ARTICLES

The Ongoing Mystery of the Limited Public Forum

Marc Rohl

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When Did Scrooge Become a Role Model? Why Criticism of America's National Debt Is Misplaced

Alireza Gharagozlou

POLST: A Cure for the Common Advance Directive—It's Just What the Doctor Ordered

Keith E. Sonderling

NOTES AND COMMENTS

The War Comes Home: How Congress' Failure to Address Veterans' Mental Health Has Led to Violence in America

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Alexa Welzien

VOLUME 33 SPRING 2009 NUMBER 2
Articles

The Ongoing Mystery of the Limited Public Forum ........................................Marc Rohr 299

2007-2008 Survey of Juvenile Law .................................................................Michael J. Dale 357

Corporate Representative Depositions: In Search of a Cohesive and Well-Defined Body of Law..........................Robert D. Peltz
Robert C. Weill 393

When Did Scrooge Become a Role Model? Why Criticism of America’s National Debt Is Misplaced...........Alireza Gharagozlou 427


Notes and Comments

The War Comes Home: How Congress’ Failure to Address Veterans’ Mental Health Has Led to Violence in America..........................................................Alyson Sincavage 481

Life, Liberty, and the Pursuit of Parental Equality:
Florida’s New Parenting Plan Remains Overshadowed by Lingering Gender Bias.............................Alexa Welzien 509
THE ONGOING MYSTERY OF THE LIMITED PUBLIC FORUM

MARC ROHR* 

I. INTRODUCTION .................................................................................................................. 300

II. AMBIGUITY AND LACK OF CLARITY AT THE SUPREME COURT LEVEL ................................................................. 303
A. The Early Cases: Decisions Without Rules ........................................... 303
B. The Trouble with Perry ........................................................................ 304
C. The Ambiguity of Cornelius ................................................................... 312
D. Kokinda Keeps the Mystery Alive ...................................................... 316
E. ISKCON and Rosenberger: Misleading Statements Emerge ................. 318
F. Forbes to the Doctrinal Rescue? ............................................................. 320
G. Good News Club: A Big Step Backward .......................... 325
H. Synthesizing the Supreme Court's Limited Public Forum Jurisprudence 326
  1. The Court's Pronouncements ......................................................... 326
  2. The Court's Rulings ................................................................... 327

III. HOW HAVE THE FEDERAL COURTS OF APPEALS UNDERSTOOD "THE MIDDLE CATEGORY?" ................................................................. 331
A. Competing Understandings of the Terminology ................................. 332
B. "Middle Category" Decisions ................................................................. 335
  1. Rulings ...................................................................................... 335
  2. "General" or "Selective" Access? ...................................................... 338
    a. Use of the Forbes "Permission" Factor ........................................ 338
    b. Is "Standardless Discretion" Relevant? ....................................... 346

IV. CAN A MEANINGFUL "LIMITED PUBLIC FORUM" CATEGORY EXIST? ............................................................................. 349
A. Rationalizing the Public Forum Doctrine ............................................. 349
B. Does the "Permission" Factor Make Sense? ......................................... 351
C. Can the "Limited Public Forum" Be Salvaged? ..................................... 352

V. PRAYER FOR RELIEF ............................................................................. 354

A designated public forum is a non-public forum the government intentionally opens to expressive activity for a limited purpose such as use by certain groups or use for discussion of certain subjects. . . . Despite this direction from the Supreme Court, our Circuit's analysis of what constitutes a "designated public forum, like

our sister Circuits,” is far from lucid. Substantial confusion exists regarding what distinction, if any, exists between a “designated public forum” and a “limited public forum.”

I. INTRODUCTION

More than twenty-five years after the United States Supreme Court, in Perry Education Ass’n v. Perry Local Educators’ Ass’n, purported to define and elucidate the components of its “public forum” doctrine, the meaning—and legal significance—of the “limited public forum” concept remains startlingly unclear. Confessions of uncertainty by courts as to the meaning of this term—and its relationship to its doctrinal siblings, the “designated” public forum and the “non-public forum”—are, in fact, surprisingly common in reported judicial decisions. At the same time, the body of rules created by the Supreme Court governing access by citizens to governmentally controlled properties and channels of communication for the purpose of expression has been subjected to much criticism, usually and primarily on the ground that these rules, in their entirety, are unduly restrictive of freedom of expression. Often such criticism has been accompanied by thoughtful sug-

1. Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006). The court’s definition of a designated public forum is itself reflective of the confusion of which the court speaks.
3. See, e.g., Christian Legal Soc’y v. Walker, 453 F.3d 853, 865 n.2 (7th Cir. 2006); Justice for All v. Faulkner, 410 F.3d 760, 765 n.6 (5th Cir. 2005) (“Although the Supreme Court and the circuits have clarified the functional difference between the designated and limited forums, the precise taxonomic designation of the latter remains elusive.”); Goulart v. Meadows, 345 F.3d 239, 249 (4th Cir. 2003); Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001) (“The designated public forum has been the source of much confusion. . . . ‘The contours of the terms “designated public forum” and “limited public forum” have not always been clear.’”) (quoting Diloreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 n.4 (9th Cir. 1999)); Summum v. Callaghan, 130 F.3d 906, 914 (10th Cir. 1997).
gestions of alternative approaches that would be more protective of speech.\textsuperscript{5} But, to paraphrase Marc Antony,\textsuperscript{6} I come to decipher the "public forum" doctrine, not to denigrate it.

The purpose of this Article is not to argue that the "public forum" doctrine is too speech-restrictive, but rather to simply try to make a contribution toward clarifying the meaning of the mysterious and perplexing "limited public forum." I do criticize the Court, however, for allowing the confusion surrounding this concept to fester and persist. And, in trying to make sense of what the Supreme Court has said and done with respect to this concept, and thus to arrive at a workable understanding thereof, I will briefly consider whether any such understanding makes sense within the larger context of facilitating freedom of expression. But my focus will remain primarily a pragmatic one, accepting the broad outlines of what the Supreme Court has done, under the heading of the "public forum" doctrine, with the relatively modest goal of trying to eliminate (or at least minimize) needless confusion in the application of these rules.

The importance of this legal doctrine can hardly be doubted. It is commonplace for citizens to seek to engage in communicative activities on (or via) governmentally controlled properties (or channels of communication) other than those that have traditionally been available for expression, and case law reflects that they have done so with regard to a wide variety of such "non-traditional fora"—ranging from government office waiting rooms,\textsuperscript{7} to college campus lawns,\textsuperscript{8} to national cemeteries,\textsuperscript{9} to name just a few examples. In each such instance, when the government actor in charge of the forum

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5. Farber & Nowak, supra note 4, at 1239-45; Fischer, supra note 4, at 670-73; Gey, supra note 4, at 1566-76; Post, supra note 4, at 1765-84; Massey, supra note 4, at 334-51; McGill, supra note 4, at 953-57.

6. WILLIAM SHAKESPEARE, JULIUS CAESAR, act 3, sc. 2.

7. E.g., Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 137 (2d Cir. 2004).

8. E.g., Gilles v. Blanchard, 477 F.3d 466, 467 (7th Cir. 2007).

9. E.g., Griffin v. Sec’y of Veterans Affairs, 288 F.3d 1309, 1314 (Fed. Cir. 2002).
denies access, and the speaker cares enough to bring suit, a decision must be made, under governing legal principles, as to the nature of the forum: Is it "closed," so that access may presumptively be denied, or has it been "opened," so that access must presumptively be granted? The government actor may place the forum "off limits" to expressive activity, in which case the property (or channel) in question will be deemed a "non-public forum." If, on the other hand, the government actor has opened, for expressive activity, a property (or channel) that need not have been so opened, we then have a "forum by designation" or "designated public forum." The government actor is not completely free, even in the non-public forum, to deny access for expressive activity, but the level of judicial review that will be employed in such cases is relatively low and deferential to the government, at least in theory. In the designated public forum, on the other hand, a more rigorous level of judicial review is (theoretically) employed. So the label matters.

The "mystery" of my title is really twofold, as reflected in the two major questions to be pursued in this Article: First, how does the concept of the "limited public forum" fit into this scheme? To put it another way, what is the legal significance of that label? Second, how do we know when we have a limited public forum, as opposed to a non-public forum? To put that question another way, what criteria (if any) may dependably guide us in deciding whether a limited public forum has been created? A subsidiary question here, of potential significance, is: How do we decide for whom such a forum has been opened?

Part II of this Article will explain how pertinent United States Supreme Court opinions have given rise to, and perpetuated, the mystery of the limited public forum, and extract the clues the Court has provided to the solution of this mystery. Part III will summarize the treatment of the limited public forum concept by federal appellate courts in recent years, highlighting the extent to which some of those courts have been misled by what the United States Supreme Court has said and done. Finally, Part IV will consider the workability of an approach guided by what appears to be the proper understanding of the United States Supreme Court's collective teachings concerning the limited public forum.

10. Because we are dealing, by definition, with public—and not private—property, the term is something of a misnomer. It would be more accurate to speak, in such a case, of a "public non-forum," but we appear to be stuck, at this point, with "non-public forum."
II. AMBIGUITY AND LACK OF CLARITY AT THE SUPREME COURT LEVEL

A. The Early Cases: Decisions Without Rules

The history of the public forum doctrine at the United States Supreme Court level—and the philosophical underpinnings thereof—have been described quite satisfactorily elsewhere. Suffice to say, here, that a theme that made its first appearance in a United States Supreme Court opinion in 1966, namely that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated," soon led to fairly clear implications that limitations on expressive activity in a governmentally controlled property that was not a "public forum" would be subjected to a significantly lower level of judicial scrutiny than would otherwise be the case. No explicit statement was made, in the cases of the 1970s, regarding the level of scrutiny to be employed in such a case, but clearly the Court, once it declared that a government property was not a "public forum," was not going to adhere to the emerging rule that discrimination against speech on the basis of content would be subjected to strict judicial scrutiny. Conversely, the Court was quite hospitable to the claims of speakers in settings which were characterized as "open" or "public" fora. Not until 1983, in the Perry decision, did the Court attempt to impose structure and clarity upon this body of case law involving access by speakers to non-traditional governmentally controlled fora.
B.  The Trouble with Perry

Justice White’s majority opinion in Perry represented a major step forward doctrinally, but nonetheless fell well short of achieving optimum clarity in its explication of governing rules. Justice White set forth, in this opinion, the tripartite breakdown of governmental “fora” in language that continues to be quoted regularly. The first category, he stated, consists of “places which by long tradition or by government fiat have been devoted to assembly and debate,” embracing (at least) “streets and parks.” “In these quintessential public forums,” he went on to say, restrictions on expression would be evaluated pursuant to the tests usually employed to gauge the constitutionality of content-based or content-neutral regulations of speech. “A second category,” he continued, “consists of public property which the State has opened for use by the public as a place for expressive activity.” (Immediately a clear, if ultimately insignificant, semantic contradiction arose: How can a place devoted to expression “by government fiat”—ostensibly in the first category of forum—not fall into this second category?) This second category is important because, Justice White instructed us, the First Amendment “forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.”

At this point a key point was made in a footnote: “[a] public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.” A significant caveat was added: “[a]lthough a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum” (thus introducing the term “traditional public forum” to describe the first category in this taxonomy).

Finally, he addressed the third category, described simply as “[p]ublic property which is not by tradition or designation a forum for public communication.” In such locations, it was revealed for the very first time,
"the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." 28 Oddly, it was not until later in his opinion that Justice White gave this third type of governmental property a name, and he did so only in passing, while adding important content to its definition: "[i]mplicit in the concept of the non-public forum," he wrote, "is the right to make distinctions in access on the basis of subject matter and speaker identity." 29 Distinctions of this kind, he continued, "are inherent and inescapable in the process of limiting a non-public forum to activities compatible with the intended purpose of the property." 30

Thus, the following important precepts had now been established: First, that streets and parks (and later, sidewalks) 31 were "traditional" public fora, subject to the usual principles of First Amendment analysis; 32 second, that government actors might, as a matter of discretion, create "designated" public fora, which would be subject to those same First Amendment rules, at least as long as they retained their status as fora opened for expressive activities; and third, that even with respect to those governmentally owned properties which the government was entitled to make "off limits" for expressive activity, there were limits on the government's power to do so. 33 The last proposition was surely the most surprising, and the most welcome from the
standpoint of maximizing freedom of speech; no prior United States Supreme Court decision had spoken of, much less relied upon, the concept of viewpoint discrimination, which was now declared to be intolerable even in a “non-public forum.”34 And while earlier “non-public forum” decisions at the United States Supreme Court level had typically offered ad hoc justifications for the exclusions at issue,35 it was now clear, for the first time, that some level of justification—satisfying a test of “reasonableness”36—was in fact required.37 In all of these respects, the opinion in Perry was quite helpful.

But with respect to the concept of the “limited” public forum, the opinion was distinctly unhelpful. First, as with the term “non-public forum,” Justice White used the term “limited public forum” only in passing, never defining it despite the fact that this opinion was the occasion for his grand elaboration of the three-part “forum” categorization scheme; readers of the opinion were thus left to infer that the “limited” public forum was the aforementioned forum “created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.”38

Second, and most inexcusably, the legal significance of the label was never made explicit in Justice White’s opinion. He stated that the designated public forum would be treated as if it were a traditional public forum, but said nothing, in general terms, as to how the constitutionality of an exclusion of a particular speaker from a designated public forum limited for “use by certain groups” would be assessed. He did, however, provide some pretty good clues to the solution of this mystery. The most helpful clue emerged from his response to the argument made by the excluded teachers’ union, Perry Local Educators’ Association (PLEA), that the mailbox system had “become a ‘limited public forum’ from which it may not be excluded because of the periodic use of the system by private non-school connected

34. See id. at 46. The dissenters in Perry, of course, believed that the school district’s exclusion of the rival teachers’ union from the interschool mail system did indeed amount to viewpoint discrimination. Id. at 56 (Brennan, J., dissenting). But the majority disagreed. Id. at 49 n.9 (majority opinion).
36. While this requirement of “reasonableness” has at times been lightly equated with the familiar “rational basis” level of scrutiny. See, e.g., Dienes, supra note 4, at 117; Massey, supra note 4, at 313, lower court decisions appear to refute this unsupported conclusion. See infra note 276 and accompanying text. See also ISKCON, 505 U.S. at 690–92 (O’Connor, J., concurring) (finding a ban on leafletting in a non-public forum unreasonable, and maintaining that “we have required some explanation as to why certain speech is inconsistent with the intended use of the forum.”).
37. Perry, 460 U.S. at 46.
38. Id. at 46 n.7 (citation omitted).
groups."³⁹ PLEA's core grievance, of course, was that its access to the school mail system was terminated subsequent to the certification of its rival, Perry Education Association (PEA), as the exclusive bargaining representative for the teachers in the school district; PEA, of course retained access to the mailboxes.⁴⁰ But, in addition, the school district did "allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities."³⁴¹ Had the mail system thus become a limited public forum, as PLEA contended? No, replied Justice White, adding: "This type of selective access does not transform government property into a public forum."⁴² He went on to add the following paragraph, which is the major clue to which I have referred:

Moreover, even if we assume that by granting access to the Cub Scouts, YMCA's, and parochial schools, the [school] district has created a "limited" public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.⁴³

The implications of this dictum seem clear: In a limited public forum, we must first identify the speakers to whom the forum has been opened—the favored class of speakers, if you will—and then ask whether the speaker who seeks access to the forum—the challenger—is an "entity of similar character" to those to whom the forum has been opened.⁴⁴ In other words, we must ask whether the challenger falls within the favored class of speakers. If the answer is "yes," then that challenger enjoys a "right of access" to the forum. To put it another way, a limited public forum would be "open" to speakers who fall into the same class as those to whom the forum has already been opened. But as to a speaker who does not fall into the favored class, what then? The answer to this question would appear to be provided by the way the Court treated PLEA's attempt to gain access to the school mail system: Justice White asserted that "the school mail system" (vis-a-vis PLEA, in any

39. Id. at 47.
40. Id. at 40-41.
41. Id. at 47.
42. Perry, 460 U.S. at 47.
43. Id. at 48.
44. See id.
event) was “not a public forum,” and fell within the “third category” (later equated, implicitly, with the term “non-public forum”) of the new taxonomy. So it would appear, from the totality of the Perry decision, that a limited public forum will be treated as either a traditional public forum or a non-public forum, depending on whether the challenger does or does not fall within the favored class of speakers.

The other clue, in Perry, that supports this conclusion—and, in particular, the conclusion that a limited public forum will be treated as a traditional public forum if the challenger falls within the favored class of speakers—is the citation of Widmar v. Vincent as an example of a public forum “created for a limited purpose such as use by certain groups.” Widmar, of course, involved a state university that “routinely provide[d] University facilities for the meetings of registered [student] organizations,” but subsequently decided that it would violate the Establishment Clause if it were to continue to make those facilities available to a religious student organization. The student organization sued, and prevailed. Justice Powell’s pre-Perry reasoning regarding the public forum issue, on behalf of the Court’s majority, was as follows:

Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place. . . .

. . . With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.

Here [the University of Missouri] has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. . . . In order to justify discriminatory exclusion from a public forum based on the religious content of a group’s intended speech, the

45. Id. at 46, 48.
46. This understanding is essentially shared by Professor Buchanan and Professor Werhan. See Buchanan, supra note 4, at 960, 965; Werhan, supra note 4, at 406 n.346; see also Fischer, supra note 4, at 671–72; McGill, supra note 4, at 942.
48. Perry, 460 U.S. at 46 n.7.
49. Widmar, 454 U.S. at 265.
50. Id. at 265 & n.3.
51. Id. at 267.
University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.52

Again, Widmar was cited in Perry, as an example of a case involving a limited public forum (despite the incongruous reference by Justice Powell here, to “a forum generally open to the public”); the university facilities were made available, for expressive purposes, only for student organizations.53 The excluded speaker was a student organization.54 The Court in Widmar appears to have decided that the excluded speaker fell into the class of speakers to whom the forum had been opened.55 That finding, along with the recognition that the exclusion was based on the content of the speech in question, led to the application of strict scrutiny—exactly as it would have had the restriction been applied in a traditional public forum.56 If, on the other hand, a non-student organization (the local chapter of the American Civil Liberties Union, for example) had sought access to the university’s facilities and been rebuffed, those same university facilities would presumably have been treated as a non-public forum with respect to this speaker that did not fall within the favored class.

Assuming that I am correct about Perry’s implicit instructions concerning restrictions on speech within a limited public forum, another perplexing question arises: Why was not the teachers’ mailbox system in Perry deemed to be a limited public forum? By saying that the mail system fell “within this third category” (non-public forum) and that it was “not a public forum,”57 Justice White pretty clearly declined to deem it a limited public forum. But why was not it, given the fact that it appeared to have been opened to some, but not all speakers? Granted, calling it a limited public forum would presumably not have changed the result in this case (since Justice White regarded the forum as closed to the challenger), but the question remains important for the sake of understanding, generally, when we have a limited public forum (thereby necessitating the subsidiary inquiry as to whether the challenger is within the favored class of speakers) and when we have a non-public forum (in which case no such inquiry is required).

52. Id. at 267–70 (citations and footnotes omitted).
53. Perry, 460 U.S. at 45 (citing Widmar, 454 U.S. at 263).
54. See Widmar, 454 U.S. at 265 n.2.
55. See id. at 269–70.
56. Id.
57. Perry, 460 U.S. at 46, 48.
The same question may be asked with regard to the earlier United States Supreme Court decisions which were predicated on the absence of "public forum" status, all of which involved fora that had been opened to some speakers, but not to the challengers: *Lehman v. City of Shaker Heights*58 (in which the transit system "car cards" were available to most advertisements, but not to political campaign ads);59 *Greer v. Spock*60 (in which some speakers and entertainers, but not political speakers, had been given access to the military base);61 and, *Jones v. North Carolina Prisoners' Labor Union, Inc.*62 (in which some speakers had been allowed to address the prisoners, but the prisoners' union could not).63 When no speaker has been given access to the forum (as in *Adderley v. Florida*)64 the non-public forum label is easily applied. But, when is a property properly deemed to be a non-public forum when it has been opened to some (but not all) speakers? *Lehman, Greer,* and *Jones* can be rationally viewed, in retrospect, as examples of limited public fora, along with *Widmar,* yet Justice White cited *Greer* and *Lehman,* in *Perry* in support of his pointed assertion that "selective access does not transform government property into a public forum."65 Moreover, as noted earlier, Justice White also stated that "[i]mplicit in the concept of the non-public forum is the right to make distinctions in access on the basis of subject matter and speaker identity."66 But, why is a forum in which such subject-matter distinctions have been made not a limited public forum? What distinguishes *Widmar,* the quintessential limited public forum case, from these others?

Justice White sheds little light in *Perry* on this key question, as he spent most of his time (regarding the classification of the forum) making the obvious point that the school mail system was "not held open to the general public."67 Even after having said that, and while purporting to explain why the mailboxes did not amount to a "limited public forum," he simply reiterated that "there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public."68

59. Id. at 304.
61. Id. at 838 n.10.
63. Id. at 121, 134.
66. Id. at 49.
67. Id. at 47.
68. Id.
No, of course there was not, but, again, why was not the system a limited public forum? In this regard, his next sentence may have had more significance than was apparent at the time: "Permission to use the system to communicate with teachers must be secured from the individual building principal." (We will return to that point later on.) It was at that point that he made his statement that "selective access does not transform government property into a public forum" (even a limited public forum, apparently) which was followed by his suggestion that, even if it were a limited public forum, that would create a right of access "only to other entities of similar character."

The mysterious matter of when we have a limited public forum is perhaps all the more significant when one considers how rarely one is likely to encounter a designated public forum that is not limited—i.e., "public property which the [S]tate has opened for use by the public as a place for expressive activity." The reader will no doubt recognize this language as the description of Justice White’s second category of forum, a description which was followed by three citations: Widmar, City of Madison Joint School District v. Wisconsin Public Employment Relations Commission, and Southeastern Promotions, Ltd. v. Conrad. In fact, none of those cases involved a forum that was opened to the general public for expressive activity on an unlimited basis. Indeed, Widmar and City of Madison are the cases which Justice White cited in the footnote in which he added that a public forum might be created on a limited basis, either for use "by certain groups" (citing Widmar) "or for the discussion of certain subjects" (citing City of Madison, which involved speech at school board meetings, limited to "school board business"). As for Conrad, it involved access to a municipally owned theater, which, by its very nature, certainly could not have been opened to all speech by all speakers. So, Perry left careful students of First Amendment law wondering, not only when a limited public forum might have been created, but when the entire category of designated public fora might be encountered as well.

69. Id.
70. See infra text accompanying notes 127–33.
71. Perry, 460 U.S. at 47.
72. Id. at 48.
73. Id. at 45 (emphasis added).
74. 429 U.S. 167 (1976).
75. 420 U.S. 546 (1975).
76. Perry, 460 U.S. at 46 n.7.
77. See Conrad, 420 U.S. at 546.
78. A case which Justice White did not cite, but might have, as presenting an example of a designated public forum not limited by subject matter or speaker identity is Heffron v. Int’l
A final point with regard to Perry speaks to another perplexing aspect of the limited public forum inquiry: If the Court had deemed the school mail system to be a limited public forum, and if that meant (as it would appear to) that the system would thus be open to "entities of a similar character" to those speakers presently granted access thereto, why would PLEA, the rival teachers' union, not be an "entity of a similar character?" Could it not be credibly argued that the system had been opened to teachers' unions, of which PLEA was one? (Indeed, it had previously been opened to both teachers' unions.)

Pretty clearly, the majority viewed the mail system as being open not to teachers' unions generally, but only to the union that had been certified as "the exclusive bargaining representative" of the local teachers (along with the Cub Scouts and others, of course). That is not an irrational conclusion by any means, but it does serve to illustrate the inescapable corollary that, even if a limited public forum has been created, the fate of the challenger will depend upon how the court characterizes the class of speakers to whom the forum has been opened. In Widmar, by way of contrast, the Court appeared to view the forum as having been opened to student organizations, which included the religious challenger.

Why, it may sensibly be asked, did the Court not view the forum as opened only to non-religious student organizations, in which case the challenger would not have fallen within the favored class of speakers?

C. The Ambiguity of Cornelius

Justice O'Connor's majority opinion in Cornelius v. NAACP Legal Defense & Educational Fund, Inc., written in 1985, is notable primarily for its elaboration upon Perry's minimal pronouncements regarding the designated-public-forum concept. It was another case, like Perry, in which the Court might have found that a limited public forum had been created, but instead

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Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654–55 (1981), in which Justice White himself wrote the majority opinion upholding a time, place, and manner regulation applicable to a state fairgrounds—a forum which presumably need not have been opened for expression, but was.

79. See Perry, 460 U.S. at 48.
80. Id. at 55.
82. For a nuanced analysis of Widmar, see Post, supra note 4, at 1749.
83. 473 U.S. 788 (1985). Although the majority in this case consisted of only four Justices, with three Justices dissenting and two not participating, the O'Connor opinion is consistently treated as the opinion of the Court. See, e.g., Flint v. Dennison, 488 F.3d 816, 826 (9th Cir. 2007); Parks v. City of Columbus, 395 F.3d 643, 647 (6th Cir. 2005).
84. See Cornelius, 473 U.S. at 802.
deemed the intangible "forum" ("a charity drive aimed at federal employees")\(^8\) to be a non-public forum.\(^6\) The oft-quoted general explanation offered by Justice O'Connor included the following language:

In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. ... 

The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent. ... 

... We will not find that a public forum has been created in the face of clear evidence of a contrary intent ... nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity. ... In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum.\(^7\)

The key consideration, it is now clear, is the intention of the relevant government actor. But how is a court to determine whether that government actor (a) intended to create a public forum open to a limited class of speakers, on the one hand, or (b) intended to maintain a closed, "non-public" forum, even while "permitting limited discourse," on the other? The very fact that a speaker has been excluded from the forum may be seen as evidence of intent not to create a public forum, and the government actor can be expected, in any conflict that leads to litigation, to take the position that it had no intention of opening a public forum. If the fact that some speech has been permitted in the forum does not necessarily count against the government, what will? Citations to prior decisions were sprinkled throughout O'Connor's discussion, with cases like *Widmar* offered as examples of situations in which the government actor did have the intent to create a public

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85. *Id.* at 790.
86. *Id.* at 806.
87. *Id.* at 802–04 (citations omitted).
forum, and cases like *Lehman* offered as examples of cases in which the government actor did not have such intent. But did any of that suffice to provide the necessary guidance?

As to “the nature of the property and its compatibility with expressive activity,” furthermore, could that possibly point toward a finding of intent to create an open forum? A finding of incompatibility would understandably support the conclusion that the government actor did not intend to create a public forum (as in *Adderley* and *Greer*, the cases cited in support of that proposition by O'Conner), but why would the fact that the challenger's speech is compatible with the nature of the forum tell us anything about the intentions of the relevant government actor? And what exactly is meant by this notion of “compatibility?” Was *Lehman*’s political campaign advertisement incompatible with the “car cards” to which he was denied access? Were PLEA’s mailings incompatible with the school mailbox system in *Perry*? Would it have been incompatible with the Combined Federal Campaign (the charity drive in *Cornelius*) to have included the NAACP Legal Defense and Educational Fund? The answers to these questions, unless we are to understand “compatibility” to mean the absence of any persuasive reason for excluding the speaker from the forum, would appear to be “no.” Yet the arguable compatibility of speaker and forum appeared to count for nothing in each of these cases.

*Cornelius* is also notable because of the powerful dissenting opinion of Justice Blackmun, joined by Justice Brennan, that the decision inspired. Blackmun issued a fundamental critique of the Court’s public forum doctrine, but, for the purposes of those of us who seek merely to understand, and not to criticize, the most striking aspect of Blackmun’s opinion is his ultimate description of how, in his view, the doctrine works:

The Court’s analysis empties the limited public forum concept of meaning and collapses the three categories of public forum, limited public forum, and non-public forum into two. The Court makes it virtually impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. If the Government does not create a limited public forum unless it intends to provide an “open forum” for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum no speaker challenging denial of access

88. Id. at 802.
90. Id. at 802.
91. Id. at 804.
will ever be able to prove that the forum is a limited public forum. The very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court’s analysis that fact alone would demonstrate that the forum is not a limited public forum. 92

Was he correct in this assessment of the state of affairs to which the Court’s public-forum jurisprudence had led? Or was he missing something—and, if so, what? Interestingly, Justice O’Connor, in her majority opinion, said not a word about Blackmun’s dissent—no “Justice Blackmun overlooks” or “Justice Blackmun misunderstands.” Why? Why not reassure her readers that all is not as bleak as the dissenters suggest? Why not explain, to Justice Blackmun and the rest of us, that it really is still possible for a court to properly conclude that a government actor intended to create a limited public forum, and suggest how such a conclusion might be reached? One can only wonder how she, and the Justices who joined her in the majority, reacted to Blackmun’s assertions. Did they simply feel that the majority opinion was clear enough, and that Blackmun’s view of the matter was misguided?93 Or did they perhaps believe, in their heart of hearts, that, as a practical matter, he probably had it right, and that limited public fora were, like other endangered species, theoretically extant but not likely to be seen very often?

92. Id. at 825 (Blackmun, J., dissenting) (citation omitted). Seven years later, in the ISKCON decision, Justice Kennedy, in a concurring opinion joined by Justices Blackmun, Stevens, and Souter, quickly echoed Blackmun’s concerns, in a single sentence regarding “the so-called ‘designated’ forum. The requirements for such a designation,” he wrote, “are so stringent that I cannot be certain whether the category has any content left at all.” Int’l Soc’y for Krishna Consciousness, Inc. v. Lee (ISKCON), 505 U.S. 672, 697 (1992) (Kennedy, J., concurring). Consider also the words of Professor Post, commenting on Cornelius:

[T]he focus on intent had the virtue of candor, for it tactfully withdrew the concept of the limited public forum as a meaningful category of constitutional analysis. . . .

Cornelius shrinks the limited public forum to such insignificance that it is difficult to imagine how a plaintiff could ever successfully prosecute a lawsuit to gain access to such a forum. If the reach of the forum is determined by the intent of the government, and if the exclusion of the plaintiff is the best evidence of that intent, then the plaintiff loses in every case.

Post, supra note 4, at 1756–57 (footnote omitted); see also Timothy Zick, Speech and Spatial Tactics, 84 Tex. L. Rev. 581, 615 n.230 (2006) (characterizing the limited public forum as “a doctrinally incoherent concept”).

93. Professor Post’s critique of Cornelius, quoted in part at supra note 92, continued:

There is only one way out of this vicious circle, and it is not very satisfactory. It would require the Court to distinguish between the intent to include the class of speakers or subjects of which the plaintiff is the representative, and the intent to exclude the plaintiff. One problem with this distinction is that it is precious and in practice unworkable.

Post, supra note 4, at 1757. (But is it unworkable?)
D. Kokinda Keeps the Mystery Alive

Justice O'Connor's plurality opinion in United States v. Kokinda\(^{94}\) attained instant notoriety by virtue of its surprising refusal to treat a "postal sidewalk" as a traditional public forum, but that, of course, is not the focus of this article.\(^{95}\) But, even if one accepts the plurality's resolution of that precise question, why was this particular post office sidewalk not a limited public forum? Here is O'Connor's response to that argument:

The Postal Service has not expressly dedicated its sidewalks to any expressive activity. . . . No Postal Service regulation opens postal sidewalks to any First Amendment activity. To be sure, individuals or groups have been permitted to leaflet, speak, and picket on postal premises, but a regulation prohibiting disruption, and a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to speech activities. We have held that "[t]he government does not create a public forum by . . . permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Cornelius\(^{96}\), 473 U.S. at 802 (emphasis added). Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely non-public forum, under Perry\(^{97}\), regulation of the reserved non-public uses would still require application of the reasonableness test.\(^{96}\)

A number of questions are raised by this analysis. First and foremost is the question of why a government property on which citizens "have been permitted to leaflet, speak and picket" was not a limited public forum.\(^{97}\) (The meaning of the word "permitted" may or may not have relevance here. Did O'Connor mean to suggest that those speakers sought, and were granted, permission to leaflet, speak, and picket? Or were their leafleting, speaking, and picketing merely tolerated by those in authority? Again, the distinction may or may not be significant.) The challengers, who had engaged in the solicitation of political contributions on the postal sidewalk, were convicted of violating a federal regulation that prohibited "'[s]oliciting alms and contributions, campaigning for election to any public office, . . . and displaying


\(^{96}\) Kokinda, 497 U.S. at 730 (O'Connor, J., plurality) (citations omitted).

\(^{97}\) See id.
or distributing commercial advertising on postal premises.' 98 Since only certain kinds of speech were expressly prohibited on these premises, is it not fair to conclude that, by implication, all other forms of speech were allowed at this location—especially when other forms of speech were, in fact, allowed at this location? The dissenters thought so. 99 As for the members of the plurality (given O'Conner's focus on the absence of any regulation opening the premises for speech), one wonders whether anything short of an express written proclamation would have sufficed to make this property a limited public forum.

Particularly intriguing, and thus worth restating, is the last sentence in the above-quoted passage: "Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely non-public forum, under Perry, regulation of the reserved non-public uses would still require application of the reasonableness test." 100 Note first the somewhat odd terminology that Justice O'Connor used; while appearing to consider (for just one brief moment) what the outcome would be if the postal sidewalk were a limited public forum, she chose to use the words "and thus is not a purely non-public forum," rather than the more obvious (and less troublesome) phrase, "and thus is a limited public forum." How exactly are we supposed to understand the phrase "not a purely non-public forum?" Are there degrees of non-public-forum-hood, some being more "pure" than others? (Forgive me, but the word usage cries out for such an irreverent response.) Alternatively, had the limited public forum concept come to be viewed with such distaste that the term could not be used even when it was the obvious term to use? Note further the inelegant, and tortured, use of language later in the sentence—namely, her reference to "the reserved non-public uses." 101 Was she perhaps intending to refer to speech to which a limited public forum had not been opened?

Strange semantic choices notwithstanding, that sentence can be seen as helpfully reinforcing the rule, implicit in Perry, that, in a limited public forum, expression which does not fall within the class of speech to which the forum has been opened may be regulated to the same extent as it could be in a non-public forum. That is to say, O'Conner can be understood to have said

98. Id. at 724.
99. Id. at 750 (Brennan, J., dissenting). Noting the limited restrictions of expression contained in the regulation, Justice Brennan concluded: "The Government thus invites labor picketing, soapbox oratory, distributing literature, holding political rallies, playing music, circulating petitions, or any other form of speech not specifically mentioned in the regulation." Id.
100. Kokinda, 497 U.S. at 730 (O'Connor, J., plurality).
101. Id.
that, even if the postal sidewalk were a limited public forum, it had not been opened up for solicitation of monetary donations, and thus the prohibition of such solicitation need only be reasonable (and, of course, not discriminate on the basis of viewpoint). The only difficulty with this interpretation is that the sentence is too unclear to allow us to proclaim its meaning with any confidence.

E. ISKCON and Rosenberger: Misleading Statements Emerge

The 1992 case typically referred to as ISKCON—International Society for Krishna Consciousness, Inc. v. Lee—was not one that allowed for any serious argument that the forum in question (a publicly-operated airport terminal) was a limited public forum. It is included here only because Chief Justice Rehnquist, in his cursory review of the forum categories in his majority opinion, said this:

The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the State has opened for expressive activity by part or all of the public. Regulation of such property is subject to the same limitations as that governing a traditional public forum.

But, of course, regulation of speech in a limited public forum will not necessarily be evaluated as if the property were a traditional public forum. This imprecise statement, which had no bearing on the decision, might have had the effect of over-valuing speech in a limited public forum, but in fact there is no reason to think that the statement has had any effect at all on relevant case law.

Regrettably, that cannot be said of Justice Kennedy's unhelpful pronouncements in Rosenberger v. Rector & Visitors of the University of Virginia, decided in 1995. It should be understood, at the outset, that, because the free-speech issue in this case was resolved by the majority purely on the basis of its (questionable) finding of viewpoint discrimination, it was completely unnecessary to categorize the forum—a public university fund, characterized by Kennedy as "a forum more in a metaphysical than in a spatial or geographic sense." And, in fact, while Kennedy may have appeared to

103. Id. at 678 (citation omitted).
105. Id. at 830.
conclude that the fund was a limited public forum (as some courts\textsuperscript{106} and commentators\textsuperscript{107} have asserted) nowhere in his opinion did he clearly and unequivocally do so (although doing so would have been correct). Rather, he sprinkled a couple of general statements that made reference to the limited public forum concept into a confused paragraph whose primary thrust was that viewpoint discrimination will not be tolerated.\textsuperscript{108} Here, offered in its entirety (aside from citations) because of the influence it has had on lower courts, is that regrettable paragraph, which followed a paragraph which spoke only about content and viewpoint discrimination (and said not a word about public fora):

These principles provide the framework forbidding the State [from] exercising viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving a school district’s provision of school facilities for private uses, we declared that “there is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated.” The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not “reasonable in light of the purpose served by the forum,” nor may it discriminate against speech on the basis of its viewpoint. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.\textsuperscript{109}

The careful reader will, I trust, join me in observing that, while it may appear that Justice Kennedy categorized the forum in question as a limited public forum, by making reference to the concept two or three times in the

\textsuperscript{106} E.g., Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 345 n.10 (5th Cir. 2001); Summum v. Callaghan, 130 F.3d 906, 915 (10th Cir. 1997); Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1549 (11th Cir. 1997).

\textsuperscript{107} McGill, supra note 4, at 929; see also Gey, supra note 4, at 1563, 1565.

\textsuperscript{108} Rosenberger, 515 U.S. at 828–29.

\textsuperscript{109} Id. at 829–30 (citations omitted).
course of this discussion, he really never explicitly did so. What matters more, however, is that he intertwined these references to the limited public forum with indirect references to the non-public forum concept, and with the general prohibition of viewpoint discrimination. Why? What was the need for this discussion, when all that needed to be said was that viewpoint discrimination is unacceptable, regardless of the nature of the forum? In mid-paragraph, he actually included a statement that might have been helpful (if elaborated upon) in clarifying the law of the limited public forum: "Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set." But that statement, too, was unnecessary, in this case, given his finding of viewpoint discrimination. Unfortunately, what many lower courts have extracted from this discussion is the combination of that sentence with the sentence that follows, leading to the (mis)understanding that what he said was this: In a limited public forum, exclusion of a speaker must be reasonable and must not discriminate on the basis of viewpoint. That statement is true, of course, because unreasonableness or viewpoint discrimination will invalidate a restriction even in a non-public forum, so of course it will invalidate a restriction in any forum. But Kennedy’s combination of sentences has led many lower courts to the misguided conclusion that he asserted that these are the only grounds for invalidating a prohibition of speech in a limited public forum. But he did not say that, in so many words, and, if he had, one would have to wonder why the limited public forum was suddenly being equated, for all intents and purposes, with the non-public forum.

F.  Forbes to the Doctrinal Rescue?

Somewhat ironically, Justice Kennedy’s majority opinion in Arkansas Educational Television Commission v. Forbes, decided three years after Rosenberger, is arguably the United States Supreme Court’s majority opinion that provides the most guidance with respect to distinguishing between a limited public forum and a non-public forum. (I say that this is somewhat ironic because it is also arguably the least satisfying of the United States Supreme Court’s public-forum decisions, in terms of its result.) Ralph

110.  Id.
113.  But see the discussion of Forbes in Schauer, culminating in this suggestion:
Forbes, an independent candidate for Congress in Arkansas, sought to participate in a televised debate to which only the Democratic and Republican candidates had been invited by the debate's organizer, AETC, described as "an Arkansas state agency owning and operating a network of five noncommercial television stations." The organizers of the event denied Forbes' request, because they had "decided to limit participation in the debates to the major party candidates or any other candidate who had strong popular support"—a class of speakers which, in the view of the organizers, did not include Forbes. Was the debate a limited public forum? A panel of the Court of Appeals for the Eighth Circuit thought so, and Judge Arnold's explanation is notable for its forcefulness:

We can say without reservation, . . . that the forum in this case, the debate, is a limited public forum. Just as the university in Widmar created a limited public forum by opening its facilities to registered student groups for expressive speech, AETN, by staging the debate, opened its facilities to a particular group—candidates running for the Third District Congressional seat. . . .

The debate was surely a place opened by the government for a limited class of speakers. What was that class? Was it all candidates for Congress legally qualified to appear on the ballot, or was it simply the Republican and Democratic candidates? The latter answer, which essentially is the position espoused by defendants, is not supportable either as a matter of law or logic. Surely government cannot, simply by its own ipse dixit, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation. It must be emphasized that we are dealing here with political speech by legally qualified candidates, a subject matter at the very core of the First Amendment, and that exclusion of one such speaker has the effect of a prior restraint—it keeps his views from the public on the occasion in question.

But a majority of the Supreme Court held that the state agency could limit the class of favored speakers in the way in which AETC had limited

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Although the doctrinal structure of the majority opinion in Forbes is focused on public forum doctrine . . . in the end it is the institutional character of public broadcasting as broadcasting, heightened here by the involvement of broadcasting professionals in the very decision under attack, that appears to have determined the outcome of the case.

Schauer, supra note 4, at 91.

114. Forbes, 523 U.S. at 669.
115. Id. at 670.
116. See id. at 670–71.
Writing for the majority, Justice Kennedy ultimately deemed the debate to be a non-public forum.\(^\text{119}\)

Kennedy began his "forum" discussion in the usual fashion, briefly describing each of the three categories of forum and correlating the categories with the applicable constitutional tests.\(^\text{120}\) In the process of doing so, he made this very helpful statement regarding "designated" public fora: "[i]f the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny."\(^\text{121}\) This statement—which really pertains to the concept of a limited public forum (the term I wish Kennedy had used)—was a most welcome reinforcement of the rule implied by Perry's suggestion that "entities of similar character" would enjoy a right of access to a limited forum.\(^\text{122}\) But even this helpful dictum was flawed, because, by referring only to "strict scrutiny," it ignored the possibility that a distinction among speakers might not be content-based.\(^\text{123}\)

Moving to the third category of fora, Kennedy made this intriguing statement: "[o]ther government properties are either non-public fora or not fora at all."\(^\text{124}\) "Not fora at all?" What did that mean? Did not the tripartite regime set forth in Perry represent the entire universe of governmentally owned properties and channels of communication? Perhaps he had in mind the kind of case in which the inherent need for the exercise of governmental discretion—as in public broadcasting, generally,\(^\text{125}\) or the selection of books by a public library\(^\text{126}\)—is deemed to render any "forum" analysis inapplicable.
But why did Kennedy overturn the conclusion of the Court of Appeals that the debate in Forbes was a limited public forum? In fact, he never even used that term, addressing instead the question of whether the debate was a "designated" public forum, and finding that it was not. In the process, he set forth a relatively extensive explanation of the governing criteria, which deserves quotation at some length:

To create a forum of this type, the government must intend to make the property "generally available," to a class of speakers. . . . A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers. . . . The basis for the holding in Perry was explained by the Court in Cornelius: "In contrast to the general access policy in Widmar, school board policy did not grant general access to the school mail system. The practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted." And in Cornelius itself, the Court held the Combined Federal Campaign (CFC) charity drive was not a designated public forum because "[t]he Government’s consistent policy had been to . . . require agencies seeking admission to obtain permission from federal and local Campaign officials."

These cases illustrate the distinction between "general access," which indicates the property is a designated public forum, and "selective access," which indicates the property is a non-public forum. . . . [T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission" to use it.

Kennedy then applied those considerations to the case at hand, as follows:

Here, the debate did not have an open-microphone format. . . . AETC did not make its debate generally available to candidates for Arkansas’ Third Congressional District seat. Instead, just as the Federal Government in Cornelius reserved eligibility for participation in the CFC program to certain classes of voluntary agencies, must have to fulfill their traditional missions." 539 U.S. 194, 205 (2003). See also Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 586 (1998). A lower court decision (involving plaintiffs who were denied the opportunity to speak at town meetings) in which the public forum analysis was somewhat inexplicably deemed to be “inapposite” is Curnin v. Town of Egremont, 510 F.3d 24, 25 (1st Cir. 2007).
127. Forbes, 523 U.S. at 678.
128. Id. at 678–79 (citations omitted).
AETC reserved eligibility for participation in the debate to candidates for Third Congressional District seat . . . . At that point, just as the Government in *Cornelius* made agency-by-agency determinations as to which of the eligible agencies would participate in the CFC, AETC made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate. "Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum." Thus the debate was a non-public forum.¹²⁹

At long last, we had been given some concrete guidelines. But, are they sufficiently concrete? The key distinction, it seems, is that between "general access for a class of speakers," on the one hand, and "selective access for individual speakers," on the other. But it has never been clear how to distinguish "general" from "selective" access, words that were not new to this opinion. Here, however, there was the added contrast between access "for a class of speakers" and access "for individual speakers." But how helpful is that? If we focus on the application of these principles to this very case, it seems fair to say that the "selective access" which Justice Kennedy found here was extended to a "class" of speakers (congressional candidates), and not to randomly-selected individuals. Indeed, Kennedy stated, in that part of his discussion, that the government in *Cornelius* "reserved eligibility for participation in the CFC program to certain classes of voluntary agencies."¹³⁰ So, the "selective access" that defeats a finding of a limited public forum may, it seems, be either "random" access or access that is extended only to persons or groups that fall into a defined class of speakers. In the former instance, in which disparate speakers have been allowed access on a sporadic basis, we would apparently lack the crucial evidence of a governmental intent to open the property to a "general class" of speakers. In the latter instance, it is apparently a second step that really counts toward a finding of "selective access"—the selection of speakers, by the relevant government actor, within a defined class. Given this second understanding of "selective access," the ability to distinguish it from "general access for a class of speakers" remains elusive.

Potentially more helpful, however, is the fact of Justice Kennedy’s repeated references, in this mini-tutorial, to the concept of "permission." The need to obtain "permission" on an individualized basis, as a condition of access to the forum at issue, he explained, is a key characteristic of a non-public forum, even in situations that look like "general access" cases, and

¹²⁹. *Id.* at 680.
¹³⁰. *Id.* at 680 (emphasis added).
explains why Perry and Cornelius (in which such permission was required) did not involve limited public fora. Widmar, in contrast, was viewed as involving a situation (again, the availability of university facilities to registered student organizations) in which individualized permission was not required; the property was “generally available” to all members of the favored class of speakers. The last sentence of his statement of general principles, quoted above, can thus be seen as capturing the essence of his message: “[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, ‘obtain permission’ to use it.” As the quoted statements make clear, this “permission” factor had been highlighted in Cornelius, over a decade earlier, but Kennedy’s dissertation in Forbes put the spotlight on this variable in a much more emphatic way.

Two major questions immediately come to mind with regard to this suggested key to the limited public forum puzzle: First, is it workable, and second, does it make sense? We will return to those questions shortly.

G. Good News Club: A Big Step Backward

Whatever contribution to clarity may have been made by Forbes was needlessly and regrettably undercut by Justice Thomas’ pronouncements in the 2001 case of Good News Club v. Milford Central School. The Good News Club sought access, on an “after hours” basis, to public school facilities that had been opened to use by other outside organizations for various expressive purposes. The forum in question appeared to be a limited public forum, the parties agreed on that characterization, and Justice Thomas, writing for the Court majority, was willing to assume that this was the proper category. But, as in Rosenberger, the category of forum was unimportant, given the majority’s (questionable) finding of viewpoint discrimination. Here, however, is what Thomas said next, concerning the applicable constitutional test:

135. Id. at 102–03.
136. Id. at 106.
137. See id. at 107.
When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving its forum for certain groups or for the discussion of certain topics." The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, and the restriction must be "reasonable in light of the purpose served by the forum." 138

The first three assertions in that paragraph are unexceptional, and clearly accurate. The last sentence is not inaccurate, because those limitations apply regardless of the nature of the forum, but the problem, as in Rosenberger, 139 is the immediate juxtaposition of (a) statements describing the nature of a limited public forum with (b) the two-part test governing the constitutionality of restrictions on speech in a non-public forum. The reader—unless he knows enough to recognize the incongruity between this presentation and earlier pronouncements concerning these matters—may be justified in concluding that the Court had just stated unambiguously that an exclusion of any speaker from a limited public forum would be subject only to that two-part test. Understandably, but regrettably, that is how some lower federal courts have understood Thomas' statement of governing legal doctrine. 140

H. Synthesizing the Supreme Court's Limited Public Forum Jurisprudence

1. The Court's Pronouncements

While the Justices have, over the years, made frequent use of the term "limited public forum," the Court has never defined, or adequately explained the meaning of, that concept. The closest the Court has come to defining the term was its initial indication, in Perry, that a public forum might "be created for a limited purpose" 141—a statement made in a footnote which sprang from Justice White's discussion of the second public forum category, a category that now dependably bears the label "designated public forum." Can there be any reasonable doubt, then, that the limited public forum is a sub-category of the designated public forum category? The further discussion of the limited

138. Id. at 106–07 (citations omitted).
139. See supra text accompanying notes 104–11.
public forum concept in *Perry*,\textsuperscript{142} furthermore, augmented both by 1) the reaffirmation of *Perry*'s implications in *ISKCON*\textsuperscript{143} and *Forbes*\textsuperscript{144} and 2) the constant citation (and description) of *Widmar* with approval, make clear enough how a court is to evaluate limitations on speech in a limited public forum: The court should first determine the class of speakers to whom the forum has been opened, and then decide whether the excluded speaker falls within that favored class; if the speaker falls within the favored class, the forum should be treated as if it were a traditional public forum, but if the speaker falls outside of the favored class, then the forum should be treated as if it were a non-public forum. Occasional inconsistent, ill-considered passages (in the Court's *Rosenberger*\textsuperscript{145} and *Good News Club*\textsuperscript{146} opinions), which suggest that the limited public forum is, in every case, to be treated as if it were a non-public forum, should be viewed as just that—ill-considered, and inconsistent with the more logical and coherent statements made in *Perry* and *Forbes*—and, accordingly, ignored.\textsuperscript{147}

With regard to the challenging task of deciding when a limited (or designated) public forum has been created, two majority opinions are dominant: The seminal opinion by Justice O'Connor in *Cornelius*, making clear that the government's intent is the key,\textsuperscript{148} and Justice Kennedy's opinion in *Forbes*, with its emphasis on a speaker's need to obtain permission as the major variable distinguishing "selective" access from "general" access.\textsuperscript{149}

2. The Court's Rulings

With regard to the proper understanding and treatment of the limited public forum, there are few specimens to consider, since the Court has not found any governmental property to be a limited (or designated) public fo-

\textsuperscript{142} See id. at 46–47.
\textsuperscript{144} See supra text accompanying notes 121–22.
\textsuperscript{145} See supra text accompanying note 109.
\textsuperscript{146} See supra text accompanying note 138.
\textsuperscript{147} It should be noted, however, that a further note of uncertainty regarding these matters was sounded by Justice Breyer, in dictum, in a plurality opinion in 1996, in which he declined to apply the public forum doctrine to an unconventional setting ("leased access" cable television channels). Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 749 (1996). Writing for four Justices, in clear reference to the concept of the limited public forum, he stated, somewhat cryptically: "Our cases have not yet determined, however, that [the G]overnment's decision to dedicate a public forum to one type of content or another is necessarily subject to the highest level of scrutiny." Id. at 750.
\textsuperscript{148} See supra text accompanying notes 87–89.
\textsuperscript{149} See supra text accompanying notes 128–31.
rum since the pre-Perry decision in Widmar, which, while it pre-dated the Court’s crystallization of its governing categories and rules, still stands as the preeminent example of a limited public forum. We can draw little guidance from what the Court has actually done, then, with regard to the limited (or designated) public forum.

We can, however, inquire as to whether the Court’s pre-Forbes rulings support the primacy of “permission” as the key variable explaining when we have merely “selective,” as opposed to “general,” access to a forum which has been opened to at least some speakers. (The distinction would rather clearly seem to be irrelevant in cases, like ISKCON and United States Postal Service v. Council of Greenburgh Civic Ass’n, in which there is no evidence that the property has been opened to anyone for expressive purposes). Bearing in mind that an earlier opinion may understandably fail to shed light on the existence or non-existence of a factor whose significance was far from clear at the time the opinion was written, and recognizing that some prior rulings may simply not conform to a mode of analysis that did not emerge until years later, we are nonetheless compelled to observe that the pattern of prior decisions is not consistent with regard to Kennedy’s thesis in Lehman (involving rapid transit system advertising spaces) and Greer (involving political campaigning on a military base) do appear to take their places comfortably alongside Perry and Cornelius as cases involving situations in which a prospective speaker needed to obtain permission from a controlling governmental authority as a condition of access to the property in question. In Kokinda, as was observed earlier, citizens had “been permitted to leaflet, speak and picket” on the postal sidewalk, but it is unclear wheth-

150. The other case cited in Perry as an example of a “limited” forum, 460 U.S. 37, 46 n.7 (1983), City of Madison Joint School District v. Wisconsin Public Employment Relations Commission, 429 U.S. 167 (1976), in which a school board meeting was generally open to members of the public for comments, spoke neither of forum categories nor of any level of judicial review. In his majority opinion for a unanimous Court (which ruled in favor of the excluded speaker), Chief Justice Burger said merely that “where the State has opened a forum for direct citizen involvement, it is difficult to find justification for excluding teachers.” Id. at 175. The Heffron decision of 1981, as noted earlier, is perhaps the only true example, at the Supreme Court level, of a designated public forum not limited as to subject matter or speaker identity. See Heffran v. Int’l Soc’y for Krishna Consciousness, Inc., 452 U.S. 640, 654–55 (1981). But the decision teaches us nothing, with respect to the problems at hand, since the government actor in that case made no attempt to exclude the speakers from the forum.

er the word "permitted" denoted (a) that those speakers had been required to ask and receive permission, or (b) that the presence of those speakers had merely been tolerated.

