courts in North Florida.

The interviewees agreed that same-sex marriages deserved equal legal footing—no matter whether they saw marriage itself as a positive institution or not. Yet same-sex marriage remains unavailable in most states and has found inconsistent support in the courts at best.

In addition, our research experience in the snowball sample done for this project contradicts the idea that we have achieved equality, in terms of sexual orientation, within the legal profession. Monica Salis, one of our interviewees who works with the local GLLN, also commented:

A lot of gay attorneys are not out. They [are] out socially. They [are] out in organizations. We have, I [would] say, a good [thirty] percent of GLLN members that [will not] put their name on a list, do [not] want their name anywhere, and then there [are] a whole bunch of people that [will not] join . . . at all or come to our events, and they [are] known in the community as gay, not any question.

In a truly equal legal world, lesbians in the legal profession would not need to self-censor interviews or organizational memberships. Indeed, some of the comments in our interviews suggest that this is still necessary, especially for beginning lawyers at larger firms. One experienced attorney interviewee, when asked for advice for young lawyers, said, “bear in mind that most of the people in the world are heterosexual and . . . you have to

342. See, e.g., id. at 9.
343. See Interview with Michelle M. Parker, supra note 4, at 1.
344. See Interview with Seril L. Grossfeld, supra note 4, at 18.
345. Interview with Michelle M. Parker, supra note 4, at 9.
346. Interview with Monica I. Salis, supra note 4, at 9–10, 17–18.
347. Interview with Lilas Ayandeh, supra note 3, at 8; Interview with Seril L. Grossfeld, supra note 4, at 17; Interview with Linda F. Harrison & Phyllis D. Kotey, supra note 4, at 16–17; Interview with Lea P. Krauss, supra note 4, at 6; Interview with Michelle M. Parker, supra note 4, at 10; Interview with Jennifer Travieso, supra note 3, at 12–13.
348. See supra Part IV.A.
349. See supra Part III.
350. Interview with Monica I. Salis, supra note 4, at 11.
351. See id.
352. See, e.g., Interview with Seril L. Grossfeld, supra note 4, at 22–23.
deal with them” and that “there [are] still a lot of conservative firms. If that[,] [is] where you want to have [the] job, you have to abide by their rules.”

She finished by noting that a young lawyer “[cannot] be radical if you want to work for a [big] firm . . . Once you[] [are] inside . . . you might be able to shake things up . . . ”

Although some interviewees stressed the fairness of the law to gays and lesbians, some also wanted to see a lesbian on the Supreme Court of the United States. One said, “it would be [nice] to have someone on [our] team up there.”

All our interviewees spent years practicing, teaching, or studying law in South Florida. However, while many interviewees emphasized the concept of fairness for all within the legal system, only one interviewee mentioned the many years in which gays and lesbians were treated unfairly in terms of law and forbidden to legally adopt in Florida—though they were considered fit foster parents.

VI. CONCLUSION: SOME MUSINGS ON IDENTITY AND LAW

It may seem at first that the issue of identity is a personal one, best examined through sociology or psychology, and irrelevant to law. However, in reality, for LGBTI and all those whose sexuality does not fit into mainstream categories—identity, society, and law are strongly intertwined. Why is identity important in law? Courts of law, like people, have the power to define, restrict, or even liberate an identity. The Court has done each of these in its history. For instance, in Romer v. Evans, one side singled people out, based on their identity, for a lack of protection under the law.
They said that Coloradans could not enact local laws to protect a group—homosexuals—and three dissenting members of the Court evidently saw that as acceptable. Another example is *Bowers v. Hardwick*, which upheld sodomy laws that declared homosexual sex a *crime*—the Court essentially criminalized people’s identities. Of course, this decision was later overturned in *Lawrence v. Texas*, but consider the devastating effects of the original ruling on identity from societal and personal standpoints. The effects linger today—as people and groups continue to attempt to use the courts to restrict homosexual identity.

Thus, finding out how lesbian lawyers identify and what their triumphs and challenges have been in the legal field provide an important historical perspective, and inform us about contemporary evolutions in the field. Our interviewees were a wonderfully diverse group of women that shared some qualities in common, such as lesbianism and a legal degree, but differed in race, ethnicity, class, political beliefs, family, generation, and disclosure of identity—by method, time, and impact of coming out. They did share one other quality—a passion for justice in the legal system. Perhaps that passion manifests itself in their choices related to the practice of law. None were corporate lawyers, for example. It may be that corporate lawyers are less likely to be involved in the GLLN for various reasons and were, therefore, not reached by this snowball sample. Most—but not all—saw the legal system as generally fair to LGBTI, even while surrounded by examples—particularly in Florida—of when it is not.

366. *Id.* at 624, 635–36.
367. *Id.* at 636 (Scalia, J., dissenting).
369. *Id.* at 187–89.
371. *See id.* at 578; Adams, *supra* note 193, at 751–52; Ihrig, *supra* note 97, at 558; *supra* Part II.
373. *See supra* Parts I–III.
374. Interview with Linda F. Harrison & Phyllis D. Kotey, *supra* note 4, at 8; *see also* Interview with Michelle M. Parker, *supra* note 4, at 6.
375. *See supra* Parts I–II.
377. *See supra* Part V.
may speak to optimism, it may speak to the increasing changes and ongoing evolution of the legal system, or it may be influenced by the loyalty; all seem to relate to principles of law and to the legal system in the United States. Lesbian lawyers are faced with contradictions within the system.\textsuperscript{378} They have been taught respect for the rule of law in law school, yet the same system and associated set of laws still discriminate against them at an identity-based level.\textsuperscript{379} They remain both insiders and outsiders to the system.\textsuperscript{380} This is another quality they share and one that puts them in a very different place from lawyers who are not lesbians.\textsuperscript{381}

\begin{enumerate}
\item See Memorandum from Williams Inst., \textit{supra} note 319, at 2–8; \textit{supra} Part IV.
\item See Memorandum from Williams Inst., \textit{supra} note 319, at 2–8; \textit{supra} Part IV.
\item See Memorandum from Williams Inst., \textit{supra} note 319, at 2–8; \textit{supra} Parts IV–\textit{V}.
\item See Memorandum from Williams Inst., \textit{supra} note 319, at 2–8; \textit{supra} Parts IV–\textit{V}.
\end{enumerate}
FLORIDA AND THE FILM INDUSTRY: AN EPIC TALE OF TALENT, LANDSCAPE, AND THE LAW

MARY PERGOLA PARENT* AND KEVIN HUGH GOVERN**

ABSTRACT

Hollywood East! The honorific title bestowed upon a bewitching state known for her sandy beaches, warm winter days, and mosquito-filled Everglades. Florida and the Film Industry: A tale of an alluring titan and a powerful behemoth behaving like two lovers enmeshed in an affair, complete with wooing, courting, and rebuffs. A relationship that has lasted over a century and continues to blossom amidst healthy competition, tax incentives, innovative legislation, and cooperation. Florida’s commitment to a thriving film industry—through its legislature, government administrative agencies, and incentives—has allowed its economy to grow and its citizenry to flourish, while showcasing Florida to the world.

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This article chronicles the development of the Florida film and entertainment industry, from its inception to the present day, as a product of environment, opportunity, economics, law, and policy. The film and entertainment industry is one of the most significant contributors to Florida’s local, regional, and global image, through depiction of its people, cities, industry, and nature. As an ever-growing contributor to the state’s economy through job creation, service industry revenues, and tax collections, Florida’s relationship with the film and entertainment industry has gone from an ad hoc approach to a carefully strategized, multi-year effort, fueled by the Florida Film and Entertainment Industry Financial Incentive Program, to encourage the use of the state as a location for all facets of digital, film, and television production.

This article will address in Part I the earliest history of film in Florida from the late nineteenth century birth and flourishing through the 1917 transfer to California and revitalization during World War II. Part II considers the state’s economic, political, and legal enticements for the film industry to grow in the state and to match the public relations campaign to draw tourism to the Sunshine State. Part III outlines the essence of 1950s blockbuster hits that gave impetus to rules and laws to solidify the state’s relationship with the film industry. As commented upon in Part IV, Florida’s compelling call to the industry reached New York City and beyond, bringing rare talent that would further expand the industry’s reach and hold in Florida. Worthy of Part V’s particular focus, mesmerizing Miami reached international recognition as a thriving hub for both television and film from the 1950s onward, and industry contractual practices there set the standard for the entire film and television industry thenceforth. Part VI summarizes the background, legislative authority, and practical efforts of the Governor’s Office of Film and Entertainment, followed by the tax incentives under state and federal law which caused the film and television industry efforts in Florida to expand exponentially in the twenty-first century onward in Part VII; specifically with some of the most notable progeny of this effort and their value to state, regional, and the national economies showcased in

1. See infra Part I-X.

3. See infra Part I.
4. See infra Part II.
5. See infra Part III.
6. See infra Part IV.
7. See infra Part V.
Part VIII. Part IX highlights how past is prologue for Florida film and television, why current state and federal initiatives will prevent major production efforts from becoming runaway boons to other states and countries, and the demonstrable economic benefits those laws and policies have already produced for Florida in particular, and the United States in general. In conclusion, Part X predicts how faithfulness and fidelity to the film and television industry will continue to reap benefits in a multi-billion dollar relationship continuing into its second century, with over 120 films and television shows to its credit and counting.

I. FLORIDA AND THE FILM INDUSTRY: THE LOVERS MEET

The story begins “in 1898, [when] the Spanish-American War newsreels [entitled] U.S. Cavalry Supplies Unloading at Tampa Florida” captured and permanently recorded a glimpse of Florida’s story. Film fever took hold in Miami and Jacksonville at the turn of the century. “The years 1907 to 1909 marked the first attempt by the [film] industry to mass-produce narratives,” and “Klutho, Edison and Biograph were [the giants] . . . among more than thirty silent film [studios] based in Jacksonville, [the so-called] ‘Winter Film Capital of the World,’ . . . [welcoming] The Keystone Kops, Oliver Hardy, and Lionel Barrymore.” “The [nation’s]” first permanent filming studio, Kalem Studios, [was] opened in . . . 1908” in Jacksonville, and the port city became a major innovator in the African-American film industry as well.

Aside from these innovations, Jacksonville would be...
responsible for one of the world’s largest movie studios of the twentieth and twenty-first centuries; Joseph Engel’s 1915 Metro Pictures later merged with another company to become Metro-Goldwyn-Mayer (“MGM”). Florida’s relationship with Hollywood was moving quickly, but with competing priorities and no established rules, a clash was inevitable. As the industry grew, these silent film companies began to lock horns with the conservative Florida folks. Irate residents were sick and tired of the way the movie people manhandled their town; in one instance, a script called for a shot of a red fire engine roaring down Main Street, so the production crew simply called in a fake fire and rolled cameras as the fire truck screamed to the rescue, and in another instance, pastors and their congregations lodged protests that bank robberies were being filmed on Sundays. Safety became a major issue. During the 1916 filming of The Clarion, a riot broke out, requiring forty police officers to clear out more than 1300 extras. During that same year, while filming of The Dead Alive, the actors, following instructions from the director, sped down the main thoroughfare of Jacksonville and “plunged [their movie car] into the St. Johns River.” Apparently, the director had confided in the crew—but did not tell the actors—that he had saved this scene for last, just “in case the actors [did not] survive the crash.”

This type of crass “behavior made the film industry the [major topic of the] Jacksonville[] mayoral election of 1917.” The conservatives ousted the pro-movie industry “incumbent Mayor ‘Jet’ Bowden.” This rang the death knell for the filmmakers in Florida. Without the backing and support of the government, private businesses, and the local community, the movie industry packed up and headed west. California offered a friendlier environment, mountains, beaches, plentiful talent, and a skilled labor force.

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Id.

16. Id.
17. See Ponti, supra note 11, at 3.
18. Id.
19. Id.
20. Id.
22. Miller, supra note 14, at 120; Ponti, supra note 11, at 3.
23. Ponti, supra note 11, at 3.
24. Id. at 3–4.
25. Id. at 4.
26. Id.
27. Id. at 3–4.
The film industry settled in to Los Angeles and the cameras stopped rolling in Florida—temporarily.29

Florida’s reputation was tarnished and her relationship with Hollywood was strained.30 It would have been irreparable if not for a bit of ironic serendipity—“the outbreak of World War II.”31 The Cavalry arrived as “the military brought cameras back to Florida in the early [19]40s.”32 “Hollywood brought the war . . . to [hometown] theatres across [the country].”33 The nation’s morale needed a boost and Uncle Sam asked the studios to help.34 The Federal Government “opened military bases to [the] movie stars and [film] crews [and asked them to join] the cause.”35

Florida was brimming with military installations and the humid, palm-tree-lined coast made it the perfect setting to imitate the tropics of the Pacific Islands.36 Florida cranked out box office smashes like A Guy Named Joe, 30 Seconds Over Tokyo, and Twelve O’clock High.37 These films were extremely “successful, as [both] entertainment and . . . propaganda.”38 Most importantly, this series of events and opportunities reignited the spark between Florida and the film industry.39

II. FLORIDA FLAUNTS AND FLIRTS

The State of Florida published Florida, A Guide to the Southernmost State (“The Guide”) in 193940 in order to lure major industries to the Sunshine State.41 Capitalizing on this new vitality brought on by the

29. Id. Actually, the cameras did not stop rolling completely. See The Yearling—Trivia, IMDb, http://www.imdb.com/title/tt0039111/trivia (last visited Jan. 18, 2014). MGM tried shooting “[m]ost of the ‘atmosphere’ and outdoors animal scenes [for The Yearling] . . . by a second-unit crew sent to Florida in 1941, when the project was first begun. The film was shut down soon after the footage was shot, but . . . it was restarted again in 1946, [using] the 1941 footage.” Id. “During the final days of filming, actor Gregory Peck was alternating between the Florida set of this movie and a Texas set, where he was simultaneously filming Duel in the Sun.” Id.
31. Id.
32. Id. at 5.
33. Id.
34. Id.
35. Ponti, supra note 11, at 5.
36. Id.
37. Id.
38. Id.
39. See id.
rekindled flame of the film industry, the government and administrative agencies of Florida made a conscious decision to keep the flame alive.\textsuperscript{42} The \textit{Guide}, a dense tome describing absolutely everything about Florida,\textsuperscript{43} was bound in rich green leather and imprinted with a toothy Florida gator right on the cover.\textsuperscript{44} This unabashed exposé of all that is Florida, complete with flowery language and detailed economic data, legitimized a state that had previously been known as \textit{primeval territory}.\textsuperscript{45}

In the \textit{Industry and Commerce} section, the state’s economic development is stated in terms of bank resources, which stood at $500,000,000 in 1927.\textsuperscript{46} Business life in the state is illustrated by the volume of retail sales, which stood at $504,523,000 in 1929.\textsuperscript{47} “Building contracts awarded during 1936” increased by 35% over 1935, reaching $72,587,000.\textsuperscript{48} Florida boasted “[f]ifteen [f]ederal highways, [a] [s]tate highway patrol, [and a] [s]tate gasoline tax [of seven cents].”\textsuperscript{49} Passenger steamship lines ran from Miami to Jamaica, the Waterman Line ran from Tampa to Puerto Rico, and the Mobile Oceanic Line embarked from Tampa to Europe.\textsuperscript{50} Extensive rail travel stretched the length of the peninsula.\textsuperscript{51} But, one word of caution—some lines had “less than 100 miles of track each.”\textsuperscript{52} At that time, the Atlantic Coast Line and the Florida East Coast Railway were built to “penetrate the Everglades, meeting at Lake Harbor, south of Lake Okeechobee.”\textsuperscript{53}

\textsuperscript{42} See PONTI, supra note 11, at 5, 7.
\textsuperscript{43} See FED. WRITERS’ PROJECT OF THE WORK PROJECTS ADMIN. FOR THE STATE OF FLA., supra note 40, passim.
\textsuperscript{44} Id. This was an important moment for Florida. This was the original Film Florida Production Guide—even though the authors, at the time, did not know it. See id. at iv; FILM FLORIDA PRODUCTION GUIDE (2003). The spiral bound, color rich guide in 2003, for example, reports in great detail every aspect of transportation, labor—including union and non-union workers—permitting, and tax incentives, as “advantages of relocating or expanding to Florida.” FILM FLORIDA PRODUCTION GUIDE, supra note 44. The \textit{Guide} from 1939 and the Film Florida Production Guide in the twenty-first century—although worlds apart in presentation—embody the same theme. Compare FED. WRITERS’ PROJECT OF THE WORK PROJECTS ADMIN. FOR THE STATE OF FLA., supra note 40, at ix, with FILM FLORIDA PRODUCTION GUIDE, supra note 44.
\textsuperscript{45} See FED. WRITERS’ PROJECT OF THE WORK PROJECTS ADMIN. FOR THE STATE OF FLA., supra note 40, at 9, 93, 472.
\textsuperscript{46} Id. at 93.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at xvii.
\textsuperscript{50} FED. WRITERS’ PROJECT OF THE WORK PROJECTS ADMIN. FOR THE STATE OF FLA., supra note 40, at xvii.
\textsuperscript{51} See id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
Labor in Florida included “seven locals [of] the International Cigar Makers’ Union.” The workforce also included Florida longshoremen and dockworkers, citrus workers, factory workers, canners, packers, and boatmen. By the end of 1937, the American Federation of Labor (“AFL”) had an estimated membership of “65,000 craft unionists in 400 locals affiliated with the State Federation of Labor.”

A state child-labor law, enacted in 1913 and amended in 1915, established minimum wages and maximum hours for the employment of children . . . . A State workmen’s compensation law [was] enacted in 1935 [and] provide[d], with exceptions, for medical care, compensation, and other assistance to workers receiving injuries while gainfully employed . . . . A Florida industrial commission [was] created in 1935 [for the purpose of] exercis[ing] general authority over industrial employment.

Despite union presence in Florida, state laws giving “preference to the right to work over union membership” allowed Florida to attract production away from California’s closed shop environment.

Beautiful sepia photos in the Guide enticed readers to join in the nightlife of Hollywood Beach, walk the links of the St. Petersburg Golf Course, or visit the Old Slave Market in St. Augustine. An entire chapter is dedicated to giving detailed touring directions. “Tour 5” illustrates the route from Miami to Naples as a 113-mile trip on US 94. The tour promises a “[h]ard-surfaced roadbed throughout” with “[l]imited accommodations [and] camp sites.” This section of the Tamiami Trail was constructed by the State Road Department and opened on April 25, 1928 at a cost of $13 million.

While traveling Florida in the late 1930s, visitors were encouraged to photograph the wildlife, respectfully visit the Seminole Villages, and use caution along the highways, as “[t]he ’Glades [were] thickly overgrown,” the

54. Id. at 95.
55. See Fed. Writers’ Project of the Work Projects Admin. for the State of Fla., supra note 40, at 98.
56. Id.
57. Id.
60. See id. at 297–538.
61. Id. at 406.
62. Id. at 297, 406.
63. Id. at 406.
“mangled corpses of snakes” laid on the road, and alligators and buzzards were everywhere.64

Florida’s wiles have tempted and then transformed out-of-staters for decades.65 The 1939 Guide describes the transformation this way: “The person noted for taciturnity in his home community often becomes loquacious, determined that those about him shall know that he is a man of substance.”66 A spell, whether brief or extended, in the Florida sunshine was believed to bring out the best in everyone and everything.67

Over eighty years ago—just as today—Florida understood the importance of bringing people, industry, and money to Florida: “Regardless of individual circumstances and preference, one desire seems to be common to all—the desire to improve Florida.”68

III. Florida Charms a Captivating Cast of Characters

The unspoilt scenery of Florida beckoned to the film industry often in the early 1940s, with exotic potential film locations close to cities with transportation and production-supporting infrastructure.69 Two films depicting the Second Seminole War of 1835–1842 came out in short order, with all-star casts.70 The first such film, Distant Drums in 1951, featured Gary Cooper and Mari Aldon in which “American soldiers and their rescued companions . . . face[d] the dangerous Everglades and hostile Indians in order to reach safety [in Florida].”71 The journey into the Everglades was only simulated though, as the actual location of the fort in the film was the historic Castillo de San Marcos in historic St. Augustine, Florida, near the sprawling metropolis of Jacksonville, Florida.72 Shortly thereafter came Seminole, the 1953 American western film directed by Budd Boetticher and starring Rock Hudson as “[nineteenth]-century army officer Lance Caldwell,” born and raised in Florida, and returning from his West Point
education to be “assigned to Fort King in the Everglades.”

Along with Hudson, notables of the time including Barbara Hale, Anthony Quinn, and Lee Marvin, and the rest of the cast, actually did endure the steamy, humid surroundings of the Everglades National Park for much of the film’s shooting.

In 1954, Ricou Browning emerged from an eminently hospitable Wakulla Springs in a $12,000 half-man, half-fish monster suit. The Creature from the Black Lagoon emerged from the murky depths and “saved Universal [Studios] from impending bankruptcy.”

“Browning, a swimming champion, was able to hold his breath for up to four minutes . . . [and] is credited with creating the . . . torso-twisting creature swimming technique.” Creature from the Black Lagoon grossed $3 million and helped resuscitate Florida’s film industry through audiences drawn to its 3-D horror film appeal, if not for the dramatic acting or scenery.


75. Ponti, supra note 11, at 35–36. Speaking of springs, beginning in 1916, when The Seven Swans was filmed in the Silver Springs area of Central Florida, six Tarzan movies, Creature from the Black Lagoon, Rebel Without a Cause, and Thunderball, among many movies have been filmed there, as well as over a hundred episodes of the TV series Sea Hunt, an episode of I Spy, an episode of Crocodile Hunter with Steve Irwin, and various vacation episodes of a range of series.


76. Ponti, supra note 11, at 6, 36.

77. Id. at 36.

78. Id.

79. See id. at 6, 36; Blair Davis, The 1950s B-Movie: The Economics of Cultural Production 73 (Jan. 2007) (unpublished Ph.D. thesis, McGill University), available at http://digitool.library.McGill.ca/webclient/streamgate?folder_id=0&dvs=1384119620758-312; Brian Douglas, Top 10 Horror Films of the 1950s, TOPTENZ (Feb. 14, 2011), http://www.toptenz.net/top-10-horror-fims-1950s.php. Davis noted that these three-dimensional, or 3-D, movies “utilized stereoscopic cinematography to create the illusion of greater image depth and a spatially separated foreground, [as seen in] 3-D films such as Bwana Devil (1952), House of Wax (1953), It Came From Outer Space (1953), and Creature From the Black Lagoon (1954).” Davis, supra note 79, at 73. The 3-D process in Creature from the Black Lagoon “was dubbed Thrill Wonder 3-D Horrorscope” as a bit of cinematographic hyperbole. Ponti, supra note 11, at 35–36.
What the terrorizing *Man-Eating Gill Creature* did to help the industry, the *Chairman of the Board* succeeded in spoiling. In 1959, Frank Sinatra arrived at the Cardozo Hotel on Miami Beach. *A Hole in the Head* was the story of a widower—played by Sinatra—who had “dreams of opening a giant . . . amusement park” in Florida. With a star-studded cast, including Edward G. Robinson and Keenan Wynn, the movie was sure to be a hit, but Sinatra’s temper tantrums, dame chasing, missed appearances, and nuisance lawsuits filed by a rival hotel brought more notoriety than good publicity. “[T]he film went on to win an Oscar for [Sinatra’s] song *High Hopes*,” but it did not win many friends in Florida.

Florida’s courtship with the film industry definitely was not boring. As she lured a bevy of eligible bachelors, ranging from Ol’ Blue Eyes to Elvis Presley, she lacked any boundaries in the relationship. She needed rules in order to make the relationship work.

### IV. Florida’s Alluring Call Reaches New York City

During a brutal winter in the 1950s, twenty-seven year old James Pergola exited his New York City apartment and looked down his street. Two blizzards, back-to-back, had buried his car and everyone else’s, in a pristine blanket of icy snow. James shoveled for two days until he finally found his car. He proceeded to pack all of his worldly belongings and headed south in search of sunshine, beaches, balmy breezes, and a job.

James had apprenticed under Jack Painter, A.S.C.—the American Society of Cinematographers—a world-renowned New York cameraman in the New York local union of the International Alliance of Theatrical Stage

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80. *Ponti*, supra note 11 at 6, 63.
81. *Id.* at 63.
82. *Id.*
83. *Id.* at 63–64.
84. *Id.* at 64.
85. *See PONTI*, supra note 11 at 2–3.
86. *See id.* at 2–6, 63–64.
87. *See id.*
88. Interview with James C. Pergola (Sept. 1, 2012) (on file with Nova Southeastern University, Shepard Broad Law Center Library). Pergola worked in the film and television industry for fifty years. *Id.* He shot the original pilot episode of *Baywatch* for NBC and continued as both a Producer and the Director of Photography of the television series for ten years. *Id.* He retired after the conclusion of the final episode of *Baywatch* in 1999. *Id.* For a time, *Baywatch* was the number one syndicated television show in the world. *Id.*
89. Interview with James C. Pergola, *supra* note 88.
90. *Id.*
91. *See id.*
Employees (“IATSE”).

James took his union card with him, which would entitle him to work as an assistant cameraman in Florida and earn a lucrative salary of $400 to $500 per week; but, that was contingent upon the work available in Florida at the time. His departure surprised everyone and, much to the dismay of his colleagues in New York, James left. James was the number one camera assistant in New York; he was making top dollar and had a sterling reputation based on his incredible work ethic and talent, but something was calling him, luring him to Florida.

He remembered that his father, Jimmy V. Pergola, had worked in Florida in the 1920s and 1930s shooting newsreel movie shorts and had also worked on one of bathing beauty Esther Williams’ aqua ballets in Miami Beach.

What followed James to Miami was an enormous influx of talent and the explosive growth of the Florida film industry. James had heard the siren call from the waves off the shore of that lush tropical paradise. At that time, Miami had only one Florida-based assistant cameraman and his name was Eddie Gibson. When James Pergola arrived in Miami, the total number of Florida film industry, union-card-carrying, New York trained, assistant cameramen doubled to two. Gibson did not mind Pergola’s entrance into Miami at all. He respected James immensely. James Pergola and Eddie Gibson’s fathers had been great friends that worked together on covering the Cuban Revolution, Mussolini’s rise to power in Italy, and the hottest car races in Daytona Beach.

The friendship between Eddie Gibson’s father and James Pergola’s father abruptly ended on October 17, 1937. Veteran Pathé News and Fox Movietone News cameraman Jimmy V. Pergola was killed when a United Airlines “Mainliner . . . crashed . . . into . . . Hayden Peak, high in the Uinta
Range” resulting in the worst air crash in U.S. history.\textsuperscript{105} He was shooting a newsreel story entitled, \textit{The Safety of Transcontinental Flying}.\textsuperscript{106} This left young James with only memories of his dad, now a legend, but he was embraced by all who had known and worked with his father.\textsuperscript{107} Florida opened her arms as well.\textsuperscript{108}

V. MESMERIZING MIAMI

By the 1950s and early 1960s, Miami had reached international recognition as a thriving hub for both television and film.\textsuperscript{109} Paul Newman and Joanne Woodward sizzled in \textit{The Long, Hot Summer} (1958) and Elvis Presley raised the temperature in the Sunshine State in \textit{Follow That Dream} (1962).\textsuperscript{110} From 1966 to 1970, Jackie Gleason filmed his eponymous \textit{Jackie Gleason Show} in Miami.\textsuperscript{111} From short comedy and melodrama to dramatic action, the James Bond series thriller \textit{Goldfinger} (1964) featured luxurious shots of Millionaire’s Row located at the Morris Lapidus-designed Fontainebleau Hotel in Miami Beach.\textsuperscript{112}

\begin{thebibliography}{9}
\bibitem{106} \textit{Id.}
\bibitem{107} Interview with James C. Pergola, \textit{supra} note 88; see also Pergola, \textit{supra} note 104.
\bibitem{108} Interview with James C. Pergola, \textit{supra} note 88; see also Pergola, \textit{supra} note 104.
\bibitem{109} \textit{Ponti}, \textit{supra} note 11, at 6.
\bibitem{112} \textit{Goldfinger} (Eon Productions 1964); see also Overview, Fontainebleau Miami Beach, www.fontainebleau.com/web/about_bleau (last visited Jan. 18, 2014). Some 161 road miles and a world apart from Miami, Key West was the film site for a sizeable portion of another Bond film. \textit{See Licence to Kill}, IMDb, http://www.imdb.com/title/tt0097742/ (last visited Jan. 18, 2014). Just ninety-seven road miles north of Key West lies the island that gained fame as the setting for the 1948 film \textit{Key Largo}; apart from background filming used for establishing shots, however, the film was shot on a Warner Brothers sound stage in Hollywood. \textit{See Key Largo–Filming Locations}, IMDb, http://www.imdb.com/title/tt0040506/locations (last visited Jan. 18, 2014). Although not a filming location for the 1951 Lauren Bacall and Humphrey Bogart movie, \textit{The African Queen}, Key Largo is also home port to a newly restored 100-year-old riverboat figuring prominently in the movie’s plot and after which the movie was named. \textit{See The African Queen Sets Sail Again}, CBSNEWS (Apr. 13, 2012, 3:23 PM), http://www.cbsnews.com/8301-31749_162-57413816-10391698/the-african-queen-sets-sail-again/.
\end{thebibliography}
Elsewhere in Miami, Ivan Tors Studios was producing *Flipper* and *Gentle Ben*, two of the hottest prime time shows on television.113 Ivan was born in Budapest in 1916 and immigrated to the United States just prior to World War II.114 He produced the smash hit motion picture *Flipper* for MGM and the film grossed over $23 million.115 To put this success in perspective, MGM had produced *Mutiny on the Bounty*, starring Marlon Brando, that same year, and *Mutiny* lost $23 million at the box office.116

“The television series *Flipper* [aired] on Saturday night[s] at 7:30 p.m.” on CBS and was the number one show on television; it upstaged *The Jackie Gleason Show*, which had to be moved to a later time slot in order to survive.117 That friendly dolphin, along with Ranger Porter Ricks and his sons, Sandy and Bud, turned all eyes to Miami, Florida.118 Luke Halpin, who played teen heartthrob Sandy, was featured on the cover of the debut issue of *Tiger Beat* magazine in September 1965, sending millions of teenage girls to the newsstands and making the fictitious town of Coral Key Park their dream destination.119 Today, at fifty years and counting, the ripple effect of *Flipper’s* success is still impacting Florida.120 The Miami Seaquarium still boasts “[television] [s]uperstar Flipper and his Atlantic bottlenose dolphin friends” in their daily live show *Flipper’s Beach Bash*.121 Prior to this huge boon, friendly Florida provided the gorgeous scenery, but only to local craftsmen.122 The keys—or team-leaders of the various crews—were still being sent down from New York or east from California.123 The key-electricians and key-grips brought their top assistants with them from New York City or Hollywood, “and hired locals for the third or fourth

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114. Interview with James C. Pergola, supra note 88.
115. Id.
120. About Us: History, supra note 118.
122. See Interview with James C. Pergola, supra note 88.
123. Id.
electrician," camera, grip, or set construction positions.¹²⁴ James Pergola was quickly hired for his expertise and worked under camera operators and directors of photography from California.¹²⁵ As a result of this symbiotic relationship, the local Florida crews became highly skilled technicians, having trained under the best teachers in the industry.¹²⁶ It was not long before Florida was boasting that it could provide everything a movie company needed without shipping in entire crews from Los Angeles and New York.¹²⁷ By the mid-1960s, “Hollywood was happy to come” to Miami, Florida.¹²⁸ There were enough set builders, art directors, soundmen, camera crews, and equipment to fully stock two films simultaneously.¹²⁹

Meanwhile, back in New York City, the movie industry was dying.¹³⁰ The unions in New York “had gotten so demanding and difficult that New York [p]roducers went to Los Angeles.”¹³¹ There was a mass exodus from New York, formerly the television capital of the world, to California.¹³² In order to stop this crippling flight, “New York Mayor, [John] Lindsay, came up with the Lindsay Plan.”¹³³ He instituted a plan that he hoped would enable filmmakers to easily tour locations, have access to fire and police, shoot in museums and government buildings, and secure permits quickly and easily.¹³⁴ Mayor Lindsay “made deals with the [International Alliance of Theatrical Stage Employees] (“IATSE”) to hold costs down” and forced them to make sacrifices—no more Triple Golden Time.¹³⁵ New York was forced to mend fences and cooperate with the film and television industry.¹³⁶ They had to rebuild their relationship from the ground up.¹³⁷

¹²⁴ Id.
¹²⁵ See id.
¹²⁶ Id.
¹²⁷ See Interview with James C. Pergola, supra note 88.
¹²⁸ Id.
¹²⁹ Id.
¹³⁰ Id.
¹³¹ Id.
¹³³ Interview with James C. Pergola, supra note 88.
¹³⁵ Interview with James C. Pergola, supra note 88.
¹³⁶ See The City of N.Y.C Mayor’s Office of Media & Entm’t, supra note 134.
As they watched the painful destruction of such a storied and honored industry in the Empire State, the filmmakers and television craftsmen in Florida took action.\textsuperscript{138} Greed could have easily destroyed them, too, and then everything they had built would have crumble. James Pergola met with the producers, directors, and government agencies in Florida, and all agreed that it was necessary to use the same idea in Miami.\textsuperscript{139} James met with the Stage Hands local and every other specialty union from Miami to Tampa, in order to get a consensus.\textsuperscript{140} It took over three months to come up with the \textit{Florida Standard Agreement}.\textsuperscript{141}

The Standard Agreement contract fixed the start time, end time, and realistic overtime wages within all the unions across the state.\textsuperscript{142} “I sent every producer in the country, in concert with [the] business agents, this standard agreement,” explained Pergola.\textsuperscript{143} “As films and television shows came in to Florida, they used our Standard Agreement.”\textsuperscript{144} Pergola and his crew formed The Florida Motion Picture and Television Association (“FMPTA”), which grew to seven chapters by the end of the 1970s.\textsuperscript{145} The FMPTA wanted to influence the governor.\textsuperscript{146} Governor Reubin Askew needed to have a hard sell.\textsuperscript{147} Unfortunately, \textit{Deep Throat} and other pornographic films were being shot in Florida,\textsuperscript{148} and the Governor was

\begin{footnotesize}
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\item Interview with James C. Pergola, supra note 88.
\item Id.
\item Id.
\item Id.
\item Id.
\item Interview with James C. Pergola, supra note 88.
\item Interview with James C. Pergola, supra note 88.
\item See \textit{id.}; \textit{Florida’s Entertainment Industry Success Is Counting on YOU!!!}, FLA. MOTION PICTURE & TELEVISION ASS’N, http://www.fmpta-mo.com/Home_Page.html (last visited Jan. 18, 2014) (explaining both the mission and composition of the association). FMPTA is still very much active today. \textit{Florida’s Entertainment Industry Success Is Counting on YOU!!!}, supra note 146. For the past thirty-nine years, FMPTA has been a vital part of the motion picture and television industry in Florida. \textit{Id.} FMPTA is organized to promote Florida’s “motion picture, television, audio recording, theater, and digital media” industries, by providing assistance and information to all interested organizations in regards to Florida’s skilled personnel, locations, services and fiscal incentives. \textit{Id.}
\item Interview with James C. Pergola, supra note 88.
\end{enumerate}
\end{footnotesize}
apprehensive about supporting filmmaking in the Sunshine State. It was not until July 1, 1973, that the new Florida Film Coordinator, Sunny Fader, was appointed to change Florida’s filmmaking opportunities and image for the better with a modest $50,000 budget.

The Governor also assigned a man named Ben Harris who was instrumental in the formation of the FMPTA and “ran the nationally envied Florida Film Bureau out of the state’s Department of Commerce.” Harris explained that the group would have to show the Governor that the Florida film industry was economically beneficial to the state of Florida. And so it did. The group compiled data and appealed to the Governor to supply government assistance to this viable industry. Through the ease of obtaining permits, use of state facilities, access to the Florida Highway Patrol, ability to block off and use state roads, and developing liaisons and healthy relationships with the administrative agencies in Tallahassee—as well as county and city governments—the relationship would thrive.

The Governor agreed and the Florida Film Commission was born. James Pergola and his dedicated group deeply believed they had “[a] sleeping giant just waiting to be awakened,” and by all indications, they were right. As with any love story, there are periods of time when lovers may quarrel and stop speaking—possibly because there has been a misunderstanding or because one of them has taken the other for granted. In any event, the relationship between Florida and the film industry is a relationship that has withstood the tests of time, and has survived undulating periods of undying support and unchivalrous repudiation.

149.  Interview with James C. Pergola, supra note 88.
151.  Jack Zink, Film Wars Solution: Rewind, SUN-SENTINEL, May 23, 1999, at 1D; see also Interview with James C. Pergola, supra note 88.
152.  See id.
153.  Id.
154.  Id.
155.  Id.
156.  Id.
158.  See id.
159.  See id.
160.  See id.
VI. THE GIANT AWAKENS TO CONCEIVE A NEW FILM LAW AND COUNCIL

The Florida Film & Entertainment Advisory Council was formed as a result of legislation signed into law by [then] Governor Jeb Bush, July 1, 1999. Created in accordance with Chapter 288.1252 of the Florida Statutes, the . . . Council consists of [seventeen] members, seven appointed by the Governor, five appointed by the President of the Senate, and five appointed by the Speaker of the House of Representatives.161

The Florida Office of Film and Entertainment (“OFE”) notes that, “[t]he Film Commissioner, a representative of Enterprise Florida, Inc., a representative of Workforce Florida, Inc., and a representative of the Florida Tourism Industry Marketing Corporation (Visit Florida) serve as ex officio, nonvoting members of the council, and are in addition to the [seventeen] appointed members of the Council.”162 Aside from the very significant changes to law and bureaucracy intended to grow Florida’s connections to the film industry, Governor Bush also endorsed a five-hundred-page Film Florida Production Guide, produced in 2003.163 The guide provides a “direct link to more than [forty] local film offices throughout the state—from Pensacola to Key West” and lists “producers, post-production facilities, crews, studios, equipment, support services, government assistance, associations, and accommodations . . . all over Florida.”164 Governor Bush stated, “[t]he Sunshine State’s entertainment industry has grown over the past decade for one reason: [P]roducers find everything they need in Florida.”165

161. The Fla. Office of Film & Entm’t, About Us: Film & Entertainment Advisory Council, FILMINFLORIDA.COM, http://www.filminflorida.com/about/feac.asp (last visited Jan. 18, 2014) [hereinafter The Fla. Office of Film & Entm’t, About Us: Film & Entertainment Advisory Council]; see also Fla. Stat. § 288.1252 (2013). See supra notes 150, 156, and accompanying text for previous commentary about the role of the Florida Film Coordinator, as well as the Florida Film Commission.

162. The Fla. Office of Film & Entm’t, About Us: Film & Entertainment Advisory Council, supra note 161.

163. Letter from Jeb Bush, Governor of Fla., to Friends, (Jan. 2003) (on file with Nova Southeastern University, Shepard Broad Law Center Library); Letter from the Staff of the Governor’s Office of Film & Entm’t, Office of the Governor of Fla., to Friends (Jan. 2003) (on file with Nova Southeastern University, Shepard Broad Law Center Library); see also FILM FLORIDA PRODUCTION GUIDE, supra note 44.

164. Letter from Jeb Bush to Friends, supra note 163.

165. Id.
The Staff of the Governor’s OFE queries, “[s]ound like a production paradise? It is. From any angle.”166 The Governor’s OFE is committed to the mission of functioning as “an effective link between industry and all levels of government to improve the business climate for the growth and expansion of the entertainment industry in Florida.”167 The mission includes accountability, innovation, partnering, and “strategic focus to capitalize on [the] opportunities . . . that set Florida apart from the rest of the world.”168

In order to encourage success at every level, Florida has instituted major incentives for filmmaking, and empowered administrative agencies to implement them.169 Introduction of legislation that benefits filmmakers—as well as easy to use permitting forms, and an abundance of grants and assistance—have contributed to the overwhelming success of the film industry in Florida.170

VII. FLORIDA PROPOSES WITH TAX INCENTIVES AND THE FILM INDUSTRY SAYS, “I DO!”

In May of 2010, Governor Charlie Christ “inked legislation that create[d] a five-year, $242 million transferable tax credit for the state’s film and entertainment industry.”171 Qualified “projects . . . receive a rebate of 20% to 30% on qualified Florida expenditures.”172 There is “an $8 million cap for major productions.”173 The tax exemption “allocates a 5% bonus for family-friendly projects and an additional 5% for activity taking place during hurricane season.”174

166. Letter from the Staff of the Governor’s Office of Film & Entm’t to Friends, supra note 163.
168. Id.
170. See id.
172. Id.
173. Id.
174. Id.

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“[This] program covers [both] in-state and out-of-state productions . . . .”\textsuperscript{175} It also benefits post-production and digital productions.\textsuperscript{176} The governor “authorize[d] $53.5 million in transferable tax credits for the 2010–2011 fiscal year.”\textsuperscript{177} The total increased to $74.5 million for 2011–2012.\textsuperscript{178} Suzy Spang, Vice President of the Metro Orlando Film and Entertainment Commission, explained, “‘[w]e never knew from one year to the next what the rebate would be. . . . This stabilizes everything.’”\textsuperscript{179} The impact of these tax incentives has far ranging implications from Los Angeles, California to little towns in Florida.\textsuperscript{180}

When Warner Brothers executives were budgeting for the hit “rock musical Rock of Ages, with Tom Cruise, there was no doubt that [the film would be shot] in Los Angeles . . . where the story is set.”\textsuperscript{181} But, as the budgeting process began, producers were scanning the country, even the world, “tabulating tax credits and exchange rates.”\textsuperscript{182} Producers looked from Sydney to Louisiana before settling on Miami, Florida; but they had to transform Miami into “Reagan-era [1980s] rock ‘n’ roll Hollywood.”\textsuperscript{183} “‘We needed to reroute traffic, turn a one-way street into a two-way street, repaint lines and put up traffic signs,’ [sa[id] producer Garrett Grant, ‘and the city was just fantastic, along with the State of Florida, making sure we got everything we needed.”’\textsuperscript{184}

While Florida’s climate, topography, and architecture convincingly doubled for Los Angeles, what “sealed the deal was the state’s production incentive, which offer[ed] a [twenty percent] base tax credit on in-state spend[ing], capped at [eight] million [dollars] per production, with [an] additional [five percent] . . . for shooting . . . off-season.”\textsuperscript{185} The potential was a total of thirty percent.\textsuperscript{186} The tax incentives caused an infusion of projects into Florida.\textsuperscript{187} The abundance of work came in the “nick of time for local film and [television]
workers who [were] underemployed or idle.” 188 “[C]ostume supervisor Emae Villalobos, a [twenty-five]-year veteran of the [movie] biz, [said], ‘I was thinking of getting out of the business completely and going into retail.’” 189 But, then the incentives kicked in, and she was inundated with work for A&E network, including the show The Glades, and movies such as Dolphin Tale and Rock of Ages. 188

Despite the overwhelming success of the tax incentives, there was an amendment that went into effect on July 1, 2011. 191 It mandated that “no more than [twenty-five percent of] its funds go to high-impact television shows.” Although certain series were “grandfathered in through 2015, [it left little room] for any major new series or pilots.” 192

In true Floridian form, Film Florida representatives volunteered to take legislators on a detailed tour of Florida film and television sets. 193 Their goal was to make certain that all members of Florida’s Congress thoroughly understood the significant domino effect of Florida’s film industry. 194 “‘They were blown away by how many people were employed and the amount of construction materials used,’ sa[id] Sandy Lighterman, [F]ilm and [E]ntertainment [I]ndustr[y] [L]iaison for Miami-Dade County. ‘Hopefully, they [will see] those images in their minds at the next legislative session.’” 195

In addition to monetary incentives, the State of Florida is committed to assisting filmmakers through various administrative agencies. 196 The Florida Department of Environmental Protection (“FDEP”) was instrumental in the production of Basic, starring John Travolta and Samuel L. Jackson in 2003. 197 “‘When a . . . set is doubled to look like another area of the country, or the world, for that matter, attention to detail is paramount,’ said [Basic]

188. Id.
189. Id.
190. Longwell, supra note 180.
192. Longwell, supra note 180.
193. Id. (emphasis added).
194. Id.
195. See id.
196. Id.
location manager Mitch Harbeson,” who made the former Naval Air Station at Cecil Field stand in for Panama.\textsuperscript{199}

After the tragedy of 9/11, the Basic location crew had to refocus and change their international settings to domestic.\textsuperscript{200} The plot demanded a location that would allow “several months of filming machine gun firefight scenes” amidst special effects created to produce a hurricane—all without disturbing the peace or alarming local residents.\textsuperscript{201} Florida saved the day and provided paradise for the filmmakers.\textsuperscript{202} While working in the Florida wetlands, near Jacksonville, the team worked night hours.\textsuperscript{203} They had to build “a road that would surround the set and was also strong enough to support production trucks during Florida’s heavy rainfall.”\textsuperscript{204} “We had to be very careful how this road was cut into the dense tropical vegetation and forest,’ said Harbeson. ‘Prevention of senseless tree cutting and trimming had to balance with a road designed not to impact camera sight lines during filming.”\textsuperscript{205} “To create . . . jungles, . . . the team placed 120 truckloads of dirt into the area . . . and added two truckloads of plant[s] . . . .”\textsuperscript{206}

“This was only permitted by the [FDEP] because of my guarantee that I would not introduce foreign soil or water into the area and that it would be brought back to its original condition, within an inch,’ Harbeson explained.”\textsuperscript{207} Based on his relationship with the FDEP and their past experience working together, Harbeson was confident that “all would go as planned.”\textsuperscript{208}

Years later, Harbeson returned to scout locations for a new HBO project.\textsuperscript{209} Navigating these locations would “require[] the assistance of the


\textsuperscript{200}. Muttalib, supra note 197.

\textsuperscript{201}. Id.

\textsuperscript{202}. See id.

\textsuperscript{203}. Id.

\textsuperscript{204}. Id.

\textsuperscript{205}. Muttalib, supra note 197.

\textsuperscript{206}. Id.

\textsuperscript{207}. Id.

\textsuperscript{208}. Id. (emphasis added).

\textsuperscript{209}. Id.
supervisor of elections, committee leaders, the governor, and [the] mayor.”
Towards the end, Harbeson observed that “‘[r]egardless of what jersey [they]
wore, [whether] Democrat or Republican, Floridians wanted to be a part of
this film and represented the film well.’” Florida’s dedication to the film
industry has moved the love affair into a profitable, deeply committed
marriage of sorts. And this marriage has been blessed with fertility. Their Florida-born progeny will leave a legacy for generations.

VIII. FLORIDA’S FILM INDUSTRY PRODUCES PROGENY

“In the summer of 1980, a group of overeducated, authority-defying
comedy writers from the Second City improv[isation] troupe and National
Lampoon magazine delivered perhaps the funniest sports movie ever
made.” Caddyshack was born. Over the past thirty years, the low-
budget $6 million movie has generated over $20 million in video and DVD
rentals, $40 million in sales at the box office, and a place on American Film
Institute’s (“AFI”) top one hundred funniest American movies of all time—
with the special effects talents of George Lucas and other talented producers
and directors enhancing the eleven-week shoot. Caddyshack is particularly memorable, amongst other reasons, for Davie’s gorgeous golf
greens, Key Biscayne’s blue yachting waters, and, not to mention, some of
the funniest lines in film history.

210. Muttalib, supra note 197.
211. Id.
213. See id. at 2–3.
214. See id. at 9–11.
216. CADDYSHACK (Orion Pictures 1980).
In addition to the aforementioned comedies, the AFI compilation of the top one hundred funniest American movies also includes another Florida sibling from 1994: *Ace Ventura, Pet Detective*.220 *Ace Ventura*—played by Jim Carrey—is a private detective who is hired when the Miami Dolphins’ mascot, Snowflake, the bottle-nosed dolphin, is kidnapped.221 Ace embarks on a veritable tour of Miami and Collier County as he searches for clues to the kidnapper’s identity and Snowflake’s location.222 *Ace Ventura* grossed over $12 million when released in theatres the first weekend.223 With a production budget of $12 million,224 the film went on to gross over $107 million worldwide.225 Former Miami Dolphins’ quarterback Dan Marino, Courtney Cox, and Tone Loc helped to make *Ace Ventura* a splashing success, as priceless gems of dialogue flowed from Jim Carey’s lips.226

*Caddyshack* and *Ace Ventura* were not award winning for acting or cinematography, but are excellent examples of small budget Florida films with major impact.227 Together, grossing over $100 million at the box office

filmed in Bel Air, California on Sunset Boulevard. “*Caddyshack* was filmed on location at the Boca Raton Hotel [and] Country Club, Boca Raton and The Rolling Hills Golf & Tennis Club, Davie, Florida.” Id. “The pool scene was filmed at the Plantation Preserve Golf Course in Plantation, [Florida]” and clubhouse scenes at Rolling Hills. Id. “The yacht club scene was filmed at the Rusty Pelican Restaurant . . . [in] Key Biscayne, . . . Florida.” Id.

219. See *CADDYSHACK*, supra note 216. For example, the line uttered by Carl the greens keeper: “On your deathbed, you will receive total consciousness. So I got that going for me, which is nice.” Id. Another nice—but some would argue utterly forgettable—movie made in St. Petersburg was *Summer Rental*, a 1985 comedy film directed by Carl Reiner, starring John Candy. *Summer Rental*, IMDb, http://www.imdb.com/title/tt0090098/ (last visited Jan. 18, 2014). It was filmed in St. Petersburg Beach near St. Petersburg, and includes as part of its soundtrack one of the only Jimmy Buffett songs which is impossible to get on iTunes or in any legitimate—non-bootleg—album: “Turn It Around.” See Mikey Hersh, *Out There!: “Turning Around” by Jimmy Buffet*, MISENOPic (Jan. 2, 2010), http://misenopic.blogspot.com/2010/01/out-there-turning-around-by-jimmy.html; *Summer Rental—Filming Locations*, IMDb, http://www.imdb.com/title/tt0090098/locations (last visited Jan. 18, 2014).


222. See id.


224. Id.


and landing on AFI’s top one hundred funniest films of all time are accomplishments that any parent could be proud of.\(^{228}\)

And the dolphin does it again.\(^{229}\) A 2012 study conducted by the University of South Florida College of Business shows that the little Florida movie “Dolphin Tale, which was shot on location in Pinellas County and produced a direct local economic impact of more than $18 million during the three-month shoot alone,” is set to generate “an economic impact of $580 million in 2013.”\(^{230}\) In addition to Pinellas County’s St. Petersburg/Clearwater Film Commission assessment,\(^ {231}\) the University of South Florida report shows the far-reaching impact of the film across all sectors of Florida’s economy, but especially in Clearwater, and most directly at the Clearwater Marine Aquarium, where Winter, the dolphin star, resides.\(^ {232}\) The film has generated jobs and increased tourism, with a forecasted 2.3 million visitors to the St. Petersburg/Clearwater area and to the Aquarium in 2016.\(^ {233}\) The economic impact of these visitors totals $5 billion to the Florida economy\(^ {234}\) including actual on location vacation tourism around Florida and those pursuing cast extra opportunities.\(^ {235}\)

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\(^{228}\) Ventura: Pet Detective—Box Office/Business, supra note 223; Caddyshack—Box Office/Business, supra note 217.


\(^{231}\) VISIT ST. PETE CLEARWATER, supra note 230, at 9.


\(^{233}\) Id.

\(^{234}\) Study: ‘Dolphin Tale’ Creates Millions in Economic Impact, supra note 229.

One of the longest running, if not most flattering, depictions of Miami in film or television, were “[t]he adventures of the vice squad detectives of the Miami Police Department,” as portrayed over seven seasons from 1984 through 1990 in *Miami Vice*, and the movie adaptation by the same name in 2006.236 This “massively successful national and international hit” featured “[t]he Art Deco buildings of South Beach . . . as a backdrop for much of the show,” the plot “glorified the very real crime problems the area was suffering, and city officials were concerned about the image it was giving of their community.”237 As tourists came to visit the *exotic splendor* of the series’ locations and other Miami area movies and television shows,238 businesses invested more in renovating South Beach and city leaders increased law enforcement vigilance.239 By 2008, “[t]he Art Deco District and South Beach were the top tourist attractions in Miami-Dade County . . . visited by nearly 52% of its 12 million visitors.”240 During a fourteen year period “[f]rom 1995–2009, these visitors to Miami Beach spent . . . $15 billion for food, drinks and lodging, with historic South Beach [accounting for] nearly 75% of [that] spending.”241

IX. FLORIDA AND THE FILM INDUSTRY IN THE 21ST CENTURY

More than any other time in filmmaking history, the latter portions of the twentieth and early twenty-first centuries were marked by the cinematographic equivalent of outsourcing, also known in the film industry as runaway productions.242 This term describes filmmaking and television productions that are “intended for initial release/exhibition or television

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238. *Id.* at 97; see also *Bad Boys, Bad Boys II, The Bird Cage, & True Lies—Filming Locations*, IMDb, http://www.imdb.com/ (search “film name”; select “film name”; select “filming locations”) (last visited Jan. 18, 2014).

239. See Drolet et al., supra note 237, at 96–97.

240. *Id.* at foreword.

241. *Id.*

broadcast in the U.S., but are actually filmed in another country.”243 Hardly a new complaint in the media industry, film crews often “left Los Angeles to shoot in exotic [often overseas] locales—creative runaways—but in the 1970s and 1980s, technological changes related to the advent of television production methods made filmmaking more mobile.”244 In some instances, the choice to produce creative runaways was based on requirements of the script, setting, or due to preferences of the actors or director.245 Alternatively, economic runaways are and have been productions made in other countries to reduce costs.246 For instance, in 2002, only one of the five Best Picture nominees, The Hours, for that year’s Academy Awards was shot in Hollywood—Hollywood, Florida, that is.247

The United States Federal Government and many states, including Florida, recognized “the substantial economic damage inflicted by [r]unaway [p]roductions” proliferating in the 1980s and beyond.248 In turn, “Congress enacted section 181 of the Internal Revenue Code of 1986, as amended (“the Code”),249 as part of the American Jobs Creation Act of 2004.”250 “Section 181 allows for certain expenses associated with films and television productions costing less than $15 million to be immediately deducted in the

243. Screen Actors Guild & Dirs. Guild of Am., supra note 242, at 2; see also Herd, supra note 58, at 40–41 (U.S. production went offshore to Australia, in part, because of government incentives). For runaway productions in Canada, see Debra Felstead, Toronto TV Production Is Fading to Black; Actors Scrambling to Find Work Funding Cuts, SARS to Blame, Toronto Star, July 6, 2003, at D03. For an appreciation of the global effect of creative and economic runaways, see Katz, supra note 242, at 1–2.


246. Id.


250. Medina & Klein, supra note 247, at 2; see also Katz, supra note 242, at 60 (“The language allows producers of films with budgets under $15 million to immediately write off their costs in a single year—if 75% of their principal costs are incurred via shooting in the [United States]. Previously, producers had to amortize those costs over several years.”).
year incurred.” At present, section 181 of the Code—Treatment of certain qualified film and television productions—provides that “[a] taxpayer may elect to treat the cost of any qualified film or television production as an expense which is not chargeable to capital account. Any cost so treated shall be allowed as a deduction.” As currently in force, “[s]ection 181 has the potential to be very effective in limiting the negative economic impact of [r]unaway [p]roductions,” encouraging television and film productions in the United States in general and, with economic enticements, in Florida in particular.

The Governor’s OFE commissioned an independent assessment of Florida’s film and entertainment industry, conducted by the Haas Center for Business Research and Economic Development. The study revealed that “[t]he estimated . . . impact of . . . Florida[’]s [f]ilm and [e]ntertainment [i]ndustry grew from . . . $27 billion in 2003 to [almost $30] billion in 2007.” In no small part, this growth was fueled by Florida’s own financial incentive program for the entertainment industry, codified in section 288.1254 of the Florida Statutes. Florida’s Entertainment Industry Financial Incentive Program—which became effective July 1, 2007—“was created within the Governor’s . . . (OFE) to ‘encourage the use of this state as a site for filming and to develop and sustain the workforce and infrastructure for film and entertainment production.’” “To further support this mission [of maximizing film and entertainment production in Florida], the Governor and the Florida Legislature provided $25 [million] in funding for the 2007–2008 fiscal year, . . . up $5 million from the previous fiscal year.” In its present inception as a six-year program—which “began on July 1, 2010 and sunsets June 30, 2016”—some $12 million have been allocated by the State Legislature in tax credits beyond the initial 2010 allocation of $242 million. In “2012, the legislature allocated an additional $42 million in tax credits to the program, totaling $296 million.” As a cost-to-benefit bottom

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251. MEDINA & KLEIN, supra note 247, at 2.
253. MEDINA & KLEIN, supra note 247, at 2.
254. Id.; see also KATZ, supra note 242, at 62; Koegel, supra note 169, at 15.
255. POOLEY, supra note 227, at 1.
256. Id. at 20.
257. FLA. STAT. § 288.1254 (2013); see also Koegel, supra note 169, at 15.
259. Id.
261. Id.
Florida’s Department of Economic Opportunity claims that since the program’s inception, the OFE has:

- Submitted and processed 481 applications;
- Qualified and certified 230 of those productions for tax credits with projected Florida expenditures of approximately $1.3 billion; [and]
- Estimated that wages to Floridians associated with the 230 productions are currently projected to be close to $760 million and are associated with 161,000 positions for Florida residents.

Governor Charlie Crist renewed and re-enforced his public commitment to the program by stating: “‘As we continue to seek growth opportunities for Florida’s economy, it is important to remember the significant role film and entertainment plays in our state, directly employing more than 100,000 Floridians.’”

Crist was well aware that “‘[t]hese findings highlight how important it is for Florida’s businesses and workforce to ensure this revenue stream continues flowing into our state.’”

The study reiterated the unique benefits that are generated by the film and entertainment industry: “[T]he economic benefits extend into other industries: . . . [R]estaurants, lodging, retail, construction, and tourism.” The economic benefits set in motion “an additional estimated 105,000 related spinoff jobs in 2007 [alone]." "[I]n 2007, the [film and entertainment] industry [in Florida] accounted for: $17.9 billion in Gross State Product (“GSP”); $8.5 billion in income to Floridians; and $498 million in tax revenue.”