But of the three cases cited in Perry as examples of designated public fora, only one—City of Madison—seems to fall into the "open to all speakers, no permission required" category (keeping in mind that the forum was a school board meeting, so that only speech related to "school board business" was permitted).\textsuperscript{156} Widmar, in contrast (and notwithstanding its treatment by Justice Kennedy in Forbes), does not seem to have involved a "no permission required" situation, as this sentence from Justice Powell's majority opinion reveals: "From 1973 until 1977 a registered religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities."\textsuperscript{157}

(Each of these rare exemplars of the limited public forum concept, it should be noted, differs from the more typical such case in that, in each, the government actor in direct control of the forum was not actually motivated by a desire to exclude the challenger for any reason relating to the effect of the speech on the forum.) In City of Madison, the speaker who was supposed to be barred from the forum—by a state labor-relations statute—had actually been permitted to speak by the school board at its meeting; litigation ensued only after a third party, after the fact, challenged the legitimacy of the school board's action.\textsuperscript{158} In Widmar, university officials sought to bar the religious student group from using the school's facilities for expressive purposes, but only because those university officials feared that continuing to grant access to the religious group would violate the Establishment Clause;\textsuperscript{159} the Su-
The Supreme Court could have resolved the dispute by deciding only—as it did—that the Establishment Clause concern was groundless.160

The third decision put forth in Perry as an example of a designated public forum, Conrad, not only involved a governmentally-controlled property (a municipally operated theater) whose use was made available only through an application process,161 but appears to be completely out of sync with later decisions. A majority of the Court, speaking through Justice Blackmun, found fault with a municipal board’s rejection of an application to stage a controversial musical stage play at the theater in question.162 Key to the decision was Blackmun’s preliminary conclusion that the theater in question was a “public forum[] designed for and dedicated to expressive activities.”163 But surely this was not a governmental forum that had been opened to any and all members of a particular class of speakers, with no discretion reserved to the officials in charge of the property.

Other decisions simply do not fit as comfortably into either the “permission required” or “no permission required” paradigms. Hazelwood School District v. Kuhlmeier,164 for example, which extended the public forum doctrine to the public school setting, involved a claim by student staff members of a high school newspaper that their First Amendment rights had been violated when certain student-authored articles were removed from the newspaper prior to its publication.165 Justice White, for the majority, found, in effect, that the newspaper was a non-public forum.166 The newspaper had arguably been opened to written expression by a particular class of speakers—namely, student members of the newspaper’s staff—and it did not appear that a formal system was in place pursuant to which “permission” needed to be obtained before an article could be published.167 But the key to the decision was the undeniable maintenance of ultimate control over the contents of the newspaper by the journalism teacher and the school principal.168 Forbes itself, ironically, involved no requirement that permission be

160. Id. at 273–75.
162. Id. at 562.
163. Id. at 555.
165. Id. at 262.
166. Id. at 270.
167. Id. at 268–70.
168. See id. at 269. Pervasive governmental control of the forum can be seen as explaining the result in Jones v. North Carolina Prisoners’ Labor Union, Inc., 433 U.S. 119 (1977), as well. A lower court decision placing primary emphasis on “whether the government has exercised a sufficient degree of control over the forum” is Pocatello Education Ass’n v. Heideman, 504 F.3d 1053, 1066 (9th Cir. 2007).
granted as a condition of access to the forum in question, a one-time televised candidates' debate. Access was allowed, instead, on an "invitation-only" basis.\footnote{Ark Educ. Television Comm’n v Forbes, 523 U.S. 666, 670 (1988).}

We may conclude, then, that most, but not all, of the Court’s precedents support Justice Kennedy’s attempt to explain them in Forbes. Based primarily on Forbes itself, and to a lesser extent Hazelwood, we might also conclude, for the sake of achieving greater descriptive accuracy, that what has mattered, almost always, in the cases in which a denial of access to a forum has been upheld by the Supreme Court, is the presence of a governmental “gatekeeper” of sorts—meaning, a government actor who, either through a process of inviting certain speakers, requiring speakers to obtain permission to speak (and granting it only sometimes), or otherwise exercising ongoing control over the expressive enterprise, made it quite clear that the government did not mean to open the forum to all speakers falling within a particular class. We will return to the question of whether this “gatekeeper” concept provides a workable and sensible basis for distinguishing between designated and limited public fora, on the one hand, and non-public fora, on the other.

III. HOW HAVE THE FEDERAL COURTS OF APPEALS UNDERSTOOD “THE MIDDLE CATEGORY?”

Our understanding of “the middle category”\footnote{The term is commonly used to embrace the designated and limited public forum concepts. See, e.g., Justice for All v. Faulkner, 410 F.3d 760, 765 (5th Cir. 2005).} of governmental forum—focusing primarily on the limited public forum but, of necessity, embracing as well the designated public forum—may be enhanced by a consideration of how federal appellate courts (who have had many more opportunities than has the Supreme Court to address these issues) have dealt with it. What do these courts understand to be meant by the phrase “limited public forum?”\footnote{For a fairly comprehensive review—with a somewhat different focus—of lower court case law in this area, as of 2002, see Fischer, supra note 4, at 657–70. See also Mary Jean Dolan, The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech, 31 HASTINGS CONST. L.Q. 71, 80–100 (2004).} What legal consequences flow from that label? Have lower courts found designated and limited public fora, and, if so, to what extent have they been guided by Justice Kennedy’s opinion in Forbes in reaching such results?
A. Competing Understandings of the Terminology

The federal courts of appeals remain strikingly divided with respect to their understanding of what it means to pin the label "limited public forum" upon a governmentally controlled property or channel of communication. At the risk of over-simplification, these courts can essentially be placed into one of two groups: Those who, like your humble author, are guided by the implications of Perry and Forbes, and those who have been influenced primarily by the misleading statements made in the Rosenberger and Good News Club decisions.

In the first group are, most dependably, the Second and Fourth Circuit Courts of Appeals. The Second Circuit's understanding, dating back more than twenty years, was perhaps best expressed in the following passage from a fairly recent decision:

A subset of the designated public forum, the "limited" public forum, exists "where the government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects." . . . In limited public fora, strict scrutiny is accorded only to restrictions on speech that falls within the designated category for which the forum has been opened. . . . As to expressive uses not falling within the limited category for which the forum has been opened, restrictions need only be viewpoint neutral and reasonable.

The Second Circuit has, moreover, actually utilized this approach.

The Court of Appeals for the Fourth Circuit, while employing uniquely creative (but dispensable) terminology, appears rather clearly to be in agreement with the Second Circuit, as this (necessarily) lengthy excerpt from a fairly recent Fourth Circuit decision reveals:

172. Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986).
173. Hotel Employees & Rest. Employees Union v. City of N.Y. Dep't of Parks & Recreation, 311 F.3d 534, 545-46 (2d Cir. 2002) (citations omitted); accord Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 143 (2d Cir. 2004); Fighting Finest, Inc. v. Bratton, 95 F.3d 224, 229 (2d Cir. 1996); Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991). But see Amidon v. Student Ass'n of State Univ. of N.Y. at Albany, 508 F.3d 94, 100 (2d Cir. 2007); Husain v. Springer, 494 F.3d 108, 121 (2d Cir. 2007); Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 626 (2d Cir. 2005); Gen. Media Commc'n v. Cohen, 131 F.3d 273, 278 n.6 (2d Cir. 1997).
174. Travis, 927 F.2d at 693 ("Travis's program was the same type as a previously permitted use. Even if the forum was limited, Travis, being within the category for which use had been permitted, could not be denied access absent a sufficient constitutional justification.").
When a particular forum is classified as a designated/limited public forum, "[t]wo levels of First Amendment analysis" apply: the "internal standard" and the "external standard." The "internal standard" applies to situations where "the government excludes a speaker who falls within the class to which a designated [limited] public forum is made generally available." In this situation, the government's "action is subject to strict scrutiny." In other words, "as regards the class for which the forum has been designated, a limited public forum is treated as a traditional public forum." On the other hand, the "external standard" "places restrictions on the government's ability to designate the class for whose especial benefit the forum has been opened." We explained that "once a limited forum has been created, entities of a 'similar character' to those allowed access may not be excluded." The government's designation of the class for the "external standard" is "subject only to the standards applicable to restrictions on speakers in a non-public forum," namely that "the selection of a class by the government must only be viewpoint neutral and reasonable in light of the objective purposes served by the forum." 175

And, as in the Second Circuit, this approach has actually been used by the Fourth Circuit. 176

The Third, Eighth, and Federal Circuit Courts of Appeals appear to be in agreement. 177 In addition, panels of the Sixth 178 and Eleventh 179 Circuits,


176. Goulart, 345 F.3d at 251 ("[T]o determine which standard to apply to the Board's exclusion of the plaintiffs in this case, we must determine whether homeschoolers as a group are an entity of a 'similar character' to those groups permitted to use the community centers.").

177. See Preminger v. Sec'y of Veterans Affairs, 517 F.3d 1299, 1311 (Fed. Cir. 2008) (en banc); Bowman v. White, 444 F.3d 967, 976 (8th Cir. 2006); Griffin v. Sec'y of Veterans Affairs, 288 F.3d 1309, 1321 (Fed. Cir. 2002); U.S. v. Goldin, 311 F.3d 191, 196 (3d Cir. 2002); Christ's Bride Ministries, Inc. v. Se. PA Transp. Auth., 148 F.3d 242, 255 (3d Cir. 1998). But see Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 526 (3d Cir. 2004). Note, however (as reflective of the persistent confusion in the use of public forum terminology), that the court in Preminger stated that a "designated" public forum "is an area dedicated by the government for a certain class of speakers." Preminger, 517 F.3d at 1311.

178. Kincaid v. Gibson, 236 F.3d 342, 354 (6th Cir. 2001). This decision can also be understood as having, alternatively, viewed the restriction as content-based and employed strict scrutiny. Id. at 355. See also Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834, 843 (6th Cir. 2000).

179. Rowe v. City of Cocoa, Fla., 358 F.3d 800, 802–03 (11th Cir. 2004); Crowder v. Hous. Auth. of Atlanta, 990 F.2d 586, 591 (11th Cir. 1993).
albeit with far less explication of general doctrinal understanding, have applied time, place and manner analyses to content-neutral restrictions on speech in limited public fora.

In contrast, a number of other federal appellate courts, taking seriously the misleading discussions in *Rosenberger* and *Good News Club,* treat the limited public forum designation as if it were synonymous with "non-public forum"—sometimes even while stating that the "limited public forum is a sub-category of a designated public forum!" A panel of the Court of Appeals for the First Circuit even referred to “a non-public forum (sometimes called a limited public forum)."

Recognizing that lower court judges must defer to the United States Supreme Court when it comes to constitutional pronouncements (at least when they are clear and consistent), one may nonetheless wonder how any reasonable jurist could believe that, in a scheme apparently comprising four categories, two of them—one labeled "limited" and one labeled “non”—are to be treated as exactly the same. What meaning is assigned to the word “limited” if that equation is made? While some of us are inclined to perceive the phrase “limited public forum” in a “positive” way, connoting a place that has been opened to expression, but on a limited basis (a glass half full, if you will) it appears to be possible to think of “limited” as having primarily “negative” connotation, tending to denote that the property is presumptively “closed” to expression (i.e., a glass half empty). Thus, one panel of the Fifth Circuit Court of Appeals stated that “a given forum may be designated for

181. *See supra* text accompanying note 138.
182. *See, e.g.*, Curnin v. Town of Egremont, 510 F.3d 24, 28 (1st Cir. 2007); Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 76 n.4 (1st Cir. 2004) (“We adopt the usage equating limited public forum with non-public forum and do not discuss the issue further.”); Hopper v. City of Pasco, 241 F.3d 1067, 1075 n.8 (9th Cir. 2001) (“This categorization admittedly leads to the strange semantic result that a limited public forum is not actually a public forum.”); Summum v. Callaghan, 130 F.3d 906, 916 n.14 (10th Cir. 2007) (“We use the term ‘limited public forum’ here to denote a particular species of non-public forum . . . .”). Even one commentator has asserted that “the ‘limited public forum’ is a subset of the ‘non-public’ forum.” Dolan, *supra* note 171, at 77. Similar confusion pervades the discussion in Leslie Gielow Jacobs, *The Public Sensibilities Forum,* 95 NW. U. L. REV. 1357, 1370–71 & n.117 (2001). The Ninth Circuit, in particular, has been persistent in taking this approach. Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 969 (9th Cir. 2008); Flint v. Dennison, 488 F.3d 816, 831 (9th Cir. 2007); Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 908 n.8 (9th Cir. 2007); Cogswell v. City of Seattle, 347 F.3d 809, 814 (9th Cir. 2003), *cert. denied,* 541 U.S. 1043 (2004); Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1049 (9th Cir. 2003).
183. *Hopper,* 241 F.3d at 1074.
184. *Ridley,* 390 F.3d at 76.
one class of speaker or speech, and still ‘limited’ with respect to others.”185
But a panel of the Tenth Circuit, using terminology that threatens to com-
plify matters to an intolerable degree, stated that “a designated public forum
for a limited purpose and a limited public forum are not interchangeable
terms,”186 thus giving no meaning to the latter phrase.

B. “Middle Category” Decisions

1. Rulings

The United States Supreme Court, of course, has not found a govern-
mental property to be a limited (or even a designated) public forum since
Widmar in 1981. Dissenting in Cornelius in 1985, Justice Blackmun com-
plained that, given the approach set forth therein, the Court had made “it
virtually impossible to prove that a forum restricted to a particular class of
speakers is a limited public forum.”187 His core reasoning, shared by critics
of the Court’s public forum doctrine, is worth restating:

If the Government does not create a limited public forum unless it
intends to provide an “open forum” for expressive activity, and if
the exclusion of some speakers is evidence that the Government
did not intend to create such a forum, no speaker challenging deni-
al of access will ever be able to prove that the forum is a limited
public forum.188

Was Justice Blackmun right? Has it proven to be virtually impossible
to persuade a court that a governmental property or channel of communi-
cation is a designated or limited public forum? The good (and perhaps surpris-
ing) news, for partisans of freedom of expression, is that it has not.189

185. Justice for All v. Faulkner, 410 F.3d 760, 766 (5th Cir. 2005). The Fifth Circuit has
given hints of agreement with the understanding of “limited public forum” shared by the
Second and Fourth Circuits, but has stopped short of taking such an approach unambiguously.
Id. at 769; Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 347 (5th Cir. 2001). The two opi-
nions cited in this note project, more than anything else, a sense of uncertainty concerning the
terminology. Id. at 345–46; Faulkner, 410 F.3d at 765 n.6.
186. Callaghan, 130 F.3d at 916 n.14.
(Blackmun, J., dissenting).
188. Id. (internal citation omitted). See supra text accompanying note 92.
189. The discussion of cases that follows is not intended to be exhaustive, and is based
primarily on a consideration of federal appellate decisions rendered subsequent to the Su-
preme Court’s 1998 decision in Forbes. Note, too, that cases discussed herein in which the
The number of recent holdings of federal appellate courts indicate that designated and limited public fora do exist.

The public university setting has yielded the most persuasive examples of unlimited designated fora. At least two appellate courts have held the outdoor open areas of such campuses to be designated public fora, but since, in one of those cases, the areas in question appear to have been opened only to members of the university community, the court probably should have found a limited, as opposed to an unlimited, public forum (since the challenger was a student group, the distinction would not have affected the subsequent analysis). In each of these cases, the open nature of the forum was presumptively important, as the court, in each case, went on to find that a content-neutral restriction failed intermediate scrutiny. Another court properly found that a bulletin board on a state university campus, open to use by the general public, was a designated public forum.

Lehman notwithstanding, at least three federal appellate courts have found public-transit system advertising spaces—on the exterior panels of buses or in subway and railroad stations—to be designated public fora. The forum, in each case, might well have been deemed a limited, as opposed to an unlimited forum because, in each, the forum was open only to advertising (admittedly broadly defined) and in one of the cases, the governing policy excluded several categories of ads. (The persuasiveness of these courts' reasoning will be considered in the next section). The court went on to rule in favor of the challenger, on the merits of its First Amendment claim, in each of the three cases; in two of the three, the court found that a content-based exclusion would not withstand strict scrutiny, but found as well in

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190. Bowman v. White, 444 F.3d 967, 979 (8th Cir. 2006); Justice for All v. Faulkner, 410 F.3d 760, 769 (5th Cir. 2005).
191. See Faulkner, 410 F.3d at 768.
192. Id. at 772; Bowman, 444 F.3d at 981–82.
193. Giebel v. Sylvester, 244 F.3d 1182, 1188 (9th Cir. 2001), cert. denied, 534 U.S. 858 (2001). Because the Court went on to find that the removal of the plaintiff’s handbills amounted to viewpoint discrimination, the finding of a designated public forum turned out to be unnecessary to the resolution of the case. Id.
196. United Food, 163 F.3d at 353.
197. Id. at 355; Christ’s Bride Ministries, 148 F.3d at 255.
the alternative, that the exclusion was not even reasonable,\(^\text{198}\) thus rendering
the forum categorization non-dispositive.

Another court held that when city officials extended a general invitation
to artists to display their works in the hallways of city hall, they created a
designated public forum.\(^\text{199}\) (The persuasiveness of this holding will also be
considered in the next section). Again, the court probably should have found
(at most) that a limited public forum had been created, since the forum had
been opened only to works of art (which, however defined, would surely
leave out some other forms of expression); but again, the distinction was
unimportant here because the plaintiffs were indisputably artists. The court
went on to rule that the content-based exclusion of the plaintiffs’ works
failed to satisfy strict scrutiny.\(^\text{200}\)

Appellate courts have also discerned the existence of limited public fora
in the truest and most meaningful sense. An easy example, given the United
States Supreme Court’s decision in \textit{City of Madison}, is a case in which a city
council meeting, at which city residents or taxpayers were permitted to
speak, was deemed to be a limited public forum.\(^\text{201}\) (The court then upheld
what it saw—questionably—as a content-neutral restriction on comments by
nonresidents).\(^\text{202}\) Another good example is a city’s “voters’ pamphlet,”
which was limited to “‘statements by a candidate . . . about the candidate
himself or herself,’”\(^\text{203}\) thus obviously limited by both content and speaker
identity.\(^\text{204}\) (But while the court correctly deemed the pamphlet to be a li-
mited public forum, it incorrectly subjected the content-based limitation to
only the reasonableness level of review, and upheld it).\(^\text{205}\) Yet another good
example is a case involving access to the outdoor areas of a public university
campus, held to be a limited public forum open to members of the university
community but not to outsiders (including the plaintiffs).\(^\text{206}\)

In addition, at least one appellate court found meeting rooms in a county
community center to be limited public fora,\(^\text{207}\) but held that the challengers

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\(^\text{198}.\) \textit{Christ’s Bride Ministries}, 148 F.3d at 255; \textit{United Food}, 163 F.3d at 358.
\(^\text{199}.\) Hopper v. City of Pasco, 241 F.3d 1067, 1081 (9th Cir. 2001).
\(^\text{200}.\) \textit{Id.}
\(^\text{201}.\) \textit{Rowe}, 358 F.3d at 802.
\(^\text{202}.\) \textit{Id.} at 803.
\(^\text{203}.\) Cogswell v. City of Seattle, 347 F.3d 809, 811–12 (9th Cir. 2003) (quoting \textsc{WASH. REV. CODE} \S 29.81A.030(3) (2003)).
\(^\text{204}.\) \textit{Id.} at 814.
\(^\text{205}.\) \textit{Id.} at 814, 818.
\(^\text{206}.\) ACLU v. Mote, 423 F.3d 438, 444 (4th Cir. 2005).
\(^\text{207}.\) Goulart v. Meadows, 345 F.3d 239, 251 (4th Cir. 2003). Another court made the
credible determination that a meeting room in a public library was a limited public forum, but
treated the limited public fora as equivalent to non-public fora, and upheld the exclusion of the
(two families seeking to use the facilities for "homeschooling") did not constitute "an entity of a ‘similar character’ to those groups permitted to use the community centers."208 Another court held that a state’s specialty license plate program was a limited public forum open “to only nonprofit organizations with community driven purposes” that complied with certain additional requirements.209 A far less obvious example of a limited public forum, finally, is a university yearbook, which was deemed to have been opened to the yearbook’s student editors (including the plaintiffs herein).210 The court went on to find that the challenged government action—confiscation and ban on distribution of the yearbook, based in part on its content—failed every level of judicial review, including reasonableness.211

2. "General" or "Selective" Access?

a. Use of the Forbes “Permission” Factor

In the post-Forbes federal appellate cases in which the forum had been opened to some, but not all, speakers, thereby necessitating a ruling as to whether “general” or merely “selective” access had been granted, the “permission” factor identified by Justice Kennedy in Forbes has not been consistently utilized. Some courts have (reasonably) deemed fora to be “non-public,” despite the fact that some speakers had been granted access thereto, with no explicit consideration of the fact that speakers needed permission as a condition of access,212 while other courts have ignored the existence of

plaintiff therefrom. Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 908, 910 (9th Cir. 2007). A comparable decision is Child Evangelism Fellowship of New Jersey Inc. v. Stafford Township School District, in which then-Judge Alito made the defensible finding (with minimal explanation) that a school district’s practice of distributing certain community-group materials to students—through flyers and posting, etc.—had the effect of creating limited public fora. 386 F.3d 514, 526 (3d Cir. 2004). But, per Rosenberger, he then appeared to subject the exclusion of plaintiffs’ materials from these media of distribution to only the lowest level of judicial review, but ultimately found that the exclusion was viewpoint-discriminatory. Id. at 528.

208. Goulart, 345 F.3d at 251.
209. Ariz. Life Coal., Inc. v. Stanton, 515 F.3d 956, 970 (9th Cir. 2008).
210. Kincaid v. Gibson, 236 F.3d 342, 353 (6th Cir. 2001). See also Husain v. Springer, 494 F.3d 108, 125 (2d Cir. 2007) (reaching the same conclusion with respect to a college student newspaper).
211. Kincaid, 236 F.3d at 354–56.
permit requirements in finding that designated fora had been created.\textsuperscript{213} But other courts have given great weight to the permission factor, sensibly finding only selective access—and, accordingly, non-public fora—when permission was required as a condition of access.\textsuperscript{214}

A number of other courts, meanwhile, have addressed the permission factor in ways that both (a) suggest the possibility of some judicial resistance to its influence, and (b) raise questions as to its meaning and utility.

One such case is \textit{Goulart v. Meadows},\textsuperscript{215} in which two “homeschooling mothers” sought to use space at a county community center “for meetings of a geography club and a fiber arts club.”\textsuperscript{216} A written Community Center Use Policy governed access to the county’s community centers, and required written applications for use of any such center to be submitted to a “Recreation Coordinator,” who had “‘the right to refuse or revoke any application not in accordance with’” the Use Policy.\textsuperscript{217} That policy, as modified, did “not permit homeschool instructors to use the community centers to offer homeschool educational classes intended to satisfy state educational requirements.”\textsuperscript{218} The uses for which access was sought in this case were deemed by the Recreation Coordinator to run afoul of that restriction.\textsuperscript{219} So, had the county afforded “general” or merely “selective” access to these community centers? Was it not clear that permission was required, as a condition of such access, thus pointing to the conclusion that access was “selective?” The court thought otherwise, as the following key paragraph reveals:

We are not persuaded that the community centers at issue in this case are non-public fora. First, the Recreation Coordinators at the
community centers make only ministerial judgments because they are allowed to deny an application only if it is "not in accordance with the provisions outlined in the [Use Policy]." In other words, if a proposed user falls within the confines of the Use Policy, the application will be granted. Here, permission to use the community centers is not "selective," but is "granted as a matter of course" to all individuals or groups who fall within the Use Policy. In addition, Calvert County has intentionally made the community centers generally available to certain types of expressive activity. For example, the community centers are open to a wide variety of instructional activities . . . . We classify the community centers as designated or limited public fora and will analyze the restrictions here accordingly.\footnote{220}

The challengers were nonetheless unsuccessful, because the court went on to find, sensibly, that they did not fall within the category of speakers to whom the forum had been opened.\footnote{221} But, given the fact that a formal application for use of community center facilities was required, and that such an application could be (and was, in this case) rejected, was the court’s intermediate conclusion in this case—that the community center was a designated public forum, to which access had been granted on a general basis\footnote{222}—consistent with what Justice Kennedy said in Forbes? His assertion, again, was this: "[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, ‘obtain permission,’ to use it."\footnote{223} Does that not describe the situation in Goulart, or are we to correctly understand that there is no real permission requirement when "permission" is "‘granted as a matter of course’" (to some speakers, at least) by the rules that govern the forum?

Two decisions involving access to public transit systems show even less commitment to the Forbes permission factor as a potentially dispositive criterion. In the first, Christ’s Bride Ministries, Inc. v. Southeastern Pennsylvania Transportation Authority (CBM),\footnote{224} the transportation authority, SEPTA, allowed paid advertising in its rail and subway stations, but rejected an anti-abortion advertisement submitted by the challenger, CBM.\footnote{225}

\footnotesize
220. Goulart, 345 F.3d at 250–51 (citations omitted).
221. Id. at 255.
222. Id. at 251.
224. 148 F.3d 242 (3d Cir. 1998).
225. Id. at 244.
SEPTA's written policy governing such advertising included the following language:

All advertising displays . . . shall be of an appropriate character and quality, and the appearance of all displays shall be acceptable to SEPTA. No libelous, slanderous, or obscene advertising maybe [sic] accepted . . . . All advertising determined by . . . SEPTA, in its sole discretion, as objectionable . . . must not be utilized on any SEPTA vehicle or facility. SEPTA shall have the right to immediately remove any advertising material which has already been applied, in the event that . . . SEPTA deems material objectionable for any reason . . . .

Despite this evidence that SEPTA retained tight control over the forum, the United States Court of Appeals rejected SEPTA's argument that no designated public forum had been created. In doing so, Judge Roth made the following striking assertions:

[T]he fact that SEPTA has reserved for itself the right to reject ads for any reason at all does not signify, in and of itself alone, that no public forum has been created. In [a prior decision], we warned that “standards for inclusion and exclusion” in a limited public forum “must be unambiguous and definite” if the “concept of a designated open forum is to retain any vitality whatever.” . . . [T]he fact that the government has reserved the right to control speech without any particular standards or goals, and without reference to the purpose of the forum, does not necessarily mean that it has not created a public forum.

Looking at SEPTA's past practice, the court found that SEPTA had “accepted a broad range of advertisements for display,” including two advertisements pertaining to the subject of abortion. Judge Roth was thus led to this result:

We conclude then, based on SEPTA's written policies, which specifically provide for the exclusion of only a very narrow category of ads, based on SEPTA's goals of generating revenues through the sale of ad space, and based on SEPTA's practice of

226. Id. at 250–51.
227. Id. at 252.
228. Id. at 251 (citation omitted).
229. Christ's Bride Ministries, 148 F.3d at 251.
230. See id.
permitting virtually unlimited access to the forum, that SEPTA created a designated public forum.\footnote{231}

SEPTA's argument based on its "'tight control' over the forum," and the fact that its permission was required, was explicitly rejected, largely because "at least 99% of all ads [were] posted without objection by SEPTA,"\footnote{232} and those few ads to which SEPTA had previously objected (resulting in their modification) were objectionable for reasons unrelated to the content of CBM's proposed advertisement.\footnote{233} Strict scrutiny was thus called for, but the court went on to hold that the rejection of CBM's advertisement could not even withstand the test of reasonableness.\footnote{234}

The second of these public-transit cases is \textit{United Food & Commercial Workers Union Local 1099 v. Southwest Ohio Regional Transit Authority.}\footnote{235} The transit authority, SORTA, allowed paid advertising on its buses, and had accepted an ad from the union, UFCW, but rejected a second such advertisement submitted by UFCW.\footnote{236} SORTA's advertising policy, according to Judge Moore, "specifically excludes '[a]dvertising of controversial public issues that may adversely affect SORTA's ability to attract and maintain ridership,' and requires that all ads 'be aesthetically pleasing and enhance the environment for SORTA's riders and customers and SORTA's standing in the community.'"\footnote{237}

UCFW's second advertisement, which essentially conveyed a pro-union message, was rejected by SORTA's general manager—"who must approve every wrap-around bus advertisement"—because he deemed it "aesthetically unpleasant and controversial."\footnote{238} The union sued, the District Court entered a preliminary injunction in its favor, and the Court of Appeals affirmed.\footnote{239}

In his opinion for the court, Judge Moore quoted the key pronouncements from Justice Kennedy's \textit{Forbes} opinion, but then proceeded, in essence, to decline to be governed by them, saying this:

Discerning whether the government permits general access to public property or limits access to a select few does not end our inquiry, however, for we must also assess the nature of the forum

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\begin{itemize}
    \item 231. \textit{Id.} at 252.
    \item 232. \textit{Id.}
    \item 233. \textit{See id.}
    \item 234. \textit{Christ's Bride Ministries}, 148 F.3d at 255–57.
    \item 235. 163 F.3d 341 (6th Cir. 1998).
    \item 236. \textit{Id.} at 346–47.
    \item 237. \textit{Id.} at 346 (citation omitted).
    \item 238. \textit{Id.} at 347.
    \item 239. \textit{Id.} at 347, 364.
\end{itemize}
}
and whether the excluded speech is compatible with the forum’s multiple purposes. The government’s decision to limit access to the property is not dispositive in answering whether or not the government created a designated public forum. Rather, we must also examine the relationship between the reasons for any restriction on access and the forum’s purpose. A contrary rule that focused solely on whether a speaker must obtain permission to access government property “would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.”

While the court’s solicitude for freedom of expression is admirable, it is difficult to reconcile this language with the thrust of *Forbes*. Pursuant to a proper understanding of the concept of the limited public forum, moreover, a government actor is permitted to limit access to a designated public forum on the basis of the content of speech. Judge Moore continued his lengthy explication of these matters by positing that “the courts will infer an intent on the part of the government to create a public forum where the government’s justification for the exclusion of certain expressive conduct is unrelated to the forum’s purpose, even when speakers must obtain permission to use the forum.” But it is hard to understand why the government’s justification must be related, somehow, to “the forum’s purpose,” when the Supreme Court has stated repeatedly that the key to the classification of a forum is the government actor’s intent. That perceived requirement, however, played a major role in leading the court to the conclusion that a designated public forum had been created here, as the court—looking past SORTA’s written policy to focus instead on its practices—found “no established causal link” between SORTA’s stated goals “and its broad-based discretion to exclude advertisements that are too controversial or not aesthetically pleasing.” The court was willing to “assume that those seeking access to SORTA’s advertising space must first obtain permission from SORTA, and that this permission is not granted as a matter of course,” and yet still managed to conclude “that in accepting a wide array of political and public-issue speech, SORTA has demonstrated its intent to designate its advertising space a public fo-

240. *United Food*, 163 F.3d at 350–51 (citations omitted).
242. *United Food*, 163 F.3d at 351.
243. See *id.* at 350.
244. *Id.* at 354.
245. *Id.* at 353.
As in the Christ's Bride Ministries case, the court went on to find that the transit authority's action could survive neither strict scrutiny nor the reasonableness test. Judge Wellford, concurring, agreed that the rejection of the union's advertisement was unreasonable, but did not agree with the conclusion that SORTA had created a designated public forum.

A variation on this theme, finally, is the situation in which it appears that no formal permission is required, but a question remains as to whether or not the government actor has retained sufficient control over access to the forum to compel the conclusion that the forum is non-public. Such a case is Hopper v. City of Pasco, in which the plaintiffs were two "artists whose works were excluded from public display at the Pasco City Hall Gallery in Pasco, Washington, because city officials deemed their art too 'controversial.'" Local artists were invited to display their works in the public hallways of a new city hall. While a notice inviting such submissions included the statement that "all works will be screened for content and professional presentation," the Court of Appeals described the situation as follows:

[T]he arts program was run without any pre-screening process, and the city provided no further definition or guidance as to what kind of work would be considered inappropriate. There was no selection process to monitor quality, content, or controversy. As a result, the Arts Council rejected no artwork during the entire length of the program . . . . Nor did the city review works prior to their placement in the gallery.

But the city manager "assumed the Arts Council, [which actually administered the program] would screen for content," and the city manager's assistant "testified that he expected and trusted [the director of the Arts Council] to make sure that no 'offensive or politically-motivated art' would be shown." As it turned out, one plaintiff's sculptures were removed from the display, and the other plaintiff's prints were never displayed—despite having been submitted for display—in both cases because of their potentially offen-

246. Id. at 355.
247. United Food, 163 F.3d at 355–58.
248. Id. at 364–65 (Wellford, J., concurring).
249. 241 F.3d 1067 (9th Cir. 2001).
250. Id. at 1069–70.
251. Id. at 1070.
252. Id. at 1071.
253. Id. at 1071–72.
254. Hopper, 241 F.3d at 1072.
sive content. 255 Had the city created a designated public forum? Despite the written notice indicating that works would be “screened for content,” and despite the undeniable fact that an artist’s work would not actually be exhibited unless the Arts Council chose to display it, the Court (saying nothing explicitly about “permission”) held that a designated public forum had indeed been created, explaining its conclusion as follows:

It is undisputed that Pasco opened its display space to expressive activity by retaining the Arts Council to manage a gallery with exhibitions by local artists. This evinces an intent to create a designated public forum . . . . The city’s so-called policy of non-controversy became no policy at all because it was not consistently enforced and because it lacked any definite standards. Prior to the exclusion of the works at issue here, the city neither pre-screened submitted works, nor exercised its asserted right to exclude works. . . . Given the undisputed facts in the record concerning the selection and screening process for art to be displayed at City Hall (or rather, the lack thereof), we conclude that the city retained no substantive control over the content of the arts program. 256

“Having effectively opened its doors to all comers,” the Court went on to say, the city “has failed to exercise the clear and consistent control over the exhibits in city hall” required to establish a non-public forum. 257 The Court went on to find that the city could not satisfy the requisite strict judicial scrutiny. 258 A dissenting judge, viewing summary judgment in favor of the challengers as inappropriate, did not believe that the record clearly established that a designated public forum had been created. 259

At the lower-court level, then, it seems fair to conclude that Forbes has not, through its emphasis on whether “permission” is needed, provided the kind of bright-line test that it might have appeared to provide. Cases of the kind which I have just described raise serious questions, moreover, as to whether “permission” is an unambiguous, and therefore, workable, concept. Is “permission” required, so that access to the forum should be viewed as “selective” rather than “general,” in every instance in which, due to physically limited resources (because, for example, there are a limited number of buses or rooms in community centers available at any particular time) it is necessary to employ a procedure whereby a speaker must make application

255. Id. at 1073.
256. Id. at 1078.
257. Id. at 1080.
258. Id. at 1081–82.
259. Hopper, 241 F.3d at 1083–92 (Gould, J., dissenting).
for access to the forum at issue? If so, should the fact that permission is technically required lead to a “selective access” conclusion even if permission is always (or virtually always) granted? Should it matter, furthermore, why access might be denied by the governmental gatekeeper, or does it suffice that the system in place contemplates that access may sometimes be denied?

b. Is “Standardless Discretion” Relevant?

As the preceding discussion reveals, courts have at times been influenced in determining whether a designated public forum has been created, by the perception that the relevant government actor has effectively been given unlimited discretion to grant or deny access to the forum in question; the existence of standardless discretion has, in those cases, been held against the government. Thus, in the CBM case, the court reiterated the assertion of an earlier Third Circuit panel that “standards for inclusion and exclusion’ in a limited public forum ‘must be unambiguous and definite’ if the ‘concept of a designated [public] forum is to retain any vitality whatever,”260 and went on, in the process of reaching the conclusion that a designated public forum had been created, to observe that “[t]here is no policy, written or unwritten, pursuant to which CBM’s ads were removed.”261 In the United Food & Commercial Workers case, the court employed some of the language from the CBM opinion to make the same point more explicitly.262 “[I]f the ‘concept of a designated open forum is to retain any vitality whatever,’ we will hold that the government did not create a public forum only when its standards for inclusion and exclusion are clear and are designed to prevent interference with the forum’s designated purpose.”263

In the Hopper case as well, the court quoted the heart of the statement about standards made in the CBM opinion, adding, somewhat cryptically in the midst of its discussion of the forum issue, that “[c]ourts have also been reluctant to accept policies based on subjective or overly general criteria.”264 The theme was echoed in the court’s later statement that “[t]he city’s so-called policy of non-controversy [with regard to the display of art at city hall] became no policy at all because it was not consistently enforced and because

261. Id. at 254.
263. Id.
264. Hopper v. City of Pasco, 241 F.3d 1067, 1077 (9th Cir. 2001).
it lacked any definite standards."^{265} Still later in its discussion of the forum issue, the court said this:

[D]espite its stated policy of avoiding "controversial art," Pasco never established criteria by which to assess whether or not a work would fall within the policy. Instead, application . . . was left entirely to the discretion of city administrators.

The potential for abuse of such unbounded discretion is heightened by the inherently subjective nature of the standard itself. A ban on "controversial art" may all too easily lend itself to viewpoint discrimination, a practice forbidden even in limited public fora.^{266}

The court's conclusion, with respect to the classification of the forum, was, again, that "[h]aving effectively opened its doors to all comers, subject only [to] a standardless standard," the city had failed in its attempt to persuade the court that the art exhibit was a non-public forum.^{267} The existence of standardless discretion thus clearly seemed to bother the court and bolster its conclusion that a designated public forum had been created.

But the question must be asked: Why must the gatekeeper of a governmental forum be limited by definite standards, in the exercise of discretion regarding access to that forum, in order for the forum to be deemed non-public? Indeed, what does the issue of standardless discretion have to do with the ostensibly governing criterion of the government's intent to create, or not to create, an open forum? Forbes itself appears to contradict such reasoning, as reflected in the complaint of Justice Stevens, in his dissenting opinion, that "the Court barely mentions the standardless character of the decision to exclude Forbes from the debate."^{268}

It bears mentioning that the issue of standardless discretion has come into play in yet another way in some lower-court decisions involving public forum determinations—namely, as a basis for finding forbidden viewpoint discrimination. The link between standardless discretion and the potential

^{265} Id. at 1078.
^{266} Id. at 1079.
^{267} Id. at 1080. What the court actually said at this point was that "Pasco has failed to exercise the clear and consistent control over the exhibits in city hall that our cases require to maintain a limited public forum." Id. But it must be understood that, in the Ninth Circuit, the "limited" public forum has been consistently equated with the "non-public" forum. See supra text accompanying notes 180–84.
for impermissible viewpoint discrimination is well-established, as Justice Brennan’s majority opinion in *City of Lakewood v. Plain Dealer Publishing Co.* makes clear:

[T]he absence of express standards makes it difficult to distinguish . . . between a licensor’s legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

The danger of content and viewpoint censorship, he went on to say, “is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.”

According to some federal appellate courts, standardless discretion does not simply create a danger of viewpoint discrimination, but, in essence, amounts to such discrimination, serving as a basis for invalidating a regulatory scheme even in a non-public forum. Thus, in the words of one court, “viewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints.” But it is the exercise of viewpoint discrimination—as opposed to simply the potential therefore—that, according to the Supreme Court, will invalidate a denial of access to a non-public forum. As one court has observed, moreover, “[a]ll of the modern cases in which the Supreme Court has set forth the unbridled discretion doctrine have involved public fora, and no Supreme Court case has suggested that the doctrine is applicable outside the setting of a public forum.” Thus, while judicial wariness of standardless discretion even in non-public fora is commendable, the willingness of some courts to equate such discre-

270. *Id.* at 758.
271. *Id.* at 763.
272. Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five, 470 F.3d 1062, 1069 (4th Cir. 2006); Summum v. City of Ogden, 297 F.3d 995, 1007–09 (10th Cir. 2002); Amandola v. Town of Babylon, 251 F.3d 339, 344 (2d Cir. 2001). See also DeBoer v. Vill. of Oak Park, 267 F.3d 558, 572–74 (7th Cir. 2001).
274. Griffin v. Sec’y of Veterans Affairs, 288 F.3d 1309, 1321 (Fed. Cir. 2002).
tion with viewpoint discrimination must be regarded as highly questionable under prevailing legal doctrine.

IV. CAN A MEANINGFUL "LIMITED PUBLIC FORUM" CATEGORY EXIST?

While lower courts have discerned the existence of designated and limited public fora more frequently than pessimistic readers of pertinent Supreme Court opinions would ever have expected, the questionable nature of some of these rulings, combined with the intrinsic challenge of finding a limited forum to be open to a challenger while faithfully employing a "government intent" standard, cannot help but leave one wondering, still, whether a meaningful and workable "limited public forum" concept can be envisioned. In asking this question, one may benefit by briefly considering, first, whether the overall public forum doctrine makes sense, and, next, whether the "permission" factor highlighted in *Forbes* offers a persuasive basis for distinguishing between closed and open fora.

A. Rationalizing the Public Forum Doctrine

Arguably, the public forum doctrine, overall, does make sense. As an overall body of rules, its primary effect is to presumptively make many governmentally-controlled properties and channels of communication "off limits" to expressive activities by ordinary citizens. In each such case, the government, as the proprietor of property not traditionally or primarily dedicated to speech or assembly, has made the judgment that such expressive activity is not compatible with the intended use of the property. While judicial deference to the government's judgment in this regard is not inevitable, a significant degree thereof is arguably defensible.\(^{275}\) Meanwhile, traditional public fora, as well as private property and privately-controlled channels of communication, remain presumptively accessible to speakers. We are accustomed to "place" limitations on speakers (subject, of course, to intermediate judicial scrutiny, because the restrictions are content-neutral), but the public forum doctrine is special in that it allows even content-based distinctions to be made, in a non-public forum, on the basis of "place" considerations. Even those critics who have urged the Court to employ an approach that approximates a "compatibility" analysis in such cases,\(^{276}\) however, would countenance content discrimination that could not withstand strict scrutiny.

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275. See the discussion of warranted judicial deference to governmental exercise of "managerial authority" in Post, *supra* note 4, at 1809–24.

276. See, e.g., Post, *supra* note 4, at 1765–66. Similarly, Professor Gey has argued for the use of what he calls an "interference" analysis that asks "whether expressive activity would
The governmental property thus made “off limits” to speech is, moreover, made only presumptively unavailable to speakers, as meaningful judicial review is employed even with respect to non-public fora, in which restrictions must satisfy a requirement of “reasonableness.” To a surprising extent, lower courts have put teeth into this seemingly deferential standard, not infrequently striking down denials of access to non-public fora as unreasonable.277 More importantly, the doctrine in fact encompasses significant limitations on discrimination; viewpoint discrimination is forbidden in all settings,278 and content discrimination is presumptively impermissible not only in traditional public fora, but also in any non-traditional forum which a government actor has decided to treat as if it were a traditional public forum.279 Under the proper understanding of the limited public forum concept, moreover, content discrimination is presumptively intolerable within the class of speakers to whom the forum has been opened. Thus, the doctrine, in its entirety, can be seen as balancing deference toward the government as proprietor with an insistence that, at some point, discrimination among speakers is unacceptable.280 Of course, the nondiscrimination principle is undermined, in
large part, by the fact that the government is not required to maintain the openness of a designated public forum, and may limit access to the forum by speech content or speaker identity.

B. Does the "Permission" Factor Make Sense?

The Court's recognition of a "permission" requirement as the hallmark of "selective access," thereby indicating that a forum is "non-public" rather than "designated" (or "limited"), surely fits nicely into a regime that is devoted, above all else, to effectuating the intent of the relevant government actor. The existence of a "gatekeeper," who grants access to some but denies it to others, can be seen as a clear indication of an intent to keep a forum closed. But when the gatekeeper allows some to enter, one could just as easily conclude that the forum is "limited," meaning that it is open to some and closed to others. A "permission" requirement, in other words, is not inescapably an indicator of an intent to maintain a closed forum. One may yet be grateful to Justice Kennedy for his identification of a relatively concrete criterion by which courts are to be guided, in what would otherwise be a largely unstructured process of divining governmental intent. At the same time, it must be recognized that this is a criterion that can only have the effect of reducing the number of instances in which an "open" forum will be found to exist—particularly if every situation in which access to a forum is granted pursuant to a formal application process (as was true even in Widmar itself!) is viewed as one in which "permission" is required, regardless of how often access is denied.

In Forbes, Kennedy defended the Court's "distinction between general and selective access [as one that] furthers First Amendment interests." By not equating selective access with a governmental intent to open a forum, he explained, "we encourage the government to open its property to some expressive activity in cases where, if faced with an all-or-nothing choice, it might not open the property at all." The logic of that suggestion is clear, in the abstract, but is it likely to prove accurate, in reality? Is it not more likely that governmental entities, advised by counsel that they will enjoy more latitude with respect to "forum" determinations if they implement meaningful "permission" requirements so as to grant only "selective" access, will do just

281. Indeed, one commentator has argued, not unreasonably, "that within the parameters of a limited public forum, it is impossible to differentiate between an impermissible content-based . . . restriction on speech and a valid subject-matter-based or speaker-based redesignation of the forum." McGill, supra note 4, at 939.


283. Id.
that? Would not a city that wished to invite local artists to submit their works for display at city hall, for example (as in the *Hopper* case, discussed above), likely employ a regime pursuant to which every submission would be screened on the basis of content?

C. *Can the “Limited Public Forum” Be Salvaged?*

The difficulties attending the concept of the limited public forum, even when that concept is properly understood, are clear. While Justice Blackmun’s complaint that the category had effectively been eliminated may have been overstated, the fact remains that instances of governmental fora opened to certain categories of speaker, in which the excluded speaker is seen as falling within the class to whom the forum was intended to be opened, are likely to be rare. Even when a court is prepared to conclude that “general access” to a forum has been extended to a class of speakers, that decision will likely lead to a second difficult determination as to whom it has been opened—i.e., how shall the favored class be defined? In *Widmar*, the Court found that the university classrooms had been made available to registered student organizations, but why did the Court not conclude that the facilities had been opened only to *non-religious* student organizations? In *Forbes*, the Court found that the televised debate had been opened to *serious* Congressional candidates, but why did the Court not conclude that it had been opened to all Congressional candidates?

The challenge of defining the forum is nicely illustrated by an exchange between Justices Breyer and Kennedy, in dictum, in a 1996 decision, *Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*. Writing for a plurality of four Justices, Breyer had occasion to offer the following comment:

284. *See supra* text accompanying notes 248–58.
285. *See PETA, Inc. v. Gittens*, 414 F.3d 23, 28–31 (D.C. Cir. 2005), in which the exercise of tight governmental control over the selection of sculptures to be featured in a public art project—and the rejection of one of plaintiff’s designs—was upheld as an exercise of “government speech”; forum analysis was deemed wholly inapplicable in this context. A similar ruling, in the context of specialty license plate programs, is *ACLU of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2006). *But compare* Ariz. Life Coal. Inc. v. Stanton, 515 F.3d 956, 963–68 (9th Cir. 2008), and *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004). *See also* Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000). For a discussion of the relationship of “government speech” to forum analysis, see generally Dolan, *supra* note 171.
It is plain from this Court’s cases that a public forum “may be
created for a limited purpose.” Our cases have not yet determined,
however, that [the] government’s decision to dedicate a public
forum to one type of content or another is necessarily subject to
the highest level of scrutiny. Must a local government, for exam-
ple, show a compelling state interest if it builds a band shell in the
park and dedicates it solely to classical music (but not to jazz)?
The answer is not obvious. 287

Justice Kennedy (joined by Justice Ginsburg), in a separate opinion, re-
sponded to Breyer as follows:

I do not foreclose the possibility that the Government could
create a forum limited to certain topics or to serving the special
needs of certain speakers or audiences without its actions being
subject to strict scrutiny. This possibility seems to trouble the plu-
rality, which wonders if a local government must “show a compel-
ling state interest if it builds a band shell in the park and dedicates
it solely to classical music (but not to jazz).” . . . This is not the
correct analogy. [Our case is] more akin to the Government’s cre-
ation of a band shell in which all types of music might be per-
formed except for rap music. 288

Were a case to arise, then, in which a governmental band shell was made
available only to musicians playing classical music, and a challenge was
brought by an excluded jazz musician, how should the forum (assuming the
challenger could even surmount the hurdle of persuading the court that it was
a limited as opposed to a non-public forum) be described? Would it be open
to all musicians, or open only to classical musicians? If the latter, then the
“open” character of the forum would be of no avail to the excluded jazzman.

Perhaps the key to salvaging a meaningful limited-public-forum catego-
ry is to employ two distinctions, in those cases in which the forum has clear-
ly been opened to some speakers: a distinction between speaker identity and
speech content, and a distinction between a government actor’s “primary”
and “secondary” intentions. The first of these distinctions is predicated on
the fact that, while the limited public forum was initially defined as one
“created for a limited purpose such as use by [different] groups . . . or for the
discussion of certain subjects,” 289 there is a difference between discrimina-

287. Id. at 749–50 (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S.
37, 46 n.7 (1983)) (citations omitted).
288. Id. at 802 (Kennedy, J., concurring in part and dissenting in part).
289. Perry, 460 U.S. at 46 n.7 (1983).
tion on the basis of speaker identity and discrimination based on the content of speech. Coupling that distinction with a determination of “primary” and “secondary” intentions, while far from a fully comfortable approach, may just be the only way to escape from the intrinsic tautology of dividing the open or closed nature of a forum based on an assessment of governmental intent.

The suggested approach would work as follows: When a court is persuaded that the primary intention of the relevant government actor is to make a forum available to a particular category of speakers, defined without reference to the content of their speech, and that a secondary intention is to block access to a member of the favored category based upon the content of his speech, the forum should be deemed a limited public forum and the content-based restriction should be subjected to strict scrutiny. Thus, Widmar may be understood as implicitly based upon the understanding that the university’s primary intention was to make its facilities available to student organizations, to which was added a less important, secondary intention to bar student organizations engaging in religious speech; the distinction based on speaker identity (student organizations versus the rest of the world) reflected the university’s dominant intention. In contrast, Lehman and Greer, to take just two additional examples from Supreme Court cases, were each situations in which the primary intention of the relevant government actor was to bar speech of a certain content (political campaign advertising and political campaign speech, respectively), regardless of speaker identity. Compare Perry, in which the school district’s primary intention was to discriminate based on speaker identity (in favor of the certified bargaining representative) rather than speech content, but the excluded speaker did not fall within the favored class of speakers. Focusing on these distinctions may, just possibly, provide a principled basis for requiring access by speakers to limited public fora.

V. PRAYER FOR RELIEF

More than ten years have passed since the Supreme Court last decided—in Forbes—whether a governmentally controlled channel of communication was or was not an open forum for expression. The Court has, in that span of time, declined on several occasions to hear cases that would provide it with the opportunity to do so again,290 despite the undeniable existence of

conflict within the federal courts of appeals concerning the proper understanding and treatment of the "middle category" of governmental fora. Meanwhile, the mystery of the legal significance of that middle category—and, in particular, the limited public forum—persists, along with the steady flow of cases which require, for their resolution, a decision as to whether or not the forum in question has been opened for expressive purposes. The uncertainty surrounding this body of First Amendment doctrine cries out for resolution.

Therefore, your humble author beseeches the Court to grant certiorari, soon, in a case that will afford it the opportunity to clarify the following points: When does a limited public forum exist? What is the legal significance of that designation? If, as Forbes suggests, the need for speakers to obtain "permission" as a condition of access to a forum is the key to the distinction between "general access" (in which the case the forum is a "designated" public forum of some kind) and "selective access" (in which case the forum is "non-public," or closed), what does it mean to say that "permission" is required? What is the relevance (if any), for this analysis, of a grant of standardless discretion to the relevant government actor? If, finally, the existence of a limited public forum is ever to support a claim of access by a speaker who has been excluded by the relevant government actor, how is a court to decide—once it decides that the forum has been opened to some speakers—how to identify the class of speakers to whom it has been opened? To the extent that these questions can be answered in a way that maximizes opportunities for expression in governmentally-controlled fora, the clarification of doctrine prayed for herein will be even more welcome. But, above all, give us clarity, please.


291. The persistent denial of certiorari in cases of this kind is particularly striking in light of the fact that Chief Justice Roberts (speaking in May 2007) reportedly offered, as one explanation for the Court's smaller docket in recent years, "fewer conflicts among the circuits." Marcia Coyle, Justices' Homestretch Packed, 29 Nat'l L.J., June 4, 2007 at 17.
2007-2008 Survey of Juvenile Law

Michael J. Dale*

I. INTRODUCTION ................................................................. 357
II. DEPENDENCY ....................................................................... 357
III. TERMINATION OF PARENTAL RIGHTS ......................... 369
IV. PERMANENT GUARDIANSHIP ......................................... 374
V. JUVENILE DELINQUENCY ................................................. 375
VI. THE RIGHTS OF UNWED BIOLOGICAL FATHERS ............. 387
VII. OTHER MATTERS ............................................................. 388
VIII. CONCLUSION ................................................................. 391

I. INTRODUCTION

Unlike in prior years when the Supreme Court of Florida was active in the juvenile law area, this year, there is not much to report from the high court with two exceptions. On the other hand, the intermediate appellate courts and the Second District Court of Appeal, in particular, continue to be active in several respects. They continue to provide guidance with statutory interpretation of Chapters 39 and 985 as well as to reverse when trial courts make clear mistakes regarding evidentiary matters.

II. DEPENDENCY

Domestic violence has been the subject of dependency proceedings in the Florida courts for a number of years. Chapter 39 specifically recognizes domestic violence as grounds for dependency describing it as harm that can take place when a person "[e]ngages in violent behavior that demonstrates a wanton disregard for the presence of a child and [can] reasonably result in serious injury to the child." However, domestic violence is limited in a dependency proceeding by the proposition that the harm that takes place must occur in the presence of the child. The child must see the violence and be

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aware of it. The proof may be more than the child’s presence when the domestic violence occurs. Finally, the violence must result in some mental, physical, or sexual injury to the child or “prospective abuse” that is imminent.

In the second domestic violence situation, the test is whether, when the parents’ behavior occurs, it must be shown that there is a “nexus” between that behavior and the State’s assertion of prospective abuse as to the children. These issues came up in a pair of cases involving the same family in the Second District Court of Appeal in *L.R. v. Department of Children & Family Services* and *J.C. v. Department of Children & Family Services.* One of these reported cases involved the father and the other involved the mother. In each case, the appellate court found that the Department of Children and Families (DCF) did not introduce any evidence that either parent engaged in domestic violence after the children were born. In fact, all of the domestic violence occurred years before the dependency trial took place. Thus, the court found, as to the father, that the findings were speculative and unsupported. As to the mother, the DCF alleged, inter alia, that the mother placed the children “at substantial risk of imminent abuse” because she failed to protect them from an abuser even where the child was not previously abused. Starting with the proposition that there was not evidence that any of the children had been injured in any way, the court held that, nonetheless, there was no nexus shown between the parents’ behavior and prospective abuse. It held that, in failure to protect situations, there are

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5. FLA. STAT. § 39.01(2); see also M.B. v. Dep’t of Children & Family Servs., 937 So. 2d 647, 648 (Fla. 2d Dist. Ct. App. 2004); D.D., 773 So. 2d at 617–18.
6. FLA. STAT. § 39.01(15)(f).
8. 947 So. 2d 1240 (Fla. 2d Dist. Ct. App. 2007).
10. Id. at 1247.
11. Id. at 1247; L.R., 947 So. 2d at 1242–43.
12. J.C., 947 So. 2d at 1247; L.R., 947 So. 2d at 1244.
13. J.C., 947 So. 2d at 1248; L.R., 947 So. 2d at 1243–44.
14. J.C., 947 So. 2d at 1250.
15. L.R., 947 So. 2d at 1244–45.
16. J.C., 947 So. 2d at 1250; L.R., 947 So. 2d at 1245.
two nexuses that must be proven—the acts of the abuser shows that he or she will continue the abuse and "the parent’s behavior shows that he or she will continue [to fail] to protect the child." 17 Under the facts of the case, neither of these was proven. 18

Finally, in the case involving the mother, the court ruled on an evidentiary matter worth expressing. 19 The DCF had offered documents in evidence alleging violence after the children’s birth. 20 It was the father’s written petition seeking a domestic violence injunction against the mother in which he alleged, by checking a box, that the incidence took place in the presence of the children. 21 At trial, he testified that he checked the box inadvertently. 22 The trial court found his explanation not credible. 23 The appellate court found the document was hearsay and, while there is an exception to hearsay "if the declarant testifies at trial, is subject to cross-examination concerning the statement, and ‘the statement is inconsistent with the declarant’s testimony [at trial,] and was given under oath . . . at a trial, hearing, or other proceeding or in a deposition,’” it may be used. 24 However, the written statement here was not made in a matter described in the Florida Rules of Evidence. 25

The limitation on domestic violence being grounds for dependency, even in the presence of a child, was also before an appellate court in J.S. v. Department of Children & Families. 26 In that case, there was an incident which "occurred when the child was only a few weeks old." 27 The mother "raised her hand" to the father during an argument. The father twisted her arm, took the child from the mother’s other arm, and left the residence with the child. 28 The appellate court held that while there was an acrimonious relationship between the parents, they were now separated and there was no evidence that the child was affected by the incident of domestic violence. 29

17. L.R., 947 So. 2d at 1245.
18. Id.
19. See id. at 1244.
20. See id.
21. Id.
22. L.R., 947 So. 2d at 1244.
23. Id.
24. Id. (emphasis omitted).
25. Id.
26. 977 So. 2d 705, 706 (Fla. 5th Dist. Ct. App. 2008).
27. Id. at 706.
28. Id.
29. Id. at 707.
The appellate court thus, reversed the finding of dependency as to the father. 30

In a third domestic violence dependency case, M.B. v. Department of Children & Family Services, 31 the Second District Court of Appeal was faced with a situation where there was a single incident of domestic violence in the presence of the children, but where there was no evidence that the children suffered any physical or mental harm as a result of witnessing the act or that the parents posed any current threat of harm to the children. 32 Under the facts of the case, “the [f]ather knocked the [m]other down several times, punched her in the chest, and kicked at her legs” after learning that she “was cheating on him.” 33 The young children were in the room and witnessed the events. 34 At the dependency hearing, the mother testified that the father had never hit her before during their eight-year relationship, and did not touch her since. 35 Subsequently, the father and mother ended their relationship and were currently involved in other relationships and there was no evidence that the father had engaged in any inappropriate harm toward the children. 36 Thus, there being no evidence that the safety and well-being of the children would be threatened if they were placed in their father’s care, there was insufficient evidence to make a finding of dependency. 37

In M.B., the Second District Court of Appeal ruled in a domestic violence dependency case interpreting what it means for the domestic violence to occur in the presence of the child. 38 It held that the “‘presence’ of the child must be something more than physical proximity.” 39 There must be “evidence that the child sees or is aware of the occurrence of the domestic violence.” 40 Thereafter, there must be a showing of “some physical, mental or sexual injury to the child” and that the parent’s harmful behavior must present a present risk to the child based upon current circumstances. 41 Under

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30. Id.
31. 937 So. 2d 709 (Fla. 2d Dist. Ct. App. 2006).
32. Id. at 712.
33. Id. at 710.
34. Id.
35. Id.
36. M.B., 937 So. 2d at 710.
37. Id. at 711.
38. Id.
39. Id.
40. Id.
41. M.B., 937 So. 2d at 711 (citing B.C. v. Dep’t of Children & Families, 846 So. 2d 1273, 1274 (Fla. 4th Dist. Ct. App. 2003)).
the facts of the case there simply was no evidence that the child was aware of
the violence that occurred.\textsuperscript{42}

The nexus test described previously in the context of domestic violence
dependency cases can also arise in other factual scenarios. For example, in
\textit{G.R. v. Department of Children \& Family Services},\textsuperscript{43} both parents appealed
from an adjudication of dependency as to a daughter, and the mother ap-
pealed as to the daughter and her two sons by her former husband who was
not a party to the proceeding.\textsuperscript{44} The underlying facts of the case are signifi-
cant. The parents took a three year old son of the mother to the hospital after
the father, who had noticed that the child "had wet his pants, . . . lifted the
child . . . off the bed [and] swung him around, [and as he did so] heard a loud
pop."\textsuperscript{45} At the hospital, it was determined that the child had suffered a spiral
fracture of his left arm and the matter was reported to the DCF.\textsuperscript{46} As a result,
the child who was injured and his sibling, and the couple's daughter, who
was born after the incident, were sheltered.\textsuperscript{47} The Second District Court of
Appeal reversed as to the daughter and the uninjured son finding that the
evidence was not legally sufficient to support the finding that the mother
failed to protect the daughter or the other children from the father's abuse,
and that DCF "failed to establish a nexus between the [f]ather's abuse of [the
stepchild] and prospective abuse [of his daughter]".\textsuperscript{48} The test for whether
the mother, as the initially non-offending party, may be held accountable in
dependency is that the parent must have allegedly failed to protect the child
in that the parent "knew or should have known" that the abusive parent was
engaging in the abuse.\textsuperscript{49} DCF conceded that there was no evidence that the
mother knew or should have known that the father constituted a danger to the
baby daughter and that the mother failed to protect their baby daughter.\textsuperscript{50}
Similarly, "there was no evidence that the [m]other knew or should have
known [that] the [f]ather had a propensity toward abuse" as there had been
no prior incident.\textsuperscript{51} Thus, there could be no showing that the mother failed to

\begin{itemize}
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} 937 So. 2d 1257 (Fla. 2d Dist. Ct. App. 2006).
\item \textsuperscript{44} \textit{Id.} at 1259.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{G.R.}, 937 So. 2d at 1263.
\item \textsuperscript{49} \textit{Id.} at 1262–63; \textit{see also} A.B. v. Dep't of Children \& Family Servs., 901 So. 2d 324, 327 (Fla. 3d Dist. Ct. App. 2005); A.R. v. Dep't of Children \& Family Servs., 876 So. 2d 647, 648 (Fla. 2d Dist. Ct. App. 2004).
\item \textsuperscript{50} \textit{See G.R.}, 937 So. 2d at 1262.
\item \textsuperscript{51} \textit{Id.}
\end{itemize}
protect the child who was injured by her father. And finally, there must be a nexus between abuse and the prospective abuse to the sibling. None of this applied to the mother but as to the father, there was just a single incident of abuse. There was "no evidence [of] any psychological condition" of the father that might indicate ongoing abuse. And "there was no evidence of any other incident[] of abuse to any of the children." Thus, there was no nexus between the abuse of the one child and the others. The appellate court, therefore, reversed the adjudicatory disposition as to the father and the young daughter and as to the mother, as to all three children.

A second case involving a dependency proceeding charging domestic violence and the issue of presence of children in order to substantiate the charge is *M.M. v. Department of Children & Families*. In this case, DCF alleged that the mother was not willing or able to protect the child because she "failed to follow through with a restraining order against the father after . . . two incidents of domestic violence against" the mother. The father had been arrested twice but the mother refused to testify at trial. There was also an additional incident where the father broke into the mother’s home,” was drunk, and the mother sought and obtained a temporary restraining order. None of these incidents occurred in the presence of the child. Because the trial court’s judgment established that the dependency proceeding was based solely on the “domestic acts involving violence, or the threat of violence committed outside . . . the presence of the child,” and because the undisputed testimony by the mother that she “prevented the father from having any contact with” the child in the two situations, and there was no evidence that the mother’s “failure to extend the restraining order constitute[d] imminent harm to” the child, the court reversed.

It is possible to prove dependency based upon acts of domestic violence that occur outside the presence of the children. As described earlier in this

52. Id.
53. *Id.* at 1262–63 (citing C.M. v. Dep’t of Children and Family Servs., 844 So. 2d 765, 766 (Fla. 2d Dist. Ct. App. 2003)).
54. *Id.* at 1263.
55. G.R., 937 So. 2d at 1263.
56. *Id.*
57. *Id.*
58. *Id.*
59. 946 So. 2d 1287, 1288 (Fla. 4th Dist. Ct. App. 2007).
60. *Id.*
61. *Id.* at 1289.
62. *Id.*
63. *Id.*
64. *M.M.*, 946 So. 2d at 1290.
survey, it can be done if there is a showing that the acts of domestic violence create an imminent risk of harm to the children. In *C.J. v. Department of Children & Families*, the issue was whether incidents of domestic violence can rise to the level of a risk of imminent neglect of the child. In that case, "[t]he first incident resulted in the mother seeking a restraining order; the second involved cuts and bruises and the mother being hospitalized; and the third incident involved... [the husband] grabbing and holding [the mother's] sister, smashing car windows, and breaking [the] glass coffee table [with all of] the children in the same or adjacent rooms." The mother suffered serious injuries and the sister called the police. The court concluded that the finding of dependency was proper in that there were "multiple incidents of ongoing and substantial domestic violence with [the] children present" at the house in a short period of time which created "a risk of imminent neglect."!

However, there has to be competent evidence of the domestic violence as defined by Florida law. Under the facts of the case, in *T.S. v. Department of Children & Families*, involving claims of domestic violence perpetrated by the father, the appellate court held that the mother's "two applications for domestic violence injunctions" did not result in the issuance of a restraining order and the other incident in which the father and mother were involved in a commotion at the mother's house in which the father was combative when the police arrived and threw a chair which hit the door of the house, did not constitute legally sufficient demonstration of domestic violence. The appellate court thus reversed.

As the Second District Court of Appeal said in *M.C. v. Department of Children & Family Services*, the law relating "to prospective harm to one child by a parent based upon" the abuse and neglect or abandonment as to another is well-settled. In *In Re M.F.*, the Supreme Court of Florida had

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65. 968 So. 2d 121 (Fla. 4th Dist. Ct. App. 2007).
66. Id. at 122.
67. Id. at 124.
68. Id.
69. Id. at 125.
70. See Fla. Stat. § 741.28(2) (2008) ("'Domestic violence' means any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any [other] criminal offense resulting in physical injury or death of one family or household member by another family or household member.").
71. 944 So. 2d 1049 (Fla. 4th Dist. Ct. App. 2006) (per curiam).
72. Id. at 1050–52.
73. Id. at 1049.
74. 936 So. 2d 764 (Fla. 2d Dist. Ct. App. 2006).
75. Id. at 765.
originally required that the evidence necessary to prove dependency as to other children required more than a finding as to a child against whom injury had occurred. The court required additional proof establishing a nexus between the prior abuse and the prospective abuse of the sibling recognizing that a flexible test was required. The intermediate appellate courts have further amplified the opinion by describing what the nexus requires. For example, a parent who suffers from "a mental or emotional condition that will continue [as in the case of] mental illness, drug [abuse], or pedophilia [makes] it highly probable that" the parent in the future will abuse or neglect another child. The court applied these principles in M.C., where a stepfather who had abused an eleven-year old child of the mother by a previous marriage appealed from an adjudication of a second child, his natural child by the mother.

The testimony generating a nexus between the alleged offense of sexual abuse of the other child, which was hotly contested, in M.C., was the testimony of a sexual abuse expert. The expert "testified that there are three [ways] by which adults who sexually abuse a child may recidivate against another child," but that the appellant father did not meet any of the three "pathways" tests and that risk was not imminent to the other child. However, the expert was asked whether, if the court found that the first child was a victim of sexual abuse, did the expert believe that there was "a substantial risk that if untreated, [the father] could commit an act . . . of sexual abuse against his own child," to which the expert answered "correct." The appellate court rejected this hypothetical question and answer as the basis for the finding of nexus. It did so because the Florida test for nexus is more than a finding of a "sexual abuse of one child creat[ing] a substantial risk of abuse to another child." The fact that it arises in the context of testimony by an expert witness does not disguise it as a per se rule rejected by the Supreme Court of Florida.

76. 770 So. 2d 1189 (Fla. 2000) (per curiam).
77. Id. at 1194.
78. Id.
80. M.C., 936 So. 2d at 764.
81. Id. at 765.
82. Id. at 767.
83. Id.
84. Id. at 767–68.
85. See M.C., 936 So. 2d at 768.
86. Id.
The intermediate appellate courts also decided a series of procedural issues during the past two survey years. In what can only be described as an extraordinary failure to comply with rudimentary due process, a trial court found a child dependent as to the mother, based upon the proffers made by the DCF lawyer and the parent’s lawyer and a short colloquy with the mother in *A.G. v. Department of Children & Families.* At the start of an adjudicatory hearing, the mother’s lawyer told the court the following: “Seriously, I would truly be happy to have—DCF’s attorney—proffer his evidence as to what he believes makes this child dependent, and I’ll proffer mine and let you make a decision.” Apparently taking the lawyer at the lawyer’s word, and after addressing the mother directly and hearing her answer in which she said that she had “more than enough evidence to prove that” she took care of her son, the court found the child dependent. As the appellate court noted in reversing, “there was no evidence, no sworn testimony, and no stipulated facts presented to the trial court at [that] hearing.”

In a second case, albeit in the adoption law setting, involving the failure to receive evidence and move immediately to a finding, a trial court heard opening statements in an unfitness proceeding under the state adoption law, asked the lawyers to proffer evidence, and at the conclusion of opening statements granted the motion to dismiss with prejudice and entered final judgment for the respondent. In *A.N. v. M.F.-A.*, the appellate court held that the dismissal of a “petition with prejudice based upon a proffer of testimony by the attorneys in their opening statements . . . prior to the completion of appellants’ case” was a violation of due process and thus there should be a

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87. 938 So. 2d 606 (Fla. 5th Dist. Ct. App. 2006).
88. Id.
89. Id. at 606–07.
90. Id. at 607.
91. Id. at 607 (citing *Lane v. Lane*, 599 So. 2d 218, 219 (Fla. 4th Dist. Ct. App. 1992)). In addition, the appellate court then added that even if the parent’s attorney had proffered facts to demonstrate dependency, the trial court should determine whether such an “admission or consent to a finding of dependency was made voluntarily and with a full understanding.” *A.G.*, 938 So. 2d at 607. If the parent’s lawyer proffered testimony that would constitute grounds for dependency, the appellate court held that there still have to be an admission or consent of the findings by the parent. Id.
93. Id. at 58.
reversal. Under the Florida Rules of Civil Procedure, the appellate court noted, the motion for judgment for a directed verdict must occur after the party seeking affirmative relief has had an opportunity to present evidence.

The right to present evidence is also provided for earlier in a dependency proceeding, at the shelter care hearing stage. In *L.M.C. v. Department of Children & Families*, the appellate court reversed the trial court’s denial of the parents’ “request to present evidence on the issue of probable cause” at the shelter care hearing. In a brief opinion, the Fifth District Court of Appeal reaffirmed the proposition “that parents have a statutory right to present evidence contesting probable cause at shelter [care] hearings.”

Perhaps most disturbing among the cases reported here concerning due process procedures is *C.J. v. Department of Children & Families*. In that case, DCF alleged that the child was at a “substantial risk of imminent threat of harm . . . or imminent neglect . . . arising out of [the father’s] history of domestic violence against the mother.” DCF conceded before the appellate court “that the trial court erred in making a ‘blanket ruling’ admitting hearsay under the assumption that hearsay ‘is permitted in dependency matters.’” Noting that the trial court has “discretion to rely upon hearsay” in such matters as shelter hearings, at the adjudicatory stage the Florida statute on point is crystal clear: “[a]djudicatory hearing[s] shall be conducted by the judge . . . applying the rules of evidence in use in civil cases.” In what can only be described as a polite understatement, the appellate court held “thus, the trial court erred in admitting, and relying upon, inadmissible hearsay testimony at the adjudicatory hearing.”

Rights of a parent as to whom no dependency finding was made were before the court in *C.K. v. Department of Children & Families*. The father appealed “from an order finding him unfit for placement of [his] minor child” and required him to comply with requirements of the Interstate Com-

94. *Id.* at 60.
95. *Id.* (citing Fla. R. Civ. P. 1.420(b)).
97. *Id.*
98. *Id.*
99. *Id.* (citing A.M.T. v. Dep’t of Children & Families, 890 So. 2d 551, 552 (Fla. 5th Dist. Ct. App. 2005); S.M. v. Dep’t of Children & Families, 890 So. 2d 552, 552 (Fla. 5th Dist. Ct. App. 2005) (per curiam)).
100. 968 So. 2d 121 (Fla. 4th Dist. Ct. App. 2007).
101. *Id.* at 122 (citing Fla. Stat. § 39.01(30), (43) (2006)).
102. *Id.*
103. *Id.* (quoting Fla. Stat. § 39.507(1)(b) (2006)).
104. *Id.*
105. 949 So. 2d 336, 337 (Fla. 4th Dist. Ct. App. 2007).
The appellate court found that while the trial court in a dependency case does have "authority to require a non-offending parent to participate in treatment and services," the evidence must be sufficient to require such obligations. However, the court's order requiring the father to comply with Interstate Compact on the Placement of Children was affirmed because that statute does apply where "the court is transferring custody of the child to an out of state non-custodial parent," which was the case in the matter before the appellate court in C.K.

Complying with principles of service of process in a dependency proceeding would seem simple enough. However, compliance with service rules was before the Third District Court of Appeal in N.L. v. Department of Children & Family Services. Under Florida law, service of process must be either personally on the "parent who can be located" or by a showing of "diligent search and [an] inquiry for a parent who cannot be located." In N.L., "there was no personal service of the . . . petition on the mother and [there was] no affidavit of diligent search." Thus, there was a failure to comply with the statute. Significantly, the appellate court rejected Department's argument "that service of the dependency petition on the mother's counsel was effective to accomplish . . . service on the mother." Further, the fact that the summons in the dependency proceeding "contained a warning that failure to respond or appear at the hearing constitutes consent to an adjudication" does not dispense with the obligation of the State to serve the petition. Thus, the appellate court reversed.

Parents have the right to counsel by statute in Florida in dependency proceedings as well as in termination of parental rights cases. In S.K. v. Department of Children & Families, a father, in prison for life, appealed from a trial court order adjudicating his child dependent, arguing "that the trial court" failed to provide him with "an attorney ad litem to represent him during the proceedings."
when he was indisputably incompetent,” and thus denied him due process.\textsuperscript{118} The appellate court affirmed, finding that the father was represented by counsel through the entire proceeding and that the proceeding “could not be delayed to await” the father’s restoration of competency.\textsuperscript{119} The appellate court recognized that the trial court was faced with two propositions: First, the protection of the child as well as the parent; and second, the obligations of the lawyer representing a client under a disability pursuant to the \textit{Florida Rules of Professional Conduct.}\textsuperscript{120}

The appellate court first held that the rights of the parents “must yield to the needs of the children.”\textsuperscript{121} The court then discussed at length the obligation of counsel to a client under a disability.\textsuperscript{122} The court recognized that “[t]here is no provision in any [law] for the appointment of an attorney ad litem for a parent” although such a provision does apply for children.\textsuperscript{123} The rationale, according to the appellate court was quite simple—“[p]arents are already provided with attorneys.”\textsuperscript{124} Further, the appellate court recognized that the attorney ad litem for a child performs the duty of an attorney and the parent already has an attorney.\textsuperscript{125}

The court then recognized that the possible remedy would have been the “appointment of a guardian for an incompetent person, . . . even within a dependency proceeding.”\textsuperscript{126} However, this did not occur in this case.\textsuperscript{127} The court thus concluded that the parent was represented by obviously competent counsel and affirmed.\textsuperscript{128}

Cases involving corporal punishment have regularly been reported upon in this survey.\textsuperscript{129} However, the law is clear that “one incident of corporal punishment, even when [the] parent’s behavior is uncontrolled, [does not

\begin{itemize}
\item \textsuperscript{118} \textit{Id.} at 1210.
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{Id.} at 1211–13 (quoting \textit{FLA. BAR R. PROF. CONDUCT} 4-1.14).
\item \textsuperscript{121} \textit{Id.} at 1212 (quoting \textit{L.M. v. Dep’t of Children & Families}, 946 So. 2d 42, 46 (Fla. 4th Dist. Ct. App. 2006)).
\item \textsuperscript{122} \textit{S.K.}, 959 So. 2d at 1212–13.
\item \textsuperscript{123} \textit{Id.} at 1213 (citing \textit{FLA. R. JUV. P.} 8.217).
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{S.K.}, 959 So. 2d at 1213
\item \textsuperscript{128} \textit{Id.}
\end{itemize}
suffice] to support a dependency adjudication."  

This was the issue before the court in *E.S. v. Department of Children & Families.* The appellate court reversed a finding of dependency based upon a single act of “inappropriate or excessively harsh corporal punishment” because there was only one instance. The appellate court held that the facts did not support a finding of dependency based upon the single act. Then it added, “[h]ere, the trial court conceded that it was not following the correct law, as it acknowledged the case law in its tentative oral ruling, but stated that it disagreed with the case law.”

III. TERMINATION OF PARENTAL RIGHTS

The test for termination of parental rights in Florida, as in other jurisdictions, requires the trial court to make two findings. The first is to prove a statutory ground in abuse, neglect or abandonment. The second is a determination that termination is in the best interest of the child. In *K.W. v. Department of Children & Family,* a father whose parental rights were terminated and who had been “convicted on nine counts of sexually abusing his” children and his stepchildren, as well as others, and was “serving three consecutive life sentences” appealed from the termination order. He claimed that the court failed to consider his mother who lived in Tennessee and who indicated an interest in looking after the children for a long-term placement, as a less restrictive means short of termination of parental rights. Florida recognizes that “[t]he least restrictive means test requires that measures short of termination” of parental rights be undertaken “if they would enable the child to reunite safely with the parent.” However, the least restrictive alternative test does not apply after parental rights are termi-


131. Id.

132. Id.

133. Id.

134. Id.

135. FLA. STAT. § 39.802(4)(a), (c) (2008).

136. Id. §§ 39.802(4)(a), 806 (1)(b)–(c).

137. Id. § 39.802(4)(c); see 1 MICHAEL J. DALE ET AL., REPRESENTING THE CHILD CLIENT, 4-103 (2008).

138. 959 So. 2d 401 (Fla. 1st Dist. Ct. App. 2007).

139. Id. at 402.

140. Id.

141. Id. (citing L.B. v. Dep’t of Children & Families, 835 So. 2d 1189, 1195–96 (Fla. 1st Dist. Ct. App. 2002)).
nated as part of the "task of placing the [child] in a suitable home."\textsuperscript{142} The Florida courts have held, and the court in \textit{K.W.} reaffirmed, that "long-term relative placement does not foreclose a termination of parental rights."\textsuperscript{143} The obligation of the court is to determine whether termination is in the "best interest of the child."\textsuperscript{144} It may take into account long-term placement with a relative but it need not if to do so would not be in the best interest of the child.\textsuperscript{145} On this basis, the court in \textit{K.W.} affirmed.\textsuperscript{146}

In a termination of parental rights case based upon abandonment, Florida provides the precise statutory elements which must be proven by clear and convincing evidence.\textsuperscript{147} In \textit{T.S. v. Department of Children & Families},\textsuperscript{148} the First District Court of Appeal of Florida was faced with the application of the abandonment grounds in the context of a parent's incarceration.\textsuperscript{149} The law in Florida is clear that a parent's incarceration is a factor to be considered in "terminating parental rights based" upon abandonment, but incarceration alone without other evidence is insufficient grounds.\textsuperscript{150} In addition, for abandonment to be shown, there must be proof that the parent was financially able to provide for the child or assume parental obligations which may be impossible in the context of incarceration.\textsuperscript{151} In the \textit{T.S.} case, the father was incarcerated for only eight months during a period when the child was between eight and fifteen months old.\textsuperscript{152} Further there was no evidence that the father had the ability to either support the child or had meaningful contact during that period.\textsuperscript{153} Thus, the appellate court reversed on the grounds that there was no substantial evidence of abandonment.\textsuperscript{154}

It would seem obvious that a court may only terminate parental rights on grounds alleged in the Department of Children and Family Services petition. Yet, in two recently reported opinions, \textit{L.A.G. v. Department of Child-

\begin{itemize}
  \item \textsuperscript{142} \textit{Id.}
  \item \textsuperscript{143} \textit{K.W.}, 959 So. 2d at 403.
  \item \textsuperscript{144} \textit{See id.} at 402.
  \item \textsuperscript{145} \textit{See id.}
  \item \textsuperscript{146} \textit{Id.} at 403.
  \item \textsuperscript{147} \textit{FLA. STAT.} § 39.809(1) (2008).
  \item \textsuperscript{148} 969 So. 2d 494 (Fla. 1st Dist. Ct. App. 2007).
  \item \textsuperscript{149} \textit{See id.} at 495.
  \item \textsuperscript{150} \textit{Id.} at 496 (citing \textit{W.T.J. v. E.W.R.}, 721 So. 2d 723, 723 (Fla. 1998); \textit{K.S. v. Dep't of Children & Family Servs.}, 898 So. 2d 1194, 1198 (Fla. 2d Dist. Ct. App. 2005)); \textit{J.T. v. Dep't of Children & Family Servs.}, 819 So. 2d 270, 272 (Fla. 2d Dist. Ct. App. 2002).
  \item \textsuperscript{151} \textit{See FLA. STAT.} § 39.01(1) (2008); \textit{C.B. v. Dep't of Children & Families}, 874 So. 2d 1246, 1248 (Fla. 4th Dist. Ct. App. 2004); \textit{J.T.}, 819 So. 2d at 272.
  \item \textsuperscript{152} \textit{T.S.}, 969 So. 2d at 496.
  \item \textsuperscript{153} \textit{Id.}
  \item \textsuperscript{154} \textit{Id.}
\end{itemize}
ren & Family Services and Z.M. v. Department of Children & Family Services, the Third and First District Courts of Appeal of Florida, respectively, reversed the termination adjudications at the trial level on the same basis—that the trial courts terminated based upon grounds not asserted in the petition. In L.A.G., the court held that a “termination order violates due process [when] it is based on grounds not asserted in [the] petition.” Specifically, the failure to include the ground for termination in the petition denies the parent notice of the charges in a proceeding that will result in “the parental death penalty,” as described in the concurring opinion. In Z.M., at the close of evidence, the court suggested a ground for termination that seemed to be more apt than that pleaded by DCF. When DCF “expressly declined to seek amendment of the petition,” the trial court nonetheless terminated on grounds that were neither pleaded nor added by amendment. The appellate court thus reversed.

The issue of whether a parent’s failure to appear at an adjudicatory hearing in termination of parental rights proceedings constitutes consent to the termination has been before the Florida appellate courts on a number of occasions over the past half-dozen years. Chapter 39 of the Florida Statutes allows termination of parental rights by consent where a parent fails “to personally appear at” an adjudicatory hearing where the parent was advised in person at the advisory hearing of the obligation to appear. However, Florida courts have been reluctant to terminate parental rights by default where a parent “makes a reasonable effort to be present” at the hearing but is unable to do so due to “circumstances beyond the parent’s control.” The issue came before the Second District Court of Appeal of

155. 963 So. 2d 725 (Fla. 3d Dist. Ct. App. 2007).
156. 981 So. 2d 1267 (Fla. 1st Dist. Ct. App. 2008).
157. L.A.G., 963 So. 2d at 726; Z.M., 981 So. 2d at 1269.
158. L.A.G., 963 So. 2d at 726.
159. Id. at 728 (Shepherd, J., concurring) (citing Michele R. Forte, Comment, Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings, 28 Nova L. Rev. 193, 193 (2003)).
160. See Z.M., 981 So. 2d at 1269-70.
161. Id.
162. Id. at 1271.
Florida again in *B.B. v. Department of Children & Family Services.*\(^{166}\) In that case, the trial court terminated a mother's parental rights to her three children when she did not appear at the adjudicatory hearing, and her counsel advised the court that the mother's caseworker had told the lawyer that the parent informed the case worker that she was having transportation problems.\(^{167}\) The lawyer requested a continuance and advised the trial court that he would transport the mother to the next hearing.\(^{168}\) The trial court rejected the request for continuance and terminated parental rights by consent.\(^{169}\) The appellate court concluded "that the trial court abused its discretion in denying [the lawyer's] motion for a continuance."\(^{170}\) Here, the mother could not attend because of "transportation problems beyond her control" and there was no evidence that she was "stalling" or disregarded the proceedings, or that the children would in any way be harmed by granting the continuance.\(^{171}\) Relying upon earlier case law relating to transportation problems beyond the parent's control, the appeals court reversed.\(^{172}\)

While the failure of a parent to appear can serve as the basis for termination of parental rights, where the parent fails to appear at an advisory hearing because the parent did not receive notice, it would seem obvious that termination may not take place. In *S.S. v. Department of Children & Family Services,\(^{173}\) the Third District Court of Appeal of Florida affirmed this proposition stating "[b]ecause the delivery of . . . notice is an express condition precedent to the draconian consequences of a parent's failure to appear, it follows that, on that point alone, the termination of parental rights in this case must be reversed and remanded for further proceedings."\(^{174}\)

Charges of abuse and neglect and efforts to seek termination of parental rights occasionally arise in the context of divorce cases. The Florida courts have occasionally analyzed the interplay of the two proceedings.\(^{175}\) Such

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\(^{166}\) 943 So. 2d 885, 886 (Fla. 2d Dist. Ct. App. 2006).

\(^{167}\) Id.

\(^{168}\) Id.

\(^{169}\) Id.

\(^{170}\) Id. at 887.

\(^{171}\) *B.B.,* 943 So. 2d at 887.

\(^{172}\) Id. at 886–87 (citing R.P. v. Dep't of Children & Families, 835 So. 2d 1212, 1213 (Fla. 4th Dist. Ct. App. 2003)).

\(^{173}\) 976 So. 2d 41 (Fla. 3d Dist. Ct. App. 2008).

\(^{174}\) Id. at 42.

was the case in *S.S. v. D.L.*\(^ {176}\) Nearly five years after the couple’s marriage was dissolved, the former wife amended her “petition for dissolution to include termination of [the father’s] parental rights to his two younger daughters.”\(^ {177}\) At the time, the father was in prison and release was imminent.\(^ {178}\) He “was convicted of sexual battery of the thirteen-year-old friend of his eldest daughter.”\(^ {179}\) The mother had remarried, and at trial the testimony presented came through the former wife, her new husband, and a guardian ad litem.\(^ {180}\) The appellate court recognized that “termination cases filed by divorced parents are rare” and suggested “caution to avoid second challenges to custody determinations.”\(^ {181}\) The appellate court overturned the finding of termination of parental rights on several grounds, including the fact that the opinion testimony of the guardian ad litem was speculation since the guardian was not an expert and, more significantly, that no nexus had been shown between the sexual abuse conviction and the future behavior of the father toward these children.\(^ {182}\)

The issue of proper testimony by expert witnesses in termination of parental rights cases came before the Second District Court of Appeal of Florida in *Department of Children & Family Services v. D.W.*\(^ {183}\) In that case, the expert witness improperly supported “his opinion by testifying [about] the contents of three articles published in the Journal of Neurosurgery.”\(^ {184}\) The articles themselves, as inadmissible hearsay, should not have been relied upon by the court.\(^ {185}\) Merely because an expert relies upon a treatise does not make it admissible. The opposing party, here the Department of Children and Family Services, “was unable to cross-examine the authors of the articles regarding their qualifications or any aspect of their studies.”\(^ {186}\) Thus, the appellate court reversed for a new trial on the petition to terminate parental rights of the parents.\(^ {187}\)

Apparently, the procedures for changing counsel on appeal in dependency and termination of parental rights (TPR) matters are not always followed. As a result, the Second District Court of Appeal in *W.G. v. Depart-
ment of Children & Family Services) issued orders to show cause why sanctions should not be imposed upon appellate and trial counsel for failure to notify the appellate court about substitution of counsel on appeal. The appellate court held that “when a trial court appoints [a lawyer] to represent a parent in [the appellate] court in a dependency or TPR case, the trial court should” forward a copy of the order to the appellate court. Then, because the trial courts may fail to carry out this responsibility, the appellate court said that “it would be prudent for trial counsel who has been granted leave to withdraw to [forward] copies of any trial court order[s] granting leave to withdraw and appointing [an] appellate counsel” to the appellate court. And finally, “the attorney appointed as appellate counsel should” file notice of appearance in a prompt manner in the appellate court and attach a copy of the court’s order of appointment.

IV. PERMANENT GUARDIANSHIP

Florida law provides that when reunification with the parent “or adoption is not in the best interest of the child, the court may place the child in a permanent guardianship with a relative or other adult [who is] approved by the court” subject to a set of five conditions set out in the statute. In C.D. v. Department of Children & Families, the question was whether the evidence at the trial level, placing the children in permanent guardianship and denying the mother’s Petition for Reunification, was supported by competent evidence. The appellate court reversed and remanded for reunification with the mother and reinstatement the Department of Children and Family Services’ supervision. The court held that a denial of reunification “based solely on issues existing at the time a dependency case was initiated, without regard to the parent’s progress” in overcoming the problems, is improper. Further, the appellate court held that the trial court failed to follow the mandatory language of the state law providing the six factors that must be demonstrated in showing that reunification is not “in the child’s best interests.”

188. 944 So. 2d 443 (Fla. 2d Dist. Ct. App. 2006) (per curiam).
189. Id. at 445.
190. Id. at 448.
191. Id.
192. Id.
194. 974 So. 2d 495 (Fla. 1st Dist. Ct. App. 2008).
195. Id. at 496–97.
196. Id. at 503.
197. Id. at 500.
198. Id. at 496, 500–01; see Fla. Stat. § 39.6221(2).
With specific reference to the case plan, the appellate court held that two questions must be answered: "[T]he parent’s compliance with the case plan and whether reunification would be detrimental to the children." Finding no substantial competent evidence to support the trial court’s finding, the appellate court reversed.

Once a court makes a finding of permanent guardianship, it may terminate protected supervision by DCF. In I.Z. v. Department of Children & Families, a mother appealed from an order terminating Department supervision and placing the child in permanent guardianship. In a short opinion, the appellate court found that "the trial court’s order met the statutory requirements for terminating protective supervision and for placing the child in a permanent guardianship" as provided by Florida law.

V. JUVENILE DELINQUENCY

The Florida State Legislature has provided that in certain situations criminal justice costs and surcharges can be taxed against criminal defendants. Funds from the surcharge are used to support a variety of state and local programs. The issue before the Supreme Court of Florida in V.K.E. v. State, the significant juvenile delinquency case decided by the Supreme Court during the survey period, concerned the question of whether juvenile court judges had the authority to impose surcharges on a juvenile in a delinquency case.

The underlying facts were that an eleventh grade student "was involved in an altercation with another . . . and entered a plea of nolo contendere to [the] delinquency petition" of simple battery. It was a misdemeanor and the Court withheld adjudication, placing the child on probation and ordering her, inter alia, to pay domestic violence costs of $201 and rape crisis fund fees of $151. Relying upon a concurring opinion by Judge Sharp in the Fifth District Court, the Court held that the legislative intent in creating the juvenile justice system as a separate "rehabilitative alternative to the punitive
criminal justice system" did not include the assessment of costs as provided for in the criminal justice system within the juvenile justice system. Justices Cantero and Bell dissented.

The juvenile’s right of privacy was before the First District Court in an unusual case in *A.H. v. State*. A sixteen-year-old girl “challenge[d] her adjudication of delinquency for producing, directing or promoting a photograph or representation that she knew included sexual conduct of a child in violation” of Florida law. According to the appellate decision, the girl and her seventeen-year-old boyfriend were charged under the child pornography laws for taking a substantial number of digital photos of the two of them “naked and engaged in sexual behavior.” They then emailed the photos to another computer from the girl’s house. The photographs were not actually distributed to any third party. The girl filed a motion to dismiss, claiming that the statute as applied to her was unconstitutional as an invasion of her right to privacy under the Florida Constitution. The majority held there was “no reasonable expectation of privacy” because these were photographs and they might be shown to others in the future. Further, the court said the pictures taken were shared by the two minors involved in the activities. Neither juvenile, according to the majority, “had a reasonable expectation that the other would not show the [photographs] to a third party.” Then, in a statement without attribution, the court said the following: “Minors who are involved in a sexual relationship, unlike adults who may be involved in a mature committed relationship, have no reasonable expectation that their relationship will continue and that the photographs will not be shared with others intentionally or unintentionally.” Apparently, the basis for this statement is the court’s stated concern about child pornography. The court’s attempted cause and effect analysis is hard to follow. Apparently the court thought that the “117 sexually explicit photographs [that were tak-

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210. Id. at 1278, 1282–83.
211. *V.K.E.*, 934 So. 2d at 1285–93 (Cantero, J., dissenting); Id. at 1293–94 (Bell, J., dissenting).
212. 949 So. 2d 234, 235 (Fla. 1st Dist. Ct. App. 2007).
213. Id. (citing *FLA. STAT.* § 827.071(3) (2008)).
214. Id.
215. Id.
216. Id.
217. *A.H.*, 949 So. 2d at 235; see *FLA. CONST.* art. I, § 23.
218. *A.H.*, 949 So. 2d at 237.
219. Id.
220. Id.
221. Id.
222. See id.
would undoubtedly have market value.” The court’s second argument was that there was a compelling state interest in prosecuting the juvenile. The court held that “[t]he State’s interest in protecting children from exploitation in [the] statute is the same [irrespective] of whether the person inducing the child to appear” is an adult or a child. The argument is self-defeating for at least two reasons. First, the court assumes that the child who did not take the picture is the one to be protected. This apparently runs counter to the fact that both of the juveniles were charged with acts of juvenile delinquency. Second, while the child who was photographed was a boy and was older, there was no analysis of equal treatment of males and females. What is oddly missing from the majority’s opinion is an analysis of whether this was the least restrictive means available to the State in dealing with the problem of promoting sexual conduct through photographs of minors. Rather, the court seems to believe that the compelling interest was seeing that the photographs were never produced. That argument seems to suggest that criminal penalties were in order to stop minors from “doing it again.”

The dissent in A.H. relied upon the Supreme Court of Florida’s opinion in B.B. v. State. B.B. was an opinion that overturned a statute “prohibiting unlawful carnal intercourse” as applied to consensual behavior by minors. In B.B., the act was carnal sexual intercourse and in A.H. the act was photographing sexual intercourse. According to Judge Padovano, dissenting, this was “a distinction without a difference.” The dissent viewed the matter as one of privacy because in fact, the child intended to keep the photographs private. As the dissent concluded, “I believe the court has committed a serious error. The statute at issue was designed to protect children, but in this case the court has allowed the state to use it against a child in a way

223. A.H., 949 So. 2d at 237.
224. Id. at 238.
225. Id. (citing State v. A.R.S., 684 So. 2d 1383, 1387 (Fla. 1st Dist. Ct. App. 1996)).
226. See id. at 236–39.
227. Id. at 235.
228. See A.H., 949 So. 2d at 236–39.
229. See id. at 237–39.
230. See id.
231. Id. at 239 (Padovano, J., dissenting) (citing B.B. v. State, 659 So. 2d 256 (Fla. 1995)).
232. Id.
233. A.H., 949 So. 2d at 239.
234. Id.
235. Id.
that criminalizes conduct that is protected by constitutional right of pri-

vacy."\(^{236}\)

Issues concerning restitution in delinquency cases regularly come be-
fore the intermediate appellate courts. For example, in two short per curiam
opinions, the First District Court of Appeal in \textit{T.L. v. State}\(^{237}\) and \textit{I.M. v. State (I.M. II)},\(^{238}\) reversed a trial court that had entered a restitution order in the
absence of the juvenile appellant.\(^{239}\) In \textit{I.M. II}, over the objection of counsel,
the appellate court heard testimony determining the amount of restitution.\(^{240}\)
The court recognized that "[a] juvenile has a constitutional right to be present
at hearings to determine the imposition and amount of restitution [in the ab-
sence of] a voluntary intelligent waiver of [the] right."\(^{241}\) The appellate court
also held that a trial court may only order restitution for an unemployed or
incarcerated delinquent child with a showing that the child has the present
ability to pay on a finding that the child had suitable employment, and the
court must also base the amount of restitution on anticipated earnings.\(^{242}\)

In two recent cases, the Fourth District Court of Appeal was faced with
the question of whether a trial court could go directly to a determination of
restitution without providing the delinquent with notice and a right to a sepa-
rate hearing.\(^{243}\) In \textit{J.G. v. State},\(^{244}\) at the disposition hearing, the victim’s
father testified to medical bills and lost wages.\(^{245}\) The "court, hearing no
objection, ordered [the child] and his parents to pay" a restitution in the
amount of over $3400.\(^{246}\) The appellate court reversed on this ground, hold-
ing that a trial court must conduct a restitution hearing addressing the child’s
ability to pay and then the amount of restitution could be paid.\(^{247}\) There must
also be notice given to the juvenile that the evidence produced at the disposi-

\(^{236}\) \textit{Id.} at 241.

\(^{237}\) 967 So. 2d 421 (Fla. 1st Dist. Ct. App. 2007) (per curiam).

\(^{238}\) 955 So. 2d 1163 (Fla. 1st Dist. Ct. App. 2007) (per curiam).

\(^{239}\) \textit{See id.} at 1164; \textit{T.L.}, 967 So. 2d at 421.

\(^{240}\) \textit{I.M. II}, 955 So. 2d at 1164.

\(^{241}\) \textit{Id.; see also T.L.}, 967 So. 2d at 421; \textit{M.W.G. v. State}, 945 So. 2d 597, 599–600 (Fla.
(per curiam).

\(^{242}\) \textit{I.M. II}, 955 So. 2d at 1165; \textit{see also M.W.G.}, 945 So. 2d at 601; \textit{A.J. v. State}, 677 So.
2d 935, 938 (Fla. 4th Dist. Ct. App. 1996).

2d 554 (Fla. 4th Dist. Ct. App. 2008).

\(^{244}\) 978 So. 2d at 270 (Fla. 4th Dist. Ct. App. 2000).

\(^{245}\) \textit{Id.} at 272.

\(^{246}\) \textit{Id.}

\(^{247}\) \textit{Id.}
tion hearing would determine the amount of restitution.\textsuperscript{248} The court gave no notice of either the hearing on the amount or the child's ability to pay.\textsuperscript{249} In \textit{L.S. v. State},\textsuperscript{250} the court took evidence on the amount of damage to a vehicle in a vandalization case at the adjudicatory stage.\textsuperscript{251} Then, when imposing a penalty, the court held "that the child was responsible for restitution in the amount testified by the owner."\textsuperscript{252} The appellate court held that "[w]hile the testimony of the owner was sufficient to prove guilt, it was not . . . sufficient to [set] the amount of restitution."\textsuperscript{253} Furthermore, it held that there was no notice to the child that he would be obligated to offer evidence as to the amount of restitution at a hearing to determine whether he was even guilty of the charge.\textsuperscript{254} The issue of how the amount of restitution is proven at a restitution hearing was before the court in a similarly named case \textit{I.M. v. State (I.M. III)}.\textsuperscript{255} A child was adjudicated delinquent for the commission of an arson and burglary when "he and friends set fire to a middle-school band room."\textsuperscript{256} On remand from a prior appellate ruling,\textsuperscript{257} a school official testified that he contacted "vendors to determine the fair market value" of property including items like choir robes.\textsuperscript{258} He determined that the value was $31,143.\textsuperscript{259} The juvenile's lawyer objected that the testimony was based upon hearsay.\textsuperscript{260} The appellate court reversed on the grounds that the person testifying "did not have personal knowledge of the value of the" damaged property "but relied upon the opinions of . . . vendors, who did not testify."\textsuperscript{261} In reversing, the court noted that written estimates might "suffice, so long as they satisfy the requirements of business records . . . or are uncontested."\textsuperscript{262}

A second case involving the improper alliance on hearsay testimony in establishing the amount of restitution is \textit{T.J.N. v. State}.\textsuperscript{263} A juvenile appealed from an order of restitution in the amount of $1910 relating to damage

\textsuperscript{248} Id.
\textsuperscript{249} \textit{J.G.}, 978 So. 2d at 272.
\textsuperscript{250} 975 So. 2d 555 (Fla. 4th Dist. Ct. App. 2008).
\textsuperscript{251} Id. at 555.
\textsuperscript{252} Id.
\textsuperscript{253} Id.
\textsuperscript{254} Id.
\textsuperscript{255} 958 So. 2d 1014, 1016 (Fla. 1st Dist. Ct. App. 2007) (per curiam).
\textsuperscript{256} Id.
\textsuperscript{258} \textit{I.M. III}, 958 So. 2d at 1016.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} Id.
\textsuperscript{262} \textit{Id. See also} B.L.N. v. State, 722 So. 2d 860, 861 (Fla. 1st Dist. Ct. App. 1998) (per curiam).
\textsuperscript{263} 977 So. 2d 770, 771 (Fla. 2d Dist. Ct. App. 2008).
caused to "a truck in connection with the commission of two batteries."

The appellate court recognized that, under Florida law, a "[written opinion] or estimate may qualify as a business record exception to the hearsay rule" and thus, may be admissible. The court further noted that there is a distinction between a witness who states from hearsay what someone else said the damages might be and an individual who, qualified as an expert, can opine as to the fair market value of the cost of repairs. In the case at bar, an insurance adjuster testified on cross-examination that he based his testimony on an estimate received from an auto body shop. The respondent objected and on appeal, the Second District Court of Appeal reversed.

In a case involving proof of damages at the adjudicatory stage of a delinquency case, the Fourth District Court of Appeal, in L.D.G. v. State, affirmed a trial court finding that the State provided proof of damages exceeding $1000 for purposes of establishing a prima facie showing of a felony of the third degree under Florida law. The respondent had been "accused of damaging a vehicle in a temper tantrum" and the State, through the owner's testimony, showed that the insurance paid $750, the insured paid a deductible of $500, and the total payment was made by handing over to the repair company the sum of $1250. The appellate court rejected the claim that the testimony was inadmissible hearsay and also found that the evidence was "prima facie proof by competent, substantial evidence [of] the damage exceed[ing] $1000."

Florida has developed a body of statutory law as well as interpretative case law concerning the standards for secure detention for delinquents. The statutory scheme is quite clear. First, the child may be detained for the specific reasons contained in the statute. Second, the statute requires that, in the absence of a specific statutory exception, the order placing a child in detention must "be based [upon] a risk assessment of the child."

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264. Id.
265. Id. at 773 & n.2 (quoting Butler v. State, 970 So. 2d 919, 920 (Fla. 1st Dist. Ct. App. 2007)).
266. Id. at 773.
267. Id.
268. T.J.N., 977 So. 2d at 773–74.
269. 960 So. 2d 767 (Fla. 4th Dist. Ct. App. 2007).
270. Id. at 767 n.1; see also FLA. STAT. § 806.13(1) (b) (2006).
271. L.D.G., 960 So. 2d at 767–68.
272. Id. at 768.
274. FLA. STAT. § 985.245 (1) (2008).
a "Risk Assessment Instrument." A court has the power to deviate from the level of restrictiveness required by the scoring instrument but the judge must explain why the deviation is necessary. When the court deviates, it must provide a written statement of "clear and convincing reasons" for the deviation.

Application of the Risk Assessment Instrument and the limits of statutory authority to detain a child was before the First District Court of Appeal in *K.E. v. Department of Juvenile Justice.* The child petitioned for a writ of habeas corpus to challenge the validity of detention during a juvenile delinquency proceeding based upon the fact that "[t]he child had a total score of two points on the Risk Assessment Instrument and therefore did not meet the general [category] for detention." Although the matter had become moot, the appellate court, nonetheless, issued a ruling because the matter was "capable of repetition yet evading review." Under the facts of the case, the child with a "total score of two points, which [was] not enough to justify any form of detention without a written statement of clear and convincing reasons," and who was not eligible for detention based upon a charge of domestic violence because there had been no showing that secure detention was necessary to protect the victim, nonetheless was subjected to continued secure detention by the trial court based upon the mother's fear that the juvenile posed an ongoing threat of domestic violence even though the child was not going to be living with the mother; and further the mother feared the child would run away and then perhaps take drugs or engage in sexual activity. Citing in a footnote, the fact that in the last eighteen months the appellate court had issued writs of habeas corpus directed to the juvenile trial judge, the Honorable Angela Dempsey, in fourteen juvenile delinquency cases, including the one at bar, and in ten of which writs were issued because the judge had "failed to give adequate reasons for departing from the risk assessment instrument or failed to give any reason at all," the court reversed. In so doing, the court stated, "[t]hese errors lead us to conclude that our main point bears repeating. Juvenile detention is a matter that is

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275. *See K.E. v. Dep't of Juvenile Justice, 963 So. 2d 864, 866 (Fla. 1st Dist. Ct. App. 2007).*
276. *See FLA. STAT. § 985.255(3)(b).*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id. at 866.*
281. *Id. at 867.*
282. *Id. at 867–68 n.1.*
controlled by legislation. It is not for us, as judges, to question the wisdom of the legislation. Rather, our task is simply to carry it out.”

Among those requirements is that a juvenile is entitled to a detention hearing within twenty-four hours of being taken into custody. The issue in *D.M. v. Dobuler* was whether a judicial circuit administrative practice procedure in Miami, which did not require a detention hearing within the twenty-four hour period, violated the state statute. The specific issue before the appeals court was what the term “taken into custody” meant. The court held, contrary to the assertion of the State, that a child who is to be placed in detention must receive a detention hearing within twenty-four hours of being physically detained by law enforcement. It does not mean twenty-four hours from the time a juvenile probation officer takes the child into custody and determines the need for detention.

The appellate courts often deal with questions of interpreting who gets detained and for what. In *Z.B. v. Department of Juvenile Justice*, the issue was whether certain juveniles, who are alleged to be absconders from probation, could be held in secure detention. The definition of absconding established by the Department of Juvenile Justice (DJJ) in its Handbook was a juvenile who was “gone in a clandestine manner out of the jurisdiction of the courts in order to avoid legal process” or one who would “hide, conceal or absent himself clandestinely with the intent to avoid legal processes.” Under the facts of this case, while the juveniles may have violated curfew conditions of probation, “they voluntarily returned to their approved residences” and thus did not meet the definition in the DJJ Handbook. Therefore, because the juveniles did not meet the agency definition, they were not considered absconders, and thus could not be securely detained pursuant to the risk assessment instrument which forms the basis for evaluating secured detention in Florida.

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283. *K.E.*, 963 So. 2d at 868.
285. 947 So. 2d 504 (Fla. 3d Dist. Ct. App. 2006).
286. *Id.* at 506.
287. *Id.* at 507.
288. *Id.* at 509.
289. See *id.* at 508.
290. 938 So. 2d 584 (Fla. 1st Dist. Ct. App. 2006) (per curiam).
291. See *id.* at 584–85.
292. *Id.* at 585.
293. *Id.*
294. *Id.* at 585–86.
The use of curfew ordinances for juveniles has become popular in the United States and has been recently ruled on by the Supreme Court of Florida. Violations of curfew ordinances often can result in delinquency charges filed against juveniles. Such was the case in *State v. A.L.* In that case, a sheriff’s department deputy observed “a young man, who appeared to be a juvenile, walking on a public street” in violation of the county’s curfew order. The child consented to “a pat-down search,” and the search resulted in discovery of a bag of marijuana and a pipe. The child moved to suppress the evidence, and the trial court rejected the claim on the grounds that it was proper “for the deputy to suspect that [the child] was violating the curfew ordinance.” The appellate court, in affirming, recognized the growing body of Florida law supporting the proposition that officers may reasonably suspect that juveniles are violating curfew ordinances.