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262. Id.

The production types certified to date [as of 2011/2012] include: 58 motion pictures (theatrical, made for [television], direct to video, documentaries, visual effects sequences in conjunction with a motion picture); 42 digital media productions; and 101 television productions ([television] series, including high-impact, drama, comedy, game shows, variety, entertainment shows, reality), [television] series pilots, telenovelas, and award shows; and 29 commercials.


264. Id.

265. Id.

266. Id.

267. Id.

268. Study Shows $29.2 Billion Economic Impact for Film and Entertainment Industry in Florida, supra note 263.
In 2012, Ernst & Young was commissioned by the Motion Picture Association of America (“MPAA”) to complete a study evaluating the effectiveness of film tax credits. In that report, Ernst & Young noted:

[t]he net fiscal benefit for state and local budgets is generally determined by comparing the cost of incentives to the additional state and local taxes generated by the film industry expansion. The net fiscal effect could be positive or negative depending upon both the features of state film credits and the economic characteristics of each production.

Elsewhere in the report, Ernst & Young found Florida comparable to California when comparing “film tax credit programs in selected states with highest FY2010 credit program expenditures,” yet not as generous as eight of its peer-competitor film-making states—Connecticut, Georgia, Louisiana, Massachusetts, Michigan, New Mexico, New York, and Pennsylvania—with respect to “[s]tatutory credit rates by type of qualified expenditure.”

The Association of National Advertisers (“ANA”) published a white paper titled The Found Money of State Commercial Production Incentives highlighting that:

The list of states that offer commercial production incentives and the specific details for each state, are continually evolving. Commercial production incentives are currently available from Alaska, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Mississippi, Missouri,

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270. Id. at 7. In the report, Ernst & Young cited how [t]he advertising value of film and television productions, at a minimum, can be evaluated by comparing the costs of generating similar awareness of a state through paid advertising. For decades, states have purchased advertising in magazines and on television to promote awareness of their states as a destination for tourists. Examples include Michigan’s “Pure Michigan” campaign, which cost nearly $30 million in 2009; California’s “Find Yourself Here” campaign, which has cost $50 million annually since 2007–08; Hawaii’s leisure and sports marketing budget of $44 million in 2010; Florida’s marketing cost of $23 million in 2002; and Las Vegas’ $87 million spent on advertising in 2009, including its “What Happens in Vegas, Stays in Vegas” campaign.

271. Id. at 21 tbl. A-2.
Montana, New Mexico, North Carolina, Oklahoma, Pennsylvania, Puerto Rico, Texas, Washington, and West Virginia.272

The Florida Film and Entertainment Industry Financial Incentive Program, overseen by the Governor’s Office of Tourism, Trade, and Economic Development—in the Governor’s OFE—builds, supports and markets the high-wage, high-growth motion picture and entertainment industry sectors in Florida.273 With offices in Tallahassee and Los Angeles, Florida is able to implement innovative strategies to attract world-class productions to the state that provide economic benefits to residents and businesses.274 A study released in March 2013

on the economic impact of The Florida Film and Entertainment Industry Financial Incentive Program found a return on investment (“ROI”) of 4.7, with estimated state and local tax revenues in Florida last fiscal year totaling $547 million and the present value


273. See The Fla. Office of Film & Entmt, *Florida Film & Entertainment Industry Financial Incentive Program*, supra note 2. A brief overview of the program benefits identified included:

20%–30% transferable tax credit; 20% base percentage; 5% Off Season Bonus (for certain production types); 5% Family Friendly Bonus (for certain production types); 5% Underutilized Region Bonus (for General Production Queue only); 5% Qualified Production Facility/Digital Media Facility Bonus (for General Production Queue, on expenditures associated with production activity at a Qualified Production Facility/Digital Media Facility); 15% Florida Student/Recent Graduate Bonus (for General Production Queue, on student/recent grad wages and other compensation). The priority for qualifying/certifying projects for tax credit awards is determined on a first-come, first-served basis within its appropriate queue.

Id. For a comparison and contrast of Florida’s peer-competitor states seeking film industry revenues, and second-order-of-effect tourism and service industry benefits, see, for example, Emily Patricia Graham, *Compiled Comparison of Film Tax Incentives in Louisiana, Florida, Texas and New Mexico* (n.d.), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/entertainment_sports/film_incentives_compiled_comparision.authcheckdam.pdf.

of the tax credit totaling $117 million. The ROI is 4.7 when the state and local tax revenue effects of film-induced tourism, production spending, and infrastructure spending are taken into account.\(^{275}\)

That means, “for every $1.00 of credit distributed, the state and local governments received a combined $4.70 in taxes.”\(^{276}\) The incentive also supported an estimated 87,870 jobs and $7.2 billion in economic spending across the state, both through production spending and induced tourism.\(^ {277}\)

Vans Stevenson, Senior Vice President for State Government Affairs at the MPAA, aptly pointed out in 2013 that the range of “major theatrical releases like *Magic Mike* and *Dolphin Tale* to some of television’s most watched shows like *Burn Notice* and *The Glades* [in] the entertainment industry is a fundamental element to Florida’s economy.”\(^ {278}\) Indeed, “[t]he Emmy-nominated show [*Burn Notice*] infused more than $28.6 million into South Florida’s economy during [its] first two seasons [alone of a seven season run], and . . . created more than 2700 jobs”\(^ {279}\) while receiving $5.2 million of the 2009 State of Florida incentive budget totaling $10.8 million.\(^ {280}\) “[H]oliday box office [hit] *Marley & Me* . . . injected more than $10 million into South Florida’s economy, employing nearly 1400 Floridians,” as the number one hit at the box office for two weeks and “effectively market[ed] South Florida[] [as the perfect] . . . destination[] [for] millions of winter moviegoers.”\(^ {281}\)

For over a billion warm climate moviegoers in India, Mumbai’s so-called Bollywood has traditionally satisfied cinematic cravings,\(^ {282}\) at least


\(^{276}\). Id.

\(^{277}\). Id.

\(^{278}\). Id.

\(^{279}\). Study Shows $29.2 Billion Economic Impact for Film and Entertainment Industry in Florida, supra note 263.


\(^{281}\). Study Shows $29.2 Billion Economic Impact for Film and Entertainment Industry in Florida, supra note 263.

until Miami beckoned for a creative runaway\textsuperscript{283} to its sandy shores and hot nightlife.\textsuperscript{284} Dharma Productions’ feature film \textit{Dostana—Friendship} in Hindi and Urdu—starring John Abraham, Abhishek Bachchan, and Priyanka Chopra, produced by Karan Johar, was “the first major Bollywood [f]ilm to shoot in Miami-Dade County.”\textsuperscript{285} The romantic-comedy \textit{Dostana} went on to become the eighth highest grossing film at the Indian box office,\textsuperscript{286} grossing one billion Indian rupees, or $16.8 million, in its first four weeks alone at the box office\textsuperscript{287}—no small measure in the world’s largest movie market—which “had a revenue of . . . $3 \text{[billion]}$ in 2011, and has been growing at approximately \text{10.1} \% \text{a year}. The revenue is expected to reach . . . $4.5 \text{[billion]}$ by 2016.”\textsuperscript{288} As a \textit{low budget} sequel of five hundred and six thousand—compared to two million dollars for the original \textit{Dostana}\textsuperscript{289}—actor “John Abraham promises [a] kid-friendly \textit{Dostana 2},” with Abraham and Bachchan “migrating] from Miami to Punjab,”\textsuperscript{290} as only a partial creative runaway.\textsuperscript{291}

Because of this unprecedented governmental support, “there is an established film office and film liaison infrastructure within Florida.”\textsuperscript{292} In addition to the “Florida[f]ilm office . . . housed in the Governor’s office, . . . there are [fifty-four] film liaisons located throughout the [s]tate.”\textsuperscript{293} The Sunshine State is also the only state with a full time Los Angeles film office

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283 & For a discussion of creative versus economic runaways, see \textsc{Screen Actors Guild & Dirs. Guild of Am., supra note 242}, at 2.
284 & \textsc{M. Barron Stofik, Saving South Beach} 239–41 (2005).
287 & \textit{Dostana Grosses Rs 1 Billion Worldwide in Four Weeks}, supra note 285. Conversion calculated based upon June 23, 2013 foreign currency exchange rate of one Indian rupee to \texttt{0.168703764625 United States dollars}. \textsc{INR to USD Rate}, \textsc{Forex Money Changer}, http://www.fxmoneychanger.com/inr/usd/rate/?q=180 (last updated Nov. 10, 2013).
288 & \textsc{Vogg, supra note 282}.
291 & \textit{Id.; see also Screen Actors Guild & Dirs. Guild of Am., supra note 241}, at 2.
292 & \textsc{Pooley, supra note 227}, at 22.
293 & \textit{Id}.
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whose goal is to bridge the gap between Hollywood and Florida.\textsuperscript{294} Extending Florida’s reach to California cements a strong and enduring relationship with Hollywood and exemplifies Florida’s steadfast commitment to the film industry.\textsuperscript{295} Florida is aggressively implementing innovative strategies to attract productions from all over the world.\textsuperscript{296} World-class productions provide billions of dollars of economic benefits to Florida residents and businesses.\textsuperscript{297}

\section{Florida’s Future: Faithfulness and Fidelity to the Film Industry}

Florida is not about to take its relationship with the movie industry for granted.\textsuperscript{298} Dedicated to the successful growth of the industry, Florida continues to find ways to reinforce the bonds, reveal weaknesses and reaffirm its strengths.\textsuperscript{299} The Tourism Committee of the Florida House of Representatives State Infrastructure Council authored a report in 2006, entitled \textit{Florida’s Entertainment Industry Infrastructure: Are We Growing the Indigenous Industry as well as Supporting Production?}\textsuperscript{300} The report made recommendations for the operations within the Governor’s Office and the film industry within the state.\textsuperscript{301} Recommendations included reevaluation of Florida’s tax incentives, fully funding and staffing the Governor’s Office of Film and Entertainment, and aggressively bringing in production from other states.\textsuperscript{302}

The 2009 Haas Analysis of the Florida Film and Entertainment Industry (“Haas Analysis”) explored Florida’s strengths, weaknesses, and opportunities.\textsuperscript{303} Florida’s “[u]niqueness of place . . . offers a wide variety of filming locations,” and Miami is now internationally recognizable because of Florida’s film industry.\textsuperscript{304} Notably, Matt Nix, Executive Producer of \textit{Burn
Notice, explained about Miami, “Miami [is] just a very convenient place for [the lead character, Michael]. It [is] a place where you can blow things up and nobody notices.”

The Haas Analysis report points out a weakness in labor rates. “[T]he current structuring of labor rates by unions, [especially the] IATSE, results in wage rates [of] $5.25 to $6.00 . . . higher on productions taking place in Florida as compared to . . . competing states. There is also a[] . . . perception that unions are [hard] to deal with in Florida.” Also, recent severe weather, tropical storms, and hurricanes add an additional concern to productions choosing Florida.

But, there are opportunities for increased production in niche markets. Florida is looking to get a competitive edge by appealing to Spanish-language television and the Spanish-language workforce. The overall conclusion, as a result of all the industry analysis, is that if Florida wants to attract on-location filming to the Sunshine State, it will have to provide the most attractive incentive programs. A statement from Warner Brothers Worldwide Television summed this up: “[I]n the past few years, financial incentives have overwhelmed the where to shoot equation. Major studios and smart independents are going to locations that have the best incentives. It [is] as simple as that.”

The Film in Florida website—www.filminflorida.com—is the new guide to the Florida Film Industry for 2013, highlighting the Florida OFE’s mission to support, build, and market Florida’s entertainment industry. The mission reaffirms the importance of “collaboration with the indigenous . . . community [and dedication] to implement innovative ways to grow [the] industry.” The OFE strives to provide “hands-on, world-class service that our clients need and deserve, and exceed our annual business goals to become the number two global . . . leader.” They are committed

306. Id.
307. Id.
308. Id.
309. Id. at 170–71.
310. Id. at 24, 31.
311. See POOLEY, supra note 227, at 30.
312. Id.
315. Id.
to integrity, inclusiveness, accountability, partnering, empowerment, and innovation.\textsuperscript{316} Links from the website include easy on-line permitting, federal incentive programs, and contact information to guilds, unions and associations.\textsuperscript{317}

The film office website has launched the \textit{Florida Green Production Plan}, which includes guidance to production companies so that they can “make environmentally-wise decisions at every phase of production” in Florida.\textsuperscript{318} This initiative involves interaction with multiple Florida agencies.\textsuperscript{319} The Forest Stewardship Council, recycling centers, the Florida Green Lodging program, hazardous waste centers, and regulations are clearly linked and articulated to ease production companies in going green in Florida.\textsuperscript{320}

The Governor’s Office also provides, through the Film in Florida organization, a \textit{Hurricane Preparedness Plan} for filmmakers.\textsuperscript{321} It explains specific insurance provisions through Insuring Florida, links to the Central Florida Hurricane Center, numerous phone numbers and links for emergency evacuation assistance, mayors’ offices, disaster preparedness centers, and storm surge evacuation maps.\textsuperscript{322}

The website includes an almost limitless library of photographs and a rich inventory of locations that showcase the expansive diversity of Florida.\textsuperscript{323} This is incredibly helpful to out-of-state producers, who can scout locations in cyberspace without the expense of physically traveling to Florida during the early phase of production planning.\textsuperscript{324}

It appears that by 2014 and beyond, the Governor’s Office, Florida administrative agencies, and film liaisons will have covered every conceivable whim, wish, want, \textit{sine qua non}, and exigency.\textsuperscript{325} The Film in Florida website is a fascinating display of Florida’s undying dedication to Hollywood and the film industry.\textsuperscript{326}

\begin{itemize}
  \item \textsuperscript{316} \textit{Id.}
  \item \textsuperscript{317} \textit{Id.}
  \item \textsuperscript{319} \textit{See id.}
  \item \textsuperscript{320} \textit{Id.}
  \item \textsuperscript{321} FILM FLA. & GOVERNOR’S OFFICE OF FILM & ENTMT, FLORIDA FILM, TELEVISION, AND ENTERTAINMENT HURRICANE PREPAREDNESS PLAN 1 (n.d.), \textit{available at} http://www.miamidade.gov/filmmiami/hurricane-preparedness.pdf.
  \item \textsuperscript{322} \textit{Id.} at 8–10.
  \item \textsuperscript{323} The Fla. Office of Film & Entm’t, \textit{Location Resources}, supra note 274.
  \item \textsuperscript{324} \textit{See id.}
  \item \textsuperscript{325} \textit{See FILM FLA. & GOVERNOR’S OFFICE OF FILM & ENTMT, supra note 321, at 1–3; FILMINFLORIDA.COM, supra note 313; The Fla. Office of Film & Entm’t, \textit{Location Resources}, supra note 274.
  \item \textsuperscript{326} \textit{See FILMINFLORIDA.COM, supra note 313.}
\end{itemize}
A recent study commissioned by the MPAA is a revealing quantification of the economic impact of the film industry in Florida, as already experienced in fiscal year (“FY”) 2011/2012.327

<table>
<thead>
<tr>
<th>Florida Impacts FY 2011/2012</th>
<th>Production Impacts</th>
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<tbody>
<tr>
<td>Production Expenditure ($2005 millions)</td>
<td>$1512</td>
</tr>
<tr>
<td>Output ($2005 millions)</td>
<td>$2536</td>
</tr>
<tr>
<td>Gross State Product ($2005 millions)</td>
<td>$1507</td>
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<tr>
<td>Employment (FTEs)</td>
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<tr>
<td>Labor Income ($2005 millions)</td>
<td>$761</td>
</tr>
<tr>
<td>State and Local Taxes (Nominal $ millions)</td>
<td>$140.44</td>
</tr>
</tbody>
</table>

Figure 1—Estimated Florida Economic Impacts of Production Spending in FY 2011/2012328

What may well be most telling of the future economic impact of Florida’s film industry was the study’s estimates for the exponential revenue growth, employment increases, and raised tax revenues in the five-year period beginning in 2011 forward.329

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<tbody>
<tr>
<td>Production Expenditure ($2005 millions)</td>
<td>$3769</td>
<td>$3769</td>
<td>$3769</td>
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<tr>
<td>Output ($2005 millions)</td>
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<td>Gross State Product ($2005 millions)</td>
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<td>State and Local Taxes (Nominal $ millions)</td>
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<td>Not Reported</td>
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</tr>
</tbody>
</table>

Figure 2—Midpoint of IMPLAN and REMI TAX-PI Estimated Florida Economic Impacts of Production Spending330

328. Id.
329. See id. at 1.
330. Id. Note: IMPLAN=Impact Analysis for Planning; REMI=Regional Economic Models, Inc.; TAX-PI=a ready-to-use, “dynamic fiscal and economic impact model” that captures the direct, indirect, and induced “fiscal and economic effects of
XI. Conclusion

Florida and the film industry: A match made in heaven, or rather, paradise. Florida’s ineradicable dedication to the needs and desires of the film industry proves her unwavering commitment to this treasured relationship. Globally, grateful members of the film industry show respect and loyalty in return. This allegiance allows the benefits of the relationship to flow both ways, and ultimately the citizens of the Sunshine State reap the greatest rewards.

Proof of Florida’s steadfastness continues as Governor Rick Scott highlighted *Dolphin Tale 2*’s production in Florida highlighted earlier. *Dolphin Tale 2* is the true story of baby dolphin, named Hope, who was rescued and rehabilitated by the Clearwater Marine Aquarium in 2010. Florida Representative Ed Hooper said, “It’s great news that *Dolphin Tale 2* will be filmed in Clearwater, creating an economic benefit to the entire area.” Hooper went on to thank Governor Scott for “focusing on creating jobs in Florida.” According to the Governor’s Office, the 2013-2014 Florida Families First budget includes $5 million in general revenue funds to be allocated to the production. Also anxiously anticipated for its entertainment prospects, and much appreciated from a jobs and revenue perspective, is the May 2015 release of an upcoming science fiction mystery film, *Tomorrowland*; it is being filmed at various Disney theme parks, and directed, co-written, and produced by Brad Bird and produced and co-written by Damon Lindelof, starring the non-Delphinidae human actors Britt Robertson and George Clooney, with Hugh Laurie as the primary villain.

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332. See *id.* at i–ii.
333. See *id.* at ii, iv, viii; *Longwell*, supra note 180.
334. See *id.* at v; *Longwell*, supra note 296, at i–ii.
337. Id.
338. *Tomorrowland*, is being filmed at the *Tomorrowland* attraction at Walt Disney World, Lake Buena Vista, Florida, as well as various locations around Titusville and New Smyrna Beach, Florida. *See, e.g.*, Anthony Breznican, *Disney’s Mysterious ‘1952’ Movie Has a New Name . . . ‘Tomorrowland’—Exclusive*, ENT. WKLY. (Jan. 28, 2013, 3:15 PM), http://insidemovies.ew.com/2013/01/28/disneys-1952-is-tomorrowland/; Mike Fleming, *‘Lost’s’ Damon Lindelof Makes 7-Figure Disney Deal to Write Secret Sci-Fi Feature,*
As this multi-billion dollar relationship continues into its second century, with over 120 films and television shows and counting, filmmakers and Floridians can look forward to many more success stories—especially if they focus on diligent collaboration, economic incentives, and absolutely any tale about a bottlenose dolphin.

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340. See Fla. H.R. Comm. on Tourism, supra note 296, at ii; Flipper Dolphin, supra note 121.
2013 SURVEY OF JUVENILE LAW

Michael J. Dale*

I. INTRODUCTION................................................................. 81
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I. INTRODUCTION

The Supreme Court of Florida decided three cases this past year involving juveniles, all in the delinquency field involving significant but technical matters. In the first case, the court held that it was necessary to prove that a school police officer was the designee of the school principal in order for a juvenile to be adjudicated for committing trespass on school grounds. In the second case, the court held, over a dissent, that a juvenile who committed several acts of indirect criminal contempt could be sentenced to consecutive periods of secure detention for each of the two offenses, thus resolving a conflict in the district courts of appeal. In the third case, the court held that a juvenile detention center falls within the criminal law definition of a detention facility.

The intermediate appellate courts were quite busy in the juvenile delinquency field, deciding both important issues and also reversing regretful fundamental errors by the trial courts. In the dependency and termination of parental rights (“TPR”) field, the appellate courts were less busy, but

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* Professor of Law, Nova Southeastern University, Shepard Broad Law Center. This survey covers cases decided during the period from July 1, 2012 through June 30, 2013. The author thanks law librarian Robert Beharriell, Esq. for his help in the preparation of this survey.

2. J.R., 99 So. 3d at 428.
3. J.M. II, 101 So. 3d at 356, with J.M. II, 101 So. 3d at 357 (Quince, J., dissenting).
5. Hopkins II, 105 So. 3d at 471.
nonetheless, decided several important cases.\textsuperscript{7} And again, some of the opinions involved rudimentary trial court error.\textsuperscript{8}

II. DEPENDENCY

Issues regarding non-offending parents come up regularly in the appellate decisions in Florida, including issues of due process.\textsuperscript{9} In A.S. v. Department of Children & Family Services (\textit{In re Interest of E.G-S.}),\textsuperscript{10} a dependency petition was filed against a mother who was divorced and in which the petitioner made no allegation against the father.\textsuperscript{11} After a trial on the petition, the court found the child dependent and ordered the child placed with the non-offending father, terminated its jurisdiction along with Department of Children and Families’ (“DCF” or “Department”) supervision.\textsuperscript{12} The mother based her appeal on a violation of her due process rights, resulting in the court’s termination of jurisdiction and supervision, without a hearing.\textsuperscript{13} The appellate court agreed.\textsuperscript{14} The mother was entitled to notice that the court would determine the child’s permanent placement at the dispositional hearing, and further that “a court may not place [the] child permanently with [the] non-offending parent when the offending parent is either in substantial compliance with [the] reunification . . . plan or the time for compliance has not expired.”\textsuperscript{15} The court then remanded for an “evidentiary hearing to determine whether allowing the case to remain pending while [the mother] complete[d] her case plan would be detrimental to the child’s interest, and . . . whether a preponderance of the evidence support[ed] changing the goal of [the] case plan” to custody for the father.\textsuperscript{16}

In \textit{F.O. v. Department of Children & Families},\textsuperscript{17} a father appealed an order after the adjudicatory hearing found no evidence that he abused, abandoned, or neglected the children, and entered the mother consent plea to the petition for dependency.\textsuperscript{18} The problem was that the trial court nonetheless

\begin{itemize}
\item \textsuperscript{7} See infra Parts II, III.
\item \textsuperscript{8} See id.
\item \textsuperscript{10} 113 So. 3d 77 (Fla. 2d Dist. Ct. App. 2013).
\item \textsuperscript{11} Id. at 78.
\item \textsuperscript{12} Id.
\item \textsuperscript{13} Id. at 79–80.
\item \textsuperscript{14} Id. at 80.
\item \textsuperscript{15} \textit{In re Interest of E.G–S.}, 113 So. 3d at 79.
\item \textsuperscript{16} Id. at 80.
\item \textsuperscript{17} 94 So. 3d 709 (Fla. 5th Dist. Ct. App. 2012).
\item \textsuperscript{18} Id. at 709–10.
\end{itemize}
ordered the father to participate in the case plan.\textsuperscript{19} Relying upon two earlier intermediate appellate court decisions, but without any discussion, the appellate court held that even when the parent had not been found to have abused, neglected, or abandoned the child at issue, the parent could be ordered to participate in the case plan.\textsuperscript{20}

In \textit{M.P. v. Department of Children & Family Services (In re Interest of T.B. & T.P.)},\textsuperscript{21} the issue was whether temporary legal custody could be shared with DCF in a case where the dependency adjudication by consent was made as to the father, but an order of dependency was withheld as to the mother, except for the case plan for the children.\textsuperscript{22} In its order, the trial court determined that remaining in the mother’s custody, with protective supervision, was in the best interests of the children.\textsuperscript{23} However, the order also determined that the mother “share temporary physical custody of the children” with the DCF.\textsuperscript{24} Given the trial court’s grant of legal custody of the children to the mother, it was reversible error to also order temporary physical custody of the children to the Department.\textsuperscript{25}

Once parents have completed tasks assigned to them pursuant to a case plan after a finding of or consent to dependency, they may seek reunification with their children.\textsuperscript{26} However, a trial court must determine if the parents “compli[ed] with the case plan” and if “reunification [is] detrimental to the child” before considering an order of reunification.\textsuperscript{27} In addition, “[t]he court is also [obligated] to make written . . . findings as to the six statutory factors.”\textsuperscript{28} In \textit{Department of Children & Families v. W.H.},\textsuperscript{29} the trial court failed to make findings on a number of the statutory factors.\textsuperscript{30} Nor was there competent evidence in support of finding the factors; DCF did not have notice that a hearing may result in the possibility of reunification, and no evidence of the issue

\footnotesize{\textsuperscript{19} Id. at 710.  
\textsuperscript{20} Id.  
\textsuperscript{21} 107 So. 3d 515 (Fla. 2d Dist. Ct. App. 2013).  
\textsuperscript{22} Id. at 516.  
\textsuperscript{23} Id.  
\textsuperscript{24} Id.  
\textsuperscript{25} Id. at 516–17.  
\textsuperscript{26} FLA. STAT. § 39.522(2) (2013); see also id. §§ 521(d)(9), 6011(1).  
\textsuperscript{27} Id. § 39.522(2); Dep’t of Children & Families v. W.H., 109 So. 3d 1269, 1270 (Fla. 1st Dist. Ct. App. 2013) (per curiam) (quoting C.D. v. Dep’t of Children & Families, 974 So. 2d 495, 500 (Fla. 1st Dist. Ct. App. 2008)).  
\textsuperscript{28} FLA. STAT. § 39.621(10); W.H., 109 So. 3d at 1270.  
\textsuperscript{29} 109 So. 3d 1269 (Fla. 1st Dist. Ct. App. 2013) (per curiam).  
\textsuperscript{30} Id. at 1270.}
was presented at trial.\textsuperscript{31} The appellate court reversed given the absence of both notice and “an evidentiary hearing on reunification.”\textsuperscript{32}

In \textit{State Department of Children & Families v. B.D.},\textsuperscript{33} the trial court adjudicated the child dependent and placed the child with her maternal cousin as permanent guardian.\textsuperscript{34} Subsequently, the mother’s motion was granted and DCF was ordered to reinstate protective supervision, “without scheduling or holding an evidentiary hearing or setting out specific findings of fact.”\textsuperscript{35} From that order, the Department sought certiorari.\textsuperscript{36} The appellate court issued a writ quashing the trial court’s order.\textsuperscript{37} The appellate court opined that the trial court order departed from the essential requirements of law as it “failed to make specific, required findings of fact addressing the child’s best interest[s], stating the circumstances that caused the . . . dependency, and explaining [why the] circumstances [were] resolved.”\textsuperscript{38} The appellate court then added:

“Time is of the essence for . . . children in [a] dependency system.” . . . [T]he court’s failure to comply with the express requirements of the law significantly disrupts what was supposed to be a permanent guardianship, leav[ing] the child’s status in a continuing state of uncertainty, subject[ing] the child to [a] risk of harm, and requir[ing] immediate relief that cannot be provided at some uncertain future time on plenary appeal.\textsuperscript{39}

In a third case, a mother appealed from an order granting the state’s motion for reunification with her two children, closing the case as to a third child, and placing that third child with the father.\textsuperscript{40} The appellate court held, quite simply, that an evidentiary hearing must be held where there are disputed facts concerning the “detriment to the child,” allowing an offending parent to contest the issue.\textsuperscript{41} As “the [trial] court made findings of fact without conducting an evidentiary hearing,” this was a reversible error.\textsuperscript{42}

\begin{itemize}
\item \textsuperscript{31} \textit{Id.}
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} 102 So. 3d 707 (Fla. 1st Dist. Ct. App. 2012).
\item \textsuperscript{34} \textit{Id.} at 708.
\item \textsuperscript{35} \textit{Id.}
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{B.D.}, 102 So. 3d at 710.
\item \textsuperscript{39} \textit{Id.} at 711 (citation omitted) (quoting Fla. STAT. § 39.621(1) (2013)).
\item \textsuperscript{40} B.W. v. Dep’t of Children & Families, 114 So. 3d 243, 244 (Fla. 5th Dist. Ct. App. 2013) (per curiam).
\item \textsuperscript{41} \textit{Id.} at 249.
\item \textsuperscript{42} \textit{Id.}
For over two decades, the Florida courts have dealt with dependency determinations based upon prospective neglect. In the leading case, Padgett v. Department of Health & Rehabilitative Services, the Supreme Court of Florida held that in order to make a finding of prospective neglect, there must be “a nexus between the parent’s problem and the potential for future neglect.” The issue arose again in J.V. v. Department of Children & Family Services (In re Interest of J.I.V.). In that case, a father appealed an order adjudicating his son dependent. The basis for the petition to adjudicate the child dependent was that the father was a danger to the son because the father was a member of the Bloods gang; the police officer testified that the father’s gang involvement was proven by his numerous tattoos. The twenty-three year old father obtained some of the tattoos as a teenager. Both the DCF and the Guardian Ad Litem (“GAL”) Program conceded error, and the appellate court recognized that while tattoos may indicate previous gang association, there was nothing to indicate his involvement in any criminal activity since he was released from prison two years earlier; further, all other testimony was that he “had been . . . diligent in visiting his son and offering financial support.”