Juveniles have been provided the right to counsel in delinquency cases since the United States Supreme Court’s decision in 1967 in *In re Gault.* The right to counsel includes the right to a conflict-free attorney who will represent the juvenile vigorously, independently and avoid the appearance of a conflict. The issue of conflict-free counsel arose in *A.P. v. State.* A fifteen-year-old girl was charged with battery on her stepfather. It turned out that the public defender representing the child was a member of an office which had represented the victim’s stepfather on a prior domestic matter charge. The assistant public defender advised the court in the presence of the child that he might have a conflict of interest because of the facts that he had asserted, and then he requested what is known in Florida as a Forsett inquiry, from the name of the case establishing the proposition. That case allows for voluntary waiver of a conflict if three matters are “proven: 1) the

297. *See e.g., State v. A.L.,* 956 So. 2d 1215, 1215-16 (Fla. 2d Dist. Ct. App. 2007).
298. *Id.* at 1215.
299. *Id.*
300. *Id.* at 1216.
301. *Id.*
303. 387 U.S. 1, 41 (1967).
305. 958 So. 2d 519, 520 (Fla. 2d Dist. Ct. App. 2007).
306. *Id.*
307. *Id.*
defendant is aware of the conflict; 2) the defendant understands that the conflict could affect [one's] defense; and 3) the trial court has informed the defendant of the right to obtain other conflict-free counsel.”

The appellate court read the transcript of the inquiry by the trial court and found that the three elements of the test were not proven independently as to the fifteen-year-old who did in fact waive the conflict. The appellate court then held that because the assistance of counsel is an important constitutional right, the violation of the constitutional right cannot be viewed as harmless.

Issues relating to waiver of Miranda rights by juveniles come up regularly in the Florida courts and elsewhere. Included among those issues is whether juveniles can waive Miranda rights without the presence of the parents. The states differ on the requirement for parental presence and possibly parental approval of the waiver. The issue of the role of parents in the waiver of Miranda rights was before the Fourth District Court of Appeal in State v. S.V. The State appealed an order granting the juvenile’s motion to suppress on the grounds that the trial court granted the motion “solely on the basis that the juvenile’s parents were not notified before the interview.” The appellate court agreed with the State, although it affirmed the suppression on other grounds in one of the two charges involving the juvenile that was before it. In one of the two charges, when the Miranda warnings were given, the appellate court held that they “were defective because they failed to advise the juvenile of his right to counsel during [the] questioning.” However, as to the issue of the ruling that the child’s statements should be suppressed because of the failure to notify the parents, the appellate court held that “there is no constitutional requirement that [law enforcement officials] notify a juvenile’s parent[] prior to questioning.” And further, “if the juvenile indicates to [the] police that [the juvenile] does not [want] to

309. A.P., 958 So. 2d at 520 (citing Forsett, 790 So. 2d at 475); see also Larzelere v. State, 676 So. 2d 394, 403 (Fla. 1996) (per curiam); Thomas v. State, 785 So. 2d 626, 628 (Fla. 2d Dist. Ct. App. 2001) (per curiam); Lee v. State, 690 So. 2d 664, 667 (Fla. 1st Dist. Ct. App. 1997).
310. A.P., 958 So. 2d at 521.
311. Id. (quoting Lee, 690 So. 2d at 668).
312. See, e.g., State v. Roman, 983 So. 2d 731, 735 (Fla. 3d Dist. Ct. App. 2008); M.A.B. v. State, 957 So. 2d 1219, 1219 (Fla. 2d Dist. Ct. App. 2007) (en banc) (per curiam).
313. See, e.g., State v. S.V., 958 So. 2d 609, 610 (Fla. 4th Dist. Ct. App. 2007).
314. See DALE ET AL., supra note 137, at 5-60.
315. 958 So. 2d at 610.
316. Id.
317. Id. at 611-12.
318. Id. at 612.
319. Id. at 611 (quoting Frances v. State, 857 So. 2d 1002, 1003 (Fla. 5th Dist. Ct. App. 2003)).
speak to them until he or she has had [a chance] to speak [to his or her] par-
ents, [then] the questioning must cease." 320

A second recent appellate opinion involving an appeal from a denial of
a motion to suppress, based in part upon the lack of involvement of a sixteen-
year-old defendant’s mother, prior to a confession of participating in a rob-
bery that resulted in the victim’s death, is Harris v. State. 321 In that case, the
minor’s “mother was home when the [police] arrived and was told that her
son was going to be taken to the police station for questioning about a recent
murder.” 322 The mother did not indicate “she wanted to come to the station
or that she wanted an attorney for her son.” 323 At no time did the juvenile
ever ask for his mother or an attorney to be present when he was ques-
tioned. 324 On these grounds, and applying the generic totality of the circums-
tances test to the confession, the appellate court upheld it. 325

In recent years most states, including Florida, have expanded the use of
the juvenile delinquency court as a means to deal with school-related is-
issues. 326 For example, Florida provides that acts by juveniles which are “spe-
cifically and intentionally designed to stop or temporarily impede . . .
progress of any normal school function or activity occurring on the school[
] property” constitutes an act of juvenile delinquency. 327 J.J. v. State 328 is an
example of an appellate opinion dealing with school disruption by a student
that resulted in a delinquency charge. 329 The underlying dispute which re-
sulted in the delinquency charge was disruptive behavior by the youngster in
a school cafeteria during breakfast hours where the student “attempted to
incite two female students to engage in an altercation in the cafeteria.” 330
The school employee had to call the school dean and the school’s resource
officer to control the youngster. 331 The appellate court affirmed, finding that

320. S.V., 958 So. 2d at 611 (quoting Frances, 857 So. 2d at 1004).
322. Id. at 374.
323. Id.
324. Id. at 375.
325. Id.
797 So. 2d 1291, 1292 (Fla. 4th Dist. Ct. App. 2001)).
328. Id. at 518.
329. Id. at 519.
330. Id.
331. Id. at 520.
there was evidence to support the proposition that the youngster "intended to disrupt school activities." 332

The school employee charged with monitoring the cafeteria testified that she asked J.J. to calm down and stop at least four or five times, which he did not do. She believed J.J. was inciting the two girls to fight, and he wanted to see them fight again like they did on the bus the day before. As a result of J.J.'s behavior, the students in the cafeteria got louder and started to crowd around the girls' table. She further testified that the incident interfered with the serving of breakfast and her normal duties in the cafeteria. 333

While the student's behavior was unacceptable and while the media is full of reports about problems in the public school system, it remains to be seen whether the use of the juvenile criminal justice system can assist in diminishing school disruption.

Two cases came before the Florida appellate courts during the most recent reported cycle, involving delinquency cases derived from school searches. 334 In R.B. v. State, 335 a student charged with possession of cannabis appealed from an adjudication of delinquency on the grounds that there was no reasonable suspicion to justify the school search under the United States Supreme Court's holding in New Jersey v. T.L.O. 336 Under T.L.O., the test for a warrantless search is reasonable suspicion rather than probable cause. 337 In the case at bar, the security officer monitoring the school security camera had a previous encounter with the youngster being under the influence of drugs at school, saw that the youngster with his hands cupped showing another student something and then putting the object in his pocket, and therefore brought both students to the school office where the officer removed the small bag of marijuana. 338 The appellate court affirmed on these facts. 339

332. J.J., 944 So. 2d at 520. But see M.S.G., III v. State, 971 So. 2d 273, 274 (Fla. 1st Dist. Ct. App. 2008) (per curiam) (finding no evidence of "deliberate intent to disrupt a school function").
333. J.J., 944 So. 2d at 520.
334. See R.B. v. State, 975 So. 2d 546, 546 (Fla. 3d Dist. Ct. App. 2008) (per curiam);
D.G. v. State, 961 So. 2d 1063, 1064 (Fla. 3d Dist. Ct. App. 2007).
335. R.B., 975 So. 2d at 546.
336. 469 U.S. 325 (1985); R.B., 975 So. 2d at 547.
337. T.L.O., 469 U.S. at 341; R.B., 975 So. 2d at 547 (citing D.G., 961 So. 2d at 1064).
338. R.B., 975 So. 2d at 547.
339. Id. at 548.
D.G. v. State\textsuperscript{340} involved an eighth grader who appealed from a determination of delinquency based on possession of marijuana.\textsuperscript{341} Here the basis for the school search was the statement of a student informant that the respondent "may have been in possession of marijuana."\textsuperscript{342} The appellate court held that information provided by an informant, who is known to the investigator, is widely regarded as "reasonable suspicion necessary to meet the constitutional test,"\textsuperscript{343} recognizing that other courts have similarly found.\textsuperscript{344} The appellate court thus affirmed.\textsuperscript{345}

VI. THE RIGHTS OF UNWED BIOLOGICAL FATHERS

In 2003, the Florida Legislature dramatically changed Florida's Adoption Act by adding a putative father registry.\textsuperscript{346} This statute provided that the failure to register through the registry constituted a waiver of parental rights for these unwed fathers when the biological mother sought to have the child adopted.\textsuperscript{347} This statute, apparently aimed at expediting the adoption process, was promulgated in the face of a series of United States Supreme Court opinions that provided protection to unwed fathers, including Stanley v. Illinois,\textsuperscript{348} Quillen v. Walcott,\textsuperscript{349} Caban v. Mohammed,\textsuperscript{350} and Lehr v. Robinson.\textsuperscript{351} In combination, these cases have held on the basis of the principles of due process and equal protection that unwed fathers have a protected privacy and liberty interest in their children so long as the father has evidenced some form of involvement with the child.\textsuperscript{352} As the Court said in Lehr: "The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological..."
cal connection into a full and enduring relationship." 353 In *Heart of Adoptions, Inc. v. J.A.*, 354 the Supreme Court of Florida held that an adoption agency must serve the unmarried, biological father "known or identified by the mother as a potential father and who" may be located, through reasonable efforts, "with a notice of the intended adoption plan." 355 He should further be advised "that he has thirty days in which to file a claim of paternity with the Florida Putative Father Registry and to file an affidavit of commitment [with] the court." 356 In so doing, the court recognized that *Florida Statutes*, as a matter of statutory construction, should be read to provide for notice. 357 The Supreme Court of Florida chose not to reach the constitutional question, either on the basis of the Florida Constitution or the Federal Constitution, of whether the notice requirement violated due process and privacy rights set forth in the United States Supreme Court jurisprudence, as well as in the Florida Constitutional jurisprudence. 358

The Florida statutory scheme for adoption contains other possible shortcomings, such as the elimination of fraud as a defense for failure to register, statutory construction, which may deny a putative father the ability to grasp an opportunity to develop a relationship with his biological child, and a standard of care, which places the burden of proving financial and other capacity on the putative father. 359 The constitutional infirmities in the Florida statute were described in some detail in the concurring opinion in *J.A.* by Chief Justice Lewis. 360

**VII. OTHER MATTERS**

Over thirty years ago in *Goss v. Lopez*, 361 the United States Supreme Court held that a "10 day suspension from school is not de minimus" and may not be imposed without complete disregard of due process rights. 362 In

354. 963 So. 2d 189 (Fla. 2007).
355. *Id.* at 202.
356. *Id.*
357. *Id.* at 203.
358. *See id.* at 206 (Lewis, J., concurring) (citing N. Fla. Women’s Health & Counseling Servs. v. State, 866 So. 2d 612, 634 (Fla. 2003); Beagle v. Beagle, 678 So. 2d 1271, 1275 (Fla. 1996); *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989)).
362. *Id.* at 576.
Rigau v. District School Board of Pasco County, the appellate court heard a pro se appeal by an attorney father of a student who had been suspended from school for ten days for being under the influence of alcohol at a school-related event, the Grad Bash Universal Studios-Orlando. Significantly, the board failed to appear at the appeal or respond in any way. The appellate court held that there was no evidence that the student had been under the influence. "Rather, the school board found that the . . . [youngster] was in close proximity to . . . alcohol throughout the evening." There being no evidence at all of the intoxication, indeed he was admitted to Universal Studios after the police officer conducted a field sobriety test, the appellate court reversed the youngster's suspension. Significantly, the appellate court noted that the child's father was an attorney and that less fortunate students would not be able to appeal the board's suspension, which was not supported by any competent evidence and, that such a suspension, would cause serious damage to the students. On the other hand, in D.K v. District School Board Indian River County, the school board sought dismissal of an "appeal on the grounds that a suspension order is not permitted to be reviewed under the Florida Administrative Procedure Act." The appellate court granted the motion finding that "hearings that result in expulsion fall within the [Administrative Procedure Act] and are entitled to judicial review," but that "suspension hearings are specifically exempted from the protections" of the Administrative Procedure Act. However, the court noted in a footnote that its ruling did "not bar [a] student who has a constitutional right violated by a suspension from bringing action in the appropriate court." It simply held that the child did not allege any due process or other constitutional violation.

Children who are in the care of the Department of Children and Families sometimes are recipients of funds from government agencies such as the Social Security Administration. When that happens, the amounts are

363. 961 So. 2d 382 (Fla. 2d Dist. Ct. App. 2007).
364. Id. at 383.
365. Id.
366. Id.
367. Id.
368. Rigau, 961 So. 2d at 383–84.
369. Id. at 384.
370. 981 So. 2d 667 (Fla. 4th Dist. Ct. App. 2008).
371. Id. at 667.
372. Id.
373. Id. at 668 n.1.
374. Id.
placed into a master trust fund by DCF for the benefit of the child. The question before the Fifth District Court of Appeal in *Department of Children & Families v. R.G.*, was whether DCF should distribute the money in the account directly to the juvenile upon his eighteenth birthday or send the money back to the government agency, in the case at bar to the Social Security Administration, and "the Social Security Administration would later disburse the funds to" the child. DCF appealed from a trial court order requiring it to provide the funds directly to the child. At the trial level, DCF could cite no legal authority in support of its position, despite the fact that it was offered the opportunity to "file a motion for rehearing to provide the trial court with any federal authority" in support of its position. The State filed no motion for rehearing. On appeal, the Fifth District rejected all of the State's arguments, finding the claim under Florida law was preempted by the federal Supremacy Clause, and finding the State's interpretation of the federal statute on point "tortured." Finding no support for the State's position, the appellate court affirmed the proposition that the funds go to the child upon reaching his or her eighteenth birthday.

Proceedings pursuant to Florida's Domestic Violence statute may involve minors. In *Moore v. Pattin*, a mother filed a petition "for an injunction for protection against domestic violence" on behalf of the parties' ten-year-old daughter. The mother alleged that while she was at work, "the father beat . . . the dog, threw pots and pans, ordered [the child] to remove all her clothing, and beat her with a belt and a shoe." The appellate court affirmed the trial court ruling, finding first that the Florida Domestic Violence Statute provides for injunctions of the nature sought. It found further that, pursuant to chapter thirty-nine, the test "is whether the discipline imposed . . . is likely to result in physical, mental, or emotional injury and thus constitute[s] excessively harsh corporal discipline." Applying the standard, the

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376. See id.
377. 950 So. 2d 497 (Fla. 5th Dist. Ct. App. 2007).
378. Id. at 499.
379. Id.
380. Id.
381. Id. at 499.
382. R.G., 950 So. 2d at 499–500.
383. Id. at 500–01.
384. 983 So. 2d 663 (Fla. 4th Dist. Ct. App. 2008).
385. Id. at 664.
386. Id.
387. Id. at 663–64.
388. Id. at 665.
court held that for purposes of the domestic violence injunction, the corporal punishment was excessive and the injunction should stand. 389

VIII. CONCLUSION

During the survey year, the intermediate appellate courts decided a substantial series of cases involving important statutory claims. In particular, the courts provided substantial guidance in the area of domestic violence and its application in dependency proceedings that should help the practitioner representing all parties in juvenile court.

389. Moore, 983 So. 2d at 665.
CORPORATE REPRESENTATIVE DEPOSITIONS: IN SEARCH OF A COHESIVE & WELL-DEFINED BODY OF LAW

ROBERT D. PELTZ*
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I. INTRODUCTION .............................................................................. 393
II. SCOPE OF PERMISSIBLE INQUIRY .................................................. 394
   A. Is Inquiry Limited to the Specific Identified Areas on the Notice? .............. 395
   B. When Does Inquiry Violate a Corporation's Work Product Privilege? .......... 400
III. DESIGNATION OF AREAS ................................................................. 405
   A. The "Reasonable Particularity" Requirement ....................................... 405
   B. What Constitutes Sufficient Compliance with the Notice? ......................... 406
IV. SELECTION OF CORPORATE REPRESENTATIVES ............................. 411
   A. The Importance of the Selection ....................................................... 411
   B. The Knowledge Base of the Representative(s) ......................................... 412
   C. The Knowledge Level of the Representative(s) ......................................... 415
   D. The Corporation's Use of the Rule to Avoid Harassment ........................ 416
V. THE IMPACT OF THE CORPORATE REPRESENTATIVE’S TESTIMONY .................................................... 417
   A. Changing Testimony Through Errata Sheets ........................................... 417
   B. Conflicting Testimony ...................................................................... 422
VI. CONCLUSION .................................................................................. 425

I. INTRODUCTION

Although corporate representative depositions¹ are a common discovery tool in litigation, there are surprisingly few reported decisions discussing

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¹ Both the federal and state rules are equally applicable to other organizations, including partnerships, governmental entities, and associations. See, e.g., Anderson Invs. Co. v.
their scope and parameters, especially from Florida’s state courts. Most of these reported decisions involve the location of such depositions\(^2\) rather than the scope of permissible inquiry. Therefore, while the use of corporate representative depositions gives rise to many important legal questions, there are very few reported answers. This article will focus on some of the more important issues presented by these depositions, the manner in which they have been treated, and the proposed answers to those issues which are presently unresolved.

II. SCOPE OF PERMISSIBLE INQUIRY

Although differing slightly in their wording, the substance of both Federal Rule of Civil Procedure 30(b)(6)\(^3\) and Florida Rule of Civil Procedure 1.310(b)(6)\(^4\) are the same. Both rules essentially provide that a party wanting to depose a corporation or other organization may do so through the use of a notice, which designates the proposed areas of inquiry with reasonable parti-

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3. Federal Rule of Civil Procedure 30(b)(6) provides:

In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about matters known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

FED. R. CIV. P. 30(b)(6).

4. Florida Rule of Civil Procedure 1.310(b)(6) provides:

In the notice a party may name as the deponent a public or private corporation, a partnership or association, or a governmental agency, and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to do so, to testify on its behalf and may state the matters on which each person designated will testify. The persons so designated shall testify about matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized in these rules.

FLA. R. CIV. P. 1.310(b)(6).
Corporation or organization selects one or more individuals with knowledge of the matters listed who will testify on behalf of the corporate entity. Since the Florida rule was patterned after the then-existing federal rule, Florida courts have often relied on interpretations of the corresponding federal rule.

A. Is Inquiry Limited to the Specific Identified Areas on the Notice?

One of the first issues, which regularly arises during the taking of many corporate representative depositions, is whether the questioning party is limited in its interrogation of the witness to the specific matters identified in the notice or whether it can go beyond these areas. Surprisingly, there are no Florida state appellate opinions which even address this issue and only a handful of reported federal district court cases.

The first reported decision to consider this issue was the 1985 Massachusetts' federal district court opinion in Paparelli v. Prudential Insurance Co. of America, which involved a products liability claim for injuries allegedly sustained as a result of the defective operation of an elevator. In Paparelli, plaintiffs' counsel admittedly questioned defendant's corporate representative on matters outside of the areas designated on the deposition notice. Defense counsel responded by instructing his "witness not to answer the questions," which in turn prompted a motion for sanctions.

The court began its inquiry by observing that there was nothing in either the wording of Federal Rule of Civil Procedure 30(b) or the accompanying

5. Compare FED. R. CIV. P. 30(b)(6), with FLA. R. CIV. P. 1.310(b)(6).
10. See id. at 728.
11. Id. at 729.
12. Id. at 728–29. Although concluding that the questioning was not appropriate, the court nevertheless further held that defense counsel had improperly instructed his client not to answer the questions, since they did not involve a claim of privilege. Id. at 731. The court, however, ultimately declined to impose sanctions concluding that both counsel had been at fault. Paparelli, 108 F.R.D. at 731.
Advisory Committee notes, which expressly limited inquiry to the designated areas.\textsuperscript{13} Despite this lack of express restrictions, the court reasoned that inquiry was nevertheless limited to the stated areas for a number of reasons.\textsuperscript{14} It began its analysis with the conclusion that:

It makes no sense for a party to state in a notice that it wishes to examine a representative of a corporation on certain matters, have the corporation designate the person most knowledgeable with respect to those matters, and then to ask the representative about matters totally different from the ones listed in the notice.\textsuperscript{15}

The court then went on to note that prior to the adoption of the rule, a corporation often had no idea of the potential areas of inquiry when a specific named corporate employee or officer was noticed.\textsuperscript{16} Often, the specifically named individual had no relevant knowledge regarding the matter.\textsuperscript{17} Accordingly, one of the purposes behind the adoption of the rule was to allow the corporation to determine which of its employees or officers had knowledge of the matters sought to be discovered, to select someone with such knowledge, and to prepare them for the deposition.\textsuperscript{18} Therefore, the court expressed concern that the:

\textit{[P]urpose of the rule would be effectively thwarted if a party could ask a representative of a corporation produced pursuant to a Rule 30(b)(6) deposition notice to testify as to matters which [were] totally unrelated to the matters listed in the notice and upon which the representative is prepared to testify.}\textsuperscript{19}

Finally, although noting the absence of an express limitation upon questioning in the rule itself, the court nevertheless concluded that the language of the rule implicitly supported such a restriction by stating:

\textit{[T]he fact that the notice must list the matters upon which examination is requested “with reasonable particularity” also lends weight to the notion that a limitation on the scope of the deposition to the matters specified in the notice is implied in the rule. If a party were free to ask any questions, even if “relevant” to the law-}

\textsuperscript{13} Id. at 729; see Fed. R. Civ. P. 30(b).
\textsuperscript{14} Paparelli, 108 F.R.D. at 729–30.
\textsuperscript{15} Id.
\textsuperscript{16} Id. at 730.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 729–30.
\textsuperscript{19} Paparelli, 108 F.R.D. at 730.
suit, which were completely outside the scope of the “matters on which examination is requested,” the requirement that the matters be listed “with reasonable particularity” would make no sense. With this in mind, the sentence which reads that “[t]he persons so designated shall testify as to matters known or reasonably available to the organization” can be read in harmony with the rest of the rule if the word “matters” has the same meaning as it does when used earlier in the rule, i.e. “matters upon which examination is requested.” As to “matters upon which examination is requested,” the representative has the duty to answer questions on behalf of the organization to the extent that the information sought is “known to the organization or reasonably available to it.”

The opposite conclusion was reached ten years later, however, by the United States District Court for the Southern District of Florida in *King v. Pratt & Whitney (King I)*. Looking at the rule as being designed to provide an additional discovery tool, this court concluded that while it imposed an affirmative duty on the corporation to select an individual with knowledge of the designated areas, it did not “confer some special privilege on a corporate deponent,” which would allow it to avoid answering questions of which it had knowledge, just because they were outside the scope of the deposition notice. The court further reasoned that, even if the inquiry had been intended to be limited by Rule 30(b)(6) to the designated areas, the party taking the deposition could simply re-notice the witness’ deposition as an individual and cover the new areas. Accordingly, the court concluded that the party seeking the deposition “should not be forced to jump through that extra hoop absent some compelling reason.”

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23. *Id.*

24. *Id.*
The district court's decision was subsequently affirmed by the Eleventh Circuit Court of Appeals in an unpublished memorandum decision,\(^2\) which under the court's rules constitutes only persuasive and not binding authority.\(^2\) This case has since been followed by several other more recent district court decisions.\(^2\)

Therefore, one line of federal cases views Rule 30(b)(6) as designed to provide additional protection to corporations having to select representatives and accordingly limits the inquiry to the designated areas.\(^2\) The other line, however, looks at Rule 30(b)(6) as providing parties with additional discovery tools and as a result does not limit the inquiry.\(^2\) Although more federal district court decisions follow the latter approach, the minuscule number of total cases coupled with the lack of binding circuit court authority clearly fails to constitute a definitive federal rule.\(^3\)

The rule limiting the inquiry to the designated matters makes more sense from both a legal and logical standpoint, although the \textit{Paparelli} court fails to address many of the reasons supporting this conclusion.\(^3\) As discussed in more detail below, there are distinct differences between the permitted uses of corporate representative depositions as opposed to those involving normal witnesses.\(^3\)

A corporate representative deposition is a party deposition and accordingly, is not limited by the normal rules regarding witness depositions.\(^3\) As

\(^{25}\) \textit{King II}, 213 F.3d at 647.

\(^{26}\) Under Eleventh Circuit Rule 36-2, a decision of the court referenced in a Table of Decisions Without Reported Opinions appearing in the Federal Reporter is "not considered binding precedent, but . . . may be cited as persuasive authority, . . . [provided that] a copy of the unpublished opinion [is] attached to or incorporated within the" pleading. 11TH CIR. R. 36-2.


\(^{29}\) \textit{See}, e.g., \textit{Cabot Corp.}, 194 F.R.D. at 499; \textit{Detoy}, 196 F.R.D. at 367; \textit{Mandelbaum}, 185 F.R.D. at 68.

\(^{30}\) \textit{See} Wylie v. \textit{Inv. Mgmt. & Resource}, Inc., 629 So. 2d 898, 900 (Fla. 4th Dist. Ct. App. 1993) (en banc). "When a state appellate court is asked to decide a federal question as to which there is no Supreme Court authority directly on point, and the Circuit Courts of Appeal are divided, there is no [definitive] rule to guide such a state court." \textit{Id.} In such cases, state courts engage in a reverse \textit{Erie} analysis and "guess how the highest court is likely to decide the issue." \textit{Id.}


\(^{32}\) \textit{See} FLA. R. CIV. P. 1.330(a)(1)-(2).

\(^{33}\) \textit{See id.} 1.330(a)(2).
such, under both the federal and state rules the deposition may be used at trial "for any purpose," which means it may be read at trial regardless of the availability of the witness and offered as substantive evidence. The witness may also be led on direct examination and admissions made by a corporate representative are binding on the corporation, while the same statements made by a normal employee, even if a high-ranking one, are not binding. As discussed in more detail below, while most courts have not considered such admissions "conclusive" in the same sense as "judicial admissions," they are nevertheless given tremendous weight when compared to the testimony of a normal witness.

Courts have also been more liberal in allowing the questioning of party witnesses as opposed to independent ones, especially where the party has some special expertise, such as a physician. In such cases, opinion testimony has often been allowed.

Although the testimony of the corporate representative in a deposition as to designated matters is binding on the corporation, the deponent's knowledge as to other matters outside the designations in the deposition is not. Therefore, if a court is going to permit a corporate representative to be questioned on outside matters, at the very least, it must weigh the different portions of the deposition testimony separately to determine each one's admissibility and weight. If the testimony outside of the designated areas is still admissible so that it may be read or shown to the jury, this will present a very confusing situation for the jury, which is unlikely to be cured by a jury instruction. Essentially, the jury would be required to give different parts of the same deposition different weight or consideration, which presents a highly technical and unrealistic situation for the jury.

39. See discussion infra Section V.B.
41. See, e.g., Weyant, 389 So. 2d at 712.
43. See, e.g., id.; see also United States v. Taylor, 166 F.R.D. 356, 359 (M.D.N.C. 1996) (recognizing that not all discoverable matters are "necessarily admissible at trial" in dealing with the scope of corporate representative depositions).
44. See McLellan, 95 F. Supp. 2d at 10.
Therefore, while a party could simply re-notice the deposition of the corporate representative in order to take a subsequent deposition as a fact witness with reference to matters outside the notice, this is not a mere technicality as suggested by the court in *King I*, because of the differences between the uses and permissible manner of inquiry between the two types of depositions.45

B. When Does Inquiry Violate a Corporation’s Work Product Privilege?

Another common issue, which has surprisingly received no attention by the Florida state courts, is the question of when inquiry of a corporate representative violates the work product privilege. A notice of corporate representative deposition will often contain designations such as “all of the issues raised by plaintiff’s complaint” or “the facts of the accident,” which implicate several work product issues.

First, designations like “all of the issues raised by plaintiff’s complaint” require the corporation’s counsel to exercise its legal discretion in defining the relevant issues in the case in order to even identify the appropriate representative. Such designations are conceptually no different than requests “to produce ‘all documents that relate to or otherwise support’ each essential allegation in the . . . complaint,” or to designate all documents selected by counsel and given to his client to review in preparation for deposition, which have been held to constitute work product.46 At least one federal court has found that while “the facts of a relevant incident . . . are proper for a 30(b)(6) inquiry, the contentions, i.e. [the] theories and legal positions, of an organizational party may be more suitably explored by way of interrogatories.”47

Another work product issue arises when the designated witness does not have actual knowledge of the areas of inquiry, but instead only has information supplied by the corporation’s legal counsel. An example of this type of problem typically occurs in a personal injury case, where the notice delineates issues relating to the occurrence of the underlying accident, such as “how the accident occurred,” “the facts giving rise to the plaintiff’s comparative negligence,” and so on. If the corporate employees actually involved in the accident are not available for deposition, reside outside the jurisdiction, are no longer employed, or did not personally witness the facts underlying


the designated issues, the corporation will be forced to select a representative without actual first hand knowledge, such as an adjuster, whose information was provided by the company’s counsel as a result of discovery and its case investigation.\textsuperscript{48}

This situation presents a potential clash between the application of the work product doctrine and the provisions of both the state and federal rules, which require the representative to testify as to the matters that are known or reasonably available to the corporation.\textsuperscript{49} Normally, information developed by a party’s attorney in preparation of the case would be privileged as work product.\textsuperscript{50} Under Florida law, this protection cannot be circumvented by asking a recipient of the information to set forth his or her “observations” regarding the subject matter of the privileged information, when the observations are based upon privileged information.\textsuperscript{51} Such an inquiry is also not so different from the type prohibited in \textit{ICI Explosives USA Inc. v. Douglas},\textsuperscript{52} where the court held that plaintiffs’ counsel could not ask the defendant corporation’s safety director the content of witnesses’ statements told to him during the course of his work product investigation or to set forth the corporation’s contentions regarding the cause of the accident giving rise to the suit.\textsuperscript{53} Some federal courts have reached the same conclusion, holding that the work product privilege applies to prevent the questioning of corporate employees as to \textit{privileged matters} relayed to them by the corporation’s attorneys.\textsuperscript{54}

At least one federal court has held that the work product doctrine cannot be used as a shield from preparing witnesses for their 30(b)(6) depositions:

While counsel’s own investigation into the facts of the case is substantially protected by the [work product] doctrine, and while the proceedings of any investigation conducted for purposes of risk assessment or peer review may be privileged by reason of the Maryland statute, the fact remains that a designated witness or witnesses must still be prepared to respond to the 30(b)(6) notice. If that

\begin{footnotes}
48. See, e.g., \textit{id.} at 530.
49. \textit{See id.} at 528–29.
50. \textit{Huet v. Tromp}, 912 So. 2d 336, 338 (Fla. 5th Dist. Ct. App. 2005) (finding that information provided to an adjuster by the defendant’s attorneys is normally protected from disclosure as work product); \textit{Alachua Gen. Hosp. v. Zimmer USA, Inc.}, 403 So. 2d 1087, 1088 (Fla. 1st Dist. Ct. App. 1981) (per curiam).
51. \textit{Huet}, 912 So. 2d at 341.
52. \textit{643 So. 2d} 707 (Fla. 4th Dist. Ct. App. 1994) (per curiam).
53. \textit{See id.} at 708.
\end{footnotes}
preparation means tracking much the same investigative ground that counsel and the risk management/peer review committee have already traversed, but independently of that investigation, so be it. Defense counsel may wish to exercise caution in preparing the witness or witnesses with privileged documents—otherwise the privilege may be waived as to those documents—but it is simply no answer to a 30(b)(6) deposition notice to claim that relevant documents or investigations are privileged and that therefore no knowledgeable witness can be produced.35

On the other hand, the federal decisions in particular have made it clear that the corporation has a duty to provide a representative with information that is "known or reasonably available" to it.56 As subsequently discussed in more detail,57 the corporation is therefore charged with the responsibility of preparing the witness to fully and completely answer questions reasonably related to the designated areas.58 Some have gone so far as to say the representative must be prepared to testify about not only the corporation's knowledge, but "its subjective beliefs and opinions."59

A number of federal cases have tried to draw the line between the obligation to prepare the corporate representative and the right to avoid disclosing privileged matters.60 These courts have concluded that where "the notice seeks, if not the deposition of opposing counsel, then the practical equivalent thereof. Courts... have generally taken a critical view of such a tactic."61

Accordingly, in SEC v. Morelli,62 the court quashed the defendant's notice of deposition and directed it to instead propound contention interrogatories:

[The Court finds that the proposed Rule 30(b)(6) deposition constitutes an impermissible attempt by defendant to inquire into the mental processes and strategies of the SEC. Given plaintiff's

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57. See infra Section IV.B., "The Knowledge Base of the Representative(s)."
58. Taylor, 166 F.R.D. at 360; Draw, 164 F.R.D. at 75.
59. Taylor, 166 F.R.D. at 361. For further discussion see infra note 120 and accompanying text.
62. 143 F.R.D. at 42.
CORPORATE REPRESENTATIVE DEPOSITIONS

sworn, uncontroverted statement that all relevant, non-privileged evidence has been disclosed to the defendants, the Court is drawn inexorably to the conclusion that [defendant’s] Notice of Deposition is intended to ascertain how the SEC intends to marshall the facts, documents and testimony in its possession, and to discover the inferences that plaintiff believes properly can be drawn from the evidence it has accumulated.

. . . .

Despite this result, [defendant] is not precluded from all inquiries into the contentions of the SEC . . . [Contention interrogatories] represent[] an appropriate method for [defendant] to inquire into the SEC’s contentions. 63

In SEC v. Buntrock,64 the court noted the potential for conflict between the case law requiring a party to properly prepare a witness to answer questions outside its own personal knowledge and the party’s work product privilege:

Buntrock claims that it does not seek to depose opposing counsel, arguing that the SEC may designate any person under the rule. While this contention may be technically true, from a practical standpoint it is an unconvincing argument. The rule requires that the responding party make a conscientious good faith effort to designate the persons having knowledge of the matters sought by the [discovering party] and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed by the [discovering party] as to the relevant subject matters. The investigation in this matter was conducted by SEC attorneys and by SEC employees working under the direction of attorneys. Thus, the 30(b)(6) notice would necessarily involve the testimony of attorneys assigned to this case, or require those attorneys to prepare other witnesses to testify. In SEC v. Rosenfeld, 1997 WL 576021, No. 97 Civ. 1467 (S.D.N.Y. Sept. 16, 1997), the court found that this amounted to an attempt to depose the attorney for the other side, because even if a non-attorney witness were designated, they would have to have been prepared by those who conducted the investigation, and that preparation would include disclosure of SEC attorneys’ legal and factual theories. The court’s comments in Rosenfeld are applicable here: “Although defendant is correct that a

63. Id. at 47–48.
64. 217 F.R.D. at 441.
Rule 30(b)(6) witness is not required to have firsthand knowledge, and that discovery should be conducted as efficiently as possible, the notice of deposition clearly calls for the revealing of information gathered by the SEC attorneys in anticipation of bringing the instant enforcement proceedings, and if forced to designate witnesses to testify fully and completely concerning the matters described in the notice of deposition, testimony of SEC attorneys or examiners working under the direction of the SEC attorneys conducting the investigation would be necessary. 65

As a result, designations which seek to inquire into one party’s responses to the others’ interrogatories and requests for production have been found to be not only overbroad, but violative of the corporation’s work product privilege, especially since “answering requests for production and interrogatories customarily is performed with the assistance of counsel.” 66

In an effort to balance one party’s right to permissible discovery with another’s work product protections, many federal courts have focused on the subject matter of the proposed inquiry, trying to draw the line between “facts” and the “significance” of those facts:

There is simply nothing wrong with asking for facts from a deponent even though those facts may have been communicated to the deponent by the deponent’s counsel. But, depending upon how questions are phrased to the witness, deposition questions may tend to elicit the impressions of counsel about the relative significance of the facts; opposing counsel is not entitled to his adversaries’ thought processes. Here the effort must be to protect against indirect disclosure of an attorney’s mental impressions or theories of the case.

The problem in this type of situation is determining the degree to which a particular deposition question elicits the mental impressions of the attorney who communicated a fact to the deponent. 67

Where the courts have found that the designations improperly impinge on the corporation’s work product and attorney client privileges, they have

65. Id. at 444 (quoting Rosenfeld, 1997 WL 576021, at *2) (citation omitted).
CORPORATE REPRESENTATIVE DEPOSITIONS

often struck the notice and instead directed the party to propound contention interrogatories.\textsuperscript{68}

In the same vein, it seems incongruous that a designee can be compelled to testify about the corporation's subjective beliefs and opinions but that the same questions could not be asked to a lay witness.\textsuperscript{69} There is no overriding policy reason or legal rationale for treating corporate representative depositions different from individual party depositions. Therefore, to the extent possible, corporate representative's depositions should be governed by the same rules and limitations as individual party depositions.

III. DESIGNATION OF AREAS

A. The "Reasonable Particularity" Requirement

Both the federal and state rules require that the areas of inquiry be designated in the notice with "reasonable particularity"\textsuperscript{70} but do not otherwise provide guidance as to the degree of specificity required.\textsuperscript{71} Unfortunately, the cases construing the rules fail to offer any meaningful general rule and instead are limited to their specific facts.

In one case, a Rule 30(b)(6) notice, which stated "that the areas of inquiry will 'includ[e] but not [be] limited to' the areas specifically enumerated," was held to be overbroad and therefore failed to meet the reasonable particularity standard.\textsuperscript{72} In another case, the district court held that a notice which sought "to examine 'such other officers and employees of said plain-

\textsuperscript{68} See, e.g., id.; Smithkline, 2000 WL 116082, at *9; Exxon Res. & Eng'g Co. v. United States, 44 Fed. Cl. 597, 602–03 (Fed. Cl. 1999); Rosenfeld, 1997 WL 576021, at *3–4.

\textsuperscript{69} See Exxon Research & Eng'g Co., 44 Fed. Cl. at 602–03.

\textsuperscript{70} FED. R. Civ. P. 30(b)(6); FLA. R. Civ. P. 1.310(b)(6). The reason for the particularity requirement "is to give the opposing party notice of the areas of inquiry that will be pursued so that it can identify appropriate deponents and ensure they are prepared for the deposition." Tri-State Hosp. Supply Corp. v. United States, 226 F.R.D. 118, 125 (D.D.C. 2005).

\textsuperscript{71} The ABA's Civil Discovery Standards provide that the notice "should accurately and concisely identify the designated area(s) of requested testimony, giving due regard to the nature, business, size, and complexity of the entity being asked to testify." ABA SECTION OF LITIG., CIVIL DISCOVERY STANDARDS, § 19a (2004) available at http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf [hereinafter CIVIL DISCOVERY STANDARDS]. The ABA also suggests that if a party is in doubt as to "the meaning and intent of any designated area of inquiry [it] should communicate in a timely manner with the requesting party to clarify the matter so that the deposition may go forward as scheduled." Id. § 19e.

\textsuperscript{72} Reed v. Bennett, 193 F.R.D. 689, 692 (D. Kan. 2000); accord Tri-State Hosp. Supply Corp., 226 F.R.D. at 125 (striking the phrase "including but not limited to" from six categories in a 30(b)(6) notice because "[l]isting several categories and stating that the inquiry may extend beyond the enumerated topics defeats the purpose of having any topics at all").
tiff as have knowledge of the matters involved in this action” was too general. 73 Similarly, a designation regarding Plaintiff’s “responses to Defendants’ Interrogatories and requests for production, along with the subject[] [matters] identified therein,” was held to be not only overbroad and burdensome, but violative of the corporation’s work product privilege as well. 74

In contrast, another federal district court held that a 30(b)(6) notice identifying the subject matter as “[t]he Group Health Insurance Plan issued to plaintiff through his employment with Xerox, Inc., believed to be numbered E9387,” was stated with reasonable particularity. 75 Likewise, an insured’s 30(b)(6) notice, seeking “a person knowledgeable about the claims processing and claims records, and persons familiar with general file keeping, storage and retrieval systems of [the] defendant” insurer, was held to be sufficiently particular. 76 Most cases have held, however, that designations which are overly broad or general, such as “all of the issues raised in plaintiff’s complaint,” may raise work product issues as well. 77

B. What Constitutes Sufficient Compliance with the Notice?

Sanctions for failure to comply with both the state and federal rules are dependent in the first instance upon the discovering party’s compliance with the procedures set forth in the rules. 78 Where the party seeking the discovery does not properly comply with the provisions of the rules, such as by naming a specific individual, 79 or by inadequately delineating the areas of inquiry, 80 or by failing to serve a formal notice, 81 sanctions for failing to produce a

76. Marker v. Union Fid. Life Ins. Co., 125 F.R.D. 121, 125–26 (M.D.N.C. 1989); see also Alexander v. FBI, 186 F.R.D. 137, 140 (D.D.C. 1998) (holding that a Rule 30(b)(6) notice which stated “that the subject matter of [the] inquiry will be ‘the computer systems commonly known as or referred to as ‘Big Brother’ and/or ‘WHODB,’” was stated with “reasonable particularity”).
77. See supra Section II.B.
78. CIVIL DISCOVERY STANDARDS, supra note 71, § 3.
79. See Anderson Invs. Co. v. Lynch, 540 So. 2d 832, 833 (Fla. 4th Dist. Ct. App. 1988) (per curiam) (holding that a corporation is not subject to sanctions for failing to produce a specifically named employee in response to notice under Florida rule).
80. See King v. Pratt & Whitney (King I), 161 F.R.D. 475, 476 (S.D. Fla. 1995) (finding that a corporate party may not be sanctioned for a representative’s inability to answer questions outside the designated areas).
knowledgeable corporate representative are generally not appropriate. As stated rather unceremoniously by the court in *King I*, "if the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party’s problem."

Where the proper procedures are followed, however, the failure to produce individuals with sufficient knowledge of the matters asserted can lead to a variety of sanctions, which normally become progressively more severe as noncompliance continues. Typically, the court’s first reaction to the failure to provide a witness with sufficient knowledge of the designated matters is to enter an order compelling production, sometimes even identifying the specific individual(s) to appear. The types of escalating sanctions that can follow are documented in *Precision Tune Auto Care, Inc. v. Radcliffe*.

producing purportedly inadequate witnesses when defendants’ informal requests for deposition witnesses did not constitute “notice” under the rule).

82. See, e.g., id.; *King I*, 161 F.R.D. at 476; *Lynch*, 540 So. 2d at 833. A party must be careful though not to sit on its rights and then try to justify its designation of a plainly unqualified deponent. For example, in *Arctic Cat, Inc. v. Injection Research Specialists, Inc.*, the district court sanctioned the plaintiff for designating an unqualified deponent even though plaintiff contended that its faulty designation was caused “by the vagueness of the [defendant’s] Deposition Notice.” 210 F.R.D. 680, 682–84 (D. Minn. 2002). The court disagreed with the plaintiff since it “voiced no uncertainty to [the defendant], after [it] amended its Deposition Notice, about the intended scope of inquiry, nor did it seek the assistance of the Court in bringing further clarity to [the] scope of [the] questioning.” Id. at 683; see also *Cont’l Cas. Co. v. Compass Bank*, No. CA04-0766-KD-C, 2006 WL 533510, at *19 (S.D. Ala. Mar. 3, 2006) (suggesting that objections to the areas of inquiry must be made and ruled upon prior to the commencement of the deposition).

83. *King I*, 161 F.R.D. at 476.

84. The inadequate designation of a corporate employee for deposition, or even the failure to appear for the deposition, is sometimes considered tantamount “to a refusal or failure to answer a deposition question.” *Marker v. Union Fid. Life Ins. Co.*, 125 F.R.D. 121, 126 (M.D.N.C. 1989); see also *Barron v. Caterpillar, Inc.*, 168 F.R.D. 175, 177 (E.D. Pa. 1996). But see *Alexander v. FBI*, 186 F.R.D. 137, 142–43 (D.D.C. 1998) (finding that designee’s inability to answer all deposition questions was not “tantamount to a failure to appear” because designee “testified adequately in numerous respects” and “generally provided the name of the person that could answer” the questions).

85. See, e.g., *Precision Tune Auto Care, Inc. v. Radcliffe*, 804 So. 2d 1287, 1288 (Fla. 4th Dist. Ct. App. 2002). There is some authority supporting the proposition that “[b]oth in preparing and in responding to a notice,” the corporation or designated “witness is expected to interpret the designated area(s) of inquiry in a reasonable manner consistent with the entity’s business and operations.” *Civil Discovery Standards, supra* note 71, at § 19d.


87. *See Precision Tune*, 804 So. 2d at 1288.

88. Id. at 1287, 1290–91.
In *Precision Tune*, the plaintiff noticed the deposition of the foreign defendant's corporate representative in Florida. Although the defendant filed a motion for protective order, it never set it down for a hearing. Subsequently, the court granted the plaintiff's ensuing motion for sanctions and required the corporate defendant to produce an employee for deposition in Florida. Although the corporation produced an employee in response to the order, the witness had only "very limited knowledge of the case, but identified three others with knowledge in the requested areas." The plaintiff "again moved for sanctions, which the court granted" and ordered the defendant to produce the three named individuals for deposition in Florida, in addition to various specific documents by a specified date or its pleadings would be stricken. The corporate defendant subsequently provided two of the three employees, but failed to produce the documents or the third witness. Following a hearing, the court concluded that the corporation's conduct had demonstrated "'deliberate and contumacious disregard of the Court's previous orders,'" and struck the defendant's pleadings. The trial court's action was subsequently affirmed on appeal.

The federal courts have taken a much stricter approach with respect to compliance with the corporate representative rule than their Florida state counterparts. In *Resolution Trust Corp. v. Southern Union Co.*, the Fifth Circuit Court of Appeals concluded that a corporation's failure to produce a sufficiently knowledgeable representative was the equivalent of producing no representative; in upholding an award of fees and costs in the absence of a prior court order, the court stated:

> When a corporation or association designates a person to testify on its behalf, the corporation appears vicariously through that agent.

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89. *Id.* at 1289.
90. *Id.* The defendant's initial objection appears to have been well taken, since the general rule recognized in Florida is that absent extraordinary circumstances, a non-resident employee of a foreign corporation, which is not seeking affirmative relief, cannot be compelled to come to Florida for deposition. *See, e.g.*, *Prevost Car, Inc. v. Vehicles-R-Us, Inc.*, 658 So. 2d 668, 668 (Fla. 5th Dist. Ct. App. 1995). Although not discussed by the appellate court, it appears as if the defendant's failure to notice its own motion for hearing was treated by the trial court as a waiver of its right to insist upon requiring the plaintiff to come to its principal place of business. *See Precision Tune*, 804 So. 2d at 1289.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Precision Tune*, 804 So. 2d at 1290.
96. *Id.* at 1293.
97. 985 F.2d 196 (5th Cir. 1993).
If that agent is not knowledgeable about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness, then the appearance is, for all practical purposes, no appearance at all.\(^{98}\)

The next logical question is what happens when the corporate representative does not know the answer to a question or series of questions.

Rule 30(b)(6) implicitly requires the designated representative "to review all matters known or reasonably available to it in preparation for the Rule 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and to prevent the sandbagging of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial. . . . [A party] does not fulfill its obligations at the Rule 30(b)(6) deposition by stating it has no knowledge or position with respect to a set of facts or area of inquiry within its knowledge or reasonably available."\(^{99}\)

But the question then becomes to what lengths must a corporate representative conduct research in order to competently testify as to the designated areas. Courts appear to apply a reasonableness standard, requiring the corporation to "‘prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources.’"\(^{100}\) "Reasonably available" has been defined to mean those documents that are in a party’s control.\(^{101}\) "[I]t need not make extreme efforts to obtain all information possibly relevant to the requests."\(^{102}\) Courts have enforced this interpretation "in order to make the deposition a meaningful one and to prevent the 'sandbagging' of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before . . . trial."\(^{103}\)

\(^{98}\) Id. at 197.


\(^{103}\) Taylor, 166 F.R.D. at 362.
At the bare minimum, a corporation must prepare its representatives "by having them review prior fact witness deposition testimony as well as documents and deposition exhibits, . . . [so it] can state its corporate position at the Rule 30(b)(6) deposition [about] . . . prior deposition testimony." At least one case has gone so far as to hold that the corporate representative must also review all corporate documentation that might have a bearing on the 30(b)(6) deposition topics, "[e]ven if the documents are voluminous and the review of those documents would be burdensome." In short,

[w]hile the rule may not require absolute perfection in preparation . . . it nevertheless . . . requires a good faith effort on the party of the designate to find out the relevant facts—-to collect information, review documents, and interview employees with personal knowledge just as a corporate party is expected to do in answering interrogatories.

"There is no obligation to produce witnesses who know every single fact, only those that are relevant and material to the incident or incidents that underlie the suit."

Although the length of time involved in preparation will not be determinative of whether the corporation has reasonably prepared its deponent, courts do consider it. In one case, the court found that a corporate representative failed to "appear" when the deponent spent a total of three hours reviewing materials, merely glancing at some; conducted no investigation into the corporation's role in the case; and spent a "scant" one and one-half hours meeting with the corporate attorney prior to the deposition.

In light of the above, some courts consider the production of an unprepared designee to be "tantamount to [the] failure to appear" at a deposition. "[I]f it becomes obvious during the course of a deposition that the designee is deficient, the corporation . . . [must] provide a substitute." In addition, "[m]onetary sanctions are mandatory under Rule 37(d) for [the] failure to appear by means of . . . failing to [adequately] educate a Rule 30(b)(6) wit-

104. Id.
105. Calzaturificio, 201 F.R.D. at 37.
107. Id. at 529 n.7.
108. See id. at 528.
ness, unless the conduct was substantially justified.\textsuperscript{112} The rule provides that a "court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure."\textsuperscript{113} In some cases where there is a repeated violation of the rule, courts have held the corporation bound to the initial level of the response and have precluded any later contradiction or supplementation.\textsuperscript{114}

IV. SELECTION OF CORPORATE REPRESENTATIVES

A. The Importance of the Selection

Before 1970, it was generally held that if a corporation was to be examined through its officers, directors, and managing agents, the individual to be questioned had to be identified in the notice.\textsuperscript{115} Now that the corporation selects the witnesses to testify as corporate representatives, this has become an extremely important decision for two reasons.

First, since the deposition will be treated at trial as the testimony of a party and not just an independent witness, the deposition may be used at trial "for any purpose."\textsuperscript{116} This means that the deposition may be read at trial and offered as substantive evidence, regardless of the availability of the witness to testify in person.\textsuperscript{117}

Second, and most obviously, the corporate party is bound by testimony of the corporate representative, and the representative's statements can be admitted as an admission of the corporation.\textsuperscript{118} In other words, "[a] corporation is 'bound' by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be 'bound' by his or her testimony, however, this does not mean that the witness has made a judicial admission that formally and finally decides an issue."\textsuperscript{119}


\textsuperscript{113} FED. R. CIV. P. 37(d)(3).

\textsuperscript{114} Werner-Masuda, 390 F. Supp. 2d at 491.

\textsuperscript{115} FED. R. CIV. P. 30(b)(6).

\textsuperscript{116} See FED. R. CIV. P. 32(a)(3); FLA. R. CIV. P. 1.330(a)(2).

\textsuperscript{117} See, \textit{e.g.}, LaTorre v. First Baptist Church of Ojus, Inc., 498 So. 2d 455, 458 (Fla. 3d Dist. Ct. App. 1986).

\textsuperscript{118} McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70, 79 (D.D.C. 1999).

Accordingly, a corporation should be careful not to choose a representative whose testimony will contradict other testimony offered on behalf of the corporation. The situation would probably be likened to a party who alters its deposition testimony in order to create a genuine issue of material fact to preclude the entry of summary judgment. "When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact [for summary judgment], that party cannot thereafter create such an issue with an affidavit that merely contradicts without explanation, previously given clear testimony."  

B. The Knowledge Base of the Representative(s)

The testimony elicited at [a corporate representative's] deposition represents the knowledge of the corporation, not of the individual deponents. The designated witness is "speaking for the corporation," and this testimony must be distinguished from that of a "mere corporate employee" whose deposition is not considered that of the corporation and whose presence must be obtained by subpoena.

Under both the state and federal rules, the corporate representative has a duty to provide information that is "'known or reasonably available to the' corporation." As such, "the duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved." For this reason, the
corporate representative does not need to have "personal knowledge of the facts to which he testifies." 125

The corporation "must make a conscientious good-faith [effort] to designate the person[ ] who has knowledge [about] the matters sought by" the party noticing the deposition. 126 But the corporation's "duty extends beyond the mere act of presenting a human body to speak on the corporation's behalf." 127 Therefore, the corporation is not relieved of producing a representative simply because it has no employee who participated in the underlying event or transaction or who "has sufficient [personal] knowledge to provide the requested information." 128 In such situations, a number of district court decisions have held that the corporation must make a good faith effort to prepare the representative to answer fully and completely any questions posed as to the relevant subject matters based on any reasonably available information including documents, past employees, or other sources. 129 It may not be enough for the representative to simply review documents previously produced in deposition and to confer with the corporation's attorney if this will not sufficiently prepare him to testify as to the designated areas. 130

The corporation's duty to provide information through a knowledgeable representative has been equated to its obligations in answering interrogatories:

The Advisory Committee said: "This burden is not essentially different from that of answering interrogatories under Rule 33 . . . ." As with interrogatories, depositions should be answered directly and without evasion, in accordance with the information the deposed party possesses, after due inquiry. [The corporation] must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [the noticing party] and to prepare those persons in order that they can answer fully, com-

pletely, unevasively, the questions posed by Mitsui as to the relevant subject matters.131

As previously discussed in more detail in Part II.B., a number of federal district courts have limited inquiry under Rule 30(b)(6) to factual matters in order to avoid allowing litigants to use the rule to circumvent a corporation’s work product protections.132 There is, however, a line of federal district opinions which state that the corporate representative “must not only testify about facts within the corporation’s knowledge, but also its subjective beliefs and opinions” and its “interpretation of documents and events.”133 In Lapenna v. Upjohn Co.,134 the court qualified this requirement by stating: “Before compelling such a witness to testify regarding the subjective beliefs of the corporation, a court should first be satisfied that the employee has the requisite knowledge and authority to make an accurate statement.”135

Unfortunately, these cases do little to explain how a corporation can have a “subjective belief,” much less give any clue as to how it could ever be determined. Is the subjective belief of the corporation the belief of its CEO? How about a majority of its directors? Its stockholders? Its attorneys?