Finally, in a case of first impression, perhaps nationally, in R.L.R. v. State, a seventeen-year-old minor in a dependency case sought a writ of mandamus to compel a reversal of the trial court’s order, “directing the [child’s] Attorneys Ad Litem [(“AAL”) to disclose the [child’s] whereabouts,” to whom the child had formerly provided this information and requested that it not be shared. The trial court “recognize[d] the attorney-client privilege, but [found] the disclosure [was] required ‘for the proper administration of justice.’” Finding no exception to the attorney-client privilege that would support the trial

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44. 577 So. 2d 565 (Fla. 1991).
46. 99 So. 3d 578, 579 (Fla. 2d Dist. Ct. App. 2012).
47. Id. at 578.
48. Id. at 579.
49. Id.
50. Id. at 578, 580.
51. 116 So. 3d 570 (Fla. 3d Dist. Ct. App. 2013).
52. Id. at 571, 572 n.2.
53. Id. at 571.
court’s order to disclose, the appellate court reversed.\textsuperscript{54} In doing so, it relied in part on the brief of amicus curiae the Florida Association of Counsel for Children, the Juvenile Law Center of Philadelphia, the National Association of Counsel for Children, and the Youth Law Center of San Francisco\textsuperscript{55} for the proposition that any exceptions to the lawyer-client privilege in certain lower court cases were inapposite.\textsuperscript{56} Finally, the appellate court recognized that “[c]ourts and legislatures in other jurisdictions have recognized and enforced the attorney-client privilege in dependency proceedings.”\textsuperscript{57} 

III. TERMINATION OF PARENTAL RIGHTS

Just as parents are statutorily entitled to counsel in dependency proceedings in Florida by statute, they are entitled to counsel in TPR proceedings as a matter of constitutional right.\textsuperscript{58} The same court in Miami that failed to provide counsel in a dependency case in \textit{G.W. v. Department of Children & Families}\textsuperscript{59} during the course of a staccato-case shelter hearing—as discussed in last year’s survey article\textsuperscript{60}—was reversed in \textit{F.M. v. State Department of Children & Families},\textsuperscript{61} when it defaulted a father in a termination of parental rights case when he failed to appear personally, although he appeared telephonically at the advisory hearing.\textsuperscript{62} At that hearing, as quoted by the appellate court, both the mother and father appeared by telephone.\textsuperscript{63} “When the judge discovered the father was appearing telephonically, the following brief exchange took place”:

\begin{quote}
The Court [calling]: Well that [is] not good enough. You’re supposed to be here.

The Father [calling]: I could [not] afford it.

The Court [calling]: Well, that [is] really too bad.

DCF [calling]: How is he on the phone?
\end{quote}

\begin{footnotes}
\item[54] Id. at 573–74.
\item[55] Brief on file with the Nova Law Review.
\item[56] \textit{R.L.R.}, 116 So. 3d at 571, 573 n.5.
\item[57] Id. at 574 n.8.
\item[58] \textit{In re Interest of D.B. & D.S.}, 385 So. 2d 83, 87 (Fla. 1980); Dale, 2011 \textit{Survey of Juvenile Law, supra} note 9, at 179.
\item[59] 92 So. 3d 307 (Fla. 3d Dist. Ct. App. 2012).
\item[61] 95 So. 3d 378 (Fla. 3d Dist. Ct. App. 2012).
\item[62] Id. at 382–83.
\item[63] Id. at 380.
\end{footnotes}
The Court [calling]: Okay, so go ahead.

Counsel for the mother: With the mother?

DCF [calling]: No, that [is the father]. Judge, well, [the father] is present via phone. There is publication. His attorney over there [in Louisiana] was noticed to be present.

The Court [calling]: He is not present. I am granting the termination of parental rights and closing the case. Mr. M. has no contact with his children.

Citing prior case law to the effect that the “termination of parental rights [ought] never be determined on a default basis or by gotcha practices when [the] parent makes a reasonable [attempt] to be present at [the] hearing and is delayed by circumstances beyond [that parent’s] control,” the appellate court reversed the termination of parental rights.

The issue of whether parental rights can be terminated based upon the abuse of a sibling or another child in the family, is predicated upon a showing of a totality of the circumstances surrounding the current petition by applying the Padgett nexus test. The issue before the Fourth District Court of Appeal in A.J. v. Department of Children & Families was whether a father’s parental rights to five children should be terminated because, while there was proof of sexual abuse as to two daughters, the record did not provide support for a finding harm or a risk of harm with regard to their two brothers. While there was evidence of mental health problems with the two boys, it was unclear if the issues stemmed from the domestic abuse. On that basis, the appellate court reversed as to the brothers.

64. Id. at 380–81 (alteration in original).
65. Id. at 381, 382–83 (quoting B.H. v. Dep’t of Children & Families, 882 So. 2d 1099, 1100 (Fla. 4th Dist. Ct. App. 2004)).
67. 97 So. 3d 985 (Fla. 4th Dist. Ct. App. 2012) (per curiam).
68. Id. at 986.
69. Id. at 987–88.
70. Id. at 986.
In *G.O. v. Department of Children & Families*, the appellate court reversed as a matter of statutory construction because the general magistrate who presided over the advisory hearing found that the parents gave constructive consent for TPR by not appearing, and later allowed the guardian ad litem to testify as to the child’s best interest. The trial court signed an order that conformed to the general magistrate recommendation for TPR. Under Florida law, general magistrates are prohibited from presiding over advisory hearings. The hearing at which the guardian ad litem testified “was an adjudicatory hearing on the petition for [TPR].” The appellate court reversed, since the proper court presiding over the adjudicatory hearing should have been the trial court.

The rights of putative fathers in TPR and adoption cases are limited in Florida by statute. In only one case, *Heart of Adoptions, Inc. v. J.A.*, has the Supreme Court of Florida addressed the constitutionality of the adoption statute as it relates to putative fathers. In *S.C. v. Gift of Life Adoptions*, an adoption agency filed a petition to terminate a father’s parental rights as a precursor to an adoption involving a biological mother who intended to place the child up for adoption with the agency. The appellate court affirmed and granted the petition to terminate the putative father’s parental rights, but avoided any constitutional claim, finding that there was abandonment, which independently supported the granting of the petition. The father had argued that he was not appointed counsel in a timely fashion “until the first hearing on the petition.” The court did recognize “that the filing requirements [were] very technical and might be a challenge to the nonlawyer biological father,” and in his concurrence, Judge Davis expressed his concern that unwed biological fathers

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71. 100 So. 3d 232 (Fla. 3d Dist. Ct. App. 2012).
72. *Id.* at 233.
73. *Id.*
74. FLA. R. JUV. P. 8.257(h); *G.O.*, 100 So. 3d at 233.
75. *G.O.*, 100 So. 3d at 233.
76. *Id.*
77. FLA. STAT. §§ 63.053(1), .054(1) (2013).
78. 963 So. 2d 189 (Fla. 2007).
80. 100 So. 3d 774 (Fla. 2d Dist. Ct. App. 2012) (per curiam).
81. *Id.* at 774–75.
82. *Id.* at 775.
83. *Id.*
84. *Id.*
should be entitled to all the due process rights of other parties, including the right to counsel.\footnote{85}

IV. JUVENILE DELINQUENCY

The question of how indirect criminal contempt applies in juvenile delinquency cases was before the Supreme Court of Florida in \textit{J.M. v. Gargett (J.M. II)}.\footnote{86} The specific issue was whether, when an adjudicated delinquent violates a single probation order on multiple occasions, that juvenile may be held in contempt and placed in a secure detention facility for consecutive periods.\footnote{87} In the case at bar, the juvenile was placed on probation and was held in indirect criminal contempt as a result of violating curfew, as well as violation of a second order to obey household rules.\footnote{88} The juvenile was placed in secure detention for both offenses; five days for the first offense and fifteen days for the second.\footnote{89} Specifically, after the first period was satisfied, the second period began.\footnote{90} The Supreme Court of Florida—recognizing a split in opinions between the Second and Fifth District Courts of Appeal—held that the consecutive sentences could properly be instituted.\footnote{91} Justices Quince and Pariente dissented on the grounds that there was “only a single act of indirect contempt” under the Florida dependency statute.\footnote{92}

In the second case before the Supreme Court of Florida this year, the issue involved a school-related matter.\footnote{93} Juveniles are often the subject of delinquency cases that arise out of events which occur at school.\footnote{94} The issue in \textit{J.R. v. State}\footnote{95} was whether a juvenile could be found to have committed a trespass on school grounds without evidence that the juvenile had formerly been warned by the school principal’s designee for trespassing.\footnote{96} The Supreme Court

\footnote{85. \textit{S.C.}, 100 So. 3d at 776 (Davis, J., concurring).}
\footnote{86. 101 So. 3d 352, 353 (Fla. 2012) (per curiam).}
\footnote{87. \textit{Id.} at 355.}
\footnote{88. \textit{Id.} at 353.}
\footnote{89. \textit{Id.}}
\footnote{90. \textit{Id.} at 353–54.}
\footnote{92. \textit{J.M. II}, 101 So. 3d at 357 (Quince, J., dissenting).}
\footnote{93. \textit{J.R. v. State}, 99 So. 3d 427, 427 (Fla. 2012) (per curiam).}
\footnote{94. \textit{See 2 Michael J. Dale et al., Representing the Child Client ¶ 10.07(1) (2013).}}
\footnote{95. 99 So. 3d 427 (Fla. 2012) (per curiam).}
\footnote{96. \textit{Id.} at 427 (citing D.J. v. State, 43 So. 3d 176, 177 (Fla. 3d Dist. Ct. App.), \textit{review granted}, 47 So. 3d 1287 (Fla. 2010) (unpublished table decision), \textit{and quashed}, 67 So. 3d}
of Florida held that the failure to present evidence at trial that the individuals who warned the child were designees of the school’s principal was reversible error. In addition, the Supreme Court of Florida held that the trial court failed to properly comply with the conditions for taking judicial notice under Florida’s rules of evidence.

The third case in the Supreme Court of Florida was Hopkins v. State (Hopkins II), in which the court decided the question of whether a detainee’s act of battery at a juvenile detention center, and charged with battery falls under Florida’s criminal law within this setting. Resolving a question of conflict between the First and Fourth District Courts of Appeal—as a matter of statutory construction—the court found that a detention center does qualify as a detention facility for purposes of the criminal law.

In what would seem like a simple proposition, juvenile court jurisdiction over a subject child in delinquency ends at age nineteen. In State v. E.I., the appellate court—in a one-paragraph opinion—dismissed the State’s appeal as moot, as the juvenile had reached his nineteenth birthday. However, the court explained that the trial court was correct and that its jurisdiction ends over any child at any time after the juvenile’s nineteenth birthday, “[u]nless [the] child is already under commitment, in a transition program, or subject to a restitution order.”

The rules concerning a determination of whether a juvenile is incompetent to proceed in a delinquency case are quite clear. Among them is the provision that the court must base its competency determination on the evaluation of at least “two . . . experts appointed by the court.” In State v. D.V., following an unauthorized absence, the juvenile was charged with threatening school personnel. The juvenile allegedly slapped another student

1029 (Fla. 2011)).

97. Id. at 430.
98. Id.; see also Fla. Stat. § 90.201(1) (2013).
99. 105 So. 3d 470 (Fla. 2012).
100. Id. at 471.
101. Id.; see also State v. Hopkins (Hopkins I), 47 So. 3d 974, 975 (Fla. 4th Dist. Ct. App. 2010), review granted, 63 So. 3d 749 (Fla. 2011) (unpublished table decision), aff’d, 105 So. 3d 470 (Fla. 2012); T.C. v. State, 852 So. 2d 276, 276 (Fla. 1st Dist. Ct. App. 2003) (per curiam).
103. 114 So. 3d 309 (Fla. 4th Dist. Ct. App. 2013) (per curiam).
104. Id. at 310.
105. Id.
107. Id. § 985.19(1)(b).
108. 111 So. 3d 234 (Fla. 4th Dist. Ct. App. 2013).
109. Id. at 235.
seven weeks later. Formerly, the juvenile had been adjudicated incompetent to proceed after allegations were raised with respect to the commission other crimes. The first expert appointed by the court evaluated the mental condition of the child and “determined that [the child] was not competent to proceed.” The court did not appoint a second expert, relying upon an earlier report from an expert who had been appointed by the Department of Children and Families, on the grounds that one could save money in so doing. The appellate court reversed, finding that as a matter of statutory construction the trial court is required to base determinations of competency on the evaluations of at least two court-appointed experts. As the court only appointed one expert, reversal was required.

Issues of the suppression of inculpatory statements by juveniles have been the source of discussion in this survey on a number of occasions. In State v. M.R., one of the issues on appeal was whether a statement that the juvenile—who was subsequently “charged in a petition for . . . possession with intent to sell, manufacture, or deliver cannabis within 1000 feet of a school”—made in front of his mother and in the presence of a police officer could be suppressed. The police officer had called the mother, and when the mother arrived, the juvenile was sitting, handcuffed, in the rear of a police car in custody and in the presence of the officer. The child said to his mother that he did not wish to talk to her in the presence of a police officer and that she knew why he was selling marijuana.” In this case, the respondent child did not request to speak with the third person—his mother—but rather, it was the police officer that brought the mother to the scene. The court held that “these statements . . . were an exploitation of the initial illegality,” citing a prior District Court of Appeal case as distinguishable in Lundberg v. State. This survey does not usually discuss evidentiary issues, as they are generic in nature and not necessarily specific to juvenile delinquency cases.

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110.  \textit{Id.}
111.  \textit{Id.}
112.  \textit{Id.} at 235–36.
113.  \textit{D.V.}, 111 So. 3d at 236–37.
114.  \textit{Id.} at 237.
115.  \textit{Id.}
117.  100 So. 3d 272 (Fla. 3d Dist. Ct. App. 2012).
119.  \textit{Id.} at 275, 280–81.
120.  \textit{Id.} at 275.
121.  \textit{Id.} at 275, 280–81.
122.  \textit{M.R.}, 100 So. 3d at 280–81 (citing Lundberg v. State, 918 So. 2d 444, 445 (Fla. 4th Dist. Ct. App. 2006)).
However, on occasion, the issue is germane to juvenile delinquency law. In *D.D.B. v. State*, the State filed a delinquency petition alleging that the juvenile called "’911 for the purpose of making a false alarm or complaint or reporting false information.’” In an adjudicatory hearing, “the State . . . introduce[d] an audio recording of [the] two calls purportedly made.” The problem was quite simple. The identification of the child’s voice on the recording required “authentication, [which] would also require . . . evidence, including [the fact] that the recording was of a telephone call received and handled by the 911 system on the relevant date.” Since there was no such evidence under section 90.901 of the Florida Evidence Code, the court was obligated to reverse.

The second evidentiary matter, also seemingly basic in nature, arose in *K.A.A. v. State*. In that case a juvenile was adjudicated delinquent for the unlawful possession of gun on school property. The trial court would not allow the respondent “to cross-examine the State’s juvenile witness about criminal charges pending against the witness.” Citing an earlier case to the effect that “‘[t]he right to cross-examine witnesses . . . outweighs the [interest of the State] in preserving the confidentiality of juvenile delinquency records,’” the appellate court reversed. It ought to have been obvious that the prosecution witness’s credibility would be an issue.

It has been forty-six years since the Supreme Court of the United States ruled in *In re Gault* that children have the right to counsel in juvenile delinquency cases. In *C.W. v. State*, a juvenile appealed from an order adjudicating her as delinquent based upon a battery on a law enforcement officer. The issue was the court’s action in taking the case to trial in the

125. *Id.* at 1184.
126. *Id.* at 1185.
127. *See id.*
128. *Id.*
129. *D.D.B.,* 109 So. 3d at 1185; *see also* FLA. STAT. § 90.901 (2013).
130. 109 So. 3d 1175, 1176 (Fla. 4th Dist. Ct. App. 2013).
131. *Id.*
132. *Id.*
133. *Id.* (quoting Tuell v. State, 905 So. 2d 929, 930 (Fla. 4th Dist. Ct. App. 2005)).
134. *Id.*
135. *See K.A.A.,* 109 So. 3d at 1176.
137. *Id.* at 41, 55.
138. 93 So. 3d 514 (Fla. 2d Dist. Ct. App. 2012).
139. *Id.* at 515.
absence of a lawyer for the child. At the child’s arraignment, the child indicated that she hired an attorney. The court asked if she was sure that she would have the attorney represent her, since the attorney had not yet filed any pleadings. On the date of trial, the child indicated that she was not sure where her attorney was, and the court said that it was going to trial. After the trial, but before the disposition, an attorney was hired and filed a motion for rehearing. Incredibly, the court denied the motion for rehearing, noting that the child “did indeed have a fair trial.” Citing to the Florida Rules of Juvenile Procedure which require notification of the right to counsel at each stage of the proceeding and—if the child chooses to waive counsel—conducting a thorough inquiry to determine if the waiver was freely and intelligently made, the appellate court reversed.

In Florida, determinations of whether an alleged juvenile delinquent is to be securely detained are based upon the use of a Risk Assessment Instrument (“RAI”). In J.L.B. v. Kelly, a juvenile petitioned for a writ of habeas corpus, challenging the validity of the detention during the course of the juvenile delinquency proceeding. Although he was released from detention while his writ was pending—and thus the matter was moot—the court on appeal ruled that “improper scoring of [a RAI] . . . is capable of repetition yet evading review,” and thus it resolved the issue. The claim involved impermissible double scoring. The trial court added points to the scoring process on the basis of two factors: “[T]he high risk nature of [a] prior commitment and the circumstances of the current burglary offense.” The problem was that by doing so, the court impermissibly double-scored by acknowledging circumstances that had already been taken into account by the RAI, there was nothing in the State statute that would allow the court to do so.

140.  Id.
141.  Id.
142.  Id.
143.  C.W., 93 So. 3d at 515.
144.  Id.
145.  Id.
146.  Id. at 515–16 (quoting FLA. R. JUV. P. 8.165(a), (b)(2)).
148.  93 So. 3d 1137 (Fla. 2d Dist. Ct. App. 2012).
149.  Id. at 1138.
150.  Id. (citing T.T. v. Esteves, 828 So. 2d 449, 450 (Fla. 4th Dist. Ct. App. 2002)).
151.  Id. at 1139.
152.  Id. at 1138.
153.  J.L.B., 93 So. 3d at 1139 (citing FLA. STAT. § 985.24 (2013)).
The State charged a juvenile with felony criminal mischief—valued at $1000 or more—for $2600 of damage to an automobile. The auto body shop owner testified in support of the value of the damage, based on an employee’s estimate. The estimate was made in the regular course of business, but the estimate was never admitted into evidence. When the trial court refused to strike the oral testimony, trial counsel objected, and the matter in A.S. v. State went up on appeal. The appellate court reversed on the basis of the Florida Rules of Evidence, specifically section 90.803(6), regarding the business records exception to hearsay. Here, the estimate itself would have qualified as a business record. “[H]owever, the testimony explaining the contents of the estimate,” where the estimate was not in evidence, did not fall within the exception. As a result, there was no competent proof of the underlying felony crime and the court reversed.

Restitution issues come up regularly at the dispositional stage of delinquency cases in Florida; issues also regularly discussed in this survey. A blatantly obvious reversal took place in X.G. v. State, where the juvenile appealed from the revocation of juvenile probation where the court’s basis for revocation and probation was the failure to pay restitution. The problem concerned a plea agreement, which stated that “no restitution would be ordered on the [underlying] charge.” Thus, the disposition order did not list restitution as a condition of probation.

In A.P. v. State, the issue was whether there was sufficient evidence to support a restitution order. The source of the evidence resulting in an order of $220 in restitution was the victim’s testimony, which was based upon the

155. Id.
156. Id.
157. 91 So. 3d 270 (Fla. 4th Dist. Ct. App. 2012) (per curiam).
158. See id. at 271.
160. A.S., 91 So. 3d at 271.
161. Id.
162. Id.
164. 106 So. 3d 90 (Fla. 2d Dist. Ct. App. 2013).
165. Id. at 91.
166. Id. at 90.
167. Id.
168. 114 So. 3d 393 (Fla. 4th Dist. Ct. App. 2013).
169. Id. at 395.
replacement value of the item, and the source of the testimony was unknown. Thus, according to the appellate court, the State failed to present competent substantial evidence of the item’s fair market value.

Among the requirements at the dispositional stage of the delinquency proceeding in Florida, is that the court strictly comply with the statutory provisions governing proper procedure at a juvenile disposition hearing. In *K.P. v. State*, while the court ordered a predisposition psychiatric evaluation of the child, the court entered a dispositional order before the psychiatric evaluation was available. That constituted failure to strictly comply with the statutory procedures, and the appellate court reversed. Similarly, at the dispositional stage, the trial court is obligated to prepare a written dispositional order that complies with its oral pronouncements. In *L.D. v. State*, the trial court failed to do so. It was conceded that the court’s written dispositional order was not consistent with its oral pronouncements. On the basis of the lower court’s failure to comply with the statutory obligations, the appellate court reversed.

Similarly, in *R.V. v. State*, the appellate court reversed the dispositional order of the trial court because there had been no articulation regarding why the dispositional alternative of a moderate risk commitment program is more appropriate than the Department of Juvenile Justice’s recommendation that the child’s rehabilitative needs should result in the least restrictive setting. The appellate court reversed, authorizing the “trial court [to] amend [its] dispositional order to include the required findings.”

Perhaps even harder to understand is the situation which required a reversal of a disposition in *M.A.L. v. State*. In that case, the trial court

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170. *Id.*
171. *Id.*
173. *97 So. 3d 966 (Fla. 4th Dist. Ct. App. 2012).*
174. *Id. at 967.*
175. *Id.*
176. *L.D. v. State, 107 So. 3d 514, 515 (Fla. 2d Dist. Ct. App. 2013); see also FLA. STAT. § 985.43(2).*
177. *107 So. 3d 514 (Fla. 2d Dist. Ct. App. 2013).*
178. *Id. at 515.*
179. *Id.*
180. *Id.; see also FLA. STAT. § 985.43(2).*
181. *107 So. 3d 535 (Fla. 4th Dist. Ct. App. 2013) (per curiam).*
182. *Id. at 536.*
183. *Id.*
184. *110 So. 3d 493, 495–96, 499 (Fla. 4th Dist. Ct. App. 2013).*
conducted a dispositional hearing outside of the appellant and her father’s presence, in a sidebar. The juvenile “claim[ed] that [the] sidebar conference violated her due process rights to be present and meaningfully heard prior to the disposition.” Shockingly, the State argued that this was harmless error. The appellate court reversed, recognizing that the issue of disposition prior to determination, in noncompliance with the Florida statute governing how the hearing should be held, constituted fundamental error.

Under Florida law, there is a variety of dispositional alternatives in addition to restitution; such alternatives encompass placement in a various residential facilities, including those described as high-risk. In *D.H. v. State*, the trial court committed a youth to a high-risk facility for a misdemeanor offense in its dispositional order. Florida law limits the trial court’s commitment authority and placement of the juvenile misdemeanant in a high-risk facility. Thus, the most restrictive facility to which the child could be sent was a moderate-risk facility; therefore, the appellate court reversed.

In *G.W. v. State*, juveniles in three consolidated appeals challenged the constitutionality of a Florida Statute governing sentencing enhancement when the crime committed was against a school officer. The appeal was based on equal protection grounds and the appellants claimed that the statute created “an elite class of untouchables” because of the additional protection provided by the law to school employees. Applying a rational basis equal protection test, the appellate court affirmed, finding no constitutional infirmity in the statute.

In two major cases decided over the past four years, the Supreme Court of the United States dealt with questions of appropriate punishment for.

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185. Id. at 495.
186. Id. at 496.
187. Id.
188. Id. at 496, 499; see also Fla. Stat. § 985.433(4)(d) (2013).
189. Compare Fla. Stat. § 985.437, with id. § 985.441.
190. Id. § 985.441(1)(b); see also id. § 985.03(46).
192. Id. at 497–98.
193. Id. (quoting Fla. Stat. § 985.441(2)).
194. Id. at 498.
195. 106 So. 3d 83 (Fla. 3d Dist. Ct. App.), review denied, 118 So. 3d 220 (Fla. 2013) (unpublished table decision).
196. Id. at 84; see also Fla. Stat. § 784.081(2).
197. G.W., 106 So. 3d at 84.
198. Id. at 85 (citing Hechtman v. Nations Title Ins. of N.Y., 840 So. 2d 993, 996 (Fla. 2003)).
199. Id. at 86; see also Fla. Stat. § 784.081(2).
individuals who were juveniles at the time they committed their crimes. In *Roper v. Simmons*, the Court held that the death penalty for individuals who committed criminal offenses while juveniles was unconstitutional in violation of the Eighth Amendment prohibition against cruel and unusual punishment. In *Graham v. Florida*, the Court held that life without the possibility of parole for a juvenile was also unconstitutional in a felony murder setting where the juvenile did not commit the homicide. Then, in *Miller v. Alabama*, the Court ruled that state sentencing statutes making life imprisonment without parole appropriately mandatory for juvenile non-homicide offenders also violated the Eighth Amendment prohibition against cruel and unusual punishment. In three intermediate appellate court opinions decided this past survey year, the courts dealt with the application of *Graham* and *Miller* to three juveniles tried as adults. The first case is *Walling v. State*. There, the defendant, who was sixteen at the time of the offense, was convicted of felony murder for participating in the planning of the robbery and supplying the gun, although he had been “waiting a few blocks away when the fatal shot was fired.” He was tried as an adult by a six-person jury. The appellate court held that under *Roper, Graham, and Miller*, the juvenile was not entitled to a twelve-person jury because the twelve-person jury is required when death is a possible penalty and that death no longer controls the question of a jury’s size when the case involves a juvenile.

In *Reynolds v. State*, the defendant had been found guilty by a jury and sentenced to life in prison on one count of robbery with a firearm in 2002. The appellate court vacated the sentence of life without parole under *Graham*.

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202. See id. at 578.
204. Id. at 2034.
206. Id. at 2475.
209. Id. at 661–62.
210. Id. at 662.
211. Id.
212. 116 So. 3d 558 (Fla. 3d Dist. Ct. App. 2013).
213. Id. at 559.
214. Id.
The second issue before the court on remand was "‘the concept of aggregate sentencing on interdependent offenses, as it relates to [the] trial judge’s desire to effect the original sentencing plan.’"\(^{215}\) The appellate court held that there is no right to "‘modification, on remand after appeal, of [the] sentences on convictions [that were] not challenged on [the original] appeal.’"\(^{216}\) The appellate court further acknowledged the lack of legal decisions on point with this issue after the Supreme Court of the United States’ opinion in *Graham*, although it recognized general support for the proposition.\(^{217}\) Finally, as the court noted that it was not unconstitutional for a juvenile to receive a life sentence for a non-homicide crime.\(^{218}\) Rather, it "is unconstitutional . . . for the State not to give [the] juvenile offender[ . . . ‘some meaningful opportunity to obtain release.’"

In a third post-*Graham* decision, *Young v. State*,\(^{220}\) the juvenile was sentenced to four consecutive thirty-year sentences and then was resentenced pursuant to *Graham*.\(^{221}\) One of the issues the defendant raised on appeal was that the trial court violated *Graham* by "fail[ing] to consider [his] rehabilitation and newfound maturity."\(^{222}\) The juvenile’s claim was that he was entitled to a hearing to prove his change in circumstances.\(^{223}\) The appellate court rejected this argument under *Graham*.\(^{224}\) Under the facts of the case, because the juvenile was sentenced to a term of thirty years in prison, after which he would be released, he did have a sentence that specifically provided for his eventual release.\(^{225}\) Therefore, *Graham* did not apply.\(^{226}\) Finally, the appellate court held that a resentencing hearing does not require the opportunity to review rehabilitation.\(^{227}\) On those bases, the court affirmed.\(^{228}\)

\(^{215}\) *Id.* at 562 (quoting Fasenmyer v. State, 457 So. 2d 1361, 1366 (Fla. 1984)).

\(^{216}\) *Id.* (quoting Fasenmyer, 457 So. 2d at 1366).

\(^{217}\) *Reynolds*, 116 So. 3d at 562.

\(^{218}\) *Id.* at 563.

\(^{219}\) *Id.* (quoting Graham v. Florida, 130 S. Ct. 2011, 2030 (2010)).

\(^{220}\) 110 So. 3d 931 (Fla. 2d Dist. Ct. App.), review denied, No. 5C13-929, 2013 WL 5614109 (Fla. 2013).

\(^{221}\) *Id.* at 931–32 (citing *Graham*, 130 S. Ct. at 2034).

\(^{222}\) *Id.* at 932.

\(^{223}\) *Id.*

\(^{224}\) *Id.* at 933.

\(^{225}\) *Young*, 110 So. 3d at 934.