Perhaps even more importantly, such a requirement creates a very high risk of violating a corporation’s work product privilege.136 It is one thing to require a corporate representative to testify about factual matters, but quite another to require testimony about conclusions and interpretations which clearly enter the realm of the attorney’s mental impressions, strategy, advice, and legal conclusions.

While many of these courts have given lip-service to the proposition that “[t]he designee, in essence, represents the corporation just as an individual represents [himself],”137 these courts, in fact, hold the corporation to a much higher standard.138 Although an individual is not required to speculate


132. See, e.g., Morelli, 143 F.R.D at 47.


134. Lapenna, 110 F.R.D. at 15.

135. Id. at 20.

136. See id. at 21–22.


as to matters of which he or she has no direct knowledge, these cases require the representative to testify as to matters of which the corporation itself may have no knowledge. Similarly, while an individual would not be required to give expert opinions in areas where he or she is not an expert, this line of cases in effect requires the corporation to do so by compelling the representative to testify concerning the corporation’s “subjective beliefs and opinions.” Since an individual litigant would not be required to divulge opinion work product or speculate as to expert opinions, why should a corporation be required to do so?

C. The Knowledge Level of the Representative(s)

A common misconception among litigants, and sometimes even courts, is that the rules require the production of the person with the “most” knowledge regarding the designated issues. Neither the state nor federal rule contains such a requirement, and instead only provide that the witness be able to “testify about matters known or reasonably available to the organization.”

Both the state and federal rules clearly call for the selection of the witness to be made by the corporation. The party seeking to take the deposition may not name a particular employee or individual under this rule. To require the corporation to produce the individual with the “most” knowledge of a designated issue, however, would nullify the corporation’s choice in the matter and, in many cases, would be tantamount to requiring the production of a specific employee.

For example, if the case involved a suit for personal injuries arising from an accident, those corporate employees with the “most” knowledge of

139. See id. at 361.
140. Id.; see also Lapenna, 110 F.R.D. at 20; A.I.A. Holdings, 2002 WL 1041356, at *2.
142. See id.
143. FLA. R. Civ. P. 1.310(b)(6); see also King v. Pratt & Whitney (King I), 161 F.R.D. 475, 476 (S.D. Fla. 1995).
144. See Chiquita Int’l Ltd. v. Fresh Del Monte Produce, N.V., 705 So. 2d 112, 113 (Fla. 3d Dist. Ct. App. 1998) (per curiam).
145. See id.
146. See id. at 112–13.
how the accident occurred would be the ones who actually witnessed it. The same could be true in a products liability suit; the employee with the "most" knowledge concerning the operation of the product would likely be the engineer who designed it. In these cases, the corporation would therefore be deprived of its right to make a selection of the representative to speak for it as guaranteed by the rule.

Such a construction would pose other problems. If, for instance, the accident in the first example occurred on a cruise ship sailing in the Mediterranean Sea, the crew members who witnessed it would likely reside and work in Europe. Similarly, if the product in the second example was manufactured in Japan, the engineer who designed it would likely live and work in Asia. To require their employers to bring them to Florida, as the witnesses with the "most" knowledge, would violate the well-established rule that witnesses who work and reside outside of the state cannot be required to come to the state for a deposition.147

It is also important to note that under both the state and federal rules, the corporation, or other organization is not limited to designating an officer, director, or managing agent, but may also select anyone who consents to act as a corporate representative, which may include an employee, attorney, or consultant.148 An individual may decline to appear as a corporate representative, particularly if they have an independent interest from, or conflicting interest with, the corporation in the pending litigation.149

Finally, if there is no single individual that can offer testimony on each of the designated areas, the corporation is obligated to produce as many representatives as necessary to satisfy the request.150

D. The Corporation's Use of the Rule to Avoid Harassment

While the state and federal rules provide an important tool for the litigant seeking to depose a corporation, they may help corporations reduce harassment in the form of having to produce excessive numbers of corporate


148. FED. R. CIV. P. 30 advisory committee's note, subdivision (b)(6) (1970) (explaining that a person who is not an officer, director, or managing agent may be designated to testify only with their consent).

149. See id.

employees for deposition. In *Plantation-Simon, Inc. v. Bahloul*,151 the Fourth District Court of Appeal concluded that while a party seeking to depose corporate employees was not required to use Rule 1.310(b)(6) and could instead set the depositions of specific employees as provided elsewhere in the *Florida Rules of Civil Procedure*, "if the trial court finds that seriatim depositions of corporate officers has created a burden on the corporate party, the court is empowered to alleviate that burden in a proper case by, e.g., limiting the examining party to the designation procedure."152

Where, however, a corporate officer or employee has specific additional personal knowledge of matters in controversy, it is erroneous to prevent the opposing party from deposing such a witness.153 Likewise, a corporation may insist on the designation of a corporate representative as an alternative to deposing high-ranking corporate officers who possess no unique, superior, personal knowledge of the matter in issue.154

A 30(b)(6) deposition may not be justified where, assuming the witness is properly prepared, the entity establishes that the witness's testimony as a 30(b)(6) witness would be identical to his testimony as an individual and the 30(b)(6) is limited, or substantially limited, to topics covered in the deposition taken in the witness's individual capacity. In such a situation, there appears to be no obstacle to the entity's complying with its obligations under Rule 30(b)(6) by adopting the witness's testimony in his individual capacity.155

V. THE IMPACT OF THE CORPORATE REPRESENTATIVE'S TESTIMONY

A. Changing Testimony Through Errata Sheets

As with most other aspects of corporate representative depositions, there is scant law dealing with the subject of what changes can be made in the transcript after the deposition is completed. Even resort to the rules applicable to depositions, in general, offers little help. Although the federal

152. Id. at 1161.
and state rules are worded somewhat differently, they both provide deponents with the opportunity to review the transcript after it is completed and to make "changes in form or substance" on a written signed statement, which also must set forth the reasons given by the deponent for each change. 156 Despite the similarity of their respective rules, Florida and federal courts have interpreted their rules differently. 157

Florida Rule of Civil Procedure 1.310(e) provides in pertinent part that "[a]ny changes in form or substance that the witness wants to make [to the transcript] shall be listed in writing by the officer with a statement of the reasons given by the witness for making the changes." 158 As is clear from the language of the rule, a "deponent can make changes of any nature [to the transcribed deposition,] no matter how fundamental or substantial." 159

If, however, the changes are substantial the opposing party can reopen a deposition to inquire about the changes. 160 While a party may inquire as to whether the substantive changes originated with the deponent or his attorney, the attorney-client privilege precludes inquiry into the substance of the communications between the deponent and his or her counsel. 161 The errata sheet, indicating the changes and corrections to the witness’s deposition testimony, is admissible in evidence since it becomes a part of the testimony. 162

While earlier interpretations of the federal rule allowed a deponent to make any change whatsoever to the deposition transcript, recent decisions, including cases in the Eleventh Circuit Court of Appeals, have limited the changes to matters of form and not the substance of the testimony given under oath. 163

156. FED. R. CIV. P. 30(e); FLA. R. CIV. P. 1.310(e).
158. FLA. R. CIV. P. 1.310(e).
161. Feltner, 622 So. 2d at 125.
162. Dowling, 595 So. 2d at 262.
163. See Greenway v. Int’l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992); see also Burns v. Bd. of County Comm’rs of Jackson County, 330 F.3d 1275, 1281–82 (10th Cir. 2003); Garcia v. Pueblo Country Club, 299 F.3d 1233, 1242 n.5 (10th Cir. 2002) ("We do not condone counsel’s allowing for material changes to deposition testimony and certainly do not approve of the use of such altered testimony that is controverted by the original testimony."); Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000); Harrell v. Wood & Assoc. of Am. (In re Harrell), 351 B.R. 221, 240 (Bankr. M.D. Fla. 2006); Reynolds v. IBM Corp., 320 F. Supp. 2d 1290, 1300 (M.D. Fla. 2004), aff’d, 125 F. App’x 982 (11th Cir. 2004).
The rationale for these more restrictive interpretations of Rule 30(e) was set forth in the oft-quoted Greenway v. International Paper Co.:164

The purpose of Rule 30(e) is obvious. Should the reporter make a substantive error, i.e., he reported "yes" but I said "no," or a formal error, i.e., he reported the name to be "Lawrence Smith" but the proper name is "Laurence Smith," then corrections by the deponent would be in order. The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.165

In Greenway, a plaintiff sought to make sixty-four corrections to her deposition testimony.166 The majority of the changes, indicated on the plaintiff's errata sheet, sought to materially alter the testimony given at deposition.167 The reasons given for the changes were "(1) [the plaintiff's] belief that the correction is a more accurate and complete answer or (2) that she subsequently recalled more accurate information or (3) that she wished to clarify her answer."168

Cases from both the United States Middle District Court of Florida and the Eleventh Circuit Court of Appeals have followed the more recent interpretation of Rule 30 and disallowed substantive changes to depositions.169 In Reynolds v. IBM Corp.,170 a former IBM employee sued the company, asserting that he was fired because of discrimination.171 The plaintiff alleged that after he sent an e-mail to a supervisor on February 27, 2001 requesting information about medical leave, the company set up a March 6, 2001 meeting

(unpublished table decision); SEC v. Parkersburg Wireless L.L.C., 156 F.R.D. 529, 535–36 (D.D.C. 1994) ("Defendant Gerstner argues that Rule 30(e) allows her to make any substantive change she so desires. While older cases appear to support this position, later cases have often limited this blank check; perhaps because of the potential for abuse."). (footnote omitted); Rios v. Bigler, 847 F. Supp. 1538, 1546–47 (D. Kans. 1994) ("The court will only consider those changes which clarify the deposition, and not those which materially alter the deposition testimony as a whole.").

164. 144 F.R.D. at 322.
165. Id. at 325.
166. Id. at 323.
167. See id. 323–25.
168. Id. at 325.
170. Id. at 1290.
171. Id. at 1298.
with him to discuss either his resignation or placement in a performance improvement plan.\textsuperscript{172} In his deposition, though, the plaintiff stated that the meeting was actually scheduled two to three weeks before he had requested information about medical leave.\textsuperscript{173} This testimony refuted the plaintiff's contention that the meeting was set up in response to his e-mail, since the meeting was clearly set up prior to the e-mail.\textsuperscript{174} Realizing that his testimony destroyed his case, the plaintiff attempted to submit an errata sheet changing "two to three weeks" to "a little before the meeting," and indicated [that] he could not recall if [his supervisor] called him 'a week or a few days before' the March 6, 2001 meeting."\textsuperscript{175} The plaintiff's reason given for these changes was "confusion."\textsuperscript{176}

The court disallowed the plaintiff's changes, adopting the rule that substantive changes to deposition testimony are impermissible:

Although the Eleventh Circuit has not spoken, the Seventh and Tenth Circuits have dealt with situations where a deponent filed an errata sheet that materially changed original deposition testimony. Both courts analogized the situation to the rule that an affidavit may not be used to contradict a witness's prior sworn testimony.\textsuperscript{177}

The Eleventh Circuit affirmed the \textit{Reynolds} decision\textsuperscript{178} in an unpublished opinion, which under its rules makes it persuasive, although not binding as precedent.\textsuperscript{179}

In \textit{Amlong & Amlong, P.A. v. Denny's, Inc.},\textsuperscript{180} Judge Hill, in a dissenting opinion, discussed the competing rules regarding changes to errata sheets, noting that the rule followed in the Eleventh Circuit is that substantive changes to a deposition are not permitted.\textsuperscript{181} There, a district court sanctioned a law firm over $400,000 "for their conduct in representing a Title VII plaintiff in a sexual harassment lawsuit."\textsuperscript{182} Originally, the district court "referred the issue of sanctions to a magistrate judge for an evidentiary hear-

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\textsuperscript{172.} \textit{Id.} at 1299–1300.
\textsuperscript{173.} \textit{Id.} at 1300.
\textsuperscript{174.} \textit{Reynolds}, 320 F. Supp. 2d at 1301.
\textsuperscript{175.} \textit{Id.} at 1300.
\textsuperscript{176.} \textit{Id.}
\textsuperscript{177.} \textit{Id.} (citations omitted).
\textsuperscript{178.} \textit{Reynolds v. IBM Corp.}, 125 F. App’x 982, 982 (11th Cir. 2004) (unpublished table decision).
\textsuperscript{179.} \textit{11th Cir. R.} 36-2.
\textsuperscript{180.} 457 F.3d 1180 (11th Cir. 2006).
\textsuperscript{181.} \textit{Id.} at 1220–21 (Hill, J., dissenting).
\textsuperscript{182.} \textit{Id.} at 1184 (majority opinion).
One of the issues presented to the magistrate was whether the law firm's submission of an errata sheet to the plaintiff's deposition with over 868 changes to the plaintiff's testimony—consisting of 1200 pages—showed that the law firm had brought the plaintiff's suit in bad faith and knew that the suit was totally baseless. Although the magistrate judge found that the law firm had not acted improperly, he further noted that the submission of the errata sheet was improper. The district court subsequently discarded the magistrate's findings and "substituted its own findings of fact," entering sanctions without conducting an evidentiary hearing.

In a two to one decision, the Eleventh Circuit concluded that the district court had abused its discretion when it rejected the magistrate's findings and entered an order of sanctions without a hearing of its own or the calling of a single witness. Although the majority did not address the propriety of the errata sheet filed by the plaintiff, Judge Hill noted in his dissenting opinion: "Although early cases may have given the impression that such [substantive] changes are permissible, the rule is, and was at the time the Amlongs filed the Errata Sheet, to the contrary." Even more recently, a Middle District bankruptcy court disregarded an errata sheet that made substantive changes to a deposition, citing to both Am-

183. Id.
184. See id. at 1185–86.
185. Amlong & Amlong, 457 F.3d at 1200.
186. Id. at 1184.
187. Id. at 1202 n.6 ("Our holding . . . is simply this: the district court abused its discretion and clearly erred when it squarely rejected the magistrate judge's findings of fact and credibility determinations and substituted its own, without hearing so much as a single witness at a sanctions hearing.") (emphasis added).
188. Id. at 1220 (Hill, J., dissenting) (emphasis added). Judge Hill's dissenting opinion also states:

The Amlongs maintain that Rule 30(e) "in no way limits the types and number of changes" that an errata sheet is permitted to make to a prior deposition. The majority seems to agree, noting without comment or objection that Norelus's sworn testimony was changed 868 times by the Errata Sheet.

Id. (footnote omitted). However, as Judge Hill points out, the majority in Amlong & Amlong never ruled on the issue of whether errata sheets could be used to make substantive changes to a deposition, instead they only noted that it was attempted below. Amlong & Amlong, 457 F.3d at 1200 (Hill, J., dissenting). The Eleventh Circuit also noted, without comment, that the magistrate found the submission of the errata sheet to be improper, which based on the reasoning stated above, would instead support the conclusion that the Eleventh Circuit agreed that the errata sheet was improper because it made substantive changes. Id. at 1194 (majority opinion).
long and Reynolds as precedent in Harrell v. Wood & Associates of America, Inc. (In re Harrell): 189

Federal Rules of Civil Procedure, Rule 30(e) permits a deponent to modify or make corrections to a deposition for form or substance. However, while older case law has taken a broader view of the rule, the modern trend, one that is bolstered by the Eleventh Circuit, is to view Rule 30(e) with a restrictive eye. The Eleventh Circuit recently broached the issue in Amlong & Amlong P.A. v. Denny’s, Inc., 457 F.3d 1180 (11th Cir. 2006). The Amlong court surveyed case law which articulated the narrow view of Rule 30(e). For example, in quoting Greenway v. Int’l Paper Co., 144 F.R.D. 322, 325 (W.D. La. 1992), the Eleventh Circuit echoed that “[a] deposition is not a take home examination.”...

The Eleventh Circuit continued its analysis by stating a broader interpretation of Rule 30(e) holds “potential for abuse.” In addition, the Amlong court noted that the Eleventh Circuit itself had affirmed a district court’s decision to disregard an errata sheet that attempted to contradict a deposition when the deponent claimed confusion at the deposition. 190

B. Conflicting Testimony

Another important issue that has not been fully addressed by either the rules or the Florida state courts is whether a party is permitted to call other witnesses at trial to refute or contradict the testimony of the corporate representative.

Numerous federal district courts have repeated the standard: “[A] corporation served with a Rule 30(b)(6) notice of deposition has a duty to ‘produce such number of persons as will satisfy the request [and] more importantly, prepare them so that they may give complete, knowledgeable and binding answers on behalf of the corporation.’” 191

189. 351 B.R. 221, 240 (Bankr. M.D. Fla. 2006).
190. Id. (citations omitted).
The unanswered question, however, is what does “binding” mean in this context? In a statement that has been repeated by a number of other cases, the court in United States v. Taylor concluded:

The designee, in essence, represents the corporation just as an individual represents him or herself at a deposition. Were it otherwise, a corporation would be able to deceitfully select at trial the most convenient answer presented by a number of finger-pointing witnesses at the depositions. Truth would suffer.

... The attorney for the corporation is not at liberty to manufacture the corporation’s contentions. Rather, the corporation may designate a person to speak on its behalf and it is this position which the attorney must advocate.

Although the foregoing quote would appear to prevent the subsequent introduction of contrary evidence, the court softened its stance on the conclusive nature of such testimony in a footnote:

When the Court indicates that the Rule 30(b)(6) designee gives a statement or opinion binding on the corporation, this does not mean that said statement is tantamount to a judicial admission. Rather, just as in the deposition of individuals, it is only a statement of the corporate person which, if altered, may be explained and explored through cross-examination as to why the opinion or statement was altered. However, the designee can make admissions against interest under Fed. R. Evid. 804(b)(3) which are binding on the corporation.

In W.R. Grace & Co. v. Viskase Corp., cited in Taylor, the United States District Court for the Northern District of Illinois went on to further define the meaning of “binding” in this context by explaining:

It is true that a corporation is “bound” by its Rule 30(b)(6) testimony, in the same sense that any individual deposed under Rule 30(b)(1) would be “bound” by his or her testimony. All this means is that the witness has committed to a position at a particular point

194. Id. at 361–62 (citation omitted) (emphasis added); see also Twentieth Century Fox Film Corp., 2002 WL 1835439, at *3.
195. Taylor, 166 F.R.D. at 362 n.6 (citations omitted).
in time. It does not mean that the witness has made a judicial ad-
mission that formally and finally decides an issue. Deposition tes-
timony is simply evidence, nothing more. Evidence may be ex-
plained or contradicted. Judicial admissions, on the other hand,
may not be contradicted. Viskase ignores the differences between
evidentiary testimony and judicial admissions. 197

Other cases have gone further, however, indicating that courts could in
fact bar inconsistent testimony. 198 In Wilson v. Lakner, 199 the United States
District Court for the District of Maryland warned that: “[D]epending on the
nature and extent of the obfuscation, the testimony given by the non-
responsive deponent (e.g. ‘I don’t know’) may be [designated] ‘binding on
the corporation’ so as to prohibit it from offering contrary evidence at tri-
al.” 200

Similarly, in Rainey v. American Forest & Paper Ass’n, 201 the United
States District Court for the District of Columbia refused to allow a corporate
party to present evidence which conflicted with the testimony of its corporate
representative in opposition to a subsequent motion for summary judgment:

In light of this factual predicate, plaintiff reads Rule 30(b)(6)
as precluding defendant from adducing from Ms. Kurtz a theory of
the facts that differs from that articulated by the designated repre-
sentatives. Plaintiff’s theory is consistent with both the letter and
spirit of Rule 30(b)(6). First, the Rule states plainly that persons
designated as corporate representatives “shall testify as to matters
known or reasonably available to the organization.” This makes
clear that a designee is not simply testifying about matters within
his or her own personal knowledge, but rather is “speaking for the
corporation” about matters to which the corporation has reasonable
access. By commissioning the designee as the voice of the corpo-
ration, the Rule obligates a corporate party “to prepare its designee
to be able to give binding answers” in its behalf. Unless it can
prove that the information was not known or was inaccessible, a

197. Id. at *2 (citation omitted); see also A & E Prods. Group, L.P. v. Mainetti USA, Inc.,
198. See generally Wilson v. Lakner, 228 F.R.D. 524 (D. Md. 2005); Rainey v. Am. For-
199. 228 F.R.D. at 524.
200. Id. at 530.
201. Rainey, 26 F. Supp. 2d at 82. In reaching this holding the court did not rely upon the
principle that a party cannot change its sworn testimony by a subsequent affidavit to defeat a
motion for summary judgment, but instead ruled squarely on its analysis of Rule 30(b)(6), so
that its holding would be equally applicable at trial. See id. at 102.
VI. Conclusion

The varying interpretations of the respective state and federal rules governing corporate representative depositions lead to the inescapable conclusion that the rules need to provide better guidance on the noticing, preparation for, conduct of, and use of corporate representative depositions. Given the potentially harsh sanctions for what courts may deem to be non-compliance with the rules, the parties need clear parameters on how to proceed. The courts and the rules committees cannot take a wait-and-see approach because most of these issues never reach the appellate courts given the stringent appellate requirements to obtain review of discovery matters.

When the rules committees decide to improve the rules, they should carefully analyze and consider that, to the extent possible, corporate representative depositions should be governed by the same rules and limitations as individual party depositions with regard to work product, speculative testimony, and the rendering of expert opinions. This will facilitate the process of bringing the corporate representative rules into focus for litigants on both sides of the bar, while at the same time, leveling the playing field so that corporations are not unfairly penalized simply because they are corporations.

202. Id. at 94 (citations omitted).
I. INTRODUCTION

Today, money is worshiped as if it is the Great Oz. It is presumed to have an unquestionable power and it is the answer to everything. Best sellers like Robert T. Kiyosaki and Sharon L. Lechter’s Rich Dad, Poor Dad, teach readers to become wealthy by spending as little as possible, accumulating savings, investing those savings, and then living off the investment earnings.1 But Mr. Kiyosaki fails to ask: What would happen if everyone did that? The investor is glamorized throughout society. College students dream of working on Wall Street, where they will be well compensated and live lavish lifestyles for investing other people’s money.2 Books, television shows, and radio shows on stock picking abound, and everyone thinks that if they could

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2. See, e.g., WALLSTREET (20th Century Fox 1987).
just pick the right stock they would be rich. But you hardly hear anyone ask: Where does this investment return come from? Every year people eagerly read the Forbes’ list of billionaires. But the writer does not ask: Exactly how did this person accumulate wealth, and what effect did this accumulation have on the people he interacted with?

Things were not always like this. In the past, savers like Kiyosaki may have been held in high esteem, but they could have just as easily been stigmatized as misers. Charles Dickens’ character, Scrooge, was not on the cover of Forbes magazine, he was undergoing an epiphany and learning the error of his ways. Letting your money work for you was not a brilliant strategy, it was the immoral act of usury. These ideas are missing from the current discourse on the economy.

The first part of this paper connects the past to the present. Through a series of stories, this paper explains why there is social value to stigmatizing cheapness, labeling avarice as a sin, and prohibiting usury. This paper then applies these ideas to a specific issue that has received a lot of attention—America’s national debt. Finally, this paper explains why criticism of the nation’s debt is misplaced.

3. See, e.g., Mad Money with Jim Cramer (CNBC television broadcast).
7. See id. There are numerous examples of usurer villains in Elizabethan era British plays. See generally Celeste Turner Wright, The Usurer’s Sin in Elizabethan Literature, 35 Stud. in Philology 178 (1938). This author cannot think of a modern movie with such a character. See generally id.
II. WHAT DO I DO WITH THIS MONEY?

There are five things a person can do with money. They can spend it, give it as a gift, save it, make an equity investment, or lend it. Each of these actions has an effect on the economy.

One preliminary question is: How do you know if something is beneficial or harmful to society? This paper answers that question by proposing that all else being equal, a society is better off when its citizens are productive. In other words, society is better off when a person is working, than if he is doing nothing all day.

Note, this is not a monetary based measure. Rather, it measures society's ability to use a person's potential. Ultimately the value of a society is not measured by how much money it has. Rather, a society is measured by the productivity of its people. Ancient Egypt is remembered for its pyramids, not its money. The United States is not valued for its wealth. In fact, the country is in tremendous debt. Rather, it is valued for its art, its inventions, its infrastructure, its farming, its healthcare, its schools, and so on. These were all created by inducing its citizens into productive activity. So, throughout this paper, the measuring stick will be the productivity of a society's citizens.

A. Spend It

To simplify the world, let us imagine a closed world with only seven people: Dopey, Grumpy, Doc, Happy, Bashful, Sneezy, and Sleepy. In this world, there is only $100 of money, and it is all in Dopey's hands. So what should Dopey do with it? Dopey decides to give it to Grumpy in exchange
for a good or service. Grumpy then gives it to Doc for a good or service. Doc then gives it to Happy for a good or service. It cycles in this manner all the way back to Dopey.

This simple model begs a number of questions. What good or service was provided in each of these transactions? The answer is whatever the buyer wanted. It is a free market and the citizens produce whatever society wants. Assuming a good was manufactured: Where did the seller get the materials with which to produce the good? We will add that nuance later, but for now assume the materials were abundant. For example, if the good was ice cream, pretend the manufacturer found the cow and fruit in nature.

The point is, they are all induced into productive activity. This society has 100% employment. Every citizen is busy doing something productive.

B. Gift It

Gifts are not pertinent to the subject matter of this paper, but they are addressed here for completeness. Let us go back to the world above and assume that Dopey gives the $100 to Grumpy. He does so not in exchange for goods or services, but rather as a gift. Everything else is the same as above. The $100 flows through everyone’s hands in exchange for goods and services, except during the Dopey to Grumpy exchange. Dopey does not receive a good or service in exchange for the $100 and Grumpy does not do any work.

Going back to the measuring stick, society’s productivity has gone down. Previously, Grumpy was doing a productive activity, but now he is not. That is why gifts are thought to be bad for society.\(^{11}\) It would be better if Grumpy had to do something—anything—for the money than if he receives it for doing nothing.

C. Save It

Now, let us say a new citizen enters the world—Scrooge. Scrooge is hard working but cheap. Scrooge asks Bashful for a job. Bashful happily hires him, and Scrooge diligently works to provide a good or service to Bashful. But Scrooge does not spend the money he receives. He saves it under his mattress.\(^{12}\) It is not that what Scrooge desires is not on the market.


\(^{12}\) The reader may note that today money is saved in banks, and that banks invest that money. One common defense of saving is that because banks invest your money, saving is
The other seven are willing to do whatever he asks, but he still refuses to spend money.13

What is going to happen if Scrooge keeps doing this? Eventually Scrooge will hold the society's entire $100. What are the other seven individuals doing? Nothing; no one has any money with which to hire each other. The only person with money is Scrooge and he loves it too much to part ways with it.

This society is now completely unproductive. No one is working. Not even Scrooge, because the others do not have any money with which to hire him. The society was running perfectly, until Scrooge's cheapness brought it to a grinding halt.14 This illustration explains why, for example, former President Bill Clinton says we will spend our way out of the recession.15 It is why Federal Reserve Chairman Ben Bernanke hints that during a recession,

equivalent to investing. The defense goes on to say that investing benefits society just as much as spending; thus, saving benefits society just as much as spending. The first response to this defense is that not all savings are invested. Some forms of saving are the equivalent of putting your money under a mattress. Furthermore, although the above defense seeks to equate investing and spending, the two are different activities. For more on why investing is not a replacement for spending, and for a response to the above defense, see infra note 27 and accompanying sections.

13. See JEAN BAPTISTE MOLIERE, THE MISER act 2, sc. 5.

There is no service great enough to induce him to open his purse.... [T]he mere sight of anyone making demands upon his purse sends him into convulsions; it is like striking him in a vital place, it is piercing him to the heart, it is like tearing out his very bowels!

Id.

14. Lack of spending is thought to be at least a contributing factor, if not the primary cause, of the great depression. See Barry L. Anderson & James L. Butkiewicz, Money, Spending, and the Great Depression, 47 S. Econ. J. 388, 388 (1980).

[The factors responsible for [the Great Depression's] origin and severity have long been in dispute. In the 1930s Keynes argued that the instability of his day originated in the private sector where it was caused by fluctuations in the level of business investment. In 1963 Friedman and Schwartz challenged the Keynesian view with the assertion that monetary shocks were the true cause of the Depression. In particular, they blamed the Federal Reserve for failing to prevent the waves of bank failures that occurred between 1930 and 1933. These failures and the resulting monetary chaos were presented as the catalysts that turned a “normal” recession into a major depression. Recently Peter Temin has argued that the case for monetary instability as the major cause of the Depression is not supported by the existing evidence. He puts forth the alternative hypothesis that an autonomous and largely unexplained fall in consumption was the precipitating factor.... While these hypotheses are not mutually exclusive, advocates of either one tend to see one factor as primary and all others as mere contributing causes.

Id. at 388–89 (emphasis added) (citing PETER TEMIN, DID MONETARY FORCES CAUSE THE GREAT DEPRESSION? 68 (1976)) (other citations omitted).

15. Bill Clinton: US Must Spend Its Way Out of Crisis, HUFFINGTON POST, Dec. 5, 2008, available at http://www.huffingtonpost.com/2008/12/06/bill-clinton-us-must-spen_n_148931. html. “We have to stimulate the economy which means in the short run, [President Obama] has to take America into even more debt.... [Obama has to] use the government’s spending ability to trigger economic activities.” Id.
he would do what is the equivalent of using a helicopter to throw bags of money onto the street. You cannot let misers like Scrooge bring the economy to a halt.

Again, this simple model begs a number of questions. Do people not need to save? For example, what if they become disabled and cannot work? Should they not have saved for that possibility? This is why the insurance industry is so valuable. It allows citizens to prepare for such remote contingencies, without saving more than is necessary. For example, say you will need $100,000 in case of disability, but there is only a 1% chance of disability. Through an insurance scheme, you can attain that coverage for only about $1000—1% of $100,000. So, instead of having to save $100,000, you only have to save $1000.

The point of this section is that saving is harmful to society. When you save money, you are taking a job from someone; you are robbing them


17. See id.


19. What about saving for retirement? Issues surrounding retirement are widely debated and beyond the scope of this paper. See Jeannine Aversa, Bernanke: Baby Boomers Will Strain U.S., WASHINGTONPOST.COM, Oct. 4, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100401596.html. However, I do want to note that some commentators think that an increase in the retirement age is the only solution. See, e.g., William Saleton, Curse of the Young Old, Why Should We Pay Them?, WASH. POST, Mar. 19, 2006, at B2. That is consistent with the measuring stick of this paper. Whether a retiree is living off of government programs, savings, or investment income, he is an unproductive member of society, and the manner by which he is being taken care of is one of form rather than substance. Finally, I will note that like attitudes towards miserliness and usury, attitudes towards retirement have also changed. In 1880, 80% of Americans ages sixty-five or older were gainfully employed. See DORA L. COSTA, THE EVOLUTION OF RETIREMENT 8 fig.2.1 (1998). In 1990, only about 20% of Americans ages sixty-five or older are gainfully employed. Id. This is especially surprising when you realize that people over sixty-five are much healthier today due to modern medicine. It may very well be that people retiring too early and saving too much for a decades-long retirement, but that is a topic for another paper.

of their potential for productivity. In exchange, you only receive money—something that has no innate value. This is why avarice was thought to be one of the seven deadly sins—it is the choosing of money—or more specifically the demon Mammon—over your fellow man.

D. Equity Investment

Now let us add some sophistication to the model. Previously, there was no capital required to provide the good or service. For example, if Bashful made and sold ice cream, he was able to find all the ingredients abundant in nature. But that is not realistic. He will need to buy the ingredients. If Bashful wants to provide medical services, he cannot just wake up one day and practice medicine. He needs to buy an education. To provide a good or service, Bashful needs not just his labor, but also capital.

Let us go back to the example above. Say Scrooge has not yet accumulated the entire $100. He has only managed to save $75 and the other $25 is floating around the world. The $25 is in Grumpy’s hands, and he wants to buy ice cream from Bashful. The ingredients for the ice cream are no longer freely available. They now cost $10. So to make $25 of ice cream, Grumpy needs to buy $10 of ingredients. But he does not have $10. He needs someone to finance this operation. This is when Scrooge appears. He will give Bashful the $10 for a share of the profits, or alternatively a share of the losses. The arrangement is as follows: If Bashful makes the ice cream and sells it for $25, he will give Scrooge $15 and keep $10. If he can only sell it for $15—perhaps the quality is bad—then Scrooge will receive $11 and

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See id. at 129. This debate is still far from being resolved, and regularly finds a forum in tax policy. Id. Of course some saving is necessary. You cannot spend every penny you earn a second after it comes into your possession. For example, if you want to buy a $500 computer, yet you only make $100 a week, then you will have to save to buy the computer. For a defense of saving as a “consumption reserve,” see G.P. Watkins, Economics of Saving, 23 AM. ECON. REV. 61, 61 (1933). While the author agrees that hoarding “is the negation of spending” he points out that the line between spending and saving is not always so clear. Id. at 62.


But, as Dickens reminds us, the sufferings of the poor masses are also causally linked to Scrooge’s hoarding of material resources. We simply forget (or fail to see) because the connection is more indirect, and thus the responsibility more easily diffused and less likely to give rise to feelings of personal and moral accountability. Moreover, this economic behavior is fundamentally similar to the significant subset of criminalized behavior discussed previously. Id. at 2170.
Bashful will keep $4. If no one buys the ice cream—perhaps it is ruined—then neither side gets anything.

Returning to the original measuring stick, let us see if society is productive. Bashful is working to make ice cream. But Scrooge is not productive. If the venture is successful, then Scrooge will get money for nothing. He has gotten his money “to work for him.”23 In fact that is not what is happening. Money cannot work. Bashful is doing all the work and Scrooge is taking some of the rewards of Bashful’s labor. Is this fair? In history, this arrangement is thought to be fair because it is an equity investment.24 An equity investment is one where the investor shares in the upside and the downside of the venture.25

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24. See, e.g., Brian M. McCall, Unprofitable Lending: Modern Credit Regulation and the Lost Theory of Usury, 30 CARDOZO L. REV. 549, 563 (2008). For example, an early Christian authority states that renting your field to a farmer in exchange for fruit is not a “cursed act” of usury. Id.

The palea Ejiciens, a fifth-century Christian comment on usury, later incorporated in the twelfth-century canon law collection entitled the Decretum, reads: “Of all merchants, the most cursed is the usurer . . . [but] is not he who rents a field to receive the fruits . . . similar to him who lends his money at usury? Certainly not.” Id. at 562 (quoting JOHN T. NOONAN, JR., THE SCHOLASTIC ANALYSIS OF USURY 38–39 (1957)). See, e.g., M. Siddiq Noorzoy, Islamic Laws on Riba (Interest) and Their Economic Implications, 14 INT’L J. MIDDLE E. STUD. 3, 6 (1982) (“The argument [against interest] is aimed at encouraging capitalists to invest directly, through proprietorships or active partnerships, or indirectly through silent partnerships (mudaraba) and purchases of shares in corporations . . .”).

25. See generally Jelle C. Riemersma, Usury Restrictions in a Mercantile Economy, 18 CAN. J. ECON. & POL. SCI. 17 (1952). A history of this idea is presented in Riemersma. “You saye, that, yf trading for money upon money be a hurtefull thing, and an offence to God, then is buying and selling also unlawfull. God forbidde. And thys is my reason. In buying and selling your gayne is not alwayes certaine, as it is in usurie.” Id. at 20–21 (citing THOMAS WILSON, A DISCOURSE UPON USURY (R.H. Tawney ed., London, G. Bell 1925) (1572)).

Tawney remarks in his introduction that “the essence of usury was that it was certain,” but he does not develop the implications. The linking of usury and certain gain is to be found already in St. Thomas, who, around 1270, said that “the lender must not sell that which he has not yet namely the benefits accruing from the use of money and may be prevented in many ways from having.” The full passage is: “Recompensationem vero damni quoque consideratur in hoc quod de pecunia non lucratur, non potest in pactum deducere: quia non debet vendere id quod nondum habet et potest impediri multipliciter ab habendo.” A pre-arranged reward (“in pactum”) is condemned, because there is a vivid realization of uncertainty. Sancti Thomae Aquinatis . . . Opera Omnia (Rome, 1847), Summa Theologica, T. IX, Qu. LXXXVIII, Art II, 159. In the Ordinance of London of 1390 we find: “si ascum apreste ou mette en mayns dascuny or ou argent, pur gaigner eut recevire ou promys en carteigne sans aventur, et la punissemence pur usurers. . . .” Georg Schanz, Englische Handelspolitik (Leipzig, 1881), I, 556. The same theme occurs again in the English usury prohibition of 1487: Any bargain is void in which “eny certeyn somme shall be lost by eny covenauud or promys betwyx eny persone or persons.” Tudor Economic Documents, II, 135–6. The ecclesiastical authorities assembled at
Note this arrangement is equivalent to Scrooge buying the ingredients and hiring Bashful to prepare the ice cream. This insight is especially helpful because you can contrast it with slavery. Here, Bashful does not have to continue working for Scrooge. Scrooge has agreed that if the venture makes no money, then Scrooge gets nothing. Bashful does not owe him anything. At any point, Bashful can leave Scrooge with half prepared ice cream. Notice also that this is not a sustainable way of making money. If too many people try to make money by saving and investing, and too few people spend money, then the investments will fail. Putting Scrooge's money at risk

the 5th Lateran Council (1517) also linked usury and certain gain. See article “Wucher” in Lexicon für Theologie und Kirche, ed. M. Buchberger, X, 977.

Id. at 21 n.16 (citations omitted); see also Jerry Useem, Banking on Allah, FORTUNE, June 10, 2002, at 154 (“[F]ailure to repay a loan could mean slavery. By outlawing interest, Islam advocated an economy based on risksharing, fair dealing[s], and equity—in both the financial and social-justice senses of the word.”).

26. But what if they enter into a contract? Could Scrooge not use the contract to force Bashful to work, and is that not similar to slavery? Karl N. Llewellyn, one of the principal figures in contract law and the principal drafter of the Uniform Commercial Code, describes the evolution of contract law away from slavery:

With prohibition of slavery and peonage, abolition of imprisonment for debt, refusal of courts to enforce penalties although expressly agreed upon, all buttressed by usury legislation and limitations on the transfer of wages and future property, modern law moves definitely onto the basis of reparation for breach as the main purpose of legal remedy. Specific reparation—which, it will be noted, presupposes that the defendant has the wherewithal to perform—we have limited largely to the case of land. In the case of irreplaceable personal services we seek a compromise with the peonage-prohibition by enjoining against a competing employment and against inducement.


27. Notice how an investor in a failed venture has begrudgingly turned into a spender. In the example above, if the venture fails, then Scrooge has spent $10 for ice cream ingredients. This transformation of investor into spender provides a self-correcting mechanism by which society can balance the two activities. If too many people invest and too few people spend money on the products produced by those ventures, then the ventures will fail. The money invested in those ventures will be in the hands of the people who provided the labor and materials for the venture. Treasury Secretary Hank Paulson referred to this phenomenon in a recent interview regarding the economic crisis. Krishna Guha, Paulson Says Crisis Sown by Imbalance, FIN. TIMES, Jan. 2, 2009, at 1.

The US Treasury secretary said that in the years leading up to the crisis, super-abundant savings . . . put downward pressure on yields and risk spreads everywhere. This, he said, laid the seeds of a global credit bubble that extended far beyond the US sub-prime mortgage market and has now burst with devastating consequences worldwide. “Excesses . . . built up for a long time, [with] investors looking for yield, mis-pricing risk,” he said. “It could take different forms. For some of the European banks it was eastern Europe. Spain and the UK were much more like the US with housing being the biggest bubble. With Japan it may be banks continuing to invest in equities.”

This argument—already advanced by a number of economists and largely endorsed by Federal Reserve chairman Ben Bernanke—suggests that the roots of the crisis do not simply lie in failures within the financial system.
provides a self-correcting mechanism by which society can balance spending and investing.

In conclusion, Scrooge’s equity investment is troubling, as it allows him to earn money without working. But it is generally thought to be an acceptable arrangement because: 1) capital investment is necessary in society; 2) Scrooge’s money is at risk; and 3) Bashful continues the arrangement through his own free will.

E. **Lend It**

Now, let us say Scrooge does not want to make an equity investment. He wants to make an investment of pure debt. Pure debt, as the term is used here, means that Scrooge is absolutely entitled to a return. For example, Scrooge will give Bashful $10, and Bashful must pay Scrooge back $10 plus 3% interest per week. It does not matter what happens with the ice cream; Bashful still has to pay this amount. It does not matter if Bashful wants to quit. He cannot quit the arrangement. He will always be under the obligation to pay.

Remember that the equity investment was equivalent to Scrooge buying the ingredients and hiring Bashful to prepare them. A debt investment also can be analogized to an employment situation, except with one difference. Bashful cannot quit the arrangement. If he refuses to work now, the interest will pile up and he will have to do more work later. If his work does not generate the required payment to Scrooge, he will have to do more work until it does. Thus, it is no longer employment, but rather, it is slavery.\(^{28}\)

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\(^{28}\) See Note, Protection of Borrowers in Distribution Finance, 60 YALE L.J. 1218, 1218 n.1 (1951).

[U]sury laws have recognized that he who is under economic necessity is not really free. To put no restriction [sic] on the freedom of contract would logically lead not to a maximum of
This is why usury was historically made illegal. It harms society in two ways. First, it allows Scrooge to make money without doing anything and without bearing any risk of loss. Second, assuming the arrangement is enforced, in other words, that Bashful will be punished if he does not comply, then it can turn into slavery. By a combination of his cheapness and individual liberty but to contracts of slavery, into which, experience shows, men will “voluntarily” enter under economic pressure.

Id. (quoting Morris R. Cohen, *The Basis of Contract*, 46 *Harv. L. Rev.* 553, 587 (1933)).


The canon law definition of usury as anything added to the principal had dominated European thought for five hundred years; the practice of usury had been forbidden by the church since the fifth century. . . . [There were two key reasons for this prohibition.] One was the theory, first stated by Aristotle, then formulated in Roman law and reformulated by Aquinas, that money was sterile or barren; it was a medium of exchange, but not productive. The other obstacle came from the Biblical prohibitions, particularly Deuteronomy 23: 19–20: "Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of anything that is lent upon usury: unto a stranger thou mayest lend upon usury: but unto thy brother thou shalt not lend upon usury."


30. In the 17th and 18th centuries, the failure to pay a debt was punished with physical mutilation and/or debtor’s prison. For an article describing these punishments, and seemingly lobbying for a return to harsh punishments, see D.N. Ghosh, *Debt Defaulters as Darlings of Society*, 34 *Econ. & Pol. Wkly.* 866, 866 (1999).


In the interior of Sindh it is a frequent practice that when a peasant or a needy person borrows money from a moneylender, the wife of the oppressed borrower becomes the physical property of the moneylender, as a security against the loan. Until such time as the loan is repaid, with exorbitant interest, to the usurer, the moneylender, who is often a landlord or Wadera, uses the wife of the needy borrower for his sexual pleasures as and when he pleases.

Id. See also A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 *Penn St. Int’l L. Rev.* 809, 820 (2005) ("Bonded laborers work in India’s agricultural sector and Pakistan’s agricultural and brick-making sectors. In both systems, laborers work to pay off exorbitant debts that can be inhe-
debt, Scrooge can enslave a person. He can enslave the entire population. He will no longer have to pay them for their goods and services; rather he can get them to produce it for free, as interest payments on his debt.

You are probably wondering why we have debt in society today. The response is that we do not. In the United States there is no such thing as pure debt of this form. When you buy a bond, it may be called debt, but the corporation is not under an absolute obligation to pay. If it cannot pay you, it simply declares bankruptcy and you could receive nothing. Thus, under the definition used by this paper, that bond was equity because you shared in the downside. Some obligations are not dischargeable in bankruptcy, but even in those situations, the lender shares in the downside. The lender does not have an absolute right to repayment. For example, student loans are not dischargeable. However, even in these situations, the borrower does not have to pay the lender until he earns income. Even then, the borrower only

32. Despite the fact that we do not have pure debt in the United States, the tax code decided to treat “debt” and equity differently, allowing a deduction for payments to “debt” holders, but no deduction for dividends paid to equity holders. See Katherine Pratt, The Debt-Equity Distinction in a Second-Best World, 53 Vand. L. Rev. 1055, 1058–60 (2000). Not surprisingly, courts have struggled to implement this fictitious distinction and tax planners regularly manipulate this fiction to reduce their tax bill. See, e.g., Nathan R. Christensen, Comment, The Case for Reviewing Debt/Equity Determinations for Abuse of Discretion, 74 U. Chi. L. Rev. 1309, 1313–14 (2007)(listing thirty factors used by courts to distinguish debt from equity); see generally Pratt, supra (describing the difficulty of distinguishing debt from equity and evaluating various treasury proposals to eliminate the debt-equity distinction).


34. See, e.g., Jonathan Stempel, American Home to Pay Fraction of Bankruptcy Claims, Reuters, Aug. 19, 2008, available at http://www.reuters.com/article/businessNews/idUSN193472020080819. “In a disclosure statement filed Friday with the U.S. bankruptcy court . . . the company said many unsecured creditors will recover zero to 2.2 cents on the dollar on their claims.” Id. One author argues that bankruptcy mainly benefits the professionals who handle the bankruptcy, at the expense of the creditors. See, e.g., SIDNEY RUTBERG, TEN CENTS ON THE DOLLAR, OR, THE BANKRUPTCY GAME 91–92 (1999).


has to pay a small percentage of his disposable income. Until the debtor earns sufficient income, the required payment will be so small that the debt is effectively void. So, the prohibition against usury is still alive and well in American law. But, there is one area where pure debt still exists—sovereign debt.

39. However, please note that the term usury has a specific meaning in American law, and that meaning is different from the historic definition used in this paper. Although the case law varies by state, generally four elements are required: 1) a loan; 2) of money; 3) that is absolutely repayable; 4) at a greater rate of interest than is allowed by the state. 9 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 20:4 (4th ed. 1999). Sometimes an additional element of intent is required. Id. For a paper arguing that interest rate limits inhibit a state’s economic growth, see Edward L. Glaeser & José Scheinkman, Neither a Borrower nor a Lender Be: An Economic Analysis of Interest Restrictions and Usury Laws, 41 J.L. & ECON. 1, 2 (1998). The authors, however, miss the point that the current legal definition of usury is very different from the historic definition of usury. See generally WILLISTON & LORD, supra. As described above, even if states allowed unlimited interest rates, it would still not amount to usury—in the historic sense—because bankruptcy laws and wage garnishment limits void the obligation to repay.
40. One paper suggests that the reason pure debt exists in the international realm is because there is no international government. See Alain Testart, The Extent and Significance of Debt Slavery, 43 REVUE FRANÇAISE DE SOCIOLOGIE 173, 197–99 (2002). He hypothesizes that debt slavery helped give rise to the state, i.e. a national government. Id. at 199. One reason debt slavery and government cannot coexist is that there can only be one master. Id. at 200. The king needs everyone’s allegiance, and he cannot lose subjects via debt slavery. Id. Extending this to the sovereign world, perhaps the lack of an international government is the reason why pure debt still exists in the sovereign world. Id. at 200–01.
F. Summary

The first section of this paper showed the problem with saving. If there is too much saving then people are not induced into productive activity. The next section described the problem with excessive investing. If there is too much investing and too little spending then the investments will fail. The last section described the danger of pure debt. If there is too much lending and too little spending then the lenders will enslave the debtors. Neither activity can replace spending. A world with too much saving—misery—and an inordinate desire to make money by investing or lending—usury—is dysfunctional.

III. The Sovereign World

The world of international economics is very much like the world described above. Nations can spend. For example, the people of the United States can pay the Japanese for goods or services. Of course, people from other countries can also hire Americans to produce goods and services. Nations can also save. For example, if you pay a Japanese person $500 for a new computer, he does not have to use that money to buy a good or service from you. He can save it.

Now let us add some economic terminology. When an American purchases a Japanese computer for $500, it is a $500 export from Japan and a $500 import into the United States. The United States is now running a trade deficit of $500. If you add these trade deficits—or surpluses—up for the year, and add a few other items, the amount is called the current account.

The other key term is the capital account—sometimes called the financial account. The capital account represents the total sum of wealth located in America and that is owned by people from other countries. This wealth could be in the form of American dollars, American real estate, American bonds, and so on. In the above example, the Japanese seller gained $500, and so the capital account went up by $500.


43. The term “located in” is this author’s simplification of the actual lengthy definition of the capital account.
The current account and capital accounts must be equal. The Japanese person is not going to give an American a computer unless the American gives him something of equal value in return. If the American gives him an equivalent good or service, then there is no trade deficit and no capital account. If the American gives him dollars, there is a $500 current account trade deficit and a $500 capital account.

Of course the Japanese person can also use the $500 to make an equity investment in an American company, gift it to an American, or he can make a pure debt loan to an American.

How can the Japanese make a pure debt loan, when such arrangements are outlawed in American courts? He can do so by purchasing American bonds. This is called sovereign debt—the debt owed by a nation’s government. There is an absolute payment requirement on sovereign debt. It does not matter if the venture financed by the debt failed. It does not matter if the country does not have the money to pay. The debt has to be paid. In history, lender countries have gone to abhorrent lengths to enforce sovereign debt, including wars.
Now let us bring everything together. Let us list all the problems with sovereign debt: 1) the only reason the Japanese lender is owed this debt, is because he chose to be a miser. Rather than buy American goods or services, he chose to be cheap and save the $500; 2) this is not an equity investment by the Japanese. It is pure usurious debt, and if it is enforced it could potentially enslave the debtor nation; 3) it is robbing the world of productivity. Instead of hiring an American to do something productive, the Japanese has parked his money.

What is especially ironic is that the Japanese has also harmed himself. If the American does not earn any money, then he will not have money with which to buy additional Japanese goods. Saving does not just rob the American of productivity; it also robs the Japanese of productivity. This is analogous to what happened when Scrooge's miserliness caused the eight person economy to completely shut down. Granted, the Japanese can lend money to the American, which the American uses to buy Japanese goods. In this case, the Japanese is induced into productive activity. But the American is still unproductive. He is borrowing to pay for his goods and services rather than working for them. So as you can see, the Japanese person’s decision to save the $500 is problematic.

IV. CHINA AND THE UNITED STATES

Over the last decade, China has played the role of Scrooge in international economics. China has accumulated the largest balance of trade surplus in world history. China’s vision for the world is apparently one where countries buy from them, but they buy as little as possible from other countries. The relationship with the United States is particularly egregious. During the years 2001 through 2007, China exported $1.43 trillion of goods to the Unit-
ed States, while importing only $0.27 trillion from the United States. This expectedly robbed Americans of jobs and productivity, and an estimated two million jobs were exported to China over this period.

China’s behavior is analogous to that of the miser because as it accumulates foreign exchange reserves of $2 trillion, private savings of $3 trillion, and almost no sovereign debt, it does so by depriving itself of needed goods and services. China is one of the most polluted countries in the world. They could hire Americans to solve this problem. Infrastructure is

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<tr>
<td>Goods &amp; services exported</td>
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<td>485</td>
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<td>Goods &amp; services imported</td>
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<td>(712)</td>
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<td>161</td>
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<td>372</td>
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<td>Cap. Acct. excluding for. exch. reserves</td>
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<td>32</td>
<td>53</td>
<td>110</td>
<td>62</td>
<td>7</td>
<td>74</td>
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<tr>
<td>Foreign exchange reserves</td>
<td>(47)</td>
<td>(75)</td>
<td>(117)</td>
<td>(206)</td>
<td>(207)</td>
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<td>(462)</td>
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<td>Statistical discrepancy</td>
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<td>27</td>
<td>(16)</td>
<td>(13)</td>
<td>16</td>
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<tr>
<td>End of year cumulative for. exch. resvrs.</td>
<td>216</td>
<td>292</td>
<td>408</td>
<td>614</td>
<td>822</td>
<td>1,069</td>
<td>1,530</td>
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53. See Central Intelligence Agency, The World Factbook, Rank Order-Public Debt, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2186rank.html (last visited Feb. 21, 2009). China’s public debt was only 16% of their GDP as of 2008, where as the United States had a 61% public debt to GDP ratio, and Japan had a 170% public debt to GDP ratio. Id.

underdeveloped in rural areas. Americans could build it for them. There is a shortage of education and healthcare in parts of China. Americans could provide these services. China needs a social insurance scheme. Americans can help create this scheme. But China refuses to spend money. Going back to the Dickens analogy, this is like when Scrooge saved money by eating a dinner of inexpensive gruel in a dark and cold room.

In addition, China is accused of appropriating intellectual property from American companies. China could have paid for this intellectual property. There are hundreds of other ways China could spend their surplus, but they refuse to, preferring to hoard money into an exorbitant pile.

What is particularly curious about China’s behavior is that it is hard to understand its goal. If they do not spend money on American goods and services, Americans will not have money to spend on their goods and services. They are not only robbing Americans of productivity, but they are also

55. See Shenggen Fan & Xiaobo Zhang, Infrastructure and Regional Economic Development in Rural China, 15 CHINA ECON. REV. 203, 213 (2004) (“[T]he lower productivity in the western region is explained by its lower level of rural infrastructure, education, and science and technology.”); Melinda Liu, Amb. Wu Jianmin: China’s Economy and Environment in 2009, NEWSWEEK, Jan. 12, 2009 (quoting China’s Ambassador Wu Jianmin, “Now there are about 320 million people with no access to safe drinking water, and 75 percent of disease comes from water pollution.”).