\(^{226}\) *Id.*

\(^{227}\) *Id.*

\(^{228}\) *Id.* at 936.
V. CONCLUSION

The Supreme Court of Florida decided three important technical matters in the delinquency field this past survey year.229 In dependency and termination of parental rights cases, the intermediate appellate courts decided a large number of cases, a number of which involved obvious and basic failures to comply with Chapter 39 by the trial courts.230 One case in particular, R.L.R. v. State, was particularly noteworthy, as it upheld the right of a juvenile to confidentiality with his volunteer AAL in a dependency case, over the objections of the GAL Program and the DCF.231

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TRICK OR TREAT: THE APPLICATION OF THE STATE
UDAP STATUTES TO GOVERNMENT AGENCIES IN THE
FLORIDA DEPENDENCY PROCESS

MICHAEL FLYNN*

I. INTRODUCTION

The State of Florida is a leader in many respects. Florida is number
one in beaches;¹ number one in tropical hurricanes;² and lightning strikes;³
and at or near the top per capita in mishandling abandoned, abused, and
neglected children.⁴ Florida actually spends more money on the

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¹ The Best Beach in America, Siesta Beach, DR. BEACH (2010), http://www.drbeach.org/top10beaches.htm.
incarceration of children than on the education of children.\textsuperscript{5} With tens of thousands of children in the dependency system in Florida every year, the legal system and child protective services system are stressed.\textsuperscript{6} One glaring weakness in the Florida process is that each dependent child is not provided a lawyer for representation, except in exceptional circumstances.\textsuperscript{7} Although a minority of states fail to provide a dependent child his or her own lawyer, in Florida, it is actually much worse.\textsuperscript{8} Take the following example.

Billy is a fourteen-year-old ninth grade high school student. Along with his ten-year-old brother, Stevie, Billy lives with his mother, Julie, and his stepfather, Dave, who have been married for seven years. Billy’s biological father abandoned Billy, his mother, and little brother many years ago. Billy, his mother, and little brother have had a hard life. Billy’s mother, Julie, did not graduate high school and has never held a steady job. Until she met and married Dave, Julie regularly relied on government benefits to help feed, house, and clothe herself and her children.

When Julie married Dave, things changed. Dave is a carpenter who—until the recent downturn in the housing market—had steady work, made enough money for the family to buy a small house, and provided for the children. With the downturn in the housing market, Dave began losing work. The family struggled to pay the bills despite Dave’s best efforts to find work. The financial pressure finally got to Dave and he began drinking more heavily. Julie took a job at a fast food restaurant to try to help out. This resulted in many nights of Dave coming home late, drunk, and picking arguments with Julie. These arguments got progressively worse when Dave started physically hitting Julie. When Billy tried to stop Dave from striking Julie, Dave hit Billy too.

This kind of physical violence continued for several months until one day, the high school physical education teacher noticed the bruising and


scarring on Billy’s face, which could not have been from football or wrestling practice. The high school teacher called child protective services to report what he saw. Child protective services, after investigating—and over the objection of Billy—removed both Billy and Stevie from the home where Julie and Dave lived, and placed both boys in foster care.

In the time period before the dependency court hearing, Billy, who was at best confused by what was happening, was approached by child protective service caseworkers. Billy was told—and received a business card stating—that the lawyers representing the child protective services government agency were part of the “‘Law Firm for Florida’s Children.’”

Further, Billy received a visit from a guardian ad litem who told Billy that the Guardian Ad Litem Program (“GAL Program”) would represent Billy’s legal interests. Billy has consistently maintained that he wants to go back home to be with his brother, his mother, and Dave, despite what Dave did to him and his mother. Billy believed in his heart that the family, with help, could be together again. Billy relied on the representations made by the child protective services’ caseworker and the guardian ad litem that Billy’s wish to reunite his family would be represented in court by both. Billy, therefore, had no idea that he might want to hire a lawyer, or that he might need to hire a lawyer, or that it might be in his best interest to hire a lawyer. Billy thought he was covered.

Such, of course, is not the case in Florida specifically, nor in other states. The state government agency involved in child protective services, the Department of Children and Families (“DCF”) in Florida, is, in fact, the petitioner who brings a dependency petition on behalf of the state, and is not authorized to, and does not, act as the lawyer for an alleged dependent child. Further, in Florida, the guardian ad litem is a representative of the statewide GAL Program. The Florida GAL Program is a separate party to the dependency proceeding. Consequently, the GAL Program does not provide legal services or representation for an alleged dependent child.

Needless to say, Billy appeared in court without a lawyer and watched as both the DCF and the GAL Program advocated for Billy and Stevie to be permanently removed from their home with their mother and Dave. No

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9. See Dale & Reidenberg, supra note 7, at 334.
10. See, e.g., CHILDREN’S ADVOCACY INST. ET AL., supra note 8, at 41, 45, 52.
13. See Dale & Reidenberg, supra note 7, at 334.
14. Id. at 327; see also Statewide Guardian Ad Litem Office v. Office of State Att’y Twentieth Judicial Circuit, 55 So. 3d 747, 750 (Fla. 2d Dist. Ct. App. 2011).
lawyer advocated on behalf of Billy, and Billy was removed from his mother and stepfather’s home and separated from his younger brother Stevie.

The purpose of this article is not to revisit the legal catastrophe that is Florida’s child protective services state agency and its GAL Program. It is clear that Florida’s DCF is systematically ineffective and the Florida GAL Program is legally impotent when it comes to providing legal representation for children in dependency proceedings. It has already been proven so! Further, this article is not designed to call into question the unselfish commitment of so many volunteer guardian ad litems and others who act with good intentions to protect abandoned, abused, and neglected children in Florida.

Rather, the purpose of this article is very different. The design of this article is to suggest that perhaps—using Florida as an example—one unexplored avenue to clean up and boost the effectiveness of the government agencies involved in the dependency process is to first require that these agencies not unfairly or deceptively lure unsuspecting children into believing that their legal rights are in any way protected in a dependency proceeding by these government agencies.

Therefore, this article begins with examining whether or not state agencies—in particular the child protective services state agencies—can be subject to prosecution under state unfair and deceptive trade practice statutes. The first part of this article will outline the fundamental concepts that define a cause of action for an unfair or deceptive trade practice. Next, this article will examine whether such state consumer protection laws have ever been applied to government entities and activities. Then, this article will analyze if an alleged dependent child could successfully maintain a cause of action for an unfair or deceptive trade practice against these child protective services government agencies when the state agencies

15. See Dale & Reidenberg, supra note 7, at 334–35.
16. Michael J. Dale, Providing Counsel to Children in Dependency Proceedings in Florida, 25 NOVA L. REV. 769, 773 (2001); Dale & Reidenberg, supra note 7, at 334; see also Statewide Guardian Ad Litem Office, 55 So. 3d at 750.
17. See FLA. GUARDIAN AD LITEM PROGRAM, supra note 6, at 5.
19. See infra Part IV.
20. See infra Part II.
21. Id.
22. See infra Part III.
misrepresent their role in the dependency process. Finally, this article will conclude by outlining how the seemingly inapplicable state unfair and deceptive trade practice statutes may be used to protect dependent children.

II. STATE UNFAIR AND DECEPTIVE TRADE PRACTICE STATUTES

“All fifty states . . . have enacted at least one statute” designed to protect consumers from deceptive or unfair trade practices. In most states, the Unfair and Deceptive Acts and Practices (“UDAP”) statutes unambiguously provide for a private right of action against a person or entity that commits unfair or deceptive trade practices. These UDAP statutes routinely advise that great weight and due deference be given to the Federal Trade Commission (“FTC”) and the federal courts’ interpretation of the FTC Act as to what comprises an unfair or deceptive practice. This deference to the FTC and the federal courts is designed to aid state courts in establishing their own judicial determination of what kind of conduct amounts to an unfair or deceptive trade practice.

The FTC Act, the FTC guidelines and policy statements, and the federal courts broadly define and construe what is an unfair or deceptive trade practice. For example, there is federal court precedent backed by FTC policy statements that defines a deceptive trade practice as any act or practice that has the tendency or capacity to deceive. The most recent FTC policy statement on deceptive trade practices—which has been adopted by some federal and state courts—defines a deceptive trade practice as any act or “practice that . . . is likely to [deceive] consumers acting reasonably under

23. See infra Part IV.
24. See infra Part V.
26. Id. at 722.
27. Id. at 197; see also 15 U.S.C. § 45(n) (2012) (containing a broad and general definition).
28. CARTER & SHELDON, supra note 25, at 197–98. Because the FTC Act does not provide for a private right of action, it can only be interpreted to evidence “what conduct is prohibited by [the] state UDAP statute[s].” Id. at 197.
Regardless of which standard a federal or state court chooses to adopt, neither standard requires proof of intent, negligence, fraud, or even actual deception to make out a prima facie case. In sum, proof of a deceptive trade practice focuses on the act or practice, and whether such act or practice might mislead or deceive a person. This is similar to the definition and interpretation of what constitutes an unfair trade practice.

The federal courts, including the Supreme Court of the United States, have defined and construed an unfair trade practice to include an act or practice that “offends established public policy and . . . is immoral, unethical, oppressive, unscrupulous, or . . . injurious to consumers.” In particular, the Court endorsed such a broad and sweeping definition of an unfair trade practice because it noted that “[t]here is no [end] to human inventiveness” for those who choose to treat people unfairly. Further, just like with deceptive trade practices, the federal courts and the FTC do not require proof of intent, negligence, fraud, or actual deception for an act or practice to be considered unfair.

The most recent version of the FTC Act and the FTC policy statements—adopted in some federal and state courts—revised the definition of an unfair trade practice. In particular, the revised definition of an unfair

31. In re Cliffdale Assocs., 103 F.T.C. at 164–65; see also FTC v. Colgate-Palmolive Co., 380 U.S. 374, 386–87 (1965) (holding that “misrepresentation of any fact which would constitute a material factor in a purchaser’s decision whether to buy” will be deemed a deceptive trade practice); Letter from James C. Miller III, supra note 29.


33. See Spiegel, Inc. v. FTC, 540 F.2d 287, 293 (7th Cir. 1976) (citing FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244–45 n.5 (1972)).

34. Id. (citing Sperry & Hutchinson Co., 405 U.S. at 244–45 n.5 (1972)).


37. See Orkin Exterminating Co., 849 F.2d at 1368; Sperry & Hutchinson Co., 405 U.S. at 244–45 n.5; FTC v. Colgate-Palmolive Co., 380 U.S. 374, 386–87 (1965); Spiegel, 540 F.2d at 293 (citing Sperry & Hutchinson Co., 405 U.S. at 244–45 n.5).

trade practice requires that the act or practice “causes or is likely to cause substantial [consumer injury that cannot be] reasonably avoid[ed] by [the] consumer[...]. . . and not outweighed by countervailing benefits to [the] consumer[...].”  

Most states adhere to one or both of these FTC and federal court-generated definitions of what constitutes an unfair or deceptive trade practice. In addition, most states require that such unfair or deceptive trade practices arise in trade or commerce. Trade or commerce is consistently defined by UDAP statutes as any profit or non-profit oriented transaction. In essence, so long as the act or practice in question can be linked in some way to trade or commerce, the act or practice will be covered by a state UDAP statute.

III. APPLICATION OF STATE UNFAIR AND DECEPTIVE TRADE PRACTICE STATUTES TO GOVERNMENT ACTIVITIES

Countering this seemingly uninhibited coverage of UDAP statutes, most states exempt some acts or practices and some persons from the reach of UDAP statutes. Common UDAP statutory exemptions include banks, savings and loan companies, insurance providers, and utility companies. Prohibiting recovery against a state or other government agency is an uncommon exemption under UDAP statutes. However, some states have addressed the issue via case law. For example, in Du Page Aviation Corp.

41. See Carter & Sheldon, supra note 25, at 11, 197.
42. See id., at 11–12. Moreover, some states include non-profit or not-for-profit activities within the definition of trade and commerce. E.g., Fla. Stat. § 501.203(8) (2013).
43. See Carter & Sheldon, supra note 25, at 11.
44. See id. at 118–20.
v. Du Page Airport Authority, the Illinois court considered the applicability of its UDAP statute to municipal corporations, and found that such corporations could not be sued under that statute. The court reasoned that municipal corporations do not fall under the definition of person as required by the UDAP statute. Since the statute specifically mentioned both domestic and foreign corporations as possible defendants, the court concluded that the failure of the statute to specifically mention municipal corporations indicated that the legislature intended to exempt municipal corporations from an unfair or deceptive trade practice lawsuit.

Similarly, in Montana Vending, Inc. v. Coca-Cola Bottling Co. of Montana, the Montana court found that the state’s UDAP statute could not be enforced against a government defendant, since the plain meaning of person could not be construed to include a government entity. The court went on to note that the government entity in the case—a school district—was not engaged in a business activity at the time and therefore, could not be sued under the state’s UDAP statute. This analysis suggests that had the school district or other government agency been engaged in trade or commerce—as defined by the Montana UDAP statute and the Montana courts—a UDAP cause of action would be cognizable.


53. Id. at 505–06.
54. Id.
55. See id.
protects governmental units of the [s]tate from” UDAP lawsuits.\textsuperscript{57} Therefore, UDAP claims against the government or its agencies will be permitted only if there is a clear and unambiguous waiver of immunity.\textsuperscript{58} In \textit{Jefferson County v. Bernard},\textsuperscript{59} the Texas court was faced with determining whether the inclusion of the term \textit{governmental entities} in the UDAP statute’s definition of persons covered in the statute constituted a waiver of sovereign immunity.\textsuperscript{60} The court reasoned that the waiver of sovereign immunity must be clear and “any ambiguities in a statute are to be resolved in favor of retaining immunity.”\textsuperscript{61} Therefore, the court held that the inclusion of the phrase \textit{governmental entities} was insufficient to indicate a waiver of governmental immunity.\textsuperscript{62} However, it is important to note that the Texas UDAP statute is one of the weakest in the country,\textsuperscript{63} and unlike the majority of states, Texas chooses to interpret its UDAP statute narrowly.\textsuperscript{64} Consequently, it is unlikely that other states faced with this issue would come to the same conclusion.\textsuperscript{65}

The purpose of UDAP statutes is to provide extensive protection from the broadest range of unfair and deceptive practices.\textsuperscript{66} The holding, set forth in the Texas case, seems to contradict this purpose by exempting governmental entities from the scope of the statutes.\textsuperscript{67} By narrowly interpreting terms such as \textit{person} or \textit{governmental entities}, these states are allowing injured consumers to go without a remedy.\textsuperscript{68} In order to advance the true purpose of UDAP statutes, courts should interpret each aspect of the statute as liberally as possible in order to ensure coverage to the most consumers.\textsuperscript{69} Despite the results in Texas and other states, some other states

\begin{itemize}
\item \textsuperscript{57} Bernard, 148 S.W.3d at 700.
\item \textsuperscript{58} Id.
\item \textsuperscript{59} 148 S.W.3d 698 (Tex. Ct. App. 2004).
\item \textsuperscript{60} Id. at 701.
\item \textsuperscript{61} Id. (citing Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 697 (Tex. 2003)).
\item \textsuperscript{62} Id.
\item \textsuperscript{63} See CARTER, supra note 32, at 11.
\item \textsuperscript{64} See id.
\item \textsuperscript{65} Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 109 (Fla. 1st Dist. Ct. App. 1996) (distinguishing the narrow Texas UDAP statute from the broad UDAP statute of Florida).
\item \textsuperscript{67} See Bernard, 148 S.W.3d at 702.
\item \textsuperscript{68} See id. at 701–02.
\item \textsuperscript{69} See Sperry & Hutchinson Co., 405 U.S. at 239–40.
\end{itemize}
have reached the opposite result and permit consumers to bring UDAP claims against governmental entities.70

UDAP statutes have been applied against government agencies in a few states.71 However, the majority of states have not yet had occasion to decide this issue.72 Unless there is a specific statutory exemption regarding lawsuits against the government, there appears to be no absolute obstacle in applying UDAP statutes to government agencies engaging in deceptive practices.73

Further, if the government engages in an unfair or deceptive trade practice in which consumers suffer a loss, such consumers should have a method of recovery under the UDAP statutes.74 Permitting such lawsuits would advance the exact purpose of UDAP statutes; namely, to protect the public from unfair and deceptive practices.75

Both Hawaii and Massachusetts permit state agencies to be sued under their respective UDAP statutes.76 Several entities are exempt under the Hawaii UDAP statute; however, the statute is silent as to municipalities.77 In Daly v. Harris,78 the Hawaii court concluded that this silence indicated that

72. See Daly, 215 F. Supp. 2d at 1123; Pierce, 626 F. Supp. at 387.
73. See Carter & Sheldon, supra note 25, at 118. Other articles have addressed how statutes have been extended to cover other entities not explicitly noted in the statutory provisions. See also Michael Flynn, Physician Business (Mal)practice, 20 Hamline L. Rev. 333, 345–46 (1996) (finding that the “scarcity of . . . statutory provisions and case law”—regarding UDAP statutes’ application to learned professionals—support the notion that the statutes could extend to learned professionals); Michael Flynn & Karen Slater, All We Are Saying is Give Business a Chance: The Application of State UDAP Statutes to Business-to-Business Transactions, 15 Loy. Consumer L. Rev. 81, 87–89 (2003) (discussing which states permit a business to sue another business).
74. Carter & Sheldon, supra note 25, at 10–11.
75. Id.
76. Daly, 215 F. Supp. 2d at 1123; see also Pierce, 626 F. Supp. at 387–88. California has also permitted suits against state agencies in violation of the state UDAP statute, though inconsistently. Compare Trinkle v. Cal. State Lottery, 84 Cal. Rptr. 2d 496, 499–500 (Ct. App. 1999) (concluding that “[o]nly through an unreasonable, strained construction” can the government entity fall under the term person; thus, the cause of action failed), and Janis v. Cal. State Lottery Comm’n, 80 Cal. Rptr. 2d 549, 553 (Ct. App. 1998) (finding a government entity is not a person subject to suit; thus, the cause of action failed as a matter of law), with Notrica v. State Comp. Ins. Fund, 83 Cal. Rptr. 2d 89, 94 (Ct. App. 1999) (permitting suit against a government entity, but relying on specific language that authorized the fund in question).
77. See Daly, 215 F. Supp. 2d at 1122–23.
the statute did indeed permit UDAP lawsuits against the government. According to Hawaiian “legislative history and judicial interpretation,” a strong movement in the direction of increased consumer protection has developed. The court noted that the legislature consequently utilized “‘broad’ and ‘sweeping terms’” in the UDAP statute to provide protection to as many consumers as possible. Therefore, when in doubt, the language of the statute should be interpreted liberally.

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Therefore, when in doubt, the language of the statute should be interpreted liberally.

The court further determined that the sole limitation set forth in the UDAP statute is the requirement that “acts or practices be done ‘in the conduct of any trade or commerce.’” Taking into account such considerations, the court held that so long as the government agency in question is engaged in trade or commerce, such agency may be sued under Hawaii’s UDAP statute.

In making this ruling, the Hawaii court looked to the Massachusetts courts, which were also faced with the same issue. In *Pierce v. Dew*, the Massachusetts court had to determine whether a governmental entity may be held liable under the state UDAP statute. The Massachusetts UDAP statute allows for suits against “‘natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.’” As similarly mentioned by the *Daly* court above, the Massachusetts UDAP statute is intended to be a “‘statute of broad impact.’” Therefore, when in doubt, it is in the court’s best interest to interpret the UDAP statute in the most liberal manner. Consequently, since there was no legislative evidence that indicated otherwise, the court found the phrase “‘any other legal entity’” to include governmental agencies.

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79. *Id.* at 1123–25.
80. *Id.* at 1122.
81. *Id.* (quoting Han v. Yang, 931 P.2d 604, 619 (Haw. Ct. App. 1997)).
82. *Id.* at 1124 (quoting Cieri v. Leticia Query Realty, Inc., 905 P.2d 29, 43 (Haw. 1995)).
84. *Id.* at 1122–23 (quoting United States Leasing Corp. v. City of Chicopee, 521 N.E.2d 741, 744 (Mass. 1988)).
85. *Id.* at 1123 (citing *Cieri*, 905 P.2d at 37–38).
87. *Id.* at 387.
88. *Id.* (quoting MASS. GEN. LAWS ch. 93A, § 1(a) (2013)).
89. *Id.* at 388 (quoting Slaney v. Westwood Auto, Inc., 322 N.E.2d 768, 772 (Mass. 1975)); see also *Daly*, 215 F. Supp. 2d at 1122 (citing Han v. Yang, 931 P.2d 604, 619 (Haw. Ct. App. 1997)).
In United States Leasing Corp. v. City of Chicopee,92 the Massachusetts court further developed its stance regarding whether a governmental entity may be a proper defendant in a UDAP lawsuit.93 The court recognized that the legislature had maintained its silence on this issue; thus, the court found it necessary to focus its analysis on whether the potential government defendant engaged in trade or commerce.94 Though the defendant in the case had not been participating in any business-like endeavors, the analysis set forth by the court suggests that had the defendant engaged in such activities, the UDAP statute would have applied and been violated.95

Both the Hawaii and Massachusetts courts promote a broad interpretation of each state’s UDAP statute’s text.96 Though most courts have yet to face the issue of whether a government entity may be a proper defendant under state UDAP statutes,97 Hawaii and Massachusetts indicate that such lawsuits may well fit within the reach of UDAP statutes.98 Since the majority of state UDAP statutes are both expansive in scope and contain broad prohibitions against unfair and deceptive acts, state courts should be able to permit lawsuits against the government and its entities when such parties are engaging in unfair and deceptive acts or practices.99

IV. APPLICATION OF STATE UNFAIR AND DECEPTIVE TRADE PRACTICE STATUTES BROUGHT ON BEHALF OF A DEPENDENT CHILD

There has yet to be a case in this country in which a dependent child has maintained a cause of action for an unfair or deceptive trade practice against a state agency, when such agency misrepresented to the child its role in a dependency proceeding.100 Yet, UDAP statutes seem to be broad

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93. Id. at 744.
94. Id.; Genesco Entm’t, Inc. v. Koch, 593 F. Supp. 743, 750–51 (S.D.N.Y 1984) (finding courts must focus on whether the practice in question arose out of trade or commerce).
95. United States Leasing Corp. v. City of Chicopee, 521 N.E.2d 741, 744 (Mass. 1988); see also Bedrosian, L.L.C. v. Costanza, 10 Mass. L. Rptr. 459, 459–60 (Super. Ct. 1999) (concluding that municipality may be subject to suit so long as the municipality engaged in trade or commerce).
100. See id.
enough to enable a dependent child to initiate such a claim when the state agency deceives or treats a dependent child unfairly.\textsuperscript{101} The key to such a claim is to examine the nature of the dependent child’s claim and determine if such a claim fits within the UDAP statute prohibitions.\textsuperscript{102}

Florida provides an example of how the courts could permit a UDAP claim against government agencies on behalf of dependent children.\textsuperscript{103} The Florida UDAP statute, which is typical of most state UDAP statutes, prohibits “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”\textsuperscript{104} Florida specifically requires that the provisions of the statute \textit{be construed liberally} in order to promote the policies set forth in the statute, which includes protecting the consuming public.\textsuperscript{105} Therefore, the Florida UDAP statute is a broadly written statute.\textsuperscript{106}

In order to determine whether a cause of action could indeed be brought against a state agency for misrepresenting its role in a dependency proceeding, the facts set forth in the opening anecdote involving Billy’s dependency proceeding will be analyzed. First, the Florida UDAP statute defines a consumer as “an individual; child, by and through [the child’s] parent or legal guardian; business; firm; . . . corporation; any commercial entity, however denominated; or any other group or combination.”\textsuperscript{107} Billy is a child and, therefore, fits within the definition of a consumer.\textsuperscript{108}

Next, the Florida UDAP statute requires that unfair or deceptive practices arise in trade or commerce.\textsuperscript{109} The phrase \textit{trade or commerce} is

\begin{itemize}
  \item \textsuperscript{101} See id. at 24–29.
  \item \textsuperscript{102} See FLA. STAT. §§ 501.203(7), .204 (2013); CARTER, \textit{supra} note 32, app. at 7–10.
  \item \textsuperscript{103} See FLA. STAT. § 501.204.
  \item \textsuperscript{104} \textit{Id.} § 501.204(1).
  \item \textsuperscript{105} \textit{Id.} § 501.202.
  \item \textsuperscript{106} Hanson Hams, Inc. v. HBH Franchise Co., No. 03-61198-CIV, 2003 WL 2276867, at *2 (S.D. Fla. Nov. 7, 2003) (citing Day v. Le-Jo Enters., Inc., 521 So. 2d 175, 178 (Fla. 3d Dist. Ct. App. 1988)) (finding courts have regarded the Florida UDAP statute as \textit{extremely broad}; \textit{see also}, e.g., Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 103 (Fla. 1st Dist. Ct. App. 1996)).
  \item \textsuperscript{107} FLA. STAT. § 501.203(7). At least thirty-four states would grant a private right of action to a \textit{person or a consumer} like Billy. \textit{See id.; see also} ALA. CODE §§ 8-19-3, (2), (5), -10(a) (2013); LA. REV. STAT. ANN. §§ 51:1402(1), (8), :1409(A) (2013); MISS. CODE ANN. §§ 75-24-3(a), -15(1) (2013); N.H. REV. STAT. ANN. §§ 358-A:1(I), :10(I) (2013); 73 PA. CONS. STAT. ANN. §§ 201-2(2), -9.2(a) (West 2013).
  \item \textsuperscript{108} FLA. STAT. § 501.203(7) and \textit{see supra} hypothetical Part I.
  \item \textsuperscript{109} FLA. STAT. § 501.204(1). Many states require that the unfair or deceptive trade practice arise from trade or commerce. ALA. CODE § 8-19-5; ALASKA STAT. § 45.50.471(a) (2013); CONN. GEN. STAT. § 42-110b(a) (2013); FLA. STAT. § 501.204(1); HAW. Rev. STAT. § 480-2(a) (2013); IDAHO CODE ANN. § 48-601 (2013); 815 ILL. COMP. STAT.
defined as “the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, . . . whether tangible or intangible, . . . wherever situated.”

This is an expansive definition of trade or commerce and seems to cover more than what would conventionally be considered business activities. The actions of both the child protective services caseworkers and the GAL representatives fit this definition. By providing Billy with a business card, the child protective services caseworker engaged in a form of advertisement. The business card is tangible evidence of trade or commerce. Further, the representation that the child protective services government agency is the law firm for Florida’s children is tangible evidence that a service is being offered to Billy. In addition, the GAL Program representative declared to Billy that the GAL Program represented him in the dependency proceeding. This kind of statement also fits within the definition of trade or commerce because the GAL Program is providing legal services.

The Florida UDAP statute requires that “due consideration and great weight shall be given to the interpretations of the [FTC] and the federal courts.” Therefore, the FTC and the federal court definitions of unfair and deceptive trade practices apply to the Florida Statutes. Under FTC and federal court precedent, an act or practice is a deceptive trade practice if the act or practice is likely to, or “has the tendency [or] capacity to . . . deceive” consumers acting reasonably under the circumstances. Further, proof of


110. FLA. STAT. § 501.203(8).
111. Id.
112. See id. and see hypothetical supra Part I.
113. See Florida Bar v. Matus, 528 So. 2d 895, 895 (Fla. 1988) and see hypothetical supra Part I.
114. FLA. STAT. § 501.203(8); Matus, 528 So. 2d at 895.
115. FLA. STAT. § 501.203(8) and see hypothetical supra Part I.
116. See hypothetical supra Part I.
117. FLA. STAT. § 501.203(8).
118. Id. § 501.204(2).
119. See id.
intent, negligence, fraud, or actual deception is not required to establish such a prohibited practice.\(^{121}\) The FTC and federal court definitions are intended to be flexible and do not require a specific rule to be violated in order for deception to be found.\(^{122}\) The FTC has determined that oral misrepresentations and failures to disclose material facts both violate the FTC Act.\(^{123}\) Therefore, any oral misrepresentation or failure by a party to disclose a material fact will be deemed sufficiently deceptive under the Florida UDAP statute.\(^ {124}\) Further, federal courts have held that if a practice “offends established public policy, . . . is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers,” such practice is unfair.\(^ {125}\) Again, proof of intent, negligence, fraud, or actual deception is not required for an act to be deemed unfair.\(^ {126}\)

Viewed from the perspective of Billy, he reasonably believed that both the state child protective services caseworker and the GAL Program were his legal representatives and would advocate on his behalf.\(^ {127}\) When the child protective services caseworker handed Billy a business card stating that his agency was the law firm for Florida children, a reasonably prudent person—even if not a child like Billy—would have every reason to believe that the caseworker would indeed be his legal representative in court.\(^ {128}\) The caseworker failed to mention that he is in fact the petitioner who brings the dependency petition on behalf of the state.\(^ {129}\) By failing to properly disclose the child protective services worker’s true role in the dependency proceeding, the caseworker failed to disclose material facts that may have impacted Billy’s decision to even think about obtaining his own lawyer.\(^ {130}\)


\(^{123}\) In re Peacock Buick, Inc., 86 F.T.C. 1532, 1556 (1975).


\(^{125}\) Spiegel, Inc. v. FTC, 540 F.2d 287, 293 (7th Cir. 1976) (citing FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5 (1972)).

\(^{126}\) See Orkin Exterminating Co., 849 F.2d at 1368.

\(^{127}\) See hypothetical supra Part I.

\(^{128}\) See id.; see also Dep’t of Legal Affairs v. Father & Son Moving & Storage, Inc., 643 So. 2d 22, 26 (Fla. 4th Dist. Ct. App. 1994) (citing Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977)) (stating that “an advertisement is considered deceptive if it has the capacity to convey misleading impressions to consumers”).

\(^{129}\) Fla. Stat. § 39.501(1) and see hypothetical supra Part I.

\(^{130}\) See Fla. Stat. § 501.204(1); In re Peacock Buick, Inc., 86 F.T.C. 1532, 1556 (1975) and see hypothetical supra Part I.
The caseworker misled Billy, who acted reasonably under the circumstances.\textsuperscript{131} Such deceptive actions by the caseworker are prohibited under the Florida UDAP statute.\textsuperscript{132}

Further, when the GAL Program representative visited Billy, the representative explained that the GAL Program served as Billy’s representative in court and would advocate on his behalf.\textsuperscript{133} Billy consistently maintained that he wanted to return to his home and be with his mother, brother, and stepfather.\textsuperscript{134} Instead, the GAL Program advocated for Billy’s separation from his mother, brother, and stepfather, and recommended Billy’s removal from his home during the actual proceeding.\textsuperscript{135} Again, a reasonably prudent person in Billy’s position would have had every reason to believe that the GAL Program would advocate for what Billy wanted.\textsuperscript{136} By relying on the oral misrepresentations made by the GAL Program representative, Billy acted reasonably when he did not hire a lawyer.\textsuperscript{137} Such deceptive actions by the GAL Program are prohibited under the Florida UDAP statute.\textsuperscript{138}

Moreover, both the caseworker and the GAL Program representative engaged in unfair practices by misrepresenting their respective roles to Billy.\textsuperscript{139} Billy is a child faced with a very difficult and emotionally demanding situation—Billy is at least scared, worried, confused, and vulnerable.\textsuperscript{140} Both the caseworker and the GAL Program representative have an ethical, if not moral, responsibility to properly advise Billy, and the failure to do so breaches their duties as public officials to carry out the legislative policy to protect dependent children.\textsuperscript{141} Instead, both parties treated Billy unfairly by denying him legal representation when Billy

\begin{itemize}
  \item \textsuperscript{131} See hypothetical \textit{supra} Part I.
  \item \textsuperscript{132} \textsc{Fla. Stat.} § 501.204(1) and see hypothetical \textit{supra} Part I.
  \item \textsuperscript{133} See hypothetical \textit{supra} Part I.
  \item \textsuperscript{134} See id.
  \item \textsuperscript{135} See id.
  \item \textsuperscript{136} See Dep’t of Legal Affairs v. Father & Son Moving & Storage, Inc., 643 So. 2d 22, 26 (Fla. 4th Dist. Ct. App. 1994) (citing Chrysler Corp. v. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977)) and see hypothetical \textit{supra} Part I.
  \item \textsuperscript{137} See hypothetical \textit{supra} Part I.
  \item \textsuperscript{138} \textsc{Fla. Stat.} § 501.204(1) (2013).
  \item \textsuperscript{139} See id.
  \item \textsuperscript{140} See hypothetical \textit{supra} Part I.
  \item \textsuperscript{141} See Spiegel, Inc. v. FTC, 540 F.2d 287, 293 (7th Cir. 1976) (citing FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244–45 n.5 (1972)) (reasoning that under the Florida UDAP statute, immoral acts are unfair practices); Urling v. Helms Exterminators, Inc., 468 So. 2d 451, 453 (Fla. 1st Dist. Ct. App. 1985) (per curiam) (quoting \textit{Spiegel, Inc.}, 540 F.2d at 293).
\end{itemize}
reasonably believed he was covered. Billy had no way to know that he could even ask for a lawyer, much less that he needed a lawyer, and that the GAL Program was prohibited from acting as his lawyer in the dependency proceeding; the GAL Program’s actions would fit as an unfair trade practice under the Florida UDAP statute.

Next, Billy must contend with the exemptions section of the Florida UDAP statute. The Florida UDAP statute does not specifically mention that the government or government agencies are exempt from lawsuits claiming deceptive or unfair trade practices. However, no Florida court has determined if this absence from the exemptions section of the UDAP statute permits unfair and deceptive trade practice claims against a government agency, like the child protective services state agency or the GAL Program. Yet, the Florida courts have determined this same issue with reference to professionals. In *Kelly v. Palmer, Reifler, & Associates, P.A.*, a Florida district court was asked to determine whether an attorney may be sued under Florida’s UDAP statute. Like government agencies, neither attorneys specifically, nor learned professionals in general, are mentioned under the exemptions section of the statute. The court reasoned that the legislature’s unambiguous failure to mention attorneys in the statute exemptions indicates that attorneys are not exempt from a UDAP claim. The court noted that neither a Florida District Court of Appeal nor the Supreme Court of Florida has decided otherwise. Therefore, since the legislature similarly made no mention of government agencies under the exemptions section of the statute, such agencies are not exempted from suit. Therefore, Billy’s claim against both the child protective services government agency and the GAL Program is not exempt from enforcement under the Florida UDAP statute.

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142. FLA. STAT. § 39.4085(20) and see hypothetical *supra* Part I.
143. See FLA. STAT. § 501.204(1); *Urling*, 468 So. 2d at 453 (quoting *Spiegel, Inc.*, 540 F.2d at 293 (noting that if an act results in a substantial injury, such act is unfair)); Dale & Reidenberg, *supra* note 7, at 334.
144. FLA. STAT. § 501.212.
145. See id.
148. 681 F. Supp. 2d 1356 (S.D. Fla. 2010).
149. Id. at 1371.
150. FLA. STAT. § 501.212.
152. Id.
153. See FLA. STAT. § 501.212; *Kelly*, 681 F. Supp. 2d at 1371.
154. FLA. STAT. § 501.212; *Kelly*, 681 F. Supp. 2d at 1371.
In sum, there appears to be no impediment to Billy—as a dependent child—bringing a lawsuit against the child protective services government agency or the GAL Program for unfair and deceptive trade practices.

V. EFFECT OF APPLYING STATE UNFAIR AND DECEPTIVE TRADE PRACTICE STATUTES TO ENSURE PROTECTION OF DEPENDENT CHILDREN

Perhaps the use of a UDAP statute as a remedy for a dependent child’s denial of legal representation seems a bit strange and stretched. However, such use of a UDAP statute seems no more strange or stretched than the failure to provide dependent children with a lawyer in a dependency proceeding. After all, the purpose of the dependency proceeding is to provide government protection to children who have been abused, neglected, or abandoned. 155 Denying such dependent children their own legal representation subjects these children to abuse, neglect, and abandonment within the dependency process. 156 The lack of legal representation for dependent children—when cloaked with deception and unfairness—cries out for a legal remedy. 157 State UDAP statutes provide just such a remedy. 158 Most state UDAP statutes—just like Florida’s—provide as remedies for an unfair or deceptive trade practice injunctive relief, economic damages, and the prospect of prevailing party attorney’s fees and costs. 159 In Billy’s case, an injunction mandating that the child protective services state agency and the GAL Program refrain from misrepresenting their function and not advising Billy that he needs to at least consider, if not obtain, his own lawyer to represent him in a dependency proceeding, would ensure that these government agencies refrain from deceptive and unfair acts or practices. 160 Although economic damages might be difficult to prove, the prospect of recovering attorney’s fees and costs would encourage lawyers to take on the representation of Billy in a state UDAP claim. 161

155. FLA. STAT. § 39.001(1)(a).
156. See Am. Acad. of Pediatrics, Developmental Issues for Young Children in Foster Care, 106 PEDIATRICS 1145, 1148 (2000); CHILDREN’S ADVOCACY INST. ET AL., supra note 8 at 15–17; Dale & Reidenberg, supra note 7, at 352; Joseph J. Doyle, Jr., Child Protection and Child Outcomes: Measuring the Effects of Foster Care, 97 AM. ECON. REV. 1583, 1589 (2007).
157. See CHILDREN’S ADVOCACY INST. ET AL., supra note 8, at 15–17.
158. CARTER & SHELDON, supra note 25, at 1.
159. Id. at 2.
160. See FLA. STAT. § 501.207(b); CARTER & SHELDON, supra note 25, at 1–2.
161. See CARTER & SHELDON, supra note 25, at 2, 721.
VI. CONCLUSION

By allowing state UDAP claims against government entities, courts would accomplish two goals. First, such a determination would place the government on the same legal footing as any other illegitimate business that uses unfair or deceptive trade practices to gain an advantage. Second, in the context of dependent children, such a determination would prevent the government from further abusing abused, neglected, and abandoned children. Both of these goals fit well within the purpose of the state UDAP statutes and the child protection statutes. Absent legislation requiring that every dependent child receive legal representation in a dependency proceeding, the least the courts can do is prohibit government entities from tricking an abused, neglected, or abandoned child, and treat these vulnerable children to a legal process that is not riddled with unfairness and deception.

162. See supra Part III.
163. See supra Parts IV–V.
164. See Fla. Stat. §§ 39.001(1)(a), 501.204(1); supra Part III.
THE BATTLE AGAINST HUMAN TRAFFICKING: FLORIDA’S NEW EXPUNGEMENT LAW IS A STEP IN THE RIGHT DIRECTION

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I. INTRODUCTION

Human trafficking is one of the most highly organized—and highly elusive—crime epidemics, claiming victims internationally. However, many people do not realize that human trafficking is not just a foreign issue; trafficking is occurring within the United States and a majority of victims are American citizens. While there are many forms of human trafficking, each case almost always “includes psychological coercion, threats against family, . . . and in sex trafficking cases, the threat of being ousted in the victim’s community.” One reason why this crime epidemic is so elusive is because the victims are very difficult to identify. This is because most victims are locked away in a house and rarely allowed outside. However, not all victims constantly seek a way out; some victims feel that working for the trafficker is their only choice, or that they owe the trafficker, and the only way to pay them back for giving them a place to live is through sex.

A. A Little Girl’s Story

Keisha is a [sixteen]-year-old African American female originally from Florida. She was raised by an aunt until she was [ten] years old and then placed in the foster care system. At the age of [fourteen], Keisha first ran away from her foster family to avoid sexual harassment from one of her foster family’s relatives.

During that time, she met “Mastur D,” a [twenty-six]-year-old man who offered to help her get back to her biological family. He said he would be able to pay for some of the expenses...
to get them there, but that she needed to help support them financially by engaging in commercial sex with some of his friends. With no money or other options Keisha took him up on his offer. He drove her back to Florida but insisted when they arrived that she had not earned enough money to cover their hotel and gas costs. He physically assaulted her and told her she would never see anyone else in her family if she did not engage in sex with other men of his choosing. She felt she had no other choice and continued to earn money for Mastur D to pay him back . . . . Keisha was arrested for solicitation in Florida and after serving time in a juvenile detention center, was returned to her foster family, and was therefore returned to sexual harassment by her foster family’s relative. Keisha ran away again a year later and called Mastur D to help her get back to Florida. He agreed to help again. She was arrested again.7

Keisha’s story is a perfect example of a young girl who felt her only option was to listen to Mastur D and have sex for money.8 He used threats and psychological coercion to make her believe this was her only option, and poisoned her mind with lies for so long that she even returned to him after she had been arrested and returned to her foster home.9 Now she is not only psychologically and physically scarred, but she also has a criminal record with prostitution charges that will follow her around for the rest of her life.10 Two prostitution charges is a first-degree misdemeanor, and three charges is a third-degree felony in Florida.11 This type of record can make it difficult for Keisha to find a decent job to support herself or a family.12 The way Keisha was treated, and the aftermath of the victimization is very common with other sex trafficking victims.13 This is why Florida Governor Rick Scott recently signed a bill that will allow human trafficking victims to petition to have their records expunged.14

8. Id.
9. Id.
10. See id.
13. HUMAN SMUGGLING & TRAFFICKING CTR., supra note 2, at 13–14.
This Comment is focused on human trafficking victims and how Florida’s legislation is growing in the right direction by adding new laws to help protect future victims and to assist in the rehabilitation of past victims. Part II will discuss the currently enacted *Florida Statutes* and how Florida defines human trafficking. Part III will analyze human trafficking victims and why the victimization continues even after the victim is free. Part IV will address current victim-focused laws Florida has in place. Part V will discuss, in detail, Florida’s new expungement law and how it compares to other expungement laws. Part VI will discuss future laws that Florida can enact to further benefit human trafficking victims.

II. AN OVERVIEW OF FLORIDA’S HUMAN TRAFFICKING LEGISLATION

The human trafficking epidemic is an international problem, but without individual states making an effort to combat local cases of human trafficking, the epidemic will only grow. Human trafficking, and more specifically, sex trafficking, is a very organized and secretive crime that is most effectively dealt with at a local level. Local communities and local law enforcement must be educated on the signs of human trafficking and the best ways to fight it.

Florida currently defines human trafficking as “transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploitation of that person.” Exploitation of a person can include labor—farm work, sweatshop work, cleaning services, or restaurant work—or sex. Sex trafficking expands that definition to include “forc[ing], compel[ling], or coerc[ing] another to


15. See infra Parts II–V.
16. See infra Part II.
17. See infra Part III.
18. See infra Part IV.
19. See infra Part V.
20. See infra Part VI.
22. Id. at 324–25.
23. See id.
25. Id. § 787.06(1)(b).
become a prostitute." While these definitions do not include every possible type of human trafficking, the Florida Legislature has attempted to encompass as much as possible.

A. Florida: The Perfect Landscape for Sex Traffickers

Florida is especially vulnerable to human trafficking crime because of the diverse population and number of immigrants. Florida is ranked among the top three states for cases of human trafficking, along with New York and California. This is due to the fact that Florida also has a large international airport—Miami International Airport—and many ports for boats to unload passengers. These two factors alone make Florida an ideal entry point for human trafficking victims to be brought into the United States. Once in Florida, “[s]ome traffickers keep their victims under lock and key. However, the most frequently used practices are . . . isolat[ion] . . . from the public and family members, confiscating passports, . . . using or threatening . . . violence, . . . [and] telling victims that they will be . . . deported for immigration violations if they contact authorities . . . .”

In 2004, Florida decided to take the steps needed to combat the human trafficking epidemic and enacted legislation to bring awareness to law enforcement and the community.

B. Florida’s First Steps in Combating Human Trafficking

In 2004, Chapters 787, 796, and 895 of the Florida Statutes, were amended to address human trafficking crimes. These laws made it a
second-degree felony to engage in labor trafficking or sex trafficking of adults, and a first-degree felony to engage in sex trafficking of minors. However, these laws were weak when it came to applicability because they did not address how to properly prevent future human trafficking. It was not until 2006 that the laws were amended to provide a more inclusive definition of human trafficking, requiring human trafficking training within law enforcement, and providing relief for victims. They were further amended in 2012 to become even stronger.

It is the intent of the Legislature that the perpetrators of human trafficking be penalized for their illegal conduct and that the victims of trafficking be protected and assisted by this state and its agencies. In furtherance of this policy, it is the intent of the Legislature that the state Supreme Court, The Florida Bar, and relevant state agencies prepare and implement training programs in order that judges, attorneys, law enforcement personnel, investigators, and others are able to identify traffickers and victims of human trafficking and direct victims to appropriate agencies for assistance. It is the intent of the Legislature that the Department of Children and Family Services and other state agencies cooperate with other state and federal agencies to ensure that victims of human trafficking can access social services and benefits to alleviate their plight.

The Criminal Justice Standards and Training Commission shall establish standards for basic and advanced training programs for law enforcement officers in the subjects of investigating and preventing human trafficking crimes. After January 1, 2007, every basic skills course required for law enforcement officers to obtain initial certification must include training on human trafficking crime prevention and investigation.

39. FLA. STAT. § 796.035 (2004) (current version at FLA. STAT. § 796.035 (2013)).
42. Act effective July 1, 2012, ch. 2012-97, § 5, 2012 Fla. Laws 1, 4–7 (amending FLA. STAT. § 787.06 (2011)).
Amending section 787.06 to include a training requirement was a huge step for Florida in the battle against human trafficking because spotting the crime is one of the toughest parts. However, the development of the protections and remedies afforded to the victims is most important. Victims need an effective support system and the ability to seek an adequate remedy from the legal system. Many victims may return to the sex trafficker because life with the sex trafficker is a better life than “foster care or . . . group homes.” If the victim has been with the sex trafficker for a long period of time, he or she may have already gone through what is known as a grooming process, in which the pimp attempts to gain control over the victim. These victims need a support system and programs in place after they have been rescued in order to recover and become accepted members of society.

C. Florida’s Harsh Punishments for Convicted Traffickers

Florida has come a long way since the 2004 legislation by adding harsher punishments for traffickers. Currently, all forms of human trafficking are first-degree felonies in the State of Florida. Sex trafficking with a minor under fifteen years of age is a life felony, which is punishable up to life in prison. Punishment for a first-degree felony is imprisonment...
for up to thirty years and up to a ten thousand dollar fine. However, section 787.06 of the Florida Statutes expressly allows for punishment for up to life in prison for the sex trafficking of a minor. Section 787.06 of the Florida Statutes also authorizes the courts to separate each individual instance of human trafficking and stack the punishments. Therefore, each victim a trafficker controls would be a separate count of human trafficking, each punishable with up to thirty years in prison.

Section 787.06 of the Florida Statutes also allows for seizure of “[a]ny real property or personal property that was used, attempted to be used, or intended to be used in violation of any provision of this section.” If this section was used against traffickers, it could potentially shut down their entire operation because they would lose their houses, cars, and any other property that was used in conjunction with the human trafficking. Having no house and no car would significantly impair a trafficker’s business. Another option is that Florida could use the seized property to help fund non-governmental organizations. This authority comes from the Florida Contraband Forfeiture Act, which allows law enforcement to seize property used for criminal purposes and use the proceeds for future crime prevention efforts. It would be very beneficial to take the property seized from human trafficking crimes and give all the proceeds to human trafficking victim relief agencies because these agencies need funding to implement more resources for victims.

D. Florida’s Civil Remedies for Trafficking Victims

Florida’s legislation does include some civil remedies for victims. These remedies, however, are hardly enough to make a significant, positive impact on the victim’s life. The victim can only recover up to three times

53. Id. §§ 775.082(3)(b), .083(1)(b).
54. Id. § 787.06(3)(g).
55. Id. § 787.06(3)(h).
56. FLA. STAT. §§ 775.082(3)(b), 787.06(3)(h).
57. Id. § 787.06(7).
58. See id.
59. See Polaris Project, Domestic Sex Trafficking, supra note 4, at 3, 5; What Is Human Trafficking?, supra note 28.
60. Butkus, supra note 21, at 337.
61. FLA. STAT. § 932.704(1).
62. See Butkus, supra note 21, at 329, 336–37.
63. FLA. STAT. §§ 772.102(1)(a)(15), .104(1)–(2).
64. See id. § 772.104(2); Butkus, supra note 21, at 328–29.
the profit made by the sex trafficker. The legislation also includes that a minimum of two hundred dollars and reasonable attorney’s fees will be awarded to the victim. The burden is on the victim to prove how much was made as a result of the sex trafficking, which can be difficult since the victim is most likely not keeping a record of how much he or she has made. Unfortunately, section 772.104 of the Florida Statutes denies victims the right to seek punitive damages against sex traffickers. Florida also has a statute that allows for victims of sexual exploitation to recover awards under victim compensation laws. However, section 960.065 of the Florida Statutes also restricts the award if the victim “who committed the crime upon which the claim is based will receive any direct or indirect financial benefit from such payment.”

Overall, Florida’s legislation addressing human trafficking has significantly improved over the last eight years since the 2004 amendments; however, there is still room for even greater improvement. Improvement in the area of victim relief is the most important. Human trafficking is occurring every day and is so widespread that it cannot possibly be fixed overnight, but the victims that are rescued need to be helped immediately.

III. THE PROFILE OF A VICTIM

A. National Victim Statistics

A victim of human trafficking can be any sex, age, or ethnicity and can be as close as a next-door neighbor. According to the most recent report published by the Bureau of Justice Statistics, between January 2008 and June 2010, there were a reported 527 victims of human trafficking. Of the 527 victims, 257 of them were 17 or younger, 159 of them were 18 to 24, 65

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66. Id.
67. Id.
68. See Polaris Project, Domestic Sex Trafficking, supra note 4, at 4.
69. Fla. Stat. § 772.104(3).
70. Id. § 960.065(1)(a).
71. Id. § 960.065(4).
73. See Butkus, supra note 21, at 327–29.
74. See id. at 315, 327–28.
75. What Is Human Trafficking?, supra note 28; Zea, supra note 3.
76. Banks & Kyckelhahn, supra note 2, at 6.
68 of them were 25 to 34, and 27 of them were 35 or older. This report also found that of the 527 victims, 346 of them were United States citizens. While this report does not include every single act of human trafficking, the trend is clear: United States citizens are just as likely, if not more likely, to become victims of human trafficking within the United States.

B. Initial Recruiting of a Victim

Victims can be taken from virtually anywhere; however, the more vulnerable ones come from foster homes, halfway houses, homeless shelters, and group homes. These victims usually have no family or place to call home, so the grooming process that the sex traffickers use to control the victims is much more effective. Victims can also be picked up at schools, playgrounds, bars, and bus stations. Once they have been taken, they can be sent far away from their hometown or locked away in a house, never to be seen again.

Some victims choose to go with the trafficker because they have been promised money, food, or love. Martina Okeke, a Nigerian woman, was brought to the United States and was “promised . . . $300 a month, . . . a house, and tuition . . . for her . . . children.” She admitted that after twelve years, she never received a dime. Martina relied on these promises because she was living in poverty with two children as a single mother; coming to the United States looked like a step up from her home in Nigeria. Individuals in vulnerable situations are the ideal targets for traffickers because they can easily be persuaded by “[p]romises of a better life, fast money, and future luxuries.” Once the victim is secured—either locked up or cooperative

77. Id. at 6 tbl.5.
78. Id.
79. See id. at 6.
80. See POLARIS PROJECT, DOMESTIC SEX TRAFFICKING, supra note 4, at 3.
81. See id.
82. Id.
83. See Zea, supra note 3.
85. Id.
86. Id.
87. See id.
88. POLARIS PROJECT, DOMESTIC SEX TRAFFICKING, supra note 4, at 3; see also Jessica De Leon, New Laws on Human Trafficking Will Aide Manatee-Sarasota Agencies as They Form Task Force, BRADENTON HERALD (June 3, 2013), http://www.bradenton.com/2013/06/03/4551754/new-laws-on-human-trafficking.html (“Two-thirds of the world lives in
because of a false sense of security—the victim may be mentally and physically abused in order to keep him or her obedient.89 This abuse can include “beating, rape, starvation, forced drug use, confinement, and seclusion.”90 Such treatment instills fear into the victim, causing them to want to perform whatever acts the trafficker desires.91

C. A Closer Look at Sex Trafficking Victims

Sex trafficking victims are generally young—most often under the age of twenty-four.92 One common reason for this is many of the clients fear contracting HIV or other sexually transmitted diseases.93 They believe having sex with a child—“some as young as seven”—will protect them from contracting diseases because the victims are “too young to have been infected.”94 Some of the victims in their late teens and early twenties may be forced to work in strip clubs or massage parlors—hidden in plain sight.95 Whatever the age may be, the sex trafficker usually sets a quota, or dollar amount, that the victim must make each night in order to avoid severe abuse.96 This quota could be anywhere from “$500 [to] $1000 each night.”97 Some of the victims may even resort to theft in order to meet the quota.98 Often times, the victims fear retaliation for not meeting the quota more than they fear being arrested by law enforcement.99 At the end of the night, all the profits the victims have made go directly to the sex trafficker; the victim keeps nothing.100

Sex traffickers reap all the benefits from exploiting the victims by forcing them to prostitute on the streets, work in brothels, or strip, and then

89. See MIKO, supra note 1, at 4.
90. Id.
92. BANKS & KYCKELHAHN, supra note 2, at 6 tbl.5.
93. MIKO, supra note 1, at 4.
94. Id.
95. See Butkus, supra note 21, at 313 n.108, 314.
96. POLARIS PROJECT, DOMESTIC SEX TRAFFICKING, supra note 4, at 4.
97. Id.
98. Id.
99. Id. at 4–5.
100. Id. at 4.
give all the money to the trafficker. It has been estimated that a sex trafficker can make up to $632,000 in just twelve months. This estimation is based on the trafficker controlling four girls, with each girl meeting a ‘quota’ of $500 [a] night, [seven] days a week." With this amount of untaxed income, traffickers have little incentive to let the victims go once they have them.

D. Victim or Offender?

One of the hardest parts for victims is the record they are left with—if they are lucky enough to escape from the trafficker. Many victims are convicted of theft, drug possession, prostitution, loitering, and other crimes that make it very difficult to build a life after escaping. Some people may ask why the victim did not tell the police about the trafficker the first time they got arrested. While this seems like a logical solution to someone who is not in a victim’s situation, it is not so easy. Often times a victim may not even think of themselves as a victim, under the impression that they owe the trafficker some debt or depend on the trafficker for food and shelter. Victims may also feel a sense of loyalty to pimps, known as Stockholm Syndrome. There is also a possibility that the victim distrusts law enforcement, due to personal experiences or being convinced by the trafficker that law enforcement will only harm them. It is also very

101. Polaris Project, Domestic Sex Trafficking, supra note 4, at 4; Butkus, supra note 21, at 308, 314.
102. Id.
103. See id.
104. See id.
106. Id.
107. See Polaris Project, Domestic Sex Trafficking, supra note 4, at 5.
108. Id.
109. Id.
110. See Polaris Project, Domestic Sex Trafficking, supra note 4, at 5.
probable that victims are scared that once they are out of jail, the trafficker may harm them or their family. Consequently, many victims accumulate a record because they were being forced to prostitute, which then makes it nearly impossible to find a job, go to school, locate a place to live, or apply for credit cards.

Victims are suffering consequences for the rest of their lives, while traffickers may only be in jail for a few years—if they are caught at all.

Ten years after Telisia Espinosa had broken free, her life on the lam with the boyfriend who had urged her to sell her body for cash continued to haunt her.

From Las Vegas to Cleveland to Florida, Espinosa had racked up arrests for prostitution, loitering, solicitation—so many charges that, years later, it would take her months to track down all the arrest warrants she [did not] even realize she had.

“You have a person who sells you and exploits you,” said Espinosa, a [thirty-seven]-year-old Tampa woman whose record has barred her from jobs and even from volunteering with the human trafficking victims whose stories match her own. “They may have a slap on the wrist and then you [are] paying for it with the rest of your life.”

Non-governmental organizations are at the home front of post-trafficking victim treatment. These organizations need more funding and support in order to maintain their facilities. Many of these facilities provide law enforcement training as well as victim support. Victims need to have a safe place to go and resources to utilize in order to have a future. Without community resources and community awareness, many victims are treated like offenders due to their criminal record, which is why victim-focused laws are so important for victim recovery.
IV. SAFE HARBOR ACT: FLORIDA’S FIRST BIG VICTIM-FOCUSED LAW

Florida has taken steps towards enacting laws for the benefit of victims. The Safe Harbor Act became effective January 1, 2013, and it is focused on protecting child victims of sex trafficking. This law requires that children be placed in a safe house and assessed through physical and mental examinations. In addition, section 409.1678 of the Florida Statutes requires that the children be provided with “food, clothing, medical care,” and other resources. The goal of the Safe Harbor Act is directed towards the rehabilitation and reintegration of children into society.

When an officer has established probable cause to believe a minor is being sexually exploited, the officer has the authority to take that child into custody “to be placed in a short-term safe house.” The safe house is required to have staff awake twenty-four hours a day to ensure the safety of the children being housed. The Safe Harbor Act states that appropriations, gifts, and government funding will be provided to the safe homes to help facilitate the rehabilitation process. The ultimate goal is to either reunite the minor with his or her family or find a long-term living arrangement where the child can be cared for and ultimately lead a normal, healthy life.

A. A Major Flaw in the Safe Harbor Act

While the Safe Harbor Act is very beneficial to minor victims, it completely ignores victims over the age of eighteen. While a majority of sex trafficking victims appear to be minors, there are still a substantial number of sex trafficking victims who are eighteen or over. Victims need

120. See, e.g., FLA. STAT. § 409.1678 (2013).
122. FLA. STAT. § 39.524(1).
123. Id. § 409.1678(1)(e).
125. Butler, supra note 124, at 237.
126. FLA. STAT. § 409.1678(1)(b).
127. Butler, supra note 124, at 237; see also FLA. STAT. § 409.1678(2)(e).
128. See Butler, supra note 124, at 236–37.
129. See FLA. STAT. § 39.524(1).
130. See BANKS & KYCKELHAHN, supra note 2, at 6 tbl.5.
to be able to find a safe place to stay while they go through the rehabilitation process. Group homes and halfway homes are potential safe houses for adult victims; however, those places are, often times, targets for sex traffickers to recruit more victims. The likelihood of being pulled back into sex trafficking is much higher if victims do not have a place to stay and be protected. The best possible solution is to amend the Safe Harbor Act to be non-discriminatory. Victims of all ages need physical and mental medical attention, food, shelter, and legal assistance to effectively seek legal remedies.