56. See Nick Young, World Bank Puts Economic Case for Health, Social Spending, CHINA DEV. BRIEF, Nov. 9, 2005, http://www.chinadevelopmentbrief.com/node/290/print. The World Bank report states: “Household savings appear to be affected by uncertainty about future costs of health care and education.” In other words, the inadequacy of social protection makes people reluctant to spend money they may need for their old age and future health care. “Removing this uncertainty and providing more insurance would support private consumption.”

57. DICKENS, supra note 5, at 18. [He] sat down before the fire to take his gruel. It was a very low fire indeed; nothing on such a bitter night. He was obliged to sit close to it, and brood over it, before he could extract the least sensation of warmth from such a handful of fuel.


59. In December of 2008, Zhou Xiaochuan told Secretary of the Treasury, Henry Paulson, “the US should take the initiative to . . . reduce its trade and fiscal deficits.” Geoff Dyer, Chinese Officials Lecture Paulson, FIN. TIMES, Dec. 5, 2008. at 2. What is remarkable about this comment is that the United States trade deficit is caused by its relationship with China. Is Mr. Wang telling Americans to stop buying Chinese goods? If not, how else are Americans supposed to eliminate the trade deficit?
robbing themselves of productivity. It is very likely that, had China spent their trillions in foreign exchange, the world could have avoided the current recession, and the Chinese government would not have to worry about employment riots.

V. THE ARGENTINA EXAMPLE

Finally, the last section of this paper looks at how Argentina dealt with its sovereign debt crisis. This is intended to give a sense of what America’s worst case scenario could look like. Of course, America is not Argentina. America has approximately eight times the population of Argentina. America possesses human and natural resources that Argentina did not possess. America has a gigantic military and political sway in the world. Most importantly, America does not need to default on the debt; the debt is denominated in dollars and America could simply inflate the debt away. But by studying Argentina, and seeing that even a weak nation like Argentina can overcome

60. See Sebastian Mallaby, What OPEC Teaches China, WASH. POST, Jan. 25, 2009, at B7 (“Starting around the middle of this decade . . . [t]he earnings from [China’s trade] surplus poured into the United States [as deposits and loans]. The result was the mortgage bubble.”); When a Flow Becomes a Flood, THE ECONOMIST (Jan. 22, 2009) (“The deep causes of the financial crisis lie in global imbalances—mainly, America’s huge current-account deficit and China’s huge surplus”).


63. See Gerald P. O’Driscoll Jr., Washington Is Quietly Repudiating Its Debts, WALL ST. J., Aug. 22, 2008, at A15. The United States was able to borrow in dollars because the dollar is a global currency. However, some governments do not have this luxury and are forced to borrow in a currency other than their own. For example, Argentina had to issue debt in dollars, not their home currency, the peso. See also Gabriel Gomez-Giglio, A New Chapter in the Argentine Saga: The Restructuring of the Argentine Sovereign Debt, 20 J. INT’L BANKING L. & REG. 345 n.2 (2005) (“[A]s of June 30, 2004, Argentina’s total gross public debt was US $181.2 billion (113.1% of GDP), 69.1% of which is owed to bondholders. Peso-denominated debt totaled US $43.6 billion and foreign currency-denominated debt totaled US $137.6 billion.”). For an example of an Argentinean dollar denominated offering, see Argentina Issues $2 Billion of Global Bonds Through J.P. Morgan and Merrill Lynch, BUS. WIRE, Jan. 22, 1997.
its debt problem, and thrive, it becomes clear that concerns over America’s debt are overblown.

There were numerous reasons for Argentina’s debt. One was its current account deficit. Between 1992 and 1999, Argentina imported $252 billion in goods and services and exported only $222 billion. What exacerbated Argentina’s situation was the government’s promise to convert pesos into dollars on a 1:1 basis, even though an Argentinean peso was not worth one dollar. This made the problem worse because it caused imports to be cheaper than their true value, increasing the trade deficit.

This convertibility policy caused problems in other ways. It is hard to see why anyone would hold a peso when they could trade it for a dollar. Banks and citizens wanted to deal in dollars, and they converted their pesos into dollars to facilitate these deals. In addition, Argentina privatized a


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<td>14</td>
<td>15</td>
<td>16</td>
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<td>Exports of goods and services</td>
<td>28</td>
<td>31</td>
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<td>Imports of goods and services</td>
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<td>4</td>
<td>16</td>
<td>15</td>
<td>12</td>
<td>12</td>
<td>13</td>
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66. Id.

The strong (most would say, overvalued) dollar has meant enormous American trade deficits. But with the Argentine peso pegged to the dollar, an overvalued dollar means an overvalued peso. And while the United States has been able to sustain trade deficits, Argentina could not. Whenever you have a massive trade deficit, you have to borrow from abroad to finance it.

Id.


68. See Roberto Frenkel, Argentina: A Decade of the Convertibility Regime, 45 CHALLENGE 41, 54 (2002) (“[P]rivate-sector savers have shown preference for dollar-
number of its utilities. In these arrangements, wealthy foreigners would buy Argentina's utilities, and charge them for things like water. The problem is that these foreigners would demand not just the cost of producing the water, but also an additional amount as profit, which again had to be paid in dollars. Where did the Argentinean government get the dollars needed to pay all these demands? By borrowing it? Obviously this could not continue. As long as other countries refused to buy Argentinean goods and services, Argentineans would never have the money to pay this debt back.

Eventually it all came to a boil. The debt service was impossible to meet, and Argentina had one of two choices. One was to follow an austerity plan recommended by the International Monetary Fund (IMF). Argentine was to raise taxes, further hurting its already beleaguered economy, cut subsidies to the poor and otherwise sacrifice, so the revenue gained could be used to pay the debt.

In a sense, this is like Scrooge telling Bashful to donate blood or a kidney, so as to raise money to pay the interest on Scrooge's loan. Bashful would never do that. He would remind Scrooge that the only reason he owes denominated deposits while banks hedged (or so they thought) balance sheets against exchange-rate risk by offering dollar-denominated credits.

69. See id at 42 ("Argentina embraced a comprehensive economic reform effort at the beginning of the 1990s. In addition to convertibility, it included a massive privatization of public utilities . . . "). During the 1990s, the privatization of utilities was thought to be beneficial. See e.g., Elizabeth Brubaker, Toronto Water Fight: Toronto Faces a Motion to Reject the Idea of Privatizing Its Water and Sewage Systems. Worldwide Experience Shows That Could Be a Mistake, NAT'L POST, Feb. 25, 1999, at C7.

70. See id.

71. See LOWENFELD, supra note 42, at 727. Once Argentina defaulted on its debt, it also immediately froze the fees paid for privatized gas, electricity, telephone, and water utilities. See id. In addition, these fees were now paid in pesos, which were no longer convertible into dollars on a 1:1 basis. Id. ("In an effort to restrain inflation, as well as to calm the population, tariffs on privatized public utilities—gas, electricity, telephone, and water—were frozen indefinitely at their nominal level, now expressed in pesos no longer equivalent to, or convertible into dollars.")

72. See Stiglitz, supra note 65.

73. See id.

74. See id.

75. Id.

76. See Stiglitz, supra note 65.
this debt is because the miser Scrooge refused to buy his goods and services. Had Bashful known that Scrooge would behave this way, Bashful would not have hired Scrooge. No one would have hired Scrooge. Scrooge would not have earned the money that he is now attempting to use to enslave the dwarves. The dwarves’ society was functioning perfectly well until Scrooge’s cheapness ruined it. The dwarves would not allow this and that is exactly how Argentina responded. Néstor Kirchner, the newly elected Argentinean President said: “It is not possible to return to paying the debt at the cost of the hunger and exclusion of Argentines, generating more poverty and social conflict.” Drawing thunderous applause, he continued: “Creditors have to understand that they can only collect if Argentina is doing well.”

What happened next was that Argentina limited its dealing with other countries. Rather than buy foreign goods, Argentineans produced the goods domestically. If foreigners were not going to hire Argentineans to produce products, they would hire themselves to do it. The privatization contracts were all immediately put up for renegotiation. Argentineans were not going to allow someone in another country to charge them high rates for their own water. The convertibility regime was also ended. From that point on Pesos were converted at about a four peso to one dollar basis. What followed is, not surprisingly, one of the biggest economic turnarounds

78. Id.
79. Id.
80. Between 2000 and 2002, Argentina’s imports of goods and services dropped from $33B to just $13B. See supra note 64.
82. Legal Tango, FOREIGN DIRECT INV., Aug. 1, 2005, available at http://www.fdimagazine.com/news/fullstory.php/aid/1336/Legal_tango.html (last visited Feb. 21, 2009). Of course this was a breach by Argentina of their original agreements. See id. This led to efforts by the other parties to enforce the agreements. See id. Many of these were arbitrated at the International Centre for Settlement of Investment Disputes. Id. For a paper describing potential difficulties in enforcing these awards, see Charity L. Goodman, Comment, Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina, 28 U. PA. J. INT’L ECON. L. 449 (2007).
83. See INTERNATIONAL MONETARY FUND, supra note 67, at 728.
84. Id.
in recent memory. Argentina no longer had a trade deficit, but instead it had a large trade surplus. Its GDP started growing at an amazing 8% per year. In summary, things worked out for Argentina. Going back to the original example, it is as if the Dwarves decided to stop interacting with Scrooge and return to their pre-Scrooge society.

VI. CONCLUSION

Over the past decade Americans have spent trillions of dollars on Chinese goods and services. This created employment in China and helped the country achieve its potential. The Chinese responded by taking that money and hoarding it. But a relationship where Americans spend and Chinese save and lend is not viable. Miserliness and usury are pernicious economic strategies that were discredited centuries ago.

The United States magnanimously took the first step and spent to establish a trading relationship. It is now China's turn to spend to continue that relationship. Only when China takes the money Americans spend to employ Chinese, and uses it to employ Americans, will there be a sustainable relationship that can tap the productive potential of both countries.


86. See supra note 64.


88. Recently, China's leaders have responded to criticism of China's refusal to spend. Geoff Dyer and James Blitz, China to Go on European Spending Spree, FIN. TIMES, Feb. 2, 2009.

China will set up "procurement missions" to buy goods and technologies in Europe in an effort to stem protectionist sentiment in the region against its exports. Wen Jiabao, the Chinese premier who was talking in London on Monday at the end of a five-day trip to Europe, said the procurement trips would be established as soon as possible. "Confidence is the most important thing, more important than gold or currency," Mr Wen said at a meeting with Gordon Brown, the British prime minister, and business leaders. China would seek to purchase commodities and technologies needed by its companies in an attempt to "help us restore and shore up confidence in the market."

Id.

[China's central bank governor], Mr. Zhou, published his thoughts on high savings rates, the flip side of US borrowing. China resents suggestions that its "excess savings" are linked to excess spending elsewhere. In his paper, Mr Zhou argues that, contrary to mechanistic arguments that savings rates can be influenced by policy, the Chinese propensity to save has cultural roots, specifically a Confucianism that "values thrift, self-discipline . . . and anti-extravagancy."

David Pilling, China Is Just Sabre-Rattling over the Dollar, FIN. TIMES, Apr. 1, 2009.

89. See Calla Wiemer, Wrong on the Yuan, ASIAN WALL ST. J., Jan. 29, 2009, at 13 ("The policy focus should be on stimulating consumption in China.").
Thus, criticism of America’s debt is misplaced. It is not America who should be criticized, but rather China, whose refusal to spend deprives itself of needed goods and services, deprives the world of productivity, threatens international trade, and may have sent the global economy into a depression. Further, concerns about China using debt to control the United States are overblown. The days when a lender could turn into enslaver, even in the sovereign world, are long gone. Finally, characterizing China’s accumulation of dollars as “currency manipulation” may pave the way for legal retaliation, but it fails to address the underlying cause. China does not accumulate foreign currency to manipulate the exchange rate. It accumulates foreign currency because it does not want to spend. China’s holdings of foreign exchange are roughly equal to its cumulative trade surplus over the past decade. China is not intervening in the currency markets. Rather, it is simply not spending the foreign currency received in trade.

90. See Willem Buiter, Beware Trade Wars, FIN. TIMES, Jan. 27, 2009, at 8. Much of what Congress and some members of the Obama administration have in mind in response to China’s currency accumulation is likely to be in clear violation of America’s WTO obligations. It would provoke a response from China. The bilateral trade war that is likely to result could easily spread to the European Union, Japan and emerging markets.


But before we conclude that a devaluation should unambiguously be seen as a violation of WTO commitments, we must consider the implications of price flexibility. In fact, on that assumption, a devaluation ... has no real effect on any economic magnitudes for China or any of its trading partners. This well-known proposition simply reflects the “long-run neutrality” of money in a setting in which all prices are fully flexible.

Id. (emphasis omitted).
POLST: A CURE FOR THE COMMON ADVANCE DIRECTIVE—IT'S JUST WHAT THE DOCTOR ORDERED

KEITH E. SONDERLING*

I. INTRODUCTION

For years, the legal and medical communities have fused their knowledge in an attempt to honor the decision of individuals regarding their life-sustaining treatment and end-of-life care. In 1914, Justice Cardozo laid the foundation for patients to take control over their own health care decisions when he stated that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.”[1] Today, patients and their families are often presented with a host of medical options concerning life-sustaining treatment and end-of-life care. Developed as tools for

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patients and their families to take control of these difficult medical decisions, advance directives specify the care and treatment patients wish to receive or refuse.² Advance directives also identify individuals authorized to make treatment decisions if the patient is incapacitated.³ Both the medical and legal communities advocate the use of advance directives as a way for “each patient to shape the course of his or her medical care,” especially when patients are unable to communicate their own preferences.⁴

Unfortunately, due to a variety of obstacles, the original intent of advance directives often is not accomplished.⁵ In an attempt to correct the problems associated with advance directives, health care professionals, attorneys, and bioethicists have worked together, developing new forms of documentation to enhance traditional advance directives and effectively implement patients’ wishes concerning end-of-life care.⁶ One such model is the Physician Orders for Life-Sustaining Treatment (POLST) form.⁷ The POLST form is a medical document designed to translate a patient’s end-of-life care desires “into actual physician orders.”⁸ Heralded as “revolutionary,”⁹ “unique,”¹⁰ and a “progressive” advance directive,¹¹ the POLST form does not replace traditional advance directives, but does convert existing advance directives into written medical orders, which attending caregivers can easily understand.¹² Surveys demonstrate that medical professionals are concerned about administering end-of-life care, and they have asked for in-

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3. Id.
5. See Hickman et al., Hastings Ctr. Report, supra note 2, at S26. Traditional forms of advance directives include the living will and the designation of a health care surrogate. Id.
6. See id. at S27.
7. Id. at S28.
11. Susan E. Hickman et al., A Viable Alternative to Traditional Living Wills, 34 Hastings Ctr. Rep. 4, 5 (2004) [hereinafter Hickman et al., Viable Alternative]. Although the authors refer to the POLST form as an example of an advance directive, the POLST form is a new model of medical documentation designed to enhance and eventually replace existing advance directives. See id.
12. See WSMA, supra note 8.
creased care planning and better documentation of treatment desires. One of the most notable features of the POLST form is that it is not a complicated legal document, which can be difficult for caregivers to interpret.

Various studies demonstrate the effectiveness of the POLST form in achieving the original intent of a patient’s wishes. However, Florida, whose advance directives statutes are considered to be contemporary guidelines for other states, in 2006 failed to pass House Bill 1017, which would have created a POLST form. Almost three years later, the political and social issues that plagued the passage of House Bill 1017 have diminished. As the state with the largest population of elderly residents as well as significant populations of persons with AIDS and heart disease, Florida has a vested interest in strengthening and enhancing its current advance directive laws. Accordingly, Florida must follow the lead of other states that have taken a proactive approach to the development and implementation of POLST initiatives.

It was surprising, in the wake of the national attention that Florida and the subject of end-of-life decision making received surrounding Terri Schiavo’s end-of-life care, that the Florida Legislature did not pass the proposed POLST legislation. Supporters of the bill believe that the legislation failed for a number of reasons, including the legislature’s reluctance to deal with controversial end-of-life legal issues in the wake of the Terri Schiavo legal battle. The timing of book releases by Terri’s parents and husband, as

13. See HICKMAN ET AL., HASTINGS CTR. REPORT, supra note 2, at S26–S27.
14. See id. at S28.
15. See id.
18. Act effective Oct. 1, 1999, ch. 99-331, § 1, 1999 Fla. Laws. The legislature also found that Florida has the third highest population of individuals with AIDS, as well as the fourth highest rate of deaths “from heart disease and chronic obstructive pulmonary disease in the nation.” Id. at 3455.
21. See, e.g., Cerminara, supra note 19, at 147.
well as then Governor Jeb Bush’s reluctance to make changes to the advance directive laws during his final term have also been identified as factors contributing to the failure of the bill. Additional, in 2005, the Florida Senate Committee on Health Care reviewed Florida’s advance directive statutes and recommended no changes be made to the current law.

House Bill 1017 would have required the Florida Department of Health to create a POLST form and to make the form available on its website. The proposed bill also would have required both a licensed health care professional and the patient to complete and sign the POLST form and to place the completed form in the patient’s medical record. Under House Bill 1017, the POLST form would have been a type of advance directive pursuant to chapter 765 of the Florida Statutes. As this article will demonstrate, the POLST form serves to promote the intent and effectiveness of advance directives by clearly documenting a patient’s end-of-life treatment decisions as a physician’s order.

Accordingly, new POLST legislation should be reintroduced pursuant to chapter 401 of the Florida Statutes, authorizing the use of the POLST form as a written medical order to be used as an alternative to, replacement for, or enhancement of, the Do Not Resuscitate Order. Part II of this article describes the history, the purpose, and the effectiveness of the POLST form. Additionally, this section presents an analysis of those states that have implemented POLST legislation or are in the process of developing a POLST form. Part III of this article analyzes Florida’s advance directive laws. This section also distinguishes the POLST form from Florida advance directives. Part IV of this article addresses problematic issues associated with Florida’s advance directives and demonstrates how the POLST form attempts to resolve these issues. Part V discusses how the POLST form satisfies advance directive reforms suggested by the medical, legal, and bioethical communi-


26. See id.

27. Id.
ties. This section also briefly details potential problems of the form’s implementation. Part VI concludes with a recommendation to the Florida Legislature for the reintroduction of POLST legislation as a medical order under chapter 401 of the Florida Statutes and not as an advance directive under chapter 765.

II. PHYSICIAN ORDERS FOR LIFE-SUSTAINING TREATMENT

An overview of the POLST form is presented in Part A of this section. The origin and history of the form is outlined in Part B. The purpose of each section of the POLST form is reviewed in Part C. Part D provides statistical evidence demonstrating the effectiveness of the form. Part E details the use of the POLST paradigm in various states throughout the nation.

A. Overview

Physician Orders for Life-Sustaining Treatment is a medical order form known by the acronym “POLST.”28 “The form is an example of an actional advance directive that is specific and effective immediately.”29 This makes the POLST form the most efficient advance planning mechanism for patients with terminal or life-threatening conditions.30 The form “is a short summary of treatment preferences . . . [which] centralizes information, facilitates record keeping, and ensures transfer of appropriate information among health care providers.”31 The physician documents the patient’s treatment and care decisions on the form.32 The neon colored form serves as the “cover sheet to the [patient’s] medical record.”33 The information contained in the form will be followed in the same manner as other physician orders.34 As part of the medical record, “the POLST form travels with the patient” between health care settings.35 Accordingly, the receiving health care provider

28. HICKMAN ET AL., HASTINGS CTR. REPORT, supra note 2, at S28.
29. Id.
31. See WASHINGTON STATE DEP’T OF HEALTH, POLST PHYSICIAN ORDERS FOR LIFE-SUSTAINING TREATMENT iii (2003) [hereinafter WASHINGTON].
33. Id. at 153; see Terri A. Schmidt et al., The Physician Orders for Life-Sustaining Treatment Program: Oregon Emergency Medical Technicians’ Practical Experiences and Attitudes, 52 J. AM. GERIATRICS SOC’Y 1430, 1431 (2004).
34. WSMA, supra note 8.
35. Sabatino, National, supra note 32, at 153.
has the appropriate information and documentation regarding the patient’s end-of-life requests, “thus, promoting continuity of care decisions.” 36

The most important and unique aspect of the POLST form is that it translates end-of-life discussions between patients and their doctors into actual treatment decisions. 37 The form is a clearly recognizable “set of physician orders” that health care providers must follow. 38 POLST documentation provides clarity to health care providers and a sense of comfort to patients ensuring that their treatment preferences will be properly interpreted and implemented. 39 Unlike advance directives, which merely document a patient’s end of life care decisions, the POLST form clearly translates a patient’s requests into specific written medical orders. 40 These orders are understandable and executable by all health care providers, even those who are unfamiliar with the individual patient. 41 Because it is a medical order signed by a physician, “it is immediately actionable without further interpretation.” 42 The POLST form clarifies treatment desires, which reduces confusion for the attending health care provider, especially in emergency situations. 43 As part of the patient’s medical record, the POLST form is intended to travel with the patient upon transfer to another care setting. 44 POLST documentation is particularly helpful to receiving health care providers who are unfamiliar with the patient, such as emergency room physicians or paramedics. 45 These health care providers are often first responders who are in a position to administer life sustaining treatments to incapacitated patients. 46 The POLST form allows the receiving medical facility or health care provider to follow specif-

36. Id.
37. WSMA, supra note 8.
38. Id.
39. See id.
41. See Hickman et al., Viable Alternative, supra note 11, at 5.
42. Id.
43. See WSMA, supra note 8.

Because the POLST form travels with a person from nursing home, to hospital to other health care settings, they are particularly useful in cases where input about health care options is immediately needed. For instance, if a seriously ill person is incapacitated when paramedics arrive, the form provides the emergency medical technicians with orders for treatments that are consistent with patient preferences.

Id.
46. See id.
ic doctor’s orders regarding the patient’s end-of-life wishes. The POLST form also eliminates the need for redundant questioning regarding life-sustaining treatment wishes because it provides pertinent information related to the requirements of the Patient Self Determination Act (PSDA). Currently, there is no other form that streamlines the documentation process related to life sustaining treatment decisions and end-of-life care in this manner.

Although the design of the POLST form is intended to efficiently and effectively expedite a patient’s end-of-life medical care, the most important goal of the form is to ensure “that treatment wishes are honored in the event that a patient is unable to speak for him or herself.” Unlike advance directives, which are often created by patients and their attorneys, the POLST form is designed to facilitate discussion between the physician and the patient concerning a wide range of end-of-life care options specifically tailored to a patient’s current medical condition. This physician-patient dialogue results in a POLST form clearly documenting the patient’s end-of-life treatment decisions as standardized physician’s orders. Typically, these orders include the patient’s desires in relation to such life-sustaining measures as resuscitation, antibiotic use, and food and fluid administration. The POLST form is modified according to changes in the patient’s condition and desires, thus ensuring that the form accurately reflects the patient’s wishes. In addition to providing clarity to the patient’s health care providers, the POLST form provides definitive direction to family members and significant others. Accordingly, the burden of life-sustaining treatment options and decisions that often plague family members in times of crisis can be reduced by the knowledge that the POLST form documents a clear articulation of the patient’s treatment wishes, which will be carried out as standardized physician’s orders.

47. WSMA, supra note 8.
48. Id.
49. Id.
51. See Sabatino, National, supra note 32, at 153.
52. WSMA, supra note 8.
53. Hickman et al., Viable Alternative, supra note 11, at 5.
54. See Zadina &Weber-Devoll, supra note 45, at 10.
55. See id.
56. See id.
B. Origin

In 1990, various Oregon ethics committees convened to discuss problems associated with Oregon’s advance directive law. Committee members consisted of doctors, nurses, and emergency personnel who were concerned about the difficulties patients and their families encountered when dealing with end-of-life decisions. The committee raised additional concerns regarding the inadequacy of Do Not Resuscitate Orders (DNRO), especially upon the transfer of patients to and from health care facilities. Identifying a need for a new type of DNRO or advance directive that would summarize a patient’s end-of-life preferences as a portable physician order led to the creation of the POLST Task Force. Over the next five years, the POLST Task Force developed a form which converted end-of-life treatment preferences into written medical orders, known as the Physician Orders for Life-Sustaining Treatment form.

In an attempt to escape legislative scrutiny, impacting the comprehensiveness of the newly created form, the POLST Task Force decided to “bypass the Oregon State Legislature” and recommended voluntary rather than mandated use of the POLST form. The POLST Task Force was also successful in persuading the Oregon Board of Medical Examiners to modify its administrative rules, which defined how emergency medical technicians (EMTs) should comply with DNROs. With strong support from the EMT community, amendments to administrative rules provide that EMTs should comply with the POLST form in the same manner as a DNRO. Additionally, this ruling provided immunity to EMTs from liability for good faith compliance with the POLST form.

59. See id.
60. See id.
61. Id.
62. Spann, supra note 57, at 1–2. Circumventing the Oregon legislature prevented alterations to the form and allowed the task force to effectively expedite the implementation of the POLST form. See generally id.
63. Id. at 2.
64. See id.
65. See id.
Between 1992 and 1995, the POLST Task Force focused on finalizing the form through extensive research and a test pilot program. The pilot study showed that health care providers were eager to use this form. By 1995, health care providers were utilizing the form throughout Oregon, and in 1996, modifications made the form more patient-friendly. Since the modifications, the POLST Task Force distributed over one million forms to nursing homes, hospices, and hospitals throughout the state. Consequently, in 2002, the majority of Oregon medical facilities used the POLST form. In November 2004, the task force again modified the form to enhance its clarity and utility. The success of the Oregon POLST program serves as an impetus and model for other states.

C. The Form

The Oregon POLST form is a two-sided document printed “on bright pink card stock.” The top of the form includes a standard Health Insurance Portability and Accountability Act (HIPAA) statement, which allows each health care provider to legally disclose the form to other receiving health care providers. The upper-right corner of the form contains the patient’s name and date of birth. The form instructs the receiving health care provider to follow the documented orders and contact the patient’s listed physi-

67. See id.
70. See id.
71. See generally WASH. PUBL. HOSP. DIST., supra note 68.
75. See POLST FORM, supra note 73.
cian or nurse practitioner. The form also notifies the health care provider to administer full treatment in the event any section is left blank.

Divided into five treatment sections, the front page contains information regarding: Cardiopulmonary Resuscitation (CPR), Medical Interventions, Antibiotics, Artificially Administered Nutrition, and Reason for Orders and Signatures. The CPR section is similar to a DNRO, instructing the health care provider regarding treatment if the patient "has no pulse and is not breathing." The patient has the choice to be resuscitated or not to be resuscitated. If the patient is breathing or has a pulse, the Medical Interventions section applies. The patient may choose Comfort Measures Only, which includes food, fluids, medical measures to relieve pain and suffering, other limited interventions, including oxygen, cardiac monitoring, and manual treatment of obstructed airways. A patient may also choose Full Treatment, including "mechanical ventilation and cardioversion." Under the Antibiotics section, the patient may choose to receive no antibiotics, limited antibiotics, or all antibiotics that are medically indicated. The Artificially Administered Nutrition section is applicable when the patient is unable to take food or liquid by mouth. The patient may decline tube feedings, or may request a trial period for a specified number of days, or choose to receive long-term artificial nutrition. The final section, identified as the Reason for Orders and Signatures, documents with whom the patient discussed his or her final treatment preferences. Both the patient and physician must sign the bottom of the front page. A designated surrogate may sign on behalf of the incapacitated patient. The back of the form contains an option for a guardian, surrogate, or other contact person to be notified, as well as instruc-

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76. Id.
77. Id.
78. Id.
79. Id.
80. See POLST FORM, supra note 73.
81. See id.
82. Id. This option prevents transfers to another medical facility if the current location is adequate. See id. This option does transfer the patient to the hospital, but avoids the intensive care unit, if possible. See id.
83. POLST FORM, supra note 73.
84. Id.
85. Id.
86. Id.
87. Id.
88. POLST FORM, supra note 73.
89. Id.
tions on the form’s use and revision. The back of the form also contains a chart documenting the form’s previous modifications.

D. Effectiveness

Since its inception in the mid 1990s, the POLST form has been “[o]ne of the most studied systems of advance care planning.” Various studies show that the POLST form is effective in ensuring one of its primary goals, which is the prevention of unwanted life-sustaining treatment. Generally, the research has concluded that emergency medical providers who are responsible for administering treatment regularly follow and can easily interpret the POLST form in situations where life-sustaining treatment is required.

After being widely used throughout Oregon, researchers conducted studies to determine the effectiveness of the form. The first study, by Susan Tolle, was conducted over a one-year period, of 180 nursing home residents who had completed a POLST form. It was designed to assess the actual implementation of the documented orders and the level of comfort care administered. All of the patients requested not to be resuscitated and asked to be transferred to a hospital only if the requested comfort measures could not be provided in the nursing home. Of these patients, none were resuscitated or received ventilator support. Most importantly, the study found adherence to the form in 98% of the cases. Furthermore, the high degree of the form’s portability across health care settings was evidenced by the finding of the proper location of the form in 94% of the patient’s records.

The most widely credited finding of the study is that POLST orders are followed regularly and result in “low rates of transfer for aggressive life-extending treatments” and “high levels of comfort care.” Tolle credited these positive outcomes to several aspects of the form’s design.

90. Id.
91. Id.
92. HICKMAN ET AL., HASTINGS CTR. REPORT, supra note 2, at S28.
93. See Spann, supra note 57, at 3.
94. See id.
95. See, e.g., Tolle et al., supra note 58, at 1097.
96. Id. at 1098.
97. Id.
98. Id. at 1097.
99. See id.
100. Tolle et al., supra note 58, at 1100.
101. Id. at 1097.
102. See id. at 1101.
Following Tolle, Melinda A. Lee conducted a study of fifty-eight patients in an Oregon nursing home "[t]o evaluate whether terminal care was consistent with" the patient’s POLST form. The study revealed that 98% of the participants had completed a POLST form. Results of the study indicated that "care was consistent with POLST instructions regarding CPR for 91% of participants, antibiotics for 86%, IV fluids for 84%, and feeding tubes for 94%." Additionally, only one patient’s form was missing and only two forms were completed improperly. In conclusion, Lee found that the POLST form "shows promise as a tool for promoting that patients’ preferences regarding end of life care are carried out.”

A third study, by Terri A. Schmidt, evaluated the attitudes and practical experiences of EMTs regarding their use of the POLST form in multiple care settings. The study indicated that 75% of the EMTs readily located the POLST form. Furthermore, EMTs reported proper completion of 87% of the forms and adherence to orders in 90% of the forms. Most importantly, 93% of the EMTs surveyed thought "the POLST form was useful in determining which treatments to” administer. Most significantly, this study found that EMTs modified their standard treatment plan pursuant to a patient’s preferences as documented on the POLST form. Overall, the “[f]indings suggest that the . . . POLST program is effective in providing instructions to EMTs regarding life-sustaining treatments.”

These studies demonstrate that the POLST form is a patient and provider-friendly planning tool which clearly documents life-sustaining and end-of-life treatment decisions in a form that is readily accessible and easily inter-

Several features appear to add to the effectiveness of the POLST form. The form has been standardized statewide, which enhances [the] recognition and respect on transfer. The shocking pink color of the form makes it hard to ignore. The orders to limit life sustaining treatment are clearly stated, . . . making them easy to locate. The form contains physician orders about specific medical treatments in language acceptable and understandable to nursing home staff, home hospice, covering physicians, and emergency medical services. The form’s specific language requiring that comfort measures must be provided is designed to encourage attention to pain and suffering.

Id.
103. Lee et al., supra note 72, at 1219.
104. Id. at 1222.
105. Id.
106. See id. at 1221.
107. Id. at 1224.
108. See Schmidt et al., supra note 33, at 1430.
109. See id. at 1433.
110. See id. at 1432.
111. Id.
112. See id. at 1434.
113. Schmidt et al., supra note 33, at 1434.
preted by a variety of health care providers. Finally, these studies show that the POLST form ‘‘offer[s] insight[] that health care systems should not ignore. It is time to make sure that patients get what they want, [and] not just what we think they need.’’

E. Use in Other States

Due to success in Oregon, POLST paradigm programs are spreading rapidly. Many states simply use the Oregon form, while other states use modified versions of the Oregon form. The following provides a policy analysis of those states that pioneered and enacted original POLST legislation. Washington State implemented a POLST form replacing the state’s EMS-No-CPR form. Additionally, Washington State, like Oregon, altered its administrative code, protecting emergency medical service providers from liability for following the POLST form in good faith. Similarly, West Virginia passed legislation in 2002 codifying their own version of the POLST form, known as the “physician’s orders for scope of treatment (POST).” Recognized as a Do Not Resuscitate Order (DNRO), the POST form provides legal protection to health care providers for good faith compliance.

Utah has also enacted POLST legislation. Added to the Personal Choice and Living Will Act, the POLST form in Utah has in effect replaced

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114. See Lee et al., supra note 72, at 1224; Schmidt et al., supra note 33, at 1434; Tolle et al., supra note 58, at 1097.
117. See History of the POLST, supra note 116.
118. For a detailed national analysis of current POLST legislation, pilot programs, and other initiatives see generally Kathy L. Cerminara & Seth M. Bogin, A Paper About a Piece of Paper: Regulatory Actions as the Most Effective Way to Promote Use of Physician Orders for Life-Sustaining Treatment, 29 J. LEGAL MED. 479 (2008).
119. See WASHINGTON, supra note 31, at 7. The EMS-No-CPR notifies the EMS of the patient’s request not to be resuscitated. See id.
120. See WASH. REV. CODE § 43.70.480 (2009).
122. See id. The statute requires a physician’s signature to become effective. See id.
123. See Henry, supra note 30, at 9.
the DNRO form. Additionally, Utah EMTs are permitted to honor the POLST form and health care providers are required to make an effort to determine if the patient has a POLST form. In 2004, Maryland enacted, what is now called, the Instructions on Current Life-Sustaining Treatment Options (ICLTO) form. The ICLTO form requires a provider's review of the form upon a patient's arrival from another health care facility. Unlike the POLST form, the ICLTO is not recognized as an official medical order. The form is only the physician's summary of the patient's wishes, or of an existing advance directive. In May of 2006, Hawaii enacted legislation which charged the Hawaii Department of Health with developing and implementing a POLST program. The POLST form will replace Hawaii's current system of bracelets and necklaces used to notify emergency personnel of the existence of an advance directive.

Finally, in November 2006, the Pennsylvania House of Representatives passed Senate Bill 628, establishing a task force to create and test the POLST form in nursing homes throughout the state. These legislative enactments demonstrate that other state lawmakers have recognized the value of POLST. Yet despite the enactment of contemporaneous POLST legislation in other states, Florida has failed to successfully enact its own POLST initiative.

III. ADVANCE DIRECTIVES IN FLORIDA

The successful utilization of the POLST form in other states provides Florida with a frame of reference for its incorporation into Florida law. This section will detail Florida's advance directive law and will distinguish the POLST form from these advance directives.

With rapid advances in medical technology, health care providers are able to sustain life for extended periods of time. Very often, health care providers and family members must make decisions without information...
regarding the level of care the patient actually wanted to receive. Efforts to alleviate these life and death decision making situations began in the 1970s, when medical professionals began asking their patients to state the level of care they wished to receive in the event of their incapacitation. Today, through the use of advance directives, patients effectuate their "own choice, thereby honoring self-determination even when individuals no longer possess the capacity for self-determination." An advance directive is "[a] legal document explaining one's wishes about medical treatment if one becomes incompetent or unable to communicate." It can also be "[a] document that takes effect upon one's incompetency and designates a surrogate decision-maker for healthcare matters." Currently, every state has at least one type of advance directive codified into law.

The Florida Statutes chapter 765 codifies Florida's health care advance directive laws. In 2002, the Last Acts Initiative rated Florida's advance directive statute as one of the best in the nation. This recognition resulted from years of public and professional input finally leading to the enactment of the Life-Prolonging Procedures Act of Florida of 1984. The Florida Legislature decided that "every competent adult has [a] right of self-determination . . . [and] the right to choose or refuse medical treatment." Under Florida law, an advance directive is a "witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's..."
health care."[144] Pursuant to the statute, advance directives include, but are not limited to, the designation of a health care surrogate, a living will, or anatomical gift."[145] Although not officially listed as an advance directive under chapter 765, the durable power of attorney is considered an advance directive.[146] House Bill 1017, Florida’s failed POLST legislation, would have added the POLST form as a type of advance directive under chapter 765.[147]

A. Living Will, Health Care Surrogate Designation, Durable Power of Attorney

Florida law defines a living will as a witnessed document or “oral statement made by the principal” (patient) that expresses “instructions concerning life-prolonging procedures.”[148] A competent adult may create a living will at any time.[149] Typically, a living will contains information regarding a person’s desire to receive or withhold treatment in the event of a terminal illness, an end-stage medical condition, or “a persistent vegetative state.”[150] The statute requires that the living will be signed in front of two witnesses, one of whom cannot be related to the principal.[151] Once completed, it is the principal’s responsibility to notify the health care provider of the existence of a living will.[152] If the principal is incapacitated, any person may provide notification to the health care provider, so that the living will is made part of the medical record.[153] Under the Patient Self-Determination Act (PSDA), federal law requires that federally funded medical facilities inform incoming patients of their right to make a living will, and inquire

144. FLA. STAT. § 765.101(1). “‘Principal’ means a competent adult executing an advance directive and on whose behalf health care decisions are to be made.” Id. § 765.101(14).
145. Id. § 765.101(1).
146. See FLA. STAT. § 709.08; see also FLA. STAT. § 401.45.
148. FLA. STAT. § 765.101(11)(a), (b) (2008). “‘Life-prolonging procedure’ means any medical procedure, treatment, or intervention ... which sustains [or] restores . . . a spontaneous vital function.” Id. § 765.101(10).
150. Id. “‘Terminal condition’ means [an injury] or illness from which there is no ... probability of recover[ing] . . . without treatment, can be expected to cause death.” FLA. STAT. § 765.101(17). “‘End-stage condition’ means an irreversible condition [which] treatment of the condition would be ineffective.” Id. § 765.101(4). “‘Persistent vegetative state’ means a permanent and irreversible condition of unconsciousness . . . .” Id. § 765.101(12).
151. FLA. STAT. § 765.302(1).
152. Id. § 765.302(2).
153. Id.
whether that patient has executed such a document.\textsuperscript{154} Once the health care provider has received the living will, a change or revocation will only be effective when communicated directly to the health care provider.\textsuperscript{155} A properly executed living will "establishes a rebuttable presumption of clear and convincing evidence of the principal's wishes."\textsuperscript{156}

Although the POLST form is not a substitute for a living will, it is a supplement to this type of advance directive.\textsuperscript{157} In effect, the POLST form translates a patient's wishes regarding life-sustaining treatment and end-of-life care, including resuscitation measures, antibiotic administration, and the administration of nutrition into standard medical orders.\textsuperscript{158} Health care professionals can easily interpret and implement POLST orders, which "surmounts the disconnect between [the living will] and the functioning of [the] health care systems."\textsuperscript{159}

A second type of advance directive under Florida law is the designation of a health care surrogate.\textsuperscript{160} This is a written document that designates a person to whom the principal has given the legal authority to make medical decisions in the event the principal is incapacitated.\textsuperscript{161} These decisions are based upon what the surrogate "believes the principal would have" wanted if they were able to speak for themselves.\textsuperscript{162} The procedure for naming a health care surrogate is similar to that of creating a living will. Two adults must witness the execution of the document.\textsuperscript{163} Once completed and delivered to the surrogate, the surrogate designation form, like the living will, creates "a rebuttable presumption of clear and convincing evidence of the principal's [desire regarding the] designation of the surrogate."\textsuperscript{164} However, the surrogacy does not commence until the attending physician finds and documents

\textsuperscript{155} FLA. STAT. § 765.104(3) (2008).
\textsuperscript{156} FLA. STAT. § 765.302(3); see also In re Guardianship of Browning, 543 So. 2d 258, 273 (Fla. 2d Dist. Ct. App. 1989) (holding surrogate's decision "to forego life-sustaining treatment [must be supported by] clear and convincing evidence").
\textsuperscript{157} See Sabatino, National, supra note 32, at 153.
\textsuperscript{158} See POLST FORM, supra note 73.
\textsuperscript{159} Sabatino, National, supra note 32, at 153.
\textsuperscript{160} See FLA. STAT. § 765.202 (2008).
\textsuperscript{161} See id. § 765.202(1).
\textsuperscript{162} FLA. STAT. § 765.205(1)(b) (2008).
\textsuperscript{163} Id. § 765.202(1). If the principal cannot sign, he or she may direct that another "sign the principal's name" in front of the witnesses. Id. The statute states that the surrogate cannot be a witness to the signing of the document, and at least one of the witnesses cannot be a blood relative or spouse. Id. § 765.202(2). Additionally, the document can name an alternative surrogate. Id. § 765.202(3).
\textsuperscript{164} Id. § 765.202(7).
the principal’s lack of capacity to make health care decisions. 165 If at any
time the principal regains capacity, the surrogate’s authority ceases. 166

An alternative to the designation of a health care surrogate is the desig-
nation of a durable power of attorney. 167 Although the durable power of at-
torney does not appear under Florida’s advance directive statute, it functions
in the same manner as an advance directive. 168 Under the durable power of
attorney, principals can designate individuals to serve as their attorneys-in-
fact. 169 Relating to health care, an attorney-in-fact is given full authority to
“make all health care decisions on behalf of the” incapacitated patient. 170
Under Florida law, the attorney-in-fact can be any competent person over the
age of eighteen. 171 The document must be in writing, it must clearly identify
the person being appointed as the attorney-in-fact, and it must state that au-
thority is conferred upon the principal’s incapacitation. 172 Once completed,
the attorney-in-fact has the same power as the health care surrogate. 173

The POLST form is useful to both the health care surrogate and the at-
torney-in-fact. 174 POLST forms reduce the need for much of the critical
health care decision making that is required of the health care surrogate or
attorney-in-fact. 175 If the incapacitated patient has not completed a POLST
form, the surrogate or attorney-in-fact can communicate with the health care
provider regarding the completion of the form. 176 Under the Summary of
Goals section of the POLST form, the physician will document that the
health care surrogate or attorney-in-fact has completed the form on behalf of
the patient. 177

165. See Fla. Stat. § 765.204(2)–(3) (2008). If a question regarding capacity arises,
another physician must evaluate the principal, and if in agreement, record a similar finding of
incapacity. Id. § 765.204(2).
166. See id. § 765.204(3).
168. See id.
169. Id.
170. Id. § 709.08(7)(c).
171. Id. § 709.08(2).
172. See Fla. Stat. § 709.08(1). The statute also requires that the document be signed in
front of two witnesses. Id.
173. See id. In addition to the living will and health care surrogate, section 765 of the
Florida Statutes provides guidelines for the donation of body organs as an anatomical gift.
174. See POLST FORM, supra note 73.
175. See id.
176. See id.
177. See id.
B. *Do Not Resuscitate Orders*

Do Not Resuscitate Orders (DNRO), established under Chapter 401 of the *Florida Statutes*, are prepared in advance to memorialize a person's life-sustaining treatment wishes. A DNRO is a physician's order signed by both the doctor and the patient. The DNRO authorizes health care providers to withhold or withdraw resuscitation in the event that an individual needs to be resuscitated. Generally, emergency medical service personnel must "resuscitate a patient to the point of stabilization of vital signs." The DNRO allows the patient to choose not to receive resuscitation in the event of cardiac or pulmonary arrest. Produced by the Florida Department of Health, the DNRO form must "be printed on yellow paper." A DNRO is generally used by patients who suffer from a terminal condition, an end-stage condition, or are in persistent vegetative states.

Although the DNRO and the POLST form are both medical orders, there are significant differences between these two directives. The POLST form requires a discussion between the patient and the health care provider regarding different levels of treatment, including, but not limited to, resuscitation. The orders on the POLST form must also be reviewed periodically. On the other hand, the DNRO, pursuant to the patient's wishes, only informs the health care provider not to resuscitate. As it has in many other states, the POLST form could replace the DNRO in Florida. The POLST form would provide greater detail and specification for patient care desires, while still fulfilling the purpose of the DNRO.

IV. **Problems with Advance Directives**

The purpose of an advance directive is to allow an individual to control decisions related to life-sustaining treatments and end-of-life care. Unfor-
tunately, research over the past several decades has demonstrated that current statutory advance directives have not produced their intended results. Of- 

ten, patients lose their ability to ensure that their end-of-life care preferences are honored. Many legal and health care professionals believe “[s]ystematic efforts are urgently needed to improve advance care planning and end-of-life care.” The American Medical Association stresses that “[m]ore rigorous efforts in advance care planning are required in order to tailor end-of-life care to the preferences of patients so that they can experience a satisfactory last chapter in their lives.” This section will detail the problems associated with current advance directives, as well as demonstrate how the POLST form represents “[p]romising new models” which can “move us closer to achieving the original intent of advance directives.”

Studies have found that only 18% of Americans have completed advance directives. Even if efforts are made to educate the public regarding the need for advance directives, simply having an advance directive does not guarantee that it will be followed. Often advance directives raise “more questions for doctors than the document answers,” and may force doctors to make treatment choices against the patient’s desires. Additionally, patients

192. Id.
197. See R. Sean Morrison et al., The Inaccessibility of Advance Directives on Transfer from Ambulatory to Acute Care Settings, 274 J. AM MED. ASS’N 478, 478 (1995).
are under the false assumption that after writing their advance directives, planning is complete.\textsuperscript{199}

A. What Does It Say?

Generally, standard advance directives assume that at some point an individual "would prefer to die rather than continue" on life support.\textsuperscript{200} Advance directives are often completed by patients and their lawyers who are unfamiliar with the specific treatments administered during life threatening medical situations and terminal illnesses.\textsuperscript{201} Unfortunately, these advance directives do not detail the various medical conditions that may arise, thus leaving the health care provider and family to decide what the patient would have wanted under these circumstances.\textsuperscript{202} One study showed that out of 4804 patients with advance directives, only ninety provided specific instructions that the health care provider could follow.\textsuperscript{203} Often, when patients write their advance directives, they are written in layman’s terms, thus leading to vague and confusing instructions.\textsuperscript{204} Researchers attribute this lack of clarity to the unpleasantness of the subject and the lack of adequate information regarding the types of treatment available.\textsuperscript{205} Advance directives are often created under urgent circumstances, which "trigger[s] emotional and existential turbulence, enhancing the likelihood of unstable decisions,"\textsuperscript{206} leading to "technically inaccurate statements," which are medically impossible to honor.\textsuperscript{207} Essentially, the health care provider and family is in the same position as if the patient had never created an advance directive.\textsuperscript{208} Accordingly,

\begin{itemize}
  \item \textsuperscript{200} See Teno et al., \textit{supra} note 4, at 508.
  \item \textsuperscript{201} See Fagerlin & Schneider, \textit{supra} note 196, at 33.
  \item \textsuperscript{202} See \textit{id}.
  \item \textsuperscript{203} Teno et al., \textit{supra} note 4, at 511. "Even if all of [the advance directives] had been noted and had been rigorously followed, the effects upon the overall population would have been imperceptible." \textit{Id}.
  \item \textsuperscript{204} See \textit{id}.
  \item \textsuperscript{205} See Fagerlin & Schneider, \textit{supra} note 196, at 34. The research also revealed that most "people are functionally illiterate, and most of the literate cannot express themselves clearly in writing." \textit{Id}.
  \item \textsuperscript{207} Teno et al., \textit{supra} note 4, at 511.
  \item \textsuperscript{208} See \textit{id}.
\end{itemize}
many researchers believe that advance directives cannot "effectively direct care decisions for seriously ill adults." 209

Even with clearly documented advance directives, a survey of Florida doctors revealed that physicians felt uncomfortable and reluctant to decide a patient's fate simply by "relying on a legal document." 210 One study concluded that overall, advance directives "do not influence the level of medical care" and found that 25% of the patients studied received care "inconsistent with their living will." 211 Additionally, problems associated with reading and interpreting advance directives may lead health care providers to interpret documents in the light of their own preferences. 212 At times, doctors simply ignore advance directives because they are reluctant to prematurely declare that a patient is in an end-stage of a terminal illness which would require reliance on an advance directive. 213 Consequently, by the time the physician actually determines that the patient has reached the threshold of imminent death, the advance directive is often regarded as no longer applicable. 214

By converting a patient's wishes into actionable medical orders, the POLST form avoids problematic issues relating to vagueness and lack of clarity of instructions commonly associated with traditional advance directives. 215 Like any medical order, the attending health care provider can quickly read and interpret the POLST form and successfully implement the instructions. 216 Unlike advance directives prepared by attorneys, the POLST form is completed by patients and their physicians, and is drafted using appropriate medical terminology in a standard medical order format. 217 Therefore, both the physician and the patient have an increased level of confidence that care will be administered in accordance with the patient's wishes. 218 The standard medical order format provides clarity and guidance to health care providers who may be unfamiliar with the patient to whom they are providing care. 219 The POLST form removes barriers associated with traditional

209. Id. at 508.
210. See Birdwell, supra note 198.
211. Fagerlin & Schneider, supra note 196, at 36.
212. See id. at 35–36.
213. Morrison et al., supra note 197, at 481.
214. Fagerlin & Schneider, supra note 196, at 36.
217. Id.
218. See id.
advance directives including unclear legal jargon that is difficult to interpret, especially in emergency situations.  

B. Where Is It?

In addition to containing clear and specific instructions, the advance directive must be readily accessible to health care providers. Most advance directives are completed years before being actually needed, consequently their “existence and location may vanish in the mists of time.” A study found that half of all advance directives created often remain in the lawyer’s office. As many as 62% of the study’s patients failed to provide their advance directives to their doctors. Upon admission to a health care facility, most patients are too overwhelmed and nervous “to recall and mention their advance directives.” The study also discovered that only 16% of reviewed patients’ charts actually contained an advance directive form. Other studies have found that patients often believe that their condition is not serious enough to mention the existence of their advance directive. Fear of early withdrawal of treatment is also identified as a reason why patients are hesitant to mention the existence of an advance directive. The increase in patient transfers between health care facilities has also added to problems asso-

220. See Susan E. Hickman et al., The POLST (Physician Orders for Life-Sustaining Treatment) Paradigm to Improve End-of-Life Care: Potential State Legal Barriers to Implementation, 36 J.L. MED. & ETHICS 119, 119 (2008) [Hickman et al., The POLST]. “[T]he wording of the standard living will may impede decision-making and lead to decisions contrary to a patient’s true preferences if there are no discussions between patient and doctor. Teno et al., supra note 4, at 511.

221. See David Martin, Using Implantable Devices to Improve End-of-Life Care, 91 AM. J. CARDIOLOGY 583, 583 (2003).

222. Fagerlin & Schneider, supra note 196, at 35.

223. See id.

224. Id.

225. Id. See Morrison et al., supra note 197, at 481 (finding responsibility for identifying advance directives are delegated to clerks who are untrained to deal with “these types of discussions”). See also Am. Med. Assoc. Council on Ethical & Jud. Affairs, supra note 203, at 670 (stating inquiry to existing advance directives “was assigned to the medical student or nurse”).

226. Fagerlin & Schneider, supra note 196, at 35.

227. Morrison et al., supra note 197, at 481.

228. Id.
associated with current advance directives. Unfortunately, advance directives “often fail to accompany” patients when they are transferred.

Unlike the lack of portability of traditional advance directives, the POLST form serves as the cover sheet for the patient’s medical record. Easily recognized when transferred across health care settings, the POLST form is reviewed upon the patient’s admission to the receiving medical facility. In those states that use the POLST form, “providers have committed to ensuring that the POLST form travels with the patient whenever transfers from one setting to another are made, thus, promoting continuity of care decisions.” Because the form is placed on top of the medical record, the health care provider is alerted to the fact that the patient has an advance directive, eliminating the need to ask as required under the PSDA. However, to comply with the PSDA, the health care provider must still ask patients whether the POLST form belongs to them. Additional efforts were made by the POLST form developers to ensure that the form would not “become buried in the [medical] record.” For instance, to increase visibility, the POLST form is printed on brightly colored neon paper. Clearly, the POLST form is designed to address the availability and portability issues that plague traditional advance directives.

C. Things Change

“Unlike most legal documents which gain credence over time, directives tend to lose credibility. The greater the time span or change in circumstances between the directive’s creation and its implementation, the greater the uncertainty that the previous and present desires are identical.”


230. See Tolle et al., supra note 58, at 1098. But see Raymond L. Parri, If I Call 911, Is My Living Will Any Good? The Living Will v. the DNRO, 70 FLA. B. J. 82, 84 (1996). Most states recommend that a copy of advance directives should be made available to the EMT as they transport a patient from one facility to another, and while in the home, the advance directive should be near the patient at all times. Id.

231. Sabatino, National, supra note 32, at 153.

232. Id.

233. Id.

234. See WSMA, supra note 8.

235. See HICKMAN ET AL., HASTINGS CTR. REPORT, supra note 2, at S27.

236. Furlong, supra note 50, at 26.


238. See WSMA, supra note 8.

ten well before a person becomes terminally ill, most advance directives only address hypothetical possibilities for the future, which rarely occur. With the passage of time and life changes, very often a patient’s personal preference regarding life-sustaining treatments and end-of-life care may change. Because a “decision made at age thirty may be different from a decision one would make at age eighty,” it is unlikely that one could create an advance directive that accurately reflects changes in personal feelings. Moreover, with advances in medical technology, of “paramount concern is the possibility that medical practice will change between the time of making the directive and [its] implementation.” For example, vaccinations and cures may become available for diseases considered terminal at the time of the drafting of the advance directive. Unfortunately, advance directives are rarely reviewed or updated.