There has been some debate recently over whether to implement secure safe houses or open safe houses. The difference between the two is that the former essentially is locking up the victims until they are physically and psychologically ready to be given freedom, and the latter does not lock the doors to keep the children in. However, locking a child up can be just as traumatizing as being with a trafficker. Often times, the advocates that wish to have secure facilities are inexperienced and would rather force their treatment on the children. Secured homes act more like a punishment for the victim rather than an effective treatment. Also, they will most likely cost more, which would pull funding away from victim treatment and put it towards security to keep them in. The Safe Harbor Act is a step in the right direction to help victims after-the-fact; however, there are still many holes in this legislation that need to be filled.

131. Butler, supra note 124, at 238.
132. POLARIS PROJECT, DOMESTIC SEX TRAFFICKING, supra note 4, at 3.
133. See Butler, supra note 124, at 236–37.
134. See id. at 238–39.
135. See id. at 236, 238–39.
136. See Lee, supra note 47.
137. See id.
138. Id.
139. Id.
140. See id.
141. See Lee, supra note 47.
142. See FLA. STAT. §§ 39.524(1), 409.1678(1)(b) (2013) (addressing the issue of minor sex trafficking victims, while leaving out individuals who are no longer minors but may have been minors while being trafficked).
V. Florida’s Expungement Law: Another Step in the Right Direction

Florida is now one of eight states to pass a law that allows victims of human trafficking to petition to have their records expunged.\textsuperscript{143} Chapter 2013-98 of the Florida Laws will give victims the opportunity to petition to have a conviction for any offense expunged off their record if the conviction occurred while they were victims of human trafficking.\textsuperscript{144} However, there are a few exceptions to the offenses that victims can have expunged.\textsuperscript{145} The exceptions include, “[a]rson, [s]exual battery, [r]obbery, [k]idnapping, [a]l[gravated child abuse, . . . [a]l[gravated assault with a deadly weapon, [m]urder, [m]anslaughter, . . . [u]sing a bomb, [a]rmed burglary, [a]l[gravated battery, [a]nd] [a]l[gravated stalking.”\textsuperscript{146} These crimes are considered violent felonies, which may be why the Florida Legislature does not want to give individuals the ability to have them expunged.\textsuperscript{147}

Furthermore, a victim who is petitioning to have his or her convictions expunged must no longer be under the control of the trafficker.\textsuperscript{148} If the victim cannot be completely free, due to possible harm, the victim may show that he or she attempted to escape by seeking services for victims of human trafficking.\textsuperscript{149}

A petition under this section must be initiated by the petitioner with due diligence after the victim has ceased to be a victim of human trafficking or has sought services for victims of human trafficking, subject to reasonable concerns for the safety of the victim, family members of the victim, or other victims of human trafficking that may be jeopardized by the bringing of such petition or for other reasons consistent with the purpose of this section.\textsuperscript{150}

If the victim has official documentation of his or her status as a victim of human trafficking, then the Session Law only requires a

\begin{itemize}
\item \textsuperscript{144} Ch. 2013-98, § 2, 2013 Fla. Laws at 3.
\item \textsuperscript{145} \textit{Id.}; see also Fla. Stat. § 775.084(1)(b)1.
\item \textsuperscript{146} Fla. Stat. § 775.084(1)(b)1.a.–e., g.–i., l.–o.; see also Ch. 2013-98, § 2, 2013 Fla. Laws at 3.
\item \textsuperscript{147} See Fla. Stat. § 775.084.
\item \textsuperscript{148} Ch. 2013-98, § 2, 2013 Fla. Laws at 3.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Id.}\
\end{itemize}
preponderance of the evidence to grant expunction. However, if there is no official documentation, the victim must show clear and convincing evidence in order to get his or her record expunged.

(b) “Official documentation” means any documentation issued by a federal, state, or local agency tending to show a person’s status as a victim of human trafficking.

(c) “Victim of human trafficking” means a person subjected to coercion, as defined in [section] 787.06, for the purpose of being used in human trafficking, a child under [eighteen] years of age subjected to human trafficking, or an individual subjected to human trafficking as defined by federal law.

Expungement of a conviction “is deemed to have been vacated due to a substantive defect in the underlying criminal proceedings.” This essentially means it will be as if the conviction never occurred. Once the court has granted the expunction, the victim will be able to “lawfully deny or fail to acknowledge the arrests covered by the expunged record.” The victim will not be liable for any criminal penalties as a result of failing to disclose the arrests to potential employers, credit card companies, apartments, or other institutions that may request information about criminal history. However, there are some limitations on when the victim can withhold the information:

The [victim] . . . may lawfully deny or fail to acknowledge the arrests covered by the expunged record, except when the subject of the record:

1. Is a candidate for employment with a criminal justice agency;

2. Is a defendant in a criminal prosecution;

3. Concurrently or subsequently petitions for relief under this section . . . ;

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151. Id.
152. Id.
154. Id. § 2, at 3.
155. See id.
156. Id. § 2, at 4.
157. See id.
4. Is a candidate for admission to The Florida Bar;
5. Is seeking to be employed or licensed by or to contract with the Department of Children and Family Services . . . .

Even with these very limited exceptions to the expungement law, this addition to Florida’s victim-focused statutes will give victims the chance to start a new life without being held back by an unfortunate past.159

A. Similar Legislation in Other States

Florida modeled its expungement law after New York’s expungement law passed in 2010.160 However, New York’s statute only seems to allow expungement of loitering and prostitution.161

The judgment is a conviction where the arresting charge was under section 240.37 (loitering for the purpose of engaging in a prostitution offense, provided that the defendant was not alleged to be loitering for the purpose of patronizing a prostitute or promoting prostitution) or 230.00 (prostitution) of the penal law, and the defendant’s participation in the offense was a result of having been a victim of sex trafficking . . . .

Yet, it seems that New York courts will expunge other crimes that are related to human trafficking if the victim is able to argue that the additional crimes were committed under the same coercion as prostitution and loitering.163 The discretion to do this comes from the word may in section 440.10(1),164 which has been interpreted to give the New York Court the ability to expunge other crimes relating to sex trafficking.165

Both Florida and New York laws

159. Id. §§ 2, 4, 6, 2013 Fla. Laws at 2, 5, 8; Clark, supra note 105.
161. N.Y. CRIM. PROC. LAW § 440.10(1)(i).
162. Id.
164. N.Y. CRIM. PROC. LAW § 440.10(1).
165. See Memorandum from Melissa Brodu & Sienna Baskin, supra note 163, at 3–4.
require that the victim no longer work for the trafficker, but they also both leave open the possibility that safety may be an issue for the victim trying to escape.166

New York’s law also includes a provision that allows a “presumption that the [victim’s] participation in the offense was a result of having been a victim of sex trafficking,” if he or she has official documentation showing his or her “status as a victim of sex trafficking.”167 Florida’s statute has the same provision, making it easy on the victim once he or she has been established as a legal “[v]ictim of human trafficking,” to successfully get his or her record expunged.168 Once a victim has the presumption in his or her favor, the burden will shift to the other side to prove that the victim’s participation in the crime was not a result of sex trafficking.169 Only six other states have currently enacted expungement legislation, including Nevada, Illinois, Vermont, Maryland, Hawaii, and New Jersey.170 A few “other states are . . . considering expungement laws, including California, . . . Pennsylvania, Texas, . . and Virginia.”171

Unfortunately, Florida’s expungement statute does not spell out what evidence should be used to prove one’s status as a victim.172 Since the law

Moreover, the defendant has provided a very compelling narrative of the circumstances surrounding all of her arrests, demonstrating that they were the product of years of brutal physical, psychological, and sexual violence by her husband, which resulted in having been trafficked by him. While the defendant has moved to vacate all six convictions based on the provisions of the new amendment, and even though only two are prostitution offenses technically covered by the [statute], this issue need not be addressed in the instant case because the People have consented to the defendant’s motion in its entirety. Based upon the unique circumstances presented here, this court concurs with the People’s position that all of the defendant’s convictions are entitled to the relief requested. Thus, under the provisions of the new amendment, this court “must vacate the judgment . . . .”


167. N.Y. CRIM. PROC. LAW § 440.10(1)(i)(ii).


170. Clark, supra note 105.


has just been enacted, becoming effective January of 2014, it is too early to
determine exactly what the Florida courts will accept as sufficient evidence
to prove victim status or exactly who may provide official documentation
when determining if a victim’s record should be expunged.\footnote{173} Illinois law
states that “evidence such as court records, law enforcement certifications, or
a ‘sworn statement from a trained professional staff of a victims services
organization, an attorney, a member of the clergy, or a medical . . .
professional’” can be used as evidence to help establish status as a victim
and ultimately determine if the victim’s record should be expunged.\footnote{174} A report
from one of these individuals would need to include a determination as to
whether the individual is truly a victim of human trafficking, which may also
be accompanied by expert testimony in court as to how the individual
reached his or her conclusion.\footnote{175} Expungement laws are extremely beneficial
to victims because they provide a chance at starting a new life.\footnote{176} Hopefully,
other states will follow the growing trend of victim-focused laws and realize
that the battle against human trafficking requires state involvement.\footnote{177}

VI. FLORIDA’S OPTIONS FOR FUTURE VICTIM-FOCUSED LAWS

A. Affirmative Defense Laws

Even though Florida has made huge improvements to its human
trafficking legislation by adding victim-focused laws, there is still room for
improvement.\footnote{178} One law that a few states have implemented a variation of,
is the affirmative defense law.\footnote{179} This law basically allows victims to use
human trafficking as a defense for the crime they are being charged with.\footnote{180}

\footnote{173. See ch. 2013-98, § 8, 2013 Fla. Laws at 9.}
\footnote{174. Baker, supra note 171, at 180; see also 725 ILL. COMP. STAT. 5/116-2.1(b).}
\footnote{175. See Baker, supra note 171, at 180.}
\footnote{176. Id. at 180–81.}
\footnote{177. See id. at 179–81.}
\footnote{179. Baker, supra note 171, at 180–81.}
Generally, with sex trafficking, this would include prostitution and loitering; however, it can be used for other related crimes.\textsuperscript{181}

Implementing an affirmative defense law would allow victims to come forward with their situation early because they would be able to use it as a defense and hopefully seek help at that juncture in time.\textsuperscript{182} This type of statute would also allow victims to avoid acquiring a cumbersome criminal record, thus, alleviating future expungement proceedings.\textsuperscript{183} If the victim can affirmatively show that he or she has been coerced into performing the illegal acts, the affirmative defense law allows for the charges to be dropped, treating the defendant “as [a] victim[] rather than [a] criminal[].”\textsuperscript{184}

Georgia’s version of the affirmative defense law states that “[a] person shall not be guilty of a sexual crime if the conduct upon which the alleged criminal liability is based was committed under coercion or deception while the accused was being trafficked for sexual servitude.”\textsuperscript{185} Implementing a statute such as this in Florida would give victims another legal resource in their fight against human trafficking.\textsuperscript{186}

B. \textit{Punitive Damages}

Allowing victims to recover punitive damages will not only benefit victims by giving them more financial resources, but also will help weaken trafficking organizations.\textsuperscript{187} Human trafficking is a business built on making money; therefore, taking away the traffickers’ resources will potentially place them out of business.\textsuperscript{188}

Illinois is leading the way with one of the strongest victim-focused “laws by allowing victims to [collect] punitive damages [from] sex traffickers, [individuals] who pay for prostitutes, and [individuals] who knowingly benefit from . . . sex [trafficking].”\textsuperscript{189} A 2008 report by the Chicago Alliance Against Sexual Exploitation found that—of the men interviewed—sixty-eight percent would think twice before buying a
prostitute if it involved fines of one thousand dollars or more. The Illinois law goes a step further, giving traffickers almost no legal recourse to defend themselves. The traffickers are not allowed “to use victims’ consent to sex acts, prior criminal conduct, or their marital, sexual or familial relations as defenses.” The Illinois Legislature has taken a stand against human trafficking by implementing such a powerful and harsh law that negatively affects human traffickers, which should prove to be an effective deterrent, and may make traffickers think twice before committing or continuing their crime.

Florida does not currently allow victims to collect punitive damages from human traffickers; however, Florida law does allow victims to recover in a civil lawsuit, and collect up to three times the amount gained from the trafficking. This method may not be the best way to allow victims to recover from years of victimization because it could leave the victim with just a small amount of award money. Generally, compensatory damages are awarded to make the victim whole again—which looks at what the victim had before the crime—but many victims had little to nothing before being trafficked. Additionally, the amount the trafficker gained is something that may be hard to prove. Since many victims do not keep any of the profits made, it may be nearly impossible to determine how much was made, and will most likely come out to less than was actually made.

While Florida does not seem to be close to passing a law allowing for punitive damages any time soon, the Florida Congress should seriously consider making it an option. It would be a great legal tool for victims to utilize in order to recover for the time they were victimized, and to potentially cripple human trafficking enterprises.

190. Knight, supra note 187.
191. See 740 ILL. COMP. STAT. 128/25; Knight, supra note 187.
192. Knight, supra note 187.
193. See 740 ILL. COMP. STAT. 128/5, 125.
194. FLA. STAT. § 772.104(2)–(3) (2013).
195. Butkus, supra note 21, at 333.
196. Id.
197. See POLARIS PROJECT, DOMESTIC SEX TRAFFICKING, supra note 4, at 4.
198. See id.
199. See Butkus, supra note 21, at 324–25.
200. See Knight, supra note 187.
VII. CONCLUSION

Human trafficking is an international epidemic that affects our neighbors, co-workers, friends, family, and children. Florida is one of the top three states for human sex trafficking because of its diverse population and easy access for international travelers. Subsequently, the Florida Legislature has been aggressive since 2004, creating and amending human trafficking laws to instill harsher punishments for traffickers and to provide assistance and relief to victims. Victims of human trafficking suffer even after they escape from the grips of their traffickers because they are left with criminal records that make it hard to move on with their lives. Florida’s Safe Harbor Act provides relief for minors, but discriminates against older victims who need the care and services just as much as minors. That is why the expungement law that Florida has enacted is a huge step towards providing victims of all ages with a second chance. New York’s expungement law has been used effectively and there is no reason to believe that victims in Florida will not obtain similar positive results.

Keisha, the little girl whose story was discussed earlier, has successfully escaped life as a sex trafficking victim. Keisha reached out to a Polaris Project social worker and told her parts of her story. Polaris Project immediately stepped in to provide emotional support and additional social services. The social worker helped Keisha talk to her case manager at the detention center about what happened and helped Keisha’s probation officer understand other options for support instead of a detention center and returning to her foster family. Keisha now has an order of protection against Mastur D and was able to leave the detention center and go to an out-of-state residential program for young girls who were victims of sex trafficking. Keisha is doing well in her program and is almost finished with her GED.

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201. See Butkus, supra note 21, at 301–02.
204. Clark, supra note 105.
208. Keisha, Domestic Minor Sex Trafficking, supra note 7.
209. Id.
Keisha’s story is an example of how one victim can successfully use her resources and reach out to the community for help.\textsuperscript{210} With Florida’s new expungement law in place, Keisha can petition to have her record expunged, which she accumulated over years of being trafficked by Mastur D.\textsuperscript{211} Florida is moving in the right direction by implementing more victim-focused laws.\textsuperscript{212} While these laws may not help prevent new trafficking crimes, they will certainly help the current and future victims, which is the first step in a long battle against human trafficking.\textsuperscript{213}

\begin{itemize}
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Ch. 2013-98, § 2, 2013 Fla. Laws at 2–4; Keisha, \textit{Domestic Minor Sex Trafficking}, \textit{supra} note 7.
\item \textsuperscript{212} See \textit{Fla. Stat.} § 409.1678 (2013); Butler, \textit{supra} note 124, at 235; Clark, \textit{supra} note 105.
\item \textsuperscript{213} See \textit{Fla. Stat.} § 409.1678; Clark, \textit{supra} note 105.
\end{itemize}
“FOR NEVER WAS A STORY OF MORE WOE THAN THIS OF JULIET AND HER ROMEO”—AN ANALYSIS OF THE UNEXPECTED CONSEQUENCES OF FLORIDA’S STATUTORY RAPE LAW AND ITS FLAWED “ROMEO AND JULIET” EXCEPTION

JAKE TOVER*

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I. INTRODUCTION

When you hear the term *sex offender*, what kind of a person comes to mind? Let me guess: An eighteen-year-old high school senior with great grades and a talent for cheerleading, basketball, and chorus.¹ Not what you had in mind? Well, in February of this year, Kaitlyn Hunt, an eighteen-year-old Florida high school student with the attributes listed above, was expelled from her high school and was charged with “two counts of lewd and lascivious battery of a child [twelve] to [sixteen] years of age.”²

Kaitlyn and her younger girlfriend met at Sebastian River High School in Sebastian, Florida.³ Kaitlyn was an eighteen-year-old senior, and her girlfriend was a fourteen-year-old freshman at the high school.⁴ There was a three year and seven month age difference between the two partners, which—as you will soon learn—will be a crucial piece of information in determining Kaitlyn’s future sentence.⁵

The couple played on the school basketball team and socialized with the same circle of friends.⁶ While dating, they engaged in sexual acts multiple times before the younger girlfriend’s parents discovered their

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⁴ Parsley, supra note 3.
⁵ *Id.; see discussion infra Parts II.B., VI.B.2.*
⁶ Slifer, supra note 2.
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relationship. Once they learned their daughter was dating a girl about three-and-a-half years older than her, they promptly contacted the police to report Kaitlyn. After rejecting a plea deal that would have sentenced her to two years house arrest and one year of probation, Kaitlyn now faces up to fifteen years in prison, and may be required to register as a sex offender.

There is no question as to the importance of statutory rape laws. Young teenagers are at risk of being taken advantage of by older individuals and they absolutely deserve the legal protection that statutory rape laws provide. Offenders of said laws are usually given lengthy prison sentences and are required to register as sex offenders upon their release. However, despite the importance of statutory rape laws it is worth questioning whether some of the acts punishable by statutory rape laws—sexual activity between two otherwise consenting teenagers—are acts that should result in such crippling consequences.

This Comment will analyze whether Florida’s statutory rape laws are too harsh on teenage offenders, and whether or not its Romeo and Juliet law—a law used to negate the sex offender registration requirement for teenage offenders—does enough to protect teenagers from the life-changing consequences of being found guilty of statutory rape.

II. A BRIEF HISTORICAL OVERVIEW OF STATUTORY RAPE LAW

A. Statutory Rape Laws: Beginnings

Statutory rape laws criminalize sexual activity with persons who are not yet old enough to legally give consent for sex. Such laws have been enforced in English law for over seven hundred years. England’s first

8. Id.
9. Barchenger, supra note 1; Parsley, supra note 3.
10. See Steve James, Comment, Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform, 78 UMKC L. REV. 241, 245–46 (2009).
11. Id.; see also Fla. STAT. §§ 775.21, 794.05, 800.04, 943.04354 (2013).
12. See Fla. STAT. §§ 775.21, 794.05, 800.04; see also id. § 775.082.
13. Id. § 775.21(6).
14. See Barchenger, supra note 1; see, e.g., Fla. STAT. § 800.04(5)(c)–(d).
15. Emily J. Stine, Comment, When Yes Means No, Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders, 60 DEPAUL L. REV. 1169, 1183 (2011) (describing the intent of Romeo and Juliet laws and why they were enacted by some states).
statutory rape law—put into effect in 1275—prohibited children under the age of twelve from consenting to sex.\textsuperscript{17} At this time, women were considered to be chattel.\textsuperscript{18} Their family would marry them off to another family’s son for a bride price.\textsuperscript{19} Chastity was of significant monetary value and a woman’s parents would receive a greater bride price if their daughter was chaste at the time she was sold.\textsuperscript{20} For this reason, statutory rape was originally considered to be a property crime.\textsuperscript{21} These laws were later adopted into American law and they continue to be the foundation of modern day statutory rape laws in America.\textsuperscript{22} Statutory rape is considered a strict liability offense, eliminating consent as a viable defense.\textsuperscript{23} At the beginning of the twentieth century, however, states began to raise the age of consent to as high as twenty-one in order to prevent young women from engaging in non-marital intercourse.\textsuperscript{24}

B. \textit{Age Discrepancy Considerations in Statutory Rape Law}

Originally, the age of the perpetrator had no impact on the severity of a punishment for statutory rape because the offender’s age was not considered to be an element of the crime.\textsuperscript{25} This led to a failure in differentiating between sexual acts amongst peers and sexual exploitation of young females by older men.\textsuperscript{26} This is different today; some states take into consideration the difference in age between the alleged victim and the alleged perpetrator when determining the punishment for statutory rape.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{17} Id.; Anthony M. Amelio, \textit{Note, Florida’s Statutory Rape Law: A Shield or a Weapon?—A Minor’s Right of Privacy Under Florida Statutes § 794.05, 26 Stetson L. Rev. 407, 410 (1996)} (providing a historical overview of statutory rape laws).
\item \textsuperscript{18} Rita Eidson, \textit{Comment, The Constitutionality of Statutory Rape Laws, 27 UCLA L. Rev. 757, 767 (1980)} (explaining the method in which women were once bought and sold in marriage).
\item \textsuperscript{19} Id.
\item \textsuperscript{20} See id.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} James, \textit{supra note 10}, at 245 (providing historical context for statutory rape laws).
\item \textsuperscript{23} Amelio, \textit{supra note 17}, at 410 (explaining how statutory rape laws were adopted into the U.S. legal system).
\item \textsuperscript{24} Eidson, \textit{supra note 18}, at 762–63 (describing how statutory rape laws were written at the turn of the twentieth century).
\item \textsuperscript{25} Amelio, \textit{supra note 17}, at 410 (providing a historical overview of statutory rape laws).
\item \textsuperscript{26} Id. at 410–11.
\item \textsuperscript{27} See, e.g., Fla. Stat. § 794.05 (2013).
\end{itemize}
C. Statutory Rape Laws Today

There have obviously been significant changes in how women have been treated since 1275, but statutory rape laws are still being enforced today. Instead of protecting women as if they were just a piece of property, statutory rape laws now serve to “protect young people from coerced sexuality activity; enforce morality; prevent teen pregnancy; and reduce welfare dependence.” Florida has two statutory rape laws: Sections 794.05 and 800.04 of the Florida Statutes. Section 794.05 prohibits a person twenty-four years of age or older from engaging in sexual activity with a person between the ages of sixteen and seventeen. Section 800.04 prohibits any sexual activity whatsoever with a person between the ages of twelve and sixteen.

Some states have also chosen to put Romeo and Juliet laws into effect. These laws are meant to lessen the punishment of teenage offenders under section 800.04 of the Florida Statutes so that they are not punished in the exact same manner as adult offenders. When teenage offenders apply for protection under Romeo and Juliet laws, their prison sentences can be reduced and their sex offender registration requirement can be dismissed as well.

D. Gender Discrimination in Statutory Rape Law

Originally, only men could be found guilty of statutory rape. Women were viewed as property in need of legal protection. Despite our ever-evolving societal views, however, some statutory rape laws still discriminate based on the minor’s gender.

29. See Fla. Stat. §§ 794.05, 800.04.
30. James, supra note 10, at 245.
31. Id. at 246 (explaining the intent behind statutory rape laws).
32. Fla. Stat. § 794.05.
33. Id. § 800.04.
34. Id. § 794.05(1).
35. Id. § 800.04(4)(a).
39. Eidson, supra note 18, at 760–61 (describing the rationale for statutory rape laws).
40. Oberman, supra note 16, at 25 (providing a brief history of statutory rape laws).
41. James, supra note 10, at 252 (explaining that age of consent laws can lawfully discriminate based on a person’s gender).
In 1981, the Supreme Court of the United States in *Michael M. v. Superior Court of Sonoma County* questioned the constitutionality of such gender-based laws. In this case, the defendant, a seventeen-year-old male, challenged California’s rape law, arguing that the law was unconstitutional because it discriminated on the basis of gender. The Court disagreed and upheld the constitutionality of California’s statutory rape law despite the fact that the law only allowed men to be held criminally liable. The Court reasoned that a statute will be upheld “where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.”

Justice Brennan, in his dissent, admitted that “[c]ommon sense . . . suggests . . . gender-neutral statutory rape law[s] [would be] a greater deterrent of sexual activity” among minors because the laws would apply to more individuals. Currently, many states have chosen to use a common sense approach and now include gender-neutral language in their statutory rape laws to allow for the protection, as well as the punishment, of both males and females.

### III. Sexual Behavior in Adolescents

Among U.S. high school students, 46% have had sexual intercourse at some point. Additionally, “[m]ore than 400,000 teen[age women] aged [fifteen to nineteen] . . . gave birth in 2009.” Moreover, the likelihood of a teenager having sex in his or her freshman year of high school is 31.6%, while the likelihood of a teenager having sex in his or her senior year of high school is a whopping 62.3%.

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43. *Id.* at 466.
44. *Id.* at 466–67.
45. *Id.* at 467.
46. *Id.* at 469.
Florida high school statistics show similar trends. According to the Florida Department of Health, which polled 6212 high school students in seventy-eight different Florida high schools in 2011, 48.2% of Florida high school students had sexual intercourse. In fact, 7.6% of high school students had sexual intercourse for the first time before they reached the age of thirteen. Of the students polled, 43.4% had also participated in oral sex, which—as you will soon learn—is also prohibited under Florida’s statutory rape laws.

These statistics are not all that surprising when you consider how much sexual content teenagers are being exposed to. These teenagers are more vulnerable to such content than adults because the exposure occurs during a period in which sexual attitudes and behaviors are being developed. Statistics show that teenagers who frequently watch television—which are many, since the average high school student has 2.9 televisions in his or her house—“see 143 incidents of sexual behavior on network television . . . each week.” Shockingly, “80% of all movies shown on network or cable television [includes] sexual content.” There is no doubt that such television content has had an impact on how teenagers view and understand sex, as 80% of teenagers reported that they or their peers have learned about sex from watching television or movies.


53. Id.

54. Id.; see also Fla. Stat. § 800.04(1)(a) (2013).


56. Id.

57. Id.

58. Id.

59. Id.

60. Id.
IV. **FLORIDA STATUTES § 800.04—LEWD AND LASCIVIOUS BATTERY ON A CHILD TWELVE TO SIXTEEN YEARS OF AGE**

A. **Definitions in Florida Statutes § 800.04**

1. **Sexual Activity**

   “‘Sexual activity’ means the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual activity does not include an act done for a bona fide medical purpose.”

   In *Burnett v. State*, the First District Court of Appeal held that the defendant was not guilty of lewd and lascivious battery towards a minor when he engaged in inappropriate activities involving pornographic films with minors and did not participate in any physical sexual acts.

   In this case, there was evidence that the defendant had watched adult pornography with at least two minors. The defendant was charged and found guilty of two counts of lewd and lascivious conduct, which he appealed. The defendant moved for a judgment of acquittal arguing that there was no evidence that he actually participated in any kind of physical sexual act with the minors. The appellate court agreed, holding that because there was no evidence of the defendant committing a lewd and lascivious act on the minors, he could not be found guilty under section 800.04(4) of the *Florida Statutes*.

2. **Consent**

   “‘Consent’ means intelligent, knowing, and voluntary consent, and does not include submission by coercion.”

   Supporters of statutory rape laws argue that sexual activity between two people, regardless of how close in age both parties may be, cannot be considered consensual if one party is below the age of consent. Opponents of statutory rape laws, however, argue that these laws—many times—punish teenagers who are engaging in what would otherwise be considered—if not for their young age—wholly

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61. FLA. STAT. § 800.04(1)(a) (2013).
63. *Id.* at 1107.
64. *Id.*
65. *Id.*
66. *Id.*
67. Burnett, 737 So. 2d at 1107; see also FLA. STAT. § 800.04(4) (2013).
68. FLA. STAT. § 800.04(1)(b).
consensual sex. Proponents of statutory rape laws have argued that acts that would legally be classified as consensual sex are—in reality—not wholly consensual when dealing with teenage girls, due to manipulation by older adults.

Michelle Oberman—in her law review article titled “Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law”—discusses Antioch College and the college’s attempt to create a system that would assure consensual sex. In this system, one partner would ask the other for verbal consent for each separate act of intimacy. This method was criticized for “tak[ing] all the fun out of sex,” which in Oberman’s opinion, “provides ample evidence of the entrenchment of the hazy spectrum that separates consensual sex from rape.” Consent is clearly a major element in sexual relationships, yet it is overlooked in statutory rape cases due to the language of these laws, which strictly prohibits minors from being able to give such consent.

3. Coercion

“‘Coercion’ means the use of exploitation, bribes, threats of force, or intimidation to gain cooperation or compliance.” In her article, Oberman explains that despite the intent of statutory rape laws, which is to protect teenage girls who are at risk of being coerced into having sex, the teenage girls’ vulnerabilities are overlooked. Instead, statutory rape laws require courts to focus simply on the age differences between the parties.