In contrast to a traditional advance directive, the POLST form addresses the issue of medical advances and personal changes impacting one’s life-sustaining treatment and end-of-life care wishes. Through its requirement of periodic review and updates, the form ensures the patient’s wishes are current and accurately documented. Specifically, the back of the form lists instructions regarding its review. Consequently, the POLST form accurately documents the patient’s wishes in light of his or her most current personal and medical circumstances.

240. Id.
241. Id.
242. Id.
243. Id.
246. See HICKMAN ET AL., HASTINGS CTR. REPORT, supra note 2, at S27. “Once advance directives are completed, planning is typically considered finished. A systematic effort to reopen the conversation . . . is rarely made. The only repeated question that a patient might hear is, ‘Do you have an advance directive?’ as required by the Patient Self-Determination Act.” Id.
247. See Bowers, supra note 199, at 719.
249. POLST FORM, supra note 73. The POLST form specifies that a review should be completed when: “The person is transferred from one care setting or care level to another, or [t]here is a substantial change in the person’s health status, or [t]he person’s treatment preferences change.” Id.
D. **The Surrogate's Burden**

Patients who designate health care surrogates often neglect to provide information regarding their specific health care treatment preferences.\(^{251}\) Although a study demonstrated that seventy percent of surrogates correctly predicted their principal's preferences, the burden of surrogacy is still significant.\(^{252}\) Even when the patient has left general guidance regarding his or her end-of-life care, studies have shown those statements are often unclear and confusing.\(^{253}\) Lacking information concerning the patient's health care wishes often results in stress and anxiety that leaves surrogates "overwhelmed with their own concerns and [they cannot] effectively advocate for the patient."\(^{254}\) Furthermore, some surrogates are not readily available for immediate decision making.\(^{255}\) Finally, in fear of potential litigation from the patient's family members, some physicians are cautious when dealing with surrogates.\(^{256}\)

Because of its intent and design, the POLST form can serve as a valuable planning tool for the patient and the health care surrogate.\(^{257}\) If the form is completed prior to the patient's incapacitation, it will provide the surrogate with detailed instruction and guidance regarding the principal's current and future treatment preferences.\(^{258}\) In fact, the surrogate may assist the patient and physician in completing the form.\(^{259}\) In the event that a patient becomes incapacitated, a health care surrogate may complete a form on behalf of the patient, which "should remove much of the burden of medical decision making from a family's shoulders in a time of crisis."\(^{260}\) Additionally, the POLST form's periodic review requirement allows surrogates to update the treatment preferences in light of the patient's current condition.\(^{261}\)

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251. See Fagerlin & Schneider, *supra* note 196, at 35–36.
252. *Id.* at 36.
253. Teno et al., *supra* note 4, at 511.
254. Fagerlin & Schneider, *supra* note 196, at 37.
255. *Id.* at 36.
256. *Id.* at 37 ("[D]octors intent on avoiding litigation may realize that the only plausible plaintiffs are families.").
258. *Id.*
259. *Id.*
260. *Id.*
V. POLST: IS IT THE ANSWER?

Clearly, problems associated with advance directives significantly impact patients, their families, and the legal and health care communities. However, most health care providers, legal professionals, and bioethicists believe "the initial goal of advance directives was laudable and is worth preserving." Numerous studies on advance directives "demonstrate that in the right system, the rate of advance care planning can be high, clinically important, available," and effective. Fortunately, there are promising new models which move us closer to achieving the original intent of advance directives. Health care providers have requested a model that converts traditional advance directives into "specific, immediately actionable medical orders that transfer with the patient throughout the health care system." This section will demonstrate how the POLST form represents a model that fulfills recommendations regarding advance directive reforms.

Hickman identified several factors that would contribute to the creation of successful advance directives. First, patients and their doctors should develop advance directives which include individualized medical plans. This allows patients to define what is acceptable rather than simply stating that they wish to refuse or to receive treatment. The POLST form satisfies this recommendation because it is a medical order individualized to the patient's desires completed by patients and their health care providers. Additionally, in contrast to the DNRO and a living will, which Hickman states "simply list[] the right to refuse treatment," the form provides the patient with a variety of treatment options. The second factor contributing to a successful advance directive is portability. The directive must be easily transferred across patient settings and provide medical instructions in "specific language that is actionable in all settings." The POLST form also fulfills this recommendation. Unlike advance directives, the POLST form

263. Id.
264. Hickman et al., Viable Alternative, supra note 11, at 5.
265. HICKMAN ET AL., HASTINGS CTR. REPORT, supra note 2, at S26.
266. Hickman et al., Viable Alternative, supra note 11, at 5.
267. See HICKMAN ET AL., HASTINGS CTR. REPORT, supra note 2, at S28–30.
268. See id. at S28.
269. See id.
270. See id.
271. Id.
272. HICKMAN ET AL., HASTINGS CTR. REPORT, supra note 2, at S28.
273. Id.
274. See id.
is a clearly documented physician’s order, which serves as a cover sheet to the patient’s medical record and must accompany the patient during transfer.\textsuperscript{275} Furthermore, the form is generally created by a state’s department of health, ensuring its standardization, so it is easily recognized by the transferring and receiving medical facilities.\textsuperscript{276} According to Hickman, the final recommendation of a stringent periodic review represents “the most crucial element[] of [a] more successful advance directive program[].”\textsuperscript{277} Once again the form fulfills this recommendation by requiring regular review and updates of a patient’s POLST form.\textsuperscript{278}

The American Medical Association (AMA) has also suggested advance directives reforms which are satisfied by the POLST form.\textsuperscript{279} For example, the AMA suggests that physicians receive immunity from malpractice when honoring patient’s wishes found in statutory documents.\textsuperscript{280} States which have enacted POLST legislation have amended their statutes and administrative codes providing immunity to health care providers who, in good faith, follow the POLST form.\textsuperscript{281} Additionally, the POLST form clearly follows the AMA suggestion that advance directives be created on worksheet-type documents to ensure treatment can be recorded and “applicable to medical decisions.”\textsuperscript{282} The form also provides an understandable standard medical format and allows for an accurate interpretation of the patient’s wishes.\textsuperscript{283} The POLST form clearly conforms to the AMA’s suggestion that advance directives ensure reasonable confidence in the patient and the provider.\textsuperscript{284} Like Hickman, the AMA has also suggested that advance directives be readily accessible, periodically updated, and easily transferable.\textsuperscript{285} The POLST form clearly conforms to these suggestions.

Although the POLST form fulfills many of the recommended advance directive reforms, it is important to note that the success of the POLST form

\begin{itemize}
  \item \textsuperscript{275} See id.
  \item \textsuperscript{276} See id.
  \item \textsuperscript{277} HICKMAN ET AL., HASTINGS CTR. REPORT, supra note 2, at S30.
  \item \textsuperscript{278} See id. at S30.
  \item \textsuperscript{279} See, e.g., Code of Medical Ethics § 2.225 (AMA Council on Ethical and Judicial Affairs 2004-05).
  \item \textsuperscript{280} See id. at 101.
  \item \textsuperscript{281} See id.
  \item \textsuperscript{282} Id.
  \item \textsuperscript{283} See Kathy L. Cerminara & Seth M. Bogin, A Paper About a Piece of Paper: Regulatory Actions as the Most Effective Way to Promote Use of Physician Orders for Life-Sustaining Treatment, 29 J. LEGAL MED. 479, 484 (2008).
  \item \textsuperscript{284} See HICKMAN ET AL., HASTINGS CTR. REPORT, supra note 2, at S28.
  \item \textsuperscript{285} See Code of Medical Ethics § 2.225 (AMA Council on Ethical and Judicial Affairs 2004-05).
\end{itemize}
is contingent upon statewide education programs. According to Susan W. Tolle, part of the success of Oregon's POLST program may be traced to a five-year statewide education effort, as well as the fact that Oregon provides more end-of-life care funding than any other state. Tolle, expressed concern that other states may not achieve the same success rates without such a fully supported state system.

States must also be prepared for new dilemmas resulting from the POLST form. For instance, if a conflict exists between a POLST form and a previously completed advance directive, the most recent form generally takes priority, but in an emergency situation the physician may ignore the POLST form if the existing advance directive provides for more aggressive life-sustaining treatment. Although this situation is not common, it can potentially open the door to future litigation.

V. CONCLUSION

The POLST form is a valuable planning tool that effectively translates a patient’s end-of-life decisions into standardized, clearly defined medical orders, thus eliminating many problems associated with traditional advance directives. Although House Bill 1017 previously would have amended chapter 765 of the Florida Statutes, that POLST legislation was not enacted. It is imperative that Florida now enact new legislation under the appropriate Florida statute.

Although the POLST form can be used as an advance directive, it is more likely that the legislature would approve the POLST form as an alternative or replacement to the DNRO under chapter 401 of the Florida Statutes. Accordingly, the POLST form should be re-introduced pursuant to chapter 401 of the Florida Statutes. As this article demonstrates, unlike advance directives, the POLST form is a document included in the patient’s medical record that clearly memorializes the patient’s treatment care decisions and end of life wishes into actionable standardized physician’s orders. The

286. Tolle et al., supra note 58, at 1101.
287. See id.
288. See id.
290. See id.
291. See id. Although conflicts between POLST forms and previously executed advance directives could be a potential source of future litigation, this “problem is not common in Oregon or in other states using the POLST” form. Id.
POLST form may be used in conjunction with advance directives, effectively translating the patient's treatment care wishes into actionable medical orders.

Many states that have successfully enacted POLST legislation have done so by authorizing the POLST form as an alternative or replacement to the existing DNRO form. Enacting such legislation would not require amending chapter 765, which the legislature has been hesitant to reform because of political, religious, and social reasons. Accordingly, because the POLST form is a medical order, like the DNRO, and not a traditional advance directive, new POLST legislation should be introduced under chapter 401 of the Florida Statutes.

Finally, to ensure the proper development and implementation of the POLST form, the Florida Department of Health should initiate a statewide POLST program. Efforts to educate the public and the medical and legal communities regarding the purpose and practical use of the POLST form should be diligently implemented. Pilot programs in a variety of health care settings will provide relevant and reliable data and findings regarding the utility of the form in practical health care settings. Results of the pilot program can be used to modify the POLST form in accordance with the identified needs and requirements of Florida patients, their physicians, and Florida law. Ultimately, Florida's enactment of POLST legislation under chapter 401 of the Florida Statutes will prove that the form is the cure for the common advance directive.
THE WAR COMES HOME: HOW CONGRESS' FAILURE TO ADDRESS VETERANS' MENTAL HEALTH HAS LED TO VIOLENCE IN AMERICA

Alyson Sincavage*

I. INTRODUCTION ................................................................. 481
II. BRINGING THE WAR HOME .................................................. 483
III. RECOGNIZING THE PROBLEM ............................................. 486
IV. THE MENTAL TOLL OF THE BATTLEFIELD:
    POST-TRAUMATIC STRESS DISORDER ........................................ 489
    A. Detailed Explanation of PTSD ............................................... 489
    B. The Pentagon Investigation .................................................. 492
V. STATES RESPOND TO THE INCREASED VIOLENCE ......................... 495
    A. Insanity Defense and PTSD ................................................ 495
    B. States Seek to Codify Protected Class .................................... 496
VI. CONGRESS RESPOND TO THE GROWING CRISIS ............................ 497
    A. History of Reintegration .................................................. 498
    B. A Good Step: The Veterans' Mental Health and Other
       Care Improvements Act of 2008 ........................................... 500
       1. Addressing Substance Use Disorders and
          Mental Health Care ..................................................... 500
       2. Mental Health Accessibility Enhancements ............................ 501
       3. Mental Health Research ................................................ 502
       4. Assistance for Families of Veterans ................................... 503
    D. Getting the American People Involved in the Solution ............ 505
VII. THE WAY FORWARD: THE REGULATORY SCHEME THAT MUST
     BE ESTABLISHED .................................................................. 505
VIII. CONCLUSION ....................................................................... 507

I. INTRODUCTION

The recent military operations, Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF), embody the most pronounced military engagements involving U.S. armed services since the Vietnam War.1 Over

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"1,500,000 members of the Armed Forces have been deployed in" these operations. More wounded soldiers have survived from these operations than from any other war. However, many of these survivors wake up each day only to be reminded of their traumatic injuries or debilitating mental disorders. A great majority of soldiers in combat experience traumatic events often considered horrific in a civilized society, such as seeing dead bodies or remains, or witnessing both friends and enemies killed in violent manners. Consistent with society's view of the heroic braveness of the men and women in uniform, war veterans are often left to overcome substantial mental anguish with little professional assistance, receiving nothing more than a mere "cursory mental health screening" upon return.

The rate of homicides committed by war veterans has drastically increased amid the return of thousands of those who have served in combat roles in Iraq and Afghanistan. States have responded to the increase in crime by combat veterans by beginning to carve out "a class of privileged offenders." At least one Florida court has already extended war related post-traumatic stress disorder (PTSD) from a mere mitigating factor in a murder trial to a basis for acquittal by reason of insanity. Other state legislatures have sought to enact legislation to protect war veterans who commit crimes from punishment offenders would otherwise receive.

Congress has taken note of these events and has introduced and passed several pieces of legislation in an effort to bring more focus to the growing
THE WAR COMES HOME

In particular, the Veterans’ Mental Health and Other Care Improvements Act of 2008 (Veterans’ Mental Health Act) demonstrates that Congress has taken note of the source of the problem, and is seeking a solution. This paper will address the adequacy of the current efforts of Congress and the states in addressing the drastic increase in violent crimes. The first part of this paper will highlight specific instances of the war being brought home to local towns and neighborhoods with the return of combat veterans. Next, this paper will offer a detailed background and explanation of post-traumatic stress disorder, the frequently diagnosed mental disorder causing much of the chaos. Then, this paper will discuss the states’ responses, including a precedent setting Florida case which has failed to receive much recognition. Finally, this paper will examine the various recent congressional responses to the inadequate mental health regulatory scheme regarding returning combat veterans.

II. BRINGING THE WAR HOME

Carol Trevino and her nine-year-old son were startled awake from a deep sleep by several consecutive loud booms. With only seconds passing between the booms and Carol Trevino reaching for her pepper spray, her estranged husband, Jon Trevino, shot her five times, including one bullet to her head, and then took his own life. Their nine-year-old son watched silently as his family exploded before his eyes. Instead of remembering days of playing catch with his father, he will forever be able to recall that “[h]is father used a silver gun [which] ‘didn’t have a wheel on it, like the cowboys used,’” and the picture of the glowing numbers on the clock, of 4:32 a.m., staring back at him as the time his mother died. Prior to the murder-suicide, Jon Trevino suffered from an array of psychiatric problems, and despite the military’s awareness, Jon Trevino was certified by the military to handle the increasingly taxing position of evacuating the wounded. In a health assessment following his return from Iraq, Jon Trevino reported, “that


12. See generally Veteran’s Mental Health Act, S. 2162, §§ 101–705.


14. Id.

15. Id.

16. Id.

17. Id.
he had 'serious problems' dealing with the people he loved and that he was feeling 'down, helpless, panicky or anxious.'"\textsuperscript{18} The Air Force restricted him from "special operational duty" and diagnosed him with "acute PTSD."\textsuperscript{19} However, in 2005, he was deemed "well enough to be deployed domestically."\textsuperscript{20} But his family, which once saw him as an "affable, quick-witted sergeant," instead could not see past the unpredictable changes in temper, paranoia, erratic behavior, continuous spousal abuse, and certain unpredictable behavior which frightened his son.\textsuperscript{21}

Needing alcohol to fall asleep, Matthew Sepi, an Iraq combat veteran, left his apartment in Las Vegas to make a trip to the nearest 7-Eleven.\textsuperscript{22} Dreading his venture outside, Matthew Sepi placed his assault rifle inside his trench coat before leaving.\textsuperscript{23} He was consistently plagued by lurking danger and could not rid himself of nightmares concerning the death his unit brought upon an Iraqi civilian.\textsuperscript{24} As Matthew Sepi stepped out into the darkness and continued to hurry down an alley, he ignored the screaming and threats from gang members.\textsuperscript{25} After obtaining his alcohol, Mr. Sepi was confronted by two armed gang members.\textsuperscript{26} In Mr. Sepi's interview, he explained "that he spied the butt of a gun, heard a boom, saw a flash and 'just snapped.'"\textsuperscript{27} As a result, one gang member was injured and the other died on the pavement.\textsuperscript{28} When the police caught up with Matthew Sepi he was shaking and crying, and he asked, "'Who did I take fire from?'"\textsuperscript{29} Matthew Sepi explained that he was "ambushed and then instinctively 'engaged the targets.'"\textsuperscript{30} Following Matthew Sepi's arrest, his public defender questioned him about PTSD.\textsuperscript{31} As he started to tell her about Iraq, his eyes suddenly were filled with tears and he hysterically exclaimed, "'We had the wrong house! We had the wrong house!'"\textsuperscript{32} Matthew Sepi recounted the nights where his unit was provided lists instructing them on their nightly captures.\textsuperscript{33} He graphically explained

\begin{itemize}
  \item 19. Id.
  \item 20. Id.
  \item 21. Id.
  \item 22. Sontag & Alvarez, Across America, supra note 6.
  \item 23. Id.
  \item 24. Id.
  \item 25. Id.
  \item 26. Id.
  \item 27. Sontag & Alvarez, Across America, supra note 6.
  \item 28. Id.
  \item 29. Id.
  \item 30. Id.
  \item 31. Id.
  \item 32. Sontag & Alvarez, Across America, supra note 6.
  \item 33. Id.
\end{itemize}
that on one particular night, after blowing a gate, his unit found a man on fire just inside the gate, and after searching the home they realized they blew up the wrong house. Matthew Sepi never imagined that the mental picture of the blazing, staggering Iraqi civilian would stay with him forever.34

Soon after returning from Iraq, Lance Corporal Walter Rollo Smith was dispatched to undertake a marksmanship instructor course in Quantico, Virginia.35 Upon setting foot in the firing range in Quantico, he peered through the scope of his gun and began shaking. Instead of viewing the inanimate targets in front of him, Smith explained that he saw “vivid, hallucinatory images of Iraq: ‘the cars coming at us, the chaos, the dust, the women and children, the bodies we left behind.’”36 Upon every pull of the trigger, Smith’s crying worsened until he was pulled away from the firing range.37 Smith was discharged from the Marines and sent off to get help from the veteran’s hospital for his PTSD.38 Smith recalls his unit filling out mental health questionnaires prior to their arrival in the United States.39 In an interview, Smith said, “Then they sat us down one after the other with an officer, and he looked over the form, and said, ‘Are you doing OK?’ and, no matter what we wrote, we’d say yup, and then he’d say, ‘Next!’”40 After being discharged from the Marines, Smith visited a psychiatrist a few times, attempted to take prescription medication for his trouble sleeping and anxiety, tried to end his life with one of his guns, and even left goodbye messages for his friends and family.41 The police were able to prevent Smith from taking his life and escorted him to a nearby mental health center.42 In 2004, Smith met Nicole Marie Speirs, who later became pregnant with twins.43 When learning of Speirs’ pregnancy, Smith broke up with her and it was not until seven months later that the couple reunited.44 They appeared to be a happy couple to everyone, including her family.45 One night they took a bath and

34. Id.
35. Id.
37. Id.
38. Id.
39. Id.
40. Id.
41. Sontag, From Iraq to Utah, supra note 36.
42. Id.
43. Id.
44. Id.
45. Id.
46. Sontag, From Iraq to Utah, supra note 36.
47. Id.
when Speirs put her head under the faucet to rinse off her hair, Smith held her head underwater until she drowned.\textsuperscript{48}

III. RECOGNIZING THE PROBLEM

These three stories are just a few, among the many cases, where veterans are suffering from debilitating mental health problems and innocent victims are suffering the violent consequences.\textsuperscript{49} Tragically, there have been 121 cases found, in this country alone, in which Iraq and Afghanistan veterans, upon returning from war, have either been charged with killing someone or have actually killed another human being.\textsuperscript{50} Spouses, significant others, children, and relatives make up about one-third of these victims.\textsuperscript{51} A \textit{New York Times} study found that many veterans coming back from war are experiencing great difficulty with the transition from war life to civilian life, but the commission of violent crimes is not the only behavior that deserves attention.\textsuperscript{52} Veterans throughout the world are homeless, engage in substance abuse, and commit suicide.\textsuperscript{53} A Pentagon task force study, released in June of 2007, revealed that the military’s mental health system is “‘woefully inadequate’” to meet all of the “‘daunting and growing’ psychological problems” of military members.\textsuperscript{54} The study found “that hundreds of thousands of the more than 1 million U.S. troops who have served at least one war-zone tour in Iraq or Afghanistan are showing signs of [PTSD], depression, anxiety

\textsuperscript{48} Id.
\textsuperscript{50} See \textit{id.} “More than half the killings involved guns, and the rest were stabbings, beatings, strangulations and bathtub drownings.” \textit{Id.} A \textit{New York Times} study found an 89% increase of homicides, from 184 cases to 349, during the current wartime period. \textit{Id.} Only one-quarter involves veterans from wars other than Iraq and Afghanistan. Sontag & Alvarez, \textit{Across America}, \textit{supra} note 6.
\textsuperscript{51} \textit{Id.} Service member made up another quarter of those who were killed, and the rest of the victims were either acquaintances or strangers. \textit{Id.}
\textsuperscript{52} Wahlz, \textit{supra} note 49.
\textsuperscript{53} \textit{Id.} On average eighteen veterans commit suicide daily and around 300,000 veterans are homeless per year. \textit{Id.}
or other potentially disabling mental disorders."55 However, even when mental health screenings are in place, they are often administered too early and only once.56 Members of the military are more likely to report symptoms of mental health problems months after returning from war than immediately upon leaving Iraq.57 To adequately assess military members for psychological disorders, the Department of Defense should intervene prior to the soldiers leaving active duty and again post-deployment.58 Of the 121 cases previously mentioned, many of the veterans, despite an apparent display of combat trauma, were only evaluated and diagnosed with PTSD once they were arrested.59 In fact, only a few of them were evaluated with "more than a cursory mental health screening at the end of their deployments."60 "Previous research conducted after other military conflicts has shown that deployment and exposure to combat result in increased risk of [PTSD], major depression, substance abuse, [and] functional impairment in social and employment settings . . . ."61 In an interview with the New York Times, one criminal defense lawyer stated, "To deny the frequent connection between combat trauma and subsequent criminal behavior is to deny one of the direct societal costs of war and to discard another generation of troubled heroes."62

In the decades following the Vietnam War, PTSD's strong presence in the media dwindled during the relative peacetime.63 However, in 2002, at Fort Bragg, North Carolina, the tables turned and the recollection of veterans suffering from mental health problems came to the forefront of everyone's mind.64 Four husbands, who were in the Special Forces, murdered their

55. Id.; see also Charles S. Milliken et al., Longitudinal Assessment of Mental Health Problems Among Active and Reserve Component Soldiers Returning from the Iraq War, 298 JAMA 2141, 2141 (2007). Military surveys, conducted once at 90 days upon return from deployment and again at 120 days, revealed "that 38 percent of soldiers, 31 percent of Marines, 49 percent of Army National Guard members and 43 percent of Marine reservists reported symptoms of PTSD, anxiety, depression or other problems." Tyson, supra note 54.

56. Milliken et al., supra note 55, at 2141.

57. Id. The percentage of active troops that showed signs of PTSD rose from 12% on the initial screening to 17% at the second screening. Id. at 2143. The same trend happened for guard troops and reservists. Id. Their numbers increased from 13% when leaving the war to almost 25% while at home. Id.

58. See Milliken et al., supra note 55, at 2145, 2147.


60. Id.

61. Charles W. Hoge et al., Mental Health Problems, Use of Mental Health Services, and Attrition from Military Service After Returning from Deployment to Iraq or Afghanistan, 295 JAMA 1023, 1023 (2006) [hereinafter Hoge et al., Mental Health Problems].


63. ILONA MEAGHER, MOVING A NATION TO CARE: POST-TRAUMATIC STRESS DISORDER AND AMERICA'S RETURNING TROOPS 20–21 (2007).

64. Id. at 21.
wives upon return from Afghanistan.\textsuperscript{65} Three of the men committed suicide, two by self-inflicted gun shot wounds, and the other by hanging.\textsuperscript{66} Following the wave of combat zone suicides in 2003, the Army and Marines sent a team of doctors to assess the reasons for these suicides, and in 2004, began sending mental health personnel with every combat division being deployed to provide help to the U.S. troops serving in OIF and OEF.\textsuperscript{67} The goal was to treat the soldiers and return them to duty as quickly as possible.\textsuperscript{68} In response to the Fort Bragg killings, Congress passed legislation in which the protection orders for civilians on military bases were binding, and the Army made changes which slowed the soldiers' transition from military life to civilian life to aid in their adjustment.\textsuperscript{69} Since then, many reports assessing the mental health treatment of American troops have been issued.\textsuperscript{70} According to the May 2007 Bureau of Justice Statistics Special Report, the number of veterans in State and Federal prison increased by more than 50,000 between 1985 and 2000, but this number has decreased between 2000 to 2004 by 13,100 veterans.\textsuperscript{71} Although this statistic seems promising, the Bureau has hypothesized that one reason behind this decline is that the decrease in numbers is directly proportional to the decline in the number of veterans currently residing in the United States.\textsuperscript{72} Another contributing factor is that the number of U.S. Armed Forces active duty personnel decreased by 34%.\textsuperscript{73} Moreover, although the prison population is comprised of more nonveterans than veterans, veterans account for a greater percentage of the incarcerated population with reference to violent crime.\textsuperscript{74} In State prison, where 57% of veterans were violent offenders, less than half of nonveterans, 47%, were

\textsuperscript{65} Id.
\textsuperscript{67} See \textit{Meagher}, supra note 63, at 21.
\textsuperscript{68} Id.
\textsuperscript{71} Noonan & Mumola, supra note 70, at 2.
\textsuperscript{72} Id. The United States' veteran population has decreased by virtually 3,500,000 since 1985. Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 4.
serving time for violent offenses. The same trend follows for veterans and nonveterans in Federal prison. Veterans in State prison victimized females and minors at a higher percentage rate, nearly 20% more, than nonveterans. Finally, the veterans in State prison were more likely to be first time offenders and have shorter criminal histories than nonveterans.

IV. THE MENTAL TOLL OF THE BATTLEFIELD: POST-TRAUMATIC STRESS DISORDER

A. Detailed Explanation of PTSD

The American Psychiatric Association (APA) formally recognized PTSD as an official diagnosis in 1980 when the APA published the disorder in their Diagnostic and Statistical Manual of Mental Disorders III. Various labels such as “soldier’s heart, shell shock, Vietnam disorder,” and combat fatigue were used in earlier eras to describe the psychological injuries suffered by members of the military. PTSD is characterized as an anxiety disorder which can most succinctly be defined as “the reexperiencing of an extremely traumatic event accompanied by symptoms of increased arousal and by avoidance of stimuli associated with the trauma.” The duration of symptoms can be identified as either acute, which describes symptoms lasting less than three months, or chronic, in which the symptoms last for three months or longer. There is typically a delayed onset between the traumatic event and the manifestations of the disorder. The manifestations begin once the stressor is removed and a period of relief follows. PTSD often surfaces when a person encounters a situation which symbolizes or resembles the original trauma. This stressor is often re-experienced by recurring

75. NOONAN & MUMOLA, supra note 70, at 4. Fifteen percent of veterans and 12% of nonveterans were serving time for homicide, and 23% of veterans and 9% of nonveterans were serving sentences for rape/sexual assault. Id.
76. Id.
77. Id.
78. Id.
82. Id. at 465.
84. Id. at 543.
85. Id.
nightmares, distressing recollections, hallucinations, or dissociative flashbacks.86

PTSD manifestations are classified within four behavioral motivations: 1) overreaction to perceived danger; 2) flashbacks during a dissociative state; 3) stimulation-seeking behavior; and 4) attempts to rid survivor’s guilt by engaging in dangerous activity.87 Most often these behavioral motivations result in destructive actions by a veteran.88 Veterans suffering from PTSD, especially those who experienced intense trauma, are hypersensitive to danger cues and in turn overreact to inconsequential threats.89 Often times PTSD sufferers will apply greater force than necessary to a perceived threat, and that force often results in perilous situations for others.90 Other times, veterans may get lost in a dissociative state, typically called a flashback.91 A flashback causes distortions in reality with the surrounding setting or with one’s own body.92 When in this dissociative state one is inhibited from consciously appraising his or her own actions or the actions of others.93 Stressors that are connected to the traumatic event in some way can bring forth the flashback.94 For some veterans, benign stimuli such as car alarms or the smell of cleaning chemicals could trigger a flashback.95 A veteran can remain in this dissociative state for as little as a couple minutes or for several days at a time.96 Other veterans suffering from PTSD may seek out stimulation by changing their lifestyle or by engaging in risk taking behaviors such as criminal activity and substance abuse.97 The veterans who generally engage in risk taking behavior are survivors of war living with the constant

86. DSM-IV, supra note 81, at 468.
87. Aprilakis, supra note 83, at 553.
88. Id.
89. Id.
90. Id.
91. Id.
92. See Aprilakis, supra note 83, at 553–54.
93. See id.
94. Id. at 554.
95. See Lizette Alvarez, After the Battlefield, Fighting the Bottle at Home, N.Y. TIMES, July 8, 2008, at A1 [hereinafter Alvarez, After the Battlefield]. One veteran described the experience:
Smells bring back the horror. “A barbecue pit–throw a stake on the grill, and it smells a lot like searing flesh . . . . You go to get your car worked on, and if anyone is welding, the smell of the burning metal is no different than burning caused by rounds fired at it. It takes you back there instantly.”
96. Aprilakis, supra note 83, at 554.
97. Id. at 554–55.
feeling of guilt and shame that they survived and others perished.\textsuperscript{98} Some other reasons for seeking stimulation include overcoming anxiety and depression; enlivening the exhilaration of combat; and counteracting the numbing detached feeling they continue to experience since returning from war.\textsuperscript{99}

The effect that PTSD may have on troops serving in OIF and OEF, and the veterans returning from these operations is of utmost concern.\textsuperscript{100} A historically higher percentage of OIF and OEF veterans have taken the initiative to sign up for Veterans Affairs (VA) health care.\textsuperscript{101} An estimated 29\% of OEF and OIF veterans have registered compared to the 10\% of registered Vietnam veterans.\textsuperscript{102} One study revealed that 13\% of OEF and OIF veterans have been diagnosed with PTSD, a percentage much higher than the 3.5\% prevalence among the general U.S. population.\textsuperscript{103} Another study, which examined the mental health impact that these operations have had on members of the military, found that the estimated risk for PTSD from serving in Iraq is 18\% and the estimated risk for PTSD from serving in Afghanistan is 11\%.\textsuperscript{104} A RAND Corporation study released in April 2008, found that around half of the U.S. service members "who need treatment for PTSD seek it," and of the service members who receive treatment, "only slightly more than half get 'minimally adequate care.'"\textsuperscript{105}

The severity of the traumatic experiences from being in combat is highly correlated with the risk of developing PTSD in the future.\textsuperscript{106} Many reports reveal that members of the military are at an increased risk for developing chronic PTSD as they become more involved in intense and frequent combat.\textsuperscript{107} The component that lends itself to an almost inevitable development of PTSD is the prolonged contact with trauma during extended tours.\textsuperscript{108} One study clearly sets out statistics which depicts the intensity of combat and severity of traumatic experiences witnessed by members of the military.\textsuperscript{109} This study indicates that 95\% of marines in Iraq reported being attacked or ambushed, 97\% were shot at or received small-arms fire, 94\% saw dead bo-

\textsuperscript{98} Id. at 555.
\textsuperscript{99} Id.
\textsuperscript{100} See generally MEAGHER, supra note 63, at 123.
\textsuperscript{101} Seal et al., supra note 1, at 479.
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 480.
\textsuperscript{104} Hoge et al., Barriers to Care, supra note 5, at 19 tbl.3.
\textsuperscript{105} Veterans for Common Sense v. Peake, 563 F. Supp. 2d 1049, 1062–63 (N.D. Cal. 2008).
\textsuperscript{106} See Aprilakis, supra note 83, at 546.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} See Hoge et. al, Barriers to Care, supra note 5, at 18 tbl.2.
dies or remains, 87% knew someone who was critically injured or killed, 65% were responsible for the death of an enemy combatant and 28% for a death of a noncombatant.\textsuperscript{110}

B. \textit{The Pentagon Investigation}

The VA provides health care for 7.8 million enrollees nationwide.\textsuperscript{111} A Pentagon task force report addressed availability of professional care, policy, training, and existing procedures.\textsuperscript{112} The task force report revealed that several barriers exist which prevent veterans and current members of the military from obtaining the appropriate care.\textsuperscript{113} These barriers include stigma related to seeking help from mental health providers, poor access to the mental health care providers and appropriate facilities, and disruption in mental health treatment as the members of the military are transferred to different locations.\textsuperscript{114}

"Stigma in the military remains pervasive" and consequently prevents members of the military from accessing the necessary and appropriate care.\textsuperscript{115} The existing processes, which assess members of the military for psychological disorders, "are insufficient to overcome the stigma inherent in seeking mental health services."\textsuperscript{116} The subjects of a 2004 study were soldiers and marines who have already met the screening criteria for a mental disorder.\textsuperscript{117} Of this subject pool, 50% believed that seeking mental health services would harm their career, 59% believed that less confidence would be instilled in them by members of their unit, 63% believed they would be treated differently by their unit leaders, and 65% believed they would be viewed as weak.\textsuperscript{118}

After assessing military treatment facilities, TRICARE benefits for mental health needs, people holding positions in the mental health care profession, and sufficiency of fiscal resources, the task force study found that

\begin{itemize}
  \item \textsuperscript{110} \textit{Id.}
  \item \textsuperscript{111} VA Benefits & Health Care Utilization (Oct. 27, 2008), http://www1.va.gov/vetdata/docs/4X6_spring08_sharepoint.pdf.
  \item \textsuperscript{112} INSPECTOR GENERAL, \textit{supra} note 70, at 2.
  \item \textsuperscript{113} Tyson, \textit{supra} note 54.
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} INSPECTOR GENERAL, \textit{supra} note 70, at 2. One marine who was later diagnosed with PTSD explained, "I was trying to be the tough marine I was trained to be—not to talk about problems, not to cry . . . . I imprisoned myself in my own mind." Alvarez, \textit{After the Battlefield}, \textit{supra} note 95.
  \item \textsuperscript{116} TASK FORCE, \textit{supra} note 70, at ES-3.
  \item \textsuperscript{117} See Hoge et. al, \textit{Barriers to Care}, \textit{supra} note 5, at 21 tbl.5.
  \item \textsuperscript{118} \textit{Id.}
\end{itemize}
the number of people holding positions in the mental health care profession is inadequate. Additionally, treatment facilities are unable to provide adequate mental health care to members of the military and their families because of insufficient resources. Veterans often face long waits to receive appropriate care from mental health care professionals. Disappointingly, there is also a shortage of active duty mental health professionals and the number of health care professionals leaving the military is growing rapidly. Twenty percent of mental health professionals in the Air Force resigned from active duty between 2003 and 2007. In addition, the percent of active duty mental health professionals decreased by 15% and 8% for the Navy and Army respectively. In a Pentagon news conference, Donald Arthur, co-chairman of the Department of Defense Mental Health Task Force, stated, "Not since Vietnam have we seen this level of combat . . . . With this increase in . . . psychological need, we now find that we have not enough providers in our system." He further explained that post Vietnam, this nation tragically learned too late that as time goes by, untreated mental illness increases dramatically. Seeing as history repeats itself and by learning from past mistakes, action needs to be taken to adequately serve the veterans' mental health needs. Steve Robinson, a veteran from the Persian Gulf War and Veterans for America spokesman stated:

The biggest message I want to say besides it's a tragedy for [a soldier] asking for help and not getting it, is there are going to be

119. INSPECTOR GENERAL, supra note 70, at 4.
120. TASK FORCE, supra note 70, at ES-3.
121. See Daniel Zwerdling, Soldiers Say Army Ignores, Punishes Mental Anguish, NPR Dec. 4, 2006, http://www.npr.org/templates/story/story.php?storyId=6576505. One soldier explains that once he finally had the courage to seek help from the Army hospital they told him he “had to wait a month and a half before [he could be] seen.” Id. Another OIF veteran described his feelings prior to seeking help, “I was on the verge of having a serious nervous breakdown or seriously hurting someone . . . . It was getting to a point where the restraints I had were slipping away.” Don Terry, Bringing the War Home, Chi. Trib., Feb. 3, 2008, at 8. After seeing a psychiatrist on the Army base for thirty minutes, one soldier was prescribed an antidepressant and sent on his way. Id. Not long after his first meeting with the psychiatrist he finished his tour in Iraq and sought help at his army base where he checked “yes” on a questionnaire as to whether he was suicidal or homicidal. Id. Even in the face of this answer, the social worker explained to this veteran that he would have to wait a minimum of one month before he could make an appointment to receive help from a therapist. Id.
122. TASK FORCE, supra note 70, at ES-3.
123. Tyson, supra note 54.
124. Id.
125. Id.
126. Id.
127. See generally id.
more veterans having the courage to go for help and not getting it.

... It's the biggest betrayal, to seek the care that has been promised to you and be told to come back another day.128

The task force report revealed insufficient continuity of care, gaps in service, inadequate treatment plans and monitoring, and insufficient mechanisms for aiding family members.129 The effectiveness of care is not measured by an objective source and no universal method is in place to track patient progress, especially when members are transitioned among providers.130 Furthermore, feedback is rarely given to the service members who seek treatment.131 By not monitoring the effectiveness of mental health treatment and making psychological assessments part of normal military life, members of the military can easily terminate treatment unnoticed.132

One final barrier depriving veterans from accessing adequate mental health services is the denial of health care benefits due to a preexisting mental health condition or due to a discharge on “less-than-honorable” terms.133 When a veteran who is suffering from PTSD is later diagnosed with a personality disorder, the veterans are no longer eligible to receive the benefits and care they need.134 Since 2001, over 22,500 members of the service were discharged from the military due to a Personality Disorder diagnosis.135 To be eligible for benefits, a veteran must make a claim proving that his or her “prior existing condition was aggravated or worsened by military service which is difficult to do.”136

129. INSPECTOR GENERAL, supra note 70, at 3.
130. Id. at 4.
131. Id. at 3.
132. See id. at 4.
134. Kennedy, supra note 133. One soldiers explains:
I had obvious symptoms of PTSD, and I was going to do the medical evaluation board .... But they sent me to psychiatrists who said I had a personality disorder. .... My commander told me it wouldn't affect my benefits, .... [b]ut I lost everything, and had to pay the Army $3,000 back because I re-enlisted and got a bonus. That's what I got for seven years of service.

Id.
136. Id. One journalist who interviewed soldiers expressed his suspicions:
tual health benefits appear to be awarded to those who act on their best behavior.\textsuperscript{137} This notion is verified each time a veteran diagnosed with PTSD is punished for engaging in behavior knowingly linked to PTSD, such as drinking and drug abuse.\textsuperscript{138} Once a service member is discharged because of less-than-honorable behavior, their VA benefits are denied and they are prevented from receiving adequate help to treat their combat stress.\textsuperscript{139}

V. STATES RESPOND TO THE INCREASED VIOLENCE

A. Insanity Defense and PTSD

PTSD has become judicially accepted in state courts where introduction of evidence of PTSD in various mitigating circumstances has been permitted.\textsuperscript{140} The Supreme Court of Kansas notes that the majority of cases where PTSD is asserted as a basis of an insanity defense are cases where "the defendant has claimed he experienced a dissociative state at the time of the crime, during which he believed he was back in Vietnam."\textsuperscript{141} However, most instances of asserting PTSD as a basis for an insanity defense have failed due to the difficulty of establishing "severe" mental distress at the time of the offense.\textsuperscript{142}

Florida follows the M'Naghten Rule for determining insanity.\textsuperscript{143} To be legally insane under the M'Naghten Rule, "the defendant must have been unable to understand the nature of his act or its consequences, or incapable of

\textsuperscript{137} See Zoroya, \textit{supra} note 133.

\textsuperscript{138} Id.

\textsuperscript{139} Id. One Lieutenant Colonel expressed his dissatisfaction with the military's actions by stating: "'The Marine Corps has created these mental health issues' in combat veterans . . . 'and then we just kind of kick them out into the streets.'” Id.


\textsuperscript{141} State v. DeMoss, 770 P.2d 441, 444 (Kan. 1989).

\textsuperscript{142} See, \textit{e.g.}, United States v. Cartagena-Cerrasquillo, 70 F.3d 706, 712 (1st Cir. 1995).

\textsuperscript{143} Reynolds v. State, 837 So. 2d 1044, 1048 (Fla. 4th Dist. Ct. App. 2002).
distinguishing right from wrong.” The Supreme Court of Florida has established that the mental disease, infirmity, or defect necessary to maintain a defense under the M’Naghten Rule for insanity does not include abnormal mental defects that do not impair the ability to distinguish between right and wrong. To distinguish from mitigating factors, insanity, if proven, excuses a defendant from all responsibility for criminal acts.

PTSD as exculpatory evidence and the M’Naghten Rule for insanity combined in Florida when Brian Christopher Wothers, an Iraq war veteran, was charged with the murder of a twenty six year old construction worker. Wothers argued, with the support of psychiatrists, that “he was having a flashback when he shot and killed a man.” After a non-jury trial, Wothers “was found not guilty by reason of insanity.” Instead of prison for murder, Wothers was ordered to “live in a mental health treatment facility until he is no longer” a societal threat. Circuit Judge Kim C. Hammond, who presided over Wothers’ trial, apparently determined that his conduct while acting under the stress of military flashbacks brought him within the boundaries of the M’Naghten standard.

B. States Seek to Codify Protected Class

Other states have taken more proactive measures and “have passed laws or begun programs to encourage alternative sentences, often including treatment, for veterans with substance-abuse and mental-health problems.” In 2007, almost half of the states in the country filed over fifty pieces of legislation to address these issues. Of those states, “Colorado, Hawaii, Iowa, Illinois, Massachusetts, Maryland, Minnesota, New Hampshire, New Jersey, New York, Texas, Utah and Wyoming enacted 23 bills,” and laws have been passed in California, Connecticut, and Minnesota. California’s law

144. Reese v. Wainwright, 600 F.2d 1085, 1090 (5th Cir. 1979).
147. Sonis, supra note 8.
148. Id.
149. Id.
150. Id.
151. Id.
152. Alvarez, After the Battlefield, supra note 95.
154. Id. In Maryland, Oregon, Texas, and West Virginia, six bills were denied. Id. As of December 2007, Illinois, Massachusetts, New Jersey, Pennsylvania and Wisconsin were still in session and thirteen bills were pending. Id.
155. Alvarez, After the Battlefield, supra note 95.
gives judges the power to mandate veterans who have been convicted to treatment instead of jail. The sentencing guidelines are no longer applied and the judge is given complete discretion. The Minnesota courts tried to push the law implemented in California further when they enacted a law that allowed judges to send veterans on trial for criminal acts to treatment prior to any decision being rendered. However, after much “[o]pposition from prosecutors and victims advocates,” the Minnesota law was rewritten to be similar to the law in California.

VI. CONGRESS RESPONDS TO THE GROWING CRISIS

Unsatisfied with the VA’s attempts, the absence of disability compensation and medical care the veterans deserve and need, and the lack of access to mental health services, a veterans’ advocacy group took their concerns a step further when they filed a law suit against the VA. Two non-profit advocacy groups, Veterans for Common Sense and Veterans United for Truth, are dedicated to improving veterans’ lives. In July 2007, these two groups filed suit against “the VA on behalf of 320,000 to 800,000 veterans who they expect will seek treatment for [PTSD] by the end of the current wars in Iraq and Afghanistan.” Specifically, the groups wanted the court “to grant a preliminary injunction that would force the VA to spend about $60 million to provide immediate care to the roughly 600,000 veterans they say have pend-

156. Russell Carollo, Suspect Soldiers: Is There a Link Between Postwar Stress and Crime?, SACRAMENTO BEE, July 14, 2008, at A16. The California Act specifically amended legislation from 1982 to be sufficient for the returning OIF and OEF combat veterans. See Assem. 2586, Reg. Sess. (Cal. 2006). This Act recognized PTSD and the fact that a significantly large number of service members returning from combat are suffering from the disease. Id. Moreover, the Act recognized that a significant amount of these veterans engaged in behaviors associated with their “misunderstood and untreated PTSD.” Id. It was the intent of the California Legislature to:

[E]xtend the opportunity for alternative sentencing to all combat veterans, regardless of where or when those veterans served our country, when those veterans are found by the court to be suffering from PTSD. . . . It is the intent of the Legislature to ensure that judges are aware that a criminal defendant is a combat veteran with these conditions at the time of sentencing and to be aware of any treatment programs that exist and are appropriate for the person at the time of sentencing if a sentence of probation is appropriate.

Id.

157. Carollo, supra note 156.
158. Id.
159. Id.
161. Id. at 1055.
The lawyer representing the two advocacy groups expressed, "'There is a crushing caseload that the VA can't keep up with. . . . You could easily wait 15 years before you get any treatment.'" After reviewing all items of relief asked for by the advocacy groups, the United States District Court for the Northern District of California concluded that the grievances were misdirected. This court lacked jurisdiction to remedy "the problems, deficiencies, delays and inadequacies complained of." Instead, the authority to remedy this problem "lies with Congress, the Secretary of the Department of VA, the adjudication system within the VA, and the Federal Circuit" Court. Congress has entrusted the VA Secretary to handle decisions pertaining to veterans' medical care. Among the statutes that explain the limited jurisdiction of the courts is 38 U.S.C. section 511. This section states:

The Secretary shall decide all questions of law and fact necessary to a decision . . . by the Secretary to Veterans or the dependants or survivors of veterans . . . [T]he decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court . . . .

A. History of Reintegration

"Throughout history, societies have made 'special efforts to protect or restore the souls of their warriors during times of war.'" Soldiers found

163. Id.
164. Id. The advocate groups explain that like William Rogers, a veteran of the Persian Gulf War who sought help multiple times and had his claims denied, too many veterans are prevented from obtaining the help they need. Id. Not until fifteen years after he first sought help and told his story, the same story, to every doctor, was William Rogers finally diagnosed with PTSD. Id. William Rogers commented on his long and drawn out journey to finally have someone take his problems seriously:

I just don't know why it was such a huge uphill battle. . . . If they don't do something to make it easier for other people, there's going to be more veterans who are going to do drugs and alcohol. There are going to be more veterans on the street. And there will be more in prison. I guarantee you that.

Gorlick, supra note 162.
166. Id.
167. Id.
168. Id.
171. Meagher, supra note 63, at 122 (quoting Edward Tick, War and the Soul: Healing Our Nation's Veterans from Post-Traumatic Stress Disorder 17 (2005)).
comfort in the rituals which, after completion, allowed them to feel welcome in the communities they left and cleansed from all of the guilt resulting from actions taken in war.\footnote{172} By taking part in such rituals with men who experienced the same trauma, soldiers felt comfortable reliving their battle experiences without feeling vulnerable.\footnote{173} Although most societies afford cleansing rituals to soldiers returning from war, most modern western societies fail to provide such rituals to acknowledge the soldiers' importance.\footnote{174} The contemporary western society's idea of reintegrating soldiers back into the community is a "Welcome Home" parade, which shows the community's support but leaves the soldier without a method for decompression.\footnote{175}

Providing soldiers with a method of decompression allows for an easier transition from military life back to civilian life.\footnote{176} In the absence of such methods, veterans may brood over their guilt and emptiness which in turn increases the soldiers' risk for developing PTSD.\footnote{177} One major lesson learned from the years following the Vietnam War was that denying a soldier's need for societal acceptance is a critical mistake.\footnote{178} In an attempt to learn from mistakes made after the Vietnam War, legislation is being drafted to try to prevent the same mistakes from being made.\footnote{179}

\footnote{172. Id. (quoting RICHARD A. GABRIEL, NO MORE HEROES: MADNESS AND PSYCHIATRY IN WAR, 155–56 (1988)).}

\footnote{173. Id. Cleansing rituals date back to 1879 when Zulu fighters, "'underwent many days of cleansing before they were free enough of their contagious pollution to be permitted to present themselves to King Cetshwayo at the royal kraal.'" Id. at 122–23 (quoting ROBERT B. EDGERTON, LIKE LIONS THEY FOUGHT: THE ZULU WAR AND THE LAST BLACK EMPIRE IN SOUTH AFRICA 45 (1988)).}

\footnote{174. Id. at 123.}

\footnote{175. MEAGHER, supra note 63, at 123.}

\footnote{176. Id.}

\footnote{177. Id.}

\footnote{178. Id. Veterans returning to a life with "'little acknowledgment and much misunderstanding by their families and society at large'" may have been a contributing factor to many soldiers' diagnosis of PTSD. Id. at 123–24 (quoting David Read Johnson et al., The Impact of the Homecoming Reception on the Development of Posttraumatic Stress Disorder: The West Haven Homecoming Stress Scale (WHHSS), 10 J. TRAUMATIC STRESS 259, 261 (1997)).}

B. A Good Step: The Veterans’ Mental Health and Other Care Improvements Act of 2008

On June 3, 2008 the United States Senate passed the Veterans’ Mental Health and Other Care Improvements Act of 2008. The “‘bill is for Justin Bailey, a young veteran of the Iraq war who died tragically while under VA care’” where he was receiving treatment for PTSD and a substance use disorder, “‘and all veterans who suffer with invisible wounds because of their service to this Nation,’” stated U.S. Senator, Daniel Akaka, when he announced that the Senate unanimously consented to the bill being passed.

In his press release, Senator Akaka further commented:

Returning home from battle does not necessarily bring an end to conflict. Service members return home, but the war often follows them in their hearts and minds. Their invisible wounds are complicated and wide-ranging, and we must provide all possible assistance. . . . Solid and reliable information is critical to our understanding of the issues.

This bill addresses several vital issues facing U.S. veterans. The Veterans’ Mental Health and Other Care Improvements Act of 2008 consists of seven major components: 1) Health Care Matters; 2) Pain Care; 3) Substance Use Disorders and Mental Health Care; 4) Mental Health Accessibility Enhancements; 5) Mental Health Research; 6) Assistance for Families of Veterans; and 7) Homeless Veterans Matters. Of focus for this note are components three, four, five, and six.

1. Addressing Substance Use Disorders and Mental Health Care

Section 301 acknowledges the comorbidity of substance abuse with suicide, mental disorders, deterioration of family support, and heightened risk for unemployment and homelessness. This provision also recognizes that “[w]hile the Veterans Health Administration has dramatically increased health services for veterans from 1996 through 2006, the number of veterans..."
receiving specialized substance abuse treatment services decreased 18 percent during that time.”186 In response to the inadequate treatment received by veterans, section 302 ensures that veterans enrolled in the VA’s health care system who seek treatment will be guaranteed appropriate care.187 For veterans suffering from comorbid disorders of both substance use and a mental health disorder, section 303 ensures that treatment for the comorbid disorders will be provided for concurrently by a licensed professional with training and expertise in the treatment of both disorders.188 Of most relevance, section 304 requires the Secretary to establish at least “six national centers of excellence on [PTSD] and substance use disorders” for the purpose of “inpatient or residential treatment and recovery services for veterans diagnosed with both [PTSD] and a substance use disorder.”189 In addition the Secretary must “conduct a review of all residential mental health care facilities, including domiciliary facilities, of the Veterans Health Administration; and not later than two years after... the completion of the review... conduct a follow-up review.”190

2. Mental Health Accessibility Enhancements

Section 401 of this Act requires the Secretary to carry out a three year “pilot program to assess the feasibility and advisability of providing” peer outreach services, peer support services, readjustment counseling services, and other services pertaining to mental health of OIF and OEF veterans.191 For veterans living in rural areas and who cannot adequately access the ser-

186. Id. § 301(4). In the 1990’s the VA cutback “its alcohol and drug-abuse services” for veterans, leaving only a few programs for extreme addicts, because the veteran population was relatively low during those years. See Alvarez, After the Battlefield, supra note 95. Veterans living in rural areas where the clinics are smaller have trouble obtaining the help they need because these smaller clinics only offer the bare-minimum when it comes to treatment, if any treatment is even offered. Id.

187. Veterans’ Mental Health Act, S. 2162 § 302. Each veteran should receive: “(1) Short term motivational counseling services; (2) Intensive outpatient or residential care service; (3) Relapse prevention services; (4) Ongoing aftercare and outpatient counseling services; (5) Opiate substitution therapy services; (6) Pharmacological treatments aimed at reducing craving for drugs and alcohol; (7) Detoxification and stabilization services; (8) Such other services as the Secretary considers appropriate.” Id.

188. Id. § 303.

189. Id. § 304. These centers will collaborate with the National Center for PTSD on all current research. Id.

190. Veterans’ Mental Health Act, S. 2162 § 305. The Secretary is required to submit a report to the veterans’ committees following the initial review. Id.