4. Victim

“‘Victim’ means a person upon whom an offense described in this section was committed or attempted or a person who has reported a violation of this section to a law enforcement officer.” The common perception of a

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70. Id. at 1183–84.
71. Oberman, supra note 16, at 70 (pointing out the short-sightedness of statutory rape laws when dealing with teenage girls who can be easily manipulated).
72. Id. at 71 (explaining the increasing difficulty of differentiating between permissible and impermissible sexual encounters).
73. Id.
74. Id.
75. Id. at 42; see also, e.g., Fla. Stat. § 800.04(2) (2013).
76. Fla. Stat. § 800.04(1)(c).
77. Oberman, supra note 16, at 42 (arguing that the vulnerability of teenage women is overlooked in statutory rape laws).
78. Id.
victim—which usually involves an individual being hurt or injured—may not always apply in statutory rape cases; a minor in a sexual relationship—regardless of how honest and consensual such a relationship may be—is considered a victim.\footnote{See Oberman, supra note 16, at 25.}

B. The Text of Florida Statutes § 800.04

Section 800.04 states, “[n]either the victim’s lack of chastity nor the victim’s consent is a defense to the crimes proscribed by this section.”\footnote{FLA. STAT. § 800.04(2).} The statute also says, “[t]he perpetrator’s ignorance of the victim’s age, the victim’s misrepresentation of his or her age, or the perpetrator’s bona fide belief of the victim’s age cannot be raised as a defense in a prosecution under this section.”\footnote{Id. § 800.04(3).} Lewd or lascivious battery—the charge that Kaitlyn is currently being charged with—occurs when:

A person . . . [e]ngages in sexual activity with a person [twelve] years of age or older but less than [sixteen] years of age; or . . . [e]ncourages, forces, or entices any person less than [sixteen] years of age to engage in sadomasochistic abuse, sexual bestiality, prostitution, or any other act involving sexual activity commits lewd or lascivious battery, a felony of the second degree . . . \footnote{Id. § 800.04(4).}

Therefore, a person under the age of sixteen in Florida is unable to consent to sexual activity, regardless of the age of the defendant.\footnote{See id.}

C. The Effectiveness of Florida Statutes § 800.04

Section 800.04 continues to be upheld because the State of Florida has determined that these laws are necessary to protect its youth, which is considered a compelling state interest.\footnote{Amelio, supra note 17, at 422 (pointing out Florida’s compelling interest in protecting its youth).} It is important to note, however, that these laws have \textit{not} been known to be effective in preventing consenting teenagers from having sex with one another.\footnote{See Stine, supra note 15, at 1212–13 (explaining that very few teenagers who are sexually active are actually prosecuted).} The ineffectiveness of these laws at deterring teenagers from having sex puts the future of many high school students in doubt, as many of them will be required to register as sex
offenders for the rest of their lives.\textsuperscript{87} The consequences of carrying such a label can be absolutely devastating.\textsuperscript{88}

V. CONSEQUENCES OF HAVING TO REGISTER AS A SEX OFFENDER

The public strongly supports sex offender registration and notification laws because of the popular belief that having knowledge of where sex offenders live in a person’s community will help protect them or their children from future sex crimes.\textsuperscript{89} This view is not without merit, as some sex offenders may repeat past unlawful sexual acts, which would pose a serious risk to people in the community.\textsuperscript{90}

The Florida Sexual Predators Act—which aims to protect the community from sexual predators—enforces a number of requirements and prohibitions on registered sex offenders.\textsuperscript{91} The statute reasons that because “[t]he high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses,” there is a significant state interest to monitor the release of sexual predators into the community, monitor the supervision of these sexual predators released into the community, enforce registration and notification laws, restrict certain employment opportunities for sex offenders, and create strict residency requirements.\textsuperscript{92} The legislature—despite their good intentions—even admits that “the cost of sexual offender victimization to society at large, while incalculable, [is] clearly exorbitant.”\textsuperscript{93}

Although there is surely a need to prevent these wrongful acts, the majority of research shows that the sex offender registration and notification laws have proven to be largely ineffective.\textsuperscript{94} Critics of such policies argue that “sex offender laws do not work, that is, they do not reduce sex offenses; . . . the stigmatizing and ostracizing effects of registration, notification, and residency restriction[s] may encourage the violent behavior they are aimed to deter.”\textsuperscript{95} This argument is sound, as these policies have been known to have

\textsuperscript{87} Id. at 1214–15.
\textsuperscript{88} Id. at 1215.
\textsuperscript{89} Jill Levenson & Richard Tewksbury, Collateral Damage: Family Members of Registered Sex Offenders, 34 AM. J. CRIM. JUST. 54, 55 (2009).
\textsuperscript{90} Doe v. City of Albuquerque, 667 F.3d 1111, 1134 (10th Cir. 2012).
\textsuperscript{91} FLA. STAT. § 775.21(3)(b) (2013).
\textsuperscript{92} Id.
\textsuperscript{93} Id. § 775.21(3)(a).
\textsuperscript{94} Levenson & Tewksbury, supra note 89, at 55.
a significantly negative impact on the lives of both sexual offenders and their families.96

A. Employment Opportunities

As a result of the registration and notification laws required by the Florida Sexual Predators Act, up to half of all sex offenders experience a decrease in employment opportunities.97 This is troubling because studies have shown the “lack of stable employment” to be a central factor in sexual offenders repeating their past criminal behavior.98 Not only does the Florida Sexual Predators Act restrict sex offenders from working near places where children frequently visit, but these sex offenders “are also excluded from working in [such] fields . . . as law, real estate, medicine, nursing, physical therapy, and education.”99

If that were not bad enough, when sex offenders are finally able to find jobs that they are not restricted from obtaining, employers are still reluctant to hire these individuals because of their criminal past.100 In fact, in “[a] survey of employers in five major” U.S. cities, two-thirds of the employers answered that they would never hire a sex offender.101 Sadly, the lack of employment opportunities has led many registered sex offenders to live a life of crime to support themselves and their families.102 This pattern just serves to reinforce the already unfavorable perception of sex offenders.103

B. Residential Restrictions

Most states require that sex offenders live a certain distance away from “schools, daycare centers, parks, [and school] bus stops.”104 The intent of these restrictions is to decrease the possibility that a sex offender could commit future sex crimes by diminishing his or her opportunities to commit such crimes again.105 To put into perspective the extreme inconvenience

96. Levenson & Tewksbury, supra note 89, at 57.
97. Id. at 55; see Fla. Stat. § 775.21(6), (7).
99. Id.; see also Fla. Stat. § 775.21(3)(b)(5).
100. Johnson, supra note 98, at 19.
101. Id.
102. See id. at 20.
103. See id. at 19–20.
104. Levenson & Tewksbury, supra note 89, at 56.
105. Stine, supra note 15, at 1183 (discussing the rationale behind residency restrictions).
these restrictions could cause a sex offender and his or her family, consider this: In the city of Orlando, a whopping 95% of residential homes fall within 1000 feet of a school, daycare center, school bus stop, or park, leaving only 5% of the city available for them to live in.106

Some states have even been known to enforce larger safety zones than are required by law.107 In Miami Beach, for example, sex offenders are prohibited from residing in homes within 2500 feet away from a school if the victim was under the age of sixteen.108 These strict policies prevent sex offenders from living stable lives, which have proven to be counterproductive in trying to reduce instances of recidivism.109

Even when sex offenders are able to finally find a home to settle down in, in 20 to 40% of cases, the sex offender is forced to move out of his or her home at the request of his or her landlord or neighbors after they receive notification of their sex offender label.110 Not surprisingly, these residency restrictions have left a large number of registered “sex offenders homeless throughout the state [of Florida].”111

C. Impact on the Family

As stated earlier, classifying somebody as a sex offender not only has an adverse impact on the offender’s life, but on the lives of his or her loved ones as well.112 While residency restrictions are intended to keep sex offenders away from certain areas, they also indirectly prevent the spouses and children living with sex offenders—individuals who may not have been charged with sex crimes—from living in close proximity to these areas as well.113 As a result, the children of sex offenders are forced to live farther away from schools, which can be quite an inconvenience for the family.114

As far as their social life is concerned, a survey of the family members of registered sex offenders revealed that 86% experienced stress in

106. Levenson & Tewksbury, supra note 89, at 56.
108. Id.
109. Stine, supra note 15, at 1183 (arguing that strict residency restrictions prevent sex offenders from living stable lives, which could be the cause of some offenders repeating past criminal behavior).
110. Levenson & Tewksbury, supra note 89, at 55–56.
111. White, supra note 107, at 170 (explaining the serious consequences of being labeled a sex offender).
112. Levenson & Tewksbury, supra note 89, at 57.
113. Id.
114. Id.
their lives, 77% felt isolated, and 49% had fear for their own safety.\textsuperscript{115} Half of the family members polled had lost friends as a result of their family member becoming a sex offender, and many who were polled admitted that being in a family with a registered sex offender kept them from participating in community events.\textsuperscript{116}

Unfortunately, the children of sex offenders suffer tremendous emotional strain from their parents’ label.\textsuperscript{117} More than half of the family members polled said that the children of sex offenders were treated badly by their classmates.\textsuperscript{118} Children of sex offenders are reported to feel increased “anger (80%), depression (77%), anxiety (73%), [loneliness] (65%), and fear [for their safety] (63%).”\textsuperscript{119} Perhaps the most disturbing fact of all is that “one in eight . . . children of [sex offenders] were reported to [experience] suicidal tendencies.”\textsuperscript{120} The statistics are clear: Sexual registration requirements will have an extremely negative effect not only on the actual offender, but extend to the offender’s family as well.\textsuperscript{121}

D. \textit{The Lasting Effects of Registering as a Sex Offender}

In 2009, a Michigan appellate court held that forcing a “teenager [who was] convicted of [having] consensual [intercourse] with his below-the-age-of-consent girlfriend” to register as a sex offender was considered cruel and unusual punishment.\textsuperscript{122} “Sex offender registration [could be considered a] modern day scarlet letter,” and as a result, the decision to classify a person as a sex offender should not be taken lightly.\textsuperscript{123} For this reason, some states—including Florida—have chosen to put Romeo and Juliet laws into place to protect consenting teenagers from having to register as sex offenders.\textsuperscript{124} These laws, however, are far from perfect.

\begin{itemize}
\item \textsuperscript{115} \textit{Id.} at 57.
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} Levenson & Tewksbury, \textit{supra} note 89, at 63–64.
\item \textsuperscript{118} \textit{Id.} at 63.
\item \textsuperscript{119} \textit{Id.} at 63–64.
\item \textsuperscript{120} \textit{Id.} at 64.
\item \textsuperscript{121} \textit{Id.} at 63–64.
\item \textsuperscript{122} Stine, \textit{supra} note 15, at 1188 (providing past constitutional challenges to sex offender laws).
\item \textsuperscript{124} \textit{Id.}; Stine, \textit{supra} note 15, at 1184; \textit{see also} Fla. STAT. § 943.04354 (2013).
\end{itemize}
VI. **FLORIDA STATUTES § 943.04354—THE ROMEO AND JULIET LAW**

A. **Text of Florida’s Romeo and Juliet Law**

(1) For purposes of this section, a person shall be considered for removal of the requirement to register as a sexual offender or sexual predator only if the person:

(a) Was or will be convicted or adjudicated delinquent of a violation of . . . [section] 800.04 . . . ;

(b) Is required to register as a sexual offender or sexual predator solely on the basis of this violation; and

(c) Is not more than [four] years older than the victim of this violation who was [fourteen] years of age or older but not more than [seventeen] years of age at the time the person committed this violation.

(2) If a person meets the criteria in subsection (1) and the violation of . . . [section] 800.04 . . . was committed on or after July 1, 2007, the person may move the court that will sentence or dispose of this violation to remove the requirement that the person register as a sexual offender or sexual predator. The person must allege in the motion that . . . [the] removal of the registration requirement will not conflict with federal law. The state attorney must be given notice of the motion at least [twenty-one] days before the date of sentencing or disposition of this violation and may present evidence in opposition to the requested relief or may otherwise demonstrate why the motion should be denied. At sentencing or disposition of this violation, the court shall rule on this motion and, if the court determines the person meets the criteria in subsection (1) and the removal of the registration requirement will not conflict with federal law, it may grant the motion and order the removal of the registration requirement. If the court denies the motion, the person is not authorized under this section to petition for removal of the registration requirement.\(^\text{125}\)

B. **Legal Authority Regarding Florida’s Romeo and Juliet Law**

Over the past decade, some states have implemented Romeo and Juliet laws, which absolve certain teenagers from having to register as sex
offenders. These provisions were created to “impose lighter penalties when both parties are underage, while maintaining strict penalties for sex between an adult and a minor,” because some states believe that “sex between two young people is . . . less punishable than sex between a young person and an adult.”

An offender under section 800.04 of the Florida Statutes is automatically labeled a sex offender unless the offender satisfies three elements. First, the offender must be no “more than [four] years older than the victim.” Second, the offender must have been “required to register as a sex offender” solely for that offense. Third, the offender must have not been charged with multiple sex crimes.

If the offender were to satisfy all three of these elements, the offender would have the potential to take advantage of the Romeo and Juliet exception to remove the registration requirement. The following cases provide authority as to when and how the Romeo and Juliet law could be applied.

1. Defendants Charged with Multiple Sex Crimes

In Courson v. State, the Second District Court of Appeal held that the defendant—who was charged on two separate occasions under section 800.04(4) of the Florida Statutes—not qualified for the Romeo and Juliet exception because the law requires that an applicant not be charged with multiple sex crimes.

The defendant was found guilty of two separate charges of “lewd and lascivious battery of a victim over [twelve] but [fewer than sixteen] years of age.” “He was [then] sentenced to three years [in prison], followed by five years of probation, and [was labeled] a sex offender.” The defendant tried to apply the Romeo and Juliet law to remove the requirement that he register as a sex offender, but his motion was denied by

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126. Stine, supra note 15, at 1184 (providing a brief history of Romeo and Juliet laws).
128. FLA. STAT. §§ 800.04, 943.04354(1).
129. Id. § 943.04354(1)(c).
130. Id. § 943.04354(1)(b).
131. Id. § 943.04354(1)(a).
132. Id. § 943.04354(2).
133. 24 So. 3d 1249 (Fla. 1st Dist. Ct. App. 2009).
134. Id. at 1250–51; see also FLA. STAT. §§ 800.04(4), 943.04354(1)(a).
135. Courson, 24 So. 3d at 1250.
136. Id.
the trial court. The trial court agreed with the State, and the defendant appealed.

On appeal, the defendant argued that although the Romeo and Juliet law requires that the defendant not be convicted of more than one section 800.04 crime, denying him usage of the Romeo and Juliet law would be to disregard the legislature’s true intent, which was to keep young lovers in consensual relationships from being branded as sex offenders for the rest of their lives. The State, on the other hand, argued that the plain language of the statute denied the defendant the right to take advantage of the Romeo and Juliet law.

The appellate court agreed that “[i]f the language is clear and unambiguous, there is no need to engage in statutory construction, and the statute should be given its plain and obvious meaning.” Therefore, because the statute clearly states that offenders with multiple sex crime convictions are not able to remove their sex offender registration requirement, the defendant was unable to take advantage of the Romeo and Juliet exception.

The appellate court’s holding was consistent with the express terms of the statute but contrary to the original legislative intent. Regardless, the court would not hold otherwise because to modify the statute’s express terms would be an abuse of the court’s power. In other words, its hands were tied.

2. The Law’s Strict Age Limit

In *State v. Welch*, the Second District Court of Appeal held that because the defendant was slightly more than four years older than his minor girlfriend when she became pregnant with his child, the defendant did not meet the elements required to use the Romeo and Juliet Statute to remove his sex offender registration requirement.

137. *Id.*; see also Fla. Stat. § 943.04354(1)-(2).
138. *Courson*, 24 So. 3d at 1250.
139. *Id.*; see also Fla. Stat. §§ 800.04, 943.04354(1)(a).
140. *Courson*, 24 So. 3d at 1250.
142. *Id.* at 1251; Fla. Stat. § 943.04354(1)(a).
143. *Courson*, 24 So. 3d at 1251.
144. *Id.*
146. *Id.* at 634.
At the time the victim became pregnant with the defendant’s child, the victim was fourteen years old, and the defendant was eighteen years old.\textsuperscript{147} They were in a relationship with one another, and the defendant was aware of the victim’s younger age.\textsuperscript{148} The defendant, who was four years, two months, and twenty days older than his girlfriend, was charged with the “second-degree felony of lewd or lascivious battery on a female under sixteen years of age.”\textsuperscript{149} The defendant was adjudicated guilty, placed on probation for ten years, and labeled a sex offender.\textsuperscript{150}

After his probation, the defendant attempted to take advantage of the Romeo and Juliet law to remove this requirement to register as a sexual offender.\textsuperscript{151} The State opposed, arguing that although the sexual conduct between the victim and the defendant was consensual, the defendant did not meet the element of the statute that requires the defendant be no more than \textit{four years} older than the victim at the time of the violation.\textsuperscript{152} Despite this argument, the trial court ruled in favor of the defendant, and reasoned that the ages at the time of the offense—eighteen and fourteen—could be considered a four-year difference.\textsuperscript{153} The trial court stated that its decision was “equitable under the circumstances” because, in the last ten years, the defendant had completed his sex offender treatment, he had married another woman, and had been having unsupervised contact with the children from his marriage.\textsuperscript{154}

The State later appealed this ruling, and the case was brought to the appellate court.\textsuperscript{155} The higher court then reversed the lower court’s ruling, holding that the language, “‘not more than [four] years older than the victim,’”\textsuperscript{156} is clear, and that construction of its interpretation was not necessary.\textsuperscript{157} Therefore, the court had no choice but to hold that he did not meet the requirements of the Romeo and Juliet law because the defendant was more than four years older than the victim.\textsuperscript{158}

\begin{itemize}
\item \textsuperscript{147} Id. at 633.
\item \textsuperscript{148} Id.
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Welch, 94 So. 3d at 633.
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Welch, 94 So. 3d at 633.
\item \textsuperscript{156} Id. at 634 (quoting State v. Marcel, 67 So. 3d 1223, 1225 (Fla. 3d Dist. Ct. App. 2011)); FLA. STAT. § 943.04354 (2013).
\item \textsuperscript{157} Welch, 94 So. 3d at 634 (quoting Marcel, 67 So. 3d at 1225).
\item \textsuperscript{158} Id.
\end{itemize}
Erasing all doubt as to what the phrase *not more than four years* meant, the court in *State v. Marcel* held that “[i]f a defendant [was] one day [older than] the four-year . . . limit, . . . he [would be] ineligible to” use the Romeo and Juliet law to pardon his sex offender registration requirement. The defendant was charged with one count of lewd or lascivious battery of a person over the age of twelve but under the age of sixteen because he “was four years, three months, and eight days older than the victim.” The defendant was initially labeled a sex offender, but once the Romeo and Juliet law was enacted, the trial court granted relief to the defendant.

The State appealed, arguing that the defendant had not met the criteria required for the Romeo and Juliet law because he was more than four years older than the victim. The defendant disagreed and argued that completed years of life, not months and days, should be used when determining whether an offender is “not . . . more than four years older than [a] victim.” This interpretation, known as the *birthday rule*, would not consider a defendant to “be more than four years older than [a] victim until . . . [he] was five years older.”

The appellate court rejected this argument and explained that the Romeo and Juliet law requires an analysis of time and the *birthday rule* was only meant to calculate age. The court also reasoned that because the Romeo and Juliet law uses the word *more*—“commonly understood to mean greater”—the law’s language was clear as to whether or not the defendant was more than four years older than the victim. The court went even further, stating, “[i]f a defendant is one day past the four-year eligibility limit prescribed by section 943.04354 of the Florida Statutes, he is ineligible to petition for relief.” Therefore, because of the strict interpretation of the Romeo and Juliet law, the defendant was unable to petition for removal of his sex offender registration requirement.

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159. 67 So. 3d 1223 (Fla. 3d Dist. Ct. App. 2011).
160. *Id.* at 1225; *see also* Fla. Stat. § 943.04354(1)(c).
161. *Marcel*, 67 So. 3d at 1224; *see also* Fla. Stat. § 800.04(4)(a).
162. *Marcel*, 67 So. 3d at 1224.
163. *Id.; see also* Fla. Stat. § 943.04354(1)(c).
164. *Marcel*, 67 So. 3d at 1224.
165. *Id.*
166. *Id.*
167. *Id.* at 1225; *see also* Fla. Stat. § 943.04354(1)(c).
168. *Marcel*, 67 So. 3d at 1225; *see also* Fla. Stat. § 943.04354(1)(c).
169. *Marcel*, 67 So. 3d at 1225.
3. Sexual Orientation Discrimination in Romeo and Juliet Laws

Unfortunately, not only are some statutory rape laws gender-biased, some are biased regarding sexual orientation as well.\(^{170}\) As shown in \textit{State v. Limon},\(^ {171}\) the penalties in statutory rape cases can be much harsher for same-sex couples than for heterosexual couples.\(^ {172}\) In this case, the defendant had just turned eighteen years old when he participated in consensual oral sex with a fourteen-year-old.\(^ {173}\) The defendant was less than four years older than the victim, so the defendant was young enough to take advantage of Kansas’ Romeo and Juliet law.\(^ {174}\) Unfortunately for the defendant, however, Kansas’ Romeo and Juliet law did not provide protection for individuals in homosexual relationships.\(^ {175}\) Therefore, because the defendant’s partner was of the same sex, he was unable to use the Romeo and Juliet law exception and was sentenced to seventeen years in prison.\(^ {176}\)

The defendant appealed and the Kansas Supreme Court reversed the lower court’s decision.\(^ {177}\) The court held that the discrimination of a same-sex relationship in its Romeo and Juliet statute violated the Equal Protection Clause and, therefore, was unconstitutional.\(^ {178}\) As a result, the defendant’s sentence was reduced from seventeen years in prison to one year in prison.\(^ {179}\)

However, Kansas is not the only state that has discriminatory language against same-sex couples in its statutory rape laws.\(^ {180}\) Currently, Texas prohibits homosexuals from taking advantage of its Romeo and Juliet statute.\(^ {181}\) There has recently been a legislative push to include same-sex couples in this law, but as of today, homosexual teenagers in Texas cannot

\begin{footnotes}
\footnotetext[170]{James, supra note 10, at 253 (providing an instance of discrimination in a Romeo and Juliet law).}
\footnotetext[171]{122 P.3d 22 (Kan. 2005).}
\footnotetext[172]{James, supra note 10, at 253; Kate Sutherland, \textit{From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities}, 9 WM. & MARY J. WOMEN & L. 313, 327 (2003) (discussing the discrimination of same-sex couples in Romeo and Juliet laws).}
\footnotetext[173]{\textit{Limon}, 122 P.3d at 24.}
\footnotetext[174]{Id.}
\footnotetext[175]{Id.}
\footnotetext[176]{Sutherland, supra note 172, at 327.}
\footnotetext[177]{\textit{Limon}, 122 P.3d at 41.}
\footnotetext[178]{Id. at 40; James, supra note 10, at 253.}
\footnotetext[179]{See James, supra note 10, at 253; Sutherland, supra note 172, at 327.}
\footnotetext[181]{Id.}
\end{footnotes}
use the Romeo and Juliet law to remove their sex offender registration requirement.

VII. OPINION

A. Why Florida’s Statutory Rape Law Is Too Harsh on Otherwise Consenting Teenagers

The purpose of this Comment is not to condone teenage sex; it is to bring to light that the consequences of section 800.04(4) of the Florida Statutes regarding consenting teenagers—which can be as severe as serving fifteen years in prison—are unintended consequences. Instead of providing real, effective ways to communicate to teenagers why abstaining from sexual activity at such a young age is a viable option, the statute seeks to imprison teenagers who have already engaged in sexual activity. This law does not deter consenting teenagers from engaging in sex, but merely punishes those who have already done so.

The Model Penal Code (“MPC”), a statutory text written by the American Law Institute, argues that teens close in age should not be held criminally liable for partaking in oral or vaginal sex. The American Law Institute reasons that because of the greater likelihood that teenagers would be otherwise consenting participants in sexual activity, criminal law should not target such activity. Additionally, the MPC states that criminal liability against only the older party of an otherwise consenting teenage relationship is unfair. Some states agree with this reasoning and have completely decriminalized sex amongst consenting teenagers altogether.

With a growing number of states implementing Romeo and Juliet laws, it is clear that states do not find such severe punishments against consenting

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182. Id.
184. Id. § 800.04(4), (5)(b)–(d), (6)(b)–(c); see also id. § 775.082; Stine, supra note 15, at 1212–15.
188. Model Penal Code § 213.3 (Proposed Official Draft 1962); Moore, supra note 186, at 224.
189. Olsen, supra note 48, at 404 (discussing recent revisions of statutory rape laws).
teenagers to be just.\textsuperscript{190} Even these Romeo and Juliet exceptions, however, do not do enough to protect teenagers from the severe consequences of statutory rape laws.\textsuperscript{191}

B. \textit{Why Florida's Romeo and Juliet Law Does Not Do Enough to Protect Otherwise Consenting Teenagers}

In the \textit{Welch} case, Justice Morris, in his concurring opinion, discussed the injustice of the appellate court’s holding that the defendant—who was four years and two months older than his girlfriend—would be unable to use the Romeo and Juliet exception to remove the requirement to register as a sex offender:

This case profoundly illustrates the manifest injustice which can result when a statute has rigid criteria that prevents a trial judge from exercising reasonable discretion. Judge Stargel, the trial judge in this case, attempted to exercise such discretion in the application of this statute. The facts of this case cry out for the result he reached. Regrettably, the requirements of the law do not permit us to support his decision.

Is there a societal interest in prohibiting an eighteen-year-old boyfriend and fourteen-year-old girlfriend from having consensual sexual relations? The answer to that question is obvious; of course there is. Mr. Welch should be punished for this behavior, and he was. However, is it really the will of the people to label the eighteen-year-old in this situation a sex offender for life? Is Mr. Welch who we really think of when we contemplate the definition of what a sex offender is or should be? I doubt most people would include him in this category.\textsuperscript{192}

Although these Romeo and Juliet laws help protect most consenting teenagers, some teenagers continue to fall victim to the laws’ strict construction.\textsuperscript{193} These high school seniors, because they are more than four years older than their partners, end up receiving the same exact punishment as much older adult sex offenders.\textsuperscript{194}

\textsuperscript{190} Stine, \textit{supra} note 15, at 1184; \textit{see also} Fla. STAT. § 943.04354.
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{See, e.g., id.}
\textsuperscript{194} \textit{See, e.g., id.}
We need to use a common sense approach here: There is no substantive difference between a relationship in which an offender is 3 years and 364 days older than his or her partner and a relationship where an offender is four years and one day older than his or her partner. Even if there were a substantive difference, it surely should not amount to enough of a difference that one party be labeled a sex offender, while the other party is not. According to Florida’s statutory rape laws, however, this distinction is justifiable.

VIII. THE SOLUTION

Kaitlyn is not a sexual predator who sought to take advantage of a younger girl. Kaitlyn is just a girl who had a crush on her friend. There is no doubt that when looking from the outside in, there seems to be a difference in maturity between an eighteen-year-old and a fourteen-year-old. But who is to say that all teenagers act their own age? When Kaitlyn was asked whether she thought it was wrong of her to be in a sexual relationship with her girlfriend because of their age difference, she responded “that she did not think about it because (redacted) acted older.” Instead of sentencing teenagers like Kaitlyn to fifteen years in prison—a punishment that has not been shown to prevent consenting teens from beginning sexual relationships—we should lower the sentences for consenting teenagers and provide services to help both the offender and the victim understand the consequences and risks that come with entering into a sexual relationship.

If our true intent is to prevent teenagers from having sex at such an early age, there needs to be a more beneficial outcome than locking teenagers in prison for fifteen years and robbing many of them of promising futures. It would not be surprising in the least if neither Kaitlyn nor her girlfriend knew that they were even breaking the law. This lack of effectiveness in deterring underage sex is the statute’s biggest flaw.

While Kaitlyn may still be able to apply the Romeo and Juliet statute to remove her sex offender registration requirement, she still faces up to

196. See Barchenger, supra note 1.
197. See id.
198. See id.
199. Id.
200. Stine, supra note 15, at 1212–13 (explaining the ineffectiveness of rape laws in regards to consenting teenagers); see also Fla. Stat. §§ 775.082, 800.04.
202. See Barchenger, supra note 1.
fifteen years in prison. Not all teenagers charged with statutory rape will be as lucky—if you can call it that—as they may be slightly too old to use the Romeo and Juliet exception. Instead of using such a strict numbering system to determine whether a teenager should be labeled a sex offender, a totality of the circumstances approach should be implemented to determine so.

Whether the teenagers were in the same high school, whether they shared the same friends, whether the older partner truly had good intentions—this is information that is important and should actually be weighed in the legal process. The current Romeo and Juliet laws do not take these essential factors into account, and for that reason, the true intention of the Romeo and Juliet exception is not being realized.

IX. CONCLUSION

Since Kaitlyn was charged with lewd and lascivious battery of a minor, her case has received national media attention. Society can clearly see the wrong in Kaitlyn facing such a harsh punishment. And though she will likely escape her sex offender registration requirement, the teenagers who fall beyond the Romeo and Juliet law’s four-year limit will be provided no such legal protection. Until Florida makes a change, these unlucky teenagers will continue to be treated the same as the sexual predators that society and the legislature intended to label as sex offenders.

Labeling a teenager a sex offender is not a decision that should be dependent solely on something as insignificant as a birthday. To the person who argues that a line needs to be drawn somewhere, I say, draw it somewhere else.

References:

204. Barchenger, supra note 1; Slifer, supra note 2.
206. See, e.g., id. at 634–35 (Morris, J., concurring).
207. Slifer, supra note 2.
208. Barchenger, supra note 1.
209. Slifer, supra note 2.
211. See Barchenger, supra note 1.