191. Id. § 401. This pilot program is interested in focusing on National Guard members or Reserve members. Id. The peer support to be provided will be given by licensed providers or veterans who have experienced mental illness before. Id.
ervices, the Secretary will ensure that such services will be provided by community mental health centers or through the Indian Health Service.\textsuperscript{192} This program requires the mental health centers to report to the Secretary all clinical information on every veteran seeking help from the mental health center.\textsuperscript{193} The Secretary must carry out training programs for all clinicians who will work in any of the mental health centers to guarantee that all clinicians can provide adequate services.\textsuperscript{194} The clinicians must be trained to respond to the unique experiences of all veterans deployed to serve in OIF or OEF on active duty, and must be able to counsel in a manner that takes these special factors into consideration.\textsuperscript{195} Each center must submit an annual report including the number of veterans treated, the types of treatment provided, and the "demographic information for such services, diagnoses, and courses of treatment."\textsuperscript{196} The Secretary must assess the impact that the implementation of these mental health programs had on veterans and whether such implementation affected veterans' mental health needs.\textsuperscript{197}

3. Mental Health Research

Section 501 mandates that a program be created to research the comorbidity of PTSD and substance use disorder.\textsuperscript{198} The National Center for Post-traumatic Stress Disorder (NCPTSD) will be conducting the research.\textsuperscript{199} Through this program the NCPTSD will develop goals for the program and will research the comorbidity of the disorders, the integration of treatment involving both disorders, and will develop protocols to assess the care veterans with these disorders are receiving.\textsuperscript{200}

\textsuperscript{192} Veterans' Mental Health Act, S. 2162 § 401(b)(1)–(2).
\textsuperscript{193} \textit{Id.} § 401(a)(2).
\textsuperscript{194} \textit{Id.} § 401(b)(1)–(2).
\textsuperscript{195} \textit{Id.}
\textsuperscript{196} \textit{Id.} § 401(i)(1)–(2).
\textsuperscript{197} See Veterans' Mental Health Act, S. 2162 § 401(j). The Secretary must assess the: Access to mental health care by veterans in need of such care; the use of telehealth services by veterans for mental health care needs; the quality of mental health care and substance use disorder treatment services provided to veterans in need of such care and services; and the coordination of mental health care and other medical services provided to veterans.
\textit{Id.} § 401(j)(2)(A)–(D).
\textsuperscript{198} \textit{Id.} § 501(a).
\textsuperscript{199} \textit{Id.} § 501(b).
\textsuperscript{200} \textit{Id.}
4. Assistance for Families of Veterans

In a sign of progress, section 602 describes “a pilot program to assess the feasibility and advisability of providing readjustment and transition assistance . . . to veterans and their families.” This pilot program will be lead by a non-VA entity and entail “[r]eadjustment and transition assistance that is preemptive, proactive, and principle-centered.” Veterans and their families will learn to cope with everyday difficulties and confrontations related to transitioning back to civilian life from life in the military.


On October 1, 2007, Congress passed the National Defense Authorization Act for Fiscal Year 2008. As part of this Act, section 1611 discusses how members of the armed forces will be provided the care they need, and transitions will be made easier when the service members return from war. This Act focuses on service members currently in active duty and the veterans who have recently returned. One goal of this comprehensive plan is to implement “[p]rocesses, procedures, and standards for” service members to have a smoother transition between the care they receive from the Department of Defense and the treatment they will receive from the Department of Veterans Affairs. The Secretary of Defense will ensure that the family members of service members will readily have access to “medical care and counseling.” Section 1631 requires the Secretary of Defense to submit a plan “to prevent, diagnose, mitigate, treat, and otherwise respond to traumatic brain injury (TBI) and [PTSD].” Goals for this section are to identify gaps in the Department of Defense’s current capabilities to prevent, diagnose, mitigate, treat, and rehabilitate service members suffering from PTSD, improve the methods of detecting and treating PTSD, further research on the

201. Veterans’ Mental Health Act, S. 2162 § 602(a).
202. Id. § 602(b)(1).
203. Id. § 602(b)(2).
205. See id. § 1611.
206. Id.
207. Id. § (a)(D)(i). The transition should be “[a] uniform, patient-focused policy to ensure that the transition occurs without gaps in medical care and the quality of medical care, benefits, and services.” Id. Cooperation between the case managers from each site is guaranteed to aid in this transition. National Defense Authorization Act, H.R. 1585 § 1611(a)(D)(ii).
208. Id. § 1626(a)(3).
209. Id. § 1631(a).
disorder, and develop uniform criteria for the disorder which will "be employed uniformly across the military departments."210 In addition, the means of detecting, assessing, and monitoring service members with PTSD will be more developed and effective, and an awareness training program on PTSD will be established to reduce the stigma related to the disorder and treatment.211

Also under this Act, a program for all service members suffering from PTSD will be implemented ensuring that all members will:

[B]e provided the highest quality of care possible based on the medical judgment of qualified medical professionals in facilities that most appropriately meet the specific needs of the individual; and be rehabilitated to the fullest extent possible using the most up-to-date medical technology, medical rehabilitation practices, and medical expertise available.212

Furthermore, Section 1691 of this Act reveals that further study will commence "on the physical and mental health and other readjustment needs of members and former members of the Armed Forces who deployed in [OIF] or [OEF] and their families as a result of such deployment."213 The study consists of two phases.214 The first phase will assess all service members' current "physical and mental health and other readjustment needs."215 The second phase includes the administration of a comprehensive assessment of the same needs on the same subject pool, but also will include:

[A]n assessment of the psychological, social, and economic impacts of . . . deployment . . . ; an assessment of the particular impacts of multiple deployments . . . ; an assessment of the effects of undiagnosed injuries such as [PTSD], . . . an estimate of the long-term costs associated with such injuries, and an assessment of the efficacy of screenings and treatment approaches for [PTSD] and other mental health conditions within the Department of Defense and Department of Veterans Affairs.216

Reports on "the completion of each phase of the study" and preliminary plans addressing the finding in each report will be exchanged between the

210. Id. § 1631(b)(5), (11).
211. Id. § 1631(b)(8).
213. Id. § 1691(a).
214. Id. § 1691(b).
215. Id. § 1691(b)(1)(A).
216. Id. § 1691(b)(2) (A)–(B), (D).
National Academy of Sciences and the Department of Defense and Department of Veterans Affairs.\footnote{217} Congress will then receive a report from the Secretary of Defense and the Secretary of Veterans Affairs on the established joint plan.\footnote{218}

D. \textit{Getting the American People Involved in the Solution}

In an effort to make the transition from military life to civilian life one which is less jarring, the House of Representatives passed a resolution encouraging Americans to take a more proactive approach.\footnote{219} This resolution recognizes that there are over 25,000,000 veterans living in the United States and every veteran has honorably served and sacrificed for our country.\footnote{220} Through this resolution, the House of Representatives hopes to show that the American people truly appreciate all sacrifices made by veterans from all wars by:

\begin{enumerate}
\item Encouraging the American people to recognize and acknowledge the sacrifices the American veteran demonstrates in the name of freedom;
\item Encouraging the education of the American people on the many great contributions of the American veteran to American society; and
\item Showing support of the goals and ideals of the Year of the American Veteran.\footnote{221}
\end{enumerate}

VII. \textit{THE WAY FORWARD: THE REGULATORY SCHEME THAT MUST BE ESTABLISHED}

Americans demonstrate great pride and patriotism when speaking of those who serve in the armed forces. Often, domestic political debates regarding war and foreign policy turn into competitions of who can paint the opponent as someone who disparages the military and the brave men and women in the war zone. However, common sense tells us that individual soldiers do not decide whether to go to war, but rather are ordered to go by elected officials. American citizens do not individually decide whether to engage in military conflict, but elect those who do every election cycle. While there is no doubt that Americans take great pride in those that volunteer to serve, our pride and proclamation of undying support for our military men and women is grossly misplaced. Criticizing a decision to engage in a

\begin{footnotes}
\footnote{217}{See National Defense Authorization Act, H.R. 1585 § 1691(f).}
\footnote{218}{Id. § 1691(g)(4).}
\footnote{219}{See H.R. Res. 1098, 110th Cong. (2008).}
\footnote{220}{Id.}
\footnote{221}{Id.}
\end{footnotes}
war does not criticize those men and women who bravely serve any more than flying an American flag above a garage door supports them. While citizens of this country try to demonstrate military pride on both sides of the political spectrum, American citizens caught up in the fighting have failed to support our military veterans and active duty soldiers in the most important way that they can. While troops may be greeted with homecoming parades and Congressmen may repeatedly express their love for those in uniform, Congress and the American citizenry have largely abandoned our soldiers in their toughest battle once they return home, coping with the extraordinary mental readjustment to civilian life and suppressing horrifying battlefield images. Congress must act quickly to implement a new approach and regulatory scheme to avoid the tragic consequences that they have failed to learn from after the Vietnam War.

Congress has taken an important step in moving towards a proper reintegration and treatment program in the Veterans Mental Health and Other Care Improvements Act of 2008. But Congress must do more than just implement a pilot program regarding reintegration and treatment. Such practices must be made mandatory as soon as possible for both returning combat soldiers and veterans who have already returned and reintegrated back into society. If soldiers returned from the battlefield with a treatable but highly contagious and dangerous physical ailment, the solution would be clear. Quarantine would be necessary to avoid the dangers of such an ailment to the general population, and to effectuate the proper treatment of those affected. It is important to recognize mental disorders, such as PTSD, as treatable conditions with dangerous consequences to the general public. It is imperative to treat all returning servicemen and women for battlefield mental conditions before a full reintegration into society takes place. Only then can proper treatment be offered without risk to the unsuspecting public.

Availability of resources and treatment options is simply not enough. The very culture of the military makes it unlikely for suffering soldiers to seek mental health treatment at the risk of being stigmatized by their fellow soldiers. Additionally, many soldiers fail to acknowledge the need for treatment and consider such thoughts as signs of weakness. A uniform and mandatory screening and treatment program will abolish all effects of stigmatization and launch a period where such treatment is simply a normal step in the reintegration process for all soldiers. Such a feeling of normalcy will likely increase cooperation by soldiers and lead to more effective treatment overall.

Additionally, Congress and the military must cooperate to fill a dangerous gap in military medical benefits. Discharged soldiers, such as Chris Packley, who was expelled from the Marines for misconduct after he left the base without permission and took other steps to escape the mental trauma of the battlefield, lost all access to free counseling and medication needed to
treat those very mental traumas that led to discharge.\footnote{Zoroya, supra note 133.} Congress and the military must acknowledge this issue, and mandate that soldiers discharged due to an underlying mental ailment suffered during active duty continue to receive mandatory treatment as if no discharge occurred.

States have begun to establish a dangerous precedent and are beginning to carve out a "class of privileged offenders."\footnote{Sonis, supra note 8.} In Florida, extending PTSD suffered in the war zone from a mitigating factor during sentencing to a basis for acquittal of murder charges establishes a means for an entire class of defendants to commit violent crimes with little consequence. Other states have taken efforts to codify such an approach, eliminating mandatory sentencing for criminal acts committed by war veterans suffering from PTSD. State legislatures recognize the responsibility in failing to offer adequate treatment to war veterans, but excusing criminal conduct to an entire class of potential defendants is unconscionable and leaves an entire class of innocent victims without proper closure to violent crimes. Instead of protecting a class from prosecution out of guilt, the government, including the states, must take proactive measures to eliminate the problem from the source. Adequate mandatory treatment may substantially reduce the occurrences of violent crimes from war veterans. Such an approach will truly demonstrate society's concern for war veterans' well-being and safeguard potential victims from violence.

VIII. CONCLUSION

For many years, and throughout many military conflicts, Congress and state governments have taken a passive approach regarding the reintegration of combat veterans into society. Today, an extraordinary number of war veterans suffer from untreated mental disorders, which often manifest themselves in violent ways on city streets. States, taking a sympathetic approach to the plight of America's heroes, began to establish an entire class of criminal defendants to which the laws of justice would not apply. Extending applicability of the insanity defense, and actually codifying PTSD as a criminal excuse into law, establishes a system where violent crimes against innocent victims are foreseeable and yet excused, with justice for victims unattainable. While the sympathy for war veterans is justified, policies of avoiding prosecution are unconscionable to the victims who suffer. While Congress has shown signs in recent years to implement mandatory treatment programs, no regulatory schemes so far enacted are nearly sufficient to deal with this ma-
ajor crisis. As Americans who love to show support for the men and women in uniform, it is time to establish the proper legal framework to carry out that support by offering protection from the evils of the battlefield that follow them home.
LIFE, LIBERTY, AND THE PURSUIT OF PARENTAL EQUALITY: FLORIDA’S NEW PARENTING PLAN REMAINS OVERSHADOWED BY LINGERING GENDER BIAS

ALEXA WELZIEN*

I. INTRODUCTION

Both parents love their child, perhaps the problem is that they show that love in very different ways. He works hard every day to support his family.

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He knows that by doing this, he sacrifices time with his child. He misses out on the daily routines and even some bedtime stories. But in his eyes, he believes that being able to provide opportunities for his child, is taking care of his child. This is the way he shows his love for his child. She stays home every day and takes care of her child. She knows all the child’s favorite things and is involved in every aspect of her child’s life. She helps her child with homework, cooks for her child, and plays with her child. She sacrifices working outside the home so that she can devote herself to being available to her child. This is the way she shows her love for her child.

One day, this arrangement no longer works for this family and the parents decide to get a divorce. This is a clear portrait of so many families. But what happens after the parents dissolve the marriage? Should one parent be entitled to more time and more rights regarding the child simply because they have spent more time with the child? Or should any parent who desires equal time and access to his or her child be automatically given such things? Unfortunately, the way a parent has shown love for his or her child in the past, can effectively determine how much time he or she will get to spend with that child in the future.

This comment provides a critical analysis of the recently enacted Florida Senate Bill 2532.\(^1\) It begins with a brief look at the history and evolution of child custody determinations, with a special emphasis placed on such decisions in Florida. The following section is an introduction of Florida Senate Bill 2532 and a discussion of how it significantly changes and reshapes the statutes governing child custody in Florida.\(^2\) Next, the comment addresses the practical implications of Florida Senate Bill 2532 and questions whether it preserves a longstanding bias against fathers.\(^3\) Following that, the article explores the difficulty involved in modifying child custody arrangements. Finally, this comment proposes a solution to the injustice that seems inherent in child custody disputes: one that promotes parental equality and is truly in the best interests of the child.

It deserves mention that the following analysis is predicated upon the assumption that the parents are competent, capable, and fit parents who desire equal access to their child. Following that assumption, customarily, mothers are more likely to stay home with the child, while fathers typically work outside the home.\(^4\) The statutory bias that exists in many child custody

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2. Id.
3. See id.
disputes is directed against the parent who works outside the home, and thus the practical effect perpetuates the bias against fathers due to the traditional roles held by men and women. If the mother worked outside the home, the bias would affect her. Consequently, the pursuit of parental equality is often thwarted by the conventional gender norms associated with child rearing.

II. HISTORY OF CHILD CUSTODY DETERMINATIONS

Historically, under Roman law, women "had no legal rights" to their children. Fathers retained exclusive control and custody over children as they were simply regarded as the father's property. This concept was known as the chattel rule, and continued through early English common law. The courts upheld this notion that fathers had superior rights to their children, and often awarded custody to them. In Busbee v. Weeks, the father gave the care of his three day old daughter to the child's maternal grandparents after the mother died during childbirth. The grandparents were to keep the child until the father could properly care for her. Despite the fact that the girl, who was then four years old, had been cared for by her grandparents, the Supreme Court of Florida awarded the father custody after he showed that he was able to care for her with the support of his parents, with whom he was living. The Court stated "[a]t common law the father has the paramount right to the custody and control of his legitimate minor children." It was not until the early nineteenth century that a custodial preference favoring mothers emerged. This transfer of legal preference was founded upon the idea that mothers were better suited to raise young children than fathers. In Fields v. Fields, the husband's father was initially awarded

5. See id. at 283.
6. See id.
8. Id.
10. GOULD & MARTINDALE, supra note 7, at 34.
11. Id.
12. 85 So. 653 (Fla. 1920).
13. Id. at 653.
14. Id.
15. Id.
16. Id.
17. EMERY, supra note 9, at 73.
18. Id.
custody of his three minor children. However, noting the young age of the children, on appeal, the Supreme Court of Florida amended the decree and awarded custody to the mother. The Court's rationale was influenced by a decision rendered by the Supreme Court of Alabama, which held that mothers were more capable to care for infants and children of a tender age. This presumption became known as "the tender years doctrine" and was virtually unchallenged as the standard in child custody decisions until the 1960s. During this time, the tender years presumption was heavily criticized for its bias towards women. As a result, the National Conference of Commissioners created the Uniform Marriage and Divorce Act, which gave birth to the standard which is still applied today, the best interests of the child standard. This new standard was implemented to shift the focus toward the best interests of the child, with no judicial preference given to either parent.

Under Florida law, child custody has been primarily governed by statute. In the determination of child custody and visitation rights, the court would designate one parent as the primary residential parent. This powerful label described "the parent with whom the child maintains his or her primary residence." The other parent would be labeled as the noncustodial parent. The noncustodial parent's contact with the child would be referred to as visitation. Throughout the country, "there is [a] bias in the courts for designating one parent as the 'primary parent' regardless of whether the parenting responsibilities are shared." Many critics have noted that this type of statutory language attaches a negative stigma to the noncustodial parent.

19. 197 So. 530 (Fla. 1940).
20. Id. at 530–31.
21. Id. at 531.
22. Id. (citing Gayle v. Gayle, 125 So. 638, 639 (Ala. 1930)).
23. GOULD & MARTINDALE, supra note 7, at 34.
24. Id. at 35.
25. Id.
27. GOULD & MARTINDALE, supra note 7, at 34.
30. Id.
who has been assigned a secondary status with a right to merely visit his or her own child. As a result, many states' legislatures have amended this type of language in an attempt to minimize the negative connotations associated with the terminology of most child custody statutes.

III. Florida Senate Bill 2532: A Plan for Change

Recently, Florida Senate Bill 2532 was enacted into law and will significantly change child custody determinations in Florida. Florida Senate Bill 2532 deletes the outdated terminology and definitions associated with custodial parent, primary residential parent, and noncustodial parent. In an effort to promote shared parental responsibility, those labels have been removed from the statute, and the terms primary residence, custody, and visitation have been replaced with the term “parenting plan.”

“Parenting plan” means a document created to govern the relationship between the parties relating to the decisions that must be made regarding the minor child and shall contain a time-sharing schedule for the parents and child. The issues concerning the minor child may include, but are not limited to, the child’s education, health care, and physical, social, and emotional well-being. In creating the plan, all circumstances between the parties, including the parties’ historic relationship, domestic violence, and other factors must be taken into consideration.

If the parents cannot agree on a parenting plan, the court will create a customized parenting plan to establish the rights and responsibilities of each parent. The parenting plan must consist of a detailed account of each parent’s responsibility of daily activities, a time-sharing schedule which arranges exactly how much time each parent will spend with the child, and a determination of which parent will be responsible for decisions regarding the minor

34. EMERY, supra note 9, at 72; see also HARTSON & PAYNE, supra note 33, at 5.
35. EMERY, supra note 9, at 72.
37. Id. § 2, 2008 Fla. Laws at 440 (amending FLA. STAT. § 61.046(3) (2007)).
38. Id. § 2, 2008 Fla. Laws at 441 (amending FLA. STAT. § 61.046(12) (2007)).
40. Id. § 3(3), 2008 Fla. Laws at 442 (amending FLA. STAT. § 61.052(3) (2007)).
41. Ch. 2008-61, § 2(13), 2008 Fla. Laws at 441 (amending FLA. STAT. § 61.046 (2007)).
42. Id.
child.\textsuperscript{43} Additionally, the specifically designed parenting plan must be in the best interests of the child.\textsuperscript{44} It must be noted that the best interests of the child standard has often been criticized for being overly vague, discretionary, and producing unpredictable outcomes.\textsuperscript{45}

A. \textit{The Best Interest of Whom?}

The best interests of the child standard is subjective and as such, there is no scientific way to determine which type of parenting plan will truly benefit the child.\textsuperscript{46} As a result, "different judges employ different ideas about the best child-rearing strategies and/or the most relevant parenting values, yielding a court system in which each judge defines his or her own version" of the best interests of the child standard.\textsuperscript{47} In order to assist judges in establishing a proper parenting plan, Florida Senate Bill 2532 introduces several new factors that must be evaluated by the court in order to determine the best interests of the child.\textsuperscript{48} Specifically, several new factors to be considered by

\begin{itemize}
\item \textsuperscript{43} Id. § 8(2)(b), 2008 Fla. Laws at 445 (amending FLA. STAT. § 61.13(2) (2007)).
\item \textsuperscript{44} Id. § 8(3), 2008 Fla. Laws at 446 (amending FLA. STAT. § 61.13(3) (2007)).
\item \textsuperscript{45} Gould & Martindale, supra note 7, at 32; see also Emery, supra note 9, at 74.
\item \textsuperscript{46} See Gould & Martindale, supra note 7, at 32.
\item \textsuperscript{47} Id. at 37.
\item \textsuperscript{48} Ch. 2008-61, § 8(3)(a)-(t), 2008 Fla. Laws at 446-48 (amending FLA. STAT. § 61.13(3) (2007)). The complete list of factors that must be evaluated by the court include:
\begin{enumerate}
\item The demonstrated capacity and disposition of each parent to facilitate and encourage a close and continuing parent-child relationship, to honor the time-sharing schedule, and to be reasonable when changes are required.
\item The anticipated division of parental responsibilities after the litigation, including the extent to which parental responsibilities will be delegated to third parties.
\item The demonstrated capacity and disposition of each parent to determine, consider, and act upon the needs of the child as opposed to the needs or desires of the parent.
\item The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
\item The geographic viability of the parenting plan, with special attention paid to the needs of school-age children and the amount of time to be spent traveling to effectuate the parenting plan. This factor does not create a presumption for or against relocation of either parent with a child.
\item The moral fitness of the parents.
\item The mental and physical health of the parents.
\item The home, school, and community record of the child.
\item The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
\item The demonstrated knowledge, capacity, and disposition of each parent to be informed of the circumstances of the minor child, including, but not limited to, the child’s friends, teachers, medical care providers, daily activities, and favorite things.
\item The demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime.
\item The demonstrated capacity of each parent to communicate with and keep the other parent informed of issues and activities regarding the minor child, and the willingness of each parent to adopt a unified front on all major issues when dealing with the child.
\item Evidence of domestic violence, sexual violence, child abuse, child abandonment, or child neglect, regardless of whether a prior or pending action relating to those issues has been brought.
\item Evidence that either parent has knowingly provided false information to the court regarding any prior or pending action regarding domestic violence, sexual violence,
the court are highly presumptuous and could potentially continue a custodial preference for mothers. According to Florida Senate Bill 2532, one of the new factors the court must consider in determining the best interests of the child is “[t]he demonstrated knowledge, capacity, and disposition of each parent to be informed of the circumstances of the minor child, including, but not limited to, the child's friends, teachers, medical care providers, daily activities, and favorite things.” Another factor the court must now consider is “[t]he demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime.” The court must also consider “[t]he particular parenting tasks customarily performed by each parent and the division of parental responsibilities before the institution of litigation and during the pending litigation.” Are these factors present to ensure that the best interests of the child are met, or have they been included to facilitate the presumed best interests of the parents? Often in child custody decisions, there is an assumption that whatever arrangement is “best for the parents” must be “best for the child.” This type of thinking neglects what should be the court’s primary concern—the needs of the child.

Id. 49. See id. § 8(3)(j), (k), (o), 2008 Fla. Laws at 447 (amending Fla. Stat. § 61.13(3)(2007)).


54. HARTSON & PAYNE, supra note 33, at 3.
IV. A STEP IN THE RIGHT DIRECTION, OR JUST GOOD INTENTIONS?

While it is the public policy of the State of Florida to order shared parental responsibility, this custodial right refers to a shared power to make decisions regarding the child’s welfare. Shared parental responsibility allows the parents to make joint decisions affecting the child’s education, healthcare, and religion. This type of joint legal custody does not encompass joint physical custody. Therefore, in addition to both parents having the legal right to participate in decision making, a time-sharing schedule must be created to establish the physical custody rights and essentially determine how much time each parent will be allowed to spend with his or her child.

A. Favorite Things

Although Florida Senate Bill 2532 specifically denotes that “[t]here is no [statutory] presumption for or against” either parent and that its goal is to encourage both mothers and fathers to experience the joys and responsibilities of parenting, some of the new factors to be considered in determining the best interests of the child indicate otherwise. Specifically, the court must now consider “[t]he demonstrated knowledge, capacity, and disposition of each parent to . . . [know] the child’s friends, teachers, medical care providers, daily activities, and favorite things.” Despite the legislature’s intention to create a more egalitarian parenting relationship by designing a customized parenting plan, this new factor to be evaluated by the court is clearly biased against the parent who spent the least amount of time with the child during the marriage. While this bias is not directly intended to be against fathers, the practical effect is such because customarily, mothers are the pri-
mary caretakers and have more daily contact with the child than fathers.\textsuperscript{65} Mothers will typically be presenting evidence demonstrating the knowledge that comes with being the primary caretaker. They will be able to recite all of the child’s friends and teachers’ names, and they will know the child’s favorite color, favorite toys, and favorite foods. Whichever parent is not the primary caretaker, mother or father, is clearly at a severe disadvantage. The parent who has spent less time with the child because of working outside the home will essentially be punished for providing financial stability for the family.

B. The Past Predicts the Future

Another new factor which seems to reinforce the gender bias that permeates child custody disputes is how the court must now consider “[t]he demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime.”\textsuperscript{66} It seems obvious that the primary caretaker who has provided the daily routine and structured the child’s schedules and daily activities will be better able to demonstrate their ability to do so. How could a father’s plea that he will or he can, measure up against a mother’s already accomplished success of providing such things? If actions really do speak louder than words, then how will a father’s words ever compare to a mother’s actions?

One factor introduced by Florida Senate Bill 2532 seems to do no more than preserve the historical division of labor and responsibilities that existed during the marriage.\textsuperscript{67} The court must consider “[t]he particular parenting tasks customarily performed by each parent and the division of parental responsibilities before the institution of litigation.”\textsuperscript{68} Maintaining whatever caretaking arrangement existed before the separation will be considered in the determination of the child’s best interests.\textsuperscript{69} This factor fails to consider the devastating effect of losing the availability of one parent. Essentially, mothers are recognized and rewarded for their past parenting, while fathers are penalized for their inability to match the mothers’ involvement due to having to work outside the home.\textsuperscript{70} Research shows that parents who took

\begin{itemize}
  \item \textsuperscript{65} MACCObY ET AL., supra note 4, at 282.
  \item \textsuperscript{66} Ch. 2008–61, § 8(3)(k), 2008 Fla. Laws at 447 (amending FLA. STAT. § 61.13(3) (2007)).
  \item \textsuperscript{67} See id. § 8(3)(o), 2008 Fla. Laws at 447 (amending FLA. STAT. § 61.13(3) (2007)).
  \item \textsuperscript{68} Id.
  \item \textsuperscript{69} See id.
  \item \textsuperscript{70} MACCObY ET AL., supra note 4, at 273.
\end{itemize}
on less parental responsibility during the marriage have the ability to learn how to evolve into a parenting role with more responsibilities. Unfortunately, however, when the assessment of one's parenting skills is based upon past behavior, the parent who had less responsibility will never have an opportunity to become more responsible—even if he or she possesses the ability and desire to do so.

Perhaps even more concerning is the vast discretion given to the court. In addition to the aforementioned factors, the court may also consider "[a]ny other factor that is relevant to the determination of a specific parenting plan, including the time-sharing schedule." By what standard is relevance being measured? Effectively, the court can consider any factor it deems important to the welfare of the child. The broad discretion given to family courts in determining the child's best interests may explain why gender biases continue to dominate child custody cases.

C. The Practical Effect

This type of statutory language promotes excessive litigation and will be burdensome on the courts. These new factors introduced by Florida Senate Bill 2532 promote competition between the parents and undoubtedly continue to give mothers an advantage and reinforce the bias against fathers. The specificity of the new factors encourage the parents to present an enormous amount of factual material to demonstrate or prove that they know the child best and therefore must be in the child's best interest. Having to present witnesses and provide testimony to persuade the judge that the factors balance in one's favor can have a devastating effect on a family's finances. Unfortunately, most child custody cases resemble warfare rather than a peaceful determination about the child's needs. "[M]any separated or divorced parents have widely conflicting perspectives on their own and

71. COMM. ON THE FAMILY OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, NEW TRENDS IN CHILD CUSTODY DETERMINATIONS 89 (1980) [hereinafter NEW TRENDS].
73. See id.
74. See id. § 8(3)(j), (k), (o), 2008 Fla. Laws at 447 (amending FLA. STAT. § 61.13(3) (2007)) .
75. See id.
76. See id.
78. See NEW TRENDS, supra note 71, at 67.
each other’s marriage.” Parents often have different recollections of how much involvement each former spouse had in the child’s life. Motivated by “the high stakes involved in custody” cases, each parent will attempt to portray him or herself in the most favorable light and devalue the other parent’s contribution.

Roberta G. Stanley, Board Certified in Marital and Family Law, and a Fellow and President Elect of the American Academy of Matrimonial Lawyers, stated, “[t]he intentions were great, but practically, I am not sure it is going to have its intended effect” when referring to Florida Senate Bill 2532. While she acknowledged the legislature’s intention to reduce child custody disputes, she remains skeptical of whether Florida Senate Bill 2532 can actually accomplish such a goal. She noted that in cases where the parents are cooperative and amicable, it could result in a parenting plan that has a fair and accommodating time-sharing schedule. On the other hand, “[f]or the cases in which the legislation will actually apply, in cases of high conflict, [Florida Senate Bill 2532] could create even more controversy because the day to day lives of each parent in relation to the child will be brought into court.” Consequently, the legislative intent conflicts with the practical application of the factors. Ms. Stanley also acknowledged that the new factors present a bias against the parent who works outside the home. This could affect either the mother or the father, depending on the division of labor and responsibilities within the household. “The practitioners need to start thinking outside of the box” to prohibit gender biases from pervading the creation of fair and equal time-sharing schedules.

V. WILL THE GENDER PREFERENCES EVER BE ERADICATED FROM CHILD CUSTODY DISPUTES IN FLORIDA COURTS?

Divorce is a reality of the modern world that cannot be ignored. It affects approximately forty percent of America’s children. Fortunately, the
vast majority of child custody arrangements following a divorce are settled outside the courtroom.\textsuperscript{91} Although legal conflict is atypical, it is usually initiated because the father wants equal custodial rights.\textsuperscript{92} Nevertheless, when two competent and capable parents both want primary responsibility for their child, mothers typically receive the primary custodial rights.\textsuperscript{93} It seems that the best interests of the child are tainted by the social presumption that a primary relationship with a fit mother is in the child’s best interest, regardless of whether the father is a capable, fit, and loving parent.\textsuperscript{94} Society is more concerned that fathers financially support their children after a divorce than continue to build and nurture a relationship with those children.\textsuperscript{95} Because a strong maternal preference still exists among the courts, fathers seeking equal custodial rights have a difficult burden to overcome.\textsuperscript{96}

A. \textit{Florida Is Determined to Continue the Gender Bias}

The custodial preference for mothers is so strong that it exists even in cases where the parents took on the traditional roles of the opposite gender.\textsuperscript{97} This judicial bias is evidenced by \textit{Young v. Hector},\textsuperscript{98} in which the mother was the primary breadwinner and worked outside the home, and the father was the primary caretaker of the two children.\textsuperscript{99} Alice Hector and Robert Young were married and had two daughters.\textsuperscript{100} While living in New Mexico, Hector was working as an attorney in her own practice and Young was an architect and entrepreneur.\textsuperscript{101} The couple had always employed someone to either help care for the two children or help with household chores.\textsuperscript{102} After the birth of their youngest child, the mother found a job working at a successful law firm in Florida and the couple decided to relocate.\textsuperscript{103} Initially, the mother moved to Miami with the children.\textsuperscript{104} The father stayed in New Mexico to complete prior business arrangements and make improvements on
their house to improve its resale value.\textsuperscript{105} During this time, he regularly visited with the children.\textsuperscript{106} After the father had rejoined the family, he traveled to Arkansas to care for his dying brother and to manage his estate.\textsuperscript{107} He also had to return to New Mexico to direct a treasure hunt and was away from his wife and children for approximately fourteen months.\textsuperscript{108} At this time, the children were being cared for by a nanny while the mother was at work.\textsuperscript{109} When the father eventually returned to Florida, he passed the Florida contractor’s exam\textsuperscript{110} and began looking for employment.\textsuperscript{111} Due to his lack of computer skills, Young was unable to find work as an architect.\textsuperscript{112} The mother, on the other hand, had accepted a new position as a shareholder in a large firm and was earning a salary of $300,000 a year.\textsuperscript{113} While there was no express verbal agreement that the father should stop seeking employment and stay home as the primary caretaker,\textsuperscript{114} that became the arrangement for three consecutive years preceding the divorce.\textsuperscript{115}

Young was an extremely dedicated father and very involved in his daughters’ lives.\textsuperscript{116} He “started and led one of the children’s Brownie troop [sic], coached one of the children’s soccer team [sic], regularly volunteered at the children’s school, and [took] the children to doctor and dentist appointments.”\textsuperscript{117} Testimony from neighbors, teachers, and friends illustrated that while the father spent more time with the children, both parents were loving and capable parents.\textsuperscript{118} During the trial, the guardian ad litem’s report stated that the father was “phenomenal” while interacting with the children and the report described the father as “warmer” towards the children than their mother.\textsuperscript{119} Despite the guardian ad litem’s praise of Young’s parenting, the report still recommended that the mother be designated as the primary residential parent.\textsuperscript{120} Under Florida law, this meant that the children would

\begin{itemize}
  \item \textsuperscript{105} Id. at 1159.
  \item \textsuperscript{106} See id. at 1154.
  \item \textsuperscript{107} Young, 740 So. 2d at 1160.
  \item \textsuperscript{108} Id.
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id. at 1159.
  \item \textsuperscript{111} Id. at 1155.
  \item \textsuperscript{112} Young, 740 So. 2d at 1155.
  \item \textsuperscript{113} Id. at 1154.
  \item \textsuperscript{114} Id. at 1160.
  \item \textsuperscript{115} Id. at 1161.
  \item \textsuperscript{116} Id. at 1155.
  \item \textsuperscript{117} Young, 740 So. 2d at 1155.
  \item \textsuperscript{118} See id. at 1156.
  \item \textsuperscript{119} Id. at 1155.
  \item \textsuperscript{120} Id.
\end{itemize}
live with the mother in her home, and the father would have visitation rights.\textsuperscript{121} The guardian ad litem based his recommendation on three factors.\textsuperscript{122} He considered the mother’s financial stability, as well as the fact that prior to taking on the primary caretaker role, the father was absent from the children for extended periods of time, and stated that the mother managed anger around the children better than the father.\textsuperscript{123} The trial court followed the recommendation and awarded the mother primary residential custody over the two children.\textsuperscript{124} The father appealed the judge’s decision\textsuperscript{125} claiming that it was predicated upon gender bias.\textsuperscript{126}

1. One Step Forward, Two Steps Back in \textit{Young v. Hector}

Initially, a three-judge panel of Florida’s Third District Court of Appeal agreed with Young and reversed the trial court’s decision to award primary residential custody to the mother.\textsuperscript{127} The panel declared that when determining custody in accordance with the best interests of the children, the judge “should attempt to preserve and continue the caretaking roles that the parties had established.”\textsuperscript{128} The panel found that the trial judge had abused his discretion by granting primary residential custody to the parent who was not the children’s primary caretaker.\textsuperscript{129} Furthermore, the panel found that the factors that were considered by the guardian ad litem were unreasonable.\textsuperscript{130} The panel of the court of appeal stated that a parent’s economic stability and finances should not be considered as a “determinative factor” when establishing the allocation of custodial rights.\textsuperscript{131} The panel also noted that the father being away from the family for lengthy amounts of time should not have been considered in light of the fact that for the last three years, he had been the primary caretaker in the children’s lives on a daily continuous basis.\textsuperscript{132}

\begin{itemize}
  \item \textsuperscript{122} \textit{Young}, 740 So. 2d at 1155.
  \item \textsuperscript{123} \textit{Id.}
  \item \textsuperscript{124} \textit{Id.} at 1156.
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} \textit{Id.} at 1159.
  \item \textsuperscript{127} \textit{Young}, 740 So. 2d at 1158.
  \item \textsuperscript{128} \textit{Id.} at 1157.
  \item \textsuperscript{129} \textit{Id.} at 1158.
  \item \textsuperscript{130} \textit{See id.} at 1157–58.
  \item \textsuperscript{131} \textit{Id.} at 1157.
  \item \textsuperscript{132} \textit{See Young}, 740 So. 2d at 1157–58.
\end{itemize}
Just when it seemed that the panel of the court of appeal was becoming aware of the gender bias that exists in many trial courts across the state, the panel granted a rehearing en banc over the matter and withdrew its former opinion, which had reversed the trial judge's initial decision. Upon reexamining the record, the court en banc concluded that the trial court had sufficient evidence to award primary residential custody to the mother and that the father's accusation of gender bias was not supported by evidence. The appellate court reiterated the fact that there was no agreement between the parents that the father would remain unemployed to stay home and care for the children. The appellate court grew skeptical of the father's role as the caretaker because the mother had employed a housekeeper/babysitter who worked in the home five days a week. Ultimately, the appellate court asked the father "why there was a need for a full-time nanny." In response to the court's questioning, the father replied, "She cooks. She cleans. I could do a lot of that. . . . [We] can afford the luxury of having help, hired help. I am not the kind of person that sits around and watches soap operas. I try to do meaningful, worthwhile things." The appellate court reevaluated the factors that were originally considered by the guardian ad litem and found that they were properly balanced by the trial judge when awarding primary residential custody to the mother. The court stated that it was proper for the trial court to consider the fact that the mother had remained continuously employed throughout the children's lives, as opposed to the father who, although licensed, chose not to pursue a career. Additionally, the appellate court found that it was reasonable for the judge to weigh the fact that the father had been missing from the children's lives for extended periods of time. The court also expressed that the trial court was correct to place more importance on the parent who had been continuously present throughout the children's entire life, rather than on the parent who had been most present in the years immediately preceding the divorce. Moreover, the appellate court noted that the guardian ad litem had witnessed the father have an angry outburst in front of the children. The court found this to be

133. Id. at 1158.
134. See id. at 1159.
135. See id. at 1163.
136. Id. at 1160–61.
137. Young, 740 So. 2d at 1161.
138. Id. at 1162.
139. See id. at 1162–63.
140. Id.
141. Id. at 1163.
142. See Young, 740 So. 2d at 1163.
143. Id.
a credible factor that tipped the balance in favor of granting primary residential custody to the mother.\textsuperscript{144} In a concurring opinion, Judge Levy remarked that the record most likely supported a finding of either parent being designated as the primary residential parent, but that it is not the job of the appellate court to “second-guess” the trial court’s determination.\textsuperscript{145}

2. A Glimmer of Hope

Not all the judges agreed with the majority. Three members of the bench, including Chief Judge Schwartz, concluded that there was no reasonable or logical explanation, based on the evidence, that supported the designation of the mother as the primary residential parent.\textsuperscript{146} The daughters are well rounded children and well adjusted as a result of the division of caretaking responsibilities established by the parents.\textsuperscript{147} A prior arrangement should not be changed or modified if it has been proven to be successful.\textsuperscript{148} The majority allowed its personal beliefs to influence the determination of the children’s best interests.\textsuperscript{149}

In my opinion, there is no question whatever that the result below was dictated by the gender of the competing parties. . . . I believe that this is shown by contemplating a situation in which the genders of the hard working and high earning lawyer and the stay at home architect were reversed, but everything else remained the same. The male attorney’s claim for custody would have been virtually laughed out of court, and there is no realistic possibility that the mother architect would have actually “lost her children.”\textsuperscript{150}

The majority opinion emphasized the fact that the parents had never agreed that the father would be the stay at home parent and primary caretaker while the mother supported the family.\textsuperscript{151} Nevertheless, despite not having an expressed mutual agreement, the parents clearly acquiesced to such an arrangement by allowing the father to continue to tend to the children’s primary care and daily needs.\textsuperscript{152} As to the factors that were considered in de-
terminating the custodial arrangement, had the roles been reversed, the guardian ad litem would not have even assessed the father's economic stability as a factor.\footnote{153} Also, because the father had legitimate reasons that kept him away from his family, it was improper to consider the fact that he was not a constant presence in the children's lives.\footnote{154}

The record indicates three instances in which the father was away from the family.\footnote{155} The first absence occurred when the father remained in New Mexico for three months after the mother and children had already moved to Florida.\footnote{156} The father stayed behind to finish prior business deals and to make renovations on their home to raise its resale value.\footnote{157} The second instance occurred when the father traveled to Arkansas for approximately three to four weeks so that he could care for his dying brother and help manage his estate.\footnote{158} The third absence occurred while the father was away from the family for fourteen months to lead a treasure hunt for gold in New Mexico, a project in which the family had invested money.\footnote{159}

The final factor that had been considered was the guardian ad litem's testimony that the father had an angry outburst in front of the children.\footnote{160} This was not relevant as a determinative factor because the father's anger was regarding their finances and never directly involved the children.\footnote{161}

The effect of designating the mother as the primary residential parent is that the children receive their daily primary care from an unrelated employee instead of their father.\footnote{162} The appellate court is constrained by the long established gender bias "that a mother will not lose her entitlement to become the primary residential parent unless her unfitness is demonstrated; no matter how actively she is engaged outside of and away from the home, even though the other parent is fit and willing to serve in that capacity."\footnote{163} The gender bias in this situation is unique and perhaps not as obvious to the majority because typically when one parent stays home as the primary caretaker it is the mother.\footnote{164} Nevertheless, \textit{Young} illustrates how gender biases can

\begin{footnotes}
\item[153.] \textit{Id.} at 1178.
\item[154.] \textit{Id.} at 1179.
\item[155.] \textit{Id.} at 1178–79.
\item[156.] \textit{Id.} at 1178.
\item[157.] \textit{Young,} 740 So. 2d at 1178 (Goderich, J., dissenting).
\item[158.] \textit{Id.} at 1178–79.
\item[159.] \textit{Id.} at 1179.
\item[160.] \textit{Id.}
\item[161.] \textit{Id.}
\item[162.] \textit{See Young,} 740 So. 2d at 1177 (Nesbitt, J., dissenting).
\item[163.] \textit{Id.}
\item[164.] \textit{Id.} at 1179 (Goderich, J., dissenting).
\end{footnotes}
pervade the courts and influence its decisions. Even in the most exceptional circumstances, the desire to grant women superior custodial rights seems to exist regardless of whether the facts support an opposite finding to be in the best interests of the child.

VI. MODIFICATION OF CHILD CUSTODY: A HEAVY BURDEN TO OVERCOME

The enormous difficulty involved in modifying custody arrangements is one reason it is so important that judicial discretion and gender biases do not influence the initial custody determinations. "[W]hen a trial court is asked to modify a final child custody order, the petitioner carries the burden of proof, and that burden is extraordinary." Appellate courts are far more likely to affirm the trial court's decision than to reverse it. Although a consensus exists that the person seeking to modify custody carries a heavy burden, the district courts of appeal have not always agreed upon the test that should be applied.

A. The First District Court of Appeal

In Cooper v. Gress, the parents had decided to share equal physical custody of their two children following the divorce. The parents acknowledged that they were both fit and capable parents who could provide proper care to their children. The parents also agreed that all decisions regarding the children would be made together. This joint custody arrangement was included in the final judgment for the dissolution of marriage. One year later, the father filed a petition to enforce the custody arrangement. The father claimed that the mother was interfering with his visitation rights and making negative comments about him in front of the children. In re-

165. See id.
166. See id.
168. Id.
169. Interview with Roberta G. Stanley, supra note 77.
170. See Wade v. Hirschman (Wade II), 903 So. 2d 928, 930 (Fla. 2005).
172. Id. at 263.
173. Id.
174. Id.
175. Id. at 264.
176. Cooper, 854 So. 2d at 264.
177. Id.
sponse, the mother filed a petition seeking to modify the custody arrangement and designate herself as the primary residential parent. The mother alleged that she and the father were no longer communicating, that the husband was unable to care for their children at times due to a new illness, and that the children wanted to live with her. The father counter petitioned to be designated as the primary residential parent, alleging a lack of communication, and the mother’s failure to follow the guidelines of the final judgment by interfering with his visitation rights. The trial judge weighed the factors that are typically used to determine the best interests of the child in an initial custody arrangement and made findings about each parent. The judge found that the parents’ lack of communication had hindered the children’s social skills and prevented them from participating in extracurricular community activities. Although both parents were found to be devoted and committed to their children’s needs, the trial court held that it was in the best interests of the children to award primary residential custody to the mother.

The father appealed the trial court’s decision alleging that it had used the wrong legal standard to determine whether modification of the custody arrangement was appropriate. Florida’s First District Court of Appeal reversed the trial court’s decision and held that the trial judge erred by not holding the mother to the heavy burden of proof that is required in all motions for modification of custody. The appellate court described the law as a two-part test and declared that the party seeking to modify custody “must show both that the circumstances have substantially, materially changed since the original custody determination and that the child’s best interests justify changing custody. Furthermore, the substantial change must be one that was not reasonably contemplated at the time of the original judgment.” The mother’s allegations were insufficient to meet the requirement that a substantial and material change had occurred. The appellate court found that a lack of communication was not enough to satisfy the first part of the test. The court also addressed the mother’s allegations that the father

178. Id.
179. Id.
180. Id.
181. Cooper, 854 So. 2d at 265.
182. Id.
183. Id.
184. Id.
185. Id. at 268.
186. Cooper, 854 So. 2d at 265 (citations omitted).
187. Id.
188. Id. at 266.
was unable to provide care to the children due to an illness. The appellate court noted that this issue was no longer relevant because the father was in remission. Additionally, the appellate court stated that there was no evidence behind the mother’s claim that the children wanted to live with her, and if there was, the children’s preference would not be considered because of their young ages. Therefore, by only assessing whether a modification of custody was in the best interests of the children, the trial judge improperly held the mother to a much lower burden of proof than what is required by law.

B. The Fifth District Court of Appeal

In Wade v. Hirschman (Wade I), the parties had agreed to share physical custody of their child, which was incorporated into the parents’ dissolution decree. Both parents sought to modify the custody arrangement alleging that a substantial change in circumstances had occurred. Also, both parents wanted the designation of primary residential parent. The trial judge found that the mother was extremely uncooperative and refused to uphold the joint custody arrangement. Similar to the trial court in Cooper, the trial court in Wade I also balanced the factors that are used in initial custody decisions to determine the best interests of the child, but granted primary residential custody to the father. The mother appealed to the Fifth District Court of Appeal alleging that the trial judge applied the wrong standard in failing to use the substantial change prong of the two-part test and only considering the best interests of the child. Unlike Cooper, the Fifth District Court of Appeal held that the trial court did not abuse its discretion and declared the two-part test of finding a substantial and material change and a consideration of the best interests of the child inapplicable in cases

189. See id. at 267-68.
190. Id. at 268.
191. Cooper, 854 So. 2d at 268.
192. Id. at 265, 268.
193. 872 So. 2d 952 (Fla. 5th Dist. Ct. App. 2004).
194. Id. at 953.
195. Id.
196. Id.
197. Id.
198. Wade I, 872 So. 2d at 955; see Cooper v. Gress, 854 So. 2d 262, 265 (Fla. 1st Dist. Ct. App. 2003).
199. Wade I, 872 So. 2d at 953.
200. See id. at 953-54.
201. Id. at 955; see Cooper, 854 So. 2d at 268.
where neither parent is the primary residential parent and the physical custody is shared equally. The appellate court stated that under such circumstances, once it established that joint physical custody is no longer functioning properly, the trial judge can reassess custody as if it were making an initial determination, using only the best interests of the child standard. 

C. The Supreme Court of Florida: The Final Authority

A discrepancy existed between the Florida district courts of appeal regarding which test should be applied in determining custody modifications. The First District Court of Appeal in Wade I is in direct conflict with the Fifth District Court of Appeal in Cooper. Thus, in Wade II, the Supreme Court of Florida granted review of Wade I to determine the test that should be applied by all Florida courts. The Court concluded that the two-part test used in Cooper should be applied in all custody modifications, regardless of whether the parents shared custody or one parent was designated as the primary residential parent. The Court also noted that while it is not necessary to prove that the child will suffer a detriment if the custody arrangement is not modified, there must be evidentiary proof of a substantial and material change in order to warrant any kind of modification. According to the Court, dissatisfaction with the arrangement or lack of cooperation in carrying out the custody arrangement is not sufficient to satisfy a substantial change in circumstances. Nevertheless, this requirement must be satisfied before a trial court can begin to consider the best interests of the child. The Supreme Court of Florida adopted the test that requires the greater burden of proof. With such a difficult burden to satisfy, the vast majority of child custody determinations remain unmodified, regardless of whether they meet the child’s or the family’s needs. Therefore, it is imperative that courts are unbiased in the initial custody determinations to ensure that the parenting plan is in the best interests of the child.

202. Wade I, 872 So. 2d at 954.
203. Id. at 954–55.
204. Wade v. Hirschman (Wade II), 903 So. 2d 928, 930 (Fla. 2005).
205. Id.
206. Id. at 932.
207. See id.
208. Id. at 934.
209. See Wade II, 903 So. 2d at 934.
210. See id. at 935.
211. See id. at 933.
VII. THE EVOLUTION OF JOINT CUSTODY AND THE EMERGENCE OF Egalitarian Parenting Relationships

The predominant outcome in most child custody cases has been to preserve the mother-child relationship by awarding mothers superior custodial rights and leaving fathers with limited physical custody. However, more recently, society has begun to take notice of the negative consequences associated with restricted access to the father, as well as the valuable aspects that a continuing father-child relationship can have on a child's overall well-being. Research shows that frequent paternal involvement in a child's daily activities has a profound positive impact on the child. A child custody arrangement that facilitates joint and equal physical custody between both parents would support fathers' participation and would encourage fathers to fully embrace a more involved role in their child's life. It is necessary for both parents to experience a broad range of activities with the child to strengthen and nurture the child's bond with each parent. "There is an emerging consensus that the benefits of maintaining contact with both parents exceed any special need for relationships with the mother or the father." Therefore, between two loving and capable parents, a parenting plan that is in the best interests of the child is one in which the child has equal access to both parents.

A. A Glimpse at Parental Equality Following a Divorce

The current goal of Florida Senate Bill 2532 is to design a parenting plan that promotes the best interests of the child. How can any parenting plan that can potentially limit one parent's time with the child be in that child's best interest? As long as both parents desire to maintain a continuing relationship with their child and want physical custody of the child, there should be a legal presumption towards joint physical custody. Parents may have decided that one of them would be responsible for the primary caretaking of the child, while the other worked outside the home to support the family. They most likely chose this arrangement because it was in the best

212. Gould & Martindale, supra note 7, at 164.
213. See id.
214. See id. at 149.
215. Id. at 166.
216. Id. at 163.
218. See id.
interest of their child and not necessarily because they wanted to or because they felt obligated to based on their gender. This division of responsibilities was functional and enabled each other to better care for the child’s needs. The efforts of both parents should be rewarded and the financial support should be given just as much value and consideration as the daily child rearing, regardless of which parent performed each task.

Additionally, establishing a parenting plan that grants joint physical custody would create more predictable outcomes in disputes between parents who want equal access and time with their child. It would encourage more cooperative settlements and would be less burdensome on the courts. It would also eliminate the opportunity for parents to demean each others’ parenting skills and personally attack each other for the sake of the children. A tactic which is unfortunately used all too often in custody disputes and is never in the best interests of the child.

Finally, a presumption of joint physical custody would encourage parental responsibility. Parents will be challenged to rethink their role as caretakers and providers and perhaps develop into more balanced examples for their children. More importantly, the focus would be on the future coparenting relationship. Fathers will no longer be judged and bound by their past parenting roles. Instead, both parents will have the opportunity to truly share all the benefits that come with parenting. Child custody determinations should not be based on past behaviors. Following a divorce, the family unit has been divided and has changed. It is only logical that the parental responsibilities should also change. Because one arrangement worked in a prior setting does not necessarily mean that the same arrangement will continue to work in a completely new setting. Child custody determinations should be aimed at the future best interests of the child. A parenting plan that gives both parents equal access and time with the child would ensure that gender biases and parenting stereotypes could no longer influence child custody decisions or be a factor in determining the best interests of the child. Every loving and capable parent deserves the right to pursue parental equality, free from the longstanding constraints of gender bias.

1. A Moment of Reflection

I feel very passionate about this subject matter because of the enormous impact it has had on my own life. My parents divorced when I was about six years old. I was fortunate enough to have two loving and capable parents. Both my mother and father wanted to remain involved in every aspect of my life and continue to nurture the parent-child bond we shared. My father challenged the societal norms that supported the popular belief that children should remain with their mothers after a divorce. He knew that he had more
to offer his child than financial support. And he knew that there was more to being a parent than sustaining an income. He wanted to go through all the experiences and privileges that come with being a parent. He wanted to experience helping me get ready for school, cooking me dinner, reading me bedtime stories, and all the other simple joys that are the building blocks to a healthy parent-child relationship. He knew that the only way to do this was to share joint physical custody of me with my mother. Together, they developed a plan that allowed me to have continuous contact with both parents throughout each week. I spent every Monday and Thursday with my mother, and every Tuesday and Wednesday with my father. Every weekend would be spent with one of my parents and would rotate each week. This cooperative and equal parenting plan also allowed me to spend every holiday with both of my parents. I would spend the first half of the day with one parent and the remaining half of the day would be spent with the other.

This is just one example of how parenting plans can be designed to allow each parent to spend the same amount of time with their child. I never felt abandoned by one of my parents or experienced intense separation anxiety. I always felt each of my parents' presence in my daily life. I do not think that my parents structured this plan out of convenience or their own preference. I believe that my parents truly considered my future well being and what was in my best interest. I am very grateful for the fact that my relationship with both of my parents never suffered as a result of their divorce. I feel that I benefitted tremendously from having consistent and continuous access to and availability of both of my parents throughout my life.